10-14-2011

Buckskin Properties, Inc. v. Valley County Clerk's Record v. 3 Dckt. 38830

Vol 3 of 6

SUPREME COURT NO. 38830-2011 VOL. III

IN THE

SUPREME COURT

OF THE

STATE OF IDAHO

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* _____

_____ *Clerk*

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,	Case No. CV-2009-554*C
-vs-	
VALLEY COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF IDAHO,	Supreme Court No. 38830-2011
Defendant/Respondent.	

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

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TABLE OF CONTENTS

	Page No.	Volume No
COMPLAINT	1	I
AFFIDAVIT OF SERVICE	7	I
ANSWER	9	I
AFFIDAVIT OF CYNDA HERRICK	16	I
PRELIMINARY INJUNCTION ORDER	19	I
AFFIDAVIT OF CYNDA HERRICK IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT (SENT AS EXHIBIT)		
VALLEY COUNTY'S STATEMENT OF MATERIAL FACTS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT	21	I
VALLEY COUNTY'S MOTION FOR SUMMARY JUDGMENT	35	I
VALLEY COUNTY'S OPENING BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT	38	I
ORDER ALLOWING PLAINTIFF'S MOTION TO FILE BRIEF EXCEEDING TWENTY-FIVE (25) PAGES (2ND PAGE OF STIP)	74	I
PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS MOTION FOR SUMMARY JUDGMENT FILED 10/14/10	77	I
AFFIDAVIT OF DAN BRUMWELL	116	I
AFFIDAVIT OF DEMAR BURNETT	130	I
AFFIDAVIT OF ROBERT FODREA	185	I
AFFIDAVIT OF RODNEY HIGGINS	214	I
AFFIDAVIT OF STEVE LOOMIS	245	II
AFFIDAVIT OF MIKE MAILHOT	249	II
AFFIDAVIT OF LARRY MANGUM	255	II
AFFIDAVIT OF JOHN MILLINGTON	259	II
AFFIDAVIT OF JOSEPH PACHNER	280	II
AFFIDAVIT OF HENRY RUDOLPH	365	II
AFFIDAVIT OF ANNE SEASTROM	398	II
AFFIDAVIT OF MATT WOLFF	410	III
AFFIDAVIT OF VICTOR VILLEGAS IN OPPOSITION TO SUMMARY JUDGMENT (SENT AS EXHIBIT)		
ORDER GRANTING VALLEY COUNTY'S MOTION TO ENLARGE PAGE LIMITATIONS	443	III
VALLEY COUNTY'S REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT	445	III

TABLE OF CONTENTS

	Page No.	Volume No
STIPULATION TO MOVE SUMMARY JUDGMENT HEARING FROM VALLEY COUNTY TO ADA COUNTY	475	III
AMENDED ORDER GRANTING VALLEY COUNTY'S MOTION TO ENLARGE PAGE LIMITATIONS	478	III
STIPULATION TO MODIFY SCHEDULING ORDER	480	III
ORDER GRANTING STIPULATION TO MODIFY SCHEDULING ORDER	483	III
MEMORANDUM DECISION RE: DEFENDANT'S MOTION FOR SUMMARY JUDGMENT	486	III
MOTION FOR PARTIAL SUMMARY JUDGMENT	494	III
MOTION TO VACATE TRIAL DATE AND REQUEST FOR STATUS CONFERENCE	496	III
VALLEY COUNTY'S MOTION FOR ENTRY OF JUDGMENT	498	III
VALLEY COUNTY'S RESPONSE TO MOTION FOR PARTIAL SUMMARY JUDGMENT	504	III
PLAINTIFF'S OBJECTION TO VALLEY COUNTY'S MOTION FOR ENTRY OF JUDGMENT FILED JANUARY 13, 2011	510	III
PLAINTIFF'S MOTION FOR RECONSIDERATION/AMENDMENT	513	III
MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR RECONSIDERATION/AMENDMENT	515	III
STIPULATION TO MOVE FEBRUARY 17, 2011 MOTIONS HEARING FROM VALLEY COUNTY TO ADA COUNTY	523	III
ORDER GRANTING STIPULATION TO MOVE FEBRUARY 17, 2011 MOTIONS HEARING FROM VALLEY COUNTY TO ADA COUNTY	525	III
VALLEY COUNTY'S RESPONSE TO MOTION FOR RECONSIDERATION	527	III
VALLEY COUNTY'S REPLY IN SUPPORT OF MOTION FOR ENTRY OF JUDGMENT	540	III
AFFIDAVIT OF CYNDA HERRICK REGARDING RESOLUTION 11-6	548	III
NOTICE OF SUPPLEMENTAL AUTHORITY	555	III
MEMORANDUM DECISION (1)PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT; (2)DEFENDANT'S MOTION FOR ENTRY OF JUDGMENT; (3)PLAINTIFF'S MOTION TO DISALLOW COSTS AND ATTORNEY FEES	597	III
PLAINTIFF'S OBJECTION TO VALLEY COUNTY'S PROPOSED JUDGMENT	586	III

TABLE OF CONTENTS

	Page No.	Volume No
RESPONSE TO PLAINTIFF'S OBJECTION TO PROPOSED JUDGMENT	588	III
JUDGMENT	593	III
NOTICE OF APPEAL	599	III
NOTICE OF CROSS APPEAL	605	III
****THE FOLLOWING ARE ADDITIONAL DOCUMENTS REQUESTED IN THE NOTICE OF CROSS APPEAL:**		
**AFFIDAVIT OF MIKE MAILHOT IN SUPPORT OF APPLICATION FOR PRELIMINARY INJUNCTION	610	III
**AFFIDAVIT OF MATTHEW C. WILLIAMS FILED 1/28/11	637	IV
**VALLEY COUNTY'S MEMORANDUM OF COSTS AND STATEMENT IN SUPPORT FILED 1/31/11	641	IV
**AFFIDAVIT OF CHRISTOPHER H. MEYER FILED 1/31/11	661	IV
**AFFIDAVIT OF MARTIN C. HENDRICKSON FILED 1/31/11	694	IV
**AFFIDAVIT OF MURRAY D. FELDMAN FILED 1/31/11	699	IV
**MOTION TO DISALLOW COSTS & ATTORNEY FEES FILED 2/15/11	711	IV
**PLAINTIFF'S MEMORANDUM IN OPPOSITION TO VALLEY COUNTY'S MEMORANDUM OF COSTS & STATEMENT IN SUPPORT FILED 2/15/11	713	IV
**VALLEY COUNTY'S RESPONSE TO MOTION FOR RECONSIDERATION FILED 3/1/11	723	IV
REGISTER OF ACTIONS	736	IV
CLERK'S CERTIFICATE OF APPEAL	741	IV
AMENDED CLERK'S CERTIFICATE OF APPEAL	743	IV
CLERK'S CERTIFICATE OF EXHIBITS	745	IV
CLERK'S CERTIFICATE TO RECORD	746	IV
CLERK'S CERTIFICATE OF SERVICE	748	IV
NOTICE OF LODGING TRANSCRIPT (12/06/10 HEARING)	749	IV
NOTICE OF LODGING TRANSCRIPT (03/11/11 HEARING)	750	IV

INDEX

	Page No.	Volume No
AFFIDAVIT OF MIKE MAILHOT IN SUPPORT OF APPLICATION FOR PRELIMINARY INJUNCTION	610	III
AFFIDAVIT OF ANNE SEASTROM	398	II
AFFIDAVIT OF CHRISTOPHER H. MEYER FILED 1/31/11	661	IV
AFFIDAVIT OF CYNDA HERRICK	16	I
AFFIDAVIT OF CYNDA HERRICK IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT (SENT AS EXHIBIT)		
AFFIDAVIT OF CYNDA HERRICK REGARDING RESOLUTION 11-6	548	III
AFFIDAVIT OF DAN BRUMWELL	116	I
AFFIDAVIT OF DEMAR BURNETT	130	I
AFFIDAVIT OF HENRY RUDOLPH	365	II
AFFIDAVIT OF JOHN MILLINGTON	259	II
AFFIDAVIT OF JOSEPH PACHNER	280	II
AFFIDAVIT OF LARRY MANGUM	255	II
AFFIDAVIT OF MARTIN C. HENDRICKSON FILED 1/31/11	694	IV
AFFIDAVIT OF MATT WOLFF	410	III
AFFIDAVIT OF MATTHEW C. WILLIAMS FILED 1/28/11	637	IV
AFFIDAVIT OF MIKE MAILHOT	249	II
AFFIDAVIT OF MURRAY D. FELDMAN FILED 1/31/11	699	IV
AFFIDAVIT OF ROBERT FODREA	185	I
AFFIDAVIT OF RODNEY HIGGINS	214	I
AFFIDAVIT OF SERVICE	7	I
AFFIDAVIT OF STEVE LOOMIS	245	II
AFFIDAVIT OF VICTOR VILLEGAS IN OPPOSITION TO SUMMARY JUDGMENT (SENT AS EXHIBIT)		
AMENDED CLERK'S CERTIFICATE OF APPEAL	743	IV
AMENDED ORDER GRANTING VALLEY COUNTY'S MOTION TO ENLARGE PAGE LIMITATIONS	478	III
ANSWER	9	I
CLERK'S CERTIFICATE OF APPEAL	741	IV
CLERK'S CERTIFICATE OF EXHIBITS	745	IV
CLERK'S CERTIFICATE OF SERVICE	748	IV

INDEX

	Page No.	Volume No
CLERK'S CERTIFICATE TO RECORD	746	IV
COMPLAINT	1	I
JUDGMENT	593	III
MEMORANDUM DECISION (1)PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT; (2)DEFENDANT'S MOTION FOR ENTRY OF JUDGMENT; (3)PLAINTIFF'S MOTION TO DISALLOW COSTS AND ATTORNEY FEES	597	III
MEMORANDUM DECISION RE: DEFENDANT'S MOTION FOR SUMMARY JUDGMENT	486	III
MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR RECONSIDERATION/AMENDMENT	515	III
MOTION FOR PARTIAL SUMMARY JUDGMENT	494	III
MOTION TO DISALLOW COSTS & ATTORNEY FEES FILED 2/15/11	711	IV
MOTION TO VACATE TRIAL DATE AND REQUEST FOR STATUS CONFERENCE	496	III
NOTICE OF APPEAL	599	III
NOTICE OF CROSS APPEAL	605	III
NOTICE OF LODGING TRANSCRIPT (03/11/11 HEARING)	749	IV
NOTICE OF LODGING TRANSCRIPT (12/06/10 HEARING)	750	IV
NOTICE OF SUPPLEMENTAL AUTHORITY	555	III
ORDER ALLOWING PLAINTIFF'S MOTION TO FILE BRIEF EXCEEDING TWENTY-FIVE (25) PAGES (2ND PAGE OF STIP)	74	I
ORDER GRANTING STIPULATION TO MODIFY SCHEDULING ORDER	483	III
ORDER GRANTING STIPULATION TO MOVE FEBRUARY 17, 2011 MOTIONS HEARING FROM VALLEY COUNTY TO ADA COUNTY	525	III
ORDER GRANTING VALLEY COUNTY'S MOTION TO ENLARGE PAGE LIMITATIONS	443	III
PLAINTIFF'S MEMORANDUM IN OPPOSITION TO VALLEY COUNTY'S MEMORANDUM OF COSTS & STATEMENT IN SUPPORT FILED 2/15/11	713	IV
VALLEY COUNTY'S MEMORANDUM OF COSTS AND STATEMENT IN SUPPORT FILED 1/31/11	641	IV
VALLEY COUNTY'S RESPONSE TO MOTION FOR RECONSIDERATION FILED 3/1/11	723	IV

INDEX

	Page No.	Volume No.
PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS MOTION FOR SUMMARY JUDGMENT FILED 10/14/10	77	I
PLAINTIFF'S MOTION FOR RECONSIDERATION/AMENDMENT	513	III
PLAINTIFF'S OBJECTION TO VALLEY COUNTY'S MOTION FOR ENTRY OF JUDGMENT FILED JANUARY 13, 2011	510	III
PLAINTIFF'S OBJECTION TO VALLEY COUNTY'S PROPOSED JUDGMENT	586	III
PRELIMINARY INJUNCTION ORDER	19	I
REGISTER OF ACTIONS	736	IV
RESPONSE TO PLAINTIFF'S OBJECTION TO PROPOSED JUDGMENT	588	III
STIPULATION TO MODIFY SCHEDULING ORDER	480	III
STIPULATION TO MOVE FEBRUARY 17, 2011 MOTIONS HEARING FROM VALLEY COUNTY TO ADA COUNTY	523	III
STIPULATION TO MOVE SUMMARY JUDGMENT HEARING FROM VALLEY COUNTY TO ADA COUNTY	475	III
VALLEY COUNTY'S MOTION FOR ENTRY OF JUDGMENT	498	III
VALLEY COUNTY'S MOTION FOR SUMMARY JUDGMENT	35	I
VALLEY COUNTY'S OPENING BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT	38	I
VALLEY COUNTY'S REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT	445	III
VALLEY COUNTY'S REPLY IN SUPPORT OF MOTION FOR ENTRY OF JUDGMENT	540	III
VALLEY COUNTY'S RESPONSE TO MOTION FOR PARTIAL SUMMARY JUDGMENT	504	III
VALLEY COUNTY'S RESPONSE TO MOTION FOR RECONSIDERATION	527	III
VALLEY COUNTY'S STATEMENT OF MATERIAL FACTS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT	21	I

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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 MATT WOLFF

STATE OF IDAHO)
) ss.
County of Ada)

MATT WOLFF, 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 Boise, Ada County, Idaho, and that I have personal knowledge of the facts set forth in this Affidavit.

2. I am a member of and a manager of RedWolff Ventures LLC, an Idaho limited liability company (referred to hereafter as "RedWolff Ventures"). Henry Rudolph, also a member and manager of RedWolff Ventures, signed an application to Valley County for a conditional use permit ("CUP") on behalf of RedWolff Ventures to construct the Whistler's Cove Subdivision located in Valley County. RedWolff Ventures' application was approved by the Valley County Planning and Zoning Commission on March 8, 2007 and CUP No. 07-04 was issued to RedWolff Ventures, effective March 20, 2007. A true and correct copy of the CUP is attached to this Affidavit as Exhibit A.

3. Condition No. 11 of the CUP states that RedWolff Ventures shall enter into a Development Agreement with Valley County. Exhibit A, Conditions of Approval, of the Staff Report of Valley County Planning and Zoning Commission, dated March 8, 2007, identifies as Condition No. 5 that RedWolff Ventures "[m]ust enter into a Road Development Agreement with the Board of County Commissioners." A true and correct copy of the March 8, 2007, Staff Report is attached this Affidavit as Exhibit B. The Staff Report's Attachment D is a letter from Valley County's engineer, Jeffery Schroeder, dated February 28, 2007, which states, in relevant part: "4. C.U.P. 07-04 Whistler's Cove Subdivision: ... Valley County will require a Road Development Agreement (RDA) for this project."

4. In fulfilling the conditions of the CUP and in order to obtain approval of the final plat for Whistler's Cove Subdivision, RedWolff Ventures was required to enter into a Road Development Agreement with Valley County and pay the fee calculated by Valley County Engineer for the Wagon Wheel 2007 Capital Improvement Area where Whistler's Cove Subdivision is located.

5. RedWolff Ventures did not offer to pay to mitigate for any impacts on county roadways attributable to traffic generated by Whistler's Cove Subdivision. Rather Valley County required RedWolff Ventures to enter into the Road Development Agreement pursuant to the conditions placed on its CUP.

6. At no time in my meetings and interactions with any Valley County representative with regard to RedWolff Ventures' CUP was I told or advised that the Road Development Agreement and payment of the fee was voluntary, or that RedWolff Ventures 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 RedWolff Ventures' CUP was I told or advised that the fee paid under the Road Development Agreement was negotiable or that RedWolff Ventures could elect not to pay a fee. At no time in my meetings or interactions with Valley County representatives with regard to RedWolff Ventures' 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. Red Wolff Ventures was not given the option of proceeding with the development of Whistler's Cove without improvements to the roadways.

7. Since Valley County imposed the Road Development Agreement and the associated fee 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 the fee under the Road Development Agreement was negotiable or that RedWolff Ventures had an option not to pay the fee, RedWolff Ventures would not have paid the fee.

8. With my consent, Henry Rudolph signed the Road Development Agreement on behalf of RedWolff Ventures on September 17, 2007. A true and correct copy of the Road Development Agreement is attached to this Affidavit as Exhibit C. RedWolff Ventures paid the

fee required by Valley County on October 29, 2007 in the amount of Forty Four Thousand Two Hundred Fifty Six and no/100 Dollars ($44,256.00).

9. RedWolff Ventures did not voluntarily enter into the Road Development Agreement with Valley County or voluntarily pay the fee under the agreement. RedWolff Ventures 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 RedWolff Ventures' project.

MATT WOLFF

SUBSCRIBED and SWORN to before me this 21st day of October 2010.

MARY C. HOLT
NOTARY PUBLIC
STATE OF IDAHO

Notary Public for Idaho
Residing in Boise
My Commission Expires: 10/30/12

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

Instrument # 219881 219881
VALLEY COUNTY, CADE, IDAHO
2007-03-29 20:57 No. of Pages: 2
Recorded for : VALLEY COUNTY PLANNING & ZONING
ARCHIE N. BANBURY Fee: 5.00
Ex-Officio Recorder Deputy
Index to: MISCELLANEOUS RECORD

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 March 27 2007

Approved by Cynda Herrick

CONDITIONAL USE PERMIT
NO. 07-04
Whistler's Cove Subdivision

Issued to: Henry Rudolph
Red Wolf Ventures, LLC
56 Meadow Lane, Highway 21
Boise, ID 83716

Property Location: The site is located on Lots 6 & 7, M&E Wagon Wheel Subdivision No. 7 and portions of Sec. 34, T. 16N, R. 3E, B.M., Valley County, Idaho.

There have been no appeals of the Valley County Planning and Zoning Commission's decision of March 8, 2007. The Commission's decision stands and you are hereby issued Conditional Use Permit No. 07-04 with Conditions for establishing a 26 lot single family residence as described in the application, staff report, and minutes.

The effective date of this permit is March 20, 2007. 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.

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. A final site-grading plan with a stormwater management plan showing BMPs should be reviewed and approved by the Valley County Engineer prior to construction of the road.

6. The CCRs shall address wood burning devices and lighting requirements.

7. Utilities shall be placed to each lot and the road constructed prior to final plat recordation or shall be financially guaranteed.

8. A wetland delineation/determination shall be submitted to the Planning and Zoning office prior to disturbance of the land.

9. A letter of approval from the Donnelly Rural Fire District is required.

10. A will serve letter is required from the North Lake Recreational Sewer and Water District prior to plat recordation.

11. A Development Agreement shall be approved by the Board of County Commissioners.

12. No building permits shall be issued until sewer and fire protection are in place.

13. A note shall be placed on the face of the plat that states, "There must be safe separation of two feet between the foundation and groundwater. Also, if fill is required, the fill must be imported."

14. High groundwater elevation must be shown for each lot on the final plat.

END CONDITIONAL USE PERMIT

Cynda Herrick, AICP
VALLEY COUNTY
IDAHO

Planning & Zoning Administrator
Flood Plain Coordinator

PO Box 1350
219 North Main Street
Cascade, Idaho 83611-1350

Phone: 208.382.7115
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Web: www.co.valley.id.us

STAFF REPORT
Conditional Use Permit Application No. 07-04
Whistler's Cove Subdivision, Preliminary Plat

HEARING DATE:	March 8, 2007
TO:	Planning and Zoning Commission
STAFF:	Cynda Herrick, AICP
APPLICANT/OWNER:	**Henry Rudolph** Red Wolf Ventures, LLC 56 Meadow Lane, Highway 21 Boise, ID 83716
SURVEYOR:	**Bob Fodrea** Rennison Fodrea, Inc. PO Box 188 Cascade, ID 83611
LOCATION/SIZE:	Located in Sec. 34, T. 16N, R. 3E, B.M., Valley County, Idaho. The property is 12 acres.
REQUEST:	26-Lot Single-Family Residential Subdivision.
EXISTING LAND USE:	Single-Family Residential Subdivision.

BACKGROUND:

The applicant is Henry Rudolph. He is requesting preliminary plat approval to re-establish a 26-lot single-family subdivision, on 12 acres. The lots would be served by individual wells and North Lake Recreational Water and Sewer District. Access would be from Jacks Lane. The site is located on Lots 6 and 7, Block 2, of M&E Wagon Wheel Subdivision No. 7.

Whistler's Cove Subdivision, preliminary plat, was previously submitted on January 27, 2005. The Planning and Zoning Commission denied the application on March 10, 2005, due to density and wetland concerns. An appeal of the Planning and Zoning Commission's decision went before the Board of County Commissioners on May 2, 2005. The Board overturned the Planning and Zoning Commission's decision. A Conditional Use Permit was issued, effective May 3, 2005,

EXHIBIT B

expiring on May 3, 2006. The applicant was notified after the permit had expired.

FINDINGS:

1. Application was made to Planning and Zoning on January 22, 2007.

2. Legal notice was posted in the Central Idaho Star News on February 15, and February 22, 2007. Neighbors within 300 feet of the property line were notified by letter dated February 20, 2007. Potentially affected agencies were notified by letter dated February 5, 2007. The site was posted February 28, 2007.

3. Agency comment received:

Bureau of Reclamation responded by letter received February 27, 2007. They requested the following:

- Include information regarding encroachments on the recorded plat.
- Prepare a stormwater abatement plan.
- Construct a single-rail fence, on Reclamation lands, along the subdivision boundary.
- Inform residents that Reclamation lands are designated as conservation and open space areas.
- No Reclamation lands shall be designated within the subdivision plat.

Central District Health Department responded by fax received February 16, 2007. They have not received an application for this development and have no comments at this time.

Neighbor comment received: none.

4. Physical characteristics of the site: Agricultural.

5. The surrounding land use and zoning includes:
   North: Single-Family Residential Subdivision.
   South: Agricultural (Bureau of Reclamation land).
   East: Agricultural (Bureau of Reclamation land).
   West: Single-Family Residential Subdivision.

6. The Comprehensive Plan contains policy created and adopted by Valley County. The Plan promotes residential uses to increase private property values. However, it also requires consideration of compatibility with surrounding land uses.

7. Land Use and Development Ordinance. This proposal is categorized under 2. Residential

Uses c. Subdivision for single-family residence in Table 1-A.

The following sections of the Land Use and Development Ordinance apply to this application.

3.03 STANDARDS

The provisions of this section shall apply to the various buildings and uses designated herein as Conditional Uses.

3.03.01 LOT AREAS - GENERAL

a. Minimum lot or parcel sizes are specified herein under the site and development standards for the specific use in sections 3.03.09 through 3.03.13.

b. The minimum lot size and configuration for any use shall be at least sufficient to accommodate water supply facilities, sewage disposal facilities, replacement sewage disposal facilities, buildings, parking areas, streets or driveways, open areas, accessory structures, and setbacks in accordance with provisions herein. All lots shall have a reasonable building site and access to that site.

c. All lots or parcels for Conditional Uses shall have direct frontage along a public or private road with minimum frontage distance as specified in the site or development standards for the specific use.

3.03.02 SETBACKS - GENERAL

a. The setbacks for all structures exceeding three feet in height are specified herein under the site and development standards for the specific use.

b. All residential buildings shall be setback at least thirty (30) feet from high water lines. All other buildings shall be setback at least one-hundred (100) feet from high water lines.

c. Front yards shall be determined by the structure establishing the principal use on the property and the location of the access street or road.

d. No other structure may encroach on the yards determined for the structure establishing principal use.

e. All building setbacks shall be measured horizontally, on a perpendicular to the property line, to the nearest corner or face of the building including eaves, projections, or overhangs.

3.03.03 BUILDINGS - GENERAL

a. All buildings or structures to be set on a permanent foundation and exceeding 120 square feet in roof area are subject to the provisions of "County Building Code Ordinance" 1-76, 2-77, 4-88, and 99-2, or any subsequent updates or adoptions. Compliance with the provisions of said ordinance shall be a condition of approval of the Conditional Use Permit.

b. Building permits are required and may be obtained from the Valley County Building Department after the Conditional Use Permit is issued. The Building Department will assist the zoning department by imposing pertinent conditions of approval on the building permit.

c. Building height, shape, floor area, construction material, and location on the property may be regulated herein under the site and development standards for the specific use as well as by provisions of the "Building Code".

3.03.04 SITE IMPROVEMENTS - GENERAL

a. Grading

Grading to prepare a site for a conditional use or grading, vegetable removal, construction or other activity that has any impact on the subject land or on adjoining properties is a conditional use. A Conditional Use Permit is required prior to the start of such an activity.

Grading for bona-fide agricultural activities, timber harvest, and similar permitted uses herein are exempt from this section.

Grading within flood-prone areas is regulated by provisions of Section 4.02 herein and the Flood Damage Prevention Ordinance No. 3-90. A permit, if required, shall be a part of the Conditional Use Permit.

Grading or disturbance of wetlands is subject to approval of the U.S. Corps of Engineers under the Federal Clean Water Act. The federal permit, if required, shall be part of the Conditional Use Permit.

The Conditional Use Permit Application shall include a site-grading plan, or preliminary site-grading plan for subdivisions, clearly showing the existing site topography and the proposed final grades with elevations or contour lines and specifications for materials and their placement as necessary to complete the work. The plan shall demonstrate compliance with best management practices for surface water management for permanent management and the methods that will be used during construction to control or prevent the erosion, mass movement, siltation,

sedimentation, and blowing of dirt and debris caused by grading, excavation, open cuts, side slopes, and other site preparation and development. The plan shall be subject to review of the County Engineer and the Soil Conservation District. The information received from the County Engineer, the Soil Conservation District, and other agencies regarding the site-grading plan shall be considered by the Planning and Zoning Commission and/or the Board of County Commissioners in preparing the Conditions of Approval or Reasons for Denial of the applications.
For subdivisions, preliminary site grading plans and storm water management plans must be presented for review and approval by the Commission as part of the conditional use permit application for subdivisions. However, prior to construction of infrastructure, excavation, or recordation of the final plat, the final plans must be approved by the Valley County Engineer.

All land surfaces not used for roads, buildings, and parking shall be covered either by natural vegetation, other natural and undisturbed open space, or landscaping.

Prior to issuance of building permits. The administrator must receive a certification from the developer's engineer verifying that the storm water management plan has been implemented according to approved plans.

b. *Roads and Driveways.*

1. Roads for public dedication and maintenance shall be designed and constructed in accordance with the "Subdivision Ordinance" and in accordance with "Construction Specifications and Standards for Roads and Streets in Valley County, Idaho".

2. Residential Developments, Civic or Community Service Uses, and Commercial Uses shall have at least two access roads or driveways to a public street wherever practicable.

3. Private roads shall meet the provisions of the Valley County Subdivision Ordinance and any policies adopted by the Board of County Commissioners.

4. Cattle guards shall not be installed in public roads within residential developments.

5. Access to Highway 55 shall be limited at all locations and may be prohibited where other access is available. An access permit from the Idaho Transportation Department may be required.

c. Parking and Off Street Loading Facilities. (See LUDO for specifics.)

d. Landscaping.. (See LUDO for specifics.)

e. Fencing:

3. If livestock are allowed in a residential development then fencing shall be installed to keep livestock out of public street rights-of-way. Cattle guards shall not be installed in public roads within residential developments.
5. Fence construction and materials shall be in accordance with commonly accepted good practice to produce a neat appearing durable fence. The location, height, and materials used for constructing a fence shall be approved by the Commission and specified in the conditional use permit. Fences required for any conditional use shall be maintained in good repair.

6. Where a Conditional Use adjoins an Agricultural Use where animal grazing is known to occur for more than 30 consecutive days per year, the permittee shall cause a fence to be constructed so as to prevent the animals from entering the use area. The permittee shall provide for the maintenance of said fence through covenants, association documents, agreement(s) with the adjoining owner(s), or other form acceptable to the Commission prior to approval of the permit so that there is reasonable assurance that the fence will be maintained in functional condition so long as the conflicting uses continue.

7. Sight-obscuring fences, hedges, walls, lattice-work, or screens shall not be constructed in such a manner that vision necessary for safe operation of motor vehicles or bicycles on or entering public roadways is obstructed.

f. Utilities:

1. All lots or parcels for, or within Conditional Uses, shall be provided, or shall have direct access to, utility services including telephone, electrical power, water supply, and sewage disposal.

2. Central water supply and sewage systems serving three (3) or more separate users shall meet the requirements of design, operation, and maintenance for central water and sewage systems in the "Subdivision Ordinance".

3. Probability of water supply, as referred to in (1) above, can be shown by well logs in general area or by a determination of a professional engineer, hydrologist, or soil scientist.

4. If individual septic systems are proposed to show compliance with sewage disposal requirements in (1) above, sanitary restrictions must be lifted on every lot prior to recordation unless it is designated as a lot where a building permit will never be issued for a residential unit, such as pasture lot, common area, open space, or a no build lot.

5. Easements or rights-of-way shall be set aside or dedicated for the construction and maintenance of utilities in accordance with the provisions of the "Subdivision Ordinance".

6. A Utility Plan showing the schedule of construction or installation of proposed utilities shall be a part of the Conditional Use Permit.

3.03.05 IMPACT REPORT

3.03.06 PERFORMANCE STANDARDS - GENERAL

a. Noise.

1.stockpiling, and/or hauling of said materials from site approved by the County for said purposes that are located outside the North Fork of the Payette River Drainage of the County.

2. The noise emanating from any residential, recreational, or commercial airstrip or airport will be considered in the conditional use permit process. The FAA will be consulted.

b. Lighting.

Purpose - These regulations are intended to establish standards that insure minimal light pollution, reduce glare, increase energy conservation, and maintain the quality of Valley County's physical and aesthetic character.

Applicability - These standards shall apply to all outdoor lighting including, but not limited to, search, spot, or floodlights for:

1. buildings and structures
2. recreational areas
3. parking lot lighting
4. landscape lighting
5. signage
6. other outdoor lighting

Standards:

1. All exterior lighting shall be designed, located and lamped in order to prevent:
    - Over lighting or excessive lighting;

- Energy waste;
- Glare;
- Light trespass;
- Skyglow.

2. All non-essential exterior commercial and residential lighting is encouraged to be turned off after business hours and/or when not in use. Lights on a timer are encouraged. Sensor activated lights are encouraged to replace existing lighting that is desired for security purposes.

4. All other outdoor lighting shall meet the following standards:

   a. The height of any light fixture or illumination source shall not exceed twenty (20) feet.

   b. All lighting or illumination units or sources shall be hooded or shielded in a downward direction so they do not produce glare or cause light trespass on any adjacent lot or real property as depicted in Figures 1 and 2 (located at the back of the chapter).

   c. Lights or illumination units shall not direct light, either directly or through a reflecting device, upon any adjacent lot or real property. Lighting should not illuminate the sky or reflect off adjacent water bodies or produce glare or cause light trespass on any adjacent lot or real property.

5. All outdoor lights used for parking areas, walkways, and similar uses mounted on poles eight feet or greater in height shall be directed downward. The light source shall be shielded so that it will not produce glare or cause light trespass on any adjacent lot or real property.

7. The installation of mercury vapor lamps is hereby prohibited.

8. Flashing or intermittent lights, lights of changing degree of intensity, or moving lights shall not be permitted. This section shall not be construed so as to prohibit the flashing porch light signal used only while emergency services are responding to a call for assistance at the property or holiday lights.

9. Industrial and exterior lighting shall not be used in such a manner that produces glare on public highways and neighboring property. Arc welding, Acetylene Torch-Cutting, or similar processes shall be performed so as not to be seen from any point beyond the property line. Exceptions will be made for necessary repairs to equipment.

10. Sensor activated lights, provided:

    a. It is located in such a manner as to prevent glare and lighting onto properties of others or into a public right-of-way;
    b. It is set to only go on when activated and to go off within five minutes after activation has ceased;
    c. It shall not be triggered by activity off the property.

11. Lighting of radio, communication and navigation towers along with power lines and power poles; provided the owner or occupant demonstrates that the Federal Aviation Administration (FAA) regulations can only be met through the use of lighting.

12. All applications for a conditional use permit shall include an outdoor lighting plan for the entire site, which indicates how the above standards are to be met. The approved permit shall be a part of the conditional use permit and/or the building permit.

d. Emissions.

The emission of obnoxious odors of any kind shall not be permitted, nor the emission of any toxic or corrosive fumes or gases.

Dust created by an industrial, commercial, or recreational operation shall not be exhausted or wasted into the air. All operations shall be subject to the standards in Appendix C – Fugitive Dust. State air quality permits, when required, may be a condition of approval of the conditional use permit or may be required to be a part of the Conditional Use Permit at the discretion of the Commission.

Wood burning devices shall be limited to one per site. Wood burning devices shall be certified for low emissions in accordance with EPA standards.

e. Dust.

Dust and other types of air pollution borne by the wind from such sources as storage areas and roads, shall be minimized by appropriate landscaping, paving, oiling, watering on a scheduled basis, or other acceptable means.

Dust created by any approved operation shall not be exhausted or wasted into the air. The standards in Appendix C – Fugitive Dust along with State air quality permits, when required, may be a condition of approval of the conditional use permit or may be required to be a part of the Conditional Use Permit at the discretion of the Commission.

f. Open Storage.

g. Fire Protection.

Provisions must be made to implement pre-fire activities that may help improve the survivability of people and homes in areas prone to wildfire. Activities may include vegetation management around the home, use of fire resistant building materials, appropriate subdivision design, removal of fuel, providing a water source, and other measures. Recommendations of the applicable fire district will be considered.

h. Community Housing.

All residential developments, PUDs, and Subdivisions shall provide on-site Community Housing units at the ratio of not less than one unit per each ten total permitted dwelling units or platted lots. All Community Housing units must conform to the regulations set out in Appendix D of this ordinance.

Subject to the approval of the Commission, which shall consider the recommendation of the VARHA, and only according to the procedures set out in Appendix D hereto, these units may be provided in alternate locations and/or fees may be paid "in-lieu" of provision of these units.

Developments shall provide Community Housing according to the following formula:

Density per Gross Acre	Community Housing
Less than 1 Unit	10%
1.00 – 1.24	11%
1.25 - 1.49	12%
1.50 - 1.74	13%
1.75 - 1.99	14%
2 Units or More	15%

There shall be a family deferral for land owners who give a portion of their land to immediate family members, up to a maximum of 5 lots per land owner. Lots gifted to family members shall be restricted for resale for at least 5 years. If any lot is sold to an unrelated party prior to 5 years from date of recordation the family member holding title to said lot shall, at the date of such sale, comply with Community Housing requirements calculated as of the date of the original subdivision. Lots gifted to family members shall be recorded with a deed restriction describing this process.

Other permitted and conditional uses, including commercial and industrial uses, will be required to include Community Housing should the Commission determine that the use

creates a demand for such housing which should be mitigated. In such instances and subject to the approval of the Commission, which shall consider the recommendation of the VARHA, and only according to the procedures set out in Appendix D, hereto, these units may be provided in alternate locations and/or fees may be paid "in-lieu" of provision of these units.

All Community Housing shall be priced (on the average, according to the procedures set out in Appendix D) to serve households with incomes not exceeding 80% of the median income for Valley County.

3.03.07 BONDS AND FEE

Dependent on the impact report and the compatibility rating as well as the applicant proposed site improvements and structure to be used or constructed, the Administrator may recommend bonds; a Development Agreement; reimbursement fees or impact fee of the applicant. The Board shall have the option of exclusively dealing with the issues of bonds, reimbursement fees, and/or application fees, in the case of developments, which are deemed by the Board to be large enough in scale to have significant impact on County services and infrastructure. In such case, pursuant to the direction of the Board, the Commission shall defer such matters to the Board

The Commission or Administrator shall have discretion as an inherent condition of the permit to impose and collect fees from the applicant for the cost of monitoring and enforcement of standards.

3.03.09 RESIDENTIAL USES

Residential uses requiring a Conditional Use permit shall meet the following site or development standards.

Subdivisions of land shall also comply with the standards of the "Subdivision Regulations for Valley County, Idaho" adopted April 29, 1970 and as revised hereafter.

Developments accommodating mobile homes, motor homes or recreational vehicles shall also comply with the standards of the "Minimum Standards and Criteria for Approval of Development and Operation of Mobile Home Subdivisions and Parks, Travel Trailer Courts and Parks" adopted May 12, 1971 and as revised hereafter.

Planned Unit Developments, condominiums, and multi-family residential developments shall be platted in accordance with the regulations of this chapter, the "Subdivision Ordinance", or as may be approved in accordance with Chapter 8 as a planned unit development prior to the sale or transfer of title to any lot, parcel, or unit.

a. Minimum Lot Area.

1. The equivalent minimum lot area shall be unlimited herein except for provisions of Section 2.03.01, Section 3.03.01 b., the "Subdivision Ordinance", the "Mobile Home Standards", Table III-A herein, paragraph e. of this section, and paragraph 2 herein.

2. New subdivisions must be compatible with existing or proposed surrounding land uses (See Appendix A).

   New subdivisions for single-family residences and multi-family residences shall provide the following minimum lot sizes:

   - An average lot size of two acres where individual sewage disposal and individual water supply systems are proposed except participants in the Community Housing program may have an average lot size of 1.6 acres;
   - 20,000 square feet where a central water supply system and individual sewage disposal systems are proposed;
   - 12,000 square feet where a central sewage collection and disposal system and individual wells are proposed;
   - 8,000 square feet where both central systems are proposed.

   These minimum lot sizes may not be used to exceed the density limitation of paragraph e. of this section for any development plans.

   Lot sizes within new Planned Unit Developments may vary from these minimum because of reduced setbacks or other consideration in accordance with the provisions of Chapter 8. In subdivisions where the amount of Community Housing provided exceeds the requirements of Section 3.03.06, required lot sizes may be reduced (provided that the conditions of all other sections of this ordinance, and state and federal requirements, are met) by an amount equivalent to offset the number of lots in excess of those required under Section 3.03.06.

3. Frontage on a public or private road shall not be less than thirty (30) feet for each lot or parcel. The lot width at the front building setback line shall not be less than ninety (90) feet. A P.U.D., Condominium, or other cluster development may contain lots without frontage on a road and widths less than ninety (90) feet in accordance with the approved development plan or plat.

b. Minimum Setbacks.

The minimum building setbacks shall be thirty (30) feet from front, rear, and side street

property lines and fifteen (15) feet from all side property lines. Setbacks for mobile homes in Subdivisions or Parks shall be in accordance with the "Mobile Home Standards". A P.U.D., Condominium or other cluster development may include zero lot line development and other reduced setbacks in accordance with the approved development plan or plat.

c. Maximum Building Height and Floor Area.

1. Building heights, except or may be modified by a P.U.D., shall not exceed thirty-five (35) feet above the lower of existing or finished grade.

2. The building size or floor area, except as may be modified by a P.U.D. shall not exceed the limitations of Section 3.03.01 and 3.03.03.

3. No structure or combination of structures, except as may be modified by a P.U.D., may cover more than forty (40%) percent of the lot or parcel.

d. Site Improvement.

1. Two off-street parking spaces shall be provided for each dwelling unit. These spaces may be included in driveways, carports, or garages.

2. All utility lines, including service lines, that are to be located within the limits of the improved roadway in new residential developments must be installed prior to placing the leveling coarse material.

e. Density.

The density of any residential development or use requiring a conditional use permit shall not exceed 2.5 dwelling units per acre except for planned unit developments. Developments which provide Community Housing at the rate set out in Section 3.03.06.h may increase density from 2.5 dwelling units per acre to 3 dwelling units per acre. Density shall be computed by dividing the total number of dwelling units proposed by the total acreage of land within the boundaries of the development. The area of existing road rights-of-way on the perimeter of the development and public lands may not be included in the density computation.

In subdivisions where the amount of Community Housing provided exceeds the requirements of Section 3.03.06, density may be increased (provided that the conditions of all other sections of this ordinance, and state and federal requirements, are met) by an

amount equivalent to offset the number of lots in excess of those required under Section 3.03.06.h .

8. Subdivision Regulations:

Section 315. Lots

1. The lot size, width, depth, shape and orientation, and the minimum building setback lines, shall be appropriate for the location of the subdivision and for the type of development and use contemplated. Every lot shall abut upon a street. Corner lots for residential use shall have extra width to permit appropriate building setbacks from and orientation to both streets.

→ (The Commission should review this list to determine any additional necessary *information needed.*)

7. The subdivider, upon demand by the Commission, shall provide the Commission with the following information, or such portion thereof as the Commission deems necessary.

(a) data setting forth the highest known water tables for the proposed subdivision and for the property lying down-grade and contiguous to subject subdivision.

(b) the strata formation of the proposed subdivision for a depth of sixteen (16) feet.

(c) a percolation test for each acre within said proposed subdivision

(d) the known well logs of wells located in surrounding contiguous property.

(e) the location of all existing or proposed irrigation ditches, streams, drainage ditches, or known underground water courses.

(f) a statement of policy to be included in the recorded subdivision covenants, if animals are permitted, regulating and restricting the area against use by animals for a radius of 50 feet from any well site.

(g) the minimum size of the lot in all instances shall be adequate to provide for the installation of two sewage disposal areas commensurate with sewage disposal demands in addition to providing adequate space for typical structures to be erected thereon.

8. If, upon consideration of such information, the Commission finds that by reason of the factual situation and circumstances concerning the subdivision in question, the health, safety and welfare of the inhabitants of the subdivision and the aquifers and streams in question would not suffer from pollution, the Commission, upon review of such information, may approve minimum lot sizes for areas to be served as follows:

(a) public water and public sewage disposal service - 8,000 sq.ft. per lot.

(b) semi-public water and sewage disposal services - 12,000 sq.ft. per lot.

(c) individual well and individual sub-surface sewage disposal service - 20,000 sq.ft. per lot.

Section 330. Easements

1. There shall be provided easements for the utilities upon and across lots, or centered on the side lot lines, of a width of a minimum of 12 feet (except for entrance service) as and where considered necessary by the Commission. There shall be provided an easement 20 feet wide centered on the rear lot line of each lot for utilities upon and across said lot and which may be opened as an alley as set forth hereinafter. Such easement shall be opened and used as an alley upon the determination and finding of the Commission, that the same is required by the public convenience and health.

SUMMARY:

Compatibility Rating: **Staff's compatibility rating is a** +38.

Staff Recommendation:

Staff believes the application is consistent with the Valley County Comprehensive Plan, complies with the Subdivision Regulations, and substantially complies with the Valley County Land Use and Development Ordinance.

The following item, however, needs to be addressed:

- I do recommend that you contact Michael David at 315-3711 concerning compliance with your participation in the community housing program.
- How much of the infrastructure is already located?

Staff recommends approval of the subdivision upon a favorable response to the above item.

ATTACHMENTS:

Attachment A:	Conditions of Approval
Attachment B:	Compatibility Rating
Attachment C:	Map of Surrounding Area
Attachment D:	Agency Responses

Conditions of Approval - Attachment A

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.

3. The final plat shall be recorded within one year 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. Must enter into a Road Development Agreement with the Board of County Commissioners.

6. Must comply with the requirements of the Donnelly Rural Fire District. A letter of approval is required.

7. Must participate in the Housing Authority.

8. All proposed improvements shall be constructed or financially guaranteed, including but not limited to: power, roads, phone, and common areas.

9. The CCRs shall address wood burning devices, bear proof garbage containers, lighting requirements, and Bureau of Reclamation lands designated as conservation and open space areas.

10. The Valley County Engineer shall approve the site grading/storm water management plan prior to construction or excavation.

11. A wetland delineation/determination shall be submitted to the Planning and Zoning office prior to disturbance of the land. .

12. Must construct a single-rail fence, on Bureau of Reclamation lands, along the subdivision boundary.

13. Final plat must include, "In accordance with Idaho Code Section 42-1102, no person or entity shall cause or permit any encroachments onto Reclamation lands, including public or private roads, utilities, fences, gates, pipelines, structure, or other construction or placement of objects, without the written permission of Reclamation".

14. No Reclamation lands shall be designated within the subdivision plat.

15. A will serve letter is required from the North Lake Recreational Sewer and Water District prior to plat recordation.

16. No building permits shall be issued until sewer and fire protection are in place.

17. A note shall be placed on the face of the plat that states, "There must be safe separation of two feet between the foundation and groundwater. Also, if fill is required, the fill must be imported."

18. High groundwater elevation must be shown for each lot on the final plat.

END OF STAFF REPORT

Valley County Engineer

Jeffrey Schroeder
E.I.T.

P.O. Box 671 • Cascade, Idaho 83611

Office • (208) 382-7117
FAX • (208) 382-7198

February 28, 2007

Cynda Herrick, AICP
Planning and Zoning Administrator
P.O. Box 1350
Cascade, ID 83611

Re: March 8th, 2007 Valley County Planning & Zoning Commission Agenda

Cynda,

The following are comments pertaining to the items listed on the March 8th, 2007 Valley County Planning and Zoning Commission Agenda:

New Business:

1. *VAC 07-01 A Portion of Lone Tree Road*

   Recommending the Applicant consider inclusion of consistent utility & private road rights-of-way through the vacated northerly portion of Reno Vista Drive on the final plat. Additionally, the road curve radius needs to be constructed symmetrically with the lower, southerly portion of the same.

2. *PUD 06-02 Buffalo Basin and VAC 07-02 A Portion of Old State Highway*

   Preliminary site grading plans have been submitted to Valley County for review and have been approved.

   Best Management Practices (BMP's) have not been shown on the submitted plan set. This project will require compliance with the Valley County Stormwater Best Management Practices Manual. Temporary Erosion Control Measures and BMP's shall be in place at all times through out construction and any required permanent erosion control measures shall be installed per the manual.

   The Applicant will be required to show sanitary sewer and water service locations on the final design for construction within any Valley County right-of-way. Installation of this infrastructure must comply with the Idaho Standards for Pubic Works Construction (ISPWC).

A permit, issued by the Valley County Road Department, must be obtained by the Applicant prior to any infrastructure/grading evolutions within the County right-of-way.

The Applicant must obtain a "will serve" letter from the applicable supplier of sanitary sewer and potable water services for the proposed development.

Site grading and storm water management from the proposed development must be incorporated into the final plat set. Additionally, drainage calculations with catch basin inlet/outlet locations, subsequent infiltration areas, and culvert locations must submitted with the revised plan set and be stamped by a licensed Professional Engineer in the State of Idaho.

As provided in the Geo-Technical Report, all storm water infiltration basins/facilities should be extended into native, poorly-graded sand sediments.

Applicant must preserve all public rights-of-way within the legal boundaries of the proposed development.

Request(s) for allocation of proposed vacated rights-of-way along Old State Highway must be approved by the Valley County Board of Commissioners.

Old State Highway is identified as a major collector road which requires a 100' right-of-way (50' each side of centerline). This development will need to dedicate additional right-of-way along Old State Highway to accommodate a 50' right-of-way from centerline. This right-of-way dedication will need to be annotated on the revised plan set prior to final plat approval.

Valley County will require a Road Development Agreement (RDA) for this project.

The Applicant must provide any structural road sections (public or private) on the revised plan set in accordance with the Valley County Minimum Standards for Road Design and Construction. (VCSRDC).

A permit must be obtained from the Idaho Transportation Department (ITD) for any work within the State rights-of-way.

The Applicant must get approval for the realignment of Old State Highway and State Hwy 55 from the Idaho Transportation Department (ITD).

Please include a note on the final plan set addressing snow storage within the proposed development, and an additional note dedicating Buffalo Basin's internal road system as private.

Any infrastructure installation or road construction within Valley County rights-of-way must have an approved traffic control plan in accordance with the Manual on Uniform Traffic Control Devices (MUTCD). Due to the location and scope of this proposed PUD, a comprehensive traffic-control plan should be submitted and include review(s) from any affected entity(s) (i.e. Idaho State Patrol, Donnelly Rural Fire District etc.).

The Applicant will be required to provide a two year guarantee on any work completed for public services or within a public right-of-way.

If construction evolutions remain at the time of final plat, the Applicant will be required to provide a surety bond in the amount of 110% of total remaining construction costs. This construction cost estimate will need prior approval from the Valley County Engineer and/or Valley County Road Superintendent.

3. *CUP 07-02 Deer Field Ranch Subdivision*

Preliminary site grading plans have been submitted to Valley County and have been approved.

Best Management Practices (BMP's) have not been shown on the submitted plan set. This project will require compliance with the Valley County Stormwater Best Management Practices Manual. Temporary Erosion Control Measures and BMP's shall be in place at all times through out construction and any required permanent erosion control measures shall be installed per the manual.

Vertical grades in the preliminary design need to be revised with respect to intersection(s) as per the Valley Count Minimum Standards for Road Design and Construction (VCSRDC). Additionally, roadway grades must be designed within the following parameter: $0.5\% < G < 10\%$

Typical road section(s) need to be provided in the revised plan set per VCSRDC.

Gold Fork Road is identified as a minor collector road which requires a 70' right-of-way (35' each side of centerline). This development will need to dedicate additional right-of-way along Gold Fork Road to accommodate a 35' right-of-way from centerline. This right-of-way dedication will need to be annotated on the revised plan set prior to final plat approval.

Applicant must preserve all public rights-of-way within the legal boundaries of the proposed development.

Valley County will require a Road Development Agreement (RDA) for this project.

Traveled-way cul-de-sacs must be redesigned with minimum radii of 45' as per the Valley County Minimum Standards for Road Design and Construction. Please include in the revised plan set for approval prior to construction.

The Applicant will be required to provide drainage calculations with all culvert sizes/locations on the revised plan set prior to construction.

Cut/fill slopes on the preliminary design indicate the possible crossing onto private lots. The Applicant will be required to re-design these adjacent areas or provide a note on the final plat addressing any additional right-of-way due to the aforementioned.

The Applicant will be required to provide all horizontal and vertical road alignments on the revised plan set to include horizontal/vertical curve calculations.

The Applicant will be required to provide the tie-in road alignment with Gold Fork Road on the revised plan set.

A private road declaration note must be included prior to final plat approval.

If construction evolutions remain at the time of final plat, the Applicant will be required to provide a surety bond in the amount of 110% of total remaining construction costs. This construction cost estimate will need prior approval from the Valley County Engineer and/or Valley County Road Superintendent.

4. *CUP 07-04 Whistler's Cove Subdivision*

Preliminary site grading plans were reviewed, and subsequent comments addressed per the approval letter dated 7 November 2005 as prepared/signed by Doug Camenisch, P.E., Parametrix.

Valley County will require a Road Development Agreement (RDA) for this project.

Jacks Loop (County Road) will be identified as a standard local road which requires a 70' right-of-way (35' each side of centerline). This development will need to dedicate the required 70' of right-of-way for public use along Jacks Loop. The Applicant will need to annotate this required right-of-way on the final plat prior to approval. Additionally, the Valley County Engineer and/or Valley County Road Superintendent must accept the aforementioned road for public use prior to final plat approval.

Valley County would request that any changes to the approved plans be submitted for review/approval.

Prior to final plat approval, Valley County will required that public road construction (Jacks Loop) be certified by the Developer's Engineer.

If construction evolutions remain at the time of final plat, the Applicant will be required to provide a surety bond in the amount of 110% of total remaining construction costs. This construction cost estimate will need prior approval from the Valley County Engineer and/or Valley County Road Superintendent.

Upon acceptance of the public road (Jacks Loop), the Applicant will be required to guarantee the aforementioned for a period of two years.

Applicant must preserve all public rights-of-way within the legal boundaries of the proposed development.

The Applicant will be required to submit the approved design plans for any relative sanitary sewer/potable water installation within the public right-of-way.

Please contact myself (382-7117) with any questions and/or concerns related to the above referenced items.

Sincerely,

Jeffrey Schroeder, EIT
Valley County Road Department

Cc: Gordon Cruickshank, Valley County Road Superintendent

327755

Instrument # 327755
VALLEY COUNTY, CASCADE, IDAHO
2007-12-18 08:52:19 No. of Pages: 4
Recorded for : AMERITITLE
ARCHIE K. BANBURY Fee: 12.00
Ex-Officio Recorder Deputy
Index to: MISCELLANEOUS RECORDS

Whistlers Cove Subdivision

ROAD DEVELOPMENT AGREEMENT

THIS AGREEMENT is made this 17th day of September, 2007, by and between Red Wolff Ventures, LLC whose address is 1804 Raintree Drive, Boise, Idaho, 83712, the **Developer** of that certain Project in Valley County, Idaho, known as Whistlers Cove 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 24 lot residential development known as Whistlers Cove 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 Donnelly to Tamarack Area 2004 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 Whistlers Cove Subdivision as established by Valley County. Currently this amount has been calculated by the Valley County Engineer to be $461 per average daily vehicle trip generated by the Project. Refer to Exhibit A for details of the Donnelly to Tamarack Area 2004 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 C

3. *Capital contribution*: Developer agrees to pay a sum equal to $1,844 per lot (an average of 4 trips per single family residential lot times $461 per trip). The Developer's proportionate share of the road improvements identified in Exhibit A for the 24 lots shown on the Final Plat is $44,256.

   The Developer agrees to pay Valley County their proportionate share of roadway costs for a total cash payment of **$44,256** 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.

Henry Rudolph, Red Wolff Ventures, LLC Manager

By: _____ Date: 9/17/07

VALLEY COUNTY BOARD OF COMMISSIONERS:

By: _____ Date: 12-10-07

Commissioner/Chairman Gerald Winkle

By: _____ Date: 12-10-07

Commissioner F. W. Eld

By: _____ Date: Dec. 10, 2007

Commissioner Gordon L. Cruickshank

ATTEST:

VALLEY COUNTY CLERK:

_____ Date: 12/10/07

Archie N. Banbury

STATE OF IDAHO)
) ss.
COUNTY OF VALLEY)

On this 17th day of September 2007, before me, Debroah L. Nemeth the undersigned, a Notary Public in and for said State, personally appeared Henry C. Rudolph 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.

Debroah L. Nemeth
Notary Public for Idaho

Residing at: 220 S. Capitol Blvd.
Boise, Id. 83702

My Commission Expires: 05-21-10

DEBROAH L. NEMETH
NOTARY PUBLIC
STATE OF IDAHO

STATE OF IDAHO)
) ss.
COUNTY OF VALLEY)

On this 17 day of December 2007, before me, Joyce Novotny the undersigned, a Notary Public in and for said State, personally appeared Gerald Winkler and Gordon 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.

Joyce Novotny
Notary Public for Idaho

Residing at: Cascade Id

My Commission Expires: 11-02-08

JOYCE NOVOTNY
NOTARY
PUBLIC
STATE OF IDAHO

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 ORDER GRANTING VALLEY COUNTY'S MOTION TO ENLARGE PAGE LIMITATIONS

THIS MATTER having come before the Court upon Valley County's Motion to Enlarge Page Limitations, and having found good cause therefore;

IT IS HEREBY ORDERED that Valley County's motion to enlarge page limitations is GRANTED and Valley County's Reply Brief in Support of Motion for Summary Judgment shall not exceed twenty-two pages in length.

DATED this 10 day of November, 2010.

MICHAEL R. MCLAUGHLIN
District Court Judge

CLERK'S CERTIFICATE OF SERVICE

I hereby certify that on the 10 day of November, 2010, a true and correct copy of the foregoing was served upon the following individual(s) by the means indicated:

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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 REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

INTRODUCTION 1

ARGUMENT 2

I. Plaintiffs have failed to plead a right of action for the alleged federal constitutional violations. 2

II. Plaintiffs' request for relief with respect to future actions is not ripe. 6

III. This lawsuit is barred by the two-year and four-year statutes of limitations. 7

IV. Plaintiffs fail the two special "ripeness" requirements of *Williamson County*. 10

A. *Williamson County* Test 1: The "final decision" requirement applies because this is a regulatory taking, not a physical taking. 10

B. *Williamson County* Test 2: The requirement to employ state inverse condemnation procedures applies. 12

V. Plaintiffs' claims fail the "exhaustion" and "voluntary" tests established under Idaho case law. 13

A. Plaintiffs failed to exhaust. 13

1. Exhaustion exception 1: Plaintiffs cannot meet the "interests of justice" exception. 14

2. Exhaustion exception 2: The "outside the agency's authority" exception does not apply. 15

3. *Euclid Avenue* is inapposite. 18

4. Idaho Code § 67-6521 is inapposite. 18

5. *BHA II* is inapposite. 19

6. Plaintiffs' alleged failure to perceive their rights at the time of the administrative proceedings does not excuse their failure to exhaust. 20

B. Plaintiffs' actions were voluntary. 21

VI. Equitable principles prevent Plaintiffs from obtaining the remedies they seek here. 24

CONCLUSION 24

TABLE OF AUTHORITIES

Cases

American Falls Reservoir Dist. No. 2 v. IDWR, 143 Idaho 862, 154 P.3d 433 (2007)14, 15, 16, 20
Azul-Pacifico, Inc. v. City of Los Angeles, 973 F.2d 704 (9th Cir. 1992)..... 3, 4, 5, 6
BHA Investments, Inc. v. City of Boise, 138 Idaho 356, 63 P.3d 482 (2004) 19, 20
BHA Investments, Inc. v. City of Boise, 141 Idaho 168, 108 P.3d 315 (2004) 3, 19
Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971)..... 3, 4, 6
Daniel v. County of Santa Barbara, 288 F.3d 375 (9th Cir. 2002), *cert. denied*, 537 U.S. 973 ..... 12, 13
Davidson v. Wright, 143 Idaho 616, 151 P.3d 812 (2006) 7
Davis v. Passman, 442 U.S. 228 (1979) 5, 6, 21
Dolan v. City of Tigard, 512 U.S. 374 (1994) 11
Euclid Avenue Trust v. City of Boise, 146 Idaho 306, 193 P.3d 853 (2008) 18
First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 210 Cal.App.3d 1353, 258 Cal. Rptr. 893 (1989)..... 4
First English Evangelical Lutheran Church of Glendale v. Los Angeles County, 482 U.S. 304 (1987)..... 3, 4, 5
Golden Gate Hotel Ass'n v. City and County of San Francisco, 18 F.3d 1482 (9th Cir. 1994) 3
Harris v. State, ex rel. Kempthorne, 147 Idaho 401, 210 P.3d 86 (2009) 8, 21
Jett v. Dallas Independent School Dist., 491 U.S. 701 (1989) 4
Kelley Property Development, Inc. v. Town of Lebanon, 627 A.2d 909 (Conn. 1993)..... 5
Kelo v. City of New London, 545 U.S. 469 (2005) 19
KMST, LLC v. County of Ada, 138 Idaho 577, 67 P.3d 56 (2003) 13, 14, 18, 19, 20, 22, 23
Lawyer v. Hilton Head Public Service Dist. No. 1, 220 F.3d 298 (4th Cir. 2000) 5
Lingle v. Chevron USA, Inc., 544 U.S. 528 (2005)..... 11
Lochsa Falls, L.L.C. v. State, 147 Idaho 232, 207 P.3d 963 (2009)..... 17
McCuskey v. Canyon County Comm'rs, 128 Idaho 213, 912 P.2d 100 (1996) 8
Monell v. Dep't of Social Services, 436 U.S. 658 (1978) 4
Nollan v. California Coastal Commission, 483 U.S. 825 (1987) 11
Rueth v. State, 103 Idaho 74, 644 P.2d 1333 (1982) 8
Schneider v. Howe, 142 Idaho 767, 133 P.3d 1232 (2006) 6
Smith v. Dep't of Public Health, 410 N.W.2d 749 (Mich. 1987) 5
State v. Korsen, 138 Idaho 706, 69 P.3d 126 (2003) 17
Thomas v. Shipka, 818 F.2d 496 (6th Cir. 1987)..... 5
Trees v. Kersey, 138 Idaho 3, 56 P.3d 765 (2002)..... 9
Wax 'n Works v. City of St. Paul, 213 F.3d 1016 (8th Cir. 2000)..... 5
White v. Bannock County Comm'rs, 139 Idaho 396, 80 P.3d 332 (2003)..... 14, 15
Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985)..... 10, 11, 12, 13

Statutes

42 U.S.C. § 1983..... 3, 4, 5, 6, 7, 12
Idaho Code § 10-1201..... 7

Idaho Code § 31-870 ..... 17, 22
Idaho Code § 5-216 9
Idaho Code § 5-224 7
Idaho Code § 67-5279(3) 18
Idaho Code § 67-6521 18
Idaho Code §§ 67-8201 to 67-8216 1

Other Authorities

26 Am. Jur. 2d. *Eminent Domain* § 10 (2004) 11
Bley, Kenneth B., *Use of the Civil Rights Acts to Recover Damages in Land Use Cases*, ALI-ABA, § III(B) (2001) 4
Madry, Alan R., *Private Accountability and the Fourteenth Amendment; State Action, Federalism and the Courts*, 59 Missouri L. Rev. 499 (1994) 5
Nahmod, Sheldon, *Civil Rights and Civil Liberties Litigation: The Law of Section 1983*, § 6:59 (2010) 5
Nutter, David C., Note, *Two Approaches to Determine Whether an Implied Cause of Action under the Constitution is Necessary: The Changing Scope of the Bivens Action*, 19 Ga. L. Rev. 683 (1985) 5
Schwartz, Martin A., *Section 1983 Litigation Claims and Defenses*, § 1.05 (2010) 5

INTRODUCTION

This is Defendant Valley County's ("County") reply brief in support of *Valley County's Motion for Summary Judgment* filed on October 14, 2010. It follows *Valley County's Opening Brief in Support of Motion for Summary Judgment* ("Opening Brief"), and replies to *Plaintiffs' Memorandum in Opposition to Defendant's Motion for Summary Judgment* ("Response Brief").

In Idaho, certain impact fees are illegal taxes under Idaho's Constitution unless imposed pursuant to an ordinance compliant with the Idaho Development Impact Fee Act ("IDIFA"), Idaho Code §§ 67-8201 to 67-8216. Valley County did not enact an IDIFA-compliant ordinance, because it believed in good faith that none was required. Recent lawsuits involving other municipalities have successfully challenged impact fees. Accordingly, to be on the safe side, the County is now exploring enactment of a new IDIFA-compliant ordinance. But there is no need to determine whether the Conditional Use Permit ("CUP") or the preliminary Development Agreement, proposed Capital Contribution Agreement, final Capital Contribution Agreement, and/or Road Development Agreement (collectively "Agreements") at issue here imposed illegal taxes. The question presented in the pending motion is whether Plaintiffs proposed and/or entered into the Agreements without objection, accepted the CUP without complaint, avoided opportunities to raise the issue administratively, and waited too long to challenge.[1]

This case has nothing to do with due process. Plaintiffs had plenty of process. Indeed, part of the County's defense is that Plaintiffs failed to exhaust the remedies available to them. Plaintiffs' so-called due process claim is based on the contention that the County should have enacted an IDIFA-compliant impact fee ordinance and that, if it had done so, they would have been given even more process. But counties are not required to enact ordinances under IDIFA.

[1] In this brief, we use the term Plaintiffs to refer to the current Plaintiffs and/or the original developers.

Thus, the question is, given that Valley County decided not to enact an ordinance under IDIFA at the time, was it unlawful for it to issue a CUP requiring an Agreement? That is purely a state constitutional law question which, if answered in the affirmative, would give rise to an unconstitutional *per se* regulatory taking under the state and federal constitutions. But there is no need to reach the merits of this claim if the defenses in the pending motion prevail.

Plaintiffs' devote most of their Response Brief to their effort to show that the County had a policy of requiring road impact fees and that there was no room for negotiation. Some of their statements inaccurately reflect the record. See footnote 14 at page 21. But this debate is not material to the pending Motion for Summary Judgment. It is undoubtedly true that, as a general statement, the County expected developers to help improve the roads near their developments. The County held this expectation in good faith, believing, correctly or incorrectly, that they had the power to provide for such improvements without adopting a special ordinance under IDIFA. Most developers welcomed having a funding mechanism available to improve local roads and operated under the same assumption that this was proper.

Even if the Court were to assume as true all the facts as stated by Plaintiffs in their Response Brief, the defenses to this litigation posed by the pending motion remain valid. The material facts are not in dispute, and the motion should be granted as a matter of law.

ARGUMENT

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

Plaintiffs' *Complaint* includes two claims for relief. In their first claim for relief, Plaintiffs purport to seek declaratory judgment that the County's alleged practice of requiring developers to pay for a proportion of road improvement costs attributable to the development is illegal under unspecified state law and unidentified state and federal constitutional provisions.

Complaint at 4-5. In the second claim for relief, Plaintiffs allege that the County's collection of funds pursuant to the Agreements was a taking under the state and federal constitutions for which they are entitled to compensation in the form of a refund. *Id.* at 5. Nowhere in Plaintiffs' *Complaint* do they identify the specific Constitutional provisions upon which their claims are based nor do they reference any source for their causes of action.

In its Opening Brief, the County pointed out that claims that are premised on alleged violations of the U.S. Constitution must be brought under 42 U.S.C. § 1983. Plaintiffs disagree, claiming that they can bring suit alleging federal takings and procedural due process claims directly under the federal constitution independent of § 1983. Response Brief at 15-16. (Actions brought directly under the constitution are referred to as *Bivens* claims, after *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389 (1971).) This matters because if no *Bivens* claim is available and § 1983 is Plaintiffs' only access to these federal claims, Plaintiffs have problems: (1) they have failed to plead § 1983 and have affirmatively disavowed it and (2) a § 1983 claim in this case is barred by various procedural hurdles.

Plaintiffs fail even to address the settled Ninth Circuit precedent on this point in *Azul-Pacifico, Inc. v. City of Los Angeles*, 973 F.2d 704, 705 (9th Cir. 1992), the authorities relied on in *Azul-Pacifico*, or subsequent cases such as *Golden Gate Hotel Ass'n v. City and County of San Francisco*, 18 F.3d 1482 (9th Cir. 1994). (The "cause of action" issue is a question of federal law, so federal cases are controlling.) Instead, Plaintiffs rely primarily on *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304, 314-15 (1987), and the reference to that case in a footnote in *BHA Investments, Inc. v. City of Boise*, 141 Idaho 168, 108 P.3d 315 (2004). Although *First English* contains some remarkably broad language regarding takings claims, it does not address the particular question of whether claims alleging

violations of the U.S. Constitution may be brought independent of § 1983. The opinion does not even mention § 1983, and the dissent mentions it only in another context. Nor do the parties' briefs. Nor does the case on remand, *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 210 Cal.App.3d 1353, 258 Cal. Rptr. 893 (1989).

Given that § 1983 was not discussed, it is fair to say that *First English* is not on point. In any event, the commentators have recognized that *First English* is not definitive. "In the wake of *Monell* and the provision of a remedy under § 1983 there is a split in authority as to whether a right of action based on the Fourteenth Amendment provides a claim for relief sufficient to invoke the federal question jurisdiction of the federal courts." Kenneth B. Bley, *Use of the Civil Rights Acts to Recover Damages in Land Use Cases*, ALI-ABA, § III(B) (2001) (available on Westlaw at SF64 ALI-ABA 435) (citing *Monell v. Dep't of Social Services*, 436 U.S. 658 (1978)). The cases and commentary, however, overwhelmingly support the rule established in the Ninth Circuit by *Azul-Pacifico* and other cases. For example:

> Although § 1983 provides express authorization for the assertion of federal constitutional claims against state actors, the Supreme Court has endorsed the view, expressed in several circuit court decisions, that limitations which exist under § 1983 may not be avoided by assertions of *Bivens*-type claims against state and local defendants. [Footnote citing *Jett v. Dallas Independent School Dist.*, 491 U.S. 701, 735 (1989).] Thus, the availability of the § 1983 remedy precludes reliance upon the *Bivens* doctrine.
>
> . . .
>
> Whether § 1983 preempts an alternative constitutional or statutory claim depends upon congressional intent.
>
> . . . As discussed below, it is settled that § 1983 operates to preempt alternative *Bivens*-type claims asserted directly under the federal Constitution.
>
> . . .
>
> The federal courts have consistently adhered to the principle that § 1983 preempts *Bivens*-type remedies against those who acted under color of state law. [Footnote citing *Azul-Pacifico* among others.]

Martin A. Schwartz, *Section 1983 Litigation Claims and Defenses*, § 1.05 (2010) (available on Westlaw as SNETLCD s 1.05).[2] The authority on this point, none of which is addressed by Plaintiffs, is overwhelming.[3] All of these cited authorities are post-*First English*. In any event, *Azul-Pacifico* is crystal clear and directly on point.

Plaintiffs cite *Davis v. Passman*, 442 U.S. 228 (1979), for the proposition that due process claims may be brought directly under the U.S. Constitution and that § 1983 is not the only means of raising these matters. Plaintiffs misrepresent the holding in this case. *Davis*

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[2] Cases from other jurisdictions reaching the same conclusion as *Azul-Pacifico* include the following: *Smith v. Dep't of Public Health*, 410 N.W.2d 749, 787 (Mich. 1987) ("Thus, both *Chappell* and *Bush* signal a retrenchment from the broad remedial scope evident in the Court's earlier *Bivens*, *Davis*, and *Carlson* opinions. Both *Chappell* and *Bush* suggest greater caution and increased willingness on the part of the Court to defer to Congress on the question whether to create damages remedies for violations of the federal constitution."); *Kelley Property Development, Inc. v. Town of Lebanon*, 627 A.2d 909, 921 (Conn. 1993) ("In its current configuration, the *Bivens* line of United States Supreme Court cases thus appears to require a would be *Bivens* plaintiff to establish that he or she would lack any remedy for alleged constitutional injuries if a damages remedy were not created. It is no longer sufficient under federal law to allege that the available statutory or administrative mechanisms do not afford as complete a remedy as a *Bivens* action would provide."); *Wax 'n Works v. City of St. Paul*, 213 F.3d 1016, 1019 (8th Cir. 2000) (Plaintiff asserted claim directly under Fourteenth Amendment; court treated it as under § 1983 and denied relief on exhaustion/ripeness grounds); *Thomas v. Shipka*, 818 F.2d 496, 499 (6th Cir. 1987), *vacated on other grounds & remanded*, 488 U.S. 1036 (1989) (when § 1983 action is precluded by statute of limitations, plaintiff may not bring separate action directly under the Constitution). A case that adopts Plaintiffs' view of *First English*, albeit in dictum, is *Lawyer v. Hilton Head Public Service Dist. No. 1*, 220 F.3d 298 (4th Cir. 2000). Even this case, however, recognizes that this is a departure from the *Azul-Pacifico* line of precedent: "Other courts, however, have held, in apparent conflict with *First English*, that a violation of the Takings Clause can only be redressed through a claim under § 1983." *Lawyer* at 303 n.4.

[3] Another hornbook on § 1983 notes a variety of federal cases reaching the same conclusion, concluding, "The Ninth Circuit asserted that Fourteenth Amendment actions for damages against state defendants are precluded by the availability of § 1983." Sheldon Nahmod, *Civil Rights and Civil Liberties Litigation: The Law of Section 1983*, § 6:59 (2010) (available on Westlaw at CIVLIBLIT § 6:59). Another law professor concludes: "Under *Bivens*, the courts are to refrain from a *Bivens*-type action for damages only when Congress has created an alternative remedy. Originally, the Court withheld a *Bivens* damages remedy, because unnecessary, only when the remedy provided by Congress was equally effective. Since *Bivens*, however, the Court has retreated from that principle and now refuses a damages action whenever Congress has made available some relief even if not equal to the damages remedy." Alan R. Madry, *Private Accountability and the Fourteenth Amendment; State Action, Federalism and the Courts*, 59 Missouri L. Rev. 499, 551 (1994) (footnote cites David C. Nutter, Note, *Two Approaches to Determine Whether an Implied Cause of Action under the Constitution is Necessary: The Changing Scope of the Bivens Action*, 19 Ga. L. Rev. 683 (1985)).

involved a suit by a congressional staffer alleging discrimination protected by the Fifth Amendment. The Court specifically noted that she could not bring her suit under § 1983, because, as in *Bivens*, no state actor was involved. *Davis*, 442 U.S. at 239 n.16. Thus, *Davis* and *Bivens* are consistent in recognizing a direct cause of action for constitutional deprivation under facts where no other cause of action is available. Neither is inconsistent with *Azul-Pacifico* and other authorities holding that § 1983 displaces direct constitutional challenges when § 1983 is available.

As the above-referenced authorities make clear, § 1983 is the only cause of action available to Plaintiffs for their federal claims. Given that Plaintiffs have affirmatively, definitively, and repeatedly stated that they are not pursuing any § 1983 claims, they have no cause of action for their federal claims. For this reason alone, the federal claims should be dismissed. If Plaintiffs are allowed to proceed under § 1983, their claims fail for the reasons discussed below.

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

As noted in *Valley County's Statement of Material Facts in Support of Motion for Summary Judgment* at 13, the County's future approach to fees for road impacts is evolving. Given this, Plaintiffs are in no position to claim that they are entitled to a declaration or injunction regarding whether the County can legally require a contract that includes payment toward off-site improvements as a condition of approval. Plaintiffs' supposition that the County will not change course in the future is, at best, hypothetical. Indeed, the very quotation provided by Plaintiffs (Response Brief at 37, quoting *Schneider v. Howe,* 142 Idaho 767, 773, 133 P.3d 1232, 1238 (2006)) works in the opposite direction. Allowing events to unfold will demonstrate whether or not the County and Plaintiffs are able to reach an accommodation as to new plats.

Given that many of the defenses the County has raised to this action would not apply to future actions, it seems a pretty good bet that the County will work out an accommodation. In sum, claims based on future actions of the County (regarding the remaining phases or any so-called "policy" of the County) are not ripe and are improper subjects for a declaratory judgment.[4]

III. THIS LAWSUIT IS BARRED BY THE TWO-YEAR AND FOUR-YEAR STATUTES OF LIMITATIONS.

Plaintiffs concede that § 1983 claims are subject to a two-year statute of limitations. Response Brief at 17. We have shown above that all claims alleging violation of constitutional rights must be brought under § 1983. Accordingly, they are subject to the two-year statute. End of story as to the federal claims.[5]

If the Court does not dismiss them for other reasons, Plaintiffs' state law claims (takings and anything else) are subject to the state's catch-all four-year statute of limitations. Plaintiffs concede this point as well (except for their side argument with respect to the five-year statute applicable to contract claims, which we discuss below). Thus, as to state constitutional claims, the only question is when the clock starts. If the statute began to run before December 1, 2005, the state constitutional claims are barred.

Plaintiffs contend the statute did not begin to run until they wrote a check on December 15, 2005, thus beating the statute by a few days. For starters, this ignores the fact that they had already conveyed right-of-way under the Capital Contribution Agreement on or before final plat

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[4] *See, e.g., Davidson v. Wright*, 143 Idaho 616, 620, 151 P.3d 812, 816 (2006) ("Idaho has adopted the constitutionally based federal justiciability standard. [Citation omitted.] Idaho courts are authorized under I.C. § 10-1201 to render declaratory judgments under certain circumstances, but even actions filed pursuant to that statute must present an actual or justiciable controversy in order to satisfy federal constitutional justiciability requirements.").

[5] If this Court were to determine that Plaintiffs could bring their federal constitutional claims independent of § 1983, they, too, would be subject to Idaho's catch-all four-year statute of limitations under Idaho Code § 5-224. Accordingly, both federal and state claims would be barred for the reasons discussed below.

approval on October 25, 2004.[6] It also ignores the law. It is well-settled that the claims run from "the time that the full extent of the plaintiff's loss of use and enjoyment of the property becomes apparent," that is, when the plaintiff "was fully aware of the extent to which [the government] interfered with his full use and enjoyment of the property." *McCuskey v. Canyon County Comm'rs*, 128 Idaho 213, 217, 912 P.2d 100, 104 (1996). Plaintiffs certainly knew the essential facts on July 14, 2004, the day they received the CUP and they signed the final Capital Contribution Agreement setting out the contribution requirements in full detail. And Plaintiffs knew on September 26, 2005, the day they signed the Road Development Agreement governing phase II. Indeed, the clock started running even earlier. It ran at least from April 1, 2004, the day that Plaintiffs submitted their proposed Development Agreement and Capital Contribution Agreement. The Plaintiffs have admitted that the developers included the proposed mitigation agreements because they believed such mitigation was required. Pachner Aff., ¶¶ 4-8. Even if the precise terms or the total amounts changed, it does not matter because the statute runs even though plaintiff does not know "the full extent of his damages." *McCuskey*, 128 Idaho at 217, 912 P.2d at 104. Indeed, in *Rueth v. State*, 103 Idaho 74, 79, 644 P.2d 1333, 1338 (1982), the Court said the statute ran on the date of a meeting between the parties at which time there was "recognition of the severity of the problem."

In the face of this, Plaintiffs cling to the fact one of the payments (for Phase II) occurred after December 1, 2005. The cases they cite do not help them push the clock back this far. In *Harris v. State, ex rel. Kempthorne*, 147 Idaho 401, 405, 210 P.3d 86, 90 (2009), the Idaho Supreme Court ruled that the statute of limitations on inverse condemnation ran from the day the

[6] The minutes of the approval at page 2 recite as follows: "accept the dedication of public right-of-way along Norwood Road and West Roseberry Road; . . . agree that the Development Agreement that is [in] place covers off-site road improvement costs for this phase; . . . ." Herrick Aff., Exh. 15.

plaintiffs were compelled to enter into a mineral lease with the state, not the time they made payments to the state under the lease. Even if the Phase II payment had been the first conveyance under the Agreements, the date the check was written is not the issue. The statute was triggered, at a minimum, on the date of the Capital Contribution Agreement and the Road Development Agreement. Accordingly, the lawsuit came too late.

Plaintiffs creatively try to avoid application of the four-year limitations period by arguing that their claims arise out of the Agreements they entered into with the County, making the five-year statute of limitations in Idaho Code § 5-216 applicable. "Plaintiffs' have requested in their Complaint declaratory relief declaring that the Road Development Agreement executed on September 26, 2004 [sic], is *void ab initio*" and should be rescinded. Response Brief at 19. The allegations in Plaintiffs' own *Complaint* belie this assertion. There is nothing in Plaintiffs' *Complaint* that can fairly be interpreted as a breach of contract claim or any request that the Agreements be declared void.

Even if Plaintiffs were permitted to amend their *Complaint* (more than six months after the deadline) it would be futile. If a contract is deemed illegal, the remedy is not rescission—the Court would simply refuse to enforce the contract and leave the parties as it finds them. *Trees v. Kersey,* 138 Idaho 3, 6, 56 P.3d 765, 768 (2002). Here, the parties have both performed their respective obligations under the Agreements so there is nothing left to enforce. Rescission is an equitable remedy that relieves the parties of their duties and obligations under the contract, and returns the parties to their pre-contract positions. *Blinzler v. Andrews,* 94 Idaho 215, 485 P.2d 957 (1971). But rescission is not a proper remedy where it would be impossible for the parties to return to their pre-contract positions. *GME, Inc. v. Carter,* 120 Idaho 517, 520, 817 P.2d 183, 185 (1991). That is the situation here. The right-of-way dedicated and the money paid by

Plaintiffs have already been put to use. Plaintiffs have already received approval of their final plat and the completion of improvements near their development. Herrick Aff., ¶¶ 31-35. There is no breach of contract claim or theory that would permit Plaintiffs to obtain both the benefit of their bargain with the County (improved roads serving their development) and a refund. In any event, it is apparent that this is a case about alleged constitutional violations, not contractual violations. This ruse fails.

IV. PLAINTIFFS FAIL THE TWO SPECIAL "RIPENESS" REQUIREMENTS OF *WILLIAMSON COUNTY*.

A. *Williamson County* Test 1: The "final decision" requirement applies because this is a regulatory taking, not a physical taking.

Plaintiffs acknowledge that *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985) establishes two special "ripeness" tests applicable to all federal regulatory takings claims. Response Brief at 33. The first is the "final decision" requirement. This means that Plaintiffs must use reasonably available opportunities to raise their concerns at the administrative level. Plaintiffs undisputedly did not do so.

Plaintiffs continue to misunderstand the finality requirement in *Williamson County*. They say, "Valley County basically asks this Court to find Plaintiffs should be precluded from maintaining this action because it did not object during the public hearings . . . ." Response Brief at 26. That is the least of their failures. The finality requirement in *Williamson County* is not limited to raising an issue at the hearing. For instance, in *Williamson County*, the Court faulted the developer for failing to initiate a new variance proceeding. Plaintiffs had ample opportunities to object or otherwise bring their concerns with the Agreements to the County's attention.[7] *Williamson County* requires that they employ at least one of them.

[7] Plaintiffs could have filed a petition with the County to reopen and amend the CUP. Although there is no express provision in the ordinance for such an amendment, the County, having issued the CUP

In any event, Plaintiffs' principal defense is that *Williamson County* does not apply to them at all because this is a physical taking, not a regulatory taking. Response Brief at 33-34.

The difference between physical takings and regulatory takings is well-established black-letter law. In a physical taking, the government forcibly appropriates the person's property. There is no *quid pro quo* and the property owner cannot say, "No thanks." Exactions are different. They occur when the plaintiff wants something from the government (*e.g.*, a permit) and the government seeks to exact something from the plaintiff (*e.g.*, an easement). When the government goes too far, that is a taking. The identifying factor in an exaction is that the government takes the property by leveraging its regulatory authority, not by fiat. The regulated person could avoid the exaction by declining the permit. For this reason, exactions are treated as a subspecies of regulatory takings, even when the exaction involves land or money.[8] Because

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pursuant to LLUPA, has inherent authority to entertain a petition by the permit holder to change the permit based on changed conditions or new information. In addition, there are specific remedial provisions in the ordinance that could have been employed. First, they could have submitted an application for final plat approval without making the conveyances contemplated under the Agreements. Subdivision Regulations § 250. In that proceeding, Plaintiffs could have presented their position that payment of their share of road costs is an unlawful exaction. Second, Plaintiffs could have filed an application for a new CUP with different conditions to replace the existing CUP. LUDO, Chapter 3. Third, they could have initiated an investigation under Chapter 12 of LUDO. This chapter allows any person to initiate a proceeding to investigate noncompliance with a CUP. Although these are typically employed by third parties and/or County staff, it could just as easily have been employed by Plaintiffs through notification to the County that they were unable to reach agreement on an Agreement, a violation of the CUP. Plaintiffs then could have presented their defense that the requirement is unconstitutional. Alternatively, they could have simply informed the County that they would not sign the Agreements, and waited for the County to initiate an investigation under Chapter 12.

[8] "The government affects a physical taking only where it requires the landowner to submit to the physical occupation of his or her land." 26 Am. Jur. 2d. *Eminent Domain* § 10 (2004) (emphasis supplied). Exactions in land use cases are discussed under the section on regulatory takings. *Id.* § 16. This black letter rule derives from many cases, notably *Lingle v. Chevron USA, Inc.*, 544 U.S. 528, 546-47 (2005) (citing *Nollan v. California Coastal Commission*, 483 U.S. 825, 831-32 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994)). In one case, the Ninth Circuit struggled with this more than necessary, we think, but came down the same way: "[The] claims arising out of the exaction of the offers to dedicate can plausibly be characterized as either regulatory or physical takings. . . . We think it most plausible to characterize [the] claims as alleged regulatory rather than physical takings." *Daniel v. County of Santa Barbara*, 288 F.3d 375, 380 (9th Cir. 2002), *cert. denied*, 537 U.S. 973.

this case involves an alleged regulatory taking, the physical takings exception to *Williamson County* does not apply.

B. *Williamson County* Test 2: The requirement to employ state inverse condemnation procedures applies.

Plaintiffs concede that *Williamson County* requires takings litigants to employ state inverse condemnation proceedings before going to federal court. Response Brief at 33. They say this does not apply because they have in fact brought an inverse condemnation claim as part of this lawsuit. But the fact that Plaintiffs are pursuing a state inverse condemnation action now (albeit one subject to fatal flaws), does not solve their problem under *Williamson County* with respect to their federal claims. *Williamson County* requires that Plaintiffs fully litigate their state law claims first, and lose, before bringing a § 1983 action. Bringing the federal and state claims in the same lawsuit does not satisfy *Williamson County*.

Plaintiffs also argue that this second test does not apply to their procedural due process claims. The problem is they have no independent due process claim; it is a meaningless restatement of the takings claim in an effort to avoid *Williamson County*.[9] Nor does it matter what relief they seek. Plaintiffs' attempt to end-run *Williamson County* is also similar to the end-run tried unsuccessfully in *Daniel*, 288 F.3d at 384-85. The plaintiffs in *Daniel* argued they were not subject to *Williamson County* because they were seeking injunctive and declaratory relief, not damages. The *Daniel* court recognized an exception to the requirement to employ state inverse condemnation proceedings (where the plaintiff is making a facial challenge to a

[9] Note also that Plaintiffs quote *Williamson County* out of context. The statement that "the remedy for a regulation that goes too far, under the due process theory is not 'just compensation' but invalidation of the regulation," *Williamson County*, 473 U.S. at 197, was not the Court expressing its view, but the Court reciting the county's argument—which it found unnecessary to reach. "We need not pass on the merits of petitioners' arguments, for even if viewed as a question of due process, respondent's claim is premature." *Williamson County*, 473 U.S. at 199.

municipal ordinance), but found it not applicable there. Nor is it applicable here. Neither *Daniel* nor our case involves a challenge to an ordinance, much less a facial challenge.[10] Where an action is alleged to be a regulatory taking, the remedy is not to stop the exaction, but to make the government pay for it. Declaratory and injunctive relief is inappropriate. *Daniel*, 288 F.3d at 385.

In sum, Plaintiffs' attempt to sidestep *Williamson County* by characterizing this as a due process case or a case seeking injunctive and declaratory relief falls flat. This is a takings case at its core. The Court should do as the district court did in *Daniel*, 288 F.3d at 380, and throw out the federal claims under *Williamson County*. As to the state law inverse condemnation claim, it fails under the statute of limitations and for all the other reasons discussed elsewhere.

V. PLAINTIFFS' CLAIMS FAIL THE "EXHAUSTION" AND "VOLUNTARY" TESTS ESTABLISHED UNDER IDAHO CASE LAW.

A. Plaintiffs failed to exhaust.

Plaintiffs had ample opportunities, both formal and informal, for bringing their concerns to the County's attention. In addition to potential avenues at the administrative level,[11] they failed to seek judicial review under LLUPA, another exhaustion requirement. The law of exhaustion requires that they employ at least one of them. As the Court said in *KMST*, "[Plaintiff] 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." *KMST, LLC v. County of Ada*, 138 Idaho 577, 583, 67 P.3d 56, 62 (2003).

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[10] Plaintiffs claim that they are facially challenging Sections I and J of Chapter 8 of LUDO, but as explained above, this is both fiction and futile. Rather, Plaintiffs are challenging the CUP and its application through the Agreements.

[11] See footnote 7 at page 11 listing administrative actions that could have been taken.

Plaintiffs defend their failure saying that exhaustion is not required here. *KMST* and other cases recognize two exceptions to the exhaustion requirement: (1) where the interests of justice so require and (2) challenges to actions "outside the agency's authority." These and other alleged exceptions are discussed below. None apply here. Plaintiffs should have exhausted, and they did not.

1. Exhaustion exception 1: Plaintiffs cannot meet the "interests of justice" exception.

In light of the current challenge and other litigation, the County has initiated a thorough review of its road mitigation process and, as previously noted, is considering new IDIFA-based ordinances. Had Plaintiffs timely challenged the County during the course of the CUP/development agreement process, who knows what might have happened? Instead, Plaintiffs waited for years, raising the issue after the money was spent and it is too late to reverse course. No public policy is served by encouraging such delinquent behavior.

There is no countervailing consideration. Plaintiffs have not offered a shred of evidence that the County acted in bad faith in the permitting process.

In *American Falls Reservoir Dist. No. 2 v. IDWR*, 143 Idaho 862, 872, 154 P.3d 433, 443 (2007), the Court explained why exhaustion matters:

> "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 body, and the sense of comity for the quasi-judicial functions of the administrative body." *White v. Bannock County Comm'rs*, 139 Idaho 396, 401-02, 80 P.3d 332, 337-38 (2003).

This statement is a good summary of why the "interests of justice" exception does not work here.

2. Exhaustion exception 2: The "outside the agency's authority" exception does not apply.

Valley County explained in its *Opening Brief* at 22 n.15 that the "outside the agency's authority" exception applies only to facial challenges. Plaintiffs dismiss our analysis of *White v. Bannock County Commissioners*, 139 Idaho 396, 80 P.3d 332 (2003) as a manipulation, Response Brief at 23, but fail to explain why. They cite only one case, *American Falls*. This case suggests that there may be some instances in which the exception could apply to an as applied challenge, but our case is not one of them.

The *American Falls* Court began by recognizing the exhaustion principle. "Additionally, a district court cannot properly engage in an 'as applied' constitutional analysis until a complete factual record has been developed." *American Falls*, 143 Idaho at 872, 154 P.3d at 443. "In this case, the district court recognized that parties must choose between either a facial or 'as applied' constitutional challenge and that an 'as applied' analysis is inappropriate before administrative proceedings have been fully completed." *Id.* 143 Idaho at 871, 154 P.3d at 442.[12]

The Court then recognized the two standard exceptions to the exhaustion requirement. *American Falls*, 143 Idaho at 872, 154 P.3d at 443. However, the Court proceeded to sharply narrow the circumstances in which the first exception might apply to an as applied challenge. The Court explained that deciding whether an agency acted outside its authority sometimes calls for a "circuitous analysis." *Id.* If the agency's action was entirely beyond the scope of its authority, no circuitous analysis is required. In such cases exhaustion is excused, apparently in both facial and applied challenges. But where the nature of the action falls within the agency's

[12] See *American Falls*, 143 Idaho at 870-72, 154 P.3d at 441-43, for a good discussion of the difference between facial and as-applied challenges under Idaho law.

broad authorization, exhaustion will be excused only for facial challenges. The Court concluded, 143 Idaho at 872, 154 P.3d at 443:

> Thus, the exception for when an agency exceeds its authority does not apply unless the CM [Conjunctive Management] Rules are facially unconstitutional. Therefore, this Court's review will be in terms of the CM Rules' constitutionality on their face and not in terms of the Rules' "threatened application" or "as applied."

This is a more nuanced statement of the simpler rule articulated by the County in its *Opening Brief*, but the end result is the same. Indeed, *American Falls* reinforces the County's main point. If an agency acts in a manner entirely outside its regulatory authority (for instance, if the County had no planning and zoning power), then the agency's action could be challenged without exhaustion. But where the governmental entity has regulatory authority to act on the subject matter and the only question is whether it has exercised that authority properly in a particular "as applied" action, then exhaustion is required.

Plaintiffs, in a transparent attempt to sidestep the exhaustion requirement (and the statute of limitations), assert that their claims include a facial challenge to Sections I and J of Appendix C of LUDO. Response Brief at 24-25. Nowhere in Plaintiffs' Complaint is there any reference to any provision of LUDO nor is there any allegation that can fairly be interpreted as bringing a facial challenge to any County ordinance. The allegations in Plaintiffs' Complaint are clearly directed at the condition included in the CUP that required a development agreement and the payment of money that was ultimately a part of the Agreements. Based upon the Plaintiffs' own allegations, their claims are an "as applied" challenge to the particular requirements that were placed upon their applications rather than a facial challenge to any County ordinance.

Even if Plaintiffs were permitted to amend their Complaint (despite the fact that the deadline for amendments to pleadings expired more than six months ago) to assert a facial

challenge, such a claim would have no merit. Plaintiffs' sole argument in support of their purported facial challenge is that two provisions of LUDO illegally require the payment of impact fees. However, the provisions at issue do not mandate any payment of fees whatsoever. Section I of Appendix C of LUDO provides that, due to the unique nature of each PUD, the County requires the developer to work with the appropriate county entities and enter into a development agreement with the Board. No particular content is specified. Similarly, Section J of Appendix C of LUDO provides only that the P&Z "may recommend" impact fees to the Board and that the Board "may implement" such fees as recommended or as deemed necessary. If a party asserts a facial challenge to a legislative act, it must prove that the act is unconstitutional in all of its applications. In other words, "the challenger must establish that no set of circumstances exists under which the [law] would be valid." *State v. Korsen*, 138 Idaho 706, 712, 69 P.3d 126, 132 (2003).

The Idaho Supreme Court rejected a similar attempt by a party to frame its claim as a facial challenge in *Lochsa Falls, L.L.C. v. State*, 147 Idaho 232, 207 P.3d 963 (2009). The plaintiff in that case was required to construct a traffic signal as a condition of a construction permit issued by the Idaho Transportation Department. The rules at issue provided that the department may require payment of costs associated with highway improvements in connection with the issuance of such a permit. Accordingly, the Court concluded that the plaintiff's action was an "as applied" challenge.

The same may be said of this lawsuit. Here, since the provisions do not specify any particular requirement or even that a fee will be charged at all, they cannot be unconstitutional in every application and a facial challenge fails. In fact, the statute referenced in Section J is Idaho Code § 31-870 that authorizes counties to charge fees for services. (See footnote 15 at page 22.)

Obviously, Section J could be applied constitutionally so long as only service or user fees were required to be paid.

3. *Euclid Avenue* is inapposite.

Plaintiffs offer a smokescreen by raising *Euclid Avenue Trust v. City of Boise*, 146 Idaho 306, 193 P.3d 853 (2008). Response Brief at 25. This case simply held that parties can no longer combine in the same lawsuit a civil complaint and a judicial review.[13] So be it. Both may still be pursued in separate lawsuits, if need be. But there would have been no need for separate lawsuits here. Plaintiffs could have obtained all the necessary relief simply by filing a timely judicial review of the CUP pursuant to LLUPA. The Idaho Administrative Procedures Act (whose judicial review provisions are incorporated by LLUPA) allows permitting decisions to be set aside for violation of constitutional or statutory provisions. Idaho Code § 67-5279(3). That is one way of undertaking an inverse condemnation. Indeed, it is probably the only proper way. If that would have occurred, there would be no need for this tardy collateral attack.

4. Idaho Code § 67-6521 is inapposite.

Plaintiffs seek relief from exhaustion under Idaho Code § 67-6521. Response Brief at 22-23. This is the same strategy that the plaintiff tried unsuccessfully in *KMST*, 138 Idaho at 580, 583-84, 67 P.3d at 59, 62-63. As the Court explained in *KMST*, the statute has no applicability here.

> By its terms, that statute has no application to the impact fees imposed in this case. It only applies if the basis of the inverse condemnation claim is "that a specific zoning action or permitting action restricting private property development is actually a regulatory action by local government deemed 'necessary to

[13] The *Euclid Avenue* Court employed the term "administrative appeal" as a shorthand for "judicial review of an administrative action." The Court was not referring to administrative appeals within the agency (e.g., an appeal from planning and zoning to the county commission), which is a separate exhaustion issue.

> complete the development of the material resources of the state,' or necessary for other public uses."

KMST, 138 Idaho at 580, 583-84, 67 P.3d at 59, 62-63. (The quoted provision was changed slightly by the Legislature in 2010, but the change does not affect the Court's analysis.) The reference to whether the action is "necessary to complete the development of the material resources of the state" is a reference to whether or not an eminent domain action is undertaken for a legitimate public purpose—an issue made famous in the case of *Kelo v. City of New London*, 545 U.S. 469 (2005). Plaintiffs' Complaint cannot be read to embrace such a claim.

5. *BHA II* is inapposite.

Plaintiffs cite *BHA Investments, Inc. v. City of Boise* ("*BHA II*"), 141 Idaho 168, 108 P.3d 315 (2004). This case involved a transfer fee charged by the City of Boise on liquor licenses. The Court ruled in a prior case, *BHA Investments, Inc. v. City of Boise* ("*BHA I*"), 138 Idaho 356, 357-58, 63 P.3d 482, 483-84 (2004), that the City had no regulatory authority whatsoever with respect to the transfer of liquor licenses. Only the State has such authority. *Id.* In a separate case involving different parties (which was consolidated in *BHA II*), the district court dismissed plaintiffs' claim because they had not paid the fee under protest. In *BHA II*, the Supreme Court reversed that point, ruling that special rules requiring that taxes be paid under protest do not apply to "an action seeking recovery of unlawful fees." *BHA II*, 141 Idaho at 176, 108 P.3d at 323. This has no applicability here. Valley County has not claimed that fees required under the development agreement are taxes. Nor has it relied on the line of authority addressed in *BHA II* requiring that taxes be paid under protest as a prerequisite to challenge. Thus, the language quoted by Plaintiffs is inapposite.

The *BHA II* Court then turned to the exhaustion requirement. The Court discussed *KMST* noting that in that case exhaustion was required because "had KMST pursued available

administrative remedies, its fee would have been reduced." The Court distinguished *KMST*: "That case has no application to this one. The City has not cited any ordinance granting the city council the authority to waive the liquor license transfer fee unlawfully charged by the City." *BHA II*, 141 Idaho at 176-77, 108 P.3d at 323-24.

Our case is like *KMST*, not *BHA II*. In *BHA II*, Boise had no discretion to eliminate or reduce the transfer fee. Valley County, in contrast, had ample authority to agree to any terms it thought appropriate for the development agreement—including imposing no road mitigation fees at all. If Plaintiffs had timely raised the issue, Valley County might have backed off. It certainly had that discretion, bringing it within *KMST's* exhaustion requirement.

Another distinguishing factor is that in *BHA II*, the City was imposing fees with no authority to regulate in the field (liquor transfers) at all and was instead intruding on authority expressly and unequivocally granted to the State. This reinforces the point we have made above with respect to *KMST* and *American Falls* that the exhaustion exception comes into play only when the governmental entity acts entirely outside the subject of is regulatory authority.

6. Plaintiffs' alleged failure to perceive their rights at the time of the administrative proceedings does not excuse their failure to exhaust.

Finally, Plaintiffs contend that they are excused from exhaustion because they assumed the County had the right to require mitigation. Response Brief at 26-27. The cases they cite are inapposite. The controlling cases on the subject of exhaustion clearly identify the exceptions to the exhaustion requirement. Failure to recognize one's own claim is not one of the exceptions.

Although *BHA II* arose in a different context (the damage claim requirement applicable to cities), the case makes this point. "[Plaintiffs] argue that they timely filed their notice of claim because they could not reasonably have known until January 30, 2003, when we issued our opinion in *BHA I*. That opinion did not create a cause of action where none previously existed."

BHA II, 141 Idaho at 174, 108 P.3d at 321. Thus, those plaintiffs were not excused by the fact that Boise City believed and acted like it had authority to regulate liquor license transfers. Likewise, in *Harris v. State, ex rel. Kempthorne*, 147 Idaho 401, 403-05, 210 P.3d 86, 88-90 (2009), the Court found that plaintiffs were not excused from the statute of limitations by the fact that the State affirmatively misstated the law and demanded that plaintiffs enter into a mineral lease over minerals that, as it later became known, the State did not own. There is no basis for Plaintiffs' suggestion that exhaustion should be treated any differently.

B. Plaintiffs' actions were voluntary.

Plaintiffs contest whether their signing of the Agreements was voluntary. They contend that there were no meaningful negotiations, that the County had a policy of requiring all developers to pay fees according to the County's schedule, and that Plaintiffs believed their failure to do so would result in delay or denial of their application. The County contests those facts.[14] But those facts are not material, and any disagreement over them does not bar summary judgment here. Even if everything that Plaintiffs say about the County's policy of seeking mitigation were true, these fact remain: Plaintiffs themselves included proposed mitigation agreements (including payments for off-site improvements) in their initial application, they did

[14] The County directs the Court's attention to testimony in the record by County representatives that establishes that the use of development agreements to help pay for road improvements was first suggested by developers and was enthusiastically supported by them when the real estate market in the County was booming. *Cruikshank Depo.*, 154:9-155:24; *Davis Depo.*, 26:18-33:22, 47:25-48:18; *Herrick Depo.*, 55:18-59:8. (The deposition transcripts are exhibits A-D to the *Affidavit of Victor Villegas in Opposition to Summary Judgment*.) Also, only one applicant objected to the inclusion of a payment for road improvements in a development agreement and the Board negotiated a reduced amount for that applicant, which contradicts Plaintiffs' position that the agreements were standard and non-negotiable. *Eld Depo.*, 34:13-36:13; *Herrick Depo.*, 81:17-82:10, 103:12-107:1. Finally, no applicant ever refused to pay and demanded approval by the Board without a development agreement. County representatives testified that they did not know how such a demand would have been handled. *Cruickshank Depo.*, 143:5-146:12; *Eld Depo.*, 39:5-45:3. That the Plaintiffs have misrepresented these issues in the record is troubling but ultimately inconsequential because none of these disputed facts is material to the dispositive issues raised by the County's *Motion for Summary Judgment*.

not protest or object to the condition in the CUP that required a mitigation agreement, they signed both Agreements, and they did not object to the conveyance of property or the payment of money required under the Agreements.

Plaintiffs attempt to distinguish their actions from those of the developers in *KMST* by claiming that they believed that LUDO mandated the Agreements,[15] and that County officials told them that road impact mitigation would be required. Response Brief at 28. But that is no different from the situation in *KMST*. In that case, the developer agreed to the road dedication. He did so not because he was anxious to give something away, but because he was told by an ACHD official that he would recommend it as a requirement. *KMST*, 138 Idaho at 579, 67 P.3d at 58. Thus, plaintiffs in *KMST* and here both believed they saw the writing on the wall; both decided that the easiest course was to give what they thought would be required at the end of the day. This is what the law means by "voluntary."

Plaintiffs meet that test as a matter of law. They included an express offer of mitigation contributions in their application and then agreed to slightly modified terms in the Agreements. The terms of the Agreements are unambiguous. They are plainly entitled "AGREEMENTS" and provide that the developer "agrees" to participate in the cost of improving the roads near the proposed development. Regardless of what discussions may or may not have taken place with County staff[16] and regardless of the Plaintiffs' understandings and assumptions, if it were not

[15] Plaintiffs point to section J of LUDO (formerly Appendix C, now codified to Chapter 8) entitled "IMPACT FEES" as the basis for not timely challenging the road development fees. Response Brief at 3, 28, 32. The text of the provision, however, references only fees based on Idaho Code § 31-870, a statute authorizing counties to collect user fees for water, sewage, and the like. Even if reliance was appropriate to justify failure to challenge, which it is not, Plaintiffs should not have relied on this provision with respect to fees charged for off-site road construction. This provision, on its face, contemplated lawful user fees.

[16] To the extent that Plaintiffs contend their entering into the Agreements was involuntary because of things they say were said by County staff, this argument is without merit. Idaho case law and

true that the developer was voluntarily agreeing to help pay for the improvement of the roads, then Plaintiffs simply should not have signed the Agreements without protest.

Joseph Pachner represented the developers with respect to their application. In language embraced by the Plaintiffs, he testified in his affidavit that he included the payments for road improvements in order to ensure an efficient application process and avoid delays. *Pachner Aff.*, ¶¶ 4, 6, and 8. This is precisely the same reason that the developer in *KMST* included the dedication of the public street.

> The district court found "that as a general matter developers do not include conditions in development applications if they disagree with the conditions." The district court also found, "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 the 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. The inclusion of the mitigation measures in their application, combined with the lack of any objection and the execution of the Agreements, establishes conclusively that the payment was voluntary. No doubt the *KMST* developers did not really want to dedicate a road to the public. Nor does the County doubt that Plaintiffs did not really want to pay money to help improve the roads to their development. But in this context, "voluntary" does not connote desire—it simply means that the developer made a choice to agree instead of to object or protest.[17] Having made this choice, the Plaintiffs' claims are barred by it.

LUDO itself are clear that only the Board of County Commissioners has authority to make a final decision on such matters.

[17] This is apparently true of the other developers who signed affidavits that have been filed in this action. As with Plaintiffs, they may not have wanted to enter into the agreements, but they did so by their own choice. The fact that the developers (including Plaintiffs) may have thought that the County

VI. EQUITABLE PRINCIPLES PREVENT PLAINTIFFS FROM OBTAINING THE REMEDIES THEY SEEK HERE.

Plaintiffs offer but one response to Valley County's equitable defenses: that the payment was not voluntary. But even if Plaintiffs believed that the County was inflexible and that agreement to the road fees would expedite approval, this does not change the fact that they signed two separate documents, without protest, which on their face say "Agreement," accepted the benefits of the Agreements, and waited for years before bringing this litigation. This is not the sort of behavior that equity encourages.

CONCLUSION

In short, payments made by Plaintiffs were voluntarily made payments that benefited them by funding road construction on an expedited basis. Even if those payments had been illegal taxes, 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.

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had the authority to require a payment of fees is also irrelevant. LUDO was available to all as were the Idaho statutes that relate to these issues.

DATED this 10th day of November, 2010.

VALLEY COUNTY PROSECUTING ATTORNEY

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CERTIFICATE OF SERVICE

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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 2009-354 **STIPULATION TO MOVE SUMMARY JUDGMENT HEARING FROM VALLEY COUNTY TO ADA COUNTY**

COME NOW the Plaintiffs, Buckskin Properties, Inc. and Timberline Development, LLC, and the Defendant Valley County by and through their respective attorneys

of record, and hereby stipulate and agree that the Summary Judgment Hearing scheduled to be heard in on November 17, 2010 in Valley County in front of Judge Michael R. McLaughlin shall be heard in Ada County, on the _____ day of November, 2010 at the hour of _____ m.

DATED this 11 day of November, 2010.

EVANS KEANE, LLP

By: _____
Victor S. Villegas
Attorney for Plaintiffs

DATED this 9th day of November, 2010.

GIVENS PURSLEY, LLP

By: _____
Martin C. Hendrickson
Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of November, 2010, a true and correct copy of the foregoing was served upon the following individual(s) by the means indicated:

Jed Manwaring
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Martin C. Hendrickson

Received Time Nov. 12. 9:02AM

ARCHIE N. BANBURY, CLERK
BY _____ DEPUTY
NOV 15 2010
Case No._____ Inst. No._____
Filed_____ A.M. 5:11 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, Plaintiffs, v. VALLEY COUNTY, a political subdivision of the State of Idaho, Defendant.		Case No. CV 2009-554 **AMENDED ORDER GRANTING VALLEY COUNTY'S MOTION TO ENLARGE PAGE LIMITATIONS**

THIS MATTER having come before the Court upon Valley County's Motion to Enlarge Page Limitations, and having found good cause therefore;

IT IS HEREBY ORDERED that Valley County's motion to enlarge page limitations is GRANTED and Valley County's Reply Brief in Support of Motion for Summary Judgment shall not exceed **twenty-five** pages in length.

DATED this 15 day of November, 2010.

MICHAEL R. MCLAUGHLIN
District Court Judge

Received Time Nov. 9. 3:34PM

CLERK'S CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of November, 2010, a true and correct copy of the foregoing was served upon the following individual(s) by the means indicated:

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Clerk of the Court

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Attorneys for Defendant

ARCHIE N. BANBURY, CLERK
By _____ Deputy
NOV 19 2010
Case No. _____ Inst. No. _____
Filed _____ A.M. 1:39 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,

Plaintiffs,

v.

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

Defendant.

Case No. CV 2009-554

STIPULATION TO MODIFY SCHEDULING ORDER

COME NOW the Plaintiffs, Buckskin Properties, Inc. and Timberline Development, LLC, and the Defendant, Valley County, by and through their respective attorneys of record, and

Received Time Nov. 19. 2:07PM

hereby stipulate and agree to the following modifications to the Scheduling Order entered in this action on February 24, 2010:

1. That the deadline for the Attorneys Conference described in paragraph 11 of the Scheduling Order, and the associated activities including exchange of witness lists and exhibits, and preparation of the pre-trial stipulation, be changed from November 22, 2010, to January 7, 2011; and

2. That the deadline for submission of the Pre-trial Memorandum by each party described in paragraph 12 of the Scheduling Order be changed from November 29, 2010, to January 7, 2011;

Good cause exists for these modifications because of the hearing on the Defendant's Motion for Summary Judgment scheduled for December 6, 2010, the outcome of which is likely to have a significant effect on the parties' preparation for trial in this action.

DATED this 19 day of November, 2010.

EVANS KEANE, LLP

By: _____
Victor S. Villegas
Attorney for Plaintiffs

DATED this 19th day of November, 2010.

GIVENS PURSLEY, LLP

By: _____
Martin C. Hendrickson
Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of November, 2010, a true and correct copy of the foregoing was served upon the following individual(s) by the means indicated:

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Received Time Nov. 19. 2:07PM

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 **ORDER GRANTING STIPULATION TO MODIFY SCHEDULING ORDER**

THIS MATTER having come before the Court upon the Stipulation to Modify Scheduling Order, and having found good cause therefore;

IT IS HEREBY ORDERED that the Scheduling Order entered in this action on February 24, 2010, is modified as follows:

1. That the deadline for the Attorneys Conference described in paragraph 11 of the Scheduling Order, and the associated activities including exchange of witness lists and exhibits, and preparation of the pre-trial stipulation, is changed from November 22, 2010, to January 7, 2011; and

2. That the deadline for submission of the Pre-trial Memorandum by each party described in paragraph 12 of the Scheduling Order is changed from November 29, 2010, to January 7, 2011;

all pretrial deadlines will be set for January 7, 2011.

DATED this 23 day of November, 2010.

MICHAEL R. MCLAUGHLIN
District Court Judge

Received Time Nov. 19. 2:07PM

CLERK'S CERTIFICATE OF SERVICE

I hereby certify that on the 19 day of November, 2010, a true and correct copy of the foregoing was served upon the following individual(s) by the means indicated:

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ARCHIE N. BANBURY
CLERK

J Garrison Deputy
Clerk of the Court

Received Time Nov. 19. 2:07PM

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, Defendant.	Case No. CV-2009-554-C MEMORANDUM DECISION RE: DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

APPEARANCES

For Plaintiff: Victor Villegas of Evans Keane LLP

For Defendants: Christopher Meyer and Martin Hendrickson of Givens Pursley

PROCEEDINGS

This matter came before the Court on the Defendant's Motion for Summary Judgment. After hearing oral argument, the Court took the matter under advisement.

BACKGROUND

The Plaintiffs Buckskin Properties, Inc. ("Buckskin") and Timberline Development, LLC ("Timberline") 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 the Plaintiffs' final plat for the various phases of the Meadows. The Plaintiffs filed this lawsuit seeking a declaration that the contracts under which Valley County required the payment of impact fees are invalid and seeking a judgment that Valley County violated the Plaintiffs' rights in conditioning approval of their project based on the payment of the impact fees. Valley County has filed the current Motion for Summary Judgment seeking dismissal of the Plaintiffs' lawsuit on the grounds that the statute of limitations has run and that the Plaintiffs voluntarily entered into the agreements and paid the fees.

LEGAL STANDARD

Summary judgment will be granted only "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c). When considering a summary judgment motion, the trial court must construe the record liberally in favor of the non-moving party and draw all reasonable factual inferences in favor of such party. *Bear Lake West Homeowner's Assoc. v. Bear Lake County*, 118 Idaho 343, 346, 796 P.2d 1016, 1019 (1990). The motion will be denied if conflicting inferences may be drawn from the evidence or if reasonable people might reach different conclusions. *Parker v. Kokot*, 117 Idaho 963, 793 P.2d 195 (1990).

The initial burden of establishing the absence of a genuine issue of material fact rests with the moving party. *Thomson v. Idaho Ins. Agency, Inc.*, 126 Idaho 527, 531, 887 P.2d 1034, 1038 (1994). If the moving party meets that burden, the party who resists summary judgment has the responsibility to place in the record before the court

the existence of controverted material facts that require resolution at trial. *Sparks v. St. Luke's Regional Medical Center, Ltd.*, 115 Idaho 505, 508, 768 P.2d 768, 771 (1988). The resisting party may not rely on his pleadings nor merely assert the existence of facts which might support his legal theory. *Id.* He must establish the existence of those facts by deposition, affidavit, or otherwise. *Id.*; I.R.C.P 56(e).

A mere scintilla of evidence or a slight doubt as to the facts is not sufficient to withstand summary judgment. *Corbridge v. Clark Equipment Co.*, 112 Idaho 85, 87, 730 P.2d 1005, 1007 (1986). In other words, there must be evidence on which a jury might rely. *Petricevich v. Salmon River Canal Co.*, 92 Idaho 865, 871, 452 P.2d 362, 368 (1969). Moreover, the existence of disputed facts will not defeat summary judgment when the plaintiff fails to make a showing sufficient to establish the existence of an element essential to his case, and on which he will bear the burden of proof at trial. *Pounds v. Denison*, 120 Idaho 425, 426, 816 P.2d 982, 983 (1991).

DISCUSSION

Valley County argues that the Plaintiffs' allegations of violations of the federal constitution must be dismissed because the Plaintiffs' failed to bring this action under 42 U.S.C. § 1983. The Plaintiffs respond that they have not sought relief under 42 U.S.C. § 1983, nor were they required to do so. The Plaintiffs argue 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 Constitution of the United States, made applicable to the states through the Fourteenth Amendment, *Dolan v. City of Tigard*, 512 U.S. 374 (1994), provides: "[N]or shall private property be taken for public use, without just compensation." Article 1, § 14, of the

Constitution of the State of Idaho provides: "Private property may be taken for public use, but not until a just compensation, to be ascertained in the manner prescribed by law, shall be paid therefore."

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 just compensation, may bring an action for inverse condemnation. *McQuillen v. City of Ammon*, 113 Idaho 719, 747 P.2d 741 (1987). The property owner cannot maintain an inverse condemnation action unless there has actually been a taking of his or her property. *Covington v. Jefferson County*, 137 Idaho 777, 53 P.3d 828 (2002). Here, the Plaintiffs have not made a claim pursuant to 42 U.S.C. § 1983. However, they were not required to do so because they have a valid claim pursuant to the State constitution.

Valley County argues that the Plaintiffs failed to timely file this action within: (1) the four-year statute of limitations under I.C. § 5-224 for an inverse condemnation claim; (2) the two-year statute of limitations for a § 1983 claim; (3) the three-year statue of limitations for the taking of personal property; and (d) the six-month statute of limitations for claims against a county. The Plaintiffs respond that their inverse condemnation claim was timely filed because the statute of limitations began to run on December 15, 2005 when the Plaintiffs drew a cashier's check in the amount of $232,160.00 in order to pay the impact fees for Phases 2 and 3 of the Meadows.

Idaho Code § 5-224 contains the statute of limitations for an inverse condemnation claim, and states: "[a]n action for [inverse condemnation] must be commenced within four (4) years after the cause of action shall have accrued." *See C &*

G, Inc. v. Canyon Highway Dist. No. 4, 139 Idaho 140, 143, 75 P.3d 194, 197 (2003). The date when a cause of action accrues is a question of law to be determined by this Court where no disputed issues of material fact exist. *Id.* at 142, 75 P.3d at 196. "The actual date of taking, although not readily susceptible to exact determination, is to be fixed at the point in time at which the impairment, of such a degree and kind as to constitute a substantial interference with plaintiffs' property interest, became apparent." *Tibbs v. City of Sandpoint*, 100 Idaho 667, 671, 603 P.2d 1001, 1005 (1979).

The Complaint in this case was filed on December 1, 2009. The facts in this case are essentially undisputed. The Plaintiffs are making a legal argument that the Valley County's "taking" did not occur until the cashier's check was drawn in order to pay the impact fees on December 15, 2005. However, as Valley County points out, the "Plaintiffs certainly knew the essential facts on July 14, 2004, the day they received the Conditional Use Permit and they signed the final Capital Contribution Agreement setting out the contribution requirements in full detail." At the very latest, drawing all reasonable inferences in favor of the Plaintiff, October 25, 2004 was the date when the statute of limitations began to run. This was the date when the dedication of right of way was accepted and it was at this point in time at which the impairment of such a degree and kind as to constitute a substantial interference with the Plaintiffs' property interest became apparent. Therefore, the Court grants the Defendant's Motion for Summary Judgment because Plaintiffs are barred from recovering under their inverse condemnation claim by I.C. § 5-224 because their Complaint was not filed within the

four-year statute of limitations.[1]

Although the Court is granting the Defendant's Motion for Summary Judgment based on the statute of limitations, the Court will address the remaining arguments submitted by the parties in order to provide a more complete record. 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). However, there is an exception to that rule when the interests of justice so require and the agency acted outside of its authority. *Regan v. Kootenai County*, 140 Idaho 721, 725, 100 P.3d 615, 619 (2004). Valley County argues that summary judgment should be granted because the Plaintiffs could have objected or otherwise filed an appeal to the conditions of approval, but did not do so. The Plaintiffs respond that they had no duty to exhaust any administrative remedies because the Plaintiffs' claims meet both exceptions to the general rule of exhaustion. It appears from the record that Valley County did not follow the provisions set forth in the Idaho Development Fee Act ("IDIFA") and Valley County concedes as much. More specifically, Valley County failed to follow the procedure for the imposition of development impact fees set forth in I.C. § 67-8206. As such, the Plaintiffs were not required to exhaust their administrative remedies because the proper administrative procedures were not in place.

Valley County also argues that the Plaintiffs should have raised their objections to the impact fees with the local government in a timely manner in order to set up their

[1] The Plaintiffs also argued that this action is subject to a five-year statute of limitations based on I.C. § 5-216. However, this is not an action for breach of contract. Furthermore, there is no evidence in the record before the Court that the contract between the Plaintiffs and the Defendant was ever breached.

claim that their payment was involuntary. In essence, Valley County is arguing that the Plaintiffs should be precluded from maintaining this action because they did not object during the public hearing on their previous approvals for Phases 1 through 3. The Plaintiffs respond that they were not required to object because there is no Idaho law requiring a party to object or otherwise pay under protest in order to later recover an illegal fee and the Plaintiffs had no reason to question Valley County's LUDO at the time of the public hearings on its CUP/PUD application. The Plaintiffs are correct. As the Idaho Supreme Court stated in *BHA Investments, Inc. v. City of Boise*, "[w]e 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." 141 Idaho 168, 176, 108 P.3d 315, 323 (2004). Here, the Plaintiffs had no obligation to pay the impact fees under protest in order to recover them later because Valley County did not have the authority to impose the impact fees as Valley County had not complied with the procedures set forth in I.C. § 67-8206.

CONCLUSION

The Court GRANTS the Defendant's Motion for Summary Judgment.

DATED this 7 day of January 2011.

MICHAEL McLAUGHLIN
DISTRICT JUDGE

CERTIFICATE OF MAILING

I hereby certify that on the 21st day of January 2011, I mailed (served) a true and correct copy of the within instrument to:

VALLEY COUNTY COURT
VIA EMAIL

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ARCHIE N. BANBURY
Clerk of the District Court

By: _____
Deputy Clerk

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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** **MOTION FOR PARTIAL SUMMARY JUDGMENT**

Plaintiffs, by and through their attorneys of record, Evans Keane LLP, move this Court, pursuant to Rule 56(c) of the Idaho Rules of Civil Procedure, for partial summary judgment on Count One of Plaintiffs' Complaint. This motion is made and based upon this Court's Memorandum Decision Re: Defendant's Motion For Summary Judgment entered on January 7, 2011 wherein this Court held "Here, Plaintiffs had no obligation to pay the impact fee fees under protest in order to recover them later because Valley County did not have the authority to impose

the impact fees as Valley County had not complied with the procedures set forth in I.C. § 67-8206." This motion is also based on the Memorandum and Affidavits in support of Plaintiffs' opposition to Defendant's Motion for Summary Judgment previously filed with this Court.

Dated this 10th day of January, 2011.

EVANS KEANE LLP

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of January, 2011, 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:

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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

MOTION TO VACATE TRIAL DATE AND REQUEST FOR STATUS CONFERENCE

Pursuant to Rule 16 of the Idaho Rules of Civil Procedure Plaintiff Buckskin Properties, Inc. and Timberline Development, LLC move this Court to vacate the trial presently set for January 24, 2011. This motion is made and based upon this Court's Memorandum Decision Re: Defendant's Motion For Summary Judgment entered on January 7, 2011. The Memorandum Decision appears to have decided all issues including Plaintiffs' Motion For Partial Summary Judgment filed concurrently. A status conference is requested.

Dated this 13th day of January, 2011.

EVANS KEANE LLP

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of January, 2011, 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:

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Victor Villegas
Victor Villegas

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JAN 13 2011
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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 ENTRY OF JUDGMENT

COMES NOW, Defendant, Valley County, by and through its attorneys of record, and hereby moves this Court to enter judgment in favor of Valley County and dismiss this action in its entirety.

This motion is based upon the *Memorandum Decision Re: Defendant's Motion for Summary Judgment* entered on January 7, 2011, wherein this Court granted *Valley County's Motion for Summary Judgment.*

A proposed judgment is attached hereto as Exhibit 1.

If this motion is opposed, oral argument is requested.

DATED this 13th day of January, 2011.

GIVENS PURSLEY LLP

By: _____
Martin C. Hendrickson

Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of January, 2011, a true and correct copy of the foregoing was served upon the following individual(s) by the means indicated:

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Martin C. Hendrickson

Exhibit 1: Proposed Judgment

Received Time Jan. 13. 4:40PM

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 **JUDGMENT**

THIS MATTER having come before the Court pursuant to *Valley County's Motion for Entry of Judgment*, and this Court having previously granted *Valley County's Motion for Summary Judgment* in its Memorandum Decision entered on January 7, 2011;

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

1. That judgment is entered in favor of the Defendant and against the Plaintiffs; and

2. That all of Plaintiffs' claims against the Defendant are dismissed with prejudice.

DATED this _____ day of January, 2011.

MICHAEL R. MCLAUGHLIN
District Court Judge

CLERK'S CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of January, 2011, a true and correct copy of the foregoing was served upon the following individual(s) by the means indicated:

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ARCHIE N. BANBURY
Clerk of the District Court

By: _____
Deputy Clerk

ARCHIE N. BANBURY, CLERK
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JAN 13 2011
Case No. Inst. No.
Filed A.M. 4:50 P.M

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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 RESPONSE TO MOTION FOR PARTIAL SUMMARY JUDGMENT

Received Time Jan. 13. 4:43PM

COMES NOW, Defendant Valley County ("County"), by and through its undersigned attorneys of record, and submits this response to Plaintiffs' *Motion for Partial Summary Judgment* ("Plaintiffs' Motion") dated January 10, 2011. Plaintiffs seek entry of partial summary judgment in their favor on Count 1 of their *Complaint*. Count 1 seeks declaratory relief regarding the County's alleged violation of the Idaho Development Impact Fee Act, Idaho Code §§ 67-8201 to 67-8216 ("IDIFA").

On October 14, 2010, the County filed *Valley County's Motion for Summary Judgment* ("Summary Judgment Motion"), which sought judgment against the Plaintiffs on all counts on jurisdictional and other grounds. On January 7, 2011, the Court entered its *Memorandum Decision Re: Defendant's Motion for Summary Judgment* ("Decision"), granting the County's motion in full. Although the Court found it unnecessary to address each of the defenses raised by the County to Plaintiffs' suit, the effect of the Decision was to fully resolve this litigation by dismissing the suit in its entirety on statute of limitations grounds.

In light of the Court's finding that Plaintiffs' claims are barred by the statute of limitations, there is no basis for granting any relief in Plaintiffs' favor. Having missed their filing deadline, Plaintiffs are entitled to no relief. In a separate filing today, the County is submitting *Valley County's Motion for Entry of Judgment*. Accordingly, Plaintiffs' Motion is out of order and should be dismissed without consideration of its merits.

Moreover, Plaintiffs' request is moot and unripe. The County has briefed this extensively and sufficiently before, and will not repeat it here. Suffice it to say that a declaratory judgment with respect to fees already paid that are non-recoverable on jurisdictional grounds would be a pointless and unauthorized judicial exercise. In a word, it is moot. As for any fees that might or might not be required in the future, those issues are patently unripe.

Finally, given the posture of this case as framed by the Motion for Summary Judgment, a ruling on the merits of Plaintiffs' claims would be premature even if the case were still alive. Simply put, if the County's motion had been denied, the next step would be to go to trial at which point there would have been further factual development and legal argument as to the legality of the fees in question.[1] That never happened. And it cannot happen now, given the Court's Decision determining that it is without jurisdiction to reach the merits. In other words, even if it were ripe and not moot and not subject to dismissal on statute of limitations grounds, the "illegal tax" issue has not yet been presented for decision.

---

[1] This is no afterthought. The County addressed the sequencing of issues in its briefing:

> In Idaho, certain impact fees are illegal taxes under Idaho's Constitution unless imposed pursuant to an ordinance compliant with the Idaho Development Impact Fee Act ("IDIFA"), Idaho Code §§ 67-8201 to 67-8216. Valley County did not enact an IDIFA-compliant ordinance, because it believed in good faith that none was required. Recent lawsuits involving other municipalities have successfully challenged impact fees. Accordingly, to be on the safe side, the County is now exploring enactment of a new IDIFA-compliant ordinance. But there is no need to determine whether the Conditional Use Permit ("CUP") or the preliminary Development Agreement, proposed Capital Contribution Agreement, final Capital Contribution Agreement, and/or Road Development Agreement (collectively "Agreements") at issue here imposed illegal taxes. The question presented in the pending motion is whether Plaintiffs proposed and/or entered into the Agreements without objection, accepted the CUP without complaint, avoided opportunities to raise the issue administratively, and waited too long to challenge.
>
> This case has nothing to do with due process. Plaintiffs had plenty of process. Indeed, part of the County's defense is that Plaintiffs failed to exhaust the remedies available to them. Plaintiffs' so-called due process claim is based on the contention that the County should have enacted an IDIFA-compliant impact fee ordinance and that, if it had done so, they would have been given even more process. But counties are not required to enact ordinances under IDIFA. Thus, the question is, given that Valley County decided not to enact an ordinance under IDIFA at the time, was it unlawful for it to issue a CUP requiring an Agreement? That is purely a state constitutional law question which, if answered in the affirmative, would give rise to an unconstitutional *per se* regulatory taking under the state and federal constitutions. But there is no need to reach the merits of this claim if the defenses in the pending motion prevail.

Valley County's Reply Brief in Support of Motion for Summary Judgment at 1-2 (Nov. 10, 2010) (emphasis supplied).

Nor can the Court reach the illegal tax issue on the basis of admission. The Court states on page 6 of its Decision that, "It appears from the record that Valley County did not follow the provisions set forth in [IDIFA] and Valley County concedes as much." However, Valley County was careful to not concede that any of its actions were actually in violation of IDIFA or any other provision of Idaho law.[2] Instead, in its briefing and at oral argument, the County acknowledged that the issue of IDIFA compliance presents a serious and important question, and that the County is carefully reviewing its authority and considering its future actions. Specifically, the County advised the Court that it is exploring adoption of a new ordinance with these concerns in mind. This demonstrates that the County is not defiantly thumbing its nose at these constitutional questions. To the contrary, it is taking them quite seriously. But that is not the same as a legal admission. Accordingly, the Court has no basis to render a ruling on the legality of the County's action in this matter.

For these reasons, the Plaintiffs' Motion should be summarily denied.

---

[2] The County forthrightly admitted that it has not enacted an ordinance that complies with IDIFA. *Valley County's Statement of Material Facts in Support of Motion for Summary Judgment*, ¶¶ 61, 62. But that does not equate to an admission that its planning and zoning actions violated IDIFA. Not all fees imposed during the course of planning and zoning require an IDIFA-compliant ordinance. Whether the fees at issue here were lawfully within the County's police power or were illegal taxes is an issue that has never been briefed in this proceeding. On the other hand, the County is not ignoring the issue. In its brief, the County stated: "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." *Valley County's Opening Brief in Support of Motion for Summary Judgment* at 25 (Oct. 14, 2010).

RESPECTFULLY SUBMITTED this 13th day of January, 2011.

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 13th day of January, 2011, a true and correct copy of the foregoing was served upon the following individual(s) by the means indicated:

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Attorneys for Plaintiffs

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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' OBJECTION TO VALLEY COUNTY'S MOTION FOR ENTRY OF JUDGMENT FILED JANUARY 13, 2011

Plaintiffs, by and through their attorneys of record, Evans Keane LLP, submit this Objection to Valley County's Motion for Entry of Judgment Filed January 13, 2011, as follows:

Although it appears that this Court may have held that it granted the County's motion in full, it did not fully decide all the claims for relief that Plaintiffs' have sought in their Complaint. When multiple claims for relief are presented in an action, an adjudication of less than all the claims does not terminate any of the remaining claims. *International Business Machines Corp v. Lawhorn* 106 Idaho 194, 196, 677 P.2d 507, 509 (Ct. App. 1984). Such an adjudication is

interlocutory, subject to revision at any time before entry of a judgment disposing of all remaining claims. *Id. Citing Baker v. Pendry*, 98 Idaho 745, 572 P.2d 179 (1977).

Here, Plaintiffs specifically asked under Count One of its Complaint, among other things, for a declaration that Valley County cannot circumvent the Idaho Development Impact Fee Act, Idaho Code § 67-8201 *et seq.* by forcing developers to pay impact fees monies under the guise of a Road Development Agreement. Plaintiffs also asked under its prayer for relief that this Court enter a declaration that Timberline Development LLC cannot be required to pay fees for the proportionate share of road improvement costs attributable to the remaining phases of the Meadows at West Mountain (i.e. Phases 4 through 6).

Final plat for Phase 4 through 6 of the Meadows at West Mountain has not been granted and the County, through its Road Superintendent Jerry Robinson, has told Plaintiffs' representatives that it must enter into a road development agreement and pay fees calculated under the 2007 Capital Improvements Program before any final plat approval. *See Affidavit of Mike Mailhot* ¶¶; 4-8. *Affidavit of Larry Mangum* ¶¶ 4-5; *Affidavit of Joe Pachner* ¶¶ 13-16. Final plat is a necessary approval that is granted by the County Commissioners and, without that approval, final plat cannot be recorded. *See Gordon Cruickshank Deposition* pg. 27, L. 18 thru pg. 28, L. 17.

The County did not present any evidence on summary judgment refuting the facts set forth in the Mailhot, Mangum and Pachner affidavits. Simply put, unless this Court's Memorandum Decision was also intended to grant partial summary judgment on Count One of Plaintiffs' Complaint, there still remains a claim not fully adjudicated. Therefore, the County's proposed Motion for Entry of Judgment is either incorrect or is premature. Either way, Plaintiffs object to Valley County's Motion for Entry of Judgment filed January 13, 2011 and request oral argument.

CONCLUSION

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

DATED this 14th day of January, 2011.

EVANS KEANE LLP

By _____
Victor Villegas, Of the Firm
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of January, 2011, 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:

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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' MOTION FOR RECONSIDERATION/ AMENDMENT**

Plaintiffs Buckskin Properties, Inc. and Timberline Development, LLC, by and through their attorneys of record, Evans Keane LLP, move this Honorable Court to reconsider and/or amend those portions of the Court's Memorandum Decision Re: Defendant's Motion for Summary Judgment dated January 7, 2011 to the extent they are deemed to grant summary judgment in favor of Defendant Valley County.

This Motion is further made and based upon the files and records in the above-entitled action, together with Plaintiffs' Memorandum filed herewith. Oral argument is requested.

Dated this 21st day of January, 2011.

EVANS KEANE LLP

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

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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

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR RECONSIDERATION/ AMENDMENT

Plaintiffs Buckskin Properties, Inc. and Timberline Development, LLC, ("Plaintiffs), by and through their attorneys of record, Evans Keane LLP, move this Honorable Court to reconsider and/or amend the Court's Memorandum Decision Re: Defendant's Motion for Summary Judgment dated January 7, 2011.

I. INTRODUCTION

Plaintiffs move this Court to reconsider and/or amend its entry of summary judgment in favor of Defendant Valley County and against Plaintiffs. In its January 7, 2011 Memorandum Decision Re: Defendant's Motion for Summary Judgment (the "Memorandum Decision"), the Court entered summary judgment in favor of Valley County and against Plaintiffs on Plaintiffs' claim for inverse condemnation. The Court ruled that Plaintiffs' inverse condemnation claim accrued on October 24, 2005, when Valley County accepted Plaintiffs' dedication of a right of way to under the Capital Contribution Agreement for Phase 1 of the Meadows at West Mountain (the "Meadows"). (*See* Memorandum Decision, p. 5.). As a result, the Court ruled that Plaintiffs' claims were not brought within the four-year statute of limitation for inverse condemnation. For the reasons set forth below, Plaintiffs seek reconsideration and/or an amendment from this Court with regard to its Memorandum Decision.

II. ARGUMENT

A. Standard for Motion for Reconsideration and/or Amendment.

As threshold matter, Plaintiffs may seek reconsideration of this Court's ruling under Idaho Rule of Civil Procedure 11(a)(2)(B) or 59(e) depending on the nature of the Court's Memorandum Decision. Under either rule, Plaintiffs' motion for reconsideration and/or amendment is timely and proper.

Idaho Rule of Civil Procedure 11(a)(2)(B), governs motions for reconsideration of interlocutory orders. Rule 11(a)(2)(B) provides a district court with authority to reconsider interlocutory orders so long as final judgment has not been entered. A final judgment is one that disposes of the controversy or determines the litigation on its merits. *Evans State Bank v. Skeen*, 30 Idaho 703, 704, 167 P. 1165, 1166 (1917). A judgment or order that is incomplete,

while it may settle some of the rights of the parties, but leaves some issues remaining in the adjudication of the parties' rights, is interlocutory. *Id.* When multiple claims for relief are presented in an action, an adjudication of less than all the claims does not terminate any of the remaining claims and is interlocutory and subject to revision at any time prior to entry of a final judgment. *International Business Machines Corp.* v. *Lawhorn* 106 Idaho 194, 196, 677 P.2d 507, 509 (Ct. App. 1984).

On the other hand, Rule 59(e) allows a district court to modify or amend a final order if a motion is filed within fourteen (14) days of the order. Rule 59(e) affords the Court an opportunity to correct errors of fact or law short of an appeal. *Lowe* v. *Lym*, 103 Idaho 259, 263, 646 P.2d 1030, 1034 (Ct.App.1982) (*quoting First Sec. Bank* v. *Neibaur*, 98 Idaho 598, 570 P.2d 276 (1977)). Since Rule 59(e) motions are brought after final judgment, new evidence may not be presented. *Id.*

In this case there is a dispute between the parties whether the Court's Memorandum Decision disposes of all of Plaintiffs' claims or only Plaintiffs' claims based on inverse condemnation. Since Plaintiffs brought more than one claim in this matter, it is Plaintiffs' position that the Memorandum Decision is not a final order, which is the position set forth in Plaintiffs' Objection to Valley County's Motion for Entry of Judgment, filed with this Court on January 14, 2011. Regardless, this motion is brought within fourteen (14) days of the Court's Memorandum Decision and Plaintiffs do not attempt to introduce new evidence in relation to this motion. Therefore, this motion is properly before the Court whether under Rule 11(a)(2)(B) as a motion for reconsideration or under Rule 59(e) as a motion to modify or amend.

B. Plaintiffs' Claim for Inverse Condemnation on Phases 2 and 3 of the Meadows is Timely.

The Meadows is a multi-phase residential development. Vitally important to the Court's decision on Plaintiffs' inverse condemnation claim is that each and every phase of a multi-phase development requires a separate approval of final plat by the County Commissioners. *See* 67-6504 (the governing board only, not a planning and zoning commission, has full authority to "finally approve land subdivisions"). Valley County's Land Use Development Ordinance outlines the process for obtaining PUD approvals, each of which is approved separately starting with Concept Approval and Ending with Final Plat approval. (*See* Affidavit of Joseph Pachner, Ex. A.). Nothing is more telling of this fact than the existence of two separate impact fee charges to Plaintiffs and two separate contracts that provide for the collecting of the illegal impact fee. Furthermore without that approval, final plat cannot be recorded and a developer cannot go forward with a development. (*See* Deposition of Gordon Cruickshank ("Cruickshank Depo."), p. 27, l. 18 – p. 28, l. 17., attached to the Affidavit of Victor S. Villegas in Support of Plaintiff's Opposition to Motion for Summary Judgment (Villegas Affidavit), Ex. A.).

Valley County did not collect its illegal impact fee for Phases 2 and 3 pursuant to the Capital Contribution Agreement for Phase 1. There was no relationship between the right of way transferred to Valley County pursuant to the Phase 1 Capital Contribution Agreement and the illegal impact fees paid pursuant to the Road Development Agreement for Phases 2 and 3. Simply put, the fees demanded by Valley County are a separate impact fee assessment. This assessment is a separate taking with its own statute of limitations accrual analysis. Each application for final plat stands on its own merits. In order to proceed with final plat for Phases 2 and 3 of the Meadows, Plaintiffs were required to obtain separate approvals independent of Phase 1. Valley County also required Plaintiffs to enter into an entirely separate contract, the

Road Development Agreement, and to pay illegal impact fees under the Road Development Agreement for Phases 2 and 3 of the Meadows.

Finally, impact fees are only collected after it is determined that an impact will actually occur. Plaintiffs had no obligation to proceed with Phases 2 and 3 after completing Phase 1. Had Plaintiffs elected not to proceed with subsequent phases, there could be no impact and, therefore, no illegal fee charged. Since Plaintiffs had no obligation to continue on with Phases 2 and 3 of the Meadows and had no obligation to pay any impact fee until they sought final plat approval, no taking could have occurred until the illegal impact fee actually was paid on December 15, 2005. This is clear under established Idaho law on inverse condemnation. Plaintiffs could not have brought their inverse condemnation claim seeking the payment of just compensation for Phases 2 and 3 at the time Valley County accepted the dedication of right of way for Phase 1. A party cannot maintain an inverse condemnation action unless there has actually been a taking of 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)). Until Plaintiffs actually paid the money, there was no taking. Had Plaintiffs filed a lawsuit for inverse condemnation at the time they signed the Road Development Agreement, but before they actually paid the illegal impact fee under the Road Development Agreement, their taking claim would not have been ripe. Plaintiffs respectfully ask this Court to reconsider or amend its ruling with regard to Plaintiffs' claim for inverse condemnation for the illegal impact fee taken by Valley County for Phases 2 and 3 of the Meadows.

The same holds true for Phases 4 through 6 of the Meadows. Plaintiffs have not yet paid the impact fee required by Valley County or sought approval for final plat for Phases 4 through 6. It is undisputed, however, that the payment of the illegal impact fee remains a condition of

final plat approval. In fact, Valley County, through its Road Superintendent Jerry Robinson, has informed Plaintiffs' representatives that Plaintiffs must enter into a road development agreement and pay fees calculated under the 2007 Capital Improvements Program before final plat for Phases 4 through 6 can be approved. (*See* Affidavit of Mike Mailhot ¶¶, 4-8; Affidavit of Larry Mangum, ¶¶ 4-5; and Affidavit of Joseph Pachner, ¶¶ 13-16.). Under the Court's current ruling, if Plaintiffs desire final plat approval for Phases 4 through 6 of the Meadows, they have no choice but to pay the illegal impact fee without any hope of recourse for inverse condemnation because the accrual date on the claim relates back to Phase 1. This is not the law in Idaho. Established Idaho law requires that a taking actually occur before a property owner can maintain an action for inverse condemnation.

C. The Five (5) Year Statute of Limitations in Idaho Code Section 5-216 Based on a Written Contract Apply Plaintiffs' Declaratory Judgment Claims.

One of Plaintiffs' claims in Count I of its Complaint is for a declaratory judgment from this Court that Valley County's Road Development Agreements requiring payment of impact fees are illegal contracts and void because Valley County uses the agreements to circumvent Idaho law on impact fees. *See* Complaint, ¶¶ 18, 21; *Prayer for Relief*, ¶ B. The Road Development Agreement is a written contract. The applicable statute of limitations states:

> Within five (5) years:
>
> An action upon any contract, obligation or liability founded upon an instrument in writing.
>
> The limitations prescribed by this section shall never apply to actions in the name or for the benefit of the state and shall never be asserted nor interposed as a defense to any action in the name or for the benefit of the state although such limitations may have become fully operative as a defense prior to the adoption of this amendment.

I.C. § 5-216. The Court indicated, however, in footnote 1 of its Memorandum Decision that the five year statute of limitations under Idaho Code section 5-216 is inapplicable to this action because there has been no claim for breach of contract and there is no evidence in the record of a breach of contract.

Plaintiffs agree with the Court that they have not claimed a breach of contract in this matter. The statute of limitations, however, is not limited to actions for a breach of contract. Section 5-216 states that: "[a]n action upon any contract, obligation or liability founded upon an instrument in writing" must be brought within five (5) years. There is no limitation or restriction in the statute that the limitations period applies only to an action "upon any contract" for breach of contract. The limitations period applies to any action founded upon an instrument in writing. In this case plaintiffs have sought a declaratory judgment with regard to the validity and enforceability of written contracts, the Road Development Agreements. A claim of breach is not necessary in order for the five (5) year limitations period to apply. Plaintiffs respectfully ask this Court to reconsider and/or clarify or modify its judgment to the extent the January 7, 2011 Memorandum Decision may dispose of legitimate claims upon a written contract. Since Plaintiffs' declaratory judgment claims have been brought within the five (5) year limitations period for claims on a written instrument, those claims should not be dismissed simply because the claims do not involve a claim for breach of contract.

III. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court reconsider and/or amend its Memorandum Decision Re: Defendant's Motion for Summary Judgment dated January 7, 2011.

Dated this 21st day of January, 2011.

EVANS KEANE LLP

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of January, 2011, 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:

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Victor Villegas

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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

STIPULATION TO MOVE FEBRUARY 17, 2011 MOTIONS HEARING FROM VALLEY COUNTY TO ADA COUNTY

COME NOW Plaintiffs Buckskin Properties, Inc. and Timberline Development, LLC, and Defendant Valley County, by and through their respective attorneys of record, and hereby stipulate and agree that Plaintiffs' Motion for Partial Summary Judgment and Motion for Reconsideration/Amendment, and Defendant's Motion for Entry of Judgment scheduled to be heard on February 17, 2011 at 3:00 p.m. before the Honorable Michael R. McLaughlin shall be heard in Ada County on the _____ day of _____, 2011 at the hour of ___:___ __.m.

DATED this 28th day of January, 2011.

EVANS KEANE LLP

By Victor Villegas
Victor Villegas
Attorneys for Plaintiffs

DATED this 28th day of January, 2011.

GIVENS PURSLEY, LLP

By Christopher H. Meyer for
Martin C. Hendrickson
Attorneys for Plaintiff

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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

ORDER GRANTING STIPULATION TO MOVE FEBRUARY 17, 2011 MOTIONS HEARING FROM VALLEY COUNTY TO ADA COUNTY

THIS MATTER having come before the Court upon the Stipulation to Move February 17, 2011 Motions Hearing from Valley County to Ada County, and having found good cause therefore;

IT IS HEREBY ORDERED that the hearing previously scheduled for February 17, 2011 in Valley County before the Honorable Michael R. McLaughlin on Plaintiffs' Motion for Partial Summary Judgment and Motion for Reconsideration/Amendment, and Defendant's Motion for

Entry of Judgment shall be heard in Ada County on the 11th day of March, 2011 at the hour of 1:00 P.m.

DATED this 8 day of February, 2011.

MICHAEL R. McLAUGHLIN per written directive
District Court Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8 day of February, 2011, 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:

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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 RESPONSE TO MOTION FOR RECONSIDERATION

TABLE OF CONTENTS

INTRODUCTION 1

ARGUMENT 1

I. Plaintiffs' motion is properly presented under Rule 11(a)(2)(B) 1

II. The four-year statute of limitations ran on all phases of the development as soon as Plaintiffs became aware that a fee would be imposed. 2

III. The five-year statute of limitations is inapplicable. 6

CONCLUSION 9

TABLE OF AUTHORITIES

Cases

City of McCall v. Buxton, 146 Idaho 656, 201 P.3d 629 (2009) 7
Cuevas v. Barraza, 146 Idaho 511, 198 P.3d 740 (Idaho Ct. App. 2008) 8
Harris v. State, ex rel. Kempthorne, 147 Idaho 401, 210 P.3d 86 (2009) 4
Johnson v. Lambros, 143 Idaho 468, 147 P.3d 100 (Ct. App. 2006) 2
Mason v. Tucker and Assoc., 125 Idaho 429, 871 P.2d 846 (Ct. App. 1994) 8
McCuskey v. Canyon County Comm'rs, 128 Idaho 213, 912 P.2d 100 (1996) 3
Rueth v. State, 103 Idaho 74, 644 P.2d 1333 (1982) 3
Thompson v. Ebbert, 144 Idaho 315, 160 P.3d 754 (2007) 8
Tibbs v. City of Sandpoint, 100 Idaho 667, 603 P.2d 1001 (1979) 3
Wadsworth v. Idaho Department of Transportation, 128 Idaho 439, 915 P.2d 1 (1996) 3

Rules

I.R.C.P. 11(a)(2)(B) 1, 2
I.R.C.P. 54(a) 2
I.R.C.P. 59(e) 1, 2

Treatises

51 Am. Jur. 2d *Application of Statutes of Limitation* § 91 (2000) 7
51 Am. Jur. 2d *Limitation of Actions* § 160 (2000) 8

INTRODUCTION

This is Defendant Valley County's ("County") response to *Plaintiffs' Motion for Reconsideration/Amendment* ("Reconsideration Motion") and *Memorandum in Support of Plaintiffs' Motion for Reconsideration/Amendment* ("Reconsideration Memorandum") both dated January 21, 2011.

In addition to the Reconsideration Motion, Plaintiffs Buckskin Properties, Inc. and Timberline Development, LLC ("Plaintiffs") have filed a *Motion for Partial Summary Judgment* and *Plaintiffs' Objection to Valley County's Motion for Entry of Judgment filed January 13, 2011*. They re-trace much of same ground again in their *Motion to Disallow Costs and Attorney Fees* and *Plaintiffs' Memorandum in Opposition to Valley County's Memorandum of Costs and Statement in Support*

All of Plaintiffs' post-decision filings share a common theme. They seek to re-hash the same issues that they have briefed, argued, and lost, all the while driving up attorney fees and wasting the Court's time. This is old ground. Plaintiffs' continued churning of this case should be taken into account in consideration of the County's pending Memorandum of Costs.

In their Reconsideration Motion, Plaintiffs press two basic points. First, they contend that the Court should have engaged in a separate statute of limitations analysis for each of the three phases of the development. Second, they repeat the arguments they have made before with respect to the state's five-year statute of limitations.

ARGUMENT

I. PLAINTIFFS' MOTION IS PROPERLY PRESENTED UNDER RULE 11(A)(2)(B).

At the outset of their Reconsideration Memorandum, Plaintiffs go through contortions to justify why their motion is proper under either Idaho R. Civ. P. 11(a)(2)(B) or 59(e). Their argument is both wrong and unnecessary.

Plaintiffs have every right to file a motion for reconsideration under Rule 11(a)(2)(B), but not for the reasons they say. The rule authorizes motions with respect to "interlocutory orders." The Court's *Memorandum Decision Re: Defendant's Motion for Summary Judgment* ("Decision") dated January 7, 2011 is an interlocutory order for the simple reason that it was issued before entry of judgment. *See, Johnson v. Lambros*, 143 Idaho 468, 147 P.3d 100 (Ct. App. 2006). Plaintiffs' contention that it is interlocutory because the Court failed to adjudicate all of Plaintiffs' claims is wrong. The Court did adjudicate them all; it threw them all out because the Plaintiffs violated the statute of limitations. But that does not make it a final judgment. It is an order, not a judgment. See Idaho R. Civ. P. 54(a).

As for Plaintiffs' reference to Rule 59(e), that rule allows for amendment of a judgment, and, as of today, there is no judgment to amend. Consequently, Rule 59(e) has no applicability here.

II. THE FOUR-YEAR STATUTE OF LIMITATIONS RAN ON ALL PHASES OF THE DEVELOPMENT AS SOON AS PLAINTIFFS BECAME AWARE THAT A FEE WOULD BE IMPOSED.

The Meadows has been developed in phases.[1] Plaintiffs insist that the Court is required to separately address the statute of limitations for each phase, and that the statute has run only on Phase 1. This is wrong, and the reason is simple. Plaintiffs knew on or before October 25, 2004 that they would have to pay a fee on all phases.

As the Court recognized in its Decision Memorandum, it makes no difference when a particular fee is quantified or when it is actually paid. The clock begins running when "the full

[1] Phase 1 was subject to the Capital Contribution Agreement of July 26, 2004. Phases 2 and 3 were subject to the Road Development Agreement of September 26, 2005. The parties have not yet entered into a development agreement regarding Phases 4-6. Phases 1-3 have gone to final plat. Phases 4-6 have not.

extent of the plaintiff's loss of use and enjoyment of the property becomes apparent." *McCuskey v. Canyon County Comm'rs* ("*McCuskey II*"), 128 Idaho 213, 217, 912 P.2d 100, 104 (1996).

The Idaho Supreme Court's reference to "full extent" in *McCuskey II* does not mean that the damages must be quantified, just that the plaintiff be aware of the impending loss. *McCuskey II* was a temporary taking case. The Court rejected McCuskey's argument that the taking did not occur until it could be quantified. "Moreover, it is well settled that uncertainty as to the amount of damages cannot bar recovery so long as the underlying cause of action is determined." *McCuskey II*, 128 Idaho at 218, 912 P.2d at 105.

The law on this is consistent and settled. In another case decided the same year, the Idaho Supreme Court explained that the statute begins to run "when the impairment was of such a degree and kind that substantial interference with Wadsworth's property interest became apparent." *Wadsworth v. Idaho Department of Transportation*, 128 Idaho 439, 443, 915 P.2d I, 5 (1996). In *Rueth v. State*, 103 Idaho 74, 79, 644 P.2d 1333, 1338 (1982), the Idaho Supreme Court held that the statute ran on the date of a meeting between parties at which time there was "recognition of the severity of the problem." In another case, the Court has explained, "The actual date of taking, although not readily susceptible to exact determination, is to be fixed at the point in time at which the impairment, of such a degree and kind as to constitute a substantial interference with plaintiffs' property interest, became apparent." *Tibbs v. City of Sandpoint*, 100 Idaho 667, 671, 603 P.2d 1001, 1005 (1979) (inverse condemnation based on airport expansion). In yet another case, the Idaho Supreme Court ruled that the statute of limitations on inverse condemnation ran from the day the plaintiffs were compelled to enter into a mineral lease with the state, not the time they made payments to the state under the lease. "We affirm the district court's determination that the full extent of the Harrises' loss of use and enjoyment of the

property became apparent when they entered into the Mineral Lease. At that point in time, the impairment constituted a substantial interference with their property interest because they signed an agreement promising to pay royalties and rents on the sand and gravel. Therefore, the Harrises are barred from recovering under their inverse condemnation claim by I.C. § 5-224." *Harris v. State, ex rel. Kempthorne*, 147 Idaho 401, 405, 210 P.3d 86, 90 (2009).

In light of these precedents, the County is at a loss to understand why Plaintiffs continue to harp on this. It became apparent to Plaintiffs at some time in 2004 (more than four years before the Complaint was filed on December 1, 2009) that the County intended to charge a road improvement fee on all phases.

How was this apparent? In many ways.[2] First, on March 29, 2004, Plaintiffs themselves included a Proposed Capital Contribution Agreement in their application filed with the Planning and Zoning Commission.[3] The paragraph on "Road Improvements" says "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. . . ." This was reflected as well in the Impact Report also attached to the Application. Exhibit A to Appendix C and Appendix D to Exhibit 2 to *Affidavit of Cynda Herrrick in Support of Motion for Summary Judgment* (Oct. 14, 2010). Thus, by their very own statements, Plaintiffs knew about the road fees even before they filed their Application.

---

[2] The items listed below are a subset of the events documenting that Plaintiffs were aware from the outset that a road improvement fee would be imposed on all phases of their development. Others are discussed in *Valley County's Opening Brief in Support of Motion for Summary Judgment* dated October 14, 2010.

[3] The Application is dated "March 2004" on the footer. The cover letter is dated March 24, 2004. The "Acceptance" by Jack Charters is dated March 29, 2004. Mr. Charters also signed the Application on March 29, 2004. The Application was actually filed on April 1, 2004.

Second, Plaintiffs entered into a Capital Contribution Agreement for Phase 1 on July 26, 2004. Exhibit 1 to *Affidavit of Cynda Herrrick in Support of Motion for Summary Judgment* (Oct. 14, 2010). This Agreement set out the formula that would be applied on a per unit basis ($1,844). From this, Plaintiffs easily could determine what the fee was likely to be on subsequent phases.

Third, On October 25, 2004, Plaintiffs actually conveyed the property (via final plat approval) to the County, as required for Phase 1. Exhibit 15 to *Affidavit of Cynda Herrrick in Support of Motion for Summary Judgment* (Oct. 14, 2010). This was the date that the Court determined started the limitations clock "[a]t the very latest." Memorandum Decision at 5.

Fourth, on September 26, 2005, Plaintiffs entered into a Road Development Agreement for Phases 2 and 3.[4] In this agreement, they agreed to pay cash of $232,160, based on $1,844 per single family lot and $1,383 per apartment unit. Again, it was easy for Plaintiffs to look down the road to Phases 4-6. Each of these four events occurred more than four years before the Complaint was filed on December 1, 2009. Accordingly, the Court was correct in dismissing the entire Complaint.

It is thus inescapable: If Plaintiffs knew they had a takings problem with Phases 1, 2, and 3 (the fees for which were quantified more than four years before the Complaint was filed), they must also have known that they had a problem with Phases 4-6. It is irrelevant, for purposes of the statute of limitations, that the actual payment for Phases 2 and 3 was made later, or that the quantity of the fee for Phases 4-6 has not yet been determined. It is equally irrelevant that

[4] On its face, this agreement refers only to Phase 2. That is because Phase 2 was later renamed Phases 2 and 3, but this reference was not updated to reflect this. *See* Minutes of September 23, 2005, reproduced in Exhibit 18 to Affidavit of Cynda Herrick in Support of Motion for Summary Judgment (Oct. 14, 2010) ("Has been a confusion because of changing Phase II's name [which] is now called Phase II and Phase III.")

Plaintiffs conceivably might decide not to proceed with subsequent phases; they still have a cause of action as soon as it is apparent that their right to develop is unlawfully restricted. Finally, Plaintiffs' contention that a takings claim as to Phases 2-6 would not accrue until a payment was made is simply and profoundly wrong.[5] The Court acted correctly in dismissing Plaintiffs' entire case.

As the County repeatedly has pointed out, it is now considering what to do going forward, in light of this and other litigation challenging development fees.[6] All options are on the table. Accordingly, the County contends that the litigation vis-à-vis Phases 4-6 is not ripe. But if it is ripe, it became ripe in early 2004 when the County began applying its road improvement fee formula. Accordingly, the statute has run in any event.

III. THE FIVE-YEAR STATUTE OF LIMITATIONS IS INAPPLICABLE.

Plaintiffs contend that Count 1 of their Complaint sounds in contract, making it subject to the state's statute of limitations for contract actions. This statute sets a five-year deadline for "[a]n action based upon any contract, obligation or liability founded upon an instrument in writing." Idaho Code § 5-216 (emphasis supplied).

Before going further, it may be enough to point out that Plaintiffs have mischaracterized Count 1. In fact, nothing in Count 1 (or any other count) sounds in contract. For starters, Count 1 is entitled "Declaratory Relief – Violation of State Law and State and Federal Constitutions."

---

[5] Ignoring all the case law, Plaintiffs continue to make assertions like this: "Until Plaintiffs actually paid the money, there was no taking." Reconsideration Memorandum at 5.

[6] "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." *Valley County's Opening Brief in Support of Motion for Summary Judgment*, at 25 (Oct. 14, 2010). See also, *Valley County's Statement of Material Facts in Support of Motion for Partial Summary Judgment*, ¶¶ 62 and 63 (Oct. 14. 2010); *Affidavit of Cynda Herrick in Support of Motion for Summary Judgment*, ¶¶ 37 and 38 (Oct. 14, 2010).

Paragraph 18 complains about the County's "practice" of imposing fees on developers. Paragraph 19 complains that the County has not complied with IDIFA and that money collected "amounts to an unauthorized tax." Paragraph 20 also complains that monies collected "constitute an unauthorized tax." Paragraph 21 complains that because of these violations, the County cannot force "developers to pay monies under the guise of a Road Development Agreement and/or Capital Contribution Agreement." In other words, the County's actions are illegal in spite of the contracts, not because of the contracts. Moreover, none of the prayers for relief involve either breach or invalidation of the agreements.

In sum, ignoring the words of their own Complaint, Plaintiffs now contend that Count I seeks declaratory relief that the development agreements "are illegal and void." Reconsideration Memorandum at 6. This is simply not so. Plaintiffs' contract theory is plainly an afterthought—an effort to re-cast the Complaint in a way that was never intended.

The Court properly rejected such semantic gamesmanship. The Court rightly looked to the nature of this case—which is plainly a takings case. "In determining the nature of the actions for limitations purposes, it is the substance or gravamen of the action, rather than the form of the pleading, that controls. In other words, in determining which statute of limitations governs an action, the court looks to the reality and essence of the action, and not to its name." 51 Am. Jur 2d *Application of Statutes of Limitation* § 91 (2000).[7]

[7] Another example of the need to look past the plaintiff's characterization of the case to its true basis is found in *City of McCall v. Buxton*, 146 Idaho 656, 201 P.3d 629 (2009). In that case, the City sued its attorneys for malpractice. It also included a claim for unjust enrichment, seeking return of the money paid to its attorneys. This Court dismissed that latter claim, stating, "Although styled as a claim of unjust enrichment, Count Six is clearly premised upon legal malpractice." *Buxton*, 146 Idaho at 663, 201 P.3d at 636. The Idaho Supreme Court upheld that portion of the District Court's decision.

The Court was also correct in declining to apply the five-year statute because "this is not an action for breach of contract." Memorandum Decision at 6 n.1. Plaintiffs concede that they have not plead breach of contract, but insist the statute is not limited to breach of contract. Reconsideration Memorandum at 7. Yet they point the Court to not a single case supporting this conclusion. What case law is out there does not support their position.

The Idaho Court of Appeals provided this definitive summary in 2008:

> Pursuant to I.C. § 5-216, an action upon any contract, obligation or liability founded upon an instrument in writing must be filed within five years. A cause of action for breach of contract accrues upon breach for limitations purposes.

Cuevas v. Barraza, 146 Idaho 511, 198 P.3d 740 (Idaho Ct. App. 2008) (emphasis supplied). This is consistent with the black letter law on the subject:

> The statute of limitations begins to run in civil actions on contracts from the time the right of action accrues. This is usually the time the agreement is breached, rather than the time the actual damages are sustained as a consequence of the breach.

51 Am. Jur. 2d *Limitation of Actions* § 160 (2000) (emphasis supplied).

Plaintiffs' position is further demolished by the fact that they are alleging there was no valid contract. In *Thompson v. Ebbert*, 144 Idaho 315, 318, 160 P.3d 754, 757 (2007), the Court found that contract statute of limitations was inapplicable because the contract at issue was void *ab initio*. In other words, if Plaintiffs' theory of the case is that there was no valid contract, this is not an action "upon a contract." Instead, this is an action based on alleged constitutional and statutory violations, and is therefore subject to the four-year statute.

Plaintiffs seem to believe that if a case's facts involve a contract, it is a suit "upon a contract." This is not the case. For example, the case of *Mason v. Tucker and Assoc.*, 125 Idaho 429, 871 P.2d 846 (Ct. App. 1994), involved a single transaction (a court reporter's failure to prepare an accurate transcript) and various claims based on that event: section 1983, fraud,

negligence, tortuous interference, and breach of contract. The Court carefully applied a different statute of limitations to each claim, applying the contract statute of limitations only to the claim for breach of contract. The fact that a contract governed the entire action of the court reporter did not turn the rest of the case into a case "upon a contract."

An analogy might illustrate. If someone made a contract to kill another person and then did so, the resulting homicide could give rise to a criminal prosecution and a wrongful death action—but not a suit upon a contract. The problem with the killing is not that the contract was breached, but that it was carried out. In the case at bar, Plaintiffs' contention that this is a case "upon a contract" is no less absurd.

CONCLUSION

Plaintiffs' Reconsideration Motion accomplishes nothing but more stirring of an old pot. They have offered nothing new and nothing helpful to the Court. Their motion should be denied.

DATED this 28th day of February, 2011.

VALLEY COUNTY PROSECUTING ATTORNEY

By: _____
Matthew C. Williams

GIVENS PURSLEY, LLP

By: _____
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By: _____
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I hereby certify that on the 28th day of February, 2011, a true and correct copy of the foregoing was served upon the following individual(s) by the means indicated:

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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

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Plaintiffs,

v.

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

Defendant.

Case No. CV 2009-554

VALLEY COUNTY'S REPLY IN SUPPORT OF MOTION FOR ENTRY OF JUDGMENT

TABLE OF CONTENTS

INTRODUCTION 1
ARGUMENT 1
I. Statute of limitations 1
II. Mootness and Ripeness 2
III. Interaction of statute of limitations and mootness/ripeness. 3
CONCLUSION 3

TABLE OF AUTHORITIES

Cases

Cabaccagn v. U.S. Citizenship and Immigration Services, 627 F.3d 1313 (9th Cir. 2010) 3

Statutes

Idaho Development Impact Fee Act, Idaho Code §§ 67-8201 to 67-8216 2

INTRODUCTION

On January 7, 2011, the Court filed its *Memorandum Decision Re: Defendant's Motion for Summary Judgment* ("*Decision*"), which fully disposed of the each of the claims by Plaintiffs Buckskin Properties, Inc. and Timberline Development, LLC ("Plaintiffs"). Two days later, on January 10, 2011, Plaintiffs filed their *Motion for Partial Summary Judgment*. On January 13, 2011, Defendant Valley County ("County") filed *Valley County's Response to Motion for Partial Summary Judgment*. On the same day, it filed *Valley County's Motion for Entry of Judgment*. The following day, January 14, 2011, Plaintiffs filed *Plaintiffs' Objection to Valley County's Motion for Entry of Judgment Filed January 13, 2011* ("*Objection*"). This is the County's reply to that *Objection*.

ARGUMENT

In their *Objection*, Plaintiffs contend that Count One of their *Complaint* has survived the Court's *Decision* because Count One is forward-looking to yet uncompleted Phases 4-6 for which a road development agreement has not yet been negotiated. This is incorrect for the reasons discussed below.

I. STATUTE OF LIMITATIONS

First, the statute of limitations applies to the entire project (which is governed by a single conditional use permit ("CUP")). It does not run separately on separate phases. Plaintiffs knew when they signed the Capital Contribution Agreement on July 14, 2004, when right-of-way was conveyed via final plat on October 25, 2004, and again when they signed the Road Development Agreement on September 26, 2005, that their project—all of it—was subject to fees which they allege are illegal. Plaintiffs had no reason to believe, at that time, that subsequent phases would be treated any differently. Hence, the statute ran on all phases, and Plaintiffs' *Complaint* was filed too late.

II. MOOTNESS AND RIPENESS

On March 7, 2011, the Valley County Board of County Commissioners adopted *Resolution 11-6: Resolution Regarding Road Improvement Fees and Development Agreements* ("*Resolution*"). A copy of the *Resolution* is attached to the *Affidavit of Cynda Herrick Regarding Resolution 11-6* filed today. By this action, the County has gone on record stating that developers who have outstanding payment obligations under existing road development agreements have three options. These are set out in Section 4 on page 3 of the *Resolution*. First, they may make those remaining payments. Second, if development is stalled, they may ask for a "time out" on those obligations. Third, they may notify the County that the permit holder wishes to renegotiate the road development agreement.

In addition, Section 2 on pages 2-3 of the *Resolution* provides that the County will not enter into any new road development agreements calling for the payment of fees or other contributions for off-site road improvements unless (1) the County has adopted an ordinance in compliance with the Idaho Development Impact Fee Act, Idaho Code §§ 67-8201 to 67-8216 ("IDIFA") or (2) the permit holder voluntarily and expressly waives any objection to such fees.

Accordingly, any claim that Plaintiffs may believe they have with respect to Phases 4-6 has been mooted by the *Resolution*. Given Plaintiffs' opportunity to negotiate a road development agreement subject to the terms of Resolution 11-6, it is apparent that no one can say today what that new agreement might look like. Accordingly, lacking a crystal ball, Plaintiffs cannot possibly contend that the Court is in a position to rule on that new agreement. In other words, any old claim is moot and any potential new claim is not yet ripe.

III. INTERACTION OF STATUTE OF LIMITATIONS AND MOOTNESS/RIPENESS.

Given that the entire case is barred by the statute of limitations, there is no need for the Court to address ripeness and mootness. The Court need address ripeness and mootness only if it determines that Count One is not barred by the statute of limitations.

By the way, the fact that claims with respect to future road development agreements have become moot and unripe is not inconsistent with the Court's ruling that the entire case is tardy under the statute of limitations. In other words, it is possible for the statute of limitations to run on a matter that subsequently becomes moot or unripe. This does not occur very often, but it is a principle recognized by the courts. *Cabaccagn v. U.S. Citizenship and Immigration Services*, 627 F.3d 1313 (9th Cir. 2010) ("[A]lthough jurisdiction is usually determined from the filing of the relevant complaint, after-arising events can defeat jurisdiction by negating the ripeness of a claim."). In other words, a claim may be ripe when filed, but become un-ripe later. Thus, there is no inconsistency in arguing (1) that the takings claim for the entire subdivision accrued and was ripe more than four years ago and was therefore barred by the statute of limitations and (2) that the forward-looking challenge as to Phases 4-6 has been mooted and made no longer ripe by the action of the County this week.

CONCLUSION

The County's action in adopting Resolution 11-6 reflects the fact that it has acted in good faith throughout this process. It adopted the Capital Improvements Program in good faith, believing that it had the authority to do so. It issued CUPs and entered into road development agreements with these Plaintiffs and others in a spirit of cooperation to improve the roads and allow development. It relied in good faith on payments made, and it spent that money in accordance with those agreements for the direct benefit of Plaintiffs and other developers whose applications might otherwise have been denied for lack of public services. Without conceding

that its actions were in violation of law, the County's action in adopting this *Resolution* shows that it is acting in recognition of the fact that recent litigation concerning impact fees put the situation in a new light. The County wants to do the right thing and has done the right thing. Acting out of caution and concern for all citizens, businesses, and taxpayers, the County is steering a course aimed at preventing further controversies over the lawfulness of its approach to road improvement funding. At the same time, the County seeks to protect its taxpayers from unfair claims from persons like Plaintiffs who see an opportunity to line their pockets based on agreements they previously made with the County that have served them well. For these reasons, the Court should enter judgment in favor of the County on all counts.

DATED this 9th day of March, 2011.

VALLEY COUNTY PROSECUTING ATTORNEY

By: _____ for
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 9th day of March, 2011, a true and correct copy of the foregoing was served upon the following individual(s) by the means indicated:

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MAR 09 2011
Case No. _____ Inst. No. _____
Filed _____ A.M 1:43 P.M.

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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

AFFIDAVIT OF CYNDA HERRICK REGARDING RESOLUTION 11-6

STATE OF IDAHO)
)ss.
County of Valley)

I, CYNDA HERRICK, being first duly sworn, depose and say:

1. I am the Valley County Planning and Zoning Administrator and have been for the entire time the applications for The Meadows at West Mountain ("The Meadows") have been processed through Valley County.

2. The statements in this affidavit are based upon my personal knowledge or upon information contained in official records of Valley County that set forth Valley County's regularly conducted and regularly recorded activities or both.

3. Attached hereto as Exhibit 1 is a true and correct copy of Resolution 11-6 entitled "Resolution Regarding Road Improvement Fees and Development Agreements."

4. The attached resolution was adopted by the Valley County Board of County Commissioners on March 7, 2011.

I declare under penalty of perjury that the foregoing is true and correct.

DATED this 9th day of March, 2011.

Cynda Herrick

SUBSCRIBED and SWORN to before me this 9th day of March, 2011.

GLENNA K. YOUNG NOTARY PUBLIC STATE OF IDAHO

Notary Public for Idaho
Residing at Cascade
Commission expires: 7-30-2011

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of March, 20110, a true and correct copy of the foregoing was served upon the following individual(s) by the means indicated:

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Christopher H. Meyer

RESOLUTION NO. 11-6

RESOLUTION REGARDING
ROAD IMPROVEMENT FEES AND DEVELOPMENT AGREEMENTS

WHEREAS, in order to provide a fair and equitable process for ensuring that adequate public services are provided to new developments, Valley County (the "County") prepared a Capital Improvement Program ("CIP"). The CIP, as revised from time to time, identifies and quantifies anticipated capital costs for road improvements within discrete geographic areas within the County.

WHEREAS, the County has entered into agreements under which real estate developers agree to pay their proportionate share of road improvement costs based on cost estimates derived from the CIP. These agreements have gone by various names, including "development agreement," "road development agreement," and "capital contribution agreement." They are referred to collectively herein as "Road Development Agreements."

WHEREAS, in considering applications for permits and zone changes, the County is obligated by the Local Land Use Planning Act ("LLUPA") to take into account its ability to provide services required for the new development. For instance, LLUPA's provision on special use permits states: "A special use permit may be granted to an applicant if the proposed use is conditionally permitted by the terms of the ordinance, . . . subject to the ability of political subdivisions, including school districts, to provide services for the proposed use . . . ." Idaho Code § 676512(a). Similarly, the zoning provision of LLUPA states: "Particular consideration shall be given to the effects of any proposed zone change upon the delivery of services by any political subdivision providing public services, including school districts, within the planning jurisdiction." In addition, zoning and conditional use permits must be consistent with the comprehensive plan, which is mandated to address such things as school facilities and transportation. Idaho Code § 67-6508(c). Finally, the Idaho Development Impact Fee Act ("IDIFA") provides: "Nothing in this chapter shall obligate a governmental entity to approve any development request which may reasonably be expected to reduce levels of service below minimum acceptable levels established in the development impact fee ordinance."

WHEREAS, fees and other contributions generated by these Road Development Agreements have enabled the County to approve new real estate projects on the basis of anticipated revenues provided under the Road Development Agreements. In the absence of these Road Development Agreements, the County might have been required to deny approval of some or all of these permit applications, or to impose sequence and timing conditions, on the basis that adequate public services were not then available to serve the proposed development.

EXHIBIT 1

WHEREAS, fees and other contributions generated by these Road Development Agreements have in fact been used to provide road improvements in accordance with the CIP, and these improvements have benefitted the holders of permits making the contributions.

WHEREAS, the County undertook the program and actions described above in the good faith belief that it had the authority to do so under its police power and under the following statutory provisions: (1) Idaho Code § 31870, which provides: "Notwithstanding any other provision of law, a board of county commissioners may impose and collect fees for those services provided by the county which would otherwise be funded by ad valorem tax revenues. The fees collected pursuant to this section shall be reasonably related to, but shall not exceed, the actual cost of the service being rendered," (2) Idaho Code § 67-6511A, which authorizes development agreements in connection with rezones, (3) Idaho Code § 67-6512(d)(2), which authorizes the County to impose conditions via conditional use permits controlling the "sequence and timing of development," (4) Idaho Code § 67-6512(d)(6), which authorizes the County to require "the provision for on-site or off-site public facilities or services," and (5) Idaho Code § 67-6512(d)(8), which authorizes the County to require "mitigation of effects of the proposed development upon service delivery by any political subdivision, including school districts, providing services within the planning jurisdiction."

WHEREAS, based on its understanding that the fees contemplated under the CIP and the various Road Development Agreements fell within its authority based on the County's police power and the statutory provisions cited above, the Board of County Commissioners believed in good faith that it was not necessary to enact an impact fee ordinance in compliance with IDIFA. Accordingly, the County did not enact an IDIFA-compliant impact fee ordinance.

WHEREAS, the County acted in good faith in entering into all prior Road Development Agreements and has spent money collected thereunder in accordance with and in reliance on those Road Development Agreements.

WHEREAS, years after the Road Development Agreements were entered into, some of the parties to some of the Road Development Agreements have initiated litigation contending that the fees agreed to under the Road Development Agreements are unlawful taxes because the County has failed to enact an IDIFA-compliant impact fee ordinance.

NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF COUNTY COMMISSIONERS OF VALLEY COUNTY, as follows:

Section 1: The County will defend its right not to reimburse persons who previously have paid fees or made contributions in accordance with prior Road Development Agreements which the County entered into in good faith and upon which the County reasonably has relied.

Section 2: In order to avoid litigation costs and uncertainty, the Board of County Commissioners will no longer enter into Road Development Agreements calling for the payment of fees or other contributions for off-site road improvements until such time as the County adopts

an IDIFA-complaint ordinance, unless the permit holder voluntarily and expressly waives any objection thereto. In the absence of such waiver, the County will negotiate the terms of future Road Development Agreements in good faith in a manner that addresses the County's obligation to assure the availability of adequate public services in ways other than the imposition of fees or other contributions for off-site road improvements. The inability of the County to secure funding under the CIP on a going forward basis may be taken into account by the Planning and Zoning Commission and by the Board of County Commissioners in considering applications for permits for new developments.

Section 3: The restrictions set out in Section 2 of this Resolution do not prohibit the County from imposing requirements or securing commitments respecting on-site or on-boundary improvements or dedications that are authorized under LLUPA and the County's police power, nor do they prohibit the County from requiring or entering into agreements respecting water, sewer, trash collection, stormwater, and other services provided by the County or its authorized agents or contractors for the direct benefit of the permit holder, property owner, or tenant.

Section 4: To the extent any Road Development Agreement now in effect calls for payment of fees or other contributions which have not been made as of this date, the permit holder may elect (1) to make those payments or contributions in accordance with the Road Development Agreement, (2) to request the County to temporarily suspend the permit holder's obligations under the Road Development Agreement and/or other deadlines for a period of time during which no further development is anticipated, or (3) to notify the County that the permit holder wishes to negotiate a new Road Development Agreement. Upon such a request to negotiate a new Road Development Agreement, the Board of County Commissioners will enter into good faith negotiations with the permit holder in that regard. If, at the time of such negotiation, an IDIFA-compliant impact fee ordinance has been enacted, the revised Road Development Agreement will be in accordance with such ordinance. If no IDIFA-compliant impact fee ordinance has been enacted at the time of the negotiation, the County will seek other ways to meet its obligation to ensure that adequate public services are available to serve the new development. This could include conditions respecting the sequence and timing of development so as to ensure that development occur on a schedule consistent with the availability of public services. Absent an IDIFA-compliant ordinance, the new Road Development Ordinance, as in the past will contain no requirements for payments or contributions by the permit holder unless such requirements are expressly and voluntarily agreed to by the permit holder.

ADOPTED on this 7th day of March, 2011, by majority vote of the Board of County Commissioners of Valley County, Idaho pursuant to and in compliance with all applicable public notice, hearing, and other procedural requirements.

Gordon Cruickshank

Gordon L. Cruickshank
Chairman by Ray Moore per phone Authorization

Gerald "Jerry" Winkle
Commissioner

Ray Moore
Commissioner

Archie N. Banbury

ATTEST: Archie N. Banbury, Clerk

ORIGINAL

ARCHIE N. BANBURY, CLERK
By A Garrison Deputy
MAR 28 2011
Case No. _____ Inst. No. _____
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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

NOTICE OF SUPPLEMENTAL AUTHORITY

Pursuant to Idaho Rule of Evidence 201, Plaintiffs submit the attached Order on Summary Judgment in the matter of *Cove Springs Development, Inc. and Redstone Partners, L.P. v. Blaine County*, Case No. CV-2008-22, and respectfully ask the Court take judicial notice of the attached Order on Summary Judgment with regard to Plaintiffs' pending Motion for Partial Summary Judgment in this case.

DATED this 25th day of March, 2011.

EVANS KEANE LLP

By _____
Victor Villegas, Of the Firm
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of March, 2011, 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:

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Cove Springs Development, Inc. and
Redstone Partners, L.P.

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

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

COVE SPRINGS DEVELOPMENT, INC., a Nevada corporation, and REDSTONE PARTNERS, L.P., a Nevada limited partnership,

Petitioners/Plaintiffs,

v.

BLAINE COUNTY, a political subdivision of the State of Idaho, and JOHN DOES 1 THROUGH 20, Whose True Names Are Unknown,

Respondents/Defendants,

TOM O'GARA, JOHN STEVENSON, and GERRY BASHAW,

Intervenors.

Case No. CV2008-22

ORDER ON SUMMARY JUDGMENT ON COUNTS 2 AND 3

This matter came on for hearing before the Court on May 29, 2008. Appearing at that hearing on behalf of the Plaintiffs Cove Springs Development, Inc. and Redstone Partners, L.P. were Chris Meyer, Boise, Idaho, Martin Hendrickson, Boise, Idaho, and Martin Flannes, Hailey, Idaho. Appearing on behalf of the Defendant Blaine County was Tim Graves, Hailey, Idaho. Also appearing at the hearing but not participating was Ned Williamson, Hailey, Idaho on behalf of Intervenors Tom O'Gara, John Stevenson, and Gerry Bashaw. The Court, having reviewed and considered the Petitioners/Plaintiffs' Motion for Summary Judgment on Counts 2 and 3, the supporting pleadings, and the briefing with respect to the motion, and having heard and considered the oral argument of respective counsel, finds and rules as follows:

Count 2 – Threshold, PUD, and CD Standards for Conformance with Comprehensive Plan (2004 Ordinance)

1. In its Answer, the County admitted paragraphs 211, 212, 213, 214, and 215 of Cove Springs' Complaint, which state as follows:

> 211. County Subdivision Threshold Standard § 10-5-2B states that no application shall be approved unless the Board determines that: "The proposed subdivision of land conforms to and is in accordance with the comprehensive plan text and map."
>
> 212. County Subdivision Planned Unit Development Standard § 10-6-8A.10 states that a planned unit development is contingent upon the Board's determination: "That the PUD will conform to the comprehensive plan."
>
> 213. County Subdivision Cluster Development Standard § 10-9-8E states that a cluster development is contingent upon the Board's determination: "That the A-20 CD conforms to the goals, recommendations and conclusions in the Blaine County comprehensive plan."
>
> 214. Under Idaho law, the purpose of a comprehensive plan is to serve as a general guide in instances involving zoning decisions such a[s] revising or adopting a zoning ordinance.
>
> 215. Under Idaho law, the County may not elevate its comprehensive plan to the level of controlling zoning law.

2. The County admitted Paragraphs 211, 212, 213, 214, and 215 of Cove Springs' Complaint. These are accurate statements of the law. *Urrutia v. Blaine County*, 134 Idaho 353, 358, 2 P.3d 738, 743 (2000).

3. Subdivision Ordinance §§ 10-5-2.B, 10-6-8.A.10, and 10-9-8.E, as written in 2004, apply to the Cove Springs applications. These ordinances remain in effect throughout Blaine County today with minor changes under the 2025 Ordinances which do not affect the analysis or conclusions reached in this order.

4. The Local Land Use Planning Act, Idaho Code §§ 67-6501 to 67-6537 ("LLUPA") contemplates that the comprehensive plan shall serve as a planning document to guide the adoption of zoning and other ordinances. Comprehensive plans are forward-looking, visionary documents. Although LLUPA requires that land use ordinances adopted by the County should generally reflect the broad goals and aspirations of the comprehensive plan, not all of the specific provisions in a comprehensive plan are necessarily reflected in current zoning ordinances. *Giltner Dairy, LLC v. Jerome County*, 2008 WL 803001 (Mar. 27, 2008). Thus, the standards and conditions spelled out in its adopted land use ordinances constitute the County's articulation as to how the comprehensive plan is to be applied to subdivision applications, including the Cove Springs Applications. Cove Springs and all citizens of Blaine County are entitled to rely on that articulation. Thus, individual zoning and subdivision permit applications are to be measured against the specific criteria set out in the applicable ordinances.

5. The following statement by the Idaho Supreme Court is controlling here:

> It is to be expected that the land to be subdivided may not agree with all provisions in the comprehensive plan, but a more specific analysis, resulting in denial of a subdivision application based solely on non-compliance with the comprehensive plan **elevates the plan to the level of legally controlling zoning law**. Such a result affords the Board unbounded discretion in examining a

> subdivision application and allows the Board to effectively re-zone land based on the general language in the comprehensive plan. As indicated above, the comprehensive plan is intended merely as a guideline whose primary use is in guiding zoning decisions. Those zoning decisions have already been made in this instance. . . . Thus, . . . the Board [may not rely] completely on the comprehensive plan in denying these applications, and should instead have crafted its findings of fact and conclusions of law to *demonstrate that the goals of the comprehensive plan were* considered, but were simply used in conjunction with the zoning ordinances, the subdivision ordinance and any other applicable ordinances in evaluating the proposed developments.

Urrutia, 134 Idaho at 358-59, 2 P.3d 743-44.

6. There is no issue before the Court on these present motions as to whether and what extent the County may consider its comprehensive plan in passing upon a subdivision application. More particularly, what weight Blaine County chooses to give to its comprehensive plan in considering or passing upon a subdivision application, or the question of whether the County can give its comprehensive plan any weight in passing upon a PUD or a Cluster Development or a Subdivision Application, (as opposed to adopting a new ordinance, or considering a conditional use permit, etc.) are not before the Court.

7. County ordinances are law. By including in its ordinance 10-5-2.B a *requirement* that "No application shall be approved" unless the Board "determines the proposed subdivision conforms to and is in accordance with the comprehensive plan," Blaine County has elevated its comprehensive plan "to the level of legally controlling zoning law." Therefore, this particular provision of this ordinance violates *Urrutia v. Blaine County*, 134 Idaho 353, 358, 2 P.3rd 738, 743 (2000), and is contrary to law on its face.

8. By including in its ordinance 10-6-8.A.(10) a *requirement* that a planned unit development is "contingent upon the Boards determination" that "the PUD will conform to the comprehensive plan," Blaine County has elevated its comprehensive plan "to the status of legally

controlling zoning law." Therefore, this particular provision of this ordinance violates *Urrutia*, and is contrary to law on its face.

9. By including in its ordinance 10-9-8.E a *requirement* that a Cluster Development is "contingent upon the Boards determination" that the "A-20 CD conforms to the goals, recommendations, and conclusions in the Blaine County comprehensive plan," Blaine County has elevated its comprehensive plan "to the status of legally controlling zoning law." Therefore, this particular provision of this ordinance violates *Urrutia* and is contrary to law on its face.

The Court therefore ORDERS, ADJUDGES, AND DECREES that Blaine County Code Sections 10-5-2.B, 10-6-8.A.10, and 10-9-8.E are contrary to law and are therefore null, void, and without further force and effect.

Count 2 - Unauthorized Exactions in Threshold, PUD, and CD Standards (2004 Ordinance)

10. In its Answer, the County admitted paragraphs 219, 221, 223, 225, 226, 227, 228, 229, 230, 231, 233, 234, 235, 236, 240, 241, 243, 244, and 249 of Cove Springs' Complaint, which state as follows:

> 219. County Subdivision Threshold Standard § 10-5-2.C states that no application shall be approved unless the Board determines that: "The proposed subdivision shall not adversely affect the quality of essential public services and facilities to current residents, including but not limited to school facilities, school bus transportation, police and fire protection, emergency services, and roads, and shall not require substantial additional public funding in order to meet the needs created by the proposed subdivision. The applicant shall be required by the Board to mitigate the adverse effects of the proposed subdivision, which may include, without limitation, contributions for additional capital improvements, on-going maintenance, and labor costs. The plan for, timing of, and proposed phasing of the mitigation shall be in a form acceptable to the Board."

221. County Subdivision Planned Unit Development Standard § 10-6-8.A.9 states that a planned unit development is contingent upon the Board's determination: "That the developer will finance the improvement of the road network outside of the PUD where traffic generated by the PUDs increased densities make such improvements necessary."

223. County Subdivision Cluster Development Standard § 10-9-8.D makes approval of a Cluster Development contingent upon a determination: "That where off-site impacts are found to result from the proposed development of the A-20 CD, the developer has proposed improvements to mitigate said impacts. Such improvements may include but not be limited to the road network (road improvements not limited to surfacing, school bus turnarounds, widening, intersections, bridges, culverts, and drainage facilities), fire protection facilities, and trails/recreation."

225. Idaho is a Dillon's Rule state.

226. Under Dillon's Rule, counties have no inherent authority to regulate or to tax.

227. Under Dillon's Rule, the authority of Idaho counties to tax derives from grants found in or necessarily implied by the Idaho Constitution and state statutes.

228. The Idaho Constitution contains a grant of police power to Idaho counties.

229. The grant of police power to counties contained in the Idaho Constitution does not include a general authority to tax.

230. The police power includes the authority to impose regulatory fees that are incidental to proper regulatory programs for the purpose of funding such programs.

231. The police power includes the authority to charge user fees for services provided by the County to a user of those services.

233. Development impact fees and other measures whose primary purpose is to generate revenue for services and capital improvements benefiting the public in general are not incidental regulatory fees.

234. Development impact fees and other measures whose primary purpose is to generate revenue for services and capital improvements benefiting the public in general are not user fees for services.

235. Development impact fees and other measures whose primary purpose is to generate revenue for services and capital improvements benefiting the public in general are not the sort of traditional exactions authorized under the police power in association with dedications within and primarily benefiting the development.

236. Development impact fees and other measures whose primary purpose is to generate revenue for services and capital improvements benefiting the public in general are taxes.

240. Article VII, § 6 of the Idaho Constitution is not self-executing. Any power of taxation authorized under this section must be implemented by legislation.

241. The only statute authorizing counties to assess development impact fees is the Idaho Development Fee Act, Idaho Code §§ 67-8201 to 67-8216 ("IDIFA").

243. County Ordinances §§ 10-5-2.C, 10-6-8.A.9 and 10-9-8.D do not comply with the procedural and substantive requirements of IDIFA.

244. The County did not enact County Ordinances §§ 10-5-2.C, 10-6-8.A.9 and 10-9-8.D pursuant to or in reliance on IDIFA.

249. The County has no authority to enforce a void ordinance or to apply a void ordinance to the Development Applications.

11. The County admitted Paragraphs 219, 221, 223, 225, 226, 227, 228, 229, 230, 231, 233, 234, 235, 236, 240, 241, 243, 244, and 249 of Cove Springs' Complaint. These are accurate statements of the law. *Idaho Building Contractors Ass'n v. City of Coeur d'Alene* ("*IBCA*"), 126 Idaho 740, 890 P.2d 326 (1995); *Brewster v. City of Pocatello*, 115 Idaho 502, 768 P.2d 765 (1988).

12. Subdivision Ordinance §§ 10-5-2.C, 10-6-8.A.9, and 10-9-8.D, as written in 2004, apply to the Cove Springs applications. These ordinances remain in effect throughout Blaine County today with minor changes under the 2025 Ordinances which do not affect the analysis or conclusions reached in this order.

13. Subdivision Ordinance §§ 10-5-2.C, 10-6-8.A.9, and 10-9-8.D establish development impact fees that the County seeks to impose without compliance with IDIFA.

14. The County has no inherent authority to impose taxes under its police power. The County must impose development impact fees pursuant to IDIFA or not at all.

15. The County could have imposed development impact fees to recover certain costs associated with new developments pursuant to IDIFA, but apparently elected not to do so.

16. The fees imposed under these ordinances are not incidental regulatory fees or user fees, but are intended to raise revenues for public purposes benefiting the County as a whole. Accordingly, the fees imposed under these ordinances constitute illegal taxes in violation of the Idaho Constitution and are, therefore, null and void.

> 17. "Approval of a plat may not be conditioned upon payment by the subdivider of a specified portion of the cost of improvements if no power to exact such a payment is delegated by the statutes. The county has a duty to keep all roads in reasonable repair and may not discharge that duty by imposing the costs on local developers, absent statutory authority; thus, requiring a developer to pave a county road as a condition for approving a site plan is ultra vires."
>
> 83 Am. Jur. 2d *Zoning and Planning* § 485, at 420 (2003) (emphasis added).

18. In addition, even if the County had inherent authority to impose taxes (which it does not), Subdivision Ordinance §§ 10-5-2.C, 10-6-8.A.9, and 10-9-8.D are void because they have been preempted by IDIFA. IDIFA is a broad regulatory program that comprehensively addresses development impact fees in Idaho and was intended "to occupy the entire field of

regulation." *Envirosafe Services of Idaho v. County of Owyhee*, 112 Idaho 687, 689, 735 P.2d 998, 1000 (1987).

19. Specifically, with regard to designated paragraph 223, the County argues that compliance with Standard § 10-9-8.D is voluntary. While part of that may be true, the County has made approval "contingent" on whether the proposed development has voluntarily agreed to contribute to mitigate off site impacts. When viewed in context, the County has conditioned approval upon an agreement by the developer to contribute to offsite improvements for clearly designated public purposes. In other words, the County has conditioned approval upon the developer's agreement to voluntarily pay a tax. In that regard, the County seeks to do indirectly, (by coercing payment of a fee for mitigation of offsite public impacts) what it may not do directly (levy an "exaction" or tax for precisely the same purpose).

Idaho Code 67-6513 requires that: "Fees established for purposes of mitigating the financial impacts of development must comply with the provisions of chapter 82, title 67, Idaho Code." Additionally, the Idaho Development Impact Fee Act ("IDIFA") provides, at section 67-8204(17): "A development impact fee ordinance shall include a schedule of development impact fees for various land uses per unit of development." Blaine County's ordinance includes no such fee schedule, an omission the County seeks to get around by arguing their fees are "voluntary", that the County does not need to enact or set a fee, (because they have placed the burden on the developer to set a fee[1]), and that the County may or may not actually set a fee requiring any payment in any particular instance. The issue is not whether the County *will or might* set a fee; the statute *demands* that they set a fee. This attempt by the County (to avoid setting fees as

[1] Blaine County Ordinance 10-9-8.D provides that approval is contingent upon a determination that "...the developer has proposed improvements to mitigate such impacts."

called for by IDIFA) runs afoul of IDIFA. Another subsection of the same statute sets forth the result. 67-8204(25) provides:

> "Any provision of a development impact fee ordinance that is inconsistent with the requirements of this chapter *shall be null and void and that provision shall have no legal effect.* A partial invalidity of a development impact fee ordinance shall not affect the validity of the remaining portions of the ordinance that are inconsistent with the requirements of this chapter."

The Court therefore ORDERS, ADJUDGES, AND DECREES that Sections 10-5-2.C, 10-6-8.A.9, and 10-9-8.D are contrary to law and are therefore null, void, and without further force and effect.

Count 3 –Road Mitigation Fee (2025 Ordinance)

19. In its Answer, the County admitted paragraphs 225, 226, 227, 228, 229, 230, 231, 233, 234, 235, 236, 240, and 241 of Cove Springs' Complaint, which are quoted above.

20. In its Answer, the County admitted paragraphs 256, 257, and 258 of Cove Springs' Complaint, which state as follows:

> 256. The Road Mitigation Fee [defined in paragraph 254 of the Complaint as Public Ways and Property Ordinance § 6-1-4 as amended in 2007] does not fall within the scope of IDIFA.
>
> 257. The Road Mitigation Fee does not comply with the procedural and substantive requirements of IDIFA.
>
> 258. The County did not enact the Road Mitigation Fee pursuant to or in reliance on IDIFA.

21. The County admitted Paragraphs 225, 226, 227, 228, 229, 230, 231, 233, 234, 235, 236, 240, 241, 256, 257, and 258 of Cove Springs' Complaint. These are accurate statements of the law.

22. The Road Mitigation Fee required under Public Ways and Property Ordinance § 6-1-6, (sometimes referred to as 6-1-4 in Cove Springs documents) as amended in 2007, establishes a development impact fee that the County seeks to impose without compliance with IDIFA.

23. The County has no inherent authority to impose taxes under its police power. The County must impose development impact fees pursuant to IDIFA or not at all.

24. The County could have imposed development impact fees to recover costs associated with roads pursuant to IDIFA, but elected not to do so.

25. The Road Impact Fee is not an incidental regulatory fee or user fee, but is intended to raise revenues for public purposes benefiting the County as a whole. Accordingly, the fees imposed under this ordinance constitute illegal taxes in violation of the Idaho Constitution and are, therefore, null and void. The County may not use an applicant's failure to pay an illegal fee as a basis for denial of a permit application.

26. In addition, even if the County had inherent authority to impose taxes (which it does not), the Road Impact Fee is void because it has been preempted by IDIFA. IDIFA is a broad regulatory program that comprehensively addresses development impact fees in Idaho and was intended "to occupy the entire field of regulation." *Envirosafe Services of Idaho v. County of Owyhee*, 112 Idaho 687, 689, 735 P.2d 998, 1000 (1987).

The Court therefore ORDERS, ADJUDGES AND DECREES that Section 6-1-6 of the Blaine County Code is contrary to law and is therefore null and void, and without further force and effect.

Count 3 – Inclusionary Housing Fee (2025 Ordinance)

27. In its Answer, the County admitted paragraphs 225, 226, 227, 228, 229, 230, 231, 233, 234, 235, 236, 240, and 241 of Cove Springs' Complaint, which are quoted above.

28. In its Answer, the County admitted paragraphs 265, 266, 267, 268, and 269 of Cove Springs' Complaint, which state as follows:

> 265. Subdivision Ordinance § 10-5-4 adopted in 2006, provides, in relevant part: "*INCLUSIONARY HOUSING*: Twenty percent (20%) of the lots and houses in all subdivisions, including condominium subdivisions, approved and platted after the adoption date hereof shall be permanently restricted as community housing . . . ."
>
> 266. Pursuant to Subdivision Ordinance § 10-5-4, an applicant for subdivision approval may propose and the Board may approve, any of four (4) options, or a combination thereof, for providing community housing that is required by the ordinance, as follows: (1) the applicant build community housing on the site of the subdivision; (2) the applicant build community housing off the site of the subdivision; (3) the applicant convey land, either within the subdivision or off the site of the subdivision, for community housing; or (4) the applicant pay a fee in lieu for community housing.
>
> 267. Subdivision Ordinance § 10-5-4 does not fall within the scope of IDIFA.
>
> 268. Subdivision Ordinance § 10-5-4 does not comply with the procedural and substantive requirements of IDIFA.
>
> 269. The County did not enact Subdivision Ordinance § 10-5-4 pursuant to or in reliance on IDIFA.

29. The County admitted Paragraphs 225, 226, 227, 228, 229, 230, 231, 233, 234, 235, 236, 240, 241, 265, 266, 267, 268, and 269 of Cove Springs' Complaint. These are accurate statements of the law.

30. The Inclusionary Housing Fee imposed under Subdivision Ordinance § 10-5-4 establishes a development impact fee that the County seeks to impose without compliance with IDIFA.

31. The County has no inherent authority to impose taxes under its police power. The County must impose development impact fees pursuant to IDIFA or not at all.

32. IDIFA authorizes certain categories of development impact fees, to wit:

1. water supply,
2. wastewater facilities,
3. roads,
4. storm water collection facilities,
5. parks and open space, and
6. public safety facilities.

Idaho Code § 67-8203(24). Affordable workforce housing is not among them.

33. Accordingly, the County has no authority to impose a development impact fee for affordable workforce housing, even if it complied with the procedural requirements of IDIFA. If the County wishes to provide affordable workforce housing, it must do so through the expenditure of property tax revenues or other authorized means. The Legislature has not authorized the County to shift the cost of building affordable housing from the community as a whole to individual developers and property owners.

34. The County has no inherent authority to impose taxes. The Inclusionary Housing Fee is not an incidental regulatory fee or user fee, but is intended to raise revenues for public purposes benefiting the County as a whole. Accordingly, the fees imposed under this ordinance constitute illegal taxes in violation of the Idaho Constitution and are, therefore, null and void.

35. In addition, even if the County had inherent authority to impose taxes (which it does not), the Inclusionary Housing Fee is void because it has been preempted by IDIFA. IDIFA is a broad regulatory program that comprehensively addresses development impact fees in Idaho

and was intended "to occupy the entire field of regulation." *Envirosafe Services of Idaho v. County of Owyhee*, 112 Idaho 687, 689, 735 P.2d 998, 1000 (1987).

The Court therefore ORDERS, ADJUDGES, AND DECREES that Section 10-5-4 of the Blaine County Code is contrary to law, is therefore null and void, and without further force and effect.

Count 3 - Wildlife Overlay District (2025 Ordinance)

36. In its Answer, the County admitted paragraphs 262 and 263 of Cove Springs' Complaint, which state as follows:

> 262. The Wildlife Overlay District includes all "Classified Lands" as defined in Zoning Ordinance § 9-20-4.
>
> 263. "Classified Lands" are defined in Zoning Ordinance § 9-20-4 solely by reference to determinations made by the IDFG [Idaho Department of Fish and Game].

37. The County admitted Paragraphs 262 and 263 of Cove Springs' Complaint. These are accurate statements of the law as enacted by Blaine County.

38. Zoning Ordinance § 9-20-4 defines "Classified Lands" in terms of elk winter habitat, mule deer winter habitat, elk migration corridors, mule deer migration corridors, and other areas identified by IDFG. The ordinance provides:

- "Elk migration corridors in Blaine County are designated by IDF&G."
- "Elk winter habitat in Blaine County is designated by IDF&G."
- "Mule deer migration corridors are designated by IDF&G."
- "Mule deer winter habitat in Blaine County is designated by IDF&G."

39. Zoning Ordinance § 9-20-5 provides: "Prior to the planning or designating of any subdivision, the applicant shall contact IDF&G and any other applicable agency or professional as determined by the administrator to identify any classified lands on the subject property."

40. LLUPA authorizes and mandates the establishment of zoning districts. Idaho Code § 67-6511.

41. LLUPA does not require creation of a zoning map in so many words, but it does require the designation of zoning districts which, as a practical matter, may be displayed on a zoning map.

42. A zoning map describes current zoning. It is not to be confused with the land use map that is part of the comprehensive plan.[2]

43. LLUPA does not expressly authorize overlay districts, which are special zones imposed on top of an underlying zoning district. However, zoning districts and overlay districts are permissible forms of zoning, so long as they comply with statutory, common law, and constitutional requirements for land use zoning. One of the requirements inherent in all zoning is that landowners and other affected parties be informed of the boundaries of the zones. This may be accomplished either by mapping or by the establishment of objective, textual standards that allow persons to determine with reasonable certainty which zones apply to a given property.

44. Accordingly, the County's adoption of a Wildlife Overlay District without mapping its boundaries does not, in itself, violate LLUPA.

45. However, the Wildlife Overlay District fails to provide any objective criteria (or any criteria at all) to define its boundaries, other than "references used by IDF&G." Accordingly, there is no way for a person to determine whether a property is within or outside of

[2] The operative provision simply refers to this as a "map." Idaho Code § 67-6508(e). It is referred to as a "land use map" in Idaho Code § 67-6509(d).

the Wildlife Overlay District other than to ask for a determination by a third party (an IDFG employee) who answers to no one within the County and who can issue a conclusory determination on a case-by-case basis unbounded by any fixed, articulated standards or criteria. Furthermore, the ordinance allows IDFG to modify such "references" from time to time without any notice to and/or input from affected landowners.

The County argues that "wildlife move" which makes the adoption of a map difficult. Petitioners argue that the County had a map that was used prior to the adoption of this ordinance. At different times, in different years, virtually everyone in Hailey, Bellevue, or Ketchum has seen moose in the streets, elk in their yards or subdivisions, elk or deer wintering on surrounding hillsides, bears along the river, etc. Yes, wildlife move, and they move in different quantities to different locations in different years; however, the county has sought in this instance to avoid responsibility for fixing or studying or ascertaining the general movement of various animals, and/or zoning in accordance with general movements of particular populations, by delegating this entire responsibility to the Idaho Department of Fish and Game.

Fish and Game undoubtedly has more expertise than the County Commissioners in this area, but Fish and Game has no authority to set and/or designate zoning boundaries. The setting of zoning boundaries is a function that rests entirely with the designated agents of Blaine County.

In making this delegation, the County has unlawfully delegated *all* of its authority to officially designate the boundaries of a zoning district, the Wildlife Overlay District, to a non elected non county agent that needs to hold no hearings, accepts no public input, can change its designations of "classified lands" (and therefore the zoning boundary line) daily, weekly, or monthly, without notice, be subject to differing opinions and criteria within Fish and Game itself, and are not required to set forth their designations in a published map or guide for the benefit of

landowners, buyers, sellers, developers, or the general public. The boundaries of the zoning district don't even shift with the wildlife; they shift with the opinions of unknown persons in an amorphous state agency.

Blaine County has wholly abandoned its exclusive statutory obligation to establish a zoning boundary in this instance. The fact that the public can find out where these boundaries exist by contacting Idaho Fish and Game, or possibly obtain a waiver from the County administrator, or address grievances or complaints about the process or how Fish and Game exercises its discretion, before the Board of Commissioners does not save the ordinance. Contrary to the County's arguments, the Board of Commissioners, in this circumstance, is not able to control the ability of Fish and Game to exercise discretion. It is too late for there to be any discussion regarding an exercise of discretion once Fish and Game has made a designation. That comes about because Blaine County has delegated to Fish and Game the ability *to set and establish law* – the boundary of a zoning district, which may not be delegated. Any challenge after that is not a challenge to someone's exercise of discretion, it becomes a challenge to legislative authority, something quite different.

46. The delegation of land use planning and zoning authority contained in LLUPA is a complete, comprehensive, and exclusive delegation to local city and county governments. "The LLUPA provides both mandatory and exclusive procedures for the implementation of planning and zoning." *Sprenger, Grubb & Associates v. Hailey*, 133 Idaho 320, 321, 986 P.2d 343, 344 (1999) ("*Sprenger Grubb II*"). "[LLUPA] directs cities and counties to plan and zone. . . . Exercise of the authority to zone and plan, whether by governing board or by the established [planning and zoning] commissions, is made mandatory by I.C. § 67-6503." *Gumprecht v. City of Coeur d'Alene*, 104 Idaho 615, 617, 661 P.2d 1214, 1216 (1983), overruled on other grounds,

City of Boise City v. Keep the Commandments Coalition, 143 Idaho 254, 257, 141 P.3d 1123, 1126 (2006). "The legislature clearly intended that the authority to enact comprehensive plans, establish zoning districts and adopt amendatory ordinances be exercised exclusively by city and county legislative or governing bodies and pursuant to specific prescribed procedures." *Gumprecht*, 104 Idaho at 618, 661 P.2d at 1217 (1983). "We conclude that the power to approve a subdivision application in the impact area resides exclusively with the County." *Blaha v. Bd. of Ada County Commr's*, 134 Idaho 770, 777, 9 P.3d 1236, 1234 (2000) (only the county has the authority to approve applications in the area of impact, even if the county wished to cede or delegate that authority to a city).

47. IDFG is charged by the Legislature with the regulation of fishing and hunting and with wildlife research. Idaho Code §§ 36-101 to 36-124. It has no regulatory authority over habitat on private lands.

48. Zoning Ordinance § 9-20-4 constitutes an unlawful delegation of regulatory authority by the County to another agency. *Gumprecht*, 104 Idaho at 617, 661 P.2d at 1216 (holding that the City of Coeur d'Alene may not, in effect, delegate its planning and zoning responsibilities under LLUPA to the people by holding an initiative election on zoning issues).

49. LLUPA preempts Zoning Ordinance § 9-20-4, because the ordinance violates LLUPA's assignment of decision-making authority to local officials and authorizes non-elected officials outside of county government to make binding determinations that affect the land use entitlement process.

50. If the County desires to make use of the expertise of IDFG, the U.S. Fish and Wildlife Service, the University of Idaho, the USDA Extension Service, or any other expert, it should invite their views in the context of a hearing process that accommodates rebuttal of

evidence and which reserves the final decision to the County, as mandated by LLUPA. The result of that process should be the adoption of a map or objective criteria that clearly define the boundaries of the zone.

51. Accordingly, Zoning Ordinance § 9-20-4 is inconsistent with fundamental principles of zoning law. Zoning Ordinance § 9-20-4 on its face violates both LLUPA and the due process clauses of the Idaho and federal constitutions. The Court hereby declares, adjudges, and decrees it is void and of no further force and effect.

Therefore, the Court ORDERS, ADJUDGES, AND DECREES that Blaine County Code section 9-20-4 is contrary to law and is therefore null and void, and without further force and effect.

IT IS SO ORDERED.

DATED this 3rd day of June, 2008.

ROBERT J. ELGEE
District Judge

CLERK'S CERTIFICATE OF SERVICE

I hereby certify that on this 3 day of June, 2008, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Jim J. Thomas Timothy K. Graves Blaine County Prosecuting Attorney's Office 201 2nd Ave. South, Suite 100 Hailey, ID 83333	____ U. S. Mail X Hand Delivered ____ Overnight Mail ____ Facsimile ____ E-mail
David R. Lombardi Christopher H. Meyer Martin C. Hendrickson GIVENS PURSLEY LLP 601 West Bannock St. P.O. Box 2720 Boise, Idaho 83701-2720	X U. S. Mail ____ Hand Delivered ____ Overnight Mail ____ Facsimile ____ E-mail
Martin A. Flannes FLANNES LAW, PLLC P.O. Box 1090 Hailey, Idaho 83333	X U. S. Mail ____ Hand Delivered ____ Overnight Mail ____ Facsimile ____ E-mail
Ned C. Williamson Williamson Law Office, PPLC 115 Second Avenue South Hailey, ID 83333	X U. S. Mail ____ Hand Delivered ____ Overnight Mail ____ Facsimile ____ E-mail

Lindsay Fisus
Deputy Clerk

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, Defendant.	Case No. CV-2009-554C MEMORANDUM DECISION (1) PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT (2) DEFENDANT'S MOTION FOR ENTRY OF JUDGMENT (3) PLAINTIFFS' MOTION FOR RECONSIDERATION/AMENDMENT (4) PLAINTIFFS' MOTION TO DISALLOW COSTS AND ATTORNEY FEES

APPEARANCES

For Plaintiff: Jed Manwaring and Victor Villegas of Evans Keane LLP

For Defendant: Christopher Meyer and Martin Hendrickson of Givens Pursley

PROCEEDINGS

This matter came before the Court on (1) Plaintiffs' Motion for Partial Summary Judgment; (2) Defendant's Motion for Entry of Judgment; (3) Plaintiffs' Motion for Reconsideration/Amendment; and (4) Plaintiffs' Motion to Disallow Costs and Attorney Fees. After hearing oral argument, the Court took the matter under advisement.

BACKGROUND

The Plaintiffs Buckskin Properties, Inc. ("Buckskin") and Timberline Development, LLC ("Timberline") 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 the Plaintiffs' final plat for the various phases of the Meadows. The Plaintiffs filed this lawsuit seeking a declaration that the contracts under which Valley County required the payment of impact fees are invalid and seeking a judgment that Valley County violated the Plaintiffs' rights in conditioning approval of their project based on the payment of the impact fees. On October 14, 2010, Valley County filed its Motion for Summary Judgment seeking dismissal of the Plaintiffs' lawsuit on the grounds that the statute of limitations has run and that the Plaintiffs voluntarily entered into the agreements and paid the fees. On January 7, 2011, the Court entered its Memorandum Decision granting Valley County's Motion for Summary Judgment.

DISCUSSION

Plaintiffs' Motion for Partial Summary Judgment and Defendant's Motion for Entry of Judgment

Summary judgment will be granted only "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c). When considering a summary judgment motion, the trial court must construe the record liberally in favor of the non-moving party and draw all reasonable factual inferences in favor of such party. *Bear Lake West Homeowner's Assoc. v. Bear Lake County*, 118 Idaho 343, 346, 796 P.2d 1016, 1019 (1990). The motion will be denied if conflicting inferences may be drawn from the evidence or if reasonable people might reach different conclusions. *Parker v. Kokot*, 117 Idaho 963, 793 P.2d 195 (1990).

The Plaintiffs are seeking summary judgment on Count One of their Complaint because they contend that it survived the Court's ruling on the Defendant's previous

Motion for Summary Judgment because Count One relates to uncompleted Phases 4-6 for which a Road Development Agreement has not yet been negotiated. However, as the Court stated in its previous Memorandum Decision, "[t]he actual date of taking, although not readily susceptible to exact determination, is to be fixed at the point in time at which the impairment, of such a degree and kind as to constitute a substantial interference with plaintiffs' property interest, became apparent." *Tibbs v. City of Sandpoint*, 100 Idaho 667, 671, 603 P.2d 1001, 1005 (1979).

Here, the entire project was governed by a single Conditional Use Permit and at the very latest, October 25, 2004 was the date when the statute of limitations began to run on all of the Plaintiffs' claims regarding each phase of the entire project because that was the date when the dedication of right of way was accepted and it was at that point in time at which an impairment of such a degree and kind as to constitute a substantial interference with the Plaintiffs' property interest became apparent. Although there may be some dispute as to the exact date when the statute of limitations began to run, the dispute does not create a genuine issue of material fact because October 25, 2004 was the latest point in time that the statute of limitations could have began to run as a matter of law.

In addition, on March 7, 2011, the Valley County Board of County Commissioners adopted Resolution 11-6: Resolution Regarding Road Improvement Fees and Development Agreements ("Resolution"). The Resolution provides that the County will not enter into any new road development agreements calling for the payment of fees or other contributions for off-site road improvements unless (1) the County has adopted an ordinance in compliance with the Idaho Development Impact Fee Act or (2) the permit holder voluntarily and expressly waives any objection to such

fees. Based on the subsequent adoption of the Resolution, it appears the Plaintiffs' claims with respect to Phases 4-6 have also been rendered moot because the Plaintiffs will now have an opportunity to negotiate a Road Development Agreement for Phases 4-6, which will be subject to the terms of the Resolution. Therefore, the Court denies the Plaintiffs' Motion for Partial Summary Judgment and grants the Defendant's Motion for Entry of Judgment in favor of the County on all counts of the Complaint.

Plaintiffs' Motion for Reconsideration/Amendment

A motion for reconsideration of an order granting summary judgment can be made prior to entry of final judgment. I.R.C.P. 11(a)(2)(B); *Puckett v. Verska*, 144 Idaho 161, 166, 158 P.3d 937, 942 (2007). A party may submit new evidence with the motion for reconsideration but is not required to do so. *Johnson v. Lambros*, 143 Idaho 468, 473, 147 P.3d 100, 105 (Ct. App. 2006). A decision to grant or deny a motion for reconsideration is within the sound discretion of the trial court. *Van v. Portneuf Med. Ctr.*, 147 Idaho 552, 560, 212 P.3d 982, 990 (2009).

The Plaintiffs argue that the Court should reconsider its Memorandum Decision on the Defendant's previous Motion for Summary Judgment for two reasons. First, the Plaintiffs argue that the Court is required to separately address the statute of limitations for each phase of the project and that the statute of limitations has only run on Phase 1. Second, the Plaintiffs argue that Count 1 of their Complaint arises from a contract, which makes that claim subject to the five year statute of limitations for contract actions.

The Plaintiffs' first argument is without merit because "[t]he actual date of taking, although not readily susceptible to exact determination, is to be fixed at the point in time at which the impairment, of such a degree and kind as to constitute a substantial interference with plaintiffs' property interest, became apparent." *Tibbs v. City of*

Sandpoint, 100 Idaho 667, 671, 603 P.2d 1001, 1005 (1979). As stated previously, the entire project was governed by a single Conditional Use Permit and at the very latest, October 25, 2004 was the date when the statute of limitations began to run on all of the Plaintiffs' claims regarding each phase of the entire project because that was the date when the dedication of right of way was accepted and an impairment of such a degree and kind as to constitute a substantial interference with the Plaintiffs' property interest became apparent. It is irrelevant that the project was divided into separate phases because the entire project was governed by a single Conditional Use Permit and the Plaintiffs had no reason to believe that the later phases of the project would not be subject to the same impact fees as the earlier phases of the project.

The Plaintiffs' second argument is also without merit because this is simply not an action based on a contract. It is an action based on inverse condemnation. Under the Plaintiffs' interpretation of I.C. § 5-216, any cause of action where there was some type of contract between the parties would be subject to a five year statute of limitations regardless of whether the cause of action stemmed from the contract itself. This interpretation is incorrect. *See Fla. Agency for Health Care Admin. v. St. John Med. Plans, Inc.*, 674 So.2d 911, 912 (Fla. 3d DCA 1996) (noting that "[c]haracterizing the claim as an inverse condemnation will not convert what appears to be a pure breach of contract action into something more"); *see also, Tex. S. Univ. v. State St. Bank & Trust Co.*, 212 S.W.3d 893, 916-17 (Tex.App.-Houston 1st Dist. 2007) (discussing the differences between an inverse condemnation claim and a contract dispute).

Idaho Code § 5-224 applies in this case and contains the statute of limitations for an inverse condemnation claim. "An action for [inverse condemnation] must be commenced within four (4) years after the cause of action shall have accrued." *See C &*

G. Inc. v. Canyon Highway Dist. No. 4, 139 Idaho 140, 143, 75 P.3d 194, 197 (2003). In this case, the Complaint was filed on December 1, 2009 and October 25, 2004 was the latest date when the statute of limitations could have started to run. As such, the Plaintiffs were required to bring their inverse condemnation action by October 25, 2008 in order to comply with the four year statute of limitations.[1] Therefore, the Court denies the Plaintiffs' Motion for Reconsideration/Amendment.

Plaintiffs' Motion to Disallow Costs and Attorney Fees

The Defendant is seeking recovery of $666.00 in costs as a matter of right pursuant to I.R.C.P. 54(d)(1)(C), $697.00 in discretionary costs pursuant to I.R.C.P. 54(d)(1)(D), and $56,165.00 in attorney fees pursuant to I.C. §§12-117 and/or 12-121, as provided under I.R.C.P. 54(e)(5). The Plaintiff has filed a Motion to Disallow Costs and Attorney fees in this matter.

I.R.C.P. 54(d)(1)(C) provides that:

> When costs are awarded to a party, such party shall be entitled to the following costs, actually paid, as a matter of right:
> . . .
> 9. Charges for reporting and transcribing of a deposition taken in preparation for trial of an action, whether or not read into evidence in the trial of an action.
> 10. Charges for one (1) copy of any deposition taken by any of the parties to the action in preparation for trial of the action.

I.R.C.P. (d)(1)(D) provides that:

> Additional items of cost not enumerated in, or in an amount in excess of that listed in subparagraph (C), may be allowed upon a showing that said costs were necessary and exceptional costs reasonably incurred, and should in the interest of justice be assessed against the adverse party.

[1] Even assuming that the Plaintiffs' cause of action for inverse indemnification could be classified as a breach of contract claim, the Plaintiffs' claim would still be barred under a five year statute of limitations because they filed their Complaint more than five years after October 25, 2004, which was the latest date when the statute of limitations could have started to run.

> The trial court, in ruling upon objections to such discretionary costs contained in the memorandum of costs, shall make express findings as to why such specific item of discretionary cost should or should not be allowed.

I.R.C.P. 54(e)(5) provides that:

> Attorney fees, when allowable by statute or contract, shall be deemed as costs in an action and processed in the same manner as costs and included in the memorandum of costs . . . .

I.C. 12-117(1) provides that:

> Unless otherwise provided by statute, in any administrative proceeding or civil judicial proceeding involving as adverse parties a state agency or political subdivision and a person, the state agency or political subdivision or the court, as the case may be, shall award the prevailing party reasonable attorney's fees, witness fees and other reasonable expenses, if it finds that the nonprevailing party acted without a reasonable basis in fact or law.

I.C. 12-121 provides that:

> In any civil action, the judge may award reasonable attorney's fees to the prevailing party or parties, provided that this section shall not alter, repeal or amend any statute which otherwise provides for the award of attorney's fees. The term "party" or "parties" is defined to include any person, partnership, corporation, association, private organization, the state of Idaho or political subdivision thereof.

The Plaintiffs argue that the pursuit of their claims against the County was in good faith and was not without a reasonable basis in fact or law because the County was collecting illegal impact fees and there were genuine legal issues regarding the appropriate accrual date of the inverse condemnation claim. Both parties spent a significant amount of time briefing the statute of limitations issue and it was not clear from the outset of the litigation exactly when the statute of limitations began to run. Although the Court ultimately determined under the summary judgment standard that October 25, 2004 was the latest possible date when the statute of limitations could have started to run, there was a legitimate issue of law that was in dispute. Therefore,

the Court finds that the Plaintiffs were acting with a reasonable basis in fact or law and deny the Defendant's request for attorney fees. The Court also denies the Defendant's request for discretionary costs because the Defendant has not made a sufficient showing of how those costs were necessary and exceptional. However, the Court will award the Defendant $666.00 in costs as a matter of right pursuant to I.R C.P. 54(d)(1)(C).

CONCLUSION

The Court (1) DENIES the Plaintiffs' Motion for Partial Summary Judgment; (2) GRANTS the Defendant's Motion for Entry of Judgment; (3) DENIES the Plaintiffs' Motion for Reconsideration/Amendment; and (4) GRANTS IN PART Plaintiffs' Motion to Disallow Costs and Attorney Fees by awarding the Defendant $666.00 in costs as a matter of right under I.R.C.P. 54(d)(1)(C). The Defendant will prepare an appropriate judgment with an IRCP 54(b) certification.

DATED this 11th day of April 2011.

MICHAEL McLAUGHLIN
DISTRICT JUDGE

CERTIFICATE OF MAILING

I hereby certify that on the 11 day of April 2011, I mailed (served) a true and correct copy of the within instrument to:

VALLEY COUNTY COURT
VIA EMAIL

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ARCHIE N. BANBURY
Clerk of the District Court

By: _____
Deputy Clerk

ORIGINAL

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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' OBJECTION TO VALLEY COUNTY'S PROPOSED JUDGMENT FILED APRIL 13, 2011

Plaintiffs, by and through their attorneys of record, Evans Keane LLP, submit this Objection to Valley County's Proposed Judgment delivered under cover letter dated April 13, 2011.

Defendant's proposed Judgment at paragraph #2 states "That all of Plaintiffs' claims against Defendant are dismissed with prejudice and;..."

This Court's April 11, 2011 Memorandum Decision granted Defendant's Motion For Entry of Judgment because this Court found that Plaintiffs' claims for Phases 4-6 were rendered

moot by the enactment of Resolution 11-6. *See. Memorandum Decision pp. 3-4.* Such finding does not merit dismissal with prejudice of Plaintiffs' claims with respect to Phases 4-6. Plaintiffs have not yet met with Defendant to determine what requirements, if any, will be imposed as a condition to final plat approval.

CONCLUSION

For the reasons stated above Plaintiffs request that any entry of judgment dismissing Plaintiffs' claims with respect to Phases 4-6 be done without prejudice.

DATED this 13th day of April, 2011.

EVANS KEANE LLP

By _____
Victor Villegas, Of the Firm
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of April, 2011, 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 Facsimile: (208) 382-7124	[X] 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 Facsimile: (208) 388-1300	[X] U.S. Mail [X] Fax [ ] Overnight Delivery [ ] Hand Delivery

_____
Victor Villegas

ARCHIE N. BANBURY, CLERK
BY _____ DEPUTY
APR 13 2011
Case No._____ Inst. No._____
Filed_____ A.M. 5:20 P.M

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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 **RESPONSE TO PLAINTIFFS' OBJECTION TO PROPOSED JUDGMENT**

COMES NOW, the Defendant, Valley County, by and through its attorneys of record, and hereby submits its Response to Plaintiffs' Objection to Proposed Judgment.

On April 11, 2011, the Court entered its *Memorandum Decision* ("*April Decision*") concerning the pending motions in this action. The end result of that decision was to confirm that the Court's *Memorandum Decision Re: Defendant's Motion for Summary Judgment*, entered on January 7, 2011, fully disposed of the each of the claims by Plaintiffs. In the *April Decision*, the Court clarified that all of Plaintiffs' state law claims were barred by the four year statute of limitations, noting that they all arose from the same Conditional Use Permit and that all of the claims accrued at the same time. In accordance with the Court's instructions contained in the final sentence of the *April Decision*, Valley County submitted its proposed judgment to the Court, a copy of which is attached hereto as Exhibit A ("*Proposed Judgment*").

Plaintiffs object to the *Proposed Judgment* on the ground that Plaintiffs' claims regarding phases 4 through 6 of their development were held to be moot based upon Valley County's recent adoption of Resolution 11-6. Plaintiffs' objection to the *Proposed Judgment* is without merit because the Court, in the *April Decision*, clearly stated that all of Plaintiffs' claims were barred by the statute of limitations.

> Here, the entire project was governed by a single Conditional Use Permit and at the very latest, October 25, 2004 was the date when the statute of limitations began to run on all of the Plaintiffs' claims regarding each phase of the entire project because that was the date when the dedication of right of way was accepted and it was at that point in time at which an impairment of such a degree and kind as to constitute a substantial interference with the Plaintiffs' property interest became apparent. Although there may be some dispute as to the exact date when the statute of limitations began to run, the dispute does not create a genuine issue of material fact because October 25, 2004 was the latest point in time that the statute of limitations could have began to run as a matter of law.

(*April Decision*, p. 3; *see also* pp. 4-5.) Thus, the *Proposed Judgment* accurately reflects the Court's rulings and dismissal of all of Plaintiffs' claims with prejudice is appropriate.

Valley County recognizes that the Court discussed Resolution 11-6 in the *April Decision* and concluded that Plaintiffs' claims regarding phases 4-6 of their development have been rendered moot. However, that portion of the *April Decision* is plainly articulated by the Court to be an additional basis for dismissal of those claims. (*Id.*, pp. 3-4.) If the Court had determined that the claims related to phases 4-6 were not barred by the statute of limitations and, instead, had ruled that such claims were subject to dismissal only based on mootness, then Plaintiffs would have a point. But a judgment of dismissal with prejudice of all claims is proper here because the Court ruled that "at the very latest, October 25, 2004 was the date when the statute of limitations began to run on all of the Plaintiffs' claims regarding each phase of the entire project . . ." (*Id.*, p. 5, emphasis added.)

For these reasons, Valley County respectfully submits that the Court should enter judgment in favor of the County on all counts consistent with the *Proposed Judgment*.

DATED this 13th day of April, 2011.

GIVENS PURSLEY, LLP

By: _____
Martin C. Hendrickson
Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of April, 2011, 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

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- ☐ Hand Delivery
- ☒ Facsimile
- ☐ E-Mail

Martin C. Hendrickson

EXHIBIT A

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 JUDGMENT

THIS MATTER having come before the Court pursuant to *Valley County's Motion for Entry of Judgment*, and this Court having previously granted *Valley County's Motion for Summary Judgment* in its Memorandum Decision entered on January 7, 2011, and this Court having also considered *Plaintiffs' Motion for Partial Summary Judgment*, *Plaintiffs' Motion for Reconsideration*, *Valley County's Memorandum of Costs and Attorney Fees*, and *Plaintiffs' Motion to Disallow*;

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

1. That judgment is entered in favor of the Defendant and against the Plaintiffs on all counts of *Plaintiffs' Complaint*;

2. That all of Plaintiffs' claims against the Defendant are dismissed with prejudice, and;

3. That Plaintiffs shall pay to Valley County $666.00 for its costs pursuant to IRCP Rule 54(d)(1)(C), plus interest accruing at the statutory rate from and after the date of entry of judgment.

DATED this _____ day of April, 2011.

MICHAEL R. MCLAUGHLIN
District Court Judge

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the Court has determined that there is no just reason for delay of the entry of a final judgment and that the Court has and does hereby direct that the above judgment shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

DATED this _____ day of April, 2011.

MICHAEL R. MCLAUGHLIN
District Court Judge

CLERK'S CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of April, 2011, a true and correct copy of the foregoing was served upon the following individual(s) by the means indicated:

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Matthew C. Williams
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ARCHIE N. BANBURY
Clerk of the District Court

By: _____
Deputy Clerk

ARCHIE N. BANBURY, CLERK
BY [illegible] DEPUTY
APR 19 2011
Case No. _____ Inst. No. _____
Filed _____ A.M. 2:29 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, Plaintiffs, v. VALLEY COUNTY, a political subdivision of the State of Idaho, Defendant.	Case No. CV 2009-554 **JUDGMENT**

THIS MATTER having come before the Court pursuant to *Valley County's Motion for Entry of Judgment*, and this Court having previously granted *Valley County's Motion for Summary Judgment* in its Memorandum Decision entered on January 7, 2011, and this Court having also considered *Plaintiffs' Motion for Partial Summary Judgment*, *Plaintiffs' Motion for Reconsideration*, *Valley County's Memorandum of Costs and Attorney Fees*, and *Plaintiffs' Motion to Disallow*;

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

1. That judgment is entered in favor of the Defendant and against the Plaintiffs on all counts of *Plaintiffs' Complaint*;

2. That all of Plaintiffs' claims against the Defendant are dismissed with prejudice, and;

3. That Plaintiffs shall pay to Valley County $666.00 for its costs pursuant to IRCP Rule 54(d)(1)(C), plus interest accruing at the statutory rate from and after the date of entry of judgment.

DATED this 19 day of April, 2011.

MICHAEL R. MCLAUGHLIN
District Court Judge

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the Court has determined that there is no just reason for delay of the entry of a final judgment and that the Court has and does hereby direct that the above judgment shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

DATED this 19 day of April, 2011.

MICHAEL R. MCLAUGHLIN
District Court Judge

CLERK'S CERTIFICATE OF SERVICE

I hereby certify that on the 19 day of April, 2011, a true and correct copy of the foregoing was served upon the following individual(s) by the means indicated:

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- [ ] Hand Delivery
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ARCHIE N. BANBURY
Clerk of the District Court

By: Jayne Thompson
Deputy Clerk

ARCHIE N. BANBURY, CLERK
By A Garrison Deputy
MAY 26 2011
Case No. _____ Inst. No. _____
Filed _____ A.M. 3:23 P.M.

Jed Manwaring ISB #3040
Victor Villegas ISB# 5860
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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/Appellants,** **vs.** **VALLEY COUNTY, a political subdivision of the State of Idaho.** **Defendant/Respondent.**	**Case No. CV-2009-554-C** **NOTICE OF APPEAL**

TO: THE ABOVE NAMED RESPONDENT, AND ITS ATTORNEYS, AND TO THE CLERK OF THE ABOVE-ENTITLED COURT

1. The above-named Appellants, Buckskin Properties, Inc., and Timberline Development, LLC, appeals against the above-named Respondents to the Idaho Supreme Court from the District Court's Memorandum Decision Re: Defendant's Motion for Summary Judgment entered on January 7, 2011, Memorandum Decision entered on April 11, 2011 and Judgment entered April 19, 2011 by the Honorable Judge Michael R. McLaughlin, presiding.

2. That the party has a right to appeal to the Idaho Supreme Court, and the Memorandum Decisions and Judgment described in Paragraph 1 above are appealable under and pursuant to Rule 11(a)(1) of the Idaho Appellate Rules.

3. Appellants intend to assert a number of issues on appeal, including, but not limited to, the following:

(a) When does a cause of action for inverse condemnation begin to accrue on a multi-phase residential subdivision?

(b) Did the District Court err in fixing the accrual date of Appellant's inverse condemnation claim upon its payment of road development fees under Phase 1 despite the fact that Appellant paid separate road development fees for later phases?

(c) Did the District Court err in dismissing Appellant's declaratory action on the final phases of its development as being moot?

This appeal is taken upon both matters of law and issues of fact. Appellants reserve the right to add additional issues on appeal and to revise or restate the issues set forth above.

4. There have been no orders entered sealing all or any portion of the record.

5. Appellants request pursuant to I.A.R. 25(c) the reporter's transcripts of the **December 6, 2010** hearing on the Defendant's Motion for Summary Judgment and the **March 11, 2011** hearing on Plaintiff's Motion for Partial Summary Judgment and Motion for Reconsideration.

6. Appellants request the following documents to be included in the clerk's record in addition to those automatically included under Rule 28, I.A.R:

No.	Filed	Description
1	12/01/09	Complaint
2	12/01/09	Summons
3	12/01/09	Affidavit of Service
4	12/21/09	Answer
5	04/15/10	Affidavit of Cynda Herrick

No.	Filed	Description
6	10/14/10	Valley County's Motion for Summary Judgment
7	10/14/10	Valley County's Statement of Material Facts in Support of Motion for Summary Judgment
8	10/14/10	Valley County's Opening Brief in Support of Motion for Summary Judgment
9	10/14/10	Affidavit of Cynda Herrick in Support of Motion for Summary Judgment **(as Exhibit to Clerk's Record)**
10	11/02/10	Plaintiffs' Memorandum in Opposition to Defendant's Motion for Summary Judgment
11	11/02/10	Affidavit of Dan R. Brumwell
12	11/02/10	Affidavit of DeMar Burnett
13	11/02/10	Affidavit of Robert W. Fodrea
14	11/02/10	Affidavit of Rodney A. Higgins
15	11/02/10	Affidavit of Steve Loomis
16	11/02/10	Affidavit of Michael Mailhot
17	11/02/10	Affidavit of Larry Mangum
18	11/02/10	Affidavit of John Millington
19	11/02/10	Affidavit of Joseph Pachner
20	11/02/10	Affidavit of Henry Rudolph
21	11/02/10	Affidavit of Anne Seastrom
22	11/02/10	Affidavit of Matt Wolff
23	11/09/10	Affidavit of Victor Villegas in Opposition to Summary Judgment **(as Exhibit to Clerk's Record)**
24	11/10/10	Valley County's Reply Brief in Support of Motion for Summary Judgment
25	11/11/10	Stipulation to Move Summary Judgment Hearing from Valley County to Ada County
26	01/11/11	Motion for Partial Summary Judgment
27	01/11/11	Motion to Vacate Trial Date & Request for Status Conference
28	01/13/11	Motion for Entry of Judgment
29	01/13/11	Response to Motion for Partial Summary Judgment
30	01/14/11	Plaintiffs' Objection to Valley County's Motion for Entry of Judgment Filed January 13, 2011
31	01/21/11	Plaintiffs' Motion for Reconsideration/Amendment

No.	Filed	Description
32	01/21/11	Memorandum in Support of Plaintiffs' Motion for Reconsideration/Amendment
33	01/28/11	Stipulation to Move February 17, 2011 Motions Hearing from Valley County to Ada County
34	02/28/11	Valley County's Response to Motion for Reconsideration
35	03/09/11	Valley County's Reply in Support of Motion for Entry of Judgment
36	03/09/11	Affidavit of Cynda Herrick Regarding Resolution 11-6
37	03/28/11	Notice of Supplemental Authority
38	04/13/11	Plaintiffs' Objection to Valley County's Proposed Judgment Filed April 13, 2011
39	04/13/11	Response to Plaintiffs' Objection to Valley County's Proposed Judgment
40		All Orders

7. I certify:

(a) That a copy of this Notice of Appeal has been served on the reporter of whom a transcript has been requested as named below at the address set out below:

Frances Garrison
Fourth Judicial District Court
Valley County Courthouse
P.O. Box 1350
Cascade, ID 83611

Vanessa Gosney
c/o Hon. Timothy Hansen
Ada County Courthouse
200 W. Front St.
Boise, ID 83702-7300

Penny Tardiff
c/o Hon. Darla S. Williamson
Ada County Courthouse
200 W. Front St.
Boise, ID 83702-7300

(b) That the Clerk of the District Court has been paid the estimated fee for preparation of the reporter's transcript.

(c) That the estimated fee for preparation of the clerk's record has been paid.

(d) That the appellate filing fee has been paid.
(e) That service has been made upon all parties required to be served pursuant to Rule 20.

DATED this 26 day of May, 2011

EVANS KEANE LLP

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this _____ day of May, 2011, 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 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 Facsimile: (208) 388-1300	[X] U.S. Mail [ ] Fax [ ] Overnight Delivery [ ] Hand Delivery
Valley County Clerk P.O. Box 1350 Cascade, ID 83611 Facsimile: (208) 382-7184	[X] U.S. Mail [ ] Fax [ ] Overnight Delivery [ ] Hand Delivery
Vanessa Gosney c/o Hon. Timothy Hansen Ada County Courthouse 200 W. Front Street Boise, ID 83702-7300	[X] U.S. Mail [ ] Fax [ ] Overnight Delivery [ ] Hand Delivery

Penny Tardiff
c/o Hon. Darla S. Williamson
Ada County Courthouse
200 W. Front Street
Boise, ID 83702-7300

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Victor Villegas

Matthew C. Williams, ISB #6271
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mwilliams@co.valley.id.us

Christopher H. Meyer, ISB #4461
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chrismeyer@givenspursley.com
mch@givenspursley.com

Attorneys for Defendant/Respondent/Cross-Appellant

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/Appellant/Cross-Respondents, v. VALLEY COUNTY, a political subdivision of the State of Idaho, Defendant/Respondent/ Cross-Appellant.	Case No. CV 2009-554 **NOTICE OF CROSS-APPEAL**

TO: THE ABOVE-NAMED CROSS-RESPONDENTS, BUCKSKIN PROPERTIES, INC., TIMBERLINE DEVELOPMENT LLC, AND THE PARTIES' ATTORNEYS, AND THE CLERK OF THE ABOVE-ENTITLED COURT.

NOTICE IS HEREBY GIVEN THAT:

1. The above-named Respondent/Cross-Appellant, Valley County, appeals against the above named Appellants/Cross-Respondents to the Idaho Supreme Court from the *Memorandum Decision Re: Defendant's Motion for Summary Judgment* entered on January 7, 2011, the *Memorandum Decision (1) Plaintiffs' Motion for Partial Summary Judgment (2) Defendant's Motion for Entry of Judgment (3) Plaintiffs' Motion for Reconsideration/ Amendment (4) Plaintiffs' Motion to Disallow Costs and Attorney Fees* entered on April 11, 2011, and the *Judgment* entered on April 19, 2011, the Honorable Judge Michael R. McLaughlin presiding.

2. The Respondent/Cross-Appellant has a right to cross-appeal to the Idaho Supreme Court pursuant to Rules 15(a) and 11(g), I.A.R., and the two memorandum decisions and *Judgment* described in paragraph 1 above are appealable under and pursuant to Rule 11(a)(1), I.A.R.

3. The following is a preliminary statement of the issues that the Respondent/Cross-Appellant presently intends to assert in the appeal:

a. The thrust of the issues presented by Respondent/Cross-Appellant will be a defense of the District Court's decisions on the merits, both on the legal and factual bases identified in the District Court's two memorandum decisions and on other legal and factual bases presented to the District Court. In addition, Respondents/Cross-Appellants will raise the issue listed below.

b. In its two memorandum decisions and *Judgment*, the District Court erred in failing to award attorney fees to Respondent/Cross-Appellant. More specifically, the District Court should have found that Appellants/Cross-Respondents acted without a reasonable basis in law or fact thus entitling Respondent/Cross-Appellant to an award of attorney fees as the prevailing party pursuant to Idaho Code §12-117 and 42 U.S.C. §1988. Respondent/Cross-Appellant intends to seek costs and attorney fees for both the District Court proceedings and on this appeal.

c. Respondent/Cross-Appellant reserves the right to raise other issues on appeal only to the extent permitted by law. Respondent/Cross-Appellant will object to any issue, argument, or fact raised on appeal by the Appellants/Cross-Respondents that was not timely raised below.

4. Respondent/Cross-Appellant does not request any additional reporter's transcript.

5. Respondent/Cross-Appellant requests the following documents to be included in the Clerk's record in addition to those automatically included under Rule 28, I.A.R. and those designated by the Appellants/Cross-Respondents in the initial *Notice of Appeal*:

a. *Affidavit of Mike Mailhot in Support of Application for Preliminary Injunction* filed on 4/6/2010;

b. *Affidavit of Matthew C. Williams* filed on 1/28/2011;

c. *Valley County's Memorandum of Costs and Statement in Support* filed on 1/31/2011;

d. *Affidavit of Christopher H. Meyer* filed on 1/31/2011;

e. *Affidavit of Martin C. Hendrickson* filed on 1/31/2011;

f. *Affidavit of Murray D. Feldman* filed on 1/31/2011;

g. *Motion to Disallow Costs and Attorneys Fees* filed on 2/15/11;

h. *Plaintiff's Memorandum in Opposition to Valley County's Memorandum of Costs and Statement in Support* filed on 2/15/11; and

i. *Valley County's Response to Motion to Disallow Costs and Attorney Fees* filed on 3/1/2011.

6. Respondent/Cross-Appellant does not request any documents, charts, or pictures offered or admitted as exhibits to be copied and sent to the Supreme Court.

7. I certify:

a. That service of the notice of cross-appeal and any request for additional transcript has been made upon the reporter;

b. That the estimated reporter's fees for the requested transcript, if any, have been paid;

c. That the estimated fees, if any, for including any additional documents in the clerk's or agency's record have been paid;

d. That all appellate filing fees, if any, have been paid; and

e. That service has been made upon all other parties required to be served pursuant to Rule 20, I.A.R.

DATED this 15th day of June, 2011.

GIVENS PURSLEY LLP

By: _____
Christopher H. Meyer

Attorneys for Respondent/Cross-Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 15th day of June, 2011, the foregoing was filed, served, and copied as follows:

DOCUMENT FILED:

Fourth Judicial District Court Attn: Archie N. Banbury, Clerk Valley County Courthouse 219 Main Street Cascade, ID 83611 Facsimile: 208-382-7107	☒ ☐ ☐ ☒ ☐	U. S. Mail Hand Delivered Overnight Mail Facsimile E-mail

SERVICE COPIES TO:

Jed Manwaring, Esq. Victor Villegas, Esq. Evans Keane LLP 1405 West Main Street P.O. Box 959 Boise, ID 83701-0959 jmanwaring@evanskeane.com vvillegas@evanskeane.com	☒ ☐ ☐ ☐ ☒	U. S. Mail Hand Delivered Overnight Mail Facsimile E-mail

COURTESY COPIES TO:

Honorable Michael R. McLaughlin District Judge Ada County Courthouse 200 W. Front St. Boise, ID 83702	☒ ☐ ☐	U. S. Mail Hand Delivered Overnight Mail
Jason Gray Law Clerk to Judge Michael McLaughlin Fourth Judicial District Court Ada County Courthouse 200 W. Front Street Boise, ID 83702 Email: jmgray@adaweb.net	☐ ☐ ☐ ☒	U. S. Mail Hand Delivered Overnight Mail E-mail

Christopher H. Meyer

Jed Manwaring ISB #3040
Victor Villegas ISB# 5860
EVANS KEANE LLP
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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 MIKE MAILHOT IN SUPPORT OF APPLICATION FOR PRELIMINARY INJUNCTION

STATE OF CALIFORNIA)
) ss.
County of El Dorado)

Mike Mailhot, being duly sworn upon oath deposes and says as follows:

1. That I have personal knowledge of the facts set forth herein.

2. 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.

3. 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.

4. I am the managing member of Timberline.

5. 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. A true and correct copy of said Conditional Use Permit is attached hereto as Exhibit "A".

6. 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.

7. On or about July 12, 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 by 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. A true and correct copy of the Capital Contribution Agreement is attached hereto as Exhibit "B".

8. 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 the final plat for later phases.

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

10. 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. A true and correct copy of said Road Development Agreement is attached hereto as Exhibit "C".

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

12. Timberline is currently in the process of completing the 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 as a condition to it signing and recording the final plat for the remaining phases.

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

14. Valley County approved and issued said one-year extension to record the final plat for the remaining phases of the Subdivision on July 9, 2009. Said extension will expire on July 12, 2010. A true and correct copy of said approval is attached hereto as Exhibit "D".

15. Plaintiff's obligation to pay such monies to Valley County as a condition to the final plat approval and recording is an issued to be tried in the above-referenced matter.

16. Without a temporary stay of the extension period during the pendency of the above-referenced matter, Timberline will be irreparably harmed because said extension period

will expire during the pendency of the above-referenced matter and Plaintiff will be unable to obtain final approval and recording of the final plat for the remaining phases of the Subdivision.

17. Since the granting of extensions is a discretionary matter, and based on my experiences with Valley County, I fear Valley County will not grant Timberline another extension as retaliation for filing this lawsuit.

Mike Mailhot

SUBSCRIBED and SWORN to before me this 2 day of April, 2010.

JOSEPH M. HENDERSON
Comm. 1854514
Notary Public - California
El Dorado County
Comm. Expires Jul 15, 2013

Notary Public for California
Residing in El Dorado Hills CA
My Commission Expires: July 15, 2013

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5 day of April, 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

Victor Villegas

Valley County Planning and Zoning Commission

P.O. Box 1350
Courthouse Building Annex

Cascade, Idaho 83611
Phone (208) 382-7114

Instrument # 285116
VALLEY COUNTY, CASCADE, IDAHO
2004-07-14 09:54:52 No. of Pages: 3
Recorded for : V C P & Z
LELAND G. HEINRICH Fee: 0.00
Ex-Officio Recorder Deputy
Index to: COUNTY MISC

Date July 14, 2004

Approved by Cynde Herrick

CONDITIONAL USE PERMIT
For Planned Unit Development No. 04-01
(PUD 04-01)

The Meadows at West Mountain

Issued to: Jack Charters
Buckskin Properties, Inc.
PO Box 145
Donnelly, ID 83615

Property Location: The property is located in the NE4 of Section 17, T. 16N, R. 3E, Boise Meridian, Valley County, Idaho. The site contains 122 acres.

There have been no appeals of the Valley County Board of County Commissioner's decision of July 12, 2004. The Board's decision stands and you are hereby issued a conditional use permit with conditions of approval for establishing PUD 04-01 The Meadows at West Mountain as described in the application as updated, staff reports, and minutes. The approved use is for temporary contractor housing, 221 single-family residential lots, 17 common lots, 2 commercial lots totaling 11.2 acres, and 160 multi-family units.

The effective date of this permit is July 13, 2004. All provisions of the conditional use permit 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.

EXHIBIT A

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 proposed occupancies described in the application and in this report shall be established, and in use according to the phasing plan or this permit shall be null and void. A phase will be developed at least every two years.

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 site-grading plan approved by the Valley County Engineer is required.

6. The irrigation district must approve the relocation of the irrigation ditch.

7. A letter of approval from the Donnelly Fire District is required.

8. A letter from the Army Corps of Engineers addressing wetlands is required.

9. A letter from North Lake Recreational Sewer & Water District verifying use of the sewer is required.

10. A letter verifying water rights is required from Idaho Dept. of Water Resources and a letter from the Idaho Department of Environmental Quality addressing the approved water system is required.

11. Prior to issuance of building permits, water, sewer and fire protection will be available.

12. The Development Agreement and Capital Contribution Agreement must receive approval from the Board of County Commissioners.

13. Development of a portion of the multi-family units will be moved to Phase II.

14. The Homeowner's Association will take care of snow removal.

15. There will be no fencing between single-family structures.

16. They will not discharge more water into the drainage then pre-development flows.

17. The final plat will either dedicate or deed to the public the right-of-way along West Roseberry Road on the northern portion of the development.

END CONDITIONAL USE PERMIT

Instrument # 286976
VALLEY COUNTY, CASCADE, IDAHO
2004-08-04 08:12:43 No. of Pages: 7
Recorded for : VALLEY COUNTY COMMISSIONERS
LELAND G. HEINRICH Fee: 0.00
Ex-Officio Recorder Deputy
Index to: COUNTY MISC

STATE OF IDAHO, County of Valley) ss.
I hereby certify that the foregoing is a true copy of the original on file and of record in this office.
Dated: 8-16-04
Clerk, Auditor & Recorder Lee Heinrich
By Deputy

MEADOWS AT WEST MOUNTAIN

CAPITAL CONTRIBUTION AGREEMENT

THIS AGREEMENT is made this 12th day of July 2004, by and between **BUCKSKIN PROPERTIES INC.** whose address is P.O. Box 145, Donnelly ID. 83615 the **Developer** of that certain Project in Valley County, Idaho, known as the **MEADOWS AT WEST MOUNTAIN**, and **VALLEY COUNTY**, a political subdivision of the State of Idaho, (hereinafter generally referred to as "Valley County").

RECITALS

Developer has submitted a land subdivision application for Valley County approval.

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. **Improvement Program:** A program summary and cost estimate for the Donnelly to Tamarack Road Improvement Program is attached as Exhibit A.

2. **Capital Contributions:** Developer agrees to a proportionate share of the road improvement costs attributable to the site-generated traffic as established by Valley County. Currently this amount has been calculated by the Valley County Engineer to be **$461.00** per average daily vehicle trip generated by the Project. 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 offsets are included in this Agreement.

3. **Proportionate Share:** Developer agrees to pay a sum equal to 1/9000 of the total costs of the road improvement program identified on the attached Exhibit A for each new vehicle trip generated by the Project. Refer to the attached Exhibit B for details of the calculation.

4. **Method and Timing of Payments for Road Improvements:** Developer shall contribute capital to road impact mitigation as established by Valley County at the time the final plat of each phase of the Project is recorded. Said payment may be adjusted for offsets described herein above. The Developer's aforesaid contributions shall be paid as follows:

EXHIBIT B

A. Method/Timing of Payments: The Developer's contribution shall be paid as follows:

1) Upon the final approval of the preliminary plat for the first phase of the Project, payment of Seventy nine Thousand two hundred ninety two and No/100 Dollars ($79,292.00) shall be made by the conveyance of the road right-of-way described on the attached Exhibits C-1 and C-2. The total value of which is $91,142.00 A credit in the amount of $11,850.00 shall be available to the Developer for future capital contributions.

2) Modification of Developer's Payment Schedule: It is acknowledged by Valley County and the Developer that the construction of the road improvements and the acquisition of public right-of-way mutually beneficial to Valley County and the Developer to complete at the earliest possible date. In the event that Valley County demonstrates that a modification or acceleration of the timing of Developer's aforesaid contributions would facilitate an earlier completion of this project, the Developer shall negotiate in good faith regarding the possible modification of and/or acceleration of the aforesaid payment schedule.

B. Upon the recording of the final plat of any future phase of the Project, Developer shall pay a sum per average daily vehicle trip, which is roughly proportional to 1/9000 of the most recent estimated construction cost of the current road improvement program for the service area. That program may include (1) improvements, which have been completed by Valley County prior to the date of contribution, and (2) improvements, which are budgeted for completion within the next ten years following the date of contribution.

C. 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 which are specified in Exhibit A, or to such other projects as are mutually agreeable to the parties.

D. 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.

5. **Recordation:**

A. 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 interest in favor of Valley County as to any real property owned by the Developer at the time of recording, or any real property, which may be acquired by the Developer on any date after the recording of this Agreement.

VALLEY COUNTY BOARD OF COMMISSIONERS:

By _____ Date: 7/26/04
Commissioner / Chairman: Terry F. Gestrin

By: _____ Date: 7/26/04
Commissioner: F. Phillip Davis

By: _____ Date: 7-26-04
Commissioner: Thomas W. Kerr

ATTEST:

VALLEY COUNTY CLERK:

_____ Date: 7/26/04
LELAND G. HEINRICH

BUCKSKIN PROPERTIES, INC.

By: Jack A. Charters Pres. Date: 7-14-04
Jack A. Charters

STATE OF IDAHO)
) ss.
COUNTY OF VALLEY)

On this 14 day of July, 2004, before me, _____, the undersigned, a Notary Public in and for said State, personally appeared Jack A. Charters and acknowledged to me that they executed the same.

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

_____
Notary Public for Idaho
Residing at: Cascade
My Commission Expires: 11-02-08

JOYCE NOVOTNY NOTARY PUBLIC STATE OF IDAHO

EXHIBIT A

DONNELLY TO TAMARACK ROAD IMPROVEMENTS PHASE 1
PROGRAM SUMMARY
JAN. 7, 2004

ITEM NO.	PROJECT	ESTIMATED COST
1	DONNELLY TO TAMARACK OVERLAY	$1,150,000
2	W. ROSEBERRY ROAD EXTENSION	$1,600,000
3	CAUSEWAY ENGINEERING (PRELIM.)	$85,000
4	W. ROSEBERRY RD. BRIDGE (95% COMPLETE)	$590,000
5	WEST MT. ROAD CULVERTS (95% COMPLETE)	$55,000
6	*RIGHT-OF-WAY ACQUISITION*	$300,000
7	*ROSEBERRY/NORWOOD INTERSECTION*	$200,000
8	*CORRIDOR STUDY*	$50,000
9	ROCK CREEK BRIDGE	$60,000
10	POISON CREEK BRIDGE	$60,000
		$4,150,000

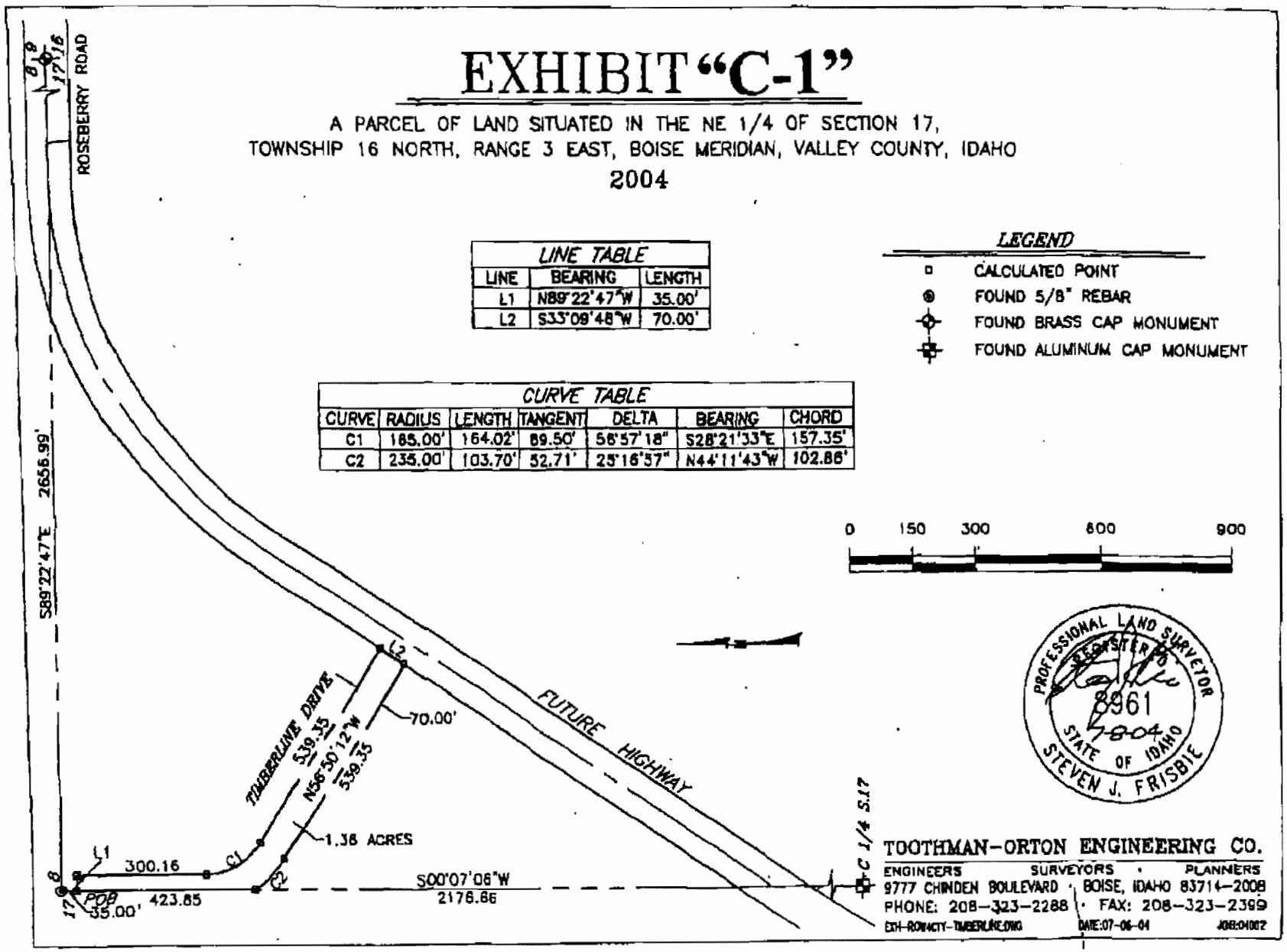
EXHIBIT B

DONNELLY TO TAMARACK ROAD IMPROVEMENTS PHASE 1
PROGRAM SUMMARY
JAN. 7, 2004

ESTIMATED PHASE 1 COSTS		$4,150,000
TRAFFIC CAPACITY (LOS-D)		9,000 VPD
TAMARACK RESORT @ 30%		
CAPITAL CONTRIBUTION		1,245,000
CAPACITY ALLOCATION		2700 VPD
PLATTED DEVELOPMENT @ 40%		
CAPITAL CONTRIBUTION		$1,660,000
CAPACITY ALLOCATION		3600 VPD
PLATTED LOTS	900	
FUTURE DEVELOPMENT @ 30%		
CAPITAL CONTRIBUTION		$1,245,000
CAPACITY ALLOCATION		2700 VPD
FUTURE LOTS	675	
DEVELOPMENT COST PER FUTURE LOT		**$1,844 /LOT**
DEVELOPMENT COST PER VEHICLE TRIP		**$461 /VPD**

EXHIBIT "C-1"

A PARCEL OF LAND SITUATED IN THE NE 1/4 OF SECTION 17,
TOWNSHIP 16 NORTH, RANGE 3 EAST, BOISE MERIDIAN, VALLEY COUNTY, IDAHO
2004



LINE TABLE		
LINE	BEARING	LENGTH
L1	N89°22'47"W	35.00'
L2	S33°09'48"W	70.00'

CURVE TABLE						
CURVE	RADIUS	LENGTH	TANGENT	DELTA	BEARING	CHORD
C1	185.00'	164.02'	89.50'	56°57'18"	S28°21'33"E	157.35'
C2	235.00'	103.70'	52.71'	25°16'57"	N44°11'43"W	102.86'

LEGEND

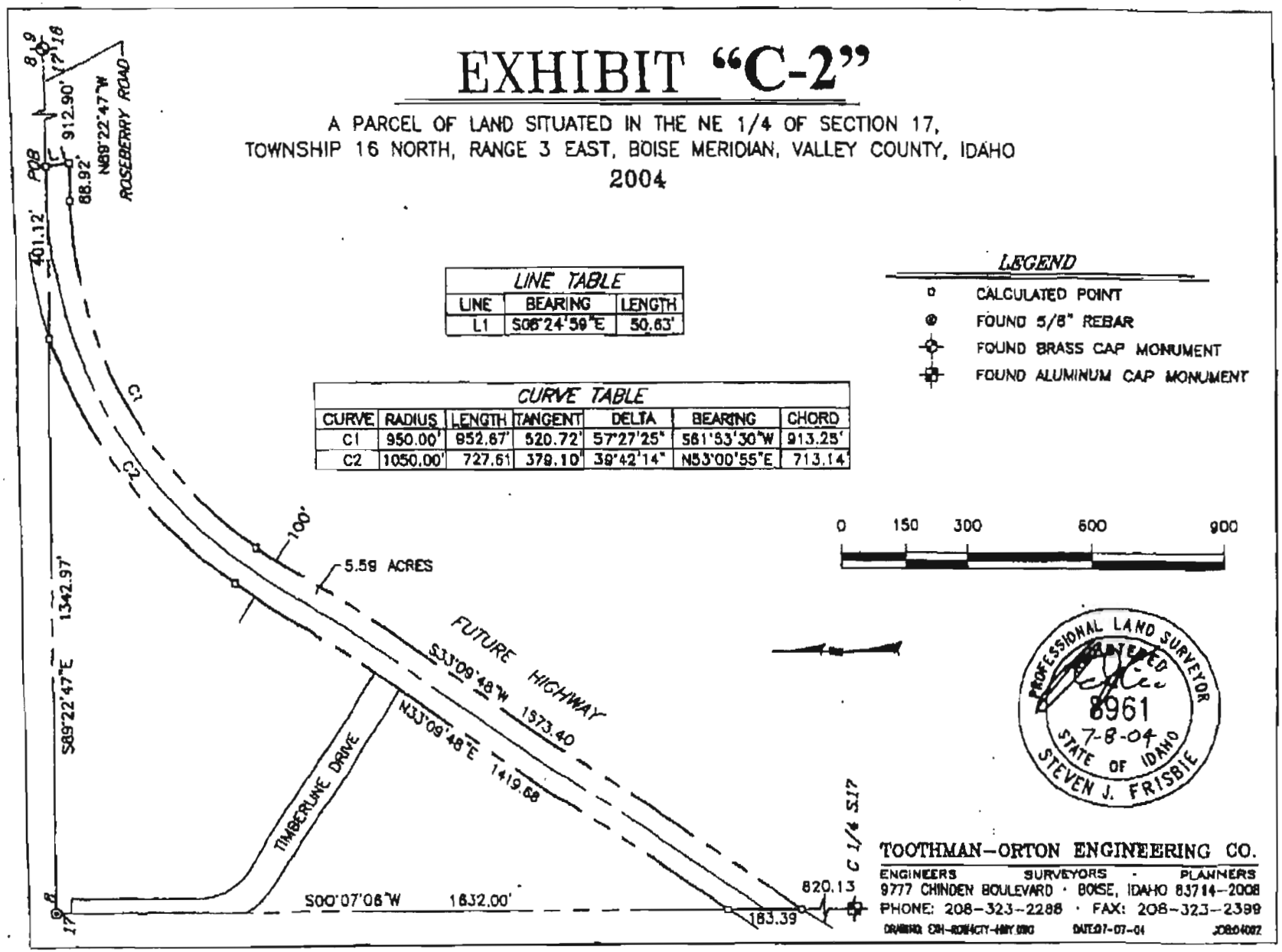
- CALCULATED POINT
- FOUND 5/8" REBAR
- FOUND BRASS CAP MONUMENT
- FOUND ALUMINUM CAP MONUMENT

PROFESSIONAL LAND SURVEYOR
REGISTERED
8961
STATE OF IDAHO
STEVEN J. FRISBIE

TOOTHMAN-ORTON ENGINEERING CO.
ENGINEERS · SURVEYORS · PLANNERS
9777 CHINDEN BOULEVARD · BOISE, IDAHO 83714-2008
PHONE: 208-323-2288 · FAX: 208-323-2399
EXH-ROWCITY-TIMBERLINE.DWG DATE:07-06-04 JOB:04002

EXHIBIT "C-2"

A PARCEL OF LAND SITUATED IN THE NE 1/4 OF SECTION 17,
TOWNSHIP 16 NORTH, RANGE 3 EAST, BOISE MERIDIAN, VALLEY COUNTY, IDAHO
2004



LINE TABLE		
LINE	BEARING	LENGTH
L1	S06°24'59"E	50.63'

CURVE TABLE						
CURVE	RADIUS	LENGTH	TANGENT	DELTA	BEARING	CHORD
C1	950.00'	952.67'	520.72'	57°27'25"	S61°53'30"W	913.25'
C2	1050.00'	727.61'	379.10'	39°42'14"	N53°00'55"E	713.14'

LEGEND

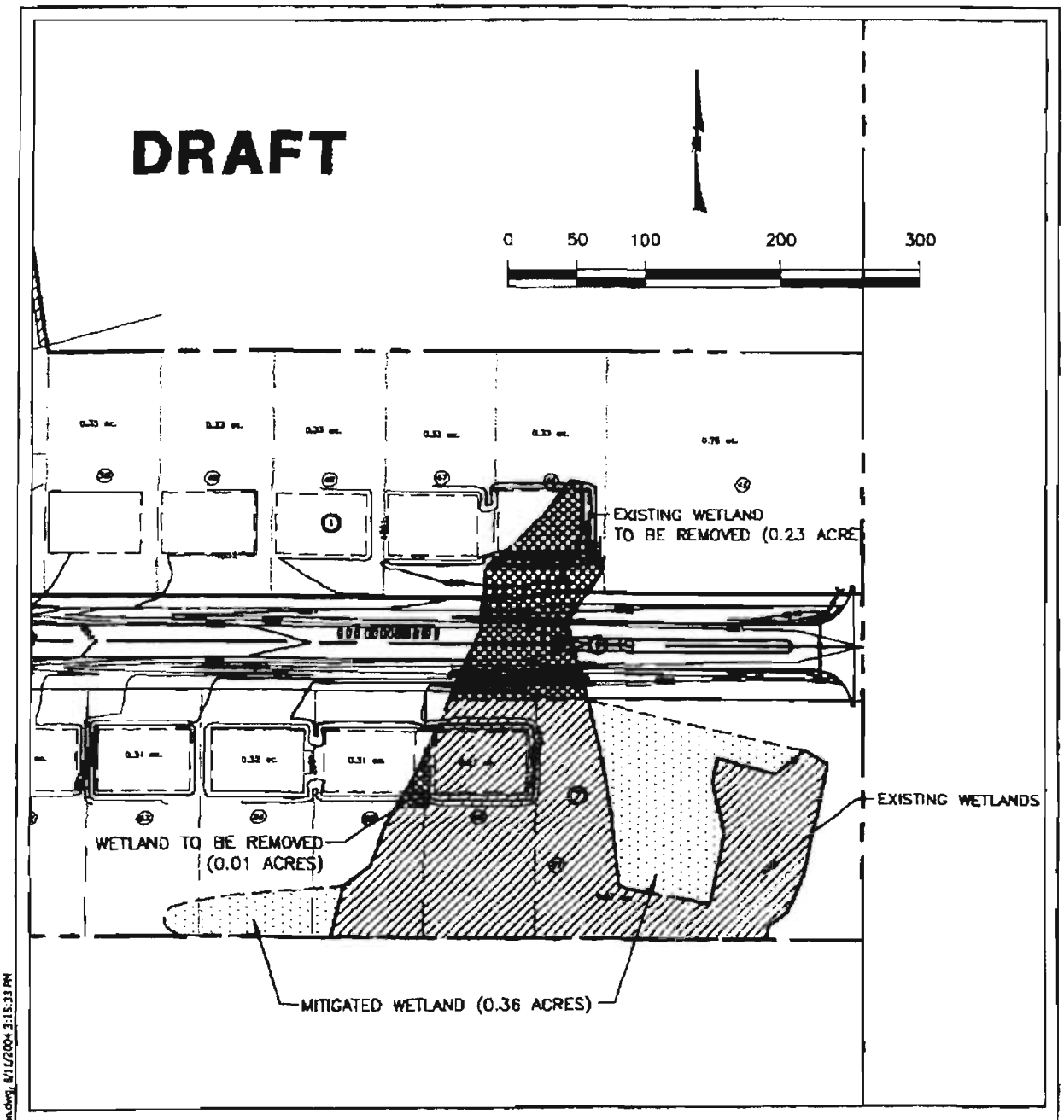
- CALCULATED POINT
- FOUND 5/8" REBAR
- FOUND BRASS CAP MONUMENT
- FOUND ALUMINUM CAP MONUMENT

PROFESSIONAL LAND SURVEYOR
8961
7-8-04
STATE OF IDAHO
STEVEN J. FRISBIE

TOOTHMAN-ORTON ENGINEERING CO.
ENGINEERS · SURVEYORS · PLANNERS
9777 CHINDEN BOULEVARD · BOISE, IDAHO 83714-2008
PHONE: 208-323-2288 · FAX: 208-323-2399

DRAWING: E:\H-ROSECITY-HWY.DWG DATE: 07-07-04 JOB: 04007

343 7460



THE MEADOWS AT WEST MOUNTAIN 404 PERMIT APPLICATION
PROPERTY LOCATED NEAR CASCADE LAKE, DONNELLY IDAHO
LOCATION: NW 1/4 CORNER, SECTION 17, T.16N, R. 3E, VALLEY COUNTY, IDAHO
APPLICANT: BUCKSKIN PROPERTIES
DETAIL SHEET 3
PREPARED BY: TOOTHMAN-ORTON ENGINEERING COMPANY
DATE: AUGUST 11, 2004

FILE NO. _____

Valley County Road Department

P.O. Box 672 - Cascade, Idaho 83611

Gordon Cruickshank
Superintendent

gcruickshank@co.valley.id.us
Office • (208) 382-7195
FAX • (208) 382-7198

Mr. Jack Charters
Buckskin Properties Inc.
P.O. Box 145
Donnelly Id, 83615

Re: Meadows at West Mountain Phase1

Dear Jack,

The Construction Plans for the Phase I road, drainage and grading work is approved subject to the following conditions:

1) Prior approval of submittals for the base, sub-base and asphalt to demonstrate compliance with ISPWC Specifications. Compliance with minimum strength standards (L.A. Abrasion > 35) is required unless a geotechnical fabric is installed below the sub-base course.
2) A quality control plan is required. Outlining the responsibility and frequency of Compaction Tests.
3) Compliance with Valley County fugitive dust standards is required.
4) Compliance with standard Valley County Road permit condition is required (copy attached)
5) Final inspection and acceptance of the work, by the Road Superintendent will be required prior to County maintenance of the public roads in Phase I
6) The temporary gravel site access at Roseberry Road should be paved between Charters Circle and Cameron Dr. If the Phase II work is not completed by 2005.

Sincerely,

Patrick Dobie P.E.
Valley County Engineer

Right–of-Way Use Permit – General Conditions

1) All work shall be completed in accordance with the plans and specification submitted by the Applicant, the Idaho Standards for Public Works Constructions (ISPWC), and the conditions of the permit.
2) The Applicant will monitor the quality of the work performed by the Contractor for conformance with the plans, specifications and conditions of this permit. The required inspection and testing results will be submitted to Valley County in a timely manner for review. If the required testing is not provided then Valley County will hire a Soil Engineer to perform the work and direct expenses incurred will be billed to the applicant. Failure to perform according to requirements to this permit will result in the revocation of the permit.
3) Trench backfill shall be 6" minus granular fill material compacted in 18" lifts to a density of 95% as measured by ASTM D 698. Compaction tests shall be performed at least every 500' of trench.
4) Road base shall be type I crushed gravel conforming to ISPWC Section 802 placed with a minimum thickness of 6" and compacted to a density of 100% as measured by AASHTO T 99. Tests shall be performed at each crossing or at least every 500' of trench. A gradation and abrasion test are required for the gravel.
5) Asphalt resurfacing shall be Class I plant mix asphalt, conforming to ISPWC Section 810. Asphalt shall be placed with a minimum thickness of 2 ½" and a minimum tolerance of ¼" measured with a 10' straight edge standard. Asphalt shall be compacted to a density of 97% maximum weight as measured by AASHTO T 166 (method A). Test shall be performed at all road crossing.
6) Asphalt joints shall be saw cut immediately prior to resurfacing. Cuts shall be made along smooth straight lines with a minimum patch width of 4'. An emulsified asphalt tack coat shall be applied on all edge joints.
7) Road shoulders shall be reconstructed with 6" of type I gravel with a minimum width of 2 feet and 2:1 embankment side slope. Shoulder and embankment shall be compacted to a density of 95% (ASTM D 698) and revegetated with an approved seed mix following construction.
8) Roadway borrow ditched disturbed during construction shall be cleaned and regraded to the standard Valley County ditch section following construction.
9) Asphalt road surfaces removed or damaged shall be repaved within 7 calendar days of the initial excavation. Temporary patching materials shall be approved by Valley County prior to installation.
10) Signs, marker or delineators posts removed or damaged during construction shall be replaced with new posts and compacted backfill. Sign installation shall conform to ISPWC; SD-1131.
11) Construction traffic control devices and activities shall conform to the MUTCD recommendations.
12) All public and private roads will remain open to at least one traffic lane at all times and both traffic lanes will be open during the night. Construction activities shall be scheduled to minimize interruption of traffic. Through traffic shall not be stopped for more than 5 minutes at any time without prior written authorization.

Instrument # 300816
VALLEY COUNTY, CASCADE, IDAHO
2005-09-27 04:52:37 No. of Pages: 6
Recorded for : V C COMMISSIONERS
LELAND G. HENRICH Fee: 0.00
Ex-Officio Recorder Deputy
Index to: COUNTY MISC

The Meadows at West Mountain – Phase 2

ROAD DEVELOPMENT AGREEMENT

THIS AGREEMENT is made this 26th day of September, 2005, by and between Buckskin Properties Inc., whose address is P.O. Box 145, Donnelly, Idaho 83615, the **Developer** of that certain Project in Valley County, Idaho, known as the **Meadows at West Mountain** – 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 158 lot residential development known as the Meadows at West Mountain – 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 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 West Roseberry Area 2005 Roadway Capital Improvement Program, incorporating construction and right-of-way needs for the project area 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 Meadows at West Mountain – Phase 2 as established by Valley County. Currently this amount has been calculated by the Valley County Engineer to be $461 per average daily vehicle trip generated by the Project. Refer to Exhibit A and Exhibit B for details of the West Roseberry 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 $1,844 (an average of 8 trips per lot x ½ (50% split) x $461 per trip) per each of the 62 single family

EXHIBIT C

residential lots. Developer agrees to pay a sum equal to $1,383 (an average of 6 trips per unit x ½ (50% split) x $461 per trip) per each of the 96 apartment dwelling units. The Developer's proportionate share of the road improvements identified in Exhibit A for the 158 residential units shown on the subdivision application is $247,096 less the following offsets:

> Existing Credit of $11,850 for roadway right-of-way dedicated under Phase I of this development and documented under the subsequent Road Development Agreement approved by Valley County on July 26, 2005.
>
> Dedicated roadway right-of-way as shown on the Final Plat and more specifically described as: Ten (10) feet adjacent to Roseberry Road for a distance of 960', and totaling 0.2204 acres. The value of the dedicated ROW is $3,086.
>
> The total value of the dedicated ROW is $14,936.

The developer agrees to pay Valley County the difference between their proportionate share of roadway costs ($247,096) less the offsets for dedicated right-of-way ($14,936) for a total cash payment of $232,160 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.

By: Jack A. Charters Date: 9/26/05

Jack A. Charters, member of Buckskin Properties, Inc., Developer

VALLEY COUNTY BOARD OF COMMISSIONERS:

By: excused Date: _____

Commissioner/Chairman F. Phillip Davis

By: Thomas W. Kerr Date: 9-26-05

Commissioner Thomas W. Kerr

By: F. W. Eld Date: 9/26/05

Commissioner F. W. Eld

ATTEST:

VALLEY COUNTY CLERK:

Leland G. Heinrich Date: 9/26/05

STATE OF IDAHO)
) ss.
COUNTY OF VALLEY)

On this 26th day of September 2005, before me, Glenna K. Young, the undersigned, a Notary Public in and for said State, personally appeared Jack A Charters 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.

Glenna K. Young
Notary Public for Idaho

Residing at: Cascade
Idaho 83611

My Commission Expires: July 30, 2011

GLENNA K. YOUNG
NOTARY
PUBLIC
STATE OF IDAHO

STATE OF IDAHO)
) ss.
COUNTY OF VALLEY)

On this 26 day of September 2005, before me, Joyce Novotny, the undersigned, a Notary Public in and for said State, personally appeared Cameron Thomas W. Kerr + 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 Novotny
Notary Public for Idaho

Residing at: Cascade Id

My Commission Expires: 11-02-08

JOYCE NOVOTNY
NOTARY
PUBLIC
STATE OF IDAHO

EXHIBIT A

DONNELLY TO TAMARACK ROAD IMPROVEMENTS PHASE 1
PROGRAM SUMMARY
JAN. 7, 2004

ITEM NO.	PROJECT	ESTIMATED COST
1	DONNELLY TO TAMARACK OVERLAY	$1,150,000
2	W. ROSEBERRY ROAD EXTENSION	$1,600,000
3	CAUSEWAY ENGINEERING (PRELIM.)	$85,000
4	W. ROSEBERRY RD. BRIDGE (95% COMPLETE)	$590,000
5	WEST MT. ROAD CULVERTS (95% COMPLETE)	$55,000
6	RIGHT-OF-WAY ACQUISITION	$300,000
7	ROSEBERRY/NORWOOD INTERSECTION	$200,000
8	CORRIDOR STUDY	$50,000
9	ROCK CREEK BRIDGE	$60,000
10	POISON CREEK BRIDGE	$60,000
		$4,150,000

EXHIBIT B

DONNELLY TO TAMARACK ROAD IMPROVEMENTS PHASE 1
PROGRAM SUMMARY
JAN. 7, 2004

ESTIMATED PHASE 1 COSTS		$4,150,000
TRAFFIC CAPACITY (LOS-D)		9,000 VPD
TAMARACK RESORT @ 30%		
CAPITAL CONTRIBUTION		1,245,000
CAPACITY ALLOCATION		2700 VPD
PLATTED DEVELOPMENT @ 40%		
CAPITAL CONTRIBUTION		$1,660,000
CAPACITY ALLOCATION		3600 VPD
PLATTED LOTS	900	
FUTURE DEVELOPMENT @ 30%		
CAPITAL CONTRIBUTION		$1,245,000
CAPACITY ALLOCATION		2700 VPD
FUTURE LOTS	675	
DEVELOPMENT COST PER FUTURE LOT		**$1,844 /LOT**
DEVELOPMENT COST PER VEHICLE TRIP		**$461 /VPD**

Valley County Planning & Zoning Commission

PO Box 1350
219 North Main Street
Cascade, ID 83611-1350

Phone: 208.382.7115
Fax: 208.382.7119
Email: cherrick@co.valley.id.us
Website: *www.co.valley.id.us*

VALLEY COUNTY PLANNING AND ZONING MEETING MINUTES

DATE: July 9, 2009

TIME: 6:00 p.m. – 7:30 p.m.

LOCATION: Valley County Courthouse

ATTENDANCE: Commissioners present: Chairman Todd Hatfield, Rob Garrison, Tom Olson, Jr., Harry Stathis, and Ed Allen were present. Staff member present: Cynda Herrick, AICP, Planning and Zoning Administrator.

MINUTES:

Commissioner Garrison moved to approve the June 11, 2009, minutes. Commissioner Allen seconded the motion. Motion carried with changes indicated on page 5, second paragraph changing "law to have a tank".

Commissioner Allen moved to table minutes from June 25, 2009 to July 28, 2009. Commissioner Stathis seconded the motion. Motion carried.

OLD BUSINESS:

1. CUP 05-17 White Cloud Phase 2 – Extension Request: Elkhorn LLC is requesting approval of a one-year extension of the final plat approval that currently expires on August 1, 2009. White Cloud Phase 1 was recorded July 2006. Phase 2 is a replat of Block 4 and Block 5 of Phase 1. The site is located in the SE Section 24 & NE Sec 25, T.18N, R.2E, and SW Sec 19 & NW Sec. 30, T.18N, R.3E, B.M., Valley County, Idaho. [Not a public hearing.]

Staff explained that the applicant was continuing to monitor for septic permits as described in the request for extension from James Fronk, P.E., Secesh Engineering, dated June 11, 2009. Staff also explained that the first phase had already been recorded and all improvements of infrastructure were complete.

Commissioner Stathis moved to extend final plat approval for CUP 05-17 White Cloud Phase 2 to August 1, 2010. Commissioner Allen seconded the motion. Motion carried.

EXHIBIT D

2. PUD 04-01 The Meadows at West Mountain, Phases 4-6 -- Extension Request: Timberline Developments, LLC, are requesting approval of an one-year extension of the Conditional Use Permit which states that a phase will be developed at least every two years. Phase 4 expires on July 12, 2009. The site is located in Section 17, T.16N, R.3E, B.M., Valley County, Idaho. [Not a public hearing.]

Staff explained that the applicant was requesting an extension in order to finalize the road development agreement; seek approval from North Lake Recreational Sewer and Water District; gain approval from Valley County for engineering of phases 4-6; and approval from the county surveyor. Staff also explained that the first three phases had already been recorded.

Commissioner Stathis moved to extend final plat approval for PUD 04-01 Meadows at West Mountain Phase 4-6 to July 12, 2010. Commissioner Olson seconded the motion. Motion carried.

3. Impact Fees: Continuation of discussion on Impact Fees – (Moved on agenda to the end of New Business.)

A. NEW BUSINESS:

1. C.U.P. 09-09 Elo Estates – Preliminary & Final Plat: Youde - Three Forks, LLC, and Steve & Ingri Millemann are requesting approval of a 2-lot single-family residential subdivision on approximately 24 acres. Subdividing this property would rectify an illegal lot split. The subdivision would be served by individual well and septic systems. Conservation easements are located on the property. The property is currently addressed as 1171 & 1291 Elo Road and is located in the E ½ SE ¼ Section 22, T.18N, R3E. BM, Valley County, Idaho.

Chairman Hatfield asked if there was any exparte contact or conflict of interest. Chairman Hatfield excused himself from discussions due to conflict of interest.

Commissioner Stathis, Vice-Chairman, acted as the Chairman and asked for the Staff Report. Staff presented the Staff Report and read an e-mail from Janet Lord (exhibit 1).

Bob Youde, 1210 Samson Trail, managing partner, to represent the applicant:

- 12.5 acre parcel was approved in 1997, but final plat was never recorded.
- Parcel has been sold and resold since 1997.
- Discussed septic issue.
- Discussed road right-of-way.
- Intention is to keep this intact as a single family residential site.
- Millemann's are co-applicants.
- Purpose is to make this a legal lot.

Commissioner Garrison asked if other half has a house, well, and septic. Youde confirmed.

Commissioner Stathis asked if there were any proponents, undecided, or opponents. There were none.

Commissioner Stathis closed the public hearing. Discussion ensued: correcting error, septic is taken care of, can find no issues.

Commissioner Garrision moved to approve C.U.P. 09-09 Elo Estates, preliminary and final plat, and authorize the Chairman to sign. Commissioner Allen seconded the motion. Motion carried.

OLD BUSINESS:

1. Impact Fees: *Continuation of discussion on Impact Fees.*

Chairman Hatfield announced the item and invited Assessor Campbell and Clerk Banbury to address the Commission.

Assessor Campbell stated she is here to give accurate information concerning Mr. Moore's presentation as presented on June 11, 2009. She presented exhibit 1 - Crane Shores and exhibit 2 - Hawks Bay Subd Tax Comparison. She then explained the worksheets.

Archie Banbury, Clerk, stated this is the first time he has ever talked to a Commission about funds. He commended the Commission. He questioned where to go with the discussion. He said he will try to impart some background – we do fund accounting, all of which have their own income and expense. There are 22 funds. At the beginning of this year, there was 8.5 million; but, you need to take out for operating cash, trust funds that cannot be spent, court facilities fund, etc.

Working capital gets you from the low point to the high point. A financial statement is a snap shot. Need to take a look at whether we need Impact Fees. Over last three – four years, building and P&Z have contributed large revenues, which are now down.

Commissioner Olson asked how you budget when impact fees are small. Archie said we anticipated a slow down. Commissioner Olson asked, how would you budget impact fees? Archie – you would have to budget it low. Funds can be put into a contingency fund to save the money and cannot be spent without unanimous vote of County Commissioners.

Commissioner Garrison questioned black side of the budget. In boom years, where does the money go? Archie responded, into general fund and can be diverted into capital improvements. Discussion ensued concerning the court facilities fund.

Commissioner Olson asked if new funds could be established for capital improvements. Archie stated can only have 5% reserve. Talked about decrease in building fees, Tamarack's capital improvements, etc. but had increase in PILT funds. Grants were discussed. County grants to seniors, WICAP, etc.

Commission Allen made a motion to set a public hearing on August 25 at 6:00 for Impact Fees. Amendments to the comprehensive plan and the adoption of CIP and implementation of impact

fees. Commissioner Stathis seconded. Motion carried. Chairman Hatfield voted no.

B. OTHER ITEMS:

1. **Facts & Conclusions:**
   - C.U.P. 09-02 SLRWSD Treatment Plant
   - C.U.P. 09-07 Shilo Bible Camp – Managers Residence

Commissioner Allen moved to approve the Facts and Conclusions as listed. Commissioner Garrison seconded the motion. Motion carried.

2. **Discussion of Proposed Subdivision Regulations & LUDO Amendments:** The Commission agreed to have a work session at the regularly scheduled meeting in August.

3. **Appeal of Administrative Decision – C.U.P. required for Kelly's Whitewater Park**

There needs to be public input. This park will be there for a long time. Need to know where rock will be, parking, facilities, etc.

Jim Fodrea responded. The packages are ready to go to the Corps and state agencies. Focus is to place rock in river this fall.

Commissioner Allen moved to require a conditional use permit for Kelly's Whitewater Park. Commissioner Garrison seconded the motion. Motion carried.

Meeting adjourned 7:35 p.m.