11-21-2011

Buckskin Properties, Inc. v. Valley County Appellant's Brief Dckt. 38830

IN THE SUPREME COURT OF THE STATE OF IDAHO

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

Plaintiffs/Appellants,

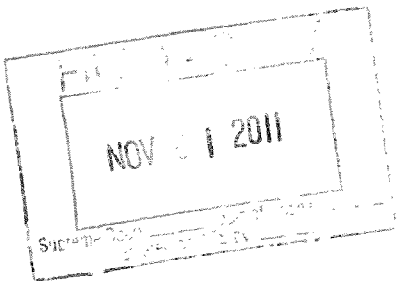
vs.

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

Defendant/Respondent.

Supreme Court No. 38830-2011

Case No. CV-2009-554-C



APPELLANT'S BRIEF

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT AND FOR THE COUNTY OF VALLEY

HONORABLE MICHAEL R. MCLAUGHLIN, DISTRICT JUDGE, PRESIDING

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STATEMENT OF THE CASE

(i) Nature of the Case:

This is a land use case involving the payment of impact fees. Appellants Buckskin Properties, Inc. and Timberline Development, LLC (collectively "Buckskin") undertook a multi-phase development called The Meadows at West Mountain ("The Meadows") located in Valley County, Idaho. After paying the impact fee on three out of six phases of the development, Buckskin filed this lawsuit seeking a declaration that the payment of impact fees violated state law because Valley County did not follow the requirements of state law for collecting impact fees. The district court dismissed Buckskin's Complaint on summary judgment on grounds that all of Buckskin's claims were barred by the four-year statute of limitations for bringing an inverse condemnation claim.

(ii) Course of Proceedings:

Buckskin filed its initial Complaint against Valley County on December 1, 2009. R. Vol. I, p. 1. Buckskin's Complaint included two counts requesting a declaratory judgment that Valley County's collection of impact fees is in violation of Idaho law and for inverse condemnation. *Id.* Valley County answered on December 21, 2009. R. Vol. I, p. 9. Valley County filed its Motion for Summary Judgment on October 14, 2010 arguing that Buckskin's Complaint must be dismissed based on the running of the statute of limitations for inverse condemnation claims, failure to exhaust administrative remedies, ripeness, and allegations that Buckskin's payment of the impact fee was voluntary. R. Vol. I, p. 35. Buckskin filed its Memorandum in Opposition to Defendant's Summary Judgment on November 2, 2010. After oral argument on Valley County's motion, the District Court issued its Memorandum Decision Re: Defendant's Motion for Summary Judgment granting summary judgment to Valley County on January 7, 2011. R. Vol. III, p. 486.

The district court dismissed Buckskin's inverse condemnation claim on the basis that the four-year statute of limitation accrued when payment of the impact fee was made on Phase 1 of The Meadows, which was more than four years from the filing of Buckskin's Complaint. *Id.* The district court also held, however, that Valley County acted outside the scope of its legal authority to collect an impact fee. *Id.* Based on the district court's Memorandum Decision, Buckskin filed a Motion for Partial Summary Judgment on January 10, 2011, seeking a declaration from the district court on Count I of the Complaint that Buckskin was not required to pay an impact fee. R. Vol. III, p. 494. Valley County filed a Motion for Entry of Judgment on January 13, 2011. R. Vol. III, p. 498. The following day, on January 14, 2011, Buckskin filed an opposition to the Motion for Entry of Judgment arguing that the district court's Memorandum Decision did not dispose of Buckskin's claim for a declaratory ruling that it did not have to pay impact fees for Phases 4, 5, and 6 of The Meadows.

Shortly thereafter Buckskin then filed a Motion for Reconsideration/Amendment and supporting memorandum on January 21, 2001. R. Vol. III, p. 513, 515-22. The Motion for Reconsideration/Amendment repeated the arguments on Buckskin's opposition to entry of judgment, that Buckskin's claim for inverse condemnation on Phases 2 and 3 of The Meadows was timely because they were separate takings with separate accrual dates, and because the five-year statute of limitations for disputes arising from a written agreement applies in this case.

On March 7, 2011, the Valley County Board of County Commissioners adopted Resolution 11-6, which purports to place a moratorium on aspects of Valley County's impact fee practices. R. Vol. III, p. 551. Two days after adopting Resolution 11-6, on March 9, 2011, Valley County filed its brief replying to Buckskin's objections to the Motion for Entry of Judgment, arguing, in part, that Resolution 11-6 mooted Buckskin's objections to the entry of

judgment. R. Vol. III, pp. 540, 548, Ex. 1. The district court then conducted a hearing on these matters two days later, on March 11, 2011.

The District Court issued its Memorandum Decision Re: (1) Plaintiff's Motion for Partial Summary Judgment; (2) Defendant's Motion for Entry of Judgment; and (3) Plaintiff's Motion to Disallow Costs and Attorney Fees on April 11, 2011, denying Buckskin's Motion for Partial Summary Judgment and Motion for Reconsideration/Amendment, and granting the Motion for Entry of Judgment and granting, in part, the Motion to Disallow Attorney Fees and costs. R. Vol. III, p. 577. The District Court entered its Judgment on April 19, 2011, in favor of Valley County dismissing all of Buckskin's claims against Valley County with prejudice, and ordering Buckskin to pay costs to Valley County in the amount of $666. R. Vol. III, p. 596. Thereafter, Buckskin filed its Notice of Appeal to this Court on May 26, 2011. R. Vol. III, p. 599. Valley County filed Notice of its Cross Appeal on June 15, 2011. R. Vol. III, p. 605.

(iii) Statement of Facts:

Idaho Development Impact Fee Act ("IDIFA"):

The Idaho Development Impact Fee Act ("IDIFA"), I.C. § 67-8201 *et seq.*, is the enabling statute that sets forth all of the necessary prerequisites for a local government entity to collect an impact fee. An impact fee is: "a payment of money imposed as a condition of development approval to pay for a proportionate share of the cost of system improvements needed to serve development." I.C. § 67-8203(9). The purpose of IDIFA is to promote orderly growth and development by establishing uniform procedures for local governments to require developers the payment of impact fees and to establish minimum standards for the implementation of impact fee ordinances. I.C. § 67-8202. The payment of an impact fee is usually established during the land use application process as a "development requirement." IDIFA defines "development requirement" as:

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

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

IDIFA indicates that "Governmental entities which comply with the requirements of this chapter may impose by ordinance development impact fees as a condition of development approval on all developments." I.C. § 67-8204 (underlining added). Hence, failure to follow IDIFA precludes a governmental entity from collecting an impact fee and/or conditioning a land use approval upon the payment of an impact fee.

Valley County's Local Land Use Development Ordinance:

Valley County's ordinance containing the regulations and standard of review procedures for zoning and subdivision applications is called the Valley County Land Use and Development Ordinance ("LUDO"). The LUDO contains the rules and procedures for all land use applications in Valley County. Appendix C to the 2004 LUDO contains the requirements for Planned Unit Development Applications. One of the requirements under the LUDO is the payment of impact fees. It states, in relevant part:

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

R. Vol. II, p. 298 (emphasis added).

Valley County's Capital Improvements Program:

Valley County has also implemented a program it calls a Capital Improvements Program ("CIP") for new development in the County. Affidavit of Victor S. Villegas in Support of Plaintiff's Opposition to Motion for Summary Judgment, Ex. A (deposition of Gordon Cruickshank), p. 36, l. 17 – p. 37, l. 8.[1] Under that program, Valley County identified different areas throughout the county to determine the level of road improvements necessary for the roads in that area to handle the increases in traffic as a result of the development. *Id.* Valley County identified approximately 15 to 20 CIP areas throughout the County. Villegas Affidavit, Ex. A (deposition of Gordon Cruickshank) at p. 39, l. 2-11. Under the CIP, road impact fees are to be paid pursuant to a contract called a Road Development Agreement ("RDA") between the developer and Valley County. Importantly, the CIP is not part of the LUDO and is not an ordinance or law.

A description of Valley County's CIP can be found in the public records such as Valley County's March, 2008 Master Transportation Plan. The Transportation Plan describes the CIP as:

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

[1] The Affidavit of Victor Villegas in Support of Plaintiffs' Opposition to Motion for Summary Judgment was sent to the Clerk of the Supreme Court as an Exhibit to the Clerk's Record and will be subsequently referred to as the "Villegas Affidavit."

> from the development and any in-lieu-of contributions, such as construction materials or developer sponsored construction of portions of roads and bridges.

Villegas Affidavit, Ex. E (emphasis added).

The CIP requires that developers pay a fee, construct in-kind improvements on existing roadways or dedicate rights-of-way in an amount calculated by the County's engineer to deal with impacts on county roads. Villegas Affidavit, Ex. A (deposition of Gordon Cruickshank) at p. 41, l. 7 – p. 42, l. 18. The CIP, and calculations as to road impacts allegedly caused by new development, was completed by Valley County and its engineer sometime between 2000 and 2005. Villegas Affidavit, Ex. A (deposition of Gordon Cruickshank) at p. 43, l. 6 – p. 45, l. 11.

Valley County did not bother to follow IDIFA and the enabling process required under IDIFA to exact road impact fees from developers. This is true even though Valley County officials understood that they were requiring developers to pay to mitigate the impacts of development. Villegas Affidavit, Ex. B (deposition of Phillip Davis) at p. 59, ll. 16-24. Planning and Zoning officials just assumed that the RDA scheme was lawful under the Local Land Use Planning Act ("LLUPA"), which allows for development agreements for zoning changes. Villegas Affidavit, Ex. C (deposition of Cynda Herrick) at p 112, l. 22 – p. 113, l. 5, p. 121, ll. 12-17.

The CIP was implemented, after due discussion between the Valley County Commissioners, the Valley County Planning and Zoning Commission and the Valley County Road Department Supervisor. Villegas Affidavit, Ex. A (deposition of Gordon Cruickshank) at p. 45, l. 12 – p. 48, l. 15.) The Valley County Commissioners directed the Valley County Planning and Zoning Commission to begin placing a condition to final approval of developments upon developers to enter into a RDA with the County to pay for impacts on County roads based on the CIP and calculations arrived by the County and its engineers. Villegas Affidavit, Ex. A (deposition of Gordon Cruickshank) at p. 45, l. 18 – p. 50, l. 5; Villegas Affidavit, Ex. B

(deposition of Phillip Davis) at p. 110, l. 1 – p. 111, l. 25.; R. Vol. I, p. 130, ¶ 3. As a result, the Planning and Zoning Department began conditioning final plat approval on developers entering into an agreement with the County to pay for road impacts. Villegas Affidavit, Ex. A (deposition of Gordon Cruickshank) at p. 49, ll. 12-17; Villegas Affidavit, Ex. C (deposition of Cynda Herrick) at p. 59, ll. 13-19, p. 65, l. 12 – p. 66, l. 1, p. 68, ll. 2-10; R. Vol. I, p. 130, ¶ 3.

Buckskin's Land Use Application:

Buckskin submitted a land use application to Valley County on or about March 29, 2004 seeking to develop The Meadows, a multi-phase development project consisting of at least six phases. R. Vol. II, p. 280, ¶ 9; Affidavit of Cynda Herrick in Support of Motion for Summary Judgment, Exs. 3, 4.[2] The application was for a Planned Unit Development ("PUD"), Conditional Use Permit ("CUP"), Preliminary Plat and Final Plat for Phase 1 of The Meadows. *Id.*

As part of the application, Buckskin attached two proposed agreements, a "development agreement" and a "capital contribution agreement." R. Vol. II, p. 280, ¶¶ 3-8; Herrick Affidavit, Ex. 3. Buckskin submitted these proposed agreements with its application because Valley County's LUDO required that Buckskin, as the applicant for a PUD, enter into a development agreement. R. Vol. II, p. 280, ¶¶ 3-8. The idea to enter into a development agreement or pay an impact fee was not Buckskin's, but rather it was required under Valley County's LUDO and policies.

The CIP area for The Meadows is the West Roseberry Area. R. Vol. II, p. 280, ¶ 14, Ex. G. For Phase 1 of The Meadows the impact fee was calculated by Valley County's engineer pursuant to a traffic impact study he conducted for the development of the Tamarack Resort. R. Vol. II, p. 280, ¶ 5; R. Vol. I, p. 130, ¶¶ 4-5, Exs. A, B. According to the engineer's traffic

impact study and his calculations, an impact fee of approximately $1,800.00 per residential unit was necessary to account for impacts of new development on the roadways located in the West Roseberry CIP area. R. Vol. II, p. 280, ¶¶ 5-7; R. Vol. I, p. 130, ¶¶ 4-5, Exs. A, B. This amount and the fact that Valley County planned to require that all developers enter into an agreement with Valley County to pay the impact fee as a condition to approval of a land use application was determined before Buckskin filed its application. R. Vol. I, p. 130, ¶¶ 4-5, Exs. A, B.

Buckskin's proposed "capital contribution agreement" attached to its application identified the payment of an impact fee as required by the LUDO. R. Vol. II, p. 280, ¶¶ 6-8; Herick Affidavit, Ex. 3 (Appendix C). Buckskin and Valley County never entered into the proposed "development agreement" attached to Buckskin's application.

Valley County required that Buckskin sign a Capital Contribution Agreement that was different than the agreement proposed in its application. Valley County's Capital Contribution Agreement for Phase 1 of The Meadows contained terms relating only to the payment of impact fees and nothing more. R. Vol. II, p. 280, ¶ 11, p. 334. The impact fee was calculated by Valley County's Engineer as $1,844 per lot. R. Vol. II, p. 338. According to the terms of the Capital Contribution Agreement for Phase 1 of The Meadows, Buckskin was required to pay impact fees in the form of a dedication of right-of-way in a total amount equal to or greater than $91,142.00. R. Vol. II, p. 335. A credit for impact fees under future phases was granted to Buckskin for the amount the dedicated right-of-way exceeded the impact fee for Phase 1 of The Meadows.

Buckskin likewise was required to pay an impact fee for Phases 2 and 3 of The Meadows when it applied for Final Plat approval of these phases. R. Vol. II, p. 280, ¶¶ 12-13. On or about September 26, 2005, Buckskin entered into another contract, this time titled "Road Development

[2] The Affidavit of Cynda Herrick in Support of Motion for Summary Judgment was sent to the Clerk of the Idaho Supreme Court as an exhibit to the Clerk's Record and will be subsequently referred to as the "Herrick Affidavit."

Agreement," for the payment of impact fees in order to receive Final Plat approval for Phases 2 and 3 of The Meadows. R. Vol. II, p. 344.

Under the RDA, Buckskin was assessed an impact fee of $247,096 and after the deducting $14,936 in credits, Buckskin paid $232,160 to Valley County. R. Vol. II, p. 344; R. Vol. II, p. 254. The per lot impact fee assessment for Phases 2 and 3 was also calculated at $1,844 by Valley County's Engineer. R. Vol. II, p. 344. The RDA for Phases 2 and 3 also was not negotiated or discussed prior to Valley County conditioning final plat approval on entering into the agreement. *Id.*; R. Vol. II, p. 280, ¶ 13.

Buckskin prepared to get final plat approval to develop Phases 4 through 6 of The Meadows on or around August 2007. R. Vol. II, p. 280, ¶ 14; R. Vol. II, p. 249, ¶¶ 6-8; R. Vol. III, p. 255, ¶¶ 4-5. Based on Valley County's impact fee, as calculated by Valley County's Engineer under the West Roseberry Area 2007 Roadway Capital Improvement Program, the fee was unilaterally and arbitrarily increased from $1,844.00 per building lot to $3,968.00 per building lot. Vol. II, p. 280, ¶ 14, Ex. G. This increase was both startling and unanticipated. As a result of the increase, Buckskin representatives scheduled a meeting with the Valley County Road Superintendent to discuss the RDA and the increase in the fee. R. Vol. II, p. 255, ¶¶ 4-5; R. Vol. II, p. 249, ¶ 6-7; R. Vol. II, p. 280, ¶¶ 15-16.

At this meeting the Road Superintendent informed the Buckskin representatives that they had to enter into a RDA and that they had to pay the fee in full to get final plat. Vol. II, p. 249, ¶¶ 6-7; R. Vol. II, p. 255, ¶¶ 4-5; R. Vol. II, p. 280, ¶¶ 15-16. When questioned about the impact fee and why it more than tripled from Phases 2 and 3, the Road Superintendent told the Buckskin representatives that he hoped someone would take Valley County to court to figure out if the RDA's and the impact fees required under the agreements were legal. R. Vol. II, p. 255, ¶¶ 4-5; R. Vol. II., p. 249, ¶¶ 6-7; R. Vol. II, p. 280, ¶¶ 15-16.

Despite Valley County's defense that the payment of impact fees was voluntary, Buckskin's experience was similar or the same as all other developers. Valley County required developers to enter into a RDA regardless of the size of the development, including a one-lot subdivision. Villegas Affidavit, Ex. A (deposition of Gordon Cruickshank) at p. 70, l. 25 – p. 71, l. 5. Valley County unilaterally determined the impact fee for each of the CIP areas. Villegas Affidavit, Ex. A (deposition of Gordon Cruickshank) at p. 71, ll. 6-25. As the projects neared the point where approval of a final plat was necessary, developers generally paid a visit to the Valley County Road Department to discuss the RDA and how it would be implemented. Villegas Affidavit, Ex. A (deposition of Gordon Cruickshank) at p. 49, l. 12 – p. 50, l. 5.

The actual RDA was prepared by Valley County and its engineer; when the agreement was finalized, it was sent to the County Commissioners for approval. Villegas Affidavit, Ex. A (deposition of Gordon Cruickshank) at p. 50, l. 6 – p. 52, l. 6. The RDA also had to be signed by the developer and the impact fee paid before the developer could get on the agenda for the Board of County Commissioners to consider the developer's Final Plat. Villegas Affidavit, Ex. A (deposition of Gordon Cruickshank) at p. 106, l. 23 – p. 109, l. 9. This process of finalizing the RDA and identifying the impact fee the developer was required to pay under the agreement usually happened well after the initial approval of the application for a CUP. Villegas Affidavit, Ex. A (deposition of Gordon Cruickshank) at p. 117, l. 8 – p. 119, l. 24.

Other than the amount of the fee paid under the RDA, the wording of the agreements generally did not vary from developer to developer. Villegas Affidavit, Ex. A (deposition of Gordon Cruickshank) at p. 125, ll. 2-7; *See also* R. Vol. 1, p. 123; R. Vol. I, p. 169; R. Vol. I, p. 178; R. Vol. I, p. 181; R. Vol. I, p. 194; R. Vol. I, p. 204; R. Vol. I, p. 221; R. Vol. II, p. 273; R. Vol. II, p. 334; R. Vol. II, p. 344; R. Vol. II, p. 394; R. Vol. II, p. 404. Developers, however, did not know the contents of or the terms and conditions of a RDA when their CUP was approved

with the condition that they enter into a RDA. Villegas Affidavit, Ex. C (deposition of Cynda Herrick) at p. 83, l. 24 – p. 84, l. 16. Unquestionably, signing the RDA and paying the required fee under the agreement, however, was a required condition to obtaining Final Plat approval and authorization to begin construction. Villegas Affidavit, Ex. A (deposition of Gordon Cruickshank) at p. 137, l. 6 – p. 138, l. 21; Villegas Affidavit, Ex. C (deposition of Cynda Herrick) at p. 101, l. 23 – p. 102, l. 3, p. 107, l. 10 – p. 109, l. 9, p. 104, l. 2-18; Villegas Affidavit, Ex. B (deposition of Phillip Davis) at p. 65, l. 16 – p. 68, l. 2.

More than a year after Buckskin initiated this litigation, the Board of County Commissioners of Valley County, on March 7, 2011, approved Resolution 11-6. R. Vol. III, p. 551. This resolution purports to place a moratorium on Valley County's CIP and RDA requirement. *Id.* The resolution was adopted four days before a hearing on these matters. Based on Resolution 11-6, Valley County argued that Buckskin's claims were also moot. The district court agreed. R. Vol. III, p. 596.

ISSUES PRESENTED ON APPEAL

A. When does an inverse condemnation action accrue for fees paid on a multi-phase development project?

B. Should this Court apply a standard similar to the "project completion rule" for the purpose of accrual of the statute of limitations in an inverse condemnation case involving a multi-phase development project?

C. Did the district court err in holding Resolution 11-6 mooted Appellant Buckskin's request for declaratory relief?

D. Did the district court err in dismissing Appellant Buckskin's illegal fee/tax claim on summary judgment?

E. Did the district court err in refusing to apply the five-year statute of limitations in this case to a claim based upon a written instrument?

F. Is Appellant Buckskin entitled to an award of attorney fees on appeal?

ARGUMENT

I. Standard of Review.

This Court employs the same standard as the district court in ruling on a motion for summary judgment. *Mutual of Enumclaw Ins. Co. v. Pedersen*, 133 Idaho 135, 138, 983 P.2d 208 (1999). Summary judgment is appropriate only when all of the evidence establishes that there are no genuine issues of material fact and the moving party is entitled to a judgment as a matter of law. I.R.C.P. 56(c); *Willie v. Board of Trustees*, 138 Idaho 131, 133, 59 P.3d 302, 305 (2002). The Court should liberally construe all facts and draw all reasonable inferences in favor of the nonmoving party. *Id.* The non-moving party must set forth genuine issues of material fact by affidavit or otherwise. I.R.C.P. 56(e). Regarding constitutional claims or the interpretation and application of a legislative act, this Court independently determines whether the facts support a violation. *Willie* at 133, 59 P.3d at 305.; *Driver v. SI Corp.*, 139 Idaho 423, 427, 80 P.3d 1024, 1028 (2003).

II. When does an inverse condemnation action accrue for fees paid on a multi-phase development project?

Appellant, Buckskin filed this lawsuit seeking in part, to recover monies it paid to the County under its Capital Improvements Program for Phases 2 and 3. Specifically, Buckskin paid $232,160 in road mitigation fees to the County in order to get final plat for Phases 2 and 3 of The Meadows Subdivision. R. Vol. II, p. 344; R. Vol. II, p. 254. One of the theories for recovery raised by Buckskin was inverse condemnation; Buckskin asked that it be paid "just compensation" for the fees paid on Phases 2 and 3.

Buckskin contends that the district court erred in dismissing its inverse condemnation claim for the Phase 2 and 3 impact fee payments because: (a) the justiciability requirement of ripeness requires that each payment should have been considered a separate taking with separate accrual dates; (b) the district court improperly expanded the test for determining the accrual of an

inverse condemnation claim; and (c) public policy considerations support a finding that separate takings with separate accrual dates occurred in this case with each payment of impact fees.

A. Ripeness considerations favor a finding of separate takings.

The district court's holding fails to consider issues of justiciability and is in direct conflict with this Court's requirement that a claim must be ripe before it can be adjudicated. Ripeness is a fundamental prerequisite to invoke a Court's jurisdiction—a harm must be sufficiently matured to warrant judicial intervention. *Mannos v. Moss*, 143 Idaho 927, 936, 155 P.3d 1166, 1175 (2007) (citing *Noh v. Cenarrusa,* 137 Idaho 798, 801, 53 P.3d 1217, 1220 (2002)). The central concern of the ripeness doctrine is whether the case involves uncertain or contingent future events that may or may not occur as anticipated or, indeed, may not occur at all. *See Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 479–80, 110 S.Ct. 1249, 108 L.Ed.2d 400 (1990). In other words, ripeness relates to the timing of a suit and asks whether a case is brought too early. *State v. Manley,* 142 Idaho 338, 342, 127 P.3d 954, 958 (2005).

In this case, Buckskin was required to pay an impact fee for each phase as each phase came up for final plat. In dismissing Buckskin's inverse condemnation claim on the four year statute of limitations, the district court held that since The Meadows development was covered under one Conditional Use Permit, all future phases were subject to that specific accrual date. R. Vol. III, p. 583.

The district court's reliance on the fact that Buckskin's project was approved under one conditional use permit for the entire project demonstrates a fundamental misunderstanding of multi-phase development. The Meadows is a multi-phase mixed use development. Vitally important to Buckskin's 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* I.C. § 67-6504 (the governing board only, not a planning and zoning commission, has full

authority to "finally approve land subdivisions"). Valley County's LUDO outlines the process for obtaining PUD approvals, each of which is approved separately starting with Concept Approval and ending with Final Plat approval for each phase in a multi-phase development. *See* R. Vol. II, p. 290. Just because Final Plat of one phase is approved does not guarantee or mean that future phases will receive Final Plat approval.

The district court's holding is in error because it flies in the face of the doctrine of ripeness. When the impact fees were paid on Phase 1 no other payments were made and therefore no other takings had occurred. Had Buckskin sued for "just compensation" for all future fees it had yet to pay, that lawsuit would have been dismissed because the claims would not have been ripe. This Court has held that 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)). Even when a fee payer knows in advance that a fee will be collected it has not ripened enough to bring an inverse condemnation lawsuit. Thus, the district court's reasoning that Buckskin knew it would have to pay impact fees on future phases is irrelevant.

The only way for Buckskin to be receive "just compensation" for impact fee payments paid on later phases without running afoul of the doctrine of ripeness is to find that each impact fee assessment triggers a new and separate accrual period.

B. There Was No Substantial Interference with Buckskin's Property Interest In the Money Paid for Phases 2 and 3 When It Dedicated Real Property For Right Of Way As Payment For Phase 1.

A second reason for finding that Buckskin's impact fee payments on Phases 2 and 3 should be treated as separate takings-and hence separate accrual dates-is the fact that there was no substantial interference with Buckskin's money paid for Phases 2 and 3 when it paid the impact fee for Phase 1 by giving right of way.

This Court has held that the test for determining when an inverse condemnation action accrues for purposes of the statute of limitations "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) (underlining added). The district court relied on the above quoted rule of law to fix the accrual date for all of Buckskin's phases at the time payment was made on Phase 1, reasoning that: "[i]t is irrelevant that the project was divided into separate phases because the entire project was governed by a single Conditional Use Permit and [Buckskin] 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." R. Vol. III, p. 583. The district court's reasoning however impermissibly expands the rule in *Tibbs* to require that a property owner need only be aware that a taking is likely to occur. Merely being aware that a taking of one's property is imminent does not rise to the level of "substantial interference" nor is it sufficient to start the clock on the statute of limitations.

The facts are undisputed that Buckskin paid impact fees on Phase 1 in the form of giving real property for right-of-way. R. Vol. II, p. 280, ¶ 11; R. Vol. II, p. 334. When Buckskin gave real property to Valley County it cannot be said that there was also a "substantial interference" with Buckskin's property interest in its money that would be eventually paid on later phases. The money remained in Buckskin's bank account. Buckskin was free to do whatever it wanted to do with its money, and in fact, if it chose not to complete the project, it had no obligation to pay the impact fee. Whether The Meadows was governed by a single CUP is not a controlling factor. Rather, the separate impact fee payments made as each phase comes for final plat approval should be the trigger for accrual because that is when there is a substantial interference with Buckskin's money. *See also, Corbridge v. Clark Equip. Co.*, 112 Idaho 85, 88-89, 730 P.2d

1005, 1008-09 (1986) (holding "we have never held that a statute of limitations may run before an aggrieved party suffers damages.").

C. Public policy considerations favor a finding of separate takings hence separate accrual dates.

Public policy concerns and the interest of justice favor a holding from this Court that each impact fee assessment for the various phases starts a separate accrual date because to hold otherwise would lead to an unconscionable result. The district court's decision allows a governmental entity to increase the amount of an unauthorized fee on multi-phase projects with no fear of recourse if the statute of limitations is allowed to run once the first impact fee is paid.

Here, there is no dispute that The Meadows is a multi-phase project. R. Vol. II, p. 280, ¶ 3; Herrick Affidavit, Ex. 3. More importantly, the fact that final plat has not been recorded for the final phases of The Meadows demonstrates that completion of a multi-phase project may or will take longer than four years. Those facts coupled with the fact that Valley County has now increased the impact fee assessment to more than two times per lot for the final phases of The Meadows shows how the district court's holding produces an unconscionable result.

When Buckskin executed the RDA for Phases 2 and 3 the impact fee assessment was $1,844 per single family lot and $1,383 per apartment dwelling unit. R. Vol. II, p. 344, 349. According to Valley County's West Roseberry Area 2007 Capital Improvement Program Cost Estimate, the impact fee for a residential lot has now more than doubled to $3,968 per lot. R. Vol. II, p. 350. Therefore, under the district court's holding, since Buckskin's cause of action for all phases accrued at the payment of Phase 1 fees, Valley County is now free to unilaterally raise the amount because Buckskin is barred from bringing an inverse condemnation action for subsequent payments. This unconscionable result should not be allowed to stand and the only way to avoid that result is to treat each assessment as a separate taking.

III. Should this Court apply a standard similar to the "project completion rule" for the purpose of accrual of the statute of limitations in an inverse condemnation case involving a multi-phase development project?

If this Court disagrees with Buckskin that each impact fee assessment should be treated as a separate taking, Buckskin argues, in the alternative, that this Court should hold that the statute of limitations has not accrued. Specifically, Buckskin asks this Court to apply a standard similar to the "project completion rule" established by this Court in *C&G, Inc. v. Canyon Highway District No. 4*, 139 Idaho 140, 75 P.3d 194 (2003) and apply it to multi-phase projects. Unless and until all impact fees are paid and Final Plat is approved on the very last phase, the statute of limitations cannot accrue.

Generally, the standard test for determining when an inverse condemnation action accrues for purposes of the statute of limitations "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). However, this Court has departed from the *Tibbs* standard the facts and circumstances of a case and public policy required application of a different standard.

In *C&G Inc. v. Canyon Highway District No. 4*, 139 Idaho 140, 75 P.3d 194 (2003) this Court departed from the *Tibbs* rule holding that where government takes property by way of a construction project, the property owner has the "right to wait until completion of the project before his or her inverse condemnation claim accrues for purposes of calculating the statute of limitations." *Id.* at 144. That rule has been referred to by this Court as the "construction completion rule."

In *C&G* the Canyon Highway District rebuilt a road over C&G's property. *Id.* at 141. The Highway District believed it owned an easement over the section line and could rebuild the road without compensating C&G for taking the property on which the road would be built. *Id.*

The Highway District advised C&G that due to its alleged easement, C&G was not entitled to compensation for a taking of its property. *Id.* C&G believed the Highway District's representations without further inquiry. *Id.*

By November 1992 the Highway District completed construction of the road's subbase and construction was totally finished by November 1993. *Id.* at 142, 75 P.3d at 196. In January 1997, when C&G hired a surveyor for development purposes, it learned for the first time there was no easement over the section line. *Id.* C&G initiated an inverse condemnation action against the Highway District on January 31, 1997. *Id.* C&G prevailed before the district court and the Highway District appealed on grounds that the four year statute of limitations barred C&G's lawsuit. *Id.*

On appeal, the Idaho Supreme Court declined to apply the *Tibbs* standard on the issue of accrual and instead applied the "project completion rule." In doing so, this Court adopted its reasoning in *Farber v. State*, 102 Idaho 398, 630 P.2d 685 (1981) (project completion rule applied to when notice provisions of Idaho Tort Claims Act is triggered) and found that there is no reliable method to determine the extent of damages when property is taken through a construction project until the construction project is completed. *Id.* at 144-145. Furthermore, this Court held that ripeness considerations favored departure from the *Tibbs* standard because a "landowner subjected to the taking of his or her property by a government construction project should not be required to prematurely bring an inverse condemnation claim before damages can be fully assessed." *Id.*

In addition to ripeness and speculative damages concerns, the *C&G* Court looked at other policy considerations to justify its holding. One interesting consideration was this Court's recognition that C&G's claim should also not be barred given the Highway District's misrepresentation to C&G that it had an easement over their property:

> Furthermore, the Highway District's erroneous belief it had an easement over the section line caused the confusion in this case. It would be bad precedent for this Court to condone the government's misrepresentation, albeit innocently mistaken, by holding otherwise. The project completion rule promotes judicial economy and certainty, which benefits all parties involved in a takings case.

Id. at 144 (underlining added).

In this case the facts present similar ripeness and policy considerations found in *C&G* and provide compelling reasons for this Court to depart from the *Tibbs* standard and adopt a tolling standard like the construction completion rule to multi-phase projects. Like *C&G*, Buckskin's damages would be speculative because it cannot know what each fee assessment will cost until it actually files for Final Plat on each of its phases. There are two reasons why damages are speculative. First, Buckskin will not know how many building lots it will actually include for construction in each phase until it actually seeks Final Plat approval. The number of lots included in a phase may be dictated by a number of factors, but it is not an exactly known quantity at the time the CUP was approved. Since Valley County's road impact fee is calculated based on the number of lots in a phase, damages are purely speculative until final plat approval is sought and the exact number of lots is determined.

Secondly, and more significantly, Valley County has demonstrated by its own actions in this case that damages are purely speculative until Final Plat approval is sought by a developer. At the commencement of construction for Phase 1 of The Meadows Subdivision, Valley County identified a per lot road impact fee of $1,844. R. Vol. II, p. 338. When Buckskin applied for and received final plat approval for Phases 2 and 3 of The Meadows and entered into a new RDA with Valley County, the per lot road impact fee was again calculated at $1,844. R. Vol. II, p. 349. As Buckskin began preparations to obtain final plat approval for Phases 4 through 6 of The Meadows Subdivision, it was informed that Valley County had unilaterally and without notice increased the per lot road impact fee to $3,968. This represents a more than *two fold* increase in

the road impact fee. *See* R. Vol. II, p. 351; R. Vol. II, p. 280, ¶¶ 14-17; R. Vol. II, p. 250, ¶¶ 5-8; R. Vol. II, p. 255, ¶¶ 4-5.

Buckskin's damages for inverse condemnation on Phases 2 and 3 were speculative until it was required to actually pay the road impact fees, and remain speculative for the future phases of The Meadows. The evidence in the record also establishes that the road impact fees exacted from developers by Valley County may unilaterally increase at the County's whim without notice. Not only is this egregiously unfair, it more than illustrates the speculative nature of Buckskin's inverse condemnation damages before Final Plat approval was (or is) sought and the road impact fee was actually paid.

Public policy considerations in this case also compel departure from the *Tibbs* standard. Like *C&G*, Buckskin was mislead into believing that Valley County could collect an impact fee. The County's ordinance (i.e. the LUDO) governing applications for planned unit developments states that the County can impose impact fees. Specifically, Section I and J of Appendix C of the LUDO requires the payment of impact fees. R. Vol. II, p. 280, 298. Additionally, prior to Buckskin filing this lawsuit, at least one sitting Valley County Commissioner, during a public hearing on September 28, 2009, expressed serious doubts about the legality of Valley County's CIP/Road Development Agreements by stating:

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

Villegas Affidavit, Ex D (Deposition of Frank W. Eld), p. 55, l. 25 – p. 56, l. 12. This Commissioner also testified that Valley County had two legal opinions that the Road

Development Agreement method of raising funds violated Idaho law. *Id.*, at p. 62, l. 23 – p. 63, l. 25.

Although the LUDO states that impact fees can be collected, the County admits that it never enacted an IDIFA compliant impact fee ordinance. R. Vol. I, p. 33. This further provides a policy basis for departing from the *Tibbs* standard in this case. Not only did Valley County's LUDO incorrectly state that impact fees can be collected, Valley County continued its illegal scheme by adopting a uniform practice of conditioning approval of Final Plat upon applicants entering into a RDA. Now, the County uses that fact to fabricate a defense that the fees were paid were voluntary and hence not a taking. The affidavits submitted by Buckskin representatives, the affidavits from other developers, deposition testimony from current and former county commissioners and the County's very own Master Transportation Plan all point to the fact that impact fee payments were required. *See* Statement of Facts, *supra.*

IV. Did the district court err in holding Resolution 11-6 mooted Appellant Buckskin's request for declaratory relief?

Valley County's Resolution 11-6 does not moot Buckskin's request for a declaratory judgment that it does not have to pay a road impact fee for Phases 4, 5, and 6 of The Meadows. The Board of County Commissioners of Valley County approved Resolution 11-6 on March 7, 2011, well over a year after Buckskin initiated this legislation. Resolution 11-6 is a misguided attempt to moot Buckskin's claims related to future phases of The Meadows Subdivision. Based on the nature of a resolution and the very language of Resolution 11-6, the district court erred in ruling that Buckskin's claims related to its future phases were moot.

Resolution 11-6 purports to place a moratorium on Valley County's road development fee program and RDA requirement. R. Vol. III, p. 551. For those developers that have yet to enter into an RDA, Section 2 of Resolution 11-6 requires applicants to either voluntarily pay road impact fees until Valley County adopts an IDIFA-compliant ordinance or to negotiate

RDA's with the County, reserving to Valley County the unilateral authority to deny an application based on its inability to secure funding under its CIP. R. Vol. III, p. 552-53. For existing RDA's, under Section 4 of Resolution 11-6, developers have an opportunity to voluntarily pay a fee, put the development on hold, or negotiate a new RDA. R. Vol. III, p. 553. If an IDIFA-compliant ordinance is not in place, Valley 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 [sic] on a schedule consistent with the availability of public services.

R. Vol. III, p. 553.

As part of its Complaint, Buckskin requested a declaratory judgment that Valley County's practice of requiring developers to pay impact fees is in violation of Idaho law and is invalid. R. Vol. I, p. 4. After the district court issued its initial Memorandum Decision, Valley County filed a Motion for Entry of Judgment on January 13, 2011, asking the district court to dismiss Buckskin's Complaint with prejudice. R. Vol. III, p. 498. Buckskin objected to this motion on grounds that the district court's Memorandum Decision did not dispose of all the claims raised in its Complaint, including Buckskin's claim for declaratory relief that it did not have to pay impact fees for the final phases. R. Vol. III, p. 510. On March 9, 2011, Valley County replied to Buckskin's objection, in part, on grounds that Resolution 11-6, adopted two days earlier, rendered Buckskin's claims moot. R. Vol. III, pp. 540, 548, Ex. 1. A hearing was held two days later, on March 11, 2011, which included arguments related to the newly adopted Resolution 11-6. The district court agreed and entered judgment on behalf of Valley County, dismissing Buckskin's entire Complaint with prejudice.

In ruling against Buckskin on Valley County's Motion for Entry of Judgment, the district court found that Resolution 11-6 mooted Buckskin's declaratory judgment claims for the future

phases of The Meadows Subdivision because Buckskin now has a chance under Resolution 11-6 to negotiate a RDA for phases 4-6 of The Meadows. R. Vol. III, p. 579-80. The district court erred in its ruling with regard to the effect of Resolution 11-6 because Resolution 11-6 is an improper method to address the illegal impact fee issue, Valley County has no authority to require Buckskin to negotiate a RDA for the remaining phases of The Meadows Subdivision, and any claim for the future yet-to-be completed phases of The Meadows are now improperly subjected to the res judicata effect of the district court's entry of judgment.

A. Resolution 11-6 does not moot Buckskin's claim for a declaratory judgment in relation to the future phases of its development because the ordinances requiring the payment of an illegal impact fee remain in force.

Though Valley County clearly adopted Resolution 11-6 in response to this litigation, it does not moot Buckskin's claim for a declaratory judgment related to the development of future phases of The Meadows Subdivision. Resolution 11-6 is just that, a resolution. It does not create any binding authority on Valley County and may be revoked or withdrawn as quickly and as easily as it was adopted. If anything, the facts of this case and the timing of adoption of this resolution suggest that it was passed merely to create a mootness argument. As set forth below, Resolution 11-6 does not moot Buckskin's request for declaratory relief that it does not have to pay an impact fee or otherwise mitigate for traffic impacts on Phases 4, 5, and 6 of The Meadows. Further, under IDIFA an ordinance is the only allowed method for placing any requirement for the payment of impact fees on a land use applicant.

A government body generally may act by ordinance or resolution unless a particular mode of action is required by constitution or statute. *Snake River Homebuilders Assn. v. Caldwell*, 101 Idaho 47, 48, 607 P.2d 1321, 1322 (1980). Regardless, a resolution is very different from an ordinance. A resolution is a mere expression of opinion of the governing body and, unlike an ordinance, is not a law. *See City of Salisbury v. Nagel*, 420 S.W.2d 37 (Kans. Ct.

App. 1967) (citing 37 Am. Jur. Municipal Corporations s 142; 62 C.J.S. Municipal Corporations s 411; Vol. 5 McQuillin, Municipal Corporations, s 15.02; *Baker v. Lake City Sewer Dist.*, 30 Wash.2d 510, 191 P.2d 844).

Under IDIFA, Valley County is required to enact an ordinance to collect impact fees. I.C. § 67-8207. Thus a particular mode of action is required under Idaho law to address the payment of any impact fee. Resolution 11-6 remains nothing more than an attempt by Valley County to circumvent the requirements of IDIFA. Under its own terms, continued development will be allowed in Valley County only if the developer expressly volunteers to pay road impact fees or if the County decides to allow the development nonetheless. Valley County ominously reserves to itself the right to either deny an application based on its inability to obtain funds under its CIP or to dictate the timing and sequence of development. This is simply not allowed by IDIFA. Resolution 11-6 cannot be used to avoid the requirements of IDIFA.

Further, the provisions of the County's LUDO and CIP scheme remain in place. Valley County has admitted that it has not enacted an IDIFA compliant ordinance, nor has it taken any steps to do so. Therefore, Sections I and J of Appendix C to Valley County's LUDO requiring the payment of impact fees through a development agreement or otherwise is illegal. None of the controlling legal mechanisms have changed, been abolished, or replaced with an ordinance compliant with the IDIFA. As for Buckskin, Valley County's future enactment of an IDIFA-compliant ordinance is of little relevance because it is the ordinances in place at the time of the application that apply, not a future IDIFA-compliant ordinance. *See South Fork Coalition v. Bd. of Comm'rs of Bonneville County*, 117 Idaho 857, 861, 792 P.2d 882, 886 (1990) (holding that an applicant's rights are determined by the ordinances in place at the time of the application). The enactment of an IDIFA-compliant ordinance is irrelevant to Buckskin's existing CUP.

Thus, Valley County leaves itself with the same power to deny Buckskin final plat approval if Buckskin refuses to "voluntarily" pay an illegal impact fee for road development purposes. Resolution 11-6 does not answer the problem or moot the issue. Buckskin was entitled to a declaration voiding the offending ordinance provisions in the LUDO as well as a declaration that it did not have to pay impact fees for the final phases of The Meadows.

B. Valley County does not have legal authority to require Buckskin to enter into a Road Development Agreement under Resolution 11-6.

Valley County has limited authority to require a developer to enter into a road development agreement. Resolution 11-6 still requires Buckskin to negotiate for a RDA in order to proceed with development of future phases of The Meadows. Valley County, however, has no authority under Idaho law to require Buckskin to negotiate or enter into a development agreement of any kind outside the context of a rezone of property. Under the Local Land Use Planning Act ("LLUPA"), a governmental body is granted the authority to require an applicant to enter into a development agreement only if the application requests a re-zoning of the subject property. Section 67-6511A of LLUPA, entitled "Development Agreements," states, in relevant part: "[e]ach governing board may, by ordinance adopted or amended in accordance with the notice and hearing provisions provided under section 67-6509, Idaho Code, require or permit ***as a condition of rezoning*** that an owner or developer make a written commitment concerning the use or development of the subject parcel." I.C. § 67-6511A (emphasis added).

There was no rezone as a part of Buckskin's application. Buckskin applied for a Planned Unit Development and Conditional Use Permit, not a rezone. The County has no authority under Resolution 11-6 to require a party to negotiate or enter into a development agreement outside of circumstances where a request for a rezone is included in the application. The district court erred in concluding that Buckskin even "negotiate" a new development agreement because Valley County has no authority to require Buckskin to negotiate for and enter into a development

agreement of any kind. Further related to this, it is highly questionable what, exactly, will be the subject of any such development agreement aside from the payment of road impact fees. The RDA's required by Valley County prior to Resolution 11-6 dealt solely with the payment of road development fees. *See* R. Vol. 1, p. 123; R. Vol. I, p. 169; R. Vol. I, p. 178; R. Vol. I, p. 181; R. Vol. I, p. 194; R. Vol. I, p. 204; R. Vol. I, p. 221; R. Vol. II, p. 273; R. Vol. II, p. 334; R. Vol. II, p. 344; R. Vol. II, p. 394; R. Vol. II, p. 404.

Resolution 11-6 essentially states that payment of such fees will be required for approval of any application due to the alleged impacts of the development. Otherwise it is entirely unclear what exactly developers have to negotiate with Valley County in relation to a road development agreement besides the payment of a road impact fee. Valley County has no legal authority to require Buckskin to negotiate a RDA under Resolution 11-6.

C. Dismissing Buckskin's Complaint with prejudice leaves Buckskin without the possibility of redress for any violation of the law with regard to the future phases of its development.

Valley County has preserved to itself all the necessary power under Resolution 11-6 to mandate or require the payment of an impact fee as a condition to approval of a land use application or approval of final plat by maintaining, under Sections 2 and 4, the right to deny applications based on impacts or the right to control the timing and sequence of development. Under the Declaratory Judgment Act, Buckskin is entitled to a declaration that Valley County's road development fee and its ordinances and programs requiring payment of road development fees are invalid under the law, even if no other relief is available to Buckskin. I.C. § 10-1212; *See also Schneider v. Howe*, 142 Idaho 767, 773, 133 P.3d 1232, 1238 (2006) (holding that a declaratory action is appropriate if it will clarify and settle the legal relations at issue, if such declaration will afford relief from uncertainty and controversy giving rise to the proceeding, and if deferring adjudication would add nothing to the legal issues presented); See also *Ayers v.*

General Hospital, 67 Idaho 430, 434, 182 P.2d 958, 959 (1947) (recognizing that a declaratory action is appropriate to invoke remedial or preventative relief, or for a potential threat).

Resolution 11-6 is subject to change at Valley County's whim. The County may revise Resolution 11-6 or it may withdraw it altogether. It is nothing more than an expression of the County Commissioner's opinion or mind with regard to Valley County's impact fee scheme. Despite the representations made in Resolution 11-6, there is absolutely no assurance that Buckskin's rights will not be impacted with regard to the development of future phases of The Meadows. The discussion above regarding Valley County's unilateral and arbitrary increase of the road impact fee by more than double between Phases 2 and 3 and Phases 4 to 6 of The Meadows is a perfect illustration of why it is necessary for Buckskin to obtain a declaratory judgment that Valley County's LUDO and CIP are illegal under Idaho law. Valley County's further hedging on whether it will actually follow Idaho law and adopt an IDIFA-compliant impact fee ordinance further illustrates Buckskin's need for a declaratory judgment with regard to the future phases of its development and whether Valley County's current impact fee scheme and program is illegal under Idaho law.

For all of these reasons, the district court erred in granting Valley County's Motion for entry of judgment and in entering judgment on behalf of Valley County and dismissing all of Buckskin's claims with prejudice. Resolution 11-6 does not moot Buckskin's claim for declaratory judgment in this case.

V. Did the district court err in dismissing Appellant Buckskin's illegal fee/tax claim on summary judgment?

Valley County's CIP and LUDO provisions requiring the payment of road development fees is an impact fee scheme and constitutes an unauthorized and illegal fee or tax because Valley County has not followed the requirements under the enabling statutes of IDIFA necessary to collect impact fees. In Count One of its Complaint, Buckskin requested a declaratory

judgment that Valley County's road impact fee scheme is an unauthorized and illegal fee or tax because Valley County has not enacted an ordinance to collect impact fees under IDIFA. R. Vol. I, pp. 4-5. The District Court essentially agreed with Buckskin, finding in its Memorandum Decision Re: Summary Judgment that: "[h]ere 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." R. Vol. III, p. 492.

Based on the District Court's finding and because Valley County's Motion for Summary Judgment only addressed Count Two of Buckskin's Complaint for its claim of inverse condemnation, Buckskin moved for partial summary judgment on Count I of its Complaint that the RDA fee constitutes an unauthorized impact fee and/or illegal tax. R. Vol. III, p. 494. Buckskin again raised the issue of its unadjudicated illegal fee and tax claim in objecting to Valley County's Motion for Entry of Judgment, which sought to dismiss all of Buckskin's claims with prejudice. R. Vol. III, p. 510. During the district court's March 11, 2011 hearing on the Motion for Partial Summary Judgment, Buckskin's counsel again raised the issue of Buckskin's illegal fee and tax claim against Valley County. Tr. Vol. I, p. 2, L. 17 – p. 5, L. 2.

The district court denied Buckskin's Motion for Partial Summary Judgment on Count I on grounds that: "...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 ... because ... it was at that point in time ... a substantial interference with the Plaintiffs' property interest became apparent." R. Vol. III, p. 579. The District Court held that: "October 25, 2004 was the latest point in time that the statute of limitations could have began to run as a matter of law." *Id.* Other than to recite the legal standard on which it dismissed Buckskin's inverse condemnation claim, the district court provided no other analysis

as to why Buckskin was not entitled to summary judgment on its illegal fee and tax declaratory judgment claim despite the fact the district court essentially agreed that Valley County's impact fee ordinance is illegal.

The district court's ruling is in error with regard to Buckskin's claim for payment of an illegal fee or tax. Buckskin's additional claim (i.e. declaration of illegal tax and violation of the Idaho Development Impact Fee Act) is completely distinct, and must be addressed apart from the inverse condemnation claim. The district court's ruling either ignores Count I of Buckskin's Complaint or it subsumes Buckskin's illegal fee or tax claim within its inverse condemnation claim, and assigns to the illegal fee or tax claim the same standard for accrual as for inverse condemnation.

Buckskin's claim for a declaratory judgment that Valley County's RDA scheme and the fee required under the RDA is an illegal fee or tax is wholly separate from Buckskin's claim for inverse condemnation. In fact, the legal standard for accrual of an inverse condemnation claim has no application to Buckskin's claim for payment of an illegal fee or tax. The correct standard of accrual for an illegal fee or tax claim is the date upon which the illegal fee or tax was paid.

A. Buckskin's claim for a declaratory judgment that the fee it paid under Valley County's Road Development Agreement scheme is illegal is a separate claim from its inverse condemnation claim.

That a claim to recover payment of an illegal and unauthorized fee is a separate and distinct claim from a claim for inverse condemnation cannot be seriously disputed. This Court long ago recognized that a claim for payment of an illegal tax in violation of the Idaho Constitution is as an independent, stand-alone cause of action under Idaho law. In *Brewster v. City of Pocatello* this Court overturned a city ordinance imposing a street maintenance and restoration fee on owners of property abutting a public street. *Brewster v. City of Pocatello,* 115 Idaho 502, 504-05, 768 P.2d 765, 767-78 (1988) (holding that the fee at issue was a revenue

generating measure and constituted an unauthorized and illegal tax without specific statutory authority to charge such a fee from the legislature). In *BHA Investments, Inc. v. City of Boise*, this Court reviewed and invalidated a city liquor license transfer fee because the city had no authority to impose such a fee. *BHA Investments, Inc. v. City of Boise*, 138 Idaho 356, 357-58, 63 P.3d 482, 483-84 (2003) (holding that any authority of a county to regulate a matter for which the state constitution authorized the legislature to act must come from the legislature and the relevant statutory authority did not grant the municipality the authority to impose this fee). Likewise, in *Idaho Building Contractors Association, Inc. v. City of Coeur d'Alene*, this Court struck down an impact fee required by the city for all new building permits because the fee was imposed in violation of IDIFA. *Idaho Building Contractors Association, Inc. v. City of Coeur d'Alene*, 126 Idaho 740, 890 P.2d 326 (1995) (finding that IDIFA is the only enabling statute permitting the collection of an impact fee and absent an IDIFA compliant ordinance the building permit fee is a non-individual assessed tax).

As these cases demonstrate, a claim against a government entity to recover the payment of an illegal and unauthorized fee or tax is clearly a recognized and accepted cause of action under Idaho law. Buckskin pleaded a claim for illegal fee or tax as an alternative to its inverse condemnation claim. This is allowable under the applicable rules and law. "Under modern pleading rules parties may seek alternative or different types of relief regardless of consistency or whether based on legal or equitable grounds or both." *MK Transport, Inc. v. Grover*, 101 Idaho 345, 350, 612 P.2d 1192, 1197 (1980). Modern pleading rules merely require a simple and concise statement of the operative facts upon which relief may be granted on any sustainable theory and regardless of consistency. *Id.* (citing *Bernstein v. U.S.*, 256 F.2d 697, 706 (10th Cir. 1958)). Several legal theories for recovery may draw upon the same core set facts. *See Associates Northwest, Inc. v. Beets*, 112 Idaho 603, 605, 733 P.2d 824, 826 (1987)

(acknowledging that plaintiffs in the case pleaded alternative claims based on several different legal theories). Certainly each legal theory is unique and each legal theory is subject to separate elements of proof and accrual triggers for statute of limitations purposes.

This is illustrated in the case of *Intermountain West, Inc. v. City of Boise*, 111 Idaho 878, 728 P.2d 767 (1986). In that case Intermountain West, Inc. began developing land that was subsequently annexed into Boise city limits. *Id.* at 878, 728 P.2d at 767. The City posted a stop work order because Intermountain West had not obtained building permits from the City after annexation of the property. *Id.* After the stop work orders were ignored, the City sought an injunction to stop the construction. *Id.* The court ruled in favor of Intermountain West on a vested rights theory and the City appealed. *Id.* at 879, 729 P.2d at 768. After that appeal, Intermountain West sued Boise City for damages caused by issuance of the stop work order and for inverse condemnation. *Id.* While both claims were dismissed as untimely, this Court reviewed each claim separately and identified different accrual dates for each claim. The tort cause of action accrued on September 3, 1975, because that was the date the stop work orders were lifted. *Id.* The inverse condemnation claim, on the other hand, accrued on a different date, no later than July 30, 1975, because that was the date the plaintiff's loss of its property became apparent. *Id.* at 880, 729 P.2d at 769.

The distinction between Buckskin's claims and the required proof for each claim further illustrates the district court's error in dismissing Buckskin's Motion for Partial Summary Judgment. The Idaho Constitution states that private property may be taken by the government for a public use, "but not until a just compensation" has been paid for the property. Idaho Const. Art. 1, § 14. Thus the government's taking of private property for public use is not the conduct that violates the Idaho Constitution, but rather, it is the taking without the payment of just compensation. The Idaho Constitution is clear that the remedy is the payment of just

compensation, not declaratory relief preventing the taking of private property. Buckskin's request for declaratory relief that the fee collected under the RDA, on the other hand, will require evidence that Valley County engaged in an ultra vires act in violation of IDIFA. This proof must come by way of a declaratory action- an action that is separate from an inverse condemnation action.

As illustrated by *Intermountain West, Inc. v. City of Boise*, a plaintiff may plead alternative theories for recovery, each of which is governed by different elements of proof and a distinct standard for triggering accrual of the statute of limitation. The district court's analysis that all Buckskin's claims, without regard to the nature of the claim or the elements of proof, accrued as of October 25, 2004 because the entire PUD was approved under one conditional use permit was in error. Buckskin's declaratory judgment claim for an unauthorized and illegal fee or tax is a separate, alternative claim from its inverse condemnation claim and cannot be dismissed on the same procedural grounds the district court applied to Buckskin's inverse condemnation claim.

B. The correct standard for accrual of the statute of limitations for a claim to recover payment of an unauthorized and illegal tax is the date the illegal tax is paid.

There is no Idaho law assigning the test for accrual of an inverse condemnation claim to a claim against a government entity for the imposition of an unauthorized and illegal fee or tax, which is a separate and distinct cause of action from inverse condemnation. The district court further erred in assessing whether Buckskin's illegal fee or tax claim was timely under the same standard applied to Buckskin's inverse condemnation claim. The fact that this case happens to involve a land use application for a PUD that was granted under a single conditional use permit is not relevant. An illegal tax claim is not an inverse condemnation claim and the triggering

event for accrual of the statute of limitations for an illegal tax claim is clearly different than the standard that must be applied to a claim for inverse condemnation.

The appropriate standard for the triggering or accrual of a claim for the payment of an unauthorized and illegal fee/tax is the date upon which the claimant was made to pay the fee. Though an Idaho court has not ruled on this question specifically, many other courts have. For example, in *Sundance Homes, Inc. v. County of DuPage*, 746 N.E.2d 254 (Ill. 2001), the Illinois Supreme Court set the accrual date for payment of an illegal impact fee claim as the date the claimant paid the fee. *Id.* at 262. In that case, Sundance Homes, Inc., a developer, sued DuPage County for a declaratory judgment to return the road impact fee it paid under the County's road impact fee ordinance after the enabling statute was determined unconstitutional under Illinois law. *Id.* at 257. The developer argued that its cause of action did not accrue until the Illinois Supreme Court ruled the enabling statute unconstitutional. *Id.* at 258. After reviewing the underlying legal policy for a statute of limitations and what events trigger a statute of limitations, the court held that the event triggering the statute of limitations for a declaratory judgment claim to return payment of an illegal fee is the date the fee was paid. *Id.* at 262.

In *Lowenberg v. Dallas*, 168 S.W.3d 800 (Tex. 2005), the Texas Supreme Court likewise addressed the issue of when a claim for the payment of an illegal fee is triggered for statute of limitations purposes. In *Lowenberg*, the ordinance at issue required commercial property owners to pay a "fire registration fee." *Id.* at 801. The claimant sued the city alleging that the fee was an illegal tax. *Id.* The lower court agreed and the city appealed on grounds that the statute of limitations had expired because it accrued on the date the city passed the ordinance. *Id.*

The Texas Supreme Court held that a claim to recover payment of an illegal fee charged by a government entity accrues on the date when the payment is made. *Id.* The Court stated that under Texas law the applicable statute of limitations was the same statute of limitations as for a

takings claim. *Id.* at 802. In setting the accrual date, the Court compared a regulatory taking to a physical taking and the distinct accrual dates for those distinct claims. *Id.* The Court reasoned that a claim for the payment of an illegal or unauthorized fee, as with a physical taking, is triggered on the date the fee was paid because that is the point in time the claimant is deprived of its money and the point in time at which the claimant suffers a wrong or an injury allowing the claimant to sue to recover. *Id.* Mere enactment of the ordinance, or some other arbitrary date prior to the actual payment of the illegal fee, does not harm or injure the claimant. *Id.* It is payment of the fee that causes the harm. *Id.*

This rule is consistent with what other state and federal courts have identified as the accrual date for a claim to recover the payment of an illegal and unauthorized fee. In *Kuhn v. Department of Revenue*, 897 P.2d 792 (Colo. 1995) the Colorado Supreme Court held that a claim to recover the payment of an illegal tax accrues when the tax is paid, independently of the claimant's knowledge of an injury. *Id.* at 797. In *Paul v. City of Winsoocket*, 745 A.2d 169 (R.I. 2000), the Rhode Island Supreme Court found that a claim for the payment of an illegal water connection impact fee accrued, and the statute of limitations began ticking, as of the date the claimant paid the illegal fee because that was the date the claimant suffered an injury. *Id.* at 171. In *Howard Jarvis Taxpayers Association v. City of La Habra*, 23 P.3d 601 (Cal. 2001), the California Supreme Court likewise concluded that in a case to recover ongoing payments for utility assessments that arose from an illegal tax, the claim accrued *each time* the fee was collected. *Id.* at 602. In the case of *Venture Coal Sales Company v. U.S.*, 370 F.3d 1102 (Fed. Cir. 2004), the court ruled that a claim for recovery of payment of an illegal sales tax accrued when payment for the sales tax was remitted to the federal government. *Id.* at 1105.

These holdings are in line with the views of this Court with regard to the accrual or triggering of the statute of limitations. This Court has been more than clear that accrual does not

occur until damages are incurred: "...we have never held that a statute of limitations may run before an aggrieved party suffers damages. The authority to do so is highly doubtful, since it is axiomatic that a party has no right to sue for damages until actual injury occurs. *Corbridge v. Clark Equip. Co.*, 112 Idaho 85, 88-89, 730 P.2d 1005, 1008-09 (1986). This is further in line with the "some damage" standard, which this Court has also applied to the question of accrual for a claim under Idaho Code section 5-224. *See Jones v. Runft, Leroy, Coffin & Matthews, Chtd.*, 125 Idaho 607 873 P.2d 601 (1994) (applying the "some damage" standard to a claim under Idaho Code section 5-224 for breach of a fiduciary duty claim). As with a claim to recover the payment of an illegal tax, a party cannot incur "some damage" until it is made to pay the fee that is an illegal tax.

In this case, Buckskin's claim for a declaratory judgment that Valley County's RDA scheme is an unauthorized and illegal fee or tax did not accrue until it was required to pay the illegal fee. It is not relevant that Buckskin's project involved one conditional use permit. Each phase required final plat approval by the Valley County Commissioners. Payment of the illegal impact fee was a condition of, and occurred at, final plat approval for each subsequent phase of the development. Buckskin suffered no harm or injury, and had no right to seek redress for payment of the illegal fee, until each time it paid the illegal fee. Setting the accrual date for an illegal fee claim as the date the illegal fee is paid provides a date certain that comports with the underlying policy that an injury has not occurred, and a claim has not arisen, until the party suffers damages. The arbitrary "made aware of a substantial interference" standard applicable to inverse condemnation claims is simply unwarranted in the context of a claim to recover the payment of an illegal fee or tax. Aside from the fact that these are distinct claims with distinct elements of proof, in the context of an illegal fee/tax claim there is no question as to when the

claimant has suffered damages. The illegal fee or tax is paid on a date certain. There is no place for an arbitrary standard for accrual when damages arise from a single, specified event.

Applying the test for accrual for an inverse condemnation claim to an illegal tax claim would lead to an absurd result. Passage of an ordinance to collect puts the public on notice of the requirements of the ordinance. In the case of an ordinance requiring payment of an unauthorized fee or tax, such notice does not mean the offending ordinance is made enforceable against all persons who did not bring a lawsuit within the statute of limitations based on the mere passage of time. Rather, the offended party must suffer some damage or some harm by being made to pay the illegal tax. Otherwise, an ordinance requiring the payment of an unauthorized fee or tax becomes, in effect, "legal" after the passage of time simply because nobody sued within the limitations period. This cannot be, and is not, the law with regard to the question of when a claim to recover payment of an illegal fee or tax accrues. The claim accrues upon the payment of the illegal fee or tax because that is when the party paying the illegal fee or tax suffers an injury or some damage.

VI. Did the district court err in refusing to apply the five-year statute of limitations in this case to a claim based upon a written instrument?

Buckskin's claim in Count I of its Complaint is for a declaratory judgment that Valley County's RDA's requiring payment of impact fees are illegal contracts and void because Valley County uses the agreements to circumvent Idaho law on impact fees. *See* R. Vol. I, p. 2. The Road Development Agreement is a written contract. The applicable statute of limitations for a dispute involving a written agreement states that "[a]n action upon any contract, obligation or liability founded upon an instrument in writing must be brought: "[w]ithin five (5) years." I.C. § 5-216. The district court indicated in footnote 1 of its Memorandum Decision that the five year statute of limitations under Idaho Code section 5-216 is inapplicable to Buckskin's claims

because there has been no claim for breach of contract and there is no evidence in the record of a breach of contract. R. Vol. III, p. 491.

The five-year limitations period under Idaho Code section 5-216 is not limited to breach of contract claims. The limitations period applies to any action founded upon an instrument in writing. In this case Buckskin sought a declaratory judgment that Valley County cannot "circumvent Idaho law by forcing developers to pay monies under the guise of a Road Development Agreement and/or Capital Contribution Agreement." R. Vol. I, p. 5. The very mechanism by which the impact fee was paid was a contract. The Uniform Declaratory Judgment Act sets no statute of limitation itself. Therefore, the five-year statute of limitations for an action founded upon a written instrument applies. *See* I.C. § 5-201. For this additional reason the district court erred in dismissing Buckskin's Complaint.

In denying the Motion for Reconsideration on this same issue, the district court further determined that Buckskin's assertion of the five year statute of limitations was "without merit because this is simply not an action based on a contract." R. Vol. III, p. 581. As stated directly above, it was by way of a written contract that Valley County required the payment of an impact fee. If it is determined that Valley County cannot circumvent IDIFA by means of a written contract to collect impact fees, all contracts entered into under that scheme are illegal. Hence, money collected under that contract in the form of impact fees should be returned to the developer. *See Primary Health Network, Inc. v. State Dept. of Admin.*, 137 Idaho 663, 668, 52 P.3d 307, 312 (2002) (Idaho law recognizes rescission as an equitable remedy that totally abrogates the contract and seeks to restore the parties to their original position prior to the contract).

VII. Is Appellant Buckskin entitled to an award of attorney fees on appeal?

Buckskin requests an award of attorney fees on appeal based on Idaho Code Sections 12-117, and 12-121.

Idaho Code Section 12-117 provides in a judicial proceeding involving a governmental entity such as Valley County, the prevailing party is entitled to an award of reasonable attorney fees if the Court finds that the other party acted without a reasonable basis in fact or law. The purpose of this statute is: (1) to deter arbitrary or groundless action by the government agency; and (2) to provide a remedy for financial burdens attempting to correct mistakes made by the governmental agency. *Reardon v. Magic Valley Sand and Gravel, Inc.*, 140 Idaho 115, 118, 90 P.3d 340, 343 (2004). A party acts without a reasonable basis in fact or law only when the party's pursuit of its claims is frivolous, without foundation or unreasonable. *Karr v. Bermeosolo*, 142 Idaho 444, 449, 129 P.3d 88, 93 (2005). Where the requirements of I.C. § 12-117 are met, an award of attorney fees is mandatory, not discretionary. *Rincover v. State of Idaho, Dep't of Finance*, 132 Idaho 547, 549, 976 P.2d 473, 475 (1999).

Likewise, I.C. § 12-121 permits an award of attorney fees to a prevailing party is entitled to an award of attorney fees only when a claim is pursued or defended frivolously, unreasonably or without merit. I.C. § 12-121, I.R.C.P. 54(e)(1). However, unlike Idaho Code 12-117 an attorney's fees award under section 12-121 is discretionary on the court. *Chisholm v. Twin Falls County*, 139 Idaho 131, 136, 75 P.2d 185, 190 (2003).

In this case, attorney fees on appeal are awardable under I.C. §§ 12-117 and 12-121 because there is no basis in law for the County to collect impact fees in derogation of IDIFA's requirements. The County's LUDO references the ability to collect an impact fee on Planned Unit Developments. R. Vol. II, p. 290. Further, the County has already admitted that it has not enacted an IDIFA compliant ordinance. R. Vol. I, p. 33. Even Valley County's Master

Transportation Plan reveals that the County's program was intended to collect impact fees. Villegas Affidavit, Ex. E. These facts taken together should have been enough for the district court to order that the offending provisions of the LUDO be stricken and declare that Buckskin did not have to pay an impact fee on its final phases of The Meadows.

If this Court finds that the district court erroneously relied on the County's Resolution 11-6 to moot Buckskin's request for declaratory relief, then a finding should also be made that the County had no basis in law to collect impact fees. Buckskin raised this issue in its Objection to Valley County's Motion for Entry of Judgment, as well as its Motion for Reconsideration and Memorandum in support of that motion. *See* R. Vol. III, pp. 510-522. Buckskin also filed its Motion for Partial Summary Judgment (R. Vol. III, p. 494) on Count I of is Complaint because the district court recognized that that County could not collect impact fees (R. Vol. III, p. 494). Based on its arguments raised on appeal, Buckskin respectfully asks this Court to award attorney fees on appeal.

CONCLUSION

For the reasons stated above, Buckskin respectfully requests that this Court reverse the district court's judgment dismissing Buckskin's Complaint.

DATED this 21st day of November, 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 November, 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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