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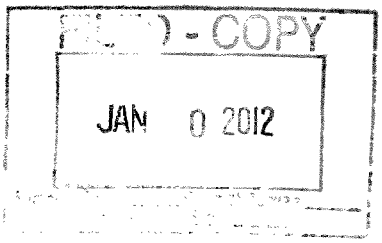
Buckskin Properties, Inc. v. Valley County Appellant's Reply Brief Dckt. 38830

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 REPLY 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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I. INTRODUCTION

Pursuant to Idaho Appellate Rule 34(c) and 35(c), Appellants Buckskin Properties, Inc. and Timberline Development, LLC (collectively "Buckskin") submit this Reply Brief in rebuttal to the arguments and additional issues raised by Respondent Valley County in its Respondent's Brief filed on December 29, 2011. To the extent Valley County raised cross issues on appeal as a Cross-Appellant, Buckskin will file a separate Cross-Respondent's Brief pursuant to IAR 35(b).

Buckskin incorporates the statement of the course of proceedings and facts in its opening brief here. In short, Buckskin filed a Complaint alleging two separate causes of action: (1) that the Road Development Agreement ("RDA") it entered into with Valley County to pay a road impact fee on Phases 2 and 3 of its planned unit development The Meadows at West Mountain ("The Meadows") and Valley County's road impact fee scheme under its Land Use Development Ordinance ("LUDO") and Capital Improvements Program ("CIP") is an illegal fee or tax because Valley County failed to comply with the requirements of the Idaho Development Impact Fee Act ("IDIFA") to collect impact fees; and (2) inverse condemnation. Valley County moved for summary judgment on Buckskin's inverse condemnation claim, which the district court granted on grounds that the inverse condemnation claim was untimely under the applicable statute of limitations. Buckskin then moved for partial summary judgment on its claim for a declaratory judgment on the issue of an illegal tax or fee, which the district court denied on grounds that all Buckskin's claims accrued at the same time and were untimely.

Buckskin appealed and addressed those issues in its Appellant's Brief. Valley County filed its Respondent's Brief and raises several additional issues on appeal, arguing issues and matters not decided by the district court, but arguing additional defenses to its actions. As set forth in this Reply Brief, the district court's grant of Valley County's motion for summary judgment and denial of Buckskin's motion for partial summary judgment were in error. Further, Buckskin's additional

defenses are not applicable and do not warrant a confirmation of the lower court's decisions. Rather, this matter should be remanded to be determined on its merits.

II. ARGUMENT

A. Buckskin's Federal Taking Claim is Properly Before the Court.

1. Buckskin was not required to plead its federal claims under 42 U.S.C. section 1983.

Valley County states that the district court dismissed Buckskin's federal claim on the basis of a failure to plead 42 U.S.C. § 1983. *See Respondent's Brief*, p. 13. This mischaracterizes the district court's holding. At best the district court ignored Valley County's section 1983 defense. While the district court may have ultimately dismissed Buckskin's claims for statute of limitations purposes, the dismissal had nothing to do with a failure to plead the federal claims under section 1983. The district court simply indicated that, with regard to pleading a section 1983 claim for inverse condemnation, Buckskin was "not required to do so because they have a valid claim pursuant to the State constitution." R. Vol. III, p. 489. This hardly constitutes a dismissal of the federal claim under section 1983. If anything, it indicates that the federal claims were properly pled, but ultimately subject to the district court's application of the statute of limitations.

Nonetheless, Valley County's position with regard to Buckskin's federal takings claim and 42 U.S.C. § 1983 is incorrect. Buckskin was not required to seek relief for its federal claims in this case under section 1983. A party may bring an inverse condemnation action seeking the payment of just compensation directly under the Fifth Amendment because of the self-executing character of that constitutional provision. *First English Evangelical Lutheran Church of Glendale v. Los Angeles County, Cal.* 482 U.S. 304, 314-315 (1987); *see also BHA Invs, Inc. v. City of Boise*, 141 Idaho 168, 175 n. 2 108 P.3d 315, 322 n. 2 (2004) (recognizing that in Idaho

takings plaintiffs may proceed directly under the Fifth Amendment or section 1983). Buckskin properly pled a takings claim in this action independent of filing a section 1983 cause of action.

2. Buckskin's federal takings claim is not unripe under *Williamson County*.

Valley County also asserts that Buckskin's federal claim fails under the two part ripeness test of *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). The two-part test requires that: (1) the governmental entity reach a final decision; and (2) in federal court litigation involving regulatory takings, the property owner must seek compensation through the procedures the State has provided. *Id.* at 186, 194.

The *Williamson County* "finality" test is met in this case because Valley County already took Buckskin's property in the form of a right of way of real property and payment of impact fee money. *See Daniel v. County of Santa Barbara*, 288 F.3d 375, 382 (9th Cir.2002) (once property is taken, the finality test is satisfied). The second prong of the *Williamson County* test requires that the property owner must first seek just compensation through state inverse condemnation and be denied before litigating in federal court. *Williamson County* at 194. Buckskin, having filed this action seeking among other things, a remedy for inverse condemnation, has rendered the second *Williamson County* ripeness test inapplicable.

B. Buckskin's State Law Claims Are Not Barred For Not Seeking Judicial Review Under The Idaho Administrative Procedures Act.

The County argues that Buckskin's claims seeking inverse condemnation and declaratory relief are impermissible collateral attacks because "judicial review" under the Idaho Administrative Procedures Act ("IAPA"), Title 67, Chapter 52, Idaho Code, is the only means for addressing Buckskin's claims. Therefore, the County contends that the courts lack jurisdiction to hear Buckskin's inverse condemnation and declaratory actions in this matter. The County's position on this issue is wrong because:

(1) Buckskin's challenge to the County's use of a Road Development Agreement ("RDA") and the charging of an impact fee are not "permits" under Idaho's Local Land Use Planning Act ("LLUPA"), Title 67, Chapter 65, Idaho Code, and therefore is not reviewable by way of judicial review under the IAPA;

(2) There was no "adverse zoning decision" in this case that required Buckskin to file for judicial review with the district court;

(3) The out of state cases cited by the County have no persuasive value to the application of Idaho's LLUPA;

(4) Judicial review under the IAPA cannot afford the relief Buckskin requests; and

(5) The exceptions to the exhaustion of administrative remedies apply in this case and therefore judicial review under the IAPA is not applicable.

1. Both Road Development Agreement and Impact Fees are not a "permits" under LLUPA and therefore not subject to judicial review under the IAPA.

"To obtain judicial review of final action under LLUPA, there must be a statute granting the right of judicial review." *Stafford v. Kootenai County*, 150 Idaho 841, 252 P.3d 1259 (2011). "Idaho Code § 67-6519(4) grant[s] the right of judicial review regarding applications for a permit required or authorized under LLUPA." *Id.* at Idaho 846 (citing I.C. § 67-6519(4), Ch. 123, § 1, 2003 Sess. Laws 373, 374). Similarly, LLUPA's section 67-6521 allows an affected person having an "interest in real property which may be adversely affected by the issuance or denial of a permit authorizing the development....seek judicial review" I.C. § 67-6521(1)(a)and (d), Ch. 199, § 1, 1996 Idaho Sess. Laws 620-621.

This Court has recognized that not all land use decisions are subject to judicial review under the IAPA. For example, in *Giltner Dairy, LLC v. Jerome County*, 145 Idaho 630, 181 P.3d 1238 (2008), this Court determined that there was no statutory right to judicial review of the

county's decision to amend its comprehensive plan because "[a] request to change a comprehensive plan map is not an application for a permit." *Id.* at 633, 181 P.2d at 1241.

The same conclusion was reached in *Burns Holdings v. Madison County Board of County Commissioners*, 147 Idaho 660, 214 P.3d 646 (2009), where the denial of an application for a comprehensive plan amendment was not a permit. *Id.* at 663, 214 P.3d at 649. The *Burns* Court also held that an application for a rezone, which the appellant had simultaneously applied for, was also not a "permit" under LLUPA: "[a]n application for a zoning change, like a request for an amendment to a comprehensive plan, is not an application for a 'permit,' and thus no review is authorized under the LLUPA." *Id.*

The claims raised by Buckskin in this lawsuit likewise have nothing to do with a "permit" under LLUPA. Therefore, judicial review is inapplicable. First, Buckskin is not challenging a denial of its conditional use permit ("CUP"), the CUP was granted; it is challenging the imposition of an impact fees collected at the time of final plat. The imposition of an impact fee is not a permit under LLUPA and there is nothing in LLUPA authorizing judicial review under IAPA regarding the collection of impact fees. Buckskin's challenge to the imposition and actual collection of impact fees can only be brought by way of a direct action, such as a through a declaratory lawsuit.

Second, Buckskin's RDA is not a permit under LLUPA and its challenge to the validity of its RDA cannot be subject to judicial review under the IAPA. While LLUPA may authorize the use of development agreements for certain purposes, a development agreement is not a "permit." As such, Buckskin's RDA is not a "permit" under LLUPA and therefore is not subject to judicial review under the IAPA.

2. There was no "adverse zoning decision" in this case that would require judicial review.

Valley County argues that Buckskin's claims seeking inverse condemnation and declaratory relief are impermissible collateral attacks because "judicial review" is the only means for addressing Buckskin's claims. Valley County discusses this Court's holdings *Bone v. City of Lewiston*, 107 Idaho 844, 693 P.2d 1049 (1984) and *Curtis v. City of Ketchum*, 111 Idaho 27, 720 P.2d 210 (1986) in support of its argument. Both cases are factually distinguishable from this case and have no application.

Bone involved a land use permit application seeking to rezone property from low density residential use to commercial use. *Bone*, at 846, 693 P.2d at 1051. The City Council denied the application and Mr. Bone filed suit in district court requesting declaratory relief and a writ of mandamus forcing the City to enact a zoning ordinance that would allow the rezone to commercial. *Bone* at 846-847, 639 P.2d at 1051-52. This Court held that Mr. Bone's declaratory action and writ of mandamus could not be brought because judicial review under Idaho Code § 67-5215(b-g) of the IAPA, was the "exclusive source of appeal for adverse zoning decisions." *Bone* at 848, 693 P.2d at 1053. (underlining added).

Shortly after the *Bone* decision, this Court reached the same conclusion in *Curtis v. City of Ketchum*, 111 Idaho 27, 720 P.2d 210 (1986). *Curtis* involved a claim brought by Mr. Curtis against Ketchum for inverse condemnation alleging that the city had taken his property because the city denied his 1982 subdivision application. *Id.* at 32-33, 720 P.2d at 215-16. The *Curtis* Court held that Mr. Curtis' argument was nothing more that a "challenge to the city's quasi-judicial action denying his subdivision application" and he had to comply with former §67-6519 and 6521(d),[1] which required judicial review under the former IAPA section 67-5215(b)-(g). *Id.*

[1] Since the *Curtis* decision, I.C. § 67-6521 was amended in 1996 to include (2)(b) which allows an affected person to seek inverse condemnation in lieu of judicial review. *See.* Ch. 199, § 1, 1996 Idaho Sess. Laws 620-621.

The facts of this case are distinguishable from *Bone* and *Curtis*. The actions challenged by Buckskin do not involve Valley County's denial of a permit or a challenge to Valley County's quasi-judicial decision making authority.

Unlike the *Bone* and *Curtis* applicants, Buckskin's permit (i.e. the conditional use permit (CUP)) was granted. Buckskin was not aggrieved by the decision of Valley County. There was no "adverse zoning decision" that triggered Buckskin's obligation to file for judicial review. Buckskin is not arguing that Valley County's decision to grant its CUP is wrong. This case is and has always been about whether the County can charge an impact fee. Buckskin's challenge to the County's ordinance, the RDA's and the actual collection of impact fees has nothing to do with challenging the County's quasi-judicial role to consider a permit.

The facts and holding in *McCuskey v. Canyon County*, 123 Idaho 657, 851 P.2d 953 (1993) support Buckskin's arguments. *McCuskey* involved a dispute over the zoning status of a parcel and denial of a building permit. Mr. McCuskey requested a building permit for a gas station, but was denied by Canyon County because his property was zoned rural residential, which did not allow gas stations. *Id.* at 658-659, 851 P.2d at 954-55. Unbeknownst to Mr. McCuskey, Canyon County had rezoned his property seven years earlier from heavy industrial to rural residential. *Id.* Mr. McCuskey filed a declaratory action challenging the County's zoning ordinance on the grounds that he was not given notice of the rezone. *Id.*

On appeal, this Court held that the requirements of *Bone* did not apply to Mr. McCuskey because he was not arguing that the County made a "wrong zoning decision," but rather Mr. Bone was challenging the validity of the County's ordinance. *Id.* at 660, 851 P.2d at 956. Here, Buckskin is doing the same thing as Mr. McCuskey. Buckskin is not challenging Valley County's decision to grant its CUP. Buckskin is challenging the RDA's, the LUDO provisions

purporting to authorize the use of these agreements to collect impact fees, and the actual collection of the impact fees.

Further, the fact a development agreement is referenced in the section of Buckskin's CUP entitled "Conditions of Approval" does not make it an adverse zoning decision subject to judicial review. One could conceivably argue that a permit condition is an "adverse zoning decision" under *Bone* that is subject to judicial review. That argument has no application to the facts of this case because the requirement that Buckskin to enter into a development agreement for the payment of impact fees was not a condition of the CUP itself, but rather a requirement of the County's PUD ordinance under its LUDO. The statements referencing a Development Agreement and Capital Contribution Agreement in the CUP are purely informational of what the County's ordinance requires.

Generally, the purpose of attaching conditions of approval to a permit is to set forth requirements that would not otherwise be required by state or federal law, local ordinances, or policies. It is important to note that conditions of approval placed on a permit are site specific and/or application specific that are applied on a case by case basis. For example, a county's local ordinance may have standards regarding subdivision entrances (i.e. regulating width, lighting, etc), but would not address entrance location. A permit condition could be attached directing the applicant to locate the entrance on a specific corner of their property.

In contrast, language contained in a permit that recites matters that are uniformly enforced on all applicants, whether pursuant to law or local ordinances or local policies/practices are not "permit conditions." Those statements are purely informational and are not tied to anything site specific or application specific. For example, a statement, such as the one in Buckskin's CUP, that says an applicant "must comply with the laws of the State of Idaho" is not a "permit condition" subject to judicial review regardless of whether the applicant agrees with

the statement. It defies logic to think that if that statement were omitted from the permit, then the applicant is free to violate Idaho or federal law.

In this case, Buckskin's CUP contains statements under the heading "Conditions of Approval" that include:

> 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.
> ...
>
> 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.
> ...
>
> 12. The Development Agreement and Capital Contribution Agreement must received approval from the Board of County Commissioners.

R. Vol. II, p. 332. These statements are not permit conditions. It goes without saying that Buckskin, like every other applicant, must comply with provisions of the LUDO and must comply with state and federal law. Those sentences provide information to the applicant and are not a condition on the permit.

The same is true for the sentence referencing the development agreement in condition number 12. That statement is informational because it merely notifies Buckskin that the agreement needs approval from the County Commissioners. The requirement to enter into that agreement, however, comes not from the CUP, but from the County's PUD section in its LUDO (R. Vol. II, p. 298) and Valley County's policies as explained in the County's 2008 Master Transportation Plan (see *Appellant's Brief* p. 5 for text). Thus, the informational statements in Buckskin's CUP are not permit conditions that, if Buckskin disagreed with, would qualify as an "adverse zoning decision" and require judicial review as described in *Bone*.

3. Administrative remedies do not provide the relief plaintiffs seek.

The administrative appeal process through judicial review would not provide Buckskin adequate judicial process or a proper remedy for the relief it seeks. When a district court entertains a petition for judicial review, it does so in an appellate capacity. *Burns Holdings v. Madison County Board of County Commissioners*, 147 Idaho 660, 662, 214 P.3d 646, 646 (2009). This Court distinguished an administrative appeal from a civil action in *Euclid Avenue Trust v. City of Boise*, 146 Idaho 306, 193 P.3d 853 (2008) and held that an administrative appeal and a civil action cannot be combined in the same proceeding. The *Euclid* Court reasoned:

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

Id. at 308, 193 P.3d at 855.

Here, Buckskin's claims for inverse condemnation and request for declaratory relief cannot be combined with judicial review. A court sitting in an appellate capacity has no authority to award monetary damages or issue an order striking down an ordinance. In addition, the court has no authority under the IAPA to enjoin Valley County from continued attempts to collect an impact fee without first adopting an IDIFA-compliant ordinance.

Judicial review also would not provide Buckskin adequate judicial process to defend against the County's "voluntary payment" defense. Discovery is limited in judicial review and the court is limited to the administrative record. Had it not been for the opportunity to conduct written discovery and take depositions, Buckskin would not have discovered evidence of the mandatory nature of Valley County's road impact fee program. This includes the statements found in Valley County's 2008 Master Transportation Plan describing the mandatory collection

of roadway impact fees nor would Buckskin have discovered the various developers who were also subject to the payment of these mandatory road mitigation fees. Judicial review was simply not the right proceeding for addressing Buckskin's claims.

4. Out of State Cases Are Distinguishable

Land use authority arises from statute. Each state has its own unique statutory framework governing land use matters. Valley County suggests that this Court should adopt the holdings of the appellate courts from Washington and Maine, which held that under Washington and Maine law the collection of an impact fee is subject to each state's particular administrative procedures act and the timeframes for seeking judicial review. These out-of-state land use cases are not persuasive authority or even instructive of Idaho's LLUPA framework. Idaho's LLUPA and case law applying LLUPA and the judicial review procedures of the IAPA are unique to Idaho's legislative scheme for the land use process. Valley County has provided absolutely no argument regarding how Washington or Maine land use laws relate to Idaho's LLUPA, or why the wording or nature of the laws of those states should dictate the construction and application of Idaho's LLUPA.

Buckskin does not deny he holdings of the Maine court in *Sold Inc. v. Town of Gorham*, 868 A.2d 172 (2005) or the Washington court in *James v. Kitsap* 154 Wash.2d 574, 115 P.3d 286 (2005). Both cases, however, were decided based on a specific statutory framework unique to Maine and Washington. Again, there is absolutely no indication that land use laws in those states are the same as or similar to Idaho's LLUPA. As pointed out directly above, not all land use decisions under LLUPA are subject to judicial review. For example, an impact fee is not a "permit" under LLUPA and is not subject to judicial review under the IAPA. Thus, unlike Maine and Washington law, Idaho law does not allow judicial review of illegally collected impact fees.

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

Valley County argues that the recognized exceptions to exhausting administrative remedies do not excuse Buckskin's alleged failure to seek judicial review in this case. The County is incorrect.

As a general rule, a party must exhaust administrative remedies before the district court will hear a case challenging the validity of administrative acts. *Arnzen v. State*, 123 Idaho 899, 906, 854 P.2d 242, 249 (1993); *Park v. Banbury*, 143 Idaho 576, 580-81, 149 P.3d 851, 855-56 (2006). The Idaho Supreme Court has recognized exceptions to that rule in two instances: (a) when the interests of justice so require, or (b) when the agency acted outside its authority. *Regan v. Kootenai County*, 140 Idaho 721, 725, 100 P.3d 615, 619 (2004); *Park v. Banbury*, 143 Idaho 576, 580-81, 149 P.3d 851, 855-56 (2006). In such circumstances, courts will not require a party to exhaust administrative remedies.

Evidence contained in the Clerk's Record on appeal shows that the exceptions to the exhaustion of administrative remedies rule apply in this case. The exceptions excused Buckskin from any obligation to bring an appeal before the Valley County Board of Commissioners or the district court. *See e.g., Regan* and *Mccuskey supra.*

a. "Outside Agency Authority" Exception:

The district court correctly held that Buckskin met the exceptions to exhausting administrative remedies because Valley County acted outside its authority to charge an impact fee. Specifically, the court's Memorandum Decision reads:

> It appears from the record that Valley County did not follow the provisions set forth in the Idaho Development Impact 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 no in place.

R. Vol. III, p. 491. There is ample evidence in the Clerk's Record to support the district court's conclusion. *See e.g.*, LUDO provisions (R. Vol. II, p. 298 and quoted directly below) and 2008 Master Transportation Plan (*Appellant's Brief*, p. [ ]). Based on those facts, Valley County cannot credibly claim that it had authority to charge an impact fee. A more detailed discussion explaining why Valley County has no authority to charge an impact fee is found below.

b. "Interests of Justice" Exception

Buckskin also meets the interest of justice exception. On this point, Valley County argues that this exception cannot be met because Buckskin could have raised its concerns in a timely petition for judicial review. However, in order for that argument to work, Buckskin would have had to have knowledge that the road impact fee was illegal, but still chose to proceed from with the project anyway. There is nothing in the record that supports such a finding.

The interests of justice favor excusing Buckskin from exhausting administrative remedies based on the County's ordinances and polices that mislead the public into thinking that Valley County had an IDIFA-compliant impact fee ordinance. Buckskin's Project Manager testified in his affidavit that he was familiar with Valley County's LUDO and that he reviewed the LUDO so he would know what was required to have a complete application. *See* R. Vol. II, p. 230 ¶¶ 4-8, Ex. A. The Project Manager reviewed the LUDO provision applicable to PUD projects which states in relevant part:

> **I. DEVELOPMENT AGREEMENT**
>
> Because of the uniqueness of each proposal a PUD may impact county services and/or property which may be mitigated through a Development Agreement. Compensation for these impacts ***shall be*** negotiated in work sessions with appropriate county entities and ***a Development Agreement shall be entered into between the applicant and the county*** through the Board as additional conditions considered for approval of a PUD.

J. **IMPACT FEES**

> The Commission may recommend to the Board **impact fees** as authorized by Idaho Code Section 31-870 for any PUD proposal. The Board may implement the **impact fees** as recommended by the Commission or as it deems necessary for the proposal.

(emphasis added). As a result, Buckskin's Project Manager believed that Valley County had the necessary authority to charge development impact fees. Any reasonable person reading that LUDO provision would have reached the same conclusion as Mr. Pachner and would have no reason to question whether the County followed the requirements of IDIFA. The public has to have a reasonable expectation that its local government is complying with state law. If every person is held to the unreasonable standard that the public is held to the County proposes.

C. Buckskin's State Taking Claim is Timely Under the Four Year Statute of Limitations.

The district court determined that the statute of limitations was triggered and accrued when Buckskin first paid for Valley County's impact fee by dedicating a right-of-way to obtain final plat approval for Phase 1 of The Meadows. Valley County argues that events even before the dedication of the right-of-way for Phase 1 final plat approval triggered the statute of limitations. Both the district court and Valley County are incorrect. Under the facts and circumstances involving a multi-phase development project, the accrual of the statute of limitations for an inverse condemnation claim is not triggered until final plat is sought and the fee is paid.

1. Buckskin's inverse condemnation claim did not accrue when it gained knowledge of Valley County's impact fee scheme or when it became apparent that final plat approval would first require the payment of a road impact fee because there had been no substantial interference with Buckskin's property at that time.

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). Valley County wants this standard to be solely when it "became apparent." This abbreviated standard, however, is not the standard under existing Idaho law. A substantial interference with property is also required. Under Valley County's interpretation of the standard, the mere existence of the LUDO and CIP triggers the statute of limitation the moment any party submits and application.

Substantial interference under *Tibbs* is particularly relevant to the facts of this case because The Meadows is a multi-phase development. It does not matter that Buckskin's development of The Meadows was covered by one CUP. Each subsequent phase requires final plat approval from the Board of County Commissioners. *See* I.C. § 67-6504. Buckskin had no obligation to pay any road impact fee until a phase came up for final plat and, for that matter, had no obligation to seek final plat approval of any phase of development. Until Buckskin was required to pay the impact fee, its property had not been interfered with nor had it been taken. There was no damage and nothing to complain of.

This is the distinction between this case and *Harris v. State*, 147 Idaho 401, 210 P.3d 86 (2009) and *Wadsworth v. Idaho Department of Transportation*, 128 Idaho 439, 915 P.2d 1 (1996) cited by Valley County. In Wadsworth, for example, the plaintiff may not have been aware of the full extent of his damages, but it had become apparent that there had been a substantial interference with his property when the state excavated gravel upstream, which had an erosive effect on his land. *Wadsworth* at 443, 915 P.2d at 919. The same is true in *Harris v. State* – at the time the plaintiffs entered into the sand and gravel lease with the State, their rights and obligations (including their obligation to verify ownership) and the interference with their property was definite. *Harris* at 405, 210 P.3d at 90.

Buckskin, on the other hand, had suffered no comparable interference with its property when the CUP was issued, or even when right-of-way was dedicated under Phase 1 relative to

subsequent phases. There must be a taking for there to be an inverse condemnation action. *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)); *See also, Corbridge v. Clark Equip. Co.*, 112 Idaho 85, 88-89, 730 P.2d 1005, 1008-09 (1986) ("we have never held that a statute of limitations may run before an aggrieved party suffers damages."). The money remained in Buckskin's possession the entire time until the impact fee had to be paid to obtain final plat approval.

The problem with affixing the accrual date as a date prior to the payment of the impact fee in a multi-phase development project is exemplified by exactly what happened in this case. Valley County can increase its road development fees without consequence every time a developer seeks final plat approval more than four years after the date the CUP was issued. In Buckskin's case Valley County updated its CIP under the West Roseberry Area 2007 Capital Improvement Program Cost Estimate. The update resulted in more than doubling the impact fee for a residential lot in The Meadows from $1,844 per single family lot to $3,968 per lot. R. Vol. II, pp. 344, 349; R. Vol. II, p. 350.

Even knowledge of the new, more than double, impact fee is not a substantial interference with Buckskin's property. Valley County decries the potential effect of leaving itself open to suit for four years after collecting an impact fee. Had Valley County complied with IDIFA to collect impact fees, as it is required to and as it should have in this case, it would have no such concern. *See* I.C. § 67-8212 (providing an appeal and mediation process in the event an impact fee is disputed). In the context of a multi-phase development Valley County cannot hide behind the statute of limitations to increase impact fees without consequence. Accrual on an inverse condemnation claim involving multi-phase development does not accrue until the fee is paid because there is no substantial interference with the developer's property prior to that time.

2. Buckskin's illegal tax/fee claim did not accrue simultaneously with its inverse condemnation claim.

Buckskin's claims did not accrue at the same time and are not subject to the same accrual standard for statute of limitation purposes. Valley County argues that Buckskin's cause of action arose simultaneously as to all claims and as to all phases because Buckskin's declaratory judgment claim and inverse condemnation claim are "joined at the hip." *Respondent's Brief*, p. 25. As set forth more thoroughly in Section E.1, below, Buckskin's claim for inverse condemnation and declaratory judgment are wholly separate causes of action. These claims arise from different provisions of the Idaho and U.S. Constitutions, are subject to differing elements of proof, and are subject to different standards for accrual for statute of limitations purposes. While these different claims arise from and are based on the same set of facts, that hardly means that they accrued at the same time for statute of limitation purposes. *See* Section E.1, *infra*; I.R.C.P. 8(e)(2).

3. The facts and circumstances involved in a multi-phase development warrant a different accrual standard for purposes of an inverse condemnation claim.

Valley County mischaracterizes Buckskin's argument for a change in the accrual standard for inverse condemnation claims under the facts of a multi phase development project. Buckskin is not requesting that this Court adopt the "project completion" rule from *C&G, Inc. v. Canyon Highway District No. 4*, 139 Idaho 140, 75 P.3d 194 (2003). Buckskin is asking this Court, based on the facts unique to a multi-phase development, including the fact that final plat approval on later phases of a development may not be sought for several years after the initial permit approval, to follow the precedence of *C&G* and adopt a different accrual trigger along the lines of the project completion rule because the unique facts of multi-phase development and policy reasons support a departure from the *Tibbs* standard.

Valley County argues that the policy reasons for departing from the accrual standard in *C&G* should not apply in this case because *C&G* involved a physical taking. This argument is a

distinction without any legal significance. There is no Idaho case law, including *C&G*, holding that a departure from the *Tibbs* standard is warranted only in a physical takings scenario. The type of taking in *C&G* did not merit a departure from the *Tibbs* accrual standard, the facts and circumstance warranted the departure. As set forth in Buckskin's Appellant's Brief and here, the facts and circumstances of this case likewise merit a departure from the *Tibbs* standard.

The same policy reasons for departing from *Tibbs* in *C&G* are present in cases involving multi-phase development. As set forth in Buckskin's *Appellant's Brief*, pp. 17-21, these include the speculative nature of damages at the outset of multi-phase development years before any decisions might be made about a number of factors relevant to calculating a fee (such as the number of lots in a given phase) and Valley County's own bad acts in flouting IDIFA and its unilateral increase of the fees by more than double. A more appropriate accrual trigger in multi-phase development projects is the time at which all impact fees are paid and Final Plat is approved on the very last phase, the statute of limitations cannot accrue.

Valley County also argues that this Court should not depart from the *Tibbs* standard because the RDA's state that the impact fee is "currently" set at a specified amount and, therefore, Buckskin knew the fee could change. *Respondent's Brief*, p. 28. This argument is without merit. The word "currently" does put a party on notice that fees will be subject to increase. Equally important is the fact that the word "currently" does not evidence consent to pay an increased fee. Valley County's unilateral increase in fees that are not subject to review or protest merit a departure from the *Tibbs* standard as set forth Buckskin's Appellant's Brief.

Finally, Valley County continues to argue that it should not be required to pay refunds years after collecting the fees and after it has made substantial investments, which would shift the costs of improvements to taxpayers. Valley County has not put any evidence into the record regarding what investments it has made relative to Buckskin. More importantly, IDIFA provides safeguards to

local governments charging impact fees in order to avoid this very problem. *See* I.C. § 67-8212. Having completely flouted Idaho law governing the collection of impact fees, Valley County cannot now complain that it may be required to reimburse fees it collected illegally.

4. Valley County admits that a claim based on the payment of an illegal and unauthorized fee or tax accrues at the time of payment.

In addressing Buckskin's argument related to when a cause of action accrues for purposes of a claim for an unauthorized and/or illegal tax or fee, Valley County admits that the claim accrues at the time of payment. *Respondent's Brief*, p. 29-30. Yet surprisingly, Valley County charges that the out-of-state cases cited by Buckskin in its opening brief for when an illegal tax/fee claim accrues are inapposite. The point of the out-of-state cases cited by Buckskin is that the accrual standard for an illegal or unauthorized fee or tax claim, an issue not previously decided by this Court, is when the fee or tax is paid. Valley County apparently agrees.

D. Buckskin's Actions were not Voluntary Within the Meaning of *KMST*.

Buckskin's entering into the RDA's and payment of road impact fees was not voluntary in the sense of *KMST, LLC v. County of Ada*, 138 Idaho 557, 67 P.3d 56 (2003). Valley County hangs its hat on the fact that Buckskin included a proposed development agreement and proposed capital contribution agreement with its application to argue that the payment of impact fees was voluntary. Valley County, however, conveniently excuses away its own LUDO and policy requirements for these agreements. Per Valley County's LUDO Buckskin had no choice but to include these documents with its application, which is contrary to the facts of *KMST*.

Valley County's reliance on *KMST* as being indistinguishable from the facts of this case is simply wrong. The "voluntary" act of the land use applicant in *KMST*, unlike in this case, was actually voluntary. In *KMST* the applicant, prior to submitting its land use application, met twice with the supervisor of ACHD's Development Services Division in order to determine what ACHD staff may recommend regarding its application. *KMST*, at 579-580. The ACHD

supervisor informed the applicant that "he would recommend that KMST be required to construct a street...and dedicate that street to the public." *KMST*, at 580. Based on that conversation, the applicant included with its application a statement that it would voluntarily construct a public street and that such street would be the primary access for the development. *Id.* After dedication of the street, the applicant sued Ada County for a taking.

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

What happened in this case was drastically different from *KMST*. There was no pre-application meeting in this case where Buckskin elicited from Valley County representatives their thoughts about what might give Buckskin's application a better chance for approval. The LUDO required a development agreement and the payment of impact fees. R. Vol. II, p. 290. This is also not a situation where Buckskin knew something was wrong, but chose to continue with the project anyway as Valley County has attempted to characterize. There was no choice in the matter because existing Valley County ordinances and policies required Buckskin to act. It may be true that developers agree to things in the land use process that they might not "voluntarily" do otherwise in order to get an approval, but Buckskin's payment of literally hundreds of thousands of dollars in right-of-way dedication and monetary fees is not an example.

Buckskin included a proposed development agreement and a proposed capital contribution agreement with its application, but only because those agreement were required by the LUDO. *See* R. Vol. 11, p. 280 ¶¶ 4-8, Ex. A (p. 290). Buckskin was likewise informed that, pursuant to the LUDO, road impact fees were required. R. Vol. 11, p. 280, ¶ 6. Section II of the

table of contents of Buckskin's application clearly states that the portions of the application including the proposed agreements were a requirement of Valley County's LUDO. *See* Affidavit of Cynda Herrick (the "Herrick Affidavit," which was filed with the Clerk of the Court as an exhibit to the Clerk's Record), Ex. C. The proposed development agreement, which was attached to the application as Appendix C, also unambiguously includes statements that show that it was a required item with Buckskin's application. *See Id.* (sections 2.10, 2.11, and 2.21 of the Appendix C). The proposed capital contribution agreement, attached as Exhibit A to the proposed development agreement, arose as a result of Valley County's engineer and planning director statements to Buckskin's representatives prior to submission of the application that the capital contribution agreement was a requirement. *See* R. Vol. II, p. 280, ¶ 5-6.

Buckskin's proposed development agreement, which was typical of a form development agreement, covered many topics generally relating to the development of a subdivision. *See* Herrick Affidavit, Ex. 3, Appendix C. The parties never entered into the proposed development agreement or the proposed capital contribution agreement. Valley County states that the parties entered into RDA's with "slightly modified" terms from Buckskin's proposed agreements. Other than the fact that Buckskin's proposed capital contribution agreement mentions road impact fees, which Valley County's LUDO and representatives made patently clear was a requirement for application approval, it is hardly similar to the RDA's prepared by Valley County. *See* Herrick Affidavit, Ex. 3, Attachment A to Appendix C; *compare* R. Vol. II, pp. 334, 344.

A sitting Valley County Planning and Zoning Commissioner at the time corroborates the fact that Valley County fully intended that its road impact fee program be made mandatory for all development applications. Valley County's engineer met with the Planning and Zoning Commission on February 14, 2004, to discuss traffic impact issues. R. Vol. I, p. 130, ¶¶ 4-5,

Exs. A-B. It was clear that payment of road impact fees was to be made a mandatory requirement for approval of all land use applications regardless of whether the project was a PUD or not. *Id.* This was again reiterated at the public hearing for Buckskin's CUP/PUD application on May 17, 2004. *Id.* This confirms the information previously conveyed to Buckskin and why Buckskin included a proposed capital contribution agreement with its application in the first place.

Valley County officials, including sitting Board of County Commissioner members and the Planning and Zoning Administer openly admit that entering into Valley County drafted RDA's and paying impact fees was not voluntary. *See* Affidavit of Victor S. Villegas (the "Villegas Affidavit," which was filed with the Clerk of the Court as an exhibit to the Clerk's Record), Ex. A (deposition of Gordon Cruickshank), p. 59, l. 24 – p. 60, l. 14; p. 88, l. 12 – p. 90, l. 16; p. 136, l. 18 – p. 138, l. 21; p. 77, l. 11 – p. 82, l. 2; pp. 140-153, l. 6. The RDA language itself was a standardized form contract with only the variation being the amounts required for mitigating impacts. *See* Villegas Affidavit, Ex. A, p. 125, ll. 2-7; Ex. C, p. 101-104.

One land use applicant in Valley County attempted to submit her own version of a RDA, which included a statement that she was dedicating right-of-way under protest, but Valley County refused to consider or allow the applicant's version. R. Vol. II, p. 398, ¶ 5. There was no negotiation with Valley County as to the contents of the RDA's or the fees paid pursuant to the RDA's. *See* Villegas Affidavit, Ex. A, p. 40, l. 11 – p. 42, l. 18, p. 88 l. 12 – p. 90, l. 16; Ex. B, p. 93, l. 3 – p. 96, l. 12. This was reflective of the experience of numerous land use applicants in Valley County aside from Buckskin. *See* R. Vol. II, p. 365, ¶¶ 4-6; R. Vol. III, p. 410, ¶¶ 4-6; R. Vol. I, p. 116, ¶¶ 4-7; R. Vol. I, p. 130, ¶ 7; R. Vol. I, p. 185, ¶¶ 4-6; R. Vol. I, p. 214, ¶ 3; R. Vol. II, p. 245, ¶¶ 2-7; R. Vol. II, p. 398, ¶4; R. Vol. II, p. 259, ¶ 8).

The mandatory nature of the RDA and payment of road impact fee is further illustrated by instances where Valley County still required the agreement and payment of the fee in seemingly in applicable situations such as where a property owner sought a lot split with no new development and where an improved road already served the development. R. Vol. II, p. 259, ¶¶ 2-8, Ex. B-F; R. Vol. II, p. 245, ¶ 5. Further, no developer, including Buckskin, was allowed to schedule a hearing for Final Plat approval until the RDA was signed and the fee paid. See R. Vol. II, p. 255, ¶¶ 3-4; R. Vol. II, p. 365, ¶ 9; R. Vol. III, p. 410, ¶ 9; R. Vol. I, p. 116, ¶ 9; R. Vol. I, p. 130, ¶ 9; R. Vol. I, p. 185, ¶ 8; R. Vol. I, p. 214, ¶ 5; R. Vol. II, p. 245, ¶ 6; R. Vol. II, p. 398, ¶6.

The facts of this case and Valley County's approach to RDA's and road mitigation fees is contrary to the facts in *KMST*; voluntariness, even in the sense of *KMST*, is clearly lacking in this case. Execution of a RDA and payment of a road impact fee was a standard condition of final plat approval that was placed on all development applications in Valley County. Buckskin was simply fooled by Valley County's LUDO and statements from Valley County representatives into believing that Valley County could legally require the payment of impact fees as a condition of approval.

E. Buckskin's Declaratory Judgment was Improperly Denied.

1. Buckskin's declaratory judgment action is separate from its inverse condemnation action, and accrued at a different time.

Valley County argues that there is no difference between Count I (declaratory judgment for illegal tax or fee) and Count II (inverse condemnation) of Buckskin's Complaint, and that Buckskin's claims are all the same. There is no legitimacy to Valley County's position. Buckskin properly pled alternative theories of recovery. Each claim arises from a different provision of the constitution – an illegal fee or tax claim arises from Article 7, Section 6 of the Idaho Constitution and an inverse condemnation claim arises from Article 1, Section 14 of the Idaho Constitution and

Fifth Amendment of the United States Constitution. Each claim involves different elements of proof – an inverse condemnation claim requires proof of the fair market value of the property taken whereas an illegal tax claim requires proof that the fee/tax was illegal under Idaho law.

Count I of Buckskin's Complaint clearly and unequivocally seeks a declaration from the court that Valley County's RDA's and its requirement that Buckskin pay a proportionate share fee for road impacts is in violation of Idaho Code section 67-8201 *et. seq.*, and constitutes an illegal fee or tax. R. Vol. I, p. 4. Count I says nothing about inverse condemnation or a taking of Buckskin's property. *Id.*

Count II of the Complaint, on the other hand, is entitled "Inverse Condemnation – Violation of State and Federal Constitution" and very clearly alleges a taking of property without just compensation. R. Vol. I, p. 5. Count II says nothing about a declaratory judgment or about an illegal fee or tax. *Id.* Rather, it asks for a judgment that the road impact fees paid by Buckskin constitute a taking of its property.

A claim against a governmental agency to recover payment of an illegal tax or fee is a recognized cause of action under Idaho law. *See Brewster v. City of Pocatello,* 115 Idaho 502, 768 P.2d 765 (1988); *BHA Invs., Inc. v. City of Boise*, 138 Idaho 356, 357-58, 63 P.3d 482, 483-84 (2003); *Idaho Bldg. Contractors Assn., Inc. v. City of Coeur d'Alene*, 126 Idaho 740, 890 P.2d 326 (1995). The Idaho Rules of Civil Procedure clearly allow for a plaintiff to plead alternative theories and remedies from the same actions:

> [a] party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in a separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal or equitable grounds or both. All statements shall be made subject to the obligations set forth in Rule 11.

I.R.C.P. 8(e)(2); see also *MK Transport, Inc. v. Grover*, 101 Idaho 345, 350, 612 P.2d 1192, 1197 (1980); *Assocs. Northwest, Inc. v. Beets*, 112 Idaho 603, 605, 733 P.2d 824, 826 (1987); *Murr v. Odmark*, 112 Idaho 606, 733 P.2d 827 (Ct. App. 1987).

These claims were properly pled as alternative theories of recovery and alternative methods of seeking a remedy in this case. The claims did not accrue at the same time and the district court erred in its determination on the question of accrual.

2. Buckskin's declaratory judgment claim is not mooted by Valley County's Resolution 11-6.

Valley County argues that Resolution 11-6 moots Buckskin's declaratory claims as to future phases of The Meadows because it is a waiver of the RDA requirement. There is no waiver of the RDA requirement in Resolution 11-6. Section 2 of Resolution 11-6 clearly contemplates that there will indeed be RDA's required in the future, which will be subject to further "negotiation" with Valley County. See R. Vol. III, p. 553. Absent an IDIFA-compliant ordinance, there is simply nothing to negotiate with regard to offsite public roadway improvements.

Valley County further attempts to skirt Resolution 11-6 by claiming that Buckskin misreads its underlying ordinance, which requires the payment of "impact fees," because the reference to Idaho Code section 31-870 in the LUDO makes it clear that there is nothing improper with the ordinance. "Impact fee" is a term of art with a specific legal definition. *See* I.C. § 67-8203(15). The term does not appear anywhere in Idaho Code section 31-870 and the types of fees a county has authority to charge under section 31-870 have nothing to do with land use approvals. Valley County did not use the term "impact fee" in its LUDO by accident. When Section I of the LUDO's PUD provision is read in conjunction with Section J, the payment of fees are the types of fees contemplated in IDIFA. The relevant portions of the LUDO read:

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

(emphasis added). This is an ordinance, which cannot be amended merely by passage of a resolution.

3. Buckskin's declaratory judgment claim is ripe.

Valley County further argues that if Buckskin's declaratory judgment claims are not moot, then they are not ripe because Buckskin could be required to do nothing further under Resolution 11-6 since the roads are already built. Valley County provides absolutely no evidence in the record what roads have allegedly been built or how or why Buckskin could be required to do nothing further. This is contrary to the language of Resolution 11-6, which still requires developers to enter into RDA's with Valley County to address offsite public roadways. If there was nothing further to be done with regard to offsite public roads, Resolution 11-6 should simply state that until an IDIFA-compliant ordinance is enacted, there will be no more RDA's at all. That's not what Resolution 11-6 says, however. It still requires developers to enter into RDA's and it clearly implies the threat of denial of final plat applications if road impact fees are not voluntarily paid.

In an attempt gain an advantage and to convince this Court that it will waive the RDA requirement under Resolution 11-6, Valley County refers to a separate matter involving the same legal issues presented in this appeal and involving the same legal counsel. *See* Respondent's Brief,

p. 36, n. 26. That case is currently pending in federal district court, *White v. Valley County*, 2011 WL 4583846 (D. Idaho). While undersigned counsel does not deny the facts alluded to by opposing counsel, there is more to story than is set forth in footnote 26 of Respondent's Brief. Furthermore, it provides no guarantee that Valley County will follow suit in other cases.

F. The issue of whether Valley County can use a development agreement to collect impact fees is not raised for the first time on appeal.

In response to Buckskin's arguments regarding Valley County's authority to require Buckskin to enter into RDA's and whether Resolution 11-6 moots Buckskin's declaratory judgment claims, Valley County asserts that this is an issue raised for the first time on appeal. This is simply inaccurate. This issue is raised as a result of Resolution 11-6, which Valley County enacted only days before the district court's second Memorandum Decision below and well after the Buckskin had briefed the issues. Section 67-6511A of LLUPA is part of the authority cited in Resolution 11-6 justifying Valley County's RDA program. Further, Valley County's "first time on appeal" argument ignores Buckskin's Complaint, which very clearly seeks a declaratory ruling on the validity of Valley County's RDA scheme. Valley County also mischaracterizes Buckskin's position on this question much too broadly.

Valley County approved Resolution 11-6 on March 7, 2011. R. Vol. III, p. 551. This was well over a year after Buckskin initiated this litigation and well after Valley County moved for summary judgment and the district court made its decision on summary judgment. After the district court issued its memorandum decision on summary judgment, Valley County moved for an entry of judgment to dismiss all of Buckskin's claims, to which Buckskin objected on the basis that summary judgment had not disposed of all its claims. R. Vol. III, p. 498, 510. On March 9, 2011, two days after passing Resolution 11-6, Valley County replied to Buckskin's objection, in part, on grounds that Resolution 11-6, rendered Buckskin's declaratory claims moot. R. Vol. III, pp. 540, 548, Ex. 1.

The district court issued a second ruling on April 11, 2011, dismissing Buckskin's entire Complaint with prejudice partly on the basis that Valley County's freshly minted Resolution 11-6 rendered Buckskin's claims moot. *See* R. Vol. III, p. 577. Given the claim in Buckskin's Complaint for a declaratory ruling on the RDA scheme, and the timing of Valley County's passage of Resolution 11-6 and that it was a basis relied on by the district court to dismiss Buckskin's declaratory judgment claims, it is unclear how Valley County now attempts to dispose of this issue on grounds that it is being raised for the first time on appeal. Valley County's authority to force Buckskin to enter into the RDA's has been an issue from the commencement of this litigation, and was further put at issue based on Valley County's enactment of Resolution 11-6 and the district court's subsequent reliance on Resolution 11-6 to dismiss Buckskin's declaratory judgment claim. This is not an issue raised for the first time on appeal.

Resolution 11-6 states that: "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 the following statutory provisions: ... Idaho Code § 67-6511A, which authorized development agreements in connection with rezones...". R. Vol. III, p. 552. Section 67-6511A provides authority to: "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). The emphasized language is vitally important because it demonstrates that Valley County has no authority under section 67-6511A to require Buckskin to negotiate development agreements addressing the payment of impact fees. The only type of "development agreement" in the Idaho Code authorizing the conditioning of a land use approval on the payment of an impact fee for proportional impacts to offsite public roadways is found in IDIFA. *See* I.C. § 67-8203(10).

G. The Five Year Statute of Limitations for Contract Claims Applies to Buckskin's Declaratory Judgment Claims in this Case.

The five year statute of limitations for actions upon a contract should apply to Buckskin's declaratory judgment claims. Contrary to Valley County's characterization, Buckskin's contract theory is not a mere afterthought. Valley County chides Buckskin for not citing to any case law supporting that the five year statute of limitations applies in a situation such as this where the plaintiff is not complaining of a breach of the contract. Buckskin's basis for asserting the five-year statute of limitations for its declaratory judgment claim is based on the plain language of Idaho Code section 5-216, which states: "[a]n action upon any contract, obligation or liability founded upon an instrument in writing." Section 5-216 does not say "an action for *breach* upon any contract," or otherwise suggest that the limitations period applies only to a claim of breach of contract. Rather, it says any action upon a contract without any requirement that the action involve a breach. I.C. § 5-216.

The language of the Uniform Declaratory Judgment Act clearly illustrates that "an action upon a contract" may be brought without a breach. Under this Act, Idaho courts "have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed." I.C. § 10-1201. Further, any party with an interest in a contract is entitled to a ruling under this Act determining rights, validity or status. I.C. § 10-1202. In fact, declaration to construe a contract may be sought before or after a breach. I.C. § 10-1203 (emphasis added). The authority of courts to render a declaration is broad where such a determination will resolve an issue or remove uncertainty. I.C. § 10-1205.

A claim for a declaratory judgment regarding the illegality of a contract or the subject matter of a contract is clearly an appropriate cause of action under the Declaratory Judgment Act. *See e.g. Taylor v. AIA Servs. Corp.*, 151 Idaho 552, 564, 261 P.3d 829, 841 (2011). In *Taylor*, this Court upheld the district court's declaration that the contract at issue was illegal and in violation of Idaho

law governing the subject matter of the contract. *Id.* at 564, 261 P.3d at 842; *see also Wernecke v. St. Maries Joint School Dist. No. 401*, 147 Idaho 277, 288 n. 12, 207 P.3d 1008, 1019 n. 12 (2009) (recognizing the circumstances under which the innocent party to an illegal contract is entitled to relief). While one of the claims in Taylor involved a claim for breach of contract, once the contract was declared illegal the breach of contract claim was dismissed by the district court. *Taylor v. AIA Servs. Corp.*, at 551, 261 P.3d at 850. The claim for a declaratory judgment on the legality of the contract was "an action upon contract" without regard to whether it was breached. *Id.*

The statute of limitations for a declaratory action to determine the legality of a contract is an action upon any contract. *See* I.C. § 5-216. Valley County required the payment of illegal impact fees through contractual arrangements, namely the RDA. The subject matter of the contracts is illegal. Buckskin has simply requested a declaration that the RDA's are void because Valley County had no legal authority to require that Buckskin pay an impact fee under the RDA's.

H. Idaho Code § 67-6512 Does Not Authorize The Collection Of Impact Fees.

Valley County argues that despite not having an IDIFA compliant ordinance for the collection of impact fees, it has statutory authority under LLUPA to do so. Specifically, the County relies on Idaho Code § 67-6512(d)(6) language which reads

> (d) Upon the granting of a special use permit, conditions may be attached to a special use permit including, but not limited to, those:
>
> ...
>
> (6) Requiring the provision for on-site or off-site public facilities or services;

I.C. § 67-6512(d)(6). According to the County, since that statute permits local governments to impose conditions on developers requiring offsite facilities or services, it is a sort of "mini-IDIFA" that allowed Valley County to collect an impact fee.

While the County's interpretation of I.C. § 67-6512(d)(6) is certainly imaginative, it is not a reasonable construction of that code section. There is absolutely nothing contained in the plain language of I.C. § 67-6512 that authorizes the collection of an impact fee. In fact, the word "fee" is not even used in that statute at all. Valley County certainly cannot argue that the legislature does not know how to use the word "fee" for the legislature does so in LLUPA.

There is express language in LLUPA that requires that all "[f]ees established for purposes of mitigating the financial impacts of development must comply with chapter 82, title 67 Idaho Code [IDIFA]." I.C. § 67-6513, Ch. 142, § 3, 2003 Sess. Laws 414. That statement in § 67-6513 expresses the legislature's intent that IDIFA is the sole source of a local government's authority to collect impact fees. The inclusion of that language in § 67-6513 evidences the legislature's intent to let local governments know that the land use powers granted under LLUPA do not the power to collect impact fees.

I. Equitable Principles do not Dictate Dismissal of any of Buckskin's Claims.

Valley County asserts that Buckskin's claims should also be dismissed on equitable principles. Valley County cannot hide behind equitable theories in light of its own conduct. The doctrine of unclean hands allows "a court to deny equitable relief to a litigant on the ground that his conduct has been inequitable, unfair and dishonest, or fraudulent and deceitful as to the controversy at issue." *Sword v. Sweet,* 140 Idaho 242, 251, 92 P.3d 492, 501 (2004). Valley County extracted the payment of road impact fees from Buckskin and similarly situated developers in violation of IDIFA. Its strained use of the term "voluntary" does not establish otherwise. Forcing Buckskin and all other developers to enter into RDA's in order to circumvent or flout very specific state law requirements for proportionate payments of impact fees is inequitable, unfair and illegal. Valley County's unclean hands deprive it of any equitable defense against Buckskin's claims.

Valley County's equitable principles defense is based entirely on completely unsupported (and assuredly disputed) factual assertions. These unsupported factual assertions include: that "Buckskin benefitted substantially from its arrangement" with Valley County; that "[t]hose roads are now in place" (implying that the roads did not preexist Buckskin's application); that Buckskin's development would be "sitting on undeveloped land served by dirt or gravel roads;" and that "the County performed the substantial service of designing, financing, and building the road network to serve The Meadows." See Respondent's Brief, pp. 44-45. There is not one shred of evidence in the record to support Valley County's factual assertions regarding the roads. With absolutely no evidence to support the facts necessary to affirmatively establish the elements of these equitable theories, Valley County's equitable principles defense does not merit further consideration.

J. The County is not Entitled to an Award of Attorney Fees on Appeal.

Valley County's Respondent's Brief/Cross Appellant's Brief makes no effort to distinguish whether its arguments on attorney fees relate to its cross appeal or a request for attorney fees on appeal. To the extent Valley County has cross appealed the district court's denial of its motion for an award of attorney fees below, Buckskin is entitled to address those issues as part of a separate Cross Respondent's brief, which Buckskin has filed concurrently with this Reply Brief. Buckskin only addresses Valley County's claim for attorney fees on appeal in this Reply Brief.

Valley County claims an entitlement to attorney fees on appeal under Idaho Code section 12-117 and Idaho Code section 12-121. Valley County is not entitled to an award of attorney fees on appeal under either attorney fees statute. Idaho Code section 12-117 provides that in a judicial proceeding involving a governmental entity, 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).

Buckskin, for the reasons set forth in this Reply Brief and in its Appellant's Brief, does not believe that Valley County will prevail on appeal. Even if this Court affirms the district court's decision below, Valley County is not entitled to an award of any fees on appeal. There is nothing to indicate or establish that Buckskin acted without a reasonable basis in fact or law in pursuing this appeal.

Buckskin pursued its claims on appeal in good faith and with a reasonable basis in law and fact. In arguing for attorney fees on appeal, Valley County claims that Buckskin pursued this appeal in defiance of settled authority on issues such as the statute of limitation, *KMST*, and other of Valley County's defenses, which Buckskin challenged below but has not appealed. The district court below based its ruling solely on the statute of limitations issue, which Buckskin has addressed. These other defenses that Valley County claims Buckskin did not appeal were not part of the district court's decision and were not a basis to appeal. In fact, the district court determined that Valley County's impact fee violated IDIFA, that Buckskin had no obligation to exhaust administrative remedies because Valley County's impact fee is illegal, and that voluntariness was not relevant. R. Vol. III, pp. 491-92. The district court's findings confirm that Buckskin did not seek this appeal frivolously or in bad faith.

What is more, Buckskin's appeal included at least two issues not previously ruled on by this Court, and thus are issues of first impression. First, this Court has never decided the applicability of the *Tibbs* standard of accrual to a multi-phase development project or whether a departure from this

standard is warranted under the facts of a multi-phase development project, similarly to what this Court decided *C&G, Inc. v. Canyon Highway District No. 4.*, cited *supra*. Buckskin pursued this appeal in good faith seeking such a departure because of the unique circumstances involving multi-phased developments. Secondly, Buckskin pursued this appeal on the basis that its illegal tax claim did not accrue at the same time as its inverse condemnation claim. The standard of accrual for such a claim has not been determined by this Court and is likewise a matter of first impression. As these are matters of first impression, Valley County is not eligible for an award of attorney fees on appeal. *Saint Alphonsus Reg'l Med. Ctr. v. Ada County*, 146 Idaho 862, 863, 204 P.3d 502, 503 (2009).

Finally, Valley County's actions on appeal establish that it, not Buckskin, has acted frivolously and without a reasonable basis in fact or law. This is primarily illustrated by Valley County's numerous misrepresentations of the underlying facts or failure to provide any support in the record for its factual claims, including, as addressed above, that it has designed and built certain roads pursuant to its CIP and RDA scheme. Valley County has provided no such evidence in the record.

For all of these reasons, Valley County is not entitled to an award of attorney fees on appeal, under either Idaho Code Section 12-117 or 12-121. Buckskin, if the prevailing party, is entitled to an award of costs or fees as set forth in its Appellant's Brief.

III. CONCLUSION

For the reasons set forth above and in Buckskin's Appellants' Brief, the district court's grant of summary judgment should be reversed.

DATED this 20th day of January, 2012.

EVANS KEANE LLP

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of January, 2012, 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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