12-29-2011

Buckskin Properties, Inc. v. Valley County Respondent's Cross 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/Cross-Respondents v. VALLEY COUNTY, a political subdivision of the State of Idaho, Defendant/Respondent/Cross-Appellant	Supreme Court Docket No. 38830-2011

RESPONDENT/CROSS-APPELLANT'S BRIEF

Appeal from the District Court of the Fourth Judicial District
Of the State of Idaho, in and for the County of Valley,
Honorable Michael R. McLaughlin, Presiding

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STATEMENT OF THE CASE

This is Defendant/Respondent/Cross-Appellant Valley County's (the "County") response brief. It responds to *Appellant's Brief* (hereinafter *"Appellants' Brief")* filed by Appellants Buckskin Properties, Inc. and Timberline Development, LLC (collectively, "Buckskin").[1] It also serves as the County's opening brief on cross-appeal.

I. NATURE OF THE CASE

Buckskin seeks to frame this case as being about illegal impact fees, but it is more accurately described as a collateral attack on a permit issued by the County for real estate development. Buckskin seeks the return of money it paid years ago toward road improvements pursuant to its agreement with the County in connection with Phases 2 and 3 of a residential project known as The Meadows at West Mountain ("The Meadows"). The County used that money, along with funds from other developers, to construct roads serving the developments, without which The Meadows and other projects probably could not have been built. Having received the benefit of its bargain, Buckskin now contends that the money it agreed to pay was an illegal tax under Idaho law and, therefore, was a *per se* taking under state and federal law.[2] Buckskin also seeks declaratory relief to the same effect in an effort to bar future payments on the remaining three phases of the project. It seeks this despite the fact that the County adopted a resolution foregoing such fees.

At the time of Buckskin's application for a conditional use permit ("CUP"), the proposed project was located within a rural area served by gravel roads that were not intended for urban-type residential development. The County could have denied the application outright, Idaho

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[1] Buckskin Properties, Inc. was the initial developer of the property. Timberline Development, LLC is the assignee/successor in interest of Buckskin Properties, Inc.

[2] Buckskin has not alleged an independent basis for a regulatory taking. Instead, its state and federal taking claims are entirely dependent on its allegation of an illegal tax in violation of Idaho Const. art. VII, § 6.

Code § 67-6512(a), or controlled the timing of the development, Idaho Code § 67-6512(d)(2), on the basis of inadequate transportation infrastructure. Instead, at the behest of many developers at the time who were clamoring to move forward with projects in areas underserved by road infrastructure, the County developed a Capital Improvement Program ("CIP"). The CIP gave developers whose projects would otherwise have been denied or delayed the opportunity to move forward based on a program in which they contributed their fair share to fund road improvements serving their developments.

Buckskin, like many others, took advantage of this program and benefited from it. Indeed, Buckskin included in its own CUP application a proposed agreement for it to contribute toward road improvements based on the CIP program. The County approved Buckskin's application with a condition that it enter into such a development agreement for each phase. On the same day, Buckskin executed the first of these agreements, the *Capital Contribution Agreement*, covering Phase 1 of the project. In it, Buckskin agreed to convey right-of-way to the County as its contribution toward its share of road construction costs. The value of the right-of-way exceeded the amount due, so it obtained a credit for future phases. It later entered into a *Road Development Agreement* for Phases 2 & 3, providing for payment of $232,160. These are referred to collectively the "*Development Agreements*."[3] *Herrick Aff.*, Exhs. 1 and 2.[4]

Buckskin is not seeking return of the conveyance it made for Phase 1, acknowledging that this occurred outside of the statute of limitations. Instead, its lawsuit seeks (1) damages for the money it paid in connection with Phases 2 & 3 and (2) declaratory relief, particularly as to future phases.

[3] There is no significant functional difference between the *Capital Contribution Agreement* and the *Road Development Agreement*. The different names merely reflect an evolution in naming convention.

The County seeks dismissal of the action for a variety of jurisdictional, procedural, substantive, and equitable reasons. Most notably, the lawsuit is too late (both as to the 28-day appeal clock and the four-year statute of limitations). In addition, Buckskin failed to exhaust its remedies and entered into the *Development Agreements* voluntarily. Other defenses apply specifically to the federal takings claim (failure to plead 42 U.S.C. § 1983, special ripeness tests under *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), and the two-year statute of limitations). Finally, the County has raised equitable defenses to both state and federal claims.

While this case was pending (but after the District Court had ruled in the County's favor), the County enacted *Resolution 11-6*. This resolution declared in section 2: "In order to avoid litigation costs and uncertainty, the Board of County Commissioners will no longer enter into Road Development Agreements calling for the payment of fees or other contributions for off-site road improvements until such time as the County adopts an IDIFA-compliant ordinance, unless the permit holder voluntarily and expressly waives any objection thereto."[5] R. Vol. III, pp. 552-53. Although the County believes it is on firm constitutional footing with its actions, it sought through the resolution to avoid further controversy and conflict.

II. COURSE OF PROCEEDINGS

The District Court granted the County's summary judgment motion. First, it dismissed Buckskin's federal taking claim for failure to plead § 1983. It then dismissed Buckskin's remaining claims as untimely under the four-year statute of limitations. In dictum, the District Court rejected some of the County's other defenses. Other defenses were not addressed.

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[4] The *Affidavit of Cynda Herrick in Support of Motion for Summary Judgment ("Herrick Aff.")* is an exhibit to the *Clerk's Record on Appeal.*

[5] IDIFA refers to the Idaho Development Impact Fee Act ("IDIFA"), Idaho Code §§ 67-8201 to 67-8216.

In response to Buckskin's *Motion for Reconsideration/Amendment* (R. Vol. III, p. 513), the District Court explained that The Meadows is one project subject to a single CUP governing all phases, that the substantial impairment of Buckskin's property was apparent as to all phases from the outset, and that the cause of action for all phases therefore accrued at once when this obligation first became apparent. The District Court further ruled that, in any event, Buckskin's request for declaratory relief as to future phases 4, 5, and 6 was mooted by *Resolution 11-6*. The District Court did not comment on the County's alternative argument that claims as to such future phases are not yet ripe. R. Vol. III, p. 577.

The merits of Buckskin's lawsuit (whether the *Development Agreements* were a permissible means of addressing inadequate infrastructure or illegal taxes) is not now before the Court.[6] Indeed, the County has been careful to reserve that question.[7] This case was disposed of on the County's motion which was limited to specified defenses. *Valley County's Brief in Support of Motion for Summary Judgment* (R. Vol. I, p. 38). Notwithstanding anything the District Court may have said in its decision, the merits of this case have never been briefed, argued, or presented. If the County's statute of limitations and other defenses are rejected, the County is prepared to, and must be afforded an opportunity to address the legality of its actions.

The County is not hiding from the merits. The County should prevail on the merits. The County simply elected to frame its summary judgment motion on the basis of defenses that it

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[6] The "merits" were addressed by the County only in the context of its argument that the payments were voluntary and therefore were not a taking. The "merits" of whether the road fees were an illegal tax in the first place has never been presented or addressed by the County until this brief.

[7] "But there is no need to determine whether the Conditional Use Permit ('CUP') or the preliminary Development Agreement, proposed Capital Contribution Agreement, final Capital Contribution Agreement, and/or Road Development Agreement (collectively 'Agreements') at issue here imposed illegal taxes. The question presented in the pending motion is whether Plaintiffs proposed and/or entered into the Agreements without objection, accepted the CUP without complaint, avoided opportunities to raise the issue administratively, and waited too long to challenge." *Valley County's Reply Brief in Support of Motion for Summary Judgment* at 1 (R. Vol. III, p. 449).

thought would more easily dispose of the matter. Notwithstanding the County's reservation, the District Court commented on the merits. Accordingly, it is now wise for the County to address the subject, as it has in section VIII at page 40. We leave it to the Court to determine whether it is necessary or appropriate to reach those merits now.

III. STATEMENT OF THE FACTS

For the convenience of the Court, the key facts are set out in a timeline attached to this brief as Appendix A. The appendix notes where each of the key documents may be found in the record. It also explains some minor discrepancies as to dates, none of which are of consequence.

ADDITIONAL ISSUES PRESENTED ON APPEAL

In addition to the issues identified in *Appellants' Brief*, the County identifies these issues:

1. Was Buckskin's federal claim properly dismissed?
2. Was there no taking in any event because Buckskin's action was voluntary?
3. Did Buckskin fail to exhaust its administrative and judicial remedies?
4. Should attorney fees be awarded to Valley County?

ATTORNEY FEES ON APPEAL

The County seeks reversal of the denial of attorney fees by the District Court. It also seeks attorney fees on this appeal. The basis of the County's claims and its objection to Buckskin's claim for attorney fees is set out in section X at page 46.

ARGUMENT

I. BUCKSKIN'S FEDERAL TAKING CLAIM WAS IMPROPERLY PLED, UNRIPE UNDER *WILLIAMSON COUNTY*, AND, IN ANY EVENT, UNTIMELY.

Buckskin pled its takings claim under both the federal and state constitutions. Buckskin's federal claim is not properly before the Court because (1) Buckskin failed to bring the claim

under 42 U.S.C. § 1983,[8] and (2) even if it had done so or were excused from doing so, the federal claim is subject to a two-year statute of limitations,[9] which it clearly missed.[10] In addition, Buckskin's suit fails both of the specialized ripeness tests established by *Williamson County*.[11]

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[8] It is well settled in the Ninth Circuit that so-called *Bivens* actions (after *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389 (1971)) brought directly under the U.S. Constitution are impermissible where a § 1983 action is available. *Azul-Pacifico, Inc. v. City of Los Angeles*, 973 F.2d 704, 705 (9th Cir. 1992), *cert. denied*, 506 U.S. 1081 (1993); *Martinez v. City of Los Angeles*, 141 F.3d 1373, 1382 (9th Cir 1998); *Hacienda Valley Mobile Estates v. City of Morgan Hill*, 353 F.3d 651, 655 (9th Cir. 2003), *cert. denied*, 543 U.S. 1041 (2004 and 2005) (two petitions for certiorari denied).

[9] Federal law dictates which statute of limitations is applicable to federal claims and when that statute will begin to run. *Wallace v. Kato*, 549 U.S. 384, 387-88 (2007); *McCabe v. Craven,* 145 Idaho 954, 957, 188 P.3d 896, 899 (2008). All § 1983 actions are subject to the state's statute of limitations for personal injury (aka torts). *Wilson v. Garcia*, 471 U.S. 261, 266-67 (1985). On numerous occasions, Idaho courts have applied *Wilson* and held that Idaho's two-year statute of limitations (Idaho Code § 5-219(4)) applies, regardless of the nature of the § 1983 claim. *McCabe v. Craven,* 145 Idaho 954, 957, 188 P.3d 896, 899 (2008); *Osborn v. Salinas*, 131 Idaho 456, 458, 958 P.2d 1142, 1144 (1998); *Idaho State Bar v. Tway*, 128 Idaho 794, 798, 919 P.2d 323, 327 (1996); *Mason v. Tucker and Assoc.*, 125 Idaho 429, 436, 871 P.2d 846, 853 (Ct. App. 1994); *Herrera v. Conner,* 111 Idaho 1012, 1016, 729 P.2d 1075, 1079 (Ct. App. 1987); *Henderson v. State*, 110 Idaho 308, 310-11, 715 P.2d 978, 980-81 (1986).

Moreover, courts have held that even if a *Bivens* action were available, the personal injury statute of limitations applies in any event. *Bieneman v. City of Chicago*, 864 F.2d 463 (7th Cir. 1988) (direct takings claim subject to two-year statute); *Van Strum v. Lawn*, 940 F.2d 406 (9th Cir. 1991) (applying *Bieneman* in Ninth Circuit in non-takings case). Thus, application of the two-year statute of limitations to the federal claims is inescapable.

[10] Under federal law, the statute of limitations begins to run when the constitutional wrong becomes or should have become apparent. "Federal law, however, determines when the state limitations period begins for a claim under 42 U.S.C. § 1983. A federal claim is generally considered to accrue when the plaintiff 'knows or has reason to know of the injury which is the basis of the action.'" *Norco Construction, Inc. v. King County*, 801 F.2d 1143, 1145 (9th Cir. 1986) (citations omitted). Ignorance of the right to sue is no excuse. "Her tardiness therefore was due not to the lack of a viable cause of action, but rather to an ignorance of her right to sue. Such ignorance is not a legally sufficient excuse for a delay in filing a claim." *Moore v. Exxon Transportation Co.*, 502 F. Supp. 583 (E.D. Vir. 1980) (dealing with tardy amendment of complaint; statute of limitations applied by analogy; not barred by laches due to lack of prejudice). "The phrase 'reasonably should have been discovered' refers to knowledge of the facts upon which the claim is based, not knowledge of the applicable legal theory upon which a claim could be based." *BHA Investments, Inc. v. City of Boise ("BHA II")*, 141 Idaho 168, 174, 108 P.3d 315, 321 (2004) (in context of notice required under Idaho Tort Claims Act). Although the federal claim would not have yet been ripe in federal court under *Williamson County*, it was plainly ripe in state court under *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323, 346 (2005) ("With respect to those federal claims that did require ripening [that is, those claims barred from federal court under *Williamson County*], we reject petitioners' contention that *Williamson County* prohibits plaintiffs from advancing their federal claims in state courts."). If the federal claim is ripe in state court, it follows that the statute of limitations is running—and has now run.

[11] These are not traditional Article III or prudential ripeness tests, by the way, but special tests for federal takings claims. Frankly, they sound more like exhaustion, but the Supreme Court has made clear that they are not. *Williamson County*, 473 U.S. at 193.

First, the claim must be ripe in the sense that the would-be plaintiff has availed itself of all opportunities to obtain relief at the administrative level. This is referred to as the "final decision" requirement.[12] Second, the plaintiff must utilize available state judicial remedies for inverse condemnation. By failing to bring a timely state inverse condemnation action, the plaintiff forfeits its federal taking claim.[13] For the reasons set out in the footnotes, Buckskin fails both the "final decision" and the "state remedies" tests. The District Court dismissed the federal claim on the basis of failure to plead § 1983, without addressing the others. *Memorandum Decision* at 4 (R. Vol. III, p. 489).

II. BUCKSKIN'S STATE LAW CLAIMS ARE BARRED BY BUCKSKIN'S FAILURE TO SEEK JUDICIAL REVIEW.

A. The County's decisions concerning Buckskin's application were appealable under LLUPA.

Since 1975, the Local Land Use Planning Act ("LLUPA") has authorized judicial review of certain permitting decisions—including CUPs and final plats—identified in Idaho Code §§ 67-6519 and 67-6521(1).[14] LLUPA, in turn, references and relies on the judicial review provisions of the Idaho Administrative Procedures Act ("IAPA"), Idaho Code § 67-5279(3).

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[12] While *Williamson County* dealt with the failure to seek a variance, the holding is equally applicable to Buckskin's failure to question the County's CIP or request approval without a development agreement. In other words, plaintiffs must raise and press their objections with the local government in a timely and meaningful way in order to set up their claim that the exaction is involuntary. Buckskin did just the opposite. It actually proposed these conditions in its own CUP application. Accordingly, there is no "final decision" in the sense of *Williamson County*.

[13] Although Buckskin filed a state inverse condemnation action (this very lawsuit), it filed too late. It should have appealed under LLUPA within 28 days. Idaho Code §§ 67-6519(4) and 67-6521(1)(d). Even if a collateral action outside of LLUPA is permissible, it should have filed its collateral action within four years. By failing to file a timely takings action under state law, it forfeited its federal taking claim, too. "[W]hile the *Williamson County* requirements typically reveal a claim to be premature, they may also reveal that a claim is barred from the federal forum. The *Williamson County* 'ripeness' requirements will never be met in this case, because the state statute of limitations has run on Pascoag's inverse condemnation claim. By failing to bring its state claim within the statute of limitations period, Pascoag *forfeited* its federal claim." *Pascoag Reservoir & Dam, LLC v. Rhode Island*, 337 F.3d 87, 95 (1st Cir. 2003) (citations omitted, emphasis original).

[14] References in this brief will be made to the language of the statute in effect at the relevant time prior to its amendment last year, 2010 Idaho Sess. Laws ch. 175. Neither the 2010 amendment nor the Court's decision in

As a result, Buckskin was required to file a petition for judicial review within 28 days of the final decision of the County. Idaho Code §§ 67-6519(4), 67-6521(1)(d). Instead of appealing, Buckskin signed the *Capital Contribution Agreement* on the same day the CUP was issued.

B. Judicial review is the exclusive means to challenge a decision under LLUPA.

This Court has held repeatedly that judicial review under LLUPA is the exclusive procedure for challenging a decision to grant or deny a permit where review is provided under LLUPA. In *Bone v. City of Lewiston,* 107 Idaho 844, 693 P.2d 1046 (1984), the plaintiff brought a petition for declaratory judgment and an application for a writ of mandate instead of filing an appeal from the denial of rezoning application. The Court admonished the plaintiff for trying to "bypass" the statute declaring that LLUPA "is the exclusive source of appeal for adverse zoning actions." *Bone*, 107 Idaho at 848, 693 P.2d at 1050. The Court explained:

> We find § 67-5215(b-g) [the former judicial review provisions of IAPA incorporated by LLUPA] to be a complete, detailed, and exhaustive remedy upon which an aggrieved party can appeal an adverse zoning decision. We also find that the legislature's intent in outlining the scope of review and the bases upon which a court may reverse a governing body's zoning decision to be clear.

Bone, 107 Idaho at 847-48, 693 P.2d 1049-50.

The Court reached the same result in *Curtis v. City of Ketchum*, 111 Idaho 27, 720 P.2d 210 (1986). There, a subdivision applicant missed the deadline for filing a LLUPA appeal and instead brought an inverse condemnation action against the City. The Court rejected the collateral action, noting that Curtis' constitutional arguments could have and should have been

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Giltner Dairy v. Jerome County, 145 Idaho 630, 633, 181 P.3d 1238, 1241 (2008) changed the availability of judicial review for CUPs and final plats. Both were reviewable before and remain reviewable today under LLUPA.

raised in a timely judicial review under LLUPA. *Curtis*, 111 Idaho at 32-33, 720 P.2d at 215-216 (the reference to the former 60-day deadline corresponds to today's 28-day deadline).

Similarly, this Court held in *Regan v. Kootenai County*, 140 Idaho 721, 725, 100 P.3d 615, 619 (2004), that the Regans "had improperly bypassed the exclusive source of appeal" by suing the county for declaratory judgment concerning the interpretation of the county's land use ordinance. This Court went on to hold that "[t]he Regans' failure to exhaust their administrative remedies deprived the district court of subject matter jurisdiction over their claim for declaratory relief." *Regan*, 140 Idaho at 726, 100 P.3d at 620.

The exclusivity of judicial review also arises in areas of the law besides land use decisions under LLUPA. In *Cobbley v. City of Challis*, 143 Idaho 130, 133-34, 139 P.3d 732, 735-36 (2006), this Court held that a petition for judicial review pursuant to Idaho Code § 40-208 (the public road statute) is the exclusive means to challenge a county's decision concerning the validation of a road. Citing *Bone*, this Court reiterated that, when provided, statutory judicial review proceedings are exclusive remedies.

We are not aware of an Idaho case applying this principle in the context of impact fees, but courts in other jurisdictions have done so. In *Sold, Inc. v. Town of Gorham*, 868 A.2d 172 (Maine 2005), the Supreme Judicial Court of Maine considered a declaratory judgment action brought by developers who had paid impact fees under an allegedly unconstitutional and illegal ordinance. The Court held that the action was barred by the plaintiffs' failure to challenge the city's approval of their subdivisions, which included the payment of the impact fees as a condition, within 30 days as provided under state law. "When the time to file an appeal expired, the conditional approvals, including the impact fee requirements, became final, and were not subject to challenge." *Sold Inc.* at 176 (citation omitted).

Similarly, in *James v. County of Kitsap*, 115 P.3d 286 (Wash. 2005), the Washington Supreme Court addressed claims from developers who sought refunds of impact fees paid during the time that the county's ordinances were not in compliance with state law. In *James*, the county appealed from a summary judgment that awarded the developers more than three million dollars in refunds arguing, inter alia, that the developers' claims were barred by their failure to challenge the fees within 21 days of when the permits were issued, as required under Washington's Land Use Petition Act ("LUPA"). The *James* Court agreed with the county. "[W]e find that the imposition of impact fees as a condition on the issuance of a building permit is a land use decision and is not reviewable unless a party timely challenges that decision within 21 days of its issuance." *James* at 292. The Court rejected the developers' argument that the superior court had original jurisdiction to hear their claims:

> The Developers here were provided, by statute, with several avenues to challenge the legality of the impact fees imposed by the County and comply with the procedural requirements under chapter 82.02 RCW and LUPA. . . . However, rather than complying with either of these procedures provided by statute, the Developers waited almost three years before challenging the legality of the impact fees imposed by the County. The Developers have not complied with the procedures provided under LUPA and RCW 82.02.070(4) and are barred under LUPA from challenging the legality of the fees imposed.

James at 293-94. The *James* court went on to describe the public policy considerations that supported limiting challenges to land use decisions to the procedures available under the statute.

> As we stated in [*Chelan County v.*] *Nykreim*, this court has long recognized the strong public policy evidenced in LUPA, supporting administrative finality in land use decisions. 146 Wash.2d at 931–32, 52 P.3d 1. The purpose and policy of the law in establishing definite time limits is to allow property owners to proceed with assurance in developing their property. Additionally, and particularly with respect to impact fees, the purpose and policy of chapter 82.02 RCW in correlation with the procedural requirements of LUPA ensure that local jurisdictions have timely notice of potential impact fee challenges. Without notice of these

> challenges, local jurisdictions would be less able to plan and fund construction of necessary public facilities. Absent enforcement of the requirements under chapter 82.02 RCW and LUPA, local jurisdictions would alternatively be faced with delaying necessary capacity improvements until the three-year statute of limitations for challenging impact fees had run.

James at 294. Buckskin's lawsuit is the perfect illustration of why this policy is needed.

Based upon these authorities from Idaho and elsewhere, the rule is indisputable—if a procedure for judicial review of a decision has been created by the legislature, then that procedure is the exclusive means to challenge that decision (absent exceptions not applicable here), and a court does not have subject matter jurisdiction over a collateral attack. Because judicial review under LLUPA was Buckskin's exclusive means of challenging the County's decisions, the district court lacked subject matter jurisdiction over Buckskin's civil action.

C. Buckskin may not avoid LLUPA judicial review by contending that it is not challenging the approvals themselves, or that this lawsuit is a challenge to LUDO.

Buckskin may argue that its collateral attack is permissible because it is not challenging the approvals themselves. Yet a simple review of the *Complaint* and undisputed facts shows that the claims arise from, and are a direct challenge to, the decisions made by the County with regard to the approval of Buckskin's applications for development.[15] The Court cut through a similar diversionary fog in *Curtis,* 111 Idaho at 32-33, 720 P.2d at 215-16: "The heart of appellant's case is that the city's application of its zoning ordinances to appellant's property has

[15] Buckskin specifically refers to the condition of approval imposed by the County that required a written agreement to mitigate traffic impacts. *Complaint*, ¶ 10, R. Vol. I, p. 3. Buckskin alleges in the *Complaint* that the County "illegally required Buckskin to enter into a Capital Contribution Agreement and Road Development Agreement solely for the purpose of collecting an impact fee." *Complaint*, ¶ 22, R. Vol. I, p. 5. Further, in the prayer for relief, Buckskin asks the Court to declare that "Valley County's use of the Capital Contribution Agreement and Road Development Agreement as a condition of approval to collect monies from Plaintiffs for their proportionate share of road improvement costs attributable to traffic generated by their development is a disguised impact fee and is therefore illegal." *Complaint*, R. Vol. I, p. 6. The staff reports, meeting minutes, and the CUP itself all reflect that a condition of approval is that the *Development Agreements* receive approval from the Board of County Commissioners. *Herrick Aff.*, Exhs. 5, 6, 7, 8, 9, 10, and 11.

resulted in a taking of his property by inverse condemnation. . . . Appellant's arguments are nothing more than a challenge of the city council's quasi-judicial action denying his subdivision application. As such, the express provisions of I.C. §§ 67–6519, -6521(d), limit appellant's remedy to seeking judicial review of the city council's action pursuant to I.C. § 67-5215(b)-(g)."

Nor can Buckskin credibly contend that its lawsuit is really a constitutional challenge to the Land Use Development Ordinance ("LUDO"). First, such a claim is not found in the *Complaint*. Second, LUDO itself does not mandate (or even address) the fees contemplated under the CIP and the *Development Agreements*. Buckskin points to a sentence in the ordinance containing the words "impact fees." But the ordinance is talking about something entirely different. LUDO states: "The Commission may recommend to the Board impact fees as authorized by Idaho Code Section 31-870 for any PUD proposal." *Appellants' Brief* at 4 (referencing R. Vol. II, p. 298). Idaho Code § 31-870 authorizes the imposition "fees for services" in which the "fees collected pursuant to this section shall be reasonably related to, but shall not exceed, the actual cost of the service being rendered." This describes the ordinary, garden-variety service fees that, as the Court held in *Brewster v. City of Pocatello*, 115 Idaho 502, 505, 768 P.2d 765, 768 (1988), fall within the police power and are not illegal taxes. Thus, the County's actions challenged by Buckskin were "as applied" actions, not ones mandated by LUDO's reference to "impact fees." In short, LUDO has nothing to do with this lawsuit.

D. Exceptions to the exhaustion requirement do not apply here.

Buckskin may also seek to hide behind the two exceptions to the requirement of administrative exhaustion: "(a) when the interests of justice so require, and (b) when the agency acted outside its authority," *KMST, LLC v. County of Ada*, 138 Idaho 577, 583, 67 P.3d 56, 62 (2003). Neither applies here.

By the way, the law of exhaustion requires litigants to utilize available administrative remedies before seeking judicial relief. This is codified in the IAPA at Idaho Code § 67-5271. What we are talking about here is Buckskin's obligation to utilize judicial remedies under LLUPA. However, the law of administrative exhaustion is sometimes applied in the context of failure to pursue available judicial review. E.g., *Regan*. Accordingly, to be on the safe side, we address the exceptions here.

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

The "interests of justice" exception requires Buckskin to demonstrate that it will suffer irreparable harm if exhaustion is required. *Park v. Banbury*, 143 Idaho 576, 581, 149 P.3d 851, 856 (2006). Buckskin fails this test. Buckskin could have raised these same issues in a timely petition for judicial review of the County's actions. Instead, Buckskin waited for years, only objecting after the money was spent for its benefit and it is too late to reverse course. No public policy is served by encouraging such delinquent behavior. Likewise, Buckskin's claims as to future phases of The Meadows are mooted by *Resolution 11-6*. Simply put, there is no showing of any potential irreparable harm and therefore no reason to excuse Buckskin from the requirement to seek judicial review.

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

A review of the cases shows that this exception typically applies only to facial challenges to ordinances and statutes[16]—which this action is not. Even if the "outside the agency's

[16] "Our disposition of this case makes it unnecessary for us to address appellant's constitutional claims. Exhaustion of administrative remedies is generally required before constitutional claims are raised." *Service Employees Int'l Union, Local 6 v. Idaho Dep't of Health & Welfare*, 106 Idaho 756, 762, 683 P.2d 404, 410 (1984) (emphasis supplied). Although the opinion does not say what constitutional claims were raised, the dissent shows that they involved fact-based, "as applied" equal protection claims, not facial challenges. Likewise, the Court noted in *Palmer v. Bd. of County Comm'rs of Blaine County*, 117 Idaho 562, 564, 790 P.2d 343, 345 (1990): "This Court has frequently announced that except in unusual circumstances parties must exhaust their administrative remedies

authority" exception does apply to "as applied" challenges like this one, however, it does not matter because the County acted within its planning and zoning authority. This is illustrated by the decision in *American Falls Reservoir Dist. No. 2 v. IDWR*, 143 Idaho 862, 872, 154 P.3d 433, 443 (2007).[17] Thus, if an agency acts entirely outside its regulatory authority (for instance, if a county sought to rule on the validity of an applicant's water rights) then the action could be challenged without exhaustion. But where the governmental entity has regulatory authority over the subject matter and the only question is whether it has exercised that authority lawfully, then exhaustion is required.

The *Sold, Inc.* court considered this same issue. Maine law recognizes the same exception to the exhaustion requirement for government actions that are "beyond the jurisdiction or authority of the administrative body to act." *Sold, Inc.*, 868 A.2d at 176. In that case, the court found that the imposition of impact fees as conditions of approval was within the jurisdiction and authority of the city, even in the face of statutory and constitutional challenges.

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before seeking judicial recourse." No exception applied because "[h]ere, there is no challenge to the validity of Ordinance 77-5." This, too, suggests that the exception applies only to facial challenges. Another example is found in *White v. Bannock County Comm'rs*, 139 Idaho 396, 80 P.3d 332 (2003). In *White*, the Court rejected an end run around LLUPA's judicial review requirements by a neighbor challenging approval of an asphalt plant. Rather than appeal, White filed suit raising various "as applied" due process challenges. The county sought dismissal for failure to exhaust. The Court stated: "We also conclude that the recognized exceptions to the exhaustion doctrine do not apply to the present case where the question of a conditional use permit 'is one within the zoning authority's specialization and when the administrative remedy is as likely as the judicial remedy to provide the wanted relief.'" *White*, 139 Idaho at 402, 80 P.3d at 338 (citing *Fairway Development Co. v. Bannock County*, 119 Idaho 121, 124, 804 P.2d 294, 297 (1990)). The obvious conclusion is that when parties to a land use matter wish to challenge an "as applied" decision of a governing board (as opposed to the ordinance itself) they must first utilize the administrative procedures including judicial review.

[17] In *American Falls*, the Court explained that trying to figure out whether an agency acted outside its authority is essentially a circular argument (except in those rare cases where the agency had no authority over the subject matter at all). Thus, a plaintiff may not avoid the exhaustion requirement merely by alleging that the agency's action is unlawful and therefore beyond the scope of its authority. That would be circuitous, and exhaustion would never be required when challenging agency action. Rather, for the exception to apply, the agency must have acted on a matter entirely outside of its bailiwick. In such cases, no circuitous analysis is required to determine it acted outside the scope of its authority. The *American Falls* Court concluded: "Thus, the exception for when an agency exceeds its authority does not apply unless the CM Rules are facially unconstitutional." *American Falls*, 143 Idaho at 872, 154 P.3d at 443.

> Here, there is no dispute that the Planning Board had authority to consider, approve, and attach conditions to approvals of subdivisions. Plaintiffs only challenge one condition of the subdivision approval as inconsistent with statutory and constitutional requirements. Such challenges are the essence of matters that must be brought pursuant to Rule 80B to question whether the particular action of a municipal administrative agency is consistent with the requirements of law.

Id. Here, the County had authority to issue CUPs and to impose conditions, so exhaustion is required and Buckskin's collateral attack is barred.

III. BUCKSKIN'S STATE CLAIMS ARE UNTIMELY UNDER IDAHO'S FOUR-YEAR STATUTE OF LIMITATION.

Even if this Court were to determine that Buckskin was not bound to seek judicial review within 28 days and could instead bring a collateral challenge to the County's action, such a claim would be subject to the statute of limitations. Lawsuits alleging inverse condemnation or other forms of relief involving an alleged taking are subject to Idaho's residual four-year statute of limitations. Idaho Code § 5-224; *Harris v. State, ex rel. Kempthorne*, 148 Idaho 401, 404, 210 P.3d 86, 89 (2009). The only question is when the clock starts to run. If the cause of action accrued before December 1, 2005, the state claims are barred.

A. Buckskin's cause of action accrued and the statute began to run when it became apparent that Buckskin would be required to contribute toward road improvements.

Buckskin contends the statute did not begin to run until it wrote a check on December 15, 2005, thus beating the statute by a few days. But the statute was triggered well before that.

This Court has consistently explained that a claim for a regulatory taking accrues and the statute of limitation runs from "the time that the full extent of the plaintiff's loss of use and enjoyment of the property becomes apparent," that is, when the plaintiff "was fully aware of the extent to which Canyon County interfered with his full use and enjoyment of the property." *McCuskey v. Canyon County Comm'rs ("McCuskey II")*, 128 Idaho 213, 217, 912 P.2d 100, 104

(1996) (quoting *Intermountain West, Inc. v. Boise City*, 111 Idaho 878, 880, 728 P.2d 767, 769 (1986) and citing *Tibbs v. City of Sandpoint*, 100 Idaho 667, 671, 603 P.2d 1001, 1005 (1979)[18]) (emphasis supplied).

In *Harris*, 147 Idaho at 405, 210 P.3d at 90, this Court ruled that the statute of limitations on inverse condemnation ran from the day the plaintiffs were compelled to enter into a mineral lease with the state, not the time they made payments to the state under the lease. "We affirm the district court's determination that the full extent of the Harrises' loss of use and enjoyment of the property became apparent when they entered into the Mineral Lease. At that point in time, the impairment constituted a substantial interference with their property interest because they signed an agreement promising to pay royalties and rents on the sand and gravel. Therefore, the Harrises are barred from recovering under their inverse condemnation claim by I.C. § 5-224." *Harris*, 147 Idaho 405, 210 P.3d 90 (emphasis supplied).

Similarly, this Court has said that the statute begins to run "when the impairment was of such a degree and kind that substantial interference with Wadsworth's property interest became apparent." *Wadsworth v. Idaho Department of Transportation*, 128 Idaho 439, 443, 915 P.2d 1, 5 (1996) (emphasis supplied).

The County's alleged substantial interference with Buckskin's property interests was apparent at each of the following events:

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[18] The *Tibbs* case is often referenced in cases dealing with the statute of limitations and the date of accrual. The *Tibbs* Court stated: "The actual date of taking, although not readily susceptible to exact determination, is to be fixed at the point in time at which the impairment, of such a degree and kind as to constitute a substantial interference with plaintiffs' property interest, became apparent." *Tibbs*, 100 Idaho at 671, 603 P.2d at 1005. Curiously, however, the *Tibbs* case did not involve the statute of limitations. The case was an action for inverse condemnation involving an expansion of an airport, where the impact on the neighboring property was gradual. The question in the case was how and when to value the decline in property value. The reference to accrual arose in the context of fixing the dates for determination of "the difference in the value of the property before and after the destruction or impairment of the access." *Tibbs*, 100 Idaho at 670, 603 P.2d at 1004.

- On April 1, 2004, Buckskin filed its application for a CUP, which included as Appendix C a proposed *Development Agreement – The Meadows at West Mountain* ("*Proposed Development Agreement*") and a *Proposed Capital Contribution Agreement*. The paragraph on "Road Improvements" in the *Capital Contribution Agreement* says, "Developer agrees to pay a road impact fee as established by Valley County. Currently this fee has been set by the Valley County Engineer at $1,870.00 per equivalent single-family residential unit." (Emphasis supplied.) Appendix D to the Application is an "Impact Report." It states: "Currently this fee has been set by the County Engineer at $1,870.00 per equivalent single-family residential unit. Road impact fees may be offset by developer contribution of right-of-way or in-kind construction." (Emphasis supplied.) *Herrick Aff.*, Exh. 3.

- On May 17, 2004, the Valley County Planning and Zoning Commission ("P&Z") recommended approval of the CUP. The minutes of that meeting recited that Joe Pachner, speaking for applicant, said: "The traffic report completed by the Tamarack Resort has been incorporated into the design of this project. The impact of this project using this roadway is incorporated and they will pay their proportional impact fees." Likewise, Pat Dobie, the County Engineer said: "[A] fee of approximately $1,800 per residential unit will be required to construct the roads." *Herrick Aff.*, Exh. 6.

- On May 21, 2004, Buckskin submitted a revised application for CUP. It contained the same proposed agreements as were included in the initial application on April 1, 2004. *Herrick Aff.*, Exh. 4.

- On June 10, 2004, the P&Z issued Findings and Conclusions recommending approval of the revised CUP application. The recommendation included this condition number 12: "The Development Agreement and Capital Contribution Agreement must receive approval from the Board of County Commissioners." *Herrick Aff.*, Exh. 7.

- On July 12, 2004, the Board of County Commissioners voted to approve the revised CUP. The minutes contain a discussion of *Capital Contribution Agreement* and acceptance of the conveyance of right-of-way in lieu of cash. *Herrick Aff.*, Exh. 10.

- On July 14, 2004, Buckskin's CUP was issued by the P&Z (following approval by the County). *Herrick Aff.*, Exh. 11.

- On the same day, Buckskin signed the *Capital Contribution Agreement* setting out the payment requirements (a right-of-way conveyance with a credit for future phases). Paragraph 2 provided: "Currently this amount has been calculated by the Valley County Engineer to be $461.00 per average daily vehicle trip generated by the Project." As shown on Exhibit B, this equates to $1,844 per lot. *Herrick Aff.*, Exh. 1. Based on this, the District Court concluded that "the Plaintiffs certainly knew the essential facts" by this date. R. Vol. III, p. 490.

- On September 9, 2004, the P&Z approved the final plat for Phase 1. The minutes state at page 3: "They also discussed the maintenance of private roads, the dedication of public right of way, and that $1,844 per lot will be paid toward road maintenance." *Herrick Aff.*, Exh. 14.

- On October 25, 2004, the Board of County Commissioners approved the final plat for Phase 1. The County expressly accepted Buckskin's conveyance of the right-of-way as provided in the *Capital Contribution Agreement.*[19] *Herrick Aff.*, Exh. 15. This is the date on which the District Court said the statute of limitations ran '[a]t the very latest." R. Vol. III, p. 490.

- On September 26, 2005, the parties executed the *Road Development Agreement* for Phases 2 and 3. One of the recitals states: "Developer has agreed to participate in the cost of mitigating these impacts by contributing its proportionate fair share of the cost of the needed improvements identified in the Agreement and listed on the attached Exhibit A." The fee set at $247,096, less the credit from Phase 1, requiring a cash payment of $232,160. This was based on $1,844 per single family lot and $1,383 per apartment unit. *Herrick Aff.*, Exh. 2.

Buckskin's knowledge that it would be required to contribute toward road improvements is evident in the very application it filed on April 1, 2004, which included a proposal to make such payments. Indeed, Buckskin has admitted that it included the proposed agreements with its application because it understood such mitigation was required. *Pachner Aff.*, ¶¶ 4-8 (R. Vol. II, pp. 281-84.). The admission is repeated in Buckskin's *Appellants' Brief*: "The CIP requires that developers pay a fee . . . . In this case, Buckskin was required to pay an impact fee for each phase as each phase came up for final plat." *Appellants' Brief* at 6, 13.

If that were not enough, the substantial interference was apparent when the CUP was issued on July 14, 2004, the same day that Buckskin signed the *Capital Contribution Agreement.* Finally, as Judge McLaughlin noted, the substantial interference was apparent, at the very latest, on October 25, 2004, the day the right-of-way was conveyed to the County. (This conveyance was made for Phase 1, but carried over for Phases 2 and 3 via a credit.)

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

In this case, the amount of the payment per unit set in the *Development Agreements* signed by the parties was the same as called for in Buckskin's original application on April 1, 2004. But even if that were not the case, it would make no difference. The statute runs even though plaintiff does not know "the full extent of his damages." *McCuskey II*, 128 Idaho at 217, 912 P.2d at 104. Indeed, in *Rueth v. State*, 103 Idaho 74, 79, 644 P.2d 1333, 1338 (1982), the Court said the statute ran on the date of a meeting between the parties at which time there was "recognition of the severity of the problem." R. Vol. III, p. 490.

The fact that payment for Phases 2 and 3 occurred after December 1, 2005 (less than four years before the *Complaint* was filed) does not change that fact that the impairment of Buckskin's property was apparent long before that. Buckskin's insistence that the statute does not begin to run until payment is made cannot be reconciled, for example, with *Harris*, 147 Idaho at 405, 210 P.3d at 90, in which this Court ruled that the statute of limitations on inverse condemnation ran from the day the plaintiffs were compelled to enter into a mineral lease with the state, not the time they made payments to the state under the lease.

Given this clear and unwavering line of authority, it is perplexing why Buckskin would make a statement like this: "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." *Appellants' Brief* at 15. The opposite is true.

B. Buckskin's cause of action arose simultaneously as to all claims and all phases of the project.

Buckskin insists that "each payment should have been considered a separate taking with separate accrual dates." *Appellants' Brief* at 12. It says the District Court's rejection of this assertion "is in error because it flies in the face of the doctrine of ripeness." *Appellants' Brief* at 14. Here is the problem that Buckskin perceives: "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." *Appellants' Brief* at 14.

This argument goes nowhere. First, Buckskin is not suing, even now, for reimbursement (*i.e.*, inverse condemnation) as to future fees it has yet to pay. That would be absurd. Instead, it is suing, quite sensibly, for reimbursement as to past fees and a declaration that it is not required to pay additional fees in the future.

This is how it always works in exaction cases. Exaction cases are different than physical takings. In a physical taking, the plaintiff cannot stop the taking from occurring. Governments have the right to take property for public purposes. Accordingly, the plaintiff must wait until the property is taken and then seek just compensation. But when the exaction is illegal (e.g., where a condition of approval is that the plaintiff is required to pay an allegedly illegal tax), the plaintiff can sue at once to stop the exaction before it happens. (This is one reason the accrual date for physical takings is different.)

In Buckskin's case, payments have been made on three phases, but not for the remaining phases. Buckskin is free to plead its request for backward-looking relief and forward-looking relief as separate "claims" if it likes. But that does not change the fact that these "claims" are joined at the hip. Both "claims" arise out of the same CUP and the same alleged constitutional vice—the imposition of illegal taxes. Accordingly, they became ripe (and therefore accrued) at the same time.

Apparently Buckskin believes that its request for declaratory relief as to future fees was ripe in 2009 when it filed this lawsuit. But if it was ripe in 2009, then it must have been ripe all along. Nothing changed since 2004 to make it more ripe in 2009. (If anything, it is less ripe due

to *Resolution 11-6.*) The fact is, this suit was ripe when Buckskin submitted its application and/or received the CUP and executed the *Development Agreements*. It should have been filed within four years of that (if not within 28 days of CUP issuance).

There are, by the way, occasions when a facial taking challenge can be mounted even before an application for development is filed. Such was the case with *Mountain Central Bd. of Realtors, Inc. v. City of McCall*, Case No. CV 2006-490-C (Idaho, Fourth Judicial Dist., Feb. 19, 2008) (reproduced in Appendix B). This case was filed by a group of affected realtors and developers before any of them had any particular project in play. They had to show that they had standing, of course, and that was an issue. But once standing is established, lawsuits such as *Mountain Central* based on a facial challenge to an unconstitutional ordinance are certainly ripe. This reference to *Mountain Central* should not be misunderstood as a suggestion that suit necessarily must be filed the moment an illegal ordinance is enacted. This is the "absurd result" that Buckskin warns of in *Appellants' Brief* at 36. But it will not occur. In order to establish standing and to meet other threshold requirements, a plaintiff must establish that the ordinance affects its property or legal interests in some concrete way resulting in particularized injury. *Martin v. Camas County ex rel. Bd. of Comm'rs.*, 150 Idaho 508, 512-13, 248 P.3d 1243, 1247-48 (2011). In Buckskin's case, there was no facially unconstitutional ordinance, and Buckskin's injury occurred on April 1, 2004, July 14, 2004, or "at the latest" October 25, 2004.[20]

[20] The *Mountain Central* case is different from the case at bar because it was a facial challenge. Despite what Buckskin says, this case is an as applied challenge. The County may have had a practice of conditioning approvals to require road fees, but that practice was not driven by or even authorized by ordinance. The CIP was not adopted by ordinance, and LUDO's reference to "impact fees" was limited to lawful, statutorily authorized user fees. (See discussion in section V.B at page 35). While the *Mountain Central* case arose in a different context, we mention it here simply to show the plain error in Buckskin's assertion that a case challenging impact fees cannot be ripe until payment is made on each phase.

C. The Court should not depart from precedent and apply a different accrual standard.

Buckskin argues that the Court should depart from precedent because public policy considerations favor a finding of separate accrual dates for each phase. Buckskin makes much of the fact that the County updated its cost calculation for road improvements subsequent to the first two *Development Agreements*. This is of no legal consequence, because it does not alter the fact that it was apparent from the outset that Buckskin would have to pay something. Moreover, the change in payment is moot, because of *Resolution 11-6*. Nor is there any basis for Buckskin's contention that the County could raise the fees based on its "whim" (Opening Brief at 21). The CUP and the agreements between the County and Buckskin are all premised on the CIP, which is a highly technical, structured, and constrained approach to fee calculation upon which CUP holders are entitled to rely. Buckskin could challenge any future final plat in the event the County tried to impose a requirement inconsistent with the CIP framework (or with *Resolution 11-6*). In any event, the change in fees was no surprise to Buckskin. As noted in the bullet points above in section III.A, Buckskin's own proposed agreement and the *Development Agreements* it ultimately signed each contained a statement as to how the fee is "currently" set—thus reflecting recognition that it could change. Everyone understood that the CIP was intended as an ongoing, iterative process in which the status of infrastructure needs would be periodically reviewed and the formula recalibrated reflecting the latest data.

As for public policy, the Legislature has expressed its view of public policy by enacting the statutes of limitation (as well as time limits on judicial review). The public policy reflected in that legislation, and in the Court's interpretation of those statutes, is a sensible one. This is particularly so here where the local government has made substantial investments of resources.

If reimbursements are ordered years after the fact, plaintiffs may receive something for nothing while shifting the cost of their development to the taxpayer.

Next Buckskin urges the Court to scrap decades of settled law and adopt the "project completion rule" from physical takings cases. Buckskin has switched course on appeal. Before the District Court, Buckskin took the remarkable position that this is a physical taking case. *Plaintiffs' Memorandum in Opposition to Defendant's Motion for Summary Judgment* at 34. R. Vol. I, p. 110. It has wisely abandoned that position on appeal, but nonetheless urges the Court to change the law so that it may take advantage of the rules applicable to physical takings.

In *C & G, Inc. v. Canyon Highway Dist. No. 4*, 139 Idaho 140, 143-44, 75 P.3d 194, 197-98 (2003), this Court explained the simple policy reason for adopting the project completion rule: "[T]he property owner was justified in waiting until the project was completed before bringing suit for damages because until completion, there was no reliable method to determine the extent of the damages." Obviously, that policy rule has no applicability here. Plaintiffs certainly knew what their alleged "damages" were when they signed the *Development Agreements*. Moreover, given that courts have the power to enjoin an unlawful exaction before payment is made, there is no sense in waiting.

D. Cases from other jurisdictions concerning payment of fees or taxes are inapposite.

In support of its argument that its claims for refunds of the fees paid under the *Development Agreements* did not accrue until such time as Buckskin actually tendered the funds to the County, Buckskin discusses several cases from other jurisdictions in which the courts ruled that the plaintiffs' claims accrued on the date that payment was made. These cases are

unremarkable and inapplicable here.[21] The County recognizes that many claims arising from the payment of allegedly unlawful taxes and fees accrue, for statute of limitations purposes, on the date that the money is paid to the government. Buckskin stubbornly refuses to grasp that the distinction between its claim and those cases is the date upon which the impairment became apparent.

IV. BUCKSKIN'S ACTION WAS VOLUNTARY WITHIN THE MEANING OF *KMST*.

The *KMST* case applied *Williamson County* in ruling that ACHD's action could not be challenged under § 1983 because its decision was not a "final decision." This Court then went on to say that even if ACHD's recommendation had been a final decision, it would not have constituted a taking because the dedication was voluntary. In a pre-application meeting, ACHD staff advised KMST that staff would recommend a requirement of a road dedication. In order to move things along, KMST agreed to the dedication and included it in its application. This proved fatal to KMST's taking claim.

> KMST representatives included the construction and dedication of Bird Street in the application because they were concerned that failing to do so would delay closing on the property and development of the property. KMST's property was not taken. It

[21] In both *Sundance Homes, Inc. v. County of DuPage*, 746 N.E.2d 254 (Ill. 2001) and *Venture Coal Sales Company v. U.S.*, 370 F.3d 1102 (Fed. Cir. 2004), the courts rejected plaintiffs' argument that the statute of limitations did not begin to run until there was a court decision declaring the fee or tax to be illegal. That is consistent with the holding in *BHA II*. In all three cases, the payments were actually made well beyond the applicable statute of limitations and there was simply no need to analyze whether the claim accrued any earlier.

Furthermore, all three of those cases, as well as *Lowenberg v. Dallas*, 168 S.W.3d 800 (Tex. 2005), *Paul v. City of Woonsocket*, 745 A.2d 169 (R.I. 2000), and *Howard Jarvis Taxpayers Ass'n v. City of La Habra*, 23 P.3d 601 (Cal. 2001), involved fees or taxes imposed via ordinance instead of a condition of approval of a land use permit. As a result, in those cases there was no administrative process, no application of the ordinance, and no other government action until such time as the fee or tax was actually paid. In the instant case, the impairment upon Buckskin's property interest became apparent when the requirement to enter into the *Development Agreements* (which Buckskin knew included contributions for road improvements) was imposed by the County.

The *Howard Jarvis* court distinguished a case nearly identical to this appeal, *Ponderosa Homes, Inc. v. City of San Ramon*, 29 Cal. Rptr. 2d 26 (Ct. App. 2001), which involved a challenge to a traffic mitigation fee imposed in connection with the approval of a subdivision. In *Ponderosa*, the claim accrued (both for purposes of the state statute of limitations and § 1983) when the fee was imposed rather than when it was paid, which was when the development was conditionally approved by the city. The same result obtains here—Buckskin's claim accrued when the impairment became apparent, which occurred more than four years prior to the filing of its action.

> voluntarily decided to dedicate the road to the public in order to speed approval of its development. Having done so, it cannot now claim that its property was "taken."

KMST, 138 Idaho at 582, 67 P.3d at 61 (emphasis supplied) (internal quotations identifying district court's language omitted). This language is significant because it shows that a developer's action may be "voluntary" even when motivated by a desire to speed the processing of its application. In other words, the Court was not talking about altruism. Rather, it spoke of voluntary action in the sense of a calculated decision by the applicant to take the simplest path forward even when that means paying money.

Buckskin's situation is indistinguishable from KMST's. Perhaps the developers of The Meadows were not pleased with the idea of paying for road improvements benefiting their property, but they did not say so and they certainly did not challenge the County's authority to require such mitigation. One way or another, the County was responsible for ensuring that adequate infrastructure would be in place to support the new development. Buckskin could have simply waited until the County was able to raise the funds to build that infrastructure. Instead, in order to speed the project forward, Buckskin elected to make contributions to the County reflecting the project's proportionate share of the costs of the improvements. Having so elected, Buckskin cannot now be heard to complain that the payments they agreed to make were illegal taxes. This was the holding of the Idaho Supreme Court in *KMST*.

Buckskin attempts to distinguish its actions from those of the developers in *KMST* by claiming that they believed that the County's ordinance (LUDO) mandated the *Development Agreements*, and that County officials told them that road impact mitigation would be required. R.Vol. I, p. 104. But that is no different from the situation in *KMST*. In that case, the developer

agreed to the road dedication because he was told by ACHD staff that it would be recommended as a requirement. *KMST*, 138 Idaho at 579, 67 P.3d at 58.[22]

Buckskin's actions were plainly voluntary in this sense. Buckskin included an express offer of mitigation contributions in its application and then agreed to slightly modified terms in the *Development Agreements*. The terms of the *Development Agreements* are unambiguous. They are plainly entitled "AGREEMENTS" and provide that the developer "agrees" to participate in the cost of improving the roads near the proposed development.[23] Regardless of what discussions may or may not have taken place with County staff[24] and regardless of Buckskin's understandings and assumptions, if it were not true that the developer was voluntarily agreeing to help pay for the improvement of the roads, then Buckskin should not have signed documents saying that it agreed.[25]

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[22] Buckskin also claims that in 2004 it was "mislead [sic] into believing that Valley County could collect an impact fee" by the LUDO *Appellants' Brief* at 20. Buckskin then quotes a statement from a Valley County Commissioner in 2009 expressing concern over the legality of the road development agreements. These arguments are specious. The LUDO plainly does not mandate contributions toward road improvements, and any debate regarding the legality of the County's actions in 2009 only demonstrates the County's good faith efforts to address this issue.

[23] The *Capital Contribution Agreement* signed by Buckskin on July 14, 2004 contains this recital on page 1: "Developer has agreed to participate in the cost of mitigating these impacts by contributing its proportionate fair share of the cost of the needed improvements . . . ." *Herrick Aff.*, Exh. 1. The *Proposed Development Agreement* states at ¶ 2.18 at page 4: "Development of the Property pursuant to this Development Agreement will also result in significant benefits to Developer . . . .", at ¶ 2.19 at page 4: "Developer and the County have cooperated in the preparation of this Development Agreement . . . .", and at ¶ 2.20 at page 4: "The parties desire to enter into this Development Agreement . . . ." *Herrick Aff.*, Exh. 3, Appendix C to the Application.

[24] To the extent that Buckskin contends that entering into the *Development Agreements* was involuntary because of alleged statements by County staff, this argument is without merit. Idaho case law and the County's LUDO are clear that only the Board of County Commissioners has authority to make a final decision on such matters. These facts are identical to the situation in *KMST*.

[25] The recognition in *KMST* that voluntary actions do not give rise to takings is not undercut by the Court's holding in *BHA II*, which held that plaintiffs are not required to pay under protest as a prerequisite to challenging an unlawful tax. The *BHA II* case involved a transfer fee charged by the City of Boise on liquor licenses. The Court ruled in a prior case, *BHA Investments, Inc. v. City of Boise ("BHA I")*, 138 Idaho 356, 357-58, 63 P.3d 482, 483-84 (2004), that the City had no regulatory authority whatsoever with respect to the transfer of liquor licenses. Only the State has such authority. *Id. BHA II* involved two consolidated cases—the original *BHA I* case following remand and a different case. In *BHA II*, the district court dismissed a claim by a different set of plaintiffs because they had not paid the fee under protest. This was based on an old line of cases (*e.g.*, *Walker v. Wedgwood*, 64 Idaho 285, 130 P.2d 856 (1942)) holding that plaintiffs must pay taxes under protest to preserve the right to request a refund. The

V. BUCKSKIN'S REQUEST FOR A DECLARATORY JUDGMENT WAS PROPERLY DENIED.

A. The claim for declaratory action is no different from the claim for inverse condemnation and accrued at the same time

Buckskin believes that even if its inverse condemnation claim is barred as untimely, its request for declaratory judgment on the same subject somehow survives. Buckskin says: "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." *Appellants' Brief* at 29. That is exactly what the District Court did, and exactly what it should have done. Buckskin's assertion that its request for declaratory relief is "wholly separate," *Appellants' Brief* at 29, from its inverse condemnation claim is simply wrong. They are one and the same. Its assertion that it "pleaded a claim for illegal fee or tax as an alternative to its inverse condemnation claim," *Appellants' Brief* at 30, makes no sense. If there has been a taking, the one and only reason is that the contribution toward road improvements was an illegal tax. The "taking" and the "tax" claims are one and the same. (See footnote 2 at page 7.)

An inverse "condemnation action" is nothing more than a handy description for this type of takings claim. As the U.S. Supreme Court explained:

> The phrase "inverse condemnation" appears to be one that was coined simply as a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted. . . . The

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Supreme Court reversed the district court on that point, ruling that the requirement that taxes be paid under protest applies to lawful taxes, and is inapplicable in cases involving unlawful taxes. *BHA II*, 141 Idaho at 176, 108 P.3d at 323. In essence, the City of Boise tried to pull a fast one by saying, in essence, "OK, if our liquor license transfer fee is really a tax as you claim, you should have paid it under protest." The Court did not buy it. The inapplicability of *BHA II* is reflected in the fact that, in *KMST*, the Court noted one of the reasons that it was clear that plaintiff's action was voluntary was because they did not pay the impact fees under protest. "[Plaintiff] did not request an individual assessment of the amount of its impact fees; it did not appeal the calculation of the fees; and it did not pay the fees assessed under protest. It simply paid the impact fees in the amount initially calculated." *KMST*, 138 Idaho at 583, 67 P.3d at 62 (emphasis supplied).

> phrase "inverse condemnation," as a common understanding of that phrase would suggest, simply describes an action that is the "inverse" or "reverse" of a condemnation proceeding.

United States v. Clarke, 445 U.S. 253, 255-57 (1980). Asking for declaratory relief in addition to seeking recovery of money paid is simply a belt and suspenders form of pleading. They are not separate causes of action. If no property has yet been taken, then the relief would come solely in the form of a declaratory judgment or perhaps an injunction. Whether you call this "inverse condemnation" or a "duck" or a "goose" makes no difference. They all arise out of the same facts and legal principles—the assertion the property has been taken or is about to be taken.

This Court has noted on more than one occasion that "[a]n inverse condemnation action cannot be maintained unless an actual taking of private property is established." *Covington v. Jefferson County*, 137 Idaho 777, 780, 53 P.3d 828, 831 (2002). That may be, but in the case of an allegedly unlawful exaction, the cause of action arises as soon as it becomes apparent that the exaction will be imposed. Unlike physical takings, there is no need to wait for the money to be paid and then seek a recovery. This is not a situation where the government has the authority to take a person's property, and it is simply a question of paying for it. Here, Buckskin's allegation is that the government had no authority at all to demand payments for road improvements. If that is the case, it was a *per se* taking from the moment the County made clear that such payment would be required as a condition of development. Indeed, this is why the district court declared the City of McCall's impact fee ordinance invalid in *Mountain Central.*

Buckskin cites the case of *Intermountain West, Inc. v. City of Boise*, 111 Idaho 878, 728 P.2d 767 (1986) (whose facts are more fully explained in the prior case of *Boise City v. Blaser*, 98 Idaho 789, 572 P.2d 892 (1977)), noting that the Court evaluated two different accrual dates for two claims. That is because there were two distinct claims. One was a tort claim based on the City's failure to recognize that the developer was entitled to rely on a prior zoning certificate

obtained from Ada County before the land was annexed. The second was a claim based on the subsequent downzoning by the City after the annexation alleging that the downzone was so severe as to constitute a regulatory taking. These are two entirely different governmental actions by different governmental entities giving rise to two distinct causes of action. The case bears no resemblance to the single CUP issued to Buckskin by the County.

B. If the declaratory judgment claim is not otherwise barred, it is mooted by *Resolution 11-6*.

As the District Court found, whatever right the County may have had under the CUP to require road improvement payments for future phases was given away by the County when it adopted *Resolution 11-6*. Buckskin notes that this was a resolution and not an ordinance. Appropriately so. The CIP was not adopted by ordinance, it was not mandated by ordinance, and no ordinance is required to abandon it. The resolution may not have the force and effect of a law, and the County, presumably, could change it prospectively as to others. Nonetheless, the resolution constitutes an unequivocal and binding waiver as to Buckskin. The County would have no problem with the Court saying so in its opinion. Were the County to act inconsistently with the assurances provided in the resolution, Buckskin could challenge such action under LLUPA by appealing the final plat for future phases.

Buckskin insists that the threat of impact fees is still upon it because of the language it quotes from the County's zoning ordinance, LUDO. This misrepresents the plain meaning of that ordinance. See discussion in section II.C beginning on page 17. Despite having the words "impact fee" appear in the ordinance, LUDO's reference to Idaho Code § 31-870 makes it clear that there is nothing even arguably improper in the ordinance.

C. If the declaratory judgment claim is not time-barred or moot, it is not yet ripe.

Buckskin complains that *Resolution 11-6* reserves the County's right to take into account

its authority and obligation to consider the availability of adequate public services in considering new applications for land developments. Rightly so, but in Buckskin's case the CUP has already been issued and the roads have now been built. Consequently, it difficult to see how anything further could be required of Buckskin.[26] Nevertheless, Buckskin complains that "it is highly questionable what, exactly, will be the subject of any such development agreement aside from the payment of road impact fees." *Appellants' Brief* at 26. If that is so, it only demonstrates that any claim based on future action by the County is not yet ripe. In the event that the County were to insist on new exactions beyond its power, Buckskin would have a new, ripe, and timely claim to make at that time. The law of ripeness makes clear that the Court should not entertain this claim until facts develop showing that harm will be suffered.[27]

VI. COUNTIES HAVE AUTHORITY TO ENTER INTO DEVELOPMENT AGREEMENTS OUTSIDE OF SECTION 67-6511A.

Buckskin raises an argument for the first time in its briefing on appeal that the County lacked the authority to enter into the *Development Agreements* with Buckskin because Idaho Code § 67-6511A provides the exclusive authority to enter into such agreements and it is limited to agreements associated with rezoning actions. The simple answer is that section 67-6511A is not the sole authority for local governments to enter into agreements respecting developments. Development agreements have been around for a long time and are critical to implementing land

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[26] In another recent instance involving similar facts and a different developer, the County approved a new phase with no development agreement at all in light of *Resolution 11-6*. This is too recent to be in the record, but undersigned counsel represents this as true, and opposing counsel—who represents the developer—also knows it to be true. We do not offer this observation as evidence, but merely illustrative of the fact that there is no telling what may unfold, and that Buckskin is in no position today to claim harm is inevitable. Buckskin's statement that "Resolution 11-6 essentially states that payment of such fees will be required for approval of any application due to alleged impacts of the development," *Appellants' Brief* at 26, is simply not true, as the resolution shows.

[27] Buckskin, by the way, makes a fair point in observing that if the County were to enact an IDIFA-complaint ordinance, it may not apply that ordinance retroactively to previously filed applications for development. The County has been so advised by its counsel, and there is no need for the Court to assume at this point that the County will attempt to apply any future ordinance unlawfully. If and when that were ever to occur, affected parties would have an opportunity to challenge it.

use policy. For example, the development agreement in *Sprenger, Grubb & Associates v. Hailey ("Sprenger Grubb I"),* 127 Idaho 576, 578-79, 903 P.2d 741, 743-44 (1995) had been in place since 1973. The practical reality is that development agreements are used by local governments and developers extensively throughout the State in virtually all contexts of land use entitlements. Buckskin's suggestion that the Legislature's recognition of development agreements in the context of rezones thereby prohibits development agreements in any other context would turn the world of land use planning upside down.

In any event, this issue is raised too late. Buckskin never raised the issue with the County. It does not appear in the *Complaint* or the *Notice of Appeal.* It was not briefed below. And it should not be considered by the Court. "[I]ssues not raised below but raised for the first time on appeal will not be considered or reviewed." *Whitted v. Canyon County Bd. of Comm'rs*, 137 Idaho 118, 122, 44 P.3d 1173, 1177 (2002).

VII. BUCKSKIN'S CLAIMS ARE NOT CONTRACT CLAIMS AND ARE NOT SUBJECT TO THE FIVE-YEAR STATUTE OF LIMITATIONS.

Buckskin tries to avoid application of the four-year limitations period by arguing that Count 1 of its *Complaint* sounds in contract and is therefore subject to the five-year statute of limitations in Idaho Code § 5-216. The allegations in the *Complaint* belie this assertion.

Nothing in Count 1 (or any other count) sounds in contract. Count 1 is entitled "Declaratory Relief – Violation of State Law and State and Federal Constitutions." Paragraph 18 complains about the County's "practice" of imposing fees on developers. Paragraph 19 complains that the County has not complied with IDIFA and that money collected "amounts to an unauthorized tax." Paragraph 20 also complains that monies collected "constitute an unauthorized tax." Paragraph 21 complains that because of these violations, the County cannot force "developers to pay monies under the guise of a Road Development Agreement and/or

Capital Contribution Agreement." In other words, Buckskin's contention is the County's actions are illegal in spite of the contracts, not because of the contracts. Moreover, none of the prayers for relief involve either damages for breach or any request for invalidation of the agreements.

In sum, ignoring the words of its own *Complaint*, Buckskin now contends that Count 1 seeks declaratory relief that the development agreements are illegal and void.[28] This is simply not so. Buckskin's contract theory is plainly an afterthought—an effort to re-cast the *Complaint* in a way that was never intended solely to gain extra time under the statute of limitations.

The District Court properly rejected such semantic gamesmanship and looked to the nature of this case—which is plainly a takings case. It was on firm ground. "In determining the nature of the actions for limitations purposes, it is the substance or gravamen of the action, rather than the form of the pleading, that controls. In other words, in determining which statute of limitations governs an action, the court looks to the reality and essence of the action, and not to its name." 51 Am. Jur 2d *Application of Statutes of Limitation* § 91 (2000).[29] Thus, the District Court was correct in declining to apply the five-year statute because "this is simply not an action based on a contract. It is an action based on inverse condemnation." *Memorandum Decision (1) Plaintiffs' Motion for Partial Summary Judgment (2) Defendant's Motion for Entry of Judgment, (3) Plaintiffs' Motion for Reconsideration/Amendment (4) Plaintiffs' Motion To Disallow Costs and Attorney Fees* at 5 (R. Vol. III, p. 581).

Buckskin concedes that it has not pled breach of contract, but insists the statute is not

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[28] Buckskin similarly mischaracterized its Count 1 in its *Memorandum in Support of Plaintiffs' Motion for Reconsideration/Amendment* at 6 (R. Vol. III, p. 520). This error was pointed out to Buckskin, yet Buckskin persists in it before this Court.

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

limited to breach of contract. Yet it points the Court to not a single case supporting this conclusion. What case law is out there does not support its position. The Idaho Court of Appeals provided this helpful summary in 2008:

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

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

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

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

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

Buckskin seems to believe that if a case's facts involve a contract, the lawsuit must be a suit "upon a contract." Not so. For example, the case of *Mason v. Tucker and Assoc.*, 125 Idaho 429, 871 P.2d 846 (Ct. App. 1994), involved a single transaction (a court reporter's failure to prepare an accurate transcript) and various claims based on that event: § 1983, fraud, negligence, tortuous interference, and breach of contract. The Court carefully applied a different

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clearly premised upon legal malpractice." *Buxton*, 146 Idaho at 663, 201 P.3d at 636. The Idaho Supreme Court upheld that portion of the District Court's decision.

statute of limitations to each claim, applying the contract statute of limitations only to the claim for breach of contract. The fact that a contract governed the entire action of the court reporter did not turn the rest of the case into a case "upon a contract."

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

Even if the Court were to find the five-year statute applicable, this does not buy enough time to save Buckskin's lawsuit. The cutoff date for the five-year statute is December 1, 2004. As detailed in Appendix A, numerous triggering events occurred prior to that date.

VIII. THE COUNTY'S ORDINANCE WAS AUTHORIZED BY SECTION 67-6412 AND IS THEREFORE NOT AN ILLEGAL TAX.

As the County noted in its trial brief, "Plaintiffs' lawsuit also fails on the merits." *Valley County's Brief in Support of Motion for Summary Judgment* at 1 (R. Vol. I, p. 42). As noted above, however, the question of whether the subject road payments constitute an illegal tax has never been presented. If reached, however, Buckskin's claim fails on the merits.

Buckskin's lawsuit is based on the well-settled principle that Idaho is a Dillon's Rule state. *Caesar v. State*, 101 Idaho 158, 160, 610 P.2d 517, 519 (1980). Accordingly, the power to tax (found in Idaho Const. art. VII, § 6) is separate from the police power, is not self-executing, and must be expressly conferred by the Legislature. *Idaho Building Contractors Ass'n v. City of Coeur d'Alene ("IBCA")*, 126 Idaho 740, 890 P.2d 326 (1995); *Brewster v. City of Pocatello*, 115 Idaho 502, 768 P.2d 765 (1988). If there is no express authorization, then the courts must

determine whether the regulatory exaction is a legitimate fee or an illegal tax. If there is an express authorization, then it is constitutionally permissible no matter what it is called.[30]

One instance in which the Legislature has granted the power to tax is IDIFA. IDIFA authorizes local governments, if they so elect, to enact ordinances for the imposition of development impact fees on new developments. IDIFA contains no mandate to do so, however. The statute is complex and technical, and relatively few Idaho governments have undertaken the expense of enacting an IDIFA-compliant ordinance.

The absence of an IDIFA-compliant ordinance is determinative of nothing, because not all obligations imposed on developers outside of IDIFA are illegal taxes. Notably, LLUPA expressly authorizes local governments to impose conditions on developers seeking a CUP.[31] One type of expressly authorized condition is one "[r]equiring the provision for on-site or off-site public facilities or services." Idaho Code § 67-6512(d)(6).[32] That, of course, is exactly what Valley County did in the condition it imposed on Buckskin and other developers.

In other words, Idaho Code § 67-6512(d)(6) is the express authorization that turns what might otherwise be an illegal tax into a permissible conditional requirement, thus meeting the constitutional standard articulated in *IBCA* and *Brewster*. In essence, Idaho Code

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[30] Buckskin's repeated references to IDIFA suggest that it may misperceive this as a statutory rather than constitutional issue. But it is not IDIFA that causes some impact fees to be illegal taxes. If they are illegal, they would be illegal even if IDIFA did not exist. The thing that makes them illegal, if they are illegal, is the non-self-executing nature of the grant of taxation authority in Idaho's Constitution. To put it differently, IDIFA does not occupy the field for establishing legal taxes. There are numerous examples of legal taxes that are not imposed pursuant to IDIFA, *e.g.*, ad valorem taxes.

[31] The terms "conditional use permit" and "special use permit" are synonymous under LLUPA. Idaho Code § 67-6512(a).

[32] Another type of condition expressly authorized by the Legislature is this: "Requiring mitigation of effects of the proposed development upon service delivery by any political subdivision, including school districts, providing services within the planned jurisdiction." Idaho Code § 67-6512(d)(8). In addition, governments may impose fees for services. Idaho Code §§ 31-870 and 63-1311. All of these things may be done without enacting an ordinance pursuant to IDIFA.

§ 67-6512(d)(6) is a mini-IDIFA of very limited scope.[33]

This makes sense. Local governments have a responsibility to ensure that development does not proceed in the absence of adequate public facilities and services. Indeed, this is fundamental to the land use planning process. As noted above, governments have the discretion to deny or delay development approvals where there is inadequate infrastructure to support them. Idaho Code §§ 67-6512(a), 67-6512(d)(2). Rather than bar all new development until funds for infrastructure become available from general revenues, grants, or otherwise, section 67-6512 provides another option. It allows the local government to condition the development in a way that allows that infrastructure to be provided by the developer.

This is nothing new. Section 67-6512 predates IDIFA (which was enacted in 1992) and dates back to the enactment of LLUPA in 1975. Nothing in IDIFA overrides this authority. One might ask, however, if this authority predates IDIFA, why did the Legislature enact IDIFA? The answer is simple. Section 67-6512 is very narrow. It is available only to developers who approach the city or county seeking a CUP. IDIFA is far broader, authorizing local governments to impose impact fees on anyone who subdivides property, pulls a building permit, or does anything else requiring approval.

When the Legislature enacted IDIFA, it was cognizant of LLUPA and took steps, where it deemed appropriate, to ensure that governments did not use their LLUPA powers to sidestep IDIFA. It amended LLUPA's provision dealing with subdivision to say: "Fees established for purposes of mitigating the financial impact of development must comply with the provisions of chapter 82, title 67, Idaho Code [IDIFA]." Idaho Code § 67-6513. In contrast, it did not amend

[33] Because section 67-6512 is limited to "public facilities and services," it would not save the affordable housing ordinances overturned by districts courts in *Mountain Central Bd. of Realtors, Inc. v. City of McCall*, Case No. CV 2006-490-C (Idaho, Fourth Judicial Dist., Feb. 19, 2008) (reproduced in Appendix B) and *Schaefer v. City of Sun Valley*, Case No. CV-06-882 (Idaho, Fifth Judicial Dist., July 3, 2007) (reproduced in Appendix C).

or restrict the corresponding power to impose conditions on CUPs found in section 67-6512(d).

In short, the County's CIP and the conditions it imposed on Buckskin and others are expressly authorized by the Legislature in section 67-6512(d) and therefore are not illegal taxes.

IX. EQUITABLE PRINCIPLES DICTATE DISMISSAL OF BUCKSKIN'S LAWSUIT.

Buckskin benefited substantially from its arrangement with the County. As a result of the CIP and the *Development Agreements*, Buckskin did not have to wait for the County to find the money elsewhere to build roads. Those roads are now in place, and The Meadows continues to benefit from an improved regional road network. Despite those benefits, Buckskin says it should get its money back.

Equitable principles, however, prevent Buckskin from having its cake and eating it, too. Buckskin should not prevail in its attempt to profit from what amounts to reneging on an explicit agreement regarding a fair and reasonable way to finance the road improvements that enabled The Meadows to be built. But for the *Development Agreements*, Buckskin and other developers would most likely be sitting on undevelopable land served by dirt or gravel roads. To allow them to enter agreements, receive their permits, make payments without objection or appeal, watch the roads be built, sell lots, and then sue years later is inequitable.

First, equity abhors the unjust enrichment of one party at the expense of another, and it is a general principle of law that one should be required to make restitution of benefits received, retained, or appropriated from another. 66 Am. Jur. 2d *Restitution and Implied Contracts* § 8 (2001). Allowing Buckskin to recover the payment it made to the County would result in the unjust enrichment of Buckskin at the expense of the County. *See Barry v. Pacific West Construction, Inc.*, 140 Idaho 827, 103 P.3d 440 (2004) (general contractor was unjustly enriched by uncompensated work of subcontractor).

Second, someone who performs substantial services for another without an express agreement for compensation ordinarily becomes entitled to the reasonable value of those services. 66 Am. Jur. 2d *Restitution and Implied Contracts* § 37 (2001). Even if there had been no agreement between the parties, the fact remains that the County performed the substantial service of designing, financing, and building the road network to serve The Meadows. Under this theory of *quantum meruit*, the County is entitled to the reasonable value of the work and material provided to Buckskin. The contributions under the *Development Agreements* represent Buckskin's share of the reasonable value of this work, and should not be refunded.

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

Fourth, the equitable principle of laches provides that a plaintiff is estopped from asserting the alleged invasion of his rights when: (i) the plaintiff delayed in asserting these rights;

(ii) the plaintiff had notice and an opportunity to institute a suit; (iii) the defendant did not know that the plaintiff would assert such rights; and (iv) the delayed suit would injure or prejudice the defendant. *Finucane v. Village of Hayden*, 86 Idaho 199, 205, 384 P.2d 236, 240 (1963). All those tests are met here. Allowing Buckskin to recover the road construction costs will result in a windfall to Buckskin and an unfair detriment to the County. The undisputed facts in the record show that Buckskin did not raise any objection to any action of the County. Buckskin claims that it did not object because it assumed the County's actions were lawful. That is, in effect, an admission that it did not question the County's actions, and, in any event, it is insufficient to overcome the equities favoring the County.

Finally, the equitable concept of "waiver" applies in an action for breach of contract and states that "a party who accepts the other's performance without objection is assumed to have received the performance contemplated by the agreement." 17A Am. Jur. 2d *Contracts* § 640 (2001). "A waiver is a voluntary, intentional relinquishment of a known right or advantage [and the] party asserting the waiver must show that he has acted in reliance upon such a waiver and reasonably altered his position to his detriment." *Dennett v. Kuenzli*, 130 Idaho 21, 26, 936 P.2d 219, 224 (Ct. App. 1997). Here, Buckskin has breached its contract with the County by bringing this lawsuit. The principles behind the concept of waiver instruct that Buckskin cannot now complain that the terms of the *Development Agreements* were unacceptable. Until this suit was filed, Buckskin did not characterize the *Development Agreements* as establishing an illegal impact fee. Had Buckskin done so, the County could have taken Buckskin's arguments into account and responded accordingly before committing resources. Waiver principles should prevent Buckskin from backing out of its *Development Agreements*.

Finally, the County's adoption of *Resolution 11-6* demonstrates clearly its bona fides. Given all of the County's defenses and the legitimacy of the actions under Idaho Code § 67-6512, it could have pressed Buckskin and other developers to continue making payments under existing contracts. Instead, it took the high road and said it will not do so.

X. THE COUNTY IS ENTITLED TO ATTORNEY FEES; BUCKSKIN IS NOT.

A. The standards under Idaho Code § 12-117 and 12-121 are functionally identical.

The County seeks attorney fees under both Idaho Code § 12-117 and Idaho Code § 12-121.[34] Under Idaho Code § 12-117, prevailing parties in civil actions involving a state agency or local government and a private entity as adverse parties may recover their costs and attorney fees where they can show that the non-prevailing party acted "without a reasonable basis in fact or law." Idaho Code § 12-121 reads like a pure prevailing party statute but is modified by Idaho R. Civ. P. 54(e)(1), which states: "Provided, attorney fees under section 12-121, Idaho Code, may be awarded by the court only when it finds, from the facts presented to it, that the case was brought, pursued or defended frivolously, unreasonably or without foundation." This Court has essentially equated the two standards.[35] Accordingly, the discussion of fee awards under Idaho Code § 12-117 will include some case law arising under section 12-121.

B. The County is entitled to fees under Idaho Code 12-117.

This case satisfies the threshold requirements in Idaho Code § 12-117: the case is a civil action involving a governmental entity and private entities as adverse parties. If the County

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[34] There is a line of authority holding that, if section 12-117 is available, it is exclusive and section 12-121 is unavailable. *Potlatch Educ. Ass'n v. Potlatch School Dist. No. 285*, 148 Idaho 630, 635, 226 P.3d 1277, 1282 (2010). On other occasions, the Court has applied both sections 12-117 and 12-121. *E.g.*, *Total Success I* and *Total Success II*. Therefore, we have included the claim under section 12-121 out of an abundance of caution.

[35] *Total Success Investments, LLC v. Ada County Highway Dist. ("Total Success II")*, 148 Idaho 688, 695, 227 P.3d 942, 949 (Ct. App. 2010); *Ada County Highway Dist. v. Total Success Investments, LLC ("Total Success*

prevails, all that remains to establish is that Buckskin pursued the matter without a reasonable basis in fact or law.

Where parties ignore settled precedent, as Buckskin did here, they are subject to a mandatory award of fees under section 12-117. Unlike other attorney fee provisions, section 12-117 does not entail an exercise of discretion. *Fischer v. City of Ketchum*, 141 Idaho 349, 356, 109 P.3d 1091, 1098 (2005). This Court has ruled that failure to address controlling appellate decisions and failure to address factual or legal findings of the district court equates to pursuing litigation without a reasonable basis in fact or law. *Waller v. State of Idaho, Dep't of Health and Welfare*, 146 Idaho 234, 240, 192 P.3d 1058, 1064 (2008). Other examples of parties paying the price for ignoring settled precedent are found in *Excell Construction, Inc. v. Idaho Dep't of Commerce and Labor*, 145 Idaho 783, 793, 186 P.3d 639, 649 (2008) (attorney fees awarded against agency that failed to apply a case whose relevant facts were "virtually indistinguishable"), and *Gallagher v. State*, 141 Idaho 665, 669, 115 P.3d 756, 760 (2005) (attorney fees may be awarded when "the law is well-settled").[36] In *Allied Bail Bonds, Inc. v. County of Kootenai*, 151 Idaho 405, 415, 258 P.3d 340, 350 (2011), the Court awarded attorney fees against the plaintiff noting: "Allied misrepresented controlling precedent in its briefing, and also presented multiple arguments in its briefing that it abandoned at oral argument. Further, Allied unreasonably pursued this appeal even though it failed to comply with the notice requirement of the ITCA and the bond requirement of I.C. § 6-610." Although the case at bar does not involve the Idaho Tort Claims Act, Buckskin pursued this action and this appeal in

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I"), 145 Idaho 360, 372, 179 P.3d 323, 335 (2008); *Jenkins v. Barsalou*, 145 Idaho 202, 207, 177 P.3d 949, 954 (2008); *Nation v. State, Dep't of Correction*, 144 Idaho 177, 194, 158 P.3d 953, 970 (2007).

[36] The same holds true under Idaho Code § 12-121. "Attorney fees are awardable if an appeal does no more than simply invite an appellate court to second-guess the trial court on conflicting evidence, or if the law is well settled and appellant has made no substantial showing that the district court misapplied the law." *Johnson v. Edward*, 113 Idaho 660, 662, 747 P.2d 69, 71 (1987).

defiance of settled authority on the statute of limitations, *KMST*, exhaustion, and a host of federal defenses (which Buckskin challenged vigorously below but did not appeal).

This Court has often described the purpose of this statute as follows: "First, it serves 'as a deterrent to groundless or arbitrary agency action; and [second, it provides] a remedy for persons who have borne unfair and unjustified financial burdens defending against groundless charges or attempting to correct mistakes agencies never should have made.'" *Reardon v. Magic Valley Sand and Gravel, Inc.*, 140 Idaho 115, 118, 90 P.3d 340, 343 (2004) (brackets original). In *State of Idaho v. Estate of Joe Kaminsky*, 141 Idaho 436, 439-40, 111 P.3d 121, 124-25 (2005), the Court quoted the dual purposes of the statute recited above and declared that both were violated. "The action was groundless because the Department clearly waited too long to present its claim. . . . It is appropriate to discourage such action. Further, the Department's action placed an unjustified financial burden on the Estate." *Id.* The same can be said here.

Ironically, the very case that hung Buckskin on the statute of limitations, *McCuskey II*, also compels an attorney fee award. The *McCuskey II* Court dismissed the inverse condemnation claim as time barred on the basis of prior precedent, concluding therefore that fees should be awarded.[37] The precedent is now all the more settled and the basis for a fee award against Buckskin is even more compelling.

C. The County may also be eligible for an award under Idaho Code § 12-121.

For all the reasons cited above, the Court should award attorney fees under section 12-121 as well. The County acknowledges that, as a practical matter, the section 12-121 claim

[37] The fee award in *McCuskey II* was made under Idaho Code § 12-121, not § 12-117, which, at the time, was a one-way street and did not allow counties to obtain fee awards against private parties. As noted in section X.A at page 46, however, the standards under the two statutes are essentially identical.

does not appear to add anything to the analysis or to the relief.[38] The County includes this seemingly redundant claim for purposes of completeness in the event that, for some reason, section 12-117 were found to be unavailable.

D. Buckskin is not entitled to attorney fees.

Even if this Court were to overturn the District Court, Buckskin would not be entitled to fees because the County has defended this suit fairly and reasonably.

CONCLUSION

For all these reasons, the Court should affirm the District Court's dismissal of this suit.

Respectfully submitted this 29th day of December, 2011.

GIVENS PURSLEY LLP

By _____
Christopher H. Meyer

By _____
Martin C. Hendrickson

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 29th day of December, 2011, the foregoing was served as follows:

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_____
Christopher H. Meyer

[38] The only difference between the statutes of which the County is aware is that section 12-121 entails an exercise of discretion. Consequently, on appeal, the reviewing court reviews section 12-121 claims under an abuse of discretion standard. In contrast, appellate courts freely review section 12-117 claims. *Total Success II*, 148 Idaho at 695, 227 P.3d at 949.

Appendix A TIMETABLE OF KEY EVENTS

Date	Document or Event	Comments	Comments on Date	Appeal Record
4/1/2004	Buckskin's Application for CUP (all phases)	This application included as Appendix C a Proposed Development Agreement and a Proposed Capital Contribution Agreement. The paragraph on "Road Improvements" in the Capital Contribution agreement says "Developer agrees to pay a road impact fee as established by Valley County. Currently this fee has been set by the Valley County Engineer at $1,870.00 per equivalent single-family residential unit. ..." Appendix D to the Application is an "Impact Report." It states: "The original estimated cost to complete this roadway improvements was $6,000,000.00. The development is proposing in the Development Agreement to a road impact fee as established by Valley County. Currently this fee has been set by the County Engineer at $1,870.00 per equivalent single-family residential unit. Road impact fees may be offset by developer contribution of right-of-way or in-kind construction."	The application is dated "March 2004" on the footer. The cover letter is dated 3-24-2004. The acceptance by Jack Charters is dated 3-29-2004. It is also signed at the end by Jack Charters on 3-29-2004. According to the County's planning staff, it was actually filed on 4-1-2004.	Herrick Aff., Exh. 3 (The Affidavit of Cynda Herrick in Support of Motion for Summary Judgment is an exhibit to the Clerk's Record on Appeal.)
5/17/2004	P&Z hearing on CUP (all phases)	P&Z voted to recommend approval of CUP. Joe Pachner speaking for applicant: "The traffic report completed by the Tamarack Resort has been incorporated into the design of this project. The impact of this project using this roadway is incorporated and they will pay their proportional impact fees." Pat Dobie, County Engineer: "[A] fee of approximately $1,800 per residential unit will be required to construct the roads."		Herrick Aff., Exh. 6
5/21/2004	Buckskin's revised Application for CUP (all phases)	This revision contained the same proposed agreements as were included in the initial application on April 1, 2004.		Herrick Aff., Exh. 4
6/10/2004	P&Z Findings and Conclusions (all phases)	Recommended Condition #12: "The Development Agreement and Capital Contribution Agreement must receive approval from the Board of County Commissioners."	The date is unclear on the copy in the record. We have confirmed that the correct date is 6-10-04.	Herrick Aff., Exh. 7

Date	Document or Event	Comments	Comments on Date	Appeal Record
7/12/2004	County Commissioners' hearing on CUP (all phases)	Voted to approve the CUP. The minutes contain a discussion of Capital Contribution Agreement and acceptance of the conveyance of right-of-way in lieu of cash.		Herrick Aff., Exh. 10
7/14/2004	CUP issued by P&Z (all phases)	Although approved by the Board of County Commissioners on 7-12-2004, it is the P&Z which issued the CUP document. Condition #12 reads: "The Development Agreement and Capital Contribution Agreement must receive approval from the Board of County Commissioners." The District Court noted this in his decision, concluding that "the Plaintiffs certainly knew the essential facts" by this date. R. Vol. III, p. 490.	The CUP is dated 7-14-2004. It was recorded on the same day as Instrument #285115. The text of the CUP states that the effective date is 7/13/2004.	Herrick Aff., Exh. 11
7/14/2004	Capital Contribution Agreement - Phase 1	Applies to Phase 1. Fee set at $79,292 (based on $1,844 per single family lot). Paid via a conveyance of right of way with a credit for overpayment. One of the recitals states: "Developer has agreed to participate in the cost of mitigating these impacts by contributing its proportionate fair share of the cost of the needed improvements identified in the Agreement and listed on the attached Exhibit A."	Executed by Buckskin on 7-14-2004. Executed by County on 7-26-2004. Recorded as Instrument 285976 on 8-4-2004. The text of the agreement gives the date as 7-12-2004.	Herrick Aff., Exh. 1
9/9/2004	P&Z hearing on application for final plat - Phase 1	Approved final plat for Phase 1. Minutes state at page 3: "They also discussed the maintenance of private roads, the dedication of public right of way, and that $1,844 per lot will be paid toward road maintenance."		Herrick, Aff., Exh. 14
10/25/2004	County Commission hearing on application for final plat - Phase 1	Approved final plat for Phase 1. Minutes state at page 2: "[A]ccept the dedication of public right-of-way along Norwood Road and West Roseberry Road; ... agree that the Development Agreement that is in place covers off-site road improvement costs for this phase." This is the date on which the District Court said the statute of limitations ran '[a]t the very latest." R. Vol. III, p. 490.		Herrick Aff., Exh. 15
12/1/2004	Cutoff date for 5-year statute of limitations	If the 5-year statute applies and the cause of action accrued prior to this date, the lawsuit is untimely.		

Date	Document or Event	Comments	Comments on Date	Appeal Record
9/8/2005	P&Z hearing on application for final plat - Phases 2 & 3	Approved final plat for Phases 2 & 3. Minutes state at page 8: "[A] letter from Parametrics, Valley County Engineer, dated September 8, 2005, stating that Valley County will require a Road Development Agreement ...."		Herrick Aff., Exh. 17
9/26/2005	County Commission hearing on application for final plat - Phases 2 & 3	Approved final plat for Phases 2 & 3. Minutes explain at page 5 that this was originall presented as phase 2, but is now for phases 2 & 3.		Herrick Aff., Exh.18
9/26/2005	Road Development Agreement - Phases 2 & 3	One of the recitals states: "Developer has agreed to participate in the cost of mitigating these impacts by contributing its proportionate fair share of the cost of the needed improvements identified in the Agreement and listed on the attached Exhibit A." Fee set at $247,096, less credit from Phase 1, requiring cash payment of $232,160. Based on $1,844 per single family lot and $1,383 per apartment unit. (The agreement references Phase 2, but this was renamed Phases 2 & 3. See Minutes of 9-26-2005.)	Executed by all parties on 9-26-2005. Text recites 9-26-2005 as date of agreement. Recorded as Instrument #300816 on 9-27-2005.	Herrick Aff., Exh. 2
12/1/2005	Cutoff date for 4-year statute of limitations	If the 4-year statute applies and the cause of action accrued prior to this date, the lawsuit is untimely.		
12/15/2005	Check for $232,160 payable to Valley County	Payment made for Phases 2 & 3 per Road Development Agreement.		Herrick Aff., ¶ 23
12/1/2007	Cutoff date for 2-year statute of limitations	If the cause of action accrued prior to this date, the federal claim is untimely.		
12/1/2009	Complaint filed			R. Vol. I, p. 1
11/7/2011	Resolution 11-6	The resolution states in section 2: "In order to avoid litigation costs and uncertainty, the Board of County Commissioners will no longer enter into Road Development Agreements calling for the payment of fees or other contributions for off-site road improvements until such time as the County adopts an IDIFA-compliant ordinance, unless the permit holder voluntarily and expressly waives any objection thereto."		R. Vol. III, pp. 552-53

ARCHIE N. BANBURY, CLERK
BY _____ DEPUTY
FEB 19 2008

Case No. _____ Inst. No. _____
Filed _____ A.M. 3:03 P.M.

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

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

MOUNTAIN CENTRAL BOARD OF REALTORS, INC., an Idaho Non-Profit Corporation,

Plaintiff,

vs.

CITY OF MCCALL, a municipal corporation of the State of Idaho,

Defendant.

Case No. CV 2006-490-C

MEMORANDUM DECISION AND ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

APPEARANCES:

David Gratton and Victor Villegas, for the Plaintiff
William A. Morrow, Christopher D. Gabbert, and Jill S. Holinka, for the Defendant

This matter came before the Court for oral argument on July 13, 2007, regarding Plaintiff's Motion for Summary Judgment. On July 14, 2007, Plaintiff filed a Notice of Supplemental Authority.

FACTUAL AND PROCEDURAL BACKGROUND

The facts and procedural history of this case were set forth in more detail in the Court's previously filed Memorandum Decision and Order Denying the Defendant City of McCall's Motion for Summary Judgment on the issue of standing. Essentially, Plaintiff is challenging the constitutionality of two ordinances passed in February of 2006 by the City of McCall: Ordinance No. 819 which is an inclusionary zoning ordinance, and Ordinance No. 820 which is the residential linkage or community

housing fee ordinance.[1] Such ordinances were enacted to ensure and provide for affordable housing in the City of McCall.

Under Ordinance No. 819, all applications for new subdivisions are required to submit an inclusionary housing plan providing that twenty percent (20%) of lots and houses be permanently deed-restricted as affordable community housing as a precondition to plat approval. Specifically, Ordinance No. 819 is designed to provide for "community housing to be affordable to City of McCall households with incomes in categories III and IV as defined in subsection 2, Community Housing by Income." City of McCall Ordinance No. 819, § 9.7.10(A). These categories define moderate to middle income. Category III includes households with incomes greater than one hundred percent (100%) but not more than one hundred twenty percent (120%) of the Valley County median household income. Category IV includes households with incomes greater than one hundred twenty percent (120%) but not more than one hundred sixty percent (160%) of the Valley County median household income.

There are four ways by which an applicant for subdivision approval may meet the requirements of Ordinance No. 819: (1) the first priority is to permanently deed restrict twenty percent (20%) of the land within the subdivision for affordable housing, called "on-site" housing; (2) the second priority is to construct such housing "off-site" from the proposed subdivision;[2] (3) the third priority is to convey land; and (4) the fourth priority is to pay a fee in lieu of the previous three options.

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[1] Although Ordinance No. 819 is referred to as the inclusionary zoning ordinance and Ordinance No. 820 is the linkage ordinance, the Court generally refers in this decision to both ordinances as inclusionary zoning ordinances.

[2] If community housing is constructed off-site, the required percentage of land allocated to affordable housing increases from twenty percent (20%) of the subdivision land to one hundred twenty-five percent (125%) if the housing is built within the city of McCall; or to one hundred fifty percent (150%) if the housing is built within the city limits of another municipality located in Valley or Adams Counties; or to two hundred percent (200%) if the housing is built within unincorporated Valley or Adams Counties.

Under Ordinance No. 820, all applicants for a building permit are required to pay a community housing fee for each residential dwelling unit that is proportional to the demand for community housing created by the dwelling unit. Ordinance No. 820 is designed to benefit employees of low or moderate income in categories I and II who are needed to maintain and service the residential dwelling unit.[3] Low income is defined in Category I as households with incomes greater than fifty percent (50%) but not more than eighty percent (80%) of the Valley County median household income. Income Category II includes households with incomes greater than eighty percent (80%) but not more than one hundred percent (100%) of the Valley County median household income. Certain residential development is exempted under Ordinance No. 820 such as redevelopment, remodeling or relocation of any legally pre-existing residential unit, expansion up to 500 square feet, mobile homes, skilled nursing facilities, retirement or assisted living homes, foster homes, and community housing units. City of McCall Ordinance No. 820, § 3.8.21(C).

Plaintiff filed a Verified Complaint on September 22, 2006, seeking declaratory relief that the City of McCall's Ordinance Numbers 819 and 820 violate both State and Federal laws and constitutions, and seeking a permanent injunction enjoining the City from enforcing such ordinances against its members. Defendant filed an Answer on October 18, 2006, asserting a number of affirmative defenses including no justiciable case or controversy, ripeness, standing, failure to join an indispensable party,

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[3] Ordinance No. 820 defines the community housing fee as follows:

> The community housing fee shall be commensurate with the current community housing subsidy amount required to develop and construct community housing for fifty (50) percent of the employees needed to maintain and service the dwelling unit and who have incomes in Income Categories I and II. The number of employees needed to maintain and service the residential unit varies based on the size of the unit.

City of McCall Ordinance No. 820, § 3.8.21(D)(1)(a).

and no irreparable injury.

Plaintiff filed a Motion for Summary Judgment along with a Motion to File Brief Exceeding Twenty-Five (25) Pages on November 20, 2006. This Court entered an Order Granting Plaintiff's Motion to File Brief Exceeding Twenty-Five (25) Pages on November 29, 2006. On December 6, 2006, the parties filed a Stipulated Litigation Schedule. Defendant filed a Stipulation to Exceed Page Limit on February 7, 2007, allowing Defendant to file a Response Brief in excess of the twenty-five page limit.

On May 22, 2007, this Court issued a Memorandum Decision and Order Denying the Defendant City of McCall's Motion for Summary Judgment, holding that the Plaintiff did have "associational" standing to pursue its claim. On May 31, 2007, the parties filed a Stipulation to Amend Litigation Schedule. Also on that date, Plaintiff filed an Amended Notice of Hearing.

STANDARD OF REVIEW

Idaho Rule of Civil Procedure 56 provides that summary judgment is proper when the court is satisfied that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." I.R.C.P. 56(c). All disputed facts are to be resolved and all reasonable inferences drawn in favor of the non-moving party. *See Stafford v. Klosterman*, 134 Idaho 205, 206, 998 P.2d 1118, 1119 (2000); *Smith v. Meridian Joint Sch. Dist. No. 2*, 128 Idaho 714, 719, 918 P.2d 583, 588 (1996). If reasonable persons could reach different findings or draw conflicting inferences from the evidence, the motion must be denied. *Jordan v. Beeks*, 135 Idaho 586, 590, 21 P.3d 908, 912 (2001); *Smith*, 128 Idaho at 718, 918 P.2d at 587.

The district court as the trier of fact may draw reasonable inferences based upon the evidence before it and may grant summary judgment despite the possibility of conflicting inferences. *Karterman v. Jameson*, 132 Idaho 910, 913, 980 P.2d 574, 577 (Ct. App. 1999) (citing *Cameron v. Neal*, 130 Idaho 898, 900, 950 P.2d 1237, 1239 (1997)). *See also* Idaho Code Ann. § 10-1201 (2005). Where the matter

would be tried without a jury, the court is "free to arrive at the most probable inferences to be drawn from uncontroverted evidentiary facts." *Loomis v. City of Hailey*, 119 Idaho 434, 437, 807 P.2d 1272, 1275 (1991); *accord Steiner v. Ziegler-Tamura Ltd.*, 138 Idaho 238, 241, 61 P.3d 595, 598 (2002). If the evidentiary facts are not in dispute, the trial court may grant summary judgment despite the possibility of conflicting inferences, because the court alone will be in the position of resolving the conflicting inferences at trial. *Riverside Development Co. v. Ritchie*, 103 Idaho 515, 519, 650 P.2d 657, 661 (1982).

In order to challenge the constitutionality of a statute or ordinance, the plaintiff has the burden of showing the invalidity of such statute or regulation and must overcome the strong presumption of validity. *Olsen v. J.A. Freeman Co.*, 117 Idaho 706, 709, 791 P.2d 1285, 1288 (1990); *see also Wyckoff v. Board of County Commissioners*, 101 Idaho 12, 14, 607 P.2d 1066, 1068 (1980). "It is generally presumed that legislative acts are constitutional, that the state legislature has acted within its constitutional powers, and any doubt concerning interpretation of a statute is to be resolved in favor of that which will render the statute constitutional." *Olson*, 117 Idaho at 709, 791 P.2d at 1288. The party asserting a facial challenge to an ordinance must demonstrate that the "law is unconstitutional in *all* of its applications. . . . [And] that no set of circumstances exists under which the [law] would be valid." *American Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Resources*, 143 Idaho 862, ___, 154 P.3d 433, 441 (2007) (internal quotes omitted).

DISCUSSION

Inclusionary zoning ordinances appear to be a recent trend in the efforts of local communities, especially in seasonal economy-based communities, to address the needs of providing affordable housing for the local workforce. Inclusionary zoning or inclusionary housing ordinances generally require a residential developer to set aside a specific percentage of new housing units for low or moderate income

households. *Home Builders Ass'n of Northern California v. City of Napa*, 108 Cal.Rptr.2d 60, 62 n.1 (Cal. Ct. App. 2001) (citing Laura M. Padilla, *Reflections on Inclusionary Housing and a Renewed Look at its Viability*, 23 Hofstra L. Rev. 539, 540 (1995)).[4]

While a number of jurisdictions have case law discussing the constitutionality of inclusionary zoning ordinances, there is no case precedent which has been established in Idaho. Furthermore, there is no legislative authority in Idaho providing for inclusionary zoning provisions. Although not controlling, this Court is aware that a Decision on Summary Judgment was filed July 3, 2007, in Blaine County regarding an as-applied challenge to the City of Sun Valley's Workforce Housing Linkage Ordinance No. 364, in *Schaefer v. City of Sun Valley, Idaho*, Case No. CV-06-882.

In the case before this Court, there are no genuine issues of material fact. The dispositive issue is the purely legal question of whether Ordinance Nos. 819 and 820 are proper police power regulations of the City of McCall. This Court defers to the City of McCall's determination of a lack of affordable housing and to their laudable intention to address the issue; the question for this Court, however, is whether the methods of remedying this housing shortfall pass legal muster.

In Idaho, "a municipal corporation may exercise only those powers granted to it by either the state constitution or the legislature . . . ." *Caesar v. State*, 101 Idaho 158, 160, 610 P.2d 517, 519 (1980). Article 12, Section 2 of the Idaho State Constitution provides for any county, city, or town to make and enforce all such local police, sanitary, and other regulations which are not in conflict with its charter or with the general laws. Idaho Const. Art. 12 § 2. The Idaho Supreme Court has recognized that "[t]he

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[4] *Home Builders Association of Northern California* illustrates the trend toward inclusionary zoning ordinances, especially in California where there is extensive legislation providing for affordable housing incentives. See Cal. Gov't Code § 65580 et seq. This case relied upon by the City of McCall is of little assistance to courts in Idaho where there is not extensive legislative authority for inclusionary zoning ordinances.

power to restrict the uses of property is within the police power of the state, delegable to its municipal subdivisions, and is not per se repugnant to the Constitution of the United States." *White v. City of Twin Falls*, 81 Idaho 176, 182, 338 P.2d 778, 781-82 (1959). Therefore, the power to zone derives from the police power of the state, and local legislative entities are authorized to enact zoning ordinances restricting the use of property within the corporate limits of the legislative entity. *City of Lewiston v. Knieriem*, 107 Idaho 80, 83, 685 P.2d 821, 824 (1984); *see also Dawson Enterprises, Inc. v. Blaine County*, 98 Idaho 506, 511, 567 P.2d 1257, 1262 (1977).

The Local Land Use Planning Act (LLUPA), at Idaho Code Section 67-6501 *et seq.*, was enacted in 1975. The Idaho Supreme Court has found that under LLUPA, "the legislature intended to give local governing boards broad powers in the area of planning and zoning." *White v. Bannock County Commissioners*, 139 Idaho 396, 400, 80 P.3d 332, 336 (2003) (citing *Worley Hwy. Dist. v. Kootenai County*, 104 Idaho 833, 663 P.2d 1135 (Ct. App. 1983)). Such zoning power is not unlimited, but must bear a reasonable relation to the goals of the state pursuant to the state's police powers. *Sprenger, Grubb & Assocs, Inc. v. City of Hailey*, 127 Idaho 576, 583, 903 P.2d 741, 748 (1995) (citing *City of Lewiston v. Knieriem*, 107 Idaho 80, 83, 685 P.2d 821, 824 (1984)); *see also Dawson Enterprises, Inc.*, 98 Idaho at 511, 567 P.2d at 1262.

> The governmental power to interfere by zoning regulations with the general rights of the land owned by restricting the character of his use, is not unlimited, and other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare.

Dawson Enterprises, Inc., 98 Idaho at 511, 567 P.2d at 824 (citing *Cole-Collister Fire Protection Dist. v. City of Boise*, 93 Idaho 558, 468 P.2d 290 (1970) (quoting *Nectow v. City of Cambridge*, 277 U.S. 183, 188 (1927))).

The Idaho Supreme Court has recognized that LLUPA is the exclusive and mandatory source for a municipality's planning and zoning authority. *Sprenger, Grubb & Assocs, Inc. v. City of Hailey*, 133 Idaho 320, 321, 986 P.2d 343, 344 (1999). Under the LLUPA, a governing board, consisting of either a city council or a properly delegated planning and zoning commission, is given the powers authorized under the LLUPA. Idaho Code Ann. § 67-6504. Under section 67-6508, the planning and zoning commission is to conduct a comprehensive planning process designed to prepare a comprehensive plan which outlines the desirable goals and objectives for each planning component including in pertinent part:

> An analysis of provisions which may be necessary to insure that land use policies, restrictions, conditions and fees do not violate private property rights, adversely impact property values or create unnecessary technical limitations on the use of property and analysis as prescribed under the declarations of purpose in chapter 80, title 67, Idaho Code.[5]

Idaho Code Ann. § 67-6508(a).[6] Furthermore, the comprehensive plan should include a provision relating to housing containing:

> An analysis of housing conditions and needs; plans for improvement of housing standards; and plans for the provision of safe, sanitary, and adequate housing, including the provision for low-cost conventional housing, the siting of manufactured housing and mobile homes in subdivisions and parks and on individual lots which are sufficient to maintain a competitive market for each of those housing types and to address the needs of the community.

Idaho Code Ann. § 67-6508(j).[7] The LLUPA expressly identifies the need to maintain a balance between protecting property rights and providing for affordable housing by stating that one of its

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[4] Title 67, chapter 80 of the Idaho Code is known as the Idaho Regulatory Takings Act, which establishes a review process to evaluate regulatory takings.

[5] Subsection (a) on property rights was added in 1995. Local Land Use Planning-Property Rights-Planning and Zoning Commissions, ch. 181, sec.4, § 67-6508, 1995 Idaho Sess. Laws H.B. 212.

purposes is "[t]o protect property rights while making accommodations for other necessary types of development such as low-cost housing and mobile home parks." Idaho Code Ann. § 67-6502(a).

With respect to zoning ordinances, the LLUPA provides that the governing board shall "establish standards to regulate and restrict the height, number of stories, size, construction, reconstruction, alteration, repair or use of buildings and structures; percentage of lot occupancy, size of courts, yards, and open spaces; density of population; and the location and use of buildings and structures." Idaho Code Ann. § 67-6511. Furthermore, the governing board may "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." Idaho Code Ann. § 67-6511A.

The inclusionary zoning ordinances at issue in this case go well beyond the traditional zoning standards relating to height, size, construction, zoning areas, open space requirements, density, and location. The City of McCall argues it is regulating the use to which certain land or housing may be put by requiring developers to deed restrict a percentage of new development as affordable or community housing. There is no doubt that the City of McCall determined there exists a need for affordable housing in McCall. Although LLUPA specifically allows a city to include within its comprehensive plan regulations affecting property rights and housing conditions, LLUPA does not specifically address whether the City of McCall or any other city may enact inclusionary zoning ordinances. Given the relatively recent trend towards inclusionary zoning ordinances since LLUPA has been enacted in Idaho, it is not surprising that LLUPA does not specifically address inclusionary zoning ordinances. Thus,

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[7] Also in 1995, the Legislature inserted the language regarding low-cost housing. Local Land Use Planning-Property Rights-Planning and Zoning Commissions, ch. 181, sec. 4, § 67-6508, 1995 Idaho Sess. Laws H.B. 212.

whether the City of McCall may require affordable housing through a land use regulation is a matter of first impression which this Court must decide.

A. Restrictions on the City of McCall's Police Powers

The Idaho Supreme Court has recognized three general restrictions on a municipality's police powers: (1) the ordinance must be confined to the limits of the governmental body enacting the same; (2) such ordinance must not be in conflict with other general laws of the state; and (3) such ordinance must not be an unreasonable or arbitrary enactment. *Hobbs v. Abrams*, 104 Idaho 205, 207, 657 P.2d 1073, 1075 (1983) (citing *State v. Clark*, 88 Idaho 365, 374, 399 P.2d 955, 960 (1965)).

1. Regulation Within the City Limits of McCall

In *Hobbs*, the county passed an ordinance which prohibited the sale of beer in kegs in "Franklin County," and also prohibited the possession of beer in kegs within the "unincorporated areas of Franklin County." 104 Idaho at 207, 657 P.2d at 1075. The plaintiff in that case owned two businesses licensed to sell beer in Franklin, Idaho and Preston, Idaho. The Idaho Supreme Court held that the plaintiff did not have standing to challenge the ordinance since his businesses were within an incorporated city and the county did not have the authority to regulate activities within incorporated cities. *Id.* at 208, 657 P.2d at 1076. Similarly, in the underlying case, the City of McCall's Ordinance Nos. 819 and 820 only have power and effect within the limits of the City of McCall. Although the ordinances repeatedly state that such ordinances have been implemented in partnership with Valley County, Adams County, and the communities of Cascade, Donnelly, and New Meadows, Ordinance Nos. 819 and 820 can only regulate land use permits in the City of McCall.[8] Therefore, Ordinance Nos. 819 and 820 would not apply to a landowner who owns and wishes to subdivide land located outside the city limits of McCall.

[8] Pursuant to Ordinance No. 819, if a developer provides community housing off-site, the developer is required to provide 125 percent of the amount of land which would

2. Not in Conflict with Other General Laws of the State

Under the second prong of *Hobbs*, this Court must determine whether Ordinance Nos. 819 and 820 are in conflict with other general laws of the state. The stated purpose of these ordinances is to provide a "reasonable supply of affordable, deed restricted workforce housing (community housing)" to "ensure that critical professional workers, essential service personnel, and service workers live within proximity to their work to provide municipal and private sector services." In order to obtain a building permit to subdivide land and build houses or dwelling units, a landowner must designate at least twenty percent of the land or lots as deed-restricted community housing under Ordinance No. 819. Furthermore, in order to build residential dwelling units, a landowner is required to pay a community housing fee for a building permit under Ordinance No. 820.

Pursuant to Ordinance No. 819, upon applying for subdivision approval, a developer must submit an Inclusionary Housing Plan which designates that at least twenty percent of all the lots and houses in the subdivision have been permanently deed-restricted[9] as community housing and affordable to households in McCall with moderate or middle incomes in categories III and IV. Ordinance No. 819 specifically states that providing on-site community housing within the new subdivision is the first priority. However, if a landowner or developer is not able to designate community housing within the proposed subdivision, the second priority is for the developer to designate community housing outside

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have been required on-site, if the off-site housing is "within the city limits of the City of McCall." Alternatively, if the off-site housing is located "within the city limits of another municipality located in Valley or Adams County," the developer is required to provide 150 percent of the amount which would have been required on-site. To the extent that the City of McCall attempts to regulate housing outside its city limit, such provision is without effect and therefore null and void.

[9] Ordinance No. 819 also provides that as an alternative to permanent deed restriction, the developer may request that up to twenty-five percent of the lots and houses be subject to an "Equity-Builder" program.

the subdivision, or "off-site." The third priority is for a developer to convey land to the City of McCall for community housing. And the fourth priority is to pay a fee in lieu of community housing. Essentially, the McCall City Council decides pursuant to the priority list if on-site community housing is impractical.

Under the first two priorities, a landowner still retains ownership of such community housing units but is restricted regarding selling or renting community housing units.[10] The third and fourth priorities are reserved for situations in which it is not practical for the landowner to develop community housing either on or off site because the required community housing units results in less than one housing unit.[11] Under the third and fourth priorities, the landowner either conveys land calculated at fair market value, or pays a fee equal to the total subsidy amount for the required community housing units. Additionally, if the number of required community housing units result in a fraction under the first or second priority, the landowner must pay an in lieu fee equal to the subsidy amount for that fraction.

For any community housing units provided under the first or second priorities, the developer must enter into a Community Housing Agreement which sets forth, among a number of other requirements, the sales or rental terms and the restrictions to ensure the permanent affordability and compliance with the Community Housing Guidelines. The McCall Planning & Zoning Commission and the City Council have the power to review and approve the Inclusionary Housing Plan. If the City Council collects in lieu fees pursuant to the fourth priority, or fees for any fractional amount of community housing, such funds are to be deposited into the Community Housing Trust Account to be

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[10] Potential buyers or renters must meet the requirements established by the City of McCall to qualify for affordable housing.

[11] Because the developer is required to set aside twenty percent of the units as community housing, the minimum number of units a developer must develop under the first or second priorities would be five units, of which one unit must be community

spent for planning, subsidizing, or developing community housing units in McCall. A landowner may petition for a refund of the in lieu fees if such fees have not been expended by the City of McCall within five years, provided the City has not already earmarked the funds and extended the time period another five years.

Furthermore, the City of McCall may adjust or waive the requirements under Ordinance No. 819 if the developer demonstrates and the City Council finds there is "no reasonable relationship between the housing impact of the proposed residential subdivision and the requirements of this section." City of McCall Ordinance No. 819, § 9.7.10(A)(13)(a). The developer has the burden of providing economic information or data necessary to establish that there is no reasonable relationship.

Ordinance No. 820 requires that every landowner seeking a building permit for a residential dwelling unit, not exempted by the ordinance,[12] is required to pay a community housing fee. This fee represents the subsidy amount required to develop and construct community housing for fifty percent of the employees needed to maintain and service the dwelling unit and who have low to moderate incomes in categories I and II. Such fees are also deposited in the Community Housing Trust Account and similarly to Ordinance No. 819, a landowner may request a refund of such fees if they have not been

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housing. Subdivisions with less than five units presumably would be subject to either the third or fourth priorities.

[12] The following residential development units are exempted from the community housing fee:

1. The redevelopment, remodeling, or relocation of a legally pre-existing residential unit provided no new or additional residential unit is created.
2. The expansion up to five hundred square feet of gross floor area of a legally pre-existing residential dwelling unit.
3. Mobile homes.
4. Skilled nursing facilities.
5. Retirement or assisted living homes.
6. Foster and group homes.
7. Community housing units.

See City of McCall Ordinance No. 820. § 3.8.21(C).

spent within five years unless the City has earmarked such funds and extended the time an additional five years. An applicant may also apply for a reduction or waiver of the community housing fee if such person receives income within the Income Categories identified above or believes the residential unit does not relate to the purposes and standards of Ordinance No. 820.

Plaintiff argues that Ordinance Nos. 819 and 820 exceed the City's zoning authority because they attempt to regulate ownership as opposed to use of the property. Furthermore, Plaintiff argues that such ordinances violate the general laws of the state because regulations relating to community housing have been preempted by other state law, that such ordinances unconstitutionally control rent, that such ordinances are disguised impact fees, or that they impose illegal taxes.

a. Whether the Authority to Implement Affordable Housing has been Impliedly Preempted by State Law

While Article 12, Section 2 of the Idaho Constitution is a grant of local police powers to Idaho cities, this police power is limited in at least two important respects. First, cities cannot act in an area which is so completely covered by general law as to indicate that it is a matter of state concern. Second, cities may not act in an area where to do so would conflict with the state's general laws. *Caesar v. State*, 101 Idaho 158, 161, 610 P.2d 517, 520 (1980). Under the doctrine of implied preemption, where a state has acted in an area in such a pervasive manner, it is assumed that the state intended to occupy the entire field of regulation despite the lack of any specific language preempting regulation by local government entities. *Id.* (citing *United Tavern Owners of Philadelphia v. School Dist. of Philadelphia*, 272 A.2d 868, 870 (Pa. 1971)).

In 1967, the Idaho Legislature enacted the Housing Authorities and Cooperation Law at Idaho Code Section 50-1901 *et seq.* By enacting this statute, the Legislature recognized the need for sanitary and safe dwelling accommodations for persons of low income. *See* Idaho Code Ann. § 50-1902(a).

Essentially, a housing authority is created as an independent public body corporate and politic by a resolution of the governing body of the city, but is not an agency of the city. Idaho Code Ann. § 50-1905; *see also* Idaho Code Ann. § 31-4205 (county housing authorities).[13] The housing authority is imbued with a number of powers necessary or convenient to carry out and effectuate the purposes and provisions of the act. Specifically, a housing authority has the power to contract with other housing authorities for services, create bylaws, rules and regulations, prepare, carry out, acquire, lease, and operate housing projects, lease or rent dwellings, establish and revise rents, own, hold and improve real or personal property, and acquire real property through eminent domain. Idaho Code Ann. § 50-1904(a), (b), and (d).

Overall, Chapter 19, Title 50 of the Housing Authorities and Cooperation Law discusses a housing authority's ability to own and acquire real property. Subsection (d) grants the housing authority broad power with respect to leasing, renting, owning, purchasing, acquiring by gift, grant, bequest, devise, or eminent domain, and selling, exchanging, transferring, assigning, pledging or disposing of any real or personal property. Idaho Code Ann. § 50-1904(d). This is quite different from any "interest" the City of McCall may have in a landowner's real property which is required to be earmarked as community housing under the first two priorities of Ordinance No. 819.

This Court believes that the Idaho Legislature has carefully designated powers within a housing authority in Chapter 19, Title 50 and Chapter 42, Title 31, of the Idaho Code (created either by a city or a county) to address housing problems and provide for affordable housing to low income households. Pursuant to those code sections, a housing authority may acquire real property primarily through two mechanisms: the power of eminent domain and the issuance of bonds upon proper resolution. Idaho

[13] Chapter 19, Title 50 of the Idaho Code which governs city housing authorities is essentially identical to Chapter 42, Title 31 governing county housing authorities.

Code Ann. §§ 50-1914, -1916; 31-4214, -4216. With such bonds, a housing authority may purchase or obtain real property.[14] A housing authority may also acquire real property by gift, grant, bequest or devise. Alternatively, a housing authority may also acquire real property through loans. Idaho Code Ann. §§ 50-1904(i); 31-4204(i). Furthermore, a city or county may lend or donate money to the housing authority. Idaho Code Ann. §§ 50-1909; 31-4209. And the federal government may also loan, contribute or provide grants or other financial assistance to housing authorities. Idaho Code Ann. §§ 50-1923; 31-4223.

If a city or county finds that there exist "insanitary or unsafe" dwelling accommodations or that there is a shortage of safe and sanitary dwelling accommodations available to low income households, "[t]he governing body shall adopt a resolution declaring that there is a need for a housing authority." Idaho Code Ann. §§ 50-1905; 31-4205. Although a city or county is not required to create a housing authority, it seems apparent that if the city or county is faced with a need to address affordable housing, the appropriate mechanism for governing affordable housing is through a housing authority pursuant to either section 50-1901 *et seq.*, or section 31-4201 *et seq.*[15] Essentially, these statutes provide the framework in which local governments are to address affordable housing.

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[14] If low income housing is owned by a non-profit organization such as a housing authority, it would be eligible to be exempt from taxation under Idaho Code Section 63-602GG. The Idaho Impact Fee Act, Idaho Code Section 67-8201 *et seq.*, also contains an incentive for affordable housing. Local governments may waive all or part of any impact fees as an incentive for developers to include affordable housing. Idaho Code § 67-8204(10).

[15] By Resolution 10-06, Valley County and Adams County created a county housing authority known as VARHA pursuant to Idaho Code Section 31-4208. Under that section, a county may authorize the creation of a housing authority, with the ability to transact business and exercise powers, pursuant to a proper resolution declaring the need for an authority to function. Resolution 10-06 was adopted on January 23, 2006, signed by the Valley County Commissioners. While the City of McCall did not expressly authorize a city housing authority, it appears to rely on the findings and expertise of VARHA. Prior to the creation of VARHA, the City of McCall passed Resolution 05-19 providing for a community housing policy which was signed by Mayor Kirk L. Eimers on September 22, 2005. Ordinance Nos. 819 and 820

In 1972, the Idaho Legislature enacted Idaho Code Section 67-6201 *et seq.*, which created a state agency, the Idaho Housing and Finance Association, to address the issue of affordable housing. Essentially, the state housing association is empowered to conduct its business, make and execute agreements or contracts, and to lease, sell, construct, finance, any housing projects and to establish and revise rents or charges. Idaho Code Ann. § 67-6206(a), (b), (e), and (f). The state housing association is also empowered to own, hold and improve real property, purchase, lease, and obtain options upon, acquire by gift, grant, bequest, devise, eminent domain or otherwise any real property and to sell, lease, exchange, transfer, assign, pledge, or dispose of such property. Idaho Code Ann. § 67-6206(g), (h). Housing projects are to be subject to the local planning, zoning, sanitary and building laws, ordinances and regulations applicable to the locality of the housing projects. Idaho Code Ann. § 67-6209. Similar to housing authorities, the state housing association has the power of eminent domain and the power to issue bonds to achieve its purpose of providing affordable housing. Idaho Code Ann. § 67-6206.

The Legislature has also created the Idaho Housing Trust Fund for the purpose of providing a "continuously renewable resource known as a housing trust fund from the private and/or public moneys to assist low-income and very low-income citizens in meeting their basic housing needs, and that the needs of very low-income citizens should be given priority." Idaho Code Ann. § 67-8101. The housing trust funds are to be used to assist a variety of activities, including but not limited to:

> (a) New construction, rehabilitation, or acquisition of housing units for occupancy by low-income and very low-income households;
> (b) Rent subsidies in new construction or rehabilitated multifamily units for low-income and very low-income households;
> ...

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rely on Community Guidelines enacted by VARHA and to the extent that the City of McCall's Resolution allowed the City of McCall to enact inclusionary zoning ordinances, the administration of such ordinances is governed by VARHA.

(e) Administrative costs for housing assistance groups or organizations which provide housing when such grant or loan will substantially increase the recipient's access to housing funds other than those available under this chapter;

. . .

(i) Acquisition of housing units for the purpose of preservation as housing for low-income and very low-income households;

Idaho Code Ann. § 67-8103(2). Local governments and local housing authorities may receive assistance from the state housing association. Idaho Code Ann. § 67-8104. Specifically, the Idaho Housing Trust Fund Act applies to low and very low income households; and defines low-income households as those with a median income of more than fifty percent but less than eighty percent of the median income of the area, and very-low income households as those with less than fifty percent of the median income. Idaho Code Ann. § 67-8102(9), (10).

The Plaintiff argues the Legislature specifically chose to address affordable housing in separate and distinct statutes. The statutes cited above do not make it an absolute requirement to build affordable housing. Rather, the Plaintiff argues such statutes limit a local government's ability to provide affordable housing through bonds or eminent domain or to offer incentives such as tax or impact fee exemptions to developers. The City of McCall, on the other hand, argues that none of the above statutes prohibit the City from passing legislation to provide for housing that is affordable to the City's workforce. What the above statutes make clear is that the Legislature has enacted provisions both through the Idaho Housing and Finance Association as well as local housing authorities at the city and county level to *regulate* affordable housing.

However, the Idaho Supreme Court has held that "[a] local ordinance which merely goes further than a state statute in imposing additional regulation of a given conduct does not conflict with state law." *Voyles v. City of Nampa*, 97 Idaho 597, 601, 548 P.2d 1217, 1221 (1976). Furthermore, under LLUPA, "[w]henever the ordinances made under this chapter impose higher standards than are

required by any other statute or local ordinance, the provisions of ordinances made pursuant to this chapter shall govern." Idaho Code Ann. § 67-6518. Although there is extensive statutory regulation regarding community or affordable housing for low income households, this Court does not find that the Legislature impliedly preempted the entire field of affordable housing. While such legislation may provide the framework for regulations relating to affordable housing, there is nothing in these statutes which appears to prevent a city from enacting a zoning ordinance with respect to affordable housing.

b. Whether Ordinance No. 819 Operates as an Unauthorized Rent Control Provision

Under Ordinance No. 819, if a developer constructs community housing units as rentals, the developer is required to enter into a Community Housing Agreement which provides the construction specifications, sales and/or rental terms, and the restrictions placed on the units to ensure their permanent affordability and compliance with the Community Housing Guidelines. Such housing is permanently deed-restricted affordable housing subject to the regulations governing potential renters with qualifying income levels. VARHA recommends rental or sale prices to the City of McCall, although the City has the ultimate authority on price or rent restrictions. Such deed restrictions and affordable housing classification remain tied to the property and run with the land to future owners. The City of McCall argues it retains an interest in the deed-restricted community housing through the community housing agreement entered into by the property owners and through the regulations which ensure that such housing remains affordable, thus preserving the governmental interest in such property. Plaintiff argues that such rent restrictions amount to a violation of Idaho Code Section 55-307(2).

Idaho Code Section 55-307 provides in pertinent part as follows:

> A local governmental unit shall not enact, maintain, or enforce an ordinance or resolution that would have the effect of controlling the amount of rent charged for leasing private residential property. This provision *does not impair the right of any local governmental unit to manage and control residential property in which the local governmental unit has a property interest.*

Idaho Code Ann. § 55-307(2) (emphasis added). The statute expressly allows a local governmental unit to enact a resolution that would have the effect of controlling rent if the governmental unit has a "property interest" in the residential property. The City argues it has an interest in such affordable housing, explaining that its interest, while not a possessory interest, is a regulatory and administrative interest "applied through VARHA, to maintain the upkeep and usefulness of such affordable housing units and to ensure that such units are utilized only by those individuals qualifying for the low income housing."

Under Idaho Code Section 50-1904, a city housing authority has the power to "lease or rent any dwellings . . . embraced in any housing project . . . [and] to establish and revise the rents or charges therefore." Idaho Code Ann. § 50-1904(d); *see also* Idaho Code Ann. § 31-4204(d) (county housing authority). Furthermore, these provisions provide a housing authority with the power to acquire such real property through eminent domain or with funds obtained through issuance of a bond. *See* Idaho Code Ann. §§ 50-1914, -1916; 31-4214, -4216. A housing authority would clearly have a "property interest" in such property and the authority to control rents. *See* Idaho Code Ann. §§ 50-1913 and 31-4213. This Court does not conclude that the City of McCall possesses the same interest as a housing authority which owns real property.

The City of McCall admits it has only a regulatory or administrative interest. This Court is not convinced that such interest amounts to a "property interest" under section 55-307(2). The landowner or developer of affordable housing would retain a property interest subject to regulation. To hold that a local government entity has a property interest in real property when it exercises only a regulatory or administrative function would essentially eviscerate Idaho Code Section 55-307, which prohibits a local government from controlling rent charged for leasing private residential property.

c. Whether the Ordinances Exact an Unauthorized Tax or are Disguised Impact Fees

Initially a distinction must be drawn with respect to Ordinance Nos. 819 and 820. These ordinances are essentially attempting to *provide* for affordable housing rather than *regulate* affordable housing. Although the Court defers to the City of McCall's findings relating to the need for affordable housing and the City's sincere efforts to provide for such, this Court is being asked to decide the constitutionality of the means the City of McCall is utilizing to provide for affordable housing. The City of McCall has meticulously engineered a land use provision which requires landowners and developers to give over something of value in exchange for the right to develop a subdivision or build a residential unit. While the City of McCall argues that Ordinance Nos. 819 and 820 merely regulate the growth of residential housing in McCall, it is undeniable that the stated goals of such ordinances are to provide for "a reasonable supply of affordable, deed restricted workforce housing (community housing)." Such ordinances contemplate that in exchange for approval and issuance of a building permit a landowner or developer must give over something of *value*, whether it be an agreement to provide deed-restricted inclusionary housing, the conveyance of land, or a fee under Ordinance Nos. 819 or 820. Therefore, this Court must determine whether the City of McCall has authority for exacting such "fee."[16]

[16] When the Court uses the term "fee" it is referring to *any* and all of the priorities listed under Ordinance No. 819, and not merely the "in lieu fee" under the fourth priority. Furthermore, it is understood that under Ordinance No. 820, the community housing fee is a "fee" in any general sense of the word. The Court's analysis is not restricted to the fact that under the first two priorities of Ordinance No. 819, the landowner is not relinquishing control over his or her property. This does not mean that the landowner is not in essence paying a price or a "fee" to the City of McCall for the privilege of subdividing or erecting improvements on his or her land. This Court recognizes the fact that the City of McCall has characterized such requirement as a "subsidy amount," as defined by the provisions for land conveyance and the in lieu fee. *See* City of McCall Ordinance No. 819, § 9.7.10(A)(4)(e) and § 9.7.10(A)(5)(b). Therefore, it is appropriate for this Court to find that the requirements under any of the four priorities in Ordinance No. 819 constitute a "fee."

Municipalities are allowed pursuant to the Idaho Constitution to enact fees or impose taxes to fund projects. Generally, there are two primary ways in which a municipality may impose charges on the public or on particular persons: (1) by legislative enactment which specifically permits the municipality to fund a project through the assessment of taxes or fees; or (2) pursuant to the police power for the collection of revenue incidental to the enforcement of a regulation. *See Idaho Building Contractors Ass'n v. City of Coeur D'Alene*, 126 Idaho 740, 742-43, 890 P.2d 326, 328-29 (1995).

Article 7, section 6 of the Idaho Constitution expressly provides that a city has the power to assess and collect taxes for all purposes of the city corporation. Idaho Const. Art. 7 § 6. While Article 7, section 6 of the Idaho Constitution permits a municipal corporation to assess and collect taxes for the purposes of the corporation, that taxing authority is not self-executing and is limited to that taxing power given to the municipality by the Idaho Legislature. *Id.* at 742, 890 P.2d at 328 (citing *Brewster v. City of Pocatello*, 115 Idaho 502, 503-04, 768 P.2d 765, 766-67 (1988)). Neither party has asserted any statutory authority which would permit the City of McCall to impose a tax through Ordinance Nos. 819 and 820. In fact, the City of McCall denies that the fees or costs imposed upon landowners in either Ordinance Nos. 819 or 820 constitute a tax. Rather, the City argues such fees are lawful pursuant to its police powers.

Under Article 12, section 2 of the Idaho Constitution, a municipality may enact regulations pursuant to its police power for the furtherance of the public health, safety, morals, or welfare of its residents. Idaho Const. Art. 7 § 6. Pursuant to those police powers, a municipality may provide for the collection of revenue incidental to the enforcement of a regulation. *Idaho Bldg. Contractors Ass'n*, 126 Idaho at 742-43, 890 P.2d at 328-29. However, such municipal fees must be rationally related to the cost of enforcing the regulation and cannot be assessed purely as a revenue-generating scheme. *Brewster v. City of Pocatello*, 115 Idaho 502, 504, 768 P.2d 765, 767 (1988). If the fee or charge is imposed

primarily for revenue raising purposes, it is in essence a tax and can only be upheld under the power of taxation. *Idaho Bldg. Contractors Ass'n*, 126 Idaho at 743, 890 P.2d at 329.

The City of McCall argues that Ordinance Nos. 819 and 820 are not revenue raising mechanisms, but rather land use regulations enacted through the City's police powers to control zoning regulations within the City's jurisdiction because such ordinances control a specific use of land and development. Just as the City of Coeur D'Alene argued in *Idaho Building Contractors Association*, the City of McCall argues that Ordinance Nos. 819 and 820 have been enacted for the purposes of promoting the health, welfare, safety, and morals of the residents of McCall. *See Idaho Bldg. Contractors Ass'n*, 126 Idaho at 743, 890 P.2d at 329.

In *Brewster*, the Idaho Supreme Court addressed the validity of an ordinance passed by the City of Pocatello charging a street restoration and maintenance fee upon all owners or occupants of property in the City of Pocatello pursuant to a formula reflecting the traffic which was estimated to be generated by that particular property. *Id.* at 502, 768 P.2d at 765. The Court held that "the revenue to be collected from Pocatello's street fee has no necessary relationship to the regulation of travel over its streets, but rather is to generate funds for the non-regulatory function of repairing and maintaining streets. The maintenance and repair of streets is a non-regulatory function as the terms apply to the facts of the instant case." *Id.* at 504, 768 P.2d at 767. The fee imposed by the ordinance in *Brewster* effectively was a general tax rather than an incidental regulatory fee. "In a general sense a fee is a charge for a direct public service rendered to the particular consumer, while a tax is a forced contribution by the public at large to meet public needs." *Id.* at 505, 768 P.2d at 768.

Under Ordinance No. 819, the subsidy created either by requiring landowners to deed restrict a percentage of units as community housing, to convey land, or to pay an in lieu fee appears to be an innovative way of creating or generating affordable housing. Quite plainly, even the fees collected

pursuant to Ordinance No. 820 are for the purpose of "planning, subsidizing, developing or constructing community housing." City of McCall Ordinance No. 820, § 3.8.21(E)(4). To be a valid fee, the fee must be incidental to the enforcement of the regulation and bear a reasonable relationship to the cost of enforcing such regulation. *Brewster*, 115 Idaho at 504, 768 P.2d at 767; *see also Foster's Inc. v. Boise City*, 63 Idaho 201, 118 P.2d 721 (1941).

The City of McCall argues it has specific statutory authority under the LLUPA to require a subsidy under Ordinance No. 819, or a fee under Ordinance No. 820, to provide for safe, affordable housing. Generally speaking, the LLUPA governs zoning regulations such as setbacks, density, and height regulations. *See Sprenger, Grubb & Assocs. v. City of Hailey*, 127 Idaho 576, 903 P.2d 741 (1995). However, as discussed previously, the LLUPA does not provide the City with any authority for enacting ordinances which require that developers provide affordable housing, let alone authority to impose a fee or require a subsidy from landowners to further such goals. To the contrary, LLUPA provides that:

> Fees established for purposes of mitigating the financial impacts of development must comply with the provisions of chapter 82, title 67, Idaho Code. Denial of a subdivision permit or approval of a subdivision permit with conditions unacceptable to the landowner may be subject to the regulatory taking analysis provided for by section 67-8003, Idaho Code, consistent with the requirements established thereby.

Idaho Code Ann. § 67-6513. Chapter 82 is the Idaho Development Impact Fee Act,[17] and provides for the imposition by ordinance of development impact fees as a condition of development approval. Idaho

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[17] The Idaho Development Impact Fee Act defines "affordable housing" as "housing affordable to families whose incomes do not exceed eighty percent (80%) of the median income for the service area or areas within the jurisdiction of the governmental entity. Idaho Code Ann. § 67-8203(1). Furthermore, the act 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." Idaho Code Ann. § 67-8203(10). Under section 67-8204,

Code Ann. § 67-8204. A development impact fee is "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." Idaho Code Ann. § 67-8203(9). Such fees "shall not exceed a proportionate share of the cost of system improvements." Idaho Code Ann. § 67-8204(1).

The critical language in the Idaho Development Impact Fee Act is that the purpose of such act is to provide funds necessary for "planning and financing public facilities needed to serve new growth and development . . . necessary . . . to promote and accommodate orderly growth and development and to protect the public health, safety and general welfare." Idaho Code Ann. § 67-8202. Public facilities are defined as water works, waste facilities, roads, streets, and bridges, storm water collection, parks and capital improvements, as well as public safety facilities such as law enforcement, fire, emergency medical and rescue and street lighting facilities. Idaho Code Ann. § 67-8203(24). Ultimately, while the Idaho Development Impact Fee Act allows an exception to imposing a development impact fee on affordable housing, the Act does not contemplate the imposition of development impact fees to ensure an adequate affordable housing supply or to develop such. Therefore, this Court is unable to conclude

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> A development impact fee ordinance may exempt all or part of a particular development project from development impact fees provided that such project is determined to create affordable housing, provided that the public policy which supports the exemption is contained in the governmental entity's comprehensive plan and provided that the exempt development's proportionate share of system improvements is funded through a revenue source other than development impact fees.

Idaho Code § 67-8204(10). Essentially, a city may provide an incentive for the creation of affordable housing by exempting the development impact fee, provided that such exemption is within the city's comprehensive plan and that such proportionate share of system improvements is funded through another source such as state or federal funding of affordable housing.

If the fees imposed under Ordinance Nos. 819 and 820 are development impact fees, such fees would be contrary to the stated legislative intention to provide an exception to the imposition of such fees under section 67-8204 for the development of affordable housing.

that either such subsidy under Ordinance No. 819, or fee under Ordinance No. 820, is appropriate under the Idaho Development Impact Fee Act.

Additionally, the Idaho Supreme Court in *Idaho Building Contractors Association* found that the fee imposed by the city's ordinance "purports to assess a fee to support additional facilities or services made necessary by the development, and to shift the cost of those additional facilities and services from the public at large to the development itself." *Id.* In *Idaho Building Contractors Association*, the City of Coeur D'Alene had enacted an ordinance which required a capitalization fee to pay for a proportionate share of the cost of improvements needed to serve development. The capitalization fee was imposed on all building permits, in an attempt to have growth pay for growth. Relying on the analysis in *Brewster*, the Court held:

> [T]he assessment here is no different than a charge for the privilege of living in the City of Coeur d'Alene. It is a privilege shared by the general public which utilizes the same facilities and services as those purchasing building permits for new construction. The impact fee at issue here serves *the purpose of providing funding for public services at large, and not to the individual assessed, and therefore is a tax.* The fact that additional services are made necessary by growth and development does not change the essential nature of the services provided: they are for the public at large.

Idaho Bldg. Contractors Ass'n, 126 Idaho at 744, 890 P.2d at 330 (emphasis added).

The Idaho Supreme Court distinguished taxes from fees, stating that "taxes serve the purpose of providing funding for public services at large, whereas a fee serves only the purpose of covering the cost of the particular service provided by the state to the individual." *Id.* (citing *Alpert v. Boise Water Corp.*, 118 Idaho 136, 145, 795 P.2d 298, 307 (1990)). Quoting the *Brewster* Court, the Idaho Supreme Court acknowledged its previous holding stating:

> It is only reasonable and fair to require the business, traffic, act, or thing that necessitates policing to pay this expense. To do so has been uniformly upheld by the courts. *On the other hand, this power may not be resorted to as a shield or subterfuge, under which to enact and enforce a revenue-raising ordinance or statute.*

Id. (quoting *Brewster*, 115 Idaho at 504, 768 P.2d at 767). In *Idaho Building Contractors Association*, the Idaho Supreme Court affirmed the district court's decision holding that the municipal ordinance imposing fees was not authorized by the Development Impact Fee Act and that such fee was essentially a tax providing funding for public services at large. *Id.* at 743-44, 890 P.2d at 329-30.

Likewise, the City of McCall is attempting to have growth in McCall pay for growth. Essentially, landowners and developers are being charged a premium, by way of either a subsidy or a fee, to live in the City of McCall. There has been no suggestion that the landowner or developer enjoys some benefit, other than a benefit ostensibly to be realized by the public at large, from paying the subsidy or building permit fee under Ordinance Nos. 819 and 820.[18] While the landowner or developer may be denied a permit to develop a subdivision or build a residential unit if he or she fails to provide the subsidy or pay the fee, the "benefit" he or she receives in subdividing his or her land does not distinguish the subsidy or fee from a tax. Admittedly, the benefit provided is to assure "a reasonable supply of affordable, deed restricted workforce housing (community housing) being made available . . . [to] critical professional workers, essential service personnel, and service workers" who are able to live within proximity to their work. Whatever benefit the landowner receives is no different than a benefit received and shared by the public at large. The lack of affordable workforce housing is a problem for which the public should bear the cost to remedy rather than imposing the burden on a few landowners or

[18] The City of McCall attempts to argue that the benefit to the landowner is two-fold: (1) assurance that "critical professional workers, essential service personnel and service workers live within proximity to their work to provide municipal and private sector services;" and (2) incentives such as density bonuses, equity builder programs, and priority in sewage and water hookups. The benefit of essential workforce services is a benefit shared by the public at large. As to the incentives a landowner receives, such incentives are not clearly outlined in the ordinances themselves and this Court is not persuaded that such incentives are provided in exchange for the subsidy or fees paid pursuant to Ordinance Nos. 819 and 820.

developers. Therefore, the purpose of the subsidy or fee under Ordinance Nos. 819 and 820 is for the benefit of public services at large rather than a benefit to the individual assessed.

The City of McCall urges that this Court's analysis, in determining whether the fees imposed are disguised taxes, should focus on whether the funds collected are disbursed in accordance with the stated purpose of the regulation. However, this step in the analysis should come only *after* a determination that the City of McCall had authority to impose such fees. In *Loomis v. City of Hailey*, 119 Idaho 434, 807 P.2d 1272 (1991), and also in *Schmidt v. Village of Kimberly*, 74 Idaho 48, 256 P.2d 515 (1953), the Idaho Supreme Court found that the fees imposed were collected pursuant to the Idaho Revenue Bond Act. Under those circumstances, the Court was required to determine whether the fees were collected under the guise of the Act and allocated and spent otherwise on projects not related to the ordinance. Such is not the situation in the underlying case. Therefore, unless the Court finds the fees imposed under Ordinance Nos. 819 and 820 are properly enacted pursuant to the City's police powers, it need not determine whether such fees are being properly disbursed in accordance with the stated purposes of the ordinances.

3. Whether Ordinance Nos. 819 and 820 are Unreasonable or Arbitrary

The third prong under *Hobbs* is to determine whether Ordinance No. 819 is a reasonable or arbitrary enactment. The Plaintiff argues that Ordinance No. 819 operates as a regulation of ownership rather than a land use regulation. As an ordinance regulating a landowner's ownership rather than use, it is an arbitrary and unreasonable exercise of the police powers and violates the constitutional protection given by the due process clause. The Plaintiff relies on *O'Connor v. City of Moscow*, 69 Idaho 37, 202 P.2d 401 (1949), for the proposition that a zoning ordinance may only regulate use, not ownership, of property. *Id.* at 43, 202 P.2d at 404 ("A zoning ordinance deals basically with the use, not ownership, of property.").

In *O'Connor*, the Court recognized that generally, zoning regulations are divided into two classes: "first, those which regulate the height and bulk of buildings within certain designated districts, and second, those which prescribe the use to which buildings within certain designated districts may be put." *Id.* at 41, 202 P.2d at 403. The City of Moscow attempted to restrict certain businesses to one area of the business district in downtown by adopting an ordinance that provided any change of ownership would constitute a new or additional business. Therefore, any non-conforming business which attempted to sell to a new owner would be prohibited from operating such business as it was a "new or additional" business.

Specifically, the *O'Connor* Court held that the provision of the ordinance declaring a change of ownership to be a new business was void as being an arbitrary and unreasonable exercise of the city's police power violating the constitutional protections given by the due process clause. *Id.* at 43, 202 P.2d at 404. By enacting an ordinance relating to the business district and the uses of property within certain limits of the city, the City of Moscow was regulating the use of such properties. However, attempting to make a change in ownership a "new business" was arbitrary and unreasonable.

Likewise, the City of McCall can designate the use of specific property in zoning areas as residential or commercial. However, the City of McCall's requirement that twenty percent of new subdivisions be deed-restricted as community housing regulates much more than a landowner's "use" of his or her property. The restrictions for community housing dictate the price for which the property may be sold and to whom the property may be sold. Even if the landowner builds rental units, the restrictions that twenty percent of the units be community housing also limit how much rent a landowner may charge and to whom the units may be rented. These restrictions go much further than merely regulating the use of property; instead, they essentially regulate ownership of the property by dictating to whom a unit may

be sold or rented. This Court concludes such "regulation" is arbitrary and unreasonable as a land use provision.

This Court is convinced that the imposition of the subsidy or fee required under Ordinance Nos. 819 and 820 are, in reality, a tax, and not a regulation. Through such ordinances, the City of McCall has attempted to provide for affordable housing either by requiring developers to pay for such by subsidizing the housing market or by requiring landowners to pay a community housing fee for new residential building permits. There is nothing which regulates the use of land other than requiring a landowner to pay such subsidy or fees. Therefore, this Court finds that Ordinance Nos. 819 and 820 impermissibly exceed the City's police powers as they impose a tax without legislative authority allowing the City of McCall to enact such tax. Furthermore, to the extent that such ordinances attempt to regulate ownership (i.e. restricting a landowner's right to sell or rent lots and units by requiring affordable housing provisions), such ordinances are arbitrary and unreasonable.

Given these conclusions, there is no need to address the remaining issues or challenges by the Plaintiff of violation of the Equal Protection Clause, the unconstitutional "taking" analysis, or the ability of the City of McCall to contract with VARHA.

CONCLUSION

For the foregoing reasons, this Court hereby GRANTS the Plaintiff's Motion for Summary Judgment, finding City of McCall Ordinance Nos. 819 and 820 exceed the City of McCall's police powers as they provide for unauthorized taxes and are, therefore, void and without force and effect. Counsel for Plaintiff shall submit any proposed judgments consistent with this decision, subject to the right of Defendant's counsel to review for form.

AND IT IS SO ORDERED.

Dated this 19th day of February, 2008.

Thomas F. Neville
District Judge

MEMORANDUM DECISION AND ORDER - PAGE 31

CERTIFICATE OF MAILING

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Valley County, Idaho

Deputy Clerk

MEMORANDUM DECISION AND ORDER - PAGE 32

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF

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

PHIL AND LYNN SCHAEFER, Plaintiffs/Counterdefendants, v. CITY OF SUN VALLEY, IDAHO, a Political subdivision of the State of Idaho Defendant/Counterclaimant.	Case No. CV-06-882 **DECISION ON SUMMARY JUDGMENT**

Plaintiffs/Counterdefendants, Phil and Lynn Schaefer Lane Ranch Partnership filed this lawsuit on October 18, 2007, challenging the City of Sun Valley's imposition of an in-lieu fee on the Schaefers, pursuant to Ordinance 364, the Workforce Linkage Ordinance. This matter came before the Court by Oral Argument on May 3, 2007. Christopher Meyer appeared for and on behalf of plaintiffs/counterdefendants Phil and Lynn Schaefer, and Mr. Rand Peebles and Geoffrey M. Wardle appeared for and on behalf of the defendant/counterclaimant the City of Sun Valley. The Court has discussed this matter at oral argument, reviewed the briefs, and conducted independent research on the matter, and renders the following decision.

FACTUAL BACKGROUND

The following facts are undisputed. On April 21, 2005 the City of Sun Valley adopted Ordinance No. 363 and Ordinance No. 364. Both ordinances sought to address the growing need for affordable workforce housing in Sun Valley. Ordinance 363 applies to residential and multi-family development, and Ordinance 364, known as *Workforce Housing Linkage Ordinance*, applies to single-family construction. Ordinance 363 is not at issue in the present lawsuit.

Ordinance 364 provides that all applications for Design Review in the City of Sun Valley "shall require an approved Workforce Housing Linkage Plan such that a percentage of the employee housing demand generated by the application will be provided as Workforce Housing Units." Sun Valley, Idaho Ordinance No. 364, § 9-9F-2. Permit approval for residential development requires the applicant to either "develop or ensure development of twenty percent (20%) of the employee housing unit demand generated by the application either onsite or on an Eligible Site prior to or concurrent with the issuance of any building permits for proposed new construction." *Id.* at 9-9F-4(B). The ordinance then sets forth a formula to compute the total on-site workforce housing units a home-builder must provide. The formula is based upon the size of the residential development, how many employees will be required, and how many employees will reside in a unit.

Ordinance 364 also provides "[w]here alternatives to the on-site provision of such housing is determined to be more practical, efficient, and equitable, this Article will set forth standards for Eligible Site housing, the conveyance of land, or a payment in-lieu

fee." *Id.* at § 9-9F-1. For instance, if the formula yields a fraction of a unit a home-builder has the option to either build a full unit or pay a fee in-lieu. An in-lieu fee may also be provided where the City Council finds on-site housing to be inappropriate or impractical. Once collected, the fees must be deposited into a Workforce Housing Fund and used "solely to increase and improve the supply of rental and/or for sale workforce housing..."

Plaintiffs/Counterdefendants Phil and Lynn Schaefer owned a lot in Sun Valley and sought to obtain design review approval and a building permit for a new home. The City assessed an "in-lieu" fee of $11,989.97 against the Schaefers pursuant to the Linkage Ordinance. The Schaefers filed this lawsuit and moved for summary judgment challenging the constitutionality of Ordinance 364. Sun Valley filed a counterclaim seeking a declaration that Ordinance 364 is a permissible constitutional exaction pursuant to the police power of Article XII, § 2 of the Idaho Constitution.

STANDARD OF REVIEW

Summary Judgment is proper if the "pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), I.R.C.P. Ordinarily, the Court liberally construes all disputed facts in favor of the non-moving party, and draws all reasonable inferences and conclusions supported by the record in favor of the party opposing the motion. *Bonz v. Sudweeks*, 119 Idaho 539, 541, 808 P.2d 876, 878 (1991). If the evidence reveals no disputed issues of material fact, the trial court should grant the motion for summary judgment. *Farm Credit Bank v. Stevenson,* 125 Idaho 270, 272, 869 P.2d 1365, 1367 (1994). The fact that both parties

move for summary judgment does not in and of itself establish that there is no genuine issue of material fact. *Kromrei v. AID Ins. Co.*, 110 Idaho 549, 551, 716 P.2d 1321 (1986).

The parties appear to agree that no facts are at issue.

ISSUES

In the present case the primary issue is whether, as the City of Sun Valley argues, the in-lieu fees provided by Ordinance 364 are a proper exercise of authority under the police powers granted to municipalities by the Idaho Constitution. In the alternative, the City of Sun Valley argues that the Local Land Use Planning Act (LLUPA) provides the City with the authority to assess in-lieu fees for the purpose of affordable housing. In response, the Schaefers first argue that Ordinance 364 is an unconstitutional tax. Secondly, the Schaefers contend there is no legislation that permits the City to assess the in-lieu fee. Further, the Schaefers claim the only arguable legislation that would permit in-lieu fees would be the Idaho Development Impact Fee Act (IDIFA). IDIFA addresses the city's authority to assess charges on new growth and development, and importantly, does not allow the imposition of in-lieu fees for affordable housing. Therefore, the Schaefers claim, the IDIFA pre-empts the area of impact fee assessment.

The Court will analyze both issues in turn.

ANALYSIS

At the outset, a brief review of the law regarding a municipality's authority to assess charges on the public is necessary. "Idaho has long recognized the proposition that a municipal corporation, as a creature of the state, possess and exercises only those powers either expressly or impliedly granted to it. This position, also known as "Dillon's

Rule," has been generally recognized as the prevailing view in Idaho." *Caesar v. State*, 101 Idaho 158, 610 P.2d 517, 520 (1980). (citations omitted).

Consequently, there are three limited methods by which a municipality may impose charges on the public or particular persons. *Idaho Bldg. Contractors Assoc. v. City of Coeur d'Alene*, 126 Idaho 540 (1995). Under Art. 12, § 2 of the Idaho Constitution, a municipality may enact regulations pursuant to its police power, for the furtherance of the public health, safety or morals or welfare of its residents. *Brewster v. City of Pocatello*, 114 Idaho 502, 503-504, 768 P.2d 765, 766-67 (1988). Under its police powers, a municipality may "provide for the collection of revenue incidental to the enforcement of that regulation." *Idaho Bldg. Contractors Assoc.*, 126 Idaho at 743, P.2d at 329.

Also pursuant to a municipality's police power, Art. 8 § 3 of the Idaho Constitution permits the imposition of rates and charges to provide revenue for public works projects. *Loomis v. City of Hailey*, 119 Idaho 434, 438, 807 P.2d 1272, 1276 (1991). Under this constitutional grant of authority, the Idaho Legislature enacted the Idaho Revenue Bond Act, which allows cities to vote to approve the issuance of revenue bonds to finance the cost or maintenance of public works. *Id.* In the present action it is undisputed that Sun Valley did not attempt to hold an election to provide a bond to finance affordable housing.

Finally, a municipality may assess charges on the public pursuant to specific legislation permitting a municipality to fund a particular project through the assessment of taxes or fees. *Id.* This municipal authority arises from Art 7, § 6 of the Idaho Constitution, which "allows the legislature to invest in the corporate authorities... the

power to assess and collect taxes for all purposes of the corporation." *Sun Valley Co. v. City of Sun Valley*, 109 Idaho 424, 427, 708 P.2d 147, 150 (1985). This grant of authority however, is not self-executing. A municipality may only exercise this taxing power pursuant to, and limited by the authority granted by the legislature.

The first issue of contention is the scope of authority possessed by municipalities. The City of Sun Valley claims a municipality's authority is much broader than Dillon's rule, whereby a city's exercise of authority is only improper if it conflicts with the general laws of the state. Therefore, the City may enact Ordinance 364 so long as it does not conflict with the state's general laws. The City cites the recent Supreme Court decision of *Plummer v. City of Fruitland*, 139 Idaho 810, 87 P.3d 297 (2004), as support for this proposition. When considering a municipality's police power, the Court in *Plummer* stated that, "the burden falls upon the party challenging the exercise of this power to show that such an exercise is either in conflict with the general laws of the state or that it is unreasonable or arbitrary." *Id.* at 813.

While the City is correct that *Plummer* does set forth the law for a municipality's police power, a municipality's authority to tax requires separate authority. A City's police power does not authorize a city to *tax* the public, but rather *regulate* the public and in some instances assess a fee incidental to the regulation. As the Court recently made clear in *Potts Construction Company v. North Kootenai Water District*, "a municipal corporation's *taxes* on the general public require specific legislative authorization." 141 Idaho 678, 681, P.3d 8, 11 (2005). Therefore, the distinction lies in whether a city has imposed a general tax, in which specific authorizing legislation is required, or acted pursuant to their police power, where a broader grant of authority exists.

The second issue that must be resolved prior to the assessing the constitutionality of Ordinance 364 regards the difference between a tax and an exaction. The City spends a considerable amount of time arguing that the in-lieu fee is an exaction rather than an impact fee. The import of this argument is two-fold; first, that an exaction is constitutionally distinct from a fee, and second, because the in-lieu fee is an exaction rather than an impact fee, LLUPA doesn't apply. The City, however, cites no Idaho law supporting these propositions and this Court can find none. The analysis is the same whether it is labeled fee or an exaction. A municipality may regulate within its police collect revenue if it is incidental to the enforcement of that regulation. *Brewster*, 115 Idaho 504. The first requirement is whether the municipality may lawfully regulate pursuant to their police power. If the regulation fails to satisfy this requirement, then the Court need not address whether the revenue is incidental to the regulation. Here, the regulation is an ordinance requiring development to mitigate its effect on the housing market. The revenue at issue is an in-lieu fee. Whether the revenue is labeled an exaction or an in-lieu fee does not remove it from the requirements of a valid exercise of police power.

With regard to the argument that an in-lieu fee is an exaction and not an impact fee, and therefore LLUPA is inapplicable, the Court's holding is the same. The label is not the distinguishing factor. The question is whether the Idaho Legislature has specifically authorized the collection of revenue. Thus, for purposes of this analysis, whether the charge is labeled an in-lieu fee or an exaction is inconsequential.

I. Ordinance 364 is not a lawful exercise of the City of Sun Valley's Police Power.

The City of Sun Valley argues that Ordinance 364 is merely a "regulation of development to ensure that new development adequately mitigates its effect on the supply of affordable workforce housing," and as such, falls within a city's established police power authority to regulate for the furtherance of the public health, safety or morals or welfare of its residents. Further, since a municipality may impose fees incidental to police power regulation, charging an in-lieu fee is permissible. The Schaefers argue that Ordinance 364 is nothing more than a general tax, and thus requires specific legislative authorization.

A municipality's police power arises from the Idaho Constitution, Art. XII, § 2, which provides:

> Any county or incorporated city or town may make and enforce, within its limits, all such local police, sanitary and other regulations as are not in conflict with its charter or with the general laws.

As stated above, pursuant to a municipality's police power, a city may provide for a fee incidental to the enforcement of that regulation. *Brewster*, 115 Idaho at 504, P.2d at 767. The funds generated must "bear some reasonable relationship to the cost of enforcing the regulation." *Idaho Bldg Contractors Assoc.*, 126 Idaho at 743, P.2d at 329. However, if the regulation's purpose is to raise revenue rather than regulate, it is a tax, and may only be upheld under the power of taxation. *Id.* The Idaho Supreme Court cautiously reviews whether the collection of revenue is incidental to the enforcement of that regulation, to ensure that the police power is not "resorted to as a shield or subterfuge, under which to enact and enforce a revenue-raising ordinance or statute." *Id, Foster's Inc. v. Boise City*, 63 Idaho 201, 118 P.2d 721 (1941).

In *Brewster v. City of Pocatello,* the Idaho Supreme Court analyzed the difference between a fee and a tax. Generally, the Court considered a fee as revenue incidental to police power regulations, and a tax to include ordinances enacted for the purpose of raising revenue. See generally *Brewster,* 504 Idaho at 502, 768 P.2d at 676. In that case, the Court held invalid an ordinance that imposed a charge for the restoration and maintenance of streets on all owners or occupants of property in the city, as an unconstitutional tax. The charge was calculated pursuant to a formula reflecting the traffic estimated by that particular property. *Id* at 502. Initially, the Court noted that the ordinance had no terms of regulation. The Court compared the alleged "fee" to a fee upheld in *Foster's Inc. v. Boise City* as an example of a revenue incidental to a valid police power regulation. In *Foster's*, the operation of parking meters was found to be incidental to the city's police power to regulate traffic and parking. However, the Court found the revenue from the Pocatello ordinance had "no necessary relationship to the *regulation* of travel over its streets, but rather [was] to generate funds for the non-regulatory function of repairing and maintaining streets." *Id.* at 504.

In other cases distinguishing a fee from a tax, the Idaho Supreme Court has placed emphasis on the terms of the ordinance regarding who will benefit from the revenue collected, whether it be the particular consumer or the public at large. In *Idaho Building Contractors Assoc.* v. *City of Coeur D'Alene*, 126 Idaho 740, 890 P.2d 326 (1995), the Court reviewed a case with facts similar to the present case, where contractors challenged an ordinance that required payment of impact fees from new builders to pay for the cost of development as a precondition to the receipt of a building permit. The Contractors claimed that the City lacked authority to collect the fees without authorizing legislation,

and the City defended its ordinance by arguing the fee was a valid exercise of police power. In differentiating a fee from a tax, the Court defined a fee as "a charge for direct public service rendered to the particular consumer, while a tax is a forced contribution by the public at large to meet public needs." 126 Idaho at 744, 890 P.2d at 330. The Court held the charge to be a tax because it benefited all those who live in Coeur d'Alene equally, yet only newcomers were responsible for the cost. *Id.* As the Court stated "[t]he fact that additional services are made necessary by growth and development does not change the essential nature of the services provided: they are for the public at large." *Id.* Similarly, in *Brewster*, the Court viewed the street fee to be a charge on the occupants or owners of property for the privilege having a public street abut their property, which is no different from a privilege shared by the general public in the usage of public streets. *Brewster*, 115 Idaho at 504, 768 P.2d at 767.

The Court in *IBCA* also expressed concern that the revenues collected pursuant to the ordinance were paid into a general fund to be used "for capital improvements throughout the City by all residents, and not solely for the benefit of those seeking the building permit." *Idaho Bldg Contractors Assoc.*, 126 Idaho at 330, 890 P.2d at 330. Because those funds were not earmarked for use based on the demand created by development, they could not possibly relate to any specific regulation, but rather raise revenue for all public facility infrastructure.

The Idaho Supreme Court has found ordinances requiring payment for water services to be a valid exercise of a municipality's police power. In *Loomis v. City of Hailey*, the Court found fees valid under the city's police power that were segregated and used to repair and replace water system components used by the city. 119 Idaho 434, 807

P.2d 1272 (1991). Again in *Potts Construction Company v. North Kootenai Water District*, the Court found the purpose of water and sewer districts are to "serve a public use and promote health, safety, prosperity, security and general welfare of the inhabitants of said district." 141 Idaho 678, 682, 116 P.3d 8 12 (2005). The Court found the fee to be used toward the water district's system and reasonably and rationally related to the purpose of the city's regulatory function of "insuring clean and safe water for those users of the district's system." *Id.* Thus the ordinance was upheld the by the Court.

In the present case, this Court finds that the purpose of Ordinance 364 is more similar to a general tax than a fee because its clear purpose is to raise revenue rather than regulate. In order for an ordinance to regulate, it must exercise some control by a rule or a restriction. Blacks Law Dictionary (7^{th}) 2000. For example, in *Foster's* the Court found that operating the parking meters was an essential part of the city's authority to *control* traffic and parking. In contrast, in *Brewster* the Court found the street fee was not tailored to control anything regarding streets, but raise revenue for maintenance and repair of the streets. Similarly, Ordinance 364 is not designed to exercise control or regulate the building of community housing, but merely generates revenue.

Sun Valley also argues that it would be inconsistent to prohibit in-lieu fees while allowing restrictions on development with regard to off-street parking, setback and height regulations, and provide for on-site and off-site improvements necessitated by new growth. The Court finds nothing inconsistent with the above scenario. It is well settled that municipalities are able to *regulate* development. Setbacks and height regulations are valid regulations of a city's police power. *Sprenger, Grubb and Associates v. City of Hailey*, 127 Idaho 576, 903 P.2d 741 (1995). Furthermore, municipalities have been

legislatively authorized to enact zoning regulations pursuant to the Local Land Use Planning Act. Parking restrictions are proper regulations under the city's recognized police power to regulate traffic and parking. The in-lieu fees assessed in Ordinance 364, as discussed above, do not assess fees incidental to police power *regulations*, but instead generate revenue.

As stated above, another factor in establishing whether Ordinance 364's in-lieu fee is a tax, is determining who will benefit. As *Brewster* stated, generally a tax benefits the public at large and a fee is payment by a particular consumer for a public service. According to Sun Valley, Ordinance 364 seeks to address the lack of workforce housing in the Wood River Valley, and its effect on local employer's ability to attract and retain employees. *Memo in Support of Sun Valley's Motion for Summary Judgment and Memorandum in Opposition to Schaefers' Motion for Summary Judgment*, p.4. It is clear that the benefit of the ordinance serves new home-builders and the general public equally. This Court cannot distinguish this situation from the one that existed in *Brewster* or *Idaho Building Contractors Association*, where the Court stated "the assessment here is no different than a charge for the privilege of living in the City..." Similar to *Brewster*, where the City utilized a formula to determine the amount of the charge based on the traffic estimated by that particular property, the City of Sun Valley attempts to distinguish Ordinance 364 from a general tax by including a formula to calculate the amount of the fee for each home-builder to ensure the builder does not bear an inordinate amount of the cost. Despite the city's effort, the problem remains. The lack of workforce housing, like the improvement of city streets, has an effect on the public, and thus the public should bear the cost. As the Supreme Court stated in *Idaho*

Building Contractors Assoc., "the fact that additional services are made necessary by growth and development does not change the essential nature of the services provided: they are for the public at large." 126 Idaho at 744, 890 P.2d 330.

As an alternative argument, the City then asserts that there is a particular benefit received by the Schaefers, which is the relief from constructing and dedicating a complete workforce housing unit as required by the Ordinance. By paying the in-lieu fee, the City claims, the Schaefers are saving money by paying Sun Valley to assume the costs associated with workforce housing. The City is likely correct. However, the City's options really only provide one feasible selection to the average person. The alternative options, such as on-site housing, eligible site housing or a conveyance of land to Workforce Housing, are all unrealistic to the average applicant. For example, if the formula calculating the number of units the applicant shall provide produces a fractional number, either the applicant must build an entire unit, or pay an in-lieu fee. Further, if the P&Z finds on-site housing to be impractical or inappropriate, or that it would be more practical for the required units to be pooled with housing units from other projects in the City, or a more viable project may be constructed elsewhere, then an applicant may either pay an in-lieu fee or convey another piece of property. Ord. 364, § 9-9F-4.D. However, the conveyance of land option is only possible if (1) the applicant owns another piece of property in Sun Valley, and (2) the property is properly zoned, (3) the value of the property is enough to offset the City's development costs, and finally (4) the proposal is accepted by the Sun Valley City Council. In addition, the developer must appraise the property, and the City may require, prior to approval, that the property contain roads, water supply, sewage disposal, an environmental report and other basic services. Ord.

364, 9-9F-4.D.2. Due to the numerous obstacles an applicant would confront by choosing any other alternative options, the City has effectively required an applicant to pay an in-lieu fee. Consequently, it is unreasonable to claim that Schaefers have received the benefit of not being required to choose the other three options.

Sun Valley's claims that Ordinance 364 does not suffer from the same flaws as *Idaho Building Contractors Association* because Ordinance 364 specifically segregates and allocates the in-lieu fees, and limits their use to fund the workforce housing created by the new development. The Court agrees that the ordinance does not fail in this regard. As stated above, the Court in *Idaho Building Contractors Association* partially based its invalidation of the Coeur d'Alene ordinance on the fact that the fees were accumulated into a general fund. The Court was concerned that an impact fee could be assessed and the benefit would go toward an unrelated public need. Here, Ordinance 364 serves only to mitigate the portion of the demand for affordable workforce housing directly caused by the new development. Revenue provided from in-lieu fees are to be deposited into an interest bearing Workforce Housing Fund, and solely used to "increase and improve the supply of rental and/or for sale workforce housing affordable to moderate and low income households and whose income is derived from employment within Sun Valley or when found appropriate by the City, employed in Blaine County commonly known as the North Valley, including the City of Ketchum and River Run." Ordinance, 364, § 9-9F-4B.D.1. Although Ordinance 364 satisfies this one component of a valid police power regulation, it fails on the grounds discussed above.

This Court finds, therefore, that the Ordinance 364 in-lieu is in reality an imposition of a tax, and not a valid exercise of a municipality's police power.

I. The City's charge of an in-lieu fee pursuant to Ordinance 364 is not specifically authorized by the Idaho Legislature.

As discussed above, a municipality may also impose taxes or fees on the public by *specific* authorization from the Idaho legislature. *Idaho Bldg Contractors Assoc*,126 Idaho at 742, 890 P.2d 328. Therefore, the *only* proper question for this Court is whether any specific authorization from the legislature exists. The City of Sun Valley identifies the Local Land Use Planning Act ("LLUPA") as the source of the City's authority. The Schaefers argue that Ordinance 364 is without legislative authorization. The Schaefers further contend that Ordinance 364 is preempted by Idaho law, particularly the Impact Fee Act.

The Schaefers' argument is two fold. First, the Idaho Legislature did not specifically authority the City to assess in-lieu fees. Second, the IDIFA preempted the area of impact fees, and therefore the City could not assess in-lieu fees. Here, the Court need not proceed to Schaefer's second argument on preemption at this time. The question to address is whether the Idaho Legislature specifically authorized a municipality to assess fees or taxes for affordable housing. If so, the ordinance would be upheld on that basis. If no legislative authority exists, then no preemption argument is necessary because the state did not grant specific authorization to the city.

Furthermore, preemption generally serves as a limitation of authority granted to municipalities by the Idaho Constitution. *Caesar,* 101 Idaho at 161. "The city cannot act in an area which is so completely covered by general law as to indicate that it is a matter of state concern. Nor may it act in an area where, to do so, would conflict with the state's general laws." *Id.* For instance, a city's police power is limited in areas where the State has either directly preempted an ordinance or preempted the field. The Schaefers appear

to concede that the preemption argument would apply only if the Court found Ordinance 364 to be a proper exercise of a municipality's police power. Only then could it be argued that the State has preempted the area of impact fees, and the city is prohibited from acting in that field. Since this Court found Ordinance 364 to be outside the authority of a municipality's police power, the Court need not decide whether IDIFA preempted the ordinance. Therefore, since it is undisputed that IDIFA does not provide the necessary authority from the legislature, the Court will focus on the LLUPA.

The City defends Ordinance 364 by arguing that LLUPA provides the authority necessary for a municipality to assess in-lieu fees for affordable housing. This Court cannot find that LLUPA provides the City with any such authority.

The Idaho Supreme Court has reviewed other challenges to County ordinances where the County defended by identifying a specific grant of authority by the legislature. One such lawsuit, *Kootenai County Property Ass'n v. Kootenai County* involved a municipality's attempt to charge the public fees to establish, maintain and operate a solid waste disposal system. In that case the Court upheld the assessment of fees on the basis that the Idaho legislature permitted the municipality to fund a particular project through the assessment of taxes or fees. 115 Idaho 676, 769 P.2d 553 (1989). The legislation at issue was entitled Solid Waste Disposal Sites, Title 31, Chapter 44, which granted county commissioners the authority "to acquire, establish, maintain and operate such solid waste disposal systems as are necessary and to provide reasonable and convenient access to such disposal systems by all the citizens." I.C. § 31-4402. Further, the statute provides the board of county commissioners the following options to fund the waste disposal

system: levy a tax, collect fees, use existing revenues, or collect money from any other source, or any combination thereof. I.C. § 31-4404(1).

In contrast, the City of Sun Valley fails to point to any language in the Local Land Use Planning Act that specifically grants authority to assess fees or taxes. It is evident from the Solid Waste Disposal Sites Act that the legislature provides revenue collection authority with specific language. In contrast, the City of Sun Valley cites the Court to several sections of LLUPA as support for the legislature's broad grant of authority. These sections provide cities with the authority to promote the general welfare of the people of Idaho by identifying and assessing the need for affordable housing, and requiring cities to address such issues by implementing regulations and standards. I.C. § 67-6508, I.C. § 67-6511. Indeed, LLUPA provides a city with broad authority to regulate in the context of land use. However, notably absent from LLUPA is language permitting a city to assess taxes or fees.

Further, it is not at all clear that Ordinance 364 is of the type that LLUPA applies to. "LLUPA establishes explicit and express procedures to be followed by the governing boards or commissions when considering, enacting and amending *zoning* plans and ordinances." *Reardon v. Magic Valley Sand and Gravel, Inc.*, 140 Idaho 115, 119, 90 P.3d 340, 344 (2004). Further, zoning regulations "are divided into two classes; first, those which regulate the height and bulk of buildings within certain designated districts, and second, those which prescribe the use to which buildings within certain designated district may be put." *O'Connor v. City of Moscow*, 69 Idaho 37, 202 P.2d 401 (1949). The standards listed in the LLUPA are consistent with the above definition of zoning regulations, listing "such things as building design; blocks, lots, and tracts of land; yards,

courts, greenbelts, planting strips, parks, and other open spaces; trees; signs; parking spaces; roadways, streets, lanes, bicycleways, pedestrian walkways, rights-of-way, grades, alignments, and intersections; lighting; easements for public utilities; access to streams, lakes, and viewpoints; water systems; sewer systems; storm drainage systems; streets numbers and names; house numbers; schools, hospitals, and other public and private development." I.C. § 67-6518. The common theme of the above standards is the *regulation* of land use. Ordinance 364 does not impose standards related to the regulation of land use, but rather seeks to impose fees upon landowners seeking a building permit.

In sum, the Court cannot find that the LLUPA specifically grants the City of Sun Valley the authority to assess fees or taxes on the public. Therefore, Ordinance 364 cannot be upheld on the basis that the City of Sun Valley may assess an in-lieu fee pursuant to specific legislative authorization.

IDAHO TORT CLAIM ACT

The Schaefers seek a refund of the $11,989.97 in-lieu fee pursuant to the Idaho Tort Claim Act, I.C. § 6-901 to 6-929. The City claims no refund is due because the city acted "without reckless, willful and wanton conduct as defined in 6-904C, Idaho Code." I.C. § 6-904A. This Court cannot find that the City of Sun Valley enacted Ordinance 364 willfully or recklessly, and therefore denies any refund pursuant to this act.

The Schaefers also seek a refund on the basis that the state was unjustly enriched by receipt of an unconstitutional tax. The Court in *BHA Investments, inc., v. State*, 138 Idaho 348, 355, 63 P.3d 474, 481 (2003), acknowledged such a claim may be appropriate where the state charges an unconstitutional fee. A claim of unjust enrichment requires

(1) a benefit is conferred upon defendant by plaintiff, (2) appreciation by the defendant of the benefit, and (3) acceptance of the benefit under circumstances that would be inequitable for the defendant to retain the benefit without payment of the value thereof. *Gibson v. Ada County*, 142 Idaho 746, 133 P.3d 1211 (2006). In the present action, the City collected and appreciated receipt of $11,989.97 from the Schaefers. Further, as a result of this Courts ruling regarding the constitutionality of the ordinance, acceptance of the charge by the City would be inequitable. Thus, this Court finds the City to have been unjustly enriched in the amount of $11,989.97 and the Schaefers are HEREBY entitled to a refund in that amount.

In conclusion, because Ordinance 364 is not a valid exercise of a municipality's police power, nor specifically authorized pursuant to a specific legislative enactment, the Schaefer's Summary Judgment is HEREBY GRANTED, and thus the City of Sun Valley's Summary Judgment is DENIED.

It is so ordered.

July 3, 2007

Robert J. Elgee
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3 day of July, 2007, I caused to be served a true copy of the foregoing document by the method indicated below, and addressed to each of the following:

Geoffrey Wardle HAWLEY TROXELL ENNIS & HAWLEY LLP P.O. box 1617 Boise, Idaho 83701-1617	✓ U.S. Mail, Postage Prepaid _ Hand Delivered _ Overnight Mail _ Telescope
Rand L. Peebles HAWLEY TROXELL ENNIS & HAWLEY LLP PO Box 297 Ketchum, Idaho 83340	✓ U.S. Mail, Postage Prepaid _ Hand Delivered _ Overnight Mail _ Telecopy
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Deputy Clerk