2-10-2012

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

IN THE SUPREME COURT OF THE STATE OF IDAHO

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

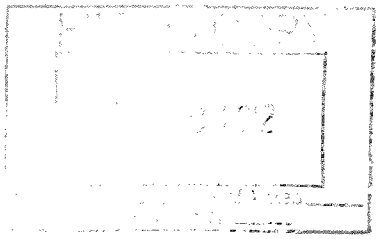
Plaintiffs/Appellants/Cross-Respondents

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 REPLY 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") reply brief in support of its cross-appeal of the district court's decision denying the County's request for attorney fees. It responds to *Appellants'/Cross-Respondents' Brief* (hereinafter "*Buckskin's Attorney Fee Brief*") filed by Appellants Buckskin Properties, Inc. and Timberline Development, LLC (collectively, "Buckskin") on January 20, 2012. The County's opening brief on its cross-appeal was included as part of *Respondent/Cross-Appellant's Brief* ("*County's First Brief*") filed on December 29, 2011.

Buckskin makes both procedural and substantive arguments in opposition to the County's cross-appeal. We will briefly discuss each in turn. The discussion concerning the County's entitlement to fees under Idaho Code § 12-117 will necessarily touch on some of the legal issues raised in the parties' other briefs in this appeal, because the standard for an award of fees under that statute is whether "the nonprevailing party acted without a reasonable basis in fact or law."

ARGUMENT

I. THE COUNTY ADEQUATELY SUPPORTED ITS REQUEST FOR ATTORNEY FEES.

Buckskin begins with a procedural argument. It contends that the County is not entitled to an award of attorney fees because (1) the County failed to distinguish between its claim for the attorney fees incurred at the district court level and its claim for attorney fees on appeal, (2) it failed to discuss the district court's decision, and (3) it failed to provide argument in support of its claim. *Buckskin's Attorney Fee Brief* at 1-2. This is plainly not so. Indeed, these arguments, too, are frivolous.

In accordance with Idaho Appellate Rules 41(a), 35(b)(4), and 35(b)(5), the County, in the *County's First Brief*, listed "Should attorney fees be awarded to Valley County?" as an additional issue presented on appeal. It then set out a separate section of the brief entitled "Attorney Fees on Appeal." That section stated: "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." The County could hardly have been more clear that it was seeking attorney fees in connection with the action below and on appeal to this Court.[1]

The County is perplexed by Buckskin's contention that the County failed to break out its argument into a separate discussion of attorney fees below and on appeal. First, there is no such requirement. Nor does Buckskin complain that it was in anyway misled or confused by the County's presentation of the attorney fee issue. Indeed, Buckskin had no difficulty formulating a

[1] In fact, Buckskin was aware even prior to receiving the *County's First Brief* that the County would be seeking both a reversal of the district court's denial of its request for attorney fees and attorney fees on appeal. On June 15, 2011, the County filed its *Notice of Cross Appeal*, in which it appealed from the decisions of the district court denying its request for fees. R. Vol. III at 605. In the notice, the County identified the following as an issue to be presented on its cross appeal: "In its two memorandum decisions and Judgment, the District Court erred in failing to award attorney fees to Respondent/Cross-Appellant. More specifically, the District Court should have found that Appellants/Cross-Respondents acted without a reasonable basis in law or fact thus entitling Respondent/Cross-Appellant to an award of attorney fees as the prevailing party pursuant to Idaho Code §12-117 and 42 U.S.C. §1988. Respondent/Cross-Appellant intends to seek costs and attorney fees for both the District Court proceedings and on this appeal." R. Vol. III at 607.

response to the merits of the County's claim for attorney fees.[2] In any event, the applicable law is the same at each stage. As Buckskin itself said, "The same standards set forth above, including under Idaho Code section 12-117, apply to Buckskin's claim for attorney fees on cross-appeal." *Buckskin's Attorney Fee Brief* at 5. In the County's briefing, sometimes the County makes reference to a position staked out by Buckskin in the litigation below; in others, the County refers to actions taken on appeal. Both below and on appeal, the problem is the same: Buckskin proceeded with this litigation in the face of settled authority.

Similarly puzzling is Buckskin's complaint that the County did not specifically reference and discuss the district court decision, *Buckskin's Attorney Fee Brief* at 1-2. The County cited authority, described the applicable standard, and explained how that standard is met in this action. No particular reference to the district court's decision was necessary.

Finally, Buckskin complains that the County "failed to provide sufficient factual or legal support for its cross-appeal," and therefore violated the standard set in *Cowles Publ'g Co. v. Kootenai County Bd. of County Comm'rs*, 144 Idaho 259, 266, 159 P.3d 896, 903 (2007). *Buckskin's Attorney Fee Brief* at 2. This is baffling. *Cowles* involved a party who "[i]n the last line of its response brief and its reply brief, [requested] that the Court award it attorney fees and costs." *Cowles,* 144 Idaho at 266, 159 P.3d at 903. Assuredly, this Court vigorously applies the

[2] Buckskin accurately frames the issue as follows: "Valley County claims an entitlement to attorney fees on appeal and below under Idaho Code section 12-117, and perhaps Idaho Code section 12-121." *Buckskin's Attorney Fee Brief*, at 2.

requirement that a party seeking attorney fees must cite authority and provide argument.[3] The County met that requirement; the required authority and argument was set out in the *County's First Brief* at 46-49. If Buckskin disagrees with the argument, that is fine and it may say so. But Buckskin has no basis to say that the County failed to cite authority and provide argument for its attorney fee request. The fact that the County has to waste time explaining this in this reply is further evidence that Buckskin continues to pursue this litigation without basis in law or fact.

II. THERE IS NO DISPUTE AS TO THE STANDARDS GOVERNING ATTORNEY FEE AWARDS.

Recent cases have held that if section 12-117 is available, it is exclusive. *Kepler-Fleenor v. Freemont County*, 2012 WL 181661, *5 (Idaho, Jan. 24, 2012); *Potlatch Educ. Ass'n v. Potlatch School Dist. No. 285*, 148 Idaho 630, 635, 226 P.3d 1277, 1282 (2010). As noted in the *County's First Brief* at 49, Idaho Code § 12-121 will come into play only if, for some reason, the Court determines that section 12-117 is unavailable.

This is of no great consequence, because this Court has equated the standards under these two provisions. As a result, earlier cases applying section 12-121 remain applicable precedent. Under either provision, the applicable standard boils down to a requirement that Buckskin's pursuit of the litigation be frivolous. It was, and it remains frivolous.

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[3] *Carroll v. MBNA America Bank*, 148 Idaho 261, 270, 220 P.3d 1080, 1089 (2009) ("A citation to statutes and rules authorizing fees, without more, is insufficient. Although MBNA cited to the above statutory fees provisions, it submitted no argument in its brief as to why fees should be awarded under either I.C. § 12–120(3) or I.C. § 12–121." (Citation omitted.)).

III. BUCKSKIN'S POSITION ON THE FOUR-YEAR STATUTE OF LIMITATIONS LACKS A REASONABLE BASIS IN LAW.

The district court threw out Buckskin's state law claims on the basis of the four-year statute of limitations. Buckskin's primary argument in support of the district court's decision to deny the County's request for fees is that, applying the law to the undisputed facts in the record, there was a "genuine dispute" as to when the statute of limitations began to run.

In support of this point, Buckskin contends that "Valley County's own efforts to identify multiple dates that it believes may have triggered the statute of limitations for Buckskin's inverse condemnation claim exemplify the genuine dispute in this case regarding that matter." *Buckskin's Attorney Fee Brief* at 3.

Buckskin further contends that "the district court ultimately settled on an accrual date different than any of those proposed by Valley County . . . ." *Buckskin's Attorney Fee Brief* at 3. This is false. The County identified October 25, 2004 as one of the key trigger dates in its briefing below and at oral argument.[4] Like the County, the district court also mentioned earlier dates. "Plaintiffs certainly knew the essential facts on July 14, 2004, the day they received the Conditional Use Permit and they signed the final Capital Contribution Agreement setting out the contribution requirements in full." *Memorandum Decision Re: Defendant's Motion for Summary Judgment* at 5, R. Vol. III at 490. In the next sentence, however, the district court settled on the date mentioned above. "At the very latest, drawing all reasonable inferences in favor of the

[4] "For starters, this ignores the fact that they had already conveyed right-of-way under the Capital Contribution Agreement on or before final plat approval on October 25, 2004." *Valley*

Plaintiff, October 25, 2004 was the date when the statute of limitations began to run." *Id.* Particularly when defending a request for attorney fees, Buckskin should be more careful about misstating the record.

Buckskin's contention that multiple possible accrual dates equates to a "genuine dispute" misses the point. The thing that makes Buckskin's pursuit of this litigation utterly frivolous is that each and every plausible date for accrual was more than four years before Buckskin filed suit.

Buckskin continues to insist, as it did below, that its state law claims did not accrue until December 15, 2005, when it actually tendered the check to the County for the payment of the amounts required under the *Road Development Agreement* for Phases 2 and 3 of its development. *Appellant's Brief*, at 15; *Appellant's Reply Brief*, at 16; *Plaintiffs' Memorandum in Opposition to Defendant's Motion for Summary Judgment*, at 19-20, R. Vol. I at 95-95. While Buckskin has consistently claimed to recognize the applicable test—that its inverse condemnation claim accrued "as of the time that the full extent of the plaintiff's loss of use and enjoyment of the property becomes apparent"[5]—it has stubbornly and unreasonably refused to acknowledge (much less distinguish) that this Court has previously rejected the date of payment as being the date of accrual, where the impairment became apparent earlier.

County's Reply Brief in Support of Motion for Summary Judgment at 7-8, R. at Vol. III at 455-56.

[5] *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)) (emphasis supplied)).

The clearest example of this is *Harris v. State, ex rel. Kempthorne*, 147 Idaho 401, 210 P.3d 86 (2009), 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. "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 at 405, 210 P.3d at 90 (emphasis supplied).

Buckskin has never provided any applicable authority or cogent argument in response to the holding in *Harris* that the statute of limitations runs from the date of the execution of the agreement that imposes the obligation rather than from the date of the payment made pursuant to the agreement. Buckskin only discusses *Harris* briefly in *Appellant's Reply Brief* alongside *Wadsworth v. Idaho Dep't of Transportation*, 128 Idaho 439, 915 P.2d 1 (1996) as follows:

> In Wadsworth, for example, the plaintiff may not have been aware of the full extent of his damages, but it had become apparent that there had been a substantial interference with his property when the state excavated gravel upstream, which had an erosive effect on his land. *Wadsworth* at 443, 915 P.2d at 919 [sic: 4]. The same is true in *Harris v. State* – at the time the plaintiffs entered into the sand and gravel lease with the State, their rights and obligations (including their obligation to verify ownership) and the interference with their property was definite. *Harris* at 405, 210 P.3d at 90.

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

Appellant's Reply Brief, at 15-16. While Buckskin's discussion of *Harris* provides an argument for using the date of the execution of the *Road Development Agreement* (rather than an earlier date), that accomplishes nothing for Buckskin. That agreement was executed on September 26, 2005, more than four years before suit was filed.[6]

Buckskin then goes on to contradict itself on the accrual date. At times it contends that its cause of action as to Phases 2 and 3 did not accrue until it presented a check on December 15, 2005. Yet elsewhere it argues that its claim accrued at the time of final plat approval.[7] This remarkable concession destroys its case, just as surely as did the district court's conclusion that cause of action accrued no later than October 25, 2004. The final plat for Phases 2 and 3 was approved on September 26, 2005 (the same day the *Road Development Agreement* was executed quantifying the obligation to pay $232,160). *Valley County's Statement of Material Facts in Support of Motion for Summary Judgment* at 10, R. Vol. 1 at 30. That is more than four years before suit was filed. So Buckskin's argument for separate accrual dates (aside from being wrong) accomplishes nothing. Why Buckskin would undercut its own case by conceding that

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[6] See Appendix A to *County's First Brief* for a timeline and references to the record.

[7] "Since Valley County's road impact fee is calculated based upon the number of lots in a phase, damages are purely speculative until final plat approval is sought and the exact number of lots is determined." *Appellant's Brief*, at 19. "It does not matter that Buckskin's development of the Meadows was covered by one CUP. Each subsequent phase requires final plat approval from the Board of County Commissioners. *See* I.C. § 67-6504. Buckskin had no obligation to pay

the cause of action accrues at the time of plat approval is unclear. What is clear is that its pursuit of this litigation is frivolous.

IV. BUCKSKIN'S CONTENTION THAT THIS CASE IS GOVERNED BY THE FIVE-YEAR STATUTE OF LIMITATIONS CANNOT BE SQUARED WITH ITS OWN *COMPLAINT* AND IS FRIVOLOUS.

Buckskin's attempt to rely upon the five-year statute of limitations for actions based upon a contract is similarly indefensible. Neither of the claims for relief set forth in the *Complaint* sound in contract. Buckskin's Second Claim for Relief, which is the only claim that seeks damages, is described by Buckskin as "Inverse Condemnation-Violation of State and Federal Constitution." *Complaint* at 4, R. Vol. 1 at 4. While Buckskin's First Claim for Relief references the *Capital Contribution Agreement* and the *Road Development Agreement*, it is only in the context of Buckskin's claim that the County's imposition of the requirement to make contributions toward off site road improvements is an illegal impact fee. *Id.* at 5. There is no action upon a contract stated anywhere in the *Complaint*. Buckskin's attempt to characterize its claims as being based upon a contract is a transparent, after-the-fact effort to avoid the application of the statute of limitations and is therefore without a reasonable basis in fact or law.

V. BUCKSKIN'S POSITIONS ON THE OTHER DEFENSES TO ITS STATE CLAIMS WERE ALSO UNREASONABLE.

As stated in the *County's Opening Brief*, Buckskin's pursuit of this action was in defiance of settled authority not only with regard to the statute of limitations, but also as to the exhaustion

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any road impact fee until a phase came up for final plat and, for that matter, had no obligation to seek final plat approval of any phase of development." *Appellant's Reply Brief*, at15.

of remedies and voluntariness under *KMST, LLC v. County of Ada*, 138 Idaho 577, 583, 67 P.3d 56, 62 (2003).

VI. BUCKSKIN'S PURSUIT OF ITS FEDERAL CLAIMS WAS FRIVOLOUS AS WELL.

The four-year statute of limitations would be enough to bar Buckskin's federal claims, as well as its state claims. However, there are many more reasons why Buckskin's federal claims fail.

The district court explained, "Valley County argues that the Plaintiffs' allegations of violations of the federal constitution must be dismissed because the Plaintiffs[] failed to bring this action under 42 U.S.C. § 1983. . . . Here, the Plaintiffs have not made a claim pursuant to 42 U.S.C. § 1983. However, they were not required to do so because they have a valid claim pursuant to the State constitution." *Memorandum Decision Re: Defendant's Motion for Summary Judgment* at 3-4, R. Vol. III at 488-89. While the district court did not explain its reasoning, its decision to throw out the federal claim is supported by settled and definitive Ninth Circuit authority stating that § 1983 is the exclusive means of pursuing a claim under the Fifth Amendment. *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).

Buckskin continues to ignore this authority, citing instead an earlier case, *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304, 314-15 (1987). *First English* contains some sweeping language, but it does not address the question of whether

takings claims may be brought directly under Constitution independent of § 1983. This question is squarely addressed and resolved in the subsequent Ninth Circuit precedents. As for *BHA Investments, Inc. v. City of Boise* ("*BHA II*"), 141 Idaho 168, 176 n.2, 108 P.3d 315, 323 n.2 (2004), the Court noted in passing that the plaintiffs in that case brought their action directly under the federal Constitution and that doing so was permissible under *First English* (which it called *First Lutheran*). However, this was not an issue in the case, and the Court did not discuss, much less reject, the Ninth Circuit authority. Rather, the Court was discussing the non-applicability of the Idaho Tort Claims Act ("ITCA") to federal causes of action. The nonapplicability of the ITCA to federal claims is the only holding that can be found in *BHA II* on the subject of § 1983. The rest is dictum that is in direct conflict with Ninth Circuit precedent. Buckskin's insistence on pursuing its federal claim without pleading § 1983 is frivolous.

So, too, is Buckskin's belief that it can evade *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). And even if it could, there is no way that Buckskin can avoid the two-year statute of limitations applicable to federal takings claims. See discussion in *County's First Brief* at 11-12, particularly footnotes 9 and 10.

Again, even if the Court were to find something unsettled or unclear in this admittedly complicated area of the law, that really does not matter. If one swept aside all of the special defenses raised by the County to the federal claim, that claim would still fall just as surely on Idaho's four-year catch-all statute of limitations. In other words, even if there is debate as to

which defense should strike the fatal blow,[8] there was simply no way that Buckskin could overcome all of the hurdles.

VII. BUCKSKIN'S MISREPRESENTATION OF THE RECORD SHOULD BE TAKEN INTO ACCOUNT AS WELL.

Another example of Buckskin's unreasonable pursuit of this litigation is its propensity for misrepresenting the record and the law, which unnecessarily increases the work required by the County to respond, and which underscores the lack of merit of its claims. In the *Appellant's Reply Brief*, while discussing the County's equitable arguments, Buckskin persists in its characterization of the doctrine of unclean hands as being a complete bar to relief, when it plainly is not so. More troubling is Buckskin's misrepresentation of the facts in the record concerning these claims. Buckskin charges that "Valley County's equitable principles defense is based entirely on completely unsupported (and assuredly disputed) factual assertions." *Id.* at 31. Specifically, Buckskin claims that there is no evidence to support the County's representations that Buckskin benefited from the development agreements and that the County actually made road improvements referenced by those agreements that serve the Meadows. "There is not one

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[8] As the Supreme Court said: "Thus, . . . Hacienda's claim . . . will either fail because it is not ripe, or, if it is ripe, it will be barred by the statute of limitations." *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) (citing *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 688 (9th Cir. 1993)). Another example of the principle that if one thing does not take this case down another thing will, is found in *Bieneman v. City of Chicago*, 864 F.2d 463 (7th Cir. 1988) (direct takings claim subject to two-year statute) and *Van Strum v. Lawn*, 940 F.2d 406 (9th Cir. 1991) (applying *Bieneman* in Ninth Circuit in non-takings case). These cases show that even if Buckskin were allowed to bring its federal claims outside of § 1983, it would be subject to the two-year statute of limitations.

shred of evidence in the record to support Valley County's factual assertions regarding the roads." *Id.*

This appears to be a deliberate attempt by Buckskin to mislead this Court. Valley County Planning and Zoning Administrator testified in her affidavit concerning the road improvements as follows:

> 31. Using money received from the Plaintiffs pursuant to the Mitigation Agreements, the County undertook capital investments for roads in the vicinity of The Meadows development.
>
> 32. All such monies spent by the County were spent in accordance with and in fulfillment of obligations on the County spelled out in the Mitigation Agreements.
>
> 33. But for the Mitigation Agreements and other similar voluntary development agreements, the County would not have undertaken the road improvements and expenditures described above.
>
> 34. Those capital improvements are now in place.
>
> 35. Those capital investments have improved transportation access to The Meadows and have thereby benefited the Developers of The Meadows and the current residents of The Meadows.

Affidavit of Cynda Herrick in Support of Motion for Summary Judgment at 5-6 (sent as an exhibit to the Clerk's Record).

VIII. IN ADDITION, BUCKSKIN FAILED TO SEEK JUDICIAL REVIEW.

On appeal, the County has emphasized another basis for dismissing Buckskin's case—its failure to seek judicial review under the Local Land Use Planning Act ("LLUPA"). *County's First Brief* at 13-21. Although this issue was presented only glancingly below—it is, of course, a

jurisdictional issue that may be raised at any time—it only adds to the list of reasons that Buckskin's case was a non-starter.

For example, Buckskin's contention in *Appellant's Reply Brief* at 5 that "[t]he claims raised by Buckskin in this lawsuit likewise have nothing to do with a 'permit' under LLUPA" is frivolous. The fees Buckskin alleges are illegal were imposed pursuant to a conditional use permit ("CUP"). And, even if it mattered that the *Road Development Agreement* expressly required by the CUP was not finalized at the time of CUP approval, it was finalized and executed in conjunction with and as a condition of the final plat approval on September 26, 2005. A final plat approval is the same thing as a "subdivision permit" and, like CUPs, falls within appealable actions under LLUPA. *Terrazas v. Blaine County ex rel. Bd. of Comm'rs*, 147 Idaho 193, 197, 207 P.3d 169, 173 (2009) ("The decision regarding a subdivision application is a decision granting a permit, I.C. § 67-6513, and is therefore subject to judicial review.") (citing *Johnson v. Blaine County*, 146 Idaho 916, 920-21, 204 P.3d 1127, 1131–32 (2009)); *Noble v. Kootenai County*, 148 Idaho 937, 940, 231 P.3d 1034, 1037 (2010) (citing *Terrazas*).

Buckskin continues, "Further, the fact a development agreement is referenced in the section of Buckskin's CUP entitled 'Conditions of Approval' does not make it an adverse zoning decision subject to judicial review." This, too, flies in the face of settled precedent and common sense. Then Buckskin repeats a point it made, incorrectly, before: "That argument has no application to the facts of this case because the requirement that Buckskin [] enter into a development agreement for the payment of impact fees was not a condition of the CUP itself, but rather a requirement of the County's PUD ordinance under its LUDO." *Appellant's Reply Brief*

at 8. It is perplexing why Buckskin continues to ignore the clear and irrefutable explanation previously provided by the County that the reference to impact fees in the County's Local Land Use Development Ordinance ("LUDO") has nothing to do with the road fees here. See *County's First Brief* at 18.

In sum, Buckskin's ineffective defense of its failure to appeal under LLUPA is yet another example of its frivolous pursuit of this case.

CONCLUSION

It is not necessary for the Court to agree with the County on each and every one of its defenses. The County urges, however, that it is clear that Buckskin could not survive all of them. Accordingly, one way or the other, Buckskin's pursuit of this lawsuit was frivolous, and the Court should grant the County attorney fees.

Respectfully submitted this 10th day of February, 2012.

GIVENS PURSLEY LLP

By _____
Christopher H. Meyer

By _____
Martin C. Hendrickson

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10th day of February, 2012, the foregoing was served as follows:

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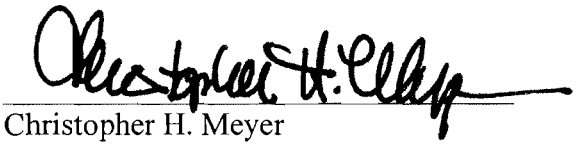

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