3-28-2012

Alpine Village Co. v. City of McCall Clerk's Record v. 3 Dckt. 39580

SUPREME COURT NO. Vol 3 of 4

SUPREME COURT
OF THE
STATE OF IDAHO

COPY

ALPINE VILLAGE COMPANY

LAW CLERK

PLAINTIFF and

APPELLANT

VS.

CITY OF MCCALL

DEFENDANT and

RESPONDENT

Appealed from the District Court of the Fourth Judicial District of the State of Idaho, in and for Valley County.

Honorable Michael R. McLaughlin, District Judge, Presiding

Steven J. Millemann

Attorney for *Appellant*

Christopher H. Meyer

Attorney for Respondent

Filed this 26th *day of* March ,2012

FILED - COPY
MAR 8 2012
Supreme Court Court of Appeals
Started on ATS by:

ARCHIE N. BANBURY *Clerk*

By: /s/ D. PERRY *Deputy*

IN THE SUPREME COURT OF THE STATE OF IDAHO

ALPINE VILLAGE COMPANY, Plaintiff/Appellant, -vs- CITY OF MCCALL, Defendant/Respondent.	SUPREME COURT NO. 39580-2012 District Court No.CV-2010-519-C

CLERK'S RECORD ON APPEAL

Appeal from the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Valley.

Honorable Michael R. McLaughlin, District Judge
Presiding

STEVEN J. MILLEMANN
MILLEMANN, PITTENGER, MCMAHAN & PEMBERTON, LLC
P.O. BOX 1066
MCCALL, ID 83638

ATTORNEY FOR APPELLATE

CHRISTOPHER H. MEYER
GIVENS PURSLEY LLC
P. O. BOX 2720
BOISE, ID 83701

ATTORNEY FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF CONTENTS

INDEX

INDEX

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Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF VALLEY

ALPINE VILLAGE COMPANY, an Idaho Corporation, Plaintiff,	**CASE NO. CV-2010-519C**
v.	**AFFIDAVIT OF DEANNA SCHNIDER**
CITY OF MCCALL, a municipal corporation, Defendant.	

STATE OF IDAHO)
.ss
County of Valley.)

I, Deanna Schnider, having been duly sworn upon oath, depose and state as follows:

1. I make this Affidavit based on my own personal knowledge and with the understanding that it will be submitted in support of Plaintiff's Motion for Summary Judgment.

ORIGINAL

2. I am a Paralegal at the law firm Millemann, Pittenger, McMahan & Pemberton, attorney of record representing Alpine Village Company in this action.

3. True and correct copies of two spreadsheets provided by the City of McCall in Defendant's Response to Plaintiff's First Interrogatories and Requests for Production of Documents, are attached as **Exhibit 1** and **Exhibit 2** (bates no. COM001196–COM1199 and COM1203-COM1208).

4. I have taken the information on those spreadsheets and combined them in order to create one spreadsheet that identifies the following information:

a) Building Permit Number
b) Amount of Community Housing Fee Paid
c) Date Community Housing Fee Paid
d) Date Refund Request was made to City
e) Amount of Refund
f) Date Community Housing Fees Paid were Refunded

A copy of the spreadsheet I created is attached hereto as **Exhibit 3.**

5. Based on my analysis of the spreadsheets, a total of fifty-eight refund requests were made to the City of McCall and a total of $92,820.00 was refunded.

Further your affiant sayeth naught.

DATED this 7th day of October, 2011.

DEANNA SCHNIDER

SUBSCRIBED AND SWORN to before me this 7th day of October, 2011.

NOTARY PUBLIC FOR IDAHO
My Commission Expires: 12/12/2

STATE OF IDAHO
GREGORY C. PITTENGER
NOTARY

Prmt Yr	BP#	Status	Date Applied	Owner	Property Address	Type	Value	BP Fee	PC Fee	CH Fee	CH Date Pd
00	0000		01/01/00	Dummy Case-Do not delete	Dummy Property	Test	$0.00	$0.00	$0.00	$0.00	01/01/00
06	3246		04/05/06	Hugh Quist	1016 Kaitlyn Loop	SF Res	$266,850.00	$1,906.75	$1,239.39	$1,146.00	04/05/06
06	3249		04/06/06	Chad Urwin Cornerstone	243 Pinedale St	SF Res Multi-fam	$295,600.00	$2,066.25	$1,343.06	$1,337.00	04/20/06
06	3252		04/14/06	Custom Homes Cornerstone	1673 Ginney Way	Townhouse Multi-fam	$190,325.00	$1,269.63	$825.26	$668.50	04/14/06
06	3252		04/14/06	Custom Homes Cornerstone	1675 Ginney Way	Townhouse Multi-fam	$190,325.00	$1,269.62	$825.25	$668.50	04/14/06
06	3253		04/14/06	Custom Homes Cornerstone	1659 Ginney Way	Townhouse Multi-fam	$190,325.00	$1,269.63	$825.26	$668.50	04/14/06
06	3253		04/14/06	Custom Homes	1661 Ginney Way	Townhouse	$190,325.00	$1,269.62	$825.25	$668.50	04/14/06
06	3254		04/14/06	Savasta	1295 Bitterroot Drive	SF Res	$416,950.00	$2,737.25	$1,779.21	$1,623.00	04/14/06
06	3262		04/15/06	Bellard Smith Sandra & David	349 Whitetail Drive	SF Res	$1,100,000.00	$5,958.75	$3,873.19	$2,483.00	05/03/06
06	3260		05/02/06	Miller Dave & Nina	287 Rio Vista Blvd	SF Res	$219,450.00	$1,648.25	$1,071.36	$1,146.00	05/02/06
06	3263		05/02/06	Farnsworth	1018 Penstemon Place	SF Res	$404,250.00	$2,643.75	$1,718.14	$1,337.00	05/04/06
06	3264		05/05/06	Nate Hauder	1102 Alpine Street	SF Res	$245,075.00	$1,791.25	$1,164.31	$1,146.00	05/05/06
06	3265		05/05/06	Larry Hauder	1045 Potts Drive (amended)	SF Res	$245,075.00	$1,791.25	$1,164.31	$1,146.00	05/05/06
06	3266		05/05/06	Pat Aarti	708 Fir Street	SF Res	$140,000.00	$1,213.75	$788.94	$859.00	05/05/06
06	3271		05/11/06	IRMD8 LLC	126 River Ranch Rd	SF Res	$596,775.00	$3,694.50	$2,401.43	$2,483.00	05/12/06
06	3280		05/15/06	Werner Scharmach Richard & Debbie	2025 Fox Fairway Ct	SF Res	$925,000.00	$5,252.50	$3,414.13	$2,483.00	05/15/06
06	3281		05/15/06	Holsman	361 Whitetail Drive	SF Res	$798,750.00	$4,649.25	$3,022.01	$2,483.00	05/15/06
06	3294		05/30/06	Pat Tunis Holly & Kelly	1304 Louisa Ave	SF Res	$144,240.00	$1,235.75	$803.24	$1,146.00	05/30/06
06	3350		06/02/06	Wallace	716 Fir Street	SF Res	$220,000.00	$1,653.75	$1,074.94	$1,146.00	07/21/06
06	3301		06/07/06	Michael Goldman	700 & 704 Deer Forest Drive	Multi-fam Duplex	$326,000.00	$1,886.75	$1,096.39	$1,337.00	06/07/06
06	3302		06/07/06	Michael Goldman	740 Deer Forest Drive	SF Res	$219,120.00	$1,648.25	$1,071.36	$1,146.00	06/07/06
06	3303		06/07/06	Michael Goldman	736 Deer Forest Drive	SF Res	$219,120.00	$1,648.25	$1,071.36	$1,146.00	06/07/06
06	3304		06/07/06	Michael Goldman	752 Deer Forest Drive	SF Res	$219,120.00	$1,648.25	$1,071.36	$1,146.00	06/07/06
06	3305		06/07/06	Michael Goldman Carl & Nikki	Deer Forest Drive	SF Res	$326,700.00	$1,886.75	$1,096.39	$1,337.00	06/07/06
06	3310		06/09/06	Kenver	342 Whitetail Drive	SF Res	$800,757.00	$4,883.75	$3,174.44	$2,483.00	06/09/06
06	3311		06/09/06	Terry Rogers Advanced	1130 Heaven's Gate Court	SF Res	$1,000,000.00	$5,608.75	$3,645.69	$2,960.00	06/09/06
06	3324		06/23/06	Properties	1023 Potts Drive	SF Res	$302,650.00	$2,003.75	$1,302.44	$1,146.00	06/30/06
06	3334		07/05/06	Stuart Roberts Cornerstone	1348 Par Lane	SF Res Multi-fam	$355,625.00	$2,396.25	$1,557.56	$1,337.00	07/06/06
06	3335		07/05/06	Custom Homes Cornerstone	1681 Lick Creek	Townhome Multi-fam	$300,000.00	$2,093.75	$1,360.94	$668.50	07/06/06
06	3336		07/05/06	Custom Homes	1683 Lick Creek	Townhome	$300,000.00	$2,093.75	$1,360.94	$668.50	07/06/06
06	3337		07/07/06	Jim Sabatasse	1022 Fireweed Drive	SF Res	$356,025.00	$2,368.75	$1,539.69	$1,337.00	07/07/06

Exhibit 1

06	3342		07/14/06	Troy & Jennifer Summers	4605 Williams Creek Court	SF Res	$2,556,300.00	$11,054.75	$7,185.56	$2,960.00	07/14/06
06	3365		07/17/06	Frostback LLC	1409 / 1415 Mountain Meadows Drive	Multi-Fam Townhome	$664,750.00	$4,012.75	$2,606.29	$1,337.00	08/03/06
06	3347		07/18/06	Whitetail Club LLC	563 Appaloosa	SF Res	$882,000.00	$3,708.75	$2,410.69	$2,960.00	07/24/06
06	3354		07/24/06	Darick Heimgartner	1465 Bitterroot Drive	SF Res	$413,325.00	$2,715.25	$1,764.91	$1,337.00	07/25/06
06	3356		07/24/06	Anthony Gabrielli	408 Osprey View Drive	SF Res	$884,150.00	$5,580.25	$3,627.16	$2,483.00	07/24/06
06	3358		07/25/06	Mal & Molley Murphy	957 Flynn Lane	SF Res	$347,000.00	$2,352.25	$1,528.96	$1,337.00	07/25/06
06	3364		08/01/06	Duane & Jan Horning	1170 Aspen Ridge Lane	SF Res	$40,000.00	$2,643.75	$1,718.44	$1,337.00	08/01/06
06	3370		08/03/06	Jason & Roben Caufield	935 Flynn Ln	SF Res	$364,200.00	$2,445.75	$1,589.74	$1,337.00	08/03/06
06	3377		08/07/06	Jack Wetherall	1485 Majestic View Drive	SF Res	$720,000.00	$4,278.75	$2,781.18	$1,337.00	08/07/06
07	3377	BP issued	08/07/06	Jack Wetherall	1485 Majestic View Dr.	SF Res	$720,000.00	$4,278.75	$2,781.18	$1,337.00	08/07/06
06	3383		08/15/06	Jerome Tripoli	620 Lenora Street	SF Res	$450,000.00	$2,918.75	$1,878.18	$2,196.00	08/15/06
06	3388		08/15/06	Marianne Jones/Adrienne Quinn	925 Chipmunk Lane	SF Res Foundation for Modular home	$18,000.00	$293.25	$190.51	$1,337.00	08/15/06
06	3390		08/18/06	Pavel Babichenko	1325 Bitterroot Drive	SF Res	$500,000.00	$3,708.75	$2,410.69	$2,483.00	08/18/06
06	3395		08/25/06	Jon & Bridget Hubbard (extended to June, 08')	1690 Majestic View Circle	SF Res	$450,000.00	$2,918.75	$1,897.18	$1,623.00	08/25/06
06	3397		08/29/06	Evan & Janet Thomas	1100 Heaven's Gate Court	SF Res	$416,750.00	$2,643.75	$1,718.44	$1,337.00	08/29/06
06	3399		08/30/06	Michael Goldman	748 Deer Forest Drive	SF Res	$193,750.00	$1,510.75	$981.99	$1,146.00	08/30/06
06	3417		09/14/06	Tim Snooks	1034 Kaitlyn Loop	SF Res	$167,100.00	$1,362.25	$885.46	$1,146.00	09/14/06
06	3418		09/14/06	Tim Snooks	1647 Ginney Way	SF Res	$167,100.00	$1,362.25	$885.46	$1,146.00	09/14/06
06	3419		09/14/06	Tim Snooks	1020 Kaitlyn Loop	SF Res	$167,100.00	$1,362.25	$885.46	$1,146.00	09/14/06
06	3423		09/20/06	Big Timber H & D Inc.	159 Morgan Drive - River's Crossing Lot 23 Blk 11	SF Res	$220,505.00	$1,553.75	$1,074.94	$1,146.00	09/20/06
06	3426		09/21/06	Brendon Heiner Bridge	Pinedale Street Lot 24 Blk 11	SF Res	$221,725.00	$1,659.25	$1,078.51	$1,146.00	09/21/06
06	3427		09/21/06	Development	Pinedale Street	SF Res	$227,525.00	$1,147.75	$746.04	$1,146.00	09/21/06
06	3428		09/22/06	John Williams	2004 Fox Fairway Court - Whitetail	SF Res	$1,300,000.00	$5,622.75	$3,654.79	$1,623.00	09/25/06
06	3429		09/22/06	Chris Thomas Travis Higgins (Extention to June	1021 Potts Drive 325 Whitetail Dr. Lot	SF Res	$250,000.00	$1,818.75	$1,182.19	$1,623.00	09/22/06
06	3430		09/26/06	08)	40 Whitetail 377 Whitetail Dr. Lot	SF Res	$1,400,000.00	$7,008.75	$4,555.68	$1,623.00	10/13/06
06	3431		09/25/06	Travis Higgins	54 Whitetail	SF Res	$1,200,000.00	$6,308.75	$4,100.69	$1,623.00	10/13/06

Exhibit 1

		Total CH number of permits under ORD#820								Total CH paid under ORD#820	7 requests for refunds as of 5/30/08 totaling	
		56								$82,602.00	$10,218.00	
06	3446		10/16/06	Ted & Harold Lukecart	1195 Majestic View	SF Res	$385,000.00	$2,561.25	$1,664.81	$2,483.00	10/16/06	
06	3459		11/21/06	Rick Eagleston	1420 Majestic View Dr	SF Res	$550,000.00	$3,471.25	$2,256.31	$1,623.00	11/21/06	
07	3507		02/09/07	Jason Clay	308 Camp Road	SF Res	$259,950.00	$1,868.25	$1,214.36	$1,337.00	02/09/07	
07	3512		02/23/07	Larry Hausler	Lot 2 Blk 18 W. Hays Street	SF Res	$230,000.00	$1,708.75	$1,110.69	$1,146.00	02/23/07	
07	3517		03/06/07	Craig & Nicole Brown	653 Koski	SF Res	$333,100.00	$2,275.25	$1,478.91	$1,146.00	03/06/07	
07	3518		03/09/07	Joy Smith	201 Country Craftsman Loop	SF Res	$165,000.00	$1,351.25	$878.31	$1,146.00	03/09/07	
07	3519		03/09/07	Michael Lamm	1022 Kaitlyn Loop	SF Res	$287,800.00	$2,022.25	$1,314.46	$1,146.00	03/09/07	
07	3521		03/12/07	Broken Ridge Partners , LLC	31 Broken Pine Road	Condo (10 Condos based on 188,750. ea)	$1,887,500.00	$8,716.75	$5,665.89	$11,460.00	03/23/07	
07	3533	BP issued	03/21/07	Dusty Bitton	1490 Majestic View	SF Res	$400,000.00	$2,648.75	$1,721.59	$1,623.00	06/15/07	
07	3535		03/23/07	Tim & Amy Myers	1115 Heavens Gate Court	SF Res	$547,500.00	$3,457.00	$2,247.05	$1,337.00	03/23/07	
07	3560	BP issued	04/24/07	Randy Acker	1916 Balshae Drive	SF Res	$183,500.00	$1,312.75	$853.29	$1,146.00	04/25/07	
07	3562		04/27/07	Status Homes, Inc.	1695 Ginney Way	SF Res	$268,600.00	$1,917.75	$1,246.54	$1,146.00	04/27/07	
07	3563		04/27/07	Status Homes, Inc.	1007 Kaitlyn Loop	SF Res	$310,700.00	$2,148.75	$1,396.69	$1,146.00	04/27/07	
07	3568		04/30/07	Holly & Jeremy Haener	719 Deer Forest Dr.	SF Res	$354,550.00	$2,390.75	$1,553.99	$1,337.00	04/30/07	
07	3566		04/30/07	Greg & Marsha Johnson	745 Deer Forest Dr.	SF Res	$363,600.00	$2,440.25	$1,586.16	$1,337.00	04/30/07	
07	3568		05/01/07	Cornerstone Custom Homes	1677 Ginney Way	Multi-Family Townhome (one side)	$221,200.00	$1,659.25	$1,078.51	$1,146.00	05/01/07	
07	3569		05/01/07	Cornerstone Custom Homes	1679 Ginney Way	Multi-Family Townhome (one side)	$221,200.00	$1,659.25	$1,078.51	$1,146.00	05/01/07	
07	3580		05/17/07	Denise & Ken Mulle	1105 Aspen Ridge ln	SF Res	$600,000.00	$3,708.75	$2,410.68	$1,623.00	06/04/07	
07	3583	BP issued	05/21/07	Richard W.& Mary Lou Ennis	213 W. Lake St.	SF Res	$757,000.00	$4,459.25	$2,898.51	$2,483.00	07/10/07	
07	3582	BP issued	05/23/07	Bryant Forrester	325 Forest St	SF Res	$345,000.00	$2,341.25	$1,522.13	$1,337.00	09/10/07	
07	3594	BP issued	06/06/07	Cornerstone	1665 Ginney Way	Townhome s	$221,000.00	$1,659.25	$1,078.51	$1,146.00	06/06/07	
07	3596	BP issued	06/06/07	Gary and Barbara Kutlarer	934 Chipmunk Ln.	SF Res.	$200,000.00	$1,543.75	$1,003.44	$1,146.00	06/21/07	

Exhibit 1

07	3593	BP issued	06/07/07	Cornerstone	1563 Ginney Way	Townhomes	$221,000.00	$1,659.25	$1,078.51	$1,146.00	06/06/07
07	3599	BP issued	06/12/07	Steve & Beth Tarter	1310 Aspen Ridge Lane	SF Res.	$500,000.00	$3,233.75	$2,101.93	$1,337.00	07/05/07
07	3602	BP issued	06/13/07	James Bock	1042 Fireweed	SF Res.	$375,000.00	$2,506.25	$1,629.06	$1,337.00	07/03/07
07	3608	BP issued	06/20/07	Gary Christensen	1037 Fireweed Drive	SF Res.	$500,000.00	$3,708.75	$2,410.69	$1,623.00	07/06/07
07	3609	BP issued	06/20/07	Nick & Kim Hurren	702 Lick Creek Rd.	SF Res	$37,000.00	$2,022.25	$1,314.46	$1,337.00	07/16/07
07	3613	BP issued	06/25/07	Russell Vertrees	937 Conifer	SF Res	$273,400.00	$1,945.25	$1,264.41	$1,146.00	07/23/07
07	3617	BP issued	07/02/07	Brett Froemke	502 Wanda	SF Res.	$268,400.00	$2,470.88	$1,606.07	$1,146.00	07/02/07
07	3619	BP issued	07/03/07	Chris Connolly	417 Virginia Blvd.	SF Res	$197,000.00	$1,507.25	$979.71	$1,146.00	07/24/07
07	3622	BP issued	07/09/07	Eiden Properties LP	313 W. Lake	SF Res	$525,000.00	$3,252.50	$2,114.13	$1,623.00	07/23/07
07	3632	BP issued	07/23/07	McCall River Ranch	112 Headquarters Rd.	SF Res	$245,875.00	$1,791.25	$1,164.31	$1,337.00	10/11/07
07	3634	BP issued	07/24/07	Rick Griffth	109 River Ranch Rd.	SF Res	$635,000.00	$3,875.00	$2,518.75	$1,337.00	07/31/07
07	3635	BP issued	07/25/07	Phil & Nancy Brand	1558 Majestic View	SF Res	$400,000.00	$2,781.25	$1,807.81	$1,337.00	07/25/07
07	3637	BP issued	07/27/07	Stephen W. Bell	2018 Fox Fairway Court	SF Res	$1,558,000.00	$7,561.75	$4,915.14	$2,960.00	09/11/07
07	3642	BP issued	08/02/07	Carol Hilden	380 TJ Loop	SF Res	$300,000.00	$2,093.75	$1,360.94	$1,146.00	08/07/07
07	3661	BP issued PC pending	08/21/07	Anthony Cvitanich	953 Chipmunk Lane	SF Res.	$289,400.00	$2,033.25	$1,321.61	$1,146.00	09/17/07
07	3667	Extend 08	08/30/07	Larry Hullman	1440 Mountain Meadow Dr.	SF Res	$422,250.00	$2,764.75	$1,797.09	$1,337.00	08/30/07
07	3671	BP issued	08/31/07	William Thomas	650 Saari Dr.	SF Res	$211,500.00	$1,604.25	$1,042.76	$1,146.00	09/28/07
07	3686	BP issued	09/20/07	Bill Shortly	1415 Majestic View Dr.	SF Res.	$430,000.00	$2,808.75	$1,825.69	$1,337.00	11/06/07
07	3688	BP issued	09/21/07	Robin Hooper Thomas	951 Conifer	SF Res	$160,000.00	$1,323.75	$860.44	$1,146.00	09/21/07
07	3692	BP issued	09/26/07	Mawhinney ; Kristi Mitchem	653 Migratory Ridge Way	SF Res	$1,827,000.00	$7,960.75	$5,174.49	$7,161.00	11/02/07
07	3694	BP issued	09/28/07	Todd Holbrook	942 Strawberry Lane	SF Res	$249,750.00	$1,813.25	$1,178.61	$1,146.00	10/10/07
07	3702	BP issued	10/05/07	Mike & Sandra Wilkinson	269 Morgan Dr.	SF Res	$600,000.00	$3,233.75	$2,101.93	$1,623.00	10/09/07
07	3703	BP issued	10/11/07	Hot Springs Prop. LLC	1309 Hubbard	SF Res	$134,500.00	$1,180.75	$767.49	$1,146.00	10/17/07
		Total number of permits under ORD#833								11 requests Total CH for refunds as paid under ot 5/30/08-NO ORD#833	REFUNDS
		45								$77,732.00	$0.00

Exhibit 1

COM001199

407

Date	Name-fee paid by...	Mailing Address	Phone No.	Project name or address & BP#	Ordinance 820-eligible for refund	Ordinance 833-not eligible for refund ALL REQUEST ARE ELIGIBLE per Council 6/26/08	Not eligible	Date Paid	Ck#	Amount Paid	Submitted to Finance	Letter sent Request not eligible
1/16/2008	Volo, LLC	10060 W. Rolling Hills Dr.Star ID 83669	208-286-7344	Lot 24 Blk 11 (Lardo) #3426	X			9/21/2006	#2589	$1,146.00	4/25/2008	
1/16/2008	Volo, LLC	10060 W. Rolling Hills Dr.Star ID 83669	208-286-7344	Lot 23 Blk 11 (Lardo) #3427	X			9/21/2006	#2589	$1,146.00	4/25/2008	
2/20/2008	Carl Keever	1037 Lick Creek Rd.	630-4858	342 Whitetail Dr. #3310	X			8/9/2006	#2254	$2,483.00	4/28/2008	
2/22/2008	John Williams	P.O. Box 2832 McCall	630-4324	204 Fox Fairway Ct. #3428	X			9/25/2006	#125	$1,623.00	4/28/2008	
3/26/2008	Jason Clay	P.O. Box 1083 McCall	630-3647	308 Camp Rd. #3507	XXX approved 6/26/08	X		2/9/2007	#1709	$1,337.00	7/7/2008	5/2/2008
4/7/2008	Larry Hultman	Blue Canyon Custom 1225 N Autumn Wind	208-941-5474	1440 Mtn Meadow Dr #3567	XXX approved 6/26/08	X		8/30/2007	#11190	$1,337.00	7/7/2008	5/2/2008
4/23/2008	Ronda Sandmeyer	7485 W Kerry Dr Boise 83714	208-853-5483	1310 Aspen Ridge Ln. #3599	XXX approved 6/26/08	X		6/12/2007	#1798	$1,337.00	7/7/2008	5/2/2008
4/30/2008	Corbel Inc. for Rick Eagleston	1779 Woodside Rd. Redwood City CA	650-854-8008	1420 Majestic View Dr. #3489	XXX approved 6/26/08	X		11/21/2006	#1665	$1,623.00	7/9/2008	5/2/2008
5/2/2008	Jason Caufield	P.O. Box 2444 McCall	271-6397	935 Flynn Ln. #3370	X			8/3/2006	#1005	$1,337.00	5/5/2008	
5/5/2008	Sandra & David Miller	P.O. Box 1757 McCall	634-0503	287 Rio Vista Blvd. #3260	X			9/5/2006	#2175	$1,146.00	5/7/2008	
5/14/2008	Diane Darden	30589 Willow Brook Place Canyon Lake CA	951-326-5228	1535 Majestic View Dr. #1800	N/A		Mar.2005 prior to Ord.	N/A	N/A	N/A	N/A	Faxed 5/21/2008
5/14/2008	Diane Darden	30589 Willow Brook Place Canyon Lake CA	951-326-5228	1060 Cedar Lane #3066	N/A		Aug.2005 prior to Ord.	N/A	N/A	N/A	N/A	Faxed 5/21/2008
5/16/2008	David Armstrong	125 Commerce St. McCall ID 83638	634-5556	125 Commerce St#3135	N/A		Oct 2005 prior to Ord.	N/A	N/A	N/A	N/A	Faxed 5/20/2008
5/20/2008	Pinetop Builders	P.O. Box 4110, McCall	315-0090	1465 Bitterroot #3354	X			7/25/2006	#5539	$1,337.00	5/27/2008	
5/20/2008	Pinetop Builders	P.O. Box 4110, McCall	315-0090	1415 Majestic View #3686	XXX approved 6/26/08	X		11/6/2007	#3686	$1,337.00	7/7/2008	5/23/2008
5/20/2008	Pinetop Builders	P.O. Box 4110, McCall	315-0090	1490 Majestic View #3533	XXX approved 6/26/08	X		6/15/2007	#2028	$1,623.00	7/7/2008	5/23/2008
5/20/2008	Pinetop Builders	P.O. Box 4110, McCall	315-0090	1030 Meadows Rd. #3355	N/A		Impact area no fee paid	N/A	N/A	N/A	N/A	5/27/2008
5/22/2008	Richard Ennis	1947 S. Roosevelt Boise 83705		213 W. Lake Street #3583	XXX approved 6/26/08	X		7/10/2007	#3219	$2,483.00	7/7/2008	5/22/2008
6/5/2008	Ballard Smith	P.O. Box 2190 McCall	634-6419	349 Whitetail Dr. #3262	X			5/3/2006	#254	$2,483.00	6/12/2008	N/A
6/30/2007	Randy Acker	P.O. Box 3 McCall	630-4706	1916 Balshae #3560	XXX approved 6/26/08	x		4/25/2007	#5080	$1,146.00	7/7/2008	N/A
7/2/2007	James Bock	P.O. Box 2857 Boise 83701	208-440-4663	1042 Fireweed #3602	XXX approved 6/26/08	x		7/3/2007	#1022	$1,337.00	7/7/2008	N/A

Exhibit 2

Date	Name-fee paid by...	Mailing Address	Phone No.	Project name or address & BP#	Ordinance 820-eligible for refund	Ordinance 833-not eligible for refund ALL REQUEST ARE ELIGIBLE per Council 6/26/08	Not eligible	Date Paid	Ck#	Amount Paid	Submitted to Finance	Letter sent Request not eligible
7/7/2008	Ted Lukecart	P.O. Box 2335 McCall	634-9807	1195 Majestic #3446	XXX approved 6/26/08	x		10/16/2006	#1484	$2,483.00	7/8/2008	N/A
7/8/2008	Kristi Mitchem	136 Robiak Ave Hillsborough Ca 94010	415-215-8563	653 Migratory Way #3692	XXX approved 6/26/08	x		11/2/2007	#3202	$7,161.00	7/8/2008	N/A
7/14/2008	Gould Custom Builders for Max Elden	291 Ashton Lane McCall	634-9898	313 W. Lake #3622	XXX approved 6/26/08	x		7/23/2007	#10121	$1,623.00	7/15/2008	N/A
7/10/2008	Cornerstone Custom Homes, Inc.	P.O. Box 321 Nampa ID 83686	208-713-0504	1673/1675 Ginney Way #3252	XXX approved 6/26/08	x		4/14/2006	#4990	$1,337.00	7/15/2008	N/A
7/10/2008	Cornerstone Custom Homes, Inc.	P.O. Box 321 Nampa ID 83686	208-713-0504	1659/1661 Ginney Way #3253	XXX approved 6/26/08	x		4/14/2006	#4990	$1,337.00	7/15/2008	N/A
7/10/2008	Cornerstone Custom Homes, Inc.	P.O. Box 321 Nampa ID 83686	208-713-0504	1681 Ginney Way #3335	XXX approved 6/26/08	x		7/5/2006	#4794	$1,146.00	7/15/2008	N/A
7/10/2008	Cornerstone Custom Homes, Inc	P.O. Box 321 Nampa ID 83686	208-713-0504	1683 Ginney Way #3336	XXX approved 6/26/08	x		7/5/2006	#4795	$1,146.00	7/15/2008	N/A
7/10/2008	Cornerstone Custom Homes, Inc.	P.O. Box 321 Nampa ID 83686	208-713-0504	1677 Ginney Way #3568	XXX approved 6/26/08	x		5/1/2007	#4812	$1,146.00	7/15/2008	N/A
7/10/2008	Cornerstone Custom Homes, Inc.	P.O. Box 321 Nampa ID 83686	208-713-0504	1679 Ginney Way #3569	XXX approved 6/26/08	x		5/1/2007	#4812	$1,146.00	7/15/2008	N/A
7/10/2008	Cornerstone Custom Homes, Inc.	P.O. Box 321 Nampa ID 83686	208-713-0504	1563 Ginney Way #3593	XXX approved 6/26/08	x		6/6/2007	#5622	$1,146.00	7/15/2008	N/A
7/10/2008	Cornerstone Custom Homes, Inc.	P.O. Box 321 Nampa ID 83686	208-713-0504	1665 Ginney Way #3594	XXX approved 6/26/08	x		6/6/2007	#5622	$1,146.00	7/15/2008	N/A
7/15/2008	Anthony Gabrielli Everest	P.O. Box 2924 McCall	634-2409	408 Osprey View Dr. #3356	XXX approved 6/26/08	x		7/24/2006	#1641	$2,483.00	7/15/2008	N/A
7/17/2008	Construction for Travis Higgins	P.O. Box 867 Donnelly ID 83615	325-4600	325 Whitetail Dr. #3430	XXX approved 6/26/08	x		10/13/2006	#4667	$1,623.00	7/17/2008	N/A
7/17/2008	Everest Construction for Travis Higgins	P.O. Box 867 Donnelly ID 83615	325-4600	377 Whitetail Dr. #3431	XXX approved 6/26/08	x		10/13/2006	#4668	$1,623.00	7/17/2008	N/A
7/21/2008	Joy Smith	P.O. Box 987 McCall	315-3732	201 Country Craftsman Loop #3518	XXX approved 6/26/08	x		3/9/2007	#1128	$1,148.00	7/21/2008	N/A
7/25/2008	Troy Summers	518 E. Fujil Drive Nampa 83686	466-3312	4605 Williams Creek #3342	XXX approved 6/26/08	x		14-Jul	#4660	$2,960.00	7/29/2008	N/A
8/12/2008	Harvey Meyer for Russell Vertrees	P.O. Box 829 McCall	630-3894	937 Conifer # 3613	XXX approved 6/26/08	x		7/23/2007	#2904	$1,148.00	8/13/2008	N/A

Exhibit 2

COM001204

409

Date	Name-fee paid by...	Mailing Address	Phone No.	Project name or address & BP#	Ordinance 820-eligible for refund	Ordinance 833-not eligible for refund ALL REQUEST ARE ELIGIBLE per Council 6/26/08	Not eligible	Date Paid	Ck#	Amount Paid	Submitted to Finance	Letter sent Request not eligible
8/13/2008	Idaho Mountain Retreats for Todd Holbrook	12934 Ginger Creek Boise ID 83713	941-1709	942 Strawberry Lane #3694	XXX approved 6/26/08	x		10/10/2007	#1418	$1,146.00	8/14/2008	N/A
8/19/2008	Rick Griffith	747 Morning Sun Drive Twin Falls ID 83301	208-724-6008	109 River Ranch Rd #3634	XXX approved 6/26/08	x		7/31/2007	#8272	$1,337.00	8/19/2008	N/A
8/20/2008	Larry Hauder	1704 N. 25th St. Boise ID 83702	208-830-4330	Lot 2 Block 18 W. Hays St. #3512	XXX approved 6/26/08	x		2/23/2007	#1484	$1,146.00	8/25/2008	N/A
8/20/2008	Larry Hauder	1704 N. 25th St. Boise ID 83702	208-830-4330	1045 Potts Dr #3265	XXX approved 6/26/08	x		5/5/2006	#1404	$1,146.00	8/25/2008	N/A
8/22/2008	Sandra Wilkerson	8351 Turnberry Cr. Huntington Beach CA 92648	626-327-8888	269 Morgan Drive #3702	XXX approved 6/26/08	x		10/9/2007	#1025	$1,623.00	8/25/2008	N/A
9/10/2008	Werner Scharmack	P.O. Box 1517 McCall ID 83638	208-630-8874	2025 Fox Fairway Court #3280	XXX approved 6/26/08	x		5/15/2006	#8108	$2,483.00	9/10/2008	N/A
10/1/2008	Debbie & Rich Holsman	P.O. Box 2564 McCall ID 83638	619-890-4538	361 Whitetail Drive #3281	XXX approved 6/26/08	x		5/15/2006	#403	$2,483.00	10/2/2008	N/A
10/1/2008	Nate Hauder	1810 W. State St. Boise ID 83702	208-514-8494	1102 Alpine St #3264	XXX approved 6/26/08	x		5/5/2006	#1018	$1,146.00	10/2/2008	N/A
10/7/2008	LAMVEY LLC for Hugh & Barbara Quist	2914 Grover Street Boise ID 83705	208-866-3701	1016 Kaitlyn Loop #3246	XXX approved 6/26/08	x		4/5/2006	#257	$1,146.00	10/8/2008	N/A
				Ordinance #820 Total of 19 requests for refunds as of 10/24/08 totaling $31,514.00 $82,602.00 Total Community Housing Fees Paid $31,514.00 Refunded $51,088.00 Balance		Ordinance #833 Moratorium Total of 24 requests for refunds as of 10/24/08 totaling $40,201.00 $77,732.00 Total Community Housing Fees Paid $40,201.00 Refunded $37,531.00 Balance						
10/23/2008	C&C Capital LLC	827 S. Bridgeway Place #110 Eagle ID 83616	208-323-6600	Lot 11 Blk 20 Dawson Ave #3086	N/A		no fee paid	N/A	N/A	N/A	N/A	11/3/2008
10/23/2008	C&C Capital LLC	827 S. Bridgeway Place #110 Eagle ID 83616	208-323-6600	Lot 12 Blk 20 Dawson Ave #3087	N/A	Fee paid was for building permit ranking	X	N/A	N/A	N/A	N/A	11/3/2008
10/23/2008	C&C Capital LLC	827 S. Bridgeway Place #110 Eagle ID 83616	208-323-6600	Lot 13 Blk 20 Dawson Ave #3088	N/A	Fee paid was for building permit ranking	X	N/A	N/A	N/A	N/A	11/3/2008

Exhibit 2

COM001205

410

Date	Name-fee paid by...	Mailing Address	Phone No.	Project name or address & BP#	Ordinance 820-eligible for refund	Ordinance 833-not eligible for refund ALL REQUEST ARE ELIGIBLE per Council 6/26/08	Not eligible	Data Paid	Ck#	Amount Paid	Submitted to Finance	*Letter sent Request not eligible*
10/23/2008	C&C Capital LLC	827 S. Bridgeway Place #110 Eagle ID 83616	208-323-6600	Lot 11 Blk 21 Dawson Ave #3089	N/A	Fee paid was for building permit ranking	X	N/A	N/A	N/A	N/A	11/3/2008
10/23/2008	C&C Capital LLC	827 S. Bridgeway Place #110 Eagle ID 83616	208-323-6600	Lot 12 Blk 21 Dawson Ave #3090	N/A	Fee paid was for building permit ranking	X	N/A	N/A	N/A	N/A	11/3/2008
10/23/2008	C&C Capital LLC	827 S. Bridgeway Place #110 Eagle ID 83616	208-323-6600	Lot 13 Blk 21 Dawson Ave #3091	N/A	Fee paid was for building permit ranking	X	N/A	N/A	N/A	N/A	11/3/2008
10/23/2008	C&C Capital LLC	827 S. Bridgeway Place #110 Eagle ID 83616	208-323-6600	Lot 14 Blk 21 Dawson Ave #3092	N/A	Fee paid was for building permit ranking	X	N/A	N/A	N/A	N/A	11/3/2008
10/23/2008	C&C Capital LLC	827 S. Bridgeway Place #110 Eagle ID 83616	208-323-6600	Lot 15 Blk 21 Dawson Ave #3093	N/A	Fee paid was for building permit ranking	X	N/A	N/A	N/A	N/A	11/3/2008
10/23/2008	C&C Capital LLC	827 S. Bridgeway Place #110 Eagle ID 83616	208-323-6600	Lot 16 Blk 21 Dawson Ave #3094	N/A	Fee paid was for building permit ranking	X	N/A	N/A	N/A	N/A	11/3/2008
10/23/2008	C&C Capital LLC	827 S. Bridgeway Place #110 Eagle ID 83616	208-323-6600	Lot 17 Blk 21 Dawson Ave #3095	N/A	Fee paid was for building permit ranking	X	N/A	N/A	N/A	N/A	11/3/2008
10/23/2008	C&C Capital LLC	827 S. Bridgeway Place #110 Eagle ID 83616	208-323-6600	Lot 18 Blk 21 Dawson Ave #3096	N/A	Fee paid was for building permit ranking	X	N/A	N/A	N/A	N/A	11/3/2008
10/23/2008	C&C Capital LLC	827 S. Bridgeway Place #110 Eagle ID 83616	208-323-6600	Lot 19 Blk 21 Dawson Ave #3097	N/A	Fee paid was for building permit ranking	X	N/A	N/A	N/A	N/A	11/3/2008
10/23/2008	C&C Capital LLC	827 S. Bridgeway Place #110 Eagle ID 83616	208-323-6600	Lot 20 Blk 21 Dawson Ave #3098	N/A	Fee paid was for building permit ranking	X	N/A	N/A	N/A	N/A	11/3/2008
1/16/2009	Tim & Amy Myers	P.O. Box 2466 McCall ID 83638	208-315-5166	1115 Heavens Gate Court #3535		X		3/23/2007	2017	$1,337.00	1/20/2009	
				$92,602.00 Total Community Housing Fees Paid $31,514.00 Refunded $51,088.00 Balance		$77,732.00 Total Community Housing Fees Paid $41,538.00 Refunded $36,194.00 Balance						
10/3/2009	Jerome Tripoli	P.O. Box 596 Whitefish MT 59937	406-250-5717	620 Lenora Street #3383		x		8/15/2008	2512	$2,196.00	10/5/2009	N/A
				as of 10/03/09 $82,602.00 Total Community Housing Fees Paid		as of 10/03/09 $77,732.00 Total Community Housing Fees Paid						

Exhibit 2

COM001206

Date	Name-fee paid by..	Mailing Address	Phone No.	Project name or address & BP#	Ordinance 820-eligible for refund	Ordinance 833-not eligible for refund ALL REQUEST ARE ELIGIBLE per Council 6/26/08	Not eligible	Date Paid	Ck#	Amount Paid	Submitted to Finance	Letter sent Request not eligible		
				$31,514.00 Refunded		$43,734.00 Refunded								
				$51,088.00 Balance		$33,998.00 Balance								
11/10/2009	Barbara Kutterer	934 Chipmunk Lane McCall ID 83638	208-634-0060	934 Chipmunk Lane #3596		x		6/21/2007	1192	$1,146.00	11/10/2009			
11/13/2009	David Farnsworth	Jorgenson Construction P.O. Box 1711 McCall	208-547-4804	1018 Pensteman Place #3253		X		5/4/2006	10683	$1,337.00	11/16/2009	N/A		
11/16/2009	Patricia Luginbill	2900 E. Parkriver Dr Boise ID 83706	208-867-0052	1270 Aspen Ridge Lane #1807	N/A	N/A	Jan.2005 prior to Ord.	N/A	N/A	No fee paid	N/A	Called Ms. Luginbill 11-16-09		
11/17/2009	Dave Carter	P.O. Box 816 McCall	315-2472	1309 Hubbard		X		10/17/2009	273	$1,146.00	11/17/2009	N/A		
11/19/2009	Nicole Brown	7524 S. Locust Grove Meridian ID 83642	208-860-1010	553 Koski #3517		X		3/6/2007	#1178	$1,146.00	11/19/2009	N/A		
11/30/2009	Greg Johnson	3670 E. Trail Bluff Lane Boise ID 83716	208-343-3959	745 Deer Forest Drive #3568		X		4/30/2007	3512	$1,337.00	12/1/2009	N/A		
12/3/2009	Holly Haener	423 E. Carter St. Boise 83706	208-871-5289	719 Deer Forest Drive #3565		X		4/30/2007	3220	$1,337.00	12/4/2009	N/A		
12/14/2009	Bryant Forrester	823 W. Braemere Rd Boise ID 83702	208-866-7551	325 Forest Street #3582		X		9/10/2007	3230	$1,337.00	12/14/2009	N/A		
12/21/2009	IRMD8 LLC	7250 Redwood Blvd Suite 218 Novato CA 94945	415-898-4802	126 River Ranch Road #3271		X		5/11/2006	92	$2,483.00	12/21/2009	N/A		
12/21/2009	McCall River Ranch	7250 Redwood Blvd Suite 218 Novato CA 94945	415-898-4802	101 Headquarters Rd. #3632		X		10/11/2007	3304	$1,337.00	12/21/2009	N/A	fees from voided BP #3338 & #3357 credited to BP#3632	
12/29/2009	Michael Goldman	275 W. Parliament Boise ID 83706-4300	208-283-1415	748 Deer Forest Dr. #3399		X		8/30/2006	2009	$1,146.00	12/29/2009	N/A		
12/29/2009	Michael Goldman	275 W. Parliament Boise ID 83706-4300	208-283-1415	740 Deer Forest Dr. #3302		X		6/7/2006	3788	$1,146.00	12/29/2009	N/A		
12/29/2009	Michael Goldman	275 W. Parliament Boise ID 83706-4300	208-283-1415	752 Deer Forest Dr. #3304		X		6/7/2006	3788	$1,146.00	12/29/2009	N/A		
12/29/2009	Michael Goldman	275 W. Parliament Boise ID 83706-4300	208-283-1415	700 & 704 Deer Forest Dr. (duplex) #3301		X		6/7/2006	3788	$1,337.00	12/29/2009	N/A		
12/31/2009	Volo LLC	P.O. Box 2150 Eagle, ID 83616	208-570-8201	1348 Par Lane #3334		X		7/5/2006	2265	$1,337.00	1/4/2010	N/A	DR fees of $1,286.17 deducted	refund $50.
12/31/2009	Volo LLC	P.O. Box 2150 Eagle, ID 83616	208-570-8201	Pinedale Street #3426			refunded 04/25/08					1/7/2010		
12/31/2009	Volo LLC	P.O. Box 2150 Eagle, ID 83616	208-570-8201	Pinedale Street #3427			refunded 04/25/08					1/7/2010		

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12/31/2009	Volo LLC	P.O. Box 2150 Eagle, ID 83616	208-570-8201	#3086, #3087, #3088, #3034, #3035, #3036, #3037, #3038			X					1/7/2010	prior to Ordinances

Exhibit 2

Exhibit 3

BP #	CH Fee Paid	Date CH Fee Paid	Date Refund Request	Amount Refund	Date Refunded
3246	$ 1,146.00	4/5/2006	10/7/2008	$ 1,146.00	10/8/2008
3249	$ 1,337.00	4/20/2006			
3252	$ 1,337.00	4/14/2006	7/10/2008	$ 1,337.00	7/15/2008
3253	$ 1,337.00	4/14/2006	7/10/2008	$ 1,337.00	7/15/2008
3254	$ 1,623.00	4/14/2006			
3260	$ 1,146.00	5/2/2006	5/5/2008	$ 1,146.00	5/7/2008
3262	$ 2,483.00	5/3/2006	6/5/2008	$ 2,483.00	6/12/2008
3263	$ 1,337.00	5/4/2006	11/13/2009	$ 1,337.00	11/16/2009
3264	$ 1,146.00	5/5/2006	10/1/2008	$ 1,146.00	10/2/2008
3265	$ 1,146.00	5/5/2006	8/20/2008	$ 1,146.00	8/25/2008
3266	$ 859.00	5/5/2006			
3271	$ 2,483.00	5/12/2006	12/21/2009	$ 2,483.00	12/21/2009
3280	$ 2,483.00	5/15/2006	9/10/2008	$ 2,483.00	9/10/2008
3281	$ 2,483.00	5/15/2006	10/1/2008	$ 2,483.00	10/2/2008
3294	$ 1,146.00	5/30/2006			
3301	$ 1,337.00	6/7/2006	12/29/2009	$ 1,337.00	12/29/2009
3302	$ 1,146.00	6/7/2006	12/29/2009	$ 1,146.00	12/29/2009
3303	$ 1,146.00	6/7/2006			
3304	$ 1,146.00	6/7/2006	12/29/2009	$ 1,146.00	12/29/2009
3305	$ 1,337.00	6/7/2006			
3310	$ 2,483.00	6/9/2006	2/20/2008	$ 2,483.00	4/28/2008
3311	$ 2,960.00	6/9/2006			
3324	$ 1,146.00	6/30/2006			
3334	$ 1,337.00	7/6/2006	12/31/2009	$ 1,337.00	1/4/2010
3335	$ 668.50	7/5/2006	7/10/2008	$ 1,146.00	7/15/2008
3336	$ 668.50	7/6/2006	7/10/2008	$ 1,146.00	7/15/2008
3337	$ 1,337.00	7/7/2006			
3342	$ 2,960.00	7/14/2006	7/25/2008	$ 2,960.00	7/29/2008
3347	$ 2,960.00	7/24/2006			
3350	$ 1,146.00	7/21/2006			
3354	$ 1,337.00	7/25/2006	5/20/2008	$ 1,337.00	5/27/2008
3356	$ 2,483.00	7/24/2006	7/15/2008	$ 2,483.00	7/15/2008
3358	$ 1,337.00	7/25/2006			
3364	$ 1,337.00	8/1/2006			
3365	$ 1,337.00	8/3/2006			
3370	$ 1,337.00	8/3/2006	5/2/2008	$ 1,337.00	5/5/2008
3377	$ 1,337.00	8/7/2006			
3383	$ 2,196.00	8/15/2006	10/3/2009	$ 2,196.00	10/5/2009
3388	$ 1,337.00	8/15/2006			
3390	$ 2,483.00	8/18/2006			
3395	$ 1,623.00	8/25/2006			
3397	$ 1,337.00	8/29/2006			
3399	$ 1,146.00	8/30/2006	12/29/2009	$ 1,146.00	12/29/2009
3417	$ 1,146.00	9/14/2006			
3418	$ 1,146.00	9/14/2006			
3419	$ 1,146.00	9/14/2006			

Exhibit 3

BP #	CH Fee Paid	Date CH Fee Paid	Date Refund Request	Amount Refund	Date Refunded
3423	$ 1,146.00	9/20/2006			
3426	$ 1,146.00	9/21/2006	1/16/2008	$ 1,146.00	4/25/2008
3427	$ 1,146.00	9/21/2006	1/16/2008	$ 1,146.00	4/25/2008
3428	$ 1,623.00	9/25/2006	2/22/2008	$ 1,623.00	4/28/2008
3429	$ 1,623.00	9/22/2006			
3430	$ 1,623.00	10/13/2006	7/17/2008	$ 1,623.00	7/17/2008
3431	$ 1,623.00	10/13/2006	7/17/2008	$ 1,623.00	7/17/2008
3446	$ 2,483.00	10/16/2006	7/7/2008	$ 2,483.00	7/8/2008
3469	$ 1,623.00	11/21/2006	4/30/2008	$ 1,623.00	7/9/2008
3507	$ 1,337.00	2/9/2007	3/26/2008	$ 1,337.00	7/7/2008
3512	$ 1,146.00	2/23/2007	8/20/2008	$ 1,146.00	8/25/2008
3517	$ 1,146.00	3/6/2007	11/19/2009	$ 1,146.00	11/19/2009
3518	$ 1,146.00	3/9/2007	7/21/2008	$ 1,146.00	7/21/2008
3519	$ 1,146.00	3/9/2007			
3521	$ 11,460.00	3/23/2007			
3533	$ 1,623.00	6/15/2007	5/20/2008	$ 1,623.00	7/7/2008
3535	$ 1,337.00	3/23/2007	1/16/2009	$ 1,337.00	1/20/2009
3560	$ 1,146.00	4/25/2007	6/30/2007	$ 1,146.00	7/7/2008
3562	$ 1,146.00	4/27/2007			
3563	$ 1,146.00	4/27/2007			
3565	$ 1,337.00	4/30/2007	12/3/2009	$ 1,337.00	12/4/2009
3566	$ 1,337.00	4/30/2007	11/30/2009	$ 1,337.00	12/1/2009
3568	$ 1,146.00	5/1/2007	7/10/2008	$ 1,146.00	7/15/2008
3569	$ 1,146.00	5/1/2007	7/10/2008	$ 1,146.00	7/15/2008
3580	$ 1,623.00	6/4/2007			
3582	$ 1,337.00	9/10/2007	12/14/2009	$ 1,337.00	12/14/2009
3583	$ 2,483.00	7/10/2007	5/22/2008	$ 2,483.00	7/7/2008
3593	$ 1,146.00	6/6/2007	7/10/2008	$ 1,146.00	7/15/2008
3594	$ 1,146.00	6/6/2007	7/10/2008	$ 1,146.00	7/15/2008
3596	$ 1,146.00	6/21/2007	11/10/2009	$ 1,146.00	11/10/2009
3599	$ 1,337.00	7/5/2007	4/23/2008	$ 1,337.00	7/7/2008
3602	$ 1,337.00	7/3/2007	7/2/2007	$ 1,337.00	7/7/2008
3608	$ 1,623.00	7/6/2007			
3609	$ 1,337.00	7/16/2007			
3613	$ 1,146.00	7/23/2007	8/12/2008	$ 1,146.00	8/13/2008
3617	$ 1,146.00	7/2/2007			
3619	$ 1,146.00	7/24/2007			
3622	$ 1,623.00	7/23/2007	7/14/2008	$ 1,623.00	7/15/2008
3632	$ 1,337.00	10/11/2007	12/21/2009	$ 1,337.00	12/21/2009
3634	$ 1,337.00	7/31/2007	8/19/2008	$ 1,337.00	8/19/2008
3635	$ 1,337.00	7/25/2007			
3637	$ 2,960.00	9/11/2007			
3642	$ 1,146.00	8/7/2007			
3661	$ 1,146.00	9/17/2007			
3667	$ 1,337.00	8/30/2007	4/7/2008	$ 1,337.00	7/7/2008
3671	$ 1,146.00	9/28/2007			

Exhibit 3

BP #	CH Fee Paid	Date CH Fee Paid	Date Refund Request	Amount Refund	Date Refunded
3686	$ 1,337.00	11/6/2007	5/20/2008	$ 1,337.00	7/7/2008
3688	$ 1,146.00	9/21/2007			
3692	$ 7,161.00	11/2/2007	7/8/2008	$ 7,161.00	7/8/2008
3694	$ 1,146.00	10/10/2007	8/13/2008	$ 1,146.00	8/14/2008
3702	$ 1,623.00	10/9/2007	8/22/2008	$ 1,623.00	8/25/2008
3703	$ 1,146.00	10/17/2007			

ARCHIE N. BANBURY, CLERK
By _____ Deputy
OCT 25 2011
Case No. _____ Inst. No. _____
Filed _____ A.M. 4:54 P.M.

Christopher H. Meyer, ISB #4461
Martin C. Hendrickson, ISB #5876
GIVENS PURSLEY LLP
601 West Bannock Street
P.O. Box 2720
Boise, Idaho 83701-2720
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Attorneys for Defendant City of McCall

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF VALLEY

ALPINE VILLAGE COMPANY, an Idaho corporation, Plaintiff, vs. CITY OF McCALL, a municipal corporation, Defendant.	Case No. CV-2010-519C **AFFIDAVIT OF WILLIAM F. NICHOLS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

STATE OF IDAHO)
)ss.
County of Canyon)

I, WILLIAM F. NICHOLS, being first duly sworn, depose and say:

1. I am a shareholder in the law firm of White, Peterson, Gigray, Rossman, Nye & Nichols, P.A.

2. I serve as counsel to the City of McCall. I have served in this capacity since August, 2005.

3. The statements in this Affidavit are based upon my personal knowledge or upon information contained in the City's official records that set forth the City's regularly conducted and regularly recorded activities or both.

4. I am familiar with the land use applications filed by Alpine Village in 2006, as well as the Development Agreement associated with that project, and the different Amendments to the same.

5. The Development Agreement was executed by the parties on December 13, 2007. That Development Agreement noted pending litigation challenging Ordinances 819 and 820.

6. The Development Agreement provided that in the event those ordinances were declared unconstitutional: "The Plan will be reviewed and modified, as necessary, to comply with the final disposition of the litigation as to any Community Housing Units which have not been sold prior to the final disposition of the litigation."

7. On February 19, 2008, the District Court declared Ordinances 819 and 820 to be unconstitutional.

8. Shortly thereafter, on April 26, 2008, I was copied on an email from Steven Millemann, who was and is counsel to Alpine Village, to Lindley Kirkpatrick, who was and is McCall's City Manager. A true and correct copy of the email is attached hereto as Exhibit A.

9. The April 26, 2008 email stated: "I am assuming that, given the Mountain Central Board of Realtors Decision and the subsequent repeal of Ordinance No. 819, the City is prepared to release Alpine Village from its Community Housing Plan. Toward that end, I have attached a 'First Amendment to Development Agreement', which does so. Please review the

Amendment and let me know if it is acceptable. I will then secure my client's signature and return it to you for approval and execution by the Council. For your reference, I have also attached the current Development Agreement which, at Article VII, addresses this issue. Thanks."

10. A true and correct copy of the referenced draft First Amendment to Development Agreement is attached hereto as Exhibit B.

11. The amendment to the Development Agreement proposed by Alpine Village stated in relevant part: "Article VII of the Agreement shall be deleted in its entirety and Alpine Village shall be and hereby is released from any requirement to provide Community Housing for or related to the PUD. Exhibit 'B' to the Agreement is deleted in its entirety."

12. Ultimately, the City agreed to the operative language quoted above.

13. The above-described correspondence documents that Alpine Village expected and requested to be released from the restrictive language contained in the initial Development Agreement, but that it did not express any expectation nor make any request for any further relief. Specifically, Alpine Village did not assert that it had suffered any damages. Nor did Alpine Village demand or request compensation for any damage until submitting its demand letter and filing this lawsuit in 2010.

14. This correspondence, and my description above, is consistent with my recollection of the events during this time period. I recall no other communications with Alpine Village or any other person or entity that are inconsistent with the conclusions expressed in paragraph 13 above.

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

DATED this 25th day of October, 2011.

William F. Nichols

SUBSCRIBED and SWORN to before me this 25th day of October, 2011.

DONNA M. MacLEAN NOTARY PUBLIC STATE OF IDAHO

Notary Public for Idaho
Residing at Nampa
Commission expires: April 13, 2012

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 25th day of October, 2011, the foregoing was filed, served, and copied as follows:

DOCUMENT FILED:

Fourth Judicial District Court Attn: Archie N. Banbury, Clerk Valley County Courthouse 219 Main Street Cascade, ID 83611 Facsimile: 208-382-7107	☐ ☐ ☐ ☒ ☐	U. S. Mail Hand Delivered Overnight Mail Facsimile E-mail

SERVICE COPIES TO:

Steven J. Millemann, Esq. Gregory C. Pittenger, Esq. Millemann, Pittenger, McMahan & Pemberton, LLP 706 North First Street Post Office Box 1066 McCall, ID 83638	☒ ☐ ☐ ☐ ☒	U. S. Mail Hand Delivered Overnight Mail Facsimile E-mail

COURTESY COPIES TO:

Honorable Michael R. McLaughlin District Judge Ada County Courthouse 200 W. Front St. Boise, ID 83702	☒ ☐ ☐	U. S. Mail Hand Delivered Overnight Mail
Jason Gray Law Clerk to Judge Michael McLaughlin Fourth Judicial District Court Ada County Courthouse 200 W. Front Street Boise, ID 83702 Email: jmgray@adaweb.net	☐ ☐ ☐ ☒	U. S. Mail Hand Delivered Overnight Mail E-mail

Christopher H. Meyer

Christopher H Meyer

From: William F.Nichols [wfn@whitepeterson.com]
Sent: Thursday, October 13, 2011 2:30 PM
To: ChrisMeyer@; mgroenevelt@
Subject: FWD: Alpine Village Community Housing
Attachments: Developm.pdf; FirstAme.doc

Here is an email I received from Steve Millemann after the appeal time ran on the MCBR decision.

William F. Nichols
Admitted to practice in Idaho and Oregon
White, Peterson, Gigray, Rossman, Nye & Nichols, P.A.
Attorneys at Law
5700 East Franklin, Suite 200
Nampa, Idaho 83687
(208) 466-9272
Fax (208) 466-4405
E-Mail: wfn@whitepeterson.com

----- Original Message -----
From: Steve Millemann
Received: 04/26/2008 04:15 PM
To: lkirkpatrick@mccall.id.us
Cc: wfn@WHITEPETERSON.com, michael@rmhcompany.com, msdavid1@gmail.com
Subject: Alpine Village Community Housing

Lindley,
I am assuming that, given the Mountain Central Board of Realtors Decision and the subsequent repeal of Ordinance No. 819, the City is prepared to release Alpine Village from its Community Housing Plan. Toward that end, I have attached a "First Amendment to Development Agreement", which does so. Please review the Amendment and let me know if it is acceptable. I will then secure my client's signature and return it to you for approval and execution by the Council. For your reference, I have also attached the current Development Agreement which, at Article VII, addresses this issue. Thanks.

Steven J. Millemann
Millemann Pittenger McMahan & Pemberton LLP
P. O. Box 1066
706 N. 1st Street
McCall, ID 83638
Office: (208) 634-7641
Fax: (208) 634-4516
Email:
Steven J. Millemann: sjm@mpmplaw.com
Gregory C. Pittenger: gcp@mpmplaw.com
Brian L. McMahan: blm@mpmplaw.com
Amy N. Pemberton: amy@mpmplaw.com
Merideth C. Arnold: marnold@mpmplaw.com
Deanna Schnider: deanna@mpmplaw.com
Debra Martens: debra@mpmplaw.com
Maria McConnell: maria@mpmplaw.com
Rashelle Troupe: rtroupe@mpmplaw.com

EXHIBIT A

Recording Requested By and
When Recorded Return to:

City Clerk
City of McCall
216 East Park Street
McCall, Idaho 83638

For Recording Purposes Do
Not Write Above This Line

FIRST AMENDMENT TO DEVELOPMENT AGREEMENT
ALPINE VILLAGE PLANNED UNIT DEVELOPMENT

This First Amendment to Development Agreement (the "**First Amendment**") is entered into effective this ___ day of _____, 2008, by and between the City of McCall, a municipal corporation of the State of Idaho, hereinafter referred to as the "**City**", and Alpine Village Company, hereinafter referred to as "**Alpine Village**", whose address is 1101 W. River Street, Suite 300, Boise, Idaho, 83702, and who is the owner of the Alpine Village Planned Unit Development (the "**PUD**"), as the same is platted of record with Valley County, Idaho.

WHEREAS, the City and Alpine Village entered into that certain Development Agreement, dated December 13, 2007, which was filed of record with the Office of Recorder of Valley County, Idaho on January 28, 2008, as Instrument No. 328801 (the "**Agreement**").

WHEREAS, the Agreement included a Community Housing Plan and contained provisions requiring Alpine Village to provide Community Housing pursuant to McCall City Ordinance No. 819 (the "**Ordinance**").

WHEREAS, the Ordinance has been declared void by means of that certain Memorandum Decision and Order Granting Plaintiff's Motion for Summary Judgment, which was rendered by the District Court of the Fourth Judicial District of the State of Idaho in Valley County Case No. CV 2006-490-C.

WHEREAS, the Ordinance has been repealed by the City.

WHEREAS, the parties have agreed that the Agreement should be amended to eliminate the Community Housing Plan and any requirements that Alpine Village provide Community Housing Units.

WHEREFORE, the City of McCall and the Alpine Village do agree to amend and modify the Agreement, as follows:

1. **Community Housing.**

   Article VII of the Agreement shall be deleted in its entirety and Alpine Village shall be and hereby is released from any requirement to provided Community Housing for or related to the PUD. Exhibit "B" to the Agreement is deleted in its entirety.

2. **Continuing Effect of the Agreement.**

   Except as expressly modified by the terms of this First Amendment, the Agreement shall remain fully in force and binding on the parties according to its terms.

3. **Miscellaneous.**

   After its execution, this First Amendment shall be recorded in the office of the Valley County Recorder, at the expense of Alpine Village. Each commitment and covenant contained in this First Amendment shall constitute a burden on, shall be appurtenant to, and shall run with the PUD Property. This First Amendment shall be binding on the City and Alpine Village and their respective heirs, administrators, executors, agents, legal representatives, successors and assigns.

IN WITNESS WHEREOF, the parties have hereunto caused this First Amendment to be executed, effective on the day and year first above written.

ALPINE VILLAGE COMPANY

By: _____
Michael B. Hormaechea, President

CITY OF MCCALL

By: _____
Norbert Kulesza, Mayor

ATTEST:

By: _____
Brenna Chaloupka, Acting City Clerk

STATE OF IDAHO,)
(ss.
County of Valley.)

On this _____ day of _____, 2008, before me, _____, a Notary Public in and for said State, personally appeared _____ known or identified to me to be the **Mayor of the City of McCall,** who executed the said instrument, and acknowledged to me that said municipality executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

_____
NOTARY PUBLIC FOR IDAHO
My Commission Expires: _____

STATE OF IDAHO,)
(ss.
County of Valley.)

On this _____ day of _____, 2008, before me, _____, a Notary Public in and for said State, personally appeared _____, known or identified to me to be the **Acting City Clerk of the City of McCall,** who executed the said instrument, and acknowledged to me that said municipality executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

_____
NOTARY PUBLIC FOR IDAHO
My Commission Expires: _____

STATE OF IDAHO,)
(ss
County of Valley.)

On this _____ day of _____, 2008, before me, _____, a Notary Public in and for said State, personally appeared **Michael B. Hormaechea**, President of **ALPINE VILLAGE COMPANY**, known or identified to me to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same for and on behalf of said Limited Liability Company.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

_____
NOTARY PUBLIC FOR IDAHO
My Commission Expires: _____

Christopher H. Meyer [ISB No. 4461]
Martin C. Hendrickson [ISB No. 5876]
GIVENS PURSLEY LLP
601 West Bannock Street
P.O. Box 2720
Boise, Idaho 83701-2720
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Fax: (208) 388-1300
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mch@givenspursley.com
www.givenspursley.com

Attorneys for Defendant City of McCall

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

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

ALPINE VILLAGE COMPANY, an Idaho corporation,

Plaintiff,

v.

CITY OF McCALL, a municipal corporation,

Defendant.

Case No. CV-2010-519C

CITY'S REPLY BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND RESPONSE BRIEF IN OPPOSITION TO ALPINE'S MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Regulations

INTRODUCTION

This combined brief contains Defendant City of McCall's ("City") reply in support of *City's Motion for Summary Judgment* filed on September 16, 2011 as well as its response to *Plaintiff's Motion for Summary Judgment* dated October 7, 2011. This brief follows *City's Opening Brief in Support of Motion for Summary Judgment* dated September 16, 2011 *("City's Opening Brief")* and responds to Alpine's *Memorandum in Support of Alpine's Motion for Summary Judgment and in Opposition to Defendant's Motion for Summary Judgment* dated October 7, 2011 *("Alpine's Opening Brief")*.

ARGUMENT

I. ALPINE STILL HOLDS THE PROPERTY AND HAS NOT PLED A TEMPORARY TAKING.

It its opening brief, the City began by noting that Alpine still owns the subject property and that all restrictions relating to community housing have been removed. *City's Opening Brief* at 13. Alpine responds by raising the possibility of there being a temporary taking. *Alpine's Opening Brief* at 17. Alpine has not pled a temporary taking claim and should not be allowed to pursue it now.

As for the merits, the cases cited by Alpine are out of date. In recent years, the courts have largely eviscerated this theory. For example, the Idaho Supreme Court held in 2004:

> As noted above, the destruction of access and deprivation of the use of property may be compensable, but the mere interruption of the use of one's property, as it is less than a permanent (complete) deprivation, does not mandate compensation. This Idaho authority relied upon by the district court has since been overruled by the Supreme Court's interpretation of the scope of a taking.

Moon v. North Idaho Farmers Ass'n, 140 Idaho 536, 542, 96 P.3d 637, 643 (2004).[1]

But none of this matters. Temporary takings are subject to the same notice requirements, statutes of limitations, and other defenses applicable to any other taking claim. Thus, even if Alpine were allowed to expand this lawsuit to include a temporary taking, the claim is barred for all the same reasons discussed below.

II. ALPINE'S STATE CLAIM IS BARRED FOR THREE REASONS.

A. Alpine failed to provide notice within 180 days.

It is undisputed that Alpine failed to file timely notice under the Idaho Tort Claims Act ("ITCA"), Idaho Code §§ 6-901 to 6-929. In the case of litigation against a city, this requirement is applicable not just to tort claims but to all damage claims. Idaho Code § 50-219. This includes claims for takings/inverse condemnation. *BHA Investments, Inc. v. City of Boise* ("*BHA II*"), 141 Idaho 168, 174-76, 108 P.3d 315, 321-23 (2004).

(1) Compliance with the 180-day requirement is not optional.

Alpine responds that, while Idaho Code § 50-219 requires it to file a notice of claim within 180 days, there are no consequences for its failure to do so. In other words, the notice requirement is optional. According to Alpine, section 50-219 applies only to § 6-906 (the 180-day notice requirement) and not to section 6-908 (which prohibits claims not filed in accordance with the 180-day rule). *Alpine's Opening Brief* at 22.

This reading confounds the Court's instruction in *Sweitzer v. Dean*, 118 Idaho 568, 572, 798 P.2d 27, 31 (1990). Speaking about section 50-219, the Court said: "It is incumbent upon

[1] Moreover, Alpine's suggestion that this is a physical taking does not withstand scrutiny. *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), cited by Alpine, was a classic physical invasion, involving a requirement imposed by the government that the landowner physically open a marina to the public. Likewise, *Hodel v. Irving*, 481 U.S. 704 (1987) involved the complete abrogation of rights of tribal members to bequeath certain real property, the result of which is that another entity (the tribe) became the owner of the property. These cases bear no resemblance to the regulatory taking effected by Ordinance 819.

this Court to interpret a statute in a manner that will not nullify it . . . ." *Sweitzer*, 118 Idaho at 572, 798 P.2d at 31. Making notice optional would render the statute pointless.

Alpine's interpretation is also impossible to reconcile with the straightforward language of the section 50-219. The provision states in full: "All claims for damages against a city must be filed as prescribed by chapter 9, title 6, Idaho Code." There is no reference to section 6-906 or to any other specific section of the ITCA. Instead, it simply says that all claims for damages must be filed as prescribed in the ITCA. Logically, this would include the provisions saying how to provide notice and the immediately adjacent provision barring lawsuits by those who fail to provide notice. How Alpine reads section 50-219 as an instruction to "file a notice within 180 days, but only if you feel like it" is difficult to fathom.

Alpine's observation that ITCA's definition section defines "claim" as a tort claim ignores the fact that section 50-219 converts the ITCA's tort claim notice requirement to one applicable to all damage claims. Indeed, that is the whole point of the statute. Alpine's argument that section 50-219 did not broaden the applicability of the ITCA is the same argument that the Idaho Supreme Court rejected over two decades ago in *Sweitzer*. "To construe the language to mean that the Tort Claims Act is substituted for I.C. § 50-219 would render I.C. § 50-219 meaningless and essentially null." *Id.* Instead, the Court concluded: "Applying the plain meaning of the language contained in I.C. § 50-219 clearly demonstrates that the legislature's intent was to incorporate the notice requirements contained in chapter 9, title 6 so as to make the filing procedures for all claims against a municipality uniform, standard and consistent." *Id.* Incorporating the requirement to file a notice (section 6-906) but not the adjacent provision setting out the consequences (section 6-908) would hardly result in "uniform, standard and consistent" filing procedures.

In any event, Alpine cites no authority for its proposition that compliance with section 6-906 is optional. Nor does Alpine attempt to explain away those cases which have imposed harsh consequences for failure to comply with the 180-day rule in the context of non-tort damage claims against cities. *E.g.*, *Sweitzer v. Dean*, 118 Idaho 568, 571-73, 798 P.2d 27, 30-32 (1990); *BHA Investments, Inc. v. City of Boise* ("*BHA II*"), 141 Idaho 168, 174-76, 108 P.3d 315, 321-23 (2004).

(2) Compliance with the 180-day requirement is jurisdictional.

McQuillen v. City of Ammon, 113 Idaho 719, 747 P.2d 741 (1987) and *Madsen v. Idaho Dept. of Health and Welfare*, 116 Idaho 758, 779 P.2d 433 (Ct. App. 1989) held that failure to comply with the 180-day rule is a jurisdictional defect. Alpine's effort to sidestep these clear precedents hinges on its argument that section 50-219 does not sweep in section 6-908. We have pointed out why that argument fails.

In addition, Alpine complains that *McQuillen* and *Madsen* were tort cases. Of course, they were tort cases. But section 50-219 makes them and all the other cases interpreting the notice requirement equally applicable to other damage claims.

The best Alpine offers is *Cox v. City of Sandpoint*, 140 Idaho 127, 90 P.3d 352 (Ct. App. 2003), which found—in a single paragraph—that a contract between the City of Sandpoint and the plaintiff did not waive the 180-day rule. Alpine wonders why the Court of Appeals even discussed waiver of a jurisdictional requirement, and so does the City. Be that as it may, the *Cox* Court found it unnecessary to reach the jurisdictional question because nothing in the contract even purported to waive the requirement. This failure to address a question (which may not even have been briefed) hardly overcomes the clear precedent in *McQuillen* and *Madsen*.

Finally, Alpine relies on authorities from other states holding that notice requirements in those jurisdictions are not jurisdictional. *Alpine's Opening Brief* at 24-25. There is no need to respond to these. If Idaho precedent conflicts with the interpretation of other statutes in other states, that simply shows that Idaho has followed a different path. Idaho law controls.

Alpine is right about one thing. The 180-day notice requirement in the ITCA is not a statute of limitations.[2] But this does not help Alpine. It cuts in the other direction. The Idaho Supreme Court has made quite clear that the notice requirement is a different and additional requirement.[3] Alpine flunks both the 180-day notice requirement and the four-year statute of limitations requirement. Either one, however, provides a sufficient basis to dismiss Alpine's state law claims.

(3) In any event, application of the 180-day rule to Alpine does not violate Equal Protection principles.

Alpine points out, correctly, that the City went the extra mile in allowing refunds of fees paid to it by various other developers after the housing ordinances were declared unconstitutional. The City did not have to do so, because many of those claims were also barred by the statute of limitations and/or the 180-day rule. However, given the District Court's ruling in *Mountain Central Bd. of Realtors, Inc. v. City of McCall*, Case No. CV 2006-490-C (Idaho,

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[2] As we noted in *City's Opening Brief* at 18 n.14, the ITCA contains its own two-year statute of limitations. The City believes there is a credible argument that this is applicable to the Alpine's state law claims. Alpine correctly notes that no reported decision has applied this two-year statute of limitations in the context of a lawsuit against a city. Then again, no appellate court, apparently, has been called upon to address the subject. But this is a separate issue. Whether the ITCA's shorter statute of limitations applies here has no bearing on whether the 180-day requirement is mandatory and jurisdictional.

[3] In *Harkness v. City of Burley*, 110 Idaho 353, 359-60, 715 P.2d 1283, 1289-90 (1986), the plaintiff argued that he was not subject to what was then a 60-day notice requirement in Idaho Code § 50-219, because a four-year statute of limitations contained in another part of the statute was more specific. The Idaho Supreme Court rejected this argument saying that the notice requirement is different from and in addition to the statute of limitations.

Fourth Judicial Dist., Feb. 19, 2008), the City determined that returning money received under the housing ordinances was the right thing to do.

Consistent with that spirit and with the Development Agreement, the City released Alpine from any restrictions or obligations arising under Ordinance 819. Alpine had not yet paid the City any money under that Agreement, so there was nothing to refund. Indeed, as explained in the September 16, 2011 *Affidavit of Michelle Groenevelt,* no money had been collected from any other developer under Ordinance 819, so there was no need for a resolution addressing refunds under that ordinance.

The release provision in the Development Agreement expressly provided that if Alpine sold any units subject to income restrictions prior to the decision in *Mountain Central*, the City would not be responsible for any damages based on those below-market sales. (None were sold, as it turns out.) Having given this release, Alpine cannot complain about the restrictions during that time. After *Mountain Central* was decided, the City promptly released Alpine from all restrictions, allowing units to be sold at full market value.

The City reasonably concluded that it had done all it was required to do in good faith and fair dealing. It treated the various developers fairly and equitably. It did not offer to reimburse other developers who paid fees under Ordinance 820 for their lost opportunities while their money was in the City's hands. It simply returned their property or, in Alpine's case, released the property restrictions. Alpine's suggestion that the Constitution requires the City to also protect Alpine from market fluctuations during a time when Alpine had released the City from claims for below-market sales stretches the "equal protection" principle beyond any reasonable construct. Far from being "irrational" or "class based," the City's treatment of developers in response to the decision in *Mountain Central* was fair, even-handed, and exemplary.

(4) Alpine's estoppel argument does not hold water.

Alpine presses the same quasi-estoppel argument that this Court rejected in *Hehr v. City of McCall*, Case No. CV-2010-276-C (Idaho, Fourth Judicial Dist., June 6, 2011). Alpine mentions this case in a footnote. *Alpine's Opening Brief* at 28 n.50. Alpine says that the cases this Court relied on there (*Harrell v. The City of Lewiston*, 95 Idaho 243, 506 P.2d 470 (1973) and *Sprenger, Grubb & Associates, Inc. v. City of Hailey*, 127 Idaho 576, 903 P.2d 741 (1995)) are not applicable here because they were zoning cases. Yet the language quoted by Alpine notes that zoning is merely an example of "a governmental function which is not usually subject to estoppel." *Sprenger*, 127 Idaho at 583, 903 P.2d at 748. Because the City was plainly performing a governmental function when it imposed housing requirements, *Harrell* and *Sprenger* are equally applicable here.

Those cases make clear that equitable estoppel does not apply to the City absent a showing of "exigent circumstances." Alpine's perception that the City was too protective of developers who paid fees in cash falls far short of the Supreme Court's standard for exigent circumstances.

Alpine's theory also falters out of the gate because estoppel cannot operate to grant subject matter jurisdiction, which, as we have noted above, is lacking here. "Estoppel is not appropriate where jurisdiction is at issue." *City of Eagle v. Idaho Dept. of Water Resources*, 150 Idaho 449, 454, 247 P.3d 1037, 1042 (2011).

Even if Alpine could overcome those obstacles, it has failed to prove the basic elements of quasi-estoppel. Quasi-estoppel applies when it would be unconscionable to permit a party to maintain a position that is inconsistent with one in which the party acquiesced or pursuant to which the party accepted a benefit. *Mitchell v. Zilog, Inc.*, 125 Idaho 709, 715, 874 P.2d 520,

526 (1994); *Willig v. State, Dep't of Health & Welfare,* 127 Idaho 259, 261, 899 P.2d 969, 971 (1995).

The City has consistently taken the position that Alpine's claims are barred by its failure to timely file a notice of claim. If the City had initially offered to waive Alpine's deadlines and then changed its mind, that might be different. But no refund resolution ever applied to Alpine. As a result, there is no inconsistency in the City's position. Indeed, as shown in the *Affidavit of William F. Nichols,* Alpine asked the City to be released from the restrictive conditions on the Timbers, and the City did exactly what Alpine asked. The City never promised more than that, and it has never changed its position.

Nor can Alpine show that it relied to its detriment on a reasonable assumption that the City would waive the 180-day rule. In sum, Alpine has not been disadvantaged or induced to change its position as a result of any action by the City.

Alpine concedes that the quasi-estoppel argument is based on "[t]he identical set of facts which form the basis for the equal protection analysis." *Alpine's Opening Brief* at 28. Thus, even if quasi-estoppel were applicable, it would fail for the same reasons discussed above in section II.A(3) at page 5. In short, the City acted rationally and fairly in refunding fees and releasing developers from all restrictions on their property. To suggest that the City's action is unconscionable does not pass the straight face test.

(5) At best, Alpine's estoppel argument only buys it another 180 days.

Even if Alpine's estoppel argument worked, it would only give Alpine another 180-day shot at providing the proper notice. Resolution 08-11 (providing refunds to other developers who paid fees under Ordinance 820) was adopted on April 24, 2008. Alpine's notice was not filed within 180 days of that date.

B. Alpine's state claim is barred by the four-year statute of limitations.

The statute of limitations argument is simple enough. The key facts triggering the statute of limitations are undisputed. As Alpine notes: ". . . Ordinance 819 was in effect when Alpine submitted its development applications and was applied to Alpine as a mandatory condition of approval of Alpine's Applications." *Alpine's Opening Brief* at 1 n.1. And again: "At the time Alpine filed its development applications, the community housing ordinance was in effect and Alpine's compliance with that ordinance was mandatory." *Alpine's Opening Brief* at 11. Thus, Alpine knew on the day that it filed its applications that it would be required to provide community housing.

The mere existence of the statutory requirement at the time of the application suffices to ripen the cause of action. Here, however, the record is even more complete. Alpine prepared and submitted in conjunction with its application a document entitled "Community Housing Plan – Alpine Village Planned Unit Development" dated June 4, 2006. (A copy is attached as Exhibit 4 to *Affidavit of Steven J. Millemann*, which confirms that the plan was submitted to the City on that date.) This proves beyond a shadow of a doubt that Alpine knew of the housing requirement, and was acting on it, on or before the time of its application on June 20, 2006.

That should be the end of the story. Yet Alpine endeavors to turn a simple matter into a complex one. It explains at great length that it was not known until sometime later exactly what mixture of housing measures would be provided. *Alpine's Opening Brief* at 20. But this makes no difference, because it is undisputed that Alpine knew that it would have to provide something of value on the day it applied. Whether that would be 20 percent of the units on site, a larger amount off-site units, land, or cash is beside the point. As the District Court ruled in *Mountain Central Bd. of Realtors, Inc. v. City of McCall*, Case No. CV 2006-490-C (Idaho, Fourth Judicial

Dist., Feb. 19, 2008), each of the four constituted an illegal tax in excess of the police power (Idaho Const. art. XII, § 2) and the taxation power (Idaho Const. art. VII, § 6):

> 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."

Mountain Central at 21 (emphasis original). Given this ruling against the City, it is unclear why Alpine devotes so many pages of its brief to the law of unconstitutional takings. The City does not and cannot dispute that Ordinances 819 and 820 are unconstitutional.

For these reasons, it is apparent that the statute of limitations began to run on or before the day Alpine filed its applications. This is not complicated. But Alpine would have this Court believe there is more to it. Alpine admits that it faced an unconstitutional tax on day one, but it argues: "What did not become clear until months later is *how* Alpine would comply and what the ramifications of that compliance would ultimately be." *Alpine's Opening Brief* at 11 (emphasis original). But it makes no difference how Alpine would comply with the unconstitutional ordinance. Alpine was required to give something of value in any event. As soon as it decided to proceed with the development, Alpine could have challenged the ordinance as facially invalid, just as the plaintiffs did in *Mountain Central*. (There is no exhaustion requirement for such a challenge.)

Alpine counters, citing *City of Coeur d'Alene v. Simpson*, 142 Idaho 839, 846, 136 P.3d 310, 317 (2006), which held that "a regulatory takings claim does not become ripe upon enactment of the regulation." *Alpine's Opening Brief* at 18. That certainly was true in *Simpson*, which was an as-applied challenge. In an as-applied taking, the taking does not occur (rather

obviously) until the ordinance is applied. In a facial challenge like this one, the invalid ordinance may be challenged at any time someone has standing to challenge it. In *Mountain Central*, the cause of action accrued and the challenge was ripe when an organization of realtors showed that they represented persons who would be adversely affected by the ordinance. In *Mountain Central*, the Court did not wait to see "*how* the developers would comply and what the ramifications of that compliance would ultimately be" (paraphrasing *Alpine's Opening Brief* at 11).

Alpine contends that *McCuskey v. Canyon County Comm'rs* ("*McCuskey II*"), 128 Idaho 213, 912 P.2d 100 (1996) supports Alpine's position that its cause of action did not arise until it signed the Development Agreement or the City approved its use of the Timbers. *Alpine's Opening Brief* at 19. Not so. In *McCuskey II*, the taking was traceable to an ordinance downzoning parts of the county to rural residential. Like virtually all downzones, this was an as-applied challenge. Mere enactment of a downzone ordinance affecting a broad swath of land does not instantly create a cause of action, because a downzone does not impair any existing use. Thus, the Court found that the cause of action arose at the time Canyon County first interfered with McCuskey's development of the property. In other words, the landowner must show that he or she wishes to do something with the land that is not allowed. A downzone, in itself, does no such thing. Exactly what is prohibited under a downzone ordinance is sometimes unclear. But even if the ordinance is clear, there is always the possibility of a nonconforming use, conditional use, or a variance. Indeed, in *McCuskey II*, the County initially granted the building permit. *McCuskey II*, 128 Idaho at 215-16, 912 P.2d at 102-03. It was not until the County reversed course and issued a stop work order that there was any interference with McCuskey's property.

And it was at that point, said the Court, that the cause of action arose. *McCuskey II*, 128 Idaho at 217, 912 P.2d at 104.

As the Court noted: "Contrary to McCuskey's assertion, there was nothing to prevent him from including his inverse condemnation claim with his petition for declaratory judgment and writ of mandamus." *McCuskey II*, 128 Idaho at 218, 912 P.2d at 105. The fact that McCuskey did not realize he had a cause of action was irrelevant. He had a cause of action—whether he knew it or not—so the clock was running.

Similarly, Alpine could have initiated a challenge to Ordinance 819 on the day it filed its applications (or earlier, as did the plaintiffs in *Mountain Central*). Alpine's contention that it is excused from the statute of limitations because it was not then known "*how* Alpine would comply and what the ramifications of that compliance would ultimately be" cannot be reconciled with *McCuskey II*. Alpine knew on or before June 20, 2006 that it would have to dedicate at least 20 percent of its units to affordable housing or pay a comparable fee.

Indeed, Alpine proposed use of its mobile home property as early as June 4, 2006. The fact that its initial housing plan was later modified is not relevant to whether a cause of action arose in June of 2006. Alpine's certain knowledge that it would have to provide something to comply with Ordinance 819 is sufficient to create a cause of action. Quantification of the damages based on the final housing plan is not necessary to ripen the claim. "Moreover, it is well settled that uncertainty as to the amount of damages cannot bar recovery so long as the underlying cause of action is determined." *McCuskey II*, 128 Idaho at 218, 912 P.2d at 105.

In its brief, Alpine attempts to confuse this simple point by setting up straw men that have nothing to do with the City's statute of limitations defense:

> Consistent with *McCuskey*, Alpine is arguing that its inverse condemnation action accrued *not* on the date that Ordinance 819

> was adopted and *not* on the date on which the *Mountain Central* decision was issued, but, rather, when the full extent of Alpine's loss of use and enjoyment of its constitutionally protected property rights became apparent.

Alpine's Opening Brief at 19 (emphasis original). The City agrees with this statement. Indeed, no one is arguing that the cause of action accrued on the date of enactment or on the date of the *Mountain Central* decision.[4] As Alpine says, the cause of action accrued "when the full extent of Alpine's loss of use and enjoyment of its constitutionally protected property rights became apparent" and that interference was fully apparent in June of 2006.

Alpine goes on for pages about its preference for satisfying the unconstitutional ordinance with its mobile home property and how the City found mobile homes to be inconsistent with the ordinance, thus essentially forcing Alpine to acquire the Timbers. *Alpine's Opening Brief* at 20. This is entirely irrelevant. This goes to the measure of damages, not the existence of a cause of action. As *Mountain Central* made clear, the ordinance was unconstitutional from the beginning. The unconstitutional interference with Alpine's property was apparent in June of 2006 and would have been just as unconstitutional even if Alpine had never acquired the Timbers. Alpine's statement (*Alpine's Opening Brief* at 21) that "Alpine's cause of action accrued . . . when it became clear that the Timbers would be dedicated as community housing" is simply wrong.

Alpine contends that *Harris v. State, ex rel. Kempthorne*, 147 Idaho 401, 405, 210 P.3d 86, 90 (2009), helps its cause. It does not. In *Harris*, the Idaho Supreme Court ruled that the statute of limitations on inverse condemnation ran from the day the plaintiffs were compelled to

[4] Depending on the plaintiff, a cause of action might occur as early as the date of enactment, but whether the case is ripe depends on whether the plaintiff can show that it is affected by the ordinance at that time. The Court's decision in *Mountain Central* may have bearing on other defenses, but it is irrelevant to the accrual of the cause of action.

enter into a mineral lease with the state, not the time they made payments to the state under that lease. But this decision simply reinforces the point made by the Court in *McCuskey II* that the cause of action accrues when the impairment to plaintiff's property becomes "apparent." As the Court said, "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." *Harris*, 147 Idaho 405, 210 P.3d 90 (emphasis supplied). It may be that the Harrises became aware of the interference even before the signing of the lease. The Court did not address this, because it did not need to. The Court found that the Harrises were certainly aware of the impairment when they signed the lease, and that was more than four years before they brought their inverse condemnation action. This case is also important because it reinforces the conclusion drawn in *McCuskey II* that a plaintiff's ignorance of its cause of action—even in the face of affirmative, incorrect statements of the law by the governmental entity—is no defense to the statute of limitations.

Alpine also makes a weak attempt to distinguish *Wadsworth v. Idaho Department of Transportation*, 128 Idaho 439, 915 P.2d 1 (1996). But *Wadsworth* only reinforces the consistent case law on this point. In *Wadsworth*, the Court ruled, as it has in so many others, that the statute began to run when the interference with the property "became apparent."

> There was a single event, and that event triggered the running of the limitation period in I.C. § 5-224 when the impairment was of such a degree and kind that substantial interference with Wadsworth's property interest became apparent. *Tibbs v. City of Sandpoint*, 100 Idaho at 671, 603 P.2d at 1005; *Rueth v. State*, 103 Idaho at 79, 644 P.2d at 1338.
>
> Wadsworth was aware of some effect the excavation had on his property at least as early as 1976 when he filed the first tort claim. Certainly, the substantial interference was apparent when he submitted the second tort claim in 1983 . . . .

Wadsworth, 128 Idaho at 443, 915 P.2d at 5 (emphasis supplied).

Alpine does not even attempt to distinguish *Tibbs v. City of Sandpoint*, 100 Idaho 667, 603 P.2d 1001 (1979)) or *Rueth v. State*, 103 Idaho 74, 644 P.2d 1333 (1982).

Here is the bottom line. In June of 2006 it submitted an application and a housing plan that called for encumbering its property. Thus, it was "apparent" at that time that it was required to provide community housing to the City.

C. Alpine's decision to enter into a Development Agreement based on its purchase of the Timbers was voluntary, and Alpine received exactly what it was promised.

Alpine contends because that the housing requirement imposed by Ordinance 819 was mandatory, its actions to comply with the ordinance were not voluntary in the sense of *KMST, LLC v. County of Ada*, 138 Idaho 577, 67 P.3d 56 (2003). The City, of course, does not dispute that Ordinance 819 was mandatory. Nor does the City dispute that it informed Alpine that use of mobile home lots might not satisfy the ordinance's requirements.

While the ordinance may have been mandatory, Alpine chose not to fight the ordinance but, instead, to enter into a Development Agreement with the City. That agreement expressly identified the then-pending litigation in *Mountain Central*. It then provided:

> . . . The Plan will be reviewed and modified, as necessary, to comply with the final disposition of the litigation as to any Community Housing Units which have not been sold prior to the final disposition of the litigation.

Article VI of the Development Agreement, set out as Exhibit 16 to *Affidavit of Steven J. Millemann*. As discussed in section II.A(4) beginning on page 7 and in the *Affidavit of William F. Nichols*, Alpine got exactly what this agreement provided. After *Mountain Central* was decided, the City reviewed the Housing Plan and modified it by releasing the developer from all of its requirements. The Development Agreement said nothing about protecting Alpine from a decline in market conditions pending the outcome of *Mountain Central*.

These facts are not identical to those in *KMST*, but the spirit and teaching of *KMST* calls for the same result. Alpine could have objected, appealed, or litigated Ordinance 819. Instead, it entered into a deal. The City fulfilled its promise under that deal. As a result of these choices, Alpine cannot now claim a "taking" of its property.

III. ALPINE'S FEDERAL CLAIM IS TIME-BARRED.

A. Alpine's federal claim is subject to a two-year statute of limitations.

Alpine initially pled its federal taking claim "directly" under the Fifth Amendment. That is clearly impermissible in the Ninth Circuit.[5] Alpine later amended its complaint to plead its federal claim under 42 U.S.C. § 1983 in the alternative.

Alpine recognizes that the § 1983 claim is subject to a two-year statute of limitations. However, it clings to the idea that its "direct" claim may be subject to the four-year statute of limitations. "The two causes of action may or may not be subject to the same statute of limitations." *Alpine's Opening Brief* at 29.

This is a false hope. Even if Alpine could bring its taking claim directly under the Fifth Amendment, it cannot escape the two-year statute of limitations. Those federal courts that have recognized the possibility of a direct federal claim have held that such claims are nonetheless subject to the same statute of limitations as actions brought under § 1983. *Bieneman v. City of Chicago*, 864 F.2d 463, 468 (7th Cir. 1988) (direct takings claim subject to two-year statute). Indeed, even the Ninth Circuit so held in a non-takings case. *Van Strum v. Lawn*, 940 F.2d 406

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[5] "Plaintiff has no cause of action directly under the United States Constitution. We have previously held that a litigant complaining of a violation of a constitutional right must utilize 42 U.S.C. § 1983." *Azul-Pacifico, Inc. v. City of Los Angeles*, 973 F.2d 704, 705 (9th Cir. 1992), *cert. denied*, 506 U.S. 1081 (1993). "For these reasons, we have held that a plaintiff may not sue a state defendant directly under the Constitution where section 1983 provides a remedy, even if that remedy is not available to the plaintiff." *Martinez v. City of Los Angeles*, 141 F.3d 1373, 1382 (9th Cir 1998). "Taking claims must be brought under § 1983." *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).

(9th Cir. 1991) (applying *Bieneman*). Alpine has no credible argument that its federal taking claim can escape the two-year statute of limitations, no matter how it is pled.[6]

B. Alpine's federal claim has accrued and the statute is running.

No one disputes that, if the two-year statute applies and the statute is running, Alpine's federal claim comes too late. Alpine's only defense is that its federal cause of action "has not even *accrued* for statute of limitations purposes." *Alpine's Opening Brief* at 30 (emphasis original). This is a curious position to take, because if it has not accrued, how can it be before the Court today?

Alpine cites *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680 (9th Cir. 1993), a 1993 case applying the statute of limitations to a federal takings claim brought in federal court.[7] But this case does not help Alpine.

The Court began by explaining the obvious, and the key point here—that a cause of action accrues when the case is ripe: "To determine when the statute of limitations period begins to run, we first must determine when the cause of action accrued. Determining when the cause of action accrues is merely the corollary to the ripeness inquiry." *Levald*, 998 F.2d at 687. The Court continued noting that in the case of a facial challenge, a case may be ripe as soon as the unconstitutional ordinance is enacted (assuming the plaintiff can show it wishes to do something that it is affected by the ordinance). "A plaintiff asserting a facial challenge contends that the

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[6] In brief, Alpine says it has two federal claims under the Fifth Amendment (one direct and one under § 1983). In fact, it is one claim, pled two ways.

[7] In *Levald*, the Court of Appeals first determined that the two *Williamson County* ripeness tests were inapplicable. (The first prong was inapplicable, because this was a facial challenge. The second prong was inapplicable, because, at the time, California did now allow inverse condemnation actions on regulatory takings, thus making resort to state court futile. *Levald*, 998 F.2d at 686.) With *Williamson County* out of the way, the Court then turned to the statute of limitations.

passage of the ordinance effects a taking." *Id.* The Court then observed that in federal takings cases, there is a preliminary obligation to seek relief in state court:

> However, "[t]he Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." "So long as the state provides 'an adequate process for obtaining compensation,' no constitutional violation can occur" until just compensation is denied. Thus, a plaintiff cannot bring a section 1983 action in federal court until the state denies just compensation. A claim under section 1983 is not ripe—and a cause of action under section 1983 does not accrue—until that point.

Id. (emphasis supplied) (citing to *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194-95 (1985) and *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398, 1402 (9th Cir. 1989)). The Court went on to explain that this requirement, just like the second prong of the *Williamson County* test, is not applicable where compliance would be futile—as it was here. "As our ripeness cases teach, there is an exception to this general rule. . . . In this small class of cases, the cause of action accrues and the limitations period begins to run upon the enactment of the statute." *Id.*

Thus, *Levald* held that the cause of action has not accrued and the statute of limitations is tolled only when the case is not ripe. Where the case is ripe, the statute is running.

Levald, of course, was decided before *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005) at a time when it was generally believed that the state action must be brought in state court first, not simultaneously with the federal cause of action. Applying the teaching of *Levald* in a post-*San Remo* world leads to an inescapable and perfectly obvious conclusion: If the federal cause of action is ripe in state court, then the statute of limitations is running.

Alpine brought its federal claim simultaneously with its state claim. This is exactly what *San Remo* says a plaintiff is permitted to do:

> With respect to those federal claims that did require ripening, we reject petitioners' contention that *Williamson County* prohibits plaintiffs from advancing their federal claims in state courts. The requirement that aggrieved property owners must seek "compensation through the procedures the State has provided for doing so," 473 U.S., at 194, 105 S. Ct. 3108, does not preclude state courts from hearing simultaneously a plaintiff's request for compensation under state law and the claim that, in the alternative, the denial of compensation would violate the Fifth Amendment of the Federal Constitution. Reading *Williamson County* to preclude plaintiffs from raising such claims in the alternative would erroneously interpret our cases as requiring property owners to "resort to piecemeal litigation or otherwise unfair procedures."

San Remo, 545 U.S. at 346 (emphasis supplied). Thus, under *San Remo*, if the federal claim can be brought simultaneously, it follows that the federal cause of action has accrued in state court. The federal claim might be pled in the alternative, and the state court might find it unnecessary to reach the federal claim, but under *San Remo* there can be no doubt that the federal claim is ripe for presentation to the court and, hence, has accrued.

San Remo resolved a conundrum created by *Williamson County*: Litigants were obligated to litigate their state law claim first, but if that claim were rejected by the state court, the federal claim might be barred by *res judicata*.[8] *San Remo* eliminated this Catch-22 and provided a path forward for simultaneous state court litigation of state and federal claims. Nothing in the decision, however, hints at a free pass from applicable timeliness requirements. Yet that is exactly what Alpine seems to believe it has. Under Alpine's analysis, it could wait 20 or, for that matter, 100 years before filing its state and federal claims. Then, according to Alpine's theory,

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[8] Prior to *San Remo*, the courts struggled with how to implement the ripening process mandated by *Williamson County*. *See, e.g., Palomar Mobilehome Park Association v. City of San Marcos*, 989 F.2d 362, 365-66 (9th Cir. 1993); *Dodd v. Hood River County*, 59 F.3d 852 (9th Cir. 1995).

when the tardy state claims are thrown out, the federal claims miraculously spring to life because they had never "accrued" until then. This defies logic and does not follow from *San Remo*. *San Remo* gives plaintiffs a way to pursue their federal claims by litigating them simultaneously, but they must still be litigated within the statute of limitations.[9]

C. In any event, Alpine can never ripen its federal claim because it filed its state claim too late.

It is elemental that *Williamson County* and *San Remo* require a takings plaintiff to ripen its state claim before filing its federal claim. As discussed in *City's Opening Brief* at 29-30, a plaintiff that is precluded from bringing its state claim by the statute of limitations or the 180-day notice requirement is thus unable to ripen its federal claim. *Pascoag Reservoir & Dam v. Rhode Island*, 337 F.3d 87 (1st Cir 2003). If the federal claim cannot be ripened, it, too, is forfeited.

Alpine does not quarrel with this principle. Indeed, it describes *Pascoag* as "no more than an extension of the *Williamson County* ruling." *Alpine's Opening Brief* at 33. Its response is simply that its state claim is not late. *Id.* This is circular. If Alpine's state claim is timely, then, obviously, it has not forfeited its federal claim. But if the Court agrees that Alpine's state claim is untimely (either under section 50-219 or the statute of limitations), then Alpine has forfeited its federal claim. Alpine implicitly concedes this.

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[9] The City believes it is inescapable that if a case is ripe, then the cause of action has accrued and the statute of limitations is running. The federal court, however, did not find this to be so obvious. "This Court, although it does not rule on the City's statute of limitations claims at this time, finds they are not so decisive as to justify dispensing with prudential ripeness requirements." *Memorandum Decision and Order* at 6 (reproduced as Exhibit 30 to *Affidavit of Steven J. Millemann*). The federal court went on to offer some gratuitous observations that were quoted by Alpine in its brief. The City respectfully suggests that the federal court's parting remarks in declining to exercise jurisdiction failed to grapple with the underlying issue (ignoring, for example, that *Hacienda* was decided before *San Remo*). In short, this dictum is wrong, and this Court is not compelled to follow it.

IV. THE RELEASE IN THE DEVELOPMENT AGREEMENT SHOULD BE READ BROADLY TO BAR ALPINE'S CLAIMS.

The City acknowledged in its *City's Opening Brief* at 31 that a strict reading of the *Development Agreement* provides only a release as to units that are sold at a discount. The City's argument is that the language of the agreement should be read in context and the Court should look to the obvious intent of the agreement. It is simply not credible that the parties intended to protect the City from claims based on units sold below market, but intended to hold the City accountable for losses associated with units sold at full market value. Alpine has not responded to this argument, other than to insist on a literal interpretation—irrespective of common sense.

The City also urges the Court to consider the last sentence of the agreement, underlined below:

> Alpine Village's approved Community Housing Plan is attached hereto as Exhibit "B". Alpine Village waives and releases the City from any claims whatsoever regarding or stemming from the pending litigation between the Mountain Central Board of Realtors and the City (ie. Mountain Central Board of Realtors, et al v. City of McCall, et al, Valley County Case Number CV-2006-490-C) as to Community Housing Units which are sold pursuant to this Plan prior to the final disposition of such litigation. <u>The Plan will be reviewed and modified, as necessary, to comply with the final disposition of the litigation as to any Community Housing Units which have not been sold prior to the final disposition of the litigation.</u>

Article VI of the Development Agreement, set out as Exhibit 16 to *Affidavit of Steven J. Millemann* (emphasis supplied). This provision makes clear that, if Ordinance 819 was invalidated, the City was obligated to review and modify the housing requirement. That is all it was obligated to do. The City did what was required of it, completely releasing Alpine from its obligations. By clear implication, Alpine agreed to and was entitled to no more than this.

V. ALPINE'S CLAIMS ARE BARRED BY LACHES.

The City's point about laches is simple. If Alpine wanted to challenge the City's housing ordinances before it acquired the Timbers, it could have. Instead, Alpine waited until the end of 2010 to demand payment and file suit against the City. If the Court were to find that the City's lawsuit is timely under the applicable statutes of limitation, it should nonetheless take into account the long delay in bringing this lawsuit.

The City has acted in good faith throughout this process. It sincerely believed that it had the authority to enact the housing ordinances. It was wrong, of course. But absent a showing (or even an allegation) that the City knew its ordinances were unconstitutional, it is unfair to suggest that its hands are unclean. The City is not responsible for the housing bubble or the losses that have fallen on those who invested during that bubble.

CONCLUSION

For each of the reasons discussed above, the City urges that its motion be granted and Alpine's motion denied.

Respectfully submitted this 26th day of October, 2011.

GIVENS PURSLEY LLP

By _____
Christopher H. Meyer

By _____
Martin C. Hendrickson

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 26th day of October, 2011, the foregoing was filed, served, and copied as follows:

DOCUMENT FILED:

Fourth Judicial District Court Attn: Archie N. Banbury, Clerk Valley County Courthouse 219 Main Street Cascade, ID 83611 Facsimile: 208-382-7107	☒ ☐ ☐ ☐ ☐	U. S. Mail Hand Delivered Overnight Mail Facsimile E-mail

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COURTESY COPIES TO:

Honorable Michael R. McLaughlin District Judge Ada County Courthouse 200 W. Front St. Boise, ID 83702	☒ ☐ ☐	U. S. Mail Hand Delivered Overnight Mail
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Christopher H. Meyer

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Case No._____ Inst. No._____
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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF VALLEY

ALPINE VILLAGE COMPANY,
an Idaho Corporation,
Plaintiff,

v.

CITY OF MCCALL,
a municipal corporation,
Defendant.

CASE NO. CV-2010-519C

ALPINE VILLAGE'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

I. Introduction

The City's *Reply Brief in Support of Its Motion for Summary Judgment and Response Brief in Opposition to Alpine's Motion for Summary Judgment* ("City's Reply Brief") does little to advance the discussion of the real issues which are presented by this case. At work in the City's Reply brief is the art of; (i) misstating an opponent's position in the interest of then offering arguments to defeat the misstated position; (ii) mischaracterizing the applicable legal standard governing an issue in the interest of appearing to satisfy that standard; and, (iii) stating that legal conclusions which would be critical to the success of the City's case are "obvious" in the face of precedent to the contrary and without any citation of legal authority to support the "obvious" conclusion.

An example of the first technique is the City's repeated assertion that Plaintiff's ("Alpine") position regarding the application of Idaho Code §50-219 and the associated 180 day Notice of Claim Statute contained in Idaho Code §6-906 is that compliance with the statute is "optional".[1] This is, of course, not Alpine's position. To the contrary, Alpine's position is that:

- Idaho Code §50-219 applies Idaho Code §6-906 to claims against municipalities for damages.
- Tort claims are also subject to the balance of the provisions of the Idaho Tort Claims Act ("ITCA").
- Alpine's claim is not a tort claim and is not subject to the balance of the provisions of the ITCA.
- The City is, therefore, entitled to assert non-compliance with Idaho Code §50-219 as a defense to Alpine's state constitutional claim (there being no dispute that Idaho Code §50-219 is *inapplicable* to the federal takings claims).
- The Idaho Supreme Court and the courts of numerous other jurisdictions have held that, absent a clear legislative intent to make a statutory requirement "jurisdictional" or to preclude the assertion of equitable defenses to the

[1] See City's Reply Brief at 2, "Alpine responds that, while Idaho Code §50-219 requires it to file a notice of claim within 180 days, there are no consequences for its failure to do so. In other words, the notice requirement is optional"; See also City's Reply Brief at 3, "How Alpine reads section 50-219 as an

application of the statutory requirement, the requirement should not be found to be "jurisdictional".

- Under the judicial precedent cited by Alpine (and consistent with the history of the amendments to Idaho Code §50-219 itself), this Court should find that the City certainly may assert Idaho Code §50-219 as a defense to Alpine's state constitutional claim, but that Alpine is entitled to offer equitable and constitutional defenses to the City's assertion of Idaho Code §50-219 as a defense.
- Alpine has done so, arguing that the City should be estopped from asserting Idaho Code §50-219 as a bar to Alpine's state constitutional claim and that allowing the City to do so would also deny Alpine equal protection of the law.
- If this Court finds that Alpine's arguments have merit, then Alpine should be excused from compliance with Idaho Code §50-219. If not, then the City would have successfully defended the state constitutional claim; but, in such case, this Court is not deprived of jurisdiction to proceed with the adjudication of Alpine's federal takings claims and is, in fact, specifically instructed by the decisions of the U.S. Supreme Court and the Ninth Circuit Court of Appeals to then adjudicate the federal claims.

In its arguments regarding the date on which Alpine's state takings claim accrued the City both mischaracterizes Alpine's state takings/inverse condemnation claim *and* invents a legal standard for determining the date of accrual of the claim which is unsupported by judicial precedent. First, despite Alpine's consistent position to the contrary in the federal briefing and in Alpine's *Memorandum in Support of Alpine Village's Motion for Summary Judgment and in Opposition to Defendant's Motion for Summary Judgment* ("Alpine's Opening Brief"), the City continues to characterize Alpine's takings claim as a "facial challenge" as opposed to an "as applied" challenge. The City appears to be inviting this Court to reach the ill advised conclusion that, because the Mountain Central Board of Realtors successfully pursued a facial challenge to Ordinances 819 and 820, then it follows that Alpine's takings claim is somehow a facial

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instruction to 'file a notice within 180 days, but only if you feel like it' is difficult to fathom" and at 4, "In

challenge to Ordinance 819. The City's motivation is its hope that if it can convince this Court to characterize Alpine's takings claim as a facial challenge then it can also convince this Court to attach an earlier (and improper) accrual date to the state constitutional claim for purposes of determining the timeliness of the claim under the applicable 4 year statute of limitation (i.e., Idaho Code §5-224).

The City's characterization of Alpine's takings claim as a "facial challenge" is incorrect and misleading. To begin with, the terms "facial challenge" and "as applied challenge" refer to challenges to ordinances, statutes, or regulations. A facial challenge argues that the statute could not possibly be applied in a constitutional manner and typically seeks only to invalidate the ordinance. An as applied challenge argues that, as applied to the particular plaintiff, the statute is unconstitutional, for which the plaintiff seeks compensation (i.e., damages). If *Mountain Central Board of Realtors v. City of McCall*[2], had never occurred and Alpine were pursuing its takings claim, then Alpine *would* be challenging Ordinance 819, and it would, indeed, be appropriate to characterize the nature of the challenge. In such case, Alpine's challenge would clearly be to the Ordinance as it was applied to Alpine. However, as was noted in Alpine's Opening Brief, Alpine does not need to challenge the Ordinance. It has already been challenged and declared void and unconstitutional. Alpine's state takings/inverse condemnation claim is that the City's application of a void and unconstitutional ordinance to Alpine resulted in a per se taking of two of Alpine's constitutionally recognized property rights, namely the right to freely exclude people from and dispose of its property and the right to not be dispossessed of the money which Alpine was required to expend to acquire the Timbers complex. Alpine's state takings claim is clearly that the *application* of this indisputably void and constitutional ordinance to Alpine, *in the manner in which it was imposed by the City,* effectuated a compensable taking. This claim has nothing to do with a "facial challenge" to Ordinance 819. The City concedes that in such case, the claim

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any event, Alpine cites no authority for its proposition that compliance with section 6-906 is optional."

[2] Case No. CV2006-490-C (Idaho, Fourth Judicial Dist., Feb. 19, 2008)

accrues when the ordinance is actually applied to Alpine, not when Alpine filed its Application.[3]

In addition to mischaracterizing Alpine's state takings/inverse condemnation claim the City also argues to this Court that the *mere existence* of an Ordinance which *could* be applied in a manner which would constitute a taking triggers the accrual of the takings cause of action at the time of the filing of the Application. Thus, the City offers this Court a self serving standard which is unsupported by the applicable judicial precedent. When Alpine filed its application with the City, there were a number of ordinances in place which, depending on whether and how the City elected to apply them, could have produced takings claims. For example, when Alpine filed its applications with the City, the City had an ordinance which required developers of residential subdivisions to provide new parks of a size to be determined by the number of units being developed or to pay an in lieu fee. Had the City required Alpine to acquire property and dedicate it for parks in order to satisfy the ordinance, which might well have been a compensable taking. However, it did not. Instead, the City agreed that a plaza being designed as part of Alpine Village would be deemed to satisfy the parks requirement. Thus, it was not until the parks ordinance was applied to Alpine that Alpine could be said to know whether or not it had a takings cause of action relative to the ordinance.

The same is true of Ordinance 819. This case provides a graphic example of why courts like the Idaho Supreme Court in *City of Coeur d'Alene v. Simpson,* 142 Idaho 839, 136 P.3d 310, (2006) have held that a takings/inverse condemnation cause of action does not accrue until the ordinance in question has been applied to the property owner. The mere existence of the ordinance is not enough. When Alpine filed its applications with the City, there was no way for Alpine to know whether and how the City would ultimately apply Ordinance 819 to Alpine's applications. The ordinance was newly enacted and had not been previously applied by the City Council or its staff. There was additionally no way for Alpine to know at that time that the *Mountain Central* litigation would be initiated, or how the City would react to the litigation. It was not until the City Council elected to actually apply the ordinance to Alpine's project, despite the pending

[3] See City's Reply Brief at 10-11, "In an as-applied taking, the taking does not occur (rather obviously) until the ordinance is applied."

Mountain Central litigation, that it can be said that the full extent of the impairment of Alpine's use and enjoyment of its property became apparent. The community housing plan which was ultimately required and approved by the City bore no resemblance to the plan which was submitted with the applications. Consistent with both the U.S. Supreme Court and the Idaho Supreme Court decisions which were cited by Alpine in its Opening Brief and which are referenced below, Alpine's state takings/inverse condemnation claim accrued when the ordinance was applied to Alpine's applications, not when the applications were filed. If, as is suggested by the City, the *mere possibility* that an Ordinance will be applied in a manner which gives rise to a takings/inverse condemnation claim triggers the accrual of the claim, the City's arguments would be well founded. However, this is not the law and this Court should decline to subscribe to the City's position.

In its Reply brief, the City also employs the tactic of stating as "obvious" conclusions or propositions which are contrary to judicial precedent. This tactic is employed by the City in support of its argument that Alpine's federal takings claims must have already accrued. In its Reply Brief, the City states that

> Applying the teaching of *Levald* in a post-*San Remo* world leads to an inescapable and perfectly obvious conclusion: If the federal cause of action is ripe in state court, then the statute of limitations is running
>
> ....
>
> Thus, under *San Remo,* if the federal claim can be brought simultaneously, it follows that the federal cause of action has accrued in state court.

City's Reply Brief at 18-19.

The City offers no authority for this "inescapable and perfectly obvious conclusion". Alpine would submit that this omission recognizes that the conclusion is contrary to the precedential Ninth Circuit and U.S. Supreme Court decisions on point, which provide that, although the federal claims do not ripen or accrue until and unless relief has been denied on the state claim, the federal claims must be pled in the state court proceeding and can be considered by this Court in conjunction with its review of the state

claim.[4] To do otherwise creates the piecemeal litigation which the decision in *San Remo* expressly condemns.

The City's Reply Brief does, however, significantly narrow the issues which are in dispute in the pending motions, namely, whether a compensable taking has occurred. In its discussion of Judge Neville's decision in *Mountain Central*, the City states that "Given this ruling against the City, it is unclear why Alpine devotes so many pages of its brief to the law of unconstitutional takings. The City does not and cannot dispute that Ordinances 819 and 820 are unconstitutional."[5] Consistent with this concession, the City does not dispute or rebut Alpine's arguments in Alpine's Opening Brief that the City's application of Ordinance 819 to Alpine's project effectuated a compensable taking of two constitutionally protected property interests, namely the right to freely exclude people from and dispose of its property and the right to not be dispossessed of the money which Alpine was required to expend to acquire the Timbers complex. Specifically, the City does not dispute or rebut Alpine's assertion in its Opening brief at page 15 that:

> Money is property in the constitutional sense. "Money is clearly property that may not be taken for public use without the payment of just compensation. *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 123 S.Ct. 1406, 155 L.Ed.2d 376 (2003)." *BHA Investments, Inc. v. City of Boise*, 141 Idaho 168, 172, 108 P.3d 315, 319 (2004). In *BHA* the Idaho Supreme Court found that the payment of money to the City of Boise pursuant to a city ordinance that the Court had earlier ruled void[6] was an unconstitutional taking. "Since the City had no authority to charge the liquor license transfer fee, its exaction of the fee constituted a taking of property under the United States and Idaho Constitutions." *BHA Investments, Inc,* 141 Idaho 168, 172, 108 P.3d 315, 319 (2004). The clear and unambiguous holding of BHA is that the exaction of money pursuant to a void ordinance is a per se unconstitutional taking of property.
>
> There is no constitutionally relevant distinction between BHA's payment of money directly to the City of Boise and Alpine's payment of money to a third party to purchase property as required by the Ordinance. It is the taking of property for a public use, without compensation that constitutes the taking. In both instances, the exactions were mandated by an ordinance later declared to be invalid.

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[4] See discussion at Section IV below.

[5] City's Reply Brief at 10.

[6] In the earlier case, the Supreme Court held that "The state legislature has not granted cities the authority to impose a transfer fee. The City exceeded its power in collecting the transfer fee." *BHA Investments, Inc. v. City of Boise,* 138 Idaho 356, 358, 63 P.3d 482, 484 (2003).

It would, thus, appear that the only defenses to Alpine's claims which are being offered by the City are the arguments that the claims are time barred.

II. Temporary takings are clearly compensable.

In its Reply Brief the City repeats the argument that, since Alpine still owns the Timbers property, no taking can have occurred. This argument continues to be unsupported by any prevailing case law. Alpine has presented State and Federal case law that clearly holds that a temporary taking, such as is the case before this court, is a compensatory taking.[7] In response, the City asserts that the cases cited by Alpine are out of date and that in recent years the courts have largely "eviscerated" this theory [temporary taking]. In support of this remarkable statement the City cites no federal caselaw and one Idaho case, *Moon v. N. Idaho Farmers Ass'n,* 140 Idaho 536, 96 P.3d 637 (2004).[8]

In *Moon,* landowners were contesting a state statute which conferred immunity on grass seed growers who created smoke by burning stalks after harvest in compliance with Smoke Management and Crop Residue Disposal Act. The court held that the statute was not an unconstitutional taking of the property of area residents who complained about the smoke. Here, Alpine is asserting that the City affected a per se physical taking of its property. *Moon* has no application to the case at hand. The *McCuskey* and *First English* cases (both of which recognized that "temporary takings can be compensable takings) were not even discussed in *Moon* and remain clear precedent for this Court.

III. Alpine's state constitutional claim is not time barred.

A. Failure to comply with the 180 day notice requirement of the Idaho Tort Claims Act is not a jurisdictional bar to Alpine's state claim.

As is noted above, the City misrepresents Alpine's position with regard to the 180 day notice requirements of the ITCA. Alpine has never stated, as the City would have the court believe, that compliance with the ITCA notice requirements is "optional". City Reply Brief at 1, 3, 4. The requirement imposed by Idaho Code §50-219 has never been

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[7] *McCuskey v. Canyon County Com'rs,* 128 Idaho 213, 216, 912 P.2d 100, 103 (1996) citing *First English Evangelical Lutheran Church v. Los Angeles County.,* 482 U.S. 304, 319, 107 S.Ct. 2378, 2388, 96 L.Ed.2d 250 (1987). See also Alpine's Opening Brief at 17.

[8] City's Reply Brief at 1.

disputed by Alpine. What is in dispute is whether Alpine is entitled to assert defenses to the application of Idaho Code §50-219 and whether non compliance with the statute deprives the Court of jurisdiction to consider Alpine's federal claims.

It is City's position that the 180 day notice requirement is jurisdictional and, as a result, this Court is divested of any jurisdiction to even hear Alpine's state takings claim or its equitable and constitutional defenses to the application of Idaho Code §50-219 to its state claim. Alpine argues that in all non-tort claims for damages against a city, the 180 day notice is procedural, not jurisdictional, and as such, Alpine is permitted to raise equitable and constitutional reasons as to why compliance with the notice of claim provisions was not required in this case.

The issue presented is one of statutory construction. The language of Idaho Code §50-219 requires that all claims for damages against a city must be filed as prescribed by chapter 9, title 6, Idaho Code. There are twenty nine (29) statutory sections of the ITCA. Only two sections prescribe when and how claims must be filed. These are Idaho Code §6-906- *Time for filing claims* and Idaho Code §6-907- *Contents of claim.* The City and Alpine agree that the §50-219 has the effect of applying these two sections to non-tort claims for damages against a municipality. However the City argues that "logically" Idaho Code §50-219 should also be interpreted as applying to such non-tort claims the provisions of Idaho Code §6-908, which purports to bar lawsuits by those who fail to provide notice. This assertion by the City is neither logical nor consistent with the rules of statutory construction.

Idaho Code §50-219 is a short and simple statute. The Idaho Supreme Court in *Sweitzer v. Dean*, 118 Idaho 568, 572, 798 P.2d 27, 31 (1990) had the opportunity to apply the rules of statutory construction to the meaning of the words "all claims must be filed as prescribed" in §50-219. Sweitzer argued that Idaho Code §50-219, as amended in 1983, acted to incorporated the entire ITCA. In rejecting that argument, the Court held

> Applying the plain meaning of the words "all" and "filed" in conjunction with that of the word "prescribe," may clearly be construed to mean that all damage claims are to be filed as directed by or in the manner set forth in the ITCA. Applying the plain meaning of the language contained in I.C. §50-219 clearly demonstrates that the legislature's intent was to incorporate the notice requirements contained in chapter 9, title 6 so as to make the filing procedures for all claims against a municipality uniform,

> standard and consistent. To construe the language to mean that the Tort Claims Act is substituted for I.C. § 50-219 would render I.C. § 50-219 meaningless and essentially null. We therefore construe the language contained in I.C. § 50-219 to require that a claimant must file a notice of claim for all damage claims, tort or otherwise, as directed by the filing procedure set forth in I.C. § 6-906 of the Idaho Tort Claims Act, chap. 9, tit. 6.

Sweitzer v. Dean, 118 Idaho 568, 572, 798 P.2d 27, 31 (1990).

Thus, the Sweitzer court limited the application of Idaho Code §50-219 to the filing procedures of the ITCA and nothing more.

Further evidence of the legislative intent to limit the scope of Idaho Code §50-219 can be found in the history of that code section. Prior to the amendment in 1983 of Idaho Code §50-219 to its present language that section read.

> All claims for damages against a city must be filed with the city clerk within sixty (60) days after the time when such claim for damages shall have occurred; specifying the time, place and probable cause of said damage. *No action shall be maintained against the city for any claim for damages until the same has been presented to the city council, and until sixty (60) days shall have elapsed after such presentation.* The payment of any and all damage claims by the city shall be by resolution, and not otherwise (emphasis added).

Thus, like the civil rule which the Supreme Court relied on in *City of Eagle v. Idaho Department of Water Resources*, 150 Idaho 449, 247 P.3d 1037 (2011), the prior version of Idaho Code §50-219 contained language from which the Court could find a legislative intent to make compliance with the statute jurisdictional. However, in its 1983 amendment to §50-219 the legislature deleted all of the language which would suggest a legislative intent that compliance with §50-219 be found to be jurisdictional.

This entire issue is framed in the context of the Supreme Court's holdings which were cited at page 23 of Alpine's Opening Brief that, absent express language in the subject statute evidencing a legislative intent to bar equitable defenses, such defenses to the application of even a statute of limitations may be asserted. The City's only foundation for its position that the failure to comply with the 180 day notice requirements is jurisdictional is its own unsupported argument. The City has failed to cite any case law that would support its position that Idaho Code §6-908 applies to non-tort claims, because there is none. The only holdings that §6-908 creates a jurisdictional bar arise in two tort

cases.[9] Likewise, the City cannot cite any case law that supports its claim that Idaho Code §50-219 sweeps in the provisions of Idaho Code §6-908 to non-tort claims for damages against municipalities, because there is none. It elects to not respond to the significant body of case law from other jurisdictions which hold that the requirements of comparable notice of claim statutes are procedural, not jurisdictional, in nature and are thus subject to equitable and constitutional defenses.[10] To the contrary, the legislative history and the *Sweitzer* court's statutory interpretation of the language of Idaho Code §50-219 make it clear that §50-219 is a statute dealing with when a claim for damages must be filed against a city and nothing more.

The conclusion to be drawn from all of this is that, as applied to Alpine's case, Idaho Code §50-219 is a procedural statute to which equitable and constitutional defenses may be asserted. In the event that the Court finds that Alpine's equitable and constitutional defenses are not persuasive and dismisses Alpine's state claim, the Court should then proceed to hear Alpine's federal claim. This is the procedure prescribed by *San Remo Hotel, L.P. v. City and County of San Francisco, et al.*, 545 U.S. 323, 125 S. Ct. 2491, 162 L. Ed. 2d 315 (2005) and followed by the Supreme Court in *BHA Investments, Inc. v. City of Boise*, 141 Idaho 168, 108 P.3d 315 (2004). In *BHA*, the court found that the state claims against the City of Boise were barred by Idaho Code §6-907, since BHA failed to state the names and addresses of the claimants, the amounts of claimed damages and the nature of the injury claimed.[11] However, the Court's resultant dismissal of the BHA state claims for failure to comply with the tort claim notice requirements did not prevent the court from hearing the federal takings claim. The court held "Bravo and Splitting Kings' complaint also included, however, a claim that the City had taken their property for public use without the payment of just compensation in violation of the Constitution of the United States. The notice of claim requirement set forth in Idaho Code §50–219 does not apply to a claim based upon federal law." Id.

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[9] See *McQuillen v. City of Ammon*, 113 Idaho 719, 722, 747 P.2d 741,744 (1987); *Harkness v. City of Burley*, 110 Idaho 353, 360, 715 P.2d 1283, 1290 (1986).
[10] See Alpine's Opening Brief at 24-25; City's Reply Brief at 5.
[11] *BHA Investments*, 141 Idaho at 175, 108 P.3d at 322.

B. The City has not offered any rational basis for its disparate treatment of Alpine, as opposed to the other members of the class of people impacted by Ordinances 819 and 829.

The essence of Alpine's contention that the application of Idaho Code §50-219 to Alpine's state constitutional claim in this case would constitute a denial of Alpine's right to equal protection of the law is that:

- There have been 59 persons who were financially impacted by Ordinance 819 or 820 identified.
- The City allowed, in fact invited, requests for refunds to be submitted by 58 of those persons.
- The refund requests were accepted by the City as long as 43 months after the date on which the fee was paid.
- The City did not assert Idaho Code §50-219 as a bar to any of the requests.
- Depending on which date this Court ultimately holds Alpine's state constitutional claim accrued, Alpine submitted its demand for compensation 35-43 months after its claim accrued.[12]
- Alpine is the only member of the class of persons who were financially impacted by Ordinance 819 and/or 820 against whom the City is asserting Idaho Code §50-219 as a bar to recovery.

In its Reply Brief, the City acknowledges that it could have asserted Idaho Code §50-219 as a bar to the other 58 refund requests, but elected not to do so. Referring to the refund requests which the City paid, the City concedes that:

> The City did not have to do so, because many of those claims were also barred by the statute of limitations or the 180-day rule. However, given the District Court's ruling in *Mountain Central Board of Realtors, Inc. v. City of McCall* . . . the City determined that returning money received under the housing ordinances was the right thing to do."[13]

[12] Alpine's claim was presented to the City in a letter dated and delivered on November 15, 2010. The letter is attached hereto as Attachment 1. The Development Agreement for Alpine Village, which dedicated the Timbers Units as Community Housing Units, was executed on December 13, 2007. The City Council's first approval of the proposal to utilize the Timbers units as community housing units was on March 22, 2007.

[13] City's Reply Brief at 5-6.

Alpine should have been given the same opportunity to request compensation as was afforded the other members of the class of persons who were financially impacted by Ordinances 819/820. Having not been afforded that opportunity and having submitted its claim within the same time frame as was allowed by the City to the other members of the class, the City should not be allowed to assert Idaho Code §50-219 as a bar to Alpine's state constitutional claim. The City has offered no rational basis or reasoned decision for not allowing persons impacted by Ordinance 819 to request refunds, other then stating that Alpine did not pay any fee to the City. Yet, in its arguments regarding the date on which Alpine's state inverse condemnation/takings claim accrued (starting at page 9 of its Reply Brief), the City argues that all four of the alternative compliance methods provided in Ordinance 819 (*i.e.*, providing units on site, providing units off-site, providing land, and/or paying an in lieu fee) are equally compensable as takings. Moreover, the question of how the City would have responded (or in fact has responded) to a request from Alpine for compensation is irrelevant to Alpine's equal protection claim. The issue is whether the City had any rational basis for the disparate treatment of Alpine (i.e. that the disparate treatment of Alpine was reasonably in furtherance of a legitimate public purpose). None has been offered.

C. Alpine's estoppel argument is meritorious.

The City initially contends that Alpine's estoppel argument is the same argument which was rejected by the Court in *Hehr v. City of McCall.*[14] That is most certainly not the case. The facts of Alpine's case are distinctly different than those presented by the *Hehr* case, not the least of which is that Alpine was unquestionably subjected to mandatory requirements of Ordinance 819 and Alpine's estoppel argument is premised on the City's disparate treatment of others who were also subjected to Ordinance 819 or its companion, Ordinance 820. Moreover, a review of the briefing in *Hehr* reveals that the legal arguments presented regarding the issue of whether Idaho Code §50-219 should be found to be jurisdictional were not presented in *Hehr*.

The City next offers three arguments in response to Alpine's contention that the City should be estopped from asserting Idaho Code §50-219 as a bar to Alpine's state

[14] City's Reply Brief at 7.

inverse constitutional claim: (i) that estoppel should not be applied against a municipality absent "exigent circumstances"; (ii) that estoppel cannot operate to grant subject matter jurisdiction; and, (iii) that Alpine has not been "disadvantaged or induced to change its position as a result of any action by the City."[15] As to the first argument, the undisputed facts of record in this case certainly establish the kind of exigent circumstances to which the courts have referred. It is also indisputable that Alpine has been disadvantaged by the City's change of position. Had Alpine been treated the same as others similarly situated, its state constitutional claim for compensation would not be subject to Idaho Code §50-219 and would have to be evaluated on its merits, which have been conceded by the City. The issue of whether the statute is "jurisdictional" has been addressed above.

The City also suggests that, even if Alpine's estoppel claim is found to have merit, then the remedy is simply to extend the period for Alpine to file its claim for a period of 180 days following the City's adoption of Resolution 08-11, which invited refund requests from those financially impacted by Ordinance 820.[16] This makes no sense. Resolution 08-11 was adopted by the City on April 24, 2008. The period to file refund requests was not closed by the City until December 31, 2009, some 20 months later. Moreover, requests for compensation/refunds were accepted and paid by the City as long as 43 months after the date on which the community housing fee had been paid. The remedy for Alpine's estoppel claim is to declare the City estopped from asserting Idaho Code §50-219 as a bar to Alpine's state claim, thereby treating Alpine exactly the same as the others who were financially impacted by Ordinances 819/820.

D. Alpine's Complaint was timely under Idaho Code §5-224.

As is explained above, in order to support its argument that Alpine's state constitutional claim accrued on the date of Alpine's filing of its development applications, the City both mischaracterizes Alpine's state takings/inverse condemnation claim *and* invents a legal standard for determining the date of accrual of the claim which is unsupported by judicial precedent. First, the City incorrectly characterizes the claim as a "facial challenge" to Ordinance 819. Then the City argues that the *mere existence* of an Ordinance which *could* be applied in a manner which would constitute a taking triggers

[15] City's Reply Brief at 7-8.
[16] City's Reply Brief at 8.

the accrual of the takings cause of action at the time of the filing of the Application.[17] For the reasons explained below and at pages 17-21 of Alpine's Opening Brief, the Court should reject the City's mischaracterization and flawed analysis. The law of Idaho is that:

> A claim for inverse condemnation action 'accrues after the full extent of the impairment of the plaintiffs' use and enjoyment of [the property] becomes apparent.' *Tibbs v. City of Sandpoint,* 100 Idaho 667, 671, 603 P.2d 1001, 1005 (1979) (quoting Aaron v. United States, 160 Ct.Cl. 295, 311 F.2d 798, 802 (1963)).

City of Coeur d'Alene v. Simpson, 142 Idaho at 846, 136 P.3d at 317.

The "full impairment becomes apparent" standard of *Tibbs* was also cited in *McCuskey v. Canyon County Com'rs,* 128 Idaho 213, 217, 912 P.2d 100, 104 (1996).

> [T]his Court has decided that damages for inverse condemnation should be assessed at the time the taking occurs. *Tibbs v. City of Sandpoint,* 100 Idaho 667, 670, 603 P.2d 1001, 1004 (1979) *citation omitted* The time of taking occurs, and hence the cause of action accrues, as of the time that the full extent of the plaintiff's loss of use and enjoyment of the property becomes apparent. *Intermountain West,* 111 Idaho at 880, 728 P.2d at 769 (citing *Tibbs,* 100 Idaho at 671, 603 P.2d at 1005).

To understand the impact of the "full impairment becomes apparent" language of *Tibbs* it is important to remember that in *Tibbs*, the Court was also deciding when damages in an inverse condemnation case accrued ("both the extent and the measure of damages, are inextricably fixed by a finding of the time of taking" *Tibbs,* 100 Idaho at 670). The *Tibbs* court concluded that the time of the taking, the accrual of the taking claim, and the time from which to measure a plaintiff's damages, although not readily susceptible to exact determination, must all 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. The City's entire argument on this issue extracts the word "apparent" but attaches it to a completely different concept, arguing that, when Alpine filed its application, it was "apparent" that it might somehow be impacted by Ordinance 819. That is simply not the standard in Idaho for determining the accrual date of a takings claim such as the claim being asserted by Alpine.

[17] See discussion in the *Introduction,* at 2-5 above.

Alpine knew the Community Housing Ordinance applied to its project at the time it first submitted its development application to the City just as it knew that countless other city ordinances would apply to its development. However, the first community housing plan submitted by Alpine was far different in scope and impact from the community housing plan which was ultimately required by the City.[18] Only when the final components of the community housing plan were established and approved by the McCall City Council, and incorporated into a Development Agreement did the full extent of Alpine's loss of use and enjoyment of its property became apparent. Under Idaho law, that is when Alpine's state constitutional takings claim accrued.

IV. Alpine's federal takings claims are timely.

The City takes issue with Alpine's contention that its federal takings claims have not accrued for statute of limitations purposes, stating that: "This is a curious position to take, because if it has not accrued, how can it be before the court today?"[19] At the outset, it is worthy of note that this same "curious" position was taken by U.S. District Judge Winmill in his decision remanding this case:

> The accrual of a federal takings claim turns on the exhaustion of state remedies: "[T]he date of accrual is either (1) the date compensation is denied in state courts, or (2) the date the ordinance is passed if resort to state courts is futile." *Hacienda Valley Mobile Estates v. City of Morgan Hill*, 353 F.3d 651 (9th Cir. 2003) (citing *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 688 (1993)). There is no contention that the exhaustion requirement is futile here. Therefore, Alpine Village's federal claim does not accrue until compensation is denied in state court, and it appears that the statute of limitations has not yet begun to run.
>
> (continuing at footnote 2):
>
> > The City argues that *Hacienda Valley Mobile Estates and Levald* apply only "with respect to a federal claim brought first in federal court." (citation omitted). But the Ninth Circuit's rationale is at least as strong with respect to a state claim removed to federal court.
> >
> > > "[T]he Fifth Amendment does not proscribe the taking of property; it proscribes taking *without just compensation.*" ... Thus, a plaintiff cannot bring a section 1983 action in federal court until the state denies just compensation. A claim under section 1983 is not ripe-

[18] See *Introduction* above and Statement of Facts, at 3-7 of Alpine's Opening Brief.

[19] City's Reply Brief at 17. This is the same argument which was [resented by the City in its Opening Brief and which was discussed at some length by Alpine at 29-33 of Alpine's Opening Brief.

> and a cause of action under section 1983 does not accrue-until that point.

Levald, 998 F. 2d at 687 (quoting *Williamson County,* 473 U.S. at 194).[20]

The City cites no authority for its dismissal of this proposition, instead relying on its reading of the U.S. Supreme Court's decision in *San Remo Hotel, L.P. v. City and County of San Francisco, et al.*, 545 U.S. 323, 125 S. Ct. 2491, 162 L. Ed. 2d 315 (2005) and the decision of the Ninth Circuit Court of Appeals in *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 687 (9th Cir. 1993). In fact, the City's argument (i.e., that if the federal claims have been brought in state court, then they must be ripe and the claims must have already accrued) was expressly addressed and rejected by the U.S. Supreme Court in *San Remo*. Therein, one of the arguments being made by the appellants was that, as to federal claims which required ripening by first being brought in state court under *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City,* 473 U.S. 172 (1985), the appellants were not required to present those federal claims in the state court action, for the reason that they were not yet ripe. The Supreme Court rejected this argument, holding specifically that such federal claims must be pled "in the alternative" in the state court action:

> With respect to those federal claims that did require ripening, we reject petitioners' contention that *Williamson County* prohibits plaintiffs from advancing their federal claims in state courts. The requirement that aggrieved property owners must seek "compensation through the procedures the State has provided for doing so," 473 U.S. at 194, 105 S.Ct. 3108, does not preclude state courts from hearing simultaneously a plaintiff's request for compensation under state law and the claim that, in the alternative, the denial of compensation would violate the Fifth Amendment of the Federal Constitution. Reading *Williamson County* to preclude plaintiffs from raising such claims in the alternative would erroneously interpret our cases as requiring property owners to "resort to piecemeal litigation or otherwise unfair procedures." *MacDonald, Sommer & Frates v. Yolo County,* 477 U.S. 340, 350, n. 7, 106 S.Ct. 2561, 91 L.Ed.2d 285 (1986).[21]

The City also erroneously cites *Levald* in support of its argument that Alpine's resort to state court should be found to be "futile", and that, therefore, Alpine's federal

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[20] See Memorandum Decision and Order, filed August 25, 2011, at 6, (Exhibit 29 to *Affidavit of Steven J. Millemann,* filed with and in support of Alpine's Motion for Summary Judgment).

claim should be found to have accrued when Ordinance 819 was adopted.[22] This argument is surprising and is flawed in a number of respects. The argument is surprising because in its *Opening Brief in Support of Motion to Dismiss* in federal court, the City specifically argued that Alpine was required to resort to state court to ripen its federal takings claim *because resort to state court would not be futile.*[23] In his decision remanding this case, Judge Winmill recognized that in this case, "There is no contention that the exhaustion requirement is futile here."[24] The City's acknowledgement in federal court recognized that the post-*Williamson* decisions which have held that resort to the state courts prior to adjudication of a federal takings claim is not required if it would be "futile" have consistently, without exception, defined "futility" as the state not recognizing an inverse condemnation/taking cause of action. The state court's ultimate decision on the merits of the state claim is irrelevant to the issue of futility. This narrow definition of futility was recognized by the Ninth Circuit in *Levald:*

> Here, the taking at issue in the facial challenge allegedly occurred at the time the ordinance was enacted-in 1986. California did not recognize actions for inverse condemnation based on *regulatory* takings until *after* the Supreme Court's decision in *First English Evangelical Lutheran Church v. County of Los Angeles,* 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987). Therefore, even though Levald did not seek remedies in state court, it was not required to do so because it would have been futile to seek state court relief at the time the alleged taking occurred. The claim is ripe.[25]

The additional flaw in the City's citation of *Levald* in this context is that, as the above cited language of the decision confirms, *Levald* involved a *facial challenge* to a statute at a time when California did not recognize or allow inverse condemnation claims. Thus, the "small class of cases" to which the *Levald* court was referring does not include this case.

Lastly, on the issue of the timeliness of Alpine's federal takings claims, the City

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[21] *San Remo,* 545 U.S. at 346, 125 S.Ct. at 2506.
[22] City's Reply Brief at 17-18.
[23] City's Opening Brief in Support of Motion to Dismiss, at 16-17 (Exhibit 24 to the *Affidavit of Steven J. Millemann,* filed with and in support of Alpine's Motion for Summary Judgment).
[24] See Memorandum Decision and Order, filed August 25, 2011, at 6, (Exhibit 29 to *Affidavit of Steven J. Millemann,* filed with and in support of Alpine's Motion for Summary Judgment).
[25] *Levald,* 998 F.2d at 686.

suggests that "Under Alpine's analysis, it could wait 20, or for that matter, 100 years before filing the state and federal claims."[26] First, that is not Alpine's position. Second, that did not occur here. Alpine has timely filed its state claim within the 4 years allowed by Idaho Code §5-224, thus unquestionably giving this Court jurisdiction to consider the state claim and the City's alleged defenses thereto.

CONCLUSION

For the reasons stated herein and in Alpine's Opening Brief, Alpine respectfully requests that its Motion for Summary Judgment be granted and the City's Motion for Summary Judgment be denied.

DATED this 14th day of November, 2011.

MILLEMANN, PITTENGER, McMAHAN & PEMBERTON, LLP

BY: _____
STEVEN J. MILLEMANN

BY: _____
GREGORY C. PITTENGER

[26] City's Reply Brief at 19.

ATTACHMENT I

MILLEMANN, PITTENGER, McMAHAN & PEMBERTON, LLP
ATTORNEYS AT LAW
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MCCALL, IDAHO 83638

STEVEN J. MILLEMANN
Email: sjm@mpmplaw.com

TELEPHONE: (208) 634-7641
FACSIMILE: (208) 634-4516

November 15, 2010

HAND DELIVERED AND MAILED

Lindley Kirkpatrick
McCall City Manager
City of McCall
216 E. Park St.
McCall, Idaho 83638

Re: Alpine Village/Timbers Community Housing

Dear Lindley,

I am writing on behalf of Alpine Village Company, who is a client of this office. As you know, Alpine Village Company received P.U.D. approval from the City of McCall for the construction of a multi phase residential/commercial development on property it owns on Third St. The project is known as Alpine Village. To date, Phase 1 of Alpine Village has been built, which consists of commercial space and 27 residential units.

As a condition of the P.U.D. approval, the City required Alpine Village to provide 17 residential units to satisfy the then Community Housing provisions of the McCall City Code. To comply with these conditions and with the approval of the McCall City Council, Alpine Village Company purchased the Timbers, which was converted from an apartment complex to a condominium project, consisting of 17 individual condominium units, specifically to comply with the Ordinance. Following acquisition, Alpine Village Company completed an interior remodel of the units and offered them as Community Housing units. None sold.

The Community Housing provisions of the McCall City Code were judicially declared to be invalid in February, 2008, by District Judge Neville in the case of *Mountain Central Board of Realtors, Inc. v. City of McCall.* In July, 2009 the City released the Timbers from the community housing restrictions and Alpine Village Company has endeavored since that time to recover its investment in the Timbers by offering the units for sale free of any deed restrictions. To date, only two units have been sold, despite aggressive marketing efforts by Alpine Village Company.

Alpine Village Company acquired, converted and improved the Timbers complex solely to comply with the City's Ordinance. This was a mandatory compliance and not pursuant to any

ATTACHMENT 1

of the City's later Resolutions which invited "voluntary" community housing programs. Alpine Village Company has incurred significant financial loss as a result of its acquisition, remodel and continued ownership of the Timbers units. This loss amounts to $2,792,605 as of June, 2010. Despite efforts to mitigate its losses through rentals and sales, and after applying the current appraised market value of the Timbers of $475,000 to offset its losses, damages of $2,317,605 still remain.

The purpose of this letter is to provide notice to the City of McCall of Alpine Village Company's claim against the City for the aforesaid damages Alpine Village Company has incurred as a result of the City's invalid Community Housing Ordinance. This claim is actionable as a "taking" in violation of the Fifth and Fourteenth Amendments to the United States Constitution. The Idaho Supreme Court has made it clear that losses occasioned as a result of an invalid city ordinance constitute an unconstitutional taking and that the City is liable therefore. See *BHA Investments, Inc. v. City of Boise,* 141 Idaho 168, 108 P.3d 315 (2005). In the event that this sum is not paid or other resolution of this claim satisfactory to Alpine Village is not reached by November 30, 2010, we will initiate litigation for these damages, as well as our client's costs and attorney's fees incurred in pursuit of this claim.

The time remaining for the Alpine Village Company to commence litigation to recover its losses is very short. However, in light of the good relationship that we believe exists between our client and the City, which is certainly valued by Alpine Village Company, we would defer the filing of a lawsuit in order to explore the possibility of some other resolution, short of litigation. Should the City desire to explore alternative resolutions, we would suggest that a meeting be scheduled as soon as possible, but in any event prior to the end of November. We would propose that such a meeting be held pursuant to Rule 408 of the Idaho Rules of Evidence, which protects such discussions from later being admissible in a court proceeding. If the City is interested in scheduling a meeting, please call me to discuss timing and participants.

Finally, I should note that, as you will recall, both this firm and Mike Hornaechea testified before the McCall City Council during the public hearing process on the Community Housing Ordinance that the Ordinance was ill advised, inequitable and would likely not survive judicial scrutiny. The Council and the County Commissioners were encouraged at the time by Mr. Millar to disregard that testimony, and they did so. I offer this fact for the reason that the judicial challenge to the Ordinance brought cries of "where were they during the public hearings on the Ordinance"? The answer in this instance is that both we and our client were there and made our best efforts to avoid this very scenario.

If you have any questions regarding the Alpine Village Companies position, please do not hesitate to contact me.

Sincerely,

STEVEN J. MILLEMANN

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Martin C. Hendrickson, ISB #5876
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Attorneys for Defendant City of McCall

IN THE DISTRICT COURT OF THE FORUTH JUDICAL DISTRICT OF

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

ALPINE VILLAGE COMPANY, an Idaho corporation, Plaintiff, vs. CITY OF McCALL, a municipal corporation, Defendant.	Case No. CV-2010-519C **NOTICE OF SUPPLEMENTAL AUTHORITY**

COMES NOW the Defendant, by and through its attorneys of record, Givens Pursley LLP, and hereby provides notice to the Court and to Plaintiff of its intent to rely upon the following supplemental authorities at the hearing on the cross motions for summary judgment that is scheduled for November 17, 2011, at 3:00 p.m.

Attached hereto as Exhibit A are true and correct copies of the legislative history of the amendment to Idaho Code § 50-219 that occurred in 1983. These materials are being provided

to the Court in response to the argument made by Plaintiff in its Reply Brief, p. 9, that the Legislature deliberately removed the language that would make non-compliance a jurisdictional defect. As the Court can see from these materials (re: RS 9018 and SB 1148), there was no such intent – the amendment was only intended remove conflicts between section 50-219 and the tort claims act as to whether the notice deadline should be 60 days or 180 days. Thus, section 50-219 has required notice as a mandatory condition both before and after its amendment in 1983.

Attached hereto as Exhibit B is a true and correct copy of *Magnuson Properties Partnership v. City of Coeur D'Alene*, 59 P.3d 971, 138 Idaho 166 (2002), in which the Idaho Supreme Court held that compliance with § 50-219 was a mandatory condition precedent to the filing of plaintiff's lawsuit that included tort, contract, and equitable claims. This case is being submitted to the Court in response to Plaintiff's argument in its Reply Brief, p. 10, that there is no case law in Idaho holding that compliance with Idaho Code § 50-219 is a mandatory condition precedent for a non-tort damage claim against a municipality.

Attached hereto as Exhibit C is a true and correct copy of *Brown v. City of Caldwell*, 769 F.Supp.2d 1256 (D.Idaho 2011), in which the court observed that the notice requirement in § 50-219 is a "mandatory condition precedent" to bringing suit which deprives the court of subject matter jurisdiction. The court in *Brown* held that the plaintiff's contract claim was barred by his failure to give notice, but that his claim under the Idaho Whistleblower Act was not barred because that Act has its own timeliness requirements that are not consistent with § 50-219. As with *Magnuson Properties Partnership*, this case is being provided to the Court specifically to rebut Plaintiff's assertion that there is no case law that supports the application of Idaho Code § 6-908 as a jurisdictional bar to a non-tort damage claim against a city.

Both *Magnuson Properties Partnership* and *Brown* were decided prior to the service of the City's Reply Brief in this matter, and counsel for the City acknowledges that these cases should have been cited in that Reply Brief. However, these cases were discovered during the course of analyzing Plaintiff's Reply Brief and preparing for oral argument and are believed to be directly applicable to the issues at hand.

DATED this 15th day of November, 2011.

GIVENS PURSLEY LLP

By: _____
Christopher H. Meyer

By: _____
Martin C. Hendrickson

Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 15th day of October, 2011, the foregoing was filed, served, and copied as follows:

DOCUMENT FILED:

Fourth Judicial District Court Attn: Archie N. Banbury, Clerk Valley County Courthouse 219 Main Street Cascade, ID 83611 Facsimile: 208-382-7107	☒ ☐ ☐ ☐ ☐	U. S. Mail Hand Delivered Overnight Mail Facsimile E-mail

SERVICE COPIES TO:

Steven J. Millemann, Esq. Gregory C. Pittenger, Esq. Millemann, Pittenger, McMahan & Pemberton, LLP 706 North First Street Post Office Box 1066 McCall, ID 83638	☐ ☐ ☐ ☒ ☒	U. S. Mail Hand Delivered Overnight Mail Facsimile E-mail

COURTESY COPIES TO:

Honorable Michael R. McLaughlin District Judge Ada County Courthouse 200 W. Front St. Boise, ID 83702	☒ ☐ ☐	U. S. Mail Hand Delivered Overnight Mail
Jason Gray Law Clerk to Judge Michael McLaughlin Fourth Judicial District Court Ada County Courthouse 200 W. Front Street Boise, ID 83702 Email: jmgray@adaweb.net	☐ ☐ ☐ ☒	U. S. Mail Hand Delivered Overnight Mail E-mail

Christopher H. Meyer

RS 9018

STATEMENT OF PURPOSE

When the Idaho Tort Claims was enacted in 1971, it established the liability of government entities and established procedures to be followed in making tort claims against state and local government entities, superseding previous acts. Under the Tort Claims Act, Idaho Code § 6-906, tort claims must be filed with 120 days from the date the claim arose.

A 1967 statute, Idaho Code § 50-219, had established a 60 days time limit for filing tort claims against cities. Although superseded, Idaho Code § 50-219 is still on the books and can create confusion for potential claimants and lawyers advising their clients.

This bill would amend Idaho Code § 50-219 to remove the conflict with the Idaho Tort Claims Act.

FISCAL NOTE

This bill would have no fiscal impact on the state general account.

EXHIBIT A

S1148

MINUTES

SENATE JUDICIARY AND RULES COMMITTEE

February 28, 1983 1:30 p.m.

MEMBERS PRESENT: Senators Fairchild (Chairman), Barker, Rydalch, Darrington, Marley, Sweeney, Wetherell and Bray.

Moved by Senator Marley, second by Senator Sweeney that the minutes of the meeting of February 25th be accepted as presented. On a voice vote, the motion passed.

S 1128 Extraditions. Deputy Attorney General Ken McClure said this legislation corrects a defect in existing extradition law. Currently, extradition is allowed only for state to state. If a person living in California, commits a crime via telephone to Idaho and is apprehended in Oregon, Idaho cannot extradite him from Oregon.

MOTION: Moved by Senator Barker, Second by Senator Rydalch, that S 1128 be sent to the floor with a DO PASS recommendation. On a voice vote, the motion passed. Barker sponsor Senator Risch present.

RS 9208 Pardons and paroles, violations, time limit for warrants. Steve Coles, Pardons and Paroles Commission said that the current 15 day time limit was too constricting and this legislation would change the 15 day time limit to start at the completion of the investigatory work.

MOTION: Moved by Senator Risch, second by Senator Marley, to introduce RS 9208. On a voice vote, the motion passed.

RS 9192 License suspended, minors, alcohol related. Senator Beitelspacher again reiterated this legislation would speak to the problem of the 14-18 year old driver. Senator Wetherell asked about the problem of the cost of acquiring a SR22, after the suspension of a license. Senator Barker said he had some problems, also, with this legislation.

MOTION: Moved by Senator Bray, second by Senator Darrington that RS 9192 be introduced. On a voice vote, the motion passed. Senator Smyser present.

RS 9237 Highway Districts, clarifying duties. Senator Risch said this legislation was brought by the highway district people. This would clarify the duties of the county-wide highway district's function over public rights-of-way as they are affected by proposed sub-divisions.

MOTION: Moved by Senator Marley, second by Senator Risch, that RS 9237 be introduced. On a voice vote, the motion passed.

HCR 21 — Amending Joint Rule 6. Senator Barker explained that this rule change allows that resoltuions and memorials be printed in full only in the house of origin. This will be a cost savings for the journal.

MOTION: Moved by Senator Risch, second by Senator Rydalch, that HCR 21 be sent to the floor with a DO PASS recommendation. On a voice vote, the motion passed. Barker, sponsor.

RS 9018 — Tort Claims, removing conflict with Idaho Tort Claims Act. Senator Risch explained that when the Idaho Tort Claims Act was enacted, this section was not changed. This merely brings into conformance.

MOTION: Moved by Senator Risch, second by Senator Bray, to introduce RS 9018. On a voice vote, the motion passed.

Senator Barker said that he had an RS he would be bringing to the next meeting for introduction.

There being no further business, the meeting adjourned.

Respectfully submitted,

Roger Fairchild, Chairman

Hazel Keefer, Secretary

MINUTES

SENATE JUDICIARY AND RULES COMMITTEE

March 9, 1983 1:30 p.m.

MEMBERS PRESENT: Senators Fairchild (Chairman), Barker, Smyser, Darrington, Marley and Sweeney.

Moved by Senator Sweeney, second by Senator Smyser, to accept the minutes of the meeting of March 7th as presented. On a voice vote the motion passed.

RS 9299 Driving under the Influence. Senator Smyser went through the legislation pointing out the major issues.

Senators Bray, Wetherell and Rydalch present

Senators Fairchild and Smyser thanked the members of the sub-committee and the public who gave of their time and ideas in the preparation of this legislation.

Senator Risch present.

Senator Fairchild said that the legislative intent written into this bill was unique and hoped that the judiciary would get the message that the legislature wanted the law applied equally.

MOTION: Moved by Senator Barker, second my Senator Marley, that RS 9299 be sent to print. On a voice vote, the motion passed.

S. 1146 Drivers license, suspended for minors in alcohol related offenses. Senator Beitelspacher, in response to a question raised at the last meeting, said that an amendment to the bill, stating that these offenses would not be on the driving record would take care of the matter

MOTION: of increased insurance costs. Moved by Senator Risch, second by Senator Bray, that S. 1146 be sent to the 14th order for amendment. On a voice vote, the motion passed.

S. 1148 Tort Claims Act, removing conflicts. Carl Bianchi, Court Administration, said this was just a housekeeping

MOTION measure to remove some conflicts in the Act. Moved by Senator Risch, second by Senator Marley, that S. 1148 be sent to the floor with a DO PASS recommendation. On a voice vote, the motion passed.

S. 1164 Forceable rape. Ken McClure, Deputy Attorney General explained this legislation closes some loopholes in the law. Idaho Code does not define penetration with objects other than a penis. Trish Flannigan of the Ada County Prosecutor's Office gave a brief background on the need for this legislation. Moved by Senator Bray, seonc by Senator Darrington, to send S. 1164 to the floor with a DO PASS recommendation. On a voice vote, the motion passed.

MOTION:

There being no further business, the meeting adjourned.

Respectfully submitted,

Roger Fairchild, Chairman

Hazel Keefer, Secretary

LOCAL GOVERNMENT COMMITTEE
MINUTES
WEDNESDAY, MARCH 16, 1983

TIME: 2 P.M.

PLACE ROOM 408, STATEHOUSE.

VISITORS: Mr. Jim Weatherby, Association of Idaho Cities; Mr. Bob Venn, Public Employees Retirement System.

PRESENT: Bunting, Paxman, Sharp, Lucas, Strasser, Loveland, Deckard, Findlay, Stoicheff, Lacy, Kellogg.

ABSENT OR EXCUSED: Bateman.

Meeting called to order by Chairman Bunting at 2 p.m.

MOTION: Representative Findlay moved to accept the minutes of March 14, 1983 as written.

No objection - Motion carried.

SB 1016 AA Mr. Jim Weatherby of the Association of Idaho Cities testified in support of SB 1016 as amended. He said it is jointly sponsored by the cities, counties as well as highway systems. It was amended in the Senate so that it includes cities, counties and highway districts. This limitation was last raised in 1975 from $2,500 to $5,000, and due to inflation in the last couple of years this will raise it from $5,000 to $10,000, narrowing the scope of limitations. It relates to equipment purchases only. Prior to this legislation the limitation was for all purchases. One area of purchasing is for computor equipment. If after a purchase is made through the bidding process additional equipment is needed and it comes from the same company in which the initial bid was made, this would eliminate the necessity of an additional bid. This would also be beneficial when buying used equipment, such as used vehicles that can be purchased for less than $10,000.

Mr. Weatherby urged support of this legislation.

MOTION: Representative Strasser moved to hold SB 1016 as amended in committee; seconded by Bunting.

Strasser explained that he has a great fear that this will take it out of the market enterprise and put it in the hands of friends, etc.

Motion to hold in committee failed.

MOTION: Representative Stoicheff moved to send SB 1016 as amended to the floor with a "do pass" recommendation; seconded by Representative Lacy.

AMENDED MOTION: Representative Strasser made an amended motion to send SB 1016 as amended to the floor with a "do not pass" recommendation; seconded by Findlay.

Motion to send to floor "do not pass" failed.

Motion to send to the floor with a "do pass" recommendation passed; Strasser and Findlay voting "no."

Stoicheff to carry.

SB 1027 Mr. Robert Venn of the Retirement System referred testimony of SB 1027 to Mr. Jim Weatherby of the Association of Idaho Cities. Mr. Weatherby stated this legislation is an attempt to resolve a dilemma that cities and fire districts are now in when they hire a fireman who are over the age of 34 years. He said the United States Supreme Court states it is constitutional for the Congress to prohibit discrimination on the basis of age as far as hiring employees is concerned. They asked the Attorney General where they stand and received an informal opinion in July,1982 that 72-1428 cannot be upheld because of the Federal Age and discrimination Act. He said they can ignore this section, or abide by 72-1428 and be in violation of the federal law, or they can seek a solution by amending the present law to delete the portion under 72-1428 which states "and has not reached the age of thirty four". This is the logical way to go and they ask for repeal of this provision of the law. The amendment is for the Fireman's Retirement Fund and there would be no effect on the Fund.

Mr. Venn stated the minimum requirement for retirement would be five years of accredited service. He would have to have five years before he would be eligible to retire. The impact on the Fireman's fund would have no measurable effect whatsoever.

Mr. Weatherby said hiring is on the basis of physical performance standards, and age is merely not a factor.

MOTION: Representative Stoicheff moved to send SB 1027 to the floor with a "do pass" recommendation; seconded by Paxman.

Motion to send to the floor "do pass" carried. (Paxman to carry)

SB 1148 Mr. Carl Bianchi, Administrator of the Courts, testified in favor of SB 1148. He stated this bill would amend Idaho Code 50-219 to remove the conflict with the Idaho Tort Claims Act. He urges support of this bill.

MOTION: Representative Kellogg moved to send SB 1148 to the floor with a "do pass" recommendation; seconded by Paxman.

Motion carried. (Lucas to carry)

MEETING ADJOURNED AT 2:45 p.m.

Chairman

Secretary

Supreme Court of Idaho,
Coeur d'Alene, October 2002 Term.
MAGNUSON PROPERTIES PARTNERSHIP, an Idaho General Partnership, Plaintiff-Appellant-Cross Respondent,
v.
CITY OF COEUR D'ALENE, an Idaho Municipality, Defendant-Respondent-Cross Appellant.

No. 28392.
Nov. 26, 2002.

Commercial landowner brought a breach of contract action against city based on an agreement that city would reimburse landowner to extend sewer line to adjoining property. The District Court of the First Judicial District, Kootenai County, Charles W. Hosack, J., granted default judgment in favor of landowner, but subsequently granted city's motion to set aside the default judgment and granted city's motion for summary judgment. Landowner appealed, and the Court of Appeals affirmed the set aside of the default judgment, but reversed the grant of summary judgment. City appealed. The Supreme Court, Kidwell, J., held that: (1) letter from city to landowner denying reimbursement claim began notice period of Idaho Tort Claims Act (ITCA), and (2) city was not entitled to attorney's fees.

District Court affirmed.

Walters, J., concurred specially with opinion.

West Headnotes

[1] Appeal and Error 30 ⇐1082(1)

30 Appeal and Error
30XVI Review
30XVI(L) Decisions of Intermediate Courts
30k1081 Questions Considered
30k1082 Scope of Inquiry in General
30k1082(1) k. In General. Most Cited Cases

When a case is on review from the Court of Appeals, the Supreme Court hears the matter as if it is on appeal from the district court rather than review the Court of Appeal's decision.

[2] Appeal and Error 30 ⇐1082(1)

30 Appeal and Error
30XVI Review
30XVI(L) Decisions of Intermediate Courts
30k1081 Questions Considered
30k1082 Scope of Inquiry in General
30k1082(1) k. In General. Most Cited Cases

On appeal from the Court of Appeals, the Supreme Court gives due regard, but not deference, to the decision of the Court of Appeals.

[3] Appeal and Error 30 ⇐934(1)

30 Appeal and Error
30XVI Review
30XVI(G) Presumptions
30k934 Judgment
30k934(1) k. In General. Most Cited Cases

In a motion for summary judgment, the Supreme Court should liberally construe all facts in favor of the nonmoving party and draw all reasonable inferences from the facts in favor of the nonmoving party. Rules Civ.Proc., Rule 56(c).

[4] Judgment 228 ⇐185(6)

228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185 Evidence in General
228k185(6) k. Existence or Non-Existence of Fact Issue. Most Cited Cases

Summary judgment must be denied if reasonable

EXHIBIT B

persons could reach differing conclusions or draw conflicting inferences from the evidence presented. Rules Civ.Proc., Rule 56(c).

[5] Appeal and Error 30 ⚿842(1)

30 Appeal and Error
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k838 Questions Considered
30k842 Review Dependent on Whether Questions Are of Law or of Fact
30k842(1) k. In General. Most Cited Cases

On appeal, the Supreme Court exercises free review over questions of law.

[6] Municipal Corporations 268 ⚿741.30

268 Municipal Corporations
268XII Torts
268XII(A) Exercise of Governmental and Corporate Powers in General
268k741 Notice or Presentation of Claims for Injury
268k741.30 k. Service or Presentation; Time Therefor. Most Cited Cases

The 180-day notice period for filing a claim for damages against a government entity under the Idaho Tort Claims Act (ITCA) begins to run at the occurrence of a wrongful act, even if the extent of damages is not known or is unpredictable at the time. I.C. § 6-906.

[7] Municipal Corporations 268 ⚿741.30

268 Municipal Corporations
268XII Torts
268XII(A) Exercise of Governmental and Corporate Powers in General
268k741 Notice or Presentation of Claims for Injury
268k741.30 k. Service or Presentation; Time Therefor. Most Cited Cases

Knowledge of facts which would put a reasonably prudent person on inquiry, triggers the 180-day notice period for filing a claim for damages against a government entity under the Idaho Tort Claims Act (ITCA). I.C. § 6-906.

[8] Municipal Corporations 268 ⚿741.20

268 Municipal Corporations
268XII Torts
268XII(A) Exercise of Governmental and Corporate Powers in General
268k741 Notice or Presentation of Claims for Injury
268k741.20 k. Requirement as Mandatory or Condition Precedent. Most Cited Cases

Compliance with the 180-day notice requirement of the Idaho Tort Claims Act (ITCA) is a mandatory condition precedent to bringing suit against a city, the failure of which is fatal to a claim, no matter how legitimate. I.C. § 6-906.

[9] Municipal Corporations 268 ⚿741.30

268 Municipal Corporations
268XII Torts
268XII(A) Exercise of Governmental and Corporate Powers in General
268k741 Notice or Presentation of Claims for Injury
268k741.30 k. Service or Presentation; Time Therefor. Most Cited Cases

A claimant is not required to know all the facts and details of a claim for damages against a government entity under the Idaho Tort Claims Act (ITCA) because such a prerequisite would allow a claimant to delay completion of their investigation before triggering the notice requirement. I.C. § 6-906.

[10] Municipal Corporations 268 ⚿741.30

268 Municipal Corporations
268XII Torts
268XII(A) Exercise of Governmental and Corporate Powers in General
268k741 Notice or Presentation of Claims for Injury
268k741.30 k. Service or Presentation; Time Therefor. Most Cited Cases

Letter from city to commercial landowner, in which city denied the existence of any agreement regarding the extension of city sewer system to land and rejected landowner's request for reimbursement, began 180-day notice period in Idaho Tort Claims Act (ITCA) for landowner to bring action against city for reimbursement, and thus landowner's action, filed more than 180 days after the date he received the letter, was untimely. I.C. §§ 6-906, 50-219.

[11] Appeal and Error 30 ⇐173(10)

30 Appeal and Error
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(A) Issues and Questions in Lower Court
30k173 Grounds of Defense or Opposition
30k173(10) k. Time of Bringing Suit, Limitations, and Laches. Most Cited Cases

Commercial landowner failed to argue in trial court that letter to city asking for reimbursement for *extension of sewer line* to land was a notice of a claim for purposes of the Idaho Tort Claims Act (ITCA), and thus Supreme Court would not consider the argument on appeal. I.C. § 6-906.

[12] Appeal and Error 30 ⇐170(1)

30 Appeal and Error
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(A) Issues and Questions in Lower Court
30k170 Nature or Subject-Matter of Issues or Questions
30k170(1) k. In General. Most Cited Cases

Commercial landowner failed to raise in trial court the issue of whether statute which required claims against a city for damages to be brought as required by Idaho Tort Claims Act (ITCA) applied to his equitable claims against the city for costs associated with his extension of city sewer line to his land, and thus Supreme Court would not consider his unjust enrichment claim on appeal. I.C. §§ 6-906, 50-219.

[13] Appeal and Error 30 ⇐169

30 Appeal and Error
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(A) Issues and Questions in Lower Court
30k169 k. Necessity of Presentation in General. Most Cited Cases

Appeal and Error 30 ⇐500(1)

30 Appeal and Error
30X Record
30X(A) Matters to Be Shown
30k498 Presentation and Reservation of Grounds of Review
30k500 Rulings by Lower Court
30k500(1) k. In General. Most Cited Cases

To raise an issue on appeal, the record must contain an adverse ruling to form the basis for assignment of error and the Supreme Court will not consider or review an issue raised for the first time on appeal.

[14] Municipal Corporations 268 ⇐1040

268 Municipal Corporations
268XVI Actions
268k1040 k. Costs. Most Cited Cases

City failed to provide a basis for award of attorney fees in successful defense under the Idaho Tort Claims Act (ITCA) of commercial landowner's request for reimbursement for sewer line extension, and thus city was not entitled to fees. I.C. § 6-901; Rules Civ.Proc., Rule 54(e)(1).

[15] Costs 102 ⇐194.16

102 Costs
102VIII Attorney Fees
102k194.16 k. American Rule; Necessity of Contractual or Statutory Authorization or Grounds in Equity. Most Cited Cases

A party must assert a specific statutory or common law rule upon which the Supreme Court may base an award of attorney fees. Rules Civ.Proc., Rule 54(e)(1).

**973 *168 John F. Magnuson, Coeur d'Alene, for plaintiff-appellant-cross respondent.

Quane Smith, Coeur d'Alene, for defendant-respondent-cross appellant. Michael L. Haman argued.

ON REVIEW

KIDWELL, Justice.

Magnuson Properties Partnership (Magnuson) filed suit against the City of Coeur d'Alene (City). The district court granted summary judgment in favor of the City because Magnuson failed to file notice of its claim as required by the Idaho Tort Claims Act (ITCA). This Court affirms the judgment of the district court.

I.
FACTS AND PROCEDURAL BACKGROUND

Magnuson owned undeveloped property within the City that it wished to develop. In early 1995, Magnuson approached the City with a plan to subdivide its property into three separate commercial lots. The plan called for installation of a sewer line. As a condition of approval, the City required Magnuson to extend the sewer line from its property to an adjoining parcel owned by a third party. Magnuson objected to this requirement because the extension increased the cost of the project but provided no benefit to Magnuson. According to Magnuson, a city engineer stated that the City would reimburse Magnuson for the additional cost associated with the extension. Magnuson asserts it acted in reliance on this representation in extending the sewer line as the City required.

On May 10, 1996, at the direction of Magnuson, the general contractor, Shea Construction (Shea), submitted a statement of reimbursable costs to the City. Shea itemized the extra costs attributable to the extension, totaling $30,802, and requested the City pay Magnuson that amount. The City's Public Works Director responded to Shea's request on August 13, 1996. The City denied the existence of any agreement between the City and Magnuson and denied the request for reimbursement. The City acknowledged its policy of requiring property owners to extend sewer lines to the farthest boundary of their property when installing a sewer line. However, the City asserted it only reimburses property owners for costs associated with enlarging the size of sewer pipe and deeper excavation. The City maintained that Magnuson incurred no reimbursable costs in extending its sewer line.

Magnuson claims that after August 13, 1996, it repeatedly attempted to contact the City in order to discuss its request for reimbursement. The City met with Magnuson on November 7, 1996. City representatives reiterated**974 *169 their denial of Magnuson's claim for reimbursement at this meeting. On November 11, 1996, Magnuson paid Shea the balance it owed on the project, $30,802. Magnuson filed notice of a claim against the City on February 18, 1997.

Obtaining no response to this notice, Magnuson filed suit on October 16, 1998, alleging tort, contract, and equitable claims against the City. The district court entered default in favor of Magnuson against the City on November 24, 1998. On December 18, 1998, upon the City's motion, the district court set aside the entry of default and allowed the City to answer. The City then filed a motion for summary judgment on the ground Magnuson's claim was barred by I.C. §§ 50-219 and 6-906, which require filing notice of a claim against a municipality within 180 days from when the claim arises. The district court granted summary judgment in favor of the City. Magnuson appealed the district court's decision to set aside the entry of default and summary judgment and the City cross-appealed the district court's order denying the City's request for attorney fees. The Court of Appeals upheld the district court's order to set aside entry of default but reversed the summary judgment and remanded the case for further proceedings. *Magnuson Props. P'ship v. City of Coeur d'Alene*, 2002 WL 13783 (Ct.App.2002). The Court of Appeals found its reversal of summary judgment rendered the City's cross-appeal moot. *Id.* The City now seeks, and this Court has granted, review of the Court of Appeal's decision.

II.
STANDARD OF REVIEW

[1][2] When a case is on review from the Court of Appeals, this Court hears the matter as if it is on appeal from the district court rather than review the Court of Appeal's decision. *Leavitt v. Swain*, 133 Idaho 624, 627, 991 P.2d 349, 352 (1999). This Court gives due regard, but not deference, to the decision of the Court of Appeals. *Id.*

[3][4] Summary judgment is proper when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no

genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c) (2002). In a motion for summary judgment, this Court should liberally construe all facts in favor of the nonmoving party and draw all reasonable inferences from the facts in favor of the nonmoving party. *Northwest Bec-Corp v. Home Living Servs.*, 136 Idaho 835, 838-39, 41 P.3d 263, 266-67 (2002). Summary judgment must be denied if reasonable persons could reach differing conclusions or draw conflicting inferences from the evidence presented. *Id.*

[5] On appeal, this Court exercises free review over questions of law. *Brooks v. Logan*, 130 Idaho 574, 576, 944 P.2d 709, 711 (1997).

III.
ANALYSIS

A. The Time For Filing Notice Of A Claim Under I.C. §§ 50-219 And 6-906 Began To Run When Magnuson Received The City's August 13, 1996 Letter Of Denial.

I.C. § 50-219 (2000) requires filing any claim for damages against a government entity as required by the ITCA. IDAHO CODE § 6-901 (2000). A claimant has one hundred eighty (180) days from the day they knew, or should have known, of the claim to provide notice of the claim to the government entity. IDAHO CODE § 6-906 (2000). This notice requirement applies equally to tort claims and claims for breach of contract. *Enterprise, Inc. v. Nampa City*, 96 Idaho 734, 737-38, 536 P.2d 729, 732-33 (1975); IDAHO CODE §§ 50-219 and 6-906 (2002).

[6][7][8][9] The 180-day notice period begins to run at the occurrence of a wrongful act, even if the extent of damages is not known or is unpredictable at the time. *Ralphs v. City of Spirit Lake*, 98 Idaho 225, 227, 560 P.2d 1315, 1317 (1977). "Knowledge of facts which would put a reasonably prudent person on inquiry," triggers the 180-day period. *McQuillen v. City of Ammon*, 113 Idaho 719, 722, 747 P.2d 741, 744 (1987). Compliance ****975 *170** with the notice requirement is a "mandatory condition precedent to bringing suit [against a city], the failure of which is fatal to a claim, no matter how legitimate." *Id.* A claimant is not required to know all the facts and details of a claim because such a prerequisite would allow a claimant to delay completion of their investigation before triggering the notice requirement. *Mitchell v. Bingham Mem'l. Hosp.*, 130 Idaho 420, 423, 942 P.2d 544, 547 (1997).

[10] The record reflects that, at the very latest, Magnuson had knowledge of the City's August 13, 1996 letter on August 15, 1996, which places Magnuson's February 18, 1997 notice beyond the 180-day period. The City's letter denies the existence of any agreement between the City and Magnuson and rejects Magnuson's request for reimbursement. As of August 15, 1996, a reasonable and prudent person would have knowledge of facts of a wrongful act, i.e., the City's denial of and/or breach of the alleged contract. Therefore, the 180-day notice period began on August 15, 1996, and Magnuson failed to provide timely notice of its claim.

[11] Arguably, Magnuson's May 10, 1996 letter asking for reimbursement was a notice of a claim for purposes of the ITCA. However, because this argument was raised for the first time on appeal, this Court will not consider it. *Whitted v. Canyon County Bd. of Com'rs*, 137 Idaho 118, 121-22, 44 P.3d 1173, 1176-77 (2002).

B. This Court Will Not Consider When The Time For Filing Notice Of A Claim Under the ITCA Begins To Run For A Claim Of Unjust Enrichment.

[12][13] Magnuson argues the ITCA's notice requirement does not apply to its equitable claims. To raise an issue on appeal, the record must contain an adverse ruling to form the basis for assignment of error and this Court will not consider or review an issue raised for the first time on appeal. *Whitted*, 137 Idaho at 121-22, 44 P.3d at 1176-77. Magnuson failed to raise the issue of whether I.C. § 50-219 applied to its equitable claims in the district court. As a result, this Court declines to decide Magnuson's argument that its claim for unjust enrichment is not governed by the 180-day notice provision found in I.C. § 6-906.

Even if Magnuson had properly raised the issue, this Court has construed I.C. § 50-219 to require a claimant to file notice of all claims for damages against a government entity, tort or otherwise, as directed by the ITCA. *Sweitzer v. Dean*, 118 Idaho 568, 572, 798 P.2d 27, 31 (1990).

C. The City Is Not Entitled To An Award Of Attorney Fees.

[14][15] A court may award reasonable attorney fees to a prevailing party when it is provided for by statute or by contract. I.R.C.P. 54(e)(1) (2002). A party must assert a specific statutory or common law rule upon which this Court may base an award of attorney fees. *Bingham v. Montane Res. Assocs.*, 133 Idaho 420, 424, 987 P.2d 1035, 1039 (1999). The City has failed to provide a basis for this Court to award fees. Therefore, the City's request for fees is denied.

IV.
CONCLUSION

The City's August 13, 1996 letter triggered the 180-day period to file notice of a claim against a city as required by the Idaho Tort Claims Act. As a result, the district court did not err in granting summary judgment to the City on the ground Magnuson failed to file notice of a claim with the City within 180 days from the date it gained knowledge of its claim. Therefore, the district court is affirmed. The City is not entitled to an award of attorney fees because it failed to provide any basis for such an award. Costs to respondent.

Chief Justice TROUT and Justices SCHROEDER, WALTERS, and EISMANN concur.

WALTERS, J., Specially Concurring.

I write only to address a minor point that may appear as an anomaly in this case. It relates to the steps taken by Magnuson to bring its damage claim to the courts.

**976 *171 The purpose of the notice requirement under the ITCA is to give a governmental entity-here, the City of Coeur d'Alene-an opportunity to investigate a potential claim so the City could decide whether it is responsible for the debt and should pay the claim either in full or by some agreeable amount in settlement, or to reject the claim and let the claimant proceed with a legal action for collection. The letter from Magnuson's agent, Shea, on May 10, 1996, served that purpose. If, after review, the City had paid or settled the claim, then this case would not have proceeded through the courts. Under I.C. § 6-909, the City had ninety days to notify the claimant in writing of its approval or denial of the claim. Pursuant to the statute, a claim shall be deemed denied if at the end of the ninety-day period the City has failed to approve or deny the claim. Here, the City denied the claim on August 13, 1996, some ninety-five days after May 10. The City's reason for rejecting the claim is irrelevant. At that point, in my opinion, Magnuson was free to file an action to collect on the rejected claim. Magnuson did not need to later send in a second claim addressing the same dispute when that claim had already been denied by operation of the terms of the pertinent statute and by the City's rejection in fact.

However, Magnuson chose not to rely on the May 10 letter as a notice of claim. Instead, Magnuson continued to pursue discussions with the City in an attempt to receive reimbursement for its project's costs. When Magnuson's attempts proved futile, Magnuson sent another demand notice in February 1997, and then filed suit when that demand was rejected. As it turned out, of course, the February 1997 notice of claim was held untimely by the district court upon the facts as presented and argued by the parties in this case.

The Court's opinion in this case correctly notes that Magnuson did not contend in the district court that the May 10 letter had the effect of a notice of claim under the ITCA. Indeed, even at oral argument on this appeal when the subject was broached, Magnuson took the position that the May 10 letter did not serve as a notice to the City of Magnuson's claim.

Because Magnuson decided to proceed under its own interpretation of the steps to be followed without suggesting to the courts the correct alternative route, this Court is not required to reconstruct the case and put it on the proper track. Accordingly, I concur with the approach expressed in the Court's opinion concerning the role the May 10 letter legally played in this case.

EISMANN, J. concurs.

Idaho,2002.
Magnuson Properties Partnership v. City of Coeur D'Alene
138 Idaho 166, 59 P.3d 971

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769 F.Supp.2d 1256
(Cite as: 769 F.Supp.2d 1256)

United States District Court,
D. Idaho.
Douglas A. BROWN, Plaintiff,
v.
CITY OF CALDWELL, a subdivision of the state of Idaho, Mark Wendelsdorf, Garret Nancolas, Monica Jones, and John/Jane Does I through X, whose true identities are presently unknown, Defendants.

Case No. 1:10–CV–536–BLW.
Feb. 14, 2011.

Background: Former deputy fire chief brought action in state court against city, fire chief, mayor, and human resources director, alleging breach of contract, wrongful discharge in violation of Idaho Whistleblower Act, and retaliation in violation of the First Amendment. Following removal, defendants filed motion to dismiss.

Holdings: The District Court, B. Lynn Winmill, Chief Judge, held that:
(1) under Idaho law, as predicted by the district court, 180-day notice requirement for claims for damages against city did not apply to claims under Idaho Whistleblower Act;
(2) requirement did apply to breach of contract claim;
(3) allegations were insufficient to state claims against fire chief, mayor, and human resources director in their personal capacities;
(4) demand letters did not satisfy notice requirement; and
(5) service of initial complaint did not satisfy notice requirement.

Motion granted in part and denied in part.

West Headnotes

[1] Courts 106 ⚿107

106 Courts
106II Establishment, Organization, and Procedure
106II(K) Opinions
106k107 k. Operation and effect in general. Most Cited Cases

There is a pronounced line of demarcation between what is said in an opinion and what is decided by it; judicial opinions must be construed in light of the rule that they are authoritative only on the facts on which they are founded.

[2] Municipal Corporations 268 ⚿741.25

268 Municipal Corporations
268XII Torts
268XII(A) Exercise of Governmental and Corporate Powers in General
268k741 Notice or Presentation of Claims for Injury
268k741.25 k. Applicability in particular cases. Most Cited Cases

Under Idaho law, as predicted by the district court, 180-day notice of claim requirement for claims for damages against city did not apply to claims under Idaho Whistleblower Act; Act required filing a civil action within 180 days, notice requirement would deprive claimants of Act's full limitations period, Act was enacted 27 years after enacting notice requirement, and application of notice requirement would create a distinction between city employees pursuing whistleblower claims and county or state employees. West's I.C.A. §§ 6–2105, 50–219.

[3] Municipal Corporations 268 ⚿196

268 Municipal Corporations
268V Officers, Agents, and Employees
268V(B) Municipal Departments and Officers Thereof
268k193 Fire
268k196 k. Chief or superintendent or other executive. Most Cited Cases

Under Idaho law, 180-day notice requirement for claims for damages against city applied to former deputy fire chief's breach of contract claim against city brought pendent to his claims under Whistleblower Act. West's I.C.A. §§ 6–2105, 50–219.

[4] Municipal Corporations 268 ⚿196

EXHIBIT C

268 Municipal Corporations
268V Officers, Agents, and Employees
268V(B) Municipal Departments and Officers Thereof
268k193 Fire
268k196 k. Chief or superintendent or other executive. Most Cited Cases

Deputy fire chief's allegations that he was terminated in violation of the Idaho Whistleblower Act were insufficient to state claims for violations of the Act and for breach of contract under Idaho law against fire chief, mayor, and human resources director in their personal capacities, absent allegations that they were acting outside the course and scope of their employment. West's I.C.A. §§ 6–903(e), 6–2105.

[5] Municipal Corporations 268 ⚿741.30

268 Municipal Corporations
268XII Torts
268XII(A) Exercise of Governmental and Corporate Powers in General
268k741 Notice or Presentation of Claims for Injury
268k741.30 k. Service or presentation; time therefor. Most Cited Cases

Former deputy fire chief's service of demand letters on city did not satisfy notice requirement for bringing claims for damages against city, as required for his breach of contract claims under Idaho law, where letters did not contain chief's address, amount of alleged damages or nature of damages, and letters were not addressed to or formally filed with city clerk. West's I.C.A. § 50–219.

[6] Municipal Corporations 268 ⚿741.30

268 Municipal Corporations
268XII Torts
268XII(A) Exercise of Governmental and Corporate Powers in General
268k741 Notice or Presentation of Claims for Injury
268k741.30 k. Service or presentation; time therefor. Most Cited Cases

Service of deputy fire chief's initial complaint on city did not satisfy notice of claim requirement for bringing claims for damages against city, as required for his breach of contract claims under Idaho law, where Idaho law required notice to be filed prior to and separate from a civil complaint. West's I.C.A. §§ 6–906, 50–219.

*1257 Sam Johnson, Johnson & Monteleone, Boise, ID, for Plaintiff.

Bruce J. Castleton, Eric F. Nelson, Kirtlan G. Naylor, Naylor and Hales, Boise, ID, for Defendants.

MEMORANDUM DECISION AND ORDER
B. LYNN WINMILL, Chief Judge.

INTRODUCTION

Before the Court is Defendants' Motion to Dismiss Plaintiff Douglas Brown's state law claims for damages against Defendants. (Dkt. 10). The Court heard oral argument on January 26th. For the reasons explained below, the Court will grant in part and deny in part Defendants' Motion.

***1258 BACKGROUND**

Plaintiff Douglas Brown was terminated from his position as Deputy Fire Chief and Fire Marshall for the City of Caldwell in November 2009. Seeking both damages and injunctive relief, Brown has sued the City of Caldwell and three City employees-Fire Chief Mark Wendelsdorf, Caldwell Mayor Garret Nancolas, and Caldwell Human Resources Director Monica Jones. He alleges claims for wrongful discharge in violation of the Idaho Whistleblower Act, breach of contract and the covenant of good faith and fair dealing, and retaliation in violation of his First Amendment rights to freedom of speech and association.

Brown originally filed this lawsuit in state court on March 9, 2010. Before its removal to this Court, the City of Caldwell moved to dismiss all of Brown's state law claims for damages. *Def. Motion* at 14, Dkt. 4–1. The City argued that Brown's failure to comply with the notice of claim requirement under Idaho Code § 50–219 deprived the court of subject matter jurisdiction over Brown's state law claims for damages. *Def. Resp.* at 13–14, Dkt. 4–10. Brown responded by arguing that the notice of claim requirement does not apply to the Idaho Whistleblower Act; but even if it did, he satisfied the notice requirement through his sending of two separate demand letters. *Pl. Resp.* at 1–4, Dkt. 4–8.

On October 21, 2010, the state court judge issued an oral order denying the city of Caldwell's Motion to Dismiss. *Naylor Aff.* Exhibit A, Dkt. 10–3. The state judge found that (1) the notice of claim requirement applied to Brown's whistleblower claim, and (2) Brown's initial Complaint, not his demand letters, "adequately provided notice of the claims" as required by Idaho Code § 50–219 and the Idaho Tort Claims Act. *Id.* at 34–37. On November 1, 2010, Defendants removed this action to federal court. *Def. Removal,* Dkt. 6–1. Simultaneous with its removal, Defendants filed the pending motion to dismiss and/or motion for reconsideration. Dkt. 10. Defendants renew their arguments to dismiss Brown's state law claims for damages.[FN1] Brown responds with the same arguments he raised in state court.

FN1. The parties have agreed that Idaho Code § 50–219 applies only to claims for damages and therefore does not apply to Brown's claims for injunctive relief.

ANALYSIS

1. Scope of Idaho Code § 50–219 Notice Requirement

Idaho Code § 50–219 provides, "All claims for damages against a city must be filed as prescribed by [Idaho Code § 6–906 of the Idaho Tort Claims Act]." Thus, pursuant to Idaho Code § 50–219 and § 6–906 of the Idaho Tort Claims Act, a notice of claim for damages against a city must be filed with the city clerk within 180 days from the date the claim arose or reasonably should have been discovered, whichever is later. *Scott Beckstead Real Estate Co. v. City of Preston,* 147 Idaho 852, 216 P.3d 141, 143 (2009). In the context of the Idaho Torts Claim Act (ITCA), which is incorporated by reference into Idaho Code § 50–219, the Idaho Supreme Court has deemed the notice requirement a "mandatory condition precedent" to bringing suit. *See, e.g., Banks v. University of Idaho,* 118 Idaho 607, 798 P.2d 452, 453 (1990).

Defendants argue that Brown's state law claims for damages are barred because Brown failed to comply with the notice of claim requirement under Idaho Code § 50–219, and this failure deprives the Court of subject matter jurisdiction to hear these claims.[FN2]

FN2. Because a court's lack of subject matter jurisdiction cannot be waived, *United States v. Cotton,* 535 U.S. 625, 630, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002), "and the defense of lack of subject matter jurisdiction may be raised at any time," *United States v. Shaw,* 655 F.2d 168, 171 (9th Cir.1981), the Court remains obligated to address whether subject matter jurisdiction exists even though the issue was previously decided by the state court.

***1259** Idaho Supreme Court precedent would seem to answer this issue. In *Beckstead,* the Idaho Supreme Court construed the "all claims" language contained in I.C. § 50–219 "to require a claimant to file a notice of claim for all damage claims, *tort or otherwise,* as directed by the filing procedure set forth in I.C. § 6–906 of the Idaho Tort Claims Act." 216 P.3d at 144 (emphasis added). It explained: " "All claims for damages" means just that; all claims for damages, regardless of the theory upon which the claim is based." *Id.* This language suggests that Brown's failure to provide notice to the city of his damages claims would preclude both his statutory whistleblower claim and his "pendent" contract claims.

[1] Despite this clear language, however, Brown argues that the Idaho Legislature did not intend for Idaho Code § 50–219 to apply to either the Whistleblower Act, or to contract claims brought pendent to statutory whistleblower claims. "There is a pronounced line of demarcation between what is said in an opinion and what is decided by it." *Hash v. U.S.,* 454 F.Supp.2d 1066, 1072 (D.Idaho 2006) (quoting *Bashore v. Adolf,* 41 Idaho 84, 238 P. 534 (1925)). Judicial opinions must be construed "in light of the rule that they are authoritative only on the facts on which they are founded." *Idaho Schools for Equal Educational Opportunity v. Evans,* 123 Idaho 573, 850 P.2d 724, 737 (1993). Applying this directive, the Court agrees that *Beckstead* does not necessarily answer all the questions at issue here; rather, it is significant that *Beckstead* involved a common law unjust enrichment claim while this case involves a statutory whistleblower claim. Therefore, before deciding whether *Beckstead* applies, the Court must look to the language of the Whistleblower Act, in addition to what Idaho Code 50–219 says.

Idaho's Whistleblower Act "seeks to protect the

integrity of government by providing a legal cause of action for public employees who experience adverse action from their employer as a result of reporting waste and violations of a law, rule or regulation." *Van v. Portneuf Medical Center*, 147 Idaho 552, 212 P.3d 982, 987 (2009) (internal quotation marks and citations omitted). It provides its own limitation period: "An employee who alleges a violation of this chapter may bring a civil action for appropriate injunctive relief or actual damages, or both, within one hundred eighty (180) days after the occurrence of the alleged violation of this chapter." Idaho Code § 6–2105(2).

When considering the meaning of a statute, the focus of the Court is to determine and give effect to the intent of the legislature. *State v. Yzaguirre*, 144 Idaho 471, 163 P.3d 1183, 1187 (2007). The best guide to legislative intent is the words of the statute, and the language of the statute must be given its plain, obvious, and rational meaning. *State v. Escobar*, 134 Idaho 387, 3 P.3d 65, 67 (2000). Typically the plain meaning of a statute prevails unless that plain meaning leads to absurd results. *Yzaguirre*, 163 P.3d at 1187.

[2] Here, the Court is presented with two statutes, which appear to contain competing directives. Idaho Code 50–219 provides that a notice of claim must be filed for *all* claims against a city within 180 days. When read alone, this language is clear: a claimant must comply with the notice requirement for *all* claims, including whistleblower claims. However, the Whistleblower Act, provides its own limitations ***1260** period, which requires the filing of a *civil action* under the Act within 180 days. I.C. § 6–2105(2). Both statutes read together would require one seeking to file a whistleblower claim against a city to file a notice of claim within the same period that the claimant files a complaint. Yet, Defendants have argued, and the Court agrees, a claimant must file a notice of claim *before* filing a complaint. *Butler v. Elle*, 281 F.3d 1014, 1029 (9th Cir.2002).[FN3] So while the Whistleblower Act says a claimant has 180 days to file suit, requiring a claimant to file notice before filing a civil action would truncate the express 180–day limitations period contained in the Act.

> FN3. This issue will be covered in further detail below in the context of whether Brown's filing of a civil complaint satisfies the notice of claim provision.

This statutory interpretation, Defendants urge, serves to "harmonize and reconcile" the two statutes. Defendant argue that Brown could have complied with the notice requirement by filing a notice "with the Caldwell City Clerk within ninety days of his termination, which is the date his cause of action arose."[FN4] *Defs.' Reply* at 4, Dkt. 19. Then, according to Defendants, after filing his notice, Brown could have filed his whistleblower complaint ninety days later and still complied with the statutory 180–day filing deadline. *Id.* However, this reading of the statutes suggest that when the Idaho legislature said that a claimant has 180 days to file a notice of claim, they really meant 90 days—at least if the claim is brought under the Whistleblower's Act.

> FN4. Only Idaho Code § 6–906 of the ITCA is specifically referenced in Idaho Code § 50–219. However, Defendants take the position that other sections of the ITCA are incorporated into Idaho Code § 50–219, including the requirement that the government notify the claimant in writing of its approval or denial of the claim within 90 days. I.C. § 6–909. If this 90 day period expires without notification of approval or denial from the government, the claim is assumed denied. *Id.* Only at that point may a claimant file a civil action. I.C. § 6–910. The Court assumes, without deciding, that Defendants are correct, and the Idaho legislature intended to incorporate other sections of the ITCA into Idaho Code § 50–219 even though they are not specifically referenced in the statute.

The Court does not believe the Idaho legislature intended to deprive plaintiffs bringing claims against the city of the full 180–day limitation period under the Whistleblower Act. In answering this question, the Court is mindful that, when interpreting Idaho law, it is bound by decisions of the Idaho Supreme Court. *See Arizona Elec. Power Coop., Inc. v. Berkeley*, 59 F.3d 988, 991 (9th Cir.1995). In the absence of a controlling decision, this Court must predict how the Idaho Supreme Court would decide the question. *See id.*

Neither the parties nor the Court have located an Idaho case speaking directly to this issue. The chronology of the statutes' enactment, however, supports the conclusion that the legislature did not intend Idaho Code § 50–219 to apply the Whistleblower Act. The

legislature enacted the Whistleblower Act in 1994, 27 years after it enacted Idaho Code § 50–219 in 1967. In 1967 the legislature could not have contemplated the inclusion of whistleblower claims within § 50–219's scope. Conversely, in 1994 the Legislature was aware of Idaho Code §§ 50–219 and 6–906; yet the Legislature did not address those notice requirements and instead embedded the Whistleblower Act with its own 180–day limitations period. Although the legislature specifically included an express limitations period for filing whistleblower claims, Defendants essentially propose that the Court write out or ignore the express 180–day filing requirement for city employees. ***1261** The Court can discern no reason why the legislature would have intended such a result.

Two additional factors suggest that the Idaho legislature did not intend for Idaho Code § 50–219 to apply to claims under the Whistleblower Act:

First, the Whistleblower Act, like Idaho Code § 50–219, represents a limited waiver of sovereign immunity from suit, *Van*, 212 P.3d at 987, "and this waiver can be made on whatever terms and conditions the Idaho legislature chooses," *Butler v. Elle*, No. 4:98–CV–046–BLW (D.Idaho March 24, 1999). Under the Whistleblower Act, the legislature has chosen to require that public employees seeking to bring whistleblower claims against their government employers file any claim under the Whistleblower Act within 180 days. The legislature did not include any additional notice requirement. The Court therefore declines to insert an additional notice requirement when the legislature did not. *Cf., Van*, 212 P.3d at 988 ("... there is no reason to assume that the Legislature intended those alleging claims under the statute to have to comply with the notice provision of the ITCA where the Legislature did not specifically require it."). *See also id.* at 988, n. 4 (noting a general limitations period applies unless the legislature has provided a specific limitations period for a specific statutory liability).

Second, the statutory interpretation proffered by Defendants creates an arbitrary—and the Court believes—unintended distinction between those pursuing statutory whistleblower claims who are city employees as opposed to county or state employees. Again, the Court can think of no reason why the legislature would have intended such a result when it created a special statutory remedy that applies *solely* to public employees, and the statute itself does not distinguish between public employees who work for a city, county, or the state.

Ultimately the most rational application of Idaho Code § 50–219 is to exclude whistleblower claims from its notice requirements. This Court therefore finds that Idaho Code § 50–219 does not apply to claims for damages under the Idaho Whistleblower Act, and it denies Defendants' motion to dismiss Brown's whistleblower claims for failure to comply with Idaho Code § 50–219's notice of claim requirement.

[3] The Court, however, reaches a different conclusion with respect to Idaho Code § 50–219's application to Brown's contract claims. Brown argues that contract claims, brought pendent to whistleblower claims, should not be subject to the notice of claim requirement. But Brown fails to explain why or cite any authority to back up this assertion. There is nothing unique about a common law breach of contract claims, and such claims were certainly in existence at the time the legislature enacted Idaho Code § 50–219. The Court finds no reason why run-of-the mill contract claims—whether pendent to a statutory whistleblower claim or not—should be excepted from Idaho Code § 50–219's notice requirement. Therefore, the Court holds that Idaho Code § 50–219 applies to Brown's common law breach of contract claims. *Beckstead*, 216 P.3d at 144.

2. Validity of Brown's Claims Against City Officials in Their Personal Capacities

Defendants argue that Brown's claims against Wendelsdorf, Nancolas, and Jones in their personal capacities are either subject to the notice of claim requirement, or they must be dismissed pursuant to Rule 12(b)(6) for failure to state a claim.

Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement ***1262** of the claim showing that the pleader is entitled to relief," in order to "give the defendant fair notice of what the ... claim is and the grounds upon which it rests." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). While a complaint attacked by a Rule 12(b)(6) motion to dismiss "does not need detailed factual allegations," it must set forth "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at

555, 127 S.Ct. 1955. To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Id.* at 570, 127 S.Ct. 1955.

[4] Here, Brown has failed to allege facts sufficient to state a plausible claim for relief against Wendelsdorf, Nancolas, and Jones in their personal capacities. The Idaho Code provides a rebuttable presumption that "any act or omission of an employee within the time and at the place of his employment is within the course and scope of his employment and without malice or criminal intent." I.C. § 6–903(e). Under Idaho Code § 6–903(e) Wendelsdorf, Nancolas, and Jones, *as employees of the city who presumably* acted within the time and at the place of employment, have thus acted within the course and scope of their employment, rather than in their personal capacities. Brown has not rebutted this presumption.

Thus, with respect to Brown's whistleblower claims and breach of contract against Defendants Wendelsdorf, Nancolas, and Jones in their individual capacities, the Court grants Defendant's motion to dismiss for failure to state a claim upon which relief can be granted. Because the Court finds that Brown has failed to state a claim against the individual city defendants in their personal capacities, it will not address whether such claims are subject to the notice of claim requirement. The Court, however, will allow Brown leave to amend his complaint. *Harris v. Amgen, Inc.*, 573 F.3d 728, 737 (9th Cir.2009) (noting that a dismissal without leave to amend is improper unless it is beyond doubt that the complaint "could not be saved by any amendment.").

3. Sufficiency of Notice under Idaho Code § 50–219

Having concluded that Idaho Code § 50–219 applies to Brown's breach of contract claims, the Court must consider whether Brown satisfied the statute's notice of claim requirement. Brown argues that he substantially complied with the notice requirements, either through the service of two demand letters, providing written notice of his whistleblower claim, or, as the state district court held, via the service of Brown's initial complaint.

As a threshold matter, Brown argues that this Court cannot properly determine whether the demand letters complied with the notice requirements based solely on the pleadings. The Court agrees that the demand letters lie outside the pleadings and therefore cannot be properly considered on a motion to dismiss. *Edwards v. Ellsworth*, 10 F.Supp.2d 1131, 1133 (D.Idaho 1997) (citing *Branch v. Tunnell*, 14 F.3d 449, 453 (9th Cir.), *cert. denied* 512 U.S. 1219, 114 S.Ct. 2704, 129 L.Ed.2d 832 (1994)). But federal courts have complete discretion to determine whether to accept the submission of any material beyond the pleadings that is offered in conjunction with a Rule 12(b)(6) motion and rely on it, thereby converting the motion to a motion for summary judgment under Rule 56. *Id.*

In this case, the Court finds that converting Defendants' motion to dismiss to a motion for summary judgment is appropriate. Moreover, it finds that formal notice before converting the motion is not required***1263** because both parties have had a full and fair opportunity to ventilate all issues raised in Defendants' motion. *In re Rothery*, 143 F.3d 546 (9th Cir.1998). The Court will therefore consider whether the demand letters satisfied the notice of claim requirement.

[5] Here, there is no factual dispute about what the demand letters say. Thus, the only question is purely legal: whether Brown's demand letters meet the applicable notice requirements. The Court finds they do not. Under Idaho Code § 50–219 and the Idaho Tort Claims Act, notice must be (1) in writing; (2) filed with the city clerk; (3) submitted within 180 days from the date the claim arose or reasonably should have been discovered; and (4) contain statutorily-specified information regarding the plaintiff's residence and the facts and circumstances surrounding the plaintiff's injuries. *See also* Idaho Code § 6–907. Yet, Brown's demand letters do not meet the applicable notice requirements because the letters do not include the statutorily-specified information, such as Brown's address, the amount of his alleged damages, or the nature of his damages. More importantly, neither of the letters were addressed to or formally filed with Caldwell's City clerk. [FN5] Service of the demand letters therefore did not satisfy the notice of claim requirement.

> FN5. Idaho Supreme Court case law establishes that the City of Caldwell, through service on the city clerk, must have actual knowledge of an impending lawsuit. *See e.g. Calkins v. City of Fruitland*, 97 Idaho 263,

543 P.2d 166 (1975).

[6] Nor, as previously indicated in this Court's decision, does Brown's initial complaint meet the applicable notice requirements. Idaho Code §§ 50–219 and 6–906 require that notice be filed prior to and separate from the filing of a civil complaint. *Butler*, 281 F.3d at 1029; *see also Madsen v. Idaho Dept. of Health and Welfare*, 116 Idaho 758, 779 P.2d 433 (Idaho Ct.App.1989). The Idaho Supreme Court has frequently deemed the notice requirement a "mandatory condition precedent" to bringing suit. *Banks v. University of Idaho*, 118 Idaho 607, 798 P.2d 452, 453 (1990); *McQuillen v. City of Ammon*, 113 Idaho 719, 747 P.2d 741, 744 (1987). And, as Defendants point out, there is no Idaho case of record where the filing of a complaint has been deemed to satisfy the notice requirement. To the contrary, in *Madsen*, the Idaho Court of Appeals held that a plaintiff must file a notice with the city clerk before filing a complaint. 747 P.2d at 744. And this Court followed *Madsen* in reaching the same conclusion, *Butler v. Elle*, No. 4:98–CV–046–BLW (D.Idaho March 24, 1999)—a decision affirmed by the Ninth Circuit, *Butler*, 281 F.3d at 1029. A civil complaint cannot act as both the notice of a claim and civil lawsuit simultaneously. Brown's failure to file notice of his contract claims prior to filing his complaint dooms those claims.

CONCLUSION

The Court finds that Idaho Code § 50–219's notice requirement does not apply to Brown's state law claim for damages under the Idaho Whistleblower Act. But it does apply to Brown's contract claims for damages, and the Court further finds Brown failed to give proper notice under the statute. Therefore, the Court will dismiss Count Two of Brown's Second Amended Complaint. In addition, all claims against Defendants Wendelsdorf, Nancolas, and Jones in their individual capacities are dismissed. All other claims survive.

ORDER

IT IS ORDERED:

1. *Defendant's Motion to Dismiss* is GRANTED in part and DENIED in part (Dkt. 10).

***1264** 2. As to the Defendant City of Caldwell, Count Two of Brown's Second Amended Complaint is DISMISSED. All other claims against the City survive.

3. As to all claims against Defendants Wendelsdorf, Nancolas, and Jones in their individual capacities, the Court grants Defendant's motion to dismiss for failure to state a claim upon which relief can be granted, but with leave to amend. If an amended complaint is not filed within 30 days from the date of this order, the dismissal will be final and with prejudice.

4. Defendant's Motion for Protective Order (Dkt. 11) is DENIED as moot.

D.Idaho,2011.
Brown v. City of Caldwell
769 F.Supp.2d 1256

END OF DOCUMENT

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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF VALLEY

ALPINE VILLAGE COMPANY, an Idaho Corporation, Plaintiff,	**CASE NO.** CV-2010-519C
v.	**PLAINTIFF'S NOTICE OF SUPPLEMENTAL AUTHORITY**
CITY OF MCCALL, a municipal corporation, Defendant.	

COMES NOW, the Plaintiff, by and through its attorney of record, Millemann, Pittenger, McMahan & Pemberton, LLP, and in response to Defendant's Notice of Supplemental Authority dated November 15, 2011, hereby provides notice to the Court and to the Defendant of its intent to rely upon the following supplemental authority at the hearing on the Cross-Motions for Summary Judgment that is scheduled to be heard before this Court on November 17, 2011.

Attached hereto as Exhibit A is a true and correct copy of *Verska v. Saint Alphonsus Regional Medical Center*, No. 37574-2010, 2011 WL 5375192 (Idaho Sup. Ct., Nov. 9, 2011).

DATED this 16th day of November, 2011.

MILLEMANN, PITTENGER, McMAHAN & PEMBERTON, LLP

BY: _____
STEVEN J. MILLEMANN
GREGORY C. PITTENGER

I hereby certify that I caused to be served a true and correct copy of the foregoing document in the manner stated below to the following:

DOCUMENT FILED:

Fourth Judicial District Court	___	U.S. Mail
Valley County Courthouse	X	Hand Delivery (November 17, 2011)
P.O. Box 1350	___	Facsimile
Cascade, ID 83611	___	Email

SERVICE COPIES TO:

Christopher H. Meyer	___	U.S. Mail
Martin C. Hendrickson	X	Hand Delivery (November 17, 2011)
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MILLEMANN, PITTENGER, McMAHAN & PEMBERTON, LLP

BY: _____
STEVEN J. MILLEMANN

Exhibit A

2011 WL 5375192
Only the Westlaw citation is currently available.

Supreme Court of Idaho,
Boise, September 2011 Term.

Joseph M. VERSKA, M.D., and The Spine Institute of Idaho, Plaintiffs–Appellants,
v.
SAINT ALPHONSUS REGIONAL MEDICAL CENTER; Christian G. Zimmerman, M.D.; and Donald Fox, M.D., Defendants–Respondents.

No. 37574–2010.Nov. 9, 2011.

Synopsis

Background: Physician and professional corporation that he created filed action against hospital and two medical staff members, asserting bad-faith claims conspiracy, interference with economic advantage, and defamation in connection with nonrenewal of politician's staff privileges. Physician filed motion to compel discovery of his peer review records, and defendants sought protective order. The District Court, Fourth Judicial District, Ada County, Deborah A. Bail, J., denied motion to compel and granted protective order. The Supreme Court granted plaintiffs a permissive appeal.

Holdings: The Supreme Court, Eismann, J., held that:
1 statute making peer review records privileged applied, by its terms, to present lawsuit, and therefore those records were not subject to discovery by physician;
2 the Supreme Court does not have the authority to modify an unambiguous statute on ground that it is palpably absurd or would produce absurd results when construed as written, abrogating *State, Department of Law Enforcement v. One 1955 Willys Jeep,* 100 Idaho 150, 595 P.2d 299; *Statewide Constr., Inc. v. Pietri,* 150 Idaho 423, 247 P.3d 650; and
3 physician's filing of lawsuit did not waive defendants' right to assert peer review privilege.

Affirmed.

J. Jones, J., filed a concurring opinion.

West Headnotes (19)

1 **Appeal and Error**—Grounds for Allowance or Refusal

30Appeal and Error
30VIITransfer of Cause
30VII(B)Petition or Prayer, Allowance, and Certificate or Affidavit
30k363Grounds for Allowance or Refusal

The Supreme Court would grant a permissive appeal to physician from grant of a protective order as to peer review records that physician sought to discover in his action asserting claims including defamation and interference with economic advantage against hospital and two of its staff members in connection with nonrenewal of physician's staff privileges; order of district court involved a matter of first impression, the issues raised were controlling questions of law, an immediate appeal would advance the orderly resolution of the litigation, and it would decrease

the likelihood of a second appeal. West's I.C.A. § 39–1392b; Appellate Rule 12.

2 **Appeal and Error**—Necessity of Allowance or Leave

30Appeal and Error
30VIITransfer of Cause
30VII(B)Petition or Prayer, Allowance, and Certificate or Affidavit
30k358Necessity of Allowance or Leave

The Supreme Court grants permissive appeals only in the most exceptional cases. Appellate Rule 12.

3 **Appeal and Error**—Grounds for Allowance or Refusal

30Appeal and Error
30VIITransfer of Cause
30VII(B)Petition or Prayer, Allowance, and Certificate or Affidavit
30k363Grounds for Allowance or Refusal

In accepting or rejecting an appeal by certification, the Supreme Court considers a number of factors in addition to the threshold questions of whether there is a controlling question of law and whether an immediate appeal would advance the orderly resolution of the litigation; the Supreme Court also considers such factors as the impact of an immediate appeal upon the parties, the effect of the delay of the proceedings in the district court pending the appeal, the likelihood or possibility of a second appeal after judgment is finally entered by the district court, and the case workload of the appellate courts. Appellate Rule 12.

4 **Appeal and Error**—Necessity of Allowance or Leave
Appeal and Error—Grounds for Allowance or Refusal

30Appeal and Error
30VIITransfer of Cause
30VII(B)Petition or Prayer, Allowance, and Certificate or Affidavit
30k358Necessity of Allowance or Leave
30Appeal and Error
30VIITransfer of Cause
30VII(B)Petition or Prayer, Allowance, and Certificate or Affidavit
30k363Grounds for Allowance or Refusal

No single factor is controlling under appellate rule in the Supreme Court's decision of acceptance or rejection of an appeal by certification, but the Supreme Court intends by that rule to create an appeal in the exceptional case and does not intend by the rule to broaden the appeals which may be taken as a matter of right. Appellate Rules 11, 12.

5 **Appeal and Error**—Cases or Questions Reported, Reserved, or Certified

30Appeal and Error

30XVIReview
30XVI(A)Scope, Standards, and Extent, in General
30k857Extent of Review Dependent on Mode of Review
30k861Cases or Questions Reported, Reserved, or Certified

Because of the nature of an interlocutory appeal, the Supreme Court addresses in a permissive appeal only the precise question that was presented to and decided by the trial court. Appellate Rule 12.

6 **Privileged Communications and Confidentiality**⚖Medical or Health Care Peer Review

311HPrivileged Communications and Confidentiality
311HVIIOther Privileges
311Hk419Peer Review Privilege
311Hk422Medical or Health Care Peer Review
311Hk422(1)In General

Statute making peer review records privileged applied, by its terms, to a physician's lawsuit against a hospital claiming that the hospital acted in bad faith in refusing to renew a physician's privileges, and therefore those records were not subject to discovery by physician. West's I.C.A. § 39–1392b.

7 **Privileged Communications and Confidentiality**⚖Medical or Health Care Peer Review

311HPrivileged Communications and Confidentiality
311HVIIOther Privileges
311Hk419Peer Review Privilege
311Hk422Medical or Health Care Peer Review
311Hk422(1)In General

By its terms, statute creating the peer review privilege is not limited in its scope to peer review records sought in a medical malpractice action. West's I.C.A. § 39–1392b.

8 **Statutes**⚖Policy and Purpose of Act
Statutes⚖Preamble and Recitals

361Statutes
361VIConstruction and Operation
361VI(A)General Rules of Construction
361k180Intention of Legislature
361k184Policy and Purpose of Act
361Statutes
361VIConstruction and Operation
361VI(A)General Rules of Construction
361k204Statute as a Whole, and Intrinsic Aids to Construction
361k210Preamble and Recitals

The asserted purpose for enacting the legislation cannot modify its plain meaning, and the scope of the legislation can be broader than the primary purpose for enacting it.

9 **Constitutional Law**⇨Making, Interpretation, and Application of Statutes

92Constitutional Law
92XXSeparation of Powers
92XX(C)Judicial Powers and Functions
92XX(C)2Encroachment on Legislature
92k2472Making, Interpretation, and Application of Statutes
92k2473In General

If the statute as written is socially or otherwise unsound, the power to correct it is legislative, not judicial.

10 **Statutes**⇨Literal and Grammatical Interpretation
Statutes⇨Statute as a Whole, and Intrinsic Aids to Construction

361Statutes
361VIConstruction and Operation
361VI(A)General Rules of Construction
361k187Meaning of Language
361k189Literal and Grammatical Interpretation
361Statutes
361VIConstruction and Operation
361VI(A)General Rules of Construction
361k204Statute as a Whole, and Intrinsic Aids to Construction
361k205In General

The interpretation of a statute must begin with the literal words of the statute, which must be given their plain, usual, and ordinary meaning, and the statute must be construed as a whole.

11 **Statutes**⇨Judicial Authority and Duty
Statutes⇨Existence of Ambiguity

361Statutes
361VIConstruction and Operation
361VI(A)General Rules of Construction
361k176Judicial Authority and Duty
361Statutes
361VIConstruction and Operation
361VI(A)General Rules of Construction
361k187Meaning of Language
361k190Existence of Ambiguity

If a statute is not ambiguous, the Supreme Court does not construe it, but simply follows the law as written.

12 **Statutes**⇨Giving Effect to Entire Statute

361Statutes
361VIConstruction and Operation
361VI(A)General Rules of Construction
361k204Statute as a Whole, and Intrinsic Aids to Construction
361k206Giving Effect to Entire Statute

The fact that a portion of a statute has a restricted application does not similarly restrict the entire act of which that portion is a part.

13 **Statutes**--Effect and Consequences

361Statutes
361VIConstruction and Operation
361VI(A)General Rules of Construction
361k180Intention of Legislature
361k181In General
361k181(2)Effect and Consequences

The Supreme Court does not have the authority to modify an unambiguous statute if the result of applying it as written is palpably absurd; abrogating *State, Department of Law Enforcement v. One 1955 Willys Jeep,* 100 Idaho 150, 595 P.2d 299; *Statewide Constr., Inc. v. Pietri,* 150 Idaho 423, 247 P.3d 650.

14 **Constitutional Law**--Policy

92Constitutional Law
92XXSeparation of Powers
92XX(C)Judicial Powers and Functions
92XX(C)2Encroachment on Legislature
92k2485Inquiry Into Legislative Judgment
92k2488Policy

The public policy of legislative enactments cannot be questioned by the courts and avoided simply because the courts might not agree with the public policy so announced.

15 **Statutes**--Existence of Ambiguity

361Statutes
361VIConstruction and Operation
361VI(A)General Rules of Construction
361k187Meaning of Language
361k190Existence of Ambiguity

A statute is ambiguous where the language is capable of more than one reasonable construction.

16 **Statutes**—Existence of Ambiguity

361Statutes
361VIConstruction and Operation
361VI(A)General Rules of Construction
361k187Meaning of Language
361k190Existence of Ambiguity

An unambiguous statute would have only one reasonable interpretation, and an alternative interpretation that is unreasonable would not make it ambiguous.

17 **Privileged Communications and Confidentiality**—Waiver

311HPrivileged Communications and Confidentiality
311HVIIOther Privileges
311Hk419Peer Review Privilege
311Hk422Medical or Health Care Peer Review
311Hk422(2)Waiver

Physician's filing of a lawsuit against hospital and two members of its medical staff, asserting claims including defamation and interference with economic advantage in connection with nonrenewal of physician's staff privileges, did not waive defendants' right to assert peer review privilege as to records that physician sought to discover, although physician waived his right to assert the privilege by filing lawsuit. West's I.C.A. § 39–1392e(f).

18 **Statutes**—Giving Effect to Entire Statute

361Statutes
361VIConstruction and Operation
361VI(A)General Rules of Construction
361k204Statute as a Whole, and Intrinsic Aids to Construction
361k206Giving Effect to Entire Statute

When determining the plain meaning of a statute, effect must be given to all the words of the statute if possible, so that none will be void, superfluous, or redundant.

19 **Appeal and Error**—Necessity of Ruling on Objection or Motion

30Appeal and Error
30VPresentation and Reservation in Lower Court of Grounds of Review
30V(B)Objections and Motions, and Rulings Thereon
30k242Necessity of Ruling on Objection or Motion
30k242(1)*In General*

The Supreme Court would not address on permissive appeal an issue on which there was no ruling by the district court. Appellate Rule 12.

Appeal from the District Court of the Fourth Judicial District of the State of Idaho, in and for Ada County. The Hon. Deborah A. Bail, District Judge.
The order of the district court is affirmed.

Attorneys and Law Firms

Raymond D. Powers; Powers Tolman, PLLC; Boise; argued for appellants.

Brad Fisher; Davis Wright Tremaine, LLP; Seattle, Washington; argued for respondents.

Opinion

EISMANN, Justice.

*1 This is a permissive appeal from an order of the district court holding that the statute making peer review records privileged applies, by its terms, to a lawsuit brought against a hospital claiming that the hospital acted in bad faith in refusing to renew a physician's privileges. We affirm the order of the district court.

I.

Factual Background

Joseph Verska, M.D., (Physician) is an orthopedic spine surgeon licensed in the State of Idaho. On January 22, 1996, he was appointed to the medical staff of Saint Alphonsus Regional Medical Center (Hospital) located in Boise. Thereafter, he was continually reappointed through June 30, 2008.

As required by Idaho law, Hospital caused its medical staff to organize in-hospital medical staff committees to review the professional practices of members of the Hospital's medical staff for the purpose of reducing morbidity and mortality and for the improvement of the care of patients in the hospital. After a series of reviews of Physician's practice initiated in 2004 by Hospital and in 2006 and 2007 by its Medical Executive Committee, on July 9, 2008, Physician requested a hearing before a Fair Hearing Panel. After an evidentiary hearing in late October 2008, the panel made recommendations, which were rejected by Hospital. Since July 1, 2008, Physician has not had privileges at Hospital.

On July 23, 2009, Physician and The Spine Institute of Idaho, a professional corporation created by Physician, (Plaintiffs) filed this action against Hospital and physicians Christian G. Zimmerman and Donald Fox (herein collectively called "Defendants"). Plaintiffs alleged that Defendants conspired to wrongfully harm them, intentionally and/or negligently interfered with their economic advantage, interfered with Physician's prospective contractual relations and business expectations, defamed them, and intentionally and/or negligently inflicted emotional distress upon Physician. Plaintiffs also alleged that Hospital and Dr. Fox breached the implied covenant of good faith and fair dealing and that Hospital denied Physician fair procedure rights, breached its fiduciary duties, and violated his due process rights. In addition to damages, Plaintiffs sought an injunction requiring Hospital to restore Physician's privileges.

1 During this litigation, Plaintiffs initiated discovery related to the process, activities, and decisions that led to Hospital's decision to deny Physician's application to be reappointed to the medical staff and to have his privileges renewed. Hospital objected on the ground that such information was protected by the peer review privilege. Plaintiffs filed a motion seeking to compel discovery, and Defendants sought a motion for a protective order. On February 5, 2010, the district court entered an order denying the motion to compel and granting the protective order. The court determined, "I .C. § 39–1392b unambiguously protects all peer review records from discovery of any type and bars any testimony about those peer review

records." This Court granted Plaintiffs' request for a permissive appeal of that order pursuant to Idaho Appellate Rule 12.

*2 2 3 4 5 We grant such appeals only in the most exceptional cases. *Aardema v. U.S. Dairy Systems, Inc.*, 147 Idaho 785, 789, 215 P.3d 505, 509 (2009). The factors we consider are as follows:

> In accepting or rejecting an appeal by certification under I.A.R. 12, this Court considers a number of factors in addition to the threshold questions of whether there is a controlling question of law and whether an immediate appeal would advance the orderly resolution of the litigation. It was the intent of I.A.R. 12 to provide an immediate appeal from an interlocutory order if substantial legal issues of great public interest or legal questions of first impression are involved. The Court also considers such factors as the impact of an immediate appeal upon the parties, the effect of the delay of the proceedings in the district court pending the appeal, the likelihood or possibility of a second appeal after judgment is finally entered by the district court, and the case workload of the appellate courts. No single factor is controlling in the Court's decision of acceptance or rejection of an appeal by certification, but the Court intends by Rule 12 to create an appeal in the exceptional case and does not intend by the rule to broaden the appeals which may be taken as a matter of right under I.A.R. 11.

Budell v. Todd, 105 Idaho 2, 4, 655 P.2d 701, 703 (1983). In this case, the order of the district court involved a matter of first impression, the issues raised were controlling questions of law, an immediate appeal would advance the orderly resolution of the litigation, and it would decrease the likelihood of a second appeal. Because of the nature of an interlocutory appeal, we address only the precise question that was presented to and decided by the trial court. *Winn v. Frasher*, 116 Idaho 500, 501, 777 P.2d 722, 723 (1989).

II.

Does Idaho Code Section 39–1392b Apply to This Case?

6 A peer review privilege is created by Idaho Code section 39–1392b, which provides:

> Except as provided in section 39–1392e, Idaho Code, all peer review records shall be confidential and privileged, and shall not be directly or indirectly subject to subpoena or discovery proceedings or be admitted as evidence, nor shall testimony relating thereto be admitted in evidence, or in any action of any kind in any court or before any administrative body, agency or person for any purpose whatsoever....

It is undisputed that the records sought by Plaintiffs are peer review records. The statute states that "all peer review records shall be confidential and privileged." It further provides that such records "shall not be directly or indirectly subject to subpoena or discovery proceedings or be admitted as evidence, nor shall testimony relating thereto be admitted in evidence." The privilege applies "in any action of any kind in any court." Thus, by its terms, the statute applies to this litigation.

Plaintiffs contend that Hospital is a business; that it developed an in-house entity named the "Spine Medicine Institute of Idaho," which competes with Plaintiffs; that Hospital's actions in denying Physician privileges were motivated by the desire to remove him as a competitor; and that for public policy reasons the statute therefore should not apply. The statute does not create an exception for this type of litigation, and we cannot create such an exception under the rubric of public policy. The creation of such an exception is an issue within the province of the legislature.

*3 7 The act creating the peer review privilege, I.C. §§ 39–1392 through 39–1392e, was enacted in 1973. Plaintiffs contend that the statement of purpose accompanying that legislation indicates that it was intended to apply only to medical malpractice actions. The statement of purpose was not enacted into law. The statutes were. There is no wording in section 39–1392b that limits its scope to peer review records sought in a medical malpractice action. In that respect, the legislation is unambiguous.

8 9 10 11 "The asserted purpose for enacting the legislation cannot modify its plain meaning. The scope of the legislation can be broader than the primary purpose for enacting it." *Viking Constr., Inc. v. Hayden Lake Irr. Dist.*, 149 Idaho 187, 191–92, 233 P.3d 118, 122–23 (2010). "If the statute as written is socially or otherwise unsound, the power to correct it is legislative, not judicial." *In re Estate of Miller*, 143 Idaho 565, 567, 149 P.3d 840, 842 (2006). The interpretation of a statute "must begin

with the literal words of the statute; those words must be given their plain, usual, and ordinary meaning; and the statute must be construed as a whole. If the statute is not ambiguous, this Court does not construe it, but simply follows the law as written." *State v. Schwartz*, 139 Idaho 360, 362, 79 P.3d 719, 721 (2003) (citations omitted). "We have consistently held that where statutory language is unambiguous, legislative history and other extrinsic evidence should not be consulted for the purpose of altering the clearly expressed intent of the legislature." *City of Sun Valley v. Sun Valley Co.*, 123 Idaho 665, 667, 851 P.2d 961, 963 (1993).

12 Plaintiffs also contend that wording in subsections (a) through (e) of Idaho Code section 39–1392e indicate that the peer review statutes were intended only to apply to medical malpractice actions. Those subsections specifically apply in medical malpractice actions .1 Subsection (f) clearly is not limited to medical malpractice actions. For example, it applies to "any physician ... whose conduct ... is the subject of investigation ... in the course of ... disciplinary proceeding or investigation of the sort contemplated by this act, [who] makes claim or brings suit on account of such health care organization activity." I.C. § 39–1392e(f). Likewise, section 39–1392b, which creates the peer review privilege, is not, by its terms, limited to medical malpractice actions. The fact that a portion of a statute has a restricted application does not similarly restrict the entire act of which that portion was a part.

III.

Does This Court Have the Authority To Modify an Unambiguous Statute If the Result of Applying It As Written is Palpably Absurd?

13 Plaintiffs quote from *Federated Publications, Inc. v. Idaho Business Review, Inc.*, 146 Idaho 207, 210, 192 P.3d 1031, 1034 (2008), wherein we stated, "Unless the result is palpably absurd, this Court must assume that the legislature meant what it wrote in the statute." Relying upon that quote, they contend, "The literal wording of a statute cannot be honored if it creates unreasonable, absurd results...." They then argue that applying Idaho Code section 39–1392b to bar their access to the peer review records would be an absurd result.

*4 The language upon which Plaintiffs rely had its genesis in *State, Department of Law Enforcement v. One 1955 Willys Jeep*, 100 Idaho 150, 595 P.2d 299 (1979). That case involved the timing of a hearing in contested asset forfeiture proceedings under the Uniform Controlled Substances Act. A party contesting the asset forfeiture was required to file a verified answer. The statute in question stated, "If a verified answer is filed, the forfeiture proceeding shall be set for hearing before the court without a jury on a day not less than thirty (30) days therefrom; and the proceeding shall have priority over other civil cases." I.C. § 37-2744(d)(3)(D). In *Willys Jeep*, the party contesting the forfeiture filed a motion to dismiss the proceedings, contending that the hearing had not been held within thirty days of the filing of the verified answer as required by the statute. The magistrate court denied the motion to dismiss because the clear wording of the statute required the hearing to be at least thirty days *after* the verified answer was filed, not *within* ninety days of filing the verified answer. The district court reversed, holding that the hearing must be held within thirty days of the filing of the verified answer in spite of the statute's literal language, stating that once the verified answer was filed, the hearing was to be "not less than thirty (30) days therefrom." *Willys Jeep*, 100 Idaho at 151, 595 P.2d at 300. In reversing the district court on appeal, this Court stated:

> The most fundamental premise underlying judicial review of the legislature's enactments is that, unless the result is palpably absurd, the courts must assume that the legislature meant what it said. Where a statute is clear and unambiguous the expressed intent of the legislature must be given effect. *Worley Highway Dist. v. Kootenai County*, 98 Idaho 925, 576 P.2d 206 (1978); *Moon v. Investment Board*, 97 Idaho 595, 548 P.2d 861 (1976); *Herndon v. West*, 87 Idaho 335, 393 P.2d 35 (1964). Referring to a virtually identical Arizona statute, the Arizona court stated that the purpose of the statute was to provide "the law enforcement agencies with 30 days in which to prepare prosecution of their case." *State ex rel. Berger v. McCarthy*, 113 Ariz. 161, 164, 548 P.2d 1158, 1161 (1976). Likewise, the Idaho legislature may have intended to provide the state with a thirty day period in which to prepare its case. A literal reading of the statute is not necessarily irrational or absurd. Therefore, the statute must be interpreted as written.

Id. (footnote omitted).

The *Willys Jeep* Court began its analysis by stating, "The most fundamental premise underlying judicial review of the

legislature's enactments is that, unless the result is palpably absurd, the courts must assume that the legislature meant what it said." *Id.* at 153, 595 P.2d at 302. It concluded its analysis by stating: "A literal reading of the statute is not necessarily irrational or absurd. Therefore, the statute must be interpreted as written." *Id.* at 154, 595 P.2d at 303. Because there was no contention that the statute was ambiguous, the Court was stating that it must interpret an unambiguous statute as written, unless the result of doing so is palpably absurd. The Court did not cite any authority for that statement.

*5 None of the three cases cited—*Worley Highway District, Moon,* and *Herndon*—support that statement. In *Worley Highway District,* we said, " 'This Court has consistently adhered to the primary canon of statutory construction that where the language of the statute is unambiguous, the clear expressed intent of the legislature must be given effect and there is no occasion for construction.' " 98 Idaho at 928, 576 P.2d at 209 (quoting *State v. Riley,* 83 Idaho 346, 349, 362 P.2d 1075, 1076–77 (1961)). *In Moon, we said, "where a statute or constitutional provision is plain, clear, and unambiguous, it 'speaks* for itself and must be given the interpretation the language clearly implies.' " 97 Idaho at 596, 548 P.2d at 862 (quoting *State v. Jonasson,* 78 Idaho 205, 210, 299 P.2d 755, 757 (1956)). In *Herndon,* we said: "We must follow the law as written. If it is socially or economically unsound, the power to correct it is legislative, not judicial." 87 Idaho at 339, 393 P.2d at 37.

In the *Willys Jeep* case, the Court simply made a misstatement. If this Court were to conclude that an unambiguous statute was palpably absurd, how could we construe it to mean something that it did not say? Doing so would simply constitute revising the statute, but we do not have the authority to do that. The legislative power is vested in the senate and house of representatives, Idaho Const. art. III, § 1, not in this Court. As we said in *Berry v. Koehler,* 84 Idaho 170, 177, 369 P.2d 1010, 1013 (1962), "The wisdom, justice, policy, or expediency of a statute are questions for the legislature alone."

We have recited the language from the *Willys Jeep* case or similar language numerous times, usually without even addressing whether we considered the unambiguous statute absurd as written. *See State v. Urrabazo,* 150 Idaho 158, 244 P.3d 1244 (2010); *Statewide Constr., Inc. v. Pietri,* 150 Idaho 423, 247 P.3d 650 (2011); *Viking Constr., Inc. v. Hayden Lake Irrigation Dist.,* 149 Idaho 187, 233 P.3d 118 (2010); *State v. Pina,* 149 Idaho 140, 233 P.3d 71 (2010); *Kootenai Hosp. Dist. v. Bonner County Bd. of Comm'rs,* 149 Idaho 290, 233 P.3d 1212 (2010); *Farber v. Idaho State Ins. Fund,* 147 Idaho 307, 208 P.3d 289 (2009); *Federated Publ'ns, Inc. v. Idaho Business Review, Inc.,* 146 Idaho 207, 192 P.3d 1031 (2008); *State Dept. of Health and Welfare v. Hudelson,* 146 Idaho 439, 196 P.3d 905 (2008); *State v. Mubita,* 145 Idaho 925, 188 P.3d 867 (2008); *State v. Hensley,* 145 Idaho 852, 187 P.3d 1227 (2008); *In re Daniel W.,* 145 Idaho 677, 183 P.3d 765 (2008); *Mattoon v. Blades,* 145 Idaho 634, 181 P.3d 1242 (2008); *State v. Kimball,* 145 Idaho 542, 181 P.3d 468 (2008); *State v. Parkinson,* 144 Idaho 825, 172 P.3d 1100 (2007); *State v. Grazian,* 144 Idaho 510, 164 P.3d 790 (2007); *In re Estate of Miller,* 143 Idaho 565, 149 P.3d 840 (2006); *Kirkland v. State,* 143 Idaho 544, 149 P.3d 819 (2006); *Employers Res. Mgmt. Co. v. Department of Ins.,* 143 Idaho 179, 141 P.3d 1048 (2006); *McNeal v. Idaho Pub. Utils. Comm'n,* 142 Idaho 685, 132 P.3d 442 (2006); *Rahas v. Ver Mett,* 141 Idaho 412, 111 P.3d 97 (2005); *Kootenai Med. Ctr. v. Bonner County Comm'rs,* 141 Idaho 7, 105 P.3d 667 (2004); *State v. Thompson,* 140 Idaho 796, 102 P.3d 1115 (2004); *Garza v. State,* 139 Idaho 533, 82 P.3d 445 (2003); *Dyet v. McKinley,* 139 Idaho 526, 81 P.3d 1236 (2003); *State v. Schwartz,* 139 Idaho 360, 79 P.3d 719 (2003); *Inama v. Boise County ex rel. Bd. of Comm'rs,* 138 Idaho 324, 63 P.3d 450 (2003); *State v. Jeppesen,* 138 Idaho 71, 57 P.3d 782 (2002); *Ahles v. Tabor,* 136 Idaho 393, 34 P.3d 1076 (2001); *State v. Daniel,* 132 Idaho 701, 979 P.2d 103 (1999); *State v. Knott,* 132 Idaho 476, 974 P.2d 1105 (1999); *Idaho Dep't of Health and Welfare v. Jackman,* 132 Idaho 213, 970 P.2d 6 (1998); *City of Sun Valley v. Sun Valley Co.,* 123 Idaho 665, 851 P.2d 961 (1993); *In re Application for Permit No. 36–7200,* 121 Idaho 819, 828 P.2d 848 (1992); *Sherwood v. Carter,* 119 Idaho 246, 805 P.2d 452 (1991); *George W. Watkins Family v. Messenger,* 118 Idaho 537, 797 P.2d 1385 (1990); *In re Miller,* 110 Idaho 298, 715 P.2d 968 (1986); and *Parker v. Wallentine,* 103 Idaho 506, 650 P.2d 648 (1982).

*6 In several cases, we have responded to arguments that the wording of an unambiguous statute would produce an absurd result, but we have never agreed with such arguments. *See Idaho Dep't of Health and Welfare v. Doe,* 151 Idaho 300, 256 P.3d 708 (2011); *State v. Doe,* 147 Idaho 326, 208 P.3d 730 (2009); *St. Luke's Reg'l Med. Ctr., Ltd. v. Board of Comm'rs,* 146 Idaho 753, 203 P.3d 683 (2009); *Glaze v. Deffenbaugh,* 144 Idaho 829, 172 P.3d 1104 (2007); *State v. Yzaguirre,* 144 Idaho 471, 163 P.3d 1183 (2007); *Driver v. SI Corp.,* 139 Idaho 423, 80 P.3d 1024 (2003); *State v. Rhode,* 133 Idaho 459, 988 P.2d 685 (1999); and *Moses v. Idaho State Tax Comm'n,* 118 Idaho 676, 799 P.2d 964 (1990).

14 15 16 Thus, we have never revised or voided an unambiguous statute on the ground that it is patently absurd or would produce absurd results when construed as written, and we do not have the authority to do so. "The public policy of legislative enactments cannot be questioned by the courts and avoided simply because the courts might not agree with the public policy so announced." *State v. Village of Garden City,* 74 Idaho 513, 525, 265 P.2d 328, 334 (1953). Indeed, the contention that we could revise an unambiguous statute because we believed it was absurd or would produce absurd results is itself illogical. "A statute is ambiguous where the language is capable of more than one reasonable construction." *Porter v. Board of Trustees,*

Preston School Dist. No. 201, 141 Idaho 11, 14, 105 P.3d 671, 674 (2004). An unambiguous statute would have only one reasonable interpretation. An alternative interpretation that is unreasonable would not make it ambiguous. *In re Application for Permit No. 36–7200*, 121 Idaho 819, 823–24, 828 P.2d 848, 852–53 (1992). If the only reasonable interpretation were determined to have an absurd result, what other interpretation would be adopted? It would have to be an unreasonable one. We therefore disavow the wording in the *Willys Jeep* case and similar wording in other cases and decline to address Plaintiffs' argument that Idaho Code section 39–1392b is patently absurd when construed as written.

IV.

Pursuant to Idaho Code Section 39–1392e(f), Did the Filing of this Lawsuit Waive Defendants' Right to Assert the Peer Review Privilege?

17 Plaintiffs contend that pursuant to Idaho Code section 39–1392e(f), the peer review privilege was waived in its entirety by the filing of this lawsuit. That statute provides:

> If any physician, emergency medical services personnel, patient, person, organization or entity whose conduct, care, chart, behavior, health or standards of ethics or professional practice is the subject of investigation, comment, testimony, dispositive order of any kind or other written or verbal utterance or publication or act of any such health care organization or any member or committee thereof in the course of research, study, disciplinary proceeding or investigation of the sort contemplated by this act, makes claim or brings suit on account of such health care organization activity, then, in the defense thereof, confidentiality and privilege shall be deemed waived by the making of such claim, and such health care organization and the members of their staffs and committees shall be allowed to use and resort to such otherwise protected information for the purpose of presenting proof of the facts surrounding such matter, and this provision shall apply whether such claim be for equitable or legal relief or for intentional or unintentional tort of any kind and whether pressed by a patient, physician, emergency medical services personnel, or any other person, but such waiver shall only be effective in connection with the disposition or litigation of such claim, and the court shall, in its discretion, enter appropriate orders protecting, and as fully as it reasonably can do so, preserving the confidentiality of such materials and information.

*7 Specifically, Plaintiffs rely upon that portion of the statute providing as follows:

> If ***any physician*** ... whose conduct [or] care ... is the subject of investigation ... makes claim or ***brings suit*** on account of such health care organization activity, then, in the defense, thereof, ***confidentiality and privilege shall be deemed waived by the making of such claim,*** and such health care organization and the members of their staffs and committees shall be allowed to use and resort to such otherwise protected information for the purpose of presenting proof of the facts surrounding such matter.... (Emphasis theirs.)

They argue that if the health care organization has the option of using otherwise privileged information when a physician brings a claim against it, then the physician bringing the lawsuit should also have that option.

As stated above, Idaho Code section 39–1392e(f) applies to this lawsuit. The waiver provision states that when a physician, who has been the subject of "investigation of the sort contemplated by this act, makes claim or brings suit on account of such health care organization activity, then, in the defense thereof, confidentiality and privilege shall be deemed waived by the making of such claim." The key language in this provision is:

> then, *in the defense thereof,* confidentiality and privilege shall be deemed waived by the making of such claim, *and such health care organization and the members of their staffs and committees shall be allowed to use* and resort to *such otherwise protected information for the purpose of presenting proof of the facts surrounding such matter* .... (Emphasis added.)

18 When determining the plain meaning of a statute, "effect must be given to all the words of the statute if possible, so that none will be void, superfluous, or redundant." *In re Winton Lumber Co.*, 57 Idaho 131, 136, 63 P.2d 664, 666 (1936). If the bringing of an action by the physician who was investigated or disciplined waived the peer review privilege of the defendants

in that action, then the emphasized words above would be meaningless. In fact, to have the statute so state, it would be necessary to delete the emphasized words so that the wording would simply provide that if the physician investigated or disciplined "makes claim or brings suit on account of such health care organization activity, then confidentiality and privilege shall be deemed waived by the making of such claim."

To give effect to all of the words in the statute when construing it, the physician investigated or disciplined, the health care organization, and the members of such organization's staff and committees all have the right to assert the peer review privilege. By bringing the lawsuit, the physician waives his or her right to assert the privilege. The health care organization and the members of its staff and committees who are defendants in the lawsuit can then elect also to waive the privilege in order to defend the lawsuit. The statute further provides that "such waiver shall only be effective in connection with the disposition or litigation of such claim, and the court shall, in its discretion, enter appropriate orders protecting, and as fully as it reasonably can do so, preserving the confidentiality of such materials and information ." I.C. § 39–1392e(f). By bringing the lawsuit, the physician does not waive the privilege for purposes unconnected with the lawsuit, nor does the health care organization or the members of its staff and committees do so if they elect to rely upon privileged information in defense of the lawsuit.

*8 Finally, the statute provides that the right of the health care organization or the members of its staff or committees to use privileged information in defense of the lawsuit, "shall apply whether such claim be for equitable or legal relief or for intentional or unintentional tort of any kind." I.C. § 39–1392e(f). That provision clearly shows that Idaho Code section 39–1392e(f) is not limited in its application to medical malpractice actions.

V.

Can This Court Address the Scope of Idaho Code Section 39–1392c?

19 Idaho Code section 39–1392c provides in part, "The furnishing of information or provision of opinions to any health care organization or the receiving and use of such information and opinions shall not subject any health care organization or other person to any liability or action for money damages or other legal or equitable relief." Plaintiffs ask us to address the scope of that statute, although they admit that the district court did not address it in its decision.

We granted a permissive appeal only from the district court's "Order Re: Motion To Compel/Protective Order" filed on February 11, 2010. That order denied Plaintiffs' motion to compel discovery and granted Defendants' motion for a protective order regarding that requested discovery. "Because there was not a ruling on that issue by the district court, we will not address it on appeal." *Brian and Christie, Inc. v. Leishman Elec., Inc.*, 150 Idaho 22, ——, 244 P.3d 166, 173 (2010).

VI.

Conclusion

We affirm the order of the district court entered on February 11, 2010, granting Defendants' motion for a protective order and denying Plaintiffs' motion to compel discovery. We award costs on appeal to respondents.

Chief Justice BURDICK, Justice HORTON and Justice Pro Tem TROUT concur.

J. JONES, Justice, concurring in the result of Part II, specially concurring in Part III, and concurring in Parts IV and V.

I concur in the result reached by the Court in Part II—that I.C. § 39–1392b applies in this case—but would not necessarily

agree that the statute prohibits discovery in all instances where a physician alleges a peer review proceeding is being misused. I agree with the Court's conclusion in Part III that the Court does not have the authority to modify an unambiguous statute, but I do not necessarily believe that the Legislature has the last word with regard to the subject of evidentiary privileges. I concur in Part IV and Part V.

The Court correctly concludes that the privilege contained in I.C. § 39–1392b applies to all types of peer review proceedings, including hospital credentialing and disciplinary proceedings. According to I.C. § 39–1392f, peer review includes activities of medical staff to improve "the care of patients in the hospital," as well as the "quality and necessity of care provided to patients." Plaintiffs' contention that the privilege only applies to medical malpractice claims is untenable.

*9 As with any privilege, the peer review privilege must be strictly construed and applied. As the U.S. Supreme Court stated in *Jaffee v. Redmond:*

> When we come to examine the various claims of exemption, we start with the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule. Exceptions from the general rule disfavoring testimonial privileges may be justified, however, by a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.

518 U.S. 1, 9, 116 S.Ct. 1923, 135 L.Ed.2d 337 (1996) (quotation marks and citations omitted). The Court continued, "Our cases make clear that an asserted privilege must also 'serv[e] public ends.' " *Id.* at 11. If the asserted privilege is being misused, such as to serve some interest not within the public policy ends for which it was intended, the privilege should not apply.

The Legislature made the following public policy statement with respect to the peer review privilege:

> To encourage research, discipline and medical study by certain health care organizations for the purposes of reducing morbidity and mortality, enforcing and improving the standards of medical practice in the state of Idaho, certain records of such health care organizations shall be confidential and privileged as set forth in this chapter.

I.C. § 39–1392. The Legislature is not the only branch of Idaho's government that has adopted a public policy favoring the protection of peer review proceedings from public disclosure in order to facilitate the frank exchange of information. This Court has adopted its own privilege designed to protect the confidentiality of the proceedings of in-hospital medical committees. Rule 519 of the Idaho Rules of Evidence prevents the disclosure of confidential communications "made in connection with a proceeding for research, discipline, or medical study ... for the purpose of reducing morbidity and mortality, or improving the standards of medical practice for health care." I.R.E. 519(a)(4). The proceedings at issue in this case are clearly within the contemplated coverage of both the legislative enactment and the judicial rule.

However, like any privilege, the party invoking the privilege must make an initial showing that the proceeding at hand is within the intended coverage of the privilege. The person challenging the privilege must then make a credible showing that the privilege does not apply. That may be done by showing that the person or entity claiming the privilege does not qualify under the terms of the legislative enactment or judicial rule, but it may also be done by making a credible showing that the privilege is being misused. As stated in 81 Am.Jur.2d Witnesses § 537 (2011):

> Such statutorily created privilege will be narrowly construed by the courts. In construing the peer-review privilege granted to healthcare providers, a court must balance privilege against a plaintiff's right to due process and the judicial need for the fair administration of justice. The view has been followed that the broad privilege granted to a hospital by a state's peer review law extended to any and all matters related to the peer-review process pursuant to which a physician's staff privileges were revoked, subject to the physician's right to conduct discovery for the limited purpose of investigating the committee members' good faith, malice, and reasonable knowledge or believe in order to carry his burden in opposing their qualified immunity.

*10 Public policy dictates that when peer review proceedings are being conducted in good faith, all documents and proceedings should be exempt from disclosure. However, if it can be shown by credible evidence by a physician aggrieved by the proceeding that it is not being conducted in good faith, such as for anti-competitive objectives, the privilege simply does not apply. The privilege is not intended to apply to bad faith proceedings. Rather, as the Legislature has stated in I.C. § 39–1392, it is intended for "the purposes of reducing morbidity and mortality, enforcing and improving the standards of medical practice in the State of Idaho." Advancement of anti-competitive practices or other improper agendas does not serve

such purposes.

An analogy to the federal act pertaining to peer review, or "professional review actions," is apt. The Health Care Quality Improvement Act of 1986 was enacted for the purpose of "encouraging good faith professional review activities." Pub.L. No. 99–660, 100 Stat. 3743. The Act is codified beginning at 42 U.S.C. § 11101. The Act provides broad immunity from damage claims for persons and entities conducting professional review actions. 42 U.S.C. § 11111(a). However, in order to obtain such immunity, the actions of a professional review body must meet all of the standards specified in 42 U.S.C. § 11112(a). That subsection provides:

> (a) In General–For purposes of the protection set forth in [42 U .S.C. § 11111(a)], a professional review action must be taken—
>
> (1) in the reasonable belief that the action was in the furtherance of quality health care,
>
> (2) after a reasonable effort to obtain the facts of the matter,
>
> (3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and
>
> (4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting [specified requirements for notice and hearing].
>
> A professional review action shall be presumed to have met the preceding standards necessary for the protection set out in [42 U.S.C. § 11111(a)] unless the presumption is rebutted by a preponderance of the evidence.

It seems to logically follow that, if a peer review panel's immunity from a damage claim is lost for failure to pursue a peer review action in the furtherance of quality health care, the immunity from disclosure of such panel's proceedings should also be lost for such a failure. Where a proceeding is being conducted, not for the purpose of improving the quality of health care, but, rather, for the purpose of eliminating competition, conducting a vendetta, or some other reason not embodied within the public policy supporting the privilege, it should be lost.

Of interest is the fact that the Hospital's Fair Hearing Plan specifically adopts the provisions of the Health Care Quality Improvement Act. Section 22 of Chapter XII of the Medical Staff Policy & Plans states: "This Fair Hearing Plan will be construed, and at all times will be consistent with, the Health Care Quality Improvement Act and its implementing regulations (HCQIA), and in the event of a conflict, HCQIA will control."

**11* I would hold that the Plaintiffs could overcome the privilege with a credible showing that the Hospital was using the peer review proceedings for an improper purpose, such as the Plaintiffs allege. The problem for Plaintiffs is that they have not made a credible showing that such is the case. The Plaintiffs allege that the peer review proceedings were merely a ruse to stifle competition by eliminating Dr. Verska as a competitor against the Hospital's in-house spinal surgery group. Plaintiffs have failed to present any credible evidence to support that contention. Nor has it been shown that the Hospital did not substantially comply with the standards adopted by the Hospital for its Fair Hearing Plan, specifically the HCQIA requirements.

On the other hand, the record shows that the proceedings were instituted for valid reasons. It would not have been responsible for the Hospital to have ignored the fact that Dr. Verska had had his hospital privileges at St. Luke's Regional Medical Center curtailed. Subsequent review of the doctor's charts indicated the need for further study. The fact that he had five cases reported to the National Practitioner Data Bank could not have been properly disregarded by the Hospital. It certainly appears that the proceeding was initiated and pursued in "furtherance of quality health care."

The Plaintiffs allege that information was improperly disclosed by at least one peer review panel member involved in the proceedings. It is not clear whether the Plaintiffs asserted to the district court that the privilege had been waived by virtue of that fact.2 Certainly a party asserting a privilege can waive it by voluntary disclosure, as we have provided in I.R.E. 510:

> A person upon whom these rules confer a privilege against disclosure of the confidential matter or communication waives the privilege if the person or the person's predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the matter or communication. This rule does not apply if the disclosure is itself a privileged communication.

Although I.R.E. 510 deals specifically with waiver of privileges provided for in the Idaho Rules of Evidence, there is no reason why we should not apply it equally to legislatively-created privileges. However, the Plaintiffs have failed to raise this particular waiver issue on appeal. Presumably, they can do so on remand.

Because the Plaintiffs have failed to make a sufficient showing that the privilege should not apply in this case, the district court correctly ruled with regard to the Plaintiffs' request to conduct discovery and this Court reached the correct conclusion in affirming that holding.

With regard to Part III of the opinion, I agree that the Court cannot modify an unambiguous statute. Our job is to determine whether a legislatively-created privilege applies in a particular fact situation. However, I would observe that the Court has inherent constitutional powers to control court procedures, including the conduct of discovery, and to implement rules regarding the admissibility of evidence, including the power to establish privileges in furtherance of public policy objectives. Indeed, the Court has established a specific privilege entitled "Hospital, in-hospital medical staff committee and medical society privilege." I.R.E. 519. That privilege covers much of the same ground as the legislatively-enacted privilege. Oddly, neither party has cited I.R .E. 519 to the Court. Because I.C. § 39–1392b does not appear to conflict with the Court's rule, application of that statute in this proceeding is not inappropriate.

1 Idaho Code sections 39–1392e(a)–(e), with the provisions upon which Plaintiffs rely highlighted, provide as follows:

> (a) In the event of a claim or civil action **against a physician,** emergency medical services personnel, a hospital or a skilled nursing facility arising out of a particular physician-patient, emergency medical services personnel-patient, hospital-patient relationship, or skilled nursing facility-patient, or which concerns the sufficiency of the delivery of particular health care to a specific patient, any health care organization having information of the kind covered by section 39–1392b, Idaho Code, shall, when interrogated as hereinafter provided, advise any **such claimant** who is or was such a **patient** or who, in a representative capacity, acts on behalf of such patient or his heirs, as follows:
> (1) Whether it has conducted or has in progress an inquiry, proceeding or disciplinary matter regarding the quality or propriety of the health care involved, which concerns the subject patient while he was under the care or responsibility of a member of such health care organization or while he was a patient in such hospital or facility; and, if so,
> (2) Whether disposition of any kind resulted or will result therefrom; and, if so,
> (3) What the disposition was, or, if not yet determined, approximately when it will be determined.
> Such disclosure of information shall be limited to the health care organization's actions in connection with the physician, emergency medical services personnel, hospital or skilled nursing facility against whom such claim is asserted.
> (b) **Such a claimant** shall likewise be entitled to inquire of such health care organization respecting the names and addresses of persons who such health care organization knows to have direct knowledge of the provision of the health care in question, such inquiry to be limited, however, to the particular patient and the particular times and occasions germane to the specific occurrences on which the claim is based; provided, names shall not be disclosed respecting persons who have gained secondary knowledge or formed opinions respecting the matter solely by participating as witnesses, officials, investigators or otherwise on, for, or in connection with such a health care organization committee, staff, governing board or the state board of medicine.
> (c) Such limited, conditional discovery and disclosure of information as provided above shall be allowed only in response to inquiries directed to such a health care organization, and then only if initially propounded by **a claimant of the type above described.** If the matter is in litigation, inquiry may be by customary means of discovery under the Idaho rules of civil procedure, or, if pending in a United States court, then under discovery as allowed by its applicable rules; provided, pendency of the claim in the United States court or before any other tribunal shall not operate to broaden the exception to the rules of privilege, confidentiality and immunity set down in this act.
> (d) Such disclosures may be voluntarily made without judicial order or formal discovery **if all disciplined, accused or investigated physicians** or emergency medical services personnel consent thereto, and if privileged or confidential information regarding any other patient, physician, emergency medical services personnel, or person will not be disclosed thereby. When the terms of this paragraph are complied with, such voluntary disclosures may be made without civil liability therefor as if in due response to valid judicial process or order.
> (e) **If any claimant** makes such inquiry of any such health care organization, he shall be deemed to have consented to like inquiry and disclosure rights for the benefit **of all parties against whom he asserts such claim or brings such suit or action,** and all other persons who are parties to such action, and thereafter all such persons and parties may invoke the provisions of this section, seeking and securing specific information as herein provided for the benefit of such claimant, to the same extent as the same is allowed to such claimant.

2 Plaintiffs do claim on appeal that the privilege was waived, but their argument is premised upon I.C. § 39–1392b(f). The Court correctly disposes of that contention in Part IV of the Opinion.

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ARCHIE N. BANBURY, CLERK
BY ______ DEPUTY
2011

Case No ______ Inst. No. ______
Filed ______ P.M

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF VALLEY

ALPINE VILLAGE COMPANY, an Idaho corporation, Plaintiff, vs. CITY OF MCCALL, a municipal corporation, Defendant.	Case No. CV-2010-519C MEMORANDUM DECISION ON PLAINTIFF'S AND DEFENDANT'S CROSS MOTIONS FOR SUMMARY JUDGMENT

APPEARANCES

For Plaintiff: Steven J. Millemann of Millemeann, Pittenger, McMahan & Pemberton, LLP

For Defendant: Christopher H. Meyer of Givens Pursley, LLP

PROCEEDINGS

This Memorandum Decision addresses cross Motions for Summary Judgment on all of Plaintiff's claims for relief.

BACKGROUND

This is an inverse condemnation/takings case. The following facts are undisputed by the parties.

On February 23, 2006, the City of McCall, hereinafter referred to as "the City" passed Ordinance 819, which required developers of residential subdivisions to set

aside 20% of their planned units for "community housing", that is, restricted housing for low-income residents. An applicant could satisfy the ordinance by (1) constructing the community housing units on-site (2) constructing or converting units for community housing off-site (3) donating sufficient land to the City to construct the quota units of community housing or (4) pay an in-lieu fee to the City (or a combination thereof). Ordinance 819 was later codified into McCall City Code § 9.7.10.

On June 20, 2006, Plaintiff, hereinafter referred to as Alpine, filed their applications with the Planning and Zoning Commission seeking to develop a mixed use residential and commercial property (The "Alpine Village"). In order to comply with Ordinance 819, Alpine proposed to convert sixteen (16) mobile home spots on real property they already owned for community housing and construct another 6 units for community housing onsite at Aspen Village. On October 3, 2006, The Planning and Zoning Commission preliminarily approved Alpine's applications with the condition that Alpine revise their community housing plan to provide for fourteen(14) off-site units, which recommendation was adopted by the McCall City Council on December 13, 2006.

Meanwhile, Mountain Center Board of Realtors, Inc. had filed an action against the City of McCall in Valley County Case No. 2006-490-C, seeking the Court there to declare, *inter alia*, Ordinance 819 as facially unconstitutional (the "MCBR litigation").

On March 12, 2007, Alpine presented a revised community housing plan to the City Council wherein Alpine would elect to provide the off-site units by purchasing a 17-unit apartment complex known as "The Timbers" and converting the units into community housing condominiums. The McCall City Council approved the revised plan on March 22, 2007, Alpine closed on the purchase of The Timbers on April 16, 2007,

and the parties entered into a Development Agreement with Alpine for Alpine Village on December 13, 2007. Specifically, Section 7.1 of the Development Agreement provided, in reference to the pending MCBR litigation:

> Alpine Village's approved Community Housing Plan is attached hereto as Exhibit "B". Alpine Village waives and releases the City from any claims whatsoever regarding or stemming from the pending litigation between the Mountain Central Board of Realtors and the City (i.e. Mountain Central Board of Realtors, et al v. City of McCall, et al, Valley County Case Number CV-2006-490-C) as to Community Housing Units which are sold pursuant to this Plan prior to the final disposition of such litigation. The Plan will be reviewed and modified, as necessary, to comply with the final disposition of the litigation as to any Community Housing Units which have not been sold prior to the final disposition of the litigation.

On February 19, 2007, Fourth District Judge Thomas Neville ruled in the MCBR litigation that Ordinance 819, McCall City Code § 9.7.10., was an unconstitutional tax. Subsequent to that decision, the City entered into the First Amendment to Development Agreement on July 24, 2008, wherein the City deleted Article VII of the original development agreement and lifted the restrictions that Ordinance 819 had imposed upon Alpine's property at Alpine Village. The City further lifted the community housing restrictions on Alpine's property at The Timbers on May 21, 2009.

On November 15, 2010, Alpine sent a written demand letter to the City seeking payment of damages it had incurred in purchasing The Timbers in order to comply with now invalidated Ordinance 819. The City did not respond to Alpine's demand, and Alpine commenced suit against the City in this case on December 10, 2010. The City then removed this matter to federal court and sought dismissal of Alpine's claims. The U.S. District Court remanded the action to this Court, on August, 2011, stating that Alpine's federal claims were not yet ripe for determination, and as such, that the U.S. District court lacked subject matter jurisdiction over the matter.

After remand, the City filed a motion for summary judgment on September 19, 2011, for all of Alpine's claims, contending (1) that Alpine's inverse condemnation claim was barred by I.C. § 50-219, I.C. § 6-906, and I.C. § 6-908, because Alpine did not file a timely notice of claim with the City within the 180-day timeline prescribed by I.C. § 6-906; (2) that Alpine's inverse condemnation claim is barred by the four-year statute of limitation; (3) that Alpine's decision to purchase The Timbers was voluntary, thus defeating the inverse condemnation claim; (4) that Alpine's 42 U.S.C. § 1983 claim is barred by a two-year statute of limitations; (5) that Alpine's claims are barred by the Release in the Development Agreement; and finally (6) that Alpine's claims are barred by laches.

Alpine, in their cross Motion for Summary Judgment, contends (1) that the City's imposition of Ordinance 819 on Alpine constituted a taking or inverse condemnation under Article I, Section 14 of the Idaho Constitution and, if relief is denied under the state constitutional claim, then a compensable taking under the Fifth Amendment to the United States Constitution has occurred; (2) that Alpine's inverse condemnation claim was timely under the four-year statute of limitation; (3) that Alpine's inverse condemnation claim was not barred by Idaho Code § 50-219; (4) that Alpine's federal claims were timely under the applicable statute of limitations; and (5) that the City's remaining arguments concerning release, voluntary purchase, and laches are without merit.

STANDARD OF REVIEW

Summary judgment will be granted only "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine

issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c). When considering a summary judgment motion, the trial court must construe the record liberally in favor of the non-moving party and draw all reasonable factual inferences in favor of such party. *Bear Lake West Homeowner's Ass'n. v. Bear Lake County*, 118 Idaho 343, 346, 796 P.2d 1016, 1019 (1990). The motion will be denied if conflicting inferences may be drawn from the evidence or if reasonable people might reach different conclusions. *Parker v. Kokot*, 117 Idaho 963, 793 P.2d 195 (1990).

The initial burden of establishing the absence of a genuine issue of material fact rests with the moving party. *Thomson v. Idaho Ins. Agency, Inc.*, 126 Idaho 527, 531, 887 P.2d 1034, 1038 (1994). If the moving party meets that burden, the party who resists summary judgment has the responsibility to place in the record before the court the existence of controverted material facts that require resolution at trial. *Sparks v. St. Luke's Reg'l Med. Ctr., Ltd.*, 115 Idaho 505, 508, 768 P.2d 768, 771 (1988). The resisting party may not rely on his pleadings or merely assert the existence of facts which might support his legal theory. *Id.* He must establish the existence of those facts by deposition, affidavit, or otherwise. *Id.*; I.R.C.P. 56(e). Supporting and opposing affidavits must be made on personal knowledge and must set forth such facts as would be admissible in evidence. I.R.C.P. 56(e).

A mere scintilla of evidence or a slight doubt as to the facts is not sufficient to withstand summary judgment. *Corbridge v. Clark Equip. Co.*, 112 Idaho 85, 87, 730 P.2d 1005, 1007 (1986). Moreover, the existence of disputed facts will not defeat summary judgment when the Plaintiff fails to make a showing sufficient to establish the

existence of an element essential to his case, and on which he will bear the burden of proof at trial. *Pounds v. Denison*, 120 Idaho 425, 426, 816 P.2d 982, 983 (1991).

DISCUSSION

The Court will first address the notice of tort claim and statute of limitation issues before the Court.

1. Application of I.C. § 50-219 to Alpine's State Inverse Condemnation Claim

I.C. § 50-219 provides that "All claims for damages against a city must be filed as prescribed by chapter 9, title 6, Idaho Code." Idaho courts have interpreted this provision to apply to all damages claims against cities. *Sweitzer v. Dean*, 118 Idaho 568, 572, 798 P.2d 27, 31 (1990). Specifically preempted from this requirement, however, are federal claims filed pursuant to 42 U.S.C. § 1983. *Id.* at 572-573, 31-32. Neither party has contended that I.C. § 50-219 applies to Alpine's §1983 claim or federal takings claim. In line with *Sweitzer* and the issues presented by the parties, the Court only considers the application of I.C. § 50-219 as to Alpine's state law inverse condemnation claim. Alpine concedes that I.C. § 50-219 applies to Alpine's state claim but disputes that certain portions of chapter 9, title 6 apply.

The City argues that I.C. § 50-219 does bar the inverse condemnation claim, because it implicitly references I.C. §§ 6-906 and 6-908. The City then cites two cases which interpret I.C. § 6-908 to be jurisdictional. In other words, failure to comply with the notice of claim requirements therein is fatal to the claim, and the Court lacks any jurisdiction to further hear the claim.

Alpine argues that, while it did not timely file a notice of claim pursuant to I.C. § 50-219 and I.C. § 6-906, Alpine asserts that I.C. § 6-908, as a jurisdictional requirement, does not apply to I.C. § 50-219 and that it is excused from compliance for constitutional and equitable reasons. Specifically, Alpine states that, if the Court bars Alpine's claim under I.C. § 50-219, Alpine would be deprived of its right to Equal Protection, as the City has not enforced the notice of claim requirement on other claimants arising out of the MCBR decision. Finally, Alpine argues that the City should be estopped from asserting the 180-day notice of claim requirement as a bar to Alpine's claim.

I.C. § 6-906 requires, in part, that all claims shall be presented to and filed with *the clerk or secretary* of the political subdivision within one hundred eighty (180) days from the date the claim arose or reasonably should have been discovered, whichever is later. Furthermore, I.C. § 6-908 provides that no claim or action shall be allowed against a governmental entity or its employee unless the claim has been presented and filed within the time limits prescribed by the ITCA.

The explicit language of I.C. § 50-219 states that the manner of filing claims for damages against cities are "as prescribed by chapter 9, title 6, Idaho Code." The plain meaning of this text is that the Legislature intended all of the general notice of claim provisions in the Idaho Tort Claims Act, not just §6-906, are to apply generally to claims under I.C. § 50-219. The courts in Idaho have also previously applied other provisions of the Idaho Tort Claims Act through I.C. § 50-219. *e.g., Magnuson Properties Partnership v. City of Coeur d'Alene*, 138 Idaho 66,169, 59 P.3d 971, 974 (2002) (stating that the ITCA, I.C. § 6-901 applied to I.C. §50-219 claim). In that case, the court there affirmed the trial court's dismissal of the Plaintiff's damage claims against

that Plaintiff because that Plaintiff had not complied with the notice requirements of I.C. § 50-219 and I.C. § 6-906. *Id.* at 170, 975. In that holding, the court there reasoned that, "Compliance with the notice requirement is a "mandatory condition precedent to bringing suit [against a city], the failure of which is fatal to a claim, no matter how legitimate." *Id.* at 169-170, 974-975.

Alpine further argues in their reply brief that *Sweitzer v. Dean* stands for the proposition that only I.C. § 6-906 applies to I.C. § 50-219. In that case, Sweitzer argued that because I.C. § 50-219 referenced the tort claims act, then I.C. § 50-219 only governed tort claims against the City. *Id.* Rather than limit the application of the ITCA, the court in *Sweitzer* essentially held that the requirements/scope of I.C. § 50-219 was expanded beyond tort claims. *Id.* Moreover, the court in *Sweitzer* specifically stated that:

> The plain meaning of the language contained in I.C. § 50-219 clearly demonstrates that the legislature's intent was to incorporate the notice requirements contained in chapter 9, title 6 so as to make the filing procedures for all claims against a municipality uniform, standard and consistent.

Id.

To hold that I.C. § 6-908 does not apply to claims filed against municipalities and that I.C. § 50-219 is merely procedural would create numerous case by case exceptions for untimely notices like the case argued by Alpine here. Alpine's position cuts against the legislature's intent to make the filing procedures for all claims against municipalities uniform, standard and consistent. Nor does Alpine's citation of the *Verska v. Saint Alphonsus Regional Medical Center,* 2011 WL 5375192 (Idaho Sup. Ct. Nov 9, 2011)

support its position, as the Court's ruling follows the text of I.C. § 50-219. As such, the Court will decline to address Alpine's arguments on equal protection and estoppel.

The 180 day period begins to run from "the date the claim arose or reasonably should have been discovered, whichever is later." I.C. § 6-906. The parties have not explicitly asserted which date should apply for purposes of starting the timeline under the ITCA. The parties have also not disputed that the November 15, 2010 demand letter is arguably the earliest notice that was given under I.C. § 6-906. Accordingly, for the November 15, 2010 demand letter to be timely, the claim must have arisen or reasonably should have been discovered no later than on or about May 19, 2010.

Alpine contends, for purposes of statute of limitations on the state law claim that the cause of action accrued on December 13, 2007, when they entered into the Development Agreement with the City. Based upon the record before the Court, Alpine's claim arose and reasonably should have been discovered no later than December 13, 2007.

Alpine has not shown to the Court any specific statutory provision that would exempt their state law claim from the requirements of the Idaho Tort Claims Act. Therefore, the Court finds that Alpine's failure to timely comply with the notice requirements of I.C. § 50-219, I.C. § 6-906, and I.C. § 6-908 bars Alpine's state law claim of inverse condemnation. The Court further declines to address the statute of limitations issues on the substantive merits of state law claim as those inquiries are rendered moot.

Accordingly, the Court GRANTS the City's Motion for Summary Judgment as to Alpine's Second Claim for Relief and DENIES Alpine's Motion for Summary Judgment

as to Alpine's Second Claim for Relief.

2. Statute of Limitations Issues on Remaining Federal Claims

Federal law dictates which statute of limitations are applicable to federal claims and section 1983 claims are subject to the two-year statute of limitations in I.C. § 5-219(4). *McCabe v. Craven*, 145 Idaho 954, 957, 188 P.3d 896, 899 (2008).

The City contends in their Motion for Summary Judgment that both Alpine's remaining federal claims are subject to the two-year statute of limitations in I.C. § 5-219(4), that the statute began to accrue no later than December 13, 2007, and that Alpine's remaining claims are therefore time-barred.

Alpine responds by stating that while the section 1983 action is subject to I.C. § 5-219(4), the direct takings claim under the U.S. Constitution is subject to the four-year statute of limitations in I.C. § 5-224. Moreover, Alpine contends that even if the two-year period applies to both, both claims are timely. In support of this argument, Alpine cites *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 687 (9th Cir. 1993), which provides that "a Plaintiff cannot bring a section 1983 action in federal court until the state denies just compensation. A claim under section 1983 is not ripe-and a cause of action under section 1983 does not accrue-until that point." Alpine further cites *Hacienda Valley Mobile Estates v. City of Morgan Hill*, which held that in order for a § 1983 claim to be ripe, and thus for the statute of limitations to run, the state remedies requirement of *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S.Ct. 3108 (1985) must be met. 353 F.3d 651, 655-658 (9th Cir. 2003). The parties seem to agree that the first requirement of *Williamson* for ripeness has been met. The second issue is the application of the second

requirement of *Williamson*, which held that a taking is not complete until compensation for a deprivation has been sought and denied. *Id.* (citing *Williamson*, supra). Therefore, the second prong of the *Williamson County* ripeness analysis requires the petitioners to seek state remedies unless doing so would be futile. *Id.* As a result, Alpine claims that, because this instant action is pending on their state inverse condemnation claim, Alpine's federal claims will not ripen unless and until this Court denies relief on the state inverse condemnation, and thus, the statute of limitations has not even begun to run.

The City, anticipating Alpine's point, argues that *Levald* and *Hacienda* only apply to section 1983 actions in federal court, and cite *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005), which held that *Williamson* did not bar a section 1983 takings claim from being presented simultaneously with a state law inverse condemnation claim in state court. The City reasons under *San Remo* that if a section 1983 claim is allowed to be brought in state court, it must be ripe for review, and therefore, the statute of limitations must have been running and started running at the same time as the state law inverse condemnation claim.

Alpine, in their reply brief, cites *BHA Investments, Inc. v. City of Boise* for the proposition that a bar of state takings claims by I.C. § 50-219 does not preclude the Court from hearing Alpine's federal claims. Alpine is correct to the extent that I.C. § 50-219, in itself, does not bar the federal claims. However, the court in *BHA* did not discuss or consider the application of I.C. § 5-219(4). The holding in BHA was limited to the direct effect of I.C. § 50-219 on federal claims, and does give any guidance on the statute of limitations issue.

While the Idaho Supreme Court has espoused that a Plaintiff may bring a direct action for a taking under the 5th Amendment in addition to a section 1983 action, it did so in the context of whether the notice requirement of the Idaho Tort Claims Act barred a Plaintiff's federal claims after the Plaintiff's inverse condemnation claim under the Idaho constitution was barred (which issue the parties here do not contest). *BHA Investments, Inc. v. City of Boise*, 141 Idaho 168, 175 n.2, 108 P.3d 315, 322 n.2. (2004). Moreover, the Ninth Circuit Court of Appeals in *Hacienda* analyzed both a section 1983 action and a direct takings action under the same statute of limitations and resulting rules. 353 F.3d at 654-658. Accordingly, the Court finds that the two-year statute of limitations in I.C. § 5-219(4) applies to both Alpine's Third Cause of Action and the remaining federal constitutional claim under Alpine's First Cause of Action.

Alpine in this case is claiming that their challenge is a facial challenge however the undisputed facts of this case demonstrate that this is an as-applied challenge. This was an action worked out between the Alpine and the City providing for the restriction of housing on two pieces of property. Moreover, the first requirement of *Williamson* concerns administrative remedies for obtaining relief or compensation for a taking of property, not an erstwhile judicial decision generally declaring an ordinance unconstitutional on other grounds. The Court finds that the case brought before it is an as-applied takings challenge and thus subject to the first prong of *Williamson County*.

The Court will find that the precedent set forth in *Williamson County* and as adopted in *KMST*, is applicable to the facts of this case. *Williamson County* dealt with the failure to seek a variance and the court ruled that the case was not ripe for that reason. In this case, Alpine failed to contest the Development Agreement. In this case,

Alpine was required to raise their objections with the local government in a timely and meaningful way in order to set up their claim that the exaction was involuntary. Alpine did not lodge an objection with the City over its denial of converting Alpine's motor home lots to community housing. In this case, Alpine proposed, executed and carried out a development agreement. Thus, the Court will find there is no final decision as spelled out in *Williamson County*. *Williamson County* went on to hold that where a regulatory taking is alleged against the state or local government agency, the property owner must first seek compensation through the procedures the state has provided for doing so before litigating the federal claim. In this case, Alpine failed to seek judicial review of the decision by the City. The only process that Alpine can point to is where it sought release of the housing restrictions on the Timbers Property, which the City granted. From the Court's review of *Williamson County*, this is a strict requirement for a federal takings claim. Alpine has failed to complete this two-step procedure and therefore their federal claims are barred as unripe.

Because the City released the restrictions from Alpine's property and because Alpine's state law remedies are barred by I.C. § 50-219, Alpine never exercised and will never have the ability to exercise administrative remedies on their takings claim. As a result, Alpine's federal claims will never ripen in this case. *See generally Pascoag Reservoir & Dam v. Rhode Island*, 337 F.3d 87 (1st Cir. 2003).

Even if the Court were to find that the challenge before it is a facial challenge and not subject to the first requirement to exhaust administrative remedies, Alpine's claim ripened no later than on or around June 11, 2008 and is thus time-barred by I.C. § 5-219(4).

The Court admittedly notes that, in general, the paired holdings in *San Remo* and *Williamson* create a procedural nightmare when considering the accrual of federal takings causes of action for statute of limitations purposes in state courts. However, the Court has found no controlling legal authority for the City's argument that the principles in *Levald* and *Hacienda* are inapplicable and is constrained by those cases to hold that I.C. § 5-219(4) does not begin to run until Alpine seeks state remedies and is denied compensation unless doing so would be futile.

Nevertheless, the undisputed facts of this particular case do not support Alpine's assertion that the statute has not yet begun to run. As discussed above, Alpine did not file a timely notice of claim with the City within 180 days after its state inverse condemnation claim arose on December 13, 2007. That failure barred Alpine's Second Claim for Relief and, more importantly, deprived this Court of any jurisdiction to hear and grant relief for Alpine's state remedies. As a result, I.C. § 50-219, I.C. § 6-906, and I.C. § 6-908 functioned as the state's denial of compensation or made Alpine's future efforts to obtain compensation under state remedies futile. By operation of those statutes, the bar on Alpine's state claims went into effect 181 judicial days after December 13, 2007, that is, on or around June 11, 2008. Thus, the Court finds that Alpine's remaining federal claims ripened and that I.C. § 5-219(4) began to run on or around June 11, 2008.

In order for Alpine's remaining federal claims to be timely filed, Alpine must have commenced their action no later than on or around June 11, 2010. I.C. § 5-219(4). It is undisputed and the record reflects that this action was not commenced until December 10, 2010. Alpine's remaining federal claims are therefore untimely filed and barred by

I.C. § 5-219(4). As such, the Court declines to address the further arguments and issues on Alpine's First and Third Claims for relief.

Accordingly, the Court GRANTS the City's Motion for Summary Judgment as to Alpine's First and Third Claims for Relief and DENIES Alpine's Motion for Summary Judgment as to Plaintiff's First and Third Claims for Relief.

CONCLUSION

The Court GRANTS the City's Motion for Summary Judgment as to all of Plaintiffs' claims for relief and DENIES Plaintiff's Motion for Summary Judgment as to all of Plaintiffs' claims for relief. Counsel for the Defendant shall prepare a judgment dismissing the case with prejudice and setting forth the IRCP Rule 54 (b) certification.

DATED this 16 day of December, 2011.

MICHAEL McLAUGHLIN
DISTRICT JUDGE

CERTIFICATE OF MAILING

I hereby certify that on the 20 day of December, 2011, I mailed (served) a true and correct copy of the within instrument to:

VALLEY COUNTY COURT
VIA EMAIL

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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF VALLEY

ALPINE VILLAGE COMPANY, an Idaho corporation, Plaintiff, vs. CITY OF McCALL, a municipal corporation, Defendant.	Case No. CV-2010-519C **JUDGMENT**

THIS MATTER having come before the Court pursuant to the *City's Motion for Summary Judgment* and the *Plaintiff's Motion for Summary Judgment*, and, following briefing and oral argument, this Court having granted the *City's Motion for Summary Judgment* and denied the *Plaintiff's Motion for Summary Judgment* in its *Memorandum Decision on Plaintiff's and Defendant's Cross Motions for Summary Judgment* entered on December 16, 2011;

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

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

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

DATED this 5 day of January, 2012.

MICHAEL R. MCLAUGHLIN
District Court Judge

Signature Stamp per email directive Deborah M. Perry -

RULE 54(b) CERTIFICATE

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

DATED this 5 day of January, 2012.

MICHAEL R. MCLAUGHLIN
District Court Judge

CLERK'S CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of January, 2012, a true and correct copy of the foregoing was served upon the following individual(s) by the means indicated:

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Clerk of the District Court

By: Deborah M. Perry
Deputy Clerk

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Attorneys for Plaintiff/Appellant

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF VALLEY

ALPINE VILLAGE COMPANY,
an Idaho Corporation,

Plaintiff/Appellant,

v.

CITY OF MCCALL,
a municipal corporation,

Defendant/Respondent.

CASE NO. CV-2010-519C

NOTICE OF APPEAL

Filing Fee: $86.00

TO: THE ABOVE NAMED RESPONDENT, CITY OF MCCALL AND THE PARTY'S ATTORNEYS, CHRISTOPHER H. MEYER, OF GIVENS PURSLEY LLP, AND THE CLERK OF THE ABOVE ENTITLED COURT.

NOTICE IS HEREBY GIVEN THAT:

ORIGINAL

1. The above named Appellant, Alpine Village Company, appeals against the above-named respondent to the Idaho Supreme Court from the Memorandum Decision on Plaintiff's and Defendant's Cross Motions for Summary Judgment, entered in the above entitled action on the 16th day of December, 2011, and the Judgment entered in the above entitled action on the 12th day of January, 2012, by the Honorable Judge Michael McLaughlin presiding.

2. Appellant Alpine Village Company has a right to appeal to the Idaho Supreme Court, and the Decision and Judgment described in paragraph 1 above are appealable orders under and pursuant to Rule 11(a)(1), I.A.R.

3. Preliminary Statement of Issues on Appeal:

(a) Whether the District court erred as a matter of law in granting Respondent City of McCall's Motion for Summary Judgment;

(b) Whether the District court erred as a matter of law in denying Appellant Alpine Village Company's Motion for Summary Judgment; and,

(c) Whether Appellant Alpine Village Company is entitled to an award of attorneys fees on appeal.

4. An order sealing the record has not been entered.

5. A Reporter's Transcript of the hearing conducted by the District Court on November 17, 2011 on the parties' cross motions for summary judgment in both hard copy and electronic format is requested.

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

(a) City's Motion for Summary Judgment, dated September 16, 2010;

(b) City's Opening Brief in Support of Motion for Summary Judgment, dated September 16, 2010;

(c) Affidavit of Michelle Groenevelt in Support of Motion for Summary Judgment, dated September 16, 2010;

(d) Affidavit of Martin C. Hendrickson In Support of Motion for Summary Judgment, dated October 4, 2011:

(e) Exhibits A, B, and C to Affidavit of Martin C. Hendrickson, dated October 4, 2011;

(f) Plaintiff's Motion for Summary Judgment, dated October 7, 2011;

(g) Memorandum in Support of Alpine Village Company's Motion for Summary Judgment and in Opposition to Defendant's Motion for Summary Judgment, dated October 7, 2011;

(h) Affidavit of Deanna Schnider, dated October 7, 2011, together with exhibits 1 and 2 thereto;

(i) Affidavit of Steven J. Millemann dated October 7, 2011, together with Exhibits 1-29 thereto;

(j) Affidavit of William F. Nichols in Support of Motion for Summary Judgment, dated October 25, 2010, together with Exhibits A and B thereto;

(k) City's Reply Brief in Support of Its Motion for Summary Judgment and Response Brief in Opposition to Alpine's Motion for Summary Judgment, dated October 26, 2011;

(l) Alpine Village's Reply Memorandum in Support of Motion for Summary Judgment and in Opposition to Defendant's Motion for Summary Judgment, dated November 14, 2011;

(m) (Defendant's) Notice of Supplemental Authority, dated November 15, 2011; and,

(n) Plaintiff's Notice of Supplemental Authority, dated November 16, 2011.

7. The appellant requests the following documents, charts, or pictures offered or admitted as exhibits to be copied and set to the Supreme Court-none.

8. I certify:

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

Mia J. Martorelli, CSR #750
Ada County Courthouse, Administration Department
200 W. Front Street
Boise, Idaho 83702

(b)(1) that the Clerk of the district court has been paid the estimated fee for the preparation of the reporter's transcript.

(c)(1) that the estimated fee for the preparation of the clerk's record has been paid.

(d)(1) that the appellate filing fee has been paid

(e) that service has been made on all parties required to be served pursuant to I.A.R. 20

DATED this 12th day of January, 2012.

MILLEMANN, PITTENGER, McMAHAN & PEMBERTON, LLP

BY: _____
STEVEN J. MILLEMANN
Attorneys for Plaintiff/Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of January, 2012, I caused to be served a true and correct copy of the foregoing Notice of Appeal addressed to the following in the United States mail, postage prepaid

Christopher H. Meyer
Martin C. Hendrickson
GIVENS PURSLEY LLP
P.O. Box 2720
Boise, Idaho 83701-2720
Attorneys for Respondent City of McCall

Mia J. Martorelli, CSR #750
Ada County Courthouse, Administration Department
200 W. Front Street
Boise, Idaho 83702

MILLEMANN, PITTENGER, McMAHAN & PEMBERTON, LLP

BY: _____
STEVEN J. MILLEMANN
Attorneys for Plaintiff/Appellant

STEVEN J. MILLEMANN, ISB NO. 2601
GREGORY C. PITTENGER, ISB NO. 1828
MILLEMANN, PITTENGER, McMAHAN & PEMBERTON, LLP
ATTORNEYS AT LAW
706 NORTH FIRST STREET
POST OFFICE BOX 1066
McCALL, IDAHO 83638
TELEPHONE: (208) 634-7641
FACSIMILE: (208) 634-4516
EMAIL: sjm@mpmplaw.com
gcp@mpmplaw.com

Attorneys for Plaintiff/Appellant

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF VALLEY

ALPINE VILLAGE COMPANY,
an Idaho Corporation,

Plaintiff/Appellant,

v.

CITY OF MCCALL,
a municipal corporation,

Defendant/Respondent.

CASE NO. CV-2010-519C

AMENDED NOTICE OF APPEAL

TO: THE ABOVE-NAMED RESPONDENT, CITY OF MCCALL AND THE PARTY'S ATTORNEYS, CHRISTOPHER H. MEYER, OF GIVENS PURSLEY LLP, AND THE CLERK OF THE ABOVE-ENTITLED COURT.

NOTICE IS HEREBY GIVEN THAT:

1. The above-named Appellant, Alpine Village Company, appeals against the above-named Respondent to the Idaho Supreme Court from the Memorandum Decision on Plaintiff's and Defendant's Cross Motions for Summary Judgment, entered in the above-entitled action on the 16th day of December, 2011, and the Judgment entered in the above -entitled action on the 12th day of January, 2012, by the Honorable Judge Michael McLaughlin presiding.

2. Appellant Alpine Village Company has a right to appeal to the Idaho Supreme Court, and the Decision and Judgment described in paragraph 1 above are appealable orders under and pursuant to Rule 11(a)(1), I.A.R.

3. Preliminary Statement of Issues on Appeal:

(a) Whether the District Court erred as a matter of law in granting Respondent City of McCall's Motion for Summary Judgment;

(b) Whether the District Court erred as a matter of law in denying Appellant Alpine Village Company's Motion for Summary Judgment; and,

(c) Whether Appellant Alpine Village Company is entitled to an award of attorneys fees on appeal.

4. An order sealing the record has not been entered.

5. A Reporter's Transcript of the hearing conducted by the District Court on November 17, 2011 on the parties' Cross Motions for Summary Judgment in both hard copy and electronic format is requested.

6. The Appellant requests the following documents to be included in the Clerk's record in addition to those automatically included under Rule 28, I.A.R.:

(a) City's Motion for Summary Judgment, dated September 16, 2011;

(b) City's Opening Brief in Support of Motion for Summary Judgment, dated September 16, 2011;

(c) Affidavit of Michelle Groenevelt in Support of Motion for Summary Judgment, dated September 16, 2011;

(d) Affidavit of Martin C. Hendrickson In Support of Motion for Summary Judgment, dated October 4, 2011;

(e) Exhibits A, B, and C to Affidavit of Martin C. Hendrickson, dated October 4, 2011;

(f) Plaintiff's Motion for Summary Judgment, dated October 7, 2011;

(g) Memorandum in Support of Alpine Village Company's Motion for Summary Judgment and in Opposition to Defendant's Motion for Summary Judgment, dated October 7, 2011;

(h) Affidavit of Deanna Schnider, dated October 7, 2011, together with Exhibits 1 and 2 thereto;

(i) Affidavit of Steven J. Millemann dated October 7, 2011, together with Exhibits 1-29 thereto;

(j) Affidavit of William F. Nichols in Support of Motion for Summary Judgment, dated October 25, 2011 together with Exhibits A and B thereto;

(k) City's Reply Brief in Support of Its Motion for Summary Judgment and Response Brief in Opposition to Alpine's Motion for Summary Judgment, dated October 26, 2011;

(l) Alpine Village's Reply Memorandum in Support of Motion for Summary Judgment and in Opposition to Defendant's Motion for Summary Judgment, dated November 14, 2011;

(m) (Defendant's) Notice of Supplemental Authority, dated November 15, 2011; and,

(n) Plaintiff's Notice of Supplemental Authority, dated November 16, 2011.

7. The Appellant requests the following documents, charts, or pictures offered or admitted as Exhibits to be copied and set to the Supreme Court: None.

8. I certify:

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

Mia J. Martorelli, CSR #750
Ada County Courthouse, Administration Department
200 W. Front Street
Boise, Idaho 83702

(b)(1) that the Clerk of the District Court has been paid the estimated fee for the preparation of the reporter's transcript;

(c)(1) that the estimated fee for the preparation of the Clerk's record has been paid;

(d)(1) that the appellate filing fee has been paid; and,

(e) that service has been made on all parties required to be served pursuant to I.A.R. 20.

DATED this 18th day of January, 2012.

MILLEMANN, PITTENGER, McMAHAN & PEMBERTON, LLP

BY: _____
STEVEN J. MILLEMANN
Attorneys for Plaintiff/Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of January, 2012, I caused to be served a true and correct copy of the foregoing Amended Notice of Appeal addressed to the following in the United States mail, postage prepaid

Christopher H. Meyer
Martin C. Hendrickson
GIVENS PURSLEY LLP
P.O. Box 2720
Boise, Idaho 83701-2720
Attorneys for Respondent City of McCall

Mia J. Martorelli, CSR #750
Ada County Courthouse, Administration Department
200 W. Front Street
Boise, Idaho 83702

_____
STEVEN J. MILLEMANN

Alpine Village COMPANY, An Idaho Corporation, vs. City of McCall, A municipal corporation,	Plaintiff/Appellant, Defendant/ Respondent.	Case No. CV-2010-519C

ARCHIE N. BANBURY, CLERK
By D PERRY Deputy

FEB 0 8 2012

Case No._____ Inst No._____
Filed_____ A.M._____ P.M.

Received from Mia Martorelli, Official Court Reporter, of the above-entitled action, and lodged with me this 8th ~~7th~~ day of February, 2012.

Archie N. Banbury
Clerk of the District Court

Deborah M. Perry
Deputy Clerk

Alpine Village Company vs. City Of Mccall

Other Claims

Date		Judge
12/10/2010	New Case Filed - Other Claims	Michael McLaughlin
	Filing: A - All initial civil case filings of any type not listed in categories B-H, or the other A listings below Paid by: Alpine Village Company (plaintiff) Receipt number: 0006530 Dated: 12/10/2010 Amount: $88.00 (Check) For: Alpine Village Company (plaintiff)	Michael McLaughlin
	Plaintiff: Alpine Village Company Appearance Steven J. Millemann	Michael McLaughlin
	Complaint Filed	Michael McLaughlin
	Summons Issued	Michael McLaughlin
12/16/2010	Miscellaneous Payment: For Making Copy Of Any File Or Record By The Clerk, Per Page Paid by: White Peterson Receipt number: 0006597 Dated: 12/16/2010 Amount: $7.00 (Credit card)	Michael McLaughlin
	Miscellaneous Payment: Technology Cost - CC Paid by: White Peterson Receipt number: 0006597 Dated: 12/16/2010 Amount: $3.00 (Credit card)	Michael McLaughlin
5/12/2011	Notice Of Proposed Dismissal Issued	Michael McLaughlin
5/23/2011	Verified Amended Complaint Filed	Michael McLaughlin
	Affidavit Of Gregory C. Pittenger	Michael McLaughlin
	Summons Issued	Michael McLaughlin
	Summons: Document Service Issued: on 5/23/2011 to City Of Mccall; Assigned to . Service Fee of $0.00.	Michael McLaughlin
5/26/2011	Affidavit Of Service	Michael McLaughlin
	Summons: Document Returned Served on 5/23/2011 to City Of Mccall; Assigned to Private Server. Service Fee of $0.00.	Michael McLaughlin
6/13/2011	Notice Of Appearance--NO FILING FEE PD.	Michael McLaughlin
	Defendant: City Of Mccall, Appearance Christopher H. Meyer	Michael McLaughlin
6/22/2011	Notice to Adverse Party of Removal to Federal Court	Michael McLaughlin
	Civil Disposition entered for: City Of Mccall,, Defendant; Alpine Village Company, Plaintiff. Filing date: 6/22/2011	Michael McLaughlin
	STATUS CHANGED: closed pending clerk action	Michael McLaughlin
8/26/2011	District of Idaho--Civil Docket	Michael McLaughlin
	Memorandum Decision and Order	Michael McLaughlin
	Judgment	Michael McLaughlin
	Hearing Scheduled (Status 09/22/2011 04:00 PM)	Michael McLaughlin
	Notice of Procedures For Telephonic Appearances Regarding CourtCall	Michael McLaughlin
8/30/2011	Motion For Leave To File Second Amended Complaint	Michael McLaughlin
	Memorandum In Support Of Motion For Leave To File Second Amended Complaint	Michael McLaughlin
9/6/2011	Hearing result for Status scheduled on 09/22/2011 04:00 PM: Hearing Vacated	Michael McLaughlin
	Hearing Scheduled (Status 10/05/2011 04:00 PM)	Michael McLaughlin
	Amended Notice of Procedures For Telephonic Appearances Regarding CourtCall	Michael McLaughlin

Alpine Village Company vs. City Of Mccall

Other Claims

Date		Judge
9/7/2011	Notice of Non-Opposition to Plaintiff's Motion for Leave to File Second Amended Complaint	Michael McLaughlin
9/12/2011	Order Granting Plaintiff's Motion For Leave to File Second Amended Complaint	Michael McLaughlin
9/14/2011	Continued (Status 10/20/2011 04:00 PM)	Michael McLaughlin
	Amended Notice of Telephonic Status Conference Under I.R.C.P. 16(a) & 16(b)	Michael McLaughlin
9/19/2011	Second Amended Complaint Filed	Michael McLaughlin
	City's Motion To Enlarge Page Limitation	Michael McLaughlin
	City's Motion For Summary Judgment	Michael McLaughlin
	Affidavit of Michelle Groenevelt In Support of Motion For Summary Judgment	Michael McLaughlin
	Order Granting City of McCall's Motion to Enlarge Page Limitations	Michael McLaughlin
	City's Opening Brief in Support of Motion For Summary Judgment	Michael McLaughlin
9/20/2011	Hearing Scheduled (Motion 11/17/2011 02:30 PM) Tentative Set	Michael McLaughlin
9/30/2011	Answer to Second Amended Complaint	Michael McLaughlin
10/4/2011	Notice of Hearing	Michael McLaughlin
10/5/2011	Affidavit of Martin C. Hendrickson in Support of Motion for Summary Judgment	Michael McLaughlin
10/7/2011	Plaintiff's Motion for Summary Judgment	Michael McLaughlin
	Memorandum in Support of Alpine Village's Motion for Summary Judgment and In Opposition to Defendant's Motion for Summary Judgment	Michael McLaughlin
	Affidavit of Steven J Millemann	Michael McLaughlin
	Affidavit of Deanna Schnider	Michael McLaughlin
	Notice Of Hearing on Plaintiff's Motion for Summary Judgment	Michael McLaughlin
	Plaintiff's Motion To Enlarge Page Limitation	Michael McLaughlin
	Certificate Of Service	Michael McLaughlin
10/20/2011	Hearing result for Status scheduled on 10/20/2011 04:00 PM: Hearing Vacated	Michael McLaughlin
10/25/2011	Order Granting Plaintiff's Motion to Enlarge Page Limitation	Michael McLaughlin
	Affidavit of William F. Nichols in Support of Motion for Summary Judgment	Michael McLaughlin
10/27/2011	City's Reply Brief in Support of Its Motion For Summary Judgment and Response Brief in Opposition to Alpine's Motion For Summary Judgment	Michael McLaughlin
10/28/2011	Stipulation to Modify Briefing Schedule	Michael McLaughlin
11/7/2011	Order Modifying Briefing Schedule	Michael McLaughlin
11/14/2011	Alpine Village's Reply Memorandum In Support Of Motion For Summary Judgment And in Opposition To Defendant's Motion For Summary Judgment	Michael McLaughlin
	Plaintiff's Motion To Enlarge Page Limitation	Michael McLaughlin
	Certificate Of Service	Michael McLaughlin
11/17/2011	Notice of Supplemental Authority	Michael McLaughlin

Alpine Village Company vs. City Of Mccall

Other Claims

Date		Judge
11/17/2011	Plaintiff's Notice of Supplemental Authority	Michael McLaughlin
	Hearing result for Motion for Summary Judgment scheduled on 11/17/2011 03:00 PM: District Court Hearing Held Court Reporter: Mia Martorelli Number of Transcript Pages for this hearing estimated: Oral Argument	Michael McLaughlin
	Case Taken Under Advisement	Michael McLaughlin
11/21/2011	Order Granting Alpine Village's Motion to Enlarge Page Limitation	Michael McLaughlin
12/16/2011	Memorandum Decision on Plaintiff's and Defendant's Cross Motions for Summary Judgment	Michael McLaughlin
1/12/2012	Judgment	Michael McLaughlin
	Notice of Appeal	Michael McLaughlin
1/17/2012	Filing: L4 - Appeal, Civil appeal or cross-appeal to Supreme Court Paid by: Millemann, Steven J. (attorney for Alpine Village Company) Receipt number: 0000265 Dated: 1/17/2012 Amount: $101.00 (Check) For: Alpine Village Company (plaintiff)	Michael McLaughlin
	Bond Posted - Cash (Receipt 266 Dated 1/17/2012 for 285.00) - Estimated Appeal record and transcript	Michael McLaughlin
	STATUS CHANGED: Closed pending clerk action	Michael McLaughlin
1/18/2012	Amended Notice Of Appeal	Michael McLaughlin
	Clerk's Certificate Of Appeal	Michael McLaughlin
1/23/2012	Transcript Letter	Michael McLaughlin
1/26/2012	City's Memorandum of Costs and Attorney Fees With Supporting Statement	Michael McLaughlin
	Affidavit of William F Nichols	Michael McLaughlin
	Affidavit of Martin C Hendrickson	Michael McLaughlin
	Affidavit of Christopher H Meyer	Michael McLaughlin
2/2/2012	Bond Posted - Cash (Receipt 536 Dated 2/2/2012 for 616.25) - Appeal Record preparation.	Michael McLaughlin
2/8/2012	Notice Of Transcript Lodged	Michael McLaughlin
	Transcript Filed	Michael McLaughlin
	Motion To Disallow Attorney Fees	Michael McLaughlin
	Plaintiff's Memorandum In Support Of Motion To Disallow Attorney Fees	Michael McLaughlin
2/15/2012	Bond Converted (Transaction number 76 dated 2/15/2012 amount 100.00) - partial for Appeal Record cost	Michael McLaughlin
	Bond Converted (Transaction number 77 dated 2/15/2012 amount 185.00)	Michael McLaughlin
2/21/2012	City's Response Brief In Opposition To Plaintiff's Motion To Disallow Attorney Fees	Michael McLaughlin
2/23/2012	Bond Converted (Transaction number 108 dated 2/23/2012 amount 616.25) - Appeal Record	Michael McLaughlin

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF VALLEY

ALPINE VILLAGE COMPANY, Plaintiff and Appellant -vs- CITY OF MCCALL, Defendant and Respondent	SUPREME COURT NO.39580-2012 Case No. CV-2010-519*C CERTIFICATE OF EXHIBITS

I, ARCHIE N. BANBURY, Clerk of the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Valley, do hereby certify that the following is a list of the exhibits (none) and the Affidavits listed below being sent as Exhibits, which have been lodged with the Supreme Court or retained as indicated:

NO.	DESCRIPTION	SENT/RETAINED
1	AFFIDAVIT OF MARTIN C. HENDRICKSON IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT (dated October 4, 2011)	Sent
2	AFFIDAVIT OF STEVEN MILLEMANN (dated October 4, 2011)	Sent

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court this ___ day of March, 2012.

ARCHIE N. BANBURY,
Clerk of the District Court

By: /s/ D. PERRY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF VALLEY

ALPINE VILLAGE COMPANY, Plaintiff and Appellant -vs- CITY OF MCCALL, Defendant and Respondent	SUPREME COURT NO.39580-2012 Case No. CV-2010-519*C CLERK'S CERTIFICATE TO RECORD

I, ARCHIE N. BANBURY, Clerk of the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Valley, do hereby certify that the foregoing Record in this cause was compiled and bound under my direction and contains true and correct copies of all pleadings, documents and papers designated to be included under Rule 28, IAR, the Notice of Appeal, any Notice of Cross-Appeal, and any additional documents requested to be included.

I do further certify that all documents, x-rays, charts and pictures offered or admitted as exhibits in the above entitled cause, if any, will be duly lodged with the Clerk of the Supreme Court along with the Court Reporter's Transcript and Clerk's Record as required by Rule 31 of the Idaho Appellate Rules.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court this 23rd day of February, 2012.

ARCHIE N. BANBURY
Clerk of the District Court

By Deborah M. Perry
Deputy

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF VALLEY

ALPINE VILLAGE COMPANY, an Idaho Corporation, Plaintiff/ Appellant, -vs- CITY OF MCCALL, a municipal corporation, Defendant/Respondent.	)	SUPREME COURT NO. Dist. Court No. CV-2010-519-C CERTIFICATE OF SERVICE

I, ARCHIE N. BANBURY, Clerk of the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Valley, do hereby certify that I have personally served or mailed, by United States Mail, postage prepaid, one copy of the Clerk's Record and any Reporter's Transcript to each of the Attorneys of Record in this cause as follows:

Steven J. Millemann Millemann, Pittenger, Mcmahan & Pemberton, LLC P.O. Box 1066 Mccall, ID 83638	Christopher H. Meyer Givens Pursley LLC P. O. Box 2720 Boise, ID 83701
ATTORNEY FOR APPELLATE	ATTORNEY FOR RESPONDENT

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court this 23rd day of February, 2012.

ARCHIE N. BANBURY,
Clerk of the District Court

By: Deborah M. Perry
Deputy

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF VALLEY

ALPINE VILLAGE COMPANY, an Idaho Corporation, Plaintiff/ Appellant, -vs- CITY OF MCCALL, a municipal corporation, Defendant/Respondent.	)	SUPREME COURT NO. 39580-2012 Dist. Court No. CV-2010-519-C NOTICE OF LODGING

TO: Steven J. Millemann, Attorney for Plaintiff/Appellant
Christopher C. Meyer, Attorney for Defendant/Respondent

YOU ARE HEREBY NOTIFIED:

That the Appeal Record and Transcript in the above entitled cause has been lodged with the District Court and copies sent to counsel; that objections to the Clerk's Record and Reporter's Transcript, including any requests for corrections, deletions, or additions, must be filed with the District Court together with a Notice of Hearing within twenty-eight (28) days from the date of this Notice.

DATED this 23rd day of February, 2012.

ARCHIE N. BANBURY,
Clerk of the District Court

By: Deborah M. Perry
Deputy

CERTIFICATE OF MAILING

I hereby certify that on this 23rd day of February, 2011, I mailed (served) a true and correct copy of the within instrument to the following:

Steven J. Millemann
Millemann, Pittenger, Mcmahan & Pemberton, LLC
P.O. Box 1066
Mccall, ID 83638

Christopher H. Meyer
Givens Pursley LLC
P. O. Box 2720
Boise, ID 83701

ARCHIE N. BANBURY,
Clerk of the District Court

By: Deborah M Perry
Deputy Clerk