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Alpine Village Co. v. City of McCall Respondent's Brief Dckt. 39580

IN THE SUPREME COURT OF THE STATE OF IDAHO

ALPINE VILLAGE COMPANY, an Idaho corporation,

Plaintiff/Appellant

v.

CITY OF McCALL, a municipal corporation

Defendant/Respondent

Supreme Court Docket No. 39580

Dist. Court No. CV-2010-519-C

RESPONDENT'S BRIEF

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

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STATEMENT OF THE CASE

This is Defendant/Respondent City of McCall's ("City") response brief. It responds to *Appellant's Brief* filed by Plaintiff/Appellant Alpine Village Company ("Alpine").[1]

I. NATURE OF THE CASE

This is an as-applied regulatory takings case involving a development agreement for Alpine Village ("*Alpine Development Agreement*")[2] and a corresponding development agreement for the Timbers ("*Timbers Development Agreement*")[3] under which Alpine agreed to make certain properties available to qualified purchasers for affordable housing. Ordinances 819 and 820, which required affordable housing contributions, were later invalidated. Pursuant to the development agreements and Alpine's specific request, R. Vol. III, pp. 422-26, the City released Alpine from all housing obligations under those agreements. Years later, Alpine decided that this was not enough. Alpine now alleges a "taking" because the market declined and the Timbers is now worth less than before. This is an unusual taking case, indeed. Alpine is alleging inverse

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[1] As reflected in the Clerk's *Certificate of Exhibits* (R. Vol. III, p. 550), the *Affidavit of Martin C. Hendrickson* (R. Ex. I) and the *Affidavit of Steven J. Millemann* (R. Ex. II) were lodged with the Court as exhibits instead of being included in the Clerk's Record. The Hendrickson affidavit (R. Ex. I), in turn, includes two other affidavits: *Affidavit of Steven J. Millemann in Support of Motion to Remand* (R. Ex. I (Ex. B)) and *Affidavit of Gregory C. Pittenger in Opposition to Defendant's Motion Dismiss* (R. Ex. I (Ex. C)).

[2] The first *Alpine Development Agreement* was executed by both parties on December 13, 2007 and recorded as Instrument No. 328801 on January 28, 2008. R. Vol. II, p. 225. It was superseded by an identically titled document executed by the parties on March 6 and 25, 2008 and recorded as Instrument No. 330524 on April 7, 2008. R. Ex. I (Ex. B) (Ex. 9). The second agreement is the same as the first, except for Exhibit A (legal description). On July 24, 2008 (the effective date), the parties executed the *First Amendment to Development Agreement – Alpine Village Planned Unit Development*, which was recorded as Instrument No. 334281 on August 20, 2008. R. Ex. I (Ex. C) (Ex. 13). This released Alpine Village from any community housing requirements and deleted Article VII of the prior *Alpine Development Agreement*. A number of further amendments followed, which are not relevant here.

[3] An unexecuted draft of the *Timbers Development Agreement* is in the record at R. Ex. II (Ex. 13). Alpine explains in its *Appellant's Brief* at 5 that this draft was prepared in conjunction with the approval of the preliminary and final plat for the Timbers on March 22, 2007. For some reason, it was not executed until 2009. It was signed by the City on May 8, 2009 and by Alpine on May 21, 2009 and was recorded on July 7, 2009 as Instrument # 343026. It is in the record as R. Ex. I (Ex. C) (Ex. 10). This version is identical to the draft except for the addition of a new Article VII that is not relevant to this litigation. On the same days, the parties executed and recorded the *First Amendment to Development Agreement – The Timbers*, which removed the housing obligation. Since it was not central to this litigation, the 2009 amendment was not made a part of the record before the District Court. However, it is a public record, and the City has attached a true and correct copy of the document hereto as Addendum B.

condemnation of property it owns in fee, free and clear from any governmental restriction.

II. COURSE OF PROCEEDINGS

The City does not see a need to supplement Alpine's description of the course of proceedings is set forth in the Statement of the Case on pages 1 and 2 of *Appellant's Brief.*

III. STATEMENT OF THE FACTS

For the convenience of the Court, the key events and documents, and their location in the record, are set out in a timeline attached to this brief as Addendum A.

In its initial development applications, Alpine proposed use of mobile home sites it owned for affordable housing pursuant to Ordinance 819. R. Ex. II (Ex. 4). When the City said that did not comply, Alpine developed a new proposal in which it agreed to provide 17 condominium units located in a converted apartment complex known as the Timbers, six on-site units, and an in lieu fee for another half unit. R. Ex. I (Ex. C) (Ex. 4); *Appellant's Brief* at 5.

On September 22, 2006, a trade group filed the *Mountain Central* lawsuit challenging Ordinance Nos. 819 and 820. This occurred while Alpine's land use applications were pending and before Alpine committed to purchase the Timbers. Two days later, the City imposed a moratorium on all new applications. R. Ex. I (Ex. C) (Ex. 6).[4] But it agreed to process pending applications subject to agreements providing mutual assurances regarding *Mountain Central.* Accordingly, the City entered into development agreements with Alpine designed to hold the City harmless for events during the pendency of *Mountain Central.* The agreements also provided assurance to the developer that any affordable housing commitment it made would be reevaluated in light of the outcome of *Mountain Central Bd. of Realtors, Inc. v. City of McCall*, Case No. CV

[4] The moratorium was imposed by Ordinance 817 on September 28, 2006, two days after *Mountain Central Bd. of Realtors, Inc. v. City of McCall*, Case No. CV 2006-490-C (Idaho, Fourth Judicial Dist., Feb. 19, 2008) was filed. This ordinance is not in the record, but its text also appears in Ordinance 828 enacted on October 12, 2006, which amended Ordinance 827 to add an exception to the moratorium, R. Ex. I (Ex. C) (Ex. 6).

2006-490-C (Idaho, Fourth Judicial Dist., Feb. 19, 2008). Alpine thus proceeded with its acquisition of the Timbers with eyes wide open that the affordable housing ordinances were being challenged and that it might end up owning the building which it could then market without restrictions. No one—certainly not the City—required Alpine to purchase the Timbers. Now that the market has turned, Alpine seeks to pin its investment loss on the City.

ADDITIONAL ISSUES PRESENTED ON APPEAL

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

1. Was judicial review under LLUPA Alpine's exclusive remedy?
2. Was there any taking of Alpine's property?
3. Do equitable principles demand dismissal of Alpine's lawsuit?
4. Is the City entitled to attorney fees on appeal?

ATTORNEY FEES ON APPEAL

The City seeks attorney fees on this appeal and opposes Alpine's request for fees.

ARGUMENT

I. ALPINE'S STATE AND FEDERAL CLAIMS ARE BARRED BY ITS FAILURE TO SEEK JUDICIAL REVIEW.

The Local Land Use Planning Act ("LLUPA") authorizes judicial review of certain permitting decisions identified in Idaho Code §§ 67-6519 and 67-6521(1), including plats and planned unit developments.[5] *Giltner Dairy v. Jerome County*, 145 Idaho 630, 633, 181 P.3d 1238, 1241 (2008). The City's approval of the final plat and final plan for Alpine Village on August 23, 2007, contained a finding (paragraphs 18 and 19 at page 3) that Alpine had submitted its revised Community Housing Plan providing six on-site units, 17 units at the Timbers, and an in lieu fee. R. Ex. II (Ex. 15). The approval also contained a requirement that the development agreements,

[5] The 2010 amendment to the statute, 2010 Idaho Sess. Laws ch. 175, has no bearing on this case.

including the Community Housing Plan, "be in final form, approved, and signed." *Id.*, p. 6. This was final agency action reviewable under LLUPA.[6]

This Court has held repeatedly that when judicial review is available under LLUPA, it is the exclusive procedure for challenging the local government's action. In *Bone v. City of Lewiston,* 107 Idaho 844, 693 P.2d 1046 (1984), the Court admonished the plaintiff for trying to bypass the statute, declaring that LLUPA "is the exclusive source of appeal for adverse zoning actions." *Bone*, 107 Idaho at 848, 693 P.2d at 1050. The Court reached the same result in *Curtis v. City of Ketchum*, 111 Idaho 27, 32-33, 720 P.2d 210, 215-16 (1986) and *Regan v. Kootenai County*, 140 Idaho 721, 725-26, 100 P.3d 615, 619-20 (2004). *See also*, *Cobbley v. City of Challis*, 143 Idaho 130, 133-34, 139 P.3d 732, 735-36 (2006) (applying the same principle in the context of judicial review of a road validation).[7]

These cases establish that if the Legislature provides a mechanism for judicial review, that procedure is exclusive, and a court does not have subject matter jurisdiction over a collateral attack. *Regan*, 140 Idaho at 726, 100 P.3d at 620. Because judicial review under LLUPA was available to Alpine and it failed to use it, the District Court lacked subject matter jurisdiction over

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[6] Likewise, Alpine could have appealed the final plat approval of the Timbers on March 22, 2007, which approved use of the Timbers under Ordinance 819. For that matter, Alpine could have appealed the preliminary plat approval of Alpine Village on December 13, 2006. If a preliminary plat approval allows the applicant to take immediate steps to permanently alter the land before final approval, the preliminary plat approval is subject to appeal under LLUPA. *Rural Kootenai Organization, Inc. v. Bd. of Comm'rs, Kootenai County*, 133 Idaho 833, 837-39, 993 P.2d 596, 600-02 (1999).

[7] Idaho law, of course, is controlling. But it is interesting to note that Idaho law is consistent with the decisions reached by the high courts of other states, which have rejected end-runs around judicial review of allegedly illegal impact fees. *Sold, Inc. v. Town of Gorham*, 868 A.2d 172, 176 (Maine 2005) ("When the time to file an appeal expired, the conditional approvals, including the impact fee requirements, became final, and were not subject to challenge.") (citation omitted); *James v. County of Kitsap*, 115 P.3d 286, 293-94 (Wash. 2005) ("The Developers here were provided, by statute, with several avenues to challenge the legality of the impact fees imposed by the County and comply with the procedural requirements under chapter 82.02 RCW and LUPA. . . . However, rather than complying with either of these procedures provided by statute, the Developers waited almost three years before challenging the legality of the impact fees imposed by the County. . . . [P]articularly with respect to impact fees, the purpose and policy of chapter 82.02 RCW in correlation with the procedural requirements of LLUPA ensure that local jurisdictions have timely notice of potential impact fee challenges. Without notice of these challenges, local jurisdictions would be less able to plan and fund construction of necessary public facilities.").

Alpine's civil action.

This Court has recognized an exception to the exclusivity of judicial review under LLUPA where the plaintiff brings a facial challenge to the ordinance itself. *McCuskey v. Canyon County* ("*McCuskey I*"), 123 Idaho 657, 660, 851 P.2d 953, 956 (1993) ("Thus, he is not arguing that the authorities made the wrong zoning decision, but rather he challenges the validity of the zoning ordinance."). But this is not a facial challenge. This case involves a one-off agreement involving a particular property. As Alpine agrees: "This claim has nothing to do with a 'facial challenge' to Ordinance 819." Alpine's summary judgment reply brief at 3, R. Vol. III, p. 460. See footnote 23 at page 30.

Nor does Idaho Code § 67-6521(2)(b) exempt Alpine from exhaustion requirements or the obligation to seek judicial review. As this Court has noted before, this provision does not apply to all regulatory takings actions. "It only applies if the basis of the inverse condemnation claim is that a specific zoning action or permitting action restricting private property development is actually a regulatory action by local government deemed necessary to complete the development of the material resources of the state, or necessary for other public uses." *KMST, LLC v. County of Ada*, 138 Idaho 577, 583, 67 P.3d 56, 62 (2003) (internal quotations omitted).[8]

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[8] The exemption in 67-6521(2)(b) is expressly tied to the constitutional provision on eminent domain, Idaho Const., art. I, § 14, which authorizes condemnation of property for any "use necessary to the complete development of the material resources of the state," which uses are "declared to be a public use." This sweeping condemnation power—which may be exercised not only by the government but by private parties—has been recognized since 1906. *Potlatch Lumber Co. v. Peterson,* 12 Idaho 769, 88 P. 426 (1906); *Blackwell Lumber Co. v. Empire Mill Co.,* 28 Idaho 556, 155 P. 680 (1916), appeal dismissed, 244 U.S. 651. It appears that 67-6521(2)(b) is aimed at facilitating challenges to takings that are alleged not to be for a legitimate public use. The statutory language is obtuse, however, and resort to legislative history is justified. (See complete legislative history is set out as Addendum C to this brief.) The sponsor of House Bill 628, Rep. Jim D. Kempton, provided brief testimony on the measure to the House State Affairs Committee on January 30, 1996. His testimony was summarized in the record as follows, "This proposed legislation amends local government land use planning statutes to the extent that administrative remedies need not be exhausted prior to judicial review if a taking claim involves court determination of public use under provisions of eminent domain." Virtually identical statements were made by Rep. Kempton before the same committee on February 13, 1996 and on March 1, 1996 to the Senate Local Government and Taxation Committee. This language also corresponds, word for word, to the official statement of purpose for the bill (H.B. 628). At the March 1, 1996 hearing, Rep. Kempton handed out a packet of information including a copy of Idaho Const., art. I, § 14, with the

II. ALPINE'S STATE LAW CLAIM IS BARRED BY ITS FAILURE TO TIMELY FILE A NOTICE OF CLAIM.

The District Court correctly dismissed Alpine's state law claim based on Alpine's failure to timely file a notice of claim. R. Vol. III, p. 527. Alpine acknowledges that Idaho Code § 50-219 requires compliance with the notice requirement in 6-906 of the Idaho Tort Claims Act ("ITCA") for damage claims against municipalities and that it failed to timely provide such notice. Alpine nevertheless contends it is excused for two reasons. First, Alpine argues that 50-219 incorporates only 6-906 (the 180-day rule) and 6-907 (content of claim) but not 6-908 (prohibiting claims filed after 180 days) or any other provision of the ITCA. Second, Alpine argues that if 6-908 does apply, it is not jurisdictional and Alpine's noncompliance may be excused because (1) the City's refund of affordable housing fees under Ordinance 820 violates Alpine's equal protection rights and (2) the City should be estopped from raising this defense.

A. 50-219 incorporates all ITCA provisions concerning the filing of claims.

Alpine acknowledges that it must file a notice of claim within 180 days under 6-906, but, in a bizarre reading of 50-219, contends that there is no consequence for its failure to meet the deadline because 6-908 does not apply to it. *Appellant's Brief* at 22, 24. In other words, the notice requirement is optional.

Alpine's interpretation is impossible to reconcile with the straightforward language of 50-219. It states in full: "All claims for damages against a city must be filed as prescribed by chapter 9, title 6, Idaho Code [the ITCA]." There is no reference to any specific section of the ITCA, and certainly no limitation to 6-906 and 6-907. The broad requirement that claims "must be filed as prescribed by" the ITCA naturally would include not only the provisions saying when

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relevant language underlined, as well as an exchange of correspondence with the Office of the Idaho Attorney General discussing this constitutional language. (The Deputy Attorney General approved of a change in the bill's language specifically including "other public uses.") That is the extent of the legislative history.

to provide notice (6-906) and what the notice should say (6-907), but the adjacent provision barring lawsuits by those who fail to provide timely notice (6-908).[9] The Legislature's use of the phrase "must be filed" further reinforces the conclusion that there is a consequence for the failure to file. How Alpine reads 50-219 as an instruction to "file a notice within 180 days, but only if you feel like it" is difficult to fathom.

Alpine relies upon *Sweitzer v. Dean*, 118 Idaho 568, 572, 798 P.2d 27, 31 (1990) for its proposition that the scope of 50-219 is limited to 6-906 and 6-907. This is a perversion of the holding in *Sweitzer*. In that case, the plaintiff argued unsuccessfully that 50-219, by its broad reference to the ITCA, effectively incorporated the act in its entirety, making 50-219 applicable only to tort claims and nullifying the plain language of 50-219 extending the notice requirement to all damage claims. This Court easily rejected that argument based on the plain language of 50-219. 118 Idaho at 572, 798 P.2d at 31. In so holding, however, this Court did nothing to suggest that 6-908 was inapplicable or the notice requirement was optional or waivable. To the contrary, the Court said the purpose of 50-219 was to ensure that "the filing procedures for all claims against a municipality [are] uniform, standard and consistent." *Id.* Incorporating the requirement to file a notice but not the corresponding provision setting out the consequence of the failure to do so would hardly result in "uniform, standard and consistent" filing procedures. Indeed, the *Sweitzer* Court dismissed the lawsuit without any suggestion that it had any discretion in the matter. There is no explaining how Alpine can read *Sweitzer* as an endorsement of its theory that failure to file a timely notice may be overlooked. Alpine also ignores *BHA Investments, Inc. v. City of Boise* ("*BHA II*"), 141 Idaho 168, 174-76, 108 P.3d 315, 321-23 (2004), another case in

[9] It would include other provisions, too, that are essential to the notice of claim process, including 6-902(7) (the definition of "claim"), 6-906A ("time for filing claims by minors"), 6-909 (time limit for the governmental entity to act upon a claim), and 6-910 (right to file an action on a denied claim).

which this Court declined to recognize excuses for failure to comply.

B. Alpine's failure to comply with section 50-219 is jurisdictional.

While Alpine concedes that the Idaho Court of Appeals found the failure to comply with the notice requirement of the ITCA to be a jurisdictional defect, Alpine claims that "this Court has never directly considered the issue." *Appellant's Brief* at 17. Not so. In holding that the failure to file a claim is a jurisdictional defect, the *Madsen* court relied upon this Court's decision in *McQuillen v. City of Ammon*, 113 Idaho 719, 722, 747 P.2d 741, 744 (1987): "Compliance with the Idaho Tort Claims Act notice requirement is a mandatory condition precedent in bringing suit, the failure of which is fatal to a claim, no matter how legitimate. . . . In summary, McQuillen's negligent issuance claim under the Idaho Tort Claims Act is absolutely barred for failure to timely comply with the 120–day notice requirement." (Emphasis supplied.) While the *McQuillen* court did not explicitly state that the failure to file a claim was a jurisdictional defect, that is the clear import of the quoted statements. In the context of exhaustion of administrative remedies, this Court has also described the failure to satisfy a mandatory condition precedent as depriving a court of subject matter jurisdiction. See *Petition of Felton*, 79 Idaho 325, 316 P.2d 1064 (1957) (failure to exhaust administrative remedies in tax appeal); *Fairway Dev. Co. v. Bannock County*, 119 Idaho 121, 124, 804 P.2d 294, 297 (1990); *Regan v. Kootenai County*, 140 Idaho 721, 724, 100 P.3d 615, 618 (2004); *Park v. Banbury*, 143 Idaho 576, 149 P.3d 851 (2006).

Alpine says it could not find any Idaho cases other than *Madsen* holding that failure to file a claim is jurisdictional. *Appellant's Brief* at 18, n.11. It did not dig very deep. In *Allied Bail Bonds, Inc. v. County of Kootenai*, 151 Idaho 405, 409-10, 258 P.3d 340, 344-45 (2011), the district court ruled that plaintiff's failure to provide notice under the ITCA of its constitutional and other claims deprived it of subject matter jurisdiction. This Court affirmed, quoting the "condition precedent" language from *McQuillen*. Earlier, in *Stevens v. Fleming*, 116 Idaho 523, 527, 777

P.2d 1196, 1200 (1989), this Court held that notice "is prerequisite to maintaining a claim" and failure to file a timely notice means that "the claim against the Grimes failed for lack of jurisdiction." In *Greenwade v. Idaho State Tax Com'n*, 119 Idaho 501, 503, 808 P.2d 420, 422 (Ct. App. 1991), the district court found that plaintiff's failure to comply with the ITCA deprived it of jurisdiction. This Court affirmed. "When it is read together with I.C. § 6-908, it is clear that failure to comply with the notice requirement bars a suit."[10]

C. Even if timely notice were not a jurisdictional requirement, Alpine's constitutional and equitable arguments lack merit.

(1) The City's refund of fees paid under Ordinance 820 does not violate equal protection.

Alpine contends that the City discriminated among developers by enacting a resolution to refund fees paid under Ordinance 820 while providing no refunds under Ordinance 819. *Appellant's Brief* at 24-28. This, says Alpine, violated the Equal Protection Clause of the Constitution. As Alpine recognizes, the City's action here must be analyzed under the rational basis test, a minimal standard requiring only that the classification be rationally related to a legitimate government objective. *Appellant's Brief* at 27, citing, inter alia, *Bon Appetit Gourmet Foods, Inc. v. State Dept. of Employment*, 117 Idaho 1002, 793 P.2d 675 (1990). As stated by the United States Supreme Court: "State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality." *McGowan v. Maryland,* 366 U.S. 420, 425–426 (1961).

Alpine's equal protection argument collapses because there was no disparate treatment. The simple reason the City did not refund money or return property under Ordinance 819 was that

[10] Since all the Idaho cases run against it, Alpine discusses a number of cases from foreign jurisdictions holding that failure to comply is procedural rather than jurisdictional. *Appellant's Brief* at 20-21. The short and sufficient answer is that these authorities conflict with the Idaho cases discussed above.

"no properties or fees were ever collected by the City under that Ordinance." R. Vol. II, p. 297, ¶ 5. At the time of *Mountain Central*, only two developers were obligated to provide community housing under Ordinance 819 (Alpine and one other). *Id.* ¶ 6. After *Mountain Central*, the City promptly released both developers from those restrictions. *Id.*, pp. 297-98, ¶¶ 7-8. So there was no reason to enact a resolution for Ordinance 819 like the one adopted for Ordinance 820. In other words, Alpine and the other developer received the equivalent of a full refund. The City's action with respect to fees paid under Ordinance 820 and property restrictions under 819 was the same. The City did not reimburse developers under Ordinance 819 for their missed opportunities while their money was held by the City. Nor did the City insulate Alpine or the other developer under Ordinance 819 from market fluctuations. The City simply gave the developers their property back. This was an even-handed and rational response. Alpine may wish that the City had done more, but it is hardly in a position to complain of unequal treatment.

(2) Alpine cannot establish the essential elements of equitable estoppel.

Next, Alpine contends that quasi-estoppel applies here and bars the City from raising the 180-day notice requirement. Appellant's Brief at 28-29. 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).

Alpine then fails to inform the Court that estoppel applies against an entity acting in a governmental capacity only if there is a showing of "exigent circumstances." *Harrell v. The City of Lewiston*, 95 Idaho 243, 506 P.2d 470 (1973); *Sprenger, Grubb & Associates, Inc. v. City of Hailey,* 127 Idaho 576, 903 P.2d 741 (1995). None are even alleged here.

Alpine then 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). Alpine contends that the City changed its position by refunding money it collected under Ordinance 820 while declining to further reimburse Alpine after releasing it from restrictions imposed under Ordinance 819. Alpine may disagree with that decision, but there has been no change in the City's position. 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. Indeed, it is Alpine that has changed its position! As shown in an email from counsel for Alpine to the City on April 26, 2008 (two days after the City repealed Ordinance 819), Alpine sought nothing more than a release of the housing restrictions on the Timbers—which the City promptly provided. R. Vol. III, pp. 422-26. This is further explained in the accompanying *Affidavit of William F. Nichols in Support of Motion for Summary Judgment*, R. Vol. III, pp. 417-21. It was only years later that Alpine changed its position and demanded money in addition to the release.

Nor can Alpine show that it relied to its detriment on a reasonable assumption that the City would waive the 180-day rule. If Alpine really thought that the City's action in 2008 (refunding fees under Ordinance 820) meant that it was waiving the ITCA and welcoming lawsuits under Ordinance 819, why didn't Alpine take advantage of the City's "waiver"? It is obvious that Alpine dreamed up this lawsuit years later, not as a result of some revoked promise by the City that it could take its time in filing suit. In sum, Alpine has not been disadvantaged or induced to change its position as a result of any action or representation by the City.

Alpine concedes that its quasi-estoppel argument is based on "[t]he identical set of facts

which form the basis for the equal protection defense." *Appellant's Brief* at 28. Thus, if applicable at all, it fails for the same reasons discussed above. In short, the City acted rationally and fairly in refunding fees and releasing developers from restrictions on their property. To suggest that the City's action is unconscionable does not pass the straight face test.[11]

III. ALPINE'S STATE LAW CLAIMS MAY BE SUBJECT TO THE ITCA'S TWO-YEAR STATUTE OF LIMITATIONS.

The City calls to the Court's attention, as it did in district court, that the ITCA contains its own two-year statute of limitations, Idaho Code § 6-911. The plain language of Idaho Code § 50-219 broadly applies all of the ITCA's requirements governing the filing of damage actions against cities: "All claims for damages against a city must be filed as prescribed by chapter 9, title 6, Idaho Code." This would appear to embrace not only the 180-day notice requirement, but the statute of limitations. The City has found no case in which this argument has been presented. Despite the lack of precedent, the argument seems to make sense.

IV. IN ANY EVENT, ALPINE'S STATE CLAIMS ARE UNTIMELY UNDER IDAHO'S FOUR-YEAR STATUTE OF LIMITATIONS.

Alpine acknowledges that its state takings claim is subject to Idaho's residual four-year statute of limitations, Idaho Code § 5-224. *Appellant's Brief* at 29. Thus, if Alpine's cause of action accrued before December 10, 2006, its lawsuit is untimely.

In fact, Alpine's cause of action accrued about six months earlier, on June 20, 2006, the day it filed its development applications. Alpine acknowledged in its complaint that it knew at the time of its applications that it was required to contribute property to community housing. "Ordinance 819 required any applicant seeking the City's approval of a new residential

[11] As the final kick to this dead horse, even if estoppel were applied here, it would only restart the clock and extend the deadline to 180 days from the date that the City stopped accepting refund requests. Since that date was December 31, 2009 (*Appellant's Brief* at 25), the new deadline for filing the notice of claim would be June 29, 2010. Thus, even under Alpine's estoppel theory, its action is still barred because Alpine did not submit its claim to the City until November 15, 2010.

subdivision or condominium project to submit and Inclusionary Housing Plan (a.k.a. Community Housing Plan) with the initial subdivision application." *Second Amended Complaint* ¶ 8, R. Vol. II, p. 200. "On June 20, 2006, Plaintiff submitted the applications to the City which were required by the McCall City Code for preliminary approval of the Alpine Village project. . . . As required by Ordinance 819, a Community Housing Plan was submitted with the Preliminary Applications." Id. ¶ 10, R. Vol. II. p. 201. Indeed, Alpine submitted its proposed housing plan June 4, 2006, a couple weeks in advance of the applications. R. Ex. II (Ex. 4).[12] Alpine admits that the housing obligation was controlled by the Ordinance's fixed formula based on "a specified percentage of the total units in the subdivision." *Appellant's Brief* at 3. The ordinance provided some leeway as to how the housing contribution is made (onsite versus offsite versus in lieu payments), but it provided no flexibility or way around the requirement that the contribution be made. Thus, since Alpine knew how many units it wanted to build, it was a simple matter to understand the extent of its obligation on June 20, 2006.

It makes no difference whether the exaction ultimately would be paid in the form of mobile home sites, the Timbers, on-site units, or in lieu cash. Whatever form it took, the exaction was equally unconstitutional. Alpine could have initiated suit right then—which, as a facial challenge to the ordinance, would have been permissible even before the City acted on the applications. *McCuskey I*, 123 Idaho at 660, 851 P.2d at 956. After all, the plaintiff in *Mountain Central* did not wait until its members filed applications, and it had a cause of action.

Alpine's position that it had no cause of action until the City approved use of the Timbers runs counter to a mountain of appellate precedent. A cause of action arises as soon as it becomes

[12] "Alpine proposed to satisfy the requirements of Ordinance 819 by providing six community housing units on site and by converting 16 mobile home spaces which were owned by Alpine to Community Housing Rental Units." Alpine's *Opening Trial Brief* at 3, R. Vol. II, p. 368.

apparent that the government is requiring an unlawful and uncompensated conveyance or impairment of a person's property. In the words of this Court, "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." *McCuskey v. Canyon County Comm'rs* ("*McCuskey II*"), 128 Idaho 213, 217, 912 P.2d 100, 104 (1996).

But "full extent" does not mean that the exact quantity of the regulatory taking be known. McCuskey contended that the statute did not begin to run until the Court ruled the county's zoning action illegal, because only then did he know the full extent of damages for the temporary taking. The Court rejected this argument, explaining that the lack of quantification of the loss is not an excuse for delay in filing the lawsuit:

> 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. Besides, although McCuskey may not have known the full extent of his damages at the time the stop-work order was issued, he would have known with certainty what they were once a taking had been finally adjudicated.

McCuskey II, 128 Idaho at 218, 912 P.2d at 105 (citation omitted). Thus, the clock begins to run when interference with plaintiff's property is sufficiently apparent that a cause of action has arisen, even if the damages are not yet quantified. On June 20, 2006, it was fully apparent and absolutely certain that some property would be taken, thus giving Alpine a cause of action. Indeed, if had been brought in a timely fashion, the City might have been barred from the taking and there would have been no need to quantify anything.

In a case decided the same year as *McCuskey II*, this Court explained that the statute began to run "when the impairment was of such a degree and kind that substantial interference with Wadsworth's property interest became apparent." *Wadsworth v. Idaho Department of Transportation*, 128 Idaho 439, 443, 915 P.2d 1, 5 (1996). In *Rueth v. State*, 103 Idaho 74, 79,

644 P.2d 1333, 1338 (1982), this Court held that the statute began to run on the date of a meeting between parties at which time there was "recognition of the severity of the problem." In another case, the Court explained, "The actual date of taking, although not readily susceptible to exact determination, is to be fixed at the point in time at which the impairment, of such a degree and kind as to constitute a substantial interference with plaintiffs' property interest, became apparent." *Tibbs v. City of Sandpoint*, 100 Idaho 667, 671, 603 P.2d 1001, 1005 (1979) (inverse condemnation based on airport expansion).

Despite this clear authority, Alpine asserts that its claim did not accrue until December 13, 2007 (the date of the *Alpine Development Agreement*) or "at the earliest" March 22, 2007 (when the City approved Alpine's proposal to dedicate the Timbers). *Appellant's Brief* at 31. In support of this contention, Alpine relies on *City of Coeur d'Alene v. Simpson*, 142 Idaho 839, 136 P.3d 310 (2006). But *Simpson* does not support Alpine's conclusion.

Simpson involved landowners who built fences on their lakefront property. The City of Coeur d'Alene determined that this violated city ordinances and demanded that the fences be removed. The Simpsons refused, and the City sought an injunction. The landowners counterclaimed for inverse condemnation. Although the Simpson's counter-claim came in 1998, just a year or so after they installed the fences in 1997, the City said that was too late because their cause of action arose when the ordinances were first enacted. The Court disagreed. *Simpson*, 142 Idaho at 846, 136 P.3d at 317 (citing *Palazzolo v. Rhode Island*, 553 U.S. 606, 620-21 (2001)). The Court held that the statute of limitations did not begin to run upon enactment of the applicable ordinances, but only when Coeur d'Alene brought an enforcement action against the landowners. This makes sense. The ordinances had been on the books for decades, long before the Simpsons built the fences. Moreover, there was uncertainty until just before the litigation about which

ordinances were in effect. *Simpson*, 142 Idaho at 843 n.1, 136 P.3d at 314, n.1. Finally, the city's enforcement action involved an exercise of discretion. "More important, however, is the fact that the City brought this action in 1998 to require removal of the fences . . . ." *Simpson*, 142 Idaho at 846, 136 P.3d at 317.

The situation in the instant case is fundamentally different. First, the City is not alleging that Alpine's cause of action accrued on the enactment of Ordinance 819. Second, the City did not initiate this matter; Alpine did, on June 20, 2006. Third, Ordinance 819 is non-discretionary and sets out a fixed formula for community housing. Accordingly, it was apparent as soon as Alpine's application was filed that there was a taking.[13]

The U.S. Supreme Court made this distinction clear in *Palazzolo*. The Court recognized and contrasted cases in which the regulatory action involved no discretion. "While a landowner must give a land-use authority an opportunity to exercise its discretion, once it becomes clear that the agency lacks the discretion to permit any development, or the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened." *Palazzolo*, 53 U.S. at 620.

These cases make clear what really should be obvious. A cause of action does not arise instantly and automatically upon enactment of an ordinance. That ordinance must be applied to someone in order join the issue. That occurred here when Alpine filed its applications on June 20, 2006, which included a housing plan mandated by Ordinance 819.

V. ALPINE'S CLAIMS ALSO FAIL THE EXHAUSTION AND VOLUNTARY ACTION TESTS ESTABLISHED UNDER *KMST*.

As documented above, the conveyance of property to the City was proposed by Alpine

[13] The ordinance set out the formula for fees with particularity. Even if it did not, that would not matter. Alpine's case is not premised on a regulatory taking that "went too far." Rather, it is based on a per se violation of Idaho's constitutional provision dealing with illegal taxes. Thus, one penny is enough for the action to accrue.

itself in its June 20, 2006 applications. When the City balked at the proposal to satisfy the ordinance with mobile home sites, Alpine proposed a mix of on-site units, the Timbers, and an in lieu fee. When the City agreed, Alpine entered into development agreements. It never sought an amendment of the planned unit development (as provided in the McCall Zoning Ordinance § 3.10.12, reproduced in Addendum D), or judicial review under LLUPA.

This falls within the rule governing voluntary actions established by this Court in *KMST, LLC v. County of Ada*, 138 Idaho 577, 67 P.3d 56 (2003). In that case, a developer brought two claims against the Ada County Highway District ("ACHD"), one in connection with ACHD's road dedication requirement and another in connection with ACHD's impact fees. Other claims against Ada County were not pursued on appeal. The Idaho Supreme Court dismissed both ACHD claims on technical grounds— exhaustion (as to the impact fees) and ripeness (as to the road dedication). Nevertheless, the *KMST* Court went on to opine as to the merits of the takings claim on the road dedication saying that this was not a taking because it was voluntarily offered. In essence, it was a not a "taking" but a "giving" (our words, not the Court's). The exhaustion and voluntariness issues are discussed in turn below.

A. Alpine did not exhaust its administrative remedies.

(1) Alpine failed to exhaust.

"As a general rule, a party must exhaust administrative remedies before resorting to court to challenge the validity of administrative acts. . . . KMST had the opportunity to challenge the calculation of the impact fees administratively, and it chose not to do so." *KMST*, 138 Idaho at 583, 67 P.3d at 62. Alpine is in the same position. Alpine could have informed the City that Ordinance 819 was unlawful and that it would not agree to contribute property for affordable housing. Instead, Alpine proposed and ultimately signed two development agreements. By failing to object, or to seek an amendment (as provided in the McCall Zoning Ordinance § 3.10.12,

reproduced in Addendum D), Alpine failed to exhaust.

(2) Exceptions to the exhaustion requirement do not apply here.

Alpine seeks to hide behind the two exceptions to the requirement of administrative exhaustion: "(a) when the interests of justice so require, and (b) when the agency acted outside its authority," *KMST, LLC v. County of Ada*, 138 Idaho 577, 583, 67 P.3d 56, 62 (2003). *Appellant's Brief* at 35.

(a) Alpine cannot meet the "interests of justice" exception.

Alpine presents no argument on this exception, other than saying, "It certainly could be argued." *Appellant's Brief* at 35. In any event, the argument fails. This Court explained: "Typically this situation occurs where irreparable harm results from the administrative process itself. The standard may also be satisfied by showing that the agency lacks power to grant the requested relief, i.e., that exhaustion would be futile." *Park*, 143 Idaho at 581, 149 P.3d at 856 (citations omitted). Alpine has pointed to nothing in the record showing it would have been futile for it to have worked with the City to come up with some alternative to its buying the Timbers before the decision was rendered in *Mountain Central*. Nor has Alpine identified irreparable harm that would have occurred to it had it exhausted its administrative remedies.

(b) The "outside the agency's authority" exception does not apply.

It is doubtful that this second exception applies at all to "as applied" challenges. A review of this Court's decisions strongly suggests that this exception applies only to facial challenges.[14]

[14] After all, *KMST* was an "as applied" takings case, just like this one. If the mere allegation of an uncompensated taking was sufficient to trigger the exception in an "as applied" challenge, then the exception would have applied there. Instead, this Court recited the exceptions and declared that they did not apply. *KMST*, 138 Idaho 583, 67 P.3d 62. A similar result obtained in *Park*. "Even if these claims are interpreted as a constitutional challenge to the validity of a statute or rule, it does not follow that exhaustion is waived. Although facial challenges to the validity of a statute or ordinance need not proceed through administrative channels, as-applied challenges may be required to do so." *Park*, 143 Idaho at 581-82, 149 P.3d at 856-57. *White* also involved an "as applied" constitutional challenge to the issuance of a conditional use permit. The Court did not apply any exceptions to the exhaustion rule.

This makes sense, because further administrative process would add nothing to the purely legal question presented in a facial challenge. In contrast, "a district court cannot properly engage in an 'as applied' constitutional challenge until a complete factual record has been developed." *American Falls Reservoir Dist. No. 2 v. IDWR*, 143 Idaho 862, 872, 154 P.3d 433, 443 (2007). "Thus, the exception for when an agency exceeds its authority does not apply unless the CM Rules are facially unconstitutional." *Id.*[15]

Even if the "outside the agency's authority" exception does apply to "as applied" challenges like this one, the test is not satisfied here. The City was not "palpably without jurisdiction." *Sierra Life Ins. Co. v. Granata*, 99 Idaho 624, 627, 586 P.2d 1068, 1071 (1978). The City was acting within its authority under LLUPA to issue planned unit development and subdivision permits. Only when an entity strays entirely outside its regulatory authority (for instance, if a city sought to rule on the validity of water rights or otherwise invade the domain of other regulatory agencies) may the action be challenged without exhaustion. Where, as here, the entity has regulatory authority over the subject matter and the only question is whether it has

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"We also conclude that the recognized exceptions to the exhaustion doctrine do not apply to the present case where the question of a conditional use permit 'is one within the zoning authority's specialization and when the administrative remedy is as likely as the judicial remedy to provide the wanted relief.'" *White v. Bannock County Comm'rs*, 139 Idaho 396, 402, 80 P.3d 332, 338 (2003). Similarly, in *Palmer v. Bd. of County Comm'rs of Blaine County*, 117 Idaho 562, 564, 790 P.2d 343, 345 (1990), the Court applied no exception to the exhaustion requirement in that case where "there is no challenge to the validity of Ordinance 77-5. . . . This Court has frequently announced that except in unusual circumstances parties must exhaust their administrative remedies before seeking judicial recourse." In *Service Employees Int'l Union, Local 6 v. Idaho Dep't of Health & Welfare*, 106 Idaho 756, 762, 683 P.2d 404, 410 (1984), this Court said: "Our disposition of this case makes it unnecessary for us to address appellant's constitutional claims. Exhaustion of administrative remedies is generally required before constitutional claims are raised." This, too, was an "as applied" constitutional challenge in which the Court found it unnecessary to address the exceptions to the exhaustion rule.

[15] In *American Falls Reservoir*, the Court explained that trying to figure out whether an agency acted outside its authority is essentially a circular argument. *Id.* Thus, a plaintiff may not avoid the exhaustion requirement merely by alleging that the agency's action is unconstitutional and therefore beyond the scope of its authority. If that were the case, exhaustion would never be required in a constitutional challenge. Rather, for the exception to apply, the plaintiff must show that the agency had no authority over the subject matter at all.

exercised that authority constitutionally, the exception does not apply and exhaustion is required.[16]

B. Alpine's actions were voluntary.

The *KMST* Court went on to say that even if ACHD's recommendation had been a final decision, it would not have constituted a taking because the dedication was voluntary. In a pre-application meeting with ACHD staff, KMST was advised that staff would recommend a requirement of a road dedication. In order to move things along, KMST agreed to the dedication and included it in its application. This proved fatal to KMST's taking claim. "KMST's property was not taken. It voluntarily decided to dedicate the road to the public in order to speed approval of its development. Having done so, it cannot now claim that its property was 'taken.'" *KMST*, 138 Idaho at 582, 67 P.3d at 61 (emphasis supplied). This language is significant because it shows that it makes no difference that the developer was motivated by a desire to speed the processing of its application; the developer's action is still deemed voluntary even if it was not motivated by altruism.

Alpine could have told the City: "We will not give you anything. You cannot require this." Instead, Alpine proposed a housing contribution as part of its applications, later offered a revised plan involving the Timbers, raised no objections, sought no amendment during the permitting process, and signed the development agreements. Under *KMST*, Alpine cannot now be heard to complain that the payments it agreed to make were an unlawful taking.[17]

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[16] Although from another jurisdiction, the reasoning of the Supreme Court of Maine in *Sold, Inc. v. Town of Gorham*, 868 A.2d 172 (Maine 2005) is compelling and on point. Maine law recognizes the same exception to the exhaustion requirement for government actions that are "beyond the jurisdiction or authority of the administrative body to act." *Sold, Inc.*, 868 A.2d at 176. In that case, the Court found that the imposition of impact fees as conditions of approval was within the jurisdiction and authority of the town, even in the face of statutory and constitutional challenges. "Here, there is no dispute that the Planning Board had authority to consider, approve, and attach conditions to approvals of subdivisions. . . . Such challenges are the essence of matters that must be brought pursuant to Rule 80B to question whether the particular action of a municipal administrative agency is consistent with the requirements of law." *Id.*

[17] The recognition in *KMST* that voluntary actions do not give rise to takings is not undercut by the Court's holding in *BHA Investments, Inc. v. City of Boise* ("*BHA II* "), 141 Idaho 168, 108 P.3d 315 (2004), which held that

VI. ALPINE'S CLAIMS ARE BARRED BY THE RELEASE IN THE DEVELOPMENT AGREEMENTS.

As part of its two development agreements with the City, Alpine waived and released the City from claims relating to the *Mountain Central* litigation. Article VII of the *Alpine Development Agreement* reads in full:[18]

> 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. 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.

This provision fully allocated the risk that *Mountain Central* would overturn Ordinance 819, providing assurances to both parties. First, it provided that if Alpine sold any units below cost prior to the final resolution of *Mountain Central*, Alpine would shoulder that loss. As it turns out, none were sold.[19] Second, the language addressed what would happen to the unsold units after *Mountain Central*. As to these, the City was obliged to agree to an appropriate modification

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plaintiffs are not required to pay under protest as a prerequisite to challenging an unlawful tax. The *BHA II* case involved a transfer fee charged by the City of Boise on liquor licenses. The district court dismissed plaintiffs' claim because they had not paid the fee under protest. This was based on an old line of cases (*e.g.*, *Walker v. Wedgwood*, 64 Idaho 285, 130 P.2d 856 (1942)) holding that plaintiffs must pay taxes under protest to preserve the right to request a refund. The Supreme Court reversed, ruling that the requirement that taxes be paid under protest applies to only to lawful taxes. *BHA II*, 141 Idaho at 176, 108 P.3d at 323. This has no applicability here. The City is not arguing that Alpine should have paid under protest because the development agreements constituted a tax. It is arguing, under *KMST*, that Alpine cannot claim a taking where it agreed to the contract. Indeed, in *KMST* the Court noted one of the reasons that it was clear that plaintiff's action was voluntary was because they did not pay the impact fees under protest. *KMST*, 138 Idaho at 583, 67 P.3d at 62.

[18] This release language is repeated verbatim in Article IV of the *Timbers Development Agreement* at 2. R. Ex. I (Ex. C) (Ex. 10).

[19] "None of the condominium units which were acquired and deed restricted by Alpine in compliance with Ordinance 819 sold prior to the final disposition of the *Mountain Central* litigation." *Appellant's Brief* at 4.

of the housing plan reflecting the outcome of the case. Thus, if the ordinance was declared entirely invalid, the City would be obligated to entirely remove the housing restrictions. That is all. The contract did not provide, and the parties obviously did not expect, that the City would be obligated to reimburse Alpine for any lost opportunity costs or reduction in market value occurring during the pendency of the litigation. The City reasonably relied on this language to protect it. After all, it had enacted a moratorium on all new development applications in response to *Mountain Central*. (See footnote 4 at page 9.) Rather than delaying or denying pending applications, this contract language was intended to allow applications like Alpine's to proceed without financial risk to the City. It is safe to assume that the City would never have entered into this contract and approved the project if it thought that Alpine reserved the right to sue the City despite the City's compliance with the terms of the deal.

When the *Mountain Central* plaintiffs prevailed, the City released Alpine from all the housing plan restrictions.[20] The City complied fully and in good faith with its agreement, and Alpine got exactly what it bargained for. This Court should not allow Alpine to engage in this end run around its contract to obtain something more than the contract contemplated.

VII. ALPINE'S FEDERAL TAKING CLAIM IS UNRIPE AND FORFEITED UNDER *WILLIAMSON COUNTY* AND, IN ANY EVENT, UNTIMELY.

In addition to the defenses discussed above, the following defenses are applicable exclusively to the federal claims. First, Alpine fails the two ripeness tests established in *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). It failed prong one (the "final decision" test) because, as the District Court said, "Alpine failed to contest the Development Agreement." *Memorandum Decision* at 12, R. Vol. III, p. 530.

[20] The amendment to the *Alpine Development Agreement* provided: "Article VII of the Agreement [the article imposing housing restrictions] shall be deleted in its entirety and Alpine Village shall be and hereby is released

It failed prong two (the "state remedies" test) because, as the District Court said, "Alpine failed to seek judicial review." *Id.* at 13, R. Vol. III, p. 531. This resulted in Alpine forfeiting its claim. *Id.* Second, its federal claims are tardy under the two-year statute of limitations.

A. Alpine's federal claims are blocked by both "ripeness" tests.

(1) Prong one: The "final decision" requirement

Williamson County established two special ripeness tests for plaintiffs alleging an uncompensated taking under the federal Constitution. The first test is that the decision appealed from must have been a "final decision." That is, the defendant agency must have "arrived at a final, definitive position regarding how it will apply the regulations at issue." *Williamson County*, 473 U.S. at 191.[21]

In *Williamson County*, the plaintiff failed to seek a variance. *Williamson County* at 190. But the "final decision" requirement is not limited to variances. The Supreme Court explained why requiring the plaintiff to probe the decision maker in this way is a fundamental prerequisite to a takings claim. "Our reluctance to examine taking claims until such a final decision has been made is compelled by the very nature of the inquiry required by the Just Compensation Clause." *Williamson County* at 190 (citing *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264 (1981); *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978)). The message of these four Supreme Court cases is that

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from any requirement to provide[] Community Housing for or related to the PUD." R. Vol. II, p. 290. The amendment to the *Timbers Development Agreement* did the same thing. Addendum B to this brief at 2.

[21] Alpine incorrectly characterizes this as an exhaustion requirement, *Appellant's Brief* at 34-35. The *Williamson County* Court took pains to explain that it was requiring ripeness, not exhaustion. "While the policies underlying the two concepts often overlap, the finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate." *Williamson County*, 473 U.S. at 193 (emphasis supplied). Exhaustion is relevant to this case (see discussion at section V.A at page 30). Indeed, some of the facts showing failure to exhaust may also show lack of ripeness. But these are separate legal requirements.

developers must take full advantage of opportunities for securing relief from the local governing body—whether that be by means of a variance or otherwise. The developer certainly cannot offer up or agree by contract to the very thing it claims is being taken. Otherwise, it is impossible to know how much was "taken" and how much was "given."

Here, Alpine failed to object to the arrangement it worked out with the City for use of the Timbers. As the District Court explained:

> 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 voluntary. Alpine did not lodge an objection with the City over its denial of converting Alpine's motor [mobile] home lots to community housing. In this case, Alpine proposed, executed and carried out a development agreement. Thus the Court will find that there was no final decision as spelled out in *Williamson County*.

Memorandum Decision at 12-13, R. Vol. III, p. 530-31.

The District Court is exactly right. Alpine premises its lawsuit on the fact that "[u]nder the perceived authority of Ordinance 819, the City required Alpine to spend in excess of two million dollars to provide low income housing for a public use." *Appellant's Brief* at 14. Given that Alpine itself proposed using the Timbers, how can the Court determine whether purchasing the Timbers was compelled? Might the City have agreed to let the development proceed based on, for instance, Alpine obtaining an option to acquire the Timbers later in the event that Ordinance 819 was upheld? Alternatively, as the ordinance makes clear, Alpine could have committed more of its on-site units and/or provided a greater in lieu payment, either of which could have been released or refunded in the event Ordinance 819 was overturned. Instead, Alpine itself admits that

it, not the City, came up with idea of using the Timbers.[22] Due to Alpine's failure to probe alternatives to proceeding with the Timbers (just as the plaintiff in *Williamson County* failed to seek a variance), prong one of *Williamson County* is not met.[23]

(2) Prong two: The requirement to employ state remedies.

Under the second prong of *Williamson County,* the property owner must "seek compensation through the procedures the State has provided" before litigating the federal claim. *Williamson County* at 194. "[I]f a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." *Williamson County* at 195. Idaho provided Alpine with a means for challenging a taking (aka inverse condemnation) by seeking judicial review under LLUPA within 28 days of the approval of its development permits with unacceptable conditions. In the alternative, if this were framed as a facial challenge, Alpine could have filed a separate lawsuit attacking ordinance and/or the development agreements. (If seeking prospective relief instead of damages, the 180-day notice requirement would not have applied.) Alpine failed to do either, and now it is too late. Accordingly, Alpine has forfeited its federal claim under prong two of *Williamson County.*

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[22] "Alpine submitted a revised Community Housing Plan, which proposed to satisfy the requirements of Ordinance 819 for Alpine Village by providing six units on site, all seventeen of the Timbers units as off-site units, and the remaining required .5 units by paying an 'in lieu' fee to the City." *Appellant's Brief* at 5.

[23] In pressing this point on appeal, the City adopts the reasoning of the District Court. Initially, the City had thought of this as a facial challenge, based on the fact that Ordinance 819 was found to be facially unconstitutional. Facial challenges are exempt from prong one. The District Court, however, found that this is an as-applied challenge, hence making prong one applicable. *Memorandum Decision* at 12, R. Vol. III, 530. This is consistent, by the way, with Alpine's position that this is an as-applied challenge. "Alpine's state takings claim is clearly that the *application* of this indisputably void and unconstitutional 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." Alpine's summary judgment reply brief at 3, R. Vol. III, p. 460 (emphasis original). The points made by both Alpine and the District Court have merit. While this case involves a facially invalid ordinance, the crux of the case is Alpine's contention that the City applied the ordinance to Alpine in a manner that prevented Alpine from being fully compensated once the ordinance was overturned. Hence, the City agrees with Alpine and the District Court that this is an as-applied challenge.

The First Circuit Court of Appeals considered an identical situation in *Pascoag Reservoir & Dam v. Rhode Island*, 337 F.3d 87 (1st Cir. 2003). In that case, the plaintiff argued that it was excused from prong two on futility grounds in light of the fact that it had missed the statute of limitations deadline. The court soundly rejected this argument. A plaintiff may not base futility on self-inflicted wounds. The court explained: "Adequate remedies were available to Pascoag; it simply ignored those remedies until it was too late. By failing to bring a timely state cause of action, Pascoag forfeited its federal claim." *Pascoag*, 337 F.3d at 94 (emphasis supplied). The court continued, "The *Williamson County* 'ripeness' requirements will never be met in this case, because the state statute of limitations has run on Pascoag's inverse condemnation claim. By failing to bring its state claim within the statute of limitations period, Pascoag forfeited its federal claim." *Pascoag*, 337 F.3d at 95 (emphasis original) (citing *Gamble v. Eau Claire County*, 5 F.3d 285, 286 (7th Cir. 1993) and *Vandor, Inc. v. Militello*, 301 F.3d 37, 39 (2nd Cir. 2002)). This is exactly what happened here. As these cases from three federal circuits point out, a takings plaintiff like Alpine who fails to timely bring a state claim can never satisfy the second prong of *Williamson County*, and its federal claim is therefore forever barred.

For this reason, even if Alpine had brought its federal claim between June 11, 2008 and June 11, 2010 (that is, within the federal two-year statute of limitations as applied by the District Court, as discussed below), it still would have been barred.

Alpine says it satisfied the second prong by bringing this very suit. *Appellant's Brief* at 41 ("Thus, it is entirely appropriate for Alpine to bring both the State and Federal Constitutional Claims in this action . . . ."). This misses the point. If this lawsuit had been properly filed (*e.g.*, in a timely judicial review, a non-damage-based facial challenge to the ordinance, or a damage-based facial challenge brought within 180 days of accrual), then Alpine could then have presented the

state and federal claims simultaneously. But Alpine did not do that, and now it is too late to ripen the federal claim.

B. Alpine missed the statute of limitations applicable to its federal claims.

(1) Both of Alpine's federal claims are subject to the two-year statute of limitation.

Where there is no statute providing a private cause of action, federal constitutional challenges may be presented directly under the federal Constitution. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389 (1971). These are known as *Bivens* actions. However, where a private cause of action is established by statute, it is exclusive and a plaintiff may not evade its restrictions be pleading directly under the Constitution. *Azul-Pacifico, Inc. v. City of Los Angeles*, 973 F.2d 704, 705 (9th Cir. 1992), *cert. denied*, 506 U.S. 1081 (1993); *Martinez v. City of Los Angeles*, 141 F.3d 1373, 1382 (9th Cir 1998); "*Hacienda Valley Mobile Estates v. City of Morgan Hill*, 353 F.3d 651, 655 (9th Cir. 2003), *cert. denied*, 543 U.S. 1041 (2004 and 2005). 42 U.S.C. § 1983 is such a private cause of action and, hence, is Alpine's only means of presenting its federal claim. Although some confusion on this point was introduced by *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304, 314-15 (1987),[24] the cases and commentary overwhelmingly support the rule established in the

[24] *First English* contains some remarkably broad language regarding takings claims: "We have recognized that a landowner is entitled to bring an action in inverse condemnation as a result of 'the self-executing character of the constitutional provision with respect to compensation.'" *First English*, 482 at 315 (internal quotation marks omitted). However, this sweeping statement was offered as a background premise explaining the substantive issue in the case (temporary takings)—which the Court never reached—and not as a repudiation of the limitations on *Bivens* recognized by the Ninth Circuit and other courts. Indeed, *First English* does not address the question of whether takings claims may be brought directly under Constitution independent of § 1983. The opinion does not even mention § 1983, and the dissent mentions it only in another context. Nor do the parties' briefs. Nor does the case on remand, *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 210 Cal.App.3d 1353, 258 Cal. Rptr. 893 (1989). This may be explained by the peculiar posture of the case. It was brought in state court pursuant to a complaint that alleged only violations of the state constitution. Somehow, in an apparent afterthought, the federal takings claim was introduced at the state appellate level. The U.S. Supreme Court said that was good enough to allow the case to be brought under 28 U.S.C. § 1257. *First English*, 482 U.S. at 313 n.8. Nor does the case cited by the Court for this proposition, *United States v. Clarke*, 445 U.S. 253, 257 (1980) have anything to do with the *Bivens*

Ninth Circuit by *Azul-Pacifico* and other cases.[25] There is also substantial secondary authority on this point.[26] All of these authorities are post-*First English*.

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exception issue; *Clarke* involved a federal actor. Owing to the peculiar posture of the case, it appears that no one thought to ask whether a statutory cause of action was available. In any event, the Court did not address the question.

Given that § 1983 was not discussed, it is fair to say that *First English* is not on point. Nevertheless, a few courts have assumed that *First English* offers a way for inverse condemnation cases to proceed around § 1983. *E.g., Bieneman v. City of Chicago,* 864 F.2d 463, 468 (7th Cir. 1988), *cert. denied*, 490 U.S. 1080 (1989); *287 Corporate Center Associates v. Township of Bridgewater*, 101 F.3d 320 (3d Cir. 1996). These cases, however, dispose of the claims on other grounds (statute of limitations) and do not engage on the issue of independent causes of action against state actors under the Fifth or Fourteenth Amendments. The only case we have encountered that expressly addresses and rejects *Azul-Pacifico*, albeit in dictum, is *Lawyer v. Hilton Head Public Service Dist. No. 1*, 220 F.3d 298 (4th Cir. 2000): "Other courts, however, have held, in apparent conflict with *First English*, that a violation of the Takings Clause can only be redressed through a claim under § 1983." *Lawyer* at 303 n.4.

[25] "Since *Bivens*, the Court has applied a two-prong test to determine whether an implied cause of action is necessary. According to this test, a *Bivens* action is permissible unless either (1) special factors counsel hesitation or (2) Congress has provided an alternative remedy intended to be an equally effective substitute for the Bivens claim." David C. Nutter, *Two Approaches To Determine Whether an Implied Cause of Action Under the Constitution Is Necessary: The Changing Scope of the Bivens Action*, 19 Georgia L. Rev. 683, 683-84 (1985).

Cases from other jurisdictions reaching the same conclusion as *Azul-Pacifico* include the following: *Smith v. Dep't of Public Health*, 410 N.W.2d 749, 787 (Mich. 1987) ("Thus, both *Chappell* and *Bush* signal a retrenchment from the broad remedial scope evident in the Court's earlier *Bivens*, *Davis*, and *Carlson* opinions. Both *Chappell* and *Bush* suggest greater caution and increased willingness on the part of the Court to defer to Congress on the question whether to create damages remedies for violations of the federal constitution."); *Kelley Property Development, Inc. v. Town of Lebanon*, 627 A.2d 909, 921 (Conn. 1993) ("In its current configuration, the *Bivens* line of United States Supreme Court cases thus appears to require a would be *Bivens* plaintiff to establish that he or she would lack any remedy for alleged constitutional injuries if a damages remedy were not created. It is no longer sufficient under federal law to allege that the available statutory or administrative mechanisms do not afford as complete a remedy as a *Bivens* action would provide."); *Wax 'n Works v. City of St. Paul*, 213 F.3d 1016, 1019 (8th Cir. 2000) (Plaintiff asserted claim directly under Fourteenth Amendment; court treated it as under § 1983 and denied relief on exhaustion/ripeness grounds); *Thomas v. Shipka*, 818 F.2d 496, 499 (6th Cir. 1987), *vacated on other grounds & remanded*, 488 U.S. 1036 (1989) (when § 1983 action is precluded by statute of limitations, plaintiff may not bring separate action directly under the Constitution).

Indeed, *Jett v. Dallas Independent School Dist.*, 491 U.S. 701, 735 (1989), it would seem, should put to rest the suggestion that *First English* provides a basis for an end run around § 1983. It held: "We hold that the express 'action at law' provided by § 1983 for the 'deprivation of any rights, privileges, or immunities secured by the Constitution and laws,' provides the exclusive federal damages remedy for the violation of the rights guaranteed by § 1981 when the claim is pressed against a state actor." *Jett*, 491 U.S. at 735.

[26] "Although § 1983 provides express authorization for the assertion of federal constitutional claims against state actors, the Supreme Court has endorsed the view, expressed in several circuit court decisions, that limitations which exist under § 1983 may not be avoided by assertions of *Bivens*-type claims against state and local defendants. [Footnote citing *Jett v. Dallas Independent School Dist.*, 491 U.S. 701, 735 (1989).] Thus, the availability of the § 1983 remedy precludes reliance upon the *Bivens* doctrine. . . . Whether § 1983 preempts an alternative constitutional or statutory claim depends upon congressional intent. . . . As discussed below, it is settled that § 1983 operates to preempt alternative *Bivens*-type claims asserted directly under the federal Constitution. . . . The federal courts have consistently adhered to the principle that § 1983 preempts *Bivens*-type remedies against those who acted under color of state law. [Footnote citing *Azul-Pacifico* among others.]" Martin A. Schwartz, *Section 1983 Litigation Claims and Defenses*, § 1.05 (2010) (available on Westlaw as SNETLCD s 1.05).

Another hornbook on § 1983 notes a variety of federal cases reaching the same conclusion, concluding, "The Ninth Circuit asserted that Fourteenth Amendment actions for damages against state defendants are precluded by the

Alpine initially pled its case solely as a federal claim arising directly under the Constitution. *Verified Complaint* ¶ 26, R. Vol. I, p. 5. This was defective for the reasons noted above. Alpine later sought to cover its bet by adding an identical federal claim under § 1983. *Second Amended Complaint* ¶ 35, R. Vol. II, p. 204. However, Alpine seeks to have its cake and eat it too by retaining the *Bivens* claim in the hope of evading the two-year statute of limitations that plainly applies to § 1983 actions. This does not work for two reasons: (1) *Azul-Pacifico* is sound precedent supporting the dismissal of Alpine's *Bivens* claim, and (2) even if a *Bivens* claim is allowed, it is subject to the same two-year statute of limitations. So it makes no difference. Alpine loses either way.

Alpine rests its *Bivens* argument on dictum in *BHA Investments, Inc. v. City of Boise* ("*BHA II*"), 141 Idaho 168, 176 n.2, 108 P.3d 315, 323 n.2 (2004), in which the Court noted in passing that the plaintiffs brought their action directly under the federal Constitution and that doing so was permissible under *First English* (which it called *First Lutheran*). The District Court concluded that this statement was offered in a different context not controlling here and cannot overcome the powerful precedent in *Azul-Pacifico* and its progeny. *Memorandum Decision* at 12, R. Vol. III, p. 530. The City agrees, for the reasons discussed above.

But Alpine's argument gets it nowhere. Even if a *Bivens* action were permissible here, it

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availability of § 1983." Sheldon Nahmod, *Civil Rights and Civil Liberties Litigation: The Law of Section 1983*, § 6:59 (2010) (available on Westlaw at CIVLIBLIT § 6:59). Another law professor concludes:

> Under *Bivens*, the courts are to refrain from a *Bivens*-type action for damages only when Congress has created an alternative remedy. Originally, the Court withheld a *Bivens* damages remedy, because unnecessary, only when the remedy provided by Congress was equally effective. Since *Bivens*, however, the Court has retreated from that principle and now refuses a damages action whenever Congress has made available some relief even if not equal to the damages remedy.

Alan R. Madry, Private Accountability and the Fourteenth Amendment; State Action, Federalism and the Courts, 59 Missouri L. Rev. 499, 551 (1994) (footnote cites David C. Nutter, Note, Two Approaches to Determine Whether an Implied Cause of Action under the Constitution is Necessary: The Changing Scope of the Bivens Action, 19 Ga. L. Rev. 683 (1985)).

would be subject to the same two-year statute of limitations—thus rendering pointless Alpine's insistence that it has a separate cause of action directly under the Constitution. Alpine misleadingly informs the Court that it is an open question whether *Bivens* actions are also subject to the two-year statute of limitations. "Neither the U.S. Supreme Court nor this Court have ruled on the issue of whether the same statute of limitations would apply to Alpine's First Cause of Action . . . ." *Appellant's Brief* at 38. While that may be technically true, it is a half-truth. Alpine fails to inform the Court that virtually if not every court in the nation that has addressed the question, including the Ninth Circuit, has held that *Bivens* actions are subject to the very same statute of limitations (the one for personal injury) as are § 1983 claims.[27] Although this Court has not had occasion to address the question, the clear federal precedents are definitive because the question is controlled by federal law.[28]

(2) The federal statute of limitations begins to run when the cause of action becomes apparent.

As noted immediately above, while state law supplies the statute of limitations for a § 1983 case, federal law determines when that state statute begins to run. Under federal law, the statute of limitations begins to run when the constitutional wrong becomes apparent (closely tracking Idaho law). "A federal claim is generally considered to accrue when the plaintiff 'knows or has reason to know of the injury which is the basis of the action.'" *Norco Construction, Inc. v. King County*, 801 F.2d 1143, 1145 (9th Cir. 1986) (quoting *Trotter v. Int'l Longshoremen's & Warehousemen's*

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[27] *Bieneman v. City of Chicago*, 864 F.2d 463, 469 (7th Cir. 1988), *cert. denied*, 490 U.S. 1080 (1989) (direct takings claim subject to two-year statute); *Van Strum v. Lawn*, 940 F.2d 406 (9th Cir. 1991) (applying *Bieneman* in Ninth Circuit in non-takings case); *Chin v. Bowen*, 833 F.2d 21 (2nd Cir. 1987) (action brought directly under 14th Amendment); *S.W. Daniel, Inc. v. Urrea*, 715 F. Supp. 1082, 1085 (N.D. Ga. 1989) ("The court therefore concludes, as has virtually every appellate court addressing the issue, that the teachings of *Wilson* should be applied to *Bivens* actions as well.") (footnote citations omitted); *McSurely v. Hutchinson*, 823 F.2d 1002 (6th Cir.1987), *cert. denied*, 485 U.S. 934 (1988).

[28] Federal law dictates which statute of limitations is applicable to federal claims and when that statute will begin to run. *Wallace v. Kato*, 549 U.S. 384, 387-88 (2007); *McCabe v. Craven,* 145 Idaho 954, 957, 188 P.3d 896, 899 (2008).

Union, 704 F.2d 1141, 1143 (9th Cir. 1983)). *See also, Kimes v. Stone*, 84 F.3d 1121, 1128 (9th Cir. 1996); *Lukovsky v. City and County of San Francisco*, 535 F.3d 1044 (9th Cir. 2008).

Alpine filed its *Verified Complaint* on December 10, 2010. Consequently, if the cause of action accrued earlier than December 10, 2008, Alpine has not satisfied the two-year statute of limitations. Even Alpine admits that, if the statute is running, it began to run on December 13, 2007 (or March 22, 2007 at the earliest). *Appellant's Brief* at 31. Thus, the only question is whether the statute has begun to run at all.

Alpine contends that its federal cause of action has not accrued under *Williamson County* until its state claim is denied "on the merits." *Appellant's Brief* at 37. Alpine then contends that because the District Court did not reach the merits, its federal cause of action has not yet accrued and the statute is not running against it. *Id.* First, there is no requirement in *Williamson County* that the denial be on the merits, as opposed to a procedural denial. More importantly, however, the Supreme Court made clear in 2005 that the cause of action has been running all along in state court. *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005).

Under *Williamson County*, Alpine's federal claim is not ripe in federal court. *Williamson County* requires that a plaintiff ripen the federal taking claim by first bringing an inverse condemnation action under state law. For some time after *Williamson County*, it was thought that this required a two-step process by which the plaintiff first litigates the state claim in state court, loses, and then litigates the federal claim in either state or federal court. This separation of claims created *res judicata* complications for the plaintiff.

In 2005, however, the Supreme Court resolved this conundrum in *San Remo* by declaring that a plaintiff may bring the federal claim simultaneously (as an alternative claim) with the state claim in state court, and that doing so poses no problem under *Williamson County*'s second prong

ripeness test.

Prior to *San Remo*—when sequential litigation was presumed necessary—courts struggled with whether the statute of limitations ran at all against the federal claim prior to its being ripened through litigation of the state claim. The Ninth Circuit held that the statute does not begin to run on the unripe federal claims.[29] In contrast, the Seventh Circuit ruled that the statute begins to run as soon as the wrong occurs. *Bieneman v. City of Chicago*, 864 F.2d 463, 470 (7th Cir. 1988). But none of this matters after *San Remo*. *San Remo* clarifies that the federal claim is ripe from the outset in state court. Indeed, the federal claim, though not yet ripe in federal court, is ripe in state court and must be brought in state court simultaneously with the state claim in order to avoid *res judicata*.

Here is the key point: If the claim is ripe in state court, it necessarily follows that the cause of action has accrued. Accordingly, the statute of limitations must be running and has been running all along. Since both the state and federal takings claims are ripe in state court, the statute of limitations began to run against them at the same time. (Different statutes of limitation may apply, but the start date is the same.) After all, they both arose out of the same facts.

Alpine insists that this is not so. It contends that "Alpine's federal takings claims have not even *accrued* for statute of limitations purposes until a final decision denying Alpine compensation on Alpine's state constitutional cause of action has been rendered by the courts of Idaho." *Appellant's Brief* at 39 (emphasis original). For this point, it cites *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 687 (9th Cir. 1993).

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[29] "We further held in *Levald* that the 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. . . . Thus, . . . Hacienda's claim . . . will either fail because it is not ripe, or, if it is ripe, it will be barred by the statute of limitations." *Hacienda Valley Mobile Estates v. City of Morgan Hill*, 353 F.3d 651, 655 (9th Cir. 2003), *cert. denied*, 543 U.S. 1041 (2004) (citing *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 688 (9th Cir. 1993)). *See also*, *Norco Construction, Inc. v. King County*, 801 F.2d 1143, 1146 (9th Cir. 1986).

Alpine misses the fact that *Levald* (like *Hacienda*) dealt with federal takings claims brought in federal court that had not been previously ripened and were therefore not ripe in federal court.[30] But these pre-*San Remo* decisions have no applicability to a plaintiff who, in compliance with *San Remo*, brings its claims together in state court. If the federal claim can be brought in state court, then obviously the cause of action has accrued, the statute of limitations is running, and the case must be brought in a timely fashion. *San Remo* was intended to avoid piecemeal litigation, not to give plaintiffs a free pass on the statute of limitations.

It may seem a little odd, by the way, that a cause of action is unripe in federal court, yet the very same cause of action is ripe in state court. Peculiar as this may seem, this was the precise holding of *San Remo*. Nevertheless, the District Court declined to follow the City's reasoning, saying that it was bound by pre-*San Remo* precedent. "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." *Memorandum Decision* at 14, R. Vol. III, p. 532. The City hopes that this Court will not feel equally constrained by these pre-*San Remo* cases. Neither *San Remo* nor any other post-*San Remo* appellate court, so far as we know, has been called on to deal with the question of when the statute of limitations runs against a federal claim in state court. It would seem that the Court is free to apply *San Remo* in the way suggested by the City.

(3) In the alternative, the statute of limitations began running when

[30] Nor does the case of *Norco Construction, Inc. v. King County*, 801 F.2d 1143 (9th Cir. 1986) help Alpine. *Norco* involved a state action that was brought in state court and removed. The Ninth Circuit held that the cause of action does not accrue until the case has been ripened under prong one of *Williamson County*. As noted, prong one ripeness is not an issue here because this is a facial challenge to Ordinance 819. Under *San Remo*, a case that is ripe under prong one (like the instant case) can be brought simultaneously in state court with the state claims. If it can be brought, then obviously the cause of action has accrued and statute of limitations is running. Neither *Norco* nor any other post-*San Remo* case is to the contrary.

Alpine missed its ITCA deadline.

The District Court adopted an approach slightly different from the one urged by the City. While unwilling to find that the statute of limitations on the federal claim was running all along, it ruled that it began to run the day after Alpine blew its 180-day deadline under the ITCA (June 11, 2008). The operation of the ITCA "functioned as the state's denial of compensation or made Alpine's future efforts to obtain compensation under state remedies futile." *Memorandum Decision* at 14, R. Vol. III, p. 532. Accordingly, Alpine had two years—until June 11, 2010—to file suit. Alpine missed that deadline by six months.

If the Court rejects the City's argument under *San Remo* that the statute has been running against both state and federal claims all along, then this is a valid alternative basis for finding that Alpine missed the two-year statute of limitations.

(4) Alpine's federal claim is late even under a four-year statute of limitations.

For the same reasons that Alpine's state takings claim comes too late under the four-year statute of limitations, Alpine's federal claim would violate that statute, too. Applying the two-year statute simply makes it that much more obvious that the claim is late.

VIII. EQUITABLE PRINCIPLES DICTATE DISMISSAL OF ALPINE'S LAWSUIT.

Putting all of the above aside and looking at the case purely from the standpoint of equity, Alpine's state and federal claims should be denied. Alpine, of course, will contend that equity favors the developers because the City's affordable housing ordinances were declared invalid. But those ordinances did not control or compel Alpine's decision to purchase the Timbers. In addition, the record shows that the City was acting in good faith to address a serious problem. The City retained consultants with expertise in affordable housing ordinances (see housing report, Addendum 1 to *Appellant's Brief*), relied on their advice (which failed to take into account Idaho's

unique Constitution), and acted in an honest belief that it was within the law. See recitals in Ordinance 819 describing housing needs (R. Vol. II, pp. 208-09). Thus, the City has clean hands and is entitled to invoke the equitable defenses discussed below.

First, Alpine received the benefit of its bargain under the development agreements. Its action in filing this lawsuit is inconsistent with those agreements and other representations it made in connection with them (notably its request for a release following *Mountain Central*). This implicates the equitable principles of unjust enrichment,[31] quasi-estoppel,[32] promissory estoppel,[33] and waiver.[34]

The City could have simply suspended processing of Alpine's applications when the *Mountain Central* case was filed, just as it imposed a moratorium on new applications. Instead, in an effort to accommodate the urgent desire of developers that their projects not be held up, the City reasonably relied on the release language in the *Alpine Development Agreement*, approved Alpine's project, and allowed Alpine to make good on its investment. Equity does not permit Alpine to profit from the City's agreement, only to declare that it can sue the City outside the

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[31] 66 Am. Jur. 2d *Restitution and Implied Contracts* § 8 (2001).

[32] Quasi-estoppel is an equitable doctrine that prevents a person from denying an act or assertion if such denial is deemed to bring harm to another who reasonably relied on the act or assertion. See discussion in section II.C(2) beginning on page 17.

[33] Courts in equity can use "promissory estoppel" to enforce a promise made without consideration when the following elements are present: (i) the detriment suffered in reliance on the promise was substantial in an economic sense; (ii) the substantial loss to the promisee acting in reliance was, or should have been, foreseen by the promisor; and (iii) the promisee must have acted reasonably in justifiable reliance on the promise made. *Rule Sales and Service, Inc. v. U.S. Bank National Association*, 133 Idaho 669, 674, 991 P.2d 857, 862 (Ct. App. 2000). Put another way, "the doctrine requires only that it be foreseeable to the promisor that the promisee would take some action or forbearance in reliance upon the promise and would thereby suffer substantial loss if the promise were to be dishonored." *Id.* at 675, 991 P.2d at 863.

[34] The equitable concept of "waiver" applies in an action for breach of contract and states that "a party who accepts the other's performance without objection is assumed to have received the performance contemplated by the agreement." 17A Am. Jur. 2d *Contracts* § 640 (2001). "A waiver is a voluntary, intentional relinquishment of a known right or advantage [and the] party asserting the waiver must show that he has acted in reliance upon such a waiver and reasonably altered his position to his detriment." *Dennett v. Kuenzli*, 130 Idaho 21, 26, 936 P.2d 219, 224

agreement. *See Barry v. Pacific West Construction, Inc.*, 140 Idaho 827, 103 P.3d 440 (2004) (general contractor was unjustly enriched by uncompensated work of subcontractor). Alpine's eleventh hour contention that the relief it secured under the development agreements is not good enough and that taxpayers should make it whole for the market slide that occurred after its purchase of the Timbers reaches too far.

Second, the equitable principle of laches provides that a plaintiff is estopped from asserting the alleged invasion of his rights when: (i) the plaintiff delayed in asserting these rights; (ii) the plaintiff had notice and an opportunity to institute a suit; (iii) the defendant did not know that the plaintiff would assert such rights; and (iv) the delayed suit would injure or prejudice the defendant. *Finucane v. Village of Hayden*, 86 Idaho 199, 205, 384 P.2d 236, 240 (1963). All those tests are met here. Thus, if owing to some technicality, Alpine is excused from its failure to exhaust its administrative and judicial remedies and its failure to meet the 180-day, two-year, and four-year deadlines, equity should step in and bar relief.

Had Alpine provided a timely notice that it believed merely purchasing the Timbers constituted a taking, the City could have protected itself. Allowing Alpine to recover its market losses associated with its decision to purchase the Timbers despite the pendency of *Mountain Central* would impose an unfair burden on the City's taxpayers. On no occasion did Alpine raise any objection to either development agreement. When the City approved the development subject to the housing requirements, Alpine remained silent. Even after *Mountain Central* was decided, Alpine asked only for a release from the housing restrictions. Having waited years, while the market declined, to discover its legal theory, Alpine should not be allowed to pin its losses on the City.

(Ct. App. 1997). Here, Alpine is not claiming breach of contract against the City, but the principles behind the concept of waiver instruct that Alpine cannot now complain that the development agreements are unlawful.

IX. ALPINE'S CASE FAILS ON THE MERITS.

A. Alpine has not pled a temporary taking, and, in any event, no cognizable temporary taking has occurred.

Alpine contends, without citation, that the City has conceded that "if Alpine's claims were found to be timely, a compensable taking had in fact occurred." *Appellant's Brief* at 9. The City has made no such admission. Of course, the City concedes that its ordinances were declared unconstitutional. But that does not mean that Alpine has a viable cause of action. After all, Alpine still owns the Timbers, and the City acted promptly and without prodding to release Alpine from any requirements imposed in the development agreements.

Alpine now scrambles to characterize its claims as a temporary taking. But it failed to plead a temporary taking. Rather, it complained that it was forced to buy the Timbers, which turned out to be a poor investment. *Second Amended Complaint* ¶¶ 25, 30, R. Vol. II, pp. 203-04. Nowhere does the *Second Amended Complaint* allege that Alpine missed an opportunity for a sale or otherwise suffered damages during the seven-plus months that the restrictive conditions were in place (from December 13, 2007, the date the *Alpine Development Agreement* was executed, to July 24, 2008, the first amendment to that agreement). Indeed, the *Timbers Development Agreement* was executed and amended (to eliminate the housing requirement) on the same day, so there is no possibility of any "temporary taking" under that contract.

Even if the temporary taking claim is allowed, it fails on the merits. Although this Court on one occasion has recognized the concept of temporary takings, *McCuskey v. Canyon County Comm'rs* ("*McCuskey II*"), 128 Idaho 213, 216, 912 P.2d 100, 103 (1996), that case did not explore the contours of the law. Instead, the claim was rejected on the basis of the statute of limitations. Likewise, the U.S. Supreme Court has recognized some instances in which temporary takings can occur, *e.g.*, *First English*, but those circumstances are limited. As the Court made

clear in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), not every temporary regulation gives rise to a compensable taking. The U.S. Supreme Court applied the "parcel as a whole" rule to find that a moratorium on all construction was not a temporary taking. Thus, temporary takings appear to be limited to situations in which there is a total deprivation of all use of the property that was intended to be permanent, but the regulation is rescinded or overturned. *See*, Daniel L. Siegel and Robert Meltz, *Temporary Takings: Settled Principles and Unresolved Questions*, 11 Vt. J. Envtl. L. 479 (2010). Here, in contrast, the City imposed restrictions on sales, but did not deprive the property owner of all value.

The narrow applicability of temporary takings was reinforced by this 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). Likewise, in the case at bar, Alpine did not sell any units at below market rates (see footnote 19 at page 28), and it has made no allegation that it could have sold them at a higher price but for the restrictions. Accordingly, a temporary taking, even if it had been pled, has not been shown.

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 above.

B. The restrictions on sales to qualified buyers do not constitute a *Loretto*-type *per se* physical taking.

In apparent recognition that it cannot make out a regulatory taking under *Nollan v. California Coastal Commission*, 483 U.S. 825, 831-32 (1987) and *Dolan v. City of Tigard*, 512

U.S. 374, 384 (1994),[35] Alpine contends that Ordinance 819 took a stick in Alpine's bundle of property rights (the unrestricted right of sale) and therefore constitutes *per se* physical taking under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). *Appellant's Brief* at 10-14. This argument collapses under scrutiny.

Loretto involved a tangible physical invasion of property when the owners were required to allow third parties to install cable systems. *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) was another classic physical invasion, involving a requirement that the landowner physically open a marina to the public. These cases bear no resemblance to the regulatory taking effected by Ordinance 819.[36]

Alpine also cites *Hodel v. Irving*, 481 U.S. 704 (1987), which 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. Why Alpine even mentions *Hodel* is unclear. Perhaps *Hodel* may be characterized as a physical taking case (though the Court did not do so and this would be a stretch). But it certainly was not a *per se* taking. To the contrary, the

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[35] *Nollan* and *Dolan* established the dual principles that an exaction is an unconstitutional taking only if (1) there is no "nexus" between the exaction and a public need created by the development and (2) the exaction is not roughly proportional to impact of the proposed development.

[36] "The government effects a physical taking only where it requires the landowner to submit to the physical occupation of his land." *Yee v. City of Escondido*, 503 U.S. 519, 526 (1992) (emphasis supplied) (holding that a mobile home rent control statute did not affect a physical taking). No one requires a developer to apply for a permit. An exaction associated with a permit may be unlawful but, if it is, that is known as a regulatory taking. In *Lingle v. Chevron USA, Inc.*, 544 U.S. 528 (2005), the Court, again, drew a clear distinction between physical takings and exaction-based regulatory takings, even when the end result is that the government ends up with physical possession of the plaintiff's money or property: "In each case, the Court began with the premise that, had the government simply appropriated the easement in question, this would have been a *per se* physical taking. The question was whether the government could, without paying the compensation that would otherwise be required upon effecting such a taking, demand the easement as a condition for granting a development permit the government was entitled to deny. . . . *Nollan* and *Dolan* both involved dedications of property so onerous that, outside the exactions context, they would be deemed *per se* physical takings." *Lingle*, 544 U.S. at 546-47 (citing *Nollan v. California Coastal Commission*, 483 U.S. 825, 831-32 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994)). The distinction between physical and regulatory takings has been recognized by this Court as discussed in *Covington v. Jefferson County*, 137 Idaho 777, 781, 53 P.3d 828, 832 (2002) (citing *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002)).

Court analyzed it under the traditional balancing test, finding that some restriction on alienation would be fine, but in this case the regulatory scheme "goes too far." *Hodel*, 481 U.S. at 718. Thus, the case stands for the exact opposite of what Alpine represented to the Court.

Alpine also misleadingly relies on *O'Conner v. City of Moscow*, 69 Idaho 37, 202 P.2d 401 (1949). This 63-year-old case stands for the well-established proposition that when a city downzones property it must allow prior nonconforming uses to continue and cannot take away the owner's right to sell the property to someone else who will maintain the pre-existing use. This does not equate to turning every regulatory restriction on property conveyances into *per se* takings. Indeed, the *O'Conner* Court explained that Moscow's bar on conveyances to persons wishing to maintain the very same use was "an arbitrary and unreasonable exercise of the police power." *O'Conner*, 69 Idaho at 43, 202 P.2d at 404. Thus, the Court did not find a *per se* taking. Rather, the case involved a determination that this particular action "is not a reasonable exercise of the police power and does not bear any reasonable, real or direct relationship, to the objects and purposes sought to be accomplished." *O'Conner*, 69 Idaho at 44, 202 P.2d at 405.

X. THE CITY IS ENTITLED TO RECOVER ITS ATTORNEY FEES

The legal basis for the District Court's dismissal of Alpine's case was clear and based on settled law. Alpine has offered nothing on this appeal but a re-hash of its failed arguments below including misrepresentation of legal authority. Accordingly, the City seeks an award of its attorney fees incurred in this appeal in accordance with I.A.R 35(b)(5) and 41.

This case satisfies the threshold requirements in Idaho Code § 12-117.[37] This is a civil action involving a governmental entity and private entities as adverse parties, and the City prevailed. All that remains is to establish that Alpine pursued the matter "without a reasonable

[37] This Court has ruled that if section 12-117 is available, it is exclusive. *E.g.*, *Kepler-Fleenor v. Fremont County*, 152 Idaho 207, 213, 268 P.3d 1159, 1165 (2012).

basis in fact or law." Where parties ignore settled precedent, as Alpine did here, they are subject to a mandatory award of fees under 12-117. This Court has ruled that failure to address controlling appellate decisions and failure to address factual or legal findings of the district court equates to pursuing litigation without a reasonable basis in fact or law. *E.g.*, *Gallagher v. State*, 141 Idaho 665, 669, 115 P.3d 756, 760 (2005) (attorney fees may be awarded when "the law is well-settled"). This is particularly egregious here in light of the City's efforts to explain these authorities to Alpine early in the process. See letter from City to Alpine (R. Vol. II, p. 338).

Alpine's claims are barred in numerous ways: exclusivity of judicial review, federal and state statutes of limitations, ITCA's notice of claim requirement, exhaustion, voluntariness, exclusivity of § 1983, *Williamson County*, and equitable considerations. They also fail on the merits. Some defenses are stronger than others, but if one did not take the case down, another would. It was unreasonable for Alpine to press this litigation in the face of so many adverse precedents. As a result, the standards for an award of attorney fees to the City are met here.[38]

XI. ALPINE IS NOT ENTITLED TO AN AWARD OF ATTORNEY FEES

The Idaho Supreme Court has interpreted I.A.R. 35(a)(6) as requiring the appellant to present argument and authority on its attorney fee request in the opening brief. *E.g.*, *Cowles Publ'g Co. v. Kootenai County Bd. of County Comm'rs*, 144 Idaho 259, 266, 159 P.3d 896, 903 (2007). Alpine cites only two authorities: *Ada County Highway Dist. by and through Fairbanks v. Accarequi*, 105 Idaho 873, 673 P.2d 1067 (1983) and 42 U.S.C. § 1988. Neither works.

Accarequi deals only with attorney fees in eminent domain proceedings (that is, intentional physical takings affirmatively undertaken by the government pursuant to Idaho Const., art. I,

[38] The City is also entitled to an award of fees under 42 U.S.C. § 1988. The standard is functionally the same as 12-117. *Tutor-Saliba Corp. v. City of Hailey*, 452 F.3d 1055, 1060 (9th Cir. 2006). If the City prevails on § 1983, it should be allowed to present evidence regarding the lodestar amount and the factors set forth in *Hensley v. Eckerhart*, 461 U.S. 424 (1983), pursuant to I.A.R. 41(d).

§ 14). This is an inverse condemnation case based on a regulatory taking. The reasoning of *Accarequi* (and its 90 percent rule) is entirely inapposite. Moreover, *Accarequi* deals only with Idaho Code § 12-121 which is not available here (see footnote 37 at page 47). In any event, whatever the outcome of this appeal, the City's litigation position cannot be said to be unreasonable or frivolous given that it prevailed below. As for § 1988, the City has shown multiple reasons why the § 1983 claim was properly dismissed.

CONCLUSION

For all these reasons, the Court should affirm the District Court's dismissal of this suit and award attorney fees to the City.

Respectfully submitted this 25th day of June, 2012.

GIVENS PURSLEY LLP

By _____
Christopher H. Meyer

By _____
Martin C. Hendrickson

Attorneys for City of McCall

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 25th day of June, 2012, the foregoing was served as follows:

Steven J. Millemann Gregory C. Pittenger MILLEMANN, PITTENGER, MCMAHAN & PEMBERTON P.O. Box 1066 McCall, ID 83638 Facsimile: 208-634-4516 sjm@mpmplaw.com	☒ ☐ ☐ ☐ ☒	U. S. Mail Hand Delivered Overnight Mail Facsimile E-mail

_____
Christopher H. Meyer

ADDENDUM A:

TIMETABLE OF KEY DOCUMENTS AND EVENTS

Date	Author or Actor	Document or Event	Comments	Sup. Ct. Record
7/1/2005	City	Housing Market and Needs Assessment		Addendum 1 to Appellant's Brief.
2/23/2006	City Council	Ordinance 819		R. Vol. I, p. 9; R. Vol. I, p. 103; R. Vol. II, p. 208; R. Ex. II (Ex. 1); R. Ex. 1 (Ex. C) (Ex. 1). As codified: R. Ex. II (Ex. 3).
2/23/2006	City Council	Ordinance 820		R. Ex. II (Ex. 2); R. Ex. I (Ex. C) (Ex. 2).
6/4/2006	Alpine	Draft Community Housing Plan - Alpine Village Planned Unit Development		R. Ex. II (Ex. 4).
6/20/2006	Alpine	Applications for Preliminary Plat, PUD Preliminary Plan Approval, CUP, Scenic Route Approval, and Amendment of Zoning Map ("Preliminary Applications")		Described in Second Amended Complaint ¶10, R. Vol. II, p. 201.
9/22/2006	Mountain Central Bd. of Realtors	Complaint filed in Mountain Central v. City of McCall	Challenge to Ordinance 819 and 820.	Described in Second Amended Complaint ¶11, R. Vol. II, p. 201.
9/28/2006	City	Ordinance 827	Emergency moratorium on new residential development applications.	Not in record. But this ordinance, as amended, appears as Ordinance 828.
10/3/2006	P&Z	Recommended approval of preliminary plat (SUB-06-7).		R. Ex. I (Ex. C) (Ex. 5); Described in Second Amended Complaint ¶12, R. Vol. II, p. 201.
10/12/2006	City Council	Ordinance 828	Provided an exception to the moratorium imposed under Ordinance 827 on 9-28-2006.	R. Ex. I (Ex. C) (Ex. 6)

12/10/2006	DEADLINE	Cut-off date for four-year statute of limitations		
12/13/2006	City Council	Findings and Conclusions Regarding Application for Preliminary Plat Approval, SUB-06-7, Alpine Village	Preliminary plat approval.	R. Ex. II (Ex. 9); R. Ex. I (Ex. B) (Ex. 5); R. Ex. I, (Ex. C) (Ex. 7); Described in Second Amended Complaint ¶13, R. Vol. II, p. 201.
1/5/2007	Alpine	Purchase and Sale Agreement to acquire Timbers.		R. Ex. I (Ex. B) (Ex. 7); R. Ex. I, (Ex. C) (Ex. 8); Described in Second Amended Complaint ¶14, R. Vol. II, p. 201-02.
3/12/2007	Alpine	Revised Community Housing Plan		R. Ex. I (Ex. B) (Ex. 4); R. Ex. I (Ex. C) (Ex. 4).
3/22/2007	Alpine & City Council	Draft: Development Agreement - The Timbers Condominium	This is an unexecuted, undated draft. It appears to be identical to the version recorded on 7-7-2009, except for the addition of a new Article VII.	R. Ex. II (Ex. 13)
3/22/2007	City Council	Findings and Conclusions Regarding an Application for Final Plat Approval, SUB-06-8, The Timbers Condominiums		R. Ex. I, (Ex. C) (Ex. 9); Described in Second Amended Complaint ¶15, R. Vol. II, p. 202.
4/12/2007	AmeriTitle (for Alpine)	Buyer's Closing Statement		R. Ex. I (Ex. B) (Ex. 6); R. Ex. I (Ex. C) (Ex. 11).
4/16/2007	Alpine	Closed on purchase of Timbers.		Described in Second Amended Complaint ¶16, R. Vol. II, p. 202.
5/25/2007	Alpine	Application for final plat & final PUD plan approval for Phase 1.		Described in Second Amended Complaint ¶18, R. Vol. II, p. 202.
8/23/2007	City Council	Findings and Conclusions Regarding Applications for Final Plat and Final Plan Approval, SUB-06-7, PUD-06-3, Alpine Village, Final Plat and Plan		R. Ex. II (Ex. 15);R. Ex. I (Ex. B) (Ex. 8);R. Ex. I, (Ex. C) (Ex. 12);Described in Second Amended Complaint ¶19, R. Vol. II, p. 202.
12/13/2007	Alpine & City Council	Development Agreement - Alpine Village PUD	Executed by all parties on 12-13-07. Recorded 1-28-2008 as Instrument # 328801.	R. Vol. II, p. 225; Described in Second Amended Complaint ¶20, R. Vol. II, p. 202.

2/19/2008	District Court	Decision issued in Mountain Central v. City of McCall	Invalidated Ordinance 819 and 820.	R. Vol. II, p. 237; R. Ex. I (Ex. B) (Ex. 10); R. Ex. I, (Ex. C) (Ex. 14); Described in Second Amended Complaint ¶21, R. Vol. II, p. 203.
3/25/2008	Alpine & City Council	Development Agreement - Alpine Village PUD	This document appears to be identical to the earlier Development Agreement except for Exhibit A (legal description). Signed by City on 3-25-2008; signed by Alpine on 3-6-2008. Recorded on 4-7-2008 as Instrument #330524.	R. Ex. I (Ex. B) (Ex. 9); R. Ex. I (Ex. C) (Ex. 13); R. Ex. II (Ex. 16).
4/24/2008	City Council	Ordinance 856	Repealed Ordinance 819.	R. Vol. II, p. 270; R. Ex. I (Ex. B) (Ex. 11); Described in Second Amended Complaint ¶22, R. Vol. II, p. 203.
4/24/2008	City Council	Resolution 08-11	Providing refunds of housing fees collected under Ordinance 820.	R. Ex. I (Ex. B) (Ex. 12); R. Ex. I (Ex. C) (Ex. 15).
4/26/2008	Steve Millemann (for Alpine)	Email to City requesting release of restrictions and submitting draft First Amendment to Development Agreement - Alpine Village Planned Unit Development.		R. Vol. III, pp. 417.
6/11/2008	**DEADLINE**	**181 days after execution of Development Agreement on 12-13-2007.**	**The District Court said that on this day Alpine's state claim was barred under the ITCA (based on cause of action accruing on 12-13-2007). The District Court also said this ripened the federal claim, triggering the two-year statute of limitations.**	**Discussed in Memorandum Decision at 9,13-14, R. Vol. III, p. 527, 531-32.**
6/26/2008	City Council	Resolution 08-17	Providing refunds of community housing fees under Ordinances 820, 828, and 833.	R. Ex. I (Ex. C) (Ex. 16).
7/24/2008	Alpine & City Council	First Amendment to Development Agreement - Alpine Village PUD.	Effective date 7-24-2008. Signed by Alpine 6-6-2008. Signed by Mayor 7-24-2008. Signed by Clerk 7-30-2008.	R. Vol. II, p. 289; R. Ex. I (Ex. B) (Ex. 13); Described in Second Amended Complaint ¶23, R. Vol. II, p. 203.

			Recorded 8-20-2008 as Instrument #334281.	
12/10/2008	**DEADLINE**	**Cut-off date for two-year statute of limitations.**		
5/21/2009	Alpine & City Council	Development Agreement - The Timbers	No effective date. Signed by City 5-8-09. Signed by Alpine 5-21-09. Recorded 7-7-09 as Instrument # 343026. This appears to be identical to the undated draft referenced above on 3-22-2007, except for the addition of a new Article VII.	R. Ex. I (Ex. C) (Ex. 10).
5/21/2009	Alpine & City Council	First Amendment to Development Agreement - The Timbers	Effective date 4-9-2009. Signed by City 5-8-2009. Signed by Alpine 5-21-2009. Recorded 7-7-2009 as Instrument # 343027.	Addendum B to Respondent's Brief on appeal.
11/4/2009	City Council	Resolution 09-10	Effective 12-31-2009, eliminated refunds of commuity housing fees collected under Ordinances 820, 828 & 833. Repealed Ordinance 08-17.	R. Ex. I (Ex. C) (Ex. 17).
6/11/2010	**DEADLINE**	**Two years after 181 days after execution of Development Agreement on 12-13-2007.**	**The District Court said that on this day (two years after expiration of ITCA deadline) Alpine could no longer bring inverse condemnation challenge and therefore could not satisfy prong 2 of Williamson County.**	**Discussed in Memorandum Decision at 13-14, R. Vol. III, pp. 531-32.**
11/15/2010	Alpine	Demand letter, sent by Steven J. Millemann, seeking payment of damages.	This is referenced in the Verified Amended Complaint at paragraphs 28 and 33.	Described in Second Amended Complaint ¶¶28, 33, R. Vol. II, p. 204.
12/10/2010	Alpine	Verified Complaint	Pled only federal takings claim.	R. Vol. I, p. 1
4/15/2011	Christopher H. Meyer (for City)	Letter to Steven A. Millemann (for Alpine)		R. Vol. II, p. 338
5/23/2011	Alpine	Verified Amended Complaint	Identical except it adds a state takings claim.	R. Vol. I, p. 95
9/16/2011	Alpine	Second Amended Complaint	Identical except it adds §1983 claim & atty fees.	R. Vol. II, p. 199

12/16/2011	District Court	Memorandum Decision on Plaintiff's and Defendant's Cross Motions for Summary Judgment		R. Vol. III, p. 519
1/12/2012	District Court	Judgment		R. Vol. III, p. 535
1/12/2012	Alpine	Notice of Appeal (to Idaho Supreme Court)		R. Vol. III, p. 538
1/19/2012	Alpine	Amended Notice of Appeal		R. Vol. III, p. 542

ADDENDUM B:
FIRST AMENDMENT TO DEVELOPMENT AGREEMENT – THE TIMBERS

Instrument # 343027
VALLEY COUNTY, CASCADE, IDAHO
7-7-2009 09:50:10 No. of Pages: 4
Recorded for : CITY OF MCCALL
ARCHIE N. BANBURY Fee: 0.00
Ex-Officio Recorder Deputy
Index to: MISCELLANEOUS RECORD

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
(THE TIMBERS CONDOMINUM)

This First Amendment to Development Agreement, hereinafter referred to as "First Amendment", is entered into effective the 9 day of April, 2009, 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, and Idaho corporation, hereinafter referred to as "Developer", whose address is P.O. Box 6887, Boise, Idaho 83707, and who is the owner of THE TIMBERS CONDOMINIUM, as the same is platted of record with Valley County, Idaho.

WHEREAS, the City and Developer entered into a Development Agreement recorded 7-7-09, as Instrument No. 343026, filed of record with the Office of Recorder of Valley County, Idaho (the "**Agreement**").

WHEREAS, the Agreement provided that Developer would construct two fire hydrants; however the Developer was only required to construct one fire hydrant pursuant to the recommendation of the McCall Fire Department.

WHEREAS, the Agreement included a Community Housing Plan and contained provisions requiring Developer 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 Developer provide Community Housing Units. The 17 Units approved as Community Housing Units can be sold as Market Rate Units.

WHEREAS, the Agreement provided that the Developer would construct a Parking Facility, Storage Facility by December 1, 2007.

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

1. Amendments

Article III

Article III of the Agreement shall be modified to read as follows:

3.1 Developer shall construct one additional fire hydrant pursuant to the specifications of the City of McCall ("Fire Hydrant"), prior to the sale of any Units.

Article IV

Article IV of the Agreement shall be deleted in its entirety and Developer shall be and hereby is released from any requirement to provided Community Housing for or related to the condominium.

Article IV shall be modified to read:

Section Not Used.

Article V

Article V of the Agreement shall be modified to read as follows:

4.1 On or before December 1, 2009, Developer shall construct: (a) the covered parking structures, as depicted in the Timbers Condominium Parking Plan, which was approved by the City as part of the Applications; and (b) the Storage Facility.

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 Developer. 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 Developer 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 Hormaechea, President

CITY OF MCCALL

By: _____
Bert Kulesza, Mayor

ATTEST:

By: _____
BessieJo Wagner, City Clerk

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

On this 21 day of May, 2009, before me, Debra Sue Smith, a Notary Public in and for said State, personally appeared Michael Hormaechea, known or identified to me to be the President of the corporation that executed the instrument or the person who executed the instrument on behalf of said corporation, and acknowledged to me that such corporation 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.

DEBRA SUE SMITH NOTARY PUBLIC STATE OF IDAHO

_____
NOTARY PUBLIC FOR IDAHO
My Commission Expires: 12/31/2011

STATE OF IDAHO,)

)ss
County of Valley.)

On this 8 day of May, 2009, before me, Debra Sue Smith a Notary Public in and for said State, personally appeared Bert Kulesza and BessieJo Wagner known or identified to me to be the Mayor and the City Clerk of the City of McCall, ID, respectively, the Idaho municipal corporation that executed the instrument or the person that executed the instrument on of behalf of said municipal corporation, and the person who attested the Mayor's signature to the instrument, and acknowledged to me that such municipal corporation 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.

(SEAL) DEBRA SUE SMITH NOTARY PUBLIC STATE OF ID

NOTARY PUBLIC FOR IDAHO
My Commission Expires: 12/21/2011

ADDENDUM C:

LEGISLATIVE HISTORY OF IDAHO CODE § 67-6521(2)(B)

Fifty-third Legislature — LEGISLATURE OF THE STATE OF IDAHO — Second Regular Session - 1996

IN THE HOUSE OF REPRESENTATIVES

HOUSE BILL NO. 628

BY STATE AFFAIRS COMMITTEE

AN ACT

RELATING TO PLANNING AND ZONING; AMENDING SECTION 67-6521, IDAHO CODE, TO PROVIDE REMEDIES FOR AN AFFECTED PERSON WHO CLAIMS THAT A ZONING ACTION OR PERMITTING ACTION WAS IN ESSENCE AN EMINENT DOMAIN ACTION.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Section 67-6521, Idaho Code, be, and the same is hereby amended to read as follows:

67-6521. ACTIONS BY AFFECTED PERSONS.

(1) (a) As used herein, an affected person shall mean one having an interest in real property which may be adversely affected by the issuance or denial of a permit authorizing the development.

(b) Any affected person may at any time prior to final action on a permit required or authorized under this chapter, if no hearing has been held on the application, petition the commission or governing board in writing to hold a hearing pursuant to section 67-6512, Idaho Code; provided, however, that if twenty (20) affected persons petition for a hearing, the hearing shall be held.

(c) After a hearing, the commission or governing board may:

(~~1~~i) Grant or deny a permit; or

(~~2~~ii) Delay such a decision for a definite period of time for further study or hearing. Each commission or governing board shall establish by rule and regulation a time period within which a recommendation or decision must be made.

(d) An affected person aggrieved by a decision may within twenty-eight (28) days after all remedies have been exhausted under local ordinances seek judicial review as provided by chapter 52, title 67, Idaho Code.

(2) (a) Authority to exercise the regulatory power of zoning in land use planning shall not simultaneously displace coexisting eminent domain authority granted under section 14, article I, of the constitution of the state of Idaho and chapter 7, title 7, Idaho Code.

(b) An affected person claiming "just compensation" for a perceived "taking," the basis of the claim being that a specific zoning action or permitting action restricting private property development is actually a regulatory action by local government deemed "necessary to complete the development of the material resources of the state," or necessary for other public uses, may seek a judicial determination of whether the claim comes within defined provisions of section 14, article I, of the constitution of the state of Idaho relating to eminent domain. Under these circumstances, the affected person is exempt from the provisions of subsection (1) of this section and may seek judicial review through an inverse condemnation action specifying neglect by local government to provide "just compensation" under the provisions of section 14, article I, of the constitution of the state of Idaho and chapter 7, title 7, Idaho Code.

STATEMENT OF PURPOSE

RS 05533C1

This proposed legislation amends local government land use planning statutes to the extent that administrative remedies need not be exhausted prior to judicial review if a taking claim involves court determination of public use under provisions of eminent domain.

FISCAL NOTE

No cost to local government unless district court makes a determination that public use under provisions of eminent domain applies and that a taking has occurred.

CONTACT: Representative Jim Kempton

STATEMENT OF PURPOSE/FISCAL NOTE H 628

Minutes

HOUSE STATE AFFAIRS

DATE: JANUARY 30, 1996

TIME: 9:00 A.M.

PLACE: Room 412

PRESENT: Chairman Crane, Vice Chairman Deal, Representatives Stone, Tippets, Wood, Sutton, King, Alltus, Dorr, Erhart, Hornbeck, Kjellander, Field, Gines, Vandenberg, Stoicheff, Alexander and Judd.

ABSENT: Representatives Newcomb and Loertscher were absent.

MOTION: Chairman Crane called the meeting to order at 9:03 A.M. Representative King moved that the minutes of January 29, 1996 be approved. The motion was seconded by Representative Dorr. Motion Passed.

RS05744 Representative Stoicheff presented RS05744. The purpose of this Legislation is to allow people who do not live within a fire district but do own property within a fire district and who are Idaho residents to vote in all fire districts elections.

MOTION: Representative Vandenberg made a motion that RS05744 be introduced for printing. Representative Stone seconded the motion. Motion passed.

RS05248C1 Representative Alltus presented RS05248C1. The purpose of this legislation is to stop public funds from going to lobbying.

MOTION: Representative Erhart made a motion that RS05248C1 be returned to sponsor. Representative Stone seconded the motion.

SUBSTITUTE MOTION: Representative Dorr made a substitute motion that RS05248C1 be introduced for printing. Representative Gines seconded the motion. The motion passed. Counting vote of 12 Ayes.

RS05332C2 Mr. Freeman Duncan from the Attorney General's Office, presented RS05332C2. The purpose of this legislation is to address the statewide problems associated with the recording of vexatious common law liens against state and local officials. The legislation deals with non-statutory lien claims that are not court-imposed, are not consented to by the owner of the property being liened, and are premised upon the alleged performance or nonperformance of an official's duties. The legislation provides for an expedited court procedure for challenge of the lien, and for the ability of the property owner to recover a civil penalty of $5,000.00 or actual damages, which ever is greater, if the claim is found by a court to be groundless or false. Mr. Bill Von Tagen, from the Attorney General's office, answered questions raised by the committee concerning RS05332C2.

MOTION: Representative Hornbeck made a motion that RS05332C2 be introduced for printing. Representative Stone seconded the motion. The motion passed.

RS05507 Representative Crow presented RS05507. The purpose of this legislation is to repeal the Idaho Code which allows dog racing. It would further amend the Idaho Code to eliminate dog racing from the definition of a race meet and to eliminate references to

training dogs to race by the use of live lures.

MOTION: Representative Wood made a motion that RS05507 be introduced for printing. Representative Dorr seconded the motion. The motion passed.

RS05533C1 Representative Kempton presented RS05533C1. This proposed legislation amends local government land use planning statutes to the extent that administrative remedies need not be exhausted prior to judicial review if a taking claim involves court determination of public use under provisions of eminent domain. Representative Kempton brought to the attention of the committee that a typo error needed to be corrected on line 32. ..."taking." should read "taking". ....

MOTION: Vice Chairman Deal made a motion that RS05533C1 be introduced for printing with the typo error corrected. Representative Gines seconded the motion The motion passed. Legislative services indicated that the RS05533C1 was correct as typed. Representative Kempton will let Chairman Crane know that the RS was printed as first read.

H 419 Mr. Dwight Johnson from the Department of Employment, presented H 419. This bill contains three amendments to Idaho's Employment Security Law. Currently, one criteria for determining wether an employer is covered by the Employment Security Law is whether the employer paid three hundred dollars ($300) in covered wages in a calendar quarter. H 419 increased the amount covered to fifteen hundred dollars ($1500). The second amendment would allow the Governor to consolidate the Employment Service Advisory Council with similarly focused advisory bodies to eliminate overlapping advisory bodies and their attendant costs. The third amendment allows individuals filing a new claim for unemployment insurance benefits to voluntarily elect to have federal income tax withheld from their benefits checks.

MOTION: Representative Erhart made a motion that H 419 be sent to the floor with a DO PASS. Representative Wood seconded the motion. The motion passed. Vice Chairman Deal will Sponsor the bill on the floor.

Meeting adjourned at 10:08 A.M. Next meeting will be Wednesday, January 31, 1996 at 9:30 A.M.

RON G. CRANE, CHAIRMAN

JUDITH CHRISTENSEN, SECRETARY

Minutes

HOUSE STATE AFFAIRS

DATE: February 13, 1996

TIME: 8:30 A.M.

PLACE: Room 412

PRESENT: Chairman Crane, Vice Chairman Deal, Representatives Stone, Wood, Erhart, Sutton, King, Alltus, Dorr, Hornbeck, Kjellander, Field, Newcomb, Stoicheff, Judd, Tippets, Vandenberg, Alexander and Gines.

ABSENT: Representative Loertscher

MOTION: Chairman Crane called the meeting to order at 8:40 A.M. Representative King moved that the minutes of February 12, 1996 be approved. The motion was seconded by Representative Alltus. Motion Passed.

RS05876 Representative Gines presented RS05876. This Joint House Memorial deems it to be a violation of the rights of those who serve in our nation's military and the rights of the American people who pay for our nation's military to transfer the United States armed forces to the United Nations or any other foreign command.

MOTION: Representative King made a motion that RS05876 be introduced for printing. Representative Dorr seconded the motion. Motion passed.

H 628 Representative Kempton presented H 628. This proposed legislation amends local government land use planning statutes to the extent that administrative remedies need not be exhausted prior to judicial review if a taking claim involves court determination of public use under provisions of eminent domain.

MOTION: Vice Chairman Deal made a motion that H 628 be sent to the floor with a DO PASS. Representative Stone seconded the motion. Motion passed.

H 654 Mr. Michael Sheeley from the Department of Administration presented H 654. To amend existing central postal system statutes to allow statehouse mail delivery to all state office buildings located within the boundaries of Ada County.

Testimony in favor of H 654 was given by Mr. Jake Hofhman from the Department of Administration.

Testimony opposed to H 654 was given by Mr. Ed Johnson from Auto Sort, Mr. David Eichmann, manager of BSU mail services and Ms. Linda-Diane Hill from Pitney Bowes Company.

H 654 was assigned to a sub-committee chaired by Vice Chairman Deal. Representatives Hornbeck, Field, Dorr and Vandenberg will serve on the committee.

H 657 Mr. Michael Sheeley presented H 657. This legislation authorized the Administration of the Division of Purchasing to acquire information technology property by means of the award of a contract to multiple bidders.

Testimony in support of H 657 was given by Mr. Gary Silvester from the Department of Administration and Ms. Elinor Cheney, accountant for the Commission on Aging.

MOTION: Representative Alltus made a motion to send H 657 to the floor with a DO PASS. Vice Chairman Deal seconded the motion. Motion passed. Representative Stoicheff recorded as a nay vote. Representative King will carry the bill.

H 661 Ms. Pam Ahrens, Director of the Department of Administration presented H 661. This legislation repeals the existing statute regarding the Advisory Council on Information Technology and creates the Information Technology Resource Management Council.

Testimony supporting H 661 was given by Mr. Gene Watkins.

MOTION: Representative Kjellander made a motion that H 661 be sent to the floor with a DO PASS. Representatives Field, Hornbeck, and Alexander seconded the motion. Motion passed. Representatives Kjellander and Alexander will carry the bill to the floor.

H 676 Representative Newcomb presented H 676. The purpose of this legislation is to require the state Historic preservation officer be appointed by the Governor.

Testimony supporting H 676 was given by Mr. Weldon Branch representing ICA and Mr. Frank Land representing ICA.

MOTION: Representative Sutton made a motion that H 676 be sent to the floor with a DO PASS. Representatives Wood, Stone, Hornbeck and Kjellander seconded the motion. Motion passed. Representative Newcomb will carry the bill to the floor.

Meeting adjourned at 10:10 A.M. Next meeting for the State Affairs Committee will be Wednesday, February 14, 1996, at 9:00 A.M.

RON G. CRANE, CHAIRMAN

JUDITH CHRISTENSEN, SECRETARY

AGENDA

SENATE LOCAL GOVERNMENT & TAXATION COMMITTEE

3:00 P.M.

ROOM 426

FRIDAY, MARCH 1, 1996

BILL NO.	*DESCRIPTION*	*SPONSOR*
H 765	Sales tax seller's permits	Tax Commission
H 686	Income tax grocery credit, must be Idaho resident	Rep. Wood
H 628	Provides remedy for a zoning action which was in essence an eminent domain action	Rep. Kempton
H 672	Transportation analysis, local jurisdiction	Association of Cities
H 741	Firefighter labor relations with political subdivisions	Ken McClure
H 757aa	Budget limit exemption for five years/capital improvement projects	Cities
H 809	Income tax shareholder/corporate credits for payment	Phillip Barber

Minutes

SENATE LOCAL GOVERNMENT & TAXATION COMMITTEE

DATE: March 1, 1996

TIME: 3:00 p.m.

PLACE: Room 426

PRESENT: Chairman Thorne, Senators Hawkins, Parry, Furness, Frasure, Ipsen, Wheeler, Tucker and Stennett

ABSENT/ EXCUSED: None

Chairman Thorne called the meeting to order at 3:07 p.m. Senator Furness moved approval of the minutes for February 23, 1996. Senator Parry seconded the motion. By unanimous voice vote the motion passed. Senator Tucker moved approval of the minutes for February 28, 1996. Senator Wheeler seconded the motion. By unanimous voice vote the motion passed. Senator Frasure moved approval of the minutes for February 26, 1996. Senator Tucker seconded the motion. By unanimous voice vote the motion passed. A silent roll call was taken.

H 765 **Ted Spangler**, Idaho State Tax Commission, presented House Bill 765. This legislation makes changes to the Idaho Sales Tax Act relating to seller's permits. Presently, seller's permits are indefinite. Many of these sellers are no longer in business. With this legislation, seller's permits will automatically expire after a period of twelve consecutive months of no sales reported. Non-profit organizations that have only one large sale per year can apply for a one time sale report.

MOTION Senator Ipsen moved to send House Bill 765 to the floor with a "do pass" recommendation. Senator Frasure seconded the motion.

VOTE By unanimous voice vote the motion passed. Senator Ipsen will carry the bill.

H 686 **Representative Wood** explained House Bill 686. This legislation is an effort to stop the practice of persons claiming a grocery credit on their taxes when filing for dependents not domiciled in this State. Enforcement would be up to tax preparers.

MOTION Senator Ipsen moved that House Bill 686 be sent to the floor with a "do pass" recommendation. Senator Parry seconded the motion.

SUBSTITUTE MOTION Senator Tucker moved to hold House Bill 686 in committee. Senator Frasure seconded the motion.

ROLL CALL VOTE By a roll call vote of 3-6 the substitute motion failed, with Senators Hawkins, Frasure and Tucker voting aye; and Senators Thorne, Parry, Furness, Ipsen, Wheeler, and Stennett voting nay.

ROLL CALL VOTE By a roll call vote of 6-3 the original motion passed, with Senators Thorne, Parry, Furness, Ipsen, Wheeler, and Stennett voting aye; and Senators Hawkins, Frasure and Tucker voting nay. Senator Thorne will sponsor the bill.

H 628 **Representative Kempton** distributed a handout and explained House Bill 628. This legislation amends local government land use planning statutes to the extent that administrative remedies need not be exhausted prior to judicial review if a taking claim involves court determination of public use under provisions of eminent domain.

MOTION Senator Stennett moved to hold House Bill 628 in committee. There was no second.

MOTION Senator Frasure moved to send House Bill 628 to the full Senate with a "do pass" recommendation. Senator Wheeler seconded the motion.

Senator Stennett felt this would create more crowding in the courts. Senator Hawkins felt this may increase local discussion and lighten the load on the courts.

ROLL CALL VOTE By a roll call vote of 8-1 the motion passed, with Senators Thorne, Hawkins, Parry, Furness, Frasure, Ipsen, Wheeler, and Tucker voting aye; and Senator Stennett voting nay. Senator Hawkins will sponsor the bill.

UNANIMOUS CONSENT REQUEST Chairman Thorne requested unanimous consent to hold House Bill 809 until Monday, given that two of the committee members needed to be excused momentarily, and the sponsor desired to have all members present for the hearing on House Bill 809. There were no objections.

H 672 **Scott McDonald**, Association of Idaho Cities, explained House Bill 672. This legislation requires the cities and counties to prepare the comprehensive plans in coordination with whoever has jurisdiction over the local highway system.

MOTION Senator Wheeler moved to send House Bill 672 to the floor with a "do pass" recommendation. Senator Frasure seconded the motion.

VOTE By unanimous voice vote the motion passed. Senator Wheeler will carry the bill.

H 741 **Ken McClure**, representing the City of Boise, explained House Bill 741. Idaho Code currently requires government entities to negotiate fire fighter contracts through a quorum of the city council and mayor, or county commission, or fire district board. This legislation would allow the government entity to designate a person with authority to bargain on its behalf.

MOTION Senator Furness moved to send House Bill 741 to the floor with a "do pass" recommendation. Senator Stennett seconded the motion.

VOTE By unanimous voice vote the motion passed. Senator Furness will carry the bill.

H 757a **Scott McDonald** presented House Bill 757 as amended to the committee. This legislation will extend from 2 years to 5 years for capital improvements as an exemption from the budget limitations of taxing districts. He suggested a new amendment to replace two and add the word "or" to make the new language read "two or five years"

MOTION Senator Hawkins moved to hold House Bill 757a in committee. Senator Furness seconded the motion.

SUBSTITUTE MOTION Senator Wheeler made a substitute motion to send House Bill 757a to the 14th order for amendment. Senator Stennett seconded the motion.

VOTE By majority voice vote the substitute motion failed.

VOTE By majority voice vote the original motion passed. House Bill 757 as amended will be held in committee.

Meeting adjourned at 4:28 p.m.

J. L. Thorne
SENATOR J.L. "JERRY" THORNE, Chairman

Nancy Berger
NANCY BERGER, Committee Secretary

HB 628 3/1/96
— Kempton —

except in the manner prescribed by law.

CTION 13. GUARANTIES IN CRIMINAL ACTIONS AND DUE PROCESS OF LAW. In all criminal prosecutions, the accused shall have the right to a speedy and public trial; to have the process of the court to compel ttendance of witnesses in his behalf, and to appear and defend in person and with counsel.
person shall be twice put in jeopardy for the same offense; nor be compelled in any criminal case to be ess against himself; nor be deprived of life, liberty or property without due process of law.

CTION 14. RIGHT OF EMINENT DOMAIN. The necessary use of lands for the construction of reservoirs or basins, for the purpose of irrigation, or for rights of way for the construction of canals, ditches, or pipes, to convey water to the place of use for any useful, beneficial or necessary purpose, or for ge; or for the drainage of mines, or the working thereof, by means of roads, railroads, tramways, cuts, s, shafts, hoisting works, dumps, or other necessary means to their complete development, or any other cessary to the complete development of the material resources of the state, or the preservation of the h of its inhabitants, is hereby declared to be a public use, and subject to the regulation and control of tate.
rivate property may be taken for public use, but not until a just compensation, to be ascertained in the r prescribed by law, shall be paid therefor.

CTION 15. IMPRISONMENT FOR DEBT PROHIBITED. There shall be no imprisonment for debt in this state t in cases of fraud.

CTION 16. BILLS OF ATTAINDER, ETC., PROHIBITED. No bill of attainder, ex post facto law, or law impair- he obligation of contracts shall ever be passed.

CTION 17. UNREASONABLE SEARCHES AND SEIZURES PROHIBITED. The right of the people to be secure in their ons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no nt shall issue without probable cause shown by affidavit, particularly describing the place to be hed and the person or thing to be seized.

SECTION 18. JUSTICE TO BE FREELY AND SPEEDILY ADMINISTERED. Courts of justice shall be open to every n, and a speedy remedy afforded for every injury of person, property or character, and right and justice l be administered without sale, denial, delay, or prejudice.

SECTION 19. RIGHT OF SUFFRAGE GUARANTIED. No power, civil or military, shall at any time interfere with revent the free and lawful exercise of the right of suffrage.

SECTION 20. NO PROPERTY QUALIFICATION REQUIRED OF ELECTORS -- EXCEPTIONS. No property qualifications l ever be required for any person to vote or hold office except in school elections, or elections creating btedness, or in irrigation district elections, as to which last-named elections the legislature may rict the voters to land owners.

SECTION 21. RESERVED RIGHTS NOT IMPAIRED. This enumeration of rights shall not be construed to impair or other rights retained by the people.

ARTICLE II

DISTRIBUTION OF POWERS

SECTION 1. DEPARTMENTS OF GOVERNMENT. The powers of the government of this state are divided into three tinct departments, the legislative, executive and judicial; and no person or collection of persons charged the exercise of powers properly belonging to one of these departments shall exercise any powers properly nging to either of the others, except as in this constitution expressly directed or permitted.

ARTICLE III

LEGISLATIVE DEPARTMENT

SECTION 1. LEGISLATIVE POWER -- ENACTING CLAUSE -- REFERENDUM -- INITIATIVE. The legislative power of the te shall be vested in a senate and house of representatives. The enacting clause of every bill shall be as lows: "Be it enacted by the Legislature of the State of Idaho."
The people reserve to themselves the power to approve or reject at the polls any act or measure passed by legislature. This power is known as the referendum, and legal voters may, under such conditions and in h manner as may be provided by acts of the legislature, demand a referendum vote on any act or measure sed by the legislature and cause the same to be submitted to a vote of the people for their approval or ection.
The people reserve to themselves the power to propose laws, and enact the same at the polls independent of

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COMMITTEES
REVENUE & TAXATION
TRANSPORTATION & DEFENSE
JUDICIARY, RULES & ADMINISTRATION

House of Representatives
State of Idaho

January 15, 1996

TO: OFFICE OF THE ATTORNEY GENERAL

SUBJECT: ATTORNEY GENERAL OPINION; Eminent Domain Relevance in Land Use Planning.

Eminent domain provisions of Article 1, Section 14, of the Idaho Constitution are rather unique in that eminent domain relevance in questions of "takings" is established, in part, on the basis of actions by state or local government that are deemed "necessary to the complete development of the material resources of the state".

Blackwell Lumber Co. v. Engine Mill Co., a 1916 case before the Idaho Supreme Court, defines in considerable detail the court's authority to determine uses "necessary to the complete development of the material resources of the state"; thereby suggesting that in today's land use regulatory environment eminent domain relevance should remain a statutory consideration in an "affected person's" right to access judicial review. If so, an "affected person's" access to the courts need not always involve exhaustion of administrative remedies under 67-6521(d), Idaho Code.

An Attorney General's opinion is therefore requested related to the attached "RS"; specifically, in the limited context presented, is the proposed language correct in regard to an "affected person's" right to access judicial review without a corresponding need to exhaust administrative remedies?

Thank you in advance for your assistance

Jim D. Kempton

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
Statehouse, Room 210
P.O. Box 83720
BOISE 83720-0010

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ATTORNEY GENERAL

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January 24, 1996

Honorable Jim D. Kempton
Idaho House of Representatives
Statehouse
Boise, Idaho 83720

Dear Representative Kempton:

Per our discussion, I have reviewed your proposed legislation allowing certain individuals aggrieved by a planning and zoning decision of a governmental body to proceed directly to court, rather than exhaust administrative remedies if they allege a "taking" under the Idaho Constitution.

From your earlier draft which we reviewed, you have proposed adding language to the effect that the citation on lines 34-35 to the constitutional definition of a public use, i.e., "necessary to complete the development of the material resources of the state" would be broadened by the inclusion of language "or other public uses." This language alleviates our minor concern that your original language may actually limit the ability to proceed with an inverse condemnation action given an Idaho Supreme Court case which held that the constitutional provision is not a limitation on determining what constitutes a public use. With the inclusion of this language, we feel that your proposed legislation adequately conveys your intent.

I hope this letter is of assistance to you. If you have any questions, please feel free to contact me.

Very truly yours,

THOMAS F. GRATTON
Deputy Attorney General
Intergovernmental & Fiscal Law Division

TFG\yj

LOCAL GOVERNMENT AND TAXATION COMMITTEE

VISITOR AND TESTIMONY SIGN-UP SHEET Date 3-1-96

Name Address/City/Zip	Representing	Legislation interested in	Wish to testify Yes/No	Handouts available	Oppose/ support
Robert D Lilly 5306 Dakota Boise 83709	self	general info	No		
Dan Toh.	Tax Commission	H 809			
Derk Santos	DFM				
Ted Springlor	Tax Commin	HB 766	Yes		Supp
Jim Kempton	House	HB 628	Sponsor		
Jo Ann Wood	House	H 686	Yes Sponsor		Support
Ken McClure	city of Boise	HB 741	YES		Support
Richard Lucht	Melaleuca	HB 809	NO		Support
PHIL BARBER	"	"	Yes		"
Brady Pantopoulos	Melaleuca	HB809	No		Support

ROLL CALL VOTE

DATE 3-1-96 SUBJECT Private [illegible] taking BILL # #628

ORIGINAL MOTION do pass SUBSTITUTE MOTION AMENDED SUBSTITUTE MOTION

	AYE	NAY	A/E		AYE	NAY	A/E		AYE	NAY	A/E
THORNE	1			THORNE				THORNE			
HAWKINS	1			HAWKINS				HAWKINS			
PARRY	1			PARRY				PARRY			
FURNESS	1			FURNESS				FURNESS			
FRASURE	1			FRASURE				FRASURE			
IPSEN	1			IPSEN				IPSEN			
WHEELER	1			WHEELER				WHEELER			
TUCKER	1			TUCKER				TUCKER			
STENNETT		1		STENNETT				STENNETT			

8-1-0

MOVED Frasure MOVED _____ MOVED _____

SECONDED Wheeler SECONDED _____ SECONDED _____

ADDENDUM D:

MCCALL ZONING ORDINANCE § 3.10.12 (MAR. 16, 2006)

3.10.12: AMENDMENTS TO FINAL DEVELOPMENT PLAN:

(A) Subsequent Amendments:

1. Any subsequent amendment to the final development plan changing location, siting, and height of buildings and structures may be authorized by the commission, without additional public hearings, if required by engineering or other circumstances not foreseen at the time the final plan was approved.

2. In no case shall the commission authorize changes which may cause any of the following:

   (a) A change in the use or character of the development, including ownership.

   (b) An increase in overall coverage of structures or significant changes in types of structures.

   (c) An increase of the intensity of use or types of usage.

   (d) An increase in the problems of traffic circulation and public utilities.

   (e) A reduction of off street parking and loading space.

   (f) A reduction in required pavement widths.

(B) Change Requiring Public Hearing: All other changes in use, rearrangement of lots, blocks and building tracts, or in the provision of common open spaces and changes in addition to those listed above which constitute substantial alteration of the original plan shall require a public hearing before the commission and approval by the council.

(C) Expiration:

1. On the anniversary year after general development plan and program approval, until the project is complete, the applicants or applicants' successors, shall file a progress report. If substantial construction or development has not taken place within four (4) years from the date of approval of the general development plan and program, the commission shall review the PUD program at a public hearing to determine whether or not its continuation, in whole or in part, is in the public interest, and, if found not to be, shall recommend to the council that the PUD approval be revoked.

2. After action by the commission, the council shall consider the matter and by resolution accept or reject it or return it to the commission for further action. Notice and hearing shall be provided according to the same procedures as are then applicable to a new application, with the present owner of the property being sent notice by certified mail, return receipt requested; the city is entitled to rely on the county tax assessor's records

and a title company title search for the name and address of the current owner(s).
(Ord. 821, 2-23-2006, eff. 3-16-2006)