8-30-2012

Block v. City of Lewiston Clerk's Record v. 5 Dckt. 39685

Vol. 5 of

LAW CLERK

In the
SUPREME COURT
of the
STATE OF IDAHO

JOHN GUSTAV BLOCK, a single man,
Plaintiff-Appellant.

vs.

CITY OF LEWISTON, a municipal corporation of the State of Idaho, and its employee LOWELL J. CUTSHAW, City of Lewiston Engineer,
Defendants-Respondents

and

JACK JOSEPH STREIBICK, a single man, and Personal Representative of THE ESTATE OF MAUREEN F. STREIBICK, deceased, AND DOES 1-20,
Defendants.

VOLUME V

Appealed from the District Court of the
Second Judicial District of the State of Idaho,
in and for the County of Nez Perce

The Honorable CARL B. KERRICK

Supreme Court No. 39685

ATTORNEY FOR APPELLANT
Ronald J. Landeck

ATTORNEY FOR RESPONDENTS
Brian K. Julian

39685

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

JOHN GUSTAV BLOCK, a single man

Plaintiff-Appellant,

v.

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and

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Defendants,

SUPREME COURT NO. 39685

TABLE OF CONTENTS

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Defendants,

SUPREME COURT NO. 39685

INDEX

Page

FILED

2011 OCT 28 PM 4 52

PATTY O. WEEKS
CLERK OF THE DIST. COURT
DEPUTY

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DANELLE C. FORSETH
LANDECK & FORSETH
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(208) 883-1505
Landeck ISB No. 3001
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Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

JOHN G. BLOCK, a single man, Plaintiff, vs. JACK J. STREIBICK, a single man, JACK J. STREIBICK, as Personal Representative of the Estate of Maureen F. Streibick, deceased, CITY OF LEWISTON, a municipal corporation of the State of Idaho, and its employee, LOWELL J. CUTSHAW, City of Lewiston Engineer, and DOES 1-20, Defendants.	Case No. CV 09-02219 **FOURTH AFFIDAVIT OF RONALD J. LANDECK IN SUPPORT OF PLAINTIFF'S MOTION TO RECONSIDER MEMORANDUM OPINION AND ORDER ON SECOND MOTION FOR SUMMARY JUDGMENT**

STATE OF IDAHO)
) ss.
County of Latah)

Ronald J. Landeck, upon oath, deposes and says:

869 1007

1. The statements contained herein are made of my own personal knowledge and are true and correct to the best of my information.

2. I am a licensed attorney in the State of Idaho in good standing and am a principal of the law firm, Landeck & Forseth (the "firm").

3. The firm represents Plaintiff John G. Block in this action.

4. Attached hereto as Exhibit 1 is a true and correct copy of portions of the Deposition of John Block taken October 14, 2010 and April 6, 2011, at Lewiston, Idaho.

5. Attached hereto as Exhibit 2 is a true and correct copy of portions of the Deposition of Lowell Cutshaw taken September 21, 2010, at Bismarck, North Dakota.

6. Attached hereto as Exhibit 3 is a true and correct copy of portions of the Deposition of Chris Davies taken October 12, 2010, at Lewiston, Idaho.

7. Attached hereto as Exhibit 4 is a true and correct copy of portions of the Deposition of Eric Hasenoehrl taken April 8, 27 and 28, 2011, at Lewiston, Idaho.

8. Attached hereto as Exhibit 5 is a true and correct copy of portions of the Deposition of Tim Richards taken September 12, 2011, at Boise, Idaho.

9. Attached hereto as Exhibit 6 is a true and correct copy of portions of the Deposition of Terry Rudd taken June 7, 2011, at Lewiston, Idaho.

10. Attached hereto as Exhibit 7 is a true and correct copy of portions of the Deposition of John Smith taken November 7, 2010, at Lewiston, Idaho.

11. Attached hereto as Exhibit 8 is a true and correct copy of portions of the Deposition of Shawn Stubbers taken October 12, 2010, at Lewiston, Idaho.

12. Attached hereto as Exhibit 9 is a true and correct copy of portions of the Deposition of John "Hank" Swift taken April 5, 2011, at Lewiston, Idaho and September 14, 2011, at Moscow, Idaho.

13. Attached hereto as Exhibit 10 is a true and correct copy of portions of the Deposition of Bud Van Stone taken October 14, 2010, at Lewiston, Idaho.

14. Attached hereto as Exhibit 11 is a true and correct copy of portions of the Deposition of Warren Watts taken April 5, 2011, at Lewiston, Idaho.

The above statements are true and correct to the best of my knowledge and belief.

Dated this 28th day of October, 2011.

Ronald J. Landeck

SUBSCRIBED AND SWORN TO before me this 28th day of October, 2011.

RENEE C. EVANS NOTARY PUBLIC STATE OF IDAHO

NOTARY PUBLIC for Idaho
My commission expires: 8-17-2013

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of October, 2011, I caused a true and correct copy of this document to be served on the following individual in the manner indicated below:

BRIAN K. JULIAN
STEPHEN L. ADAMS
ANDERSON, JULIAN & HULL LLP
C. W. MOORE PLAZA
250 SOUTH FIFTH STREET, SUITE 700
POST OFFICE BOX 7426
BOISE, IDAHO 83707-7426

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[ ] email to sadams@ajhlaw.com
[ ] email to bjulian@ajhlaw.com

Ronald J. Landeck

EXHIBIT 1

FOURTH AFFIDAVIT OF RONALD J. LANDECK IN SUPPORT OF PLAINTIFF'S MOTION TO RECONSIDER MEMORANDUM OPINION AND ORDER ON SECOND MOTION FOR SUMMARY JUDGMENT

873 1077

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

JOHN G. BLOCK, a single man,

Plaintiff,

vs

JACK J. STREIBICK, a single man, JACK STREIBICK, as Personal Representative of the Estate of Maureen F. Streibick, deceased, CITY OF LEWISTON, a municipal corporation of the State of Idaho, and its employee, LOWELL J. CUTSHAW, City of Lewiston Engineer, and DOES 1-20,

Defendants.

Case No. CV 09-02219

Taken at 141 Ninth Street
Lewiston, Idaho
Thursday, October 14, 2010 - 9:46 a.m.

D E P O S I T I O N

OF

JOHN G. BLOCK

FOURTH AFFIDAVIT OF RONALD J. LANDECK IN SUPPORT OF PLAINTIFF'S MOTION TO RECONSIDER MEMORANDUM OPINION AND ORDER ON SECOND MOTION FOR SUMMARY JUDGMENT

IN THE DISTRICT COURT OF THE SECOND
JUDICIAL DISTRICT OF THE STATE OF IDAHO,
IN AND FOR THE COUNTY OF NEZ PERCE

JOHN G. BLOCK, a single man,

Plaintiff,

vs

JACK J. STREIBICK, a single man, JACK STREIBICK, as Personal Representative of the Estate of Maureen F. Streibick, deceased, CITY OF LEWISTON, a municipal corporation of the State of Idaho, and its employee, LOWELL J. CUTSHAW, City of Lewiston Engineer, and DOES 1-20,

Defendants.

Case No. CV 09-02219

Taken at 1134 F Street
Lewiston, Idaho
Tuesday, November 16, 2010 - 9:08 a.m.

C O N T I N U E D
D E P O S I T I O N

OF

JOHN G. BLOCK

875+015

factors. Another one was to put piling all the way down to bedrock and create some type of connection between all of these. Well, these pilings would have to be on the order of every six to ten feet apart, at a fairly high price per pile --

Q. Sure.

A. -- to accomplish this. And at what point do you do it? Do you do it over the entire face of this fill or this area, or do you do it -- which we came down to that being cost prohibited -- do you do it just for the one remaining house, the 155 house.

Q. Yeah.

A. And that was estimated to cost I think about five hundred thousand just to protect one structure that at the time wasn't, it was probably only worth five hundred thousand. So, to me it didn't make sense to do the study if the study is going to come out with that type of fix.

Q. Gotcha.

A. So that's why we didn't do it.

Q. And to your knowledge, no one else has done a study to conclude specifically what's caused the slope instability on these three properties?

A. As far as I'm aware, that's right.

Q. Okay. Was it your recollection that the, that

the Strata prices that they were asking for for these phases were consistent with what's indicated on 244, which is phase one of five thousand, eight hundred ninety-five dollars, and phase two, anywhere from twenty-one thousand to twenty-five thousand?

A. I assume so.

Q. You don't have a recollection of a different number being quoted for those two phases?

A. No.

Q. Okay.

EXHIBITS:

(Deposition Exhibit No. 219 marked for identification.)

Q. (BY MR. CASEY) Okay. John, we've talked in little bits and parts about what took place on this property, and I'm sorry to do that, but sometimes it just has to be with how I came across the documents, in that order. And I'm going to give you a chance. We're going to eventually get to your, your interrogatory answer --

A. Uh-huh.

Q. -- and I think that lays out your damage claims. And, but I need to go through some of these documents as we get there, okay?

A. Sure.

Q. So, Exhibit 219, tell me what that is.

A. Okay. This is the contract between myself and Catlow house movers to move the main floor of the 159 Marine View Drive house.

Q. And, John, did you move 159?

A. We moved the main floor of that house to another lot that I owned.

Q. Where is that lot?

A. It's lot number three of Canyon Greens Court. It's now addressed as 106 Canyon Greens Court.

Q. Okay. And so, did you have Catlow Professional Movers do that work?

A. Yes.

Q. And did they charge you forty-two thousand dollars to do it?

A. I believe they charged a little bit extra. We had to do a little extra but, yes, it's proximate to that.

Q. Okay. John, who owns Canyon Greens Court, 106 Canyon Greens Court?

A. The current owners are Lisa and Dave. I'm not sure of Lisa's name. They're not married, but Dave, I think it's Huntsman (phonetic), or something like that. I can get that information.

Q. Okay. And how long have the Huntsmans lived

there, John?

A. I believe they purchased in June of this year.

Q. Who did they buy it from?

A. Me.

Q. Did you own it from the time it was moved in 2006?

A. Yes.

Q. What was the sale price?

A. Three hundred twenty-five thousand.

Q. And, what's its assessed value?

A. You know, I believe it's assessed right about three hundred twenty-five thousand.

Q. Okay. Do you have the purchase and sale documents from that sale?

A. I should have.

Q. Would you supply those to your counsel, please?

A. Yes.

Q. Tell me how many square feet the house is currently, on 106.

A. I think twenty-two hundred and forty, say, square feet, roughly, twenty-two hundred.

Q. So tell me about that move and the subsequent, if you will, reconstruction. What did you do?

A. Okay. On the move, we had to basically tear down the 153 house, build an access road in between

876 1044

where the 153 house was and the 155 house. We had to lift that structure up off the foundation. It was daylight basement, so we had to demolish the entirety of the daylight basement. We had to detach the structure from the garage, and we ended up doing the reconstruction of the garage on site, just to protect it because one of the walls --

Q. Right.

A. -- went with the house. So we transported that up the street. We had to take down two stone and brick mailboxes that were in the way, and we had to take out, I believe it was two trees, that were in the way. We excavated. This was a lot that I had available. Excavated the lot, had to over-excavate the lot to get the home in there. We had to over-excavate the depth of the lot, because it went from a daylight structure to a crawl-space structure. So we had to have a higher than normal foundation for it, and we had to install more stem walls and bearing walls underneath the home to support the home other than it would have been. There was a stairway in the home that had to get sealed off and reconstructed.

Q. A stairway that went down to the daylight basement?

A. Yes.

Q. Okay.

A. We built a brand-new garage onto the, the moved structure in the new location and all the related work. That would be the porches, the patios, site work, the driveway, the landscape, the sprinklers, anything associated with getting the house ready for sale. The interior we had to do some remodel and repair from cracking. The outside of the house was completely repainted.

Q. Uh-huh.

A. The stone columns in the front were completely redone. The old house location had a large covered patio that had to get torn off. It couldn't be moved. And instead of building a covered patio, we did a pergola over the patio, so it was a different configuration. And that's about it.

Q. Okay. Do you keep project files for 106 -- and I'm just going to call it a project file. Do you keep a file that would show the expenses that you have into the property?

A. Probably the better would be the summary of information that I do for my taxes. That would probably be the better way of doing it, because it's all checkbook register stuff. I don't have it in a project file.

Q. Do you know how much -- what costs you had into it before you sold it for three hundred and twenty-five thousand?

A. I do. That's a part of my tax return.

Q. Okay. As we sit here today, you're not able to pull it off the top of your head, are you; or are you?

A. Oh, it would have been -- now, that's not counting my lot value. That's just the cost to --

Q. Yeah. I'm not talking dirt, just the structure.

A. A hundred and seventy-five to two hundred thousand dollars.

Q. Okay. Would you have the specific numbers that you could, documents that would back up those numbers, that you could provide to your lawyer?

A. Yes.

MR. CASEY: We haven't seen those, have we yet, Ron?

MR. LANDECK: No. I haven't seen them yet.

Q. (BY MR. CASEY) Okay. Would you provide those to him, please?

A. Yes.

Q. Okay. Do you know how much the lot was valued at, at the time that you put this new house on it?

A. I believe sixty-five thousand comes to mind,

but I believe there is a, an appraisal.

Q. Uh-huh.

A. Of that house that I did prior to, to help me figure out how to price it, for one. So, that appraisal would have some data.

Q. Would you supply that appraisal to your lawyer also, please?

A. Yes.

Q. And, so, then you've done all that work that you talked about after the move, and I appreciate you going through that for me. And then you put the house on the market, and you sold it to the Huntsmans?

A. Yes.

Q. Who was the realtor?

A. The listing agent is the one I've used for many years. What -- oh, Marilyn Flatt, with Century 21. And the sales agent was, I think her name is Marilyn. I'm not going to remember, but that will be in the sale document, I'm pretty sure.

Q. Yep, that's fine.

A. That's a different company.

Q. I meant your realtor, and that's Ms. Flatt, right?

A. Yes.

Q. Okay. And have the Huntsmans been happy with

877 1015

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

JOHN G. BLOCK, a single man,

Plaintiff,

vs

JACK J. STREIBICK, a single man, JACK STREIBICK, as Personal Representative of the Estate of Maureen F. Streibick, deceased, CITY OF LEWISTON, a municipal corporation of the State of Idaho, and its employees, LOWELL J. CUTSHAW, City of Lewiston Engineer, and DOES 1-20,

Defendants.

Case No. CV 09-02219

Taken at 1134 F Street
Lewiston, Idaho
Tuesday, April 6, 2011 - 2:16 p.m.
VOLUME I
OF
C O N T I N U E D

D E P O S I T I O N

OF

JOHN BLOCK

FOURTH AFFIDAVIT OF RONALD J. LANDECK IN SUPPORT OF PLAINTIFF'S MOTION TO RECONSIDER MEMORANDUM OPINION AND ORDER ON SECOND MOTION FOR SUMMARY JUDGMENT

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

JOHN G. BLOCK, a single man,

Plaintiff,

vs

JACK J. STREIBICK, a single man, JACK STREIBICK, as Personal Representative of the Estate of Maureen F. Streibick, deceased, CITY OF LEWISTON, a municipal corporation of the State of Idaho, and its employees, LOWELL J. CUTSHAW, City of Lewiston Engineer, and DOES 1-20,

Defendants.

Case No. CV 09-02219

Taken at 1134 F Street
Lewiston, Idaho
Thursday, April 28, 2011 - 1:16 p.m.
VOLUME II
OF
C O N T I N U E D

D E P O S I T I O N

OF

JOHN BLOCK

EXHIBIT 2

FOURTH AFFIDAVIT OF RONALD J. LANDECK IN SUPPORT OF PLAINTIFF'S MOTION TO RECONSIDER MEMORANDUM OPINION AND ORDER ON SECOND MOTION FOR SUMMARY JUDGMENT

IN THE DISTRICT COURT OF THE
SECOND JUDICIAL DISTRICT
OF THE STATE OF IDAHO
IN AND FOR THE COUNTY OF NEZ PERCE

* * * * * * * * * * * * * * * * *

JOHN G. BLOCK, a single man,

Plaintiff,

vs.

JACK J. STREIBICK, a single man, JACK STREIBICK, as Personal Representative of the Estate of Maureen F. Streibick, deceased, CITY OF LEWISTON, a municipal corporation of the State of Idaho, and its employee, LOWELL J. CUTSHAW, City of Lewiston Engineer, and DOES 1 - 20,

Defendants.

Case No.
CV 09-02219

* * * * * * * * * * * * * * * * *

AUDIOVISUAL DEPOSITION OF LOWELL J. CUTSHAW taken by Mr. Ronald J. Landeck, Attorney At Law, pursuant to notice and pursuant to the Idaho Rules of Civil Procedure, before Lori L. Hauge, a Notary Public in and for the County of Williams and State of North Dakota, at the State Room of the Kelly Inn, 1800 North Twelfth Street, Bismarck, North Dakota, on Tuesday, the 21st day of September, 2010, commencing at 9:09 a.m.

* * * * * * * * * * * * * * * * *

*Appearances as noted herein.

Chapter 32

SUBDIVISIONS[1]

ARTICLE I TITLE AND PURPOSE

Sec. 32-1. Short title.

This chapter shall be known as the "Subdivision Ordinance of the City of Lewiston." (Ord. No. 4177, § 1, 2-10-97)

Sec. 32-2. Purpose and intent.

(a) The purpose of this chapter is to provide for the orderly growth and harmonious development of the city of Lewiston, to insure adequate traffic circulation through coordinated street systems with relation to major thoroughfares, adjoining subdivisions, and public facilities; to achieve individual property lots of reasonable utility and livability; to secure adequate provisions for water supply, drainage, sanitary sewerage, and other health requirements; to insure consideration for adequate sites for schools, recreation areas, and other public facilities; to promote the conveyance of land by accurate legal descriptions; and to provide logical procedures for the achievement of this purpose.

(b) In its interpretation and application, the provisions of this chapter are intended to provide a common ground of understanding and a sound equitable working relationship between public and private interests to the end that both independent and mutual objectives can be achieved in the subdivision of land. (Ord. No. 4177, § 1, 2-10-97)

Sec. 32-3. Compliance with Idaho Code.

All subdividers of land located within the city of Lewiston, or, pursuant to Idaho Code, Section 50-1306, within the area of city impact shall, prior to recording of a plat, submit all plats to the city of Lewiston for approval by its city council in the manner provided by this chapter, if the piece of land is subdivided as defined in section 32-4 of this code. (Ord. No. 4177, § 1, 2-10-97)

ARTICLE II DEFINITIONS

Sec. 32-4. Definitions.

For the purposes of this chapter, certain words, terms, and phrases are defined as follows:

Affected person: One having an interest in real property which may be affected by approval or disapproval of a proposed subdivision or development.

Agricultural purposes: The use of land primarily for the commercial production of plants, crops, animals, or livestock useful to man, including the ancillary activities essential to such production, and the preparation of the products for use.

Architect: An architect licensed to practice in the state of Idaho.

Block: A piece or parcel of land or group of lots.

City engineer: The city engineer of public works of the city of Lewiston being licensed to practice in the state of Idaho.

City master transportation plan: A part of the city comprehensive plan which provides for the development of a system of major streets and highways, including the location and alignment of existing and proposed thoroughfares.

City surveyor: The licensed land surveyor appointed or employed by the city.

Commission: The city of Lewiston planning and zoning commission, as defined in chapter 37 of the Lewiston City Code.

Comprehensive plan: A comprehensive plan, or part thereof, providing for the future growth and improvement of the city of Lewiston and for the general location and coordination of streets and highways, public utilities, schools and recreation areas, public building sites, and other physical development, which shall have been duly adopted by the city council.

Conditional approval: An affirmative action by the council that approval will be forthcoming upon satisfaction of certain specified stipulations.

Construction plans: Plans, profiles, cross-sections, specifications, estimates, reports and other required details for the construction and acceptance of public improvements, prepared by an engineer and/or architect in accordance with the approved preliminary plat and in compliance with existing standards of design and construction approved by the council.

Council: The city council of the city of Lewiston.

Development master plan (DMP): A preliminary master plan for the development of a land area, the platting of which is expected in progressive stages. A DMP, if required, shall assess the feasibility of developing the land area and shall be designed by the subdivider and shall be subject to approval of the subdivision committee.

Direct access: The access which serves as the principal access to the property and determines the street address of the property.

Easement: A grant by the owner of the use of a parcel of land by the public, corporation, or persons for a specified use and purposes and so designated on a plat.

Engineer: A professional engineer licensed to practice in the state of Idaho.

Exception: Any parcel of land which is within the boundaries of the subdivision which is not owned by the subdivider.

Final plat approval: Unconditional approval of the final plat by the council, as evidenced by certifications on the plat by the city attorney, city clerk, and city engineer, constitutes authorization to record the plat.

Irrigation facilities: Includes canals, laterals, ditches, conduits, gates, pumps, and allied equipment necessary for the supply, delivery, and drainage of irrigation water.

Lot: A piece or parcel of land separated from other pieces or parcels by descriptions, as in a subdivision or on a record survey map, or by metes and bounds, for purposes of sale, or separate use.

(1) "Corner lot": A lot abutting on two (2) or more streets, other than an alley, at their intersection or upon two (2) parts of the same street forming an interior angle of less than one hundred thirty-five (135) degrees. The front of a corner lot shall be determined at the time of building permit application.

(2) "Interior lot": A lot having but one side abutting on a street.

(3) "Through (or double front) lot": A lot abutting two (2) parallel or approximately parallel streets or which fronts upon two (2) streets which do not intersect at the boundaries of the lot.

(4) "Reverse frontage lot": A through lot for which the boundary abutting an arterial route or major street is established as the rear lot line.

Lot width: The length of a line at right angles to the axis of the lot at a distance equal to the front setback required for the zone in which the lot is located. The axis of a lot shall be a line joining the midpoints of the front and rear property lines.

Neighborhood plan: A plan designed by the subdivision committee to guide the platting of remaining vacant parcels in a partially built neighborhood so as to make reasonable use of all land, correlate street patterns, and achieve the best possible land use relationships.

Owner: The person or persons holding title by deed to land, or holding title as vendees under land contract, or holding any other title of record.

Pedestrian way: A dedicated public walkway.

Planner: The community development director of the city of Lewiston.

Plat: A map of a subdivision.

(1) "Preliminary plat": A preliminary map, including supporting data, indicating a proposed subdivision development, prepared in accordance with Article VI of this chapter and the Idaho Code.

(2) "Final plat": A map of all or part of a subdivision providing substantial conformance to an approved preliminary plat, prepared in accordance with Article VII of this chapter and Idaho Code, Sections 50-1301 through 50-1329.

(3) "Administrative plat": A plat of ten (10) or fewer lots, all of which are in conformance with the zoning ordinance, all of which have direct access to an existing improved public street and not requiring any major improvement. The construction of curb, gutter and sidewalk and street patchback needed for street widening shall not be considered major improvements.

(4) "Recorded plat": A final plat or administrative plat bearing all of the certificates of approval required in this chapter and duly recorded in the Nez Perce County recorder's office.

Private street or road: A road within a subdivision plat that is not dedicated to the public and not a part of a public roadway system, meeting the design requirements for fire access.

Public improvement standards: A set of regulations setting forth the details, specifications, and instructions to be followed in the planning, design, and construction of required public improvements in the city of Lewiston, formulated by the state department of health and welfare, the North Central District Health Department, the city engineer, and other city departments.

Streets: Any public way or other way which is an existing state, county, or municipal roadway; or a street or roadway shown on a plat heretofore approved pursuant to law or by official action; or a street or roadway, whether public or private; or a plat duly filed and recorded in the county recorder's office. A street includes the land between the right-of-way lines, whether improved or unimproved, and may comprise pavement, shoulders, curbs, gutters, sidewalks, parking areas, and lawns.

(1) "Arterial route": A general term including freeways, expressways, and limited access streets; and interstate, state or county highways having regional continuity.

(2) "Minor arterial": Provides for the general inter-neighborhood traffic circulation of the community, taking priority of movement over most intersecting streets, and minimizing direct access to abutting properties.

(3) "Collector street": Provides for traffic movement within neighborhoods of the city and between major streets and local streets and for direct access to abutting properties. (Also called "secondary street.")

(4) "Local street": Provides for direct access to residential, commercial, industrial, or other abutting land and for local traffic movements and connects to collector and/or major streets. (Also called a "minor street.")

a. "Marginal access street": A minor street parallel and adjacent to an arterial route which provides access to abutting property and intercepts local streets and controls access to an arterial route. (Also called "frontage road.")

b. "Cul-de-sac street": A short local street having one end terminated in a vehicular turnaround.

c. "Dead-end street": A short local street terminating at a property line, but capable of future extension.

(5) "Alley": A public service way used to provide secondary vehicular access to property otherwise abutting upon a street.

(6) "Improved public street": A public street that has been paved with an all weather surface.

Subdivider: A subdivider shall be deemed to be the individual, firm, corporation, partnership, association, syndication, trust, or other legal entity that titles the application and initiates proceedings for the subdivision of land in accordance with the provisions of this chapter. The subdivider need not be the owner of the property as defined by this chapter.

Subdivision: The division of a tract or parcel of land within the city or area of city impact into two (2) or more lots, tracts, or parcels of land; except that:

(1) The sale or exchange of parcels of land to or between adjoining property owners where such sale or exchange does not create additional lots shall not be deemed a subdivision.

(2) The allocation of property by court decree in settling the estate of a decedent or in partitioning land among owners shall not be deemed a subdivision.

(3) The unwilling sale of land as the result of legal condemnation procedures, or the acquisition of street rights-of-way by a public agency in conformance with the comprehensive plan, shall not be deemed a subdivision.

Subdivision committee: A committee established to review subdivision plats.

Surveyor: Professional land surveyor licensed to practice in the state of Idaho.

Tract or tract of land: A parcel of land which appears on the records of the county as a single ownership as of August 23, 1971. Where two (2) or more parcels under the same ownership are contiguous, they shall be regarded for purposes of this chapter as a single tract except when no new lot lines are created for the purpose of sale.

Usable lot area: That portion of a lot usable for or adaptable to the normal uses made of property consistent with the established or proposed zoning classification, excluding any areas which may be considered wetlands, are excessively steep, or are included in certain types of easements.

Utilities: Installations or facilities, underground or overhead, furnishing public utilities including electricity, gas, steam, communications, water, drainage, solid waste disposal, sewage disposal, or flood control. Said utilities may be owned and operated by any person, firm, corporation, municipal department, or board duly authorized by state or municipal regulations. Utility or utilities as used herein may also refer to the operating persons, firms, corporations, departments, or boards.

Wetlands: Those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas. (Ord. No. 4177, § 1, 2-10-97; Ord. No. 4405, § 1, 7-25-05)

ARTICLE III ADMINISTRATION

Sec. 32-5. Subdivision committee.

(a) A subdivision committee is hereby established, to consist of the following members or their duly authorized representatives:

(1) The administrator of public works or appointed alternate(s);

(2) Community development director or appointed alternate(s);

(3) Fire chief or appointed alternate(s);

(4) Superintendents of water, sewer and streets.

(b) The subdivision committee shall examine all plats of proposed subdivisions for compliance with applicable ordinances of the city of Lewiston. The committee shall report its findings and recommendations through the community development director to the commission or council, meeting as often as necessary to report within the time limits hereinafter prescribed. (Ord. No. 4177, § 1, 2-10-97)

Sec. 32-6. Outline of procedures.

(a) The preparation, submittal, review, and approval of all subdivision plats of lands within the jurisdiction of the city of Lewiston shall proceed through the progressive stages, as described in Articles V, VI and VII of this chapter.

(b) The preparation, submittal, review, and approval of all administrative plats shall proceed as described in Article VIII of this chapter. (Ord. No. 4177, § 1, 2-10-97)

Sec. 32-7. Fees.

Fees for the processing of subdivision applications shall be required prior to review of plats. The fee shall be in accordance with the fee schedule adopted by resolution of the city council. (Ord. No. 4177, § 1, 2-10-97; Ord. No. 4506, § 1, 5-12-08)

ARTICLE IV PREAPPLICATION CONFERENCE AND CONCEPT PLAN

Sec. 32-8. Purpose.

The purpose of the preapplication conference and concept planning stage shall be to discuss the proposed subdivision concept, its conformity with the comprehensive plan, its relationship to surrounding development, any site conditions that may require special consideration or treatment, and the requirements of this chapter. (Ord. No. 4177, § 1, 2-10-97)

Sec. 32-9. Preapplication conference.

(a) The preapplication conference stage of subdivision planning comprises an informational period which precedes actual preparation of preliminary plans by the subdivider. During this stage, the subdivider makes known his intentions to the city and is advised of specific public objectives related to the subject tract, and other details regarding platting procedures and requirements.

(b) In carrying out the purposes of the preapplication stage, the subdivider and the city shall be responsible for the following actions:

(1) *Actions by the subdivider.* The subdivider and/or his agents shall meet with the city at the preapplication conference to present a general outline of the proposed development, which shall include, but is not limited to:

a. Sketch plans and ideas regarding land use, street and lot arrangement, and tentative lot sizes.

b. Tentative proposals regarding required public improvements.

c. Other information needed to explain the development.

(2) *Actions by the city.* The city will discuss the proposal with the subdivider and advise him of procedural steps, design and improvement standards, and general plat requirements. Then, depending upon the scope of the proposed development, they will proceed with the following actions:

a. Check existing zoning of the tract and make recommendations if a zone change is necessary or desirable or if other zoning action is necessary. If it is determined that zoning action is required or a permit is required for the subject tract or any part of it, the subdivider shall initiate the necessary rezoning or permit application.

b. Check conformity with the objectives and policies of the comprehensive plan and for conformity to the city's master transportation plan.

c. Inspect the site or otherwise determine its relationship to streets, utility systems, and adjacent land uses, and identify any unusual problems with regard to topography, utilities, flooding, or other conditions.

d. Determine if there is a need for the preparation and review of a development master plan before a preliminary plat can be considered. If the development master plan is required, the subdivider will be advised of this fact, and of the extent to which it should be prepared.

e. Review and discuss with the developer the potential need for special studies, which may include but are not limited to traffic, soil, slope stability, wetlands, foundations or other studies that may be required as a result of site conditions, and the implications of the findings of those studies, if required. The requirement of said special studies shall be determined by the city engineer.

f. Advise the subdivider of the results of these actions, and offer guidance as to any further actions which should be taken. (Ord. No. 4177, § 1, 2-10-97)

ARTICLE V DEVELOPMENT MASTER PLAN

Sec. 32-10. Purpose.

A development master plan may be required by the subdivision committee whenever the tract is sufficiently large as to comprise a neighborhood; the tract initially proposed for platting is only a portion of a larger land area, the development of which is complicated by size, transportation or access, unusual topographic, utility, land use, land ownership, or other conditions. The entire land area need not be under the subdivider's control in this case. (Ord. No. 4177, § 1, 2-10-97)

Sec. 32-11. Contents of plan – Preparation.

The development master plan (DMP) shall be prepared to a scale and accuracy commensurate with its purpose and shall include:

(1) General street pattern with particular attention to collection streets and future circulation throughout the neighborhood and the goals and objectives of the city's master transportation plan.

(2) General location and size of school sites, parks, or other proposed land uses.

(3) Location of shopping centers, multifamily residential, or other proposed land uses.

(4) Proposed improvements for sewage disposal, water supply, fire protection and storm drainage. (Ord. No. 4177, § 1, 2-10-97)

Sec. 32-12. Significance of development master plan approval.

Upon acceptance of general design approach by the subdivision committee, the DMP shall be followed by the preparation of preliminary plat(s). If development is to take place in several parts, the DMP shall be submitted as supporting data for each part. The DMP shall be kept up to date by the subdivider and the committee as modifications take place. (Ord. No. 4177, § 1, 2-10-97)

ARTICLE VI PRELIMINARY PLAT

Sec. 32-13. Purpose.

The purpose of the preliminary plat is to allow for the detailed examination of the proposed subdivision, determine conformity to land use and zoning ordinances and applicable state laws and to determine and apply appropriate development standards in conformance with this code. (Ord. No. 4177, § 1, 2-10-97)

Sec. 32-14. Preliminary plat.

The preliminary plat stage of land subdivision includes detailed subdivision planning, submittal, review, and approval of the preliminary plat. To avoid delay in processing the application, the subdivider shall provide the city with all information described in this article that is essential to determine the character and general acceptability of the proposed development. (Ord. No. 4177, § 1, 2-10-97)

Sec. 32-15. Conformance with zoning requirements.

The subdivision shall be designed to meet the specific requirements for the zoning district within which it is located. In the event that an amendment or variance of zoning is necessary, said action shall be initiated by the property owner or his authorized agent. Processing of the preliminary plat shall not proceed until the subdivision committee has determined that the commission or council has made a favorable decision regarding any proposed zoning change. In any event, any such change required in relation to the preliminary plat shall have been adopted prior to preliminary plat approval. (Ord. No. 4177, § 1, 2-10-97)

Sec. 32-16. Preliminary plat submission.

The following material and information shall be submitted by the subdivider in support of the request for preliminary plat approval. Review of the preliminary plat shall not commence until all required information is submitted.

(1) Three (3) copies of the preliminary plat and required data prepared in accordance with requirements set forth in Articles V, VI and IX of this chapter shall be filed with the community development department at least twenty-five (25) working days prior to the commission meeting at which the subdivider desires to be heard. In addition, the subdivider shall submit one (1) reduced copy of the proposed subdivision plat; said reduced copy shall be clear and readable and shall not exceed eleven (11) inches by seventeen (17) inches in size.

(2) *Reviewing fee.* The subdivider shall, at the time of submitting the preliminary plat, pay to the city a reviewing fee in the amount set forth in section 32-7 of this chapter. The reviewing fee shall also cover the submittal of an amended or revised preliminary plat handled as the same case. If the preliminary plat approval expires before application for final approval, the plat shall be resubmitted for preliminary approval as a new case and the subdivider shall pay the required fee.

(3) The submittal shall be checked by the community development department for completeness and assigned a case number. If incomplete as to those requirements set forth in section 32-20, the submittal shall be rejected and the subdivider notified in writing within five (5) working days. If the specified fee has been paid, scheduling of the case for commission hearing shall be dependent upon adequacy of data presented and completion of processing.

(4) The subdivider shall submit a title report or a commitment for title insurance indicating the nature of the applicant's ownership of the land included in the preliminary plat. (Ord. No. 4177, § 1, 2-10-97)

Sec. 32-17. Preliminary plat review.

(a) The community development department shall distribute copies of the plat and supporting data to the following review offices:

(1) City engineer;
(2) City parks and recreation division;
(3) City water and sewer divisions or the appropriate service provider;
(4) City fire marshal;
(5) City street superintendent;
(6) North Central District Health Department for satisfaction of sanitary restrictions as required by Idaho Code, Section 50-1326;
(7) Superintendent of the appropriate school district;
(8) If the land abuts a state highway, to the Idaho Highway Department; if the land abuts a county road, to the county commissioners;
(9) The city planner;
(10) Public utilities;
(11) State department of health and welfare, division of environment;
(12) Soil and water conservation district.

(b) The reviewing offices shall transmit their recommendations in writing to the community development department which receives and summarizes the recommendations and presents

them to the subdivision committee. The community development department prepares the report and recommendations of the subdivision committee, and forwards them to the commission. (Ord. No. 4177, § 1, 2-10-97)

Sec. 32-18. Preliminary plat approval.

(a) The commission shall review the preliminary plat within forty-five (45) calendar days of the date a full and complete application was received. The commission shall recommend approval, denial or approval with conditions to the city council.

(b) If satisfied that all objectives of this chapter have been met, and that it is in conformance with the comprehensive plan, the council shall approve the preliminary plat, with such conditions as are appropriate. Among the conditions required by council shall be the submission of construction plans and specifications pursuant to section 32-40.

(c) If the council finds the preliminary plat requires major revision, the council may reject the plat stating the reason for the rejection. Said reasons for rejection shall be transmitted in writing by the city clerk to the subdivider within five (5) working days following the rejection of the plat by the council.

(d) If a plat is rejected by the council, the review of a new plat for the same tract or any part thereof, if submitted within ninety (90) calendar days of the date of rejection, shall be considered under the original review fee. Should the plat be submitted to the city more than ninety (90) calendar days after rejection, the subdivider shall follow the aforementioned procedure and again shall be subject to the required fee. (Ord. No. 4177, § 1, 2-10-97)

Sec. 32-19. Significance of preliminary plat approval.

Preliminary plat approval constitutes authorization for the subdivider to proceed with the preparation of the final plat, and with the construction plans and specifications for public improvements. Preliminary plat approval is based upon the following terms:

(1) The basic conditions under which approval of the preliminary plat is granted will not be changed prior to expiration date.

(2) Approval is valid for a period of twelve (12) months from date of council action. Time for completion of improvements required by the preliminary plat may, upon application by the subdivider, and upon good cause showing, be extended for a period of six (6) months by the city council or as provided for in subsection (4). Should a final plat not be submitted to the city within the specified time period, the review process shall recommence as for a new subdivision and the subdivider shall submit to the city a new reviewing fee and, if necessary, a revised plat containing any revisions required by amendments in the city code approved since the date of the original submittal.

(3) Preliminary plat approval, in itself, does not assure final acceptance.

(4) However, if circumstances require, a final plat which includes only a part of the approved preliminary plat may be submitted and processed for council approval during the twelve (12) months time period. Approval of the entire preliminary plat shall remain active as long as final plats are submitted at a minimum of twelve (12) month intervals. (Ord. No. 4177, § 1, 2-10-97)

Sec. 32-20. Information required for preliminary plat submittal.

(a) *Form of presentation.* The information required as part of the preliminary plat submittal shall be shown graphically or by note on plans, or by letter, and may comprise several sheets showing various elements or required data. All mapped data for the same plat, except the vicinity map, shall be drawn at the same scale of one hundred (100) feet to an inch. Whenever practical, the drawing shall measure twenty-two (22) inches by thirty-six (36) inches and should not exceed forty-two (42) inches by sixty (60) inches.

(b) *Identification and descriptive data.*

(1) Proposed name of the subdivision, in accordance with Idaho Code, Section 50-1307, and its location by section, township, and range; referenced to a section corner, quarter-corner, or recorded monument.

(2) Name, address, and phone number of subdivider.

(3) Name, address, and phone number of the person preparing the plat.

(4) Scale, north point, and date of preparation including dates of any subsequent revisions.

(5) Vicinity map clearly showing proposed subdivision in relationship to adjacent subdivisions, arterial routes, major streets, collectors, and other important features.

(c) *Existing conditions data.*

(1) Topography by contours related to USCG survey datum, or other datum approved by the city engineer, shown on the same map as the proposed subdivision layout and showing proposed contours adequate to describe future grading. Contour interval shall be such as to adequately reflect the character and drainage of the land.

(2) Soils stability analysis when required by the city engineer.

(3) Location of water wells, streams, canals, irrigation laterals, private ditches, washes, lakes, wetlands or potential wetlands or other water features; direction of flow; location and extent of areas subject to inundation whether such inundation be frequent, periodic, or occasional.

(4) Location, widths, and names of all platted streets, railroads, utility rights-of-way of public record, public areas, permanent structures to remain including water wells, and municipal corporation lines within or adjacent to the tract.

(5) Names, book, and page numbers of all recorded adjacent subdivisions having common boundaries with the tract.

(6) By note, the existing zoning classifications of the tract.

(7) By note, the acreage of the tract.

(8) Boundaries of the tract to be subdivided shall be fully dimensioned.

(d) *Proposed conditions data.*

(1) Street layout, including location, width and proposed names of public streets, alleys, and easements; connections to adjoining platted tract.

(2) Typical lot dimensions (scaled); dimensions of all corner lots and lots on curvilinear sections of streets; each lot numbered individually; total number of lots.

(3) Location, width, and use of easements.

(4) Designation of all land to be dedicated or reserved for public use within use indicated.

(5) If plat includes land for which multifamily, commercial, or industrial use is proposed, such areas shall be clearly designated together with existing zoning classification and status of zoning change, if any.

(e) *Proposed utility methods.* The subdivider shall address by note the proposed method of utility services including but not limited to:

(1) Sewage disposal.

(2) Water supply.

(3) Storm water disposal: Preliminary calculations and layout of proposed system and locations of outlets, in conformance with the city storm water management plan and subject to approval of the city engineer.

(4) Fire protection: Preliminary evaluation by the fire marshal of available water supply and pressure and required spacing of fire hydrants. (Ord. No. 4177, § 1, 2-10-97)

ARTICLE VII FINAL PLAT

Sec. 32-21. Purpose.

The purpose of the final plat is to consider and approve the necessary maps, plats and documents that demonstrate conformity to the approved preliminary plat and associated conditions of approval in accordance with provisions of this code and Idaho state statutes. (Ord. No. 4177, § 1, 2-10-97)

Sec. 32-22. Final plat.

This stage includes the final design of the subdivision, engineering of public improvements, and submittal of the plat and construction plans by the subdivider. It includes review of the final plat by the appropriate agencies, and submission for final action by the council.

(1) *Zoning.* Zoning of the tract shall regulate the proposed use, and any zoning amendment necessary shall have been adopted by the council prior to submittal of the final plat, and shall be noted thereon.

(2) *Easements.* It shall be the responsibility of the subdivider to provide on the final plat such easements in such location and width as required for utility purposes. Prior to filing the final plat, he shall have submitted the plat to the person(s) authorized to perform plat review for the utility interests. Prior to final plat review by the city engineer, a letter shall have been received from said interested utilities signifying that easements shown on the plat are complete and satisfactory for utility purposes.

(3) *Final plat preparation.* The final plat shall be prepared in accordance with requirements set forth in section 32-26 of these regulations and shall conform closely to the approved preliminary plat. (Ord. No. 4177, § 1, 2-10-97)

Sec. 32-23. Final plat submittal.

The subdivider shall submit the final plat map prepared in conformance with provisions of this chapter and that information required in section 32-26 of this code to the community development department at least twenty-five (25) working days prior to the council meeting at which the subdivider desires to be heard. The community development department, upon receipt of a complete plat submittal, shall record the receipt and date of submittal and forward the submittal to the city engineer who shall then proceed with review action as specified in section 32-24 of this chapter. Should changes or corrections to the plat be found necessary, each resubmittal of the plat shall require and additional twenty-five (25) working days for review. Following the final approval of the plat by the city engineer and city surveyor, the city engineer shall forward the plat to the city council along with his recommendation for action made in writing. (Ord. No. 4177, § 1, 2-10-97)

Sec. 32-24. Final plat review.

(a) The engineer upon receipt of the final plat submittal shall immediately check it for completeness. If incomplete, the date of submittal shall be voided and the submittal shall be returned to the subdivider. If complete, the city engineer shall review drainage and flood control measures and review the plat for substantial conformity to the approved preliminary plat and refer copies of the submittal to the appropriate reviewing offices who will make known their recommendations in writing addressed to the city engineer.

(b) The engineer shall assemble the recommendations of the various reviewing offices, prepare a concise summary of recommendations, and submit said summary together with the reviewer's recommendations to the council.

(c) At the time of submittal of the final plat to the city, the subdivider shall pay a fee as set forth in section 32-7 of this chapter. (Ord. No. 4177, § 1, 2-10-97)

Sec. 32-25. Final plat approval.

(a) If the engineer concludes that the final plat is not in substantial conformity with the preliminary plat, the engineer shall report his findings to the planning and zoning commission. The planning and zoning commission shall then recommend approval or denial of the final plat to the city council. The city council then shall consider the final plat.

(b) If in the opinion of the engineer, the final plat is in substantial compliance with the preliminary plat, the engineer shall recommend approval to the city council. Action by the planning and zoning commission will not be required.

(c) The council or planning and zoning commission shall review and act upon the final plat within twenty-five (25) working days of the date of receipt by the engineer.

(d) Upon approval of the plat by the council, the clerk shall transcribe a certificate of approval upon the plat, first making sure that the other required certifications (see section 32-26(f)) have been duly signed, including letter of agreement between subdivider and serving utilities, that engineering plans have been approved by the engineer, the agreement between city and subdivider as provided in section 32-47(a) has been executed, and that an appropriate guarantee of construction from among those alternatives provided in section 32-48 covering said approved plan improvements has been posted with the engineer. The city shall also record the final plat with the office of the Nez Perce County recorder.

(e) Should the council reject the plat, in whole or in part, it shall advise the subdivider in writing of the reasons for the denial. (Ord. No. 4177, § 1, 2-10-97)

Sec. 32-26. Information required for final plat submittal.

(a) *Method and medium of presentation.*

(1) The subdivider shall provide a record copy of the final plat prepared as described in Idaho Code, Section 50-1304.

(2) Copies of the recorded plat shall be reproduced in the form of blueline or blackline prints on a white background.

(3) The plat shall be drawn to an accurate scale of one hundred (100) feet to the inch, or multiple thereof, unless a different scale is previously approved by the engineer.

(b) *Identification data required.*

(1) A title which includes the name of the subdivision and its location by number of section, township, range, and county. Titles shall comply with Idaho Code, Section 50-1307.

(2) Name, address, and registration number of the seal of the professional engineer or land surveyor, registered in the state of Idaho, preparing the plat.

(3) Scale, north arrow, and date of plat preparation.

(c) *Survey data required.*

(1) Boundaries of the tract to be subdivided which shall close within tolerances prescribed by Idaho Code, showing all bearings and distances determined by an accurate survey in the field. All dimensions shall be expressed in feet and decimals thereof.

(2) Any excepted parcel(s) within the plat boundaries shall show all bearings and distances determined by an accurate survey in the field. All dimensions shall be expressed in feet and decimals thereof.

(3) Location and description, and Idaho State plane coordinates of cardinal points to which all dimensions, angles, bearings, and similar data on the plat shall be referenced; each of two (2) corners of the subdivision traverse shall be tied by course and distance to separate section corners, quarter-section corners, or to existing recorded monuments.

(4) Location of all permanent physical encroachments upon the boundaries of the tract.

(d) *Descriptive data required.*

(1) Name, right-of-way lines, courses, length, width of all existing and proposed public streets, alleys, utility easements, radii, points of tangency, and central angles of all curvilinear streets and alleys, and radii of all rounded street line intersections.

(2) All drainageways shall be shown on the plat. The rights-of-way of all major drainageways, as designated by the city engineer, shall be dedicated to the public.

(3) All easements for rights-of-way provided for public services or utilities and any limitations of the easements. Construction within the easement shall be limited to utilities and wood, wire, or removable section-type fencing.

(4) Location and all dimensions of all lots.

(5) All lots shall be numbered by consecutive numbers throughout the plat. "Exceptions," "tracts," and "private parks" shall be so designated, lettered, or named and clearly dimensioned.

(6) All sites to be dedicated to the public will be clearly indicated, the boundaries and dimensions accurately shown, and the intended uses specified.

(7) Location of all adjoining subdivisions with date, book, and page number of recording noted, or, if unrecorded, so marked.

(8) Any proposed private deed restrictions to be imposed upon the plat or any part or parts thereof pertaining to the intended use of the land shall be typewritten and attached to the plat and to each copy submitted.

(9) Sanitary restrictions required by Idaho Code, Section 50-1326.

(e) *Dedication and acknowledgment.*

(1) Dedication: Statement of dedication of all streets, alleys, crosswalks, drainageways, pedestrian ways, and other easements for public use by the person holding title as vendees under a land contract, and by spouses of said parties. If lands dedicated are mortgaged, the mortgagee shall also sign the plat.

(2) Dedication shall include a written location by section, township, and range of the tract. If the plat contains private streets, public utilities shall have the right to install and maintain utilities in the street right-of-way.

(f) *Required certifications.*

(1) Certificate signed by the owner or owners, containing a correct legal description of the land, together with a statement of their intention to include the same in the plat, and making dedication of all streets and alleys shown on the plat. This certificate shall be notarized.

(2) Certificate signed by an Idaho-licensed engineer or surveyor that the plat is correct and accurate, and that the monuments described in it have been located as described. This certificate shall include the seal of the engineer or surveyor.

(3) Certificate and seal of the city engineer and of the city or county surveyor that the plat complies with the requirements of Title 50, Chapter 13, Idaho Code, and with this chapter.

(4) Certificate signed by the city clerk that the city council has approved and accepted the plat.

(5) Certificate, signed by the owner or owners, on the provision of water service to the lots within the subdivision, as provided by Idaho Code, Section 50-1334.

(6) Certificate of satisfaction of the sanitary restrictions, to be endorsed by the county recorder at the time of filing, or subsequent thereto, when the sanitary restrictions shall have been satisfied as required by Idaho Code, Section 50-1326.

(7) Certificate of recording, to be signed by the county recorder at the time of filing. (Ord. No. 4177, § 1, 2-10-97; Ord. No. 4475, § 1, 7-9-07)

ARTICLE VIII ADMINISTRATIVE PLATS

Sec. 32-27. Purpose.

The administrative plat process is intended to provide a streamlined means of subdividing property in those instances in which no public improvements are required, all property fronts upon an improved, publicly dedicated street and ten (10) or fewer lots are being created in conformance with the zoning ordinance. Administrative plats may not contain more than one flag lot as defined in Lewiston City Code section 37-124. (Ord. No. 4177, § 1, 2-10-97)

Sec. 32-28. Administrative plat procedure.

When the proposed land division includes ten (10) or fewer lots, all of which have direct access to a pre-existing improved public street, and not requiring any major improvements as provided in the definition of an administrative plat, the administrative plat procedure may be used. The procedure shall be as follows:

(1) Preapplication conference as required by section 32-9 of this chapter.

(2) The subdivider shall submit to the city a plat map prepared in conformance with provisions of this chapter and that information required in section 32-29 of this code to the community development department at least twenty-five (25) working days prior to the council meeting at which the subdivider desires to be heard. The community development department, upon receipt of a complete plat submittal, shall record the receipt and date of submittal and forward the submittal to the city engineer who shall then proceed with review. Should changes or corrections to the plat be found necessary, each resubmittal of the plat

shall require an additional twenty-five (25) working days for review. Following the final approval of the plat by the city engineer and city surveyor, the city engineer shall forward the plat to the community development department with his recommendation for council action made in writing. The community development department shall forward the completed plat, along with the city engineer's recommendation to the city council for final action.

(3) At the time of submittal to the city, the subdivider shall pay a fee in the amount set forth in section 32-7 of this chapter. (Ord. No. 4177, § 1, 2-10-97)

Sec. 32-29. Administrative plat submittal.

(a) Administrative plat application and plat drawings:

(1) The plat shall be eighteen (18) inches by twenty-seven (27) inches in size and shall comply with the other requirements of the Idaho Code, Section 50-1304.

(2) The scale of the drawing may be either one (1) inch to fifty (50) feet or one (1) inch to one hundred (100) feet, as best suits the particular case.

(3) The information required by subsections (b)(2) through (b)(4) and (b)(6) of this section shall be included on the plat.

(4) The subdivider shall submit the reproducible plat and three (3) copies of the plat.

(b) In addition to the required subdivision plat map, the applicant shall submit the following material:

(1) Request for administrative plat review and approval.

(2) A statement from the state department of health and welfare that the volume and quality of the proposed water supply is adequate and satisfactory.

(3) Letters from the serving utility companies as required by section 32-45(j) of this chapter.

(4) Evidence from the city fire marshal that adequate fire protection is available within the distances required by the Uniform Fire Code and with adequate pressure for the uses intended on the property.

(5) Acknowledgment that curbs, gutters and sidewalks are required pursuant to chapter 31.

(6) The subdivider shall submit a title report or a commitment for title insurance indicating the nature of applicant's ownership of the land included in the administrative plat.

(c) For administrative plats that are located on existing public rights-of-way of less than fifty (50) feet in width, the subdivider shall be required to dedicate an additional five (5) feet along that existing right-of-way to the city. (Ord. No. 4177, § 1, 2-10-97)

Sec. 32-30. Administrative plat approval and filing.

(a) The council, upon receipt of the plat and written recommendation of the city engineer and community development department, shall proceed as specified in section 32-25 of this chapter.

(b) The city shall file the approved administrative plat with the county recorder. (Ord. No. 4177, § 1, 2-10-97)

ARTICLE IX SUBDIVISION DESIGN PRINCIPLES AND STANDARDS

Sec. 32-31. General.

(a) Every subdivision shall conform to the requirements and objectives of the city comprehensive plan or any parts thereof, as adopted by the commission and the city council, to the zoning ordinance, to other ordinances and regulations of the city, and to the Idaho statutes.

(b) The subdivision shall include the entire tract of land unless an approved preliminary plat, planned unit development or approved development master plan shows development in phases. When development is planned in phases, a schedule will be submitted with the preliminary plat showing the anticipated completion time for each stage.

(c) Where the tract to be subdivided contains all or any part of the site of a proposed park, school, flood control facility, or other public area as shown by the city's comprehensive plan or future acquisitions map the city shall comply with the provisions of Idaho Code, Section 37-6517.

(d) Land which is within a known floodplain, land which cannot be properly drained, or other land which, in the opinion of the subdivision committee, is unsuitable for residential use shall not be subdivided; except that the subdivision of such land upon receipt of evidence from the North Central District Health Department and/or city engineer that the construction of specific improvements can be expected to render the land suitable; thereafter, construction upon such land shall be prohibited until the required improvements have been planned and approval gained from the Idaho Department of Water Resources and the Army Corps of Engineers and construction guaranteed in conformance with the provisions of Article XI of this chapter.

(e) Where the tract to be subdivided is located in whole or in part in terrain having an average slope exceeding ten (10) percent, design and development shall conform to the findings of a suitability study as required by the city engineer. (Ord. No. 4177, § 1, 2-10-97)

Sec. 32-32. Street location and arrangement.

(a) Whenever a tract to be subdivided embraces any part of a street designated in the adopted city master transportation plan and/or bike and pedestrian way designated in the adopted comprehensive plan such street, bike way or pedestrian way shall be platted in conformance therewith.

(b) Street layout shall provide for the continuation of such street as the subdivision committee may designate.

(c) Whenever a tract to be subdivided is located within an area for which a neighborhood plan has been approved by the commission, the street arrangement shall conform substantially to said plan.

(d) Certain proposed streets and utilities, as designated by the subdivision committee, shall be extended to the tract boundary to provide future connections with adjoining unplatted land.

(e) Local streets shall be so arranged as to discourage their use by through traffic.

(f) If a proposed subdivision abuts or contains an existing or proposed arterial route, the subdivision committee may recommend, and the commission may require, marginal access streets or reverse frontage with access control along the arterial route, or such other treatment as may be justified for protection of abutting properties from the nuisance and hazard of high volume traffic, and to preserve the traffic function of the arterial route.

(g) If a subdivision abuts or contains the right-of-way of a railroad, a limited access road, an irrigation canal, drainage facilities or abuts a commercial or industrial land use, the subdivision committee may recommend location of a street approximately parallel to and on each side of such right-of-way at a distance suitable for appropriate use of the intervening land. Such distance shall be determined with due regard for approach grades, drainage, bridges, or future grade separations.

(h) Streets shall be so arranged in relation to existing topography as to be in conformance with city standards.

(i) Either alleys or utility easements along rear lot lines may be required. The subdivision committee shall decide which is required in individual cases. Its decision shall be made in conference with the subdivider, and shall be based on all relevant circumstances such as topographic traits, lot sizes, and continuity of existing alleys and easements.

(j) Half streets within the subdivision boundaries shall be discouraged, except where essential to provide right-of-way, to complete a street pattern already begun, or to insure reasonable development of a number of adjoining parcels. Where there exists a platted half street abutting the tract to be subdivided and said half street furnishes the sole access to residential lots, the remaining half shall be platted within the tract. Where the half street has had no improvement or construction, the subdivision committee may recommend that the subdivider provide a full right-of-way to serve his development. (Ord. No. 4177, § 1, 2-10-97)

Sec. 32-33. Street design.

Street design shall be in based upon the classification of the street and shall be in conformance with adopted city standards. (Ord. No. 4177, § 1, 2-10-97)

Sec. 32-34. Block design.

(a) The desirable maximum length of block measured along the center line of the street and between intersecting street center lines shall be nine hundred (900) feet; except that in developments with lot areas averaging one-half (1/2) acre or more, or where extreme topographic conditions warrant, the maximum may be exceeded by four hundred twenty (420) feet.

(b) Maximum length of cul-de-sac streets shall be six hundred sixty (660) feet measured from the intersection of right-of-way lines to the extreme depth of the turning circle along the street center line. An exception may be made where topography or property ownership justifies, but shall not be made merely because the tract has restrictive boundary dimensions, wherein provision should be made for extension of street pattern to the adjoining unplatted parcel and a temporary turnaround installed.

(c) *Bicycle and pedestrian ways.* Bicycle and pedestrian ways with a right-of-way width as recommended by the city engineer may be required by the commission for circulation, or access to schools, playgrounds, shopping centers, transportation, and other community facilities. Pedestrian ways may be used for utility installation purposes. (Ord. No. 4177, § 1, 2-10-97)

Sec. 32-35. Lot planning.

(a)(1) Lot width, depth, and area shall comply with the minimum requirements of the zoning ordinance and shall be appropriate for the location and character of development proposed, and for the type and extent of street and utility improvements being installed. Side lot lines shall be substantially at right angles or radial to street lines, except where other treatment may be justified in the opinion of the subdivision committee.

(2) Where steep topography, unusual soil conditions, or drainage problems exist or prevail, the commission may recommend special lot width, depth, and area requirements of the particular zoning district.

(b) Proposed streets shall be arranged in close relation to existing topography and shall conform to adopted city standards. Where steep topography prevails, the design shall conform to the findings of any special study required by the city engineer.

(c) Single-family residential lots extending through the block and having frontage on two (2) parallel streets shall not be permitted; reverse frontage shall be prohibited except where expressly permitted in accordance with section 32-32(f) of this chapter or where justified in the opinion of the subdivision committee. (Ord. No. 4177, § 1, 2-10-97)

Sec. 32-36. Easement planning.

Easements shall be provided for all utilities and shall be in conformance with the standards of the utility providing service.

(1) Easements for utilities shall be provided as follows:

a. Where alleys are provided: Four (4) feet for aerial overhead on each side of alley shall be provided by dedication but need not be delineated on plat.

b. Along side lot lines: Five (5) feet on each side of lot lines for distribution facilities and one foot on each side of lot lines for street lighting as may be designated.

(2) For lots facing on curvilinear streets, utility easements or alley may consist of a series of straight lines with points of deflection not less than one hundred twenty (120) feet apart. Points of deflection should always occur at the junction of side and rear lot lines on the side of the exterior angle. Curvilinear easements or alleys may be provided, providing that the minimum radius for the alley or easement shall not be less than eight hundred (800) feet.

(3) Where a stream or surface water drainage course abuts or crosses the tract, dedication of a public drainage easement of a width sufficient to permit widening, deepening, relocating, or protecting said watercourse shall be required.

(4) Land within a public street or drainage easement or land within a utility easement for major power transmission (tower) lines or pipelines shall not be considered a part of the minimum lot area except where lots exceed one-half (1/2) acre in area. This shall not be construed as applicable to land involved in utility easements for distribution of service purposes. (Ord. No. 4177, § 1, 2-10-97)

Sec. 32-37. Street naming.

Subdivider shall propose the street names, subject to approval by the city council, at the preliminary plat stage. Street names shall conform to section 31-14 of this code. (Ord. No. 4177, § 1, 2-10-97)

ARTICLE X STREET AND UTILITY IMPROVEMENT REQUIREMENTS

Sec. 32-38. Purpose.

The purpose of the article is to establish in outline the minimum acceptable standards for improvement of public streets and utilities, to define the responsibility of the subdivider in the planning, construction, and financing of public improvements, and to establish procedures for review and approval of construction plans. (Ord. No. 4177, § 1, 2-10-97)

Sec. 32-39. Developer's responsibility.

All improvements required as a condition of preliminary plat approval shall be the responsibility of the subdivider. (Ord. No. 4177, § 1, 2-10-97)

Sec. 32-40. Construction plans and specifications.

(a) The subdivider shall submit to the city engineer construction plans and specifications pursuant to the approved preliminary plat as required by Articles X and XI for his approval. Said construction plans shall be prepared by an engineer licensed to practice in the state of Idaho.

(b) In the event the subdivider wishes to file the final plat prior to the construction of public improvements, the subdivider shall enter into a public improvement agreement with the city for the construction of the public improvements. The council's approval of the public improvement agreement shall constitute approval of the construction plans and specifications.

(c) In the event the subdivider wishes to complete the public improvements prior to submitting the final plat for approval, the subdivider shall submit the necessary construction plans and specifications to the city engineer for review and approval prior to commencing any construction. Upon completion of said public improvements in conformance with the approved plans, the subdivider shall submit the "as built drawings" of the improvements along with the final plat map for review and action by the city. In this case, no public improvement agreement is necessary save for certification that the subdivider shall provide the city with evidence of compliance with the one year warranty period as required in section 32-42, Warranty of Improvements. (Ord. No. 4177, § 1, 2-10-97)

Sec. 32-41. As built drawings.

Upon completion of the construction and prior to the acceptance by the city of the required public improvements, the developer shall submit to the city engineer a set of "as built drawings" which accurately depict the grade, alignment size and other pertinent features of the installation as actually constructed. Said "as built drawings" shall be stamped by an engineer licensed to practice in the state of Idaho who shall certify that the drawings accurately depict the installation as actually constructed. The city of Lewiston shall not accept

the improvements for public maintenance or ownership without said "as built drawings." (Ord. No. 4177, § 1, 2-10-97)

Sec. 32-42. Warranty of improvements.

Upon completion of the required public improvements and prior to the acceptance of said improvements by the city, the developer shall provide to the city as written warranty that the improvements shall perform as designed for a period of one (1) year. Any flaw or defect found or encountered within the year warranty period shall be the financial responsibility of the developer who shall promptly repair said flaw or defect to the satisfaction of the city and shall provide an additional warranty period for the repair as specified by the city engineer, said additional warranty period not to exceed one (1) year in duration. (Ord. No. 4177, § 1, 2-10-97)

Sec. 32-43. Grading and erosion control during construction.

Construction grading and erosion control during construction shall conform to city standards as prepared by the city engineer and adopted by the city council. (Ord. No. 4177, § 1, 2-10-97)

Sec. 32-44. Construction and inspection.

(a) Prior to the construction or installation of any required public improvements for water supply or sewerage systems, for any site grading, construction of storm water detention systems or parking areas, the developer shall apply for and receive the appropriate permits from the city of Lewiston for said improvements.

(b) All relocation, tiling, and reconstruction of irrigation facilities shall be constructed to standards of the owning utility and the city engineer.

(c) All improvements in the public right-of-way shall be constructed under the inspection and approval of the city department having jurisdiction.

(d) All underground utilities to be installed in streets shall be constructed prior to the surfacing of such streets. Service stubs to platted lots within the subdivision shall be placed to such length as not to necessitate disturbance of street improvements when service connections are made. If connected to a city-owned system, application and fee shall be the responsibility of the subdivider in accord with city requirements. (Ord. No. 4177, § 1, 2-10-97)

Sec. 32-45. Required improvements.

The subdivider shall design and construct all improvements in conformance with adopted city standards and codes. Should unique conditions exist such that these standards cannot reasonably be met, the subdivider may petition the council for amendments to the specific standard. Said request for amendment shall be accompanied by an engineering report which identifies the standard proposed and the reasons justifying such request.

The subdivider is responsible for the design and installation of the following improvements:

(a) *Streets and alleys.* All streets and alleys within the subdivision shall be graded and surfaced to cross-sections, grades and standards approved by the city engineer. Where there are existing streets adjacent to the subdivision, subdivision streets shall be improved, and, if necessary, feathered to the center of such existing streets. Dead-end streets serving more than four (4) lots shall be provided a graded and surfaced temporary turning circle.

A traffic report may be required to document the traffic impacts of the subdivision; the subdivider shall be responsible for the installation of both off-site and on-site improvements recommended in the traffic report.

(b) *Curbs.* Portland cement concrete curb and gutter or roll curb, as designated by the city engineer, shall be installed in accordance with approved city standards.

(c) *Sidewalks.* Portland cement concrete sidewalks shall be required on all streets in all zones. They shall be constructed to a width, line, and grade approved by the city engineer in accordance with approved city standards. Where unique topographical characteristics exist

and the installation of sidewalks is not practical, the commission may recommend that certain portions of sidewalks within the subdivision be waived.

(d) *Pedestrian and bicycle ways.* Pedestrian and bicycle ways shall be constructed to a line and grade approved by the city engineer. Paving, fencing, and/or landscaping may be required by the commission as recommended by the subdivision committee. Appropriate means shall be provided to prevent the use of the pedestrian ways as thoroughfares for bicycles and motorcycles.

(e) *Storm drainage.* Proper and adequate provision shall be made for disposal of storm waters; this shall apply equally to grading of private properties and to public streets. Existing watercourses shall be maintained and dedicated as drainage ways. The type, extents, location, and capacity of drainage facilities shall be determined for the individual subdivision by the engineer for approval by the city engineer and shall be constructed in accordance with approved city standards.

(f) *Sanitary sewage disposal.* Sewage disposal facilities shall be installed to serve each lot and shall be subject to the following standards and approvals:

(1) Individual systems may be constructed only in areas not reasonably accessible to a public sewer system, and then, only when the following conditions are met, to the satisfaction of the state department of health and welfare and subject to the approval of the pubic works administrator:

a. Soil absorptivity is adequate for drainfields.

b. Construction complies with approved standards for sewerage systems.

c. Location of septic tanks and seepage pits or leach lines or disposal beds in relation to property lines, buildings, water supply wells and water lines are acceptable to the department. Location shall be such that efficient and economical connection can be made to a future public sewer.

d. Lots of one (1) acre and larger.

(2) Public sanitary sewers shall be installed in areas which are reasonably accessible to an existing sewer system and shall be constructed to plans, profiles, and specifications approved by the state department of health and welfare and city departments having jurisdiction.

(3) In areas where public sanitary sewers are not reasonably accessible, but where the city, or independent sewer district having jurisdiction, agrees to provide temporary disposal of sewage, or where an engineering design for a sewer system for the area in which the subdivision is located has been adopted by the city, the subdivider shall plan and construct sewers within and for the subdivision for connection with a future public system.

(g) *Water supply.* Each lot shall be supplied with potable water in sufficient volume and pressure for domestic use and adequate water, in pressure and volume, for fire protection, in accordance with city standards.

(h) *Monuments.* Permanent monuments shall be installed in accordance with current city standards at all corners, angle points, points of curve, and at all intersections. After all improvements have been installed, an Idaho registered land surveyor shall check the location of monuments and certify their accuracy and conformance to Idaho Code, Section 50-1303.

(i) *Lot corners.* Iron pipe or pins shall be set at all corners, angle points, and points of curve for each lot within the subdivision prior to the recording of the plat in conformance with Idaho Code, Section 50-1303.

(j) *Utilities.*

(1) The subdivider shall be responsible for the requirements of this section and shall make the necessary arrangements with each of the serving utility companies involved for the installation of underground utilities. Letters from each of the serving utility companies indicating that such arrangements have been made shall be submitted to the city engineer at the time the final plat is submitted for approval.

(2) New utility lines, including, but not limited to, electric, communication, and television transmission lines, shall be installed underground in accordance with the standards of the current edition of the National Electric Safety Code. When facilities are installed in the public right-of-way, the location shall be approved by the city engineer.

(3) When overhead utility lines exist within the property being platted, said existing lines shall be removed and replaced by new underground installations.

(4) When overhead utility lines exist on the periphery of the property being platted, said existing lines and any additions or improvements needed to increase capacity or improve service reliability may remain overhead. New service drops from said overhead lines into the platted area shall be placed underground.

(5) When, as a result of the subdivision development, it is necessary to relocate, renew, or expand existing facilities within the platted area, the subdivider shall arrange with the serving utility for the installations to be placed underground.

(6) The subdivider shall arrange with the serving utility for, and be responsible for the cost of, underground service lines to approved street light locations a specified in subsection (k) of this section.

(7) When, due to subsurface soil conditions, rock, and/or other special conditions, it is determined by the city engineer that it is impractical to construct facilities underground, the planning and zoning commission may recommend approval of the overhead installation of facilities.

(8) Those electrical transmission lines of greater than three thousand (3,000) kva (kilovolt-amperes), as rated by the American Standards Association, are excluded from the requirements of this section.

(k) *Street lights.*

(1) In all subdivisions or commercial or industrial developments, street lights and their required electrical service lines shall be installed as directed by the public works administrator. The street light type, size and locations shall be indicated on the approved construction plans and specifications. All fixtures, poles, conduit and other facilities shall meet the specifications and standards of the utility providing service.

(2) If required, the developer will reimburse the city for all installation costs and monthly street light service fees in accordance with the current utility provider fee schedule and the subdivision improvement agreement, until such time as the subdivision or development is approved and accepted by the city council.

(3) Once the subdivision or development has been approved and accepted by the city council, the monthly street light service cost will be borne by the city. (Ord. No. 4177, § 1, 2-10-97)

Sec. 32-46. Review fee and approval of construction plans.

A fee for review of the construction plans shall be paid to the city prior to the time review of the plans is conducted by city personnel. The review fee shall be in the amount set forth in section 32-7 of this chapter. (Ord. No. 4177, § 1, 2-10-97)

ARTICLE XI GUARANTEE OF CONSTRUCTION

Sec. 32-47. Public improvement agreement.

(a) Agreement between city and subdivider. Prior to the approval by the city council of the final plat, the subdivider shall execute an agreement between himself and the city which shall be reviewed and approved by the city attorney and shall address the following points:

(1) Planned increments of improvements: The subdivision improvements may be constructed in practical increments of lots, as specified by the subdivider, subject to provisions for satisfactory drainage, traffic movements, and other services as determined by the city engineer.

(2) Planned construction schedule: The improvements, including those specified in section 32-45(j) of this chapter, shall be completed within an agreed upon time period for each increment, provided that an extension of time may be granted under such conditions as may be specified in the agreement.

(3) Adherence to approved plans and city construction standards: The improvements, except for those specified in section 32-45(j) of this chapter, shall be completed in accordance with the plans approved by the city engineer.

(4) Abandoned or uncompleted improvements: Any work abandoned or not completed by the subdivider may be completed by the city, and the city shall recover the costs thereof from the subdivider or his surety.

(5) Inspection of completed work: Construction of all improvements within streets and easements, except those utility facilities specified in section 32-45(j) of this chapter, shall be subject to inspection by the city engineer. A fee may be charged for this inspection. (Ord. No. 4177, § 1, 2-10-97)

Sec. 32-48. Financial guarantee of construction.

(a) To reasonably insure construction of the required improvements, as set forth in Chapter 32, Article IX of this code, except for those utility facilities specified in section 32-45(j) of this chapter, the subdivider shall post with the city prior to the recording of the final plat, one or a combination of the following, which shall be subject to review and approval of the city attorney:

(1) A performance and completion bond executed by a surety company authorized to do business in the state of Idaho;

(2) Cash; or

(3) An appropriate agreement between the applicable title insurance and trust company or a city-approved financial institution and the city of Lewiston committing the amount referred to in subsection (b) of this section for installing said improvements.

(b) For each subdivision increment, the total amount posted by methods (1), (2), and/or (3) above shall be equal to one hundred thirty-five (135) percent of the entire estimated costs of installing the said improvements, the engineering and inspection costs for that increment, and the cost of replacement or repair of any existing streets or improvements damaged by the subdivider in the course or development of the subdivision, except for those utility facilities specified in section 32-45(j) of this chapter. All public improvements for which a financial security has been provided pursuant to this section shall be constructed within one (1) year after the city council approval of the subdivision improvement agreement. In the event the improvements are not constructed by the subdivider within one (1) year as herein provided, the city shall have the authority to execute on the financial security to construct the public improvements.

(c) There shall be no lots released for sale from the indicated increment of lots until either the bond, cash, or agreement referred to above has been posted with and accepted by the city clerk and a written statement issued by the city clerk to the title company within five (5) working days of receiving the agreement that the requirements of subsection (b) of this section have been met.

(1) No construction of residential units shall be permitted until all required public improvements have been accepted by the city and/or other serving utility and the approved plat has been filed by the city in the courthouse. (Ord. No. 4177, § 1, 2-10-97; Ord. No. 4518, § 1, 11-24-08)

ARTICLE XII MODIFICATION

Sec. 32-49. Modifications generally.

(a) Where there exist extraordinary conditions of topography, land ownership, adjacent development, or other circumstances not provided for in these regulations, and where it can be shown that the public interest would be best served by such action, the council may modify the application of these regulations in a particular case in such a manner and to such an extent as it may deem appropriate for public health, welfare, or safety.

(b) When modification of these regulations, as provided for in subsection (a), is considered necessary, the subdivider or the subdivision committee shall make application to the planning and zoning commission specifying the desired modifications and the reasons therefor. The

commission shall consider the application and justification and make a recommendation thereon to the council, who may approve, approve in part, or disapprove the request.

(c) In modifying the standards or requirements of these provisions as outlined above, the council may make such additional requirements as appear necessary, in its judgment, to secure substantially the objectives of the standards or requirements so modified. (Ord. No. 4177, § 1, 2-10-97)

ARTICLE XIII PROHIBITION AGAINST CIRCUMVENTION OF CHAPTER

Sec. 32-50. Prohibition against circumvention of chapter generally.

No person, firm, corporation, or other legal entity shall, for the purpose of circumventing any of the provisions of this chapter, hereafter sell, or offer for sale any lot, piece, or parcel of land which is within a subdivision as defined in section 32-4 of this chapter without having first recorded a plat thereof in accordance with the provisions of this chapter. (Ord. No. 4177, § 1, 2-10-97)

ARTICLE XIV VIOLATIONS, PENALTIES, AND REMEDIES

Sec. 32-51. Violations, penalties and remedies generally.

(a) Any person or any member or officer of any firm, corporation, or other legal entity who violates any provision of this chapter shall be guilty of a misdemeanor, and, upon conviction thereof, may be punished by a fine of not more than three hundred dollars ($300.00) or by imprisonment for not more than thirty (30) days, or by both such fine and imprisonment. Each day that a violation is permitted to exist shall constitute a separate offense. The imposition of any sentence shall not exempt the offender from compliance with the requirements of these regulations.

(b) The violation of any provision of this chapter is hereby declared to be a public nuisance. In addition to any other remedy, either criminal or civil, provided by this chapter or by the laws of the state of Idaho, any condition existing in violation of any provision of this chapter may be abated by action in law or equity before any court of competent jurisdiction. (Ord. No. 4177, § 1, 2-10-97)

ARTICLE XV VALIDITY OF THE CHAPTER

Sec. 32-52. Validity of the chapter.

Severability. If any provision of this chapter is held invalid, such invalidity shall not affect any other provision which can be given effect without the invalid provision, and, to this end, the provisions of this chapter are declared to be severable. (Ord. No. 4177, § 1, 2-10-97)

Sec. 32-53. Effective date.

This chapter shall take effect and be in force from and after its passage, approval, and publication. (Ord. No. 4177, § 1, 2-10-97)

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[1] **Editor's note** – Ord. 4177, § 1, adopted 2-10-97, extensively renumbered this chapter. As a result, the following ordinances are still codified in this chapter but have been removed from the history notes: Ord. No. 3430, §§ 100 – 900, adopted Mar. 20, 1978; Ord. No. 3472, §§ 1, 2, adopted Nov. 6, 1978; Ord. No. 3474, §§ 1 – 5, adopted Nov. 6, 1978; Ord. No. 3555, § 1, adopted Dec. 8, 1980; Ord. No. 3736, § 1, adopted May 7, 1984; Ord. No. 3745, §§ 1– 12, adopted Feb. 19, 1985; Ord. No. 3772, § 1, adopted May 20, 1985; Ord. No. 3785, §§ 1 – 3, adopted July 15, 1985; Ord. No. 3980, § 1, adopted Sept. 10, 1990; Ord. No. 4057, §§ 1 – 4, adopted Dec. 7, 1992; Ord. No. 4070, § 1, adopted Apr. 19, 1993; and Ord. No. 4132, § 1, adopted June 26, 1995.**Cross references** – Buildings and building regulations, Ch. 10;

electricity, Ch. 14; fire protection and prevention, Ch. 15; flood insurance, Ch. 16; garbage, rubbish and weeds, Ch. 17; gas, Ch. 18; manufactured homes and tourist facilities, Ch. 23; oil burning equipment, Ch. 25; parks and recreation, Ch. 26; plumbing, Ch. 27; poles and wires, Ch. 28; signs, Ch. 30; public right-of-way, Ch. 31; swimming pools, Ch. 33; traffic, Ch. 35; water and sewers, Ch. 36; zoning, Ch. 37.**State law reference** – Plats and vacations, Idaho Code, § 50-1301 et seq.

EXHIBIT 3

FOURTH AFFIDAVIT OF RONALD J. LANDECK IN SUPPORT OF PLAINTIFF'S MOTION TO RECONSIDER MEMORANDUM OPINION AND ORDER ON SECOND MOTION FOR SUMMARY JUDGMENT

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

JOHN G. BLOCK, a single man,

Plaintiff,

vs

JACK J. STREIBICK, a single man, JACK STREIBICK, as Personal Representative of the Estate of Maureen F. Streibick, deceased, CITY OF LEWISTON, a municipal corporation of the State of Idaho, and its employee, LOWELL J. CUTSHAW, City of Lewiston Engineer, and DOES 1-20,

Defendants.

Case No. CV 09-02219

Taken at 1134 F Street
Lewiston, Idaho
Tuesday, October 12, 2010 - 1:05 p.m.

D E P O S I T I O N

OF

CHRIS DAVIES

Lewiston?
A. I don't know that.
Q. If, if it were true that Exhibit 125 is, in fact, a part of a subdivision file and was placed in that file by a former city engineer, whom I think name appears there, Tim Richard, city engineer, would you expect that that information would be helpful in the process of subdividing that particular lot at issue?
MR. ADAMS: Objection, form.
A. I can't answer that question.
Q. (BY MR. LANDECK) You don't think that -- you can't answer that that information would be helpful in a subdivision process?
A. No, I can't.
MR. ADAMS: Objection.
Q. (BY MR. LANDECK) Why can't you?
A. Because it depends on a lot of things that are going on.
Q. Okay. Would it depend on whether or not that problem got fixed?
A. No.
Q. Would it depend on whether or not that issue was studied adequately so it was understood why there was a landslide that occurred there?
A. No.

Q. What would it depend on?
A. I think, in my opinion, it depends on where this is in relationship to other developments. It could be thirty years later. I don't know. I can't go back forty years and look at what's going on. I mean, that -- because of staff time and everything else that we do, we're limited to what we can do.
Q. What if it was six years before a subdivision was approved?
A. I couldn't answer that. For me, if it was myself, no.
Q. It wouldn't be, it wouldn't be indicative of information that you would want to be considered in a subdivision --
A. If I --
Q. -- process?
A. -- knew about it, yes. But if I didn't, how am I supposed to know to go back.
Q. So if you knew about it at the time, that's what I'm asking, at the time a subdivision application was made for this site, wouldn't this information have been helpful to an understanding of, of how that site should be developed?
A. It's possible.
Q. In fact, if it was possible, you'd probably be

looking at other factors at that site, too, would you not, including things like the grade of the slope?
MR. ADAMS: Objection, form.
A. It's possible.
Q. (BY MR. LANDECK) And you'd probably be looking at other issues at that site, including things like existing drainage improvements?
MR. ADAMS: Same objection.
A. I guess, I'm sorry, I wouldn't be looking at them.
Q. (BY MR. LANDECK) Would the City of Lewiston in its subdivision review process be well advised to be looking at them in order to better understand the potential slope stability questions at that site?
MR. ADAMS: Same objection.
A. No.
Q. (BY MR. LANDECK) You don't think so?
A. No.
Q. So, they should ignore it then?
A. No.
Q. I mean, it's not important, is that what you're saying?
A. No.
MR. ADAMS: Object to form.
Q. (BY MR. LANDECK) Well, what are you -- I don't

understand what you're saying.
A. I'm answering your question.
Q. What is the importance of that information in a subdivision review process, timely -- let's say a six-year sequence from the time of the occurrence that is reported in that document to the application that's made to subdivide property for residential use?
MR. ADAMS: Objection, form.
A. I would, if I knew about this document or a document like it, I would pass it on to a potential developer.
Q. (BY MR. LANDECK) Okay. And in the -- I think in the subdivision review process, there is a portion of that process where the City is to review and discuss with the developer the need, the potential need for special studies, and I'm reading from the Lewiston code, which is section 32-9(E). The need for special studies, which may include but are not limited to slope stability. Wouldn't you say that that information would be the type of information that this code section states should be discussed between the City and the developer?
A. Yes.
Q. Has anyone explained to you why that document did not get disclosed to the developer?
A. No.

Q. Have you asked anyone on your staff to explain to you why that document did not get disclosed to the developer?
A. No.
Q. Do you think it's not important that you know why that did not happen?
MR. ADAMS: Objection, form.
A. It wasn't an issue for me.
Q. (BY MR. LANDECK) Wouldn't it be an issue if you felt something like this could occur again?
MR. ADAMS: I'm going to object as to possible remedial measures.
MR. DAVIES: I'm sorry, could you repeat the question?
Q. (BY MR. LANDECK) Well, just in general terms, for the City's sake and the developer's sake, any developer's sake, wouldn't it be important to try to rectify a situation like this, where an important bit of information was not passed on to a, a developer?
MR. ADAMS: Objection, form, foundation, remedial measures.
A. Generally speaking, I would say that if we know information, we should tell people about it. That's our job.
Q. (BY MR. LANDECK) I guess what I'm asking about

Q. Oversee "it", meaning grading and filling by developers?
A. With respect to public right of way.
Q. And not with respect to grading and filling on private property?
A. No.
Q. Are you aware of the decisions that are prescribed, that the Lewiston City Code prescribes be made by the city engineer as to whether or not a subdivision review will be by administrative plat or full plat?
A. No.
Q. If the city engineer, in fact, is responsible for that, do you -- would Mr. Stubbers be the person to ask about that?
A. Yes.
Q. Are you aware of the Lewiston City Code provision that allows the engineer, city engineer to make decisions as to whether or not special studies are done for slope stability when slopes succeed ten percent in grade?
A. No.
Q. Do you oversee any mapping work that's done by your department?
A. I'm not -- you would have to define mapping.

is sort of the recordkeeping system here. It appears that the record that is being kept by the City was kept, but it was kept to itself. So, I'm suggesting, I guess, that the problem that would need addressing is, are you going to let this happen again?
MR. ADAMS: Objection, form, foundation.
A. That's your opinion that it's being kept to itself. I can't answer that question.
Q. (BY MR. LANDECK) So, you're not aware of any involvement by the engineering, the city engineer in the processing of grading and filling permits, is that what you said earlier?
A. I can't answer that. I have to go back. You'd have to....
Q. Well, do you know -- I'll ask it again then, in case I've missed this question. Does your department have any role in the processing of grading and filling permits within the City of Lewiston?
A. No.
Q. Does your department have anything to do with grading and filling of land within the City of Lewiston?
A. I believe so, yes.
Q. And what, what do you have in that regard?
A. I can't answer that. I know that we overview it and oversee it.

Q. Mapping flood planes.
A. No.
Q. Mapping site, special site conditions, hazards?
A. No.
Q. Mapping drainage, natural drainage ways?
A. Yes.
Q. Okay. And what is that, what occurs there in your, within your department as to that?
A. I can't answer that.
Q. Who does that?
A. Shawn Stubbers would know.
Q. Do you know of specific examples in which Shawn Stubbers has mapped natural drainage ways?
A. No.
Q. It's just something you know that he's done, is that what you're saying?
A. It's under his purview.
Q. Is that done in connection with any particular activity such as subdivision applications, building permit applications or other?
A. It would be under storm drainage, and then for no other purpose than that that I'm aware of.
Q. And what would be the purpose of the mapping in regard to storm drainage?
A. To identify where our existing system is and

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907 1045

EXHIBIT 4

FOURTH AFFIDAVIT OF RONALD J. LANDECK IN SUPPORT OF PLAINTIFF'S MOTION TO RECONSIDER MEMORANDUM OPINION AND ORDER ON SECOND MOTION FOR SUMMARY JUDGMENT

908 1046

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

JOHN G. BLOCK, a single man,

Plaintiff,

vs

JACK J. STREIBICK, a single man, JACK STREIBICK, as Personal Representative of the Estate of Maureen F. Streibick, deceased, CITY OF LEWISTON, a municipal corporation of the State of Idaho, and its employees, LOWELL J. CUTSHAW, City of Lewiston Engineer, and DOES 1-20,

Defendants.

Case No. CV 09-02219

Taken at 1134 F Street
Lewiston, Idaho
Friday, April 8, 2011 - 9:12 a.m.

VOLUME I
OF THE
D E P O S I T I O N

OF

ERIC HASENOEHRL

FOURTH AFFIDAVIT OF RONALD J. LANDECK IN SUPPORT OF PLAINTIFF'S MOTION TO RECONSIDER MEMORANDUM OPINION AND ORDER ON SECOND MOTION FOR SUMMARY JUDGMENT

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

JOHN G. BLOCK, a single man,

Plaintiff,

vs

JACK J. STREIBICK, a single man, JACK STREIBICK, as Personal Representative of the Estate of Maureen F. Streibick, deceased, CITY OF LEWISTON, a municipal corporation of the State of Idaho, and its employees, LOWELL J. CUTSHAW, City of Lewiston Engineer, and DOES 1-20,

Defendants.

Case No. CV 09-02219

Taken at 1134 F Street
Lewiston, Idaho
Wednesday, April 27, 2011 - 9:09 a.m.

VOLUME II
OF THE
D E P O S I T I O N

OF

ERIC HASENOEHRL

working on is here but the entire ground is all greater than ten percent. You see, so there was those kinds of two extremes.

Q. Okay.

A. And not -- and I know there's been discussions. I was involved in some of those discussions. The terms slope and ten percent, right, you're trying to match up slope and ten percent. Is it -- is it true slope in the sense of -- it's an engineering term again. But people use slope as referring to let's say like, like let's use this case here, they use slope and to talk about the portion of, of Canyon Greens that's on the north side, right, it slopes down into the, the drainage area, okay. That is a term for slope. Slope is also just rise over run in the mathematical sense and but it gets used differently when it's the entire ground is sloped, okay, with a, like I want to put a D on the end, it's sloped, right. So it's sloped, and that was some of the discussions. I recall having some of those discussions. So in some of those other projects I think you can go see them. It's where the entire ground was sloped greater than ten percent and where we had just small little ditches and things were over ten percent. Now to get those specific examples I'd have to go, you know, into files. You see what I mean.

Q. That's fine. What I'm trying to figure out is whether you believe the City engineer has discretion to require a slope stability analysis if the slope is greater than ten percent or if they do not?

MR. LANDECK: I'm going to object to form in that this talks about average slope not just slope.

A. I would answer your question, yes, the City engineer has discretion as to whether to ask for it or not ask for it, and the reason I say that, it has not been uniformly applied.

Q. (BY MR. ADAMS) Okay. Thank you. Do you know if there was anybody at the City when the Sunset Palisades number eight plat was in the process of being approved that had knowledge of the slope failure within the area of Sunset Palisades number eight at the time it was -- the approval process was going on?

A. No.

Q. Same question for Canyon Greens.

A. At the time the plat was being processed.

Q. Right.

A. No. I mean, I....

Q. And same question for the building permits for 153, 155 and 159 Marine View Drive.

A. Yeah. I mean, no one has brought that forward . No one had any discussion with me, and so I'm not --

I'm just -- I don't know of anybody.

Q. Okay. Why should the City have had knowledge of the 1999 slope movement at the time of the approvals of Sunset Palisades number eight, Canyon Greens, the building permits?

A. Oh.

MR. LANDECK: Object to form.

A. The reason I think they should, when I read the article that John brought to me and it said in there, and it has the City engineer being quoted; it has the public works director being quoted. And they say, and we'll see that this doesn't -- something to the effect, we'll see that this doesn't get built upon or we'll see that -- there's some connotation in that article of recognition of the issue and that they would take care of it in the future.

Q. (BY MR. ADAMS) All right. Do you know if either of those two people was employed by the City at the time of the approval process for Sunset Palisades number eight, Canyon Greens or the building permits for 153, 155 and 159 Marine View Drive?

A. Going in time frame, they may have been there at Sunset Palisades eight but certainly not the rest of them, and I wouldn't know without looking back at their dates of employment.

Q. Okay. Now, do you know if those people had authority to bind the City to future acts?

MR. LANDECK: Object to form. "Those people."

Q. (BY MR. ADAMS) Sorry. Either the City engineer who made the comment, and do you remember that person's name?

A. I think it was Tim Richards.

Q. Okay. Do you know if Tim Richards had the authority in 1999 or at the time he made the comment to bind the City to a future act?

MR. LANDECK: Object to form.

A. I don't know the City's exact rules and what they live by but he let me tell you this, we're talking about something that's life safety. We're talking about public welfare, and it's a licensed engineer working for the City of Lewiston. I think he has an obligation to bring forward those things that have potential harm or cause of harm to -- that would be in conflict of public welfare and safety. So in that regard, both Bud Van Stone, another licensed engineer, and Tim Richards, it's a responsibility that I think, yes, they do have that responsibility.

Q. (BY MR. ADAMS) Okay. And do you know if they put information regarding that slope movement in the Sunset Palisades number four file?

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MR. LANDECK: I object to form.
Q. (BY MR. ADAMS) Let me ask it a more specific question. If this document was in the Sunset Palisades number four file --
MR. LANDECK: What document is that?
Q. (BY MR. ADAMS) Sorry. Exhibit No. 29, I apologize. Thank you. What responsibility does the City have to look at Sunset Palisades number four file when dealing with a re-subdivision of Sunset Palisades number four?
A. I would answer that in the antonym. Why put a note in the file? Why say that there's a hazard? Why even put it in the file? You're putting it in the file for -- we do work for a purpose, right. We do -- we create things for a purpose. And so, why was it put in the file? You see. It becomes the question of trying to answer that. I think they're putting it in there, and as I can only -- I can only look at this document, and I can only read the newspaper. And when they say to deal with it in the future kind of thing. So I can only conjecture. So it seems to me that Tim being -- and I like Tim. I think he's a very reasonable thinking person. I think he thinks very well engineering-wise. If Tim was to say, I'm putting a note in the file to be dealt with in the future, I would say that Tim

understands how the system works and he's doing that so that it can be taken care of or dealt with. So he has the understanding that -- that that file is used by somebody, that this will come back up. That this will, as he says, deal with it in the future.
Q. Is it within the City's discretion to determine whether or not to review an existing subdivision file when creating a new file for a re-subdivision of the same land?
MR. LANDECK: Can you restate that question?
MR. ADAMS: Can you read it back?
THE REPORTER: Sure.
(Whereupon, the court reporter read back the previous question.)
A. You know, and the reason that is --
MR. LANDECK: I'm going to object to the form.
A. The reason I have some difficulty having some clear discussions of this in the sense of this, I take great care to see that we have dug out all available information to come to the right conclusion, okay. And sometimes, sometimes it's a little bump in the road. Sometimes it's a big bump in the road, okay. So, the part that, that is kind of -- the part that is, is maybe missing, you're saying or is not there is, everybody doesn't play by the same standards, and I guess that's

what happened here. But why wouldn't they? Why wouldn't you try to find all available information? You're creating things in a file. No one can predict where the future is going. You're asking us to crystal ball a little bit with information we know today. Okay. But, if, in fact, you are re-subdividing property, why not look back to see if there's any issues in there. Why not look for all available information. You cannot get to a good conclusion, a good solution without having all available information, without putting that all together and saying, is there anything in there that makes me want to study it further, go deeper into the problem, look more into it. It's a -- in that sense, this work is, it's very technical, and -- and requires that due diligence to go find those answers.
Q. (BY MR. ADAMS) I don't know if that answers my question, so I'm going to ask it another way. In making the determination whether or not to look at an old file when doing a re-subdivision, would the City have to deal or address concerns and take into account considerations regarding available manpower to do that?
MR. LANDECK: Object to form.
A. Certainly. Everyone has limitations.
Q. (BY MR. ADAMS) Okay.
A. But they should at least -- they should review

it.
Q. And that's fine. But the answer is, yes, that would be a consideration?
A. To determine the amount of available manpower?
Q. To look at an old file.
MR. LANDECK: Object to the form.
Q. (BY MR. ADAMS) Well maybe I understood your answer. I thought you said certainly.
A. Here's how I understand your question. Your question was, should the City in trying to determine whether to review an old file on a subdivision, on a re-subdivision plat consider the man hours that it takes to do that.
Q. No. There's a difference between man hours and manpower, and I'll try it a different way. In dealing with a re-subdivision or re-subdivision process, is it a consideration for the City in determining how much research can be done including looking at old files whether or not there's sufficient manpower available or man hours? And we'll just use your word, man hours available.
MR. LANDECK: Object to form.
Q. (BY MR. ADAMS) Is it a consideration?
A. In my world or the City's world? If you're asking me in my world, I would tell you, I haven't seen

912-1050

Q. Okay. I'm going to ask you the same questions with regard to a couple of other considerations. Do you believe that there is a consideration, that the City has a consideration with regard to searching background information about a subdivision with regard to training of city employees, whether or not they have sufficient training to look through the files? Do you know?
A. Do I know if the City trained the personnel? Sorry, I'm just....
Q. That's not my question. Let me try again.
A. Yes.
Q. Is there a consideration with regard to availability of sufficient trained personnel to research all the available information?
MR. LANDECK: Object to the form.
Q. (BY MR. ADAMS) With regard to a subdivision?
A. Is there consideration; I would say yes. I think part of them being hired for that specific purpose.
Q. Do you know if there are any budgetary considerations that the City has to deal with when making the decision of, related to how much background searching it can do with regard to a subdivision?
MR. LANDECK: Object to form.
A. I know the City has budgetary concerns. I know

that the -- that there has been discussions about how much engineering time the community development uses. I do not know specifically about budgetary concerns with respect to researching documents or doing the background checks. I, I don't know what the City does to true up their business, right. Their business that, of what it is that they do here, has to have decisions made, and they make those internally.
Q. (BY MR. ADAMS) But you don't know whether or not -- you have no personal knowledge of whether or not there are budgetary concerns with regard to decisions about how much background information can be searched?
A. Right.
Q. With regard to a subdivision?
A. Right.
Q. Okay. Is it your opinion – I'm looking at the last sentence of your, of your report -- the first paragraph of your report.
A. Yes.
Q. Which is Exhibit 275. Is it your opinion that the City should disclose every bit of information with regard to a piece of property before approving a subdivision or a building permit?
A. I think the City should disclose every piece of information that is necessary for the orderly and safe

development of that property.
Q. Okay. Who makes the decision what is relevant to the orderly and safe -- and I apologize if I get it wrong -- development of the property?
A. It's City personnel.
Q. Okay.
A. That's doing that. And, and we get judged by the future, I mean, right?
Q. So, so the decision about what is relevant to the orderly and safe development of property is based on, what do you mean by the future?
A. Well, let me say it this way, in this case specifically we have in the article Tim Richards saying, I'm going to put something in the file, right, to deal with it in the future.
Q. And was it put in the file?
A. I – what I hear from John is, yes, and he found something in the file.
Q. Okay. So it's not that it wasn't put in the file, correct?
A. No. I think your question was, how will we be judged in the future.
Q. Right.
A. Right. And I think, I think we all can say what has happened here on this property should not have

happened, and I would say that. It should not have happened.
Q. Was it foreseeable that it would happen?
A. Looking at this article it certainly appears that it was, that they had knowledge, that they tried to document it, that they tried to preserve this information for people to be able to use it in the future.
Q. And that's not my exact question. I guess I should be more specific. It was foreseeable in 1999 that John Block would have three houses on the property that would be damaged due to slope movement?
MR. LANDECK: Object to form.
A. No. That's why it's even more important, because every city, every city in America – Lewiston is going to be some size bigger than what it is. We're going to continue to develop and grow and become bigger. We, we believe that. We plan for that. And I think – and I think that is what he's talking about here. This is of, of great enough importance, right, but we're not talking about, hey, the curb has an issue, has a little chip in it and needs to be replaced. We're not talking about, oh, it's missing a water service that you're going to find out in the future. It's talking about something more detrimental. So in that sense, yes, he's

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

JOHN G. BLOCK, a single man,

Plaintiff,

vs

JACK J. STREIBICK, a single man, JACK STREIBICK, as Personal Representative of the Estate of Maureen F. Streibick, deceased, CITY OF LEWISTON, a municipal corporation of the State of Idaho, and its employees, LOWELL J. CUTSHAW, City of Lewiston Engineer, and DOES 1-20,

Defendants.

Case No. CV 09-02219

Taken at 1134 F Street
Lewiston, Idaho
Thursday, April 28, 2011 - 8:41 a.m.

VOLUME III
OF THE
D E P O S I T I O N

OF

ERIC HASENOEHRL

A. Let me say it a little differently. I was part of the decision process to put the detention pond down near the bottom, yes.
Q. Okay. Do you have any reason to believe that the subdivision plan for Canyon Greens was not prepared in substantial conformance with engineering or design standards at the time?
A. Canyon Greens?
Q. Canyon Greens, not Sunset Palisades number eight, Canyon Greens itself.
A. Not Canyon Greens two?
Q. I'm talking specifically about Canyon Greens.
A. Okay. Was in conformance with....
Q. I'll reread it. It should be the exact same question. Do you have any reason to believe as you sit here today that the subdivision plan for Canyon Greens was not prepared in substantial conformance with engineering or design standards at the time?
A. No. Nothing leads me to believe that Canyon Greens was, now, not constructed, surveyed, right, the survey portion, right.
Q. I'm talking about the subdivision plan.
A. Yes.
Q. There were --
A. Just want to make sure that we're clear on the

difference between when you -- when you create a subdivision that does not require engineering, right, when, when it's just surveying, our scope of work was to do the surveying, right.
Q. Okay.
A. That is the mathematical solutions of lots, putting that on the plat, putting pins in the ground, filing a map with the county. That's our scope of work. There's not engineering, and, yes, I believe that was in conformance with the city.
Q. With the appropriate standards at the time?
A. Yes.
Q. Okay. Is it your opinion, and I'm – I think this is part of paragraph number seven and maybe I'll need to find which paragraph it is. I'm just wondering if it's included within the opinions you've stated today whether the City should not have approved the subdivision plan for Sunset Palisades number eight?
A. No. I think, I think the City's, the City's role is to approve them. The City's role is to bring forward concerns, as the process works. You -- the City is going to develop -- in order to develop there, there are -- there are issues and things that need to be taken care of. Whether that is solving boundaries insofar as land discrepancies between adjacent landowners, if that

is all the way through engineering issues that may facilitate the orderly development of the City.
Q. So, do you have any reason to conclude that the City should not have approved the plan as it ended up, the one that was ultimately approved for Sunset Palisades number eight?
A. As we know today?
Q. Yeah.
A. I would say they should not have approved it or they should have put conditions, conditional approval.
Q. Based on what we talked about earlier?
MR. LANDECK: I'll object to form. I don't know what that is.
Q. (BY MR. ADAMS) Sorry. Based on what we talked about earlier with regard to the detention pond?
A. No, you're saying today.
Q. Right.
A. Today what we know is that there is slope failure occurring there, okay. So, today, as we know it, and if this plat was to come in to the City, let's just submit it today, I would expect to see, they would say slope failure is occurring on this property, please show us your remedy to take care of that as a note from them. That's what I would expect today, using today's knowledge as if we were going to go out there and

subdivide it as we did Sunset Palisades number eight.
Q. Okay. Using today's knowledge. Now what about using the knowledge that was available at the time Sunset Palisades number eight was approved?
MR. LANDECK: Object to form. Available to whom?
MR. ADAMS: Okay. I'm going to withdraw the question.
Q. (BY MR. ADAMS) Do you have any reason to believe that the City should not have approved the subdivision plan for Canyon Greens?
A. The thing that today? What I know today you mean?
Q. The same question as with regard to Sunset Palisades number eight.
A. I would say this, knowing what I know that the City knew and that it was in their files, they had some information that a landslide has occurred, they should not have approved it or approved it -- well, they can approve it, approve it with conditions, okay. And those conditions would be to take care of the issues. And the issue I think that they knew or it was known was the landslide issue, and as a -- and as I have come to understand is in a note in a file in the City.
Q. Okay. With regard to approving the Sunset

Palisades number eight subdivision, is it your opinion that the City acted with deliberate indifference to the harmful consequences that arose in this case?

MR. LANDECK: Object to form.

A. Sorry. I don't quite understand that question.

Q. (BY MR. ADAMS) Do you have any opinion, and maybe I -- I didn't see it in your opinions so I'm asking you if you're going to provide an opinion with regard to whether the City acted with deliberate indifference to the harmful consequences, particularly the injuries that arose to Mr. Block, the damages, when the City approved the Sunset Palisades number eight subdivision?

A. I think my answer to that is -- is this: When the Sunset Palisades subdivision was approved by the City, the City had a major issue regarding that property in a file in the -- in the City, which is the same place going to get the approval, that had concerns that should have been addressed to overt -- or to protect the public welfare and safety. To that end, yes, they should have brought that issue out. Okay. And so, they should not have approved Sunset Palisades number eight with having that knowledge. You know what I mean, with having that piece of paper in their file.

Q. Let me ask a more general question, because it

might speed this up. Are you giving an opinion with regard to whether the City acted with gross negligence toward Mr. Block?

MR. LANDECK: Object to form.

A. Okay. Now, I have a tough time with the "gross negligence" part of that. But I would say this, the City has a piece of paper in a file that's -- that's registered to that property. It's their files. It's their information. It's information that would have been very helpful to me, very helpful to Mr. Block, very helpful to everyone that's sitting in this room today had it come known. They knew it prior to the approval of the subdivision, and all they would have to do is bring it out. I'm not sure what we would call that. Because, see, I don't have enough knowledge of who, where, and why it didn't happen or how it could have happened. But it seems to me where the City has the information, the City is doing the approval and it's in the City files and it's a major issue, enough so that they even put a letter in the file regarding it for the property, it just seems to me that, that they -- they're the ones of keeping it. They're the ones -- they're the ones that possess it. There isn't anyone else to go get it. It seems like they should have done something, yes.

Q. (BY MR. ADAMS) Okay. Now, you keep saying that

there wasn't -- well you don't keep saying it. I apologize. You just said there wasn't anyone else to go get it, and I think we've talked about this in the past. The City did not prevent anybody from finding this document, did they?

A. It is -- it is under -- it is under a restricted area. And now, I say that by the means of this, it is not open and fully available to the public. The City could, could take their files and they could put them in a place and say, when you're coming in I would like you to go over those files and look through everything that you can find about it and some cities do that. I worked for the City of San Diego. You can go research files. The public could come in and do that. The City of Lewiston does not do that. So these are files that are under the control of the City, and if you have to fill out a piece of paper asking for a specific document that seems a little restrictive to me, right. It's not free and available in that sense. So, so it's -- do they -- do they absolutely tell you, you cannot see that; no. They say, fill out a form, tell me exactly what you'd like to see, we'll go get that document.

Q. And, hypothetically, could that request say, I would like to see the Sunset Palisades number four

subdivision file?

A. I don't know. I don't know if they would allow that if it wasn't that specific. I can just tell you this, from all of the work that I have done and going and getting information from the City, I have never been able to look at any of those files.

Q. Have you asked to look at the whole file?

A. I recall one incident where, where Charlie Borcich brought the file out and he was looking in it but I was not able to look in it.

Q. And when was that?

A. I don't remember, '93, '94. Could have been '96. Charlie was here for some time in there.

Q. Okay. And I think you've answered my question so I'm going to move on to a new topic.

Are you providing any opinion with regard to whether the City or it's employees intentionally and knowingly created an unreasonable risk of harm to Mr. Block or his properties?

A. Boy, I would I would hope they would not knowingly do that, but I don't have any information to tell me that they knowingly. But it would be -- other than the fact that that -- I would say this, they know it's in there and they're not going to tell me. They're going to review and they're not bringing it up. They're

EXHIBIT 5

FOURTH AFFIDAVIT OF RONALD J. LANDECK IN SUPPORT OF PLAINTIFF'S MOTION TO RECONSIDER MEMORANDUM OPINION AND ORDER ON SECOND MOTION FOR SUMMARY JUDGMENT

917 1055

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

JOHN G. BLOCK, a single man, Plaintiff, vs. JACK J. STREIBICK, a single man, JACK STREIBICK, as Personal Representative of the Estate of Maureen F. Streibick, deceased, CITY OF LEWISTON, a municipal corporation of the State of Idaho, and its employee, LOWELL J. CUTSHAW, City of Lewiston Engineer, and DOES 1-20, Defendants.	)	Case No. CV 09-02219

DEPOSITION OF TIMOTHY J. RICHARD
SEPTEMBER 12, 2011

REPORTED BY:
MONICA M. ARCHULETA, CSR NO. 471
NOTARY PUBLIC

THE DEPOSITION OF TIMOTHY J. RICHARD was taken on behalf of the Plaintiff at the offices of Anderson Julian & Hull, 250 South Fifth Street, Suite 700, Boise, Idaho, commencing at 10:00 a.m. on September 12, 2011, before Monica M. Archuleta, Certified Shorthand Reporter and Notary Public within and for the State of Idaho, in the above-entitled matter.

APPEARANCES:

For the Plaintiff:

LANDECK & FORSETH
BY: MR. RONALD J. LANDECK
693 Styner Avenue, Suite 9
P.O. Box 9344
Moscow, Idaho 83843

For the Defendants:

ANDERSON JULIAN & HULL, LLP
BY: MR. STEPHEN L. ADAMS
C.W. Moore Plaza
250 South Fifth Street, Suite 700
P.O. Box 7426
Boise, Idaho 83707-7426

FOURTH AFFIDAVIT OF RONALD J. LANDECK IN SUPPORT OF PLAINTIFF'S MOTION TO RECONSIDER MEMORANDUM OPINION AND ORDER ON SECOND MOTION FOR SUMMARY JUDGMENT

919 1059

Page 34

photograph provided by Terry Howard, P.E., of Strata showing slope movement in Sunset Palisades No. 4 Subdivision. This photo was received from Terry Howard on 3-26-99."

Is that information that you put on this document?

A. I have no reason to doubt that.

Q. Is that consistent with your recollection of those events?

A. Yes, sir.

Q. What was your purpose in placing this memorandum and this photograph in the file of Sunset Palisades No. 4 Subdivision?

MR. ADAMS: Objection. Form and foundation.

THE WITNESS: The files or the system was used by the city to pass along institutional knowledge, I guess. So it just seemed appropriate to include a copy of that in the file for future reference.

Q. (BY MR. LANDECK) So it was your intent then to pass along to those that came after you, or to anyone, that this important information would be available; is that correct?

MR. ADAMS: Objection. Form and foundation.

THE WITNESS: Yes, sir.

Q. (BY MR. LANDECK) What constitutes the -- what

Page 35

is contained in the Sunset Palisades No. 4 file?

A. I don't recall the specifics.

Q. What would be in any subdivision file for the City of Lewiston?

A. Information about the --

MR. ADAMS: Before you answer I'm just going to object as to form. Are we talking about a specific time period?

Q. (BY MR. LANDECK) During the 1999 time frame. What information would be contained in a city subdivision file at that point in time?

A. I don't recall the specifics. But information regarding the development or platting of a subdivision.

Q. Was it your intent that before this particular property was developed, upon which the slope movement was observed, that the slope movement issues that you had observed and documented be dealt with by the City of Lewiston?

MR. ADAMS: Objection. Form and foundation. Calls for speculation.

THE WITNESS: I don't think I had formed any specific course of action or intent. It was to relay information on so others can make a decision in the future. Either the city or potentially the private property owner.

Page 36

Q. (BY MR. LANDECK) Would you have allowed this property to be developed without -- if you were the city engineer at the time an application was made to subdivide or develop it, would you, with this information known to you, have allowed a project to be subdivided or developed without addressing this slope movement circumstance?

MR. ADAMS: Objection. Form and foundation. Calls for speculation.

THE WITNESS: At that time I would have sought the advice of probably the city attorney, as well as experts in the field of geotechnical engineering to help make a recommendation as to how we would proceed. And what was contained in the city code at the time.

Q. (BY MR. LANDECK) Did you require Mr. Streibick in April of 1999 to do anything to remedy the slope movement problem on that lot?

A. I did not.

Q. And why not?

A. Could you restate that to make sure I understood the question?

(Record read.)

THE WITNESS: My recollection is that based on the opinion of Terry Howard that the public road and the utility infrastructure that we were concerned about was

Page 37

not in any imminent danger. And that the slide was located on private property and not under my jurisdiction as the city engineer.

Q. (BY MR. LANDECK) You don't think this property was within your jurisdiction as a city engineer?

A. The public right-of-way or the utility that was in here.

Q. You don't think you have any responsibility or rights as a city engineer to require property owners to deal with slope movement issues on their property?

MR. ADAMS: Objection. Form and foundation. Calls for a legal conclusion.

THE WITNESS: I have no opinion on that.

Q. (BY MR. LANDECK) When would be the proper time for the city to deal with the slope movement issue on this property after April 9 of 1999?

MR. ADAMS: Objection. Form and foundation. Calls for a legal conclusion. And speculation.

THE WITNESS: If the slope movement jeopardized a city road right-of-way or facility they would definitely have an interest in mitigating that. Or a reason to make sure that that was corrected.

Q. (BY MR. LANDECK) What if it jeopardized the construction of single-family residences? Would they

Page 42

THE WITNESS: I don't.
Q. (BY MR. LANDECK) So you don't know that the landslide reoccurred at that very site after construction of homes on it?
MR. ADAMS: Same objection.
THE WITNESS: Mr. --
MR. ADAMS: Off the record for a second.
(A discussion was held off the record.)
Q. (BY MR. LANDECK) So I guess I asked you whether or not you knew as to whether or not this property was developed over this area of the landslide without the city having dealt with it?
A. I was aware from Eric Hasenoehrl when he contacted me two years ago that some homes had been built on it and that they were damaged by continued slope movement. We did not discuss and he did not share with me anything that the city had done with regard to that issue.
Q. I would like you to look at Exhibit 229, Mr. Richard. This appears to be similar -- in fact, I think the wording of the narrative below the line is identical to Exhibit 310. Would that be correct?
A. Yes, sir.
Q. And the caption at the top, however, differs, does it not, in that it references that the memorandum

Page 43

is to the address file. Do you see that Sunset Palisades No. 4, Block 3?
A. Yes, sir.
Q. Is this a different file maintained by the city than the Sunset Palisades No. 4 file that is listed on Exhibit 310?
A. I don't recall the specifics of that file. But generally the addresses are tied to individual parcels. While the subdivision files are for the entire subdivision. If that makes sense.
Q. Do you recall determining that this particular information, the memorandum and the photograph, would be placed in the two files?
A. I don't recall doing that.
Q. Is an address file usually a street address type file? Is it noted by street address as opposed to lot, block description?
A. The system as I recall at the time that the city had was, yes, by street address.
Q. Would there be a street address for the property that was covered by the photograph provided by Mr. Howard?
A. No.
Q. So you don't know where Exhibit 229 was located in the city records?

Page 44

A. I don't recall specifically. But sometimes in the address files there was a -- well, I don't recall.
Q. It just seems there were no homes on this site.
A. Correct.
Q. So there was no address; correct?
A. Correct.
Q. Was your intent to make sure by having this in two places that this information would be available at the time of development?
MR. ADAMS: Objection. Form and foundation.
THE WITNESS: Yes, I believe that is correct.
Q. (BY MR. LANDECK) At the time of your inspection or your visit to the property with Mr. Howard and Mr. VanStone following the notification by Mr. Howard that there had been slope movement, do you recall noting any difference in the topography on that site than the topography of that site when you departed in 1993?
A. I don't recall that.
Q. So there is nothing that alerted you to the fact that a 40-foot ravine had been filled in the interim?
MR. ADAMS: Objection. Misstates prior testimony. Form and foundation.

Page 45

THE WITNESS: I don't recall that.
Q. (BY MR. LANDECK) Mr. Howard in the article -- I guess I'm back asking you a question on Exhibit 29 again. A portion of 29. The newspaper article. Mr. Howard states in that article -- and I'll quote him -- "Something needs to be done about the water that is pouring into the hillside. And the cracks created by the slips should be closed up."
That is in the second paragraph. Do you see that?
A. Yes, sir.
Q. Did Mr. Howard ever say anything of that kind to you?
A. I don't recall.
Q. And then in the second column, it looks like the fourth full paragraph, begins, "It likely has happened since the street was built." Howard said, quote, "That subdivision caused the landslide."
Do you see that?
A. I do.
Q. Did Mr. Howard ever state anything of the kind to you in 1999 or at any time regarding his opinions as to the subdivision having caused that landslide?
A. I don't recall that.
Q. Are you aware of anything that occurred during

Page 50

THE WITNESS: If I was aware of it I wouldn't ignore it. But being on private property I guess I would probably consult with the city attorney about what we should do.

Q. (BY MR. LANDECK) And I guess I'll just ask you the same question in regard to if you had knowledge of unpermitted, unengineered, uninspected fill in that same ravine in excess of 60,000 cubic yards of fill overlaying the drainage pipe, would that information have caused you as city engineer to take any action to deal with it?

MR. ADAMS: Objection. Form and foundation. Improper hypothetical. Calls for speculation.

THE WITNESS: I did not have knowledge of that or don't recall that. And, again, I would probably consult with the city attorney and determine if there is a course of action that we should take.

Q. (BY MR. LANDECK) Would those situations have raised a concern in your mind about the stability of that slope?

MR. ADAMS: Same objections.

THE WITNESS: I would have probably consulted with Mr. Howard on that since he is the geotechnical expert.

Q. (BY MR. LANDECK) Mr. Richard, in reference to

Page 51

the newspaper article and your comment there about "If plans for that property are submitted the city will deal with it at that time."

What part of the process of development allows the city to deal with it?

MR. ADAMS: Objection. Form and foundation.

THE WITNESS: I don't recall the specifics of the city code that would provide that mechanism to deal with it. Whether that is subdivision or building code.

Q. (BY MR. LANDECK) Could it be both?

MR. ADAMS: Objection. Calls for speculation.

THE WITNESS: It could be both. But I would have to review those to make a determination. Although, I didn't deal with the building codes specifically.

Q. (BY MR. LANDECK) So at the time that you made that statement you obviously had something in mind about the city's ability to deal with it. Would that be correct?

MR. ADAMS: Objection. Form and foundation. He testified he doesn't recall making any statement.

THE WITNESS: I don't recall the specifics that I had in mind when I made that statement. A specific course of action for the city.

Q. (BY MR. LANDECK) But it was your intention that it be dealt with at the time it was developed?

Page 52

MR. ADAMS: Same objection.

THE WITNESS: The intent was that the information be passed along so that whatever applicable codes or conditions existed at the time, that all parties were aware that this had occurred.

MR. LANDECK: I don't have any more questions.

MR. ADAMS: Let's go talk for a moment.

(Recess.)

MR. ADAMS: No questions.

(Deposition concluded at 12:00 p.m.)

(Signature waived.)

Page 53

REPORTER'S CERTIFICATE

I, MONICA M. ARCHULETA, CSR No. 471, Certified Shorthand Reporter, certify: That the foregoing proceedings were taken before me at the time and place therein set forth, at which time the witness was put under oath by me;

That the testimony and all objections made were recorded stenographically by me and transcribed by me or under my direction;

That the foregoing is a true and correct record of all testimony given, to the best of my ability;

I further certify that I am not a relative or employee of any attorney or party, nor am I financially interested in the action.

IN WITNESS WHEREOF, I set my hand and seal this 16th day of September, 2011.

MONICA ARCHULETA, CSR
Notary Public
P.O. Box 2636
Boise, Idaho 83701-2636
My commission expires August 3, 2012

FOURTH AFFIDAVIT OF RONALD J. LANDECK IN SUPPORT OF PLAINTIFF'S MOTION TO RECONSIDER MEMORANDUM OPINION AND ORDER ON SECOND MOTION FOR SUMMARY JUDGMENT

922 1060

EXHIBIT 6

FOURTH AFFIDAVIT OF RONALD J. LANDECK IN SUPPORT OF PLAINTIFF'S MOTION TO RECONSIDER MEMORANDUM OPINION AND ORDER ON SECOND MOTION FOR SUMMARY JUDGMENT

923 106T

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

JOHN G. BLOCK, a single man,

Plaintiff,

vs

JACK J. STREIBICK, a single man, JACK STREIBICK, as Personal Representative of the Estate of Maureen F. Streibick, deceased, City of Lewiston, a municipal corporation of the State of Idaho, and its employees, LOWELL J. CUTSHAW, City of Lewiston Engineer, and DOES 1-20,

Defendants.

Case No. CV09-02219

Taken at 1134 F Street
Lewiston, Idaho
Tuesday, June 7, 2011 - 9:12 a.m.

D E P O S I T I O N

OF

TERRY RUDD

924 1062

causing further damage to properties that haven't been considered in my figures or my consideration.

Q. Okay. But again, you don't have any information about that and you're not aware of that situation?

A. No.

Q. Okay. Okay. Is it fair to go to your report now? I think we've kind of gotten a background. So it looks --

A. Yes.

Q. -- as though we can kind of divide -- or what I'm going to divide up today because these are numbers I've seen, I think we covered the hundred and eighty thousand dollar figure?

A. Right.

Q. You know, the additional expenses. I'm going to cover the three other areas. And as I understand it, one of them is the, the damage, the property damage, if you will, to the three homes that were at issue and the other lots that he owned around the area, right?

A. Right.

Q. And that would be kind of his economic damage to his business. I mean, he was a builder building homes to resale, right?

A. Right.

Q. All of this damage is kind of his lost profits, if you will, and his expenses that he incurred along the way; correct?

A. Correct.

Q. And then we have his future damages as kind of, I'm going to call it area two, and that's his business loss for again his construction business going from this point kind of forward, is that fair?

A. True.

Q. And then we've got this four hundred thousand dollar figure which you came up with today as we sat here which is kind of, you haven't really firmed up that opinion yet, but that has to do with additional expenses that he's incurred through his business as a result of this incident, correct?

A. Yes.

Q. Again, would that be kind of expenses and lost profit? I guess kind of expenses, right, the four hundred thousand; is that right?

A. I think that's what we had here, yeah.

Q. All right. Well let's talk about each one of those areas if we can, Mr. Rudd, and again I'm going to use your, your report. And like you said, the numbers for -- for that first area, which I, I'm calling his property damage, business loss from his property

damage....

A. Okay.

Q. Okay. That's kind of part one of it. And I've got these numbers. Maybe these numbers are a little bit different. I'm looking at these numbers down the side --

A. Sure.

Q. -- of Exhibit 293. You've got the 153 Marine View Drive house at eight hundred and twelve thousand, five hundred. How did you -- how did you calculate that number?

A. Okay. In Exhibit 294....

Q. Right.

A. ....the first page past the appraisal salient information -- you know, I didn't make you a copy. Do you want --

MR. LANDECK: Can we go off the record for a second?

(Whereupon, the deposition was in recess at 10:11 a.m. and subsequently reconvened at 10:15 a.m.; and the following proceedings were had and entered of record:)

Q. (BY MR. CASEY) Okay. Mr. Rudd, are you ready to go back on the record?

A. Yes.

Q. So we can get done with this today?

A. Okay.

Q. The exhibit, we just made copies of Exhibit 294 that you brought with you today.

A. Okay.

Q. This is, it's entitled, John block Landslide Estimates.

A. Yes.

Q. What -- just tell me what appraisal salient information, why do you have that there? What is that? What's that mean?

A. The law in appraising in the state which was promulgated by the Appraisal Foundation in Washington DC....

Q. Uh-huh.

A. ....concentrated on how appraisals should be done, and they call them USPAP requirements. And, I addressed most of them here because in arguments, particularly with the state, they will go through all of these items. If there's, if this case, for instance, gets turned over to the state that I did a bad appraisal, I was off base or you get mad at me or whatever, they'll go through all of this first. So, most appraisers like myself have simply come down to addressing all of these items so that they were

THE REPORTER: I'm sorry, added up to what? Two hundred grand?
MR. CASEY: Right.
THE REPORTER: And then....
A. Two walls were constructed.
Q. (BY MR. CASEY) Okay.
A. With all the foundations, the railing, engineering, trying to stop the subsidence.
Q. Okay.
A. And there was three places involved but I attributed half to this property since this --
Q. I'm with you.
A. -- and the other property beside it were the ones that fronted.
Q. And that would have been the 159 lot?
A. Yes.
Q. Okay.
A. No, 153. Oh, the other house, yeah, right.
Q. So you added a hundred thousand to the 153 lot?
A. Right.
Q. And the hundred thousand to the 159 lot?
A. Right.
Q. Okay. I'm with you.
A. Okay.
Q. What else made up the difference between the,

the....
A. There was.
Q. The six hundred sixty -- let me ask the question, though, so we make sure we're on the same page.
A. Okay.
Q. So we've got a -- we've got a damage which is essentially the destruction and -- complete destruction of the building that was valued at six eighty-two five?
A. Right.
Q. We have twenty thousand dollars of salvage value which would be recoverable because it was taken to storage so we've got a loss of six sixty-two five, and then we go to -- we add a hundred thousand to that which was expense for attempts to fix this subsidence?
A. Right.
Q. Right. And then that adds to seven eighty-two five, seven sixty-two five, right?
A. Yeah.
Q. How do we get to eight twelve? What else is included?
A. There's an additional stormwater pond which is half of fifty thousand.
Q. Okay.
A. That went against this property, twenty-five

thousand, which is twenty-five thousand.
Q. Okay.
A. And then the additional railing, pilings, et cetera, of a hundred thousand. And then there was fifty thousand in demolition.
Q. Do we attribute all hundred thousand for the railings?
A. Yes.
Q. To this lot or....
A. Right. And the pilings.
Q. Okay.
A. And demolition ten thousand dollars, and fifteen thousand, two hundred of lost landscaping.
Q. How did you come up with that figure, just out of curiosity, fifteen two?
A. Estimated ten thousand an acre, which is a fairly well-known landscaping estimate.
Q. Okay. So this lot was one point five two acres?
A. Right.
Q. Okay. And that's 153?
A. Right.
Q. Okay. All right.
A. So --
Q. So we add up all those figures, those are the

components, if you will?
A. Yes.
Q. That add up to the eight hundred and twelve thousand, five hundred, which is the estimated damage to his business as a result of the damage and destruction of 153?
MR. LANDECK: I think that misstates his testimony. You said loss to his business.
MR. CASEY: Right.
MR. LANDECK: I think it's loss to the real estate.
MR. CASEY: What business is he in? He's a constructing -- he's a contractor, right.
MR. LANDECK: Well, I believe his testimony is about loss to real estate is one factor in damage and loss to business would be another. It's just a, I guess I'm trying to draw the distinction because I think it's important in his testimony.
MR. CASEY: Okay. Because of the two different areas he testified to?
MR. LANDECK: Right.
Q. (BY MR. CASEY) But John Block was a builder who was building 153 Marine View Drive to sell to someone else; correct?
A. Correct.

Q. That was his business, Block Group, or they were contractors who built -- he actually designed and built his own homes for resale, correct?
A. Correct.
Q. Okay.
A. But I did not value any damage to business in any of the properties involved in Exhibit 294.
Q. Right.
A. Per se.
Q. Those are just straight out property damage?
A. Real estate.
Q. To real estate?
A. Uh-huh.
Q. Okay.
A. Correct.
Q. All right. 159 -- well, let's -- yeah. We can go to 159 since it's next on Exhibit 295. 159 Marine View Drive you've -- you have a total -- you have a total appraised value that you came up with as of May of 2009; correct?
A. Correct.
Q. And this, again, would have been prior to the damage to the property? The appraised, the appraised value of the property prior to it sustaining damages, correct?

A. Yes.
Q. And what was that number?
A. Six hundred and four thousand, eight hundred.
Q. Okay. And what's the basis for that number? What components went into it?
A. The --
MR. RUDD: Shall I just turn these over like that?
MR. LANDECK: Yeah, that's good. Let's put it on the bottom.
MR. RUDD: Okay.
A. That valuation is based on the home at 159 which was sold to Scott Broyles on April 30 of 2007.
Q. (BY MR. CASEY) And the sale price to Mr. Broyles was six hundred and seventy-five thousand?
A. Yes.
MR. LANDECK: No. I think it says something different. You said six seventy-five. Is it six?
MR. RUDD: Well that was -- it was listed --
MR. LANDECK: Oh, I'm sorry.
MR. RUDD: For six hundred and ninety-five thousand. Sold to Scott Broyles --
MR. LANDECK: Sorry.
MR. RUDD: -- for six hundred and seventy-five thousand on 4-30 of '07 with conventional financing and

a trade of a home at 181 Marine View Drive which he had paid three hundred and eighty-one thousand, nine hundred for in 8 of '06 and received four hundred and thirty thousand dollars in the trade.
Q. (BY MR. CASEY) So are all of those components in your calculation of the six hundred and four thousand, eight hundred dollar appraised value of 159 Marine View Drive as of May of 2009?
A. They were in there. But, as well are three comparable sales we used in the FNMA appraisal of 113 Marine View Court; which was six hundred and fifty thousand dollar sale.
Q. Uh-huh.
A. 3431 Fifteenth Street in Lewiston also which was seven hundred and ninety-five thousand dollar sale.
Q. Uh-huh.
A. And 566 Crestline Circle which sold for six hundred and twenty-five thousand. So --
Q. Who was it that selected the comparables?
A. Two parties. Myself and my son, Mark Rudd.
Q. Okay. Are you comfortable with those comparables in the use of your appraisal?
A. Yes.
Q. Okay. Where is 566 Crestline Circle in proximity to this structure at 159?

A. Yeah. It's about a mile and a half away.
Q. Where? Which direction, if you will?
A. North and east.
Q. Okay. Okay.
A. I'll see if there's a map in here.
Q. Okay. So you -- you were telling me how you came up with a value of six zero four, eight hundred, and I asked you if the information that was contained on Exhibit 295 with regard to the sale to Mr. Broyles then the buyback and trade with Mr. Broyles, if that was the only factor in your appraised value as May of '09 and you said, no, we also did some comparables. What other factors went into the appraised value of 159 Marine View Drive as of May of 2009?
A. Okay. I did a study of the -- oh, I need to see my backup stuff....
THE REPORTER: I'm sorry?
(Discussion held off the record.)
A. In attempting to bring all the figures in all these cases that we're talking about, you know we talked cost and things today, yesterday, and the day before, when the slide started, I think, I moved that all to the date of May of '09; isn't that correct?
Q. (BY MR. CASEY) Yes.
A. Well, in doing that, I built a table which you

EXHIBIT 7

FOURTH AFFIDAVIT OF RONALD J. LANDECK IN SUPPORT OF PLAINTIFF'S MOTION TO RECONSIDER MEMORANDUM OPINION AND ORDER ON SECOND MOTION FOR SUMMARY JUDGMENT

928 1066

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

JOHN G. BLOCK, a single man,

Plaintiff,

vs

JACK J. STREIBICK, a single man, JACK STREIBICK, as Personal Representative of the Estate of Maureen F. Streibick, deceased, City of Lewiston, a municipal corporation of the State of Idaho, and its employee, LOWELL J. CUTSHAW, City of Lewiston Engineer, and DOES 1-20,

Defendants.

Case No. CV 09-02219

Taken at 1134 F Street
Lewiston, Idaho
Wednesday, November 17, 2010 - 9:04 a.m.

D E P O S I T I O N

OF

JOHN SMITH

MR. ADAMS: We'll get it to you.
A. Yes.
MR. ADAMS: Yeah, we'll get it to you.
Q. (BY MR. LANDECK) Okay. Do you know if that report is being used in any way in connection with the City's review of development activities?
A. No.
Q. You don't know if it is or not?
A. I'm not involved in that process.
Q. And that would be, what, the subdivision process?
A. Yes.
Q. That's where it would be used?
A. Yes.
Q. Okay. So, you don't really use it in your work?
A. No.
Q. On that list that I read of areas unsuitable for development, in addition, are there any other reports, maps that the City maintains that identify areas of wetlands, hillsides, excessive slope or unstable land than what you've just mentioned?
A. No.
Q. Do you as a building official have the authority to issue a residential building permit that

would permit construction on a lot that is unsuitable for development?
MR. ADAMS: Objection, form.
A. No.
Q. (BY MR. LANDECK) And why not?
A. The requirements of the code would say that prior to construction you'd have to meet those requirements. I would not be -- I'd be negligent in my duty to issue a permit.
Q. For an area on a, a lot that is unsuitable for development?
A. Yes.
MR. ADAMS: Same objection.
Q. (BY MR. LANDECK) And is that a building code requirement that you referred to?
A. Not a single requirement but the requirement of the code in whole.
Q. Okay. Do you have authority to issue a residential building permit for a lot that the City knows is within an area of landslide activity?
MR. ADAMS: Objection, form.
MR. CASEY: I join.
A. No.
Q. (BY MR. LANDECK) And why not?
A. Because you didn't tell me where on that piece

of property that landslide zone that structure would be placed.
Q. So if the area, if the, the improvement was to be placed over the area of the, specific area of the landslide activity, would you have authority to issue a permit over that, on that specific area of the lot?
MR. ADAMS: Same objection.
A. No.
Q. (BY MR. LANDECK) And, why would you not be able to issue that permit?
A. Without meeting, without you telling me if it meets my current codes for site stability, geotechnical reporting, compaction reporting, if they even had knowledge of the slide being there, the answer would be no.
Q. What code requirements are you aware of that deal with soil stability reporting?
A. The compaction of the footings is what is required by code.
Q. So when you refer to soil stability, you're referring to the compaction code requirements?
A. Yes.
Q. Are there any City of Lewiston requirements applicable during the building permitting process that specifically deal with soil stability?

A. Other than what we discussed, no.
Q. Are you aware of any City of Lewiston code requirements or code provisions -- strike requirements -- code provisions that deal with soil stability analysis during the subdivision process?
A. No.
Q. That's not within your area, either, is it? So, is that....
A. Correct.
Q. Okay. If the City of Lewiston is aware of a lot that is unsuitable for development, and I guess I'll use the example, for the reason that the proposed improvement would be constructed over an area of landslide activity, does the City have an obligation to let the potential developer know of the City's awareness and knowledge of that condition?
MR. ADAMS: Objection, form and improper hypothetical.
A. I know of no legal requirement for that.
Q. (BY MR. LANDECK) How would you react to that situation as a building official?
A. I have reacted where there's been site issues, and in the mechanism to help the developer come up with solutions for abilities to build on that site.
Q. You've already talked about how you wouldn't

Q. The letter references an investigation of foundation damage; do you see that?
A. Yes.
Q. Who -- if you know, who undertook that investigation?
A. There was -- me, along with some fire department people. Let's see, which property was this?
Q. I think --
A. 155. That would have been me.
Q. What event or events triggered this investigation?
A. A leaking gas line.
Q. And how did you obtain information about the leaking gas line?
A. I was contacted by the fire department after they had secured the scene that the gas line had separated because of the movement of the foundation, or at least that was their belief.
Q. Do you recall when you obtained that information?
A. No.
Q. Was it, can you -- do you know whether or not it was in May of 2009?
A. Not off the top of my head, no.
Q. What did you -- what did you find upon your

investigation of the foundation damage, at 155 Marine View Drive?
A. There was -- this structure was the property just up the hill from where the gas leak was at, and this structure had cracking in the western wall of the building.
Q. Did you first investigate the, the residence at which the gas leak had occurred?
A. Yes.
Q. We have them a little out of order here. How about looking at Exhibit 234, please?
MR. CASEY: Can you just identify it by the Bates number, please?
MR. LANDECK: With Bates number BLOCK 0253.
MR. CASEY: Thank you.
Q. (BY MR. LANDECK) Is this also a letter that you wrote or someone wrote at your request?
A. Yes.
Q. Do you know whether or not this is the property that suffered the gas leak?
A. No.
Q. Do you recall, did you look at all three properties on the same day?
A. Yes.
Q. Make it a little easier here.

A. Okay.
Q. So you went out on one particular day to the site, then you -- and who else went with you?
A. I'm not sure. I can't remember who else was there, but Mr. Block was there and escorted us through.
Q. Was, was there one investigation, one event and one day in which you went to these properties which resulted in these letters being prepared?
A. Yes.
Q. Okay. So, you and someone accompanied you and Mr. Block, the three of you, correct?
A. I don't know.
Q. But you -- did you then look at all three of these residential units?
A. Yes.
Q. And following that made some determinations about what -- as the building official about what, how you were going to react to what you saw?
A. Yes.
Q. And then did that result in you writing these letters to Mr. Block? We've already looked at Exhibit 230 and Exhibit 234; correct?
A. Yes.
Q. And then, if you might look at Exhibit 232, which is BLOCK 0251.

MR. CASEY: Thank you.
Q. (BY MR. LANDECK) Is that the third letter that was written following your investigation on that day?
A. Yes.
Q. Okay. And, Exhibit 232, is that also a letter that you had written at -- that was written at your request?
A. Yes.
Q. So, with reference to Exhibits -- well, I'll take them one by one. So, what did you determine to do in regard to 155 Marine View Drive, which is referenced in Exhibit 230?
A. I had sent letters, sent the letter in regards to that property, and it comments in here that Mr. Block had already detailed us what his work plan was for that property. So, we were allowing him to proceed forward at his, you know, recommendations.
Q. Do you recall what his letter said he was going to do?
A. No, not specifically.
Q. Had you had any conversations with Mr. Block before writing these letters about what he would have to do with regard to the properties?
A. Yes.
Q. Did that occur on the day you investigated at

the site?
A. Yes.
Q. You pretty much made a determination while viewing the properties that day that something was going to have to be done, correct?
A. Yes.
Q. And then you advised Mr. Block of that?
MR. ADAMS: Objection, form and foundation.
A. Yes.
MR. LANDECK: Stephen, do you have a -- did we put the May 15 or May 12 letter?
MR. ADAMS: Yeah. It's Exhibit 222. It was marked yesterday.
MR. LANDECK: Yes. I'm looking for it.
(Discussion held off the record.)
Q. (BY MR. LANDECK) So you referenced, Mr. Smith, that Mr. Block had already sent you a letter regarding his plan to correct. Is this, is Exhibit 222 that letter?
A. It appears so.
Q. He references in that letter that 153 and 159 had been posted as unsafe to occupy. Is that your recollection that by May 12 the properties had been, those two properties had been posted as unsafe to occupy?

A. Yes.
Q. Did you post those 153 and 155 -- excuse me, 153 and 159 as unsafe to occupy on the day that you investigated?
A. No.
Q. When did you do that?
A. I never did.
Q. Oh, who did?
A. Jeff Wolf.
Q. Do you know what day he did it?
A. I believe it was on the day we investigated the gas leak.
Q. And, and looked at all three properties, correct?
A. I believe so.
Q. Did you instruct him to post the properties as unsafe to occupy?
A. Yes.
Q. What was it that you observed that caused you to determine that 153 and 159 were unsafe to occupy?
A. There was severe foundation damage. The buildings had structural cracks inside sheetrock, floors were warped, walls were moved away from the, the plates, windows had broke out of them because of movement of the walls and, and such, to the extent that it was believed

that the land movement actually caused the gas line to separate.
Q. Did you observe evidence of land movement on, at the time of your investigation?
A. (No response given.)
Q. I'm not talking about was the land moving while you were there. Did you observe evidence that land had moved, of that land movement had occurred?
A. Yes.
Q. What did you observe?
A. Again, the, the breaking, the movement of the building, the cracking of the foundation, the retaining wall were -- cracked or moved, all indicating that there had been movement of the soils that put pressures against those.
Q. Did you observe the soils themselves in any places on those three lots?
A. No.
Q. Didn't see any cracks or obvious shifting of soils?
A. There were cracks in the -- on the surface of the, the yard and the driveways and, but, no, I didn't see, didn't investigate the soils themselves to see what they were composed of.
Q. Was it, was the, what you observed kind of

linear in fashion? Did it follow a line or a pattern, as best you could determine?
MR. ADAMS: Objection, form, foundation.
A. Yes.
Q. (BY MR. LANDECK) Okay. And in that regard, what, what did you observe?
A. The cracking was consistent throughout the buildings, all heading in a westerly direction.
Q. 155, which I think is reflected in Exhibit, your -- is commented on in your Exhibit 230 letter, what did you determine, if anything, needed to done with regard to 155 Marine View Drive?
MR. ADAMS: Objection, foundation, form.
A. In my recollection, my conversation with Mr. Block was the same, they would have to be made secure or they needed to be repaired or they needed to be removed.
Q. (BY MR. LANDECK) Is it true that you did not determine that 155 was unsafe to occupy?
A. Correct.
Q. So you treat -- why did you treat that house differently than the other two?
A. It was, had a lesser amount of damage to it, and it was mainly to just one portion of the foundation, not the entire structure.
Q. Now, your Exhibit 230 says that you determined

Q. What did you do with the information he provided to you regarding the plan to abate, the Exhibit 222 information? How did you respond to that?
A. We would have made copies and placed them in the property files.
Q. Did you have any discussion with him regarding the plan to abate that he set forth in Exhibit 222?
A. I remember him coming to the office giving us the letter.
Q. Okay.
A. But past that point, no, I don't have.
Q. Was the abatement essentially up to him as to what he chose to do?
A. Yes.
Q. What was the City's interests, then, in the plan that he proposed?
MR. ADAMS: Objection, form and foundation.
A. I'm not sure where you're going.
Q. (BY MR. LANDECK) Well, I guess, what did the City have to, what did the City require of him in regard to abating the unsafe conditions that you observed in those three properties?
MR. ADAMS: Objection, foundation.
A. We would have required a permit for the demolition of the structures and the capping of the

boarding it up so it doesn't become -- attract a nuisance. They can repair it. That is an option of theirs, or they can demolish it and make it safe, or, you know, reclamate the property.
Q. Mr. Block, in his May 12 letter --
A. Uh-huh.
Q. -- to you advised that the 153 house will undergo salvage and demolition as soon as possible. Do you see that?
A. Uh-huh.
Q. Okay. So that was, that if he did that properly, I guess through permitting, correct....
A. (Witness nods head.)
Q. ....then that would, would satisfy the City's concerns, is that right?
A. Yes.
Q. And, then he also, as to 159, indicated that the main floor of the house will be attempted to be moved and the balance of the house demolished as soon as the house, 153 house is gone, do you see that?
A. Yes.
Q. Okay. Was that also a satisfactory resolution, as far as you're concerned, as long as he got the proper permitting for what he intended to do?
A. Yes.

utilities, at which point the bond would have been given back to Mr. Block. I'm not sure under the circumstances, if that was required or not because of the circumstances and exigency of the --
THE REPORTER: I'm sorry, the circumstances and I didn't hear you.
A. Exigent -- sorry. I probably can't say it now that I'm thinking of it.
Q. (BY MR. LANDECK) Exigency. That's a tough word.
A. Apologize. Sometimes we don't require full permitting for a demolition of a structure if it's something that's in the best interest of everybody just to have it happen.
Q. After you'd investigated and made your determination regarding the unsafe conditions, under the code requirements that you enforce, including abatement of dangerous structures code, whatever that's referred, you referred to it in your letters.
A. Uh-huh.
Q. I guess the International Property Maintenance Code, what did -- what options did he have in regard to satisfying the City's code requirements?
A. I routinely give the same three options to somebody that has a structure. They can make it safe by

Q. Okay. And of course on May 12, he didn't quite know what he was going to do with 155, did he?
A. No, and it was being studied.
Q. Okay. And, you're aware that ultimately he, he did repairs to 155 that were satisfactory to the City, is that right?
A. Yes.
Q. And would you look at Exhibit 237, please, which is BLOCK 0256. And, do you recall receiving this letter from Mr. Hasenoehrl?
A. Yes.
Q. And what does this letter deal with?
A. It is the downhill retaining walls of that, of those properties, and essentially the engineer is saying that they want to leave them in place and watch to see if there's any more instability of those soils.
Q. And do you know what the ultimate resolution of all of that, that concern about the retaining walls was? Or was -- has there been an ultimate resolution of that?
A. No.
Q. What is the current status of those retaining walls?
A. To my knowledge, they're still watching and seeing if there's any movement.
MR. CASEY: I'm sorry, did you say they're

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EXHIBIT 8

FOURTH AFFIDAVIT OF RONALD J. LANDECK IN SUPPORT OF PLAINTIFF'S MOTION TO RECONSIDER MEMORANDUM OPINION AND ORDER ON SECOND MOTION FOR SUMMARY JUDGMENT

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

JOHN G. BLOCK, a single man,

Plaintiff,

vs

JACK J. STREIBICK, a single man, JACK STREIBICK, as Personal Representative of the Estate of Maureen F. Streibick, deceased, CITY OF LEWISTON, a municipal corporation of the State of Idaho, and its employee, LOWELL J. CUTSHAW, City of Lewiston Engineer, and DOES 1-20,

Defendants.

Case No. CV 09-02219

Taken at 1134 F Street
Lewiston, Idaho
Tuesday, October 12, 2010 - 1:54 p.m.

D E P O S I T I O N

OF

SHAWN STUBBERS

FOURTH AFFIDAVIT OF RONALD J. LANDECK IN SUPPORT OF PLAINTIFF'S MOTION TO RECONSIDER MEMORANDUM OPINION AND ORDER ON SECOND MOTION FOR SUMMARY JUDGMENT

the process on a re-subdivision?
A. I believe so, yes.
Q. Okay. Were -- do you have a recollection of the subdivision process that took place in Sunset Palisades number eight?
A. No, I do not.
Q. Okay. Do you recall who was responsible for that?
A. I do not.
Q. Did you have any input into the subdivision application for Canyon Greens subdivision?
A. Which one?
Q. Well, we'll start with Canyon Greens. I think it doesn't have a number. It's just the first one.
A. Yeah. I don't believe I was involved in Canyon Greens one.
Q. Okay. Is your recollection the first time you were involved in Canyon Greens was Canyon Greens two?
A. Yes.
Q. And what do you recall about your involvement in that subdivision process?
A. I was working under Lowell Cutshaw as city engineer, and we did that as we would typically of any other review. I would review the subdivisions, formalize my comments, he would look over my comments,

look over the plans, add to them, and then we would submit them for the developer, his engineer to address comments.
Q. Was the Canyon Greens two an administrative plat?
A. I don't believe so.
Q. Do you know why it wasn't an administrative plat?
A. It had new street improvements, I believe new water lines, new sewer lines.
Q. And, do you recall referencing any other subdivision files in your work on Canyon Greens two?
A. I do not.
Q. Are you -- were you aware at the time that Canyon Greens two was a re-subdivision of Sunset Palisades number eight?
A. I don't remember.
Q. Were you aware that Canyon Greens number two was part of an original PUD?
A. I don't remember that either.
Q. So, you have no recollection in the Canyon Greens two reviews of going back and looking at any of the former subdivision files that encompassed Canyon Greens two?
A. That is correct.

Q. Do you know if anyone did?
A. I do not know.
Q. Do you remember any pre-application stage of review for Canyon Greens two?
A. I don't remember.
Q. Do you ever remember meeting with Mr. Block regarding, well, let's say this informal subdivision review process?
A. I don't remember that either.
Q. Does public works department have any role in regard to grading and filling activities in the City of Lewiston?
A. No.
Q. There's no engineering oversight or inspection of grade and fill that is vested in public works?
A. No. We have the ability within the subdivision code to request geotechnical work, but, no, to my knowledge, no mandate.
Q. And under what circumstances do you have the authority to require geotechnical reports?
A. I believe it's under professional knowledge.
Q. There is actually a Lewiston code section that talks about that, isn't there?
A. Yes.
Q. And, when you say professional knowledge, are

you saying it is, you think it's the, the city engineer that makes a determination as to, based on professional knowledge, as to whether there is a geotechnical study required?
A. Well, it's a multiple, multiple things. I think he'd look at past history, your background, your professional background and your level of comfort with the site. You know, we can use, talk to other professionals in the field about, about the site. I mean, I guess there's just a lot of things that I would use.
Q. Did you use any of those things in evaluating the Canyon Greens two subdivision?
A. Yes.
Q. And what did you take into account?
A. To me it didn't look like a difficult subdivision, because it was in a very flat area.
Q. Did you know anything about the history of that very flat area that....
A. I did not.
Q. Did you ever look at any topographical information for that area?
A. I did not.
Q. Did you ever review any records of fill permitting or fill inspection for that area?

information of past slides. Using that information, I would get in contact with the engineer of record that worked on the subdivision and have some conversations about what's going on with their project.

Q. (BY MR. LANDECK) Okay. And would you have done more research, then, as part of that process to find out more history?

A. Yes.

Q. Okay. Were you aware of the detention pond that failed in the area of Canyon Greens?

MR. ADAMS: Objection, foundation.

A. I was not.

Q. (BY MR. LANDECK) Okay. Would that be another factor that you would consider, if that information had been known to you?

MR. ADAMS: Objection, foundation, form.

A. Canyon Greens one and Canyon Greens two, I don't know if I would have drawn any relationship to those two things to, to use that as information I would use to require a geotechnical report.

Q. (BY MR. LANDECK) Isn't one of the purposes of the subdivision review process to discuss with the developer, potential concerns, site specific concerns in their proposed development?

A. Yes.

Q. The fact that Mr. Block was allowed to build three homes over an area in which slope movement was detected, did the City fulfill its obligation to Mr. Block to advise him about that potential problem?

MR. ADAMS: Objection, form, foundation, calls for legal speculation.

MR. STUBBERS: Can you restate your question?

Q. (BY MR. LANDECK) Did the City fulfill its obligation under the subdivision ordinance to discuss with and advise developers about potential site issues in failing to let Mr. Block know of this information in the file regarding the slide activity?

A. I don't --

MR. ADAMS: Same objections.

A. I don't think the City's review guarantees that any piece of property is not going to have problems associated with it down the road.

Q. (BY MR. LANDECK) That wasn't my question. My question was, didn't the City have an obligation to let Mr. Block know of the information that was contained in its files regarding the slide activity on the property that it permitted him to develop?

MR. ADAMS: Same objections.

A. I mean, we have an obligation, in my mind, to bring forward all the information we know on the site

ourselves. All documents that are contained within the file are documents of record that are available to the developer or his engineer upon development.

Q. (BY MR. LANDECK) Oh, okay. So you're saying that Mr. Block has the duty, then, as a developer to go through every single piece of information in your files to determine whether or not that development is suitable for him?

A. I'm not saying he has the duty. I said he has the ability to do that if he so chooses.

Q. But do you have a duty to the developers to advise them about information which you know of?

MR. ADAMS: Objection, form and foundation, calls for legal conclusion.

A. Of the information I know of, I should bring that forward to the engineer of record and the developer.

Q. (BY MR. LANDECK) And this information, Exhibit 125, was not brought forward to Mr. Block, was it?

A. I did not know about this document in my review of Canyon Greens two.

Q. Do you know if Mr. Cutshaw knew of the, of the -- of this document in his review of Sunset Palisades number eight or his review of Canyon Greens?

A. I do not know.

Q. Were you involved at all in the reviews of any building permits for Mr. Block on 153, 155 and 159 Marine View Drive?

A. Not to my knowledge.

Q. Were you --

A. Sherri, Sherri Kole works under me, and I can't remember if she reviewed those while she was working under Lowell Cutshaw or she was working under myself.

Q. And were you involved at all in any reviews of building permit applications that centered on retaining walls for that same area?

A. Not to my knowledge.

Q. In your opinion, was the land upon which this slide occurred that's depicted in Exhibit 125, land that was suitable for residential use?

MR. ADAMS: Objection, calls for legal conclusion.

MR. LANDECK: No, I don't think so.

MR. ADAMS: Yeah, withdrawn. But I am going to object to form.

MR. STUBBERS: Can I answer?

MR. ADAMS: Yeah, you can still answer that.

A. There's areas in there that I think are suitable for residential use.

Q. (BY MR. LANDECK) And would there be areas in

937-1015

EXHIBIT 9

FOURTH AFFIDAVIT OF RONALD J. LANDECK IN SUPPORT OF PLAINTIFF'S MOTION TO RECONSIDER MEMORANDUM OPINION AND ORDER ON SECOND MOTION FOR SUMMARY JUDGMENT

938 1076

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

JOHN G. BLOCK, a single man,

Plaintiff,

vs

JACK J. STREIBICK, a single man, JACK STREIBICK, as Personal Representative of the Estate of Maureen F. Streibick, deceased, CITY OF LEWISTON, a municipal corporation of the State of Idaho, and its employees, LOWELL J. CUTSHAW, City of Lewiston Engineer, and DOES 1-20,

Defendants.

Case No. CV 09-02219

Taken at 1134 F Street
Lewiston, Idaho
Tuesday, April 5, 2011 - 2:01 p.m.

D E P O S I T I O N

OF

JOHN "HANK" SWIFT

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

COPY

JOHN G. BLOCK, a single man,

Plaintiff,

vs.

JACK J. STREIBICK, a single man, JACK STREIBICK as Personal Representative of the Estate of Maureen F. Streibick, deceased, CITY OF LEWISTON, a municipal corporation of the State of Idaho, and its employee, LOWELL J. CUTSHAW, City of Lewiston Engineer, and DOES 1-20,

Defendants.

Case No. CV 09-02219

Volume 2

Pages 120 - 250

DEPOSITION OF JOHN R. "HANK" SWIFT

TAKEN ON BEHALF OF DEFENDANTS CITY OF LEWISTON AND LOWELL J. CUTSHAW, CITY ENGINEER

AT MOSCOW, IDAHO

SEPTEMBER 14, 2011

9:05 A.M.

REPORTED BY:

ROBIN E. REASON, RDR, CRR, CSR

Notary Public

some people dealing with a storm drain issue, but that's the only thing that I found.

Q Okay. I need to know what documents you relied on to reach the opinion that the city had a hands-off approach.

A The lack of documents.

Q What documents have you reviewed to refer -- to conclude that there is --

A I've -- okay. Sorry --

Q -- to conclude that there is a lack of supervision and inspection?

A The information provided by the city for this case through discovery, I looked through all that. And there was really nothing that, like I said, showed that they were very hands-on when it came to anything having to do with the grading of the site or -- with the exception of -- anything else with the exception of what I had mentioned.

Q How many documents did you review from the city?

A I think everything that -- I can't tell you the number, each -- you know, a specific number. But I believe it was everything that was supplied to me.

Q Do you have a list of COL documents, with the Bates number COL, that you have reviewed?

A I would have to summarize that.

Q Well, it's kind of important because you're claiming based on your review of documents you've concluded that the city is hands-off because of a lack of documents. But we don't know what documents you've reviewed. Do you agree with that?

A Yes. I've reviewed everything with City of Lewiston's code that was provided by Mr. Landeck, and I'm assuming that that was everything that they had. I mean they --

Q Do you know if you've reviewed 3,000 documents from the city?

A I have not reviewed 3,000.

Q 2,000?

A It would be less than a hundred.

Q Okay. So all right. So if there are more documents, that may change your opinion.

A Yes. Could.

Q Your next statement is that "the City's failure to require proper abatement of a landslide ... contributed to instability."

What power did the city have to abate the landslide?

A Well, again --

MR. LANDECK: Object it calls for a legal conclusion.

MR. ADAMS: Q And I'm asking for your -- what you base that opinion on.

A Okay. It all goes back to having no geotechnical evaluation. If geotechnical evaluation would have been performed, then steps could have been taken to mitigate any landslide. The city would have known about it through the process that we've discussed previously, and if those steps were not being taken, then the city could have red tagged the project.

Q I want to make sure I understand. Are you saying your opinion is that through some statute or other source of authority, the city had the power to require a property owner to do something specific with their property, including abating a landslide? Is that your opinion?

A As far as statute or code goes, no.

Q Okay. Just with regard to had there been a geotech, they could have made --

A Yes.

Q -- specific recommendations or requirements.

A And I don't see any difference between that and red tagging the houses, which I believe they did after they became unsafe. Because it's an unsafe condition. Because I believe they red tagged two houses which were

then demolished?

Q You don't see a difference between red tagging two houses in which people were living as opposed to requiring certain actions be taken on vacant property?

A Vacant property that could impact neighboring property. Landslides go downhill. Could go onto the adjoining properties. Could adversely affect the health and safety of anyone working on the vacant property doing development.

Q Do you have any opinion as to which neighboring properties would have been affected by the landslide?

A In this particular case with what has happened so far, it doesn't appear that neighboring properties have been affected.

Q Moving down in paragraph 5, are you claiming that the city had a duty to prevent development in the area of Sunset Palisades No. 8 or Canyon Greens, the 153, 155 and 159 Marine View Drive houses?

MR. LANDECK: Object it calls for a legal conclusion.

THE WITNESS: I don't say that they had a duty to prevent the development. I think that, you know, they have a duty to ensure that development happens in such a way that is in -- that is safe and doesn't adversely impact the community.

941 1079

EXHIBIT 10

FOURTH AFFIDAVIT OF RONALD J. LANDECK IN SUPPORT OF PLAINTIFF'S MOTION TO RECONSIDER MEMORANDUM OPINION AND ORDER ON SECOND MOTION FOR SUMMARY JUDGMENT

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

JOHN G. BLOCK, a single man,

Plaintiff,

vs

JACK J. STREIBICK, a single man, JACK STREIBICK, as Personal Representative of the Estate of Maureen F. Streibick, deceased, CITY OF LEWISTON, a municipal corporation of the State of Idaho, and its employee, LOWELL J. CUTSHAW, City of Lewiston Engineer, and DOES 1-20,

Defendants.

Case No. CV 09-02219

Taken at 141 Ninth Street
Lewiston, Idaho
Thursday, October 14, 2010 - 8:09 a.m.

D E P O S I T I O N

OF

BUD R. VAN STONE

FOURTH AFFIDAVIT OF RONALD J. LANDECK IN SUPPORT OF PLAINTIFF'S MOTION TO RECONSIDER MEMORANDUM OPINION AND ORDER ON SECOND MOTION FOR SUMMARY JUDGMENT

Q. Yeah. Let me hand you Exhibit 125.
A. Yeah.
Q. Have you ever seen --
A. Man, that is just about three weeks before I retired.
Q. Do you recall any discussions with Tim Richard about Terry Howard having provided the photograph that he did?
A. No. I don't recall any specific discussions with Tim, but I'm sure I had them. But I don't recall them.
Q. Okay.
A. That's asking an awful lot, you know.
Q. I know that. Well, it's what we're talking about here in this --
A. Right.
Q. -- case.
A. I understand.
Q. Do you ever recall seeing this memo?
A. No, I don't remember it, but I'm sure I did. You know, when I read this where it says, attached to the photograph provided by Terry Howard, I -- that, that -- I vaguely remember this when I read that.
Q. Did you ever go up and look at this site on or about the time --

A. I'm sure I did.
Q. Okay.
A. It's the kind of thing that would interest me.
Q. And, you don't have any remembrance about having, or asking Tim to put something in the file to memorialize, memorialize this?
A. I don't remember doing that, but it's something I would probably have done. I don't know.
Q. Well, why would you have done it?
A. Well, that's, that's my way of doing business, you know.
Q. What do you think -- I mean, Tim put this in, looks like he put it in a file of Sunset Palisades number four. Do you see that --
A. Right.
Q. -- memorandum addressed to the file?
A. Right.
Q. So what -- would that be in the normal course of his business as city engineer to document this?
A. Yes.
Q. And what would be the purpose behind doing that?
A. Just for future reference.
Q. Okay. So this is some information that the City should have at its beck and call, correct?

MR. ADAMS: Objection, form.
A. Well, yeah, it's information that should be available to the City for future use. Whether that happens or not is another question.
Q. (BY MR. LANDECK) And why is that a question?
A. Well, because if you've ever worked around a bureaucracy like that, we aren't totally efficient. We try to be.
Q. Could you look at the last paragraph of that, not of -- of Exhibit 170, the newspaper article. I just wanted you -- the last paragraph reads, Lewiston city engineer, Tim Richard, said no --
A. Right.
Q. -- action is called for at this time to deal with the earth movement. The City will document the information, and if plans for that property are submitted, will deal with it at that time. Do you see that?
A. Right. That would be typical --
Q. Would that be a correct approach to this?
A. That would be typical.
Q. Okay. And it appears that he did document it?
A. Right.
Q. In Exhibit 125. And, are you aware of any, of the City ever dealing with it at any -- I mean, dealing

with this information?
MR. ADAMS: Objection, form.
A. No. Typically you wouldn't until a need arose to address it, you know.
Q. (BY MR. LANDECK) And would that need involve a development plan for the property that was effected?
A. Absolutely should have.
MR. LANDECK: Okay. I have no further questions.
MR. CASEY: Mr. Van Stone, my name is Clint Casey. I introduced myself before the deposition.
MR. VAN STONE: Yes, sir.
MR. CASEY: And before you leave today, I want to get your phone number so I can get it to Jack Fisher for you.
MR. VAN STONE: Okay, appreciate it.

EXAMINATION

BY MR. CASEY:
Q. You were just discussing Exhibit 149?
A. Right.
Q. That's an August -- or, I mean, October 31st of '94 exhibit, and you were talking about what the, your signature meant on --
A. On the review?
Q. Yeah. On this one, 149, yeah. It's on page

1746 of that exhibit. At this point in time, what has the City done in their, you know, PUD review process?
A. When you say at this point in time, you mean on the date here?
Q. Yeah. The date that you're going to sign that.
A. All of the, the departments that are involved in a development like this would have had the opportunity to review it and comment on it, and this document says that I reviewed that.
Q. And, then, you've reviewed it, and you've found that it's meeting the requirements of the City that you were there to enforce, right?
A. Correct.
Q. And then you sign it and say, we give the City's blessing?
A. Right.
Q. Right? And I know as we sit here --
A. Well, actually, I'd have to clarify that somewhat.
Q. Sure.
A. I sign it and give the public works department blessing.
Q. Okay.
A. The community development would have then taken that to council, and they would have blessed it.

Q. Okay. So, at this point in time you were not over community development?
A. No.
Q. That had been split out from your job?
A. That would be my recollection, yes.
Q. Okay. And that's fair enough. And I'm not asking you to recall specifically what you reviewed, but I'm just, in general, that's what this document 1746 of Exhibit 149 is telling us?
A. It should testify that I reviewed the information, and I had no problems with it and signed it.
Q. And that's what it would have told the developer, Mr. Streibick, at the time you signed it also?
A. That's correct.
MR. LANDECK: Object to the form of the question.
Q. (BY MR. CASEY) And that's the reason you sign it, right, is really to tell the developer?
A. Well, also the council.
Q. Right. But that's one of the reasons, right?
A. Right.
Q. Okay.
A. That I was satisfied with the public work's

interest in that development.
Q. Right.
MR. CASEY: Okay. I don't have any other questions for you, sir. Thank you very much.
MR. VAN STONE: You're welcome.

EXAMINATION

BY MR. ADAMS:
Q. Mr. Van Stone, I can't remember your answer to this. I'm sure I have it in my notes, but did you personally deal with review of any documents related to subdivision or re-subdivision of properties?
A. Yes.
Q. Okay. What --
A. But maybe not in every case, but I think in general, yes, I personally reviewed whatever the development was and the comments that were made by my staff concerning that development, yes. That's my recollection.
Q. All right. And, did I -- did you say that you couldn't review every single one?
A. Well, I can't sit here and say that I did that. But I should have reviewed every single one, how's that.
Q. Okay.
A. That's as close as I can get.
Q. And when you reviewed, did you review every

single document that was related to the development or subdivision or re-subdivision?
A. Just as it relates to public works.
Q. Okay. And you reviewed every single document that was relevant to the subdivision or re-subdivision?
A. If I didn't, I should.
Q. Okay.
A. That's my, part of my job, or that was part of my job.
Q. Now, when I say every single document, we may be meaning different things. What did you review?
MR. LANDECK: Object to form of the question.
A. I would --
MR. CASEY: Join.
A. I would review the comments that my staff had made for all of the public works issues that would be involved in a development of a subdivision, and if I found things that I didn't agree with or things that I questioned, I would get together with that staff person, and we'd work out something either so that I fully understood what he was saying or that he would take into account any comments that I had, and then we would eventually end up with a document like this one where I signed it off as having reviewed it.
Q. (BY MR. ADAMS) Okay. Were you the initial

reviewer of documents in the --
A. No.
Q. -- subdivision process?
A. No, huh-uh. It would come in, and I might, I might see it when it come in and give it a cursory review, but it would go to all the department heads and they would make their -- all of the people who worked for me, like sewer, water, streets and the city engineer, they would come back to me and I would see their comments.
Q. Now, when the people in your department would review the subdivision or re-subdivision application, do you know what they would look at in preparing their comments for you?
A. Yeah. They would, they would review any city code as it relates to that development to make sure that the development was in compliance with that code, and then they would sign off on that and then it would come to me.
Q. Do you know if it was possible or practical for the people in your department to research, do extensive research regarding every development, subdivision or re-subdivision that came in?
MR. LANDECK: Object to the form of the question.

A. I would say that if they didn't do that, they wouldn't have been doing their job, let's put it that way. And, again, you know, we're all humans.
Q. (BY MR. ADAMS) Okay.
A. So....
Q. At one point earlier in your testimony you said that -- and I'm not going to recall your testimony exactly, and I apologize -- but something -- when we were discussing the specialized maps of geologic hazards, such as slope instability, that that should be dealt with during the, I believe you used the word, the business of the development process. What did you mean by, and I apologize again, I may be misquoting you, but I was wondering what you meant by the business activity I believe is the word you used.
A. I remember saying that. I'm trying to remember how it -- what it related to. I don't recall specifically. But, say again now.
Q. Well, I'm going -- it's a long way back. I don't think we can have the court reporter go all the way back, but what I had written down was that in discussing the specialized maps, you had mentioned that it was dealt with as part of the business activity of the development process.
A. Well, what I meant was --

MR. LANDECK: Object to the form.
A. What I meant was that in the business of, of reviewing development plans, that's all I meant by the business activity.
Q. (BY MR. ADAMS) Okay, okay. Do you believe that developers have a responsibility for knowing about their property?
A. To an extent, yes, but, you know, his -- sometimes the history is not available. I don't know, you know.
Q. Okay. Should they be able to rely on their engineers and the people that they hire to do research of the property?
A. Should be able to. The engineer should stamp it, and the developer ought to be able to rely on it.
Q. And should the City be able to rely on the information provided by the developer's engineer?
A. Should the City be able to?
Q. Yeah.
A. Absolutely.
MR. ADAMS: Thank you. No more questions.
MR. LANDECK: I have no more questions.
MR. CASEY: I don't have any either.
(Deposition concluded at 9:38 a.m., Witness excused; Signature reserved.)

CERTIFICATE OF WITNESS
PAGE LINE

I hereby certify that this is a true and correct copy of my testimony, together with any changes I have made on this and any subsequent pages attached hereto:

Dated this day of , 2010.

BUD VAN STONE, DEPONENT

Sworn and Subscribed before me this day of , 2010.

NOTARY PUBLIC FOR THE STATE OF IDAHO
Residing in , Idaho
My Commission Expires:

EXHIBIT 11

FOURTH AFFIDAVIT OF RONALD J. LANDECK IN SUPPORT OF PLAINTIFF'S MOTION TO RECONSIDER MEMORANDUM OPINION AND ORDER ON SECOND MOTION FOR SUMMARY JUDGMENT

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

JOHN G. BLOCK, a single man,

Plaintiff,

vs

JACK J. STREIBICK, a single man, JACK STREIBICK, as Personal Representative of the Estate of Maureen F. Streibick, deceased, CITY OF LEWISTON, a municipal corporation of the State of Idaho, and its employees, LOWELL J. CUTSHAW, City of Lewiston Engineer, and DOES 1-20,

Defendants.

Case No. CV 09-02219

Taken at 1134 F Street
Lewiston, Idaho
Tuesday, April 5, 2011 - 10:05 a.m.

D E P O S I T I O N

OF

WARREN WATTS

FOURTH AFFIDAVIT OF RONALD J. LANDECK IN SUPPORT OF PLAINTIFF'S MOTION TO RECONSIDER MEMORANDUM OPINION AND ORDER ON SECOND MOTION FOR SUMMARY JUDGMENT

approving or disapproving a large embankment. That was the huge shopping center we have up there called Nez Perce Plaza.
Q. Okay.
A. I think Mr. Seubert was on board with Mr. Cutshaw when I brought the plans in for the developer, the owner.
Q. Okay. Sorry, Mr. Seubert or Mr. Stubbers? There's two employees that have similar names at the City.
A. Stubber [sic], I'm sorry. I said Seubert?
Q. You did?
A. Sorry. I used to work for a Seubert, so it's a little confusing. Stubber [sic] and Cutshaw.
Q. Okay.
A. Were involved with me on the Nez Perce Plaza at which I proposed stability of the slopes based on something steeper than the building code permitted.
Q. Okay.
A. And I had to provide information to him, so in a sense that's slope stability. And then the second one was more recently for Medley.
Q. Okay. So, how many subdivisions have you been involved in for, within the City limits?
A. Well, probably about six or eight through my

time.
Q. Okay. And only two of those have required slope stability analysis?
A. That is correct.
Q. Okay. Should the City be able to rely on a builder's knowledge about the property with regard to placement of the homes?
A. Well, the builder has to submit a plot plan. Is that what you're getting at?
Q. No.
A. Okay. Just knowledge?
Q. Well, does the City -- is the City responsible to know everything about the property before it approves a building plan?
MR. LANDECK: Object to form.
A. I would -- no, they wouldn't know everything, no.
Q. (BY MR. ADAMS) Okay. Are they required to know every potential problem with a property before they allow a building permit?
A. Oh, that's a broad statement.
MR. LANDECK: Object to form.
A. You know, what problems are you talking about?
Q. (BY MR. ADAMS) Well, I'm, I'm asking a very broad question --

A. I know you --
Q. -- intentionally.
A. -- are. Again, if a settlement is called a sore thumb out there that's had some issues of slippage and sliding, they certainly should be conscious of it and make the builder aware of it.
Q. Okay.
A. And maybe require some additional analysis before they issue and approve a building permit.
Q. Is it your opinion that the City has a duty to make sure absolutely nothing can go wrong with a property before it issues a building permit?
MR. LANDECK: Object to form.
A. I would think not, not to that extent.
Q. (BY MR. ADAMS) Okay. Is it your opinion that the City is to ensure, make sure that properties are prepared for building?
MR. LANDECK: Object to form.
A. Insured?
Q. (BY MR. ADAMS) Ensure.
A. Would you ask that question again?
MR. LANDECK: Object to form.
MR. ADAMS: Let me try that again. Well, could you read it back?
(Whereupon, the court reporter read back the

previous question.)
(Discussion held off the record.)
MR. ADAMS: Let me try again.
Q. (BY MR. ADAMS) Is it your opinion that the City has a duty to ensure that the property is prepared for building before a building permit can be issued?
MR. LANDECK: Object to form.
A. You know I, to answer that I'd have to clarify it.
Q. (BY MR. ADAMS) Okay.
A. It's my opinion that the City should relay on any information that is known on land that wants, somebody wants to develop. Whether it's, you know, whether it's proper zoning, whether it's got some conditions on it or unstable, or whether it might effect a neighbor, certainly I think the City should -- that's what they're here for is to safeguard the health and safety of the people of the community. They should be able to, or should be required as part of their duty to relay that information on to whoever might want to build on it.
Q. Okay. You said any information during your answer. What information specifically, or is it all information?
A. We're talking about unsafe conditions and

unstable land. There might be, you know, we couldn't gather everything that the City may or may not know. But if they know, if it's known in the area that there's a piece of land out there that may be unstable to build on, then there's a mechanism for the City to exercise their responsibility to make the developer aware of it and the builder. You could either deny it or you could put restrictions on it. I've seen that before. They make people aware, hey, if you're going to build on this lot, you better get a geotech report or you better analyze it or whatever. And I think that's -- in those realms, I think the City, again, the people in the City, have that responsibility.

Q. Okay. So once again, when you say "known in the area", are you referring to general knowledge?

A. General, basically. It could be however they might receive it. General to you might not be general to me or vice versa.

Q. Well, that's again what I'm trying to get it. If, for example, Shawn Stubbers did not know there was a problem with the property, not a sore thumb as you used the term, would he be required to -- well, is there any absolute requirement that he, under specific conditions require a slope stability analysis?

MR. LANDECK: Object to form.

A. I think there's language in the City's subdivision or some other documents that gives the City engineer the authority to request an evaluation from the developer if, if it's required. If the City engineer or anybody else at the City, being the planning department, feels there is a need to, to evaluate a piece of land before it's developed, then who else is going to let the person know?

Q. (BY MR. ADAMS) Is that information available to the developer?

A. I, I suspect so.

Q. Is it available to the builder?

A. It might be available to him, yes.

Q. Are City files open to review?

A. I would think so.

Q. Have you had any experience requesting information from the City?

A. Have I personally?

Q. Yes.

A. Yes, I have.

Q. Okay. Are you able to get documents that you're looking for from the City?

A. Yes.

Q. Okay. Do you know if the information regarding this property was available to Mr. Block?

A. I can't answer that. I wasn't here.

Q. Okay. What if no employee currently working for the City has knowledge about a specific site condition, what is the City's duty at that point?

MR. LANDECK: Object to the form.

A. Nobody is available, they're all gone?

Q. No, no, not available. Has no knowledge of the site condition.

A. I don't know how they could -- I'm sure they'd have records and files that would be open. I think it would be prudent for somebody in the City, be it the engineering department or planning department or building department to check the files.

Q. Okay. Which files should be checked?

A. Whatever is available on that land. If there's, you know, test reports.

Q. Do you know how long the City has to approve a subdivision plan?

A. How long do they have?

Q. Yes, from once it's submitted.

A. In the preliminary state?

MR. LANDECK: Object to form.

A. To me they have too long of a time, really.

Q. Okay.

A. They have --

Q. Let me ask it a different way.

A. Go ahead.

Q. Is there a time limit placed on how long the City has to comment, accept or reject a subdivision plan?

A. I believe there is.

Q. Okay. And, do you know if the City has time to check every file that's related to the property at issue?

A. I would think they would, yes.

Q. Okay. When you were the City engineer, slash public works director, did you check every file and every document related to a property when you were asked to comment on it?

A. If there was anything I was concerned, I would check on it.

Q. But you didn't check every time, did you?

A. Well, if I didn't, somebody in the City did.

Q. Do you know that for a fact?

A. Yes.

Q. Okay. Who was it at the City -- wait. I'm asking when you were the public works director?

A. That's right.

Q. Correct. When you said somebody at the City, you meant somebody else?

the -- I can't answer that.
Q. (BY MR. ADAMS) Okay. Have you --
A. You said the building official. Are you talking about the engineering department or the building department?
Q. I'm talking about -- I'm sorry, what did you say?
A. Are you talking about the building official or the, or the engineering department? I lost you there.
Q. I'm talking about the building official.
A. The building official.
Q. And my question is, do you -- in your experience, have you ever had a building official require a slope stability analysis?
A. No, I haven't.
Q. Is -- do building officials have, in your experience, authority to require compaction testing?
A. Yes.
Q. Okay. And is that with regard to I think you, you made a comment regarding structural slopes, I might be slaughtering the word.
A. Structural embankments.
Q. Structural embankments, thank you. And also under footings?
A. Yes.

Q. Okay. Do you know -- have you ever had an experience where a building official required a full-blown slope stability analysis?
MR. LANDECK: Object to form.
A. No, not a building official, no.
Q. (BY MR. ADAMS) Do you know if the City engineer is involved in issuing a building permit?
A. I don't know what the procedure in Lewiston is. I know when I was here what we did, but beyond that I can't answer.
Q. Okay. Is it -- are you providing any opinion today regarding the design of the houses?
A. The houses themselves?
Q. The houses and the properties?
A. I don't follow you on that. The house, no.
Q. Okay. Are you providing any opinion with regard to the design or placement of other things on the property such as retraining walls or pools?
A. No.
Q. Is it your opinion that the City should not have approved the subdivision plan for Canyon Greens?
A. It should not have unless they had stipulations on it.
Q. And what are those stipulations?
A. That it should have been analyzed, the

stability.
Q. And once again, is, is this back to the testimony you gave earlier about, because of the general knowledge regarding the condition of the property?
A. Basically.
Q. Okay. And was there any specific knowledge regarding the condition of the property that should have prevented the City from approving the subdivision plan for Canyon Greens?
A. Well, I think I answered that. I thought they should, should have been conscious of it and either rejected it or put some stipulations on it.
Q. Yes. But I'm, I guess maybe my -- and I admit, I do ask poor questions.
A. No, you're sharper than I am.
Q. Well, thank you. What specific knowledge did the City have when it approved the subdivision for Canyon Greens that should have prevented the City from either approving the subdivision plan or alternately putting stipulations on it?
MR. LANDECK: Object to form.
A. Well, again, I'm surmising they should have known, should have known there's been an embankment put on the property. You know, I think that should have been knowledge, general knowledge, of the City.

Q. Okay. So --
A. And then the knowledge that that area suspect of being unstable. Those two items should have been on the forefront of the City before they approved the plat. They should have required some geotech, be it compaction testing, whatever, some background on that land before they approved the plat.
Q. And, once again, if the employees of the City who worked on the subdivision process have testified that they didn't know that there were issues with the property, what would have been their duty to require a geotech analysis or slope stability analysis or something similar?
MR. LANDECK: Object to form, and asked and answered.
A. It's hard for me to believe they didn't have some knowledge. If they went and looked at the site, they could have ascertained there had been an embankment put on it. And then based on that, they should have required some information from the developer as to the stability of that embankment. All they had to do was review the site and see that.
Q. Do you know if an engineered set of plans is required for a subdivision plan?
A. There is engineering plans required for the

utilities and the roadways, and if there's major grading performed by the developer, then that should be included.

Q. Do you know who the engineer was who worked on the administrative plat for Canyon Greens?

A. No, I don't.

Q. Do you know if it was Keltic Construction?

MR. LANDECK: I think he said he didn't know.

Q. (BY MR. ADAMS) All right. Will you look at Exhibit 142, please ?

MR. LANDECK: What number was that?

Q. (BY MR. ADAMS) Exhibit 142, I believe.

A. Yes, it is 142.

Q. Okay. Have you seen this document before?

A. You know, I think I did see this last page maybe late -- the other day.

Q. Do you know who prepared that document?

A. Well the name on it is Keltic Engineering.

Q. Does the City have the right to rely on a plan prepared by a licensed engineer with regard to a subdivision plan?

MR. LANDECK: Object to form.

A. Yes. They have that, and they have the responsibility to check it out.

Q. What if the, if the licensed engineer has

knowledge regarding slope movement on a specific property that he has prepared a subdivision plan for, do you think he has a duty to share that knowledge with the City?

MR. LANDECK: Object to form.

A. If the engineer has knowledge?

Q. (BY MR. ADAMS) Yes.

A. I'd have to speak for myself.

Q. Okay. Speaking for yourself.

A. I'd certainly like -- I'd let them know.

Q. May I have that back? Thank you. So, it's your opinion that if Eric Hasenoehrl or some other engineer from Keltic Engineering had knowledge regarding slope movement on the property, he should have let the City know?

A. Yes. I know Eric. He's pretty thorough. I think he would have.

Q. Okay. When should the City have required a slope stability analysis be done on this property?

A. Whether they require it or not, I don't know if they went that far or not. What they should have required, in my thoughts is to let the engineer of record know what they knew about the property and make him aware of it, and he'd probably take the bull by the horns and do it himself and do whatever had to be done

on the property.

Q. So if the engineer of record was Eric Hasenoehrl or Keltic Engineering, they could have used either, from what -- I'm taking from what you just said, either the City's knowledge or their own knowledge to determine whether or not to require a slope stability analysis; is that correct?

A. Yes.

Q. Should the City have required a slope stability analysis when the property was re-subdivided in 2005?

A. I think we're getting off a little bit and talking slope stability now, and I'd like to go back and say the City should have required a geotech evaluation of the property, whatever it would take to satisfy the owner and the developer and the builder that it was stable. And, you know, whether a slope stability analysis, that would be somebody else's decision, not mine. If I was the engineer, I may or may not do it. I'd have to look into it. But that's one instrument by which, now in hindsight, would probably stipulate or show that that land is unstable.

Q. Now, apparently I -- I've been under the impression throughout this case that a geotech analysis and slope stability analysis are similar if not the same?

A. No, a geotech is more broad.

Q. Okay. So, what is the difference between the two?

A. Well, slope stability analysis is one tool that a geotech will use to evaluate a site.

Q. Okay.

A. A lot of them might be geology and might be slope steepness, water, density.

Q. So, is it your opinion that the City should have required a geotechnical analysis or a slope stability analysis?

A. Geotech evaluation, which they've done in the past.

Q. Okay. So, your opinion is not with regard to a slope stability analysis?

A. No. That came up, again, as being a tool that could have been part of the geotech evaluation.

Q. Okay. So, is it your opinion that a geotechnical analysis should have been done in 2005?

A. City should have required it.

Q. Okay. Is it your opinion that a geotech analysis should have been done when the property was re-subdivided in 2006?

A. The City should have required it.

Q. Is it your opinion that the City should have

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IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

JOHN G. BLOCK, a single man, Plaintiff, vs. JACK J. STREIBICK, a single man, JACK J. STREIBICK, as Personal Representative of the Estate of Maureen F. Streibick, deceased, CITY OF LEWISTON, a municipal corporation of the State of Idaho, and its employee, LOWELL J. CUTSHAW, City of Lewiston Engineer, and DOES 1-20, Defendants.	Case No. CV 09-02219 **AMENDED MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION OF MEMORANDUM OPINION AND ORDER ON SECOND MOTION FOR SUMMARY JUDGMENT**

Plaintiff John G. Block ("Block"), through counsel, hereby submits this Memorandum in Support of Motion for Reconsideration of Memorandum Opinion and Order on Second Motion for Summary Judgment. Pursuant to I.R.C.P. Rule 11(a)(2)(B), Block respectfully requests that

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this Court reconsider and withdraw its Memorandum Opinion and Order on Second Motion for Summary Judgment that granted Defendant City of Lewiston and Lowell J. Cutshaw's Second Motion for Summary Judgment ("Order").

In its Order this Court granted the Defendant City of Lewiston and Lowell J. Cutshaw's ("City's") Second Motion for Summary Judgment based on its application of the economic loss rule and recognized exceptions from liability based upon provisions of the Idaho Tort Claims Act ("ITCA"). Block asserts that this Court's application of the economic loss rule to bar his negligence claims was in error. In addition, Block asserts that this Court's recognition of and application of exceptions to liability based on provisions of the ITCA were also in error. Further, Block asserts that there remain genuine issues of material fact regarding the City's negligence and/or gross negligence with respect to its actions and/or omissions. Block's arguments are more fully explained below.

The background facts in their most basic sense are that (i) a landslide occurred on property contained within City limits and contained within a subdivision, Sunset Palisades No. 4 ("SP4"); (ii) the City knew and documented such landslide event in two separate file locations in City records with the intent of addressing such landslide when future development of the property occurred; (iii) the property at issue was proposed for development through various subdivision processes including Sunset Palisades No. 8 ("SP8") completed before Block purchased the property at issue, and Canyon Greens ("CG") and Canyon Greens No. 2 ("CG2") completed during Block's ownership of the property at issue; (iv) the City's subdivision ordinance required staff to meet with each developer and identify any unusual problems and determine if special studies were needed; (v) City staff met with Block and failed to warn or

advise of the landslide occurrence either by not exercising ordinary care, or by failing to do what reasonable person(s) in a similar situation and of similar responsibility would recognize as his or her duty; (vi) Block developed the property exercising, at a minimum, ordinary care and in compliance with all of the City's requirements, (vii) in 2009 an almost identical landslide/earth movement event occurred that was the proximate cause of physical damage to Block's three homes and improvements constructed at 153, 155, and 159 Marine View Drive and within CG, and Block was forced to demolish some of these structures at great monetary loss.

Some additional basic facts related to the situation described above are (i) at no time did Block enter into a contract with the City either for the sale of goods or services; (ii) at no time did Block enter into a contract to purchase anything more than the bare land on which he constructed the homes and various other structures and that contract was with the Streibicks and not the City; (iii) at the time of the City's negligent actions, Block owned only unimproved real property; (iv) Block is seeking damages because this "other property," the homes and improvements he constructed were damaged because of the 2009 landslide; (v) Block is not claiming compensation for damages to the unimproved real property he purchased from a third party; (vi) the real property is still there.

The Court's application of the economic loss rule to bar Block's recovery of damages is erroneous.

The facts of Block's case are distinguishable from the facts of the cases cited by this Court in its Order. The following cases were cited by the Court in its Order.

In *Salmon Rivers Sportsman Camps, Inc. v. Cessna Aircraft Co.*, 97 Idaho 348, 544 P.2d 306 (1975) the issues before the court were limited to (i) "whether a plaintiff may maintain an action against a manufacturer, with which it is not in privity of contract, to recover economic loss

on the ground of breach of implied warranty within the contract statute of limitations" and (ii) the effect of plaintiffs failure to give a defendant adequate notice of breach of warranty pursuant to the Uniform Sales Act. *Id.* at 352, 356, 544 P.2d at 310, 314. The court did not thoroughly consider the "economic loss rule".

The case of *Ramerth v. Hart*, 133 Idaho 194, 983 P.2d 848 (1999) is also distinguishable from Block's case. In 1995 Morris sold an airplane to Ramerth. *Id.* at 195, 983 P.2d at 849. Ramerth later discovered that the airplane had certain defects caused by repairs improperly done in 1992 by Hart. *Id.* at 195-96, 983 P.2d at 849-50. Ramerth and Morris sued Hart based on negligence, negligence per se and breach of contract and sought damages for repairing the defective airplane as well as lost profits. *Id.* at 196, 983 P.2d at 850. The district court granted summary judgment dismissing the negligence claims based on a finding that the alleged damages were purely economic. *Id.* The court cited *Salmon Rivers* stating "economic loss includes costs of repair and replacement of defective property which is the subject of the transaction, as well as commercial loss for inadequate value and consequent loss of profits or use." *Id.* The court held that the transaction was a sale and purchase and that the subject of that transaction was the defective airplane, thus damages to repair the subject of that transaction, the defective airplane, as well as commercial loss of profits from use of that defective airplane, was economic loss. *Id.* at 197, 983 P.2d at 851. Thus, boiled down to the basics, Ramerth purchased a defective airplane; the airplane was the subject of the transaction; the costs to repair or replace the defective airplane were economic loss.

Also distinguishable from Block's case and cited by this Court, is *Blahd v. Smith, Inc.*, 141 Idaho 296, 108 P.3d 996 (2005). The Blahds purchased **a lot and house** on a hillside. *Id.* at

298, 108 P.3d at 998. The ground underneath the house began to settle and caused damage to the house. *Id.* Peter and Kimberly Gysling had previously owned the lot and constructed the home. *Id.* at 299, 108 P.3d at 999. The Blahds purchased the home from the Gyslings. *Id.* The Blahds filed a complaint against several parties. *Id.* The district granted summary judgment on the ground that the Blahds' negligence claims were barred by the economic loss rule. *Id.*

On review, the Idaho Supreme Court stated "it is the subject of the transaction that determines whether a loss is property damage or economic loss, not the status of the party being sued. The Blahds purchased the house and lot as an integrated whole. . . . **[Therefore,] the subject of the transaction [was] both the lot and the house.**" *Id.* at 301, 108 P.3d at 1001. Therefore, the damage to the Blahds' house caused by the house foundation settling was purely economic and their negligence claims were barred against the Smith Entities (who improved the lot) and Jones (who told the Gyslings that the soil was adequate for residential construction) by the economic loss rule. *Id.* at 301, 108 P.3d at 1001.

Also distinguishable from Block's case and cited by this Court, is *Tusch Enterprises v. Coffin*, 113 Idaho 37, 740 P.2d 1022 (1987). In *Tusch*, Vander Boegh was the prior owner of the land and constructed three duplexes that were completed in early 1976. *Id.* at 39, 740 P.2d at 1024. In March 1979, Tusch Enterprises purchased the land and duplexes from Vander Boeghs. *Id.* at 40, 740 P.2d at 1025. Thereafter, Tusch Enterprises noticed damage to the foundation of the duplexes. *Id.* Tusch Enterprises alleged negligence on the part of the Vander Boeghs and Coffin in the design and construction of the duplexes; however, because the only damages alleged were lost rental income from the duplexes and property damage to the duplexes and parking lot, the Court affirmed the district court's decision to dismiss the negligence claim

because such losses were purely economic losses. The court cited the *Salmon Rivers* court's statement that "economic loss includes costs of repair and replacement of defective property which is the subject of the transaction as well as commercial loss for inadequate value and consequent loss of profits or use." *Id.* at 41, 740 P.2d at 1026. Thus, because Tusch Enterprises suffered no personal injuries and no damage to property other than that which was the subject of the sale and purchase transaction, being the land and duplexes, Tusch Enterprises' lost rental income and duplex and parking lot damages were deemed economic losses and non-recoverable in their negligence action. *Id.* at 40-41, 740 P.2d at 1025-26.

Thus, all cases cited by the Court are inapposite to Block's case. Ramerth purchased a defective airplane, the airplane was the subject of the transaction, the costs to repair or replace the defective airplane was economic loss; the Blahds purchased a defective house and lot, the house and lot were the subject of the transaction, the costs to repair or replace the defective house and lot was economic loss; Tusch Enterprises purchased the lots, the duplexes and the parking lots, the lots, the duplexes and the parking lots were the subject of the transaction, the costs to repair or replace the defective lots, duplexes and parking lots were economic loss. The facts in these cases cited by this Court are distinguishable from the facts of Block's case.

Block purchased four unimproved lots from Defendants Streibick; those four unimproved lots were the subject of the transaction, any costs to repair or replace those four unimproved lots is economic loss. However, Block has not alleged any such damage. The damage Block has alleged is distinct from any damage to those four lots which were the subject of his transaction with Streibicks. At least one year after purchasing the lots, Block constructed homes, retaining walls, driveways, swimming pools, fences and decks on a portion of those four lots. These

homes, retaining walls, driveways, swimming pools, fences and decks are "other property" that has suffered damage. This "other property" was not part of the subject of the transaction. Block did not purchase the homes, retaining walls, driveways, swimming pools, fences and decks like Ramerth purchased an airplane, Blahds purchased a home and lot, and Tusch Enterprises purchased lots, duplexes and parking lots. These four cases provide an incomplete analysis of the issue before this Court in this case. The facts of Block's case are **different**, distinguish Block's case from the cases relied upon by this Court and compel a different result.

The Idaho Supreme Court has recently revisited the "economic loss rule" in *Aardema v. U.S. Dairy Systems, Inc.*, 147 Idaho 785, 215 P.3d 505 (2009) and *Brian and Christie, Inc. v. Leishman Electric, Inc.*, 150 Idaho 22, 244 P.3d 166 (2010).

In *Aardema v. U.S. Dairy Systems, Inc.*, 147 Idaho 785, 215 P.3d 505 (2009) plaintiff's tort claim arose out of the contract for a milking system. *Id.* at 790, 215 P.3d at 510. The Idaho Supreme Court explained that "damage to person or property when the property is not the subject of the transaction is recoverable under a negligence theory." *Id.* The Court observed that "it has not defined the 'subject of the transaction,' instead relying on factual comparisons from previous decisions." *Id.* at 791, 215 P.3d at 511, citing *Blahd*, supra at 301. Its "clear pattern" in these decisions has been to "implicitly" define the "subject of the transaction" by the subject matter of the contract." *Id.* The court continued by recanting its prior statement in *Blahd*, to the effect that the word "transaction" refers to the "subject of the lawsuit," by clarifying that "if the subject of the transaction is defined as the subject of the lawsuit essentially every claim would be barred by the economic loss rule. Instead we read this overbroad language from *Blahd* to mean that the *underlying contract* that is the subject of the lawsuit is the subject of the transaction." *Id.* at FN2.

Thus, this Court's recitation on page 6 of its Order that for purposes of the economic loss rule the word transaction means the subject of the lawsuit is in error. Further, the court in *Aardema* explained that the defendants' argument that the cows were the subject of the transaction was strained and that only the milking machines were the subject of the transaction because the dairy did not contract with any of the defendants for cattle. Therefore physical damage to the cows was not economic loss.

Brian and Christie, Inc. v. Leishman Electric, Inc., 150 Idaho 22, 244 P.3d 166 (2010), the Idaho Supreme Court's most recent decision analyzing the "economic loss rule," clarified Idaho law and fully supports Block's right to pursue negligence claims against the City. In that case, plaintiff owned a restaurant and a subcontractor, hired to perform electrical work, connected signs that had been installed by a sign company to the restaurant building's electrical power without inspecting the sign's wiring. The sign's wiring caused a fire that resulted in substantial damage to the building and its contents. Plaintiff sued the subcontractor for negligent performance of electrical work. The district court held that the restaurant's cause of action was barred by the economic loss rule. *Id.* at 171-72.

In *Brian and Christie*, the Supreme Court drew the "distinction between the recovery of damages in tort for physical injuries to person or property and the recovery of truly economic loss for breach of warranty or contract" as one which centers upon the "economic expectations" of the parties. It quoted from *Clark v. International Harvester Co.*, 99 Idaho 326, 581 P.2d 784 (1978) in noting that "[t]he economic expectations of parties have not traditionally been protected by the law concerning unintentional torts." *Id.* at 335, 581 P.2d at 793. This is the underpinning of the economic loss rule, which is that parties enter into a transaction, through

contract or warranty, concerning which a party's economic expectations are not met. That is not at all the situation in Block's case. There was no contract or warranty with the City. There was no economic expectation involved in the transaction involving Block and the City. The facts of the Block case do not fall within the ambit of the economic loss rule.

As further support for this position, the Court in *Brian and Christie* states that the definition of economic loss stated in earlier Idaho cases "does not apply in cases involving the negligent rendition of services because such cases do not involve the purchase of defective property." Block did not purchase the houses he built. Block did not purchase any property from the City. Block had no economic expectations in connection with any transactions he had with the City. The Court goes on to say that "[d]amages from harm to person or property are not *purely* economic losses." Even though Block may have had aspirations for development when he entered into his real estate purchase with the Streibicks, his property damage occurred, as alleged in his Complaint, as a result of the City's failure to warn of the landslide. This Court has not concluded that Block has not properly alleged a common negligence claim against the City for its failure to warn of this condition. Block alleges that the City's failure to warn caused him damages. Under these circumstances, at the very least, Block's alleged economic loss "is recoverable in tort as a loss parasitic to an injury to person or property." *Id.* citing *Duffin*, supra at 1007, P.2d at 1200. The *Brian and Christie* Court emphasized that their concern is "with *the duties imposed by the law* upon the defendant with respect to the plaintiff's business not with the duties imposed by the construction contract." Citing *Just's, Inc. v. Arrington Construction Co.*, 99 Idaho 462, 468, 583 P.2d 997, 1003 (1978).

This then is the major error this Court has made by broadly applying the economic loss rule where, in reality, the rule is severely limited by circumstances of each case and those circumstances, in this case, do not give rise to the application of the rule. There is a duty imposed on the City of Lewiston under law to warn Block of the known dangerous condition on his property. The City of Lewiston did not use ordinary care and in fact was grossly negligent of its duty to avoid injury or damages to Mr. Block in his development of this property. The City is liable for those damages and the economic loss rule does not bar recovery for those damages and, even if it did, because those damages are also recoverable in tort as a loss parasitic to injury to property, all economic losses are recoverable in the negligence action. *Brian and Christie,* supra at 172.

There is no further Idaho Supreme Court case law citing to either of these two very recent cases; however, the U.S. District Court of Idaho recently discussed the *Aardema* case in *O Bar Cattle Co., v. Owyhee Feeders, Inc.*, 2010 WL 2652289 (June 30, 2010). The O Bar court addressed the issue of the economic loss rule in relation to jury instructions. The court explained that the economic loss rules operates to segregate damage claims between the tort law and the contract law and that "the Idaho Supreme Court has chosen to draw the line between these two potentially overlapping systems of law on the basis of (1) whether the loss claimed relates to the subject matter of the transaction and (2) whether the loss claimed includes property damage." *Id.* at *1.

In regard to the subject of the transaction, the court noted that the Idaho Supreme Court has interpreted the subject of the transaction by the subject matter of the contract. *Id.* at *2. In applying that definition the court found that the underlying contract was a bailment agreement

962 +100

whereby defendants would keep, care for, feed, water and medicate plaintiff's cattle. As such, the subject of the transaction was the bailment agreement and the deceased cattle were property other than that which was the subject of the transaction. *Id.* Thus, plaintiff's negligence claim was appropriate. *Id.*

In regard to the property damage, the court explained that even if the loss claimed related to the subject matter of the transaction, a plaintiff may still recover damages under a negligence theory if they have suffered property damage. *Id.* at *2. The court relied on the *Oppenheimer* case in which the Idaho Supreme Court drew a distinction between property that had been destroyed and property that had been reduced in value. The court noted "[i]t is clear that the Idaho courts have drawn a clear distinction between property damage and economic loss based around the destruction of property [and that as] long as a plaintiff claims actual damage and not just loss of use or value, they may seek damages under a negligence theory." *Id.* at *3.

In *Oppenheimer Industries, Inc. v. Johnson Cattle Co., Inc.*, 112 Idaho 423, 732 P.2d 661 (1987), Oppenheimer contracted with Bolen Cattle Co. to care for several head of cattle. *Id.* at 424, 732 P.2d at 662. Bolen allegedly rebranded the cattle and sold them. *Id.* A state deputy brand inspector inspected the converted cattle prior to sale. *Id.* The trial court ruled that Oppenheimer's claims against the State Brand Board failed to state a cause of action in tort because they were based upon economic damages. *Id.* at 425, 732 P.2d at 663. The Idaho Supreme Court noted that Oppenheimer was not alleging mere economic damage. *Id.* at 426, 732 P.2d at 664. The court found that Oppenheimer suffered the loss of its property due to the negligence of the deputy brand inspector. *Id.* Thus, Oppenheimer had a cause of action against the deputy brand inspector.

There does not appear to be any Idaho case law relating specifically to the facts of Block's case, where "other property" was added to real property that was the subject of a transaction and it is this "other property" that suffered physical damage. However, the United States Supreme Court has stated that for purposes of applying the economic loss doctrine the "product" is limited to that which the manufacturer originally placed in the stream of commerce through the product's sale to the initial user, but that equipment added to the product after the product was sold to the initial user was not part of the product itself but was "other property" and that physical damage the product causes to "other property" is recoverable. *Saratoga Fishing Co. v. J.M. Martinac & Co.*, 117 S.Ct. 1783 (1997). If the land Block purchased is designated as the "product" and the "other property" not necessarily equipment, but homes, walls, garages, driveways, fences, etc. are added to that product, or land, and then that product or land causes physical damage to the other property such damage should be recoverable.

Block clearly suffered physical damage to "other property" and therefore property loss. The City building official observed the following damage to 153 and 159: severe foundation damage, structural cracks inside sheetrock, warped floors, walls that had moved out of alignment, windows that had broken because of movement of the walls and a gas line separation. John Smith Depo. 39:19-25, 40:1-2. Furthermore, Block had to demolish an entire house (153) and demolish the basement of another (159), which is complete property loss, property which is no longer in Block's possession. John Block Depo. 286:5-7, 287:5-7, 22-25, 288:1-25.

Thus, Block asserts that this Court was in error in applying the economic loss rule to Block's tort claim against the City for failure to warn, a duty imposed by law not one imposed by

any "transaction," and that at the very least there is a genuine issue of material fact as to whether Block suffered property damage other than that which was the subject of any "transaction."

This Court failed to apply the appropriate summary judgment standard in granting Defendant City's Second Motion for Summary Judgment.

Summary judgment should be granted when there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. I.R.C.P. 56(c). "Upon a motion for summary judgment, all controverted facts are liberally construed in favor of the non-moving party." *G&M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 808 P2d 851 (1991). All reasonable inferences which can be made from the record shall be made in favor of the party resisting the motion. *Tusch Enters. v. Coffin*, 113 Idaho 37, 740 P2d 1022 (1987) (emphasis added). An inference adverse to the nonmoving party may be drawn if it is the only reasonable inference. *Christensen v. Idaho Land Developers, Inc.*, 104 Idaho 458, 660 P2d 70 (Ct.App.1983) (emphasis added). If the record contains conflicting inferences or reasonable minds might reach different conclusions, a summary judgment motion must be denied. *G&M Farms*, 119 Idaho at 517, 808 P2d at 854. "All doubts are to be resolved against the moving party[.]" *Id.*

This Court failed to construe the exceptions set forth in the ITCA appropriately.

Under the ITCA, liability is to be the rule with certain specific exceptions to be closely construed. *Sterling v. Bloom*, 111 Idaho 211, 214-15, 723 P.2d 755, 758-59 (1986); *Rees v. State, Dept. of Health and Welfare*, 137 P.3d 397, 143 Idaho 10 (2006). In addition, the purpose of the Idaho Tort Claims Act (ITCA) is to provide much needed relief to those suffering injury from the negligence of government employees. *Rees v. State, Dept. of Health and Welfare*, 137 P.3d 397, 143 Idaho 10 (2006). This Court in its construction and application of the specific exceptions to

liability under the ITCA not only failed to construe the exceptions closely, rather it construed them broadly, placing the burden on Block to counter the City's assertions of immunity.

Block's main argument is that the City should have told him, as someone with the status of a developer/builder on property within the City limits and over which the City had regulatory authority, that he was building on the site of a former landslide of which the City had knowledge and a duty to disclose.

Given the City's concession that negligence is a recognized tort in the State of Idaho, the Court erred by failing to properly apply the 3-step analysis at the summary judgment stage and concluding that the provisions of the ITCA asserted by the City, including I.C. §§ 6-904B(3) and (4), 6-904(1) or 6-904(7), provide immunity to the City for their negligent acts. Order at 13.

The City's duty to Block.

In *Rees v. Idaho Dept. of Health and Welfare*, 143 Idaho 10, 137 P.3d 397 (2006) the Idaho Supreme Court considered whether the Idaho Department of Health and Welfare and its employees could be liable for negligently investigating a reported case of child abuse. *Id.* at 13. The district court granted summary judgment for the State. The Supreme Court explained that when reviewing a motion for summary it engaged in a three step analysis. First, whether tort recovery is allowed under the laws of Idaho. Second, does an exception to liability under the ITCA shield the alleged misconduct from liability. Third, whether the merits of the claim entitle the moving party to dismissal.

Under the first step, the court noted that the parties agreed that the Department owed no general duty to Tegan thus the issue was whether Idaho law recognized a special duty of care in this instance. "Determining when a special relationship exists sufficient to impose an affirmative

duty requires an evaluation of the 'the sum total of those considerations of policy which lead the law to say that particular plaintiff is entitled to protection.'" *Id.* at 15, 137 P.3d at 402 citing *Coghlan*, 133 Idaho 399, 987 P.2d at 311. The court cited to the "public duty rule" a rule of non-liability and stated that an exception to this exists when a duty is owed to individuals rather than the public only and this approach accorded with Idaho law referring to *Coghlan*. *Id.* at 16, 137 P.3d at 403. The *Coghlan* case involved the Idaho Supreme Court determining that a district court's grant of a motion to dismiss regarding duty was in error and remanded for further proceedings because the court found sufficient inferences that the University of Idaho defendant and the sorority defendant had assumed a duty of care to the plaintiff. "A duty can be created if one voluntarily undertakes to perform an act, having no prior duty to do so, the duty arises to perform the act in a non-negligent manner." *Id.* at 400, 987 P.2d at 312. The court referenced allegations that supported an inference in favor of plaintiff that the university defendants assumed a duty to exercise reasonable care to safeguard the plaintiff from bad acts of which it had knowledge. *Id.* And further the sorority defendants took actions which constituted undertakings sufficient to create a duty to act in a non-negligent manner. *Id.* at 402, 987 P.2d at 314.

In examining this, the court applied a fact-intensive test as set out in a Minnesota case. *Id.* There, the court noted that a statute alone could not create a special duty and there had to be additional indicia that the government has undertaken the responsibility of protecting a particular class of person from the risk associated with a particular harm. *Id.* It then considered four non-exhaustive factors:

1. Whether the government had actual knowledge of the dangerous condition

2. Whether there was reasonable reliance by persons on the government's representations and conduct (such reliance must be based on specific actions or representations which cause the person to forego other alternatives of protecting themselves)
3. Whether an ordinance or statute set for mandatory acts clearly for the protection of a particular class of persons rather than the public as a whole; and
4. Whether the government used due care to avoid increasing the risk of harm.

The court explained that these four factors need not all be met for the Court to determine that a duty exists and they do not create a bright-line test.

Applying those factors in Block's case, the subdivision ordinance sets forth mandatory acts clearly for the protection of a particular class of persons rather than the public as a whole. In regard to whether the City had actual knowledge of the dangerous condition (i.e. the 1999 historic landslide), there is no question it had actual knowledge because two memos were placed in City records by the City Engineer. Regarding reliance, Block reasonable relied on City staff's statements and conduct in his preapplication meeting. Regarding the fourth factor, whether the City used due care to avoid harm to Block, clearly there is a genuine issue of material fact as to whether the City exercised due care in their actions as set forth in the affidavits of John Block, Eric Hasenoehrl, Bud Van Stone and John ("Hank") Swift previously submitted. The Court has erred by concluding that the City did not owe to Block a duty to competently perform its services as set forth in the subdivision code and to warn Block of the previous landslide on his real property because of the special relationship created once Block met with City staff as part of the subdivision process.

Idaho Code § 6-904B does not afford the City immunity for Block's claims which arise from the City's issuance of permits and/or failure to inspect because, at a minimum, there is a genuine issue of material fact whether the City acted with gross negligence.

Idaho Code § 6-904B provides immunity to a governmental entity and its employees while acting within the course and scope of their employment and without malice or criminal intent and without gross negligence or reckless, willful and wanton conduct for any claim which:

> 3. Arises out of the issuance, denial, suspension or revocation of, or failure or refusal to issue, deny, suspend, or revoke a permit, license, certificate, approval, order or similar authorization.
>
> 4. Arises out of the failure to make an inspection, or the making of an inadequate inspection of any property, real or personal, other than the property of the governmental entity performing the inspection.

Gross negligence is defined as "the doing or failing to do an act which a reasonable person in a similar situation and of similar responsibility would, with a minimum of contemplation, be inescapably drawn to recognize his or her duty to do or not do such act and that failing that duty shows deliberate indifference to the harmful consequences of others." I.C. § 6-904C. Block adamantly disputes this Court's assertion that "[n]othing in the record before the Court establishes that the City acted with gross negligence." An examination of the following facts demonstrates that genuine issues of material fact exist as to whether the City acted with gross negligence.

1. Eric Hasenoehrl, a licensed professional civil engineer, testified that the City did not act reasonably in approving the subdivision plan for Canyon Greens knowing that a landslide had occurred previously in that same area. Eric Hasenoehrl Depo. 566:9-24.

2. Mr. Hasenoehrl also testified that the City acted with deliberate indifference to the harmful consequences of its action by approving the subdivisions. Eric Hasenoehrl Depo. 567:6-24.

3. Mr. Hasenoehrl also testified that the City acted with gross negligence by failing to warn Block and approving the subdivisions. Eric Hasenoehrl Depo. 568:1-25.

969 HOT

4. Mr. Hasenoehrl testified in his deposition that a licensed engineer working for the City of Lewiston has an obligation to bring forward those things that have potential harm and to take action so that the information is used and addressed in the future. Eric Hasenoehrl Depo. 462:8-22, 472:1-5.

5. Mr. Hasenoerhl also testified that the City should disclose every piece of information that is necessary for the orderly and safe development of property. Eric Hasenoehrl Depo. 480:20-25, 481:1.

6. Chris Davies, a licensed professional engineer, and the current City Engineer, testified that if the City knows information it "should tell people about it. That's our job." Chris Davies Depo. 21:15-24. Mr. Davies also explained that if he had known about the Tim Richard Memorandum he would have passed it on to a potential developer. Chris Davies Depo. 20:3-11.

7. John Smith the current City building official has testified that issuance of a residential building permit on a lot unsuitable for development would be outside his authority and that he would "be negligent in [his] duty to issue a permit". John Smith Depo. 18:24-25, 19:1-9. Mr. Smith further testified that he does not have authority to issue a residential building permit for a lot that the City knows in within an area of landslide activity. John Smith Depo. 19:18-23.

8. Shawn Stubbers, a licensed professional engineer, testified that the City in reviewing a subdivision has a duty to bring information forward to a developer. Shawn Stubbers Depo. 47:11-17.

9. Former City Public Works Director Bud Van Stone testified that the placement of Tim Richard's memorandum into the SP No. 4 files was done in the normal course of business so that the City would use such for future reference. Bud Van Stone Depo. 46:12-25, 47:1-8.

10. By failing to warn John Block at time of subdivision of Canyon Greens and Canyon Greens No. 2 and upon issuance of building permits for 153, 155 and 159 and the Canyon Greens No. 2 lots, the City acted unreasonably and failed to exercise reasonable care. It is part of City staff's job to review every single document that was relevant to a subdivision or re-subdivision. Bud Van Stone Depo. 52:4-9.

11. If City staff failed to research every development, subdivision or re-subdivision submitted for approval then they "wouldn't have been doing their job[.]" Bud Van Stone Depo. 53:21-25, 54:1-3.

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If this Court construes the facts most liberally in favor of Block, a trier of fact could conclude that the City had a duty to warn Block of the landslide and that by failing to warn Block that he was about to develop and construct residential housing on the site of a former landslide the City showed deliberate indifference to the risk of serious harm that could result from such actions. It is not within the province of this Court on a motion for summary judgment to take this factual determination out of the jury's hands. The Idaho Supreme Court addressed this issue in *S. Griffin Const., Inc. v. City of Lewiston*, 135 Idaho 181, 16 P.3d 278 (2000) where it concluded that the district court had erred by granting summary judgment on an issue of gross negligence because genuine issues of material fact existed.

This Court's language stating that the "immunity language within this statute is broad enough to cover any claims of negligence which are based on issuance of building or other permits, approving subdivision plats, and inspecting or not inspecting the property at issue" is in error given the Idaho Supreme Court's direction that such exceptions must be construed closely or narrowly rather than broadly. *Rees*, supra. In addition, this Court's language stating that the "burden is particularly high for Block," in regard to Block proving malice or criminal intent is disconcerting. Block has never alleged malice or criminal intent and further, any "burden" imposed by the ITCA should not be "particularly high" for a plaintiff injured by wrongful act of the government and/or its employees. Rather, any "burden" must be construed in favor of Block as set forth in the appropriate summary judgment standard of review.

Idaho Code § 6-904(1) does not afford the City immunity for all of Block's claims.

Idaho Code § 6-904(1) provides immunity from liability for a governmental entity and its employees while acting within the course and scope of their employment and without malice or criminal intent for any claim which:

> Arises out of any act or omission of an employee of the governmental entity **exercising ordinary care**, in reliance upon or the execution or performance of a statutory or **regulatory function**, whether or not the statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a **discretionary function** or duty on the part of a governmental entity or employee thereof, whether or not the discretion be abused.

The regulatory function and discretionary function clauses of I.C. § 6-904(1) represent two different types of actions that might be immune under the ITCA, but the same test applies to each. *Rees*, 143 Idaho at 20, 137 P.3d at 407. However, if a governmental employee fails to exercise ordinary care while carrying out either function then this exception would not afford immunity. *Id.* "Under Idaho law whether a government employee exercised ordinary care is normally a factual question best left to the jury." *Id.*

The City failed to exercise ordinary care in carrying out its regulatory function or at a minimum there is a genuine issue of material fact whether the City failed to exercise ordinary care.

The Subdivision Ordinance states, in part, in Section 32-9 that "in carrying out the purposes of the preapplication process, the **subdivider and the city shall be responsible** for the following actions:

> (1) Actions by the subdivider. The subdivider and/or his agents shall meet with the city at the preapplication conference . . .
> (2) Actions by the city. . . . Inspect the site or otherwise determine its relationship to streets, utility systems, and adjacent land uses, and identify any unusual problems with regard to topography, utilities, flooding or other condition. . . . Review and discuss with the developer the potential need for special studies, which may include but are not limited to traffic, soil, slope stability, wetlands, foundations or other studies that may be required as a result of site conditions,

> and the implications of the findings of those studies, if required. The requirement of said special studies shall be determined by the city engineer.
>
> Lowell Cutshaw Depo., Exhibit 32.

Tim Richards, a licensed professional engineer and former City Engineer has testified that when the City memorialized the 1999 landslide in two separate files the intent was that such information would be available at the time of future development. Tim Richards Depo. 44:8-12. In addition, Mr. Richards has testified that "[t]he files or the system was used by the city to pass along institutional knowledge." Tim Richards Depo. 34:11-16. Warren Watts, a licensed professional engineer has testified that the City has a duty to review records and files as part of its subdivision process. Warren Watts Depo. 92:2-16. The City conducted a preapplication meeting with Block regarding CG. Second Affidavit of John Block p. 3-4, ¶12. The City failed to search its records and locate the memorandums related to the landslide prior to attending this meeting and thereafter. *Id.*, Second Affidavit of John Block p. 2, ¶7. In addition, Mr. Watts has testified that the City has a duty to warn or notify a developer of conditions or instability on property that the developer is planning to develop. Warren Watts Depo. 89:4-22. Eric Hasenoehrl, a licensed professional engineer has testified that at no time did the City notify or warn him of the information the City possessed in its files regarding the landslide in the area of CG and CG2. Affidavit of Eric Hasenoehrl p. 4-5, ¶12. John Block, the Plaintiff, who developed CG and CG2 has testified that at no time did the City notify or warn him of the information the City possessed in its files regarding the landslide in the area of CG and CG2. Second Affidavit of John Block p. 2, ¶7. Based on this evidence in the record there is certainly a genuine issue of material fact whether the City exercised ordinary care in conducting its regulatory functions.

973 LHT

The City failed to exercise ordinary care in carrying out its discretionary function or at a minimum there is a genuine issue of material fact whether the City failed to exercise ordinary care.

A failure to warn is a decision made solely by an individual and "does not require an evaluation of financial, political, economic and social effects. While it is hopefully not a routine, everyday decision, it nevertheless involves the exercise of practical judgment and not planning or policy formation. Thus, the activity appears to be 'operational'." *Brooks v. Logan*, 127 Idaho 484, 488, 903 P.2d 73, 77 (1995). See also, *Hunter v. State, Dept. of Corrections, Div. of Probation & Parole*, 138 Idaho 44, 57 P.3d 755 (2002) (The method in which the department warned the probationer's employer regarding his conviction did not involve consideration of financial, political, economic or social effects.) The City's failure to warn Block of the landslide was operational, just as in *Brooks*, the decision was made solely by individuals and did not require an evaluation of financial, political, economic and social effects. It involved practical judgment and not planning or policy formation.

With respect to the issue of a geotechnical evaluation, although the primary decision to modify the Subdivision Code to allow the imposition of such a requirement to be decided on a case-by-case basis, in this case, this issue could still result in the imposition of liability for the City's failure to exercise due care in the "operation stage" of this decision. See, e.g., October 4, 1995, Idaho Attorney General Guidance to the Executive Director of PERSI. (In regard to PERSI investment decisions the attorney general stated "The investment decision is still afforded the 'discretionary function' immunity, but the negligence in failing to exercise due care in the 'operation stage,' i.e., not conducting a title search or obtaining title insurance, may result in liability.") This is analogous to the City's decision regarding a geotechnical evaluation in this

case. The City's negligence in failing to exercise due care in the 'operation state,' i.e., failing to review the specific information related to this particular site which would have indicated that the proposed development was on the site of a recorded landslide and then failing to require additional studies, including a geotechnical evaluation, should result in liability. There is certainly a question of fact whether doing these things was a failure to exercise due care in the "operation state". Warren Watts, a licensed professional engineer has testified that the City should have required a geotechnical evaluation when the property was subdivided in 2005. Warren Watts. Depo. 113:18-24. In addition, John "Hank" Swift a licensed professional geotechnical engineer has testified that the City had a duty to prevent development in the area of a landslide. Hank Swift Depo. (September 14, 2011) 228:15-17.

This Court's analysis and application of I.C. § 6-904(1) makes the exceptions to liability set forth in I.C. §§ 6-904B (3) and (4) moot and is incorrect and overly broad.

This Court states that:

> All of Block's claims against the City are based upon determinations made by city employees in the processes of approving subdivision plats or issuing building permits. These determinations are made in reliance upon or the execution of regulatory function. The actions of the City that Block complains of are those decisions which are contemplated within the ITCA as an exception to liability under the discretionary function exception. I.C. § 6-904(1). Thus, the City is shielded from liability on all of Block's claims and the Defendants' motion for summary judgment is therefore granted on this alternative basis.

This Court should have construed the statutes to give effect to the intent of the legislature and give effect based on the whole act and every word therein, "lending substance and meaning to the provisions." *Carrier v. Lake Pend Oreille School Dist.*, 142 Idaho 804, 134 P.3d 655 (2006).

975 443

This Court's application of the exception to liability provided in Idaho Code § 6-904(7) was erroneous because that exception cannot apply to Block's failure to warn claim.

Idaho Code § 6-904(7) provides immunity from liability for a governmental entity and its employees while acting within the course and scope of their employment and without malice or criminal intent for any claim which:

> Arises out of a plan or design for construction or improvement to the highways, roads, streets, bridges, or other public property where such plan or design is prepared in substantial conformance with engineering or design standards in effect at the time of preparation of the plan or design or approved in advance of the construction by the legislative body of the governmental entity or by some other body or administrative agency, exercising discretion by authority to give such approval.

This Court states that the exceptions to liability provided in Idaho Code § 6-904(7) apply to Block's claim (vi). Order at 20. Claim (vi) states that the City and/or Cutshaw breached a duty of care by approving the plats of Canyon Greens and Canyon Greens No. 2 without notifying and/or warning Block that earth movement had occurred on 153, 155 and 159 in 1999 and had not been eliminated or properly abated. Again, the Court interprets Block's claim too narrowly and interprets the exception to liability broadly in contrast to Idaho Supreme Court precedent.

Block's claim (vi) is essentially a failure to warn claim. Block's claim is that neither the City nor Cutshaw notified or warned him at any step along the way during the subdivision process related to Canyon Greens and Canyon Greens No. 2 and prior to their approval, that on such property a landslide had previously occurred of which the City knew and had record of.

In addition, the Court's statement that the "approval or denial of a subdivision plat is a public project that is analogous to the development of highways, roads, streets, or other public property" is incredible. Order at 21. By its plain language, the application of I.C. § 6-904(7) is restricted to "a plan or design for construction or improvement to the highways, roads, streets,

bridges, or other public property." Clearly, the Administrative Plat for Canyon Greens was not a plan or design for construction of highways, roads, streets, bridges or other public property. Keltic Engineering prepared the Administrative Plat for Canyon Greens which was accepted by the City of Lewiston and recorded on February 15, 2006. Hasenoehrl Affidavit July 13, 2010, p.¶ 6. In accordance with the Subdivision Code Section 32-7, Administrative Plats have "**no public improvements required**, all property fronts upon an improved, publicly dedicated street[.]" Kari Ravencroft Affidavit. Canyon Greens was an Administrative Plat. Stubbers Depo. 14:4-10. An engineered set of plans is not required for a subdivision, engineered sets of plans are required for utilities and roadways and major grading performed by the developer. Watts Depo. 109:23-25, 110:1-3.

Further, Black's Law Dictionary defines "public property" as "[s]tate-or community-owned property not restricted to any one individual's use or possession." Black's Law Dictionary, 2nd Pocket Ed. at 564. Public property is exempt from taxation. Idaho Const. Art. VII, § 4. There is no right to use public property for private purposes. *Tyrolean Associates v. City of Ketchum*, 100 Idaho 703, 604 P.2d 717 (1979). Former City Engineer, Tim Richards, testified that the property at issue was private property. Tim Richards Depo. 50:1-4.

The plain language of this statute only provides immunity with regard to plans or designs for **public projects** (i.e., highways, roads, streets, bridges, or other public property). See, *State v. Hammersley*, 134 Idaho 816, 10 P3d 1285 (2000) (overruled on another point of law) ("Courts commonly construe statutory language by applying the legal maxim of *noscitur a sociis*, noting that a word is known by the company it keeps.") Idaho courts have considered this immunity in cases concerning public property. See *Brown v. City of Pocatello*, 148 Idaho 802, 229 P3d 1164

(2010) (homeowner suffered damage from City road construction project and alleged negligent planning and design of a city road); *Lawton v. City of Pocatello*, 126 Idaho 454, 886 P2d 330 (1994) (negligent design of a city street intersection); *Morgan v. State, Dept. of Public Works*, 124 Idaho 658, 862 P2d 1080 (1993) (negligent design of state office building where a blind man sustained injuries when he stepped backwards off loading dock located in state office building); *Bingham v. Franklin County*, 118 Idaho 318 (1990) (condition of public road).

Therefore, Block respectfully requests that this Court reconsider and withdraw its finding that the exceptions to liability set forth in I.C. 6-904(7) apply to this case and in particular Block's claim (vi).

CONCLUSION

Based on the foregoing, Plaintiff respectfully requests that this Court withdraw its Memorandum Opinion and Order on Second Motion for Summary Judgment and for the reasons set forth above, thereby issue a subsequent Order denying in full or in part the City's Second Motion for Summary Judgment.

DATED this 1st day of November, 2011.

LANDECK & FORSETH

Ronald J. Landeck
Attorneys for Plaintiff

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of November, 2011, I caused a true and correct copy of this document to be served on the following individual in the manner indicated below:

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Ronald J. Landeck

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Lowell J. Cutshaw, City Engineer

IN THE DISTRICT COURT OF
THE SECOND JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF NEZ PERCE

JOHN G. BLOCK, a single man,

Plaintiff,

vs.

JACK J. STREIBICK, a single man, JACK STREIBICK as Personal Representative of the Estate of Maureen F. Streibick, deceased, CITY OF LEWISTON, a municipal corporation of the State of Idaho, and its employee LOWELL J. CUTSHAW, City of Lewiston Engineer, and DOES 1 – 20,

Defendants.

Case No. CV 09-02219

RESPONSE TO PLAINTIFF'S MOTON FOR RECONSIDERATION

COME NOW, the above-entitled Defendants, the City of Lewiston and Lowell J. Cutshaw, by and through their attorneys of record, Anderson, Julian & Hull, LLP, and hereby submit this response to Plaintiff's Motion for Reconsideration.

I.

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INTRODUCTION

Plaintiff seeks reconsideration of the Court's *Memorandum Opinion and Order on Second Motion for Summary Judgment* (filed October 14, 2011) (hereinafter referred to as "Memorandum Opinion"). In the *Memorandum Opinion*, the Court determined that summary judgment was available on two basic grounds: there was no duty owed to Plaintiff[1], and the City was immune under the Idaho Tort Claims Act.[2] *Memorandum Decision*, pp. 5 – 21. Though it was not discussed in the *Memorandum Decision*, the Court appears to have rejected Defendants' petitions for summary judgment on grounds of statute of limitations and failure to comply with the Idaho Tort Claims Act.

Plaintiff now claims that the Court has made a mistake of law with regard to the application of the negligence standards. Specifically, Plaintiff contends that the Court has erroneously applied the economic loss doctrine. *Amended Memo in Support*, pp. 3 – 13. Plaintiff does not specifically address the negligence issue with regard to the duty owed by the City to him prior to his purchase of the property, and so it must be assumed that Plaintiff is not requesting reconsideration of the Court's ruling on this issue.

With regard to the various immunities, Plaintiff contends that the Court improperly decided each of the immunity issues. *Amended Memo in Support*, pp. 13 – 26.

Defendants will address below why the Court properly addressed and ruled on each of

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1 The negligence grounds for summary judgment encompassed both the economic loss rule and contention that there was no duty owed to Plaintiff prior to his purchase of the property. The Court determined that the economic loss rule prevented Plaintiff from prevailing on any of his claims. *Memorandum Decision*, p. 10. The ruling that the City owed Plaintiff no duty prior to his purchase of the property was not completely dispositive, and instead only resulted in dismissal of claims iii, iv, v, ix, x, and xi, all contained within ¶ 55 of the Complaint. *Memorandum Decision*, p. 10, 12.

2 The Court ruled that the City was immune under *I.C.* § 6-904B(3) and 6-904B(4), discretionary immunity under *I.C.* § 6-904(1), and design immunity under *I.C.* § 6-904(7). The 6-904B and discretionary immunity defenses were determined to be dispositive on all issues. *Memorandum Decision*, pp. 14, 20. Immunity under the design immunity was deemed to be applicable only to claim (vi) of ¶ 55 of the Complaint. *Memorandum Decision*, p. 21.

these issues.

II.

LEGAL ARGUMENT

A. PLAINTIFF'S MOTION FOR RECONSIDERATION SHOULD BE DENIED BECAUSE THERE IS NO BASIS IN LAW OR FACT FOR THE COURT TO RECONSIDER ITS PREVIOUS OPINION.

When a party files a motion for reconsideration, there is no requirement that the party provide the Court with either newly decided case law or new evidence. *Johnson v. Lambros*, 143 Idaho 468, 472 – 73 (Idaho Ct. App. 2006). However, a motion for reconsideration usually includes new or additional facts. *Coeur d'Alene Mining Co. v. First Nat'l Bank*, 118 Idaho 812, 823 (1990). The purpose of a motion for reconsideration is to allow the Court to "obtain a full and complete presentation of all available facts, so that the truth may be ascertained, and justice done, as nearly as may be." *Id.* Even though no new facts are required when filing a motion for reconsideration, the burden is on the Plaintiff to bring to the Court's attention any new facts or reasons why the Court's previous decision should be reconsidered. *See* *Coeur d'Alene Mining Co.*, 118 Idaho at 823 ("The burden is on the moving party to bring the trial court's attention to the new facts. We will not require the trial court to search the record to determine if there is any new information that might change the specification of facts deemed to be established."); *Johnson*, 143 Idaho at 472 – 73 (absent new facts, the Court had no basis on which to grant a motion for reconsideration) (citing *Devil Creek Ranch, Inc. v. Cedar Mesa Reservoir & Canal Co.*, 126 Idaho 202 (1994) and *Jordan v. Beeks*, 135 Idaho 586 (2001)).

In this case, there are no significant new facts on which the Court could rely to overturn its prior ruling. The only new evidence submitted by Plaintiff that was not available to the Court at the time Defendants filed the Second Motion for Summary Judgment was the Deposition of

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Tim Richards. *See Fourth Affidavit of Ronald J. Landeck*, ¶ 8 and Ex. 5. All of the other depositions attached to Mr. Landeck's affidavit had been taken prior to Defendants' Second Motion for Summary Judgment, and were available to present to the Court.[3] Further, Mr. Richard's deposition is only discussed with respect to immunity[4], and therefore does not provide any grounds for reconsideration of the negligence arguments. To the extent that his deposition constitutes new evidence, Defendants will discuss it with regard to the immunity arguments, below.

B. RECONSIDERATION SHOULD NOT BE GRANTED BECAUSE PLAINTIFF HAS NOT SHOWN THAT THE COURT MADE A MISTAKE OF LAW WITH REGARD TO THE COURT'S RULING ON THE NEGLIGENCE ARGUMENTS.

Since there is no new evidence which would support reconsideration of the Court's ruling on the negligence arguments, the only reason for the Court to reconsider this matter would be if the Court misapplied the law to the facts as presented. Johnson v. Lambros, 143 Idaho 468, 73 (Idaho Ct. App. 2006) (errors of law may be basis for reconsideration). Defendants contend that the Court properly determined that the City and Lowell Cutshaw have no duty to protect against any economic loss which Plaintiff may incur.

Plaintiff's primary argument is that while the economic loss rule may bar recovery of economic damages to the property at issue, it does not cover loss to the houses and other structures built on the property, as such constitute "other property", for which the economic loss rule does not bar recovery. *Amended Memorandum in Support*, pp. 3, 10 – 13. Plaintiff then engages in a significant discussion of the recent cases discussing the economic loss rule. However, none of the cases cited shows that the Court improperly applied the economic loss

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[3] A majority of the depositions previously taken had been submitted to the Court as part of Plaintiff's response to Defendants' Second Motion for Summary Judgment. *See Second Affidavit of Ron Landeck* (July 26, 2011), Exs. A through P.

[4] *Amended Memo in Support*, pp. 21, 25.

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doctrine.

Plaintiff seeks to expand the economic loss doctrine by expanding the definition of "other property" to include anything later (or previously) attached to the "defective property which is the subject of the transaction." *Salmon Rivers Sportsman Camps v. Cessna Aircraft Co.*, 97 Idaho 348, 351 (1975). Plaintiff seeks to convince the Court to do this by relying on an Idaho case in which there is no defective property at issue, and a United States Supreme Court case which is interpreting maritime law. *See Amended Memorandum in Support*, pp. 11 – 12 (citing *Oppenheimer Indus. v. Johnson Cattle Co.*, 112 Idaho 423 (1986) and *Saratoga Fishing Co. v. J. M. Martinac & Co.*, 520 U.S. 875 (1997)). Neither of these cases is applicable, nor do they stand for the proposition that "other property" includes any improvements added to a defective property.

In *Oppenheimer Indust.*, the plaintiff had a contract with another party to care for cattle. *Oppenheimer Indus.*, 112 Idaho at 424. That party then rebranded the cattle, and sold the herd. *Id.* The plaintiff then alleged that the State Brand Board should not have allowed the sale, as they didn't ask for proof of ownership. *Id.* The Court ultimately ruled that the economic loss rule did not apply and that the plaintiff could proceed with a claim for conversion. *Id.* at 425 – 26. However, the Court determined that the tort action could proceed because the plaintiff was "not alleging mere economic damage. Unlike the plaintiff in *Clark*, [plaintiff] is not still in possession of defective goods. Rather, [plaintiff] has suffered the loss of its property (i.e. the cattle) due to the negligence of the deputy brand inspector." *Id.* at 426. In other words, the plaintiff was allowed to proceed under a conversion theory because the property at issue (whether defective or not) was stolen. In this case, there is no such allegation. Plaintiff still owns the defective property, and has made no allegation that it was stolen. Further, there isn't even a discussion in

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Oppenheimer Indus. regarding whether there is a defective property, and such defective property resulted in economic loss. The plaintiff in *Oppenheimer* was not alleging damage to "other property" as a result of the purchase of defective property; instead, the plaintiff was claiming that his property was stolen. Therefore, *Oppenheimer* provides no support for Plaintiff's contention that the houses and structures at issue constitute "other property".

In *Saratoga Fishing Co.*, the plaintiff was suing for loss of a fishing vessel. *Saratoga Fishing Co.*, 520 U.S. at 877. The vessel was built by J. M. Martinac & Co., who sold it to Madruga. *Id.* Madruga added numerous items to the vessel, including a skiff, seine nets, and spare parts. *Id.* Madruga then sold it to Saratoga Fishing Co., who owned it when it caught fire and sank. *Id.* Saratoga Fishing Co. then sued Martinac, and was allowed to recover for the cost of the skiff, nets, and spare parts as "other property". *Id.* at 884 – 85. Plaintiff contends that this logic should be adopted by the Court in this case to apply to the houses and other structures on the property. *Amended Memorandum in Support*, p. 12. However, *Saratoga Fishing Co.* has a number of important distinctions which do not support Plaintiff's argument. First, the case is based on maritime law, not Idaho nor any other state common law. Second, the improvements to the boat were made before Saratoga Fishing bought the boat, contrasting this case where the improvements were added after the purchase of the property. If the *Saratoga Fishing Co.* facts were applied to this case, that would be equivalent to Plaintiff purchasing the defective property with the houses already on it. The Idaho Supreme Court has already ruled in such cases as *Blahd v. Richard B. Smith, Inc.*, 141 Idaho 296, 299 (2005) and *Tusch Enters. v. Coffin*, 113 Idaho 37, 40 (1987) that where a property is purchased with a defect on it, the economic loss rule prevents recovery. Therefore, the *Saratoga Fishing Co.* logic has been rejected by these cases. Third, *Saratoga Fishing Co.* is at its heart a product defect case, not a property case. In a product defect

case, the manufacturer can be sued; in a property case, there is no manufacturer. Finally, there is no governmental agency at issue in *Saratoga Fishing Co.*, like there is in this case, *Oppenheimer Indus.*, or *Duffin v. Idaho Crop Improvement Ass'n*, 126 Idaho 1002 (1995). Therefore, it does not help address the situation where an inspecting agency (not the manufacturer) is claiming that the economic loss rule is applicable.

The Court correctly construed Idaho law with regard to the economic loss rule. Plaintiff purchased a property with the intent to build houses on it. This is the "defective property which is the subject of the transaction." *Salmon Rivers Sportsman Camps*, 97 Idaho at 351. Plaintiff has not presented any issue of fact showing that the intent of the contract was to do anything other than purchase the properties to build houses for resale.[5] Instead, Plaintiff attempts to argue that the damage was not to the properties at issue (i.e. the dirt), but is instead to the houses. *Amended Memo in Support*, p. 6. This argument fails for two reasons. First, the Supreme Court has already decided, in *Blahd*, that where the defect in the property causes damage to the improvements to the property, the economic loss rule still applies. *See Blahd v. Richard B. Smith, Inc.*, 141 Idaho 296, 300 – 01 (2005). In *Blahd*, the plaintiffs purchased property and a house with a defect. They then repaired the property, and placed improvements in the basement, including slate tiles. *Blahd*, 141 Idaho at 299. These tiles were later damaged by the defect in the property. *Id.* Regardless, the economic loss rule barred recovery. *Id.* at 301. If Plaintiff's theory that any improvements to the property constitute "other property" is correct, then *Blahd* was decided incorrectly. Theoretically, the plaintiffs in *Blahd* should have been able to recover for damages related to improvements to the property, but they were not.

The Court properly applied that rule in this case. The houses and other structures built on

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[5] As Plaintiff is a developer, it would seem odd for him to make any other assertion.

the property are nothing more than a more grandiose version of the slate tile added to the basement of the house in *Blahd*. The defect in the property in *Blahd* caused damage to the improvement of that property, and the defect in the property Plaintiff purchased in this case caused damage to the improvements he added to the property.

The "other property" concept is explained in *Aardema v. U.S. Dairy Sys.*, 147 Idaho 785 (2009). In that case, the defective property was allegedly the milking machines. *Aardema*, 147 Idaho at 788. The allegation was that the milking machines caused injury to the cows, thus resulting in decreased milk production. *Id.* The Supreme Court ruled that the milking machines were the subject of the transaction. *Id.* at 791. The Court specifically stated "if the only damage that is produced is in the form of lost milk production, quality and profits and not actual physical damage to the cows then this is purely economic loss; that is, the failure of the milking equipment to produce the products and profits anticipated by Aardema Dairy." *Id.* at 791 – 92. In other words, in order to be "other property", the defect has to cause damage to something other than the defective property itself or its improvements. Clearly, the cows were not an improvement to the milking machines, as they existed outside and separate from the machines. The cows were also not like the slate tiles in *Blahd* or the houses in this case, in that they were not added to the defective property to increase its value. Theoretically, improvements to the milking machines would have included new paint, new milking cups, updated electrical systems, and not the cows on which the milking machines were used. *Aardema* shows that "other property" must be something separate and apart, and not designed to improve the value of the defective property itself.

The "property damage" and "other property" exception is designed to allow a property owner to claim that defective property damaged something other than what the defective

property was planned to be used for. For example, if the slope movement in this case had been much more rapid, and buried Plaintiff's car, there is no doubt that such damage would have constituted "property damage" to "other property". A generic example makes this point even more apparent: imagine a hypothetical in which Company A sells 1000 rubber balls to Company B. Each of the rubber balls has a defect that causes it to split down the middle after a number of days. Company B paints each of the rubber balls, with the intent of selling them. Two days after they are painted, Company B discovers that each ball has split in half, damaging both the ball and the paint. Under Plaintiff's theory, Company B gets to sue Company A for the damage to the paint and the rubber balls. This is a contract claim, which in this case, is the settled claim against Streibick. More applicable to this case, Plaintiff claims that Company B gets to sue a governmental entity (who inspected the rubber balls) for damage to both the paint and balls. As discussed above, this scenario has been rejected by the Idaho Supreme Court. Damage to the ball is a contract claim against Company A. Damage to the paint is nothing more than an improvement to the ball, which clearly falls in the realm of "loss of profits or use", i.e. higher value of the ball as a result of the paint. *Salmon Rivers Sportsman Camps*, 97 Idaho at 351. Therefore, Plaintiff has failed to show that the houses and other structures constitute "property damage" to "other property". Improvements, including significant improvements such as houses and pools are the same as the slate in the basement in *Blahd*, or the paint on the ball in the hypothetical; they are just lost profits when Plaintiff intended to resell the property.

The second reason Plaintiff's argument fails is that Plaintiff incorrectly alleges that the "homes, retaining walls, driveways, swimming pools, fences and decks are 'other property' that [have] suffered damage." *Amended Memo in Support*, pp. 6 – 7. Under Plaintiff's theory, Plaintiff could sue for the damages to this "other property". However, Plaintiff has never made

any attempt to differentiate the damages for the "other property" from the damages to the property itself (the soil). Theoretically, every property has two values: the value of the land without the improvements, and the value of the land with the improvements.[6] Plaintiff's own expert calculates damages not as the value of the improvements, but the value of the property with improvements.[7] The fact that Plaintiff's damages do not differentiate between value of the improvements and value of the defective property itself shows that Plaintiff considers the property with the improvements on it to be the subject of the transaction. If the "other property" that Plaintiff claims is damaged is only the houses, sidewalks, pools, etc., then he is merely complaining about the lost income on the property he would have obtained had he sold the property with improvements. These damages are not recoverable under the economic loss rule, and the Court did not incorrectly apply the law to the facts of this case.

It should be noted that Plaintiff never attempts to differentiate *Duffin v. Idaho Crop Improvement Ass'n*, 126 Idaho 1002 (1995) from the facts of this case. Defendants contend that *Duffin* is applicable. In that case, the Supreme Court found that a governmental entity in charge of inspecting seed potatoes was not responsible for crop loss under the economic loss rule. *Duffin*, 126 Idaho at 1007. The Court further found that there was no special relationship between the plaintiff and the governmental agency in charge of inspecting the seed potatoes. *Id.* at 1008. The Court in this case agreed that no special relationship existed here. *Memorandum Opinion*, pp. 9 – 10. Defendants cannot find that Plaintiff asks for reconsideration of this issue,

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6 For example, the Ada County Assessor allows each person to search a property by address, and when listing the appraised value of the property, lists the value of the property and the improvements (such as the house) separately. *See, e.g.,*

http://www.adacountyassessor.org/propsys/ViewParcel.do?yearParcel=2011R5125520300

(last visited November 15, 2011).

7 *See Supplemental Affidavit of Stephen Adams in Support of Motion for Summary Judgment*, Ex. L (*Terry Rudd Dep.*, Exs. 293 and 294)

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and so Defendants contend that there is no reason for the Court to reconsider its finding.

C. THE CITY HAD NO DUTY TO AFFIRMATIVELY SEEK OUT AND DISCLOSE INFORMATION WHICH WAS FREELY AVAILABLE IN A PUBLIC FILE.

A couple pages of Plaintiff's brief discuss the duty which Plaintiff believes the Defendants owed to him. *Amended Memo in Support*, pp. 14 – 16. It is unclear whether this argument applies to Plaintiff's discussion of immunities or negligence, as the Court did not rule on any issue of whether a duty was owed to Plaintiff after he purchased the property.[8] In any case, Defendants will address this issue briefly.

Plaintiff contends that the City "had knowledge and a duty to disclose." *Amended Memo in Support*, p. 14. However, Plaintiff can point to no statement by any City employee showing that said City employee had specific knowledge of slope movement in the area of Canyon Greens at the time Plaintiff was developing the property. As a result, there is no issue of fact that any City employee knew of the alleged defects with the property during that time frame. Therefore, the only way that Plaintiff can state that Defendant City "had knowledge" of the slope movement would be to argue that the documents in the City file were imputed to the knowledge of the City employees.[9] However, this argument cuts both ways. A person who purchases a property is on constructive notice of any defects to the property or title to the property when such facts are recorded in publicly available governmental files. *See 58 Am. Jur. 2d Notice* § 7 ("Constructive notice is meant to protect innocent persons about to engage in lawful transactions, by encouraging diligence in protecting one's rights and preventing fraud. It is based on the premise that citizens have no right to shut their eyes or ears to avoid information and then say they had no notice.").

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8 With the exception of the economic loss rule.

9 This appears to be what Plaintiff is alleging on p. 16 of the *Amended Memo in Support*.

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In discussing the factors applicable as to whether a special duty arose, Plaintiff attempts to show that each factor is met. *Amended Memo in Support*, pp. 15 – 16. However, the first factor, "Whether the government had actual knowledge of the dangerous condition,"[10] is the one that Plaintiff cannot actually show. A document in a publicly available file does not mean that government employees had actual knowledge of the file's contents or existence of any particular document in the file. Since Plaintiff cannot show that any City employee had actual knowledge of the landslide in the area, a duty to disclose could only arise if there were an additional duty for the City to search all available records relating to a property prior to allowing development of or construction on the property. Plaintiff does not argue that such a duty exists, nor does Plaintiff argue that the City assumed such a duty. Therefore, the argument that the City had a duty to disclose knowledge that no City employee actually had at the time Plaintiff was developing his property fails.

D. PLAINTIFF CANNOT SHOW THAT ANY NEW FACTS SUPPORT RECONSIDERATION OF THE IMMUNITY RULINGS, NOR THAT THE COURT IMPROPERLY APPLIED THE LAW.

1. The Court Properly Determined that Immunity Applies Under *I.C.* § 6-904B Because the City Could Not Have Acted with Gross Negligence.

Plaintiff contends that it was improper for the Court to state that "nothing in the record before the Court establishes that the City acted with gross negligence." *Amended Memo in Support*, p. 17 (quoting *Memorandum Opinion*, p. 15). Plaintiff then goes on to list a number of factors that a jury could have considered in determining that gross negligence occurred. However, Plaintiff has misstated the law on this particular issue. The Idaho Supreme Court has recently clarified that

> The requirement that an employee have acted "within the course and scope of

[10] *See Rees v. State*, 143 Idaho 10, 16 (2006).

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> their employment" plainly applies to the act of the employee and not of the governmental entity. Therefore, the language "and without malice or criminal intent" that follows the statute's requirement that the employee have acted within the course and scope of employment, also by its plain language only applies to the employee.

Hoffer v. City of Boise, 257 P.3d 1226, 1228-1229 (Idaho 2011). Though *Hoffer* discusses the prefatory language of *I.C.* § 6-904, the same prefatory language is contained in *I.C.* § 6-904B (with the addition of two more exceptions). Therefore, this analysis applies to the immunities in this case. In other words, Plaintiff would have to allege and prove that a specific employee acted with gross negligence, and then immunity would be denied to that specific employee. The gross negligence exception, though, only applies where a claim has been filed against a specific employee[11], and in this case, the only employee sued was Lowell Cutshaw. There is not a single allegation or issue of fact with regard to a claim that Mr. Cutshaw acted with gross negligence. *See Amended Memo in Support*, pp. 17 – 19. Therefore, to the extent that Plaintiff contends a jury could find that Chris Davies, John Smith, Shawn Stubbers, or some other employee acted with gross negligence, such persons are not parties to this lawsuit. Therefore, the City is immune on this cause of action, because the immunity applies to the City unless Plaintiff can prove that an employee against whom a claim is brought acted with gross negligence.

Plaintiff also argues that "a trier of fact could conclude that the City had a duty to warn Block of the landslide . . ." *Amended Memo in Support*, p. 19. Defendants contend that this statement is incorrect. The existence of a duty is a question of law. *McDevitt v. Sportsman's Warehouse, Inc.*, 255 P.3d 1166, 1169 (Idaho 2011). Therefore, it makes little sense to argue that a jury could find that a duty exists. To the extent that Plaintiff claims a duty existed prior to his

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[11] "If [Plaintiff] had included an employee as a defendant, his claims against that employee alleging malice or criminal intent would have survived under I.C. § 6-904(3) because an employee is only immune from suit for those intentional torts if there is no allegation of malice and/or criminal intent." *Hoffer v. City of Boise*, 257 P.3d 1226, 1229 (Idaho 2011)

purchase of the property, the Court has ruled that no such duty exists. To the extent that a duty existed afterward Plaintiff purchased the property, the Court has determined that no duty exists to prevent economic loss. Therefore no duty exists and the jury need not hear evidence to make such a determination.

2. The Court Properly Determined that Immunity Applies Under *I.C.* § 6-904(1) Because the City Counsel and City Engineer Properly Acted Within its Discretion.

Plaintiff addresses both the regulatory function exception and discretionary function exceptions under *I.C.* § 6-904(1). *Amended Memo in Support*, pp. 20 – 23. The Court's ruling did not address the regulatory function exception, *Memorandum Opinion*, pp. 16 – 20, and therefore Defendants will not address at length Plaintiff's arguments with regard to the regulatory function exception. Defendants only state that Plaintiff's discussion of the regulatory function exception is one of the places where Plaintiff discusses alleged new facts (specifically discussing the deposition of Tim Richard). As the Court did not rule on the regulatory function exception, these new facts are no basis for reconsidering the Court's decision.

With regard to discretionary immunity, the Court determined that at least two discretionary decisions applied to this case. First, the Court determined that the enactment of Lewiston City Ordinance 4177 was a discretionary decision, and that the ordinance does not set forth any mandatory language for slope stability analyses. *Memorandum Opinion*, pp. 17 – 18. Plaintiff essentially admits that this is a discretionary decision, but argues that liability could still result for "failure to exercise due care in the 'operation stage' of this decision." *Amended Memo in Support*, p. 22. Instead, Plaintiff simply ignores the discretionary decision of the City Counsel, and argues that the City engineer's discretionary decision to not require a slope stability analysis creates liability. Plaintiff cannot sidestep the discretionary decision of the governmental entity

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elected for the purpose of making such decisions, particularly where there is no issue of fact that the City Council acted within its discretion.

Plaintiff fails to show any difference between Lewiston City Engineer Shawn Stubber's decision in this case and the sewage treatment plant supervisor's decision in *Dorea Enters. v. City of Blackfoot*, 144 Idaho 422, 426 (2007). Plaintiff instead claims that his expert, Warren Watts, states that the City should have required a geotechnical evaluation when the property was subdivided in 2005 (i.e. before Plaintiff owned the property). *Amended Memo in Support*, p. 23. This however, does not provide a basis for the Court to reconsider its ruling that Shawn Stubbers decision in requiring or not requiring a geotechnical evaluation is the result of "city ordinances which leave room for policy judgment in their execution." *Memorandum Opinion*, p. 19. It also does not show that there is a factual dispute as to what considerations Mr. Stubbers made when deciding whether a slope stability analysis would be required. Therefore, summary judgment was properly granted on this issue.

Further, as discussed above, the immunity applies unless Plaintiff can show that a City employee against whom a claim is brought acted with malice or criminal intent. *Hoffer v. City of Boise*, 257 P.3d 1226, 1229 (Idaho 2011). Shawn Stubbers is not a party to this lawsuit, and therefore, the immunity must apply as to the City. Further, Plaintiff admits that he has never "alleged malice or criminal intent." *Amended Memo in Support*, p. 19. Therefore, the immunity was applicable, and there is no reason provided to the Court to reconsider its opinion.

Based on the foregoing, Plaintiff has failed to meet his burden showing that the Court overlooked facts or improperly applied the law with regard to the discretionary function immunity.

3. The Court Properly Determined that Immunity Applies Under *I.C.* § 6-904(7) Because the Plans At Issue Dealt with Improvements to Public Property.

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Plaintiff claims that the grant of immunity on the claim (vi) in ¶ 55 of his Complaint was improper, because such claim was "essentially a failure to warn claim." *Amended Memo in Support*, p. 24. Plaintiff, however, cannot plead around the immunity by calling the claim by a different name. *See* Coonse by & ex rel. Coonse v. Boise Sch. Dist., 132 Idaho 803, 806 (1999) (clever drafting of complaints in a way attempting to avoid immunities under the Idaho Tort Claims Act is not permissible). Plaintiff's claim "arises out of a plan or design for construction or improvement to . . . other public property." *See I.C.* § 6-904(7). Therefore, the immunity applies, even if Plaintiff designates the claim as a "failure to warn".

Next, Plaintiff claims that the immunity does not apply because "the Administrative Plat for Canyon Greens was not a plan or design for construction of highways, roads, streets, bridges or other public property." *Amended Memo in Support*, p. 25. Further, Plaintiff argues that "Administrative Plats have 'no public improvements required.'" *Id.*[12] This argument is does not follow the language of the immunity. The immunity applies to any "design for . . . improvement to . . . other public property." *I.C.* § 6-904(7). There is no doubt that an easement is a property right, and when owned by a governmental agency, that easement is a public property right. Each and every one of the plats, whether or not an administrative plat, and whether or not resulting in actual construction, involved a design for an improvement to public property, which is all that is necessary for the immunity to apply. Further, it is undisputed that in almost every case there was construction on a public improvement. For example, Streibick had to move a public storm water detention pond when he subdivided Sunset Palisades 8. Plaintiff had to rebuild the public storm

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12 Plaintiff also contends that Tim Richard testified that the property was "private property". *Amended Memo in Support*, p. 25. Though this alleged opinion testimony by Mr. Richard appears to be an issue of fact, whether property is public or private is a matter of law. Mr. Richards is not qualified to testify as to the legal status of property, and therefore his testimony is not grounds for reconsideration of the Court's grant of summary judgment.

water detention pond when he subdivided Canyon Greens, and had to prepare designs for strengthened retaining walls that he built over public storm drain lines. Thus, there is no doubt that "other public property" was involved, if only an easement. None of the cases cited by Plaintiff indicates that "other public property" is limited to property owned outright by a governmental entity, or that easements and rights-of-way do not constitute "other public property". Therefore, Plaintiff has failed to meet his burden showing that there is a reason for the Court to reconsider its previous ruling.

III.

CONCLUSION

Based on the foregoing, Defendants contend that the Court properly granted summary judgment. Plaintiff has failed to show any issue of fact which would be a basis for reconsidering the grant of summary judgment. Plaintiff also cannot show that the Court improperly applied the law. Therefore, Defendants request that Plaintiff's Motion for Reconsideration be denied.

DATED this 16 day of November, 2011.

ANDERSON, JULIAN & HULL LLP

By _____
Brian K. Julian, Of the Firm
Attorneys for City of Lewiston and
Lowell J. Cutshaw, City Engineer

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CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 16 day of November, 2011, I served a true and correct copy of the foregoing RESPONSE TO PLAINTIFF'S MOTON FOR RECONSIDERATION by delivering the same to each of the following attorneys of record, by the method indicated below, addressed as follows:

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Brian K. Julian

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IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

JOHN G. BLOCK, a single man, Plaintiff, vs. JACK J. STREIBICK, a single man, JACK J. STREIBICK, as Personal Representative of the Estate of Maureen F. Streibick, deceased, CITY OF LEWISTON, a municipal corporation of the State of Idaho, and its employee, LOWELL J. CUTSHAW, City of Lewiston Engineer, and DOES 1-20, Defendants.	Case No. CV 09-02219 **REPLY BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR RECONSIDERATION**

COMES NOW, the above entitled Plaintiff, John G. Block, by and through his attorneys of record, Landeck & Forseth, and hereby submits this Reply in Support of Plaintiff's Motion for Reconsideration ("Reply Brief").

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INTRODUCTION

As Defendants have cited, the "purpose of a motion for reconsideration is to allow the Court to 'obtain a full and complete presentation of all available facts, so that the truth may be ascertained, and justice done, as nearly as may be.'" Response to Plaintiff's Motion for Reconsideration at 3 citing *Coeur d'Alene Mining Co. v. First Nat'l Bank*, 118 Idaho 812, 823 (1990). Because John Block's Motion for Reconsideration, Memorandum, Affidavit and this Reply Brief have presented available facts and legal arguments for reconsideration, justice may now be done if this Court rethinks its Order and the patently unfair results of its Order under the circumstances of this case that have ruined John Block financially and through no fault of his own. John Block should be allowed, under law, to present his case to a jury.

Block has sufficiently shown that the economic loss rule does not apply to this case because Block's damages, at least in part, are not economic loss.

Block and Defendants have cited and recited and analyzed and re-analyzed Idaho case law on the subject of the economic loss rule, and Block has asserted and shown that his damages are not "economic loss." The record before this Court clearly demonstrates that he suffered physical property damage as Block constructed three (3) homes that were physically damaged as a result of the City's negligence or gross negligence.

Idaho courts have struggled with the economic loss rule while acknowledging that the circumstances of each case must be carefully analyzed to determine whether or not the rule applies. The City has consistently argued for an all-encompassing view of the rule and, to date, this Court has done that. However, this interpretation in this case has resulted in the Court's failure to carefully analyze important distinctions that are essential to a proper application of the rule. The John Block set of circumstances has not yet been ruled upon by an Idaho appellate

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court. Oregon courts, on the other hand, have been confronted with factual circumstances more akin to Block's and, in doing so, have refined the principles that distinguish economic loss from damage to property. The Oregon Supreme Court, in addressing whether physical damage to a home is economic loss, has convincingly concluded that it is not. The Oregon Supreme Court has allowed negligence claims to proceed against defendant builders who were negligent. In *Harris v. Suniga*, 209 Or. App. 410, 149 P.3d 224 (2006) plaintiffs were trustees of a trust that owned an apartment built by defendants, discovered defects in the construction of the apartment building and brought an action against defendants for negligent construction. *Id.* at 413, 149 P.3d at 225. Plaintiffs alleged that as a result of certain construction defects the apartments suffered significant dry rot. *Id.* Defendants argued that the damage to the apartment buildings was economic loss to plaintiff's investment and that plaintiffs' negligence claim was barred by the economic loss doctrine. *Id.* at 414, 149 P.3d at 225, 226.

In its consideration of the economic loss doctrine, the court explained that, although previous cases have defined such phrase to include financial losses to intangibles (e.g., lost profits, loss of expected proceeds resulting from negligent misinformation that property was buildable, loss of investment), such does not mean that the phrase is limited to such losses. *Id.* at 418, 149 P.3d at 228. However, the court concluded that "economic loss" did not refer to the sort of property damage that was involved in the case. *Id.* The court explained that there appeared to be no consistent rationale for various decisions cited by the parties and recognized that the reason for the different treatment of economic loss and physical damage does not derive from the theory or the logic of tort law. *Id.* at 422, 149 P.3d at 230. Ultimately, the court determined that plaintiffs' negligence claim was not barred by the economic loss doctrine, because it was based on damage to property, not economic loss. *Id.* at 423, 149 P.3d at 230.

In *Bunnell v. Dalton Construction, Inc.*, 210 Or. App. 138, 149 P.3d 1240 (2006), plaintiffs appealed a judgment dismissing their negligence claim against defendant, the builder of plaintiffs' home, on the grounds that the claim was for purely economic loss that was not recoverable in the absence of a special relationship between the parties. *Id.* at 141, 149 P.33d at 1240. Defendant had built a house in 1997 and sold it to the Evanses. In 2003, the Evanses sold the house to plaintiffs. Although plaintiffs were initially aware of some defects in the installation of the siding, plaintiffs discovered substantial damage caused by water leakage after they had moved into the house. Plaintiffs instituted an action against defendant for breach of warranty and negligence. As a matter of law, the court rejected defendant's contention that because the alleged negligence occurred before plaintiff acquired the property, the damage to the property either did not damage plaintiff or was not attributable to defendant. *Id.* at 143. "Whether a plaintiff could have avoided harm might be a relevant consideration in determining comparative fault or mitigation of damages. But defendant does not explain, and we do not understand, how that fact precludes recovery as a matter of law. . . . Moreover, none of the cases concerning the economic loss doctrine have identified a plaintiff's previous knowledge of the relevant facts as a consideration relevant to determining whether a given loss is "economic" as opposed to "property damage." The court concluded that the trial court erred in granting defendant's summary judgment motion and in entering judgment dismissing plaintiff's negligence claim. *Id.* at 1242-43.

Professor Anzivino, a prolific author regarding the economic loss doctrine, has authored a defensible and understandable definition of economic loss as (i) loss of product value due to the product's failure to meet its contractual promises or warranties; (ii) physical injury to the product itself or its integrated system; (iii) any incidental or consequential damages that flow from (i) or

(ii). Ralph C. Anzivino, The Economic Loss Doctrine: Distinguishing Economic Loss From Non-Economic Loss, 91 Marquette Law Review 1081 (2008). Non-economic loss is any loss that is other than that described above. *Id.* at 1117. Non-economic loss is recoverable in tort. *Id.* Real estate can be considered a product when its use is analogous to the use of tangible personal property. *Id.* at 1087.

Block's case is distinguishable from the particular facts of *Blahd v. Richard B. Smith, Inc.*, 108 P.3d 996, 1000-01 (Idaho 2005). Professor Anzivino's explanation is that *Blahd* is subject to the "integrated system rule". 91 Marq. L. Rev. at 1090. "The essence of the integrated system rule is that if the defective product at issue is a defective component in a larger system, the other components of the system are not regarded as 'other property' as a legal matter even if they are different property in a literal sense." *Id.* at 1092 (emphasis added). Therefore, tort theories are unavailable. The Restatement (Third) of Torts illustrates the integrated system rule with a hypothetical.

> A company purchases a conveyor belt that is installed in its assembly line. The defective belt subsequently breaks damaging the assembly line. All the losses stemming from the defective belt are considered to be damage to the product itself. As such, all the damages are purely economic losses, not "other property" damages. *Id.* at 1089.

Thus, Blahd's placement of slate tile over a crack in the basement hallway and the addition of a door in the basement and their subsequent damage was damage to the product itself, the product being the house that the Blahd's purchased (and not a house the Blahd's had built), which was the subject of the transaction.

Block's situation is distinguishable and not subject to the "integrated system rule" as set forth by Professor Anzivino. Block's damage is "other property" damage and non-economic loss. Non-economic loss occurs when a defective product damages property other than itself or its

integrated system. *Id.* at 1102. "The leading case discussing what constitutes 'other property' under the economic loss doctrine is *Saratoga Fishing Co. v. J.M. Martinac & Co.*" *Id.* at 1102-03. Professor Anzivino has also cited to *Marshall v. Wellcraft Marine, Inc.*, (lights in ship were defective and water damaged boat and owner's personal property within the boat, owner sued in tort, action was properly brought in tort because owner's personal property was 'other property') and to *A.J. Decoster Co. v. Westinghouse Electric Corp.*, (farmer suffered the loss of 140,000 chickens when defective ventilation switch failed, loss of chickens was loss of physical property and non-economic loss).

Professor Anzivino noted that a court might disregard de minimis non-economic loss and disallow tort recovery because insufficient "other property" has been damaged to sustain an action in tort. *Id.* at 1106. In addition, a disappointed performance expectations test might apply even though the damage suffered by the plaintiff is to other property which would normally permit tort remedies. *Id.* at 1109. Block's facts, of course, differ in that his loss was substantial and not based on profits or expectations but on the investment of his own capital. These various theories or rules provide assistance in understanding Idaho case law on the economic loss rule and also illustrate that Block's case is different from all Idaho cases cited by the City and the Court in this case.

Finally, Defendants' assertion that the court in *Aardema v. U.S. Dairy Systems, Inc.*, 147 Idaho 785, 215 P.3d 505 (2009) showed that "'other property' must be something separate and apart, and not designed to improve the value of the defective property itself" is a misstatement of that case. Instead the court stated there was a genuine issue of material fact as to whether other property (e.g., the cows) were injured and if so, the damage to property other than that which was the subject of the transaction would not be economic loss. *Id.* at 791, 215 P.3d at 511.

Block has set forth evidence in which this Court can determine there is a genuine issue of material fact regarding the City's duty to warn Block.

Defendant cannot make a good faith argument that a recorded document is the same as a memo placed in a private city file. Response at 11. Block does allege and offer evidence that there is a duty to search records relating to a property prior to allowing development of or construction on the property. Memorandum at 21, 23. In addition, the Oregon Supreme Court has stated "[w]hether a plaintiff could have avoided harm might be a relevant consideration in determining comparative fault or mitigation of damages. But defendant does not explain, and we do not understand, how that fact precludes recover as a matter of law. . . . Moreover, none of the cases concerning the economic loss doctrine have identified a plaintiff's previous knowledge of the relevant facts as a consideration relevant to determining whether given loss is 'economic' as opposed to 'property damage.'" *Bunnell v. Dalton Construction, Inc.*, 210 Or. App. 138, 149 P.3d 1240 (2006).

Block has set forth evidence in which this Court can determine there is a genuine issue of material fact regarding the City's and/or Cutshaw's gross negligence.

Defendants seek to make something out of nothing by citing to *Hoffer v. City of Boise*, 151 Idaho 400, 257 P.3d 1226 (2011). In *Hoffer*, the Idaho Supreme Court affirmed the decision of the district court on the ground that "I.C. § 6-904(3) as a matter of law exempts government entities from liability for the intentional torts at issue here [Hoffer's claim of tortious interference with contract and defamation]." *Id.* at 1227. Idaho Code § 6-904 states that a "governmental entity and its employees while acting within the course and scope of their employment and without malice or criminal intent shall not be liable for any claim which:

. . . 3. Arises out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights."

On appeal, Hoffer challenged the district court's ruling on the City's 12(b)(6) motion and the claims dismissed by the grant of the motion to dismiss. *Id.* at 1227. The only issue the Supreme Court affirmed was the dismissal of Hoffer's claims of intentional torts because the plain language of the statute provided immunity for such claims.

The City's citation and discussion of Hoffer is irrelevant to this action because Block did assert that the City and also Cutshaw acted with negligence and gross negligence with respect to all of his claims. Order at 3. In addition, the recitation of facts in Block's Memorandum in support of this assertion certainly sets forth a genuine issue of material fact that the City and Cutshaw acted with gross negligence. Memorandum at 17. Cutshaw was the City Engineer and approved the Administrative Plat of Canyon Greens. See, Second Affidavit of Ronald J. Landeck, Lowell Cutshaw Depo. Exhibit 49. Again, the issue of gross negligence of the City and Mr. Cutshaw is for the jury and should not be taken away.

Block has set forth evidence in which this Court can determine there is a genuine issue of material fact regarding the City's and/or Cutshaw's failure to exercise ordinary care in carrying out their regulatory and/or discretionary functions.

If a governmental employee fails to exercise ordinary care while carrying out his regulatory and/or discretionary functions then the exception to liability provided in Idaho Code § 6-904(1) would not afford immunity. *Rees v. Idaho Dept. of Health and Welfare*, 143 Idaho 10, 20, 137 P.3d 397, 407 (2006). "Under Idaho law whether a government employee exercised ordinary care is normally a factual question best left to the jury." *Id.*

Despite Defendants continued assertion, Block has never taken issue with the City's decision to enact Lewiston City Ordinance 4177. Block has and does assert that Cutshaw failed to exercise ordinary care in his approval of Canyon Greens and has offered evidence creating a

genuine issue of material fact with respect to whether Cutshaw exercised ordinary care. The determination of this issue is for the jury. Memorandum at 21, 23.

Block has set forth evidence in which this court can determine there is a genuine issue of material fact regarding whether the property at issue was private property thereby rendering the immunity set forth in Idaho Code § 6-904(7) inapplicable.

First, Block's claim (vi) is essentially a failure to warn claim. Block's claim is that neither the City nor Cutshaw notified or warned him or his engineers at any step along the way during the subdivision and permitting processes related to Canyon Greens that a landslide had previously occurred on such property of which the City knew and had maintained a record. Second, the property at issue was private property and the property damage at issue has nothing to do with public improvements. Memorandum at 25. Thus, the exception to liability set forth in Idaho Code §6-904(7) is inapplicable.

CONCLUSION

Based on the foregoing, Plaintiff respectfully requests that this Court withdraw its Memorandum Opinion and Order on Second Motion for Summary Judgment and for the reasons set forth in his Motion, Memorandum, Affidavit and in this Reply Brief, thereupon issue a subsequent Order denying the City's Second Motion for Summary Judgment and determining that Block's claims, as set forth herein, be tried to a jury.

DATED this 23rd day of November, 2011.

LANDECK & FORSETH

Ronald J. Landeck
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of November, 2011, I caused a true and correct copy of this document to be served on the following individual in the manner indicated below:

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Ronald J. Landeck

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

JOHN G. BLOCK, a single man, Plaintiff, v. JACK J. STREIBICK, a single man, JACK STREIBICK as Personal Representative of the Estate of Maureen F. Streibick, deceased, CITY OF LEWISTON, a municipal corporation of the State of Idaho, and its employee LOWELL J. CUTSHAW, City of Lewiston Engineer, and DOES 1-20, Defendants.	**CASE NO.** CV 09-02219 **MEMORANDUM OPINION AND ORDER ON PLAINTIFF'S MOTION FOR RECONSIDERATION AND DEFENDANTS' MEMORANDUM OF COSTS**

This matter came before the Court on Defendants City of Lewiston and Lowell J. Cutshaw's Second Motion for Summary Judgment. The Plaintiff was represented by Ronald Landeck of the firm Landeck & Forseth. Defendants City of Lewiston and City of Lewiston Engineer, Lowell Cutshaw, were represented by Stephen Adams, of the firm Anderson, Julian & Hull. The Court heard oral argument on this matter on November 29,

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2011. The Court, having heard the argument of counsel and being fully advised in the matter, hereby renders its decision.

BACKGROUND

A detailed background of this case is located within the *Memorandum Opinion and Order on Second Motion for Summary Judgment*, filed October 14, 2011 and *Memorandum Opinion and Order on Motion for Summary Judgment* dated September 14, 2010. No new facts were presented on the motion for reconsideration. The Plaintiff is seeking reconsideration of this Court's order which granted summary judgment in favor of the Defendants.

MOTION FOR RECONSIDERATION STANDARD

On a motion for reconsideration pursuant to I.R.C.P. 11(a)(2)(B), the court must take into account any new facts that may affect the correctness of the prior interlocutory order. *Nationsbanc Mortgage Corp. v. Cazier*, 127 Idaho 879, 884, 908 P.2d 572, 577 (Ct. App. 1995), *citing Coeur d'Alene Mining Co. v. First Nat'l Bank of North Idaho*, 118 Idaho 812, 823, 800 P.2d 1026, 1037 (1990). The burden is on the moving party to bring the new facts to the court's attention; the court is not required to search the record to determine whether there are any new facts that would affect its earlier decision. *Coeur d'Alene Mining Co.*, 118 Idaho at 823, 800 P.2d at 1037. Finally, the decision to grant or deny a motion for reconsideration rests within the sound discretion of the trial court. *Jordan v. Beeks*, 135 Idaho 586, 592, 21 P.3d 908, 914 (2001).

ANALYSIS

There are two motions currently pending before the Court. First, is the Plaintiff's motion for reconsideration of the Court's recent memorandum opinion and order which

granted summary judgment in favor of the Defendants. The second pending motion is the Defendants' requests for costs as the prevailing party in the action. Each will be addressed separately.

1. Plaintiff's Motion for Reconsideration

The Plaintiff is seeking reconsideration of several of the Court's determinations within the *Memorandum Opinion and Order on Second Motion for Summary Judgment*, filed October 14, 2011. The main arguments will be addressed below.

a. Economic Loss Rule

The Plaintiff asserts the Court's application of the economic loss rule was erroneous based upon the facts of the case at hand. Block asserts that only the four unimproved lots that he purchased from Streibick were the subject of the transaction, thus only costs to repair or replace the lots equals economic loss. Block asserts that damage to homes, retaining walls, driveways, swimming pools, fences and decks is damage to "other property" that was not part of the subject of the transaction. Block refers the Court to *Aardema v. U.S. Dairy Systems, Inc.*, 147 Idaho 785, 215 P.3d 505 (2009) and *Brian and Christie, Inc. v. Leishman Electric, Inc.*, 150 Idaho 22, 244 P.3d 166 (2010) in support of his argument.

In *Aardema*, the Plaintiff filed suit against *U.S. Dairy Systems* for the negligent design, installation, and maintenance of an automated milking system at a dairy farm. The system caused decreased milk production, quality and damage to the dairy cows. *Id.* at 788, 215 P.3d at 508. The *Aardema* Court determined the milking machines, not the cows, were the subject of the transaction. The economic loss rule barred the plaintiffs'

recovery unless the plaintiffs could show damage to the cows which amounted to more than the failure of the milking equipment.

> U.S. Dairy argues that the cows are the subject of the transaction; however, this argument is strained. Based on the preceding case law, the milking machines are the subject of the transaction. Aardema Dairy did not contract with any of the defendants for the cattle, but for the purchase, installation and operation of the milking system. In this case, the subject matter of the contract is the milking system and not the cattle that are milked. Therefore, on remand the inquiry is whether there is sufficient evidence to raise a genuine issue of material fact that there is damage to the cows which amounts to more than the failure of the milking equipment to meet Aardema Dairy's expectations.

Id. at 791, 215 P.3d at 511. The *Aardema* Court explained the evolution of Idaho case law addressing the economic loss rule, and discussed the subject of the transaction, which has not been specifically defined, but instead determined by making factual comparisons to prior cases.

> Economic loss is distinguishable from property damage, which would be recoverable under a tort claim. "Property damage encompasses damage to property other than that which is the *subject of the transaction.*" *Ramerth v. Hart,* 133 Idaho 194, 196, 983 P.2d 848, 850 (1999) (emphasis original) (quoting *Salmon Rivers Sportsman Camps, Inc.,* 97 Idaho at 351 544 P.2d at 309). This Court has not defined the "subject of the transaction," instead relying on factual comparisons from previous decisions. *Blahd v. Richard B. Smith, Inc.,* 141 Idaho 296, 301, 108 P.3d 996, 1001 (2005) (finding that the house and the lot are the subject of the transaction and, therefore, constitute economic loss where the allegation is damage to the house from the settling foundation); *Ramerth,* 133 Idaho at 197, 983 P.2d at 851 (finding that repair of the engine is the subject of the transaction if the allegedly negligent repair subsequently causes need for further repair to the engine); *Duffin,* 126 Idaho at 1007, 895 P.2d at 1200 (finding that no property loss, other than property which is the subject of the transaction, existed when delivered and certified seed is found to contain bacterial ring rot); *Tusch Enter. v. Coffin,* 113 Idaho 37, 41, 740 P.2d 1022, 1026 (1987) (holding that allegations of negligent design and construction of a duplex is barred by the economic loss rule); *Oppenheimer Indus., Inc.,* 112 Idaho at 426, 732 P.2d at 664 (holding that tort action may be maintained when the plaintiff alleged that his cattle were sold without his permission because the cattle brand inspector failed to verify cattle ownership prior to the sale). This line of cases delineates a

clear pattern that this Court has implicitly defined the "subject of the transaction" by the subject matter of the contract.

Id.[1]

The most recent case in Idaho which has discussed the economic loss rule is *Brian and Christie, Inc. v. Leishman Electric, Inc.,* 150 Idaho 22, 244 P.3d 166 (2010). In this case, the owners of a Taco Time sued a subcontractor alleging that the subcontractor's negligently performed electrical work caused a fire which damaged the building. The *Brian and Christie* Court held the claim was not barred by the economic loss rule. *Id.* at 29, 244 P.3d at 173.

The *Brian and Christie* Court provided detailed analysis of the economic loss rule, starting with the definition of economic loss from *Salmon Rivers Sportsman Camps, Inc. v. Cessna Aircraft Co.*, 97 Idaho 348, 544 P.2d 306 (1975). Further, the Court emphasized that the facts present in *Brian and Christie* involved a rendition of services, as opposed to defective property as the subject of the transaction.

> In *Salmon Rivers Sportsman Camps, Inc. v. Cessna Aircraft Co.,* 97 Idaho 348, 544 P.2d 306 (1975), we provided a definition of economic loss. The issue in *Salmon Rivers* was whether one could recover damages against a manufacturer for breach of an implied warranty in the absence of privity of contract. While deciding that issue, we stated that the difference between property damage and economic loss was: "Property damage encompasses damage to property other than that which is the subject of the transaction. Economic loss includes costs of repair and replacement of defective property which is the subject of the transaction, as well as

[1] This analysis was accompanied by the following footnote, which clarified that the definition of subject of the transaction, as set forth in *Blahd v. Richard B. Smith, Inc.,* 141 Idaho 196, 301, 108 P.3d 996, 1001 (2005), is overly broad:

> In *Blahd* this Court stated that the case law "indicate[s] the word 'transaction,' for purposes of the economic loss rule, does not mean a business deal-it means the subject of the lawsuit." *Blahd,* 141 Idaho at 300, 108 P.3d at 1000. However, if the subject of the transaction is defined as the subject of the lawsuit essentially every claim would be barred by the economic loss rule. Instead we read this overbroad language from *Blahd* to mean that the *underlying contract* that is the subject of the lawsuit is the subject of the transaction.

Id. at fn. 2.

commercial loss for inadequate value and consequent loss of profits or use." *Id.* at 351, 544 P.2d at 309.

We have since applied that definition to cases involving the purchase of defective personal property and real property. *See Tusch Enterprises v. Coffin,* 113 Idaho 37, 41, 740 P.2d 1022, 1026 (1987) (purchase of three defective duplexes); *Duffin v. Idaho Crop Imp. Ass'n,* 126 Idaho 1002, 1007, 895 P.2d 1195, 1200 (1995) (purchase of defective seed potatoes); *Ramerth v. Hart,* 133 Idaho 194, 196, 983 P.2d 848, 850 (1999) (purchase of a defective airplane); *Blahd v. Richard B. Smith, Inc.,* 141 Idaho 296, 300, 108 P.3d 996, 1000 (2005) (purchase of a defective house); *Aardema v. U.S. Dairy Systems, Inc.,* 147 Idaho 785, 790, 215 P.3d 505, 510 (2009) (purchase of an allegedly defective milking system). In reaching its decision, the district court used this same definition, even though Taco Time's claim against Subcontractor did not involve the purchase of defective property. The district court's attempt to apply this formulation of the rule to a case involving the rendition of services illustrates why it does not apply to such cases.

First, the *Salmon Rivers* definition states, "Economic loss includes costs of repair and replacement of defective property which is the subject of the transaction...." 97 Idaho at 351, 544 P.2d at 309. In applying that definition to this case, the district court held that "the subject of the transaction with which [Subcontractor] was involved was the remodel project" and that it was "the restaurant/building, not the services provided via remodeling, that was the subject of the transaction." In doing so, it misquoted the *Salmon Rivers* definition of economic loss.

It is the restaurant/building, not the services provided via remodeling, that was the subject of the transaction; and it was the building, its contents, and the profits derived from the building's use that were damaged by the fire.....

Correctly quoted, that definition states, "Economic loss includes costs of repair and replacement of *defective* property which is the subject of the transaction...." *Id.* (emphasis added). In its analysis, the district court omitted the word "defective." Taco Time did not contend that it suffered economic loss because Subcontractor sold it a defective restaurant. The restaurant was not defective property. It did not spontaneously combust. Rather, Taco Time's claim is that Subcontractor's negligence in connecting the signs to electrical power caused a fire that extensively damaged the restaurant and its contents. In this case, there was no defective property which was the subject of the transaction.

Brian and Christie, Inc. v. Leishman Electric, Inc., 150 Idaho at 26, 244 P.3d at 170.[2] The Court compared and contrasted cases involving rendition of services with cases which involved the purchase of defective property as the subject of the transaction.

> In *Oppenheimer Industries, Inc. v. Johnson Cattle Co., Inc.*, 112 Idaho 423, 426, 732 P.2d 661, 664 (1986), we rejected the contention that the loss of cattle due to the negligence of the deputy brand inspector was merely economic loss. In doing so, we stated, "It is also black-letter law that a cause of action in negligence is available for one whose chattel is lost or destroyed through the negligence of another." *Id.* The damage to Taco Time's restaurant and its contents was no more economic loss than was the loss of the cattle in *Oppenheimer.*
>
> The district court's analysis shows the confusion that can occur by attempting to apply the *Salmon Rivers* definition of economic loss to a transaction not involving the purchase of defective property. The definition of economic loss stated in *Salmon Rivers* and utilized in *Tusch Enterprises v. Coffin; Duffin v. Idaho Crop Imp. Ass'n; Ramerth v. Hart; Blahd v. Richard B. Smith, Inc.;* and *Aardema v. U.S. Dairy Systems, Inc.*, does not apply in cases involving the negligent rendition of services because such cases do not involve the purchase of defective property.

Id. at 27, 244 P.3d at 171. Next, the Court discussed *Just's Inc. v. Arrington Construction Co.*, 99 Idaho 462, 583 P.2d 997 (1978) as an example of a case wherein the *Salmon Rivers* definition of economic damages was not applicable.

> For example, in *Just's, Inc. v. Arrington Construction Co.*, 99 Idaho 462, 583 P.2d 997 (1978), we did not use the *Salmon Rivers* definition of economic

---

[2] The *Brian and Christie* Court stated the trial court misunderstood what economic loss is and explained that economic loss is not simply damages that can be measured monetarily.

> Second, the district court misunderstood what economic loss is. In its decision denying reconsideration, it wrote, "All of [Taco Time's] damage claims arise from restaurant property damaged by the fire, and such damages constitutes economic loss." It therefore held that Taco Time could not recover for damage to "the building, its contents, and the profits derived from the building's use that were damaged by the fire." Economic loss is not simply damages that can be measured monetarily. "Economic loss includes costs of repair and replacement of defective property which is the subject of the transaction, as well as commercial loss for inadequate value and consequent loss of profits or use." *Salmon Rivers Sportsman Camps, Inc. v. Cessna Aircraft, Co.*, 97 Idaho 348, 351, 544 P.2d 306, 309 (1975). It includes costs to repair and replace the " *defective* property which is the subject of the transaction." As discussed above, the restaurant and its contents were not defective property.

Id. at 26-27, 244 P.3d at 170-171.

damages when deciding whether a contractor performing a construction project in a business district could be liable for economic damages suffered by a business allegedly due to the contractor's negligence. The contractor and a city had entered into a contract for an extensive construction project that included removing and replacing the streets, sidewalks, sewer and water lines, electrical services, and traffic control devices in the downtown business district. The contract required the contractor to take certain actions to minimize the disruption to the businesses within the project area. A business brought an action contending that it was a third party beneficiary of the contract and that it was entitled to recover lost profits resulting from a decreased flow of customers allegedly caused by the contractor's negligence. The business did not contend that contractor had harmed the business's property.

We characterized the business's claim as follows, " The damages claimed by the plaintiff, lost profits, are purely economic losses allegedly suffered as a result of the defendant's negligent diversion of prospective customers of the plaintiff." *Id.* at 468, 583 P.2d at 1003. We then stated, "As a general rule, no cause of action lies against a defendant whose negligence prevents the plaintiff from obtaining a prospective economic advantage." *Id.* The reason for that general rule is that "a contrary rule, which would allow compensation for losses of economic advantage caused by the defendant's negligence, would impose too heavy and unpredictable a burden on the defendant's conduct." *Id.* at 470, 583 P.2d at 1005. We noted that if the business could recover such losses, so could "not only all the other businesses in the area, but also their suppliers, creditors, and so forth, Ad infinitum [sic]." *Id.* We concluded: "If the [contractor's] liability were extended to all those who suffered any pecuniary loss, its liability could become grossly disproportionate to its fault. Such potential liability would unduly burden any construction in a business area." *Id.* Although *Just's* was decided three years after *Salmon Rivers,* we did not use the *Salmon Rivers* definition of economic damages. Because *Just's* did not involve the purchase of defective property, such definition did not apply.

Id. at 27-28, 244 P.3d at 171-72.

Brian and Christie sets forth a clear delineation between cases involving the purchase of defective property, and those which involve the rendition of services. The *Brian and Christie* Court explicitly stated that the *Salmon Rivers* definition of "subject of the transaction" is only applicable to those cases involving the purchase of defective property. The Plaintiff contends this case is a rendition of services case, however, there is no dispute within the record that this lawsuit arises from the purchase of property that was to be developed, and was later discovered to be defective. Thus, while the facts of

the case may not be identical to *Blahd v. Richard B. Smith, Inc.*, 141 Idaho 296, 108 P.3d 996 (2005) and *Tusch Enters. v. Coffin,* 113 Idaho 37, 41, 740 P.2d 1022, 1026 (1987), these cases provide the best guidance regarding the application of the economic loss rule to the case before the Court. Therefore, the Court's prior ruling on this issue stands.

b. The City owed no duty to Block for events which occurred on the property prior to Block's purchase.

The Plaintiff contends the Court failed to construe the exceptions set forth in the ITCA appropriately. Within this argument, the Plaintiff contends the Court erred when it determined that the City did not owe Block a duty of care with respect to actions which occurred on the property prior to Block's purchase. The Complaint sets forth six allegations of negligence which occurred prior to Block's purchase of the property. *Complaint*, ¶ 55 (claims designated (iii), (iv), (v), (ix), (x), and (xi)).

It must be noted that the Court's determination on these six claims was made without consideration of the Idaho Tort Claims Act. The existence of a duty is a question of law. *Turpin v. Granieri*, 133 Idaho 244, 247, 985 P.2d 669, 672 (1999). This Court concluded that the City did not owe a duty to Block for allegations of negligence which occurred prior to Block's purchase of the property. Absent a duty, Block's burden to establish negligence cannot be met. Thus, the Court's prior ruling with respect to claims (iii), (iv), (v), (ix), (x), and (xi) stands.

c. Exceptions to the Idaho Tort Claims Act

In the alternative, the Defendants' motion for summary judgment was granted based on the determination that more than one exception to the Idaho Tort Claims Act was applicable to the case at hand. The ITCA "abrogates the doctrine of sovereign immunity and renders a governmental entity liable for damages arising out of its

negligent acts or omissions." *Lawton v. City of Pocatello*, 126 Idaho 454, 458, 886 P.2d 330, 334 (1994). "The purpose of the ITCA is to provide 'much needed relief to those suffering injury from the negligence of government employees.' The ITCA is to be construed liberally, consistent with its purpose, and with a view to 'attaining substantial justice.'" *Rees v. State, Dept. of Health and Welfare*, 143 Idaho 10, 19, 137 P.3d 397, 406 (2006) (internal citations omitted).

The Plaintiff contends the Court erred in the application of I.C. § 6-904B, which provides immunity to a governmental entity and its employees while acting within the course and scope of their employment and without malice or criminal intent and without gross negligence or reckless, willful and wanton conduct.

This statute reads in pertinent part:

> A governmental entity and its employees while acting within the course and scope of their employment and without malice or criminal intent and without gross negligence or reckless, willful and wanton conduct as defined in section 6-904C, Idaho Code, shall not be liable for any claim which:
> . . .
> 3. Arises out of the issuance, denial, suspension or revocation of, or failure or refusal to issue, deny, suspend, or revoke a permit, license, certificate, approval, order or similar authorization.
>
> 4. Arises out of the failure to make an inspection, or the making of an inadequate inspection of any property, real or personal, other than the property of the governmental entity performing the inspection.

I.C. § 6-904B(3),(4). The ITCA defines gross negligence and reckless, willful and wanton conduct.

> For the purposes of this chapter, and this chapter only, the following words and phrases shall be defined as follows:
>
> 1. "Gross negligence" is the doing or failing to do an act which a reasonable person in a similar situation and of similar responsibility would, with a minimum of contemplation, be inescapably drawn to

recognize his or her duty to do or not do such act and that failing that duty shows deliberate indifference to the harmful consequences to others.

2. "Reckless, willful and wanton conduct" is present only when a person intentionally and knowingly does or fails to do an act creating unreasonable risk of harm to another, and which involves a high degree of probability that such harm will result.

I.C. § 6-904C(1),(2). Further, for purposes of the ITCA, "it shall be a rebuttable presumption that any act or omission of an employee within the time and at the place of his employment is within the course and scope of his employment and without malice or criminal intent." I.C. § 6-903(5).

A plain reading of the statute requires the Plaintiff to set forth facts to establish the City employees acted with malice or criminal intent and either gross negligence or reckless, willful and wanton conduct. This statute establishes that the standard of care is more difficult to prove than the "ordinary care" standard. *See Crown v. State, Dept. of Agriculture*, 127 Idaho 175, 898 P.2d 1086 (1995). The Plaintiff has not presented new facts to this Court to establish a material question of fact on this issue. Therefore, the prior ruling on this issue stands.

The Plaintiff also asks this Court to reconsider the determination to grant summary judgment based upon I.C. § 6-904(1) and 6-904(7). Upon review, this Court finds that no facts or presentation of law which would alter the Court's prior decision on these matters. Having reviewed the *Memorandum Opinion and Order on Second Motion for Summary Judgment* in its entirety, and having considered the arguments of counsel, the Plaintiff's motion for reconsideration is denied.

2. Defendant's Memorandum of Costs

I.R.C.P. 54(d)(1)(A) states that "costs shall be allowed as a matter of right to the prevailing party . . . unless otherwise ordered by the court." The definition of prevailing party is set forth in I.R.C.P. 54(d)(1)(B):

> In determining which party to an action is a prevailing party and entitled to costs, the trial court shall in its sound discretion consider the final judgment or result of the action in relation to the relief sought by the respective parties. The trial court in its sound discretion may determine that a party to an action prevailed in part and did not prevail in part, and upon so finding may apportion the costs between and among the parties in a fair and equitable manner after considering all of the issues and claims involved in the action and the resultant judgment or judgments obtained.

Based upon the final result of this action, the Defendants are the prevailing party in the matter, and thus, are entitled to costs as a matter of right.

The following costs as a matter of right are awarded: subpoena fee - $40.00; deposition fees – $9,291.15; and witness fees -$140.00. The total award for costs as a matter of right is $9,471.15.[3]

In addition, the Defendants are seeking an award of discretionary costs in the amount of $14,736.90. This sum is comprised of photocopy charges and request for fees charged by experts. I.R.C.P. 54(d)(1)(D) permits the Court to award discretionary fees.

> Additional items of cost not enumerated in, or in an amount in excess of that listed in subparagraph (C), may be allowed upon a showing that said costs were necessary and exceptional costs reasonably incurred, and should in the interest of justice be assessed against the adverse party. The trial court, in ruling upon objections to such discretionary costs contained in the memorandum of costs, shall make express findings as to why such specific item of discretionary cost should or should not be allowed. In the absence of any objection to such an item of discretionary costs, the court may disallow on its own motion any such items of discretionary costs and shall make express findings supporting such disallowance.

[3] The Court notes that the Plaintiff objected to the amount requested for deposition costs as a matter of right. I.R.C.P. 54(d)(1)(C)(9) allows for "Charges for reporting and transcribing of a deposition taken in preparation for trial of an action, whether or not read into evidence in the trial of an action." The Court does not find the requested amount for depositions to be unreasonable or outside the confines of the rule.

I.R.C.P. 54(d)(1)(D). The Plaintiff objects to the Defendants request for discretionary fees.

"A court may evaluate whether costs are exceptional within the context of the nature of the case." *City of McCall v. Seubert*, 142 Idaho 580, 588-89, 130 P.3d 1118, 1126-27 (2006).

> In reviewing a grant or denial of discretionary costs, the key issue is whether the record indicates express findings by the district court as to whether a cost was necessary, reasonable, exceptional and should be awarded in the interests of justice. The district court does not have to engage in a lengthy discussion of these factors.

Nightengale v. Timmel, 151 Idaho 347, 354-55, 256 P.3d 755, 762 -763 (2011). The Court does not find that the requested discretionary costs are the type of expenses which fall within the framework of I.R.C.P. 54(d)(1)(D). The photocopy and expert costs may have been necessary and reasonable to the defense of the case, however, the Court is not persuaded these costs were exceptional based upon the subject matter of the litigation. Therefore, the Defendants' motion for an award of discretionary costs is denied.

CONCLUSION

The Plaintiff is seeking reconsideration of this Court's order granting summary judgment in favor of the Defendants. Having considered the file as a whole, and the Plaintiff's additional arguments, the motion for reconsideration is denied. The Defendants have filed a motion to recover both costs as a matter of right and discretionary costs. Based upon the foregoing analysis, the Defendants' motion is granted with respect to costs as a matter of right; however, the Defendants' request for discretionary costs is denied.

Based upon the foregoing analysis, the City's motion for summary judgment is granted.

ORDER

The Plaintiff's Motion for Reconsideration is hereby DENIED. IT IS FURTHER ORDERED THAT the Defendant's motion for costs is hereby GRANTED in part, and DENIED in part, consistent with the foregoing analysis.

Dated this 4th day of January 2012.

CARL B. KERRICK – District Judge

CERTIFICATE OF MAILING

I hereby certify that a true copy of the foregoing MEMORANDUM OPINION AND ORDER ON PLAINTIFF'S MOTION FOR RECONSIDERATION AND DEFENDANT'S MEMORANDUM OF COSTS was:

_____ faxed this ____ day of January, 2012, or

_____ hand delivered via court basket this ____ day of January, 2012, or

X mailed, postage prepaid, by the undersigned at Lewiston, Idaho, this 5th day of January, 2012, to:

Ronald J. Landeck
Landeck & Forseth
P.O. Box 9344
Moscow, ID 83843

Stephen L. Adams
Anderson, Julian & Hull
P.O. Box 7426
Boise, ID 83707-7426

PATTY O. WEEKS, CLERK

By: _____
Deputy

CLERK OF DISTRICT COURT SECOND JUDICIAL DISTRICT NEZ PERCE COUNTY EX-OFFICIO AUDITOR AND RECORDER STATE OF IDAHO

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PATTY O. WEEKS
CLERK OF THE DISTRICT COURT
DEPUTY

RONALD J. LANDECK
DANELLE C. FORSETH
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(208) 883-1505
Landeck ISB No. 3001
Forseth ISB No. 7124
Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

JOHN G. BLOCK, a single man,

Plaintiff/Appellant,

vs.

JACK J. STREIBICK, a single man, JACK STREIBICK, as Personal Representative of the Estate of Maureen F. Streibick, deceased,

Defendants,

CITY OF LEWISTON, a municipal corporation of the State of Idaho, and its employee, LOWELL J. CUTSHAW, City of Lewiston Engineer, and DOES 1-20,

Defendants/Respondents.

Case No. CV 09-02219

NOTICE OF APPEAL
Fee Category: L4
Fee: $101.00

TO: The above-named Respondents City of Lewiston, a municipal corporation of the State of Idaho, and its employee, Lowell J. Cutshaw, City of Lewiston Engineer, and their attorneys of record, Brian K. Julian and Stephen L. Adams of Anderson, Julian & Hull, LLP, and to the Clerk of the above-entitled Court:

1023 1161

NOTICE IS HEREBY GIVEN THAT:

1. The above-named appellant, John G. Block ("appellant" or "Block") appeals against the above-named respondents, City of Lewiston and its employee Lowell J. Cutshaw (collectively "respondents" or "City") to the Idaho Supreme Court from the Judgment entered on February 1, 2012, inclusive of the Memorandum Opinion and Order on Second Motion for Summary Judgment entered October 14, 2011, Memorandum Opinion and Order on Plaintiff's Motion for Reconsideration and Defendants' Memorandum of Costs entered on January 4, 2012, and/or other related orders, Honorable Carl B. Kerrick, presiding.

2. The Appellant has a right to appeal to the Idaho Supreme Court, from the judgments or orders described in paragraph 1 above, under and pursuant to Rules 4 and 11(a)(1) of the Idaho Appellate Rules.

3. A preliminary statement of the issues on appeal, as currently identified, provided any such list of issues on appeal shall not prevent appellant from asserting other issues on appeal, is that the district court erred by:

a) Failing to find and conclude that genuine issues of material fact exist as to whether the City acted negligently in failing to perform required services under City code, including its failure to warn Block of a previous landslide on Block's real property that was memorialized in the City's records;

b) Failing to find and conclude that genuine issues of material fact exist as to whether the City acted with gross negligence by approving plats and issuing building permits for development of Block's real property without inspecting City records and/or warning Block of a previous landslide on Block's real property that was memorialized in the City's records and by erroneously applying an exception to liability under Idaho Code § 6-9043;

c) Failing to find and conclude that genuine issues of material fact exist as to whether the City failed to exercise ordinary care in carrying out its regulatory and/or discretionary function(s) and by erroneously applying an exception to liability under Idaho Code § 6-904(1);

d) Finding and concluding that Block's claim arose out of a plan or design for construction or improvement to highways, roads, streets, bridges, or other public property and by erroneously applying an exception to liability under Idaho Code § 6-904B;

e) Erroneously applying the economic loss doctrine in dismissing Block's tort claim against the City for the City's failure to warn Block of a previous landslide on Block's real property and by failing to conclude that the City's failure to so warn is a duty imposed by law and is not the "subject of a transaction" that involved Block and the City; and

f) Erroneously applying the economic loss doctrine in dismissing Block's tort claim against the City by failing to find and conclude that Block suffered property damage other than damage that was the "subject of a transaction" that involved Block and the City.

4. Has an order been entered sealing all or any portion of the record? No.

5(a). Is a reporter's transcript requested? Yes.

5(b). Appellant requests the preparation of the following portions of the reporter's transcript:

Hearing on Second Motion for Summary Judgment held August 9, 2011.

Hearing on Plaintiff's Motion for Reconsideration held November 29, 2011.

Appellant requests that the transcript be prepared in compressed format as specified in Idaho Appellate Rule 26.

6. Appellant requests that the following documents be included in the Clerk's Record in addition to those automatically included pursuant to Rule 28 of the Idaho Appellate Rules:

a. Motion for Summary Judgment filed May 21, 2010;

b. Memorandum in Support of Motion for Summary Judgment filed May 21, 2010;

c. Statement of Facts in Support of Motion for Summary Judgment filed May 21, 2010;

d. Affidavit of Stephen Adams in Support of Motion for Summary Judgment filed May 21, 2010;

e. Supplemental Affidavit of Stephen Adams in Support of Motion for Summary Judgment filed June 23, 2010;

f. Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment filed July 13, 2010;

g. Affidavit of Eric Hasenoehrl filed July 13, 2010;

h. Affidavit of John Block filed July 13, 2010;

i. Reply in Support of Motion for Summary Judgment filed July 16, 2010;

j. Motion for Summary Judgment filed June 24, 2011;

k. Statement of Facts in Support of Motion for Summary Judgment filed June 24, 2011;

l. Memorandum in Support of Motion for Summary Judgment filed June 24, 2011;

m. Supplemental Affidavit of Stephen Adams in Support of Motion for Summary Judgment filed June 24, 2011;

n. Affidavit of Kari Ravencroft in Support of Defendants' Motion for Summayry [sic] Judgment filed June 27, 2011;

o. Plaintiff's Memorandum in Opposition to Defendant City's Second Motion for Summary Judgment filed July 26, 2011;

p. Second Affidavit of Ronald J. Landeck in Support of Plaintiff's Objections to Defendant City's Motion for Summary Judgment filed July 26, 2011;

q. Second Affidavit of Eric Hasenoehrl filed July 26, 2011;

r. Second Affidavit of John Block filed July 26, 2011;

s. Affidavit of John R. ("Hank") Swift filed July 26, 2011;

t. Reply in Support of Defendants' Motion for Summary Judgment filed August 1, 2011;

u. Stipulation for Dismissal with Prejudice of Defendant Jack J. Streibick, a Single Man and as Personal Representative of the Estate of Maureen F. Streibick filed August 3, 2011;

v. Order of Dismissal of Defendant Jack J. Streibick, a Single Man and as Personal Representative of the Estate of Maureen F. Streibick filed August 8, 2011;

w. Amended Order Setting Case for Trial and Pre-Trial Conference filed August 10, 2011;

x. Notice of Citation of Additional Authority filed August 25, 2011;

y. Motion for Reconsideration of Memorandum Opinion and Order on Second Motion for Summary Judgment filed October 28, 2011;

z. Memorandum in Support of Motion for Reconsideration of Memorandum Opinion and Order on Second Motion for Summary Judgment filed October 28, 2011;

aa. Fourth Affidavit of Ronald J. Landeck in Support of Motion for Reconsideration of Memorandum Opinion and Order on Second Motion for Summary Judgment filed October 28, 2011;

bb. Amended Memorandum in Support of Motion for Reconsideration of Memorandum Opinion and Order on Second Motion for Summary Judgment filed November 1, 2011;

cc. Response to Plaintiff's Motion for Reconsideration filed November 18, 2011; and

dd. Reply Brief in Support of Plaintiff's Motion for Reconsideration filed November 25, 2011.

7. I certify that:

a. A copy of the Notice of Appeal has been served on the reporter;

b. The clerk of the district court or reporter has been paid the estimated fee for preparation of the requested transcript;

c. The estimated fee for preparation of the Clerk's Record has been paid;

d. The appellate filing fee has been paid; and

1027 H65

e. Service has been made upon all parties required to be served pursuant to Rule 20, Idaho Appellate Rules.

DATED this 8th day of February, 2012.

LANDECK & FORSETH

By: _____
Ronald J. Landeck
Attorneys for Plaintiff/Appellant
John G. Block

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of February, 2012, I caused a true and correct copy of this document to be served on the following individual in the manner indicated below:

BRIAN K. JULIAN
STEPHEN L. ADAMS
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C. W. MOORE PLAZA
250 SOUTH FIFTH STREET, SUITE 700
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NANCY TOWLER
COURT REPORTER TO JUDGE KERRICK
NEZ PERCE COUNTY COURTHOUSE
PO BOX 896
LEWISTON, IDAHO 83501

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[ ] Email
[ ] FAX (208) 344-5510
[ ] Hand Delivery

_____
Ronald J. Landeck

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

JOHN GUSTAV BLOCK, a single man Plaintiff-Appellant, v. CITY OF LEWISTON, a municipal corporation of the State of Idaho, and its employee LOWELL J. CUTSHAW, City of Lewiston Engineer, Defendants-Respondents and JACK JOSEPH STREIBICK, a single man, and Personal Representative of THE ESTATE OF MAUREEN F. STREIBICK, deceased, AND DOES 1-20, Defendants,	SUPREME COURT NO. 39685 CLERK'S CERTIFICATE

I, DeAnna P. Grimm, Deputy Clerk of the District Court of the Second Judicial District of the State of Idaho, in and for the County of Nez Perce, do hereby certify that the foregoing Clerk's Record in the above-entitled cause was compiled and bound by me and contains true and correct copies of all pleadings, documents, and papers designated to be included under Rule 28,

Idaho Appellate Rules, the Notice of Appeal, any Notice of Cross-Appeal, and additional documents that were requested.

I further certify:

1. That no exhibits were marked for identification or admitted into evidence during the course of this action.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of said court this 27 day of March 2012.

PATTY O. WEEKS, Clerk

By _____
Deputy Clerk

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

JOHN GUSTAV BLOCK, a single man Plaintiff-Appellant, v. CITY OF LEWISTON, a municipal corporation of the State of Idaho, and its employee LOWELL J. CUTSHAW, City of Lewiston Engineer, Defendants-Respondents and JACK JOSEPH STREIBICK, a single man, and Personal Representative of THE ESTATE OF MAUREEN F. STREIBICK, deceased, AND DOES 1-20, Defendants,	SUPREME COURT NO. 39685 CERTIFICATE OF SERVICE

I, DeAnna P. Grimm, Deputy Clerk of the District Court of the Second Judicial District of the State of Idaho, in and for the County of Nez Perce, do hereby certify that copies of the Clerk's Record and Reporter's Transcript were placed in the United States mail and addressed to Ronald J. Landeck, 693 Styner

Ave, Suite 9, P O Box 9344, Moscow, ID 83843 and Brian J. Julian, CW Moore Plaza, 250 S Fifth St, Suite 700, P O Box 7426, Boise, ID 83707-7426, this 26 day of April 2012.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court this 26 day of April 2012.

PATTY O. WEEKS
CLERK OF THE DISTRICT COURT

By _____
Deputy Clerk

CERTIFICATE OF SERVICE

1032 HTO

ORIGINAL

Brian K. Julian, ISB No. 2360
Stephen L. Adams, ISB No. 7534
ANDERSON, JULIAN & HULL LLP
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Attorneys for Defendants City of Lewiston and Lowell J. Cutshaw, City Engineer

IN THE DISTRICT COURT OF
THE SECOND JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF NEZ PERCE

JOHN G. BLOCK, a single man,

Plaintiff,

vs.

JACK J. STREIBICK, a single man, JACK STREIBICK as Personal Representative of the Estate of Maureen F. Streibick, deceased, CITY OF LEWISTON, a municipal corporation of the State of Idaho, and its employee LOWELL J. CUTSHAW, City of Lewiston Engineer, and DOES 1 – 20,

Defendants.

Case No. CV 09-02219

JUDGMENT

As the Court has granted Defendant City of Lewiston and Lowell J. Cutshaw's Second Motion for Summary Judgment, pursuant to the Memorandum Opinion and Order on Second Motion for Summary Judgment,

JUDGMENT IS HEREBY ENTERED on behalf of Defendant City of Lewiston and Defendant Lowell Cutshaw. It is further ordered, adjudged and decreed that Plaintiff's Complaint and claims against Defendants be, and the same hereby are, dismissed on the merits and with prejudice with costs and/or fees to be assessed and awarded to Defendants in the amount of $9,471.15.

DATED this 1st day of ~~January~~ February, 2012.

By _____
District Court Judge

CLERK'S CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 1st day of ~~January~~ February, 2012, I served a true and correct copy of the foregoing JUDGMENT by delivering the same to each of the following attorneys of record, by the method indicated below, addressed as follows:

Ronald J. Landeck
RONALD J. LANDECK, P.C.
693 Styner Avenue
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Moscow, Idaho 83843
Telephone: (208) 883-1505
Facsimile: (208) 883-4593

Attorneys for Plaintiff

[X] U.S. Mail, postage prepaid
[ ] Hand-Delivered
[ ] Overnight Mail
[ ] Facsimile

DISTRICT COURT SECOND JUDICIAL DISTRICT NEZ PERCE COUNTY • CLERK EX-OFFICIO AUDITOR AND RECORDER STATE OF IDAHO

CLERK

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PATTY O. [illegible]
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sadams@ajhlaw.com

Attorneys for Defendants City of Lewiston and Lowell J. Cutshaw, City Engineer

IN THE DISTRICT COURT OF
THE SECOND JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF NEZ PERCE

JOHN G. BLOCK, a single man,

Plaintiff,

vs.

JACK J. STREIBICK, a single man, JACK STREIBICK as Personal Representative of the Estate of Maureen F. Streibick, deceased, CITY OF LEWISTON, a municipal corporation of the State of Idaho, and its employee LOWELL J. CUTSHAW, City of Lewiston Engineer, and DOES 1 – 20,

Defendants.

Case No. CV 09-02219

STIPULATION TO SUPPLEMENT CLERK'S RECORD

COME NOW the above entitled parties, by and through their attorneys of record, Ronald J. Landeck and Danelle Forseth of Landeck & Forseth, for Plaintiff, and Anderson, Julian & Hull, LLP, for Defendants City of Lewiston and Lowell J. Cutshaw, and pursuant to Idaho Appellate Rules 29 and 30, hereby stipulate to supplement the Clerk's record with the following documents:

1. Judgment, filed February 1, 2012.

1036

DATED this 17 day of May, 2012.

ANDERSON, JULIAN & HULL LLP

By _____
Brian K. Julian, Of the Firm
Attorneys for City of Lewiston and
Lowell J. Cutshaw, City Engineer

DATED this 17th day of May, 2012.

LANDECK & FORSETH

By _____
Ronald J. Landeck, Of the Firm
Attorneys for Plaintiff

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 17 day of May, 2012, I served a true and correct copy of the foregoing STIPULATION TO SUPPLEMENT CLERK'S RECORD by delivering the same to each of the following attorneys of record, by the method indicated below, addressed as follows:

Ronald J. Landeck
RONALD J. LANDECK, P.C.
693 Styner Avenue
P. O. Box 9344
Moscow, Idaho 83843
Telephone: (208) 883-1505
Facsimile: (208) 883-4593

Attorneys for Plaintiff

[X] U.S. Mail, postage prepaid
[ ] Hand-Delivered
[ ] Overnight Mail
[ ] Facsimile

Stephen W. for
Brian K. Julian

FILED

2012 MAY 23 AM 9 51

PATTY O. WEEKS
CLERK OF THE DISTRICT COURT

DEPUTY

RONALD J. LANDECK
DANELLE C. FORSETH
LANDECK & FORSETH
693 Styner Avenue, Suite 9
P.O. Box 9344
Moscow, ID 83843
(208) 883-1505
Landeck ISB No. 3001
Forseth ISB No. 7124
Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

JOHN G. BLOCK, a single man,

Plaintiff/Appellant,

vs.

JACK J. STREIBICK, a single man, JACK STREIBICK, as Personal Representative of the Estate of Maureen F. Streibick, deceased,

Defendants,

CITY OF LEWISTON, a municipal corporation of the State of Idaho, and its employee, LOWELL J. CUTSHAW, City of Lewiston Engineer, and DOES 1-20,

Defendants/Respondents.

Case No. CV 09-02219

SECOND STIPULATION TO SUPPLEMENT AND CORRECT CLERK'S RECORD

COME NOW the above entitled parties, by and through their attorneys of record, Ronald J. Landeck and Danelle C. Forseth of Landeck & Forseth, for Plaintiff, and Anderson, Julian & Hull, LLP, for Defendants City of Lewiston and Lowell J. Cutshaw, and pursuant to Idaho

Appellate Rules 29 and 30, hereby stipulate to:

1. At page 79 of the Clerk's Record, replace the June 24, 2011 Supplemental Affidavit of Stephen Adams in Support of Motion for Summary Judgment with the June 23, 2010 Supplemental Affidavit of Stephen Adams in Support of Motion for Summary Judgment;

2. At page 303 of the Clerk's Record, remove Defendant Streibick's Motion for Summary Judgment; and

3. At page 306 of the Clerk's Record, remove Defendant Streibick's Memorandum in Support of Motion for Summary Judgment.

DATED this 21st day of May, 2012.

LANDECK & FORSETH

By: _____
Ronald J. Landeck
Attorneys for Plaintiff/Appellant
John G. Block

DATED this 21 day of May, 2012.

ANDERSON, JULIAN & HULL LLP

By: _____
Brian K. Julian, of the Firm
Attorneys for City of Lewiston and
Lowell J. Cutshaw, City Engineer

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of May, 2012, I caused a true and correct copy of this document to be served on the following individual in the manner indicated below:

BRIAN K. JULIAN
STEPHEN L. ADAMS
ANDERSON, JULIAN & HULL LLP
C. W. MOORE PLAZA
250 SOUTH FIFTH STREET, SUITE 700
POST OFFICE BOX 7426
BOISE, IDAHO 83707-7426

[X] U.S. Mail
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[ ] Hand Delivery
[ ] email to sadams@ajhlaw.com

Ronald J. Landeck

ORIGINAL

Brian K. Julian, ISB No. 2360
Stephen L. Adams, ISB No. 7534
ANDERSON, JULIAN & HULL LLP
C. W. Moore Plaza
250 South Fifth Street, Suite 700
Post Office Box 7426
Boise, Idaho 83707-7426
Telephone: (208) 344-5800
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sadams@ajhlaw.com

Attorneys for Defendants City of Lewiston and
Lowell J. Cutshaw, City Engineer

FILED
2012 MAY 24 PM 4 59
PATTY O. WEEKS
CLERK OF THE DIST. COURT
DEPUTY

IN THE DISTRICT COURT OF
THE SECOND JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF NEZ PERCE

JOHN G. BLOCK, a single man,

Plaintiff,

vs.

JACK J. STREIBICK, a single man, JACK STREIBICK as Personal Representative of the Estate of Maureen F. Streibick, deceased, CITY OF LEWISTON, a municipal corporation of the State of Idaho, and its employee LOWELL J. CUTSHAW, City of Lewiston Engineer, and DOES 1 – 20,

Defendants.

Case No. CV 09-02219

ORDER

The Stipulation to Supplement Clerk's Record having duly and regularly come before this Court, and good cause appearing therefor,

1042

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, and this does order, adjudge and decree that Clerk's Record be supplemented.

DATED this 24th day of May, 2012

District Judge

FILED

2012 MAY 24 PM 4 59

PATTY O. WEESE
CLERK OF THE DISTRICT COURT
DEPUTY

RONALD J. LANDECK
DANELLE C. FORSETH
LANDECK & FORSETH
693 Styner Avenue, Suite 9
P.O. Box 9344
Moscow, ID 83843
(208) 883-1505
Landeck ISB No. 3001
Forseth ISB No. 7124
Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

JOHN G. BLOCK, a single man,

Plaintiff/Appellant,

vs.

JACK J. STREIBICK, a single man, JACK STREIBICK, as Personal Representative of the Estate of Maureen F. Streibick, deceased,

Defendants,

CITY OF LEWISTON, a municipal corporation of the State of Idaho, and its employee, LOWELL J. CUTSHAW, City of Lewiston Engineer, and DOES 1-20,

Defendants/Respondents.

Case No. CV 09-02219

ORDER

The Second Stipulation to Supplement and Correct Clerk's Record having duly and regularly come before this Court, and good cause appearing therefor,

1044

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, and this does order, adjudge and decree that Clerk's Record be supplemented and corrected.

DATED this 24th day of May, 2012.

District Judge

CLERK'S CERTIFICATE OF SERVICE

I hereby certify that on this 25 day of May, 2012, I caused a true and correct copy of this document to be served on the following individual in the manner indicated below:

BRIAN K. JULIAN
STEPHEN L. ADAMS
ANDERSON, JULIAN & HULL LLP
C. W. MOORE PLAZA
250 SOUTH FIFTH STREET, SUITE 700
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BOISE, IDAHO 83707-7426

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RONALD J. LANDECK
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CLERK OF DISTRICT COURT SECOND JUDICIAL DISTRICT NEZ PERCE COUNTY STATE OF IDAHO EX-OFFICIO AUDITOR AND RECORDER

Clerk