12-10-2012

Block v. City of Lewiston Appellant's Brief Dckt. 39685

IN THE SUPREME COURT OF THE STATE OF IDAHO

JOHN G. 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.	)	Docket No. 39685-2012 APPELLANT'S BRIEF

Appeal from the District Court of the Second Judicial District for Nez Perce County
Honorable Carl B. Kerrick, District Judge, presiding

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Statement of the Case

In 1999 a landslide occurred in an undeveloped portion of the partially developed Sunset Palisades subdivision No. 4 ("SP No. 4") within the City of Lewiston. A geotechnical engineer, performing an aerial inspection of another landslide about a half mile away, photographed the SP No. 4 landslide and forwarded that photograph to the Lewiston City Engineer who prepared a memorandum memorializing the landslide, and filed the photograph and memorandum in the City's SP No. 4 file and an "address" file with the express intent that the City's knowledge of the landslide be made known to any developer when, and if, plans to develop and/or construct upon or near the landslide area were proposed and/or submitted to the City. During the next six years the landslide area remained bare land but was filled and graded by its owner without supervision by the City.

In 2005, six years after the landslide, without any knowledge of the 1999 landslide, Appellant John Block ("Block") purchased the bare land upon which the 1999 landslide had occurred and, pursuant to City Code, obtained authorization and approval from the Respondents City of Lewiston ("City") and City Engineer Lowell J. Cutshaw ("Cutshaw") to subdivide and construct three (3) custom homes on the property. It was during the subdivision and building authorization and approval processes that the City and Cutshaw breached their duties to Block.

The Subdivision Ordinance of the City of Lewiston (Ord. No. 4177, §1, 2-10-97) requires City staff to meet with each prospective subdivider to identify any unusual problems, and to review and discuss with the subdivider the need for special studies, including studies of soil,

stability and other site conditions potentially affecting development of the property. Although Block met with City staff and discussed issues pertaining to his subdivision, the City failed to review, discuss and/or warn Block of the 1999 landslide upon which Block was seeking plat approval to construct three (3) custom homes. The City's failure to identify the 1999 landslide as a site issue breached its statutory duty to Block. The City's Subdivision Ordinance also provides that land which is unstable for residential use shall not be subdivided, and the City's subdivision of Block's property that enabled him to construct three (3) homes directly on the 1999 landslide area constituted a breach of this statutory duty. Block immediately constructed those three homes and their improvements in 2006 and 2007, certificates of occupancy for two (2) dwellings having been issued in May, 2007 and the third in June, 2008. Shortly thereafter a landslide occurred along the same fault line as the 1999 landslide causing substantial structural damage to all three (3) dwellings and their improvements, including garages, driveways, retaining walls, fences, decks, patios, and a swimming pool. After costly abatement effort by Block, the City declared two (2) dwellings to be uninhabitable and ordered Block to demolish them, which he did, while the third home, with its continuing structural issues, remains unsalable. Block's out-of-pocket losses far exceed one million dollars and his total damages resulting from the City's negligence exceed two million dollars.

Course of Proceedings.

Block filed his Notice of Claim for Damages with the City, including Cutshaw in his capacity as City of Lewiston Engineer, to recover money damages under the Idaho Tort Claims Act, Idaho Code §§ 6-901 et seq. ("ITCA") on August 26, 2009. On October 22, 2009, Block

filed a Complaint against Defendants. R. Vol. I, pp. 11-28. On May 21, 2010 the City/Cutshaw filed its first motion for summary judgment on the grounds that Block failed to file a timely Notice of Tort Claim. This first motion for summary judgment was denied by the district court on September 14, 2010. R. Vol. I, pp. 43-35, pp. 163-181. The City/Cutshaw filed a Second Motion for Summary Judgment on June 24, 2011. On October 14, 2011, the district court entered its Memorandum Opinion and Order on Second Motion for Summary Judgment ("Order") granting the City summary judgment based on the economic loss rule and application of certain exceptions under the ITCA. R. Vol. IV, pp. 816-838.

On October 28, 2011, Block moved to reconsider the Order and on January 4, 2012, the district court entered its Memorandum Opinion and Order on Plaintiff's Motion for Reconsideration and Defendants' Memorandum of Costs upholding its prior opinion and order regarding application of the economic loss rule and exceptions to the ITCA. R. Vol. V, pp. 1008-1022. R. Vol. IV, pp. 839-868, Vol. V, pp. 869-979, 998-1007.

Statement of Facts.

Defendant City of Lewiston ("City") is a municipal corporation of the State of Idaho. R. Vol. I, p. 37 (Answer ¶ II). At certain times relevant to this action, Defendant Lowell J. Cutshaw ("Cutshaw") was an employee of the City of Lewiston and its City Engineer. R. Vol. I, p. 37 (Answer ¶ II). In December, 2005, Block purchased property in Lewiston, Idaho, from Defendant Jack Streibick and the Estate of Maureen Streibick ("Streibick") for the purpose of constructing and selling single family residences. R. Vol. I, p. 102 (Affidavit of John Block filed July 13, 2010 ("Aff. of John Block") at p. 2 ¶ 3). The real property at issue in this lawsuit has

been identified as part of four successive and approved subdivisions of the City and from 2006 to the present has been identified as wholly within Canyon Greens subdivision ("Canyon Greens") and Canyon Greens No. 2 subdivision ("Canyon Greens No. 2"). R. Vol. III, p. 500 (Block Depo. 57:15-25, 58:1-6). Prior to becoming Canyon Greens and Canyon Greens No. 2, this property was designated as a portion of a larger Sunset Palisades No. 8 subdivision and prior thereto was designated as part of an even larger Block 3 ("Block 3") of Sunset Palisades No. 4 subdivision ("SP No. 4"). R. Vol. III, pp. 624-25 (Streibick Depo. 27:6-23, 52:7-20).

Streibick's contractor Kenneth ("Ken") Morrison testified that he, in 1994 or 1995, filled in a 40-foot deep canyon on SP No. 8. R. Vol. III, pp. 576, 585 (Morrison Depo. 6:2-25, 7:1-16, 74:21-25, 75:1-25, 76:1-6). Keltic Engineering, Inc. ("Keltic") has calculated that the amount of fill placed by Streibick prior to 1995 within SP No. 8 to be approximately 63,350 cubic yards. R. Vol. IV, p. 697 (Second Aff. of Eric Hasenoehrl p. 2, ¶ 5). Gary Stone, a licensed Idaho surveyor at the time, who performed work for Streibick on SP No. 4 stated that the fill was placed without compaction, and that the area prior to being filled was a "draw" and "with that kind of slope" toward its north end was "undividable", and that it changed the contour of the property. R. Vol. III, pp. 629-637 (Stone Depo.17:1-7, 76:18-25, 77:1-25, 78:1-25, 79:1-25, 80:1-15, 81:22-25, 82:1-6, 105:5-17,117:3-23, 127:8-25, 128:1-25, 129:1-25, 130:1-25, 131:1-4, Exhibit 260).

Mr. Morrison also testified that a detention pond built on SP No. 8 in 1994 to satisfy the City's storm drainage requirements "never did work . . . it all cracked out" and, in 1999, was filled in, leveled off, and disposed of by him for Streibick. R. Vol. III, pp. 581, 586 (Morrison Depo. 54:23-25, 55:1-14, 79:17-21).

In 1999 a landslide occurred on Block 3 of SP No. 4 and the City was provided a photograph of that landslide by Terry Howard, a geotechnical engineer, and the City's knowledge of the 1999 landslide was noted in a Lewiston Tribune article. R. Vol. III, pp. 520, 533, 553 (Cutshaw Depo. 73:6-22, Exhibit 29, Exhibit 170), R. Vol. I, p. 104 (Aff. of John Block, p. 4, ¶ 8-9). The City maintained a written record of the 1999 landslide with photographs illustrating its exact location. R. Vol. III, pp. 593-95 (Redenbaugh Depo. 36:2-25, 37:1-25, 38:1-25, 39:1-25, 40:1-11, Exhibit 125). The City's photograph of the 1999 landslide along with a memorandum had been placed in two of the City's files, its address file and its subdivision file for SP No. 4. R. Vol. III, pp. 645-46 (Stubbers Depo. 40:18-25, 41:1-4), R. Vol. III, p. 521 (Cutshaw Depo. 83:3-19), R. Vol. III, pp. 593-95 (Redenbaugh Depo. supra). The photograph and memorandum were never placed in a file for either Sunset Palisades No. 8, Canyon Greens or Canyon Greens No. 2. R. Vol. III, pp. 505, 515-17 (Block Depo. 179:24-25, 180:1-16, Exhibit 124, Exhibit 125).

Ken Morrison testified that in 1999 he performed grading activities on the area now known as the Canyon Greens subdivision in an effort to cover up the cracks caused by the 1999 landslide. He said he "leveled the cracks up." R. Vol. III, p. 582 (Morrison Depo. 57:13-22).

In the fall of 2005, the City required Streibick, as a condition of approval of SP No. 8, to construct the "missing" detention pond. R. Vol. III, p. 562 (Hasenoehrl Depo. 60:10-25, 61:1-13), R. Vol. III, pp. 522-23, 534 (Cutshaw Depo. 92:24-25, 93:1-25, 94:1-25, 95:1-4, Ex. 33).

During Streibick's subdivision of Sunset Palisades No. 8 in 2005, during Block's subdivision of Canyon Greens in 2006, and during Block's subdivision of Canyon Greens No. 2

in 2006-2007, during Block's efforts to obtain building permits for the lots within Canyon Greens in 2006, and during Block's efforts to obtain building permits for the lots within Canyon Greens No. 2 in 2007-2008, the City failed to disclose to Block the City's knowledge of the 1999 landslide. R. Vol. I, Second Affidavit of John Block filed herewith ("Second Aff. of John Block") p. 2, ¶ 7.

In December 2005, Block purchased SP No. 8 from Streibick with certain public street, water and sewer improvements of which Block was aware, as are shown on the SP No. 8 plat, but Block did not know and was not informed that uncontrolled fill had been placed on this site. R. Vol. IV, p. 691 (Second Aff. of John Block, p. 2, ¶ 5). The Administrative Plat for SP No. 8 was recorded by the City on November 7, 2005. R. Vol. III, pp. 526, 539 (Cutshaw Depo. 116:16-25, 117:1-9, Exhibit 46). Three months after SP No. 8 was approved and purchased by Block, his application for Lot 4 of SP No. 8 was approved by the City and Cutshaw for resubdivision into three (3) residential lots that are commonly known as 153 Marine View Drive ("153"), 155 Marine View Drive ("155"), and 159 Marine View Drive ("159") (collectively the "Canyon Greens" subdivision). The Canyon Greens plat was recorded by the City on February 15, 2006. R. Vol. III, p. 500 (Block Depo. 57:15-25, 58:1-6). As a condition of approval of Canyon Greens, the City required dedication of a public storm drain as well as a major repair of the detention pond that had been reconstructed before SP No. 8 could be approved but had failed soon after its construction. R. Vol. III, pp. 503-04, 511 (Block Depo. 135:24-25, 136:1-15, 136:25-26, 137:1-7, 231:9-25, 370:11-25, 371:1-3). In part, because the City's review and approval of Canyon Greens occurred three months after approval of SP No. 8 and the City had

not, except for the detention pond, raised any site-related issues in review of SP No. 8, Block had assumed that all grading and fill and other public improvements on Canyon Greens, other than the new storm drainage, had been properly placed and installed under permit from the City and under its supervision and inspection. R. Vol. IV, p. 692 (Second Aff. of John Block, p. 3, ¶ 10).

Block constructed a home on each lot in accordance with applicable building codes and standards, including compaction and testing of foundation footings, and the City conducted inspections, found each home to have been constructed in accordance with the City's applicable building codes and standards and issued certificates of occupancy for 153, 159 and 155 on May 30, 2007, May 30, 2007 and June 12, 2008, respectively. R. Vol. III, pp. 501-02 (Block Depo. October 14, 2010, 90:7-25, 91:1-25, 92:1-25, 93:1-25, 94:1-23), R. Vol. III, pp. 528, 530-31, 543, 547-48, 551 (Cutshaw Depo. 132:1-25, 133:1-16, 147:3-25, 149:9-15, 151:22-2, 153:1-4, Exhibits 61, 72, 75, 81). The City also approved Block's request to construct, pursuant to plans prepared by Block's engineer, retaining walls within the area of 153, 155 and 159, and the City issued building permits for and inspected and approved all of such construction. R. Vol. III, pp. 565-66 (Hasenoehrl Depo. 171:4-25, 172:1-15, 173:19-25, 174:1-25, 175:1-3), R. Vol. III, pp. 529, 532, 545-46, 552 (Cutshaw Depo. 143:5-25, 144:19-25, 145:1-5, 155:6-21, Exhibits 67, 69, 87). Block constructed single-family residences on 153, 155 and 159 of high quality construction that were listed for sale for nearly $600,000 each. R. Vol. IV, p. 692 (Second Aff. of John Block, p. 3, ¶ 8).

In late 2006, Block made application to the City to resubdivide the remainder of SP No. 8 then designated as Lots 1-3, into eight lots, and such resubdivision application was reviewed and

approved by Cutshaw and by the City as Lots 1 through 8 of Canyon Greens No. 2 to the City of Lewiston, a resubdivision of Lots 1, 2 and 3 of Amended Administrative Plat of Sunset Palisades No. 8 (collectively "Canyon Greens No. 2"). R. Vol. III, p. 500 (Block Depo. 57:15-25, 58:1-6). The City required Block to install a storm drain through Canyon Greens and Canyon Greens No. 2 that would discharge/outfall into the existing detention pond. R. Vol. III, p. 503 (Block Depo. 136:10-15). In addition, Block was required to correct an improperly placed sewer easement which resulted in the shifting of lot lines and the relocation of a fire hydrant. R. Vol. III, 513-14 (Block Depo. 17:18-25, 18:1-9). Block also graded the cul-de-sac, added a sanitary sewer and erosion control. R. Vol. III, pp. 564, 569 (Hasenoehrl Depo. 100:1-22, Exhibit 204).

All residential construction by Block on 153, 155 and 159 was done in accordance with all laws, statutes, ordinances, regulations and codes required by the City and any other governmental agency having jurisdiction thereof, including, but not limited to, all required soil compaction and compaction testing. R. Vol. III, p. 621 (Smith Depo. 60:10-25, 61:1-6), R. Vol. IV, pp. 692-93 (Second Aff. of John Block, pp. 3-4, ¶ 12).

In October, 2007, a realtor observed settling in the northwest corner of the home at 153 while showing the home to a prospective buyer. On or about early November, 2007, the owner of 159, who had purchased 159 in April 2007, told Block that there was a crack in the basement floor of 159. On or about early November, 2007, Block observed settling under an exterior door of 155. On November 13, 2007, Block consulted with professional engineers Keltic Engineering, Inc. and Strata Inc. Based upon professional advice from those engineers that 153, 155 and 159 were experiencing settlement problems, Block entered into a contract on December 14, 2007

with a contractor, Montana Helical Inc., to resolve the settlement problems by making structural adjustments to the structures on 153, 155 and 159 in areas where settlement had occurred by constructing a series of helical piers, and those structural adjustments were made in December, 2007. R. Vol. I, pp. 102-03 (Aff. of John Block, pp. 2-3, ¶ 4-6), R. Vol. I, pp. 116-17 (Aff. of Eric Hasenoehrl filed July 13, 2010 ("Aff. of Eric Hasenoehrl"), pp. 3-4, ¶ 9-10).

On or about December 14, 2007, to appease the owner's dissatisfaction with the condition of 159 and to be able to resolve the settlement problems to 159, Block reacquired 159 from the owner. R. Vol. IV, p. 693 (Second Aff. of John Block, p. 4, ¶ 15). Confident that the helical piers had remedied the settlement problem, Block made non-structural repairs and improvements during the spring of 2008 to 153, 155 and 159. R. Vol. I, p. 103 (Aff. of John Block, p. 3, ¶ 7).

In February, 2009, the tenants in 159 called Block, who was in California, and stated that they noticed settlement in the foundation of 159. Several weeks after that, the tenant in 153 called Block, who was still in California, and stated that there was settlement in the driveway and basement area of 153. Block returned to Idaho in March, 2009, inspected 153, 155 and 159, observed settlement to the structures on 153, 155 and 159 and observed cracks in the surface of the ground within the area of 153, 155 and 159. On or about May 11, 2009, a natural gas leak occurred at 153. On May 12, 2009, the City inspected 153, 155 and 159 and posted notice that the residential structures on 153 and 159 were unsafe to occupy. The tenants of 153 and 159 vacated the premises that same day. The City required Block to submit an abatement plan to address the unsafe conditions, and Block immediately prepared and submitted an abatement plan

for review and approval by the City. That plan, as approved by the City, required the demolition of 153 and 159 and structural repairs to 155. In accordance with the approved plan, Block demolished and removed the structures on 153 in June, 2009 and removed the main floor, remodeled the garage on site, although the City have denied Block's request to provide electrical service to said garage and have determined the garage violates the City zoning ordinance as there is no longer a residential structure on this lot, and demolished and removed the remaining structures on 159 in August, 2009. Block has made improvements required by the City to allow 155 to be occupied. R. Vol. I, p. 103 (Aff. of John Block, p. 3, ¶ 8-9).

In late May, 2009, Sandra E. Lee, a reporter for the Lewiston Tribune sent Block a copy of a May 20, 1999 Lewiston Tribune article that showed that a landslide had occurred in 1999 in the area of Marine View Drive in the vicinity of 153, 155 and 159. Block then reviewed the City records and other information he obtained regarding the development history of SP No. 8, Canyon Greens and Canyon Greens No. 2. R. Vol. I, pp. 104-05 (Aff. of John Block, p. 4-5, ¶ 10-11).

None of this information about the landslide or the filling of this canyon, the unengineered drainage system and the unengineered destruction of the detention pond had been disclosed to or known by Block when he purchased SP No. 8 and developed Canyon Greens and Canyon Greens No. 2. R. Vol. IV, p. 693 (Second Aff. of John Block, p. 4, ¶ 13). In addition, although Keltic and Eric Hasenoehrl had provided substantial engineering services related to the area that includes 153, 155 and 159, including engineering services for Streibick and Block, the City did not at any time make Keltic or Hasenoehrl aware of the 1999 landslide or of the major

fill that had occurred. R. Vol. I, pp. 117-18 (Aff. of Eric Hasenoerhl, pp. 4-5, ¶ 12). It was not until Block had shared the documents and photograph from City's records and the 1999 Tribune article from Ms. Lee with Hasenoehrl in June, 2009 that Hasenoehrl realized that the settlement conditions he had observed in late 2007 had most likely been caused by the slope movement that was now evident on the site. Hasenoehrl has surveyed the fault line of the 2009 slope movement, compared that line with the fault line shown in the 1999 photograph found in the City's records and concluded that the fault lines are almost identical. *Id.*

In Hasenoehrl's opinion, Block acted reasonably in utilizing helical piers to stabilize the settlement conditions that were observed in December 2007, in monitoring that stabilization thereafter and in undertaking all other repairs that Block undertook prior to June, 2009 to the homes he had constructed. R. Vol. I, p. 118 (Aff. of Eric Hasenoehrl p. 5 ¶ 14). Hasenoehrl has further opined that it would not be reasonable to conclude that Block or Hasenoehrl should have known or should have attempted to discover, prior to May 2009, that the observed settlement in 2007 was slope movement and not settlement. *Id.*

Block was aware fill had been placed on the lot as is typical in a purchase of a lot that has been platted and improved and assumed that such was done properly. R. Vol. I, p. 102 (Aff. of John Block p. 2, ¶ 3), R. Vol. I, p. 116 (Aff. of Eric Hasenoehrl, p. 3, ¶ 8). The placement of fill on a building lot is a common construction practice in Lewiston, Idaho. R. Vol. I, p. 116 (Aff. of Eric Hasenoehrl, p. 3, ¶ 8).

Block could not have discovered evidence of the 1999 landslide by simply reviewing the City's files on the lots he purchased. R. Vol. III, p. 646 (Stubbers Depo. 42:8-25). Block

purchased Lots 1-4 of Sunset Palisades No. 8. The City has not produced any record, memoranda, or photograph of the 1999 landslide within or linked to SP No. 8 subdivision files. R. Vol. III, pp. 647-48 (Stubbers Depo. 47:18-25, 52:3-18).

Block did conduct reasonable due diligence prior to purchasing SP No. 8 and as part of its subdivision into Canyon Greens and Canyon Greens No. 2. R. Vol. IV, pp. 692-93 (Second Aff. of John Block, pp. 3-4, ¶ 12). Block walked the site. R. Vol. III, pp. 509-10 (Block Depo. 257:10-25, 258:1-12, 259:3-22, 260:20-23). Block met with City staff as part of Canyon Green's subdivision. R. Vol. III, p. 563 (Hasenoehrl Depo. 83:19-25, 84:1-17). During this meeting, City staff Lowell J. Cutshaw, Shawn Stubbers, Sherri Kole, and others were present and brought applicable City files to the meeting. *Id.* The City had subdivided this property as part of Streibick's SP No. 8 subdivision just three months prior. R. Vol. III, pp. 526, 539, 541 (Cutshaw Depo. 116:16-25, 117:1-9, Exhibits 46 and 49). It was reasonable for Block to assume that he could rely on the recency of the previous work since it was the exact same property at issue. R. Vol. IV, p. 698 (Second Aff. of Eric Hasenoehrl, p. 3, ¶ 8).

The latent defects associated with Canyon Greens were not discoverable by reasonable inspection. R. Vol. I, pp. 118-19 (Aff. of Eric Hasenoehrl, pp. 5-6, ¶ 14). If the City had disclosed its knowledge of the 1999 landslide or provided Block copies of the documents and photographs describing the 1999 landslide and the severity of such, Block may have forgone purchase of the property or prior to deciding whether to purchase the property, may have decided to conduct a geotechnical investigation. R. Vol. IV, p. 693 (Second Aff. of John Block, p. 4, ¶ 14). The onus to discover such latent defects cannot be placed on a party who had no knowledge

of the 1999 landslide, had no records within his possession of the 1999 landslide, had no knowledge of the previous topography and prior 40-foot deep canyon that had been continually filled with uncontrolled material and had no knowledge of the previous installations of unengineered drainage features. R. Vol. IV, pp. 697-98 (Second Aff. of Eric Hasenoehrl, pp. 2-3, ¶ 7).

Losses sustained by Block are calculated by expert opinion to be $2,334,500 related to (i) Block's construction and abatement expenditures for 153, 155 and 159, (ii) the subsequent demolition and loss of value of the residences on 153 and 159 and (iii) the unsalable condition of 155. R. Vol. III, pp. 599-601, 604-14 (Rudd Depo. 11:9-19, 33:19-25, 34:1-14, 35:16-25, 36:1-25, 37:1-6, Exhibit 294). Block exhausted his life's savings in making these expenditures, drawing in excess of $1,000,000 from his own retirement savings, $500,000 from an inheritance from his parent's estate, $300,000 from proceeds of sale of four rental properties, and additional proceeds from the sale of his personal residence. R. Vol. IV, p. 694 (Second Aff. of John Block, p. 5, ¶ 15).

ISSUES PRESENTED ON APPEAL

A. Did the district court err in finding that the City did not owe Block a duty of care, that no special relationship existed between the City and Block, and/or that the City did not assume a duty of care through its actions?

B. Did the district court err by concluding that the following exceptions to liability as set forth in the ITCA apply to this case thereby precluding Block from asserting his claims in this action against the City:

   (1) Did the district court erroneously apply an exception to liability under Idaho Code § 6-904(1).
   (2) Did the district court erroneously apply an exception to liability under Idaho Code §

6-904(7).

(3) Did the district court erroneously apply an exception to liability under Idaho Code § 6-904B (3) and (4).

C. Did the district court err by concluding that the economic loss doctrine applies to this case?

ARGUMENT

A. The district court erred in finding that the City did not owe Block a duty of care, that no special relationship existed between the City and Block, and/or that the City did not assume a duty of care through its actions.

Standard of Appellate Review

In reviewing a motion for summary judgment this Court uses the same standard used by the district court when deciding a motion for summary judgment. *Nation v. State, Dept. of Correction*, 144 Idaho 177, 184,158 P.3d 953, 960 (2007). The burden is on the moving party to prove an absence of genuine issues of material fact. *Id.* This Court views the facts and inferences in the record in favor of the non-moving party. *Id.* This Court exercises free review over questions of law. *Id.*

The City owed Block a duty of care.

"A cause of action for negligence includes proof of: (1) a duty, recognized by law, requiring the defendant to conform to a certain standard of conduct; (2) a breach of duty; (3) a causal connection between the defendant's conduct and the resulting injuries; and (4) actual loss or damage." *Coghlan v. Beta Theta Pi Fraternity*, 133 Idaho 388, 399, 987 P.2d 300, 311 (1999). Whether a duty exists is a question of law over which this Court exercises free review. *Nation*, 144 Idaho at 177, 158 P.3d at 953.

Every person has a "duty to exercise ordinary care to 'prevent unreasonable, foreseeable risks of harm to others.' When asked to recognize a duty not previously recognized, this Court must consider:

> [T]he foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved." *Id.*

In this case, the City had such a duty, as discussed below, breached that duty by its negligent and grossly negligent acts and omissions, proximately causing Block's harm resulting in substantial damages. In order to replace a common law duty of care with a duty of care from a statute or regulation, the following elements must be met: (1) the statute or regulation must clearly define the required standard of conduct; (2) the statute or regulation must have been intended to prevent the type of harm the defendant's act or omission caused; (3) the plaintiff must be a member of the class of persons the statute or regulation was designed to protect; and (4) the violation must have been the proximate cause of the injury. *O'Guin v. Bingham County*, 796 P.2d 572, 142 Idaho 49, 52, 122 P.3d 308, 311 (2005).

The Subdivision Ordinance states, in part:

(i) in Section 32-2 that the purpose of the ordinance is "to provide for the orderly growth . . . achieve individual property lots of reasonable utility and livability . . . [and] provide a . . . working relationship between public and private interests to the end that both independent and mutual objections can be achieved in the subdivision of land."

(ii) in Section 32-8 that "[t]he 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, [and] any site conditions that may require special consideration or treatment. . . ."

(iii) 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. . . . Advise the subdivider of the results of these actions[.]; and

(iv) in Section 32-31 that other land which, in the opinion of the subdivision committee, is unsuitable for residential use shall not be subdivided[.]" R. Vol. V, p. 882-887, 894-95 (emphasis added) (Cutshaw Depo., Exhibit 32).

The Subdivision Ordinance clearly sets forth the City's statutory duty of care. The City maintained the photograph and memorandum related to the 1999 landslide in two different locations in its records with the intent to act upon that information at the appropriate time. Based on the Subdivision Ordinance, **City staff was required** to i) **discuss with the developer** any site conditions (the 1999 landslide) that may require special consideration or treatment, ii) **identify** any unusual problems with the site (the 1999 landslide), iii) **review and discuss with the**

developer the need for special studies as a result of the site conditions (the 1999 landslide), and iv) **advise the subdivider** of the results of the City's actions. The Subdivision Ordinance was intended to enable orderly development to occur within the City, develop property lots with utility and livability, and ensure that the developer's/subdivider's objectives are achieved through subdivision of land. The Subdivision Ordinance sets forth mandatory acts clearly for the protection of a particular class of persons, namely individual "subdividers" or developers, rather than the public as a whole.

Notwithstanding a clear statutory duty to "discuss", "identify", "review" and "advise" - essentially warn - Block about the 1999 landslide, the City had a common law duty to warn Block during the subdivision process of the 1999 landslide, specifically under circumstances wherein Block attended and participated in the preapplication meeting conducted by the City. The "liability of one who is under a public duty to give . . . information extends to loss suffered by any of the class of persons for whose benefit the duty is created, in any of the transactions in which it is intended to protect them." Restatement (Second) of Torts § 552 (2009). "A municipality [has] a duty to handle applications for building permits in a manner which is not arbitrary and capricious." *Rosen v. City of Tacoma*, 603 P.2d 846 (Wash. App. Div. 2 1979). In determining whether a municipal government owes a duty, courts looks to the public duty doctrine. *Vergeson v. Kitsap County*, 186 P.3d 1140 (Wash. App. Div. 2 2008). Under the public duty doctrine and its exceptions, a public entity is liable for negligence only if it has a statutory or common law duty of care. *Id.* at 1145. The duty must be one owed to the injured plaintiff and not one owed to the public in general. *Id.* A governmental entity is liable for negligence where

there is direct contact between the public official and the injured plaintiff, express assurance given by the public official to the injured plaintiff, and justifiable reliance by the plaintiff on such express governmental assurance. *Id.* at 1147. In *Rogers v. City of Toppenish*, 596 P.2d 1096 (Wash. App. Div. 3 1979), the court found that a zoning administrator had a duty to inform accurately an individual member of the public of the zoning classification concerning specific real property once the inquiry and its purpose were made known to him. It found such a duty owed to an individual member of the public.

> "When the initial information was given, [the zoning administrator] consulted neither the zoning maps nor the city records. Additionally, the city manager's letter rescinding Mr. Rogers' building permit indicated the city's zoning records were not kept current. For Mr. Rogers to have searched the city files to the extent that the city manager did would have been an extreme, if not impossible, burden." *Id.* at 1099.

In addition, based on the clear expression of intent in Section 32-1 of the Subdivision Ordinance, the City had a statutory duty not to subdivide "unsuitable" land, which the City knew this land to be.

A special relationship existed between the City and Block from which a duty of care arose.

Block had a special relationship with the City which obligated the City to protect him.

In *Rees v. State, Dept. of Health and Welfare*, 143 Idaho 10, 137 P.3d 397 (2006) this 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. This Court explained that when reviewing a motion for summary judgment it engages 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, this 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. 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.

In examining this, this Court applied a fact-intensive test as set out in a Minnesota case. *Id.* It 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 forth 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 do not create a bright-line test.

Applying those factors in Block's case, the City had actual knowledge of the dangerous condition, the 1999 landslide, because two photographs and memos were prepared and placed in City records by the City Engineer and maintained by City staff for the purpose of avoiding harm. Block reasonably relied on City staff's statements and conduct in the preapplication meeting. The Subdivision Ordinance sets forth mandatory acts clearly for the protection of a particular class of persons, subdividers and/or developers rather than the public as a whole. There exists genuine issue of material fact as to whether the City exercised due care in their actions as demonstrated in the depositions of Eric Hasenoehrl and Bud Van Stone and the affidavit of John ("Hank") Swift. Mr. Hasenoehrl, a licensed civil engineer, testified that a licensed engineer working for the City 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. R. Vol. V, pp. 911-12. In addition, Mr. Van Stone, former City public works director, testified that by failing to warn Block during the City's subdivision and/or building review processes the City acted unreasonably and failed to exercise reasonable care because it is the City's duty to review documents of record that are relevant to a subdivision or re-subdivision. R. Vol. V, p. 945. Furthermore, Mr. Swift, a licensed civil engineer, testified that the City's failure to warn of the 1999 landslide contributed to the instability of the property and, ultimately, caused Block's damage. R. Vol. IV, p. 701.

The City assumed a duty of care toward Block through its actions.

This Court has recognized that "it is possible to create a duty where one previously did not exist. 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." *Featherston v. Allstate Ins. Co.*, 125 Idaho 840, 843, 875 P.2d 937, 940 (1994). In *Coghlan*, this Court determined that a district court's grant of a motion to dismiss regarding duty was in error and remanded for further proceedings because this court found sufficient inferences that the University of Idaho defendant and the sorority defendant had assumed a duty of care to the plaintiff. This 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.* at 400, 987 P.2d at 312. 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.

Liberally construed, the record in this case supports inferences that the City assumed a duty of care to Block when it prepared a memorandum relating to the 1999 landslide and placed this memorandum and photographs of the 1999 landslide into two separate files within the City's records. The record demonstrates that the City intended that the record of the 1999 landslide be referred to during any future proposed development of the landslide area and the City staff had a duty to identify and review and discuss such unusual conditions with Block. Further, the record supports the inference that the City attempted to fulfill its obligation when members of City staff met with Block during the subdivision approval process. The district court should have viewed the facts and inferences on this record in favor of Block and found that a material issue of fact exists as to whether the City voluntarily assumed a duty of reasonable care to warn Block of the 1999 landslide. The district court erred in granting summary judgment in favor of the City.

B. The district court erred by concluding that certain exceptions to liability as set forth in the ITCA applied, precluding Block from asserting his claims.

Construction of ITCA.

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*, supra. In addition, the purpose of the ITCA is to provide much needed relief to those suffering injury from the negligence of government employees. *Rees*, supra. The district 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, thereby improperly placing the burden on Block to counter the City's assertions of immunity.

(1) The district court erroneously applied an exception to liability under Idaho Code § 6-904(1).

Idaho Code § 6-904(1) does not afford the City immunity for any of Block's claims. Idaho Code § 6-904(1) only 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 Idaho Code § 6-904(1) represent two different types of actions that might be immune under the ITCA; however, the

same test applies to each. *Rees*, 143 Idaho at 20, 137 P.3d at 407. The execution or performance of, i.e., the implementation of, statutory or regulatory policy is statutory or regulatory function and the exercise of choice, judgment, i.e., the formulation of policy, is discretionary function. *Bingham v. Franklin County*, 118 Idaho 318, 321, 796 P.2d 527, 530 (1990). Block has set forth substantial evidence on this record 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,* 143 Idaho at 20, 137 P.3d at 407. "Under Idaho law whether a government employee exercised ordinary care is normally a factual question best left to the jury." *Id.* However, since this case comes to the Court from a grant of summary judgment, this Court must view all of the facts and inferences in favor of Block, the non-moving party. *Id.* Block has more than met his burden to demonstrate the City's failure to exercise ordinary care.

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.

Section 32-9 of the Subdivision Ordinance provides, in part, that "in carrying out the purposes of the preapplication process, the subdivider and the city shall be responsible for the following actions:

> (3) Actions by the subdivider. The subdivider and/or his agents shall meet with the city at the preapplication conference . . .
> (4) 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.
>
> R. Vol. V, p. 886-87 (Cutshaw Depo., Exhibit 32).

Tim Richards, a licensed civil engineer and former City Engineer who prepared and placed the 1999 landslide memorandum into the City's files, has testified that when the City memorialized the 1999 landslide in two separate files the intent was that such information would be available for use at the time of future development. R. Vol. V, p. 921 (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." R. Vol. V, p. 920 (Richards Depo. 34:11-16). Warren Watts, a licensed civil engineer has testified that the City has a duty to review records and files as part of its subdivision process. R. Vol. V, p. 950 (Watts Depo. 92:2-16). The City conducted a preapplication meeting with Block regarding CG. R. Vol. IV, pp. 692-93 (Second Aff. 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.*, R. Vol. IV, p. 691 (Second Aff. 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. R. Vol. V, p. 949 (Watts Depo. 89:4-22). Block 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. R. Vol. IV, p. 691 (Second Aff. 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.

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.

The City's failure to discuss hazardous site conditions with Block "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.

The City's failure to discuss the landslide issue with Block is part of the "operation stage" of the subdivision process. See, e.g., Idaho Attorney General Guidelines to the Executive Director of PERSI.(Oct. 4, 1995) at http://www.ag.idaho.gov/publications/op-guide-cert/1995/G100495.pdf) . (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.")

In this case, the City's negligence, in failing to exercise due care in the "operation stage" by failing to review with Block the specific information related to this particular site 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 stage". Warren Watts, a licensed civil engineer has testified that the City should have required a geotechnical evaluation when the property was subdivided. R. Vol. V, p. 952 (Warren Watts. Depo. 113:18-24). In addition, John "Hank" Swift a licensed civil engineer has testified that the City had a duty to ensure that development, including development in the area of a landslide, happens in a way that is safe and doesn't adversely impact public safety. R. Vol. V, p. 941 (Hank Swift Depo. (September 14, 2011) 228:15-17). The City's failure to act with ordinary care to protect against the risks of a landslide and the City's failure to warn of a landslide during the subdivision and/or building approval process affected the property in 2006, contributed to instability of the property and ultimately caused Block's damage. R. Vol. IV, p. 701.

The district court stated 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. Idaho Code § 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.

The district court's overly broad application of Idaho Code § 6-904(1) renders the exceptions to liability set forth in Idaho Code §§ 6-904(7), 6-904B (3) and (4) wholly ineffectual and contravenes legislative intent. The district 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). Instead the district court either misapplied or failed to apply the factual circumstances of this case by erroneously concluding that all of the City's actions in this case were the result of its regulatory function. The district court's construction is not consistent with Idaho case law and would undermine the purposes of the statute.

(2) The district court erroneously applied an exception to liability under Idaho Code § 6-904(7).

The district 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 duty to inform 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.

The district court states that the exceptions to liability provided in Idaho Code § 6-904(7) apply to Block's claim (vi). R. Vol. IV, p. 835 (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 warning Block that a landslide had occurred on 153, 155 and 159 in 1999. Again, the district court interprets Block's claim too narrowly and interprets the exception to liability broadly in contrast to this Court's precedent. The property at issue is private property and the property damage at issue has nothing to do with public improvements, thus, the exception to liability set forth in Idaho Code §6-904(7) is inapplicable.

The district 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 a tortured application of facts to law and fails to give effect to the plain meaning of the statute. R. Vol. IV, p. 836 (Order at 21). By its plain language, the application of Idaho Code § 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. R. Vol. I, p. 115 (Hasenoehrl Aff. July 13, 2010, p. 2, ¶ 6). In accordance with the Subdivision Code, Administrative Plats have direct access to an existing improved street and do not require any major improvements. R. Vol. II, p. 391 (Kari Ravencroft Aff., Exhibit D). Canyon Greens was an Administrative Plat. R. Vol. V, p. 936 (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. R. Vol. V, p. 951-52 (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. R. Vol. V, p. 922 (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 P.3d 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 P.3d 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 P.2d 330 (1994) (negligent design of a city street intersection); *Morgan v. State, Dept. of Public Works*, 124 Idaho 658, 862 P.2d 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*, 118 Idaho at 318 (condition of public road).

Block respectfully requests that this Court find that the exceptions to liability set forth in Idaho Code § 6-904(7) do not apply to this case.

(3) The district court erroneously applied an exception to liability under Idaho Code § 6-904B (3) and (4).

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." Idaho Code § 6-904C. 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. R. Vol. V, p. 915 (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. R. Vol. V, p. 916 (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. R. Vol. V, p. 916 (Hasenoehrl Depo. 568:1-25).

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. R. Vol. V, pp. 911-12 (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. R. Vol. V, p. 913 (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." R. Vol. V, p. 907 (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. R. Vol. V, p. 906 (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". R. Vol. V, p. 930 (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. R. Vol. V, p. 930 (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. R. Vol. V, p. 937 (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. R. Vol. V, p. 944 (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. R. Vol. V, p. 945 (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[.]" R. Vol. V, p. 946 (Van Stone Depo. 53:21-25, 54:1-3).

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 inform Block that he was about to develop and construct three homes on the site of the 1999 landslide the City showed deliberate indifference to the risk of serious harm that could result from such actions. It was not within the province of the district court on a motion for summary judgment to take this factual determination out of the jury's hands. This 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.

The district court's statement 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, the district court's statement 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 a wrongful act of the government and/or its employees. Rather, the "burden" to prove specific exceptions to liability must be construed closely and the district court's application of a "particularly high" burden violates the appropriate evidentiary standard. *Sterling*, supra and *Rees*, supra.

C. The district court erroneously applied the economic loss doctrine in dismissing Block's tort claim against the City.

The economic loss doctrine precludes a party from recovering in tort if the party has suffered "purely economic loss." *Brian and Christie, Inc. v. Leishman Elec., Inc.*, 150 Idaho 22, 244 P.3d 166, 169 (2010). "'Economic loss,' in its broadest sense, means pecuniary loss of bargained-for economic expectations resulting from the failure of a product or structure to function as expected." 6 Bruner & O'Connor Construction Law § 19:10. The court has consistently distinguished pure economic loss from "physical injuries to person or property" which are recoverable in tort. *Brian and Christie, Inc.*, supra. As the court recognized in *Salmon Rivers Sportsman Camps, Inc. v. Cessna Aircraft Co.*, 97 Idaho 348, 544 P.2d 306 (1975), "Although personal injuries stand distinctly apart from [property damage, and economic loss], a delineation between the latter two is necessary. 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 commercial loss for inadequate value and consequent loss of profits or use."

Salmon Rivers introduced the concept of "transactional property" to distinguish between physical injury to property that is recoverable in tort and nonphysical economic losses that may

arise from defective property. The case involved an airplane crashed on takeoff. The purchaser brought an action against the seller and manufacturer of the aircraft for breach of warranties. The court held that the aircraft was economic loss because it was the subject of the contract between the parties.

This Court's understanding of transactional property has been refined as the cases before it have presented different factual patterns. Through this common law evolution, "transactional property" has been defined as the property that is the subject of the contract between the parties to the lawsuit. This Court's two most recent decisions have solidified this definition of "transactional property." *Aardema v. U.S. Dairy Systems, Inc.*, 147 Idaho 785, 215 P.3d 505 (2009); *Brian and Christie, Inc.*, supra.

In *Aardema*, plaintiff's tort claim arose out of a contract for a milking system. *Id.* at 790, 215 P.3d at 510. This 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.* This Court then noted 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 v. Richard B. Smith, Inc.*, 141 Idaho 296, 301, 108 P.3d 996, 1001 (2005), *Ramerth v. Hart,* 133 Idaho 194, 983 P.2d 848 (1999), *Duffin v. Idaho Crop Imp. Ass'n,* 126 Idaho 1002, 895 P.2d 1195 (1995), *Tusch Enterprises v. Coffin,* 113 Idaho 37, 740 P.2d 1022 (1987), and *Oppenheimer Industries, Inc. v. Johnson Cattle Co., Inc.,* 112 Idaho 423, 732 P.2d 661 (1986). This Court summarized these cases as "delineat[ing] a clear pattern [that] implicitly defines the 'subject of the transaction' by the subject matter of the contract." *Id.* In a footnote to this sentence, the Court

narrowed its prior statement that the word "transaction" refers to the "subject of the lawsuit," noting 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.

In this case Block purchased from Streibick the four bare lots that comprised SP No. 8, which through Block's subdivision process with the City became Canyon Greens and Canyon Greens No. 2. This real property is the subject of this lawsuit. Any costs to repair or replace this real property are economic loss in relation to Streibeck. They are not, however economic loss in relation to the City because there is no *underlying contract* between Block and the City. The City did not sell the bare land to Block. Instead, Block is suing the City for a breach of the duty the City owed Block independent of any contract, and further, Block is not seeking any damages for costs to repair or replace this real property.

This Court's most recent decision analyzing the "economic loss rule," *Brian and Christie, Inc.*, supra, further clarified Idaho law and fully supports Block's right to pursue negligence claims against the City. In that case, owners of a restaurant hired a subcontractor to perform electrical work. The defendant connected signs that had been installed by a sign company to the restaurant's electrical power without inspecting the sign's wiring, which resulted in a fire that caused substantial damage to the building and its contents. Plaintiff sued the subcontractor for negligent performance of electrical work. The district court held that the plaintiff's cause of action was barred by the economic loss rule. *Id.* at 171-72. This Court reversed, drawing a

"distinction between the recovery of damages in tort for physical injuries to person or property and the recovery of purely 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), 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 policy basis of the economic loss rule: when an individual's contractual expectations are not met, his remedy is contractual. As the court noted in *International Harvester*: "The law of negligence requires the defendant to exercise due care to build a tractor that does not harm person or property. If the defendant fails to exercise such due care it is of course liable for the resulting injury to person or property as well as other losses which naturally follow from that injury. However, the law of negligence does not impose on International Harvester a duty to build a tractor that plows fast enough and breaks down infrequently enough for Clark to make a profit in his custom farming business. This is not to say that such a duty could not arise by a warranty -- express or implied -- by agreement of the parties or by representations of the defendant, but the law of negligence imposes no such duty." *International Harvester,* 99 Idaho at 336.

In our case, there is no contractual relationship between Block and the City. The City thus has no interest in protecting its bargained-for immunities because there are none. The court's distinction in *International Harvester* between the disappointed purchaser – who is restricted to a contract claim -- and the endangered purchaser – who can seek compensation in torts -- is irrelevant.

The facts of the Block case do not fall within the ambit of the economic loss rule.

Blahd, supra, is distinguishable from Block's case. 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, this 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.

The case of *Ramerth*, supra, 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 the district court, is *Tusch Enterprises*, supra. 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.

A case analogous to Block's situation is *Oppenheimer Industries, Inc.*, supra. There, 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. This Court noted that Oppenheimer was not alleging mere economic damage. *Id.* at 426, 732 P.2d at 664. This 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.

In sum, 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 are distinguishable from the facts of Block's case and as such the district court erroneously applied the economic loss doctrine in dismissing Block's tort claim against the City.

Block did not purchase the houses he built. Block did not purchase any property from the City. 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. R. Vol. V, p. 932 (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. R. Vol. V, pp. 876-77 (Block Depo. 286:5-7, 287:5-7, 22-25, 288:1-25).

CONCLUSION

There is a duty imposed on the City of Lewiston under law to inform Block of the known dangerous condition on his property. The source of the City's duty to Block is created by law, including the City's Subdivision Ordinance, which imposed upon the City a duty to exercise due care to not harm Block's development interests. The City failed to exercise due care and or acted with gross negligence and is therefore liable for the resulting injury to Block's property as well as losses that naturally follow from such injury. Block relied on the City's professional engineer's expertise, the City's records, and the City's institutional knowledge. The City of

Lewiston did not use ordinary care and in fact was grossly negligent of its duty to avoid injury or damages to 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.

Based upon the record on appeal and the foregoing analyses, Block requests that this Court reverse the district court's grant of summary judgment in this case and remand this case, with proper instruction, to the district court for a trial on the merits.

RESPECTFULLY SUBMITTED this 5th day of December, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of December, 2012, I caused true and correct copies of this document to be served on the following party in the manner(s) indicated below:

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