6-23-2014

North Idaho Bldg. Contractors Ass'n v. City of Hayden Appellant's Reply Brief 1 Dckt. 41316

IN THE SUPREME COURT OF THE STATE OF IDAHO

NORTH IDAHO BUILDING CONTRACTORS ASSOCIATION, an Idaho non-profit corporation; TERMAC CONSTRUCTION, INC., an Idaho corporation, on behalf of itself and all others similarly situated; and JOHN DOES 1-50, whose true names are unknown. Appellant, vs. CITY OF HAYDEN, an Idaho municipality, Respondent.	Supreme Court Case No. 41316 First Judicial District Court Case No. CV-OC-12-02818

NORTH IDAHO BUILDING CONTRACTORS ASSOCIATION'S REPLY BRIEF AND CROSS-APPEAL RESPONSE BRIEF

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI HONORABLE BENJAMIN R. SIMPSON, DISTRICT JUDGE, PRESIDING

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If ever there was a case in controversy ripe for resolution by the Supreme Court of the State of Idaho, this case is it. Generally speaking, the facts have been developed to the point that there is little factual dispute. A general look at the case law cited by each side reveals that each party interprets the exact same cases as supportive of their position. However, the NIBCA have the benefit of precedent on their side and the City's interpretation of the case law fails when applied against the facts at hand. Specifically, there is no grant of authority that allows local jurisdictions to collect a fee that will be used solely to raise revenues to fund future expansion.

> Municipal power is a classic example of derivative power. It is a longstanding rule in Idaho that cities possess only the powers expressly conferred on them by the legislature or which can be derived by necessary implication. This Court has articulated this rule as a strict limitation when construing municipal powers: "municipalities may exercise only those powers granted to them or necessarily implied from the powers granted ... **[and i]f there is a fair, reasonable, substantial doubt as to the existence of a power, the doubt must be resolved against the city**." This rule is especially applicable to proprietary functions, of which garbage collection services are included. *Plummer v. City of Fruitland*, 140 Idaho 1, 5 (2003) on reh'g, 139 Idaho 810 (2004) (Internal Citations Omitted, Emphasis Added).

PART I. REPLY BRIEF

With exception to an entirely new argument, the City in its brief cite to the very statutes that NIBCA, the Appellant, established as invalid in their opening brief; specifically 63-1311 and 50-1023 *et. seq.*

The City concedes in its brief that it must prove the existence of some granting authority in order for its fee to stand. "The powers of local governments are limited to those granted or clearly implied by the state constitution or legislation. ... Hence the only fees that are lawful without statutory authorization are 'incidental regulatory fees.' Every other fee must have some specific statutory basis." (Respondent Brief pp 14-15, *parenthetical omitted*).

1. User Fee Rebuttal

The City's reliance on Idaho Code § 63-1311 (the user fee statute) fails, as the fee is indisputably being used to fund future capital improvement projects. This Court has repeatedly found that a user fee can only be imposed to provide for a service being rendered. The City argues that a service is being rendered; sewer services. (Respondent Brief p. 19). However, as revealed in NIBCA's opening brief, the City already has a separate and distinct user fee for sewer services; the City calls it a bi-monthly fee. The fee at issue before this Court is in no way reasonably related to a service being provided. It is to establish a slush fund to build future capital improvement projects.

In its user fee argument, the City cites the *Brewster v. City of Pocatello* 115 Idaho 502 (1988) and *Property Owners Association v. Kootenai County* 115 Idaho 676 (1989) cases as support for their disguised tax. The City's fee fails the *Brewster* test as the fee is based upon the Welch Comer Report which is unrelated to the cost of the services being rendered or even to capacity replacement. By the Report's own admission, it was merely looking for a method to fund the City's "ambitious $20 million capital improvement plan." (R. Aug. p.0041 ¶ 13.5.2).

The City's citation to the *Kootenai County* case is completely inapplicable to the case at hand, as the statute at issue in the *Kootenai County* case clearly authorized the use of fees to acquire future landfill sites. Despite this vast and critical difference between the *Kootenai County* statute and Idaho Code § 63-1311, the City startlingly states that the *Kootenai County* case "is on all fours with the instant litigation and it destroys the builder's argument..." (Respondent Brief p. 22). This is smoke and mirrors logic.

2. Equity Buy-In Fee Rebuttal

The second source of authority the City cites is Idaho Code § 50-1027 *et. seq.*, the Idaho Revenue Bond Act. The Act allows local jurisdictions to "prescribe and collect rates, fees, tolls

or charges..." for public works. (Idaho Code § 50-1030). This is known as the equity buy-in theory, and is based on the value of a current existing system.

Again, this Court has a history of case law pertaining to equity buy-in fees, the most noteworthy case being *Loomis v. City of Hailey* 119 Idaho 434 (1991). The *Loomis* analysis in NIBCA's opening brief sufficiently explains why *Loomis* does not stand for the concept of enacting an equity buy-in fee solely to be used for future expansion. In summary, the City's formula has no correlation to the existing system a customer is connecting to. It is pertinent to know that the *Loomis* case was reviewing the second variation of the City of Hailey's equity buy-in fee, as the first variation was struck down by a lower court because it was doing exactly what the City of Hayden is attempting to do:

> In 1983 a suit against the City entitled *Redman, et. al. v. Hailey,* Blaine County Case No. 11855... The District Court in that case held that the connection fees were in violation of the Idaho Constitution and void because the City was collecting fees for future expansion and enlargement of the system. *Loomis* at 435.

The *Loomis* court was reviewing the City of Hailey's revised fee after the City of Hailey realized it could not include taxation for expansion in its equity buy-in fee. However, the *Loomis* court specifically stated that it was not providing an opinion on the concept of using equity buy-in fees for future expansion:

> Although the City of Hailey argues that a municipality may charge a fee for future expansion, that issue is not present in the instant appeal. ... Since the precise issue of whether fees may be collected for future expansion of a sewer or water system is not before us on this appeal, we leave for another day a determination of that issue. *Loomis* at 439 f. 3.

One might say we have arrived at "another day."

The City next relies on the case *Viking Construction v. Hayden Lake Irrigation District* 149 Idaho 187 (2010) as justification that an equity buy-in fee can be used solely to fund future

expansion. In advancing this argument, the City ignored the fundamental basis of the decision in *Viking*. *Viking* held that a fee to buy into a current system would not be invalid just because it resulted in incidental reserves for replacing or improving the system. In order to accept the City's argument you must first believe that the $20 million being collected by the City is an incidental reserve. However, most importantly the *Viking* case mandated a calculation of the value of the current system stating:

> However, for the connection fee to be an equity buy-in, it must be based upon some calculation designed to determine the value of that portion of the system that the new user will be utilizing. If there is no attempt to calculate in some manner that value, then the connection fee is not an equity buy-in, regardless of its label. *Viking* at 194.

The City's fee is not an equity buy-in fee as it raises $20 million in revenue for the City and is not tied to the value of the current system.

3. Home Rule Issue

The final statutes cited by the City, 50-320 and 50-323, are entirely new concepts never argued below. The City acknowledges that 50-320 is raised for the first time upon appeal, but a cursory review of the table of contents on the City's briefs below reveals that the City is surprisingly raising not one new argument but two, as 50-323 was never argued before either. The City cannot make these arguments at this time as it is a long standing rule of this Court that matters raised for the first time on appeal will not be considered. "It is axiomatic that an issue not raised below will not be considered for the first time by this Court." Butters v. Hauser, 125 Idaho 79, 82 (1993).

This long standing rule is so axiomatic, new arguments are typically dispatched with one or two sentences and has been employed by this Court as recently as March 2014. "We do not consider issues raised for the first time on appeal." *Morgan v. New Sweden Irr. Dist.*, 156 Idaho

247, ___ (2014), reh'g denied (May 2, 2014). The court has enacted this rule for several reasons not the least of which is that parties on appeal who find their trial court foundation falling apart as is happening to the City here, commonly make desperate grasps at new and controversial positions.

Before addressing the significance of the City's request, it is important to emphasize that not only is this argument raised for the very first time on appeal, it is in direct contradiction to the City's position and argument below. Its brief stated:

> The law on this subject is simple. Idaho cities are not home rule cities with respect to raising revenue, so they must have authorization for any tax. (City's Opening Brief p. 8, emphasis added).
>
> Idaho follows Dillon's Rule under which the powers of local governments are limited to those granted or clearly implied by the state Constitution or legislation. This is in contrast to other states that have granted home rule status to municipal governments. As our Supreme Court has said, "Thus, under Dillon's Rule, a municipal corporation may exercise only those powers granted to it by either the state constitution or the legislature and the legislature has absolute power to change, modify or destroy those powers at its discretion. *Ceaser v. State* 101 Idaho 158, 160, 610 P.2d 517, 519 (1980). (City's Opening Brief p. 11, emphasis added).

It is not simply that the City is raising a new argument; it does so in the face of the black and white statement above and is directly contradicting what it stated to the lower court.

Nevertheless, if one were to look past this well established rule of law which precludes the City from making these arguments, one would discover the arguments raised by the City are shocking in the least. The City is actually advocating for this Court to overturn a hundred years of precedent, dating back to Idaho's inception and grant "home rule" authority to Idaho cities.

Simply put, the City of Hayden is asking for this Court to grant every city in Idaho the unfettered and uncontrolled ability to enact any tax or fee they so desire. In a gross understatement, the City calls this "cutting edge stuff." (Respondent Brief p. 36). Catastrophic

upheaval would be a more appropriate description. This outlandish argument that Idaho is a home rule state directly controverts literally all Idaho case law on the matter issued by this Court.

> Our analysis of this issue necessarily involves a review of the basic tenets of municipal corporation law. Idaho has long recognized the proposition that a municipal corporation, as a creature of the state, possesses and exercises only those powers either expressly or impliedly granted to it. *Sandpoint Water & Light Co. v. City of Sandpoint*, 31 Idaho 498, 503, 173 P. 972, 973 (1918); *Boise Dev. Co. v. Boise City*, 30 Idaho 675, 688, 167 P. 1032, 1034-35 (1917). This position, also known as "Dillon's Rule," has been generally recognized as the prevailing view in Idaho. Moore, "Powers and Authorities of Idaho Cities: Home Rule or Legislative Control?" 14 Idaho L.Rev. 143, 147, n. 18 (1977) (for cases supporting this view). Thus, under Dillon's Rule, a municipal corporation may exercise only those powers granted to it by either the state constitution or the legislature and the legislature has absolute power to change, modify or destroy those powers at its discretion. *Caesar v. State*, 101 Idaho 158, 160 (1980).
>
> Idaho has long recognized the proposition that a municipal corporation, as a creature of the state, possesses and exercises only those powers either expressly or impliedly granted to it. *Caesar,* 610 P.2d at 519. Accordingly, we must review Idaho law[1] to determine whether the City has that power. *Alliance for Prop. Rights & Fiscal Responsibility v. City of Idaho Falls*, 742 F.3d 1100, 1102-03 (9th Cir. 2013)
>
> Municipal corporations in Idaho may exercise only those powers granted to them by the state Constitution or the legislature. *Caesar v. State,* 101 Idaho 158, 160, 610 P.2d 517, 519 (1980); *Washington Water Power Co. v. Kootenai,* 99 Idaho 875, 591 P.2d 122 (1979); *Arrow Transp. Co. v. Idaho Pub. Utils. Comm'n,* 85 Idaho 307, 379 P.2d 422 (1963); *Sandpoint Water & Light Co. v. City of Sandpoint,* 31 Idaho 498, 173 P. 972 (1918).
> *Alpert v. Boise Water Corp.,* 118 Idaho 136, 142 (1990).

This Court should refuse to consider the City's new arguments raised for the first time on appeal, as they are directly contrary to its assertions to the lower court. This Court should maintain the century of precedence limiting Idaho local governments' powers to only those expressly granted to them through constitutional or legislative authority.

This argument is a crystal clear example of where the cities would go if left unchecked. It highlights the needs for legislative and judicial oversight of all local jurisdictions.

PART II. RESPONSE TO APPEAL OF ATTORNEY'S FEES DECISION

1. Summary

This litigation lasted less than a year. Over the course of that year, both parties worked diligently to research and argue their respective positions. However, this case had only three substantive court hearings: a motion to vacate the hearing date, a motion to compel/protective order and a motion for summary judgment. It is important to note that the motion for summary judgment found certain conclusions of law in favor of the City, however it also found certain issues of fact critical to how the City was spending the fee revenue.

The City then asserted that it was entitled to an excessively inflated award of $221,543.00 for attorney fees claiming that the case was brought "without a reasonable basis in fact or law." The trial court soundly rejected the City's request only awarding costs. The City claims to be the prevailing party in the suit based solely on the final judgment. However, the process which resolved this litigation is based on a negotiated settlement in which the City was forced to admit $555,986.73 in improper expenditures from the capitalization fee account and $760,575.90 improperly spent from the operations and maintenance account. (*First Affidavit of Donna Phillips*, R. Vol. III pp. 657-668)

2. Standard of Review

The City's request for attorney fees is based on Idaho Code § 12-117(1) and (2), which state:

> (1) Unless otherwise provided by statute, in any proceeding involving as adverse parties a state agency or a political subdivision and a person, the state agency, political subdivision or the court hearing the proceeding, including on appeal, shall award

> the prevailing party reasonable attorney's fees, witness fees and other reasonable expenses, if it finds that the nonprevailing party acted without a reasonable basis in fact or law.
> (2) If a party to a proceeding prevails on a portion of the case, and the state agency or political subdivision or the court hearing the proceeding, including on appeal, finds that the nonprevailing party acted without a reasonable basis in fact or law with respect to that portion of the case, it shall award the partially prevailing party reasonable attorney's fees, witness fees and other reasonable expenses with respect to that portion of the case on which it prevailed. (Emphasis Added).

This Court has regularly held that the "without a reasonable basis in fact or law" standard is synonymous with the frivolous standard of I.C. § 12-121. "The requirement of I.C. § 12-117 that the party acted without a reasonable basis is similar to the requirement of I.C. § 12-121 that the cause was brought, pursued or defended frivolously, unreasonably or without foundation." *Total Success Investments v. Ada County Highway District*, 148 Idaho 688, 695 (2010). "Both I.C. § 12-117 and § 12-121 permit the award of attorney's fees to the prevailing party if the court determines the case was brought, pursued or defended frivolously, unreasonably or without foundation." *Nation v. State Dept. of Corrections*, 144 Idaho 177, 194 (2007).

The award of attorney's fees lies within the sound discretion of the Trial Court, the Idaho Court of Appeals has instructed that, "[s]uch award is appropriate when [the] Court is left with the abiding belief that the [case] has been brought or defended frivolously, unreasonably or without foundation." *Suitts v. First Security Bank of Idaho*, 125 Idaho 27 (Ct. App. 1993) (Emphasis added).

In reviewing a trial court's denial of attorney's fees, Idaho appellate courts use the abuse of discretion as standard. "An award of attorney fees pursuant to I.C. § 12–121 and I.R.C.P. 54(e)(1) will not be disturbed absent an abuse of discretion." (*Idaho Military Historical Soc'y, Inc. v. Maslen*, 39909, 2014 WL 2735320 (Idaho June 17, 2014, *Internal Citations Omitted*).

When an exercise of discretion is involved, this Court conducts a three-step inquiry: (1) whether the trial court properly perceived the issue as one of discretion; (2) whether that court acted within the outer boundaries of such discretion and consistently with any legal standards applicable to specific choices; and (3) whether the court reached its decision by the exercise of reason. *Id.*

The lower court issued a lengthy memorandum as to exactly why it was not left with the belief that this case was frivolous.

3. The Lawsuit was Brought with a Reasonable Basis in both Fact and Law

A. The factual and legal issues of this case are ones of first impression in Idaho.

"When dealing with an issue of first impression, [courts] are generally reluctant to find an action unreasonable." *Ciszek v. Kootenai County Board of Commissioners*, 151 Idaho 123, 135 (2011). In *Ciszek*, property owners brought an action against the county to declare a zoning change invalid because the county commissioners had approved zoning changes on two separate parcels, but the landowner had only filed one application. Even though the county eventually prevailed, this Court ruled that the county was not entitled to an award of attorney fees, stating "[b]ecause this Court has never addressed whether a local governing body is within its authority to approve two rezones based on a single application, we decline to award attorney fees to Respondents." *Id.* at 135.

The case at hand follows similar circumstances as those found in *Ciszek*. The City would have this Court believe that the case law is well settled on whether a municipality may charge capitalization fees exclusively for the use of future expansion of its sewer system. However, there is not one statute or Idaho appellate court decision that has dealt exclusively with whether municipalities may charge capitalization fees solely to fund future expansion projects. No other jurisdiction has ever had this type of peculiar fee structure reviewed by any court; most other

municipalities use Impact Fees to accomplish what the City is trying to do.

The closest the City can get to "well settled" case law is citing one sentence in one case. The City rests its whole argument on *Viking Const., Inc. v. Hayden Lake Irrigation Dist.*, 149 Idaho 187 (2010) which states, "The intent is to prevent such districts from transferring to their general funds revenues from works financed with bonds until full and adequate provision has been made for the five listed purposes, including providing the reserve for improvements to those works." *Id.* at 197. Nothing in this sentence states an authorization that municipalities may, in lieu of following bonding procedures, charge capitalization fees to be used for the future expansion of the municipality's sewer system.

A reasonable legal argument was made by NIBCA and the lower court found:

> As to the factual issues brought before the Court, by the City's own admission, there were accounting errors. The Court acknowledges that those errors were fixed and, ultimately, Plaintiffs withdrew their claims relating to those accounting errors. Nevertheless, the Court finds that there were substantial issues of materials fact regarding the expenditures by the City, and thus it cannot be said that Plaintiffs acted without a reasonable basis in fact. Therefore, the Court finds that because Plaintiffs acted with a reasonable basis in both fact and law, an award of attorney's fees pursuant to I.C. § 12-117 is not appropriate in the case at bar. (*Memorandum Decision and Order RE: Attorney Fees* p. 13, R. Vol. III, p. 818).

The trial court who personally witnessed each party's argument and conduct ruled NIBCA's suit was not brought frivolously or in bad faith.

B. Even with the existing Idaho law, a reasonable dispute existed over the legal basis for the City's fee.

Where there is a "reasonable controversy over the application of [a statute or law] to the circumstances[,]" an award of attorney fees under I.C. § 12-117 is inappropriate. *Central Paving Co., Inc. v. Idaho Tax Commission*, 126 Idaho 174, 178 (1994). "[F]rivolous conduct...means conduct or argument of counsel that is not supported in fact or warranted under existing law and

cannot be supported by a good faith argument for an extension, modification, or reversal of existing law." *Hanf v. Syringa Realty, Inc.*, 120 Idaho 364, 370 (1991). In *Hanf*, although considering an award of attorney fees under I.C. § 12-121, the trial court found Idaho law to be unclear regarding a broker's duty in a real estate transaction. "The trial court, having found Idaho law to be unclear, uncertain and conflicting, examined conflicting authority from other jurisdictions to determine the broker's duty." *Id.* The Court found that because the existing Idaho case law was unsettled, plaintiff's legal argument could not be found to be "so plainly fallacious as to be deemed frivolous, or that their case was not supported by a good faith argument" so to justify an award of attorney fees. *Id.*

"A misperception of law or of one's interest under the law is not, by itself, unreasonable conduct. Rather, the question must be whether the position adopted by the [plaintiff] was not only incorrect but so plainly fallacious that it could be deemed frivolous, unreasonable or without foundation." *Lowery v. Board of County Commissioners for Ada County*, 115 Idaho 64, 69 (1988), quoting *Wing v. Amalgamated Sugar Co.*, 106 Idaho 905, 911 (Ct. App. 1984). "Where questions of law are raised, attorney fees should be awarded under I.C. § 12-121 [or § 12-117] only if the nonprevailing party advocates a plainly fallacious, and therefore, not fairly debatable, position." *Id.*

This case is directly on point with the holding in *Hanf*, in which the trial court had to look to foreign jurisdictions to assist in determining the outcome of the case. Here, the lower court cited authority from Arizona and Florida to clarify uncertainties in Idaho law. Although NIBCA was ultimately unsuccessful in asserting its legal position, the mere fact that it argued that this was an unsettled area of law does not indicate that its position was plainly fallacious and not fairly debatable. The mere fact that the City allegedly expended considerable legal resources, $221,543.00, shows that legitimate legal arguments were being made by NIBCA. NIBCA's

conduct in bringing this cause of action cannot be found to be so simple and without foundation as to justify penalizing NIBCA with a quarter million dollar award of attorney fees to the City.

C. NIBCA raised legitimate factual concerns regarding the City's expenditures of funds from the capitalization fee account.

Courts are loathe to punish parties for exercising their legal rights and therefore have set a very high bar for finding frivolous conduct. "If there is a legitimate, triable issue of fact or a legitimate issue of law, attorney fees may not be issued under [I.C. § 12-121 or § 12-117] even though the losing party has asserted factual or legal claims that are frivolous, unreasonable or without foundation." *Thomas v. Madsen*, 142 Idaho 635, 639 (2006). "[T]he total [prosecution] of a party's proceedings must be unreasonable or frivolous before an award of attorney fees was justified under I.C. § 12-121 [and § 12-117] and Rule 54(e)." *Turner v. Willis*, 119 Idaho 1023, 1025 (1991), quoting *Magic Valley Radiology Associates, P.A. v. Professional Business Services, Inc.*, 119 Idaho 558, 563 (1990). "[I]t is not appropriate to segregate those claims and defenses to determine which were or were not frivolously defended or pursued." *Id.*

Arguing for a moment that this Court was inclined to find that NIBCA had in fact pursued portions of this suit frivolously, and that the lower court abused its discretion, this Court would still be hard pressed to find a legal basis to award attorney fees to the City. In the lower court's *Memorandum Decision and Order Granting in Part and Denying in Part Defendant's Motion for Summary Judgment* it was ruled that there were legitimate issues of material facts concerning the City's expenditures of funds from its capitalization fee account. (R. Vol. III pp. 657-668). This was a result of NIBCA presenting evidence to the lower court of a sampling of these misappropriations which eventually the City had to concede. See *First Affidavit of Donna Phillips*, (R. Vol. III pp. 657-668) where the city identified a total of $555,986.73 in improper expenditures from the capitalization fee account and an additional $760,575.90 of fees from their

operations and maintenance account. Although a settlement was ultimately negotiated concerning these misappropriated funds, it cannot possibly be said that NIBCA did not raise a legitimate triable issue and in fact prevailed on getting each account refunded. Therefore, an award for attorney fees under I.C. § 12-117 would have been inappropriate.

4. The City Was Not The Prevailing Party In This Litigation.

"The district court's determination of prevailing party status for the purpose of awarding attorney fees and costs is within the court's sound discretion." *Hobson Fabricating Corp. v. SE/Z Construction, LLC*, 154 Idaho 45, 47 (2012). "This Court has held that the trial court has the discretion to decline an award of attorney fees when it determines that both parties have prevailed in part." *Id.*

As stated above, NIBCA and the City, working together, identified $555,986.73 in improper expenditures from the capitalization fee account and $760,575.90 from the operations and maintenance account. (*Phillips Aff.*, Page 10. R. Vol. III p. 666). Although NIBCA discovered several discrepancies in the accounting presented in the Phillips Affidavit, NIBCA was generally satisfied with the City's admission to error and the proposed corrections. NIBCA chose not to quibble over small errors in the Affidavit and entered into the Stipulation that ended this case. (*Jameson Aff.*, ¶ 4. R. Vol. IV, p. 843).

The accounting discrepancies were not as inconsequential or "minor accounting errors" as the City would have this Court believe. (Respondent Brief, page 38). The City is not the prevailing party as required by I.C. 12-117.

5. The City's Attorney Fees Are Unreasonable Given the Time and Labor Required to Resolve this Case Prior to Trial

This case was initiated by NIBCA on April 12, 2012. Less than a year later on April 5, 2013, the lower court issued its *Memorandum Decision and Order Granting in Part and Denying*

in Part The City's Motion for Summary Judgment. (R. Vol. III, p. 634). Thereafter, both parties worked together to formulate a mutual compromise to resolve any outstanding factual issues prior to trial.

Exactly 358 days passed between filing suit and the lower court's *Memorandum Decision and Order Granting in Part and Denying in Part The City's Motion for Summary Judgment*. The City is claiming it is entitled to an award of $221,543.00. This amount equates to roughly $620.00 per day, including Saturdays, Sundays and holidays, billed to the City during the pendency of this suit. Given counsels' average billing rate, this means that the City's attorneys spent nearly 2.2 hours a day, every day, over the last year. *Fourth Affidavit of Christopher H. Meyer*, ¶ 13 (filed July 16, 2013 R. Vol. III p. 682). It is not only unreasonable but unfathomable that any attorney would need to dedicate that amount of time, including weekends and holidays, for an entire year on three hearings.

In contrast, NIBCA spent only $51,896.83 to advance this case through summary judgment and final settlement. *Jameson Aff.* ¶ 6 R. Vol. IV p. 843). Granted litigation strategy varies from case to case and from Plaintiff to Defendant, but it is incomprehensible to believe that the City spent over four times the amount of time, effort and legal resources necessary to defend this litigation.

The City's attorney fees are clearly unreasonable given the scope of this litigation which was resolved through summary judgment and negotiated settlement.

6. Attorneys Fees on Appeal

The City has made application for appellant attorney's fees under the same frivolous arguments it used in the lower court. The City's request should be denied for the same reasons stated in the lower court's decision and as argued above.

CONCLUSION

As stated herein and in its appellant brief, NIBCA respectfully requests this court find the City's fee which collecting revenue solely for future expansion be voided as there is no basis in Idaho law for such a fee.

NIBCA respectfully requests that this Court reject the City's assertions that the lower court abused its discretion and that NIBCA need to be punished for exercising their rights in challenging the legal foundation of a municipality's fees. Punishment would only serve to have a chilling effect for all citizens throughout this state. Further, accepting and awarding an attorney's fees of this size after only three hearings will only serve to encourage law firms to run up excessive bills in the future. Each party should bear their own costs and fees.

Respectfully submitted this 23rd day of June, 2014.

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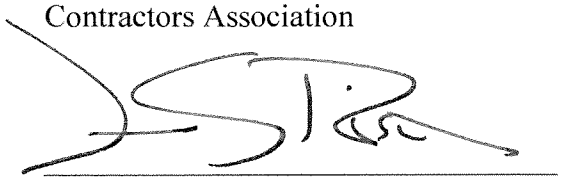

JASON S. RISCH

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of June, 2014, I caused to be served a true and correct copy of the foregoing **REPLY BRIEF AND CROSS-APPEAL RESPONSE BRIEF** as follows:

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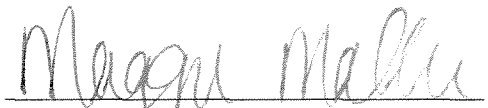

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