2-10-2016

City of Sandpoint v. Independent Highway District Appellant's Reply Brief Dckt. 42517

IN THE SUPREME COURT OF THE STATE OF IDAHO

CITY OF SANDPOINT, a municipal corporation of the State of Idaho,

Plaintiff / Respondent,

INDEPENDENT HIGHWAY DISTRICT, a political subdivision of the State of Idaho,

Defendant / Appellant.

Supreme Court No. 42517

Bonner County District Court
Case No. CV 2013-01342

APPELLANT'S REPLY BRIEF

Appeal from the District Court of the First Judicial District
In and for the County of Bonner
Honorable John T. Mitchell, Presiding

David E. Wynkoop [ISB No. 2429]
SHERER & WYNKOOP, LP
730 North Main St.
P.O. Box 31
Meridian, Idaho 83680
Telephone: 208-887-4800
Facsimile: 208-887-4865

Susan P. Weeks [ISB No. 4255]
JAMES, VERNON & WEEKS, PA
1626 Lincoln Way
Coeur d'Alene, Idaho 83814
Telephone: 208-667-0683
Facsimile: 208-664-1684

Attorneys for Independent Highway District

Scot R. Campbell [ISB No. 4121]
Sandpoint City Attorney
1123 Lake Street
Sandpoint, Idaho 83864-0871
Telephone: 208-263-0534
Facsimile: 208-255-1368

C. Matthew Andersen [ISB No. 3581]
WINSTON & CASHATT, LAWYERS
250 Northwest Boulevard, Suite 206
Coeur d'Alene, Idaho 83814
Telephone: 208-667-2103
Facsimile: 208-765-2121

Attorneys for City of Sandpoint

IN THE SUPREME COURT OF THE STATE OF IDAHO

CITY OF SANDPOINT, a municipal corporation of the State of Idaho, Plaintiff / Respondent, INDEPENDENT HIGHWAY DISTRICT, a political subdivision of the State of Idaho, Defendant / Appellant.	Supreme Court No. 42517 Bonner County District Court Case No. CV 2013-01342

APPELLANT'S REPLY BRIEF

Appeal from the District Court of the First Judicial District
In and for the County of Bonner
Honorable John T. Mitchell, Presiding

David E. Wynkoop [ISB No. 2429]
SHERER & WYNKOOP, LP
730 North Main St.
P.O. Box 31
Meridian, Idaho 83680
Telephone: 208-887-4800
Facsimile: 208-887-4865

Susan P. Weeks [ISB No. 4255]
JAMES, VERNON & WEEKS, PA
1626 Lincoln Way
Coeur d'Alene, Idaho 83814
Telephone: 208-667-0683
Facsimile: 208-664-1684

Attorneys for Independent Highway District

Scot R. Campbell [ISB No. 4121]
Sandpoint City Attorney
1123 Lake Street
Sandpoint, Idaho 83864-0871
Telephone: 208-263-0534
Facsimile: 208-255-1368

C. Matthew Andersen [ISB No. 3581]
WINSTON & CASHATT, LAWYERS
250 Northwest Boulevard, Suite 206
Coeur d'Alene, Idaho 83814
Telephone: 208-667-2103
Facsimile: 208-765-2121

Attorneys for City of Sandpoint

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

RULES

INTRODUCTION

This reply brief tracks Appellant's Opening Brief dated November 9, 2015 and responds to the response brief filed by Respondent City of Sandpoint ("City") on January 4, 2016.

The City addressed some arguments raised in Appellant's Opening Brief, but not others. The City did not dispute that Idaho has adopted a conservative approach regarding incurring debt; and has one of the strictest constitutional debt prohibitions in the country. Nor did the City contest that the Joint Powers Agreement ("JPA"), including the 2005 Memorandum of Understanding amendment ("MOU"), was a multi-year agreement which obligated IHD to spend more IHD funds than it had during the year 2003 in which the JPA was entered. The City agreed on appeal the ordinary and necessary proviso was inapplicable although in its Complaint the City contended "[t]hat even if the collection and distribution of the ad valorem tax is considered indebtedness, it falls under the exception as an ordinary and necessary expense authorized by the general laws of the state to repair and maintain streets for public safety." R pp. 27-28. The City agreed Idaho has rejected the special fund doctrine; and Art. VIII, § 3 of the Idaho Constitution applied to agreements between Idaho's political subdivisions, and was not limited to the procurement of goods and services. The only remaining constitutional issue not conceded by the City in its response on appeal is whether the JPA created a prohibited debt or liability for purposes of Art. VIII, §3.

Disagreements remain. The City improperly attempts on appeal to bring the special fund doctrine in through the back door by citing *McQuillan on Municipal Corporations* and California cases. The City relies heavily on California cases which have no persuasive value in interpreting Art. VIII, § 3. The City forgets interpretation of the phrase "that year" in Art. VIII, § 3 means the year in which the agreement was entered. The City incorrectly argues Art. VIII, § 3 applies only to

future "fixed" obligations and does not apply to multi-year agreements which "apportion" future revenues.

The City also argues IHD is not obligated by the JPA to levy *ad valorem* taxes in the future **[it is]**, and the recent case of *Greater Boise Auditorium District v. Frazier*, 2015 WL 6080521 (October 15, 2015) (*"GBAD")* validates the JPA **[it does not]**. Rather, *GBAD* spotlights the illegality of the JPA and imparts that a multi-year agreement such as the JPA must contain a walk-away provision.

Based on these arguments, the City concludes the JPA complies with Art. VIII, § 3. IHD will show that each of the City's arguments is contradicted by Idaho case law invalidating the City's conclusion. Curiously, the City largely avoids analysis of Idaho Art. VIII, § 3 cases, and totally ignores the Idaho Supreme Court's definitions of indebtedness and liability in its analysis of the issues before this Court on appeal.

Although irrelevant to the ultimate issues to be decided by this Court on appeal, the City made several misleading statements in its Statement of the Case:

1. The City repeatedly uses the term "shared statutory responsibility" referring to the maintenance of City streets. *See* e.g. Respondent's Brief, p. 10. While not material, it is misleading. Under Idaho Code section 40-1333,[1] the City has primary responsibility for the maintenance of City streets. If IHD assists in City street maintenance, the City must reimburse IHD for any IHD work performed within the City. Idaho cities use their highway distribution account funds received pursuant to Idaho Code section 40-709, city levy proceeds, grants, and the cities' statutory share of Idaho Code section 40-801 revenue to fulfill the cities' responsibility for the

[1] Idaho Code §40-1333 provides: "Cities, with city highway systems, shall be responsible for the construction, reconstruction and maintenance of highways in their respective city systems, except as provided in section 40-607, Idaho Code. Cities may make agreements with a county, highway district or the state for their highway work, or a portion of it, but they shall compensate the county, district or state fairly for any work performed." Idaho Code §40-607 applies only to cities under 5,000 in population. Sandpoint is over that threshold. *See* Complaint, ¶ 1.

maintenance of city streets. All Idaho cities and highway districts operate under this statutory scheme; except the City of Sandpoint and IHD.[2]

2. The City asserts a dissolution "election...would have resulted in the dissolution of IHD." Respondent's Brief, footnote 2, p. 11. There is no support for this statement in the record and the statement is pure speculation. Had the election been held, the voters may well have elected to keep IHD intact.

3. The City asserts IHD voluntarily stipulated to the injunction. IHD did voluntarily stipulate to the preliminary injunction (as opposed to a permanent injunction) with the exact wording of the stipulation indicating: "Any distribution made during the pendency of this case shall not be deemed 'voluntary' by IHD to Sandpoint." R. 177. (emphasis added).

4. The City omits from its statement of facts it declined IHD's multiple requests to re-negotiate the JPA. *See* Tilley Affidavit. R. 232-233 and Scot Campbell email, R. 241-242. The City does not deny it rejected IHD's offers to negotiate and settle this dispute. R. 45. Rather than discuss the constitutional issue with IHD and potential resolutions, the City immediately filed its third lawsuit against IHD, this time to seek IHD's compliance with the JPA.

5. The City asserts that the order approving the settlement stipulation (R. 99-100) resulted in judicial approval of all details of the stipulation and subsequent JPA. In fact, the district court signed an order dismissing the case which referenced, but did not incorporate, the settlement agreement. There is no evidence the district court analyzed the terms of the stipulation for compliance with Idaho's constitution and statutes. There is no evidence the district court approved the terms of the JPA.

---

[2] Another exception is the Ada County Highway District and Ada County cities which operate under Title 40, Chapter 14, Idaho Code. In Ada County, the highway district receives 100% of the Idaho Code section 40-801 revenue since the highway district has statutory responsibility the maintenance of city streets. All other Idaho cities and highway districts, including IHD and the City, operate under Title 40, Chapter 13, Idaho Code.

ARGUMENT

I. AREAS OF AGREEMENT BETWEEN IHD AND THE CITY

The City agrees with most of the constitutional arguments made in IHD's Opening Brief:

A. The City agrees the JPA is a multi-year agreement which applies in perpetuity unless mutually terminated. Respondent's Brief, p. 35. The City acknowledges the JPA was intended to be "permanent" which is why it had no provision for "renegotiation." Respondent's Brief, p. 16.

B. The City agrees the trial court ruled a liability was created by the JPA. Respondent's Brief, p. 22. (However, the City argues the JPA multi-year liability is not illegal on the false premise that IHD is not obligated to levy taxes. Respondent's Brief, pp. 25-27).

C. The City agrees, despite the allegations in its Complaint that the Art. VIII, § 3 "ordinary and necessary" proviso is inapplicable to the facts in this case. Respondent's Brief, p. 33.

D. The City agrees Art. VIII, § 3 applies to agreements between Idaho's political subdivisions. Respondent's Brief, pp. 30-31.

E. The City agrees Art. VIII, § 3 is not limited to the procurement of goods and services. Respondent's Brief, pp. 31-32.

F. The City agrees property taxes constitute IHD general revenues. Respondent's Brief, p. 31.

G. The City agrees Idaho has rejected the special fund doctrine and the doctrine cannot be used to validate the JPA. Respondent's Brief, pp. 32-33. (However, the City attempts to resurrect the special fund doctrine by citing *McQuillan on Municipal Corporations* and California cases. Respondent's Brief, pp. 23-25.)

H. The City agrees "the JPA does affect the ability of future IHD Boards to decide how its tax revenues should be spent." Respondent's Brief, p. 33.

Also, the City does not dispute that:

1. IHD repeatedly asked the City to renegotiate the JPA and the City failed to respond or declined the requests;

2. IHD's aggregate liability under the JPA exceeded IHD's 2003 revenues;[3]

3. *Feil* and its progeny remain good law in Idaho; and

4. An agreement made in violation of Art. VIII, § 3 is void.

II. THE JPA REQUIRES IHD TO LEVY TAXES IN THE FUTURE

The City advances a new argument not raised below which is now the City's fundamental constitutional argument on appeal. The City asserts, under the terms of the JPA, IHD has no obligation to levy property taxes in any future year. The City maintains since IHD had no obligation to levy taxes in any future year, IHD had only a contingent obligation to make payments to the City. Under such circumstances, the City contends the aggregation of payments is improper in determining if IHD's obligation exceeded IHD's 2003 revenues.

The City asserts:

1. "Truly, if IHD elected to have no levy for a tax year, there would be no [IHD] obligation to pay [tax revenue to the City]." Respondent's Brief p. 25.

2. "In reality, the JPA does not require IHD to levy one cent in tax...it creates no rights by the City to demand or enforce a tax levy." Respondent's Brief, p. 26.

3. "IHD's former board **did not** obligate itself to perpetually levy real property taxes and pay the revenues from such levy to the City" Respondent's Brief, p. 27. (emphasis in original)

4. "Nothing in the JPA obligates IHD to so levy, and thus does not create a liability which may or may not be payable by future revenue.

[3] The City does not dispute the estimate of the IHD obligation made in the JPA of $350,000 per year would exceed $20 million over sixty years and would, in fact, be infinite since the JPA has a perpetual duration.

> This is the fact that renders all of the cases cited by IHD inapplicable and irrelevant to the issues at hand." Respondent's Brief, p. 27.

So what does the JPA actually say? At clause 1, Revenue Distribution, it states:

> The District at the present time and in the future **will** levy and apply for *ad valorem* property taxes under the authority granted in Chapter 13, Title 40, Idaho Code. The District will pay over to the City all property tax funds from such District levies on all property located within the City limits.
> R. 39 (emphasis added).

The plain language of the JPA mandates that IHD "will levy" taxes "in the future". The City attempts in its appellate argument to re-draft the agreement to change the mandatory "will" to the discretionary "may". "Will" means

> **WILL**, v. An auxiliary verb commonly having the mandatory sense of "shall" or "must". It is a word of certainty, while the word "may" is one of speculation and uncertainty.

Black's Law Dictionary, Rev. 4th Ed. (1968).

This Court held in *Jim & Maryann Plane Family Trust v. Skinner*, 157 Idaho 927, 342 P.3d 639, 645-646 (2015):

> "When interpreting a contract, this Court begins with the document's language." *Potlatch Educ. Ass'n v. Potlatch Sch. Dist. No. 285*, 148 Idaho 630, 633, 226 P.3d 1277, 1280 (2010)." In the absence of ambiguity, the document must be construed in its plain, ordinary and proper sense, according to the meaning derived from the plain wording of the instrument." *Id.* (quoting *C & G, Inc. v. Rule*, 135 Idaho 763, 765, 25 P.3d 76, 78 (2001)).

The plain and ordinary language of the contract indicated IHD had to levy taxes in future years. Either the City ignored this plain language in the JPA or the City believes it does not apply to all future years.[4] Since the key premise to the City's constitutional argument is false, the City's constitutional conclusion is wrong.

[4] It is not realistic for the City to suggest that IHD can choose to levy for some years but not for others. Under the "budget cap" statute, Idaho Code section 63-802, should IHD not levy real property taxes for a specific future year, IHD will be precluded, as a practical matter, from doing so in subsequent years. IHD cannot decline to levy in a specific year if it wants to retain the ability to levy in future years.

The City's position is also inconsistent. In a different section of its brief, when addressing IHD's penalties and interest argument, the City contradicted itself and conceded that the JPA "provided that IHD would levy and apply for *ad valorem* property taxes." Respondent's Brief, p. 42. The context of the statement clearly refers to the "future years" language from the same JPA sentence. In this portion of its brief, the City argues IHD must levy and pay over to the City taxes and penalties for all future years.

The City sued IHD and asserted IHD had an obligation to pay the City IHD taxes for all future years. How can the City now argue on appeal the same JPA language does not obligate IHD to levy taxes in the future? The City cannot have it both ways.

Because IHD is obligated by the JPA to levy and pay over taxes to the City "in the future", the aggregation of all future JPA payments is required by Idaho Art. VIII, § 3. The amount IHD was obligated to pay to the City under the JPA exceeded IHD's 2003 revenue. Thus, the JPA created a multi-year debt and liability prohibited by Art. VIII, § 3.

Even if, *arguendo*, IHD could choose not to impose its levy for any specific future year, the JPA still created a multi-year obligation to pay the City into perpetuity all revenue collected during those years when taxes were levied. This multi-year obligation, even if analyzed as a contingent liability, violated Art. VIII, § 3 based on *GBAD.*

III. IDAHO DEFINITIONS OF LIABILITY AND INDEBTEDNESS

The City admits the JPA created a liability if IHD levied taxes and does not dispute that the JPA is a multi-year agreement. The City does not dispute that IHD did not have revenue in 2003 to make all payments for the perpetual duration of the JPA.[5] Even so, the City continues to argue the JPA created no indebtedness or liability prohibited by Art. VIII, § 3. Art. VIII, § 3 provides:

[5] *See* Footnote 3 on p. 9

> No county, city, board of education, or school district, or other subdivision of the state, shall incur any indebtedness, or liability, in any manner, or for any purpose, exceeding in that year, the income and revenue provided for it for such year, without the assent of two-thirds of the qualified electors thereof voting at an election to be held for that purpose....

Idaho Constitution, Art VIII, § 3 (emphasis added).

The City did not rebut IHD's discussion of the Idaho definitions of indebtedness or liability in pages 10-12 of IHD's Opening Brief. Rather, the City quoted extensively from California cases[6] and other non-Idaho authorities as support for this Court to nullify the Idaho definitions of these terms. Why? Because Idaho case law contradicts the City's arguments. IHD contended in its opening brief (p. 11) and continues to assert in this reply that the JPA created an illegal debt and undeniably created an illegal liability.

> The Idaho Supreme Court has defined "debt" or "indebtedness," within the meaning of Art. 8, §3, as an obligation, incurred by the state or municipality, which creates a legal duty on its part to pay from its general funds a sum of money to another, who occupies the position of a creditor, and who has a lawful right to demand payment.

17 Idaho L. Rev. 55 (1980), p. 59. *Constitutional Debt Limitations on Local Government in Idaho – Article 8, Section 3, Idaho Constitution,* Michael C. Moore.

"Liability" is more broadly defined as:

> '...the state of one who is bound in law and justice to do something which may be enforced by action.'
> ***
> '...the state of being bound or obliged in law or justice to do, pay or make good something; legal responsibility.'

GBAD *8, quoting from *Feil v. City of Coeur d'Alene,* 23 Idaho 32, 50, 129 P. 643, 649 (1912).

[6] Compared with Idaho's simple, conservative approach to local government multi-year financing, California's approach is liberal and result oriented. California has engaged in the true lease/financing lease fiction rejected in *Williams v. City of Emmett*, 51 Idaho 500, 6 P.2d 475 (1931) and *GBAD*. *See* e.g. *Dean v. Kuchel,* 218 P.2d 521 (Cal. 1950) and *Rider v. City of San Diego* 959 P.2d 347 (Cal. 1998). Idaho totally rejects the California approach and requires that there be a walk away provision in multi-year agreements. *See GBAD.*

The JPA created a multi-year legal duty for IHD to pay its property tax revenues over to the City, which duty the City sought to enforce in its lawsuit against IHD; **a debt**. The City claims in its Complaint that IHD was bound in law or justice to make multi-year payments to the City; **a liability**.

In *GBAD*, this Court reaffirmed the breadth of the liability definition. "[T]he term 'liability' is even more sweeping and comprehensive term than the word 'indebtedness'". *GBAD* *8. *GBAD* analyzed an earlier Idaho case with approval, which stated:

> The framers of our constitution were not content to say that no city shall incur an indebtedness 'in any manner or for any purpose,' but they rather preferred to say that no city shall incur any *indebtedness* or *liability* in any manner, or for any purpose. It must be clear to the ordinary mind on reading this language that the framers of the constitution meant to cover all kinds and character of debts and obligations for which a city [or other political subdivision such as IHD] may become bound, and to preclude circuitous and evasive methods of incurring debts and obligations to be met by the city or its inhabitants.

Boise Dev. Co., Ltd. v. Boise City, 26 Idaho 347, 361, 143 P. 531, 535 (1914). (emphasis added) analyzed in *GBAD* *8-9.

Based upon the breadth of Idaho's liability definition, there is no doubt that the JPA created a liability.

IV. CITY ARGUMENTS

A. The City Incorrectly Argues that Art. VIII, § 3 is Limited to "Fixed" Liabilities.

The City introduces a novel argument not raised below: Art. VIII, § 3 prohibits only "fixed" liabilities. The City reasons the JPA does not create a "fixed" liability since the IHD "levy amount can freely change." Respondent's Brief, p. 22. The City does not tell the Court what it means by "fixed" liability.

Art. VIII, § 3 does not reference "fixed" liabilities or include any such limitation. The City has not cited a single Idaho case which limits the Art. VIII, § 3 prohibition to one that is "fixed." Indeed, *Boise Dev. Co.* dealt with liabilities that were not fixed. In *Boise Dev. Co.* this Court analyzed a litigation settlement agreement between Boise and a development company. Boise entered into a multi-year agreement to channel the Boise River by building river banks and a road. The agreement included the statement: "In consideration of the foregoing terms and stipulations on the part of the party of the first part (Boise), the party of the second part agrees as follows: I. To dismiss the action now pending between the parties hereto...." *Boise Dev. Co.,* 26 Idaho 347, 355, 143 P. 531, 533.

The obligations agreed to by Boise were not "fixed." The agreement included Boise's obligation to perform reclamation work in an indefinite amount of at least $5,000 per year over five years. It was probable that Boise would have to spend more than $5,000 per year on the reclaiming work but the amount was not yet identified. *Id* at 359, 143 P. at 534. Boise promised to build Riverside Drive within eight years, at a cost yet to be determined. *Id.*

The *Boise Dev. Co.* Court held the multi-year agreement was prohibited by Art. VIII, § 3 as an illegal debt or liability, even though the contract was not for a "fixed" amount. The *Boise Dev. Co.* Court held Art. VIII, § 3 prohibits the pledging of future revenues whether the pledge amount was fixed or not. The Court rejected California case law as "not sound" when it came to interpreting Art. VIII, § 3. *Id* at 362, 143 P. at 535.

The City cites *Quantification Settlement Agreement Cases* 201 Cal. App. 4th 758 (Cal. Ct. App. 2011) to support its "fixed" argument. In its analysis, the California Court of Appeals case dealt with a provision in California's constitution which differs greatly from Idaho's Art. VIII, § 3. Case law interpreting California's constitution is irrelevant when interpreting Idaho's constitution.

The California provision required a two-thirds vote of each house of the California legislature for any unbudgeted expenditure exceeding $300,000. A California state agency contracted to pay certain mitigation costs, but only if the mitigation costs exceed $133 million. The California court held the California constitution was not yet violated because no one knew whether the mitigation costs would exceed the $133 million threshold. At the time of the litigation, there was only a theoretical potential that the state would have to pay anything under the agreement. The California Court of Appeals reasoned that such a potential contingent obligation did not violate the California constitution unless and until the contingency occurred. Essentially, the California case was about ripeness. At the time of the litigation, the state was not obliged to pay anything. If the contingency happened, the payment obligation may have violated the California constitution. *Quantification* provides no support for the City's position. The JPA created a real, not a potential, liability. Even though the exact amount of the JPA obligation was not determined when the JPA was executed, it is clear that IHD was obligated to pay large sums to the City in each future year. IHD made payments to the City every year since 2003, and according to the City's Complaint, must continue payments to the City every year into perpetuity. Under the City's reasoning, a variable interest rate multi-year mortgage obligation would not be a "liability" under Art. VIII, § 3 because the exact future payments are not yet "fixed". This analysis is inconsistent with Idaho case law.

The City argues *Williams v. City of Emmett,* 51 Idaho 500, 6 P.2d 475 (1931) to support its "fixed" liability theory. Emmett was obligated to make future lease payments on a lease/purchase of sprinkler equipment. There was no non-appropriation clause, or walk-away provision, in the agreement. This Court held the agreement violated Art. VIII, § 3 because Emmett did not have funds available for all future lease/purchase payments in the year the agreement was signed; referred to in *GBAD* as the "aggregation principle." *GBAD* *9. *Williams* held that the City's

pledge of its future revenues created an indebtedness or liability in violation of Art. VIII, § 3. There was no distinction in *Williams* between "fixed" versus "non-fixed" liabilities. The *Williams* holding followed the *Feil* analysis that Art. VIII, § 3 unequivocally prohibits pledging any revenues beyond the year in which the obligation was incurred. *Feil,* 23 Idaho 32, 55, 129 P. 643, 651.

Based on *Feil* and *Williams*, the JPA violated Art. VIII, § 3 because the JPA created an IHD liability to the City into the indefinite future, not because the liability was "fixed." In any case, *GBAD* clarifies that the framers of the Idaho Constitution intended the Art. VIII, § 3 prohibition to apply to contingent liabilities, and is not limited to "fixed" liabilities.

B. The City Incorrectly Argues "That Year" Means Any Future Year

The City perpetuates the trial court's error by asserting the JPA is legal because IHD's future liability does not exceed IHD's future revenue for any future year. All Idaho cases, including *GBAD,* construe the phrase "that year" in Art. VIII, § 3 to mean the year in which the agreement was entered; not future years. Future years' **revenues** cannot be considered in the Art. VII, § 3 analysis. Future years' **liability** includes all future obligations. This "aggregation principle" mandates that all future JPA payments be aggregated when an agreement such as the JPA contains no walk away clause.

> Accordingly, governmental subdivisions are liable for the aggregate payments due over the total term of a contract rather than merely for what is due the year in which the contract was entered.

*GBAD, *8-9* (emphasis added).

It is the pledge of future years' revenue that is problematic; not whether the pledge of some future year's revenue potentially equals or exceeds that future year's liability. Based on *Boise Dev. Co., Williams*, and *GBAD,* there is a present liability or aggregation for all future years' payments at the time of execution of a multi-year agreement. Because IHD's aggregate JPA obligation (an

estimated $350,000 per year into perpetuity) exceeds IHD's 2003 revenue, the JPA violated Art. VIII, § 3.

C. The City Incorrectly Argues Art. VIII, § 3 is Inapplicable to Agreements which "Apportion" Funds

The City tries to remove the JPA from the Art. VIII, § 3 prohibition with the novel proposition that the JPA is merely an agreement to apportion funds, or divide revenue. For example, "(t)he JPA is simply…an agreement on the division of revenue. That is not a debt or a liability of a sum certain." Respondent's Brief, p. 26. Ironically, the City fails to acknowledge that the apportioned funds belong to IHD. Calling them "apportioned funds" when they belong to one entity and must be paid to the other entity based upon an agreement is merely another way of saying that the JPA agreement requires IHD to pay its revenues to the City based on an ongoing liability.

The language of Art. VIII, § 3 contains no exclusion for agreements which apportion or divide one entity's funds and pays them to another entity based upon an agreement. The long-established case law from *Feil* to *GBAD* rejects such an approach. In *Feil, Buhl, Asson v. City of Burley,* 105 Idaho 432, 670 P.2d 839 (1983) and *City of Boise v. Frazier*, 143 Idaho 1, 137 P.3d 388 (2006), each of the agreements apportioned revenues generated from the acquisition of equipment or improvement projects to pay off the debt associated with the acquisition. Notwithstanding such "apportionment" of revenues, the agreements were held to be illegal. The City's "apportionment" of revenue argument is really the special fund doctrine argument in disguise.

The City attempts to sneak the special funds doctrine through the back door by quoting from 15 *McQuillin Mun Corp* §41:22 (2013) "If an obligation is payable out of a special fund only, and the municipality is not otherwise liable, it is held that there is no indebtedness." Respondent's

Brief, p. 25. *McQuillin* may state a general principal applicable in some states, but when it comes to Idaho local government financing, Idaho has repeatedly rejected the more liberal constitutional debt prohibition interpretations from other states. In Idaho, future revenues which may become available from whatever source become income or revenue within the meaning of the constitution. *Feil,* 23 Idaho 32, 55, 129 P. 643, 651 (1912).

The City continues its advocacy for the special fund doctrine by suggesting that if the repayment of the JPA obligation is made only from the revenue generated from City properties, then Art. VIII, § 3 is not implicated. "The amount paid can never exceed the amount collected." Respondent's Brief, p. 23. So what? Based upon long-established Idaho jurisprudence, future revenues cannot be included in the Art. VIII, § 3 analysis of whether future liability exceeds the agency's revenue for the year the obligation was incurred. The City compounds its error at p. 25 of its brief, noting that in California a "contract for reimbursement from revenues derived from a water main extension were not constitutional 'debts.'" Because Idaho has rejected the special fund doctrine, the opposite is true in our state.

The City relies heavily on California cases, *McQuillan*, and other non-Idaho cases to interpret the Idaho Constitution. *See* Respondent's Brief, pp. 23-25. As noted in *Feil* and *GBAD,* Idaho has one of the strictest, if not the strictest, debt/liability prohibition in the country. Writing in 1912, this Court reasoned in *Feil* that cases from other states have no applicability in analyzing debt prohibitions under Idaho's Art. VIII, § 3. This Court described how other courts have "indulged in various subtleties and refinements of reasoning to show that no debt or indebtedness [had] occurred." *Feil,* 23 Idaho at 49, 129 P. at 649. *Feil* clarified that Idaho's conservative approach prohibits the pledging of "all sources and kinds of income or revenue." 23 Idaho at 49, 129 P. at 649. *GBAD* affirmed this conservative approach just a few months ago.

In *Miller v. City of Buhl,* 48 Idaho 668, 284 P. 483 (1930), this Court noted that other states, including California, have adopted the special fund doctrine. This Court flatly rejected those cases. This *Feil* and *Buhl* reasoning was reaffirmed by *GBAD.*

In other words, pledging future revenues is prohibited regardless of how the revenue is generated or allocated. Art. VIII, § 3 prohibits pledging of future revenues "in any manner, or for any purpose." The pledge of future IHD revenues is the fatal flaw in the JPA. Art. VIII, § 3 protects future IHD commissioners, tax payers and residents by ensuring that future IHD revenues are not dedicated to past liabilities and future revenues remain available to be used for the future needs and priorities of the voters who elect those future commissioners. Without a walk away provision, the JPA binds the hands of future IHD boards and voters and saddles future IHD commissioners and taxpayers with a long-term obligation, regardless of whether the JPA is analyzed as an apportionment of revenue. The 2003 IHD commissioners could only obligate IHD 2003 revenues, not 2016 revenues or any other future years' revenues.

D. The City Incorrectly Argues *Jeff D.* Supports the City's Arguments

The City cites *Jeff D. v. Andrus,* 899 F. 2d 753 (9th Cir. 1990) to support its argument that multi-year agreements do not violate Art. VIII, § 3. Respondent's Brief, p. 21. *Jeff D.* is a continuation of the case of *Evans v. Jeff D.,* 475 U.S. 717, 106 S.Ct. 1531 (1986). In 1980, Jeff D., on behalf of a class of indigent Idaho children suffering from emotional and mental disabilities, commenced a class action against the Governor of Idaho and other state officials, alleging they were provided inadequate care in violation of their state and federal statutory rights and in violation of their constitutional rights under the United States and Idaho constitutions. The complaint sought only declaratory and injunctive relief. In 1983, the parties entered into a settlement agreement that

offered injunctive relief to the class members. The district court entered the agreement as a consent decree in April 1983. *See Jeff D. v. Otter*, 643 F.3d 278, 281 (9th Cir. 2011).

This case is inapposite to the issues raised in this appeal. Art. VIII, § 3 was not analyzed in *Jeff D.* The defendant was the State, not a political subdivision. Further, the stipulated injunctive relief was unrelated to declaration of a multi-year debt owed by the state to the disabled children. *Jeff D.* does not pertain to the constitutional issues raised in the present case.

V. *GBAD* SUPPORTS IHD'S ARGUMENTS AND REFUTES CITY'S ARGUMENTS

The City relies heavily on *GBAD.* IHD agrees that a proper understanding of *GBAD* is crucial to resolution of this case.

GBAD initially reaffirmed that a liability prohibited by Art. VIII, § 3 is one in which the political subdivision "is bound in law and justice to do something which may be enforced by action." *GBAD* *8, quoting from *Feil.* The Court then emphasized "obligating oneself to future payments...is a present liability" prohibited by Art. VIII, § 3. *GBAD* *9.

The key to Art. VIII, § 3 cases is a walk-away or termination clause. The *GBAD* agreement contained a non-appropriation clause which allowed *GBAD* to walk away from the agreement each year. GBAD was "bound only for the one year term", *GBAD* *9, unless *GBAD* affirmatively renewed the agreement each year. The *GBAD* agreement approved by this Court is starkly different from the JPA since IHD has no ability to terminate the JPA or to even renegotiate it absent the City's consent. As the City emphasized, the JPA was intended to be a permanent liability, therefore there were no provisions in the JPA for termination or renegotiation by IHD. Respondent's Brief, p. 16.

Even if the JPA obligation is analyzed as a "contingent" liability, it is prohibited by Art. VIII, § 3. *GBAD* held that contingent multi-year liabilities are subject to the Art. VIII, § 3

prohibition. *GBAD.* Only theoretical or potential liabilities are outside the Art. VIII, § 3 prohibition. "The framers, while being quite concerned with incurring contingent liabilities, were not worried about all potential liabilities." *GBAD* *11 (emphasis added). The lower court held *GBAD* had not disproved the possibility of all *potential* liabilities because the bank could theoretically exercise *potential* remedies beyond the first year of the agreement. This Court emphasized the nature of the *potential* liability by stating, "the district court never identified what such a remedy could be." *GBAD* *10; and "[it] is difficult to conceive of a set of facts under which (the bank) could recover against the District...." *Id.* The relevant determination under Art. VIII, § 3 is whether the governmental subdivision presently bound itself to a liability greater than it has funds to pay for in the year in which it bound itself." *Id.*

Justice Eismann emphasized this point in his concurring opinion. "[I]t is clear that the word *liability* meant a legal responsibility that could be enforced in a court of law." *GBAD* *20. "Liability" must be something more than a mere theoretical or moral obligation. Multi-year obligations prohibited by Art. VIII, § 3 include obligations, such as the JPA, where the political subdivision can be sued to enforce the obligation. Clearly, the City sued IHD to enforce this multi-year obligation asserting that the JPA constituted a multi-year obligation.

GBAD reiterated the "aggregation principle" set forth in *Williams:*

> The relevant determination under Article VIII, section 3 is whether the governmental subdivision presently bound itself to a liability greater than it has funds to pay for in the year in which it bound itself.

GBAD at *10.

IHD did not have the money on hand in 2003 to make all payments for the perpetual duration of the JPA. Therefore, IHD was required to seek voter approval. Because IHD entered into a multi-year obligation without voter approval, Article VIII, § 3 was violated.

VI. POLICY ARGUMENT

The City concedes "the JPA does affect the ability of future IHD Boards to decide how its tax revenues should be spent." Respondent's Brief, p. 33. Despite this admission, the City argues the constitution was concerned only with financially distressed local government agencies, not with undermining the discretion of future elected officials. It is true that the framers were concerned with agencies bankrupting themselves. However, the framers' concerns were broader than that. *GBAD* clarifies that the framers intended to prevent agreements "which could bind future officials or taxpayers." *GBAD* *13. The Constitution prohibits multi-year commitments not fully funded in the first year of the agreement. Under the JPA, future IHD commissioners and taxpayers are perpetually bound to levy property taxes and to pay IHD general fund revenues to the City. Future IHD boards have no discretion whether to levy taxes and district taxpayers have no vote on the allocation of the revenues being spent. Because there is no walk away provision, there is no discretion whether to pay the collected taxes to the City. The agreement violated Art. VIII, § 3 by providing that future IHD commissioners had no authority over expenditure of future IHD revenues to satisfy a pre-existing liability. Future commissioners cannot exercise their judgment in spending decisions to best serve the taxpayers in the current year due to the pre-existing liability. Future voters cannot elect future IHD commissioners who will spend future IHD funds according to the will of the electorate. Part of the policy behind the Art. VIII, § 3 prohibition was to prevent future boards and taxpayers from losing the ability to decide how future revenues should be spent, unless approval from two-thirds of the citizen-taxpayers was first received. The JPA violated this policy and so is void.

If the Court concludes the JPA violated Art. VIII, § 3, the Court need not consider the following arguments regarding the Joint Powers Act, and penalties and interest.

VII. THE JPA DOES NOT CONTAIN A DURATION OR A TERMINATION CLAUSE

The Idaho Joint Powers Act, Idaho Code section 67-2326, *et seq.* (the "Act") mandates all joint powers agreements contain a provision on "duration" and "methods...(for) termination of the agreement." The JPA contains neither. As noted by the City, the JPA was intended to be "permanent" which is why it had no provision for termination or renegotiation. Respondent's Brief, p. 16. Based on the parties' intent that the agreement be permanent, the JPA provided that "the duration of the agreement shall be perpetual" or until the parties "jointly and together agree to amend or terminate the same." R. p. 37.

A perpetual agreement violates the statutory requirement for a statement of duration. "Duration" necessitates an end point. A joint agreement is not a method for termination. There is no way for either party to terminate the agreement without the consent of the other party. If that consent is withheld, the agreement lasts forever. Without an ability to terminate or renegotiate the JPA, the consequence in the present is a permanent liability, a permanent transfer of jurisdiction and a permanent transfer of statutory authority.

The City argues "perpetual" is a duration and that the method of termination is by joint agreement. Neither IHD nor the City located any Idaho case authority directly on point, so this appears to be an issue of first impression in Idaho. The City points to out-of-state cases which enforced "perpetual" agreements. The first is *Bell v. Leven,* 90 P.3d 1286 (Nev. 2004). *Bell* involved a contract dispute between private parties. *Bell* interpreted no state statute requiring a duration or method of termination. *Bell* stated "We agree that as a matter of public policy, courts should avoid construing contracts to impose a perpetual obligation", unless the contract explicitly states it is intended to be permanent. *Bell,* 90 P.3d 1286, 1288.

A review of the remaining cases cited by the City supporting perpetual contracts reveals they are not useful in resolving the present case. They are all decided on general contract law principles, and address no similar statutory requirement for governmental contracts to include a clause addressing duration and method of termination as exists in the present case. None of the City's cases involve public agencies with statutory powers and duties which may be violated by a perpetual agreement.

The City's interpretation of the Act not only vitiates legislative intent as expressed in the statutory language, but may also lead to poor public policy and mischief. Pursuant to the City's analysis, Idaho agencies could enter into agreements to permanently transfer jurisdiction and other statutory powers without a vote of the people and without authorization from the legislature. This case illustrates the point. In the JPA and accompanying MOU, IHD and the City permanently transferred jurisdiction over City streets without following the statutory procedures for altering jurisdiction. *See City of Sandpoint v. Sandpoint Independent Highway District,* 139 Idaho 65, 72 P.3d 905 (2003) ("*Sandpoint* II") (discussing the proper process for transferring jurisdiction). IHD and the City also permanently transferred all jurisdiction and authority for the vacation of City streets, including altering the statutory requirements for conducting public hearings on vacations and abandonments. R. 38, 43, 44. It is unlawful for Idaho local governments to delegate the authority and duty to conduct public hearings from one agency to another. *Blaha v. Board of Ada County Com'rs,* 134 Idaho 770, 9 P.3d 1236 (2000). Disregard of the statute is further found in the failure to either establish a separate legal entity to conduct the joint or cooperative undertaking or to provide for an administrator or a joint board responsible for administering the joint or cooperative undertaking. I.C. § 67-2328(d).

This Court can avoid the mischief likely to result from the City's interpretation by concluding that a "perpetual" agreement with no ability to renegotiate or terminate violates the statutory requirement for a "duration" clause and fails to meet the requirement that the JPA include a method for termination.

The Act contemplates a concurrent or joint exercise of powers, not a permanent abdication of authority or a permanent transfer of jurisdiction. Future commissioners should be free, as a matter of public policy, to exercise their statutory authority as they see fit, and not be boxed in by agreements entered by prior boards which take away some or all of their statutory authority to act on behalf of the voters they were elected to serve. This Court should take the same conservative approach toward interpreting multi-year obligations under the Joint Powers Act that Idaho takes in interpreting multi-year obligations under Art. VIII, § 3.

VIII. ESTOPPEL CANNOT SAVE THE VOID JOINT POWERS AGREEMENT

A. Idaho does not permit Estoppel to save an Agreement Prohibited by the Constitution.

The City proffers estoppel on appeal to rescue the void JPA. The City raised estoppel in response to the motion to dismiss. The trial court decided because the JPA was constitutional, there was no need to address judicial estoppel or equitable estoppel. There is a huge hole in the City's estoppel argument. This Court has repeatedly held that estoppel cannot be used to validate agreements which violate Art. VIII, § 3.

Deer Creek Highway District v. Doumecq Highway District, 37 Idaho 601, 218 P. 371 (1923) is precisely on point. In *Deer Creek* this Court held a multi-year agreement to construct a bridge across the Salmon River void in violation of Art. VIII, § 3. Doumecq Highway District ("Doumecq") agreed to pay one third of the cost of the bridge, but after the bridge was built

reneged on the deal. The contract violated Art. VIII, § 3 because it was a multi-year obligation exceeding Doumecq's revenue for the year in which the agreement was entered. Despite the apparent unfairness of Doumecq's actions, this Court stated: "it is elementary that there can be no recovery on a void contract." *Deer Creek,* 37 Idaho 601, 606, 218 P. 371, 372.

The Deer Creek Highway District (DCHD) built the bridge and sought to recoup from Doumecq its contractual share of the construction costs. DCHD argued even though the agreement violated Art. VIII, § 3, estoppel should require Doumecq to perform its obligation - exactly the argument the City now asserts against IHD.

This Court definitively disposed of the estoppel argument, holding: "when the contract is absolutely and directly prohibited by some statutory or constitutional enactment, the contract is void and it cannot be enforced either as an express or implied contract..." *Deer Creek* at 608, 218 P. at 373. **"An estoppel can never be invoked in aid of a contract which is expressly prohibited by a constitutional or statutory provision."** *Deer Creek* at 609, 218 P. at 373, quoting from *School District No. 8 v. Twin Falls County Mutual Fire Ins. Co.,* 30 Idaho 400, 164 P. 1174 (1917). (Emphasis added.)

Deer Creek unequivocally rebuts the City's estoppel argument. *Deer Creek* has been repeatedly reaffirmed by this Court. If ever an attractive estoppel argument was made, *Deer Creek* was it. Doumecq's citizens received the benefit of the bridge. Doumecq's failure to honor its obligation under the agreement resulted in detriment to DCHD and its citizens. Yet, because the multi-year obligation was void in violation of Art. VIII, § 3, estoppel could **not** be invoked to remedy the manifest injustice suffered by DCHD.

The *Deer Creek* court concluded its reasoning with an explanation of why estoppel could not be used to alleviate the apparent unfairness of the holding.

> "No sound reason occurs to us why a highway district should not be chargeable with the knowledge of the limitations of the lawful powers of other highway districts with which it seeks to contract. Municipal corporations must be required to take account of and obey the law whose creatures they are.

Deer Creek, 37 Idaho 601, 610, 218 P. 371, 373.

The City and IHD in 2003 were both chargeable with knowing Idaho's longstanding Art. VIII, § 3 jurisprudence. Although their desire to resolve an ongoing litigation to the mutual benefit of their taxpayers was legitimate, they should have known they were entering an agreement which was void *ab initio.*

Deer Creek has been followed and reaffirmed in numerous Idaho cases, including: *J & J Contractors / O.T. Davis Construction, A.J.V. v. Idaho Transportation Board,* 118 Idaho 535, 797 P.2d 1383 (1990); *Jones v. Big Lost River Irrigation District*, 93 Idaho 227, 459 P.2d 1009 (1969) (estoppel cannot be used in aid of a void contract); *Whitney v. Continental Life and Accident Company,* 89 Idaho 96, 403 P.2d 573 (1965) (if the agreement is void it cannot be treated as valid by invoking estoppel); *Lloyd Crystal Post No. 20, The American Legion v. Jefferson County,* 72 Idaho 158, 237 P.2d 348 (1951) (an agreement prohibited by a statutory or constitutional enactment is beyond the power of a municipality to enter. Estoppel can never be invoked in aid of such an agreement.)

Village of Heyburn, Idaho v. Security Savings & Trust Company, 55 Idaho 732, 49 P.2d 258 (1935) is especially noteworthy in its reaffirmation of *Deer Creek.* This Court held that bonds issued in violation of Art. VIII, § 3 were void and estoppel could not be invoked to save the void agreement. The Court reasoned:

> The bar of the constitution against excessive municipal indebtedness would be very weak indeed to protect the taxpaying public if, when plainly overstepped, the resulting obligation could be enforced upon equitable grounds. No one can occupy a position of defiance to the fundamental law

> and defend himself successfully thereunder by invoking the jurisdiction of equity.

Village of Heyburn, 55 Idaho 732, 753, 49 P.2d 258, 267. Finally, *Williams v. City of Emmett,* 51 Idaho 500, 6 P.2d 475 (1931) cited and analyzed by the City in its Respondent's Brief and by this Court in *GBAD* reaffirmed *Deer Creek.*

The City relies on *City of Sandpoint v. Sandpoint Independent Highway District,* 126 Idaho 145, 879 P.2d 1078 (1994) (*Sandpoint* I) to support its estoppel argument. In *Sandpoint I*, This Court declined to apply estoppel as requested by the City. This Court discussed the doctrine as a theoretical possibility. However, *Sandpoint I* did not involve allegations of a violation of Art. VIII, § 3 as is now before the Court. Nor were there allegations of other constitutional or statutory violations which estoppel was invoked to overcome. The estoppel analysis in *Sandpoint I* does not affect the issues in the present case even though the same parties are once again before this Court.

The City urges *Murtaugh Highway District v. Twin Falls Highway District*, 65 Idaho 260, 142 P.2d 479 (1943) (*Murtaugh II)* supports its argument. *Murtaugh Highway District v. Twin Falls Highway District*, 55 Idaho 400, 42 P.2d 1007 (1935) (*Murtaugh I)* sheds light on the estoppel holding of the court in the subsequent case.

Twin Falls Highway District ("TFHD") was organized in 1918 or 1919. In 1922, the Murtaugh Highway District ("MHD") and Rock Creek Highway Districts ("RCHD") were organized out of territory taken from TFHD. The statute at the time, C.S. sec 1496 (later I.C.A. § 39-1509) provided land taken from the old district into the new district would continue to be liable for assessments by the old district for taxes to pay outstanding approved bonds as they became due. Section 1497, C.S. (later I.C.A. 39-1510) provided the parent district could require the commissioners in the new district to levy an annual property tax on land in the new district to pay its share of the debt. TFHD interpreted the statute to require MHD to impose an assessment year to

year based upon the assessed value of the property in its district each year. The Supreme Court agreed, holding in *Murtaugh I*: "It would rather seem that when the rate of levy is fixed by the commissioners of the parent district it was the intention that such rate should apply to and be spread over the entire original territory of the parent district, and we so hold." *Murtaugh I* at 403. The Supreme Court found no different method of computation or rate of levy was intended to be used. *Murtaugh I* at 403-404.

In *Murtaugh II*, the Supreme Court noted that there were ten bonds outstanding at the time of the division of the parent highway district. MHD claimed TFHD owed it a reimbursement for overpayment of its proportionate share of the bonds. TFHD required MHD and RCHD to levy an ad valorem tax slightly higher than the one imposed by TFHD for the years of 1932 through 1938. MHD claimed the levy should have been the same under the prior holding of the Supreme Court in *Murtaugh I.* MHD claimed it paid $12,660.78 toward retirement of the bonds more than it should have had the levy been uniform in all three districts. However, TFHD made up the difference in the levy rate with money it received from motor vehicle license fees and paid its proportionate share towards retirement of the bonds. (MHD and RCHD also received motor vehicle license fees and did not apply their fees toward the debt.)

In resolving the issue, this Court in *Murtaugh II* acknowledged that a highway district could apply motor vehicle license fees toward retirement of principal and interest on any outstanding bond, but it would not affect the levy apportionment pursuant to Sec. 39-2111, I.C.A. *Murtaugh II* at 266. The Court reiterated the holding in *Murtaugh I* that the proportionate share of each districts debt would be computed based upon assessed valuation, and not the amount of license fees received. *Murtaugh II* at 267.

Despite the statutory requirements and prior holding in *Murtaugh I,* this Court found it would be unjust to require TFHD to reimburse money to MHD because it would cause TFHD to pay a portion of MHD's share of the bond debt. The *Murtaugh II* Court held where a party consents or offers no opposition to an act which could not lawfully have been done without consent and induces the other from that which might otherwise be done, he cannot question the legality of past actions to the prejudice of those who acted on the fair inference to be drawn from the conduct. As further support for its laches and estoppel holding, *Murtaugh II* recognized highway districts were in the category of purely business and proprietary corporations, and as such, laches and estoppel could be invoked against them. *Id* at 268. *Murtaugh II* involved a finite past obligation, not a future perpetual obligation.

This case was revisited by this Court in *Sandpoint I.* This Court held "equitable estoppel, at a minimum, requires: a concealment or misrepresentation of fact; that the party asserting estoppel not have knowledge of the true facts; and that the misrepresentation must be relied on to the party's detriment. *Sandpoint v. Sandpoint Ind. Hwy. Dist.,* 126 Idaho 145, 879 P.2d 1078, 1084 (1994). *See also Curry v. Ada County Highway District*, 103 Idaho 818, 654 P.2d 911 (1982).

This minimum is not met in the present case. IHD did not conceal or misrepresent any fact to the City. It did not even misrepresent the law to the City. Both parties had legal counsel to assist them at the time. The parties made a mutual mistake of law which was not solely the fault of IHD.

B. Judicial Estoppel is not Applicable.

The City next argues more specifically that judicial estoppel precludes IHD from raising the illegality of the JPA under Art. VIII, § 3 and/or the Joint Powers Act. The City cites three cases: *Hoaglund v. Ada County,* 154 Idaho 900, 303 P.3d 587 (2013); *Indian Springs L.L.C. v. Indian*

Springs Land Investment, L.L.C., 147 Idaho 737, 215 P.3d 457 (2009); and *Buckskin Properties, Inc. v. Valley County,* 154 Idaho 486, 300 P.3d 18 (2013).

Several matters are noteworthy:

1. Judicial estoppel is a kind of estoppel which precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position." *Sword v. Sweet*, 140 Idaho 242, 252, 92 P.3d 492, 502 (2004). The rule set out in *Deer Creek* and its progeny that estoppel cannot be used to enforce an agreement void in violation of Idaho's constitution or statutes remains controlling Idaho law and applies equally to judicial estoppel;

2. The three cases cited by the City apply to specific factual misrepresentations made to the court, not mutual mistakes of law as occurred in this matter;

3. Two of the three cases assert estoppel against private parties, not political subdivisions;

4. The JPA was never presented to or approved by the court. The settlement agreement was presented to the trial court only in the context of seeking an order of dismissal. There is no indication a hearing was held. Certainly, no Art. VIII, § 3 analysis was provided to or considered by the district court with respect to the JPA or the settlement agreement. There is no indication the court analyzed the JPA or the settlement agreement for compliance with Art. VIII, § 3 or the Joint Powers Act; and

5. Even if the settlement agreement was "approved" by the district court, it does not differ from a judicial confirmation where the Supreme Court always gets the final word on the constitutionality and legality of an agreement.

Hoaglund v. Ada County, 154 Idaho 900, 303 P.3d 587 (2013) does not support the City's judicial estoppel argument. *Hoaglund* involved an attempt to resurrect a wrongful death claim which Hoaglund had previously voluntarily dismissed. Hoaglund told the court one thing, and then later told the court the exact opposite in order to revive her wrongful death action. The court refused to condone her sworn inconsistent factual statements. There was no allegation of a violation of a statute or the constitution by a public agency.

Neither does *Buckskin Properties v. Valley County,* 154 Idaho 486, 300 P.3d 18 (2013) support the City's judicial estoppel argument. *Buckskin* involved a developer who agreed to contribute road impact mitigation fees to Valley County to gain approval of development. A Development Agreement was entered into pursuant to which the developer paid fees. After the development was approved by the County, and the lot fees were paid, the developer sued the County for return of the fees. The Court held that the developer voluntarily paid the fees, received the benefit of the development agreement, and so could not now contend that he entered the agreement involuntarily. In *Buckskin,* the County adopted a resolution which made moot some of the developer's claims. In oral argument before the trial court, the County attorney stated the County had no intention of rescinding the resolution. On appeal, the Supreme Court affirmed the trial court ruling that the resolution rendered moot several of the developer's claims. The developer's claims were moot because the County no longer engaged in the conduct the developer was seeking to restrain.

It was in response to the developer's hypothetical that the County might rescind its resolution and come back after the developer for illegal impact fees this Court discussed judicial estoppel. In *dicta*, the Court responded to the developer's hypothetical that judicial estoppel would protect the developer from future "sharp dealing or revision of Resolution 11-6 by the County",

Buckskin, 154 Idaho 486, 500, 300 P.3d 18, 29 (2013). In *Buckskin,* there was no assertion of an Art. VIII, § 3 violation as is present in this appeal.

Buckskin is based upon *Loomis v. Church,* 76 Idaho 87, 277 P.2d 561 (1954). *Loomis* refutes the City's judicial estoppel argument. *Loomis* is apparently the first Idaho case to recognize judicial estoppel. Accordingly, *Loomis* provides important guidance regarding when and if judicial estoppel may be applied.

Loomis was a passenger in a car driven by Church. Loomis was injured when the vehicle she was riding in collided with a Garret Freightlines truck. Loomis first sued Garret Freightlines and made sworn statements to the Court that Garrett Freightlines was solely responsible for the accident; and Church was free from fault. Loomis obtained a settlement from Garret Freightlines based on those sworn statements.

Loomis then sued Church alleging directly opposite facts. In her lawsuit against Church, Loomis asserted that Church was not only at fault, but acted with reckless disregard by refusing to stop at a stop sign before crossing State Highway 26, even though Loomis asked Church to stop and Church verbally refused.

Loomis' specific factual allegations in her sworn statements and pleadings in her second lawsuit were in direct contradiction with those in her first lawsuit. This Court was concerned these contradictory factual allegations created a fraud on the courts. The Court first identified the parameters of judicial estoppel:

> It is quite generally held that where a litigant, by means of such sworn statements, obtains a judgment, advantage or consideration from one party, he will not thereafter, by repudiating such allegations and by means of inconsistent and contrary allegations or testimony, be permitted to obtain a recovery or a right against another party, arising out of the same transaction or subject matter.

Loomis, 76 Idaho 87, 93, 277 P.2d 562, 565 (citations [all from other states] omitted).

Idaho's foundational case for judicial estoppel requires sworn misrepresentations of fact. The doctrine has no applicability to a mutual mistake of law such as occurred when the JPA and the settlement agreement were signed. Here, there are no allegations of inconsistent sworn factual allegations arising to the level of a fraud upon the court.

Finally, the City cites *Indian Springs, LLC v. Indian Springs Land Investment, LLC,* 147 Idaho 737, 215 P.3d 457 (2009. *Indian Springs* also involved inconsistent sworn factual statements presented to the Court. In a mortgage foreclosure proceeding, the holder of the mortgage alleged a principal balance of the note of $188,000 in one case, but then in a later case alleged a principal balance of $270,637.50. These contradictory factual allegations triggered the consideration of judicial estoppel.

The Court stated that "[b]ecause judicial estoppel is an equitable doctrine existing to protect the dignity of the judicial process, it is invoked by the court at its discretion." 147 Idaho 737, 748, 215 P.3d 457, 469. The Court noted that "...the party asserting judicial estoppel must show that the sworn statement at issue was used to obtain a judgment, advantage or consideration from another party." *Indian Springs* 737, 749, 215 P.3d 457, 469. (Emphasis added.) Because the party claiming judicial estoppel failed to show that the other party made sworn factual misstatements intending to gain an advantage, this Court refused the invitation to invoke judicial estoppel.

Judicial estoppel cannot salvage the JPA. This Court has repeatedly held estoppel cannot be used to enforce an agreement which violates Article VIII, § 3. Judicial estoppel applies only to inconsistent sworn factual statements. Here, there was, at most, a mutual mistake of law. As stated in *Indian Springs*, the doctrine of judicial estoppel is invoked only at the discretion of the court to prevent an attack on the integrity of the judicial system where a litigant is playing fast and loose with specific factual representations made to the court. Here, there were no inconsistent sworn

factual statements that put the integrity of the court at risk. Rather, the City and IHD represented to the district court in 2003 they intended to enter into a JPA to resolve pending litigation. This representation was true. Certainly, had the parties represented to the district court they intended to enter a JPA that violated the Idaho constitution, the stipulation to dismiss would not have been granted by the district court.

Unfortunately, the JPA as written included terms which were prohibited by the Constitution and the Joint Powers Act. Under such circumstances, judicial estoppel should not be invoked in this case. Equitable remedies should be invoked to support and uphold Idaho's Constitution and statutes; not to affirm void agreements made in violation of those provisions.

The City argues that because the JPA was part of a settlement agreement, it should be immune from compliance with Idaho's constitution. The same question was before this Court in *Boise Development Company, Ltd. v. Boise City,* 26 Idaho 347, 143 P. 531 (1914). Boise entered into a multi-year agreement to settle on-going litigation. The Court held the settlement agreement violated Art. VIII, § 3 and accorded no preferential treatment to the agreement because it was a litigation settlement agreement. A void agreement is void even if the parties had a noble intent when the agreement was drafted.

IX. THE TRIAL COURT ERRED IN OTHER APSECTS OF ITS DECISION

A. The district court erred in declaring the City's rights under the JPA and the MOU.

In its response the City claims it is undisputed that not all City residents paid their taxes on time. The City also claims IHD previously paid to the City all delinquent taxes owed as they were paid. The City ignores it is undisputed that IHD has never paid the City late fees and interest associated with the collection of delinquent taxes. R p. 236.

The City argues there can be only one reasonable interpretation of the contract. The City adopts the trial court's analysis, arguing the plain language of the contract required IHD to remit all gross amounts of money collected for IHD from City residents, regardless of whether it was for ad valorem taxes, penalties or interest.

Returning to the fundamental proposition raised in the opening brief, if an agreement or contract is ambiguous, the resolution of any ambiguity raises a question of fact for the trier of fact. *St. Clair v. Krueger*, 115 Idaho 702, 704, 769 P.2d 579, 581 (1989); *Mountainview Landowners Coop. Ass'n, Inc. v. Cool*, 139 Idaho 770, 772, 86 P.3d 484, 486 (2004). The preliminary question of whether a contract is ambiguous is a question of law over which this Court exercises free review. *City of Chubbuck v. City of Pocatello*, 127 Idaho 198, 201, 899 P.2d 411, 414 (1995). When an instrument is ambiguous in nature, the intention of the parties as reflected by all of the circumstances in existence at the time the agreement was created must be considered in construing the agreement. *Cusic v. Givens*, 70 Idaho 229, 215 P.2d 297 (1950); *Quinn v. Stone*, 75 Idaho 243, 250, 270 P.2d 825, 829-30 (1954). An instrument which is reasonably subject to conflicting interpretation is ambiguous. *Latham v. Garner*, 105 Idaho 854, 858, 673 P.2d 1048, 1052 (1983).

The City does not disagree that the contract does not define the terms property tax funds or tax revenues. The City does not address there is no uniformly recognized legal meaning for these terms.

Instead, the City contends IHD's interpretation of the contract is unreasonable because it ignores the modifier "all" in the contract. The contract provided:

> "The District at the present time and in the future will levy and apply for ad valorem property taxes under the authority granted in Chapter 13, Title 40, Idaho Code. The District will pay over to the City all property tax funds from such District levies on all property located within the city limits. On the basis of present tax rates this amount is presently approximately $350,000 per year. District, upon receipt of tax revenues, forward to the City all tax revenues received by the District . . . [sic]."
>
> R p. 39.

The City maintains this language is unambiguous and can have only one meaning.

In an attempt to prove its point, the City notes under I.C. section 40-805 the County has the obligation to pay to highway districts all district tax monies when they are collected, and to include in the County's final payment the district's proportionate amount of delinquent taxes, interest and costs on all tax sales and redemptions. The City claims the parties intended to incorporate this statute into interpreting the contract because the adjective "all" is utilized in the contract. In other words, the City's argument does not rely upon the plain wording of the contract. Instead, the City resorts to matters outside the contract to argue the intent of the parties at the time the contract was created.

In advancing this argument, the City ignores that IHD has advanced a reasonable interpretation of the contract clause based upon the intent of the parties when the agreement was formed.

To reiterate what IHD raised in its opening brief, the Idaho Constitution defines taxation as revenue gained by levying a tax on the value of property. Idaho Const. Article VII, section 2. The chapter and title of Idaho Code referenced in the JPA grants a highway district the power to levy ad valorem taxes. Idaho Code section 40-1309(3). Idaho Code section 40-801 reiterates this power, indicating that highway districts are empowered, for the purpose of construction and maintenance of highways and bridges under their jurisdiction, to make highway ad valorem tax levies. These tax levies are certified to the county auditor for tax collection and apportioned to the highway districts in the amount their levies produced exclusive of ordinary collection fees owed to the county. Idaho Code section 40-801(2). These statutory provisions existed when the parties chose the language in the agreement and it was reasonable for IHD to interpret this clause to mean the payment of only the collected ad valorem taxes.

When property taxes are delinquent, late charges and interest are assessed. Idaho Code section 63-1002. Late charges are not defined as taxes. Idaho Code section 63-201(12). These code sections

were also in existence when the agreement was prepared. The City does not explain why it believes only Idaho Code section 40-805 controls interpretation of the contract or guides an analysis of the intent of the parties at the time the contract was formed. IHD contends the parties did not intend to include penalties and interest at the time the contract was executed. Its decade long course of dealings with the City reinforce this interpretation.

The City perpetuates the district court's error by isolating its analysis to a few chosen words in the payment clause and ignoring the entire context of the agreement. The agreement mandated that IHD would levy and apply for ad valorem property taxes under the authority of Chapter 13, Title 40, Idaho Code. Following collection of the ad valorem taxes, the agreement required IHD to pay the City all property tax funds "*from such District levies.*" The tax funds referenced were those collected from IHD's levies.

Late charges and interest are not a result of IHD's levy. Rather, they are assessed later because of a delinquency in payment of the levy. A reasonable interpretation of this clause was IHD was to utilize its power to levy ad valorem taxes and pay to the City that portion of ad valorem taxes collected on real property located within the City. The trial court erred in determining the contract was unambiguous, and the only reasonable interpretation was that the contract required IHD to include in its payment to the City penalties and interest collected on delinquent taxes.

B. The trial court erred in awarding damages to the City for breach of contract

The City contends on appeal it only sought declaratory judgment and therefore had no obligation to prove an amount of past due penalties and interest it claimed was due. In its Final Judgment filed November 22, 2014, the trial court declared "[t]he Independent Highway District is directed to include in its payment of ad valorem taxes to the City of Sandpoint all taxes collected pursuant to Idaho Code section 40-800 et seq., *including without limitation any collection for past,*

present or future delinquent taxes, interest and costs, that are collected as a result of Independent Highway District levies on the taxpayers of the City of Sandpoint." R p. 386 (emphasis added). The district court also decreed post judgment interest at the legal rate would accrue until the judgment was paid in full. *Id.*

The City claims it sought a declaration of rights pursuant to I.C. section 10-1203. Relying upon *Sweeney v. American Nat. Bank*, 62 Idaho 544, 115 P.2d 109 (1941), the City argues the trial court could both construe the contract and award damages pursuant to its request for declaratory judgment. The City also claims the only monetary relief it sought was the award of attorney fees. This claim contradicts the City's pleadings. Count One of the City's complaint indicated it was a claim for breach of contract.

Further, the relief the trial court awarded was contrary to Idaho law. As set forth in *Hull v. Giesler*, 156 Idaho 765, 331 P.3d 507, 516 (2014), the City had to prove it was injured by the breach of contract and the amount it was owed had to be proven with reasonable certainty. Even though the trial court acted within its powers to declare the rights of the parties, it could not excuse the City from meeting its burden of proof as a prerequisite to a damage award.

The district court found IHD had breached the terms of the JPA by failing to include late charges and interest in the prior year's payments to the City. It ordered IHD to pay these unspecified amounts to the City. It was error for the trial court to require IHD in its judgment to include past amounts in its payment to the City when there was no evidence of damages from the alleged breach. The trial court erred in making such an order.

C. The district court's permanent injunction was improper in form

The City claims in its response to this issue it is premature for the trial court to enter a preliminary injunction because one is unnecessary given IHD's continuing payment of its

obligations under the contract. The City claims the issue was not before the trial court when it issued its final judgment. This claim is incorrect. If the final judgment included a permanent injunction, it had to comply with Idaho Rule of Civil Procedure 65(d). The trial court's final judgment merely indicated "[a] permanent injunction shall issue with regard to the obligation." This permanent injunction failed to comply in form or scope with I.R.C.P. 65(d). The trial court erred in the entry of a permanent injunction using such vague language.

D. The District Court erred in its award of attorney fees

The City does not disagree four major motions were involved in this litigation: IHD's motion to dismiss, IHD's motion for permissive appeal, the City's motion for summary judgment and the City's motion for an award of attorney fees. The City contends that IHD failed to establish a lower prevailing rate for like work in the area. In advancing its argument, the City utilizes a very narrow definition of "like work". IHD utilized complex litigation as the standard for like work which it submitted to the district court. The City claims that the correct focus for like work is statutory construction and constitutional analysis.

Litigation attorneys commonly engage in statutory construction. It is also not uncommon for litigation attorneys to utilize and analyze constitutional provisions, especially when working in the field of government finance. The City bolsters its argument by implying no local attorney in the First Judicial District had such experience necessitating the use by the clients of Spokane, Washington and Boise, Idaho attorneys. The City represents that the case started out with the City attorney and a Coeur d'Alene attorney, and then the clients reached out to more distant attorneys, implying such action was taken due to the inexperience of the local bar in such work. However, IHD started with a Boise attorney and then hired a local attorney to assist in the litigation. Thus, the City's argument rests upon a false premise.

On the attorneys who provided direct information to the district court regarding the prevailing rate in the local area, the City claims none would be competent to engage in developing the constitutional and statutory analysis which the City's outside counsel utilized. There is no such evidence before this Court. Every one of the attorneys who provided information of local rates have practiced for a quarter century or longer. Every one of them have engaged in complex litigation. They were all competent to testify to the prevailing rate for complex litigation in the local area. Their testimony was relevant and should not have been disregarded by the trial court.

Mr. Andersen opined in his affidavit that the rates charged for legal services for his firm were prevailing and competitive in the area, and were reasonable and customary hourly rates for this type of legal work. In its response, the City claims "like work" is statutory and constitutional and statutory municipal corporate litigation, analysis. No support was provided by the City for this opinion. Mr. Andersen provided no information at the time of requesting attorney fees that local rates were different when a constitutional or statutory municipal issue were involved in the litigation, and IHD's counsel is unaware of such a distinction in the local bar.

In response to the issue raised about Ms. Anderson's experience with Idaho law and lack of admission to practice in Idaho, the City correctly notes it could have applied for a *pro hac vice* admission. However, this observation does not address the substance of IHD's argument regarding Ms. Anderson's time expended in the matter. The City claims that "like work" is constitutional and statutory municipal corporate litigation, not complex litigation. Neither Mr. Andersen or Ms. Anderson were identified as primarily practicing in constitutional and statutory municipal corporate litigation. Ms. Anderson was characterized in the request for attorney fees as spearheading the firm's general litigation research for all major litigation. In other words, she was identified as

specializing in complex litigation. Thus, the comparison of the rates to local attorneys dealing in complex litigation was appropriate.

The City also claims IHD's position understates the magnitude and complexity of the issues raised in the district court, and these factors were reflected in the time spent and hourly rate charged. The City contends the need for immediate and successful resolution also was a factor in awarding a larger amount of attorney fees. Rule 54 contains no such factor. I.R.C.P. 54(e). The closest factor is 54(e)(3)(F), which allows considering time limitations imposed by the client or the circumstances of the case. However, this factor was not argued below or analyzed by the trial court as a factor it considered in awarding the fee. The City enunciates no reason on appeal why this factor would dictate an award higher than the prevailing local rate.

The trial court drew no distinction between complex civil litigation and litigation involving constitutional provisions and statutory interpretation. Rather, the trial court focused upon longevity of time practiced by the attorneys performing the City's legal work. As set forth in the opening brief, the district court engaged in no analysis of the prevailing rate for like work in the geographic area in its award.

The City further maintains its time was not excessive because statutory and constitutional issues were involved. The City contends the amount of time dedicated to the summary judgment was a function of IHD filing a response in the summary judgment. In its opening brief, IHD carefully analyzed and allocated the time the City spent on specific tasks. That time included 1.5 hours to prepare a response to an auditor at the cost of $487.50. R. p. 327. Such response was unrelated to the litigation, but the district court awarded attorney fees for this unrelated item.

The remaining time which was devoted to the motion practice was excessive. While the constitutional analysis required a review of several cases spanning decades, the case law was well

established. The City presented no argument to overrule that law. IHD recognizes the litigation was complex, but it was not of such a magnitude that justified the time dedicated to the motion practice which occurred.

The heart of the case was two documents; the JPA and an MOU. No discovery occurred. The case was decided on motion practice. Under such circumstances, IHD submits the time devoted to the motion practice was excessive as outlined in its opening brief.

Regarding the amount involved and the results obtained, no evidence was ever admitted in the record regarding the amount involved. The City claimed, without support, in its memorandum of costs that the amount exceeded $300,000. R. p. 311. It also said that IHD sought recoupment of the entire amount paid plus interest, which was rejected and summary judgment granted for the City. *Id.* At no time did IHD raise recoupment as an affirmative defense. IHD raised other defenses in its motion to dismiss, but recoupment was not one of them. While summary judgment was granted to the City, no such defense was ever advanced by IHD.

The City contends the trial court did not err in giving the I.R.C.P. 54(e)(3)(G) factor the most weight in its award of attorney fees. While consideration of the factor is not inappropriate, the trial court's use of it as a punitive measure was inappropriate. It is clear from the trial court's holding it utilized this factor as a punitive measure against IHD for raising the constitutional issue. Rule 54 utilizes no punitive component as a factor the trial court is to consider in awarding fees.

The City claims other factors support its position. It did not raise these other factors to the trial court. The City maintains the City Attorney worked on the case, yet his efforts were not reflected in the fees requested by the City. The City gives no explanation why the City Attorney's time was excluded by the City in its fee request. The City should not be allowed to reinforce its fee request on appeal by claiming unreported time which it never raised or argued below.

E. A New Trial Judge should be assigned on Remand

This Court twice, has assigned a new judge on remand, both cases which originated in the First Judicial District. *Capstar Radio Operating Co. v. Lawrence*, 153 Idaho 411, 424, 283 P.3d 728, 741 (2012); *Sky Canyon Properties, LLC v. The Golf Club at Black Rock, LLC*, ___ P.3d ___, 2015 WL 5719996 (September 30, 2015). In *Capstar*, this Court found a new presiding judge would provide a much needed fresh perspective and eliminate any concerns relating to the repeated assertions of judicial bias. In *Sky Canyon,* this Court replaced the district court on remand following a position by the trial court characterized as ridiculous.

In this matter, the district judge took several opportunities to express his displeasure with IHD's position, even relying upon facts that weren't in the record, pre-determining issues before they were ripe, introducing arguments not presented by the City, and preventing IHD from being heard on its presentment of judgment by entering another judgment (not proper in form).

The City contends forum shopping is not favored. IHD does not disagree. However, another precept of trial practice is all parties are entitled to a fair and unbiased decision maker in a litigation. It is the job of the attorneys to be advocates for the parties, not the trial judge. From IHD's perspective, the trial court abandoned its proper role and became an advocate for the City, even pointing out to the City when it was not relying upon the proper statute for attorney fees. The trial court was so eager to rush to judgment, it even ignored crucial deadlines. Assuring the parties have such a fair tribunal does not violate I.R.C.P. 40(d)(1) as suggested by the City.

ATTORNEY FEES ON APPEAL

The City has advanced a request for attorney fees on appeal under I.C. section 12-117. IHD does not believe the City should prevail on appeal, and would not qualify for attorney fees on appeal.

The City also claims it is entitled to attorney fees pursuant to I.C. section 12-121. While advocating on the one hand this case is complex in scope and magnitude because of the constitutional and statutory issues, the City maintains in this portion of its argument that the case is merely about a contractual obligation IHD failed to perform.

IHD's position on appeal was not frivolous. The district court's analysis was flawed in several aspects. IHD has brought forward a meritorious appeal.

CONCLUSION

The framers mandated a pay-as-you-go system for Idaho local governments. Idaho local government agencies cannot bind future governing boards to multi-year obligations without walk-away provisions that preserve future discretion. The JPA binds future IHD commissioners into perpetuity with no ability to make a choice to walk away from the agreement each year. It is this choice the Framers sought to protect by prohibiting debts or liabilities that take that choice away. Prior IHD elected officials cannot deprive future elected officials of having authority over how to spend future IHD revenues, absent a vote of the people.

DATED this 8th day of February, 2016.

SHERER & WYNKOOP, LLP

David E. Wynkoop

JAMES, VERNON & WEEKS, P.A.

By Susan P. Weeks

Susan P. Weeks

Attorneys for Respondent/Appellant
Independent Highway District

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of February, 2016, I caused a copy of the foregoing **APPELLANT'S REPLY BRIEF** to be served by the method stated below, and addressed to :

Scot R. Campbell ISB No. 4121
Sandpoint City Attorney
1123 Lake Street
Sandpoint, Idaho 83864-0871
Telephone 208-263-0534
Facsimile 208-255-1368

_✓_ via U.S. mail, postage prepaid
_____ via facsimile to 208-255-1368

C. Matthew Andersen ISB No. 3581
WINSTON & CASHATT, LAWYERS
250 Northwest Boulevard, Suite 206
Coeur d'Alene, Idaho 83814
Telephone 208-667-2103
Facsimile 208-765-2121

_✓_ via U.S. mail, postage prepaid
_____ via facsimile to 208-765-2121

Christine Elarose