11-12-2015

City of Sandpoint v. Independent Hwy. Dist. Appellant's 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 OPENING BRIEF

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

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"Act" – Idaho Joint Powers Act, I.C. § 67-2326, *et seq.*

"City" – City of Sandpoint

"IHD" – Independent Highway Dist

"JPA" – Joint Powers Agreement

"MOU" Memorandum of Understanding

"SJ Decision" Memorandum Decision and Order Granting Plaintiff City of Sandpoint's Motion for Summary Judgment

I. STATEMENT OF THE CASE

A. Nature of the Case

Several acronyms are utilized in this brief. These acronyms are set forth at the end of the Table of Cases and Authorities.

This appeal presents a request for a determination of the constitutionality and legality of a JPA and an MOU entered into between the City and IHD. The City filed a request for an injunction and declaratory relief seeking a declaration from the trial court that the JPA and MOU were valid and enforceable. R. pp. 19-47. The agreements followed extended litigation between the parties and were contemplated during execution by the governing bodies to resolve litigation between the entities regarding jurisdiction, operation, and maintenance of streets located within the City's boundaries. *Id.*

The 2003 JPA by its terms purported to be perpetual and required IHD to pay to the City all IHD ad valorem taxes collected from properties within City boundaries. R. pp. 37-42. A related Memorandum of Understanding ("MOU") was executed September 14, 2005, surrendering IHD's jurisdiction of highway districts streets within City boundaries to the City. R. pp. 43-44. IHD repeatedly attempted to renegotiate the JPA with the City. R. p. 233. The City declined negotiation and sued seeking a declaration of the parties' rights under the JPA and MOU after IHD notified the City it would no longer voluntarily pay over tax revenues under the JPA because IHD's Board believed the JPA was illegal. R. pp. 45-47.

B. Course of Proceedings Below

The City filed its Complaint for Declaratory and Injunctive Relief on August 16, 2013. R. p. 19. IHD moved to dismiss the City's Complaint on September 9, 2013, asserting that the JPA was void and unenforceable. R. pp. 49-51; 56-72. IHD contended that an agreement entered into by an Idaho political subdivision which created a multi-year indebtedness or liability violated Art. VIII, § 3 of the Idaho Constitution and the Idaho Joint Powers Act. R. pp. 56-72.

On December 9, 2013, the district court issued its memorandum opinion which denied the motion to dismiss. R. pp. 154-175. The district court concluded that the JPA created a multi-year liability, but the liability was lawful. R. p. 163. The district court declined to decide if the JPA violated public policy, noting it presented a question of fact. R. p. 169.

Following the decision, the parties stipulated to a reciprocal preliminary injunction which allowed IHD to make payments to the City of ad valorem taxes without such payments being deemed voluntary payments. R. pp. 176-178. Based upon the stipulation, the district court entered a Reciprocal Preliminary Injunction Order on December 16, 2013. R. pp. 179-181. The district court granted a Rule 12 permissive appeal which this Court declined. R. pp. 194-195; 272.

The City moved for summary judgment which was scheduled for hearing on July 22, 2014. R. pp. 187-193. The court granted the City's summary judgment motion by decision dated July 31, 2014. R. pp. 273-290. The trial court incorporated by reference into the SJ Decision it's analysis from the memorandum denying the motion to dismiss. R. p. 278. The district court entered an order granting declaratory relief on July 31, 2014. R. pp. 291-295.

On July 31, 2014, the district court entered the City's proposed judgment. R. pp. 291-295. On August 13, 2015, the City filed its memorandum of costs and supporting affidavit seeking costs and attorney fees. R. pp. 298-334. On August 21, 2014, eight days after the City filed its memorandum of costs, the trial court entered its order granting the request for attorney fees and costs. R. pp. 335-337. At the same time, the district court entered the City's proposed Declaratory and Monetary Judgment which included attorney fees as costs. R. pp. 338-341.

On August 22, 2014, one day after the entry of the judgment, the district court entered an amended order granting the City's request for attorney fees and costs. R. pp. 342-344. The trial court also entered an amended declaratory and monetary judgment. R. pp. 345-349.

On August 27, 2014, five days after the entry of judgment, IHD filed its objection to the memorandum of costs. R. pp. 353-354. IHD's objection was supported by a memorandum and affidavits. R. pp. 355-369; AR Affidavit of Douglas S. Marfice filed September 8, 2014.[1] On August 27, 2014, IHD also filed its motion for reconsideration of the district court's entry of the attorney fee judgment because the order was entered before consideration of IHD's timely objection. R. pp. 350-352. On October 24, 2014, the district court ruled on the motion to reconsider. AR Memorandum Decision and Order Granting in Part (As to timing of this Court's Prior Decision) and Denying in Part (As to Amount of Attorney Fees Previously Awarded Defendant IHD's Motion for Reconsideration of Attorney Fees) filed October 24, 2014.

Although it appeared the judgments entered by the district court did not comply with Rule 54, I.R.C.P, out of an abundance of caution, IHD filed a notice of appeal on September 4,

[1] AR in this brief stands for "Augmented Record". Two augmented records were filed in this matter by IHD.

2014. R. pp. 370-373. On September 23, 2014, this Court conditionally dismissed the appeal because the order did not comply with Rule 54, I.R.C.P. R. p. 377. On October 17, 2014, IHD filed a response to the conditional dismissal, indicating a hearing was scheduled for October 23, 2014 with the district court to bring the matter of the judgment's compliance with I.R.C.P. 54(a) to the district court's attention. R. pp. 378-379. The trial court's decision on reconsideration filed October 24, 2014 did not address the non-compliance issue. *Id.* On October 28, 2014, IHD filed a notice of hearing regarding a motion for presentment of judgment. AR Notice of Hearing RE: Defendant's Motion for Presentment of Judgment filed October 28, 2014. On November 14, 2014, prior to the presentment hearing, the trial court entered a second amended declaratory and monetary judgment. R. pp. 381-384. On November 24, 2014, the trial court entered a final judgment. R. pp. 385-387.

On December 8, 2014, IHD moved to alter or amend the judgment, and a memorandum and an amended memorandum to support its motion to alter or amend the judgment. AR Motion to Alter or Amend Judgment filed December 8, 2014; Memorandum in Support of Defendant's Motion to Alter or Amend Judgment filed December 8, 2014; and Amended Memorandum in Support of Motion to Alter or Amend Judgment filed December 8, 2014. On December 30, 2014, the City filed its response, together with a supporting declaration. AR City of Sandpoint's Response to Defendant's Motion to Alter or Amend Judgment filed December 30, 2015; AR Declaration of C. Matthew Andersen filed December 30, 2014.

On February 4, 2015, IHD filed a notice of hearing on its motion to alter or amend the judgment. AR Notice of Hearing re: Defendant's Motion to Alter or Amend Judgment filed

February 4, 2015. On March 26, 2015, IHD filed a second amended notice of hearing of the motion to alter or amend the judgment. AR Second Amended Notice of Hearing re: Independent Highway District's Motion to Alter or Amend Judgment filed March 26, 2015. A reply memorandum in support of the motion to alter or amend the judgment was filed April 2, 2015. AR Reply Memorandum in support of Defendant's Motion to Alter or Amend Judgment filed April 2, 2015. On April 10, 2015, the trial court filed its order denying the motion to alter or amend the judgment. R. p. 388-390.

C. Statement of Facts

The JPA was entered between the City and IHD in 2003 to resolve then pending litigation between the entities. R. pp. 37-41. The JPA provided IHD would "pay over to the City all property tax funds from such District levies on all property located within the city limits." R. p. 39. The JPA acknowledged that IHD had the powers provided by Idaho Code section 40-1310, and purported to transfer IHD's jurisdiction to the City over IHD streets located within the City. R. p. 37.

By its term, the JPA indicates it is perpetual. "The duration of this agreement shall be perpetual or until such time as the District and the City jointly and together agree to amend or terminate the same." (Emphasis added.) R. p. 37. The JPA contains no provision for IHD to terminate, modify, or renegotiate the agreement. In 2005, an MOU was entered which supplemented the terms JPA and delegated to the City IHD's jurisdiction to conduct street vacations and hold public hearings to vacate IHD streets located within the City. R. pp. 43-44.

None of the current IHD elected Commissioners signed the JPA. R. p. 41. The 2013 IHD Board of Commissioners made numerous requests to the City to renegotiate the JPA. Affidavit of Marj Tilley. R. p. 233. The City declined or failed to respond to IHD's requests to negotiate. R. p. 241. On July 11, 2013, IHD notified the City it believed the JPA was illegal and made an offer to resolve outstanding differences. R. pp. 45-46. After receiving no response from the City, on July 25, 2013, IHD notified the City it elected to terminate the illegal JPA. R. p. 47. Rather than responding to IHD's request for negotiation and offer of settlement, the City sued IHD, claiming breach of contract; seeking a declaration of the City's rights; and for preliminary and permanent injunction, which lawsuit is the subject of this appeal.

IHD responded to the suit by seeking a dismissal and ruling that the JPA was unconstitutional and violated certain provisions of Idaho statute. R. pp. 49-53; 56-72. Once the trial court denied the motion to dismiss, the City sought summary judgment on all issues. R. pp. 187-193. Notwithstanding the clear holdings from this Court, the trial court issued a summary judgment holding that the JPA complies with Art. VIII, § 3 based upon six conclusions: 1) The JPA creates no indebtedness or a liability in violation of Art. VIII, § 3; 2) Art. VIII, § 3 does not apply to agreements entered into between two political subdivisions; 3) The JPA is legal because it does not obligate IHD general revenues; 4) Art. VIII, § 3 applies only to the purchase of systems and goods; 5) the JPA is legitimized by the special funds doctrine; and 6) the JPA follows the Idaho Joint Powers Act. R. pp. 154-175. The trial court also issued a monetary judgment which is the subject of this appeal. R. pp. 385-387.

II. ISSUES PRESENTED ON APPEAL

A. Did the trial court err in holding that the Joint Powers Agreement complies with Article VIII, § 3 of the Idaho Constitution?

B. Did the trial court err in holding the Joint Powers Agreement complies with the Idaho Joint Powers Act, Idaho Code § 67-2326, *et seq.*?

C. Did the trial court err in its declaration of the City's rights under the JPA and the MOU?

D. Did the trial court err in awarding damages to the City for breach of contract?

E. Did the trial court err in holding that the JPA references to "taxes" included penalties and interest?

F. Did the trial court err in the form of the permanent injunction it issued?

G. Did the trial court err in its award of attorney fees?

H. Should a new trial judge be assigned on remand?

III. STANDARD OF REVIEW ON APPEAL

When reviewing a grant of summary judgment, this Court's standard of review is the same as that of the district court in ruling upon the motion. *Purvis v. Progressive Cas. Ins. Co.*, 142 Idaho 213, 215, 127 P.3d 116, 118 (2005); citing, *Thomson v. City of Lewiston*, 137 Idaho 473, 475-76, 150 P.3d 488, 490-91 (2002). Therefore, this Court reviews the record before the district court, including the pleadings, depositions, admissions and affidavits, if any, to determine *de novo* whether, after construing the facts in the light most favorable to the nonmoving party, there exist any genuine issues of material fact and whether the successful movant below was

entitled to judgment as a matter of law. *Id.; citing, Tusch Enterprises v. Coffin,* 113 Idaho 37, 740 P.2d 1022 (1987); and I.R.C.P. 56(c).

"This Court defers to the factual findings of the district court unless those findings are clearly erroneous. This Court exercises free review of the district court's application of the relevant law to the facts. Constitutional issues are questions of law over which we also exercise free review." *City of Idaho Falls v. Fuhriman,* 149 Idaho 574, 576, 237 P.3d 1200, 1202 (2010) (quoting *City of Boise v. Frazier,* 143 Idaho 1, 2, 137 P.3d 388, 389 (2006))." *City of Challis v. Consent of the Governed Caucus,* 2015 WL 5667481, p. 2 (2015).

IV. ARGUMENT

A. The trial court erred in holding that the Joint Powers Agreement complies with Article VIII, § 3 of the Idaho Constitution.

1. Introduction

The Idaho Constitution strictly prohibits Idaho political subdivisions from incurring multi-year indebtedness or liability without a two-thirds vote of the qualified electors. Indeed, Idaho's constitutional prohibition against incurring multi-year obligations by Idaho's local governments is one of the most restrictive of all the states. Art. VIII, § 3, provides:

> No ...[political] 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 in such year, without the assent of two thirds (2/3) of the qualified electors... Any indebtedness or liability incurred contrary to this provision shall be void. (Emphasis added).

This Court has repeatedly interpreted "that year" and "such year" to mean the year in which the obligation was incurred.

The disputed 2003 JPA was entered without a vote of the qualified IHD electors. Because the JPA created a multi-year indebtedness or liability exceeding 2003 IHD revenue, the JPA is void and unenforceable.

Highway districts may levy ad valorem taxes. Pursuant to Idaho Code section 40-801, highway district property tax revenue collected from properties located within a city is distributed by the county treasurer fifty percent (50%) to the highway district and fifty percent (50%) to the city.[2] The disputed JPA requires IHD to distribute to the City 100% of the tax revenues generated by IHD property tax levy from properties located within the City. R. p. 39. This distribution contradicts Idaho Code section 40-801 and is unique among cities and highway districts in the state of Idaho.

The trial court held that the City is entitled to perpetually receive IHD's share of the property tax revenues from IHD levy in addition to the City's share. R. p. 168. The court recognized the JPA obligation was a multi-year liability. R. p. 163. However, the court wrongly held the multi-year JPA liability complies with Art. VIII, § 3 based on the reasoning that in no future year will IHD's obligation exceed its total revenue received for that future year. R. p. 163. On appeal, IHD contends the JPA is unconstitutional in violation of the Art. VIII, § 3 prohibition against multi-year indebtedness or liability.

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[2] Idaho Code § 40-801 provides: "...the commissioners of highway districts are empowered, for the purpose of construction and maintenance of highways and bridges under their respective jurisdictions, to make the following highway ad valorem tax levies as applied to the market value for assessment purposes within their districts: (a) Two-tenths per cent (0.2%) of market value for assessment purposes for construction and maintenance of highways and bridges ; provided that if the levy is made upon property within the limits of any incorporated city, fifty per cent (50%) of the funds shall be apportioned to that incorporated city."

2. The JPA obligation is an indebtedness or liability

The trial court correctly concluded that: "Because IHD has obligated itself to pay a percentage of the annual revenue it collected on ad valorem taxes, it did incur a liability. R. p. 163.

The definitions of "indebtedness" and "liability" for Art. VIII, § 3, have been analyzed as follows:

> 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. "Liability," however, has been given a broader and more comprehensive definition than "indebtedness," and refers to all kinds and character of debts and obligations for which a municipality may become bound in law or justice to perform." This broad, sweeping definition of "liability" was the basis of Idaho's unique doctrine of constitutional debt limitation, commencing with the leading case of *Feil v. City of Coeur d'Alene,* one of the landmark decisions in the law of municipal debt limitation. (Footnotes omitted).

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.

> [W]hat constitutes an "indebtedness or liability" has been a recurring subject of litigation over the century since the adoption of the Idaho Constitution. In the early case of *Feil v. City of Coeur d'Alene,* the Idaho Supreme Court adopted a far more restrictive view of this term than did the courts of most other states, holding that the vote approval requirement of article VIII, section 3, applied not only to general obligation debt payable from property taxes, but also to indebtedness payable solely from the revenues of revenue-producing public works. The *Feil* court rejected the so-called "special fund" doctrine recognized as an exception to constitution debt limitation provision in the great majority of jurisdictions. Although the Idaho Supreme Court has recognized that some types of obligations do not constitute "indebtedness or liability" within the meaning of the constitution provision, and has also held that the limitation does not apply to certain types of entities, it has never retreated from the holding in *Feil* because special revenue

> debt is an "indebtedness or liability" within the remaining of article VIII, section 3 of Idaho's constitution. (Footnotes omitted).

31 Idaho L. Rev. 417 (1995), p. 455. *Idaho Constitution and Local Governments – Selected Topics,* Michael C. Moore.

> It remains a safe legal proposition that in Idaho, a local government debt or liability extending beyond the current year's revenues, whether in general obligation or a special revenue obligation, requires voter approval, unless it is "ordinary and necessary" or qualifies for one of the other limited exceptions recognized by the court.

Id., p. 456. (Emphasis added).

Idaho Water Resource Board v. Kramer, 97 Idaho 535, 548 P.2d 35 (1978) sheds further light on the definitions of indebtedness and liability for obligations created by the state under Art. VIII, § 1 of the Idaho Constitution; a similar provision to Art. VIII, § 3 applicable to state agencies:

> [A] 'debt' refers to an obligation incurred by the state, which creates a legal duty on its part to pay from the general fund a sum of money to another, who occupies the position of a creditor, and who has a lawful right to demand payment. It contemplates an obligation which is irrevocable and requires for its satisfaction levies beyond the appropriations provided by the Legislature to meet the ordinary expenses of state government for the fiscal year. 'Liability' as used within our constitution, has been afforded a broader and more comprehensive definition. It refers to an obligation one is bound in law or justice to perform.

Kramer, 97 Idaho 535, 556, 584 P.2d 35, 56 (1978) (emphasis added).

The JPA created both an indebtedness and a liability. The JPA created a legal duty for IHD to pay its ad valorem funds over to the City. The City is in the position of a creditor who may demand payment from IHD, i.e., an indebtedness. The City claims in its Complaint that IHD is bound in law or justice to make multi-year payments to the City, i.e., a liability.

The Art. VIII, § 3 case just decided by this Court, *Greater Boise Auditorium District v. Frazier*, 2015 WL 6080521 (October 15, 2015) ("*GBAD*"), confirms at p. 8 the breadth of the liability definition. "[T]he term 'liability' is a much more sweeping and comprehensive term than the word 'indebtedness'", quoting from *Charles Feil v. City of Coeur d'Alene* 23 Idaho 32, 49, 129 P. 43, 649 (1912).

3. The JPA obligation is an illegal multi-year obligation

After correctly acknowledging that the JPA created a liability, the district court incorrectly found the obligation complies with Art. VIII, § 3 because any future liability will not exceed IHD's revenues for any future year. The court stated "the liability does not exceed the income received a year." [Sic]. R. p. 163. From the context of the sentence, it appears that the district court meant "in any given year" or "in a future year" at the end of this sentence. The district court clarified its ruling by stating "so long as IHD's boundaries equal or exceed the City's boundaries, IHD will always receive more revenue than what it has apportioned the City each year because it will receive levies from property in the City limits as well as levies from property outside the City limits." R. p. 163. The district court reasoned that it is acceptable for IHD to obligate future years' revenue if "IHD has not incurred a liability which exceeds its revenue (for each future year)". *Id.* The trial court held that even though the JPA created a long-term liability, the liability was not precluded by Art. VIII, § 3, because it resulted in a future apportionment of revenues. R. p. 163. The trial court's holding is not supported by the language of Art. VIII, § 3 or by any Idaho case law and is an improper constitutional analysis. Any multi-

year obligation which subjects a political subdivision to liability greater than it had the funds to pay during the year the obligation was entered violates the Constitution.[3]

Williams v. City of Emmett, 51 Idaho 500, 6 P.2d 475 (1931) contradicts the trial court's conclusion that potential future revenue can be considered in the constitutional analysis. In *Williams,* the City of Emmett contracted to purchase a street sprinkler system over a three year period. The contract was a multi-year lease agreement with an option to purchase, but without a non-appropriation clause. This Court stated: "It is quite apparent from the record that the necessary revenue to meet the total indebtedness undertaken or liability of this contract was not provided for in the year in which it was contracted, pursuant to any bond election or otherwise." *Williams,* 51 Idaho 500, 504, 6 P.2d 475, 476 (1931) (emphasis added). The appropriate inquiry under Art. VIII, § 3 is not whether potential revenue will be available in each future year to satisfy an obligation entered in a prior year. Rather, the key question is whether there is revenue available to satisfy all future years' obligations in the year the obligation was created. In other words, a present liability is created on the date the multi-year obligation is incurred. The *Williams* Court emphasized the reasoning for this strict analysis by quoting with approval from the decision of Judge Deitrich in *Dexter Horton T. & Sav. Bank v. Clearwater County,* 235 F. 743, 754 (Idaho 1916) that:

> The Idaho Constitution is imbued with the spirit of economy, and in so far as possible it imposes upon the political subdivisions of the state a pay-as-you-go system of finance. The rule is that, without the express assent of the qualified electors, municipal officers are not to incur debts for which they have not the funds to pay.

[3] There are several exceptions to this rule more fully discussed below. None of the exceptions are applicable to the case at bar.

Williams, 51 Idaho 500, 505, 6 P.2d 475, 476 (1931).

Williams further elaborated on the intention of the constitutional convention by including the language of Art. VIII, § 3 within the Idaho Constitution, stating:

> Municipalities in this state have by one engagement or another endeavored to acquire property, the cost of which was beyond the revenue provided for it in the current year without the bond election and without provision for the annual tax required by the Constitution. This of course has always been upon the theory that the undertaking on the part of the city in the matter was short of a promise constituting an indebtedness as contemplated by the Constitution. By virtue of the decisions in such cases, the law with reference to the effect of this section of the Constitution is pretty well settled in this state.

Williams, 51 Idaho 500, 506, 6 P.2d 475, 477 (1931) (emphasis added). The revenue availability analysis under Art. VIII, § 3 is based upon the year in which the obligation is incurred, not revenue availability for future years.

Williams then considered the argument that no indebtedness or liability was created because payments would be made strictly from the revenue generated from the equipment in future years. This argument is sometimes referred to as the special fund doctrine.

> It is claimed that the city may enter into a binding lease for future years for services needed in those years; that such an agreement is not creating a present indebtedness within the meaning of this constitutional provision. The court expressed a contrary view, and we think properly, in *Boise Dev. Co. v. Boise City,* 26 Idaho 347, 143 P. 531, 535. On this point the court said:
>
> "But if this contract was valid, would not the courts intervene to compel the city authorities to comply with all its terms and provisions? Conceding that it is true that it would not be 'legally permissible' to call the aggregate amounts in the contract to be paid a present *debt*, then we submit that it would be a 'present *liability*' for such aggregate amounts. If the contract was valid, by its terms $1225 would become due at the end of each quarter of each year of its existence, as the services were performed, from the beginning of said services to the

> expiration of the five years for which it was made, and this sum would then be a *debt*, but the city incurred a liability for the aggregate sum of $24,500 at the date the contract was executed."[4]

Williams, 51 Idaho, 500, 506-507, 6 P.2d, 475, 477 (1931) (emphasis added). The phrases "that year" and "such year" contained in Art. VIII, § 3 mean the year in which the obligation was incurred (2003 in this IHD/City case) not the future years in which the payments are owed.

Similar to the district court's holding, it was argued in *Williams* that the obligation created no multiple year indebtedness or liability but was merely a pledge of future revenues. *Williams* flatly rejected this argument.

> ... [T]his court has held that a city cannot pledge its revenues from any source whatever without creating an indebtedness subject to this constitutional restriction.

Williams, 51 Idaho, 500, 507, 6 P.2d, 475, 477 (1931) (emphasis added). The *Williams* Court upheld the trial court judgment enjoining further performance of the multi-year obligation.

The holding and reasoning of *Williams* was reaffirmed in *Hanson v. City of Idaho Falls,* 92 Idaho 512, 446 P.2d 634 (1968) and recently reaffirmed in *GBAD, supra.* This Court held in *GBAD* that a lease agreement which can be terminated each year does not violate Art. VIII, § 3. *GBAD* relied heavily on *Williams,* stating that "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*, p. 9. *GBAD* summarized the reasoning of *Williams* by stating "this Court aggregated all the lease payments to which the governmental

[4] Under the same logic, the JPA created an indebtedness or liability of seven million dollars to IHD over a twenty-year period. R. pp. 39, 163. Seven million dollars far exceeds IHD's 2003 budget. However since there is no method for IHD to terminate the JPA, the liability **far exceeds** seven million dollars and is mathematically infinite.

subdivision had bound itself (in that case the full length of the entire multi-year lease) and used that as the measure of 'liability' that the subdivision would need to be able to pay off in the year in which it entered the lease." *Id.* "We reaffirm that principle now. 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 p. 10 (emphasis added). The Court emphasized that the *GBAD* lease was only valid because the lease was renewable year to year at the "sole discretion" of *GBAD*, p. 13.

The JPA is unconstitutional because IHD did not have funds on hand in 2003 to satisfy all future liabilities created by the JPA. [5] Since the JPA obligated IHD to make multi-year payments to the City, all future payments must be considered to test the constitutionality of the JPA. Such consideration is compelled because failure to make future payments constitutes a breach of the JPA for which IHD is bound in law or in justice as demonstrated by the filing of the present suit.

The trial court reasoned that the JPA complied with Art. VIII, § 3 because it created only a "contingent" liability since IHD would have no liability to the City if IHD levied no property taxes. R. p. 161. The court wrongly concluded from this observation that the liability was contingent, and Art. VIII, § 3 was not implicated. The trial court cited no authority for its analysis that a contingent liability is an exception to the Art. VIII, § 3 prohibition. The trial court's reasoning is contradicted by *Williams* and other Idaho cases.

Moreover, the JPA mandates that IHD levy property taxes for all future years (R. p. 39), so the liability cannot be deemed contingent. IHD is perpetually obligated by the JPA to levy and

[5] The amount paid annually under the JPA by IHD to the City was estimated to be $350,000 in the first year. R. pp. 39 and 280.

pay its portion of ad valorem taxes collected in the future over to the City. Even if, *arguendo*, the JPA liability is analyzed as contingent, this Court stated in *GBAD* that the framers intended the Art. VIII, § 3 prohibition to apply to contingent liabilities. *GBAD,* pp. 11-12.

The Idaho Supreme Court has repeatedly and consistently held that Art. VIII, § 3 precludes multi-year obligations such as found in the JPA. This Court comprehensively addressed the Art. VIII, § 3 prohibition in the seminal case of *Charles Feil v. City of Coeur d'Alene,* 23 Idaho 32, 129 P. 643 (1912). In *Feil*, the city entered into a 20-year contract to purchase a water system from a contractor for $180,000. The city pledged to make annual payments to the contractor from the revenues generated by the water system. This Court held the agreement created an "indebtedness or liability" extending beyond the city's budget year in violation of Art. VIII, § 3. *Feil* reviewed the history of Art. VIII, § 3 noting that the language of Idaho's constitution is more restrictive than virtually any other state's constitution. This Court rejected the city's argument that because numerous other states had upheld similar agreements, Idaho courts should follow suit. The *Feil* Court stated "[o]ur constitution specifically prohibits anticipating the income or revenue for more than the current year." *Feil,* 23 Idaho 32, 45, 129 P. 643, 647 (1912).

> [T]he framers of our constitution employed more sweeping and prohibitive language in framing sec. 3 of art. 8, and pronounced a more positive prohibition against excessive indebtedness than is to be found in any other constitution to which our attention has been directed.

Feil, 23 Idaho 32, 49, 129 P. 643, 649 (1912). "The constitution not only prohibits incurring any indebtedness, but it also prohibits incurring any liability." *Id.* The intent of the framers was to

prevent the pledging of future income including "all sources and kinds of income or revenue" *Id.* No Idaho political subdivision "shall incur any indebtedness or liability in any manner, or for any purpose" beyond the current budget year. *Feil,* 23 Idaho 32, 50, 129 P. 643, 649 (1912).

Feil further discussed the breadth of the term "liability", noting several definitions, including "...the state of one who is bound in law and justice to do something which may be enforced by action" and "the state of being bound or obliged in law or justice to do, pay or make good something; legal responsibility." *Id.* Just recently this Court reaffirmed *Feil* and the liability definition discussed in *Feil. GBAD,* p. 8. The *Feil* Court elaborated on why a governing body should not be allowed to financially obligate future governing bodies.

> Suppose, now, after purchasing this property, another city council hereafter to be elected should decline to comply with the promises, agreements and covenants of this ordinance. If the ordinance is legal and valid, would not the courts intervene to compel the city authorities to comply with the provisions and terms of this ordinance and to take such steps as might be necessary to raise the required revenue to meet these obligations...

Feil, 23 Idaho 32, 53, 129 P. 643, 651 (1912).

Feil noted that the framers endorsed Art. VIII, § 3 as means to prevent Idaho's local government agencies from incurring obligations that might bankrupt their future.

The city in *Feil* argued that the multi-year agreement was constitutional since it obligated only future revenues received from the water system to be financed and did not obligate the general revenues of the city— the special fund argument. The *Feil* Court rejected the city's argument, responding that "...the receipts from this source will at once become an *income,* under the provisions of sec. 3, art. VIII, of the constitution, which it is forbidden to pledge or

hypothecate for more than the current year..." *Feil,* 23 Idaho 32, 55, 129 P. 643, 651 (emphasis added); and "[a]fter it owns that property, the receipts from water rents would clearly be an *income* or *revenue* within the purview and meaning of the constitution, but in advance of the purchase it undertakes to appropriate and hypothecate that *income* for a period of twenty years so that it may not be an *income* after the purchase is made." *Feil, 23 Idaho 32, 55, 129 P. 643, 651* (emphasis added). "*Feil's* analysis of the scope of Idaho's constitutional prohibition that has not been superseded by constitutional amendment remains good law." *GBAD*, p. 8.

The very concern expressed in *Feil* and *GBAD* is now squarely before this Court. The City sued IHD to enforce the JPA claiming IHD is obligated in law and in justice to perpetually make multi-year payments to the City. The trial court agreed with the City that IHD is liable to turn over all future years IHD property tax revenues based upon the JPA. The trial court misapplied *Feil* finding *it was* unpersuasive authority. *Feil* remains good law, and its analysis of impermissible obligations has been repeatedly reaffirmed.

In the present case, the 2003 IHD Board pledged **all** future years' IHD property tax revenues. Since the agreement is perpetual and requires mutual consent to terminate, IHD remains bound to make future payments from future revenues. IHD's former Board obligated itself to perpetually levy real property taxes and pay the revenue from such levy to the City. The rationale behind the Constitutional prohibition against pledging future years' revenue is as compelling in the present case as it was in *Feil* and *Feil's* progeny.

The *Feil* Court stated that the Constitution provides the exclusive method for incurring multi-year obligations; specifically, a vote of two-thirds of the electors of the taxing district.

Absent such a vote, no obligation may be incurred beyond the current budget year. No such vote was held by IHD electors. Based upon *Feil* and subsequent Idaho cases, the JPA violates Idaho's Constitution.

Feil was followed in *Miller v. City of Buhl,* 48 Idaho 668, 284 P. 843 (1930). The City of Buhl attempted to purchase an electricity generating system over multiple years. Buhl pledged the future revenues from the sale of power to pay off the purchase price of the system. Citing *Feil*, this Court reaffirmed that Art. VIII, § 3 prohibits Idaho municipalities from incurring obligations which extend beyond the year in which the agreement was made. The Court declined the invitation to overrule *Feil.*

Three recent cases have also reaffirmed *Feil.* In *City of Boise v. Frazier,* 143 Idaho 1, 137 P.3d 388 (2006), this Court had before it another multi-year obligation entered into by a city. This Court followed *Feil* and held that Idaho's political subdivisions are prohibited by Art. VIII, § 3 from entering into multi-year obligations.

City of Idaho Falls v. Fuhriman, 149 Idaho 574, 237 P.3d 1200 (2010), also affirmed the prohibition against multi-year obligations. Idaho Falls entered into a 17-year agreement obligating the city to future purchases of electricity. The Court held that by creating a multi-year obligation, the agreement violated Art. VIII, § 3. The Court noted that the city could incur short-term obligations within the current budget year, but could not incur obligations extending beyond the year in which the agreement was entered.

The city in *Fuhriman* argued that its taxpayers would benefit from the certainty of a long term contract for the purchase of electricity. This Court responded that even if such an

agreement was beneficial to city residents, Art. VIII, § 3 prohibits the city from incurring multi-year obligations. The Court reaffirmed that the Idaho Constitution "imposes upon the political subdivisions of the state a pay as you go system of finance." *Fuhriman,* 149 Idaho 574, 579, 237 P.3d 1200, 1205 (2010), citing *Frazier. Accord. City of Challis v. Consent of the Governed Caucus,* 2015 WL 5667481 (9/25/15).

This Court reaffirmed the holding and reasoning of *Feil* in *GBAD.* The *GBAD* obligation was upheld only because the political subdivision could annually exercise its rights under a non-appropriation clause.

> We thus hold that the Center Lease does not subject the District to more liability than it could pay in the year in which it was entered and therefore does not violate Article VIII, section 3 of the Constitution.

GBAD, p. 14 (emphasis added).

And,

> Therefore, we hold that the overall agreement entered into by the District does not subject it to a long-term liability greater than it had the funds to pay for in the year in which it was entered.

GBAD, p. 15 (emphasis added).

The *GBAD* concurring opinion agreed that the measure of liability includes all future payments to be made under the agreement.

> If the District was contractually obligated to make lease payments in the future, then all of those payments would be aggregated to determine whether the lease violated article VIII, section 3.

GBAD, p. 19.

The 2003 IHD commissioners entered into a multi-year obligation to address a difficult situation, but in doing so violated the reasoning and holdings in *Feil, Buhl, Frazier, Fuhriman* and *GBAD*. The district court found that even though the JPA resulted in IHD incurring a multi-year liability, "the case law cited by IHD (i.e. *Feil, Buhl, Frazier* and *Fuhriman*) simply does not apply to this case." R. p. 160-161. The court was mistaken. These cases (and now *GBAD*) directly apply, holding that Idaho political subdivisions cannot enter into multi-year obligations such as that created by the JPA.

The trial court relied on *Ball v. Bannock County,* 5 Idaho 602, 51 P. 454 (1897) for its reasoning that *Feil* is inapplicable and that the JPA complies with Art. VIII, § 3. R. p. 160-161. Contrary to the court's analysis, *Ball* supports IHD's contention that the JPA is unconstitutional. In 1893, Bannock County contracted to purchase land for a new courthouse and jail for $4,000. The County had 1893 revenue exceeding $30,000. The Court upheld the County's proposed issuance of a $4,000 warrant to purchase the land. Art. VIII, § 3 was not violated because the County had sufficient 1893 revenue to pay for the 1893 expenditure. The Court noted had the County created an obligation in 1893 to pay for the land in future years after 1893, a violation of Art. VIII, § 3 would have occurred. *Ball* stated "it was the intention of the people (in enacting Art. VIII, § 3) to put the several counties, so far as the future was concerned, upon practically a cash basis. This object and intent must be observed. Its violation, either directly or indirectly cannot be tolerated." *Ball,* 5 Idaho 602, 605, 51 P. 454, 455. *Ball* clarified that Idaho political subdivisions cannot be allowed to bankrupt themselves or mortgage their future.

The court below incorrectly stated that Art. VIII, § 3 "prohibits a political subdivision from incurring any indebtedness or liability that exceeds what the subdivision can satisfy in a year without the assent of two-thirds of the qualified electors." (Emphasis added.) R. p. 160. The court wrongly concluded that the phrase "in a year" means any future year.

Such reasoning vitiates Art. VIII, § 3 and defeats the very reason it was placed into Idaho's Constitution. By this reasoning, multi-year obligations are permissible if future revenue will be available to satisfy future obligations. The framers would be appalled at this interpretation. It is not supported by any Idaho appellate decision. The court erred by adopting the City's argument that when pledging future year's property tax revenues "a municipality does not violate the constitutional prohibition on indebtedness when it pays expenses out of revenue for that year". R. p. 160. The trial court's conclusion is contradicted by this Court's admonition that Art. VIII, § 3 allows no Idaho political subdivision "to pledge or hypothecate [income] for more than the current year." *Feil,* 23 Idaho 32, 55, 129 P. 643, 651 (1912).

> This Court stated in the early case of *Theiss v. Hunter,* 4 Idaho 788, 45 P.2 (1896):
>
> > The evident intent of section 3 of article 8 of the constitution of Idaho and the act above cited, was to make the revenue or income collected each year pay such year's indebtedness, unless by the assent of two-thirds of the qualified electors, given as provided by law, other indebtedness was authorized.

Theiss, 4 Idaho 788, 793, 45 P. 2, 3 (1896) (emphasis added). Had the 2003 IHD Board obligated only 2003 revenue, that agreement would have met the *Theiss* criteria. However, by executing the 2003 JPA, IHD obligated IHD revenue for each year - 2003 to the present - and all future years, in violation of Art. VIII, § 3.

4. There is no exception to Article VIII, § 3 for agreements between political subdivisions

The trial court concluded that:

> ...*Frazier, Feil* and *Fuhriman* are all cases involving the municipal purchases of systems or goods from private parties that the municipality would be liable from its general revenues and those are simply not the facts in this case....the case law cited by IHD does not apply to this case."

R. p. 161. (Emphasis in original). The court ruled that Art. VIII, § 3 does not apply to an agreement between two government agencies. The court cited no authority for this conclusion. The language of Art. VIII, § 3 does not contain this exception. IHD is unaware of any Idaho commentator who supports grafting such an exception onto Art. VIII, § 3. Indeed, the reasoning of every Idaho Supreme Court Art. VIII, § 3 case is opposed to the judicial creation of such an exception.

In *Williams*, this Court stated that no undertaking by a political subdivision is legal unless there is adequate revenue to support the undertaking "in the year in which it was contracted." *Williams v. City of Emmett,* 51 Idaho 500, 504, 6 P.2d 475, 476 (1931). *Williams* also held that an Idaho political subdivision cannot "pledge its revenues from any source whatever". *Williams,* 51 Idaho 500, 507, 6 P.2d, 475, 477 (1931). An Idaho political subdivision cannot incur a multi-year obligation "in any manner or purpose," *Boise Development Company,* 26 Idaho 347, 361, 143 P. 531, 535 (1914). None of this reasoning supports an analysis that Art. VIII, § 3 applies only to agreements with "private parties."

The language of Art. VIII, § 3 itself states the breadth of the prohibition by prohibiting such debt "in any manner or for any purpose." No exception was created for obligations entered

into between Idaho political subdivisions. The framers enacted Art. VIII, § 3 to prevent Idaho political subdivisions from bankrupting themselves and their taxpayers or mortgaging their future. It is illogical to prohibit a political subdivision from bankrupting itself by entering into a multi-year obligation with a private party, but to allow the same political subdivision to bankrupt itself by entering into a multi-year obligation with a government agency. Based upon clear Idaho precedent and the broad language of Art. VIII, § 3, the prohibition applies whether the creditor is a private party or a government agency.

5. The JPA obligates IHD general revenue

The trial court reasoned that Art. VIII, § 3 applies only to the pledge of future "general revenues", curiously reasoning that IHD property tax revenues do not constitute IHD general revenues. R. p. 161. Under Idaho Code section 40-801, highway districts may levy ad valorem property taxes within their districts for maintenance and construction of highways and bridges. The County collects the tax revenues. The revenue generated from ad valorem taxes is distributed by counties into the highway district's general fund. The trial judge's assertion these funds are not "future general revenues" is wrong.

Under well settled Idaho law, it is irrelevant whether the property tax revenue is general revenue. Even if the property tax revenue is characterized as special revenue, it is illegal under *Feil* and its progeny for an Idaho political subdivision to obligate future years' revenues.

6. Article VIII, § 3 is not limited to the purchase of systems or goods

The trial court reasoned that Art. VIII, § 3 applies only to an indebtedness or liability for the purchase of a system or goods.

> ...*Frazier, Feil* and *Fuhriman* are all cases involving the municipal purchases of systems or goods from private parties that the municipality would be liable from its general revenues and those are not the facts in this case....the case law cited by IHD does not apply to this case."

R. p. 161. (Emphasis added)

There is no support in Idaho law for limiting Art. VIII, § 3 only to purchases of systems or goods. At least four Art. VIII, § 3 cases dealt with obligations for purposes other than the purchase of systems or goods, i.e. *Ball, Dexter, Boise Development Co.* and *GBAD.* In *Boise Development Company, Ltd. v. Boise City,* 26 Idaho 347, 143 P. 531 (1914), this Court held that a multi-year obligation entered into by the City of Boise violated Art. VIII, § 3. The obligation in *Boise Development* was not entered into for the purchase of systems or goods. Rather, it provided payments arising out of tort liability. While analyzing the breadth of the prohibition of Art. VIII, § 3, this Court communicated a familiar refrain:

> The courts to whose decisions we have above referred have indulged in various subtleties and refinements of reasoning to show that no *debt* or *indebtedness* is incurred where a municipality buys certain property and specifically provides that no liability shall be incurred by the city, but that the property shall be paid for out of a *special fund* to be raised from the income and revenue from such property. The reasoning, however utterly fails when applied to our constitution, because none deals with the word 'liability,' which is used in our constitution, and which is a much more sweeping and comprehensive term than the word 'indebtedness'; nor are the words 'in any manner or for any purpose' given any special attention by the courts in the foregoing cases. The framers of our constitution were not content to say that no city shall incur any 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 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 Development Company, Ltd., 16 Idaho 347, 361, 143 P. 531, 535 (1914), quoting from *Feil* with approval (emphasis added).

Boise Development reiterates that the Art. VIII, § 3 prohibition applies to "all kinds and character of debts and obligations". It is not limited to the purchase of systems or goods. *See* also, *Dexter Horton Trust & Savings Bank v. Clearwater County,* 235 F. 743 (D. Idaho 1916), where the federal district court held the issuance of warrants for payment of labor incurred to value timber properties violated the prohibition of Art. VIII, § 3. Likewise, *Ball v. Bannock County,* 5 Idaho 602, 51 P. 454 (1897) held that Art. VIII, § 3 prohibits multi-year obligations for the purchase of land. Both *Dexter* and *Ball* did not limit Art. VIII, § 3 to the purchase of a "system or goods". Finally, *GBAD* involved a real property lease, not the purchase of a "system or goods". The policy behind Art. VIII, § 3 mandates that no multi-year debt or liability be incurred for any purpose without a vote of the electors. It is not limited to the purchase of systems or goods.

7. Idaho rejects the special fund doctrine

The trial court stated:

> *Feil* and *Miller* were cases where expenses were invalidated because neither fell into a special fund exception (i.e., bonds paid by revenue from the services of the plant that was financed by the bond), but this later became an exception that was amended into Article 8, § 3.

R. p. 162. The trial court concluded that the special fund doctrine applies to the facts of this case. It does not.

The special fund doctrine allows special revenues to be used to pay multi-year obligations if the general revenues of the political subdivision do not become liable to pay for the obligations. While many states have adopted the special fund doctrine as an exception to their debt limitation provisions, this Court has repeatedly rejected the doctrine as contrary to Art. VIII, § 3. In *Feil, Buhl, Williams, Fuhriman* and *Frazier*, the obligations were to be paid using the proceeds generated from the water systems, electrical generating systems, a sprinkler system and a parking garage rather than general fund revenues. The cities argued in each case that under the special fund doctrine the obligations did not violate Art. VIII, § 3 because the general revenues of the cities were not at risk. This Court declined in each case to create a special fund exception to Art. VIII, § 3. Even if the obligation created is not an indebtedness, the obligation is still an illegal liability. Once the revenues are generated they become revenues of the political subdivision, which cannot be pledged on a long-term basis without approval by a two-thirds vote of qualified electors, regardless of how the revenues are characterized.

> Unlike many other state supreme courts, the Idaho Supreme Court has rejected the "special fund" doctrine, which has been summarized by the Idaho Supreme Court as a holding that "a municipality does not contract indebtedness or incur liability, within the constitutional limitation, by undertaking an obligation which is to be paid out of a special fund consisting entirely of revenue or income from the property purchased or constructed."... The special fund doctrine would allow municipalities to issue "revenue bonds," meaning bonds or other indebtedness secured and paid solely by revenue generated by the financed facility, without holding an election and levying a tax to repay the obligations, as would otherwise be required by article VIII, section 3. Article VIII, section 3 has been amended numerous times, to add certain limited "special fund" concepts by

> permitting, for certain entities for certain projects, the ability to incur indebtedness secured by something other than a dedicated tax; however, incurring such indebtedness still requires a vote. A complete exception from the requirements of article VIII, section 3 exists for port districts and entities issuing indebtedness to finance industrial development. (Footnotes omitted) (Emphasis added)

Not to Build: *City of Boise v. Frazier* Further Restricts Local Governments' Ability to Finance Public Projects by S.C. Danielle Quade, 43 Idaho Law Review, p. 329, 331 (2007).

Idaho has adopted several constitutional amendments which authorize the special fund doctrine in limited circumstances. These amendments apply only to specific subjects which are not applicable to this case.

Art. VIII, § 3A was added in 1974 to allow the issuance of multi-year revenue bond financing for pollution control, if approved by a majority of the electors. Art. VIII, § 3B was added in 1978 to permit the issuance of multi-year revenue bond financing for port district facilities and projects. Art. VIII, § 3C was added in 1996 to allow multi-year financing for hospitals and health services. Art. VIII, § 3D was added in 2010 to permit a city owning a municipal electric system to enter into multi-year agreements, with a vote of a majority of the electors to finance electric facilities. Art. VIII, § 3E was added in 2010 to allow multi-year financing for airports and airport related projects. None of these amendments apply to the JPA or the case now before this Court.

The trial judge reasoned that *"Feil* and *Miller* were cases where expenses were invalidated because neither fell into a special fund exception (i.e. bonds paid by revenue from the services of the plant that was financed by the bond) but this later became an exception that was amended into Art. VIII, § 3. *See Asson v. City of Burley,* 105 Idaho 432, 439, 670 P.2d 839, 846.

(1983)." R. p. 162. The trial court's reliance on *Asson* was misplaced. A correct reading of *Asson* establishes that *Asson* reaffirmed Idaho's rejection of the special fund doctrine.

Asson addressed a multi-year indebtedness incurred by several Idaho cities for the purchase of electricity. The bond holders urged that the obligation should be upheld under the special fund doctrine since the cities' payment obligations were to be satisfied out of utility revenues alone. The Court stated the argument as:

> It is urged we overrule *Feil v. City of Coeur d'Alene,* 23 Idaho 32, 195 P. 643 (1912), and apply the "special fund" doctrine. That doctrine, accepted by a great majority of cases, holds that a municipality does not contract indebtedness or incur liability, within the constitutional limitation, by undertaking an obligation to be paid out of a special fund consisting entirely of revenue or income from the property purchased or constructed.

Asson v. City of Burley, 105 Idaho 432, 438, 670 P.2d 839, 845. This Court again declined the request to overrule *Feil* and its progeny or to reverse course on its long-standing rejection of the special fund doctrine.

Asson noted that subsequent constitutional amendments allowed the limited application of the special fund doctrine to specific circumstances, such as water and sewer systems and treatment plants, port districts, recreation, navigation and electrical generating facilities. Except for these narrow areas adopted by constitutional amendment, there is no general acceptance of the special fund doctrine in Idaho.

The *Asson* Court stated:

> The intent of the framers of the constitutional amendments, and the electorate through their ratification, is clear that approval of a municipality's qualified voters is necessary whether its Art. 8, § 3 indebtedness or liability is against the general

> fund of the city, and its tax revenues, or limited to a special fund of project-generated revenues.

Asson, 105 Idaho 432, 439, 670 P.2d 839, 846 (1983).

> And:
>
> Were we to accept the argument that the cities' liability comes under the special funds doctrine, the indebtedness would still be without constitutional authority because Art. 8, §3, requires voter approval of qualifying indebtedness regardless of the method or source of repayment.

Asson, 105 Idaho 432, 440, 670 P.2d, 839, 847 (1983).

Asson stands for the opposite of what the trial court cited it for. Idaho case law demonstrates that even dedicated funds become future revenues of a political subdivision. Any agreement to obligate future revenues violates Art. VIII, § 3, because such agreements are binding on future governing boards and diminish the budget authority of future elected officials and the voters who elect them, unless such expenditures fit within adopted constitutional amendments. The *Asson* analysis is confirmed in *GBAD* that Art. VIII, § 3 prohibits any "financial requirement...which could bind future officials or taxpayers." *GBAD,* p. 13.

8. The ordinary and necessary proviso does not apply here

IHD anticipates that the City may argue the ordinary and necessary proviso legitimizes the JPA. It does not. The Art. VIII, § 3 proviso states: "Provided, that this section shall not be construed to apply to the ordinary and necessary expenses authorized by the general laws of the state."

An expense is "ordinary" if in the ordinary course of the transaction of municipal business, or the maintenance of municipal property, it may be and is likely to become necessary.

Hanson v. City of Idaho Falls, 92 Idaho 512, 446 P.2d 634 (1968). "'Ordinary' means regular; usual; normal; common; often recurring; . . . not characterized by peculiar or unusual circumstances;..." *City of Pocatello v. Peterson,* 93 Idaho 774, 778, 473 P.2d 644 (1970).

There is nothing "ordinary" about one public agency agreeing to forever transfer its property taxes to another public agency.

City of Boise v. Frazier, 143 Idaho 1, 137 P.3d 388 (2006), examined the "necessary" component of the proviso and concluded that necessary is limited only to expenditures made during the budget year the obligation is entered into, and only if the necessity is urgent.

> Here, we return to the test stated in *Dunbar* and hold that in order for an expenditure to qualify as "necessary" under the proviso clause of Art. 8, § 3 there must exist a necessity for making the expenditure at or during such year. (Emphasis added)

Frazier, 143 Idaho 1, 5, 137 P.3d 388, 392 (2006).

City of Challis v. Consent of the Governed Caucus, 2015 WL 5667481 (9/25/15) is the most recent case to analyze the ordinary and necessary proviso. This Court did not waiver from its conservative approach to multi-year obligations undertaken by Idaho's political subdivisions. The question was whether an upgrade to the city's water system qualified for the ordinary and necessary exception. The majority opinion stayed the course with the *Dunbar* test discussed in *Frazier.* Specifically, to qualify for the ordinary and necessary proviso, the expenditure must be urgent within the current budget year. The JPA does not meet the necessary component of the proviso since it was not urgent in 2003 that all future years' IHD property taxes be granted to the City.

The dissenting opinion in *Challis* urged more flexibility in interpreting "necessary". However, neither the majority opinion nor the dissent urged any variance to the strict prohibition against multi-year obligations where, as here, the obligation is neither ordinary nor necessary.

9. Policy considerations require the conclusion that the JPA is unconstitutional

Under Idaho Code section 40-801, the City has control over its half of IHD levy revenue, and IHD has control over the other half. The City may well decide that its priority for IHD levy proceeds is for aesthetic items such as landscaping, traffic chokers, and pathways. IHD may decide that its highest priorities are street maintenance and construction to better facilitate the transportation of people and goods. It is possible neither elected body may agree with the priorities established by the other elected body. So long as each entity has authority over how its half of ad valorem taxes collected pursuant to Idaho Code section 40-801, is spent, there is no violation of. Art. VIII, § 3. Art VIII, § 3 was violated when IHD obligated itself in perpetuity to have no authority over how IHD's future revenues are spent.

The problem with a perpetual and mandatory diversion to the City of all IHD property tax revenues collected from City properties is that future IHD Boards of Commissioners lose the ability to determine priorities for how IHD property tax revenues should be spent to address future issues faced by IHD. Based upon the trial court holding, all future IHD Commissioners forever forego their statutory authority to set policy regarding whether to levy property taxes and how IHD tax revenues should be spent. Worse yet, it impairs the ability of voters and IHD taxpayers to elect new IHD commissioners who will follow the priorities of the electorate. The

trial court's ruling greatly diminishes the accountability to voters and taxpayers because future IHD Commissioners have no voice in how future IHD property tax revenues are used. This is contrary to the legislative intent in specifying the sharing ratio found in Idaho Code section 40-801. It is also contrary to the intent of the framers of the Idaho Constitution. This Court emphasized this very point by expressing that the key point to Art. VIII, § 3 analysis is that a multi-year agreement such as the JPA cannot "bind future officials or taxpayers." *GBAD,* p. 13.

If a 2015 IHD Board of Commissioners decides to pay its 2015 tax revenues to the City, then those Commissioners are accountable to the voters for that decision at the next election. However, if a 2003 IHD Board may determine how a 2015 IHD Board must distribute 2015 IHD tax revenues, there is no accountability to 2015 voters for that decision. IHD electors lose their ability to elect Commissioners who will act based upon the priorities of those electors; which priorities may differ from the priorities of the 2003 Commissioners. If the JPA were held to be enforceable into perpetuity, the very reason Art. VIII, § 3 was placed into the Idaho Constitution is defeated.

10. Since the JPA violates Article VIII, § 3, it is void

Any agreement which violates Art. VIII, § 3 of the Idaho Constitution is "void" under the express language of this Constitutional provision and under Idaho case law. *See e.g. Deer Creek Highway Dist. v. Doumecq Highway Dist.,* 37 Idaho 601, 218, P. 371 (1923); and *Boise Dev. Co. v. City of Boise,* 26 Idaho 347, 143 P. 531 (1914) (affirming that agreements which violate Art. VIII, § 3 are void).

If this Court agrees that the JPA is void, it need not consider the arguments found at B, C and D below.

B. The trial court erred by holding the JPA complies with the Idaho Joint Powers Act

1. The JPA has no real duration or termination clause

The trial court wrongly concluded that the JPA complies with the Idaho Joint Powers Act, Idaho Code section 67-2326, *et seq.* (the "Act"). The Act requires that "Any such agreement shall specify the following: 1) its duration, and 5) ...methods...(for) termination of the agreement..." Idaho Code section 67-2328. The JPA provides that "the duration of this agreement shall be perpetual or until such time as the District and the City jointly and together agree to amend or terminate the same." R. p. 37. (Emphasis added). Under the terms of the JPA, IHD cannot modify or terminate the "perpetual" agreement without the consent of the City. Absent the agreement of the City, the agreement lasts forever.

The trial court ruled that the JPA has a specified duration; that "perpetual" is a duration for purposes of the Act. "Perpetual" cannot be a duration contemplated by the Idaho Legislature when adopting the Act. It is illogical to require that an agreement specify a duration and then conclude that the agreement can last forever. If an agreement can last forever, there is no reason for the requirement that the agreement specify a duration and methods for termination, and the statutory language would be rendered meaningless. Courts do not favor construction of a statute which lead to an absurd result. *State v. Yzaguirre,* 144 Idaho 471, 475, 163 P.3d 1183, 1187 (2007).

The language and the logic of the Act require there be a method for termination. The JPA is not saved by the language that it can be modified by the mutual agreement of both parties. Modification or termination of the JPA only by mutual agreement is illusory. It gives each party absolute veto power over any attempt by the other party to terminate the JPA. IHD is forever bound unless the City consents to negotiation or termination. Here, IHD repeatedly requested that the City renegotiate the JPA. R. p. 233. All such requests were unsuccessful. R. p. 233. IHD notified the City of IHD's desire to terminate the JPA and offered the City a settlement agreement. R. pp. 45-56. The City responded by suing.

The City has every incentive to decline IHD's requests to negotiate or terminate the agreement. Under the agreement, the City receives IHD property taxes it would not otherwise receive. Because there is no effective termination clause, there will never be a realistic opportunity for IHD to terminate the agreement.

The term "duration" is not defined in the Act nor has the term as used in the Act been defined by this Court. However, assistance is provided by *Black's Law Dictionary* which defines "duration" as:

> The length of time something lasts.

Black's Law Dictionary, 898 (Bryan A. Gardner 9th ed., West 2009).

A specified duration and method of termination requires there be a limited term, not an open-ended perpetual existence with no method for renegotiation. The legislative requirements of duration and termination clauses in agreements between Idaho public agencies is particularly compelling because of Idaho's constitutional prohibition against multi-year obligations.

2. The City and IHD lacked authority under the Joint Powers Act to transfer jurisdiction over City streets.

In *City of Sandpoint v. Sandpoint Independent Highway Dist.,* 139 Idaho 65, 72 P.3d 905 (2003) (*Sandpoint III*) this Court analyzed the jurisdiction of the City and IHD over streets within the city and reaffirmed *City of Sandpoint v. Sandpoint Independent Highway District,* 126 Idaho 145, 879 P.2d 1078 (1994) (*"Sandpoint I"*). This Court carefully reviewed the statutes that granted jurisdiction to each entity to determine when the City's right to exercise jurisdiction over the streets within its city limits was triggered. After exploring the different statutes granting jurisdiction to each entity, this Court announced "...we hold that the City cannot obtain jurisdiction over city streets that are within the boundaries of the District unless the District's jurisdiction over those streets is first lawfully terminated under the appropriate statutory provisions." *Sandpoint* III, 139 Idaho 65, 70, 72 P.3d 905, 910. The methods of termination of IHD's jurisdiction discussed in the opinion were detachment from IHD pursuant to Idaho Code section 40-1601 *et seq.* or by dissolution of IHD as provided in I.C. section 40-1811 and section 40-1814, *Id,* 139 Idaho at 68, 72 P.3d at 908-909.

Following the announcement of the above decision on June 19, 2003, IHD and the City discussed settling the then pending litigation. In a letter to the Mayor of the City dated June 24, 2003, IHD's attorney indicated "SIHD would agree to a stipulated court settlement giving Sandpoint jurisdiction over its streets, despite the Supreme Court ruling." R. p. 103. Thereafter, on July 3, 2003, a stipulation for settlement was executed by the parties in the underlying litigation. R. pp. 32-36. This stipulation stated that the City would have jurisdiction and control

over all streets within the city limits and a joint powers agreement would be utilized to recognize the City's jurisdiction. R. p. 35. On July 8, 2003, the JPA was executed by the City and IHD. R. pp. 37-41. In the purpose section of the JPA, it was stated that the purpose of the agreement was to divide the jurisdiction of streets and public rights of way within the boundaries of IHD between IHD and the City. R. p. 37. "The City shall exercise exclusive general supervisory authority over all streets and public rights-of-way within the city limits..." R. p. 37, and that "the City will have the final say over all street matters within its boundaries." R. p. 39.

This Court was clear in its decision in *Sandpoint III* there were two methods of terminating IHD's jurisdiction over city streets: detachment or dissolution of IHD. The issue before the district court was whether a third method, a JPA, could terminate IHD's jurisdiction.

IHD argued that it could not delegate away or exceed its statutory authority when entering into a joint agreement. R. p. 67. The district court acknowledged IHD's argument. R. p. 167. In its analysis of this issue, the trial court held Idaho Code section 67-2328(a) of the Joint Powers Act allows for state or public agencies to exercise their powers jointly provided each has power over the common subject matter. R. p. 169. However, it did not address the argument, instead holding "[t]he Court's decision above that IHD has not violated the Idaho Constitution in entering into this agreement thus effects (sic) this Joint Powers argument raised by IHD." *Id.* While it is not clear what the district court meant by this statement, it is clear the district court did not address the jurisdiction issue raised by IHD.

> a) Any power, privilege or authority, authorized by the Idaho Constitution, statute or charter, held by the state of Idaho or a public agency of said state, may be exercised and enjoyed jointly with the state

> of Idaho or any other public agency of this state having the same powers, privilege or authority; but never beyond the limitation of such powers, privileges or authority;
>
> ***
>
> The state or any public agency thereof when acting jointly with another public agency of this state may exercise and enjoy the power, privilege and authority conferred by this act; but nothing in this act shall be construed to extend the jurisdiction, power, privilege or authority of the state or public agency thereof, beyond the power, privilege or authority said state or public agency might have if acting alone.

Idaho Code section 67-2328(a) (emphasis added).

The fundamental aspect of this statute is to allow a contract between two (or more) public agencies to exercise, jointly, all power(s) common to each to accomplish specific goals they may have in common. It does not authorize transfer of jurisdiction from one public agency to another. Contrary to the district court's view, the statute allows public agencies to exercise the powers jointly only if both have power over the common subject matter. *Sandpoint I* and *Sandpoint III* held IHD has jurisdiction over city streets. The City does not. The JPA establishes no agreement for the exercise of both public agencies to jointly exercise their powers to maintain the streets. Instead, it intended to terminate IHD's jurisdiction over streets within the City's limits. The purpose section of the JPA acknowledges this intent. In a section entitled "Jurisdiction, Maintenance and Control", the agreement indicates the City shall exercise exclusive general supervisory authority over all the streets and public rights of way within the city limits. R. p. 37. The supervisory authority includes the right to vacate, abandon and relinquish IHD streets and rights of way. R. p. 38.

The problem with the above clause is it grants powers to the City that IHD and City do not hold in common. Only highway districts have the jurisdiction to abandon and vacate highway district streets and public rights of way. *See* Idaho Code section 40-203. This clause purports to extend the jurisdiction of the City beyond the power it would have if acting alone because the City does not hold the power to abandon or vacate IHD streets and rights of way. For example, street vacations require public hearings. *See* Idaho Code section 40-203. Agencies cannot delegate their statutory duty to conduct public hearings to another agency. *See Blaha v. Board of Ada County Com'rs,* 134 Idaho 770, 9 P.3d 1236 (2000).

The City also requested the Court declare the validity of a subsequent Memorandum of Understanding executed by the City on August 18, 2005 and by IHD on September 14, 2005. R. pp. 43-44. This agreement also purported to give the City the rights and power to vacate IHD streets and rights of way. As argued above, the City does not hold this power in common with IHD, and the Memorandum of Understanding violates the Joint Powers Act.

Finally, the JPA fails to provide for the joint exercise of power. The agreement establishes no separate legal entity to conduct the joint or cooperative undertaking. It does not provide for an administrator or a joint board responsible for administering the joint or cooperative undertaking as required under Idaho Code section 67-2328(d)(1) in the absence of a separate legal entity. This omission is not surprising since the intent of the agreement was to terminate IHD's jurisdiction without following statutory provisions rather than conduct a joint or cooperative undertaking as contemplated by the Joint Powers Act. The JPA in this instance was contrary to the statute.

3. The City and IHD exceeded their statutory authority when executing the JPA

The Joint Powers Act prohibits Idaho political subdivisions from acting in excess of their authority. *See* Idaho Code section 67-2328(a). Because executing the JPA violated Art. VIII, § 3 of the Idaho Constitution, it was not within the power of the 2003 IHD Board or the City to enter into the 2003 Agreement.

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

In its verified complaint, the City requested the trial court issue a declaratory judgment upholding the Stipulation for Settlement entered into by the parties in a previous lawsuit and approved by the district court in that lawsuit which required IHD to transfer to the City all ad valorem taxes collected by IHD. R. p. 30. The City also contended in its verified complaint that ad valorem taxes included penalties and interest collected on delinquent taxes from property owners within the City. R. p. 27.

The Stipulation for Settlement was a stipulation entered into in the previous suit between the parties in Bonner County Case No. CV-00-00615. R. p. 32. Paragraph 2 of the stipulation indicated the parties would enter into a joint powers agreement incorporating the terms of the stipulation. R. p. 35. The stipulation provided "[t]he joint powers agreement would provide that the Sandpoint Independent Highway District pay over to the City of Sandpoint all ad valorem property tax funds received from levies by IHD upon all property located within the city limits." *Id.* The district court entered an order approving the stipulation for settlement on July 11, 2003. R. pp. 99-100. A negotiation letter executed near the time of the stipulation indicated that IHD would pay over to the

City all of the property tax funds received from City residents. R. pp. 103-104. No discussion of sharing of late charges or interest on delinquencies was discussed in this offer letter. *Id.*

The City filed a summary judgment in this case and presented a short four page memorandum in support of its motion that incorporated its memorandum in opposition to IHD's motion to dismiss. R. pp. 190-194. IHD opposed the motion because material questions of fact prevented entry of a summary judgment on the issue of payment of penalties and interest to the City. R. pp. 246-247. In reply, the City conceded IHD had only paid the City delinquent taxes, but not penalty and interest through the years. R. p. 264. Despite recognizing this fact, the City argued since Idaho Code section 40-805 required the county treasurer to pay IHD delinquent taxes and penalty and interest, by definition delinquent taxes included penalty and interest. R. pp. 263-264. The trial court concluded it made no sense that the accompanying interest and penalties paid with delinquent taxes were not similarly paid over to the City. R. p. 264.

The district court in its memorandum decision observed the parties' agreement included the following clause:

> 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. 280 (emphasis included in district court memorandum decision).

Based upon this language, the district court held the contract was clear and unambiguous as a matter of law regarding the terms in bold and held a plain reading of the JPA required IHD to turn over penalties and interest collected on delinquent taxes. R. p. 280. The trial court, utilizing Black's law dictionary, took the broadest interpretation of the term "tax" available, noting it "embraces all governmental impositions on ... property ...." *Id.* The district court also reasoned that revenue was defined as "gross income or receipts" by Black's Law Dictionary. *Id.* Based on these definitions, the Court concluded that "all tax revenues" and "all property tax funds" encompassed the gross amount of money collected under IHD levy from City properties in relation to the ad valorem tax, including interest and costs collected pursuant to Idaho Code section 40-805. *Id.*

It is well settled that the determination of a contract's meaning and legal effect are questions of law to be decided by a court where the contract is clear and unambiguous. This Court held in *Jim & Maryann Plane Family Trust v. Skinner*, ___ Idaho ___, 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)).

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). Before this Court can review the district court's interpretation of the JPA, it must first determine whether the above clause is ambiguous. In doing so, this Court asks whether the reservation is "reasonably subject to conflicting interpretation." *See C & G, Inc. v. Rule*, 135 Idaho 763, 766, 25 P.3d 76, 79 (2001). A contract term is ambiguous when there are two different, reasonable interpretations of the language. *Swanson v. Beco Constr. Co.*, 145 Idaho 59, 62, 175 P.3d 748, 751 (2007).

The JPA does not define property tax funds or tax revenues. There is no uniformly recognized legal meaning for these terms. *See Ida-Therm, LLC v. Bedrock Geothermal, LLC,* 154 Idaho 6, 10, 293 P.3d 630, 634 (2012) (recognizing that no Idaho case defined the term "mineral" and there was no uniformly recognized legal meaning for the term.).

The district court erred when it held the terms "tax revenue" and "property tax funds" were unambiguous. The district court ignored that portion of the Black Law Dictionary definition which preceded the language quoted by the district court and defined a tax as "[a] charge, usually monetary, imposed by the government on persons, entities, transactions, or property to yield public revenue." *Black's Law Dictionary* (Bryan A. Gardner 9th ed., West 2009). Such a definition does not encompass interest and cost arising from late payment of delinquent taxes. Further, the trial court ignored that Idaho Code section 40-805 categorizes interest and cost separate from delinquent

taxes. The clause itself is silent regarding payment of interest and penalties on delinquent taxes.

More than one reasonable interpretation of the JPA's tax fund or tax revenue payment clause exists. Two reasonable interpretations of the terms "tax revenue" and "property tax funds" have been advanced. One is that it was intended to include all funds connected to the levy of the ad valorem property taxes. The other is that it included only the ad valorem property tax revenue from the levy. R. p. 246. The district court erred in concluding that the clause was unambiguous.

The interpretation advanced by IHD that the clause included only the ad valorem tax revenue was reasonable. The Idaho Constitution defines taxation as revenue gained by levying a tax by valuation of owned property. Idaho Const. Article VII, section 2. The chapter and title of Idaho Code referenced in the JPA clause 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 commissioners 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 contained in the agreement and it was reasonable for IHD to interpret this clause to mean the payment of only the collected ad valorem taxes.

Additionally, when property taxes are delinquent, late charges and interest are included. 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 at the time the agreement was prepared.

However, nothing in the agreement indicated the parties intended for the payment to the City to include late charges and interest, which were identified by Chapter 8, Title 40 as items separate from the ad valorem taxes, and which arose only in the event of a delinquent payment.

The district court utilized the broadest definition of the term "tax" to support its analysis. More restrictive definitions exist that are equally reasonable to utilize in interpreting the term "tax". Merriam-Webster defines a tax as "an amount of money that a government requires people to pay according to their income, the value of their property, etc., and that is used to pay for the things done by the government. (*Merriam-Webster Online,* retrieved September 30, 2015 from http://www.merriam-webster.com/dictionary/tax.) The Idaho code definition of late charge is unrelated to imposition of a tax. Rather, it is imposed as a penalty for being delinquent in payment of the tax. The interest is also unrelated to imposition of the tax. Again, it is a charge incurred due to a delinquency. The late charge and interest do not arise from imposition of the tax levy. Thus, it is reasonable to interpret "tax revenue" and "tax fund" to exclude such charges.

By isolating its analysis to a few chosen words in the payment clause and ignoring the entire context of the agreement, the trial court concluded the clause was unambiguous. This analysis was incorrect. The district court was required to consider the clause in its entirety. 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.*" Thus, 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.

Sufficient evidence in the record at summary judgment precluded the grant of the summary judgment on this issue. The settlement agreement and stipulation to dismiss the previous lawsuit informed the trial court that IHD had agreed to turn over to the City the ad valorem taxes it collected on real property located within city limits. No mention was made that IHD had agreed to turn over late charges or interest paid to it on delinquent taxes. The second affidavit of Marj Tilley filed in opposition to the City's motion for summary judgment indicated throughout the history of payment to the City and performance of the agreement, IHD had never paid any penalties or interest collected on past due ad valorem taxes to the City. R. p. 236. The reasonable inference from this evidence was the parties did not intend for penalties and interest to be included, and conducted themselves accordingly.

The City submitted no evidence that any past due penalty or interest were due in support of its summary judgment. It also submitted no evidence explaining why it allowed IHD to go over ten years without paying an amount it claimed was due under the contract. Despite this lack of evidence in the record, the trial court made up its own explanation of why IHD's past performance contradicted the payment term. The trial court held this Court's statute of limitations analysis in *City of Rexburg v. Madison County,* 115 Idaho 88, 89, 764 P.2d 8383, 389 (1988) stood for the proposition that failure to correctly distribute ad valorem taxes owed to a city was a factor to for it to

consider in drawing an inference in favor of the City despite the lack of evidence in the record before it. The trial court held "failure to distribute exact monies owed to a city by highway districts does not in itself imply an ambiguity because such distributions have previously been subject to simple human error and oversight." R. p. 281. The trial court then impermissibly drew an inference in favor of the City, relying upon this case, and held, "[i]f a city can go twenty-two years without noticing it is only being paid one-tenth of funds due, **it is reasonable to infer that the City here may not have taken notice of the discrepancy in the decade following the formation of the contract.** This does not create an ambiguity in the contract. It merely shows oversight by City in failing to realize IHD failed to perform in accordance with the Agreement." (Emphasis added.) R. p. 281. It was error for the trial court to draw this inference in favor of the City on this material issue of disputed fact based upon the facts of an unrelated case.

Further, *City of Rexburg, supra*, provides no authority or guidance to this issue and the district court's reliance on this case was misplaced. *City of Rexburg, supra,* addressed an incorrect apportionment of highway fund levies by Madison County to the City of Rexburg. For nearly twenty-two years, only 5% of highway ad valorem taxes were apportioned and paid to the City of Rexburg instead of the 50% required by Idaho Code section 40-801 due to a clerical error. This Court ruled a three year statute of limitation applied to reimbursement due to such a mistake.

No interpretation of an agreement was involved in *City of Rexburg*. This case adds nothing to the analysis of whether the JPA payment clause is ambiguous, or how it should be interpreted. At most, it stands for the proposition that the City may only seek payment of any unpaid penalties and interest for three years prior to filing its suit if a finder of fact holds in its favor. It does not address

the issue of whether IHD's non-payment of the penalty and interest was because "tax revenue" or "tax funds" was not intended to include the late charges and interest. It was error for the district court to infer that the failure to pay was due to clerical error based upon the *City of Rexburg* ruling.

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

Besides the above issue regarding the grant of summary judgment on the contract issue, the trial court erred in the relief awarded for breach of contract in its final judgment following its grant of summary judgment to the City. 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.*

In its memorandum decision, the district court held, "[t]he language of the Agreement is clear. IHD should have been paying City all revenue from ad valorem taxes, including interest and penalties." R. p. 281. In other words, the trial court found IHD breached the contract by failing to pay penalty and interests.

The City presented no evidence in the record of amount it claimed it was due in past interest and late charges. The trial court determined no amount due for interest and costs previously collected and not paid to the City by IHD. Despite the City's failure to support its

claim for damages for the breach of contract, the Court's final judgment ordered IHD to pay over unspecified amounts collected in the past and to pay interest on such amounts. R. p. 386.

On December 8, 2014, IHD filed an amended motion to alter or amend the judgment on the grounds that the City had failed to prove any amount due for the above breach of contract. AR Motion to Alter or Amend Judgment filed December 8, 2014. IHD contended that the City had failed to present evidence in support of its breach of contract damages in its summary judgment. The district court denied the motion. R. p. 388-389.

In *Hull v. Giesler*, 156 Idaho 765, 331 P.3d 507, 516 (2014), this Court held:

> Breach of contract requires "(a) the existence of the contract, (b) the breach of the contract, (c) the breach caused damages, and (d) the amount of those damages." *Mosell Equities, LLC v. Berryhill & Co.*, 154 Idaho 269, 278, 297 P.3d 232, 241 (2013). The plaintiff has the burden to prove that he was injured and his injury was the result of the defendant's breach; "both amount and causation must be proven with reasonable certainty." *Harris, Inc. v. Foxhollow Constr. & Trucking, Inc.*, 151 Idaho 761, 770, 264 P.3d 400, 409 (2011).

The district court determined the terms of the agreement of the parties and found IHD had breached the terms of the agreement by failing to include late charges and interest on delinquent taxes to the City. The district court ordered IHD pay unspecified amounts for these items to the City.

The City presented no evidence in the summary judgment of any amounts it claimed it was owed for the alleged breach. 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.

E. The District Court's permanent injunction was improper in form

Idaho Rule of Civil Procedure 65(d) addresses the form and scope of an injunction. This rule requires every order granting an injunction shall set forth the reasons for its issuance, shall be specific in terms, and shall describe in reasonable detail the act or acts sought to be restrained. The trial court's final judgment merely indicated "[a] permanent injunction shall issue with regard to the obligation." This permanent injunction does not 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.

Further, because the JPA was void *ab initio*, it was improper for the trial court to issue an injunction mandating that IHD continue to make payments pursuant to a void agreement.

F. The District Court's erred in its award of attorney fees

The standard of review on appeal of an award of attorney fees pursuant to Idaho Code section 12-117 is set forth in *City of Osburn v. Randel*, 152 Idaho 906, 908, 277 P.3d 353, 355 (2012) and is determined based upon an abuse of discretion standard. In *Taylor v. AIA Services Corp.*, 151 Idaho 552, 559, 261 P.3d 829, 836 (2011), this Court reiterated its prior holdings on abuse of discretion, holding:

> "The burden of showing the trial court abused its discretion rests with the appellant." *Walker v. Boozer*, 140 Idaho 451, 456, 95 P.3d 69, 74 (2004). In reviewing a trial court's abuse of discretion, this Court considers: (1) whether the court correctly perceived the issue as discretionary; (2) whether the court acted within the outer boundaries of its discretion and consistently with applicable legal standards; and (3) whether it reached its decision by an exercise of reason. *Stewart v. Stewart*, 143 Idaho 673, 678, 152 P.3d 544, 549 (2007).

In its memorandum decision filed July 31, 2014, the district court held:

> There is no doubt in the Court's mind that City is in all aspects the prevailing party as compared to IHD. The Court so finds City to be the prevailing party in this litigation.
>
> Thus, if City requests fees under I.C. § 12-117(4), City is entitled to those fees as the prevailing party and the only issue at the time of a motion under I.R.C.P. 54(c)(5) will be the amount of those fees.

R. p. 290.

On appeal, IHD maintains that it was error for the trial court to award attorney fees based upon the erroneous holding regarding the constitutional argument. IHD also maintains it was error for the trial court to award attorney fees even if this court affirms the trial court's constitutional analysis.

Since the trial court erred in holding that the City was entitled to damages for the breach of contract claim, it was error for the trial court to award the City attorney fees pursuant to Idaho Code section 12-117(4) at the summary judgment level.

On August 13, 2014, the City filed a Notice of Presentment without oral argument for its motion for award of attorney's fees and costs scheduled for Wednesday, August 27, 2014. R. pp. 296-297. The City also filed its motion for an award of attorney fees and costs and supporting pleadings on August 13, 2014. R. pp. 298-334. Eight days later, on August 21, 2014, the trial court entered its Order Granting Request for Attorney Fees and Costs. R. pp. 335-337. On the same date, the trial court filed a proposed declaratory and monetary judgment presented by the City which again did not comply with Rule 54(a), I.R.C.P. R. pp. 338-341. This judgment awarded the City $56,131.75 in attorney's fees. *Id.*

IHD thereafter on August 27, 2015, filed a Motion for Reconsideration of the award of attorney's fees on the grounds that it was entered prior to the time I.R.C.P. 54(d)(7) allowed for settlement of costs by order of the court. R. pp. 350-352. IHD also filed its objection to the City's request for attorney fees and its motion to disallow the attorney fees, along with the supporting memorandum and affidavits in support of the motion. R. pp. 353-369. IHD filed an additional supporting affidavit on September 8, 2014. AR Affidavit of Marfice filed September 8, 2014.

Assuming arguendo for the sake of addressing this issue on appeal that the trial court was correct in the manner in which it awarded the breach of contract damages to the City, the amount of fees it awarded was not reasonable. This matter was decided on motion practice. No discovery was promulgated. No depositions were taken. No trial was held.

Four major motions were involved: 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 parties negotiated a reciprocal preliminary injunction. R. p. 179-181. The City also responded to IHD's motion to alter or amend the judgment and the award of attorney fees.

Three factors regarding the amount of attorney fees require examination on appeal. The first is the time and labor required to produce City's work product. I.R.C.P. 54(e)(3)(A). The second is the skill requisite to perform the legal service properly and the experience and ability of the attorney in the particular field of law. I.R.C.P. 54(e)(3)(C). The third is the prevailing charge for like work. I.R.C.P. 54(e)(3)(D). "Before a court may determine whether claimed

attorney fees are reasonable, it must have enough information to properly consider the factors of Rule 54(e)(3)." *Bailey v. Bailey*, 153 Idaho 526, 284 P.3d 970, 974 (2012).

Turning to the time and labor factor, the City's private counsel billed 191.15 hours for attorney time; 20.5 hours for law clerk time and 4.4 hour for paralegal time for a total of 216.05 hours devoted to motion practice. R. p. 30. This time did not include drafting of the complaint and summons, which was completed by the City Attorney before the City's private counsel appeared on 9/30/2013. R. p. 12.

When this time is broken down by the significant pleadings, the City's outside counsel spent 51.1 hours doing legal research to respond to IHD's motion to dismiss. R. pp. 314-319 [6] On drafting the brief filed in opposition to the motion to dismiss, the City spent 48.2 hours drafting the opposition brief, although 1 hour of law clerk time was not charged. *Id.* The City spent 12 hours preparing for and attending the hearing on the motion to dismiss. *Id.* This time excludes office conference time, client conference time, and responses to IHD's motion to strike affidavits filed by the City related to the motion to dismiss. *Id.* The City filed a 25 page brief, excluding the certificate of service, based upon the time it invested in the response to the motion to dismiss. R. pp. 73-98.

Another way of viewing this item is that it took the City 99.3 hours to research and create the 25 page brief filed in opposition to the motion to dismiss, not including the time to prepare for hearing and client conferences, and the response to IHD's motion to strike the affidavits submitted by the City as part of the response to the motion to dismiss. In total, the City devoted

[6] Appendix A includes an Excel sheet with a tabulation of the numbers referenced herein.

just under 4 hours average to each page of its brief. The constitutional argument presented a more complex argument given the breadth of Idaho law on the issue and required more labor and time to analyze. However, the remaining issues were not complex, and should not require an unusual amount of labor or time to analyze. Given the scope and depth of the memorandum submitted by the City in opposition to IHD's motion to dismiss, the amount of time and labor devoted to the response brief appears excessive.

Although minor in scope, included in the City's billings was 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.

Thereafter, the City opposed IHD's motion for permissive appeal. The City's counsel invested a fair portion of time prior to IHD's motion researching a Rule 54(b) certification of the court's denial of IHD's motion to dismiss. R. pp. 323-325. In total, the City devoted 3.8 hours to researching the matter and 7 hours to writing and phone calls on the Rule 54(b) certification issue.[7] *Id.* Another 4.3 hours was expended in legal research to respond to IHD's motion to allow permissive appeal at the trial court level. R. p. 329. Another 7.3 hours was utilized to draft the response, prepare for and attend the hearing on the motion for permissive appeal at the district court level. *Id.* Thereafter, following the trial court's grant of the motion for permissive appeal, the City's counsel invested another 8.6 hours in legal research and 15.5 hours in legal drafting to file an opposition to IHD's motion for permissive appeal with this Court. R. pp. 330-

[7] Appendix B contains an Excel spreadsheet summarizing of the time spent on both the 54(b) certification and the opposition to the Motion for permissive Appeal at the trial court level and before this Court.

332. Given the opposition at the trial court level, the additional hours for legal research and writing to prepare the opposition memorandum to this Court appears excessive.

The City filed for summary judgment. The City initially filed a 4 page memorandum in support of its motion. R. p. 199-193. The City expended 3.85 hours in preparing the initial motion. R. p. 332.[8] The City accrued 4.8 hours in legal research time for its reply brief, and 30.4 hours drafting its response brief, preparing for and attending the hearing, and preparing an order for the Court to enter following the hearing. The reply brief was ten pages, one of which was a certificate of service. R. pp. 261-271. The number of hours claimed as reasonable to draft the nine page reply argument appears excessive.

Thereafter, the City expended 9.1 hours preparing its memorandum of costs in support of its fees, and preparation of a proposed order. R. p. 34. Again, this amount of time and labor devoted to a standard pleading appears excessive.

The next factor for examination is the skill requisite to perform the legal service properly and the experience and ability of the attorney in the particular field of law. I.R.C.P. 54(e)(3)(C). The Memorandum of Costs and Affidavit of C. Matthew Andersen in Support of Attorney's Fees and Costs indicate that his prevailing rate in $375.00 per hour, but he reduced his fee to $325.00 because he was representing a public entity. R. p. 309. Mr. Anderson also indicated that Beverly Anderson was billed at $225.00 per hour. R. p. 309. (A slight portion of Ms. Anderson's time was billed at $250.00 per hour. R. p. 310.) Mr. Andersen opined the rates charged for legal services were prevailing and competitive in the area, and were reasonable and

[8] Appendix C contains an Excel spreadsheet summarizing the time spent on the summary judgment initial brief, reply brief, and totals of each.

customary hourly rates for this type of legal work. No support was provided for this opinion other than Mr. Andersen's conclusory statement.

In their application for attorney fees, Mr. Andersen indicated that Ms. Anderson spearheads the firm's litigation research and working with litigation counsel, she conducts or supervises research and brief writing for all phases of major litigation. R. p. 306-307. Ms. Anderson is not licensed in Idaho. R. p. 307. Given the issues in this case, familiarity with Idaho's constitution and Idaho's statutes should enhance the understanding of the constitutional and statutory issues raised in this litigation. Given Ms. Anderson's lack of an Idaho license, it is probable that her research time was increased as reflected in the hours devoted to legal research which are before this Court. This factor dovetails with the previous factor of the reasonable labor and time devoted to the matter. The trial court erred in finding the hours were reasonable and necessary and the attorneys possessed the skill necessary to address the issues. Further, there is no prevailing rate in Idaho for an unlicensed attorney working on an Idaho case.

Finally, the trial court erred in finding the amounts charged were the prevailing charge for like work. I.R.C.P. 54(e)(3)(D). This Court held in *Lettunich v. Lettunich,* 141 Idaho 425, 435, 111 P.3d 110, 120 (2005) that the trial court "should consider the fee rates generally prevailing the pertinent geographic area, rather than what any particular segment of the legal community may be charging." The trial court erred in this case by failing to follow this holding.

Other than opining that their rate was reasonable and in accordance with the prevailing rate, the City's counsel presented no evidence that such was the case. The City's counsel opined that the rate was prevailing in cases that require the level of law firm support, resources for trial

preparation, travel, expertise and skill for trial as were present in the case. R. p. 309. However, the City's counsel presented no evidence regarding the prevailing charges for like work in the applicable geographic area.

On the other hand, IHD's attorneys presented evidence that Eric Stidham with Holland & Hart's Boise branch billed $285 an hour for complex litigation issues in this geographic area; that John Miller charged $200 per hour for a non-complex litigation trial matter in the geographic area; that IHD's counsel's billing rate for non-complex civil litigation was $225 an hour and complex litigation was billed at $250 an hour; that Joel Hazel with Witherspoon Kelly was charging $285 an hour at his highest rate; that Doug Marfice with Ramdsen Lyons (now Ramsden, Marfice, Ealey & Harris) was billing $250 an hour; that Brent Featherston was billing $250 an hour and Ausey ("Rusty") Robnett, who was then with Paine Hamblen, was billing $250 an hour for non-recurring clients in the geographic area. R. pp. 353-357. Mr. Featherston and Mr. Marfice also submitted affidavits that corroborated this testimony. R. pp 367-369, AR Affidavit of Marfice filed September 8, 2014.

Rather than looking at the prevailing charge for like work in the geographic area, the trial court abused its discretion by focusing on the longevity of time practiced by the attorneys performing the City's legal work. The trial court disregarded testimony submitted on prevailing rates for like work in the geographic area, noting that Douglas S. Marfice, Brent Featherston and Susan Weeks all had less experience than Beverly Anderson by five years, and holding this justified an upward departure from the City's initial fee request of $225 an hour for Ms. Anderson. AR Memorandum Decision and Order Granting in Part (As to timing of this Court's

Prior Decision) and Denying in Part (As to Amount of Attorney Fees Previously Awarded) Defendant IHD's Motion for Reconsideration of Attorney Fees filed October 24 2014, page 5. The trial court ignored that Ms. Anderson was not an Idaho licensed attorney and there is no prevailing charge for an unlicensed attorney in Idaho.

The Court also relied solely on the fact that Mr. Andersen was licensed in Washington for thirty-eight years at the time of the fee request as justification for the rate awarded. AR Memorandum Decision and Order Granting in Part (As to timing of this Court's Prior Decision) and Denying in Part (As to Amount of Attorney Fees Previously Awarded) Defendant IHD's Motion for Reconsideration of Attorney Fees filed October 24 2014, page (Mr. Andersen was licensed in Idaho for twenty eight years at the time of the fee request.) The court engaged in no analysis of the prevailing rate for like work in the geographic area in its award. In its motion to reconsider, IHD raised that the Court had recently adjusted another case downwards by 33%, finding the lead attorney, Robert A. Dunn's $400 per hour rate was not the prevailing charge for like work. AR Amended Memorandum in Support of Defendant's Motion to Alter or Amend Judgment filed December 8, 2015, page 6.

In ruling on IHD's request for reconsideration of the attorney fee award, the trial court claimed it did not award the requested attorney fees in the case raised by IHD on the motion to reconsider because Spokane attorney Robert A Dunn, who billed $400.00 per hour, was only licensed for seven years and "[e]xperience is perhaps the largest factor in any attorney determining his hourly rate, a rate which the market will decide can be justified in any particular case, the client ratifies is justified." AR Memorandum Decision and Order Granting in Part (As

to timing of this Court's Prior Decision) and Denying in Part (As to Amount of Attorney Fees Previously Awarded) Defendant IHD's Motion for Reconsideration of Attorney Fees filed October 24 2014, pp. 6-7.

The flaw in this analysis is that the trial court's analysis of Mr. Dunn's attorney fees was not based upon his being a 7 year licensed attorney. It was one of the other attorneys involved who was licensed for 7 years. Robert A. Dunn was a Washington licensed attorney since 1981. The other flaw in the trial court's analysis is Ausey Robnett has been licensed since October 22, 1984, thirty years at the time of the trial court's decision. The trial court ignored this fact in its analysis of Ms. Anderson's rate, and in the analysis of Mr. Andersen's rate and did not address Mr. Robnett's rate, or any of the other attorney rates charged in the geographical area.

Instead of analyzing and weighing the prevailing rate for like work in the geographic area, the trial court indicated it found the factor contained in "I.R.C.P. 54(3)(3((G)" [sic] a powerful reason why the amount awarded was reasonable. AR Memorandum Decision and Order Granting in Part (As to timing of this Court's Prior Decision) and Denying in Part (As to Amount of Attorney Fees Previously Awarded) Defendant IHD's Motion for Reconsideration of Attorney Fees filed October 24 2014, page 8. The trial court indicated that the suit involved multi-decade litigation in more current-time with this lawsuit arising from IHD's blunt statement given with little notice it would not be paying the City the substantial contract price of about $350,000.00 per year on a contract that was reached to put prior decades of litigation to bed. AR Memorandum Decision and Order Granting in Part (As to timing of this Court's Prior Decision) and Denying in Part (As to Amount of Attorney Fees Previously Awarded) Defendant IHD's

Motion for Reconsideration of Attorney Fees filed October 24 2014, page 8. In other words, the trial court found that a punitive measure justified the award.

Regarding the amount involved and the results obtained, no evidence was ever admitted in the record regarding the amount involved. The City stated, 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 in favor of 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 in the litigation by IHD.

The trial court awarded attorney fees in the full amount requested by the City before Rule 54 allowed and before IHD had a fair opportunity to object. R. pp. 335-337. Following IHD's Motion to Reconsider this decision and request the trial court properly hear and consider its objection, the district court again awarded the same attorney fee award. AR Memorandum Decision and Order Granting in Part (As to timing of this Court's Prior Decision) and Denying in Part (As to Amount of Attorney Fees Previously Awarded) Defendant IHD's Motion for Reconsideration of Attorney Fees filed October 24 2014. The trial court was specific that it was giving the I.R.C.P. 54(e)(3)(G) factor the most weight in its award of attorney fees. *Id* at page 8.

"Although one of the twelve factors listed is '[t]he amount involved and the results obtained,' I.R.C.P. 54(e)(3)(G), this factor is given no more weight than any others." *Lunders v. Estate of Snyder,* 131 Idaho 689, 700, 963 P.2d 372, 383 (1998). The trial court abused its

discretion in considering this factor to the exclusion of the prevailing rate, and other factors listed in 54(e)(3). It is clear from its holding the trial court utilized this factor as a punitive measure against IHD for raising the constitutional issue. Rule 54 does not utilize a punitive component as one of the factors the trial court is to consider in awarding fees.

As previously briefed, Idaho Code section 12-117(4) mandates an award in any civil proceeding involving as adverse parties a governmental entity and another governmental entity. IHD requests its reasonable attorney fees pursuant to this statute on appeal should it prevail.

G. A New Trial Judge should be assigned on Remand

This Court on two occasions 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 to 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 that was 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 first such incident arose when the trial court noted, "[o]f concern to the Court is the fact that the parties have obviously considered this to be a binding agreement for the past ten years. Apparently, IHD recently received legal advice indicating there are legal arguments to be made as to the legitimacy of the agreement. Obviously, the City relied on these revenues being paid from IHD to the City each year. Rather than IHD bringing a declaratory action against the City where IHD would continue to pay the City under the contract until those legal arguments are decided by a court, IHD instead chose to simply not pay the under the agreement, leaving the City in the lurch financially and forcing the City to sue IHD." R. p. 159. This analysis played no legal role in the determination of IHD's motion to dismiss.

The trial court also advanced arguments and drew inferences not raised by the City in its motion for summary judgment memorandum or its reply. The trial court, utilizing *Sandpoint Independent Highway Distr. v. Board of County Com'rs of Bonner County,* 138 Idaho 887, 892, 71 P.3d 1034, 1039 (2003) relied upon testimony mentioned by the Idaho Supreme Court in the former case to draw the inference in the present case that city residents would naturally look to city officials for guidance as to whether it was in their interest to support dissolution of the highway district. R. p. 283. IHD had no opportunity to rebut this inference from this testimony as it wasn't raised by the City. This Court has expressed that trial courts should not *sua sponte* raise issues not argued by the opposing party. *See generally Deon v. H&J, Inc.,* ___ Idaho ___, 339 P.3d 500,553-554 (2014). By interjecting additional facts not argued by the City in support of its decision, the trial court acted as an advocate for the City and did not give IHD a fair opportunity to dispute the facts relied upon by the trial court.

In this matter, the City's complaint requested attorney fees pursuant to Idaho Code section 12-121. R. p. 29. In its summary judgment, the City again requested attorney fees pursuant to Idaho Code section 12-121. R. pp. 187-189. In its memorandum decision on summary judgment, the trial court declined to address the Idaho Code section 12-121 request, indicating it was not the most applicable statute. R. p. 289. At the hearing on summary judgment, the trial court inquired of the City why it was not pursuing fees under Idaho Code section 12-117(4). R. p. 289. Despite the City's explanation of its reasons, the trial court directed its analysis to Idaho Code section 12-117(4) even though the City had not requested fees under this statute. R. p. 289. In following this course of action, the district court once again interceded on behalf of the City as an advocate rather than basing its decision upon the arguments presented.

On July 31, 2014, the Court entered an Order Granting Declaratory Relief submitted by the City's counsel which purportedly contained a Rule 54(b) certificate even though the order did not comply with Rule 54(a), I.R.C.P. R. pp. 292-294. This order awarded the City its attorney fees and the Court added the language "only after I.R.C.P. 54 application." IHD did not join in presentment of the proposed judgment. *Id.*

Thereafter, on August 13, 2014, the City filed its memorandum of costs and attorney fees. R. pp. 298-334. Eight days later, on August 21, 2014, without compliance with I.R.C.P. 54(d)(7), the trial court entered its Order Granting Request for Attorney Fees and Costs. R. pp. 335-337. On the same date, the trial court filed a proposed declaratory and monetary judgment presented by the City which again did not comply with Rule 54(a), I.R.C.P. R. pp. 338-341.

This judgment awarded the City $56,131.75 in attorney's fees. *Id.* On August 22, 2014, the trial court entered an amended order granting the City's request for attorney fees and costs. R. pp. 342-344. The trial court also entered an amended declaratory and monetary judgment on the same date, including attorney fees. R. pp. 345-349. On October 28, 2014, IHD scheduled a notice of hearing to present a form of final judgment on November 19, 2014. AR Notice of Hearing Re: Defendant's Motion for Presentment of Judgment filed October 28, 2014. Immediately prior to the hearing, on November 13, 2014, the trial court entered a second amended declaratory and monetary judgment which was not approved as to form by IHD, and mooted IHD's motion. R. pp. 384. This order still did not comply with the final judgment rule. Finally, on November 22, 2014, the trial court entered a final judgment which indicated it was done in open court. R. pp. 385-387. However, no hearing was held on that date. R. p. 17.

The trial court's actions indicate it has acted with bias in favor of the City, motivated by its displeasure with the course of action taken by IHD. While it is appropriate for the trial court to point out what it deems to be the error of IHD's ways, it is not appropriate for the trial court to become the City's advocate. Whether it perceives its transgressions or not, the trial court has made arguments and garnered evidence not advanced by the City to grant the City its summary judgment. It has informed the City when it wasn't advancing the best argument for an award of attorney fees. It has disregarded the attorney fee request advanced by the City and analyzed it under alternative grounds that it deemed were more beneficial to the City. It disregarded hearing dates and entered multiple judgments presented to the trial court without approval as to form by

IHD (and which were incorrect as to form). It disregarded I.R.C.P. 54(d)(7) in its rush to award the City attorney fees.

Based upon these instances of the trial court acting as an advocate for the City's position as opposed to a finder of law and fact, IHD respectfully submits that the criteria of *Capstar* has been met. The trial court's actions, unrelated to its decisions on the substantive issues of law and fact, indicate a bias for the City. Since this matter has not gone to trial, IHD requests a new presiding judge be assigned on remand.

V. ATTORNEY FEES ON APPEAL

Should IHD be the prevailing party on this appeal, it is entitled to attorney fees on appeal pursuant to Idaho Code section 12-117(4), which provides:

> In any civil judicial proceeding involving as adverse parties a governmental entity and another governmental entity, the court shall award the prevailing party reasonable attorney's fees, witness fees and other reasonable expenses. For purposes of this subsection, "governmental entity" means any state agency or political subdivision.

IHD, as a governmental entity, is entitled to an award of reasonable attorney fees against the City, as another governmental entity, should it prevail on this appeal.

VI. CONCLUSION

IHD requests that the trial court's decisions on the motion to dismiss and the motion for summary judgment be reversed and the case be remanded to the district court for further action

consistent with this Court's opinion.

DATED this 9th day of November, 2015.

SHERER & WYNKOOP, LLP

David E. Wynkoop

JAMES, VERNON & WEEKS. P.A.

Susan P. Weeks

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of November, 2015, I caused a copy of the foregoing APPELLANT'S OPENING 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

✓ via U.S. mail, postage prepaid

C. Matthew Andersen ISB No. 3581
WINSTON & CASHATT, LAWYERS
601 W. Riverside #1900
Spokane, WA 99201

✓ via U.S. mail, postage prepaid

Christie Elmore

Appendix A

MOTION TO DISMISS TIME AND BILLING

Date	Attorney	Category of work	Drafting	Legal Research	Amount/Drafting	Amount/Research
9/27/2013	CMA	Pleading drafting	1		$ 325.00	
9/27/2013	BLA	Research		1.2		$ 270.00
9/30/2013	BLA	Research		1.9		$ 427.50
10/4/2013	BLA	Research		2.2		$ 495.00
10/7/2013	BLA	Research		2.2		$ 495.00
10/8/2013	BLA	Research		1.4		$ 315.00
10/9/2013	BLA	Research		2.6		$ 585.00
10/11/2013	TRW	Research		3.1		$ 24.50
10/14/2013	BLA	Research		2.3		$ 517.50
10/16/2013	TRW	Research		3.5		$ 332.50
10/16/2013	BLA	Research		2.3		$ 517.50
10/16/2013	TRW	Pleading drafting	3.2		$ 304.00	
10/17/2013	BLA	Research		3.8		$ 855.00
10/18/2013	CMA	Pleading drafting	1		$ 325.00	
10/23/2013	TRW	Pleading drafting	0.4		$ 38.00	
10/23/2013	CMA	Pleading drafting	2		$ 650.00	
10/25/2013	TRW	Pleading drafting	2		$ 190.00	
10/28/2013	TRW	Pleading drafting	0.3		$ -	
10/28/2013	BLA	Research		1.5		$ 337.50
10/30/2013	CMA	Pleading drafting		5		$ 1,625.00
10/31/2013	CMA	Pleading drafting		4		$ 1,300.00
10/31/2013	BLA	Research		3.3		$ 742.50
11/1/2013	TRW	Pleading drafting	0.8		$ -	
11/1/2013	BLA	Research		4.8		$ 1,080.00
11/4/2013	TRW	Pleading drafting	1.4		$ 133.00	
11/4/2013	BLA	Research		2.9		$ 652.50
11/5/2013	TRW	Pleading drafting	3.4		$ 323.00	
11/5/2013	BLA	Pleading drafting	2.2		$ 495.00	
11/5/2013	CMA	Pleading drafting	6		$ 1,950.00	
11/6/2013	TRW	Pleading drafting	3.5		$ 332.50	
11/6/2013	CMA	Pleading drafting	10		$ 3,250.00	
11/7/2013	CMA	Pleading drafting	5		$ 1,625.00	
11/7/2013	BLA	Pleading drafting	3		$ 675.00	
11/8/2013	TRW	Research		1		$ -
11/12/2013	BLA	Research		1.1		$ 247.50
11/13/2013	TRW	Research		1	$ -	
11/13/2013	CMA	Pleading drafting	3		$ 975.00	
Total			**48.2**	**51.1**	**$ 11,590.50**	**$ 10,819.50**

APPENDIX B

RULE 54(b) CERTIFICATION RESEARCH AND OPPOSITION TO PERMISSIVE APPEAL

Date	Attorney	Category of work	Drafting	Research	Amount/Drafting	Amount/Research
54(b)						
1/22/2014	BLA	Legal Research		0.8		$ 180.00
1/24/2014	CMA	Pleading Drafting	1		$ 325.00	
2/5/2014	CMA	Pleading Drafting	1.5		$ 487.50	
2/20/2014	CMA	Pleading Drafting	2		$ 650.00	
2/20/2014	BLA	Legal Research		0.4		$ 90.00
2/21/2014	CMA	Pleading Drafting	1		$ -	
2/21/2014	BLA	Legal Research		1.6		$ 360.00
2/23/2014	BLA	Legal Research		1		
2/25/2014	CMA	Pleading Drafting	1.5		$ 487.50	
Total for 54(b)			**7**	**3.8**	**$ 1,950.00**	**$ 630.00**
Trial Court Permissive Appeal						
5/7/2014	CMA	Review IHD Pleading	1		$ 325.00	
5/13/2014	CMA	Pleading Drafting	1.5		$ 487.50	
5/13/2014	BLA	Legal Research		2.8		$ 630.00
5/14/2014	BLA	Legal Research		1.1		$ 247.50
5/14/2014	CMA	Pleading Drafting	1.5		$ 487.50	
5/19/2014	BLA	Legal Research		0.4		$ 90.00
5/19/2014	CMA	Review Pleading	0.8		$ 260.00	
5/21/2014	CMA	Prepare/Attend Hearing	2.5		$ 812.50	
Total Trial Court Permissive Appeal			**7.3**	**4.3**	**$ 2,372.50**	**$ 967.50**
Supreme Court Permissive Appeal						
6/24/2014	CMA	Pleading Review	0.9		$ 202.50	
6/25/2014	BLA	Legal Research		3.3		$ 742.50
6/25/2014	CMA	Pleading Drafting	2		$ 650.00	
6/26/2014	CMA	Pleading Drafting	1.5		$ -	
6/26/214	BLA	Pleading Drafting	1.4		$ 315.00	
6/30/2014	BLA	Pleading Drafting	4.4		$ 990.00	
7/1/2014	BLA	Pleading Drafting	3		$ 675.00	
7/2/2014	BLA	Pleading Drafting	1.1		$ 247.50	
Total Supreme Court Permissive Appeal			**15.5**	**8.6**	**$ 4,947.50**	**$ 1,935.00**

APPENDIX C

SUMMARY JUDGMENT PLEADINGS

Date	Attorney	Category of work	Drafting	Legal Research	Amount/Pleadin
SJ Opening Memorandum					
5/30/2014	BLA	Draft SJ Pleading	1.4		$ 315.00
6/3/2014	CMA	Finalize SJ pleading	1.45		$ 471.25
6/20/2014	CMA	Edit SJ Pleading	1		$ 325.00
Sub Total			**3.85**		**$ 1,111.25**
SJ Reply Brief					
7/9/2014	BLA	Review SJ Response	0.9		$ 202.50
7/10/2014	CMA	Work on SJ Reply	1		$ 325.00
7/10/2014	BLA	Work on SJ Reply	4.2		$ 945.00
7/11/2014	BLA	Work on SJ Reply	4		$ 900.00
7/11/2014	CMA	Work on SJ Reply	1.5		$ 487.50
7/14/2015	BLA	Legal Research		4.8	$ 1,080.00
7/14/2014	CMA	Draft SJ Pleading	2		$ 650.00
7/15/2014	BLA	Work on SJ Reply	1.1		$ 247.50
7/21/2014	CMA	Prepare for hearing	4		$ 1,300.00
7/22/2014	CMA	Attend Hearing & Prepare order	4		$ 1,300.00
Sub-total			**30.4**	**4.8**	**$ 7,437.50**
Total for Drafting and Research			**34.25**	**4.8**	**$ 8,548.75**