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Burns Concrete, Inc. v. Teton County Appellant's Brief Dckt. 43527

IN THE SUPREME COURT OF THE STATE OF IDAHO

BURNS CONCRETE, INC., an Idaho corporation, and BURNS HOLDINGS, LLC, an Idaho limited liability company, Plaintiffs-Appellants, v. TETON COUNTY, a political subdivision of the State of Idaho, Defendant-Respondent.	Supreme Court Docket No. 43527-2015 Teton County Case No. CV-2013-165

APPELLANTS' BRIEF

Appeal from the District Court of the Seventh Judicial District for Teton County, the Honorable Dane H. Watkins, Jr., District Judge, Presiding.

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TABLE OF CONTENTS

I. STATEMENT OF THE CASE 1

A. Summary Of The Dispute. 1

B. Summary Of The Proceedings In The Trial Court. 2

C. Summary Of The Facts. 3

(i) Preliminary Statement 3

(ii) Parties 4

(iii) Jurisdiction and Venue 5

(iv) Relevant Terms of the Agreement. 5

(v) General Allegations. 7

II. ISSUES PRESENTED ON APPEAL 12

III. LEGAL STANDARDS 13

IV. ARGUMENT 14

A. Application Of The Force Majeure Clause Should Be Held To Have Suspended Burns' Obligation To Construct The Permanent Facility. 15

B. Application Of The Doctrine Of Prevention Should Be Held To Have Suspended Or Discharged Burns' Obligation To Construct The Permanent Facility. 25

C. Application Of The Doctrine Of Impossibility Should Be Held To Have Suspended Or Discharged Burns' Obligation To Construct The Permanent Facility. 30

D. Teton County Should Be Held To Be Estopped From Rezoning The Property By Application Of The Doctrine Of Quasi-Estoppel 37

V. CONCLUSION 42

TABLE OF CASES AND AUTHORITIES

Page(s)

CASES

Ace Realty, Inc. v. Anderson,
106 Idaho 742, 689 P.2d 1289 (Ct. App. 1984) 21

Burns Holdings, LLC v. Teton Cnty. Bd. of Comm'rs,
152 Idaho 440, 272 P.3d 412 (2012) 9, 10, 28, 31, 34

City of Meridian v. Petra Inc.,
154 Idaho 425, 299 P.3d 232 (2013) 22

Daugharty v. Post Falls Highway Dist.,
134 Idaho 731, 9 P.3d 534 (2000) 22

George v. Univ. of Idaho,
121 Idaho 30, 822 P.2d 549 (Ct. App. 1991) 22

Hayward v. Jack's Pharmacy Inc.,
141 Idaho 622, 115 P.3d 713 (2005) 43

Idaho Power Co. v. Cogeneration, Inc.,
134 Idaho 738, 9 P.3d 1204 (2000) 22, 23, 24

Kel Kim Corp. v. Central Mkts., Inc.,
519 N.E.2d 295 (N.Y. 1987) 17, 18

Knipe Land Co. v. Robertson,
151 Idaho 449, 259 P.3d 595 (2011) 13, 14

Landis v. Hodgson,
109 Idaho 252, 706 P.2d 1363 (Ct. App. 1985) 31, 33, 35, 36

Peck Ormsby Constr. Co. v. City of Rigby,
No. CV 10-545-S-WBS, 2012 WL 5273087 (D. Idaho 2012) 27

Perlman v. Pioneer Ltd. P'ship,
918 F.2d 1244 (5th Cir. 1990) 21

Specialty Foods of Indiana, Inc. v. City of South Bend,
997 N.E.2d 23 (Ind. Ct. App. 2013) 17, 18, 19, 20, 21

Sprenger, Grubb & Associates, Inc. v. City of Hailey,
127 Idaho 576, 903 P.2d 741 (1995).....39

Sullivan v. Bullock,
124 Idaho 738, 864 P.2d 184 (Ct. App. 1993).....26, 27

Sutheimer v. Stoltenberg,
127 Idaho 81, 896 P.2d 989 (Ct. App. 1995).....29, 30

Terrazas v. Blaine Cnty. ex. rel. Bd. of Comm'rs,
147 Idaho 193, 207 P.3d 169 (2009).....37, 39, 40

URI Cogeneration Partners, L.P. v. Bd. of Governors for Higher Educ.,
915 F.Supp. 1267 (D.R.I. 1996).....15, 16, 17, 18, 19, 20, 21, 22, 24, 25

Vinegar Hill Zinc Co. v. United States,
276 F.2d 13 (Ct. Cl. 1960).....21

STATUTES

Idaho Code § 5-403.....5

Idaho Code § 5-514.....5

Idaho Code § 67-6516.....36

OTHER AUTHORITIES

13 RICHARD A. LORD, WILLISTON ON CONTRACTS (4th ed., updated May 2015).....25, 26

BLACK'S LAW DICTIONARY (10th ed. 2014).....16

RESTATEMENT (SECOND) OF CONTRACTS § 261.....31, 33, 36

RESTATEMENT (SECOND) OF CONTRACTS § 264.....31, 33, 34, 35

RESTATEMENT (SECOND) OF CONTRACTS § 266.....34, 35, 36

I. STATEMENT OF THE CASE

A. Summary Of The Dispute.

In 2007 Burns Holdings, LLC (jointly with its affiliate Burns Concrete, Inc., "Burns") entered into an agreement with Teton County, Idaho ("Teton County") providing for Burns' construction of (i) substantial road and other public improvements and (ii) a building for a concrete batch plant having the elevations depicted in an exhibit to the parties' agreement, which specified a 75' height for the building. But shortly after Teton County executed and recorded the agreement and Burns then constructed the public improvements and other work it was contractually obligated to Teton County to *immediately* construct—and incurred several hundred thousand dollars in out-of-pocket costs doing so—Teton County decided it didn't want Burns to construct a 75' building after all and refused to provide Burns with the conditional use permit that was then required by the relevant zoning ordinance for a 75' building.

Because the agreement between Burns and Teton County *required* Burns to install and then operate a temporary concrete batch plant until the 75' building could be constructed, Burns installed and continued to operate its temporary plant through the years while it sought to obtain the required zoning approvals and building permit. However, after (i) Teton County refused to issue Burns a conditional use permit to construct a 75' building, (ii) the Idaho Supreme Court ruled that Burns was required to obtain a zoning variance rather than a conditional use permit for the building, and (iii) Teton County then also refused to issue Burns a zoning variance to construct the building, Burns was left with no alternative but to continue the operation of its temporary batch plant until Teton County might once again change positions and amend its zoning ordinances to allow for Burns' construction of its desired 75' building.

Not satisfied with having induced Burns into buying the property for a concrete batch plant, installing and operating a temporary and less efficient batch plant pending construction of the building depicted in the parties' agreement, and constructing extensive public and other improvements to satisfy Burns' contractual obligations to Teton County, Teton County initiated action to shut down Burns' operation of its temporary batch plant and rezone Burns' property so that it could no longer be used in accordance with the terms of the parties' agreement. Burns then filed this lawsuit to enforce the terms of the parties' agreement or, alternatively, recover either (i) Burns' actual damages for Teton County's repudiation and breach of the agreement or (ii) should the agreement be held to be unenforceable for any reason, restitution damages for the benefits Burns provided Teton County under the agreement.

The elemental issue presented in this appeal is whether Burns' construction of the 75' building depicted in the parties' agreement has been delayed or prevented by action beyond Burns' control as a result of Teton County's not issuing the zoning approvals and building permit required for construction of the building.

B. Summary Of The Proceedings In The Trial Court.

Burns filed its verified complaint initiating this civil action on May 21, 2013 [R, p. 1]. After Teton County filed its verified answer and counterclaim on June 11, 2013 [R, p. 25], Burns filed its initial reply to the counterclaim against it on July 15, 2013 [R, p. 41]. Thereafter, and in accordance with the trial court's order granting Burns leave to amend its reply [R, p. 116], Burns filed an amended reply to Teton County's counterclaim on December 29, 2014 [R, p. 143].

Both Burns and Teton County moved for the entry of summary judgment, with Burns moving for the entry of partial summary judgment in its favor on the liability issues only [R, p.

47-48], and Teton County moving for full summary judgment in its favor on both counts of its counterclaim [R, p. 65]. The trial court denied Burns' motion and granted Teton County's motion through the court's Memorandum Decision and Order Re: Motions for Summary Judgment, filed December 19, 2014 (*"1st MSJ Decision"*) [R, pp. 118 & 141].

On January 20, 2015, Burns filed a motion requesting reconsideration of the *1st MSJ Decision* based on the application of the "impossibility doctrine," which was pleaded as an additional affirmative defense in Burns' amended reply to Teton County's counterclaim [R, p. 150]. The trial court denied Burns' motion through the court's Memorandum Decision and Order Re: Motion for Reconsideration, filed June 24, 2015 (*"2nd MSJ Decision"*) [R, pp. 168 & 182].

The trial court's final judgment was subsequently filed on July 13, 2015 [R, p. 185]. Burns then filed its notice of appeal on August 21, 2015 [R, p. 187], under and pursuant to I.A.R. 11(a)(1) with respect to an appeal from a final judgment and within the 42-day period required by I.A.R. 14(a).

C. Summary Of The Facts.

(i) Preliminary Statement.

1. Burns holds all rights of the defined "Developer" under that certain Developer's Agreement for Burns Holdings, LLC, made by and between Burns Holdings, LLC and Teton County and recorded September 5, 2007 by Teton County as Instrument #191250 (the

"Agreement"). *Complaint*[1] ¶ 1 [R, pp. 13-24]. (A true and correct copy of the recorded Agreement is attached hereto as Exhibit 1.)

2. A true and correct copy of the recorded Agreement is also attached to the *Complaint* as Exhibit 1. *Complaint* ¶ 2 [R, p. 2]; *Answer*[2] ¶ *2* [R, p. 26].

3. Burns sought by its *Complaint* (a) a decree that Teton County is estopped from rezoning the property described in the Agreement and that the time for constructing the "Permanent Facility" defined in the Agreement has been tolled since November 15, 2007, when the Teton County Board of County Commissioners first voted to deny issuance of the land use approvals required for construction of the Permanent Facility; (b) a decree establishing Teton County's anticipatory repudiation and material breach and Burns' rescission of the Agreement, together with judgment against Teton County for all damages incurred by Burns related to or arising out of the Agreement; and (c) in the event the Agreement should for any reason be held to be void or voidable by Teton County, judgment against Teton County for restitution damages in an amount equal to the benefits by which Teton County was unjustly enriched as a result of the public improvements constructed by Burns pursuant to the terms of the Agreement. *Complaint* ¶ 3 [R, p. 2].

(ii) Parties.

4. Burns Concrete, Inc. is an Idaho corporation engaged in the manufacture and sale of concrete, and Burns Holdings, LLC is an Idaho limited liability company engaged in the

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[1] Verified Complaint for: (i) Declaratory Judgment, (ii) Breach of Contract and Rescission, (iii) Unjust Enrichment, filed May 21, 2013 ("*Complaint*") [R, pp. 1-24].

[2] Answer and Counterclaim, filed June 11, 2013 ("*Answer*") [R, pp. 25-31].

holding of real property, with the two companies being under common ownership and together holding all rights of the defined Developer under the Agreement. *Complaint* ¶ 4 [R, p. 2].

5. Teton County is a political subdivision of the State of Idaho. *Complaint* ¶ 5 [R, p. 3]; *Answer* ¶ 5 [R, p. 26].

(iii) Jurisdiction and Venue.

6. Jurisdiction exists in the trial court under Idaho Code § 5-514. *Complaint* ¶ 6 [R, p. 3]; *Answer* ¶ 6 [R, p. 26].

7. Venue exists in Teton County under Idaho Code § 5-403. *Complaint* ¶ 7 [R, p. 3]; *Answer* ¶ 7 [R, p. 26].

(iv) Relevant Terms of the Agreement.

8. The real property subjected to the Agreement is located within the Area of Impact of the City of Driggs, Teton County, Idaho and described in Exhibit "A" to the Agreement (the "Property"). *Complaint* ¶ 8 [R, p. 3]; *Answer* ¶ 8 [R, p. 26].

9. Pursuant to Paragraph 1 (titled, Zoning Ordinance Amendment) of the Agreement, Teton County agreed to "adopt an ordinance amending the Driggs Area of Impact Zoning map to rezone the property to M1." The Property was thereafter rezoned by Teton County to M1 (Light Industrial). *Complaint* ¶ 9 [R, p. 3]; *Answer* ¶ 9 [R, p. 27].

10. Pursuant to Paragraph 2 (titled, Conditions on Development) of the Agreement:

> The sole use allowed and restrictions pursuant to this conditional rezone as reflected in this Agreement are as follows:
>
> a. The property shall be used exclusively for the operation of a ready-mix concrete manufacturing plant.

b. . . . This development and operation shall be subject to the following terms and conditions, in addition to the other terms hereof:

(i) Developer intends to operate a Ready-Mix Concrete Manufacturing Facility (a "Facility") on the property.

(ii) All operations on the property shall comply with all applicable and governing local, state or U.S. ordinances and laws relating to dust, noise, water quality and air quality.

(iii) Attached as **Exhibit "B"—Site Plan, and Exhibit "C"—Building Elevations**, and by this reference incorporated herein are plans for construction of Developer's intended permanent facility ("Permanent Facility").

(iv) Immediately upon execution of this Agreement, Developer shall order and commence construction of the Permanent Facility. The installation of the Permanent Facility shall be completed within eighteen (18) months of execution of this Agreement by the County, subject to delays resulting from weather, strikes, shortage of steel or manufacturing equipment or any other act of force majeure or action beyond Developer's control.

(v) In order to facilitate and support the construction of the Permanent Facility and to allow the Developer to expedite commercial operations, the Developer shall erect and operate a temporary concrete batch plant on site as shown in **Exhibit "B"—Site Plan and Exhibit "D".**

(vi) In the event that the Permanent Facility is not completed within the time allowed herein, the County shall have the right to revoke the authority to operate the Temporary Facility. The grant of authority of the Temporary Facility is to allow Developer to operate Developer's business until the Permanent Facility is constructed. The authority to operate the Temporary Facility shall terminate upon completion of the Permanent Facility even if sooner than the described eighteen (18) month time period.

(Underscoring added.) *Complaint* ¶ 10 [R, pp. 3-4]; *Answer* ¶ 10 [R, p. 27].

11. Pursuant to Paragraph 5 (titled, Zoning Reversion Consent) of the Agreement:

> The execution of this Agreement shall be deemed written consent by Developer to change the zoning of the subject property to its prior designation upon failure to comply with the conditions imposed by this Agreement. No reversion shall take place until after a hearing on this matter pursuant to Idaho Code § 67-6511A. Upon notice and hearing, as provided in this Agreement and in Idaho Code §67-6509, if the property described in attached Exhibit "A" is not used as approved, or if the approved use ends or is abandoned, the Board of County Commissioners may, upon receiving a recommendation from the City's governing board, order that the property will revert to the zoning designation (and land uses allowed by that zoning designation) existing immediately prior to the rezone action, i.e., the property shall revert back to the C3, Service and Highway Commercial zoning designation.

(Underscoring added.) *Complaint* ¶ 11 [R, p. 4]; *Answer* ¶ 11 [R, p. 27].

12. Pursuant to Paragraph 12.b of the Agreement, the Agreement runs with the land, binds the Property in perpetuity, and inures to the benefit of and is enforceable by Developer and its assigns. *Complaint* ¶ 13 [R, p. 5]; *Answer* ¶ 13 [R, p. 27].

13. Finally, Paragraph 2.b(iii) and Exhibit C of the Agreement expressly provide for and depict Burns' construction of its desired 75' Permanent Facility. *Complaint* ¶ 14 [R, p. 5]; *Answer* ¶ 14 [R, p. 27].

(v) General Allegations.

14. When considering whether to expand its business operations into Teton County, Burns met with representatives of both Teton County and the City of Driggs to determine whether and where to construct a concrete batch plant in the area. All such representatives encouraged Burns to construct such a plant, with both Teton County and the City of Driggs designating the Property as the specific site where Burns should construct it. *Complaint* ¶ 23 [R, p. 7].

15. Burns purchased the Property based on the representations made by Teton County and the City of Driggs, and with the reasonable expectancy of entering into the Agreement with Teton County, after having first filed for a change of zoning for the Property to allow for the construction and operation of the proposed Permanent Facility. *Complaint* ¶ 24 [R, p. 7].

16. In accordance with Teton County's requirements, the City of Driggs' Planning and Zoning Commission heard on July 11, 2007 and unanimously recommended for approval by Teton County both the Agreement and the issuance of a conditional use permit allowing the 75' height of the Permanent Facility (the "CUP"). *Complaint* ¶ 15 [R, p. 15]; *Answer* ¶ 15 [R, p. 27].

17. Thereafter, on or about August 31, 2007 Teton County and Burns entered into the Agreement and Teton County caused the Agreement to be recorded. *Complaint* ¶ 16 [R, p. 5]; *Answer* ¶ 16 [R, p. 27].

18. Following the execution of the Agreement, Burns expended many hundreds of thousands of dollars constructing and implementing the commitments imposed under the Agreement, including without limitation (a) erecting and operating a temporary concrete batch plant (the "Temporary Facility") required under Paragraph 2.b(v) of the Agreement, which required Burns to incur substantial expense for site demolition, remediating the site for prior waste disposal, clearing and grubbing the site, extending utilities to the site, and transporting to and erecting on the site the Temporary Facility; (b) constructing the road and highway improvements required under Paragraph 2.d(iv) of the Agreement, which required Burns to incur substantial expense for barrier fencing with concrete foundations, new turn lanes, landscaping, and performance bonds; and (c) applying for and taking all actions necessary to obtain the CUP and zoning variance required to construct the Permanent Facility. *Complaint* ¶ 17 [R, p. 6].

Substantially all, if not 100%, of the work described in parts (a) and (b) of this paragraph was completed prior to November 15, 2007. Affidavit of Kirk Burns, filed November 5, 2014, ¶ 5 [R, p. 89].

19. On November 15, 2007, after Burns had incurred the substantial costs required by the Agreement, and notwithstanding the unanimous recommendation for approval by the City of Driggs' Planning and Zoning Commission and the determination of Teton County's attorney that the Agreement was a valid and binding contract, the Teton County Board of County Commissioners voted to deny the CUP. *Complaint* ¶ 18 [R, p. 6].

20. Burns thereafter confirmed with Teton County's director of planning and zoning, Kurt Hibbert, on November 20, 2007 that Teton County would not issue a building permit for the construction of the Permanent Facility specified in the Agreement. *Complaint* ¶ 19 [R, p. 6].

21. After the Idaho Supreme Court held that a provision in the relevant zoning ordinance was void and that Burns must therefore obtain a zoning variance from Teton County, rather than the CUP, in order to construct the Permanent Facility,[3] Burns applied for the required variance, which the Teton County Board of County Commissioners voted to deny on September 13, 2012. Affidavit of Kimberly D. Evans Ross, filed August 11, 2014, ¶ 4 and Ex. G [R, pp. 51 & 59-60].

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[3] *See Burns Holdings, LLC v. Teton Cnty. Bd. of Comm'rs,* 152 Idaho 440, 443-44, 272 P.3d 412, 415-16 (2012) (hereinafter *"Burns Holdings I"*).

22. Teton County admits "there is no legal means currently available to [Burns] to build the promised batch plant," *id.*, because Burns cannot make the showing required for a zoning variance.[4]

23. Burns undertook every act reasonably possible to obtain the CUP and zoning variance required by Teton County for Burns to construct the Permanent Facility, both of which Teton County refused to issue. *Complaint* ¶ 20 [R, p. 6].

24. Burns could not construct the Permanent Facility without an amendment to the ordinances of Teton County. *Complaint* ¶ 21 [R, p. 7]; *Answer* ¶ 21 [R, p. 28].

25. Burns has operated the Temporary Facility in accordance with the terms of the Agreement. However, Burns has not ever been able to construct the Permanent Facility by reason of actions and inaction by Teton County over which Burns has no control. *Complaint* ¶ 25 [R, p. 7]. *See also* Agreement ¶ 10 ("Developer agrees to comply with all . . . county and local laws, rules and regulations, which appertain to the subject property.").

26. By letter dated October 4, 2012 from its Board of County Commissioners, Teton County revoked Burns' authority to operate the Temporary Facility and demanded its immediate removal from the Property. *Complaint* ¶ 32 [R, p. 9]; *Answer* ¶ 32 [R, p. 30].

27. In response to Teton County's revocation and demand, counsel for Burns provided Teton County written notice by letter dated October 15, 2012 that Teton County's action constituted a breach of the Agreement and demanded the following:

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[4] To obtain a variance, Burns is required "to show that there was undue hardship because of the site characteristics and that the variance would not conflict with the public interest." *Burns Holdings I, supra.* In regards to the first of these requirements, Burns acknowledges that the Property is without problematic site characteristics.

(i) If the County contends the Developer has breached or is in default of the Agreement, that the County provide the Developer with "not less than thirty (30) days' Notice of Default, in writing . . . [and] specify the nature of the alleged default and, where appropriate, the manner and period of time during which said default may be satisfactorily cured"—in accordance with the requirements imposed under Paragraph 8 of the Agreement;

(ii) That the County take no further action adverse to the Developer's rights under the Agreement without first providing a written Notice of Default and opportunity to cure the alleged default—as is expressly required by Paragraph 8 of the Agreement; and

(iii) That the County provide the Developer with a written retraction of its notice of revocation dated October 4, 2012, within 30 days of the County's receipt of this letter—which demand is hereby made subject to the Developer's reservation of rights to treat any further action by the County that is adverse to the Developer's rights under the Agreement or the County's failure to retract its notice of revocation within said 30 days as a repudiation of the County's obligations under the Agreement.

Complaint ¶ 33 [R, pp. 9-10]; *Answer* ¶ 33 [R, p. 30].

28. Nevertheless, by letter dated October 23, 2012 from the Teton County Prosecuting Attorney, Teton County resubmitted to the City of Driggs a previously withdrawn application for a recommendation by the city that the zoning of the Property should revert to C3 (Service and Highway Commercial). Although a final decision on the application was tabled by the City of Driggs' Planning and Zoning Commission, Teton County's proposal to rezone the Property remains pending. *Complaint* ¶ 26 [R, p. 7]; *Answer* ¶ 26 [R, p. 29].

29. Additionally, by letter dated November 5, 2012 from the Teton County Prosecuting Attorney to Burns' counsel, Teton County asserted that the clause in Paragraph 2.b(iv) of the Agreement extending the 18-month period to construct the Permanent Facility "is

inapplicable to the present situation" and threatened to file suit to force Burns' removal of the Temporary Facility from the Property. *Complaint* ¶ 28 [R, p. 8]; *Answer* ¶ 28 [R, p. 29].

30. Thus, Teton County responded to Burns' October 15 notice and demand referenced in paragraph 27 above, (a) by acting to rezone the Property and (b) by the Teton County Prosecuting Attorney's November 5 response referenced in paragraph 29 above, which rejected all of the demands made by Burns and threatened suit to compel Burns' removal of the Temporary Facility from the Property. *Complaint* ¶ 34 [R, p. 10]; *Answer* ¶ 34 [R, p. 30].

31. Burns thereafter commenced this civil action on May 21, 2013 after the parties were unable to resolve their dispute. *Complaint* 1 [R, p. 1].

II. ISSUES PRESENTED ON APPEAL

1. Did the trial court err in ruling that the force majeure clause in the Agreement does not suspend Burns' obligation under the Agreement to construct the Permanent Facility?

2. Did the trial court err in ruling that the doctrine of prevention of performance does not suspend or discharge Burns' obligation under the Agreement to construct the Permanent Facility?

3. Did the trial court err in ruling that the doctrine of impossibility of performance does not suspend or discharge Burns' obligation under the Agreement to construct the Permanent Facility?

4. Did the trial court err in ruling that the doctrine of quasi-estoppel does not estop Teton County from rezoning the Property?

III. LEGAL STANDARDS

The dispute between Burns and Teton County arises out of the terms of the Agreement, with the gist of the dispute being over whether the requirement to construct the Permanent Facility has been extended by the occurrence of actions beyond Burns' control.[5] The applicable legal standards with respect to this Court's interpretation of the Agreement and the elemental issues in dispute are set forth in detail in *Knipe Land Company v. Robertson*, 151 Idaho 449, 259 P.3d 595 (2011), as follows:

> As provided by this Court in *Potlatch Education Ass'n v. Potlach School District No. 285*:
>
> > When interpreting a contract, this Court begins with the document's language. 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. Interpreting an unambiguous contract and determining whether there has been a violation of that contract is an issue of law subject to free review. A contract term is ambiguous when there are two different reasonable interpretations or the language is nonsensical. Whether a contract is ambiguous is a question of law, but interpreting an ambiguous term is an issue of fact.
>
> Whether an ambiguity exists in a legal instrument is a question of law, over which this Court exercises free review.

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[5] As also set forth in the foregoing Summary of the Facts (hereinafter "*Facts*"), Paragraph 2.b(iv) of the Agreement provides, in relevant part, as follows:

> The installation of the Permanent Facility shall be completed within eighteen (18) months of execution of this Agreement by the County, subject to delays resulting from weather, strikes, shortage of steel or manufacturing equipment or any other act of force majeure or action beyond Developer's control.

Facts ¶ 10 (underscoring added). (The foregoing contractual provision is hereinafter referred to as the "Force Majeure Clause.")

> Where a legal instrument is found to be unambiguous the legal effect must be decided by the district court as a matter of law; it is only when that instrument is found to be ambiguous that evidence as to the meaning of that instrument may be submitted to the finder of fact. "[E]vidence of custom or usage may not be introduced to vary or contradict the terms of a plain and unambiguous contract. . . ."

Knipe Land Co., 151 Idaho at 454-55, 259 P.3d at 600-01 (internal and concluding citations omitted).

Neither Burns nor Teton County has asserted during this dispute that the Force Majeure Clause quoted in note 5, *supra*, is ambiguous and thus not subject to this Court's interpretation as a matter of a law. *See 1st MSJ Decision* 8 ("Both parties agree that the Agreement is not ambiguous.") [R, p. 125].

IV. ARGUMENT

As set forth in the *Complaint*, Burns expended many hundreds of thousands of dollars constructing and implementing the commitments imposed under the Agreement following its execution, including constructing public improvements. *Facts* ¶ 18. Nevertheless, Teton County has steadfastly refused to take the action necessary to allow Burns to construct the Permanent Facility. *Facts* ¶¶ 19-21. And as the undisputed facts in this case establish, the sole reason Burns has not constructed the Permanent Facility is because Teton County has *prevented* Burns from doing so. *Facts* ¶¶ 22-25. Burns therefore submits that the fundamental question distills down to whether Burns could control either (i) Teton County's issuance of the CUP or zoning variance Burns applied for in order to construct the Permanent Facility or (ii) Teton County's amendment of its ordinances so as to otherwise allow Burns to construct the Permanent Facility.

A. Application Of The Force Majeure Clause Should Be Held To Have Suspended Burns' Obligation To Construct The Permanent Facility.

Teton County's counterclaims for breach of contract (Count I) and declaratory judgment (Count II) are both based on limiting the meaning of the phrase "any other . . . actions beyond Developer's control" in the Force Majeure Clause to exclude Teton County's failure to issue the CUP, zoning variance, and building permit Burns required to construct the Permanent Facility. *See Counterclaim*[6] ¶¶ 15 & 43 [R, pp. 33 & 37-38].[7] The trial court, which held as set forth below, decided the question in favor of Teton County based on the opinion of the federal district court for Rhode Island in *URI Cogeneration Partners, L.P. v. Board of Governors for Higher Education*, 915 F.Supp. 1267 (D.R.I. 1996):

> The reasoning of the court in *URI Cogeneration Partners* is persuasive here. Section 2.b.(iv) of the Agreement does not include failure to obtain zoning approval within the list of examples of a force majeure. As in *URI Cogeneration Partners*, the catchall phrase in Section 2.b(iv), "or action beyond Developer's control," should not be given expansive meaning, but should be confined to things of the same kind or nature as "weather, strikes, shortage of steel or manufacturing equipment." Burns was aware it would need approval for a CUP or zoning variance prior to entering the agreement—consequently, the failure to procure the zoning variance was foreseeable. Burns states that it could not have foreseen Teton County's denial of the CUP and zoning variance because Burns applied for the CUP prior to the parties' execution of the Agreement. Burns adds that Teton County implicitly approved the 75-foot height when it executed the Agreement. However, Section 10 of the Agreement unambiguously requires Burns to comply with all applicable laws. Burns has acknowledged that it cannot satisfy the standard for a zoning variance. Additionally, during the February 26, 2007

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[6] Answer and Counterclaim, filed June 11, 2013 ("*Counterclaim*") [R, pp. 32-39].

[7] Burns denied these allegations in its Amended Reply to Counterclaim, filed December 29, 2014 ("*Reply*"), at ¶¶ 7 and 26 [R, pp. 144 & 146].

> public hearing, the Board of County Commissioners expressed concerning [sic] regarding the plant facility being 45 feet tall. Burns should have foreseen that there was, at a minimum, a risk that its request for a CUP and/or zoning variance could or would be denied. Burns and Teton County could have provided for the eventuality that a zoning variance would not be obtained. They did not, thereby requiring Burns to assume the risk of not obtaining the variance. [¶] Burns's failure to complete construction of the permanent facility within 18 months is not excused by Teton County's denial of the zoning variance.

1st MSJ Decision 12 (underscoring added) [R, p. 129].

The trial court erred in applying the decision in *URI Cogeneration Partners* to decide the present dispute for multiple reasons.

It should be clearly understood as an initial matter that the force majeure clause at issue in *URI Cogeneration Partners* was included in a contract between the two parties to that lawsuit but that the required zoning approval in question was denied by a stranger to the contract, the town of South Kingston. 915 F.Supp. at 1286. Thus, as stated in the language used in determining the application of force majeure clauses,[8] while the parties to a contract may well *anticipate* that a local jurisdiction not bound by contractual obligation to either party may decide not to issue a zoning approval, it was plainly *unanticipated* here that Teton County—one of the parties to the Agreement—would not promptly issue the zoning approvals required for Burns to

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[8] The term "force majeure" is defined in the most current version of *Black's Law Dictionary* to mean:

> An event or effect that can be neither anticipated nor controlled; esp., an unexpected event that prevents someone from doing or completing something that he or she had agreed or officially planned to do. The term includes both acts of nature (e.g., floods and hurricanes) and acts of people (e.g., riots, strikes, and wars).

BLACK'S LAW DICTIONARY 761 (10th ed. 2014).

construct the Permanent Facility depicted in the Agreement. The unforseeability of Teton County's unexpected change of heart and denial of Burns' CUP application is particularly obvious because Burns and Teton County entered into the Agreement after the City of Driggs' Planning and Zoning Commission heard and unanimously recommended for approval by Teton County both the Agreement and the issuance of the CUP allowing the 75' height of the Permanent Facility. *Facts* ¶¶ 16-17. Accordingly, the facts before the district court in *URI Cogeneration Partners* are readily distinguishable from those presented in this appeal.

In addition, the rule adopted by the federal district court in *URI Cogeneration Partners,* which purports to be grounded in the law of New York and, more specifically, the decision in *Kel Kim Corporation v. Central Markets, Inc.*, 519 N.E.2d 295 (N.Y. 1987),[9] is at odds with the facts presented in *Kel Kim.* The obvious conflict is illustrated by the following discussion of *Kel Kim* in *Specialty Foods of Indiana, Inc. v. City of South Bend*, 997 N.E.2d 23 (Ind. Ct. App. 2013):

> Additionally, in support of its argument that the parties' force majeure provision is inapplicable in this instance, Specialty Foods cites *Kel Kim Corp. v. Central Markets, Inc.*, 70 N.Y.2d 900, 524 N.Y.S.2d 384, 519 N.E.2d 295 (1987). In *Kel Kim*, the force majeure provision provided:
>
> > If either party to this Lease shall be delayed or prevented from the performance of any obligation through no fault of their own by reason of labor disputes, inability to procure materials, failure of utility service, restrictive governmental laws or regulations, riots, insurrection, war, adverse weather, Acts of God, or other similar causes beyond the control of such party, the performance

[9] *See URI Cogeneration Partners*, 915 F.Supp. at 1286-87.

> of such obligation shall be excused for the period of the delay.
>
> 524 N.Y.S.2d 384, 519 N.E.2d at 296 n.*. The New York Court of Appeals determined that the force majeure provision did not apply because the event that prevented Kel Kim's performance under the contract was neither specifically included in the force majeure provision nor generally included within the provision's catchall phrase "or other similar causes beyond the control of such party." The court explained that the event (i.e., the inability of Kel Kim to procure and maintain liability insurance) was of a different kind and nature from the particular events listed in the force majeure provision such that it could not be considered a "similar cause."
>
> Specialty Foods' reliance upon *Kel Kim* is misguided. The force majeure clause in *Kel Kim* is distinguishable from the clause in the instance case primarily due to its inclusion of the phrase "or other similar causes." This is a limiting phrase that the court determined required the event causing the non-performance of a party to be similar to the events specifically spelled out in the provision of the parties' contract. The provision in the present case does not contain such a restrictive clause. Rather, the parties here agreed that when an event occurs, the cause of which is "any other reason" not within the reasonable control of the parties, the performance of obligations under the agreement shall be excused. Thus, instead of a limiting clause, the [contracting parties] included broad terminology that does not require the non-performance triggering event to be similar to the specific causes listed in the force majeure provision. We remain mindful that we must look to the specific language of the contract. *See Va. Power* [*Energy Mktg., Inc. v. Apache Corp.*, 297 S.W.3d 397, 402 (Tex. App. 2009)]. Accordingly, the underlying rationale of the decision in *Kel Kim* is not applicable here.

Specialty Foods, 997 N.E.2d at 28 (underscoring added). Thus, the force majeure clause at issue in *Kel Kim* was inconsistent with the broad terminology used in the force majeure clauses in both *Specialty Foods* and *URI Cogeneration Partners*[10] (as well as that used in the Agreement).

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[10] The relevant portion of the force majeure clause at issue in *URI Cogeneration Partners* is as follows:

Moreover, the "foreseeable" limitation imposed on force majeure clauses in *URI Cogeneration Partners* (as well as by the trial court in this dispute) was expressly rejected in *Specialty Foods* on the following grounds:

> Historically, the theory of force majeure embodied the concept that parties could be relieved of performance of their contractual obligations when the performance was prevented by causes beyond their control, such as an act of God. However, much of the theory's "historic underpinning have fallen by the wayside" with the result that force majeure is now "little more than a descriptive phrase without much inherent substance." Indeed, the scope and effect of a force majeure clause depends on the specific contract language and not on any traditional definition of the term. In other words, when the parties have defined the nature of force majeure in their agreement, that nature dictates the application, effect, and scope of force majeure with regard to that agreement and those parties, and reviewing courts are not at liberty to rewrite the contract or interpret it in a manner which the parties never intended. The party seeking to excuse its performance under a force majeure clause bears the burden of proof of establishing that defense.
>
> We begin by determining the intent of the parties through examination of the language they used in the contract. The force majeure provision in the UMO Agreement provides:

> As used in this Agreement, "Force Majeure" means causes beyond the reasonable control of and without the fault or negligence of the party claiming Force Majeure. <u>If either Party shall be unable to carry out any of its obligations under this Agreement due to events beyond the reasonable control of and without the fault or negligence of the party claiming Force Majeure—including, but not limited to</u> an act of God; sabotage; accidents; appropriation or diversion of steam energy, equipment, materials or commodities by rule or order of any governmental or judicial authority having jurisdiction thereof; any changes in applicable laws or regulations affecting performance; war; blockage; insurrection; riot; labor dispute; labor or material shortage; fuel storage; fire; explosion; flood; nuclear emergency; epidemic; landslide; lightning; earthquake or similar catastrophic occurrence—this Agreement shall remain in effect, but the affected Party's obligations shall be suspended for the period the affected Party is unable to perform because of the disabling circumstances provided that . . . .

915 F.Supp. at 1276 (underscoring added).

> In the event Century Center or [Specialty Foods] shall be delayed or hindered or prevented from the performance of any obligation required under this Agreement by reason of strikes[,] lockouts, inability to procure labor or materials, failure of power, fire or other casualty, acts of God, restrictive governmental laws or regulations, riots, insurrection, war or any other reason not within the reasonable control of Century Center or [Specialty Foods], as the case may be, then the performance of such obligation shall be excused for the period of such delay and the period for the performance of any such act shall be extended for a period equivalent to the period of such delay.
>
> The parties agree that the specific language from the force majeure provision in the UMO Agreement with which we are concerned is the phrase "any other reason not within the reasonable control of Century Center."
>
> Specialty Foods argues that the force majeure provision of the UMO Agreement is inapplicable to excuse the Century Center's performance because the termination of the Management and License Agreements was "not unforeseeable." However, the force majeure provision in this case contains nothing about foreseeability, and Specialty Foods points to neither terms in the provision nor in the remainder of the parties' contract in support of its argument. The scope and effect of a force majeure clause depends on the specific contract language.
>
> Further, there is no evidence before us that the bargaining between the parties was not free and open. The City, the Century Center, and Specialty Foods are sophisticated parties presumably represented by counsel who were at liberty to define the nature of force majeure in whatever manner they desired. We decline to rewrite the parties' contract by interjecting into the force majeure provision a requirement of foreseeability.

Specialty Foods, 997 N.E.2d at 27-28 (internal and concluding citations omitted). Although not all authorities are in agreement on the question, multiple other courts have also rejected the "foreseeable" limitation imposed on force majeure clauses in *URI Cogeneration Partners* and by

the trail court below for the reasons articulated in *Specialty Foods*. *See, e.g.*, *Perlman v. Pioneer Ltd. P'ship*, 918 F.2d 1244, 1248 (5th Cir. 1990); *Vinegar Hill Zinc Co. v. United States*, 276 F.2d 13, 15-16 (Ct. Cl. 1960).

Finally, and decisively, the "catchall phrase" and "foreseeable" limitations imposed on force majeure clauses in *URI Cogeneration Partners* and by the trial court below are also inconsistent with established Idaho precedent.

The Idaho Court of Appeals addressed the proper interpretation of a catchall phrase in *Ace Realty, Inc. v. Anderson*, 106 Idaho 742, 689 P.2d 1289 (Ct. App. 1984):

> The Victors assert that the Andersons should not have been awarded hay-cutting expenses incurred in harvesting the Victors' share of the hay. The contract provides that the Victors "shall pay one-fourth of all normal harvesting expenses, including . . . bailing [sic], hauling and stacking of hay . . . ." The Victors request that we apply the maxim "expressio unius est exclusio alterius" (the expression of one thing is the exclusion of another) to determine that the inclusion of specific activities—baling, hauling and stacking of hay—implies an intent to exclude all other activities from the meaning of "harvesting". That maxim "applies to contracts . . . and hence, the expression in a contract of one or more things of a class implies the exclusion of all not expressed." 17 Am.Jur.2d *Contracts* § 255 (1964). (Footnotes omitted.)
>
> We must construe this contract so as to give effect to every part of it, if possible. *Wright v. Village of Wilder,* 63 Idaho 122, 117 P.2d 1002 (1941). Here, the phrase "all normal harvesting expenses" sufficiently expresses the range of activities to be included as expenses so as to make that maxim inapplicable. To interpret the contract otherwise would result in nullifying the phrase "all normal harvesting expenses." This we refuse to do.

106 Idaho at 749-50, 682 P.2d at 1296-97 (underscoring added). The rule articulated in *Ace Realty* requiring a court to construe a contract "so as to give effect to every part of it, if possible" has been repeatedly followed and quoted by both of Idaho's appellate courts. *See, e.g.,*

Daugharty v. Post Falls Highway Dist., 134 Idaho 731, 735, 9 P.3d 534, 538 (2000); *Twin Lakes Vill. Prop. Ass'n Inc.*, 124 Idaho 132, 137, 857 P.2d 611, 616 (1993); *George v. Univ. of Idaho*, 121 Idaho 30, 36, 822 P.2d 549, 555 (Ct. App. 1991).

Accordingly, the trial court's interpretation of the Force Majeure Clause so as to effectively nullify the phrase "any other act of force majeure *or action beyond Developer's control*" is inconsistent with Idaho's established rule that every phrase of a contract be given effect if possible. *See also City of Meridian v. Petra Inc.*, 154 Idaho 425, 437, 299 P.3d 232, 244 (2013) ("This Court has no "roving power to rewrite contracts to make them more equitable.' Thus, when weighing various interpretations of contracts, we consider the language of the agreement as 'the best indication of [the parties'] intent." (Internal and concluding citations omitted.)). Nor is the trial court's interpretation of the Force Majeure Clause consistent with the leading Idaho authority construing the application of force majeure clauses in contracts, *Idaho Power Company v. Cogeneration, Inc.*, 134 Idaho 738, 9 P.3d 1204 (2000).

Similar to the broad terminology used in the force majeure clause at issue in *URI Cogeneration Partners*[11] (as well as that used in the Agreement), the force majeure clause at issue in *Idaho Power* provided, in relevant part, as follows:

> [F]orce majeure or an event of force majeure means any cause beyond the control of the Seller or of Idaho Power which, despite the exercise of due diligence, such Party is unable to prevent or overcome, including but not limited to an act of God, fire, flood, explosion, strike, sabotage, an act of the public enemy, **civil or military authority**, court orders, laws or regulations, insurrection or riot, an act of the elements or lack of precipitation resulting in reduced water flows for power production purposes. **If either party is rendered** wholly or in part **unable to perform its**

[11] *See supra* note 10.

> **obligations** under this Agreement because of an event of *force majeure*, **both parties shall be excused from whatever performance is affected by the event of *force majeure***, provided that . . . .

Idaho Power, 134 Idaho at 747-48, 9 P.3d at 1213-14 (bolding in original). Based on the foregoing provision, Cogeneration argued that acts of civil authority in revoking Cogeneration's permits constituted events of force majeure because doing so affected Cogeneration's ability to post the security required under the parties' agreement. *Id.*

As the Idaho Supreme Court explained the question decided by the district court and presented on appeal:

> The district court concluded that although the actions of government agencies in revoking and suspending the required permits and certificates were events of *force majeure* as applied to the obligations of the parties for construction and operation, they did not affect Cogeneration's physical ability to deliver the required security in a timely manner and did not relieve Cogeneration of its obligation to deliver the security to Idaho Power.
>
> * * *
>
> Looking at the plain language of the contract, the district court correctly interpreted the *force majeure* clause as excusing only those obligations affected by an event of *force majeure*. Based upon the record, ample evidence exists indicating that the obligation to pay the security was not directly affected by the revocation and suspension of the required permits and certificates since Cogeneration and its financial partner Calpine could have posted the security but chose not to. As was correctly pointed out by the district court in its memorandum decision, Cogeneration and Calpine may not have wanted to tender the security deposit without assurance that Idaho Power would recognize the occurrence of events of *force majeure*, but nothing prevented them from doing so. Cogeneration argues that business sense prevented it from posting the security, for had it tendered the security without acknowledgment of events of *force majeure* by Idaho Power, by the terms of the Agreement, Cogeneration would have forfeited the

> deposit when permitting delays prevented completion of the facility on time. We do not find this argument persuasive in light of the fact that had Cogeneration subsequently failed to complete the facility on time, it would have then been permitted to invoke the *force majeure* provision of the Agreement and excuse such breach, thereby avoiding forfeiture of its security deposit.

Id. (underscoring added). Thus, both the district court and the Idaho Supreme Court decided that the broad terminology of the force majeure clause at issue in *Idaho Power* would apply to "actions of government agencies in revoking and suspending the required permits."[12] The same rule should apply equally here to Teton County's failure to issue the CUP and building permit Burns required to construct the Permanent Facility, as well as to Teton County's failure to amend its ordinances so as to otherwise allow Burns to construct the Permanent Facility.

In sum, then, the trial court erred in applying the decision in *URI Cogeneration Partners* to decide the present dispute for the following reasons:

- The facts in *URI Cogeneration Partners* are readily distinguishable from those presented in this appeal.
- The rule adopted in *URI Cogeneration Partners* is at odds with the very New York authority on which the rule was purportedly based.
- The "catchall phrase" and "foreseeable" limitations imposed on force majeure clauses in *URI Cogeneration Partners* are not only inconsistent with persuasive

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[12] In support of its holding, the Supreme Court relied on the following rule, as previously discussed above:

> In construing a written instrument, this Court must consider it as whole and give meaning to all provisions of the writing to the extent possible. *See Magic Valley Radiology, P.A. v. Professional Business Services, Inc.* 119 Idaho 558, 565, 808 P.2d 1303, 1310 (1991).

Idaho Power, 134 Idaho at 748, 9 P.3d at 1214.

authority from other state and federal courts, but they are inconsistent with established Idaho precedent.

And for all these reasons, *URI Cogeneration Partners* is not the law of Idaho.

Accordingly, application of the Agreement's Force Majeure Clause should be held to have suspended Burns' obligation to construct the Permanent Facility.

B. Application Of The Doctrine Of Prevention Should Be Held To Have Suspended Or Discharged Burns' Obligation To Construct The Permanent Facility.[13]

The doctrine of prevention is summarized in *Williston on Contracts* as follows:

> It is a general principle of contract law that if one party to a contract hinders, prevents or makes impossible performance by the other party, the latter's failure to perform will be excused. This general principle has been referred to as the doctrine of prevention. Under the doctrine, a contracting party whose performance of its promise is prevented by the other party is not obligated to perform and is excused from any further offer of performance. In turn, the preventing party is not allowed to recover damages for the resulting nonperformance or otherwise benefit from its own wrongful acts.
>
> When a promisor prevents, hinders, or renders impossible the occurrence of a condition precedent to its promise to perform, or to the performance of a return promise, the promisor is not relieved of the obligation to perform and may not legally terminate the contract for nonperformance. Furthermore, the promisor may not invoke the other party's nonperformance as a defense when it is sued on the contract. In short, under the doctrine of prevention, when a party to a contract causes the failure of the performance of the obligation due, it cannot in any way take advantage of that failure.
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> * * *
>
> The principle that prevention by one party excuses performance by the other applies to both the performance of a

[13] Burns pleaded the doctrine of prevention of performance as an affirmative defense to Teton County's counterclaims. *Reply* ¶ 31 [R, p. 147].

> condition and of a promise and may be laid down broadly as applying to every contract. Whether interference by one party to a contract amounts to prevention so as to excuse performance by the other party and constitute a breach by the interfering party is a question of fact to be decided by the jury under all of the proved facts and circumstances.
>
> * * *
>
> The rationale underlying the prevention doctrine, pursuant to which the nonperformance by one party to the contract is excused when the other party to the contract hinders, prevents, or makes impossible that performance, is two-fold. First, the doctrine is based on the long-established principle of law that a party should not be able to take advantage of its own wrongful act. Thus, one who prevents the fulfillment of a duty of performance under a contract may not then rely on the nonperformance which has been caused by the prevention. It is a principle of fundamental justice that if a promisor is personally responsible for the failure of performance, either of an obligation due the promisor or of a condition on which the promisor's liability depends, it cannot take advantage of the failure.
>
> Second, the principle of prevention is based on the implied agreement of the parties to a contract to proceed in good faith and cooperate in performing the contract in accordance with its expressed intent and, therefore, to refrain from committing any intentional act or omission that would interfere with the other party or prevent or make it impossible for the other party to perform.

13 RICHARD A. LORD, WILLISTON ON CONTRACTS §§ 39:3 & 39:6 (4th ed., updated May 2015) (underscoring added) (footnotes omitted).

The leading authority on the application of the prevention doctrine as applied under Idaho law is *Sullivan v. Bullock*, 124 Idaho 738, 864 P.2d 184 (Ct. App. 1993). As the Idaho Court of Appeals there discussed, there are two distinct articulations of the type of conduct warranting application of the doctrine,[14] with the articulation adopted in Idaho being that the act of

[14] As explained in *Sullivan*:

prevention must have been "*outside the reasonable contemplation of the parties when the contract was executed.*" 124 Idaho at 743, 864 P.2d at 189 (emphasis added).

In applying this principle to the facts in *Sullivan*, the Court of Appeals held as follows:

> The jury returned a verdict stating that Mr. Bullock had not substantially performed but that Mrs. Sullivan had unreasonably prevented his performance. There was substantial evidence from which the jury could conclude that Mr. Bullock's failure was to be excused by Mrs. Sullivan's act of denying access to her home. True, an employee did enter Mrs. Sullivan's home when he was not supposed to. However, when Mrs. Sullivan denied any further access to the home she acted in a manner that was outside the contemplation of the contract or the parties when they executed the contract.

Id. (underscoring added). *See also Peck Ormsby Constr. Co. v. City of Rigby*, No. CV 10-545-S-WBS, 2012 WL 5273087, at *4 (D. Idaho 2012) (finding a genuine issue of material fact "[s]ince it is not clear that rejection . . . was '*outside the reasonable contemplation of the parties when the contract was executed*'" (quoting *Sullivan*) (emphasis added)).

Therefore, the question with respect to whether the prevention doctrine here applies under Idaho law is whether, at the time the Agreement was executed on August 31, 2007, the

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> To excuse a party's nonperformance, however, the conduct of the party preventing performance must be "wrongful" and "in excess of their legal rights." 17A C.J.S. *Contracts* § 468. Other authorities have stated that the conduct of the party preventing performance must be outside what was permitted in the contract and "unjustified," or outside the reasonable contemplation of the parties when the contract was executed. *Godburn v. Meserve*, 130 Conn. 723, 37 A.2d 235 (1944); *Morton Buildings, Inc. v. Dept. of Human Resources*, 10 Kan.App.2d 197, 695 P.2d 450 (1985); *Kooleraire Service and Installation Corp., v. Board of Education of the City of New York*, 28 N.Y.2d 101, 320 N.Y.S.2d 46, 268 N.E.2d 782 (1971). Our Supreme Court has echoed this standard in *Molyneux* [*v. Twin Falls Canal Co.*, 54 Idaho *619, 35 P.2d 651 (1934)*] . . . . [¶] The issue of prevention was described in instruction twenty-two, which follows the theory stated in *Molyneux* that the act of prevention must have been unreasonable, in other words, outside the contemplation of the parties as expressed in the contract.

124 Idaho at 742-43, 864 P.2d at 188-89 (underscoring added) (footnote omitted).

parties contemplated that Teton County would deny Burns the CUP and building permit required to construct the Permanent Facility and then, two years later, would first contest the validity of the applicable ordinance in order to avoid issuing Burns the zoning approvals Burns required. *See Burns Holdings I,* 152 Idaho at 443, 272 P.3d at 415.

In this regard, because paragraphs 2.b(iv)-(v) of the Agreement *require* Burns to *immediately* commence construction of the Permanent Facility and to erect and operate the Temporary Facility, *see* Facts ¶ 10, rather than delaying or conditioning Burns' performance until after Teton County approved the CUP application that was then pending before it, there can be no material question of fact but that the parties contemplated Teton County would promptly issue Burns the CUP and building permit required to construct the Permanent Facility when they executed the Agreement.[15] Indeed, construction of the Permanent Facility without the CUP and a building permit would have been both illegal and proscribed by the terms of the Agreement.[16] Therefore, unless Teton County intended for Burns to immediately breach the Agreement by either failing to commence construction of the Permanent Facility or by commencing construction before obtaining the required CUP and building permit—something Teton County has never asserted—Teton County must necessarily have "contemplated" it would promptly approve and issue the CUP Burns required when Teton County executed the Agreement.

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[15] If paragraphs 2.b(iv)-(v) of the Agreement were not dispositive, there would then be a material question of fact. *See* above quote from *Williston* and *Sullivan*, 124 Idaho at 743 n.2, 864 P.2d at 189. However, Teton County has not submitted a scintilla of evidence supporting a finding that the parties did not intend Burns to immediately commence construction of the Permanent Facility following execution of the Agreement. Nor could any such evidence be considered without violating the parol evidence rule.

[16] *See* Agreement ¶ 10 ("Developer agrees to comply with all federal, state, county and local laws, rules and regulations, which pertain to the subject property.") [R, p. 17].

Although Burns made all of the foregoing arguments to the trial court, and it acknowledged the controlling legal principle to be applied, *see 1st MSJ Decision* 13 [R, p. 130], the trial court ruled that the doctrine of frustration was inapplicable for the following reason:

> Because Section 10 of the Agreement required Burns to comply with all applicable rules and regulations, and under the language of [Idaho Code] Section 67-6516, the County Commissioners could not grant a zoning variance to the property in question, it was not unreasonable of Teton County to deny Burns the zoning variance. Teton County's actions in denying the zoning variance were not unreasonable and was not outside the parties' contemplation as expressed in the Agreement.

Id. at 14 [R, p. 131]. Thus, the trial court's ruling is based on the September 13, 2012 vote of the Teton County Board of Commissioners to deny Burns' application for a zoning variance, *see Facts* ¶ 21—an event that occurred five years *after* the Agreement was executed on August 31, 2007.

Accordingly, because the trial court's holding fails to consider whether Teton County's denial of the CUP and refusal to issue Burns a building permit in November 2007, *see Facts* ¶¶ 19-20, was outside the reasonable contemplation of the parties when the Agreement was executed, the trial court erred in ruling the prevention doctrine to be inapplicable. And based on the points and authorities discussed above, the doctrine should be held to have suspended or discharged Burns' obligation to construct the Permanent Facility.

C. Application Of The Doctrine Of Impossibility Should Be Held To Have Suspended Or Discharged Burns' Obligation To Construct The Permanent Facility.[17]

The general elements and application of the doctrine of impossibility were explained by the Idaho Court of Appeals in *Sutheimer v. Stoltenberg*, 127 Idaho 81, 896 P.2d 989 (Ct. App. 1995):

> In *Haessly v. Safeco Title Insurance Co.*, 121 Idaho 463, 465, 825 P.2d 1119, 1121 (1992), the Idaho Supreme Court stated that the doctrine of impossibility "operates to excuse performance when the bargained-for performance is no longer in existence or is no longer capable of being performed due to the unforeseen, supervening act of a third party." To establish impossibility: "(1) a contingency must occur; (2) performance must be impossible, not just more difficult or more expensive; and (3) the nonoccurrence of the contingency must be a basic assumption of the agreement." *Id.*
>
> Impossibility that is only temporary will not act to discharge a contractual obligation if the contract can yet be performed after the impossibility ceases. *Culp v. Tri-County Tractor, Inc.*, 112 Idaho 894, 900, 736 P.2d 1348, 1354 (Ct.App.1987). This is explained in Section 269 of the RESTATEMENT (SECOND) OF CONTRACTS as follows:
>
> > Impracticability of performance or frustration of purpose that is only temporary suspends the obligor's duty to perform while the impracticability or frustration exists but does not discharge this duty or prevent it from arising unless his performance after the cessation of the impracticability or frustration would be materially more burdensome than had there been no impracticability or frustration.
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> *See also Twin Harbors Lumber Co. v. Carrico*, 92 Idaho 343, 348, 442 P.2d 753, 758 (1968) (Under the doctrine of impossibility, if the existence of a specific thing is essential for performance, a duty

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[17] Burns pleaded the doctrine of impossibility of performance as an affirmative defense to Teton County's counterclaims. *Reply* ¶ 32 [R, p. 147].

> to perform is discharged if the thing "subsequently is not in existence *in time for seasonable performance*." Emphasis added).

Sutheimer, 127 Idaho at 85, 896 P.2d at 993 (emphasis in original).

As set forth in the above quoted excerpt from the opinion in *Sutheimer*, there are three elements to a defense based on the doctrine of impossibility and all three are satisfied in the present dispute. Thus, the first element (a contingency must occur) was satisfied when the Idaho Supreme Court ruled that the CUP Burns sought could not be obtained because a provision in the relevant zoning ordinance was void.[18] *Facts* ¶ 21. The second element (performance must be impossible) was established by Teton County's denial of the variance Burns sought following the Supreme Court's decision in *Burns Holdings I*, Burns' admission that the Property is without problematic site conditions, and Teton County's admission that "there is no legal means currently available to [Burns] to build the promised batch plant . . . ." *Facts* ¶¶ 21- 22. And the third element (the nonoccurrence of the contingency must be a basic assumption of the agreement) is established by the fact that both Burns and Teton County thought the 75' Permanent Facility could be constructed upon the issuance of the CUP Burns had applied for in accordance with the then-existing zoning ordinances, with both the CUP application and the Agreement having already been recommended by the City of Driggs for approval by Teton County when the Agreement was executed by Burns and Teton County. *Facts* ¶¶ 16-17. Indeed, as the Supreme Court found in *Burns Holdings I*, Teton County did not first raise the variance

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[18] The difference between Burns having to obtain the CUP, as the parties expected when the Agreement was executed, or a variance, as the Supreme Court held to be required and for which the Property does not qualify, is material for multiple reasons. *See Burns Holdings I*, 152 Idaho at 444-45, 272 P.3d at 416-417. In fact, as a result of the change in the required approval Burns was deprived of any and all ability it had to construct the 75' Permanent Facility, including through a judicial challenge to Teton County's denial of the CUP.

requirement until two years after the CUP application was filed by Burns. 152 Idaho at 443, 272 P.3d at 415.

The foundation for Burns' defense of impossibility is set forth in Sections 261 and 264 of the *Restatement (Second) of Contracts* (1981) (the "*Restatement*"), as adopted and applied in *Landis v. Hodgson*, 109 Idaho 252, 706 P.2d 1363 (Ct. App. 1985). The relevant portions from the opinion in *Landis* are as follows:

> In determining whether the non-occurrence of a particular event was a basic assumption, a court will look at all the circumstances, including the terms of the contract. The fact that the event was unforeseeable is significant in suggesting that the non-occurrence was a basic assumption. "If the superseding event was not reasonably foreseeable when the contract was made, the party claiming discharge can hardly be expected to have provided against its occurrence. However, if it was reasonably foreseeable, or even foreseen, the opposite conclusion does not necessarily follow." RESTATEMENT (SECOND) OF CONTRACTS § 261, comment (c) (1981).
>
> One such superseding event has been the government imposition of a new law, regulation or order which makes the performance of a duty impractical. RESTATEMENT (SECOND) OF CONTRACTS § 264 (1981). If such performance becomes impractical, i.e., if the order or regulation was an event the non-occurrence of which was assumed at the time the contract was made, the person will be relieved of his duty to perform.
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> * * *
>
> [A]s stated in *Lane v. Dashiell*, 195 Md. 677, 75 A.2d 348, 353-54 (1950):
>
> > It is a general rule of the common law that when the impossibility of performance arises after the formation of the contract, the failure of the promisor to perform is not excused. This rule was founded on the theory that if the promisor makes his promise unconditionally, he takes the risk of being held liable even though performance should become

> impossible by circumstances beyond his control. The unjust consequences of this general rule gave rise to certain exceptions. One of these is that a contractual duty is discharged where performance is subsequently prevented or prohibited by a judicial, executive, or administrative order, in the absence of circumstances showing either a contrary intention or contributing fault on the part of the person subject to the duty. [Citations omitted.] But an order which interferes with the performance of the contract is not an excuse if the circumstances surrounding the formation of the contract are such as to indicate that the possibility of such interference was recognized and the risk of it was assumed by the promiser.
>
> *Lane* is cited as authority in *Acme Moving and Storage Corporation v. Bower*, 269 Md. 478, 306 A.2d 545 (1973). In *Acme*, a lease agreement was executed for a warehouse. The landlord had to obtain a special variance to build a totally enclosed warehouse. The variance was granted subject to ten conditions regarding fencing, landscaping, parking and vehicular access. The landscaping plan had to be submitted to the county planning board for approval. A plan was submitted; however, it was not approved. The board promulgated its own plan which provided for the removal of a chain-link fence and sidewalk surrounding the buildings. Without the fence and sidewalk the warehouse did not comply with the zoning law as a totally enclosed warehouse and could not receive a use and occupancy permit which was required in the lease. The Maryland Court of Appeals held the tenant could not sue for specific performance of the lease. No fault was found on the part of the landlord in failing to obtain the use and occupancy permit. There was no suggestion that the refusal to issue the use and occupancy permit was foreseeable or that the landlord assumed the risk for such refusal. Therefore, the defense of impossibility of performance was properly available to him.

Landis, 109 Idaho at 256-57, 706 P.2d at 1367-68 (underscoring added).

Burns therefore submits that the application of the doctrine of impossibility to the present dispute falls within the scope of Sections 261 and 264 of the *Restatement* and the holding in *Landis*.

Moreover, assuming the facts in *Landis* can be meaningfully distinguished based on Burns' (unknowingly) having to obtain a variance at the time the Agreement was signed, Burns submits that Idaho law should be extended to adopt the parallel provisions in Section 266(1) of the *Restatement*. For as explained in Comment a to Section 264 of the *Restatement:*[19]

> *Rationale.* This Section, like the two that precede it, states a specific instance for the application of the rule stated in § 261. It is "a basic assumption on which the contract was made" that the law will not directly intervene to make performance impracticable when it is due. Therefore, if supervening governmental action prohibits a performance or imposes requirements that make it impracticable, the duty to render that performance is discharged, subject to the qualifications stated in § 261. . . . If the prohibition or prevention already exists at the time of the making of the contract, the rule stated in § 266(1) rather than that stated in § 261 controls, and this Section applies for the purpose of that rule as well. *See* Comment *a* to § 266.

RESTATEMENT (SECOND) OF CONTRACTS § 264, cmt. a (underscoring added).

Thus, the fact that the law required Burns to obtain a variance at the time the Agreement was signed (as held over four years later in *Burns Holdings I*) merely means that the applicable

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[19] Section 264 provides: "If the performance of a duty is made impracticable by having to comply with a domestic or foreign governmental regulation or order, that regulation or order is an event the non-occurrence of which was a basic assumption on which the contract was made." As further explained in Comment b to Section 264:

> *Nature of regulation or order.* Under the rule stated in this Section, the regulation or order may be domestic or foreign. It may emanate from any level of government and may be, for example, a municipal ordinance or an order of an administrative agency. Any governmental action is included and technical distinctions between "law," "regulation," "order" and the like are disregarded. It is not necessary that the regulation or order be valid, but a party who seeks to justify his non-performance under this Section must have observed the duty of good faith and fair dealing imposed by § 205 in attempting, where appropriate, to avoid its application.

RESTATEMENT (SECOND) OF CONTRACTS § 264, cmt. b.

provisions of the *Restatement* are Sections 264 and 266,[20] rather than Sections 261 and 264 as in *Landis*. And as explained in Comment a to Section 266:

> *Relation to other rules.* A party's performance may be as easily affected by impracticability existing at the time the contract was made, because of some fact of which he was ignorant, as by supervening impracticability. Indeed, it is sometimes difficult to characterize a situation as involving either existing or changed circumstances, as, for example, where a judicial decision is handed down after the time that the contract was made giving an unanticipated interpretation to a statute enacted before that time. Cf. Illustration 3. The rules stated in this Section for cases of existing impracticability and frustration therefore parallel those for supervening impracticability and frustration (§§ 261, 265).

RESTATEMENT (SECOND) OF CONTRACTS § 266, cmt. a (underscoring added).

Notwithstanding the fact that Burns presented all of the foregoing points and authorities to the trial court, it ruled that the doctrine of impossibility was inapplicable for substantially the same reasons that it ruled the doctrine of frustration was inapplicable:

> Section 10 of the Agreement indicates that the parties contemplated possible interference with construction from state laws and that Burns assumed the risk of any non-compliance.[21]

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[20] Section 266 of the *Restatement* provides as follows:

> (1) Where, at the time a contract is made, a party's performance under it is impracticable without his fault because of a fact of which he has no reason to know and the non-existence of which is a basic assumption on which the contract is made, no duty to render that performance arises, unless the language or circumstances indicate the contrary.
>
> (2) Where, at the time a contract is made, a party's principal purpose is substantially frustrated without his fault by a fact of which he has no reason to know and the non-existence of which is a basic assumption on which the contract is made, no duty of that party to render that performance arises, unless the language or circumstances indicate the contrary.

[21] The trial court provides no guidance with respect to those words included within the generic language comprising "Section 10" that support this finding. *Cf. supra* note 16.

> There is no genuine issue of material fact that compliance with Idaho Code § 67-6516 was reasonably foreseeable by the parties.[22] Because the necessity of obtaining a zoning variance in order to exceed the maximum height allowance was reasonably foreseeable,[23] the doctrine of impossibility is inapplicable to the facts of this case.

2nd MSJ Decision 14 [R, p. 181].

However, the trial court provides no factual support for its implicit finding that Burns could reasonably foresee *when it executed the Agreement* that Teton County would three months later deny Burns a CUP, that Teton County would then raise the variance requirement two years after Burns executed the Agreement, that the Supreme Court would then hold Burns was required to obtain a variance four years after Burns executed the Agreement, and that Teton County would then deny Burns a variance five years after Burns executed the Agreement because the Property is without problematic site characteristics. And if successive, interrelated events such as these are all held to be reasonably foreseeable as a matter of law, and without need of factual support or explanation for why or how they are foreseeable, when would Sections 261, 264, and 266 of the *Restatement* ever have legal effect?

Accordingly, because the trial court's holding is irreconcilable with the provisions in Sections 261, 264, and 266 of the *Restatement* and the Court of Appeal's holding in *Landis*, the doctrine of impossibility should be held to have suspended or discharged Burns' obligation to construct the Permanent Facility.

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[22] The trial court provides no explanation for why Burns might have reasonably foreseen the possible application of Idaho Code § 67-6516.

[23] The trial court also provides no explanation for why Burns might have reasonably foreseen the necessity of obtaining a zoning variance, rather than the CUP.

D. Teton County Should Be Held To Be Estopped From Rezoning The Property By Application Of The Doctrine Of Quasi-Estoppel.[24]

The elements of quasi-estoppel under Idaho law are as follows:

> The doctrine of quasi-estoppel applies when: (1) the offending party took a different position than his or her original position, and (2) either (a) the offending party gained an advantage or caused a disadvantage to the other party; (b) the other party was induced to change positions; or (c) it would be unconscionable to permit the offending party to maintain an inconsistent position from one he or she has already derived a benefit or acquiesced in.

Terrazas v. Blaine Cnty. ex. rel. Bd. of Comm'rs, 147 Idaho 193, 200 n.3, 207 P.3d 169, 176 (2009).

There is no dispute that the Agreement was executed on behalf of Teton County by the Teton County Board of County Commissioners. *See, e.g.*, Agreement 7 (which bears the seal of Teton County) [R, p. 19]. There is also no dispute that the Agreement *requires*:

> (iv) Immediately upon execution of this Agreement, Developer shall order and commence construction of the Permanent Facility. The installation of the Permanent Facility shall be completed within eighteen (18) months of execution of this Agreement by the County, subject to delays resulting from weather, strikes, shortage of steel or manufacturing equipment or any other act of force majeure or action beyond Developer's control.
>
> (v) In order to facilitate and support the construction of the Permanent Facility and to allow the Developer to expedite commercial operations, the Developer shall erect and operate a temporary concrete batch plant on site as shown in **Exhibit "B"—Site Plan and Exhibit "D."**

Agreement ¶¶ 2.b(iv)-(v) (underscoring added) [R, p. 14].

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[24] Burns pleaded the doctrine of quasi-estoppel as an affirmative defense to Teton County's counterclaims. *Reply* ¶ 29 [R, p. 147].

Because the foregoing contractual provisions *require* Burns to *immediately* commence construction of the Permanent Facility and erect and operate the Temporary Facility, rather than delaying or conditioning Burns' performance until after Teton County approved the CUP application that was then pending before it, there can be no material question of fact but that the parties contemplated on August 31, 2007 that Teton County would promptly issue Burns the CUP and building permit required to construct the Permanent Facility. Nor can there be any material question of fact but that the parties then contemplated that the period for Burns to construct the Permanent Facility would be extended by any "act of force majeure or action beyond Developer's Control." Agreement ¶ 2.b(iv).

Thus, by entering into the Agreement Teton County "took the position" on August 31, 2007 that Burns' should immediately commence construction of the Permanent Facility and erect and operate the Temporary Facility. Conversely, however, on November 15, 2007 Teton County "took the position" that Burns could not construct the Permanent Facility, *Facts* ¶ 19; on November 5, 2012, Teton County "took the position" that the clause in Paragraph 2.b(iv) of the Agreement extending the 18-month period to construct the Permanent Facility was inapplicable and threatened to file suit to force Burns' removal of the Temporary Facility, *Facts* at ¶ 29; and on June 11, 2013 Teton County filed a counterclaim in this lawsuit seeking to do just that.

Moreover, with respect to the second element of quasi-estoppel and its three alternative grounds:

- Teton County gained an advantage by obtaining the road and highway improvements Burns was required to construct under Paragraph 2.d(iv) of the Agreement and Teton County caused a disadvantage to Burns by requiring it to

expend hundreds of thousands of dollars in constructing such improvements, in erecting and operating the Temporary Facility, and in applying for and taking all actions necessary to obtain the zoning approvals required to construct the Permanent Facility. *Facts* ¶ 18.

- Not only was Burns "induced to change positions" by Teton County, but Burns was required to expend the hundreds of thousands of dollars just referenced by the express terms of the Agreement. Agreement ¶¶ 2.b(iv)-(v) & 2.d(iv).
- And, finally, it would be unconscionable to permit Teton County to now rezone the Property because Burns was required to expend the hundreds of thousands of dollars just referenced prior to the November 15, 2007 hearing of the Teton County Board of County Commissioners when they first unexpectedly "took the position" that Burns could not construct the Permanent Facility. *Facts* ¶ 19.

Accordingly, not only is the first element of quasi-estoppel satisfied in this dispute, but so is each and every one of the alternative grounds contained in the second element.

The question of whether a county may be estopped from rezoning property after a property owner is induced by the county to change positions was discussed but not decided in *Terrazas*. *See* 147 Idaho at 201, 207 P.3d at 177 ("although we do not reject the proposition that estoppel may be applied in appropriate circumstances, we do not find this to be an appropriate circumstance."). In articulating the considerations applicable to estopping a local government from rezoning property, the court in *Terrazas* quoted its earlier holding in *Sprenger, Grubb & Associates, Inc. v. City of Hailey*, 127 Idaho 576, 583, 903 P.2d 741, 748 (1995):

> In *Harrell* [*v. The City of Lewiston*, 95 Idaho 243, 506 P.2d 470 (1973)], we held that "[i]n the

> exercise of its police power, which includes the enactment and enforcement of zoning regulations, a municipality acts in a governmental capacity." We further stated that "[a]lthough a municipality may be estopped in limited circumstances, the enactment of zoning regulations is a governmental function which is not usually subject to estoppel." We determined in *Harrell* that no exigent reasons existed in that case for the application of estoppel without deciding what extraordinary circumstances may merit the application of the doctrine of estoppel in future cases. As in *Harrell*, we again determine that no exigent circumstances exist in this case to apply estoppel against the City in the exercise of its police power.
>
> As in *Harrell* and *Sprenger, Grubb*, we conclude that Applicants have failed to demonstrate the "exigent circumstances" that would warrant application of estoppel in the instant case. Considering first the underlying principles of estoppel, we note that it cannot be said that *the Board* took an inconsistent position by denying the application, as the determination that the proposed sites of disturbance fell within the MOD was the Board's one and only official position. Applicants have not asserted that actions of the Board induced them to change positions.

Terrazas, 147 Idaho at 200-01, 207 P.3d at 176-77 (underscoring added) (internal citations omitted).

In the present dispute, conversely, not only has Burns demonstrated "the 'exigent circumstances' that would warrant application of estoppel," but Teton County has clearly taken "an inconsistent position." Additionally, Burns has expressly asserted that actions of the Teton County Board of County Commissioners "induced [Burns] to change positions." Thus, *every* consideration articulated in *Terrazas* applicable to estopping Teton County from rezoning the Property against Burns' objection is satisfied in this dispute.

Although Burns made all of the foregoing arguments to the trial court, and it acknowledged the controlling legal principles to be applied, *see 1st MSJ Decision* 15-16 [R, pp. 132-33], the trial court ruled that the doctrine of quasi-estoppel was inapplicable for the following reasons:

> Although Exhibit C does show a building elevation of 75 feet, Section 10 of the Agreement states "Developer agrees to comply with all federal, state, county and local laws, rules and regulations, which appertain to the subject property." The inclusion of the building elevations, indicating a 75-foot height does not negate the requirements of Section 10 that Burns comply with the applicable zoning ordinance and/or obtain a variance. This Court cannot conclude, therefore, that the Agreement indicates Teton County took a position contrary to its ultimate denial of the zoning variance.[25]
>
> Burns' reliance on the Drigg's Planning and Zoning Commission's recommendation as proof Teton County has changed its position is also without merit. As in *Terrazas*, Burns cannot attribute the planning and zoning commission's recommendation to an official action by the Teton County Board of County Commissioners.[26]
>
> Furthermore, even if Teton County had taken a position different than its original position, Burns has not established any exigent circumstances that would warrant the application of quasi-estoppel in this case. Burns argues that its expenditure of hundreds of thousands of dollars to construct improvements under the Agreement constitutes exigent circumstances sufficient to estop Teton County from denying it from constructing a 75-foot tall facility. However, as indicated in *Terrazas*, the expenditure of money, alone, is insufficient to create exigent circumstances

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[25] The trial court fails to address the requirements in paragraph 2.b(iv)-(v) of the Agreement *requiring* Burns to *immediately* commence construction of the Permanent Facility and to erect and operate the Temporary Facility.

[26] The trial court misstates Burns' argument, which is that Teton County itself took official action when the Teton County Board of County Commissioners executed the Agreement.

> sufficient to invoke the doctrine of quasi-estoppel in a zoning case.[27]

1st MSJ Decision, 16-17 [R, pp. 133-34]. However, for the reasons set forth in the footnotes added by Burns to the trial court's foregoing ruling, the trial court both fails to address and misconstrues Burns' arguments establishing why the doctrine of quasi-estoppel should apply to this dispute.

Accordingly, based on the points and authorities discussed above, and in light of the fact that the trial court's decision fails to consider the arguments made by Burns showing the satisfaction of both the first element of quasi-estoppel and each and every one of the alternative grounds comprising the second element, Teton County should be held to be estopped from rezoning the Property by application of the doctrine of quasi-estoppel.

V. CONCLUSION

For the reasons discussed above, Burns contends that there is no basis in the record or the law supporting the trial court's grant of summary judgment to Teton County based on its findings (a) that the Force Majeure Clause does not apply because "Burns should have foreseen that there was, at a minimum, a risk that its request for a CUP and/or zoning variance could or would be denied[,]" *1st MSJ Decision* 12; (b) that the prevention doctrine does not apply because "Teton County's actions in denying the zoning variance were not unreasonable and was [sic] not outside the parties' contemplation as expressed in the Agreement[,]" *id.* at 14; (c) that the

---

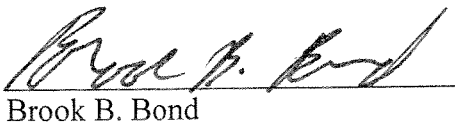
[27] The trial court again misstates Burns' argument, which is that Burns was induced by Teton County and the *requirements* in the Agreement to expend hundreds of thousands of dollars in constructing road and highway improvements *for the benefit of Teton County*, in erecting and operating the Temporary Facility, and in applying for and taking all actions necessary to obtain the zoning approvals necessary to construct the Permanent Facility.

impossibility doctrine does not apply "[b]ecause the necessity of obtaining a zoning variance in order to exceed the maximum height allowance was reasonably forseeable," *2nd MSJ Decision* 14; and (d) that the doctrine of quasi-estoppel does not apply because Teton County did not take "a position contrary to its ultimate denial of the zoning ordinance[,]" and "Burns has not established any exigent circumstances that would warrant the application of quasi-estoppel in this case[,]" *1st MSJ Decision* 16-17. Thus, at a bare minimum, there would be genuine issues of material fact precluding the grant of summary judgment to Teton County if each of these questions were not decided in Burns' favor as a matter of law. *Hayward v. Jack's Pharmacy Inc.*, 141 Idaho 622, 625, 115 P.3d 713, 716 (2005) (if the facts, with inferences favorable to the nonmoving party, are such that reasonable persons could reach differing conclusions, summary judgment is not available).

Burns therefore respectfully requests this Court to reverse the trial court's judgment in favor of Teton County, including the award of attorney fees, and to remand the case to the trial court for further proceedings consist with this Court's opinion.

DATED this 29th day of February 2016.

PARSONS BEHLE & LATIMER

By 
Brook B. Bond
Attorneys for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of February 2016, I caused two true and correct copies of the foregoing **APPELLANTS' BRIEF** to be served by the method indicated below and addressed to the following:

Kathy Spitzer
Teton County Prosecuting Attorney
230 N. Main Street, Room 125
Driggs, Idaho 83422-5124
Facsimile (208) 354-2994

(x) U.S. Mail, Postage Prepaid
( ) Hand Delivered
( ) Overnight Mail
( ) Facsimile

By _____
Brook B. Bond

191250 SEP 5 '07 PM 4 57

Instrument # 191250
TETON COUNTY, IDAHO
2007-09-05 04:57:00 No. of Pages: 12
Recorded for : BURNS CONCRET
MARY LOU HANSEN Fee: 36.00
Ex-Officio Recorder Deputy
Index to: AGREEMENT

DEVELOPER'S AGREEMENT for BURNS HOLDINGS, LLC

On the 31st day of August, 2007, Teton County, Idaho (hereinafter referred to as "County"), and Burns Holdings, LLC, an Idaho limited liability company (hereinafter referred to as "Developer"), the owner of the real property described in the attached Exhibit "A" enter into the following agreement:

WHEREAS, the Developer has applied for a zone change from C3, Service and Highway Commercial to M 1, Light Industrial, for certain real property described in Exhibit "A", attached hereto and located in the City of Driggs Area of Impact, Teton County Idaho, and hereinafter referred to as "the property"; and

WHEREAS, the Developer has requested the zone change for the purpose of developing a concrete batch plant facility on the property; and

WHEREAS, the County, pursuant to Section 67-6511A, Idaho Code, has the authority to conditionally rezone the property and to enter into a development agreement for the purpose of allowing, by agreement, a specific development to proceed in a specific area and for a specific purpose or use which is appropriate in the area, but for which all allowed uses for the requested zoning may not be appropriate pursuant to the Idaho Code and the City of Driggs Zoning Ordinance, adopted by the County as the official zoning ordinance for the Driggs Area of Impact; and

WHEREAS, the County and the Developer desire to formalize and clarify the respective obligations of the parties, it is agreed as follows:

1. Zoning Ordinance Amendment: The City of Driggs (hereinafter referred to as "City") has recommended approval of, and the County hereby grants, the zone change to M 1, Light Industrial, for the property, and will adopt an ordinance amending the Driggs Area of Impact Zoning Map to rezone the property to M1.

2. Conditions on Development: The sole use allowed and restrictions pursuant to this conditional rezone as reflected in this Agreement are as follows:

EXHIBIT 1
013

a. The property shall be used exclusively for the operation of a ready-mix concrete manufacturing facility.

b. At the current time the property has been re-zoned to M1, Light Industrial as described in paragraph 1. above. Part of such approval and recommendation was based upon execution of this development agreement to identify responsibilities and obligations pertaining to certain matters relating to the improvement and operation of the property. This development and operation shall be subject to the following terms and conditions, in addition to the other terms hereof:

(i) Developer intends to operate a Ready-Mix Concrete Manufacturing Facility (a "Facility") on the property.

(ii) All operations on the property shall comply with all applicable and governing local, state or U.S. ordinances and laws relating to dust, noise, water quality and air quality.

(iii) Attached as **Exhibit "B" – Site Plan, and Exhibit "C" – Building Elevations,** and by this reference incorporated herein are plans for construction of Developer's intended permanent facility ("Permanent Facility").

(iv) Immediately upon execution of this Agreement, Developer shall order and commence construction of the Permanent Facility. The installation of the Permanent Facility shall be completed within eighteen (18) months of execution of this Agreement by the County, subject to delays resulting from weather, strikes, shortage of steel or manufacturing equipment or any other act of force majeure or action beyond Developer's control.

(v) In order to facilitate and support the construction of the Permanent Facility and to allow the Developer to expedite commercial operations, the Developer shall erect and operate a temporary concrete batch plant on site as shown in **Exhibit "B" – Site Plan and Exhibit "D".**

(vi) In the event that the Permanent Facility is not completed within the time allowed herein, the County shall have the right to revoke the authority to operate the Temporary Facility. The grant of authority of the Temporary Facility is to allow Developer to operate Developer's business until the Permanent Facility is constructed. The

authority to operate the Temporary Facility shall terminate upon completion of the Permanent Facility even if sooner than the described eighteen (18) month time period.

c. The access to the property from State Highway 33 shall be via Casper Lane, which shall be improved to City of Driggs Public Works Standards and Specifications, as shown in the construction drawings submitted by Developer and held by the City of Driggs, prior to operation of the Temporary Facility.

d. To assure compatibility with other surrounding uses the following additional matters have been addressed and agreed upon for the Permanent Facility as follows:

(i) Noise related issues will be addressed by construction of decorative concrete block walls of eight and three-quarters feet (8.75') in height along the boundaries of the property, as shown in Exhibit B – Site Plan and enclosure of the Batch Plant Equipment within a building, as shown in Exhibit C – Building Elevations.

(ii) Dust will be controlled through paving of the area around the Facility, the enclosure of the Batch Plant Equipment within a building, a truck wash for trucks utilized by the Facility and a dust collection system on the Batch Plant. In addition, the Facility will have an air quality permit from the Idaho Department of Environmental Quality and comply with the requirements of that agency.

(iii) Hours of operation shall not be restricted as this is consistent with the provisions for M1 and C3 zoning. The property is surrounded by property zoned M1 and C3. The construction business activities of the Facility sometimes require varying hours of operation due to the nature of the construction industry.

(iv) Traffic issues shall be mitigated by construction of improvements on Casper Drive as described herein and the implementation of improvements on Highway 33 as required by the Idaho Department of Transportation.

(v) Landscaping on the North and West side will consist of a block wall with planter areas that will include trees or vegetation. The east boundary of the property shall have a fifteen (15) foot wide area reserved for future landscaping that will be

addressed if the future road planned for the area is developed. See Exhibits "B"-Site Plan and "E"- Block Wall Planter Detail.

(vi) Lighting issues shall be mitigated by using cut-off fixtures that direct the light downward rather than flood lighting.

3. Indemnity: Developer agrees to, and does hereby, defend, hold harmless and indemnify the City and County, all associated elected and appointed officials, officers, employees, agents, representatives, and attorneys, from any and all claims that may, at any time, be asserted against any such parties in connection with:

a. the City's or County's review and approval of any plans or improvements, or the issuance of any approvals, permits, certificates, or acceptances relating to the use and/or development of the property;

b. the development, construction, and maintenance of the property;

c. the performance by the County of its obligations under this Agreement and all related ordinances, resolutions, or other agreements; and

d. Notwithstanding the foregoing, the indemnification terms of this paragraph 3 shall not extend or apply to the failure of the County to follow, in good faith, governing law or ordinances.

4. Agreement Modification: This Agreement may be modified only by a written document, signed by the parties, or their successors in interest, after complying with the notice and hearing procedures of Idaho Code §67-6509 and of the Driggs Zoning Ordinance.

5. Zoning Reversion Consent: The execution of this Agreement shall be deemed written consent by Developer to change the zoning of the subject property to its prior designation upon failure to comply with the conditions imposed by this Agreement. No reversion shall take place until after a hearing on this matter pursuant to Idaho Code §67-6511A. Upon notice and hearing, as provided in this Agreement and in Idaho Code §67-6509, if the property described in attached Exhibit "A" is not used as approved, or if the approved use ends or is abandoned, the Board of County Commissioners may, upon

receiving a recommendation from the City's governing board, order that the property will revert to the zoning designation (and land uses allowed by that zoning designation) existing immediately prior to the rezone action, i.e., the property shall revert back to the C3, Service and Highway Commercial zoning designation.

6. Annual Review: The County may, while this Agreement is in effect, annually review the extent of good faith substantial compliance with the terms of this Agreement. Developer shall have the duty to demonstrate Developer's good faith compliance with the terms of this Agreement during such review.

7. Performance: Developer shall comply with all commitments set out in this Agreement. Developer shall timely and satisfactorily carry out all required performance to appropriately maintain, in the discretion of the County, all commitments set forth in this Agreement.

8. Default and Remedies: In the event of a default or breach of this Agreement or of any of its terms or conditions, the party alleging default shall give the breaching party not less than thirty (30) days Notice of Default, in writing, unless an emergency exists threatening the health and safety of the public. If such an emergency exists, written notice shall be given in a reasonable time and manner in light of the circumstances of the breach. The time of the giving of the notice shall be measured from the date of the written Notice of Default. The Notice of Default shall specify the nature of the alleged default and, where appropriate, the manner and period of time during which said default may be satisfactorily cured. During any period of curing, the party charged shall not be considered in default for the purposes of termination or zoning reversion, or the institution of legal proceedings. If the default is cured, then no default shall exist and the charging party shall take no further action.

9. Termination: This Agreement may be terminated in accordance with the notice and hearing procedures of Idaho Code §67-6509, and the zoning designation upon which the use is based reversed, upon failure of Developer, a subsequent owner, or other person acquiring an interest in the property described in attached Exhibit "A" to comply with the terms of this Agreement.

10. Compliance with Laws: Developer agrees to comply with all federal, state, county and local laws, rules and regulations, which appertain to the subject property.

Developer's failure to comply with the above laws or the terms of this Agreement will subject Developer to an enforcement action by the County in a court of competent jurisdiction.

11. Changes in Law: Any reference to laws, ordinances, rules, regulations, or resolutions shall include such laws, ordinances, rules, regulations, or resolutions as have been, to the date of this agreement, or as they may then be in force in the future with respect to proposed amendments to this Agreement in the future.

12. Miscellaneous Provisions:

a. The parties agree that the relationship created by the agreement is solely that of a private Developer and the City. Nothing in this agreement shall create the Developer or City as an agent, employer, employee, legal representative, partner or subsidiary of the other.

b. The parties agree that this Agreement shall run with the land and bind the property in perpetuity, and shall inure to the benefit of and be enforceable by the parties, and any of their respective legal representatives, heirs, successors, and assigns.

c. All notice must be in writing, mailed in the U.S. Mail via certified mail to the addresses indicated on this agreement.

d. This agreement shall be construed and enforced pursuant to the laws of the State of Idaho.

e. If any party shall bring suit against the other party to enforce this agreement, the prevailing party shall be entitled to reasonable attorney fees and costs.

f. If any term of this agreement is declared invalid, illegal or unenforceable, the remainder of this agreement shall remain operative and binding.

g. The Developer hereby guarantees the prompt and satisfactory correction of all defects or deficiencies in the improvements that occur or become evident during the one-year period following [final construction of the improvements. If the defect or deficiency occurs or becomes evident, then the Developer shall commence correction of

the defect of deficiency within ten days after written notice from the City. The Developer shall proceed with reasonable diligence to correct the defect or deficiency. The guaranty shall be extended one full year from the date of repair or replacement of any improvement made pursuant to this paragraph.

h. This agreement shall be signed in duplicate originals. Each party shall receive one original of this agreement.

i. The County shall have this agreement recorded in the office of the Teton County Clerk.

AGREED:

Teton County, Idaho

By: _____
County Commissioners
P.O. Box
Driggs, Idaho 83422

BOARD OF COUNTY COMMISSIONERS TETON COUNTY IDAHO

Attest:

By: _____
County Clerk

Developer:

BURNS HOLDINGS, LLC

By: _____
Kirk Burns, Manager

EXHIBIT "A"

FROM INSTRUMENT NO. 183802

TRACT 1: FEE ESTATE

LOT 1B-W, TETON PEAKS VIEW SUBDIVISION, TETON COUNTY, IDAHO, PART OF THE W1/2.NEI/4, SECTION 23, TOWNSHIP 5 NORTH, RANGE 45 EAST, BOISE MERIDIAN, TETON COUNTY, IDAHO, BEING FURTHER DESCRIBED AS: FROM THE N1/4 CORNER OF SAID SECTION 23, SOUTH 975.63 FEET AND EAST, 627.41 FEET TO THE POINT OF BEGINNING; THENCE SOUTH 510.00 FEET TO A POINT; THENCE WEST 274.41 FEET TO A POINT; THENCE NORTH 510.00 FEET TO A POINT; THENCE EAST 274.41 FEET TO THE POINT OF BEGINNING.

TRACT 2: EASEMENT ESTATE

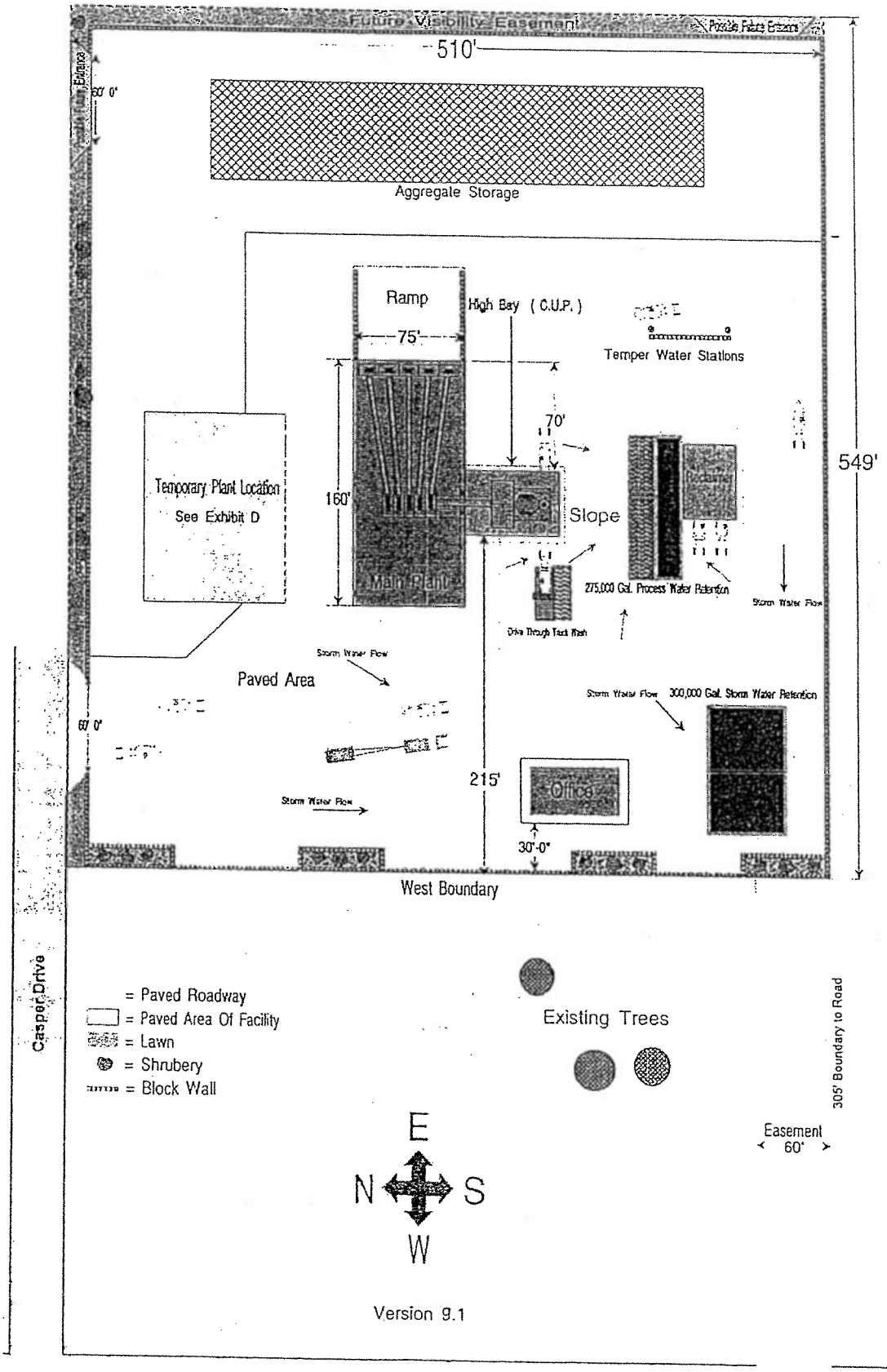
TOGETHER WITH A 60 FOOT WIDE ROAD AND UTILITY EASEMENT ALONG THE SOUTH SIDE OF THE. REMAINDER LOT 1A, AS SHOWN ON THE RECORD OF SURVEY RECORDED FEBRUARY 24, 1999 AS INSTRUMENT NO. 133115, RECORDS OF TETON COUNTY, IDAHO.

FROM INSTRUMENT NO. 183803

LOT 1B-E, TETON PEAKS VIEW SUBDIVISION, TETON COUNTY, IDAHO, BEING FURTHER DESCRIBED AS FOLLOWS: PART OF THE W1/2NE1/4 SECTION 23, TOWNSHIP 5 NORTH, RANGE 45 EAST, BOISE MERIDIAN, TETON COUNTY, IDAHO, BEING FURTHER DESCRIBED AS: FROM THE N1/4 CORNER OF SAID SECTION 23, SOUTH 975.63 FEET AND EAST 627.41 FEET TO THE POINT OF BEGINNING. THENCE EAST 274.60 FEET TO A POINT; THENCE SOUTH 510.00 FEET TO A POINT; THENCE WEST 274.60 FEET TO A POINT; THENCE NORTH 510.00 FEET TO THE POINT OF BEGINNING.

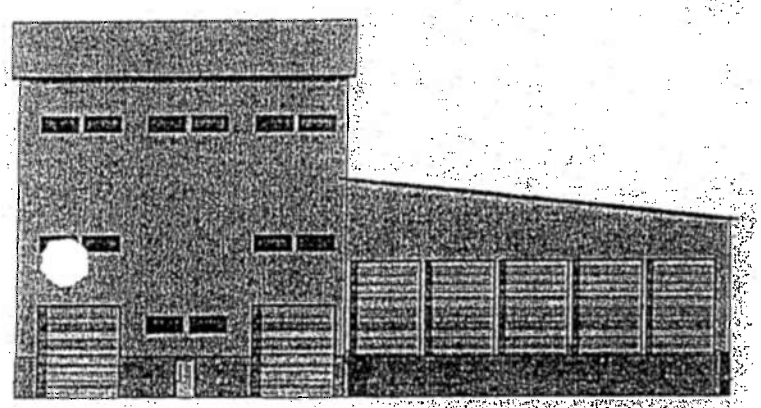
Exhibit B

Burns Holdings Driggs Site Plan Version 9.5

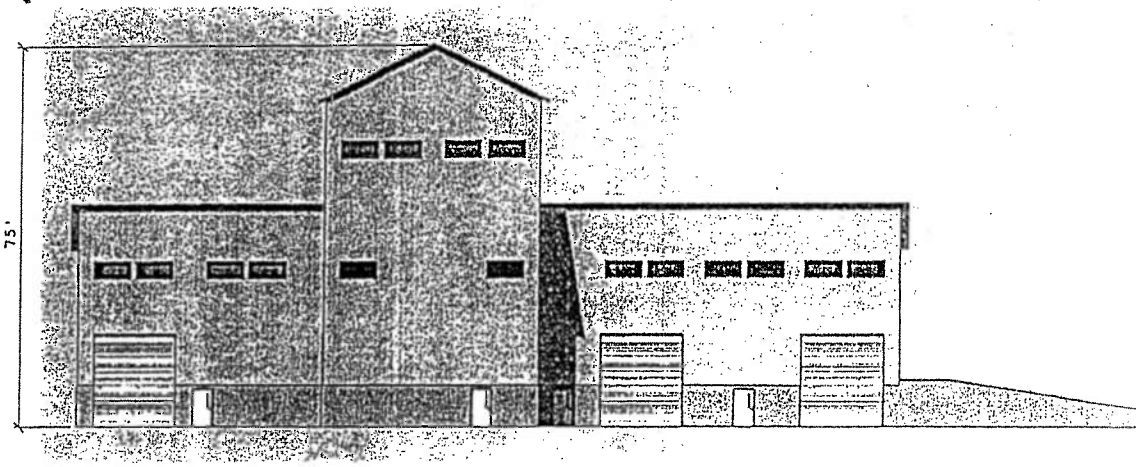


State Highway 33

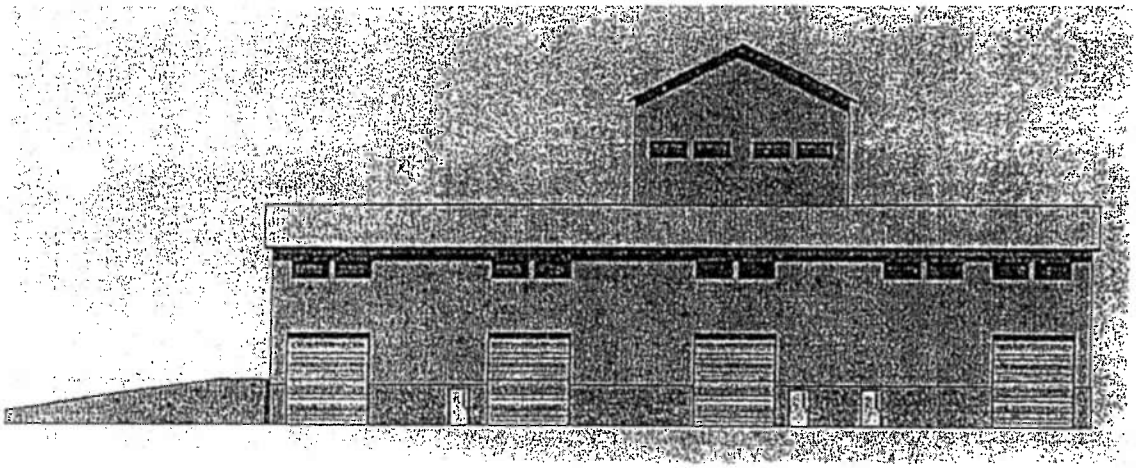
EXHIBIT "C"



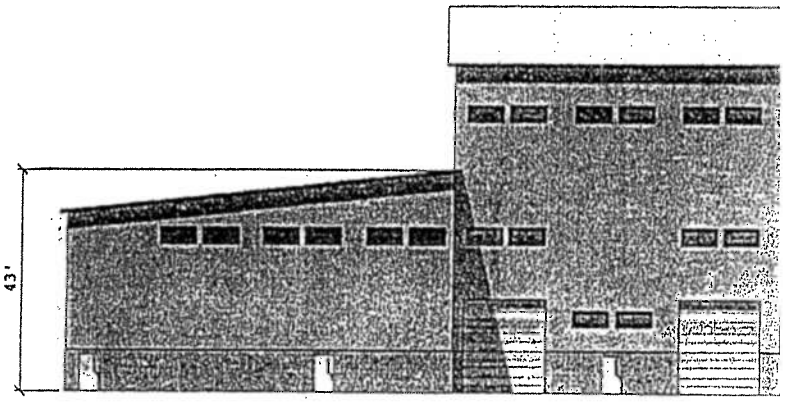
EAST ELEVATION



SOUTH ELEVATION



NORTH ELEVATION



WEST ELEVATION

BUILDING ELEVATIONS

Exhibit D Temporary Batch Plant

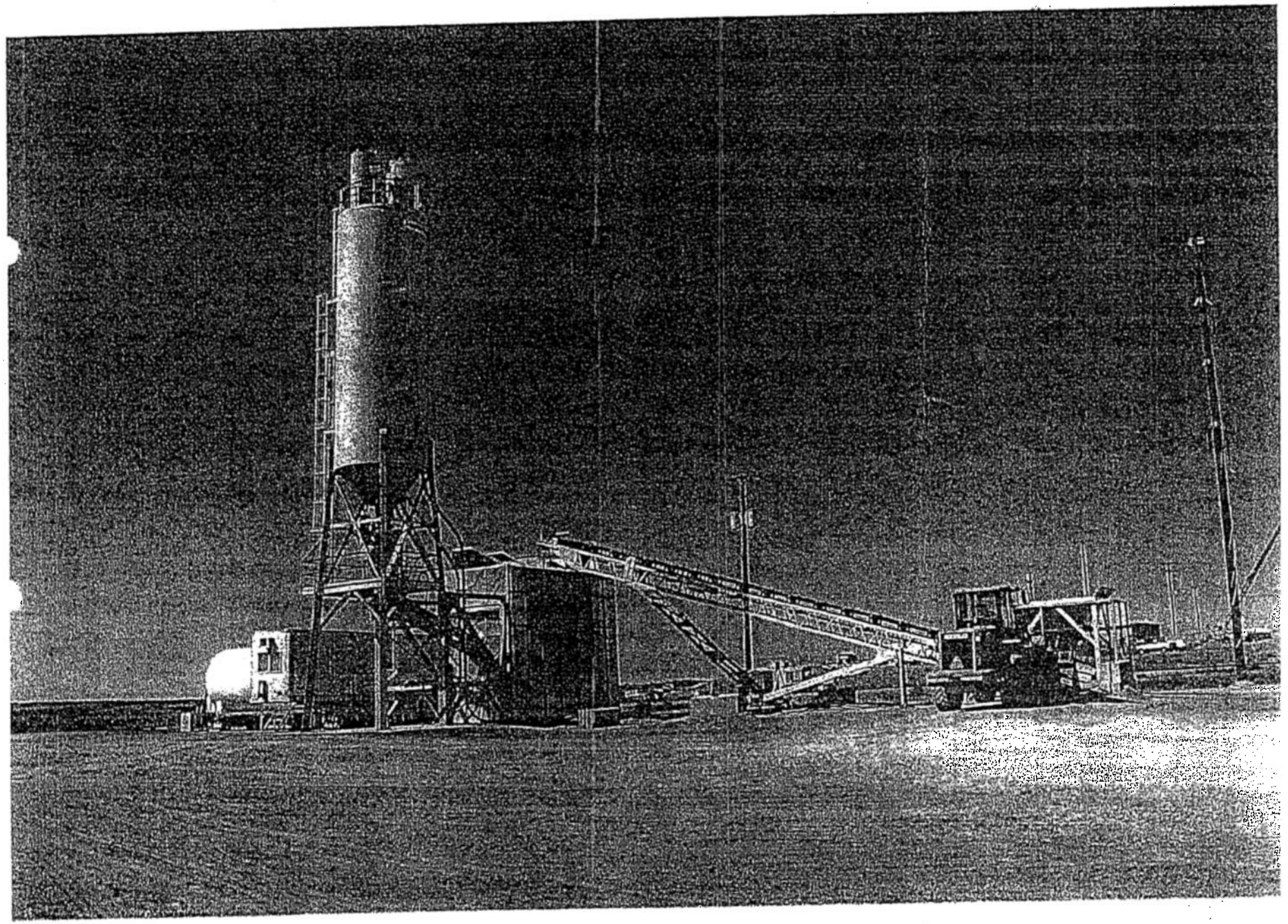
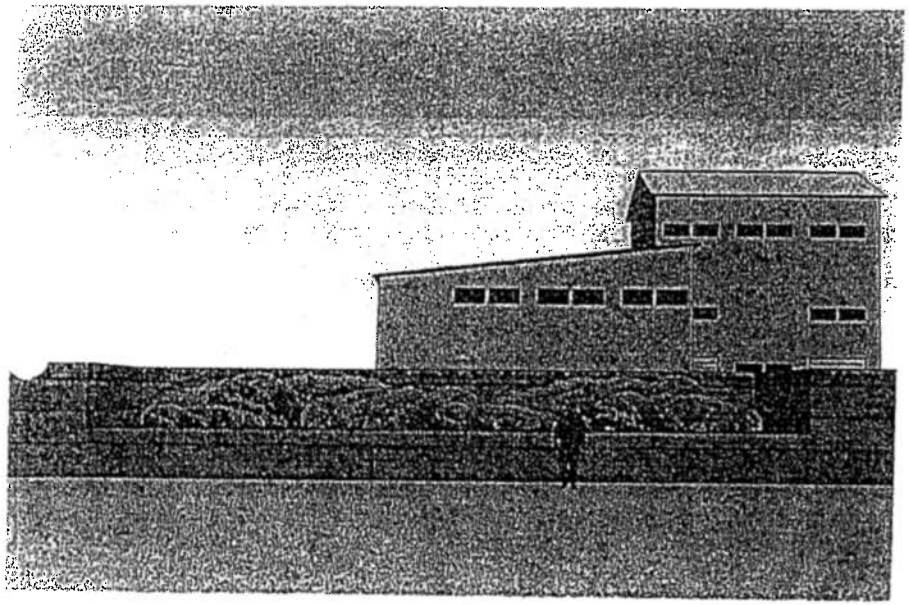
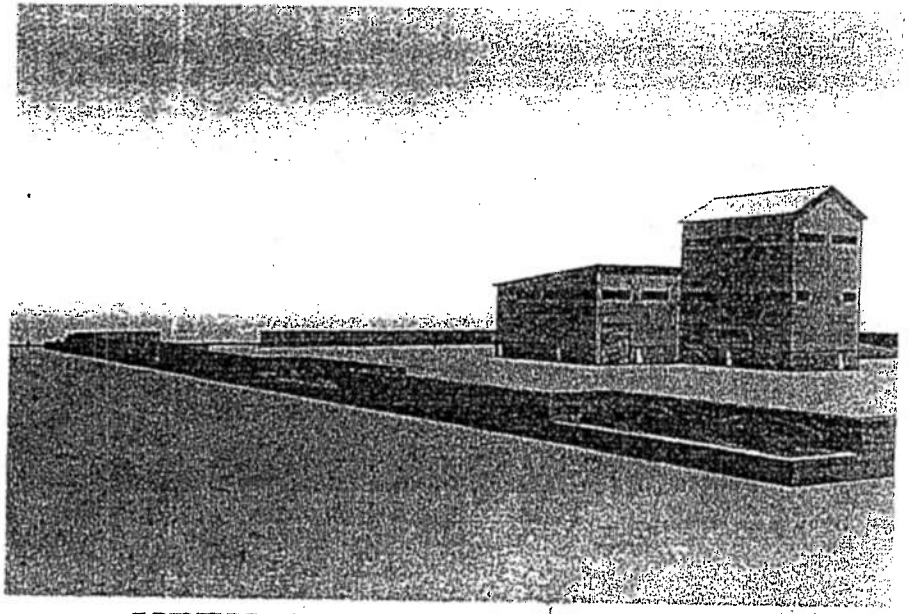


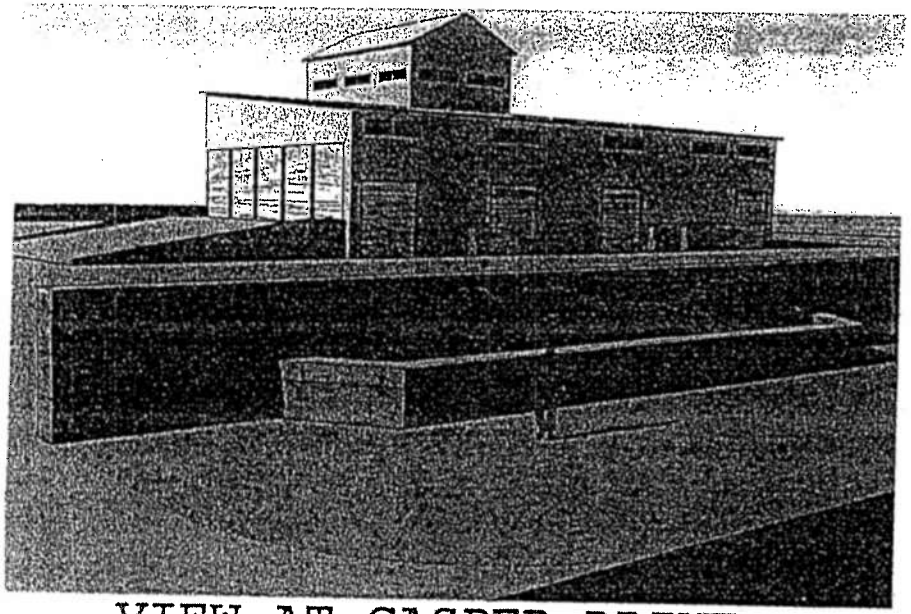
EXHIBIT "E"



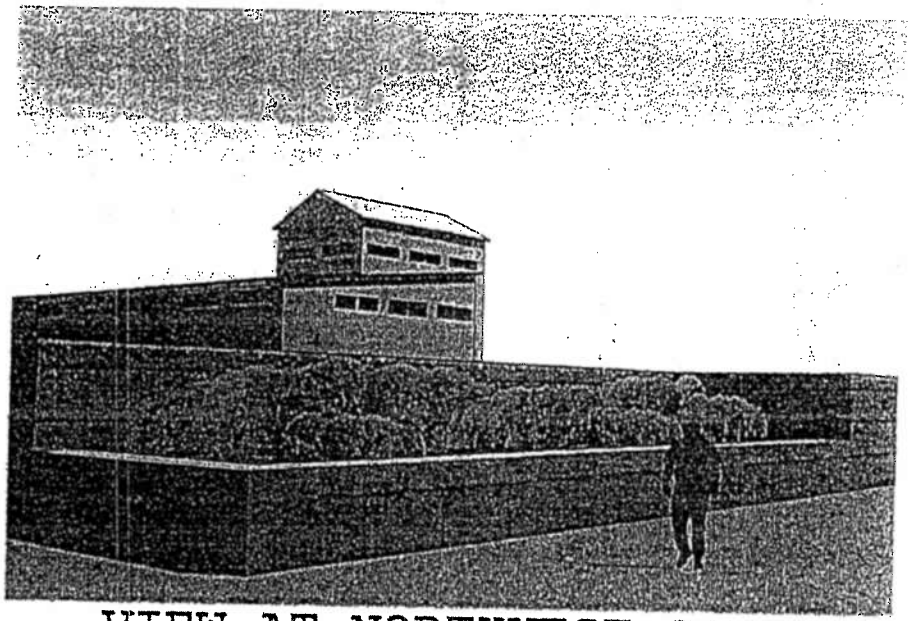
VIEW AT WEST BOUNDARY



VIEW AT WEST BOUNDARY



VIEW AT CASPER DRIVE



VIEW AT NORTHWEST CORNER