3-31-2016

Arnold v. City of Stanley Clerk's Record v. 2 Dckt. 43868

Vol. 2 of 2

Vol 2 of 3

43868
Custer County Case CV-2014-35

LAW CLERK

IN THE

SUPREME COURT

OF THE

STATE OF IDAHO

THOMAS ARNOLD and REBECCA ARNOLD
Plaintiffs/Appellants

vs.

CITY OF STANLEY, a political subdivision of the State of Idaho
Defendant/Respondents.

CLERK'S RECORD ON APPEAL

Appealed from the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Custer

Before the Honorable Alan C. Stephens, District Judge

Fredric V. Shoemaker & Thomas J. Lloyd III
Attorney at Law

Attorney for Appellant

Paul J. Fitzer
Attorney at Law

Attorney for Respondent

43868

TABLE OF CONTENTS

COVER PAGE ----------1

TABLE OF CONTENTS ----------2-3

TITLE PAGE ----------4

REGISTER OF ACTIONS ----------5-9

PETITION FOR JUDICIAL REVIEW(3-13-14)----------10-16

STATEMENT OF ISSUES FOR JUDICIAL REVIEW PURSUANT TO I.R.C.P.84(d)(5) (4-14-14)----------17-22

PETITIONER'S OPENING BREIF (6-12-14)----------23-53

PETITIONER'S SUPPLEMENT TO THEIR OPENING BREIF (7-12-14)---------- 54-62

AFFIDAVIT OF CARI TASSANO (7-24-14)----------63-72

RESPONDENT'S BRIEF (7-24-14)----------73-96

PETITIONER'S REPLY BREIF (9-22-14)----------97-126

MINUTE ENTRY (5-20-15)----------127-128

DECISION AND ORDER RE: JUDICIAL REVIEW OF BUILDING PERMIT APPLICATION DENIAL (06-10-15)----------129-136

PETITION FOR REHEARING (7-1-15)----------137-139

PETITIONER'S MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING (7-15-15)----------140-149

PETITIONERS' MOTION TO CORRECT THE RECORD (10-7-15)----------150-152

AFFIDAVIT OF REBECCA W. ARNOLD IN SUPPORT OF PETITIONERS' MOTION TO CORRECT THE RECORD (10-7-15)----------153-200

AFFIDAVIT OF JOHN C. ANDERSON IN SUPPORT OF PETITIONERS' MOTION TO CORRECT THE RECORD (10-7-15)----------201-205

MEMORANDUM IN SUPPORT OF MOTION TO STRIKE PETITIONER'S MOTION TO CORRECT RECORD AND SUPPORTING AFFIDAVITS (10-13-15)----206-210

RESPONDENT'S NOTICE OF OBJECTION AND MOTION TO STRIKE PETITIONER'S MOTION TO CORRECT RECORD AND AFFIDAVITS OF REBECCA W. ARNOLD AND JOHN C. ANDERSON FILED ON OCTOBER6, 2015 (10-13-15)----------211-213

RESPONSE TO PETITIONER'S OBJECTION TO RESPONDENT'S MEMORANDUM OF ATTORNEY FEE'S AND COSTS AND PETITION FOR REHEARING (10-13-15)----------214-241

PETITIONERS' REPLY MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING (10-19-15)----------242-252

PETITIONERS' REPLY MEMORANDUM IN SUPPORT OF MOTION TO CORRECT THE RECORD AND MEMORANDUM IN OPPOSITION TO RESPONDENT'S MOTION TO STRIKE (10-19-15)----------253-257

MINUTE ENTRY (10-21-15)----------258-259

DECISION AND ORDER RE: MOTION FOR REHEARING, MOTION TO CORRECT THE RECORD, AND MOTION TO STRIKE (11-3-2015)----------260-266

NOTICE OF APPEAL TO THE IDAHO SUPREME COURT (12-14-15)----------267-271

AMENDED NOTICE OF APPEAL TO THE IDAHO SUPREME COURT (12-14-15)--272-276

CLERK'S CERTIFICATE OF APPEAL (12-15-15)----------277

CERTIFICATE OF EXHIBITS (2-22-16)----------278

NOTICE OF TRANSCRIPT LODGED (2-23-16)----------279

CLERKS CERTIFICATE (2-23-16)----------280

NOTICE OF LODGING OF CLERKS RECORD (2-23-16)----------281

CERTIFICATE OF SERVICE (2-24-16)----------282

INDEX

AFFIDAVIT OF CARI TASSANO (7-24-14)----------63-72

AFFIDAVIT OF JOHN C. ANDERSON IN SUPPORT OF PETITIONERS' MOTION TO CORRECT THE RECORD (10-7-15)----------201-205

AFFIDAVIT OF REBECCA W. ARNOLD IN SUPPORT OF PETITIONERS' MOTION TO CORRECT THE RECORD (10-7-15)----------153-200

AMENDED NOTICE OF APPEAL TO THE IDAHO SUPREME COURT (12-14-15)--272-276

CERTIFICATE OF EXHIBITS (2-22-16)----------278

CERTIFICATE OF SERVICE (2-24-16)----------282

CLERK'S CERTIFICATE (2-23-16)----------280

CLERK'S CERTIFICATE OF APPEAL (12-15-15)----------277

COVER PAGE ----------1

DECISION AND ORDER RE: JUDICIAL REVIEW OF BUILDING PERMIT APPLICATION DENIAL (06-10-15)----------129-136

DECISION AND ORDER RE: MOTION FOR REHEARING, MOTION TO CORRECT THE RECORD, AND MOTION TO STRIKE (11-3-2015)----------260-266

MEMORANDUM IN SUPPORT OF MOTION TO STRIKE PETITIONER'S MOTION TO CORRECT RECORD AND SUPPORTING AFFIDAVITS (10-13-15)----206-210

MINUTE ENTRY (5-20-15)----------127-128

MINUTE ENTRY (10-21-15)----------258-259

NOTICE OF APPEAL TO THE IDAHO SUPREME COURT (12-14-15)----------267-271

NOTICE OF LODGING OF CLERKS RECORD (2-23-16)----------281

NOTICE OF TRANSCRIPT LODGED (2-23-16)----------279

PETITION FOR JUDICIAL REVIEW (3-13-14)----------10-16

PETITION FOR REHEARING (7-1-15)----------137-139

PETITIONER'S MEMORANDUM IN SUPPORT OF PETITION
FOR REHEARING (7-15-15)----------140-149

PETITIONER'S OPENING BREIF (6-12-14)----------23-53

PETITIONER'S REPLY BREIF (9-22-14)----------97-126

PETITIONER'S SUPPLEMENT TO THEIR OPENING BREIF (7-12-14)---------- 54-62

PETITIONERS' MOTION TO CORRECT THE RECORD (10-7-15)----------150-152

PETITIONERS' REPLY MEMORANDUM IN SUPPORT OF MOTION
TO CORRECT THE RECORD AND MEMORANDUM IN OPPOSITION
TO RESPONDENT'S MOTION TO STRIKE (10-19-15)----------253-257

PETITIONERS' REPLY MEMORANDUM IN SUPPORT OF PETITION
FOR REHEARING (10-19-15)----------242-252

REGISTER OF ACTIONS ----------5-9

RESPONDENTS BRIEF (7-24-14) ----------73-96

RESPONDENT'S NOTICE OF OBJECTION AND MOTION TO STRIKE
PETITIONER'S MOTION TO CORRECT RECORD AND AFFIDAVITS
OF REBECCA W. ARNOLD AND JOHN C. ANDERSON FILED ON
OCTOBER6, 2015 (10-13-15)----------211-213

RESPONSE TO PETITIONER'S OBJECTION TO RESPONDENT'S
MEMORANDUM OF ATTORNEY FEE'S AND COSTS AND PETITION
FOR REHEARING (10-13-15)----------214-241

TABLE OF CONTENTS ----------2-3

TITLE PAGE ----------4

STATEMENT OF ISSUES FOR JUDICIAL REVIEW PURSUANT
TO I.R.C.P.84(d)(5) (4-14-14)----------17-22

ORIGINAL

Fredric V. Shoemaker, ISB #1687
Thomas J. Lloyd III, ISB #7772
GREENER BURKE SHOEMAKER OBERRECHT P.A.
Counselors and Attorneys at Law
950 West Bannock Street, Suite 950
Boise, ID 83702
Telephone (208) 319-2600
Facsimile (208) 319-2601
fshoemaker@greenerlaw.com
tlloyd@greenerlaw.com

Attorneys for Petitioners

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CUSTER

THOMAS ARNOLD AND REBECCA ARNOLD, HUSBAND AND WIFE, Petitioner, v. CITY OF STANLEY, A POLITICAL SUDIVISION OF THE STATE OF IDAHO, Respondent.	Case No.: CV 2014-35 **AFFIDAVIT OF JOHN C. ANDERSON IN SUPPORT OF PETITIONERS' MOTION TO CORRECT THE RECORD**

STATE OF IDAHO)
) ss.
County of Ada)

JOHN C. ANDERSON, being first duly sworn upon oath, deposes and says:

1. I am over eighteen years of age, and am competent to testify regarding the matters set forth herein. I make the following statements based upon my own personal knowledge.

2. I was the contractor for the construction work performed for Thomas and Rebecca Arnold on Lot 5 of the Mountain View Subdivision (hereinafter "Lot 5"). Specifically, the work I performed for the Arnolds on Lot 5 included construction of a retaining wall and the installation of the access driveway from Ace of Diamonds Street into Lot 5. In conducting this work I relied upon my extensive experience and expertise in earthwork and road construction, including my experience in performing similar work for the City of Stanley.

3. I have been an earthwork and road construction contractor since 1978. I have constructed new roads as part of subdivision developments and I have constructed, repaired, rehabilitated, maintained and snow-plowed streets and roads located in several jurisdictions, including the City of Twin Falls, Custer County and Twin Falls County, among others. I am familiar with engineering standards for road construction used in those jurisdictions and used by the Idaho Department of Transportation. I have been the successful low bidder for both the Summer Streets and Roads Contract and the Winter Streets and Roads Contract for the City of Stanley and I am familiar with the policies of the City of Stanley regarding city streets. The City of Stanley has not had any engineering standards or specifications for road construction within the City of Stanley and the City of Stanley has not had any standards or specifications for the type of gravel to be used on any of the City streets.

4. As part of the 2012 Summer Streets and Roads Contract, I repaired and rebuilt part of the Airport Road, which is the steepest street within the City of Stanley. The City of Stanley did not have any engineering standards or specifications for the construction of the Airport Road or other City streets and did not have any specifications for the type of gravel to be used on the Airport Road or other Stanley City Streets. Because the City of Stanley had no engineering standards for construction of City streets, I performed the work on the Airport Road

using my extensive knowledge of acceptable standards for road construction within other jurisdictions and the work on the Airport Road was accepted by the City of Stanley.

5. I also worked on the construction of the Stanley Town Square retail and condominium project located abutting the corner of Niece Avenue and Critchfield Street in the City of Stanley in 2012 and 2013. The Stanley Town Square project included alteration of Stanley City streets (Critchfield and Niece), construction of an access drive from Critchfield into the Stanley Town Square private property, and placement of gravel on those streets. The City of Stanley did not require any separate permit for the construction of that access driveway, or for the use of those city streets for construction staging, or for the work done on those city streets, but allowed the work to be completed as part of a building permit for the Stanley Town Square project on the private property adjacent to the City streets. The City of Stanley did not have any engineering standards or specifications for the construction of that access drive from Critchfield, or for alteration of those City streets or for the gravel to be used on the City streets.

6. The slope of the access driveway into Lot 5 is not an "extreme slope" as described by the City of Stanley. The slope of the access driveway is less than some of the other access driveways in the City of Stanley and much less than the slope of the Airport Road in Stanley. I constructed the access driveway into Lot 5 at the end of Ace of Diamonds using the same methods and standards that I used for the Stanley City streets while I was the streets and roads contractor for the City of Stanley.

7. Further, during excavation work for the construction of the retaining wall that I installed on Lot 5 I stockpiled topsoil and other vegetation. A photograph of the topsoil and other vegetation that I stockpiled in construction of the retaining wall on Lot 5 is shown on

page 54 of the Agency Record[1]. **All** of the topsoil and vegetation shown in this photograph was removed from Lot 5, so the City of Stanley's statement on page 54 of the Agency Record that the stockpile was "[t]opsoil and vegetation including that removed from city property" is false. In fact, there was no vegetation or topsoil on the City property at the end of Ace of Diamonds that could have been removed or utilized. The material at the end of Ace of Diamonds was rock, gravel and concrete residue from another landowner's contractor who washed out his concrete truck at the end of the street. None of the Stanley City officials were present on the job site at the time the topsoil and vegetation was removed from Lot 5 and placed in the stockpile shown on page 54 of the Agency Record.

Further your Affiant saith naught.

John C. Anderson

John C. Anderson

SUBSCRIBED AND SWORN TO before me this 5th day of October, 2015.

Lela Peña

Notary Public for Idaho
Residing at Boise
Commission Expires 5-31-2018

Lela Peña NOTARY PUBLIC STATE OF IDAHO

[1] References in this Affidavit to "Agency Record" or "AR" shall mean and refer to the Agency Record, consisting of 108 numbered pages, as filed in Case No: CV 2014-35 in the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Custer.

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of October, 2015 I served a true and correct copy of the following documents, under the method indicated below:

Paul J. Fitzer
MOORE SMITH BUXTON & TURCKE, CHTD.
950 W. Bannock, Suite 520
Boise, ID 83702
Attorney for Defendant

- ☐ U.S. Mail
- ☐ Facsimile
- ☒ Hand Delivery
- ☐ Overnight Delivery
- ☐ E-mail: pjf@msbtlaw.com

Fredric V. Shoemaker
Thomas J. Lloyd

Paul J. Fitzer, ISB # 5675
MOORE SMITH BUXTON & TURCKE, CHTD.
950 West Bannock Street, Suite 520
Boise, Idaho 83702
Telephone: (208) 331-1800
Facsimile: (208) 331-1202
Email: pjf@msbtlaw.com

Attorney for the City of Stanley

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CUSTER

TOM and REBECCA ARNOLD, husband and wife, Petitioners, v. CITY OF STANLEY, a political subdivision of the State of Idaho, Respondent.	Case No. CV-14-00035 MEMORANDUM IN SUPPORT OF MOTION TO STRIKE PETITIONER'S MOTION TO CORRECT RECORD AND SUPPORTING AFFIDAVITS

COMES now, the Respondent, City of Stanley, by and through its counsel of record, Paul Fitzer, of MOORE SMITH BUXTON TURCKE, CHTD., hereby submits this Memorandum in Support of Motion to Strike Petitioner's Motion to Correct Record.

I. ARGUMENT

A. Petitioner's attempt to augment the record with extrinsic evidence however clothed is untimely.

Petitioner claims that she is merely attempting to correct incorrect and/or false statements made within the Agency Record and within the Respondents' brief and/or at oral argument. She is doing nothing of the kind, but is rather submitting questionable testimony not

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subject to cross-examination and other spurious factual and legal assertions. Her motion and supporting affidavits are irrelevant and untimely and offered for an improper purpose.

Pursuant to I.R.C.P. 84(e), "[w]hen judicial review is authorized by statute, review of agency action shall be based upon the record created before the agency." While a court may in certain limited circumstances admit additional evidence when "the authorizing statute provides that the district may take additional evidence itself" there is no such statute in this instance and regardless, I.R.C.P. 84(l) allows for the augmentation of the record only "within twenty-one days of the filing of the settled transcript and record." The rules are unequivocal and extrinsic evidence offered *after* this Court's Decision and Order Re: Judicial Review of Building Permit Application Denial ("Order") is absurdly untimely.

Pursuant to I.R.C.P. 84(n) and (l), failure to timely object to a record / transcript constitutes a waiver of the right to contest the same. Additionally, an untimely motion to correct the record is subject to sanctions as the district Court deems appropriate, including dismissal. Idaho Rule of Civil Procedure 84(n) provides that:

> *Failure of a party to timely take any other step in the process for judicial review shall not be deemed jurisdictional, but may be grounds only for such other action or sanction as the district court deems appropriate, which may include dismissal of the petition for review.*

Idaho Rule of Civil Procedure 84(l) provides that:

> *Any party desiring to augment the transcript or record with additional materials presented to the agency may move the district court within twenty-one (21) days of the filing of the settled transcript and record*
>
> . . .
>
> *Where statute provides for the district court itself to take additional evidence, the party desiring to present additional evidence must move the court to do so within twenty-one (21) days of the filing of the transcript and record with the district court.*

The Petitioner's October 6, 2015 Motion to Correct the Record was filed more than twenty-one (21) days after the filing of the settled transcript and record. The notice of lodging of the

agency record was filed April 18 2014 and deemed settled on May 1, 2014. In fact, Petitioner not only waited until after the deadline for objecting to the record, but did not file or serve its objections until after the Court's final decision which was filed on June 10, 2015; a full year, five months and five days after the settling of the record / transcript and after a year's worth of briefing and oral argument.[1] Therefore, Petitioner's Motion to Correct Record is untimely and their objections are waived.

As expressed in the Respondent's Response to Petitioner's Objection to Respondent's Memorandum of Attorney Fees and Costs and Petition for rehearing filed contemporaneously herewith and incorporated herein, the Petitioner's lawsuit had no merit in the first place. Respondents have already expended significant funds and time to defend against Petitioner's multiple frivolous claims. The Court ruled in favor of Respondent in its June 10, 2015 Order. In part, the Court found that Petitioner caused her own financial setbacks by failing to follow established city ordinance procedures before beginning construction. Petitioner expected the City to bear the brunt of those costs. Now, with this Motion, additional expense and time will be necessary in order to defend against Petitioner's untimely request to correct the record and submit additional arguments and objections. Additionally, if ultimately said request(s) were granted, the record will need to be augmented at even more expense and time expended in order to allow the Respondent to respond to Petitioner's spurious factual and legal conclusions. This is precisely why the Idaho Rules of Civil Procedure provide strict temporal remedies and protections from such untimely filings as delineated in Respondent's argument above.

[1] Respondent's responsive brief to Petitioner's opening brief was filed on July 24, 2014. Petitioner's objections therefore would have been due in their reply brief and/or at the oral argument. Petitioner was granted two extensions of time to file their reply, ultimately filed on September 19, 2014. Oral argument was held on May 20, 2015 and the Court's final decision was issued on June 10, 2015. Petitioner filed and delivered to Respondent its Motion to Correct Record and supporting documents on October 6, 2015, well after the deadline to file or serve its objections within the mandatory timeframe. Accordingly, Petitioner's Motion to Correct Record as to extrinsic evidence and Petitioner's allegations of incorrect and/or false statements are untimely and their objections are waived, I.R.E. 613(b).

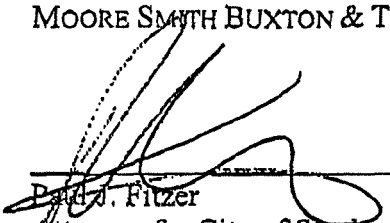
Accordingly, the Court's review is and always correctly was confined to the administrative record in this case.

II. CONCLUSION

Respondents are entitled to an order striking the Motion to Correct Record and Supporting Affidavits from the record and are entitled to additional costs and fees for defending Petitioner's untimely arguments and objections.

DATED this 12 day of October, 2015.

MOORE SMITH BUXTON & TURCKE, CHARTERED



Paul J. Fitzer
Attorney for City of Stanley

CERTIFICATE OF SERVICE

I certify that on the 12 day of October, 2015, a true and correct copy of the foregoing document was served as follows:

Tom Lloyd GREENER BURKE SHOEMAKER OBERRECHT, P.A. 950 W Bannock St, Ste 950 Boise, ID 83702	x ___ ___ ___	Mailed Facsimile Hand-delivered E-Mail: tlloyd@greenerlaw.com
Hon. Judge Alan C. Stephens District Court 210 Courthouse Way, Suite 120 Rigby, ID 83442	x ___ ___ x	Mailed Facsimile: (208) 745-6636 Hand-delivered E-Mail: nanderson@co.jefferson.id.us sficklin@co.jefferson.id.us astephens@co.jefferson.id.us
Hon. Judge Alan C. Stephens C/O Custer County District Court PO Box 385 Challis, ID 83226	___ ___ ___ x	Mailed Facsimile Hand-delivered E-Mail: ckestler@co.custer.id.us custercountycourt@gmail.com

Paul J. Fitzer
Attorney for City of Stanley

Paul J. Fitzer, ISB # 5675
MOORE SMITH BUXTON & TURCKE, CHTD.
950 West Bannock Street, Suite 520
Boise, Idaho 83702
Telephone: (208) 331-1800
Facsimile: (208) 331-1202
Email: pjf@msbtlaw.com

Attorney for the City of Stanley

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CUSTER

TOM and REBECCA ARNOLD, husband and wife, Petitioners, v. CITY OF STANLEY, a political subdivision of the State of Idaho, Respondent.	Case No. CV-14-00035 RESPONDENT'S NOTICE OF OBJECTION AND MOTION TO STRIKE PETITIONER'S MOTION TO CORRECT RECORD AND AFFIDAVITS OF REBECCA W. ARNOLD AND JOHN C. ANDERSON FILED ON OCTOBER 6, 2015

COMES now, the Respondent, City of Stanley, by and through its counsel of record, Paul Fitzer, of MOORE SMITH BUXTON TURCKE, CHTD., hereby moves this Court for an order to strike the Petitioner's Motion to Correct the Record and Affidavits of Rebecca W. Arnold, and John C. Anderson filed on October 6, 2015 pursuant to I.R.C.P. 12(f) and I.R.C.P. 84(e), (l), and (n). This motion is based upon the records and pleadings on file herein and supported by Respondents' Memorandum in Support of Motion to Strike Petitioner's Motion to Correct

Record and Supporting Affidavits. Defendants request attorney fees and costs pursuant to Idaho Code §§ 12-117 and I.R.C.P. 11(a)(1) and any other relief deemed appropriate by the Court.

DATED this 12th day of October, 2015.

MOORE SMITH BUXTON & TURCKE, CHTD.

Paul J. Fitzer
Attorney for Respondent, City of Stanley

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 12 day of October, 2015, I caused to be served a true and correct copy of the foregoing MOTION TO STRIKE by the method indicated below, and addressed to the following:

Tom Lloyd GREENER BURKE SHOEMAKER OBERRECHT, P.A. 950 W Bannock St, Ste 950 Boise, ID 83702	X ___ ___ ___	Mailed Facsimile Hand-delivered E-Mail: tlloyd@greenerlaw.com
Hon. Judge Alan C. Stephens District Court 210 Courthouse Way, Suite 120 Rigby, ID 83442	x ___ ___ x	Mailed Facsimile: (208) 745-6636 Hand-delivered E-Mail: nanderson@co.jefferson.id.us sficklin@co.jefferson.id.us astephens@co.jefferson.id.us
Hon. Judge Alan C. Stephens C/O Custer County District Court PO Box 385 Challis, ID 83226	___ ___ ___ x	Mailed Facsimile Hand-delivered E-Mail: ckestler@co.custer.id.us custercountycourt@gmail.com

Paul J. Fitzer

Paul J. Fitzer, ISB # 5675
MOORE SMITH BUXTON & TURCKE, CHTD.
950 West Bannock Street, Suite 520
Boise, Idaho 83702
Telephone: (208) 331-1800
Facsimile: (208) 331-1202
Email: pjf@msbtlaw.com

Attorneys for the City of Stanley

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CUSTER

TOM and REBECCA ARNOLD, husband and wife, Petitioners, v. CITY OF STANLEY, a political subdivision of the State of Idaho, Respondent.	Case No. CV-14-00035 **RESPONSE TO PETITIONER'S OBJECTION TO RESPONDENT'S MEMORANDUM OF ATTORNEY FEE'S AND COSTS AND PETITION FOR REHEARING**

CITY OF STANLEY, by and through their attorneys of record, MOORE SMITH BUXTON & TURCKE, CHARTERED, submit its Response to Petitioner's Objection to Respondent's Memorandum of Attorney Fees and Costs and Petition for Rehearing.

I.
INTRODUCTION

Petitioner Rebecca Arnold ("Arnold") does not specifically object to the itemization of any of the requested attorney fees and costs pursuant to I.R.C.P. 54(d)(6) and 54(e)(3) and

54(e)(6) and any such specific objection is therefore deemed waived.[1] Rather, the sole remaining objection is limited to an award of attorney fees pursuant I.C. § 12-117; that Arnold proceeded with a reasonable basis in fact and law. Arnold's legal theory is that a lot, presumably every lot, in a duly approved and platted subdivision that happens to abut a street, regardless of the terms and conditions of the plat itself, possesses a preexisting "vested right" "appurtenant to the land" to access the public way as "one of the incidents of ownership of land". The City is therefore powerless "to cut off this right of ingress and egress [which] would be to take[2] the lot owner's property without due process of law."[3]

Arnold further asserts that the City has never enacted any ordinances entitling the City through its police powers to either require a building permit to construct a road access and/or require the submission of technical information in support of such an application in order to protect the public health and safety. Arnold concludes by stating that this Court's Decision and Order Re: Judicial Review of Building Permit Application Denial ("Order") flat out ignores and "runs afoul of a long history of Idaho law that has been set forth in over a century's worth of case law".[4] Respectfully, this Court was correct. Arnold mispresents applicable case law by taking partial excerpts of case law out of its legal context, historical context, and claiming its principles apply in modern subdivision law.

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[1] See I.R.C.P. 54 (d)(6) and (e)(3) and (6); I.R.C.P. 54(e)(3) requires that the court consider numerous factors in determining the amount of attorney fees in a civil action. I.R.C.P. 54(e)(3). "While the district court does not have to 'address all of the I.R.C.P. 54(e)(3) factors in writing, the record must clearly indicate the court considered all of the factors.'" *Pocatello Hosp., LLC v. Quail Ridge Medical Investor, LLC*, 339 P.3d 1136 (Idaho 2014); *Hurtado v. Land O'Lakes, Inc.*, 153 Idaho 13, 23, 278 P.3d 415, 425 (2012) (quoting *Lee v. Nickerson*, 146 Idaho 5, 11, 189 P.3d 467, 473 (2008)).

[2] It should be noted that this is not takings cause of action.

[3] Objection to Respondent's Memorandum of Attorney Fees and Costs ("Objection"), p. 5.

[4] *Id.*

With regard to Petitioner's Memorandum in Support of Petition for Rehearing "Rehearing") and Motion to Correct the Record, Arnold has undertaken a personal attack against the City referencing "[m]aterial errors of fact and law advanced by the City", "gross mischaracterizations", "barren assertions during oral argument", "lobbed accusations of criminal and otherwise illegal conduct" and "prejudice" "stemming from untruths". Believing the Court cannot review the record for itself, Arnold hypocritically accuses the City Attorney of leading the Court astray. Such unprofessionalism does not warrant a response other than to point out that Arnold's outright rude accusations and misrepresentation of the facts and law have no reasonable basis in fact, law, or in a courtroom. If anything, Arnold's Petition to Rehear bolsters a finding that attorney fees should be awarded.

II.
ARGUMENT

A. Arnold's contention that each lot in an approved subdivision that abuts a city street has a vested right appurtenant to the land to access that street even in contravention to an approved subdivision plat lacks a reasonable basis in fact and law.

Arnold blatantly misrepresents the law by asserting that a city is compelled to grant a secondary access to a lot within an approved subdivision by virtue that the lot is adjacent to a city street; that such a right is a vested right appurtenant to the land. Arnold berates both this Court and the City for ignoring "over a century's worth of Idaho law"[5] in opining that a right of access exists "where a lot is otherwise landlocked"[6] or where there is no other reasonable alternate access. Arnold concludes that there is no legal support for this "unfounded deviation

[5] Rehearing, p. 6; Objection, p. 5.
[6] The doctrine by necessity for landlocked properties is discussed in *MacCaskill v. Ebbert,* 112 Idaho 1115, 739 P.2 414 (1987).

from the ... long standing law of Idaho".[7] It is Arnold who chooses to ignore the entirety of case law in the modern era taking excerpts of several cases out of context to support her conclusion.[8]

Arnold relies upon *Johnson v. Boise City,* 87 Idaho 44, 51, 390 P.2d 291, 294 (1964) wherein the owner of two parcels (both of which enjoyed vehicular access to the city street) sought to enjoin the City of Boise from closing the curb cuts / driveways and reconstructing the curb pursuant to its police powers in order to eliminate vehicular access from the street to the property for public safety and parking considerations. *Id;* 87 Idaho at 48. Arguably running afoul of I.R.C.P. 11(a)(1) Arnold quotes only the introductory statements of the Idaho Supreme Court's analysis; specifically the generic statement that "access to a public way is one of the incidents of ownership of land bounding thereon. Such right is appurtenant to the land and is vested right." *Id;* 87 Idaho at 51. Arnold twists this maxim to purportedly apply to a lot within a subdivision with an alternate access already provided pursuant to an approved final plat.

Arnold conveniently left out the very next paragraph which provided that "this right of access, however, may be regulated, for it is subservient to the primary rights of the public to the free use of the streets for travel and incidental purposes." *Id.* The substance of the *Johnston* opinion and the myriad of others that follow is the Court's reiteration that a municipality's police power to police the streets and regulate the traffic thereon outweighs incidental injury to an individual property owners' right to access the right of way. *Id;* at 52. If the exercise of authority "bears a reasonable relationship to the public health, safety, morals, or general welfare, such

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[7] Objection, p. 6.
[8] *ITD v. HI Boise, LLC,* 153 Idaho 334, 282 P.3d 595 (2012); *Lochsa Falls, LLC v. ITD,* 147 Idaho 232, 207 P.3d 963 (2009); *Killinger v. Twin Falls Highway Dist.,* 135 Idaho 322, 17 P.3d 266 (2000);

enactment would be valid within the inherent powers of the legislative body". *Id;* at 52. As the Court noted:

> This case presents the problem of reconciling the conflicting interests of the public with that of the abutting owner. Under its exercise of the police power and authority over the streets and in furtherance of the public good, the [city council] for sufficient reason, can eliminate these curb cuts and the driveways without incurring liability to the abutting owner for the resulting injury.

Id; at 51. Contrary to Arnold's contention that the City and this Court's observation that Lot 5 is not landlocked ignores a century of case law, the Court's analysis in *Johnson* and other precedent focuses on the existence or non-existence of alternate or secondary accesses to an otherwise land-locked property;

> As concerns the Bannock street premises, there exists access from the street to the premises for pedestrian traffic not only from Bannock street and Eleventh street, but also from the alley, vehicular traffic presently has access from Eleventh street and potentially from the alley.

Id; at 53. The Supreme Court then adopted this rule of law: "**Where the abutting owner had other means of access, the right of access may be denied by a police regulation.**" *Id.* Emphasis Added. Incidentally, *Johnston* carefully noted that this was not a takings analysis as the land-owners were not seeking damages at all.

> ... the problem presented here is not a question of taking under the authority of eminent domain with payment of compensation; the problem is simply whether the city may proceed in the closing of these curb cuts under its 'police powers', regardless of payment of compensation. Appellant merely seeks a permanent injunction against the exercise of this power; he is not seeking damages.

Id, at 52. In short, Arnold takes the *Johnston* excerpt out of context. The *Johnson* Court was distinguishing the existence of secondary accesses in its fact pattern from that in prior precedent

including those cases cited by Arnold to wit: *Village of Sandpoint v. Doyle,* 14 Idaho 749, 95 P. 945 (1908), *Farris v. City of Twin Falls,* 81 Idaho 583, 347 P.2d 996 (1959 and *Continental Oil Co. v. City of Twin Falls,* 49 Idaho 89, 286 P. 353 (1930). All of these cases are easily distinguished from the present case.

The significance is that first; none of these cases pertain to a mere lot within a duly approved subdivision. Second, these cases unlike in *Johnston* and here, pertain to abutting property owners that were completely deprived of access to any ingress / egress. The challenged municipal activity or regulation completely "cut off" any access whatsoever to their property: In *Doyle* it was the Village of Sandpoint's bridge:

> ... the village here constructed its bridge on the side of its right of way next to [Doyle's] property and caused the bridge to adjoin the front of [Doyle's] lot. It therefore cut him off from his previous right of access to the street on its natural surface and left him without any means of egress and ingress at all, unless he can go over the bridge."

14 Idaho at 759-760. Emphasis added. In *Farris,* the City of Twin Falls negligently constructed a curb that raised Washington Street eight inches *above* its previous location leaving the adjacent buildings eight inches lower than the level of the street thereby wholly "cutting off" *any* access to the street. 81 Idaho at 585. *Continental Oil* was a takings action challenging an ordinance that completely prohibited drive-up gas stations within 500 feet of a school.[9] There are many many cases in this arena and the reasoning is consistent.

[9] See also *Merritt v. State,* 742 P.2d 397, 113 Idaho 142 (1986),.

1. The City cannot be compelled to issue a second access to a lot duly created and approved but in contradiction with the Mountain View Subdivision Plat.

Citing to the aforementioned cases, Arnold presents the unsupportable legal conclusion that her "property right appurtenant to the land abutting the public streets [is a] right of access [that] already exists before and after any plat is drawn."[10] Arnold even has the audacity to paraphrase the following statement as directly attributable to the *Johnston* decision (specifically page 51): "there is no legal principle in the state of Idaho that would support a finding that the existence of a platted easement would nullify or otherwise eliminate a property owners' vested right to access the public roadways directly abutting their property."[11] *Johnston* said no such thing. Nonetheless, Arnold concludes that that Lot 5 *already* has a preexisting vested right to access Ace of Diamonds street pursuant to *Johnston.* This conclusion is factually incorrect, deliberately obtuse, and legally unworkable. Yet, Arnold accuses the City and this Court of ignoring "over a century's worth of Idaho law". [12] She also attempts to recreate the wheel after the fact by arguing for the first time in her Motion to Correct the Record that the access to Lot 5 had already been constructed in prior building permits and that the purpose of Building Permit 831 was merely because the preexisting access drive merely needed "additional finish work". While we believe we should rely upon the established record, needless to say, the City disagrees with this spurious statement and the entirely of the proffered testimony of Mr. Anderson and Ms. Arnold.[13]

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[10] Objection, p. 8.
[11] Petitioner's Memorandum in Support of Petition for Rehearing, p. 5. ("Rehearing").
[12] Rehearing, p. 6.
[13] See Affidavit of Rebecca Arnold, ¶ 14.

All of this is also irrelevant. "Lot 5" is not some homesteader's 640 acre section of farm land that enjoyed access to a right of way. Rather, pursuant to the City's subdivision ordinances, it came into existence with the approval of the Mountain View Subdivision Plat and is subject to that Plat. It did not preexist anything. *Lochsa Falls, LLC v. ITD,* 147 Idaho 232, 207 P.3d 963 (2009) is illustrative although even the plaintiff developer in that case did not attempt to present such a daft argument as here.

In *Lochsa Falls,* a developer challenged ITD's *requirement* that the developer install an internal collector street with a traffic signal in order to access Chinden Boulevard. The developer wished to obtain the benefit of the bargain to subdivide 254 acres of farm land into 740 residential lots and then, having received that benefit, cried foul that they had to incur the detriment of installing the collector street with a traffic signal. There is no mention of some divine vested property right appurtenant to the dozens, perhaps hundreds, of individual lot owners abutting Chinden Boulevard independent of and in contradiction to the plat approval. It was also irrelevant whether the individual lot owners called their access a driveway, private road, public road, drive access, or road access.

The *Lochsa Falls* Court was equally unsympathetic. In particular, Justice Jim Jones concurring opinion was fabulous:

> ... This Justice was left with the abiding feeling that Lochsa Falls benefited much more than the State from the Transaction at issue. ... While Lochsa Falls portrays itself as having been put upon by being required to signalize the intersection for the benefit of the State and the motoring public, the reality is otherwise. The salient facts are that Lochsa Falls wished to develop a parcel of property located along a limited access highway, its traffic consultant recommended and it requested a signalized intersection to provide subdivision access to and from the

> highway, it was advised it could have the signalized intersection if it would pay for the same, it raised no protest to this routine requirement, and having gotten the benefit it sought Lochsa Falls now wishes to have ITD foot the bill.
> This case could appropriately be analyzed in a contractual context Lochsa Falls requests that ITD grant it the right to have a signalized intersection to benefit its subdivision. ITD agrees, provided that Lochsa Falls pays for signalizing the intersection. Lochsa Falls accepts the proposal without protest and proceeds to perform the signalizing work. Upon completion of the work, Lochsa Falls unilaterally changes its mind and decides it needs to be paid for the signalizing, but expresses no intention of giving up the valuable benefit it has derived from the deal. Lochsa Falls got what it bargained for but does not wish to honor its undertaking to bear the cost of such benefit. Had Lochsa Falls objected to the requirement that it pay for signalizing the intersection, it could simply have said 'thanks, but no thanks' and done without a signal. One suspects there is not the slightest chance it would have done so, as the increase in the value of its lots would substantially outweigh the cost of the traffic signal. .... Because Lochsa Falls has brought and appealed claims without a reasonable basis in fact or law, I would award ITD attorney fees under Idaho Code §12-117.

Id, at 245. See also *Wylie v. ITD and City of Meridian,* 151 Idaho 26, 253 P.3d 700 (2011).

The bottom line is this: while a preexisting 254 acre section of farm land may have abutted a public road (Chinden Blvd and others) and perhaps could have a vested right to access an abutting road if it was otherwise rendered land-locked, this "vested right" does not extend to each and every lot abutting Chinden Boulevard when a developer takes advantage of Meridian's subdivision laws to subdivide this section of land into 740 residential lots generating 12,480 trips per day. With or without "established procedures", a red herring to be discussed *infra*, the local governmental jurisdiction is not compulsorily required to extend a preexisting "vested right of access", if it exists at all, to each and every resulting subdivision lot that happens to abut the public road. There is no such vested right and Arnold fails to present a scintilla of valid legal argument or precedent to that effect.

Akin to *Lochsa Falls,* Arnold received the benefit of the bargain to subdivide a tract of land taking full advantage of Stanley's subdivision ordinances. The resultant final plat of the Mountain View Subdivision, prepared and presented by Arnold, clearly depicts that Lot 5 was granted direct access from Highway 21 on its north-west side via an access road depicted along the western edge of Lot 6.[14] As she points out, this was *her* request. Arnold clearly stated in Permit 690R-2:

> No structure; excavation, grading and fill material, construction of Mountain View Subdivision Utilities (underground); silt fencing and/or retaining walls …; ***construction of access roads****; utilities, etc.* ***to be installed per preliminary plat approval*** *for Mountain View Subdivision.*

Emphasis added. Arnold now wishes to recreate the wheel as to what was and was not specifically approved in her subdivision application. This is not the venue or medium to challenge her subdivision plat entitlements. Certainly, were the City to deny Lot 5 access to Highway 21, there is not the slightest chance that Arnold would not be the first one to enforce the entitlements afforded to her pursuant to her plat approval. The approved Mountain View Subdivision Plat and prior approved building permits do not depict that an access road on the eastern edge of Lot 5 will connect to Ace of Diamonds street along a steep ravine. Arnold believes it a strength of her argument that the City did not apply the hillside ordinances to her application. In reality, this strengthens the City's interpretation because no one considered accessing this subdivision down a steep ravine. How steep is the ravine? We suspect that we

[14] AR. P. 65.

now actually know the answer to this question, but again, the time and place for this is in her application; not in judicial review after the fact limited to administrative record.

More importantly, a city is not *required* to grant Arnold a secondary access to the City's right of way or "road" (i.e. "road access"?) by virtue of some surviving divine vested right afforded not only to the original tract of land but to each and every subsequent subdivision lot that happens to abut a public street where said access is not depicted in a properly approved, and bargained for, subdivision plat.

In Arnold's Rehearing request (Argument A.1, p. 5), Arnold misconstrues and misquotes the City and this Court in stating that the plat "only allows for one access point to Lot 5". While this is true, the legal significance of an approved access pursuant to the Mountain View Subdivision is not that Arnold is legally precluded from having two accesses or that she is legally precluded from adding or even substituting a second access in contravention of an approved preliminary plat. Rather the legal significance of the Mountain View Subdivision plat is that Arnold is not entitled to a second access as a vested right. In short, Arnold is not land-locked nor has she in any way asserted that her approved access pursuant to her preliminary plat is unworkable. She has not requested a plat-amendment. The City is not compelled to grant a secondary access to a lot in an approved subdivision by virtue that the subdivided lot is adjacent to a city street.

B. Arnold's contention that the City is without any legal authority or municipal ordinances that require a building permit to build an access with accompanying technical information lacks a reasonable basis in fact or law.

Whether via a plat amendment or building permit, the City is not compelled to grant Arnold a secondary access to a lot within an approved subdivision as a matter of right irrespective of "established procedures". However, even if Arnold's application contained anything substantive beyond "gravel" enabling the City to consider granting the request, Arnold contends in her Objection that the City possesses no legal authority or codified municipal standards to either 1) require a building permit to construct an access road; and/or 2) require technical plans and specifications in conjunction with an application for a building permit to construct an access.[15] She in essence argues that the City must simply accept whatever Arnold wishes to utilize to construct her road whether it be dirt, gravel, or silly putty. Safety is presumably irrelevant and any inquiry by the City "[r]egardless whether the Court [also] deems the City's [public safety] concerns reasonable" is legally precluded because the "City Council has not codified or otherwise established these alleged standards."[16] In short, Arnold claims there are no "established procedures" so she can do absolutely anything with impunity. Respectfully, we do not agree.

1. Public Health and Safety Consideration

Pursuant to Title 50, Chapter 13 a municipality's police power extends to the regulation of subdivisions and any streets, driveways, alleys, or accesses whether private or public.[17][18]

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[15] See also Request, p. 4.
[16] Objection, p. 9.
[17] See Title 50, Chapter 13. We need not discuss the jurisdictional distinctions between ITD or highways districts which also possess such power for their respective public road ways.
[18] As a matter of law, the power to "regulate" streets is conferred on the municipality and the City has every right to regulate work performed on its own right-of-way. McQuillen, §30.40." "In Idaho the streets from side to side and end to end belong to the public and are held by the municipality in trust for the use of the public." *Infanger v. City of Salmon,* 137 Idaho 45, 49, 44 P.3d 1100, 1104 (2002); *Kleiber v. City of Idaho Falls,* 110 Idaho 501, 503, 716

"Government power over public ways is 'exclusive and unlimited'."[19] Further, the City further possesses implied police powers to protect the public health and safety. As to these "unknown ordinances", Arnold conveniently ignores Stanley Municipal Code (hereinafter "SMC") 15.04 which governs the process for the issuance of a building permit. SMC 15.04.010 provides that

> No ... lot [shall] be excavated for sidewalks, ... roads, or any other purpose, nor shall fill be placed on any lot, nor shall any lot be cleared, or fenced unless a building permit therefor has been issued ... Permittee shall follow good engineering practices relating to fill compaction for structural support and for preventing collapse and/or erosion of fill not used for structural support.

Emphasis added. SMC 15.04.020 additionally requires that

> Applications ... shall be accompanied [with] ... a drawing showing the location of the proposed project on the applicant's property and the location of the property in the city, building plans and specifications, and proof of approval of the proposed project by the appropriate fire department and the appropriate sewer district or state health department. Applications which do not contain all of the foregoing shall not be considered complete. Development and construction drawings and technical support material shall be to scale or otherwise in sufficient detail to allow a technical or engineering review to determine whether the proposed development complies with all zoning requirements.

Emphasis added.

Arnold wishes to build a road access which admittedly includes modifying the City's right of way placing great amounts of fill on a steep slope for an access to her commercial lot. There can be absolutely no question that such work required Arnold to obtain a building permit.

P.2d 1273, 1275 (1986) citing *Keyser v. City of Boise*, 30 Idaho 440, 165 P. 1121 (1917). A city has exclusive control by virtue of its police power over its streets, highways and sidewalks within the municipal boundaries. *Id;* See also *Tyrolean Associates v. City of Ketchum*, 100 Idaho 703, 604 P.2d 717 (1979); *City of Nampa v. Swayne*, 97 Idaho 530, 547 P.2d 1135 (1976); *Yellow Cab Taxi Service v. City of Twin Falls*, 68 Idaho 145, 190 P.2d 681 (1948).

[19] *Merritt v. State*, 742 P.2d 397, 113 Idaho 142 (1986) quoting *Cf. Foster's Inc. v. Boise City*, 63 Idaho 201, 211, 118 P.2d 721, 725 (1941).

She failed to do so. Moreover, after completing said work, what technical information ("development and construction drawings and technical support") has she provided that would lead a responsible decision maker to conduct an engineering review such to render a finding that she has demonstrated "good engineering practices" thereby protecting the public health and safety?

In her application she merely provided that Ace of Diamonds Street was to be "graveled" and that "gravel to be placed as needed to provide access to/from the property to/from Ace of Diamonds by all types of vehicles". There is a complete absence of technical drawings. There is a complete absence of *any* explanation of the engineering employed. Arnold reasons that because the City did not overtly define "good engineering practices" or specify by ordinance what must be included in the development and construction drawings, the City possesses no legal authority whatsoever to reject a proposal and Arnold has *carte blanche* right do whatever she wishes. Specifically, Arnold objects to the City's examples of what good engineering practices *might* entail including slope percentage, hillside stabilization, drainage, fill material and proposed compaction, and other public works road standards that would enable a city council (and its engineer) to easily conduct an engineering *review* to approve an application as in compliance with the Stanley Municipal Code and the Mountain View Plat.

These are but examples of what she could do. We are not the engineer. The onus is on the applicant to demonstrate good engineering practices best accomplished by a competent contractor and/or an engineer; not the City. It is not the City's job to stand in the shoes of an engineer/applicant to produce development and construction drawings and technical support

material. It is the City's job *after* such information is provided to conduct its own engineering *review* of the applicant's plans to verify that good engineering practices have been followed so that this drive access does not collapse or erode and suffer other concerns related to the public health and safety.

Arnold describes this as "unfettered discretion", but she completely misses the point. More importantly, such an accusation is not ripe as the City has not exercised unfettered discretion or any discretion at all. There was nothing to arbitrarily reject. Arnold produced nothing. Put simply, Arnold lacks standing and there is no justiciable case or controversy. In *Arnold v. City of Stanley,* Arnold did the very same thing. All the way to the Idaho Supreme Court, she challenged the City's starting a public hearing five minutes earlier than advertised; a meeting that she did not attend nor ever intended on attending. The Idaho Supreme Court held that she did not have standing because she did not even claim to have been harmed by the meeting's early starting time.

> Because a plain reading of the statute contradicts the Arnolds' position, and because they do not even claim to have been actually harmed by the 6:00 p.m. meeting's early start time, we find that their appeal was brought without a reasonable basis in fact or law.[20]

The same is true here, but worse because this pertains to the public health and safety. Perhaps had Arnold (or her engineer) in good faith made *some* prima facie presentation of what she or her engineer believed to be detailed engineering plans demonstrating good engineering practices and the City arbitrarily rejected her plans without conducting its own engineering review or did so

[20] *Arnold v. City of Stanley*, 345 P.3d 1008, 1014, 158 Idaho 218, 226 (2015)

unreasonably, a court might consider whether the City had arbitrarily rejected her expert's proposal. This issue is not ripe because Arnold did not do anything at all; just demanded the City has no power whatsoever.

Arnold also conveniently ignores the plethora of SMC subdivision ordinance provisions pertaining to slopes[21] that Arnold does not believe apply to an access road in the building permit process. This is an access road in an approved subdivision. What argument could there possibly be that soil and roadway standards, especially pertaining to fill utilized to stabilize slopes, contained within the subdivision ordinances do not apply to a proposed access along a steep slope to a lot in an approved subdivision? Her reasoning is circular; that her access drive was or should have been considered and approved in her subdivision application, but then claims that none of the subdivision standards that would have applied to such a steep slope, if indeed this access was a consideration, should apply to a building permit in a subdivision lot in an approved subdivision plat.

As a matter of public health and safety, the City denied the building permit due to the absence of <u>any</u> technical information that would allow the City to render a finding that the applicant utilized good engineering practices. It is undisputed that Arnold failed to provide any specifications or technical information or articulate any engineering standards at all. John Anderson does not speak for the City and it is unclear what purpose she believes an affidavit should serve that was proffered not in the administrative process but after the Court's Order.

[21] See SMC 16.08.190, SMC 16.36.060, 17.40.32.D governing slope standards and building on a slope.

Arnold is not eligible for a building permit. While Arnold believes it is sufficient to merely state that "gravel" will be used, the City acting within its police powers finds this unacceptable. Due to the severity of the slope, the City in its police power has every right to regulate the construction of access roads (or whatever Arnold wants to call it today) within its jurisdiction especially as it applies to the modification of its own right-of-way to be discussed *infra*. Arnold's contention that in the absence of specific public works road standards a City is legally precluded from denying any request at all lacks a reasonable basis in fact and law. The City's ordinances are adequate to put the incentive on the applicant to demonstrate that it has demonstrated good engineering practices thereby protecting the public health and safety. The City is not compulsorily required to accept her demand to build an access road absent a permit without a scintilla of information provided in support thereof in contradiction to her own plat.

C. Additional arguments presented in the Rehearing request.[22]

1. Arnold's contention that a plat is not required to identify connectivity to public rights of way is irrelevant but nonetheless incorrect.

Arnold argues that a "subdivision plat is not required to contain any and all points of access to the public roads" and more specifically that a plat does not need to show how inner connector streets or individual lots will access the public roadways. This is irrelevant. First, if Arnold thinks the Idaho Code enables her to surreptitiously connect each and every lot in her plat to connect to an abutting street as a matter of right; this is legally unsupportable. Second, even if

[22] Argument A. 1-3 are addressed *supra*. Argument B. 1 and 2 will be addressed herein.

it is not *required* (which we disagree) the fact remains that she did not clearly depict an access to Ace of Diamonds although she did clearly depict an access to Highway 21. Regardless, while she can of course seek to amend her plat, Arnold's time period to clarify or object to her approved Mountain View Subdivision plat has long since passed and Arnold presents no justiciable case or controversy in this cause of action. Her allegations have no reasonable basis in fact or law and are in fact logically incongruous to subdivision law.

As a matter of law a subdivision plat must depict all roads, alleys, easements, and accesses within the subdivision. Additionally, the boundaries of each lot as well as the exterior boundaries of the subdivision must be shown.[23] Arnold is being deliberately obtuse employing chicanery to argue that one can realistically depict the external boundaries of each lot and the subdivision in general as well as all easements, roads, alleys, and accesses without depicting it in relationship to the neighboring properties and adjacent or abutting right-of-ways. A plat application does not satisfy Title 50, Chapter 13 if the plat does not depict where and how the roads, streets, access, alleys, and easements begin and terminate; i.e. a solid line dead-end, curb, berm, fence, etc. or an open line stub street or connectivity to adjoining parcels or public roads. While irrelevant, Arnold is being disingenuous to argue that a developer, while required to depict how particular lots will access an inner private road easement within the subdivision, nonetheless possesses an independent divine vested right that secretly allows her to *also* utilize a secondary external access to the city's right of way up a steep slope[24] along the external boundaries of the subdivision without depicting such plans on the plat. This is academic as her plat does depict

[23] See Idaho Code §§ 50-1304; 1313, 1330.
[24] along with concomitant *required* slope contour lines ... see SMC 16.16.030 K. "Contour lines"

Lot 5's access to Highway 21, but does not depict access to Ace of Diamonds not to mention the absence of any technical data of how this access is to be constructed.

2. Arnolds contention that the access drive is not constructed on the City property is erroneous.

On page 8-9 of Arnold's Rehearing request under the caption "[t]he access drive is not constructed on City property", Arnold criticizes this Court's "factually flawed" finding that the City's "requests seem reasonable due to the special circumstances regarding the slope of the access road and the fact that the road is being constructed on city property." *Id.* First, she argues that the road is not constructed on city property; that it is "fully contained within ...Lot 5". This is absurd. Second, she presents the strange argument that since the access was already built, it cannot be built on the City's property. We have no idea what this means since the City's right of way has been altered by Arnold. Third, which seems to restate the first, is her claim that "Building Permit No. 831 sought no construction on the City's property."

Arnold argues that this "Court's conclusion is based upon an erroneous understanding that the Arnolds were somehow seeking to construct an access road on top of City property" which she argues is "belied by the record". *Id,* at 9. As to all of Arnold's cantankerous accusations that the City and/or the Court has "grossly mischaracterized" the record, the record speaks for itself. Take for example, Arnold's very own letter dated March 31, 2014 regarding Building Permit 831 (AR 42):

> "This building permit is no different than a previous permit #637..., which **allowed work on the city street** to construct accesses on both Critchfield and

> Ace of Diamonds. .... [T]he Site Plan attached to 637 clearly **showed the work to be done on** both the Arnold Property and **the referenced city streets**. ... There was no separate permit required **for the work done on the City streets** and the Stanley Municipal Code (SMC) does not have a permitting process for construction access onto city streets.

Id. Emphasis Added. While we disagree with everything she said, the frivolity of her position is palpable.

With regard to her defense that Arnold did not construct an access road on city property because "the access driveway already exists", [25] she castigates the City Attorney for his audacity to state that she did so illegally. She plays the "prejudiced" victim "stemming from certain untruths conveyed to the Court by the City"[26] that the Arnold's constructed a road in violation of applicable city ordinances. She claims a new hearing is required because the City Attorney "lobbed accusations of criminal and otherwise illegal conduct by the Arnolds" and "that there is nothing in the record to support the City's unsubstantiated and plainly false accusations" fearing that this Court couldn't read the record for itself and instead relied on the City Attorney's "realm of untruth".[27] As the Court is familiar with the record, this is no need to reply other than to note the absurdity of the accusation and the extent of the harassment in the Petition for Rehearing.

> SMC 15.04.010 provides that
>
> No ... lot [shall] be excavated for sidewalks, ... roads, or any other purpose, nor shall fill be placed on any lot, nor shall any lot be cleared, or fenced unless a building permit therefor has been issued ....
> ....

[25] Rehearing, p. 9.
[26] Rehearing, p. 2.
[27] Rehearing, p. 3.

Emphasis added. SMC 15.04.050 "Enforcement" provides a misdemeanor penalty for a violation of the provisions of the chapter. Arnold constructed an access utilizing great amounts of fill without a building permit. In addition to civil remedies, the City has probably cause to "lob an accusation" that Arnold is in violation of the law both civilly and criminally.

Incredulously, she now seems to suggest that the work was *de minimus* and did not require a building permit.

> Building Permit No. 831 sought no construction on the City's property. Rather, it sought to smooth the transition between the existing public roadway and the existing access driveway by simply laying additional gravel at the transition between the dirt/gravel Ace of Diamonds roadway and the dirt/gravel driveway for Lot 5.[28]

So she admittedly wished to "smooth the transition" with gravel which she claims in just "finish work". This is so patently false and more importantly not supported in the record. She dumped countless amounts of fill just to raise the level up this steep slope to meet Ace of Diamonds. She clearly modified her lot and the City's right of way as is plainly evident in the agency record.

3. Access Road versus Driveway

On pages 2 and 3 of its Rehearing request, Arnold condemns, defames, and insults the City and the City Attorney for articulating the aforementioned access as a "road access" or "roadway", which she now articulates is a "driveway access". Arnold describes the City's reference of a "roadway" or "road access" as a "gross mischaracterization", "barren assertions during oral argument", "untruths", "misinformation", and other such mundane characterizations. First, this is completely irrelevant if not completely unprofessional and offensive. It matters not what she calls it. She is attempting to access a

[28] Rehearing, p. 9.

pubic road. A mere lot in a duly approved subdivision does not have a vested right to access a city right of way in contravention of the plat whether on Ace of Diamonds street or Chinden Boulevard.

Second, in none of the agency records can we locate where she describes this access as a "driveway". In none of the briefing can the City locate where we referred to the access as a "roadway". The City refers to this as an "access road" as it is an access to the City's Right of Way; i.e. … an access to a road. Ironically Arnold does too. It is only in a footnote that Arnold concedes this point that she too described this as an "access road". So she condemns the City attorney for "barren assertions" and "gross mischaracterizations" but she calls it the same thing. The City has since looked through the record and Arnold consistently referred to her accesses as an "access road" not a "driveway"; i.e. in Arnold's letters to the City (AR 92 "While we do not agree that individual lot permits are required for installation of utility lines and **roads** for the subdivision…"), in her building permit applications AR 69, AR 77, 80, 83 ("construction of **access roads**") AR 93, 94 ("installation of utilities and **roads** in easement") , and on the face of the Mountain View Subdivision plat itself, Arnold does not ever call her access a "driveway". *Id.* Emphasis Added.

The only other distinction Arnold makes is to call the access an "easement" and purportedly therefore not a road. What she obviously does not realize is that it is typical that public streets and private streets are actually just easements. It is a misconception to think that even a dedicated street is held in fee simple. It is merely an easement held on behalf of the public so her emphasis that her access road is an easement and therefore dispositive is irrelevant. Whether called an access road, road easement, or access drive is inconsequential. What is consequential is that Arnold seeks to connect whatever this thing is to the City's right of way and as provided herein, a mere subdivision lot does not

possess a vested right to connect to an adjacent city right of way and certainly not without demonstrating that it will be performed safely.

D. Arnold lacks a reasonable basis in fact and law because she still has failed to demonstrate that the City prejudiced her substantial rights or that she has suffered any harm.

The party contesting a city council's decision must demonstrate that 1) the board erred in a manner specified in Idaho Code section 67-5279(3); and 2) that the board's action prejudiced its substantial rights.[29] Absent either of these two conditions, the district court must affirm the board's action[30]. "There is a strong presumption that the actions of the [local governmental entity], where it has interpreted and applied its own ... ordinances, are valid."[31]

As stated herein, the approved plat for the Mountain View Subdivision granted Lot 5 direct access from Highway 21 on its north-west side via an access road depicted along the western edge of Lot 6.[32] Although she clearly would *like* two accesses and subjectively believes she has this right, she has not plead any actualized harm by not being granted two accesses to her property. Her claim of right is illusory and her purported injury is self-induced. Arnold provided no evidence how this access; i.e. complying with her own plat, constituted a hardship or is otherwise unworkable nor has she sought to amend her plat. Now, Arnold's application seeks a secondary access from Ace of Diamonds Street, which is not depicted on the approved Mountain View Plat and more importantly her application is bereft of any technical information

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[29] I.C. § 67-5279(4); *Neighbors for a Healthy Gold Fork*, 145 Idaho at 126, 176 P.3d at 131.
[30] Taylor, 147 Idaho at 431, 210 P.3d at 539.
[31] *Evans v. Teton County*, 139 Idaho 71, 74, 73 P.3d 84, 87 (2003)
[32] AR. P. 65.

to ensure the protection of the public health and safety. Her building permit application was denied and she is in the same position as she was upon the approval of her subdivision. She still has an approved access to her lot.

E. Respondents should be awarded their reasonable attorney fees and costs and this Court may wish to consider Rule 11 Sanctions.

Arnold has acted without a reasonable basis in fact or law pursuant to Idaho Code § 12-117, and has in fact presented facts and law that are irrelevant nor good faith reasonably to be expected to extend clear modern subdivision law. I.R.C.P. 11(a)(1). Nothing has changed and the arguments remain the same although her harassment is palpable in accusing both the City and the Court of ignoring a century of established precedent. Again, this Court is hard-pressed to find a single alleged fact or legal argument that makes any sense at all.

Arnold cannot compulsorily require the city to issue a building permit to construct an access by virtue that one of the many lots in an approved subdivision abuts a city street where she clearly has access to her lot already. *Johnston* and its progeny do not stand for such a conclusion and she negates to cite to the myriad of decisions that contradict her conclusions. While we may disagree as to what is or is not required in a plat, this issue is not properly before this Court. She never objected and her time to object to what is and is not contemplated in her plat has long since passed absent a re-plat. She has not amended her plat nor indicated that her approved access is unsatisfactory. More importantly, she was granted the only access that she

specifically asked for in her plat. Her assertion that she possesses other secret vested rights to access adjacent streets is legally indefensible.

The City does not act arbitrarily by enforcing ordinances that do in fact exist along with Idaho statutes that collectively require an applicant to demonstrate good engineering practices and produce enough information to allow the decision maker to responsibly render a finding that the materials utilized will be installed (including on the City's right of way) in a professional manner especially in light of the safety issues attributable to the steepness of the slope. While Arnold objects to the City's examples of what could be construed as good engineering principles, the simple fact is that the onus is on the applicant to demonstrate something, i.e. good engineering principles with technical plans and specifications; not the City. Perhaps if she had and the City arbitrarily denied her expert's good faith prima facie offering of sound engineering, she might have a basis to object. She offered nothing.

The Petition for Rehearing and Motion to Correct the Record are offered for an improper purpose. It is needlessly increasing the costs of litigation, and we cannot but offended by its harassing nature. We seriously doubt that the City and the Court has ignored a century of binding legal precedent. We also doubt that the City's recitation of the record at oral argument was in any way incorrect, but more importantly, somehow supplants this Court's own independent review of the record. Arnold closes her Rehearing request by stating that asking this Court to reconsider its decision "necessarily places them in the undesirable position of suggesting to this Court that it committed legal error in reaching its Decision." I doubt the Court would ever object to a litigant pointing out a legal error or correcting an incorrect factual record,

but Arnold is doing no such thing. If there is something undesirable in Arnold's strategy, Arnold puts herself in this position by attacking the City, misrepresenting applicable precedent, misrepresenting the record, and accusing the Court of being incapable of performing an independent review of the record; all after stubbornly installing an access road without a permit, without any technical information, and seemingly without a scintilla of consideration for the people who will be walking and driving on this access.

Unfortunately, the City is accustomed to bearing such attacks by Arnold. In *Arnold v. City of Stanley,* 345 P.3d 1008, 158 Idaho 218 (2015), the Idaho Supreme Court was unpersuaded by her arguments that she had a reasonable basis in fact or law even in matters of first impression.

> Although this Court typically does not award attorney fees in matters of first impression, "[t]he purpose of I.C. § 12-117 is to serve as a deterrent to groundless or arbitrary action and to provide a remedy for persons who have borne unfair and unjustified financial burdens defending against groundless charges." In *Castrigno v. McQuade*, this Court awarded attorney fees to Ada County when an appellant appealed without a reasonable basis in fact or law. There we reasoned, in part, that attorney fees were appropriate because the appellants, in arguing to the Court, had added nothing to the argument that failed in the district court. Id. We noted that appellants had the benefit of the district court's well-reasoned, articulate analysis finding against their position, yet they still chose to expend more time and resources to bring an appeal, using the same arguments that were unpersuasive below and remained unpersuasive on appeal. Id. Here, although the Court has not before addressed the scope of who may bring an enforcement action under Section 67-2347(6), the plain language of that section is clear enough that we believe the Arnolds' appeal was made without a reasonable basis in fact or law. Asserting that an appeal involves a matter of first impression is not a "free pass" to bring an appeal based on unreasonable arguments. .... Although the Arnolds had the benefit of the district court's articulate and well-reasoned analysis to that effect, they still chose to bring an appeal, further raising the expense to the City to defend against the same arguments. Because a plain reading of the statute contradicts the Arnolds' position, and because they do not even claim to have

> been actually harmed by the 6:00 p.m. meeting's early start time, we find that their appeal was brought without a reasonable basis in fact or law.

Arnold v. City of Stanley, 345 P.3d 1008, 1014, 158 Idaho 218, 226 (Idaho 2015) Emphasis added. The City has borne an unfair and unjustified financial burden against groundless charges. The City was forced to litigate this and the resulting decision rendered by this Court was well reasoned and articulate. All of the myriad of filings submitted *after* this Court's Order simply expends more time and more resources using the same unpersuasive arguments but laced with hostility.

IV.

CONCLUSION

The City requests that this Court deny the request to rehear this action and pursuant to Idaho Code 12-117 award the City its reasonable costs and attorney fees and costs incurred in this matter further allowing the City to amend its Memorandum of Costs to include the time and expense necessary to prepare for this hearing including attendance therein on September 16, 2015.

Dated this 12th day of October, 2015.

MOORE SMITH BUXTON & TURCKE, CHTD.

Paul J. Fitzer
Attorneys for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 12th day of October, 2015, I caused to be served a true and correct copy of the foregoing **RESPONSE TO PETITIONER'S OBJECTION TO RESPONDENT'S MEMORANDUM OF ATTORNEY FEE'S AND COSTS AND PETITION FOR REHEARING** by the method indicated below, and addressed to the following:

Thomas Lloyd GREENER BURKE SHOEMAKER OBERRECHT, P.A. 950 W Bannock St, Ste 950 Boise, ID 83702	x 	Mailed Facsimile Hand-delivered E-Mail: fshoemaker@greenerlaw.com tlloyd@greenerlaw.com
Hon. Judge Alan C. Stephens District Court 210 Courthouse Way, Suite 120 Rigby, ID 83442	x x	Mailed Facsimile: (208) 745-6636 Hand-delivered E-Mail: nanderson@co.jefferson.id.us sficklin@co.jefferson.id.us astephens@co.jefferson.id.us
Hon. Judge Alan C. Stephens C/O Custer County District Court PO Box 385 Challis, ID 83226	 x	Mailed Facsimile Hand-delivered E-Mail: ckestler@co.custer.id.us custercountycourt@gmail.com

Paul J. Fitzer

Fredric V. Shoemaker, ISB # 1687
Thomas J. Lloyd III, ISB #7772
GREENER BURKE SHOEMAKER OBERRECHT P.A.
Counselors and Attorneys at Law
950 West Bannock Street, Suite 950
Boise, ID 83702
Telephone (208) 319-2600
Facsimile (208) 319-2601
fshoemaker@greenerlaw.com
tlloyd@greenerlaw.com

Attorneys for Petitioners

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CUSTER

THOMAS ARNOLD AND REBECCA ARNOLD, HUSBAND AND WIFE, Petitioner, v. CITY OF STANLEY, A POLITICAL SUDIVISION OF THE STATE OF IDAHO, Respondent.	Case No.: CV 2014-35 **PETITIONERS' REPLY MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING**

COME NOW Petitioners Thomas Arnold and Rebecca Arnold ("Arnolds"), by and through their counsel of record the firm of GREENER BURKE SHOEMAKER OBERRECHT P.A., and hereby submit this reply memorandum in support of their Petition for Rehearing.

INTRODUCTION

The contentious relationship between the City of Stanley ("City") and the Arnolds is apparent in the briefing before this Court. However, that contentiousness warrants neither the amount of hyperbole used by the City nor its request for Rule 11 sanctions against the Arnolds. Cutting through the extraneous matter and without burdening the Court with an in-kind response to what the Arnolds consider to be a mischaracterization of both their tone and their approach on

this Petition, the fact remains that the City has failed to justify its contentions and positions in this case with any applicable law. Rather, the City has continuously 1) made barren assertions of law that are devoid of legal citation or support, 2) misconstrued the facts of the case in a manner not supported by the record before the Court, and 3) misapplied existing and applicable law. Because the Arnolds are prepared to stand on the arguments previously set forth in their Memorandum in Support of Petition for Rehearing, filed on July 15, 2015, they will not endeavor to readdress each argument set forth therein. However, the record before the Court demonstrates that the City of Stanley did not premise its denial of Building Permit No. 831 upon a finding that the Arnolds did not have an access right to their property where it abuts Ace of Diamonds Street, but the Court relied heavily upon such a conclusion in upholding the denial of that Building Permit. Because that conclusion was legal error, the Arnolds respectfully request a rehearing of this matter to review the Court's prior decision in a light not clouded by such error of law and fact regarding the Arnold's property within the City of Stanley.

ARGUMENT

Through all of the briefing and argument presented to the Court regarding the Arnolds' access rights to their property, there remains one crucial and unremedied deficiency in the City's arguments: The City has never exercised the police power with which it now wishes to shield its actions. Because a governmental entity must validly and appropriately exercise its police powers by duly passing rules and regulations before it can impose such rules and regulations, and because the City of Stanley has not done so, the Court has committed legal error in its Decision and Order Re: Judicial Review of Building Permit Denial ("Decision") in finding that the Arnolds have improperly implemented an access point on their property and that the City is justified in denying that access point. In view of this error, as well as the others identified in the

Arnolds' filings in this matter, the Arnolds respectfully request a rehearing on the merits of this case, in which each of the issues originally presented for judicial review be reconsidered in accordance with the duly-enacted laws and regulations (or lack thereof) applicable to the arbitrary denial of the Arnolds' building permit.

1. **The City has Not Presented any Authority Supporting its *Ad Hoc* Utilization of its Police Powers to Restrict Access to Private Property Absent Prior Action to Adopt Rules and Regulations Governing Access.**

In the midst of accusing the Arnolds of "[a]rguably running afoul of I.R.C.P. 11(a)(1)," the City has asserted to this Court that the Arnolds have "conveniently left out the very next paragraph [of the *Johnston*[1] decision] which provided that 'the right of access, however, may be regulated, for it is subservient to the primary rights of the public to the free use of the streets for travel and incidental purposes.'"[2] However, the City has itself failed to provide a complete analysis of what *Johnston* requires in order for the City to regulate access. Thus, the issue now before the Court is not whether the City ***can*** regulate access; it is whether the City ***actually has*** regulated access prior to this case. As such, the City's claim that the Arnolds "twist[]" the legal principles of the *Johnston* decision is inaccurate, as *Johnston* (and a wealth of other case law in Idaho) unequivocally holds that a private property owner maintains a vested and unregulated right of access from his property to the abutting public streets until and unless the governing body responsible for those streets takes action to regulate.

In criticizing the Arnolds' reliance on *Johnston*, the City contends that the Arnolds' conclusion (that they maintain a vested right of access to the abutting public streets) is "factually incorrect, deliberately obtuse, and legally unworkable."[3] However, the City then fails to provide

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[1] *Johnston v. Boise City*, 87 Idaho 44, 51, 390 P.2d 291, 294 (1964).
[2] City's *Response to Petitioner's [sic] Objection to Respondent's Memorandum of Attorney Fee's [sic] and Costs and Petition for Rehearing* ("Response"), p. 4.
[3] Response, p. 7.

the Court with a single legal citation that supports its position. Indeed, two of the three legal citations relied upon by the City, as explored in greater detail below, were cases involving the Idaho Transportation Department – likely the public entity in Idaho that has implemented the *most* regulation regarding usage of streets and a far cry from a reasonable comparison to the City of Stanley given its complete lack of such regulation in the Stanley Municipal Code. At its core, the question presented for this Court in this Petition for Rehearing is: Can a municipality that *has not* regulated rights of access within its jurisdiction using its police powers nevertheless arbitrarily impose restrictions upon one landowner, which restrictions have not ever before been imposed, without utilizing the regular and required channels for passing such regulations under their police powers? The answer to this question is no, yet that is exactly what the City has argued for and what it has been granted through this Court's prior decision. Despite the uncontroverted power of the City to regulate access to and from its streets, the fact is that the City has never before (and to this day has not) *exercised* that power. The City conflates the Arnolds argument (that although the City *has the power* to so regulate access, it has not done so), with an argument not once offered by the Arnolds: "The City is ... *powerless*" to regulate access.[4] This is a straw man argument, a logical fallacy.

Thus, the fundamental issue presented by the Arnolds in seeking this Court's reconsideration of its prior decision arises from the Court's conclusion, at the urging of the City, that a property owner does not have an inherent right of access to the abutting public roadways. The *Johnston* decision settles this question – while a "right of access ... <u>may be regulated</u>," in the absence of such regulation a landowner's right of access to an abutting public street is "one of the incidents of ownership" and remains "appurtenant to the land and is a vested right." 87 Idaho at 51 (emphasis added). This established Idaho law is incompatible with the Court's

[4] Response, p. 2 (emphasis added).

statement that it "is hard pressed to believe that just because a parcel abuts a city street that parcel would be entitled to access to that street."[5] The City has neither presented evidence of such a regulation within the Stanley Municipal Code, nor has it presented any case law controverting *Johnston*.[6]

Rather, the City's own citations illustrate the Arnolds' argument.[7] *ITD v. HI Boise, LLC*, 153 Idaho 334 (2012), for example, involved a claim for severance damages for limitation of an access road in the context of a properly-executed exercise of eminent domain. 153 Idaho at 341. The Idaho Supreme Court found that "no severance occurs where the court finds as a matter of law that an access right has merely been regulated by *an exercise of* police power rather than taken by eminent domain." *Id.* (emphasis added). The key in *HI Boise* that the City is disregarding, then, is that the Idaho Transportation Department had taken proper legal action in accordance with the laws of the state of Idaho when it "condemned a narrow strip along the west edge of the HI Boise property, on which it constructed a new bike lane and sidewalk." This action was consistent with ITD's exercise of its police power. In contrast, the City of Stanley has never taken any action (through eminent domain or regulation) to restrict property owners' rights of access to the city streets.

Similarly, in *Lochsa Falls, LLC v. ITD*, 147 Idaho 232 (2009), the Supreme Court decided an issue that arose out of an actual *exercise* of ITD's police powers: "Pursuant to its grant of authority under I.C. §§ 40-310(9), 40-311(1), 40-312(3), 40-313(2), and 49-202(19), (23) and (28), 49-221, and 67-5203, the Board of ITD promulgated the 'Rules Governing Highway Right-of-Way Encroachments on State Rights-of-Way.'" 147 Idaho at 238. Among the

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[5] Decision, p. 5.
[6] The City accurately points out that this case is not a takings case. This emphasizes the point – up until the briefing before this Court on the Arnolds' Petition for Judicial Review, the City had not taken any action or made any argument whatsoever that the Arnolds somehow no longer had a right of access. The City has not regulated access.
[7] Response, p. 4, n. 8.

Rules promulgated, ITD "require[d] that any new encroachment to a controlled state highway must comply with the safety specification and standards specified by ITD and that an application may be denied if it does not." *Id.* (citing IDAPA 39.03.42.300.06; 39.03.42.300.09). There is nothing similar in the Stanley Municipal Code or any other rules or regulations passed by the City, yet the City has claimed a right to nevertheless arbitrarily impose such standards when it pleases. Again, the Arnolds do not quarrel with the existence of the City's power to make such rules, but in the absence of such action by the City, the Arnolds do quarrel with the City's sudden imposition of unwritten rules that, for the first time in the history of the City of Stanley, restrict property owners' rights of access to and from their property.

Finally, the City's citation to *Killinger v. Twin Falls Highway District*, 135 Idaho 322 (2000), counsels in favor of the same result. In *Killinger*, the Idaho Supreme Court again upheld the long-standing rule of law in Idaho that "the right of a property owner to access a public way is a vested property right appurtenant to the land abutting the public way in question, and that an unreasonable limitation upon such a right may constitute a taking requiring compensation." 135 Idaho at 325. Further, the Supreme Court determined exactly that which is claimed by the Arnolds here, to wit, a failure of a governmental entity to utilize the proper procedures available for the *exercise of* its police powers is improper.[8] "When the state appropriates property *without going through the procedure of a condemnation*, the property owner may initiate an inverse condemnation suit and request compensation." *Id.* (citations omitted, emphasis added).

The City of Stanley is not above the law, and cannot simply impose *ad hoc* restrictions upon a landowner without going through the normal channels of passing regulations that can be readily accessed and reviewed by a landowner to ensure his/her compliance with those

[8] While *Killinger* was an inverse condemnation case seeking damages for an unlawful taking, the principle that the government must actually exercise its police powers in order to rely on its police powers remains the same.

regulations. More to the point in this litigation, the City cannot simply do whatever its current leadership feels like – governed by the excruciatingly apparent animosity that is prevalent throughout the City's briefing – and then simply hoist the flag of "police powers" to justify its failure or refusal to heed its own laws.

2. The Mountain View Subdivision Plat does Not Govern Access.

In addition to the legal error regarding rights of access in the state of Idaho when the governing body has not appropriately and properly passed regulations limiting access to city streets (as the City has not), the Arnolds' respectfully contend that the subdivision plat for the Mountain View Subdivision should not be regarded as a basis to limit or otherwise restrict their access rights. Again, the question before the Court has been misconstrued by the City. Rather than whether the City must be "*required* to grant Arnold a secondary access,"[9] the pertinent question is whether, absent any regulation in this regard, the City has any right to arbitrarily tell its residents where they can and cannot take ingress and egress from their property. Because the City has not regulated access to the public streets within its city limits, this is not, as the City has attempted to argue, a question of whether the City must "grant" a landowner *one*, *two*, *four*, or *nineteen* access points. Such an inquiry is only appropriate in evaluating damages in a takings case – it is not relevant to the question at hand.[10] Rather, until regulation has been properly adopted by the City, a landowner has the right to access the public streets *wherever* his property so abuts and without any preliminary "grant" by the City.[11]

Thus, the inquiry turns to whether the Mountain View Subdivision plat should be

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[9] Response, p. 11 (emphasis in original).
[10] *Johnston*, 87 Idaho at 52-53.
[11] As the Idaho Supreme Court noted in *Johnston*: "[W]here the abutting owner had other means of access, the right of access *may be* denied by a police regulation." 87 Idaho at 53. Put another way, where an abutting owner has other means of access, that access exists without restriction *until and unless* such access is actually denied by a proper use of police regulation.

considered, for purposes of this action, to be the requisite exercise of police power regarding the Arnolds' access rights to their property. On this point, the Arnolds have previously set forth the required components for plats under Idaho law, Idaho Code § 50-1304, and the City has not rebutted this argument. As a matter of law, a plat in the state of Idaho is not required to depict access points between private property and the public roadways, so as a further matter of law, the Arnolds' access rights cannot be limited by a document which by its very design is not intended to address those rights. Moreover, also ignored by the City is the comparison that the Arnolds have made regarding the various lots within the Mountain View Subdivision. In particular, the City has avoided addressing how, if the subdivision plat was intended to or actually did govern access rights on the property, there could be any explanation for Lot 1, Parcel A or Parcel B.[12] Each of these parcels, as they exist on the subdivision plat, lack any noted access point, so according to the City's argument regarding the dominance of the subdivision plat in evaluating access rights, each of those parcels is landlocked until the City provides some sort of special permission to afford them access. This is not a supportable legal position in the state of Idaho.

If a subdivision plat was intended to be a governing document for purposes of access rights in this state, the Idaho legislature would have included them within the "Essentials of Plats" in Idaho Code § 50-1304. Plats would, in that case, include a far greater amount of detail regarding specific points of access and, arguably, the City's engineers and officials would not approve of or affix their signatures to plats until all access points for the affected property were noted. The Court need not look any further than the Mountain View Subdivision plat, approved by the City of Stanley, to know that this simply is not the case. Respectfully, the Arnolds posit that the subdivision plat is silent on access for these lots because a subdivision plat is not the vehicle by which to determine access points. As argued throughout this Petition for Rehearing,

[12] AR, p. 94

long-standing Idaho law deems that the default access right between private property and public roadways is unrestricted absent existing regulation by the governing body. As such, for the City or the Court to restrict the Arnolds' access rights based upon a document that does not, by law, address or otherwise limit those rights, is unsupportable and constitutes legal error.

On a related note, the Arnolds would be remiss to not respond to the City's contention that they have allegedly acknowledged the supremacy of the subdivision plat in establishing access rights to the affected property.[13] The City, ignoring the punctuation in the Arnolds' description of work for Building Permit No. 690R-2 and by a creative use of bold type, attempts to rearrange the scope of the Arnolds' earlier building permit (which was granted by the City) to suggest that the Arnolds have at some point conceded that access to the various lots of the Mountain View Subdivision was intentionally limited by the plat.[14] Respectfully, this effort is misleading. While the City would have this Court read Building Permit No. 690R-2 as "**construction of access roads . . . to be installed per preliminary plat approval,**" the reality is that the permit actually says, "construction of access roads**; utilities, etc. to be installed per preliminary plat approval** . . . ."[15] This is simply a matter of punctuation, and the plain language of Building Permit No. 690R-2 cannot be misconstrued in this manner.

In view of the foregoing, the Arnolds respectfully contend that the Court committed legal error when it determined that the subdivision plat for the Mountain View Subdivision restricted or limited the Arnolds' vested right of access from their property to the public roadways.

CONCLUSION

[13] Response, p. 10.
[14] *Id.*
[15] It cannot go ignored in these proceedings that the City previously approved Building Permit No. 690R-2, which clearly discussed "access roads," without the various engineering and technical drawings and information that the City now claims are a requirement under the Stanley Municipal Code. This contradiction unavoidably illustrates the arbitrariness of the denial of Building Permit No. 831, and that the so-called requirements that the Arnolds allegedly did not meet do not actually exist in the Stanley Municipal Code at the building permit stage.

In the proceedings on judicial review, as well as in the briefing on this Petition for Rehearing, the City has continuously taken positions that lack support in law. First, the City contended that a certain amount of technical engineering information is required for issuance of a building permit. As is evident by the City's approval of Building Permit No. 690R-2, and the complete absence of any such requirements in the Stanley Municipal Code, this position was and remains unsupportable. Next, the City contended and the Court agreed that the Arnolds did not have a vested right of access from their property onto Ace of Diamonds Street, but the record was and remains devoid of any exercise of the City's police power to regulate that access right. Finally, the City contended and the Court agreed that the Mountain View Subdivision plat governed access rights for the affected parcels of property, but neither Idaho law nor the plat itself supports such a proposition. In sum, the City has failed to support its legal arguments with applicable law. The City has never adopted any regulations, within its undisputed police powers, to limit a property owners' right of access to the abutting public roads. The Arnolds' respectfully request a rehearing of this matter so that the Court may reevaluate the propriety of the City's denial of Building Permit No. 831, with recognition of the Arnolds' access rights and the City's lack of any established regulations justifying its denial.

DATED this 19th day of October, 2015.

GREENER BURKE SHOEMAKER OBERRECHT P.A.

Fredric V. Shoemaker / Thomas J. Lloyd III
Attorneys for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of October, 2015, I served a true and correct copy of the following documents, under the method indicated below:

Paul J. Fitzer
MOORE SMITH BUXTON & TURCKE, CHTD.
950 W. Bannock, Suite 520
Boise, ID 83702
Attorney for Defendant

- ☐ U.S. Mail
- ☐ Facsimile
- ☒ Hand Delivery
- ☐ Overnight Delivery
- ☐ E-mail: pjf@msbtlaw.com

Fredric V. Shoemaker
Thomas J. Lloyd

Fredric V. Shoemaker, ISB # 1687
Thomas J. Lloyd III, ISB #7772
GREENER BURKE SHOEMAKER OBERRECHT P.A.
Counselors and Attorneys at Law
950 West Bannock Street, Suite 950
Boise, ID 83702
Telephone (208) 319-2600
Facsimile (208) 319-2601
fshoemaker@greenerlaw.com
tlloyd@greenerlaw.com

Attorneys for Petitioners

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CUSTER

THOMAS ARNOLD AND REBECCA ARNOLD, HUSBAND AND WIFE, Petitioner, v. CITY OF STANLEY, A POLITICAL SUDIVISION OF THE STATE OF IDAHO, Respondent.	Case No.: CV 2014-35 **PETITIONERS' REPLY MEMORANDUM IN SUPPORT OF MOTION TO CORRECT THE RECORD AND MEMORANDUM IN OPPOSITION TO RESPONDENT'S MOTION TO STRIKE**

COME NOW Petitioners Thomas Arnold and Rebecca Arnold ("Arnolds"), by and through their counsel of record the firm of GREENER BURKE SHOEMAKER OBERRECHT P.A., and hereby submit this memorandum in support of their Motion to Correct the Record and in opposition to Respondent's Motion to Strike.

ARGUMENT

Respondent City of Stanley ("City") has asked this Court to strike the Motion to Correct the record on the grounds that it is untimely under Idaho Rule of Civil Procedure 84(l). The City's motion was not served with a Notice of Hearing, nor was it served with a Motion to

Shorten Time, though the Arnolds presume that the City intends to call its motion for hearing when the parties and the Court convene for the hearing on the Arnolds' Petition for Rehearing and attendant Motion to Correct the Record. As the City's motion was served so that it was received by counsel for the Arnolds with only six (6) days' notice, including a weekend, the Arnolds object to the City's motion as untimely under I.R.C.P. 84(o).

Notwithstanding the foregoing objection, the City's Motion to Strike should be denied on the merits. The City has moved to strike the Arnolds' Motion to Correct the Record under the authority of I.R.C.P. 84(l), which specifically pertains to Augmentation of the Record on judicial review. As is evident from the information presented to the Court with the Arnolds' Motion to Correct the Record, the fundamental problem in the current record is not a matter of what is in the record, but rather what is *not* in the record. In its briefing and argument submitted to this Court on Judicial Review of the City's denial of Building Permit No. 831, a number of statements were made by the City for which there is absolutely no support in the existing record. The City has made many statements through the course of these proceedings that the Arnolds, and specifically Respondent Rebecca Arnold, has engaged in systematic illegal conduct and that she did not follow the policies and procedures in place in the Stanley Municipal Code. As has been argued and demonstrated by the Arnolds on several occasions, there is absolutely no evidence in the record of the Arnolds ever having been accused, charged, or otherwise adjudged guilty of any sort of "illegal" conduct. Moreover, the City has repeatedly failed to identify where in the Stanley Municipal Code there is any legal support for the contentions by the City that there were procedures, of the sort advocated for by the City in these proceedings, that the Arnolds failed to abide by. Indeed, what the record *actually* contains are examples of instances in which individuals – these very Respondents – were issued building permits without the type of

information that the City now claims in this litigation to be necessary under the City's ordinances governing the application and issuance of building permits.

Nevertheless, the City's statements appear to have influenced and impacted this Court's view of the Arnolds' position in this case, given that the Court's concluding remarks in its Decision and Order Re: Judicial Review of Building Permit Denial echoed the City's unsubstantiated claims against the Arnolds: "Had the Arnolds followed the established procedure before beginning construction, their setback would be limited . . . ." With respect to the Court, the Arnolds have demonstrated that the claims asserted by the City throughout the course of these proceedings are not supportable, either in fact or in law.

Thus, in order to ensure that the Court is fully apprised of the true facts on Rehearing, the Arnolds brought their Motion to Correct the Record under I.R.C.P. 84(o). Because the Arnolds have taken issue with how the record has been misconstrued, rather than what is contained in the record, a motion to augment the record (timely or not) would not have been the appropriate avenue to accomplish that which is sought by the Arnolds on their motion. As set forth by the City, itself, "review of agency action shall be based upon the record created before the agency." (City's Memorandum in Support of its Motion to Strike, p. 2.) The Arnolds agree, and simply seek to have a fair hearing that is actually based upon the facts of record, and not any hyperbole or unnecessarily and inaccurately exaggerated rendition of those facts. Again, it is not the record that has presented this problem – it is the briefing and argument that has been presented well after the record was settled. As I.R.C.P. 84(l) and (n) are not applicable to the Arnolds' Motion, the City's Motion to Strike should be denied.

CONCLUSION

As a final note, the Arnolds again reiterate that all they are seeking is a fair Rehearing of

this matter without the extraneous and overly-rhetorical accusations with which they have dealt through these proceedings. The Arnolds merely seek to bring this litigation back to the record – not as misconstrued by the City, but as actually set forth before the Court. For those items not in the record that the City would like to assert to the Court (including the argument that the Arnolds do not have a right of access to Ace of Diamonds Street from their property, which was neither addressed nor decided by the agency from which this case of judicial review originates), the Arnolds respectfully object. In order to ensure the accuracy of the Court's understanding of the facts, the Arnolds ask that the Court grant their Motion to Correct the Record and deny the City's attendant Motion to Strike.

DATED this 19th day of October, 2015.

GREENER BURKE SHOEMAKER OBERRECHT P.A.

Fredric V. Shoemaker
Thomas J. Lloyd III
Attorneys for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of October, 2015, I served a true and correct copy of the following documents, under the method indicated below:

Paul J. Fitzer
MOORE SMITH BUXTON & TURCKE, CHTD.
950 W. Bannock, Suite 520
Boise, ID 83702
Attorney for Defendant

- ☐ U.S. Mail
- ☐ Facsimile
- ☒ Hand Delivery
- ☐ Overnight Delivery
- ☐ E-mail: pjf@msbtlaw.com

Fredric V. Shoemaker
Thomas J. Lloyd

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CUSTER

THOMAS ARNOLD, ETAL, Petitioner, vs. CITY OF STANLEY, Respondent,	Case No. CV-2014-35 MINUTE ENTRY

The above entitled matter having come before the Court on this the 21st day of October, 2015, for all pending matters, before the Honorable Alan C. Stephens, District Judge, in the Custer County Courthouse, Challis, Idaho. Thomas J Lloyd III, Esq. appeared on behalf of the plaintiffs. Paul J Fitzer, Esq., appeared on behalf of the defendant. Also present were Court Reporter Mary Ann Elliot, Chief Deputy Mike Talbot, and Deputy Clerk Crystal Kestler.

The Court inquired of counsel. Mr. Lloyd made argued his pending motions. Mr. Fitzer responded and argued his pending motion. Mr. Lloyd gave rebuttal argument.

Based upon the information stated by counsel; The Court will take both parties arguments under advisement and submit a decision at a later date.

DATED AND DONE this 21st day of October, 2015.

Alan C. Stephens
District Judge

CERTIFICATE OF MAILING

I HEREBY CERTIFY that a full, true and correct copy of the Minute Entry was personally delivered; faxed or mailed this 21st day of October, 2015, to the following:

Thomas J Lloyd III, Esq.
Greener Burke Shoemaker PA — Email
tlloyd@greenerlaw.com

Paul J Fitzer
Moore Smith Buxton & Turcke, Chtd — Email
pjf@msbtlaw.com

LURA H. BAKER
Clerk of the Court

Crystal Kestler
Deputy Clerk

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CUSTER

THOMAS AND REBECCA ARNOLD,	)	
	)	
Plaintiffs,	)	Case No. CV 2014-35
	)	
-vs.-	)	
	)	**DECISION AND ORDER RE: MOTION FOR REHEARING, MOTION TO CORRECT THE RECORD, AND MOTION TO STRIKE**
CITY OF STANLEY,	)	
	)	
	)	
Defendant.	)	
	)	

The Plaintiffs, Thomas and Rebecca Arnold, filed a motion for rehearing and a motion to correct the record. The Defendant contests the motion. The Defendant filed a motion to strike. The Plaintiffs contest the motion. After reviewing all of the filings and holding a hearing on these matters, the Court HEREBY DENIES THE MOTION FOR REHEARING, THE MOTION TO CORRECT THE RECORD, and THE MOTION TO STRIKE.

MOTION FOR REHEARING

The Arnolds base their motion for rehearing on an accusation that the Court relied on false information in coming to its original conclusion and therefore must reconsider.

This Court's original decision was made based on the standard set forth in Idaho Code §67-5279. This standard requires the Arnolds to prove that the City of Stanley's denial of their building permit was in violation of constitutional or statutory provisions, in excess of the statutory authority of the agency, was made upon unlawful procedure, was not supported by substantial evidence, or was arbitrary, capricious, or an abuse of discretion. The Arnolds have

not proved that any of these occurred. Absent such proof, the Court was required to rule in favor of the City of Stanley.

At the center of this Court's decision was the conclusion, against the Arnolds' contention, that the City of Stanley has rules regarding subdivisions that apply to the access road/driveway the Arnolds are attempting to get a building permit for in this action. SMC §16.16. These rules require an application for the creation of a subdivision to include all "streets, street names, right of way and roadway widths, including adjoining streets or roadways." SMC §16.16.030.I. Additionally, the rules require that the preliminary plat plan be in sufficient detail as to "enable the commission to make a determination as to the conformance of the proposed improvements to applicable regulations, ordinances and standards." SMC §16.16.020.B.

This Court concluded that these procedures are in compliance with Idaho law governing the improvement of property within the city, and that the Arnolds failed to follow these procedures when they began construction of the road in question in this action. In light of these circumstances, the City of Stanley has every right to deny a building permit in order to enforce those procedures.

The Arnolds argue that the Court relied on various facts and conclusions that are false in making its decision and ask the Court to hold an additional hearing in order to sort through these facts. The Statements of the Court that the Arnolds argue were made upon relying on false statements by the City are: (1) that the Arnolds had constructed a road in violation of applicable city ordinances, (2) that the case is about access roads, not a private driveway, (3) that the original plat agreement only allows for one access point to Lot 5, (4) that a building permit is not the appropriate method for gaining approval for an access road, (5) that more information

regarding the method to be used to build the road is required for the City Council to be able to make the decision, (6) that a plat amendment would be required in order to regain an access right to the abutting public road, and (7) that the access drive is constructed on city property. These statements are discussed below.

In Statement 1 the Court stated that had the Arnolds waited to build the access road/driveway until they amended their plat plan and obtained a valid building permit, the loss they would have suffered might not have been substantial. The Arnolds do not deny that the building permit they sought was for a road not on the plat plan. They argue that because the plat plan was not submitted to the Court, the Court cannot come to that conclusion. However, that conclusion was presented to the Court in argument and was not disputed. Even in their current arguments, the Arnolds do not claim that the road in question was part of the original plat plan. Since there is no evidence that the road was on the plat plan as it was required to be under SMC §16.16.030.I, the Arnolds were in violation of a city ordinance when they began construction of that road.

In Statement 2, the Arnolds claim that the road in question is actually a driveway and not an access road even though the Arnolds referred to it as a road. This is irrelevant because the subdivision application requires all streets and rights of way to be included in the preliminary plat. SMC §16.16.030.I. This Court interprets this to include all means of access to the property because storm drainage, public water and sewer systems, utility easements, pedestrian walkways, and street lighting will all be affected whether the road is an access road or a driveway. Hence, the City has an interest in knowing about all driveways and other access points at the preliminary plat stage.

Statement 3 was a remark that the plat agreement only allowed for one access point to Lot 5. No evidence was provided to prove to this Court that Lot 5 originally had more or less than one access point in the original plat agreement. Since the Plaintiffs have the burden of proof under the §67-5279 standard, it would be up to them to show the Court that this fact was not true. This Court rejects the argument that the parcel is entitled to an additional access point simply because it abuts the city street. This Court does not deny the Arnolds any opportunity to have access to the abutting street, but concludes that the Arnolds must follow the appropriate procedure in order to gain that access. They have not done so here.

Statement 4, that a building permit is not the appropriate method for gaining approval of an access road (or driveway), is proven by a quick look at SMC §16.16.030.I,where it states that all streets in a proposed subdivision must be clearly named and drawn on the preliminary plat. This is so the proposed access point can be investigated and either approved or denied by the City Council and presented to various public agencies and the public by way of a hearing. Then an ultimate, informed decision can be made as to whether the proposed street is in compliance with city ordinances before approval is granted. Clearly, the addition of a street to a subdivision plan must be approved in the same method as the rest of the streets or it would deem the whole process arbitrary. The Court came to this conclusion by reading the Stanley Municipal Code.

In statement 5 the Court stated that the City of Stanley has the right to request more information before making its decision. The Stanley Municipal Code requires the applicant for a subdivision to provide "sufficient information and detail to enable the commission to make a determination as to conformance of the proposed improvements to applicable regulations, ordinances and standards." SMC 16.16.020.B. Since the City has every right to request more

information regarding the construction of roads before approving a subdivision application, it must also have the right to request more information regarding a street that is being added to the original plan. The Court interpreted the law to reach this conclusion.

Statement 6 concludes that a plat amendment would be required in order to regain an access right to the abutting road. The City of Stanley has set forth several rules regarding the creation of a subdivision, one of those rules is that all streets and rights of way (interpreted to mean all access points) must be divulged on the preliminary plat. The preliminary plat is then submitted to the City Council and various public agencies and presented to the public for input before being approved. If a change to the preliminary plat is not required to go through these steps, then the process is deemed meaningless and arbitrary. It is essential that any change to the plat plan must be put through the same scrutiny as the preliminary plat.

Finally, statement 7 was a remark that the access drive is constructed on city property. Again, this is irrelevant. The City of Stanley has power to regulate all property within the city and has chosen to regulate subdivisions in the ways proscribed herein. Idaho Code gives the City Of Stanley this power, which extends to private as well as public property. Therefore, reliance on this fact would not be determinative.

The Court finds that it did not rely on any "false statements" by the City of Stanley in making its prior decision and, therefore, denies the motion for rehearing.

MOTION TO CORRECT THE RECORD

In a motion for judicial review of an agency action the Court is confined to review the record as it stood when the agency made the decision. Any motion to correct the record should

have been filed long ago with the City of Stanley and cannot be considered by this Court. The Court, therefore, denies the motion to correct the record.

MOTION TO STRIKE PLAINTIFFS' MOTION TO CORRECT THE RECORD

Since the Court has denied the motion to correct the record, the Defendant's motion to strike the motion to correct the record is moot. The Court, therefore, denies the motion to strike.

IT IS SO ORDERED.

Dated this 3rd day of November, 2015.

Alan C. Stephens, District Judge

CERTIFICATE OF MAILING

I HEREBY CERTIFY that a full, true and correct copy of the Decision and Order was personally delivered; faxed or mailed this 4th day of November, 2015, to the following:

Thomas J Lloyd III, Esq.
Greener Burke Shoemaker PA — Email
tlloyd@greenerlaw.com

Paul J Fitzer
Moore Smith Buxton & Turcke, Chtd — Email
pjf@msbtlaw.com

LURA H. BAKER
Clerk of the Court

Crystal Kestler

Crystal Kestler
Deputy Clerk

ORIGINAL

Fredric V. Shoemaker (ISB No. 1687)
Thomas J. Lloyd III (ISB No. 7772)
GREENER BURKE SHOEMAKER OBERRECHT P.A.
950 West Bannock Street, Suite 950
Boise, ID 83702-6138
Telephone: (208) 319-2600
Facsimile: (208) 319-2601
Email: fshoemaker@greenerlaw.com
tlloyd@greenerlaw.com

Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CUSTER

THOMAS ARNOLD AND REBECCA ARNOLD, Husband and Wife, Petitioner, v. CITY OF STANLEY, a Political Subdivision of the State of Idaho, Respondent.	Case No. CV-2012-142 **NOTICE OF APPEAL TO THE IDAHO SUPREME COURT** **FEE: $129.00** **FEE CATEGORY: L.4**

TO: THE ABOVE-NAMED RESPONDENT, CITY OF STANLEY, ITS ATTORNEYS OF RECORD, AND THE CLERK OF THE ABOVE-ENTITLED COURT,

NOTICE IS HEREBY GIVEN THAT:

1. The above-named Appellants, Thomas Arnold and Rebecca Arnold ("Appellants"), hereby appeal against the above-named Respondent, City of Stanley ("Respondent"), to the Idaho Supreme Court from the following final disposition entered in the above-entitled action, the Honorable Alan C. Stephens, District Judge, presiding:

a. Decision and Order Re: Motion for Rehearing, Motion to Correct the Record, and Motion to Strike, entered on November 3, 2015, denying the Appellants' Motion for a Rehearing on their Petition for Judicial Review; and

b. Decision and Order Re: Judicial Review of Building Permit Application Denial, entered on June 10, 2015, denying the Appellants' Petition for Judicial Review and restricting Appellants' property rights

2. That the Appellant has a right to appeal to the Idaho Supreme Court, and the judgments or orders described in paragraph 1 are appealable orders under and pursuant to Rule 84(t), Idaho Rules of Civil Procedure, and Rule 11(a)(1), Idaho Appellate Rules.

3. Appellants intend to assert the following issues on appeal. By setting forth this list of preliminary issues on appeal, Appellants do not intend to restrict or prevent themselves from asserting other issues on appeal:

a. Whether the District Judge erred in determining that Appellants do not have a right of access to/from their property at the point of intersection with the abutting public rights of way, in the absence of any regulatory restrictions?

b. Whether the District Judge erred in determining that under Idaho law, all access points for a parcel of property (including those which are neither streets nor public rights of way, e.g. driveways) must be depicted on a preliminary plat?

c. Whether the District Judge erred in concluding that the acceptance by the City of Stanley of a subdivision plat had the effect of nullifying all other appurtenant property rights not shown on the plat, regardless of whether those rights are required to be shown on a plat according to Idaho Code § 50-1304?

d. Whether the District Court erred in imposing municipal code requirements on the Appellants that are applicable to the establishment of subdivisions, in a subdivision that had previously been established, in conjunction with the Appellants' request for a building permit?

e. Whether the District Court erred in treating Appellants' proposed driveway as a "right of way" or "street" for purposes of applying local and state laws?

f. Whether the District Court erred when it found that Appellants were required to follow any particular procedure to "gain" access from the public roadways to their abutting private property, in the absence of any codified restrictions previously curtailing that appurtenant access right (*see Johnston v. Boise City*, 87 Idaho 44, 51, 390 P.2d 291, 294 (1964))?

g. Whether the District Court erred in concluding that the Appellants had constructed an "access road" in violation of the Stanley Municipal Code?

h. Whether the District Court erred in determining that the City of Stanley's denial of the Appellants' Building Permit Application No. 831 was not a decision made on unlawful procedure?

4. To the knowledge of the Appellants, no order has been entered sealing all or any portion of the record.

5. The Appellants request the preparation of the following portions of the reporter's transcript in both hard copy and electronic format:

a. May 20, 2015, 11:00am: Hearing on Petition for Judicial Review; and

b. October 21, 2015, 11:00am: Hearing on Petition for Rehearing and other matters.

6. Appellants request the following documents, together with their related exhibits, to be included in the clerk's record in addition to those automatically included in the Standard Record under Idaho Appellate Rule 28:

a. Any and all documents filed and/or lodged with the District Court in this matter.

7. I certify:

a. That a copy of this Notice of Appeal has been served on the court reporter from whom a transcript has been requested, as named below at the address set out below:

Jack Fuller
Court Reporter
c/o Custer County Courthouse
801 Main Street
PO Box 385
Challis, ID 83226

b. That in accordance with Rules 24(c) and 24(d) of the Idaho Appellate Rules, Appellant has paid the sum of $200.00 to the clerk of the District Court for the preparation of the reporter's transcript;

c. That the estimated fee for preparation of the clerk's record has been paid;

d. That the filing fee for filing this Notice of Appeal with the District Court, County of Custer has been paid; and

e. That service has been made upon all parties required to be served pursuant to Idaho Appellate Rule 20.

DATED THIS 11th day of December, 2015.

GREENER BURKE SHOEMAKER OBERRECHT P.A.

By _____
Fredric V. Shoemaker
Thomas J. Lloyd III
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 11th day of December, 2015, a true and correct copy of the within and foregoing instrument was served upon:

Paul J. Fitzer
MOORE SMITH BUXTON & TURCKE, CHTD.
950 W. Bannock, Suite 520
Boise, ID 83702
Attorney for Defendant/Respondent

- ☐ U.S. Mail
- ☐ Facsimile
- ☒ Hand Delivery
- ☐ Overnight Delivery
- ☐ E-mail: pjf@msbtlaw.com

Jack Fuller, Court Reporter
Custer County Courthouse
P.O. Box 385
Challis, ID 83423

- ☐ U.S. Mail
- ☒ Facsimile
- ☐ Hand Delivery
- ☐ Overnight Delivery

_____
Fredric V. Shoemaker
Thomas J. Lloyd

Fredric V. Shoemaker (ISB No. 1687)
Thomas J. Lloyd III (ISB No. 7772)
GREENER BURKE SHOEMAKER OBERRECHT P.A.
950 West Bannock Street, Suite 950
Boise, ID 83702-6138
Telephone: (208) 319-2600
Facsimile: (208) 319-2601
Email: fshoemaker@greenerlaw.com
tlloyd@greenerlaw.com

Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CUSTER

THOMAS ARNOLD AND REBECCA ARNOLD, Husband and Wife, Petitioner, v. CITY OF STANLEY, a Political Subdivision of the State of Idaho, Respondent.	Case No. CV-2014-35 **AMENDED NOTICE OF APPEAL TO THE IDAHO SUPREME COURT** **FEE: $129.00** **FEE CATEGORY: L.4**

TO: THE ABOVE-NAMED RESPONDENT, CITY OF STANLEY, ITS ATTORNEYS OF RECORD, AND THE CLERK OF THE ABOVE-ENTITLED COURT,

NOTICE IS HEREBY GIVEN THAT:

1. The above-named Appellants, Thomas Arnold and Rebecca Arnold ("Appellants"), hereby appeal against the above-named Respondent, City of Stanley ("Respondent"), to the Idaho Supreme Court from the following final disposition entered in the above-entitled action, the Honorable Alan C. Stephens, District Judge, presiding:

a. Decision and Order Re: Motion for Rehearing, Motion to Correct the Record, and Motion to Strike, entered on November 3, 2015, denying the Appellants' Motion for a Rehearing on their Petition for Judicial Review; and

b. Decision and Order Re: Judicial Review of Building Permit Application Denial, entered on June 10, 2015, denying the Appellants' Petition for Judicial Review and restricting Appellants' property rights

2. That the Appellant has a right to appeal to the Idaho Supreme Court, and the judgments or orders described in paragraph 1 are appealable orders under and pursuant to Rule 84(t), Idaho Rules of Civil Procedure, and Rule 11(a)(1), Idaho Appellate Rules.

3. Appellants intend to assert the following issues on appeal. By setting forth this list of preliminary issues on appeal, Appellants do not intend to restrict or prevent themselves from asserting other issues on appeal:

a. Whether the District Judge erred in determining that Appellants do not have a right of access to/from their property at the point of intersection with the abutting public rights of way, in the absence of any regulatory restrictions?

b. Whether the District Judge erred in determining that under Idaho law, all access points for a parcel of property (including those which are neither streets nor public rights of way, e.g. driveways) must be depicted on a preliminary plat?

c. Whether the District Judge erred in concluding that the acceptance by the City of Stanley of a subdivision plat had the effect of nullifying all other appurtenant property rights not shown on the plat, regardless of whether those rights are required to be shown on a plat according to Idaho Code § 50-1304?

d. Whether the District Court erred in imposing municipal code requirements on the Appellants that are applicable to the establishment of subdivisions, in a subdivision that had previously been established, in conjunction with the Appellants' request for a building permit?

e. Whether the District Court erred in treating Appellants' proposed driveway as a "right of way" or "street" for purposes of applying local and state laws?

f. Whether the District Court erred when it found that Appellants were required to follow any particular procedure to "gain" access from the public roadways to their abutting private property, in the absence of any codified restrictions previously curtailing that appurtenant access right (*see Johnston v. Boise City*, 87 Idaho 44, 51, 390 P.2d 291, 294 (1964))?

g. Whether the District Court erred in concluding that the Appellants had constructed an "access road" in violation of the Stanley Municipal Code?

h. Whether the District Court erred in determining that the City of Stanley's denial of the Appellants' Building Permit Application No. 831 was not a decision made on unlawful procedure?

4. To the knowledge of the Appellants, no order has been entered sealing all or any portion of the record.

5. The Appellants request the preparation of the following portions of the reporter's transcript in both hard copy and electronic format:

a. May 20, 2015, 11:00am: Hearing on Petition for Judicial Review; and

b. October 21, 2015, 11:00am: Hearing on Petition for Rehearing and other matters.

6. Appellants request the following documents, together with their related exhibits, to be included in the clerk's record in addition to those automatically included in the Standard Record under Idaho Appellate Rule 28:

a. Any and all documents filed and/or lodged with the District Court in this matter.

7. I certify:

a. That a copy of this Notice of Appeal has been served on the court reporter from whom a transcript has been requested, as named below at the address set out below:

Mary Ann Elliott
Court Reporter
c/o Jeffereson County Courthouse
210 Courthouse Way, Suite 120
Rigby, ID 83442

b. That in accordance with Rules 24(c) and 24(d) of the Idaho Appellate Rules, Appellant has paid the sum of $200.00 to the clerk of the District Court for the preparation of the reporter's transcript;

c. That the estimated fee for preparation of the clerk's record has been paid;

d. That the filing fee for filing this Notice of Appeal with the District Court, County of Custer has been paid; and

e. That service has been made upon all parties required to be served pursuant to Idaho Appellate Rule 20.

DATED THIS 14th day of December, 2015.

GREENER BURKE SHOEMAKER OBERRECHT P.A.

By _____
Fredric V. Shoemaker
Thomas J. Lloyd III
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 14th day of December, 2015, a true and correct copy of the within and foregoing instrument was served upon:

Paul J. Fitzer
MOORE SMITH BUXTON & TURCKE, CHTD.
950 W. Bannock, Suite 520
Boise, ID 83702
Attorney for Defendant/Respondent

- ☐ U.S. Mail
- ☐ Facsimile
- ☒ Hand Delivery
- ☐ Overnight Delivery
- ☐ E-mail: pjf@msbtlaw.com

Mary Ann Elliott, Court Reporter
Jefferson County Courthouse
210 Courthouse Way
Rigby, ID 83442

- ☐ U.S. Mail
- ☒ Facsimile: 208-745-6636
- ☐ Hand Delivery
- ☐ Overnight Delivery

_____
Fredric V. Shoemaker
Thomas J. Lloyd

DISTRICT COURT
CUSTER COUNTY
IDAHO
2015 DEC 15 AM 8:50
By: Laila Plummer Deputy

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CUSTER

THOMAS ARNOLD and REBECCA ARNOLD,

Appellants,

Vs

CITY OF STANLEY, a political subdivision of the State of Idaho,

Respondent,

CASE NO. CV-2014-35

CLERK'S CERTIFICATE OF APPEAL

Supreme Court No._____

Appeal from: Seventh Judicial District, Custer County, State of Idaho

District Court Judge: Honorable Alan C. Stephens

District Court No: CV-2014-35

Order or judgment appealed from: Decision and Order RE: Motion for Rehearing, Motion to Correct the Record and Motion to Strike dated November 3rd, 2015; Decision and Order RE: Judicial Review of Building Permit Application Denial dated June 10th, 2015

Attorney for Appellant: Fredric V. Shoemaker and Thomas J Lloyd III

Attorney for the Respondent: Paul J. Fitzer

Appealed by: Thomas and Rebecca Arnold through attorney, Fredric V. Shoemaker

Appealed against: City of Stanley, a political subdivision of the State of Idaho

Notice of Appeal filed: December 14th, 2015

Filing Fees Paid: Yes
Reporter's transcript requested: Yes
Name of Reporter: Mary Ann Elliott
Estimate of cost of transcript: No estimate in file

Dated: December15th, 2015

LURA H BAKER
Clerk of the Court

Laila Plummer
Laila Plummer, Deputy Clerk

SEVENTH JUDICIAL DISTRICT COURT CUSTER COUNTY IDAHO

DISTRICT COURT
CUSTER COUNTY
IDAHO
2016 FEB 22 PM 2:43

By: Crystal Kestler Deputy

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT STATE OF IDAHO, IN AND FOR THE COUNTY OF CUSTER

Thomas Arnold and Rebecca Arnold, Plaintiffs/Appellants, -vs- City of Stanley, a political subdivision of the State of Idaho, Defendant/Respondent.	)	Supreme Court Case No. 43868 CERTIFICATE OF EXHIBITS

I, LURA H. BAKER, Clerk of the District Court of the Seventh Judicial District of the State of Idaho in and for the County of Custer, do hereby certify:

That the attached list of exhibits are true and accurate copies of the exhibits being forwarded to the Supreme Court on Appeal – District exhibits: NONE

1. Amended Agency Record – (06-10-14)
2. Audio CD listed as Exhibit B, filed with the Affidavit Of Cari Tassano – (07-24-14)
3. Audio CD listed as Exhibit C, filed with the Affidavit Of Cari Tassano – (07-24-14)

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court this 22 day of February, 2016.

LURA H. BAKER, Clerk of the Court

Crystal Kestler

Deputy Clerk

MARY ANN ELLIOTT, RPR, CSR
Official Court Reporter
Seventh Judicial District
2184 Channing Way, Suite 208
Idaho Falls, Idaho 83404-8034
elliottcourtreporting@gmail.com
(208-932-1413)

****

NOTICE OF TRANSCRIPT LODGED

****

DATE: February 22, 2016

TO: Stephen W. Kenyon, Clerk of the Court
Supreme Court/Court of Appeals
P.O. Box 83720
Boise, Idaho 83720-0101

SUPREME COURT DOCKET NO.: 43868

DISTRICT COURT CASE NO.: CV-2014-35

CAPTION OF CASE: Arnold v. City of Stanley

You are hereby notified that a reporter's appellate transcript in the above-entitled and numbered case has been lodged with the District Court Clerk of the County of Custer in the Seventh Judicial District. Said transcript consists of the follow proceedings, totaling 135 pages:

1. Hearing on Judicial Review of Building Permit Application Denial (May 20, 2015)

2. Hearing on Motion for Rehearing, Motion to Correct the Record, and Motion to Strike (October 21, 2015)

Respectfully,

Mary Ann Elliott, RPR, Idaho CSR #1015

xc: District Court Clerk

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT STATE OF IDAHO, IN AND FOR THE COUNTY OF CUSTER

Thomas Arnold and Rebecca Arnold, Plaintiffs/Appellants, -vs- City of Stanley, a political subdivision of the State of Idaho, Defendant/Respondent.	Supreme Court Case No. 43868 CLERK'S CERTIFICATE

I, LURA H. BAKER, Clerk of the District Court of the Seventh Judicial District of the State of Idaho in and for the County of Custer, do hereby certify that the above and foregoing Clerk's Record in the above-entitled cause was compiled and bound under my direction as, and is a true, full and correct record of the pleadings and documents as are automatically required under Rule 28 of Idaho Appellate Rules along with all requested documents.

I do further certify that the Court Reporter's Transcript and Clerk's Record will be duly lodged with the Clerk of the Supreme Court, as required by Rule 31 of the Idaho Appellate Rules.

IN WITNESS WHEREOF, I hereunto set my hand and affixed the seal of said Court at Challis, Idaho this 23rd day of February, 2016.

LURA H. BAKER
Clerk of the District Court

By: Crystal Kestler
Crystal Kestler, Deputy Clerk

Cc: Clerk of the Court
Idaho Supreme Court

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT STATE OF IDAHO, IN AND FOR THE COUNTY OF CUSTER

Thomas Arnold and Rebecca Arnold, Plaintiffs/Appellants, v. City of Stanley, a political subdivision of the State of Idaho, Defendant/Respondent.	)	Supreme Court Case No. 43868 County Case No. CV-2014-35 NOTICE OF LODGING OF CLERK'S RECORD

Notice is hereby given that the Clerk's Record was lodged with the District Court on February 23, 2016.

The parties shall have twenty-eight (28) days from the date of service of the appeal record to file any objections, together with a Notice of Hearing, with the District Court. If no objection is filed, the record will be deemed settled and will be filed with the Supreme Court.

LURA H. BAKER
Clerk of the District Court

By Crystal Kestler
Crystal Kestler, Deputy Clerk

cc: Idaho Court of Appeals
Idaho Supreme Court

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT STATE OF IDAHO, IN AND FOR THE COUNTY OF CUSTER

Thomas Arnold and Rebecca Arnold, Plaintiffs/Appellants, -vs- City of Stanley, a political subdivision of the State of Idaho, Defendant/Respondent.	Supreme Court Case No. 43868 CERTIFICATE OF SERVICE

I, LURA H. BAKER, Clerk of the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Custer, do hereby certify that I have personally served or mailed, by United States mail, postage prepaid, one copy of the Clerk's Record and Reporter's Transcript to each of the parties or their Attorney of Record, this 24th day of February, 2016 as follows:

FREDRIC V. SHOEMAKER, ESQ.
THOMAS J LLOYD III ESQ.,
950 WEST BANNOCK STREET, SUITE 950
BOISE, ID 83702

PAUL J. FITZER, ESQ.,
950 WEST BANNOCK STREET, SUITE 520
BOISE, ID 83702

LURA H. BAKER
Clerk of the District Court

BY Crystal Kestler
Crystal Kestler, Deputy Clerk

CERTIFICATE OF SERVICE