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In the Supreme Court of the State of Idaho

Supreme Court Case No. 43868-2015

THOMAS ARNOLD and REBECCA ARNOLD,

Plaintiffs-Appellants

vs.

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

Defendant-Respondent.

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RESPONDENT'S BRIEF

Appeal from the District Court of the Seventh Judicial District for Custer County
Case No. CV 2014-35

Hon. Alan C. Stephens, presiding

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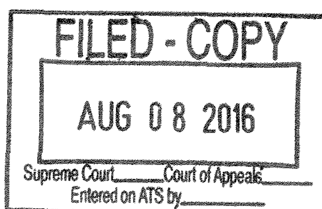

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I.
STATEMENT OF THE CASE

The District Court correctly ruled that Rebecca Arnold ("Arnold") is not entitled to a building permit. In support of her building permit application seeking to develop an access road down a steep slope of approximately fifteen percent,[1] she failed to provide a scintilla of information that would enable the City to evaluate and render educated findings that the proposed access road was constructed safely utilizing sound engineering practices.[2] In contravention of SMC 15.04.020, Arnold believes it is sufficient to merely state that the access road will 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".[3] As a matter of public safety, this explanation wholly fails to comply with the plethora of Stanley Municipal Code provisions governing development on a slope exceeding ten percent.[i]

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[1] See Findings of Fact, Conclusions of Law, A.R. p. 34.

> "The subdivision is partially impacted by a FEMA "A" flood zone. The subdivision is characterized by slopes that may exceed 15 per cent [sic] and this particular slope from Ace of Diamonds is quite steep in nature although the Applicant has not provided this information. Subdivisions that contain any portion having an average slope of 10% or more are subject to the Hillside requirements of the Stanley Municipal Code 16.08. Lots that exceed 15% slope are subject to the Hillside provisions of Stanley Municipal Code 17.40.

See also A.R. 56 showing the contour lines. See also SMC 16.08.180 defines a "Hillside subdivision" as "any subdivision, or portion thereof, having an average slope of ten percent (10%) or more." (Ord. 52, 1978) See also zoning requirement ordinance SMC 17.40.032 governing hillside development.

[2] The Stanley Municipal Code unequivocally requires that a "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." SMC 15.04.010. The application additionally must include "[d]evelopment and construction drawings and technical support material ... in sufficient detail to allow a technical or engineering review to determine whether the proposed development complies with all zoning requirements". SMC 15.04.020.

[3] In short, the City does not have any way of knowing what she did out there, what material she utilized, whether it can withstand vehicular traffic, Stanley's weather, or accommodate Spring runoff, or any other of the myriad of reasons why the State, municipalities, highway districts, and counties all have the power to regulate the construction of roads within their jurisdiction.

Had Arnold indicated on her preliminary plat application that she wished to develop this eastern edge of Lot 5 as an access road, there is no question that numerous Stanley Municipal Code provisions governing such hillside development would have governed such construction[4] including but not limited to the necessity to provide a hillside development evaluation, engineering plans, a grading plan, a maintenance plan, comply with further development standards, and a vegetation and revegetation plan.[5]

Rather, Arnold merely proffered the conclusory legal maxim that a lot owner in a duly approved subdivision abutting a city street possesses a constitutional right appurtenant to the land to access that street (with the incidental right to place great quantities of fill material on the City's right of way) regardless that such an access is not depicted or requested in her preliminary and final plat; that the City is powerless to regulate her access to Ace of Diamonds Street. Arnold has not offered a single case to support her conclusion that somehow she has successfully evaded the City's hillside ordinances by waiting to the building permit stage to unveil her desire to develop the hillside. The City's hillside ordinances, which predate the Mountain View Subdivision Plat, are unequivocal and clearly apply to a subdivision access road on a slope exceeding ten percent.

The District Court correctly noted that there is a legal process to approve access roads within an approved subdivision allowing adjacent property owners and the City as a property owner to make an educated decision whether to accept or deny a subdivision plan with access

[4] Se A.R. 50, 63 "Building on a slope" referencing SMC 17.44.050, 17.40.032, and the entirety of SMS 16.36 (16.36.020, 16.36.030, 16.36.040, 16.36.060, and 16.36.060).
[5] SMC 16.36.020 through SMC 16.36.070.

roads to wit: the subdivision platting or re-platting process. Arnold is the owner and developer of the Mountain View Subdivision which received final plat approval on April 11, 2007. As unequivocally depicted on the approved plat for the Mountain View Subdivision, 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.[6] This is further reiterated in numerous prior building permit approvals (BP # 690, 690R-1[7], 744, 789 etc.) wherein access and utilities are clearly depicted along this western edge. Arnold herself stated in the following 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. Now, in building permit application #831,[8] Arnold diverges from these prior approvals by seeking to access the eastern edge of Lot 5 from the west end of Ace of Diamonds street. This is not depicted on the approved Mountain View Plat and an application to amend the plat has not been submitted. Further Arnold proposed and then illegally placed great quantities of fill of an unknown substance on the City's right of way.[9]

This access road is clearly not depicted on her plat nor is there any evidence in the record to support the City's approval of an access from Ace of Diamonds to Lot 5. Arnold has not

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[6] AR. P. 65.

[7] See A.R. p. 32-33, f.n. 1-3; Permit 690 was approved on November 8, 2006 and renewed as 690R-1 on November 14, 2007, again as 690R-2 on or about May 11, 2010 and again as Building Permit 789 and yet again as 789-R2 on May 14, 2013. Building Permit 789-R2 was valid through May 12, 2014. Building Permit 831, the subject of this action, was submitted and purportedly reiterated the already issued and still valid Building Permit 789. *Id.*

[8] A.R. p. 69-70.

[9] See A.R. 52. In particular, See the arrows in relation to the fence line. The fence line shows the preexisting level and the arrows shows the sheer amount of fill placed *on the city right of way.*

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.

This does not mean that two accesses are forever legally precluded as Arnold perceives, but there is a process to be followed when such material changes are presented. Now, before the District Court and this Court for the first time, she wishes to change her chosen label of "access road" and call her access a "driveway" in order to justify her subterfuge as to why her access road is not depicted on her plat. While we disagree, this side-steps the pertinent issue. If Arnold had been forthright in stating that she intended to develop this hillside as an access road off of Ace of Diamonds street to Lot 5, the hillside ordinances clearly would apply and the City, adjacent property owners, and the citizenry all would have the due process right to weigh in as to whether 1) this could be accomplished safely per the Stanley Municipal Code; and 2) whether the access road on the other side of her lot connecting Lot 5 to Highway 21 through Lot 6 is needed or appropriate.

As to this second point, the City or a citizen's review of the preliminary plat shows the Highway 21 access road ending in a cul-de-sac / dead-end. By adding an access on the eastern edge to Ace of Diamonds coupled with the west access to Highway 21, this commercial lot now potentially creates connectivity between the two roads. Depending on the nature of the commercial business (of which the table of permitted uses in this commercial zone is extensive; See 17.24.010), this fundamentally and materially changes the nature of the subdivision and to the City's downtown. Where the building permit process is mostly ministerial and does not require a public hearing, the platting process affords due process via a public hearing. This is

specifically what Arnold demands; the City to ministerially issue her a building permit without compliance with the hillside ordinances and without transparency to the City or the public as to her construction methods. The District Court correctly noted that if an additional access can be built as a matter of right in contradiction to the approved plat and that a city council is powerless to refuse to issue a building permit for such an access, this essentially renders the plat approval process as arbitrary.

II.
ATTORNEY FEES ON APPEAL

The City seeks attorney fees and costs incurred in defending this action on appeal in accordance with Idaho Code § 12-117 and Idaho Appellate Rules 40 and 41 for the reason that Arnold brought this cause of action without a reasonable basis in fact or law nor reasonable extension thereof.

III.
STANDARD OF REVIEW

A. Is Judicial Review available for the denial of a building permit?

The first threshold issue in this case is whether this Court even has jurisdiction. "The IAPA and its judicial review provisions do not apply to the actions of local governing bodies, unless expressly authorized by statute."[10] "To obtain judicial review of final action under LLUPA, there must be a statute granting the right of judicial review. Arnold cites to two cases from 2008 wherein this Court in dictum purportedly asserted that judicial review is afforded to the denial of a building permit. This is irrelevant since the statutes were amended in 2010

[10] *Ravenscroft v. Boise County,* 154 Idaho 613, 301P.3d 271 (2013).

wherein the legislature limited the persons entitled to judicial review under LLUPA."[11] Pre-2010 the Legislature afforded judicial review to those "affected by the issuance or denial of a permit authorizing development" or by those denied a permit or "aggrieved by the decision for the application for the permit".[12] Post-2010 LLUPA's plain text is now devoid of any reference to a "permit". Moreover, a building permit is not included in the enumerated list of applications that are entitled to judicial review. "Idaho has recognized the rule of *expressio unius est exclusio alterius[;]* where a constitution or statute specifies certain things, the designation of such things excludes all others." [13] A building permit is not "an application for a subdivision, variance, special use permit [or] ... such other applications required or authorized pursuant to this chapter."[14]

Arnold latches onto "other applications ... authorized pursuant to this chapter". Yet, only a narrow class of building permits are authorized pursuant to Idaho Code § 67-6517 "for development on any lands designated upon the future acquisitions map."[15] This Court cautioned about this consequence in a 2008 dissenting opinion in *Highlands Development Corp.*:

> If one reads I.C. § 67-6519(2) to establish the entire universe of decisions that may be appealed under LLUPA-"a permit required or authorized under this chapter" -we would eliminate appeals for decisions granting or denying most building permits, as I.C. § 67-6517 only deals with building permits "for

[11] *Stafford v. Kootenai County,* 150 Idaho 841, 847, 252 P.3d 1259, 1265 (2011)(internal citations omitted). While there is no case regarding judicial review of a building permit, in prior dictum, there is support for the conclusion that the *prior pre-2010* Idaho Code § 67-6519(4) would likely provide jurisdiction to any applicant "aggrieved by a decision", which could include a building permit. Regardless, this language no longer appears in the statute.
[12] *Highlands Development Corp. v. City of Boise*, 145 Idaho 958, 961, 188 P.3d 900, 903 (2008).
[13] *Id* citing *Local 1494 of the Int'l Ass'n of Firefighters v. City of Coeur d'Alene*, 99 Idaho 630, 639, 586 P.2d 1346, 1355 (1978).
[14] Idaho Code § 67-6521 (Emphasis added).
[15] *Highlands Development Corp. v. City of Boise,* 145 Idaho 958, 964-965, 188 P.3d 900, 906-907 (2008). 145 Idaho at 964-65, 188 P.3d at 906-07 (Justice Jim Jones dissenting).

> development on any lands designated upon the future acquisitions map," but not with the great number of building permits based upon existing land use ordinances. Review would be precluded for all zoning decisions, as well as interim and emergency moratoria on issuance of selected classes of permits under I.C. §§ 67-6523 and 6524 because moratoria are not stated to be permits.[16]

The Legislature saw fit to remove any reference to a "permit" in the 2010 amendment thus exercising its discretion in opening the door to the various zoning decisions and other LLUPA applications that are not technically "permits". Concomitantly the Legislature further distanced any non-I.C. § 67-6517 building permit from entitlement to judicial review. We must assume this was intentional.[17]

As a practical matter this makes sense when construing the statutes together.[18] Typically, the conventional medium for compelling the issuance of a building permit is through a *writ of mandate*. Conversely, an application required or authorized under LLUPA requires a transcribable record (Idaho Code § 67-6536) and findings of fact, conclusions of law (Idaho Code § 67-6535); both of which can only occur during a public meeting presided over and thereafter authored by the elected governing body. Yet, the issuance or denial of a building permit does not occur at a public meeting. Generally ministerial in nature, building permits are typically issued at the staff level by the building inspector or planning and zoning administrator;

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[16] *Highlands Development Corp. v. City of Boise*, 145 Idaho 958, 964-965, 188 P.3d 900, 906-907 (2008).
[17] *Twin Lakes Canal Co. v. Choules,* 115 Idaho 214, 218, 254 P.3d 1210, 1214 (2011) "Courts must construe statutes " under the assumption that the legislature knew of all legal precedent and other statutes in existence at the time the statute was passed." *Id* citing *City of Sandpoint v. Sandpoint Indep. Highway Dist.*, 126 Idaho 145, 150, 879 P.2d 1078, 1083 (1994).
[18] The Court must give effect to all the words and provisions of the statute so that none will be void, superfluous, or redundant. *Saint Alphonsus Regional Medical Center v. Gooding County*, 356 P.3d 377, 379-380 (2015).

none of which is subject to LLUPA's requirements governing transcribable records or findings of fact, conclusions of law.

That the City did so in this instance merely reflects the City's anticipation of Arnold's litigious nature. The City was not required to do so. [19] Reading the statutes together, this Court is in essence being asked to determine that the Legislature intended that every building permit issued in this State can only be issued following a public hearing (hence a transcribable record which can only occur in a public meeting) followed by written findings of fact, conclusions of law. Clearly if the legislature had intended such a requirement, the plain text of the statutes would depict as such. Arnold is not entitled to judicial review.

IV. ARGUMENT

A. Public Health and Safety: Bereft of any explanation other than the access was to be "graveled", the District Court correctly determined that the City correctly could not render a finding that Arnold complied with the Stanley Municipal Code.

1. "Graveled" fails to demonstrate sound engineering practices.

SMC 15.04 governs the process for the issuance of a building permit. SMC 15.04.010 provides that

[19] Arnold believes that this Court has jurisdiction by virtue of SMC 15.04.040(c) which essentially mirrors the pre-2010 I.C. § 67-6519 text allowing an applicant denied a permit or aggrieved by a decision to seek judicial review "under the procedures provided by Idaho Code and any amendments thereto." As clearly articulated in *Black Labrador Investing LLC, v. Kuna,* 147 Idaho 92, 205 P.3d 1228 (2009) and numerous other decisions, a city ordinance cannot authorize judicial review. The power to enact such a law was outside the scope of local police regulations delegated to counties under Idaho Const. art. XII, § 2. To the extent the City's law may be interpreted as purporting to authorize judicial review differently than the statute, it is conflict with the general laws of the State and invalid.

> 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[20] requirements.

Emphasis added.

What technical information 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".[21] There is a complete absence of the information required pursuant to SMC 16.36 and 17.40.032. In fact, there is a complete absence of *any* explanation of the engineering employed.

[20] Arnold continually asserts there are no such zoning requirements. In addition to being subject to the City's hillside provisions of 16.36 (which predated the Mountain View Subdivision) see also SMC 17.40.032: HILLSIDE PROVISIONS which regulates cut and fill slope construction activities, revegetation planning, and requirements for public safety, erosion, and other aesthetic considerations.

[21] A.R. p. 69-70.

The City is not the applicant. The City is not the engineer. The onus is on the applicant to demonstrate good engineering practices. 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 access road does not collapse or erode and suffer other concerns related to the public health and safety.

2. <u>Arnold contends that the City's subdivision ordinance governing development on a hillside does not apply to a lot within a subdivision for proposed development on a hillside.</u>

Arnold proverbially wants to have her cake and eat it too. Whether in 2007 when the Mountain View Subdivision was considered or today, whether clothed as a plat, re-plat or building permit in a lot in a duly approved subdivision, if an applicant submits an application to develop on a hillside such as building a subdivision access road on a steep ravine such as seen on the eastern edge of lot 5, SMC 16.36[22] and SMC 17.40.032 governing hillside development clearly would apply. "[A]n applicant's rights are determined by the ordinance in existence at the time of filing an application for the permit."[23] This "South Fork Coalition rule is applicable where a building permit has been applied for prior to the amendment or change in the ordinance."[24]

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[22] See SMC 16.36.010 through 16.36.070.
[23] *South Fork Coalition v. Board of Comm'rs,* 117 Idaho 857, 861, 792 P.2d 882, 886 (1990); *Ben Lomond, Inc. v. City of Idaho Falls*, 92 Idaho 595, 448 P.2d 209 (1968) (*"Lomond"*).
[24] *Cunningham v. City of Twin Falls*, 125 Idaho 776, 781, 874 P.2d 587, 592 (App. 1994).

The City's hillside ordinances, SMC 16.36 and 17.40.032, predate the Mountain View Subdivision plat. A portion of the Mountain View Subdivision includes a slope likely in excess of fifteen percent; i.e. from this eastern edge of Lot 5 to Ace of Diamonds.[25] Therefore, the Mountain View Subdivision is subject to the Stanley Municipal Code hillside ordinances, zoning ordinances, and every other ordinance in effect at the time of application. Further, Lot 5 is a lot in a subdivision governed by the hillside ordinances

. Whether by subterfuge or accident, the Mountain View Subdivision plat clearly depicts that Lot 5 was granted direct access from Highway 21, and conversely it does not depict that Arnold intended to build an access road from Ace of Diamonds down a steep ravine along this eastern edge of Lot 5. This begets the question as to what a subdivision applicant is required to demonstrate to obtain subdivision approval. It would be illogical, arguably punitive, to require an applicant to provide, for example, a grading plan for an access road no one knew was to be built,[26] a revegetation plan of a hillside no one knew would be used as an access,[27] a maintenance

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[25] See Findings, A.R. 34 and contour lines of this slope A.R. p. 56

[26] 16.36.040: GRADING PLAN:

A. A preliminary grading plan shall be submitted with each hillside preliminary plat proposal and shall include the following information:

1. Approximate limiting dimensions, elevations, or finish contours to be achieved by the grading, including all cut and fill slopes, proposed drainage channels and related construction;

2. Preliminary plans and approximate locations of all surface and subsurface drainage devices, walls, dams, sediment basins, storage reservoirs and other protective devices to be constructed;

3. A description of methods to be employed in disposing of soil and other material that is removed from the grading site, including the location of the disposal site.

B. A final grading plan shall be submitted with each final plat and shall include the following information:

1. Limiting dimensions, elevations or finish contours to be achieved by the grading, including all proposed cut and fill slopes, and proposed drainage channels and related construction;

2. Detailed plans and locations of all surface and subsurface drainage devices, walls, dams, sediment basins, storage reservoirs and other protective devices to be constructed;

3. A schedule showing when each stage of the project will be completed, including the total area of soil surface which is to be disturbed during each stage together with estimated starting and completion dates. In

plan showing who and how someone is going to maintain this non-existent access into a commercial establishment[28], a hillside development evaluation (see below)[29], engineering plans

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no event shall the existing ("natural") vegetative ground cover be destroyed, removed, or disturbed more than fifteen (15) days prior of grading. (Ord. 52, 1978)

[27] 16.36.070: VEGETATION AND REVEGETATION:

A. The developer shall submit a slope stabilization and revegetation plan which shall include a complete description of the existing vegetation, the vegetation to be removed and the method of disposal, the vegetation to be planted, and slope stabilization measures to be installed. The plan shall include an analysis of the environmental effects of such operations, including the effects on slope stability, soil erosion, water quality, and fish and wildlife.

B. Vegetation sufficient to stabilize the soil shall be established on all disturbed areas as each stage of grading is completed. Areas not contained within lot boundaries shall be protected with perennial vegetal cover after all construction is completed. Efforts shall be made to plant those species that tend to recover from fire damage and do not contribute to a rapid rate of fire spread.

C. The developer shall be fully responsible for any destruction of native vegetation proposed for retention. He shall carry the responsibility both for his own employees and for all subcontractors from the first day of construction until the notice of completion is filed. The developer shall be responsible for replacing such destroyed vegetation. (Ord. 52, 1978)

[28] 16.36.050: MAINTENANCE:

The owner of any private property on which grading or other work has been performed pursuant to a grading plan approved or a building permit granted under the provisions of this title shall continuously maintain and repair all graded surfaces and erosion prevention devices, retaining walls, drainage structures or means, and other protective devices, plantings and ground cover installed or completed. (Ord. 52, 1978)

[29] 16.36.020: HILLSIDE DEVELOPMENT EVALUATION:

A. All development proposals shall take into account and shall be judged by the way in which land use planning, soil mechanics, engineering geology, hydrology, civil engineering, environmental and civic design, architectural and landscape design are applied in hillside areas, including, but not limited to:

1. Planning of development to fit the topography soils, geology, hydrology, and other conditions existing on the proposed site;
2. Orientation of development on the site so that grading and other site preparation is kept to an absolute minimum;
3. Shaping of essential grading to blend with natural landforms and to minimize the necessity of padding and/or terracing of building sites;
4. Division of large tracts into smaller workable units on which construction can be completed within one construction season so that large areas are not left bare and exposed during the winter-spring runoff period;
5. Completion of paving as rapidly as possible after grading;
6. Allocation of areas not well suited for development because of soil, geology, or hydrology limitations for open space and recreation uses;
7. Minimizing disruption of existing plant and animal life;
8. Consideration of the view from and of the hills.

B. Areas having soil, geology, or hydrology hazards shall not be developed unless it is shown that their limitations can be overcome; that hazard to life or property will not exist; that the safety, use or stability of a public way or drainage channel is not jeopardized; and that the natural environment is not subjected to undue impact. (Ord. 52, 1978)

including a soils report, geology report, and hydrology report for an unknown access;[30] and further development standards such as fill composition and compaction and road construction standards for an access road.[31] Rather it is the development of the hillside, or an expressed intention to do so that would trigger the need to satisfy these requirements.[32]

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[30] 16.36.030: ENGINEERING PLANS:

The developers shall retain a professional engineer(s) to obtain the following information:

A. Soils Report: For any proposed hillside development, a soils engineering report shall be submitted with the preliminary plat. This report shall include data regarding the nature, distribution and strength of existing soils, conclusions and recommendations for grading procedures, design criteria for corrective measures, and opinions and recommendations covering the adequacy of sites to be developed.

B. Geology Report:

1. For any proposed hillside development a geology report shall be submitted with the preliminary plat. This report shall include an adequate description of site geology and an evaluation of the relationship between the proposed development and the underlying geology and recommendations for remedial remedies.

2. The investigation and subsequent report shall be completed by a professional hydrologist registered in the state of Idaho.

C. Hydrology Report:

1. For any proposed hillside development a hydrology report shall be submitted with the preliminary plat. This report shall include an adequate description of the hydrology, conclusions and recommendations regarding the effect of hydrologic conditions on the proposed development, and opinions and recommendations covering the adequacy of sites to be developed. (Ord. 52, 1978)

[31] 16.36.060: DEVELOPMENT STANDARDS:

A. Soils:

1. Fill areas shall be prepared by removing organic material, such as vegetation and rubbish, and any other material which is determined by the soils engineer to be detrimental to proper compaction or otherwise not conducive to stability; no rock or similar irreducible material with a maximum dimension greater than eight inches (8") shall be used as fill material in fills that are intended to provide structural strength.

2. Fills shall be compacted to at least ninety five percent (95%) of maximum density, as determined by AASHO T99 and ASTM D698.

3. Cut slopes shall be no steeper than two (2) horizontal to one vertical; subsurface drainage shall be provided as necessary for stability.

4. Fill slopes shall be no steeper than two (2) horizontal to one vertical; fill slopes shall not be located on natural slopes two to one (2:1) or steeper, or where fill slope toes out within twelve feet (12') horizontally of the top of an existing or planned cut slope.

5. Tops and toes of cut and fill slopes shall be set back from property boundaries a distance of three feet (3') plus one-fifth ($^1/_5$) of the height of the cut or fill, but need not exceed a horizontal distance of ten feet (10'); tops and toes of cut and fill slopes shall be set back from structures a distance of six feet (6') plus one-fifth ($^1/_5$) the height of the cut or fill, but need not exceed ten feet (10').

6. The maximum horizontal distance of disturbed soil surface shall not exceed seventy five feet (75').

B. Roadways:

1. Road alignments should follow the natural terrain and no unnecessary cuts or fills shall be allowed in order to create additional lots or building sites.

Ironically, Arnold does not dispute the applicability of these provisions to the development of a subdivision access road on a slope exceeding ten percent. On page 37 of Appellant's Opening Brief, she appears to acknowledge that "hillside stabilization, drainage, fill material and proposed compaction, slope of fill, retaining walls" etc.[33] are all viable legal standards and would apply to an access road from this eastern edge of Lot 5 to Ace of Diamonds *at the subdivision stage*. Incredulously, without a single case in support of her claim, she deems them inapplicable to her subdivision lot at the building permit stage stating that somehow these

> standards are not applicable to a building permit for a driveway, but are for the approval of a subdivision deemed a "Hillside Development" under Title 16 of the City Code... The Mountain View Subdivision had already been approved and was not classified as a "Hillside Development"... [and thus] the alleged "standards" relied upon by the City have no relation to building permit applications under Title 15..."

Arnold's subdivision application (and every corresponding lot created by virtue thereof) is subject to all ordinances in effect at time of application. There is no pre-requisite to attach the

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2. One-way streets shall be permitted and encouraged where appropriate for the terrain and where public safety would not be jeopardized. Maximum width shall be seventeen feet (17') between the backs of curbs.
3. The width of the graded section shall extend three feet (3') beyond the curb back or edge of pavement on both the cut and fill sides of the roadway. If sidewalk is to be installed parallel to the roadway, the graded section shall be increased by the width of the sidewalk plus one foot (1') beyond the curb back.
4. Standard vertical curb (6 inches) and gutter shall be installed along both sides of all paved roadways.
5. A pedestrian walkway plan may be required.

C. Driveways And Parking: Combinations of collective private driveways, cluster parking areas and on street parallel parking bays shall be used to attempt to optimize the objectives of minimum soil disturbance, minimum impervious cover, excellence of design and aesthetic sensitivity. (Ord. 84, 5-8-1990: Ord. 52,1978).

[32] This is an important point as the subject slope is on the very eastern edge of Lot 5 presumably outside of any setback building envelop. The zoning ordinance, SMC 17.40.032, is not technically triggered unless the "building site where the topographic slope of said building site exceeds fifteen percent (15%) grade". Unless and until the applicant indicates that they wish to include this eastern edge as part of a building site, the ordinance is arguably not triggered. It is only in building permit #831 that the City first learned that Arnold wished to develop this eastern edge slope as an access road.

[33] As codified in SMC 16.36; See the Findings of Fact, Conclusions of law.

entire code or to otherwise "deem" or "classify" the application subject to the Stanley Municipal Code to deem them applicable. Yet, Arnold believes that in gaining subdivision approval depicting only an access road through Lot 6, she can successfully evade the application of the hillside ordinances by withholding her intent to develop the hillside until her ninth renewal of her various building permits. What is legally unsupportable is her claim that the hillside ordinances somehow are deemed waived or precluded by estoppel when a subsequent request, whether by re-plat or building permit, reveals an intent to develop the hillside.

Read together, Arnold's arguments are illogical. She concedes that an "access drive" developed on a slope exceeding ten percent requires compliance with the hillside ordinance *if* it is addressed during the subdivision approval stage. Yet, she claims that a "driveway" does not ever need to be depicted on a plat, but that it is a right appurtenant to the land to connect to an abutting street. In short, the City can always require the construction of an access road to comply since it must be disclosed at the subdivision stage, but the city evidently can *never* require a driveway to comply with the hillside ordinance, which, according to her, is not required to be depicted on the subdivision plat and only comes up at the building permit stage.

Arnold cannot have it both ways. In building permit #831 Arnold clearly depicted her proposed development on this steep slope, but she did not depict such development in her plat in 2007 or any of her building permits leading up to #831. Yet, in arguing that a re-plat is not required, she argues the development of this access on a steep slope was contemplated or at least

implied in 2007 and thereafter in subsequent building permits.[34] If so, then all ordinances in effect at the time of application apply; notably the hillside ordinances and Arnold is required to comply.[35] Alternatively, if development on the hillside was not contemplated, adding a new access road and altering a hillside is now a material change to the plat requiring a re-plat and the hillside ordinances apply.

The alternative is ridiculous: either that upon initial application a grading plan, etc. is required even in the absence of a manifested intent to develop the hillside; or that by withholding an intent to develop the hillside in 2007 the hillside ordinances magically go away, in fact legally precluded, and she can do absolutely anything with impunity. Ministerial in nature, the City must simply accept whatever Arnold wishes to utilize to construct her access road to this commercial lot whether it be dirt, gravel, or silly putty including modifying the City's right of way. Respectfully, we do not agree; neither did the District Court.

The ordinances in effect at the time of application govern that application regardless of whether by ignorance or subterfuge the players fail to apply them. There is no "gotcha" defense; that Arnold can escape its provisions by sneaking it through estopping[36] the City thereafter from

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[34] This is belied by her written statements; see for example, A.R. 92 wherein Arnold states: "The Hillside Ordinance does not apply and even if applicable, none of the slopes exceed 10% in the area where the road and utilities will be installed." We agreed only insofar as the proposed development did not request building sites on slopes exceed ten or fifteen percent. Well now they do exceed ten percent.

[35] See also A.R. 73, where pursuant to a settlement agreement Arnold contractually agreed that "building permits … will be subject to the City ordinances in place at the time of application."

[36] "The general rule is that administrative officers of the state cannot estop the state through mistaken statements of law." *Kelso & Irwin, P.A. v. State Ins. Fund*, 134 Idaho 130, 138, 997 P.2d 591, 599 (2000) (citing *Austin v. Austin,* 350 So.2d 102, 105 (Fla.Ct.App.1977); *Rainaldi v. Public Emp. Retirement Bd.,* 115 N.M. 650, 857 P.2d 761, 769 (1993))

its enforcement. "[A] public body may not permit a use that is prohibited by ordinance."[37] "A city council or county commissioner may not permit an implied variance violative of land use ordinances."[38] Rather, as a matter of due process, an applicant may be relieved from complying with municipal ordinance requirements but only through a formal, noticed process such as a variance, waiver, or like application. It can't be just ignored. Arnold's subdivision includes portions on a steep slope and upon development the hillside ordinances apply. To argue the alternative is at the expense of the public health and safety.

B. As a property owner, the City cannot be compelled to grant Arnold a second access to its right of way from a lot in a duly approved subdivision.

1. An adjacent lot's vested right appurtenant to the land extended to every subsequent subdivision lot?

Equally unpersuasive is Arnold's assertion that a city is compelled to grant a second access to a lot within an approved subdivision by virtue that the lot is adjacent to a city street. All of the cases cited by Arnold are clearly distinguishable. As a matter of law, a vested right appurtenant to the land[39] does not extend to a mere lot owner in a duly approved subdivision to *unsafely* access an abutting public street where the lot is not landlocked and where an existing duly approved access was clearly provided pursuant to the subdivision process by the applicant's request.[40]

Arnold largely 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

[37] *Simpson,* 142 Idaho at 839, 136 P.3d at 310.
[38] *Hubbard,* 106 Idaho at 437, 680 P.2d at, 538.
[39] Or implied easement by way of necessity.
[40] *Akers v. Mortensen*, 147 Idaho 39, 45-46, 205 P.3d 1175, 1181-82 (2009)(Akers II).

street) sought to enjoin the City of Boise from closing the curb cuts / driveways and reconstructing the curb pursuant to its police powers to eliminate vehicular access from the street to the property for public safety and parking considerations.[41] Arnold partially quotes this Court's maxim 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."[42] The next paragraph however provides 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."[43]

The substance of the *Johnston* opinion and the myriad of others that follow is this 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.[44] If the exercise of authority "bears a reasonable relationship to the public health, safety, morals, or general welfare, such enactment would be valid within the inherent powers of the legislative body".[45] 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. [46]

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[41] *Johnson,* 87 Idaho at 48, 390 P.2d at 33.
[42] *Id;* 87 Idaho at 50-51.
[43] *Id.*
[44] *Id;* at 52.
[45] *Id.*
[46] *Id;* at 51.

As discussed in the previous section, a municipality clearly has the jurisdiction and power to control whether an encroachment is permissible where, as here, the proposed access is down a steep ravine jeopardizing the public health and safety. "Clearly, the rights of an owner of property abutting the street or public way are subject to the power of the ... municipality to control and regulate the streets."[47]

The Court's analysis in *Johnson* and other precedent also focus 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.[48]

This Court's conclusion was dispositive: "Where the abutting owner had other means of access, the right of access may be denied by a police regulation."[49] In short, 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;[50] all of which are distinguishable from the present case.

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. Thus, in *Village of Sandpoint v. Doyle* this Court noted:

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[47] McQuillen, §30.63.
[48] *Id;* at 53.
[49] *Id.*
[50] *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).

> … 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."[51]

In *Farris v. City of Twin Falls,* 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.[52]

2. The contractual context: 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.

Lot 5 is not some homesteader's 640 acre section of farm land that is being deprived of its historical access to a right of way. Lot 5 is a creature of modern subdivision law and should be viewed, in the words of Justice Jim Jones, in this "contractual context"[53]. Pursuant to the City's subdivision ordinances, Lot 5 is one of multiple lots in the duly approved Mountain View Subdivision Plat and is subject to that Plat.

In *Lochsa Falls, LLC v. ITD,* 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 cost of installing a collector street with a traffic signal. There is no mention of some

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[51] 14 Idaho at 759-760. Emphasis added.

[52] 81 Idaho at 585. See also and *Continental Oil Co. v. City of Twin Falls,* 49 Idaho 89, 286 P. 353 (1930); a takings action challenging an ordinance that completely prohibited drive-up gas stations within 500 feet of a school. See also *Merritt v. State,* 742 P.2d 397, 113 Idaho 142 (1986).

[53] *Lochsa Falls, LLC v. ITD,* 147 Idaho 232, 245, 207 P.3d 963, 976 (2009).

divine vested property right appurtenant to the dozens, perhaps hundreds, of individual lot owners that happen to abut Chinden Boulevard independent of and in contradiction to the plat approval. It was also irrelevant whether the individual lot owners labeled their access a driveway, public road, drive access, road access, or game trail. The *Lochsa Falls* Court was equally unsympathetic. This Court's concurring opinion articulated:

> … 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.[54]

The bottom line was this: while the 254 acres of open farm land may have abutted a public road (Chinden Blvd) and certainly would have a vested right to access the abutting road if

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

it was otherwise rendered land-locked, this "vested right" does not survive the subdivision process extending the right to each and every lot abutting the public road 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.

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 relatively flat western edge of Lot 6.[55] As she points out, this was *her* request.[56] She has received the benefit of her bargain. A local governmental jurisdiction is not compulsorily required to extend a preexisting "vested right of access" to not only the original tract of land, but to each and every resulting subdivision lot that happens to abut that public road.

3. Lot 5 is not limited to a single access point.

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 even that she is legally precluded from adding a second access in contravention of an approved preliminary plat absent a

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[55] AR. P. 65.
[56] 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.

plat amendment. Rather the legal significance of the Mountain View Subdivision plat is that Arnold is not entitled to a second *unsafe* access as a matter of right shielded from the City's hillside ordinances. Lot 5 is *not* land-locked nor has she in any way asserted that her approved, bargained-for access pursuant to her preliminary plat is unworkable. If she wishes to have a second access, she must adhere to the City's subdivision ordinances that govern the construction on such a steep ravine; ordinances that preexisted her preliminary plat application and apply to any proposal to install an access road up this steep ravine to Ace of Diamonds street.

C. An amendment of the subdivision plat is needed to construct an access road on a slope exceeding ten percent in contravention of the Subdivision Plat.

As an ancillary issue, Arnold's argument regarding whether a building permit is the proper medium in which to approve an access road is irrelevant for purposes of judicial review. Nonetheless, the City contends that a building permit is not the proper medium in which to address what is in all respects a material change to what is depicted on the duly approved plat. Mentioned for the first time in litigation, Arnold now wishes to label her "access road" as an "access drive" or "driveway" in order to justify the absence of the subject access on her preliminary plat, but the label itself is irrelevant. Lot 5 is zoned commercial with a considerable table of permitted uses. At present, Ace of Diamonds is a dead-end street. The western access from Lot 5, through Lot 6 connecting to Highway 21 is a dead-end street. If Arnold is permitted to add an eastern access into her commercial lot and if she chooses to continue to utilize her west

access to Highway 21,[57] this in essence connects Ace of Diamonds street to Highway 21 through this commercial lot; a dead-end, at least potentially, becomes connectivity. This fundamentally changes the nature of the subdivision and downtown Stanley.

The City approved this subdivision, approved this commercial lot, and notably approved the requested access from the western edge of Lot 5 through Lot 6 to Highway 21 without knowledge that Arnold desired to develop an access from Ace of Diamonds. There has never been a meeting of the minds on this issue. In addition to the safety considerations of building such a steep access road given the City of Stanley's weather, this second access has potentially further complications to vehicular traffic, pedestrian safety, snow removal, run-off, fire and emergency access, erosion, drainage etc.

This does not mean that two accesses are legally precluded as Arnold alleges the City is contending, but at the very least a process must allow for the citizenry to address this issue. A mere building permit does not require a public hearing whereas a plat amendment allows the City, neighbors, and the citizenry to testify as to whether two accesses into this commercial lot, i.e. the western edge connection to highway 21 coupled with this eastern access to Ace of Diamonds, may materially impact them. Regardless, to the extent that Arnold 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.

[57] 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.

D. Additional ancillary arguments presented in the Arnold's Brief.

1. On a Commercial Lot within a duly established subdivision, the distinction between an Access Road versus Driveway is irrelevant.

The City has looked through the record and Arnold consistently referred to her access as an "access road" and not once as a "driveway".[58] Her reasons for doing so now are obvious. For its part, although Arnold accuses the City as referring to her access road as a street or right of way, the City has consistently referred to her proposal as an "access road" as it is an access to the City's Right of Way; i.e. ... an access to a road.[59]

Whether called an access road, road easement, right of way, access drive, or, if she prefers, an access driveway is inconsequential. What is consequential is that this lot is zoned Commercial (SMC 17.24) with an expansive table of permitted uses (SMC 17.24.010); most of which potentially include the ability of the general public to utilize this access to frequent the commercial establishment. Ironically, purportedly in support of her argument regarding the rights of an abutting property owner, Arnold includes this quotation from 10A McQuillin, the Law of Municipal Corporations, §30:62 (3d ed. 1990):

> "Private driveways *used by the public* are subject to municipal regulation, within constitutional limits. However, an abutting property owner ... has the right to

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[58] For example, 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.

[59] Ironically Arnold does too. It is only in a footnote that Arnold concedes this point that she too consistently described her access as an "access road". It is only now, in litigation that she wishes to call her access road a "driveway".

In fact, this author notes that even in Appellant's Opening Brief, her description of the access changes throughout the brief from an "access road" in the early pages and transitions to an "access driveway", and finally as a "driveway".

> construct a driveway from his or her property to the traveled portion of the highway, provided, of course, the owner does not unreasonably interfere with the public use of the street, and provided, further, the construction is not forbidden by statute or ordinance."

This citation does not help Arnold. First, her access most certainly may interfere with the public's use of the street. They might slide right off the edge of it. Arnold has placed great amounts of fill of unknown composition not only on her own property but on the City's right of way impacting erosion, run-off, snow removal, etc. As stated, it also creates potential connectivity through Lots 5 and 6 to Highway 21. Second, this "graveled" access road on such a steep slope is forbidden by ordinance for the reasons stated herein. Lastly, Arnold tries to distinguish between a "right of way" and a "driveway" stating that a right of way is the "right to pass through property owned by another..."[60] Whether labelled an access road or private driveway on a commercial lot is academic because of the commercial nature of the lot. Unless Arnold restricts the use of the lot, this private driveway *will* be utilized by the public; i.e. the customers of the potential myriad of permitted uses to this commercial lot.

Lastly, Arnold seeks to connect whatever this "graveled" 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 pursuant to the very much applicable SMC 16.36 and SMC 17.40.032. Arnold believes that *Ben Lomond, Inc. v. City of Idaho Falls*, 92 Idaho 595, 448 P.2d 209 (1968) (*"Lomond"*) supports the conclusion that unless a municipality has adopted an encroachment permit

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[60] Black's Law Dictionary 1440 (9th ed. 2009).

ordinance any lot owner in a duly approved subdivision enjoys an unfettered right to access city real property including its right of way; that a city is powerless to regulate access to its own property. Arnold thus concludes stating the "approval of Building Permit 831 was a 'ministerial duty' that the City was compelled to issue." *Ben Lomond, Inc.* says no such thing; a case easily distinguishable from the present action. In that case, the City of Idaho Falls annexed land which had been part of the county, but the City did not zone the property only later enacting a zoning ordinance that, of course, cannot be applied to retroactively. Thus, the applicant was entitled to a building permit to construct a service station, which included a second access.[61]

Lomond merely reiterates *Johnson, Continental Oil Co.,* and *Village of Sandpoint v. Doyle*; that an ordinance generally should not restrict an abutting property owner right of access unless the ordinance is justified by the city's police power. This Court noted in *Lomond* that there were no reasonable grounds for denying the requested access. In fact the traffic expert noted that an additional access would in fact add safety to the area by relieving congestion from the adjoining shopping center.[62] In contrast, here there are valid "considerations for the health, safety, moral or welfare of the City's inhabitants".[63] SMC 16.36 governs the construction of an access road, driveway, or anything else on a slope exceeding ten percent. Arnold can cite to no case that allows Arnold to perform an end-around this clearly applicable ordinance by proposing the development on the hillside post-subdivision approval.

[61] Id. See also *Highlands; Cunningham v. City of Twin Falls*, 125 Idaho 776, 874 P.2d 587 (Idaho App. 1994).
[62] *Lomond,* 92 Idaho at 603, 448 P.2d at 217.
[63] *Id.*

2. Arnold's contention that a plat is not required to identify points of connectivity from the internal subdivision to the outside adjacent 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 (via a driveway) will access the public roadways. First, as expressed herein, Arnold bargained for and received preliminary plat approval wherein she requested and received access through to Highway 21. Second, if Arnold thinks the Idaho Code enables a developer to surreptitiously connect each and every lot abutting a public street to that street as a matter of right, this is legally unsupportable and incongruous to modern subdivision law.

SMC 6.16.030 requires a vicinity map to show the relationship of the proposed plat to the surrounding areas as well as all right of ways, alleys, streets, etc. Additionally, the boundaries of each lot as well as the exterior boundaries of the subdivision must be shown.[64] Arnold is being deliberately obtuse 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 and/or abutting right-of-ways. Meaningfully, the City contends this must include points of connectivity with the adjacent properties. 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

[64] See Idaho Code §§ 50-1304; 1313, 1330.

parcels or public roads. While irrelevant, Arnold is being disingenuous to argue that a developer, while required to depict how particular lots will access inner private road easements within the subdivision, nonetheless possess a right appurtenant to the land to secretly access the city's right of way up a steep slope[65] along the external boundaries of the subdivision without depicting such plans on the plat merely by calling it a "driveway". Regardless, even if true and Arnold is legally entitled to not include this on the subdivision plat, this only strengthens the argument that Arnold must comply with the hillside ordinances, which are not directly tied to the subdivision plat contents either.

3. Arnold's contention that the access drive is not constructed on City property is erroneous.

Arnold wishes to build an access road 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; what Arnold now grossly mischaracterizes as a "slight overlay". There can be absolutely no question that such work required Arnold to obtain a building permit. She failed to do so. It is important to note that the City too is a property owner possessing the rights of a property owner and the jurisdiction to control not only access but the construction activities over its right-of way.[66] "Government power over public ways is 'exclusive and unlimited'."[67] Further, the City

[65] ... along with concomitant *required* slope contour lines ... see SMC 16.16.030 K. "Contour lines"

[66] 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. 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 P.2d 1273, 1275 (1986) citing *Keyser v. City of*

possesses implied police powers to protect the public health and safety. In short, the City has a vested interest in preventing Arnold from disrupting the efficacy of its right of way.[68]

Before the District Court however, Arnold claimed that "[t]he access drive is not constructed on City property"; that it is "fully contained within …Lot 5". Arnold's very own letter dated March 31, 2014 pertaining to Building Permit 831 demonstrated the frivolity of her argument:

> "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.[69]

While we disagree with everything she said, the frivolity of her position is palpable. Now, before this Court, she for the first time admits only to installing "a slight overlay". This too is a farce as Arnold has placed vast amounts of fill on both her property but also on the City's right of way. 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. The pictures of the City's right of way, A.R. 52, specifically the fence line, clearly shows the sheer volume of fill that Arnold placed on the City's right of way. The arrow

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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).

[67] *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).

[68] Arnold has altered the crown / edges of the road disrupting water run-off increasing the erosive effects on its right of way.

[69] AR 42 emphasis added.

depicting the road level is several feet *above* the top of the fence. A.R. 55 shows the vegetation (which prevents erosion) before Arnold modified the City's right of way and A.R. 54 shows the pile of what used to be the City's vegetation; all illegally performed without a permit.

4. Arnold's equal protection argument lacks a reasonable basis in fact or law.

Citing to various "class of one" cases, Arnold's equal protection argument is premised entirely on her argument that the City treated her differently "than other similarly situated property owners". Yet, she fails to allege any other property owners much less those that are similarly situated. Rather, she compares herself to herself. Without citing to any authority, she alleges unequal treatment based solely on "Arnolds' own prior dealings with the City..." Her argument in short is that she is intentionally being singled out and treated differently than ... herself.

An equal protection claim cannot rest on disparate treatment than upon oneself. Rather, the District Court noted that Arnold's accusations appear not to be that of equal protection but that of estoppel: because the City did not enforce certain ordinances in the past against her, the City is now estopped from doing so.[70] As a matter of law, the application of estoppel against a municipality in the exercise of its police power is prohibited.[71] We agree with her in one regard: of the many examples she proffered purportedly as evidence in support of her arguments, it only highlights the fact that the City has allowed Arnold to get away with far, far, far more than she was entitled. The mere fact that Arnold obtained preferential treatment or conversely that the

[70] R. Vol. 1, p. 130 citing *Kleiber v. City of Idaho Falls,* 110 Idaho 501, 503, 716 P.2d 1273, 1275 (1986).
[71] *Id.*

City neglected to properly enforce its ordinances in the past does not legally preclude the City from forever after enforcing its ordinances. The same is true for the equal protection claim. Akin to prosecutorial discretion such a "selective enforcement" class of one claim is without authority of law.[72]

> In order to establish a prima facie case of discriminatory application of the laws such that equal protection standards are violated, [a plaintiff] ... must first establish the existence of a "deliberate plan of discrimination based on some unjustifiable classification such as race, sex, religion, etc. Selective enforcement without more, does not comprise a constitutional violation under either the Idaho or United States Constitutions.[73]

This equal protection claim is legally without merit and any amorphous references to past incidents are irrelevant and outside of the Administrative Record.

Most importantly, even if true, the City's treatment of Arnold fulfills a rational basis test insofar as this particular building permit application is unlike any preceding it as it raises public safety concerns unlike any before given the severity of the slope of the proposed access. Arnold asserts that she "had gone through the approval and renewal process regarding the construction of driveways for their property nine different times prior to filing an application for Building Permit 831 (*see* building permits 637, 690, and 789, each renewed twice)." She then claims that the "facts were essentially identical to Building Permit 831..." This is not true; not even close. In fact, this is the single most important fact. First, she never referenced the construction of a "driveway"; a minor point but irritating. Second, she seems not to acknowledge that the City approved her requests nine times in a row when her permits depicted constructing access roads

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[72] Akin to the argument that because the police officer let the prior person go without citing them for speeding, the officer should (must) let the defendant go too. The fact of selective enforcement, without more, is not per se arbitrary. *Young Elec. Sign Co. v. State ex rel. Winder*, 135 Idaho 804, 809, 25 P.3d 117, 122 (2001).

[73] *Coeur D'Alene v. Simpson,* 142 Idaho 839, 845, 136 P.3d 310, 316 (2006)(internal quotes and citations omitted).

on relatively flat terrain. (See contour lines in A.R. 56) Third, and most importantly as stated throughout Respondent's Brief, it is here for the first time in Building Permit 831 that she stated that she wanted to traverse straight down this steep slope.[74] [75]

E. Arnold has failed to demonstrate that the City prejudiced her substantial rights or that she has suffered any harm.

1. Arnold's purported Vested Right Appurtenant to the Land.

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.[76] Absent either of these two conditions, the district court must affirm the

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[74] Building Permit #637 deserves a comment. It is irrelevant. First, it predates the Mountain View Subdivision pertaining to the entire un-platted parcel. As it predated the Mountain View Subdivision, it is completely irrelevant and supplanted by the duly approved preliminary plat. However, Arnold raises the issue to support her claim that because a prior city council ignored its ordinances then by not requiring engineered plans, etc., the current city council is legally estopped from enforcing its ordinances now. For the reasons stated herein, this argument fails to state a legally supportable equal protection claim.

However, there is one other distinguishing characteristic associated with this building permit. On the map, A.R. 45, it is interesting to note that Arnold drew a hard left turn coming off of Ace of Diamonds in order to not dip into the steep ravine. (Note the contour lines, A.R. 56) Thus she was parallel to the steep slope staying above it. Similarly, the access coming off Critchfield Avenue regarding Lot 1 is nearly flat. Arnold drafted her preliminary plat. It was a mistake to not depict an access from Critchfield into Lot 1. However, Lot 1 is otherwise landlocked so the City issued the building permit on this flat terrain. Again and again, Arnold stressed that the hillside ordinances did not apply because she was not developing on a slope exceeding ten percent. A.R. 92. This certainly does not excuse Arnold or the City as the City clearly should <u>not</u> have approved these building permits as the hillside <u>was</u> developed. See again the estoppel arguments herein. Nonetheless, it does however demonstrate that even here these building permits are distinguishable from Building Permit 831 where Arnold proposed to develop an access road <u>perpendicular</u> to the steepest parts of the ravine.

[75] With regard to building permit 789, the City objects to Arnold's argument on page 7 of its brief that building permit #789 ever depicted or granted Arnold the right to render improvements to the north side of Ace of Diamonds street. There is no evidence whatsoever to support this contention. It certainly is not depicted on any map or any text on any permit prior to building permit #831. Arnold conveniently cites to A.R. 42; a letter written by her pertaining to building permit 831 *after* the city denied the permit. It is a fiction. As soon as Arnold began to disturb Ace of Diamonds street, the City objected even sending the Sherriff to intervene.

[76] I.C. § 67-5279(4); *Neighbors for a Healthy Gold Fork*, 145 Idaho at 126, 176 P.3d at 131.

board's action[77]. "There is a strong presumption that the actions of the [local governmental entity], where it has interpreted and applied its own ... ordinances, are valid."[78]

For the reasons stated herein, Arnold bargained for and obtained approval of the plat for the Mountain View Subdivision which 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.[79] Although Arnold 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 appurtenant to the land is illusory and her purported injury is self-induced.[80] 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. More importantly, her application is bereft of any technical information to ensure the protection

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[77] *Taylor*, 147 Idaho at 431, 210 P.3d at 539.

[78] *Evans v. Teton County*, 139 Idaho 71, 74, 73 P.3d 84, 87 (2003)

[79] AR. P. 65.

[80] See R. Vol. 1, p. 135 wherein the District Court noted:

> The Court understands that the Arnolds have already constructed most the access road and will lose all of the investment put into building the road and may have to brunt the cost of tearing at least a part of it down if the road is not ultimately approved as is. This, however, is not a consideration for the Court because the road was constructed in violation of Stanley city ordinances. As it is, the Arnolds will likely suffer a substantial financial setback because of the City Council's decision to deny the permit. However, that setback would have been minimal if the Arnolds had followed the correct procedure and obtained permission to build the access road before beginning construction. Had the Arnolds followed the established procedure before beginning construction, their setback would be limited to the added costs of requesting a plat amendment and providing the specifications requested by the City Council.

The City simply does not know what material was utilized to build this access road. As a matter of public safety notably given Stanley's weather, the hillside ordinances are to protect any who use this access road from harm. Ignoring the City's cease and desist communications, Arnold's actual harm is of her own making.

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.

2. Arnold has failed to demonstrate prejudice by virtue of a purported lack of a transcribable record[81].

A transcribable record is not required at all, but regardless Arnold is not deprived of due process by virtue of an absent minute. Because the Mayor's comments begin mid-sentence, Arnold insinuates she has been deprived of a procedural due process right to which she is entitled and that she is simply in the dark as to the City's rationale or that this Court is incapable of discerning the basis of the City Council's denial of the building permit application. This strains credibility and Arnold can make no claim that she is denied due process. Arnold received the benefit of a well-reasoned decision. After comprehensively addressing the applicable case law in this arena, [82] the District Court stated:

> In the current case, there is a clear audio recording of the City Council's decision to deny the building permit application; however, the recording is missing the first

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[81] Although academic as a transcribable record was provided, there still is the threshold issue whether a transcribable record was required for the issuance or denial of a building permit pursuant to the plain text of the Local Land Use Planning Act ("LLUPA"). See the plain text of Idaho Code §67-6536 which requires a transcribable verbatim record only where an appeal is provided under LLUPA. Does a building permit require a public hearing in " which testimony or evidence is received or at which an applicant or affected person addresses the commission or governing board regarding a pending application"? Must a building permit be issued in a public meeting by the city council wherein "the commission or governing board deliberates toward a decision after compilation of the record"? An appeal of a denial of a building permit is not authorized pursuant to LLUPA other than for a narrow class of building permits "for development on any lands designated upon the future acquisitions map." Reading the statute as a whole, the City cannot see how a transcribable record is required.

[82] *Rural Kootenai Organization, Inc. v. Kootenai County,* 133 Idaho 833, 843-844, 993 P.2d 596, 606-607 (1999); *Chambers v. Kootenai County Bd. of Comm'rs,* 125 Idaho 115, 118, 867 P.2d 989, 992 (1994); *Gay v. County Comm'rs of Bonneville County,* 103 Idaho 626, 629, 651 P.2d 560, 563 (Ct.App.1982); *Cooper v. Ada County,* 101 Idaho 407, 411, 614 P.2d 947, 951 (1980).

> minute or two of the decision. The Court has listened to the audio recording of the decision and heard the City Council discussing a variety of reasons why the building permit must be denied, any one of which provides a sufficient basis on which to deny the building permit application. If the omitted portion[83] of the recording contained some evidence that the City Council acted arbitrarily, that evidence is contradicted by the remainder of the discussion on the recording. Apply the *Rural Kootenai* standard to the City Council's audio recording, it is clear that the recording is "adequate for purposes of ascertaining the basis of the [Council's] decision" to deny the building permit application. This Court finds that the appropriate due process safeguards are satisfied with this recording.[84]

Given Arnold's considerable written testimony and the plethora of evidence in the record[85], Arnold has failed to demonstrate how she has been deprived of procedural due process by virtue of the inaudible one minute of the audio disc.

V.
ATTORNEY FEES ON APPEAL

For the reasons stated herein, Arnold lacked a reasonable basis in fact or law to appeal the City's denial of its building permit application pursuant to Idaho Code § 12-117 and I.A.R. 40 and 41. Pointedly, there is nothing for this Court to review. Arnold is not eligible for a building permit. In support of her building permit application seeking to develop an access road on a slope exceeding ten percent, she failed to provide a scintilla of information that would

[83] The City notes that the inaudible portion of the disc amounts to 1 minute, 11 seconds out of the 56 minute meeting. The comprehensive meeting minutes of the February 13, 2014 hearing reflect that the meeting began at approximately 6:03 p.m. and concluded at approximately 7:42 p.m. This approximate time total is 99:00 minutes. The minutes also reflect that a recess for executive session began at approximately 6:45 p.m. and resumed upon conclusion of the executive session at approximately 7:26 p.m. This time total is approximately 41:00 minutes. When one subtracts the time period for the executive session *not* contained on the audio from the length of the entire hearing as approximated in the minutes, the remaining portion of the February 13, 2014 hearing is roughly 58:00 minutes. The first audio disc is 42:49 minutes long and the second is 14:00 minutes long, for a total of 56:49 minutes. The second disc of the audio, which part *was* included in the transcript, begins recording mid-sentence.

[84] R. Vol. 1, p. 131.

[85] IN particular the Findings of Fact, Conclusions of Law clearly reference the Stanley Municipal Code's hillside provisions. See A.R. 34, 36.

enable the City to evaluate and render educated findings that the proposed access road was constructed safely utilizing sound engineering practices. While Arnold believes it is sufficient to merely state that "gravel" will be used, the City acting within its police powers finds this unacceptable. Perhaps if she had provided something 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. 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. Rather, Arnold merely proffered conclusory legal maxims that the City was compulsorily obligated to grant a second access because her lot in a duly approved subdivision abutted a city street. However, Arnold has not offered a single case to support her conclusion that she has successfully evaded the City's hillside ordinances by waiting to the building permit stage to seek to develop the hillside. The City's hillside ordinances clearly apply to the construction of an access road on a slope exceeding ten percent.

Unfortunately, the City is accustomed to Arnold's litigious nature. In *Arnold v. City of Stanley,* 345 P.3d 1008, 158 Idaho 218 (2015), this Court was unpersuaded by her arguments that she had a reasonable basis in fact or law:

> "[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. .... 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.[86]

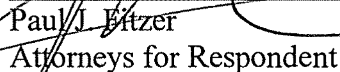
Arnold was afforded a well-reasoned decision by the District Court; two actually considering the Decision and Order Re: Motion for Rehearing. Here, for the third time, Arnold is again rehashing the very same legal arguments that were unpersuasive below and remain unpersuasive on appeal. Yet, the City has again borne an unfair and unjustified financial burden against groundless charges. This access road needs to be constructed safely.

VI. CONCLUSION

For the reasons stated herein, the City requests that this Court affirm the decision of the District Court and pursuant to Idaho Code § 12-117 award the City its reasonable costs and attorney fees and costs incurred in this matter.

Dated this 8th day of August, 2016.

MSBT LAW, CHTD.



Paul J. Fitzer
Attorneys for Respondent

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

[i] On page 9, f.n. 3 of its Opening Brief, Arnold argues that the building permit portion of the Stanley Municipal Code was adopted after Building Permit #831 was approved and arguing it is therefore inapplicable. This is not true and quite aggravating. In this action, the City has been citing to the previous versions of SMC 15.04.010 and .020 pursuant to Ordinance 184 which predates Building Permit 831. Pursuant to the Ordinance 192, there is additional underlined text that was added to the ordinance; none of which pertains to this action. In short all of the provisions cited herein were not modified at all and predate Building Permit #831:

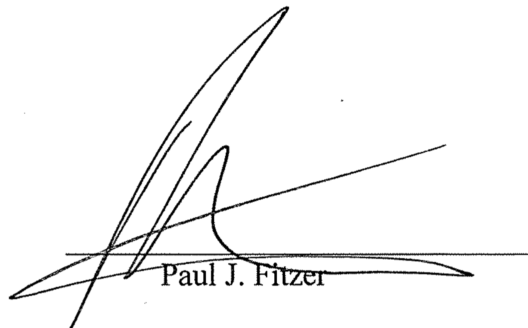
> 15.04.010: REQUIRED: No building shall be constructed, erected, or altered structurally, nor shall any lot be excavated for sidewalks, sewer, water, septic tanks, roads, or any other purpose, nor shall fill be placed on any lot, nor shall any lot be cleared, or fenced unless a building permit therefore has been issued by the city council or its authorized representative. Structural alterations subject to permitting shall include any changes to the building footprint, or changes to the exterior appearance of the structure that are subject to the building appearance and materials requirements covered in Title 17 of the Stanley municipal code. Actions exempt from the building permit process include gardening and raised garden boxes, ground-level patios, maintenance and repair on existing roads and driveways, movable storage sheds less than 150 square feet that comply with zoning and building appearance regulations, fence replacement or maintenance if construction is substantially the same as the current fence and otherwise meets requirements of the Stanley Municipal Code, landscaping that does not substantially alter the terrain, sprinkler systems, and playground equipment that is moveable and not permanently anchored. The issuance of a building permit by the city does not imply or guarantee the safety, suitability, or structural adequacy of buildings, building pads, retaining walls, fill, or natural terrain for meeting structural support requirements for buildings. Permittee shall follow good engineering and architectural practices relating to the construction of new commercial and public buildings, and fill compaction for structural support and for preventing collapse and/or erosion of fill not used for structural support. Provided, however, no building permit shall be necessary for repairs to previously installed utility lines such as telephone, sewer, or water; said repairs shall be limited to restoration of the line to proper working condition and shall not include any expansion or extension of said lines. All permits shall issue only in conformity herewith and shall be valid only for a period of one year thereafter. Changes to the proposed use or construction specified in the original approved permit that occur during the term of the permit shall require approval by the City of Stanley. Prior to initiating such changes, the applicant may be required by the City Council to submit an amended application for review and approval. Building permit fee costs shall be established by city council resolution.

> 15.04.020: APPLICATION: Applications for building permits shall be submitted in the form specified by resolution of the city council and shall be accompanied by the application fee, 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 the project's effects and impacts on adjacent properties and whether the proposed development complies with all zoning requirements. Applicant is responsible for obtaining required permits and approvals from all Federal, State and local agencies and departments with jurisdiction covering the proposed building permit actions.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 8th day of August, 2016, I caused to be served a true and correct copy of the foregoing **RESPONDENT'S BRIEF** 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