9-19-2016

Arnold v. City of Stanley Appellant's Reply Brief Dckt. 43868

IN THE SUPREME COURT OF THE STATE OF IDAHO

THOMAS ARNOLD and REBECCA ARNOLD,

Plaintiffs/Appellants,

v.

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

Defendant/Respondent.

Supreme Court Docket No. 43868

Custer County Case No. 2014-35

APPELLANTS' REPLY BRIEF

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

District Case No. 2014-35

The Honorable Alan C. Stephens, District Judge, presiding.

Fredric V. Shoemaker, ISB No. 1687
Thomas J. Lloyd III, ISB No. 7772
GREENER BURKE SHOEMAKER OBERRECHT P.A.
950 W. Bannock Street, Suite 950
Boise, Idaho 83702
Telephone: (208) 319-2600
Facsimile: (208) 319-2601

Attorneys for Petitioners/Appellants, Thomas Arnold and Rebecca Arnold

Paul J. Fitzer, ISB No. 5675
MOORE SMITH BUXTON & TURCKE, CHTD.
950 W. Bannock, Suite 520
Boise, ID 83702
Telephone: (208) 331-1800
Facsimile: (208) 331-1202

Attorneys for Respondent

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Rules

Appellants Thomas and Rebecca Arnold (the "Arnolds"), by and through their attorneys of record, GREENER BURKE SHOEMAKER OBERRECHT P.A, hereby file this Reply Brief pursuant to Idaho Appellate Rule 35(c), to rebut certain of the arguments set forth in the Respondent's Brief, filed on August 8, 2016. The Arnolds expressly reserve rebuttal to, and do not concede to, any arguments set forth in Respondent's Brief, but instead provide this Reply Brief for the purpose of addressing some of the primary factual and legal issues in this Appeal.

STANDARD OF REVIEW: Petitioners Are Entitled to Judicial Review

As it did before the District Court, Respondent City of Stanley ("City") has attempted to escape scrutiny in this action by claiming that the Arnolds are not entitled to any judicial review over the denial of their Building Permit Application No. 831, despite the fact that the City's own Municipal Code specifically affords that right to any applicant denied a building permit. Stanley Municipal Code ("SMC") 15.04.040. In effect, the City attempts to evade review of its decisions regarding the property rights of persons within its jurisdiction – rendering the Mayor and City Council immune from constitutional requirements and limitations – by asserting that the 2010 amendments to the Local Land Use Planning Act ("LLUPA"), Idaho Code § 67-6501, *et seq.*, eliminated the reviewability of building permit denials. (Respondent's Brief, pp. 5-8.) However, the City ignores a fundamental piece of its own history. The City's Municipal Code was amended by Ordinance No. 184 on February 10, 2011 – *after* the 2010 amendments to LLUPA – to incorporate what the City referred to as "Omnibus Revisions." (*See* http://www.stanley.id.gov/City%20Documents/ Omnibus%20Ordinance.pdf.) Among those

"Revisions," the City recodified its building permit code from Title 17 to Title 15.04, including SMC 15.04.040:

> **REVIEW: An applicant denied a permit or aggrieved by a decision of the city council may seek judicial review under the procedures provided by Idaho Code sections 67-5215(b) through (g) and 67-5216, and any amendments thereto.**[1]

(*Id.* at p. 11.) That appears to be the version of SMC 15.04.040 that was in effect at the time that the Arnolds' Building Permit No. 831 was denied, on March 31, 2014. (Amended Agency Record ("AR") at 57-64.) SMC 15.04.040 was not later amended until Ordinance No. 192, passed on April 7, 2014 (which version also included a right of judicial review, but removed any reference to specific statutory provisions). (*See* http://www.stanley.id.gov/City%20Documents/Ordinance%20192%20Building%20Permits.pdf.) Thus, the Stanley Municipal Code that was in effect at the time of the City's denial of the Arnolds' building permit application, and consequently the governing ordinance for purposes of this Appeal (*Ben Lomond, Inc. v. Idaho Falls*, 92 Idaho 595, 448 P.2d 209 (1968)), expressly incorporated a right of judicial review for persons adversely affected by a denial of a building permit within its jurisdiction.

However, even if the Court accepts the City's invitation to disregard the right of judicial review that the City had expressly extended to its residents, there is no authority presented by the City to support the contention that the 2010 amendment to LLUPA eliminated judicial review of

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[1] Although Idaho Code §§ 67-5215 and 67-5216 were repealed in 1992, the SMC's reference to those sections indicates an intention by the Stanley City Council to incorporate into its building permit process (formerly SMC Title 17.56.010-050, likely in effect before 1992) the judicial review rights and procedures formerly described therein for review of the decisions of state agencies. 1965 Idaho Sess. Laws, ch. 273, §§ 15-16, pp. 709-711.

building permit denials – something that has existed for many years under LLUPA. *See, e.g., Giltner Dairy, LLC v. Jerome County*, 145 Idaho 630, 181 P.3d 1238 (2008). The City admits as much, acknowledging that in the post-2010 world, "there is no case regarding judicial review of a building permit." (Respondent's Brief, p. 6, n. 11.) Instead, the City asks the Court to infer, in the absence of any legislative history indicating this to be the Legislature's intention, that the alteration of the wording in LLUPA that occurred in 2010 was necessarily intended to restrict or limit the availability of judicial review, and to specifically exclude its availability in the building permit process.[2] (Respondent's Brief, pp. 6-7.)

Respectfully, the Arnolds disagree. By its decision to replace the word "permit" with "application," it appears that the Legislature intended to *broaden*, not restrict, the availability of judicial review under LLUPA. No longer is the statute limited to those specific and limited matters for which a "permit" can be issued; rather, the net is now cast wide to include the broader universe of matters for which an "application" must be made under LLUPA. I.C. § 67-6521. Thus, the salient question on the jurisdictional issue presented by the City in this Appeal is whether a building permit *application* is one that is "required or authorized" by LLUPA, for purposes of the judicial review provisions set forth in Idaho Code § 67-6521. The

[2] The City's "practical" argument in this regard is belied by these very proceedings. The City claims that there are certain characteristics of the review process for an application brought under authority of LLUPA that are not present in the review process for a building permit application: transcribable record, findings of fact, conclusions of law, and public meetings. (Respondent's Brief, p. 7.) In this case, the City literally did all of these things (with the exception of its failed attempt at keeping a *complete* transcribable record), demonstrating that until it saw fit to argue otherwise in this litigation, even it considered the building permit review process to be as required by LLUPA.

answer to that question requires examining the Act as a whole, beginning with the constitutional and statutory implications of the City's position.

The City's claim that decisions on applications for building permits are not performed pursuant to LLUPA (and, thus, not subject to the judicial review rights guaranteed under LLUPA) raises an important constitutional question: If not by LLUPA, on what statutory authority *does* the City of Stanley have any power to regulate improvement of private property within its jurisdiction? If that authority is not found in, and thus not subject to, LLUPA, then it must be found elsewhere, lest the City's entire Municipal Code pertaining to building permits be rendered an unconstitutional and unauthorized regulatory taking of private property rights, devoid of statutory authorization from the State and due process of law. The City, for its part, has not provided any other legal basis authorizing such action by municipalities.

The answer to this question fortunately does not require complex legal analysis, and leads directly back to the necessary conclusion that judicial review is available here. There is, in fact, no other provision in the Idaho Code that would authorize the City to regulate building and construction on private property beyond that which is covered in LLUPA. Specific to this case, for instance, all of the matters addressed by Title 15 of the Stanley Municipal Code (Buildings and Construction) are matters that are included within the *zoning* powers of a governing body under LLUPA:

> Within a zoning district, the governing board shall where appropriate establish **standards to regulate and restrict the height, number of stories, size, construction, reconstruction, alteration, repair or use of buildings and structures**; percentage

> of lot occupancy, size of courts, yards, and open spaces; density of population; and the location and use of buildings and structures.

I.C. § 67-6511(a) (emphasis added). Thus, it is through the powers conferred by LLUPA that the City is even able to impose standards for building and construction: "**Standards may be provided as part of** zoning, subdivision, planned unit development, or **separate ordinance** adopted, amended, or repealed in accordance with the notice and hearing procedures provided in section 67-6509, Idaho Code." I.C. § 67-6518 (emphasis added). Here, the City has chosen to impose those standards by operation of Title 15 of the Stanley Municipal Code.[3] By extension, an application for a building permit is one that falls squarely within the definition of those applications that are "required or authorized" by LLUPA, as it is an application to take action according to the standards set in force by the City pursuant to its authority under LLUPA:

> As part of ordinances required or authorized under this chapter, a procedure shall be established for processing in a timely manner applications for zoning changes, subdivisions, variances, special use permits and such other applications required or authorized pursuant to this chapter for which a reasonable fee may be charged.

I.C. § 67-6519(1). It was through LLUPA, and LLUPA alone, that the City had the power to require the Arnolds to submit a building permit application to begin with, and it is through LLUPA that the Arnolds' are consequently entitled to a right of judicial review.

It must be noted that the implications of allowing judicial review over denial of building permits are not as catastrophic as the City would have this Court believe. (*See* Respondent's

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[3] As set forth above, even the City's Building and Construction Code provisions – now codified in Title 15 of the Stanley Municipal Code – were originally codified in Title 17 ("Zoning Regulations") until February, 2011.

Brief, p. 8.) In fact, the implications are the exact same as they were before the 2010 amendments to LLUPA. *See, e.g., Giltner Dairy*, 145 Idaho 630. Although the City warns that permitting judicial review over building permit decisions would result in the requirement that "every building permit issued in this State can only be issued following a public hearing" (Respondent's Brief, p. 8), that conclusion is not warranted by the plain language of the review process set forth in LLUPA. The Arnolds addressed this argument below:

> The City's argument is empty hyperbole, and is not supported by the plain language of Idaho Code § 67-6521(b). By that statutory language, a public hearing would not be required in order to initially evaluate and make a decision on every permit, as claimed by the City. Rather, a hearing would only be required if one was requested by the affected party upon an initial adverse decision. This is basic due process; this is the law. Clearly, most building permits are resolved without a hearing because it is only where the approval of a building permit is in dispute that the right of a public hearing and transcribable record becomes relevant. Such is the case here. Had the permit been approved, then no public hearing, transcribable record, or written findings would have become necessary. Similarly, if the denial of the Arnolds' building permit occurred without a hearing, it would only be upon the Arnolds' petition that a public hearing would be required.

(R. Vol. 1, pp. 106-107.) The District Court correctly found that judicial review was available under these circumstances. On Appeal, the City has merely repeated its argument without any additional analysis or argument to suggest that the Arnolds' explanation was incorrect and/or that the District Court's decision was in error.

Finally, the Arnolds note that the substantive decision of the City, as upheld by the District Court, imposed affirmative findings of fact and conclusions of law that exceeded the mere denial of a building permit, and this Appeal is therefore not limited to the sole issue of the

building permit denial. By far the more significant issue in this Appeal is whether the City has unjustifiably and unlawfully determined that the Arnolds do not have access from Lot 5 to the abutting public roadway, Ace of Diamonds Street. Although this case originated with a properly submitted application for a building permit, it has in effect become an inverse condemnation action brought about by the City's findings of fact and conclusions of law that Petitioners are no longer entitled to their vested and appurtenant property right of access to the abutting public roads. (AR at 57-64.) This is an entirely separate issue on appeal (*see* Petitioners' Opening Brief, p. 24 (Issue No. 2)), which has nothing to do with LLUPA and is certainly reviewable by this Court, as it calls into question whether a governing body may use a simple administrative action (such as acting on a building permit application) to reach conclusions of law that have far greater adverse consequences to the property owner (such as the denial of a constitutionally-protected access right to one's property).

For all of the foregoing reasons, the City has failed to demonstrate how this Court would not have jurisdiction over the matters presented in this Appeal.

ARGUMENT

I. The City and the District Court Erred In Concluding that the Arnolds Do Not Have a Right of Access to Ace of Diamonds Street.

A. Access to Public Roadways is a Vested and Appurtenant Property Right Absent Proper Exercise of Police Power.

On page four of the City's Brief, it explains its position regarding the ability of the Arnolds to establish access to the abutting public streets, as opposed to only taking access from the right-of-way set forth in the Mountain View Subdivision 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." (Respondent's Brief, p. 4.) In so arguing, the City presents the law exactly backwards. Indeed, there is no precedent in the State of Idaho – nor anywhere else in the United States – that stands for the proposition that a property owner whose property abuts a public right-of-way does not have legal access to that right-of-way *absent a valid and prior exercise of police power by a governmental entity.* Certainly, the City has not provided this Court with any citation to authority that even remotely stands for its stated proposition.

However, in addition to the case law and other analytic authority set forth in the Arnolds' Opening Brief, case law from around the United States further illustrates the propriety of a property owner's ability to access abutting roadways absent any prior regulation to the contrary, as well as the proper way for a governmental entity to restrict such access if it wishes to do so. In *Ryder v. Petrea*, 243 Va. 421, 416 S.E.2d 686 (Va. 1992), for example, the Supreme Court of Virginia addressed a similar question regarding the availability of multiple access points for a lot in a platted subdivision. In *Ryder*, a parcel of property was subdivided by the original owner who subsequently sold lots to various purchasers. *Id.* at 687. As a part of the Subdivision Plat, the original owner laid out a right-of-way extending north from Route 620 to provide access to the subdivision lots (*Id.* at 687), not dissimilar to how the Mountain View Subdivision plat included a "Private Access And Utility Easement" extending south from State Highway 21 (AR at 65).

After the various lots in the subdivision had changed hands from the original purchasers, one of the subsequent owners of Lot 1 (which abutted both the platted right-of-way and Route

620) began using the platted right-of-way for ingress and egress to Lot 1. *Ryder* at 687. The then-owner of most of the other property that abutted the platted right-of-way (both to the north of Lot 1 on the east side of the platted right-of-way, as well as the property on the west side of the platted right-of-way), blocked access to Lot 1 from the platted right-of-way "by erecting a fence between lot one and the right-of-way." *Id.* In the ensuing litigation, the trial court determined that Lot 1 "had no easement over the right-of-way because [it] fronted on Route 620" and therefore already had a means of ingress and egress. *Id.*

On appeal, the Virginia Supreme Court disagreed with the trial court, and with the contention that "no such rights [to access the private easement] can be acquired when the subdivision lots also abut upon a public street, as in this case." *Ryder* at 688. The Virginia Supreme Court relied on its prior precedent in *Lindsay v. James*, 188 Va. 646, 51 S.E.2d 326 (Va. 1949), in which it had addressed the scope of easement rights as distinguished from rights to access abutting streets:

> [the view] adopted in this jurisdiction, limits the extent of easements of this nature to such streets and alleys shown on the plat as are reasonably beneficial to the grantee, and a deprivation of which would reduce the value of his lot. ***In any event, such grantee is entitled to an easement in streets and alleys adjoining his lot.***

Ryder at 688 (citing *Lindsay* at 329) (emphasis in original). This is entirely consistent with the law of the state of Idaho, as previously set forth in Petitioners' Opening Brief. *See, e.g., Johnson v. Boise City*, 87 Idaho 44, 390 P.2d 291 (1964) ("This court has consistently held that access to a public way is one of the incidents of ownership of land bounding thereon"); *State v. HI*

Boise, LLC, 153 Idaho 334, 282 P.3d 595 (2012) (access to public roadways abutting property "is one of the incidents of land ownership.").

The facts of *Ryder* and the instant litigation are undoubtedly distinguishable. In *Ryder*, a private property owner sought to invalidate a right of access via a private easement by virtue of the fact that the property had alternate access to a public road. Here, in contrast, the Respondent governmental entity has sought to invalidate a right of access via a public road by virtue of the fact that the property has alternate access to a private easement. Notwithstanding the factual differences, the Virginia Supreme Court's analysis is equally applicable to the facts at bar:

> We note that Townes' plat shows the easement as a right-of-way and not a street or alley. In our opinion, that makes no difference. A "street" is a "way," Black's Law Dictionary 1421 (6th ed. 1990), and a "way," in a technical sense, is a right of passage over land. *Id.* at 1593. A "right of way" is a term used to describe a right belonging to a party to pass over land of another. *Id.* at 1326. Accordingly, purchasers of subdivision lots may acquire **the same private easements of passage over "rights-of-way" that are shown on a subdivision plat as they would acquire over streets and alleys that are shown on such a plat.**[4]

Ryder at 688 (emphasis added). Whether the facts involve a litigant attempting to deprive another of access rights via a public road or a private easement, the salient and controlling legal conclusion in either scenario is the same: Wherever property abuts the public roadways, absent statute or lawful regulation to the contrary (exercised properly under the police powers of the state and its political subdivisions), a property owner has a legal, vested, and appurtenant right to

[4] Notably, the abutting termination of Ace of Diamonds street is shown on the Mountain View Subdivision plat, without any notation indicating that access rights via that public road were in any way affected by the plat or the subdivision approval. (AR at 65.)

access those public roadways. The City's argument to the contrary is neither supported by any legal authority nor consistent with any legal precedent in this state or elsewhere.

B. The City of Stanley *Has Not* Regulated Access to Ace of Diamonds Street from Lot 5.

The City's Brief focuses upon a straw man argument; what the City has claimed to be the Arnolds' argument is not supported by anything that the Arnolds have ever argued. Rather than addressing the argument set forth by the Arnolds in their Opening Brief – that although the City has the ability to execute its police powers to regulate access to its streets, the record demonstrates that it has not exercised those powers as between Ace of Diamonds street and Lot 5 (Petitioners' Opening Brief, p. 30) – the City has attempted to distract the inquiry from the real legal issues in this action, instead casting the Arnolds' argument as something entirely different: "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 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**." (Respondent's Brief, pp. 26-27 (emphasis added).) Setting aside the fact that the City has now made an illogical leap between access to city streets and the totality of "city real property," which is not justifiable upon even the broadest interpretation of the Arnolds' argument, the City's assertion is plainly wrong.

As opposed to allegedly claiming that "a city is powerless to regulate access to its own property," the Arnolds argued in their Opening Brief the exact opposite: "**This is not to say**, as

this Court has previously found, **that the government is unable to regulate access** to private property **from the public roadways** . . . ." (Petitioners' Opening Brief, p. 30 (emphasis added).) It is not understandable to the Arnolds why the City would so noticeably misstate their argument, but the Arnolds surmise that because there is no legal justification for the City's *ad hoc* removal of their access rights to Ace of Diamonds Street, the City is attempting to substantively alter the legal question at issue into one that makes the Arnolds appear quite unreasonable to this Court. Plainly stated, it is irrational to suggest that the Arnolds – one of whom is a sitting Commissioner for the Ada County Highway District, an entity responsible for, *inter alia*, regulating access to public roadways – have argued that the City of Stanley is "powerless to regulate access" to its public roadways.

More importantly, however, the City has distorted the rule of law set forth in *Lomond*, glossing over the legal principles that mandate a reversal of the City's and the District Court's decisions. The City states: "*Lomond* merely reiterates . . . that an ordinance generally should not restrict an abutting property owner [sic] right of access unless the ordinance is justified by the city's police power." (Respondent's Brief, p. 27.) This is not at all an accurate representation of *Lomond*, as evidenced by a plain reading of that decision. In *Lomond*, this Court did not only indicate that an ordinance affecting private property rights must be "justified by the city's police power," but *also* that the exercise of that police power must have already been exercised and in full force and effect *prior to* it being used as a justification for the denial of a building permit:

> On the basis of appellant's evidence and the testimony of Officer Nielson, it is apparent that the City's refusal to grant an access from appellant's land to 17th Street is not justified by

> considerations of the health, safety, morals or welfare of the City's inhabitants. The fact that appellant's application requested an access across the planting easement was not a sufficient reason to refuse to issue the permit, and appellant, **having complied with all existing requirements at the time of filing its application, was at that time entitled to the building permit it requested.**

Lomond, 92 Idaho at 603 (emphasis added). This conclusion was preceded by a considerably lengthy analysis of competing case law from around the country, from which the Idaho Supreme Court concluded that "[t]he weight of (and in our opinion the better reasoned) authority from other jurisdictions . . . is to the effect that a public official must issue a building permit when the applicant has complied with all **existing** requirements." *Id.* at 600 (emphasis added).

In view of the foregoing, the City's argument regarding what justifications *might* exist for the City's restriction of access from Lot 5 to Ace of Diamonds Street is entirely irrelevant. The sole factor of import is that the City had not, at any time prior to the Arnolds' Building Permit Application No. 831 (nor any of its predecessor permits) enacted any law, statute, ordinance, code, regulation, condition, or any other exercise of police power, restricted access to Ace of Diamonds Street from the private property that abuts it – including the Arnolds' Lot 5. Absent such an exercise of that power – regardless of whether the City can presently make an argument as to why such restrictions *could be* justified – the City and the District Court both erred in citing such an alleged access restriction as the primary basis for denying the building permit. Effectively, as noted, the City has used the building permit process to commit an act of inverse condemnation, a regulatory taking, and the District Court has erroneously condoned that conduct.

Lacking any evidence of an actual exercise of police powers that resulted in the restriction of access to Ace of Diamonds Street from Lot 5, the City asks the Court to read into the Mountain View Subdivision plat an access restriction that is nowhere to be found – expressly or impliedly. Curiously, while asking the Court to find a restriction in the Mountain View Subdivision plat that is not there, the City wholly ignores the restrictions that are there. On pages 25 through 27 of Respondent's Brief, the City argues that a restriction of access between Ace of Diamonds Street and Lot 5 would be justified to avoid "potential connectivity through Lots 5 and 6 to Highway 21" and because "this private driveway will be utilized by the public; i.e. the customers of the potential myriad of permitted uses to this commercial lot." (Respondent's Brief, p. 26.) The City is chasing windmills in its efforts to exaggerate the "potential" problems with the construction that is the subject of the Arnolds' building permit are belied by the very subdivision plat that the City has made central to its argument. First, because the westerly access road adjoining Lot 5 and Highway 21 is specifically denoted to be a "**Private** Access And Utility **Easement**," there is literally no threat that a driveway on the opposite side of the property, which does not even connect to that private access road, will become the City's new public thoroughfare between downtown Stanley and Highway 21. Further, regarding the City's fear of "the myriad of permitted uses to this commercial lot," the City is again reminded that the Mountain View Subdivision plat specifically includes a notation, as voluntarily agreed upon between the Arnolds and the City at the time the subdivision was created, that Lot 5 *is* restricted from being used for *any* of those myriad commercial purposes. (AR at 65.) Note 2 on the right-hand side of the plat reads: "Lots 2, 3, 4 and 5 of Mountain View Subdivision, as shown hereon,

shall be used only for the same residential purposes as the Residential A zone." (*Id.*) As the Stanley Municipal Code limits Residential A development to churches, single family dwellings, parks and playgrounds, and schools (SMC 17.16), the supposed dangers of the "potential myriad of permitted uses to this commercial lot" simply do not exist.

Although the City's disregard of the actual restrictions in the Mountain View Subdivision plat is perplexing, it does highlight that there *is* a process that can be followed to impose restrictions in conjunction with the approval of a subdivision plat. The Supreme Court of California's decision in *Ayres v. City Council of Los Angeles*, 34 Cal. 2d 31, 207 P.2d 1 (Cal. 1949) illustrates that process well. *Ayres* was a mandamus proceeding "brought to compel the respondent city council to approve a proposed subdivision map without certain conditions." *Ayres* at 2. The design of the proposed subdivision included residential lots, and "[t]he so-called cellular design of residence lot subdivision was employed so that the rear of residential lots abuts the principal thoroughfares, thus prohibiting access to the lots therefrom." *Id.* Among the conditions sought to be imposed upon the approval of the subdivision, the Los Angeles City Council included a provision that "an additional 10-foot strip along the rear of the lots be restricted to the planting of trees and shrubbery for the purpose of preventing direct ingress and egress between the lots and Sepulveda Boulevard" (*Id.* at 3), on the basis that "the creation of the subdivision necessitated the restricted use to confine ingress and egress to and from the lots away from Sepulveda Boulevard" (*Id.* at 5). Rejecting the petitioner's argument that the subdivision ought to be approved without the stated conditions, the California Supreme Court found: "The

regular design of subdivision, with ingress and egress to and from Sepulveda Boulevard, would have been out of harmony with the neighborhood plan and traffic needs." *Id.* at 6.

The City did not follow the standard procedures for imposing access restrictions in the creation of a subdivision, as the City Council in *Ayres* had done. It is historically false for the City to now claim that there was a restriction in the creation of the Mountain View Subdivision that eliminated the otherwise vested and appurtenant property right for Lot 5 to access the abutting public roadway. Quite clearly, the Mountain View Subdivision plat depicts, *inter alia*, the east side of Lot 5 abutting what is clearly marked as the western termination of Ace of Diamonds Street. (AR at 65.) However, there is no condition or other restriction written into the plat, nor in any subdivision approval that the City has been able to point to, that expressly limits the access to the subdivision's lots to merely the "Private Access And Utility Easement."

In sum, while the City certainly has the ability to regulate access to its public roads within the confines of the police powers conferred upon it by the State, there is nothing in the history of Lot 5 or the general regulation of the City's streets, including the approval of the Mountain View Subdivision plat and its lack of any conditions of approval, that has ever restricted the vested and appurtenant access rights incidental to the ownership of Lot 5 where it abuts Ace of Diamonds Street. Even if this Court upholds the denial of Building Permit No. 831 on some other basis, the Arnolds respectfully request that the Court correct the errors of the City and District Court, such that the unlawful access limitation that has now been unjustifiably authorized by the District Court be reversed and the Arnolds are reinstated their vested property rights incidental to their ownership of Lot 5.

II. The City Owed a Ministerial Duty to the Arnolds to Issue Building Permit No. 831.

As set forth in the Arnolds' Opening Brief, with specific attention to this Court's decision in *Lomond*, "a public official must issue a building permit when the applicant has complied with all existing requirements." 92 Idaho at 600. In defending against this Appeal, and the weight of authority set forth in *Lomond*, the City has attempted to justify its denial of the Arnolds' building permit application by imposing burdens upon the Arnolds that the Stanley Municipal Code does not place upon an *applicant* at the *application stage* of the building and construction process. (*See* Respondent's Brief, pp. 8-17.) The City has incorrectly applied its own Municipal Code in two ways. First, the City has confused the code's requirements as they pertain to an *applicant* versus how they apply to a *permittee*. Second, the City has confused the requirements for the issuance of a building permit and the requirements for the approval of a subdivision. These will be addressed in turn.

A. The City Code Does Not Require a Building Permit Application to Include Detailed Engineering Information.

The first error in the City's responsive analysis of the straightforward building permit process, which is clearly detailed in its own code and had been followed without incident by the Arnolds many times before, is that the City has taken the various steps of the building process (including applying for and obtaining a permit, as well as action that may only logically occur *after* the issuance of a permit) and front-loaded them all into the application phase of that process. (Respondent's Brief, pp. 8-9.) Through its use of ellipses in quoting its code quotations, the City has confused its own process. The City writes, "SMC 15.04 governs the process for the

issuance of a building permit," and then immediately quotes SMC 15.04.010 as its so-called authority for the "process for the issuance of a building permit." In fact, SMC 15.04.010 does not govern that process at all. Rather, SMC 15.04.010 simply explains that a building permit must *first* be obtained prior to the construction, erection, or alteration of any structure. It is, in a word, an *overview* of the construction process, from start to finish, according to the Code, including an explanation of the sort of work for which no building permit is required at all. SMC 15.04.010. That section does not, as argued by the City, detail or otherwise describe any aspect of the "process for the issuance of a building permit." As to the language within section 15.04.010 upon which the City has focused, that a "**Permittee** shall follow good engineering practices" (emphasis added), it is illogical to suggest that this phrase imposes an added requirement upon an *applicant* to provide highly-detailed engineering documentation (of the sort never before required by the City in its handling of any of the Arnolds' prior building permit applications).[5] An *applicant*, by its nature, is one who has not yet received a permit; conversely, a *permittee*, by its nature, is one who has already received a permit. While section 15.04.010 of the Stanley

[5] The City, as it did below and as the District Court did below, has focused on the phrase, "great quantities of fill material," in reference to what the Arnolds allegedly sought to place "on the City's right of way." (Respondent's Brief, p. 2.) The record is completely devoid of any evidence of this "fact." It is an exaggeration that the City placed into its original findings of fact and conclusions of law, without any factual support in the record before it or now before this Court. Rather, the Arnolds' building permit application (AR at 69-70) clearly shows that the Arnolds were merely going to overlay a small amount of gravel between the driveway and the dead-end culmination of the dirt road known as Ace of Diamonds, in order to ensure a safe connection between the public road and the proposed driveway. This is identical to that which the City had previously approved. (AR at 44-45.) Certainly, the Arnolds did not request to place "great quantities of fill material" on the City's right-of-way; the City's argument in this respect is yet another straw man argument.

Municipal Code does impose a requirement upon a *permittee* to follow good engineering practices, this sentence cannot be reasonably interpreted to impose the added requirement here thrust upon the Arnolds to prove the sound engineering practices of something that is not yet engineered.

The code provisions actually setting forth the "process for the issuance of a building permit" are set forth in SMC 15.04.020, which reads (in the version in effect at the time of the denial of the Arnolds' Building Permit Application No. 831):

> 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 of state health department. Applications which do not contain all of the foregoing shall not be considered complete.

SMC 15.04.020 (2011) (available at http://www.stanley.id.gov/City%20Documents/Ordinance%20192%20Building%20Permits.pdf). Just as they had done before, the Arnolds submitted a complete application (on the City's form) that fully complied with these requirements. (AR at 69-70.) According to *Lomond*, approval of the building permit was at that moment a "ministerial duty of the city building official." 92 Idaho at 600.

The remaining language of SMC 15.04.020 then in effect adds no further assistance to the City: "Development and construction drawings and technical support material shall be to scale or otherwise in sufficient detail to allow a technical or engineering review to determine whether the proposed development complies with all zoning requirements." As argued previously, there were

no "zoning requirements" that applied to the construction of a driveway or its connection to the City's public streets, as more fully addressed in the next section of this brief.

Because a plain reading of the Stanley Municipal Code cannot lead to the conclusion that a building permit applicant, at the application stage, had any duty to provide detailed engineering information to the City upon submission of the basic application, the City had a duty to approve the Arnolds' duly submitted Building Permit Application No. 831. If the party seeking the building permit meets all the standards prescribed in the ordinance, a city council has no discretion to deny the permit. The council's refusal to grant the permit in such circumstances is arbitrary as a matter of law. *See, e.g.*, *Southern Co-op. Development Fund v. Driggers*, 696 F.2d 1347, 1355-56 (11th Cir. 1983) ("There was no genuine dispute of material fact regarding plaintiffs' compliance with the requirements of the Subdivision Regulations. Under these circumstances the defendants had an administrative duty to approve the plaintiffs' proposed plat and their refusal to do so was a violation of the plaintiffs' guarantee of due process." (Emphasis added.)); *Chase v. City of Minneapolis*, 401 N.W.2d 408, 412-14 (Minn. Ct. App. 1987); *Application of Ellis*, 277 N.C. 419, 424-26, 178 S.E.2d 77, 80-81 (N.C. 1970); *Vagnoni v. Brady*, 218 A.2d 235, 237 (Pa. 1966) ("The issuance of a building permit, once the prerequisite conditions have been fulfilled, is merely a ministerial act."); *Boxell v. Planning Commission of City of Maumee*, 225 N.E.2d 610, 615-20 (Ohio Ct. App. 1967) ("Upon such full compliance with the ordinances and statutes, as a matter of law the Common Pleas Court should have found the proposed subdivision to be reasonable and proper and that the refusal of the planning commission to approve the proposed subdivision without plat was unreasonable and unlawful.").

B. No Other Zoning Requirements Applied to the Arnolds' Application.

In addition to arguing that SMC 15.04.010 imposed additional submission requirements upon the Arnolds, the City also asserts that the Arnolds' had a heightened application burden by virtue of two other "zoning requirements" allegedly applicable to their proposed construction: SMC 16.36 and 17.40.032. (Respondent's Brief, p. 9.) Notably, each of these code sections apply only to "Hillside" development, as set forth in the Stanley Municipal Code. Because the Arnolds' Lot 5 is not classified as such, according to the City's own actions, such "zoning requirements" do not apply to the proposed driveway from Ace of Diamonds into Lot 5.

First, SMC 16.36 is a subdivision classification that is used when "any subdivision, or portion thereof, [has] an average slope of ten percent (10%) or more." SMC 16.08.180. When that is the case – something that is evaluated and established at the time of the subdivision's formation – the subdivision is classified as a "Special Development" under SMC 16.32, and the provisions of Chapter 16.36 of the Stanley Municipal Code apply. As set forth in SMC 16.32.010, "The purpose of chapters 16.36 through 16.44 of this title is to identify various types of developments that normally pose special concerns to the commission and elected officials *when reviewing and acting upon* ***subdivision requests***." SMC 16.32.010 (emphasis added). In other words, the Hillside evaluation, including the engineering (soils, geology, hydrology) and grading plans, are all reviewed at the time of the subdivision creation. In the case at bar, the Mountain View Subdivision was not found to be a Hillside development under SMC 16.36 when it was created – a determination made by the City, not the Arnolds. As such, the requirements for a Hillside subdivision are not applicable to Lot 5 of the Mountain View Subdivision.

In addition to the fact that Mountain View simply is not classified as a Hillside Special Development, which renders moot all of the provisions of 16.36, the City has never presented any real evidence that any characteristic of Lot 5 would warrant a re-classification of Mountain View, even if that were possible. In the agency proceedings, the City merely speculated that "[t]he subdivision is characterized by slopes that ***may*** exceed 15 per cent," but blamed the Arnolds for not providing detailed information in that regard. (AR at 60 (emphasis added).) If the subdivision was truly "characterized by slopes" exceeding fifteen percent, it should have been classified by the City as a Hillside subdivision to begin with. As it was not, the Arnolds were entitled to rely upon the City's prior decision not to classify it as such, as is this Court, especially in the absence of any evidence by the City that some other standard is warranted by demonstrable facts. On appeal, the only "proof" that the City adds to justify a reversal of its prior non-classification of Mountain View as a Hillside subdivision is a request that the Court conduct an expert analysis of the "contour lines of this slope," as depicted on a drawing found, but not verified by Affidavit, in the Agency record. (Respondent's Brief, p. 11, n. 25.) This "evidence" is specious, at best. Given the fact that Mountain View has never been classified as a Hillside subdivision, none of the "zoning requirements" contained within SMC 16.36 were applicable to the Arnolds' Building Permit Application No. 831.

Finally, the City's reliance upon the "zoning requirements" set forth in SMC 17.40.032 is equally problematic. Pursuant to Section A of SMC 17.40.032, "[t]he provisions of this section shall apply to any building site where the topographic slope of said building site exceeds fifteen

percent (15%) grade." As noted above, there is no evidence beyond mere speculation that the situs of the proposed driveway in this case exceeds fifteen, or even ten, percent.

C. The District Court Erred by Finding that the City Did Not Act Arbitrarily and Capriciously In Violation of the Arnolds' Property Rights.

In taking action on an application that substantially affects a property owner's use and enjoyment of his property, a municipality is held to a much greater standard than mere speculation. "A city's actions are considered an abuse of discretion when the actions are arbitrary, capricious or unreasonable." *Lane Ranch P'ship v. City of Sun Valley*, 145 Idaho 87, 91, 175 P.3d 776, 780 (2007); *see also, Rehmann v. City of Des Moines*, 204 N.W. 267, 269-70 (Iowa 1925) ("The authority, delegated to municipalities to impose building restrictions and regulations, does not carry with it the authority to arbitrarily prevent the owner from improving his property. Independent of the power to regulate and enact restrictions, the owner of the property has the absolute right to improve it and use it in any lawful way or for any lawful purpose."). Lacking any evidence that Lot 5 and/or the Mountain View Subdivision had characteristics that subjected them to any additional zoning requirements (and in fact having acknowledged previously that Mountain View was not a Hillside subdivision), the City acted without adequate determining principles and without a rational basis.

Courts have regularly reversed the denial of a building permit where the denial is based on insufficient "determining principles." *See, e.g., City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 770-72 (1988) ("We hold those portions of the Lakewood ordinance giving the mayor unfettered discretion to deny a [newsrack] permit application and unbounded authority to

condition the permit on any additional terms he deems 'necessary and reasonable,' to be unconstitutional."); *Chandler v. Town of Pittsfield*, 496 A.2d 1058, 1061-63 (Me. 1985) ("The present ordinance could easily become such an instrument of discrimination by a majority of the councilmen giving what each might think 'due consideration' to traffic problems and thereafter denying a permit in one instance while granting a permit in a less meritorious case, though acting conscientiously in both. This would be possible because no uniform rules or regulations are defined to remove the sphere of action from the influences of whim or caprice."); *Application of Ellis*, 178 S.E.2d 77, 80-81 (N.C. 1970); *Appeal of Clements*, 207 N.E.2d 573, 580-81 (Ohio Ct. App. 1965); *Drexel v. City of Miami Beach*, 64 So.2d 317, 319-20 (Fla. 1953) ("We think a city council may not deprive a person of his property by declining a permit to erect upon it a certain type of garage where the only restriction on the use of the police power is that it shall not be exercised before 'due consideration' is given by someone, presumably the councilmen, to the effect of the building upon traffic. Both the quoted words, as well as their synonyms, could be construed to allow all manner of latitude in the grant of a permit in one case and the denial of a permit in a similar one, and would give every opportunity for the exercise of the power with partiality. Such laxness and inexactness in a delegation of the power is not sanctioned by the courts.").

Here, the City's ordinances (establishing a hillside classification) are not, in and of themselves, insufficiently vague. In fact, as set forth hereinabove, the ordinances upon which the City relies clearly *do not* apply to the Arnolds' property in the Mountain View Subdivision. However, should the City be permitted to approve or deny building permit applications based

solely upon loose guesswork (in this case, regarding the steepness of the subject slope), then the rule of law requiring that such decisions not be arbitrary or capricious will be cast aside, and all of the constitutional dangers associated with vague ordinances (as described in the citations above) will manifest. A misapplied ordinance is per se unreasonable and cannot support the denial of a building permit. *See Lane Ranch Partnership,* 145 Idaho at 91, 175 P.3d at 780 ("Here, the City viewed Lane Ranch's application as incomplete based on previous attempts by Lane Ranch to subdivide the property. The City automatically assumed that the private road application was another attempt to build a subdivision, rather than a legitimate attempt to gain access to the property under the current applicable zoning standards. The City's interpretation of their code is unreasonable and therefore an abuse of discretion under I.C. § 67–5279(3)(e)."). *See also*, *Vineyard Investments, LLC v. City of Madison*, 999 So.2d 438, 440-42 (Miss. Ct. App. 2009) ("Thus, we are unable to find a legally valid reason for the City of Madison's denial of the building permit application submitted by Vineyard. Additionally . . . we find that the City of Madison did not have the discretion to deny said building permit as Vineyard had complied with all building codes and zoning ordinances."); *Norquest/RCA-W Bitter Lake Partnership v. City of Seattle*, 865 P.2d 18, 23-26 (Wash Ct. App. 1994) (evidence relied upon by city did not support claimed violation of ordinance and building permit denial overturned).

ATTORNEY FEES ON APPEAL

The City is not entitled to attorney fees on this Appeal, as the matters involved herein do not warrant such an award in its favor. Although the City claims that there is "nothing for this Court to review," the facts and law presented by the Arnolds suggest quite the opposite. Through

this process, the City has attempted to infuse into the Mountain View Subdivision plat an elimination of the Arnolds' right of access from Lot 5 to Ace of Diamonds Street, which restriction simply is not there. Indeed, the City has presented no evidence, and no authority, that would authorize or justify a municipal government's *ad hoc* elimination of such an access right without due process of law (including, at a minimum, a valid exercise of its police powers). In turn, the District Court committed legal error of a constitutional nature when it determined that the Arnolds could not construct a driveway onto their property from Ace of Diamonds Street, erroneously concluding that it was "hard pressed to believe that just because a parcel abuts a city street that parcel would be entitled to access to the street." (R., Vol. 1, p. 133.) As demonstrated in the briefing now before this Court, the District Court's conclusion is exactly wrong on the law of access rights in the absence of properly-exercised police power regulation. *See, e.g., Johnson v. Boise City*, 87 Idaho 44, 390 P.2d 291 (1964).

The rule of law that the City and the District Court have presented is not supported by any precedent, and is one that would unconstitutionally open the door for the government to usurp private property rights without any regard for due process or just compensation – or even a valid exercise of police powers – based solely on the *absence* of express reservations or conditions in plats. In other words, if a municipality wishes to remove private property rights, it would only need to look back at historical plats (which may have been completed decades ago) and point out that the original plats did not expressly reserve those rights, as opposed to proceeding on the universally-recognized principle that unless such rights have been expressly removed or abandoned, they continue to exist. There is no "reasonable basis in fact or law" for

the City or the District Court's sudden reversal of these long-standing legal and constitutional principles relating to private property rights. I.C. § 12-117(1). Additionally, by virtue of the fact that the Arnolds had fully complied with all requirements set forth in the Stanley Municipal Code for the issuance of Building Permit 831, the City had a "ministerial duty" to issue that permit, and its refusal to do so based on pure speculation about the grade of the landscape was necessarily arbitrary and capricious as a matter of law. *See Lomond*, 92 Idaho at 600.

The City's reference to the earlier proceeding in which it was awarded attorney fees from the Arnolds does nothing to support an award of fees to it in the case at bar. Needless to say, the Arnolds disagree with the Court's award in the prior action, and believe that it merits re-examination. *Arnold v. City of Stanley*, 158 Idaho 218, 345 P.3d 1008 (2015), indicates that Idaho Code § 12-117 is intended to be a deterrent against groundless action against governmental entities, and that attorney fees may be appropriate if the appellant raises the same arguments as raised below. However, *Arnold v. City of Stanley* must not be read to suggest that *every time* a party loses in the District Court, attorney fees are awardable if it pursues an appeal. That is, however, the City's argument. In *Arnold*, the Arnolds were criticized by the Court for having lost at the District Court, "yet they still chose to expend more time and resources to bring an appeal, using the same arguments that were unpersuasive below . . . ." 158 Idaho at 226. Respectfully, by operation of a long history of precedent by this Court, the Arnolds (and every other appellant) are necessarily limited to "the same arguments that were unpersuasive below." *See, e.g., Morgan v. New Swed. Irrigation Dist.*, 156 Idaho 247, 253, 322 P.3d 980, 986 (2014) ("We do not consider issues raised for the first time on appeal."). While it is true that the Arnolds have herein

presented the same arguments as they did below, they have also provided additional analysis and citation to cases from around the country and from a variety of legal authorities, all of which supports their argument. A litigant – especially one appealing an unconstitutional deprivation of a private property right – should not be punished for exercising its appeal rights in the face of adverse decisions at the District Court that are not reasonably based in fact or any known law or precedent.

In contrast, the City has defended its actions frivolously since the inception of this litigation. From the very beginning, the issue of whether the Arnolds had a legal right of access to Ace of Diamonds street was not even properly before the City in ruling upon Building Permit No. 831, but both it and the District Court improperly ruled as a matter of law that the Arnolds do not have such a right. The City thus denied the Arnolds' request for a building permit on unsound grounds, claiming (in contravention of all previous building permits that it had issued to the Arnolds for this property, and in contravention of its own decision to not classify the Mountain View Subdivision as a Hillside subdivision) that the Arnolds failed to provide necessary information with their building permit application due to the City's new-found decision that the Mountain View Subdivision should have been classified as a Hillside subdivision and that the Arnolds' access rights to Ace of Diamonds Street were somehow impliedly impaired by the approval of the Mountain View Subdivision. Through the City's attempt to disparage the Arnolds by calling them "litigious," the City demonstrates that all of the legally and factually flawed arguments presented in support of its denial are mere pretexts for the

fact that the City officials are hostile to the Arnolds.[6] The claimed bases for the denial of Building Permit 831 are as much without factual support as they are without legal merit. Should any party be entitled to attorney fees in this Appeal, it is the property owners who have been deprived of their constitutional property rights by the City and the District Court.

CONCLUSION

Because the City failed to strictly adhere to its own ordinances by instead denying the Arnolds their Building Permit No. 831 on a record of pure conjecture, it acted arbitrarily and capriciously as a matter of law. Further, by virtue of the fact that the City and the District Court both concluded that the Arnolds were not entitled to construct their access driveway off of Ace of Diamonds Street, due to the erroneous conclusion that the Mountain View Subdivision plat had divested the Arnolds of their vested and appurtenant right of access, the decision of the City was in violation of constitutional provisions governing access from private property to the public roadways in Idaho. On the record before the Court, the Arnolds are entitled to a reversal of the City's and the District Court's decisions, including and especially the decisions to eliminate the Arnolds' vested and appurtenant access rights to the public streets abutting their property.

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[6] Though the City has attempted to disparage the Arnolds by calling them "litigious," basing its claim for attorney fees in *this* appeal largely on the fact that the City was awarded attorney fees from the Arnolds in a previous appeal, there is no merit to the City's argument. Here, the City and the District Court based their decisions upon a determination that the Arnolds were somehow precluded from having more than one access point to their property – a legal conclusion that has no basis in any precedent in this jurisdiction – but neither could point to any fact or proceeding in which that access right was either expressly abandoned or lawfully taken.

RESPECTFULLY SUBMITTED this 19th day of September, 2016.

GREENER BURKE SHOEMAKER OBERRECHT P.A.

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 19th day of September, 2016, two (2) true and correct copies of the within and foregoing instrument was served upon:

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

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

_____
Fredric V. Shoemaker
Thomas J. Lloyd III