10-27-2017

City of Middleton v. Coleman Homes, LLC Respondent's Brief Dckt. 45105

IN THE SUPREME COURT OF THE STATE OF IDAHO

Supreme Court No. 45105-2017

District Case No. CV-2015-8119

THE CITY OF MIDDLETON,

Plaintiff/Counter Defendant/Respondent/Cross-Appellant,

vs.

COLEMAN HOMES, LLC, an Idaho limited liability company; WEST HIGHLANDS, LLC, an Idaho limited liability company; WEST HIGHLANDS SUBDIVISION HOMEOWNERS ASSOCIATION, INC, an Idaho Corporation; WEST HIGHLANDS LAND DEVELOPMENT, LLC, an Idaho Limited Liability Company.

Defendants/Counterclaimants/Appellants/Cross-Respondents.

RESPONDENT'S REPLY BRIEF

CROSS-APPELLANT'S OPENING BRIEF ON CROSS-APPEAL

Appeal from the District Court of Third Judicial District in and for the County of Canyon
Case No CV-2015-8119

Honorable Christopher Nye, District Judge, Presiding

Joseph W. Borton [ISB No. 5552]
BORTON-LAKEY LAW OFFICES
141 E. Carlton Ave.
Meridian, ID 83642
Fax: (208) 493-4610
joe@borton-lakey.com
Attorneys for City of Middleton

Bradley J. Dixon [ISB No. 6167]
GIVENS PURSLEY, LLP
601 W. Bannock St.
Boise, ID 83701
Fax: (208) 388-1300
bradleydixon@givenspursley.com
Attorneys for Coleman Homes et al

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STATEMENT OF THE CASE

(i) Nature of the Case

This case concerns the Appellants' refusal to acknowledge the validity of, and then abide by, two land use contracts that it had with the City of Middleton.

The City of Middleton, Idaho (herein "City") is a municipal corporation of the State of Idaho that is located in Canyon County. Appellant Coleman Homes, LLC (herein "Coleman") is a land development company who gained approval for a residential project in the City called West Highlands Subdivision (herein the "Project") (R. at 10, 36, 302). West Highlands Subdivision Homeowner's Association, Inc serves as the Homeowner's Association (HOA) for the Project and is charged with maintaining and managing association property, including park space made available to the public pursuant to the terms of two contracts which were at issue in the underlying declaratory action. West Highlands Land Development, LLC owned the real property where the Project is located the City of Middleton which is subject to the two contracts which were at issue. (R. at 10, 36)

In accordance with the Local Land Use Planning Act ("LLUPA"), Idaho Code §67-6501 *et seq* from 2006 through 2009 the City approved several land use applications brought by the Coleman for the Project. Within this land use approval was Coleman's proposal, commitment, and integrated condition of approval that Coleman set aside 15.1 acres of open space for use by the public. (R. at 371) This public open space would be owned and maintained by a homeowners' association for the development, but like an actual park that is owned by the City, it would be open for all public use. (R. at 371) After the land use approval, the City and

Appellants entered into several contracts that would guide the development of West Highlands, including a Development Agreement (R. at 265-309), a "Parks Dedication Agreement" (herein "PDA") (R at 461), and an "Impact Fee Agreement "(herein "IFA") (R at 448). The PDA was signed on December 8, 2011, between the City and West Highlands Homeowners Association, Inc as an implementation agreement for Coleman's obligations to provide open space for public use within the Project that would be maintained by a private HOA at no expense to the City. The IFA was also signed on December 8, 2011. This agreement waived the obligation to pay a parks impact fee for the Project as required by city ordinance, in exchange for the developer meeting its obligation to provide the open space requirement that it had placed within its conditions of approval.

Several years after gaining approval and signing the IFA and PDA, on May 13, 2015, Coleman write to the City and represented its position that both the IFA and PDA were "void and unenforceable". (R. at 475). On May 20, 2015, Coleman wrote a second letter to the City where it again represented its position that the IFA and PDA were "void and unenforceable". (R. at 481) On August 13, 2015, counsel for Coleman wrote to the City's counsel and stated for a third time its position in a more forceful tone: "As we have discussed with the City for some time, *these agreements are null and void* due to the City's actions". (R. at 484)

In response to and as a result of three separate declarations that the waiver of parks impact fees was somehow void, the City began collecting and Coleman began paying the normal park impact fee for the Project pursuant to existing City ordinance. The City was also forced to file a Petition in District court to gain judicial determination to see if the City was correct that

both the IFA and PDA were valid and binding contracts. Eventually all agreed that they were. (R. 87, 815). Once the City prevailed in getting the District Court to confirm the validity of the PDA and IFA (R. at 87), the City returned to Coleman all collected park impact fees for the Project. (R at 519, ¶66). Following the review on the City's Motion for Summary Judgment, Coleman's claim of "breach of contract" for the City's collection of the impact fee as noted above, was argued by the parties but eventually dismissed by the Court in the City's favor. (R. at 823). One last issue remained which was raised by Coleman, not the City.

In its Counterclaim, Coleman also asked the District Court to reduce the number of acres it had to provide as public open space for the Project. (R at 100) In an irrational reading of both the IFA and PDA, Coleman claimed in a Summary Judgment motion on its counter-claim that only 6.92 acres was all that was required to be provided as public open space, not the 15.1 acres as set forth in the Conditions of Approval that Coleman had voluntarily offered to the City (R. at 355) and which because part of his binding obligations for the Project. On summary judgment, Coleman's argument was rejected and dismissed along with its counterclaim referenced above.

Finally, in concluding the case the District Court recognized that the City prevailed in pursuing its declaratory action because both the PDA and IFA were held to be enforceable. The District Court also recognized that the City prevailed in defeating the single counterclaim levied against it. The City made a request for the recovery of its attorney fees and costs based upon the terms of the IFA (R. at 893) and Idaho Code §12-120(3). However, despite the contractual provision in the IFA that requires the losing party in litigation to pay "all" costs and expenses, including attorney's fees, the District Court erred by applying a "reasonable" standard that does

not exist in the contract, and reduced the attorney fees requested from reducing the attorney's fees requested by the City from $37,397.55 to $28,048.17 (R. at 963).

On Cross Appeal, the City seeks to (1) correct a technical error in the Second Amended Judgment to properly reflect the entity that must provide the City a financial guarantee, and (2), correct a second error in the Second Amended Judgment so as to allow the City to recover all of its attorney fees incurred in litigating a dispute that was caused by the Appellant's refusal to honor the terms of its contracts. (R at 1029).

(ii) Course of the Proceedings and Disposition

On September 4, 2015, the City of Middleton filed a *Petition for Declaratory Ruling* wherein a single request for relief was made against four entities associated with certain obligations for the Project's development: Coleman Homes LLC, West Highlands LLC, West Highlands Subdivision Homeowners Association Inc and West Highlands Land Development, LLC. (Defendants") The request was for a "declaratory ruling that the [IFA and PDA] were not voided as a result of the City's 2012 repeal of its impact fee ordinance, which was re-enacted soon thereafter in 2014. This declaratory ruling will resolve this present dispute and clarify the obligations as between the parties relating to the required conduct of the parties as set forth in the Agreements. The declaratory ruling will ensure that the Project will continue through its development lifecycle in a manner consistent with and as contemplated by the parties in their two mutually beneficial Agreements." (R. at 9-13)

On October 6, 2015, the Defendants all filed a single Answer. In this Answer the enforceability of the IFA and PDA was *denied for a fourth time*. ("Defendants deny that the at-

issue agreements are "valid and binding" as alleged"). (R. at 36). The City requested and received discovery and continued to prosecute the action over the subsequent months and into the next year.

On March 2, 2016, Defendants sought leave from the court to amend their answer and assert seven separate counterclaims. (R.at 41-65). The City was required to brief its opposition to each proposed counterclaim. (R at 66)

On May 3, 2016, the District Court allowed Defendants to present two counts (declaratory relief and breach of contract). All other proposed causes of action in were withdrawn. The District Court order also stated that the IFA and PDA were "valid and enforceable". (R. at 86-88)

On May 6, 2016, the Amended Answer, comprised the two counts, was filed. One count was for declaratory relief and a second count alleged the City breached the very contracts that until recently Coleman has insisted were void and unenforceable. (R. at 89-103).

On June 9, 2016, Coleman filed for summary judgment, and soon thereafter, on July 21, 2016, the City filed its own Motion for Summary Judgment. (R. at 225) The City, now facing a counterclaim for breach of contract, argued that this cause of action should be dismissed, and the case concluded. (R. at 237-246). Defendants in their own summary judgment request sought to have the court reduce the number of acres of open space it had to provide in the Project by more than half, from 15.1 acres to 6.92 acres. (R. at 125) This was argued despite the fact that Thomas Coleman, manager, and owner of Coleman Homes, testified that he believed Coleman's obligation was to provide 15.1 acres of open space. (R. at 766).

On October 17, 2016, the District Court filed its decision ("Decision") on the cross motions for summary judgment. (R. at 815-824). In that Decision the Court denied Coleman's motion and granted the City's motion in part, and denied it in part.

On November 6, 2016, Judgment was entered during the pendency of cross-motions for reconsideration. (R. 830). The District Court denied the cross-motions. (R. at 943-945)

On November 16, 2016 and November 17, 2016, the parties exchanged cross motions for attorney fees and costs. (R. at 862, 892). Oral argument was noticed to occur on January 19, 2017. (R. at 25-46).

The City asked for attorney fees of $37,397.55. (R. at 899) while Coleman *et al*, asked for attorney's fees of $120,8467.00. (R. at 866).

On February 5, 2017, after receipt and review of substantive and procedural objections filed by both parties, the District Court entered it *Memorandum Decision and Order* finding that the City was the prevailing party and awarding a portion of the requested attorney fees and costs to the City in the reduced amount of $28,526.22. (R. at 958-965). In February 16, 2017, a First Amended Judgment was entered. (R. at 966)

On February 21, 2017 a Motion to Reconsider was filed, as well as a Motion to Alter or Amend the Judgment. (R. at 969, 972).

On April 11, 2017, the District Court entered its *Memorandum Decision and Order* that denied Coleman's Motion to Reconsider the Costs and Fees Award and granted Coleman's Motion to Alter or Amend the Judgment. (R. at 995-998).

On April 11, 2017 a *Second Amended Judgment* was entered. (R. at 999).

On May 12, 2017 the Defendants' *Notice of Appeal* was filed. (R. 1002-1028)

On June 2, 2017 the City filed its *Notice of Cross Appeal.* (R. 1029-1053)

On October 2, 2017 the Appellants filed and served their opening Brief on Appeal.

On October 27, 2017 the City filed and served its "Respondents and Cross-Appellants Brief" which served dual purposes: it is to be considered by the Court in response to Appellant's Brief, as well as for the Court's consideration in support of the City's Cross-Appeal, as permitted by IAR 34(c).

(iii) Statement of Facts

In 2005 the City received Coleman's application for annexation of The Highlands Ranch property ("Highlands Ranch") consisting of about 297 acres, with a request to zone 7.5 acres commercial and zone the remaining land residential. The Planning and Zoning Commission held a public hearing on November 21, 2005 and December 19, 2005 to consider the application, at which time the Planning and Zoning Commission recommended that the Middleton City Council approve the Project. On January 18, 2006, the City Council approved the Project, and issued Findings of Fact and Conclusions of Law for approval. There was no impact fee ordinance in effect at this time in Middleton. A Development Agreement between Coleman and the City was signed and recorded on February 28, 2006. This Development Agreement was revised once on November 16, 2006, and a second time on March 31, 2009. (R at 505-521)

On October 16, 2008, Coleman submitted and the City accepted applications to annex and zone 40.56 additional acres; to amend the 2006 preliminary plat for the Project by subdividing approximately 282 acres into 844 residential lots; for a conditional use permit to

allow a planned unit development on an R-3 zoned property; and to amend the 2006 Development Agreement. With these applications, Coleman changed the name of the subdivision from Highlands Ranch Subdivision to West Highlands Ranch Subdivision ("West Highlands"). (R at 505-521)

On January 20, 2009, Coleman submitted a revised application-narrative, a revised proposed development agreement, and proposed a list of "Conditions of Approval" that the Project should be subject to. These revisions provided specific commitments regarding parks and public open space. This proposal and the specifics of what commitments Coleman offered was memorialized in a letter signed by Thomas Coleman. Within Coleman's January 20, 2009 submittal, Coleman specifically proposed a 38-acre park and trail system, with "15.1 acres of individual parks with amenities", and offered to the City that "[t]he park and trail system shall be open to the public but will be privately owned and maintained so there will be no ongoing cost to the city." Within every public hearing Coleman reinforced its desire to provide 15.1 acres of public park amenities as cited in the January 20, 2009 proposed "conditions of approval". (R at 505-521)

On March 4, 2009, the City Council considered Coleman's applications at a public hearing. Following this public hearing, the City Council unanimously voted to approve the Coleman applications for West Highlands Ranch Subdivision, subject to several conditions, including "The applicant shall comply with all conditions of approval entitled West Highlands Conditions of Approval, dated January 20, 2009," Findings of Fact, Conclusions of Law and Order dated May 6, 2009. In making this approval, the City approved the application with the

following conditions "(3) The application shall comply with all conditions of approval entitled West Highlands Conditions of Approval dated January 20, 2009". Again, these were the same conditions that Coleman originally offered to the City as part of the application which was referenced earlier. (R at 505-521)

Coleman was obligated to provide to the City that which Coleman had originally offered: open space amenities that would be owned and maintained by a homeowners' association and made available for public use. As stated in Coleman's original January 20, 2009 proposed Conditions of Approval; 15.1 acres of parks and amenities that would be owned and maintained by a homeowners' association and open for use by all members of the public. (R at 505-521)

On July 15, 2009, the City adopted a Parks and Transportation Impact Fee as Ordinance No. 447. Mr. Thomas Coleman was on the City's impact fee advisory committee at the time and he began discussions with the City on how park impact fees would be collected and credited in West Highlands. Legal counsel for Coleman and the City negotiated terms and conditions of what impact fees were going to be due for the Project, whether any credits were warranted, and how the parties intended to reconcile these positions. Each party worked to outline the respective roles, rights and responsibilities of the City, Coleman, and the homeowners' association for West Highlands, which would be tasked with owning and maintaining the parks improvements that would be open to the public. (R at 505-521)

On November 16, 2011, the City approved a moratorium and stopped collecting the 2009 Parks and Transportation Impact Fee. Three weeks later on December 8, 2011, Coleman and the City signed an Impact Fee Agreement ("IFA") and a Parks Dedication Agreement ("PDA")

(collectively referred as "the Agreements") that were subsequently recorded in Canyon County. Prior to December 15, 2011 (the date the Parks Dedication Agreement was recorded) the City had not adopted an impact fee ordinance identifying a level of service for park improvements below that found in Ordinance 447. Therefore, the last sentence of paragraph 2.1 in the Impact Fee Agreement was not triggered. Then on August 29, 2014, the City passed Ordinance 541 to collect a $1,485.00 City park impact fee at the time each new construction residential building permit was issued (Park Impact Fee). This is the Parks Impact Fee in effect today. (R at 505-521)

Following the execution of the Agreements, both Coleman and the City for several years acted in reliance on these two Agreements. Even after the passage of Ordinance 541 the City did not collect any park impact fees from Coleman, and Coleman did not claim any credits for its obligation to provide public park space. One example of this mutual understanding and reliance was evidenced in an email sent to the City by legal counsel for Coleman on August 27, 2014. Coleman told the City in this e-mail the following "Based on these agreements, and the performance made pursuant to them, no impact fees should be charged to West Highlands and no demand for payment for credits should be made against the city." (R at 695)

On February 27, 2015, Coleman submitted an application to amend its 2009 Preliminary Plat and Development Agreement to add a school lot, city park lot, and 114 residential lots. On April 20, 2015 at the Planning and Zoning Commission hearing Thomas Coleman abruptly changed his mind and claimed that the Agreements were void. Coleman also represented to the City that it believed it was no longer obligated to make any of its park space open to the public,

despite the express language of the Conditions of Approval (which Coleman proposed and never objected to during the public hearing process).

This irrational reversal was then restated on May 13, 2015, when Coleman wrote to the City and represented its position that both the IFA and PDA were "void and unenforceable". (R. at 475). On May 20, 2015, Coleman wrote a second letter to the City where it again represented its position that the IFA and PDA were "void and unenforceable". (R. at 481) Finally, on August 13, 2015, counsel for Coleman wrote to the City's counsel and stated for a third time its position in a more forceful tone: "As we have discussed with the City for some time, these agreements are null and void due to the City's actions". (R. at 484) Because Coleman was steadfast that it felt that the IFA was void and therefore the waiver of the obligation to pay park impact fees (within the IFA) was no longer valid, the City started charging and Coleman started paying impact fees on August 28, 2015 in the amount of $1,485.00 on each new residential building permit for the Coleman project. Company representatives from Coleman paid this parks impact fee to the City with each new building permit and did so without objection. (R at 518, ¶61).

The legal status of the IFA and PDA was still unresolved and ripe for judicial intervention. Consequently, on September 4, 23015 the City filed its Petition for Declaratory Ruling to answer that question.

ISSUES PRESENTED ON CROSS APPEAL

1. Did the District Court err in the Second Amended Judgment by stating in paragraph 4 that the obligation of providing the City of Middleton a "financial guarantee" was an obligation of West Highlands, LLC, rather than the Developer Coleman Homes, LLC?

2. Did the District Court err in awarding part, but not all, of the attorney's fees incurred and requested by the City of Middleton as the prevailing party?

3. Is the City of Middleton as the Cross-Appellant entitled to attorney's fees on appeal?

STANDARD OF REVIEW

The decision of the District Court in making a ruling on a motion for reconsideration and for determining "prevailing party" status is committed to its sound discretion and will not be disturbed absent an abuse of that discretion. *Oakes v. Boise Heart Clinic Physicians, PLLC*, 152 Idaho 540, 542–43, 272 P.3d 512, 514–15 (2012), *Jorgensen v. Coppedge*, 148 Idaho 536, 538, 224 P.3d 1125, 1127 (2010); *Shea v. Kevic Corp.*, 156 Idaho 540, 545, 328 P.3d 520, 525 (2014). The burden is on the opposing party to demonstrate that the district court abused its discretion. *Lettunich v. Lettunich*, 145 Idaho 746, 749, 185 P.3d 258, 261 (2008) (quoting *E. Idaho Agric. Credit Ass'n v. Neibaur*, 133 Idaho 402, 412, 987 P.2d 314, 324 (1999)

> When examining whether a district court abused its discretion, this Court considers whether the district court: (1) perceived the issue as one of discretion; (2) acted within the outer boundaries of that discretion and consistently within the applicable legal standards; and (3) reached its decision by an exercise of reason. Only in the rarest of circumstances will this Court reverse the district court's determination of which party prevailed.

Shore v. Peterson, 146 Idaho 903, 914, 204 P.3d 1114, 1125 (2009).

Where the terms of a written contract dictate the scope of attorney's fees a party may recover, and the terms of that contract are clear and unambiguous, the interpretation of their meaning and legal effect are questions of law over which this Court exercises free review. *Opportunity, L.L.C. v. Ossewarde,* 136 Idaho 602, 605–06, 38 P.3d 1258, 1261–62 (2002).

ARGUMENT

A. The District Court erred in the Second Amended Judgment by stating in paragraph 4 that the obligation of providing the City of Middleton a "financial guarantee" was an obligation of West Highlands, LLC, rather than the Developer Coleman Homes, LLC, as set forth in paragraph 3 of the Impact Fee Agreement.

This Court entered its Judgment in this matter on November 7, 2016. This was a "Final Judgment" in accordance with IRCP 54(a)(1), which states that "a judgment is final if either it is a partial judgment that has been certified as final pursuant to subsection (b)(1) of this rule or judgment has been entered on all claims for relief, except costs and fees, asserted by or against all parties in the action." Nobody sought to alter or amend that final judgment within fourteen days. The Amended Judgment entered on February 16, 2017 was only amended to include the award of attorney's fees in favor of the City; not another word from the November 7 Judgment was changed. Nonetheless, first the first time on February 21, 2017 Coleman sought to amend the judgment. This request was outside the time limits of IRCP 54(a)(1) and should have been rejected by the district court for that reason alone.

However, the district court did not dismiss the request and erroneously changed the substance of the Amended Judgment on April 11, 2017. Within this Second Amended Judgment the district court mistakenly changed in paragraph 4 the substantive obligation of the Defendants to that of West Highlands LLC, as follows:

> West Highlands, LLC must provide the City of Middleton one or more financial guarantees consistent with the terms and conditions of Section 3 of the Impact Fee Agreement.

Not only was this request for a change in the Judgment inexcusably late and in direct contrast to the time requirements of IRCP 54(a), *supra*, but was also contradictory to the language of the IFA itself. The 2011 Impact Fee Agreement was entered into and signed by three parties; the City, West Highlands LLC, and Coleman Homes, LLC, referred to in the agreement as "Developer". On page 3 of that IFA the following obligation is stated:

> 3. Financial Guarantee. In the event that the Developer applies for building permits before completion of the equivalent service level of Parks and Streets, **Developer shall provide** on or more financial guarantees. The form of which shall be approved by the City, for Parks and Streets yet to be completed. Acceptable guarantees shall include but not be limited to irrevocable letter(s) of credit and/or cash deposit(s). In all cases, the guarantees shall be drawn solely in favor of, and payable to, the order of the City.
>
> (Emphasis added in **Bold**) (R. p. 450)

The "Developer" is clearly defined in the IFA as Coleman Homes, LLC, not West Highlands, LLC. (R. p. 448). Thus, the District Court erred in the *Second Amended Judgment* by stating in paragraph 4 that the obligation of providing the City of Middleton a "financial guarantee" was an obligation of West Highlands, LLC, rather than the Developer Coleman Homes, LLC.

B. The District Court erred in only awarding part, but not all, of the attorney's fees incurred and requested by the City of Middleton as the prevailing party.

The decision by the District Court in finding that the City was the prevailing party was supported by the record and should not be disturbed on appeal. *Infra.* However, the District Court improperly reduced the attorney fees requested by the City in its award, in error. Idaho Rule of Civil Procedure 54(e)(3) sets forth twelve factors that a court shall consider when

determining the amount of an award of attorney fees. When reviewing a trial court's award of attorney fees this court does not give any one factor from I.R.C.P. 54(e)(3) more weight than any of the other factors. *Lunders v. Estate of Snyder*, 131 Idaho 689, 700, 963 P.2d 372, 383 (1998). The City's Memorandum of Fees and Costs (R p. 892) and Affidavit of counsel (R p. 897) address all of the factors in IRCP 54(e)(3) factors. There was no reason given for reducing the attorney fees award of the City other than an application of the "reasonable fee" standard set forth in IRCP 54(e)(1). (*Memorandum Decision* at R p. 962 "the Court may only award a reasonable attorney fee").

While it is the City's position that its total requested attorney fee of $37,397.55 was reasonable (defense counsel requested fees of $120,847.50) the correct standard was to award the *all* attorney fees incurred, pursuant to the terms of the parties' IFA. Paragraph 6 of the IFA upon which the City's fees request was made states the following:

> In the event a suit or action is filed by either party against the other to interpret or enforce this Agreement, the unsuccessful party to such litigation agrees to pay to the prevailing party **all costs and expense, including attorney's fees incurred** therein, including the same with respect to an appeal.
>
> (R. p 450) (emphasis added in **bold**)

Appellant conceded that this contractual provision governs the award of attorney fees in making his own request for fees citing that same contractual provision. This contractual provision is a clear expression of what the parties agreed to: that "all" attorney's fees incurred would be paid by the losing party; all means all. "If the language of a contract is plain and unambiguous, the intention of the parties must be determined from the contract itself." *Rowan v*

Riley, 139 Idaho 49, 54, 72 P.3d 889, 894 (2003). In prior cases where this Court has reconciled fees requests when based in contract, the terms of the contract control. *See.*, *Mihaika v Shepard*, 145 Idaho 547, 181 P.3d 473 (2008). Moreover, where the terms of a statute and the contract conflict, the contract controls. *Zenner v Holcomb*, 147 Idaho 444, 210 P.3d 553 (2009).

In *Shepard*, a dispute arose over the award of attorney's fees pursuant to a written settlement agreement. Two neighbors (the Shepards and the Mihaikas) became entangled in litigation over a claimed trespass and assault. The parties participated in mediation, where a settlement was reached and reduced to writing. Within that settlement agreement was a provision for attorney's fees that could be awarded if a dispute arose to enforce the agreement. *Shepard*, at 549, 475. The case was concluded on a summary judgment finding that the settlement agreement was enforceable. Attorneys fees were awarded pursuant to the terms of the settlement agreement in favor of Mihaikas and the Shepards promptly appealed. *Id.* On appeal the Idaho Supreme Court affirmed the district court's conclusion that the Mihaikas were the prevailing party, and that they were entitled to attorney's fees *pursuant to the written agreement*. In so finding the Court followed it analysis in *Lettunich v Lettunich*, 141 Idaho 425, 111 P.3d 110 (2005) by noting that hearings on contested motions and efforts to enforce an agreement constitute the "commencement" of an "action". The Court in *Shepard* also concluded that in order to trigger the attorney's fees provision in the settlement agreement, one need only to bring an action to affirm the validity of the agreement as a whole; no separate claim of breach need be made. *Shepard*, at 478, 552.

In *Zenner*, the Court affirmed an order of actual attorney's fees incurred. *Zenner v Holcolb.*, 147 Idaho 444 (2009). This case concerned the parties contract for the Holcombs to build a house on the Zenners' property. After construction was complete, the Zenners were unsatisfied with the house and made a list of several items that were defective or unfinished. Mr. Holcomb returned to the house several months later and addressed some items from the Zenners' list; however, several issues remained unresolved, including the Zenners' claims of deviations from architectural plans and water collection under the house. Mr. Holcomb refused to fix the defects. The Zenners soon filed a complaint for breach of contract against the Holcombs and requested costs and attorney fees pursuant to Idaho Code and the terms within their contract. *Zenner*, at 446.

The contract between the parties contained a provision for the recovery of attorney's fees, which included the following: "should any kind of proceeding including litigation or arbitration be necessary to enforce the provisions of this agreement the prevailing party shall be entitled to have its [sic] attorney's fees and costs paid by the other party." After a ten-day trial a verdict was returned in favor of the Zenners for $40,000.00. Zenners filed a request for their actual attorney's fees soon thereafter, to which Holcombs objected. The district court held that the Zenners were the prevailing party and were entitled to their actual costs and attorney fees pursuant to the contract. Accordingly, the district court signed an amended judgment on the verdict, awarding the Zenners the full amount of attorney fees and costs requested. The Holcombs filed an appeal, and asserted that the district court abused its discretion in determining that the Zenners were the prevailing party. Alternatively, the Holcombs argued that even if the

Zenners were the prevailing party, the district court should have determined the amount of costs and attorney fees to be awarded pursuant to the criteria set forth in I.R.C.P. 54(d) and (e) rather than awarding them actual costs and attorney fees under the language of the contract. *Id*, at 447.

After promptly affirming the district court's finding that the Zenners were the prevailing party (even though they sought $120,000.00 and only recovered a $40,000.00 verdict) the Court turned its attention to the amount of attorney's fees awarded. The Holcombs argue that, although the contract provision does not state "reasonable" attorney fees, I.R.C.P. 54(e) is nevertheless applicable because it would strain the plain meaning of I.R.C.P. 54(e)(1) to interpret the rule to mean that a contract must provide for "reasonable attorney fees" in order for I.R.C.P. 54(e) to apply." *Id*, at 450.

In review of this argument the Court set forth a detailed analysis of the substance and applicability of IRCP 54(e) factors when faced with a clear contractual provision for attorney's fees. The existence of the contract is critical, as noted in IRCP 54(e)(8) cited by the Court because this subsection preserves the priority of the terms of the contract over the application of Rule 54(e). That is, IRCP 54(e) factors are relevant to the extent they would not be inconsistent with the contract. In affirming the district court's order of actual attorney's fees as provided for in the contract, the Court reasoned as follows:

> To determine the amount of attorney's fees considering the factors in IRCP 54(e)(3) would be contrary to the language of the contract, and, therefore, contrary to IRCP 54(e)(8). Due to this inconsistency, IRCP 54(e) is not applicable." *Id*, at 451.

The words contained within the contract provision did not contemplate the court's involvement in determining whether the fee is reasonable, and therefore, the Court held on appeal that I.R.C.P. 54(e)(3) is inapplicable because it is inconsistent with the language of the contract. *Id*, at 451. The Court went on to add that even if the Holcombs had asserted a different interpretation of the contract provision "we would construe the contract most strongly against the person who prepared the contract." *Win of Michigan, Inc. v. Yreka United, Inc.,* 137 Idaho 747, 751, 53 P.3d 330, 334 (2002). That policy applies here because the IFA was drafted by counsel for Coleman. (See., R. p 387, 409, 417 ".... Coleman sent a proposed impact fee agreement ("Impact Fee Agreement") to City attorney Paul Fitzer"....)

The *Zenner* Court provides some parting caution and guidance that use of the term "all" in an attorney fee provision does not mean unlimited; the losing party can still argue that the fees requested constitutes an "unconscionable penalty". *Id*, at 451. That argument was not made by in this case though, which comes as no surprise when viewing the parties' respective fee requests; the City requested on $37,397.55 as compared to Coleman absurd request for $120,847.50.

Wherefore, in finding that the District Court erred by not applying the terms of the parties' contract in making its assessment of attorney's fees to be recovered by the City, the City respectfully requests that the matter be remanded with instructions to amend the Judgment an award the City all of its attorney's fees in the amount of $37,397.55, plus attorney's fees incurred on appeal, *infra*.

C. The District Court was correct in concluding that Middleton's Memorandum of Fees and Costs was timely.

As the District Court properly concluded, the City's motion for attorney fees was timely filed and served. Based upon the prior argument of the Appellant, the City's filings were actual "premature". (R at 938 "Coleman notes initially that the city's request for fees and costs is premature, as cross-motions to reconsider are currently pending before the Court....") Nonetheless, a trial court's finding of fact will not be set aside unless clearly erroneous. Findings of fact, even if based on conflicting evidence, will not be disturbed on appeal. *Shore v. Peterson*, 146 Idaho 903, 907 (2009). On appeal a court should not disturb findings of fact based on the weight or credibility of the evidence, nor should it "re-weigh the evidence or consider whether we would have drawn a different conclusion from the evidence presented." *Watson v Joslin* Millwork, Inc 149 Idaho 850, 854, 243 P.3d 888,670 (2010).

In its February 5, 2017 *Memorandum Decision and Order*, the District Court properly concluded that judgment was entered on November 7, 2016. (R. at 960) IRCP 58, which provides that "the filing of a judgment by the court as provided in Rule 5(d) or the placing of the clerk's filing stamp on the judgment constitutes the entry of the judgment". In this case the Judgment was entered on November 7 and mailed to the attorneys on that same day. The City filed its Motion for Attorney fees on November 17, 2016. (R. at 892) and noticed the Motion for oral argument on January 19, 2017. The motion was timely filed, and each party had ample time to prepare a response before the hearing two months later.

The District Court also properly concluded on two occasions that the City timely served its memorandum of fees. Appellant simply restates verbatim here its old argument set forth its Motion for Reconsideration, an argument that was considered and rejected within the sound discretion of the District Court. (R. at 995) In reviewing pleadings and recognizing that there existed a factual dispute for the court to resolve, the court assessed the conflicting evidence and made its factual determination that the City timely served its memorandum of fees. All pleadings within the Record show service on a date certain by facsimile, and every one of them was sent and received as noted.

The case of *Allstate v. Mocaby*, 133 Idaho 593, 990 P.2d 1204 (1999) was cited as one of multiple authorities citing the same proposition ("see e.g.") that the district court is empowered to weigh conflicting evidence and make a finding of fact which it not to be "re-weighed" on appeal. It does not stand for allocating a "benefit of the doubt" to a non-offending party as suggested by Appellants. In *Mocaby*, the court considered a tragic case involving an accidental shooting death of Ms. Marjorie Upton, and whether there was insurance coverage for various claims alleged surrounding the shooting. The district court issued a summary judgment in favor of Allstate concluding it did not have a duty to defend based upon certain exclusions in the insurance contract.

Allstate soon thereafter filed its Motion to recover attorney fees and costs. Allstate claims that it served and filed its motion for attorney fees and costs with its memorandum of costs and fees on July 11, 1997. Although the certificate of service is also dated July 11, 1997, the facsimile time-stamp appearing at the top of each page of the memorandum bears the date of

July 23, 1997. Conflicting evidence existed as to when the memorandum was filed, and therefore what date Macoby's objection would have be due. The court resolved this conflicting evidence by making its finding of fact that Macoby's objection was timely. Rather than find that Macoby's objection was filed too late, the court resolved the conflicting evidence by accepting the pleading, and then resolved the attorney fees matter on the merits of the parties' respective claims. The District Court in our case did the same thing by concluding that the City timely served its memorandum of fees and costs and supporting affidavit on November 17, 2016. (R. at 960). That finding of fact, made after considering conflicting evidence, should not now be re-weighed, it should be affirmed.

D. The District Court was correct in concluding that the City was the Prevailing Party.

When the District Court issued its *Memorandum Decision and Order* finding that the City of Middleton was the prevailing party in this litigation, and denying the request by Coleman that it was somehow the prevailing party, it acted within the bounds of its discretion. (R. at 958). The decision that Coleman was *not* the prevailing party was not appealed. The District Court cited IRCP 54(d)(1)(B) as the foundation for its analysis and conclusion, which was cited in the Decision, and reads as follows:

> In determining which party to an action is a prevailing party and entitled to costs, the trial court shall in its sound discretion consider the final judgment or result of the action in relation to the relief sought by the respective parties. The trial court in its sound discretion may determine that a party to an action prevailed in part and did not prevail in part, and upon so finding may apportion the costs between and among the parties in a fair and equitable manner after considering all of the issues and claims involved in the action and the resultant judgment or judgments obtained.
> IRCP 54(d)(1)(B).

The District Court then reviewed the final judgment in relation to the relief sought, and the extent to which each party prevailed on each claim at issue. In doing so the Court noted that the City was successful in its request for declaratory relief by obtaining an Order that the IFA and PDA were valid and enforceable. The City also defeated the single counterclaim against it (breach of contract) which was dismissed on the City's summary judgment motion. Finally, as to the number of park acres that are subject to the PDA, the Court rejected Coleman's request to reduce the number of acres to 6.92 acres. (R. at 961). Based upon these findings it was well within the District Court's discretion to conclude that the City was the prevailing party. This finding should be affirmed on appeal.

In support of its appeal Coleman first offers an illusory "straw-man" claim that it successfully recovered illegally collected park impact fees. (Appellants Brief, p 9). This contention ignores the chronology of events that led to the litigation in the first place, cited above. It was Coleman who asked to pay park impact fees in lieu of the IFA waiver by repeatedly telling the City that the IFA (which would have waived impact fees) was void. *Supra.* On three separate occasions in 2015 Coleman made this representation to the City, and then doubled-down on that position a fourth time in its Answer to the current litigation wherein Coleman denied that the IFA and PDA were valid or binding agreements. (R. at 36, ¶1). That claim, which was contained within Count II of its counterclaim, was dismissed with prejudice pursuant to the City's summary judgment motion. (R. at 831, ¶3)

Coleman also ignores the five other causes of action against the City within its proposed counterclaim that were baseless, yet the City had to brief a response to defend and defeat each

one. (R. at 66-75). As a result of and consistent with Coleman's position in 2015 that the IFA was void, these impact fees were paid by Coleman without objection with each building permit issued. (R. at 261, ¶61). These impact fees (which would be due if the IFA was void) were then returned the moment that Coleman changed its position and decided to agree with the City that the IFA was a valid and binding contract. It is a gross misrepresentation for Coleman to have requested the City treat the IFA as void and then object to the City acting consistent with that request. It is also irrational to assert that you prevailed on a claim that was dismissed by summary judgment.

Coleman's second straw-man argument is that the court's ruling that the IFA and PDA were valid contracts was merely an expression of Coleman's own position. Yet that was not the case, and it was Coleman's own stubborn insistence that the agreements were void that caused the litigation to begin with. The inclusion of this form of relief obtained by the City through this litigation is clearly an appropriate consideration for the district court within its discretion. As to all four defendants in the litigation the City was able affirm the validity of the IFA and PDA and that these defendants are each bound by their respective terms as originally intended. Coleman's argument on this point was considered by the District Court but proved to be unpersuasive and was rejected.

Finally, Coleman argues that relief was not obtained against all four defendants in the lawsuit. This confusion mirrors other misrepresentations that have been made in this action. (R. at 948, wherein Coleman's counsel wrote in its *Memorandum in Opposition* that "Coleman Homes, LLC … was not a signatory to either of those agreements". This assertion is false. See.,

R. at 451.) Three of the four entities are signatories to the agreements that the City sought to validate. The fourth entity, West Highlands Land is the undisputed owner of the real property upon which the IFA and PDA were each recorded; the West Highlands Land real property is subject to their terms. (R. p 10, ¶5; R. p 36, ¶2) Clearly all four entities had a stake in the City's petition to get what Coleman refused to provide: affirmation that the IFA and PDA were valid and binding agreements that by its terms impacted each defendant in the litigation. All four defendants appeared in the action, and none requested summary judgment or even alleged that it had no role or stake in the litigation. To the contrary, as the face of each pleading will confirm, all four defended the case to the tune of $120,000+ in attorney's fees, and all four denied in unison the validity of the IFA and PDA. (R. at 36, ¶1) ("All defendants deny that the at-issue agreements are "valid and binding" as alleged within paragraph 1 of the petition". *Answer to Petition for Declaratory Ruling*). The case cited in Appellant's Brief, *Gunter v Murphys Lounge, LLC*, 144 Idaho 16 (2005), addressed facts different than what is presented here and is clearly distinguishable.

In *Gunter* the plaintiff (Shannon Gunter) sued two LLCs alleging a breach of written lease agreements related to the operation of a bar and liquor license, and also sued two individuals who signed the agreements as agents of the companies (Wendel and Beverly Bergman). Over the years the business relationship between Gunter as the tenant bar-owner and the Defendants deteriorated to the point that the defendants sent a letter to Gunter terminating the leases. Gunter, determined she had done nothing wrong, filed suit alleging breach of contract, tortious interference with contract, and requested compensatory and punitive damages. *Id*, at 22,

682. After a five-day jury trial, a verdict was returned in Gunter's favor, and awarded her damages of $36,000.00, plus punitive damages of $75,000.00, as well as an award of attorney's fees jointly and severally against all four defendants; the two LLCs owners of the leased business and liquor license, as well as Wendel and Beverly Bergman who were sued in their individual capacity. An appeal on several issues, including the award of attorney's fees, was filed by the defendants soon thereafter. On appeal the Idaho Supreme Court affirmed the trial court determination that the gravamen of the dispute was a commercial transaction falling within the parameters of I.C. §12-120(3), yet reversed the application of the attorney fee award against the Bergmans because they merely signed the leases as agents of the entities, and therefore were not themselves parties to the commercial transaction. *Id*, at 32, 692.

This holding in *Gunter* is factually different then the issue before this Court. The *Gunter* decision would support excluding Thomas Coleman *personally* from liability in the present case. But in our case no individual was a party. The only parties named as defendants here are direct signatories to and/or bound by the contracts at issue. Relief was specifically pled against all four defendants, all four defended their position and lost, and relief was ultimately granted against all four. The IFA an PDA are binding, and each must comply with and/or be subject to the terms of both contracts. The City sought to declare two agreements valid; a single count. The City accomplished that goal. The City sought to defeat a breach of contract counterclaim (a decision which was not appealed) and the City accomplished that goal. The appellants effort to cherry pick at the edges of the case does not negate the District Court's sound and thorough analysis of the entire case and claims of the parties.

An affirmation of the district court's finding of the City as the prevailing party is supported by other cases where the Idaho Supreme Court has rejected cherry-picking attacks on a prevailing party determination. For example, in *Oakes v. Boise Heart Clinic Physicians, PLLC*, 152 Idaho 540, 272 P.3d 512 (2012), a former cardiologist employee (Mr. Oakes) sued his former employer (Boise Hearty Clinic) seeking unpaid wages of $25,171.69. The employer counter-claimed asserting an overpayment had been made to the employee in the amount of $32,794.10. After a 2009 jury trial the jury returned its verdict and awarded Oakes $2,043.92. *Oakes*, at 542. Oakes made a request to the court for attorney's fees as the prevailing party based upon two grounds; he defeated his employer's counter-claim and recovered some (but not) all of his waged requested. The district court was then presented with a request by Oakes for the recovery of his attorney's fees, based upon his motion that he was the prevailing party in the case. The district court denied his request and held that neither party was the prevailing party. *Id*, at 543.

On appeal, the Idaho Supreme Court reversed the district court and found it had made an error in concluding that Oakes did not prevail. Finding that Oakes received an award far smaller than that which he sought, but he also defeated BHC's counterclaim, the Idaho Supreme Court reversed the district court ruling and concluded that Oakes was in fact the prevailing party. *Id*, at 546. Relying heavily on its own analysis in *Eighteen Mile Ranch v Nord Excavating & Paving Inc.*, 141 Idaho 716, 117 P.3d 130 (2005) and *Bates v Seldin*, 146 Idaho 772, 203 P.3d 702 (2009) the *Oakes* court recognized that Oakes received an award smaller than he sought, but he also defeated BHC's counterclaim. Therefore, the district court was found to have abused its

discretion in not finding that Oakes was the prevailing party. *Oakes*, at 518, 546. Only in the rarest of circumstances will this Court reverse the district court's determination of which party prevailed. *Poole v Davis*, 153 Idaho 604, 606 (2012), citing *Shore v. Peterson*, 146 Idaho 914, 204 P.3d at 1125.

The prevailing party analysis by the District Court in the present case was in accordance with Idaho case law and within the bounds of the District Court's discretion. The City of Middleton prevailed. It is respectfully requested that this decision be affirmed on appeal.

ATTORNEY FEES ON APPEAL

In order to recover attorney fees on appeal in Idaho one must make use of the procedural means to obtain them, and demonstrate a substantive right to receive them. I.A.R. 41 sets forth a process by which this Court can grant the City attorney fees on appeal, and the City expressly requests the recovery of all attorney fees and costs incurred on appeal.

The substantive basis upon which attorney fees can be awarded is found within I.C. 12-120(3), and the unambiguous terms of the parties' written contract, which states "[i]n the event a suit or action is filed by either party against the other to interpret or enforce this Agreement, the unsuccessful party to such litigation agrees to pay to the prevailing party all costs and expense, including attorney's fees incurred therein, including the same with respect to an appeal." (R. at 450) (emphasis added in underline) *See., Garner v Povey*, 151 Idaho 462, 259 P.3d 608 (2011); *See E.g.*, Ingrid Batey, *Attorneys Fees in Idaho: A Handbook.*, 584 Idaho L.R. 584, 635 (2016).

CONCLUSION

The District Court was correct in concluding that the City's Memorandum of Fees and Costs was timely filed and served, and the City was the prevailing party. It is respectfully requested that both findings be affirmed on appeal.

However, the District Court did err in two other ways: it erred in the Second Amended Judgment by stating in paragraph 4 that the obligation of providing a "financial guarantee" was an obligation of West Highlands, LLC, rather than the Developer Coleman Homes, LLC, as set forth in paragraph 3 of the Impact Fee Agreement. It also erred in awarding part, but not all, of the attorney's fees incurred and requested by the City as the prevailing party. It is respectfully requested that this Court vacate and remand to amend the judgment accordingly.

Finally, in accordance with the relief provided to the City in this appeal and the terms of the IFA and Idaho Code §12-120(3), the City as Respondent and Cross-Appellant requests that the judgment also include an award of the City's attorney fees and costs incurred on appeal.

Respectfully Submitted this 27th day of October 2017.

BORTON-LAKEY LAW OFFICES

By:_____
Joseph W. Borton
Attorneys for City of Middleton
Cross-Appellant/Respondent

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of October 2017, I caused a true and accurate copy of the foregoing document to be served upon the following as indicated below:

Bradley J. Dixon
Givens Pursley, LLP
601 West Bannock Street
P.O. Box 2720
Boise, ID 83701-2720
Facsimile: (208) 388-1300

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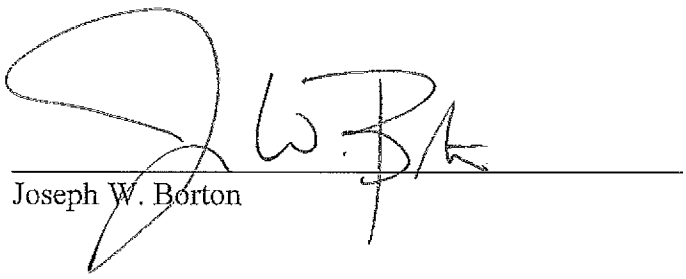

Joseph W. Borton