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IN THE SUPREME COURT OF THE STATE OF IDAHO

SILVERWING AT SANDPOINT, LLC, an Idaho limited liability company,

Plaintiff/Counterdefendant/Respondent,

vs.

BONNER COUNTY, an Idaho municipal corporation,

Defendant/Counterclaimant/Appellant.

Supreme Court Docket No. 45052-2017
Bonner County No. CV-2009-23757

BRIEF OF RESPONDENT SILVERWING AT SANDPOINT, LLC

Appeal from the District Court of the First Judicial District of the State of Idaho, in and for the County of Bonner, Honorable Richard Christensen, District Judge, Presiding

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I. STATEMENT OF THE CASE

A. Nature of the Case

In late 2006 and early 2007, Respondent SilverWing at Sandpoint, LLC ("SilverWing") repeatedly met with Appellant Bonner County (the "County") in connection with SilverWing's plans to develop a residential "fly-in, fly-out" property adjacent to the Sandpoint Airport operated by the County (the "Airport"). SilverWing's plans included the construction of a parallel taxiway entirely on its property to access the runway at the Airport. The County represented to SilverWing that the Federal Aviation Administration ("FAA") had approved an Airport Layout Plan ("ALP") to build a parallel taxiway along the entire west side of the Airport and, based on that ALP, asked SilverWing to alter its taxiway construction plans to accommodate and facilitate the development of the west side taxiway. SilverWing relied on the County's representations to change its plans for the benefit of the County and built its taxiway partially on Airport property in conformity with the ALP at a significant increased cost to SilverWing. Thereafter, the County reversed its position and demanded that SilverWing remove the taxiway because the ALP it had provided to SilverWing to construct the taxiway had never been approved by the FAA.

After attempts to resolve the matter failed, SilverWing sued the County for, *inter alia*, promissory estoppel. The County countersued SilverWing alleging breach of contract. After more than a week of trial, a Bonner County jury found in favor of SilverWing on its promissory estoppel claim and held that the County failed to establish any breach of contract by SilverWing. Accordingly, the jury awarded SilverWing $250,000.00 in reliance damages and, later, the Court

awarded SilverWing a total of $764,363.32 in attorney's fees and costs.[1] Judge Richard Christensen denied the County's Motion for Judgment Notwithstanding the Verdict ("JNOV"). The County now appeals the district court's denial of its JNOV motion and that portion of the fee award related to SilverWing's successful prosecution of its promissory estoppel claim.

B. Statement of Facts

1. <u>The County Operates the Sandpoint Airport Through its Airport Board.</u>

The County owns the Airport and operates it through actions and recommendations of the Sandpoint Airport Advisory Board (the "Airport Board"). R. Exh. at 351 (Defendant Exh. A7).[2] In addition, the County contracts with an individual to perform specific, designated services to operate and maintain the Airport under the title of Airport Manager.

On May 31, 1996, the County entered into a contract with Robert Maurice entitled Lease of Airport Fixed-Base and Related Facilities (the "Airport Lease"). R. Exh. at 17-45 (Plaintiff Exh. 3). The Airport Lease specifically delegates certain responsibilities from the County to the Airport Manager (or "Tenant"). R. Exh. at 23, 26 (Plaintiff Exh. 3 at 7, 10). On June 5, 1996, Maurice, with the written approval of the County, assigned his rights and responsibilities under

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[1] Of this total amount, the Court awarded $252,850.10 in attorney's fees to SilverWing for its successful defense of the County's breach of contract claims. R. at 5862. The County has not appealed this portion of the award of fees to SilverWing.

[2] Both the County and *Amicus* cite to the "record" below, much of which was never seen or considered by the jury. Since this is an appeal of the district court's denial of the County's JNOV motion, SilverWing only cites to that evidence presented to the jury. SilverWing cites to the Amended Clerk's Record on appeal with the abbreviation "R." and to the Amended Clerk's Record of Trial Exhibits with the abbreviation "R. Exh.," with a parallel citation to the exhibit number (*e.g.*, Plaintiff Exh. 1). As multiple transcripts were prepared for this appeal, SilverWing cites to the trial transcript with the abbreviation "Trial Tr."

the Airport Lease to Jorge L. O'Leary ("O'Leary"). R. Exh. at 46-49 (Plaintiff Exh. 3). O'Leary served as Airport Manager from June 1996 to late 2008. Trial Tr. at 1081-82; 1087. During that time, O'Leary was the County's authorized agent to communicate with state and federal agencies on Airport matters; he maintained the Airport's ALPs and correspondence from the FAA; and frequently acted as a liaison between the FAA and the County. Trial Tr. at 1082:20-1083:8, 1095:10-1096:7.

2. <u>SilverWing Develops its Property Adjacent to Sandpoint Airport</u>.

In April 2006, SilverWing's former principal John McKeown ("McKeown") purchased 18.1 acres of land adjacent to the west side of the Airport (the "Property") and, thereafter, conveyed the Property to a new entity that became SilverWing. Trial Tr. at 264:24-268:7; 269:18-271:3; 315:4-316:13. SilverWing intended to design and construct a 45-Planned Unit Development ("PUD") of hangar structures for airplanes with residences (the "Development"). R. Exh. at 101, 127 (Plaintiff Exh. 36, 56). *See also* Trial Tr. 271:4-272:4 (original intent was to "mirror what was being done at Gillespie [Field]" with upscale hangar homes); 298:17-21; 578:1-5. As planned, residents could taxi in their airplanes directly between the Airport runway and their hangar home. *Id.* Thus, a crucial component of this "fly in/fly out" development was direct access to the Airport's runway. Trial Tr. at 267:25-268:3; 865:16-25.

Included within SilverWing's purchase of the Property was a perpetual Taxi Way Easement from the County in favor of SilverWing for access from the Property to the Airport's runway at an access point in the middle of the runway or "mid-field." Trial Tr. at 272-77; 381:23-382:2. R. Exh. at 50-67 (Plaintiff Exh. 3-5) (hereinafter "Easement"). The Easement and

access point to the runway made the SilverWing parcel particularly attractive because "it meant that if [SilverWing] built what [it] wanted to build, that the people that were part of [the] project that wanted to get their airplanes from their hangars to the runway could use that easement to get on the runway." Trial Tr. at 267:25-268:3. At the time, the Airport had at least six (6) separate mid-field access points to its runway, of which three (3) provided the only access from the west side of the Airport, including the one shared by SilverWing and Quest. Trial Tr. at 306:10-13. R. Exh. at 83 (Plaintiff Exh. 32).

Shortly after purchasing the Property, SilverWing hired an airport design expert to develop the architectural design and layout for the project. Trial Tr. at 277-80; R. Exh. at 362-63 (Defendant Exh. A42). The initial site plan for the Property included a parallel taxiway entirely within the Property's boundary lines. Trial Tr. at 83:22-24; 280-85; R. Exh. at 73 (Plaintiff Exh. 21-A). The taxiway allowed SilverWing residents to exit their property and make their way to the mid-field access point on the Airport runway provided by the Easement. *Id.* Upon learning of SilverWing's purchase of the Property, on June 22, 2006, the Airport Board requested that SilverWing provide it with "your plans for [the Property] and construction schedule" and informed SilverWing that "[w]e have been working with the FAA to install the west side taxi way." R. Exh. at 74-75 (Plaintiff Exh. 21-B). SilverWing responded to the Airport Board by sharing a copy of its initial site plan and noting, "[a]s for the taxi way, we think expanding the West Side taxi way is great." *Id.* at 74.

As early as August 2006, SilverWing requested a copy of the current ALP on file with the FAA for the Airport from the County's Airport Manager. Trial Tr. at 299:2-303:2, R. Exh. at

79-81 (Plaintiff Exh. 27, 28). *See also* Trial Tr. at 301:5-8 ("sometimes airports will have multiple ALP plans . . . I just wanted the most recent one [ALP] because that's what we were going to develop off of"). An ALP is a survey that depicts, among other things, the location and nature of existing and proposed airport facilities and structures. Trial Tr. at 728:20-729:5; 1087.

3. SilverWing Alters its Taxiway in Reliance on the County's Promises.

After reviewing SilverWing's initial site plan, the Airport Board was "very much in favor of" the Development. Trial Tr. 491:3-10. Beginning in September 2006, however, the County asked SilverWing to alter its plans to, instead, build its taxiway partially on Airport property to line up with the full west side taxiway depicted in ALP Alternative 2(B). Trial Tr. at 312:1-313:1, R. Exh. at 98 (Plaintiff Exh. 34). The County told SilverWing that they hoped that doing so would spur growth on the west side of the Airport and be consistent with a plan to build out the entire west side taxiway under ALP Alternative 2(B). Trial Tr. at 324:3-14; 332:9-18. At the time, all of SilverWing's improvements were located within its Property lines, including its taxiway. Trial Tr. at 313:18-315:3, R. Exh. at 101 (Plaintiff Exh. 35). In response to this request, McKeown testified that he "was hesitant when they called me and they asked to do that, because when you do that, it was much more expensive taxiway." Trial Tr. at 331:11-16.

On October 20, 2006, SilverWing hired Clearwater Engineering (Debbie Van Dyk, hereinafter "Van Dyk") to design its Development, including, *inter alia*, the west parallel taxiway to connect its Development with the runway at the Airport. Trial Tr. at 583:18-5, R. Exh. at 85-97 (Plaintiff Exh. 33). Clearwater Engineering, in turn, hired ES Engineering (Corrie Esvelt-Siegford, hereinafter "Esvelt-Siegford") to perform specific Airport engineering

work on the SilverWing project. Trial Tr. at 584:6-585:12; 715:5-12; 728:7-14; R. Exh. at 102-12 (Plaintiff Exh. 36).

SilverWing's engineers began preliminary engineering for the Development by contacting the FAA. Trial Tr. at 586:3-590-18; R. Exh. at 379 (Defendant Exh. B8). The FAA indicated to Esvelt-Siegford on November 3, 2006 that "the runway was not going to move." Trial Tr. at 732:20-733:12; 783:14-784:1 ("this was preliminary engineering. Nothing at this point was set in stone"); R. Exh. at 117-19 (Plaintiff Exh. 39). Thereafter, the engineers requested that the Airport Manager (O'Leary) provide them with a FAA approved copy of the ALP for the Airport.[3] Trial Tr. at 579:5-580:6; 729:6-732:8. On December 5, 2006, the Airport Manager provided Van Dyk with a hard copy of the ALP depicting Alternative 2(B) and a hard copy of the Environmental Assessment ("EA")[4] done for the planned west side taxiway. Trial Tr. at 592:1-593:3, R. Exh. at 122 (Plaintiff Exh. 45). In so doing, the Airport Manager specifically told Van Dyk "this is what you work from." Trial Tr. at 593:4-11. Van Dyk testified that this was important to her and that "[i]t would have been a huge red flag" if the Airport Manger had told her that she needed to wait for future approval of the ALP. Trial Tr. at 593:12-21. Given the assurances of the Airport Manager, SilverWing's engineers specifically relied upon this hard copy ALP to "site our taxiway, our parallel taxiway for the – and to lay out

[3] FAA expert Thomas Chastain testified that it was reasonable for SilverWing's engineers to rely on the ALP they were given by the Airport Manager, explaining, "[t]he airport manager represents the airport owner or sponsor. In this case the County." Trial Tr. at 1403:22-1404:5.

[4] The County's Airport Engineer prepared the EA to assess the environmental impact of ALP Alternative 2(B). Trial Tr. at 581:20-583:17; 591:1-11. "[A] good portion of [the EA] had to do with putting in the west side taxiway . . ." Trial Tr. at 582:17-20. *See also* Trial Tr. 591:5-7; 591:11; 598:16-23.

the development of the SilverWing site." Trial Tr. at 732:1-5.

After reviewing the ALP and EA provided by the Airport Manager, on December 7, 2006, Van Dyk called the Airport Engineer (Napier) to discuss the location of the west side taxiway and the County's plans to move forward with ALP Alternative 2(B). Trial Tr. at 594:24-596:7. The Airport Engineer confirmed that the County purchased $127,000.00 of wetlands credits to correspond with Alternative 2(B) in the EA. Trial Tr. at 596:8-599:1. Napier did not tell Van Dyk that ALP Alternative 2(B) had not been approved by the FAA or that SilverWing should wait for further approval. Trial Tr. at 599:5-7. To the contrary, Van Dyk testified that had he done so, it would "[d]efinitely be a red flag. . . . if they weren't going forward with 2B or they hadn't decided, if there was any indecision there, I would have called the client saying I think this is too risky; we need to wait and make sure they're going forward." Trial Tr. at 599:14-19.

Thereafter, McKeown requested a meeting with the Airport Board because the Development was at the point where SilverWing was going to "process all the entitlements, spend a lot of money, and I wanted them [the Airport Board] to just approve the project, assure that I was putting the taxiway in the right location." Trial Tr. at 344:15-21; R. Exh. at 120 (Plaintiff Exh. 40). McKeown prepared an agenda for that meeting, which included a specific item regarding "plans to improve the west side taxiway in front of our development." Trial Tr. at 320:25-322:19; 323:22-324:14; R. Exh. at 123 (Plaintiff Exh. 48).

On December 11, 2006, McKeown, along with his engineers, met with the Airport Board (and the Airport Manager and Airport Engineer), and he brought the revised site plan for the

SilverWing Development that showed the SilverWing taxiway moved to its new location consistent with ALP Alternative 2(B), "mostly" on Airport property. Trial Tr. at 325-329; R. Exh. at 388 (Defendant Exh. B15). McKeown testified that the County specifically confirmed that SilverWing was placing its taxiway in the correct location, according to the County's ALP Alternative 2(B). Trial Tr. at 331:6-332:22. *See also* Trial Tr. at 344:4-345:12.

On December 12, 2006, McKeown sought additional assurances from the County that SilverWing should build its west side taxiway in the location shown on ALP Alternative 2(B). Trial Tr. at 336:4-337:18; R. Exh. at 124 (Plaintiff Exh. 53). On December 13, 2006, the Airport Manager specifically informed McKeown: "We would allow you to build inside our property line so that it aligns and conforms with where the taxiway should go for its future full length." Trial Tr. at 337:17-338:9; 346:17; R. Exh. at 124 (Plaintiff Exh. 53).

Shortly thereafter, McKeown brought a copy of his revised site plan to meet with Bonner County Commissioner Lewis Rich and the Airport Manager, Airport Engineer and Airport Board to "confirm exactly what he [Rich] wanted." Trial Tr. at 346:18-348:7. Commissioner Rich talked "at length" with McKeown about the location of the SilverWing taxiway and specifically assured him that it was placed in the correct location and "thanked [him] for doing it." Trial Tr. at 348:8-20. During the meeting, an issue had come up about the location of some equipment that needed to be moved, so McKeown asked the Airport Manager and Airport Engineer to go to the Property to show him what equipment they were talking about and to confirm the location that the taxiway should be built. Trial Tr. at 348:22-349:18. The Airport Engineer brought a copy of ALP Alternative 2(B), and the three men walked the SilverWing Property to, once again,

confirm the correct location of SilverWing's planned taxiway consistent with ALP Alternative 2(B). Trial Tr. at 349:19-351:2. At no point during this walk through did either the Airport Manager or Airport Engineer tell McKeown that SilverWing should not build its taxiway in the location consistent with ALP Alternative 2(B). Trial Tr. at 351:3-13.

Based on the above repeated and consistent assurances by the County, SilverWing agreed to revise its site plan to place its taxiway "mostly" on Airport property in a location consistent with ALP Alternative 2(B). *See* Trial Tr. at 326:11-328:7; R. Exh. at 388 (Defendant Exh. B15).

4. <u>The County Reviews and Continues to Approve SilverWing's Altered Plans.</u>

SilverWing was required to submit two forms to the FAA for approval of its Development: (1) Form 7480 – Notice of Landing Area Proposal ("Form 7480") that dealt with SilverWing's proposed taxiway given that it was now going to be built partially on Airport property; and (2) Form 7460 – Notice of Proposed Construction and Alteration ("Form 7460") that dealt with the structures at the Development off Airport property. Trial Tr. at 740:15-744:5.

On January 22, 2007, SilverWing sent the County its detailed plans via Form 7480 and Form 7460. Trial Tr. at 745:16-22. Both Forms specifically relied on, and attached, ALP Alternative 2(B). Trial Tr. at 744:2-15. SilverWing was required to submit such plans through the Airport Manager, not directly to the FAA. Trial Tr. at 744:16-745:15. The County's Airport Manager and Airport Engineer reviewed SilverWing's 7480 and 7460 Forms and, on January 31, 2007, provided substantive comments on them. R. Exh. at 156-60 (Plaintiff Exh. 62 and 65); Trial Tr. at 745:16-748:2. SilverWing incorporated the County's comments into a final draft and sent them back to the County on the same day. R. Exh. at 144-55 (Plaintiff Exh. 60 and 61); Trial

Tr. at 748:3-749:14. On February 14, 2007, the Airport Manager provided SilverWing with additional comments on the FAA Forms and indicated that he would submit them to the FAA. R. Exh. at 161-63 (Plaintiff Exh. 68 and 69). Trial Tr. at 749:15-754:5. Throughout this process, the County never informed SilverWing that the taxiway was incorrectly located because it was based on an unapproved ALP. Trial Tr. at 747:21-24. Instead, on February 14, 2007, the County, as Airport Sponsor, submitted SilverWing's Form 7480 and Form 7460, which were based on and attached ALP Alternative 2(B), to the FAA for approval, stating it had "no objection" to the submission. R. Exh. at 164 (Plaintiff Exh. 70). Trial Tr. at 718:16-23; 754:3-755:16.

On April 30, 2007, the FAA informed the County that it had reviewed SilverWing's Form 7480 (taxiway) and indicated that "we have no objection to its construction, provided that the taxiway design standards meet FAA Advisory Circular 150/5300-13, Airport Design." Trial Tr. at 756:6-757:6; R. Exh. at 200 (Plaintiff Exh. 81). Shortly thereafter, on May 3, 2007, the FAA approved SilverWing's Form 7460 for construction of its Development. Trial Tr. at 759:6-10; R. Exh. at 201-02 (Plaintiff Exh. 84).

On May 31, 2007, SilverWing's engineers sent the FAA additional plans it had requested concerning the taxiway construction and informed the FAA that an environmental checklist was not needed because the County already completed, and the FAA approved, the EA for the full-length taxiway shown on ALP Alternative 2(B). R. Exh. at 203 (Plaintiff Exh. 88). On July 11, 2007, the FAA informed Esvelt-Siegford that the FAA had received and reviewed SilverWing's taxiway plans and that SilverWing could move forward with the taxiway construction. R. Exh.

at 204-05 (Plaintiff Exh. 89).

Beginning in September 2007, SilverWing constructed a 1,098-foot taxiway partially on Airport property consistent with ALP Alternative 2(B) at a cost of approximately $851,120.00. Trial Tr. at 387:8-19; 763:15-19; 943:22-944:4; R. Exh. at 317-18 (Plaintiff's Exh. 177 and 178.) Doing so, rather than constructing the taxiway solely on SilverWing's property as it initially planned, caused SilverWing to incur significantly more cost and expense because of the increased requirements for on-Airport construction. Trial Tr. at 331:10-23.

5. The County Supports SilverWing's Development.

In early January 2007, SilverWing prepared and submitted its conditional use, subdivision and planned unit development applications to the City of Sandpoint. Trial Tr. at 351-58; R. Exh. at 127-43 (Plaintiff Exh. 56, 57 and 58). Each one of these applications was specifically based on the ALP depicting Alternative 2(B) and explained: "A partial parallel taxiway that is part of Sandpoint Airport's Master Plan will be constructed within 7.5' of the parcel's east boundary with the remainder on Bonner County property." R. Exh. at 128, 135, 141 (Plaintiff Exh. 56, 57 and 58).

On February 20, 2007, the Sandpoint Planning Commission met to consider SilverWing's applications. R. Exh. at 165-71 (Plaintiff Exh. 71). During this meeting, both the Chairman of the Airport Board and Airport Manager testified in support of SilverWing's applications. Trial Tr. at 359-61; R. Exh. at 168 (Plaintiff Exh. 71). Moreover, when specifically asked whether the Development would impact the long term development of the Airport, Airport Board Chairman Terry McConaughey ("McConaughey") responded, "there are no plans for major developments

for runway length, except for the taxi way on the left side, which SilverWing is developing within FAA guidelines." R. Exh. at 168 (Plaintiff Exh. 71). The Sandpoint Planning Commission approved SilverWing's PUD. R. Exh. at 170-71 (Plaintiff Exh. 71).

On March 21, 2007, McConaughey attended a Sandpoint City Council meeting wherein SilverWing's PUD (based on ALP Alternative 2(B)) was considered. R. Exh. at 174-81 (Plaintiff Exh. 75); Trial Tr. 362-65. Again, McConaughey testified that he "supports the project." R. Exh. at 177 (Plaintiff Exh. 75). The City of Sandpoint unanimously approved SilverWing's PUD. R. Exh. at 179-81 (Plaintiff Exh. 75). SilverWing began construction of its Development in September 2007. Trial Tr. at 763:15-19. Through December 31, 2008, SilverWing conducted significant development work at its Property, including grading all 45 lots, utility work, fencing, paving streets and building its taxiway, at a total cost of $5,723,120.00. Trial Tr. at 387:8-19; 943:22-944:4; R. Exh. at 317 (Plaintiff Exh. 177).

6. <u>The Parties Enter into a Through The Fence Airport Access Agreement</u>.

Although SilverWing already had runway access rights under its Easement, SilverWing decided to enter into a Through the Fence Airport Access Agreement ("TTFA") with the County, in part, to help share the costs associated with Airport access. Trial Tr. at 378-380; 475:9-21; R. Exh. at 193-99 (Plaintiff Exh. 76). In April 2007, SilverWing and the County negotiated the TTFA to grant SilverWing a perpetual right to access the Airport's runway in private aircraft from the Property for a yearly fee. Trial Tr. at 378-83.

The Airport Board approved the TTFA on April 16, 2007, and sent it to the County Commissioners with a recommendation to approve it. R. Exh. at 192 (Plaintiff Exh. 76). On

April 27, 2007, County Commission Chairman Lewis Rich executed the TTFA on behalf of the County, which included the County's specific acknowledgment that "the Licensee is constructing 44 residential airplane hangars." R. Exh. at 195, 198 (Plaintiff Exh. 76). It was the County's responsibility to get the TTFA approved by the FAA. Trial Tr. at 1372:14-17.

Subsequently, the Airport Manager sent the partially executed TTFA to the FAA for review and approval, and on May 3, 2007, the FAA responded that it considered residential use adjacent to a public airport to be an incompatible use and "encouraged" the County to "ensure through your TTF Agreement that access is not provided to hangars with residences." R. Exh. at 201-02 (Plaintiff Exh. 84). The FAA never approved the TTFA. R. Exh. at 232 (Plaintiff Exh. 109). Nonetheless, on May 10, 2007, the County sent SilverWing the TTFA, along with a cover letter stating: "Enclosed are two copies of the revised through-the-fence agreement that the Commissioners signed reflecting the changes made by the Airport Advisory Board. Please return one copy to us. The other copy if [sic] for you to retain for your records." R. Exh. at 191 (Plaintiff Exh. 76). The County did not inform SilverWing that the FAA had not approved the TTFA. Trial Tr. at 384-85. On June 6, 2007, SilverWing executed the TTFA, as requested by the County. R. Exh. at 198 (Plaintiff Exh. 76); Trial Tr. 385.

7. The FAA Places the Airport on "Non-Compliance" Status.

In December 2008, the FAA placed the Airport on "non-compliance" status because the County had: (1) on May 25, 2000, prior to SilverWing's purchase of the Property in 2006, granted the Easement without FAA approval; (2) entered into the TTFA with SilverWing allowing residential "through the fence" access to the runway; and (3) allowed numerous private

property owners mid-field access to the runway at the Airport. R. Exh at 242-52 (Plaintiff Exh. 115); R. Exh. at 301-04 (Plaintiff Exh. 142).

In January 2009, the County implemented a Corrective Action Plan (the "CAP") in an effort to get the Airport back into compliance. R. Exh. at 235-38 (Plaintiff Exh. 110). Among other things, the CAP sought to: (1) "pursue[] all avenues to extinguish the perpetual nature of the SilverWings TTF easement;" and (2) "pursue[] an amendment to the Silverwing and Quest TTF agreement to require access only to the end of the runway; midfield access is unacceptable from a safety perspective." *Id.* at 236. *See also* Appellant Br. at 8 n.5. The CAP was partially accepted by the FAA in February 2009. R. Exh. at 398 (Defendant Exh. D3).

On March 25, 2009, the FAA notified the County that the SilverWing taxiway was not constructed based on an "approved ALP." R. Exh. at 241 (Plaintiff Exh. 114). The FAA further stated that if "the taxiway was constructed in the incorrect location, then SilverWing needs to have a plan to relocate the taxiway, when the runway is shifted." *Id.* McKeown testified this was the first time he was made aware of the fact that ALP Alternative 2(B) had not been approved by the FAA. Trial Tr. at 413:4-414:15. Indeed, he testified that he was "shocked and infuriated" at the news. Trial Tr. at 414:16-17.

8. <u>SilverWing Works With the County to Address FAA Concerns.</u>

SilverWing was unaware of the FAA's concerns with its Development until the County's designated FAA liaison, Chris Popov, informed them of such. Trial Tr. at 403:10-406:21. Immediately thereafter and continuing through 2011, SilverWing worked with the County and the FAA to resolve the County's non-compliance status. Trial Tr. at 412:4-413:1. *See also* Trial

Tr. at 1022:19-1033:20 (SilverWing hired FAA specialty counsel to work with the FAA).

In March 2011, the FAA's interim policy allowing existing residential developments with through the fence access went into effect, 76 Fed. Reg. 15,028 (Mar. 18, 2011), rendering SilverWing's access FAA compliant. R. Exh. at 402 (Defendant Exh. E40); Trial Tr. at 416:11-17; 1063:20-22. On October 11, 2011, the County approved an amended ALP moving the runway and taxiway 60 feet to the west and acquiring all or some of the SilverWing Development. Trial Tr. at 424:22-425:19; R. Exh. at 253 (Plaintiff Exh. 121). McKeown testified that this ALP "ripped up all my front lots, it ripped up all my taxiways, interior, and it ripped up the taxiway I built on behalf of the County." Trial Tr. at 425:16-19. The FAA approved the amended ALP on October 24, 2011. *Id.* The County's FAA liaison (Popov) testified that "the biggest issue" of the CAP was the County's seeking to "terminate and extinguish" SilverWing's access rights to the runway. Trial Tr. at 1363:25-1364:10.

In February 2012, the FAA informed the County that it was tentatively placing the Airport back into compliance conditioned on the Airport continuing to pursue items in its CAP, including extinguishing SilverWing's Easement and modifying its TTFA. Trial Tr. at 426:2-14; 1369:22-24. In 2012, Congress passed legislation rescinding the previous prohibition on residential through-the-fence access agreements. Pub. L. 112-95 § 136, 126 Stat. 23-24 (amending 49 U.S.C. § 47107); Trial Tr. at 1369:22-1379:3.

9. Three Years After this Lawsuit was Initiated, the County Gets FAA Approval of New ALP.

In 2015, the FAA signed a new ALP for the Airport. Trial Tr. at 472:10-17; 1262:6-21;

1370:4-11. According to the County, this ALP "is in complete conformity with the SilverWing development as built." Appellant Br. at 9.

C. Course of Proceedings

1. SilverWing Sues the County and the County Removes Case to Federal Court.

On May 11, 2012, SilverWing initiated this matter by filing its Complaint, which pled three counts against Bonner County: (1) Breach of the Covenant of Good Faith and Fair Dealing; (2) Taking Without Compensation – Inverse Condemnation pursuant to 42 U.S.C. § 1983; and (3) Violation of Equal Protection pursuant to 42 U.S.C. § 1983. R. at 40. The case began in the district court in Bonner County, and the County removed it to the U.S. District Court for the District of Idaho on June 6, 2012. R. at 86.

2. Judge Lodge Denies the County Summary Judgment on SilverWing's Promissory Estoppel Claim and Remands Claim to State Court.

The parties engaged in extensive discovery, and on October 16, 2013, SilverWing amended its Complaint to add a fourth count for promissory estoppel. R. at 268. The County sought summary judgment on all four of SilverWing's claims based on federal preemption. On November 21, 2014, the court granted the County's motion for summary judgment with respect to the first three counts of SilverWing's Amended Complaint but denied summary judgment as to the fourth count for promissory estoppel. As explained by Judge Edward Lodge:

> Having undertaken a lengthy review of the record in this case, the Court finds SilverWing's claim for breach of the covenant of good faith and fair dealing is preempted by federal law but its claim of promissory estoppel is not. The difference between the two claims lies in the allegations giving rise to each. Unlike the breach claim, the promissory estoppel claim is based on allegations that do not

> involve interference with federal laws and regulations sufficiently to fall within the scope of the preempted field.
>
> The promissory estoppel claim centers around allegations involving the County's representations to SilverWing upon which SilverWing relied in moving forward with the proposed development and expending a great deal of money. In particular, SilverWing's claims that the County failed to provide SilverWing with the current/correct ALP, the County repeatedly assured SilverWing that the alternative 2(B) layout would be used, the County allegedly requested that the West Taxiway be placed where SilverWing built it, and the County failed to get FAA approval for the TTF Agreement. Those representations occurred prior to the FAA's involvement and enforcement of its regulations. The fact that the FAA later determined the Airport was not in compliance does not mean the County may not be liable for any misrepresentations it made to SilverWing and/or its conduct in its dealings with SilverWing. As such, the Court denies the Motion for Summary Judgment as to the Promissory Estoppel claim.

SilverWing at Sandpoint, LLC v. Bonner Cty., 2014 WL 6629600, at *10 (D. Idaho Nov. 21, 2014), *aff'd*, 700 F. App'x 715 (9th Cir. 2017); *see also* R. at 5746-47. On January 21, 2015, the federal court remanded SilverWing's promissory estoppel claim to state court. R. at 159.

3. SilverWing Prevails in its Defense of the County's Second Motion for Summary Judgment.

Back in state court, on May 1, 2015, the County moved for judgment on the pleadings and subsequently filed its second motion for summary judgment on SilverWing's promissory estoppel claim. R. at 168, 220. On April 13, 2016, the district court denied both motions, finding genuine issues of material fact as to whether the County made a promise to SilverWing and whether it was reasonable for SilverWing rely on the County's promise. R. at 3073.

4. The County Asserts Counterclaims, and SilverWing Moves for Summary Judgment.

On March 3, 2016, the County amended its Answer to assert counterclaims against SilverWing for: (1) Breach of Contract; and (2) Breach of the Covenant of Good Faith and Fair Dealing, related to the parties' TTFA. R. at 2985-3006. SilverWing subsequently moved for summary judgment on the counterclaims. R. at 3075. On September 8, 2016, the court granted SilverWing's motion in part, dismissing three of the County's five theories of breach of contract and dismissing the County's claim for breach of the implied covenant of good faith and fair dealing in its entirety. R. at 3314-3327.

5. SilverWing Prevails at Trial in Bonner County.

On November 15, 2016, a six-day jury trial commenced on SilverWing's promissory estoppel claim and the County's breach of contract counterclaim in Bonner County. Trial Tr. at 2:4-10. The jury found for SilverWing on its promissory estoppel claim and awarded it $250,000.00 in out-of-pocket reliance damages. Trial Tr. at 1577-79. The jury also determined SilverWing did not breach the TTFA. *Id.* Specifically, the jury returned the following Verdict on Special Interrogatories on SilverWing's promissory estoppel claim:

> **Question No. 1:** Did the County make one or more promises to SilverWing?
>
> **Answer to Question No. 1**: Yes [√] No [ ]
>
> **Question No. 2**: Did SilverWing rely on such promise or promises by acting, or not, to its detriment?
>
> **Answer to Question No. 2:** Yes [√] No [ ]
>
> **Question No. 3:** Was SilverWing's reliance on the promise, or

promises, foreseeable, or should it have been foreseeable to the County?

Answer to Question No. 3: Yes [√] No [ ]

Question No. 4: Was SilverWing's reliance on the promise, or promises, reasonable?

Answer to Question No. 4: Yes [√] No [ ]

Question No. 5: What is the amount of out-of-pocket damages, if any, sustained by SilverWing as a result of its reliance on Bonner County's promise or promises from October 25, 2006 through December 31, 2008?

Answer to No. 5: $250,000.00.

R. at 4901; *see also* R. at 4906.

The County moved for JNOV on SilverWing's promissory estoppel claim. R. at 4908. On March 17, 2017, the court denied the County's JNOV motion. R. at 5727-48. The County timely filed its original Notice of Appeal on April 14, 2017. R. at 5821.

6. The District Court Awards SilverWing its Attorney Fees and Costs.

Following extensive briefing by the parties, the district court entered its Memorandum Decision on Defendant's Motion to Disallow Costs and Fees. R. at 5836. Therein, the court concluded that SilverWing was the prevailing party in the state court action and was entitled to its fees and costs. The court awarded SilverWing $48,883.19 for its costs as a matter of right and $704,024.63 for its reasonable attorney fees. R. at 5863. Of this total amount, $445,622.40 in attorney fees was awarded to SilverWing for prosecution of its promissory estoppel claim, $252,850.10 for its successful defense of the County's counterclaims, and $5,552.13 for legal research. R. at 5862. The court also awarded SilverWing an additional $11,458.50 for its fees

related to supplemental briefing on an issue raised by the County at oral argument. R. at 5862, 5875. On June 9, 2017, the court entered Judgment against the County for SilverWing's attorney fees and costs in the total amount of $764,363.32. R. at 5875.

On July 13, 2017, the County filed its Amended Notice of Appeal. R. at 5878. On August 11, 2017, this Court granted the Idaho Association of Counties' motion to file *Amicus Curiae* Brief. The County filed its Appellant's Brief on November 16, 2017 ("Appellant Br."). The Idaho Association of Counties also filed its *Amicus Curiae* Brief on November 16, 2017 ("Amicus Br.").

II. ISSUES PRESENTED ON APPEAL

In its Appellant's Brief, the County asserts three issues on appeal. SilverWing restates the issues on appeal as follows:

1. Whether the district court erred in denying the County's JNOV motion;

2. Whether the district court erred in awarding SilverWing its reasonable attorney fees under Idaho Code § 12-120(3) for its successful promissory estoppel claim; and

3. Whether the County is entitled to an award of its attorney fees and costs incurred in the district court and on appeal under Idaho Code § 12-117 and/or under the TTFA.

In addition, SilverWing asserts the following issue on appeal:

4. Whether SilverWing is entitled to its attorney fees and costs on appeal under Idaho Code §12-120(3).

III. STANDARD OF REVIEW

A. Judgment Notwithstanding the Verdict.

A decision on a motion for JNOV under I.R.C.P. 50(b) is a pure question of law and, therefore, the standard is one of free review. This Court applies the same standard as the district court when ruling on the JNOV motion—whether substantial evidence supports the jury's verdict. *Johannsen v. Utterbeck*, 146 Idaho 423, 428, 196 P.3d 341, 346 (2008). Thus, the question here "is whether 'giving deference to the district court and drawing all inferences in favor of the jury's verdict, there is substantial and competent evidence to support the verdict.'" *Id.* (citations omitted). *See also Schroeder v. Partin*, 151 Idaho 471, 476, 259 P.3d 617, 622 (2011) (on a JNOV motion, "the moving party admits any adverse facts, and the Court must draw all inferences in the light most favorable to the nonmoving party"). By substantial, it is not meant that the evidence is uncontracted, but that it is of sufficient quantity and probative value that reasonable minds could conclude that the jury's verdict was proper. *Lanham v. Idaho Power Co.*, 130 Idaho 486, 495-96, 943 P.2d 912, 921-22 (1997). "In reviewing a grant or denial of a motion for JNOV the court may not reweigh evidence, consider witness credibility, or compare its factual findings with that of the jury." *Hall v. Farmers All. Mut. Ins. Co.*, 145 Idaho 313, 324, 179 P.3d 276, 287 (2008).

B. Attorney Fees and Costs.

The award of attorney fees and costs is within the discretion of the district court and will not be disturbed absent an abuse of discretion. *Idaho Transp. Dep't v. Ascorp, Inc.*, 159 Idaho 138, 140, 357 P.3d 863, 865 (2015). To assess an abuse of discretion, this Court applies the

three-factor test: "(1) whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the boundaries of this discretion and consistent with the legal standards applicable to the specific choices available to it; and (3) whether the trial court reached its decision by an exercise of reason." *Rocky Mountain Power v. Jensen*, 154 Idaho 549, 554, 300 P.3d 1037, 1042 (2012). Significantly, "[t]he burden of showing the trial court abused its discretion rests with the appellant." *Walker v. Boozer*, 140 Idaho 451, 456, 95 P.3d 69, 74 (2004). "Whether an action is based on a commercial transaction is a question of law over which this Court exercises free review." *Idaho Transp. Dep't*, 159 Idaho at 140, 357 P.3d at 865.

IV. ARGUMENT

A. The District Court's Denial of the County's JNOV Motion Must be Affirmed Because Substantial and Competent Evidence Supports the Jury's Verdict.

In denying the County's JNOV motion, the district court found that "the jury's verdict is based on substantial and competent evidence." R. at 5741. As set forth below, this finding is supported by substantial evidence, particularly when all adverse inferences from the evidence are taken in the light most favorable to SilverWing.

1. SilverWing's Promissory Estoppel Claim is Not Based on Access Rights Created Under the TTFA and, Therefore, Not Barred by Its Existence.

Here, as below, the County argues that SilverWing's promissory estoppel claim is barred because the promises made by the County to SilverWing are encompassed within the TTFA. *See* Appellant Br. at 12-16. This argument is not supported by the County's authority or the evidence presented at trial.

First, none of the cases cited by the County apply to the facts of this case. Appellant Br.

at 13-14. In *Lettunich v. Key Bank Nat'l Ass'n*, 141 Idaho 362, 109 P.3d 1104 (2005), a bank argued that the statute of frauds rendered an alleged promise to lend money to plaintiff unenforceable. The plaintiff attempted to invoke promissory estoppel to prevent the bank from denying the enforceability of its oral promise to lend him money. *Id.* This Court noted that because the promise did not comply with the statute of frauds, "there was not a complete promise . . . to be enforced." *Id.* at 367, 109 P.3d at 1109. In contrast, here, the jury found that SilverWing reasonably relied upon complete promises made by the County to its detriment, causing it to suffer economic damage. R. at 4901-4903.

Similarly, in *Idaho Wool Growers Ass'n v. State*, 154 Idaho 716, 723, 302 P.3d 341, 348 (2012), the plaintiff based its promissory estoppel claim on a letter that did not contain a promise. The district court dismissed the claim for lack of evidence of a promise and this Court affirmed. *Id.* In contrast, here, the jury heard testimony from McKeown and his engineers and reasonably concluded that complete promises were made. R. at 4901.

Finally, in *Zollinger v. Carroll*, 137 Idaho 397, 49 P.3d 402 (2002), this Court affirmed the district court's finding that defendants had made no promises and that the corresponding contracts were illegal. 137 Idaho at 398, 49 P.3d at 403. Here, SilverWing is not attempting to enforce a contract (illegal or otherwise) between two other people for its benefit. Accordingly, the cases cited by the County are inapplicable.

Second, the factual record below makes clear that the County's promises to SilverWing about ALP Alternative 2(B) and where to build its taxiway are independent and separate from the TTFA concerning midfield access rights. In order for the County's promises to SilverWing

to be encompassed within the TTFA, the TTFA would have had to contemplate the Development's location and/or a particular ALP – which it did not. As the district court noted, "[w]here the airport layout plan called for Plaintiff's development (be it adjacent to, or very far away from, the runway) is independent from whether planes coming from such development had permission to access the airport runway, and if so, at what cost." R. at 5734.

Unlike in *Lettunich* where the agent promised the principal would enter into the contract (and provide plaintiff with a loan), here the County's agents promised, not that the principal would enter into the TTFA, but that the Development corresponded with the correct ALP. This case would be more like *Lettunich* if O'Leary promised SilverWing the County would enter into the TTFA, but thereafter the County decided not to, and in the interim SilverWing relied on O'Leary's promise and began developing to its economic detriment. Instead, O'Leary and Airport Board members promised SilverWing its Development plan conformed to the proper ALP, and the taxiway was in the proper location. Thereafter, in a separate time and place, the parties entered into a contract that permitted SilverWing—independent of its Development's configuration—access to the Airport runway for an annual fee. Under these circumstances, the district court held "[c]ontracting access rights with a developer does not cure inaccurate assertions and promises unrelated to the terms of that contract." R. at 5734.

The County argues that the TTFA's inclusion of a map of the Airport (Exhibit A to the TTFA) indicates that the TTFA's scope includes promises about the layout of the Airport. Appellant Br. at 6-7, 15-16. In interpreting contractual language, courts begin with the language of the contract itself. *Cristo Viene Pentecostal Church v. Paz*, 144 Idaho 304, 308, 160 P.3d 743,

747 (2007). The TTFA's reference to Exhibit A is preceded by a paragraph entitled "Access to Airport." R. Exh. at 194 (Plaintiff Exh. 76). Moreover, the TTFA provides that "Bonner County hereby grants to [SilverWing] access to the Airport in private aircraft at the location designated in Exhibit 'A' attached hereto and made a part of by this reference." *Id.* Thus, it is clear that Exhibit A is included to show where the access rights were being granted. Because there are no terms in the TTFA specifically indicating the parties are bound to follow a particular layout plan, the County's previous promises made about layout plans are unrelated. This conclusion is consistent with the testimony at trial from numerous witnesses, including McKeown and former Commissioner Joe Young, that the TTFA is—as labeled—an access agreement (*see* R. Exh. at 191-99 (Plaintiff Exh. 76); Trial Tr. at 381:3-382:2) and that SilverWing understood it to be limited to providing runway access at the midfield access point designated on Exhibit A. *See* R. Exh. at 199 (Plaintiff Exh. 76); Trial Tr. at 475:9-478:1.

The district court considered the County's arguments herein and methodically reviewed the evidence presented at trial and held that "[t]he legal defense that a written contract precludes claims for promissory estoppel on the same subject matter of such contract does not factually, legally or equitably apply to the promises and contract in this case." R. at 5735-36. Substantial evidence supports this conclusion and, therefore, it should be affirmed.

2. SilverWing Presented Substantial Evidence at Trial to Support the Jury's Verdict Awarding SilverWing Reliance Damages.

The County contends that the district court erred in denying its Motion for JNOV because there is not substantial evidence to support each of the elements of SilverWing's promissory

estoppel claim. Appellant Br. at 16-23. As set forth below, this claim is without merit.

a. *SilverWing Presented Substantial Evidence of Promises at Trial.*

The jury was instructed that a "promise" is defined as the "manifestation of an intention to act or refrain from acting in a specified manner, conveyed in such a way that another is justified in understanding that a commitment has been made; it is a person's assurance that the person will or will not do something." R. at 5914 (Jury Instruction No. 6). *See* PROMISE, BLACK'S LAW DICTIONARY (10th ed. 2014). At trial, SilverWing presented substantial evidence that the County, through its agents, in 2006 and 2007 made specific promises to McKeown and SilverWing's engineers, that: (1) the ALP provided to SilverWing in 2006 depicting Alternative 2(B) was the ALP upon which SilverWing should base the plans for its Development, and (2) the west parallel taxiway designed and constructed by SilverWing was in the correct location. *See, e.g.*, Trial Tr. at 330:20-332:22 (McKeown received assurances and commitments from Airport Board about proper location to build SilverWing taxiway); 335:10-338:9 (O'Leary confirmed the County's assurance to SilverWing that it should build its taxiway consistent with ALP Alternative 2(B)); 344:15-345:12 (McKeown received assurances from Airport Board that plan to build taxiway partially on County property consistent with ALP Alternative 2(B) was "appropriate and correct to go forward with"); 345:20-346:23 (O'Leary confirmed assurance that SilverWing should build taxiway consistent with ALP Alternative 2(B)); 348:8-20 (Commissioner Rich gave commitment to SilverWing that it should build taxiway consistent with ALP Alternative 2(B)); 350:23-351:13 (Napier and O'Leary assured SilverWing that taxiway should be built in location consistent with ALP Alternative 2(B)); 359:11-19

(McConaughey and O'Leary testify at Sandpoint City Commission to assure Commission that SilverWing project consistent with approved ALP); 360:12-361:15 (*id.*); 738:3-740:6, 744:12-745:3, 747:17-748:2, 754:3-22 (Esvelt-Siegford trial testimony regarding promises made by County); 592:1-593:21,599:2-24 (Van Dyk trial testimony regarding promises made by County). *Compare Gilbert v. Caldwell*, 112 Idaho 386, 391, 732 P.2d 355, 360 (Ct. App. 1987) ("as good as" statements were "indications of hope or expectation" and not binding commitments).

The County ignores this evidence and would have this Court believe that it did nothing more than "mistakenly provide[] SilverWing with incorrect information regarding the plans for the Airport." Appellant Br. at 18. As shown above, the County did substantially more than that—it repeatedly and consistently made assurances and commitments to SilverWing about where to place its taxiway and upon which ALP to base its Development. When viewed in the light most favorable to SilverWing, this certainly amounts to "substantial evidence" that would support the jury's finding that the County made "one or more promises to SilverWing." *See* R. at 4901.

b. *SilverWing Presented Substantial Evidence of Reasonable Reliance at Trial.*

Focusing on Defendant's Exhibit B9 (R. Exh. 380), the County argues that SilverWing's engineers decided on November 3, 2006 to use the ALP Alternative 2(B) based on a single conversation with the FAA and, therefore, could not reasonably rely on anything said by the County thereafter. Appellant Br. at 19-21. This argument directly contradicts the testimony of SilverWing's engineers and evidence presented at trial, including:

November 3, 2006 – Esvelt-Siegford speaks to FAA and emails Van Dyk a summary of

their conversation. Esvelt-Siegford testifies that this was preliminary engineering and there is a lot of work to be done. R. Exh. at 380 (Defendant Exh. B9); Trial Tr. at 783:14-784:1.

December 5, 2006 – Airport Manager (O'Leary) gives Van Dyk a large scale, hard copy of the current ALP for Airport and copy of EA—both show ALP depicting Alternative 2(B). R. Exh. at 122 (Plaintiff Exh. 45); Trial Tr. at 592:3-593:21. Shortly thereafter, Van Dyk confirms with Airport Engineer (Napier) that the County is purchasing $127,000.00 in wetlands credits to follow EA requirements for ALP Alternative 2(B). Trial Tr. at 594:24-599:24.

December 11, 2006 – Van Dyk, Esvelt-Siegford and McKeown meet with the Airport Board, Airport Manager and Airport Engineer for a presentation on the SilverWing project and its proposed taxiway design. Everyone assures SilverWing that it should build its taxiway based on the ALP depicting Alternative 2(B). R. Exh. at 123 (Plaintiff Exh. 48); Trial Tr. at 344:4-345:12 (McKeown), 601:14-603:17 (Van Dyk), 738:3-740:6 (Esvelt-Siegford).

January 22, 2007 through February 14, 2007 – Esvelt-Siegford gives Airport Manager (O'Leary) drafts of the FAA Forms 7460 and 7480 for FAA approval of SilverWing's Development and taxiway. Both forms attach the ALP depicting Alternative 2(B). Trial Tr. at 744:2-746:2. Airport Manager and Airport Engineer provide her with substantive comments to the draft FAA Forms. Neither of them tells her that the Forms are based on the wrong ALP. R. Exh. at 156-60 (Plaintiff Exh. 62 and 65); Trial Tr. at 746:6-748:2. Esvelt-Siegford finalizes the FAA Forms, incorporating the substantive comments from the County, and mails them to the Airport Manager. R. Exh. at 144-55 (Plaintiff Exh. 60 and 61); Trial. Tr. at 748:3-749:14. He provides additional comments on the FAA Forms and states he will mail the Forms to the FAA.

R. Exh. at 161-63 (Plaintiff Exh. 68 and 69); Trial Tr. at 750:20-754:5.

February 14, 2007 – Airport Manager (O'Leary) mails the 7460 and 7480 Forms to the FAA on behalf of the County as Airport Sponsor for the Airport, stating the Airport has "no objection" to the Forms. Both Forms attach the ALP depicting Alternative 2(B). R. Exh. at 164 (Plaintiff Exh. 70).

April 30, 2007 – The FAA approves SilverWing's Form 7480 for construction of the taxiway. R. Exh. at 200 (Plaintiff Exh. 81).

May 3, 2007 – The FAA approves SilverWing's Form 7460 for construction of its Development. R. Exh. at 201-02 (Plaintiff Exh. 84).

May 31, 2007 – Esvelt-Siegford sends the FAA additional plans it had requested concerning the taxiway construction. She also informs the FAA that an environmental checklist is not needed because the County completed, and the FAA approved, the EA for the full-length taxiway shown in the County's ALP depicting Alternative 2(B). R. Exh. at 203 (Plaintiff Exh. 88); Trial Tr. at 757:13-759:4. On July 2, 2007, Esvelt-Seigford emails the FAA to follow up, and the FAA confirms that it has received and reviewed the complete taxiway plans and SilverWing can move forward with the taxiway construction. R. Exh. at 204 (Plaintiff Exh. 89); Trial Tr. at 762:3-763:19.

While the County ignores this evidence, the jury did not. *See* R. at 5702. This clearly amounts to substantial and competent evidence of SilverWing's reasonable reliance[5] on the

[5] Both Appellant and Amicus cite *Brown v. Caldwell Sch. Dist. No. 132*, 127 Idaho 112, 898 P.2d 43 (1995), as an example where this Court did not apply the doctrine of promissory estoppel to a

County's promises.

c. ***SilverWing Presented Substantial Evidence of Damages at Trial.***

The jury was instructed that SilverWing must establish "substantial economic loss" as a result of its reliance on the County's promises. R. at 5913. *See also Grover v. Wadsworth*, 147 Idaho 60, 64, 205 P.3d 1196, 1200 (2009). "Reliance damages include expenses reasonably related to the purposes of the contract which would not have been incurred but for the contract's existence." *Beco Const. Co. v. Harper Contracting, Inc.*, 130 Idaho 4, 9, 936 P.2d 202, 207 (Ct. App. 1997).

At trial, Erick West, SilverWing's damages expert, testified that SilverWing incurred a total of $5,723,120.00 in reliance damages based on the County's promises. Trial Tr. at 943:17-944:15. Of this, SilverWing spent $851,120.00 on building its taxiway in reliance on the promises of the County. R. Exh. at 317 (Plaintiff Exh. 177). The County argues that SilverWing did not sustain any reliance damages because "nothing has changed and SilverWing's development as it stands today is in conformity with the approved ALP." Appellant Br. at 22. This argument ignores the undisputed testimony at trial that SilverWing incurred increased costs to design and build its taxiway in the location promised by the County; that is, partially on

government entity due to lack of reasonable reliance. Appellant Br. at 25; Amicus Br. at 20. In *Brown*, a school superintendent made promises to a teacher concerning her employment contract but had no actual authority to make the promises. This Court held the teacher could not reasonably rely on the promises since Idaho Code § 33-513 "sets out a detailed procedure to be followed when a school district seeks to employ professional personnel." *Brown*, 127 Idaho at 117-18, 898 P.2d 43, 48-49. In contrast, SilverWing reasonably relied on the County's promises based on the actual authority the County delegated to the Airport Manager and Airport Board as detailed in Section IV.A.3.a., *infra*.

Airport property as compared to entirely on SilverWing property. *See* Trial Tr. at 331:11-16 (McKeown testified "it was a much more expensive taxiway . . . you have to build it to a much higher level").

Based upon the evidence presented at trial, the jury awarded SilverWing $250,000.00 in reliance damages. R. at 5703. Viewing all of the evidence and inferences drawn therefrom in favor of SilverWing, substantial evidence supports the jury's award.

3. **Idaho's Open Meetings Law Does Not Bar SilverWing's Promissory Estoppel Claim.**

The County asserts Idaho's Open Meetings Law bars enforcement of any promises made to SilverWing by the County's agents, including members of the Airport Board and the Airport Manager. *See* Appellant Br. at 23. In support, the County relies on Idaho Code § 74-208, which provides:

> "If an action, or any deliberation or decision-making that leads to an action, occurs at any meeting which fails to comply with the provisions of this chapter, such action shall be null and void."

I.C. § 74-208 (emphasis added). The Open Meetings Law does not define "action." "Where the legislature has not provided a definition in the statute, terms in the statute are given their common, everyday meanings." *State v. Yzaguirre*, 144 Idaho 471, 477, 163 P.3d 1183, 1189 (2007). However, "decision" is defined to mean "any determination, action, vote or final disposition upon a motion, proposal, resolution, order, ordinance or measure on which a vote of a governing body is required, at any meeting at which a quorum is present, but shall not include those ministerial or administrative actions necessary to carry out a **decision previously adopted** in a meeting held in compliance with this chapter." I.C. § 74-202(1) (emphasis added).

"'Meeting' means the convening of a governing body of a public agency to make a decision or to deliberate toward a decision on any matter." I.C. § 74-202(6). *See Yzaguirre*, 144 Idaho at 477, 163 P.3d at 1189 ("Legislative definitions of terms included within a statute control and dictate the meaning of those terms as used in the statute.").

Here, the district court properly held "that Idaho's Open Meetings law does not render [the County's] promises null and void" because the County's promises "were not actions" under Idaho Code or, alternatively, they were "administrative actions necessary to carry out a decision previously adopted" pursuant to Idaho Code § 74-202. R. at 5737. This holding is supported by substantial evidence and Idaho Law.

a. *The County Delegated Authority to the Airport Manager and Airport Board to Act on Airport Matters, and Their Promises to SilverWing Were Not Actions Under Idaho's Open Meetings Law.*

A county, through its "board of county commissioners, <u>or by agents</u> and officers <u>acting under their authority</u>, or authority of law" has the power to take care of, manage and control county property. I.C. §§ 31-602, 31-604, 31-807 (emphasis added). This is in accord with well-established precedent that a principal may be bound by an agent acting within its express, implied or apparent authority.[6] *Clark v. Gneiting*, 95 Idaho 10, 11-12, 501 P.2d 278, 279-80 (1972). As explained in *Bailey v. Ness*, 109 Idaho 495, 479, 708 P.2d 900, 902 (1985), express and implied authority are both types of actual authority. Express authority is that which the principal explicitly grants the agent. *Id.* Implied authority is that "which is necessary, usual, and proper to accomplish or perform the express authority delegated to the agent by the principal."

[6] The jury was instructed on Idaho agency law. R. at 5919-24 (Jury Instruction Nos. 11-15).

Clark, 95 Idaho at 12, 501 P.2d at 280. Express authority may be proven with circumstantial evidence, and in a case of conflicting evidence, the trier of fact must resolve the "question of the nature and extent of the authority of an agent." *Muniz v. Schrader*, 115 Idaho 497, 500-01, 767 P.2d 1272, 1275-76 (Ct. App. 1989).

SilverWing presented substantial evidence that O'Leary—in his capacity as Airport Manager—had actual authority to bind the County on matters related to the Airport, including the promises made to SilverWing. Specifically, the Airport Lease signed by the Board of County Commissioners and assigned to O'Leary as Tenant (Airport Manager) details particular responsibilities delegated to him by the County, including:

> 8. Keep and maintain any and all records required by the County.
>
> . . .
>
> 25. Perform administrative and professional managerial duties related to planning, organizing, directing, and controlling the maintenance, services, and general operation of the Sandpoint Airport. He shall work in conjunction with the Sandpoint Airport Commission and the Bonner County Commissioners.
>
> 26. [O'Leary] shall act as a coordinator between Bonner County and prospective tenants, contractors, federal and state agencies pertaining to the improvement, protection, operation, and maintenance of Airport properties and attendant facilities.

R. Exh. at 23, 26 (Plaintiff Exh. 3 at 7, 10). This corresponds with O'Leary's understanding of his duties as Airport Manager, which included representing the County to all agencies (including the FAA), liaise and correspond with the FAA and attend Airport Board meetings. Trial Tr. at 1082:5-1083:21. O'Leary was also responsible for maintaining a record of correspondence with the FAA and the ALP files, including a copy of the most recent ALP. Trial Tr. at

1095:10-1096:7. SilverWing's understanding of O'Leary's responsibilities and authority correspond with O'Leary's actual authority. Trial Tr. at 288:22-289:6 (McKeown); 579:25-580:2 (Van Dyk); 729:10-12 (Esvelt-Siegford). As held by the district court, "[s]uch evidence is substantial, supports the jury's verdict, and is in harmony with Idaho's Open Meeting Laws." R. at 5738.

SilverWing also presented evidence that the Board of County Commissioners, in its "Resolution to Improve Operation of the Sandpoint Airport and to Create an Airport Advisory Board" ("Airport Board Resolution"), delegated authority to the Airport Board to, *inter alia*, supervise the management and improvement of airport operations, formulate an annual Airport budget and serve as a "communications conduit for Airport related matters," including acting as a "liaison between the Airport users and governmental officials." R. Exh. at 351-54 (Defendant Exh. A7). The Airport Board's actions are only "subject to approval by the Board of County Commissioners when such approval is deemed necessary."[7]

In this case, the jury found that the County, through its agents,[8] made promises to

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[7] *See* Respondent's Motion to Augment Record, filed February 1, 2018, attaching a full copy of Defendant Exhibit A7, including page two. Order Granting Respondent's Motion to Augment (February 6, 2018).

[8] The County ignores the district court's holding that, based on the evidence at trial, the County expressly delegated its authority to O'Leary and the Airport Board concerning Airport matters. R. at 5737-38. Instead, the County asserts, "SilverWing has introduced no evidence of actual authority and apparent authority is insufficient to support SilverWing's claim of promissory estoppel against the County." Appellant Br. at 25. The County then analyzes case law specific to apparent authority. *Id.* at 25-27; *see also* Amicus Br. at 20, 33-35. Given the substantial evidence presented by SilverWing regarding actual authority of County agents concerning the Airport, and the requirement that all evidence and inferences drawn therefrom be viewed in favor of

SilverWing concerning the ALP upon which to base its Development. R. at 5738. As explained by the district court:

> [S]uch a promise is not an action or decision that required a vote or final disposition upon a motion, proposal, resolution, order, ordinance, or measure. Defendant's promises to Plaintiff were not promises that it would change the management or control of the airport. Defendant did not promise Plaintiff that it would, at a later time, vote to adopt a different airport layout plan. Defendant's agent promised that Plaintiff's development plans were based on the correct airport layout plan. Defendant has not identified any law, rule, or ordinance requiring that the Airport Board take a vote before individual members (or agents) can make promises or assurances to parties with which it is negotiating regarding information within its charge.

R. at 5738. Therefore, the County's promises to SilverWing were not actions under Idaho Code § 74-208. And, even if those promises amounted to "actions," they were administrative actions necessary to carry out the terms of O'Leary's obligations as Airport Manager under his Airport Lease or the Airport Board's obligations to the County pursuant to the Airport Board Resolution.

The doctrine of ratification is also relevant. The jury was instructed that even if an "agent acts outside the scope of authority," the principal may still be bound by the agent's actions through ratification. R. at 5924. "Although the effect of a ratified act is essentially the same as an act that was authorized . . . ratification takes place after the act has occurred while authorization must occur before conduct arises." *Manning v. Twin Falls Clinic & Hosp., Inc.*, 122 Idaho 47, 54, 830 P.2d 1185, 1192 (1992).

SilverWing, case law where courts deny estoppel claims in the context of an agent having apparent (and not actual) authority is inapplicable.

Ratification by a municipality can be established by any action or inaction that amounts to an approval of its agent's actions. For example, in *Punxsutawney Mun. Airport Auth. v. Lellock*, 2000 PA Super 18, 745 A.2d 666 (2000), a tenant (Lellock) made improvements to a hanger he rented from the Punxsutawney Municipal Airport Authority ("PMAA") based upon an oral promise from the PMAA chairman (Chango) that the improvement costs would extend the lease period and be offset against rents. *Id.* at 668. PMAA later took the position that the oral contract was invalid because it was not a contract signed by the chairman or approved by a board vote. *Id.* Testimony at trial demonstrated that "individuals relied upon [Mr. Chango's] representations since [he] operated PMAA with full authority" and "the airport was in need of repair at the time, and any capital improvements were welcome by PMAA." *Id.* at 669. Lellock also "showed his plans for improving the hangar to everyone at the airport, and everyone knew [he] was making them." *Id.* at 669. Based on this evidence, the jury determined the agreement was enforceable "through the doctrines of ratification or estoppel." *Id.* On appeal, the court observed, "a municipality like a private corporation . . . may be estopped to deny the authority of its agents to act if it has the power to act." *Id.* at 671. PMAA board members "watched and waited" as Lellock made improvements to the hangar over the course of several years, and "no board member ever approached [Lellock] to prevent him from continuing with his plans to improve the hangar." *Id.* Since the elements of estoppel were present and "municipal inaction, plus acceptance of benefits, may constitute ratification," the appellate court held that the district court correctly permitted the jury to determine if a valid oral contract existed. *Id.* at 672.

The facts of this case are strikingly similar to those in *Punxsutawaney*. Namely, following the promises made by County agents, the County's actions (and inaction), while SilverWing planned its Development and built the taxiway based on the County's promises, ratified the promises. *See, e.g.*, R. at 5739 ("Defendant was aware that multiple airport layout plans were discussed and circulated through its agent, Mr. O'Leary."). Therefore, even if the jury determined the County's agents did not have actual authority for the promises made to SilverWing, SilverWing presented substantial evidence of ratification of the promises so as to provide an alternative basis on which the jury could have reasonably based its verdict.

b. *Principles of Substantial Justice and Fair Play Support the Jury's Verdict in Favor of SilverWing.*

The district court held that even if the County's promises were actions or decisions, "promissory estoppel is nevertheless applicable" based on equitable principles. R. at 5737-39. Promissory estoppel is an equitable remedy for damages arising out of good-faith reliance on a promise. "In its broadest and most general signification, equity denotes the spirit and habit of fairness, justness, and right dealing . . . the rule of doing to all others as we desire them to do to us." *Climax, LLC v. Snake River Oncology of E. Idaho, PLLC*, 149 Idaho 791, 796, 241 P.3d 964, 969 (2010) (citing *Land v. United States*, 29 Fed.Cl. 744, 752 (Fed.Cl. 1993)). As recognized by the district court, estoppel is available against government bodies where "required by notions of justice and fair play." R. at 5738-39 (citing *Idaho Wool Growers Ass'n, Inc. v. State*, 154 Idaho at 723, 302 P.3d at 348).

Moreover, the "modern trend" is to apply estoppel "to prevent unjust enrichment and to accord fairness to those who bargain with the agents of municipalities for the promises of the municipalities." *Wiggins v. Barrett & Assocs., Inc.*, 295 Or. 679, 692, 669 P.2d 1132, 1142 (1983); *see also Charleston Cty. v. Nat'l Adver. Co.*, 292 S.C. 416, 418, 357 S.E.2d 9, 10 (1987) ("The acts of a government agent that are within the proper scope of his authority may give rise to estoppel against a municipality."); *Aranosian Oil Co. v. City of Portsmouth*, 136 N.H. 57, 59, 612 A.2d 357, 358 (N.H. 1992); *US Ecology, Inc. v. State of California*, 92 Cal. App. 4th 113, 131, 111 Cal. Rptr. 2d 689 (2001) (principles of promissory estoppel "apply to claims against the government, particularly where the application of the doctrine would further public policies and prevent injustice."); *Bishop v. City of Columbia*, 401 S.C. 651, 666, 738 S.E.2d 255, 262-63 (Ct. App. 2013).

In this case, a jury comprised of Bonner County citizens determined that Bonner County agents made promises that SilverWing relied on to its detriment. As the district court stated, "[n]otions of justice and fair play are offended, and greatly diminished, if Defendant's promises are unenforceable. Defendant accepted the benefit conferred upon it by the Plaintiff's development: building the west side taxiway on County property." R. at 5739. Moreover, it would be *manifestly unjust and unfair* for this Court to nullify the jury's verdict which found that the County's agents made promises to SilverWing and that SilverWing's reliance on such promises by these individuals was reasonable and justified.

Further, *Amicus'* concern that promissory estoppel should never apply to a government entity "because it is inconsistent with sound, efficient and transparent governmental operations"

and could have a "chilling effect" is misplaced. *See* Amicus Br. at 28. Relying on *Terrazas v. Blaine Cty. ex rel. Bd. of Comm'rs*, 147 Idaho 193, 207 P.3d 169 (2009), *Amicus* claims that Idaho does not "apply the doctrine of equitable estoppel or quasi-estoppel against a local government entity." Amicus Br. at 17-19. This Court specifically declined to accept such a rule in *Terrazas*. 147 Idaho at 201, 207 P.3d at 177. Moreover, *Terrazas* does not compel such a result here because the promise at issue and person making that promise in *Terrazas* are distinguishable from the instant case.

In *Terrazas*, a county planner opined ("subject to further examination by the Board") that the Terrazases' property was located within a certain district and that the Terrazases relied on that opinion to incur significant expenses in preparing a subdivision application. *Id.* at 196, 207 P.3d at 172. When the Terrazases' application was denied because the planner's opinion was inaccurate, they argued that the County was estopped from denying their application. *Id.* at 200, 207 P.3d at 176. This Court disagreed, stating that if it applied "the doctrine of estoppel in the instant case, then all future boards of commissioners in similar circumstances would be estopped from disagreeing with the opinions of staff members simply because a landowner expended money in reliance on those promises." *Id.* at 201, 207 P.3d at 177 (emphasis added). In contrast to staff members with no actual authority, here the Airport Manager and members of the Airport Board were delegated actual authority by the County on Airport matters. Moreover, nothing in any of the repeated and consistent promises to SilverWing by the County indicated that they were "subject to further review." Authorized agents must have the ability to bind counties on matters within the scope of their authorization. Indeed, to hold otherwise would create chaos in

the day-to-day operation of Idaho's counties. Accordingly, this is the appropriate case for the Court to uphold the application of the doctrine of promissory estoppel against a county.

4. <u>Idaho's Statute of Frauds Does Not Bar SilverWing's Claim.</u>

Under Idaho's statute of frauds, an "agreement that by its terms is not to be performed within a year from the making thereof" is invalid unless in writing. I.C. § 9-505. "[E]ven if a contract appears on its face to anticipate performance for more than one year, it may fall outside the statute if it is subject to a condition or contingency that could occur within a year, terminating further performance." *Gen. Auto Parts Co. v. Genuine Parts Co.*, 132 Idaho 849, 856, 979 P.2d 1207, 1214 (1999) (quoting *Whitlock v. Haney Seed Co.*, 110 Idaho 347, 348, 715 P.2d 1017, 1018 (Ct. App.1986)). Idaho has construed its "statute of frauds narrowly." *Frantz v. Parke*, 111 Idaho 1005, 1008, 729 P.2d 1068, 1071 (Ct. App. 1986) ("We have allowed enforcement of an oral contract made for an indefinite period, to be determined by a stated future event, if it was possible-albeit unlikely-that the stated event could occur within a year.").

The County argues that the statute of frauds bars its promises to SilverWing because "SilverWing seeks to bind the County for more than one year" and that "one year after the alleged promises were made, nothing had changed." Appellant Br. at 30. The County cites one sentence of McKeown's testimony confirming that the runway had not moved to support this argument. *Id.* (citing Trial Tr. at 471:17-472:3). But, testimony about the movement (or lack thereof) of the runway is irrelevant to SilverWing's promissory estoppel claim. As detailed above, SilverWing's promissory estoppel claim was based on the County's promises concerning which ALP to rely on for its Development and the proper location of SilverWing's taxiway.

Moreover, the statute of frauds does not apply to the County's promises because they are subject to a contingency that could have occurred within one year. As noted by the district court, a number of contingencies could have prevented SilverWing from continuing with the Development and which would have then discharged the County's performance of its promises. R. at 5745. For example, SilverWing could have ceased to do business or sold the property or the County could have approved a new ALP. *Id.* As such, the "statute does not apply to Defendant's promises." *Id.*

5. **The County's Statute of Limitations Argument is a Red-Herring Rejected by the District Court and Should be Rejected by this Court Too.**

There is a four-year statute of limitations for actions "upon a contract, obligation or liability not founded upon an instrument of writing." I.C. § 5-217. "A cause of action for breach of contract accrues upon breach for limitations purposes." *See Cuevas v. Barraza*, 146 Idaho 511, 517, 198 P.3d 740, 746 (Ct. App. 2008) (stating statute of limitations began to run when plaintiff became aware of the breach). SilverWing filed its complaint on May 11, 2012 and, therefore, any claim that accrued before May 11, 2008 is time barred.

The County argues that the statute of limitations bars SilverWing's claim because in May 2007, "SilverWing's engineer Corrie Esvelt-Siegford knew that the FAA's letter responding to SilverWing's Form 7460 Application (R. at PTE 84) raised red flags" concerning "the FAA's position on the development" and specifically the fact that the Development involved residential use. Appellant Br. at 30; *see also* R. Exh. at 201-202 (Plaintiff Exh. 84). As the evidence at trial makes clear, this is both misleading and incorrect.

The County's promises concerned which ALP to rely on and the proper location of the taxiway, *not that the FAA approved residential hangars in SilverWing's Development.* McKeown testified that SilverWing first learned in April 2009, not 2007, that the ALP the County provided SilverWing in 2006 was not the FAA-approved plan; he testified he "was shocked and infuriated" at the news. Trial Tr. at 413:18-414:21. The Court must view this evidence and all inferences therefrom in favor of SilverWing. *See Schroeder*, 151 Idaho at 476, 259 P.3d at 622. Accordingly, this Court (like district court below (R. at 5743)) should find that SilverWing's promissory estoppel claim was timely.

6. The Idaho Constitution Does Not Bar SilverWing's Claim.

The County asserts that because Article VIII, § 4 of the Idaho Constitution and Idaho Code § 31-605 prohibit a county and other municipalities from loaning money or giving credit, the County could not make promises to SilverWing that were unsupported by consideration (promises that the County labels "gratuitous"). *See* IDAHO CONST. art. VIII, § 4 (County shall not lend or pledge credit or "become responsible for any debt, contract or liability of any individual, association or corporation."); I.C. § 31-605 ("No county must in any manner loan or give its credit to or in aid of any person, association or corporation unless it is expressly authorized by law so to do."). This argument defies common sense. As held by the district court, the County's promises to SilverWing about the correct ALP and location to build its taxiway, "in no reasonable view of the evidence, were promises to loan money or extend credit." R. at 5746.

Likewise, the County's argument concerning Article VIII, § 3, of the Idaho Constitution also fails. This section prohibits the County from incurring "indebtedness, or liability" exceeding

its revenues, without voter approval. IDAHO CONST. art. VIII, § 3. The purpose of Article VIII, § 3 is "to maintain the credit of the state and its political subdivisions by keeping them on a cash basis . . . and to prevent indebtedness incurred in one year from being paid from the income of a future year without voter approval." Michael C. Moore, *The Idaho Constitution and Local Governments - Selected Topics*, 31 Idaho L. Rev. 417 (1995). Thus, when a city attempted to issue bonds without a vote of the electors and without a provision for levying a special tax to pay the principal and interest on the bonds, such action violated Article, VIII, § 3. *See Feil v. City of Coeur d'Alene*, 23 Idaho 32, 129 P. 693 (1912).

In contrast to *Feil*, the County's promises to SilverWing concerning the ALP upon which SilverWing should base its Development and the location of its taxiway do not violate this section of the Idaho Constitution because such promises were not monetary obligations incurred by the County. Moreover, the County presented no evidence at trial that it incurred any specific liability to SilverWing that would exceed its ability to pay in the year in which it was entered. *See Greater Boise Auditorium Dist. v. Frazier*, 159 Idaho 266, 273, 360 P.3d 275, 282 (2015), *reh'g denied* (Nov. 23, 2015) ("The relevant determination under Article VIII, section 3 is whether the governmental subdivision presently bound itself to a liability greater than it has funds to pay for in the year in which it bound itself."). For the same reasons, *Amicus*' argument that Article VIII, § 3 should bar SilverWing's promissory estoppel claim also fails. *See* Amicus Br. at 23-25. Thus, the district court's finding that the Idaho Constitution does not bar SilverWing's promissory estoppel claim should be affirmed.

B. The District Court Properly Awarded SilverWing Attorney Fees on its Promissory Estoppel Claim Under Idaho Code § 12-120(3).

The County appeals the district court's award of $486,337.03 in fees to SilverWing under Idaho Code § 12-120(3), asserting SilverWing's promissory estoppel claim did not arise from a commercial transaction. The County's argument is unsupported by Idaho law and the facts of the case. As the district court held, "a commercial transaction is the gravamen of Plaintiff's promissory estoppel claim" and "served as the basis for Plaintiff's claim." R. at 5852.

Idaho Code § 12-120(3) provides that "in any civil action to recover on . . . any commercial transaction unless otherwise provided by law, the prevailing party shall be allowed a reasonable attorney's fee . . ." A "commercial transaction" is defined by the Idaho Code as "all transactions except transactions for personal or household purposes." I.C. § 12-120(3); *see also Stevens v. Eyer*, 161 Idaho 407, 412, 387 P.3d 75, 80 (2016) (quoting *Dictionary.com*, which defines the adjective "commercial" to mean "prepared, done, or acting with sole or chief emphasis on salability, profit, or success" or "able to yield or make a profit.").

"Thus, whether a party can recover attorney fees under Idaho Code Section 12-120(3) depends on whether the gravamen of a claim is a commercial transaction." *Sims v. Jacobson*, 157 Idaho 980, 985, 342 P.3d 907, 912 (2015). "A gravamen is 'the material or significant part of a grievance or complaint.'" *Id.* "[C]ourts analyze the gravamen claim by claim." *Id.* "To determine whether the significant part of a claim is a commercial transaction, the court must analyze whether a commercial transaction (1) is integral to the claim and (2) constitutes the basis of the party's theory of recovery on that claim." *Id.* In addition, "each party to the transaction

must enter the transaction for a commercial purpose." *Carrillo v. Boise Tire Co.*, 152 Idaho 741, 756, 274 P.3d 1256, 1271 (2012).

While no Idaho case specifically addresses whether a claim for promissory estoppel may be the basis for an award of attorney fees under Idaho Code § 12-120(3), the authority to do so is apparent. This Court has given broad meaning to the term "transaction" and, importantly, has held that "Idaho Code § 12-120(3) does not require that there be a contract between the parties before the statute is applied; the statute only requires that there be a commercial transaction." *Univ. of Idaho Found., Inc. v. Civic Partners, Inc.*, 146 Idaho 527, 541, 199 P.3d 102, 116 (2008). "Where a party alleges the existence of a contractual relationship of a type embraced by section 12–120(3) . . . that claim triggers the application of the statute." *Idaho Transp. Dep't.*, 159 Idaho at 141, 357 P.3d at 866. The Court's inquiry under Idaho Code § 12-120(3), therefore, focuses on the nature of the claim and on the allegations rather than on the stated cause of action.

The County cites to *Brower v. E.I. DuPont De Nemours & Co.*, 117 Idaho 780, 792 P.2d 345 (1990), as support for its argument that SilverWing's promissory estoppel claim did not arise out of a commercial transaction. Appellant Br. at 39. In *Brower*, the plaintiff sued the manufacturer (DuPont) of an experimental herbicide that plaintiff purchased from a third party. The herbicide damaged the plaintiff's crops, and he sued DuPont for fraud, alleging its representations induced his reliance, causing him to purchase and apply the herbicide to his land, resulting in damages. Defendant DuPont prevailed on a statute of limitations defense, and the district court awarded it attorney fees. This Court reversed on appeal, concluding:

> The only commercial transaction involved is the purchase by

> Brower of the DuPont chemicals from a local co-op. If there is any contract involved in this case it is not a contract surrounding that purchase, but one that might have been implied from the facts surrounding the relationship between DuPont and Brower. We cannot say that this case revolves around a commercial transaction sufficient to implicate the terms of I.C. § 12–120(3).

Brower, 117 Idaho at 784, 792 P.2d at 349.

This Court recently distinguished *Brower* in *Bryan Trucking, Inc. v. Gier*, 160 Idaho 422, 374 P.3d 585 (2016). In *Bryan Trucking*, plaintiff Bryan Trucking alleged he purchased a commercial truck based on representations made by Terry Gier (Gier), a third party whose company (Gier Jammer's Diesel Repair, LLC) had serviced the truck. Because Gier and his company had overhauled the truck's motor and performed other maintenance, Gier, acting as an agent for the seller (Ring), was "able to answer numerous questions Bryan posed about the truck." *Id.* at 424, 374 P.3d at 587. The truck later experienced mechanical problems, and Bryan Trucking incurred damages for its repair. *Id.* Bryan Trucking sued both the seller (Ring) and Gier for fraud and asserted contract-based claims against the seller. *Id.* All the claims were dismissed pursuant to stipulation of the parties. *Id.* Thereafter, the district court awarded Gier $26,496.66 for his attorney fees under Idaho Code § 12-120(3). The relevant issue on appeal was whether a commercial transaction supported an award of attorney fees to Gier. *Id.* The court reasoned that although Gier was not a party to the sale contract or a named defendant on other claims, plaintiff Bryan Trucking did allege "that Gier was a party to the commercial transaction[9]

[9] Justice Eismann clarified that I.C. § 12-120(3) "does not require an action to recover *on* a commercial transaction. It requires that the claim be an action to recover in a commercial transaction." *Bryan Trucking*, 160 Idaho at 428, 374 P.3d at 591.

when it alleged that Gier was Ring's agent, had defrauded Bryan Trucking, and owed Bryan Trucking a duty." *Id.* at 426, 374 P.3d at 589.

Likewise, in this case, the basis of SilverWing's promissory estoppel claim is a commercial transaction. The County's promises, on which SilverWing relied, related to the SilverWing Development, including its taxiway, adjacent to the Airport. In addition, both parties had a commercial purpose in their transaction. SilverWing relied on the County's promises in developing its commercial hangar home project, and the County made promises to SilverWing for a commercial purpose, *i.e.*, the potential to obtain increased tax revenue and jobs for the County. Sol Pusey ("Pusey"), a former member of the Airport Board, testified at trial that the Airport Board was "excited" about SilverWing's plans to build its taxiway in the location consistent with ALP Alternative 2(B) because it would "make the airport better," and SilverWing would generate "about three quarters of a million dollars a year in tax revenue to the County/City. And that would take care of a lot of our funding problems." Trial Tr. at 501:24-502:15; *see also* R. Exh. at 395 (Defendant Exh. C49) (emphasis added) (Pusey testified "the Airport Board approved the Westside taxiway and Silverwings because it would improve the airport and bring jobs and visitors to Bonner County."); Trial Tr. at 509:3-10. This is consistent with McKeown's testimony that, on December 11, 2007, the Airport Board told him that building SilverWing's taxiway in accord with the layout of Alternative 2(B) "was important to them to spur that growth on the side of the runway." Trial Tr. at 332:14-18 (emphasis added). Together, this testimony provides substantial evidence to confirm the County had a commercial purpose in making promises to SilverWing concerning its Development; namely to bring

increased tax revenue and jobs, improve the Airport, and spur growth on the west side of the runway. *See Stevens*, 161 Idaho at 412, 387 P.3d at 80 (stating "commercial" means "prepared, done, or acting with sole or chief emphasis on salability, profit, or success". . . .).

The County asserts that any "value" received for its promises would equal consideration and, thus, negate SilverWing's claim for promissory estoppel. Appellant Br. at 40. While the County certainly hoped the Development would increase growth, jobs and tax revenues, SilverWing did not offer growth, jobs and tax revenues as "consideration" for the promises made by the County. Moreover, the County did not receive consideration for its promises under the TTFA because the County's promises were unrelated to the subject matter of the TTFA. *See* Section IV.A.1, *supra*; *see also* R. at 5852 (district court disagreeing with County's consideration argument and stating, "[w]here there is consideration for a contract between parties regarding airport access for a few, that consideration (and contract) is not related enough to promises regarding the location and composition of development property such that the promising party can shield itself from liability.").

As aptly summarized by the district court:

> Here, there is a commercial transaction that comprises the gravamen of the promissory estoppel claim. To begin, there is no dispute that Plaintiff and Defendant were parties in a contractual relationship with respect to the TTFA. The terms of the TTFA controlled access between Plaintiff's air hangar-home development and Defendant's airport. The evidence admitted at trial showed that Plaintiff and Defendant were motivated by the desire for profit and growth. Before and after the execution of the TTFA, Defendant's agent made promises to Plaintiff about where the runway and taxiway should be. Plaintiff reasonably relied on those promises to its detriment. Defendant's promises and Plaintiff's subsequent

> reliance comprise the commercial transaction.
>
> The commercial transaction, and commercial relationship between the parties, is integral to Plaintiff's promissory estoppel claim. Without the TTFA, and corresponding development, the parties would never have been in a position to make promises to one another about ancillary matters that would have foreseeably induced detrimental reliance.
>
> The parties entered the transaction for a commercial purpose. Plaintiff relied on Defendant's promises in developing its commercial hangar-home project, tacitly to facilitate its completion. Defendant made the promise to Plaintiff for a commercial purpose; Defendant's commercial purpose was the pecuniary benefits of increased tax revenue, approximately $750,000.00 a year. Accordingly, the Court holds that a commercial transaction is the gravamen of Plaintiff's promissory estoppel claim and that it served as the basis for Plaintiff's claim.

R. at 5852 (internal citation omitted) (emphasis added). This decision is sound and should be affirmed.

C. The County is Not Entitled to An Award of Its Fees.

Despite the fact that the jury rendered a verdict entirely in SilverWing's favor and that Judge Christensen methodically considered and reviewed all of the same arguments presented by the County herein to conclude that SilverWing's promissory estoppel claim was well founded, the County asserts that it is entitled to an award of its attorney fees and costs in the trial below pursuant to Idaho Code § 12-117. The County's request is premised on the condition that this Court reverse the judgment below. Appellant Br. at 41. *Regardless* of whether this Court reverses or affirms the judgment below, there is *no basis* for an award of fees and costs to the County pursuant to Idaho Code § 12-117. There is simply no evidence for this Court to conclude that SilverWing "acted without a reasonable basis in fact or law" or that it "brought, pursued or

defended frivolously, unreasonably or without foundation" its successful promissory estoppel claim. *See Coeur d'Alene Tribe v. Denney*, 161 Idaho 508, 387 P.3d 761, 778–79 (2015); *City of Osburn v. Randel*, 152 Idaho 906, 908, 277 P.3d 353, 355 (2012).

The County's secondary basis for a request of attorney fees is equally unavailing. The County claims it is entitled to its fees under the TTFA because SilverWing's promissory estoppel claim is "based, at least in part, on Exhibit A to the TTF[A]." Appellant Br. at 41-42. As demonstrated above in Section IV.A.1, *supra*, the promises that form the basis of SilverWing's successful promissory estoppel claim against the County are not encompassed within the TTFA. Accordingly, this Court—like the district court—should reject the County's argument on this point and decline to award it fees and costs at trial and in these proceedings.

V. OBJECTION TO SCOPE OF AMICUS BRIEF

This Court, as a matter of first impression, recently held that it "will not consider arguments advanced by *amicus curiae* which have not been raised by the parties." *Schweitzer Basin Water Co. v. Schweitzer Fire Dist.*, No. 44249, 2017 WL 5710684, at *2–3, ___ P.3d___ (Idaho Nov. 28, 2017). This follows United States Supreme Court precedent establishing that arguments not raised by the parties or considered by lower courts will not be considered on appeal. *See, e.g., F.T.C. v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 226 n.4, 133 S.Ct. 1003, 185 L.Ed.2d 43 (2013) (when asked by an *amicus curiae* to consider an argument not raised directly by the parties, the Court refused, stating "Because this argument was not raised by the parties or passed on by the lower courts, we do not consider it"); *Watkins Co., LLC v. Estate of Storms*, 161 Idaho 683, 685, 390 P.3d 409, 411 (2017) ("This Court will not consider issues

raised for the first time on appeal"). "An amicus must take a case as he finds it without attempting to inject new issues or to tailor the case to suit his needs." *Blackburn v. State Farm Mut. Auto. Ins. Co.*, 108 Idaho 85, 90, 697 P.2d 425, 430 (1985) (citing *Bogert v. Kinzer*, 93 Idaho 515, 517-18, 465 P.2d 639, 641-42 (1970)).

Here, *Amicus* improperly goes beyond the arguments and issued raised by the County in two ways. First, *Amicus* challenges numerous jury instructions either given or requested and refused by the district court. Amicus Br. at 32 ("at trial the jury should have been instructed as to how a binding obligation can be made by a county"); 33 ("the District Court erred in failing to instruct the jury as to" statements made by the County outside a duly noticed Open Meeting); 37-39 ("The District Court failed to properly instruct the jury as to how a county can lawfully enter into a binding agreement"); 40 (the district court erred in rejecting Jury Instruction No. 67). Although the County had the opportunity to (and did) object to all of the jury instructions offered or given and request additional instructions that it deemed appropriate (Trial Tr. at 1448-1475), the County did not appeal the district court's ruling on any jury instruction nor has the County addressed jury instructions in its Appellant's Brief. As such, the County cannot object to any jury instruction either given or offered and refused for the first time in its Reply Brief or at oral argument. *Suitts v. Nix*, 141 Idaho 706, 708, 117 P.3d 120, 122 (2005) ("A reviewing court looks only to the initial brief on appeal for the issues presented because those are the arguments and authority to which the respondent has an opportunity to respond in the respondent's brief"). And, correspondingly, this Court should not consider *Amicus*' objections and arguments related to any jury instruction used or refused by the district court. *Bogert*, 93 Idaho at 517-18, 465 P.2d

at 641-42. *See also Oregon Shortline R.R. Co. v. City of Chubbuck,* 93 Idaho 815, 817, 474 P.2d 244, 246 (1970) (questions not raised by the pleadings nor argued or decided by the lower court "will not be considered for the first time on appeal").

Second, *Amicus* offers arguments about FAA preemption. Amicus Br. at 35-36, 40. This Court did not grant *Amicus*—an association of counties—permission to appear in this case to provide the Court with FAA expertise. Nor does it have any. More importantly, while the County made federal preemption arguments below, it did not appeal this issue or raise it in its Appellant's Brief. Accordingly, this Court should decline to consider *Amicus*' federal preemption argument. *See Schweitzer Basin Water Co.*, 2017 WL 5710684, at *2–3 (Court "will not consider arguments advanced by *amicus curiae* which have not been raised by the parties").[10]

VI. SILVERWING IS ENTITLED TO ITS ATTORNEY FEES ON APPEAL

SilverWing seeks costs and attorney fees on appeal as authorized by I.A.R. 40 and I.A.R. 41. Pursuant to I.A.R. 41(a), SilverWing has designated the award of attorney fees on appeal as an issue on appeal. SilverWing bases its claim for fees on Idaho Code § 12-120(3) as the prevailing party in a commercial transaction, which applies with equal measure at trial and on appeal. *See Idaho Transp. Dep't.*, 159 Idaho at 142, 357 P.3d at 867 ("When a party prevails at both trial and on appeal, and that party received an award of attorney fees under Idaho Code section 12-120(3) at the trial level and the award is affirmed on appeal, that party is also entitled to an award of attorney fees for the appeal pursuant to Idaho Code section 12-120(3)").

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[10] *Amicus* also appears to address arguments concerning the County's motion for summary judgment and motion for judgment on the pleadings. Amicus Br. at 13-15. However, the County has only appealed the decision on its JNOV Motion.

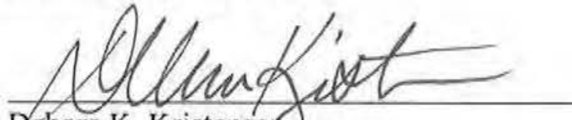
VII. CONCLUSION

A promise, made by one with authority, must be honored. Enforcing such a promise, when reliance thereon has caused significant economic injury, will not cause county governments in Idaho to fall apart. Far from it – enforcing such promises will ensure certainty in dealing with county agents and guaranty that the day-to-day operation of county affairs can proceed smoothly and efficiently.

The record before this Court provides substantial and competent evidence to support the jury's conclusion that SilverWing reasonably relied on promises made by the County to its detriment and was entitled to an award of $250,000.00 in damages. Moreover, the district court applied reason to conclude that the gravamen of SilverWing's promissory estoppel claim is a commercial transaction and, therefore, SilverWing is entitled to its attorney fees and costs under Idaho Code § 12-120(3). As such, the judgment below should be AFFIRMED, and this Court should award SilverWing its attorney fees and costs on appeal.

DATED this 6th day of February, 2018.

GIVENS PURSLEY LLP



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