11-20-2017

Silverwing at Sandpoint, LLC v. Bonner County Appellant's Brief Dckt. 45052

IN THE SUPREME COURT OF THE STATE OF IDAHO

SILVERWING AT SANDPOINT, LLC, an Idaho limited liability company, Plaintiff-Respondent, vs. BONNER COUNTY, an Idaho municipal corporation, Defendant-Appellant,	Supreme Court No. 45052-2017 Bonner County District Court No. CV2012-0840

APPELLANT'S BRIEF

Appeal from the District Court of the First Judicial District for Bonner County
Honorable Richard Christensen, Presiding

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A. NATURE OF THE CASE

In April 2007, real estate developer SilverWing at Sandpoint, LLC entered into a written agreement with Bonner County giving SilverWing "through-the-fence" access to Sandpoint Airport for an annual fee ("TTF Agreement"). The TTF Agreement states that it constitutes "the entire understanding of the parties concerning the subject of this Agreement" and that the Agreement "shall not be modified by either party by oral representation." (R. at PTE 76, ¶¶ 14(d), (i).)[1] SilverWing sued Bonner County under several inapplicable legal theories including under the narrow doctrine of promissory estoppel. (R. at p. 268.) SilverWing sought damages for relying on the County's "promise" that the runway would not move. Notwithstanding the fact that the runway has not moved and that promissory estoppel is merely a substitute for consideration, the district court allowed SilverWing's claim to proceed to trial. A jury awarded SilverWing $250,000 on the theory of promissory estoppel and the district court later added $764,363.32 in attorney's fees and costs. The district court denied the County's Motion for JNOV. This Court should reverse and dismiss the claim of promissory estoppel.

B. COURSE OF THE PROCEEDINGS

SilverWing filed its original complaint on May 11, 2012, in the First Judicial District of Idaho. (R. at p. 40.) After the County removed the action to the United States District Court for the Northern District of Idaho, SilverWing amended the complaint to add a claim of promissory

[1] The Clerk's Certificate of Exhibits (R. at p. 5951) attaches trial exhibits to the record under a separate document that is not contiguously paginated. Thus, this Brief will refer to Plaintiff's Trial Exhibits as "PTE" and Defendant's Trial Exhibits as "DTE" with the exhibit number following such designation. For example, "R. at PTE 76" refers to Plaintiff's Trial Exhibit 76.

estoppel. (R. at p. 252.) The federal court dismissed SilverWing's three original claims and remanded the claim of promissory estoppel to the First Judicial District of Idaho.[2] (R. at p. 159.)

Although Bonner County moved for judgment on the pleadings (R. at p. 168) and summary judgment (R. at p. 220), the district court denied each of those motions (R. at p. 3053) and the case proceeded to trial.[3] At trial, the district court excluded SilverWing's claim of lost profits. (Tr. at 1446:10-14). The jury returned a verdict awarding SilverWing $250,000 in "out-of-pocket" damages on its promissory estoppel claim. (R. at p. 4903.) On December 1, 2016, the district court entered a judgment of $250,000 against Bonner County. (R. at p. 4906.) On December 15, 2016, Bonner County filed a Motion for Judgment Notwithstanding the Verdict on several grounds. (R. at p. 4911.) On March 17, 2017, the district court denied Bonner County's Motion for Judgment Notwithstanding the Verdict. (R. at p. 5727.)

On April 14, 2017, Bonner County timely filed its original Notice of Appeal. (R. at p. 5821.) On June 9, 2017, the District Court entered a second document titled "Judgment" making the determination that SilverWing is the prevailing party and awarding SilverWing $764,363.32 in attorney's fees and costs. (R. at p. 5875.) On July 13, 2017, Bonner County filed its Amended Notice of Appeal.

[2] On November 1, 2017, the United States Court of Appeals for the Ninth Circuit affirmed the dismissal of SilverWing's three original claims. SilverWing at Sandpoint, LLC v. Bonner Cty., 2017 U.S. App. LEXIS 21970 (9th Cir. Idaho Nov. 1, 2017).

[3] Bonner County also counterclaimed against SilverWing for violating the TTF Agreement but the counterclaims are not the subject of this appeal.

C. STATEMENT OF FACTS

1. Core Allegations of the Complaint

SilverWing's promissory estoppel claim alleges that "[i]n 2007, the County provided to SilverWing an ALP that reflected the existing location of the Airport's runway, and made no mention or reference to any plans for the runway to be moved. At the same time, the County promised that there were no plans regarding changes to runway location which would be incompatible with SilverWing's Development." (R. at p. 268, ¶ 85.) According to SilverWing, "SilverWing relied on the County's promise, that there were no plans to change the location of the Airport's runway, to its substantial economic detriment." (R. at p. 268, ¶ 86.)

2. Factual Background

In April 2006, SilverWing's former principal, John McKeown, purchased 18.1 acres of land on the border of Sandpoint Airport. (R. at PTE 8.) The property was then conveyed to a Delaware LLC formed on October 25, 2006,[4] which ultimately merged into SilverWing. (R. at PTE 26 and 102.) From the outset, SilverWing planned to construct hangar-homes for residents who wish to park their aircraft in their home garage. (Tr. at 271:4-272:5.)

On the day that it was formed, SilverWing hired Clearwater Engineering (R. at PTE 33), which subcontracted with ES Engineering (R. at PTE 36) to plan the hangar-home development. At the time, Sandpoint Airport was in the process of updating its Master Plan and ALP to abandon the existing plan to relocate the runway, known as Alternative 4 (R. at DTE F47), in

[4] At trial, SilverWing was precluded by an order of the court from presenting evidence or argument that (1) the County made any promise prior to October 25, 2006, or (2) SilverWing relied on any promise prior to October 25, 2006. (R. at p. 4611-4612.)

favor of a plan to keep the runway in its current location and relocate the west-side taxiway, known as Alternative 2(B) (R. at DTE A35). (Tr. at 704:22-706:21.)

The unrebutted evidence at trial, including an email exchange between SilverWing's engineers at the very outset of the project (R. at DTE B9), demonstrated that SilverWing's engineers relied on communications with the FAA in determining that there were no plans to move the runway. (Tr. at 706:4-707:15.) Specifically, Corrie Esvelt-Siegford of ES Engineering emailed Debbie Van Dyk of Clearwater Engineering on November 3, 2006 stating "No Runway relocation – as far as Trang [Tran] knows." (R. at DTE B9, p. 1.) Trang Tran was the civil engineer at the FAA assigned to Sandpoint Airport. (Tr. at 734:1-14.) SilverWing's engineers concluded based on their conversation with Trang Tran that the runway would not be moved. (Tr. at 704:9-11; R. at DTE B9, p. 1.)

Ms. Esvelt-Siegford testified at trial that "the decision was made" that day, November 3, 2006, to develop the property based on the ALP depicting Alternative 2(B). (Tr. at 807:1-5; see also 804:25-805 [the November 3, 2006 decision was made in reliance on the FAA].) SilverWing failed to present evidence of any reliance on County promises during the nine day period between the date SilverWing was formed (October 25, 2006) and the date SilverWing decided to proceed using Alternative 2(B). (Id.; see also R. at p. 4611-4612.)

On or about January 8, 2007 SilverWing filed Conditional Use Permit ("CUP") (R. at PTE 56) and Planned Unit Development ("PUD") (R. at PTE 58) applications (collectively "Applications") with the City of Sandpoint. In support of its Applications, SilverWing stated, among other things, "[t]he airpark is designed to match surrounding airport related uses. It

follows the Airport's master plan design by locating the parallel taxiway in accordance with the plan." (R. at PTE 58.) In order to obtain City approval of its Applications, SilverWing was required to comply with applicable City Zoning Codes, which includes Sandpoint City Zoning Code, Chapter 12, Airport Overlay Zone District, § 9-12-3. (R. at DTE H42A.) That section states, in pertinent part:

> In order to carry out the provisions of this chapter, there are hereby created and established certain zones for existing and future planned airport conditions as they apply to Sandpoint Airport. . . Such zones are shown on the approved Sandpoint airport master plan 1993-2013, as amended from time to time, which by this reference is incorporated and made a part hereof as if set forth in full.

(R. at DTE H42A.) SilverWing's engineers knew that it was "risky" to design the development based on an unapproved ALP showing Alternative 2(B) (Tr. at 804:17-805:5) but they relied on their discussions with the FAA and moved forward without waiting for the updated Master Plan. (Tr. at 807:1-5; R. at DTE B9.)

John McKeown testified at trial that on December 11, 2006, he met at a restaurant with the part-time airport manager Jorge O'Leary and volunteer members of the airport advisory board, who gave him "assurances" that the planned location of SilverWing's taxiway (partially on Airport property) had been approved by the FAA. (Tr. at 321:6-332:22.) McKeown testified that he was promised several things by several people:

> Question: First, clarifying. You've alleged certain promises that were made by the County, and one of them is that Bonner County told you the existing location of the runway was the alternative upon which SilverWing could base its plan for development. Is that a correct statement?

> Answer [by John McKeown]: True.
>
> Q: Can you tell us again who specifically at Bonner County told you that?
>
> A: Well, I think the bigger question is who didn't. You know, Jorge O'Leary, the airport manager, the airport County -- the County Airport Board, the commissioners when they signed the Through the Fence Agreement with the Attachment that showed where the taxiway was going.

(Tr. at 427:21-428:1.)

In support of McKeown's testimony that the Bonner County Board of Commissioners had made these promises, SilverWing introduced Exhibit A to the TTF Agreement, which was a map depicting the planned location of SilverWing's taxiway based on the non-movement of the runway. (Tr. at 380:12-381:14; R. at PTE 76, Ex. A.) According to McKeown, the TTF Agreement entered into between SilverWing and the County in April 2007 did not just encompass the issue of SilverWing's access to the Airport, but also included promises regarding the proper configuration of SilverWing's development. (Tr. at 427:12-428:1.)

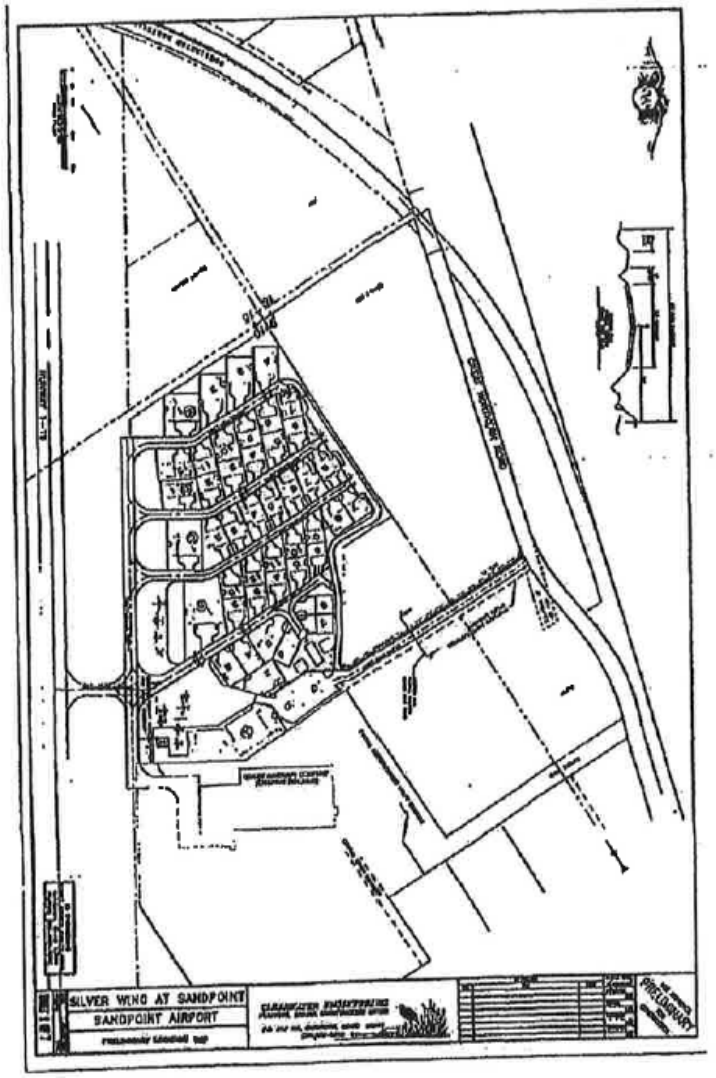
The TTF Agreement also contained the following clauses:

> d. Modification. This Agreement shall not be modified by either party by oral representation made before or after the execution of this Agreement. All modifications must be in writing and signed by the parties….
>
> i. All negotiations are merged into this Agreement. This Agreement constitutes the entire understanding of the parties concerning the subject of this Agreement. This Agreement shall constitute a binding obligation between the parties and shall be applicable beyond the term of this Agreement.

(R. at PTE 76, ¶¶ 14(d), (i).)

McKeown admitted that no promises were made to SilverWing *after* SilverWing entered into the TTF Agreement. (Tr. at 453:2-454:23.) "Exhibit A" to the TTF Agreement shows the runway and taxiway in the locations contemplated by ALP Alternative 2(B):

Exhibit A



(R. at PTE 76, Ex. A.) McKeown understood that the TTF Agreement constituted "the entire understanding of the parties" at the time that he signed it. (Tr. at 454:16-454:23.)

On May 3, 2007, the FAA sent a letter in response to SilverWing's plans stating "we have no objection to the proposed development, provided that the TTF Agreement between Sandpoint Airport and SilverWings [sic] at Sandpoint LLC is approved by our office." (R. at PTE 84.) However, the FAA stated its position that "residential use adjacent to a public airport is considered an incompatible land use and the airport should not encourage or participate in permitting such development." (R. at PTE 84.) SilverWing's Engineer Corrie Esvelt-Siegford testified that this communication from the FAA raised a "red flag." (Tr. at 767:22-768:1.)

In December 2008, the FAA put the Airport on "noncompliance" status for regulatory issues arising from SilverWing's development. (R. at PTE 109.)[5] On March 25, 2009, the FAA rejected Bonner County's 2006 Proposed ALP which was aimed at maintaining the runway in its current position. (R. at PTE 114.)

Notwithstanding the FAA's noncompliance determination, SilverWing was never required to move its taxiway or alter its development because the runway was never moved. (Tr. at 471:17-472:3.) Additionally, all of the regulatory issues were ultimately resolved. In 2012, Congress enacted the FAA Modernization and Reform Act of 2012, Pub. L. 112-95 ("FMRA"), § 136. FMRA § 136 allows existing residential developments with TTF access (including

[5] In January, 2009, Bonner County implemented a Corrective Action Plan ("CAP") which sought, at the FAA's explicit direction, to: (1) "pursue[] all avenues to extinguish the perpetual nature of the Silver Wings [sic] TTF easement;" and (2) "pursue[] an amendment to the Silver Wings [sic] and Quest TTF agreements to require access only to the end of the runway [because] midfield access is unacceptable from a safety perspective." (R. at PTE 110.) However, the federal district court held that the CAP could not serve as a basis for liability in this case under federal preemption doctrine. (R. at p. 293.) To the extent SilverWing relies on the CAP to establish liability, its claim is preempted. (R. at p. 293.)

SilverWing). (Tr. at 1032:12-1033:24.) And on May 27, 2015, the FAA officially signed a new ALP approving the current physical configuration for Sandpoint Airport, including an approved layout that is in complete conformity with the SilverWing development as built. (R. at p. 768-785; Tr. at 1262:6-1263:6.)

At trial, the court determined that SilverWing had failed to present sufficient evidence to show that it had lost any profits as a result of these events. (Tr. at 1446:10-14 [excluding SilverWing's lost profits claim as speculative].) Although SilverWing introduced additional evidence regarding the out-of-pocket expenses associated with grading and building its taxiway and model home, SilverWing still owns and uses those items.

II. ISSUES PRESENTED ON APPEAL

1. Whether the district court erred in denying the County's Motion for Judgment Notwithstanding the Verdict (R. at p. 4911-4982) on any of the twelve grounds stated therein.

2. Whether the district court erred in its determination that SilverWing's promissory estoppel claim arises from a "commercial transaction" entitling SilverWing to $486,337.03 in attorney's fees under I.C. §12-120(3), or, in the alternative, whether such a finding requires reversal of the judgment below since promissory estoppel does not apply where there is an exchange of consideration.

3. Whether the district court's award of prevailing party attorney's fees and costs to SilverWing should be reversed following a reversal of the underlying judgment on the merits, and whether such reversal would entitle Bonner County to prevailing party fees and costs.

III. STANDARD OF REVIEW

The trial court's denial of a motion for judgment notwithstanding the verdict is reviewed de novo. Kuhn v. Coldwell Banker Landmark, Inc., 150 Idaho 240, 246, 245 P.3d 992, 998-999 (2010). "Our task on appeal of an order denying a motion for [JNOV] is the same as that of the trial judge is when he or he considers the motion. Whether the trial court should have entered a judgment notwithstanding the verdict is purely a question of law." Id. (citing Schwan's Sales Enters., Inc. v. Idaho Transp. Dep't, 142 Idaho 826, 830, 136 P.3d 297, 301 (2006)). "A motion for judgment n.o.v. based on I.R.C.P. 50(b) is treated as simply a delayed motion for a directed verdict and the standard for both is the same." Quick v. Crane, 111 Idaho 759, 763-764, 727 P.2d 1187, 1191-92 (1986). "Whether a verdict should be directed, as noted above, is purely a question of law and on those questions, the parties are entitled to full review by the appellate court without special deference to the views of the trial court." Id.

The function of a JNOV is to give the trial court the last opportunity to order the judgment that the law requires. Quick, 111 Idaho at 764, 727 P.2d at 1192. Under Idaho Rule of Civil Procedure 50(b), the issue to be determined on a motion for JNOV is whether substantial evidence supports the jury's verdict. Lanham v. Idaho Power Co., 130 Idaho 486, 495, 943 P.2d 912, 921 (1997).

Generally speaking, the district court's decision to award attorney's fees is discretionary, subject to the abuse of discretion standard of review. Bailey v. Sanford, 139 Idaho 744, 753, 86 P.3d 458, 467 (2004). To determine whether the district court abused its discretion, this Court considers: (1) whether the trial court correctly perceived the issue as one of discretion; (2)

whether the trial court acted within the outer boundaries of its discretion and consistently 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. Nampa Charter School, Inc. v. DeLaPaz, 140 Idaho 23, 29, 89 P.3d 863, 869 (2004).

IV. ARGUMENT

This Court recently restated the rule that "[p]romissory estoppel is a substitute for consideration." Nicholson v. Coeur D'Alene Placer Mining Corp., 161 Idaho 877, 883, 392 P.3d 1218, 1224 (2017). Unfortunately, litigants routinely misunderstand the narrow function of promissory estoppel.[6] Generally speaking, the doctrine of promissory estoppel means that a

[6] See, e.g., Bank of Commerce v. Jefferson Enters., LLC, 154 Idaho 824, 303 P.3d 183 (2013) (promissory estoppel properly dismissed under Statute of Frauds); Black Canyon Racquetball Club, Inc. v. Idaho First Nat'l Bank, N.A., 119 Idaho 171, 804 P.2d 900 (1991) (promissory estoppel properly dismissed because there was no definite agreement); Gilbert v. Caldwell, 112 Idaho 386, 732 P.2d 355 (Idaho Ct. App. 1987) (promissory estoppel properly dismissed because no reliance and general comments not being contractual commitments); Gillespie v. Mt. Park Estates, 138 Idaho 27, 56 P. 3d 1277 (2002) (promissory estoppel properly dismissed because written agreement creates presumption of consideration); Grover v. Wadsworth, 147 Idaho 60, 205 P.3d 1196 (2009) (promissory estoppel properly dismissed because no underlying promise); Idaho Wool Growers Ass'n v. State, 154 Idaho 716, 302 P.3d 341 (2012) (promissory estoppel properly dismissed because of lack of promise); Lettunich v. Key Bank Nat'l Ass'n, 141 Idaho 362, 109 P.3d 1104 (2005) (promissory estoppel properly dismissed because there was evidence of adequate consideration); Profits Plus Capital Mgmt., LLC v. Podesta, 156 Idaho 873, 332 P.3d 785 (2014) (promissory estoppel properly dismissed because of evidence of adequate consideration); Smith v. Boise Kenworth Sales, Inc., 102 Idaho 63, 625 P.2d 417 (1981) (promissory estoppel properly dismissed because of lack of agreement between the parties); Zollinger v. Carrol, 137 Idaho 397, 49 P.3d 402 (2002) (promissory estoppel properly dismissed because of lack of promise); Wandering Trails, LLC v. Big Bite Excavation, Inc., 156 Idaho 586, 329 P.3d 368 (2014) (promissory estoppel properly dismissed because there was adequate consideration); Chapin v. Linden, 144 Idaho 393, 162 P.2d 772 (2007) (promissory estoppel properly dismissed because of lack of agreement); Brown v. Caldwell Sch. Dist. No. 132, 127 Idaho 112, 898 P.2d 43 (1995) (promissory estoppel properly

"'promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.'" Bank of Commerce, supra, 154 Idaho at 834-835, 303 P.3d at 193-194 (quoting Smith, supra, 102 Idaho at 67-68, 625 P.2d at 421-22 (citing Restatement (Second) of Contracts § 90(1) (1973))). This Court has stated the additional requirements that: (1) the reliance on the promise must create a "substantial economic detriment," (2) the reliance "was or should have been foreseeable," by the promisor, and (3) the reliance was "reasonable and justified." Grover, supra, 147 Idaho at 64, 205 P.3d at 1200.

A. THE DISTRICT COURT ERRED IN DENYING THE COUNTY'S MOTION FOR JNOV BECAUSE THE PARTIES EXCHANGED MUTUAL CONSIDERATION UNDER THE TTF AGREEMENT.

Since promissory estoppel is simply a substitute for consideration, it does not apply where there is evidence of a mutual exchange of consideration between the parties. Lettunich, supra, 141 Idaho at 367-368, 109 P.3d at 1109-1110 ("The doctrine of promissory estoppel is of no consequence in this case because there is evidence of adequate consideration."); see also Zollinger, supra, 137 Idaho at 400, 49 P.3d at 405 (holding that where there is an exchange of mutual promises, there is no lack of consideration). Further, Promissory estoppel is an equitable doctrine. C. H. Leavell & Co. v. Grafe & Assocs., 90 Idaho 502 (Idaho 1966). When parties

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dismissed due to lack of justifiable reliance and lack of authority to make promise); Nordstrom v. Diamond International Corporation, 109 Idaho 718, 710 P.2d 718 (Idaho Ct. App. 1985) (promissory estoppel properly dismissed due to lack of promise); Scott v. Castle, 104 Idaho 719, 662 P.2d 1163 (Idaho Ct. App. 1983) (same); Archer v. Mountain Fuel Supply Co., 102 Idaho 852, 642 P.2d 943 (1982) (same).

enter into an express contract, a claim based in equity is not allowed because the express contract precludes enforcement of equitable claims. See In re: Estate of Boyd, 134 Idaho 669, 673, 8 P.3d 664, 668 (Ct. App. 2000); see also Iron Eagle Dev., LLC v. Quality Design Sys., 138 Idaho 487, 492 (Idaho 2003).

In Lettunich, supra, the plaintiff invoked the doctrine of promissory estoppel in an attempt to enforce a bank's oral promise to lend money to support the plaintiff's purchase of cattle. Lettunich, supra, 141 Idaho at 366, 109 P.3d at 1108. Lettunich argued that "promissory estoppel should be used in this case to prevent KeyBank from denying the enforceability of an oral promise." Id. at 367, 109 P.3d at 1109. This Court explained, "Promissory estoppel is simply a substitute for consideration[.]" Id. Accordingly, though Lettunich "clearly suffered a detriment when he purchased cattle without a way to pay for them," the "doctrine of promissory estoppel [was] of no consequence… because there [was] evidence of adequate consideration." Id. at 368, 109 P.3d at 1110.

Similarly, in Idaho Wool Growers Ass'n, supra, 154 Idaho at 723, 302 P.3d at 348, where the Wool Growers sued the State of Idaho on a theory of promissory estoppel based in part on the State's representation in a letter, the court stated:

> [R]egardless of issues of sovereignty, the district court was correct in dismissing the Wool Growers' estoppel claims because no promise to protect—and certainly not a promise to indemnify—appears on the face of the 1997 letter… The Wool Growers base their claims for relief on an alleged promise of protection or indemnity, which they assert induced them to withdraw opposition to the reintroduction plan and cease lobbying efforts. However, as discussed above, such a promise appears nowhere on the face of the 1997 letter.

Idaho Wool Growers Ass'n, supra, 154 Idaho at 723, 302 P.3d at 348.

In Zollinger, supra, 137 Idaho at 400, 49 P.3d at 405, the plaintiff director sued the defendant shareholders for breach of contract based on the shareholder agreement and on a promissory estoppel theory to recover monies the director paid out to satisfy the personal guarantees he signed on behalf of the corporation. Id. The trial court awarded summary judgment in favor of the shareholders and denied the director's motion for reconsideration. Id. The director appealed. Id. On appeal, this Court stated the familiar rule that promissory estoppel is simply a substitute for consideration, and held, "**Where the parties to the shareholder agreements had exchanged mutual promises, there was no failure of consideration such that promissory estoppel should be applied**[.]" Id. (emphasis added).

Here, it is undisputed that the parties entered into a separate written agreement governing the relationship between the Airport and SilverWing's development. (R. at PTE 76.) It is also undisputed that the parties exchanged consideration under the TTF Agreement, with the County providing access to the runway in exchange for SilverWing's payment of an annual fee, and with each party exchanging several promises. (Tr. at 365:13-366:3.) Thus, as a matter of law, promissory estoppel does not apply to the facts of this case. See Nicholson, 161 Idaho at 883, 392 P.3d at 1224 ("[p]romissory estoppel is a substitute for consideration."); see also Zollinger, supra, 137 Idaho at 400, 49 P.3d at 405 (holding the existence of a separate written agreement meant "there was no failure of consideration such that promissory estoppel should be applied[.]"). This requires reversal of the judgment below.

Further, SilverWing's claim is legally barred under the "no oral modifications" clause and "integration clause" in the TTF Agreement (R. at PTE 76, ¶¶ 14(d), (i)), which state:

> d. Modification. This Agreement shall not be modified by either party by oral representation made before or after the execution of this Agreement. All modifications must be in writing and signed by the parties.
> …
> i. All negotiations are merged into this Agreement. This Agreement constitutes the entire understanding of the parties concerning the subject of this Agreement. This Agreement shall constitute a binding obligation between the parties and shall be applicable beyond the term of this Agreement.

(R. at PTE 76, ¶¶ 14(d), (i).) This means that even if the Court finds there was substantial evidence of a separate promise that did not appear in the TTF Agreement, the promise would be barred under the terms of the Agreement because McKeown testified that all promises occurred *before* SilverWing entered into the TTF Agreement and that no promises were made *after* (Tr. at 453:2-454:23). He understood the TTF Agreement to be "the entire understanding of the parties" at the time that he signed it. (Tr. at 454:16-454:23.) SilverWing also admitted in its pretrial pleadings that "SilverWing's promissory estoppel claim concerns *promises not contained with the TTFA* – despite being related to the subject matter of the TTFA." (R. at p. 4119.)

Although SilverWing will predictably respond by arguing that the TTF agreement addresses different subject matter than the alleged oral promises, that argument fails for three reasons: (1) the express terms of the TTF Agreement state that there are no other promises and that any additional promises cannot be made orally (R. at PTE 76, ¶¶ 14(d), (i)); (2) John McKeown made it clear at trial that he believed "Exhibit A" to the TTF Agreement – which

depicts all airfield elements at issue in this case including SilverWing's perpendicular and parallel connection to the airport's runway – was a promise from the Bonner County Board of Commissioners that SilverWing was designing its taxiway in the correct location (Tr. at 427:21-428:1); and (3) there is no such exception to the rule that promissory estoppel does not apply where the parties have exchanged mutual consideration.[7] See Lettunich, 141 Idaho at 367-368, 109 P.3d at 1109-1110; see also Zollinger, 137 Idaho at 400, 49 P.3d at 405.

Thus, based on the existence and terms of the TTF Agreement, the district court erred in denying Bonner County's Motion for JNOV.

B. THE DISTRICT COURT ERRED IN DENYING THE COUNTY'S MOTION FOR JNOV BECAUSE NO SUBSTANTIAL EVIDENCE OF A SPECIFIC AND COMPLETE ORAL "PROMISE" WAS PRESENTED AT TRIAL.

The doctrine of promissory estoppel requires reliance upon a ***specific*** and ***complete*** promise. Gilbert, supra, 112 Idaho at 390-392, 732 P.2d at 359-361 (citing Restatement (Second) of Contracts § 98 (1979)); see also Lettunich, supra, 141 Idaho at 366-367, 109 P.3d at 1108-1109 (holding promissory estoppel did not apply because "there was no complete promise here to be enforced"); Zollinger, supra, 137 Idaho at 399, 49 P.3d at 404. Black's Law Dictionary defines a "promise" 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; a person's assurance that the person will or will not do something." 9th Ed. at p. 1332 (2009). Unlike a cause of action for fraud, which "cannot be

[7] Indeed, such an exception would allow litigants to invoke promissory estoppel in every breach of contract case to sue for breaches of promises that do not appear on the face of the contract by arguing they "arise from different subject matter." The law is not nearly that malleable.

based upon statements promissory in nature that relate to future actions or upon the mere failure to perform a promise or an agreement to do something in the future," (Gillespie v. Mt. Park Estates, L.L.C., 142 Idaho 671, 673-674, 132 P.3d 428, 430-431 (2006)), a claim of promissory estoppel ***must*** be supported by a "specific promise" rather than by mere factual statements. Zollinger, supra, 137 Idaho at 399, 49 P.3d at 404; Gilbert, supra, 112 Idaho at 390-392, 732 P.2d at 359-361.

In Gilbert, supra, the City of Caldwell, Idaho pursued completion of a sewer line project along a thoroughfare bordering the Gilberts' commercial property. In addition to securing an easement from the Gilberts, the city added several written terms to its agreement with the contractor to address concerns raised by the Gilberts. Upon completion of the project, the Gilberts were dissatisfied with the condition of the property and sued the city based in part on the city's oral representations that the property would be restored to "as good or better" condition than it was in before the project. Id. Rejecting the Gilberts' claim of promissory estoppel, the district court found, and the Court of Appeals affirmed, that the city's "as good as" statements "were not of the kind to constitute contractual promises, but instead were intended merely as **encouragement**," or "of a **hope** or **expectation** and not as contractual commitments." Id. (emphasis added).

Here, SilverWing seeks to hold the County liable for alleged factual statements regarding the nonexistence of plans to move the runway or the status of approval for the ALP showing Alternative 2(B). Specifically, SilverWing's promissory estoppel claim alleges that "[i]n 2007, the County provided to SilverWing an ALP that reflected the existing location of the Airport's

runway, and made no mention or reference to any plans for the runway to be moved. At the same time, the County promised that there were no plans regarding changes to runway location which would be incompatible with SilverWing's Development." (R. at p. 268, ¶ 85.) According to SilverWing, "SilverWing relied on the County's promise, that there were no plans to change the location of the Airport's runway, to its substantial economic detriment." (R. at p. 268, ¶ 86.) John McKeown confirmed this was the basis of SilverWing's claim at trial:

> Question: …And did you get assurances that that plan, in fact, was appropriate and correct to go forward with?
>
> A [by John McKeown]: I did.

(Tr. at 345:9-12.)

> Question: Did they tell you that location was the correct location? And by "correct," what I mean is an approved location with the FAA.
>
> A [by John McKeown]: Yes.

(Tr. at 332:19-22.)

At worst, this evidence showed that the County mistakenly provided SilverWing with incorrect information regarding the plans for the Airport. Id. That the County may have given SilverWing a copy of the ALP – regardless of whether it was the correct or incorrect version – is inactionable on its face because it does not include a specific and complete promise binding the County to future action. See Grover, supra, 147 Idaho at 64, 205 P.3d at 1200 (holding "there was no underlying promise between the Wadsworths and the Grovers and therefore, promissory estoppel is the incorrect legal theory."). There is no evidence that such a promise was ever

made. Though the parties may dispute whether the ALP reflecting Alternative 2(B) was provided specifically at SilverWing's request or negligently by the part time airport manager, no evidence supports stretching promissory estoppel to include negligent misrepresentation.[8] Allowing SilverWing's claim to proceed would be unjust because the evidence makes it clear that the County is being charged with accidental conduct rather than conduct of an intentional or promissory nature. Id.

C. THE DISTRICT COURT ERRED IN DENYING THE COUNTY'S MOTION FOR JNOV BECAUSE THERE IS NO SUBSTANTIAL EVIDENCE OF REASONABLE RELIANCE BETWEEN OCTOBER 25, 2006 AND NOVEMBER 3, 2006.

Promissory estoppel requires a showing of action or inaction in reliance on the promise and such reliance must have been reasonable, justifiable, and detrimental. Brown v. City of Pocatello, 148 Idaho 802, 807-08, 229 P.3d 1164, 1169-70 (2010).

Here, SilverWing testified "the decision was made" to develop the property based on Alternative 2(B) on ***November 3, 2006***. (See Tr. at 807:1-5; see also 804:25-805.) The fact that SilverWing was formed on ***October 25, 2006*** means SilverWing was required to introduce evidence that it reasonably relied on promises from the County during that nine day window between the date of SilverWing's formation and the date that the decision was made. (R. at p. 4611-4612 [order *in limine* excluding evidence of promises or reliance prior to October 25,

[8] SilverWing is using promissory estoppel as a vehicle for asserting a makeshift claim of negligent misrepresentation because negligent misrepresentation is not a valid cause of action under Idaho law. See Duffin v. Idaho Crop Improvement Ass'n, 126 Idaho 1002, 1010, 895 P.2d 1195, 1203 (1995) (negligent misrepresentation inactionable except in professional accounting relationships).

2006].) SilverWing failed to meet this burden. SilverWing's engineers testified that they knew it was "risky" to design the development based on an unapproved ALP showing Alternative 2(B) (Tr. at 804:17-805:5) but they relied on their discussions with the FAA and moved forward without waiting for the updated Master Plan. (Tr. at 807:1-5; R. at DTE B9.) SilverWing failed to present evidence of reliance on County promises between October 25, 2006 – the earliest date for an actionable promise, and November 3, 2006 – the date the "decision was made." Thus, because there is no evidence that SilverWing made its decision in reliance on any County promises made during that nine day window, Bonner County is entitled to judgment as a matter of law.

Further, even if SilverWing had presented evidence of reliance on a County promise during that nine day window, such reliance was *per se* unreasonable for at least three reasons: (1) such reliance involved the "risky" decision to design the development based on an unapproved ALP showing Alternative 2(B) (Tr. at 804:17-805:5); (2) such reliance required submitting CUP and PUD applications in violation of City Code, which required compliance with the then-currently approved airport plans (R. at DTE H42A); and (3) there is an empty signature block on the face of the 2006 ALP showing the FAA had not yet approved it (R. at DTE A35).

In reality, SilverWing did not plan its development based on the mistaken belief that Alternative 2(B) had been approved by the FAA. Instead, Trial Exhibit B9 (R. at DTE B9) makes it clear that SilverWing's engineers made a calculated decision on November 3, 2006 to move forward based on an unapproved ALP. Corrie Esvelt-Siegford wrote:

Debbie,

I had a discussion with Sandy Simmons and Trang Tran (Sandpoint's contact):

To submit the 7460, we need the cover letter to come from the Airport Manager. We should set up a meeting with him to get him up to speed.

FYI the ALP update is being done by W&H Pacific (Mark Napier). They are planning to relocate the taxiway on the west side. It currently is too close to the Runway. No Runway relocation - as far as Trang knows.

We will need to name the taxilanes. I assume the owner will want unique names to match the development - these will probably serve as their address later, for fire suppressant.

Do we have any soils information? Gradations, Soil classification, Soil density, CBR, Typical frost depth, any of this information would be helpful. Or a typical section used on other parts of the airport.

After review, some taxilanes do not provide adequate object free area for the aircraft shown. We may need to do some adjusting of the hangar layout.

Attached is your logo in block format.

Corrie

(R. at DTE B9; Tr. at 706:4-707:15.) Thus, SilverWing's engineers relied on the FAA, not the County.

D. SILVERWING HAS NOT SUFFERED SUBSTANTIAL ECONOMIC DETRIMENT BECAUSE SILVERWING'S OUT-OF-POCKET EXPENSES DO NOT CONSTITUTE DAMAGES.

Promissory estoppel requires a showing of "substantial economic detriment." See Grover, supra, 147 Idaho at 64, 205 P.3d at 1200.

In this case, the $250,000 awarded to SilverWing for "out-of-pocket" reliance damages does not represent a substantial economic detriment because SilverWing has not been deprived of the value of its development costs. SilverWing still owns and uses all of the features that it paid for. (Tr. at 471:17-472:3.) In fact, SilverWing even allowed its testifying trial expert to stay in SilverWing's model home during this litigation. (Tr. at 855:11-12.) SilverWing complained of lost sales resulting from the regulatory uncertainty, but no evidence was presented

at trial that the physical configuration of the airport has been altered or that SilverWing has been deprived of the use or benefit of its improvements. When the district court ruled that SilverWing's speculative lost profits claim could not be presented to the jury (Tr. at 1446:10-14), the result was to eliminate any possibility of SilverWing recovering damages at trial because SilverWing's out-of-pocket-expenses cannot fairly be characterized as damages. Today, SilverWing is free to use its property and any improvements on the property. This is confirmed by John McKeown's testimony at trial: "The runway is still where it was when I came here in 2006, yes." [Q]: "And your taxiway is still open to the runway… [A]: …yes. (Tr. at 471:17-472:3.)

Further, in 2012, the FAA promulgated Draft Compliance Guidance Letter 2012-X, 77 Fed.Reg. 44,515 (July 30, 2012), after Congress enacted the FAA Modernization and Reform Act of 2012, Pub. L. 112-95 ("FMRA"), § 136. FMRA § 136 allows existing residential developments with TTF access under certain specified conditions. And on May 27, 2015, the Federal Aviation Administration officially signed a new ALP approving the current physical configuration for Sandpoint Airport, including an approved layout that is in complete conformity with the SilverWing development as built. (R. at p. 768-785; Tr. at 1262:6-1263:6.)

In other words, the funds SilverWing expended to design and build its taxiway or model hangar home unit cannot fairly be construed as damages because nothing has changed and SilverWing's development as it stands today is in conformity with the approved ALP. Allowing SilverWing to recover the costs of improvements which SilverWing is free to use today would be a windfall to SilverWing. For example, if SilverWing were to sell its property, it would receive

value in exchange for the features that SilverWing paid to add, such as the model home. This would result in double recovery since the jury awarded $250,000 to compensate SilverWing for "out-of-pocket" damages.

Thus, because there is no substantial evidence that SilverWing reasonably relied on the County's promise to its substantial economic detriment, promissory estoppel does not apply.

E. THE IDAHO OPEN MEETINGS LAW BARS ENFORCEMENT OF THE ALLEGED PROMISES IN THIS CASE.

In Idaho, a County is considered a "public agency" and as such, is subject to the requirements of Title 74, Chapter 2 of the Idaho Code ("Open Meetings Law"). See I.C. §74-202(4)(c) and 74-203(1). The County is a "body corporate." I.C. §31-601. Its powers can *only* be exercised by the Board of County Commissioners ("BOCC"), or by agents and officers acting under their authority, or authority of law. I.C. §31-602 (emphasis added). Bonner County Code §1-305(B) confirms that the affairs of the County shall be conducted and carried out by the BOCC. Idaho's Open Meeting Law provides: "All meetings of a governing body of a public agency shall be open to the public and all persons shall be permitted to attend any meeting except as otherwise provided by this act…" I.C. §67-2342(1). "Governing body" is defined to mean the members of a public agency "with the authority to make decisions for or recommendations to a public agency regarding any matter." I.C. §67-2341(5).

The general process for a County to make a binding decision is established with specificity in the Code.[9] Decisions of the BOCC are subject to the open meetings and public

[9] During BOCC meetings, minutes must be kept in which all orders and decisions must be

records requirements. See generally, I.C., Title 74, Chapter 2 and Title 31, Chapter 7. The BOCC convenes to make a decision or deliberate to a decision in a "meeting" which must be properly noticed and conducted. See I.C. §74-202, §74-203, §74-204. Most importantly, the Open Meetings Law states:

> 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.

See I.C. §74-208(1).

Further, Idaho law prohibits county commissioners from delegating their discretionary powers, and any attempt to do so is void. Johnson v. Young, 53 Idaho 271, 23 P.2d 723, 729-30 (1932). The Court in Johnson cited the following:

> The Supreme Court of California, in House v. Los Angeles County, 104 Cal. 73, 37 P. 796, 798, said: "We are of opinion that the board of supervisors, in the absence of positive law authorizing it so to do, cannot, in any case, appoint an agent to exercise powers which it cannot itself exercise. In the exercise of powers conferred upon it, it may appoint agents to discharge ministerial duties not

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logged, in addition to certain other information. Minutes must be made available to the public within a reasonable period of time following the meeting. I.C. §74-205. Records of the BOCC must be signed by both the chairman and the clerk. I.C. §31-707. Ordinance and Resolution records must be kept permanently and indefinitely by the Board. I.C. §31-709 and 710. In addition, "all ordinances of a general nature shall, before they take effect and within one (1) month after they are passed, be published in at least one (1) issue of a newspaper published in the county, but if no paper be published in the county, then in some paper having general circulation therein..." I.C. §31-715. When a revision or codification of ordinances is made and published by BOCC authority , no further publication shall be necessary, provided that regulatory code sections pertaining to building construction and the like have been regularly adopted as a code by the BOCC, they shall take effect without publication or posting thereof if reference is made to the code, however one copy of such code duly certified by the clerk of the board of county commissioners shall be filed in the Clerk's office for use and examination by the public prior to the adoption of said ordinance, and thereafter kept on file. I.C. § 31-715.

> calling for the exercise of reason or discretion, but cannot go beyond this, and delegate to others duties, the discharge of which, calling for the use of reason and discretion, are regarded as public trusts. Scollay v. Butte Co., 67 Cal. 249, 7 P. 661."
> In 15 C. J. 465, § 116, it is said: "The right of a county board to delegate its authority depends on the nature of the duty to be performed. Powers involving the exercise of judgment and discretion are in the nature of public trusts and cannot be delegated to a committee or agent."

Johnson, 53 Idaho at 287-288, 23 P.2d at 729. "Duties which are purely ministerial and executive and do not involve the exercise of discretion may be delegated by the board to a committee or to an agent or employee." 20 C.J.S. Counties § 132 (2016).

The management of property of the county is a duty expressly vested with the BOCC. See I.C. §31-807; I.C. §31-604. The county commissioners are the only county officers empowered to purchase property, and to manage and control that property. Magoon v. Board of Commissioners of Valley County, 58 Idaho 317, 323, 73 P.2d 80, 82 (1937). Unlike other county officers, county commissioners are prohibited from appointing deputies to assist in discharging their duties. I.C. §31-2003.

The burden of establishing an agency relationship is on the party asserting it. Transamerica Leasing Corp. v. Van's Realty Co., Inc., 91 Idaho 510, 427 P.2d 284 (1967). Here, SilverWing has introduced no evidence of actual authority and apparent authority is insufficient to support SilverWing's claim of promissory estoppel against the County. Further, even if apparent authority could be applied, which it cannot, "apparent authority cannot be created by the acts or statements of the alleged agent alone." Brown, supra, 127 Idaho at 117, 898 P.2d at

48 (citing Idaho Title Co. v. American States Ins. Co., 96 Idaho 465, 468, 531 P.2d 227, 230 (1975)).

Particularly salient to this case, longstanding Idaho law holds a party cannot assert that an agent or employee has apparent authority when the law provides that only the governing body of that agency has such authority. Huyett v. Idaho State University, 140 Idaho 904, 908-910, 104 P.3d 946, 950-952 (2004); Totman v. E. Idaho Technical Coll., 129 Idaho 714, 717-718, 931 P.2d 1232, 1235-1236 (Ct.App.1997); Leon v. Boise State Univ., 125 Idaho 365, 369, 870 P.2d 1324, 1328 (1994); Woodward v. City of Grangeville, 13 Idaho 652, 658, 92 P. 840, 841 (1907).

In Totman, supra, 129 Idaho at 717-718, 931 P.2d at 1235-1236, the Court of Appeals held that a supervisor's representation to a teacher, both before being hired and during employment, that she could not be terminated other than for cause, was an unenforceable promise as only the Board of Education had authority to approve her employment beyond the express term of her employment contract. 129 Idaho at 717-718, 931 P.2d at 1235-1236. Likewise, in Leon, supra, 125 Idaho at 369, 870 P.2d at 1328, this Court held that a supervisor's alleged promise was unenforceable:

> Leon also contends that BSU breached a promise Anooshian made to him. He states in his affidavit that Anooshian "specifically agreed that [he] could wait until the Fall of 1991 to apply for tenure ..."
> The fundamental problem with this claim is that the policies of the state board that apply to BSU provide: "Any commitment to employ a nontenured member of the faculty beyond the period of his or her current appointment is wholly ineffective without prior approval of the Board." IDAPA 08.00.B.10. There is no evidence that the state board approved employment of Leon beyond his annual contract. Therefore, **even if Anooshian had promised**

> **Leon that he could defer his tenure application until the seventh year, this would have been an unauthorized act and wholly ineffective**.

Leon, supra, 125 Idaho at 369, 870 P.2d at 1328.

Similarly, in Huyett, supra, 140 Idaho at 908-910, 104 P.3d at 950-952, this Court held that the a basketball coach hired by Idaho State University could not claim that the University had apparent authority to enter into a multi-year contract when she was charged with notice of regulations in effect at the time which made multi-year contracts dependent on approval by the state Board of Education. 140 Idaho at 908-910, 104 P.3d at 950-952.

In Woodward, supra, 13 Idaho at 658, 92 P. at 841, this Court held that a contract signed by the mayor of the city of Grangeville, without any authorization by the city council, or any approval or ratification on the part of said city, was void and not enforceable against the city. "In this case without said contract having been authorized by the city, or having been ratified by the city, the mayor would have no authority to enter into the same as a binding obligation of said city." Id.

Promissory estoppel requires proving the existence of "an agreement between parties." Lettunich, supra, 141 Idaho at 367, 109 P.3d at 1109. If a mayor or county commissioner attempts to enter into a contract on behalf of the governmental entity without actual authority, the contract is void. See I.C. § 74-208(1). Any promise by any officer or agent of the county is likewise void. See id.

Other jurisdictions are in accord. In Pittsburgh Baseball, Inc. v. Stadium Auth. of the City of Pittsburgh, 157 Pa.Cmwlth. 478, 630 A.2d 505 (1993), the court held that oral promises

by Pittsburgh's mayor, his successor, and other city officials to provide $4,200,000.00, which was relied upon by the plaintiff in purchasing the Pittsburgh Pirates baseball team, failed to support a claim of promissory estoppel claim against the city, as a matter of law, stating:

> As to the promissory estoppel claim, we merely note that "it is a general and fundamental principle of law that persons contracting with a municipal corporation must at their peril inquire into the power of the corporation or its officers to make the contract or incur the debt." Pittsburgh Paving Co. v. City of Pittsburgh, 332 Pa. 563, 569, 3 A.2d 905, 908 (1938). See also School District of Philadelphia v. Framlau Corp., 15 Pa.Commonwealth Ct. 621, 627–28, 328 A.2d 866, 870 (1974) ("[o]ne who contracts with a school district must, at his peril, know the extent of the power of the school district's officers in making the contract."). As such, we conclude that Pittsburgh Associates has failed to sufficiently plead that it reasonably relied on Mayor Caliguiri's alleged oral promise, and the trial court did not err in dismissing the promissory estoppel count.

Pittsburgh, supra, 157 Pa.Cmwlth. at 485-86.

Here, other than the TTF Agreement, SilverWing presented no evidence at trial that anyone associated with the County made a promise to SilverWing at a duly-noticed open meeting that complies with the procedures set forth above. The County's decisions with respect to the configuration of the airport, including the ever-present potential to change that configuration at any time or to pursue changes to the location of the airport runway, concern a duty expressly vested with the BOCC. See I.C. §31-807; I.C. §31-604; Magoon, 58 Idaho at 323, 73 P.2d at 82. The BOCC is prohibited from appointing deputies to assist in discharging such duties. I.C. §31-2003. A decision involving the exercise of judgment and discretion cannot be delegated by the BOCC to an agent or employee. Johnson, 53 Idaho at 287-288, 23 P.2d at

729. SilverWing, as a matter of law, cannot claim that an agent or employee has apparent authority when the law provides that only the BOCC has such authority. Huyett, 140 Idaho at 908-910, 104 P.3d at 950-952; Totman, 129 Idaho at 717–718, 931 P.2d at 1235–1236; Leon, 125 Idaho at 369, 870 P.2d at 1328; Woodward, 13 Idaho at 658, 92 P. at 841. There is no evidence that the BOCC made any promise to SilverWing as to the airport configuration or location of the airport runway. As such, the district court erred in denying Bonner County's Motion for JNOV.

F. SILVERWING'S CLAIM OF PROMISSORY ESTOPPEL IS BARRED BY THE STATUTE OF FRAUDS (I.C. § 9-505.1) BECAUSE SILVERWING SEEKS TO BIND THE COUNTY IN PERPETUITY.

Idaho's Statute of Frauds provides in pertinent part: "In the following cases, the agreement is invalid, unless the same or some note or memorandum thereof, be in writing and subscribed by the party charged, or by his agent. Evidence, therefore, of the agreement cannot be received without the writing or secondary evidence of its contents: 1. An agreement that by its terms is **not to be performed within a year** from the making thereof." I.C. §9-505.1 (emphasis added).

In Bank of Commerce, supra, 154 Idaho at 834-835, 303 P.3d at 193-194, the Plaintiff sought to enforce an oral promise by a bank to make a loan. Citing Lettunich, supra, the court stated: "The Lettunich holding disposes of Jefferson's claim here. As noted above, any alleged oral pre-commitment from the Bank would not be valid for failure to comply with the Statute of Frauds. And just as promissory estoppel would not substitute for an invalid agreement in Lettunich, it will not do so here. Because there is 'no complete promise… to be enforced' here,

Jefferson is unable to avail itself of promissory estoppel. We thus affirm the district court's decision on this claim." Bank of Commerce, supra, 154 Idaho at 834-835, 303 P.3d at 193-194.

Here, SilverWing's alleged "promises" are barred by the Statute of Frauds because SilverWing seeks to bind the County for a period of more than one year. For SilverWing to claim otherwise would be tantamount to admitting the County successfully *performed* on its "promises," because one year after the alleged promises were made, nothing had changed (i.e., the runway had not moved, the taxiway had not been altered, etc.). (Tr. at 471:17-472:3.) In fact, even ten years after the alleged promise that the runway would not move, the runway has not moved. Id. SilverWing cannot have its cake and eat it too by alleging an oral "promise" that binds the County in perpetuity. It is for precisely such a "promise" that the Statute of Frauds exists. SilverWing failed to tie its assertions of promises to any condition, contingency, or other exception that might provide a termination date for the alleged obligation. Thus, the Statute of Frauds bars SilverWing's attempt to argue the County bound itself in perpetuity.

G. SILVERWING'S CLAIM OF PROMISSORY ESTOPPEL IS BARRED BY THE STATUTE OF LIMITATIONS BECAUSE SILVERWING'S ENGINEERS KNEW OF THE FAA'S CONCERNS IN MAY OF 2007.

The statute of limitations based on an oral contract is 4 years. I.C. §5-217. The original complaint in this action was filed on May 11, 2012, barring any claims that accrued before May 11, 2008. "[U]nder Idaho law, a cause of action generally accrues, and the statute of limitation begins to run, when a party may maintain a lawsuit against another." Galbraith v. Vangas, Inc., 103 Idaho 912, 915, 655 P.2d 119, 122 (Ct.App.1982); see also Spence v. Howell, 126 Idaho 763, 770, 890 P.2d 714, 721 (1995) (The cause of action accrued upon the breach of the

contract.). "A cause of action for breach of contract accrues upon the breach even though no damage may occur until later." Mason v. Tucker and Associates, 125 Idaho 429, 436, 871 P.2d 846, 853 (Ct.App.1994). "The… statute of limitation[s]… to bring this breach of contract claim began to run when [Plaintiff] became aware of the breach." Cuevas v. Barraza, 146 Idaho 511, 517, 198 P.3d 740, 746 (Ct.App.2008).

Here, 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. Specifically, she testified:

> Q. Okay. Were you troubled when the FAA saying we consider residential use -- because SilverWing was going to be a residential use; is that right?
>
> A. [Corrie Esvelt-Seigford]: It is.
>
> Q. So were you troubled when the FAA says, "Residential use adjacent to a public airport," and Sandpoint Airport's a public airport; is that right?
>
> A. Yes.
>
> Q. Okay. Were you troubled with the FAA is saying, "Residential use adjacent to a public airport is considered an incompatible land use?" In other words, did that raise a red flag in your mind?
>
> A. Yes.

(Tr. at 767:14-768:1.) SilverWing's claim accrued at that moment. Because SilverWing's engineer knew there were red flags regarding the FAA's position on the development as early as May of 2007, SilverWing's claim of promissory estoppel was filed approximately one year after

the running of the 4 year statute of limitations. See I.C. §5-217. Thus, the County is entitled to judgment in its favor on SilverWing's claim of promissory estoppel.

H. SILVERWING'S CLAIM OF PROMISSORY ESTOPPEL IS BARRED BY SEVERAL PROVISIONS OF THE IDAHO CONSTITUTION.

Bonner County may only exercise those powers granted to it by statute or the Idaho Constitution. Caesar v. State, 101 Idaho 158, 160, 610 P.2d 517, 519 (1980).

> Idaho has long recognized the proposition that a municipal corporation, as a creature of the state, possesses and exercises only those powers either expressly or impliedly granted to it. Sandpoint Water & Light Co. v. City of Sandpoint, 31 Idaho 498, 503, 173 P. 972, 973 (1918); Boise Dev. Co. v. Boise City, 30 Idaho 675, 688, 167 P. 1032, 1034-35 (1917). This position, also known as "Dillon's Rule," has been generally recognized as the prevailing view in Idaho. Moore, "Powers and Authorities of Idaho Cities: Home Rule or Legislative Control?", 14 Idaho L.Rev. 143, 147, n. 18 (1977) (for cases supporting this view). **Thus, under Dillon's Rule, a municipal corporation may exercise only those powers granted to it by either the state constitution or the legislature** and the legislature has absolute power to change, modify or destroy those powers at its discretion. State v. Steunenberg, 5 Idaho 1, 4, 45 P. 462, 463 (1896).

Caesar, supra, 101 Idaho at 160, 610 P.2d at 519 (emphasis added).[10]

[10] University of Idaho law professor James S. MacDonald explains Dillon's Rule in a recent law review article as follows:

> "Dillon's Rule" has been stated and restated in literally hundreds and hundreds of cases and articles. In the words of the last edition of the great man's treatise itself: § 237(89). Extent of Power; Limitations: Canons of Construction.--It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation--not simply convenient, but

Article VIII, Section 4 of the Idaho Constitution provides:

> No county, city, town, township, board of education, or school district, or other subdivision, shall lend, or pledge the credit or faith thereof directly or indirectly, in any manner, to, or in aid of any individual, association or corporation, for any amount or for any purpose whatever, or become responsible for any debt, contract or liability of any individual, association or corporation in or out of this state.

Thus, Article VIII, § 4 does not provide Bonner County with the power or authority to make gratuitous promises (promises without consideration to Bonner County) to SilverWing.[11]

Similarly, I.C. §31-605 limits Bonner County's ability to loan or give its credit. That section provides: "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." Id.[12] Idaho is not alone in its prohibition against gratuitous credit.

> indispensable. **Any fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied.**

James S. Macdonald & Jacqueline R. Papez, Over 100 Years Without True "Home Rule" in Idaho: Time for Change, 46 Idaho L. Rev. 587 (2010) (emphasis added). In this same article professor James Macdonald notes "… leading study **ranked Idaho fiftieth, and thus last, among the states in terms of degree of local discretionary authority**". Id. (emphasis added).

[11] Unlike the state, this section forbids counties from providing gratuities even where there is a public purpose. Idaho Falls Consolidated Hospital v. Bingham County Board of County Comm'rs, 102 Idaho 839, 642 P.2d 554 (1982) ("[A]rticle 8, § 4, specifically forbids counties from loaning or giving credit 'for any purpose whatever.' Therefore, the fact the Act in this case serves a public purpose is not enough in itself to uphold its constitutionality. Fluharty v. Board of County Commissioners, 29 Idaho 203, 158 P. 320 (1916)").

[12] Article XII, § 2 of the Idaho Constitution limits the powers of counties to make regulations which are not in conflict with other law if such powers are delegated by the legislature. I.C. §31-714 generally describes the scope of the powers of the board of county commissioners:

> Also, several states employ statutory prohibitions against the giving or lending of credit. For example, Alaska generally forbids the State and its political subdivisions to "make a subscription to the capital stock of …, lend its credit for the use of …, or borrow money for the use of a corporation." Similarly, an Idaho statute forbids its counties, unless "expressly authorized by law," to loan or give credit to "any person, association or corporation …"

Gelfand, State and Local Government Debt Financing § 11:10 (2d ed.).

As noted supra, an essential element of promissory estoppel is the lack of consideration. "'Promissory estoppel is simply a substitute for consideration, not a substitute for an agreement between parties.'" Profits Plus, supra, 156 Idaho at 891, 332 P.3d at 803 (2014) (quoting Lettunich, supra, 141 Idaho at 367, 109 P.3d at 1109. "Thus, where there is evidence of adequate consideration, the doctrine of promissory estoppel is of no consequence." Id. (citing Lettunich, 141 Idaho at 368, 109 P.3d at 1110). Neither Article VIII, § 4 of the Idaho Constitution nor I.C. §31-605 provide Bonner County with the power or authority to make gratuitous promises (promises without consideration to Bonner County) to SilverWing. As such, as a matter of law, Bonner County did not make any gratuitous promises to SilverWing (promises without consideration to Bonner County), because Bonner County did not have the authority or power to make any such promises.

> The board of county commissioners may pass all ordinances and rules and make all regulations, **not repugnant to law,** necessary for carrying into effect or discharging the powers and duties conferred by the laws of the state of Idaho, and such as are necessary or proper to provide for the safety, promote the health and prosperity, improve the morals, peace and good order, comfort and convenience of the county and the inhabitants thereof. (emphasis added).

Additionally, the Idaho Constitution art. VIII, § 3 provides yet another barrier to SilverWing's misguided attempt to obligate the County to "promises" beyond the term of one year. That section provides in pertinent part:

> No county, city, board of education, or school district, or other subdivision of the state, shall incur any indebtedness, or liability, in any manner, or for any purpose, exceeding in that year, the income and revenue provided for it for such year, without the assent of two-thirds of the qualified electors thereof voting at an election to be held for that purpose… **Any indebtedness or liability incurred contrary to this provision shall be void**.

Idaho Const. art. VIII, § 3 (emphasis added).

The word "liability" as used in Article VIII, Section 3 "is a much more sweeping and comprehensive term than the word 'indebtedness.'" Feil v. City of Coeur d'Alene, 23 Idaho 32, 50, 129 P. 643, 649 (1913). As this Court noted in Feil, the use of the word "liability" was intended to cover all kinds and character of debts and obligations. Id. In Feil, this Court adopted a standard for what constitutes a liability by stating that "a liability is a responsibility; the state of one who is bound in law and justice to do something which may be enforced by action. The liability may arise from contract, either express or implied, or in consequence of torts committed. The state of being bound or obliged in law or justice." Id.

This Court recently noted that "[w]hile many states have a similar constitutional provision, this Court has held that Idaho's is among the strictest, if not the strictest, in the nation." Greater Boise Auditorium District v. David R. Frazier, 159 Idaho 266, 272, 360 P.3d 275, 281 (2015). The Court goes on to affirm that "Feil's analysis of the scope of Idaho's

constitutional prohibition that has not been superseded by constitutional amendment remains good law." Id.

Unspecified contingent liability has been recognized by this Court as prohibited by Article VIII, Section 3. In School District No. 8, Twin Falls County v. Twin Falls County Mutual Fire Insurance Co., 30 Idaho 400, 164 P. 1174 (1917), the Court held that a school district did not owe money due under its contract with a mutual fire insurance company because the contract violated Article VIII, Section 3. The Court held:

> "It may be that a postponed contingent liability is not an indebtedness within the meaning of the section of the constitution until the contingency has occurred, but it is a liability which may become an indebtedness upon the happening of the contingency."

Williams v. City of Emmett, 51 Idaho 500, 506-507, 6 P.2d 475, 477 (1931).

Accordingly, when determining whether an indebtedness or obligation exceeds the annual income of a subdivision of the state, the total indebtedness undertaken or liability incurred must be considered, not just the payments due each year. Id. In Williams, the City entered into a three-year contract to lease a street sprinkler. Id. During the term of the contract, the City had an option to purchase the street sprinkler for a specified sum, with all rental payments being applied to the purchase price. Id. The purchase price equaled the sum of the three years of payments. Id. The Williams Court held that the contract was a liability that exceeded the City's annual income as the total amount of the payments due under the contract exceeded the City's annual income. Id.

In sum, SilverWing cannot reinterpret the doctrine of promissory estoppel as a vehicle for making an end-run around the Statute of Frauds and the Idaho Constitution. The County had no power to bind itself to any obligations to SilverWing lasting more than one year, and the evidence at trial showed that one year after all of the alleged promises the runway had not moved, the taxiway had not moved, and SilverWing's development had not been disturbed.

I. THE PRINCIPLES OF JUSTICE AND FAIR PLAY DO NOT SUPPORT THE JUDGMENT.

Promissory estoppel "is generally not applicable to state agencies acting in a sovereign or governmental capacity," and applies only where required by notions of justice and fair play. Idaho Wool Growers Ass'n v. State, 154 Idaho at 723, 302 P.3d at 348. At the trial of this action, SilverWing presented evidence of part-time and/or volunteer personnel who allegedly made promises on behalf of the County. SilverWing claims it relied on these representations notwithstanding the fact that it had a contract with the County saying SilverWing could not rely on extraneous oral promises. SilverWing's attempt to enforce such representations runs contrary to the notions of justice and fair play. Because the doctrine of promissory estoppel generally does not apply to governmental entities, and because there is no reason in this case to stretch its application to require the taxpayers of Bonner County to pay a $250,000 judgment to SilverWing for "out-of-pocket" expenses for improvements SilverWing still owns and is free to use, the notions of justice and fair play weigh in favor reversing the judgment below.

V. ATTORNEY'S FEES

A. THE DISTRICT COURT ERRED IN AWARDING SILVERWING ATTORNEYS FEES UNDER IDAHO CODE § 12-120(3) BECAUSE THE CLAIM OF PROMISSORY ESTOPPEL DOES ARISE FROM A COMMERCIAL TRANSACTION AS A MATTER OF LAW.

The district court improperly awarded SilverWing $486,337.03 in attorney's fees under I.C. §12-120(3) for prosecuting its claim of promissory estoppel. (R. at p. 5848.)

Idaho Code § 12-120(3) allows for an award of attorney's fees to the prevailing party in a civil action to recover "in any commercial transaction," but attorney fees "are not appropriate . . . unless the commercial transaction is integral to the claim, and constitutes the basis upon which the party is attempting to recover." Merrill v. Gibson, 139 Idaho 840, 845, 87 P.3d 949, 954 (Idaho 2004). "[I]n order for a transaction to be commercial, 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). As one court has explained, "I.C. § 12-120(3) has nothing to do with the duties of public officials. It simply adds an attorney fee entitlement to the terms on which two parties enter into certain commercial transactions." Idaho Newspaper Found. v. Cascade, 117 Idaho 422, 424, 788 P.2d 237, 239 (Idaho Ct. App. 1990).

In Brooks v. Gigray Ranches, 128 Idaho 72, 78, 910 P.2d 744, 750 (1996), this Court outlined the two stages of analysis to determine whether a prevailing party could avail itself of I.C. § 12-120(3): (1) "there must be a commercial transaction that is integral to the claim"; and (2) "the commercial transaction must be the basis upon which recovery is sought." Brooks, 128 Idaho at 78, 910 P.2d at 750. "[A] court is not required to award reasonable attorney fees every time a commercial transaction is connected with a case." Bingham v. Montane Resource

Associates, 133 Idaho 420, 426, 987 P.2d 1035, 1041 (1999) (citing Ervin Construction Co. v. Van Orden, 125 Idaho 695, 704, 874 P.2d 506, 515 (1993).

Brower v. E.I. DuPont De Nemours & Co., 117 Idaho 780, 792 P.2d 345 (1990), is directly on point. There, Brower sued Dupont on the basis that Dupont's **representations induced his reliance**, causing him to purchase and apply the herbicide "Glean" to his land. Brower had purchased the product from a local co-op in reliance on Dupont's representations that there were no restrictions on the crops that could be grown 24 months after using the product. Id. Because that period of time turned out to be much longer, Brower's reliance on Dupont deprived Brower of profits from his property for several years. Id. Dupont prevailed in the proceedings below due to the running of the statute of limitations, and recovered fees based on the argument that the suit arose from a "commercial transaction" under I.C. § 12-120(3). This Court reversed the fee award. Id. The Court concluded:

> [T]he award of attorney's fees is not warranted every time a commercial transaction is remotely connected with the case. Rather, the test is whether the commercial transaction comprises the gravamen of the lawsuit. Attorney's fees are not appropriate under I.C. § 12-120(3) unless the commercial transaction is integral to the claim, and constitutes the basis upon which the party is attempting to recover. To hold otherwise would be to convert the award of attorney's fees from an exceptional remedy justified only by statutory authority to a matter of right in virtually every lawsuit filed.
>
> In the present case, Brower's complaint alleges that DuPont's representations induced his reliance, causing him to purchase and apply Glean to his land, resulting in damages. 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 v. E.I. DuPont de Nemours & Co., 117 Idaho 780, 784, 792 P.2d 345 (Idaho 1990) (emphasis added).

Here, the irony of SilverWing invoking I.C. §12-120(3) is that SilverWing cannot recover for promissory estoppel if the County received anything in exchange for its promises. Nicholson, supra, 161 Idaho at 883, 392 P.3d at 1224 ("Promissory estoppel is a substitute for consideration."); See Gillespie, supra,138 Idaho at 30, 56 P.3d at 1280 (promissory estoppel does not apply where there is an exchange of consideration); see also Zollinger, supra, 137 Idaho at 400, 49 P.3d at 405 (same). SilverWing cannot carry its burden of demonstrating Bonner County "enter[ed] the transaction for a commercial purpose" (See Carrillo, supra,152 Idaho at 756, 274 P.3d at 1271) unless SilverWing makes the case-ending admission that the promises upon which it sued the County were encompassed within the TTF Agreement (R. at P76). If SilverWing were to identify a commercial purpose for the County's extraneous oral promises, such an admission would require reversal of the judgment below on the grounds that the doctrine of promissory estoppel does not apply if the County received value in exchange for its promises. See, e.g., Nicholson, supra,161 Idaho at 883, 392 P.3d at 1224.

Thus, because the district court's award of attorney's fees under I.C. § 12-120(3) is directly at odds with SilverWing's underlying theory of recovery, this Court should REVERSE the $486,337.03 award of attorney's fees on the promissory estoppel claim. Alternatively, if this

Court determines that SilverWing's claim arises out of a commercial transaction sufficient to support an award of fees under I.C. § 12-120(3), this Court should reverse the underlying judgment and fee award on the grounds that promissory estoppel does not apply where there is evidence of consideration. See Nicholson, 161 Idaho at 883, 392 P.3d at 1224. Such a determination would entitle the County to prevailing party attorney's fees under I.C. § 12-120(3) on the grounds that SilverWing's defective promissory estoppel claim arose from a commercial transaction. In any event, SilverWing's fee award is legally untenable under I.C. § 12-120(3).

B. BONNER COUNTY IS ENTITLED TO ITS FEES AND COSTS IN THE TRIAL COURT AND ON APPEAL IF THIS COURT REVERSES THE UNDERLYING JUDGMENT.

If this Court reverses the judgment below, the County would be entitled to its fees and costs in the trial court and below. First, the County would be entitled to its fees under I.C. §12-117 because SilverWing "acted without a reasonable basis in fact or law," for suing the County on a theory of promissory estoppel despite the fact that SilverWing has a written agreement with the County that contains a no-oral-modification and integration clause. (R. at PTE 76, ¶¶ 14(d), (i).) Because these facts have been known to SilverWing since the outset of the litigation, the County would be entitled to its fees under I.C. §12-117.

Second, even if the Court were to find I.C. §12-117 inapplicable to SilverWing's promissory estoppel claim, the County would be entitled to recover its defense fees as to that claim under Section 14(g) of the Through the Fence Airport Access Agreement (R. at PTE 76, ¶ 14(g)) because SilverWing testified that its claim was based, at least in part, on Exhibit A to the

TTF Agreement, which was a map depicting the planned location of SilverWing's taxiway based on the non-movement of the runway. (Tr. at 380:12-381:14; R. at PTE 76, Ex. A.)

VI. CONCLUSION

For the foregoing reasons, the judgment below should be REVERSED and SilverWing's claim of promissory estoppel should be DISMISSED, with attorney's fees and costs on appeal awarded to Bonner County. The case should then be REMANDED to the district court for a determination of the amount of Bonner County's prevailing party fees and costs from litigating the proceedings below.

DATED this 16th day of November, 2017.

BONNER COUNTY PROSECUTOR'S OFFICE

Scott Bauer

By: D. Scott Bauer
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CERTIFICATE OF SERVICE

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