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Silverwing at Sandpoint, LLC v. Bonner County Amicus 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 Docket No. 45052 Bonner County Civil Case No. CV-2012-0840

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BRIEF OF *AMICUS CURIAE* IDAHO ASSOCIATION OF COUNTIES

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APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER THE HONORABLE RICHARD CHRISTENSEN, DISTRICT JUDGE, PRESIDING

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TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

Idaho Cases

Idaho Constitution, Idaho Code, and Idaho Session Laws

Idaho Rules of Civil Procedure

Idaho Administrative Rules

Federal Cases

United States Code and Public Laws

Code of Federal Regulations

Federal Agency Guidance

Cases from Other Jurisdictions

I. STATEMENT OF THE CASE

A. Nature of the Case

On its face, this case simply concerns the development of an aviation-themed residential subdivision adjacent to the Sandpoint Airport. However, much more is at stake in this case beyond the parties involved or the claims and counterclaims that have been made. This case will determine whether, and to what extent, the doctrine of promissory estoppel can be applied against a governmental entity so as to bind the entity to an obligation that was never approved by the entity's governing board in accordance with Idaho law. Thus, the outcome of this case has the potential to affect how local government works for a long time to come.

The Plaintiff/Respondent, Silverwing at Sandpoint, LLC ("Silverwing"), has contended that it suffered damages based on the doctrine of promissory estoppel because it relied to its detriment on promises alleged to have been made by various representatives of Bonner County prior to and during the development process. On the other hand, the Defendant/Appellant, Bonner County, has contended that the application of promissory estoppel is inappropriate in this case because, *inter alia*, no promises were ever made to Silverwing, and because any such promises could not be binding on the County because the persons who made them were not lawfully authorized to do so.

B. Concise Statement of Facts

Bonner County is a political subdivision of the State of Idaho. It owns the Sandpoint Airport, which is located within the City of Sandpoint, pursuant to Title 21, Chapter 4, Idaho Code.

The Bonner County Board of Commissioners ("the Board") exercises executive authority over the airport pursuant to section 21-401, Idaho Code.

As part of its oversight of airport management and operations, the Board appoints an Airport Advisory Board ("the Advisory Board"), which was created by resolution of the Board in 1999. R. at 3137-41; R. Exh. at 351-54 (Defendant's Exhibit A7)[1]. The resolution specifies that the Advisory Board can make recommendations to the Board regarding operations, maintenance, budgeting, and grant funding, and other aspects of airport management, but it also emphasizes that the Board is the final authority over the airport and only the Board can bind the County with respect to any matter regarding the airport. *Id*.

In 1993, the Board approved an Airport Master Plan ("the Master Plan") for the period of 1993-2013. R. at 2987-88; *see also* R. at 3044-45. This Master Plan contained an Airport Layout Plan ("ALP"), which depicts the location and nature of existing and proposed airport facilities and structures. Trial Tr. p. 1087, L. 8-22. Bonner County's 1993 ALP showed the airport's runway moving sixty feet (60') to the west of the then-current alignment in the future. R. at 2987-88; *see also* R. at 3044-45. The ALP was approved in conjunction with an update to the Master Plan by the Federal Aviation Administration (FAA) in November of 2003. *Id*.

On May 31, 1996, the Board entered into a contract with Robert Maurice, entitled "Lease of Airport Fixed-Base and Related Facilities" ("the Airport Lease"), the terms of which included

[1] In this brief, citations to the Amended Clerk's Record on appeal will be referenced with the abbreviation "R." Citations to the Amended Clerk's Record of Trial Exhibits will be referenced with the abbreviation "R. Exh.," and will include a parallel citation to the party and exhibit number (e.g., "Plaintiff's Exh. 1"). As there were multiple transcripts prepared for this appeal, citations to the trial transcript will be referenced with the abbreviation "Trial Tr."

acting as the airport manager. R. at 3080; R. Exh. at 17-45 (Plaintiff's Exh. 3). On June 5, 1996, Mr. Maurice assigned his rights to Jorge L. O'Leary. *Id.*

The Airport Lease included a determination by the Board that the "operation, management, and maintenance of such airport facilities constitute reasonable and necessary activities of the County." *Id*. The Airport Lease provided that Mr. O'Leary would perform a number of ministerial duties, and also provided that he would "act as coordinator between Bonner County and ... contractors, federal and state agencies, pertaining to the improvement, protection, operation and maintenance of Airport properties and attendant facilities." *Id*. The Airport Lease further stated that he would "confer with members of the Airport Commission, Bonner County Commissioners, or their designated representatives on aviation matters, which may include but shall not be limited to the interpretation of federal aviation agency rules and regulations, the adequacy of the existing airport facilities, and flight load capacities of the Airport." *Id*. The airport has had at least six separate mid-field access points to its runway; three provide the only access from the west side of the runway which includes the mid-field access point shared by Silverwing and Quest Aircraft Company, Silverwing's northern neighbor. R. at 3082.

In 2005, the Board began the process to revise the ALP approved in 2003 to conform to the then-current runway alignment, thereby abandoning its previous plan to move it sixty feet to the west. R. at 2988; R. Exh. at 356-59 (Defendant's Exhibit A27). Instead, the Board sought to adopt a new ALP that contemplated moving both the east and west taxiways to achieve the 240-foot separation between runway and taxiway required by the FAA. *Id*.

In April 2006, John McKeown purchased 18.1 acres of land immediately adjacent to the west side of the airport. R. at 1071, 3081. Shortly thereafter, that property was conveyed to Silverwing. *Id.* Silverwing intended to design and construct 45 hangar structures for airplanes with residences above the hangars ("the Development"), so that residents could have access to the airport runway. *Id.* To that end, the conveyance to Silverwing included a taxiway easement ("the Easement") that Bonner County had originally granted to Silverwing's predecessors in interest, which provided access through the airport fence to the runway. *Id.; see also* R. Exh. at 50-67 (Plaintiff's Exh. 5-7).

During the same month, Mr. McKeown requested a copy of the ALP on file with the FAA at that time from Mr. O'Leary. R. Exh. at 82-84 (Plaintiff's Exh. 32); Trial Tr. p. 299, L.3-p. 307, L. 19. Mr. McKeown testified that Mr. O'Leary responded to this request by emailing him a copy of an ALP for the airport, and that he represented it was current and approved; however, in his deposition, Mr. O'Leary could not specifically recall providing an ALP to Silverwing or which ALP would have been provided. R. Exh. at 82-84; Trial Tr. p. 299, L.3-p. 307, L. 19; p. 1094, L. 12-p. 1099, L. 21. Mr. McKeown also testified that the ALP that he was provided reflected the existing location of the runway and made no mention of plans to move it. *Id*. He also testified that Mr. O'Leary and Mark Napier, an engineer with the firm with which Bonner County had contracted as an engineering consultant for the airport, provided him with additional copies of an ALP depicting the runway in its current location. Trial Tr. p. 350, L. 13-p. 351, L. 13.

In late 2006, Silverwing attended numerous meetings related to the Development which led to the understanding that the Development should be based on the assumption that the ALP

would be amended to reflect the airport runway's then-current orientation. R. at 1047-48; Trial Tr. p. 336, L. 4-p. 338, L. 9; p. 344, L. 4-p. 351, L. 13; p. 441, L. 2-20. Although Silverwing had originally intended to build a taxiway entirely on its property, the taxiway was moved at the County's request to be partly on County property to accommodate the County's plans to build a west side taxiway for the entire length of the runway in its then-current location, pursuant to a development alternative identified as "Alternative 2(B)." Trial Tr. p. 336, L. 4-p. 338, L. 9; p. 344, L. 4-p. 351, L. 13. Bonner County was seeking FAA approval of an ALP modification that reflected this alternative. R. at 3096.

In January of 2007, Silverwing submitted draft plans for construction of the Development to Mr. O'Leary. Such plans were required to be submitted on a standard form provided by the FAA known as Form 7460-1, entitled "Notice of Proposed Construction or Alteration," and were subject to approval of both Bonner County and the FAA. R. Exh. at 144-49 (Plaintiff's Exh. 60); Trial Tr. p. 366, L. 9-p. 377, L. 25. Messrs. O'Leary and Napier offered comments to Silverwing's proposed Form 7460-1, and those comments were incorporated into the final draft. R. Exh. at 156-63 (Plaintiff's Exhibits 62, 65, 68 and 69). Although those comments did not indicate that Silverwing's submission was based on an unapproved ALP, there is evidence that Silverwing's engineers were aware of this. R. Exh. at 306-08 (Plaintiff's Exhibit 150); R. Exh. at 379-82 (Defendant's Exhibits B8 and B9); R. Exh. at 403-07 (Defendant's Exhibits E44 and E46).

On February 14, 2007, Mr. O'Leary submitted Silverwing's final Form 7460 to the FAA. R. Exh. at 164 (Plaintiff's Exh. 70.) During this time, Silverwing also sent plans for the design and construction of a 1,098 foot west parallel taxiway at the Airport to the County via FAA Form

7480, entitled "Notice of Landing Area Proposal." R. Exh. at 150-55 (Plaintiff's Exh. 61); Trial Tr. p. 366, L. 9-p. 377, L. 25.

On February 20, 2007, the Planning Commission for the City of Sandpoint held a public hearing to consider planned unit development (PUD) approval and preliminary subdivision approval of Silverwing's application for the Development. R. Exh. at 165-71 (Plaintiff's Exhibit 71). During this meeting, then-Advisory Board Chairman Terry McConnaughey was asked if the proposal would impact the long-term development of the Airport. R. Exh. at 168. He replied that "there are no plans for major development for runway length, except for the taxiway on the left side, which Silverwing is developing within FAA guidelines." *Id.* At the conclusion of that hearing, the Planning Commission approved the application. R. Exh. at 170-71.

On March 21, 2007, the Sandpoint City Council held a public hearing to consider final PUD and preliminary subdivision approval of Silverwing's application for the Development. R. Exh. at 174-81 (Plaintiff's Exhibit 75). During this meeting, McConnaughey once again expressed support for the project. R. Exh. at 177. The City Council approved the application at the conclusion of that meeting. R. Exh. at 179-81.

In April of 2007, Silverwing and Bonner County entered into a "Through-the-Fence Agreement" ("the TTFA"). R. Exh. at 191-99 (Plaintiff's Exhibit 76). On April 16, 2007, the Advisory Board recommended that the Board approve the TTFA, and the Board approved the TTFA on April 27, 2007. R. Exh. at 192. The TTFA reads, in pertinent part:

> 4. **Conditions and Restrictions**. [Silverwing's] right hereunder to access the Airport shall be subject to the following conditions:

a. [Silverwing] shall comply with all applicable present and future:

(i) rules, regulations, and other requirements of the FAA or any successor federal regulatory agency;

(ii) laws of the State of Idaho and of the United States of America, including without limitation, statutes, rules, regulation, ordinances and codes; and

(iii) County and City laws, rules, regulations, ordinances, and codes, including without limitation rules and regulations of the Airport Board;

b. All plans, designs and specifications for security measures and means of access, shall be subject to the prior review and approval by the Airport Board, and [Silverwing] shall also obtain and submit to the Airport Board all approvals which may be required by the FAA from time to time …

5. **Access Fee**. ... It is acknowledged that [Silverwing] is constructing 44 residential airplane hangars.…

13. **Remedy Upon Breach.** Should either party hereto breach any of its obligations hereunder and fail to cure such default within thirty (30) days after written notice of the breach given by the other party, then such other party may terminate this Agreement and pursue such other remedies as may be available at law....

14. **General Provisions**. The parties hereto agree to the following general provisions: …

d. Modification. This Agreement shall not be modified by either party by oral representations made before or after the execution of this Agreement. All modifications must be in writing and signed by the parties.

R. Exh. at 194-97.

This is when the Development started to get sideways with the FAA. Correspondence dated April 30, 2007 and May 3, 2007 from Trang Tran, a civil engineer with the FAA's Seattle Airports District Office, demonstrated that the FAA had concerns about the Development. R. Exh. at 200-01 (Plaintiff's Exhibits 81 and 84). While the April 30, 2007 letter stated that the FAA had no objection to the construction of the 1,098-foot parallel taxiway, it specifically stated that "[t]his

airspace determination should not be construed to mean FAA approval of the physical development involved in the proposal." R. Exh. at 200. The May 3, 2007 letter then informed Bonner County of the following:

> The Federal Aviation Administration (FAA) has completed its review of your proposal to develop a 44-hangar subdivision ... with airport access using through-the-fence (TTF) operation ... as shown on the sketch attached to your *Notice of Proposed Construction of Alteration* (FAA Form 7460 1) dated January 31, 2007.
>
> It has been determined that the proposal would not exceed the standard of [FAA] Regulation Part 77. Therefore, we have no objection to the proposed development, *provided* that the TTF Agreement between [the parties] is approved by our office. The Agreement ... must be in compliance with [FAA Rules] and the Airport Layout Plan (ALP).
>
> We note that the 7460-1 plans for two FBO building and for hangars that will have a loft with living or office spaces. ... Additionally, 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. The fact that there is aircraft parking collocated with a residence does not change the fact that that it is [a] residential use. Therefore, we encourage you to ensure through your [ITFA] that access is not provided to hangars with residences.

R. Exh. at 201 (emphasis in original). Silverwing's representatives were made aware of the FAA's concerns. R. Exh. at 203-09 (Plaintiff's Exhibits 88, 89 and 96).

Notwithstanding the FAA's stated concerns, however, Silverwing began construction of the Development in September of 2007. R. at 3091; Trial Tr. p. 385, L. 8-p. 386, L. 9. This work cost approximately $4,950,000, including the construction of a 1,098-foot taxiway along the west side of the Airport at a cost of approximately $650,000. R. at 3091; Trial Tr. p. 387, L. 8-19. On December 5, 2008, the FAA sent then-Board Chairman Lewis Rich a letter stating that allowing Silverwing and others through-the-fence access, and allowing Silverwing to construct a development with a residential component adjacent to the airport, violated Grant Assurance Nos.

5, 19 and 21. R. Exh. at 232-34 (Plaintiff's Exhibit 109). Accordingly, the FAA placed the airport on the "FAA Airports Non-Compliance List" for three years. *Id*. The airport would be ineligible for FAA funding during that period unless the FAA and Bonner County could come to a satisfactory resolution of those issues. *Id*.

In response to the FAA's determination of non-compliance status, Bonner County adopted a corrective action plan (CAP) on January 29, 2009. R. Exh. at 235-38 (Plaintiff's Exhibit 110). Among other things, the CAP sought to pursue an extinguishment or amendment to the perpetual nature of the Silverwing easement agreement and TTFA; pursue an amendment to the TTFA that expressly subordinates the agreement to Bonner County's grant assurances with the FAA; and pursue an amendment to the Silverwing and Quest TTFAs to require access only at the end of the runway, with the County recognizing FAA's position that midfield access is unacceptable from a safety perspective. *Id*. The FAA accepted the CAP in part, and rejected it in part, via letter dated February 25, 2009. R. Exh. at 398 (Defendant's Exhibit D3).

In January of 2009, Advisory Board member Chris Popov contacted Silverwing to discuss the ramifications of the December 5, 2008 FAA non-compliance letter. R. Exh. at 301-04 (Plaintiff's Exhibit 142). He did so again on March 8, 2009 in an email setting forth the FAA's concens in detail. R. Exh. at 399-400 (Defendant's Exhibit D5). Mr. Popov testified that the provision in the CAP regarding extinguishment or amendment to the Silverwing easement agreement and TTFA was included because that was the only way the FAA would approve the CAP. Trial Tr. p. 1362, L. 8-p. 1365, L. 3.

On March 25, 2009, the FAA notified Bonner County that Silverwing's taxiway had not been constructed in accordance with the ALP previously approved by the FAA, which depicted the future relocation of the airport's runway 60 feet to the west to provide 240 feet of separation between the runway and taxiways. R. Exh. at 241 (Plaintiff's Exhibit 114). According to Mr. McKeown, during July 2009, Mr. Popov informed Silverwing that it may need to relocate the existing taxiway 60 feet to the west at its own expense. R. at 1262, 1290-93. Silverwing objected to the County's demand, arguing that it built the taxiway based upon the ALP depicting the current location of the runway. *Id.*

From 2009 to 2011, Silverwing and Bonner County negotiated with the FAA to resolve the Airport's non-compliance status. *Passim.* In September of 2009, the County and Silverwing entered into a Letter of Intent evidencing a possible purchase of the Silverwing property in its entirety by the County, though Silverwing ultimately rescinded that agreement in a letter dated February 4, 2010. R. Exh. at 401 (Defendant's Exh. D50A). Notably, that letter also stated the following:

> [Silverwing] remains very optimistic about the future of Sandpoint Airport and the Sandpoint Community and we are steadfast in our desire to work with Bonner County to make the Sandpoint Airport an even more special destination and economic generator than it is today. We will be moving forward with lot sales and building sales at our development and we look forward to generating new jobs and other income sources for the entire community. It has been a pleasure working with Mr. Popov and we look forward to working with the airport board and Bonner County in the future….

Id.

In March of 2011, Compliance Guidance Letter 2011-1, the FAA's interim policy permitting existing residential developments with through-the-fence access points to continue to

operate, went into effect. R. Exh. at 402 (Defendant's Exh. E40). On October 11, 2011, the County approved an amended ALP depicting the future relocation of both the runway and the taxiway 60 feet to the west of their respective then-existing locations, and also depicting the acquisition of a portion of Silverwing's development to accommodate this plan. R. at 1214-18, 1231-34; R. Exh. at 253 (Plaintiff's Exhibit 121). The FAA approved this amended ALP on October 24, 2011. *Id*. In December of 2011, the County submitted an amended CAP to the FAA depicting the future relocation of the runway and taxiway 60 feet to the west and acquisition of a parcel of Silverwing's Development, consistent with its October 2011 updated ALP. R. at 1218-22, 1235-40.

In 2012, Congress passed legislation rescinding the previous prohibition on residential through-the-fence agreements. Pub. L. 112-95 § 136, 126 Stat. 23-24 (amending 49 U.S.C. § 47107); Trial Tr. p. 1369, L. 22-p. 1370, L. 3. In early 2015, the County submitted a new ALP which showed the runway remaining in its current location consistent with Alternative 2(B). R. at 3096; Trial Tr. p. 1370, L. 3-11. The runway and the taxiway that Silverwing built are in the location depicted in the 2015 ALP, consistent with Alternative 2(B), and have not moved from the time Mr. McKeown purchased the Silverwing property until today. Trial Tr. p. 1370, L. 12-21.

C. Course of Proceedings

On May 11, 2012, Silverwing filed this action in the District Court in Bonner County. R. at 40-57. The County then removed the case to the U.S. District Court for the District of Idaho. *Silverwing at Sandpoint, LLC v. Bonner County,* No. 2:12-CV-00287-EJL, 2014 WL 66296000 (D. Idaho Nov. 21, 2014). The County moved for summary judgment. *Id.* at *3-*4. The U.S. District Court granted the County's motion on all claims with the sole exception of the promissory

estoppel claim, and remanded that claim to the state District Court. *Id.* at *6-*13; *see also* R. at 157-59.

On May 1, 2015, the County moved for judgment on the pleadings, and subsequently filed an alternative motion for summary judgment. R. at 168-246. Prior to the hearing set for County's motions, County amended its Answer to include two counterclaims: breach of contract and breach of the covenant of good faith and fair dealing. R. at 2957-3020. On April 13, 2016, the District Court denied the County's motions for judgment on the pleadings and summary judgment. R. at 3053-74. On July 27, 2016 Silverwing moved for summary judgment as to County's two counterclaims. R. at 3075-77. On September 8, 2016, the District Court granted Silverwing's motion in part and denied it in part. R. at 3303-28.

A jury trial of this matter was held from November 16, 2016 to November 22, 2016. Trial Tr. p. 2, L. 4-10. During trial, the County moved for a directed verdict. Trial Tr. p. 1176 L. 1-p. 1214, L. 15. The Court denied the motion. Trial Tr. at 1422. At the conclusion of the trial, the jury found that Bonner County was liable to Silverwing in the amount of $250,000. R. at 4902-05; Trial Tr. p. 1577, L. 11-p. 1579, L. 13. After trial, the County moved for judgment notwithstanding the verdict, essentially renewing the motion for a directed verdict it had made during trial. R. at 4908-10. On March 17, 2017, the District Court denied that motion. R. at 5727-48. The County appealed this matter to this Court on April 14, 2017. R. at 5821-29.

In the meantime, Silverwing appealed the decision of the U.S. District Court to the Ninth U.S. Court of Appeals. *Silverwing at Sandpoint, LLC v. Bonner County,* 2017 WL 4995822 (9th

Cir. Nov. 1, 2017). The Court of Appeals issued its decision affirming the U.S. District Court on November 1, 2017. *Id*.

II. ISSUES DISCUSSED IN THIS BRIEF

A. Whether the doctrine of promissory estoppel may ever be the basis for a cause of action against a governmental entity.

B. Whether the doctrine of promissory estoppel should be applied upon the facts of this case.

III. STANDARD OF REVIEW

A. Summary Judgment and Judgment on the Pleadings

The standard of review of a decision on a motion for summary judgment is *de novo*; *i.e.*, this Court reviews the motion based upon the same standard as the court below. *Massey v. ConAgra Foods, Inc*., 156 Idaho 476, 479-80, 328 P.3d 456, 459-60 (2014). That standard is whether "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." *Massey*, 156 Idaho at 479, 328 P.3d at 459, *quoting* I.R.C.P. 56(c). The record is to be liberally construed, and all reasonable inferences must be drawn, in favor of the non-moving party. *Id*. If the evidence is conflicting on material issues, or if reasonable minds could reach different conclusions, summary judgment is not appropriate. *Id*.

The standard of review of a decision on a motion for judgment on the pleadings is the same as that of a motion for summary judgment. *State v. Yzaguirre*, 144 Idaho 471, 474, 163 P.3d 1183, 1186 (2007). In reviewing a motion for judgment on the pleadings, however, the moving party is

deemed to have admitted the allegations of the opposing party's pleadings, and also admits the untruth of its own pleadings to the extent they have been denied. *Id*.

B. Directed Verdict and Judgment Notwithstanding the Verdict

A decision on a motion for a directed verdict under I.R.C.P. 50(a), or on a motion for judgment notwithstanding the verdict under I.R.C.P. 50(b), is purely a question of law, and this Court applies the same standard of review to each. *Quick v. Crane*, 111 Idaho 759, 763, 727 P.2d 1187, 1191 (1986). This standard is also *de novo*, with this Court applying the same standard as the trial court which made the original decision on the motion. *Smith v. Mitton*, 140 Idaho 893, 897, 104 P.3d 367, 371 (2004).

The Court is to determine whether there exists substantial evidence to justify submitting the case to the jury. *Id*. In making this determination, the truth of the adverse evidence is deemed admitted, and all legitimate inferences must be drawn in favor of the non-moving party. *Id*. "Substantial evidence" is defined as evidence of sufficient quantity and probative value that reasonable minds could conclude that a verdict in favor of the party against whom the motion is made is proper. *Id*. On the other hand, such a motion is properly granted whenever the evidence is so clear that all reasonable minds would only reach the conclusion that the moving party must prevail. *Id*. Motions for judgments notwithstanding the verdict are treated as delayed (or renewed) motions for a directed verdict, and they are intended to provide the court with the last opportunity to order the judgment that the law requires. *Quick*, 111 Idaho at 764, 727 P.2d at 1192.

C. Jury Instructions

The standard by which the acceptance or rejection of jury instructions is whether the instructions, as a whole, fairly and adequately present the issues and state the law that applies in that case. *Smith*, 140 Idaho at 897, 104 P.3d at 371. No reversible error occurs as long as the instructions, taken as a whole, are not misleading and do not prejudice any party to the action. *Id*.

IV. ARGUMENT

A. This Court should hold that promissory estoppel cannot be the basis for a cause of action against a governmental entity performing a governmental function.

1. The planning, management and operation of a public airport is a governmental function.

Silverwing has sought an award of damages against Bonner County based on the theory of promissory estoppel. Promissory estoppel, along with its sister remedies of equitable estoppel and quasi-estoppel, each require the allegation of a promise or representation by the person or entity against which the applicable form of estoppel is to be asserted. *Idaho Wool Growers Ass'n v. State ex rel. Idaho Dept. of Fish and Game*, 154 Idaho 716, 723, 302 P.3d 341, 348 (2012). In general, estoppel is not applicable against governmental entities acting in a sovereign or governmental capacity, but "may apply where required by notions of justice or fair play." *Id*. Thus, the first question to be addressed is whether the County's planning and management of the Sandpoint Airport is a governmental function.

As stated above, this matter centers around the location of an aviation-themed residential development, including the construction of a taxiway, in relation to: 1) the actual location of the airport's lone runway, 2) the future location of the runway as depicted in the FAA-approved ALP

at the time the infrastructure for the development, including the taxiway, was constructed, and 3) the future location of the runway as depicted in the draft ALP for which Bonner County was seeking approval from the FAA at all times relevant to this matter, which was finally granted in 2015. *See* Trial Tr. at 188-92. The Idaho Legislature has provided that the acquisition, construction, operation and maintenance of public airports in Idaho is a governmental function. Idaho Code §§ 21-110, 21-401. In addition, planning activities involving policy formulation have been recognized as governmental functions that are immune from tort liability, even before statutory changes were made to also make other governmental functions immune from tort liability. *See Sterling v. Bloom*, 111 Idaho 211, 230, 723 P.2d 755, 774 (1986), superseded by enactment of Idaho Code §§ 6-904A through 6-904(c), *see Harris v. State ex rel. Dep't of Health and Welfare*, 123 Idaho 295, 301, 847 P.2d 1156, 1162 (1992).

2. The doctrine of equitable estoppel is generally not applicable against a governmental entity performing a governmental function, and is strongly disfavored.

The next question is whether, and under what circumstances, it may be appropriate for a court to apply the doctrine of estoppel against a governmental entity performing a governmental function. This Court has set forth the elements of equitable estoppel as follows:

> (1) a false representation or concealment of a material fact with actual or constructive knowledge of the truth,
>
> (2) the party asserting estoppel did not know or could not discover the truth,
>
> (3) the false representation or concealment was made with the intent that it be relied upon and
>
> (4) the person to whom the representation was made or from whom the facts were concealed, relied and acted upon the representation or concealment to his prejudice.

Twin Falls Clinic & Hospital Bldg. Corp. v. Hamill, 103 Idaho 19, 22, 644 P.2d 341, 344 (1982). Similarly, the doctrine of quasi-estoppel "prevents a party from asserting a right, to the detriment of another party, which is inconsistent with a position previously taken." *Allen v. Reynolds*, 145 Idaho 807, 812, 186 P.3d 663, 668 (2008). The elements of quasi-estoppel are as follows:

> (1) the offending party took a different position than his or her original position, and
>
> (2) either:
>
> > (a) the offending party gained an advantage or caused a disadvantage to the other party;
> >
> > (b) the other party was induced to change positions; or
> >
> > (c) it would be unconscionable to permit the offending party to maintain an inconsistent position from one he or she has already derived a benefit or acquiesced in.

Id. Prior decisions of this Court, including those discussed below, are evidence of this Court's reluctance to apply the doctrine of equitable estoppel or quasi-estoppel against a local governmental entity in the exercise of a governmental function.

In *Harrell v. City of Lewiston*, 95 Idaho 243, 506 P.2d 470 (1973), this Court discussed the history of its prior decisions regarding the application of estoppel against governmental entities, and also discussed the fact that some jurisdictions had refused to do so in any circumstance concerning the enactment or enforcement of zoning regulations, while other jurisdictions would do so only under "extraordinary circumstances." *Harrell*, 95 Idaho at 247-48, 506 P.2d at 474-75. The *Harrell* Court then adopted the "extraordinary circumstances" rule, but found that no exigency existed such as would estop the City of Lewiston from refusing to issue a building permit based on the zoning of the property at issue. *Id*. at 248-49, 506 P.2d at 475-76.

A later case considered the application of estoppel to an instance in which a city entered into an agreement with a developer in 1973, and then subsequently rezoned the property in 1993 in a manner inconsistent with the original 1973 agreement. *Sprenger, Grubb & Associates, Inc. v. City of Hailey*, 127 Idaho 576, 578-80, 903 P.2d 741, 743-45 (1995). In that case, the City of Hailey conceded that the property owner's predecessor in interest had fulfilled the terms and conditions of the agreement. *Id*. at 579, 903 P.2d at 744. The then-current property owner had contended that the City of Hailey should have been estopped from changing its position as to its obligations under the development agreement, since the City had "received the benefit of its bargain." *Id*. at 582-83, 903 P.2d at 747-48. The Court, however, found that the application of estoppel was not appropriate because the City did not breach the agreement, the agreement did not impose a "regulatory freeze" on the property in question, and the property owner did not rely to its detriment on the prior zoning as opposed to the new zoning. *Id*. at 582-83, 903 P.2d at 747-48.

Most recently, this Court has had occasion to extend the rule from *Harrell* and *Sprenger* to a case involving a representation that a county planner had made with respect to a subdivision application. *Terrazas v. Blaine County*, 147 Idaho 193, 200-01, 207 P.3d 169, 176-77 (2009). In that case, the property owners had applied for preliminary subdivision approval based on planning staff's interpretation that the property in question did not lie within Blaine County's "Mountain Overlay District" (MOD). *Id*. They had contended that because they had relied on this interpretation to their detriment in the form of expenditures of large sums of money in preparing the subdivision application, the county should be estopped from denying the application on the basis that the property was within the MOD. *Id*. This Court, however, once again declined to

apply the doctrine of estoppel in this matter, expressly finding that the result of doing so would be that "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 opinions." *Id*. at 177.

Although these cases each involved claims of equitable estoppel or quasi-estoppel in the context of a land use application, their reasoning applies equally to decisions of a local governing board performing other governmental functions, including policy decisions related to the planning, management and operation of a public airport. For the reasons discussed below, this reluctance should apply to an even greater degree with respect to the application of promissory estoppel under such circumstances.

3. No Idaho appellate decisions have applied the doctrine of promissory estoppel against a governmental entity.

This Court has expressed the elements of promissory estoppel as follows:

(1) the detriment suffered in reliance was substantial in an economic sense;
(2) substantial loss to the promisee acting in reliance was or should have been foreseeable by the promisor; and
(3) the promisee must have acted reasonably in justifiable reliance on the promise as made.

Gillespie v. Mountain Park Estates, LLC, 138 Idaho 27, 29, 56 P.3d 1277, 1279 (2002). Of course, there must have been a promise made in order to apply this doctrine. *Idaho Wool Growers Ass'n*, 154 Idaho at 723, 302 P.3d at 348. Whenever promissory estoppel is applied, it acts as a substitute for consideration. *Gillespie*, 138 Idaho at 30, 56 P.3d at 1280.

To the best of the undersigned's knowledge, this Court has never applied the doctrine of promissory estoppel when one of the parties has been a governmental entity. *See Idaho Wool Growers Ass'n*, 154 Idaho at 723, 302 P.3d at 348 (document relied upon by plaintiff contained no promises); *Brown v. Caldwell Sch. Dist*., 127 Idaho 112, 117-18, 898 P.2d 43, 48-49 (1995) (employee did not have right to rely on statement by assistant superintendent regarding continued employment where such decision could only be made by the school board in accordance with section 33-513, Idaho Code); *Gilbert v. City of Caldwell*, 112 Idaho 386, 391-92, 732 P.2d 355, 360-61 (1987) (statement indicated "hope or expectation" rather than an oral promise, which in any event was superseded by the written promises made in exchange for a grant of easement); *see also Mitchell v. Bingham Mem. Hosp.*, 130 Idaho 420, 425, 942 P.2d 544, 549 (1997) (promissory estoppel did not act to waive requirement to file written notice of tort claim).

These cases show that although this Court has indicated that it is possible for the doctrine of estoppel, in general, to be applied against a governmental entity in extraordinary circumstances, in practice, it has found claims based on promissory estoppel, in particular, to be lacking in some manner. What these cases have not addressed to date, however, is whether promissory estoppel should ever be applied against a governmental entity performing a governmental function. There are several reasons why the Court should answer this question in the negative.

4. The application of promissory estoppel against a governmental entity would result in the formation of a binding obligation in a manner which is unconstitutional, violates the Open Meetings Law, and ignores longstanding case law.

The application of promissory estoppel differs from equitable estoppel and quasi-estoppel in that it provides an element necessary for the formation of a contract. This is highly concerning

for all governmental entities, and particularly counties, because it would provide any party with a contractually based grievance against a governmental entity with a "backdoor" means to obtain a legally binding obligation from that entity without having to adhere to such procedural niceties such as open meetings, a decision of a majority of a quorum of the governing board, or a public hearing when one is required. In addition, it would fail to respect the scope of the duties of an advisory board to make recommendations to a governing board, rather than making decisions for it, and would undo the prerogative of the governing board to disagree with its staff, as this Court articulated in *Terrazas*, including members of its advisory boards.

a. *The powers and duties specifically and exclusively assigned to boards of county commissioners under the Constitution and laws of the State of Idaho preclude the application of promissory estoppel*.

Article XVIII, Section 10 of the Idaho Constitution provides for boards of county commissioners for each county in Idaho. The board of county commissioners is the chief executive authority of county government. *Reynolds Const. Co. v. Twin Falls County*, 92 Idaho 61, 66, 437 P.2d 14, 19 (1968). Article XVIII, Section 6 of the Idaho Constitution provides for all of the elected county officers, including county commissioners, and also very emphatically expresses the policy that the laws pertaining to county officials "shall provide for the strict accountability of county … officers for all fees which may be collected by them, and for all public or municipal moneys which may be paid to them, or officially come into their possession." Idaho Const., art. XVIII, § 6 (emphasis added).

In keeping with that directive, the powers and duties of boards of county commissioners are outlined in Title 31, Chapter 8, Idaho Code. This includes "the power and authority to

purchase, receive by donation, or lease any real or personal property necessary for the use of the county; [and to] preserve, take care of, manage and control the county property…." Idaho Code § 31-807. For over eighty years, this Court has consistently held that this power is exclusive to the board of county commissioners, even as against other elected officials who have sufficient money in their budgets to purchase such property. *Magoon v. Valley County*, 58 Idaho 317, 73 P.2d 80, 81-82 (1937); *see also Clayton v. Barnes*, 52 Idaho 418, 16 P.2d 1056, 1058-59 (1932) (salaries for clerical staff and attorney hired by county assessor without authorization of the county commissioners were not legal charges against the county).

In addition, this Court has held as far back as 1896 that "a board of county commissioners is an entity and can only act to bind the county when sitting as a board." *Conger v. Latah County*, 4 Idaho 740, 48 P. 1064, 1064 (1896). Whenever individual members, "acting individually and separately," authorize an expenditure, it is void even if all the commissioners were in agreement; only "the county commissioners acting as a board that are given that authority." *Id.* [2]

More recently, the Idaho Legislature has enacted a number of provisions to promote local government transparency, which are now codified together as Title 74 of the Idaho Code. One of these provisions is the Open Meetings Law, found at Title 74, Chapter 2, Idaho Code. This chapter begins with the legislative declaration that "it is the policy of this state that the formation of public policy is public business and shall not be conducted in secret." Idaho Code § 74-201. Thus, with certain exceptions not germane to this matter, "all meetings of a governing body of a public agency

[2] In the 2017 legislative session, the Idaho Legislature carved out a limited exception authorizing boards of county commissioners to delegate purchasing power to other elected officials or county employees. *See* 2017 Idaho Sess. Laws, Vol. 1, Ch. 197, p. 482 (Senate Bill No. 1074, as amended).

shall be open to the public," and "no decision at a meeting of a governing body of a public agency shall be made by secret ballot." Idaho Code § 74-203.

The Open Meetings Law defines "decision" as "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." Idaho Code § 74-202(1). It also defines "deliberation" as "the receipt or exchange of information or opinion relating to a decision." Idaho Code § 74-202(2). It then makes it abundantly clear that any "action, or any deliberation or decision-making that leads to an action, [that] occurs at any meeting which fails to comply with the provisions of this chapter … shall be null and void." Idaho Code § 74-208(1) (emphasis added). This Court has previously held that recovery cannot be had on a void contract with a board of county commissioners under the theory of *quantum meruit*. *Hampton v. Logan County*, 4 Idaho 646, 43 P. 324, 325-26 (1896). It follows that recovery should not be available under the theory of promissory estoppel based on a promise that is void because it was made in violation of the Open Meetings Law.

b. *The application of promissory estoppel against a governmental entity would cause that entity to assume a debt or liability for a period of greater than one year in violation of Article VIII, Section 3 of the Idaho Constitution.*

Article VIII, Section 3 of the Idaho Constitution provides as follows:

> 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: Provided, that this section shall not be construed to apply to the ordinary and necessary expenses authorized by the general laws of the state ….

Idaho Const. art. VII, § 3 (emphasis added). The primary purpose of this section is to protect taxpayers and citizens of the various political subdivisions of the state, as they are the ones who would ultimately bear the consequences of excessive indebtedness or liability. *Koch v. Canyon County*, 145 Idaho 158, 162, 177 P.3d 372, 376 (2008).

This Court has held that contracts for various projects in which the expenditure exceeded, or was to exceed, the revenue available in that fiscal year, were not ordinary and necessary expenses, and therefore were void under the prohibition contained in this section. See, e.g., *Dexter Horton Trust and Savings Bank v. Clearwater Count*y, 235 F. 743, 750-57 (D. Idaho 1916) (cruise of timber lands on behalf of county assessor); *City of Challis v. Consent of the Governed Caucus*, 159 Idaho 398, 400-05, 361 P.3d 485, 487-92 (2015) (repair and replacement of components of city water system); *City of Boise v. Frasier*, 143 Idaho 1, 2-6, 137 P.3d 388, 389-93 (2006) (airport parking garage expansion held to be ordinary but not necessary expense).

It is important to note that this provision is not merely limited to indebtedness, but also applies to liability. This Court has stated that people "contract debts; they incur liabilities. In the one case they act affirmatively; in the other, the liability is incurred or cast upon them by act or operation of law." *Boise Dev. Co. v. City of Boise*, 26 Idaho 347, 143 P. 531, 534 (1914), *overruled on other grounds, Asson v. City of Burley*, 105 Idaho 432, 438-39, 670 P.2d 839, 845-46 (1983). In that case, the Court also adopted the definition of liability as "[r]esponsibility. The state of one who is bound in law and justice to do something which may be enforced by action. This liability may arise from contracts either express or implied, or in consequence of torts committed. The state of being bound or obliged in law or justice." *Boise Dev. Co.*, 143 P. at 534.

This Court has yet to consider the interplay between equitable doctrines that result in liability in contract or tort and the constitutional limitation on the incursion of indebtedness or liability in excess of one year contained in Article VIII, Section 3. However, it stands to reason that if a local governmental entity such as a county cannot incur indebtedness or liability on an express contractual obligation exceeding the revenue available in that fiscal year, it also should not be able to do so by making a promise to incur such indebtedness or liability, and a court should not be able to enforce such a promise by operation of promissory estoppel. Therefore, to the extent that a promise made by a governmental entity purports to bind the entity to an indebtedness or liability exceeding the revenue available in that fiscal year, that promise is void as a violation of Article VIII, Section 3 of the Idaho Constitution.

As discussed above, this Court has historically been reluctant to apply the doctrine of equitable estoppel against a governmental entity performing a governmental function. With respect to promissory estoppel specifically, the case against applying this doctrine against a governmental entity is even more compelling, since it would result in the enforcement of a contractual obligation in a manner outside of the procedures set forth in the Open Meetings Law, and contrary to other Idaho statutory and case law dating back nearly to statehood. In addition, the application of promissory estoppel can lead to the creation of an indebtedness or liability exceeding the revenue available to that entity in that fiscal year in violation of Article VIII, Section 3 of the Idaho Constitution. This would fly directly in the face of the public policies of government transparency and the prudent expenditure of public funds.

5. The application of the doctrine of promissory estoppel against a governmental entity is also strongly disfavored in other jurisdictions.

Other jurisdictions that have addressed the application of promissory estoppel against a governmental entity have taken different approaches to this issue. Some jurisdictions allow for its application under extraordinary circumstances, the same approach this Court has taken with respect to equitable estoppel. *See Harrell*, 95 Idaho at 247-49, 506 P.2d at 474-76. Other jurisdictions have adopted an absolute rule against applying promissory estoppel against governmental entities. *See Phipps Products Corp. v. Massachusetts Bay Transp. Auth.*, 443 N.E.2d 115, 118 (Mass. 1982).

An example of a state which has at least recognized the ability to state a claim of promissory estoppel against a governmental entity is Ohio. *See Current Source, Inc. v. Elyria City Sch. Dist.*, 813 N.E.2d 730, 737-38 (Ohio Ct. App. 2004). In *Current Source*, the Ohio Court of Appeals refused to apply promissory estoppel against a school district which had sought proposals for survey work in connection with technological upgrades. *Current Source*, 813 N.E.2d at 737. In that case, the court pointed out that "a board of education, through which a school district acts, may be estopped only by the conduct of the board itself and not by the conduct of employees who have no power to act on the board's behalf." *Id*. Additionally, it stated that "appellants had the responsibility of determining whether the alleged conduct in question was made in accordance with all applicable laws of Ohio...." *Id*.

The New Mexico Supreme Court has reached the same result for similar reasons. In New Mexico, the doctrine of equitable estoppel may be applied against a governmental entity, but only

in exceptional situations involving a "shocking degree of aggravated and over-reaching conduct" on the part of the governmental entity. *State ex rel. State Hwy. Dept. v. Yurcic*, 511 P.2d 546, 548-50 (N.M. 1973). However, the court refused to apply promissory estoppel against a county which had offered the plaintiff a two-year term of employment when that offer was made in violation of New Mexico's Open Meetings Act. *Trujillo v. Gonzales*, 747 P.2d 915, 916-17 (N.M. 1987). The court stated that the plaintiff had no right to rely on the oral representations regarding the promise of a two-year term because people are charged with notice of the limitations on the powers of public officials when they are dealing with them. *Id*. at 917.

On the other hand, an example of a state which has barred the application of promissory estoppel against a governmental entity is Massachusetts. *See Phipps*, 443 N.E.2d at 118. In *Phipps*, the Massachusetts Supreme Judicial Court articulated several compelling reasons for this position which this Court should find persuasive. First of all, the court found that "the public interest in compliance with bidding procedures overrides the equities that would appropriately be considered in a purely private transaction." *Id*. It noted that it "has been reluctant to apply principles of estoppel to public entities where to do so would negate requirements of law intended to protect the public interest." *Id*. Finally, it quoted a prior decision which stated that "[t]he public interest in the enforcement of the laws of the Commonwealth cannot be defeated by failures of public officials to perform their duties." *Id.*, *quoting Doris v. Police Comm'r of Boston*, 373 N.E.2d 944, 948-49 (Mass. 1978).

Whether they absolutely prohibit the application of promissory estoppel against a governmental entity or they allow for the possibility of its application in extraordinary

circumstances, the cases cited above from other jurisdictions all stand for the proposition that the only agreements or promises that can be made binding on a governmental entity are ones that have been made in compliance with the applicable laws of that state. None of them have allowed such an agreement, representation, or promise to be enforced if such action was performed in violation of those laws. This Court should, at the very least, do the same.

6. The application of doctrine of promissory estoppel against a governmental entity would unduly disrupt governmental operations.

Aside from the legal ramifications of applying promissory estoppel to impose a contractual obligation against a governmental entity in derogation of longstanding constitutional and statutory requirements, the application of promissory estoppel in this situation would cause major disruptions in governmental operations. For one, it would make hiring contractors or consultants problematic, to the extent that a contractor or consultant could be found to have been acting with apparent authority to make a statement interpreted as a promise that ultimately binds the governing board to a contractual obligation it never intended, and most likely did not include in its budget. The same principle would also apply to individual commissioners and staff members, having a chilling effect on communications with the constituents whom they serve. In addition, it would have a major chilling effect on advisory boards; governing boards would be greatly reluctant to appoint them or seek their advice if a member of the advisory board could bind the entity based on a statement that was deemed a promise after the fact. Accordingly, this Court should determine that the application of promissory estoppel is inconsistent with sound, efficient and transparent governmental operations.

B. The doctrine of promissory estoppel should not be applied upon the facts of this case.

Even if this Court ultimately holds that it is possible to apply the doctrine of promissory estoppel against a governmental entity performing a governmental function under certain extraordinary circumstances (which it has yet to actually encounter), the application of this doctrine is not appropriate in this matter, and the District Court erred in allowing this doctrine to be considered by a jury. This is because none of the statements made by persons acting, or purporting to act, on behalf of Bonner County were in fact promises, and Silverwing had no right to rely on those statements as promises. In addition, the alleged promises were never made in the context of any agreement intended to be contractually binding on the parties, and therefore would not be appropriately used as a substitute for consideration. Finally, the application of the doctrine of promissory estoppel in this matter would lead, and in the District Court did lead, to an unjust result.

1. <u>The statements alleged to be promises were not promises as a matter of law</u>.

Thousands of pages of clerk's record, numerous pretrial motions, hundreds of pages of trial testimony, and hundreds of pages of exhibits admitted at trial all boil down to three statements that are alleged to have been promises Bonner County made to Silverwing: first, that the ALP provided to Silverwing in 2006 was the ALP that had been approved by the FAA; second, that the runway at the Sandpoint Airport would remain in its then-current location; and finally, that the taxiway Silverwing built with the County's approval and at its own expense was in the correct place, as depicted in the ALP provided by the County. R. at 1021-22; Trial Tr. p. 189, L. 21-p. 191, L. 14. (In her opening statement, counsel for Silverwing referred to two promises, combining the second

and third alleged promises outlined above.) Silverwing has contended that it relied on those alleged promises to its detriment in constructing its development, including the taxiway in question. R. at 1024-25; Trial Tr. p. 191, L. 15-p. 192, L. 4. It has contended that it suffered damages in the form of lost sales resulting from the fact that the FAA had not approved the ALP provided by the County, leading to years of legal uncertainty until those issues were finally resolved in 2015. R. at 1025, 3100; Trial Tr. p. 212, L. 12-p. 221, L. 18.

It is axiomatic that for the doctrine of promissory estoppel to apply, there must have been a promise made. *Idaho Wool Growers Ass'n*, 154 Idaho at 723, 302 P.3d at 348. The determination of the absence of a promise may be made as a matter of law. *Id*. Here, the statements or actions referenced above do not on their face constitute promises, but the District Court failed to recognize this in its pretrial and post-trial rulings. R. at 3063-65, 5738-41.

The alleged "promise" regarding the ALP was in fact an action which, arguably at least, was combined with an implied representation that it had been approved by the FAA. At worst, it was a misrepresentation by the County as to what had been approved by the FAA, but even if that were so, it would not automatically transmute that statement into a promise simply because it turned out not to be the case. In fact, not only was it a representation of what was actually on the ground at the time, but it was also the ALP that the County wanted the FAA to approve at all times relevant to this matter. There are also emails in the record involving the engineers that Silverwing had hired for the development project which indicate that they were aware of the actual FAA-approved ALP even prior to the start of the project. R. Exh. at 306-08 (Plaintiff's Exhibit 150); R. Exh. at 379-82 (Defendant's Exhibits B8 and B9); R. Exh. at 403-07 (Defendant's Exhibits E44

and E46). The other statements were made later, but related to the issues as between the FAA-approved ALP and the ALP provided to Silverwing as to the position of the runway vis-à-vis the position of the taxiway that Silverwing ultimately constructed.

In addition, the persons who made the alleged promises were not persons who could legally bind the County. Some of them were independent contractors retained by the County as an airport manager, engineer, and legal consultant; others were members of the Advisory Board; still others were individual members of the board of county commissioners. R. at 746-56; Trial Tr. p. 483, L. 3-20; p. 535, L. 21-p. 538, L. 13; p. 1079, L. 2-p. 1084, L. 4; p. 1131, L. 24-p. 1136, L. 15; p. 1359, L. 8-p. 1360, L. 2; p. 1367, L. 18-p. 1369, L. 6. However, only a properly constituted Board, acting as such, at a meeting complying with the requirements of the Open Meetings Law, can lawfully bind the County; any other means of doing so is void as a matter of law. Idaho Code §§ 31-706, 74-208. Therefore, because the "promises" alleged in this case are not in fact the type of promises that could contractually bind the County, they cannot be bootstrapped into a binding obligation by operation of promissory estoppel, either.

2. Silverwing had no right to rely on any of the statements alleged to be promises.

Even if the statements in question were construed to be promises made by the persons who made the statements, Silverwing nevertheless had no right to rely on those statements as a matter of law. As stated above, they were not made by a properly constituted Board, acting as a governing board, and were not made in compliance with the Open Meetings Law. In addition, none of the persons making the alleged promises had actual authority or apparent authority to bind Bonner County, and in any event, the "promises" allegedly made were a nullity since they were within the

purview of the FAA, not the County, to fulfill. Although this should have been decided in favor of the County as a matter of law, at trial the jury should have been instructed as to how a binding obligation can be made by a county, as this is a prerequisite for determining whether a promise was ever properly made that could be held binding against the County.

a. *None of the alleged promises were made in accordance with the Open Meetings Law, and are therefore not binding*.

As stated above, the record reflects that all of the alleged promises were made by persons acting outside of the scope of a properly noticed meeting, open to the public, where a quorum of the board of county commissioners were present to deliberate toward, and ultimately make a decision, in the presence of the public. R. at 1047-48; R. Exh. at 82-84 (Plaintiff's Exh. 32); Trial Tr. p. 299, L.2-p. 307, L. 19; p. 335, L. 10-p. 338, L. 9; p. 344, L. 6-p. 351, L. 13; p. 441, L. 9-20; p. 1094, L. 21-p. 1099, L. 21. It cannot be repeated often enough that any such action is **void** – not merely voidable – under the abundantly clear provisions of the Open Meetings Law. Idaho Code § 74-208; *cf. Hampton*, 43 P. at 325-26 (no recovery under *quantum meruit* theory when underlying contract was void).

Although the law of promissory estoppel with respect to governmental entities is not yet well developed in Idaho, other jurisdictions that have considered this issue have uniformly held that persons who deal with governmental entities are charged with knowledge of how governmental entities can properly enter into binding obligations, and the constitutional and statutory limitations on their authority. *Trujillo*, 747 P.2d at 917; *Current Source*, 813 N.E.2d at 737; *cf. Maloney v. Oakdale Cemetery Bd. of Trustees*, 1993 WL 407302, at *2, *4 (Ohio Ct. App.

1993) (promissory estoppel does not apply if a governmental entity is acting outside the scope of its authority). This Court should find these well-reasoned decisions to be persuasive, and in this case, it should find that Silverwing is properly charged with knowledge of how Bonner County can properly enter into a binding obligation, and the limitations placed on that authority under the Constitution and laws of the State of Idaho. This fact alone precludes a finding that Silverwing had a reasonable and foreseeable right to rely on statements made outside the context of the decision-making process mandated under the Open Meetings Law. Thus, the District Court erred in failing to instruct the jury as to this point of law, and erred in denying judgment notwithstanding the verdict when this issue was raised. *See* R. at 4881-84, 5736-40.

b. *None of the persons who made the alleged promises had the legal authority to bind Bonner County*.

Despite the clear statutory language providing that the county commissioners have an exclusive duty to manage county property, including its airport, and providing the proper procedure for counties to enter into binding obligations, Silverwing has attempted an end run around these provisions by contending that the Board somehow gave several independent contractors, Advisory Board members, and individual members of the board of county commissioners "apparent authority" to make promises that would be binding on the County. Trial Tr. p. 1503, L. 16-p. 1506, L. 14.

To bind a principal, an agent must have either actual or apparent authority to do so. *Huyett v. Idaho State Univ.*, 140 Idaho 904, 908, 104 P.3d 946, 950 (2004). Actual authority may be express or implied. *Id*. Express authority is given when a principal expressly authorizes an agent

to act on the principal's behalf, while implied authority consists of those actions necessary to accomplish an expressly authorized act. *Id.* Here, Bonner County demonstrated that the Board never took official action that could be interpreted as providing express or implied authority to bind the County. R. at 1841-2938; Trial Tr. p. 1131, L. 24-p. 1171, L. 19.

Perhaps more importantly, though, the doctrine of apparent authority should not be applied against a governmental entity for much the same reasons as promissory estoppel should not be applied against a governmental entity. Apparent authority occurs if a principal, whether by words or actions, "voluntarily places an agent in such a position that an ordinary person of business prudence would believe the agent is acting pursuant to existing authority." *Huyett,* 140 Idaho at 908, 104 P.3d at 950. Apparent authority cannot occur based solely on the actions of the purported agent. *Brown*, 127 Idaho at 117, 898 P.2d at 48. A finding of apparent authority may only be made "where the third party was not on notice of the scope of the agent's actual authority." *Huyett,* 140 Idaho at 908, 104 P.3d at 950 (emphasis added).

In *Huyett*, a former basketball coach sued Idaho State University, alleging, *inter alia*, that ISU's president had apparent authority to enter into a multi-year employment contract based on a State Board of Education policy allowing for such contracts, though an administrative rule of the Board of Education in effect at that time (then-IDAPA Personnel Rule 08.01.02.103.02.c) limited such contracts to one year except with prior approval of the board. *Id*. at 906-07, 104 P.3d at 948-49. This Court found that the plaintiff "was deemed to know the law and effect of IDAPA over her negotiations for a multi-year employment contract with ISU" and, therefore, "she may not claim the university had apparent authority to enter into a multi-year contract." *Id*. at 908-09, 104

P.3d at 950-51. Even after the IDAPA personnel rule in question was repealed, the university president's authority to negotiate multi-year employment contracts was still expressly subject to approval of the Board of Education. *Id*. at 909, 104 P.3d at 951.

In this case, as in *Huyett*, Silverwing was on notice of the laws that provide that the ability to bind a county with respect to its property is vested solely in its board of county commissioners, and of the laws that provide that decisions regarding County property are to be made in open public meetings. Unlike *Huyett*, which involved a Board of Education policy which was inconsistent with, and arguably contrary to, an IDAPA personnel rule, the statutes in question are clear and unambiguous, and have been in effect at all times relevant to this matter. Because Silverwing was on notice of the scope of the actual authority of the various agents acting as representatives of the County, a finding that any of the Board's agents had apparent authority to make promises binding the County is not appropriate.

c. *Bonner County lacked the legal authority to make promises regarding matters within the regulatory purview of the FAA*.

Finally, the alleged promises related to matters that, though subject to County approval, are subject to the ultimate approval authority of the FAA. The FAA has exclusive jurisdiction over airspace nationwide. 49 U.S.C. § 40103. Airport layout plans are subject to approval of the FAA. 49 U.S.C. § 47107(a)(16); 14 C.F.R. § 151.5. Likewise, through-the-fence agreements (TTFAs) are subject to FAA approval. 49 U.S.C. § 47107(s). Failure to obtain FAA approval of any such items can lead to the loss of federal granting for that airport and any other airports under the entity's jurisdiction. 49 U.S.C. § 47107(g)(2); 14 C.F.R. § 151.7.

In this case, there were actually two aspects of Silverwing's development that the FAA found to be problematic. One aspect was the issue on which Silverwing is basing its promissory estoppel claim, that being the position of the runway and taxiway with respect to the approved ALP. R. Exh. at 241 (Plaintiff's Exh. 114); 243-53 (Plaintiff's Exh. 116); Trial Tr. *passim*. The other aspect drawing the FAA's ire, however, was the residential nature of the development, which the FAA considered to be incompatible with airport operations, even notwithstanding the collocation of airplane hangars with the residential units. R. Exh. at 201-02 (Plaintiff's Exh. 84), 232-33 (Plaintiff's Exh. 109); Trial Tr. p. 1266, L. 6-p. 1269, L. 3.

Both the County and Silverwing made their best efforts to persuade the FAA to approve the TTFA associated with the development, and the County, at all times relevant to this matter, worked to persuade the FAA to adopt Alternative 2(b) as its ALP, which depicted the runway and taxiway in their actual location. Thus, what is plain from the facts of the case is that <u>both Silverwing and the County wanted the same thing</u>; the FAA was the thorn in the side of both. No matter what anyone purportedly acting on the County's behalf may have said – or even promised – resolution of those issues was out of the County's hands. In fact, it literally took an Act of Congress for the issue related to the residential nature of the Silverwing development to be finally resolved. *See* Pub. L. 112-95 § 136, 126 Stat. 23-24. That paved the way for the FAA to finally grant the County's wish to approve an ALP based on Alternative 2(b) in 2015, after this litigation had commenced.

d. *The District Court failed to properly instruct the jury as to how a county can lawfully enter into a binding agreement*.

Although this matter should have been decided in favor of the County as a matter of law, at trial the jury should have been instructed as to how a binding obligation can be made by a county, as this is a prerequisite for determining whether a promise was ever properly made that could be held binding against the County. Instead, the District Court committed reversible error when it rejected the jury instructions on this issue proposed by the County.

Bonner County proposed six jury instructions that specifically related to the laws governing a county's ability to enter into a binding contract, promise, or obligation. R. at 4880-89. The clerk's record reflects that the Court gave proposed Instruction No. 73, which reads "Idaho law prohibits county commissioners from delegating their discretionary powers, and any attempt to do so is void," Instruction No. 74, which reads "The management of property of the county is a duty expressly vested with the Board of County Commissioners, and the county commissioners are the only county officers empowered to manage and control that property," and Instruction No. 76, which reads "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." R. at 4885-87, 4889. Each of these instructions fairly states the law that it covers.

However, at least some of the other instructions on this subject that the District Court refused should have also been given, based on the principles of law discussed above. Proposed Instruction No. 71 was perhaps the most complete instruction regarding a county's ability to enter into a binding obligation. It reads as follows:

> Promises are discretionary acts. Bonner County cannot bind itself through promises made by County representatives or agents, even if there has been an attempt to delegate discretionary authority to those representatives or agents. Instead, as a government entity, Bonner County can only make a promise by an act of a vote of the Board of Commissioners for Bonner County that complies with the Idaho Open Meetings Law.
>
> All meetings of the board of commissioners must be public, and the books, records, and accounts of the meetings must be kept open for public inspection at the office of the clerk of the board of commissioners. The clerk of the board must give five days public notice of all special and adjourned meetings by posting three notices in conspicuous places, one of which shall be the courthouse door.
>
> At a minimum the Plaintiff must have proven that the alleged promise was approved by a majority of the Bonner County Board of Commissioners during a duly noticed and properly conducted public meeting that satisfies all of the formal requirements of Idaho's Open Meetings Law. Additionally, no decision of the County, including any promise, shall be given any effect unless written meeting minutes from that meeting reflected a motion and order which expressly approved the promise pursuant to the requirements of Idaho Code § 74-205.

R. at 4881-82. Proposed Instruction No. 72, which pertains to the inability of the Board to delegate its powers, reads as follows:

> The County is a "body corporate" whose powers can only be exercised by the Board of County Commissioners or by agents and officers acting under their authority, or authority of law. The County Commissioners cannot delegate the power to make a promise on behalf of the County because promises are discretionary acts. Also, even when the County Commissioners have delegated certain authority to agents and officers, such agents and officers must comply with the formalities of the Idaho Open Meetings Law.

R. at 4883-84. Proposed Instruction No. 75 pertains to findings of apparent authority when the principal is a governmental entity, and it reads "Idaho law holds that a party cannot claim that an agent or employee has apparent authority when the law provides that only the governing body of that agency has such authority." R. at 4888.

These instructions, had they been given, would have fairly and more completely reflected the law pertaining to this issue. On the other hand, the District Court's refusal to give these instructions caused the jury to have an incomplete picture of the applicable law, particularly with respect to the limitations on a governmental entity's ability to enter into binding contracts, promises or obligations. Therefore, this provides an additional basis for the reversal of the judgment entered in this case.

3. The alleged promises were not part of any binding agreement, and therefore cannot be used as a substitute for consideration.

As stated above, promissory estoppel acts as a substitute for consideration. *Gillespie*, 138 Idaho at 30, 56 P.3d at 1280. It is not, however, a substitute for an agreement between the parties. *Lettunich v. Key Bank Nat'l Ass'n*, 141 Idaho 362, 367, 109 P.3d 1104, 1109 (2005). There must be proof of an agreement that is sufficiently definite as to constitute a binding, enforceable contract before promissory estoppel may act as a substitute for consideration. *Black Canyon Racquetball Club, Inc. v. Idaho First Nat'l Bank*, 119 Idaho 171, 178, 804 P.2d 900, 907 (1991).

In reviewing the record and transcripts pertaining to this matter, one thing jumped out right away: What is the agreement in which promissory estoppel is to serve as a substitute for consideration? Silverwing has never made that completely clear. The most likely candidate is that the County allegedly promised that the airport's runway would not be moved sixty feet to the west, in exchange for Silverwing's commitment to build its development adjacent to the airport property. But if this is the case, such an agreement would have been illusory on both sides.

The County needed approval from the FAA 1) for a residential development adjacent to the airport, 2) for the TTFA appurtenant to the development, and 3) to change its ALP to reflect its desire not to move its runway sixty feet to the west. To move the runway would have come at great expense to the county, and most likely would have required the exercise of eminent domain along the entire west side of the airport property (which was actually discussed with Silverwing at the height of the FAA's intransigence). On Silverwing's part, it could have walked away from the development at any time, or refused the County's request to build a portion of the taxiway eventually planned for the entire west side of the runway.

Interestingly, Bonner County recognized this issue as well, and offered a jury instruction that covered that contingency. Proposed Instruction No. 67 reads as follows:

> There must be an agreement separate and distinct from the Through the Fence Agreement between the parties in order for SilverWing to recover for promissory estoppel. If you find there was no specific agreement between SilverWing and Bonner County, or that the only agreement was the Through the Fence Agreement, SilverWing cannot recover for promissory estoppel.

R. at 4878. This instruction was refused. *Id*.

In any event, the development was ultimately completed, federal law was changed to allow through-the-fence access for residential developments adjacent to or near an airport such as Silverwing's, the ALP was successfully amended to reflect both current reality on the ground and the County's future plans for the airport, and lots in the development are available for purchase now. Everyone ended up where they wanted to be, notwithstanding the legal uncertainty admittedly endured for several years by both Silverwing and Bonner County at the hands of the FAA. So what promises were broken?

4. The application of doctrine of promissory estoppel against Bonner County in this case would lead to an unjust result.

The verdict in this matter was a classic case of "no good deed goes unpunished." Promissory estoppel is supposed to only be applied where required by notions of justice and fair play. R. at 4889; *Idaho Wool Growers Ass'n*, 154 Idaho at 723, 302 P.3d at 348.[3] Although the jury was correctly instructed in that regard, its application of promissory estoppel worked an injustice against Bonner County because it led the jury to determine that the County was liable to Silverwing in the amount of $250,000 for alleged promises that could not lawfully bind the County and were not the cause of the protracted standoff with the FAA, which Silverwing and the County both had to endure, and which allegedly led to the lost sales that Silverwing is claiming as damages.

The bottom line is that there were no broken promises here, as Silverwing contended in its opening statement. The County and Silverwing were working toward the same end, but it was the FAA that put a monkey wrench into those efforts until Congress intervened. The fact that a jury held Bonner County liable for those actions, and that the District Court allowed that jury the opportunity to do so, were indeed a manifest injustice.

V. CONCLUSION

The Idaho Association of Counties, the *amicus curiae* in this matter, would like to thank this Court for the opportunity to support one of its member counties, Bonner County, in this matter

[3] To avoid confusion among jurors, however, it may be advisable to disavow the phrase "where required by notions of justice and fair play" and replace it with the phrase "to prevent manifest injustice," as the standard was formulated in *City of Sandpoint v. Sandpoint Indep. Hwy. Dist*., 126 Idaho 145, 151, 879 P.2d 1078, 1084 (1994). This change would more clearly articulate that, if promissory estoppel is to be applied at all, it should be applied only in the most extreme circumstances.

by providing additional points and authorities for the Court's consideration. As was stated in IAC's request to file this brief, the ultimate decision that this Court makes will directly affect every county, and in fact every local government, in the state.

IAC has grave concerns about the judgment entered in this matter because the District Court failed to properly apply relevant constitutional and statutory provisions, and case law precedents dating back nearly to statehood, regarding the manner in which a contract, agreement or promise can bind a county. The doctrine of promissory estoppel should never be applied against a governmental entity because it is in direct contradiction of this longstanding principle. At the very least, it should only be applied when the promise at issue was made in a meeting of the governing board duly convened and conducted in accordance with the Open Meetings Law, and a manifest injustice would result in the absence of its application. If this Court were to affirm the District Court's decision, it would have a seriously deleterious effect on the operations and finances of all local governments, and in particular, all forty-four Idaho counties.

In this case, the necessary result is that the judgment of the District Court awarding damages to Plaintiff/Respondent Silverwing at Sandpoint, LLC in Case No. CV-2012-0840 should be **REVERSED**, and the case should be **REMANDED** to the District Court with instructions to enter judgment in favor of the Defendant/Respondent, Bonner County.

Dated this 16th day of November, 2017.

Patrick M. Braden
Attorney for *Amicus Curiae*
Idaho Association of Counties

CERTIFICATE OF SERVICE

Pursuant to I.A.R. 34, I hereby certify that on this 16th day of November, 2017, I caused an original and six (6) bound copies of this brief to be sent via certified first class priority mail, postage prepaid, and an electronic copy via email to the address below, to be filed with the Clerk of the Supreme Court. I further certify that except as otherwise indicated, I caused to be served two (2) true and correct copies of the foregoing via certified first class priority mail, postage prepaid, addressed to the following:

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