

**IN THE SUPREME COURT FOR THE STATE OF IDAHO**

WAYNE HOFFMAN, an individual;  
FREDERIC S. BIRNBAUM, an individual;  
BRUCE C. BOYLES, an individual; G&G  
VENTURES, LLC, an Idaho limited liability  
company; ANDREA LANNING, an  
individual; and BOB TIKKER, an individual,

Plaintiffs – Appellants,

vs.

THE CITY OF BOISE, IDAHO; a municipal  
corporation and a political sub-division of the  
State of Idaho.

Defendant – Respondent.

Supreme Court Docket No. 47590-2019

Ada County Case No. CV01-19-01127

**APPELLANTS' REPLY BRIEF**

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Appeal of Wayne Hoffman, et al v. The City of Boise in the Fourth Judicial District  
of the State of Idaho, in and for the County of Ada, Case No. CV01-19-01127  
Honorable Lynn G. Norton, Presiding District Judge

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**I.**  
**INTRODUCTION**

For the purposes of this Reply, Appellants will be referred to as “Petitioners” and the Respondent as the “City.” The District Court’s Decision and Order, entered on July 12, 2019 (R. Vol I, pp 45 - 60) and granting the City’s Motion to Dismiss, will be referred to in this brief as the “First Decision.” The District Court’s Memorandum Decision and Order Denying Motion to Amend and Alter Judgment (R. Vol I pp 97 - 106 ), entered on October 18, 2019, will be referred to herein as the “Second Decision.”

**II.**  
**SUMMARY OF REPLY**

The proceedings in the District Court below and now on appeal make clear that the crux of this appeal is the proper interpretation of *Urban Renewal Agency of City of Rexburg v. Hart*, 148 Idaho 299, 222 P.3d 467 (2009) and its predecessor, *Boise Redevelopment Agency v. Yick Kong Corp.*, 94 Idaho 876, 882, 499 P.2d 575, 581 (1972). Petitioners contend that the District Court misinterpreted and conflated the holding in *Hart*, which appertained to urban renewal agencies, by misapplying that ruling to sub-divisions of the state, such as municipalities. That application is erroneous because, unlike urban renewal agencies, sub-divisions of the state, such as the City, are within the purview of Article VIII, Section 3 of the Idaho Constitution. (*Yick Kong*, 94 Idaho at 882-883, 499 P.2d at 581-582). Clarification of the *Hart* holding in this case is a prerequisite to addressing the primary issue in the instant case, which is whether the City violated Article VIII, Section 3 of the Idaho Constitution when it undertook an obligation and thereby created a liability by promulgating a binding ordinance pursuant to Idaho Code §§ 50-

2904 – 50-2906, to provide a long-term revenue stream via revenue allocation financing (“TIF”) to an urban renewal agency in amounts exceeding the municipality’s annual revenue, without the requisite approval of the qualified electors.

While claiming to stand on the two Decisions of the District Court below, the City’s brief essentially makes three arguments:

1. The City claims that the District Court dismissed this case for lack of standing under a traditional standing analysis set forth in *Miles v. Idaho Power Co.*, 116 Idaho 635, 778 P.2d 757 (1989), and did so without ruling on the merits. (City’s Brief, pp 1-2). Yet, the City illogically claims that the District Court’s holding that standing is not available to Petitioners under *Koch et al. v. Canyon County*, 145 Idaho 158, 177 P. 3d 372 (2008) is not a ruling on the merits, even though the City admits that said holding was based on the District Court’s interpretation of the decision in *Hart* regarding Petitioners’ constitutional claims. (City’s Brief, p. 5.)
2. Based on the District Court’s interpretation of *Hart*, the City claims that tax increment financing (“TIF”) does not create a continuing obligation on the part of the City under Article VIII Section 3 of the Idaho Constitution, (a) because the terms “any indebtedness or liability” in Article VIII Section 3 “are not necessarily synonymous with an obligation,” (b) because the TIF funds are paid directly to Capital City Development Corporation (“CCDC”) by the County, not the City, and (c) because the City has “...has simply foregone property tax revenues exceeding those attributable to the set base value in the TIF district.” (City’s Brief, p. 6). Petitioners stand on their position that the use of the word “obligation” in its normal meaning as used in the context of this case is synonymous with meaning of indebtedness set forth in Article VIII Section 3 of the Idaho Constitution and is of the kind that creates a liability defined and explained in *Feil v. City of Coeur d’ Alene*, 23 Idaho 32, 129 P. 643, 129 P. 643 (1912) and its progeny. Petitioners aver that

payment of the TIF proceeds by the County is a mere ministerial act commanded by statute, whereas it is act of the City in promulgating the ordinance legally authorizing the TIF that institutes and creates the indebtedness – the obligation to supply the income stream to CCDC for 20 years – which creates a liability of the City in favor of CCDC if the City by its acts (such as by amendment of the ordinance) were ever to stop that income flow. For the City to claim that it has simply “foregone” the TIF portion of the property tax revenues erroneously ignores the critical fact that said revenues have been legally pledged via the ordinance to the CCDC.

3. The City claims there is no liability created on the part of the City in agreeing to finance the CCDC’s subject Urban Renewal Plans for 20 years based, again, on the District Court’s interpretation of this Court’s holding in *Hart*. As stated above, Petitioners contend that the District Court below and the City have misinterpreted the ruling in *Hart* by conflating the law applicable to urban renewal agencies with those applicable to legal subdivisions of the state, such as cities, counties, etc. Beyond that error, there can be no question that the City incurred a liability under the *Feil* definition of “Liability.”

### III. ARGUMENT

- A. **IN ORDER TO RULE ON STANDING UNDER THE REQUIREMENTS OF *KOCH*, THE DISTRICT COURT WAS REQUIRED TO RULE ON THE MERITS OF PETITIONERS’ CONSTITUTIONAL CLAIM THAT THE CITY VIOLATED ARTICLE VIII SECTION 3 BY PROVIDING TIF TO CCDC FOR THE SUBJECT PLANS FOR A PERIOD IN EXCESS OF THE CITY’S ANNUAL REVENUE WITHOUT FIRST OBTAINING THE APPROVAL OF TWO-THIRDS (2/3) OF THE QUALIFIED ELECTORS.**

The City claims that the District Court dismissed this case for lack of standing pursuant to the holding in *Thomson v. City of Lewiston*, 137 Idaho 473, 50 P.3d 488 (2002), under a traditional standing analysis set forth in *Miles v. Idaho Power Co.*, 116 Idaho 635, 778 P.2d 757

(1989) without ruling on the merits (City's Brief, pp 1-2). The City's claim is erroneous and its argument is misleading. It is erroneous in that it alleges that the District Court dismissed the Petitioners' complaint on the traditional standing analysis under *Thomson* without reaching a decision on the merits while considering Petitioners' constitutional claim of standing pursuant to the holding in *Koch*. In this regard, Koch held as follows:

Even though standing is jurisdictional and may be raised at any time, including on appeal, *Beach Lateral Water Users Ass'n v. Harrison*, 142 Idaho 600, 130 P.3d 1138 (2006), this Court has never questioned the standing of a taxpayer to challenge expenditures that allegedly violate Article VIII, § 3.

If this Court were to hold that taxpayers do not have standing to challenge the incurring of indebtedness or liability in violation of that specific constitutional provision, we would, in essence, be deleting that provision from the Constitution.

Koch, 145 Idaho at 162; 177 P.3d at 376

The fundamental error in the City's allegation that its motion to dismiss was granted on the basis of *Thomson* is that standing under *Koch* is conferred upon the allegation by the Petitioners that the TIF expenditures authorized by the City violate Article VIII Section 3. Thus, standing under *Koch* is conferred up making the requisite constitutional allegation and is distinguished from traditional standing rules governing the status of taxpayers at large applied in *Thomson*. The City does not deny that Petitioners have alleged the requisite constitutional violation; in fact, the City admits the same (City Brief, pp 4-5). Moreover, the holding in *Thomson* is irrelevant to the necessary factual basis that must be alleged for a claim of standing under *Koch*, for the reason that the plaintiffs in *Thomson* made no constitutional claims whatsoever – their claims were solely statutorily based on allegations arising out of provisions of Idaho Code § 50-2027.

Nevertheless, the City misleadingly infers that the dismissal was based solely on *Thomson*, and that the District Court’s “further” finding that the City’s commitment of TIF to the CCDC was *dicta* as to the issue of standing, and therefore the dismissal was complete and the merits were never considered by the District Court with respect to the dismissal:

The district court dismissed this action with a finding that Appellants lacked standing (R., p. 000054), but went further in holding that Boise City’s commitment to allocate “revenue allocation financing,” also known as “tax increment financing” (“TIF”), to the CCDC for twenty years in the Shoreline Plan and the Gateway Plan did not violate Article VIII, § 3 of the Idaho Constitution. (R., pp. 000056-000058.)

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The lack of standing is adequate reason for dismissal in and of itself and could have been the end of the inquiry. But the finding of no violation of Article VIII, § 3 of the Idaho Constitution should also be affirmed and is discussed in the subsequent sections of this brief.

City’s Brief, p.2

The City’s above citation of the Record at page 000054 is erroneous and misleading for the proposition that the District Court found that Petitioners lacked standing and dismissed this case prior to consideration of the merits. The Court’s finding at R., p. 000054 was only that “...the Plaintiffs do not have standing under *Thomson* to bring their claims,” which was *arguendo*, since the Petitioners never claimed standing under *Thomson*.

Yet in contradiction to its assertion that the standing was determined under traditional standing analysis under *Thomson* without consideration of the merits of Petitioners’ constitutional claims, the City admitted in page 5 of its Brief that:

The reason that *Koch* is not applicable to the instant case is that Boise City did not incur any “indebtedness or liability” to bring it within the purview of Article VIII, § 3 of the Idaho Constitution. This was the finding of the district court (R., pp. 000056-000057, 000102-000103)...

The City's reference to the Record in the above quote encapsulates the District Court's analysis in both of its two Decisions below regarding the application of the decision in *Hart* to the merits of the instant case, which analysis Petitioners respectfully aver is erroneous, as discussed herein below. Therefore, it was only after consideration and denial of the merits of Petitioners' constitutional claims by the District Court that it found that standing under *Koch* was not available to Petitioners and that they were required to meet the traditional standing requirements as enunciated in *Thomson*.

**B. THE FINDINGS AND HOLDING OF THE TWO DECISIONS OF DISTRICT COURT (R., PP. 000056-000057, 000102-000103), THAT BOISE CITY DID NOT INCUR ANY "INDEBTEDNESS OR LIABILITY" TO BRING IT WITHIN THE PURVIEW OF ARTICLE VIII, SECTION 3 OF THE IDAHO CONSTITUTION ARE IN EACH INSTANCE BASED ON A DETERMINATIVE MISINTERPRETATION OF THE HOLDING IN *HART*.**

In Argument, Section B of its Brief (pp 5-6), the City claims that it "...did not create a continuing obligation to the CCDC in violation of Article VIII Section 3 of the Idaho Constitution by promulgating the subject ordinances pursuant to Idaho Code § 50-2906." Later in that Section B, the City claims that "...Article VIII, § 3 of the Idaho Constitution speaks of 'any indebtedness or liability,' specific terms that are not necessarily synonymous with an obligation." The City references the District Court's First Decision (R., pp. 000056-000057), but cites no cases in support of its contentions in Section B.

Rather, the City refers only to an Idaho law review article, Spencer W. Holm, *What's the Tiff about TIF?: An Incremental Approach to Improving the Perception, Awareness, and Effectiveness of Urban Renewal in Idaho*, 50 Idaho L. Rev. 273, 281 (2014), which articulates the history of TIF and explains how it works. In Section II of this law review article, entitled

“The Legality of Urban Renewal and Tax Increment Financing,” the *Hart* and *Yick Kong* cases are reviewed at pp 284-296. After discussing the Court’s rulings in these cases that, since the urban renewal agencies were not alter egos of the municipalities, the urban renewal agencies were not constrained from issuing revenue bonds by Article VIII Section 3, the author, without further analysis regarding the *Hart* opinion, concludes as follows:

The Court held: “Even as amended, the Law does not allow a city to usurp the powers and duties of the urban renewal agency. *Id* at 471, 148 Idaho at 303.

The holdings in *Yick Kong* and *Hart* thus make it clear that the Idaho Supreme Court does not think that urban renewal and TIF violate constitutional restraints on cities’ ability to incur indebtedness without voter approval.

Spencer W. Holm, *What’s the Tiff about TIF?: An Incremental Approach to Improving the Perception, Awareness, and Effectiveness of Urban Renewal in Idaho*, 50 Idaho L. Rev. 273, 281 at 284-296 (2014)

The author, like the District Court below, conflates authority of the municipalities with that of the urban renewal agencies and assumes that the cities are free of the relevant constitutional constraints in the context of implementing TIF to urban renewal agencies. Clearly, **if** a municipality adheres to the subject constitutional constraints, it is empowered under the Local Economic Development Act (Idaho Code § 50-2901, et seq.) to authorize a revenue allocation financing provision (“TIF”).

50-2904. AUTHORITY TO CREATE REVENUE ALLOCATION AREA. An authorized municipality is hereby authorized and empowered to adopt, at any time, a revenue allocation financing provision, as described in this chapter, as part of an urban renewal plan or competitively disadvantaged border community area ordinance.

Such authorization must be legally binding in the form of an ordinance of the municipality:

50-2906. PUBLIC HEARING AND ORDINANCE REQUIRED. (1) To adopt a new urban renewal plan or create a competitively disadvantaged border community area containing a revenue allocation financing provision, the local governing body of an authorized municipality must enact an ordinance in accordance with chapter 9, title 50, Idaho Code, and section 50-2008, Idaho Code.

The Local Economic Development Act does not and cannot free the City from complying with the restrictive provisions of Article VIII Section 3 of the Idaho Constitution when it promulgated the resolutions providing TIF to the CCDC for the subject urban renewal districts. The extent of the strictness of the constitutional limitations imposed by Article VIII Section 3 as first interpreted by the Idaho Supreme Court in *Feil*, was recently analyzed and reaffirmed by the Court in *In the Matter of Greater Boise Auditorium District("GBAD") v Frazier* 59 Idaho 266, 360 P.3d 275 (2015):

While 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. *Feil v. Coeur d'Alene*, 23 Idaho 32, 49, 129 P. 643, 649 (1912).[3] This Court in *Feil* was careful to distinguish an "indebtedness" from a "liability," the latter being "a much more sweeping and comprehensive term than the word 'indebtedness[.]' " *Id.* at 23 Idaho at 49-50, 129 P. at 649. Though somewhat loosened over time by constitutional amendment, the prohibition against incurring liabilities without a vote is still quite strict. See, e.g., *Hanson v. Idaho Falls*, 92 Idaho 512, 514, 446 P.2d 634, 636 (1968). *Feil*'s analysis of the scope of Idaho's constitutional prohibition that has not been superseded by constitutional amendment[4] remains good law. See *Boise v. Frazier*, 143 Idaho 1, 9, 137 P.3d 388, 396 (2006).

*Greater Boise Auditorium District*, 159 Idaho at 271, 360 P.3d at 280.

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The relevant analysis for these cases is examining the monetary obligations to which the governmental subdivision bound itself. .... As long as the agreement does not bind the party to a greater liability than it has funds to pay for in the fiscal year, the characterization of the agreement does not matter: .... The important matter is, does it create "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"? .... We reaffirm that principle now. The relevant determination under Article VIII, section 3 is whether the governmental subdivision presently bound itself to a liability greater than it has funds to pay for in the year in which it bound itself. Questions about the characterization of the document only matter to the extent that they could provide additional liability.

*Greater Boise Auditorium District*, 159 Idaho at 272-273, 360 P.3d at 281-282.

Turning to the decision in *Hart*, which held that revenue allocation bonds issued by the urban renewal agency did not violate Section 3 of Article VIII of the Idaho Constitution, the Court expressly did not address or rule on the constitutionality of the City ordinances that approved urban renewal plans which incorporate TIF provisions. The Court in *Hart* was explicit that its decision addressed only the authority of the urban renewal agency, not the municipality, to approve and issue revenue bonds, as follows:

The constitutional provisions that Hart argues the Act violates are limitations on actions by municipalities. The only action taken directly by the City in this case was the passage of Ordinance No. 950, and Hart did not challenge the enactment of this ordinance in a timely manner.[1] Thus, we consider only whether the district court erred in confirming the validity of the Agency's resolution approving the bond purchase agreement and authorizing the issuance of revenue allocation bonds, the bond purchase agreement, and the bonds that the Agency proposes to sell to Zions. (Emphasis supplied.)

(Footnote 1) Many of Hart's arguments are challenges to the City's enactment of Ordinance No. 950. We are not free to reach the merits of his challenges to the ordinance.

*Hart*, 148 Idaho 301, 222 P.3d 469.

While addressing the validity of the Agency's resolution approving the bond agreement and the sale of the bonds, the Court expressly declined to address this issue raised by Appellant Hart regarding the City's alleged violation of the restrictions of Article VIII Section 3 by passing

Ordinance No. 950 providing TIF to the urban renewal agency to finance the Agency's Plan. It must be pointed out that this issue, which was fully briefed and argued in *Hart*, has never been directly addressed by the Idaho Supreme Court. The urban renewal industry was deeply involved in the *Hart* case, as the Court acknowledged (148 Idaho at 303; 222 P.3d 471), and therefore it must be likewise acknowledged that the urban renewal industry is on notice of this potential constitutional infirmity, or "Achilles Heel," to their business.

Despite the fact that this issue remains unresolved, the large urban renewal industry continues to expand in an apparent effort to become too big to reign in to constitutional compliance. Meanwhile, virtually all of the cases involving TIF and invoking Article VIII Section 3 have challenged the authority of the urban renewal agencies and their function in regard to the funding issue – not the municipalities. This has apparently led to the assumption that what the urban renewal agency can do regarding TIF immunizes the City from its constitutional restrictions in reciprocal of its approving urban renewal plans containing obligations to provide TIF to the agency. Accordingly, in its First Decision, the District Court concluded and held as follows:

Here, the Plaintiffs specifically allege in the Amended Complaint that the "revenue allocation funding" in the Shoreline and Gateway Urban Renewal Plans violates Article VIII §3 of the Idaho Constitution. Because the Idaho Supreme Court has directly addressed this issue in *Urban Renewal Agency of Rexburg v. Hart*, and because the Idaho Supreme Court has held that revenue allocation bonds do not violated section 3 of Article VIII of the Idaho Constitution, the Court finds the City did not incur indebtedness or liability. Therefore, the Court GRANTS the Motion to Dismiss and DISMISSES Plaintiffs' claims in the Amended Complaint that Boise City's commitment to allocate "revenue allocation funding," also known as "tax increment financing" ("TIF") to the CCDC for twenty years in Ordinance No. 55-18 for the Shoreline District and Urban Renewal Plan and / or Ordinance No. 58-18 for the Gateway East District and Urban Renewal Plan violate Article VIII, § 3 of the Idaho Constitution.

R. Vol I, p. 000056. (Emphasis supplied)

Nowhere in the *Hart* decision was the issue of the constitutional validity of the City's revenue allocation funding ("TIF") directly addressed (or even indirectly) other than to expressly decline to consider the issue. Further, the Court's ruling in *Hart* that revenue allocation bonds issued by the Agency do not violate Section 3 of Article VIII of the Idaho Constitution is inapposite and irrelevant to the issue of whether the City incurred indebtedness or liability in violation of that constitutional provision, because the Agency, unlike the City, is not a subdivision of the state within the meaning of Article VIII Section 3 of the Idaho Constitution. *Yick Kong*, 94 Idaho at 882-883, 499 P.2d at 581-582.

As manifested by the above wording in the holding of the First Decision, the District Court has erroneously conflated the constitutionality of an urban renewal agency's issuance of revenue allocation bonds with the issue of whether the City can constitutionally promulgate a binding ordinance pursuant to Idaho Code §§ 50-2904 – 50-2906, to provide a long-term TIF revenue stream to an urban renewal agency in amounts exceeding the municipality's annual revenue, without the requisite approval of the qualified electors. The ruling in *Hart* regarding what an urban renewal agency can constitutionally do with regard to revenues bonds is simply not applicable to municipalities under Article VIII Section 3.

As pointed out in Petitioners' opening Appeal Brief, despite Petitioners' arguments on rehearing about the inapplicability of the decision in *Hart* to the merits of the instant case, the District Court in its Second Decision continued to misinterpret *Hart* and to conflate the constitutional law applicable to urban renewal agencies and apply it to the City, thus erroneously

avoiding the restrictive provisions of Article VIII Section 3 governing tax based municipal financing. In its Second Decision the District Court criticized words such as “commitment,” “contract,” etc., used in Petitioners’ briefs and oral argument to describe the assumpsit effect created by the passage of the Ordinances, which served to create the obligation and the liability clearly alleged in the detailed complaint of Petitioners.

To avoid rehashing Petitioners’ response contained in Petitioners’ Appellants Brief to the District Court’s said critique, Petitioners will respond only to the City’s allegation that the City avoids creating any liability by passage of an ordinance granting TIF, because the TIF funds are disbursed by the County directly to CCDC:

Boise City does not create a continuing obligation to the CCDC, but rather, the TIF funds go directly to the TIF district from the County Treasurer, and Boise City has simply foregone property tax revenues exceeding those attributable to the set base value in the TIF district. Therefore, Boise City has not created any continuing obligation to the CCDC.

City’s Brief, p.6

The District Court in its Second Opinion also found this handling of the TIF funds significant:

So, the Plaintiffs acknowledge in the Amended Complaint that the TIF revenues are paid directly from the County to CCDC and are never paid to the City and then diverted to CCDC.

Therefore, the Court will not reconsider its decision as to Urban Renewal (Hart) prohibiting a constitutional challenge on the City’s indebtedness or commitment of funds.

R. Vol. I, p. 000103

As pointed out in Petitioners' opening Appellate brief, the alleged significance of this function of the County is a "red herring," since this function is clearly ministerial in nature and is part of the County's regular function in assessing, collecting, and disbursing ad valorem tax proceeds. Idaho Code § 50-2907; see also County's function pursuant to Idaho Code 63-301, et seq. "Assessment of Real Property and Personal Property." Thus this function of the County is derivative of the determinative action of the City in promulgating the subject ordinances. The City's role in making and controlling the allocation is further emphasized by the fact that the municipality is "...empowered to adopt, at any time, a revenue allocation financing provision..." and thereafter modify it." Idaho Code § 50-2904. The plain language of the Act provides that it is the municipality that determines and allocates the tax increment financing and is "empowered" to do so by enacting an ordinance adopting a revenue allocation financing provision. Idaho Code §§ 50-2904 – 2906.

**C. THE CITY CREATED AND INCURRED LIABILITY BY PROMULGATING THE SUBJECT ORDINANCES APPROVING AND PROVIDING FOR TAX INCREMENT FINANCING ("TIF") FOR THE SUBJECT URBAN RENEWAL PLANS OF THE CCDC.**

As discussed in Petitioners' opening Appellants' Brief, the ordinances at issue created an existing, contingent liability arising from the agreement in the ordinances to provide containing TIF for a 20 year period to the CCDC for its subject urban renewal plans. Again, it must be emphasized that any claim that the City's Ordinances "appropriating" the incremental tax revenues to the CCDC is somehow different than the incurring of a debt or liability was rejected by the Court in *Koch v. Canyon County*, 145 Idaho 158, 162-163, 177 P. 3d 372 (2008): "There is no logical difference between making an appropriation that is specifically prohibited by the Constitution and incurring an indebtedness or liability that is specifically prohibited by the

Constitution.” In Section 4 of Ordinance No. 55-18, the Shoreline District Plan was approved by, incorporated in, and made a part of said ordinance, thereby appropriating the TIF in accordance with Section 502 of the Plan, “Revenue Allocation Financing Provisions.” In Section 4 of Ordinance No. 58-18, the Gateway East District Urban Renewal Plan was approved by, incorporated in, and made a part of said ordinance, thereby appropriating the TIF in accordance with Section 502 of the Plan, “Revenue Allocation Financing Provisions.” Thus, said appropriation of the TIF became and constituted an obligation of the City pursuant to said Ordinances.

Any argument that said Ordinances do not create a liability because they have no effect on the City’s budget is misleading. Budgets are developed based on the availability of anticipated revenues. Obviously, if reasonably anticipated future tax proceeds are capped at a certain level because of TIF allocations, the City budget will reflect that circumstance. Moreover, with future tax increments diverted pursuant to TIF allocations, the City, being limited to the “base” assessment during the 20 year Plan period, will likely be faced with the need to raise taxes to cover the effects of inflation and other costs that will inevitably arise.

Likewise faulty is an argument that no obligation exists by the promulgation of an ordinance allocating anticipated TIF revenue to the CCDC where no increase of assessed value above the base assessed value occurs. A promise to forego anticipated revenue and to allocate same for a term is an enforceable contract. Only if it were known as a matter of fact at the time of the promulgation of the ordinance that there would be no increment would such an argument hold, but then that fact would obviate the need and purpose for the ordinance.

In addition to the above referenced review by the Court in *Greater Boise Auditorium District* as to what constitutes an obligation and an Article VIII Section 3 liability under the *Feil* case, the Court in *Greater Boise Auditorium District* case analyzed in yet greater depth the particular essence of what constitutes “liability” under Article VIII Section 3. The Court noted (159 Idaho at 273; 360 P.3d at 282) that a liability “...may arise from contracts, either express or implied, or in consequence of torts committed. *Feil v. Coeur d’Alene*, 23 Idaho 32, 129 P. 643, 649 (1912).” The Court reviewed the *Feil* standard for liability under Article VIII Section 3, which notably includes being “bound or obliged,” i.e. an “obligation”:

In *Feil* this Court also adopted a standard for what constitutes a "liability." *Feil*, 23 Idaho 32, 50, 129 P. 643, 649. Examining Bouvier’s Law Dictionary and its sources, this Court stated that a liability is a "[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." *Id.* Adopting this definition, this Court further distinguished an indebtedness from a liability. *Boise Dev. Co. v. Boise*, 26 Idaho 347, 360-61, 143 P. 531, 535 (1914). We used a hypothetical example of how a liability can be incurred while indebtedness has not. *Id.* This Court found that presently obligating oneself to future payments is not a present indebtedness, but it is a present liability: If A by a valid contract employs B to work for him for the term of one year at \$50 per month, payable at the end of each and every month, would this contract not be a liability on A. as soon as executed? A debt of \$50 would accrue thereon at the end of each month, but the liability would be incurred at the time the contract was entered into. *Id.* at 26 Idaho at 363, 143 P. at 535. Accordingly, governmental subdivisions are liable for the aggregate payments due over the total term of a contract rather than merely for what is due the year in which the contract was entered. See *id.* ..... The obligation to pay in future years constituted a liability that the municipal corporation required a super-majority vote to incur under the Constitution. *Id.* Because it had not done so, the agreement was invalid and the contract void. *Id.* at 26 Idaho at 366, 143 P. at 537.

*Greater Boise Auditorium District*, 159 Idaho at 272; 360 P.3d at 281.

Hence, by this analysis, whereas the obligations created by the passage of the subject Ordinances providing for a stream of future revenue to the CCDC may not constitute current indebtedness beyond the City's annual revenue (particularly in the early years of the development of the Plan projects), there can be little doubt that a present, contingent liability was created to provide the "incremental" revenues for 20 years into the future.

The Court in *Greater Boise Auditorium District* commented further on the nature of the Article VIII Section 3 liability:

The framers, while being quite concerned with incurring contingent liabilities, were not worried about all potential liabilities. The distinction is an important one. While barring municipalities from incurring contingent liabilities without a vote serves the purpose of ensuring elected officials not bind future officials and taxpayers to irresponsible financial deals without citizen approval, barring the incurring of all potential liabilities would essentially handcuff governmental subdivisions, preventing them from entering any deal without a super-majority vote. There are uncountable potential liabilities that could arise, and it would be excessively difficult and inefficient, if not outright logically impossible,[7] to prove that one is subject to absolutely no potential liabilities. Further, it is similarly difficult and inefficient to require governmental subdivisions to overcome this problem of potential liabilities by subjecting every contract to a vote. Justice J. Jones recognized this difficulty in a 2008 concurrence: It is a virtual impossibility to present every multi-year governmental contract or lease to the public for a vote. Thus, leases and other contracts that are intended to extend beyond one year always contain provisions (1) making the government's performance subject to availability of appropriated funds and (2) making the agreement renewable on an annual basis for the contemplated term. *In re Univ. Place/Idaho Water Ctr. Project*, 146 Idaho 527, 547, 199 P.3d 102, 122 (2008) (J. Jones, J., concurring).

*Greater Boise Auditorium District*, 159 Idaho at 274; 360 P.3d at 283

It must be equally clear that the funding of urban renewal plans involving major community development and infrastructure projects, such as were approved by Ordinance Nos. 55-18 and 58-15, are readily distinguishable from the multi-year equipment leases and similar contracts that are discussed above. By the standards set forth in *Feil* and recently reaffirmed in *Greater Boise Auditorium District*, it is clear that the promulgation of the subject ordinances by the City created a liability in violation of Article VIII Section 3 by appropriating for a period of 20 years Boise City tax revenues to CCDC in cumulative amounts exceeding the municipality's annual revenue without the requisite approval of the qualified electors.

#### **IV. CONCLUSION**

When the City promulgated the subject ordinances containing provisions for revenue allocation financing (“TIF”) and thereby provided a long-term revenue stream to CCDC in amounts exceeding the municipality's annual revenue without the requisite approval of the qualified electors, the City violated Article VIII, Section 3 of the Idaho Constitution. In promulgating this legal obligation by and through said ordinances, which is in the power of the City not only to make, but later to amend, the City created a significant, present, contingent, resulting liability, which is unique to Idaho in its breadth and strictness. That liability was unconstitutionally undertaken by the City, because the City failed to first obtain the requisite approval of the qualified electors. The District Court's two dispositive decisions below are misinterpretations of the holding in *Hart* and fail to address the foregoing central issue of this case. Accordingly, the Judgment of Dismissal entered by the Distract Court should be reversed.



