

IN THE SUPREME COURT OF THE STATE OF IDAHO

NORTH IDAHO BUILDING  
CONTRACTORS ASSOCIATION, an Idaho  
non-profit corporation; TERMAC  
CONSTRUCTION, INC., an Idaho  
corporation, on behalf of itself and all others  
similarly situated,

Plaintiffs-Respondents-  
Cross Appellants,

and

JOHN DOES 1-50, whose true names are  
unknown,

Plaintiffs,

v.

CITY OF HAYDEN, an Idaho municipality,

Defendant-Appellant-Cross  
Respondent.

Supreme Court Docket No. 45181-2017  
Kootenai County No. CV-2012-2818  
Ref. No. 17-385

---

APPELLANT'S/RESPONDENT'S REPLY AND RESPONSE BRIEF

---

Appeal from the District Court of the  
First Judicial District for Kootenai County

---

Honorable Cynthia K.C. Meyer, District Judge, Presiding

---

Jason S. Risch, ISB #6655  
RISCH ♦ PISCA, PLLC  
Attorneys at Law  
407 West Jefferson Street  
Boise, Idaho 83702-6012  
Attorneys for Plaintiffs/Respondents

Merlyn W. Clark, ISB No. 1026  
John A. Cafferty, ISB No. 5607  
Caitlin Kling, ISB No. 9565  
HAWLEY TROXELL ENNIS & HAWLEY LLP  
877 Main Street, Suite 1000  
P.O. Box 1617  
Boise, Idaho 83702

Christopher H. Meyer, ISB No. 4461  
Martin C. Hendrickson, ISB No. 5876  
GIVENS PURSLEY LLP  
601 West Bannock Street  
P.O. Box 2720  
Boise, Idaho 83701-2720

Attorneys for Defendant/Appellants

## TABLE OF CONTENTS

I.	STATEMENT OF THE CASE .....	1
A.	Facts Are Clear and Undisputed.....	1
B.	The Law Governing the Ability to Charge the Fee is Clear.....	4
II.	RESTATEMENT OF ISSUES PRESENTED ON APPEAL .....	8
III.	ARGUMENT.....	9
A.	The District Court Committed Error When It Ruled That It Would Not Consider the Evidence of the Reasonableness of the Cap Fee Under the Methodology Prescribed by <i>Loomis v. City Of Hailey</i> , 119 Idaho 434, 807 P.2d 1272 (1991) Following Remand.....	9
1.	The district court failed to proceed in a manner consistent with the Court’s opinion in <i>NIBCA I</i> to hear and consider evidence of the reasonableness of the Cap Fee.....	9
2.	The district court failed to properly consider the relevance of the evidence and the reasonableness of the Cap Fee.....	11
B.	The District Court Abused its Discretionary Powers and Imposed its Own Sense of Justice When it Refused to Consider the City’s Evidence Following Remand that the \$2,280 Fee per ER is Less Than the Value of the System Capacity that Would Be Utilized By the New User Who Connected to the System On or After June 7, 2007. This Holding by the District Court was Arbitrary and Constitutes Reversible Error. The Remedy for an Unlawful Tax or Fee is Limited to a Refund of the Overcharge. ....	14
C.	The District Court Committed Error When it Ruled that the Failure of NIBCA To Comply with the Requirements Prescribed by <i>Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of</i> <i>Johnson City</i> , 473 U.S. 172, 105 S.Ct. 3108 (1985) Did Not Bar NIBCA’s Federal Takings Claims.....	15
1.	NIBCA may be exempt from prong one because they assert a facial challenge. ....	16
2.	NIBCA cannot satisfy prong two because it failed to timely pursue its state inverse condemnation claims by filing a timely notice of claim under the Idaho Tort Claims	

Act, and seeking review under the Regulatory Takings Act.....	16
3. Any “prudential” exception to <i>Williamson County</i> does not apply here.....	19
D. The District Court Committed Error when it Arbitrarily Rejected the City’s Equitable Defenses and Ordered that Cap Fees that Had Been Paid to the City by Developers and Individuals in Excess of the \$774 Rate be Refunded to the Class Members, which was a Cap Fee that is Less than the Pro Rata Replacement Value of the Portion of the System to which They were Allowed to Connect.....	20
1. The district court committed error when it ruled that it would not consider equitable defenses following remand.....	20
2. The district court erroneously rejected the City’s defense of unjust enrichment based on the doctrine of unclean hands.....	22
3. The district court committed error when it failed to recognize that damages, if any, are limited to the excess charged by the City over the lawful amount.....	26
E. The District Court Committed Error when it Entered Judgment in Favor of NIBCA and Awarded Costs and Attorney Fees to NIBCA.....	29
F. The City is Entitled to an Award of Costs and Attorney Fees on Appeal Pursuant to I.C. 12-120(3).....	29
G. <i>NIBCA I</i> Did Not State That the City’s Cap Fee was an Impermissible Tax.....	30
H. Reply to NIBCA’s Cross-Appeal Asserting the District Court Erred in Reinstating the Cap Fee Used in 2006.....	32
I. Reply to NIBCA’s Cross-Appeal Asserting the District Court Erred in Using Simple, Instead of Compound Interest to Determine the Amount of Prejudgment Interest Applicable to NIBCA.....	34
IV. CONCLUSION.....	39

## TABLE OF AUTHORITIES

### Cases

<i>Akers v. D.L. White Const., Inc.</i> , 156 Idaho 37, 44, 320 P.3d 428 (2014) .....	12
<i>Alpine Village Co. v. City of McCall</i> , 154 Idaho 930, 303 P.3d 617 (2013) .....	passim
<i>Bach v. Bagley</i> , 148 Idaho 784, 790, 229 P.3d 1146 (2010) .....	35
<i>BHA Investments, Inc. v. City of Boise</i> , 141 Idaho 168, 108 P.3d 315 (2004) .....	7
<i>Borah v. McCandless</i> , 147 Idaho 73, 77, 205 P.3d 1209 (2009) .....	34
<i>Boston Chamber of Commerce v. Boston</i> , 217 U.S. 189 (1910).....	27
<i>Bratton v. Scott</i> , 150 Idaho 530, 537, 248 P.3d 1265 (2011) .....	26, 27
<i>Brewster v. City of Pocatello</i> , 115 Idaho 502, 768 P.2d 765 (1989) .....	5
<i>Clements Farms, Inc. v. Ben Fish &amp; Son</i> , 120 Idaho 185, 207, 814 P.2d 917 (1991) .....	32
<i>Countrywide Home Loans, Inc. v. Sheets</i> , 160 Idaho 268, 271, 371 P.3d 322 (2016) .....	23, 25
<i>Daniel v. County of Santa Barbara</i> , 288 F.3d 375 (9 <sup>th</sup> Cir. 2002), cert. denied, 537 U.S. 973 .....	19
<i>Deiter v. Coons</i> , 162 Idaho 44, 47, 394 P.3d 87 (20017) .....	32
<i>Doolittle v. Meridian Joint Sch. Dist. No. 2</i> , 128 Idaho 805, 814, 919 P.2d 334 (1996) .....	35
<i>Downing/Salt Pond Partners, L.P. v. Rhode Island and Providence Plantations</i> , 643 F.3d 16 (1 <sup>st</sup> Cir. 2011).....	19
<i>Dunn v. Ward</i> , 105 Idaho 354, 356-57, 670 P.2d 59 (Ct. App. 1983) .....	26
<i>Gamble v. Eau Claire County</i> , 5 F.3d 285 (7 <sup>th</sup> Cir. 1993) .....	19

<i>Harbours Pointe of Nashotah, LLC v. Village of Nashotah,</i>	19
278 F.3d 701 (7 <sup>th</sup> Cir. 2002) .....	
<i>Hehr v. City of McCall,</i>	
155 Idaho 92, 305 P.3d 536 (2013) .....	passim
<i>Hill-Vu Mobile Home Park v. City of Pocatello,</i>	
162 Idaho 588, 402 P.3d 1041 (2017) .....	7, 11, 27
<i>Holladay v. Lindsay,</i>	
143 Idaho 767, 769, 152 P.3d 638 (Ct. App. 2006).....	35, 36
<i>Idaho Building Contractors Assoc. v. Coeur d'Alene,</i>	
126 Idaho 740, 890 P.2d 326 (1995) .....	7
<i>Idaho Transportation Department v. Ascorp, Inc.,</i>	
2015 Opinion No. 94 (Sept. 25, 2015).....	30
<i>Kootenai Cnty. Prop. Ass'n v. Kootenai Cnty.,</i>	
115 Idaho 676, 680, 769 P.2d 553 (1989) .....	7
<i>Loomis v. City of Hailey,</i>	
119 Idaho 434, 807 P.2d 1272 (1991) .....	passim
<i>Manwaring Investments, L.C. v. City of Blackfoot,</i>	
162 Idaho 763, 767, 405 P.3d 22 (2017) .....	7, 14, 31
<i>Marek v. Lawrence,</i>	
153 Idaho 50, 53, 278 P.3d 920 (2012) .....	37
<i>McKesson Corp. v. Div. of Alcoholic Beverages and Tobacco, Dept. of Business Regulation of Florida,</i>	
496 U.S. 18, 40, 110 S. Ct. 2238 (1990).....	14, 28
<i>Morgan v. New Sweden Irr. Dist.,</i>	
160 Idaho 47, 52, 368 P.3d 990 (2016) .....	12
<i>NIBCA v. City of Hayden,</i>	
158 Idaho 79, 343 P.3d 1086 (2015) .....	passim
<i>North Idaho Building Contractors Association v. City of Hayden,</i>	
158 Idaho 79, 83-84, 233 P.3d 1086 (2015) .....	6
<i>Parks v. Safeco Ins. Co.,</i>	
160 Idaho 556, 562, 376 P.3d 760 (2016) .....	37
<i>Pascoag Reservoir &amp; Dam, LLC v. Rhode Island,</i>	
337 F.3d 87 (1 <sup>st</sup> Cir. 2003), cert. denied, 540 U.S. 1090 (2003) .....	19
<i>Pinnacle Eng'rs, Inc. v. Heron Brook, LLC,</i>	
139 Idaho 756, 758, 86 P.3d 470 (2004) .....	14

<i>Schmidt v. Village of Kimberly</i> , 74 Idaho 48, 256 P.2d 515 (1953) .....	4
<i>Schneider v. Cty. of San Diego</i> , 285 F.3d 784 (9th Cir. 2002) .....	37
<i>Sherman Storage LLC v. Global Signal Acquisitions II, LLC</i> , 159 Idaho 331, 335, 360 P.3d 340 (2015) .....	34
<i>State v. Raudebaugh</i> , 124 Idaho 758, 864 P.2d 569 (1993) .....	13
<i>State v. Sanchez</i> , 147 Idaho 521, 211 P.3d 130 (2009) .....	13
<i>Swafford v. Huntsman Springs, Inc.</i> , 2017 WL 6347031, at *5 (Idaho Dec. 13, 2017) .....	30
<i>Syringa Networks, LLC v. Idaho Dept.of Admin., et al.</i> , 2013 Op. No. 35 (March 29, 2013).....	30
<i>Thornton v. Pandrea</i> , 161 Idaho 301, 313, 385 P.3d 856 (2016) .....	35
<i>United States v. 429.59 Acres of Land</i> , 612 F.2d 459 (9th Cir. 1980) .....	38
<i>United States v. 50.50 Acres of Land</i> , 931 F.2d 1349 (9th Cir. 1991) .....	38
<i>United States v. Miller</i> , 317 U.S. 369, 373, 63 S. Ct. 276 (1943).....	33
<i>Ventas Finance I, LLC v. California Franchise Tax Bd.</i> , 81 Cal Rptr. 3d 823 (Cal. Ct. App. 2008), <i>cert denied</i> , 556 U.S. 1176 (2009) .....	28
<i>Viking Const., Inc. v. Hayden Lake Irrigation Dist.</i> , 149 Idaho 187, 194, 233 P.3d 118 (2010) .....	6
<i>Wechsler v. Wechsler</i> , 162 Idaho 900, 407 P.3d 214 (2017) .....	37
<i>Williams v. City of Emmett</i> , 51 Idaho 500, 6 P.2d 475 (1931) .....	21
<i>Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City</i> , 473 U.S. 172, 105 S. Ct. 3108 (1985).....	passim
<i>Wing v. Hulet</i> , 106 Idaho 912, 918, 684 P.2d 314 (Ct. App. 1984).....	26
<i>Yee v. City of Escondido</i> , 503 U.S. 519 (1992).....	16

## **Other Authorities**

Hayden City Code § 8-1-3(B)(9) .....	10
I.A.R. 40.....	29
I.A.R. 41.....	29
I.C. § 28-22-104(1) .....	35
I.C. § 50-1027 .....	4
I.C. § 50-1028 .....	passim
I.C. § 50-1030(e).....	4
I.C. § 50-1030(f) .....	passim
I.C. § 50-1032 .....	6, 12
I.C. § 50-1042 .....	4
I.C. § 50-1326 .....	15, 20, 30
I.C. § 50-219 .....	16
I.C. § 67-6501 .....	18
I.C. § 50-1030 .....	5, 10
I.C. § 63-1311 .....	10
I.C. § 67-8001 .....	17, 18
I.C. § 6-901 .....	16
I.C. 12-120(3).....	29, 30
I.R.E. 401 .....	13
I.R.E. 402 .....	13
Idaho Constitution, art. 8, § 3 .....	4, 21
Idaho Revenue Bond Act .....	passim
Idaho Tort Claims Act .....	16, 19
Lewis, IDAHO TRIAL HANDBOOK, 219 (2d ed. 2005).....	13
Local Land Use Planning Act.....	18
Regulatory Takings Act .....	16, 17, 18, 19
Revenue Bond Act, I.C. Chapter 10, Title 50.....	31

## I. STATEMENT OF THE CASE

### A. Facts Are Clear and Undisputed.

The City of Hayden (the “City”) provides sewer service to the residents living in the City and to some persons living in a small service area outside the City. The City collects sewage from its customers and delivers it to a regional treatment facility. The City is responsible for the construction, maintenance, and operation of its collection system, which includes various components, such as trunk lines, sewer mains, interceptors, and lift stations which collect sewage for transport to the regional treatment facility. The City charges each customer it serves a bi-monthly fee, which covers a proportionate share of the operation and maintenance of the City’s sewer collection system and the operation and maintenance costs associated with the regional wastewater treatment facility.

In addition to the bi-monthly fee, the City charges a one-time sewer capitalization fee (“Cap Fee”) for each new structure, whether residential or commercial, and for any addition to an existing structure that will result in an increase in the volume of sewage generated. The Cap Fee is charged when a building permit is issued, and it is only charged to people who asked for a connection to the sewer. The Cap Fee is not imposed on City residents as a whole, nor is it a general obligation to all residents.

In 2007, the City raised its Cap Fee from \$774 to \$2,280 for one equivalent residential connection (“ER”). (R., p. 451; R., pp. 588- 589, ¶ 6; R., Aug. pp. 48-49, ¶ 29.) The increased fee more accurately reflected the costs of construction (or more precisely, the depreciated replacement value) of one ER. (R., p. 685.) Prior to that time, the City’s Cap Fee significantly understated this value. Indeed, as documented in great detail by City via the Second Affidavit of Donna L. Phillips (R., pp. 593-594), the tripling of the Cap Fee in 2007 reflected no more than a long-overdue catch-up on a fee that reflected substantially less than the pro rata depreciated value of the existing system.

The amount of the increased Cap Fee charged by the City was based upon the 2006 study of the system completed by Welch Comer. (R., Aug. p. 47, ¶ 23; R., Aug. pp. 325-443.) Welch Comer did not utilize the methodology prescribed by *Loomis v. City of Hailey*, 119 Idaho 434, 807 P.2d 1272 (1991). Rather, to arrive at the increased fee, Welch Comer divided the estimated cost of increasing the size of the system from 5,600 ER's to 14,550 ER's – the estimated number of future ER's that the city would need for future growth – by the number of new ER's that would result from the construction, and based the new connection fee for each new user on a proportionate amount of the cost of that increase. (R., Aug. pp. 422-423.) In essence, the Welch Comer formula calculated the replacement value of existing excess system capacity by looking at the cost to build the next increment of system capacity, rather than the cost to reproduce the existing system. At all times, the money from the Cap Fee was placed into a special fund for the utilization by the City for sewer, interceptor, collection, and treatment system construction and obligations for the regional facility.<sup>1</sup> (R., p. 576; R., p. 572; Ordinance 422.) The money from the Cap Fees was never transferred to the City's general fund or used for general fund purposes.

The increased Cap Fees were paid from 2007 to 2012 without protest or objection by members of NIBCA and others, including the class members, as a condition to the issuance of a building permit. (R., p. 449, ¶ 3.) NIBCA customers and class members were all hooked up to sewer, and enjoying the benefit of having sewer service. In 2012, the North Idaho Building Contractors Association ("NIBCA") filed this action to have the Cap Fees declared unlawful.

---

<sup>1</sup> Ordinance No. 188 States: "Reserve Fund for the Sewer Collector Depreciation and Treatment Facility: There is hereby created a reserve fund dedicated to the preliminary engineering, design, and construction of collectors, interceptors, pump station, sewer treatment facilities, and obligations for the regional facility. Funds derived from the charge of the capitalization fee and collection depreciation fee shall be placed in this dedicated reserve fund. The money so reserved may only be utilized for preliminary engineering, design and construction of collectors, interceptors, pump stations, sewer treatment facilities and obligations for the regional facility; and the money from said reserve fund is not to be utilized for regular operation and maintenance of the sewerage system, except that up to five percent (5%) of the annual receipts can be utilized to administer the capitalization fee and collector depreciation program." (R., p. 576.)

The district court found that the City’s method of calculating the replacement value of excess capacity based on the cost of building more excess capacity was reasonable, and dismissed the challenge by Plaintiffs. On appeal, the Supreme Court held the City should have calculated replacement value based on the value of the existing system, per *Loomis v. City of Hailey*. It vacated the dismissal and remanded the case to the district court for further proceedings. *See, NIBCA v. City of Hayden*, 158 Idaho 79, 343 P.3d 1086 (2015) (“NIBCA I”).

Knowing that the case required further proceedings following the remand, the City retained Financial Consulting Solutions Group, Inc. (“FCS”), an accounting firm specializing in utility rates and fee management, to conduct an analysis of the Cap Fees to determine whether, and to what extent, the Cap Fees adopted in 2007 exceeded the amount the City should have charged under the *Loomis* methodology. (R., p. 450, ¶ 9.) The FCS analysis concluded the per user depreciated replacement value of the City’s sewer system – as it existed in June of 2007 – was between \$2,600 and \$4,808, depending upon whether surface restoration costs and/or unfunded (versus straight line) depreciation are taken into account. (R., p. 450, ¶ 11.) Thus, the evidence developed by FCS established that the Cap Fee, if calculated using the authorized methodology that was approved by the Court in *Loomis*, would have been more than the \$2,280 Cap Fee that was actually paid by the class members, since the value received was at least \$2,600.<sup>2</sup> While NIBCA objected to the admission of the FCS study on the grounds of relevance, untimely disclosure and legal conclusions, the validity of this new evidence was uncontested by NIBCA and it is the only evidence in the record on this issue. (R., pp. 450-451, ¶¶ 11-17; R., p. 829.)

In the district court following remand, the City attempted to show that the amount of the fees it imposed complied with the “Equity Buy-In” connection fee methodology that was

---

<sup>2</sup> On March 4, 2016, the City, using the 2015 FCS study, increased its Cap Fee to \$2,306.00. That fee has not been challenged. (R., p. 589.)

approved in *Loomis v. City of Hailey*, that such fees were reasonable, and that the fees were placed into a separate sewer capitalization fund to be used for improvement and expansion of sewer system components and no monies from this fund were transferred to the City's general fund or used for general fund purposes. The district court ruled that the FCS evidence was irrelevant and it was rejected. (R., pp. 288-309; R., pp. 819-839; R., p. 887.)

**B. The Law Governing the Ability to Charge the Fee is Clear.**

The issue in this case is one of calculation, not of authorization. In *Loomis v. City of Hailey*, the Idaho Supreme Court recited the governing law regarding the authority of municipalities to impose rates and charges for public works projects, stating “[t]he Idaho Constitution, art. 8, § 3 allows municipalities to impose rates and charges to provide revenue for public works projects, and pursuant to this section of the Constitution, the Idaho legislature enacted the Idaho Revenue Bond Act, codified at I.C. § 50-1027 through § 50-1042.” 119 Idaho 434, 437-438, 807 P.2d 1272, 1275-76 (1991). The Court went on to state:

The Idaho Revenue Bond Act grants municipalities the right to operate public works “for the use and benefit of those served by such works and for the promotion of the welfare and for the improvement of health, safety, comfort and convenience” of its residents. I.C. § 50-1028. In order to accomplish this task, cities in Idaho are given the authority by the legislature to issue “revenue bonds … to finance, in whole or in part, the cost of the acquisition, construction, reconstruction, improvement, betterment or extension of any works …” Idaho Code § 50-1030(e). In addition, municipalities may “prescribe and collect rates, fees, tolls, or charges, … for the services, facilities and commodities furnished by such works …” Idaho Code § 50-1030(f).

*Id.* at 438, 807 P.2d at 1276.

....

The Idaho Revenue Bond Act authorizes the collection of sewer connection fees, *Schmidt v. Village of Kimberly*, 74 Idaho 48, 256 P.2d 515 (1953), and it is clear that so long as the fee collected pursuant to the Idaho Revenue Bond Act are allocated and budgeted in conformity with that Act they will not be construed as taxes. However, if fees are collected under the guise of the Act and allocated and spent otherwise, then the fees are primarily revenue raising and will be

construed as taxes. *Brewster v. City of Pocatello*, 115 Idaho 502, 768 P.2d 765 (1989). Thus, to determine whether the sewer connection fees are in reality taxes in disguise, we must determine whether the monies collected from those funds are dispersed in accordance with that Act.

*Id.* at 119 Idaho at 439, 807 P.2d at 127. (emphasis added).

Idaho Code section 50-1028 provides:

Any city acquiring, constructing, reconstructing, improving bettering or extending any works pursuant to this act, shall manage such works in the most efficient manner consistent with sound economy and public advantage, to the end that the services of such works shall be furnished at the lowest possible cost. No city shall operate any works primarily as a source of revenue to the city, but shall operate all such works for the use and benefit of those served by such works and for the promotion of the welfare and for the improvement of the health, safety, comfort and convenience of the inhabitants of the city.

I.C. § 50-1028.

Idaho Code section §50-1030 provides, in relevant part, that “[i]n addition to the powers which it may now have, any city shall have power under and subject to the following provisions:

(a) To acquire by gift or purchase and to construct, reconstruct, improve, better or extend any works within or without the city, or partially within or partially without the city...

...

(f) To prescribe and collect rates, fees,, tolls or charges, including the levy or assessment of such rates, fees, tolls or charges against governmental units, departments or agencies, including the state of Idaho and its subdivisions, for the services, facilities and commodities furnished by such works ...

I.C. § 50-1030.

In *NIBCA I*, the Court stated that sewer connection fees can be used to extend the capacity of a sewer system:

When a new user pays a sewer connection fee to a city based upon the value of that portion of the sewer system's capacity that the new user will be utilizing at that point in time, the connection fee will probably allow the city to accumulate a fund to increase the capacity of its sewer system. That proportionate value of the system capacity used by the new user will undoubtedly be more than any increased operational costs of adding the new user to the current system. Assuming that the city is able to extend its sewer system by accumulating a fund

from charging new users a connection fee based upon the value of the system capacity that each of them will be using, the Idaho Revenue Bond Act would not prevent a city from using those funds to extend its system, as long as it did so consistent with Idaho Code section 50-1028.

*North Idaho Building Contractors Association v. City of Hayden*, 158 Idaho 79, 83-84, 233 P.3d 1086, 1090-91 (2015).

Further, nothing in *Loomis* suggests that it provides the exclusive methodology for calculating legal cap fees. *Loomis* suggests factors under which a court should assess the permissibility of the fee, including assessing the intent or purpose of the fee and also whether the fee is reasonably related to the actual costs of providing the service, stating:

It is not the province of this Court to determine how a municipality should allocate its fee and rate system. So long as the fees and rates charged conform to the statutory requirements and are reasonable, the fees, rates and charges will be upheld. The fees, rates and charges imposed by the municipality must be reasonable and produce sufficient revenue to support the system at the lowest possible cost as required by the Idaho Revenue Bond Act.

*Loomis*, 119 Idaho at 442, 807 P.2d at 1280. (emphasis added).

Nine years later the Court reiterated its limited role:

The Irrigation District had discretion to decide what methodology to use in order to determine that value. For example, it is entitled to use replacement cost rather than historical cost as the basis of its calculations. The court's limited role is simply to determine whether the methodology used to determine the value is reasonable and not arbitrary.

*Viking Const., Inc. v. Hayden Lake Irrigation Dist.*, 149 Idaho 187, 194, 233 P.3d 118, 125 (2010).

Additionally, public works projects under the Revenue Bond Act “shall be and always remain self-supporting.” I.C. § 50-1032. This Court has recently reaffirmed the following principle that:

The legislature has not imposed exacting rate requirements upon localities and the law requires only that the fee be reasonably related to the benefit conveyed. *Loomis*, 119 Idaho at 442, 807 P.2d at 1280. Creating a fee structure “whereby every member of the general public would be charged only for his exact

contribution of waste presumably could be established, but the system would be cumbersome and perhaps prohibitively expensive to maintain. The law only requires that the fee be reasonably related to the benefit conveyed.” *Kootenai Cnty. Prop. Ass'n v. Kootenai Cnty.*, 115 Idaho 676, 680, 769 P.2d 553, 557 (1989).

*Manwaring Investments, L.C. v. City of Blackfoot*, 162 Idaho 763, 767, 405 P.3d 22, 27 (2017). (emphasis added).

Although the method of calculating the fee is relevant, the focus must be on how the money is used to determine whether the use is lawful. The use must comply with the Idaho Constitution and the Idaho Revenue Bond Act. The Idaho Revenue Bond Act does not prevent a city from using the funds to extend its system, so long as it does so consistent with Idaho Code section 50-1028.

At all times, the money from the Cap Fee was placed into a special fund for the utilization by the City for sewer, interceptor, collection, and treatment system construction and obligations for the regional facility. (R., p. 572; Ordinance 422.) The money from the Cap Fee was never transferred to the City’s general fund or used for general fund purposes.

This is a unique case. Unlike *Idaho Building Contractors Assoc. v. Coeur d’Alene*, 126 Idaho 740, 890 P.2d 326 (1995) (“IBCA”) and *BHA Investments, Inc. v. City of Boise*, 141 Idaho 168, 108 P.3d 315 (2004) (“BHA II”), where the fees were illegal on their face because they were imposed without authority, the Cap Fee in this case was authorized by statute and relevant to the cost of providing and sustaining the sewer system. Further, unlike *Hill-Vu Mobile Home Park v. City of Pocatello*, 162 Idaho 588, 402 P.3d 1041 (2017), where the fee was to generate revenue and the profit was placed into the general fund, the City’s Cap Fee was not assessed and collected to raise revenue for the City’s general fund. Rather, the Cap Fee was, at all times, placed into a special fund for the utilization by the City for sewer, interceptor, collection, and treatment system construction and obligations for the regional facility. (R., p. 572; R., p. 576; Ordinance 422.) This is not a situation where the City acted outside its authority. It clearly has

authority to charge a reasonable Cap Fee. Nor is this a situation where the City used money collected for improper purposes. This Court has made clear that it is proper to use a cap fee for future expansion. The City had authority to charge a fee and use it for system expansion. The only question is whether the Cap Fee charged was reasonable.

## **II. RESTATEMENT OF ISSUES PRESENTED ON APPEAL**

1. Whether the district court committed error when it ignored the instructions of the Court on remand and arbitrarily refused to consider uncontroverted evidence of the reasonableness of the Cap Fee when it was properly calculated by the City under the methodology prescribed by *Loomis v. City of Hailey*, 119 Idaho 434, 807 P.2d 1272 (1991) and was actually less than the actual pro rata value of sewer service provided to a customer connecting to the City sewer system as authorized by Idaho Code Section 50-1030(f).

2. Whether the district court failed to recognize that even if the Cap Fee were not lawfully imposed, any damages are limited to the excess of the Cap Fee over the amount that could lawfully have been charged.

3. Whether the district court committed error when it ruled that the failure of NIBCA, Termac Construction, Inc., and the class members (hereinafter collectively “NIBCA”) to ripen their federal claims (their only surviving damage claims) by employing state law remedies in compliance with Idaho precedent as established in *Alpine Village Co. v. City of McCall*, 154 Idaho 930, 303 P.3d 617 (2013) and *Hehr v. City of McCall*, 155 Idaho 92, 305 P.3d 536 (2013) and the requirements prescribed by *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S. Ct. 3108 (1985), did not bar NIBCA’s federal takings claims.

4. Whether the district court committed error when it arbitrarily rejected the City’s equitable defenses and ordered that Cap Fees that had been paid to the City by developers and individuals in excess of the \$774 rate be refunded to Plaintiffs, which was a Cap Fee that is less

than the pro rata replacement value of the portion of the system to which they were allowed to connect and which results in a double recovery for the developer Plaintiffs who were paid Cap Fees by the purchasers of their development properties.

5. Whether the district court committed error when it found Plaintiffs to be the prevailing party and awarded costs in the amount of \$976.78 and attorney fees in the amount of \$219,707.77 to Plaintiffs.

6. Whether the City is entitled to an award of costs and attorney fees on appeal.

### **III. ARGUMENT**

**A. The District Court Committed Error When It Ruled That It Would Not Consider the Evidence of the Reasonableness of the Cap Fee Under the Methodology Prescribed by *Loomis v. City Of Hailey*, 119 Idaho 434, 807 P.2d 1272 (1991) Following Remand.**

The sole and uncontested evidence in the record establishes that the fee imposed by the City is for an amount lower than it could legally have charged as measured by the *Loomis* methodology, which has been approved by the Court. The district court refused to consider this evidence, holding that the Cap Fee as imposed is an impermissible tax and that the district court would not consider whether the “tax” is reasonable in amount. This ruling is reversible for several reasons.

**1. The district court failed to proceed in a manner consistent with the Court’s opinion in *NIBCA I* to hear and consider evidence of the reasonableness of the Cap Fee.**

This case was back in front of the district court on remand from the Supreme Court with instructions to proceed in a manner that is consistent with the Court’s opinion. *NIBCA I*, 158 Idaho at 86, 343 P.3d at 1093. On remand, the posture of the case before the district court was not as the district court characterized in its “*Decision Following Remand*” – a case where the parties were placed in the same position they had been in prior to the *Order Granting*

*Defendant's Motion for Summary Judgment.* (R., p. 114.) Rather, the district court and the parties were instructed to proceed with the case in a manner that is consistent with the Court's opinion. *Id.* at 84, 343 P.3d at 1091. The failure and refusal of the district court to comply with these instructions on remand is a reversible error.

*NIBCA I* is focused on the “absence of evidence” in the record. See, *NIBCA I*, 158 Idaho at 81, 343 P.3d at 1088 (“no evidence in the record that [the Cap Fee] related to the actual cost of the service being rendered as of June 7, 2007”); *Id.* at 84, 343 P.3d at 1091 (“no evidence in the record to support the contention [that] the cap fee is ‘equal to the value of the system capacity that would be utilized by the new user who connected to the system on or after June 7, 2007’”). The Court’s decision clearly infers that an evaluation of these factual issues on remand is required, and the concurring opinion explicitly says so. *NIBCA I*, 158 Idaho at 86-87, 343 P.3d at 1093-94.

Indeed, such a reading would also be consistent with the procedural posture of the case, as the Court was assessing whether the district court properly granted summary judgment in favor of the City, holding that the City was authorized to collect the Cap Fee pursuant to Hayden City Code § 8-1-3(B)(9) and Idaho Code sections §63-1311 and 50-1030. (R., Aug. pp. 577-581.) Hearing the case in that posture, the Court’s decision to vacate the summary judgment and remand the case back to the district court would be for the purpose of requiring further evidence. Therefore, the parties were placed in the position they would have been in if the district court had denied the City’s summary judgment and found a genuine issue of fact existed as to the reasonableness of the fee. In that scenario, the case would not be disposed of summarily; rather, the case would proceed and the City would have to provide additional evidence to overcome the existence of a genuine issue of fact.

Therefore, it is reasonable to conclude that the case was remanded so the district court could take evidence to determine whether the fee was reasonably related to the value received.

The district court abused its discretionary powers and committed reversible error when it refused to consider this evidence on remand.

**2. The district court failed to properly consider the relevance of the evidence and the reasonableness of the Cap Fee.**

The district court took issue with the timing of the City's FCS study – (which established that the Cap Fee calculated under *Loomis* was actually less expensive than the methodology of assessing pro rata future expansion costs) – and implied that the post-remand timing of the FCS Study somehow inherently and permanently taints the process. While the district court, as the fact finder, would have the discretionary power to weigh the evidence of the FCS study, the district court did not do that. Instead, the district court applied a contorted legal rationale to justify completely disregarding that evidence, holding that the Cap Fee must be assessed for reasonableness “at the time” it was originally issued. (R, pp. 292-293; R., pp. 305-306.)

Here, the amount of the Cap Fee was reasonable at the time it was adopted even though the method used to arrive at the amount of the fee was deemed to be flawed. An analysis of the facts from 2007 by FCS establishes the amount of the Cap Fee as reasonable and in conformance with the Revenue Bond Act. Further, the purpose and intent of the increased fee was not to generate revenue for the City. Unlike *Hill-Vu Mobile Home Park v. City of Pocatello*, 162 Idaho 588, 402 P.3d 1041 (2017) in which Pocatello tacked on a blatantly revenue-generating “payment in lieu of taxes” charge, Hayden’s Cap Fee was not revenue-generating. Rather, the money was collected and placed in a special fund and designated for sewer system obligations. (R., p. 572; Ordinance 422.) The intent was to offset the costs of the system, and to make the system as close to self-supporting as possible in accordance with the Revenue Bond Act.

In accordance with *Loomis* and this Court’s remand order, the City’s FCS calculation looked only to infrastructure that was physically in the ground at the time the Cap Fee was imposed. The FCS study, did not, as NIBCA suggests, concoct new facts to save the fee. *See,*

*Respondents/Cross-Appellants' Br.*, p. 4. Engineering studies, such as the FCS study, have the ability to know exactly what infrastructure was in the ground at the time the fee was put in place, and are able to calculate the costs of replacing the system based upon the cost it would have been in 2007. The FCS study revealed that the methodology allowed by *Loomis*, *Viking* and *NIBCA I* would be more expensive to the new users connecting to the system, and thus established in the district court record that the amount of the Cap Fee was legal, as it did not exceed the pro rata value of the existing system. (R., p. 124, ¶ 33; R., pp. 127-143; R., p. 450.) The district court expressly stated that it would disregard that evidence. If that is allowed to stand, the district court's decision would lead to absurd results, and would create a windfall for class members at the expense of the taxpayers who would have to pay the judgment if affirmed. Further, the implications of this decision by the district court would violate the principles and plain language of the Revenue Bond Act, which requires that the system "shall be and always remain self-supporting." I.C. § 50-1032.

Previously, this Court has held "[w]hen this Court remands a case back to the district court 'it is within the discretion of the trial court to determine whether the existing record is sufficient, or should be supplemented, in order to make the required findings of fact and conclusions of law.'" *Morgan v. New Sweden Irr. Dist.*, 160 Idaho 47, 52, 368 P.3d 990, 995 (2016) (quoting *Akers v. D.L. White Const., Inc.*, 156 Idaho 37, 44, 320 P.3d 428, 435 (2014)). However, unlike *Morgan* and *Akers*, this case was not appealed from a judgment as a result of trial; rather, in *NIBCA I*, this case was before the Court on an appeal from summary judgment. Therefore, this case was not in the procedural posture as one in which the parties had completed a trial and the record had been closed, as the window to complete discovery is still open during the time motions can be heard. In this case the record was not closed. The City submits that the FCS study was admitted and properly before the district court. The district court, however, failed

to consider and weigh the evidence before it. This failure to consider pivotal evidence in the record violated a substantial right of the City.

Relevance of evidence is not a matter of discretion with the court. The determination of relevance is a legal question, not a matter of discretion. *State v. Raudebaugh*, 124 Idaho 758, 864 P.2d 569 (1993). Whether evidence is relevant under Rule 401 is an issue of law which an appellate court will review de novo. *State v. Sanchez*, 147 Idaho 521, 211 P.3d 130 (2009). If relevant, evidence is admissible unless there are other valid grounds to exclude the evidence notwithstanding the fact it is relevant. I.R.E. 401 and 402. Rule 401 defines "relevant evidence" to mean "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." I.R.E. 401. Rule 401 requires only that the proffered evidence have "any tendency" to make the existence of the fact more or less probable. Each item of evidence need not alone have probative value if the cumulative effect is probative. With respect to presumptive admissibility, the Idaho Trial Handbook provides the following:

The evidence rules give presumptive admissibility to relevant evidence. IRE 402 provides that 'all relevant evidence is admissible except as otherwise provided by these rules or by other rules applicable in the courts of this state.' The effect of this approach is to place on the party opposing the admission of relevant evidence the burden of justifying its exclusion, rather than requiring the proponent to justify admission.

Lewis, IDAHO TRIAL HANDBOOK, 219 (2d ed. 2005).

In *NIBCA I*, the inference is clear that the Court remanded the case to hear evidence of whether the Cap Fee of \$2,280 could be supported under a calculation that complies with the *Loomis* methodology. Contrary to this remand, the district court determined that the fee was an impermissible tax and arbitrarily refused to consider any evidence that was offered by the City to establish that the amount collected was less than the amount that could have been collected if the *Loomis* methodology had been followed. (R., pp. 308-309, 803.)

It would be one thing if the district court had considered the FCS Study and found it unpersuasive. It is a far different thing to arbitrarily decline to consider the report at all. For example, this Court has stated: “The opinion of an expert is not binding on the trial court [] as long as it does not act arbitrarily. ... Bate’s testimony was not arbitrarily rejected. Rather his testimony was addressed below and found unpersuasive.” *Manwaring Investments*, 162 Idaho 763, 405 P.3d at 30 (quoting *Pinnacle Eng’rs, Inc. v. Heron Brook, LLC*, 139 Idaho 756, 758, 86 P.3d 470, 472 (2004) (emphasis added). Additionally, while NIBCA argues that the FCS study was not subject to peer review and was “full or inaccuracies and unfounded assumptions,” NIBCA offered no evidence of “inaccuracies and unfounded assumptions.” It had the opportunity to submit its own study into evidence and chose not to do so. See, *Respondents/Cross-Appellants’ Br.*, p. 5.

**B. The District Court Abused its Discretionary Powers and Imposed its Own Sense of Justice When it Refused to Consider the City’s Evidence Following Remand that the \$2,280 Fee per ER is Less Than the Value of the System Capacity that Would Be Utilized By the New User Who Connected to the System On or After June 7, 2007. This Holding by the District Court was Arbitrary and Constitutes Reversible Error. The Remedy for an Unlawful Tax or Fee is Limited to a Refund of the Overcharge.**

Even if the Cap Fee is deemed an illegal tax (and the FCS analysis is an impermissible do-over), a full refund would amount to a windfall at the expense of the taxpayers who would have to pay the judgment. Such a windfall would violate U.S. Supreme Court precedent that has been followed without deviation in every state in which the issue has arisen. See, *McKesson Corp. v. Div. of Alcoholic Beverages and Tobacco, Dept. of Business Regulation of Florida*, 496 U.S. 18, 40, 110 S. Ct. 2238, 2252-53 (1990). This authority establishes that the remedy for an unlawful tax or fee is to refund the amount of the tax or fee that was in excess of that amount that NIBCA lawfully could have been charged.

Contrary to NIBCA's arguments, the City did not impose the fee without authority, amounting to an unconstitutional tax. *See, Respondents/Cross-Appellants' Br.*, pp. 14-15. In this case, the City is empowered by statutory authority under Idaho Code Section 50-1030(f) to collect a sewer connection fee, if the fee is reasonably related to the cost of the service provided as authorized under Section 50-1030(f). Therefore, since the City does have statutory authority to charge the fee, the amount of the refund is limited to the amount that was in excess of the amount that NIBCA could have been lawfully charged when calculated in compliance with the *Loomis* methodology. It is not, as NIBCA argues, that because the City used the wrong formula when it adopted the fee, even though at all times it had statutory authority to impose the fee, that NIBCA is entitled to pay no fee at all.

If a full refund is allowed, as NIBCA argues, it would amount to a windfall at the expense of the taxpayers. *See, Respondents/Cross-Appellants' Br.*, p. 15. It cannot be overlooked that NIBCA received a significant benefit from being able to hook into the sewer system. Further, a sewer connection is a requirement to build a habitable structure under Idaho Code Section 50-1326. Without the Cap Fee and associated sewer connectivity, the properties could not have been built. NIBCA is not seeking compensation, it is seeking a windfall. If a full refund is granted, NIBCA would have been allowed to connect to the sewer system for free, build and sell homes, and make a profit—all at the expense of tax payers who would have to pay the judgment if affirmed.

**C. The District Court Committed Error When it Ruled that the Failure of NIBCA To Comply with the Requirements Prescribed by *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S.Ct. 3108 (1985) Did Not Bar NIBCA's Federal Takings Claims.**

The City sought dismissal of NIBCA's federal law damage claims as unripe under *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S. Ct. 3108 (1985) ("Williamson County") and its progeny, including *Alpine Village Co. v. City*

*of McCall*, 154 Idaho 930, 303 P.3d 617 (2013) (“*Alpine Village*”) and *Hehr v. City of McCall*, 155 Idaho 92, 305 P.3d 536 (2013) (“*Hehr*”). In *Williamson Cnty.*, the United States Supreme Court announced a two-prong test to determine whether a federal takings claim against a state was ripe. *Williamson Cnty.*, 473 U.S. at 186, 105 S. Ct. at 3116. Prong one requires that “the government entity charged with implementing the regulations has reached a final decision” *Id.* Prong two requires the party alleging the taking to pursue any available state remedy and be denied relief by the state. *Id.* at 194-95, 105 S. Ct. at 3120-21. Plaintiffs fail prong two.

**1. NIBCA may be exempt from prong one because they assert a facial challenge.**

NIBCA argues that it is exempt from satisfying prong one because it asserts a facial challenge to the legality of the ordinance instituting the 2007 Cap Fee. *See, Respondents/Cross-Appellants’ Br.*, pp. 15-26. It is correct with respect to its request for declaratory relief, which is a facial challenge. However, NIBCA’s damage claims may not be exempt from prong one because each claim is based on the circumstances of each particular property. In any event, the facial challenge exception only applies to prong one, requiring NIBCA to satisfy prong two. *See, Yee v. City of Escondido*, 503 U.S. 519, 534 (1992).

**2. NIBCA cannot satisfy prong two because it failed to timely pursue its state inverse condemnation claims by filing a timely notice of claim under the Idaho Tort Claims Act, and seeking review under the Regulatory Takings Act.**

Prong two of *Williamson Cnty.* mandates that NIBCA cannot pursue a federal taking claim for compensatory damages unless it has timely pursued available state remedies and has been denied relief by the state. *Williamson Cnty.*, 473 U.S. at 194-95, 105 S.Ct. at 3120-21. The City argued that NIBCA had two available remedies under Idaho law. Having failed to use either, it has forfeited its federal damage claims. First, it failed to timely pursue its state law taking claims by failing to file a timely notice of claim under the Idaho Tort Claims Act (“ITCA”), Idaho Code Section 6-901, *et seq.*, applicable through Idaho Code Section 50-219.

(R., p. 342; R., pp. 768-769.) Second, it failed to timely seek review under the Regulatory Takings Act, Idaho Code Section 67-8001 *et seq.* (R., pp. 342-343; R., pp. 769-771.) Either failure violates prong two because these are available remedies that might have resulted in relief for the alleged harm. The district court ignored clear precedent to this effect, which is a reversible error.

Simply put, “a property owner has not suffered a violation of the Just Compensation Clause until the owner has unsuccessfully attempted to obtain just compensation through the procedures provided by the State.” *Williamson Cnty.* at 195. *Alpine Village Co. v. City of McCall*, 154 Idaho 930, 303 P.3d 617 (2013); *Hehr v. City of McCall*, 155 Idaho 92, 305 P.3d 536 (2013).

These cases establish definitively that by failing to avail themselves of potential state remedies, NIBCA forfeits its federal damage claims under the Takings Clause. *Hehr*, 155 Idaho at 98, 305 P.3d at 542. There is no precedent in Idaho or elsewhere that contradicts this conclusion. In its “*Memorandum Decision and Order on Defendant’s Third Motion for Summary Judgment*” and its “*Memorandum Decision and Order on Motion to Reconsider*,” the district court stated that the “notice-of-claim requirements imposed by state law do not apply to federal claims.” (R., p. 438; R., p. 814.) While that is true, it is irrelevant in the context of *Williamson Cnty.* All it means is that NIBCA was not required to provide notice of its federal claims. The fact that the state of Idaho notice-of-claim requirements do not apply to federal claims does not eliminate the requirement under *Williamson Cnty.* that NIBCA must pursue available state claims in accordance with state procedures in order to ripen the federal takings claims.

NIBCA argues that the Regulatory Takings Act is not mandatory, thus excusing its failure to employ that remedy. See, *Respondents/Cross-Appellants’ Br.*, pp. 20-22. This argument ignores that prong two is not limited to the failure to employ mandatory state remedies; rather, prong two is about the failure to employ any available state remedies.

In *Alpine Village* and *Hehr*, the Court ruled that plaintiffs' failure to seek relief under the Regulatory Takings Act, Idaho Code Section 67-8001 *et seq.*, barred their federal claims under prong two of the *Williamson Cnty.* two-prong test. *Alpine Village*, 154 Idaho at 939, 303 P.3d at 626; *Hehr*, 155 Idaho at 98, 305 P.3d at 542.

The district court held that *Alpine Village* and *Hehr* are distinguishable because they involved a taking of real property and the Local Land Use Planning Act (LLUPA), Idaho Code § 67-6501 *et seq.* (R., p. 439.) The district court noted that the LLUPA provides a party subject to a regulatory taking with an opportunity to challenge the proposed taking through judicial review. (R., p. 439.) And, because those decisions were framed under LLUPA rather than as inverse condemnation cases, the district court held this Court's precedents were unpersuasive and distinguishable. (R., p. 440.) The district court went even further in its “*Memorandum Decision and Order on Motion to Reconsider*,” holding “this Court determines that Plaintiff is not required to exhaust all state review procedures as a predicate to satisfying prong two of the ripeness analysis of *Williamson Cnty.*” (R., p. 811) (emphasis added).

The fact that *Alpine Village* and *Hehr* involved municipal actions that could have been challenged under LLUPA, while the action here is not reviewable under LLUPA is inconsequential. The Regulatory Takings Act is not part of LLUPA nor is it limited to LLUPA. The Regulatory Takings Act is an independent statute that applies to and provides a remedy for all types of local government actions. The only connection to LLUPA is that LLUPA happens to contain a cross-reference to the Regulatory Takings Act. NIBCA argues “[a]bsent an applicable statute that specifically calls out Idaho Code § 67-8001 [Regulatory Takings Act], as is done in the LLUPA, the regulatory takings analysis under § 67-8001 is not a mandatory requirement.” *Respondents/Cross-Appellants’ Br.*, p. 17. This makes no sense. The regulatory takings analysis is not mandatory under LLUPA and it is not mandatory outside of LLUPA; rather, the Regulatory Takings Act is an option available to anyone who believes they have suffered a

regulatory taking. NIBCA’s failure to timely pursue its available state inverse condemnation claims through a timely notice of claim under the ITCA, and to seek relief under the Regulatory Takings Act, resulted in forfeiture of its federal takings claims. *Alpine Village* and *Hehr* are on point, and it was error for the district court to ignore them.

The principle that failure to effectively employ an available (even if optional) state remedy results in forfeiture of the federal claim is widely recognized.<sup>3</sup> In *Alpine Village*, the Court applied the forfeiture principles of *Pascoag* even though it did not cite those cases. In *Hehr*, the Court cited both *Pascoag* and *Harbours Point*. The district court’s sidestepping of this clear precedent is reversible error.

### **3. Any “prudential” exception to *Williamson Cnty.* does not apply here.**

NIBCA presses on appeal an argument, rejected by the district court, that *Williamson Cnty.* is merely a prudential requirement and may be ignored by the Court if it wishes. *Respondents/Cross-Appellants’ Br.*, p. 21. There is no Idaho authority to that effect. The few federal cases that have noted the prudential nature of the requirement have done so to enable the court to “assume” ripeness and thereby reach the merits in order to deny the plaintiff’s claim rather than dismiss it on technical ripeness grounds. There is no authority in which a court has by-passed the *Williamson Cnty.* ripeness requirement in order to allow a federal taking claim to succeed.

---

<sup>3</sup> *Pascoag Reservoir & Dam, LLC v. Rhode Island*, 337 F.3d 87, 93-95 (1<sup>st</sup> Cir. 2003), cert. denied, 540 U.S. 1090 (2003); *Downing/Salt Pond Partners, L.P. v. Rhode Island and Providence Plantations*, 643 F.3d 16 (1<sup>st</sup> Cir. 2011); *Harbours Pointe of Nashotah, LLC v. Village of Nashotah*, 278 F.3d 701 (7<sup>th</sup> Cir. 2002); *Gamble v. Eau Claire County*, 5 F.3d 285 (7<sup>th</sup> Cir. 1993); *Daniel v. County of Santa Barbara*, 288 F.3d 375, 381 &382 (9<sup>th</sup> Cir. 2002), cert. denied, 537 U.S. 973.

**D. The District Court Committed Error when it Arbitrarily Rejected the City's Equitable Defenses and Ordered that Cap Fees that Had Been Paid to the City by Developers and Individuals in Excess of the \$774 Rate be Refunded to the Class Members, which was a Cap Fee that is Less than the Pro Rata Replacement Value of the Portion of the System to which They were Allowed to Connect.**

The district court rejected the City's equitable defense argument and held class members are entitled to a refund of the amount of the Cap Fees in excess of \$774 – the amount of the fee prior to the 2007 increase – and pre-judgment interest at a rate of 6.5%. (R., p. 838.) In so ruling, the district committed a reversible error.

**1. The district court committed error when it ruled that it would not consider equitable defenses following remand.**

At summary judgment and on the *Motion to Reconsider*, the City raised equitable defenses of unjust enrichment and quantum meruit to NIBCA's claims. (R., pp. 343-348; R., pp. 772-774.) The district court rejected these defenses, however, stating there was little to demonstrate what benefit was provided and what the value was. (R., 411; R., pp. 803-804.) Further, the district court held that there was nothing to show that NIBCA appreciated the benefit. (R., p. 442.) Although the district court later held in its "*Memorandum Decision and Order on the Issue of Just Compensation*" that NIBCA "received some value in the form of connection to the City's sewer service," though it never changed its reasoning on the City's claim for unjust enrichment. (R., p. 838.) The district court erred in rejecting the City's equitable defense of unjust enrichment because NIBCA did receive a benefit from the expenditure of Cap Fees on sewer infrastructure – each property was hooked up to the City's sewer system, and, without that hookup, the property could not have been further developed. Even if the Cap Fee is impermissible, it cannot be overlooked that NIBCA received a significant benefit from being able to hook into the sewer system. Further, a sewer connection is a requirement to build a habitable structure under Idaho Code Section 50-1326. While NIBCA argue that they did not receive any benefit, such argument is wholly unfounded. *See,*

*Respondents/Cross-Appellants' Br.*, p. 23. Without the Cap Fee and associated sewer connectivity, the properties could not have been built and sold.

*Williams v. City of Emmett*, 51 Idaho 500, 6 P.2d 475, 478 (1931), is directly on point to this case. There, the Court held that where an illegal and unconstitutional contract has been executed, and the parties have benefited from its execution, the parties may not recover the money they have paid even when the contract is held to be constitutionally void. *Id.* at 478. In *Williams*, the issue before the Supreme Court was whether a city could enter into a two and a half year agreement for the lease of a street sprinkler, without voter approval. *Id.* at 476. The Court looked to Article VIII, Section 3 of the Idaho Constitution which prohibits a city from incurring “any indebtedness, or liability in any manner, or for that purpose, exceeding in that year, the income and revenue provided for it for such year, without assent of two-thirds of the qualified electors thereof...” Idaho Const., Art. VIII, § 3. The Court stated that due to the long-term nature of the lease, it violated the Idaho Constitution and was therefore void. *Williams*, 51 Idaho 500, 6 P.2d at 478.

Although the lease was void, the Court found that the parties had been carrying out the agreement in good faith. *Id.* at 478. The record before the Court reflected that the lease was based on reasonable value, the city had benefited under the agreement by use of the sprinkler, and the agreement was not shown to have been entered into by fraud. *Id.* The Court stated that the agreement simply represented a contract that was void and unenforceable; however, since the city received a benefit from use of the sprinkler, it would not be allowed to recover back the money it had paid under the agreement. *Id.*

Contrary to the arguments of NIBCA, *Williams* is applicable and should be applied to this case. See, *Respondents/Cross-Appellants' Br.*, p. 23. *Williams* stands for the proposition that in the event the Court deems the Cap Fee to be inappropriate, the benefit NIBCA received in exchange for the Cap Fee must be realized. Although NIBCA continues to argue, fictitiously,

that it never received a benefit, quite the opposite is true – each home for which the Cap Fee was paid was hooked up to sewer, and the property was able to be developed and sold. *See, Respondents/Cross-Appellants' Br.*, p. 23. Therefore, in the event the fees are held to be impermissible, it is inappropriate for NIBCA to recover back the money it spent in light of the benefits received. If NIBCA were able to recover the money, after receiving the benefit of having each home built hooked up to sewer and sold, it would be unjustly enriched. The district court committed a reversible error when it refused to consider the City's defense of unjust enrichment.

**2. The district court erroneously rejected the City's defense of unjust enrichment based on the doctrine of unclean hands.**

NIBCA asserts that the City has not demonstrated that it has any equitable defenses to NIBCA's claims, particularly where it allegedly does not come to court with clean hands. *See, Respondents/Cross-Appellants' Br.*, p. 24. For its assertion, NIBCA apparently relies upon statements of the district court in its *Memorandum Decision and Order on Motion to Reconsider*, wherein the district court rejected the City's equitable defenses of unjust enrichment and quantum meruit, stating: "It is a maxim of equity that equity will not permit a party to profit by his own wrong. (citation omitted) The doctrine of unclean hands permits a trial court to deny equitable relief to a party 'on the ground that his conduct has been inequitable, unfair and dishonest, or fraudulent and deceitful as to the controversy at issue. (citation omitted) ...'"

It is true that the City acknowledged that the Cap Fee that was adopted by the City in 2007 was not based on the *Loomis* methodology, but rather on an analysis of future system expansion costs necessary to replace capacity consumed by new users. (*Second Affidavit of Angie Sanchez Virnoche*, ¶ 7, R., p. 475; *Second Affidavit of Donna L. Phillips*, ¶ 6, R., pp. 588-89.) The "capacity replacement" study was undertaken by Welch Comer & Associates in 2006 and computed a fee of \$2,280. *Id.* But, such conduct does not rise to the level of "inequitable, unfair

and dishonest, or fraudulent and deceitful,” conduct which is necessary for the application of the doctrine of unclean hands. *Countrywide Home Loans, Inc. v. Sheets*, 160 Idaho 268, 271, 371 P.3d 322, 325 (2016).

As previously stated, nothing in *Loomis* mandates that the only methodology a city may follow to calculate a legal cap fee is that which was used by the City of Hailey or that the failure to follow the *Loomis* methodology would constitute conduct that is “inequitable, unfair and dishonest, or fraudulent and deceitful” sufficient to satisfy the doctrine of “unclean hands.” On the contrary, this Court explicitly states in *Loomis*: “... when the rates, fees and charges conform to the statutory scheme set forth in the Idaho Revenue Bond Act or are imposed pursuant to a valid police power, the charges are not construed as taxes” and “[t]he Idaho Revenue Bond Act authorizes the collection of sewer connection fees, (citation omitted).” 119 Idaho at 438, 807 P.2d at 1276. The *Loomis* Court further stated:

[I]t is clear that so long as the fees collected pursuant to the Idaho Revenue Bond Act are allocated and budgeted in conformity with that Act they will not be construed as taxes. However, if fees are collected under the guise of the Act and allocated and spent otherwise, then the fees are primarily revenue raising and will be construed as taxes. (citation omitted) Thus, to determine whether the sewer connection fees are in reality taxes in disguise we must determine whether the monies collected from those funds are dispersed in accordance with that Act.

*Id.*

In *Loomis*, the Court explicitly noted that it was undisputed that the City of Hailey placed the connection fees into a separate fund to be used for replacement of sewer and water system components and that no monies from the fund were transferred to the city’s general fund or used to retire the bond indebtedness. Such is the case with the City of Hayden; all connection fees were placed in a separate fund to be used for improvement of sewer system components and extension of the sewer collection system. There is no evidence that any of the funds were transferred to the general fund or used for general fund purposes. (R., p. 572, R., p. 576

Ordinance 422; *Stipulation of Undisputed Facts*, R., pp. 448-454; *Second Affidavit of Donna L. Phillips, Ex. E.*, R., pp. 89-90.) The *Loomis* Court stated:

It is not the province of this Court to determine how a municipality should allocate its fee and rate system. So long as the fees and rates charged conform to the statutory requirements and are reasonable, the fees, rates and charges will be upheld. The fees, rates and charges imposed by the municipality must be reasonable and produce sufficient revenue to support the system at the lowest possible cost as required by the Idaho Revenue Bond Act. I.C. § 50-1028.

119 Idaho at 442; 807 P.2d 1280. Moreover, the *Loomis* Court stated that “merely because the charge represents something more than the actual cost of the actual physical hookup does not make the connection fee illegal. … Although fairness and equity must be considered, Idaho statutes require only that the fees be reasonable and not be imposed arbitrarily.” *Id.* The *Loomis* Court reiterated that “in Idaho the statutory scheme in place requires only that the rates and charges be reasonable and sufficient to support the public works project, including the retirement of bond indebtedness and operating costs.” 119 Idaho at 442-43; 807 P.2d at 1280-81. In its analysis, the *Loomis* Court further stated:

Idaho’s statutory scheme does not require a new user to “buy in” to the system, nor does it prohibit such a program. In this case the City of Hailey, after receiving an engineering report, selected a system in which the new user buys into a portion of the current value of the system capacity. The methodology used to determine the value of the system is not unreasonable, nor is it unreasonable to charge a new user the value of that portion of the system capacity that the new user will utilize at that point in time. The fact that the connection fee may be higher in Hailey than in other municipalities will not invalidate the fee as long as it is reasonable and is not primarily a source of revenue. The Ordinance specifically states that its intent is to ‘recover the costs of operating, maintaining, replacing, and depreciating the existing water and sewer system and any extensions thereof.’ Ordinance 495, Recitals. There is nothing in the ordinance that is not authorized by the Idaho Revenue Bond Act and we find no evidence in the record that the fees charged by the City of Hailey are arbitrary or unreasonable.

119 Idaho at 443-44; 807 P.2d at 1281-82. (emphasis added).

Is it any wonder that the City thought, with the advice of its counsel, that it could legally charge a cap fee that would be reasonable and would provide funds to recover the costs of

improving the existing sewer connection system and any extensions thereof that would be required to continue to provide services to the residents of the City of Hayden. Based on the statements and guidance of this Court in *Loomis*, such conduct certainly does not rise to the level of “inequitable, unfair and dishonest, or fraudulent and deceitful” conduct as to the Cap Fee that was collected from NIBCA.

One must remember that the City Council that adopted the 2007 Cap Fee was, like most city councils, made up of lay persons who were not benefiting from the decision to adopt the Cap Fee, and were just trying to do the best they could to adopt a reasonable fee that would provide for sewer service in the present and future as the need would arise. The Council held public hearings and relied on consultants and legal counsel. *See, Second Affidavit of Donna L. Phillips*, R., pp. 587-595. Without question, the City’s consultants and legal counsel were not reading the *Loomis* decision in the same manner as did the district court, i.e., that failure to follow the *Loomis* methodology when determining the 2007 Cap Fee constitutes “inequitable, unfair and dishonest, or fraudulent and deceitful” conduct, and for good reason; the *Loomis* Court never said that the *Loomis* methodology was the exclusive methodology for determining a reasonable cap fee that can be charged under the governing statute. The *Loomis* Court said the issues are whether the cap fee is reasonable under the Idaho Revenue Bond Act and whether the funds are used to recover the costs of operating, maintaining, replacing and depreciating the existing sewer connection system and any extensions thereof. Those are the issues that are the subject of this case and should have been the issues before the district court on remand.

The district court clearly committed reversible error when it arbitrarily decided that the conduct of the City, in adopting the 2007 Cap Fee, constituted conduct that was “inequitable, unfair and dishonest, or fraudulent and deceitful,” which is necessary for application of the doctrine of unclean hands. *Countrywide Home Loans, Inc. v. Sheets*, 160 Idaho 268, 271, 371 P.3d 322, 325 (2016).

**3. The district court committed error when it failed to recognize that damages, if any, are limited to the excess charged by the City over the lawful amount.**

Throughout this action, the City consistently maintained that because the FCS study established that the City could have charged \$2,600 for the Cap Fees, which was more than what the City actually charged, and NIBCA paid \$2,280 from 2007-2012, NIBCA suffered no damages. (R., pp. 450-451; R., p. 760.) In fact, NIBCA benefited under the previous Cap Fee analysis. The district court, however, failed to consider this evidence, and that failure is a reversible error.

The general rule on damages is that they “are not recoverable unless . . . clearly ascertainable both in their nature and origin, and unless it is also so established that they are the natural and proximate consequence of the breach and are not contingent or speculative.” *Wing v. Hulet*, 106 Idaho 912, 918, 684 P.2d 314, 320 (Ct. App. 1984). Moreover, the measure of damage – as well as the fact of damage – must be proven beyond speculation. *Id.* A party asserting a claim of damages has the burden of proving not only a right to damages, but also the amount of damages. *Bratton v. Scott*, 150 Idaho 530, 537, 248 P.3d 1265, 1272 (2011). The amount of damages must be proved with reasonable certainty so that the existence of damages is “taken out of the realm of speculation.” *Dunn v. Ward*, 105 Idaho 354, 356-57, 670 P.2d 59, 61-62 (Ct. App. 1983).

The uncontested evidence in the record – the FCS study – affirmatively establishes that the per user depreciated replacement value of the City’s sewer system, as it existed in 2007, was between \$2,600 and \$4,808 per ER, depending on whether surface replacement costs are included in the calculation. (R., p. 450, ¶ 11.) NIBCA paid \$2,280 per ER. (R., p. 449, ¶ 2.) Thus, the evidence developed by FCS established that the Cap Fee, if calculated under the methodology approved by the Court in *Loomis*, would have been more than the Cap Fee that was actually paid by NIBCA. (R., p. 124, ¶ 33; R., pp. 127-143; R., p. 450.) The district court, however, failed to consider the FCS study, stating:

Rather, the FCS study was completed with the intent of demonstrating that what Defendant did nine years prior was reasonable, focusing solely on the amount charged. However, it is inescapable that both the 2007 and 2012 fee were impermissible taxes imposed without authority. The measure of just compensation must be the value of what is taken and not the value of what is received. *Boston Chamber of Commerce v. Boston*, 217 U.S. 189 (1910).

....

Further, just compensation cannot be Defendant's retention of the entirety of the impermissible tax simply because, hypothetically, if Defendant had calculated the fee using the proper methodology it could have charged a fee that is close to that suggested by the low end range of the FCS study. Just compensation requires that Defendant provide in services the value, calculated in a lawful manner to those paying the fee.

(R., p. 832.)

Because NIBCA failed to contest the FCS study, or provide any other evidence of damages, it has not met its burden to prove the amount of damages it would be entitled to, if any. *Bratton*, 150 Idaho at 537, 248 P.3d at 1272. It is undisputed that the amount of the Cap Fee did not exceed the pro rata replacement value of the system in place in 2007. Ironically, class members would have paid more under the FCS study and the *Loomis* methodology than they paid in 2007-2012 (emphasis added). The reasonableness of the Cap Fee, as evidenced by the FCS study, further suggests that NIBCA's federal takings claims are without merit, as a "user fee" is only "a taking if it is not a reasonable fee imposed for the reimbursement of the costs of government services." *Hill-Vu Mobile Home Park*, 162 Idaho 588, 402 P.3d at 1050. Therefore, class members are not entitled to an award of damages. Even if the Court were to view the FCS study as coming too late to render the Cap Fee lawful, the study is relevant to establish that damages are zero. The City should not be required to repay millions of dollars when there was no overcharge at all. The district court's arbitrary refusal to consider this relevant evidence is a reversible error.

Even if the Cap Fee is deemed an impermissible tax, the award of damages is not a full refund; rather, it is limited to the excess charged by the City over the lawful amount. *See*,

*McKesson Corp. v. Div. of Alcoholic Beverages and Tobacco, Dept. of Business Regulation of Florida*, 496 U.S. 18, 40, 110 S.Ct. 2238, 2252-53 (1990). Only in circumstances where the tax is invalid because it is imposed without authority will a full refund be mandated. *Ventas Finance I, LLC v. California Franchise Tax Bd.*, 81 Cal Rptr. 3d 823, 843, n. 19 (Cal. Ct. App. 2008), *cert denied*, 556 U.S. 1176 (2009).

In this case, the City has statutory authority to impose the Cap Fees. *See*, I.C. § 50-1030(f). Therefore, any relief in the form of a refund should be limited to that portion of the Cap Fee that exceeds the properly calculated pro rata replacement value of the system. The uncontested evidence in the record establishes that the per user pro rata replacement value of the system in 2007 was between \$2,600 and \$4,808, depending upon whether surface restoration costs and/or unfunded (versus straight line) depreciation are taken into account. (R., p. 450, ¶ 11.) Therefore, any damages class members would be entitled to would be limited to any amount they paid over \$2,600. Because class members did not pay a Cap Fee that exceeded the pro rata measure established by the FCS study – class members paid \$2,280 for one ER, not the true \$2,600 minimum value – they are not entitled to any damages. (R., p. 449, ¶ 2.) If the City has authority to charge a fee and use the funds for proper purposes, but makes an honest mistake in calculating that fee, it should only be required to pay the overcharge. However, it should not be required to repay millions of dollars when, as here, there was no overcharge at all.

The district court, as a result of failing to consider the FCS study, refused to acknowledge class members did not pay a Cap Fee that exceeded the pro rata replacement value. Instead, the district court determined that the proper course was to “consider the ordinances that imposed the 2007 and 2012 fees invalidated and effectively to reinstate the pre-2007 fee as a legitimate cap fee.” (R., p. 836.) The district court, imposing its own sense of justice, determined that just compensation required the City to refund class members the difference between the “impermissible tax paid by Plaintiffs and the last lawful fee imposed, \$774.” (R., p. 836.) The

district court's decision to award class members a refund of the fees, when class members did not pay an amount that exceeded the pro rata replacement value of the system in 2007, is a reversible error.

**E. The District Court Committed Error when it Entered Judgment in Favor of NIBCA and Awarded Costs and Attorney Fees to NIBCA.**

The district court erred when entered a money judgment in favor of NIBCA and against the City for an amount totaling \$729,403.58, plus post judgment interest. (R., p. 888; R., pp. 1151-1153.) Additionally, the district court erred when it determined that NIBCA was the prevailing party and awarded NIBCA costs in the amount of \$976.78 and attorney fees in the amount of \$219,707.77. (R., Aug. p. 619.) However, the judgment and award of costs and attorney fees was entered as a result of the district court's refusal to consider evidence in the record which established that the sum of \$2,280 was less than the actual cost of providing sewer service to a customer connecting to the City sewer system, as authorized by Idaho Code section 50-1030(f) and hold that the Cap Fee, following remand, was properly calculated by the City under the methodology prescribed by *Loomis*; the district court's error in ruling that NIBCA's failure to exhaust state law remedies does not bar the federal takings claim under *Williamson Cnty.*; and the district court's refusal to consider the City's equitable remedies. Accordingly, the district court committed a reversible error when it entered a judgment in favor of NIBCA and against the City.

**F. The City is Entitled to an Award of Costs and Attorney Fees on Appeal Pursuant to I.C. 12-120(3).**

In accordance with I.A.R. 40, the City requests an award of its costs on appeal. In accordance with I.A.R. 41, the City requests an award of attorney fees on appeal, pursuant to Idaho Code Section 12-120(3). Section 12-120(3) provides in relevant part that: “[i]n any civil action ... in any commercial transaction unless otherwise provided by law, the prevailing party shall be allowed a reasonable attorney's fee to be set by the court, to be taxed and collected as

costs.” *Id.* Under that statute, a “commercial transaction” is any transaction [ ] except transactions for personal or household purposes.” *Id.* Further, the suit seeking relief in the form of a declaratory judgment that the amount of the cost of the permit is illegal and seeking recovery of the fees comes within scope of Idaho Code Section 12-120(3). *See, Idaho Transportation Department v. Ascorp, Inc.,* 2015 Opinion No. 94 (Sept. 25, 2015); *Syringa Networks, LLC v. Idaho Dept.of Admin., et al.,* 2013 Op. No. 35 (March 29, 2013).

The purchase of building permits to connect to the City’s sewer system is for the purpose of developing real estate involved commercial transactions. The payment of the Cap Fees were a requirement to obtaining building permits to connect to the City sewer system for the purpose of developing real estate, and further required by Idaho Code Section 50-1326. As such, class members did not pay the Cap Fees or acquire building permits for a “personal or household purpose.” *See, Swafford v. Huntsman Springs, Inc.,* 2017 WL 6347031, at \*5 (Idaho Dec. 13, 2017) (The subject of this lawsuit is the contract for the sale of the property, which is a commercial lot. Indeed, the Swaffords refer to the Property as a commercial lot in their complaint. Moreover, no facts indicate that the Property is for the Swaffords’ personal or household purposes. Therefore, because the subject of the lawsuit is a commercial transaction).

This purchase of a permit to develop and sell real estate involves a commercial transaction, and the gravamen of this lawsuit involved the amount of the fees charged for such connections. Therefore, this action comes within the purview of Idaho Code Section 12-120(3). If the City prevails on the merits, it is entitled to an award of attorney fees on appeal under Idaho Code Section 12-120(3).

#### **G. *NIBCA I* Did Not State That the City’s Cap Fee was an Impermissible Tax.**

In *NIBCA I*, the Court stated “We vacate the judgment of the district court and remand this case for further proceedings that are consistent with this opinion.” 158 Idaho 79, 86, 343 P.3d 1086, 1093. In a concurring opinion by Justice J. Jones, and joined by Justice Burdick,

Justice J. Jones stated – in discussing the lack of support or explanation for the three-fold increase in the Cap Fee – “[i]t is critical that this issue be addressed on remand.” *Id.* at 87, 343 P.3d at 1094. Further, Justice J. Jones went on to state: “[f]inally, the issue of valuation addressed in footnote 2 of the Court’s Opinion should be determined in the further proceedings below. The conclusion reached in the footnote as to the proper means of performing such an [a] valuation may be correct but it seems to me that expert opinion below should address that issue, as I feel uncomfortable deciding it upon appeal, especially where the case is being remanded for additional action.” *Id.* (emphasis added).

Contrary to this Court’s statements in *Manwaring Investments, L.C.*, this Court did not expressly hold in *NIBCA I*, that “this Court concluded the capitalization fee was an unconstitutional tax because it did not represent any attempt to approximate actual use. *See id.* at 81-85, 343 P.3d 1088-92.” 162 Idaho 763, 405 P.3d at 31. Rather, in *NIBCA I*, this Court expressly held that: “[t]here is nothing in the record showing that the fee of \$2,280 was based upon the value of that portion of the system capacity that the new user will utilize at the point in time when the new user connects to the system. The district court erred in holding that the fee was consistent with Idaho Code Section 50-1030(f).” *Id.* at 84, 343 P.3d at 1091.

It is clear from reading this Court’s decision and its instructions that the parties and the district court should proceed in a manner that is consistent with its decision, and that the case was remanded for the purpose of allowing the district court to hear evidence to determine whether the fee was reasonable and compliant with the authorizing statutes, specifically Idaho Code Chapter 10, Title 50 to the Revenue Bond Act. The failure and refusal of the district court to comply with these instructions on remand is a reversible error.

Contrary to the rulings of the district court, the Court did not remand with instructions to enter judgment against the City. If the Supreme Court had such intent, it would have said so and it did not. In addition – contrary to the findings and rulings of the district court – the Court did

not rule that the City's Cap Fee was an impermissible tax which precludes any need to determine whether it is reasonable in amount, as provided in the statutes. (R., p. 296; R., pp. 302-304; R., p. 441; R., pp. 801-803.) Indeed, nowhere in the opinion does it state that the Cap Fee was an impermissible tax. Rather, the Court clearly held that a Cap Fee is a legally authorized fee used for a legally authorized purpose, but, at the summary judgment stage, there was an absence of evidence that the amount of the Cap Fee was reasonable based on the methodology approved in *Loomis*. From the analysis and findings in *NIBCA I*, the Court remanded to the district court to allow the City to present evidence that the \$2,280 Cap Fee per ER is equal to or less than the value of the system capacity that would be utilized by the new user who connected to the system on or after June 7, 2007.

**H. Reply to NIBCA's Cross-Appeal Asserting the District Court Erred in Reinstating the Cap Fee Used in 2006.**

NIBCA asserts that the district court erred when it determined to use the 2006 Cap Fee of \$774 as the base for awarding just compensation to the Plaintiffs. NIBCA admits that the 2006 Cap Fee was never an issue in the suit, but was in the record. *NIBCA Response/Cross-Appellants' Br.*, p. 27. After admitting that the 2006 Cap Fee was never an issue in the suit, NIBCA, for the first time on appeal, presents argument and legal authorities in support of its contention that the 2006 Cap Fee was an illegal fee. Generally, this Court will not consider an issue that is raised for the first time on appeal to attack a judgment. *See, Deiter v. Coons*, 162 Idaho 44, 47, 394 P.3d 87, 90 (20017) (quoting *Clements Farms, Inc. v. Ben Fish & Son*, 120 Idaho 185, 207, 814 P.2d 917, 939 (1991)). Thus, the Court should reject NIBCA's arguments that the 2006 Cap Fee was illegal.

Aside from its contention that the 2006 Cap Fee was illegal, NIBCA cites no legal authorities in support of its argument that the district court erred when it used the 2006 Cap Fee of \$774 as the base for awarding just compensation to the Plaintiffs. The district court concluded

that “[j]ust compensation means the full and perfect equivalent in money of the property taken. The owner is to be put in as good position pecuniarily [sp] as he would have occupied if this property had not been taken. *United States v. Miller*, 317 U.S. 369, 373, 63 S. Ct. 276, 279-80 (1943). The remedy requires that a party subject to a taking be made whole.” (R., p. 1255.)

In its *Memorandum Decision and Order on the Issue of Just Compensation*, the district court discussed NIBCA’s proposal that it be awarded a refund of 100% of the fees it was charged for Cap Fees and the City’s proposal that NIBCA be awarded no refund because the Plaintiffs received value equal to or greater than the costs of their connections. The district court determined to reject the proposals of both NIBCA and the City. In rejecting NIBCA’s proposal, the district court stated that “[i]t cannot be, as Plaintiff argues, that the proper measure of just compensation is the return of the entire fee. Such a conclusion would offend the notion of what constitutes just compensation and would include a windfall.” (R., p. 1252.)

The district court concluded that “[p]rior to March 4, 2016, the last lawful cap fee Defendant imposed was \$774.00 in 2006. ... This Court finds that the proper course is to consider the ordinances that imposed the 2007 and 2012 fees invalidated and effectively to reinstate the pre-2007 fees as a legitimate fee.” (R., p. 1256.) The district court continued with its analysis of just compensation:

The cap fees imposed in 2007 and 2012 utilized flawed methodology and were impermissible. It is axiomatic that the ordinances revoking the lawful cap fee were not based upon any authority and are void. Therefore, in order to place the Plaintiffs in the same position they would have been in but for the impermissible tax, the Court finds that just compensation requires Defendant to refund to Plaintiffs the difference between the impermissible tax paid by Plaintiffs and the last lawful fee imposed, \$774.00.

(R., p. 1256.) NIBCA fails to cite any authority that this methodology for determining just compensation was in error.

The City still believes and contends that the district court's reasoning is erroneous and that the class members were not entitled to any refund of fees paid, because they received a value greater than the cost of their connections. Nevertheless, the City agrees with the district court that class members should be required to pay at least what the district court determined to be "the last lawful fee imposed, \$774.00." (R., p. 1256.)

"This Court reviews a district court's decision following a bench trial to ascertain 'whether the evidence supports the findings of fact, and whether the findings of fact support the conclusions of law.' *Sherman Storage LLC v. Global Signal Acquisitions II, LLC*, 159 Idaho 331, 335, 360 P.3d 340, 344, (2015) (citing *Borah v. McCandless*, 147 Idaho 73, 77, 205 P.3d 1209, 1213 (2009)). 'Since it is the province of the trial court to weigh conflicting evidence and testimony and to judge the credibility of witnesses, this Court will liberally construe the trial court's findings of fact in favor of the judgment entered' and 'will not set aside a trial court's findings of fact unless the findings are clearly erroneous.' *Id.*" "This Court exercises free review over matters of law.' *Id.*"

NIBCA fails to establish how the evidence in the record fails to support the finding and conclusion of the district court that class members should be awarded the difference between the Cap Fee of \$774 and the Cap Fees they paid as just compensation for their losses. Simply claiming the district court was in error does not satisfy the governing standard of review.

**I. Reply to NIBCA's Cross-Appeal Asserting the District Court Erred in Using Simple, Instead of Compound Interest to Determine the Amount of Prejudgment Interest Applicable to NIBCA.**

NIBCA contends in the opening brief of its Cross-Appeal that the district court abused its discretion in using simple, instead of compound interest to determine the amount of prejudgment interest that would make the NIBCA Plaintiffs whole. *See, Respondents' /Cross-Appellants' Br.*, p. 29. The Respondents are in error.

First, although it acknowledges that the district court exercised its discretion in determining to award prejudgment interest using a simple interest rate rather than a compound rate and its contends the district court abused its discretion in using a simple interest rate, NIBCA fails to cite the standard for determining whether the district court abused its discretion under Idaho law. Rather, it contends that the district court erred by not applying federal takings case law. Other than citing the federal court decisions in which compound interest was awarded, NIBCA makes no attempt to show how the district court abused its discretion in this case.

In *Thornton v. Pandrea*, 161 Idaho 301, 313, 385 P.3d 856, 868 (2016), the Court observed that Mr. Thornton had failed to articulate or apply the abuse of discretion standard in support of his argument that the district court had abused its discretion in that case. In *Thornton*, the Court, citing *Bach v. Bagley*, 148 Idaho 784, 790, 229 P.3d 1146, 1152 (2010) (internal quotation marks omitted), stated that it “will not consider an issue not supported by argument and authority in the opening brief” and “[b]ecause Mr. Thornton failed to articulate or apply the abuse of discretion standard, and because he failed to support his allegation of a due process violation with argument or authority, we conclude Mr. Thornton has not shown an abuse of discretion.” 161 Idaho at 313, 385 P.3d at 868. The same reasoning would support a finding by this Court that NIBCA has failed to show that the district court abused its discretion in awarding simple interest in this case.

This Court can also find that NIBCA has failed to show that the district court abused its discretion in awarding simple interest in this case, based on the law governing the district court’s decision to award simple interest. It is the fundamental policy of the State of Idaho that compounding of prejudgment interest is not favored. It is not allowed under Idaho Code § 28-22-104(1). See, *Holladay v. Lindsay*, 143 Idaho 767, 769, 152 P.3d 638, 640 (Ct. App. 2006) (citing *Doolittle v. Meridian Joint Sch. Dist. No. 2*, 128 Idaho 805, 814, 919 P.2d 334, 343 (1996)). Furthermore, awarding compound interest is not favored when interest is awarded as an element

of damages. In *Holladay*, the Plaintiff sought compound prejudgment interest as a item of damages on his claim for unjust enrichment. In its discussion whether Plaintiff was entitled to compound interest, the Court of Appeals acknowledged that it is not favored under Idaho law and concluded that compound interest should not be awarded under the circumstances of that case. In its discussion, the Court of Appeals recited what it characterized as an “important principle” that was pertinent to its discussion: “interest may be awarded at a rate within the trial court’s sound discretion.” 143 Idaho at 770, 152 P.3d at 770.

In this case, the district court exercised its discretion to award prejudgment interest as an element of damages in the amount of 6.5% per annum simple interest. This rate was determined by the district court to be a reasonable and appropriate rate based on the evidence that was presented by the City. The district court expressly found that NIBCA failed to comply with the Court’s Scheduling Order as it pertains to disclosure of expert witnesses and therefore rejected any testimony from Plaintiffs’ witness regarding the reasonable rate of interest that the Court should, in its discretion, award to class members to compensate it for the loss of use of their money for the period that prejudgment interest was allowed. The district court, based on the evidence in the record, found “that a reasonably prudent investor could expect a reasonable rate of return of 6.5% for the years in question.” R., p. 1258. The district court concluded that NIBCA was entitled to an award of prejudgment interest at a rate of 6.5%. R., p. 1258. When questioned whether the final judgment should reflect simple prejudgment interest or compound prejudgment interest, the district court again exercised its discretion and ordered that: “the final judgment shall reflect the simple interest calculation as contained in the City’s proposed judgment . . . ” R., p. 1264.

The well-established test to determine whether a trial court has abused its discretion consists of three parts asking whether the trial court: “(1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion and consistently with the legal

standards applicable to the specific choices available to it; and (3) reached its decision by an exercise of reason.” *Wechsler v. Wechsler*, 162 Idaho 900, 407 P.3d 214, 222 (2017) (citing *Parks v. Safeco Ins. Co.*, 160 Idaho 556, 562, 376 P.3d 760, 766 (2016) (quoting *Marek v. Lawrence*, 153 Idaho 50, 53, 278 P.3d 920, 923 (2012)).

The first prong of the abuse of discretion test is satisfied because the district court noted in its decision that NIBCA was entitled to just compensation and that the court needed to determine a reasonable rate of interest for just compensation, and that “the determination of a reasonable rate of interest for just compensation is a finding of fact, which should be disturbed only if clearly erroneous.” R., p. 1257. The district court further quoted from the Ninth Circuit decision in *Schneider v. Cty. of San Diego*, 285 F.3d 784, 793 (9th Cir. 2002), that “the Supreme Court has emphasized that under our takings jurisprudence ‘just compensation’ is a judicial, not a legislative function. (citation omitted).” R., p. 1257. Clearly, the district court perceived that the determination of a reasonable rate of prejudgment interest for just compensation in this case required the exercise of judicial discretion.

The second prong of the abuse of discretion test is whether the district court violated any legal standard or law in determining a reasonable rate of prejudgment interest for just compensation in this case. The district court clearly articulated the rule that:

Where just compensation is delayed, something more than the value of what is taken “is required to make the property owner whole, to afford him “just compensation.” This additional element of compensation has been measured in terms of reasonable interest. Thus, “just compensation” in the constitutional sense, has been held … to be fair market value at the time of taking plus interest from the date to the date of payment.” (citation omitted) The determination of a reasonable rate of interest for just compensation is a finding of fact, which should be disturbed only if clearly erroneous.

R., p. 1257.

The district court further articulated the rule for determining the appropriate rate of interest when payment of just compensation is delayed, i.e., the district court must examine what

‘a reasonably prudent person investing funds so as to produce a reasonable return while maintaining safety of principal’ would receive.” *United States v. 50.50 Acres of Land*, 931 F.2d 1349, 1354 (9th Cir. 1991). “The district court should apply an interest rate based on evidence of the rate that would be generated by investment in a diverse group of securities, including treasury bills. See *United States v. 429.59 Acres of Land*, 612 F.2d 459, 465 (9th Cir. 1980).” R., p. 1257.

The district court then found that NIBCA had failed to comply with the Court’s Scheduling Order as it pertained to Plaintiffs’ expert witnesses and rejected any testimony that Plaintiffs’ witness would have offered regarding the reasonable rate of interest. The district court then applied the rules to the evidence that was submitted by Defendants and determined that a reasonable rate of interest to award as prejudgment interest is 6.5% simple interest. There is no evidence in the record that the district court violated any legal standard or law in determining and granting prejudgment interest at the rate of 6.5% simple interest. R., pp. 1257, 1264.

The third prong of the abuse of discretion test—whether the district court’s award of prejudgment interest at the rate of 6.5% simple interest was outside the bounds of reason—is satisfied. The district court recognized that the decision required the exercise of discretion, cited the applicable federal law for determining a reasonable rate of interest for just compensation, cited NIBCA’s failure to provide admissible evidence of a reasonable rate of interest for just compensation, analyzed the evidence that was submitted by the City, and explained why it was appropriate to award pre-judgment interest at a rate of 6.5% as just compensation to NIBCA. The District Judge, further followed the policy in Idaho that compounding prejudgment interest is not favored and ordered that the court was awarding simple interest. R., p. 1264.

The district’s court’s action was reasonable. Therefore, the district court did not abuse its discretion in awarding simple prejudgment interest.

#### IV. CONCLUSION

For each of the foregoing reasons, it is respectfully submitted that this Court should find the evidence submitted by the City showing the cost of the Cap Fee was reasonable and in compliance with the standard set forth in *Loomis*; NIBCA's claims are barred by *Williamson Cnty.*; recognize that NIBCA received a benefit by gaining access to sewer, amounting to unjust enrichment; and reverse the district court's judgment in favor of NIBCA, and the district court's order awarding NIBCA costs and attorney fees. And, award attorney fees and costs to the City.

DATED THIS 21<sup>st</sup> day of February, 2018.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By



---

Merlyn W. Clark, ISB No. 1026  
Attorneys for Appellant City of Hayden

CERTIFICATE OF SERVICE

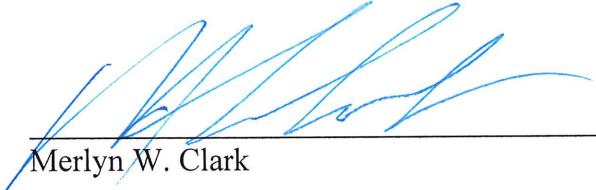
I HEREBY CERTIFY that on this 21<sup>st</sup> day of February, 2018, I caused to be served a true copy of the foregoing APPELLANT'S/RESPONDENT'S REPLY AND RESPONSE BRIEF by the method indicated below, and addressed to each of the following:

Jason S. Risch (ISB #6655)  
RISCH ♦ PISCA, PLLC  
Attorneys at Law  
407 West Jefferson Street  
Boise, Idaho 83702-6012  
*Attorneys for Plaintiffs/Respondents*

Jerry D. Mason  
Nancy Stricklin  
Mason & Stricklin  
P.O Box 1832  
Coeur d'Alene, Idaho 83816-1832  
*Attorneys for Amicus Curiae*

- U.S. Mail, Postage Prepaid  
 Hand Delivered  
 Overnight Mail  
 E-mail:  
 Telecopy:

- U.S. Mail, Postage Prepaid  
 Hand Delivered  
 Overnight Mail  
 E-mail:  
 Telecopy:

  
\_\_\_\_\_  
Merlyn W. Clark