STATE OF IDAHO)
County of KOOTENAI)ss

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Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

KENT W. ALLEN and CHRISTIE R. ALLEN, husband and wife,

Plaintiffs,

vs.

KOOTENAI COUNTY, IDAHO,

Defendant.

Case No. **CV 2013 2376**

MEMORANDUM DECISION AND ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on defendant Kootenai County's Motion for Summary Judgment filed February 3, 2014.

On March 28, 2013, plaintiffs Kent W. Allen and Christie R. Allen (Allens) filed this lawsuit against Kootenai County, alleging negligence pursuant to the Idaho Tort Claims Act, breach of statutory duty and estoppel. Complaint, pp. 4-6. Allens allege Kootenai County was negligent when it sold county property to Randy and Paula Johnson (Johnsons), neighbors of the Allens, on July 10, 2012. Complaint, pp. 4-6 ¶¶ 5.1-5.17.

On April 18, 2006, Kootenai County acquired Parcel No. 0-5800-00-002-B (the disputed property) through Tax Deed No. 202633400. Affidavit of Laurie Thomas in Support of Defendant's Motion for Summary Judgment, Exhibit C. On August 18, 2006, Kootenai County published notice in the Coeur d'Alene Press of its intent to sell the disputed property at auction. *Id.,* Exhibit D. A public auction was held on September 1,

2006, but the disputed property was not purchased. Affidavit of Laurie Thomas in Support of Defendant's Motion for Summary Judgment, p. 2 ¶ 11. Since the disputed property did not sell at auction, Kootenai County retained possession. *Id.* Kootenai County then decided to accept sealed bids from parties interested in purchasing the property. *Id*.

On June 26, 2012, the Johnsons submitted a sealed bid to Kootenai County for the purchase of the disputed property. Affidavit of Todd Tondee in Support of Defendant's Motion for Summary Judgment, p. 2 ¶ 6. At the next scheduled meeting of the Kootenai County Board of Commissioners (Board), held on July 3, 2012, the sealed bid submitted by the Johnsons was opened. *Id.* The Johnsons and their attorney John Whelan were present at this meeting. *Id.* at p. 3 ¶ 7. During the meeting, Whelan informed the Kootenai County Board of Commissioners that the disputed property is an undeveloped dirt road that runs across their property, which the Johnsons had been using as a driveway for six years. *Id.* at ¶ 8. Whelan presented pictures of the property and plat maps to the Board. *Id*. at ¶ 9. Based on the documentation, it appeared to the Board that the disputed property was contiguous to the Johnson's property and the surrounding properties could be accessed by other means. *Id.* "When questioned about other property owners nearby and their need for use of the parcel, Mr. Whelan told the [Kootenai County Board of Commissioners] that there was a 'gentleman' that owned nearby property who wanted to build a garage and make use of the parcel, however the gentleman's property was not contiguous to the parcel and the gentleman had access to his property via Boardwalk Lane and Coventry Road." *Id.* at ¶ 10. Following this discussion, the Board agreed to consider the Johnson's bid and render its decision at the next public meeting. *Id*. at p. 4 ¶ 13.

Prior to the next public meeting, Todd Tondee, an elected Kootenai County Commissioner, met with Elizabeth Anderson at the Kootenai County Planning Department to look at the plat map and arial map of the disputed property to ensure that it was not a dedicated roadway. *Id.* at ¶ 14. Based on that meeting, Commissioner Tondee determined the disputed property was not a platted or dedicated roadway. *Id.* He further determined there were no easements or encumbrances appurtenant to the disputed property. *Id.*

On July 10, 2012, the Board held their next public meeting. *Id.* at p. 5 ¶ 15. Commissioner Tondee informed the other commissioners that community development had no use for the property and recommended the Board accept the Johnsons' bid for the disputed property. *Id.* Motion for acceptance of the bid carried by unanimous vote and the disputed property was sold by the County to the Johnsons for $2,501.00. *Id.* Kootenai County Deed No. 2367907000 was issued to the Johnsons on July 26, 2012, conveying the rights, title and interest in the disputed property to them. Affidavit of Peter C. Erbland in Support of Defendant's Motion for Summary Judgment, Exhibit E.

Prior to the sale of the disputed property, the Allens applied for a building permit from Kootenai County. Affidavit of Peter C. Erbland in Support of Defendant's Motion for Summary Judgment, Exhibit A. The Building Permit Application was filed by their contractor, Tony Morss, and provides the following directions to the Allens' property: "HWY 95 south to Rockford bay Road – past marina aprox 1.5 miles to Boardwalk Ln RT – RT at T – go to end of Road. Job address: 6676 BOARDWALK LN." Affidavit of Peter C. Erbland in Support of Defendant's Motion for Summary Judgment, Exhibit A. On May 24, 2012, Kootenai County issued Building Permit No. RES12-0242 to the Allens, which includes directions to their property as provided in the Building Permit

Application. Affidavit of Peter C. Erbland in Support of Defendant's Motion for Summary Judgment, Exhibit B.

Allens claim that following the transfer of the disputed property to the Johnsons, Whelan:

> …wrote a letter to the Allens stating that they could not continue to build their garage by accessing the disputed property. Allen Aff., ¶ 5. By that time, the foundation for the Allens' garage/carport has been finished. Allen Aff., ¶ 6. Because the foundation has been poured for access only from the disputed property, which could no longer be accessed by the Allens, the foundation had to be demolished, the ground re-leveled, and a new permit had to be issued to build the garage to allow access from Coventry Dr. Allen Aff., ¶ 7.

Plaintiffs' Memorandum in Opposition to Defendant's Motion for Summary Judgment, p. 6 (citing the Affidavit of Kent Allen in Opposition to Defendant's Motion for Summary Judgment ¶¶ 5-7).

On March 28, 2013, the Allens initiated the instant action, claiming Kootenai County breached a duty to them when it sold the disputed property to the Johnsons because use of the permit issued by Kootenai County requires access via the disputed property. Complaint, p. 4, ¶ 12. Allens claim:

> In short, Defendant gave Plaintiffs a permit that Defendant knew could only be exercised by using the Disputed Property, and then Defendant sold that Disputed Property knowing the buyer's purpose was to block Plaintiffs' access, taking away Plaintiffs' ability to exercise their permit.

Id. The Allens also dispute that Commissioner Tondee researched the disputed property as it relates to access to other property owners. Plaintiffs; Statement of Material Facts in Opposition to Defendant's Motion for Summary Judgment, p. 3 ¶ 7 (citing Affidavit of Peter E. Moye in Opposition to Defendant's Motion for Summary Judgment, Exhibit G).

On February 3, 2014, Kootenai County filed its Motion for Summary Judgment

requesting all of plaintiffs' claims against it be dismissed. It was accompanied by a Memorandum in Support of Summary Judgment and the affidavits of Commissioner Todd Tondee, Laurie Thomas, and Peter C. Erbland.

In response, on February 18, 2014, the Allens filed a Statement of Material Facts in Opposition to Defendant's Motion for Summary Judgment, Memorandum in Opposition to Defendant's Motion for Summary Judgment, and the affidavits of Kent Allen, Kevin Howard, and Peter E. Moye.

On February 24, 2014, Kootenai County filed Defendant's Reply Memorandum in Support of Summary Judgment, Supplemental Affidavit of Peter C. Erbland, and Defendant's Supplemental Reply Memorandum. Oral argument on Kootenai County's motion was held on March 3, 2014.

II. STANDARD OF REVIEW.

"Summary judgment is appropriate if the pleadings, affidavits, and discovery documents on file with the court . . . demonstrate no material issue of fact such that the moving party is entitled to a judgment as a matter of law." *Brewer v. Washington RSA No. 8 Ltd. Partnership,* 145 Idaho 735, 738 184 P.3d 860, 863 (2008) (quoting *Badell v. Beeks,* 115 Idaho 101, 102, 765 P.2d 126, 127 (1988) (citing I.R.C.P. 56(c)). The burden of proof is on the moving party to demonstrate the absence of a genuine issue of material fact. *Rouse v. Household Finance Corp.,* 144 Idaho 68, 70, 156 P.3d 569, 571 (2007) (citing *Evans v. Griswold*, 129 Idaho 902, 905, 935 P.2d 165, 168 (1997)). "The burden may be met by establishing the absence of evidence on an element that the nonmoving party will be required to prove at trial." *Nelson v. Anderson Lumber Co.*, 140 Idaho 702, 707, 99 P.3d 1092, 1097 (2004) (citing *Dunnick v. Elder*, 126 Idaho 308, 311, 882 P.2d 475, 478 (Ct. App. 1994)).

"Once the moving party establishes the absence of a genuine issue of material fact, the burden shifts to the non-moving party," to provide specific facts showing there is a genuine issue for trial. *Kiebert v. Goss*, 144 Idaho 225, 228, 159 P.3d 862, 864 (2007) (citing *Hei v. Holzer,* 139 Idaho 81, 85, 73 P.3d 94, 98 (2003)); *Samuel v. Hepworth, Nungester & Lezamiz, Inc.,* 134 Idaho 84, 87, 996 P.2d 303, 306 (2000). "[I]f the nonmoving party fails to provide a sufficient showing to establish the essential elements of his or her case, judgment shall be granted to the moving party." *Porter v. Bassett,* 146 Idaho 399, 403, 195 P.3d 1212, 1216 (2008) (citing *Atwood v. Smith,* 143 Idaho 110, 113, 138 P.3d 310, 313 (2006)). In construing the facts, the court must draw all reasonable factual inferences in favor of the non-moving party. *Mackay v. Four Rivers Packing Co.,* 145 Idaho 408, 410, 179 P.3d 1064, 1066 (2008). If reasonable people can reach different conclusions as to the facts, then the motion must be denied. *Ashby v. Hubbard*, 100 Idaho 67, 593 P.2d 402 (1979).

The non-moving party's case must be anchored in something more than speculation; a mere scintilla of evidence is not enough to create a genuine issue. *Zimmerman v. Volkswagon of America, Inc.*, 128 Idaho 851, 854, 920 P.2d 67, 69 (1996). The non-moving party may not simply rely upon mere allegations in the pleadings, but must set forth in affidavits specific facts showing there is a genuine issue for trial. I.R.C.P. 56(e); *see Rhodehouse v. Stutts*, 125 Idaho 208, 211, 868 P.2d 1224, 1227 (1994). If the non-moving party does not provide such a response, summary judgment, if appropriate, shall be entered against the party. *Id.* "Questions of law are subject to free review." *Halvorson v. North Latah County Highway Dist.,* 151 Idaho 196, 201, 254 P.3d 497, 502 (2011).

III. ANALYSIS.

A. The Kootenai County Board of Commissioners Complied With the Requirements of Idaho Code § 31-808, Prior to the Sale.

> A board of county commissioners is a tribunal created by statute with limited jurisdiction and only quasi judicial powers, and can not proceed except in strict accordance with the mode provided by statute. It has no right or authority to adopt any other mode than that required by statute.

Johnson v. Young, 53 Idaho 271, ___, 23 P.2d 723, 728-29 (1932) (citing *Gorman v. Board of Com'rs of Boise County*, 1 Idaho 553, 557 (Supreme Court of the Territory of Idaho 1874)). "The board of county commissioners has only such powers as are expressly or impliedly conferred upon it by statute." *Id*. at 729 (quoting *Prothero v. Board of Com'rs of Twin Falls County*, 22 Idaho 598, ___, 127 P. 175, 177 (1912)). "The power which a county possesses to alienate its property must not only be exercised by the proper office, but, where the mode is prescribed, the same must be followed or a conveyance of such property will be void." *Id*. (citing 15 C.J. 538 § 225).

Idaho Code § 31-801, *et seq*. prescribes the powers and duties of the boards of county commissioners within the State of Idaho. Included among those powers and duties is the "power and authority to sell or offer for sale at public auction any real or personal property belonging to the county not necessary for its use." I.C. § 31-808(1). That statute requires a board of county commissioners which intends to sell county property, must comply with the following procedure:

> Prior to offering the property for sale, the board of county commissioners shall advertise notice of the auction in a newspaper, as defined in section 60-106, Idaho Code, either published in the county or having a general circulation in the county, **not less than ten (10) calendar days prior to the auction**. If the property to be sold is real property, the notice to be published shall contain the legal description as well as the street address of the property.

Id. (emphasis added). In addition, I.C. § 60-109 provides guidelines for "[w]henever any

law of this state requires publication of any notice or proceeding...", and it provides in pertinent part:

> [S]aid requirement shall be satisfied by publishing the same once each calendar week on the same day of each week for the number of times equal to the number of weeks mentioned in the requirement in any regular issue of a newspaper published on one or more days of each week; or **when a specified number of days is required, a ten (10) days' notice** shall be satisfied by two (2) such weekly publications . . .

I.C. § 6-109 (emphasis added).

The parties disagree as to whether I.C. § 31-808 and § 60-109 should be interpreted in conjunction with one another. Kootenai County contends I.C. § 60-109 does not govern the publication of notice requirement for I.C. § 31-808(1). Defendant's Reply Memorandum in Support of Summary Judgment, pp. 2-4. In support of this contention, Kootenai County relies on two (2) methods of statutory construction. Defendant's Reply Memorandum, pp. 2-4.

First, Kootenai County directs the Court to the plain language of Idaho Code § 31-808(1). *Id.* pp. 2-3. Kootenai County claims the plain language of I.C. § 31-808(1), which states "not less than ten (10) calendar days prior to the auction", is not a "specified number of days" for publication, as required to trigger Idaho Code § 60-109, but is rather an amount of time prior to the auction that the notice must be published. *Id*., pp. 3-4; I.C. § 31-808(1); I.C. § 60-109. Kootenai County further emphasizes that while the language of I.C. § 31-808(1) specifically references other sections of the Idaho Code, I.C. § 60-109 is not one of them. Defendant's Reply Memorandum in Support of Summary Judgment, p. 3. Kootenai County directs the Court to Idaho Code §§ 23-301(a), 31-4803(2), 39-5806(4), 39-5814(1)(b), and 39-5814(6)(ii)(b), which specifically reference the notice requirement of I.C. § 60-109. Defendant's Supplemental Reply Memorandum, pp. 2-4.

Second, Kootenai County argues I.C. § 31-808 and I.C. § 60-109 apply to the same subject matter. Defendant's Reply Memorandum, p. 2. Kootenai County interprets I.C. § 31-808 as a more specific statute than I.C. § 60-109, and argues under the principles of statutory construction, I.C. § 31-808 is the controlling statute for publication of notice when a county sells property. *Id.* Based on these interpretations, Kootenai County argues it followed the general procedures set forth in I.C. § 31-808(1) prior to the public of the disputed property. *Id.* at 4; Defendant's Supplemental Reply Memorandum, p. 4.

The Allens contend I.C. § 31-808(1) and I.C. § 60-109 must be interpreted together, requiring two (2) notice publications prior to a public auction. Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment, pp. 8-9. Allens do not provide a detailed explanation as to *why* the statutes should be interpreted together. Allens claim that by only publishing one notice of its intent to sell the disputed property, the sale of the disputed property is invalid. *Id*., p. 8.

Interpretation of a statute is a question of law for the court to decide. *See Twin Falls v. Cities of Twin Falls &* Filer, 143 Idaho 398, 399, 146 P.3d 664, 665 (2006). It must begin with an examination of the literal words, "giving effect to plain, usual, and ordinary meaning" without engaging in any statutory construction and following it as written. *Verska v. Saint Alphonsus Reg'l Med. Ctr.*, 151 Idaho 889, 893, 265 P.3d 502, 506 (2011) (citing *State v. Schwartz,* 139 Idaho 360, 362, 79 P.3d 719, 721 (2003)). If a statute is unambiguous, the court follows it as written. *City of Sandpoint v. Sandpoint Indep. Highway Dist.*, 139 Idaho 65, 69, 72 P.3d 905, 909 (2003) (citing *Hansen v. State Farm Mut. Auto. Ins. Co.,* 112 Idaho 663, 735 P.2d 974 (1987)). "A statute is ambiguous where the language is capable of more than one reasonable construction.

If the statute is ambiguous, then it must be construed to mean what the legislature intended for it to mean." *Id.* (internal citations omitted).

"[S]tatutes that are *in pari materia* (of the same matter or subject), are to be construed together as one system to effect legislative intent." *City of Sandpoint v. Sandpoint Independent Highway Dist*., 126 Idaho 145, 150, 879 P.2d 1078, 1083 (1994) (citing *Grand Canyon Dories v. Tax Comm'n,* 124 Idaho 1, 855 P.2d 462 (1993); *see also Meyers v. City of Idaho Falls,* 52 Idaho 81, 89–90, 11 P.2d 626, 629 (1932)). "Where a statute with respect to one subject contains a certain provision, the omission of such provision from a similar statute concerning a related subject is significant to show that a different intention existed." *City of Sandpoint,* 139 Idaho 65, 69, 72 P.3d 905, 909 (2003) (citing *Kopp v. State,* 100 Idaho 160, 595 P.2d 309 (1979)). If statutes appear to be in conflict, a specific statute will control over a more general one. *Walker v. Shoshone County*, 112 Idaho 991, 994, 739 P.2d 290, 293 (1987) (citing *Mickelsen v. City of Rexberg*, 101 Idaho 305, 612 P.2d 542 (1980)). Moreover, statutes are construed "under the assumption that the legislature knew of all legal precedent and other statutes in existence at the time the statues were passed." *Id.* (citing *George W. Watkins Family v. Messenger,* 118 Idaho 537, 540, 797 P.2d 1385, 1388 (1990)).

The relevant language of I.C. § 31-808(1) specifically states "not less than ten (10) calendar days prior to the auction." This language on its face is unambiguous. It requires a board of county commissioners seeking to auction property not necessary for its use to publish notice at least ten (10) days before the auction occurs. This language is not capable of more than one meaning unless it is read in conjunction with I.C. § 60-109. The questions then are whether Idaho Code § 31-808(1) and § 60-109 are *in pari materia* and should be construed together, and, if so, which of these two statutes is

more specific.

Both statutes discuss the subject of publication of notice. Idaho Code § 60-109 specifically states that it applies to "any law of this state [that] requires publication of any notice of proceeding" and sets forth guidance on how to interpret the notice requirement. I.C. § 60-109. Idaho Code § 60-109 was adopted by the Idaho Legislature in 1941, while the current version of Idaho Code § 31-808 was not adopted by the Idaho Legislature until 1999. I.C. § 31-808. It can be assumed the Legislature was aware of Idaho Code § 60-109 when it adopted Idaho Code § 31-808(1), and it is clear from the plain language of Idaho Code § 60-109 that the Legislature intended for Idaho Code § 60-109 to apply to all notice publications.

However, there are other sections of the Idaho Code which also have a publication notice requirement, and those sections specifically reference I.C. § 60-109. *See* I.C. §§ 7-704(4), 23-301(a), 31-4803(2), 39-5806(4), 39-5814(1)(b), 39-7408D(1)(b), 39-7910(1)(b). Unlike those code sections, I.C. § 31-808(1) does not refer to Idaho Code § 60-109. I.C. § 31-808(1). Additionally, I.C. § 7-704(4), for example, further contains the exact language found in Idaho Code § 60-109. I.C. § 7-704(4). It specifically states "…following ten (10) days' notice, as provided by section 60-109, Idaho Code". I.C. §§ 7-704(4). Idaho Code § 31-808(1) does not use the specific language "ten (10) days' notice"; rather it says "not less than ten (10) calendar days prior". I.C. 31-808(1). It should be noted that despite this, the annotated version of I.C. § 31-808 cross references I.C. § 60-109 in the notes following the language of I.C. § 31-808. I.C.A. 31-808.

It is clear that both code sections govern publication of notice. Idaho Code § 60-109 applies to all cases requiring publication by notice, while I.C. § 31-808 only applies to cases where a board of county commissioners is selling county property. *See* I.C. §§

60-109, 31-808. In *Walker v. Shoshone County*, 112 Idaho 991, 739 P.2d 290 (1987), the Idaho Supreme Court was faced with a similar decision. In that case, it needed to resolve the apparent conflict between I.C. § 6-911 and I.C. § 5-211. 112 Idaho 991, 994, 739 P.2d 290, 293. Both statutes set forth a statute of limitations for claims brought against a county. *Id.* Idaho Code § 5-221 governs actions on claims against a county and limits the time to bring an action against a county to six months. I.C. § 5-221. Idaho Code § 6-911 provides that claims against governmental entities brought pursuant to the Idaho Tort Claims Act must commence within two years of the date the claim arose. I.C. § 6-911. The claim in that case was based on tort against Shoshone County. *See Walker*, 1112 Idaho 991, 992, 739 P.2d 290, 291. The Court held that since the plaintiffs had to follow the procedures outlined in the tort claims act, the more specific statute was I.C. § 6-911; thus, the two year statute of limitations applied. 112 Idaho 991, 994, 739 P.2d 290. 293.

The issues set forth in Allens' complaint arise from the sale of Kootenai County property. It is undisputed that the Kootenai County Board of Commissioners were required to follow the procedures outlined in I.C. § 31-808 to effectuate that sale. Therefore, the more specific notice by publication requirement governing the sale of county property, I.C. §31-808, must control in this case.

The Allens' contention that I.C. § 31-808(1) and I.C. § 60-109 must be interpreted together, requiring two notice publications prior to a public auction (Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment, pp. 8-9), as stated above, is not supported by any real explanation as to *why* the statutes should be interpreted together. This Court can divine no legitimate reason as to why this should be so. Idaho Code § 60-109, by its own language, only applies when notice is required for a "specified number of days", and that is not the case with I.C. § 31-808(1), which

simply states a minimum period of ten days notice is required (and was more than met in this case), I.C. § 31-808(1) simply does not require notice for a "specified number of days."

It is undisputed that after Kootenai County acquired the disputed property it only published legal notice of its intent to sell the property on one occasion in the Coeur d'Alene Press, on August 18, 2006. Defendant's Reply Memorandum in Support of Summary Judgment, pp. 9-10; Affidavit of Laurie Thomas in Support of Defendant's Motion for Summary Judgment, pp. 2-3 ¶¶ 9-10; Affidavit of Laurie Thomas in Support of Defendant's Motion for Summary Judgment, Exhibit D; Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment, p. 8. The auction was then held thirteen (13) days later, on September 1, 2006. Affidavit of Laurie Thomas in Support of Defendant's Motion for Summary Judgment, p. 2 ¶ 11. As such, because the Court determines that the statues should be interpreted separately, and having determined that I.C. § 31-808(1) is the controlling statute, and I.C. § 331-808(1) only required one publication of notice at least ten days prior to the auction, the sale of the disputed property is valid.

B. The Kootenai County Board of County Commissioners Had the Authority to Sell the Disputed Property.

Allens claim that even if the Court finds Kootenai County complied with the notice by publication requirement, the sale of the disputed property is invalid because the Kootenai County Board of Commissioners were not authorized to sell the disputed property, as it is "necessary for county use." Plaintiffs' Memorandum in Opposition to Defendant's Motion for Summary Judgment, p. 9. The Allens assert that because the "disputed property, which looks like a road, was used as a road, and was described by the [Kootenai County Board of Commissioners], the Johnsons, the Allens, and [Worley

Highway District] as a road", it should be treated as a road. *Id.,* p. 10. The Allens claim the disputed property is the only road access to their property, which is landlocked without it, and "is necessary to the County because the County has a duty to provide for the orderly development of land and to ensure the health and safety of the public, including access by emergency response vehicles . . ." *Id.* p. 9. This is despite the fact that Kootenai County did not previously own the disputed property, and the disputed property was never platted or dedicated as a public roadway. Affidavit of Todd Tondee in Support of Motion for Summary Judgment, p. 4 ¶ 14.

The plain language of the I.C. § 31-808 clearly vests with a board of county commissioners the authority to determine if property is necessary for county use. Title 31, Chapter 8 of the Idaho Code, is entitled "Powers and Duties of Board of Commissioners". I.C § 31-808, *et seq.* The language of I.C. § 31-808(1) dictates the proper procedures for selling county property. It vests the board of county commissioners with the power and authority to sell county property and does not refer to or grant any other board or governing body with authority to do so. *Id.* The board may only sell county property that has been previously designated as "not necessary for its use." *Id.*

Reading the code section as a whole, power and authority to determine whether county property is not necessary for its use must be within the discretion of the board of county commissioners. Moreover, as stated in *Magoon v. Board of Commissioners of Valley County*, 58 Idaho 317, 73 P.2d 80 (1937), "[t]he Legislature further conferred upon boards [of county commissioners] power to sell county property no longer needed by a county or necessary for its use, where acquired by purchase or otherwise." *Magoon*, 58 Idaho at __, 73 P.2d at 82 (citing I.C. § 30-708, which has since been

amended into I.C. § 30-808). As such, the Kootenai County Board of Commissioners had the authority to sell the disputed property, which it determined it no longer needed.

Kootenai County acquired the disputed property by tax deed and decided to sell it at public auction. Memorandum in Support of Defendant's Motion for Summary Judgment, p. 9; *see also* Affidavit of Laurie Thomas In support of Defendant's Motion for Summary Judgment. The Allens seem to think that once Kootenai County acquired the disputed property it had a duty to use this land to "provide for the orderly development of land and to ensure the health and safety of the public, including access by emergency response vehicles", making it necessary for county use. Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment, p. 9.

However, the Allens have cited to no authority explaining why the April 18, 2006, acquisition by Kootenai County of a parcel previously owned by another private individual (Roy T. Smythe), as a result of that individual's failure to pay his taxes, would suddenly result in that parcel being now necessary for the county's use. Affidavit of Laurie Thomas in Support of Defendant's Motion for Summary Judgment, p. 2, ¶¶ 5, 8, Exhibit C. Kootenai County had never owned that parcel prior to April 18, 2006. It is uncontroverted Kootenai County had no need for that parcel. There is absolutely no evidence the county needed that parcel for its own use, only the Allens' unsupported argument. As such, the Court finds that Kootenai County had the authority to determine that the property was not necessary for its use and could take steps to sell the disputed property.

C. Kootenai County was not Required to Declare the Disputed Property as "Odd-Lot" Property.

The Allens claim Kootenai County should have declared the disputed property as an "odd-lot" property and, as such, would have been required to provide written notice

to the adjacent property owners of the sale pursuant to I.C. § 31-808(8). Plaintiffs' Memorandum in Opposition to Defendant's Motion for Summary Judgment, pp. 10-11. Idaho Code section 31-808(8) provides as follows:

> The board of county commissioners **may**, by resolution, declare certain parcels of real property as odd-lot property, all or portions of which are not needed for public purposes and are excess to the needs of the county. For purposes of this subsection, odd-lot property is defined as that property that has an irregular shape or is a remnant and has value primarily to an adjoining property owner. Odd-lot property **may** be sold to an adjacent property owner for fair market value that is estimated by a land appraiser licensed to appraise property in the state of Idaho. If, after thirty (30) days' written notice, an adjoining property owner or owners do not desire to purchase the odd-lot property, the board of county commissioners **may** sell the property to any other interested party for not less than the appraised value. When a sale of odd-lot property is agreed to, a public advertisement of the pending sale **shall** be published in one (1) edition of the newspaper as defined in subsection (1) of this section, and the public shall have fifteen (15) days to object to the sale in writing. The board of county commissioners **shall** make the final determination regarding the sale of odd-lot property in an open meeting.

I.C. § 31-808(8) (bold and underline added).

The plain language of the first sentence of above statute shows the decision whether or not to declare parcels of property as "odd-lot" property is clearly *permissive*. The statue gives a board of county commissioners the *discretion* to declare real property meeting the definition as odd-lot property; it does not impose a requirement that a board of county commissioners must declare *all* property meeting that description as odd-lot property. The statute simply sets forth requirements a board of county commissioners must follow if it decides to declare property to be odd-lot property in order to sell such property. As such, Kootenai County was under no obligation to declare the disputed property as odd-lot. Since the Commissioners never declared the property as odd-lot, I.C. § 31-808(8) is not applicable to the instant action.

D. The Allens Cannot Establish a Claim for Negligence Against Kootenai County under the Idaho Tort Claims Act.

Tort claims against a governmental entity invoke the Idaho Tort Claims Act (ITCA). I.C. § 6-901 *et seq.*; *Nelson v. Anderson Lumber Co.,* 140 Idaho 702, 712, 99 P.3d 1092, 1101 (2004). "The [ITCA] abrogates sovereign immunity and renders a governmental entity liable for damages arising out of its negligent acts of omissions." *Stoddart v. Pocatello School Dist. No. 25*, 149 Idaho 679, 683, 239 P.3d 784, 788 (2010) (quoting *Van v. Portneuf Med. Ctr.*, 147 Idaho 552, 557, 212 P.3d 982, 987 (2009)). A plaintiff "must assert a tort under common law or created by a separate statute in order to be eligible for relief." *Id*. However, the ITCA also exempts governmental entities from certain types of claims by establishing conditional immunity for governmental entities in certain circumstances. *See* I.C. §§ 6-904, 6-904A, 6-904B.

A plaintiff seeking recovery under the ITCA must meet the following requirements to recover under the ITCA:

> First, the plaintiff must state a cause of action for which tort recovery would be allowed under the laws of Idaho, that is, whether there is such a tort under Idaho law. Second, the plaintiff must show that no exception to liability under the ITCA shields the alleged misconduct from liability. Third, if no exception applies, the plaintiff still must meet its burden of showing that it is entitled to recovery based on the merits of its claim.

Stoddart, 149 Idaho 679, 683, 239 P.3d 784, 788 (internal quotations omitted) (citing *Sherer v. Pocatello Sch. Dist. No. 25,* 143 Idaho 486, 490, 148 P.3d 1232, 1236 (2006)). To establish causes of action for common law negligence, a plaintiff must establish: "(1) a duty, recognized by law, requiring the defendant to conform to a certain standard of conduct; (2) a breach of that duty; (3) a causal connection between the defendant's conduct and the resulting injury; and (4) actual loss or damage." *Id.* (citing *Nation v. State Dep't of Corr.,* 144 Idaho 177, 189, 158 P.3d 953, 965 (2007) (quoting *O'Guin v. Bingham County,* 142 Idaho 49, 52, 122 P.3d 308, 311 (2005)).

1. Allens Fail to Demonstrate Kootenai County Owed Them a Duty.

The Allens contend Kootenai County owed them a duty at common law and by statute. Plaintiffs' Memorandum in Opposition to Defendant's Motion for Summary Judgment, pp. 11-14.

"Determining whether a duty will arise in a particular instance involves a consideration of policy and the weighing of several factors which include[s] the foreseeability of harm to the plaintiff . . . ." *Stoddart*, 149 Idaho 679, 686, 239 P.3d 784, 791. "In addition, it is possible to create a duty where one previously did not exist. If one voluntarily undertakes to perform an act, having no prior duty to do so, the duty arises to perform the act in a non-negligent manner." *Featherston By & Through Featherston v. Allstate Ins. Co.,* 125 Idaho 840, 843, 875 P.2d 937, 940 (1994) (citing *Bowling v. Jack B. Parson Cos.,* 117 Idaho 1030, 1032, 793 P.2d 703, 705 (1990)).

The Allens maintain Kootenai County "has a general duty to use due or ordinary care not to injure others, to avoid injury to others by any agency set in operation by [it], and to do [its] work, render services or use [its] property as to avoid such injury." Plaintiffs' Memorandum in Opposition to Defendant's Motion for Summary Judgment, pp. 12. (citing *Grabicki v. City of Lewiston*, 154 Idaho 686, 691, 302 P.3d 26, 31 (2013)). The Allens claim that a reasonably prudent person in the position of Kootenai County would have investigated whether property owners near the disputed property were using it. *Id.,* pp. 13. The Allens further claim that as of the July 3, 2013, hearing, Kootenai County knew the Allens were using the disputed property to access their property and build a garage. *Id.* Based on this knowledge, the Allens claim Kootenai County should have inquired whether the sale would prohibit that access. *Id.* Moreover, the Allens claim the building permit issued to them by Kootenai County put it

on notice that the disputed property was necessary for the Allens to access their property. *Id.* at 14.

An enormous burden would be placed on counties if a duty was found requiring them to pull every building permit before making a determination about the sale of county property. Moreover, in this case, pulling their building permit would not have put Kootenai County on notice that the Allens were using the disputed property to access their property for construction. The Building Permit Application filed by Tony Morss on behalf of the Allens provides the following directions: "HWY 95 south to Rockford bay Road – past marina aprox 1.5 miles to Boardwalk Ln RT – RT at T – go to end of Road. Job address: 6676 BOARDWALK LN." Affidavit of Peter C. Erbland in Support of Defendant's Motion for Summary Judgment, Exhibit A. The Building Permit Application does not reference the disputed parcel. Even if Commissioner Tondee had gone to the planning department, he would not have been put on notice that the planning department's action had any impact on the disputed parcel.

The pictures of the disputed property and plat maps that were presented to the Kootenai County Board of Commissioners at the July 3, 2012, meeting by Whelan further supported the belief that the disputed property was contiguous to the Johnsons' property and the surrounding properties, including the Allens' property, could be accessed by other means. Affidavit of Todd Tondee in Support of Defendant's Motion for Summary Judgment, p. 3 ¶ 9. "When questioned about other property owners nearby and their need for use of the parcel, Mr. Whelan told the [Kootenai County Board of Commissioners] that there was a 'gentleman' that owned nearby property who wanted to build a garage and make use of the parcel, however the gentleman's property was not contiguous to the parcel and the gentleman had access to his property via Boardwalk Lane and Coventry Road." *Id.* at ¶ 10. This is the same access

indicated by the Allens on their Building Permit Application. Affidavit of Peter C. Erbland in Support of Defendant's Motion for Summary Judgment, Exhibit A. Based on this, it is not foreseeable that harm would result to the Allens requiring a duty to attach.

Moreover, the Allens cannot use the issuance of the building permit as a basis for imposing a duty for a negligence claim under the ITCA if Kootenai County and its employees were acting within the scope of its employment when it issued a building permit to the Allens. Under Idaho Code section 6-904B(3):

> A governmental entity and its employees while acting within the course and scope of their employment and without malice or criminal intent and without gross negligence or reckless, willful and wanton conduct as defined in section 6-904C, Idaho Code, shall not be liable for any claim which:
>
> …
>
> 3. Arises out of the issuance, denial, suspension or revocation or, or failure or refusal to issue, deny, suspend, or revoke a permit, license, certificate, approval, order or similar authorization.

Idaho Code § 6-904B(3). The Allens have not alleged that Kootenai County and its employees were acting outside the scope of its employment when it issued a building permit to the Allens; nor have Allens alleged in their Complaint that Kootenai County acted with malice or criminal intent and without gross negligence or reckless, willful and wanton conduct when it issued the permit or failed to check the permit prior to determining whether the disputed property was necessary for county use. The Allens have cited to no authority which would require a county to inspect each building permit prior to determining whether property was necessary for county use and thus create a duty in this case.

The Allens also claim Kootenai County owes the Kootenai County public, which includes the Allens, a statutory duty to properly sell land. Plaintiffs' Memorandum in Opposition to Defendant's Motion for Summary Judgment, pp. 11-14. Specifically, they claim that Kootenai County owed them a statutory duty pursuant to Idaho Code § 31-

805 and Kootenai County Code § 10-1-3. Idaho Code § 31-805 requires, among other things, the board of county commissioners to "maintain, control and manage public roads, turnpikes, ferries and bridges within the county." I.C. § 31-805. Section 10-1-3 of the Kootenai County Code is contained within the Subdivision Ordinance and provides that the purpose of the ordinance is to "promote and protect the health, safety, and general welfare of the public and to . . . . [p]rovide for orderly development of land. . . . [and p]rovide for adequate and affordable fire, water, sewer, stormwater and other services." Kootenai County Code § 10-1-3B, G; Plaintiffs' Memorandum in Opposition to Defendant's Motion for Summary Judgment, p. 11. The Allens maintain that these statutes were violated when Kootenai County sold the disputed property to the Johnsons. Plaintiffs' Memorandum in Opposition to Defendant's Motion for Summary Judgment, p. 13.

The Allens fail to explain how selling the disputed property violates either code section. Idaho Code § 40-202 governs the designation of highways and public right-of-ways. It provides in pertinent part:

> (2) . . . [A] county with highway jurisdiction or highway district may hold title to an interest in real property for public right-of-way purposes without incurring an obligation to construct or maintain a highway within the right-of-way until the county or highway district determines that the necessities of public travel justify opening a highway within the right-of-way. The lack of an opening shall not constitute an abandonment, and mere use by the public shall not constitute an opening of the public right-of-way.
>
> ***
>
> (5) Nothing in this section shall limit the power of any board of commissioners to subsequently include or exclude any highway or public right-of-way from the county or highway district system.

I.C. § 40-202(2), (5). Moreover, I.C. § 40-1310 grants commissioners of a highway district "exclusive general supervision and jurisdiction over all highways and public right-of-way within their highway system, with full power to construct, repair, acquire,

purchase and improve all highways within their highway system…." I.C. § 40-1310(1).

Establishing a public highway requires action on the part of the county commissioners. *Id.* It is within the discretion of a county to determine whether a roadway is necessary for public use. As stated above, Kootenai County determined that the disputed property was not necessary for county use. *See* Affidavit of Todd Tondee in Support of Defendant's Motion for Summary Judgment, p. 5 ¶ 15. The Allens do not cite to any authority explaining why the acquisition of property previously owned by another would suddenly establish a statutory duty to create a roadway, especially when the disputed property was never platted or dedicated as a public roadway previously. *Id.* at p. 4 ¶ 14.

At oral argument, counsel for Allens stated that Commissioner Tondee was negligent in his investigation, that he, on behalf of Kootenai County, had an obligation to talk to the Worley Highway District. No citation is given for this proposition. Such argument has no merit.

Based on the foregoing, the Court finds Kootenai County did not owe a duty to the Allens.

2. Kootenai County is Entitled to Immunity Under I.C. § 60-904(1).

The ITCA provides exceptions to liability of government entities and their employees who were:

> [A]cting within the court and scope of their employment and without malice or criminal intent . . . for any claim which:
>
> 1. Arises out of any act or omission of an employee of the governmental entity exercising ordinary care, in reliance upon or the execution or performance of a statutory or regulatory function, whether or not the statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a *discretionary function* or duty on the part of a governmental entity or employee thereof, whether or not the discretion be abused.

I.C. § 6-904(1) (emphasis added). Exceptions to the ITCA "must be closely construed." *Grabicki v. City of Lewiston*, 154 Idaho 686, 691, 302 P.3d 26, 31 (2013) (citing *Jones v. City of St. Maries*, 111 Idaho 733, 734, 727 P.2d 1161, 1162 (1986)). To determine whether the discretionary function exception applies, the Court must make two determinations. *Ransom v. City of Garden City*, 113 Idaho 202, 205, 743 P.2d 70, 73 (1984). First, it must determine whether the challenged action is operational or discretionary. *Id.* "Routine, everyday matters not requiring evaluation of broad policy factors will more likely than not be 'operational.' Decisions and actions which involve a consideration of the financial, political, economic, and social effects of a given plan or policy will generally be 'planning' and fall within the discretionary function exception." *Id.* Second, the Court must consider the policies behind the discretionary function exception, which allow governing bodies to perform their duties without being unduly hindered by the threat of liability for tortious actions and to limit the judicial examination of policy decisions entrusted to another branch of government. *Id.* In contrast, "[o]perational activities-activities involving the implementation of statutory and regulatory policy-are not immunized and, accordingly, must be performed with ordinary care. *Jones v. City of St. Maries*, 111 Idaho 733, 736, 727 P.2d 1161, 1164 (1986) (citing *Sterling v. Bloom,* 111 Idaho 211, 229-30, 723 P.2d 755, 773-74 (1986))

Kootenai County maintains it is entitled to immunity under the discretionary function exception pursuant to Idaho Code § 60-904(1) because the decision to sell county property is considered a discretionary function. Memorandum in Support of Defendant's Motion for Summary Judgment, p. 14. The Allens maintain the Kootenai County Board of Commissioners' decision to sell the disputed property was not a policy decision, but rather the implementation of a predetermined policy set by statue; thus,

Allens argue Kootenai County is not entitled to immunity. Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment, p. 14-15.

As this Court discussed above at page sixteen when discussing "odd-lot classification, I.C. § 31-808 is resplendent in its grant to boards of county commissioners the authority to use their *discretion* to sell county property and sets forth the requirements for doing so. The decision whether to sell county property and invoke I.C. § 31-808 requires the board of county commissioners, in making use of that discretion, to make considerations about the financial and economic effects of any such sale. Affidavit of *See* Affidavit of Todd Tondee in Support of Defendant's Motion for Summary Judgment, p. 2 ¶¶ 3-4. As such, the discretionary function exception protects the defendant's policy choices in initially deciding whether to sell property. Once that decision is made, the board of county commissioners must then be performed in compliance with the statutory provisions governing the procedures for selling county property. *See* I.C. § 31-808. This Court finds the decision of the Kootenai County Board of Commissioners' decision to sell this property to be a discretionary function. There can be no other interpretation.

IV. CONCLUSION AND ORDER.

For the reasons set forth above, the Court grants defendant Kootenai County's Motion for Summary Judgment as to the plaintiffs Allens' negligence claims under the ITCA, and determines that the sale of the disputed property was valid under I.C. § 31-808(1). All of Allens' claims against Kootenai County are dismissed.

IT IS HEREBY ORDERED defendant Kootenai County's Motion for Summary Judgment as to the plaintiffs Allens' negligence claims under the ITCA is GRANTED;

IT IS FURTHER ORDERED defendant Kootenai County's Motion for Summary Judgment as to the plaintiffs Allens' claims that Kootenai County breached statutory

requirements is GRANTED;

IT IS FURTHER ORDERED all claims of plaintiffs Allens are DISMISSED with prejudice.

IT IS FURTHER ORDERED the jury trial scheduled for June 2, 2014, is VACATED.

Entered this 1st day of April, 2014.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of April, 2014, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer	**Fax #**	**Lawyer**	**Fax #**
Peter E. Moye	509-456-0146	Peter C. Erbland	664-6338

_____
Jeanne Clausen, Deputy Clerk