STATE OF IDAHO)
County of BONNER)ss

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CLERK OF DISTRICT COURT

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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 BONNER

CITY OF SANDPOINT, a Municipal Corporation of the State of Idaho, *Plaintiff*, vs. **INDEPENDENT HIGHWAY DISTRICT, a political subdivision of the State of Idaho,** *Defendant*.	Case No. **BON CV 2013 1342** **MEMORANDUM DECISION AND ORDER DENYING DEFENDANT'S MOTION TO DISMISS**

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on the Motion to Dismiss filed by defendant Independent Highway District (IHD) on September 9, 2013.

On August 15, 2013, plaintiff City of Sandpoint (City) filed this lawsuit alleging a breach of contract claim against IHD for an alleged failure to perform an obligation under a 2003 contractual agreement between the two entities. The 2003 contractual agreement was a "Joint Powers Agreement," which had settled about a decade of litigation between the two parties.

The original dispute that eventually led to the settlement agreement began in the 1990s, when City and IHD in a different lawsuit brought to the district court the question of which entity was responsible for street maintenance within common boundaries. Although the district court declared the parties' respective responsibilities, the district court's decision was appealed and the district court's holding was vacated on appeal

because the Idaho Supreme Court held the district court erred in exceeding the permissible scope of a cross-claim. *City of Sandpoint v. Sandpoint Independent Highway Dist.*, 126 Idaho 145, 148, 879 P.2d 1078, 1081 (1994). The Idaho Supreme Court found that Highway District had general authority to maintain the streets absent a showing by the City that it has a functioning street department. 126 Idaho 145, 150-51, 879 P.2d 1078, 1083-84.

In 2000 the City established a street department of its own and brought suit again, which resulted in two decisions from the Idaho Supreme Court in 2003. The City sought a declaratory judgment that, because of its functioning street department, the City had exclusive general supervisory authority over street maintenance, construction, snow removal, etc. within the City. *City of Sandpoint v. Sandpoint Independent Highway Dist.*, 139 Idaho 65, 66-67, 72 P.3d 905, 905-07 (June 19, 2003). The City also sought to enjoin the IHD from exercising supervisory authority over the City's streets, and from levying any real property within the City. 139 Idaho 65, 67, 72 P.3d 905, 907. On summary judgment, the district court held the City had a functioning street department and therefore had control over the public streets within the City. *Id.* This decision was certified as a partial summary judgment and appealed. *Id.* Interpreting the relevant statutes, the Idaho Supreme Court reversed, holding: "There is no indication that the legislature intended that a city included within an existing highway district could exclude its streets from the highway district simply by creating a city street department capable of assuming the maintenance, construction, repair, snow removal, sanding and traffic control of city streets." 139 Idaho 65, 70, 72 P.3d 905, 910. The Idaho Supreme Court held the City was required to follow statutes that provided

procedures for lawful termination of a Highway District's authority within a city's boundaries. *Id.*

In the counterpart decision issued earlier that month, the Idaho Supreme Court held that the City could not be the succeeding operational unit to a dissolved highway district. *Sandpoint Independent Highway Dist. v. Board of County Commissioners*, 138 Idaho 887, 892, 71 P.3d 1034, 1039 (June 4, 2003). The Idaho Supreme Court reached this conclusion by a plain reading of the statutes that address the dissolution funds and property of a highway district. *Id.* The Idaho Supreme Court held that, because the statute prohibited surplus funds of a dissolved district to go to a city and no statute prescribed where the money would go if not to the successor, the City, therefore, could not be the successor to a dissolved highway district. *Id.*[1]

The contract at issue was the result of a settlement entered into July 3, 2003, after these last two Idaho Supreme Court decisions but before the Board of County Commissioners set a date for a dissolution election. Complaint, Exhibit A, p. 3. The Stipulation for Settlement is attached as Exhibit A to the Complaint. The parties entered into it upon general agreement that further litigation was not in the best interest of the public. *Id.,* p. 4. This contract entitled, "Joint Powers Agreement between the City of Sandpoint and the Sandpoint Independent Highway District", was dated July 8, 2003, and is attached to the verified complaint. Complaint, Exhibit B, p. 1.

The Joint Powers Agreement was intended to be a permanent resolution as it stated, under the heading "Duration": "The duration of this agreement shall be

[1] The Court was also asked to interpret Idaho Code § 40-1805 to determine what "district" meant for the commissioners' determination that dissolving the highway district "would be to the best interest of the district." *See Sandpoint Independent Highway Dist. v. Board of County Commissioners*, 138 Idaho 887, 890 (2003). The Court held that the "best interests of the district" meant "consideration of geographical area and the interests of the people living in the district." *Id.* at 891.

perpetual or until such time as the District and the City jointly and together agree to amend or terminate the same". *Id.* The City would assume responsibility for all of the streets within its limits. *Id.* The IHD promised to pay the City all ad valorem property tax funds from levies of properties within the City limits. *Id.,* p. 3. In return, the City, which had jointly petitioned for the IHD's dissolution election, would request the Bonner County Board of Commissioners to vacate the dissolution election and dismiss the action with prejudice. *Id.,* p. 5. The parties stipulated that the Joint Powers Agreement could only be terminated by mutual agreement of both parties. *Id.,* pp. 1, 4.

In this case, the City has brought an action alleging IHD has breached the agreement by unilaterally terminating it and withholding funds that the City alleges it needs to operate its street department. Complaint, p. 8. The City alleges that on July 11, 2013, the IHD notified the City that they were withholding funds and were not going to perform a material term of the agreement. *Id.,* ¶ 40.

On September 9, 2013, IHD filed its Motion to Dismiss, and on October 11, 2013, IHD filed its "Brief in Support of Motion to Dismiss." On November 7, 2013, City filed its "Plaintiff's Response to Defendant's Motion to Dismiss." On November 12, 2013, IHD filed its "Reply Brief in Support of Defendant's Motion to Dismiss." Oral argument was held on November 13, 2013. IHD' Motion to Strike was granted. IHD's Motion to Dismiss was taken under advisement at the end of that hearing.

II. STANDARD OF REVIEW.

An I.R.C.P. 12(b)(6) motion to dismiss for "failure to state a claim upon which relief can be granted" must be considered against the I.R.C.P. 8(a) requirement that a complaint contain a "short and plain statement of the claim showing that the pleader is entitled to relief." I.R.C.P. 12(b)(6); 8(a)(1); *Harper v. Harper*, 122 Idaho 535, 536, 835

P.2d 1346, 1347 (Ct.App. 1992). In motions to dismiss, the Court is to look only at the pleadings and view all inferences in favor of the non-moving party. *Young v. City of Ketchum,* 137 Idaho 102, 104, 44 P.3d 1157, 1159 (2002) (regarding 12(b)(6) motions); *Osborn v. United States,* 918 F.2d 724, 729 n. 6 (8th Cir. 1990) (regarding 12(b)(1) motions raising facial challenges to jurisdiction); *Serv. Emp. Intern. V. Idaho Department of Health and Welfare,* 106 Idaho 756, 758, 683 P.2d 404, 406 (1984 (regarding 12(b) challenges generally). "The nonmoving party is entitled to have all inferences from the record viewed in his favor and only then may the question be asked whether a claim for relief has been stated." *Idaho Branch Inc. of Associated General Contractors of America, Inc. v. Nampa Highway Dist. No. 1*, 123 Idaho 237, 240, 846 P.2d 239, 242 (Ct. App. 1993); *see also Independent School Dist. of Boise City v. Harris Family Ltd. Partnership*, 150 Idaho 583, 587, 249 P.3d 382, 386 (2011). Complaints should not be dismissed under I.R.C.P. 12(b) unless the non-moving party can prove no set of facts which would entitle him to relief. *Dumas v. Ropp,* 98 Idaho 61, 62, 558 P.2d 632, 633 (1977). And any doubts must be resolved in favor of the survival of the complaint. *Gardner v. Hollifield,* 96 Idaho 609, 610-11, 533 P.2d 730, 731-32 (1975). An I.R.C.P. 12(b)(6) motion to dismiss may be granted "when it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle the plaintiff to relief." *Harper*, 122 Idaho at 536, 835 P.2d at 1347 (Ct. App. 1992) (internal quotations omitted).

III. ANALYSIS.

A. Introduction.

IHD makes five arguments as to why the agreement entered into was unlawful. First, IHD argues the Joint Powers Agreement constitutes an indebtedness that IHD

has incurred in violation of Article VIII, Section 3 of the Idaho Constitution. Second, IHD argues I.C. §40-801 requires an equal division of ad valorem property taxes between the City and IHD, and in the Joint Power Agreement IHD promised to pay the City *all* ad valorem property tax funds from levies of properties within the City limits; therefore, since the agreement does not provide an equal division it is in violation of that statute and an unlawful agreement. Third, IHD argues the agreement is unlawful under the Joint Powers Act because there is no termination provision. Fourth, IHD argues the agreement is unlawful because it was intended to last in perpetuity and Idaho courts disfavor such contract provisions. Finally, IHD argues the contract is void because there was no consideration.

Based on these arguments, IHD asks the Court to dismiss this case on the grounds that the contract was illegal and therefore the City has asserted no claim upon which relief can be granted.

Of concern to the Court is the fact that the parties have obviously considered this to be a binding agreement for the past ten years. Apparently, IHD recently received legal advice indicating there are legal arguments to be made as to the legitimacy of that agreement. Obviously, the City relies on these revenues being paid from IHD to the City each year. Rather than IHD bringing a declaratory action against the City where the IHD would continue to pay the City under the contract until those legal arguments are decided by a court, IHD instead chose to simply not pay the under the agreement, leaving the City in the lurch financially and forcing the City to sue IHD.

B. Positions of the Parties and Analysis by the Court.

1. Indebtedness in Violation of the Idaho Constitution.

IHD argues this agreement constitutes an indebtedness and violates Article VIII, Section 3 of the Idaho Constitution. Brief in Support of Motion to Dismiss, p. 4. That

section prohibits a political subdivision from incurring any indebtedness or liability that exceeds what the subdivision can satisfy in a year without the assent of two-thirds of the qualified electors. IHD argues the agreement constitutes an obligation, or liability, on the part of IHD, where if the levy amount were $350,000 and the agreement lasted twenty years, it would create a $7 million dollar liability. *Id.,* p. 9.

The City argues, "This case does not involve a debt." Plaintiff's Response to Defendant's Motion to Dismiss, p. 12. The City claims, "This case is about how the District has agreed to 'divide' the funds it statutorily has available annually to meet its statutory duty to maintain the streets in its boundaries." *Id.* The City notes I.C. § 40-801(a) gives the IHD the power to levy a tax, and if that levy is made upon property within an incorporated city, then 50% of the funds are apportioned to that incorporated city. *Id.* The City argues that it obviously is not unconstitutional up to that point, as that is what the statute requires and the statute has never been held to be unconstitutional. *Id.,* pp. 12-13. Simply because IHD contractually agreed in the Joint Powers Agreement to go over the 50% and give all funds taxed to the City does not make the agreement unconstitutional. The City argues the disbursement from IHD to the City each year is not a debt, the IHD receives revenues from the taxpayers and has contractually agreed to pay all those revenues to the City. *Id.,* p. 13. The City notes the Idaho Supreme Court held a municipality does not violate the constitutional prohibition on indebtedness when it pays expenses out of revenue for that year, citing *Ball v. Bannock County,* 5 Idaho 602, 51 P. 454, 455 (1897). *Id.,* p. 14. The City argues, "Here, the District's disbursements to the City pursuant to the JPA are limited to a portion of that year's revenues, as no disbursement will ever require funds beyond what the District has already collected." *Id.* The City correctly notes the cases cited by IHD

(*City of Boise v. Frazier,* 143 Idaho 1, 137 P.3d 388 (2006); *Feil v. City of Coeur d'Alene,* 23 Idaho 32, 129 P. 643 (1912); and *City of Idaho Falls v. Fuhriman,* 149 Idaho 574, 237 P.3d 1200 (2010)) all deal with municipal purchases of systems or goods from private parties that necessarily require the municipality to incur liabilities beyond the current year and for which the municipality would be liable from its general revenues, where "In contrast, this case deals only with contingent periodic disbursements from the District to fulfill its statutory duty to maintain City roads." *Id.,* pp. 14-15.

IHD's reply argument, in its entirety is as follows:

> It is the Idaho Supreme Court that interprets the Idaho Constitution…not the courts of California, Washington, or any other state. In its brief, the City has virtually ignored the Idaho Supreme Court decisions interpreting Article 8, Section 3. Instead, the city has cited to and quoted from court decisions from California and other states. Apparently, the City has been unable to find Idaho authority to contradict the analysis of Article 8, Section 3 contained in IHD's initial brief. Based upon Idaho case law, the JPA clearly creates an illegal liability or indebtedness in violation of Article 8, Section 3.

Reply Brief in Support of Defendant's Motion to Dismiss, p. 9. The Court finds this argument by IHD to the points made by the City, to be disingenuous, and unpersuasive. The IHD completely ignores the fact that *Frazier, Feil,* and *Fuhriman* are all cases involving municipal **purchases** of systems or goods from private parties that required the municipality to incur liabilities beyond the current year and for which the municipality would be liable from its general revenues**, and those are simply not the facts in this case.** The present case concerns contingent periodic disbursements from the District, half of which are to fulfill its statutory duty to maintain City roads, the other half are to fulfill its contractual duty to pay the City under the Joint Powers Agreement.

The Court must deny IHD's motion to dismiss on this basis because the case law cited by IHD simply does not apply to this case. The Idaho Constitution limits the manner in which a county or municipality may incur indebtedness:

> No…subdivision…shall incur any…liability…exceeding in that year, the income and revenue provided for it for such year, without the assent of two-thirds of the qualified electors thereof voting at an election to be held for that purpose….

Constitution of the State of Idaho, Article 8, Section 3. "[A] city may anticipate both the income and revenue provided for it for such year, and incur debts or liabilities against the city which can be met and discharged out of the aggregate income and revenue for that year." *Charles Feil v. City of Coeur d'Alene*, 23 Idaho 32, __, 129 P.643, 650 (1912); *see also City of Idaho Falls v. Fuhriman*, 149 Idaho 574, 580, 237 P.3d 1200, 1206 (2010) (holding that the liability incurred by a power sales agreement exceeded the income in the year that it was incurred, and that it was the type of expenditure that needed the assent of two-thirds of the voting electorate); *City of Boise v. Frazier*, 143 Idaho 1, 7, 137 P.3d 388, 394 (2005) (holding that this constitutional provision prohibited the city from entering into a lease agreement for the expansion of airport parking facilities absent a public vote that authorized the expense); *Miller v. City of Buhl*, 48 Idaho 668, 284 P. 843, 845 (1930) (prohibiting a city from incurring a debt to purchase an electric-generating system); *Feil v. City of Coeur d'Alene*, 23 Idaho 32, __, 129 P.643, 652 (1912) (holding that a bond funding $180,000 to fund a waterworks system would create a liability against the city and was therefore invalid under this constitutional provision without a vote). *Feil* and *Miller* were cases where expenses were invalidated because neither fell into a special fund exception (i.e., bonds paid by revenue from the services of the plant that was financed by the bond), but this later became an exception that was amended into Article 8, § 3. *See Asson v. City of Burley*, 105 Idaho 432, 439, 670 P.2d 839, 846 (1983). A contract that violates this section is void and cannot be enforced. *See Deer Creek Highway Dist. v. Doumecq Highway Dist.*, 37 Idaho 601, __, 218 P. 371, 372 (1923). IHD argues the Joint Powers

Agreement is illegal because it falls under a "liability" and that, because a twenty-year view of this agreement would demonstrate that the Highway District has indebted itself upwards of $7 million, it has taken on more indebtedness than it can pay. This is simply not true when looking at the plain meaning of the statute.

"[T]he statutory rules of construction apply to the interpretation of constitutional provisions." *Sweeney v. Otter*, 119 Idaho 135, 138, 804 P.2d 308, 311 (1990) (citing *Lewis v. Woodall*, 72 Idaho 16, 18, 236 P.2d 91, 93 (1951)). "Liability" means "the state of being bound or obligated in law or justice to do, pay, or make good something." *Feil v. City of Coeur d'Alene*, 23 Idaho 32, __ 129 P. 643, 649 (1912) (relying on this definition and other comparable definitions of "liability"). Because IHD has obligated itself to pay a percentage of the annual revenue it collected on ad valorem taxes, it did incur a liability. However, the liability does not exceed the income received a year. The IHD has apportioned a portion, or a percentage of the revenue collected; the portion that the City receives only reflects the percentage of the revenue that is generated from the property located within the city. So long as the IHD's boundaries equal or exceed the City's boundaries, the IHD will always receive more revenue than what it has apportioned the City each year because it will receive levies from property in the City limits as well as levies from property outside the City limits. Because the IHD has not incurred a liability that exceeds its revenue, the Court must deny IHD's motion to dismiss upon this basis.

2. Legality of Contract Under Idaho Code § 40-801.

IHD argues I.C. §40-801 governs distribution of ad valorem taxes levied within city limits. Brief in Support of Motion to Dismiss, pp. 10-11. Under that statute, half of the funds for property within the limits of an incorporated city are apportioned to the city. IHD argues that by entering into an agreement which provides for anything other than

an even split of levies between IHD and the City, violates the division of the levy as mandated by I.C. §40-801. IHD argues the Joint Powers Agreement is illegal and thus void and unenforceable, citing *City of Meridian v. Petra, Inc.*, 154 Idaho 425, __ 299 P.3d 232, 252 (2013); *Miller v. Haller*, 129 Idaho 345, 351, 924 P.2d 607, 613 (1996) ("The general rule is that a contract prohibited by law is illegal and hence unenforceable."). *Id.* p. 11. IHD argues, "The statutory 50/50 tax distribution ratio is mandatory", because the statute uses the word "shall" not "may". *Id.* IHD argues, "The statue does not authorize a 75/25 split or a 100/0 split." *Id.* For this proposition, IHD cites *Rexburg v. Madison County,* 115 Idaho 88, 764 P.2d 838 (1988). *Id.*

The City correctly points out *City of Rexburg* does not support IHD's argument that I.C. §40-801 does not permit anything other than a 50/50 tax distribution ratio as that case dealt with an inadvertent decimal point error, where the City of Rexburg received only 5% rather than the statutory 50% revenue. Plaintiff's Response to Defendant's Motion to Dismiss, pp. 10-11. This Court finds the Idaho Supreme Court in *City of Rexburg* did not address whether a disbursement greater than 50% would have violated the statute; it simply held the county in that case had duty to allocate at least the 50% under that statute. 115 Idaho 88, 89-90, 764 P.2d 838, 839-90.

Idaho Code §40-801(1)(a) reads:

> **40-801. Authority and procedure for levies.** (1) The commissioners of a county highway system, the commissioners of a county-wide highway district, and the commissioners of highway districts are empowered, for the purpose of construction and maintenance of highways and bridges under their respective jurisdictions, to make the following highway ad valorem tax levies as applied to the market value for assessment purposes within their districts:
> (a) Two-tenths per cent (0.2%) of market value for assessment purposes for construction and maintenance of highways and bridges; provided that if the levy is made upon property within the limits of any incorporated city,

> fifty per cent (50%) of the funds shall be apportioned to that incorporated city.

The Idaho Supreme Court in *City of Rexburg* made it clear that Madison County had a "statutory duty" (and specifically not a duty "based in common law, contact, or any other theory of law") to pay the City of Rexburg the amounts due under I.C. §40-801. 115 Idaho 88, 89-90, 764 P.2d 838, 839-90. *City of Rexburg* makes it clear that the county has a statutory duty to pay the city the amount due under I.C. §40-801. *Id.* The word "shall" in I.C. §40-801 applies to IHD's statutory duty to pay City 50% of revenues raised by taxes on property owners within the City of Sandpoint. *City of Rexburg* makes it clear this statutory duty of paying revenues is mandatory under the statute, and must be in the statutory amount of 50% of revenues, and in that case the mispayment of .5% was a breach of that statutory duty. This Court can find nothing in *City of Rexburg* or in I.C. §40-801 that prohibits a county from contractually agreeing to pay more than the statutory amount. This Court finds IHD's argument "IHD cannot alter the statutory apportionment of tax revenue set forth in I.C. §40-801" to be completely without merit. Reply Brief in Support of Defendant's Motion to Dismiss, p. 8. There is nothing in I.C. §40-801 which prohibits the highway district from allocating the remaining revenues (those above the statutorily mandated 50%) to a city by agreement.

IHD's argument that the statutory language "fifty per cent (50%) of the funds shall be apportioned" means that the defendant cannot legally apportion more than fifty percent to the City, is a strained interpretation which this Court simply cannot make. "Judicial interpretation of a statute begins with an examination of the statute's literal words." *State, Dept. of Transp. v. HJ Grathol*, 153 Idaho 87, 91, 278 P.3d 957, 961 (2012); *State v. Burnight*, 132 Idaho 654, 659, 978 P.2d 214, 219 (1999). Statutes are interpreted by their plain and express meaning. *HJ Grathol*, 153 Idaho at 91, 278 P.3d

at 961. A rational and obvious meaning of a statute is always preferred to any curious, narrow, hidden sense. *Walker v. Hensley Trucking*, 107 Idaho 572, 691 P.2d 1187 (1984). A court will resort to judicial construction "only if the statute is ambiguous, incomplete, absurd, or arguably in conflict with other laws." *Arel v. T & L Enterprises, Inc.*, 146 Idaho 29, 32, 189 P.3d 1149, 1152 (2008).

A plain reading of Idaho Code § 40-801 is that a highway district owes a city 50% of ad valorem statutes within city limits. The statute does not designate what is to be done with the other fifty percent. Thus, interpreting the 50% amount as a minimum amount is much more logical than to interpret such as a limit.

IHD's argument that this 50% amount is a limit ignores the powers given to highway commissioners. "[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 District*, 126 Idaho 145, 150 (1994). Idaho Code § 40-1310 outlines the powers of the highway district commissioners, among which includes the following:

> The commissioners of a highway district have exclusive general supervision and jurisdiction over all highways and public rights-of-way within their highway system, with full power to construct, maintain, repair, acquire, purchase and improve all highways within their highway system, whether directly or by their own agents and employees or by contract… The highway district shall have power to manage and conduct the business and affairs of the district; establish and post speed and other regulatory signs; make and execute all necessary contracts; have an office and employ and appoint agents, attorneys, officers and employees as may be required, and prescribe their duties and fix their compensation. Highway district commissioners and their agents and employees have the right to enter upon any lands to make a survey, and may locate the necessary works on the line of any highways on any land which may be deemed best for the location.

I.C. §40-1310(1). A plain reading of this statute illustrates that the commissioners have the power to contract for services and to conduct its own business. Therefore, the

commissioners have discretion of what to do with its funds, including the discretion to give a city the other fifty percent above what it is required so that the city may maintain the roads. To read the fifty-percent apportionment to be a limit upon which the commissioners may not exceed would put ITD's reading of I.C. §40-801 in conflict with the powers set forth in I.C. §40-1310(1). To hold otherwise would limit the Commissioners' discretion of how to spend the other 50 percent of the taxes collected. Interpreting the fifty-percent apportionment as a minimum creates no such conflict. Thus, this Court's interpretation is I.C. §40-1310(1) mandates IHD to pay a minimum fifty percent of ad valorem city taxes to the city and IHD has the discretion on how to use the other half of its funds. IHD chose ten years ago, with the advice of counsel, to contractually agree the remaining fifty percent goes to the City as well, and that is not prohibited under § 40-801, and thus, the agreement is not illegal. IHD's motion to dismiss on this ground must be denied.

3. Legality under the Joint Powers Act.

IHD argues that the agreement is unlawful under the Joint Powers Act (JPA), I.C. §67-2326 *et seq*. Brief in Support of Motion to Dismiss, pp. 11-13. IHD argues JPA mandates an agency cannot delegate away or exceed its statutory or constitutional authority when entering into a joint agreement. I.C. § 67-2328. *Id.,* p. 12. Additionally, IHD argues there must be a termination clause and there is no termination because the contract states that it will be "perpetual." *Id.* IHD also argues that the provision stating that the agreement may terminate by "mutual agreement" is not a termination provision; rather, the IHD argues that it functions as a prohibition of termination unless there can be a mutual agreement. *Id.* The defendant argues that because the City receives

benefits in excess of what the statute authorizes, the City will never have an incentive to terminate the agreement. *Id.,* p. 13.

City argues:

> The District's contention that the JPA is void for want of an effective termination clause is misguided. I.C. § 67-2328 requires, "Any such agreement shall specify the following: (1) Its duration." The plain meaning of the statue does not require duration of a specific number of months or years. The JPA satisfies the Act's duration requirement by providing express terms of the JPA's duration, and an additional vehicle for its termination upon certain dissolving acts. The Parties did not leave any room for ambiguity when they mutually agreed on the JPA term to meet the mutual obligation to maintain City streets:
>
> > DURATION: The duration of this [A]greement shall be perpetual or until such time as the District and the City jointly and together agree to amend or terminate the same.
>
> (Complaint, Ex. B) The JPA further provides:
>
> > DISSOLUTION: This JPA will automatically terminate if the District is dissolved. It will also terminate if the City supports any future petition for dissolution of District.

Plaintiff's Response to Defendant's Motion to Dismiss, p. 17.

A joint powers agreement must specify the following:

> (1) Its duration.
> (2) The precise organization, composition and nature of any separate legal or administrative entity created thereby together with the powers delegated thereto, provided such entity may be legally created.
> (3) Its purpose or purposes.
> (4) The manner of financing the joint or cooperative undertaking and of establishing and maintaining a budget therefore.
> (5) The permissible method or methods to be employed in accomplishing the partial or complete termination of the agreement and for disposing of property upon such partial or complete termination.
> (6) Any other necessary and proper matters.

I.C. § 67-2328(c). This Court agrees with the City that the statutory mandate of I.C. § 67-2738 has been satisfied, the agreement's "duration" is "perpetual." The duration is not unknown, it is perpetual. The fact that IHD ten years later regrets entering into that agreement is of no import. This Court also agrees that there is a method of termination, and that is "mutual agreement." There is no Idaho appellate

court precedent on Idaho Code § 67-2328 which interprets "duration" and "method of termination." The language must be given its plain meaning. Given the plain meaning of "duration" and "method of termination", those requirements have been met.

The Joint Powers Act allows for state or public agencies to exercise their powers jointly provided each has power over the common subject matter. I.C. § 67-2328(a). IHD is correct that neither entity may exceed its authority and that a joint power agreement must address some specific provisions. *Id.* The Court's decision above that IHD has not violated the Idaho Constitution in entering into this agreement thus effects this Joint Powers argument raised by IHD. Had the Court bought IHD's argument that IHD had indebted itself in violation of the Idaho Constitution, then the agreement would also be unlawful under the Joint Powers Act. However, as this Court holds there is no violation of the Idaho Constitution and IHD acted in a constitutionally permissible way, then this secondary argument by IHD must be rejected as well.

Additionally, for the same reasons discussed in the next section, the argument that perpetual contracts are in violation of public policy are, best case for IHD at this juncture, not a basis for granting a motion to dismiss because a court must consider factual circumstances, which would require an examination of evidence outside the pleading. In any event, IHD's motion to dismiss on this ground must be denied.

4. Invalidity Because of Perpetuity.

IHD argues Idaho courts disfavor perpetual agreements. Brief in Support of Motion to Dismiss, pp. 13-14. IHD cites *Barton v. State*, 104 Idaho 338, 659 P.2d 92 (1983). *Id.,* p. 13. IHD notes in that case the Idaho Supreme Court declined to read a contract as containing a perpetuity clause which would have bound the State of Idaho Transportation Department. 104 Idaho 338, 340, 659 P.2d 92, 94.

City is correct that *Barton* is "… particularly distinguishable, as the court there was asked to infer an **intent** for the state to be perpetually bound by a purported JPA." Plaintiff's Response to Defendant's Motion to Dismiss, p. 18. (bold in original). What the Idaho Supreme Court actually wrote is, "Where a contract is not expressly made perpetual by its terms, construction of such contract as perpetual is disfavored." 104 Idaho 338, 340, 659 P.2d 92, 94, citations omitted. In the present case, IHD and City specifically agreed the duration was "perpetual." There is nothing about that term which is ambiguous. Thus, the implication under *Barton* is where the parties expressly agree the duration of the agreement is "perpetual", the Court should not look upon that agreement with disfavor. In *Barton*, the Idaho Department of Transportation entered into an agreement with a landowner where the State would provide access to the owner's business properties and purchase her land at $1,000. 104 Idaho 338, 339, 659 P.2d 92, 93. In return, the landowner agreed to forebear from legal action and to encourage other landowners who were dealing with the Department of Transportation to be reasonable in their dealings. *Id.* The contract did not address how long this arrangement would continue, and in 1977, the Department of Transportation closed the access points. *Id.* The Idaho Supreme Court refused to imply that the contract was perpetual absent clear indication that the parties intended to be perpetually bound: "Where a contract is not expressly made perpetual by its terms, construction of such contract as perpetual is disfavored." 104 Idaho 338, 340, 659 P.2d 92, 94. Again, the Idaho Supreme Court's statement only disfavors interpreting a contract to be perpetual when the contract is *silent* as to duration. When there is express language that a contract is intended to be perpetual, this holding suggests that the Idaho Supreme Court would uphold such an express provision.

In any event, the Court must deny the motion to dismiss on this basis because even if the contract is against public policy (which the Court does not find), the Court must determine a reasonable time for performance, and this determination requires factual findings that are outside of the pleadings. *Barton*, 104 Idaho 338, 341, 659 P.2d 92, 95. A court determines "reasonable time" by examining "the subject matter of the contract, the relationship of the parties and the circumstances surrounding the transaction." *Id.* In addition to a reasonable time of performance, a party must also give reasonable notice of its intent to terminate the contract. *Id.* In *Barton*, the Court held that twenty-two years of performance under the contract between the Idaho Department of Transportation and the landowner was reasonable. *Id.*

5. Idaho Code §40-1333.

IHD argues I.C. § 40-1333 requires cities which have city highway systems, shall be responsible for the maintenance of highways in their system, except as provided in I.C. § 40-607; and cities may make agreements with a highway district to do the city work, but the city shall compensate the district for any work performed. Brief in Support of Motion to Dismiss, p. 14. IHD argues: "The Idaho legislature has established a clear policy that a city must use its own revenues to maintain city streets and may not use highway district revenues to do so, except as provided in I.C. §40-801." *Id.* The IHD then claims "If a highway district constructs or maintains a city street, the city must repay the highway district for all expenditures made within the city by the highway district." *Id.* While that is an accurate summary of I.C. $40-1333, it has nothing to do with the facts of this case, because IHD has not counterclaimed against the City to recompense IHD for maintenance work IHD has performed for the City In its briefing,

the City did not respond to IHD's argument under I.C. § 40-1333. The Court finds IHD's argument under I.C. § 40-1333 to have no merit.

6. Sufficient Consideration.

Finally, IHD argues that there was no consideration for IHD providing 100% of its *ad valorem* property taxes. Brief in Support of Motion to Dismiss, pp. 14-15. This Court finds this argument by IHD is especially inapt. As pointed out by the City, the Joint Powers Agreement itself recited mutual consideration, as it ended all the protracted litigation. Plaintiff's Response to Defendant's Motion to Dismiss, pp. 20-21; citing Complaint, Exhibit A. The City correctly notes:

> The JPA is the result of the Parties' Stipulation for Settlement ("Settlement"), entered into July 3, 2003. (Complaint, Ex. A) By its terms, the Settlement grants the City jurisdiction over city streets, requires the formation of a the JPA, compels the City to vacate its petition for a dissolution election, requires dismissal of the civil case with prejudice, requires the City to not oppose future annexation elections sought be the District, and stipulates that the District waives its costs awarded on appeal by the Idaho Supreme Court in Docket No. 27441. (Complaint, Ex. A)

Plaintiff's Response to Defendant's Motion to Dismiss, p. 20. The City also correctly notes:

> This Court approved the Settlement. The Idaho Court of Appeals recently held that a settlement, the terms of which are incorporated into a court order, does not need additional consideration to be effective. *Davidson v. Soelberg,* 154 Idaho 227, 296 P.3d 433, 438 (Ct.App. 2013). The same rationale should apply here, where the Parties provided mutual consideration in the settlement, a part of which was the exercise of their rights under I.C. §67-2326, et seq.

Id., p. 21. IHD did not respond to the City's arguments in its Reply Brief in Support of Defendant's Motion to Dismiss.

A contract that contains no consideration is illusory and therefore unenforceable. There is consideration in the present case because the IHD has agreed to pay money and the City has agreed to forbear its legal efforts to dissolve the IHD. An agreement

must have consideration, a benefit of the bargain, in order to be enforceable. *Weisel v. Beaver Springs Owners Ass'n, Inc*, 152 Idaho 519, 526, 272 P.3d 491, 498 (2012). Here, consideration is not an issue. According to the agreement, the City benefited because it received the responsibility to maintain its own streets in addition to funds to do so. The Highway District benefitted because the City ceased its pursuit to legally dissolve the Highway District within Bonner County. There was consideration and therefore the motion to dismiss must be denied under this argument.

7. Estoppel.

The City correctly notes:

> The District is taking a position contrary to which it agreed when it entered into the JPA, and consented to this Court's Order. It was the Court's dismissal based on the stipulation that permitted the JPA.

Plaintiff's Response to Defendant's Motion to Dismiss, p. 22. The City then argues, "As a matter of equity, the District is either judicially estopped from reversing its position taken in open court, or is equitably estopped from harming the City by reversing its position. *Id.* IHD argues "Estoppel does not save a Constitutionally Invalid Agreement." Reply Brief in Support of Defendant's Motion to Dismiss, pp.14-20. Because this Court does not find the Joint Powers Agreement to be Constitutionally invalid, there is no need to discuss the judicial estoppel or equitable estoppel arguments.

IV. CONCLUSION AND ORDER.

The complaint here has been sufficiently pleaded. For that reason alone, IHD's motion to dismiss under I.R.C.P. 12(b)(6) for "failure to state a claim upon which relief can be granted" must be denied. Claims grounded in a breach of contract are sufficiently pleaded if they allege the formation of a contract, the obligations under the contract, the right of the plaintiff pursuant to the contract, and the breach by the defendant. *See State ex rel. Robins v. Clinger*, 72 Idaho 222 (1951). In this case, City

has alleged an agreement between it and IHD, has alleged City's agreed-upon right to share in the ad valorem taxes collected by IHD, and has alleged IHD's breach in withholding those funds. Because City has alleged all of the elements of a breach of contract claim, IHD's motion to dismiss must be denied.

Additionally, when an illegal contract is alleged, the Court might have an affirmative duty to examine the legality of the contract when it appears in the pleading through a verified complaint. It is generally not appropriate for a court to consider affirmative defenses in considering a motion to dismiss at the pleading stage of litigation. *See Gardner v. Hollifield*, 96 Idaho 609, 611 (1975). There are exceptions, however. One exception is when an affirmative defense appears on the face of the complaint itself. *Gardner v. Hollifield*, 96 Idaho 609, 611 (1975). Another exception, raised in contract-related defenses, is whether the alleged agreement is illegal. "The illegality of a contract can be raised at any stage in litigation. In fact, the court has the duty to raise the issue of illegality *sua sponte*." *Farrell v. Whiteman*, 146 Idaho 604, 608 (2009)(citing *Trees v. Kersey*, 138 Idaho 3, 6 (2002). Illegal contracts constitute questions of law for the court. *Trees v. Kersey*, 138 Idaho 3, 6 (2002). Here, the verified complaint has attached a copy of the contract, so the contract itself is part of the proceedings and the illegality would be evident from the face of the contract. Additionally, the defendant has questioned the contract's legality. Based on the affirmative duty of a court to evaluate the illegality of the contract, based on the contract that is part of the verified complaint, and based on the defendant's challenge of the contract's legality, this Court may proceed to make a determination of the legality of the contract in the record in deciding whether to dismiss the complaint.

As this Court's decision above shows, this Court has analyzed the merits of whether the contract is illegal as made in the arguments by IHD. Because the agreement is attached to the Complaint and is part of these proceedings, the Court can make determinations regarding the legality of the contract, and has done so. Based on the above reasons, the Court must deny the motion to dismiss on all the arguments presented by IHD.

IT IS HEREBY ORDERED the defendant IHD's Motion to Dismiss is DENIED in all aspects.

Entered this 9th day of December, 2013.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of December, 2013, 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 #**
Scot R. Campbell	208 255 1368	C. Matthew Andersen	208 765-2121
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_____
Jeanne Clausen, Deputy Clerk