IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

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; and JOHN DOES 1-50, whose true names are unknown Plaintiffs, vs. CITY OF HAYDEN, an Idaho municipality Defendant.	CASE NO. CV-12-2818 MEMORANDUM DECISION ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

The hearing on the parties' cross-motions for summary judgment was held on February 16, 2016, before the Honorable Cynthia K.C. Meyer. Defendant was represented by Christopher H. Meyer of GIVENS PURSLEY, LLP. North Idaho Building Contractors Association was represented by Jason Risch of RISCH ♦ PISCA, PLLC. Defendant's Motion for Summary Judgment is denied. Plaintiff's Motion for Summary Judgment is granted.

I. FACTS AND PROCEDURAL HISTORY

This case arises from a fee charged by the City of Hayden ("Defendant") to connect users to the city sewer system. Plaintiff's Memorandum After Remand ("Plaintiff's Memorandum") at

2. The fee was challenged by the North Idaho Building Contractors Association ("Plaintiff") based on whether Defendant could raise revenue through the fee to expand the existing sewer system. *Id*. Defendant filed a Motion for Summary Judgment in October of 2012 and the motion was heard before the Honorable Benjamin Simpson on March 19, 2013.

Defendant was granted summary judgment and Plaintiff appealed the decision to the Idaho Supreme Court on October 23, 2013. The Supreme Court vacated the grant of summary judgment and remanded the case for further proceedings on February 27, 2015. *North Idaho Bldg. Contractors Ass'n v. City of Hayden ("NIBCA")*, 158 Idaho 79, 343 P.3d 1086 (2015). A scheduling conference was held in front of the Honorable Carl Kerrick on May 19, 2015. At that scheduling conference Plaintiff argued the Supreme Court's decision was dispositive of the case and remand was made only for class certification and damages. Oral Argument May 19, 2015, at 03:06. Defendant characterized the decision of the Idaho Supreme Court as affirming the purpose of the fee, while finding that the methodology was flawed. *Id*. at 03:08. Judge Kerrick requested that both parties brief their position as to the posture of the case. *Id*. at 03:18.

After this Court received briefing and heard oral argument, the Court issued its Memorandum Decision Regarding Proceedings Following Remand ("Memorandum Decision") on August 17, 2015. This Court determined that following remand the parties were placed in the same position they had been in prior to the Order granting Defendant's motion for summary judgment. Memorandum Decision at 3. Moreover, this Court determined that there was not a motion before the Court and declined to make a ruling pursuant to the Idaho Rules of Civil Procedure. *Id*. Following that decision Defendant filed a Motion for Summary Judgment on September 18, 2015. Plaintiff filed its Motion for Summary Judgment on January 19, 2016. Oral Argument was heard on February 16, 2016. Though not captioned as such, the Court will accordingly treat these motions as cross motions for summary judgment.

II. Discussion

A. Summary Judgment Standard

Summary judgment is appropriate "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Idaho Rule of Civil Procedure 56(c). Where the parties have filed cross-motions for summary judgment relying on the same facts, issues and theories, the parties effectively stipulate that there is no genuine issue of material fact that would preclude the district court from entering summary judgment. *Davis v. Peacock,* 133 Idaho 637, 640, 991 P.2d 362, 365 (1999) (citations omitted). However, the mere fact that both parties move for summary judgment does not in and of itself establish that there is no genuine issue of material fact. *Kromrei v. AID Ins. Co.*, 110 Idaho 549, 551, 716 P.2d 1321 (1986) (citing *Casey v. Highlands Ins. Co.*, 100 Idaho 505, 507, 600 P.2d 1387, 1389 (1979)). The fact that the parties have filed cross-motions for summary judgment does not change the applicable standard of review, and this Court must evaluate each party's motion on its own merits. *Stafford v. Klosterman,* 134 Idaho 205, 207, 998 P.2d 1118, 1119 (2000) (citing *Bear Island Water Ass'n, Inc., v. Brown,* 125 Idaho 717, 721, 874 P.2d 528, 532 (1994)).

If the court will be the ultimate fact finder and if both parties move for summary judgment, basing their motions on the same evidentiary facts, theories, and issues, then summary judgment is appropriate even though conflicting inferences are possible, so long as all the evidence is confined entirely to the record. *Currie v. Walkinshaw,* 113 Idaho 586, 592, 746 P.2d 1045, 1051 (Ct.App.1987).

B. Cross-Motions for Summary Judgment.

Defendant cites the Idaho Supreme Court decision in *N. Idaho Bldg. Contractors Ass'n v. City of Hayden* ("*NIBCA*"), 158 Idaho 79, 343 P.3d 1086 (2015), for the proposition that the

standard of review of a lawful user fee is reasonableness. City's Second Motion for Summary Judgment at 9. Defendant argues the Court "made clear that, under the Idaho Revenue Bond Act, Idaho Code § 50-1030(f), to be a valid user fee, a cap fee must be based on the replacement value of the existing system, not the cost of the next increment of system capacity." *Id*. (citing *NIBCA*, 158 Idaho at 82-84, 343 P.3d at 1089-91). Defendant argues that it has complied with the Court's directive and, based on the *NIBCA* decision, completed a new survey that demonstrates the actual rate charged under the flawed calculation was less than it would have been had the proper methodology been employed. City's Second Motion for Summary Judgment at 10-15. Defendant concludes that because the cap fee charged was less than the actual cost of the service provided the cap fee was lawful. *Id*. at 16-17.

Further, Defendant argues the *NIBCA* Court specifically found that Defendant was authorized to charge a cap fee under Idaho Code §§ 63-1311 and 50-130. Defendant avers that the purpose and amount of the cap fee instituted in 2007 was held to be permissible by the Idaho Supreme Court and the only issue to be determined was whether the amount charged would have been reasonable if it had been predicated on the proper methodology. City's Response to NIBCA's Motion for Summary Judgment ("City's Response") at 7-8. Therefore, Defendant argues, the cap fee is legal because it is less than the reasonable value of the service that is being provided. *Id*. at 9-10.

Plaintiff argues the cap fee was fatally flawed from the outset because it was not properly based on any recognized grant of authority, was calculated improperly, and amounts to an impermissible tax. Plaintiff's Memorandum in Support of Summary Judgment ("Plaintiff's Summary Judgment Memo") at 3-6. Further, Plaintiff argues the *NIBCA* decision is dispositive of the case because the Court specifically rejected each premise proffered by Defendant to substantiate the cap fee. *Id*.

A discussion of case law regarding a municipality's authority to impose a fee for proprietary and regulatory functions is relevant to the issue in the present case.

a. A city may collect fees pursuant to proprietary, regulatory, and specific legislative grants of authority. Any fee so imposed must first be determined not to be an impermissible tax, then the fee must be evaluated for reasonableness.

i. Brewster v. Pocatello, 115 Idaho 502, 768 P.2d 765 (1988).

In *Brewster* the Court was considering the propriety of the City's collection of fees pursuant to a city ordinance that allocated the fees so collected to restoring and maintaining of City roadways. *Brewster*, 115 Idaho at 502-03, 768 P.2d at 765-66. The Court was determining whether the fee, as it was imposed and utilized by the City, amounted to a permissible fee or an impermissible tax. The Court held: "In the instant case it is clear that the revenue to be collected from Pocatello's street fee has no necessary relationship to the regulation of travel over its streets, but rather is to generate funds for the non-regulatory function of repairing and maintaining streets." *Id*. at 504, 768 P.2d at 767. The Court concluded the determining factor was what the basis for the fee was at the time it was imposed: "In a general sense a fee is a charge for a direct public service rendered to the particular consumer, while a tax is a forced contribution by the public at large to meet public needs." *Id*. at 505, 768 P.2d at 768.

At its essence *Brewster* stood for the proposition that when a city endeavors to collect monies from its citizens, the classification of that collection as a fee or a tax is dependent upon whether the consumer is paying for what it consumes at that point in time (fee), or for something that benefits the public at large (tax). The Court determined that what the City had done was, in effect, an attempt to circumvent the wishes of the electorate and in so doing had imposed an impermissible tax:

> We hold therefore, that the attempted imposition of the 'fee' by the city of Pocatello is in reality the imposition of a tax. . . . To some, [the] withholding of approval for necessary repairs may be

> shortsighted and/or self-defeating, but that nevertheless has been the view of the electorate, and it will not be overturned by validating the actions of the city here, no matter how well-intentioned and desirable the ultimate result may be.

Id. The import of *Brewster* in the present case is clear: the purpose for which funds are raised by a municipality determines whether such funds are classified as a tax or a fee. The distinction is relevant because, as the Court stated, municipalities have the power to assess and collect taxes, however, that power is limited by the taxing power granted by the legislature. *Id*. at 503, 768 P.2d at 766.

In *Brewster* the Court refused to uphold a fee levied on residents to restore and maintain public streets. *Id*. The City Council enacted an ordinance imposing the fee after failed attempts to finance street improvement projects. *Id*. The Court struck down the ordinance as an impermissible tax and an attempt by the City override citizens' refusal to authorize the fee at the ballot box. If the funds are determined to be a tax the municipality must have the authority to impose the tax. If the funds are paid by citizens for services they are presently consuming, then it is likely a permissible fee.

In this case, Defendant imposed the capitalization ("cap") fee in order to expand the current sewer system. The City did not base the cap fee on that portion of the system that users were utilizing. The Supreme Court relied on *Brewster* in determining Defendant had imposed an impermissible tax. *NIBCA*, 158 Idaho at 83-86, 343 P.3d at 1090-93.

ii. City of Grangeville v. Haskins, 116 Idaho 535, 777 P.2d 1208 (1989).

In *City of Grangeville v. Haskins*, 116 Idaho 535, 777 P.2d 1208 (1989), the Court was asked to consider whether the City could collect fees from property owners for services supplied by the City as a proprietary function. Tenants of the property owners had contracted for, and consumed the services provided. The facts of *Grangeville* differ from the facts of the present

case significantly. However, it is pertinent that the Court found a City's authority to impose a fee for services lies in principles of contract law. *Grangeville*, 116 Idaho at 538-39, 777 P.2d at 1211-12. Specifically, the Court held that a City's operation of a sewer system, water system, and garbage collection are proprietary functions and not governmental functions. *Id*. Further, one who accepts a service is obligated to pay for the services one utilizes. *Id*. However, a City may not collect a fee for proprietary services from a citizen who has not accepted the service. *Id*. The Court held: "An implied power to collect from an owner who had not ordered, contracted for, or used the service would be unreasonable because it would create a liability not consistent with principles of contract law." *Id*.

The Court determined the owner of the property had not consumed the services and, therefore, could not be required to pay for them. Essentially, a party is paying a fee in exchange for the consumption of a service. Where the party being charged is not consuming a service, it cannot be said that the charge is a fee. If the party being charged has not acquiesced to the imposition of the charge, or otherwise used the service, the fee is unreasonable. Read together, *Brewster* and *Grangeville* provide that, generally, a City may impose a fee based upon the consumption of services at a specific point in time. If a city imposes a charge unrelated to the consumption of services it cannot be a fee. If it is not a fee it must be a tax and the City must have specific authority to impose the tax for it to be a permissible or legal tax.

iii. Loomis v. City of Hailey, 119 Idaho 434, 807 P.2d 1272 (1991).

In *Loomis v. City of Hailey*, 119 Idaho 434, 807 P.2d 1272 (1991), the Court was asked to determine whether the City's specific manner of charging for sewer and water connection fees was authorized under the Idaho Constitution and the Idaho Revenue Bond Act. *Loomis*, 119 Idaho at 435, 807 P.2d at 1273. The Court determined the fees charged by the City would be proper if either "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." *Id.* at 438, 807 P.2d at 1276. "However, if the rates, fees and charges are imposed primarily for revenue raising purposes they are in essence disguised taxes and subject to legislative approval and authority." *Id.*

The Court upheld the connection fee based on the City's authority under its proprietary function: "municipalities may construct and maintain certain public works. . . . It is pursuant to [the Idaho Revenue Bond] Act and a municipality's proprietary function that the City of Hailey derives its authority to charge water and sewer connection fees." *Id.* at 437–38, 807 P.2d at 1275–76. However, before reaching its conclusion, the Court announced a two part test to determine whether the fee was proper. Before a court analyzes the reasonableness of a fee it must first determine whether that fee constitutes an impermissible tax. *Id*. at 437, 807 P.2d at 1275. In *Loomis* the Court found that the fee was not an impermissible tax because the fees were not collected for revenue raising purposes. *Id*. at 440, 807 P.2d at 1278. The Court stated:

> The proceeds of the connection fee for water and sewer service are dedicated to those systems. Those funds are kept in a separate, segregated account and are not used for general fund purposes. Further, *only users of those services are charged and those fees are not utilized for general fund or for future expansion of the water and sewer system.*

Id. (emphasis added).

Once the Court determined that the fee was not an impermissible tax, it evaluated the reasonableness of the fee. *Id*. at 441, 807 P.2d at 1279. The *Loomis* Court held the fee charged was proper: "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." *Id*. at 444, 807 P.2d at 1282. The fee's stated purpose was to "recover the costs of operating, maintaining, replacing, and depreciating the existing water and sewer systems and any

extensions thereof." *Id.* The Court held that the imposition of the fee was proper under the City's proprietary function based on the equity buy-in model utilized to arrive at the fee. *Id.* at 437-38, 807 P.2d at 1275-76.

The import of the *Loomis* decision lies in the Court's announcing a two-part test to determine whether a fee is an impermissible tax, and if not, whether the fee is reasonable. Moreover, the Court approved the calculation of cap fees under the equity buy-in method pursuant to the imposition of the fee. *Loomis* also recognized three distinct categories of authority that could be used by a municipality to impose a fee, (1) regulatory fees based on a city's police powers, (2) taxes based on grant of specific authority, and (3) fees imposed pursuant to a city's proprietary functions. *Id.* at 434, 807 P.2d at 1281. In the present case Defendant agrees that the cap fee was not calculated in the proper manner. Defendant's cap fee was held to be an impermissible tax. However, Defendant argues, based on the new survey conducted after remand, the cap fee was reasonable and should therefore be upheld. Defendant requests this Court to engage in a reasonableness analysis to make such a determination. Such an analysis would ignore the language of *Loomis* and its progeny.

iv. Idaho Bldg. Contractors Ass'n v. City of Coeur d'Alene, 126 Idaho 740, 890 P.2d 326 (1995).

In *Idaho Bldg. Contractors Ass'n v. City of Coeur d'Alene ("IBCA")*, 126 Idaho 740, 890 P.2d 326 (1995), the Court considered whether the Coeur d'Alene City Council had the authority to institute an ordinance that imposed an impact fee as a condition of development within the city. *IBCA*, 126 Idaho at 741, 890 P.2d at 327. The *IBCA* Court analyzed the ordinance under the framework of *Loomis*:

> "First we must determine whether the connection fee constitutes an impermissible tax. Secondly, we must determine whether the connection fee is appropriately and reasonably assessed." Under the first step of the analysis, we consider whether, on its face, the

> impact fee is a tax or a regulation. If it at least appears to be a regulation, we then reach the question of whether or not it is reasonably related to the regulated activity. If it is not reasonably related to the regulation, then it is purely a revenue raising assessment, and once again is not permissible without a specific legislative enactment.

Id., at 743, 890 P.2d at 329 (quoting *Loomis*, 119 Idaho at 437, 807 P.2d at 1275). The Court held the ordinance imposed a fee that was designed to generate revenues to benefit all residents, not simply those paying the fee. *Id.* The Court concluded under the first prong of the *Loomis* test the ordinance imposed a tax and not a fee. *Id.* "The fee is imposed on certain individuals for use by the public at large, and we thus hold that it is a tax and therefore not within the legitimate regulatory powers of the City." *Id.* In its conclusion the Court said: "[i]n order for the tax to be effective, the City must be empowered by the legislature or our Constitution. Finding no enabling legislation, we hold that the impact fee ordinance is without authority and is therefore invalid." *Id*. at 745, 890 P.2d at 331.

The City argued that even though the Court found the ordinance imposed an impermissible tax on developers, the Court was required to evaluate whether the "ordinance was reasonably related to the regulated activity." *Id*. at 745, 890 P.2d at 331. The *IBCA* Court rejected this argument and held: "[b]ecause we previously concluded that the ordinance here, no matter how rationally and reasonably drafted, imposes a tax and not a regulatory fee, we do not ever reach the second part of the *Loomis* test set forth above. The reasonableness of the ordinance simply never becomes an issue." *Id*. (citing *Brewster*, 115 Idaho 502, 768 P.2d 765).

The *IBCA* case is informative regarding the process the Court engaged in determining the appropriateness of the fee. The Court was clear that where a tax has been levied against the public a city must have specific legislative or constitutional authority to enact such a tax. Without authority the tax cannot be held valid. Whether the tax is reasonable in relation to the

regulated activity is not to be considered. Once a court determines a city has exceeded its authority and imposed a tax, the inquiry ends. The reasonableness of the fee is immaterial and is not reached.

v. Lewiston Independent School Dist. No. 1 v. City of Lewiston, 151 Idaho 800, 264 P.3d 907 (2011).

In *Lewiston Independent School Dist. No. 1 v. City of Lewiston*, 151 Idaho 800, 264 P.3d 907 (2011), the City of Lewiston enacted an ordinance that imposed a stormwater fee for the operation and maintenance of the City's stormwater system. *Lewiston*, 151 Idaho at 801, 264 P.3d at 908. Residential and non-residential property owners were charged a fee based, generally, on the size of the impervious surface area on their property. *Id*. Persons were charged the fee whether they used the City's stormwater system or not. *Id*. Five government entities filed suit alleging the stormwater fee was an unauthorized tax. The City argued that it had authority to charge the fee under the City's police powers, the Revenue Bond Act, and several statutory provisions in Title 50 of the Idaho Code. *Id*. at 804, 264 P.3d at 911.

The Court held the fee was a tax because it charged all residents regardless of whether they used the system. *Id*. at 806, 264 P.3d at 913. The City did not have specific legislative authority to raise revenues through the implementation of a tax and the City's police powers did not allow them to impose a tax on the public. *Id*. The Court cited testimony from the Stormwater Program Coordinator who said the fee was designed to benefit the public generally. *Id*. at 806, 264 P.3d at 913. The facts of Lewiston are distinguishable from the facts of the current case, however, the Court's language is instructive: *"[u]nlike water, sewer, or electrical service fees, which are based on user consumption of a particular commodity*, the stormwater fee is assessed on those who do not use the Stormwater Utility. The [fee] does not account for actual use of the stormwater system. . . ." *Id*. at 807, 264 P.3d at 914 (emphasis added).

The City next argued the fee was reasonably related to the regulated activity. *Id*. The Court refused to entertain the argument saying that "'no matter how rationally and reasonably drafted," the fee imposed a tax, thus, the Court need not reach the second prong of the *Loomis* test. *Id*. (quoting *IBCA*, 126 Idaho at 745, 890 P.2d at 331).

Even though the fee in *Lewiston* was invalidated based on the regulatory function of a municipality's police powers, the decision sounds in the present case. The Court was clear that when a fee is designed to raise revenues for the public need, and is not based on personal consumption of services, that fee is a tax. Where a municipality imposes a tax it must have specific legislative authority to do so. A tax enacted without specific authority is invalid and the reasonableness of the tax is not considered.

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

In *Viking Const., Inc. v. Hayden Lake Irr. Dist.*, 149 Idaho 187, 233 P.3d 118 (2010), *abrogated by Verska v. Saint Alphonsus Reg'l Med. Ctr.*, 151 Idaho 889, 265 P.3d 502 (2011), the Court considered whether the Hayden Lake Irrigation District could increase its water hook-up fee from $2200 to $2700. *Viking*, 149 at 190, 233 P.3d at 121. Viking argued the irrigation district did not have the authority under Idaho law to impose the fee increase. *Id*. at 191, 233 P.3d at 122.

The Court determined the irrigation district had authority under its proprietary function to impose a fee "that included an amount equal to the value of that portion of the system capacity that the new user will utilize at that point in time." *Id*. at 194, 233 P.3d at 125 (quoting *Loomis*, 119 Idaho at 443, 807 P.2d at 1281). The Court cautioned that while the Irrigation District had discretion regarding the manner in which it calculated the equity buy-in fee, the fee must be based on the value of services consumed by the user. *Id*. The Court stated: "[i]f there is no

attempt to calculate in some manner that value, then the connection fee is not an equity buy-in regardless of its label." *Id*. Ultimately, the Court found a question of fact existed regarding whether "the connection fee was based upon a reasonable method of determining an amount equal to the value of that portion of the system capacity that the new user will utilize at that point in time." *Id*. at 195, 233 P.3d at 126.

The distinction between *Viking* and the present case lies in the manner in which the fee was determined. In the present case Defendant does not dispute that the fee was not calculated based on the equity buy-in method. In *Viking* there was a question of fact whether or not the fee was calculated based upon the equity buy-in method. As the Court announced, the fee must be based on the value of that portion of the system that is being used at the point in time when the fee is imposed. *Id*. There is no question in the present case that the fee was not based on any calculation reflective of the value of a person's pro-rata share of the existing system. The City's stated reason for the fee was to raise capital to expand the existing sewer system. Further, the fee was not imposed based on services provided, rather it was for the benefit of the public at large, making the fee an impermissible tax.

> *vii. BHA Investments, Inc. v. City of Boise*, 138 Idaho 356, 63 P.3d 482 (2003); *BHA Investments, Inc. v. City of Boise*, 141 Idaho 168, 108 P.3d 315 (2004).

In *BHA Investments, Inc. v. City of Boise ("BHA1")*, 138 Idaho 356, 63 P.3d 482 (2003), the Court considered whether a city had the power to charge sellers a fee for transferring a liquor license. *BHA1*, 138 Idaho at 357, 63 P.3d at 483. The Court held the statute that granted cities the authority to impose a license fee did not confer upon the municipality the authority to impose a transfer fee. *Id*. at 358, 63 P.3d at 484. The City had the authority to collect a fee, but not the fee that it imposed. *Id*.

In *BHA Investments, Inc. v. City of Boise ("BHA2")*, 141 Idaho 168, 108 P.3d 315

(2004), the Court rejected the district court's finding that the liquor license transfer fee constituted a disguised tax. *BHA2*, 141 Idaho at 176, 108 P.3d at 323. The Court explained:

> The purpose of the analysis regarding excessive fees is to prevent a city from imposing an illegal tax by masquerading it as a fee. That analysis does not apply, however, where the city does not have the authority to impose either the tax or the fee. If it has no authority to impose any fee at all, it does not matter whether the fee imposed bears a reasonable relationship to the services provided. It is illegal regardless of the amount of the fee. In this case, the City did not have the authority to impose either a fee for the transfer of a liquor license or a tax on the transfer of a liquor license.

Id. The Court found that the City had the authority to impose a license fee under the statute, however, the statute did not confer the authority to impose the transfer fee. *Id.*

In the present case Defendant argues the proper analysis is whether the cap fee was excessive. However, such an analysis requires the Court to reach the conclusion the City had the authority to impose the fee. As the Court said in *BHA2*, the purpose of the excessive fee analysis is to *prevent* a city from imposing an illegal tax. Once an illegal tax has been imposed the excessive fee analysis cannot be used to prevent its imposition. Much like the situation in *BHA1*, the City had the authority to collect a fee, however, they did not have the authority to impose the fee they did.

The excessive fee analysis presumes that the fee is authorized, but the amount of the fee is unreasonable. *See generally Loomis*, 119 Idaho at 442, 807 P.2d at 1280 (finding the court's role is to determine whether the fee is authorized, and if authorized, whether it is reasonable). The analysis requires the municipality to have authorization at the time of imposition to assess the fee. Only then should the court analyze the valuation of the fee to determine if it is reasonable. This is analogous to the *Loomis* test that requires a court to first determine if the fee is an impermissible tax and then, only if it is not an impermissible tax, to proceed to evaluate the reasonableness of the fee. *Id.*

b. The cap fee is an impermissible tax.

When a fee for service is calculated to meet public need, it creates a forced contribution that is unrelated to personal consumption of services and is properly regarded as a tax. *Alpert v. Boise Water Corp.*, 118 Idaho 136, 145, 795 P.2d 298, 307 (1990) (citing *Brewster v. Pocatello*, 115 Idaho 502, 504, 768 P.2d 765, 767 (1988)). Municipalities may exercise only those powers granted to them or necessarily implied from the powers granted. *E.g., Caesar v. State,* 101 Idaho 158, 160, 610 P.2d 517 (1980); *Hendricks v. City of Nampa*, 93 Idaho 95, 98, 456 P.2d 262 (1969). If there is a fair, reasonable, substantial doubt as to the existence of a power, the doubt must be resolved against the city. *Oregon Short Line Railroad Co. v. Village of Chubbuck,* 83 Idaho 62, 65, 357 P.2d 1101 (1960). This is particularly true where a municipality is exercising proprietary functions instead of governmental functions. *City of Grangeville v. Haskin*, 116 Idaho 535, 538, 777 P.2d 1208, 1211 (1989). The operation of a water system, a sewer system and a garbage collection service by the city is a proprietary function, not a governmental function. *Schmidt v. Village of Kimberly,* 74 Idaho 48, 60, 256 P.2d 515 (1953).

A municipality may not impose a tax without specific legislative authority. *Brewster*, 115 Idaho at 503-04, 768 P.2d at 766-67. A one-time cap fee for sewer and water services provided by a municipality must be based on a reasonable method of determining an amount equal to the value of that portion of the system consumed. *Loomis v. City of Hailey*, 119 Idaho 434, 807 P.2d 1272 (1991). Specifically, the fee must be based on "an amount equal to the value of that portion of the system capacity that the new user will utilize at that point in time." *Viking Const., Inc. v. Hayden Lake Irr. Dist.*, 149 Idaho 187, 194, 233 P.3d 118, 125 (2010).

Here, the Idaho Supreme Court held the cap fee, as assessed, had no basis in law and constituted an impermissible tax. *NIBCA*, 158 Idaho at 81, 343 P.3d at 1086. On remand Defendant argues this Court should find the fee reasonable and proper based on a new survey

submitted to the Court showing what the fee would have been had the correct methodology been used. Moreover, Defendant suggests this Court interpret the *NIBCA* holding as inviting Defendant to substantiate the cap fee on remand in order to demonstrate the reasonableness of the fee. This Court will not entertain any argument about whether the cap fee charged by the City is a fee or a tax. The Supreme Court resolved that issue and held that the fee was an impermissible tax enacted without authority and without basis in Idaho law. *NIBCA*, 158 Idaho at 86, 343 P.3d at 1093.

Defendant next argues the Court's task is to engage in an excessive fee analysis to determine whether the amount charged is reasonable under the new equity-buy in calculation.

C. *Reasonableness of the fee cannot be a consideration when the fee fails the first prong of the Loomis test. A municipality must have authority to impose a fee at the time the fee is imposed.*

When a municipality imposes a tax without authority it cannot be saved by claiming the tax was reasonable. The second prong of *Loomis* is never reached. *Idaho Bld'g Contractors Ass'n v. City of Coeur d'Alene*, 126 Idaho 740, 745, 890 P.2d 326, 331 (1995). A tax may only be upheld if the party imposing the tax has the power of taxation. *Brewster*, 115 Idaho at 504, 768 P.2d at 767 (quoting *State v. Nelson*, 36 Idaho 713, 213 P.2d 358 (1923)).

Defendant directs this Court to the following language in *NIBCA* in support of its argument that the Supreme Court invited Defendant to substantiate the fee on remand: "The issue is whether there was evidence supporting a finding that $2,280 was the actual cost of the service being rendered as of June 7, 2007. There is no evidence in the record that it was. In fact, the evidence in the record shows that it was not." *NIBCA*, 158 Idaho at 81, 343 P.3d at 1088.

Defendant argues that this language demonstrates that the Court was looking for evidence in the record that would reflect whether the amount charged was in excess of what it could have charged under the proper methodology. Oral Argument February 16, 2016, at 3:14-15.

Defendant contends the colloquies with Justice Horton at oral argument on appeal support Defendant's position that it is only a tax if the cap fee exceeds the pro rata value of the existing system. *Id*.

However, Defendant's argument ignores the holding of the Court that the fee imposed was an impermissible tax. This Court recognizes that the exchanges between the Supreme Court and counsel are not precedential. The Court has listened to the exchanges, but does not find them instructive. The Court cannot know the purpose of the questions, nor does the Court plan to entertain suggestion regarding the meaning behind the words used during the colloquy with the Supreme Court. This Court is bound by the decision of the Court that the fee as imposed was an impermissible tax. Defendant now asks this Court to rely on the exchanges for the premise that it can only be an impermissible tax if the amount charged is in excess of the actual amount of service. Had the Supreme Court intended such a result, it would have so held.

The Court did find that the City was authorized to impose and collect a fee under Idaho Code § 63-1311(f), but that authority was limited to imposing a fee based on the services consumed *at the time* of imposition. *NIBCA*, 158 Idaho at 81, 343 P.3d at 1088. The Supreme Court held:

> Because there is nothing in the record showing that as of June 7, 2007, the sum of $2280 was the actual cost of providing sewer service to a customer connecting to the City sewer system **and** there is no showing that the amount of the fee was based upon any such calculation, the fee was not authorized by Idaho Code section 63-1311(1).

Id. 158 Idaho at 81, 343 P.3d at 1088 (emphasis added). This language provides the basis upon which the Supreme Court determined that Defendant did not have the authority to impose the fee in the manner that it did. First, the Court determined at the time the fee was imposed, June 7, 2007, Defendant did not show that the fee was related to the actual cost of sewer service to a

customer connecting to the City sewer system. Second, at the time the fee was imposed it was not based upon the cost of service to a customer connecting to the system. Based on the plain language and the conjunction, Defendant was required to show both. The language used by the Court was clear; the fee must be based upon the cost of service *at the time it is imposed*.

Defendant suggests this language directs this Court to entertain new evidence in the record that purports to show the cost of service on the date the cap fee was imposed would have been higher than the fee ultimately imposed. Oral Argument February 16, 2016, at 3:36. This Court recognizes the exchanges between the Supreme Court and counsel regarding the actual cost of service weave a layer of ambiguity into the fabric of the opinion, however, these exchanges (and the concurring opinion) are not precedential. This Court must follow the language of the decision.

Defendant argues that it can now show that the cost to connect to the City sewer system on June 7, 2007, was greater than the $2280 cap fee, therefore, the fee is reasonable and does not constitute an impermissible tax because it did not exceed the value of the existing system. Oral Argument February 16, 2016, at 3:16. Defendant avers the purpose of remand was to engage in a factual inquiry into whether the fee was, or was not, excessive. *Id*.

Defendant characterizes this case on remand as an evaluation of "whether the amount of the fee charged was in excess of the amount authorized by the applicable statutes using the correct methodology." City's Memorandum in Response to Defendant's Motion for Summary Judgment at 8. Further, Defendant argues the Court "did not declare the City's cap fee to be illegal." *Id*. at 9. Defendant avers that because the Court did not declare the fee illegal the only question remaining is whether the fee charged exceeds the reasonable value of the user's share of the system. *Id*.

Plaintiff argues *BHA1* and *BHA2* are dispositive of the issue. Plaintiff's Response to

City's Second Motion for Summary Judgment at 7. Plaintiff contends the City had no authority to impose the fee it did. *Id*. Further, Plaintiff argues that because the City lacked authority the Court should not engage in a reasonableness determination regarding the amount of the fee. *Id*.

Defendant does not address the Court's holding. That is, what was the fee *based on at the time of imposition*. At the time the cap fee was imposed, it was based not on the replacement value of the existing system, but on the cost of the next increment of system capacity. That basis for the fee made it an impermissible tax. While Defendant may now be able to establish what the proper fee should have been had the fee been based on replacement cost of the existing system, it cannot demonstrate the basis of the fee was proper on June 7, 2007, because it was not. Defendant's new survey may conclude the cap fee charged was equal to or less than the actual cost of service, but it cannot be used to justify a prior tax imposed without authority.

Defendant next argues the manner of calculation of the fee is of little import. Oral Argument February 16, 2016, at 3:36. It matters only whether the amount charged is reasonable in light of the services provided. City's Opening Brief in Support of its Second Motion for Summary Judgment at 4. That language is supported by the second prong of the test the Court endorsed in *Loomis*. However, the first prong of the Loomis test asks whether the fee constitutes an impermissible tax. *Loomis*, 119 Idaho at 437, 807 P.2d at 1275.

Further, *Viking* made clear that the calculation must be based on "the value of that portion of the system capacity that the new user will utilize at that point in time" *Viking*, 149 Idaho at 194, 233 P.3d at 125 (quoting *Loomis*, 119 Idaho at 443, 807 P.2d at 1281). The manner of calculation is important and provides the authority from which the fee is derived. Defendant argues that *Viking* limited the court's role to the narrow question of whether the fee is reasonable and not arbitrary. City's Opening Brief in Support of its Second Motion for Summary Judgment at 9. That argument misconstrues the analysis in *Viking*. The *Viking* Court announced a limited

role for a court based on a municipality's use of historical cost or replacement cost in calculating the equity buy-in fee. *Viking*, 149 Idaho at 194, 233 P.3d at 125. The *Viking* Court concluded that whatever method is used "it must be based upon . . . the value of that portion of the system that the new user will be utilizing. If there is no attempt to calculate in some manner that value, then the connection fee is not an equity buy-in regardless of its label." *Id*. Where, as here, the fee is an impermissible tax it does not matter whether that fee is reasonable; it cannot stand.

The Court in *Grangeville* held that a fee collected by a municipality that is not based on the consumption of services is "unreasonable because it would create a liability that is not consistent with the principles of contract law." *Grangeville*, 116 Idaho at 539, 777 P.2d at 1212. The fee in the present case was not based on the consumption of services. The stated purpose of the fee was to raise revenue to pay the cost of construction to expand the system. A fee so enacted is not based on the personal consumption of services and is unreasonable.

A municipality may only impose a tax when it has been given that power by the legislature. That is not the case here. Were this Court to engage in an analysis of the reasonableness of the fee it could potentially allow Defendant to retain the revenue of an unconstitutional tax. This Court is not so inclined. Defendant was misguided in calculating the fee on the basis of the cost of expansion and effectively imposed a tax without the authority to do so. Defendant claims that the error was made in good faith and the amount can now be justified by a survey conducted eight years after the fee was imposed. The City's position is fraught with serious implications to the citizens of the State of Idaho.

If a city imposes an impermissible tax upon the citizens and the courts approved that conduct by allowing a city to justify it on other grounds years later, it would have the effect, or potential chilling effect, of inhibiting an individual's right to challenge the unauthorized exercise of legislative authority. There would be no recourse available at law for a citizen forced to

contribute to a tax levied without authority. The City has the burden to demonstrate that the fee it purports to impose upon the citizenry is authorized. When a City undertakes to impose a fee it bears the responsibility to ensure the fee is properly enacted. It is not enough to impose an impermissible tax and then use the Court as a safe harbor to validate the improper tax.

This Court cannot evaluate whether the impermissible tax is excessive. To do so would invite the presumption that the underlying basis for the fee was proper. The Supreme Court held the fee was an improper tax. *BHA1* is analogous to the present case. In that case the City had the authority to collect a fee, but it did not have the authority to collect the fee it did. Here, the City has the authority to collect a fee, it does not have the authority to collect the fee it did. No amount of semantics will change the fact that at the time the fee was imposed the purpose of the fee was to raise revenue to expand the system. It was not based on the personal consumption of services. Under *Brewster*, that constitutes the imposition of a tax. Further, *Loomis* made clear that proceeds raised from sewer connection fees must only be collected from users of the service. *Loomis*, at 440, 807 P.2d at 1278. Here, that fee was collected from persons who could not use the service because the service itself did not exist. Whether the City made an honest mistake in good faith is immaterial; good faith is not a defense for the imposition of an impermissible tax.

III. CONCLUSION

The Defendant in 2007 imposed an impermissible tax. If the Court entertained Defendant's current argument it would be complicit in that conduct. It would be improper to stamp such conduct with the imprimatur of the Court. Only the legislature has the authority to grant a city the power to tax and this Court cannot, and will not, invade the province of the legislature. As much as the City would like to make this a case about valuation it is not such a case. The case is about the authority to impose a fee. The Court cannot countenance the usurpation of legislative authority and then reward that behavior with an after-the-fact

justification of the conduct.

ORDER:

Based upon the foregoing and good cause appearing therefore,

IT IS HERBY ORDERED, Defendant's Second Motion for Summary Judgment is denied and Plaintiff's Motion for Summary Judgment is granted. This Order and any judgment that follows are not dispositive of all remaining issues in the case, but only those issues reached in this decision.

DATED: This ___ day of February, 2016.

BY THE COURT:

_____
Cynthia K.C. Meyer
District Judge

CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of February, 2016, I caused, to be served, a true and correct copy of the foregoing document as addressed to:

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Deputy Clerk