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 AND ORDER ON DEFENDANT'S MOTION TO RECONSIDER

The hearing on Defendant's motion to reconsider was held on January 17, 2017, 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 to Reconsider whether the fee is an impermissible tax and whether it was reasonable is denied. Defendant's Motion to Reconsider whether this Court improperly dismissed Defendant's equitable remedies is denied. Defendant's

Motion to Reconsider whether this Court mischaracterized the taking as a physical taking and misapplied the ripeness analysis is granted. This Court's prior decision characterizing the taking as a physical taking is vacated. Defendant's motion for summary judgment as to the regulatory taking being unripe pursuant to *Williamson County* is denied.

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. This Court issued its Memorandum Decision and Order on Cross Motions for Summary Judgment ("Second Order on Summary Judgment") on February 26, 2016. This Court determined that Defendant's argument, that the fee imposed was reasonable and should be evaluated based on a new study showing what the fee would have been had the proper methodology been used, was flawed and granted summary judgment in favor of Plaintiff.

On May 17, 2016, Defendant filed its third motion for summary judgment. Defendant argued Plaintiff's state law claims must fail because Plaintiff did not comply with the Idaho Tort Claims Act. Defendant also argued the equitable defenses of unjust enrichment and quantum meruit. Finally, Defendant argued Plaintiff's federal claims must fail based upon the two-prong test set out in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S. Ct. 3108 (1985) (hereinafter *Williamson County*). In this Court's Memorandum Decision and Order on Defendant's Third Motion for Summary Judgment ("Third Order on Summary Judgment") Defendant's motion for summary judgment was granted on all of Plaintiff's state law claims. Third Order on Summary Judgment at 4-8. This Court denied Defendant's motion for summary judgment on Plaintiff's federal takings claims and equitable defenses. *Id.* at 8-15.

On December 9, 2016, Defendant filed its motion to reconsider. Defendant asks this Court to reconsider three of its prior rulings: (1) whether this Court erred in determining the fee

was an impermissible tax and refusing to reach the reasonableness prong pursuant to *Loomis v. City of Hailey*, 119 Idaho 434, 807 P.2d 1272 (1991), (2) whether this Court erred in determining the taking in this matter was a physical taking and not a regulatory taking under *Williamson County*, and (3) whether this Court erred in determining the equitable defenses of unjust enrichment and quantum meruit could not serve as an absolute bar to recovery.

II. Discussion

A. Standard of Review

"On a motion for reconsideration, the court must consider any new admissible evidence or authority bearing on the correctness of an interlocutory order." *Fragnella v. Petrovich*, 153 Idaho 266, 276, 281 P.3d 103, 113 (2012). When a trial court is deciding the motion for reconsideration, the court shall apply the same standard of review that was applied when the original order was decided. *Id.*; Idaho Rule of Civil Procedure 11.2(b). "In other words, if the original order was a matter within the trial court's discretion, then so is the decision to grant or deny the motion for reconsideration." *Id.* "When reviewing the grant or denial of a motion for reconsideration following the grant of summary judgment," the reviewing court must determine if a genuine issue of material fact existed to preclude a grant of summary judgment. *Id.* at 276, 281 P.3d at 113.

B. 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). Defendant's first claim of error, that this Court erred in determining the fee was an impermissible tax, will be reviewed under the standard applicable to cross-motions for summary judgment. Defendant's final two arguments will be reviewed under the summary judgment standard of review.

C. The fee at issue was an impermissible tax and is not subject to a reasonableness analysis under *Loomis*.

Before a court analyzes the reasonableness of a fee it must first determine whether that fee constitutes an impermissible tax. *Loomis v. City of Hailey*, 119 Idaho 434, 807 P.2d 1272 (1991). 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).

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. Rejecting the defendant's request to consider the reasonableness of the fee, the *IBCA* Court 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).

a. The fee was an impermissible tax.

Defendant argues that the Idaho Supreme Court in *N. Idaho Bldg. Contractors Ass'n v. City of Hayden* ("*NIBCA*"), 158 Idaho 79, 343 P.3d 1086 (2015), never said the fee was illegal and intended that Defendant show on remand that the fee was reasonable. City's Post Trial Brief at 7. Defendant argues that the Supreme Court never said that the Cap fee was an *illegal* tax and that this Court has erred in its characterization and analysis of the fee as an *illegal* tax. *Id.* at 13, fn. 3. Defendant argues the Supreme Court remanded for the purpose of allowing the Defendant to show how reasonable the fee was. *Id.* at 14. Defendant cites the concurring opinion in *NIBCA* and the colloquies between Justice Horton and counsel for this proposition. *Id.* at 14, fn. 4.

Defendant argues that it complied with the Supreme Court's directive and, based on the *NIBCA* decision, completed a new survey that demonstrated 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 claims it was error for this

Court to refuse to entertain the reasonableness analysis of *Loomis* and to characterize the fee as an illegal tax.

This Court has used caution when referencing the fee in the present issue. This Court has never referred to the fee as an "illegal tax" in its written decisions as Defendant contends. Defendant cites to several of this Court's decisions regarding the fee and in all of those instances this Court stated the fee was an *impermissible* tax. *See* City's Post Trial Brief at 13, fn. 3. Defendant's argument is disingenuous and mischaracterizes the language this Court has used in its prior decisions. The language used by this Court comports with the language used by the Supreme Court in *NIBCA*. Despite Defendant's statements to the contrary, the Supreme Court did declare the fee an impermissible tax.

The Supreme Court asked the question: "**Did the District Court Err in Holding that the Fee Increase Was Not an Impermissible Tax?**" *NIBCA*, 158 Idaho at 80, 343 P.3d at 1087. The Court then evaluated the authority proffered by Defendant and rejected all of them. Specifically, the Court held that the district court erred in finding that the fee was not an impermissible tax under Idaho Code § 63-1311. *Id*. at 81, 343 P.3d at 1088 (holding "the fee was not authorized by Idaho Code section 63-1311(1). The district court erred in holding that it was."). Next the Court rejected Defendant's proffer of Idaho Code § 50-1030(f). *Id.* at 84, 343 P.3d at 1091 (finding the district court erred in holding the fee was not an impermissible tax because there was nothing in the record demonstrating that the fee was based upon the proper methodology). Next the Court rejected Defendant's argument that the fee could be upheld based upon Idaho Code § 50-323. *Id.* The Court held: "There is absolutely nothing that could reasonably be construed as holding that Idaho Code section 50-323 applies to 'solid waste collection systems.'" *Id.* The Court then quoted with approval the following: "this Court has repeatedly held that municipalities may exercise only those powers granted to them or

necessarily implied from the powers granted. If there is a fair, reasonable, substantial doubt as to the existence of a power, the doubt must be resolved against the city." *Id.* (quoting *City of Grangeville v. Haskin*, 116 Idaho 535, 538, 777 P.2d 1208, 1211 (1989)).

Finally, the Court rejected Defendant's argument that Idaho Code § 50-301 authorized Defendant to impose any taxes necessary to exercise the powers enumerated in the statute. *Id.* at 86, 343 P.3d at 1093 (holding that there is a difference between the power of a city to act and the power of a city to tax, and the power to tax requires specific legislative authorization). Ultimately the Court held that Idaho Code § 50-301 did not grant Defendant the power to tax in order to expand the sewer system. *Id.* The Court held that the district court erred in determining that the fee at issue was not an impermissible tax.

Moreover, this Court held the same in its Second Order on Summary Judgment. Critical in this Court's decision was the language in *NIBCA* requiring Defendant to show the actual cost of providing sewer service to a customer connecting the City's system ***and*** a showing that the amount of the fee was based upon that portion of the sewer that an individual would be utilizing at that point in time. *NIBCA*, at 81, 343 P.3d at 1088. Defendant contends that it can show the actual cost; however, nothing Defendant has offered to this Court demonstrates that Defendant can provide that the fee was properly promulgated at the time of its imposition. It was not. Thus, the fee as imposed was an impermissible tax.

b. **The concurrence is of no precedential value.**

The concurring opinion in *NIBCA* is of no precedential value. The analysis and holding of the majority of the Court is contained in Justice Eismann's opinion *is the opinion of the Court*. Therefore, that is the only portion of the decision that has precedential effect. *See Idaho Sch. for Equal Educ. Opportunity v. Evans*, 123 Idaho 573, 579, 850 P.2d 724, 730 (1993). The concurring opinion does not, and cannot direct this Court to entertain Defendant's argument.

Defendant argues that the purpose of remand was for this Court to determine if the amount of the impermissible tax was reasonable. Defendant cites this Court to the concurring opinion and the colloquy between defense counsel and Justice Horton for the proposition that this Court was to engage in a reasonableness analysis on remand. This Court declined to attempt to discern the intent of Justice Horton based on the colloquy with Defense Counsel. Second Order on Summary Judgment at 18.

Defendant continues to stubbornly refuse to acknowledge the Supreme Court's concurrence has no precedential value and acknowledge that this Court is bound by the language of the opinion. Additionally, the invitation to read the tea leaves and divine Justice Horton's intent based on the colloquy with Defense Counsel is ludicrous. This Court is not in a position to speculate on Justice Horton's intent behind the questions asked during a colloquy with the Court. This Court is bound by the words of the opinion and those words have meaning. Defendant may not like them, but this Court is bound by them and must follow them. This Court cannot form a decision based on conjecture and speculation about what a justice is thinking because of the questions that were asked during oral argument.

c. The cap fee was an impermissible tax. Therefore, the question of reasonableness is not reached under the Loomis analysis.

When a fee is challenged the trial court must first determine whether the fee constitutes an impermissible tax or an authorized fee that comports with a statutory scheme or valid police power. *Loomis*, 119 Idaho at 437, 807 P.2d at 1275; *see also Idaho Bldg. Contractors Ass'n v. City of Coeur d'Alene ("IBCA")*, 126 Idaho 740, 890 P.2d 326 (1995). In order for the court to then evaluate the reasonableness of the fee it must find that it was, or appeared to be, an authorized regulatory fee or valid exercise of the municipality's police power. *Id.* The *IBCA* Court rejected a defense argument to analyze an impermissible tax to determine whether the

ordinance was reasonably related to the regulated activity. *IBCA*, 126 Idaho at 745, 890 P.2d at 331. The Court 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 v. City of Pocatello*, 115 Idaho 502, 768 P.2d 765 (1988)).

Defendant argues this Court misapplied the two-part test announced in *Loomis*. Defendant's Post-Trial Brief at 9. Defendant contends the first prong of the test merely requires the court to determine if the money paid was tied to a service provided and if it was spent in connection to that service. *Id.* Defendant argues that the first prong is just a threshold inquiry and the second prong is concerned with the reasonableness of the fee. *Id.*

Defendant's argument would render the *Loomis* analysis moot. Assuming Defendant were correct there would be no need for a municipality to follow the equity buy-in method announced in *Loomis*. Any city would be able to charge any fee so long as the monies collected were spent on that service and it was reasonable. *Loomis* would be a dead letter under Defendant's analysis and there would be no requirement to calculate a fee using the equity buy-in method announced by the Court. Defendant's analysis is precisely why this case is currently being litigated. A city cannot charge any fee it desires and then justify it based on how it spent that money and whether it was reasonable. The Supreme Court's decision in *NIBCA* reads in pertinent part:

> As we said in *Brewster v. City of Pocatello,* 115 Idaho 502, 768 P.2d 765 (1988), "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. ***That analysis applies here***. The portion of the fee at issue in this case was not based upon the sewer service rendered to the new user who connects to the City's sewer system.

> It was based upon the estimated cost of new construction needed to extend that system to future users in other areas, including areas outside the City in its area of impact, in order to meet public needs. As we said in *Idaho Building Contractors Association v. City of Coeur d'Alene*, 126 Idaho 740, 890 P.2d 326 (1995), with respect to a city impact fee to pay for a proportionate share of the cost of improvements needed to serve development: "It is to be used for 'capital improvements' without limitation as to the location of those improvements or whether they will in fact be used solely by those creating the new developments. This is antithetical to this Court's definition of a fee."

NIBCA, 158 Idaho at 83, 343 P.3d at 1090 (emphasis added).

No matter how well intentioned and reasonable the fee may have been is of little consequence. *See Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416, 43 S.Ct. 158, 160, 67 L.Ed. 322 (1922) ("a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change,").

The matter here is decided; the fee represents an impermissible tax. It is a forced contribution to meet public needs. Defendant had no legislative authority to impose the tax and continues to argue that it is in fact not a tax. Defendant has never cited any authority to this Court that demonstrates under what authority the tax was imposed and every basis Defendant argued before the Supreme Court was rejected. See *NIBCA*, 158 Idaho 79-87, 343 P.3d 1086-1094.

Defendant argues it does not understand this Court's concern with the fee. Defendant's Trial Brief at 11. This Court does not understand the cavalier attitude of Defendant about the imposition of a tax upon the citizens of a municipality without any authority to do so. Moreover, the implication of Defendant's argument would have a significant chilling effect on a citizen's ability to question their government. If Defendant were able to justify the imposition of an impermissible tax upon its residents and escape liability by an ex post facto rationalization, why

would anyone endeavor to hold a city accountable for its imposition of an impermissible tax?

The Court declines Defendant's invitation to reconsider its prior decision that the issue of reasonableness is never reached where the Court determines the fee at issue was an impermissible tax. Defendant's motion is denied.

D. The denial of Defendant's equitable defenses was proper.

It is a maxim of equity that equity will not permit a party to profit by his own wrong. *Root v. Lake Shore & M.S. Ry. Co.*, 105 U.S. 189, 26 L. Ed. 975 (1881). The doctrine of unclean hands permits a trial court to deny equitable relief to a party "on the ground that his conduct has been inequitable, unfair and dishonest, or fraudulent and deceitful as to the controversy at issue." *Hoopes v. Hoopes*, 124 Idaho 518, 861 P.2d 88 (Ct. App. 1993). It is within the discretion of the court to evaluate the relative conduct of the parties and determine whether the conduct of the party seeking equitable relief should, in light of all of the circumstances, preclude application of the equitable relief requested. *Curtis v. Becker*, 130 Idaho 378, 941 P.2d 350 (Ct. App. 1997).

Defendant argues this Court erred in denying the application of the equitable defenses of unjust enrichment and quantum meruit as an absolute bar to Plaintiff's claim for damages. Oral Argument at 04:15-19 (January 17, 2017); *see also* City's Opening Brief in Support of its Third Motion for Summary Judgment at 33. Defendant cited no authority for the application of the equitable defenses in the present matter. City's Opening Brief in Support of its Third Motion for Summary Judgment at 33-38.

Moreover, the Court is troubled that Defendant would seek relief in equity when Defendant has conceded that the manner in which the fee was calculated was improper and there is evidence in the record that Defendant had prior knowledge of the proper way to calculate the fee. *See* Affidavit of D. Phillips, p. 96. Defendant cannot claim that equity demands the retention of the ill-gotten fee when the conduct that it engaged in to procure the fee was itself

impermissible. The equitable defenses raised by Defendant are, in large part, an attempt to reassert Defendant's argument that the impermissible tax was reasonable, and this Court should approve the result and ignore the conduct. This Court will not partner in that behavior.

Based on the foregoing this Court, in its discretion, determines the impermissible conduct of Defendant has an immediate and necessary relation to the matter presently before this Court. Therefore, Defendant's motion to reconsider the assertion of the equitable defenses of unjust enrichment and quantum meruit as an absolute bar to Plaintiff's recovery is denied.

E. Whether the Taking was a Physical or Regulatory Taking.

"The determination of whether or not there was a taking is a matter of law to be resolved by the trial court." *Tibbs v. City of Sandpoint,* 100 Idaho 667, 670, 603 P.2d 1001, 1004 (1979) (citing *Rueth v. State,* 100 Idaho 203, 596 P.2d 75 (1978)). In *Rueth v. State,* 100 Idaho 203, 596 P.2d 75 (1979), the Idaho Supreme Court held that every issue concerning an inverse condemnation claim is to be determined by the trial court, except for the determination of what constitutes just compensation. *Id.*, at 222-23, 603 P.2d at 94-95. Once the trial court has found that a taking has occurred, "the extent of the damages and the measure thereof are questions for the finder of fact." *Covington v. Jefferson Cty.*, 137 Idaho 777, 780, 53 P.3d 828, 831 (2002).

There can be no question that money may be considered property for takings analysis. *BHA Investments, Inc. v. City of Boise ("BHA II")*, 141 Idaho 168, 172, 108 P.3d 315, 319 (2004) (holding the exaction of a fee without authority constituted a taking of property under the United States and Idaho Constitutions); *Brown v. Legal Fund of Washington*, 538 U.S. 2016, 123 S.Ct. 1406 (2003) (finding the taking of money earned on interest accounts constituted a per se taking); *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 186 L. Ed. 2d 697 (2013) (rejecting the argument that monetary exactions cannot be considered a taking); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 101 S.Ct. 446 (1980) (determining the

confiscation of money was a taking despite its similarity to a tax).

The United States Supreme Court announced a test for determining whether a predicate condition (including the payment of a fee) for issuance of a permit amounted to a taking.[1] *See Nollan v. California Coastal Com'n*, 483 U.S. 825, 107 S.Ct. 3141 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309 (1994) ("*Nollan/Dolan*"). The *Koontz* Court held that monetary exactions are subject to the *Nollan/Dollan* analysis. *Koontz*, 133 S.Ct. at 2601.

Defendant argued the taking at issue was a regulatory taking because the fee was exacted pursuant to the issuance of a building permit. City's Post-Trial Brief at 26-27. Defendant contends this Court erred in determining the impermissible fee amounted to a physical taking because the cases cited by this Court indicated that the taking of money by an agency, while different from the taking of real property, is due greater deference than physically taking real property. *Id.* Defendant contends this Court misapplied the authority cited in its Memorandum Decision and Order on Defendant's Third Motion for Summary Judgment ("Order on Third Motion"), and did not provide any authority for the proposition that taking of money constitutes a physical taking. City's Post Trial Brief at 26-33. Defendant contends that exactions subject to a *Nollan/Dolan* analysis should properly be analyzed as a regulatory taking rather than a per se, or physical taking. *Id.*

In light of the authority provided by Defendant and this Court's acknowledgement that the predicate condition is required for the issuance of the permit, and such a decision is due

[1] Defendant has not challenged that a taking occurred and has provided nothing to this Court challenging such a determination. Therefore, an analysis under *Nollan/Dolan* is unnecessary. However, were this Court to engage in such an analysis it would find as a matter of law that the present situation is equivalent to the unconstitutional conditions doctrine discussed in *Nollan/Dolan* and a taking occurred as a matter of law. Specifically, the impermissible fee was imposed without authority and does not meet the rough proportionality test of *Dolan* based upon the failure to make the individual determination regarding the impact of the construction. *Dolan*, 512 U.S. at 391, 114 S.Ct. at 2319-20. Further, the *Dolan* Court quoted with approval: "a city may not require a property owner to dedicate private property for some future public use as a condition of obtaining a building permit when such future use is not 'occasioned by the construction sought to be permitted.' " *Id*. (quoting *Simpson v. North Platte*, 292 N.W. 2d 297 (Neb. 1980).

greater deference than the physical appropriation of property; this Court's analysis that the taking of money constituted a per se taking, or physical taking was incomplete. Defendant urges this Court to reconsider the determination that the impermissible tax imposed by Defendant constituted a physical taking and not a regulatory taking.

This Court relied on the general statement that a taking of property to benefit the public at large is a physical taking. Order on Third Motion at 9. In its decision determining that the taking at issue in the present case was a physical taking this Court said:

> In *BHA* the Court determined that "[m]oney is clearly property that may not be taken for public use without the payment of just compensation." *BHA Investments*, 141 Idaho at 172, 108 P.3d at 319 (citing *Brown v. Legal Found. Of Wash.*, 538 U.S. 263, 123 S.Ct. 1406 (2003). The Court then explained: "the taking of money is different, under the Fifth Amendment, from the taking of real or personal property." *Id*. (quoting *San Remo Hotel L.P. v. City and County of San Francisco*, 41 P.3d 87, 106 (2002)).
>
> All takings are not created equally. Generally, a regulatory scheme that prohibits an owner from using its private property is a regulatory taking. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 122 S. Ct. 1465, (2002). However, when a governmental entity acquires private property, including money, it is treated as a physical taking. *Id.*

Order on Third Motion at 9. The Court does not concern itself with the question of whether money may properly be considered property; that it has been so construed has been borne out by a number of cases that have dealt with precisely that issue. *See Brown*, 538 U.S. 2016, 123 S.Ct. 1406; *Koontz*, 133 S.Ct. at 2601; *Webb's Fabulous Pharmacies*, 449 U.S. 155, 101 S.Ct. 446.

Defendant does not dispute that a taking occurred, only that this Court analyzed the taking as a physical taking rather than a regulatory taking. City's Post Trial Brief at 25-33. Defendant's argument is based on the two-prong test used to determine if a federal takings claim is ripe. *Williamson County*, 473 U.S. at 186-87, 105 S.Ct. at 3116. Specifically, Defendant argues the taking is a regulatory taking, thus, the claim is not ripe under the test announced in

Williamson County.

This Court concedes that monetary exactions are often categorized as regulatory takings. *But cf. Koontz*, 133 S. Ct. at 2600, (finding "when the government commands the relinquishment of funds linked to a specific, identifiable property interest such as a bank account or parcel of real property, a '*per se* [takings] approach' is the proper mode of analysis).

The Court agrees that the fee in the present case is more like a regulatory taking than a physical taking based upon the authority supplied by Defendant. The Court will analyze the fee as a regulatory fee for purposes of the *Williamson County* ripeness test. Defendant's motion to reconsider its prior decision that the taking must be analyzed as a regulatory taking is granted.

F. Williamson County Ripeness Test.

In *Williamson County* the Supreme Court announced a two-part test to determine whether a takings claim against a state was ripe. *Williamson County*, 472 U.S. at 186, 105 S.Ct. at 3116. Prong one requires that "the government entity charged with implementing the regulations has reached a final decision." *Id.* Prong two requires the party alleging the taking to seek compensation through available state procedures. *Id.*

a. Regulatory taking under prong one of Williamson County.

The first prong requires a party seeking relief to have first received a final decision from the agency implementing the regulation. *Id.* A permit issued that allows the recipient to permanently alter the land constitutes a final decision. *Johnson v. Blaine Cty.*, 146 Idaho 916, 204 P.3d 1127 (2009).

Defendant argues that in order to satisfy the first prong of the ripeness test under *Williamson County* Plaintiff was required to demand a regulatory takings analysis making the imposition of the fee "something less than final for purposes of *Williamson County*." City's Opening Brief in Support of its Third Motion for Summary Judgment at 26.

In *Johnson* the Idaho Supreme Court held:

> We have held that appealability depends upon whether the decision authorizes the developer to take steps to permanently alter the land without further approval of the governing board.
>
> If the ordinance authorizes the developer to alter the land upon the issuance of the permit, it does not matter if the ordinance states that the issuance of the permit is or is not appealable. It is appealable under LLUPA. To hold otherwise would allow a governing board to craft an ordinance that would permit a development to be completed before it could be challenged by a petition for judicial review.
> . . .
>
> If [the governing board] does not want the issuance of a CUP to be appealable, then the issuance of that permit cannot authorize the developer to permanently alter the land.

Johnson, 146 Idaho at 925, 204 P.3d at 1136. Moreover, there is no requirement that a party seek a regulatory takings analysis prior to seeking just compensation for a taking.

Idaho Code § 67-8003 does not require such an action and the 2016 amendment added the following:

> A private property owner is not required to submit a request under this chapter. The decision by the private property owner not to submit a request under this chapter shall not prevent or prohibit the private property owner from seeking any legal or equitable remedy including, but not limited to, the payment of just compensation.

Idaho Code § 67-8003(5). The intent of the legislature in amending the statute was to clarify the statute. *See* 2016 Idaho Sess. Laws Ch. 225, § 1, p. 620 ("This legislation clarifies that the right of a private property owner to request a regulatory takings analysis is discretionary").

In the present case once the building permit was issued it authorized Plaintiffs to permanently alter the land. There is no question that this constituted a final decision by Defendant. *See Johnson*, 146 Idaho at 925; *Canal/Norcrest/Columbus Action Comm. v. City of Boise*, 136 Idaho 666, 671, 39 P.3d 606, 611 (2001) (holding the City's approval of the conditional use application is a final, appealable decision); *Rural Kootenai Org., Inc. v. Bd. of*

Comm'rs, 133 Idaho 833, 839, 993 P.2d 596, 602 (1999) (finding where no further action by the agency was required for the developer to begin construction, the preliminary plat approval was a final decision).

Additionally, there is no requirement to seek a regulatory takings analysis prior to filing suit in state court. Defendant's argument that a regulatory takings analysis is required is in contravention to the language and the legislative intent of Idaho Code § 67-8003. There is no exhaustion requirement in order to file a takings claim in the State of Idaho. *See* Idaho Code § 67-8003(5); -6521(2)(b) (a person affected by a taking is exempted from the provisions requiring such a person to seek review of a final order). Moreover, as discussed below, there is no requirement under *Williamson County* to exhaust administrative remedies where the state itself does not require as much.

Therefore, this Court determines the issuance of the building permit constituted a final order and satisfies the first prong of the *Williamson County* ripeness test. Defendant's motion for summary judgment as to prong one of *Williamson County* is *denied*.

b. Regulatory taking under prong two of Williamson County.

Prong two of *Williamson County* requires the party asserting that a taking has occurred to seek just compensation through "procedures the state has provided for doing so." *Williamson County*, 473 U.S. at 194, 105 S.Ct. at 3120. The import of this requirement is that the aggrieved party must have been denied just compensation first before there has been a constitutional violation. *Id*. Prong two does not require the aggrieved party to seek review of the decision that precluded the taking, only that it seek compensation through available remedies. *Id.*

Defendant argues that Plaintiff's federal takings claim must be forfeited because Plaintiff failed to seek a regulatory takings analysis and failed to timely file notice under the ITCA. City's Opening Brief in Support of its Third Motion for Summary Judgment at 32.

i. Analysis under the Regulatory Takings Act, Idaho Code § 67-8001 et seq.

Defendant's argument that Plaintiff must have utilized the Regulatory Takings Act, Idaho Code § 67-8001 *et seq.*, does not comport with the intention of prong two in *Williamson County*. The purpose of Idaho's Regulatory Takings Act is to provide a review process to be used by local governments to determine if a proposed action would result in a taking of private property without due process of law. Idaho Code § 87-8001. *Williamson County* specifically rejected the requirement that a party must exhaust all review procedures:

> Again, it is necessary to contrast the procedures provided for review of the Commission's actions, such as those for obtaining a declaratory judgment . . . with procedures that allow a property owner to obtain compensation for a taking. Exhaustion of review procedures is not required. As we have explained, however, because the Fifth Amendment proscribes takings *without just compensation,* no constitutional violation occurs until just compensation has been denied. The nature of the constitutional right therefore requires that a property owner utilize procedures for obtaining compensation before bringing a § 1983 action.

Id., 473 U.S. at 195, 105 S. Ct.at 3121 n.13 (internal citations omitted) (emphasis in original).

This distinction was adhered to in *Liberty Mut. Ins. Co. v. Brown*, 380 F.3d 793 (5th Cir. 2004), in which the fifth circuit determined that exhaustion of state administrative review procedures was only necessary when state law required the exhaustion prior to seeking just compensation. *Id*. The Court held "the exhaustion of state administrative remedies is not an independent federal law prerequisite to a federal takings claim." *Id.*; *see also DLX, Inc. v. Kentucky*, 381 F.3d 511, 518 (6th Cir. 2004) (holding "exhaustion is never required in a § 1983 case . . . and that there is no exception for takings claims."); *Alto Eldorado P'ship v. Cty. of Santa Fe*, 634 F.3d 1170, 1177 (10th Cir. 2011) (holding ripeness under the second prong of *Williamson County* is only applicable to state procedures for compensation and is inapplicable "if a procedure for compensation is not available or compensation is otherwise foreclosed.").

Therefore, Plaintiff's failure to utilize the provisions of Idaho's Regulatory Takings Act does not preclude Plaintiff from pursuing a federal takings claim.

This Court recognizes that *Hehr v. City of McCall*, 155 Idaho 92, 305 P.3d 536 (2013), denied relief for failure to seek review under Idaho's Regulatory Takings Act; nevertheless, the language of *Williamson County* clearly distinguishes between the necessity of establishing that just compensation was denied and a Regulatory Takings Act review of whether a local government's actions may have resulted in a taking. That distinction is relevant to this analysis and to Defendant's assertion that a review under the Regulatory Takings Act is required. Based on the language and the intent of *Williamson County*, this Court determines that Plaintiff is not required to exhaust all state review procedures as a predicate to satisfying prong two of the ripeness analysis of *Williamson County*.

ii. Failure to seek an adequate state remedy by failing to timely file notice under ITCA.

"Compliance with the Idaho Tort Claims Act's notice requirement is a mandatory condition precedent to bringing suit, the failure of which is fatal to a claim, no matter how legitimate." *McQuillen v. City of Ammon,* 113 Idaho 719, 747 P.2d 741, 744 (1987) (citing Idaho Code § 6–908). The ITCA, found at Idaho Code § 6–901 *et seq*., was enacted in 1971. Idaho Code § 6-901. "The Act abrogates sovereign immunity and renders a governmental entity liable for damages arising out of its negligent acts or omissions." *Lawton v. City of Pocatello,* 126 Idaho 454, 458, 886 P.2d 330, 334 (1994). In order to bring a lawsuit against a governmental entity under the ITCA, a plaintiff must comply with the ITCA's notice requirements. *Smith v. City of Preston,* 99 Idaho 618, 620, 586 P.2d 1062, 1064 (1978). Pursuant to the ITCA:

> All claims against a political subdivision [subdivision] arising under the provisions of this act and all claims against an

> employee of a political subdivision for any act or omission of the employee within the course or scope of his employment shall be presented to and filed with the clerk or secretary of the political subdivision within one hundred eighty (180) days from the date the claim arose or reasonably should have been discovered, whichever is later. I.C. § 6–906.
>
> Not all actions are covered by the ITCA. Instead, the ITCA covers any "claim," which it defines as "any written demand to recover money damages from a governmental entity or its employee which any person is legally entitled to recover under this act as compensation for the negligent or otherwise wrongful act or omission of a governmental entity or its employee when acting within the course or scope of his employment." I.C. § 6–902(7).

Van v. Portneuf Med. Ctr., 147 Idaho 552, 557, 212 P.3d 982, 987 (2009).

Further, Idaho Code § 50-219 provides: "[a]ll claims for damages against a city must be filed as prescribed by chapter 9, title 6, Idaho Code." Idaho Code § 50-219. Though the ITCA relates specifically to tort claims, the Idaho Supreme Court has construed Idaho Code § 50–219 "to require that a claimant must file a notice of claim for all damage claims, tort or otherwise, as directed by the filing procedure set forth in I.C. § 6–906 of the [ITCA]." *Sweitzer v. Dean,* 118 Idaho 568, 572, 798 P.2d 27, 31 (1990). Such a notice "shall be presented to and filed with the clerk or secretary of the political subdivision within one hundred eighty (180) days from the date the claim arose or reasonably should have been discovered, whichever is later." Idaho Code § 6–906.

In the present case Plaintiff failed to file a notice of claim pursuant to the ITCA. This Court determined that the failure barred only Plaintiff's state law claims. Order on Third Motion at 8. However, this Court also determined that the failure to file a notice of claim under state law requirements did not bar Plaintiff's federal takings claim. *Id.*, at 13. This Court relied on the Idaho Supreme Court's decision in *BHA Investments, Inc. v. City of Boise ("BHA II")*, 141 Idaho 168, 108 P.3d 315 (2005). In that case the Idaho Supreme Court held:

> The Supreme Court stated that a State's authority to prescribe the rules and procedures governing suits in its own courts "does not extend so far as to permit States to place conditions on the vindication of a federal right." It later added, "[A] state court may not decline to hear an otherwise properly presented federal claim because that claim would be barred under a state law requiring timely filing of notice. State courts simply are not free to vindicate the substantive interests underlying a state rule of decision at the expense of the federal right." As we acknowledged in *Sweitzer v. Dean,* 118 Idaho 568, 572, 798 P.2d 27, 31 (1990), "A state's notice-of-claim statute which provides that no action may be brought or maintained against a state government subdivision unless claimant provides written notice within a certain period of time is preempted when a federal civil rights action is brought in state court." ***Therefore, the failure to comply with the notice requirements of the Idaho Tort Claim Act does not bar their claim based upon the Takings Clause in the Constitution of the United States.***

BHA II, 141 Idaho at 175–76, 108 P.3d at 322–23 (emphasis added).

Defendant argues this Court erred when it determined that failure to comply with the notice of claim provision of ITCA did not bar a federal claim based upon the Takings Clause. City's Post-Trial Brief at 30-31. Defendant argues that failure to comply with the notice requirement of the ITCA works a forfeiture of the federal takings claim and urges that the Idaho Supreme Court was incorrect when it decided *BHA II*. Oral Argument at 4:12 (January 17, 2017). Defendant contends the holding in BHA II simply means there is no requirement that a party provide notice of the federal claim. City's Post-Trial Brief at 30.

In *Felder v. Casey,* 487 U.S. 131, 108 S.Ct. 2302 (1988), the Court held that a state notice of claim provision "operates, in part, as an exhaustion requirement by forcing claimants to seek satisfaction in the first instance from the governmental defendant. Congress never intended that those injured by governmental wrongdoers could be required, as a condition of recovery, to submit their claims to the government responsible for their injuries." *Felder*, 487 U.S. at 132, 108 S.Ct. at 2303.

The notice requirement cannot be used to place a condition on the vindication of a federal right.[2] The federal claim asserted here is based upon the vindication of a federal right found in the constitution and failure to comply with the notice requirements of the ITCA cannot bar a claim based upon the Takings Clause.

As the United States Supreme Court made clear in *Felder* and the Idaho Supreme Court made clear in *BHA II*, state notice of claim statutes cannot be used as a bar to assert a federal claim for the vindication of a right. The *Felder* Court explained:

> While prompt investigation of claims inures to the benefit of both claimants and local governments, notice statutes are enacted *primarily* for the benefit of governmental defendants, and are intended to afford such defendants an opportunity to prepare a stronger case. Sound notions of public administration may support the prompt notice requirement, but those policies necessarily clash with the remedial purposes of the federal civil rights laws.

Felder, 487 U.S. at 132, 108 S. Ct. at 2304.

This Court determines that compliance with a state notice of claim statute does not preclude the vindication of right based on the Takings Clause. Therefore, this Court determines Plaintiff's failure to file such notice cannot form the basis for finding the federal claim is unripe under prong two of the *Williamson County* ripeness test.

The Idaho Constitution provides: "Private property may be taken for public use, but not until a just compensation, to be ascertained in the manner prescribed by law, shall be paid

[2] In *BHA II* the Court relied on Felder for its analysis: "In *Felder*, the plaintiff brought his action pursuant to 42 U.S.C. § 1983, while in this case Bravo and Splitting Kings have asserted their federal claim directly under the Takings Clause in the United States Constitution. **That difference has no bearing on the application of *Felder*.** Section 1983 "does not confer any substantive rights. It is a vehicle for vindicating rights secured by the United States Constitution or federal law." *Bryant v. City of Blackfoot*, 137 Idaho 307, 314, 48 P.3d 636, 643 (2002). The Takings Clause is self-executing, and a takings claim may be based solely upon it, *First Lutheran Church v. Los Angeles County*, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987). . . . The *Felder* case was based upon a state notice-of-claim law that 'place[d] conditions on the vindication of a federal right,' 487 U.S. at 147, 108 S.Ct. at 2311, 101 L.Ed.2d at 143 not upon a state law that conflicted with the procedure provided by § 1983." *BHA Investments, Inc. v. City of Boise*, 141 Idaho 168, 176, 108 P.3d 315, 323 (2004) (emphasis added).

therefor." Idaho Const. art. I, § 14. Under the fifth amendment to the United States Constitution there is no requirement that "just compensation be paid in advance of, or contemporaneously with, the taking; all that is required is that a 'reasonable, certain and adequate provision for obtaining compensation' exist at the time of the taking." *Williamson County.*, 473 U.S. at 194, 105 S. Ct. at 3120 (citing *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 124–125, 95 S.Ct. 335, 349 (1974)). Under *Williamson County* the Court expressed an intention to evaluate only those claims where just compensation had been denied.

Based upon Idaho's Takings Clause just compensation was denied at the time of the taking. Idaho's constitution requires that just compensation must be ascertained in a manner prescribed by law and paid at the time of the taking. Idaho Const. art. I, § 14. At the time the impermissible tax was exacted, a taking occurred and just compensation was required *at that time*. Further, Defendant calculated just compensation in contravention to the manner prescribed by law. See *NIBCA*, 158 Idaho at 81-84, 343 P.3d at 1088-91. Plaintiff was denied just compensation at the time of payment. *Williamson County's* ripeness analysis was intended to bar federal litigation where parties had been denied just compensation. To the extent that prong two requires such a denial, Plaintiffs were denied at the time of the exaction.

Therefore, this Court determines that Plaintiff's claim is ripe under prong two of *Williamson County* and Defendant's motion for summary judgment is denied.

III. CONCLUSION

Defendant's motion to reconsider this Court's classification of the fee at issue as an impermissible tax is denied. The lack of authority for the imposition of the fee is sufficient to characterize the fee as an impermissible tax. The *NIBCA* Court properly rejected Defendant's argument and also characterized the fee as an impermissible tax. Defendant's motion to reconsider this Court's decision to not entertain the reasonable nature of the fee is denied. If the

Court were to engage in a reasonable analysis it would render the requirements of *Loomis* moot. Specifically, the Loomis decision required municipalities to base cap fees upon a single, finely wrought methodology. That methodology was not employed here. If the Court were to engage in a reasonable analysis based upon the wrong methodology it would in effect create a second manner of calculating cap fees, and endorse the imposition of a tax without authority. Defendant's motion to reconsider this Court's denial of Defendant's equitable defenses of unjust enrichment and quantum meruit as an absolute bar to Plaintiff's recovery is denied. Defendant's equitable defenses cannot be used to allow Defendant to retain the proceeds from an impermissible tax that Defendant imposed without authority.

Defendant's motion to reconsider this Court's decision that the taking at issue was a physical taking is granted. This Court agrees that the taking at issue is more properly characterized as a regulatory taking. However, this Court determines the issuance of the building permit constituted a final order and no regulatory takings analysis was required in order to characterize it as final. Under prong two there is no requirement to seek administrative review and state notice of claim provisions cannot serve as a bar to federal takings claims. Defendant's motion for summary judgment is denied.

ORDER:

Based upon the foregoing and good cause appearing therefore,

IT IS HERBY ORDERED, Defendant's motion to reconsider the nature of the fee as an impermissible tax and engage in a reasonableness evaluation is denied, Defendant's motion to reconsider this Court's denial of the equitable defenses of unjust enrichment and quantum meruit is denied, Defendant's motion to reconsider the classification of the taking as a physical taking is granted. To the extent this Court characterized the taking as a physical taking that decision is vacated. Defendant's motion for summary judgment as to the regulatory taking being unripe

pursuant to Williamson County is denied.

DATED: This 21st day of February, 2017.

BY THE COURT:

/s/_____
Cynthia K.C. Meyer
District Judge

CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of February, 2017, I caused, to be served, a true and correct copy of the foregoing document as addressed to:

Jason S. Risch
RISCH ♦ PISCA, PLLC
407 W. Jefferson Street
Boise, ID 83702-6012
Fax: (208) 345-9928

____ Mailed
____ Hand Delivered
____ Faxed

Christopher H. Meyer
GIVENS PURSLEY, LLP
601 W. Bannock Street
P.O. Box 2720
Boise, ID 83701-2720
Fax: (208) 388-1300

____ Mailed
____ Hand Delivered
____ Faxed

_____
Deputy Clerk