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 THE ISSUE OF JUST COMPENSATION

Closing argument in the above entitled matter 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.

I. 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*. Plaintiff filed a Complaint and request for a court trial on June 4, 2012. 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 held the district court erred when it determined the fee was not an impermissible tax. *North Idaho Bldg. Contractors Ass'n v. City of Hayden ("NIBCA")*, 158 Idaho 79, 343 P.3d 1086 (2015). The case was remanded for further proceedings on February 27, 2015. *Id.*

Following remand 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. This Court determined the fee constituted an impermissible tax, was imposed without authority, 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 ("ITCA"). Defendant also argued the equitable defenses of unjust enrichment and quantum meruit would serve as an absolute bar to any recovery by Plaintiff. 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 September 2, 2016, this Court granted Plaintiff's motion for class certification and named Plaintiff's Counsel as class counsel. On November 17, 2016, the parties filed a stipulation of undisputed facts.

On December 9, 2016, Defendant filed its motion to reconsider. Defendant asked 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 that the equitable defenses of unjust enrichment and quantum meruit could not serve as an absolute bar to recovery. In its Memorandum Decision on Defendant's Motion to Reconsider this Court declined to reconsider the question of the reasonableness of the fee and Defendant's equitable defenses. Memorandum Decision on Defendant's Motion to Reconsider at 8, 12. This Court granted Defendant's motion to reconsider the characterization of the fee as a physical taking and vacated its prior decision. *Id.* at 17. This Court then analyzed the fee as a regulatory taking and determined that it was not unripe under the ripeness test announced in *Williamson County*. *Id.* at 23.

In sum, prior decisions have determined that the fee imposed by Defendant constituted an impermissible tax, Plaintiff failed to timely file a notice of claim under the ITCA, Plaintiff's state law claims were barred by the failure to comply with the provisions of the ITCA, Defendant's equitable defenses could not serve as an absolute bar to Plaintiff's recovery, class certification was warranted, and Plaintiff's federal takings claim was ripe under the two-prong test of *Williamson County*. Having concluded that a taking occurred the only remaining issue before this Court is what just compensation is due Plaintiff.

Trial on the remaining issues was scheduled for the end of November 2016. However, the parties agreed that they would submit stipulated facts to the Court in writing, along with their own proposed Findings of Fact and Conclusions of Law and briefing. Oral argument on Defendant's Motion to Reconsider and closing argument on the remaining issues was heard on January 17, 2017.

This Court has carefully reviewed and considered the pleadings, evidence, stipulated and proposed facts, conclusions, and briefing submitted by the parties, and now enters its Memorandum Decision and Order, which shall constitute findings of fact and conclusions of law pursuant to Idaho Rule of Civil Procedure 52(a). Any of the following findings of fact that should be denominated as a conclusion of law shall be deemed to be a conclusion of law. Any of the following conclusions of law that should be denominated a finding of fact shall be deemed a finding of fact.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Jurisdiction and venue are appropriately before this Court. Defendant is a municipality located in the County of Kootenai, State of Idaho. Plaintiffs are a class of builders and private parties residing, doing business, or securing building permits for construction in Kootenai County, State of Idaho. Defendant City of Hayden owns and operates a sewage collection system that provides for the collection of untreated sewage from residential and commercial properties and transportation thereof to a regional sewage treatment facility owned and operated by the Hayden Area Regional Sewer Board. Defendant requires the payment of a one-time sewer capitalization fee ("cap fee") as a predicate condition to the issuance of a building permit for new or existing structures connecting to the system for the first time. Each property for which a building permit was issued and a cap fee paid received a connection to Defendant's sewer system.

In 1993 the cap fee was set at $500. On February 10, 1998, Defendant enacted Ordinance 268 adopting a cap fee of $500, based on methodology announced by the Idaho Supreme Court in *Loomis v. City of Hailey*, 119 Idaho 434, 807 P.2d 1272 (1991). From 2001 to 2005 the cap fee was set at $580. From 2005 to 2006 the cap fee was $737. During 2006 through the first half of 2007 the cap fee was $774.

On May 8, 2007, Defendant adopted Resolution No. 2007-2 imposing a cap fee of $2,280. The new cap fee became effective on June 7, 2007. In December of 2012 Defendant adopted Resolution No. 2012-9 which decreased the cap fee from $2,280 to $2,239. Both the 2007 and the 2012 cap fees were not calculated according to the *Loomis* methodology.

The *Loomis* Court determined the equity buy-in method was the proper methodology for calculating a fee such as the cap fee in the present case. The *Loomis* equity buy-in model requires a municipality to arrive at the fee "by dividing the net system replacement value by the number of users the system can support. The new user is charged the value of that portion of the system capacity that the new user will utilize at that point in time." *Loomis*, 119 Idaho at 443, 807 P.2d at 1281.

Defendant had employed the *Loomis* methodology to calculate the cap fee in 1998. Defendant recognized in 1998 that a cap fee must be imposed based on the portion of the system the user was utilizing at that point in time and could not be used for future expansion. *See* Affidavit D. Phillips at 96. In 1998 Defendant refunded fees collected in excess of that allowed by *Loomis*. *Id.*

In 2007 Defendant engaged Welch Comer and Associates to complete a study to determine the propriety of increasing the cap fee. The study calculated a fee based on the *pro rata* replacement value of the next increment of sewer capacity rather than a *pro rata* replacement value of that portion of the system that a user was utilizing at that point in time. The Welch Comer study appears in the record in this action as Exhibit A to the *Affidavit of J. Jameson* filed on December 6, 2012.

The cap fee imposed in 2007, and in 2012, was calculated based upon the cost of upgrading the existing sewer system and the cost of new construction in order to expand the system to the area of city impact in an effort to extend service to anticipated areas of growth.

Defendant based the fee on the expansion of the system and the cap fee was not based on that portion of the system that a user would be utilizing at that time, but on the next increment of system capacity. All monies collected from the cap fees imposed in 2007 and 2012 were used to fund capital improvements in the sewer collection system for future use. 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.

The 2007 and 2012 fees were based upon the cost of expanding the system to serve future users. The fees were not based on the service that new users were connecting to at the time it was paid. Defendant did not have the authority to impose a cap fee based on the cost of expansion. The cap fee was an impermissible tax enacted without authority and without a basis in law.

Following remand Defendant contracted with Financial Consulting Solutions Group, Inc. ("FCS") in 2015 to complete a study of the cap fee based upon the *Loomis* equity buy-in method. The FCS study suggested the cap fee in 2007 could have been between $2,600 and $4,808 depending upon certain variables. On March 4, 2016, Defendant eliminated the fee based on the Welch Comer study and replaced it with a new cap fee. The 2016 cap fee was formulated by FCS pursuant to the equity buy-in methodology announced in *Loomis*.

The persons and entities identified in Exhibit 1 in the *Stipulation of Undisputed Facts* were timely and properly sent written notices of the pendency of this class action pursuant to the order of this Court, and Notice was published in the Coeur d'Alene Press, a newspaper in general circulation in Kootenai County, on October 26, 2016. The class consists of those parties who paid the cap fee and received a connection to Defendant's sewer system. The present action warranted certification of class as set forth in this Court's Amended Memorandum Decision on Plaintiffs' Motion for Certification of Class. All members of the class who were required to pay

the cap fee are identified in Exhibit 1 to the *Stipulation of Undisputed Facts*. Plaintiff's counsel was properly appointed class counsel. Three parties opted out of the class.

Plaintiff's state law claims are barred for failure to timely file a notice of claim under the ITCA. Plaintiffs' federal damage claims are subject to a two-year statute of limitations. Only those claims arising on or after April 12, 2010, are before this Court. A taking occurred because the cap fee constituted an impermissible tax levied without authority as a predicate for obtaining a building permit. Plaintiffs were denied just compensation in a manner prescribed by law at the time of the taking based upon Defendant's failure to calculate the cap fee in a lawful manner.

A. The Service Provided is not Just Compensation for the Taking.

Pursuant to the Takings Clause of the Fifth Amendment, "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V. 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 therefor." Idaho Const. art. I, § 14. "In order to state a claim under the Takings Clause, a plaintiff must first demonstrate that he possesses a 'property interest' that is constitutionally protected." *Schneider v. Cal. Dep't of Corr.,* 151 F.3d 1194, 1198 (9th Cir.1998). "Only if he does indeed possess such an interest will a reviewing court proceed to determine whether the expropriation of that interest constitutes a 'taking' within the meaning of the Fifth Amendment." *Id.* Depending on the facts of a case, a court will answer the question whether a "taking" has occurred by utilizing either a "per se" or an "ad hoc" analysis. *See Brown v. Legal Found. of Wash.,* 538 U.S. 216, 233–35, 123 S. Ct. 1406 (2003). Finally, if a "taking" has indeed occurred, a court must determine whether the property owner has received "just compensation." *Id.* at 235, 123 S. Ct. 1406 (The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just

compensation). The "just compensation" required by the Fifth Amendment "is measured by the property owner's loss rather than the government's gain." *Id.* at 235–36, 123 S. Ct. 1406.

Defendant argues that the 2007 and 2012 fees were reasonable and were less than the City could have charged had the proper methodology been used. Defendant contends Plaintiffs received just compensation by being able to hook up to Defendant's sewer system. Plaintiff argues that the fees were an illegal tax imposed without authority, and therefore, the entirety of the fees must be refunded because they constitute a taking without just compensation.

Initially, it is important to note that under the Idaho Constitution just compensation is required to be paid at or before the time of the taking. Idaho Const. art. I, § 14. Further, the Idaho takings provision requires that just compensation be ascertained in a manner provided by law. *Id.* Plaintiffs had a right to just compensation at the time the cap fee was paid. Defendant argues that just compensation was provided at that time in the form of the hook-up to the sewer system.

Defendant's analysis is incorrect. If Defendant had calculated the cap fee properly, using the *Loomis* methodology, there would have been no taking and a determination of just compensation would not have been necessary. It is true that Plaintiffs, in exchange for paying the cap fee, were allowed to hook into the sewer system. But Defendant's analysis is flawed to the extent it presupposes that *any* "compensation" paid or benefit conferred is "just" compensation.

Defendant has consistently failed to demonstrate under what authority the cap fee was imposed. A fee imposed without authority is, at its essence, a disguised tax. *See Brewster v. 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."). In fact Defendant's argument is flawed in its initial

premise. Just compensation cannot be measured merely based upon the fact that Plaintiffs received a connection to the sewer system. If Defendant had employed the correct methodology to determine the cap fee in the first instance, there would be no taking or just compensation analysis. Defendant did not employ the correct methodology.

i. Accepting Defendant's argument would compel this Court to stamp with approval an after-the-fact effort to justify wrongful conduct.

Defendant has steadfastly insisted that the 2007 and 2012 cap fees were reasonable based on the 2015 FCS study. Defendant has insisted that the cap fee was less than what could have been imposed at the time based upon the FCS study. Defendant continues to assert that it did nothing wrong and its actions were done in good faith. Defendant's arguments miss the point. As the Supreme Court noted in its decision on remand: because Defendant did not show that the cap fee in 2007 was the actual cost to provide sewer system service to a customer, "and, there is no showing that the amount of the fee was based upon any such calculation," the cap fee constituted an impermissible tax. *See NIBCA*, 158 Idaho at 81, 343 P.3d at 1088. Defendant cannot show that the cap fee was properly calculated in a manner prescribed by law at the time of its imposition, because indisputably, it was not.

The implication of Defendant's argument is not lost on this Court. Defendant concedes the cap fee was not calculated in accordance with the *Loomis* equity buy-in methodology. Yet Defendant contends that because the fee is reasonable based on the 2015 FCS study there is no harm. This Court has rejected that position several times.

The incongruity lies in the manner in which the fee was imposed. Defendant usurped legislative authority to impose a tax on a group of citizens to benefit the public at large. There has been nothing supplied to this Court to demonstrate that Defendant had that authority. In the absence of such authority, Defendant asks this Court to approve the conduct because eight years

later Defendant has purportedly demonstrated that if it had employed the lawful methodology mandated by the *Loomis* Court, the amount it charged for the cap fee in 2007 and 2012 would have been the same or less. This Court cannot be a safe harbor for the imposition of a tax without demonstrable authority to do so. The Court cannot be a forum for the sanctioning of wrongful conduct. The ends cannot justify the means.

Moreover, this Court is concerned with the implication of what Defendant proposes. The Court does not want to chill the legitimate grievances of a citizenry when a municipality exceeds its statutory authority. Cases such as the one now before this Court would not be brought if the Court allowed a municipality to justify its wrongful conduct by doing years later what it should have done at the outset. Suits of this type would be futile based upon a municipality's ability to justify impermissible conduct simply by showing what they could have, should have, or might have done. The Court cannot imagine a scenario where it would be proper to approve an impermissible tax on the basis that a municipality can demonstrate what it should have done. It offends the notions of fairness, justice, and it offends the Constitution.

ii. The 2015 FCS study.

The 2015 FCS study provided by Defendant, and uncontested by Plaintiff, suggests that if Defendant had used the proper methodology the City could have charged between $2,600 and $4,808. Defendant argues that this supports its contention that the cap fees imposed in 2007 and 2012 were reasonable.

Defendant has continued to insist that the proper analysis the Court should engage in is a reasonableness analysis. Defendant has argued this point in every summary judgment motion filed and in its motion to reconsider. Defendant's argument that the 2015 FCS study is dispositive on the issue of whether the cap fee was proper is flawed.

In its Memorandum Decision and Order on Cross Motions for Summary Judgment, this Court explicated three decades of decisions relating to the authority of a municipality to impose a fee. Defendant's argument that the 2015 FCS study demonstrates that the fees imposed in 2007 and 2012 are reasonable would effectively abrogate every one of those decisions. In *Brewster* the Court determined that when a municipality collects a fee from a citizen that is not based upon a service provided it constitutes an impermissible tax. *Brewster*, at 505, 768 P.2d at 768. The Court added that no matter how well-intentioned the City may have been, it would have been improper to validate such an act. *Id.* If a City imposes a tax it must have specific taxing authority in order to do so. *Id.*

The Court expanded on *Brewster* in several subsequent cases. *See City of Grangeville v. Haskins*, 116 Idaho 535, 777 P.2d 1208 (1989) (finding that fees charged for proprietary services must be based on the consumption of a service); *Loomis*, at 440, 807 P.2d at 1278 (holding that it is proper to charge a fee for water and sewer service only if "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"); *Idaho Bldg. Contractors Ass'n v. City of Coeur d'Alene ("IBCA")*, 126 Idaho 740, 890 P.2d 326 (1995) (finding that when an ordinance imposes an impermissible tax rather than a fee the question of the reasonableness of the fee is never reached); *Lewiston Independent School Dist. No. 1 v. City of Lewiston*, 151 Idaho 800, 264 P.3d 907 (2011) (stating 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); *Viking Const., Inc. v. Hayden Lake Irr. Dist.*, 149 Idaho 187, 233 P.3d 118 (2010) (discussing the method of calculating a fee for the use of a service: "[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."); *BHA Investments, Inc. v. City of Boise ("BHA II")*, 141 Idaho 168, 108 P.3d 315 (2004) (stating when a fee is imposed without authority "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*") (emphasis added).

Here, Defendant did not have the authority to impose a fee based upon the cost to expand the sewer system, nor did it have authority to levy a tax for such a purpose. Defendant acted outside the scope of its authority and imposed an impermissible tax upon Plaintiff. It does not matter how reasonable or well-intentioned Defendant was, it cannot stand. *See Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 416, 43 S. Ct. 158, 160 (1922) (finding "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"); *Montana Nat. Bank of Billings v. Yellowstone Cty., Mont.*, 276 U.S. 499, 504–05, 48 S. Ct. 331, 333 (1928) (finding "Plaintiff in error cannot be deprived of its legal right to recover the amount of the tax unlawfully exacted of it by the later decision which, while repudiating the construction under which the unlawful exaction was made, leaves the monies thus exacted in the public treasury").

Defendant was aware of the proper method for calculating the cap fee in 1998 when it refunded a portion of the fee collected based on recent decisions of the Idaho Supreme Court. See Affidavit D. Phillips, p. 96. In 2007 Defendant chose a method that was in contravention to the equity buy-in fee announced in *Loomis*. There was no attempt to properly calculate the cap fee; in fact the evidence before the Court demonstrates Defendant rejected the proper calculation and selected another that served its ends. No matter how well-intentioned Defendant was in imposing the fee, it imposed an impermissible tax without authority. To justify the fee some nine years later based on the FCS study would offend an entire body of case law. A well-intentioned desire to serve the growing community is not sufficient to justify achieving the desired result by circumventing the lawful manner in which it must be achieved. The reasonableness of the cap fee based upon the FCS study is not the issue.

If the Court were to allow Defendant's argument it would effectively create a second manner of calculating a cap fee. It would allow a municipality to base a fee on whatever it desired, then justify it years later by asking a court to ignore what the fee was based on and simply focus on the amount charged. Such a proposition is inapposite to *Loomis* and its progeny. Rather, the FCS study was completed with the intent of demonstrating that what Defendant did nine years prior was reasonable, focusing solely on the amount charged. However, it is inescapable that both the 2007 and the 2012 fee were impermissible taxes imposed without authority. The measure of just compensation must be the value of what is taken and not the value of that which is received. *Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 30 S. Ct. 459 (1910).

Therefore, a person connecting to a City's sewer system would expect to pay the lawful fee associated with that connection. It cannot be, as Plaintiff argues, that the proper measure of just compensation is the return of the entire fee. Such a conclusion would offend the notion of what constitutes just compensation and would include a windfall. Further, just compensation cannot be Defendant's retention of the entirety of the impermissible tax simply because, hypothetically, if Defendant had calculated the fee using the proper methodology it could have charged a fee that is close to that suggested by the low end range of the FCS study. Just compensation requires that Defendant provide in services the value, calculated in a lawful manner, to those paying the fee.

iii. Contracts, torts, excessive taxes and fees.

Just compensation "means the full monetary equivalent of the property taken. The owner is to be put in the same position monetarily as he would have occupied if his property had not been taken. In enforcing the constitutional mandate, the Court at an early date adopted the concept of market value: the owner is entitled to the fair market value of the property at the time

of the taking." *United States v. Reynolds*, 397 U.S. 14, 16, 90 S. Ct. 803, 805 (1970). While the determination of whether a taking has occurred is a question of law, the determination of what constitutes just compensation is a question for the trier of fact. *Id.*

The question of what constitutes just compensation in this case is not an easy one. It is not the same as the taking of a parcel of real property where just compensation is calculated based upon the prevailing market value. The property at issue is the money paid for the impermissible fee. In that sense it is more closely related to an unlawful exaction, excessive tax, or breach of contract.

In a breach of contract case "the law of damages seeks to place the aggrieved party in the same economic position he would have had if the contract had been performed." *Gilbert v. City of Caldwell*, 112 Idaho 386, 395, 732 P.2d 355, 364 (Ct. App. 1987). That bears some similarity to the goal of just compensation which is to return the party suffering the taking to the same position it would have occupied had the property not been taken. *Reynolds*, 397 U.S. at 16, 90 S. Ct. at 805.

When a tax is declared invalid the remedy is generally to "undo the unlawful deprivation by refunding the tax previously paid. . ." *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, Dep't of Bus. Regulation of Florida*, 496 U.S. 18, 39, 110 S. Ct. 2238, 2251 (1990). In essence the remedy strives to return the aggrieved taxpayer to the position it was in prior to the imposition of the invalid tax.

Unlawful exactions generally follow the same course as an invalid tax and require the entity exacting the fee to return that portion of the fee in excess of that authorized by law. *Owner-Operator Indep. Drivers Ass'n, Inc. v. Idaho Pub. Utilities Comm'n*, 125 Idaho 401, 406, 871 P.2d 818, 823 (1994). The law favors limiting the agency's authority to exact a fee to only that which is authorized, and when the agency exceeds that authority it must disgorge the

unlawful exactions and return them to the party it has taken them from. Again, the just result is to restore the aggrieved party to its pre-deprivation position.

In *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 717–18, 119 S. Ct. 1624, 1642 (1999), The Supreme Court analogized an uncompensated taking to tortious conduct:

> The city argues that because the Constitution allows the government to take property for public use, a taking for that purpose cannot be tortious or unlawful. We reject this conclusion. Although the government acts lawfully when, pursuant to proper authorization, it takes property and provides just compensation, the government's action is lawful solely because it assumes a duty, imposed by the Constitution, to provide just compensation. See *First English,* 482 U.S., at 315, 107 S. Ct. 2378 (citing *Jacobs,* 290 U.S., at 16, 54 S. Ct. 26). When the government repudiates this duty, either by denying just compensation in fact or by refusing to provide procedures through which compensation may be sought, it violates the Constitution.
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> In those circumstances the government's actions are not only unconstitutional but unlawful and tortious as well. See *Gardner v. Village of Newburgh, supra,* at 166, 168 ("[T]o render the exercise of the [eminent domain] power valid," the government must provide landowner "fair compensation"; "[u]ntil, then, some provision be made for affording him compensation, it would be unjust, and contrary to the first principles of government," to deprive plaintiff of his property rights; absent such a provision, the plaintiff "would be entitled to his action at law for the interruption of his right"); *Beatty v. United States,* 203 F. 620, 626 (C.A.4 1913) ("The taking of property by condemnation under the power of eminent domain is compulsory. The party is deprived of his property against his will. It is in effect a lawful trespass committed by the sovereign, and lawful only on the condition that the damages inflicted by the trespass are paid to the injured party. The analogy to a suit at common law for trespass is close and complete").
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> The argument that an uncompensated taking is not tortious because the landowner seeks just compensation rather than additional damages for the deprivation of a remedy reveals the same misunderstanding. Simply put, there is no constitutional or tortious injury until the landowner is denied just compensation. That the damages to which the landowner is entitled for this injury are measured by the just compensation he has been denied is neither surprising nor significant.

City of Monterey, 526 U.S. at 717–18, 119 S. Ct. at 1642.

This Court recognizes that the taking in the present matter is not perfectly analogous to the circumstances in the cases outlined above. The cases provide some instruction demonstrating that the overarching goal of just compensation is to place the party subject to a taking in the same position that it would have been in prior to the taking.

B. Just Compensation.

"Just compensation means the full and perfect equivalent in money of the property taken. The owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken." *United States v. Miller*, 317 U.S. 369, 373, 63 S. Ct. 276, 279–80 (1943). The remedy requires that a party subject to a taking be made whole. Defendant asks this Court to make the party whole by finding that the service provided is equal to the amount of the impermissible tax; in effect justifying the wrongful conduct. Defendant argues that it acted in good faith and the fee was reasonable. Plaintiff argues just compensation requires a return of the entire fee. Plaintiff's argument neglects to consider that it did receive something in exchange for the payment of the impermissible tax.

Ordinance No. 2007-2 and Ordinance 2012-9 purported to replace the existing cap fees with a new fee based upon the impermissible methodology of the Welch Comer report. *See* Affidavit D. Phillips, pp. 99-100. Because Defendant's imposition of the cap fee based on the wrong methodology was impermissible; the enactment of the ordinance replacing the pre-2007 fee with the new fee should be considered void, thus reinstating the previous ordinance establishing the cap fee at $774.

Defendant recognized the proper manner to calculate the cap fee in 1997 when it used the *Loomis* methodology to arrive at the proper fee. City's Proposed Findings of Facts and Conclusions of Law at 5. In light of this evidence, Defendant's oft repeated refrain that the 2007

and 2012 fees were imposed in good faith rings false. The evidence indicates Defendant was aware of the proper methodology required to calculate a cap fee. In 1998 Defendant issued a refund based on the discovery that the methodology used to calculate a cap fee was improper. *See* Affidavit D. Phillips at 96. Defendant's appeal to a good faith justification for its action is not credible.

Moreover, Defendant's 2015 FCS study does not provide a measure of just compensation, nor does it provide a measure of damages to a reasonable certainty.[1] The study reflects Defendant's contention that it may dragoon the legislature's taxing power so long as it can show at a later date that the funds could have been raised in a lawful manner.

Prior to March 4, 2016, the last lawful cap fee Defendant imposed was $774.00 in 2006. The two subsequent fees were imposed unlawfully and just compensation was not provided at the time of the taking because the cap fee was not calculated in a lawful manner. This Court has determined that the cap fee was an impermissible tax and was imposed without any authority. Thus, Ordinance No. 2007-2 and 2012-9 were flawed in purpose and implementation. This Court finds that the proper course is to consider the ordinances that imposed the 2007 and 2012 fees invalidated and effectively to reinstate the pre- 2007 fee as a legitimate cap fee.

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

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[1] In contract cases, damages must be proven with reasonable certainty. *Griffin v. Clear Lakes Trout Co., Inc.*, 143 Idaho 733, 152 P.3d 604 (2007). The FCS study posits that an appropriate sewer cap fee in 2007 would have ranged between $2,600 and $4,808. The tremendous disparity in the range alone suggests that the study did not and cannot be used as a damage calculation.

C. Interest.

Where just compensation is delayed, something more than the value of what is taken "is required to make the property owner whole, to afford him 'just compensation.' This additional element of compensation has been measured in terms of reasonable interest. Thus, 'just compensation' in the constitutional sense, has been held . . . to be fair market value at the time of taking plus interest from that date to the date of payment." *Albrecht v. United States*, 329 U.S. 599, 602, 67 S. Ct. 606, 608 (1947). The determination of a reasonable rate of interest for just compensation is a finding of fact, which should be disturbed only if clearly erroneous. *United States v. 50.50 Acres of Land,* 931 F.2d 1349, 1354 (9th Cir.1991). In *Schneider v. Cty. of San Diego*, 285 F.3d 784, 793 (9th Cir. 2002), the ninth circuit held:

> To determine the appropriate rate of interest when payment of just compensation is delayed, the district court must examine what "a reasonably prudent person investing funds so as to produce a reasonable return while maintaining safety of principal" would receive. *50.50 Acres of Land,* 931 F.2d at 1354. The district court should apply an interest rate based on evidence of the rate that would be generated by investment in a diverse group of securities, including treasury bills. *See United States v. 429.59 Acres of Land,* 612 F.2d 459, 465(9th Cir.1980) (approving an award of interest based on "wide range of government and private obligations with both short term and long term maturities"). In adopting this standard and rejecting Congress's attempts to set a limitation on interest, the Supreme Court has emphasized that under our takings jurisprudence "just compensation" is a "judicial, not a legislative function." *Monongahela Navigation Co. v. United States,* 148 U.S. 312, 327, 13 S.Ct. 622, 37 L.Ed. 463 (1893).

Schneider, 285 F.3d at 793.

Plaintiff has failed to comply with this Court's Scheduling Order as it pertains to disclosure of expert witnesses. The testimony of Plaintiffs' witness (whether that witness is designated as an expert or not) regarding the reasonable rate of interest will not be considered. Defendant has provided this Court with evidence that demonstrates a rate of return for a

reasonably prudent investor during the years in question to be approximately 6 to 7%. See Fifth Affidavit of M. Hendrickson; City's Post Trial Brief at 43.

Defendant has provided tables that show the historic rate of return for a diverse group of securities. Based upon this data the Court finds that a reasonably prudent investor could expect a reasonable rate of return of 6.5% for the years in question.

III. CONCLUSION

Just compensation is provided to make a party whole for a taking. Plaintiffs were denied just compensation at the time the impermissible tax was paid. Plaintiffs received some value in the form of a connection to the City's sewer service. Defendant's FCS study is not a credible measure of damages or just compensation. Plaintiffs are entitled to a refund of the amount paid in excess of $774. Plaintiffs are entitled to pre-judgment interest at a rate of 6.5%.

ORDER:

Based upon the foregoing and good cause appearing therefore, Plaintiffs are awarded just compensation to be calculated by the amount paid in excess of $774. Plaintiffs are awarded pre-judgment interest at a rate of 6.5%. Class counsel is directed to prepare a judgment in conformance with this Memorandum Decision and Order.

DATED: This 24th 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
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____
Deputy Clerk