IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

MATTHEW W. SUMMERS and LINDA SUMMERS, husband and wife, individually and as Trustees of the Matthew W. Summers and Linda Summers Trust, (UDT), dated the 7th day of May, 1999, Plaintiffs, **vs.** MARK F. LADEWIG and DOROTHY J. LADEWIG, Defendants, and KOOTENAI COUNTY, a political Subdivision of the State of Idaho, Intervenor.	**CASE NO. CV-01-05852** **CASE NO. CV-01-02231** **MEMORANDUM OPINION AND ORDER IN RE: SUMMARY JUDGMENT**

This case arises out of the interpretation of the Kootenai County Subdivision Ordinance regarding the number of land divisions that can occur before platting is required. Defendant Kootenai County moved for Summary Judgment and Plaintiffs Summers moved for Partial Summary Judgment.

John F. Magnuson, attorney for Plaintiffs Summers.

Patrick M. Braden, KOOTENAI COUNTY LEGAL SERVICES, attorneys for Defendant Kootenai County.

I
FACTUAL AND PROCEDURAL BACKGROUND

The subject property in this case originally consisted of a parcel of one hundred sixty (160) acres. On June 17, 1965, the parcel was conveyed from Ruth Evans Bradbury to Edgar C. Bradbury and Joyce E. Bradbury. The original Kootenai County Subdivision Ordinance, which was Ordinance # 15, became effective on May 14, 1974. Therefore, on the effective date of the original Subdivision Ordinance, the parcel was owned by Edgar C. Bradbury and Joyce E. Bradbury.

On January 11, 1979, the Kootenai County Subdivision Ordinance was amended by Kootenai County Ordinance No. 26A. Section 1.05 of Ordinance No. 26A, which addresses applicability of the Ordinance, provided in relevant part:

> The ***division of land*** into 5 or more lots, parcels, tracts, or sites for the purpose of sale or lease whether immediate or future, shall proceed in compliance with this Ordinance. All contiguous legal or equitable ownerships shall be governed by the terms of this Ordinance. All ***divisions*** from the original contiguous ownership from the effective date of Ordinance #15 (May 14, 1974) Kootenai County Subdivision Ordinance, whether by original or subsequent owners, shall be counted in the application of these subdivision procedures.
> ***EXCEPTIONS:*** ***The provisions of this chapter shall not apply to:***
> 1. ***Divisions of land*** where the smallest lot is not less than ten (10) acres (gross area to include road right-of-way) when each parcel divided meets the minimum frontage requirements of the Zoning Ordinance.
> 2. ***Divisions*** made by testamentary provisions, the laws of descent, or upon court order.
> 3. ***Divisions*** made for cemeteries or burial plots while used for that purpose.
> 4. ***Divisions*** made for the purpose of lot line adjustments where no additional building sites are created.
> (Emphasis added.)

On April 6, 1995, Edgar C. Bradbury and Joyce E. Bradbury conveyed the parcel to Eugene Young and Shirley Young. At the time of this conveyance, the parcel still consisted of one hundred sixty (160) acres.

On July 10, 1995, Eugene Young and Shirley Young conveyed the southeast forty (40) acres from the one hundred sixty (160) acre parcel to Alan White and Mary White.

The White property was eventually subdivided into four (4) lots pursuant to the Subdivision Ordinance in late 1996 or early 1997 and became Carmel Heights Subdivision.

On November 17, 1995, Kootenai County Ordinance No. 26B became effective. Ordinance No. 26B replaced Ordinance No. 26A with respect to certain provisions relevant to this case.[1] Section 1.05 of Ordinance No. 26B stated as follows:

> The ***division of land*** into two (2) or more lots, parcels, tracts, or sites for the purpose of sale or lease whether immediate or future, shall proceed in compliance with this Ordinance. All contiguous legal or equitable ownerships shall be governed by the terms of this Ordinance. ***All divisions*** from the original contiguous ownership from the effective date of Ordinance #15 (May 14, 1974) Kootenai County Subdivision Ordinance, whether by original or subsequent owners, shall be counted in the application of these subdivision procedures. Platting shall not be required to accomplish the following land divisions:
>
> a. ***Divisions of land*** into four (4) or fewer lots where the smallest lot is not less that twenty (20) acres (gross area to include road right-of-way) when each parcel divided meets the minimum frontage requirements of the Zoning Ordinance.
> b. ***Divisions*** made by testamentary provisions, the laws of descent, or upon court order.
> c. ***Divisions*** made for cemeteries or burial plots while used for that purpose.
> d. ***Divisions*** made for the purpose of lot line adjustments where no additional building sites are created.
>
> (Emphasis added.)

Eugene Young and Shirley Young conveyed the northwest forty (40) acres of the one hundred sixty (160) acre parcel to Chad Wayne Summers and Drista M. Summers on October 3, 1996. The Deed conveying that property was recorded on October 31, 1996.

Eugene Young and Shirley Young conveyed the southwest forty (40) acres of the one hundred sixty (160) acre parcel to Michael J. Denke and Djedda J. Denke on October 22, 1996. The Deed by which that property was conveyed was also recorded on October 31, 1996.

[1] The Subdivision Ordinance was amended and became effective as Ordinance No. 265 on April 28, 1998 and as Ordinance No. 271 on July 13, 1998. Ordinances No. 265 and 271 did not change any of the provisions relevant to this case.

On October 28, 1996, Eugene Young and Shirley Young conveyed the northeast forty (40) acres of the one hundred sixty (160) acre parcel to Matthew Wayne Summers and Linda S. Summers. The Deed conveying this property was recorded on the same day. This property was subsequently conveyed by Quitclaim Deed from Matthew Wayne Summers and Linda S. Summers to Matthew Summers and Linda Summers, Trustees of the Matthew W. and Linda Summers Trust on May 7, 1999.[2] This forty (40) acre parcel is the property at issue in this lawsuit; it will hereinafter be referred to as the "Summers Property." The entire one hundred sixty (160) acre parcel, along with its divisions, is depicted in Exhibit "A," which is attached hereto.

On August 11, 2000, the Summers Property was divided into two (2) parcels and a twenty (20) acre parcel was conveyed from Matthew Summers and Linda Summers, Trustees of the Matthew W. and Linda Summers Trust, to Mark F. Ladewig and Dorothy J. Ladewig. The Summers contend that the split was a legal division under the Subdivision Ordinance. The Kootenai County Planning and Zoning Department has advised the Summers, however, that the split was illegal and that neither of the owners of the two parcels could obtain building permits. According to the Kootenai County Planning and Zoning Department, there were no more "free splits" available and the property had to go through the Subdivision process.[3]

The Summers claim that, before finally purchasing the Summers Property, Mr. Summers contacted the planning staff and asked if he could divide the Summers Property into two (2) twenty (20) acre parcels. According to the Summers, the planning staff

[2] The Summers, individually and as Trustees of the Matthew W. and Linda Summers Trust on May 7, 1999, will be referred to as the "Summers."

[3] On August 20, 2000, the Summers sold the southern twenty (20) acres of the Summers Property to John and Colleen Orr. That sale was rescinded when the Orrs learned that a building permit could not be obtained.

affirmatively represented to Mr. Summers that the division would be exempt from the requirements to subdivide pursuant to the Kootenai County Subdivision Ordinance.

The Summers have filed two lawsuits: (1) ***Summers v. Ladewig***, Kootenai County Case No. CV-01-05852, and (2) ***Summers v. Kootenai County***, Kootenai County Case No. CV-01-02231. The cases were consolidated. Defendants Ladewig have now been dismissed from the consolidated cases. A Motion for Joinder was granted so that the Summers are Plaintiffs in both their individual capacity and in their capacity as Trustees of the Trust.

Defendant Kootenai County moved for Summary Judgment on all issues, including those presented in the Complaint and those presented in the Answer. Kootenai County supports its Motion with a Memorandum and Affidavits of Rand F. Wichman, Sandra M. Meehan, and Patrick M. Braden.

Plaintiffs Summers moved for Partial Summary Judgment on the following: (1) Claim 1 of the First Amended Complaint, and (2) Counterclaim of Kootenai County for declaratory relief. Essentially, the Summers seek entry of declaratory relief which declares that their division of the forty (40) acre parcel into twenty (20) acre parcels constitutes a valid division under all applicable Kootenai County Subdivision Ordinances. The Motion for Partial Summary Judgment is supported by a Memorandum and the Affidavit of Matthew W. Summers.

II

STANDARDS FOR SUMMARY JUDGMENT

Rule 56(c), Idaho Rules of Civil Procedure, provides for summary judgment where there is no genuine issue of material fact and the moving party is entitled to

judgment as a matter of law. In order to make that determination, the court looks to "the pleadings, depositions, and admissions on file, together with the affidavits, if any . . . ."

On a motion for summary judgment, the facts in the record are to be liberally construed in favor of the party opposing the motion. If the court will be the ultimate trier of fact and if there are no disputed evidentiary facts, the trial judge is not constrained to draw inferences in favor of the party opposing the motion for summary judgment; rather, the judge is free to arrive at the most probable inferences to be drawn from the uncontroverted evidentiary facts. ***Loomis v. City of Hailey***, 119 Idaho 434, 807 P.2d 1272 (1991); ***AID Insurance Company (Mutual) v. Armstrong***, 119 Idaho 897, 811 P.2d 407 (Ct.App. 1991).

When both parties move for summary judgment on the same evidentiary facts and on the same theories and issues, they have effectively stipulated that there is no genuine issue of material fact. ***Riverside Development Co. v. Ritchie***, 103 Idaho 515, 650 P.2d 657 (1982); ***AID Insurance Company (Mutual) v. Armstrong, supra***.

If there are no genuine issues of material fact, the court will determine whether a party is entitled to judgment as a matter of law. ***Wells v. United States Life Ins. Co.***, 119 Idaho 160, 804 P.2d 333 (Ct.App. 1991); ***Zumwalt v. Stephan, Balleisen & Slavin***, 113 Idaho 822, 758 P.2d 406 (Ct.App. 1987), ***rev. denied*** (1988).

According to ***Berg v. Fairman***, 107 Idaho 441, 444, 690 P.2d 896 (1984), the "purpose of summary judgment proceedings is to eliminate the necessity of trial where facts are not in dispute and where existent and undisputed facts lead to a conclusion of law which is certain."

In the instant case, both parties have moved for summary judgment with regard to certain issues and, therefore, have effectively stipulated to the facts pertaining to those issues. Accordingly, the matter can be determined as a matter of law. Furthermore, in this case, the court will be the ultimate trier of fact. To the extent that there may conflicting inferences from the undisputed facts, this Court is free to draw the most probable inferences.

III

QUESTIONS PRESENTED

1. Was the division of the Summers Property, which consisted of a forty (40) acre parcel, into two (2) parcels, which consisted of twenty (20) acres each, a lawful division under the terms of the then-current Kootenai County Subdivision Ordinance?

2. Is the Kootenai County Subdivision Ordinance unconstitutional on its face and as applied to Summers because it violates the *Ex Post Facto* Clause?

IV

DISCUSSION

A. DIVISION OF THE PROPERTY

Plaintiffs Summers seek declaratory relief in the form of a judicial declaration that the division of the Summers Property by conveyance of the northernmost twenty (20) acres of that property to the Ladewigs was lawful and did not violate the then-current Kootenai County Subdivision Ordinance. Kootenai County, on the other hand, contends that the division was unlawful and violated the then-current Subdivision Ordinance. Based on their respective positions, both parties moved for Summary Judgment.

The facts set forth in Section I above are not in dispute regarding the original one hundred sixty (160) acre parcel of property, its ownership, and its subsequent divisions since June of 1965. Additionally, the facts are not in dispute regarding the enactment of

the Kootenai County Subdivision Ordinance, its subsequent amendments, and the content of its provisions at given times.

The issue presented is one of proper interpretation of the Subdivision Ordinance. The court applies the same principles when ordinances are interpreted and construed as when statutes are interpreted and construed. The objective in interpreting an ordinance is to derive the intent of the legislative body that adopted the act. Any analysis begins with the language of the enactment. If the language is unambiguous, it must be given its ordinary meaning. If the language is ambiguous, the court looks to rules of construction for guidance. The sections of applicable ordinances must be construed together to determine the legislative body's intent. There is a strong presumption of validity favoring the actions of a zoning authority when it is applying and interpreting its own zoning ordinances. ***Friends of Farm to Market v. Valley County***, 137 Idaho 192, 46 P.3d 9 (2002); ***Payette River Property Owners Ass'n v. Board of Commissioners of Valley County***, 132 Idaho 551, 976 P.2d 477 (1999).

When the Summers Property was divided into two (2) parcels of twenty (20) acres each by conveyance from the Summers to the Ladewigs in August of 2000, Ordinance No. 26B was in effect. The intent of the Ordinance can be derived from its unambiguous language. That Ordinance permits divisions of land into four (4) or fewer lots where the smallest lot is not less than twenty (20) acres. That Ordinance also clearly states that "[a]ll divisions from the original contiguous ownership from the effective date of Ordinance #15 (May 14, 1974) . . . shall be counted in the application of these subdivision procedures. Thus, under the clear language of Ordinance No. 26B, the

original one hundred sixty (160) acre parcel could be divided into four parcels. The undisputed facts reveal the following divisions since 1974:

1. July 10, 1995 - Forty (40) acres were conveyed from Eugene and Shirley Young to Alan and Mary White.
2. October 3, 1996 - Forty (40) acres were conveyed from Eugene and Shirley Young to Chad and Drista Summers (recorded October 31, 1996).
3. October 22, 1996 - Forty (40) acres were conveyed from Eugene and Shirley Young to Michael and Djedda Denke (recorded October 31, 1996).
4. October 28, 1996 - Forty (40) acres were conveyed from Eugene and Shirley Young to Matthew and Linda Summers (recorded October 28, 1996).
5. August 11, 2000 - Twenty (20) acres were conveyed from Matthew and Linda Summers to Mark and Dorothy Ladewig.

When the language of Ordinance No. 26B is given its plain meaning, the last conveyance of twenty (20) acres from the Summers to the Ladewig was the fifth split. As such, the last division had to comply with the requirements of the Subdivision Ordinance. The division that occurred when the Summers conveyed the twenty (20) acre parcel to the Ladewigs was not a "free split." Under Ordinance No 26B, the last division was illegal as a matter of law.

The Summers claim, however, that the last division into two (2) parcels of twenty (20) acres each was actually the fourth split and was, therefore, a "free split." They do not count the first division that occurred when Eugene and Shirley Young conveyed forty (40) acres to Alan and Mary White on July 10, 1995. At the time of that division, Subdivision Ordinance No. 26A was in effect. That Ordinance contained language stating that the provisions of the Ordinance did not apply to divisions of land where the smallest lot was not less than ten (10) acres. Since the lot size was forty (40) acres, the Summers argue that the split fell within an exception to which the Ordinance did not

apply. According to the Summers, the Ordinance did not apply to the split at that time and, therefore, the split could not be counted later as a division.

Ordinance No. 26B states that "all divisions" from the date of May 14, 1974 "shall be counted" when determining the applicability of the Subdivision Ordinance. Ordinance No. 26A does not state that certain splits are not "divisions" nor does it define certain splits as something other than "divisions." Indeed, the Ordinance actually recognizes "divisions" of land and refers to "divisions" several times. The Ordinance does state, however, that certain "divisions" are excepted from the provisions of this particular Ordinance. Even though they were "divisions," certain splits did not have to comply with the provisions of Subdivision Ordinance No. 26A when it was in effect. When Ordinance No. 26B became effective, those "divisions" which had previously been excepted from the provisions of Subdivision Ordinance No. 26A were still "divisions" and could be counted under the plain language of Ordinance No. 26B in the further divisions of land. Thus, any "divisions" which have already occurred, including those that occurred while Ordinance No. 26A was in effect, must be counted in determining whether a particular parcel of property can be divided again.

The Summers point out that, under Subdivision Ordinance No. 26A, the original one hundred sixty (160) acre parcel could have been divided into sixteen (16) lots of ten (10) acres each without going through the subdivision process. The Summers set forth a hypothetical in their memorandum.

First, the hypothetical facts are not the facts of the instant case. The division of the Summers Property into numerous lots did not occur while Subdivision Ordinance No. 26A was in effect. Second, Section 1.05 of Ordinance No. 26B applies to *further*

divisions of real property "for the purpose of sale or lease whether *immediate or future*" (emphasis added). Any divisions while Ordinance No. 26A was in effect remain lawful "free splits," building permits can be obtained for them, and the property owners are not subject to criminal liability; when Ordinance No. 26B became effective, it simply limited further divisions of the property. Third, although the number of divisions was different, both Ordinance No. 26A and Ordinance No. 26B applied the same language with respect to the counting of the divisions from the effective date of Ordinance No. 15, which was May 14, 1974.

Properties that were legally divided during the time that Ordinance No. 26A was in effect remain legal divisions of property. When Ordinance No. 26B was adopted, it became the governing Ordinance. Under the clear language of Ordinance No. 26B, all four (4) conveyances of forty (40) acre parcels from the original one hundred sixty (160) acre parcel in existence on May 14, 1974 were to be counted in determining whether *any further divisions* must comply with the Subdivision Ordinance. Ordinance No. 26B governed at the time that the Summers Property was further divided into two (2) parcels of twenty (20) acres each by conveyance to the Ladewigs. It was this further division that was in violation of Ordinance No. 26B.

In conclusion, the division of the Summers Property, which consisted of a forty (40) acre parcel, into two (2) parcels of twenty (20) acres each was the fifth division of the original one hundred sixty (160) acre parcel. Therefore, it was not a "free split" and was not a lawful division under the terms of Ordinance No. 26B, which was then in effect as the Kootenai County Subdivision Ordinance. Kootenai County's Motion for Summary

Judgment on this ground is granted and the Summers' Motion for Partial Summary Judgment on this ground is denied.

B. CONSTITUTIONALITY OF THE SUBDIVISION ORDINANCE

The Summers contend that Subdivision Ordinance No. 26B was in violation of the *Ex Post Facto* Clause of the United States Constitution and the Idaho Constitution.[4] Article I, § 10 of the United States Constitution states, in pertinent part, that "[n]o State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts . . . ." There is a similar provision in Article I, § 16 of the Idaho Constitution.

The United States Supreme Court has long recognized that the "constitutional prohibition on *ex post facto* laws applies only to penal statutes which disadvantage the offender affected by them." ***Collins v. Youngblood***, 497 U.S. 37, 41, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990). An "ex post facto law" is defined as:

> 1st, every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2nd. Every law that aggravates a crime or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offense, in order to convict the offender.

State v. Byers, 102 Idaho 159, 166, 627 P.2d 788 (1981) (quoting ***Calder v. Bull***, 3 U.S. (3 Dall.) 386, 390, 1 L.E. 648 (1798).); ***State v. Nickerson***, 132 Idaho 406, 411, 973 P.2d 758 (Ct.App. 1990).

[4] Although the Summers originally sought a declaratory ruling that the Subdivision Ordinance was in violation of the Contracts Clause found in Article I, § 10 of the United States Constitution, they have since withdrawn that claim.

There is a strong presumption that an ordinance is constitutional. The burden of overcoming this presumption is on the party arguing that the ordinance is unconstitutional. ***State v. Hellickson***, 135 Idaho 742, 24 P.3d 59 (2001).

The *Ex Post Facto* Clause does not apply to the Subdivision Ordinance for several reasons. First, the pertinent provisions of the Subdivision Ordinance, including the specific portions at issue in this case, regulate land use and are civil in nature. It is acknowledged, however, that Section 5.05 of Ordinance No. 26B provides for penalties for failure to comply with the provisions of the ordinance. The failure to comply constitutes a misdemeanor and, in addition to the criminal penalties, the County may proceed civilly.

Second, even if it were to be assumed that the conduct of further subdividing the property at this time would constitute a misdemeanor under Section 5.05 of Ordinance No. 26B, the ordinance does not meet any part of the definition for an *ex post facto* law as articulated in ***Calder v. Bull***, either as to the ordinance itself or when applied to the Summers.

Third, the provisions of this ordinance that were amended upon the enactment of Ordinance No. 26B were effective as of November 17, 1995. The Summers did not purchase the property at issue until October 28, 1996. Therefore, it is not "retroactive legislation" in any event as to the Summers.

In conclusion, the Kootenai County Subdivision Ordinance is constitutional on its face and as applied to the Summers. It does not violate the *Ex Post Facto Clause* of the United States Constitution or the Idaho Constitution.

C. PLAINTIFFS' CLAIM FOR NEGLIGENCE

In their First Amended Complaint, the Summers allege a claim for negligence and state in Paragraph 30 as follows:

> The Kootenai County Planning Department failed to exercise ordinary and reasonable care in advising Plaintiffs that they could accomplish a division of the Summers property into two (2) twenty (20) acre parcels. Defendants breached their duty of ordinary care to Plaintiffs, proximately causing Plaintiffs damages in an amount in excess of $10,000 to be proven at trial.

The Plaintiffs claim that staff members in the Kootenai County Planning and Zoning Department made certain representations to them regarding the availability of a "free split" during the sale of a portion of the Summers Property to the Ladewigs. According to the Plaintiffs, the staff members were negligent in making such representations. Later, the Summers learned that no building permits would be issued because the split was illegal.

Defendant Kootenai County has moved for Summary Judgment on the Plaintiffs' claim for negligence. The Motion for Summary Judgment is supported by the Affidavit of Rand F. Wichman, who was the Senior Planner at the Kootenai County Planning and Zoning Department at the time of the pertinent events in this case. Mr. Wichman avers that he concurred with a determination by Ms. Meehan that a division of the Summers Property would not constitute a "free split" under Ordinance No. 26B. The Motion for Summary Judgment is also supported by the Affidavit of Sandra M. Meehan, an Associate Planner for the Kootenai County Planning and Zoning Department. Ms. Meehan avers that she advised Mr. Summers that the proposed division of the property would not qualify as an exempt split prior to the Summers' conveyance of a portion of the Summers Property to the Ladewigs. Finally, the Motion is supported by two

Affidavits of Patrick M. Braden, Kootenai County Department of Legal Services. Kootenai County points out that, at the time that the Summers acquired the Summers Property, other splits of the original one hundred sixty (160) acre parcel had not been recorded and, therefore, were not of record even if staff members consulted the records.

The Plaintiffs oppose Defendant Kootenai County's Motion for Summary Judgment. They support their claim for negligence with the Affidavit of Matthew W. Summers. Mr. Summers avers that, on October 26, 1996, Rand F. Wichman pulled out a cardboard placard and told him that the Summers had a "free split." At the time, the Summers were in the process of purchasing the Summers Property.

Mr. Summers also avers that someone named "Betty," who worked in the Kootenai County Planning and Zoning Department during the first half of 1999, stated to the Summers' realtor that it would not be a problem to sell half of the Summers Property. Defendant Kootenai County moved to strike this portion of the Affidavit because it was not based upon personal knowledge and contained inadmissible hearsay. The Motion to Strike was granted.

Finally, Mr. Summers avers that, after the conveyance of the twenty (20) acre parcel to the Ladewigs and after entering into an agreement to sell the remaining twenty (20) acre parcel, he spoke with Sandy M. Meehan, an Associate Planner at the Kootenai County Planning and Zoning Department, to seek her assistance in the matter. According to Mr. Summers, Ms. Meehan investigated and later responded that (1) Mr. Wichman did not deny that he had told Mr. Summers that there was a "free split" available, and (2) things had changed so that the Summers couldn't rely upon Mr. Wichman's statement unless it was in a recorded document.

A *prima facie* case of negligence generally consists of four elements: (1) a duty, recognized by law, requiring the defendant to conform to a certain standard of conduct; (2) a breach of that duty; (3) a causal connection between the defendant's conduct and resulting injuries; and (4) actual loss or damage. ***Dachlet v. State***, 136 Idaho 752, 759, 40 P.3d 110 (2002).

Where governmental entities and their employees are concerned, however, recovery for their negligent acts is limited by the provisions of the Idaho Tort Claims Act (ITCA), which is found in ***Idaho Code § 6-901, et seq.*** Prior to the abrogation of the sovereign immunity doctrine, there was generally no right to recovery against the state. When it was enacted, the ITCA provided for a right of recovery. ***Leliefeld v. Johnson***, 104 Idaho 357, 659 P.2d 111 (1983).

There are two specific sections of the ITCA that might apply in this case. One is ***Idaho Code § 6-904*** and the other is ***Idaho Code § 6-904B***.

The general rule is that governmental entities are liable for damages arising out of their own negligent acts and for those negligent acts of their employees who were acting within the course and scope of their employment. ***Grant v. City of Twin Falls***, 120 Idaho 69, 813 P.2d 880 (1991). Under ***Idaho Code § 6-904***, there are certain exceptions to this liability for governmental entities. The exceptions apply when the employees were acting within the course and scope of their employment and when such employees were acting without malice or criminal intent.

The exceptions to liability in ***Idaho Code § 6-904*** include an exception for acts arising

> out of any act or omission of an employee of the governmental entity exercising ordinary care, in reliance upon or the execution or

> performance of a statutory or regulatory function . . . ***or*** based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee thereof . . . . (Emphasis added.)

This exception actually consists of two clauses: (1) an exception for an employee's act in executing a regulatory function if it is done with ordinary care, and (2) an exception for discretionary functions. ***See Sterling v. Bloom***, 111 Idaho 211, 723 P.2d 755 (1986).

When the case involves a question as to whether this exception should apply, the court looks to the nature of the conduct in order to determine whether that conduct is planning or operational. If it is "planning" or consisted of decisions involving the formation of basic policy, the government is immune even if the planning was negligent. If it is "operational" or consists of everyday matters involving execution or implementation of policy, the governmental entity's immunity is contingent upon the use of due or ordinary care. ***Ransom v. City of Garden City***, 113 Idaho 202, 743 P.2d 70 (1987); ***Sterling v. Bloom***, 111 Idaho 211, 723 P.2d 755 (1986).

The relevant portions of ***Idaho Code § 6-904B*** provide as follows:

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

The term "gross negligence" is defined in ***Idaho Code § 6-904(C)(1)*** as follows:

> the doing or failing to do an act which a reasonable person in a similar situation and of similar responsibility would, with a minimum of contemplation, be inescapably drawn to recognize his

> or her duty to do or not do such act and that failing that duty shows deliberate indifference to the harmful consequences to others.

"Reckless, willful and wanton conduct," as defined in ***Idaho Code § 6-904(C)(2)***, is present only when

> a person intentionally and knowingly does or fails to do an act creating unreasonable risk of harm to another, and which involves a high degree of probability that such harm will result.

The law regarding the negligence of governmental entities and their employees must now be applied to the facts of this case. Both the facts and the law have been set forth above. For purposes of this Motion, it will be assumed, but without so deciding, that the facts alleged by the Summers would constitute a cause of action for negligence in the private sector. Therefore, the question becomes whether Kootenai County falls within an exception to liability under the Idaho Tort Claims Act.

First, the exception to liability set forth in ***Idaho Code § 6-904(1)*** must be examined. It is undisputed that, in any advice that might have been given to Mr. Summers, Mr. Wichman and Ms. Meehan were acting within the course and scope of their employment at the Kootenai County Planning and Zoning Department. There are no facts in the record to show that the employees were acting with malice or criminal intent toward the Summers. Therefore, Kootenai County can qualify for an exception from liability under the statute.

Mr. Wichman and Ms. Meehan were not acting in a discretionary or planning function. Instead, they were acting in an operational mode because they were involved in an everyday matter consisting of implementation of the subdivision ordinance. In this case, there is no exception to governmental liability based on the exercise of a discretionary function.

The question here is whether, in implementing the subdivision ordinance, the Kootenai County employees exercised "ordinary care." Under the applicable law, an operational function is an exception from liability only when it is carried out with due care. The two employees who are involved in this case are Mr. Wichman and Ms. Meehan.

In this case, the Summers contend that Mr. Wichman told Mr. Summers that they were entitled to a "free split" when they were in the process of purchasing the Summers Property in 1996. In fact, however, they were not entitled to divide their property. A review of the facts in the record reveal that the Summers met with the Youngs at Alliance Title & Escrow on October 25, 1996, for the closing on the Summers Property and that they had a three (3) day grace period after that closing date within which time they could rescind the purchase. That grace period would have expired on October 28, 1996. Mr. Summers went to see Mr. Wichman on October 26, 1996. The deeds conveying portions of the original one hundred sixty (160) acre parcel to Chad and Drista Summers and to the Denkes were not recorded until approximately 3:40 P.M. on the afternoon of October 31, 1996.

According to Mr. Summers, he did not talk to Ms. Meehan until after the Summers had conveyed a portion of the Summers Property to the Ladewigs. Therefore, viewing the facts most favorably to the Summers, they were not relying upon any representation from Ms. Meehan that the Summers Property could be split when it was divided in 2000. Furthermore, Mr. Summers acknowledges that Ms. Meehan informed him that the property could not be split, which is consistent with Ms. Meehan's

statements that she advised Mr. Summers that a division of the Summers Property would not qualify as an exempt split.

With regard to Ms. Meehan's acts, the Summers have failed to come forward with any facts to show that she did not act with ordinary care. With regard to Mr. Wichman, the focus is upon his acts in 1996. For purposes of this Motion, it will be assumed, but without so deciding, that Mr. Wichman misinformed the Summers regarding their right to a "free split" of the Summers Property. From the facts in the record, it can be inferred that, even if Mr. Wichman checked the property records of Kootenai County and properly interpreted Ordinance No. 26B at the time, he could not have learned that a "free split" of the Summers Property would be unavailable and he would not have been able to advise them differently. Additionally, the record does not contain more than a mere scintilla of evidence that Mr. Wichman acted improperly or without due care. Therefore, it cannot be found that Mr. Wichman acted without ordinary care.

Defendant Kootenai County is entitled to an exception to liability under ***Idaho Code § 6-904***. As to any claims by the Summers based upon the representations concerning a "free split" of the Summers Property by particular staff members of the Kootenai County Planning and Zoning Department, Kootenai County's Motion for Summary Judgment must be granted.

Second, the exception to liability under ***Idaho Code § 6-904B(3)*** must be examined. This section would deal with any governmental negligence that might have arisen as a result of the refusal to issue a building permit after representing to Mr. Summers that the Summers Property could be split. Initially, it must be noted that the Kootenai County employees acted properly in refusing to issue a building permit.

Furthermore, a review of the record does not show that there are facts to indicate that the employees were acting both with malice or criminal intent and with either "gross negligence" or "reckless, willful and wanton conduct" as those terms are defined in ***Idaho Code § 6-904C***. The facts do not indicate that the staff acted with "deliberate indifference" or that the staff "intentionally and knowingly" did an act creating an "unreasonable risk of harm" to the Summers.

Defendant Kootenai County is entitled to an exception from liability under ***Idaho Code § 6-904(B)***. Therefore, as to any claims by the Summers based upon the refusal to issue building permits, Kootenai County's Motion for Summary Judgment must be granted.

V

ORDER

Based on the foregoing discussion, it is hereby ORDERED that the Motion for Partial Summary Judgment by the Plaintiffs Summers be and the same is hereby denied and the Motion for Summary Judgment by the Defendant Kootenai County be and the same is hereby granted.

DATED this _____ day of March, 2003.

_____
John Patrick Luster
District Judge

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing MEMORANDUM OPINION AND ORDER IN RE: SUMMARY JUDGMENT was mailed, postage prepaid, placed in interoffice mail, or sent by facsimile transmission, on the _____ day of March, 2003, to the following:

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ALL FIRST DISTRICT COURT JUDGES

Don L. Swanstrom
Trial Court Administrator
Interoffice Mail

DANIEL J. ENGLISH
Clerk of the District Court

By: _____
Deputy Clerk

With regard to the issuance of building permits, Section 5.03 of Ordinance No. 26B addresses the issuance of building permits when a parcel of real property has been subdivided in violation of the Subdivision Ordinance as follows:

> Building Permits . . . will not be permitted in violation of this Ordinance unless the authority authorized to issue such a permit finds that the permit applicant can demonstrate that his purchase of the property was prior to development of the property that would prohibit further permits, and that he had no knowledge of any additional property transfers within the original contiguous parcel.