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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

JOHN BRADBURY,	)	
	)	**Supreme Court Docket No. 49667-2022**
Petitioner/Appellant,	)	
	)	
vs.	)	**APPELLANT'S BRIEF**
	)	
CITY OF LEWISTON,	)	
	)	
Respondent,	)	
	)	

Appeal from the District Court of the Second Judicial District for Nez Perce County.

Honorable Richard Greenwood, District Judge, presiding

John Bradbury
729 Preston Ave, Lewiston, Idaho, 83501 for Appellant

Bentley Guy Stromberg
321 13th Street, Lewiston, Idaho 83501, for Respondent
(Clements, Brown and McNichols, P.A.)

TABLE OF CONTENTS

Signals
R = Record
CR = Confidential Record
SR = Supplemental Record
CSR = Confidential Supplental Record
L = Lines

Table of Cases and Authorities

Cases

United States Constitution

Idaho Constitution

Statutes

City Code

Rules

Other Authority

STATEMENT OF THE CASE

I. NATURE OF THE CASE

This case involves the extent to which a city can constitutionally and legally use utility fees for projects unrelated to the utilities, charge water utility ratepayers for water projects unrelated to the service they receive and donate city funds to private organizations. Also at issue are whether or not the ratepayers are entitled to remedies, Petitioner's standing to raise issues regarding the water utility, the confidentiality of city attorney opinions and the award of lawyer fees.

II. STATEMENT OF FACTS

On September 28, 2010, the City of Lewiston borrowed $1,138,713 from the sanitation utility over a thirty-year term to construct a city golf course irrigation system (the "golf course loan"). It was repayable on an annual basis according to an attached amortization schedule and the loan was callable "only when necessary for a capital project." CR 157-159. It was not submitted to the voters for approval.

On March 12, 2012, the city borrowed $800,000 from the sanitation utility to reconstruct a new library building repayable over a twenty-year term (the "library loan"). The terms of the loan were the same as the golf course loan. CR. 166-170. Like the golf course loan, the library loan was not submitted to the voters for approval. Both loans were in addition to the long-standing three-month operating reserves the city maintained for its three utilities (water, wastewater, and sanitation). SR 11, ¶5

On February 11, 2013, in response to the library loan, the Lewiston voters passed an initiative that required fees be deposited in the funds designated for their use and that excess funds be returned to those persons who paid them. Lewiston City Code (LCC) 2-92, 2-93, 2-94.

In addition, from 2012 (as far back as the records go) through 2020 the city diverted $935,000 from the water utility, $900,000 from the wastewater utility and $3,483,668 from the sanitation utility for a total of $5,318,668 to the "street impact fund" for street repairs. CSR 23-25.

Up until September 10, 2018, the City Code required the city departments to pay the water utility for the water they used and required the administrative services director to enforce payment as if they were private consumers. LCC 36.5-4. The fire department was exempt and penalties could not be imposed on noncompliant city departments. CR 149, L 2-19, 195. Although that code section was amended on September 9, 2019, it continued the city's obligation to pay the water utility for its water and banned the city from assessing other ratepayers to make-up for what the city did not pay. LCC 36.5-3, CR 50, L l6-21, 196. The administrative services director never enforced the mandate. CR l51, L 12-16.

Based on existing records the city records of the public works director estimated that the water utility provided 642,789 million gallons of free or reduced cost water to the golf course at a cost to the water utility of more than $1,728,543. CR 154-155, L 17-5, 205. That does not include the millions of gallons of free water supplied to the city to irrigate its parks, its cemetery, to flush its hydrants, to clean its streets and to facilitate the fire department. CR 153-55, L 17-5.

All the costs of producing the city water are borne by only 45% of the Lewiston water consumers who get their water from the city water utility. The other 55% get their water from the independent water utility, Lewiston Orchards Irrigation District (LOID), and pay nothing for the city utility water even though they are also direct beneficiaries of the water supplied to the parks, the cemetery, the golf course, and the fire department.

In addition to the city's conduct regarding utility fees, the city has donated city funds to two private non-profit organizations, Valley Vision and Hells Canyon Visitor Bureau, dba Visit Lewis-Clark Valley, whose sole purposes are to promote business in the Lewis-Clark Valley. While the city's relationship with Valley Vision goes back to 1996, the donation records only go back to 2009. Since then, the city has donated $480,000 to Valley Vision and $247,500 to Visit Lewis-Clark Valley, with current annual payments of $40,000 and $15,000 respectively. Mr. Marsh acknowledged the donations created no legal obligations between the City and the private non-profits. CR 147, 148 – 149, 175-178, L 2-4. In response to the city attorney's opinion that the donations might be unconstitutional, the city contracted with the two non-profit entities in 2018 to promote the commerce they had already been promoting without a contract. The city has no management authority in either entity. CR 147, L 8-15, 148-149, 14-1, 79-105.

The city requires the water utility ratepayers to subsidize its public projects by not paying the utility for the water it uses for its golf course, parks, cemetery, street and parking lot cleaning, hydrant flushing and fire department use. It then turns around and uses property taxes that are supposed to be used for public purposes to finance the functional equivalents of chambers of commerce.

III. PROCEEDINGS BELOW

Petitioner filed a notice of claim with the city clerk on September 3, 2020, pursuant Idaho Code § 50-219 and Idaho Code § 6-906, noting he did not "think this Notice of Claim is required but files it in an abundance of caution." CR 38-43.

On March 29, 2021, Petitioner filed a Petition for Declaratory Judgment and Equitable Relief in his capacity as a city councilor and taxpayer and filed an accompanying Brief Supporting Petition for Declaratory Judgments and Equitable Relief. CR 10-20, 40-62. The petition alleged that:

(1) the golf course and library loans violated Article VIII, Section 3, of the Idaho Constitution that prohibits long-term debt without a vote, entitling the ratepayers to have the excess fees returned to them.

(2) the use of sanitation funds for purposes unrelated to providing its services (a library and a golf course) violated Idaho Code § 63-1311 that requires the use of utility fees be reasonably related to the service provided and not "exceed the actual cost of the service being rendered," entitling the ratepayers to have the fees returned to them.

(3) the golf course and library loans were rescindable because of the disparity of bargaining power between the city and the sanitation utility, entitling the ratepayers to have the fees returned to them.

(4) using utility fees to repair the city streets was a tax that violated Article VII, Section 6, of the Idaho Constitution that prohibits municipal taxes not legislatively authorized, entitling the ratepayers to have the fees returned to them.

(5) the use of utility fees to repair streets also violated Idaho Code § 63-1311, because the use was not related to utility services, entitling the ratepayers to have the fess returned to them.

(6) using utility funds for street repair violated LCC 2-92. 1 *et seq*. that requires excess fees be returned to the ratepayers that paid them.

(7) donating money to private non-profit organizations violated Article XII, Section 4, of the Idaho Constitution that prohibits cities from donating public funds to private organizations, warranting an injunction to stop the practice.

(8) the city's refusal to pay the water utility for the water it used violated LCC 36.5-4 and 36.5-3 that required it to pay for its water, entitling the utility to recover the value of the water supplied.

(9) LCC 36.5-5 prohibits the water utility from charging the city for water it supplies to the city except for the golf course for which payment is discretionary, all of which violates LCC 3.5-4 (x) that limits the fees levied on ratepayers to their proportionate share of the cost of operations, warranting an order enjoining the city from charging ratepayers more than their proportionate share of the cost of their services.

Petitioner also sought attorney fees and costs as a private attorney general and amended his petition on May 3, 2021, to reflect that it was brought in his capacity as a city councilor and ratepayer instead of as a councilor and taxpayer. R. 76-87.

The city moved to dismiss the petition, alleging lack of standing as a taxpayer and as a city councilor, that a remedy would disrupt the budget, that the issues raised in the petition were not justiciable because the court would be substituting its judgment for the council's, that the

declaratory judgment claims were time barred and that a notice of claim was required under the Idaho Tort Claims Act, I.C. § 6-901 *et seq.* R. 21-36.

Petitioner responded that he had standing as a rate payer and having to take an oath to uphold Idaho's Constitution, state laws, and the city's code as a condition of becoming a councilor not only permitted, but obliged him to take legal action when confronted with unconstitutional and illegal acts by the city staff and council, that he was seeking remedies for the ratepayers, not for himself as a taxpayer, that the court's role was to rule on questions of law and violations of the Idaho constitution, that Petitioner had filed a notice of claim and that the city was estopped from claiming the statute of limitations had run. CSR 1-15.

The district court ruled that Petitioner had standing as a ratepayer based on *Miles v. Idaho Power Co*., 116 Idaho 635, 778 P.2d 757 (1989), that he did not have standing as a city councilor based on *Bedke v. Ellsworth*, 168 Idaho 63, 480 P3d 121 (2021) because he was "not seeking to validate an institutional right of the council", and that the issues were justiciable on the basis that a "favorable decision is *likely* to redress [the] injury . . .." (court's emphasis) citing *Tucker v. State*, 162 Idaho 11, 19 394 P3d 54, 62 (2017). The court deferred deciding the remaining issues. R. 113-120.

In response to Petitioner's petition and supporting brief, the city moved to continue a hearing on the petition until the court decided its motion to dismiss and to strike two legal opinions by the city attorney cited in petitioner's brief, arguing they were protected by attorney-client privilege. R 65-73.

Petitioner argued the privilege did not apply because it only attached to client disclosures made for the purpose of seeking legal advice. CR 63-69. The court, citing I.R.E 502, held the communication was privileged because, "the law does not require that the communication be responsive to an inquiry from the client." R 109.

When the city attorney published an opinion on the same subject as the opinion letters, opining that the city did not have to pay the water utility for its water because it was being used for a public purpose, Petitioner moved to unseal the opinion letters because it waived the privilege. R. 135-138, CR 244. The court did not rule on the motion.

The court ordered the parties to file opposing motions for summary judgments, which they did. Amended Brief Supporting Petition for Declaratory Judgments and Equitable Relief, R. 102-300; City's Memorandum in Support of Defendant's Motion for Summary Judgment. R. 139-164.

The court then issued it's Memorandum Opinion and Order on Motions for Summary Judgment:

<u>First Cause of Action</u>

The court held $1,138,713 loan by the sanitation utility to the golf course and the $800,000 loan for the library construction were not "a case of the City incurring long-term debt as contemplated by Article VIII, Section 3" because "under the terms of the transfer, the money is to be immediately available to the Sanitation Fund in the event a need for the reserve should arise." It was, the court held, "in effect, no different than the reserves being invested in an interest-bearing account at a financial institution rather than a simple bank account paying

nominal or no interest." The court concluded they were nothing more than interdepartmental transfers of utility reserve funds to the city authorized by Idaho Code 50-1014 and, in any event, Article VIII, Section 3, of the Idaho Constitution applied only to third-party loans. R. 234-235. These conclusions were incorrect and should be reversed for the reasons explained below.

Second Cause of Action

The court held the City's use of sanitation funds for the golf course and the library did not violate Idaho Code § 63-1311 that limits the use of utility funds to the actual cost of operating a utility because it was just a means of obtaining interest on its reserves and there was no evidence the reserves were excessive. R. 235-237. These conclusions were also incorrect and should be reversed for the reasons explained below.

Third Cause of Action

The court held the golf course and library loans were not unconscionable due to the disparate bargaining power between the city and the sanitation utility because "the contract is formed between entities subject to common control" which is "analogous to a parent company making a contract with a subsidiary." The court concluded "the agreement is not itself so much a contact as an acknowledgement by the City that that the transferred funds must ultimately go back to the Sanitation Fund and must be readily available if the need for the funds should arise." R. 238. Petitioner does not agree with this holding but does not appeal it because it is not necessary to the resolution of the constitutional and statutory issues being appealed.

Fourth Cause of Action

The court held the use of sanitation and waste water utility funds to repair city streets was an illegal tax. R.39-245. That decision is not appealed, but the court's refusal to grant a remedy for the city's constitutional violation is. A remedy for the city's constitutional violation should be granted for the reasons explained below.

Fifth Cause of Action

The court decided the utility ratepayers were not entitled to have the street impact fund taxes returned to them pursuant to LCC 2-94 because Petitioner had brought his action only on his own behalf, had not filed a notice of claim with the city as required by the Idaho Tort Claims Act, I.C. § 50-219; I.C. § 6-906, and had not moved to certify the ratepayers as a class I.R.C.P. 77. R. 245 n. 23. These decisions are incorrect and should be reversed.

Sixth Cause of Action

The court decided the Fourth Cause of Action regarding the street repair tax mooted the need to decide this cause of action. That decision is not appealed. Petitioner does appeal the courtsrefusal to grant a remedy is. R. 245 n. 23. This decision is incorrect and should be reversed.

Seventh Cause of Action

The court held giving $480,000 to Valley Vision and $247,500 to Visit Lewis-Clark Valley did not violate Idaho Constitution Article XII, Section 4, prohibition of donations to private organizations because there was no evidence the funds were donations and there was no legal prohibition against a city "entering into contracts with entities that provide services related

[to] economic development and tourism." R. 247. The court's decision on this claim was incorrect and should be reversed.

Eight and Ninth Causes of Action

The court declined to decide whether the golf course had to pay the water utility for its water and whether the city had to pay for the water its uses for its parks, cemetery, street cleaning and the fire department because Petitioner lacked standing to raise the issue because he was not a water utility ratepayer.

Petitioner and the city filed motions for an award of lawyer fees. Petitioner based his request on the private attorney general doctrine and the city alleged it was a prevailing party and the Petitioner had pursued his claims frivolously. R (record not received before filing). The district court denied both parties fees and costs, holding both parties prevailed, the Petitioner had not frivolously pursued his claims, but because he was pro-se and had not submitted evidence warranting an award, he did not qualify for fees in any event.

IV. ISSUES ON APPEAL

First Issue: Do the $1,138,713 golf loan and the $800,000 library loan from the sanitation utility to the city violate Art. VIII, Sec. 3 of the Idaho Constitution?

Second Issue: Do the $1,138,713 golf loan and the $800,000 library loan from the sanitation utility to the city violate Idaho Code 63-1311?

Third issue: Are the ratepayers entitled to have the unconstitutional fees the city took from them returned to them?

Fourth issue: Does Petitioner in his capacity as a ratepayer of two of the three city utilities and as a city councilor have standing to raise all the issues regarding the city's conduct regarding all of its utilities?

Fifth issue: Does giving city funds to Valley Vision and Visit Lewis-Clark Valley violate Idaho Constitution Article XII, Section 4, that bans a city from donating public funds to private organizations?

Sixth issue: Are communications to a lawyer by persons who were not seeking legal advice is privileged?

Seventh issue: Is a lawyer who brings a public interest lawsuit in his name on behalf of city utility ratepayers is entitled to private attorney general lawyer fees and costs at the trial and appellate levels as a private attorney general and pursuant to I.C.§12-117, I.A.R. 35(a)(5), (b)(5), 40 and 41?

Lawyers Fees: Petitioner requests lawyer fees and costs at the trial and appellate levels as a private attorney general and pursuant to I.C. §12-117. I.A.R 35(a)(5), (b)(5), 40 and 41.

DISCUSSION

1. Introduction

It is important at the outset to recognize that municipal corporations and utilities are statutorily created as separate entities that have different functions, rights, constraints and sources of revenue that implicate the U.S. Constitution, the Idaho Constitution, Idaho statures and the city's code.

Idaho Constitution Article VII, Section 6, vests in the state legislature the sole discretion to decide the means by which cities can tax their residents. The legislature has authorized cities to tax all property within their limits that is not statutorily exempt and that does not exceed one percent of its assessed value. I.C. § 63-601, 1301, 1313. That power includes the right to levy and appropriate taxes for the general purposes of operating a city. I.C. § 50-235, 701. These taxes fund police and fire protection, street construction and repair, transportation, public health and other public services. See, generally, I.C. § 50-301 *et seq*.

Idaho Constitution Article VIII, Section 3, prohibits a city from incurring a debt or liability that exceeds that year's revenue without the prior affirmative approval of a majority of the voters unless the debt is for regular, usual and recurring expenses that are so emergent that they must be funded in the year the need arises.

Idaho Constitution Article XII, Section 4, prohibits a city from raising money for, lending its credit to, or donating money to any association or corporation for any purpose.

The legislature also permits the creation of water, wastewater (sewage), sanitation (garbage) and electric utilities. I.C. § 50-323, 325, 332, 344. These utilities can exist independently, as LOID does within the Lewiston city limits, or as a part of a city provided services.

Idaho utilities are required to limit their revenue to the costs of their operations. Idaho Code § 63-1311 provides that the "fees collected pursuant to this section shall be reasonably related to **but shall not exceed** the actual cost of the service being provided." (Emphasis added.)

It is important not to conflate this important distinction between the city's governing function that is funded by property taxes and the utilities' proprietary functions that are funded by users' fees.

The sanitation utility, for example, collects refuse at each home and business that pays it a collection fee. There is a calculable cost for that service that can be attributable to each rate-payer. That is in contrast to the service to the general public provided by streets, parks, a library and a golf course where the cost of the service is borne by the general public through property, sale, and other taxes.

These distinctions between the roles and funding of municipal corporations and utilities cannot be over emphasized.

> This Court has repeatedly held that municipalities may exercise only those powers granted to them or reasonably implied from the powers granted. If there is a fair, reasonable, substantial doubt as to the existence of power, the doubt must be resolved against the city. This is especially true where the city is exercising proprietary functions instead of government functions. The operation of a water system, sewer system and a garbage collection service is a proprietary function, not a governmental function.

North Idaho Bldg Contrators Ass'n v. City of Hayden, 158 Idaho 79,86, 343 P.3d 1086, 1092 (2015), quoting *City of Grangeville v. Haskin*, 116 Idaho 535, 538 777 P.2d 1208, 1211(1989).

The United States Constitution is also implicated because this Court has held that the use of utility fees for non-utility purposes constitutes an unconstitutional taking under the Takings Clause of the Fifth and Fourteenth Amendments *Hill-Vu Mobile Home Park v. City of Pocatello,* 162 Idaho 588, 594-97, 402 P.3d 1041, 1047-50 (2017).

Until September 9, 2019, the City Code required the city to pay the water utility for the

water it used. LCC 36.5-4 (repealed 9/9/18) and LCC 36.5-3 (repealed 9/9/19). 2018. CR 195-196, see appendix.. On September 9, 2019, the city council enacted section 36.5-5 that prohibits the water utility from charging the city for the water it uses to irrigate its parks and cemeteries, to fight fires, flush hydrants, train firemen, and to maintain its streets, sidewalks, storm drains, sewer drains and parking lots and leaves it in the council's discretion what to pay, if anything, for irrigating the golf course. CR 197.

The code also limits the use of fees to the purposes for which they are collected and requires fees in excess of those amounts to be returned to the ratepayers, LCC 2-92, 2-93, 2-94, and limits the amount utility ratepayers can be charged to their proportionate share of the cost of providing the service. LCC 36.5-4 (x). Appendix.

Because the district court relied on a statute that that does not stand for the proposition for which it is cited and on mischaracterized facts, it is important to put them in context at the outset. The city 1) wrongly argued that utility reserves could be transferred to city accounts for its use and 2) mischaracterized the nature of the utility reserves the golf and library loans involved.

The city repeatedly asserted throughout this case that Idaho Code 50-1014 permits it to "transfer" sanitary utility reserves to its public use golf and library loans and for street repairs despite the fact that the city had no statutory authority to transfer **any utility reserves** to itself **for any use.** This is how the city represented the law to the district court:

> Idaho law clearly allows municipalities to "to transfer an unexpended balance in one fund to the credit of another fund. I.C. 50-1014. Idaho law plainly does not prohibit transfers or allocations of existing municipal funds, and it borders on the absurd to think that a

> permissible transfer somehow violates Article VIII, Section 3, of the Idaho Constitution merely because that transfer is accompanied by a promise to make the originating fund whole.

R 151. First, the funds were not "existing municipal funds," they were sanitation utility funds, and, second, that interpretation ignored the plain terms of the statute itself and the statutory constraints on the use of utility fees.

Section 50-1014 does provide, as the city states, "The city council of the cities may transfer an unexpended **balance in one fund** to the credit of another fund. However, the city ignored Idaho Code §50-1005A that defines a **"fund balance" as "the excess of the assets of a fund over its liabilities *and* reserves."** (Emphasis added)

Assuming that utility fees can be used to fund non-utility-related work, only those assets that exceed a fund's liabilities **and reserves** qualify for such a transfer. The city has nonetheless asserted as the major premise of its entire case that the reserves themselves can be transferred despite the fact that the statute on which it relies specifically prohibits it.

The city's assertion also ignores the fact that Idaho Code 50-1020 separately provides for the creation of "waterworks plants and water supply, light and power plants, storm sewers, and sanitary sewerage systems." As to those utility "works" section 50-1028 requires that "such works shall be furnished at the lowest possible cost" and that "[n]o City shall operate such works primarily as a source of revenue to the city, but shall operate all such works for the use and benefit of those served by such works . . .." The statute clearly segregates the uses to which municipals and utility, funds can be put.

It bears repeating: No provision of the Idaho Code authorizes a city to accumulate a slush fund by overcharging utility ratepayers and then diverting those monies for its own uses. Notwithstanding these prohibitions, the city not only described how it illegally transferred accumulated sanitation reserves to the golf and library funds, but it also mischaracterized the nature of the reserves it transferred.

Chief financial officer Marsh stated in his October 14, 2021, sworn declaration regarding the golf loan that "idle cash assets had merely been exchanged for a callable account receivable," and that "[b]ecause the transferred sum [of $1,138,713] was coming out of the Sanitation Fund's operational reserve, this transfer was callable at any time during the payment term, should the Sanitation Fund need it to cover unanticipated costs." SR 11 ¶5. Regarding the $800,000 library loan, he stated "the Sanitation fund had merely swapped an existing idle cash asset for a callable account receivable." *Id.* at 5.

Those statements are demonstrably false. Paragraph Three of both Memorandums of Understanding provides:

> **When necessary for a capital project**, the Sanitation Fund may "call" for the entire unpaid balance to be paid. When such notice is made, the Golf Course Fund shall repay the entire unpaid balance and accumulated interest within 180 days. The Golf Course Fund may pre paid (sic) any portion of the unpaid balance of the interdepartmental transfer at any time without penalty. (Emphasis added)

CR 161.

These memoranda were entered as exhibits at Mr. Marsh's deposition on July 22, 2021, where he acknowledged that the loans were callable for only capital, not operational, needs.

Q. And paragraph three does it indicate whether or not the [golf] loan could be recalled?

A. Yes it does.

Q. And what were the terms of that?

A. If such need arises, the sanitation fund could call the transfer back.

Q. I'm Sorry. I didn't mean to interrupt. Excuse me, go ahead.

A. With 180 days' notice, or less.

Q. But that was only for -- if it was for capital needs, wasn't [it], needed for a capital project?

A. That's what the memorandum does indicate.

Q. So that would not include operational, would it?

A. It doesn't say operational.

* * *

Q. And, again, [the library loan was] recallable only in the event of capital need by the sanitation department on paragraph three?

A. That is correct.

Q. And just briefly, what capital project does the sanitation department have?

A. The largest would be the transfer station itself.

CR 131-133 L 22-5.

It is against this statutory framework and factual background that Petitioner appeals.

2. The Golf Course and Library Loans

Petitioners discussion of the golf and library loans assumes that the sanitation funds were available for the city's use to finance the golf and library loans. As the next section discusses, the funds were not legally available for any use by the city except to fund the utilities for which the fees were collected.

First Issue: Do the $1,138,713 golf loan and the $800,000 library loan from the sanitation utility to the city violate Art. VIII, Sec. 3 of the Idaho Constitution?

First ruling: "This is not a case of the city incurring long-term debt as contemplated by Article VIII, Section 3." R. 234.

Response: This ruling is belied by the loan documents themselves, is contrary to the sworn testimony of the chief financial officer, is bereft of a single supporting legal precedent and is contrary to this Court's controlling precedent.

The golf course Memorandum of Understanding states the "Golf Course Fund shall repay the Sanitation Fund the full amount of the interdepartmental transfer in 30 equal annual installments, plus interest." CR 157-159. The city carries the transaction as "Golf Irrigation Construction Loan 2.61%" and sets forth an amortization schedule for the interest and principal payments. *Id.*

This Court has held that the term "loan" must be interpreted in the popular sense of its understanding and "[i]n the popular sense lending money or loaning money or credit is at once understood to mean a transaction creating the customary relation of borrower and lender, in which the money is borrowed for a fixed time and the borrower promises to repay the amount borrowed at a stated time in the future, with interest at a fixed rate. *Bannock County v. Citizen's Bank and Trust Co*., 53 Idaho 159, 167, 22 P.2d 674, 680 (1933)*; Engelking v. Investment Bd.,* 93 Idaho 217, 223, 458 P.2d 213, 219 (1989); *see*, *Taylor v. State*, 62 Idaho 212, 217, 109 P.2d 879, 880 (1941)

That definition comports with Black's definition of a "loan" as "[a] thing lent for the borrower's temporary use, esp. a sum of money lent at interest." Black's Law Dictionary, 11th

ed., at 1122. That is distinguished from a "transfer" that Black defines as "[a] conveyance of property or title from one person to another." *Id*. at 1803.

Despite the obvious distinction between a loan and a transfer, the district court reasoned the transaction was a transfer because "under the terms of the transfer, the money is to be immediately available to the Sanitation Fund in the event a need for the reserve should arise."

Once again, the district court ignores the plain language of paragraph THREE of the Memorandum of Understanding, that states the loans can be called only "When necessary for a *capital project."* CR157. (Emphasis added).

Unlike the water utility that **treats** and distributes water and the wastewater treatment utility that collects and **treats** sewage, the sanitation utility is only a collection service that **treats nothing** with only a transfer station as a capital asset. So the inability of the sanitation utility to call the loan for anything but a capital need puts the funds beyond its reach for all practical purposes for a period of 30 years (later reduced to 20 years) and even in the remote event of a capital need, no matter how urgent it might be, the city has six months in which to pay it. There is simply no factual predicate for the district court's conclusion. Given that Memorandum of Understanding for the library loan has the same language and terms, the same conclusions are warranted. CR 166-170

Second ruling: Article VIII, Section 3, does not apply to these transactions because, "[h]ere the funds at issue were not acquired from an outside source, but instead came from the interdepartmental transfer from the reserves of the Sanitation Fund." R 234

Response: The district court's conclusion that Article VIII, Section 3, applied only to third party loans also ignores that section's plain language. It provides:

> No . . . city . . . shall incur any indebtedness or liability, in any manner, or for any purpose, exceeding in that year the income and revenue provided for such year, without the assent of two-thirds (2/3) of the qualified electors at an election to be held for that purpose.

This Court noted there is no more encompassing prohibition than one that applies to "any indebtedness or liability, in any manner, for any purpose."

> It must be clear to the ordinary mind on reading this language that the framers of the Constitution meant to cover all kind and characters of debt and obligations for which a city may become bound, and to preclude circuitous and evasive methods of incurring debts and obligations to be met by the city or its inhabitants.

Village of Moyie Springs, 82 Idaho at 344, 353 P.2d at 771.The city itself acknowledged as much when it sought judicial confirmation pursuant to Section 3 of a loan from the sanitation (garbage) utility to pay for a new well. CSR 27-34.

And if there were any reasonable doubt about the unqualified application of the prohibition, that doubt must be resolved against the city. *North Idaho Bldg Contractors* v. *City of Hayden,* 158 Idaho at 86, 343 P.3d at 1092.

Third ruling: "[T]hese cases (*Bannock County v Bunting and Co.* 4 Idaho 156, 37P, 277 (1984)) are distinguishable from the case at hand because each involved outside financing or entering into contracts with third parties for long-term payments for which the taxpayers would be responsible."

Response: As discussed above, there is no authority cited by either the court or the city that holds, or even suggests, that Article VIII, Section 3, does not apply to all debts and liabilities and the Memorandums of Understanding by their agreed terms impose contractual obligations. So the

question is squarely presented of whether an election was required before the golf and library debts could be incurred.

Even the district court acknowledged that this Court has "unwaveringly adhered to the pay-as-you-go ethos of article VIII, section 3 for more than one hundred years. . .." R232. Given that the loan debts were not repaid within the year they were incurred, by definition they were a liability "exceeding in that year the income and revenue provided for such year" and came within the ambit of Article VIII, Section 3.

An election on this type of long-term debt in excess of a given years revenue can be avoided only if the loans "apply to the ordinary and necessary expenses authorized by the general laws of the state . . .."

The "ordinary" exemption is defined as "regular; usual; normal; common; often recurring . . . not characterized by peculiar or unusual circumstances." *City of Pocatello v. Peterson*, 93 Idaho 774, 778, 473 P2.d 644, (1970), (quoting Black's Law Dictionary*); Asson v. City of Burley,* 105 Idaho 432, 443, 670 P.2d 839, 850 (1983). This Court held that the purchase of land for a new county courthouse was not an ordinary expense despite the fact that the services one would provide, such as a jail, were ordinary and necessary. *Bannock County v. C. Bunting & Co.*, 4 Idaho 156, 167, 37 P. 277, 380 (1894), overruled on other grounds. *Veatch v. City of Moscow*, 18 Idaho 313, 109 P. 722 (1910). Otherwise, the Court reasoned, officials would have unfettered discretion to incur public debt in any amount without the public's assent.

The decision limits the debt to the routine costs of ordinary services until the cost of the extraordinary project can be put to a vote. The Court opined that it was the "duty of the

commissioners to provide a suitable place for the holding of the courts and public offices, jails, etc.; but such rooms must be temporarily provided, at as little expense as is consistent with providing suitable quarters, until the question can be submitted to the people." *Bannock County,* 4 Idaho at 168; accord: *Dunbar v. Bd. of Comm'rs of Canyon County,* 5 Idaho 407 49 P.409 (1897) (new bridges and rabbit scalp bounties); *City of Boise v. Frazier,* 143 Idaho 1, 137 P.3d 388 (2006) (building a new airport garage); *City of Idaho Falls v. Fuhriman,* 149 Idaho 574, 237 3d 1200 (2010) (long term contract to purchase electric power); *City of Challis v. Consent of the Governed Caucus*, 159 Idaho 398, 361 P.3d 485 (2015) (upgrade an outdated water distribution system). One hopes even the city has the grace not to argue that a million-dollar irrigation system and a new library building are not routine, recurring expenses.

For an expenditure to be "necessary", it must be so emergent that it *must* be made "at or during" the year the City petitions to exceed its annual revenue. *Dunbar*, 5 Idaho at 412, 49 P. at 411*; Frazier*, 143 Idaho at 4, 137 P.3d at 391*; Fuhriman*, 149 Idaho at 578, 237 at P.3d, 204; *City of Challis*, 159 Idaho at 401, 361 P.3d at 488. The *Challis* court acknowledged that *Dunbar's* very narrow interpretation of "necessary" had been more broadly interpreted over time but that the *Frazier* Court had reinstated the narrow interpretation of "necessary" and it was now a "bright line rule." *Id*.

This Court concluded the term "necessary" therefore contemplates "immediate or emergency expenses, such as those involving public safety, or expenses the government entity in question was legally obligated perform promptly." *Frazie*r,143 Idaho at 4, 137 P.3d at 391 (citing 1 Proceedings and Debates of the Constitutional Convention of Idaho 1889 at 589-592).

In *Frazier* this Court noted the need for additional airport parking was evident from the increased traffic for which the City of Boise had set up a shuttle service to handle the overflow. It concluded, "Our state constitution requires the City to make do with such measures until sufficient normal revenue becomes available or the question of whether to enter into debt to build the desired permanent structure can be submitted to the people in accordance with Article VIII, Section 3." *Frazie*r, 143 Idaho at 5, 137 P.3d at 391.

In *Fuhriman* the City of Idaho Falls sought judicial confirmation of a long-term contract to buy electric power. Relying on the *Bannock County* rationale, this Court held that "Idaho Falls must obtain electricity on a temporary basis unless or until a long-term agreement is confirmed by two-thirds of the qualified electors." *Fuhriman,* 149 Idaho at 579, 237 P3d at 1205.

In *City of Challis,* the city sought judicial confirmation to upgrade of its water-use meters and a telemetry system, replace pipes to the airport that did not meet the fire safety code, and replace other old and broken pipes. Acknowledging the need of the upgrades, this Court held, "As with the temporary jail in *Bannock County* the City must get by with what it has until it obtains approval for these expenditures from the electorate." *City of Challis,* 159 Idaho at 404, 361 P3d at 491.

So it was with the City of Lewiston's irrigation system and the new library building. There were no reasons these projects could not wait the few months necessary to hold an election, especially given that the golf course and library were operational and providing their routine and recurring services before the funds were borrowed from the sanitation utility.

Fourth ruling: "The city council of cities may transfer an unexpended balance in one fund to the credit of another fund." I.C. §50-1014 R. 234.

Response: The fact that a **city** may transfer an unexpended balance of **its funds in excess of its reserves and liabilities** contemplates by its terms a cash transaction and precludes the transfer of any reserves from any source for any reason. I.C. §50-1005A

There is no provision in the Idaho Code that permits a utility to transfer an unexpended balance under any circumstances. Quite the reverse. An unexpended balance, by definition in excess of liabilities and reserves, violates the mandate that a **utility** may only collect fees reasonably "related to, but not exceeding, the actual cost of its services." I.C. §63-1311. This prevents the utility from over-charging the ratepayers. The result is the utilities cannot transfer what they cannot collect. And the **city** itself is specifically required to furnish utility services "at the lowest possible cost." I.C. §50-1028. This prevents the city from over-charging the utility.

A utility is clearly entitled to maintain reserves to ensure the integrity and continuity of its services. Accumulating reserves to finance a golf course and a library serves neither purpose and it can only occur if the utility over-charges the ratepayers or the city over-charges the utility.

Finally, and most importantly, the interdepartmental "transfer" mechanism adopted by the city using utility reserves cannot be used even if the voters assented to it, because there is no constitutional or statutory authority permitting it. And any reasonable doubts in that regard must be drawn against the city. *North Idaho Bldg. Contractors v. City of Hayden,* 158 Idaho at 86, 343 P.3d at 1092.

3. Accumulating the Sanitary Fees

Second Issue: Do the $1,138,713 golf loan and the $800,000 library loan from the sanitation utility to the city violated Idaho Code §63-1311?

Idaho Code §63-1311: "The fees collected pursuant to this section shall be reasonably related to, but shall not exceed, the actual costs of the services being provided."

First ruling: The difficulty for Petitioner here is the lack of evidence that the reserves held by the city are unreasonable . . ..

Response: For reserves to be reasonable, their use must be legal. As discussed above, there is no statutory authority for lending utility reserves to a municipal corporation for public purposes that by definition are unrelated to the utility services. Assuming authority for such loans, Idaho Code 50-1005A only permits transfers in excess of a fund's liabilities and reserves.

Additionally, the court relied on the Declaration of John Ghilarducci conclusion that "[*T]he Sanitation Utility rates were also insufficient to meet its revenue requirements*." (Court's emphasis). R. 237. How can putting almost $2 million beyond the reach of the utility for its operations for 20 years be reasonable for a utility that is underfunded?

Again, as discussed above, the district court failed to distinguish between a loan and a transfer, having said for purposes of Article VIII, section 3, the transaction is not a loan but for purposes of Idaho Code § 63-1311 its purpose is to generate interest income. Secondly, The court also failed to distinguish between operational and capital reserves and ignored the actual use to which the funds were put, which by no metric can be said to be reasonably related to the "actual cost of the [utility] services provided."

Second ruling: "The difficulty for Petitioner here is the lack of evidence that the reserves held by the city are . . . in violation of I.C. §63-1311." R. 236

Response: For at least the last 25 years the city has "sought to maintain a reserve in all each (sic) of these enterprise funds sufficient to maintain the funds' *operations* for a minimum of 3-months, and depending on the upcoming or anticipated needs the funds will sometimes maintain even higher reserves." SR 11 ¶5 (emphasis added).

The $1,138,713 loan for the golf course and the $800,000 loan for the library from the sanitary utility were in addition to the reserves for *operations*. By the terms of the loan agreements those funds could be called only for *capital* needs. Again, it is significant that funds from the water and wastewater utilities, that are capital intensive, were not used and funds from the one utility that has minimal capital demands are used. The city's use of a total of $1,938,713 was in excess of the established reserves for the utility and was for purposes unrelated to the cost of providing sanitation services.

By any standard, funding an irrigation system and a library building is not reasonably related to refuse collection and these funds were in addition to the operational reserves included in the actual cost of providing the services. Nor, it should be said, were these funds used for regular, usual, often recurring costs.

4. The Ratepayers Are Entitled to Remedies

Third issue: Are the ratepayers entitled to have the unconstitutional fees the city took from them returned to them?

First ruling: [T]he lawsuit before this court is only brought by Bradbury in his individual capacity. R 245.

Response: The court concluded the petition was brought only in the Petitioner's personal capacity while, oddly, at the same time acknowledging Petitioner alleged that "he brings this action 'on his own behalf and on behalf of all the residents of Lewiston ratepayers.'" R 245, n 23. Except for the Seventh Cause of Action, every cause of action asks for the ratepayers to have their illegal payments returned to them or that the water utility be paid for the water it had supplied the city. Not once is there a request for a personal remedy. There is no factual basis for the district court's conclusion.

Second ruling: **"**There is nothing in the record that indicates that Bradbury provided to the City a notice of a claim for damages [required by the Idaho Tort Claims Act]." R. 246.

Response: The court's conclusion that Petitioner was required to file a notice of claim and didn't do so is confounding. Petitioner attached his notice of claim as an exhibit to Petitioner's Opposition to City's Motion to Strike to rebut the allegation that a claim was not filed. *Id*., Ex.4. The notice also stated that, "Bradbury does not think this Notice of Claim is necessary but files it in an abundance of caution." CR 38-43. The notice was qualified because of the difference between damages recoverable at law, which were not sought, and the return of a person's wrongfully taken property recoverable in equity, which was sought.

Second ruling: "All claims for damages against a city must be filed as prescribed by the Idaho Tort Claims Act, I.C. §50-219, I.C. §6-906, *Sweitzer v. Dean,* 118 Idaho 468, 573, 798 P.2d 27, 32 (1990) . . .. " R. 245-246.

Response: Petitioner agrees that a notice for all damage claims must be filed with the city. And *Sweitzer* made it clear the notice was not limited to damages arising out of tort, Sweitzer's claim having been for damages for wrongful discharge. But Petitioner was not claiming damages; he was seeking equitable remedies.

The court neglected to note *Hill-Vu's* holding that the illegal tax was an unconstitutional taking under the Takings Clauses of the Fifth and Fourteenth Amendments. *162 Idaho at 591.* 591. This is important because it defines the equitable nature of the remedies sought, *viz*, the return of taken property to its rightful owners.

The equitable remedy of replevin is a long honored common law and statutory remedy in Idaho. *A. L. Nowels v. Ketchersid Music, Inc.* 80 Idaho 486, 333 P.3d 869 (1958) and Idaho Code § 8-101 *et seq*. As the *Nowels* Court noted, "Replevin is a possessory action and its purpose is to determine who shall have possession of the property in dispute." *Id*. at 491 (citations omitted).

That remedy is in contrast to the Idaho Tort Claims Act that contemplates damages for torts, made obvious by its title, and its definitions for "Bodily injury" and "Property damage", I.C. § 6-902-(5) & (6), and "Gross negligence" and "Reckless, willful, and wanton conduct." I.C. § 6-904C. Nowhere does the Act even hint it is aimed at equitable remedies.

In addition to the common-law and statutory remedies, the Lewiston voters, by means of an initiative crafted a remedy of their own. LCC 2-92(b) provides:

> (b) Excess funds: Excess funds are defined as fees or special taxes that are collected and exceed what is usual, proper, or necessary for the purpose for which a fee or special tax is created. Usual, proper or necessary expenditures of funds shall include the establishment of reserves as recommended by the Government Accounting Standards Board (GASB). (Ord. No. 4591, sec.2, 2-11-13).

Section 2-93 provides:

> Fees or special taxes will be deposited into such funds as are designated by the city council and their use will be restricted to those funds except in the event of an emergency declared by a majority vote of the city council. Excess funds accumulated from fees or special taxes shall be refunded to those who paid such excess fees and special taxes. (Ord. No. 4591, sec 2, 2-11-13).

By accumulating fees from the sanitation fund for the golf course and library loans and funds from all three utilities for street repairs in sums in excess of the costs of providing the utilities' respective services the city violated Article VIII, Section 3, and Article VII, Section 6, of the Idaho Constitution, Idaho Code 63-1311 and the City Code itself. As such the fees must be "refunded to those who paid such excess fees." LCC 2-93 This is not a suit to recover damages for tortious conduct; it is an action to force the city to enforce its own code and abide by the laws and constitution of the State of Idaho. And the city's own remedy is the classic equitable remedy of replevin, to which its ratepayers are entitled.

Third ruling: Simply alleging that he brings this cause of action "on his own behalf and on behalf of all residents of Lewiston ratepayers . . ." does not allow him to seek monetary relief for anyone other than himself. To do that he must comply with comply with I.R.C.P. 77. There has been no motion to certify a class under the Rule." R. 245 n. 23.

Response: The district court cited no authority or rationale for its conclusion that moving to certify a class is a mandatory condition of recovery. Class certification is by its terms permissive. The district court did not acknowledge the issue is one of discretion, did not consider the applicable standards and did not give a rationale for its decision as required by *BHA Investments, Inc. v. City of Boise,* 141 Idaho 168, 108 P.3d 315 (2004). Those standards are not met by a peremptory conclusion relegated to a footnote. R 245, n 23**.**

Class certification is a useful and sometimes necessary procedure when an undetermined number of unidentified injured persons with varying degrees of injury are involved. Here the ratepayers' identities are known as a matter of public record at the city billing office and the sums recoverable are ministerially calculable. See, e.g., *Farmers Ins. Exchange v Tucker,* 142 Idaho 191, 125 P3.d 1067 (2005). The city's code has provided the remedy and identified the ratepayers as the beneficiaries and the sums to be returned that are ministerially calculated. Once the declaratory judgments were made, if favorable, the city remedy was as close to self-executing as one can get.

And this Court can take judicial notice that is precisely what happened after it court decided the city's storm drain fees were unconstitutional in *Lewiston Independent School Dis't. No. 1 v. City of Lewiston,* 151 Idaho 800, 264 P.3d 907 (2011). See, *e.g., Fortin v. State,* 160 Idaho 437, 374 P.3d 600 (2016). Even the city has acknowledged the practice and propriety of such a refund: "If these fees had been collected without lawful authority Petitioner may have a point; courts in Idaho have in the past sometimes ordered municipalities to refund or otherwise return

unlawfully collected fees. *See, e.g., Hill-Vu Mobile Home Park v. City of Pocatello*, 162 Idaho 588, 402 P.3d 1041 (2017)." R. 152.

5. Petitioner Had Standing to Raise All Utility Issues

Fourth issue: Does Petitioner in his capacity as a ratepayer of two of the three city utilities and as a city councilor has standing to raise all the issues regarding the city's conduct regarding all of its utilities?

First ruling: "Where Bradbury is not a City Water Fund ratepayer, he does not have standing to challenge the City's allocation of water to the Golf Course from the Golf (sic) [Water] Fund, or the City ordinances that allow the City or enter into a flat fee agreement for water provided to the City owned golf course." R. 248.

Response: The court confused the difference between having standing to question a course of conduct that injures the party and the specific applications of that policy. The city's pattern of conduct of managing its utilities fees directly affected Petitioner as a consumer of the wastewater and sanitation utilities. As such he had standing to challenge the policy because standing "focuses on the party seeking relief, not on the issues the party wishes to have adjudicated." *Gifford v. West Ada Joint School District #2*, 169 Idaho 577,582, 498 P.3d 1206, 1211 (2021).

In *Gifford,* parents could not afford the monthly kindergarten tuition, did not pay it as result, and alleged the policy violated Article IX, Section 1 of the Idaho Constitution that guarantees a free education. This Court held that while the parents did not have economic standing because they had not paid the tuition, they did have standing to challenge the tuition because it denied their child the education the constitution was designed to provide. *Gifford* at

1211. So it is here. Petitioner did not pay for city water but he was directly affected by the policy and as such had standing to challenge all "the issues the party wishes to have adjudicated." *Id.*

The core standing inquiry is whether the party has "such a personal stake in the outcome of the controversy that a meaningful representation and advocacy of the issues is insured." *Miles,* 116 Idaho at 641. Petitioner submits that even a cursory review of the pleadings indicates he did.

Second ruling: "Bradbury as a member of the City Council has no cognizable individual injury" because he "is not seeking to validate an institutional right of the council." R. 118

Response: The district court also held Petitioner's status as a city councilor did not afford standing because Petitioner was "not seeking to validate an institutional right of the council," citing *Bedke v Ellsworth*, 168 Idaho 83, 480 P.3d 121 (2021) R. 118.

> As a condition of becoming a city councilor, Petitioner took this oath:
> I do solemnly swear that I will support the Constitution of the United States, the Constitution and Laws of the State of Idaho and the Laws and Ordinances of the City of Lewiston, and that I will to the best of my ability perform all of the duties of the office of the City of Lewiston.

During the August 24, 2020, council meeting Petitioner told the council his understanding of what his oath required:

> I do this [talk about suing the city] because I took an oath to uphold not only the Federal and State Constitution, but (also) the State and City laws. And if I wink at something that I think is illegal, I'm violating my oath. So I feel I'm compelled by my oath to do what I am going to do if I have to do it: and I'm hoping by this means [bringing it to the council] I can avoid having to do it.

CR 17-18.

This oath is personal to Petitioner and binds him "in conscience to perform the perform the act faithfully and truly." *State v. Harold*, 113 Idaho 938, 944, 750 P.2d 959, 964 (Ct. App. 1988). It imposes duties on him not shared by the public at large.

This is not a concept of recent vintage. The *Dunbar* Court unambiguously clear the import of an oath:

> It is not only the duty of ministerial officers, but of judicial officers as well, to support the constitution and laws of the state, but all of such officers are bound under the solemn obligations of the official oath to do so. No officer can support the constitution by ignoring and violating its plain provisions.

Dunbar 5 Idaho at 413-14, 49 P. at 411;See, *State v. Malcom*, 39 Idaho 185, 226 P.2d 1083, 1087 (1924), where the county assessor asserted a statute requiring her to collect a tax was unconstitutional. The Court decided "it was within the implied duty of the officer to raise the question of constitutionality and [the court] should pass upon it even in a mandamus proceeding." *Id.* at 191.

Surely the city has an institutional right to have its business conducted constitutionally, and if not enforced by a councilor, by whom? Or does "support" mean nothing more than sitting by and watch it occur? Had Petitioner followed that standard, none of this evidence would be before this Court because it was only as a councilor that Petitioner was able to learn of the wrongdoing and only because of his oath did he bring this action. But for that, the wrongdoing would continue.

6. Payments to Private Entities

Fifth issue: Does giving City funds to Valley Vision and Visit Lewis-Clark Valley violate Idaho Constitution Article XII, Section 4, that bans a city from donating public funds to private organizations.

Ruling: "There is nothing in the record to support Bradbury's assertion the funds paid by the city are 'donations.' Nor has Bradbury established that a City is prohibited from entering into contracts with entities that provide services that related [to] economic development and tourism." R. 246-247.

Response: The district court provided no factual support for the first conclusion and no legal basis for the second one. Idaho Constitution, Article XII, Section 4, states in part:

> No . . . city . . ., by vote of its citizens or otherwise, shall ever become a stockholder in any joint stock company, corporation, or association whatever, or raise money for, or make donation or loan its credit to, or in aid of, such company or association. . ..

The facts are undisputed. The city has donated $480,000 to Valley Vision and $247,500 to Hells Canyon Visitor Bureau, Inc., dba Visit Lewis-Clark Valley, since 2009, the last year records are available. CR 144-145, L 6-20. The City donates $40,000 a year to Valley Vision and $15,000 to Visit Lewis-Clark Valley. CR 177-178 Both entities are private non-profit organizations that promote commerce and tourism in the Lewiston-Clarkston Valley. Mr. Marsh acknowledged that there were no legal obligations between the parties. CR 147 l 2-4. In 2018 the companies signed contracts with the city in an effort to circumvent the prohibition of donations of public money to private organizations, but the employees answer only to their boards of directors and are only obliged to report designated activities to the city. CR 146-149 L 18-2. CR 179-194.

The court ignored the overarching purpose of Article XII, Section 4 of the Constitution as explained by this Court in *Fluharty v. Bd. of County Comm'rs,* 29 Idaho 203, 158 P. 320 (1916). There a statute permitted counties to appropriate funds to an organization having as its object "the exhibition of livestock and agricultural products of their county." Pursuant to the statute, the Nez Perce County Commissioners appropriated $2500 to the Northwest Livestock Association. The Court held the appropriation was unconstitutional because it put the money beyond the control of the commissioners and the funds were not being used for the administration of county government. It said:

> Were such donation or appropriation made, it would place county funds donated or appropriated to such corporation under the control of the corporation and its officers, which funds would be appropriated to, and expended for, other purposes than the legitimate current expenses for the lawful administration of the government of the county, and by individuals not officers of the county, or amenable to the laws authorizing such expenditure of public moneys."

29 Idaho at 208-209, 158 P.2d at 321; accord, *School Dis't No. 8 v. Twin Falls County Mut. Fire Ins. Co*., 30 Idaho 400, 164 P.2d 1174 (1917).

More recently, in *Village of Moyie Springs v. Aurora Mfg. Co.,* 82 Idaho 337, 353 P.2d 767 (1960) the legislature had passed legislation designed to increase employment, job opportunities and to induce companies to locate or expand in Idaho. Relying on the legislation, Moyie Springs passed a bond to buy land and build a building to lease to a private manufacturing company at very favorable terms to promote local commerce.

This Court held the Act was unconstitutional because it permitted donations of public money to a private enterprise. "We do not agree that an incidental or indirect benefit to the public

can transform a private industrial enterprise into a public one or imbue it with a public purpose." *Id*. at 346; see Att'y. Gen. Op. No. 95-07. CSR 108-118.

Here, as in *Fuharty*, the money is put beyond the control of the city government for uses other than the administration of its government. And it is hard to imagine any entities more private then functional equivalents of chambers of commerce. Their public funding should be enjoined.

7. The City Attorney's Opinion Letters

Sixth Issue: Are communications to a lawyer by persons who were not seeking legal advice privileged?

Ruling: The city attorney opinion letters were privileged pursuant to I.R.E. Rule 502 because they were a "confidential communication" and "were made for the purpose of facilitating the rendition of professional legal services by [city attorney] Ms. Gomez to the City." R. 109

Response: The district court granted the city's motion to seal the City Attorney's opinion letters dated May 3, 2017, and March 19, 2018, in which she opined the probable illegality of certain city practices. CSR 49-84. The first letter was prompted by retired sanitation utility supervisor Daniel Johnson for reasons he explained:

> I did not consult Ms. Gomez [the City Attorney] as a lawyer. I did not expect her to give me legal advice and she gave me none. Nor did I consider the information I gave her to be confidential. I simply was trying to get someone within the city to do something about what I considered to be an improper practice.

CR 71-72.

As to the second opinion letter, neither Chris Davies, the director of Public Works nor Brian Lacy, the head of the Water and Wastewater Divisions, came to Ms. Gomez with information for which they were seeking advice. Rather it was she who contacted them for information regarding the issues of concern. CSR 50.

The city moved to strike the exhibits on the basis they were privileged and the district court held they were privileged pursuant to I.R.E. Rule 502 because the letters were a "confidential communication" and "were made for the purpose of facilitating the rendition of professional legal services by Ms. Gomez to the City." The court then explained its holding:

> It is not relevant to the outcome that the letter/memos from the lawyer may have been prompted by an inquiry by a retired city employee. The law does not require that the communication be responsive to an inquiry from the client.

R 109.

That decision flies in the face of the plain language of Rule 502. The rule defines a "client' as a person "who consults a lawyer with a view to obtaining professional legal services from the lawyer. . .." Rule 502(a)(1). A "confidential communication" is defined as one "not intended to be disclosed to third persons other than those to whom disclosure is made to in furtherance of the rendition of professional legal services to the client. . .." Rule 502(a)(5). And "[a] client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client . . . ." Rule 502(b).

The court concluded it is the advice, not the communication made to get the advice, that is protected, when the reverse is what the privilege protects, albeit the advice is usually derivatively privileged because it would disclose the confidential communication.

. That is because the purpose of the privilege is to encourage a frank and robust discussion with counsel to enable the imparting of informed advice. *In re Keeper of the Records*, 348 F3d 16, 22 (1st Cir. 2003). Consistent with that aim, "[t]he privilege protects only those communications that are confidential and are made for the purpose of seeking or receiving legal advice." *Id., citing, inter alia,* 8 John Henry Wigmore, Evidence, Sec. 2292, at 545 (John T. McNaughton ed. 1961); *accord, Hall v. State,* 155 Idaho 315 P.3d 798, 811, 610, 623-24, 682 P2.d 571, 574 (2013), *State v. Iwakiri*, 106 Idaho 618, 621 (1984). As important as the privilege is, it "must be narrowly construed because it comes with substantial costs and stands as an obstacle of sorts to the search for truth." *In re Keeper of the Records* at 22, citing *United States v. Nixon,* 418 U.S. 683, 709-10, 94 S.Ct. 3090, 41 L.Ed. 1039 (1974). .

Assuming there was privilege, the city waived it when Ms. Gomez published an opinion that "it is not illegal for the Water Division to subsidize the Golf Division because the water is being used for a public purpose" and that it did not violate Article XII, Section 4, of the Idaho Constitution. CR 244. When privileged information is disclosed to a third party, "the disclosure destroys the confidentiality upon which the privilege is premised." *Id*., citing 2 Paul R. Rice, Attorney-Client Privilege in the U.S., sec. 9:79 at 357 (2d ed. 1999). The opinion letters should be unsealed.

8. Petitioner Is Entitled to Lawyers Fees and Costs

Seventh Issue: Is a lawyer who brings a public interest lawsuit in his name on behalf of city utility ratepayers entitled to private attorney general lawyer fees and costs?

First ruling: Neither party was entitled to fees and costs because "Bradbury prevailed on a significant claim regarding street impact fees" and "[g]enerally the City prevailed with respect to interdepartmental loans and the tourism contracts." R 279

Response: The court correctly noted the issue of lawyer fees and costs is reposed in the sound discretion of the court. But the court erred by relying on *Allen v. Campbell*, 169 Idaho 125, 130, 492 P.3d 1084, 1088 (2021) to deny Petitioner's request. There, there were claims and counterclaims on which each party recovered. Here the city made no claims and prevailed on none.

More instructive is *Eighteen Mile Ranch, LLC v. Nord Excavating & Paving, Inc.* 141 Idaho 716, 117 P.3d 130 (2005) where the plaintiff lost on its claims and the defendant recovered less than 10 percent of its counterclaim of $12,000. This Court held that although the defendant recovered only $1,054.38, it was the prevailing party. The court held the court must "determine who prevailed in 'the action'" and that the "prevailing party question is examined and determined from an overall view, not a claim-by-claim basis." It then concluded, "logic suggests that a verdict in Nord Excavating's favor and a victory on its counterclaim, (albeit a rather small one), by definition makes it a prevailing party." *Id.* at 716. 117 P.3d at 133.

Here Petitioner stopped a practice that had cost Lewiston utility ratepayers $5,498,668 over the past ten years. The city claimed nothing and received the same. The court correctly

opined that the ratepayers "benefitted to a great degree." Fees R. 241. It erred by applying the case-by-case basis this Court has rejected. Petitioner was by definition the prevailing party.

Second ruling: The "[Supreme] Court has long held that pro-se litigants are not entitled to attorney fees." R 281

Response: The district court relied on *Michalk v. Michalk*, 148 Idaho 224, 235, 230 P.3d 580, 591 (2009) its ruling R 281. The *Michalk* Court did deny fees to a wife who was representing herself in a divorce and custody suit after her lawyer withdrew. This is a case where the lawyer brought a suit in his name on behalf of city ratepayers to vindicate their constitutional, statutory and city code rights regarding the city's conduct with its utilities.

This is an issue of first impression with sound policy considerations warranting its adoption. This Court in *Inclusion, Inc. v. Idaho Dept. of Health and Welfare,* 161 Idaho 239, 241, 385 P.3d 1, 3 (2016), held "that a prevailing party may recover a reasonable attorney fee award even if the party never actually incurred any attorney fees," citing *Kidwell v. U.S. Mktg. Inc.,* 102 Idaho 451, 459, 631 P.2d 622, 630 (1981). Specially concurring, Justice J. Jones set forth the compelling policy predicate for the decision:

> They (pro bono lawyers) clearly do not expect to receive payment from their clients. However, if a fee award may be available to a successful lawyer, it provides some incentive to lawyers to do pro bono work. To eliminate the possibility for an attorney to receive a fee award where no payment will be forthcoming from the client would be a disservice to the pro bono effort.

Inclusion, 161 Idaho at 241, 385 P.3d at 3. The public interests about which Justice Jones was concerned are best served by the private attorney general doctrine. The needs are real and enduring.

To qualify for private attorney general fees the litigation must support important public policy, private enforcement must be necessary to vindicate the policy and a significant number of people must stand to benefit from the court's decision. *Thomson v. City of Lewiston,* 137 Idaho 473, 478, 50 P.3d 488, 492 (2003).

What public policies are more important than a city unconstitutionally imposing millions of dollars of taxes on its residents, unconstitutionally imposing long-term debt on the same residents and unconstitutionally donating those residents' taxes to private enterprises?

Facts without context mean very little. The disparity of resources between an individual ratepayer and a publicly funded municipality tells the story. This not an inadvertent lapse; it is a pattern of misconduct going back several years, that make it clear that without private enforcement, nothing would change.

This Court told the city it was unconstitutional to use storm drain utility fees to repair streets in *Lewiston Independent School District #1 v. City of Lewiston*, 151 Idaho 800, 264 P.3d 907 (2011). What did the city do? It continued charging the water, wastewater and sanitation utilities for street repairs. The district court ruled that the city had to have an election to incur a long-term debt to rehabilitate the water and wastewater treatment systems. What did the city do? It continued to defend the long-term golf and library loans. The city code required the city to pay the water utility for the water it used. What did the city do? It saddled the city water

ratepayers with the cost of the water that it used but refused to pay for. The city attorney advised the city regarding the legality of several of its practices. What did the city do? It ignored her. The residents of Lewiston passed an initiative requiring the city to limit its use of fees to the purpose for which they were assessed and to return excess fees to ratepayers. LCC 92, 93, 94. What did the city do? It retained the golf and library loan funds and continued to use funds to repair its streets. Undeterred, after the district court held the street impact fund was an illegal tax, the city asked it to approve its contract with the sanitation utility that required the utility to return ten percent of the contract amount so it could use those funds for street repairs. R. 260

The Lewiston school district, Lewis-Clark State College and the Port of Lewiston had the resources to challenge the storm drain taxes. The individual ratepayer does not enjoy comparable resources. The city to date has spent $105,200 in lawyer fees defending its street impact fund and its long-term loans without an election and asked the court to assess $70,167 in lawyer fees against the Petitioner for questioning its conduct R (record not received before filing). This is not the conduct of a city willing to correct course when called to account. Private enforcement was the only mechanism available to vindicate the rights of the city's ratepayers. Motion for fees

This is the conduct of a rogue city determined to work its will regardless of legal constraints. It ignored the thrust of court decisions directly addressing its conduct, its own city attorney regarding specific practices and its own code.

The number of people who stand to benefit from this action are significant. This court's decision has already benefitted every wastewater and sanitation ratepayer in a city of 33,000

residents who no longer have to pay for street repairs. And if this appeal is successful, the city will return to its own residents what it has unconstitutionally taken from them: $5,498,668 in street repair taxes, the balances due on the $1,938,713 golf and library loans, the $1,728,543 in golf course irrigation subsidies, and a yet to be calculated sum for the water the city has used at no or little cost for its parks, cemeteries, streets, and fire department. This is not a matter of punishing the city for its conduct. It is a matter of repaying what the city has intentionally and illegally taken from its own citizens. Absent private enforcement, given the city's history of intransigence, there is no reason to think it will alter its conduct.

Third ruling: "Further, Bradbury failed to follow the requirements of I.R.C.P. 54" R 281.

Response: Rule 54 (e) (3) outlines the factors the court is required to consider in determining the amount of fees to be awarded, including the time and labor involved, the novelty and difficulty of the issues, the lawyer's skill, experience and ability, the prevailing rate for comparable work and the amount involved and results.

Petitioner submitted his affidavit relating his legal experience, the difficulty of uncovering and assessing the city's conduct and navigating the arcane laws that intersect city governance and utilities, the inordinate amount of time involved in the research and litigation and the savings to the city's ratepayers as a result of the court's decision. R. (record not received before filing). Petitioner did not submit the hours he spent because he did not record them. Despite this showing the court ruled that "saying 'its (sic) up to the Court' does not provide a record upon which the Court may act or an appellate Court my (sic) review a decision of the amount of fees awarded." *Id.*

This Court has held that "[t]he introduction of hourly time sheets into evidence is not a prerequisite to an award of reasonable attorney fees," citing *Realty West, Inc. v. Thomas*, 95 Idaho 262, 506 P.2d 830 (1973), *Dykstra v. Dykstra,* 94 Idaho 797, 498 P.2d 1270 (1972). It added that the "amount of time spent is but of the factors to be considered . . .." and reiterated that lawyer fees do not have to be incurred to be awarded. *Kidwell v. U. S. Mktg. Inc*., 102 Idaho at 159, 631 P.3d at 630

The *Dykstra* Court, while acknowledging its general rule that evidence must be submitted to support an award of lawyer fees for difficult cases where much of the work is done outside the presence of the court, "it has little relevancy in a case such as presented herein where the amount awarded is fairly supported by services rendered in the presence of the trial court or reflected by the files of the court." *Id.*at 800, 498 P.3d at 1273. Except for the three-hour deposition of Dan Marsh, this entire case was tried in the presence of the trial court.

Here evidence was submitted addressing the Rule 54 (e) factors and left it up to the court to set the fees as the rule contemplates. Ironically, the city's counsel gave the court evidence of the range of hours needed to prosecute this case in their petition for fees. They related they spent 418.9 hours and sought $70, 167 at an average hourly rate of $167.50 (a partner and an associate) which was two-thirds of the total fee it charged the city, which amounts to $105,200 the city was charged for their efforts. R. (record not received before filing).

What ratepayer could afford lawyer fees in that range to vindicate his or her individual utility fees? How many lawyers will spend that amount of time on a case this complex involving

this much money and at the same time put himself at financial risk of thousands of dollars in lawyer fees if the private attorney general doctrine is not available?

V. CONCLUSION

Petitioner asks the Court to hold the golf and library loans violate Idaho Constitution Article VIII, Section 3, the donation of public funds to private organizations violated Idaho Constitution Article VII, Section 6, the use of utility fees for non-utility-related activities was a Taking under the Fifth and Fourteenth Amendments and violated I.C. 63-1311, that the ratepayers are entitled to a return of the funds wrongfully taken from them, that Petitioner has standing to question the city's conduct with the water utility, The city attorney opinions are not privileged, and that Petitioner is entitled to lawyer fees at the trial and appellate levels.

The ultimate question is whether or not there will be remedies for conduct of this sort in the future. That is what this Court's decision will decide.

Respectfully submitted this 7th day of September, 2022.

_____/s/_____
John Bradbury

APPENDIX - CITY CODE SECTIONS

Sec. 2-92. Definitions.

(a) *Emergency.* An emergency situation is defined as any extraordinary physical or financial disaster; any emergency work required to prepare for a physical disaster; or any action required to safeguard the public health, safety, or welfare in the event of such an emergency.

(b) *Excess funds.* Excess funds are defined as fees or special taxes that are collected and exceed what is usual, proper, or necessary for the purpose for which a fee or special tax is created. Usual, proper, or necessary expenditures of funds shall include the establishment of reasonable reserves as recommended by the Governmental Accounting Standards Board (GASB). (Ord. No. 4842, § 2, 1-10-22)

Sec. 2-93. Policy.

Fees or special taxes shall be deposited into such funds as are designated by the city council, and their use shall be restricted to those funds except in the event of an emergency declared by a majority vote of the city council. Excess funds accumulated from fees and special taxes shall be refunded to those who paid such excess fees or special taxes. (Ord. No. 4842, § 2, 1-10-22)

Sec. 2-94. Prohibition on transfer of funds.

No elected or appointed city official or officer shall approve or issue any financial instrument that has the effect of transferring or loaning monies from one city fund to another except in the event of an emergency declared by a majority vote of the city council or if required by law. (Ord. No. 4842, § 2, 1-10-22)

Sec. 36-5.3 Water used by city departments (repealed 9/9/19)

(a) If a utility service is provided to a customer for free or at a reduced rate, then the amount by which the utility service is reduced shall be billed to the city.

(b) The city shall pay such bill to the enterprise fund for the utility from which the services were rendered. The city shall not increase the rates of other ratepayers to account for the reduced rate utility services.

Sec. 36-5.4 Water used by city departments (repealed 9/9/18)

(a) Water used by other city departments shall be paid to the water division out of each department's appropriation at a scheduled rate established by the city council. However, water used by the fire department to fight fires, for training purposes, or other such uses from city owned fire hydrants shall be exempt from this section of the code.

(b) The accounts shall be paid monthly in the same manner as other users.

(c) The administrative services director shall enforce collection against any city department in the same manner as against any private consumer, except that no penalties shall be charged.

Sec. 36.-5-4(x)

(x) *User charge:* The fee levied on users of the water, wastewater, solid waste systems for their proportionate share of the costs of operation, maintenance, replacement, and capital facilities of the respective systems.

Sec. 36.5-5. Water used by city departments.

(a) Subject to the exceptions set forth in subsections (b) and (c) of this section, water used by city departments shall be paid to the water division out of each department's appropriation at the rate established by resolution of the city council.

(b) The water division shall not charge a fee for water used by city departments for the following public purposes:

(1) Irrigation of municipal parks and cemeteries;
(2) Firefighting, including firefighter training; and
(3) Maintenance of municipal streets, sidewalks, storm drains, sewer mains, and parking lots.

(c) The water division shall enter into an agreement with a municipal golf course, whether such municipal golf course is operated by the city or leased by the city to another entity to operate, setting forth the amount such municipal golf course shall pay the water division for water used for irrigation purposes.

(d) In its discretion, the city council may annually appropriate funds from the general fund to be paid to the water fund in order to offset, in full or in part, the costs associated with providing water for the public purposes set forth in subsections (b) and/or (c) of this section. (Ord. No. 4756, § 1, 9-9-19)