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Idaho Supreme Court
Melanie Gagnepain, Clerk of the 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 REPLY 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.)

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DISCUSSION

Introduction:

Petitioner replies to the issues discussed by the city in the order it lists them.

The thrust of Petitioner's complaint remains the same. The city has followed a pattern of using the utilities as a cash cow to pay for projects unrelated to the services they are created to provide. They include funds to build an irrigation system, reconstruct a new library, and build and maintain its streets or to subsidize it cemetery, parks, and fire department. At the same time the city is donating its taxes to private organization for purposes unrelated to it municipal governance, principally to attract business to the region. The subsidiary issues remain the Petitioner's standing, the confidentiality of the city attorney's opinion letters and lawyer fees.

1. Factual Background:

A. City Enterprise Funds

The city continues to conflate municipal functions with utility (enterprise) functions. It appropriately lists the water, wastewater and sanitation utilities as enterprise funds because they are funded by ratepayers based on the services they individually receive. That is in contrast to the street impact fund, the golf course fund and the library funds that are supposed to be funded by taxes and provide services to the public at large without regard to their specific usage.

B. Street Impact Fees

The city's lengthy explanation of the reasons it used utility fees to repair and maintain its streets is not relevant. The district court held it was an unconstitutional tax and the city has not appealed that decision.

C. Golf Course Fund and Library Fund Transfers

The city continuously refers to the golf course and library loans as transfers while acknowledging their use of the funds was for fixed terms, repayable with interest in annual instalments. Respondent's Brief at 4-5. Repeatedly calling a loan a transfer does not make it a transfer any more than calling a peach a banana makes it a banana.

The terms of the memoranda of understanding (memorandum) are unambiguous. If the transactions aren't loans, one would expect the city to point to precedent or the terms in the memoranda that warrant that conclusion. It does neither.

The city attempts to circumvent their terms by asserting the loans were unconditionally callable. *Id.* at 4. That representation is contrary to the specific language of Paragraph Three of the memoranda that states, "When necessary for a capital project, the Sanitation Fund may 'call' for the entire unpaid balance to be paid." CR 161. The city also omits any reference to the sworn testimony of the city's chief financial officer that confirms that limitation on the city's ability to call the loans and the fact that the sanitation utility has limited capital needs. CR 131-133 L 22-5.

It is significant that the city acknowledges that the loans were made because the city did not have the funds to finance the projects during the years the loans were made. Respondent's Brief at 4-5.

D. Valley Vision and Visit Lewis-Clark Valley Donations

The city correctly represents that the current contracts with Valley Vision and Visit Lewis-Clark Valley require them to report their activities to the city council on an annual basis. It fails to disclose that before the contracts were agreed to in 2018, there were no legal obligations at all between the parties and the contracts were formulated because of concern about the constitutionality of the donations. CR 147-149, 175-178, L 2-4.

While the city does not contend otherwise, it is important to note that the city has no management authority over either organization and their sole purpose is promotion of commerce. CR 147, L 8-15, 148-149 L 4-1, 70-105.

E. Water for Bryden Canyon Golf Course

After all is said and done, based on existing records, the city engineer/public works director calculated that the water utility would have received $1,728,543 for the 642,728 million gallons of water it supplied if the city had paid the going rate for that volume of water. CR 154-155, L 17-5, 205. And that does not include the millions and millions of gallons of water the water utility has provided at no or reduced cost for the city to irrigate its cemetery and parks, to flush its hydrants, clean its streets and parking lots and for the fire department to train personnel and to extinguish fires. CR 153-155, L 17-5.

2. Argument

The city correctly states the general rule that reasonable inferences regarding undisputed facts must be drawn against the moving party. Respondent's Brief at 12. It is important, therefore, to acknowledge that the city was the moving party in its motion to dismiss on the issues of standing and that a notice of claim pursuant to the Idaho Tort Claims Act was required and that both parties moved for summary judgment.

It is even more important to acknowledge the exception to that rule when a municipal corporation is dealing with its utilities:

> 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 service, not a government function.

North Idaho Bldg Contractors Ass'n v. City of Hayden, 158 Idaho 79, 86, 343 P.3d 1086, 1092 (2015).

A. Petitioner's Standing Regarding City Water Practices

The city has adopted a practice of plundering millions of dollars from its utilities by either taking funds from them for city purposes or by forcing utilities to absorb the costs of the services that the city uses and does not pay for. In short, for years the city has forced the utilities to directly or indirectly subsidize its municipal functions. The city argues that even though this practice as a city policy has directly injured Petitioner, he cannot challenge a specific application of the practice that does not directly affect him. This approach resulted in the district court ruling that the wastewater and sanitation funds the city used for street repairs were unconstitutional taxes, but it couldn't decide the same issue regarding the city's same conduct with the water utility.

This convoluted result is precisely what the Court wanted to avoid when it held the "[T]he doctrine of standing focuses on the party seeking relief and not on the issues the party wishes to have adjudicated." *Miles v. Idaho Power Co.,* 116 Idaho 635, 644, 778 P.2d 757, 763 (1989). The Petitioner clearly has a traceable and causal injury from the city's policy regarding the utilities sufficient to create such a "personal stake in the outcome of the controversy that a meaningful representation and advocacy of the issues is ensured." *Id.* at 641.

Petitioner continues to posit that the oath he took as a condition of becoming a city councilor gave him standing to question the city's unconstitutional and illegal conduct. The duties imposed by a public official's oath date back to 1897 when this Court held in a mandamus proceeding that a public official's oath obliged him or her "to support the constitution and laws of the state" that could not be honored "by ignoring and violating its plain provisions." *Dunbar v. Bd of Comm'rs of Canyon County*, 5 Idaho 407, 413-414, 49 P. 409, 411 (1897).

That duty also applies to legislative bodies. The same year as the *Dunbar* decision the Court held that a person who sought to prevent the legislature from converting non-negotiable instruments into negotiable ones on the basis it did not follow the constitutional procedure for enacting the conversion. This Court defined the legislators' duties:

> These [procedural] provisions are mandatory, and it is the imperative duty of the legislature to obey them. As we said in the case of Dunbar (citation omitted) the duty of supporting the constitution of the state is imposed on all public officers by the solemn obligations of the official oath, which obligations cannot be discharged by disobeying, ignoring, and setting at naught the plain provisions pf the constitution, but only by obedience thereto.

Cohn v. Kingsley, 5 Idaho 416, 421-422, 49 P. 985, 986 (1897), accord *Coeur d' Alene Tribe v. Denny,* 161 Idaho 508, 513, 387 P.3d 761, 767 (2015) (the Coeur d' Alene Tribe could force the secretary of state to enforce constitutional requirement regarding a gubernatorial veto).

The provisions of Article VIII and Article XII are no less mandatory. Can the city seriously suggest a party can force a public official to obey the constitution based on his or her oath, but the official who took the oath cannot?

B. Donations to Valley Vision and Visit Lewis-Clark Valley

Article XII, Section 4, prohibits a city from making a "donation **or** loan its credit to, or in aid of" a corporation or association. (Emphasis added). This Court delineated the standards this section imposes in *Fuharty v. Bd of County Comm'rs,* 29 Idaho 203, 2o8-209, 158 P. 230, 235 (1916). It held that a city appropriation for private party services passes constitutional muster only if the city has control over the organization receiving the funds and the funds are spent only for services directly related to its municipal governance. *Id.*

Without even citing *Fuharty* or *School Dis't 8 v. Twin Falls County Mut. Fire Ins. Co.,* 30 Idaho 400, 164 P. 1174 (1917), the city summarily dismisses them as "century old cases." Respondent's Brief at 20. One wonders how the city would handle *Marbury v. Madison,* 5 U.S.

137, 1 Cranch 137 (1803) in a federalism case. The fact is *Fuharty* has withstood the test of time and is the controlling precedent on this issue.

The city chief financial officer admits the city has no management role in either organization and that their sole function is to promote commerce in the Lewis-Clark Valley, the precise function the *Fuharty* Court condemned. CR 146-149 L 18-2, CR 179-184.

The city argues that because it has a contract with both non-profit organizations to promote commerce and report the results of their efforts annually to the city council that it is akin to paying for "phone or internet services, or even when it retains the services of private counsel." Respondent's Brief at 20. Surely the city understands that telephone, internet and legal services are integral components of a municipality's governing system. Promoting commerce for the region business community, laudable as that is, has nothing to do with the mechanics of governing.

The city then tries to distinguish *Village of Moyie Springs v. Aurora Mfg. Co*., 82 Idaho 337, 353 P.2d 267 (1960) because it involved the village lending its credit to the private business instead of making a donation, as the Petitioner wrongly concluded and for which he apologizes. Respondent's Brief at 19. But that is a distinction without a difference since Article XII, Section 4, bans both practices. Yet the city ignores the Court's holding that the transaction was unconstitutional because the credit was lent to a private company.

C. The Golf Course and Library Loans

Article VIII, Section 3, unambiguously prohibits a city from incurring "**any indebtedness** or liability**, in any manner, or for any purpose,"** in excess of its revenue during the year the indebtedness is incurred without voter approval. (Emphasis added). The city advances two theories to avoid its constraints.

First, it argues the transactions were nothing more than the permitted transfers of unconditionally callable sanitation utility reserves. "Interdepartmental transfers of exiting municipal funds—something plainly permitted by the Idaho Revenue Bond Act, see I.C.50-1014—simply do not violate Article VIII, Section 3 . . .." Respondent's Brief at 21. The city cites the Idaho Revenue Bond Act even though there are no bonds involved in the transactions. The city admits the "funds" were sanitation reserves. The golf course funds were "transferred from the Sanitation Fund's operational reserve to the Golf Fund. . .." and that they were "callable should the originating fund need to access the transferred funds for its operations. . .." Respondent's Brief at 21.

It is revealing that the city represented to the district court and now represents to this Court that I.C. 50-1014 permits the transfer of reserves from a utility to the city when section §50-1005A of the same statute plainly limits the transfers only to assets in excess of the fund's liabilities **and reserves**. Respondent's Brief at 22-23,24. The fact that that the city continues to argue that point after Petitioner pointed out that section's application in his opening brief suggests the omission is not an inadvertent oversight.

It is equally disconcerting that the city continues to allege the loans were unconditionally callable when the city's own memoranda specifically limit the city's ability to call the loans to capital needs and its chief financial officer acknowledged that limit in sworn deposition testimony. *Id.* at 21. There is simply no authority for a city to use enterprise funds for any purpose. This conclusion is especially compelling given the statute that limits utility fees to the actual cost of providing its services. I.C. 63-1311.

Secondly, the city argues that even if the transactions were sanitation utility loans, they were not proscribed by article VIII, Section 3, because they are not a third-party loans.

Respondent's Brief at 24-25. That conclusion is belied by the fact they are third-party loans. These were not city funds; they were utility funds.

If the loans were from an independent utility such as the Lewiston Orchard Irrigation District, the city would be ill heard to argue they were not third-party loans. The fact that the city governs a utility does not make it any less a separate statutory entity with its own funding source and appropriation constraints. It is because of this type of overreaching by cities with their utilities that this Court requires reasonable inferences be drawn against the city when dealing with them. *North Idaho Bldg Contractors Ass'n v. City of Hayden,* 158 Idaho at 86, 343 P.3d at 1092 (2015). Finally, it is fair to ask the city what part of "any indebtedness or liability**,** in any manner, or for any purpose" it does not understand?

The city also argues that loans were constitutional as "pay as you go" loans based on *Hoffman v. City of Boise*, 168 Idaho 782, 785, 487 P.3d 717, 720 (2021). Respondent's Brief at 23, 24. The "pay as you go" phrase plainly refers to those cases where this Court held the liabilities or indebtedness did not pass constitutional scrutiny.

In fact, the Court held the ordinance that funded the urban renewal districts did not create a liability and a result the transactions did not come within the ambit of Article VIII, Section 3. Id., 168 Idaho at 787, 487 P.3d at 722. That is in stark contrast to the city's promise to repay fixed sums with interest over twenty years of annual installment payments.

D. Do the Loans Violate Idaho Code 63-1311?

Idaho Code 63-1311 provides" [t]he fees collected pursuant to this section shall be reasonably related to, but shall not exceed, the actual costs of the services being provided."

The city argued and the trial court concluded that Petitioner's assertion that the sanitation utility golf loan of $1,138,713 and the library loan of $800,000 library was based solely on Petitioner's

speculation. In fact the conclusion is established by the city's evidence. Its chief financial officer declared that the city maintains three months of the operations costs as the utilities' operational reserves. SR 11, par.5. The $1,938,713 necessarily are in excess of the operation reserves the city maintains for each utility since thy are available only for capital needs for a utility that has almost no capital needs. If that conclusion is subject to reasonable doubt, that doubt must be resolved against the city. *North Idaho Bldg Contractors Ass'n v. City of Hayden,* 158 Idaho 79, 86, 343 P.3d 1086, 1092 (2015).

E. The Loans Were Unconscionable

Petitioner is not appealing the trial court's decision on this issue. Appellant's Brief at 13.

F. Ratepayers Are Entitled to Remedies.

The city represents it did not appeal the district court decision that the street impact fund was an unconstitutional tax "because the District Court later clarified that this holding (1) did not apply to the franchise agreement the City had implemented to replace the Sanitation Fund practices actually challenged in this litigation by Petitioner, , „" Respondent's Brief at 33. That agreement required the franchisee to return a percentage of its appropriation for the franchise to the city to use for street repairs. *Id.* at 32-33. The record is quite different.

The city did move the court to clarify its ruling. R 253-262. But contrary to what the city represents to this Court, the district court actually ruled as follows:

> The Court is simply expressing no opinion whether the new arrangement [with the Sanitation Fund] is or is not legal.

R 269

What the city proposed is nothing more than a money laundering scheme to circumvent the court's ruling that using utility fees for street repairs is an unconstitutional tax. It is too clever by half and demonstrates the city's continued effort to skirt its constitutional and legal constraints.

The city's lengthy argument that Petitioner did not comply with the Idaho Tort Claims Act is also off the mark. It asserts Petitioner claimed damages should be awarded to him. Respondent's Brief at 34. The record will reflect that Petitioner has never sought damages for himself or the ratepayers. The assertion is simply false.

Contrary to its first assertion, the city then asserts the notice was defective because it was a claim for equitable relief, not damages. *Id.* at 36. The notice was filed as a precaution against the court ruling that the Act applied to equitable relief, which the city predictably argued it did. The I.T.C.A simply requires a notice of claim be filed and one was. CR 38-43

The city next asserts Petitioner waived the issue of the notice having been filed by arguing in the alternative it did not apply to equitable claims. There is no legal authority for that claim and the city cites none.

The city also asserts the district court was entitled to ignore that the notice of claim had been filed because a copy of it was not filed with Petitioner's motion for summary judgment. The reason Petitioner did not discuss the issue in his response to the city's motion for summary judgment issue is because the city did not raise the issue of the notice's validity in its Memorandum in Support of Defendant's Motion for Summary Judgment or its Reply in Support of City's Motion for Summary Judgment. The Act was only mentioned in the context of the necessity to file the notice within 180 days of learning of the claim. R 204. As a result, it is the city, not Petitioner, that has waived the issue on appeal. *Sanchez v Arave* 120 Idaho 321, 322, 815 P.2d 1065, 1061-1062

The record is undisputed. Petitioner filed a notice of claim as required by Idaho Code §6-906 and Idaho Code §50-219 and was attached as an exhibit in response to the city's Motion to Dismiss. CR 38-43

The reason Petitioner did then and does now think the ITCA does not apply is because his claims seek equitable relief, not legal damages. In response, the city represents to this Court, as it did to the district court, the following:

> Petitioner's "assertion that I.C. 50-219 does not apply because a takings claim is alleged, or because he is seeking equitable relief is squarely contrary to prior decisions of this Court. *See Alpine Village Co. v. City of McCall,* 154 Idaho 930, 935, 303 P.3d 617, 622 (2013) applying I.C. 50-219's notice and 180-time limit requirements apply to taking claims); *Hehr v. City of McCall*5 Idaho 92, 96, 305 P.3d 536, 540 (2013) (same); *Magnuson Properties Partnership [v. City of Coeur d' Alene],* 138 Idaho at 168, 59 P3d at 975 (2002) (I.C. 50-219 applies to equitable claims that seek monetary relief}.

Respondent's Brief at 38.

Not a single one of the cited cases stands for the proposition on which the city asks this Court to rely. In *Alpine Village* the Court held the damages claim was barred by a failure to timely file a notice of claim. But the Court held the equitable claim of a taking under the Fifth and Fourteenth Amendments was not ripe for decision. "We also hold that Alpine's federal [takings] claims are unripe under both prongs of the ripeness test in *Williamson County*." *Alpine Village,* 154 Idaho at 938, 303 P.3d at 625.

In *Hehr* there was also a takings claim. The Court held:

> Graystone's claim fails to meet both of the ripeness requirements set forth in *Williamson County.* Because Graystone has waived its federal takings claim, we affirm the district court's dismissal of the claim.

Hehr, 155 Idaho at 98, 305 P.3d at 542. Likewise, in *Magnuson Properties* the Court held:

> Magnuson failed to raise the issue of whether I.C. §50-219 applied to the equitable claims in the district court. As a result, this Court declines to decide Magnuson's argument that its claim for unjust enrichment is not governed by the 180-day notice provision found in I.C. 6-906.

Magnuson Properties, 138 Idaho at 168, 59 P.3d at 975.

This pleadings are consistent with the city's failure to cite and discuss Idaho Code §50-1005A that negates its position that it can transfer utility reserves to city accounts and its failure

to disclose Paragraph Three of the Memoranda that limits the city's ability to call the loans to capital needs.

The city cites no precedent that applies the ITCA to equitable claims and no cases that allow the court to summarily dismiss a claims for not filing a motion to certify a class is required. Proper notice of claim was filed. The district court' decision to deny the ratepayers the ability to recover the property the city has unconstitutionally and illegally taken from them should be reversed.

G. Ordinance Remedy

The district court did not address the city's ordinance provisions because it decided Petitioner was not entitled to a remedy so the issues were moot. R 245 n3 . The city now argues LCC 2-29.2-3 (now renumbered LCC 292 and 293) that prohibit fund transfers and requires excess funds to ratepayers don't apply to the loans and the street repair taxes because they existed before the ordinance was enacted on February 2, 2013, it claims does not apply to it. The city cites no authority that the remedy for continuing wrongful conduct does not apply. In any event it applies to the street impact funds that were taken from February of 2013 to date since that was a continuing violation that recurred every time the funds were taken.

In any event the replevin remedy is pleaded and applies to those funds and the court should remand this issue to the district court so the rate payers can receive what was taken from them.

H. City Attorney Opinion Letters

The district court's rationale for ruling that the opinion letters were confidential was succinct and contrary to controlling law. It stated:

> 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.

A "client" is the person seeking legal advice and the "confidential communication" is what the client tells the lawyer to get that advice and it is the **client who has the privilege** to prevent disclosure of what he or she told the lawyer to get that advice. Rule 502, sections (a)(1),(a)(5) and (b) respectively. The only case the city cites, *Farr v. Mischler*, 129 Idaho 201, 923 P,2d 446 (1996), supports the Petitioner's position. Respondent's Brief at 45.

The city tries to circumvent the rule by saying the city attorney intended her opinions to be confidential and marked them confidential. *Id.* at 45-46. A lawyer's intentions and marking documents, confidential so not make them confidential. If that were the case, every document under the sun could be made confidential as a matter of whim. As long as Rule 502 is on the books, the public is entitled to have it enforced.

The city's fallback position is that the opinions are not relevant, citing *Hurtado v. Land O'Lakes, Inc*., 153 Idaho 13, 278 P.3d 415 (2012). There the Court opined that "[s]ubstantial and competent evidence is relevant evidence that a reasonable mind might accept to support a conclusion." (Citations omitted). No one has more access to the facts and is more knowledgeable about municipal law than the city attorney. Her opinion is entitled to great weight and a reasonable mind would be interested in what she has to say while assessing the merits of the issues involved. In fact, the Court of Appeals found one of the bases for awarding lawyer fees "was the Commissioners' disregard for their counsel's advice that their legal position was untenable . . .." *Fox v. Bd. of County Comm'rs*, 121 Idaho 685, 693, 827 P2d 699, 706 (1991).

The city also ignores the fact that it is a public organization and the public is entitled to know if the city's chief legal officer thinks the city is violating the constitution or the law.

The state of Idaho has adopted a strong policy of public access to public records. "[T]he legislature finds and declares that it is the public policy of the state that the formation of public policy is public business and shall not be conducted in secret." I.C. §67- 2340. As a result, the public is entitled to know what the city attorney had to say about the city's conduct. The district court's decision should be reversed.

I. Lawyer Fees and Costs

The city argues Petitioner does not qualify for fees and costs because he is pro se. The city does not address whether a pro se lawyer litigant, who instead of being paid for his time, spends time he could be paid for without being paid, who is representing the public interests, on behalf of citizens who are affected by the questioned interest. Petitioner acknowledges this an issue of first impression and relies on his discussion in his opening brief as he does on the issue of who is the prevailing party.

The city also argues that Idaho Code §12-117 bars recovery of fees and costs against a city unless the city "acted without a reasonable basis in fact and law," citing *Citizens against Linscott v. Bd. Of County Comm'rs, 168 Idaho* 705, 486 P.3d 515 (2021) . Respondent's Brief at 48-49.

Thomson v, City of Lewiston, 137 Idaho 473, 478, 59 P.3d 488, 493 (2003) is instructive. While the Court held Thomson did not have standing, it reaffirmed the private attorney general doctrine is available despite the constraints of Idaho Code §12-117, citing *Fox v. Bd. of County Comm'rs*, 121 Idaho 685, 827 P2d 699 (1991), and *Hellar v. Cenarrusa,* 106 Idaho 571, 682 P.2d 524, (1984) ("We hold that the [frivolous and unreasonable] limitation does not apply where, as here, the award of attorney fees is under the Private Attorney General Doctrine.").

The *Fox* Court held Fox was entitled to private attorney general fees because:

> [T]his action was pursued to ensure that Boundary County was governed by the rule of law, not by man. Without Fox's efforts it was highly unlikely that the actions of the Boundary Board of Commissioners would have been challenged. It is equally clear that this action imposed a substantial personal burden, both financial and emotional, on Mr. ox. As a result of this litigation, all of the citizens of Boundary County benefitted from Fox's perseverance. We conclude that the district court committed no error in deciding to award attorney fees to Fox.

Fox, 121 Idaho at 693, 827 P.2d at 706. No less can be said of Petitioner's efforts.

In addition to the application of the private attorney general doctrine to this case, Petitioner submits he also is entitled to lawyer fees because the city's defense was not reasonably based on fact and law. Factors that warrant an award of fees have included a county commission's disregard of its counsel's advice and of its own ordinances. *Id.* The Court, Eismann, J., concurring, in *Coeur d' Alene v. Denny*, 161 Idaho at 526-529, 387 P.3d at 780-782 identified disingenuous arguments regarding the facts and misrepresenting a statute's provisions as reasons to award fees. Measured against those standards the record justifies an award of fees and costs. Consider the following:

The city asserts the district court and this Court must draw inferences against the non-moving party. Respondent's Brief at 12. As a matter law the inferences must be drawn against a city in any dispute it has with its utilities. *North Idaho Bldg Contractors Ass'n v. City of Hayden,* 158 Idaho at, 86, 343 P.3d at 1092 (2015).

The city ignores the plain language of its own memoranda by arguing they are not loan contracts without citing any authority or pointing to any of their terms to support that conclusion. at 24.

The city concludes as a matter of fact the golf and library loan transactions were transfers of city funds, again, without any legal authority or pointing to any of the memoranda terms to warrant that conclusion. *Id*.

The city argues the transactions were "[i]nterdepartmental transfers of existing municipal funds. "The record is irrefutable that the funds were sanitation utility fees, not city funds. *Id.*

The city misconstrues Idaho Code §50-1014 to permit it to transfer sanitation utility reserves to city funds when that section refers only to the transfer of city funds during the city's fiscal year. I.C. §50-1001. Idaho Code §50-1020 then shifts the subject from municipal funding to the creation of utilities and requires their services to be furnished at the lowest possible cost. I.C. §50-1028 . *Id.*

The city also grossly mischaracterizes Idaho Code §50-1014 by arguing that it allows the transfer of sanitation utility reserves when section 50-1005A of the same statute limits those transfers to assets in excess of the fund's liabilites and reserves. *Id*.

In the face of the unambiguous language of Article VIII, Section 3, that bans "any indebtedness or liability, in any manner, for any purpose, " when the city, none the less argues, the section does not apply to third parties. *Id.* at 25.

The city also argues that the lent funds are operations reserves that are unconditionally callable when its own memoranda limit calls to capital needs and the chief financial officer confirmed that limit under oath. *Id*. at 26.

The city argues that *Hoffman v. City of Boise* 168 Idaho 782, 487 P.3d 717 (2021) supports its use of utility funds as a "pay as you go" transactions because the "transfer can be unwound if the unexpected happened, and the Sanitation Fund needed to access its reserve funds." I*d.* That is plainly contradicted by the valid and binding loan contracts that limit the loans being called to capital needs.

The city also continues to argue that there is no evidence that the almost two-million-dollar loans do not violate Idaho Code §63-1311 that limits utility fees to the actual cost of

providing their services. It represents they were part of the operational reserves the city maintains when in fact they were callable only for capital needs. *Id.* at 27-29. It also ignores that Idaho Code §50-1005A limits transfers to funds in "excess of the assets of a fund over its liabilities and reserves." By statutory definition the city either violated the law or the funds were in excess of the sanitation utility's reserves.

The city still argues it should be able to use utility funds for street repairs despite this Court's decision that the almost identical practice with its storm drain utility funds was an unconstitutional tax. *Lewiston Independent School District No, 1 v. City of Lewiston,* 151 Idaho 800, 264 P.3d 907 (2016). *Id.* at 2-5

The city argues at length Petitioner's notice of claim pursuant to the Idaho Tort Claims Act does not meet legal standards and the court was entitled to ignore the record that it was filed. *Id*. at 32-40. By not raising that issue before the district court, it is waived on appeal. *Id.* at 32-40. *Sanchez v, Arave*, 120 Idaho at 322, 815 P.2d at 1061-62 (1991).

The city argues the ratepayers are not entitled to remedies because Petitioner did not move to certify a class without acknowledging the district court made its decision without following the procedures necessary to reach it. *Id*. at 34 n. 9. *Farmers' Ins. Exchange v. Tucker,* 142 Idaho 191, 125 P.3d 1067 (2005).

The city argued below that Petitioner lacked standing as a ratepayer despite the unambiguous holding in *Miles v. Idaho Power Co.*, 116 Idaho 635, 778 P2d 757 (1989) that an even large group of ratepayers had standing to question legislation that affected them. R25-29.

The city represents that three cases "squarely" require a notice of claim for equitable remedies when not a single one supports that proposition. Respondent's Brief at 38.

The city continues to argue it can appropriate funds for private non-profits to promote regional commercial interests and refuses to even acknowledge the controlling precedent that limits city appropriations to activities it controls and that relate to its governance functions. *Fuharty v. Bd. of County Comm'rs*, 29 Idaho 203, 168 P. 320 (1916). Respondent's Brief

The city also argues that *Village of Moyie Springs v. Aurora Mfg. Co.,* 82 Idaho at 353 P.2d 269 (1960) is inapposite because the Village lent its credit instead making a donation and ignored the Court's actual holding that the practice was unconstitutional because ii benefitted a private company. *Id.*

The city does not cite a single case, statute or court rule supporting its argument that a legal opinion is privileged if a lawyer does nothing more than intend it to be and marks it confidential. *Id.* at 45-46. The law is clear that it is the client's privilege, not the lawyer's.

Finally, the city acknowledges that a party is entitled to fees when the non-prevailing party acted without a reasonable basis in fact or law." Citing *Linscott,* 168 Idaho at 731, 486 P.3d at 531. Judged even by the city's standard, the Petitioner is entitled to lawyer fees.

3. Conclusion

The city cites no authority for its conclusion that its memoranda are not loan contracts. It admits it "transfers" were sanitation reserves which is contrary to Idaho Code 1005A that limits transfers to assets in excess of a fund's assets and reserves. It wrongly asserts this Court held the Idaho Tort Claims Act requires a notice of claim for equitable remedies. It refuses to even acknowledge the controlling precedent that limits city appropriations to private organizations it controls and for governance purposes. It cites no authority that nothing more than a lawyer's intentions and marking a document confidential makes it confidential. It fails to cite Idaho case law that permits the private attorney general lawyer fees against municipalities.

It is in this context the city has the chutzpah to ask for lawyer fees because the Petitioner's claims were frivolous. Petitioner asks the Court to reverse the district court on the issues raised and award lawyer fees and costs.

Respectfully submitted this _____ day of October, 2022.

_____/s/_____
John Bradbury