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

Supreme Court No. 49667-2022

JOHN BRADBURY,

Petitioner/Appellant,

v.

CITY OF LEWISTON,
a municipal corporation,

Respondent.

RESPONDENT'S BRIEF

Appeal from the Judgment of the District Court for the Second Judicial District, Nez Perce County Case No. Case No. CV35-21-493, the Honorable Richard Greenwood presiding.

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I. STATEMENT OF THE CASE

1. Nature of the Case.

This matter concerns a challenge to a variety of City of Lewiston ("City") practices, policies and decisions brought by former Lewiston City Councilmember John C. Bradbury ("Petitioner"). The case was resolved on cross-motions for summary judgment. The district court's ruling on those motions dismissed eight of Petitioner's nine claims in their entirety, but granted partial declaratory relief to Petitioner on one claim. That claim, in turn, concerned certain charges imposed in connection with sanitation and wastewater services, which the District Court concluded had been imposed in violation of this Court's case law.

Petitioner now appeals, arguing that several of his claims were improperly dismissed, that he should have been awarded damages on the sole claim he prevailed on in part, and that he should have been awarded (a never specified amount) attorney's fees as a "private attorney general" for his efforts. Petitioner's arguments are meritless, and the District Court should be affirmed for reasons set forth below.

2. Factual Background.

A. City Enterprise Funds

The City maintains several enterprise funds related to services provided to City residents. Those enterprise funds include: garbage and waste services (the "Sanitation

Fund"); wastewater services (the "Wastewater Fund"); water services (the "Water Fund"); the maintenance of roadways within the city (the "Street Fund"); a public library (the "Library Fund"); and the municipally owned Bryden Canyon golf course (the "Golf Fund"). The City has sought to maintain a reserve in each of these funds sufficient to maintain the funds' operations for a minimum of 3-months, in accord with City Code Section 2-79.2(b), state law, and industry norms. (R, Vol. 1, p.227; SCR, Vol. 1, p.11).[1]

The City's Water Fund provides water services to some, but not all, City residents. Some City residents receive water services from the Lewiston Orchards Irrigation District ("LOID"). (R, Vol. 1, p.227, 247; SCR, Vol. 1, p.11).

B. Street Impact Fees

At all times relevant to this litigation the City provided curbside garbage pickup services to all City residents. The City became concerned more than two decades ago that repeated heavy sanitation vehicle traffic was causing excessive deterioration and wear to City maintained roads. (SCR, Vol. 1, p.11-12). This concern was and is supported by several studies showing that sanitation vehicles cause a disproportionate and quantifiable amount of wear to municipal streets. (R, Vol. 1, p.228-29; SCR, Vol. 1, p.11-12, 19-222). Among other reasons, this is because: (1) sanitation vehicles are usually the heaviest vehicles which regularly travel on municipally maintained streets; (2)

[1] For the sake of simplicity, the City uses the same notations Petitioner has used for the various components of the record on appeal. (*See* Appellant's Brief at 2).

sanitation vehicles typically spread that weight over fewer axles/wheels than semi-trucks/trailers or other similarly sized vehicles; and (3) sanitation vehicles make frequent starts and stops, which causes excess pavement wear. (*Id*.).

The City decided to account for those costs of that damage to City streets by assessing an annual charge to the Sanitation Fund, paid into the City's Street Fund. This charge, commonly referred to as a "street impact" charge or fee, was set at 7% of the Sanitation Fund's annual expenditures that were related to truck hauling, a figure in line with charges imposed by comparable municipalities, and which the City believed was appropriate to capture the full actual cost of providing sanitation services, street repairs included. (R, Vol. 1, p.228; SCR, Vol. 1, p. 12).

Similarly, at all times relevant to this lawsuit the City was aware that water and wastewater services routinely damage City roads. This is primarily because maintenance on existing water and sewer lines regularly requires street cuts, which the City pays to repair, and which shorten the overall expected lifespan of road surfaces. (R, Vol. 1, p.229; SCR, Vol. 1, p. 11-13). Again, the City determined that those costs could not be ignored, and should instead be accounted for by assessing the Water and Wastewater Funds fees set at 2% of total annual revenues of those Funds. (R, Vol. 1, p.229; SCR, Vol. 1, p. 13). The City believed the charge was comparable to charges imposed by other

municipalities, and would capture the full costs of providing this service. (SCR, Vol. 1, p. 13).

The City is also currently in the process of implementing a modified rate schedule for sanitation, wastewater and water services. (R. Vol. I, p. 142). This fee schedule was created based on the findings of a rate study commissioned by the City in 2019. The rate study concluded that, if anything, the City's existing water, wastewater and sanitation rates needed to be raised, because they are insufficient to ensure that these particular utility funds remain self-sustaining, or to generate sufficient funds to cover all costs, including direct and indirect costs that are the responsibility of the utility. (R. Vol. I, p. 237).

C. Golf Course Fund and Library Fund Transfers

In 2010, the existing irrigation system at the City-owned Bryden Canyon Golf Course ("Golf Course") had deteriorated, and needed to be replaced. (R. Vol. I, p. 227). The City Council eventually accepted a bid to install a replacement system. However, because the Golf Course fund did not have adequate funds to pay for the installation of that system, the City Council opted for an interdepartmental transfer, whereby the necessary sum ($1,138,713.84) would be transferred from the Sanitation Fund's operational reserve, to the Golf Course Fund. (R. Vol. I, p. 227-28; CR. Vol. I, p. 157-162). This transfer was callable, and, if not called, the transferred sum was due to be

repaid with interest in 30 annual installments. (R. Vol. I, p. 228; CR. Vol. I, p. 157-162). No additional funds were raised or collected from ratepayers to carry out this transfer. (R. Vol. I, p. 234; SCR. Vol. I, p. 13).

In 2012, the City determined that a new public library should be constructed. (R. Vol. I, p. 228). However, the Library Fund lacked sufficient funding to pay the upfront cost of that project, so the City again executed an interdepartmental transfer, whereby the Sanitation Fund would transfer $800,000 out of its reserve funds to the Library Fund to allow the construction of the new library to proceed. (R. Vol. I, p. 228; CR. Vol. I, p. 164-70). As with the Golf Course fund transfer described above, the sum transferred from the Sanitation Fund was callable, and was due to be repaid, with interest, in 20 annual installments. (*Id*.). Again, no rates were raised, nor were any additional funds collected to make this transfer possible. (R. Vol. I, p. 234; SCR. Vol. I, p. 13).

On July 12, 2021, the City Council directed a transfer of funds from the Library Fund to the Sanitation Fund sufficient to satisfy any outstanding obligations under this interfund transfer agreement by the end of October 2021. (SCR. Vol. I, p. 14).

D. Agreements with Valley Vision and Visit Lewis Clark Valley

For more than a decade the City has had an ongoing business relationship with Valley Vision. In exchange for an annual payment of $40,000, Valley Vision agreed to, among other things, assist the City in recruiting and retaining businesses, assist with City

workforce development and assist with the creation of a community strategic plan. (R. Vol. I, p. 229, 246-47). Valley Vision regularly reports on its activities to the City, and provides the City with an annual budget demonstrating how the City's payments have been put to use. (R. Vol. I, p. 229, 246-47; CR. Vol. I, p. 144-47). This contractual relationship was only reduced to writing within the last couple of years, but was preceded by a substantively identical oral agreement, under which the parties operated for more than a decade. (R. Vol. I, p. 229, 246-47; CR. Vol. I, p. 148).

Likewise, the City's written agreement with Visit Lewis-Clark Valley requires the City to pay $15,000 per year in exchange for Visit Lewis-Clark Valley agreeing to, among other things, "[p]erform tourism activities within the City of Lewiston that benefit the general public," and act as the City's tourism liaison and develop an economic development tourism strategy. (R. Vol. I, p. 229, 246-47). Like Valley Vision, Visit Lewis-Clark Valley regularly reports on the promotional services and other activities it performs for the City. (R. Vol. I, p. 229, 246-47; CR. Vol. I, p. 144-47). Though it was not reduced to writing until recently, this arrangement has been in place for more than a decade. (CR. Vol. I, p. 144-47).

E. Provision of water services to Bryden Canyon Golf Course

Bryden Canyon Golf Course was constructed with City funds in the early 1970s, on a parcel of land leased from Lewiston Airport. Since then, the City has leased the

facility to private entities who have overseen the operation of the Golf Course. (R. Vol. I, p. 229). Under the terms of the City's lease agreements with those entities, the City has agreed to provide irrigation water to the Golf Course as needed in exchange for the annual lease payments. (R. Vol. I, p. 229-30). Under the terms of those agreements, the City is also entitled to a percentage of the total revenues generated by the Golf Course. (SCR. Vol. I, p. 15).

Over the past several decades, the City has provided the water needed by the Golf Course through several sources. At one point, the City did so by purchasing surplus irrigation water from LOID. The City also later constructed a well and pumping station to serve the golf course ("Well #6"), which was funded in part through golf course user assessment fees collected by the private operator leasing the Golf Course from the City. (R. Vol. I, p. 229-30; SCR. Vol. I, p. 15).

Prior to 2012, the Golf Course's water was not metered. (SCR. Vol. I, p. 15). And because the Golf Fund was essentially the co-owner of the well, the City did not believe that it would be appropriate to charge the Golf Fund (or the private operator) the full retail value of the water provided to the Golf Course. (*Id.*). Instead, the City allocated a sum from the Golf Fund to the Water Fund on an annual basis sufficient to cover the costs associated with the operation and maintenance of Well #6, as estimated by the Public Works Department. (*Id.*). This cost was estimated at that time to be

$27,600/year. Over the years that followed, the City transferred similar sums from the Golf Course Fund to the Water Fund on a bi-annual basis, with a 2% increase annually to account for inflation. (*Id.*).

In 2019 the City Council amended the Lewiston City Code ("L.C.C.") to specifically permit a flat fee arrangement with the City-owned Golf Course for irrigation water provided to it. *See* L.C.C. § 36.5-5(c); (R. Vol. I, p. 230). Since this amendment went into force, the City has continued to provide water to the golf course in exchange for lease payments, and has continued to allocate more than $36,000/year to the Water Fund for water supplied to the Golf Course. (R. Vol. I, p. 230).

3. Course of the Proceedings.

Petitioner filed a Petition for Declaratory Judgment and Equitable Relief on March 29, 2021. The Petition raised nine separate claims, sought declaratory and injunctive relief, and, ultimately, a refund of allegedly excessive rates and fees that had been paid over the past decades.

The City moved to dismiss the Petition on April 20, 2021. (R. Vol. I, p. 21-36). Petitioner filed a response in opposition to Defendant's motion to dismiss, as well as an Amended Petition. (R. Vol. I, p. 76-87). Also, on April 20, 2021 Petitioner moved for summary adjudication of his Petition, and for entry of a declaratory judgment in his favor. (R. Vol. I, p. 40-63).

On April 27, 2021 Defendant moved to stay or continue that request, and also to strike certain materials—specifically attorney client privileged memos prepared by the City Attorney—that Petitioner had included in the pleadings he had filed. (R. Vol. I, p. 65-73). Petitioner opposed both motions. The Court, in written rulings, denied the City's motion to dismiss, but granted the City's motion to strike and motion to continue. (R. Vol. I, p. 113-120).

The City thereafter filed an Answer to Petitioner's Amended Petition on June 22, 2021, (R. Vol. I, p. 123-29), and discovery followed. On August 24, 2021, the Court entered a scheduling order, directing the parties to file summary judgment or other dispositive motions by October 15, 2021. (R. Vol. I, p. 130-31). Both parties did so. In response to the City's motion for summary judgment, Petitioner filed a motion seeking leave to add a new party to this litigation, and otherwise opposed the City's motion.

By written order dated December 7, 2021, the District Court granted the City's motion as to Claims 1-3, and 5-9, and the City's motion as to Claim 4 to the extent that Claim 4 addresses City water practices. (R. Vol. I, p. 226-50). The court also emphasized that the claims of Petitioner, and Petitioner alone had been considered, because no request to certify a class, or basis to "seek monetary relief for anyone other than himself" had ever been offered by Petitioner. (R. Vol. 1, p. 245). However, the

ruling also granted Petitioner's motion to the extent that it argued in Claim 4 that sanitation and wastewater "street impact" charges are a disguised tax.[2]

On January 10, 2022, the Court entered an order directing the parties to submit proposed judgments. (R. Vol. I, p. 251-52). The City filed a timely proposed judgment, and a motion to reconsider or clarify several aspects of the Court's summary judgment ruling. (R. Vol. I, p. 253-62). Among other things, the City was obliged to inform the Court that the particular sanitation and wastewater billing practices addressed by Claim 4 had been discontinued, and that any prospective remedy crafted by the Court would need to take that into account.

Petitioner missed the deadline to submit a proposed judgment, but was granted leave of the Court to file an untimely proposal, which he thereafter did. The City filed an objection to the judgment Petitioner had proposed. After a hearing, the Court granted the City's motion to reconsider in part, and entered a final judgment that dismissed all of Petitioner claims except for Claim 4 with prejudice, granted no monetary relief for Claim 4, and declared that the particular sanitation and wastewater fee practices challenged by Petitioner violate the law and must be halted. (R. Vol. I, p. 268-73).

[2] The Court's written ruling also memorialized oral rulings denying Petitioner's motion to unseal, and for intervention pursuant to I.R.C.P. 24, announced during the summary judgment hearing. Petitioner has not addressed the latter ruling in his opening brief, and thus has waived any challenge to it. *State v. Hawkins*, 159 Idaho 507, 517, 363 P.3d 348, 358 (2015) (appellate courts do not "consider arguments raised for the first time in a reply brief").

Both parties thereafter moved for awards of costs and attorney's fees. The City moved to disallow the costs and attorney's fees requested by Petitioner in accordance with I.R.C.P. 54(d). Petitioner did not, and instead filed what is captioned as an "Objection to the City's Motion for Attoreny [sic] Fees." After hearing argument, the district court found that both parties had prevailed in part, and declined to award costs and fees to either side. (R. Vol. I, p. 278-83). This appeal followed.

II. ISSUE PRESENTED

1. Did the District Court err in dismissing all of Petitioner's Claims except for Claim 4 to the extent that it addresses City sanitation and wastewater policies and practices?

2. Did the District Court err in granting Petitioner a declaration of illegality and no monetary damages for Claim 4?

3. Did the District Court err in refusing to unseal privileged attorney-client materials offered by Petitioner?

4. Did the District Court err in denying Petitioner's request for costs and attorney's fees?

III. ATTORNEY'S FEES

The City requests that it be awarded costs and reasonable attorney's fees incurred defending this matter on appeal. *See* I.C. § 12-117, I.C. § 12-121, I.A.R. 40, I.A.R. 41.

IV. ARGUMENT

"This Court reviews an appeal from an order of summary judgment de novo." *Curlee v. Kootenai County Fire & Rescue*, 148 Idaho 391, 394, 224 P. 3d 458, 461 (2008) (citation omitted).

"When ruling on a motion for summary judgment, disputed facts are construed in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are drawn in favor of the non-moving party." *Id.* Ultimately, summary judgment is appropriate if "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Id.*; *see also Rhodehouse v. Stutts*, 125 Idaho 208, 211, 868 P.2d 1224, 1227 (1994) (a party opposing summary judgment party "must set forth by affidavit specific facts showing there is a genuine issue for trial") (citing I.R.C.P. 56(e)); I.R.C.P. 56(c)(3) (a court "need consider only the cited materials").

Additionally, "where the evidentiary facts are not disputed and the trial court rather than a jury will be the trier of fact, summary judgment is appropriate, despite the possibility of conflicting inferences because the court alone will be responsible for resolving the conflict between those inferences." *Riverside Development Co. v. Ritchie*, 103 Idaho 515, 519, 650 P. 2d 657, 661 (1982); *see also Seward v. Musick Auction, LLC*, 164 Idaho 149, 156, 426 P. 3d 1249, 1256 (2018) ("in an action for declaratory judgment

there [is] no right to a jury trial") (citation omitted); *Ada Cnty. Highway Dist. v. Total Success Investments, LLC*, 145 Idaho 360, 369, 179 P.3d 323, 332 (2008) (same regarding equitable claims).

1. The District Court properly dismissed all claims concerning City water rates, policies or practices.

Claims 8 and 9, variously allege that City improperly billed the City-owned Golf Course for water provided to it, that City Water customers paid inflated water rates to cover the cost of subsidized water provided to Bryden Canyon, and that these practices caused a persistent budgetary shortfall at the City's Water Department. These claims were properly dismissed because Petitioner lacks standing to bring them.

Petitioner's Petition specifically alleged that he had standing to bring suit as "a member of the Lewiston City Council and a resident and taxpayer of the City of Lewiston." (R. Vol. I, p. 10). The City moved to dismiss arguing, among other things, that Petitioner's claims were barred by the taxpayer standing rule, and that he lacked "legislative" standing to bring them. *See Thomson v. City of Lewiston*, 137 Idaho 473, 477, 50 P.3d 488, 492 (2002); *Bedke v. Ellsworth*, 168 Idaho 83, 480 P.3d 121, 131 (2021); (R. Vol. I, p. 21-36). In denying the City's motion to dismiss, the District Court concluded that Petitioner did not have taxpayer or legislative standing to bring this lawsuit, but because Petitioner had clarified in his Amended Petition that he was bringing

suit instead as a "ratepayer," the lawsuit could proceed on that basis. *See Miles v. Idaho Power Co.*, 116 Idaho 635, 778 P.2d 757 (1989); (R. Vol. I, p. 116-18).[3]

Petitioner eventually—in response to the City's timely motion for summary judgment—conceded that he is not, in fact, a City water customer. (R. Vol I, p. 227, 247; Tr. Vol. I, P. 13, L. 13-19). Petitioner receives water service from LOID, and has at all times relevant to this litigation. LOID has its own elected board of directors and sets its own rates for the services it offers—rates the City has no control over. *See* I.C. § 43-1903. Petitioner, by his own admission, has not paid the water fees he challenged.

Accordingly, the District Court concluded that because Petitioner "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 Fund, or the City ordinances that allow the City to enter into a flat fee agreement for water provided to the City-owned golf course." (R. Vol I, p. 248).

The District Court's conclusion is supported by decades' worth of case law from this Court. *See Gifford v. West Ada Joint School District #2*, 169 Idaho 577, 587, 498 P.3d 1206, 1216 (2021) ("Here, Parents did not pay kindergarten fees. Thus, they do not

[3] The Court's ruling also found that Petitioner had plausibly alleged standing to bring certain of his claims concerning alleged "loans" under *Koch v. Canyon Cnty.*, 145 Idaho 158, 161, 177 P.3d 372, 375 (2008). Petitioner has not argued in his opening brief that he had standing to bring Claims 8 or 9 under *Koch*, and any argument along those lines is waived as a result. *Jorgensen v. Coppedge*, 145 Idaho 524, 528, 181 P.3d 450, 454 (2008).

have standing to seek redress—on their own behalf or on behalf of others—for an economic injury they have not suffered.") (citing *Miles*, 116 Idaho at 641, 778 P.2d at 763)); *see also Tucker v. State*, 162 Idaho 11, 19, 394 P.3d 54, 62 (2017). Nonetheless, Petitioner asserts that he has standing to bring these claims, either under *Gifford* or under the legislative standing doctrine. Neither argument is availing.

As for the former, Petitioner acknowledges that, as announced in *Gifford* and numerous prior cases, "standing focuses on the party seeking relief, not on the issues the party wishes to have adjudicated." (Appellant's Brief, at 36-37). According to Petitioner, this somehow means that because he was challenging City Water policies that he believes somehow "directly affected" him, the District Court was required to find that he had standing to challenge all the issues he "wishe[d] to have adjudicated."

Petitioner completely misconstrues the quoted statement. Standing focuses on the party seeking relief because a party's claims <u>are limited to those concerning tangible injuries that particular individual has actually suffered</u>. Standing <u>cannot</u> be established merely because a party feels strongly about a particular issue, or "wishes" that a court would weigh in on the matter. Whether Petitioner believed that he was challenging a policy that somehow affected him or not is irrelevant if he did not suffer a distinct and palpable injury due to the challenged conduct, one that is separate from that suffered

similarly throughout the jurisdiction. *Martin v. Camas County ex rel. Bd. Com'rs*, 150 Idaho 508, 516, 248 P.3d 1243, 1251 (2011); *Thomson*, 137 Idaho at 477, 50 P.3d at 492.

The District Court did not err when it concluded that Petitioner had not demonstrated that he had actually suffered a distinct and palpable injury as a result of these allegations. It is undisputed that Petitioner did not pay what he alleges are inflated water rates. And any broader challenge to the Water Fund's billing practices, or arrangements with the City-owned Golf Course, allege injuries that are not in any way unique to Petitioner—they are injuries suffered by City taxpayers generally, or by a group of ratepayers that he is indisputably not a part of.[4] Petitioner lacks standing to bring claims 8 and 9, and the dismissal of those claims should be affirmed on that basis.

Petitioner also suggests that the District Court erroneously concluded that he could not bring these claims under the legislative standing doctrine. This argument is meritless. The City does not dispute that Petitioner took his oath of office as an elected City Councilmember seriously, but that alone is not enough to establish standing to sue. Legislative standing is available only in rare cases where serious disruptions to the ordinary legislative process—a so-called "institutional injury," like vote nullification—is

[4] Nor for that matter is there any reason for this Court to "relax" the ordinary standing requirements here, because this is not a case where "no party could otherwise have standing to bring a claim." *Gifford*, 169 Idaho at 587, 498 P.3d at 1216 (citation omitted). There are literally thousands of City Water customers that could conceivably have ratepayer standing to bring similar claims—a fact that Petitioner himself belatedly recognized in this very litigation.

plausibly alleged. *Bedke*, 168 Idaho at 94, 480 P.3d at 132 (citing *Raines v. Byrd*, 521 U.S. 811, 829 (1997)).

Petitioner does not dispute that he raised the issues addressed by his lawsuit before the City Council while he was serving as an elected City Councilmember. The majority of the City Council declined to vote in favor of his proposed reforms. This was the ordinary operation of the legislative process, not a serious disruption to it. The mere fact that Petitioner decided to respond by filing a lawsuit rather than gather the votes needed to obtain the result he sought does not in any way alter this conclusion. Petitioner has never alleged or demonstrated an institutional injury, and the District Court rightly rejected this argument for that reason. This Court should as well.

Finally, should the Court for any reason conclude that Petitioner somehow had standing to pursue these claims, the Court can (and should) affirm the dismissal of them anyway. *See Idaho Sch. for Equal Educ. Opportunity v. Evans*, 123 Idaho 573, 580, 850 P.2d 724, 731 (1993) ("[W]here an order of the district court is correct but based upon an erroneous theory, this Court will affirm upon the correct theory.").

For the most part, Petitioner asserts in these claims that the City is, and long has been, improperly subsidizing the water it provides to the City-owned Golf Course, and doing so by inflating the rates charged to ratepayers for City water services. But the practice he describes is not new, nor is it unique to the Golf Course. Simply put, the City

generally does not bill its own departments for the full cost, or retail value, of water used for public purposes. (SCR. Vol. I, p. 16). Instead, the City allocates a budgeted amount on an annual basis to the relevant department to pay for water used for public purposes, and if that sum was deemed inadequate the City Council could allocate additional sums to cover the costs associated with providing that water.

The City believed that this practice was consistent with the relevant provisions of its Code, and with all applicable provisions of state law. What's more, in 2019 the City Council introduced a code amendment that not only codified this practice but also made plain that the City considered water provided to the City-owned Golf Course to be water provided for a "public purpose." The City is aware of no case or statute that prohibits such a practice, nor has Petitioner ever cited one. Should this Court, for any reason, reach the merits of Claims 8 and 9—and it should not because they were rightly dismissed for lack of standing—it can affirm their dismissal on the basis that they simply lack any plausible support in existing law.

2. The District Court properly dismissed Claim 7.

This claim alleges that the City has violated Article XII, Section 4 of the Idaho Constitution by "donating," or otherwise improperly associating itself with a pair of private organizations (Valley Vision and Visit Lewis-Clark Valley).

However, the City indisputably had (and has) contracts with both of these organizations. Those contracts were only formalized in writing in the recent past, but the written agreements merely reduced to writing the parties' pre-existing, mutual understanding of their respective duties and obligations. Petitioner offered no evidence that demonstrated that these agreements were fictitious. The District Court did not err when it concluded that payments addressed by Claim 7 were bargained for consideration for services rendered to the City, and not "donations" made in violation of Article XII, Section 4.

Nor is there any merit to Petitioner's suggestion that this arrangement somehow violates *Village of Moyie Springs, Idaho v. Aurora Mfg. Co*., 82 Idaho 337, 353 P.2d 767 (1960). In *Moyie Springs*, the municipality attempted to issue a bond that would have allowed it to acquire land, construct an industrial facility and lease it to a particular private manufacturing enterprise. 82 Idaho at 340, 353 P.2d at 770. This Court rightly concluded that this was a joint venture, intended to lend the credit and faith of the municipality to a private company that might otherwise be unable to obtain sufficient funding for the planned project, and in violation of the terms of Article XII, Section 4.

What *Moyie Springs* has to do with the payments at issue in Claim 7 is not clear. The City acquired nothing in exchange for these payments other than the services rendered to it by Valley Vision or Visit Lewis-Clark Valley. And the City has not helped

either organization obtain funding, or otherwise lent its "credit and faith" in the aid of either of them. *Moyie Springs* simply has no plausible application to these facts, and this argument was correctly rejected by the District Court.

Nor, for that matter, is there any merit to Petitioner's argument—based on century old cases that he didn't rely on below[5]—that these payments violate the Idaho Constitution because they somehow "put the money beyond the control of" duly elected officials, should be rejected. Petitioner's argument would apply to (and apparently invalidate) countless other service agreements that the City has with private entities. The City finds it difficult to believe that it (and presumably countless other municipalities across the state) has been violating the Idaho Constitution for the past century whenever it, for example, agrees to (and then does) pay for phone or internet services, or even when it retains the services of private counsel.

Petitioner's bizarre, utterly unworkable understanding of this Court's decades' old case law should be rejected, and the dismissal of Claim 7 affirmed.

3. The District Court properly dismissed the claims concerning interfund transfers.

As mentioned, the operative pleading in this matter sets forth nine separate, but in many ways overlapping claims. Petitioner's claims mostly allege that the City has long

[5] Petitioner's arguments below regarding this claim were that these payments were "donations," or somehow violated *Moyie Springs*. (Tr., Vol. 1, p. 100-01).

charged inflated rates for sanitation, wastewater and water services and that the City has used the proceeds of that "scheme" for a variety of improper purposes. The specific overcharges alleged by Petitioner take two forms. One, the so-called "street impact" charges, are addressed by Claims 4 and 5, and the District Court's resolution of those claims is discussed in Section 4 below.

The other form of alleged overcharge lay in sanitation fees which (according to Petitioner) were deliberately set higher than the actual cost of providing those services. This, according to Petitioner, was done to generate a pool of money that the City could use for unrelated purposes, like building a new public library, or purchasing a new irrigation system for the City-owned Golf Course. Those allegations were set forth in Claims 1, 2 and 3, and are addressed here.

As the District Court correctly noted, each of these claims address two fund transfers made by the City. Both transfers followed a similar blueprint. In 2010, $1,138,713.84 was transferred from the Sanitation Fund's operational reserve to the Golf Fund to facilitate the purchase and installation of a new irrigation system at the City-owned Golf Course. (R. Vol I, p. 231, 227-228; CR. Vol. I, p. 157-162). This transfer was callable should the originating fund need to access the transferred funds for its operations, but if not called, the transferred sum was due to be repaid, with interest, in 30 annual installments. (*Id*.). And in 2012, $800,000 was transferred from the Sanitation

Fund's operational reserve to the Library Capital Fund to allow the construction of a new public library. (R. Vol I, p. 231, 227-228; CR. Vol. I, p. 164-70). This sum was likewise callable, and, if not called, would be repaid, with interest, in 20 annual installments. (*Id*.).

As also found by the District Court, no rates were raised, no additional funds were collected from city ratepayers to fund these transfers, and no additional funds were raised to replenish the Sanitation Fund's reserve. (R. Vol I, p. 234-35; SCR. Vol. I, p. 13). And, due to the callable nature of the transfers, "this [was], 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." (R. Vol I, p. 235).

Petitioner did not argue below, nor does he argue now, that the City may not maintain a reserve in this or any other enterprise fund. Nor could he: maintaining reasonable reserves sufficient to ensure that utility operations remain self-supporting is specifically permitted by statute, and this Court's case law. *See, e.g.*, *Hill-Vu Mobile Home Park v. City of Pocatello*, 162 Idaho 588, 591, 402 P.3d 1041, 1044 (2017) (citing I.C. §§ 50-1032, 50-1033); *Loomis v. City of Hailey*, 119 Idaho 434, 440, 807 P.2d 1272, 1278 (1991) (same).

Petitioner cannot plausibly claim that the City Council lacks statutory authority to transfer an unexpended balance in one fund to the credit of another fund. *See* I.C. § 50-

1014 ("The city council of the cities may transfer an unexpended balance in one fund to the credit of another fund.").

Petitioner instead argues that these transfers somehow violate Article VIII, Section 3 of the Idaho Constitution (Claim 1), violate Article VII, Section 6 of the Idaho Constitution or the Idaho Revenue Bond Act (Claim 2), or are unconscionable (Claim 3). Each of these claims was properly dismissed.

A. The interfund transfers did not violate Article VIII, Section 3 as alleged in Claim 1.

As for Claim 1, the City does not dispute that Article VIII, Section 3 places limits on a municipality's ability to "incur certain debts or liabilities without the approval of a supermajority of voters in a special election," and requires municipalities to operate on a "pay as you go" basis. *Hoffman v. City of Boise*, 168 Idaho 782, 785, 487 P.3d 717, 720 (2021); *see also Koch*, 145 Idaho at 162, 177 P.3d at 376 (Article VIII, Section 3 "is primarily designed to protect taxpayers and citizens of political subdivisions . . . who would bear the consequences of the subdivision incurring excessive indebtedness").

The City also does not dispute that specific voter approval, as described above, was not obtained regarding either of these transfers. Therefore, Petitioner argues, these transfers must violate Article VIII, Section 3 unless they were for an "ordinary and necessary expenditure." *City of Challis v. Consent of Governed Caucus*, 159 Idaho 398, 399, 361 P.3d 485, 486 (2015) (noting that under the "proviso clause" "no voter approval

is required if the expenditure is for "ordinary and necessary expenses authorized by the general laws of the state"). Petitioner, as he did below, argues at length that the construction of a new library, or the purchase of a new irrigation system for the City-owned Golf course is many things, but an "ordinary and necessary expense[]" is not one of them.

However, Petitioner's arguments miss the mark: Article VIII, Section 3, as interpreted by this Court, has no plausible application to either of the transfers challenged here by Petitioner. Interdepartmental transfers of existing municipal funds—something plainly permitted by the Idaho Revenue Bond Act, *see* I.C. § 50-1014—simply do not violate Article VIII, Section 3, and the "pay as you go" principle that provision embodies. *Hoffman*, 168 Idaho at 785, 487 P.3d at 720.

Petitioner has failed to identify even a single case where this Court found a violation of Article VIII, Section 3 in circumstances remotely similar to these. To the contrary, the cases Petitioner relies on address instances where a municipality sought outside financing, or entered into a contract with third-parties, that created long term, external payment obligations. *See*, *e.g.*, *City of Challis*, 159 Idaho at 399, 361 P.3d at 486 ("The City sought approval to incur $3.2 million in public indebtedness without a public vote for work on the City's water distribution system."); *Idaho Falls v. Fuhriman*, 149 Idaho 574, 577, 237 P.3d 1200, 1203 (2010) (17-year power purchase agreement);

City of Boise v. Frazier, 143 Idaho 1, 2, 137 P.3d 388, 389 (2006) (proposed expansion of airport parking which "involved the City incurring long term indebtedness to finance the project"); *Asson v. City of Burley*, 105 Idaho 432, 434, 670 P.2d 839, 841 (1983) (long term contract with regional power company "to purchase electrical 'project capability' from three nuclear power plants"); *City of Pocatello v. Peterson*, 93 Idaho 774, 777, 473 P.2d 644, 647 (1970) (20-year lease agreement with private party for municipal use of an airport facility).

Simply put, there is no comparable bill to come due here for City taxpayers. This was not a third party loan, or an agreement that would have left City taxpayers servicing third party debt or other outside payment obligations for decades to come. Petitioner did not, and cannot, dispute that, as the District Court specifically noted, the City is on both sides of the transaction, and "the funds at issue were not acquired from an outside source" but instead from existing operational reserves. (R. Vol I, p. 234). The City offered uncontroverted evidence that sanitation rates were not raised to generate or replenish the Fund's operational reserves, or to make these transfers possible. (R. Vol I, p. 234). Indeed, as the District Court specifically noted, due to the way the transfers were actually structured, the end result was little different than if the funds had been placed in an interest bearing account with a financial institution. (R. Vol I, p. 235).

The District Court rightly rejected Petitioner's suggestion that either of these transfers in any way violate Article VIII, Section 3, and the "pay as you go" principle that

provision embodies. *Hoffman*, 168 Idaho at 785, 487 P.3d at 720. This was little more than an efficient allocation of existing municipal reserve funds from one department to another, structured to ensure that the transfer can be unwound if the unexpected happened, and the Sanitation Fund needed to access its reserve funds. These were simply not the sort of "debts or liabilities" that Article VIII, Section 3 contemplates. (R. Vol I, p. 234). No case has ever applied Article VIII, Section 3 to a transaction involving interdepartmental transfers of existing municipal funds, nor should the Court do so here. The District Court's well-reasoned ruling on this issue should be affirmed.

B. The transfers did not violate I.C. § 63-1311 as alleged in Claim 2.

In Claim 2, Petitioner asserts that the two transfers violate the Idaho Revenue Bond Act and Article VII, Section 6 of the Idaho Constitution.[6] *See North Idaho Bldg. v. City of Hayden*, 158 Idaho 79, 81, 343 P.3d 1086, 1088 (2015) (noting that under I.C. § 63-1311 "any fee collected pursuant to [I.C. § 63-1311] 'shall be reasonably related to, but shall not exceed, the actual cost of the service being rendered'"). More specifically, Petitioner claims that the very existence of idle reserve funds—whether in the Sanitation

[6] The merits of Petitioner's arguments concerning Article VII, Section 6 of the Idaho Constitution rise and fall with his arguments concerning I.C. § 63-1311. If, as the District Court found, Petitioner has not demonstrated that the Sanitation fees addressed by this claim violate I.C. § 63-1311, Petitioner's argument that those fees constitute a tax imposed without statutory authority (in violation of Article VII, Section 6) necessarily fails.

Fund or elsewhere—demonstrates that the City must have been charging rates well in excess of the actual cost of providing those services.

The District Court did not buy this argument and neither should this Court. Petitioner cannot dispute that this Court's case law—and for that matter, the plain terms of the Idaho Revenue Bond Act—specifically direct municipalities to:

> [C]harge and collect sufficient fees so that its [utility] systems 'shall be and always remain self-supporting.' [] Those fees [must] be sufficient to pay when due all bonds and interest as required by Idaho Code section 50-1032(a) and 'to provide for all expenses of operation and maintenance of such works . . . including reserves therefor," as required by Idaho Code section 50-1032(b).

Hill-Vu, 162 Idaho at 590-91, 402 P.3d at 1043-44 (citing I.C. § 50-1032, 50-1033). Instead, Petitioner argues that common sense alone demonstrates that the reserve the City maintained in the Sanitation Fund was wildly excessive, and obviously not reasonably necessary to ensure the continued operation of the Sanitation Department's activities.

There are several problems with this argument. Contrary to what Petitioner suggests, the fact that City has not needed to utilize the Sanitation Fund's reserve over the past several years to cover unscheduled repairs or other unexpected costs does not necessarily demonstrate that this reserve was or is in any way unreasonable. Petitioner argues (much as he did below) that because funds from the Sanitation Fund reserve were used for non-Sanitation Fund purposes without disrupting that Fund's operations, the unreasonableness of this reserve is "self-evident." But this is akin to suggesting that an

insurance policy (and in reality, that is what reserve funds are), is unnecessary merely because no claims have been made against it to-date.

That said, the District Court did not resolve this issue on the basis of general or allegedly "self-evident" propositions. It instead examined the evidence produced by the parties concerning this issue and determined that the Sanitation Fund's operational reserve was reasonable based on the only relevant evidence in the record before it.

As noted by the District Court, the City offered testimony that demonstrated that it has at all times relevant to this litigation sought to maintain operation reserves sufficient to maintain each funds' operations for a minimum of 3-months, in accordance with the City Code, and with prevailing industry norms. (R. Vol I, p. 227, 237; SCR. Vol I, p. 11). As the District Court also noted, the evidence offered by the City, if anything, demonstrates that the City's sanitation rates had been too low to hit that industry standard, or otherwise ensure the Sanitation Funds' long term, self-supporting financial sustainability.[7] (R. Vol I, p. 237).

[7] This evidence was a declaration from a financial consultant (John Ghilarducci), which included a memorandum summarizing the findings of a rate study Mr. Ghilarducci had performed for the City shortly before this litigation was commenced. Petitioner did not argue below or in his opening brief that this evidence was inadmissible. *See Jorgensen*, 145 Idaho at 528, 181 P.3d at 454; *Sanchez v. Arave*, 120 Idaho 321, 322, 815 P.2d 1061, 1062 (1991) (arguments raised for the first time on appeal are waived). And in any event, Petitioner offered this declaration into the record here, so it isn't clear how this Court could possibly conclude that the District Court misconstrued, or erroneously relied on this evidence. *See Greenfield v. Smith*, 162 Idaho 246, 253, 395 P.3d 1279, 1286 (2017)

Against this, Petitioner offered no evidence showing that a 3-month operational reserve is in any way unusual or outside of industry norms. He also offered no evidence showing that the Sanitation Fund's operational reserves exceeded that benchmark at any time relevant to this litigation. Instead, Petitioner offered nothing other than his own speculation and belief that the unreasonableness of the Sanitation Fund's reserve is "self-evident" or should be a matter of common sense.

Plaintiff's unsupported speculation and arguments about what he personally believed a "reasonable reserve" should consist of, was not and is not enough to resist summary judgment. The District Court—which would be resolving this claim for declaratory or equitable relief anyway, *see Seward*, 164 Idaho at 156, 426 P. 3d at 1256—was "entitled to arrive at the most probable inferences based upon the undisputed evidence properly before it." *Eagle Springs Home Assoc., Inc., v. Rodina*, 165 Idaho 862, 868, 454 P.3d 504, 510 (2019) (citation omitted); *Ritchie*, 103 Idaho at 519, 650 P. 2d at 661.

Again, the only evidence actually offered by either party that is relevant to this issue demonstrated that the Sanitation Fund's reserve was set and maintained at a reasonable amount, in line with industry norms. The only actual evidence in the record

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("It is the responsibility of the appellant to provide a sufficient record to substantiate his or her claims on appeal. In the absence of an adequate record on appeal to support the appellant's claims, we will not presume error.").

does not support any other inference or conclusion, and the District Court did not err when it concluded that the City "is not and has not overcharged [Sanitation Fund] ratepayers" as alleged in Claim 2. (R. Vol I, p. 237). The District Court dismissed Claim 2 on that basis, and this Court should affirm for the same reason.

C. The transfers were not unconscionable as alleged in Claim 3.

In Claim 3 Petitioner argues that the fund transfers are unconscionable or are otherwise unlawful. The District Court found otherwise, largely because it recognized the obvious: the City is on both sides of the transaction and, as the District Court pointed out, the written agreements memorializing the transfers do little more than "acknowledge[] . . . 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," as required "by the . . . legal constraints embodied in the Revenue Bond Act." (R. Vol I, p. 238). Petitioner does not appear to challenge this finding, or the dismissal of this claim in his opening brief. The dismissal of Claim 3 should be affirmed on this basis.

If a challenge to the dismissal of this claim is for any reason not waived, the dismissal should be affirmed nonetheless. Assuming for the sake of argument that contractual unconscionability principles are applicable to these transfers, or the writings memorializing them, lack of consent or unconscionability simply cannot be shown here.

Petitioner—eventually[8]—argued that the two transfers are actually unconscionable contracts of adhesion. But whether characterized as "contracts of adhesion" or not—and again assuming that contractual unconscionability principles apply to them at all—Petitioner would still need to demonstrate both procedural and substantive unconscionability to invalidate them. *See Losee v. Idaho Co*., 148 Idaho 219, 223, 220 P.3d 575, 579 (2009). Petitioner cannot and has not established either.

The City has little to add to the Court's well-reasoned conclusions regarding procedural unconscionability. (R. Vol I, p. 238). But the City also agrees with the District Court that procedural unconscionability is a side issue, because substantive unconscionability places an entirely insurmountable obstacle in Petitioner's way.

"A provision is substantively unconscionable if it is a bargain no reasonable person would make or that no fair and honest person would accept." *Trumble v. Farm Bureau Mutual Insurance Company*, 456 P.3d 201, 214, 166 Idaho 132, 145 (2019). This was not a third party agreement or indebtedness. It was a temporary, interest bearing allocation between departments, designed to ensure that the funds were available to the originating fund if necessary. This was many things, but the sort of fundamentally unfair,

[8] Petitioner initially argued that head of the Sanitation Department had not consented to them, evidently unaware that the documents memorializing these transfers actually include the signature of that individual. (R. Vol I, p. 154-55).

one sided transaction needed to support a substantive unconscionability finding is not one of them. Count 3 was properly dismissed on that basis.

4. Claims 4 and 5 were properly resolved.

In these claims Petitioner challenged the City's longstanding—and now discontinued—practice of charging the Sanitation and Wastewater Funds "street impact" charges. Specifically, Claim 4 alleges that those fees are a disguised tax, in violation of Article VII, Section 6 of the Idaho Constitution, while Claim 5 alleges that the wastewater and sanitation rates that reflect those charges violate the Revenue Bond Act.

As argued below, the City believed that these charges were permitted under this Courts case law. Existing cases after all, specifically allow municipalities to charge consumers of such utility services rates and fees set at a level reasonably necessary to account for the full, actual costs (both direct and indirect), of providing those services, and which are needed to ensure that a utility operation remains self-supporting. *See City of Hayden*, 158 Idaho at 81, 343 P.3d at 1088; *Potts Constr. Co. v. N. Kootenai Water Dist.*, 141 Idaho 678, 681, 116 P.3d 8, 11 (2005); *Brewster v. City of Pocatello*, 115 Idaho 502, 504, 768 P.2d 765, 767 (1988). The City is aware that rates or fees for services may not be imposed "purely as a revenue-generating scheme." *Hill-Vu*, 162 Idaho at 593, 402 P.3d at 1046 (citation omitted). But prior to this litigation, the City believed that these charges were anything but that.

Simply put, the delivery of both services damage and degrade City streets. Rather than pass the costs of repairing that damage along to City taxpayers generally—as would occur if those costs were simply left to be covered by the City's Street Fund—the City believed that street impact charges fairly passed those costs along to the actual consumers of those services. By paying consumer rates that reflected those charges, the City believed that ratepayers were merely asked to contribute their pro-rata, consumption-based share of the overall cost to the City of providing these particular services, precisely as existing case law permits.

The District Court disagreed, and concluded that because the City has other ways by which it can raise funds, or otherwise account for whatever street repair or maintenance costs are associated with sanitation or wastewater services, these charges must be a disguised tax. The City disagrees with the District Court's interpretation of existing case law. However, it does not challenge that ruling, largely because the District Court later clarified that this holding (1) did not apply to the franchise agreement that the City had implemented to replace the Sanitation Fund practices actually challenged in this litigation by Petitioner, and (2) that the Petitioner was entitled to declaratory relief only, and entered final judgment accordingly. (R. Vol I, p. 268-73).

Petitioner does not challenge (1) here. Nor could he. Apart from never being mentioned in any version of Petitioner's complaint, this Court's case law specifically

permits municipalities to "grant[] exclusive solid waste collection franchises," charge a reasonable fee for granting such a license, and set rates based thereon. *See Alpert v. Boise Water Corp.*, 118 Idaho 136, 144-45, 795 P.2d 298, 306-07 (1990); *Plummer v. City of Fruitland*, 139 Idaho 810, 814, 87 P.3d 297, 301 (2004) (I.C. § 50-344 allows municipalities to "grant[] exclusive solid waste collection franchises").

Petitioner does, however, challenge (2), because he insists that monetary damages should have been awarded to him, whether under Claim 4 or 5. In finding otherwise, the District Court emphasized that Petitioner had not demonstrated that he complied with the Tort Claims Act's (ITCA) pre-filing notice requirements regarding claims for damages against a municipality.[9] *See* I.C. § 6-906, I.C. § 50-219; *Magnuson Properties Partnership v. City of Coeur D'Alene*, 138 Idaho 166, 170, 59 P.3d 971, 975 (2002) (sovereign immunity bars claims against a municipality that seek monetary relief, unless the "mandatory condition[s] precedent" set forth in ITCA are satisfied); *Sweitzer v. Dean*, 118 Idaho 568, 573, 798 P.2d 27, 32 (1990) (I.C. § 50-219 "require[s] that a notice of

[9] And even if he had, Petitioner never moved to certify the class of ratepayers he claimed to represent, or seek monetary relief on behalf of. (R. Vol I, p. 245). Petitioner asserts that the District Court somehow erred when it declined to consider the claims of, or grant relief to, other parties. This is nonsense. Though the declaration Petitioner obtained could perhaps be used in future litigation brought others not party to this litigation, the District Court simply did not err when it limited the scope of its ruling and final judgment to the claims actually, properly brought before it, not those suggested by Petitioner vague, scattered references to claims of purportedly similarly situated individuals.

claim must be filed for all claims against a subdivision of the state, and [is] not limited solely to tort claims"); (R. Vol I, p. 245-46)

In fact, as was noted by the District Court during the summary judgment hearing, Petitioner's summary judgment briefing had not meaningfully responded to the City's arguments that ITCA applied to and barred Petitioner's claims for monetary damages. (Tr., Vol. 1, p. 98, L. 15-17). Indeed, Petitioner was specifically asked during the hearing whether he had complied with ITCA's requirements for claims for damages against a municipality, and in response he responded that those requirements simply did not apply to his claims at all, not that he had ever actually filed a pre-suit claim for monetary relief against the City. (Tr., Vol. 1, p. 98, L. 20-25). Petitioner should not be allowed to change positions on appeal, or raise an argument that he specifically declined to make below when the issue was raised by the District Court. *See Sanchez*, 120 Idaho at 322, 815 P.2d at 1062. Any argument that Petitioner filed an ITCA damage claim is waived as a result.

Nonetheless, and assuming for the sake of argument that this issue was not waived, Petitioner asserts that the District Court clearly erred when it found that there was no ITCA claim for monetary relief in the record before it. Petitioner argues that he did demonstrate during this litigation that he had informed the City in writing prior to filing suit that he intended to seek monetary damages. Specifically, Petitioner claims that

he sent an email to the City Clerk with his "draft" complaint, and a copy of this email was included as an unsworn exhibit to his opposition to the City's motion to dismiss on standing grounds. (CR., Vol I, p. 38-43). Thus, according to Petitioner, the District Court necessarily erred when it concluded that a pre-suit claim for damages had not been filed here.

There are a couple of problems with this argument. For one, the notice Petitioner references here actually states that the "Relief Sought" is declaratory and injunctive relief to halt the allegedly unlawful practices Petitioner describes, not monetary damages. (CR., Vol. I, p. 42).

But there is a larger problem with Petitioner's argument, and it lies in the plain language of I.R.C.P. 56(c)(3). Under the terms of that Rule, a court considering a motion for summary judgment "may consider other materials in the record," but is only required to "consider . . . cited materials." I.R.C.P. 56(c)(3) (emphasis added); *see also Rhodehouse*, 125 Idaho at 211, 868 P.2d at 1227.

Petitioner argues that it was clear error to ignore a document he had elsewhere offered, but the District Court was not required to scour the entire record for evidence that might support Petitioner's claims or arguments. Particularly not an argument that Petitioner—based on his answers to the Court's questions during the summary judgment hearing—had specifically declined to make. (Tr., Vol. 1, p. 98, L. 15-25). Nor was it

required to deny the City's motion because this "evidence" had previously been offered as an unsworn exhibit or attachment to response to a motion that sought dismissal of the Petition, as pleaded. *Rhodehouse*, 125 Idaho at 211, 868 P.2d at 1227 (a party opposing summary judgment "must set forth by affidavit specific facts" that demonstrate why the motion should not be granted against them).

The District Court exercised the discretion afforded to it by rule, declined to do Petitioner's homework for him, and considered only the materials he offered in support of, or in opposition to, the parties' Rule 56 motions—materials which did not include evidence of a pre-suit claim for money damages.[10] This was not error, clear or otherwise.

Moreover, after that ruling was issued, the City filed a motion for reconsideration that, once again, pointed out that, based on the District Court's summary judgment ruling, ITCA would limit the scope of the relief that the Court could possibly award here. (R. Vol I, p. 255-58). Rather than point out the oversight—whether in response to the City's motion or in a timely motion to reconsider of his own—Petitioner sat on his hands and let the opportunity pass. The District Court did not in any way abuse the discretion

[10] If Petitioner believed that the summary judgment materials he filed did include evidence of a damage claim, and the evidence was overlooked by the District Court, "provid[ing] a sufficient record to substantiate [that] claims on appeal" was his responsibility. *Greenfield*, 162 Idaho at 253, 395 P.3d at 1286. The record he produced on appeal does not in any way demonstrate that the District Court overlooked materials it was required to consider pursuant to Rule 56.

conferred on it by I.R.C.P. 56(c)(3) when it declined to develop an argument Petitioner had (again) declined to actually make.

Petitioner also of course argues here that ITCA simply does not apply to his claims. To the extent that he seeks a mere declaration of illegality, or an injunction that halts unlawful practices, the City has never argued otherwise. However, to the extent that monetary relief is sought, Petitioner's argument that ITCA is entirely inapplicable has no support in the terms of the statute or existing case law.

Specifically, his 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 takings claims); *Hehr v. City of McCall*, 155 Idaho 92, 96, 305 P.3d 536, 540 (2013) (same); *Magnuson Properties Partnership*, 138 Idaho at 170, 59 P.3d at 975 (I.C. § 50-219 applies to equitable claims that seek monetary relief).

In response, Petitioner argues that these rulings are contrary to this Court's subsequent ruling in *Hill-Vu*. Petitioner is mistaken. *Hill-Vu* did not consider ITCA's notice provisions or other procedural requirements. It considered a provision, I.C. § 6-904A, that, on its face, imposes an intent requirement wherever and whenever a claim is brought against a governmental entity that relates in one way or another to taxes. *Hill-*

Vu, 162 Idaho at 594, 402 P.3d at 1047 (noting that I.C. § 6-904A seeks to limit governmental liability in such cases to where "malice or criminal intent and with[] reckless, willful and wanton conduct," is shown). Takings claims brought under the Idaho Constitution, however, require no such heightened showing of intent, and never have under this Court's case law. It is axiomatic that the substance of a constitutional provision or the substantive relief available under it cannot be amended (or eliminated) by statute, and so the *Hill-Vu* court declined to graft I.C. § 6-904A's heightened burden of proof onto the constitutional takings claims before it. *Id.*

However, procedural requirements—whether imposed by statute, regulation or court rule—can and routinely do limit the scope of relief available for "constitutional" claims. Statutes of limitation can be (and regularly are) applied to such claims. *See McCuskey v. Canyon County Com'rs*, 128 Idaho 213, 217, 912 P.2d 100, 104 (1996) (noting that the statutory catchall 4-year statute of limitation applies to constitutional takings claims); *see also Hehr*, 155 Idaho at 96, 305 P. 3d at 540. And the rules of civil procedure don't go out the window merely because a party claims that their injury, claim or challenge is constitutional (or for that matter, equitable) in nature. *See Ackerschott v. Mountain View Hosp. LLC*, 166 Idaho 223, 237, 457 P.3d 875, 889 (2020).

Contrary to what Petitioner seems to suggest, there is no conflict in this Court's cases, or reason to conclude that *Hill-Vu* overruled or abrogated *Alpine Village*, or any of

the other cases referenced above.[11] The District Court simply did not err in concluding that Petitioner's claims for monetary damages (whether presented as a takings claim or otherwise) were subject to the requirements of the Tort Claims Act under existing case law from this Court. Nor did it err or abuse its discretion in concluding that Petitioner had not demonstrated that he had actually complied with those requirements. His request for monetary relief was properly dismissed on that basis.

Ultimately, there is no reason to disturb the judgment entered by the District Court. With a claim for monetary relief barred by Petitioner's failure to argue or demonstrate that he had actually complied with ITCA, the only relief available for these claims under the terms of the Court's ruling was a declaration of illegality, and a prospective order halting the challenged sanitation and wastewater billing practices. The judgment appealed from did just that, and should therefore be affirmed.

5. The District Court did not err in dismissing Claim 6.

Petitioner also alleged in Claim 6 that in making these "loans," the City has violated L.C.C. § 2-79.2-3 or § 2-79.2-4. The former requires the City to refund certain "excess" fees it collects to City residents who paid them, while the latter limits the City Council's ability to transfer funds amongst its enterprise funds. There are several problems with Petitioner's reliance on these provisions.

[11] *Hill-Vu* did not cite, much less discuss or overrule any of them.

For one, to the extent that Petitioner alleges that either the library or golf course transfers violate those code provisions, he is mistaken for a simple reason: neither of those provisions existed or was in force when the City made those transfers. Neither of these code provisions indicates that they are intended to have retroactive effect.

As far as L.C.C. § 2-79.2-4's limitations on transfers between enterprise funds is concerned, the City does not dispute that it limits its ability to make interdepartmental loans in the future. However, the provision does not prevent it from allocating funds as needed to fulfill pre-existing interdepartmental re-payment obligations. If nothing else, this is necessary to ensure that transferred funds ultimately go back to the originating fund which, as the District Court recognized, is required by the "legal constraints embodied in the Revenue Bond Act." (R. Vol I, p. 238).

Moreover, it is difficult to see how L.C.C. § 2-79.2-3—which requires the City to return certain "excess" funds collected to ratepayers—was actually violated here. As noted above with regard to Claim 2, what Petitioner believes are "excess" funds are in actuality funds the City collected to account for all costs associated with delivering Sanitation services, maintaining a reasonable reserve, and otherwise ensuring that those enterprise funds remain entirely and permanently self-supporting, as required by statute and existing case law. *See Hill-Vu*, 162 Idaho at 591, 402 P.3d at 1044.

As far as "street impact" charges are concerned, the City believed at all times prior to this litigation that those charges did little more than ensure that ratepayers were asked to pay rates for the services that they consumed that captured the full, direct and indirect costs to the City associated with providing that service, in accordance with existing case law. These were not "excess funds" that were due to be refunded to City residents under this or any other provision of the City's code. The District Court properly determined—just as it did for Claims 4 and 5 as discussed above—that Petitioner had not demonstrated that he is entitled to a refund for them in this litigation. The dismissal of Claim 6 should be affirmed for those reasons.

6. The District Court properly declined to unseal the attorney-client privileged materials Petitioner repeatedly sought to offer during the proceeding below.

Petitioner sought to introduce a pair of memos prepared by the former-City Attorney multiple times during the course of this litigation. Though those memos were (and are) plainly marked as privileged and confidential, Petitioner offered them to the Court in unsealed pleadings in the "Appendix" that he filed with his Petition, again along with other materials he filed in support of his opposition to the City's motion to dismiss

under I.R.C.P. 12(b), and again with his opposition to the City's motion for costs and attorney's fees.[12]

The City moved to strike those documents, but not before the District Court ordered them sealed *sua sponte*. (R. Vol I, p. 108-110). After the motion to strike was briefed, the District Court agreed with the City that these were (and are) attorney client privileged materials, that the privilege had not been waived by the City, and ruled them stricken from the record but retained under seal for the purpose of appellate review.[13]

Petitioner sought to introduce those memos again when he moved for summary judgment. More specifically, he moved to "unseal" them, and urged the District Court to consider them because (according to Petitioner) they are not privileged materials at all and are instead business records that could be considered for the truth of the matters asserted under Idaho Rule of Evidence ("I.R.E.") 803(6). (R. Vol I, p. 135-38). That

[12] Petitioner claims that he did so inadvertently in response to that motion. (R, Vol. 1, p. 177).

[13] This ruling has not been provided by Petitioner, and this Court does not presume error from an inadequate appellate record. *See Greenfield*, 162 Idaho at 253, 395 P.3d at 1286. However, the District Court's ruling denying reconsideration is before the Court, (R. Vol I, p. 108-110), so this oversight is likely not consequential. And in that ruling, the District Court clarified that the memos were privileged, but that underlying communications, or facts referenced in them were not. Petitioner never argued below that he was unable to effectively conduct discovery concerning those issues as result of the City's invocation of this privilege, nor should the Court permit him to so argue here for the first time on appeal.

motion was briefed, and denied by the Court. (R. Vol I, p. 226; Tr., Vol. 1, p. 78-80). Petitioner now argues that this ruling was error, but he is mistaken.

As an initial matter, even if this ruling was error, it is difficult to see how it in any way prejudiced or harmed Petitioner. *See Hurtado v. Land O'Lakes, Inc.*, 153 Idaho 13, 18, 278 P.3d 415, 420 (2012) ("[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected") (citing I.R.E. 103(b) and I.R.C.P. 61).

Petitioner plainly wanted the District Court to consider them because he believes that the City's Attorney's prior analysis supports his arguments. But whether the City Attorney at some point did or did not agree with any of Petitioner's arguments is a distraction, not a determinative fact. The District Court—and now this Court—must interpret the relevant cases and provisions of law, and apply them to the facts before it. That task remains the same regardless of what is stated in these memos, a fact that was specifically noted by the District Court. (Tr., Vol. 1, p. 78-79). Petitioner was not in any tangible way injured merely because he was not allowed to offer the City Attorney's privileged communications as (essentially) an amicus brief.

But while the Court can affirm on harmless error grounds, it does not need to, because the District Court did not err in concluding that these memos are indeed privileged, attorney client materials. Claims of attorney-client privilege are governed by

Idaho Rule of Evidence ("I.R.E.") 502. In relevant part, the rule states that "[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 which were made . . . between the client or the client's representative and the client's lawyer or the lawyer's representative." I.R.E. 502(b); *see also* I.R.E. 502(a)(1).

"To be a confidential communication the communication must 'not be intended to be disclosed to third persons.'" *Farr v. Mischler*, 129 Idaho 201, 206, 923 P.2d 446, 452 (1996) (citing I.R.E. 502(a)(5)); *see also Skelton v. Spencer*, 98 Idaho 417, 419, 565 P.2d 1374, 1376 (1977) (noting that the point of the attorney-client privilege is to encourage open communications and a "full and frank professional relationship[s] between attorney and client").

Both of the memos at issue here easily satisfy the above referenced criteria. Both were drafted by the City Attorney, whose duties include providing confidential advice to the City on legal issues as they arise, whether a specific request for legal advice is made or not. (R. Vol I, p. 72). And both of these memos were clearly intended to provide legal advice to the City regarding certain City policies and practices. (R. Vol I, p. 72; CR. Vol. I, p. 44-58). Both also conspicuously indicate that they are privileged attorney-client communications, and plainly were not intended to be disclosed or disseminated more

broadly. (CR. Vol. I, p. 44-58). The City can waive this privilege, but as the District Court found, an individual City Councilmember cannot. (R. Vol I, p. 109; 72). As the District Court found, both memos are plainly confidential, attorney-client communications that were, are, and should be protected against disclosure. That ruling should be left undisturbed.

7. Petitioner's motion for costs and attorney's fees was properly denied.

Finally, Petitioner argues that the District Court erroneously denied him costs and attorney's fees. Petitioner is mistaken for multiple reasons.

Most prominently, a party seeking an award of costs must, as a threshold matter, demonstrate that they are a prevailing party. *See Eighteen Mile Ranch, L.L.C., v. Nord Excavating & Paving, Inc*., 141 Idaho 716, 719, 117 P.3d 130, 133 (2005) (citing I.R.C.P. 54(d)(1)(B)). The prevailing party analysis is discretionary, but must take into consideration "the final judgment or result of the action in relation to the relief sought by the respective parties." *Id*.

The District Court applied those factors, recognized that it had discretion, and properly found that Petitioner—who had prevailed on only one part of one of his nine claims—was not the overall prevailing party, and that because each party had prevailed in part, there was no prevailing party. (R. Vol I, p. 279). The Court, in accordance with existing case law, declined to award costs and fees to either side on that basis. *See Israel*

v. Leachman, 139 Idaho 24, 27, 72 P.3d 864, 867 (2003) (where both parties prevail in part, the court has the "discretion to decline an award of attorney fees to either side").

The District Court also noted—correctly—that Petitioner's request would have been barred for other reasons as well, even if he had been deemed the prevailing party. Petitioner nowhere specified the sum of attorney's fees he was actually requesting, much less the "basis and method of computation" used to calculate fee award sought. *See* I.R.C.P. 54(e)(5). Petitioner's request was properly dismissed for this reason alone. (R. Vol I, p. 281).

Also, this Court's case law has long barred awards to pro se parties, including attorneys acting pro se. *See Chavez v. Canyon County*, 152 Idaho 297, 305, 271 P.3d 695,703 (2012) (citing *Barbee v. WMA Securities, Inc*., 143 Idaho 391, 397, 146 P.3d 657 (2006)). Though his pleadings include passing references to similarly situated parties, Petitioner never sought class certification, and never successfully brought claims in this litigation here on behalf of anyone other than himself. (R. Vol I, p. 245, 281).

And while Petitioner claimed that he could recover fees under a common law "private attorney general" theory, that argument runs headlong into cases from this Court which hold unequivocally that I.C. § 12-117 provides "the exclusive basis for awarding attorney's fees" where, as here, the litigation involves "a person and a governmental entity as adverse parties." *Citizens against Linscott v. Board of County Commissioners*,

168 Idaho 705, 731, 486 P.3d 515, 531 (2021) (citing *City of Osburn v. Randel*, 152 Idaho 906, 908 n.1, 277 P.3d 353, 355 n.1 (2012)).[14] Attorney's fee awards under I.C. § 12-117 are only available to prevailing parties, and where a municipal defendant is involved, attorney's fees are only available where "the nonprevailing party acted without a reasonable basis in fact or law." *Linscott*, 168 Idaho at 731, 486 P.3d at 531.

Petitioner is not the prevailing party here for reasons referenced above, and a party does not act unreasonably when it offers a plausible (but ultimately unsuccessful) interpretation of existing appellate case law, as applied to a disputed factual record. In short, Petitioner's motion for attorney's fees was properly denied. (R. Vol I, p. 280). Any request by Petitioner for costs or fees on appeal will fail for the same reason; judgment was properly entered below in all respects, and his appeal will fail.

8. The City should be awarded attorney's fees as the prevailing party on appeal.

Where permitted by statute, costs and attorney's fees may be awarded to the party that has prevailed on appeal. *See Gilman v. Davis*, 138 Idaho 599, 603, 67 P.3d 78, 82 (2003).

[14] To the extent that Petitioner's claims are subject to ITCA, another "exclusive" provision applies, and imposes an even higher bar. *See Bliss v. Minidoka Irr. Dist.*, 167 Idaho 141, 150, 468 P.3d 271, 280 (2020) ("[I.C. §] 6-918A is the exclusive means by which a party may recover attorneys fees for causes of action brought under the Idaho Tort Claim Act," and requires a showing of "bad faith in the commencement, conduct, maintenance or defense of the action" by clear and convincing evidence).

Where, as here, the lawsuit involves "a person and a governmental entity as adverse parties," I.C. § 12-117 allows the prevailing party to be awarded attorney's fees where "the nonprevailing party acted without a reasonable basis in fact or law." *Citizens against Linscott*, 168 Idaho at 731, 486 P.3d at 531. Likewise, attorney fees may be awarded to a prevailing party under I.C. § 12-121 if this Court believes that the proceeding was brought, pursued, or defended frivolously, unreasonably or without foundation. *Hardy v. Phelps*, 165 Idaho 137, 147, 443 P.3d 151, 161 (2019); *see also Baughman v. Wells Fargo Bank, N.A.*, 162 Idaho 174, 183, 395 P.3d 393, 402 (2017) (holding that attorney fees may be awarded "for those elements of the case that were frivolous, unreasonable, and without foundation").

The City is, or at least should be, the prevailing party on appeal. The District Court did not err in any of the rulings Petitioner challenges here, nor should the final judgment it entered be disturbed for any reason. Nor has Petitioner advanced arguments that have a remotely plausible basis in law or fact. His arguments concerning standing rest on a clear misunderstanding of this Court's case law, paired with a fact that he has known at all times relevant to this litigation, i.e. that he is not a City Water customer. As for the claims relating to the golf course fund and library fund "loans" Petitioner relies on case law that was simply not applicable to the actual practices he sought to challenge, and has offered no evidence (apart from his own baseless speculation) that in any way

demonstrates that the Sanitation Funds' reserve was ever maintained at an unreasonable level. Nor has Petitioner demonstrated any possible reason to disturb the District Court's resolution of Claim 4 based on the record and the arguments actually made before it by Petitioner. And as far as Claim 7 is concerned, Petitioner's arguments in support of them reduce down to a simple refusal to accept that the City has longstanding contractual relationships with both of those entities referenced in that claim.

For those reasons, and for reasons stated previously, the Court should affirm the judgment appealed from, determine the City to be the prevailing party on appeal, and award it costs and fees incurred defending Petitioner's baseless, unfounded appeal.

V. CONCLUSION

For the foregoing reasons, the judgment entered below should be affirmed in all respects, and the City awarded costs and attorney's fees as the prevailing party on appeal.

DATED this 5th day of October 2022.

CLEMENTS, BROWN & McNICHOLS, P.A.

By *__/s/ Bentley G. Stromberg__*
BENTLEY G. STROMBERG

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of October, 2022, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

John Bradbury 729 Preston Ave. Lewiston, Idaho 83501	[ ] iCOURT SERVICE [ ] U.S. MAIL [ ] ELECTRONIC MAIL - jhbradbury736@gmail.com [ ] FACSIMILE [ ] HAND DELIVERED

/s/ Bentley G. Stromberg
Bentley G. Stromberg