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11/2/2021 6:30 PM
Idaho Supreme Court
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Docket No. 48799-2021

In the Supreme Court of the State of Idaho

BLAINE COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF IDAHO; ARCH COMMUNITY HOUSING TRUST, INC., AN IDAHO CORPORATION; BLAINE COUNTY HOUSING AUTHORITY, A PUBLIC AGENCY OF THE STATE OF IDAHO; AND JOHN DOES 1-5,

Appellants/Cross-Respondents.

v.

KIKI LESLIE A. TIDWELL, AN INDIVIDUAL; AND THE MADISON JEAN TIDWELL QUALIFIED SUBCHAPTER S TRUST, A LEGAL ENTITY ORGANIZED UNDER THE LAWS OF THE STATE OF IDAHO,

Respondents/Cross-Appellants.

RESPONSE BRIEF OF RESPONDENTS/CROSS-APPELLANTS

Appeal from the District Court of the Fifth Judicial District of
The State of Idaho, in and for the County of Blaine
Honorable Michael P. Tribe, District Judge, Presiding

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STATEMENT OF THE CASE

A. Nature of the Case

This case is about government overreach. In 2005, Blaine County exacted Parcel C of the West Nine PUD from the Valley Club specifically for open space or recreational use. Ten years later, the County changed its mind and permitted Parcel C to be leased to a private party for use as community housing, which was not within the County's rights pursuant to the exaction. The Plaintiffs brought this suit to ensure use of Parcel C would fall within the original restrictions.

In 2005, the Valley Club applied to Blaine County to approve a planned unit development and plat for the West Nine PUD. As part of that process, the two parties agreed that a certain half-acre parcel, identified in the record and herein as "Parcel C," would be dedicated to the County to serve as open space or for recreational use. The County's public hearing process and approval of the development reflected this agreement throughout. Pursuant to this agreement, the Valley Club deeded Parcel C to Blaine County, and the parcel went untouched for a decade.

Only in 2015, when approached by a private entity that sought to build housing on Parcel C and Parcel B (a nearby parcel), did the County consider the possibility that Parcel C could be used for some other purpose. Desiring to approve the construction, the County sought to rewrite the history of Parcel C's approval, insisting that it was free to develop Parcel C however it liked. The Valley Club and other landowners in the area opposed the County's actions, yet it persisted. Kiki Tidwell, a nearby landowner and a member of the Valley Club, appealed the issuance of a building permit for Parcel C in 2018. Following denial of that appeal, Tidwell commenced the instant action.

Throughout this litigation, Appellants have regularly disparaged Tidwell by casting her claim as a mere product of NIMBY-ism,[1] as if the sole motivation behind her claims is to avoid being forced to "look at" affordable housing in her neighborhood. (*See e.g.* R. at 120, 981); Appellants' Brief at p. 38. But such ad hominem attacks do nothing for Appellants' position, and they misdirect the Court from what is really at issue in this case. Tidwell supports affordable housing. And this litigation has little to do with the nature of the building proposed for Parcel C, and everything to do with the simple fact that **any** building has been proposed on property reserved for open space or recreational use. Tidwell has no "disdain" for the affordable housing already built adjacent to Parcel C at Agave Place because, unlike the duplex proposed for Parcel C, the housing units at Agave Place were built pursuant to the agreement of the County and the Valley Club, as well as the County-approved plat.

Ultimately, this case is about holding the County to its word. In 2005 it agreed with the Valley Club that Parcel C would be left for open space or future recreational use. On this basis, the Valley Club conveyed the necessary interest in Parcel C to the County. Only now, many years later, do the County and other Appellants seek to flip the script on Parcel C's intended use. As an interested landowner, Tidwell has successfully thwarted Appellants' capricious conduct in court and will now defend her successful claims on appeal.

B. Statement of Facts

This action centers around certain real property referred to as the Valley Club West Nine P.U.D. located immediately east of the intersection of Highway 75 and Buttercup Road in Blaine County, Idaho, approximately 1.3 miles north of Hailey, Idaho.

[1] Short for "not-in-my-backyard."

The Valley Club, Inc. Applies to Create a Planned Unit Development.

In early 2005, the Valley Club, Inc. (the "Valley Club") applied to the Blaine County Board of County Commissioners ("BOCC") to create a Planned Unit Development by subdividing and platting a large parcel of land into four blocks, which would be called the Valley Club West Nine P.U.D (the "Valley Club PUD"). The approval process for the Valley Club PUD and the final plat followed a three-step process: (1) the Blaine County Planning and Zoning Commission ("P&Z") made a written recommendation to the BOCC; (2) the BOCC approved the Valley Club PUD and a preliminary plat for the subdivision, which approval included written findings of fact and conclusions of law; and (3) the BOCC approved the final plat (the "Final Plat") in writing, which would serve as the basis of any challenge brought by the applicant or an interested party. (R. at 947.)

The P&Z Recommends to Approve the Valley Club PUD Subject to the Condition That the Valley Club Transfer a Half-Acre Parcel for Future Public Open Space.

Before consideration by the BOCC, the Valley Club's application was first reviewed by the P&Z. On March 3, 2005, P&Z issued its Findings of Fact, Conclusions of Law and Recommendation ("P&Z Conclusions"). (R. at 948.) After several public hearings, P&Z recommended the BOCC approve the Valley Club PUD subject to certain conditions, one of which required that the Valley Club "transfer to the Rec. District a ½ ac. area [Parcel C] ***for a future public open space use*** south of the community housing parcel and the water to mitigate any evaporation loss that may be associated with such a use[.]" (R. at 948.) (Emphasis added.)

The BOCC Conducts a Series of Public Hearings to Consider the Valley Club PUD and Ultimately Approves the Valley Club PUD, in Addition to a Preliminary Plat.

On April 7, 2005, the BOCC conducted its first public hearing in which it considered the Valley Club's application. (R. at 948.) The minutes recorded for this meeting do not reflect that

the Valley Club or the County considered any changes to the P&Z's recommended condition that a 1/2-acre parcel be transferred to the County for a future public open space use. (R. at 948.)

In late April 2005, the BOCC resumed its consideration of the Valley Club's application and, again, the minutes from this meeting do not reflect any proposed changes to the P&Z's recommendation of a 1/2-acre parcel for future public open space use. (R. at 948-49.)

The BOCC conducted another public hearing on the Valley Club's application on May 3, 2005 and, as before, the BOCC minutes from this meeting do not discuss any change to the language that the 1/2-acre parcel south of the community housing parcel be limited to public open space or recreational use. (R. at 949.) The BOCC then voted to approve the application and accept the P&Z's conditions "with modifications as discussed[.]" (R. at 949.)

The BOCC received the draft plat on May 10, 2005 (the "May 10 Draft Plat"), which contained a specific plat note (Plat Note 20) that indicated the land that would become Parcel C would be conveyed to Blaine County "for open space and public recreational uses." (R. at 949.) At the time, the 1/2-acre parcel south of the community housing block was contained within a larger parcel titled "Parcel D" on the May 10 Draft Plat. (R. at 949.)

The BOCC again considered the Valley Club's application in a May 19, 2005 hearing, during which the May 10 Draft Plat and the 1/2-acre parcel that would later become Parcel C were discussed. (R. at 949-50.) The minutes from this meeting specifically state the 1/2-acre parcel that would later become Parcel C would be used for "recreation/public amenity for bike path rest area[.]," and it was explicitly discussed as being part of "parcel D's 2.64 acres, of which .50 acres will be used for recreation/public amenity for bike path rest area . . ." (R. at 950.) At the May 19 hearing, changes in the wording of Parcels B and C were discussed, which again did not include the 1/2-acre parcel that would later become Parcel C. (R. at 950.) During the hearing, the Valley Club's representative, Mr. Ruscitto, offered to modify the draft plat to leave

the use of Parcels B and C "more open" instead of defining a specific use. (R. at 950.) Commissioners requested that these parcels, again not the 1/2-acre parcel at issue, be relabeled on the draft plat as "public use" parcels, which the Valley Club's representative accepted and began referring to them as such. (R. at 950.) Additionally at the May 19 hearing, Mr. Ruscitto noted that the Parcel D reflected on the May 10 Draft Plat was erroneously designated as a large 2.64 acre parcel rather than the 1/2-acre parcel it was supposed to be. (R. at 951.) At no point during the May 19 hearing did any party refer to using what would later become Parcel C (the 1/2-acre parcel to the south of the community housing parcel) for community housing. (R. at 952-53.) The only reference to community housing in the May 19 hearing, by Mr. Ruscitto, referred to the area north of the community housing block, not to the south. (R. at 953.)

On May 24, 2005, apparently in response to the discussion in the May 19 hearing, the Valley Club submitted another partial draft plat (the "May 24 Draft Plat"). (R. at 951.) What were once identified as Parcels B and C on the May 10 Draft Plat were combined to reflect just one "Public Use Parcel B" northeast of the Community Housing Block 2. (R. at 951.) What was once a large Parcel D was removed entirely, and the May 24 Draft Plat reflected a 1/2-acre "Public Use Parcel C" to the southwest of the Community Housing Block 2. (R. at 951.)

The BOCC next considered the Valley Club's plat and PUD application at a public hearing on May 26, 2005 and, during that hearing, the BOCC approved a "motion to approve the findings of fact and conclusions of law for Valley Club West Nine," and the motion carried unanimously. (R. at 952.) Those findings of fact and conclusions of law are referred to as the "Preliminary Plat Decision." (R. at 952.)

The Preliminary Plat Decision indicates that the Parcel C identified in the May 24 Draft Plat was limited to open space or recreational use. (R. at 953.) The Preliminary Plat Decision

contains multiple references to Parcel C being used for open space or recreational use, but it contains no references to Parcel C being used for community housing. (R. at 953.)

For example, paragraph 3 on page 17 of the Preliminary Plat Decision calls Parcel B the "'Public Use' parcel" and calls Parcel C the "'County Recreation' Parcel." (R. at 953.)

Paragraph 6 on page 17 of the Preliminary Plat Decision mandates that the Valley Club "deed to Blaine County . . . Parcel C (for public open space or future recreational use as determined by the County and the Rec. District)." (R. at 953.)

On page 8 of the Preliminary Plat Decision, the BOCC makes necessary findings related to the sufficiency of water. (R. at 953.) Those findings indicate the BOCC found a sufficient water supply for 55 units plus a fire station or two additional units. (R. at 953.) There was not, however, any analysis or findings regarding the sufficiency of water for residential units on Parcel C. (R. at 953.) Although the Blaine County Code requires a water supply analysis prior to approving housing units on a plat or PUD, no such analysis was performed for Parcel C. (R. at 953.)

Similarly, on page 9 of the Preliminary Plat Decision, the BOCC recognizes that central water systems "shall be required for subdivisions where any lot is less than one acre in size." (R. at 954.) Although Parcel C fits that description, the BOCC made no findings that Parcel C was supplied by a central water system. (R. at 954.)

Next, on page 10 of the Preliminary Plat Decision, the BOCC recognizes that lots with a septic tank drain field sewage system have a minimum size of one acre, which means that Parcel C is too small for such a system. (R. at 954.) Despite recognizing this limitation, the BOCC made no septic or wastewater considerations for Parcel C. (R. at 954.)

On page 11 of the Preliminary Plat Decision, the BOCC recognizes that an applicant "may be required" to provide either money or land for playgrounds, "recreation space," or a

school site based on a resolution or ordinance of the BOCC. (R. at 954.) To fulfill this requirement, the Valley Club was "offering a ½ ac. area south of the community housing parcel" for a fishing pond which would count as the requisite "recreation space." (R. at 954.)

On page 14 of the Preliminary Plat Decision, the BOCC recognizes that the "usefulness of the common open spaces to the residents should be maximized in the design of the development." (R. at 954.) Then, in its finding on this issue, the BOCC notes the golf course, a small passive park, and "the ½ acre parcel maximize the usefulness of the open space area." (R. at 954-55.) If the BOCC had intended for Parcel C to be used for community housing, it could not have arrived at this finding. (R. at 955.)

The BOCC again contemplates Parcel C being open space or recreational use on page 15 of the Preliminary Plat Decision. (R. at 955.) There, it notes that the "community housing block will be buffered from adjacent uses by . . . open space to the south[.]" (R. at 955.) Parcel C was part of the open space to the south. (R. at 955.)

On page 16 of the Preliminary Plat Decision, the BOCC finds that the West Nine PUD meets the County's requirements for superior design necessary to approve a PUD based in part on the PUD including "a ½ acre or larger parcel for an open space use." (R. at 955.)

The Preliminary Plat Decision also includes extensive conditions and references to how community housing must be constructed on Community Housing Parcel B, including Conditions #4, 7, 8, 9, 50, and 51. (R. at 955.) Yet, there is not a single mention of the possibility of community housing on Parcel C. (R. at 955.)

The Valley Club Submits a Final Plat, and the BOCC Approves the Same.

Following the Preliminary Plat Decision, the Valley Club began the final plat process, which required approval from the County. As part of this, the County received another draft plat

on June 7, 2005 (the "June 7 Draft Plat"). (R. at 955.) The June 7 Draft Plat includes the same "Public Use" designation for Parcel C as the May 24 Draft Plat. (R. at 955-56.)

On June 9, Tom Bergin, the County's former senior land use planner, prepared a "'Large Block' Final Plat Staff Report" for the BOCC to review prior to finally considering the Valley Club's application (the "June 9 Bergin Report"). (R. at 956.) Page 3 of the June 9 Bergin Report contains a reference to Parcel C and expressly calls it "the 'County Recreation' Parcel". (R. at 956.) Then, at the bottom of that very same paragraph, Mr. Bergin specifically invites the BOCC to review the language of the paragraph, stating: "Draft pending, needs review before signing off on this final plat." (R. at 956.)

The BOCC again considered the Valley Club's application, and with it the Preliminary Plat Decision and the June 9 Bergin Report, in a public hearing on June 14, 2005. (R. at 956.) Here, again, the minutes reflect no discussion of Parcel C being used for any purpose broader than open space or recreational use. (R. at 956-67.) Instead, the BOCC carried a motion to approve the Preliminary Plat Decision "with the changes as noted in the hearing[.]" (R. at 957.)

In the last public hearing on the Valley Club's application, which occurred on June 23, 2005, the BOCC voted to approve the findings of fact and conclusions of law for the Valley Club's application. (R. at 959.) As with every other public hearing on the Valley Club's application, the County's record contains no evidence that anyone intended or considered Parcel C to be used for anything other than open space or recreational use. (R. at 959.)

The BOCC then approved and signed the Final Plat Decision which expressly notes that Parcel C was to be deeded to the County "for public open space or future recreational use as determined by the County and the Rec. District . . . ." (R. at 960.)

Paragraph 3 of the Final Plat Decision changed the reference to Parcel C from "County Recreation Parcel" to "south Public Use parcel." (R. at 960.) However, nothing in the minutes or

public record reflects a reason for this change and, in any case, it is consistent with the specific reference in paragraph 6. (R. at 960.) There is no evidence this change reflected deliberations of the County Commission or any negotiations with the Valley Club. (R. at 960.)

Ten Years After the Final Plat is Recorded, the County Attempts to Change History.

For approximately ten years, no development occurred on Parcel C. (R. at 765.)

On or about March 17, 2015, the BOCC conducted its regular meeting of its March 2015 session and, during that meeting, ARCH Community Housing Trust ("ARCH") sought to build community housing on Parcels B and C of the Valley Club PUD. (R. at 73.)

Cognizant of the Final Plat Decision's and/or the Final Plat's restrictions, ARCH asked the Board to consider an amendment of what was originally contemplated as "public use" in the PUD application and/or approval process and asked the Board to find that community housing was such a "public use[.]" (R. at 73.) The Board took public comment regarding ARCH's request, during which time the Valley Club noted that Parcels B and C were intended for a firehouse and open space and should remain so. (R. at 74.)

On or about April 28, 2015, Blaine County Land Use and Building Services issued a written opinion (the "Land Use Opinion") regarding whether community housing was an appropriate "public use" for Parcels B and C. (R. at 77.) The Land Use Opinion considered instances of the phrase "public use" in the Blaine County Code and concluded that housing on public land for public or local employees constitutes a "public use" in the context of Parcels B and C. (R. at 77-78.)

On or about June 30, 2015, at a follow-up BOCC meeting, ARCH requested to acquire Parcels B and C of the Valley Club PUD on which to construct or relocate existing housing. (R. at 84.) At the June 30, 2015 meeting, the BOCC concluded that community housing was an appropriate use of Parcels B and C. (R. at 84-86.)

The Valley Club Protests the County's Inappropriate Use of Parcel C.

On August 10, 2015, the Valley Club Board of Directors submitted a formal opposition, along with a memorandum, arguing against the transfer of Parcels B and C of the Valley Club PUD to the Blaine County Housing Authority ("BCHA") and ARCH and the construction of any housing on those parcels. (R. at 398.) In their August 10, 2015 complaint and/or memorandum, the Valley Club Board of Directors argued that (1) the transfer of Parcels B and C to the BCHA was illegal, (2) the proposed use of Parcel C for public housing was in violation of the Valley Club PUD, and (3) the County's determination regarding what constitutes "public use" was erroneous. (R. at 398.)

The County Ignores the Final Plat and Transfers Parcel C for Development.

On September 8, 2015, the BOCC passed Blaine County Resolution 2015-32, which transferred ownership of Parcels B and C of the Valley Club PUD to BCHA for the express purpose of constructing community housing. (R. at 432-33.)

On February 6, 2018, the Blaine County Land Use and Building Services Administrator issued Building Permit #2017-157 to ARCH for the construction of a duplex at 3702 Buttercup Road (Parcel C of the Valley Club PUD). (R. at 369.)

Ms. Tidwell timely appealed the Administrator's decision regarding issuing Building Permit #2017-157. (R. at 369.) The BOCC heard Ms. Tidwell's appeal on May 1, 2018. (R. at 369.) At the May 1, 2018 appeal hearing, ARCH and its attorney, James R. Laski, were present. (R. at 28.) Unbeknownst to Ms. Tidwell or her attorney, ARCH had submitted written materials to the Board in opposition to Ms. Tidwell's appeal; these materials were not served on Ms. Tidwell or her attorney. (R. at 28.) Mr. Laski was allowed to make an oral statement in opposition to Ms. Tidwell's appeal. (R. at 28.)

At the appeal hearing, Ms. Tidwell's attorney repeatedly pled with the County to follow its own Final Plat Decision and the conditions set forth therein, specifically with regard to Condition #6 which described the use to which Parcel C was limited. (R. at 28.)

On June 5, 2018, the BOCC filed a Decision on Appeal affirming the Administrator's decision regarding Building Permit #2017-157 and denying Ms. Tidwell's appeal. (R. at 369.) On June 12, 2018, the BOCC filed a Revised Decision on Appeal. (R. at 369.)

C. Course of Proceedings

After the denial of her appeal, Tidwell initiated the present action on September 14, 2018. (R. at 20.) Tidwell's complaint named the Madison Jean Tidwell Qualified Subchapter S Trust as a co-Plaintiff and contained three counts: (1) declaratory judgment, (2) injunctive relief, and (3) damages for violation of procedural and substantive due process pursuant to 42 U.S.C. § 1983. (R. at 20-34.)

At the outset, Plaintiffs sought a preliminary injunction barring development on Parcel C. (R. at 35-49.) The District Court denied the injunction, but held that Plaintiffs had standing to proceed. (R. at 236.) Appellants then began to attack Plaintiffs' complaint on multiple sides. ARCH and the BCHA filed a joint motion for partial summary judgment, arguing that summary judgment should be granted as to Plaintiffs' claim for declaratory relief because, relying on a number of eminent domain cases interpreting the 5th Amendment's "public use" clause and other irrelevant authority, the Final Plat unambiguously permitted Appellants to proceed with construction on Parcel C. (R. at 237-50.) The County filed a 12(b)(6) motion to dismiss, claiming that Plaintiffs had failed to state a claim under section 1983. (R. at 254-64.)

The District Court initially granted both of Appellants' motions, dismissing Plaintiffs' 1983 claim as well as their claim for declaratory relief. (R. at 357-75.) But Plaintiffs moved for reconsideration on the claim for declaratory relief, and the District Court restored the claim,

agreeing with Plaintiffs that it had improperly relied on a recent Blaine County determination, as well as other irrelevant statutory authority, in its initial decision as to the ambiguity of "public use." (R. at 439-45.) The District Court held that "public use," as used in the Final Plat, was ambiguous and relied on the following argument by Plaintiffs:

> The Court must wrestle with why the Valley Club would have labeled Parcel "C" as "Public Use" while labeling Block 2 as "Community Housing" if it ultimately intended that community housing would be permissible on Parcel C. One permissible inference may be that community housing was one of many uses to which Parcel C might be put. But the Court cannot ignore the other permissible inference, that the Valley Club meant that Parcel C would be used for something different than Block 2.

(R. at 443.)

Appellants BCHA and ARCH then filed a second motion for partial summary judgment, arguing again, as they had at the preliminary injunction hearing, that Plaintiffs lacked standing to bring their claim for declaratory relief. (R. at 446-55.) But the District Court disagreed a second time, concluding this time in writing that Plaintiffs had standing. (R. at 751-61.) Around the same time, Plaintiffs moved for summary judgment, asking the District Court for, among other things, a declaratory judgment that the proposed nonconforming housing development was not fit for Parcel C and that the building permit issued by the County was void. (R. at 474-93.) The District Court ultimately turned down Plaintiffs' motion, finding that genuine issues of material fact existed as to the intent behind "public use." (R. at 762-77.)

A three-day court trial was held via Zoom on November 12-13, 2020 and December 9, 2020, to determine the parties' intent with regard to Parcel C. At the conclusion of the trial, the District Court took the matter under advisement and, on March 2, 2021, issued its Findings of Fact and Conclusions of Law. (R. at 945-69.) After reviewing all of the evidence, the District Court concluded that the parties intended Parcel C to be limited to open space or recreational

use, that the proposed nonconforming housing development could not be built on Parcel C, and that the building permit issued by the County was void. (R. at 970-72.) Shortly thereafter, Plaintiffs filed their memorandum of fees and costs, which the District Court denied. (R. at 973-85.)

Appellants filed a joint notice of appeal on April 22, 2021. (R. at 1062-73.) Plaintiffs filed a notice of cross appeal on May 13, 2021. (R. at 1079-82.)

ISSUES PRESENTED

1. Did the District Court Err When It Ruled That Tidwell Had Standing;
2. Did the District Court Err in Determining That the Term "Public Use" is Ambiguous;
3. Did the District Court Commit Clear Error in Determining That the Parties Intended to Restrict Parcel C to Open Space or Recreational Use;
4. Are Plaintiffs Entitled to Attorneys' Fees and Costs on Appeal?

ARGUMENT

I. STANDARD OF REVIEW

This Brief addresses three distinct issues.

The first issue is whether the District Court erred when it concluded, on multiple occasions,[2] that Plaintiffs had standing to pursue their claims. While nothing in the Idaho Constitution or Idaho statutes expressly requires a litigant to demonstrate standing to support a claim, this Court has inferred such a requirement as a "fundamental tenet of American jurisprudence[.]" *Gallagher v. State*, 141 Idaho 665, 668, 115 P.3d 756, 759 (2005) ("It is a fundamental tenet of American jurisprudence that a person wishing to invoke a court's

[2] *See* R. at 982 (listing the many instances where Appellants challenged Plaintiffs' standing). The District Court itself confirmed that Plaintiffs had standing at least twice. (R. at 753-60 (District Court mentioning prior ruling as to standing (753) and then issuing written ruling affirming same)).

jurisdiction must have standing."). "Standing is a preliminary question to be determined by this Court before reaching the merits of the case." *Young v. City of Ketchum*, 137 Idaho 102, 104, 44 P.3d 1157, 1159 (2002) (citation omitted). Standing is also "a jurisdictional issue." *Haight v. Idaho Dep't of Transportation*, 163 Idaho 383, 387, 414 P.3d 205, 209 (2018), *reh'g denied* (Mar. 21, 2018). "Jurisdictional issues, like standing, are questions of law, over which this Court exercises free review." *In re Jerome Cty. Bd. of Comm'rs*, 153 Idaho 298, 308, 281 P.3d 1076, 1086 (2012).

The second issue is whether the District Court erred when it concluded that the term "public use," as used in the Final Plat, is ambiguous. The question of whether an instrument is ambiguous is a question of law, over which this Court exercises free review. *Id.* (citing *DeLancey v. DeLancey*, 110 Idaho 63, 65, 714 P.2d 32, 34 (1986)). In deciding whether a document is ambiguous, this Court seeks to determine whether it is "reasonably subject to conflicting interpretation." *Bondy v. Levy*, 121 Idaho 993, 997, 829 P.2d 1342, 1346 (1992).

The third issue is whether the District Court erred when it concluded that, per the relevant extrinsic evidence, the ambiguous term "public use," as used in the Final Plat, does not permit construction of a nonconforming housing development on Parcel C. Following a bench trial, this Court's review is limited to ascertaining whether the evidence supports the findings of fact and whether the findings of fact support the conclusions of law. *Latvala v. Green Enters., Inc.*, 168 Idaho 686, 485 P.3d 1129, 1137 (2021). "[T]his Court's place in reviewing a trial court's findings of fact and conclusions of law is one of restraint." *Lunneborg v. My Fun Life*, 163 Idaho 856, 865, 421 P.3d 187, 196 (2018). The province of weighing conflicting evidence and testimony, and judging the credibility of witnesses, belongs to the trial court. *Latvala*, 485 P.3d at 1137. On appeal, when findings of fact are challenged, the appellant has the burden of showing error, and the reviewing court will review the evidence in a light most favorable to the

respondent. *Nw. Farm Credit Servs., FLCA v. Lake Cascade Airpark, LLC*, 156 Idaho 758, 763, 331 P.3d 500, 505 (2014).

This Court will not disturb the District Court's finding of fact unless the finding is clearly erroneous. *PacifiCorp v. Idaho State Tax Comm'n*, 153 Idaho 759, 767, 291 P.3d 442, 450 (2012). A finding is clearly erroneous if it is not supported by substantial and competent evidence. *Id*. Substantial and competent evidence is relevant evidence that a reasonable mind might accept to support a conclusion. *Jarvis v. Rexburg Nursing Ctr.*, 136 Idaho 579, 583, 38 P.3d 617, 621 (2001). Evidence is substantial if a reasonable trier of fact would accept it and rely upon it in determining whether a disputed point of fact has been proven. *PacifiCorp*, 153 Idaho at 768. Substantial evidence is less than a preponderance of evidence, but more than a mere scintilla. *Nw. Farm Credit Servs., FLCA*, 156 Idaho at 764. It need not be uncontradicted, nor does it need to necessarily lead to a certain conclusion; it need only be of such sufficient quantity and probative value that reasonable minds could reach the same conclusion as the fact finder. *Id*.

II. THE DISTRICT COURT DID NOT ERR WHEN IT RULED THAT TIDWELL HAD STANDING.

As shown by the record, Plaintiffs faced several threatened harms on account of Defendants' actions—they all conferred standing on Plaintiffs. "The three most basic propositions of the doctrine of standing that [this] Court uses to guide its decisions were outlined in *Boundary Backpackers v. Boundary County* as being (1) that standing 'focuses on the party seeking relief and not on the issues the party wishes to have adjudicated;' (2) that in order 'to satisfy the case or controversy requirement of standing, litigants generally must allege or demonstrate an injury in fact and a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury;' and (3) that 'a citizen and taxpayer may not challenge a governmental enactment where the injury is one suffered alike by all citizens and taxpayers of

the jurisdiction.'" *In re Jerome Cty.*, 153 Idaho at 308, 281 P.3d at 1086 (quoting *Boundary Backpackers v. Boundary Cty.*, 128 Idaho 371, 375, 913 P.2d 1141, 1145 (1996)). "Building upon these basic propositions, this Court also considers that standing 'may be predicated upon a threatened harm as well as a past injury.'" *Id*. (quoting *Schneider v. Howe*, 142 Idaho 767, 772, 133 P.3d 1232, 1237 (2006)).

As to the second proposition—injury in fact and redressability—"[t]his requires a showing of distinct palpable injury and fairly traceable causal connection between the claimed injury and the challenged conduct." *Haight*, 163 Idaho at 392, 414 P.3d at 214. While the injury supporting standing must be "distinct" and "palpable," it does not have to be significant. The U.S. Supreme Court has explained:

> 'Injury in fact' reflects the statutory requirement that a person be 'adversely affected' or 'aggrieved,' and it serves to distinguish a person with a direct stake in the outcome of a litigation—**even though small**—from a person with a mere interest in the problem. We have allowed important interests to be vindicated by plaintiffs with no more at stake in the outcome of an action than a fraction of a vote, a $5 fine and costs, and a $1.50 poll tax. . . . As Professor Davis has put it: 'The basic idea that comes out in numerous cases is that **an identifiable trifle is enough for standing** to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation.'

U.S. v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 690 n. 14, 93 S. Ct. 2405, 2417 (1973) (emphasis added and internal citations omitted).[3] Professor Davis' commentary is most relevant here because Plaintiffs' suit is motivated not just by personal

[3] Decisions from the United States Supreme Court regarding standing are particularly compelling authority because "Idaho has adopted the constitutionally based federal justiciability standard." *Paslay v. A&B Irr. Dist.*, 162 Idaho 866, 881, 406 P.3d 878, 869 (2017); *Koch v. Canyon Cty.*, 145 Idaho 158, 161, 177 P.3d 372, 375 (2008) ("When deciding whether a party has standing, we have looked to decisions of the United States Supreme Court for guidance.").

property interests, as discussed more fully below, but also by principle—that the County be held to its word.

There exist several threatened injuries in fact sufficient to confer standing on Plaintiffs. Plaintiffs' property values; the aesthetics, ecology, and character of Plaintiffs' rural neighborhood; and the value of Tidwell's Valley Club membership, would all have been negatively impacted by Appellants' proposed nonconforming development. Much of Appellants' argument on appeal focuses on what it considers to be the trifling nature of these distinct injuries. But even "an identifiable trifle is enough for standing." *SCRAP*, 412 U.S. at 690 n. 14.

Furthermore, Appellants assign error to the District Court's "stacking" of Plaintiffs' injuries. Appellants' Brief at p. 13. As the District Court put it, "[e]ach [item] alone may not be enough to meet the threshold but collectively, the Court finds that there is an injury in fact." (R. at 758.) Appellants argue that this "collective" take on standing was error, because standing is "not a cumulative inquiry." Appellants' Brief at p. 20. But Appellants point to no authority to support this notion. Instead, this Court in *Martin v. Camas County ex rel. Board of Commissioners* demonstrated just the opposite. There, in its discussion of a prior case, *Ameritel*, the Court explained how one alleged injury—increased competition—was combined with others to establish a plaintiff's standing:

> Focusing on increased competition, Martin fails to note that there were two other factors that **aggregated** to provide standing in *Ameritel*: (1) Ameritel's status as a taxpayer whose tax funds were being used to advocate in favor of approving the bond, and (2) the *imminent and certain* increase in the taxes Ameritel would be subjected to if the bond were passed.

Martin, 150 Idaho 508, 514, 248 P.3d 1243, 1249 (2011) (bolded lettering added). In sum, not only can standing be conferred on a plaintiff when her injury is no more than an "identifiable trifle," but various factors can be aggregated to meet this minimal threshold.

A. The potential negative impact on Plaintiffs' property values is a sufficient injury in fact.

Construction of a nonconforming duplex would have caused an injury to Plaintiffs in the form of the potential for diminished property values. While not a requirement for standing generally, negative effect on property values is regularly accepted by this Court as a basis for standing in land use decisions. *Citizens Against Linscott/Interstate Asphalt Plant v. Bonner Cty. Bd. of Comm'rs*, 168 Idaho 705, 486 P.3d 515, 523 (2021); *Cowan v. Bd. of Comm'rs of Fremont Cty.*, 143 Idaho 501, 509, 148 P.3d 1247, 1255 (2006); *Ciszek v. Kootenai Cty. Bd. of Comm'rs*, 151 Idaho 123, 128-9, 254 P.3d 24, 29-30 (2011). The Court in *Jerome County* found standing when there was evidence regarding "probable compromised resale value of existing homes in the area, odors, and possible health concerns." 153 Idaho at 309, 281 P.3d at 1087. Plaintiffs have only alleged the former of these potential injuries, but the Court clarified that "[t]hese could *each* be categorized as threatened harm." *Id*. (emphasis added).

Parcel C is located in a rural part of Blaine County outside of Hailey. (*See* R. at 158.) The rural character of the area is its defining characteristic, and the source of its aesthetic and economic value. The zoning designation for the area is R-2, which means one structure per two acres. (R. at 202.) Indeed, this is an area for large lots, ranches, and other rural features. *Id.* The Blaine County Comprehensive Plan recognizes the value behind the rural character of communities, like the one at issue here, claiming that it is "proud of [its] success in directing new growth into [its] cities, keeping the County rural in nature." Blaine County Comprehensive Plan, *Introduction* at p. 1; (R. at 202). Parcel C in particular is located in a critical place in the area because it sits at the intersection of State Highway 75 and Buttercup Road, which is the entrance that leads to Tidwell's home and many other properties in the area. (R. at 302.)

The uncontested evidence before the District Court showed that Tidwell's home sits on a large open acreage and is the third home to the southeast of Parcel C on Buttercup Road, 0.9 miles from Parcel C. (R. at 147.) The Trust's property sits only .4 miles from Parcel C in this rural setting, and the State Highway 75 and Buttercup Road entrance is also the logical way to access the Trust property. (R. at 147, 203 ¶ 17.) Tidwell testified she drives by Parcel C on a daily basis, and for any potential buyer of Plaintiffs' properties, Parcel C is the first thing they would see entering the neighborhood. (R. at 203.) Given its rural character, a nonconforming duplex at the main entrance to the neighborhood would diminish the value of all properties in the area. The effect of the nonconforming duplex on the character of the neighborhood, as well as its potential effect on property values, is sufficient to confer standing on Plaintiffs. *Society Hill Towers Owners' Ass'n v. Rendell*, 210 F.3d 168, 175-78 (3d Cir. 2000) (held that "maintaining the environmental and historic quality of [plaintiffs'] neighborhood" was a "legally protected interest," especially given plaintiffs' assertion that the proposed project would decrease property values).

Appellants repeatedly make the hyperbolic assertion in their Brief that the record is devoid of any information explaining how the value of Plaintiffs' properties would be diminished by the duplex. Appellants disregard the testimony of Tidwell, as well as the production of a written opinion by a local real estate broker who stated the obvious: "[a]n exception to the underlying zoning of an inconsistent nature certainly affects the value for all surrounding property owners." (R. at 313.) This evidence was sufficient for the District Court to properly conclude that Plaintiffs had standing as a result of the potential diminution in property values.[4]

[4] It is worth noting that the issue of standing was decided early on in this litigation, as is usually the case. The District Court ruled on the question at the preliminary injunction hearing

Appellants' Brief focuses on the distance between Parcel C and Plaintiffs' properties, each of which are within one mile of Parcel C. Appellants' Brief at p. 13. Appellants insist that the mere location of these properties is, alone, insufficient to confer standing. Appellants' Brief at p. 13. In support of this notion, Appellants cite to *Butters v. Hauser*, 131 Idaho 498, 501, 960 P.2d 181, 184 (1998). But appellants make only an incomplete point. It is, of course, true that mere proximity to a challenged project—like the proposed duplex on Parcel C—is insufficient to confer standing on a property owner. A plaintiff does not have standing to challenge a development project simply because she owns property near the project's location. Instead, the plaintiff must show an injury. As *Butters* explained, the plaintiff must show that "the location [ ] expose[s] her to peculiarized harm." In that regard, proximity is simply a factor of that broader analysis of injury. *See Evans v. Teton Cty.*, 139 Idaho 71, 75, 73 P.3d 84, 88 (2003) (explaining how standing in a Local Land Use Planning Act case, which requires an adverse impact on a property interest, depends on how property is adversely affected, and proximity is "a very important factor" in that analysis).

For example, one of the plaintiffs in *Jerome County* had three members whose primary residences were within one mile of the proposed development. *Id*. at 310. That proximity, coupled with the threatened harms of diminished property value, odor, and health, was sufficient to confer standing on the plaintiff. *Id*. Such is the case with Plaintiffs. The proximity of

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and then again on ARCH's and BCHA's Joint Second Motion for Partial Summary Judgment. (R. at 751-61.) Because of the early dismissal of this objection, Plaintiffs had little need to invest any further time, effort, or expense in developing evidence or expert testimony to establish how a nonconforming duplex would impact the property values in the area. Nevertheless, the District Court concluded, based on the evidence before it at that time, that Plaintiffs had standing. *State v. Philip Morris, Inc.*, 158 Idaho 874, 882, 354 P.3d 187, 195 (2015) ("A review of our earlier decisions relating to th[e 'allege or demonstrate'] standard reveals that the detail required to show standing is not uniform or universal. . . . [S]ome standing questions can be answered without factual inquiry, ...").

Plaintiffs' properties to the proposed duplex, coupled with the potential harm of diminished property values, is sufficient to confer standing.

B. The potential for lost aesthetic value by building a duplex instead of preserving Parcel C for open space or recreational use is a sufficient injury in fact.

The United States Supreme Court has consistently held that "recreational or even the mere esthetic interests of [a] plaintiff" are sufficient to support standing. *Summers v. Earth Island Inst.*, 555 U.S. 488, 494, 129 S. Ct. 1142, 1149 (2009). As the court put it in *Sierra Club v. Morton*,

> [w]e do not question that this type of harm may amount to an 'injury in fact' sufficient to lay the basis for standing under § 10 of the APA. Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process.

405 U.S. 727, 734, 92 S. Ct. 1361, 1366 (1972). The plaintiff in *Sierra Club* lacked standing because it had failed to allege that its members used the area where a highway and ski resort were to be built. *Id*. at 735. In *SCRAP*, just the opposite was the case, as the plaintiffs had alleged that "their members used the forests, streams, mountains, and other resources in the Washington metropolitan area for camping, hiking, fishing, and sightseeing" and that the state action they challenged "would directly harm them in their use of the natural resources of [this area]." 412 U.S. at 687, 93 S. Ct. at 2416. In *Summers*, the government even conceded a particular plaintiff had standing when he testified that he repeatedly visited a particular site, that he had imminent plans to do so again, and that his interests in viewing the flora and fauna of the area would be harmed if the proposed project went forward as planned. 555 U.S. at 494.

Plaintiffs here fall squarely on the side of the *SCRAP* and *Summers* plaintiffs. There is aesthetic and recreational value to Parcel C that would be lost if a duplex was built in lieu of its

being reserved for open space and recreational use. Plaintiffs have a personal interest in that aesthetic and recreational value, as well as an interest in using Parcel C in the future for its intended use. The record shows Tidwell owns property within one mile of Parcel C, and both properties are primarily accessed off Buttercup Road, driving right past Parcel C. (R. at 754.) Thus, Tidwell and the guests to either property frequent Parcel C regularly. Tidwell testified she also enjoys habitually riding her bicycle on the bike path that runs adjacent to Parcel C. (R. at 754.) Tidwell was looking forward to and would have garnered joy from using Parcel C as an open air park and a stop on the greenbelt. (R. at 296 ¶ 5.) Tidwell testified she also golfs regularly at the Valley Club, playing two to four days per week during the four-month season. (R. at 563 ¶ 5.) Parcel C is visible to golfers from part of the course, and its appearance and use as open space contributes to the aesthetic value of the golfing experience. (R. at 754.)

Because of Tidwell's frequent use and enjoyment of the area immediately around Parcel C, Plaintiffs' ownership of nearby property and Tidwell's undisputed assertion that she fully intended to use Parcel C once it had been developed for its intended, recreational purpose, the loss of the aesthetic value conferred by Parcel C's use as open or recreational space would directly harm Plaintiffs, as was the case in *SCRAP* and *Summers*. The potential loss of Parcel C's aesthetic value is an injury in fact sufficient to confer standing on Plaintiffs.

C. The potential negative impact on the value of Tidwell's Valley Club membership is a sufficient injury in fact.

Tidwell testified she is not only the owner of property nearby Parcel C, she is also an equity member of the Valley Club, which is the entity that developed the West Nine PUD and conveyed Parcel C to Blaine County. (R. at 767.) More specifically, Tidwell has a "Full Golf Membership" at the Valley Club, which is a "proprietary membership with voting rights." (R. at 570.) As a "Full Golf Member," the Valley Club can levy assessments against her to pay for

improvements to the Valley Club's property. (R. at 563.) In this regard, Tidwell's Valley Club membership reflects a personal stake in the value of the Valley Club's assets. Because the value of these assets would be diminished or harmed by the threatened duplex, Tidwell's standing is secure.

As a member, Tidwell also has a right to the full use and enjoyment of the Valley Club assets, its recreational activities, and other amenities. Tidwell became a member of the Valley Club for the express purpose of taking advantage of and participating in these activities and amenities. (R. at 599.) The threatened construction of a duplex on Parcel C deprives Tidwell of the right to enjoy the open space and recreation for which Parcel C was intended. Furthermore, Tidwell's golfing experience, which she has a contractual right to enjoy, is diminished by the imposition of a structure at a location where there would otherwise be open space and natural ecology.

Finally, the financial value of Tidwell's Valley Club membership itself is potentially diminished by the proposed construction of the duplex. As the Valley Club Bylaws explain, the Valley Club Board of Directors has the power to fix the sales price of a membership interest like Tidwell's. (R. at 572.) Thus, while Tidwell's membership is marketable, its value may fluctuate depending on the action of the Board. As for the proposed duplex on Parcel C, the Valley Club Board opposed its construction. (R. at 495-96.) It was always the Valley Club's intent that Parcel C be reserved for recreational use. (R. at 495, 507.) Naturally, the decision of Defendants to act contrary to the designated use intended by the Valley Club for Parcel C, and to build a duplex in what is otherwise a rural and country-club setting, would diminish the value of a Valley Club membership like Tidwell's. This is especially the case where the Valley Club Board of Directors was of the belief that Parcel C would be reserved for a use consistent with the surrounding area, and where the Board considered affordable housing units to be a "financial burden." (R. at 507.)

D. Plaintiffs' threatened harms are not generalized grievances, but reflect the grievances of various distinct classes.

The threatened harms that Plaintiffs face are specific to them and only distinct classes of others. It is a general rule that a plaintiff "may not challenge a governmental enactment where the injury is one suffered alike by all citizens and taxpayers of the jurisdiction." *Miles v. Idaho Power Co.*, 116 Idaho 635, 641, 778 P.2d 757, 763 (1989). However, "standing is not to be denied simply because many people suffer the same injury." *SCRAP*, 412 U.S. at 687. "When the impact of legislation is not felt by the entire populace, but only by a selected class of citizens, the standing doctrine should not be evoked to usurp the right to challenge the alleged denial of constitutional rights in a judicial forum." *Miles*, 116 Idaho at 642, 778 P.2d at 764. "To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody." *SCRAP*, 412 U.S. at 688. On this basis, the Court in *Miles* held that the plaintiff, as a ratepayer and customer of Idaho Power, had alleged a specialized and peculiarized injury despite the size of the class of Idaho Power customers. *Miles*, 116 Idaho at 642, 778 P.2d at 764.

Plaintiffs in this case have alleged injuries that are specific to them and are not shared in equal measure by all or a large class of citizens. Even looking only to the matters previously briefed by Plaintiffs: (i) most citizens do not own real property in the vicinity of Parcel C; (ii) very few view Parcel C on their daily drives; and (iii) many residents, but far from all, frequent the bike path adjacent to Parcel C. Beyond that, Ms. Tidwell's full membership in the Valley Club establishes without a doubt that the injuries alleged are specific to her and not mere generalized grievances. Her membership, as well as the fact that she can be assessed for the Valley Club's real property improvements, imbue her with a direct interest in the Valley Club and its assets, including the use of property it has dedicated to the County. No average member

of the public shares that interest. She enjoys use of the golf course without having to first pay a fee as is required of the general public. (R. at 754.) She can reserve tee times at the golf course with fewer restrictions than can the general public. (R. at 754.) She has an interest in the retained development rights on Parcel C that she shares only with other members of the Valley Club. Even if some of the threatened injuries are shared by a somewhat large group of people, none of them are shared by all Blaine County or Idaho residents. Plaintiffs have standing to maintain the present action.

In their Brief, Appellants take the same tack as the respondents in *Miles*, urging the Court to invoke the standing doctrine because of the size of the class of potentially injured parties. But the fact that Plaintiffs are part of a class at all, some group short of the entire populace, is sufficient to show that Plaintiffs have alleged no mere "generalized grievance." The relative size of any one of these distinct classes is simply irrelevant. *See Miles*, 116 Idaho at 642, 778 P.2d at 764.

The classes of which Plaintiffs are a part are several: Plaintiffs are among the limited class of landowners whose rural properties are affected by the proposed, nonconforming duplex; Tidwell is among the limited class of Blaine County residents whose typical traffic route takes them by Parcel C; Tidwell is among the limited class of Blaine County residents whose recreational activities take them by Parcel C on a regular basis; Tidwell is among a limited class of Blaine County residents who planned to use and enjoy the open and recreational uses for which Parcel C was dedicated; Tidwell is also among the limited class of Valley Club members, even a smaller class among the members who actually have a financial stake in the assets of the Valley Club. Ultimately, Plaintiffs have challenged the proposed duplex as nearby landowners, as parties that derive peculiar benefits from the aesthetic value of an undeveloped Parcel C, and as members of the exclusive Valley Club. Plaintiffs, as members of any one of these classes, are

threatened by certain injuries that would not be borne alike by all citizens of Blaine County. Accordingly, Plaintiffs' threatened injuries are not "generalized grievances," but injuries peculiar to a class.

As for the injury of lost aesthetic value, the Court's decision in *Selkirk-Priest Basin* does not preclude Plaintiffs from asserting this injury as one that is specialized and peculiarized. 128 Idaho 831, 919 P.2d 1032 (1996). In *Selkirk-Priest Basin*, the plaintiffs alleged injury to their environmental, aesthetic, and recreational interests in state lands, waters, and natural resources. 128 Idaho at 835. The court held that the plaintiffs had alleged only generalized grievances and, therefore, lacked standing because their affidavits indicated that they used the area, at most, two weeks out of the year. *Id*. But such is not the case with Plaintiffs here. Their use of the area surrounding Parcel C and their enjoyment of the aesthetic value offered by Parcel C (or that which would be offered by Parcel C if developed for its intended use), is far more frequent and regular.

E. The injuries in fact that Plaintiffs would suffer are easily redressed by the lower court's order.

The redressability element of Plaintiffs' standing is rather straightforward. The question is whether there is a "substantial likelihood that the judicial relief requested will prevent or redress the claimed injury." *Van Valkenburgh v. Citizens for Term Limits*, 135 Idaho 121, 124, 15 P.3d 1129, 1132 (2000). Here, the Court must answer in the affirmative. Defendants' threatened development of affordable housing on Parcel C will cause injuries to Plaintiffs in the several ways discussed above. Enjoining or preventing Defendants from pursuing their threatened development would spare Plaintiffs of these injuries.

III. THE DISTRICT COURT DID NOT ERR WHEN IT RULED THAT THE TERM "PUBLIC USE" WAS AMBIGUOUS.

On reconsideration, the District Court concluded that there were at least two conflicting, reasonable interpretations of the term "public use"—one that included community housing and one that did not. (R. at 439-45.) In reaching this conclusion, the District Court held, simply, that Plaintiffs' interpretation of the term "public use," as it is used in the Final Plat, was sufficiently reasonable so as to create a conflict, thereby rendering the term ambiguous. (R. at 443); *Latham v. Garner*, 105 Idaho 854, 858, 673 P.2d 1048, 1052 (1983) ("An instrument which is reasonably subject to conflicting interpretation is ambiguous."). Appellants now challenge that conclusion.

To establish that the term "public use" is unambiguous and in their favor, however, Appellants have the heavy burden of showing that Plaintiffs' interpretation of the term "public use" is wholly without reason, such that Appellants' proposed interpretation is the **only** reasonable one. This, Appellants cannot do. By contrast, and at least with regard to this particular issue on appeal, Plaintiffs are not obligated to prove that **Appellants'** proposed interpretation of "public use" is entirely **un**reasonable. To sustain the District Court's decision as to the ambiguity of "public use," Plaintiffs need only show that there is **some** reason to **their** interpretation, even if it conflicts with Appellants'. Plaintiffs easily clear this low bar.

Plaintiffs put the two interpretations best in their Memorandum in Support of Plaintiffs' Motion for Reconsideration, which the District Court cited to directly:

> The Court must wrestle with why the Valley Club would have labeled Parcel 'C' as 'Public Use' while labeling Block 2 as 'Community Housing' if it ultimately intended that community housing would be permissible on Parcel C. One permissible inference may be that community housing was one of the many uses to which Parcel C might be put. But the Court cannot ignore the other permissible inference, that the Valley Club meant that Parcel C would be used for something different than Block 2.

(R. at 443.) Herein lies what the District Court considered to be two reasonable interpretations of the Final Plat, which the District Court found was sufficient to render the term "public use" ambiguous. Appellants have failed to establish that the latter is unreasonable.

A. A reasonable interpretation of "public use," as used on the Final Plat, is that it excludes community housing.

When examining only the four corners of the Final Plat, and considering only its plain language, it would be perfectly reasonable for one to conclude that the label "public use" is meant to indicate something distinct from "community housing."

(1) The plain, ordinary meaning of the term "public use" does not include privately owned housing.

Interpretation of a plat must begin with the plain language of words used in it. *Kepler-Fleenor v. Fremont Cty.*, 152 Idaho 207, 212, 268 P.3d 1159, 1164 (2012) ("Again, this Court interprets the plat like a deed and will apply the plain language of the deed if it is unambiguous."). Those words must be given their "plain, ordinary and proper sense, according to the meaning derived from the plain wording of the instrument." *Chavez v. Barrus*, 146 Idaho 212, 219, 192 P.3d 1036, 1043 (2008) (internal quotation omitted).[5]

In spite of how other courts might interpret the Fifth Amendment's "public use" requirement, the plain, ordinary meaning of the term "public use" does not encompass the development of residential housing for private parties by a private entity. The dictionary definition of "public" is "accessible to or shared by all members of the community." *Definition of "Public,"* MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/public (last

[5] The *Chavez* Court was interpreting a deed, not a plat, but, as mentioned, this Court "interprets plat[s] like a deed . . . ." *Fleenor*, 152 Idaho at 212, 268 P.3d at 1164.

visited October 28, 2018).[6] Any form of private housing plainly falls outside this definition. Privately owned housing occupied by private individuals is neither accessible to nor shared by all members of the community. Accordingly, the average lay person giving "public use" its plain and ordinary meaning would not conclude that a parcel of land reserved for "public use" could be sold off to a private developer for the construction of a duplex to be sold to private individuals.

A lay person's understanding of "public use" is significant because the purpose of recorded plats is to give notice to prospective purchasers of what their land, or the surrounding land, can and will be used for. *See Villager Condo. Ass'n, Inc. v. Idaho Power Co*., 121 Idaho 986, 990, 829 P.2d 1335, 1339 (1992) (recorded plat map put party on constructive notice of utility easements). Naturally, most purchasers of land are not experienced attorneys, nor do they have an idea of how "public use" has been construed in eminent domain cases or elsewhere in the law. Thus, the plain and ordinary meaning of the terms used in a plat bear as much significance as any legal or technical meaning given to those terms in other contexts. No lay person would look at the plain, ordinary meaning of the term "public use" on a plat and be on notice that the land could be used by a private party to construct housing for private individuals. The plain, ordinary meaning simply does not support such a construction.

(2) It can be reasonably assumed that two distinct labels in a development plat indicate two distinct uses of land.

The Final Plat designates Block 2 for "Community Housing," which it defines as "development of 12 community housing units in accordance with the P.U.D. master plan." (R. at 443, 62 n. 8.) On the other hand, Parcel C is designated for "public use." (R. at 62.) By

[6] While Merriam-Webster provides seven distinct definitions of the word "public," the definition provided is the most applicable to the context of the Final Plat.

delineating Parcel C and Block 2 as separate and distinct areas on the plat, and giving them distinct labels, the Final Plat makes its intention clear—the two parcels are to be put to different uses. The plain language of the Final Plat indicates that Parcel C is to have some use distinct from the community housing to which Block 2 is dedicated. And the Final Plat goes one step further, affirmatively indicating that, rather than community housing, Parcel C is to be used for "public use." Excluding community housing from the definition of "public use" is the only interpretation that gives distinct meaning to all of the labels on the Final Plat, as is required. Appellants' proposed interpretation of the Final Plat would render Parcel C's "public use" label meaningless, conflating it with Block 2's "community housing" label, or with whatever other use or label that suits the County's fancy.

Under "the doctrine [of] *expressio unius est exclusio alterius*, 'the expression of one thing is the exclusion of another[.]" *Hewson v. Asker's Thrift Shop*, 120 Idaho 164, 166, 814 P.2d 424, 426 (1991). Under that doctrine, when the drafters of a document expressly mention something in one provision, it is implied that things not mentioned are excluded therefrom. *Idaho Press Club, Inc. v. State Legislature of the State*, 142 Idaho 640, 643, 132 P.3d 397, 400 (2006). That is precisely what the Final Plat does with regard to community housing. By indicating that Block 2 is designated for the development of community housing, it can be reasonably implied that other parcels or blocks not so designated are not to be used for the development of community housing, but for some other use.

The only instance in their Brief where Appellants directly challenge the reasonableness of Plaintiffs' interpretation of the Final Plat is on this issue. Appellants argue that "public use" is simply a broad term, broad enough to encompass affordable housing, and that "[a] broad category of allowed uses does not implicitly exclude a narrow subcategory." Appellants' Brief at p. 24. But this statement is unpersuasive because, in circular fashion, it assumes Appellants'

conclusion. There is no basis to conclude that "community housing" is a "subcategory" of "public use" unless one first adopts Appellants' boundless interpretation of "public use"—*i.e.*, that it includes "community housing." It remains perfectly reasonable to reject Appellants' assumption and conclude that "public use" and "community housing" are two distinct uses that are more or less mutually exclusive.

Appellants attempt to illustrate their argument by way of analogy: "a parking lot that has spaces restricted for handicapped parking does not mean that other spaces within the parking lot [cannot be used] for handicap[ped] parking." Appellants' Brief at p. 24. But this analogy only appears compelling because it relies on the underlying and universally known fact that unrestricted parking spaces can be used by anyone, not on any inherent strength in Appellants' logic. If the analogy is tweaked to avoid that issue, it loses its effect, and an alternative interpretation arises again. For example, if the parking area at an event center includes certain labelled lots—a blue lot, a red lot, and a yellow lot—and a guest with a pass to park in the blue lot finds that all the spaces are full, it would be reasonable for that guest to conclude that she cannot park in the red and yellow lots, as they are intended only for other guests.

So it is with the labels on the Final Plat. Looking only at the plat itself, and disregarding the variety of irrelevant eminent domain cases that interpret the term "public use" as used in the Fifth Amendment, none of which have any connection to the Final Plat, the Court cannot conclude that Parcel C's "public use" label necessarily encompasses Block 2's "community housing" label. It remains perfectly reasonable to interpret those two labels on the Final Plat as indicating two distinct uses.

The doctrine *expressio unius est exclusio alterius* becomes even more compelling when you step away from Appellants' binary world of general and handicap parking spaces and into the world of plats where a developer may use a wide variety of labels to express the patchwork

design of uses for various parcels of land. With each new label used on a plat, the reasonable assumption arises that the developer intends a use of that particular parcel that is distinct from the use intended for other parcels bearing different labels.

It is reasonable to interpret the Final Plat as implicitly excluding community housing from Parcel C by expressly designating it elsewhere. Thus, either the term "public use" must be interpreted as unambiguously excluding community housing or the District Court properly found the term ambiguous.

B. Appellants' proffered interpretation of "public use" is not supported by the Final Plat or any other relevant authority.

As mentioned before, to succeed on this issue on appeal, Plaintiffs need not show that their interpretation of "public use" is the **only** reasonable interpretation. Nor do Plaintiffs need to show that **Appellants'** interpretation of "public use" is **un**reasonable. Instead, Plaintiffs need only show that their interpretation of "public use" is one among reasonable, yet conflicting, interpretations, thereby supporting the District Court's conclusion that the term is ambiguous. Plaintiffs nonetheless argue here that Appellants' interpretation is unreasonable, only to show the relative strength of the two interpretations and to support the District Court's finding of ambiguity.

(1) Legal definitions and cherry-picked statutory uses of the term "public use" are not relevant to the interpretation of that term as it is used in the Final Plat.

When it comes to the ambiguity of "public use," Appellants speak out of both sides of their mouths. On the one hand, Appellants tell the Court that the term "public use" is unambiguous. On the other, Appellants ask the Court to look beyond the four corners of the Final Plat to varying statutory, constitutional, and judicial definitions. Appellants' Brief at pp. 23-24. Proper interpretation of the Final Plat must begin by examining its own plain language. The Final

Plat itself makes no reference whatsoever to the Idaho Constitution, or to federal jurisprudence on the condemnation power, which authority's interpretation of the Fifth Amendment's "public use" requirement seems to undergo a sea-change every other decade.

The Idaho Supreme Court has held that when a statutorily defined word has varying legal meanings, the statutory definitions cannot be used to define the term as used in a deed or plat. *Ida-Therm, LLC v. Bedrock Geothermal, LLC*, 154 Idaho 6, 10, 293 P.3d 630, 634 (2012). In *Ida-Therm*, the Court interpreted a deed that reserved "minerals" to the transferor of land. *Id*., 154 Idaho at 7, 293 P.3d at 631. The issue before the Court was whether the term "mineral," as used in a deed, encompassed geothermal resources. *Id*., 154 Idaho at 8, 293 P.3d at 632. It noted that there was no single dictionary or plainly understood definition of the term that answered the question. *Id*. 154 Idaho at 11, 293 P.3d at 635. The Court then turned to judicial or other legal definitions of the term to determine whether it was ambiguous. *Id*. It noted that the term had not been consistently defined in Idaho case law and that "it has no uniformly recognized legal meaning." *Id*., 154 Idaho at 10, 293 P.3d at 634. Indeed, other courts, including extra-jurisdictional courts, had arrived at a variety of definitions. *Id*.

Looking at statutory language, the court found that, while "some Idaho statutes recognize geothermal resources as minerals, others do not." *Id*., 154 Idaho at 11, 293 P.3d at 635. Ida-Therm argued that the statutory definition of "geothermal resources" under the Geothermal Resources Act ("GRA") must control the case, but the Supreme Court flatly disagreed. *Id*. at n. 1. It noted first that the GRA "deals with permitting for geothermal wells, not private conveyances of geothermal rights, which is the issue here." *Id*. The Court then directly refuted the contention Appellants make here that external legal definitions created for a different purpose should control interpretation of a deed or plat:

> It is rudimentary that a statute cannot override terms which exist outside its expressly fixed bounds; thus, the GRA's definitions have no control over the language of the Bell Deed. And any persuasive value that the Act might have, perhaps as evidence of the Legislature's intent to define mineral in a particular way, is undercut by other statutes that define mineral in a precisely opposite fashion.

Id. (internal citations omitted).

Appellants point to provisions discussing "public use" in the Idaho Constitution and the Idaho Code. Appellants' Brief at pp. 23-24. Just as in *Ida-Therm*, those provisions "have no control over the language of" the Final Plat, which is "outside [the statute's] expressly fixed bounds". *Ida-Therm,* 154 Idaho at 11, 293 P.3d at 635, n. 1. Further, the "definitions" cited by Appellants are not so much definitions of "public use" as examples of when the eminent domain power can be exercised. Appellants cite to Idaho Code section 7-701, which is entitled "Uses for which [condemnation is] authorized" and its prefatory language clearly restricts its relevance only to condemnation cases: "Subject to the provisions of this chapter, the right of eminent domain may be exercised in behalf of the following public uses . . . ."

The constitutional provision cited by Appellants likewise has no relevance or bearing on the issue before this Court. It is titled "Right of eminent domain" and its provisions are only applicable to determine when property can be condemned by the State. *See, e.g., Washington Water Power Co. v. Waters,* 186 F. 572, 574 (C.C.D. Idaho 1910). Just as the GRA was not evidence of intent to define "mineral" in the *Ida-Therm* deed in any particular way, neither here are the constitutional or statutory provisions on eminent domain evidence of any intent to broadly define the Final Plat's "public use" label in any particular way.

Further, just as in *Ida-Therm*, where varying statutory definitions precluded the statutes' use to define a particular term, there are far too many varying judicial and statutory definitions of the term "public use" for any one of those definitions to have any bearing on this case. For

example, the term "public use" is used frequently throughout the Idaho Code, and its meaning varies significantly therein. (R. at 287-88, 384) (listing instances in Idaho Code where "public use" cannot be understood to include community housing). "The Legislature's inconsistent approach to defining ['public use'] precludes the use of statutes to determine whether [public use includes community housing], and does nothing to resolve the ambiguity of ['public use'] here." *Ida-Therm*, 154 Idaho at 11, 293 P.3d at 635, n. 1. In short, Appellants cannot properly define the contours of the Final Plat's "public use" label by cherry-picking only the statutes and judicial decisions that support their preferred interpretation.

(2) The interpretation of "public use" proposed by Appellants is improper as it is meaningless, absurd, and self-defeating.

Ignoring that it is improper to look to statutory definitions to interpret the Final Plat, Appellants' definition of public use is so broad it renders the term meaningless or absurd under the circumstances. Appellants assert that, in the context of the Final Plat, the term "public use" means only that Parcels B and C must be used in some way that vaguely benefits the public. That would mean that wind turbines, sewer plants, stadiums, landfills, roads, and so on, would all be proper uses of Parcels B and C under the Final Plat. Certainly, the Valley Club—the drafter of the Final Plat—would not have dedicated the plat and signed the deed knowing the County could choose any "public use" no matter the impact on surrounding properties, compliance with the zoning ordinance, or the PUD decision. This is strongly evidenced by the explicit instructions to the Valley Club that Parcel C be used "for public open space or future recreational use as determined by the County and the Rec. District." (R. at 956 ¶ 37.)

But even taking Appellants at their word, their arguments are self-contradictory. They are asking this Court to find that there is a single, objective, unambiguous definition of "public use." Simultaneously, they are asking the Court to find that the County's determination of "public

use," whatever that may be at any given time, applies to the Plat. Appellants' Brief at pp. 22-23. If a term's meaning is subject to the County's shifting determinations of what, out of many things, "public use" means given changing situations and its interpretation of varying constitutional and statutory provisions, the term simply cannot be unambiguous.

Furthermore, the issue before the Court is not the scope of Blaine County's eminent domain power, which is the issue in the cases cited by Appellants. Rather, the issue is whether, considering the purpose of a plat is to divide property into lots for specified purposes and to give notice to property owners for which purposes their property and neighboring property can and cannot be used, *Oregon Short Line R.R. Co. v. Stalker*, 14 Idaho 362, __, 94 P. 56, 59 (1907), a fluid definition of a label on a plat frustrates those purposes. If the meaning of "public use" can change with the whims of those in office at any given time, the legitimate property interests of landowners are invaded and the plat fails to meet its intended purpose; that is, provide meaningful notice to anyone.

(3) Appellants' interpretation of the Final Plat would render the public dedication of Parcel C an impermissible exaction.

Appellants see no wrong in their argument that the County has exacted Parcel C from the Valley Club for "public use," however they choose to define that term. But the takings clauses of the United States and Idaho constitutions limit government authority to require developers to give up property in exchange for development approvals.[7] For any exaction, there must be a "substantial nexus" between the exaction and mitigating the impacts of the development. *KMST,*

[7] *See KMST, LLC v. Cty. of Ada*, 138 Idaho 577, 581, 67 P.3d 56, 60 (2003) (analyzing and citing *Nollan v. California Coastal Comm'n*, 483 U.S. 825, (1987) ("[T]here must be a nexus between a legitimate state interest and the condition imposed by the governmental entity when approving the development. That condition must serve the same governmental purpose as the restriction or limitation on development."); *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994) (requiring a "rough proportionality" between the government exaction and the impacts of the development)).

138 Idaho at 581. For example, the government cannot require a developer to erect statues of the county commissioners because a development creates traffic or a need for schools. There exists no nexus between the state interest of statutes and the added traffic caused by the developer's project. Further, there must be a "rough proportionality" between the amount of the exaction and the impacts of the project. *Dolan*, 512 U.S. at 391.

A wholly unrestricted transfer of Parcel C to the County, as Appellants advocate, plainly fails the substantial nexus test. Under Appellants' argument, nothing prevents the County from using Parcel C as a monument to the county commissioners, or from using it for some other purpose that bears no nexus to the impact of the development. As it so happens, using Parcel C for open space was precisely intended to mitigate the negative effects of the development proposed elsewhere on the Final Plat. (R. at 477-79, 837, 947 ¶ 10, 948 ¶ 15.)

To the extent the Final Plat violates either the "substantial nexus" or "rough proportionality" tests, it is an illegal contract and is unenforceable. "Idaho has long disallowed judicial aid to either party to an illegal contract." *Farrell v. Whiteman*, 146 Idaho 604, 609, 200 P.3d 1153, 1158 (2009). "No principle in law, perhaps, is better settled than that which, with certain exceptions, refuses redress to either party to an illegal contract . . . ." *McShane v. Quillin*, 47 Idaho 542, 277 P. 554, 559 (1929). Contracts should also be interpreted in favor of validity. Therefore, contracts must be construed to avoid an interpretation that makes the contract illegal. "Further, as between two permissible constructions, that which establishes a valid contract is preferred to one which does not, since it is reasonable to suppose that the parties meant something by their agreement, and were not engaged in an attempt to do a vain and meaningless thing." *Morgan v. Firestone Tire & Rubber Co.*, 68 Idaho 506, 519, 201 P.2d 976, 983 (1948). On these bases, it would be improper to construe that Final Plat as conferring upon the County an unlimited power to use Parcel C as it pleased.

C. Whether the merger doctrine applies is irrelevant to the issues before the Court.

Appellants contend that the District Court erred because it failed to apply the merger doctrine to exclude extrinsic evidence relating to the intent of "public use," as that term is used in the Final Plat. Appellants' Brief at pp. 25-26. But the application of the merger doctrine is conditioned on there being no ambiguity in the final document to which the doctrine is applied. *Camp Easton Forever, Inc. v. Inland Nw. Council Boy Scouts of Am.*, 156 Idaho 893, 899, 332 P.3d 805, 811 (2014) ("If the deed is ambiguous, then CEF and the Edwardses argue they may use the Minutes to explain any ambiguity. However, if the deed is unambiguous, the merger doctrine applies. . . . Accordingly, this case comes down to one question: whether the deed is ambiguous."). Thus, Appellants' contention that the merger doctrine applies merely brings the Court right back to the question discussed more fully above: whether "public use," as used in the Final Plat, is ambiguous. Because it was proper for the District Court to find ambiguity in the term, the merger doctrine has no application to this case.

IV. THE DISTRICT COURT DID NOT COMMIT CLEAR ERROR IN RULING THAT THE PARTIES INTENDED TO RESTRICT PARCEL C TO OPEN SPACE OR RECREATIONAL USE.

The District Court considered a significant amount of evidence—documents, oral testimony, recordings of public hearings, etc.—all about the intent behind Parcel C's "public use" label. Indeed, three days of trial were dedicated to this primary question. The District Court then wrote 18 pages summarizing this evidence and analyzing its relevance to the parties' intent for Parcel C. (R. at 947-64.) Ultimately, the District Court concluded that there was "no evidence that any party or individual intended or considered Parcel C to be used for anything other than open space or recreational use." (R. at 959.) There is simply no basis to argue now that the District Court did not rely on substantial and competent evidence in reaching this conclusion.

A. The District Court determined the intent of the Valley Club in drafting the Final Plat and considered objective, competent parol evidence to do so.

After deeming a plat ambiguous, a Court must determine the drafter's intent. *Kepler-Fleenor v. Fremont Cty.*, 152 Idaho 207, 211, 268 P.3d 1159, 1163 (2012). Interpretation of an ambiguous document presents a question of fact. *Union Pac. R.R. Co. v. Ethington Fam. Tr.*, 137 Idaho 435, 438, 50 P.3d 450, 453 (2002). As mentioned above, "this Court's place in reviewing a trial court's findings of fact and conclusions of law is one of restraint." *Lunneborg*, 163 Idaho at 865, 421 P.3d at 196. This Court will not disturb a District Court's finding of fact unless the finding is clearly erroneous, which is to say the finding is not supported by substantial and competent evidence. *PacifiCorp*, 153 Idaho at 767, 291 P.3d at 450. Evidence is substantial if a reasonable trier of fact would accept it and rely upon it in determining whether a disputed point of fact has been proven. *Id*. at 768.

The District Court reviewed all of the evidence presented in a three-day trial, summarizing much of it in its Findings of Fact, (R. at 947-64), and ultimately decided that Parcel C was never intended to be used for anything other than open space or recreational use. (R. at 959.) Appellants essentially ask this Court to weigh the evidence anew, insisting that the District Court did not properly place enough weight on the few documents that supported their position or on the oral testimony that they considered to be most credible. This would be improper. The District Court's Findings of Fact serves essentially as a laundry list of all of the reasons why Parcel C must be preserved for open space or recreational use. In their appeal, Appellants do nothing to challenge this list, other than vaguely claim that the District Court based its conclusion on erroneous documents, among other things.

Much of the Appellants' theory of this case relies on the events of a May 19, 2005 hearing, the recording of which was available at trial. In that hearing, the Developer's

representative, Mr. Riscutto, offered to modify the draft plat to leave the use of Parcel C "more open" instead of trying to define a specific use for the parcel, such as a fishing pond. (R. at 950.) Upon this suggestion, and after it was recommended that Parcel C be called a "community" parcel, the parties agreed to begin referring to Parcel C as a "public use" parcel. (R. at 950.) Appellants insist that this moment in time instigated a dramatic shift in what the parties intended Parcel C to be used for. Under Appellants' theory, Mr. Riscutto didn't just offer to leave the use of Parcel C "more open," he offered to blow it **wide** open. Indeed, Appellants claim that at some point in the plat approval process, the intended use for Parcel C became so entirely untethered from its original required use for open space that the County was essentially given a blank check to do whatever it pleased with the parcel. Any later references to Parcel C being used for open space or recreation, Appellants contend, were merely typos, as that original limitation had been obliterated by Mr. Riscutto's suggestion.

But there exists little circumstantial evidence to support this theory. Again, the suggestion that Parcel C's use be left "more open" does not permit the inference that the County was now free to do whatever it pleased with Parcel C. While "public use" is, consistent with Mr. Riscutto's suggestion, a fairly broad term, there exist numerous uses to which Parcel C could be dedicated that would both function as a "public use" as well as open space or a recreational use. There is nothing about the change in Parcel C's label that suggests the County was suddenly free to do something with the parcel that neither party had previously anticipated. The District Court concluded as much, finding, for example, no documentary evidence that changing a reference to Parcel C from "County Recreation Parcel" to "south Public Use parcel" reflected "deliberations of the County Commission or any negotiations with the Valley Club." (R. at 960.)

Appellants also contend that the District Court's own Findings of Fact demonstrate that there was no limitation intended for Parcel C other than "public use." In support of this claim,

Appellants quote scattered paragraphs from the District Court's Findings of Fact, pulled largely out of context. Appellants' Brief at pp. 28-29. But the District Court's actual conclusion is evident: while the parties obviously agreed to change the label given to Parcel C, the evidence showed that despite this change, the parties still intended to meaningfully limit the potential uses of the parcel.

B. There was no error in the District Court's conclusion that the County had obtained only a limited property interest in Parcel C.

Upon its determination that Parcel C was limited to open space and recreational use, the District Court discussed the property interest held by the County. Under Idaho law, the acknowledgment and recording of a plat is "equivalent to a deed in fee simple of such portion of the premises platted as is on such plat set apart for public streets or other public use, ..." Idaho Code § 50-1312. This Court has explained the law as follows:

> The recording of a plat is equivalent to a deed in fee simple, but it is not a deed in fee simple: "While the acknowledgment and recording is equivalent to a deed in fee simple, it is not a deed in fee simple, and does not give the public the same right to sell or dispose of the same that a private party has to land for which he holds the title in fee simple." *Shaw v. Johnston*, 17 Idaho 676, 682, 107 P. 399, 399–400 (1910). When land is dedicated as a street for public use, the landowner owns to the center of the street and the public acquires an easement, not a title in fee simple.

Neider v. Shaw, 138 Idaho 503, 507, 65 P.3d 525, 529 (2003).

Of course, the particular circumstances here are unique, as the District Court noted, because Parcel C was conveyed via what purported to be a warranty deed, not simply by operation of statute. (R. at 966 ¶ 11.) However, the result remains the same because the intent of the parties to the deed is clear: the County was to obtain Parcel C for "public use," as that term was to be understood under the Final Plat. The deed itself acknowledges as much, stating that the parcel was conveyed "according to the official plat[.]" (R. at 61.) And it is undisputed that the

conveyance of Parcel C via deed was merely a step made pursuant to and concurrent with the recording of the Final Plat. (R. at 946, ¶ 4.)

Ultimately, despite what the deed might say, Plaintiffs assert the rule announced by *Neider* is the right one and that only an easement was conveyed as a matter of law. This construction prevents government overreach and ensures that property exacted by the government is returned to its owner free of the easement if the government does not use it for its intended purpose. The only other alternative construction permitted by Idaho law is that the County held a "determinable fee" in Parcel C. *Mochel v. Cleveland*, 51 Idaho 468, 5 P.2d 549 (1930). Plaintiffs are not aware of any substantive difference between the interests conveyed by an easement or a determinable fee.

In any case, the parties agree that the use to which Parcel C may be put is limited by its "public use" label on the Final Plat, however that phrase is ultimately construed. Since the District Court has determined that this label is no more expansive than use for open space or recreation, whatever property interest Blaine County once had, or that the BCHA has now, is limited in that fashion.

C. The District Court properly considered and weighed the testimonies of Tom Bergin and Tom Bowman.

Appellants ask this Court to reconsider how the District Court weighed Tom Bergin's testimony against the documentary and other evidence in the case. They insist that where Bergin's testimony conflicted with numerous, contemporaneous documents, the District Court should have sided with the former. But "[t]he province of weighing conflicting evidence and testimony, and judging the credibility of witnesses, belongs to the trial court." *Latvala*, 485 P.3d at 1137 (2021). As long as the evidence is such that "a reasonable trier of fact would accept it and rely upon it in determining whether a disputed point of fact has been proven," *PacifiCorp*,

153 Idaho at 768, there is no basis for this Court to overturn the District Court on appeal. Such is the case here. The District Court's Findings of Facts details the extensive, contemporaneous, documentary evidence supporting its conclusion that the parties always intended Parcel C to be limited to open space or recreational use. Any trier of fact could reasonably accept and rely on such compelling evidence. No part of Bergin's testimony was sufficiently compelling to the District Court, or corroborated, so as to overcome the weight of evidence in favor of Plaintiffs. As it so happened, the District Court concluded that Bergin's testimony was "contradicted by the overwhelming weight of the written record and testimony from the decision makers of the respective parties." (R. at 963 ¶ 61.) Again, there is no basis to disturb the District Court's weighing of the evidence on appeal.

As for Tom Bowman, Appellants complain that the District Court relied on one particular element of his testimony as opposed to others. Appellants also contend that the District Court mischaracterized Bowman's testimony. But that is hardly the case. In paragraph 54 of its Findings of Facts, the District Court details a specific question posed to Bowman and his answer. (R. at 961.) In paragraphs 53 and 55, the District Court merely restates the question verbatim, along with Bowman's answer in the affirmative. (R. at 961.) Furthermore, even if any of the District Court's use (or, alleged misuse) of Bowman's testimony was error, the error was harmless because there is otherwise substantial evidence supporting the District Court's ultimate conclusion. (*See generally* R. at 945-69.)

Apart from the particulars, Appellants' position regarding how governmental intent is determined in a case like this is troubling. The Final Plat was a product of a land use procedure where the decision was required to be in writing and supported by a "reasoned statement." Idaho Code § 67-6535. This requirement allows the applicant and members of the public to have a clear understanding of what was decided and to determine whether or not to challenge the action

within the statutory timeframes. We should be very leery of after-the-fact testimony by governmental officials to rewrite what is otherwise a well-recorded history. While the issue is not before the Court, Plaintiffs would argue such testimony should not be allowed at all.

ATTORNEYS' FEES AND COSTS ON APPEAL

Plaintiffs respectfully request their attorneys' fees and costs on appeal as allowed under Idaho Code sections 12-117, 12-121, and Idaho Appellate Rules 40 and 41. Plaintiffs seek these fees and costs on the same bases as they sought their fees and costs in their Memorandum of Fees and Costs to the District Court. (R. at 973-85.) Put simply, Appellants on appeal continue to assert the same argument that is not at all reasonable per the facts of the case—that despite the recommendation of the P&Z that Parcel C be used for open space and recreation, and subsequent and extensive back-and-forth negotiations with the County as to the proper community-focused use of Parcel C, the Valley Club ultimately granted the County a blank check to do anything it pleased with Parcel C, even something that has no connection at all to the limitation the parties agreed upon.

Furthermore, this appeal constitutes yet another attempt by Appellants to assert the failed arguments that Plaintiffs lack standing and that "public use" is unambiguously in Appellants' favor. (*See* R. at 982.) Plaintiffs have been forced to defend against these failed arguments time after time, incurring further expense with each instance. Plaintiffs should not be required to continue bearing the fees and costs necessary to defend against these failed and unfounded arguments.

CONCLUSION

There was no error in the District Court's decision that Plaintiffs had standing and that the Final Plat's "public use" label was ambiguous. Furthermore, there is no basis for this Court to re-weigh the evidence presented at trial, as Appellants request. The overwhelming weight of the

evidence in this case showed that Parcel C was always intended for open space or recreational use. Appellants' dogged efforts to rewrite this history constitutes nothing short of gross government overreach. For the foregoing reasons, Plaintiffs respectfully request that this Court affirm the District Court's holdings as to the issues addressed herein.

Respectfully submitted on November 2, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of November, 2021, I caused to be filed and served true and correct copies of the foregoing document to the person(s) listed below by the method indicated:

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