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COPY

IN THE SUPREME COURT OF THE STATE OF IDAHO

THE STATE OF IDAHO, IDAHO  
TRANSPORTATION BOARD,

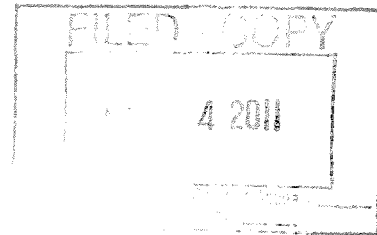
*Plaintiff-Respondent,*

v.

HJ GRATHOL, a California general partnership,

*Defendant-Appellant.*

Docket No. 38511



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**RESPONDENT'S BRIEF ON APPEAL**

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Appeal from the District Court of the First Judicial District, State of Idaho,  
County of Kootenai, Case No. CV-2010-10095  
Honorable Lansing Haynes, District Judge, presiding

---

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## I. INTRODUCTION

The Plaintiff in this case is the State of Idaho, Idaho Transportation Board. The Idaho Transportation Board is composed of citizen members appointed by the Governor. It serves as the policy-making body of the Idaho Transportation Department (“ITD”). Except where otherwise noted, the Plaintiff shall be referred to as “ITD.”

ITD filed this action to condemn a portion of real property owned by Defendant-Appellant HJ Grathol, a California limited partnership (“Grathol”). The condemned property is needed as part of the ITD project to widen and improve U.S. Highway 95 (“US-95”) between the communities of Garwood and Sagle in north Idaho.

Pursuant to Idaho Code § 7-721, ITD moved for possession of the condemned property prior to trial. The district court granted ITD’s motion following an evidentiary hearing and finding that the four statutory requirements for possession under § 7-721 were met. Grathol has appealed the district court order granting possession.

Grathol makes two arguments on appeal: (1) that the Director of ITD cannot authorize and execute an administrative order of condemnation by the Idaho Transportation Department; and (2) that ITD is condemning more property than identified in ITD’s Complaint.

This appeal has no basis in law or fact and should be denied on the following grounds. First, the Director of ITD has both statutory and administrative authority to authorize and execute an administrative order of condemnation on behalf of ITD. Second, ITD is not condemning any property other than the property identified in its Complaint.

## II. ISSUES ON APPEAL

1. May the Director of the Idaho Transportation Department, as the technical and administrative officer of the Idaho Transportation Board, authorize and execute administrative orders of condemnation on behalf of the Idaho Transportation Department.

2. Is ITD condemning property from Grathol other than the property identified in ITD’s Complaint.



3. ITD requests that it be granted its attorney fees on appeal under I.C. § 12-121. The appeal has no basis in law or fact, and would require the Court to disregard numerous statutes which directly contradict Grathol's appeal. In addition, none of the issues stated by Grathol are the proper subject of an interlocutory appeal under I.C. § 7-721 or Rule 54(b), the issues stated are not consistent with the Rule 54(b) application by Grathol and the Rule 54(b) certification by the district court. Therefore, attorney fees should be awarded to ITD under I.C. § 12-121.

### III. STATEMENT OF THE CASE

#### A. The Idaho Transportation Board.

The Idaho Transportation Board is a citizen board whose members are appointed by the Governor. I.C. § 40-302. The Idaho Transportation Department is divided into six districts. I.C. § 40-303. One Board member is appointed from each of the six districts, and a seventh, at-large member, is appointed to serve as chairman. *Id.*

The Board is the policy-making body of the Idaho Transportation Department. It meets twelve (12) times per year, generally once per month. I.C. § 40-308. Its primary function is to decide what state highway projects will be built, when, and in what order of priority. I.C. § 40-310. State highway projects include both construction of new state highways, reconstruction and improvement of existing highways, and major maintenance projects on existing highways. The decisions of the Board are based on recommendations from the District Engineer of each of ITD's six districts, with input from other state agencies, city and county governments, business interests, and private individuals.

#### B. The ITD Project.

The Idaho Transportation Department is engaged in a project to widen and improve a section of US-95 between the communities of Garwood and Sagle in north Idaho ("the Project"). In 2002, ITD initiated a comprehensive study of US-95 between Garwood and Sagle. R. at 157, ¶ 4 (Minzghor Aff., ¶ 4). The study determined that US-95 should be redesigned and expanded to improve public safety and enable the highway to accommodate increasing traffic volumes. *Id.*

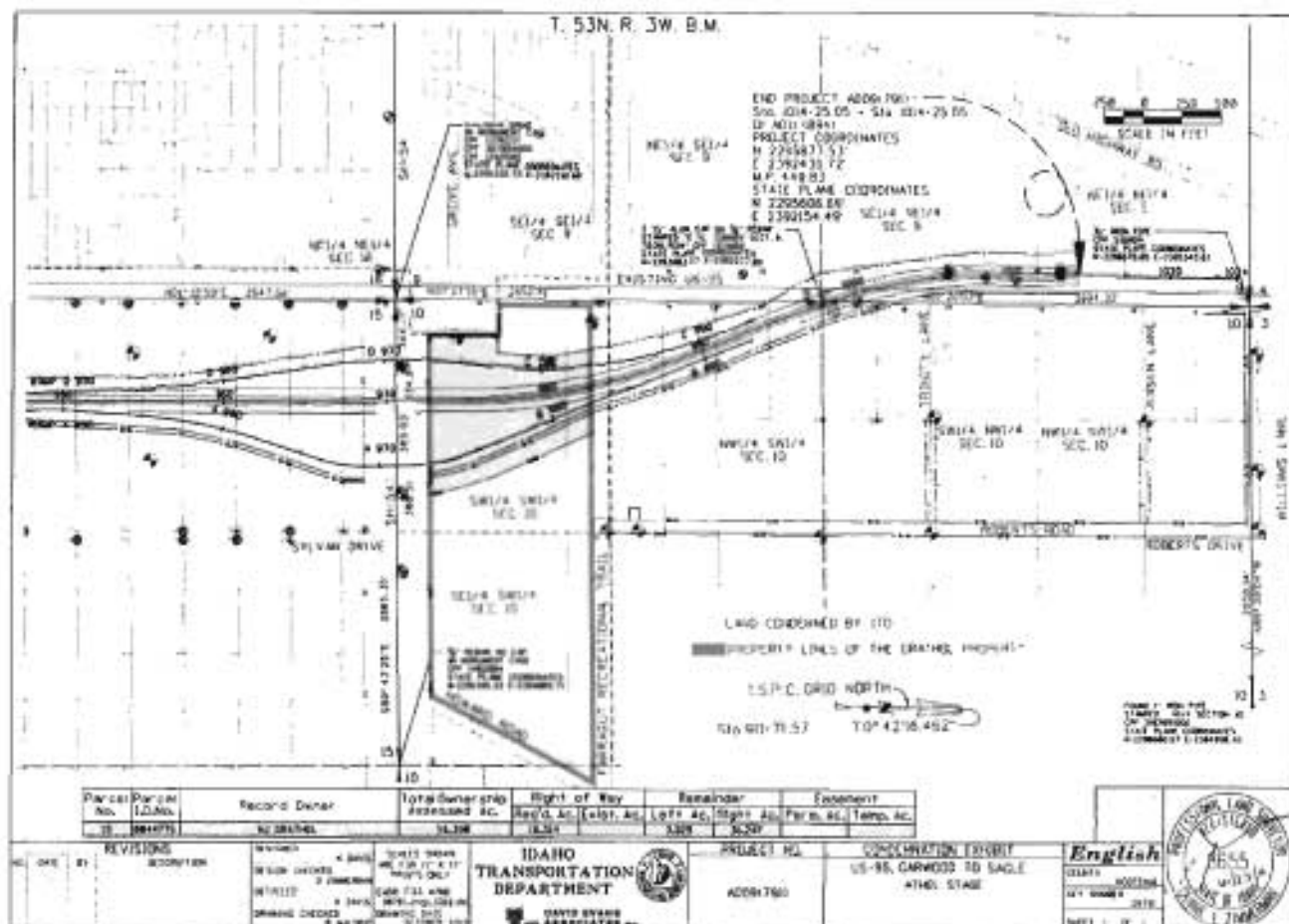
Due to the size of the US-95 Garwood to Sagle Project, it has been divided into seven segments. R. at 158, ¶ 6. The Grathol property is located in the “Athol Segment” of the Project, ITD Project No. A009(791), Key No. 9791. *Id.* The Athol Segment will convert approximately 1.8 miles of US-95 from a two-lane, Type III access highway to a four-lane divided and access-controlled highway. R. at 158, ¶ 7. The Athol Segment will also construct an interchange with Highway 54 just outside of the town of Athol. *Id.*

**C. The Grathol Property.**

The Grathol property is located in Kootenai County, outside the town of Athol, at the northeast corner of present US-95 and Highway 54. Before the Project, the total area of the Grathol property was 56.81 acres. The property condemned, shown in Exhibit B to the Complaint (*see* R. at 11) is 16.314 acres, leaving Grathol with 40.496 acres after the taking. A metes and bounds legal description of the 16.314 acres condemned in the Complaint is attached as Exhibit A to the Complaint. R. at 7-9.

The construction plan sheets for the US-95 Project specific to the Grathol property are attached as Exhibit B to the Complaint. R. at 11-15. These plan sheets identify and define the taking on the Grathol property and the US-95 highway improvements to be constructed on the Grathol property. These plan sheets also identify and define the property proposed for condemnation in the administrative order of condemnation. R. at 16, ¶¶ 2, 3 (admin. ord. of condemn., at 1, ¶¶ 2, 3).

The following is an enlarged view of the primary construction plan sheet contained in Exhibit B of the Complaint. It shows the Grathol property outlined in green, with the condemned property shaded in yellow. It also shows the construction that will occur on the condemned property in the area shaded in yellow.



Below the area shaded in yellow is the location where Sylvan Road would have been constructed by ITD if Grathol had agreed to dedicate the land for that purpose. The diagram also shows Roberts Road to the right (north) of the Grathol property and the connection of Roberts Road with Williams Lane (far right), which provides the additional access to the road system sought and obtained by Grathol's neighbors to the north.

Both the administrative order of condemnation and the Complaint use the construction plans to identify and define the property to be condemned from Grathol. As the construction plans plainly show, ITD is not condemning any of the Grathol property for construction of Sylvan Road. The only property being condemned is shown in yellow and the only improvements being constructed is the new US-95, also shown in yellow. By admitting that the Complaint does not condemn any property for Sylvan Road (Appellant Br., at 31), Grathol

admits that the administrative order also did not identify any land to be condemned for Sylvan Road.

**D. The Idaho Transportation Board Approved The US-95 Project.**

The Idaho Transportation Board repeatedly approved the US-95 Project. R. at 166-167, ¶¶ 6, 9-12 (Vogt Aff., ¶¶ 6, 9-12). The Board approves state highway projects (construction of new highways, reconstruction and improvement of existing highways, and major maintenance projects) through adoption of the annual Idaho “Statewide Transportation Improvement Program” (“STIP”). R. at 155, ¶ 10.

Grathol mischaracterizes the STIP program as a “funding mechanism.” In fact, the STIP program is an exhaustive, year-long process culminating in the selection and approval of state highway projects by the Idaho Transportation Board. The process includes public hearings by the Board and the solicitation of public comment from state and local governments, business interests, and private individuals. It is the process through which the Idaho Transportation Board decides which projects will be built, when, and in what order. In addition, prior to adoption of the STIP each year, the Board affirms that all federal requirements for public involvement and comment have been met. *See, e.g.*, R. at 191.

Every year, after months of preparation, public hearings, and public comment, the Board approves a STIP. This decision constitutes the Board’s formal decision on and approval of the state highway projects that are to be undertaken for the next five years. R. at 167, ¶ 11. An approved project is generally included in the STIP for five years, marking its progress from design and determination of route, to right-of-way acquisition, through construction and completion. The US-95 Garwood to Sagle Project has been approved by the Board in each annual STIP since 2005. R. at 166-170. *See also* R. at 175-260 (Vogt Aff., Exs. 2-11) (Board approvals and adoptions of annual STIPs for fiscal years 2005-2010).

Idaho law requires the Board to hold public hearings before making its final decision on the location and route of an individual state highway project. I.C. § 40-310. The Board is required to serve written notice of these hearings, by certified or registered mail, on all private

property owners like Grathol whose property will be acquired for the project, either through purchase or condemnation. I.C. § 40-310(1)(a). This process is controlled and directed by the Board and occurs long before an administrative order of condemnation is executed. *Id.* The Board must also satisfy federal requirements for public hearings and comment. *See, e.g.*, R. at 191 (“Whereas, the STIP was developed in accordance with all applicable federal requirements including adequate opportunity for public involvement and comment.”).

**E. The Board Approved The Acquisition Of All Properties Needed For The US-95 Project.**

The Idaho Transportation Board approved both the route of the US-95 Project and the acquisition of each parcel of land needed for the Project, including the Grathol property. *See infra* Section IV(B)(6). The Board’s approval of the condemnation of a portion of the Grathol property occurred long before the administrative order of condemnation was executed by the Director of ITD. *Id.*

**F. Events Prior To Condemnation Of The Grathol Property.**

After approving the US-95 Project, its route, and the properties to be acquired, ITD began the process of design, right-of-way acquisition, and contract bidding. ITD’s record of right-of-way negotiations show that ITD served the right-of-way acquisition packet on Grathol’s representatives on June 19, 2010. This packet included the statement of property owner rights required under I.C. § 7-711A, plans showing the location and route of the project across the Grathol property and specifically showing the portion of the Grathol property to be acquired, and a copy of an appraisal of the Grathol property commissioned by ITD. With the packet delivered on June 19, 2010, ITD conveyed to Grathol its offer to purchase the portion of property needed for the US-95 Project for \$628,100. Tr. at 17-18. Grathol rejected the offer in late June, demanding instead the payment of between \$2.5 and \$3 million. Tr. at 18.

After being unable to reach agreement with Grathol for the purchase of its property, ITD initiated the administrative process to prepare for condemnation of the property. The legal department of ITD prepared the administrative order of condemnation. The Director of ITD signed the administrative order of condemnation on November 17, 2010, along with the Right of

Way Manager, Chief Engineer, and Legal Counsel. R. at 16-18 (Ex. C to ITD's Compl.) (admin. ord. of condemn.). The Director signed on behalf of the "Idaho Transportation Department." R. at 18. The order expressly noted the Board's prior approval of the acquisition of the Grathol property: "The Board, having considered the report and recommendations of the State Highway Administrator, and having duly considered the matter finds . . . ." R. at 16.

The Director is authorized by statute and by the Idaho Transportation Board to authorize and execute administrative orders of condemnation for parcels of land needed to complete state highway projects approved by the Board. *See* I.C. § 40-505 (the Director has general supervision and control of all activities and functions of the Department); I.C. § 67-2403 (the Director is authorized to execute all powers and duties vested by law in the Department); ITD Board Policy B-03-01 (R. at 173-174) (the Director has authority to authorize and execute administrative orders of condemnation on behalf of the Board). The Director's authority to authorize and execute administrative orders of condemnation as to individual parcels of land "attaches at the time projects are approved by the Board[.]" *Id.* As noted above, Board approval of a project includes the route and location of the project and the acquisition of all properties needed for the project.

Thus, by the time the Director authorized and executed the administrative order of condemnation for the Grathol property, the Idaho Transportation Board had already formally approved, on repeated occasions, both the US-95 Project and the acquisition of the Grathol property. *See infra* Section IV(B)(6). This sequence of events occurs on all ITD projects and administrative orders of condemnation. *Id.*

**G. Only The Idaho Transportation Board Exercised The Power Of Eminent Domain.**

The State of Idaho, Idaho Transportation Board filed this condemnation action on November 19, 2010. R. at 1 (Complaint, at 1). As the Plaintiff, the Board is the entity that exercised the power of eminent domain. Prior to filing the condemnation Complaint, no power of eminent domain had been exercised by ITD, and no attempt to acquire the Grathol property by power of eminent domain had occurred.

**H. ITD Is Not Constructing Sylvan Road Across Grathol's Property.**

Jason Minzghor is the District 1 Project Development Engineer for ITD. The US-95 Project is in District 1 of the Idaho Transportation Department. As the District 1 Project Development Engineer, Mr. Minzghor is responsible for managing and administering the planning and design of state highway projects in District 1. R. at 157, ¶¶ 2-3.

Grathol contends that ITD is secretly condemning land for Sylvan or Roberts Road. However, the US-95 Project does not involve construction of Sylvan Road, and ITD is not condemning land from Grathol for the construction of Sylvan Road. As stated by Mr. Minzghor:

10. Contrary to the claim in Grathol's brief in opposition to the motion for possession of the property, ITD is not condemning any portion of the Grathol property in order to construct an extension of the Sylvan/Roberts Road as part of the US-95 Garwood to Sagle Project. ITD's Complaint does not seek to condemn any property from Grathol for construction of any such extension. The only property being acquired by ITD in this case is property needed for the realignment of US-95 and the construction of the Highway 54 interchange.

\* \* \*

17. In this eminent domain proceeding, ITD is not condemning any portion of Grathol's property for an extension of Sylvan/Roberts Road.

R. at 159-160 (Minzghor Aff., ¶¶ 10, 17). Grathol has not presented any testimony or any factual evidence to the contrary.

After an evidentiary hearing and based on uncontroverted testimony, the district court found that ITD is *not* condemning any land for Sylvan Road.

The order of condemnation does not provide or in this court's opinion does not provide for the taking of the defendant's property for the expansion of the Sylvan Road and Roberts Road. The contemplation of the expansion of Sylvan Road to link to Roberts Road is certainly mentioned in the order of condemnation, but more importantly, the complaint does not contemplate the extension of that road, and that is not the subject of the taking that is before this court. The Idaho Department of Transportation has offered to expand those roads through Grathol's property -- rather, the Sylvan Road expansion through Grathol's property, but that offer has been declined by the defendant and this has been testified to amply before the Court today and in Mr. Minzghor's deposition.

Tr. 61:2-16. Again, Grathol offered no contrary evidence to the district court.

**I. The Property Identified In The Administrative Order Of Condemnation Is Identical To The Property Later Condemned In The Complaint.**

The administrative order of condemnation identifies and defines the property to be condemned by reference to the Project construction plan sheets. *See* R. at 16, ¶¶ 2, 3. The plan sheets were then attached to the Complaint filed by the Idaho Transportation Board to identify and define the property condemned from Grathol. R. at 5, ¶ 18; 11-15. Thus, the property to be condemned from Grathol identified in the administrative order of condemnation is identical to the condemned property described in the Complaint. *Compare* R. at 5, ¶ 18; 11-15 (Compl., at ¶ 18 and Ex. B (construction plan sheets)) *with* R. 16 ¶¶ 2, 3 (admin. ord. of condemn., referencing the construction plan sheets). No change occurred in the construction plan sheets in the two days between execution of the administrative order of condemnation on November 17, 2010 (R. at 18), and the filing of the Complaint on November 19, 2010. (R. at 1).

**J. Grathol's Motive For Seeking Condemnation For Sylvan Road Is To Improperly Shift The Required Costs Of Its Development To The Tax Paying Public.**

Grathol's eagerness to have its land condemned for Sylvan Road begs the question – why? According to Grathol, “Defendant is an entity versed in the development and construction of commercial retail projects for profit. Defendant acquired the subject property, accomplished a zone change and has been actively engaged in pursuit of a development plan for the property.” R. at 91. In Idaho, cities and counties generally require developers of residential and commercial developments to construct the roads within the developments, and then dedicate those roads to the public with the plat. *See, e.g.*, I.C. § 50-1309 (requiring owners of new developments to “make a dedication of all public streets and rights-of-way shown on said plat”). The Grathol property is in Kootenai County. Kootenai County has adopted specific ordinances requiring dedications of roads within new developments.

Section 9-9-2 of the Kootenai County zoning ordinances regulating commercial zones requires that every “Commercial Lot shall have direct access from a public road.” *See* Appendix A., at 2. Thus, every individual lot within the 40-acre commercial development proposed by Grathol will, by law, have to have access from a public road. Similarly, Section 10-3-1(B)(4)(e)



of the Kootenai County zoning ordinances (identifying the services and infrastructure that the developer must construct to serve a commercial subdivision) requires “ [p]ublicly-maintained road access to each lot, as approved by the Highway District.” *See* Appendix B, at p. 33 of Ordinance. Section 10-3-1(D)(2) requires the interior roads constructed by the developer to meet highway district or ITD standards. “Road rights-of-way shall meet the requirements of the Highway District or, if applicable, ITD.” *Id.* at p. 35 of Ordinance. Section 10-3-1(D)(2) further makes clear that the developer will be required to dedicate the fully constructed roads within the development to the county or local highway district: “Except for gated communities and common driveways approved by the Board [of county commissioners], roads and associated rights-of-way *shall be dedicated to the applicable highway agency.*” *Id.* (brackets and emphasis added).

In summary, in order for Grathol to proceed with commercial development of its property, Kootenai County will require Grathol to construct internal roads within its development that meet highway district standards, so that each commercial lot will have the required direct access from a public road. To make the interior roads “public,” Kootenai County will require Grathol to dedicate the internal roads within its development to the local highway district.

Therefore, Grathol’s motive in trying to force ITD to condemn land for Sylvan Road is obvious. Under Kootenai County’s ordinances, Grathol will be required to construct the road at its expense and dedicate the road and the land to the county highway district as a condition of approval for commercial development of its property. By making the claim regarding Sylvan Road in this case, Grathol is trying to foist the costs of a commercial development onto the public that should rightfully and legally be borne by Grathol, the commercial developer. Regardless of its motive, Grathol cannot force ITD to condemn property for a *local street* or property that ITD *does not need* for a state highway project.

## IV. ARGUMENT

### A. Standard Of Review.

In eminent domain proceedings in Idaho, “all issues, whether legal or factual, other than just compensation, are for resolution by the trial court.” *City of Lewiston v. Lindsey*, 123 Idaho 851, 857, 853 P.2d 596, 602 (Ct. App. 1993) (citing *Rueth v. State*, 100 Idaho 203, 222-23, 596 P.2d 75, 94-95 (1978); *Tibbs v. City of Sandpoint*, 100 Idaho 667, 670, 603 P.2d 1001, 1004 (1979)). The court, and not the jury, is to determine “whether a taking occurred, the nature of the property interest taken, and when the taking occurred.” *Lindsey*, 123 Idaho at 857, 853 P.2d at 602. Thus, in ruling on ITD’s motion for possession of the Grathol property needed for the US-95 Project, the issue of the authority of the Director of ITD and the scope of the taking were properly decided by the district court.

In ruling on the scope of the taking, the district court necessarily made a factual finding that ITD is not condemning any property from Grathol for Sylvan/Roberts Road. A district court’s finding of fact will not be disturbed on appeal unless clearly erroneous. *See, e.g., Weitz v. Green*, 148 Idaho 851, 857, 230 P.3d 743, 749 (2010). A district court’s findings of fact are not clearly erroneous if they are supported by substantial and competent evidence, even if conflicting evidence exists. *Id.* Similarly, “[t]his Court will not substitute its view of the facts for that of the trial court.” *Id.* (quoting *Justad v. Ward*, 147 Idaho 509, 511, 211 P.3d 118, 120 (2009)). Prior to and at the evidentiary hearing on ITD’s motion for possession, Grathol offered no testimony or factual evidence to support its claim. All of the facts and testimony showed that ITD is not condemning land for Sylvan Road.

### B. The Director Of The Idaho Transportation Department Has Statutory And Administrative Authority To Authorize And Execute Administrative Orders Of Condemnation.

#### 1. Grathol’s Argument Has No Legal Support.

Grathol has not cited any Idaho statute or case that has declared that the Director of ITD may not authorize and execute an administrative order of condemnation. Grathol’s argument ignores the expansive statutory authority granted to the Director, including “general supervision

and control of all activities and functions” of ITD (I.C. § 40-505), and the authority to “execute the powers and discharge the duties vested by law in his department.” I.C. § 67-2403.

**2. Findings And Conclusion Of The District Court.**

At the hearing on ITD’s motion for possession, the district court made the following findings of fact and conclusions of law on this issue.

This court finds that the board, the plaintiff in the matter, does have the right to condemn property. Idaho Code section 40-311 provides that the board has the authority to condemn property. Idaho Code section 40-314 provides that the board has the authority to exercise any powers deemed necessary to fully implement and carry out the provisions of Title 40 which relate to highways or bridges, the subject matter of this particular litigation.

The board’s policy B-03-01 delegates the authority to condemn a property to the director of the Idaho Department of -- or Idaho Transportation Department. This court finds that the Idaho Transportation Department and its director are entities that are beneath, in the umbrella sense, the Idaho Transportation Board.

The board voted to approve this policy at its May 14, 2007 and August 20, 2008 regular meetings. Further, Idaho Code section 40-505 provides that the director or gives the director of the Idaho Transportation Department the authority to exercise all necessary incidental powers and enforce all rules and regulations of the board.

On November 17 of 2010, the director of the Idaho Transportation Department exercised that granted authority and issued or entered an order of condemnation regarding defendant’s property. That order of condemnation has now become part of and attached to by the State of Idaho, Idaho Transportation Department in the particular matter before the Court.

The board has approved this particular project in 2005 and has approved the project every year since by approving in its regular meetings the state transportation -- or the STIP, as it’s referred to, State Transportation Improvement Project.

The Idaho legislature has approved Garvee, G-A-R-V-E-E, funding for the project, which is codified in Idaho Code section 40-315, subsection 1, subsection B.

Tr. 59:14-61:2. The district court’s ruling is well supported in the law and by the facts in this case, and should be upheld on appeal.

**3. The Director Of The Idaho Department Of Transportation Has *Statutory Authority To Authorize And Sign An Administrative Order Of Condemnation.***

The legislature has given the Director of ITD broad powers of administration and execution of actions on behalf of the Idaho Transportation Department.

The director shall be the technical and administrative officer of the board and under the board's control, supervision and direction, shall have general supervision and control of all activities, functions and employees of the department. He shall enforce all provisions of the laws of the state relating to the department, the rules and regulations of the board, and shall exercise all necessary incidental powers.

I.C. § 40-505. (emphasis added).

Grathol contends that "incidental" powers means "minor" or "trivial" powers and could not mean that the Director may authorize or sign an administrative order of condemnation.

However, Black's Law Dictionary defines the term much differently than suggested by Grathol.

Incident power. A power that, although not expressly granted must exist because it is necessary to the accomplishment of an express purpose – also termed *incidental power*.

BLACK'S LAW DICTIONARY, 1207 (8th ed. 2004). Thus, the actual definition establishes that the term means important powers that "must exist" to accomplish the "express purpose" of being charged with "general supervision and control of all activities and functions" of ITD.

The Director's powers under § 40-505 are expansive and reflect the important role and status of the Director. This is particularly true since the Board only meets once a month (I.C. § 40-308), except in exigent circumstances, and is comprised of citizen representatives appointed by the Governor. The Director manages the daily operations of the Department and does all things necessary to implement and enforce the policies and transportation projects approved by the Board.

In Idaho, the head of a state department, referred to as the "director," is statutorily authorized to execute *all powers and discharge all duties* that are vested in that department:

Each department, unless specifically provided otherwise, shall have an officer as its executive and administrative head who shall be known as a director. *The director of each department shall, subject to the provisions of law, execute the powers and discharge the duties vested by law in his department.*

I.C. § 67-2403 (emphasis added). *See also* I.C. § 67-2406 (designating the Idaho Transportation Department an agency encompassed by § 67-2403). Thus, the Director of ITD is statutorily empowered to “execute the powers and discharge the duties vested by law in his department.” I.C. § 67-2403. Obviously, the power of eminent domain is one of the powers and duties vested by law in the Idaho Transportation Department. *See* I.C. § 40-311(1). No statute “specifically provides otherwise” or in any way bars the Director from authorizing and executing administrative orders of condemnation. Moreover, the only exercise of the power of eminent domain here is the filing of the condemnation complaint, which was filed by and in the name of the Idaho Transportation Board, not the Director.

**4. Grathol’s Narrow Construction Of The Exercise Of Statutory Powers By ITD Would Deprive The Director Of All Power And Render The Position Meaningless.**

Grathol contends that only the Idaho Transportation Board may take any action leading up to the exercise of the power of eminent domain. Grathol bases this argument on the fact that the statute conferring the power of eminent domain to the Idaho Transportation Department is I.C. § 40-311, which enumerates powers of the Board.

All *specific, enumerated* powers of the Idaho Transportation Department are set forth in statutes pertaining to the Board. *See* I.C. §§ 40-310 to 40-313, and 40-317. All powers of the Director are expansive, yet *general*. *See* I.C. §§ 40-505; 67-2403. Grathol argues that only the Board may exercise powers under the statutes that reference the Board. Consequently, since all specific, enumerated powers of ITD are codified under statutory provisions pertaining to the Board, if Grathol’s construction of these statutes is accepted, only the Board will be able to act under the enumerated powers of ITD. Therefore the Director, having no specific enumerated powers, will have no power, and will not be permitted to take any action on behalf of ITD or the Board. This cannot be the intent of the legislature in creating the position of Director and conferring on the Director expansive powers, including the power of “general supervision and control of all activities and functions” of ITD. I.C. § 40-505. Grathol’s construction is also unworkable, because the Board is comprised of citizen members who only meet once per month,

whereas the Director is a full time paid employee of the State of Idaho and is the only person in a position to manage the daily operations of ITD and execute its administrative functions – such as the authorization and execution of an administrative order of condemnation.

**5. The Director Of The Idaho Department Of Transportation Has Administrative Authority To Authorize And Sign An Administrative Order Of Condemnation.**

The legislature has authorized the Idaho Transportation Board to make rules and regulations regarding the manner in which the powers and actions of ITD are carried out. Idaho Code § 40-314(3) provides that the Board shall:

*(3) Exercise any other powers and duties, including the adoption of rules and regulations, deemed necessary to fully implement and carry out the provisions of this title and the control of the financial affairs of the board and the department.*

I.C. § 40-314 (emphasis added). Therefore, the Board has the statutory authority to implement rules regarding the internal ITD processes which lead to the Board’s exercise of the power of eminent domain.

The Board of ITD has adopted rules which authorize the Director to implement and carry out the policies and transportation projects approved and adopted by the Board. Among these rules, the Board has given the Director authority to authorize and execute administrative orders of condemnation to implement projects approved by the Board:

*The Director, or a delegate, is authorized to purchase, sell, exchange, and execute corresponding deeds for real estate parcels. The Chief Engineer, or a delegate, with the concurrence of the applicable District Engineer, may authorize an administrative settlement of up to \$200,000 over the reviewed fair market value of the property. The Director is further delegated authority to authorize and execute on behalf of the Board an Order of Condemnation for individual parcels of land. The authority to condemn shall be attached at the time projects are approved by the Board and made part of the ITD Project Development Schedule and shall include projects in the preliminary development schedule.*

R. 173 (Idaho Transportation Board, Policy B-03-01) (emphasis added). *See also* R. at 166 (Vogt Aff., ¶ 7). The key provisions of this policy for purposes of this appeal are the fact that the Director may only authorize and execute administrative orders of condemnation “on behalf of the Board” and only as to projects that “are approved by the Board.” Thus, the administrative

order of condemnation in this case begins “The Board, having considered the report and recommendations of the State Highway Administrator and having duly considered the matter, finds: . . . .” R. at 16.

Board Policy B-03-01 properly reflects the Director’s statutory authority as the “technical and administrative officer of the board” and his statutorily-conferred “*general supervision and control of all activities, functions and employees of the department.*” I.C. § 40-505 (emphasis added). Board Policy B-03-01 also properly reflects the Director’s statutory power and authority to “*execute the powers and discharge the duties vested by law in his department.*” I.C. § 67-2403 (emphasis added).

Policy B-03-01 was formally enacted by the Board on March 18, 1997, and has been in place for 14 years. R. at 166 (Vogt Aff. ¶ 8). Since that time, hundreds of administrative orders of condemnation in dozens of state highway projects have been executed in accordance with this policy. *Id.*

**6. The Idaho Transportation Board Approved The US-95 Project And The Acquisition Of The Grathol Property For The Project.**

The Director signed the administrative order of condemnation on November 17, 2010. Based on that date, Grathol relies on the minutes of the November, 2010 meeting of the Idaho Transportation Board for its contention that the Idaho Transportation Department did not approve the US-95 Project or the acquisition of the Grathol property because no such approval is reflected in the minutes of the Board meeting. Grathol further contends that the Board failed to make those decisions in an open meeting.

Grathol’s argument again reflects its lack of understanding of the process for approving state highway projects and the acquisition of private property for transportation projects, and the role of the Idaho Transportation Board in that process. In claiming that the Board did not approve the condemnation of its property, Grathol points to the wrong date, at the wrong stage in the US-95 Project, and the wrong documents. Grathol also ignores the fact that the Director signed the administrative order of condemnation, not in his individual capacity, but on behalf of

the Idaho Transportation Department. Grathol further ignores the fact that the order acknowledges the Board's prior determination of the need for a portion of the Grathol property and the findings of the Board on that issue. *See* R. at 16 (admin. ord. of condemn.).

The Board is involved in and makes the decision to acquire property, by purchase or condemnation, through its year-long involvement in the STIP process. As previously noted, the STIP program is the formal process by which the Board selects and approves individual state highway projects for construction. Prior to approving the location and route of a project, and prior to adoption of the STIP each year, the Board holds public hearings and takes public comment in accordance with Idaho Code § 40-310(1). In addition, prior to adoption of the STIP each year, the Board affirms that all federal requirements for public involvement and comment have been met. *See, e.g.*, R. at 191.

Under Idaho Code § 40-310(1), the Board holds hearings during the course of the STIP process in the nearest city in each area affected by or within which a state highway project is proposed for construction. The hearing must be held before the Board makes its decision approving the project. *Id.* As part of that process, ITD is required to serve written notice “setting forth the action proposed to be taken by the board” on the mayor of any city affected by the proposed state highway project and “upon all property owners from which acquisition of right-of-way is necessary and from which property must be purchased, by certified or registered mail[.]” *Id.*

All property owners whose property will be acquired for a project are entitled to appear before the Board and be heard. “At the hearing, a property owner from which right-of-way is necessary to be acquired and from which that property must be purchased . . . may appear, voice objections to the action proposed to be taken by the board, and may present evidence and call witnesses in support of their objections.” *Id.* The Board then issues written decisions on the objections, and property owners who object to a decision may appeal the Board's decision directly to the district court. *Id.* It is through this process that the Board specifically approves the acquisition of the parcels of property to be acquired for each state highway project. *Id.*



This is the process by which the Board considered and approved the acquisition of the Grathol property.

At the culmination of this year-long STIP process, and following the hearings and decisions by the Board on individual projects and acquisitions of properties required under Idaho Code § 40-310, the Board then conducts another public hearing on the proposed STIP for the coming year. *See* R. at 175-260 (minutes of Board meetings approving and adopting annual STIPs for fiscal years 2005-2010) (Vogt Aff., Exs. 2-11).

Thus, during the course of the STIP process, all property owners whose properties are to be acquired for a project have been given notice and an opportunity to appear before the Board, present evidence, call witnesses, and voice objections. The Board has heard and considered testimony from affected property owners, and has made decisions on their objections that may be appealed directly to district court. I.C. § 40-310(1)(b). After making decisions on individual projects, including the route of each the project and the properties needed for the projects, the Board then makes its final decision announcing the projects that will be included in the STIP and the order in which the projects will be constructed. That decision is set forth in the annual STIP, which is approved and adopted by the Board in another public hearing.

If and when negotiations for the purchase of a parcel fail and a condemnation suit must be initiated, the Board does not take up the issue of the need for the condemnation of individual parcels of property again. The Board has already made that determination. Therefore, if an administrative order of condemnation is needed, the Director has the authority to authorize and execute an administrative order on behalf of the Board. The Director's authority to authorize and execute administrative orders of condemnation attaches at the time the Board approves the project. R. at 173 (Board Policy B-03-01). Even then, an administrative order of condemnation is authorized "on behalf of the Board" and only if ITD is unable to negotiate for the purchase of the property. *Id.*

By the time an administrative order of condemnation is prepared and executed, the Idaho Transportation Board has already approved the route of a project and the property needed to be

acquired for the project. As such, the administrative order as to the Grathol property specifically affirms as follows:

The Board, having duly considered the report and recommendations of the State Highway Administrator and having duly considered the matter, finds:

1. That the above-designated project is for the purpose of constructing a section of the State Highway System in the location as noted above.
2. That the right of way necessary for the project consists in part of certain real property located in the county as noted above, and which property has been designated and shown as the above parcel on the plans of said project now on file in the office of the Idaho Transportation Department.
3. That the parcel so designated and shown on said project plans is necessary to the construction of said project and the construction of said project is impossible without the acquisition of said parcel.

R. at 15 (Ex. C to ITD's Compl.) (admin. ord. of condemn., at 1). By the time the Director authorized and executed this administrative order of condemnation on November 17, 2010, the US-95 Project and the acquisition of all of the properties needed for the Project had been the subject of multiple hearings and approvals by the Board as part of the STIP process. The US-95 Project has been approved in the STIP program every year since 2005.

The Idaho Transportation Board is comprised of private citizens. They meet once a month, in an open meeting, generally for a day and a half. *See* I.C. § 40-308 (the Board shall meet 12 times per year). Particularly in light of the time constraints of its citizen members, the Board is not able and is not required by law to hold yet another meeting to determine whether an administrative order of condemnation should issue. The Board has already concluded that the property must be acquired for the project and has approved its acquisition by purchase or condemnation.

The relative roles of a citizen board and the chief administrative officer of a state highway transportation department have been addressed in case law.

[T]he Chief Engineer of the State Highway Department is an extremely important officer in that Department, to whom the General Assembly has delegated the daily discharge of the duties and functions of the Department. He is a salaried fulltime

employee, as opposed to the members of the Department [Board], itself, who are non-paid, non-professional appointees . . . the members of the Department who meet only periodically, act in the capacity which in private corporate activities is filled by a Board of Directors, and the Chief Engineer is the executive head of the Department charged with the responsibility of carrying out the broad policy decisions made by the members of the Department.

*0.106 Of An Acre Of Land v. State*, 130 A.2d 355, 359 (Del. 1957) (brackets added) (holding that the chief engineer had authority to decide to commence a condemnation action). *Id.* at 360.

If negotiations for the purchase of a piece of property are unsuccessful, the Idaho Transportation Board has already held the requisite hearings and has already made the decision that the property is necessary for the project and must be acquired. Thus, the authorization and execution of an administrative order of condemnation at that point is a ministerial act by the Director who, as the “administrative officer” of the Idaho Transportation Department, has both statutory authority and has been directed by the Board to do so.

In addition to the hearings before the Board and the opportunity under Idaho Code § 40-310 to appeal the decision to condemn its property, Grathol has had full opportunity in this condemnation action to challenge whether the US-95 Project is a public use and whether its property is needed for the Project. “Public use” and “necessity” are both issues that a property owner may contest in a condemnation action. However, Grathol admitted that the US-95 Project is a public use authorized by law. *See R.* at 140. In addition, Grathol has not disputed that the acquisition of the condemned property is necessary for the US-95 Project. *R.* at 140-141.

**7. The Idaho Supreme Court Has Not Questioned The Authority Of The Director To Authorize And Sign An Administrative Order Of Condemnation.**

In *State ex rel. Winder v. Canyon Vista Family Ltd. P’ship*, 148 Idaho 718, 228 P.3d 985, (2010), this Court addressed the issue of whether the complaint or the administrative order of condemnation defines the scope of a taking in a condemnation case. It concluded that “the complaint defines the nature and scope of the take” and not the administrative order of condemnation. *Id.* at 727, 228 P.3d at 994.

The administrative order of condemnation was squarely at issue in the *Winder* case. Idaho Transportation Board Policy B-03-01 (R. at 173-174) was enacted in 1997 and has been in place for 14 years. R. at 166 (Vogt Aff. at ¶ 8). Since then, hundreds of administrative orders of condemnation in dozens of state highway projects have been executed in accordance with this policy. *Id.* This includes the administrative order of condemnation at issue in *Winder*.<sup>1</sup> The administrative order of condemnation at issue in the *Winder* case is identical in form to the administrative order in this case, and was signed by the Director of ITD and not the Board. The record in the *Winder* case shows that no concern or question was raised by the Court or the landowner regarding the authority or propriety of the Director signing the administrative order of condemnation.

**8. The Idaho Supreme Court Has Recognized The Authority Of The Director To Act On Behalf Of The Board.**

Grathol contends that if a power of ITD is listed under a section of the Idaho Code referring to the Board, that power may only be exercised by the Board and no orders or decisions can be authorized or signed by anyone but the Board. This argument is contrary to the statutes vesting expansive powers in the Director and existing Idaho case law.

For example, in *Vickers v. Lowe*, 150 Idaho 439, 247 P.3d 666 (2011), a property owner challenged the decision of the Idaho Transportation Department to grant his neighbor a permit to expand an encroachment on Highway 55. *Id.* at 441, 247 P.3d at 668. The case involved powers conferred by statute to the *Idaho Transportation Board* under Idaho Code §§ 40-310 and 40-312. *Id.* at 442-43, 247 P.3d 669-70. The Court did not refer to these powers as “exclusive powers of the Board,” but rather as “powers of ITD” or “ITD’s authority.” *Id.* The Court declared that “[t]he Idaho Code confers to the ITD the power to ‘[e]stablish standards for the location, design, construction, reconstruction, alteration, extension, repair and maintenance of state highways.’”

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<sup>1</sup> Attached hereto as Appendix C is a copy of the administrative order of condemnation in the *Winder* case. This copy was obtained from the records of the Idaho Supreme Court.

*Id.* at 443, 247 P.2d at 670 (citing I.C. §§ 40-310(5) and 40-312(1), which are sections of the code enumerating powers of *the Board*).

The decision and written order by ITD challenged by the plaintiff in *Vickers* was signed not by the Board, but by the Director of ITD, even though the authority for the decision and order were statutory provisions enumerating powers of *the Board*. Specifically, the plaintiff argued “that ITD has no authority to issue conditional-encroachment permits.” *Id.* at 442, 247 P.3d at 669. The Supreme Court noted as follows:

Vickers petitioned the ITD to deny Savala’s variance and conditional permit. After a two-day hearing, the hearing officer issued his Recommended Findings of Fact, Conclusions of Law, and Recommended Order (“Recommended Order”) . . . *The ITD Director then issued a Final Order* adopting the Recommended Order. Vickers sought judicial review of this final order, but the district court affirmed the ITD and awarded fees and costs.

*Id.* (emphasis added). On appeal, the Idaho Supreme Court found statutory authority for ITD’s actions in Idaho Code §§ 40-310 and 40-312, which confer powers to the Idaho Transportation Board. However, no question was raised and no concern was expressed by the Court or the plaintiff that the Director had issued the Final Order, and not the Board. The propriety of the Director’s action is made clear by the Director’s statutory authority and powers under § 40-505, as well as § 67-2403, which provides that “[t]he director of each department shall, subject to the provisions of law, execute the powers and discharge the duties vested by law in his department.” *See also Wylie v. State of Idaho, Idaho Transportation Bd.*, 151 Idaho 26, 33, 253 P.3d 700, 707 (2011) (referring to the powers of the Board under I.C. § 40-310(9) as vesting authority in ITD and not simply the Board).

**9. The Cases Cited By Grathol Do Not Support Its Argument That The Director May Not Authorize And Execute Administrative Orders Of Condemnation.**

In the face of clear statutory and administrative authority for the Director of ITD to sign administrative orders of condemnation, Grathol cites *Terrazas v. Blaine County*, 147 Idaho 193, 207 P.3d 169 (2009), for the proposition that Board cannot delegate condemnation authority to the Director. This case does not support Grathol’s position for the following reasons:

First, the Idaho Transportation Board did not delegate “condemnation authority” to the Director. As previously noted, the Board approved the US-95 Project and the acquisition of the Grathol property long before the Director signed the administrative order of condemnation.

Second, the Director signed the administrative order of condemnation on behalf of the “Idaho Transportation Department.” R. at 16 (signature page of the administrative order of condemnation). This makes clear that the Idaho Transportation Department will condemn the property, not the Director. ITD did not exercise its power of eminent domain until it filed this condemnation action. In addition, the suit was brought by and in the name of the Idaho Transportation Board.

Third, *Terrazas* has nothing to do with ITD, its Director, or the Idaho Transportation Board. In *Terrazas*, the Blaine County Board of Commissioners denied Terrazas’ application for a proposed subdivision, and Terrazas filed for judicial review of that administrative decision. *Id.* at 196-197, 207 P.3d at 172-73. Both the district court and the Idaho Supreme Court affirmed the decision of the Board of Commissioners. *Id.* at 205, 207 P.3d at 181. From this case, Grathol isolates one quote:

Under Idaho law, county boards are vested with the exclusive, non-delegable, authority to finally approve subdivision applications. I.C. § 67-6504; *Cowan v. Bd. of Comm’rs of Fremont County*, 143 Idaho 501, 511-12, 148 P.3d 1247, 1257-58 (2006).

*Terrazas*, 147 Idaho at 198, 207 P.3d at 174. The discussion in *Cowan* on which the *Terrazas* decision relied involved whether a planning and zoning board had the authority to approve a subdivision. *Cowan v. Bd. of Comm’rs*, 143 Idaho at 511-12, 148 P.3d at 1257-58 (2006).

Nothing in either of these cases restricts or limits the authority of the Idaho Transportation Board under Idaho Code § 40-314 to adopt rules, such as Board Policy B-03-01, deemed necessary to carry out the provisions of Title 40. Nor does either case address or limit the ability of the Director of the Idaho Transportation Department to carry out his or her statutorily-conferred administrative powers and duties under Idaho Code § 40-505, including the authorization and execution of administrative orders of condemnation. Title 40 makes clear that the Board makes

policies and approves projects, and the Director executes and administers those policies and projects.

Grathol also cites *Roberts v. Transp. Dept.*, 121 Idaho 727, 827 P.2d 1178 (Ct. App. 1991), which held that “[a]n agency must exercise any authority granted by statute within the framework of that statutory grant. It may not exercise its sub-legislative power to modify, alter, enlarge or diminish the provisions of the legislative act which is being administered.” *Id.* at 732, 827 P.2d at 1183. Here, the authority at issue is the statutory grant of the power of eminent domain to the Idaho Transportation Board. I.C. § 40-311(1). The Board has done nothing to “modify, alter, enlarge, or diminish” the power of eminent domain conferred on the Board. The only exercise of the power of eminent domain in this case was the filing of the condemnation complaint. The complaint was filed by and in the name of the Idaho Transportation Board. Nothing in Idaho Code § 40-311(1) bars the Director of ITD, the administrative officer of the Board, from signing an administrative order of condemnation on behalf of the Board.

Grathol also cites *Cowlitz County v. Martin*, 177 P.3d 102 (Wash. Ct. App. 2008). In that case, the Washington Court of Appeals held that the county could not condemn property under the state’s Salmon Recovery Act because the Act gave no power of condemnation to the county. In addition, the general statute giving the power of eminent domain to the county did not list “salmon recovery” as a permissible public use for which the power of eminent domain could be exercised. *Id.* at 104-05. The resolution by the county commission, comparable to the administrative order of condemnation in this case, described the purpose of the condemnation as removing and replacing an existing culvert that had been identified as a “fish barrier,” and that funds for the project had been obtained through a grant under the Salmon Recovery Act. *Id.* at 103. The resolution authorized the county attorney to file a condemnation action for that purpose. *Id.*

The county prosecuting attorney filed the condemnation suit. *Id.* In the condemnation complaint, the county attorney added an additional purpose for the condemnation: to enlarge the culvert to accommodate stream flows for a 100-year design storm. *Id.* In other words, the

county attorney added a “public use” to the complaint (storm water management) that was authorized in the general statute giving the county the power of eminent domain. *Id.* That purpose had not been part of the administrative resolution by the county commission. *Id.* at 104. The landowners argued that the county had only authorized condemnation for purposes relating to salmon recovery, for which it had no power of eminent domain, and the city attorney’s action constituted “an unlawful delegation of the power of condemnation.” *Id.* at 105-06. The Washington Court of Appeals agreed, holding that “a prosecuting attorney does not have authority to articulate a different or additional purpose for the condemnation not stated by the county.” *Id.* at 106.

The *Cowlitz* case has no bearing on the case at hand. The Idaho Transportation Board approved the condemnation of Grathol’s property for use in the construction of the US-95 Project. Condemnation for public highways is a public use authorized by law, which Grathol admitted in its answer. *See R.* at 140. That purpose and use are stated in both the administrative order of condemnation and the Complaint. No other use or purpose has been stated, and the Director did not add a use or purpose to the administrative order of condemnation, and certainly did not do so to cure a defect in the use and purpose given by the Board.

The *Cowlitz* case is silent as to who signed the county resolution. It may have been the full commission, the head of the commission, or the county clerk. Thus, the case does not address the issue presented in this case – whether the Director of ITD, the administrative officer of the Idaho Transportation Board, may authorize and sign an administrative order of condemnation. In addition, the county attorney’s action occurred in the *actual exercise* of the power of eminent domain – in adding to the condemnation complaint. The ITD Director’s involvement ended with the administrative order of condemnation. After that, the condemnation action was filed and pursued by the Idaho Transportation Board.



**10. Courts Across The Country Have Considered And Rejected Arguments Similar To The Argument By Grathol.**

Courts across the country have addressed and rejected arguments that the director or officer of a condemning authority may not sign orders of condemnation or take other actions to facilitate the exercise of the power of eminent domain by the condemning authority.

For example, in *Gryodyne Co. of Am., Inc., v. State Univ. of N.Y. at Stony Brook*, 794 N.Y.S.2d 87 (N.Y.App.Div. 2005), the landowner argued, as here, that the university's board of trustees had unlawfully delegated its statutory power of eminent domain to its chancellor. *Id.* at 89. The court disagreed.

[T]he record does not support the petitioner's contention that the Board of Trustees of SUNY Stony Brook improperly delegated their statutory grant of the power of eminent domain. The Board of Trustees merely authorized the Chancellor, or his designee, to "take all steps and execute or approve in the name of and on behalf of this Board all documents, notices, maps or any other instruments necessary or proper to effect the acquisition of title to and the possession of" the petitioner's property.

*Id.* (emphasis added). This holding applies equally to the case at hand.

In *Michael v. City of Bloomington*, 804 N.E.2d 1225 (Ind. Ct. App. 2004), the property owners contested the condemnation of their property by the city's Board of Public Works, arguing that only the city had the statutory power of eminent domain. *Id.* at 1228-29. The Indiana Court of Appeals noted that "the argument rests on the assumption that the Board is an entity that is independent of the City of Bloomington." *Id.* at 1229. The court then held:

[T]he Board is not a separate governmental entity with powers separate and distinct from the City of Bloomington. It is an administrative municipal Board of the City of Bloomington. The Board acts only in the name of the City of Bloomington, and its authority arises only from its relationship as a subordinate entity of the City of Bloomington.

*Id.* The court therefore ruled that the condemnation was lawful, and further noted that "[t]he property acquired through the Board becomes the property of the City of Bloomington, not the property of the Board." *Id.* Likewise, ITD's Director is not a "separate governmental entity with power separate and distinct" from ITD. He is the administrative officer of the Board.

In *Richardson v. City & County of Honolulu*, 868 P.2d 1193 (Haw. 1994), the Supreme Court of Hawaii held that a city ordinance delegating authority from the city council (designated by statute to have the power of eminent domain) to the city housing department to designate land to be condemned was not an impermissible delegation of the power of eminent domain. *Id.* at 1204-05. The court held that the housing department’s designation of the land to be condemned was simply “a means of facilitating its acquisition by the city” and was “only a preliminary step in the condemnation process that precedes the institution of eminent domain proceedings at the behest of the City Council[.]” *Id.* at 1205.

In *Burner Serv. & Combustion Controls Co., Inc. v. City of Minneapolis*, 250 N.W.2d 224 (Minn. 1977), the city of Minneapolis had the statutory power of eminent domain. The city council adopted a resolution in connection with a public project, directing the city attorney to:

[T]ake all necessary steps to prepare for, institute, and prosecute on behalf and in the name of the City of Minneapolis all such condemnation proceedings as may be necessary for the acquisition by said City of Minneapolis (of Burner’s property interest), the costs thereof to be paid from (funds authorized for this purpose).

*Id.* at 225 (parentheses in original). The city later attempted to avoid a settlement agreement negotiated by the city attorney in the condemnation action, on the grounds that the city attorney acted beyond his lawful authority. The Supreme Court of Minnesota, however, upheld and enforced the resolution by the city. “In our opinion there is little doubt that by this resolution the city council gave authority to the city attorney to acquire the property from Burner and to agree to the prices to be paid for it.” *Id.* at 229. The court cited a provision of *Nichols on Eminent Domain* as the rationale and basis for its decision that no improper delegation of the power of eminent domain occurred.

The real issue here, as stated by Burner, is not whether there was a Redelegation of authority by the city to the city attorney, but rather whether there had been an Actual exercise of the power by the city itself. The distinction between Redelegation and Actual exercise is noted in 1 *Nichols, Eminent Domain* (Ref. 3ed.) s 3.211(1), which states:

‘Where the power of eminent domain has been granted to a municipality it is questionable whether the latter has the right to redelegate such power to a subordinate city agency or official. The grant of power by the state is to

the city. The municipality has no inherent power of eminent domain but acquires its right to deal with the subject from the state. It does not acquire the right to redelegate by implication from its delegated powers as set forth either in a statute or its charter, although it may be given express power to do so. It is equally without power to give itself the right to redelegate the power by a municipal ordinance. *However, a resolution of the city council which authorizes a city attorney to acquire land for a municipal purpose is not construed as a redelegation of the power of eminent domain, but merely as an official authorization by the city of an exercise by the city, in its own right, of the delegated power of eminent domain.* Since it is a corporate entity it can act only through its officers or agents so far as ministerial or administrative acts are concerned.’

*Id.* at 227-28. Here, no “redelegation” of ITD’s power of eminent domain occurred. The Board authorized the Director of ITD to authorize and execute an administrative order of condemnation leading to the exercise by the Idaho Transportation Board “in its own right, of the delegated power of eminent domain.”

In *Cheney v. Strasburger*, 357 A.2d 905 (Conn. 1975), the landowners challenged “the delegation of the town’s power of eminent domain to the board of education.” *Id.* at 908. The landowners further argued that the local board of education was in fact an agent of the state and could not act for the town. *Id.* at 908-09. The Supreme Court of Connecticut noted that “a town board of education is an agent of the state when carrying out the educational interests of the state” but were “still officers of the town.” *Id.* at 909. The board was authorized by statute to “perform all acts required of them by the town.” *Id.* “This means all acts which may be lawfully required of them by the town.” *Id.* Accordingly, the court rejected the landowners’ argument:

The delegation of power by the town to condemn in its name to the board of education was consistent with the duties of the board of education regarding the educational policy of the state and with its functions directly relating to school facilities. It is certainly a power that the board of education may lawfully exercise where requested by the town meeting to act on behalf of the town . . . The town of Newtown by its referendum had the right and power to delegate its power of eminent domain to its board of education, and the board of education, in turn, had the authority to exercise such power.

*Id.* (internal citation omitted). Here, the Idaho Transportation Board did not delegate its power of eminent domain to another agency or lesser board. On the contrary, the Board authorized its own administrative officer to execute an administrative order of condemnation on its behalf.

In *Petition of Mich. State Hwy. Comm'n*, 178 N.W.2d 666 (Mich. Ct. App. 1970), the court “was asked whether it is consonant with Act 295, Public Acts of 1966, and the Michigan Constitution for the state highway commission to delegate its authority to condemn private property, together with the right to make a determination of necessity, to the state highway director.” *Id.* at 666. In that case, the administrative determination of necessity was signed “Michigan State Highway Commission, by Nerik E. Stafseth, State Highway Director.” *Id.* The “declaration of taking” was signed in the same manner. *Id.* In response to the challenged taking, the state confirmed that the state highway commission “had, in fact, delegated to the highway director all the powers, authorities and responsibilities of the commission.” *Id.* at 667.

The landowner argued before the trial court and on appeal that Michigan’s statutes did not permit “the state highway commission to delegate to the state highway director the authority to make a determination of necessity for condemnation purposes.” *Id.* The Michigan Court of Appeals flatly rejected this argument.

The determination of necessity for taking here was properly made by the state highway commission through its director, with the aid of his subordinates, as required and authorized by the Constitution of Michigan, Act 286, P.A. 1964 and Act 295, Public Acts of 1966. There was no illegal delegation of power and no abuse of discretion in these acts, and no error in the holding of the lower court.

*Id.*

Likewise, in *Anne Arundel County v. Bowen*, 267 A.2d 168 (Md. Ct. App. 1970), the property owner in a condemnation case made the following argument, as framed by the Maryland Court of Appeals:

Fully rendered the Bowens’ argument seems to come to this: that the Legislature’s grant of the power of eminent domain is to the County and that it would be improper for the County to delegate it to the County Executive; therefore, they conclude, the power cannot be exercised without ‘some action by the Council with respect to this specific piece of property,’ after which ‘the

Executive Officers (could) carry out the ministerial duties necessary to effectuate the action of the Council.’

*Id.* at 170. This is precisely the argument made by Grathol in the present case. In rejecting this argument, the Maryland Court of Appeals held:

In a sense it is true, as the Bowens argue, that the power of eminent domain has been granted to the County but it is also true that the County can exercise the power only through the duly authorized personnel of its executive branch. The legislative branch, the Council, by the enactment of Sec. 1-317, *supra*, has clothed the County Executive with the authority and the duty of exercising the power whenever its exercise is required in order to complete the execution of any project for which the Council has budgeted and appropriated the necessary funds. It seems absurd to suggest that the same power granted to the County by the Legislature has been delegated to the County Executive. *See Master Royalties Corp. v. Mayor & City Council of Baltimore*, 235 Md. 74, 83, 200 A.2d 652 (1964) and *Pressman v. D’Alessandro*, 193 Md. 672, 69 A.2d 453 (1949).

Having held, in *Hormes*, that the County Executive was simply ‘executing authority granted by laws already in existence’ when he negotiated and executed a ten-year lease of a floor of an office building, we have no difficulty extending that holding to include, in the circumstances here present, the condemnation of the Bowens’ property.

*Id.* at 171-72. In the case at hand, the Director of ITD is designated by statute to be the “administrative officer of the board.” *See* I.C. § 40-505. Therefore, “it seems absurd to suggest,” as Grathol has, that the same power granted to the Board has been delegated to the Director. The Director acts only for the Board and is authorized by law and Board policy to do so.

In *State v. King County*, 446 P.2d 193 (Wash. 1968), the Washington Supreme Court held that the state community college board could delegate authority to a community college district to acquire property by condemnation because all condemnation actions were to be brought in the name of the state board. *Id.* at 194-95.

In *0.106 Of An Acre Of Land v. State*, 130 A.2d 355 (Del. 1957), the property owner challenged the condemnation on the grounds that the Chief Engineer of the State Highway Department, and not its board, made the decision to institute a condemnation action to acquire the property in question. *Id.* at 358. In rejecting this argument, the Supreme Court of Delaware noted the expansive powers conferred upon the Chief Engineer (*id.* at 358-59), which parallel

those given to the Director of ITD under I.C. §§ 40-505 and 67-2403. The court also compared the role of the full time Chief Engineer responsible for all daily functions of the department, with the citizen board that only met periodically and primarily made policy decisions (*id.* at 359), which again parallels the Director and Board of ITD. Thus, the court concluded “that the Chief Engineer was within his authority in directing the institution of condemnation proceedings to acquire land required to complete a road project, the over-all approval of which the Department had theretofore given.” *Id.* at 360. In the present case, the Idaho Transportation Board had already approved the US-95 Project and the acquisition of the properties needed for the Project before the Director signed the administrative order of condemnation.

The Supreme Court of Delaware further explained that the argument by the landowner would establish “an unworkable rule” and requiring a citizen board

[t]o meet in all solemnity and adopt a resolution condemning a particular piece of land by metes and bounds. We think such a rule unrealistic in the light of the requirements of the development of a modern highway system which requires for its expansion not only the acquisition of land but, to acquire such, the frequent use of the power of eminent domain.

*Id.* at 358. The argument by Grathol would simply force a “re-approval” following a series of previous approvals by the Idaho Transportation Board of the US-95 Project and the acquisition, by purchase or condemnation, of the properties needed for the Project.

In summary, condemnation case law makes clear that the Director of ITD may authorize and execute an administrative order of condemnation. The Idaho Transportation Board authorized the US-95 Project and the condemnation of the Grathol property. The Idaho Transportation Board exercised the power of eminent domain. The Board did not delegate its power of eminent domain to another board or agency, separate and apart from ITD. The Director did not make the decision to condemn and did not file the condemnation suit on his own. His only action was to authorize and execute an administrative order of condemnation, on behalf of the Board, prior to the Complaint being filed. The administrative order was a ministerial act, reciting the prior approval and findings by the Board.

**C. ITD Is Not Condemning Any Land For Sylvan Road And Is Not Constructing Sylvan Road Across Grathol's Property.**

**1. Grathol's Claim Has No Basis In Fact.**

Grathol argues that ITD did not negotiate in good faith because it did not offer compensation for the taking of property for the extension of Sylvan Road across its property. The Affidavit of Jason Minzghor, ITD District 1 Project Development Engineer, makes clear that ITD is not condemning any portion of Grathol's property for the construction of a Sylvan Road extension. R. at 158-160 (Minzghor Aff., ¶¶ 8-17). *See also* R. at 4-5 (Complaint, ¶¶ 12-19); and R. at 8-15 (Compl. Exs. A and B) (legal description of the condemned property and the construction plan sheets showing the construction of US-95 on the Grathol property). ITD has no obligation to negotiate just compensation for property it is not taking.

Grathol's claim regarding Sylvan Road is apparently based on negotiations among ITD, Lakes Highway District, and other property owners in the area regarding the potential extension of Sylvan Road. R. at 159 (Minzghor Aff., ¶ 11). Specifically, Grathol's neighbors approached Lakes Highway District and then ITD and asked that Sylvan Road be extended across their properties to provide additional access to their properties. Because of the benefits of the extended road, those neighbors decided to dedicate portions of their property to the Lakes Highway District for that purpose, and ITD agreed to construct the Sylvan Road extension for those landowners. *Id.*

In the Fall of 2010, representatives of ITD met with Grathol and their attorneys. *Id.* at ¶ 13. At that meeting, ITD explained to Grathol that it would be willing to extend Sylvan Road across the Grathol property if they also elected to dedicate the property to Lakes Highway District for that extension. *Id.* at ¶ 14. However, Grathol elected *not* to have the Sylvan/Roberts Road extended across their property. R. at 160 (Minzghor Aff., ¶¶ 15-17). Therefore, ITD is not constructing any extension of Sylvan Road on the Grathol property. *Id.* The only property condemned in this case is a portion of the Grathol property needed solely and specifically for construction of the US-95 Project. *Id.*

At the hearing on ITD's motion for possession, Mr. Minzghor testified unequivocally that ITD is *not* condemning any property from Grathol for Sylvan Road. *See* Tr. at 11:1-8; 13:9-16; 20:1-25; 21:1-24; 33:1-25; 34:1:23 (York Aff., Ex. 1) The construction plans for the US-95 Project do not call for construction of Sylvan Road across Grathol's property. Tr. at 12:13-13:16. The Project plans show that the property condemned from Grathol property is being used exclusively for the US-95 Project. Tr. at 31:7-22. The Project plans do not call for or involve any construction of Sylvan Road on Grathol's property. Tr. at 33:12-34:1; *see also* R. at 11-15 (Compl., Ex. B) (Project Plan Sheets for construction of the US-95 Project on the Grathol Property).

ITD has no plans to construct Sylvan Road across the Grathol property in the future. Tr. at 33:2-23. Since Sylvan Road is a local street, and not a state highway, if Sylvan Road is ever extended across the Grathol property in the future, it may be constructed by some other entity such as Lakes Highway District, but it is not being constructed by ITD as part of the US-95 Project.

At the possession hearing, counsel for Grathol cross-examined Mr. Minzghor regarding whether ITD was condemning any Grathol property to construct Sylvan Road. Mr. Minzghor again affirmed that no Grathol property is being condemned to construct Sylvan Road.

Q. Okay. And this is the Grathol property outlined in blue here; is that correct?

A. I think it's blue.

Q. Kind of hard to see the blue.

A. Yeah.

Q. And you've already testified these white lines depict the proposed construction and the area of the condemnation; is that right?

A. Yes.

Q. This would be Sylvan Road to the south of US Highway 54?

A. Yes.

**Q. Or State Highway 54, I'm sorry. And it depicts nothing here. Do you know why that is?**

**A. Because at this time we have no plans in constructing Sylvan Road.**

**Q. Sylvan Road as a right-of-way does not extend across the Grathol property, does it?**

**A. That is correct.**



Q. There's no road on the ground, there's no right-of-way, there's no ownership by the state or any county or municipality, is there?

A. Correct.

Q. Okay. Now, you said that after August 1 of 2010, when the proposal was made to build the frontage road, you were referring to Sylvan Road, were you not?

A. Correct.

Q. After that --

A. The extension of Sylvan Road.

**Q. The extension of Sylvan Road across the Grathol property. You said after that date there was no plan for the construction of Sylvan Road as part of this project. Did I understand that correctly?**

**A. Across the Grathol property, yes.**

Tr. at 23:10-24:19 (emphasis added).

On re-direct, Mr. Minzghor made clear that the Project plans do not call for or involve any construction of Sylvan Road across Grathol's property.

MR. TOLLEFSON: Q. Jason, these documents that Mr. Marfice put up here, do any of these documents dictate or control what ITD is going to condemn or construct?

A. It does not.

Q. What does control what ITD is going to construct?

A. The project plans that we have designed.

Q. I'd like to turn your attention back to Exhibit 1, which I believe are the right-of-way plans.

A. Okay.

Q. Are these project plans for this project?

A. Yes.

Q. And does this control what will be constructed on the project?

A. Yes.

Tr. at 31:7-22.

Q. Okay. So is it fair to say you read those that the property that is necessary is depicted on the project plans?

A. Correct.

Q. And if you look at the top of the order condemnation, what is the project number?

A. 9791.

Q. I would like to turn your attention back to Exhibit No. 1. What are the project plans of this project?

A. 9791.

Q. And again, does anything on these project plans show condemnation of property for the construction of Sylvan Road?

A. No.

Tr. at 33:12-34:1. Mr. Minzghor also testified that there are no plans to construct Sylvan Road across Grathol's property and nothing in the administrative order of condemnation calls for the condemnation of any property for Sylvan Road.

Q. Mr. Marfice also had you read a section on page 2, 4(e) [of the administrative order of condemnation]. If you could go back to look at that. And it -- to summarize, it says that "In association with the project, the Idaho Transportation Department is in the process of extending Sylvan Road to tie into Roberts Road." At some point in time -- or excuse me,

at one point in time it was contemplated that there may be some sort of connection?

A. Correct.

Q. But there's no plans for that now?

A. No.

Q. Anything that Mr. Marfice has raised up there that require you or ITD or the project to construct Sylvan Road?

A. No.

Q. Anything that Mr. Marfice has said require ITD to construct Sylvan Road in any particular manner or designation?

A. No.

Tr. at 34:2-20 (brackets added).

After an evidentiary hearing and based on extensive, uncontroverted testimony, the district court found that ITD is not condemning any land for Sylvan Road.

The order of condemnation does not provide or in this court's opinion does not provide for the taking of the defendant's property for the expansion of the Sylvan Road and Roberts Road. The contemplation of the expansion of Sylvan Road to link to Roberts Road is certainly mentioned in the order of condemnation, but more importantly, the complaint does not contemplate the extension of that road, and that is not the subject of the taking that is before this court. The Idaho Department of Transportation has offered to expand those roads through Grathol's property -- rather, the Sylvan Road expansion through Grathol's property, but that offer has been declined by the defendant and this has been testified to amply before the Court today and in Mr. Minzghor's deposition.

Tr. at 61:2-16. The district court's finding and decision are amply supported in the record, and no contrary evidence was offered by Grathol. Accordingly, its claim relating to Sylvan Road fails as a matter of fact.

## **2. Grathol's Claim Based On Sylvan Road Fails As A Matter Of Law.**

The statutory duty to negotiate in good faith to purchase lands needed for a public project extends only to that portion of the property needed for the project. I.C. § 7-721(2)(d)

(condemnor must negotiate in good faith “to purchase the lands sought to be taken”). A condemning agency has no duty to negotiate for the purchase of property it does not need and is not condemning. Therefore, Grathol has no legal or factual basis for an interlocutory appeal as to the requirement under § 7-721(2) of good faith negotiation, particularly where it seeks to have that duty applied to property that ITD is not condemning and does not need for the US-95 Project.

Moreover, if Grathol truly believes that ITD is condemning additional property not identified in the Complaint, Grathol’s proper remedy is to file a counterclaim for inverse condemnation. Its remedy is not an interlocutory appeal of an order granting possession of property being acquired by direct condemnation.

**3. Neither The Administrative Order Of Condemnation Or The Complaint Proposes Condemnation Of Any Property For Sylvan Road.**

Grathol admits that the Complaint filed by ITD does not condemn any property for Sylvan Road. “[T]he complaint and description of the property and rights to be acquired contained in the Complaint contain no mention of the Sylvan Road extension.” Appellant Br., at 31. Grathol’s only support for its claim that property is being condemned for Sylvan Road is a reference to Sylvan Road in Paragraph 4(e) of the administrative order of condemnation.

Paragraph 4 of the administrative order of condemnation does not address or identify the land to be taken for the Project. That is addressed in Paragraphs 2 and 3 of the order. Rather, Paragraph 4 discusses “rights of access” that Grathol may be entitled to following construction of the US-95 Project. Although reference is made to Sylvan Road in Paragraph 4(e), Paragraph 4(e) does not make any provision for the condemnation of any land for that purpose and does not identify what land would be condemned for that purpose. R. 17, ¶ 4(e). Paragraph 4(e) simply reflects the offer that ITD made to Grathol that ITD would construct Sylvan Road if Grathol dedicated the land for it. Grathol rejected that offer. *See* R. at 158-160 (Minzghor Aff.). Accordingly, none of the construction plans call for construction of Sylvan Road or identify or define any land to be acquired for Sylvan Road. Tr. at 33:12-34:1. No land owned by Grathol

has been surveyed and identified for acquisition for Sylvan Road in either the administrative order or the Complaint.

**4. The Condemned Property Identified In the Administrative Order Of Condemnation Is Identical To The Condemned Property In The Complaint.**

The administrative order of condemnation identifies and defines the property to be condemned by reference to the Project construction plan sheets. *See* R. at 16, ¶¶ 2, 3. The plan sheets were then attached to the Complaint filed by the Idaho Transportation Board to identify and define the property condemned from Grathol. R. at 5, ¶ 18; 11-15. Thus, the property identified in the administrative order of condemnation is identical to the condemned property described in the Complaint. *Compare* R. at 5, ¶ 18; 11-15 (Compl., at ¶ 18 and Ex. B (construction plan sheets)) *with* R. at 16, ¶¶ 2, 3 (admin. ord. of condemn., referencing the construction plan sheets). No change occurred in the construction plan sheets from the date the administrative order was signed on November 17, 2010 (R. at 18), to when the Complaint was filed two days later on November 19, 2010. R. at 1.

**5. In The Event Of A Conflict, The Complaint Controls Over The Administrative Order Of Condemnation.**

ITD does not exercise its power of eminent domain until it files a condemnation suit. For that reason, the complaint takes precedence over the administrative order of condemnation in determining what property is being condemned. Here, the property identified in the administrative order of condemnation is identical to the property identified in the Complaint, and no conflict exists. *See* Section IV(C)(4) *supra*.

In its brief on appeal, Grathol contends that pursuant to Idaho Code § 7-707(6), the administrative order of condemnation and description of property being acquired “binds the condemning entity to the plans attached to the Complaint.” Appellant Br., at 30-31. Grathol goes on to state that “[t]his is of a huge significance to a condemnee since a condemnor cannot then arbitrarily change the scope of the ‘take’ in the middle of the lawsuit to gain advantage.” *Id.* at 31.

ITD has not made any claim or argument that it is not bound “to the construction plans attached to the Complaint.” In fact, the construction plans referenced in the administrative order of condemnation and attached to the Complaint are one and the same. ITD has not changed the scope of the “take” at any time since the construction plans and the right-of-way acquisitions for the US-95 Project were approved by the Idaho Transportation Board.

Grathol acknowledges and contends that ITD is bound by the “plans attached to the Complaint.” The plans do not identify or define any taking of property for Sylvan Road. No changes in the plans were made between when the administrative order of condemnation was signed on November 17, 2010 and when the Complaint with the plans attached was filed two days later on November 19, 2010.

Despite these admissions, Grathol wrongly contends that Paragraph 4(e) indicates an intent to condemn land for Sylvan Road. In the event of a conflict, which does not exist here, the holding in *Winder* makes clear that the complaint, not the administrative order of condemnation, defines the scope of the taking. 148 Idaho at 727, 228 P.3d at 994 (“the complaint defines the nature and scope of the take”). *See also Ada County Highway District v. Sharp*, 135 Idaho 888, 891-893, 26 P.3d 1225, 1228-30 (Ct. App. 2001) (same).

Nothing in § 7-707, including the 2006 addition of paragraph (6) (requiring the administrative order of condemnation to be attached to the complaint), overrides the holdings in *Winder* and *Sharp*. The legislature is presumed to have known the law when it added the requirement that a copy of the administrative order of condemnation be attached to the complaint. “Courts must construe statutes ‘under the assumption that the legislature knew of all legal precedent and other statutes in existence at the time the statute was passed.’” *Twin Lakes Canal Co. v. Choules*, 151 Idaho 214, 219, 254 P.3d 1210, 1214 (2011) (quoting *City of Sandpoint v. Sandpoint Indep. Highway Dist.*, 126 Idaho 145, 150, 879 P.2d 1078, 1083 (1994)). Thus, the legislature is presumed to know that Idaho courts deem the complaint in a condemnation case to control over the administrative order of condemnation in determining the scope of the taking.

The legislature clearly chose not to alter the precedents of the courts when it did not include anything in the amendment that changes or overturns the rule established in *Winder* and *Sharp*. Moreover, legislative intent to overturn established legal principles must be express and plainly apparent.

The legislature is presumed not to intend to overturn long established principles of law unless an intention to do so plainly appears by express declaration or the language employed admits of no other reasonable construction.

*George W. Watkins Family v. Messenger*, 118 Idaho 537, 540, 797 P.2d 1385, 1388 (1990) (citing *Doolittle v. Morley*, 77 Idaho 366, 372, 292 P.2d 476, 481 (1956)).

Nothing in the express language of § 7-707(6) or the legislative history of the amendment adding paragraph (6) gives any indication of an intent to overturn *Winder* and *Sharp*. Nor does the language employed admit of no other reasonable construction. On the contrary, the complaint is the document that the legislature has required to contain a description “of each piece of land sought to be taken” I.C. § 7-707(5). The later requirement that the administrative order of condemnation be attached to the complaint only adds to the complaint – which is the controlling document under *Winder* and *Sharp*. Moreover, § 7-707(6) is limited to identifying the property “rights” to be acquired, whereas § 7-707(5) deals with identifying the land to be taken. Thus, if there were a conflict, the Complaint and § 7-707(5) would control for purposes of deciding what land is being taken in this case.

**6. Grathol’s Motive For Seeking Condemnation For Sylvan Road Is To Force ITD To Condemn Land and Avoid Paying Its Development Costs.**

According to Grathol, “Defendant is an entity versed in the development and construction of commercial retail projects for profit. Defendant acquired the subject property, accomplished a zone change and has been actively engaged in pursuit of a development plan for the property.” R. at 91. In Idaho, cities and counties require internal roads within commercial and residential developments to be constructed by the developer and dedicated to the city or county with the dedication of the plat of the development. See I.C. § 50-1309 (requiring owners of new developments to “make a dedication of all public streets and rights-of-way shown on said plat”).

As discussed in detail above, Kootenai County planning and zoning ordinances requires every commercial lot to have direct access to a public street. Those streets must be constructed by the developer and then dedicated to the county highway district. *See* Section III(J) above and Kootenai County ordinances cited therein.

Therefore, Grathol's motive in trying to force ITD to condemn land for Sylvan Road is obvious. Under Kootenai County's ordinances governing commercial development, Grathol will be required to construct the road at its expense and dedicate the road and the land to the local highway district as a condition of approval for commercial development of its property. *Id.* By making the claim regarding Sylvan Road in this case, Grathol is trying to foist the costs of a commercial development onto the public that should rightfully and legally be borne by Grathol, the commercial developer. Regardless of its motive, Grathol cannot force ITD to condemn property for a *local street* or property that ITD *does not need* for a state highway project.

**7. Grathol Does Not Dispute That ITD Negotiated In Good Faith For The Purchase Of The Condemned Property.**

Grathol has not made any argument that ITD did not negotiate in good faith to purchase the property that both sides agree is being condemned in this case. "Grathol does not argue that ITD did not negotiate in good faith to purchase the property described in the Complaint." R. at 142. Rather, Grathol's argument regarding good faith negotiations is limited to its claim that ITD did not negotiate for the purchase of property for Sylvan Road. "[T]he argument is over the Board's failure to include any consideration or offer for the proposed extension of Sylvan Road." Appellant Br., at 34.

The details of ITD's good faith negotiations for the purchase of the condemned property described in the Complaint are set forth in the record. *See* at R. 66-73; Tr. at 35-38. Based on these facts, the district court concluded that ITD had negotiated in good faith to purchase the condemned property. R. at 305, ¶ 6.

**D. Grathol's Appeal Should Be Dismissed Because No Legal Basis Exists For This Interlocutory Appeal.**

This appeal should be dismissed for the reasons stated in ITD's Memorandum In Support Of Motion To Dismiss Appeal filed March 22, 2011. Neither Idaho Code § 7-721 or Rule 54(b) provides a basis for an interlocutory appeal of the issues raised in this appeal.

**E. ITD Should Be Awarded Its Attorney Fees And Costs On Appeal.**

Before the district court, Grathol represented that it sought a Rule 54(b) certificate in order to appeal the four requirements for possession under Idaho Code § 7-721. Despite clear statutory authority limiting the issues that may be pursued by interlocutory appeal to four specific issues, Grathol filed a Notice of Appeal stating issues that are not subject to interlocutory appeal. Grathol has no right of interlocutory appeal of these issues – under Idaho Code § 7-721 or otherwise. In short, Grathol's appeal is barred by the very statute on which it is purportedly based. Grathol also failed to seek or obtain permissive appeal under I.A.R. 12.

Under these circumstances, ITD should be awarded its attorney fees and costs on appeal under Idaho Code § 12-121. *See, e.g., Heiss v. Conti*, 148 Idaho 432, 441, 224 P.3d 499, 508 (2009) (awarding attorney fees on appeal under § 12-121 where appeal had no merit and would have required the Court to disregard existing statutes) (citing *Allbright v. Allbright*, 147 Idaho 752, 756, 215 P.3d 472, 476 (2009) (“Attorney fees can be awarded to the prevailing party on appeal under that statute only if the appeal was brought or defended frivolously, unreasonably, or without foundation.”)). Grathol's appeal was brought both unreasonably and without foundation, both procedurally and substantively.

**V. CONCLUSION.**

Grathol's interlocutory appeal of the district court's order granting possession of the condemned property before trial should be denied. The Idaho Transportation Board filed this condemnation suit and is the only entity that has exercised the power of eminent domain. The Board approved the US-95 Project and the condemnation of a portion of the Grathol property. At the time an administrative order of condemnation became necessary, the Board had approved the Project and the condemnation, and the Director of ITD had both statutory and administrative

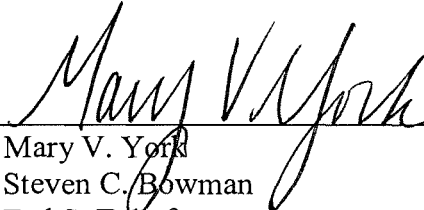


authority to authorize and execute the administrative order of condemnation. The Director did not exercise the power of eminent domain. He did not file the complaint, and did not seek to condemn property in his name or for his use.

The property identified in the administrative order of condemnation is identical to the property condemned two days later in ITD's Complaint. The uncontroverted facts show that ITD is not condemning any property other than the property identified in the Complaint needed for construction of the US-95 Project, and is not condemning any property for Sylvan Road. The district court's rulings are amply supported in the law and by the facts in this case, and should be upheld on appeal.

DATED this 4th day of November, 2011.

HOLLAND & HART LLP

By  \_\_\_\_\_  
Mary V. York  
Steven C. Bowman  
Ted S. Tollefson  
Special Deputy Attorneys General

J. Tim Thomas  
Deputy Attorney General  
Idaho Transportation Department

*Attorneys for Plaintiff-Respondent  
State of Idaho, Idaho Transportation Board*

## CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of November, 2011, I caused to be served two true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Douglas S. Marfice  
Christopher D. Gabbert  
RAMSDEN & LYONS, LLP  
700 Northwest Blvd.  
P.O. Box 1336  
Coeur d'Alene, ID 83816-1336

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| <input type="checkbox"/>            | Hand Delivered |
| <input type="checkbox"/>            | Overnight Mail |
| <input type="checkbox"/>            | Telecopy (Fax) |

  
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of HOLLAND & HART LLP

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# APPENDIX A

**KOOTENAI COUNTY ZONING ORDINANCE NO. 401**  
**CASE NO. OA-133-06 (Ordinance Text Amendments)**  
**Title 9, Kootenai County Code**

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**9-9-1: GENERAL COMMERCIAL ZONE DEFINED:** The "General Commercial zone" is a land use classification for a district suitable for wholesale and retail sales and services.

**9-9-2: PERFORMANCE STANDARDS:** In the Commercial zone, no building or premises shall be used, nor any building or structure be hereafter erected or altered, unless otherwise provided in this title , except for one (1) or more of the following uses in accordance with the following standards. **A Commercial lot shall have direct access from a public road.**

All uses shall meet the following standards:

- A. Requirements of Chapter 17 of this title, Design Standards
- B. Requirements of Chapter 19 of this title , Supplementary Regulations
- C. Anticipated traffic impacts will be determined for all commercial uses using the most current edition of the "Trip Generation Manual." A Special Notice Permit shall be required for commercial uses or buildings that are anticipated to generate traffic impacts in excess of the following thresholds:
  - 1. For sites which access directly onto a State or Federal Highway- 25 cars per hour, or 250 vehicles per day.
  - 2. For sites which access onto other public roads - 50 cars per day.
- D. Uses on all lots or parcels in the Commercial zone which front on a state or federal highway shall require a Special Notice Permit.
- E. Requirements of the applicable Highway District and Idaho Transportation Department or if the site is within an area of city impact, the city's standards for access, approaches, and street design, whichever is the higher standard.
- F. If an existing community water system within 1,000 feet of the site is willing and able to provide water service to the use, connection to that system shall be required.
- G. Requirements of the Panhandle Health District for sanitary sewage disposal.
- H. Requirements of the Panhandle Health District's Critical Materials Regulation.

# APPENDIX B

**KOOTENAI COUNTY SUBDIVISION ORDINANCE NO. 394  
CASE NO. OA-130-06 (Subdivision Ordinance Text Amendments)  
Title 10, Kootenai County Code**

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  - B. Levels of Utilities and Services
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- Section 10-3-2 Improvement Requirements
  - A. Installation of Improvements
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- Section 10-3-3 Maintenance Requirements
  - A. Maintenance Required
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- Section 10-3-4 Financial Guarantees
  - A. Financial Guarantee in Lieu of Improvements
  - B. Warranty
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  - D. Types of Financial Guarantees
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An Ordinance in and for the unincorporated areas of Kootenai County, Idaho, amending the following sections of Kootenai County Ordinance Number 344: to clarify definitions of common driveway, gated community and Wetland Specialist, 1.06 (B) Exemptions, 2.01 (A) Application Requirements- Preliminary Subdivision Approval, 2.01 (B) Application Requirements- Final Subdivision Approval, Table 2-1, 2.01 (C) Approval Process and Requirements, 2.02 Minor Subdivisions, 2.01 (B) Approval Process and Requirements, 3.01 (B) Levels of Utilities and Services, 3.01 (E) Subdivision and Lot Design, 3.01 (E) Roads and Trails, 4.01 Bonus Densities, 4.04 Conservation Design Procedure, 4.05 Additional Requirements for Conservation Design Subdivisions, and renumbering sections and making stylistic changes in language for purposes of codification; adding Appendix E, Natural Resources Report and Map- Requirements for Bonus Densities with Conservation Design Subdivisions; establishing subdivision regulations; providing purposes, definitions, and applicability; application requirements and approval procedures; design, improvement and maintenance requirements; standards for Conservation Design Subdivisions; administration and enforcement procedures; Appendices; repealing conflicting Ordinances; providing for severability; providing an effective date.

NOW THEREFORE BE IT ORDAINED BY THE BOARD OF COUNTY COMMISSIONERS OF KOOTENAI COUNTY, IDAHO:

**SECTION 1.** That former Titles 10A and 10B, Kootenai County Code, be, and the same are hereby combined as Title 10, Kootenai County Code, the provisions of which shall read as set forth in this Ordinance.

**SECTION 2.** That Kootenai County Ordinance No. 344, adopted on December 29, 2004, be, and the same is hereby designated as Title 10, Kootenai County Code, and is hereby amended to read as follows:

## **CHAPTER 1 GENERAL PROVISIONS**

Section 10-1-1 Title  
Section 10-1-2 Authority  
Section 10-1-3 Purpose  
Section 10-1-4 Definitions  
Section 10-1-5 Acronyms  
Section 10-1-6 Applicability and Exemptions

**10-1-1: TITLE:**

This Title shall be known as the *Subdivision Ordinance of Kootenai County, Idaho*.

**10-1-2: AUTHORITY:**

These regulations are authorized by Title 31, Chapter 7, Title 50, Chapter 13, and Title 67, Chapter 65 of *Idaho Code*; and Article 12, Section 2 of the *Idaho Constitution*, as amended or subsequently codified.

**10-1-3: PURPOSE:**

The purpose of this Title is to promote and protect the health, safety, and general welfare of the public and to:

- Ensure that development is in conformance with *Idaho Code*, with the goals and policies of the *Kootenai County Comprehensive Plan*, with the requirements of County ordinances, and with the requirements of other agencies.
- Provide for orderly development of land.
- Ensure that development mitigates negative environmental, social and economic impacts.

- Create buildable lots of reasonable utility and livability.
- Preserve, protect and enhance ground and surface water quality.
- Establish a transportation system for vehicles, bicycles and pedestrians that is safe, efficient, and cost effective and that minimizes congestion.
- Provide for adequate and affordable fire, water, sewer, stormwater and other services.
- Encourage the conservation of open space and environmentally sensitive areas.
- Provide for the administration of these regulations.

**10-1-4: DEFINITIONS:**

Words used in the present tense include the future tense. Words used in singular number include the plural, and vice versa. The word “shall” and “must” are mandatory, and the word “may” indicates the use of discretion. Unless clearly stated otherwise, the following words and phrases shall have the following meanings:

**Affected Person** - One having an interest in real property that may be affected by a decision.

**Agent** - One who acts for or in the place of another.

**Agency** - Any city or political subdivision of the State, including but not limited to counties, school districts, highway districts, any agency of State government, and any city or political subdivision of another state.

**Amended Plat** - A plat that has minor corrections or modifications.

**Approach** - An access point onto a public or private road.

**Best Management Practices (BMP’s)** - Land management practices, approved by the State of Idaho or other Idaho public agency, designed to minimize the discharge of sediment and other pollutants. These include, but are not limited to, the *Idaho Forest Practices Rules*, the *Rules Governing Solid Waste Management*, the *Rules for Individual and Subsurface Sewage Disposal Systems*, the *Rules and Minimum Standards for Stream Channel Alterations*, the Rathdrum Prairie sewage disposal and critical materials regulations, the *Rules Governing Exploration and Surface Mining Operations in Idaho*, the *Idaho Well Construction Standards Rules*, the *Rules Governing Placer and Dredge Mining in Idaho*, the *Rules Governing Dairy Wastes*, *Best Management Practices for Containing Critical Materials During Above Ground Storage and Handling*, and the *Catalog of Storm Water Best Management Practices for Idaho Cities and Counties*.

**Board** - The Kootenai County Board of Commissioners.

**Building Envelope** - A designated area, shown on a plat, within which all structures must be located.

**Conservation Design Subdivision** - A subdivision design that maximizes the conservation of open space and the natural, cultural or historic characteristics of an area. The subdivision name for a conservation design subdivision will be followed by the suffix “CDS”.

**Conservation Easement** - A non-possessory interest of a holder in real property, imposing limitations or affirmative obligations for retaining or protecting natural, scenic, or open space values of real property; for assuring its availability for agriculture, forest, recreation or open space use; for maintaining or enhancing air or water quality; or for preserving the historical, architectural, archeological or cultural aspects of real property (*Idaho Code* §55-2101).

**B. Approval Requirements**

The Director may grant the extension providing: a) a complete application was submitted, b) the project is in compliance with the requirements of the County and other agencies (those that were in place at the time a complete preliminary application was received by the Department), and c) the project is in compliance with its conditions of approval. Unless otherwise approved by the applicant, the Director shall make a decision within five (5) weeks of the receipt of a complete application. The Director's decision may be appealed in accordance with Section 10-5-2 of this Title.

**10-2-6: CONDITION MODIFICATION:**

At any time prior to expiration of subdivision approval, a modification of a condition of approval may be requested according to the following procedure:

**A. Application Requirements.** The following items constitute a complete application:

1. Application Form.
2. Fees as adopted by Board resolution.
3. A Narrative explaining why a condition modification is necessary.
4. As part of a complete application, the Director may require additional information to determine compliance with County ordinances, or the requirements of other agencies.

**B. Approval Process and Requirements**

For Major Subdivisions, the approval process and required findings are the same as that for preliminary approval of the subdivision, as presented in Section 10-2-1(C)(1).

For Minor Subdivisions the approval process and required findings are the same as the original approval process, presented in Section 10-2-2(B).

**CHAPTER 3  
DESIGN, IMPROVEMENT AND MAINTENANCE REQUIREMENTS**

Section 10-3-1 Design Requirements

- A. General Requirements
- B. Levels of Utilities and Services
- C. Utility and Service Standards
- D. Easements and Rights-of-Way
- E. Subdivision and Lot Design
- F. Roads and Trails
- G. Sensitive Area Requirements

Section 10-3-2 Improvement Requirements

- A. Installation of Improvements
- B. Plan Approval and Site Disturbance Permit

Section 10-3-3 Maintenance Requirements

- A. Maintenance Required
- B. County Authority to Maintain Private Systems

Section 10-3-4 Financial Guarantees

- A. Financial Guarantee in Lieu of Improvements
- B. Warranty
- C. Subdivision Completion and Warranty Agreements
- D. Types of Financial Guarantees
- E. Failure to Complete Improvements
- F. Release of Financial Guarantee

**10-3-1: DESIGN REQUIREMENTS:** This section delineates the minimum, on site design requirements for both major and minor subdivisions. While off site improvements may also be required to mitigate the effects of the development, these will be considered project by project.

**A. General Requirements**

- 1. Land Suitability. No land shall be subdivided which the Board finds to be unsuitable for building sites because of potential hazards, such as flooding, inadequate drainage, severe erosion potential, site contamination, excessive slope, rock fall, landslides, subsidence (sinking or settling), high ground water, inadequate water supply or sewage disposal capabilities, high voltage power lines, high pressure gas lines, poor air quality, vehicular traffic hazards, or any other situation that may be detrimental to the health, safety, or welfare of residents or the public, unless the hazards are eliminated or adequately mitigated.
- 2. Within the Kootenai County Airport Overlay Zone, the proposal must be in conformance with the Airport Master Plan and the plat must include an Avigation Easement approved by the Airport Director.
- 3. For lots that will not be used for habitable structures, such as open space, unmanned utility lots and dock lots, the Board may waive the requirements for some services and facilities listed in Chapter 3, providing the public, agencies, infrastructure, and future lot owners will not be negatively affected.

**B. Levels of Utilities and Services**

Development of land shall occur in conjunction with services and facilities that are appropriate for the size and density of the development, with urban services being provided for urban size lots. Services and facilities necessary to serve the subdivision must be feasible, available and adequate, and the proposal must include on and off site improvements to mitigate the impacts of the development so that the existing quality of services is not compromised, and so there is no substantial increase in the cost of services to existing residents. If authorized by law, mitigation may include payments and fees, donation of land, or off site improvements. Required improvements shall be directly related to the subdivision under consideration, shall be located in the vicinity of the subdivision, and shall be commensurate with anticipated impacts.

The following are minimum requirements. Other services and facilities may be required on a project by project basis.

- 1. For lots less than one (1.00) acres, the following services are required:
  - a. A sewage disposal system meeting the requirements of Panhandle Health District or DEQ.
  - b. A shared water system that can provide fire flows or water storage, if required by the Fire District. Shared water systems may require DEQ approval. The Director may waive the shared water system requirement if the constraints of the site warrants a modification to the requirement.

- c. Electrical service to each lot.
  - d. Fire protection from a Fire District.
  - e. Road access to each new lot meeting the standards of Section 10-3-1(F) of this Title.
  - f. For subdivisions with thirty (30) or more lots, garbage collection after the construction of fifteen (15) homes.
2. For lots between one (1.00) and 4.99 acres, the following services are required:
- a. A sewage disposal system meeting the requirements of Panhandle Health District or DEQ.
  - b. Reasonable assurance of an adequate and reliable water source for each lot.
  - c. Electrical service to each lot.
  - d. Fire protection from a Fire District.
  - e. Road access to each new lot meeting the standards of Section 10-3-1(F) of this Title.
  - f. For subdivisions with thirty (30) or more lots, garbage collection after construction of fifteen (15) homes.
3. For lots of 5.00 acres or more, the following services are required:
- a. A sewage disposal system meeting the requirements of Panhandle Health District or DEQ.
  - b. Reasonable assurance of an adequate and reliable water source.
  - c. Fire protection from a Fire District.
  - d. Road access to each new lot meeting the standards of Section 10-3-1(F) of this Title.
  - e. For subdivisions with thirty (30) or more lots, garbage collection after construction of fifteen (15) homes.
4. The following services are required for subdivisions in Commercial, Light Industrial and Industrial Zones:
- a. Adequate infrastructure for the proposed use, including treatment of non-domestic wastewater in a wastewater treatment plant approved by DEQ. No subsurface discharge of non-domestic wastewater is permitted.
  - b. A water system that meets the State requirements for a public water system and can provide fire flows, as required by the Fire District.
  - c. Electrical service to each lot.
  - d. Fire protection from a Fire District.
  - e. Publicly maintained road access to each lot, as approved by the Highway District.
  - f. Garbage collection.

*Note: For lots equal to or greater than 5.00 acres, the size of the lot may be figured using gross acreage (including ½ of adjoining rights-of-way). All other lot sizes are based on net density, being the amount of land per dwelling unit excluding the area for roads, parks, common open space, utility facilities, and any other nonresidential use.*

### **C. Utility and Service Standards**

1. Domestic Water Systems.
- a. When a water district or utility regulated under *Idaho Code* Title 61 (Public Utility Regulation) provides a “will serve” letter for a subdivision, annexation and/or connection may be required. If not required, for shared water systems serving 10 or more lots, the applicant shall form a water district or utility corporation (non-profit or for profit) to own, operate and maintain the system. Water districts and utility corporations must be established in conformance with applicable law, and cooperative corporations such as homeowners associations must also meet the requirements of Section 10-3-3 and Appendix B of this Title.

- b. The new components of a water system and any necessary improvements to an existing system, must be designed and constructed in conformance with the requirements of the Idaho Department of Environmental Quality, the *Idaho Division of Public Works, Idaho Standards for Public Works Construction*, the fire district, and if applicable, the water district, utility or corporation. Distribution lines shall be installed to each lot.

2. Fire Protection Systems

Subdivisions shall meet the requirements of the Fire District, including those pertaining to roads, driveways, fire flows, hydrants, water storage and defensible space. In addition, each lot shall have a building site capable of being accessed by a driveway meeting the minimum standards of the *Kootenai County Zoning Ordinance* or the Fire District.

Subdivisions shall also minimize the hazards associated with wildfire, and major subdivisions in timbered areas shall provide a Fire Mitigation Plan, developed by a professional forester, that meets the requirements of Appendix A and is approved by the Director, the Fire District, or the Idaho Department of Lands. The Plan must be implemented as part of the required improvements for the subdivision.

3. Sewage Disposal Systems. If a public sewage system is available and provides a “will serve” letter, connection shall be required. If a private, shared sewage system is available and provides a “will serve” letter, connection may be required, providing the cost of service is commensurate with that charged to existing customers. If connection to a shared system is required, collection lines shall be installed to each lot. All sewage disposal systems shall meet the standards of the Panhandle Health District and/or DEQ. If required, shared sewage systems shall be installed and approved, or the necessary improvements secured by a financial guarantee, prior to final approval of the subdivision. Individual septic systems may be installed after final subdivision approval, in conjunction with building permits.
4. Underground Utility Placement. Unless utility providers determine that site conditions preclude underground utility installation, all utilities shall be installed underground.
5. Stormwater Management. Lots shall be laid out to provide drainage away from building sites. Stormwater management and erosion control shall meet the requirements of the *Kootenai County Site Disturbance Ordinance* in accordance with best management practices approved by the County. Infiltration of stormwater in small quantities is preferred. The collection and concentration of stormwater in detention and retention basins, wet ponds, constructed wetlands or similar facilities is discouraged and shall only be allowed when there is no feasible alternative. The installation of curbing is also discouraged because it concentrates runoff. Discharge of untreated stormwater into streams, lakes, natural wetlands or groundwater is prohibited.
6. Under Road Utilities. Whenever a utility is proposed to be installed under a road, the utility's location and construction shall meet the requirements of the Highway District, ITD or the road owner(s). In all instances, placement of utilities shall be coordinated with proposed road improvements and shall be installed before the road is completed.

#### **D. Easements and Rights-of-Way**

1. Utility Easements. A minimum ten (10) foot general utility easement shall be provided to each lot. Any shared components of sewage, water, stormwater or other infrastructure systems, shall either be within the general utility easement or an easement dedicated or conveyed to the entity

responsible for maintenance. Easements must also be provided for individual sewage lines and drainfields that will not be located on the same parcel as residences.

2. **Road rights-of-way shall meet the requirements of the Highway District** or, if applicable, ITD. Common driveway easements shall be at least 40 feet in width. Cut and fill slopes and stormwater systems adjacent to roads and driveways must either be shown as easements or rights-of-way, in favor of the maintenance entity. When future access may be needed to adjacent parcels of land, road easements and rights-of-way shall extend to the property line of the subdivision. Except for gated communities and common driveways approved by the Board, roads and associated rights-of-way shall be dedicated to the applicable highway agency. Private roads and common driveways shall be dedicated to the maintenance entity.
3. Public trail easements or rights-of-way may be required, depending on the location of the subdivision and the need for pedestrian trails and/or sidewalks. If required, they shall be dedicated or conveyed to Kootenai County or to the entity that will provide maintenance as approved by the Board. The width of trail easements and rights-of-way shall be adequate for the intended use, and shall meet the requirements of the County or maintenance entity. When future access may be needed to adjacent parcels of land, trail easements and rights-of-way shall extend to the property line of the subdivision.
4. Public Access, Parks and Facilities. Public access easements or the conveyance of land for public access, parks or facilities may be required for subdivisions that are contiguous to: a) public lands, b) streams, lakes, ponds, wetlands or similar areas, or c) for areas designated in a County facilities acquisition plan. If so required, the property owner shall be paid fair market value for the easement or land.
5. The Board or Director may require that Hydrologic Protection Areas be shown as easements or rights-of-way.
6. Required easements and rights-of-way shall be depicted on the face of the plat.

#### **E. Subdivision and Lot Design**

1. Subdivisions shall be designed to be compatible with existing homes, businesses and neighborhoods, and with the natural characteristics of the area. Subdivisions shall minimize grading, road construction and disturbance of the terrain, vegetation, soils, and drainageways, and shall prevent soil erosion. To achieve this, the Board may require building envelopes, No-disturbance Zones, height restrictions and planting or retention of vegetation.
2. Lot Design. Subdivisions shall result in lots of reasonable utility and livability. Irregular configurations that result in unusable land, or that may cause future land use conflicts, are prohibited. All building lots must have at least one building site that can meet required setbacks and be accessed with a driveway meeting the standards of the *Zoning Ordinance* or Fire District.
3. Lot Access. All new lots shall have frontage and direct access onto a road or common driveway meeting the standards of Section 10-3-1(F) of this Title. A lot with an existing residence shall not be considered a new lot. For irregularly shaped subdivisions, or sites with severe physical constraints, the Board may allow access to individual lots via an easement. Driveway approaches to public roads must be approved by the Highway District or ITD. No new accesses to individual lots are permitted from State Highways or arterial roads as shown on the highway district's current Functional Classification Map. In some cases ITD or the highway district may require relocation, reconfiguration, consolidation or elimination of existing approaches.

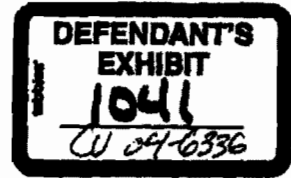
# APPENDIX C



CERTIFIED TRUE COPY

BY: 

ORDER OF CONDEMNATION



PROJECT NO.: F-2390(104)

PARCEL NO.: 41

HIGHWAY: U.S. Highway No. 93

KEY NO.: 5137

LOCATION: Twin Falls

PARCEL ID. NO: 0041481

RECORDOWNER(S): CANYON VISTA FAMILY LIMITED PARTNERSHIP, an Idaho Limited Partnership

Twin Falls, IDAHO  
COUNTY: Twin Falls

The Board, having considered the report and recommendations of the State Highway Administrator and having duly considered the matter, finds:

1. That the above designated project is for the purpose of constructing a section of the State Highway System in the location as noted above.
2. That the right of way necessary for the proposed project consists in part of certain real property located in the county as noted above, and which property has been designated and shown as the above parcel number on the plans of said project now on file in the office of the Idaho Transportation Department.
3. That the parcel so designated and shown on said project plans is necessary to the construction of said project, and the construction of said project is impossible without the acquisition of said parcel.
4. That all rights of access to, from, and between the right of way of the public way and all of the contiguous remaining real property of the record owner(s) shall be extinguished and prohibited except for access, if any, as provided and shown on the said project plans referred to in Paragraph 2 above.
5. That the record owner(s), according to a Preliminary Title Report now on file in the office of the Idaho Transportation Department, of the parcel so designated and shown on said project plans are as listed above. Any encumbrances or liens of record pertinent to the parcel so designated are as set forth in said title report. Any other known claimants to the property as determined by investigations of representatives of this Department are as set forth above.
6. That the Idaho Transportation Department has, by and through

ORDER OF CONDEMNATION

its representatives, sought in good faith to arrive at a settlement with the above-mentioned record owner(s), as to the value of land (including the improvements thereon) represented by the aforementioned parcel, together with any easements necessary for the construction and relocation of irrigation and drainage facilities, approaches, access roads, rounding of slopes, etc., in connection with the construction of the project, and the damages which will result to the property not taken and has been unable to make any reasonable bargain therefore, or settlement of such damages.

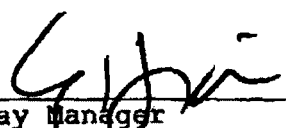
NOW THEREFORE, IT IS HEREBY ORDERED that the acquisition of the lands and property rights hereinabove described is necessary to the construction and maintenance of the said highway project.

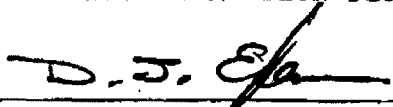
IT IS FURTHER ORDERED that the Idaho Transportation Department shall acquire the hereinabove designated real property and property rights through the power of eminent domain.

Dated this 8 day of Nov., 2004.

COMMEDED:

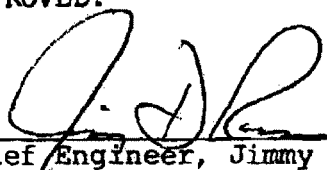
IDAHO TRANSPORTATION DEPARTMENT

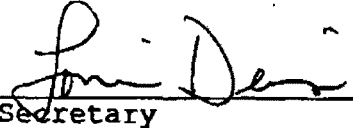
  
\_\_\_\_\_  
Right of Way Manager  
Leonard G. Hill

  
\_\_\_\_\_  
David S. Ekern, Director,  
On Behalf of The  
Idaho Transportation Board

APPROVED:

ATTEST:

  
\_\_\_\_\_  
Chief Engineer, Jimmy D. Ross

  
\_\_\_\_\_  
Secretary

APPROVED AS TO FORM:

  
\_\_\_\_\_  
Legal Counsel