No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

ROY BRACKEN, an individual; RRJ LLC, an Idaho limited liability company; and PENGUIN LLC, an Idaho limited liability company,

Petitioners,

v.

CITY OF KETCHUM, IDAHO an Idaho municipal corporation; MICAH AUSTIN, an individual, SUZANNE FRICK, an individual, and NINA JONAS, an individual,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court of Idaho

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QUESTION PRESENTED

Petitioner applied to the city of Ketchum, Idaho, for a conditional use permit to construct a gas station on property zoned for that use. Under Idaho law, a conditional use permit application (CUP) involves a discretionary process. The process is heavily regulated by both municipal ordinances and state statutes, which specify mandatory procedures for consideration of the application. The city deliberately ignored *all* mandatory procedural requirements, such as a right to be heard, and refused to process the application. The application was never considered, resulting in proven procedural and substantive due process violations and a suit for damages pursuant to 42 USC 1983. The state district court dismissed all of Bracken's claims. On appeal, the Idaho Supreme Court ruled that Bracken was not entitled to damages for apparent due process deprivations, and dismissed Petitioner's 1983 causes of action, for the sole reason that the city ultimately retained discretion to grant or deny the permit. The question presented is:

Whether All Rights To Due Process Required By Federal, State, And Municipal Law May Be Denied Because One Lacks Entitlement To A Government Benefit Solely Due To The Existence Of Discretion

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioners disclose the following: There is no parent or publicly held company owning 10% or more of Applicant RRJ LLC or Penguin LLC stock.

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The Idaho Supreme Court's opinion is unreported so far. It is Docket No. 48721.

JURISDICTION

The Idaho Supreme Court issued its decision on September 15, 2023. Pet.App.1a. Petitioner filed a timely petition for rehearing, which the Idaho Supreme Court denied on November 2, 2023. Pet.App.1b. This Court has jurisdiction under 28 U.S.C. 1257.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

FEDERAL STATUTE INVOLVED

42 USC 1983 provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State…subjects, or causes to

be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress…

STATUTES AND ORDINANCES INVOLVED

Idaho Code Sections Involved:

74-121 (1) Public records of the state and/or territory of Idaho are the property of the citizens of the state in perpetuity and they may not be improperly or unlawfully transferred or removed from their proper custodian.

67-6512. (a) As part of a zoning ordinance each governing board may provide by ordinance…for the processing of applications for special or conditional use permits…
(b) Prior to granting a special use permit, at least one (1) public hearing in which interested persons shall have an opportunity to be heard shall be held.

67-6519 (1) As part of ordinances required or authorized under this chapter, a procedure shall be established

for processing in a timely manner applications for zoning changes, subdivisions, variances, special use permits and such other applications required or authorized pursuant to this chapter for which a reasonable fee may be charged.

(2) Where the commission hears an application, the commission shall have a reasonable time fixed by the governing board to examine the application before the commission makes its decision…

67-6535. (2) The approval or denial of any application required or authorized pursuant to this chapter shall be in writing and accompanied by a reasoned statement that explains the criteria and standards considered relevant, states the relevant contested facts relied upon, and explains the rationale for the decision based on the applicable provisions of the comprehensive plan, relevant ordinance and statutory provisions, pertinent constitutional principles and factual information contained in the record.

67-6519(5) Whenever a governing board or zoning or planning and zoning commission grants or denies an application, it shall specify:

(a) The ordinance and standards used in evaluating the application;

(b) The reasons for approval or denial; and

(c) The actions, if any, that the applicant could take to obtain approval.

(6) … An applicant denied an application or aggrieved by a final decision…Idaho Code, may within twenty-eight (28) days after all remedies have been exhausted under local ordinance seek judicial review under the procedures provided by chapter 52, title 67, Idaho Code.

Ketchum Municipal Ordinances Involved:

17.116.010 - Conditional use permit.

Conditional uses by definition possess characteristics such as to require review and appraisal by the Commission to determine whether or not the use would cause any public health, safety or welfare concerns. Accordingly, conditional uses, as have been designated throughout this title, shall be allowed only upon the approval of the Commission, subject to such conditions as the Commission may attach. Such approval shall be in the form of a written permit.

17.116.030 - Conditional use permit criteria.

A conditional use permit shall be granted by the Commission only if the applicant demonstrates that:

A. The characteristics of the conditional use will not be unreasonably incompatible with the types of uses permitted in the applicable zoning district;
B. The conditional use will not materially endanger the health, safety and welfare of the community;
C. The conditional use is such that pedestrian and vehicular traffic associated with the use will not be hazardous or conflict with existing and anticipated traffic in the neighborhood;
D. The conditional use will be supported by adequate public facilities or services and will not adversely affect public services to the surrounding area, or conditions can be established to mitigate adverse impacts; and
E. The conditional use is not in conflict with the policies of the comprehensive plan or the basic purposes of this chapter.

STATEMENT

This case starts with wholesale deliberate and intentional deprivations of both procedural and substantive due process, and ends with an Idaho Supreme Court determination that all responsible actors involved achieved immunity

from damages claims under Section 1983. The Idaho Supreme Court determined that if one is not entitled to a benefit as the result of a discretionary process, one suffers no damages if the entire mandatory process is disregarded.

Multiple courts have addressed the issue of the amount and degree of discretion involved in adjudicating entitlement to land use benefits; See, e.g.-*Gerhart v. Lake County, Mont.*, 637 F.3d 1013, 1019, (9th Cir. 2011) and regarding entitlement to welfare benefits, *Kapps v. Wing*, 404 F.3d 105, 112 (2d Cir. 2005). *Kapps* contains a particularly detailed explanation of the rights and issues involved, and the differences between administrative adjudications where benefits are the subject of applications as opposed to terminations. In hundreds of cases, whether on the subject of land use permits or welfare applications, the courts require detailed examination of the amount and degree of discretion afforded state officials, and all conclude that if adjudication of the benefit entails significant curtailment of state officials' discretion, the applicant may have a legitimate expectation to the benefit. See, *Jones v. Governor of Fla.,* 975 F.3d 1016 (11th Cir. 2020). ("The lesson from this body of law is that when a State promises its citizens an entitlement based upon the satisfaction of objective criteria, it creates a due process right for those citizens.")

The facts have never been in dispute, and, except where indicated, appear at some length in the Idaho Supreme Court's Opinion entered September 15, 2023. Pet. App.1a.

Roy Bracken, a small convenience store operator in Ketchum, Idaho, sought to develop a gas station/convenience store along Highway 75 at Ketchum's northern end. He secured an option to purchase property that Ketchum had already zoned for a gas station. He applied for a Conditional Use Permit (CUP) on April 29, 2016. A local group formed in opposition. In the course of the first submitted application, Ketchum's Mayor (Respondent Nina Jonas) and the City Administrator (Respondent Suzanne Frick) dined at the home of the group's chairperson. The meeting was about the application. The mayor also commissioned an online public opinion poll about whether a gas station should be permitted at the proposed site, and the results of the poll were presented to the Ketchum Planning and Zoning (P&Z) Commission. A nine-year veteran of the P&Z Commission called that survey "unprecedented." Pet.App.3a After this poll, the staff reports changed dramatically. The first application was denied by the P&Z Commission, after a proper review, based on a purported traffic flow problem.

Bracken submitted a second application on April 10, 2017, with a re-designed site plan. It

was immediately rejected by Ketchum's Planning and Building Director (Respondent Micah Austin) on the grounds it was the same as the first application. On the same day, the Planning and Building Department submitted its own zoning amendment seeking to prevent any gas stations from accessing the highway. Pet.App.6a

An interim appeal to the P&Z Commission was taken over the April 10 rejection. While the appeal was pending, the city tried to erase the second application from its public records in an unsuccessful attempt to keep it from "vesting" pursuant to Idaho law. Micah Austin physically removed it from Ketchum's public records twice, on April 26, 2017, and again on June 27, 2017, in violation of Idaho Code Section 74-121, and returned it to Bracken's attorney each time. Bracken's attorney re-submitted the second application on June 19, 2017, to insure its presence in the public records. Austin tried to claim several new requirements prevented its refiling. "None of these added items were required by the applicable Ketchum Municipal Code" but Austin returned the original application on June 27, 2017, so as to insure it could not be found in Ketchum's public records. Pet.App.4a

During the appeal to the Commission the city passed its new ordinance on July 7, 2017, prohibiting gas stations from accessing Main

Street in Ketchum. The ordinance "was unusually expedited" and was adopted by the Ketchum City Council after being advised that a second application had been submitted on April 10, 2017. The Idaho court recognized this was a blatant violation of Idaho law: "Our holding in *Ben Lomond* prohibits the Respondent's bad faith conduct in this case." The Idaho Supreme Court (Idaho court) found that "Austin, with Jonas' encouragement, intentionally withheld action on Bracken's second application until the City could amend its ordinance in an attempt to block Bracken's proposed gas station." The Idaho court concluded that Idaho law on this point was "well-established," and it held that Bracken had a "vested right" to have his application considered under the law in effect on April 10, 2017. The Idaho court also defined a vested right: "Certainly, if the applicant does not comply with the Ordinance, a permit cannot be issued. However, the vested right in question is *not the guaranteed right to obtain the permit*, but *rather the right to have the application evaluated and measured* under the Ordinance in effect at the time of application." Pet.App.25a.

On July 7, 2017, Ketchum's P&Z Commission entered a written decision on appeal, overturning the April 10 rejection and ordering Austin, essentially, to accept and process the application according to Idaho law. Pet. App.8a. Bracken

tendered his application again on July 7, 2017, and Austin refused to accept it. On December 11, 2017, Bracken hand delivered a letter to Austin reciting the P&Z Commission's order, and made a formal request for the City to process his application. In keeping with the city's theory that it could prevent the application from vesting by concealing or suppressing it, Austin told Bracken on December 11, 2017, that "in his view, no application had been submitted…and that refiling was not an option" because the city had been careful not to keep any records of it. Pet. App.9a The Idaho Supreme Court rejected this "theory" when it ruled on appeal that the application vested as a matter of law back on April 10, 2017. Pet.App.27a

On December 13, 2017, Bracken submitted it again for filing, and it was again rejected. Pet.App.9a. Bracken tendered his second application to the City five separate times. The Mayor knew of this activity. Bracken filed a 14-page Notice of Tort Claim with the City Clerk on December 18, 2017. The city ignored it. Since he was never going to get a permit, Bracken's option to purchase the property expired. Pet.App.10a Bracken's second application was never accepted, processed, or reviewed by the P&Z Commission, so that it could be "evaluated and measured" under the pre-existing ordinance pursuant to Idaho's law granting him a vested right.

Idaho's application process is heavily regulated by its Local Land Use Planning Act, and Ketchum's municipal ordinances. They require public hearings, evaluation of the application by a P&Z Commission, and a final order subject to appeal, etc. Bracken was not afforded any hearing or other process, nor was he provided any written order or "reasoned statement" from the P&Z Commission which was then subject to appeal or judicial review. No discretion was ever exercised by any agency that was required by law to pass upon the merits of the second application.

Petitioner sued for damages in Idaho state court. A *First Amended Complaint* was filed June 4, 2020. A *Second Amended Complaint* was filed on October 2, 2020. Counts Seven, Eight and Nine of each complaint remained the same throughout. Every complaint sought damages pursuant to 42 USC 1983. Count Seven in every filed complaint alleged a claim against Respondents Jonas, Frick, and Austin individually for procedural and substantive due process deprivations in violation of 42 USC 1983. Count Eight of each complaint alleged a claim against the City of Ketchum for the same procedural and substantive due process deprivations under 42 USC 1983. Count Nine of each complaint alleged a claim for punitive damages under Section1983. Pet.App.10a. Respondents' Answer included five affirmative

defenses. Pet.App.11a Respondents acted so deliberately and in such utter disregard of established law that they intentionally declined to raise qualified immunity as a defense. For ramifications of that, s*ee, Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982), *Hunter v. Bryant,* 112 S.Ct. 534, 537 (1991)

This Court held in *Patsy v Florida Board of Regents,* 457 U.S. 496 (1982) that exhaustion of state administrative remedies is not a prerequisite to an action under Section 1983. The state district judge held, despite *Patsy,* that Bracken's claims under Section 1983 were not ripe for failure to pursue state administrative remedies. He dismissed all of Petitioner's Section 1983 claims. Pet.App.17a. On appeal, the Idaho court never addressed this basis for dismissal and never mentioned the *Patsy* decision.

Counts One through Six in each filed complaint were dismissed along the way and are not germane. In December 2020 the district court granted Respondents' third motion for summary judgement and dismissed Petitioner's Section 1983 claims contained in Counts Seven, Eight, and Nine, along with Count Ten, a late claim under state law for intentional interference with an economic expectancy.

Petitioner filed a timely appeal with the Idaho Supreme Court. In its decision, the Idaho Supreme Court recited all the above facts. It excused any failure to exhaust administrative

remedies on state grounds due to independent wrongdoing of Respondents, but refused to conclude that Petitioner had suffered any due process deprivations. Petitioner's substantive due process deprivation claims were dismissed along with his procedural claims. The Idaho court concluded Petitioner "did not have a constitutional right that was infringed," It then concluded that even though Respondents engaged in impermissible bad faith conduct, Petitioner was not entitled to damages because the city could have ultimately denied the application in the exercise of discretion, "regardless of their bad conduct." These rulings are particularly ironic given the Idaho court's conclusion that Petitioner held a vested right *to have his application "evaluated and measured,"* regardless of the outcome of the process. ("…the vested right in question is *not the guaranteed right to obtain the permit*, *but rather the right to have the application evaluated and measured*…) Pet.App.25a

Thus, Petitioner had a vested right to be free from arbitrary changes to the zoning law applicable to his property. Taking this right without due process was certainly a constitutional right of Petitioners that was infringed, among many others.

A. The Decision Below

The Idaho court ruled as follows:

> Given the discretion inherent in determining whether to grant a conditional use permit, the district court correctly found that Bracken did not have a constitutional right that was infringed. Thus, we hold that Bracken had no claim under either a procedural or substantive due process theory because he had no "legitimate claim of entitlement" to a permit that the City had discretion to deny in a reasonable exercise of its discretion. See, *Gerhart v. Lake County, Mont.*, 637 F.3d 1013, 1019, (9th Cir. 2011). Bracken focuses on Respondents' disregard for 'procedural safeguards,' as adequate to support the infringement of his constitutional rights. However, the poor conduct on the part of the City and its agents does not foreclose Respondents' discretion to ultimately grant or deny the application. Because that discretion remained with Respondents, regardless of their bad conduct, we affirm the district court's dismissal of Bracken's federal claims— Counts Three, Seven and Eight. Pet.App.53a. Count Nine claiming punitive damages was dismissed because there could be no punitive damages under Section 1983 without other liability. Pet.App.54a

Idaho's Supreme Court entered its Opinion on September 15, 2023. Petitioner timely filed a Petition for Rehearing. Rehearing was denied in an Order Denying Petition for Rehearing entered November 2, 2023. Pet.App1b.

REASONS TO GRANT THE PETITION

I. This Petition Raises A Question Of Exceptional Importance To The Citizens Of Idaho And Elsewhere

A. The Idaho Supreme Court Has Eliminated Federal Accountability for *All* State, County, and Municipal Officials For Intentional Violations of Procedural and Substantive Due Process Requirements in Every Discretionary Process. This Conflicts With Hundreds Of Decisions.

1. The Idaho Supreme Court has announced a sweeping and stunning new rule, without considering the amount and degree of discretion involved in various exercises of agency discretion. The Idaho court eliminated Section 1983 as a viable remedy for intentional due process violations for every process involving an exercise of discretion. The amount and degree of discretion involved is most often a crucial determination in any administrative process examining entitlement to a government benefit.

> *Gonzales v. City of Castle Rock,* 366 F.3d 1093, 1103 n. 7 (10th Cir.2004) (en banc) (the fact that "it may ultimately be found that an individual does not satisfy the relevant criteria necessary to receive [a] benefit" does not negate the existence of a property interest, protected by due process)…And, our own circuit has indicated on at least three occasions that benefits applicants may possess a property interest, albeit in circumstances that differ somewhat from the instant case.(citations omitted). …"[w]hether a benefit invests the applicant with a `claim of entitlement' or merely a `unilateral expectation' *is determined by the amount of discretion the disbursing agency retains,"* and "[t]he question of entitlement thus hinges on whether, `absent the alleged denial of due process, there is either a certainty or a very strong likelihood that the application would have been granted.'"
>
> *Kapps v. Wing*, 404 F.3d 105, 115 (2nd Cir. 2005).

2. The Idaho court's ruling conflicts with every Section 1983 federal ruling that examines the amount of discretion exercised by the disbursing agency. By virtue of a blanket elimination of any damage award in many cases

involving deliberate violations of Section 1983, the Idaho Supreme Court has ruled that state and local actors are immune from the reach of federal law for some of the most egregious due process violations imaginable. This ruling was not confined to land use, or discretionary permit applications, or restricted to discerning the amount of discretion involved. *Every employee of every state agency, county government, and municipality—in short, all who act under color of state law, presumably in every state, are immune, without limitation, if they deliberately ignore all statutory and/or municipal requirements for conducting every process which ultimately involves any degree of an exercise of discretion.* This ruling affects every discretionary agency process in Idaho and elsewhere that considers whether to grant, deny, or even revoke any sort of government benefit. This is a breathtaking intrusion into federal law.

Hearing requirements may be ignored. Reasoned decisions are no longer required. No exercise of discretion is required no matter what governing law says. There is no ability to judicially review whether discretion was properly exercised, since there is no penalty if discretion was never exercised. All discretionary applications or processes required by law may be ignored—there is no penalty whatsoever if state actors deliberately engage in the most arbitrary

and capricious conduct possible. An application may be concealed, suppressed, or trashed, with the city enabled to achieve its desired result without conducting any required process whatever, thereby gaining out of its own wrong. Gaining out of one's own wrong violates fundamental concepts of justice. He who prevents a thing from being done may not avail himself of the non-performance which he has himself occasioned…" *R. H. Stearns Co. v. United States*, 291 U.S. 54, 61-62 (1934). So long as an agency or state actor retains ultimate discretion over the result, there is no longer any remedy for damages under Section 1983 if state, federal, or local due process requirements are disallowed entirely.

B. This Case Presents An Issue Of Societal Significance. The Idaho Court Has Approved Intentional Violations Of Its Own State's Laws. Its Decision Conflicts With Wide Areas Of Federal Law Regarding Discretionary Entitlements.

1. Government agencies and actors in Idaho retain ultimate discretion to grant, deny, or revoke entitlement to a wide variety of government benefits which citizens are not otherwise "entitled" to. These benefits are now subject to arbitrary grant, denial, or revocation by government actors who enjoy immunity from deliberate and intentional Section 1983

violations. There are almost no discretionary decisions made at or below the state level in which state actors are deprived of ultimate discretion authority at the end of the decision process. Discretionary decisions in the land use area include rezone applications, conditional use permits, road construction permits, and subdivision applications. Agency or governmental discretionary activity required and/or regulated by law, in which the decider retains ultimate discretion, would include hundreds of daily citizen interactions with Idaho agencies or state actors: revocation of all occupational licenses, revocation proceedings for licenses for regulated activities such as driver's licenses, outfitters and guides licenses, nursing home licenses, liquor sales, concealed weapons permits, all agency action for determination of entitlement or regulation of government benefits, public utility commission regulatory actions; industrial commission/workmen's compensation proceedings; public entitlement benefit determinations such as subsidized housing, disability, food stamps, welfare, unemployment benefits, mining or excavation permits on state land; water quality and regulatory issues; entitlement to land, timber, and grazing leases; personnel/tenure proceedings.

2. Most of these described activities, and many more, are subject to state statutes and local regulations requiring specified processes which have historically been entitled to federal due process protection. According to the Idaho court, "Respondent's disregard for 'procedural safeguards'" is not adequate to support any claimed infringement of constitutional rights.

3. With regard to the question of *revoking* entitlement to licenses, the Idaho Supreme Court's ruling granting immunity where state officials retain discretion to act runs headlong into conflict with a great number of federal appellate decisions. Once licenses are issued their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment. *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969); *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, (1970). This is but an application of the general proposition that relevant constitutional restraints limit state power to terminate an entitlement whether the entitlement is denominated a 'right' or a 'privilege.' *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, (1963).

C. This Issue Of Entitlement To Benefits Is Important And Recurring

1. The Idaho court's decision is also in direct conflict with every circuit court that has addressed entitlement to welfare benefits. If it stands, government agencies may point to it as authority for immunity if they act deliberately to avoid all required due process where entitlement to benefits is in issue.

> The Supreme Court has repeatedly reserved decision on the question of whether applicants for benefits (in contradistinction to current recipients of benefits) possess a property interest protected by the Due Process Clause. See, e.g., *Lyng v. Payne*, 476 U.S. 926, 942, 106 S.Ct. 2333, 90 L.Ed.2d 921 (1986); *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 320 n. 8, 105 S.Ct. 3180, 87 L.Ed.2d 220 (1985); see also *Gregory v. Town of Pittsfield*, 470 U.S. 1018 1018, 105 S.Ct. 1380, 84 L.Ed.2d 399 (1985) (O'Connor, J., dissenting from the denial of certiorari). Every circuit to address the question, however, has concluded that applicants for benefits, no less than current benefits recipients, may possess a property interest in the receipt of public welfare entitlements.

Kapps v. Wing, 404 F.3d 105, 115 (2nd Cir. 2005).

II. The State Supreme Court Decision Is Wrong.

A. Petitioner's Case Is Unique. There Is No Authority Anywhere For The Idaho Court's Ruling; The Case The Idaho Court Relies Upon Supports Petitioner. Petitioner Held A Legitimate Claim Of Entitlement To A Permit, Which Is A Recognized Property Right.

1. The Idaho Supreme Court erroneously relied upon one case for the proposition that Bracken "had no claim under either a procedural or substantive due process theory because he had no 'legitimate claim of entitlement' to a permit that the City had discretion to deny" since Respondents retained ultimate discretion to grant or deny the application, citing *Gerhart v. Lake County, Mont.*, 637 F.3d 1013, 1019, (9th Cir. 2011). There is no authority anywhere supporting the Idaho court's decision. Unlike Petitioner's case, Lake County had no formal process governing approach permits for county roads. "There are no written or documented rules, regulations, laws, or ordinances that exist in Lake County or in Montana that put property owners on notice that the [County's permit process] exists." Nor is there any documented process or guidance for the Commissioners to

follow in deciding whether to grant an approach permit once an application is submitted. *Gerhart v. Lake County*, 637 F.3d 1013, 1017-18 (9th Cir. 2011) "Montana law does not impose any limitations on the Commissioners' discretion to permit approaches to county roads." *Id.* 1019-20. Since there were no statutory or municipal ordinances governing the process, *Gerhart* did not involve any claimed violation of statutory due process requirements or any deprivation of a right to be heard. Gerhart not only had no right to an approach permit, he had no right, statutory or otherwise, to any process that weighed and evaluated his right to an approach permit. *Gerhart* had no entitlement to any process at all.

What *Gerhart* actually stands for is the opposite proposition, that Petitioner had a legitimate claim of entitlement to a permit. *Gerhardt* points out that it is possible to have a property interest in a government benefit, e.g.-a permit, *even if all the applicant has is an expectation*, if state law has created a "legitimate claim of entitlement" to the government benefit. "…such an entitlement to a government permit exists when a state law or regulation *requires that the permit be issued once certain requirements are satisfied*." (emphasis added). *Bateson v. Geisse*, 857 F.2d 1300, 1303 (9th Cir. 1988) (holding that a builder had a property interest in a building permit where city regulations provided that once an applicant met certain requirements, a permit must be issued)"

Gerhart v. Lake County, 637 F.3d 1013, 1019-20 (9th Cir. 2011). "

2. Petitioner's case is very distinct from those relied upon by the Idaho court for four reasons. One, Ketchum's ordinance 17.116.030, is unique from all of the other cited cases. The ordinance is set forth in full in the Idaho court's opinion, Pet.App.50,51a, although it wrongly emphasized two words that the ordinance does not. It provides that a conditional use permit "shall be granted by the commission…" if specified conditions have been met. All other ordinances in the cases relied upon by the Idaho court say a permit "may" be issued. Even the case law mistakenly relied upon by the Idaho court notes the critical distinction. According to *Gerhart, Bateson,* and *Kapps*, Petitioner therefore had a legitimate claim of entitlement to a permit, which is a protected property interest. The second major distinction from *Gerhart* is that a legitimate expectation of entitlement to a permit is only one of many property rights that could exist to support a procedural due process deprivation claim. Here, Petitioner has four other property interests at stake, which are set forth below, supporting his due process claim.

The third distinction is that in every case cited by the Idaho court as "persuasive" authority, the permit applicant was granted a hearing, and received an exercise of discretion and a reasoned decision. Procedural due process requirements were observed, but claimants were

unsatisfied with the results of the discretionary exercise they received. Petitioner was afforded no process and his application was never considered. The fourth major distinction is that Petitioner held a vested right under state law to have his application evaluated and weighed and considered and made subject to an exercise of discretion and a reasoned decision.

3. Petitioner submits that Ketchum's ordinance 17.116.030, by using the word "shall" rather than "may," created its own "legitimate claim of entitlement to a permit," which one of many recognized property interests. Petitioner had even better evidence than that. This case was decided upon summary judgment. Petitioner's witness Steve Cook, the 9-year veteran of Ketchum's P&Z Commission and its chairman for two years, submitted a declaration in the course of summary judgement proceedings. In it, he describes how the Commission found that Petitioner met four of the five conditions in the course of the first application. The one remaining condition was the "*potential* for northbound traffic on Highway 75 to back up." Traffic circulation on-site was re-configured on the second application so that "two huge trucks could navigate around each other on-site. The city had no way to object to our Second Application traffic on-site movement…In [his] opinion, based on his nine (9) years on the P&Z Commission if Roy Bracken had a fair constitutional process and hearing over his

Second Application, Roy would almost to an absolute certainty have been entitled to a permit." (emphasis in original). Respondents failed to counter this evidence on summary judgment. It stands as uncontradicted proof that, absent the alleged denial of due process, there is every reason to believe that Petitioner would have obtained a permit.

Petitioner had much more than a claimed property right by virtue of a legitimate claim of entitlement to a permit. All of the evidence and applicable law suggest that, but for the denial of the entire process, Petitioner would have in fact obtained his permit. Instead, Respondents were able to defeat Petitioner's claims to entitlement of the CUP by intentionally and unlawfully avoiding the entire process, which is obviously why they did so. Although as a general rule "one cannot gain from one's own wrong," Respondents did.

B. Petitioner Accepts That One Claiming Infringement Of A Due Process Right Must Have A Protected Liberty Interest Or Property Right At Stake.

Petitioner has five property rights at stake: 1) Petitioner's vested right to have his application measured and evaluated. "The hallmark of property, the Court has emphasized, is an

individual entitlement grounded in state law, which cannot be removed except 'for cause.'" *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 430 (1982); 2) the property right created by Ketchum's unique ordinance providing that if the specified conditions are met, the permit "shall" be issued, which created a legitimate expectancy of entitlement to a permit; 3) the right to be free from an arbitrary and illegal zoning change enacted specifically to make his proposed project untenable; 4) the loss of another underlying property right of access to a particular highway, recognized in Idaho's *Ben Lomond* decision; 5) the "freedom to use his property" as referenced in *Raper v Lucey* (below) without an illegal zoning restraint being placed upon it.

C. Contrary To The Idaho Supreme Court's Decision, Petitioner Had Several Constitutional Rights That Were Infringed.

1. Deprivation Of A Vested Right Without Any Process Is A Constitutional Infringement.

1. Neither the district court nor Idaho's Supreme Court was capable of finding a constitutional infringement, concluding "the district court correctly found that Bracken did not have a constitutional right that was infringed." One need only examine the disposition of Bracken's vested right in order to shred that conclusion. The Idaho court defined a

vested right in Idaho as follows: "Certainly, if the applicant does not comply with the Ordinance, a permit cannot be issued. However, the vested right in question is *not the guaranteed right to obtain the permit*, but *rather the right to have the application evaluated and measured* under the Ordinance in effect at the time of application." (emphasis added). The Idaho court concluded that Petitioner held this vested right in this case.

There are three parts to this vested right. First, a vested right cannot be taken without due process. *Black's Law Dictionary*. Rev.4th Edition, (1968) A vested right is a right that so completely and definitely belongs to a person that it cannot be impaired or taken away without the person's consent. *Bowers v. Whitman* 664 F.3d 1321, at 1328, (2012). The same *Ben Lomond* case cited above recites that: "…the right of access from one's land to a public way is a property right appurtenant to the owner's land." "… a zoning ordinance cannot deprive a person of this property right without some police power justification." *Ben Lomond, Inc, v. Idaho Falls*, 92 Idaho 595, 602 (1968)

Second, by its own definition under Idaho law, a "*right to have the application evaluated and measured*" is a vested requirement. Without doubt, this includes the right to have discretion exercised in a quasi-judicial setting. See, Idaho Code 67 -6519(2), and *Goldberg v. Kelly*, 397 U.S. 254(1970). Win, lose, or draw, a vested right to

have a permit evaluated and measured is a right to participate in a process and obtain a result. *This is a right to be heard*. "The Court has consistently held that some kind of hearing is required at some time before a person is finally deprived of his property interests." *Wolff v. McDonnell*, 418 U.S. 539, at 557, 558 (1974).

Third, the very definition of a vested right states *is not a guaranteed right to obtain the permit*. As a matter of logic, if the vested right incorporates a right to have the application evaluated, and another part of that vested right states that it is not a guaranteed right to obtain the permit, the Idaho court has used one of the very precepts of the vested right (no guarantee of a permit) as the ultimate justification to void or ignore the right itself.

2. The Idaho Supreme Court also specified that Petitioner had a vested right to be free from arbitrary changes to the zoning law applicable to his property. *Ben Lomond, Inc, v. Idaho Falls*, 92 Idaho 595, 602 (1968). That is another constitutionally protected property right, independent of a legitimate expectation of entitlement to a permit. If it is not, no one has a right to be free from arbitrary changes to the zoning law applicable to his property. Even the Idaho court recognized that Petitioner could not be deprived of these rights by Respondents' bad faith conduct: "Our holding in *Ben Lomond* prohibits the Respondent's bad faith conduct in this case." However, the Idaho court did just the

opposite. Rather than holding firm to that position, it excused multiple intentional due process violations.

2. Deprivation Of A Right To Be Heard Is A Constitutional Infringement.

1. Idaho's Local Land Use Planning Act (LLUPA) is comprehensive, and runs from Section 67-6501 through 67-6539 of the Idaho Code. The Idaho court ruled that LLUPA applies to Respondent's case. The Idaho court also stated: "The district court relied on several cases to hold that an applicant only has a due process guarantee in procedures which ultimately affect a constitutional right. These cases are persuasive." Pet. App.44a However, none of the cases cited or relied upon by either the district court or the Idaho court involve any deprivation of either a vested right or a statutory right to be heard.

Most importantly, the right to be heard is not dependent on a predicate showing of entitlement to the benefit. Regarding benefits termination cases, *Kapps v. Wing* , 404 F.3d 105, at 116,117 noted that in welfare benefits cases the focus of the federal court is not on whether the plaintiffs are entitled to the continuation of benefits, but rather on the adequacy of the procedures used to make that determination, citing *Goldberg v Kelly*, 397 U.S. at 256 n. 2, 90 S.Ct. 1011, and *Roth* 408 U.S. at 577. *Kapps* also noted the *Roth*

court's observation "that the benefits recipients in *Goldberg* had not yet shown that they were, in fact, within the statutory terms of eligibility." It continued by citing *Fuentes v. Shevin*, 407 U.S. 67, 87, 92 S.Ct. 1983,(1972) ("The right to be heard does not depend upon an advance showing that one will surely prevail at the hearing. …It is enough to invoke the procedural safeguards of the Fourteenth Amendment that a significant property interest is at stake. . . .")

2. According to *Kerry v. Din*, 135 S. Ct. 2128, 576 U.S. 86 (2015), "…there are two categories of implied rights protected by the Due Process Clause: really fundamental rights, which cannot be taken away at all absent a compelling state interest; and not-so-fundamental rights, which can be taken away so long as procedural due process is observed."

The right to be heard is one of those really fundamental rights. "The fundamental requisite of due process of law is the opportunity to be heard." *Goldberg v. Kelly*, 397 U.S. 254, 267, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970). Due process within administrative procedures requires the opportunity to be heard 'at a meaningful time and in a meaningful manner'" *Id.* at 270. Petitioner was deprived of property rights without any opportunity to be heard. This is a constitutional infringement of the first order.

3. State Due Process Procedures Are Constitutionally Protected. The Right To Be Heard Incorporates Minimum Federal Due Process Protections; Disregard Of The Entire Process Constitutes Another Constitutional Infringement.

1. The Idaho Supreme Court was unimpressed with Respondents acknowledged "disregard for [state statutory] procedural safeguards" as being adequate to support the infringement of Petitioner's constitutional rights. Without any discussion, the Idaho court reached a conclusion that no constitutional infringement occurred.

State created rights are sufficiently embraced within Fourteenth Amendment "liberty" to entitle one to the minimum appropriate procedures required by the Due Process Clause to insure the state-created right is not arbitrarily abrogated. Some kind of hearing is required at some time before a person is finally deprived of his property interests. *Wolff v. McDonnell*, 418 U.S. 539, at 557, 558 (1974)

2. The state of Idaho has created a lengthy statutory process by which entitlement to a CUP is determined; Idaho's land-use permitting process is heavily regulated. Its requirements are set forth in its state statutes, municipal ordinances, and relevant case law. They require, among other things, that a CUP application be considered by a neutral quasi-

judicial body, [I.C 67 -6519(2)]; require that public hearings be held, [I.C. 67-6512(b)]; require, in order to keep from stripping one of a vested right, that this quasi-judicial body actually engage in an exercise of discretion by evaluating and measuring the application, [*Ben Lomond, Inc. v. City of ldaho Falls,* 92 ldaho 595 (1968)]; require, for a CUP "review and appraisal by the [P&Z] commission," [*Ketchum City Ordinance* 17.116.010] require that approval or denial of any application be in writing and accompanied by a reasoned statement explaining the relevant criteria, stating the facts relied on, and explaining the rationale for the decision [I.C. 67-6535(2)] require that the reviewing body render a final written order containing specific conclusions, [I.C. 67-6519(5)] which is then subject to judicial review [I.C.67-6519(6)] and require that if certain specified conditions are met, a conditional use permit shall be granted, *Ketchum City Ordinance* 17.116.030 These processes and procedures are not discretionary. Nor did Ketchum have discretion to ignore the Planning and Zoning Commission's written command, entered July 7, 2017, (following an appeal) directing that Ketchum review and consider Bracken's application. Pet.App.8a

3. There is no question that these statutory and municipal due process requirements governing the issuance of a permit to which one is *not* entitled are constitutionally protected. *Raper v. Lucey*, 488 F.2d 748, 752 (1st

Cir. 1973). See also, *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005), ["A liberty interest may arise from the Constitution itself, by reason of guarantees implicit in the word "liberty,"… or it may arise from an expectation or interest created by state laws or policies**,** see, *e.g., Wolff* v. *McDonnell,* 418 U. S. 539, 556–558 (1974)" (due process requires that a state-created right is not arbitrarily abrogated).] The touchstone of due process is protection of the individual against arbitrary action of government. *Wolff v. McDonnell*, 418 U.S. 539, at 557, 558 (1974)

4. Even if *Raper v. Lucey* somehow did not apply, and state due process requirements were not entitled to constitutional protection, there is no doubt that minimal federal procedural due process guarantees must be met. *Goldberg v. Kelly*, 397 U.S. 254 (1970) sets forth the minimum requirements for due process where a right to be heard exists, and where "administrative actions are under scrutiny." The Supreme Court listed the "required principles" that are required by due process "in almost every setting where important decisions turn on questions of fact." *Goldberg v. Kelly*, 397 U.S. 254, at 270 (1970) They are the same procedural requirements that are set forth in Idaho's statutory and municipal rules. Petitioner was denied all of them.

4. *Raper V. Lucey* Controls The Result Here, And Is In Direct Conflict With The Idaho Court's Ruling.

1. *Raper v. Lucey* is found at 488 F.2d 748 (1st Cir. 1973). It involved claims brought under Section 1983. Its significance lies in its conclusions that, even though Raper had no entitlement to a government benefit since it was entirely discretionary, he "*had a constitutionally protected right to procedural due process in the state application procedures whereby a determination of whether to issue such a license will be made*." This holding is in direct conflict with that of the Idaho court.

The Idaho court discussed *Raper* in its *Opinion,* and quoted from it. Pet. App.42, 43a. However, the Idaho court ignored its significance, and distinguished it on unsupportable grounds. The Idaho court distinguished *Raper* on the basis of the particular property right at stake in *Rape*r, noting Respondents' assertion that the claimed protected liberty or property interest at stake in *Raper* was different than the claimed liberty or property interest at stake in Petitioner's case. Then the Idaho court noted that Courts have not recognized a similar liberty or property interest for a conditional use permit, and that "one did not have a right to develop one's property as one pleases." This is no basis at all to distinguish *Raper v. Lucey*. The principles of the case apply no matter what particular property interests

were at stake in Raper. All that mattered in the due process analysis was that Raper had some identifiable property interest at stake to uphold his due process claim—it did not matter what it was. Petitioner's case has five identifiable property interests at stake. It is not important to the analysis whether they are the same as the one in *Raper*. The point is that Petitioner has a viable due process claim under the principles announced in Raper so long as he has *any* identifiable property interest at stake, and he has more than one.

2. Equally important is that the Idaho court miss-stated the particular property interest that was at stake in *Raper*. The Idaho court mischaracterized Raper's property interest as: "federal law recognizes a due process liberty interest in driving a vehicle." This is not so. The *Raper* courts exact words were: "We have no doubt that the freedom to make use of one's own property, here a motor vehicle, as a means of getting about from place to place, whether in pursuit of business or pleasure, is a 'liberty' which under the Fourteenth Amendment cannot be denied or curtailed by a state without due process of law." *Raper v Lucey*. 488 F.2d 748 (1st Cir. 1978). (emphasis added) This is very near or the same as the property interest claimed by Petitioner—"the freedom to make use of one's own property."

3. Finally, and of utmost significance here, is that state law procedures were federally protected *even when there was no question that the result was discretionary and Raper had no claim of entitlement to the benefit at issue.* This statement of the *Raper* court, which is incorporated into its holding, sums it up. The Idaho court even quoted this language in its opinion, but then ignored it. This is crucial:

> The district court ruled that since the issuance of an operator's license is discretionary with the state, a constitutionally guaranteed "right" was not involved. By so holding, the court misconceived the issue. In his complaint, plaintiff did not argue that he had a right to an operator's license, and we may take it as settled that such a right, federal or state, does not exist. (citations omitted). However, the plaintiff did assert that he had a constitutionally protected right to procedural due process in the state application procedures whereby a determination of whether to issue such a license will be made. With this assertion, we are in complete agreement. *Raper v. Lucey*, 488 F.2d 748, 752, (1st Cir. 1978)

4. It must be noted that the "state application procedures" to which the *Rape*r court refers were nowhere near as stringent as Idaho's, were not mandatory, and appeared to be wholly

discretionary. The action taken by Respondents to intentionally deprive Petitioner of due process was far more egregious than the due process failures in *Raper*; nonetheless, the 1st Circuit Court of Appeals found Massachusetts's simple *lack of procedure* "to involve a federally protected right." Petitioner has suffered a similar procedural due process deprivation. He lost a vested right to have his application evaluated. He lost the right to be heard "at a meaningful time and in a meaningful manner." He lost any chance of "the freedom to make use of one's own property"— "a 'liberty' which under the Fourteenth Amendment cannot be denied or curtailed by a state without due process of law." *Wall v. King*, 206 F.2d 878, at 882 (1st Cir.), cert. denied…(1953), 206 F.2d at 882."

5. *Raper* concluded that whether the permit might be issued as a right or privilege is immaterial to the questions involved in a due process analysis. By holding that the permit was discretionary with the state, and therefore that a constitutionally guaranteed "right" was not involved, the First Circuit stated that the district court "misconceived the issue." In other words, that question was irrelevant. Raper conclusively established that the Fourteenth Amendment applied to state administrative due process procedures and that minimum due process procedures must be followed, and that the administrative process must go forward even if one had no right whatsoever to the final result.

Only in that manner could the process fulfill two basic due process requirements: one, a right to be heard and two, a right to obtain timely reasons "for government actions affecting important individual rights."

Raper v Lucey is in direct conflict with the Opinion of the Idaho court.

See also "*Gonzales v. City of Castle Rock,* 366 F.3d 1093, 1103 n. 7 (10th Cir.2004) (en banc) (the fact that "it may ultimately be found that an individual does not satisfy the relevant criteria necessary to receive [a] benefit" does not negate the existence of a property interest, protected by due process)

See also, *Charry v. Hall*, 709 F.2d 139, 144 (2d Cir. 1983) (Even though taking an examination is not the equivalent of the grant of the license—the applicant may fail the examination, arbitrary rejection of an application works a serious injustice on the applicant, depriving him of even the opportunity to obtain the license. An applicant satisfying statutory prerequisites has a "legitimate claim of entitlement" to take the examination for the professional status of psychologist. The right to sit for an examination for admission to a profession represents a constitutionally protectible property or liberty interest comparable to a license already granted to practice that profession. See, *Pence v. Kleppe,* 529 F.2d 135, 140-41 (9th Cir. 1976);

Raper v. Lucey, 488 F.2d 748 (1st Cir. 1973); *Hornsby v. Allen,* 326 F.2d 605 (5th Cir. 1964); *Kinderhill Farm Breeding Associates v. Appel,* 450 F.Supp. 134 (S.D.N.Y. 1978). Decisions to the contrary are distinguishable on the ground that, unlike the present case, they involved statutes granting broad and almost unlimited discretion to the licensing authority to deny the application.)

This leaves little doubt that an applicant for a CUP permit, which may ultimately be denied for various reasons, has a protectible property interest in the preliminary process leading up to the final benefit determination, whether that be a CUP permit or a license to practice psychology. That is, Petitioner's application may not be summarily rejected or disposed of, or he has been arbitrarily deprived "of even the opportunity to obtain the license." In short, he has a protectible property interest in having his application considered to determine whether he may be entitled to the permit. This parallels Petitioner's vested right. The exercise of ultimate discretion to grant or deny a benefit can only come *after* a full due process appraisal on the merits. The Idaho Supreme Court is manifestly wrong. Under no circumstances should the possible outcome of the process justify its abrogation.

D. Respondents' Actions Rose to the Level of Substantive Due Process Deprivations. The Idaho Court Never Examined The Requirements of This Constitutional Infringement. Whether Petitioner Has a Legitimate Claim of Entitlement to a Permit and Whether A State Actor Retains Discretion To Act Are Not Factors In A Substantive Due Process Violation.

1. In the Idaho court's Opinion, it ruled that "Given the discretion inherent in determining whether to grant a conditional use permit, the district court correctly found that Bracken did not have a constitutional right that was infringed. Thus, we hold that Bracken had no claim under either a procedural *or substantive due process theory* because he had no 'legitimate claim of entitlement' to a permit the city had discretion to deny in a reasonable exercise of its discretion." (emphasis added) Pet. App. 53a

Every complaint Petitioner filed alleged substantive as well as due process violations. The Idaho court never examined any of the requirements for a substantive due process claim, and never addressed them separately from Petitioner's procedural due process claims.

According to *Sierra Lake Reserve v. City of Rocklin*, 938 F.2d 951, 957-58 (9th Cir. 1991) procedural due process claims can also be stated as substantive due process claims. "A claimant must prove that the government's action was clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."

2. Neither absence of a "legitimate expectation" to a discretionary permit, nor the presence or amount of discretion involved in the administrative process constitutes sufficient basis to dismiss a substantive due process claim. *Shanks v. Dressel*, 540 F.3d 1082, 1088 (9th Cir. 2008) sets forth the requirements: "When executive action like a discrete permitting decision is at issue, only "egregious official conduct can be said to be `arbitrary in the constitutional sense'": it must amount to an "abuse of power" lacking any "reasonable justification in the service of a legitimate governmental objective." See also, *Bateson v. Geisse*, 857 F.2d 1300, 1303 (9th Cir.1988) (City Council voted to withhold Bateson's building permit without providing Bateson with any process, let alone due process. "This sort of arbitrary administration of the local regulations, which singles out one individual to be treated discriminatorily, amounts to a violation of that individual's substantive due process rights."... Substantive due process claim does not require proof that all use of the property has been

denied, but rather that the interference with property rights was irrational or arbitrary.) Petitioner has met this standard. The interference with his vested property right was not only irrational and arbitrary, it was patently illegal.

Although only a federal district court case, the following case well summarizes almost all of the many substantive violations established here; e.g—bias, pretext, arbitrary and irrational state action, arbitrary deprivation of rights in real property, invention of a scheme solely to deprive others of lawful access to an abutting street, defendant's 'invention' of an illegitimate reason to support a land use action, political pressure, politically backed plans, etc See, *Schneider v. Cnty. of Sacramento* (E.D. Cal. 2014)

3. The facts necessary to establish The elements of a substantive due process violation have already been recited in the *Opinion* of the Idaho Supreme Court. In *County of Sacramento v. Lewis*, 523 U.S. 833, 845-46,848-49; 118 S. Ct. 1708, 1716-17 (1998), the Supreme Court defined what a substantive due process violation entails:

> …**[**A]rbitrary action of government, whether the fault lies in a denial of fundamental procedural fairness, or in the exercise of power without any reasonable justification in the service of a legitimate governmental objective; the

> substantive due process guarantee protects against government power arbitrarily and oppressively exercised;…the Due Process Clause was intended to prevent government officials "from abusing [their] power, or employing it as an instrument of oppression";…It is not a failure to exercise due care, it is "conduct intended to injure in some way unjustifiable by any government interest;... this guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property"

County of Sacramento v. Lewis, 523 U.S. 833, 845-46,848-49; (1998)

The facts described in the cases above are all present in Petitioner's case. The record supports the conclusion that the actions of Respondents were intended to injure, were deliberate, and were unjustified by any government interest. It is rather surprising, if not shocking, that the Idaho Supreme Court could find no constitutional deprivation here, but of course it never looked. The facts establish that Petitioner suffered substantive due process violations, that Petitioner's claims under Section 1983 were improperly dismissed, and that Petitioner is entitled to have his substantive due process claims reinstated along with his procedural and punitive damage claims.

E. **The Idaho Court's Conclusion Violates 42 USC 1983 On Its Face**.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State…subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress…

The statute could not be clearer. Those who cause another to be subjected to a deprivation of a constitutional right *shall be liable to the party injured in an action at law***.** The Idaho court has no authority to grant immunity to those that have violated this statute. Even qualified immunity was waived.

III. This Case Is An Ideal Vehicle to Address the Question Presented, Cure The Immense Sweep of the Idaho Court's Ruling, and Provide Guidance On The Required Due Process Parameters Required In Applications For Discretionary Benefits.

This case presents a clean vehicle for summary reversal and/or for determining the question presented because there are no facts in issue, the relevant facts have all been established, the case was decided on summary judgment, qualified immunity was never in issue, the question regarding the amount of discretion involved does not involve a question of amount or degree, the Idaho Supreme Court has entangled itself in the operation of a federal statute, so that the case presents a final decision on a federal issue from a court of last resort, the nature of the administrative processes denied Petitioner lends itself to ready examination, the question presented is important to the citizens, not only of Idaho, but of any jurisdiction that might contemplate wholesale due process violations, and the Idaho Supreme Court's errors are evident from the face of its own opinion.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioners
January 27, 2024

APPENDIX

ROY BRACKEN, an individual; RRJ LLC, an Idaho limited liability company; and PENGUIN LLC, an Idaho limited liability company, Plaintiffs-Appellants,

v.

CITY OF KETCHUM, IDAHO an Idaho municipal corporation; MICAH AUSTIN, an individual, SUZANNE FRICK, an individual, and NINA JONAS, an individual, Defendants-Respondents.

No. 48721

Supreme Court of Idaho

September 15, 2023

Appeal from the District Court of the Fifth Judicial District of the State of Idaho, Blaine County. Jonathan Brody, District Judge.

The district court's decision is affirmed in part, reversed in part, and remanded.

Robert J. Elgee, and Alturas Law Group, LLC, Hailey, attorneys for Appellants. Robert J. Elgee argued.

White, Peterson, Gigray &Nichols, P.A., Nampa, attorneys for Respondents. Matthew A. Johnson argued.

OPINION

BEVAN, CHIEF JUSTICE

This appeal is about whether an aggrieved applicant may bring a direct action against a city, its administrators, and its mayor for alleged misconduct pertaining to the granting of a conditional use permit without first exhausting administrative remedies and seeking judicial review. The answer is almost always "no," but based on the unique facts in this case we hold that the applicant was excused from exhausting administrative remedies.

I. Factual and Procedural Background

The factual background and procedural history of this case are complex, but the relevant facts are not in dispute. On April 29, 2016, Roy Bracken applied for a conditional use permit to operate a gas station off Main Street in Ketchum, Idaho. Bracken had secured an option on the property where he wished to locate the gas station. When Bracken filed his application, gas stations were permitted at the site under

Ketchum's applicable zoning laws. While Bracken's application was pending, the City of Ketchum, through its mayor Nina Jonas, commissioned an online public survey for opinions about whether a gas station should be permitted at the proposed site. The results of the survey were introduced at a public hearing before the Ketchum Planning and Zoning Commission (the "P&Z Commission") on July 9, 2016. According to Steve Cook, an architect in Ketchum since 1972, who also served on the P&Z Commission for almost nine years, the survey was unprecedented. Also, at some unknown time during the application process, Mayor Jonas, City Administrator Suzanne Frick, and former Sun Valley Mayor Ruth Lieder attended a dinner at Barbi Reed's house. Reed lived across from the proposed site and was the chairperson of a group called the "Citizens Against Bracken Station." Frick admitted that the meeting was "about [Bracken's] application."

Bracken's first application was ultimately denied based on the possibility of a traffic flow problem. Rather than appeal the denial of his first application, Bracken revised his application, and nearly one year later, on April 10, 2017, he presented a second application and site plan that was redesigned to address the concerns raised about his first application.

Bracken presented the second application to Micah Austin-the Ketchum Planning Director and Zoning Administrator. Austin denied Bracken's application, claiming that it was the same, or substantially the same, as Bracken's earlier application.

On May 8, 2017, Bracken appealed Austin's rejection of his second application to the P&Z Commission, which orally reversed Austin's decision at a hearing on June 8, 2017. Before a written decision was entered, Bracken resubmitted the second application to Austin on June 19, 2017, along with the appropriate plans and payments. Austin rejected the application as untimely because: (1) the P&Z Commission had not entered a final written decision, and (2) upon preliminary review, Planning and Building Staff advised that the application was incomplete and missing required information. Austin physically returned the application to Bracken.

Around this time, Austin-in collaboration with the Ketchum City Council, Frick and Mayor Jonas-decided the previous traffic study Bracken submitted could not be used because his engineer had not used a valid Idaho engineer stamp. Austin emailed Bracken, stating that any application submitted must include not only the application and application fee, but also

several new requirements: (1) a site plan, (2) a new traffic study from someone other than Bracken's original engineering firm, (3) circulation plans and exhibits, (4) a lighting plan, (5) a photometric plan, (6) a letter from the Idaho Transportation Department stating the proposal complied with certain standards, (7) a draining plan, and (8) a landscaping plan. None of these added items were required by the applicable Ketchum Municipal Code.

In the interim, between the P&Z Commission's oral decision and the written decision it entered on July 7, 2017, the City passed a new ordinance prohibiting gas stations from accessing Main Street in Ketchum. The ordinance's adoption was unusually expedited. At one point in the hearing on the proposed ordinance, a councilman asked Austin, "My question is directed at Micah [Austin] and why is there a sense of urgency for passing this . . . P&Z should just do their job. I don't think the sense of urgency should come from us, P&Z doesn't think this is appropriate, because it sure sounds to me like passing three readings is going after one person. So tell me why I'm not doing that." Austin replied:

> Sure, I'd be happy to explain that. In the State of Idaho an applicant's rights are

vested at the time an application is accepted by the city and so if that application is submitted when a certain ordinance is on the books their rights are vested according to that ordinance that is on the books. When we presented this amendment to the P&Z Commission on April 10, that same day the applicant for the Bracken station submitted another application on April 10 that very morning. We rejected that because the code says you can't resubmit for a denied conditional use permit within 12 months. They appealed my decision to deny that application and the Planning and Zoning Commission overturned my decision and found that the application that was submitted on April 10th was a brand-new application never-before-seen in the City of Ketchum and that it was substantially different. According to that ruling, then they had to submit findings of fact no later than July 8th. After July 8th, that applicant, assuming we get the findings out, after July 8th, that applicant for Bracken station can resubmit that "new application" and

their rights will be vested under whatever ordinance is on the books at the time.

We have a special meeting on this Friday at 4 o'clock to approve those findings and it's up to the Commission to approve those findings at that time, but the reason we are recommending the waiver of those 2nd and 3rd readings is because we don't believe that application reflects the community's values. And we do believe there is a sense of urgency and that we have been through this, like I've mentioned, over seven months last year and with the P&Z Commission, and, quite frankly, we don't believe that it would do the applicant service, the community, or staff to accept a new application while we have an ordinance on this and before you all that everyone agrees on. So, yes, there is a sense of urgency, and yes, there is no question about it. We are concerned about a single application coming in and tying up city staff and the community for months and months and months which is what we know is not what the community wants.[1]

The Ketchum City Council ultimately voted to waive the usual second and third readings of the proposed ordinance and adopted it immediately at the hearing on July 3, 2017.

As noted above, the P&Z Commission issued its written decision on July 7, 2017, holding that Bracken's second application was substantially and materially different from his first application, and ordering "the Administrator [Austin] receive and review the Second Application for completeness, and upon determination that such is complete, initiate the typical [conditional use permit] application review process set forth in Ketchum Municipal Code and pursuant to the Idaho Local Land Use Planning Act." On that same day, the City published the newly adopted ordinance in the Idaho Mountain Express and Guide. Ketchum Municipal Code section 1.20.010 designates the Idaho Mountain Express as Ketchum's official paper for publication, not the Idaho Mountain Express and Guide.

On July 7, 2017, Bracken talked to Austin about his second application. Although the ordinance had not yet been published in the City's official paper, Austin told Bracken that a city ordinance prohibiting gas stations on Main Street had just been published.

But the ordinance was not published in the official paper, the Idaho Mountain Express, until five days later, on July 12, 2017. Respondents took no further steps to review Bracken's second application.

On December 11, 2017, Bracken hand delivered a letter to Austin reciting the P&Z Commission's order that directed Austin to "receive and review" his second application. Bracken critiqued Austin's handling of the second application, provided another check for the application fee, and made a formal request for the City to process his application and initiate the typical conditional use permit process. Austin stated that the new law dictated that there would be no gas stations on Main Street, emphasizing that the redesigned and appealed application was never accepted. Austin informed Bracken that, in his view, no application had been submitted because that would require action on the City's part and there was no action taken by the City. Austin stated refiling was not an option because "they had been careful about not keeping anything here."

When Bracken submitted his identical copy of the appealed application for filing on December 13, 2019, Austin again refused to accept it. The return of Bracken's applications was known and approved by

Mayor Jonas. In fact, Jonas admitted at one point that she instructed Austin to return one of the applications based on Austin's belief that the application was incomplete.

Five days after the final rejection of his second application, Bracken filed a 14-page notice of tort claim with the City Clerk. Following the City's refusal to process his second application even after he filed his tort claim, Bracken let his option to purchase the Main Street property expire.

On June 5, 2019, Bracken filed a complaint against Austin, Frick, Jonas, and the City ("Respondents") that set forth eight causes of action: (1) negligence in operational functions; (2) gross negligence; (3) reckless, willful, and wanton conduct in refusing to accept the application; (4) acceptance of benefits/ratification of actions of employees; (5) a claim for declaratory judgment seeking a declaration that the Ketchum city ordinance was invalidly enacted; (6) a claim for declaratory judgment seeking a declaration that Ketchum's ordinance was illegal spot zoning; (7) damages under 42 U.S.C. section 1983; and (8) a claim against the City of Ketchum for violating 42 U.S.C. section 1983. The lawsuit was based on the extraordinary difficulties encountered in

Bracken's attempts to apply for a conditional use permit from the City of Ketchum. Bracken requested the following relief: special damages of at least $206,000, compensatory damages for lost profits and income in an amount to be proven at trial, but asserting annual losses more than $299,000, declaratory judgment that the ordinance passed by the City of Ketchum was void due to defects in the ordinance enactment process, and attorney fees and costs under 42 U.S.C. section 1988.

Respondents filed an answer that asserted five affirmative defenses, including: (1) failure to state a claim upon which relief could be granted; (2) Bracken's action was premature and not ripe for adjudication; (3) Bracken's action was barred by the governmental immunity provisions in the Idaho Tort Claims Act; (4) Bracken failed to exhaust administrative remedies; and (5) Bracken's attempts to resubmit the permit application were barred by city ordinances.

Respondents later moved for partial summary judgment on Count One (negligence), Count Two (gross negligence), Count Five (declaratory judgment on the validity of the Ketchum ordinance), and Count Eight (liability under 42 U.S.C. section 1983). The

parties separately agreed to dismiss Count Six (declaratory judgment on spot zoning).

The district court entered a memorandum decision granting Respondents' motion for partial summary judgment, dismissing Counts One and Two, the negligence and gross negligence claims, after concluding they were barred by the economic loss doctrine. The court also granted declaratory judgment as to the validity of the ordinance (Count Five), and held the ordinance became valid on July 12, 2017. The court denied summary judgment on Count Eight, allowing Bracken's claims under 42 U.S.C. section 1983 to proceed. The court recited Bracken's allegations that the City's actions amounted to willful disregard of the City's legal responsibilities, a "conscious disregard of law and fact" resulting in a purposeful deprivation of constitutional rights. As a result, the court determined there were issues of material fact over the possibility of municipal liability under 42 U.S.C. section 1983.

Respondents later filed a second motion for summary judgment on Count Three (reckless, willful, and wanton conduct) for failure to state a claim recognized by Idaho law and Count Four (acceptance

of benefits/ratification of actions of employees), asserting that it was barred by statutory immunity.

While Respondents' second motion for summary judgment was pending, Bracken filed a first amended complaint that added a claim for punitive damages related to his 42 U.S.C. section 1983 claims. Respondents answered Bracken's first amended complaint, adding two new affirmative defenses: (1) that the district court lacked subject matter jurisdiction over some or all of Bracken's claims, and (2) that Bracken failed to mitigate damages.

The district court entered a memorandum decision granting Respondents' second motion for summary judgment. The court dismissed Count Three after finding it did not allege an independent cause of action. That said, the court declined to strike Count Three from the complaint and allowed Bracken to reference it as a factual allegation that could support other cognizable causes of action. Next, the court dismissed Count Four after holding it was barred by statutory immunity. The court recognized the claim arose from the City's failure to issue a permit or similar authorization. Because governmental entities have absolute immunity under these circumstances, the court granted summary judgment on Count Four.

In January 2020, Bracken filed his own motion for summary judgment, ostensibly seeking rulings on twelve legal questions.[2] The district court entered its decision on Bracken's motion six months later, declining to enter the rulings Bracken requested based on its finding that "summary judgment [was] procedurally improper due to lack of clarity as to how the twelve issues presented relate[d] to the claims in [Bracken's] complaint." The court recognized that the issues had some relevance to Bracken's position, but determined it was unclear how Bracken was trying to connect those issues to the claims presented, noting that some issues seemed more appropriate as independent claims which would need to be raised in the complaint.

After Bracken's motion for summary judgment was denied, Respondents filed a third motion for summary judgment on Bracken's remaining claims, Counts Seven and Eight (42 U.S.C. section 1983 claims), on constitutional ripeness grounds. Respondents also sought summary judgment on Count Nine (punitive damages) on liability grounds.

While the Respondents' third motion for summary judgment was pending, Bracken filed a motion for rulings on issues of law and a subsequent motion for

summary judgment. Bracken's motion included eighteen propositions of law for the district court to rule on and argued that under Idaho Code section 9-102 the court had a statutory duty to decide the issues "when submitted." Bracken summarized the eighteen motions as, among other things, breaking down "what Austin did into discrete and different acts," such as removing public records, defying P&Z orders, and making up fabricated requirements. Bracken argued the point of his eighteen motions was to get the district court to the ultimate conclusion that Austin acted repeatedly without authority in refusing to accept Bracken's application.

Bracken's motion for rulings on issues of law also sought summary judgment against two of Respondents' affirmative defenses: (1) failure to exhaust administrative remedies; and (2) that Bracken's attempts to resubmit the permit application were barred by city ordinance. Bracken also moved for summary judgment "on the issue of whether defendants injured and interfered with a valuable property right when they refused to accept, process, or hold a hearing on Bracken's Second Application as required by law."

While the cross-motions for summary judgment were pending, the district court granted Bracken's motion for leave to file a second amended complaint. On October 2, 2020, Bracken filed his second amended complaint to add these allegations to Count Three:

> Individual defendants Micah Austin, Suzanne Frick, and/or Nina Jonas had a duty existing by virtue of Idaho state law [including I.C. [§§] 67-6519(1) and (2)] and Ketchum's municipal code (Chapter 17.116) to timely accept and/or process Bracken's Second Application for a conditional use permit, and/or submit the application to the Planning and Zoning Commission for proper processing. These individual defendants either individually or collectively refused to perform or comply with this legal duty. The failure to comply with this duty was not the product of accident or simple negligence but was carried out willingly and purposefully and intentionally.

(Alterations in original). Bracken also added Count Ten, a claim for intentional interference with economic expectancy against all defendants.

In December 2020, the district court granted Respondents' third motion for summary judgment and dismissed Counts Seven, Eight and Nine. The district court determined Bracken did not have a constitutional right in a conditional use permit or the procedures in obtaining such a permit, and therefore did not have a viable 42 U.S.C. section 1983 claim. The district court also held Bracken's 42 U.S.C. section 1983 claims were not ripe since administrative remedies available to Bracken were not exhausted before bringing the complaint. Because Counts Seven and Eight were decided on summary judgment, the court held there was no liability for which to attach punitive damages under 42 U.S.C. section 1983 and dismissed Count Nine.

On that same day, the district court entered a memorandum decision denying Bracken's motion for rulings of law and subsequent motion for summary judgment. The court acknowledged the procedural posture of the case, noting that although Bracken's second amended complaint had alleged ten counts against Respondents, Counts One, Two, Four, Five, Six, Seven, Eight, and Nine had all been dismissed in previous summary judgment decisions. The district court then held Bracken's claims were barred because he failed to exhaust administrative remedies and did

not provide sufficient evidence that exhaustion of remedies was excused. The court determined that because administrative remedies were not exhausted, it had no jurisdiction over any state law claims related to Respondents' actions towards Bracken's applications. And the district court held it was procedurally improper to determine a motion for rulings on issues of law before a trial began. Bracken had suggested that Idaho Code section 9-102[3] required the court to decide the legal issues "when submitted." The district court disagreed, concluding instead that the statute's use of the phrase "upon the trial" meant the court had to decide the issues when the trial commenced. The court ultimately denied Bracken's request after determining Bracken had failed to explain or cite any authority to support why his motion was proper at that point in the proceedings.

Bracken filed a motion for reconsideration. The district court denied Bracken's motion, reasoning "the law is clear. The overall trend in the law is clear that these decisions are really geared for local administrative review and then judicial review of that and not tort claims." On the same day, the district court entered a judgment.

Respondents moved for $204,256.13 for attorney fees and costs. Bracken moved to disallow the application for costs and attorney fees. The district court denied the Respondents' request for attorney fees but granted discretionary costs. The court found that Respondents were entitled to discretionary costs because such costs were necessary and exceptional since Bracken's claims lacked any legal merit. The court denied the Respondents' request for attorney fees based on its determination that they failed to apportion fees under the appropriate and controlling statutes. Bracken filed a timely notice of appeal.

II. Standards of Review

This Court employs the same standard as the district court when reviewing rulings on summary judgment motions. *Jones v. Lynn*, 169 Idaho 545, 551, 498 P.3d 1174, 1180 (2021) (citing *Owen v. Smith*, 168 Idaho 633, 640-41, 485 P.3d 129, 136-37 (2021)). Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." I.R.C.P. 56(a). A moving party must support its assertion by citing particular materials in the record or by showing the "materials cited do not establish the . . . presence of a genuine dispute, or that an adverse

party cannot produce admissible evidence to support the fact[s]." I.R.C.P. 56(c)(1)(B). Summary judgment is improper "if reasonable persons could reach differing conclusions or draw conflicting inferences from the evidence presented." *Jones*, 169 Idaho at 551, 498 P.3d at 1180 (quoting *Owen*, 168 Idaho at 64041, 485 P.3d at 136-37). "Even so, a 'mere scintilla of evidence or only slight doubt as to the facts is not sufficient to create a genuine issue of material fact for the purposes of summary judgment.'" *Id*.

When reviewing the grant or denial of a motion for reconsideration, the district court, as well as this Court, "must apply the same standard of review that the court applied when deciding the original order that is being reconsidered." *Drakos v. Sandow*, 167 Idaho 159, 162-63, 468 P.3d 289, 292-93 (2020) (quoting *Alsco, Inc. v. Fatty's Bar, LLC*, 166 Idaho 516, 524, 461 P.3d 798, 806 (2020)). Thus, "when reviewing the grant or denial of a motion for reconsideration following the grant of summary judgment, this Court must determine whether the evidence presented a genuine issue of material fact to defeat summary judgment." *Id*. (citing *Ciccarello v. Davies*, 166 Idaho 153, 159, 456 P.3d 519, 525 (2019)).

III. Analysis

Before reaching the merits of Bracken's arguments on appeal, we must address what claims are properly before us. Bracken's original complaint alleged eight causes of action: (1) negligence in operational functions; (2) gross negligence; (3) reckless, willful, and wanton conduct in refusing to accept the application; (4) acceptance of benefits/ratification of actions of employees; (5) a claim for declaratory judgment seeking a declaration that the Ketchum city ordinance was invalidly enacted; (6) a claim for declaratory judgment seeking a declaration that Ketchum's ordinance was illegal spot zoning; (7) damages under 42 U.S.C. section 1983; and (8) a claim against the City of Ketchum for violating 42 U.S.C. section 1983. Bracken later amended his complaint to add Count Nine (punitive damages related to his 42 U.S.C. section 1983 claims) and Count Ten (a claim for intentional interference with economic expectancy).

The district court dismissed Count One (negligence) and Count Two (gross negligence) on Respondents' first partial motion for summary judgment after concluding Bracken's negligence claims were barred by the economic loss rule. The district court dismissed Count Four (acceptance of benefits/ratification of actions of employees) after concluding it was barred by statutory immunity. The

district court granted Respondents' motion for summary judgment on Count Five (seeking a declaration that the Ketchum City ordinance was unlawfully enacted) and declared Ketchum ordinance 1174 became valid on July 12, 2017. Count Six (seeking a claim for declaratory judgment that Ketchum's ordinance was illegal spot zoning) was dismissed based on a stipulation between the parties.

Bracken has not challenged these alternative bases for dismissing these claims on appeal. In the context of summary judgment, this Court has repeatedly held that "an appellant's failure to address an independent ground for a grant of summary judgment is fatal to the appeal." *La Bella Vita, LLC v. Shuler*, 158 Idaho 799, 806, 353 P.3d 420, 427 (2015) (quoting *Weisel v. Beaver Springs Owners Ass'n, Inc.,* 152 Idaho 519, 525-26, 272 P.3d 491, 497-98 (2012)). "[T]he fact that one of the grounds may be in error is of no consequence and may be disregarded if the judgment can be sustained upon one of the other grounds." *Id*. (quoting *Andersen v. Prof'l Escrow Servs., Inc.*, 141 Idaho 743, 746, 118 P.3d 75, 78 (2005)). Thus, the district court's dismissal of Counts One, Two, Four, Five, and Six is affirmed.

The district court had originally dismissed Count Three on Respondents' second partial motion for summary judgment after concluding it did not state an actionable claim under Idaho law. However, the district court later allowed Bracken to amend Count Three in his second amended complaint to cure any defects. The district court did not rule on Count Three as amended. That said, in response to a question at oral argument before this Court, Bracken's counsel asserted that Count Three was part of his 42 U.S.C. section 1983 claims, and conceded it was "not a separate count, it's not a separate state law count." Bracken's attorney concluded, "there's one state law claim that's in existence, and that's the intentional interference with a tort, I think that's the last one that got dismissed on summary judgment." Counsel then confirmed that he was only appealing the dismissal of the federal 1983 claims (Counts Three, Seven, Eight, and Nine), and the intentional interference of economic expectancy claim (Count Ten).

A. Bracken's rights vested under the second application when it was filed on April 10, 2017.

The first issue Bracken raises on appeal pertains to when his rights vested under the second

application. Bracken argues his rights vested when the application was first filed on April 10, 2017, and again when it was refiled on June 19, 2017. Bracken claims that once the application vested on April 10, his rights could not be taken away by Ketchum's enactment of the new ordinance on July 12, 2017, the date it was published in the official newspaper.

Idaho law is well established that an applicant's rights are determined by the ordinance in existence at the time of filing an application for the permit. *See S. Fork Coal. v. Bd. of Comm'rs of Bonneville Cnty.*, 117 Idaho 857, 860-61, 792 P.2d 882, 885-86 (1990); *Cooper v. Board of Cnty. Comm'rs of Ada Cnty.*, 101 Idaho 407, 614 P.2d 947 (1980); *Ready-To-Pour, Inc. v. McCoy*, 95 Idaho 510, 511 P.2d 792 (1973); *Ben Lomond, Inc. v. City of Idaho Falls*, 92 Idaho 595, 448 P.2d 209 (1968). This Court originally explained its adoption of this rationale in *Ben Lomond*:

> [T]o hold for the City in the present case would mean that a city, merely by withholding action on an application for a permit, could change or enact a zoning law to defeat the application. It could, in substance, give immediate effect to a future or proposed zoning ordinance before that

> ordinance was enacted by proper procedure.

92 Idaho at 602, 448 P.2d at 216.

Our holding in *Ben Lomond* prohibits the Respondents' bad faith conduct in this case. "Certainly, if the applicant does not comply with the Ordinance, a permit cannot be issued. However, the vested right in question is not the guaranteed right to obtain the permit, but rather the right to have the application evaluated and measured under the Ordinance in effect at the time of application." *Payette River Prop. Owners Ass'n v. Bd. of Comm'rs of Valley Cnty.*, 132 Idaho 551, 556, 976 P.2d 477, 482 (1999), overruled on other grounds by *City of Osburn v. Randel*, 152 Idaho 906, 277 P.3d 353 (2012); *see also Ready-to-Pour*, 95 Idaho at 513, 511 P.2d at 795 (holding that the rule regarding the ordinance under which an applicant's rights are determined is the minority view "that the applicant's rights are *measured* under the law in effect at the time of the application.") (emphasis in original).

Austin, with the encouragement of Jonas, intentionally withheld action on Bracken's second application until the City could amend its ordinance in an attempt block Bracken's proposed gas station.

Other than Austin's unsubstantiated suggestion that Bracken's second application was "incomplete," no facts show that Bracken skirted the original ordinance. Rather, it appears Respondents delayed accepting Bracken's second application so the City could rush to pass the new ordinance. The district court elaborated on the impediments to Bracken's application process, explaining:

> As noted by two witnesses who have been around Ketchum Planning and Zoning for a while, the difficulties [Bracken] encountered were unusual. Steve Cook, a Ketchum Planning and Zoning Commission[er] for 9 years, and an architect in Ketchum since 1972, found that the requests were out of sequence. The staff continually requested more information, made more expensive requests, and declined studies or materials Bracken submitted The design review process was initiated before even accepting Bracken's application, but this process normally would not begin until after a conditional use permit was granted There were an unusual number of hearings considering the size of the issue Garth

> McClure, a civil engineer who had been involved in public process and public hearings for land use application in all jurisdictions in Blaine County with zoning or permit applications, concurs Among other expenses, the traffic studies cost $25,935, and the necessary site planning work cost $26,332.

We hold that the ordinance in effect on April 10, 2017, controls. Bracken's right to have the application evaluated under the then-existing ordinance vested when he attempted to file his second application. This is even more true because the P&Z Commission had orally ruled in Bracken's favor and ordered Austin to accept and process Bracken's second application *before* the proposed ordinance was officially enacted. Having determined Bracken had a vested right, we must consider: (1) whether judicial review was the exclusive remedy available to Bracken; and if so, (2) whether he was excused from exhausting administrative remedies and petitioning for judicial review.

B. Typically, an aggrieved land use applicant must exhaust administrative remedies under LLUPA before challenging

those land use decisions or actions in court; however, based on the unique facts here, Bracken was excused from exhausting administrative remedies before pursuing judicial review.

The primary issue raised by this appeal is whether the district court had authority to act on Bracken's complaint. The district court held it lacked jurisdiction to consider Bracken's state law claims because he failed to both exhaust administrative remedies and pursue judicial review. Bracken argues that "[o]nce the district court glued itself to this remedy, it dismissed any notion that Bracken had a tort claim and used this as the basis to dismiss all of Bracken's claims ...." As explained above-nearly all Bracken's state law claims were dismissed on alternate grounds that Bracken has not challenged on appeal. Still, we consider the applicability of the district court's holding to Count Ten, Bracken's remaining state law claim for intentional interference with economic expectancy.

1. LLUPA standards in general.

The administrative exhaustion doctrine is well-established in American jurisprudence, dating back to the turn of the twentieth century. *Hartman v. Canyon*

Cnty., 170 Idaho 666, 670, 516 P.3d 90, 94 (2022). "Generally stated, administrative exhaustion 'requires that where an administrative remedy is provided by statute, relief must first be sought by exhausting such remedies before the courts will act.'" *Id*. (quoting *Regan v. Kootenai Cnty*., 140 Idaho 721, 72526, 100 P.3d 615, 619-20 (2004)). The rule serves twin purposes. First, it safeguards agency autonomy to make decisions within an agency's expertise. *Id*. (citing *McKart v. United States*, 395 U.S. 185, 194 (1969)). Second, as a corollary of allowing agencies to resolve disputes within their jurisdiction, exhaustion protects judicial economy. *Id*. (citing*McKart*, 395 U.S. at 194-95).

In general, LLUPA requires litigants to utilize available administrative remedies before seeking judicial review. I.C. §§ 67-6521(1)(d) and 67-6519(5). Idaho Code section 67-6521 provides that an "affected person aggrieved by a final decision concerning matters identified in section 67-6521(1)(a), Idaho Code [the failure to act upon an application for a special use permit], may within twenty-eight (28) days after all remedies have been exhausted under local ordinances seek judicial review as provided by chapter 52, title 67, Idaho Code." Decisions about a conditional use permit are the type of land use decision that fall

within the purview of LLUPA and its exhaustion requirement. *City of Ririe v. Gilgen*, 170 Idaho 619, 626, 515 P.3d 255, 262 (2022); *see also Citizens Against Linscott/Interstate Asphalt Plant v. Bonner Cnty. Bd. Of Comm'rs*, 168 Idaho 705, 715, 486 P.3d 515, 525 (2021).

This Court has held that the failure to exhaust administrative remedies deprives courts of jurisdiction to consider challenges to local land use decisions. *Palmer v. Bd. of Cnty. Comm'rs of Blaine Cnty.*, 117 Idaho 562, 565, 790 P.2d 343, 346 (1990); *S Bar Ranch v. Elmore Cnty.*, 170 Idaho 282, 301, 510 P.3d 635, 654 (2022) (district court did not have jurisdiction to consider S Bar's challenge to a Board of County Commissioners' denial of a conditional use permit because S Bar failed to exhaust administrative remedies and timely petition for judicial review). Thus, direct collateral attacks on land use decisions are unavailable when review is available under LLUPA.

For example, in *Palmer*, homeowners brought what their attorney characterized as a "tort claims case" against county commissioners after they were prohibited by a stop work order from completing a residence for which they had obtained a building

permit. Their action was dismissed on summary judgment for their failure to exhaust administrative remedies. We held that failure to exhaust administrative remedies doomed their direct action:

> Since the Palmers did not apply for a special use permit and obtain a decision of the county commissioners on that application, they did not exhaust their administrative remedies under the Act. The Act commits to local units of government the authority over planning and zoning matters. It is the county through its planning and zoning commission and the county commission that should make the decision whether a special use permit should be issued. Only after the exhaustion of remedies provided under the Act and under local ordinances may an unsuccessful applicant or an affected person seek judicial review.

117 Idaho at 565, 790 P.2d at 346; *see also Regan v. Kootenai Cnty.*, 140 Idaho 721, 725-26, 100 P.3d 615, 619-20 (2004) (The Regans' failure to exhaust their administrative remedies deprived the district court of

subject matter jurisdiction over their claim for declaratory relief).

2. LLUPA applies to Bracken's claims.

Normally, an applicant in Bracken's shoes would have to pursue the administrative remedies required of him under LLUPA before seeking redress in the courts. Bracken had administrative remedies available that he did not pursue. This is not a case in which the City is alleged to have taken actions against Bracken unrelated to his application for a conditional use permit. LLUPA applies because the City's actions involved the handling of, and its actions (or inaction) related to Bracken's application for a conditional use permit. Thus, his claim is not independent of his land use application; instead, it is tied to it.

Section 17.144.010 of the Ketchum Municipal Code provides that "[a]n appeal of any order, requirement, decision or determination of the administrator made in the administration or enforcement of this title may be taken by any affected person." The Ketchum Municipal Code specifies that an "affected person" is defined just as an "affected person" under LLUPA as: ["one having a bona fide interest in real property which may be adversely affected by . . . the approval, denial or failure to act upon an application for a . . .

special use permit"]. I.C. § 67-6521. Austin was the director of the Planning and Building Department in 2017, and thus was the "administrator" of the zoning ordinance. Bracken was aware of his obligations under the City code because he appealed Austin's first refusal to accept his second application to the P&Z Commission. Thus, Bracken harnessed some of the administrative remedies available. He was aware of and used administrative remedies, ostensibly to his benefit.

3. In rare instances, exhaustion of administrative remedies under LLUPA is excused.

While we have recognized the important policy and legal canon underpinning the exhaustion doctrine, this Court has also acknowledged that, "in unusual circumstances," failure to exhaust administrative remedies can be excused. *See Palmer*, 117 Idaho at 564-65, 790 P.2d at 345-46 ("This Court has frequently announced that except in unusual circumstances parties must exhaust their administrative remedies before seeking judicial recourse."). We have elaborated on this point, noting two exceptions to the black-letter rule:

> As a general rule, a party must exhaust administrative remedies before resorting

> to the courts to challenge the validity of administrative acts. We have recognized exceptions to that rule in two instances: (a) when the interests of justice so require, and (b) when the agency acted outside its authority.

KMST, LLC v. Cnty. of Ada, 138 Idaho 577, 583, 67 P.3d 56, 62 (2003) (citation omitted); *see also Regan*, 140 Idaho at 725, 100 P.3d at 619 (acknowledging the two exceptions to the exhaustion rule). "Styled differently, courts will not require exhaustion 'when exhaustion will involve irreparable injury and when the agency is palpably without jurisdiction.'" *Park v. Banbury*, 143 Idaho 576, 581, 149 P.3d 851, 856 (2006) (quoting *Sierra Life Ins. Co. v. Granata*, 99 Idaho 624, 627, 586 P.2d 1068, 1071 (1978)).

a. Bracken is excused from exhausting administrative remedies due to the biased conduct of Respondents.

The "when justice so requires" exception referenced above encompasses those rare circumstances when bias or prejudgment by the decisionmaker can be shown. *See Owsley v. Idaho Industrial Comm'n*, 141 Idaho 129, 135-36, 106 P.3d 455, 461-62 (2005) (recognizing an exception to the

exhaustion requirement "where bias or prejudgment by the decisionmaker can be demonstrated" because due process entitles a person to an impartial tribunal and requiring exhaustion before a biased decision maker would be futile). "[T]he due process clause entitles a person to an impartial and disinterested tribunal." *Id*. at 135, 106 P.3d at 461 (citing *Eacret v. Bonner Cnty.,* 139 Idaho 780, 784, 86 P.3d 494, 498 (2004)). Actual bias on the part of a decisionmaker is "constitutionally unacceptable." *Id*. at 135, 106 P.3d at 461 (quoting *Johnson v. Bonner Cnty. Sch. Dist. No. 82,* 126 Idaho 490, 493, 887 P.2d 35, 38 (1994)).

We reached a similar conclusion in *Johnson*. Mr. Johnson, a school principal, had engaged in a public dispute with members of the school board. Both Johnson and members of the board traded barbed comments that were published in the local newspaper. *Id*. When the board acted to fire him, Johnson, alleging bias, sought a restraining order in district court to prevent the board from acting as the adjudicator at his termination hearing. *Id*. at 491-92, 887 P.2d at 36-37. Reasoning that it was not empowered to enjoin the board under those circumstances, the district court dismissed Johnson's action. *Id*. at 492, 887 P.2d at 37. On review, this Court reversed the district court's dismissal. *Id*. at

494, 887 P.2d at 39. We found that requiring a litigant to submit to a biased decisionmaker to be a "constitutionally unacceptable" violation of due process. *Id*. at 493, 887 P.2d at 38. Therefore, "upon a showing that there is a probability that a decisionmaker in a due process hearing will decide unfairly any issue presented in the hearing, a trial court may grant an injunction to prevent the decisionmaker from participating in the proceeding." *Id*. at 494, 887 P.2d at 39.

Bracken argues that seeking additional administrative remedies was excused because further administrative remedies would have been futile, given the bias demonstrated by the City's leaders and representatives. He alleges that the City, through its agents, was biased against him and thus provided him with no fair forum in which to seek any further administrative redress. He alleges that Mayor Jonas, who supervises the city staff, including Austin and Frick, ran an unprecedented anonymous poll to influence the City's consideration of Bracken's applications. Jonas also instructed Austin to reject Bracken's second application on at least one occasion. Additionally, Jonas, City Administrator Suzanne Frick, and former Sun Valley Mayor Ruth Lieder attended a dinner at Barbi Reed's house directly

across from the property where Bracken held his option to purchase. Reed was the chairperson of a group called the "Citizens Against Bracken Station." Frick admitted that the meeting was "about [Bracken's] application." Further, the Ketchum City Council approved the expedited passing of the ordinance in a targeted effort to prohibit Bracken's application from being approved. Frick admitted that the City made a conscious decision in December 2017 that Bracken was not going to be allowed to file his application.

Based on these circumstances, Bracken argues that seeking additional administrative remedies was excused because further administrative remedies would have been futile given the bias demonstrated by the City's leaders and agents, and the district court would have had no administrative action to review. We agree.

The general principles underpinning the exception stated in *Johnson* and *Owsley* are at play here. Given that we are reviewing this case de novo, we apply a focused review as we did in *Owsley*, with all disputed facts construed "liberally in favor of [Bracken], and all reasonable inferences that can be drawn from the record are to be drawn in [his] favor." *Dep't of Fin.,*

Sec. Bureau v. Zarinegar, 167 Idaho 611, 629, 474 P.3d 683, 701 (2020).

Respondents' actions throughout this case specifically targeted Bracken's efforts to obtain a conditional use permit to construct a gas station on Main Street, a use permissible when he filed his original applications. Austin admitted as much, explaining there was a sense of urgency in passing the new ordinance to prevent "a single application coming in and tying up city staff and the community for months and months and months." Austin's comments establish that Bracken's second application would never be processed, even if he had continued to seek relief by exhausting administrative remedies. Austin's conduct exemplifies how Bracken's attempts to seek redress by administrative process were and would be "futile."

We thus hold that, while Bracken would normally have to exhaust administrative remedies in front of a fair, unbiased decisionmaker, such action is excused here under these exceptional circumstances. Accordingly, the district court's dismissal of Count Ten-the tort claim for interference with economic expectancy-is reversed.

C. The district court did not err in dismissing Bracken's 42 U.S.C. section 1983 claims.

Next, Bracken argues the district court erred in dismissing his federal claims. Bracken argues the district court erred in grouping his substantive due process claims in with his procedural due process claims and concluding Ketchum's conditional use permit application process was not entitled to due process protection or that Bracken did not have a constitutionally protected property interest. Bracken also disputes the district court's conclusion that his federal claims were not ripe for adjudication. In response, Respondents argue Bracken could not have a constitutionally protected property interest in a conditional use permit application because he has no legal entitlement to a conditional use permit. The decision to grant or deny a conditional use permit is within the discretion of City officials empowered to evaluate the merits of the application. With no protected property interest, Respondents add, Bracken also lacks a protected interest in the procedures for obtaining a conditional use permit.

United States Code, Title 42, Section 1983 "does not confer any substantive rights. It is a vehicle for

vindicating rights secured by the United States Constitution or federal law. It provides a cause of action to anyone who is deprived, by a person acting under color of state law, of rights secured by federal law." *Bryant v. City of Blackfoot*, 137 Idaho 307, 314, 48 P.3d 636, 643 (2002). 42 U.S.C. section 1983 only provides a remedy for violating constitutional rights, not for violations related to "benefits" or "interests." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002). As a result, for a 42 U.S.C. section 1983 claim to survive summary judgment, the district court must determine whether there is a "factual basis for the claimed violations of the Constitution" that was violated by individuals acting under the color of state law. *Bryant*, 137 Idaho at 315, 48 P.3d at 644.

The district court determined Bracken did not have a constitutional right in a conditional use permit or the procedures employed in obtaining such a permit, and so Bracken did not have a viable 42 U.S.C. section 1983 claim. The district court dismissed Counts Seven (damages under 42 U.S.C. section 1983) and Eight (a claim against the City of Ketchum for violating 42 U.S.C. section 1983). The district court further held that Bracken's federal claims were not ripe since administrative remedies available to

Bracken were not exhausted before bringing the complaint.

2. Bracken did not have a constitutional right to a conditional use permit because Respondents had discretion to deny it.

Addressing the district court's first basis for dismissing Bracken's federal claims, Bracken argues that a vested right to have his CUP considered under the then-existing ordinance is a property right. Bracken contends the district court erroneously found Bracken's constitutional claim was solely grounded on process or procedure when Bracken had distinct property interests at stake that the district court failed to address.

First, Bracken argues that he had the vested right to have his application "evaluated and measured." *Payette River Prop. Owners Ass'n v. Bd. of Comm'rs of Valley Cnty.*, 132 Idaho 551, 556, 976 P.2d 477, 482 (1999), overruled on other grounds by *City of Osburn v. Randel*, 152 Idaho 906, 277 P.3d 353 (2012) (an applicant has a vested right to have an application evaluated and measured under the Ordinance in effect at the time of application). Bracken argues that vested right also protects and insures against a due process invasion of another property right-the right of access

to one's land from a public way. Bracken concludes the district court erred in holding that his vested right was not a constitutionally protected right that must be afforded due process.

In support of his contention that he had a "protectable property right in the procedures governing his application" Bracken quotes the First Circuit decision in *Raper v. Lucy*:

> The district court ruled that since the issuance of an operator's license is discretionary with the state, a constitutionally guaranteed "right" was not involved. By so holding, the court misconceived the issue. In his complaint, plaintiff did not argue that he had a right to an operator's license, and we may take it as settled that such a right, federal or state, does not exist. *See, e. g.*, *Perez v. Tynan*, 307 F.Supp. 1235, 1238 (D.C. Conn. 1969); *United States v. Carter*, 275 F.Supp. 769, 770 (D.C. D.C. 1967). However, the plaintiff did assert that he had a constitutionally protected right to procedural due process in the state application procedures whereby a

> determination of whether to issue such a license will be made. With this assertion, we are in complete agreement.
>
> . . . In *Wall v. King*, 206 F.2d 878 (1st Cir.), *cert. denied*, 346 U.S. 915, 74 S.Ct. 275, 98 L.Ed. 411 (1953), this court was faced with the contention that the personal liberty provision of the due process clause should be extended to cover the use of a motor vehicle. After careful analysis, the court accepted this proposition, remarking:
>
> "We have no doubt that the freedom to make use of one's own property, here a motor vehicle, as a means of getting about from place to place, whether in pursuit of business or pleasure, is a 'liberty' which under the Fourteenth Amendment cannot be denied or curtailed by a state without due process of law." 206 F.2d at 882.

488 F.2d 748, 751-52 (1st Cir. 1973). The First Circuit concluded that "[Fourteenth [A]mendment due process will attach to state procedures regulating the application and issuance of a motor vehicle operator's license. Consequently, the claims asserted in the

complaint must be said to involve a federally protected right." *Id*. at 752.

Respondents counter that *Raper* is inapt because it involves an application for a driver's license, and federal law recognizes a due process liberty interest in driving a vehicle. Courts have recognized no comparable liberty or property interest for a conditional use permit. *See Welch v. Paicos*, 66 F.Supp.2d 138, 164 (D. Mass. 1999) ("The courts have not recognized a similar [due process] right to develop one's own property as one pleases; indeed, they have reached the opposite result.").

The district court relied on several cases to hold that an applicant only has a due process guarantee in procedures which ultimately affect a constitutional right. These cases are persuasive. For example, in *Gerhart v. Lake Cnty, Montana*, 637 F.3d 1013 (9th Cir. 2011), a plaintiff had experienced some difficulties with a few employees of the county, including one of the county commissioners when trying to obtain an approach permit for his property. This animosity contributed to an outright denial of the plaintiff's approach permit by the commissioners, even though denial of approach permits was exceedingly rare. *Id*. at 1016-19. The plaintiff alleged

that his constitutional rights were violated by the denial. *Id.* at 1020. The Ninth Circuit held that the plaintiff did not have a protected constitutional interest in an approach permit since state law granted the county a large amount of latitude in granting such permits. *Id.* It also determined that since the plaintiff did not have any informal agreement or understanding with the county, the policies and practices of the county related to approach permits did not create a constitutionally protected interest. *Id.*

Closer to home, the federal district court for Idaho held that an application for a conditional use permit was not a constitutionally protected property interest because, as a matter of state and local law, a city has full discretion to deny the application. *MountainWest Ventures, LLC v. City of Hope*, Case No. 2:14-cv-000290-BLW, 2015 WL 222448 (D. Idaho 2015). By way of background, MountainWest Ventures applied for a conditional use permit to develop certain real property, and that application was denied at the end of a public hearing. *Id.* MountainWest filed suit in federal court, alleging various procedural deficiencies with the City's denial of its application, claiming that its Fourteenth Amendment right to due process had been violated. Among other things, MountainWest

alleged that the City itself, or certain members of the City Council:

> (1) did not provide timely or adequate information to MountainWest before or after the public hearings; (2) did not allow MountainWest to participate in the application review meeting; (3) met with, and provided information to officials from the Idaho Transportation Department, without first notifying MountainWest; (4) improperly remanded the application to MountainWest after the May 8, 2013 hearing; (5) did not include in the record all of the information MountainWest had provided; (6) did not timely decide the application; (7) conducted an executive City Council session without identifying the basis for doing so; (8) refused to provide MountainWest with a copy of the preliminary decision document denying MountainWest's application; and (9) provided no forum for an appeal of the City's administrative land use decisions.

Id. at *1 (internal citations omitted). The City of Hope moved to dismiss on grounds that MountainWest did

not have a protected property interest in the conditional use permit it sought. The federal district court granted the motion, reasoning that since the issuance of the permit was discretionary under the plain language of the applicable state law and local ordinance, MountainWest had no "legitimate claim of entitlement" to the permit.

As recognized by Idaho's federal court, Idaho statutory law governing conditional or special use permits grants wide discretion to Idaho's political subdivisions in making these decisions. Idaho Code section 67-6512(a) provides:

> A special use permit *may be granted* to an applicant if the proposed use is conditionally permitted by the terms of the ordinance, subject to conditions pursuant to specific provisions of the ordinance, subject to the ability of political subdivisions, including school districts, to provide services for the proposed use, and when it is not in conflict with the plan.

(Emphasis added).

Noting the permissive language in both Idaho Code section 67-6512(a) and the applicable local ordinance,

the federal district court determined under well-settled principles of statutory construction that the City of Hope retained the discretion to deny the permit application. It concluded MountainWest had no "legitimate claim of entitlement" that could support a claim for violating due process:

> The use of the word "may"-rather than "shall"-in both the statute and the ordinance indicates that the City Council retained discretion to grant or deny a permit. *See Marcia T. Turner, L.L.C. v. City of Twin Falls*, 159 P.3d 840, 848-89 (Idaho 2007); *see also Burch v. Smathers*, 990 F.Supp.2d 1063, 1073 (D. Idaho 2014). As a result, MountainWest cannot plausibly allege that it has a legitimate claim of *entitlement* to a conditional use permit.

Id. (emphasis in original).

The *MountainWest* decision aligns with *Burch v. Smathers*, 990 F.Supp.2d 1063 (D. Idaho 2014). In *Burch*, the plaintiff applied for a special use permit with the City of Orofino to operate a law office in a residential zone. *Id*. at 1067. After a public hearing, the Planning and Zoning Commission voted to

recommend approval of the application to the City Council. The City Council held a public hearing on the matter, during which it heard testimony from individuals who were concerned that the operation of a law office would cause traffic and safety concerns, and that the proposed use conflicted with the character of the residential zone. *Id*. The City ultimately denied Burch's application, remarking on the traffic and neighborhood character concerns raised during the public hearing before the City Council. *Id*. at 1068.

In his complaint against the mayor and city council members under 42 U.S.C. section 1983, Burch alleged that the City Council's hearing procedures did not comply with LLUPA, and that because permits had been granted to other applicants, the City Council deprived him of his rights to due process and equal protection. *Id*. The district court dismissed Burch's due process claims at summary judgment, ruling that he had no constitutionally protected property interest in an application for a permit that the City had full discretion to deny. Citing the same permissive language in Idaho Code section 67-6512, and the relevant sections of the Orofino City Code, the court determined that, notwithstanding Burch's allegations that the City Council did not comply with the

procedural requirements set forth in the City Code and LLUPA, Burch could not satisfy the threshold requirement of a constitutionally protected property interest:

> In sum, Idaho law does not impose a constitutionally significant restriction on the City Council's discretion to issue or deny special use permits. Notwithstanding Burch's unilateral expectation, the procedural requirements of LLUPA and the Orofino City Code create no legitimate claim of entitlement to a special use permit. Because Burch does not make the threshold showing of a constitutionally protected interest, his federal due process claim fails as a matter of law.

Id. at 1074.

Bracken argues that these cases do not apply because the Ketchum ordinance requires a permit to be issued once certain requirements are satisfied. The applicable Ketchum ordinance provides:

> A conditional use permit shall be granted by the commission *only if* the applicant demonstrates that:

> A. The characteristics of the conditional use will not be unreasonably incompatible with the types of uses permitted in the applicable zoning district;
>
> B. The conditional use will not materially endanger the health, safety and welfare of the community;
>
> C. The conditional use is such that pedestrian and vehicular traffic associated with the use will not be hazardous or conflict with existing and anticipated traffic in the neighborhood;
>
> D. The conditional use will be supported by adequate public facilities or services and will not adversely affect public services to the surrounding area, or conditions can be established to mitigate adverse impacts; and
>
> E. The conditional use is not in conflict with the policies of the comprehensive plan or the basic purposes of this chapter.

KMC 17.116.030 (emphasis added). Respondents concede the language of the ordinance restricts the

Commission's discretion, but assert it does not mandate the approval of the application as Bracken asserts. The ordinance provides that a conditional use permit will be granted "only if" the applicant shows that the criteria for granting a permit are met. Thus, it constrains the discretion of the Commission in granting a permit; the ordinance does not restrict the Commission's discretion to deny one. Indeed, if the Commission finds that any of the criteria are not met, it may deny the permit.

Still, Bracken maintains that "[a]s a matter of established fact, the Commission had no further reason to deny Bracken a [conditional use permit]. Bracken's First Application met four of the five conditions for a permit, and he had cured the last 'potential' issue with his Second Application." Respondents counter that Bracken ignores the considerable discretion involved in determining whether the criteria for granting a permit are met. For example, the Commission has discretion to determine whether the use will generate too much traffic, whether it will conflict with the character of the neighborhood, whether it conflicts with the policies of the comprehensive plan, and whether it aligns with the health, safety, and welfare of the community. These are criteria about which reasonable minds may

disagree, and thus, the Commission has broad discretion to determine whether, in its judgment, these criteria are met.

Given the discretion inherent in determining whether to grant a conditional use permit, the district court correctly found Bracken did not have a constitutional right that was infringed. Thus, we hold Bracken had no claim under either a procedural or substantive due process theory because he had no "legitimate claim of entitlement" to a permit that the City had discretion to deny in a reasonable exercise of its discretion. *See Gerhart v. Lake Cnty., Mont.*, 637 F.3d 1013, 1019 (9th Cir. 2011).

Bracken focuses on Respondents' disregard for "procedural safeguards," as adequate to support the infringement of his constitutional rights. However, the poor conduct on the part of the City and its agents does not foreclose Respondents' discretion to ultimately grant or deny the application. Because that discretion remained with the Respondents, regardless of their bad conduct, we affirm the district court's dismissal of Bracken's federal claims-Counts Three, Seven, and Eight.

Since we have affirmed the district court's dismissal of Bracken's federal claims, we do not

address whether Bracken's federal claims were ripe. *See Brunobuilt, Inc. v. Strata, Inc.*, 166 Idaho 208, 222, 457 P.3d 860, 874 (2020) (declining to reach alternative bases for dismissal considered by district court once this Court had affirmed the district court's decision).

D. The district court did not err in dismissing Bracken's punitive damage claim.

Count Nine of Bracken's first and second amended complaint sought punitive damages for Respondents' alleged 42 U.S.C. section 1983 violations. The district court dismissed Bracken's punitive damages claim once it dismissed Bracken's other 42 U.S.C. section 1983 claims, reasoning there could be no punitive damages without other liability.

On appeal, Bracken argues that punitive damages may be awarded even with no other liability. Bracken cites *Smith v. Wade*, 461 U.S. 30 (1982), which noted "punitive damages may be the only significant remedy available in some § 1983 actions where constitutional rights are maliciously violated but the victim cannot prove compensable injury." *Id.* at 55, n. 21. Respondents counter that the quoted statement from *Smith* simply means punitive damages may be assessed to punish a defendant that *violates the*

plaintiff's constitutional rights even when the plaintiff can prove no compensable damages. The Respondents are correct.

Here, the district court dismissed Bracken's punitive damage claim because punitive damages cannot be assessed against a defendant absent liability, and the district court found there was no violation of Bracken's constitutional rights. The district court did not err in dismissing Bracken's punitive damages claim. Since Bracken's claims asserting constitutional violations were dismissed, there is no underlying liability to use as the springboard from which to award punitive damages. *See Peden v. Suwannee County. Sch. Bd.*, 837 F.Supp. 1188, 1197 (M.D. Fla. 1993) (in a section 1983 action, "a jury may properly award[ ] punitive damages even though it awards no compensatory damages, but only where the jury first finds that a constitutional violation was committed by the party against whom the punitives are imposed."). The district court's dismissal of Count Nine is affirmed.

E. The district court did not err in refusing to rule on Bracken's motions for rulings on issues of law.

Next, Bracken alleges there are no identified issues of fact, and so the district court erred in refusing to rule on Bracken's motion for rulings of law. A district court's decision whether and when to consider a motion for rulings of law is reviewed for an abuse of discretion. *See McCandless v. Pease*, 166 Idaho 865, 872, 465 P.3d 1104, 1111 (2020). When this Court reviews an alleged abuse of discretion by a trial court, the Court considers the following: "Whether the trial court: (1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion; (3) acted consistently with the legal standards applicable to the specific choices available to it; and (4) reached its decision by the exercise of reason." *Lunneborg v. My Fun Life*, 163 Idaho 856, 863, 421 P.3d 187, 194 (2018).

While Respondents' third motion for summary judgment was pending, Bracken moved for rulings on eighteen issues of law along with a subsequent motion for summary judgment. Many of these eighteen "motions" asked the district court to rule on the propriety of actions taken by Austin. The motions asked the court to conclude that Austin acted repeatedly without authority in refusing to accept Bracken's application.

Bracken based his motion on Idaho Code section 9-102:

> All questions of law arising *upon the trial*, including the admissibility of testimony, the facts preliminary to such admission, and the construction of statutes and other writings, and other rules of evidence, are to be decided by the court when submitted and before the trial proceeds, and all discussions of law are to be addressed to the court.[4]

(Emphasis added).

The district court held it was procedurally improper to determine a motion for rulings on issues of law before a trial commences. The court found the phrase "upon the trial" meant when the trial starts and determined Bracken had failed to explain or cite any authority to support why his motion was proper at an earlier point in the proceedings.

There appears to be an inherent conflict within the timing designated in the statute. On one hand, "upon" is defined as "immediately following on," "very soon after," or "at the time of." *Upon*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1993).

Thus, the meaning of "upon the trial" would be immediately following the start of trial or at the time of trial. On the other hand, the statute designates all questions of law are to be decided "when submitted."

"[A]ny ambiguity in a statute should be resolved in favor of a reasonable operation of the law." *State v. Neal*, 159 Idaho 439, 445, 362 P.3d 514, 520 (2015) (quoting *Lawless v. Davis*, 98 Idaho 175, 177, 560 P.2d 497, 499 (1977)). Here, we must consider the timing of Bracken's motion. Bracken submitted his motion while Respondents' third motion for summary judgment was pending, at the same time he moved for summary judgment. But he then claimed a ruling on his motions was necessary "for the district court to properly instruct the jury at trial." Based on the pending motions it was unclear whether a trial would ever occur. As a result, it was impractical to ask the district court to decide issues of law for a trial that may never happen. We hold the district court did not abuse its discretion in denying Bracken's motion.

F. We vacate the district court's award of all costs to Respondents.

The district court granted Respondents' request for discretionary costs after concluding Bracken's claims lacked "any legal merit." The court found that in

defending any lawsuit where all adverse claims lacked a reasonable basis in law, discretionary costs are necessary and exceptional since those claims should have never been brought in the first place. Here, the district court found Respondents' costs were exceptional because the case should have been confined to administrative remedies followed by judicial review. Bracken argues the district court erred in awarding discretionary costs because his factual allegations remained unchallenged and had merit. Respondents counter that the district court based its award of discretionary costs on the lack of merit in Bracken's *legal* arguments, not his factual claims.

An award of discretionary costs is authorized under Idaho Rule of Civil Procedure 54(d)(1)(D) "on a showing that the costs were necessary and exceptional costs, reasonably incurred, and should in the interests of justice be assessed against the adverse party." An award of discretionary costs is reviewed for abuse of discretion, and the party opposing the award of costs bears the burden of showing that the district court abused its discretion. *Easterling v. Kendall*, 159 Idaho 902, 917, 367 P.3d 1214, 1229 (2016). When this Court reviews an alleged abuse of discretion by a trial court the sequence of inquiry requires consideration of the

four essential questions noted above. *See Lunneborg* 163 Idaho at 863, 421 at 194.

Because we have reversed the district court's dismissal of Count Ten, we vacate the district court's award of all costs, discretionary and automatic, pending the outcome of Bracken's remaining claim on remand.

G. We decline to award attorney fees on appeal.

Both parties request attorney fees on appeal. In his opening brief, Bracken states he is seeking "an award of attorney fees on this appeal pursuant to 42 USC [section] 1988. *Larez v. Los Angeles*, 946 F.2d 630 (9th Cir. 1991)." Bracken does not provide any analysis or argument in support of his request in his initial brief. "A party seeking attorney fees on appeal must state the basis for such an award." *Jones v. Lynn*, 169 Idaho 545, 565, 498 P.3d 1174, 1194 (2021) (citing *Bromund v. Bromund*, 167 Idaho 925, 932, 477 P.3d 979, 986 (2020)). This means that the party seeking fees must provide argument on the issue and not simply cite a statute. I.A.R. 35(a)(6), (b)(6). "[A]bsent any legal analysis or argument, 'the mere reference to [a] request for attorney fees is not adequate.'" *Jones*, 169 Idaho at 565, 498 P.3d at 1194 (quoting *Johnson v.*

Murphy, 167 Idaho 167, 176, 468 P.3d 297, 306 (2020) (second alteration in original)).

Although Bracken thoroughly supports his request in his reply brief, "this Court will not consider arguments raised for the first time in the appellant's reply brief." *Suitts v. Nix*, 141 Idaho 706, 708, 117 P.3d 120, 122 (2005) (quoting *Myers v. Workmen's Auto Ins. Co.*, 140 Idaho 495, 508, 95 P.3d 977, 990 (2004)). A reviewing court looks only to the initial brief on appeal for the issues presented because those are the arguments and authority to which the respondent can respond in the respondent's brief. *Id*. Thus, Bracken's request for attorney fees is denied.

Respondents also request attorney fees on appeal under Idaho Code sections 12-117, 12121, and 42 U.S.C. section 1988. Section 12-117 "mandates an award of reasonable attorney fees to the prevailing party 'in any proceeding involving as adverse parties a state agency or a political subdivision and a person'" if the court finds that "the nonprevailing party acted without a reasonable basis in fact or law." *Byrd v. Idaho State Bd. of Land Comm'rs*, 169 Idaho 922, 933, 505 P.3d 708, 719 (2022). Similarly, attorney fees may be awarded on appeal under Idaho Code section 12-121 when the court is "left with the abiding belief that

the appeal was brought, pursued or defended frivolously, unreasonably or without foundation." *Florer v. Walizada*, 168 Idaho 932, 936, 489 P.3d 843, 847 (2021).

Respondents argue Bracken's state law claims were pursued without a reasonable basis in fact or law because Bracken sued for damages against the City when his sole remedy was judicial review, and because he failed to exhaust administrative remedies before pursuing an action in district court. We have reversed the district court's order, holding that Bracken may pursue a legal claim related to Count Ten. Thus, Bracken's arguments about the doctrine of exhaustion are not frivolous. Accordingly, we decline to award Respondents attorney fees on appeal under Idaho Code sections 12-117 or 12-121.

Separately, Respondents request attorney fees for Bracken's federal claims under 42 U.S.C. section 1988. Section 1988(b) provides: "In any action or proceeding to enforce a provision . . . of this title . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." Like the standard in Idaho Code section 12-121, attorney fees may be awarded under 42 U.S.C. section 1988 to a prevailing defendant if "the

plaintiff's action was frivolous, unreasonable, or without foundation." *Hughes v. Rowe*, 449 U.S. 5, 14 (1980). Respondents claim Bracken's 42 U.S.C. section 1983 claims were frivolous, unreasonable and without foundation because they contravened years of federal precedent holding that there is no legitimate claim of entitlement to a discretionary land use permit.

We decline to award Respondents attorney fees related to Bracken's federal claims. Although we have held Bracken lacked a constitutional right to a conditional use permit, he made good-faith arguments about the deprivation of the process he endured to obtain the conditional use permit. Given the Respondents' conduct below, we decline to award them attorney fees on appeal.

IV. Conclusion

We affirm the district court's dismissal of Counts One through Nine in Bracken's second amended complaint but reverse the district court's dismissal of Count Ten based on our conclusion that Bracken was excused from exhausting administrative remedies under the uniquely egregious facts here. We therefore vacate the judgment: (1) against Bracken as to Count Ten; and (2) awarding costs to the Respondents. No attorney fees or costs are awarded on appeal.

JUSTICES MOELLER and ZAHN, JUSTICE HORTON, pro tem, and JUDGE PETTY, pro tem, CONCUR.

Notes:

[1] A copy of the transcript from the July 3, 2017, hearing was not in the record on appeal. But Ketchum City Council meetings are public events, are video recorded, and are available online by visiting the City of Ketchum website at *https://www.ketchumidaho.org/citycouncil/page/city-council-regular-meeting-59*. Because the information is publicly available and not disputed by Respondents, this Court takes judicial notice of the quoted exchange pursuant to Idaho Rule of Evidence 201 ("The court may judicially notice a fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.").

[2] Bracken's brief in support of the motion for summary judgment was not included as part of the record, so the full extent of Bracken's argument is unclear. The district court summarized Bracken's request as asking the court to make these rulings and

findings: (1) The filing and processing of a conditional use permit application is an operational function that involves ministerial duties and is not a discretionary function; (2) The City assumed a duty by enacting KCO 17.116.040(A) to take reasonable steps to process Bracken's application in due course, safeguard said application, and do so in a non-negligent manner; (3) Bracken's Second Application was complete and properly submitted on April 10, 2017, because it met all the filing requirements in KCO 17.116.040(A); (4) The defendants lacked the authority to add any new filing requirements for Bracken's Second Application; (5) Bracken's April 10, 2017, application rights vested on April 10, 2017, which was known by the individual defendants; (6) The City had no legal basis to return Bracken's June 19, 2017, submission of his April 10, 2017, [application]; (7) The June 19, 2017, resubmission of Bracken's Second Application was timely, and Bracken should have received his April 10, 2017, application date; (8) The City had no legal basis to reject Bracken's July 7, 2017, verbal submission or his December 11, 2017, and December 13, 2017, submissions of his Second Application; (9) The notice of tort claim filed on December 17, 2017, put Ketchum on notice that they were proceeding in the face of a known risk; (10) Except for Bracken's April 10, 2017, application, none of the rejections to file Bracken's

April 10, 2017, application by Austin were "decisions" subject to appeal or administrative review; (11) [Bracken has] made out a prima facie case that the defendants acted intentionally, willfully, and wantonly or recklessly such that the $500,000 statutory limitation on tort claims does not apply; and (12) [The defendants] have failed to assert any arguments or facts that support their affirmative defenses.

[3] Idaho Code section 9-102 provides that "[a]ll questions of law arising upon the trial, including the admissibility of testimony, the facts preliminary to such admission, and the construction of statutes and other writings, and other rules of evidence, are to be decided by the court when submitted and before the trial proceeds, and all discussions of law are to be addressed to the court."

[4] The statute appears to encroach on the judiciary's authority to set its own procedural rules. *In re SRBA Case No. 39576*, 128 Idaho 246, 255, 912 P.2d 614, 623 (1995) (quoting *State v. Beam*, 121 Idaho 862, 863, 828 P.2d 891, 892 (1992) ("[T]his Court's rule making power goes to procedural, as opposed to substantive, rules.")). That said, neither party has raised the propriety of section 9-102 on appeal, so we leave that determination for another day.

ROY BRACKEN, an individual; RRJ LLC, an Idaho limited liability company; and PENGUIN LLC, an Idaho limited liability company, Plaintiffs-Appellants,

v.

CITY OF KETCHUM, IDAHO an Idaho municipal corporation; MICAH AUSTIN, an individual, SUZANNE FRICK, an individual, and NINA JONAS, an individual, Defendants-Respondents.

Supreme Court Docket No. 48721-2021

Blaine County Docket No. CV07-19-00324

Order Denying Petition for Rehearing

The Appellant having filed a Petition for Rehearing on October 6, 2023, and supporting brief on October 23, 2023, of the Court's Published Opinion released September 15, 2023; therefore, after due consideration,

IT IS ORDERED that Appellant's Petition for Rehearing is denied.

Dated November 02, 2023.

By Order of the Supreme Court
/s/ Melanie Gagnepain
Clerk of the Courts