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RECEIVED

FEB 10 2010

Attorneys for Defendants Idaho Counties Risk Management Program, (ICRMP)

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

COUNTY OF BOISE, a political
subdivision of the State of Idaho,

Plaintiff,

vs.

IDAHO COUNTIES RISK
MANAGEMENT PROGRAM,
UNDERWRITERS (ICRMP), and DOES
1 through X,

Defendants.

Case No. CV09-94-S-BLW

**DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT**

COMES NOW defendant Idaho Counties Risk Management Program, (ICRMP) (defendant), by and through their counsel of record, pursuant to Rule 56 of the Idaho Rules of Civil Procedure, and hereby moves this Court for its order granting summary judgment to this defendant for the reason that there are no material facts in dispute and this defendant is entitled to judgment as a matter of law.

This motion is supported by a memorandum of law, lodged concurrently herewith in Support of Defendant's Motion for Summary Judgment filed concurrently herewith.

Oral argument is requested.

DATED this 9 day of February, 2010.

ANDERSON, JULIAN & HULL LLP

By Phillip J. Collaer
Phillip J. Collaer, Of the Firm
Attorneys for Defendant

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 9 day of February, 2010, I served a true and correct copy of the foregoing **Defendant's Motion for Summary Judgment** by delivering the same to each of the following attorneys of record, by the method indicated below, addressed as follows:

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Risk Management Program, (ICRMP)

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1 through X,

Defendants.

Case No. CV09-94-S-BLW

**DEFENDANT'S MEMORANDUM IN
SUPPORT OF MOTION FOR
SUMMARY JUDGMENT**

This case involves a coverage dispute between Idaho Counties Risk Management Program Underwriters (ICRMP) and its insured, the County of Boise. In January of 2008, Alamar Ranch LLC filed a lawsuit against Boise County. After reviewing the allegations in the liability complaint, ICRMP denied coverage on the grounds the allegations in the Alamar Ranch complaint did not allege claims that were covered under the terms and conditions of the ICRMP insurance policy. **See** Complaint ¶¶17-18.

The complaint for declaratory relief filed by Boise County alleges breach of contract

surrounding ICRMP's denial of coverage and refusal to defend the Alamar Ranch litigation. In the sections below, ICRMP will establish the claims in the Alamar Ranch complaint do not describe covered claims or, describe claims that are excluded from coverage by virtue of the exclusions in the policy.

I. STATEMENT OF FACTS.

1. This matter arose due to a *Complaint and Demand for Jury Trial* filed by Alamar Ranch LLC ("Alamar") against Boise County in the United States District Court for the District of Idaho. *See Complaint for Declaratory Relief*, Exhibit A (hereinafter, "Alamar Complaint").

2. In its Complaint, Alamar alleged the following facts:

- (i) On April 19, 2007, Alamar applied for a conditional use permit ("CUP") to develop a residential treatment facility and private school on its property for handicapped persons. *See Alamar Complaint ¶¶6.*
- (ii) Public hearings on that application were held before the planning and zoning ("P&Z") board on August 2, 2007 and August 15, 2007. *See Alamar Complaint ¶7.*
- (iii) Via a written September 28, 2007 decision, the P&Z board denied the application for a CUP on the basis that a residential treatment center was inappropriate for the location at the current time and that the County lacked sufficient infrastructure or money to monitor and enforce the conditions proposed for the application. *See Alamar Complaint ¶¶10-11.*
- (iv) Alamar filed a timely appeal on October 18, 2007, appealing the matter to the Boise County Board of Commissioners ("Board"). *See Alamar Complaint ¶12.*
- (v) The Board heard the appeal at a public hearing on January 28, 2008. *See Alamar Complaint ¶13.*
- (vi) The Board deliberated the matter at a March 10, 2008 meeting, and imposed various restrictions that Alamar claims makes the project economically unfeasible. *See Alamar Complaint ¶14.*
- (vii) The Board issued a written decision and order on April 21, 2008. *See*

Alamar Complaint ¶¶15.

(viii) The conditions imposed by the Board were a pretext for the Board's discriminatory motive. **See** Alamar Complaint ¶¶14.

3. Alamar further alleged that Boise County violated the Fair Housing Act, 42 U.S.C. § 3601 *et seq.*, to-wit:

- (i) Failing to accommodate for handicapped individuals by "placing onerous, arbitrary and unreasonable conditions on the approval of the application which destroyed the feasibility of the project." **See** Alamar Complaint ¶¶25.
- (ii) Engaging in impermissible disparate treatment by placing "onerous, arbitrary and unreasonable conditions on the permit," while approving other developments without such conditions. **See** Alamar Complaint ¶¶30.
- (iii) By unlawfully interfering with the anticipated residents of such project "by obstructing the construction or availability of housing...." **See** Alamar Complaint ¶¶36.

4. Boise County had in force a Public Entity Multi-Lines Insurance Policy which it had procured from ICRMP. **See** *Complaint for Declaratory Relief*, Exhibit B.

5. Boise County tendered a claim for defense and indemnification which was denied by ICRMP, and subsequently filed the above-entitled suit on October 21, 2009. **See** Alamar Complaint ¶¶17.

II. LEGAL STANDARD

A party is entitled to summary judgment "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." **I.R.C.P. 56(c)**. "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of that party's pleadings, but the party's response . . . must set forth specific facts showing

that there is a genuine issue for trial." I.R.C.P. 56(e). "If the defendant moves for summary judgment on the basis that no genuine issue of material facts exists with regard to an element of the plaintiff's case, the plaintiff must establish the existence of an issue of fact regarding that element." *Zimmerman v. Volkswagen of Am.*, 128 Idaho 851, 854, 920 P.2d 67, 70 (1996). "In order to forestall summary judgment in that case, the plaintiff must do more than present a scintilla of evidence, and merely raising the 'slightest doubt' as to the facts is not sufficient to create a genuine issue." *Id.* See also *Harpole v. State*, 131 Idaho 437, 439, 958 P.2d 594, 596 (1998) (stating that "a mere scintilla of evidence or only slight doubt as to the facts is insufficient to withstand summary judgment."). Moreover, "a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *McGilvray v. Farmers New World Life Ins. Co.*, 136 Idaho 39, 42, 28 P.3d 380, 383 (2001) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)). Thus, Rule 56 "mandates the entry of summary judgment ... against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Jenkins v. Boise Cascade Corp.*, 141 Idaho 233, 239, 108 P.3d 380, 386 (2005) (emphasis added) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)).

III. COVERAGE DOES NOT EXIST UNDER THE GENERAL LIABILITY INSURING AGREEMENT

The ICRMP policy extends coverage for tort claims under Section II, General Liability Insurance and Premises Medical Payments as well as Section IV, Errors and Omissions Insurance. The insuring agreement of the General Liability section of the policy reads:

We agree, subject to the terms and conditions of this Coverage, to pay on your behalf those sums which you become legally obligated to pay as **damages** for **personal injury** or **property damage** which arise out of an **occurrence** during the policy period.

See ICRMP policy, page 15.

Under the General Liability Agreement, coverage is limited to claims where the alleged damages are based upon personal injuries or property damage. The term "property damage" is defined in the policy as involving "...physical damage to or destruction of tangible property,....". See ICRMP policy, pg. 16. The term "personal injury" is defined as a "bodily injury" which is defined as involving "...physical injury to any person, ...and any mental anguish or mental suffering associated with or arisen from such physical injury." *Id.* at 15.

The Alamar Ranch liability complaint does not allege that the corporation suffered any personal injuries or property damage. Obviously, a business entity such as Alamar Ranch, LLP cannot suffer personal injuries as that term is defined in the ICRMP policy. Additionally, according to the allegations in the liability complaint, Alamar Ranch's alleged damages are limited to business losses arising from Boise County's use of its zoning powers and the conditions the County placed upon the plaintiffs' conditional use permit. See Alamar Ranch Complaint, ¶¶ 14-16. Because the complaint fails to allege that Alamar Ranch experienced personal injuries or property damage due to any acts or omissions of Boise County, coverage would not exist under the General Liability Insuring Agreement.¹

¹ As outlined below, coverage is excluded under the E & O section of the policy through the intentional act and planning and zoning exclusions. The general liability section of the policy contains similar exclusions. See ICRMP policy, pg. 18, ¶¶ 2 and 11. These exclusions provide an independent basis to deny coverage under the General

IV. COVERAGE UNDER ERRORS AND OMISSIONS INSURING AGREEMENT

The Errors and Omissions Insuring Agreement found at Section IV, pg. 24 of the policy does, under appropriate circumstances, extend coverage for economic claims. The insuring agreement reads:

We agree, subject to the terms and conditions of this Coverage, to pay on your behalf all sums which you shall become legally obligated to pay as **damages** because of any **claim** which is **first made** against you during this Policy Period, arising out of any **wrongful acts** by you.

All **wrongful acts**, including all related **wrongful acts**, must take place after the retroactive date, if any, shown in the Declaration Page and before the end of this Policy Period. A **claim** may also be **first made** against you if it is made during any Extended Reporting Period we may provide pursuant to the Specific Conditions outlined in this section below.

See ICRMP policy, pg. 24. The term "wrongful act" is defined at pg. 7, ¶7 as

follows:

"Wrongful Act" means the negligent performance of or failure to perform a legal duty or responsibility in a tortious manner pursuant to the Idaho Tort Claims Act or be premised upon allegations of unlawful violations of civil rights pursuant to Federal law arising out of public office or position.

Through this language, in the absence of an exclusion, coverage could arise for wrongful acts described as civil rights violations pursuant to federal law. ICRMP does not dispute that the Alamar Ranch liability complaint alleges certain civil rights violations. However, the particular civil rights violations alleged are not entitled to coverage due to the operation of a number of specific exclusions.

The applicable exclusions in the E & O section are found at pages 25 through 26 of the policy and read:

Liability section of the policy.

The Errors and Omissions Insuring Agreement does not cover any **claim**:

- ...
2. Arising out of any dishonest, fraudulent, criminal, malicious, deliberate or intended **wrongful act** committed by you or at your direction.

...

 4. Resulting from a **wrongful act** intended or expected from the standpoint of any **insured** to cause **damages**. This exclusion applies even if the **damages** claimed are of a different kind or degree than that intended or expected.

...

 12. To any **claim** of liability arising out of or in any way connected with the operation of the principles of eminent domain, condemnation proceedings, inverse condemnation, annexation, regulatory takings, land use regulation or planning and zoning activities or proceedings, however characterized, whether such liability accrues directly against you or by virtue of any agreement entered into by or on your behalf.

The General Exclusions section of the policy addresses coverage for civil penalties and punitive damages as follows:

Unless otherwise stated, these exclusions are applicable to ALL Sections of this Policy.

1. **Civil and Criminal Penalties.** This Policy does not cover any **claim**, loss or damage resulting from any civil and criminal penalties imposed or provided for pursuant to any federal, state, or local law, statute, ordinance, or regulation, however characterized.

...

6. **Punitive Damage.** This Policy does not cover any **claim**, loss or damage for exemplary or punitive **damages**, however, characterized.

See ICRMP policy, page 7. The question before this court is whether the allegations contained in the Alamar Ranch liability complaint describe claims which are entitled to

coverage under the sections of the ICRMP policy described above. If coverage exists, it will arise only under the Errors and Omissions Insuring Agreement. It is ICRMP's position the alleged civil rights violations and claims for punitive damages are unambiguously excluded from coverage under the Policy.

A. THE COURT IS LIMITED TO EXAMINING THE FOUR CORNERS OF THE COMPLAINT AND THE FOUR CORNERS OF THE INSURANCE POLICY TO DETERMINE IF THERE IS A DUTY TO DEFEND.

"Under Idaho law and consistent with other states, an insurer's duties to defend and indemnify are separate duties." *Hoyle v. Utica Mut. Ins. Co.*, 137 Idaho 367, 375, 48 P.2d 1256 (2002). "The duty to defend is broader than the duty to indemnify." *Id.* Nonetheless, the duty to defend only arises "upon the filing of a complaint, whose allegations, in whole or in part, read broadly, reveal a potential for liability that would be covered by the insured's policy." *Amco Ins. Co. v. Tri-Spur Inv. Co.*, 140 Idaho 733, 737, 101 P.3d 226, 230 (2004); *Hoyle v. Utica Mut. Ins. Co.*, 137 Idaho 367, 371-72, 48 P.3d 1256, 1260-61 (2002); *Kootenai County v. Western Casualty & Sur. Co.*, 113 Idaho 908, 910, 750 P.2d 87, 89 (1988). *See also State v. Bunker Hill Co.*, 647 F. Supp. 1064, 1068 (D. Idaho 1986)). That is, the duty to defend only arises where the complaint asserts a claim for which there is, or potentially could be, coverage under the policy. *See Amco Ins. Co.*, 140 Idaho at 737; *Hoyle*, 137 Idaho at 1262-63. Where there is no coverage according to the policy, there is no duty to defend. *See Treasure Valley Transit v. Phila. Indem. Ins. Co.*, 139 Idaho 925, 929, 88 P.3d 744, 748 (2004). *See also Hoyle, supra*, 137 Idaho at 373 (holding that because of intentional act exclusion, there was no duty to defend as to claim of intentional breach of the covenant of good faith).

The Court cannot consider extrinsic evidence when considering the claims asserted in the underlying lawsuit. *See Hoyle*, 137 Idaho at 373. *See also Construction*

Management v. Assurance Co. of America, 135 Idaho 680, 684, 23 P. 3d. 142, 146 (2001). Rather, the Court is confined to examining the claims set forth in the underlying complaint and the terms of the insurance policy to determine if there is coverage for those claims as they are asserted in the underlying complaint. See also *Amco Ins. Co.*, 140 Idaho at 738. If this analysis fails to reveal coverage, the insurer is not required to defend the liability complaint and is not obligated to indemnify the insured if they are found liable. See *Hoyle* 137 Idaho at 375-376.

B. THE CLAIMS ASSERTED IN THE COMPLAINT.

The court is constrained to read a liability complaint in a normal manner. Thus, general factual allegations made near the beginning of a complaint explain, and limit, the breadth of the claims found later in the text; particularly if such general allegations are incorporated into the text of the claim. See *Vanvooren v. Astin*, 141 Idaho 440, 443-44, 111 P.3d 125, 128-29 (2005).

As set forth more fully in the Statement of Facts, *supra*, the Alamar complaint alleges the plaintiff applied for a conditional use permit to develop a residential treatment facility and school. See Alamar Complaint ¶¶6-7. The complaint further alleges the permit was initially denied; but on appeal to the Board of Commissioners, the permit was approved, but with conditions. *Id.* ¶¶14-15. According to Alamar, those conditions made the project economically unfeasible. These general facts are the basis for the FHA claims asserted by Alamar, and are, in fact, specifically incorporated into each of the claims. *Id.*, ¶¶ 20, 27, 33. Alamar further alleges that the County's decisions were "manufactured" as a pretext for discrimination, *Id.* ¶ 11, and "knowingly imposed" in order to carry out the County's "discriminatory purpose." *Id.* ¶ 14. Thus, the plain text of the Alamar complaint clearly alleges that all of the claims arise out of the disputed planning and zoning decisions

of Boise County were made with the intent to discriminate against Alamar and/or the intended residents.

Boise County has admitted as much. In Plaintiff's *Complaint and Demand for Jury Trial*, Boise County states, in the pertinent part:

On or about January 13, 2009, *Alamar Ranch, LLC*, filed an action in U.S. District Court, District of Idaho, against County of Boise alleging violations of the Fair Housing Act, 42 U.S.C. § 3601 *et seq.* The violations are alleged in connection with the: (1) County of Boise Planning and Zoning Commission's denial of a conditional use permit for a residential treatment facility designed to house individuals allegedly protected under the Fair Housing Act ...; and/or (2) County of Boise Board of Commissioners' imposition of conditions of permit approval that Alamar Ranch alleges were "pretext designed to conceal the Board's discriminatory motive"

Complaint for Declaratory Relief, ¶ 13 (*italics in original; underline added*). In short, even Boise County acknowledges that the FHA claims arise out of its planning and zoning decisions regarding Alamar's conditional use permit application; and that Alamar alleges intentional conduct. These undisputed facts establish that ICRMP properly denied coverage as the allegations in the liability complaint describe claims that are excluded from coverage.

C. THE TERMS OF THE POLICY EXCLUDE COVERAGE.

The Idaho Supreme Court has ruled that if an insurance policy is clear and unambiguous, the determination of the insurance policy's meaning and legal effect are questions of law. *City of Idaho Falls v. Home Indem. Co.*, 126 Idaho 604, 607, 888 P.2d 383, 386 (1995). The meaning of the insurance policy and the intent of the parties must be determined from the plain meaning of the insurance policy's own words. *Id.* Whether or not an insurance contract is ambiguous is a question of law. *Potlatch Grain & Seed v. Millers Mut. Fire Ins. Co.*, 138 Idaho 54, 58, 57 P.3d 765, 769 (2002).

"Where the policy language is clear and unambiguous, however, coverage must be determined in accordance with the plain meaning of the words used." *Mutual of Enumclaw Ins. Co. v. Roberts*, 128 Idaho 232, 235, 912, P.2d 119, 122 (1996). "[W]ords in an insurance policy that have a settled legal meaning are not ambiguous merely because the policy does not contain a definition." *North Pacific Ins. Co. v. Mai*, 130 Idaho 251, 253, 939 P.2d 570, 572 (1997). Moreover, "not every word and phrase in an insurance contract needs to be defined in the contract." *Perry v. Farm Bureau Mut. Ins. Co. of Idaho*, 130 Idaho 100, 102, 936 P.2d 1342, 1344 (Ct. App. 1997).

The Idaho Supreme Court has repeatedly stated that courts must "construe a contract of insurance as it is written, and the Court by construction cannot create liability not assumed by the insurer, nor make a new contract for the parties, or one different from that plainly intended, nor add words to the contract of insurance to either create or avoid liability." *Kromrei v. Aid Ins. Co.*, 110 Idaho 549, 551-552, 716 P.2d 1321, 1323-1324 (1986) (citing *Unigard Ins. Group v. Royal Globe, Etc.*, 100 Idaho 123, 128, 594 P.2d 633 (1979), quoting *Miller v. World Ins. Co.*, 76 Idaho 355, 357, 283 P.2d 581, 582 (1955)). "[W]here the provisions of an insurance contract are not against public policy, the contract provisions control." *Howard v. Oregon Mut. Ins. Co.*, 137 Idaho 214, 217, 46 P.3d 510, 513 (2002).

The steps in interpreting an insurance policy to determine coverage are well understood: First, the court must look to the insuring agreement. If there is potential coverage, the court looks next to the exclusions. Last, if any exclusions apply, the court may then consider whether an exception to the exclusions reinstate coverage, recognizing that an exception to an exclusion does not create coverage. *See Pursell Construction, Inc. v. Hawkeye-Security Ins. Co.*, 596 N.W.2d 67, 69 (Iowa 1999). *See also Auto-*

Owners Ins. Co. v. Reliance Ins. Co., 227 F. Supp. 2d 1248, 1263-64 (M.D. Fla. 2002) (“In sum, an exception to an exclusion in a CGL policy does not create coverage.”); *Weedo v. Stone-E-Brick, Inc.*, 405 A.2d 788, 795 (N.J. 1979) (stating that it is a “basic principle that exclusion clauses *subtract* from coverage rather than grant it.”) (italics in original).

1. **There Is No Coverage for Intentional Wrongful Acts.**

The intentional act exclusion found at pg. 25, ¶4 of the policy defeats coverage for any claim arising from a wrongful act intended or expected by the insured to cause damage. The fact the damage claimed is different from what the insured intended or expected is irrelevant. *See Farmers Ins. Group v. Sessions*, 100 Idaho 914, 607 P.2d 422 (1980) (intentional act exclusion required insurer to show the insured intended to cause injury. The fact the actual injury is different than originally intended was not relevant. *See* 100 Idaho at 918), *see also Maxson v. Farmers Ins. of Idaho, Inc.*, 107 Idaho 1043, 695 P.2d 428 (1985) (same).

As noted above, the Alamar Complaint specifically alleges the actions undertaken by Boise County were intentional. In regard to the initial decision by the Planning and Zoning Commission, Alamar alleges that the County “manufactured” its reasons for denying the conditional use permit as a “pretext” for discrimination. **Alamar Complaint ¶ 11.** Alamar further alleges that, on appeal, to the County Commissioners, “carried out its discriminatory purpose of preventing the project from being built by knowingly imposing numerous conditions....” *Id.* ¶ 14. Alamar then alleges the “conditions were a pretext designed to conceal the Board’s discriminatory motive of preventing the project from being built.” *Id.* **See also Complaint for Declaratory Relief, ¶ 13** (Boise County quoting this same language). Alamar also contends that “[i]n essence, Boise County refused Alamar’s request for reasonable accommodations by placing conditions on the CUP aimed at

ensuring the project would not be economically feasible.” **Alamar Complaint** ¶ 16. As previously noted, all of these allegations are incorporated by reference into each of the claims that followed. Moreover, all of these allegations bespeak an intent on the part of Boise County to discriminate against the Plaintiffs and/or potential residents of the Alamar facility and prevent the facility from opening which then caused the damages sought in the liability complaint.

In addition to the general allegations, Alamar alleged in Count Two that: “Upon information and belief, a discriminatory reason more likely than not motivated the challenged decision of Boise County.” **Alamar Complaint** ¶ 31. This contention was incorporated into Count Three. **See Id.** ¶ 33.

Alamar also requested punitive damages pursuant to 42 U.S.C. § 3613(c), which authorizes a court to award actual and punitive damages, and injunctive relief. Punitive damages are not automatic in every FHA claim. *Jeanty v. McKey & Poague, Inc.*, 496 F.2d 1119, 1121 (7th Cir. 1974). “Punitive damages are limited ‘to cases in which the [defendant] has engaged in intentional discrimination and has done so with malice or with reckless indifference to the federally protected rights of an aggrieved individual.’” *United States v. Space Hunters, Inc.*, 429 F.3d 416, 427 (2nd Cir. 2005) (quoting *Kolstad v. Am. Dental Ass’n*, 527 U.S. 526, 529-30 (1999)). **See also Preferred Properties, Inc. v. Indian River Estates, Inc.**, 276 F.3d 790, 800 (6th Cir. 2002) (punitive damages available under FHA where the defendants acted with malice or reckless indifference that their actions might violate a federal statute of which they were aware); *United States v. Pacific Northwest Electric, Inc.*, 2002 U.S. Dist. LEXIS 26305 (D. Idaho 2002) (same). In other words, by making a claim for punitive damages, Alamar was, again, alleging intentional conduct on the part of Boise County.

In short, the Alamar Complaint is clear in alleging that Boise County intended the wrongful act—the discrimination. Thus, coverage is excluded under the Policy and, for that reason, ICRMP does not have a duty to either defend or indemnify Boise County as to the Alamar suit.

2. **There Is No Coverage for Claims Arising from Planning and Zoning Decisions.**

The ICRMP policy, at page 26, ¶12 excludes coverage for claims arising out of land use decisions and activities, including planning and zoning. Specifically, the Policy provides an exclusion for “any *claim* of liability arising out of or in any way connected with the operation of the principles of eminent domain, condemnation proceedings, inverse condemnation, annexation, regulatory takings, land use regulation or planning and zoning activities or proceedings, however characterized, whether such liability accrues directly against you or by virtue of any agreement entered into by or on your behalf.” (emphasis added).

Courts interpreting the “arising out of” language have considered it “a very broad, general, and comprehensive term ... meaning originating from or growing out of or flowing from.” *Winnacunnet Co-op School Dist. v. Nat’l Union Fire Ins. Co.*, 84 F.3d 32, 35 (1st Cir. 1996). *See also Nutmeg Ins. Co. v. Clear Lake City Water Auth.*, 229 F. Supp. 2d 668, 684-85 and 696 (S.D. Tex. 2002) (citing cases) (holding that exclusion for damages “arising out of or connected to” eminent domain actions eliminated coverage for unconstitutional taking, as well as related breach of contract and quantum meruit claims); *Trumpeter Developments, LLC v. Pearce County*, 681 N.W.2d 269, 271-72 (Wis. App. 2004) (exclusion as to eminent domain eliminated coverage for claims of unlawful taking, slander of title, and violation of civil rights because all of the claims derived from an attempt

to force the developer to dedicate land as a public park). Idaho Courts have applied the same broad rendering of the term. *See e.g., Amco Ins. Co. v. Tri-Spur Inv. Co.*, 140 Idaho 733, 738-39, 101 P.3d 226 (2004) (holding that an exclusion for damages to “[a]ny person arising out of any federal, state or governmental civil rights violations or alleged violations” clearly and unambiguously excluded coverage for discrimination claims filed by the Equal Employment Opportunity Commission (EEOC)); *Trinity Universal Ins. Co. v. Kirsling*, 139 Idaho 89, 73 P.3d 102 (2003) (holding that exclusion for “any loss arising out of any act committed: (1) by or at the direction of an ‘insured’; and (2) with the intent to cause a loss” barred recovery by both the husband that intentionally burned down his house, and his innocent spouse); *Foremost Ins. Co. v. Putzier*, 100 Idaho 883, 888-89, 606 P.2d 987 (1980) (holding that exclusion for “bodily injury or property damage arising out of riot, civil commotion or mob action” relieved insurer of duty to indemnify or defend claim for property damage and theft caused by unruly crowd).

Furthermore, as noted above, Boise County has admitted that Alamar’s claims “are alleged in connection with” the Planning and Zoning Commission’s denial of the conditional use permit, and the subsequent decision of Board of Commissioner’s to impose conditions when the permit was eventually approved. **Complaint for Declaratory Relief**, ¶ 13. Based on the plain language of the exclusion, as well as the admission by Boise County, Alamar’s claims “arise out of” and are “connected with” the land use and planning activities conducted by the County. For that reason any claims associated with the counties consideration of the Alamar Ranch application for a conditional use permit are excluded from coverage. Because of the exclusion, ICRMP is relieved of any duty to provide a defense for any of the claims in the Alamar complaint.

3. The ICRMP Policy Excludes Coverage for Punitive Damages.

The Alamar complaint, at ¶38, requests punitive damages pursuant to 42 U.S.C. § 3613(c). As described above, in order to recover punitive damages, the plaintiffs must establish intentional discrimination undertaken with malice and reckless indifference to the rights of the plaintiff. These claims are excluded under the intentional act exclusion discussed above. Additionally, the ICRMP policy contains a very specific exclusion which reads, “[t]his policy does not cover any claim, loss or damage for exemplary or punitive damages, however characterized.” See ICRMP policy pg. 7, ¶6. This policy language is unambiguous. For that reason, all claims in the Alamar complaint seeking punitive damages are excluded from coverage. ICRMP was not obligated to defend or indemnify Boise County for these particular claims. Accordingly, to the extent the breach of contract claim in the declaratory judgment complaint alleges ICRMP improperly denied coverage for the punitive damage claims, ICRMP is entitled to summary judgment.

D. CONCLUSION.

The claims set forth in Alamar’s Complaint all arise from or are connected with Boise County’s actions and decisions regarding a planning and zoning and/or land use application. Alamar has also alleged that the wrongful conduct—discrimination in violation of the FHA—was intentional and state a claim for punitive damages. The Policy specifically excludes coverage for intentional acts, or that arise from or are connected with land use and P&Z decisions or punitive damages. Because the Policy excludes coverage for the claims alleged by Alamar, ICRMP is relieved of its duty to defend the suit, or provide indemnification. *Treasure Valley Transit v. Phila. Indem. Ins. Co.*, 139 Idaho 925, 929, 88 P.3d 744, 748 (2004); *Hoyle v. Utica Mut. Ins. Co.*, 137 Idaho 367, 373, 48 P.3d 1256, 1262 (2002). Accordingly, ICRMP is entitled to summary judgment.

DATED this 9 day of February, 2010.

ANDERSON, JULIAN & HULL LLP

By 
Phillip J. Collaer, Of the Firm
Attorneys for Defendant

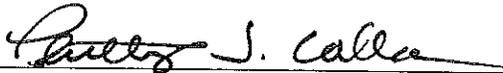
CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 9 day of February, 2010, I served a true and correct copy of the foregoing **DEFENDANT ICRMP'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** by delivering the same to each of the following attorneys of record, by the method indicated below, addressed as follows:

Robert T. Wetherell,
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203 W. Main Street
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Telephone: (208) 344-7300
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| <input checked="" type="checkbox"/> | U.S. Mail, postage prepaid |
| <input type="checkbox"/> | Hand-Delivered |
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