IN THE SUPREME COURT FOR THE STATE OF IDAHO

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| COUNTY OF BOISE, a political subdivision of the State of Idaho,<br><br>Plaintiff-Appellant,<br><br>vs.<br><br>IDAHO COUNTIES RISK MANAGEMENT PROGRAM, UNDERWRITERS (ICRMP), and DOES 1 through X,<br><br>Defendants-Respondents. | Supreme Court Case No. 37861<br><br>Ada County District<br>Case No. CV-2009-20083 |

# RESPONDENTS' BRIEF

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

THE HONORABLE CHERI C. COPSEY PRESIDING DISTRICT JUDGE

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# I.
# STATEMENT OF THE CASE

## A. INTRODUCTION.

This appeal arises from a lawsuit filed in Federal district court by Alamar Ranch LLC (hereinafter, "Alamar") against Appellant, County of Boise (hereinafter, "County"). In its complaint, Alamar alleged that the County engaged in a discriminatory zoning activity which violated the Fair Housing Act, 42 U.S.C. § 3601 *et seq.* ("FHA"). Alamar alleged that the County's actions were intentional.

At all relevant times, the County was insured by the Idaho Counties Risk Management Program (hereinafter, "ICRMP"). It is undisputed that the only potentially applicable coverage is that provided by the Errors & Omissions coverage part found at § IV of the Policy. ***See* R. 53** *et seq.*

The County's request for coverage was denied because of provisions of the Policy that exclude claims arising out of planning and zoning decisions and intentional conduct. The District Court correctly interpreted the terms of the Policy as excluding coverage for all claims raised in Alamar's complaint. Accordingly, the District Court correctly held that since there was no potential for coverage, ICRMP had no duty to defend the County in the federal action.

## B. COURSE OF PROCEEDING BELOW.

The County filed its Complaint for Declaratory Relief on October 21, 2009. **R. 5.** ICRMP filed a Motion for Summary Judgment on February 10, 2010. ***See* R. 211.** The County filed its Motion for Partial Summary Judgment on March 24, 2010. ***See Id.*** The District Court heard both motions on May 20, 2010 and took the matter under advisement. ***See Id.*** The District Court rendered its decision on May 28, 2010, granting ICRMP's motion for summary judgment. **R.**

211-223. Judgment was entered on June 7, 2010. **R. 225.** The County filed its Notice of Appeal on July 9, 2010, and an Amended Notice of Appeal on July 19, 2010. **R. 227** and **232.**

## C. STATEMENT OF FACTS.

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* R. 14-21** (hereinafter, "Alamar Complaint"). 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* R. 15-16**, ¶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* R. 16**, ¶7.

(iii) In a written September 28, 2007 decision, the P&Z board denied the CUP application for a CUP on the basis that a residential treatment center was inappropriate for the location and that the County lacked sufficient infrastructure or money to monitor and enforce the conditions proposed for the application. ***See* R. 16-17**, ¶¶10-11.

(iv) Alamar filed a timely appeal on October 18, 2007, appealing the matter to the Boise County Board of Commissioners ("Board"). ***See* R. 17**, ¶12.

(v) The Board heard the appeal at a public hearing on January 28, 2008. ***See* R. 17**, ¶13.

(vi) The Board deliberated the matter at a March 10, 2008 meeting, and imposed various restrictions and conditions that Alamar claims renders the project economically unfeasible. ***See* R. 17-18**, ¶14.

(vii) The Board issued a written decision and order on April 21, 2008. ***See* R. 18**, ¶15.

(viii) The conditions imposed by the Board were a pretext for the Board's discriminatory motive. ***See* R. 17-18**, ¶14.

Alamar further alleged that the County acted in violation of the Fair Housing Act, 42 U.S.C. § 3601 *et seq.*, by:

(i) Failing to accommodate handicapped individuals by "placing onerous, arbitrary and unreasonable conditions on the approval of the application which destroyed the feasibility of the project." *See* **R. 19,** ¶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* **R. 19,** ¶30.

(iii) By unlawfully interfering with the anticipated residents of such project "by obstructing the construction or availability of housing...." *See* **R. 20,** ¶36.

Alamar also made a claim for punitive damages pursuant to 42 U.S.C. 3613(c). *See* **R. 20,** ¶ 38.

Significantly, the Alamar Complaint alleges that the County through its P&Z Commission and its Board of County Commissioners—acted with intent. For instance, the Alamar Complaint indicates:

1. There was considerable public opposition to Alamar's application for a conditional use permit (CUP) based on discriminatory grounds, **R. 16** ¶ 8 and **R. 17** ¶ 13;

2. Alamar satisfied all the conditions for obtaining a CUP, **R. 16,** ¶ 10;

3. The P&Z board issued a written decision denying Alamar's application, and that, "[b]ecause there was no basis within the CUP standards to deny the application, the P&Z commissioners, as a pretext, manufactured ... reasons for the denial...," **R. 16-17,** ¶ 11 (emphasis added);

4. On appeal to the Board of County Commissioners, the Board "carried out its discriminatory purpose of preventing the project from being built by knowingly imposing numerous conditions on the CUP that individually or cumulatively made the proposed use of the property impossible," and that "the conditions were a pretext designed to conceal the Board's discriminatory motive of preventing the project from being built," **R. 17-18,** ¶ 14 (emphasis added); and,

5. "In 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," **R. 18,** ¶ 16 (emphasis added).

In other words, Alamar alleged that the County knowingly undertook acts intended to prevent Alamar from constructing and operating its planned facility despite Alamar having satisfied the requirements for a CUP.

The County had in force a Public Entity Multi-Lines Insurance Policy (hereinafter, "Policy") which it had purchased from ICRMP. *See* **R. 23-74.** It tendered a claim for defense and indemnification which was denied by ICRMP, and subsequently filed the present suit on October 21, 2009. *See* **R. 5-12** (the County's Complaint in the present action). It is undisputed the only applicable portion of the Policy is the Errors & Omissions coverage. *See* **R. 215.**

## II.
## STANDARD OF REVIEW

The standard for this Court's review of a trial court's ruling on a motion for summary judgment is the same standard as used by the trial court in ruling on the original motion. ***Shawver v. Huckleberry Estates, L.L.C.,*** 140 Idaho 354, 360, 93 P.3d 685, 691 (2004). 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).**

Should this Court find the decision of the lower court to be based on an erroneous theory, the Court will nonetheless uphold the lower court's decision if any alternative legal basis can be found to support it. ***Martel v. Bulotti,*** 138 Idaho 451, 454-55, 65 P.3d 192, 195-96 (2003). In doing so, "[t]his Court may apply the law to undisputed facts de novo." ***Id.***, 138 Idaho at 455.

## III.
## ARGUMENT

"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). 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. ***Amco Ins. Co.,*** 140 Idaho at 737; ***Hoyle,*** 137 Idaho at 371-72. "[A]n insurer does not have to look beyond the words of the complaint to determine if a possibility of coverage exists." ***Hoyle,*** 137 Idaho at 373. Where there is no coverage according to the policy, there is no duty to defend. ***Treasure Valley Transit v. Phila. Indem. Ins. Co.,*** 139 Idaho 925, 929, 88 P.3d 744, 748 (2004); ***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; ***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. ***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. ***Hoyle*** 137 Idaho at 375-376.

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.*** 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).

As the District Court recognized, "[t]he steps in interpreting an insurance policy to determine coverage are well established: First, the Court examines the insuring agreement, in this case, the Policy. If there is potential coverage, the Court looks next to the exclusions." **R. 216.** The District Court correctly applied these principles by concluding the liability complaint alleged Boise County had intentionally discriminated against Alamar Ranch by imposing illegal conditions on a conditional use permit. ICRMP does not disagree with the District Court's conclusion that the Alamar Ranch allegations that Boise County actions violated the Fair Housing Act would, absent the existence of an exclusion, describe a covered claim.[1] ***See*** **R. 215.**

[1] The relevant portion of the insuring agreement for the Errors & Omissions ("E&O") coverage states: "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 act*** by you." **R. 53** ("Coverage A") (emphasis in

However, the District Court correctly held that two independent and equally applicable exclusions defeated coverage. *See* **R. 219-221.** In reaching this conclusion the court ruled:

> The Court finds that plain text of the Alamar complaint clearly alleges that all of the claims arise out of or are related to the disputed Boise County planning and zoning activities or proceedings. The Court further finds that Alamar clearly alleges Boise County's actions were deliberately taken with a specific intent to commit the wrongful act of discriminating against Alamar or the intended handicapped residents in violation of the Fair Housing Act. The claims also allege that Boise County deliberately tried to disguise its discriminatory motives by designing and imposing the onerous conditions for the specific purpose of making the project uneconomic.

*See* **R. 218.**

## A. THE DISTRICT COURT CORRECTLY HELD THAT THE COUNTY WAS NOT ENTITLED TO COVERAGE BECAUSE OF EXCLUSIONS FOR CLAIMS ARISING FROM PLANNING AND ZONING ACTIVITIES.

Exclusion No. 12 of the E&O policy eliminates coverage for:

> [A]ny ***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.

**R. 55** (emphasis added; italics and bold in original). The District Court found that "based on the plain language of the exclusion, Alamar's claims 'arise out of' and are 'connected with' the land use and planning activities conducted by the County." **R. 221.** The District Court also held that "under a reasonable reading of the Alamar complaint there is no arguable potential that Alamar's

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original). "***Wrongful Act***" is defined as "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." **R. 53.**

claims could be interpreted as anything other than alleging Boise County's discriminatory actions arose out of planning and zoning or land use regulations activities or proceedings." ***Id.***

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). This Court has 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). Thus, so long as the alleged wrongful act originated from, grew out of, flowed from, or was in any way connected with "land use regulation or planning and zoning activities or proceedings, however characterized," coverage is excluded.

Planning, zoning, and land use regulation is governed by the Local Land Use Planning Act, Idaho Code § 67-6501 *et seq.* The Act grants a "governing board," such as board of county commissioners, authority to issue conditional use permits (CUPs). **I.C. § 67-6512(a) and (d).** ***See also*** **I.C. § 67-6504** (defining "governing board" and allowing delegation of authority to a planning and zoning commission). "Denial of a special use permit or approval of a special use permit with conditions unacceptable to the landowner may be subject to the regulatory taking analysis provided for by section 67-8003, Idaho Code, consistent with requirements established thereby." **I.C. § 67-6512(a).** ***See also*** **I.C. § 67-6516** (similarly providing for a regulatory taking analysis for denial of variance permits).

The action by Alamar Ranch against Boise County arose out of and grew from the proceedings and decisions on Alamar's application for a conditional use permit. Alamar alleged in its Complaint that Boise County was zoned as a "mixed use," and that Alamar was required to apply for a CUP by the County. ***See*** **R. 15,** ¶¶ 5-6. According to the Alamar Complaint, a hearing was held as to consider Alamar's application, but, although Alamar had satisfied the standards for issuance of a CUP, the application was denied of the Planning and Zoning Commission. **R. 16,** ¶ 10. Alamar contended that "[b]ecause there was no basis within the CUP standards to deny the application, the P & Z commissioners, as a pretext, manufactured ... reasons for the denial of the application...." **R. 16,** ¶ 11. 2

2 As noted by the district court " 'pretext' is defined as a purpose or motive alleged or an appearance assumed in order to cloak the real intention or state of affairs' " **R. 218,** N.3. The court concluded the allegation of pretext in

Alamar subsequently appealed the decision of the Planning and Zoning Commission decision to the Boise County Board of Commissioners. **R. 17,** ¶ 12. "In its appeal, Alamar informed Boise County that it had a duty under the FHA to approve the CUP and allow the project to be built so that housing could be made available for the 'handicapped' youth that Alamar proposed to serve." ***Id.*** Specifically, Alamar requested that the County identify the specific provisions of the County's ordinances that would have to be waived or varied to allow the Development; identify the specific aspects of the Development that did not comply with the ordinance; and consider whether those ordinances could be waived or varied. ***Id.*** Alamar acknowledged the Board of County Commissioners reversed the Planning and Zoning Commission denial of the application but, "[i]n doing so, however, it carried out its discriminatory purpose of preventing the project from being built by knowingly imposing numerous conditions on the CUP that individually or cumulatively made the proposed use of the property impossible." **R. 17,** ¶ 14. ***See also*** **R. 18,** ¶ 15 (setting out the conditions which made the proposed use of the site impossible). In light of these allegations, and considering Boise County's ability to consider and process a conditional use permit is regulated by the Local Land Use Planning Act, ***see*** **I.C. § 67-6512(a),** it is difficult to understand how the allegations in the Alamar Complaint can be characterized as anything other than planning and zoning activities or proceedings.

Moreover, as noted by the District Court, ***see*** **R. 220,** even Boise County acknowledged the relation between Alamar's claim and a planning and zoning decision. The County stated in its Complaint that "[t]he 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

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the Alamar Ranch liability complaint described intentional conduct that was excluded from coverage. **R. 218-219.**

... and/or (2) County of Boise Board of Commissioners' imposition of conditions of permit approval...." **R. 8, ¶ 13.** Clearly, the only reasonable way to read the Alamar Complaint is for one alleging actions and decisions related to planning and zoning activities and proceedings.

The "wrongful acts" alleged in the Alamar complaint are directly tied to and are a result of the County's initial denial of a conditional use permit by its Planning & Zoning commission and, upon appeal to the County's Board of Commissioners, the imposition of "several onerous, arbitrary and discriminatory conditions for the permit." **R. 18, ¶ 15.** Absent the offending conditions imposed in the CUP, there would have been no dispute between Alamar and the County.[3] The liability claims arose out of and were connected to land use regulation, and planning and zoning proceedings and/or activities, and, therefore, are excluded from coverage.

## B. THE DISTRICT COURT CORRECTLY HELD THAT THE INTENTIONAL ACT EXCLUSIONS DEFEATED COVERAGE.

Independent of the exclusion as to land use and planning and zoning activities and decisions, the E&O section of the policy also excludes any claims "[a]rising out of any dishonest, fraudulent, criminal, malicious, deliberate or intended ***wrongful act*** committed by you or at your direction." **R. 54** (Exclusion No. 2) (emphasis in original). The E&O section likewise excludes any claim "[r]esulting 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

[3] The County's argument concerning civil rights claims in the context of jail overcrowding or tort claims for negligent road design is a red herring. The decision by a sheriff on the number of inmates to house in a jail is not a decision arising from a planning and zoning proceeding or activity or made pursuant to the Local Land Use Planning Act. An engineer's negligent design of a road is similarly unrelated to the approval to build a road utilizing the County's zoning powers. The County's reference to Tim McNeese's testimony is equally unavailing. First, the Policy only provides coverage for "claims," that is, "a demand received by [the insured] for money ***damages*** alleging a ***wrongful act*** of a tortious nature by [the insured]." **R. 53** (emphasis in original). Mr. McNeese's request for legal counsel at a deposition is not a "claim" for which coverage is afforded. If Mr. McNeese had actually been sued, the allegations against him would have been reviewed, independently, for potential coverage in accordance with ***Hoyle v. Utica Mutual Ins. Co.***, 137 Idaho 367, 48 P.3d 1256 (2002) and ***Amco Ins. Co. v. Tri-Spur Investment Co.***, 140 Idaho 733, 101 P.3d 226 (2004).

different kind or degree than that intended or expected." **R. 54** (Exclusion No. 4) (emphasis in original).

The County suggests the intentional act exclusions do not apply to claims made pursuant to Title VIII of the Civil Rights Act. *See* **Appellant's Brief** p. 15. However, unless the County is conceding the FHA claims are not "wrongful acts", which would create a separate basis to deny coverage under the Policy, those claims would logically fall within the definition of a "wrongful act" as defined by the policy. For that reason, the exclusions for intentional conduct would also apply to any intentional violations of the FHA.

1. **The Allegations by Alamar Describe Intentional Acts.**

The District Court held that "the undisputed facts establish that Alamar's complaint alleges a series of acts specifically intended to commit the wrongful act of discriminating against Alamar or the intended handicapped residents." **R. 219.** The District Court further noted that "by making a claim for punitive damages, Alamar was, again, alleging intentional conduct on the part of Boise County." ***Id.*** The Court found that "under a reasonable reading of the Alamar complaint there is no arguable potential that Alamar's claims could be interpreted as alleging negligent actions." **R. 220.**

The County argues these exclusions are not relevant, contending that the Complaint does not allege "intentional" conduct. The County specifically cites to ¶ 4 of the Complaint, alleging a violation of the Fair Housing Act (FHA) (**R. 15**); ¶ 22, claiming that the County "knew or reasonably should have known" that the P&Z application was for disabled persons (**R. 22**); and ¶ 25, alleging that the County acted in an "arbitrary and unreasonable" manner (**R. 19**).

It may be possible that a public entity could unintentionally violate the FHA.[4] That, however, is not what is alleged in the Alamar Complaint. That Complaint alleges:

1. There was considerable public opposition to Alamar's application for a conditional use permit (CUP) based on discriminatory grounds, **R. 16,** ¶¶ 8, 13;

2. Alamar satisfied all the conditions for obtaining a CUP, **R. 16,** ¶ 10;

3. The P&Z board issued a written decision denying Alamar's application, and that, "[b]ecause there was no basis within the CUP standards to deny the application, the P&Z commissioners, as a pretext, manufactured ... reasons for the denial...," **R. 16-17,** ¶ 11 (emphasis added);

4. On appeal to the County Board of Commissioners, the Board "carried out its discriminatory purpose of preventing the project from being built by knowingly imposing numerous conditions on the CUP that individually or cumulatively made the proposed use of the property impossible," and that "the conditions were a pretext designed to conceal the Board's discriminatory motive of preventing the project from being built," **R. 17-18,** ¶ 14 (emphasis added); and,

5. "In 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," **R. 18,** ¶ 16 (emphasis added).

Notably, the allegation of pretext is an allegation of intentional conduct. ***See Hawks v. J.P. Morgan Chase Bank,*** 591 F.3d 1043, 1049 (8th Cir. 2010) ("An inference of discrimination may sometimes arise without additional evidence where the overall strength of the prima facie case and the evidence of pretext suffices to show intentional discrimination.") (internal quotes and brackets omitted); ***Hudson v. Chicago Transit Auth.,*** 375 F.3d 552, 561 (7th Cir. 2004) ("Pretext is more than a mistake on the part of the employer; it is a phony excuse.") (internal quotations

[4] Courts have recognized that while an intentional act exclusion may exclude coverage for allegations of disparate treatment (which is intentional), such exclusions are not applicable to allegations of disparate impact discrimination "because such claims require no proof of discriminatory motive." ***Coleman v. Sch. Bd. of Richland Parish,*** 418 F.3d 511, 521 (5th Cir. 2005) (racial discrimination under Title VII); ***Solo Cup Co. v. Federal Insurance Co.,*** 619 F.2d 1178 (7th Cir. 1980) (gender discrimination under Title VII). ***See also Ricci v. DeStefano,*** __ U.S. __, 129 S. Ct. 2658, 2676, 174 L. Ed. 2d 490 (2009) ("Congress has imposed liability on employers for unintentional discrimination in order to rid the workplace of practices that are fair in form, but discriminatory in operation.") (citation and internal quotes omitted). Courts have recognized a disparate impact cause of action under the Fair Housing Act against governmental authorities. ***See e.g., Saunders v. Farmers Ins. Exch.,*** 537 F.3d 961, 964 (8th Cir. 2008).

omitted); ***Chapman v. AI Transp.***, 229 F.3d 1012, 1050 (11th Cir. 2000) (explaining that demonstrating pretext is an indirect means of demonstrating that the defendant acted with discriminatory animus).

All of these general allegations were re-alleged in relation to each of the subsequent causes of action (i.e., Counts One, Two and Three) in the Complaint. Accordingly, the intentional conduct is alleged as the basis for each of the subsequent legal claims. ***See Vanvooren v. Astin,*** 141 Idaho 440, 443-44, 111 P.3d 125, 128-29 (2005). ***See also, Hoyle v. Utica Mut. Ins. Co.,*** 137 Idaho 367, 373, 48 P.3d 1256, 1262 (2002). 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. All of these allegations point to intent on the part of Boise County to discriminate against the Alamar plaintiffs and/or potential residents of the Alamar facility, and prevent the facility from opening.[5] Contrary to the County's arguments, the District Court correctly reviewed the allegations in the Alamar Complaint as a whole, concluding that Alamar Ranch was alleging intentional conduct.

Additionally, as the District Court noted, Alamar also requested punitive damages pursuant to 42 U.S.C. § 3613(c), which authorizes a court to award actual and punitive damages

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[5] Boise County has essentially admitted as much in its *Complaint and Demand for Jury Trial*, stating:

> 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" ....

R. 8-9, ¶ 13 (italics in original; underline added).

in addition to injunctive relief for a violation of the FHA. This allegation is important as 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.

2. **The Failure to Re-Allege the Prior Pleadings in the Claim for Punitive Damages is Irrelevant.**

The County argues that Alamar's failure to re-allege all preceding paragraphs in the claim for punitive damages has some special significance. Plaintiff's argument is flawed. First, the request for punitive damages is made by specific reference to 42 U.S.C. § 3613(c), which requires a finding of a discriminatory housing practice in violation of the FHA—i.e., the facts alleged elsewhere in the Complaint. Thus, the request for punitive damages under § 3613 requires a violation of the FHA that warrants the award of punitive damages, which, as Plaintiff admits, would constitute intentional conduct. ***See*** **Appellant's Brief**, p. 20. Second, a "fair reading" of the Alamar Complaint would indicate that the Alamar plaintiffs intended that the punitive damage claim be based on the prior allegations and not some unknown set of facts. ***See Vanvooren v. Astin,*** 141 Idaho 440, 443-44, 111 P.3d 125, 128-29 (2005) (factual pleadings of

wrongful birth framed subsequent cause of action for negligent infliction of emotional distress as being related to and arising from allegations of wrongful birth).

3. **The Alamar Complaint Does Not Allege Negligence.**

The portions of the Complaint cited by the County do not indicate that Alamar was alleging negligence. The fact that the claims arose out of violations of the FHA (¶ 4 of the Alamar Complaint) is simply an allegation to support the claim of federal jurisdiction, and does not contradict the subsequent allegations of intentional conduct. **R. 15.** The County also points to paragraph 22, which states: "Boise County knew or reasonably should have known the application was for housing for handicapped individuals." **R. 19.** However, the phrase "knew or reasonably should have known" refers to Boise County's knowledge of the Alamar plaintiffs' status, not Boise County's intent to violate the FHA. Similarly, the reference to "arbitrary and unreasonable" in paragraph 29 describes only the conditions in the CUP, not the County's reason or intent on imposing those restrictions. ***See* R. 19.** Instead, paragraph 16 of the Alamar Complaint contends that the conditions on the CUP were "aimed at ensuring the project would not be economically feasible." **R. 18.**

The Alamar Ranch allegations are similar to those raised in ***Intermountain Gas Co. v. Industrial Indemnity Co. of Idaho,*** 125 Idaho 182, 868 P.2d 510 (Ct. App. 1994) where an employee of Intermountain Gas, (Metcalf) alleged she had been demoted for using too much sick leave.[6] Intermountain's insurer, Industrial Indemnity, determined that there was no coverage under the policy and, consequently, did not provide a defense or indemnity. The policy specifically excluded coverage for claims of discrimination, and only provided coverage for negligent acts, errors or omissions. ***Intermountain Gas Co.***, 125 Idaho at 186. The court held

[6] ***Metcalf v. Intermountain Gas Co.,*** 116 Idaho 622, 778 P.2d 744 (1989).

that by limiting coverage to negligent acts, the policy excluded coverage for intentional acts. ***Id.*** Intermountain argued that the claim of breach of Metcalf's employment contract was linked to the administration of her employment benefit program and that Metcalf's punishment "was a misinterpretation [of her benefits] resulting in the termination of her sick-leave benefits," and therefore negligent. ***See Id.***, 125 Idaho at 186-87. The Court of Appeals disagreed, explaining:

> ... Further, it was the intentional act of demoting Metcalf that caused the harm, not the negligent interpretation of her benefits. Metcalf claimed that her reduction in hours was "motivated by a purpose to punish her for being ill and taking sick leave." When demoting Metcalf, Intermountain employees did not assert that the company's sick-leave policy failed to afford her the leave she had taken, but instead that she had exceeded the company average for absences. As punishment, Metcalf alleged, employees drastically reduced her hours of employment with the intent to deprive her of benefits under the sick-leave plan. By definition, punishment is an intentional act, not a negligent one.

***Id.***, 125 Idaho at 187. In this case the district court correctly focused upon that the act (discrimination and imposing onerous conditions on the CUP intended to render the project economically unforeseeable) that allegedly caused Alamar's damages to determine whether the intentional act exclusions applied. This is the same approach utilized by the Court in ***Intermountain Gas Co. v. Industrial Indemnity Co. of Idaho,*** supra. Appellant's attempts to characterize the Alamar Complaint as alleging negligence is not supported by the record and is inconsistent with the analytical approach utilized in ***Intermountain Gas Co.***

Alamar also argues that because the Alamar Complaint prays for "damages in an amount to be proven at trial" and "such other and further relief as the Court deems just and proper," that "[t]his leaves the door wide open for Alamar to seek damages against Boise County for unintentional conduct under the Civil Rights Act of 1968." This is similar to the argument rejected by this Court in ***Hoyle v. Utica Mut. Ins. Co.,*** 137 Idaho 367, 48 P.3d 1256 (2002). In

that case, the insureds (Hoyle and HAII) were denied coverage under an intentional acts exclusion. Hoyle and HAII argued that the although the underlying complaint made no express claim for negligence, the use of phrases such as "including but not limited to," "improper," "illegal," and "inconsistent with general industry standards" revealed a potential claim for negligence. ***See Hoyle,*** 137 Idaho at 372-73. This Court rejected that argument, stating:

> These arguments are unpersuasive. Every claim in the FSI complaint alleges the acts in question were committed in a "fraudulent, improper and illegal" manner. Despite this, Hoyle and HAII go on to argue that the word "improper" includes negligence. This is also unpersuasive because in every instance it is used, it is paired with the term "fraudulent." Also, the term "improper" is in no way synonymous with the word "negligent." Hoyle and HAII argue Idaho law, namely *Kootenai County* [*v. Western Casualty and Surety Co.,* 113 Idaho 908, 750 P.2d 87 (1988)], requires the complaint to be read in whole or *in part,* and the district court failed to follow the latter part of this disjunctive rule. While *Kootenai County* does require the Complaint to be read in whole or in part, there are no parts of the complaint that reveal any potential claims for negligence. The use of the terms "improper", "illegal", "inconsistent with general industry standards", and "including but not limited to", read in part, are still insufficient to find a claim of negligence.

***Hoyle,*** 137 Idaho at 373. Here, the request for damages as proven at trial or such further relief that the court might grant is not synonymous with "negligence" and does not change the fact that the Alamar Complaint is based on intentional discrimination.

Finally, the County argues that "the Alamar Complaint contains the factual basis and the necessary allegations to put Boise County on notice of a disparate impact claim under Title VIII." Disparate treatment requires a showing of a significantly adverse or disproportionate impact on persons of a particular protected class produced by the defendant's facially neutral acts or practices. ***See Budnick v. Town of Carefree,*** 518 F.3d 1109, 1118 (9th Cir. 2008); ***Gallagher v. Magner,*** 619 F.3d 823, 833 (8th Cir. 2010). The Alamar Complaint does not allege that a

facially neutral practice or ordinance had a significantly adverse or disproportionate impact on "handicapped" youth. Rather, it alleges that "[t]he Board, knowing it could not issue an absolute denial of the application, instead reversed the denial of the application. In doing so, however, it carried out its discriminatory purpose of preventing the project from being built by knowingly imposing numerous conditions on the CUP that individually or cumulatively made the proposed use of the property impossible." **R. 17**, ¶ 14.

In short, Alamar is alleging that the County deliberately and intentionally undertook acts that it intended and expected would prevent Alamar from constructing and operating its planned facility despite Alamar having satisfied the requirements for a CUP. Consequently, the District Court correctly determined that the Exclusions 2 and 4 of the E&O policy (**R. 54**) eliminated coverage and, therefore, ICRMP did not have a duty to defend or indemnify the County.

### C. THE DISTRICT COURT CORRECTLY HELD THAT THE FINAL SENTENCE OF EXCLUSION 16 DOES NOT CREATE COVERAGE OR SERVE AS A GENERAL EXCEPTION TO ALL EXCLUSIONS.

The District Court rejected the County's argument that Exclusion 16 of the E&O policy "resurrects" coverage. Exclusion 16 states:

> No ***claim*** exists where the alleged harm for which compensation is sought derives from performance or nonperformance of terms of a contract, concerns the measure of performance or payment related to contract performance, derives from fines, penalties or administrative sanctions imposed by a governmental agency, or is generated by intergovernmental handling or allocation of funds according to the law. The ***claims*** for which this section provides defense and indemnification must arise out of conduct of a tortious nature or be premised upon allegations of unlawful violation of civil rights pursuant to state or federal law.

**R. 55.**

It is a fundamental principle of interpreting insurance policies that 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). Nevertheless, "[a]n exception pertains only to the exclusion clause within which it appears; the applicability of an exception will not create coverage if the insuring agreement precludes it or if a separate exclusion applies." ***Am. Family Mut. Ins. Co. v. Am. Girl, Inc.,*** 673 N.W.2d 65, 73 (Wisc. 2004). ***Accord, Columbia Cas. Co. v. Ga. & Fla. Railnet Inc.,*** 542 F.3d 106, 113 (5th Cir. 2008); ***Nat'l Union Fire Ins. Co. v. Lynette C.,*** 228 Cal. App. 3d 1073, 1081-1082, 279 Cal. Rptr. 394, 399 (Cal. App. 1991).

The County's argument before the District Court was that the final sentence of the exclusion acted as a general exception to all exclusions. The District Court rejected this argument for two reasons. First, the District Court held that Exclusion 16 did not apply because "[t]he claims Alamar made in its lawsuit did not derive from performance or nonperformance of terms of a contract, concern the measure of performance or payment related to contract performance, derive from fines, penalties or administrative sanctions imposed by a government agency, and did not arise from intergovernmental handling or allocation of funds." **R. 222.**

Second, the District Court noted that the final sentence of Exclusion 16 was limited only to Exclusion 16. The County had argued that the use of the word "section" in Exclusion 16 applied to the whole of the E&O policy. The District Court, however, noted:

> Throughout the Policy when the parties intend for the word, section, to refer to the particular Policy Section in which it appears,

> the word is capitalized. However, in Paragraph 16, the word, section, is not capitalized. Therefore, the Court finds that this last sentence only modifies the exclusions found in that same paragraph.

**R. 222.** This is consistent with the rule, cited earlier, that exceptions to exclusions only apply to the exclusion clause in which it appears.

That the District Court's conclusion is correct is illustrated by placing the Contracts Exclusion in context with the rest of the E&O section of the policy. The E&O insuring agreement relates only to "claims" arising out of a "wrongful act." **R. 53.** As noted previously, a "claim" is defined as "a demand received by you for money ***damages*** alleging a ***wrongful act*** of a tortious nature by you." ***Id.*** "Wrongful act" similarly is limited to "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...." ***Id.*** That is, the insuring agreement only provides coverage for torts or federal civil rights violations. Exclusion 16 makes this clear by specifically excluding liability arising under a contract, penalties for violation of regulations, or handling of public funds. The last sentence acts as a limitation on Exclusion 16. It prevents Exclusion 16 from being interpreted as broadening coverage to claims not based on torts or civil rights violations. Exclusion 16 then states that covered claims are limited to torts or civil rights violations. This does not, however, limit or annul the other, separate, exclusions.

To accept Appellant's argument would render all of the exclusions in the E&O policy meaningless in the context of an alleged civil rights violation. On that basis, the last sentence of Exclusion 16 would void Exclusion 12 (which also excludes coverage for eminent domain, condemnation and inverse condemnation), as those claims described in the exclusion are litigated as civil rights violations. ***Covington v. Jefferson County,*** 137 Idaho 777, 53 P.3d 828 (2002),

(Inverse condemnation allows private parties whose property is taken without just compensation to file suit for the violation of its rights secured by the State Constitution). ***Dolan v. City of Tigard,*** 512 U.S. 374 (1994) (TheTakings clause of the Fifth Amendment, made applicable to the states through the Fourteenth Amendment prohibits the taking of private property for public use without just compensation). Appeallant's argument is inconsistent with this Court's rule that when interpreting contracts, the "various provisions in a contract must be construed to give force and effect to every part thereof" ***Daugharty v. Post Falls Highway Dist.,*** 134 Idaho 731, 735, 9 P.3d 534, 538 (2000). Additionally, a contract must be construed as a whole rather than focusing upon a particular isolated provision. ***See Canyon View Irr. Co. v. Twin Falls Canal Co.,*** 101 Idaho 604, 619 P.2d 122 (1980) cert. denied 451 U.S. 912 (1981). The District Court applied these rules and correctly limited the impact of the last sentence of Exclusion No. 16 to that exclusion only, thus preserving the intent and purpose of the other exclusions.

## IV.
## CONCLUSION

For the reasons set forth above, the District Court's Decision and Order on the cross motions for summary judgment should be affirmed.

DATED this 25 day of January, 2011.

ANDERSON, JULIAN & HULL LLP

By _____
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Attorneys for Defendant/Respondent

## CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 25 day of January 2011 I served a true and correct copy of the **RESPONDENT'S BRIEF** by delivering the same to each of the following attorneys of record, by the method indicated below, addressed as follows:

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