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IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

IN THE MATTER OF:

City of Ammon, Bonneville County, Idaho,

PETITIONER.

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Case No. CV-15-6823

**FINDINGS OF FACT, CONCLUSIONS
OF LAW AND DECREE**

This matter came before the Court for hearing on February 25, 2016 on the verified Petition for Judicial Confirmation (the "**Petition**"). The Petition was supported by the Affidavit of Dana Kirkham, the Affidavit of Bruce Patterson, the Affidavit of Posting, Mailing and Publishing of Notice of Public Hearing and of Posting and Publishing Notice of Hearing on Judicial Confirmation (collectively, the "**Affidavits in Support**"), and the Memorandum in Support of Petition for Judicial Confirmation (the "**Memorandum in Support**"). Scott R. Hall (in person) and Adams S. Christenson (by telephone) appeared at the hearing on behalf of Petitioner, City of Ammon, Bonneville County, Idaho (the "**Petitioner**" or the "**City**"). No one appeared at the hearing in opposition to the Petition.

The Court has considered the Petition together with the Affidavits in Support, the Memorandum in Support and the argument of counsel. At the conclusion of the hearing, the Court took the matter under advisement for a written decision, including findings of fact and

conclusions of law. Now being fully advised, the Court makes the following Findings of Fact and Conclusions of Law:

I. JURISDICTION

1. A proceeding under the Idaho Judicial Confirmation Law, Idaho Code § 7-1301 *et seq.* (the “**Confirmation Law**”), is a proceeding *in rem*. Publication and posting as authorized by the Confirmation Law is a valid method of vesting jurisdiction in this Court over all interested parties and the subject matter. *See In re City of Shelley*, 151 Idaho 289, 292, 255 P.3d 1175, 1178 (2011) (stating that actions of local governments are reviewable if permitted by statute); *see also* I.R.C.P. 84(a)(1) (stating that “judicial review of state agency and local government actions shall be as provided by statute”).

2. The Petitioner is a public body corporate and politic organized, existing, and operating as an incorporated city pursuant to Title 50 of the Idaho Code. Petitioner is a “political subdivision” as that term is used in the Confirmation Law, I.C. § 7-1303(6).

3. The City encompasses territory in Bonneville County, Idaho.

4. The Council of the City (the “**Council**”) is a “governing body” as that term is defined in the Confirmation Law. I.C. § 7-1303(4)(b).

5. Petitioner held a public hearing to consider whether it should adopt a resolution to authorize filing the Petition on December 3, 2015 (the “**Public Hearing**”). Prior to the Public Hearing, Petitioner caused notice of the Public Hearing to be published, far forward, in the main news section of the POST REGISTER, the official newspaper of general circulation in Petitioner’s jurisdiction, on November 18, 2015. Such notice was therefore properly published at least 15 days prior to the Public Hearing date as required by I.C. § 7-1304(3). In addition, on November

18, 2015, Petitioner posted notice of the Public Hearing in a prominent place at or near the main door of Petitioner's administrative office. No persons requested notice of the Public Hearing under I.C. § 7-1304(3).

6. Petitioner duly brought this Petition pursuant to Resolution No. 2015-020 (the "**Resolution**"), adopted December 17, 2015, in conformity with I.C. § 7-1304(1).

7. Since at least January 12, 2016, Petitioner has posted the Notice of Filing Petition and Notice of Hearing as required by I.C. § 7-1306(2)(b) at the main door of Petitioner's administrative offices, which notice remained posted through February 25, 2016, the date of the hearing on the Petition.

8. Petitioner caused the Notice of Filing Petition and Notice of Hearing to be published in the POST REGISTER on February 3, 2016, February 10, 2016, and February 17, 2016, in the paper's main news section far forward in conformity with I.C. § 7-1306(2)(a).

9. Because Petitioner has completed publication and posting, and held the Public Hearing required by law, this Court has acquired subject-matter jurisdiction over the Petition. I.C. §§ 7-1305, 7-1306(3), 7-1311.

10. Although there has been no opposition to the Petition, the Court is still required under the Confirmation Law to make independent findings of fact and conclusions of law.

II. FINDINGS OF FACT

A. BACKGROUND

11. On December 21, 2015, Petitioner filed its Petition pursuant to the Confirmation Law seeking judicial examination and determination of the validity and authority of the City to construct, operate and maintain residential area one ("**Residential Area 1**") of an open access

fiber optic infrastructure system (the “**Fiber Optic System**”) under various statutory and constitutional provisions including Idaho Code §§ 50-301, 50-302, 50-328, and 62-602 and Article XII, Section 2 of the Idaho Constitution, and to finance the construction of Residential Area 1 of the Fiber Optic System through the creation of a local improvement district (the “**District**”) pursuant to the Local Improvement District Code, Idaho Code § 50-1701 *et seq.* (the “**LID Act**”).

12. Petitioner is not seeking a judicial analysis and interpretation that its proposed expenditures are “ordinary and necessary” under the Proviso Clause of Article VIII, § 3 of the Idaho Constitution and the Court has not conducted such an analysis.

13. In 2008, the Council unanimously adopted a “Municipal Broadband Network Policy” (the “**Broadband Policy**”) which declared and established the City’s broadband policy that “broadband telecommunications are a basic and essential service,” and as a basic and essential service, “such services can be cared for by a municipal utility.” The Broadband Policy was placed into full force and effect on December 4, 2008.

14. The Broadband Policy led to the creation of the Fiber Optic System within the City as set forth and governed by a City ordinance adopted January 20, 2011 (the “**Broadband Ordinance**”). The primary purpose of the Fiber Optic System as stated in the Broadband Ordinance was to provide broadband access to meet the needs of the City departments, public safety organizations, other publicly owned and operated facilities, community anchor institutions, City businesses and City residents, in that order. Other goals for the Fiber Optic System included protecting the City right of way, economic vitality and to provide broadband competition.

15. Since enactment of the Broadband Ordinance, the City has installed over 30 miles of fiber optic infrastructure which now serves the City departments and utilities, including but not limited to parks, streets, water systems and wastewater systems, as well as county law enforcement and 911 dispatch, the local school district, numerous wireless and cellular providers, and over 30 local businesses. In accordance with the Broadband Ordinance, the City now desires to extend the Fiber Optic System to the homes of City residents.

16. Upon receipt of judicial confirmation as prayed for in the Petition, the City intends to construct, operate and maintain Residential Area 1 of the Fiber Optic System and finance the construction of the same through the creation of the District and issuance of the Bonds pursuant to the LID Act.

17. The District will issue its improvement bonds (the "**Bonds**") payable from assessments levied against the property of only those District landowners who have specifically elected to be so assessed and to have the Fiber Optic System connected to their home (each a "**Fiber Property**" and collectively, the "**Fiber Properties**"; each landowner being a "**Fiber Property Landowner**" and collectively, the "**Fiber Property Landowners**"), and the proceeds from the sale of the Bonds will be used to construct the proposed Residential Area 1 Fiber Optic System improvements (the "**RA-1 System Improvements**").

B. THE RA-1 SYSTEM IMPROVEMENTS

18. The City intends to expand the Fiber Optic System to City residents in geographic phases based on resident interest. The first geographic phase of expansion is Residential Area 1.

19. The City has estimated that Residential Area 1 of the Fiber Optic System will consist of approximately 300 Fiber Properties, although this number may vary depending on District landowner adoption rates.

20. In constructing the RA-1 System Improvements and expanding the Fiber Optic System, the City seeks to advance consumer welfare, civic participation, public safety, community development, private sector investment, entrepreneurial activity, job creation and economic growth.

21. Once constructed, the RA-1 System Improvements will provide fiber optic connectivity to the Fiber Properties.

22. Each Fiber Property Landowner or Fiber Property resident (e.g., a renter), as applicable, will need to become a member of the City's fiber optic utility (each a "**Utility Member**") in order to have access to Fiber Optic System services.

23. The City will maintain and operate the fiber optic line of Utility Members. The costs of said maintenance and operation as incurred by the City shall be paid for by a separate monthly municipal utility fee currently estimated by the City to be approximately \$15 per month.

24. Access to the Fiber Optic System will enable a Utility Member to select among various packages offered by third-party service providers depending on the Utility Member's desired bandwidth, services and price point. The City contends that this structure will provide for both choice and competitive pricing.

25. Utility Members will pay the cost(s) of their particular service or service package(s) directly to their respective third-party service providers.

26. The City will not be acting as a retail service provider and, because it is not providing retail services, will not be in competition with the third-party service providers.

27. The City expects the services available to Utility Members to include internet, video, voice, public safety, educational, private networking and life line services.

28. The City intends to provide life line internet service to all Utility Members at no additional cost. Life line service will allow for basic functions such as web browsing, email, messaging and small file transfers enabling Utility Members to complete essential daily tasks without the added expense of paying for a service package from a third-party service provider. The City anticipates that, as part of the life line service, Utility Members will also be able to utilize the RA-1 System Improvements to contact the police, 911 and other emergency communication services.

29. Utility Members that wish to discontinue paying the monthly City utility fee may discontinue utility membership at any time at no cost. Once utility membership is discontinued, the Fiber Property, although physically connected, will no longer have access to Fiber Optic System services. If a Fiber Property Landowner desires to subsequently rejoin the City Fiber Optic Utility after discontinuing membership, he or she may do so at any time for a minimal provisioning / processing fee, with the understanding that any additional equipment replacement costs due to premise equipment failure or systems upgrades while membership was discontinued must also be borne by the Fiber Property Landowner as required.

30. Under the City's proposed payment model, the user costs related to the final retail fiber optic service are independent of both the capital costs and the operation and maintenance costs of the RA-1 System Improvements.

31. The City estimates that the RA-1 System Improvements cost per Fiber Property will generally consist of the following approximate expenses:

<u>Description of Proposed RA-1 System Improvements (per Fiber Property)</u>	<u>Estimated Costs</u>
Fiber optic cable, duct, vaults, pedestals, enclosures and terminations	\$1,100
Premise equipment	500
Remote office switch equipment and optics	300
Installation labor	<u>1,100</u>
Total (per Fiber Property):	\$3,000

32. Using an estimate of 300 fiber properties for Residential Area 1, the City estimates the total cost of the proposed RA-1 System Improvements, exclusive of issuance, reserve fund and financing costs, as follows:

<u>Description of Proposed RA-1 System Improvements</u>	<u>Estimated Costs</u>
Fiber optic cable, duct, vaults, pedestals, enclosures and terminations	\$330,000
Premise equipment	150,000
Remote office switch equipment and optics	90,000
Installation labor	<u>330,000</u>
Total (Residential Area 1):	\$900,000

33. The Fiber Optic System supports a variety of "smart" applications that can be used to promote the health, welfare, and safety of City residents. One example of these "smart" applications in practice is the City's award-winning active shooter altering system.

34. The City intends to continue with the development of public safety "smart" applications in partnership with the Bonneville County dispatch center and first responders. The City intends to provide these next generation public safety services to Utility Members via their City fiber connection at no additional cost.

35. The Court finds that by tying into and building upon the City infrastructure and applications already in place, the RA-1 System Improvements bring significant public safety potential to City residents.

36. The City contends that the RA-1 System Improvements will also drive economic development in the City; a significant public purpose. In support of this contention, the City asserts that, in its experience, advanced telecommunications services are a key selling point for businesses large and small. Accordingly, the City projects that the construction of the RA-1 System Improvements, and the resulting expansion of the Fiber Optic System to the homes of City residents, is likely to drive economic development in the City. The Court finds that the basis for the City's projection is reasonable.

37. The expansion of the Fiber Optic System to City residences will provide the City with additional access to grants and other outside funding and will also allow the City to participate in the development of next generation network applications.

C. FINANCING THE RA-1 SYSTEM IMPROVEMENTS

38. The City intends to finance the RA-1 System Improvements through the creation of the District and issuance of the Bonds pursuant to the LID Act.

39. The District will issue its Bonds as improvement bonds.

40. Property owners within the District will be presented with the option to accept or decline the installation of a fiber optic line to their property and, in so doing, accept or decline the assessment of their property to pay for the same. Property owners must opt-in to incurring this indebtedness and no one will be required to pay for the RA-1 System Improvements who does not elect to do so.

41. No tax dollars will be used to repay the bonds and the City is not liable for any bond payments.

42. The proceeds from the sale of the Bonds will be used to construct the RA-1 System Improvements.

43. As indicated above, the City estimates the average cost of the RA-1 System Improvements per Fiber Property to be \$3,000 depending on lot size, adoption rate and other variables, together with additional issuance and financing costs. This improvement cost relates only to the Fiber Property's share of the capital costs associated with the initial installation of the RA-1 System Improvements and does not include future monthly maintenance and operation costs nor the cost associated with the particular service package selected by the Utility Member. As provided in the LID Act, Fiber Property Landowners will have the opportunity to either prepay this capital improvement cost upfront or as installment assessments levied against the landowner's Fiber Property.

D. PROCEDURAL HISTORY

44. Petitioner filed the Petition on December 21, 2015. Petitioner then filed the Memorandum in Support and Affidavits in Support on February 1, 2016.

45. Petitioner has requested the Court to determine: (1) whether the City has the authority under the general laws of Idaho to construct, operate and maintain the RA-1 System Improvements; and (2) whether the City has the authority under the LID Act to finance the construction of the RA-1 System Improvements through the creation of the District and the issuance of the Bonds.

46. The Court held a hearing on the matter on February 25, 2016, for the purpose of examining the questions submitted and identifying any interested parties appearing in opposition to the Petition. No documents have been filed on behalf of any interested party seeking to answer the Petition. There was no opposition at the hearing.

III. CONCLUSIONS OF LAW

47. The Court has subject matter jurisdiction over the Petition and has jurisdiction to adjudicate this matter and to validate the proceedings taken by the City pursuant to I.C. § 7-1301, *et seq.*

A. AUTHORITY TO CONSTRUCT, OPERATE AND MAINTAIN

48. The City has broad statutory self-governance powers and may exercise all powers and perform all functions of local self-government in city affairs as are not specifically prohibited by or in conflict with the general laws or the constitution of the state of Idaho. I.C. § 50-301.

49. The City has statutory authority to promote and maintain the general welfare of its citizens as well as the City's trade, commerce, and industry. I.C. § 50-302.

50. The legislature of the state of Idaho has found that: "universally available telecommunications services are essential to the health, welfare and economic well-being of the citizens of the state of Idaho . . .". I.C. § 62-602(1). Broadband internet falls within the definition of "telecommunication service." I.C. § 62-603(13).

51. The City's adoption of the Broadband Policy and Broadband Ordinance are in keeping with this legislative finding and the City's statutory authority to promote and maintain the general welfare of its citizens. I.C. §§ 50-302(1), 62-602(1).

52. The City has wide regulatory discretion and autonomy when it comes to the welfare of its citizens and “[i]t is not the province of courts, except in clear cases, to interfere with the exercise of the power reposed by law in municipal corporations for the protection of local rights and the health and welfare of the people in the community.” *State v. Freitas*, 157 Idaho 257, 266, 335 P.3d 597, 606 (Ct. App. 2014). Indeed, the Court is to “indulge every presumption in favor of the valid exercise of legislative discretion unless arbitrary action is clearly disclosed.” *Id.*

53. The City also has specific statutory authority to regulate utility transmission systems. I.C. § 50-328. Although the term “utility transmission systems” is undefined in the Idaho Code, it is the Court’s view that the City’s provision and regulation for erection of the Fiber Optic System and the RA-1 System Improvements falls within the express import of this statute.

54. The City has the requisite statutory authority to construct, operate and maintain the RA-1 System Improvements.

55. The Idaho Constitution contains a broad, self-executing grant of police power to municipalities. Idaho Const. art. XII, § 2. Article XII, Section 2 provides that “any county or incorporated city or town may make and enforce, within its limits, all such local policy, sanitary and other regulations as are not in conflict with its charter or general laws.” Idaho Const. art. XII, § 2.

56. This constitutional provision grants cities and counties broad “police” powers, so long as their actions do not conflict with statutory restrictions. See *Boudreau v. City of Wendell*, 147 Idaho 609, 612, 213 P.3d 394, 397 (2009) (local governments cannot override statutes

enacted by the legislature). A city's exercise of its police powers is limited by the restriction that ordinances enacted under the authority conferred by this constructional provision must not be unreasonable or arbitrary and must be properly classified as a governmental function. *Plummer v. City of Fruitland*, 139 Idaho 810, 813, 87 P.3d 297, 300 (2004) (holding that where an action of a municipality or government entity serves a public purpose then the function is proprietary, and where the purpose is governmental, then the function is also governmental).

It is well recognized that there are two kinds of duties imposed or conferred upon municipal corporations; those termed public governmental functions, where the municipality performs certain duties as an agent or arm of the state, and those other municipal activities which are sometimes termed administrative, ministerial, corporate, private, or proprietary functions, performed for the municipality's own benefit, or for the benefit of its citizens . . .

Lundahl v. City of Idaho Falls, 78 Idaho 338, 343, 303 P.2d 667, 669 (1956).

57. Proprietary functions, as opposed to governmental functions, are those performed for the benefit of the citizens that are not legal duties of the state. *Id.* Accordingly, a city acts in a proprietary capacity when it owns, maintains, and operates a water system for the benefit of its inhabitants. *Skaggs Drug Centers, Inc. v. City of Idaho Falls*, 90 Idaho 1, 7, 407 P.2d 695, 697 (Idaho 1965) (citing *Gilbert v. Village of Bancroft*, 80 Idaho 186, 327 P.2d 378 (Idaho 1958)); See also *City of Grangeville v. Haskin*, 116 Idaho 535, 538, 777 P.2d 1208, 1211 (1989) (holding that the operation of a water system, a sewer system and a garbage collection service by the city is a proprietary function, not a governmental function).

58. As explained by the Idaho Supreme Court in *Plummer*, “[p]roprietary function” refers to the actual act of hauling garbage. Passing laws regulating solid waste collection is a government function.” 139 Idaho at 813, 87 P.3d at 300.

Where a municipality's action is properly classified as the governmental function of regulation, such regulation falls under that municipality's police power. Therefore, an ordinance passed by a municipality seeking to regulate the collection of solid waste within its city limits is an exercise of police power by that municipality.

...

Accordingly, we hold that in regulating the collection of solid waste within its city limits, a municipality is exercising its police power function . . .

Id.

59. The City's regulation of the Fiber Optic System, and specifically the RA-1 System Improvements, is a proper exercise of the City's police power function. The operation and maintenance of the Fiber Optic System and RA-1 System Improvements are proprietary functions of the City statutorily authorized under the legislative grant of power discussed above.

60. Municipal corporations are limited to functions and purposes which are public in character as distinguished from those which are private in character and engaged in for private profit. *Bd. of Cty. Comm'rs of Twin Falls Cty. v. Idaho Health Facilities Auth.*, 96 Idaho 498, 502, 531 P.2d 588, 592 (1974) (citing *Village of Moyie Springs, Idaho v. Aurora Manufacturing Co.*, 82 Idaho 337, 353 P.2d 767, 773 (1960)); Idaho Const. art. III, § 1.

61. The RA-1 System Improvements serve an important public purpose and are a valid municipal function.

62. The City has authority under the general laws of Idaho to construct, operate and maintain the RA-1 System Improvements.

B. AUTHORITY TO FINANCE

63. The City is empowered to create an improvement district “within the municipality” for the “purpose of making and paying for all or a part of the cost of any such improvements.” I.C. §§ 50-1703(b), 50-1722. Once created, the City may levy assessments on “the property within such a district which is benefited by the making of the improvements” and finance the improvements through warrants or local improvement bonds. *Id.*

64. An LID may be created to finance, among other things, the costs:

(10) To construct, reconstruct, extend, maintain or repair optional improvements¹; . . .

(12) To make any other improvements now or hereafter authorized by any other law, the cost of which in whole or in part can properly be determined to be of particular benefit to a particular area within the municipality; [and] . . .

(13) To construct and install all such structures, equipment and other items and to do all such other work and to incur any such costs and expenses as may be necessary or appropriate to complete any of such improvements in a proper manner;

I.C. § 50-1703(a)(10), (a)(12), and (a)(13).

65. The RA-1 System Improvements fall within the wide-ranging assortment of improvements financeable pursuant to the LID Act.

66. The City has the authority under the LID Act to finance the construction of the RA-1 System Improvements through the creation of the District and the issuance of the Bonds.

¹ “Optional improvements” are not defined by the Act.


67. The findings of fact and conclusions of law made herein are binding upon all persons interested in the outcome of this proceeding, including but not limited to all persons or entities who received actual or constructive notice of the filing of the Petition.

IV. DECREE

Now therefore, it is ordered, adjudged and decreed as follows:

1. That the City has the authority under the general laws of Idaho to construct, operate and maintain the RA-1 System Improvements;
2. That the City has the authority under the LID Act to finance the construction of the RA-1 System Improvements through the creation of the District and the issuance of the Bonds. The Bonds, once duly authorized, executed, issued, and delivered, will be valid obligations and enforceable in accordance with their terms under the laws and constitution of the State of Idaho;
3. That the findings of fact and conclusions of law made herein are binding upon all persons interested in the outcome of this proceeding, including but not limited to all persons or entities who received actual or constructive notice of the filing of the Petition;
4. That a separate Judgment shall be entered consistent herewith in accordance with I.R.C.P. 54(a).

DATED THIS 29 day of February, 2016.


JOEL E. TINGEY
District Judge

CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29 day of Feb, 2016, I caused to be served a true copy of the foregoing FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECREE by the method indicated below, and addressed to each of the following:

Michael M. Stoddard
Adam S. Christenson
HAWLEY TROXELL ENNIS & HAWLEY LLP
877 Main Street, Suite 1000
P.O. Box 1617
Boise, ID 83701-1617

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- E-mail
- Telecopy: 208.954.5951

Scott R. Hall
AMMON CITY ATTORNEY
C/O NELSON HALL PARRY TUCKER, PLLC
490 Memorial Drive
Idaho Falls, ID 83405-1630

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- E-mail
- Telecopy: 208.523.7254

Clerk of the District Court
Bonneville County, Idaho

By ms
Deputy Clerk