

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

<p>CITIZENS OF HARRISON OPPOSING POWDERHORN, INC., an Idaho non-profit corporation and CITIZENS PROTECTING THEIR RURAL COMMUNITY, INC., an Idaho non-profit corporation,</p> <p>Petitioners,</p> <p>vs.</p> <p>CITY OF HARRISON, an Idaho municipality; MAYOR WANDA IRISH; CITY COUNCIL MEMBERS WILLIAM BUTLER, MARK WAGNER, RICHARD LUND, RONDALD ELLIOT, KEVIN KINCHELOE AND RUSSELL RIBERICK, all in their official capacities,</p> <p>Respondents.</p>	<p>CASE NO. CV-10-9357</p> <p>MEMORANDUM DECISION AND ORDER DENYING RESPONDENTS' MOTION TO DISMISS PETITION FOR JUDICIAL REVIEW</p>
--	---

**PROCEDURAL AND FACTUAL HISTORY:**

This matter is before the Court on a Petition for Judicial Review of the validity of the City

of Harrison's annexation of approximately 2,000 acres on the Powderhorn Peninsula, owned by Powderhorn Ranch, LLC ("Powderhorn Annexation").

Petitioners filed their Amended Petition for Judicial Review on November 15, 2011. Therein, Petitioners argue that the Powderhorn Annexation is facially void under I.C. § 50-222 because the city failed to obtain consent from all necessary landowners and because the annexed lands were not contiguous to Harrison city limits. This Petition for Review specifies the Petition is brought pursuant to the Local Land Use Planning Act, the Idaho Administrative Procedures Act and Rule 84 of the Idaho Rules of Civil Procedure.

Respondents filed a Motion to Dismiss Petition for Judicial Review, and a Memorandum in Support of this Motion, on January 18, 2011. Respondents argue that this Court lacks jurisdiction to consider a Petition for Judicial Review of the Powderhorn Annexation. Specifically, Respondents argue that there is no statute conferring jurisdiction upon this court in the Local Land Use Planning Act, the Idaho Administrative Procedures Act, or pursuant to Rule 84 of the Idaho Rules of Civil Procedure.

This Court heard oral argument on the matter of jurisdiction on February 1, 2011, and took the matter under advisement. This Court has considered the oral argument of counsel and reviewed the files and records herein and now being fully advised in the premises, and good cause appearing therefore, now renders its Memorandum Decision and Order.

**MEMORANDUM DECISION:**

**DISCUSSION**

“Actions of state agencies or officers or actions of a local government, its officers or its units

are not subject to judicial review unless expressly authorized by statute.” I.R.C.P. 84(a)(1).

Therefore, a statute must grant a right to judicial review in order for an aggrieved party to obtain review of a city’s annexation. *Highlands Development Corp. v. City of Boise*, 145 Idaho 958, 960, 188 P.3d 900, 902 (2008), citing *Gibson v. Ada County Sheriff’s Dept.*, 139 Idaho 5, 8, 72 P.3d 845, 848 (2003).

“When an appeal is taken from a non-appealable order, the appeal should be dismissed, even by the court *sua sponte*, for lack of jurisdiction over the particular appeal.” *Highlands* 145 Idaho at 960, 188 P.3d at 902, quoting *State, Dept. of Law Enforcement v. One 1955 Willys Jeep, V.I.N. 573481691*, 100 Idaho 150, 595 P.2d 299, n. 1 (1979) (other citation omitted).

Therefore, unless there is some statute which confers upon this Court the authority to hear an appeal regarding the validity of the Powderhorn Annexation, the matter must be dismissed for lack of jurisdiction.

**1. Whether the Local Land Use Planning Act (LLUPA) Provides this Court with Jurisdiction to Review the Annexation?**

Respondents argue that the Local Land Use Planning Act (“LLUPA”) permits review of some decisions made by a governing board, *Highlands*, 145 Idaho at 961, 188 P.3d at 903, but that LLUPA does not grant a right to judicial review of a decision to annex property under the circumstances herein.

LLUPA authorizes judicial review in cases where a person has applied for and been denied a permit that is required or authorized under LLUPA. *Highlands*, 145 Idaho at 961, 188 P.3d at 903; I.C. 67-6519. LLUPA specifically mentions special use permits, I.C. 67-6512; subdivision permits, I.C. 67-6513; planned unit development permits, I.C. 67-6515; variance permits, I.C. 67-6516; and building permits, I.C. 67-6517. *Giltner Dairy*, 145 Idaho at 633, 181 P.3d at 1241. LLUPA also authorizes judicial review in cases where a person’s interest in real property may be adversely affected by the issuance or denial of a permit authorizing development. I.C. 67-6521. LLUPA does not mention any permit that relates to the

annexation of land by a city. Black Labrador does not argue that the City denied it any permit required or authorized under LLUPA. Accordingly, we conclude that LLUPA does not authorize judicial review in the instant case.

*Black Labrador Investing, LLC v. Kuna City Council*, 147 Idaho 92, 98, 205 P.3d 1228, 1234 (2009).

Petitioners have not, through briefing or otherwise, provided this Court with any authority that LLUPA grants this Court jurisdiction under the current circumstances. It appears, for all intents and purposes, that this argument has been abandoned by Petitioners. Even if it has not, however, the Court finds that LLUPA does not contain a grant of jurisdiction to this Court to hear the Petitioners' appeal.

**2. Whether the Idaho Administrative Procedures Act provides the Court with Jurisdiction to Review the Approval of the Category A Annexation by the City?**

Respondent next argues that the IAPA similarly provides no authority for this Court to review the Powderhorn Annexation.

“The [IAPA] does not grant to the right to review decisions made by counties or cities.”

*Highlands*, 145 Idaho at 961, 188 P.3d at 903.

“The IAPA and its judicial review standards apply to agency actions.” *Gibson v. Ada County Sheriff's Dept.*, 139 Idaho 5, 7, 72 P.3d 845, 847 (2003). “Counties and city governments are considered local governing bodies rather than agencies for purposes of the IAPA.” *Id.* “The language of the IAPA indicates that it is intended to govern the judicial review of decisions made by state administrative agencies, and not local governing bodies.” *Idaho Historic Preservation Council, Inc. v. City Council of City of Boise*, 134 Idaho 651, 653, 8 P.3d 646, 648 (2000).

*Id.* The Court, historically, has characterized annexation decisions as legislative decisions by cities, and therefore not subject to judicial review. *Black Labrador*, 147 Idaho at 96, 205 P.3d at 1232 (citations omitted). But, “[t]he legislature has specifically authorized judicial review under

the APA of a city council's annexation decision under certain circumstances.” *Id.*, citing I.C. § 50-222(6).

The Court finds that the IAPA does not generally provide a jurisdictional basis with which this Court may hear Petitions for Review of county and city governments, as they are considered local governing bodies rather than agencies for purposes of the IAPA. However, Petitioners appear to have abandoned any argument that they have statutory authority regarding this Court's jurisdiction, *except* as the same is purportedly found in I.C. § 50-222. Regardless of whether this argument was abandoned by Petitioners, however, this Court finds that the IAPA does not historically provide this Court with jurisdiction to consider Petitions for Review, such as the one currently before the Court, and that this Court's jurisdictional authority, if any, must be found in I.C. § 50-222. Indeed, case law supports this finding. *See, Highlands Development Corp. v. City of Boise*, 145 Idaho 958, 960, 188 P.3d 900, 902 (2008) (Providing that, prior to the enactment of Idaho Code § 50-222, which took effect on July 1, 2002, there was no statute granting the right to obtain judicial review of the City's annexation and initial zoning of property.), citing *Gibson v. Ada County Sheriff's Dept.*, 139 Idaho 5, 8, 72 P.3d 845, 848 (2003).

**3. Whether this Court has Jurisdiction to Hear the Petition for Judicial Review pursuant to I.C. § 50-222?**

**a. Classification of the Current Annexation.**

Idaho Code § 50-222 permits judicial review of the decision of a city council to annex lands, but only under certain circumstances. In order to determine whether this Court has jurisdiction over this Petition, it is first necessary to determine the category under which the Powderhorn Annexation belongs. Pursuant to I.C. § 50-222, there are three Categories of

annexation:

- a. Category A: Annexations wherein:
  - i. All private landowners have consented to annexation. Annexation where all landowners have consented may extend beyond the city area of impact provided that the land is contiguous to the city and that the comprehensive plan includes the area of annexation;
  - ii. Any residential enclaved lands of less than one hundred (100) privately-owned parcels, irrespective of surface area, which are surrounded on all sides by land within a city or which are bounded on all sides by lands within a city and by the boundary of the city's area of impact; or
  - iii. The lands are those for which owner approval must be given pursuant to subsection (5)(b)(v) of this section.
- b. Category B: Annexations wherein:
  - i. The subject lands contains less than one hundred (100) separate private ownerships and platted lots of record and where not all such landowners have consented to annexation; or
  - ii. The subject lands contain more than one hundred (100) separate private ownerships and platted lots of record and where landowners owning more than fifty percent (50%) of the area of the subject private lands have consented to annexation prior to the commencement of the annexation process; or
  - iii. The lands are the subject of a development moratorium or a water or sewer connection restriction imposed by state or local health or environmental agencies; provided such lands shall not be counted for purposes of determining the number of separate private ownerships and platted lots or record aggregated to determine the appropriate category.
- c. Category C: Annexations wherein the subject lands contain more than one hundred (100) separate private ownerships and platted lots of record and where landowners owning more than fifty percent (50%) of the area of the subject private lands have not consented to annexation prior to the commencement of the annexation process.

I.C. § 50-222(3).

Disregarding Petitioners' argument that the annexation is invalid (and thus would not fit into any category of annexation), both Petitioners and Respondents have treated the Powderhorn Annexation as a category A annexation. Respondents have continuously argued that all private landowners have agreed to the Powderhorn Annexation. Petitioners agree that the Powderhorn Annexation, if valid concerning consent and contiguity, is a category A annexation. Therefore, the parties agree, and this Court finds, that the Powderhorn Annexation is a Category A annexation.

**b. The Scope of Judicial Review of a Category A Annexation Under I.C. § 50-222(6).**

I.C. § 50-222(6) provides the authority for judicial review of the validity or decision of a city to annex. However the statute, at first glance, appears to grant an express right to judicial review only for category B or category C annexations:

The decision of a city council to annex and zone lands as a category B or category C annexation shall be subject to judicial review in accordance with the procedures provided in chapter 52, title 67, Idaho Code, and pursuant to the standards set forth in section 67-5279, Idaho Code. Any such appeal shall be filed by an affected person in the appropriate district court no later than twenty-eight (28) days after the date of publication of the annexation ordinance. All cases in which there may arise a question of the validity of any annexation under this section shall be advanced as a matter of immediate public interest and concern, and shall be heard by the district court at the earliest practicable time.

I.C. § 50-222(6).

Respondents argue that I.C. § 50-222(6) confers jurisdiction upon the Court the to hear Petitions for Judicial Review of category B and category C annexations, but not category A annexations. Therefore, Respondent argues that I.C. § 50-222(6) does not provide a basis for judicial review of category A annexations and therefore, because no other statutory authority exists with which this Court is cloaked with jurisdiction, Petitioners' appeal must be dismissed.

Respondents cite *Highlands Development Corp. v. City of Boise*, 145 Idaho 958, 960,

188 P.3d 900, 902 (2008), in support of their argument. There, the Highlands Development Corporation sought judicial review of a zoning classification following an annexation. The Court held that there was no statute which authorized judicial review, and dismissed the appeal. While *Highlands* was decided prior to the enactment of I.C. § 50-222, it affirms that there was no statute which provided for judicial review of the city’s annexation determinations prior to the enactment of that statute, and affirmed the need for statutory authority granting the right to such review.

Petitioners, in response, argue that the validity of a category A annexation may be reviewed by this Court by grant of authority found in the last sentence of I.C. § 50-222(6).

In construing a statute, the Court is to construe the statute as a whole, and gives the words contained therein their “plain, usual and ordinary meaning.” *Athay v. Stacey*, 142 Idaho 360, 365, 128 P.3d 897, 902 (2005) (citation omitted).

Where the language of a statute is plain and unambiguous, this Court must give effect to the statute as written, without engaging in statutory construction. . . . If the language is clear and unambiguous, there is no occasion for the court to resort to legislative history or rules of statutory interpretation. When this Court must engage in statutory construction, it has the duty to ascertain the legislative intent and give effect to that intent. To ascertain the intent of the legislature, not only must the literal words of the statute be examined, but also the context of those words, the public policy behind the statute, and its legislative history. It is incumbent upon a court to give a statute an interpretation which will not render it a nullity. Construction of a statute that would lead to an absurd result are disfavored.

*State v. Locke*, 149 Idaho 641 at \_\_\_, 239 P.3d 34, 35 (Ct. App., August 10, 2010) (internal citations omitted). A court must similarly “give effect to all the words and provisions of the statute so that none will be void, superfluous, or redundant.” *Farber v. Idaho State Ins. Fund*, 147 Idaho 307, 310, 208 P.3d 289, 292 (2009), citing *AmeriTel Inns, Inc. v. Pocatello-Chubbuck*

*Auditorium Dist.*, 146 Idaho 202, 204, 192 P.3d 1026, 1028 (2008).

Here, the plain language of I.C. § 50-222(6) states that decisions of a city council to annex lands as a category B or category C annexation are subject to judicial review. This is not in dispute. However, the legislature also included a sentence which provides that “[a]ll cases in which there may arise a question of the *validity* of *any* annexation under this section shall be advanced as a matter of immediate public interest and concern, and shall be heard by the district court at the earliest practicable time.” I.C. § 50-222(6) (emphasis added).

Whether or not this sentence provides statutory authority sufficient to confer jurisdiction upon this Court to hear a Petition for Judicial Review of a category A annexation, is not immediately clear on the face of the above-quoted language. However, an analysis of the particular language used in subsection (6), as well as this Court’s consideration of *Black Labrador*, aids in this Court’s determination.

First, this Court finds that the final sentence of I.C. § 50-222(6) confers jurisdiction beyond that granted in the case of category B and category C annexations, in the first sentence of 50-222(6). This finding is wholly consistent with this Court’s duty to construe every portion of the statute as meaningful and not superfluous. Therefore, this Court must next determine the nature and extent of the right to judicial review granted by this final sentence of § 50-222(6).

First, the sentence includes the words “all cases” and “any annexation.” Clearly, as is evident from the first sentence of § 50-222(6), the legislature would have limited this language to certain categories of annexations had this sentence only been meant to apply to certain categories. Therefore, taking the clear meaning of the word “all” and “any”, this Court finds that category A

annexations are meant to be affected by the final sentence of 50-222(6).

Next, the Court must determine the difference between the first sentence and the last sentence of 50-222(6), in terms of the scope of judicial review conferred by each sentence. In other words, the Court cannot allow the first sentence to be swallowed up by the final sentence of 50-222(6)—if the final sentence intended to allow judicial review of “any annexation”, to the same extent as the first sentence permits judicial review to only category B and category C annexations, the first sentence would be impermissibly swallowed by the third sentence. The Court is not at liberty to find that the legislature included the first sentence superfluously.

The distinction made by the legislature in these two sentences lies in the use of the words “decision of a city council to annex”, under sentence one, and the words “validity of any annexation”, under sentence three. In order to wholly appreciate and understand this distinction, the statute must be construed as a whole.

Under § 50-222(3), the most obvious distinction between category A annexations and category B and C annexations is that, in category B and C annexations, the city has not procured the consent of all private landowners, while all private landowners have agreed in the case of category A annexations. This distinction is important because the first sentence of 50-222(6) only applies to circumstances in which less than all private landowners have agreed to annexation.<sup>1</sup> Therefore, when the city makes a *decision* to annex when less than all landowners have agreed, an aggrieved party (for example, a non-consenting private landowner) may make Petition for Judicial Review of the city’s *decision* to annex.

---

<sup>1</sup> I.C. § 50-222(3)(b)(iii) also characterizes annexations of certain lands which are the subject of a development moratorium or a water or sewer connection restriction as category B annexations.

In contrast, the final sentence of I.C. § 50-222(6) concerns the *validity of any annexation*. I.C. § 50-222(2) states that “[c]ities have the authority to annex land into a city upon compliance with the procedures required in this section.” Thus, this court holds that in order for an annexation to be *valid*, it must comport with the procedures required in I.C. § 50-222. Therefore, the third sentence of I.C. § 50-222(6) provides that any annexation, including category A annexations, may be reviewed by this Court, if a city annexes land and that annexation is invalid due to noncompliance with the statutory requirements of I.C. § 50-222(6).

The Court’s holding herein is wholly consistent and supported by *Black Labrador, supra*. In *Black Labrador*, the court was concerned with an appeal of a denial for annexation. The court recognized that Idaho Code § 50-222(6) expressly provides for judicial review of decisions regarding category B and category C annexations. As stated therein:

Idaho Code 50-222(6) authorizes judicial review under the APA of a city council[’]s *decision* to annex lands in category B and C annexations only. Idaho Code 50-222(6) provides in relevant part:

The decision of a city council to annex and zone lands as a category B or category C annexation shall be subject to judicial review in accordance with the procedures provided in chapter 52, title 67, Idaho Code, and pursuant to the standards set forth in section 67-5279, Idaho Code.

Idaho Code 50-222(6) *also contains a broad grant of judicial review that applies to all annexations authorized by city council*: All cases in which there may arise a question of the validity of any annexation under this section shall be advanced as a matter of immediate public interest and concern, and shall be heard by the district court at the earliest practicable time. I.C. 50-222(6).

If the City had annexed Black Labrador’s property, the action would have been a category A annexation as Black Labrador, the only private landowner involved, did not raise an objection to the annexation. However, I.C. 50-222(6) does not authorize judicial review of a category A annexation under the APA. The structure of I.C. 50-222(6) clearly reflects that

the right of judicial review is dependent upon an affirmative decision to annex property; the legislature did not provide for judicial review when a city has decided not to annex property.

*Id.* at 96-97, 205 P.3d at 1232-33 (emphasis added). Black Labrador also argued that the last sentence of I.C. 50-222(6) authorized judicial review of an annexation decision when a dispute concerning the annexation arises. As the Court stated therein,

[J]udicial review under that sentence requires an affirmative decision by a city to annex property. The instant case does not involve an affirmative decision by the city to annex property. Therefore, we conclude that I.C. 50-222(6) does not expressly authorize judicial review in the instant case.

*Id.* at 97, 205 P.3d at 1233.

Petitioners argue that the obvious implication of *Black Labrador* is that category A annexations are reviewable under the last sentence of I.C. § 50-222(6) when a question arises as to the validity of any annexation under the procedural requirements of I.C. § 50-222. Here, the questions of validity include contiguity, under § 50-222(3)(a)(i), and consent, under § 50-222(4).

Respondents argue that *Black Labrador* is actually injurious to a finding of jurisdiction. At the hearing, Respondents focused on the above quoted language, “Idaho Code 50-222(6) authorizes judicial review under the APA of a city councils decision to annex lands in category B and C annexations *only*.” *Id.* at 96, 205 P.3d at 1232 (emphasis added). Further, Respondents argue that the language from *Black Labrador* with regard to the third sentence of I.C. § 50-222(6) is dicta, and thus should not provide the basis for this Court’s holding.

First, the language relied upon by Respondents does not persuade this Court that the last sentence of I.C. § 50-222(6) does not apply to category A annexations. In fact, this language only serves to further highlight the distinction between the two sentences. This Court agrees with

Respondents, and *Black Labrador*, that I.C. § 50-222(6) “authorizes judicial review . . . of a city council[’]s *decision* to annex lands in category B and C annexations only.” *Black Labrador*, 147 Idaho at 96, 205 P.3d at 1232. Second, the Court agrees with Respondents that the language from *Black Labrador*, as it relates to the validity of annexations under category A annexations, is dicta; *Black Labrador* involved a city’s determination *not* to annex. However, *Black Labrador* does act to strengthen the Court’s ultimate determination, which is made pursuant to the principles of statutory construction. *Black Labrador* recognized that the last sentence of § 50-222(6) contains a broad grant of judicial review, which applies to all annexations authorized by city council. This is consistent with this Court’s reading of I.C. § 50-222(6).

Lastly, Respondent argues that the final sentence of I.C. § 50-222(6) only applies to § 50-222(6), and not to the remainder of § 50-222. This argument is based upon the language in the third sentence of I.C. § 50-222(6) stating, “All cases in which there may arise a question of the validity of any annexation *under this section* . . .” However, § 50-222(6) is a *subsection* of *section* 50-222. When asked at oral argument why the legislature would use the word “section” instead of “subsection”, if this sentence were only meant to apply to § 50-222(6), counsel responded that the Court may be giving the legislature undue credit for its selection of terms. This Court disagrees.

In fact, the legislature clearly intends the subsections of I.C. § 50-222 to be referred to as subsections, which is evidenced by language found within I.C. § 50-222(4)(a): “[f]or purposes of this *section*, and unless excepted in paragraph (b) of this *subsection* (4), consent to annex shall be valid only when evidenced by written instrument consenting to annexation executed by the owner or the owner’s authorized agent.” Therefore, the legislature clearly referred to the subsections as

subsections, and would have also done so in subsection I.C. § 50-222(6) if its intent was for such a narrow application of the last sentence therein.

Based on the foregoing, this Court holds that it has jurisdiction under the final sentence of I.C. § 50-222(6), to hear a Petition for Judicial Review of the validity of a city's annexation, even if the annexation falls within the confines of category A. "Validity", for purposes of judicial review under § 50-222(6), refers to whether or not the city complied with the procedures mandated by I.C. § 50-222. Here, Petitioners have sought review for a determination as to whether the Powderhorn Annexation should be deemed invalid due to noncompliance with the procedural requirements of I.C. § 50-222—namely, the contiguity requirement of I.C. § 50-222(3)(a), and the consent requirement of I.C. § 50-222(4). Therefore, Petitioners request for judicial review falls squarely within the purview of § 50-222(6), as it challenges the validity of the Powderhorn Annexation.

**ORDER:**

The Court being fully advised in the premises and good cause appearing therefore,  
IT IS HERBY ORDERED, as follows:

1. That Respondents Motion to Dismiss the Petition for Review is DENIED.

DATED: The \_\_\_ day of February, 2011

\_\_\_\_\_  
Benjamin R. Simpson  
District Judge # 1001

CERTIFICATE OF SERVICE

I hereby certify that on the \_\_\_\_\_ day of February, 2011, I caused, to be served, a true and correct copy of the foregoing document as addressed to:

MEMORANDUM DECISION AND ORDER DENYING RESPONDENTS' MOTION TO DISMISS PETITION FOR JUDICIAL REVIEW 14

Mischelle R. Fulgham  
LUKINS & ANNIS, P.S.  
601 E. Front Ave., Ste. 502  
Coeur d' Alene, ID 83814-5155  
Fax: (208) 664-4125

Scott W. Reed  
Attorney at Law  
P.O. Box A  
Coeur d' Alene, ID 83816  
Fax: (208) 765-5117

Kathlene Landgraf Kolts  
Attorney at Law  
1510 Pebblestone Court  
Hayden Lake, ID 83835  
Fax: (208) 772-3688

---

Deputy Clerk