146 Idaho 527, 547, 199 P.3d 102, 122. As such, the lease agreement before the Court in the instant matter does not differ from those entered into by governments and subdivisions of governments. Although the lease at issue likely implicitly contemplates extending beyond one year, so long as it contains specific language making NIC's renewal subject to the availability of therefore appropriated funds and makes the lease term renewable on a yearly basis, the lease complies with the Idaho Constitution.

This was also the result *Dieck,* the 1991 Wisconsin Supreme Court case discussed by NIC at length. There, the Wisconsin Supreme Court reasoned:

> "indebtedness" contemplates a "voluntary and absolute undertaking to pay a sum certain. No indebtedness exists if the municipal body may avoid its obligation or if conditions precedent exist... The undertaking must be enforceable by the creditor against the municipal body or its assets.

165 Wis.2d 458, 470, 477 N.W.2d 613, 625. Because the school district in *Dieck* had the right under the non-appropriation option to terminate the lease by opting to not appropriate funds for the following fiscal year's payment, no district funds were jeopardized beyond the current fiscal year. 165 Wis.2d 458, 465, 477 N.W.2d 613, 620. We have precisely that same situation in the present case. As stated in *Dieck*:

> The test, [for "indebtedness" under Wisconsin's similar constitutional provision], is not whether the municipal body unit will probably pay or whether the municipal body would be foolish not to pay. The test is whether the municipal body is under an obligation to pay and the creditor has a right to enforce payment against the municipal body or its assets.

165 Wis.2d 458, 470, 477 N.W.2d 613, 625. Under the terms of the Lease Agreement, NIC is not under an obligation to pay and the Foundation has no right to enforce payment by NIC. The *Dieck* Court found that because the lease-purchase at issue in that case contained a "non-appropriation option", the lease agreement did not violate Wisconsin's Constitution because payments were to be made solely from the current year's budget. The *Dieck* Court found the lease-purchase agreement with the non-

appropriation option, meets the purposes of and maintains the integrity of the constitutional debt limitations:

> A nonappropriation option preserves for each successive legislative body the responsibility of reviewing the wisdom of the lease and of deciding whether to continue it and shield taxpayers from burgeoning debt. Future generations are not burdened by past decisions.

165 Wis.2d 458, 472, 477 N.W.2d 613, 627. The *Dieck* Court noted the majority of other jurisdictions hold that lease agreements containing non-appropriation clauses do not constitute impermissible debt under similar state constitutional limitations, and cited those cases. 165 Wis.2d 458, 472, n. 8, 477 N.W.2d 613, 627, n. 8. Those cases are: *Department of Ecology v. State Finance Comm.,* 116 Wash.2d 246, 804 P.2d 1241, 1244-47 (1991) ("The overwhelming majority of jurisdictions that have considered the issue have concluded that a nonappropriation clause precludes the creation of debt." 116 Wash.2d 246, 256, n. 9; 804 P.2d 1246, n. 9); *State ex rel. Kane v. Goldschmidt,* 308 Or. 573, 783 P.2d 988, 991-96 (1989) (discussing many prior decisions by the Oregon Supreme Court going back to 1873, consistently adopting the majority view); *Glennon Heights, Inc. v. Central Bank & Trust,* 658 P.2d 872, 878-79 (Colo.1983); *Edgerly v. Honeywell Information Sys., Inc.,* 377 A.2d 104, 108 (Me.1977); *Ruge v. State,* 201 Neb. 391, 267 N.W.2d 748, 750-52 (1978); *Enourato v. New Jersey Bldg. Auth.,* 182 N.J.Super. 58, 440 A.2d 42, 46-47 (1981), *aff'd,* 90 N.J. 396, 448 A.2d 449, 455-56 (1982); *Caddell v. Lexington Cy. Sch. Dist. 1,* 296 S.C. 397, 373 S.E.2d 598, 599-600 (1988); *McFarland v. Barron,* 83 S.D. 639, 164 N.W.2d 607, 609-10 (1969); *Texas Pub. Bldg. Auth. v. Mattox,* 686 S.W.2d 924, 928 (Tex.1985); *Baliles v. Mazur,* 224 Va. 462, 297 S.E.2d 695, 698-700 (1982); *State ex rel. West Virginia Resource Recovery-Solid Waste Disposal Auth. v. Gill,* 174 W.Va. 109, 323 S.E.2d 590, 594-95 (1984). This Court has reviewed those cited cases, and finds the *Dieck* Court's

analysis sound. This view is consistent with a treatise cited by the *Dieck* Court in which:

> One author concluded that declaring a lease purchase agreement with a nonappropriation option constitutional was the "optimal approach that establishes both the correct legal rule and encourages utilization of lease-purchasing." Reuven Mark Bisk, *State and Municipal Lease-Purchase Agreements: A Reassessment,* 7 Harv.J.L. & Pub.Pol'y 521, 546 (1984).

165 Wis.2d 458, 472, n. 8, 477 N.W.2d 613, 627, n. 8. The minority view, according to the *Dieck* Court, was noted in *Montano v. Gabaldon,* 108 N.M. 94, 766 P.2d 1328, 1329-30 (1989), where a lease purchase agreement with nonappropriation clause creates moral or equitable obligation to continue payment and therefore creates debt. 165 Wis.2d 458, 472, n. 8, 477 N.W.2d 613, 627, n. 8. This Court is more persuaded that the majority view is correct. That conclusion that the majority view is correct is certainly bolstered by the concurring opinion of Justice Jim Jones in *In Re University Place/Idaho Water Center Project,* 146 Idaho 527, 547, 199 P.3d 102, 122 (2008), (J. Jones, concurring), where the practicality of such arrangements is noted. NIC simply does not incur a liability if it elects to not renew the Lease Agreement for a subsequent year term. Before a liability exists, there must be an enforceable duty against the municipality to make the payment. *Lewis v. Brady,* 17 Idaho 251, 256, 104 P. 900, 301 (1909). (interpreting Idaho Constitution, Ariticle III, Section 1). Here, there is no enforceable duty against NIC to make the next year's payment. The various hypothetical scenarios presented by plaintiffs of situations that *could* happen which *could* result in liabilities (Plaintiff's Answering Brief in Response to Defendant's Motion for Summary Judgment, p. 10), do not show *current* liabilities, they are all contingent on other events occurring in the future. There fact remains there is no penalty if NIC fails to renew the Lease Agreement.

Plaintiffs cite *O'Bryant v. City of Idaho Falls,* 78 Idaho 313, 303 P.2d 672 (1956), for the proposition:

> What cannot be done directly [by the City of Idaho Falls because of constitutional limitations] cannot be accomplished indirectly. That which the constitution directly prohibits may not be done by indirection through a plan or instrumentality attempting to evade the constitutional prohibition.

Plaintiff's Answering Brief in Response to Defendant's Motion for Summary Judgment, pp. 10-11. William McCrory argued that point at oral argument on his behalf. That is an accurate quote from *O'Bryant*. 78 Idaho 313, 325. While *O'Bryant* also dealt with ARtilce III, Section 3 of the Idaho Constitution, the facts are much different to those of the present case. Some of those facts are set forth below in the following quote from *O'Bryant*:

> The creation of the Cooperative, its contracts for the purchase of gas and for the sale of its bonds to raise funds for the construction, operation and maintenance of a gas distribution system and the ordinance of the City of Idaho Falls granting an exclusive franchise for thirty years to the Cooperative with the contract provided for by such ordinance are all parts of a plan and design devised to enable the City of Idaho Falls to evade and circumvent the limitations and prohibitions of the constitution and statutes; and to exercise powers not granted to a municipality. The purpose of the whole plan is to allow the City to do indirectly what it cannot do directly, that is, to construct, operate and maintain a system for the distribution of gas; *and to pay for same by the creation of indebtedness and liabilities in excess of its revenues for the current year* without a vote of the qualified electors and without providing for an annual tax to retire such indebtedness.

78 Idaho 313, 327. This quote illustrates just some of the distinctions between the present case and *O'Bryant,* but the italicized portion shows the critical undisputed distinction between the present case and *O'Bryant* which cause plaintiff's reliance upon *O'Bryant* to be completely misplaced. The evidence is uncontradicted by plaintiffs that NIC paid for this lease by revenues it had for the current year. See, Plant fund Expenditures, Plant fund Budget, General Fund Budget Proposal FY 10, Attached to Affidavit of William McCrory; Lease Agreement, p. 1 ¶ C.

At summary judgment, the non-moving party is entitled to having all reasonable

inferences construed in their favor, but must make a showing sufficient to establish the existence of an element essential to its case on which it will bear the burden of proof at trial. *Badell v. Beeks*, 115 Idaho 101, 102, 765 P.2d 126 (1988). Here, plaintiffs have raised the following issues for the Court: that documents evince NIC's underlying intent to purchase the Mill Site, regardless of any stated one-year term of the lease; that the tax agreement allowing the Foundation tax exempt status demonstrates the lease was in fact a sales contract; and that exercise of the non-appropriation option by NIC may result in losses. None of the arguments raised by plaintiffs refute NIC's and the Foundation's claims that the language of the lease contemplates the necessity of affirmative action on the part of NIC in order for renewal of the lease to occur. The language of Justice Jim Jones in his concurring opinion, quoted *supra,* indicates how commonplace these types of leases are, and that the Lease Agreement at issue does not violate of Article VIII, Section 3 of the Idaho Constitution:

> The fact of the matter is that all state contracts contain those same provisions because Article VIII § 1 of the Idaho Constitution prohibits the State from incurring multi-year indebtedness without submitting the matter to the public for a vote. Article VIII § 3 imposes a similar limitation on public indebtedness with respect to subdivision of state government. It is virtually impossible the present every multi-year governmental contract or lease to the public for a vote. Thus, leases and other contracts that are intended to extend beyond one year always contain provisions (1) making the government's performance subject to the availability of appropriated funds and (2) making the agreement renewable on an annual basis for the contemplated term.

146 Idaho 527, 547, 199 P.3d 102, 122.

Finally, this Court has been cited to District Judge Hosack's decision in *County of Bonner, Petition for Minimum Security Facility, Petitioner,* Bonner Co. Case No. CV 2008 641. Plaintiff's Answering Brief in Response to Defendant's Motion for Summary Judgment, p. 9. That case is not on point. In that case, Judge Hosack found that

Bonner County created a "lien" upon *its own* property by proposing to transfer such property to a Trustee, would then in turn lease that same property back to Bonner County. Also, Bonner County is statutorily mandated to house its detainees. In the present case, NIC does not own the property in dispute. Thus, NIC cannot lien its own property because it does not own such. NIC cannot lose the use of its asset since it does not own the asset. Finally, NIC is not mandated by statute to maintain a particular activity of the property (like a detention facility), NIC can use the property for whatever use it sees fit while it leases the land (presently it is used as a parking lot, Affidavit of Lawrence Spencer, p. 2, ¶ 3), and if NIC were to so choose, NIC could simply not renew the lease vacate the property. No statute requires NIC to have a parking lot, unlike the situation in Judge Hosack's case.

IV. CONCLUSION AND ORDER.

For the reasons stated above, as to each claim made by plaintiffs, this Court must grant NIC's Motion for Summary Judgment (in which the Foundation has joined).

IT IS HEREBY ORDERED NIC's Motion for Summary Judgment (in which the Foundation has joined) is GRANTED as to all claims made by plaintiffs.

Entered this 19th day of March, 2010.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the 19 day of March, 2010, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Party *pro se*		Lawyer	Fax #
Lawrence Spencer (*pro se*)	Via U.S. Mail ✓		
William McCrory (*pro se*)	Via U.S. Mail ✓	Marc Lyons	664-5884 ✓
Thomas R. Macy (*pro se*)	Via U.S. Mail ✓	Dana Rayborn Wetzel	664-6741 ✓

Jeanne Clausen, Deputy Clerk