

NIC's 499-Day "Lease" of 17 Acres of Bare Land (The Brief Version)

Before 2003 several interested parties had begun working with and on behalf of North Idaho College (NIC) toward the orderly acquisition of the 17-acre DeArmond Mill Site contiguous to both the existing NIC campus and the City's sewage treatment plant. In 2005 the Mill's owner, Stimson Lumber Company, abruptly sold the property not to NIC but to The Mill Sites, LLC, one of developer Marshall Chesrown's companies. Chesrown had not been one of the original parties, so his entry onto the scene created some panic among them. When NIC could not put together the \$10 million to buy the land in one annual appropriation as required by the Idaho Constitution, Article VIII, Section 3, NIC and its Foundation concocted a scheme that would use taxpayer money to buy the land for \$10 million plus about \$444,800 in federally tax-exempt interest.

NIC hired an appraiser to appraise the purchase price of the Mill site. The appraiser, a business partner with one the NIC Trustees and her husband who is on the NIC Foundation, said the property would appraise at \$13.25 million assuming "...annexation [into the City of Coeur d'Alene], rezoning [to C-17, commercial], cleaning and clearing site, gain in size, and conditions as stated in the appraisal." At the time of the appraisal in mid-2008, none of those assumptions had been met.

On May 12, 2009, attorney Marc Lyons representing both NIC and its Foundation argued forcefully for annexing the land into the City and zoning it C-17. Though the existing campus zoning of R-17 and special use permits has enabled NIC to fulfill its mission, Lyons said C-17 was essential to give NIC "greater flexibility." "Greater flexibility to do what? We don't know, because no one on the Coeur d'Alene Planning Commission asked. We do know that C-17 zoning was essential to justify a \$10 million purchase price, though. The attorney representing the prospective buyer was, in effect, asking for zoning that drove up the purchase price the taxpayers would have to pay. The Planning Commission approved, and subsequently the City Council obediently annexed the property and zoned it C-17 as Lyons urged.

Because the Idaho Constitution, Article VIII, Section 3 prohibited NIC from buying the land outright unless it could do it with one annual appropriation, NIC and its Foundation signed a "Lease Agreement" on July 23, 2009. Under the terms of the "Lease Agreement", NIC would "lease" the property for no more than four one-year terms from the NIC Foundation. Under the terms of that "Lease Agreement" NIC would pay the Foundation \$4 million in "prepaid rent" up front at signing. Then, beginning on February 10, 2010, and every six months thereafter, NIC would pay an additional \$1,074,134.02 in rent until the last payment in August 2012. With that last payment, NIC would have paid \$10, 444,804.12 in rent until July 2013.

To put together the \$4 million down payment on July 23, 2009, NIC collected \$2.4 million in foregone taxes from Kootenai County property taxpayers. NIC added \$1.6 million from its fund balance.

The remaining \$6 million on the \$10 million purchase price would be provided by the NIC Foundation. It issued a promissory note to Mountain West Bank for which it received a \$6 million loan. The Foundation was obligated to pay back the \$6 million loan, plus interest, in five equal semiannual installments of \$1,074,134.02. The sixth and final installment payment of \$1,074,134.01 was to be made on August 1, 2012. Under the terms of the "Lease Agreement" with NIC, the Foundation would deliver fee simple title on the property to NIC immediately after the Foundation made the last loan payment.

It is very important to understand that the "Lease Agreement" was never amended or supplemented. It is the only agreement known to exist that resulted in ownership of the Mill site being delivered to NIC. The only provision in the "Lease Agreement" allowing NIC to buy the property was if the Foundation defaulted on its loan. The Foundation did not default on its loan.

NIC and its Foundation entered into a Tax Agreement Regarding Revenue Ruling and created what is commonly called a 63-20 corporation, after the Internal Revenue Service Revenue Ruling which permits it. That Ruling combines the borrowing power of a political subdivision of the state (NIC) with the tax-exempt 501(c)(3) status of a state non-profit corporation (the Foundation). The result was that the lender, Mountain West Bank, would be repaid the \$6 million loan principal plus approximately \$444,801.11 in interest exempt from federal tax.

Compare the amounts and dates of "rent" paid by NIC to the Foundation with the amounts and dates of loan payments made by the Foundation to the Bank. They are nearly identical. This strongly suggests the Foundation was nothing more than a straw man using NIC (taxpayer) money to make loan plus interest payments to the Bank. Thus, the "Lease Agreement" was really an installment purchase contract designed to circumvent the Idaho Constitution, Article VIII, Section 3.

Why did NIC and the Foundation carefully select four years as the maximum term of the "Lease Agreement?" We believe it was because NIC Trustees serve staggered four-year terms. Thus, barring a recall, it would be impossible for voters to elect enough new Trustees who might refuse to make the annually appropriated payment and stop the unconstitutional expenditure of public money. There may be other reasons, but this is the simplest and most obvious.

On November 17, 2010, the NIC Trustees voted at their regularly scheduled meeting to amend its fiscal year 2011 budget allowing NIC to pay off its remaining "rent" and purchase the property from the Foundation. Sometime between November 17 and December 3, 2010, NIC delivered a check for approximately \$4.1 million to the Foundation. The Foundation immediately paid off its loan to the Bank, and the deed of trust was delivered to the Foundation. On that same day, a grant deed was executed by the Foundation, transferring ownership to NIC. So, as of December 3, 2010, NIC owned the Mill site.

As of December 3, 2010, NIC had paid the Foundation \$10,287,420.19 in “rent” covering the 499 days between July 23, 2009, and December 3, 2010. That works out to NIC having paid its own Foundation \$20,616.07 **per day** in “rent” for bare land! This absurdly large daily rental coupled with the transfer of title to NIC by the Foundation after the Foundation paid off its loan is further evidence that the “Lease Agreement” was, in fact, an installment purchase agreement intended to circumvent the voter approval or judicial confirmation approval required by the Idaho Constitution, Article VIII, Section 3.

But what about all that “prepaid rent” that NIC had prepaid through August 2013? If as the NIC Trustees and the Foundation asserted and represented to District Court Judge John T. Mitchell, NIC was only renting the property, shouldn’t NIC be trying to recover the “prepaid rent” paid for the time NIC actually owned the property? NIC shouldn’t use taxpayer money as “rent” for property it already owned! Shouldn’t the NIC Foundation be eager to return taxpayer money it was given but not entitled to keep?

“Yes” is the answer to both of those questions, but neither NIC nor the Foundation has done it. But how much of Kootenai County taxpayers’ money should be refunded?

The “Lease Agreement” doesn’t specify the annual “rent,” but dividing the agreed-upon amount of \$10,444,804.11 by the maximum allowable lease period of 48 months to get the monthly rent of approximately \$217,600.08, it can be calculated that NIC is due a refund from its Foundation of approximately \$6,745,602.60 in “prepaid rent” paid for time when NIC actually already owned the property after December 3, 2010. This calculated amount includes the “prepaid rent” portion of the \$4 million down payment paid by NIC on July 23, 2009.

In October 2009, Larry Spencer, Tom Macy, and I filed a civil lawsuit against NIC and the Foundation. The purpose of the lawsuit was not to stop the acquisition of the land by NIC. NIC is statutorily authorized to purchase land provided it does so in compliance with the Idaho Constitution and Idaho statutes. The lawsuit sought to compel NIC to seek voter approval or judicial confirmation for the expenditure of public funds as required by the Idaho Constitution, Article VIII, Section 3.

It was clear to us, and we believe it will be clear to those who read the linked documents, that the “Lease Agreement” scheme employed by NIC and the Foundation was in fact a prohibited installment purchase. Had District Court Judge John T. Mitchell allowed this to proceed to trial, that would have been proven at trial. Instead, Judge Mitchell awarded summary judgment to the defendants, concluding that the “Lease Agreement” was constitutional.

We believe Judge Mitchell’s decision was wrong, and we have appealed to the Idaho Supreme Court. We do not seek to have the Supreme Court “unwind” the transfer of ownership to NIC. Rather, we ask the Court to compel the Foundation to return several million dollars in “prepaid rent” paid wrongly by NIC to its Foundation for the time when NIC already owned the property. That several million dollars is Kootenai County property taxpayer dollars levied by NIC.