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Armand v. Opportunity Management Co., Inc. Appellant's Brief 1 Dckt. 39445

IN THE SUPREME COURT OF THE STATE OF IDAHO

GUIDO ARMAND, et al,

Plaintiffs/Appellants,

vs.

OPPORTUNITY MANAGEMENT CO. INC., et al,

Defendants/Respondents.

Supreme Court Docket No. 39445-2011

BRIEF OF APPELLANT

Appeal from the District Court of the First Judicial District
of the State of Idaho in and for the County of Kootenai
the Honorable Lansing Haynes Presiding

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I. STATEMENT OF THE CASE

A. Nature of the Case

This is a real property case involving (1) dedications of expressly labeled common areas upon a plat; (2) a subsequent re-plat over-lapping the original plat and obliterating said common areas following the sales of lots in the original plat; and (3) the common law dedication of a lake-front lot to the purchasers under the original plat. This matter was previously appealed, then remanded to District Court after this Court determined that the Appeal was premature, absent further action with regard to the surveys and locations of the easements. However, the issues raised and errors assigned to the District Court took place prior to the previous remand and appeal; thus, any and all references to the Record, Augmented Record, and/or Transcripts in this Brief are to those produced pursuant to 36557-2009, unless otherwise indicated. *See also* Order Taking Judicial Notice, on file herein.

This case is on appeal from the District Court's Memorandum Decision and Supplemental Memorandum Decision entered on June 22, 2007 (Augmented Record (Aug. R.) at 88–137) and July 22, 2008 (Aug. R. at 138–54) respectively, following a five-day court trial, which concluded on February 9, 2007, and a second court trial which concluded on May 29, 2008. The trial was conducted pursuant to a remand from this Court in its decision reported as *Armand v. Opportunity Management, Inc.*, 141 Idaho 709, 117 P.3d 123 (2005) (hereinafter "*Armand I*"), in which this Court held that (1) the Plaintiffs-Appellants (hereinafter "Appellants") had a valid interest in the areas expressly designated as "common areas" on the plat, *id.* at 714, 117 P.3d at 128; and (2) that genuine issues of material fact existed as to whether

or not a common-law dedication of the lot labeled as "Lot 10" on the Berven Bay Terrace ("BBT I") plat took place. *Id.* at 715, 117 P.3d at 129. Further, this Court held that the second plat, Berven Bay Terrace II ("BBT II") did not replace BBT I:

> While Opportunity would like to have the BBT plat declared void so that the BBTII plat would take its place, there is no support for that in § 50-1309. Thus, the unilateral actions of subsequent property owners re-platting part of the property into BBTII has no effect on the validity of the BBT plat and those areas designated as common areas.

Armand I, 141 Idaho at 714, 117 P.3d at 128. As such, to the extent Appellants received property rights under BBT I and the areas dedicated therein, pursuant to said ruling from this Court that BBT II does not replace it, BBT II cannot serve to divest Appellants of said rights.

However, the District Court treated the language in *Armand I* relating to the express common areas as "dicta," and allowed the entire matter to be re-tried on a *de novo* basis. *See* Memorandum Decision (Aug. R. 97–98); (Transcript (Tr.) at 146, 150, 153, 225).

During the course of the trial, in light of the District Court's choice not to treat the Supreme Court's ruling relating to the express common areas as the "law of the case," Respondents introduced additional evidence raising new issues surrounding the original developer's ownership of the property upon which many of the express common areas lie, (R. *Passim*). Also, the District Judge made a visit to the site following the trial, incorporating many of his observations into his Decision. (Aug. R. at 123–28). Both of these actions played a large role in the District Court's decision on the express common areas, Memorandum Decision, *id.*, and the Respondents were able to introduce additional evidence which they failed to provide to the District Court upon their original Motion for Summary Judgment.

As such, the District Court misinterpreted the Supreme Court's ruling in *Armand I*, and failed to apply the "law of the case" upon remand. The District Court committed further error in holding that Appellants possess only an easement in Lot 10 for "lake access," a vague ruling which will likely result in further litigation; and visiting the site when it was not necessary "in determining the weight and applicability of the evidence." *Lobdell v. State Board of Highway Directors*, 89 Idaho 559, 568, 407 P.2d 135, 140 (1965). Following the second court trial in May of 2008, the Court held, without any regard to the intent of the grantor, that Appellants were only entitled to limited access across Lot 10. (Aug. R. at 138–54). Therefore, for the following reasons, Appellants request that this Court reverse and remand the issue to the District Court, with directions to enter judgment in favor of the Appellants.

B. Course of the Proceedings

The course of the proceedings prior to the initial Appeal in this matter are set forth in *Armand v. Opportunity Management, Inc.*, 141 Idaho 709, 117 P.3d 123 (2005) ("*Armand I*"), and are contained in the record therein. This appeal forms the latest chapter in a legal dispute which has been on-going for nearly ten years. On July 23, 2002, Appellants filed the Original Complaint which initiated this action. Appellants then filed their First Amended Complaint on December 4, 2002, prior to any of the Respondents filing an Answer. Finally, the Amended Complaint was answered by Respondents Schadel, Blanchette, Opportunity Management, and Felsing on January 10 and 24, and March 11, 2003, respectively.

On June 26, 2003, Respondents Felsing, Schadel, and Blanchette moved for Summary Judgment. Following Appellants' Reply and several Motions to Strike filed by Respondents, the

District Court granted Respondents Motion for Summary Judgment on August 29, 2003, holding that: (1) the plat was invalid under Idaho Code § 50-1309 due to a lack of signatures; (2) that Appellants had no interest in the express common areas or Lot 10 on the Berven Bay Terrace plat; and (3) that Respondents were entitled to an award of fees and costs. It was from this Order granting Summary Judgment that the first appeal in this case was taken, and upon which the Idaho Supreme Court issued its decision in *Armand v. Opportunity Management, Inc.*, 141 Idaho 709, 117 P.3d 123 (2005) ("*Armand I*").

Following remand, the District Court stated its intent to treat all of statements from the Supreme Court relating to the express common areas as *dicta*, and would proceed to trial upon *all* of the various parcels of land which were in dispute. (Transcript (Tr.) at 146, 150, 153, 225).

A five-day court trial was conducted from February 5th through February 9, 2007. At the conclusion of the trial, the Court indicated that it would be conducting a subsequent visit to the site. The Court then issued its Memorandum Decision approximately four and one-half months later, on June 22, 2007. (Augmented Record (Aug. R.) at 88–137).

An additional trial was then held on the issue of the scope of the easement from about May 28, 2008 through May 29, 2008. After trial, the Court subsequently issued a Supplemental Memorandum Decision, which certified this matter for Appeal pursuant to Idaho Rule of Civil Procedure 54(b). (R. at 82). Appellants Siegwarth then filed a Notice of Appeal initiating 36557-2009. However, following the submission of Appellants' Brief and an initial Denial of a Motion to Dismiss filed by Respondents, this Court re-considered its decision, and remanded for additional action. Following the surveys and adoption of the report of the Master/Surveyor, and

a Motion to Reconsider a part of an earlier District Court determination, final judgment was entered. From this final judgment Appellants now appeal, and raise a number of issues on appeal in this matter, set forth below and in the Notice of Appeal, on file herein.

C. Concise Statement of the Facts

The facts are recited in detail in the text of the Supreme Court's decision in *Armand I*. *Armand I*, 141 Idaho at 712–13, 117 P.3d at 126–27. However, for the sake of convenience of the Court and the other parties to this action, they will be briefly set forth as follows:

In the late 1970's, Michael Smith (hereinafter "Smith") was the owner of all the property at issue in this case. Smith had purchased the property, which was comprised of Lot 35 of Wright's Park subdivision, in 1979, with the intent of developing the property into the Berven Bay Terrace subdivision (hereinafter "BBTI"). In approximately 1984, during the course of developing the subdivision, Smith built two homes in the subdivision, which were eventually sold, with one of the homes being purchased by Mark Schafhausen (hereinafter "Schafhausen") and the other home purchased by Knute Eie (hereinafter "Eie"). In addition to these sales, several of the other lots in BBTI were sold to John Schafhausen, Sr, father of Mark Schafhausen. (hereinafter "J. Schafhausen"). (Exhibit (Ex.) 75.4).

Following the transfer from Smith to Eie, but before the transfer from Smith to Schafhausen, a document purporting to forfeit an option to purchase held by Smith in the land located in Section 7, Township 51 North, Range 3 West (hereinafter "Section 7"), in which most of the expressly labeled common areas are located, was recorded on June 15, 1984, over one month after it was executed. (Ex. W). However, Respondents have, to date, failed to produce

the actual Option to Purchase which the document seems to "forfeit," and the Optionors, Kermit and Katherine Petersen, did not object to the conveyances of the BBTI lots according to the plat which dedicated said common areas.

Prior to Schafhausen's purchase of Lot 2, he contacted Smith regarding the development and lake access via Lot 17 of the proposed BBTI plat (Lot 17 later re-designated as Lot 10 on the final BBTI plat (hereinafter "Lot 10")). (Tr. at 333–45); (Ex. 79.2). Smith informed Schafhausen that Lot 10 (which was clearly not able to be built upon, and which was previously part of a public right of way), would be designated as a common area and would provide lake access to all BBTI lot owners, who would own the lot jointly. *Id.* Smith envisioned Lot 10 as the cornerstone of his development, providing lake access, boat docks, swimming, a picnic area and general recreation to all lot owners (past and future) within the subdivision. (Tr. at 310). This not only enticed Schafhausen to buy Lot 2, but also enticed his father, J. Schafhausen, to buy Lots 3, 4 and 5. (Tr. at 349–50), Schafhausen's deed was recorded on July 3, 1984. (Ex. 7.4). J. Schafhausen's deed was recorded on July 2, 1984, and contained language granting to him and to all other owners within BBTI shared access to Lot 10 (and the other common areas). *Id.* (hereinafter "Schafhausen Deed"). During this time, the proposed BBI plat was circulating among county and city offices for approval. The proposed plat designated numerous common areas, including, but not limited to, Lot 10. (Ex. 79.2).

It was around the same time that Lot 1 was purchased by Eie. (Ex. 11.7). On September 7, 1984, BBTI was platted and recorded. (Ex. 79.2). The southern portion of the plat, comprising the majority of the land at issue, contained land that was formerly Lot 35 of Wrights

Park subdivision. *Id.* At that time, J. Schafhausen executed consent to the plat, but Schafhausen and Eie were not asked to do the same. (Ex. UU). (Mark Schafhauen would record a Consent to the plat in 1991 – Ex. VVVVV). The plat for BBTI dedicated certain areas as common areas to be owned by all lot owners jointly, and clearly shows a common area between Lots 9 and 11, as well as several common areas on the north side of the subdivision. (Ex. 79.2). The common area between Lots 9 and 11 is a corridor from a cul-de-sac to Lot 10, and provides the only access to Lot 10 from Lots 11 through 17. Lots 1-9 have direct access to Lot 10. The corridor also provides the only access to and from Lot 10 other than through private property. *Id.* This corridor was meant to provide access to Lot 10 for all owners in BBTI. *Id.* The J. Schafhausen deed made clear that Lot 10, which touches the common area between Lots 9 and 11 shown in the deed, was meant to be a common area providing lake access to all lot owners in the subdivision. *Id.*; (Ex. 75.4). The Schafhausen and Eie lots were now part of BBTI.

In 1990, Eie sold Lot 1 to Appellants Siegwarth and Schafhausen sold Lot 2 to Plaintiffs Armand. (Exs. 11.8 and 11.10). The Siegwarths' and Armands' title insurance policies each contained reference to the fact that Lot 10 had been deemed a common area for all owners of lots within BBTI. (Exs. 73.2 and 98.1). The Siegwarth and Armand Deeds each note that the Deed is subject to all encumbrances and easements of record, which would necessarily include the joint ownership of and the right in Lot 10, as evidenced in a document of record, the J. Schafhausen Deed. (Exs. 11.8 and 11.10). Following recordation of the BBTI plat, Smith's financial difficulties caused him to lose the remainder of the property, excluding Lots 1-5, which were owned by Schafhausen, J. Schafhausen and Eie, to Kermit D. and Katherine M. Petersen

and Donald H. and Violet Klages (hereinafter "Petersens" and "Klages"). (Ex. EE). The deeds to Petersens and Klages purported to convey *all* of Smith's original interest in the property, including the property which had already been sold to Schafhausen, J. Schafhausen and Eie, as well as all of the common areas. Essentially, the deeds transferred the entirety of Lot 35 of Wright's Park. *Id.*

In the late 1980's Petersens, Klages and another family, Hedburg (herinafter "Hedburg") re-platted Lots 6-17 into larger lots, labeled Lots 1-8, in order to form Berven Bay Terrace Two (hereinafter "BBTII"). In this process, the former Lot 10 (previously Lot 17) became the new Lot 8. Other common areas were also subsumed in the replat. (Ex. 75.6). Specifically, a large part of the common area leading from Lakeview Drive along side Lots 3 through 6 and continuing into a cul-de-sac was subsumed. In addition, the entire common area along the north side of the development was subsumed. *Id.* These areas were clearly marked "common" and were jointly owned by all lot owners in BBTI, including Appellants. Neither Appellants, nor their predecessors consented to the replat. *Id.*

In addition, BBTII subsumed Lot 10 into Lot 8, which was now purported to be owned entirely by the owners of Lots 1-7 in BBTII. Respondents continue to argue this point despite the fact that, in Respondents' best case scenario, J. Schafhausen and the subsequent owners of Lot 2 in the BBTI subdivision, Plaintiffs Armand, received an ownership and/or usufructuary interest the lot, and, in Respondents' worse case scenario, *all* of the Appellants received an ownership and/or usufructuary interest the lot. Furthermore, neither the Appellants, nor the Schafhausens, nor the Eies, ever signed off on the BBTII plat. *Id.*

Even after the platting and recording of BBTII, the Kootenai County recorder's office continued to note that the BBTI lot owners never conveyed their interests in the common areas to the BBTII lot owners. The recorder's office noted that the BBTI lot owners still jointly retained an interest in common areas that were now platted and recorded in BBTII.

In the early 1990's, Respondent Opportunity Management Company (hereinafter "Opportunity") and Larry Blankenship (hereinafter "Blankenship") purchased the property owned by the Petersens, Klages and Hedburg, which by now was platted and recorded as BBTII. Opportunity and Blankenship then sold portions of the property to Respondents Schadel (hereinafter "Schadel"), Respondents Blanchette (hereinafter "Blanchette") and Respondent Felsing (hereinafter "Felsing"). The deeds, and as title policies, from Opportunity and Blankenship to Blanchette, Felsing and Schadel all referenced the deed from Smith to Schafhausen, which specified that Lot 10 of BBTI was a common area available for use by all owners of lots in BBTI. The warranty deeds related to the property sales also contained language specifying that all of Lot 8 and part of Lot 6 of BBTII were common areas subject to an *undetermined undivided common interest*.

The Appellants and their predecessors in interest took ownership of their property and purchased the same based on their reliance on the documents of record at the time of purchase. *See, e.g.* (Tr. at 337). The documents of record gave notice that the property had lake access via the common areas. Idaho Code § 55-811. The Appellants and their predecessors in interest relied upon this in deciding to purchase the property at issue and in paying the purchase price for the property at issue, which was increased based on the lake access and ability to use the

common areas. (Tr. 349, 350, 353, 386-87, 388-90, 395-96). The Appellants and their predecessors in interest also paid property taxes on the common areas and were taxed as if their properties had lake access. (Tr. at 417-19). The Appellants and their predecessors in interest used the property at issue on a regular basis, open, notoriously and continuously for lake access and other purposes, from the moment of purchase, continuing until today.

II. ISSUES PRESENTED ON APPEAL

Appellants present the following Issues on Appeal:

A. Whether the District Court erred in ruling that the language in *Armand I* concerning the expressly labeled common areas and the applicability of Idaho Code § 50-1309 was mere dicta, rather than establishing the "law of the case" and thus committed further error in allowing Respondents to present evidence at trial regarding the ownership of said common areas. Even if the District Court's determination on this issue was correct:

1. Whether the District Court erred in its determination that the dedication of the common areas located in Section 7 was ineffective.

2. Whether the District Court committed an error of law in interpreting the Sun Valley case to hold that a mortgagee of a mortgage recorded prior to the subdivision plat is not bound by the plat as recorded by the mortgagor.

3. Whether the District Court erred based on its interpretation of the Sun Valley case, given that the property was conveyed prior to the recordation of the plat and the recordation of the forfeiture of the property.

4. Whether the District Court erred in holding that Smith did not possess an ownership interest in Section 7 that would entitle him to convey this property.

5. Whether the District Court erred in its determination that the failure of the Section 7 dedications affected the Section 18 dedications, and whether it erred in using the value of Section 18 as the basis to make said determination.

6. Whether the District Court erred in holding that there was no evidence showing Appellants and/or their predecessors had previously utilized Section 7.

B. Whether the District Court erred in ruling that I.C. 50-1309 could be used against the Bervan Bay Terrace I plat while not considering its application to Bervan Bay Terrace II.

C. Whether the District Court committed an error of law in allowing Respondents to object to the Bervan Bay Terrace I plat in an untimely manner and/or on behalf of their predecessors in interest when their predecessors in interest did not object.

D. Whether the District Court's subsequent visit to the site constituted reversible error and whether District Court erred by bringing in its own factual evidence to support its legal conclusions.

E. Whether the District Court erred in its determination that the Appellants possessed only an easement in Lot 10 for "lake access," versus an ownership interest.

F. Even if Appellants' interest were an easement, whether the District Court erred in restricting the scope of the easement more narrowly than intended by the grantor, and by limiting the geography of the same based on conflict between the parties rather than the intent of the Grantor

G. Whether the District Court erred in its determination that the Appellants possessed an easement in Lot 10 for "lake access" versus an easement for recreational use and lake access.

H. Whether the District Court erred in failing to set forth the meaning of the term "lake access" when both parties requested the same in order to define the scope of the easement that the Court had determined existed, and further erred in refusing Appellants the right to present evidence at the continuation of trial related to their riparian, littoral or dock rights.

I. Whether the District Court erred in concluding that it could not determine the Grantor's intent based on the evidence in the record.

J. Whether the District Court erred in allowing a quitclaim to transfer of ownership when said quitclaim purported to transfer property which either no longer existed and/or purported to transfer property already owned by other persons — but did so without the consent of the persons who already had an ownership interest in said property.

K. Whether the District Court erred in finding that the plat of Bervan Bay Terrace II was a valid plat, despite the fact that it purported to subsume property already platted in a prior valid plat, without the consent of the owners of that plat.

L. Whether the District Court's determination that the Grantor, Michael Smith, abandoned the plat of Bervan Bay Terrace I made factual findings which was not supported by the substantial weight of the evidence.

M. Whether the District Court erred in granting Respondents' Motion for Bifurcation and deferring ruling on Appellants' Request for Jury Trial.

III. ARGUMENT

A. Standard of Review

In reviewing the District Court's determinations on matters of law, or relating to the application of the facts to the law, the Supreme Court will review such issues on a *de novo* basis. *Marshall v. Blair*, 130 Idaho 675, 679, 946 P.2d 975, 979 (1997) (Supreme Court exercises "free review over the district court's conclusions of law" and "may substitute its view for that of the district court on a legal issue."). Issues of fact are reviewed under the "clearly erroneous" standard. "In determining whether a finding is clearly erroneous [the Supreme] Court does not weigh the evidence as the district court did. The Court inquires whether the findings of fact are supported by substantial and competent evidence . . . Evidence is regarded as substantial if a reasonable trier of fact would accept it and rely upon it in determining whether a disputed point of fact had been proven." *Carpenter v. Terrell*, 148 Idaho 645, 647–48; 227 P.3d 575, 577–78 (2010).

Appellants raise herein both legal determinations to be reviewed *de novo*, as well as factual findings reviewed under the Clearly Erroneous standard..

B. The District Court erred in ruling that the language in *Armand I* with respect to the expressly labeled common areas and the applicability of Idaho Code § 50-1309 was mere dicta, and that it did not establish the law of the case, and, thus, committed further error in allowing Respondents to present evidence at trial regarding the ownership of said common areas.

In the *Armand I* decision, the Supreme Court explicitly stated that "Armands [and Siegwarths] *have a valid interest* in the areas that are expressly designated as common areas on the BBT[I] plat." *Armand I*, 141 Idaho at 714, 117 P.3d at 128. (emphasis added). Since the entire basis for the District Court's initial decision was that the plat was invalid for its failure to comply with the requirements of Idaho Code § 50-1309, *Armand I*, 141 Idaho at 714, 117 P.3d at 128, the reversal of the District Court's grant of summary judgment *required* that section 50-1309 be held not to apply to a dedication which did not involve public streets or rights of way—the *precise* holding of the Supreme Court in *Armand I*. *Id.* ("The plat in this case does not contain any public streets or rights-of-way and thus, it is difficult to see how this statute pertains here."). However, on Page 10 of its Memorandum Decision, the District Court, after acknowledging that the Supreme Court's statement was "clear," stated that it would be considering the language to be *dicta*, and concluded that "the only direction from the Supreme Court was that 'the District Judge's grant of summary judgment is reversed and the case remanded for further proceedings.'" (Aug. R. at 97). The District Court then proceeded to rule upon all of the issues surrounding all of the disputed lots, including the expressly labeled common areas, anew.

The law of the case doctrine is discussed in depth in the early Idaho case of *Hall v. Blackman*, 9 Idaho 555, 75 P. 608 (1904). There, the appellant was seeking a reversal of the trial court's refusal to consider issues which it had determined as the law of the case after a previous appeal involving the determination of water rights. On the issue which the appellant had sought to re-litigate, the Court stated that the "question was directly raised upon [the first] appeal, and

was squarely before the court, and its determination was essential to a determination of that appeal." *Id.* at 609. Furthermore, "whatever the opinion of the court might be at [the time of second appeal] as to the correctness of the conclusions there reached, or the soundness of any legal principle there announced, its judgment cannot now be invoked to disturb such questions as have become a final adjudication in the case." *Id.* In other words, as the rule is summarized in the headnotes to the reported version of the case, "the appellate court is bound by its decision on a prior appeal in the same cause, whether right or wrong." *Id.* at 608.

Here, as in the *Hall* case, the issue of the expressly labeled common areas and the applicability of section 50-1309 "was directly raised upon the first appeal, was squarely before the court, and its determination was essential to a determination of that appeal." If section 50-1309 *did* apply, based upon the faulty copy of the plat upon which the signatures were omitted (although the plat was, in fact, signed), the District Court's initial determination would have been correct—the plat would have been void for failure to comply with the statute, and the appeal would have been taken on whether or not a genuine issue of material fact existed as to a common law dedication of said common areas. However, since section 50-1309 did *not* apply, a valid statutory dedication[1] *had*, in fact, taken place, and it was therefore not necessary to remand for further findings upon the issue—the express labeling of the common areas on a valid plat

[1] While the Supreme Court in *Armand I* and the parties refer to the private dedication of expressly labeled common areas as a "statutory dedication," this is, in fact, somewhat of a misnomer, as Idaho's dedication statutes mainly apply only to public dedications. *See, e.g.*, Idaho Code § 50-1312. Rather, the dedication statutes are invoked by analogy in the case of *Smylie v. Pearsall*, 93 Idaho 188, 457 P.2d 427 (1969), which held that "[w]hen an owner of land plats the land, files the plat for record, and sells lots by reference to the recorded plat, a dedication of public areas indicated by the plat is accomplished. This dedication is irrevocable except by statutory process. The original owner is estopped to deny the dedication of public areas indicated on the plat." *Id.* at 191, 457 P.2d at 430. And that common areas delineated on the plat become a "part of the deeds" and become "appurtenances to the lots." *Id.* at 192, 457 P.2d at 431.

effected an *ipso facto* dedication of said common areas for the benefit of the BBTI lot owners, and there was no need to re-litigate that portion of the dispute. *See Smylie v. Pearsall*, 93 Idaho 188, 191–92, 457 P.2d 427, 430–31 (1969). If there were any potential issues surrounding Smith's ownership of a portion of the property upon which the BBTI plat was located, the time and the place to raise those issues was in Respondents' Motion for Summary Judgment prior to the first appeal. Since Respondents did not raise those issues at that time, any issues surrounding Smith's ownership of a portion of the property should be deemed waived, and the trial court erred in entertaining and considering further evidence on the issue on a remand for determination of the Lot 10 issues. Thus, this Court should *reverse* the ruling of the District Court outright with regard to expressly labeled common areas on the grounds that the holding in *Armand I* quieted title to said areas in the Appellants as the law of the case, and should remand to the District Court with instructions to enter a final order in Appellants' favor to that effect.

C. Even if the District Court was correct in viewing the *Armand I* language as dicta, the District Court erred in holding that the dedication of the Section 7 property was defective, and that Smith failed to possess an ownership interest therein which would entitle him to convey said property.

Even in the event that the Supreme Court in the *Armand I* decision did not intend to issue a definitive ruling on the expressly labeled common areas, the District Court erred in determining that the dedication of said common areas failed with regard to the land located within Section 7. The District Court's decision and Respondents' argument with regard to this property centers upon the fact that Smith may have merely had an option to purchase those areas

at the time of dedication, therefore, he did not have a right to dedicate. However, since: (1) Only the optionors (the Petersens) would have standing to raise any possible objection to the dedications by Smith of the Section 7 property; and (2) even if the Respondents somehow received the optionors' standing to object, the optionors acquiesced in the dedications and sales, and, thus, are estopped from revoking the dedication, the District Court's decision is incorrect as a matter of law.

While there is no case law directly on point regarding an optionee's ability to dedicate land, there is a line of cases from other jurisdictions relating to the dedications on the part of mortgagors which prove instructive on this issue, most notably the Florida decision in *Weills v. City of Vero Beach*, 96 Fla. 818, 119 So. 330 (1928). While an option to purchase is not a "mortgage," a direct analogy may be drawn between the optionor-optionee relationship and the mortgagee-mortgagor relationship in the context of this case.[2] It is beyond dispute that the person holding an option possesses property rights in, at the very least, that option. To use the classic analogy of property rights, a holder of one or more of the "sticks" in the "bundle" may alienate or otherwise transfer his own "sticks" in whatever manner he pleases, just so long as he does not purport to transfer "sticks" which he does not hold. As the Florida Court states, "[A] mortgagor may of course dedicate land to the public use so as to divest himself of any rights in the property dedicated." *Weills*, 96 Fla. at 822, 119 So. at 332. That is to say, the mortgagor may dedicate his own "sticks" to the use or ownership others, but he may not so transfer the "sticks" of the mortgagee.

[2] Appellants, of course, recognize that this analogy may not be appropriate in all circumstances, most notably option forfeiture and mortgage foreclosure.

Likewise, an optionee also possesses certain "sticks" out of the "bundle" that constitute property rights—the exclusive right to purchase that property for a certain period of time. Since this option to purchase is the property of the optionee, he may assign or otherwise divest himself of his rights, which would include the right to dedicate. The optionor also possesses certain "sticks" from the "bundle," and is directly analogous to a mortgagee. Since the underlying rationale of the rule relating to mortgaged land is the maxim "*nemo dat quod non habet*" ("one cannot give what one does not have"), and since that is, essentially, the same argument Respondents offer on this issue, the estoppel exceptions which allow a Court to exercise its equitable powers in order to prevent a mortgagee from asserting its objection in certain circumstances would also apply to an optionor.

In this case, although the forfeiture document was executed on May 10, 1984, said document was neither acknowledged nor recorded until ***June*** 14 and 15, 1984 respectively (Ex. W)—well ***after*** the transfer to Siegwarths' predecessor in title, Mr. Eie, on May 25, 1984, (Ex. 11.7), who purchased in reliance upon the dedications on the then-proposed plat. Under the rules discussed in detail above, and under Idaho Code § 55-812, the forfeiture was *void* as against Mr. Eie, and, therefore, as against Appellants Siegwarth. Ergo, the dedication of the common areas by Smith to Siegwarths via Eie was complete and *irrevocable*, and the optionor, as the mortgagee in *Weills*, "by [his] acquiescence in said dedication, ratified such dedication as is *now estopped to revoke such dedication*." *Weills*, 96 Fla. at 821, 119 So. at 331 (emphasis added). If the optionors truly wished to object to the dedication of the land through their execution of the forfeiture, then they would have acknowledged and recorded their document less than *one month*

following the signing of said document, and would have certainly done so sooner than a full *three weeks* following the sale. Eie, and later, Siegwarth, purchased this lot based upon their reasonable reliance upon legally recorded documents, and the principle that their interest shown on their plat was valid. There is *no* rule of law which allows an optionor, or a mortgagee, to object to a dedication a full three weeks after the dedication has taken place. Therefore, even if a common law dedication must be shown vis-à-vis the express common areas located in Section 7, it has been fully consummated.

Although the transfer to Plaintiffs Armand's predecessor in title took place following the recording of the Forfeiture document, the Respondents are likewise estopped from revoking the dedication under the estoppel principle discussed in *Weills*. Once the dedication of certain lands has been made, it is irrevocable. As the Idaho Supreme Court stated in *Smylie*:

> This dedication is *irrevocable* except by statutory process. The original owner and platter of such land is *estopped to deny the dedication* of public areas indicated on the plat. One purpose of this doctrine is to *protect the interests of purchasers of platted lots in their reliance upon the valuable maintenance of such public areas*.

Smylie, 93 Idaho at 191, 457 P.2d at 430 (emphasis added). The court goes on to quote the Kentucky Supreme Court in stating: "It is presumed that *all* such places add value to *all* the lots embraced in the general plan and that the purchasers invest their money upon the faith of this assurance that such open spaces, particularly access ways, are *not to be the private property of the seller.*" *Id.* at 192, 457 P.2d at 431 (emphasis added). In other words, since the Respondents

are estopped from revoking the dedication to Siegwarths' predecessor, they are estopped from revoking the dedication to Armands' predecessor as well.

Therefore, even if there is a problem surrounding Smith's ownership in the portion of the plat located in Section 7, the mortgage dedication rules apply by direct analogy, and the optionors failed to object to Smith's dedication of the common areas located in that area. Given that the recording statutes remain in full force and effect, since the forfeiture was not recorded until over three weeks after Eie purchased the first lot, it was not effective against Eie, and could not have operated as an objection to the dedication. As such, Respondents are thus estopped from objecting to any dedication of the land located in Section 7 on the basis of the Option and Forfeiture.

Furthermore, the District Court states that there "is nothing in the record to show the owners of the ground even knew about . . . Smith's recording the BBT I plat in September of 1984." (Aug. R. at 104). This is contradicted by the express language on the *face* of the BBT II Plat, which states that it is re-plat of a portion of BBT I. (Ex. 75.6), i.e., it makes little sense that the signatories to the second plat would expressly state that they are attempting to re-plat a portion of a plat of which they were not aware. Further, this statement by the District Court is *directly contrary* to the statutory language of Idaho Code § 55-811, which states that every conveyance of real property which has been properly acknowledged and recorded imparts constructive notice. Moreover, the testimony at trial and Smith's deposition testimony show that the Petersens may have also had *actual* knowledge of Smith's activities surrounding the BBTI plat, (Tr. At 286) (Smith's testimony that he approached Petersen regarding re-conveyance of the

property once he ran into financial difficulties); (Tr. at 290) (Smith's testimony that he was in contact with Petersen); (Tr. at 294) (indicating that Petersen may have been aware of Smith's original development plans) and, also, the proposed plat had been properly advertised and approved by the Hayden Lake City Council (Tr. at 263); (Exs. 95.2–95.7, 103.1). Thus, the District Court is in error on this account as well.

As for the District Court's discussion of the Sun Valley cases and its discussion of the title held by an optionee, under *Sun Valley Hot Springs Ranch, Inc. v. Kelsey* 131 Idaho 657, 662–63, 962 P.2d 1041, 1046–47 (1998), while this Court in that particular case did hold that the purchasers of the lot took subject to the mortgage, this is not in conflict with the rule in the *Weills* case, nor does the decision defeat Appellant's analogy in this case. In *Sun Valley Hot Springs*, the mortgagee and the developer made it *clear* that the lots were to remain subject to the mortgage, and that the mortgagee reserved its right to foreclose if the developer defaulted. *Id.* Since the mortgagee did *not* simply watch silently while the developer sold and dedicated various property within the subdivision, the court correctly concluded that there was no estoppel in that case. *Id.* Here, however, the Petersens *failed* to raise any objection to the BBTI, and *did* simply stand by and watch while Smith sold the lots to purchasers, which sales were induced by the common areas on the proposed, and finally recorded, plat. (Tr. 349, 350, 353, 386-87, 388-90, 395-96). As such, *Sun Valley Hot Springs* is clearly distinguishable from the case at bar with regard to this issue.

On the issue of the title possessed by an optionor and optionee, this, likewise, does not defeat the mortgage analogy. The estoppel principle has been adopted by jurisdictions which

follow the "title theory" with regard to mortgages, in which a mortgage operates as an actual conveyance of title to real property to the mortgagee, rather than simply a lien. *See, e.g.*, *Manning v. House*, 211 Ala. 570, 100 So. 772, 775 (1924) (holding that mortgagee which knew of, and participated in, sales would be estopped from objecting to dedications of certain streets) *and Trauner v. Lowrey*, 369 So.2d 531, 534 (Ala. 1979) (reaffirming that Alabama follows the "title theory" with regard to mortgages). In other words, the principle of estoppel with regard to dedications *has* been held to operate to the detriment of holders of *legal title* to property, such as the Petersens, rather than simply the loss of a lien interest.[3] Therefore, the District Court erred in holding that the analogy to the mortgagor-dedication cases does not apply, and its decision should be reversed and the cause remanded for the entry of an order quieting title to the expressly labeled common areas in the Appellants.

D. Even if the Dedication of the Common Areas located in Section 7 failed, the District Court erred in determining that this resulted in a failure of the dedication of the disputed labeled common areas in Section 18 as well, and the District Court erred in using the value, (either monetary or utilitarian—or both) of Section 18 as the basis to make said determination .

Perhaps the most puzzling aspect of the District Court's Decision is its holding that, due to the failure of the dedication of the common areas located in Section 7, the requisite intent to dedicate the remaining portions of said common areas was lacking as well, resulting in a failure.

[3] Of course, Appellant recognizes that Idaho is a "lien theory" jurisdiction with regard to mortgages, and the discussion of the Alabama cases is included for the sole purpose of illustrating the fact that the person or entity holding legal title to property does not defeat the principle of estoppel to object to a dedication.

(Aug. R. at 117–19). However, even assuming *arguendo* the Smith lacked the *ability* to dedicate the lands located in Section 7, this does not equate to a lack of *intent* to dedicate. According to the rules in *Smylie*, labeling of properties on a plat as common areas, and subsequent sales according to said plat *ipso facto* satisfy the requirements of intent and acceptance. *Smylie*, 93 Idaho at 191, 457 P.2d at 430. The problem the District Court found with regard to the Section 7 dedication related to Smith's *title*, *not* his intent. In addition to the BBTI plat, there has been *substantial* testimony and evidence as to Smith's intent to dedicate the common areas, including Smith's own deposition testimony. (Tr. at 265, 273-74, 275-77, 279, 280).

There was never any dispute over Smith's ownership of the land in Section 18, which was formerly known as Lot 35 of Wright's Park Addition. The 1979 deed clearly conveys this particular property to Smith, (Ex. 79), and none of the issues surrounding his ability to dedicate which were present with regard to the land in Section 7 are present with regard to the land located within Section 18. Therefore, since; Smith indisputably owned the Section 18 property; he expressly labeled portions of said property as "common areas" on the BBTI plat, evidencing an unequivocal intent to dedicate; and subsequent purchasers according to the plat accepted the dedication via their purchase. The dedication was, therefore, complete, and any possible problems which may have existed surrounding Smith's ownership of the Section 7 land is *wholly and entirely irrelevant* as it relates to the dedication of portions of the land located within Section 18. As such, even if this Court determines that the District Court was correct in holding that the Section 7 dedications failed, this Court should reverse the District Court's decision as to the

Section 18 common areas, and remand with instructions to enter an order quieting title thereto in the Appellants.

Another basis upon which the District Court sets forth for its determination with regard to the Section 18 common areas is that, in light of the failure of the Section 7 common areas, the remaining Section 18 common areas are essentially useless, and, therefore, the dedication somehow failed (although the District Court fails to cite any authority on this point). However, it is an established matter of Idaho Law that a dedication remains irrevocable, despite its utility, and whether or not the property has actually been used or developed.

A clear example is the case of *Worley Highway Dist. v. Yacht Club of Coeur d'Alene, Ltd.* 116 Idaho 219, 775 P.2d 111 (1989), involving a strip of land dedicated as a public road in 1904, but which had never been developed or put to use. In that case, the Supreme Court held that, since the District Court had conceded that the 1904 plat was valid pursuant to the statutes then in effect, and since the subsequent sales of the lots in the plat constituted an acceptance for the purposes of common-law dedication as well, the dedication became irrevocable pursuant to the rule in *Smylie. Worley Highway Dist.*, 116 Idaho at 226, 775 P.2d at 118. This "irrevocable character of a common law dedication is *not affected* by the fact that the property *is not at once subjected to the use as designed*." *Id.* at 227, 775 P.2d 111 (emphasis added). Since a failure to exercise a valid dedication for *eighty-five years* following said dedication did not result in a loss of the property at issue, the fact that the common areas located within Section 18 may have been rendered unusable by a possible failure of the dedications in Section 7 is irrelevant for the purposes of determining the validity of the dedication. The only possible bearing the usability of

the land may have upon this case is as it would relate to the damages to which Appellants are entitled, an issue which was not decided upon by the District Court given its determination. Thus, once again, this Court should reverse the decision of the District Court with instructions to enter an order quieting title to the common areas at issue in the Appellants, and for determination of the damages to which Appellants are entitled.

E. The District Court Erred in Determining that there was No Evidence Showing Appellants and/or their Predecessors had Previously Utilized Section 7 or the Section 18 Common Areas.

The testimony at the initial trial, in support of Appellants' alternative argument in favor of an easement by prior use or by prescription in the expressly labeled Common Areas, clearly established that Appellants Siegwarth, and their predecessors in interest, used said common areas openly, notoriously, continuously, and in an uninterrupted manner under a claim of right, with the knowledge of Respondents and/or their predecessors in interest. *See* Idaho Code § 5-203 (five-year period then in effect); *Walker v. Hollinger*, 132 Idaho 172, 176, 968 P.2d 661, 665 (1998). Mark Schafhausen testified that he used the common areas "all the time" and "on a regular basis," (Tr. at 352–54), and Appellant Robert Siegwarth testified extensively as to his and his family's use of the common areas (Tr. at 452–58, 506–08) while Respondents' witness testimony was conflicting and muddled at best: They first testified they did not see Appellants use the property but acknowledged they had only finite opportunity to do so. (Tr. at 809, 945). Further, they testified they did not see Appellants build trails–which took years – but acknowledge, that Appellants must have built trails as said exist. (Tr. at 845, 863, 919). So

simply not seeing Appellants use does not establish that it did not occur. Further, Respondents' witness Stan Brazington testified that there were no trees on the lake frontage, while others testified it was heavily treed and brushed – some Respondents testified that they had to machete through it – while others say they walked right down. (Tr. at 781, 793, 794, 866). All admit debris flowing in and collecting said debris is an annual event. (Tr. at 698, 699, 751, 779, 784–85).

Also, with regard to Respondents' contention that Appellants were subsequently prevented from using the areas in question via physical barriers, this is clearly rebutted by the testimony of Appellants' witnesses: Appellants testified that the fence is finite, leaving access to the area at issue on either side of the fence; that the berm is nothing more than the natural grade of the property and that it, too, fails to prevent access to the area at issue; and that they have always assumed that the no trespassing sign did not apply to them as owners of property within Berven Bay Terrace. (Tr. at 691).[4] Therefore, the Court's determination was not supported by substantial and competent evidence on the record and should likewise be reversed.

F. The District Court Erroneously Applied Idaho Code § 50-1309 Against the BBT I Plat Without Considering its Application to the BBT II Plat.

In its initial Memorandum Decision (Aug. R. at 101–02), the District Court, in light of its failure to consider this Court's ruling in *Armand I* to be the law of the case despite the clear language therein, appears to re-visit, or at least consider the possibility of revisiting, the issue of

[4] It should also be noted that Respondents were on notice that they were encroaching upon the upper common areas as early as May of 2000, when Appellants Siegwarth brought the matter to their attention at the meeting regarding the placement of the dock. (Tr. at 415, 421).

the applicability of Idaho Code § 50-1309, although not on the basis that the plat was unsigned, but that the signatory to the plat was not the record owner of the property. (Aug. R. at 103). However, given that BBT II attempted to dedicate property in which others had ownership interests, namely the Appellants' and/or their predecessors in interest, the District Court *fails* to address the effect of lack of said signatures upon the owner's certification for BBT II.

Moreover, at the very least, the District Court's statements reflect that it either did not fully comprehend this Court's findings in *Armand I*, or that it chose not to abide by what is clearly the law of the case:

> This [District] Court believes that the Supreme Court opinion, as written, does not necessarily hold that section 50-1309 cannot have any application to this case. The only statement in the opinion is that "it is difficult to see how this statute pertains here." However, the basis of the decision by the Supreme Court, to reverse the grant of summary judgment in favor of the defendants, appears to this [District] Court to be based upon the Supreme Court's conclusion that, even if section 50-1309 did apply, plaintiffs had nonetheless raised valid factual disputes with regard to defendants' claim that the BBT I plat was void

(Aug. R. at 100). Further statements indicate further confusion on the part of the District Court as to what portions of the Idaho Code apply, and also indicate that the District Court possibly came under the impression that, if this Court did, in fact hold that section 50-1309 did not apply, then *no* statutory provision applied *see, e.g.*, (Tr. 147–50).

In *Armand I*, this Court makes it clear that it is simply responding to Respondents' argument that the failure to conform to the requirements of section 50-1309 rendered the plat invalid. Since several of the lots at issue in this case were clearly designated as common areas, if the plat were allowed to stand, the Defense would be left with no basis on which to deny

ownership in the Appellants, for "[w]hen an owner of land plats the land, files the plat for record, and sells lots by reference to the recorded plat, *a dedication of public areas indicated by the plat is accomplished.* This dedication is *irrevocable* except by statutory process."[5] Further, "The original owner and platter of such land is *estopped to deny the dedication of public areas indicated on the plat.*" [6] In order to escape this cardinal principle of black-letter law, Respondents' only hope was somehow to attack the validity of the plat, and, if successful, would then no longer be so bound as to accept the express dedication on the recorded plat. Since the faulty copy of the original plat on record in *Armand I* appeared not have been signed by all of the parties, the section to which the plat failed to conform would appear to be Idaho Code § 50-1309.

However, this Court did not accept Respondents' attack on the validity of the Berven Bay Terrace plat. In explaining its rejection of Respondents' argument, this Court begins with the plain language of the statutory provision, which reads:

> 1. The owner or owners of the land included in said plat shall make a certificate containing the correct legal description of the land, with the statement as to their intentions to include the same in the plat, and make a dedication of all *public streets and rights-of-way* shown on said plat, which certificate shall be acknowledged before an officer duly authorized to take acknowledgments and shall be indorsed on the plat.

Idaho Code § 50-1309 (emphasis added). However, since the dedications at issue were common areas, and not "public streets or rights of way," section 50-1309 did not apply: "[T]he provision as a whole appears to relate to dedicating *streets and rights-of-way* for public use . . . The plat in this case *does not contain any public streets or rights of way*, and thus, it is difficult to see how

[5] *Smylie v. Pearsall* 93 Idaho 188, 191, 457 P.2d 427, 430 (1969) (emphasis added).
[6] *Id.* (emphasis added).

this statute pertains here." *Armand I*, 141 Idaho at 714, 117 P.3d at 128 (emphasis added). In other words, section 50-1309 had a narrow application, and the plat in this case did not fall within that narrow application. Since the plat was not invalid, the rule of law regarding the listing of common areas on a plat applied, and "[t]herefore Armands have a valid interest in the areas that are expressly designated as common areas on the BBT plat." *Id.*

Where this Court did resort to a discussion of "common law dedication" was in its discussion of the issues surrounding Lot 10. Since Lot 10 was not expressly designated as a common area, the face of the plat was not dispositive of the issue, and it was necessary to examine whether or not genuine issues of material fact existed as to the common law elements of intent and acceptance.[7] In the end, of course, this Court determined that genuine issues of material fact did exist as to whether or not there was a common law dedication of Lot 10, and the case was remanded to this Court for determination on those issues.[8]

In sum, this Court did *not* determine that *none* of the statutory provisions of the Idaho Code applied, but simply that Idaho Code *§ 50-1309* did not apply, because the dedications at issue were not public streets or rights of way. Since that particular statute did not apply, the plat was not invalid for its failure to meet its requirements, ergo, the rule regarding the dedication of common areas expressly designated as such on the plat was in full force and effect vis-à-vis those common areas, and title in said common areas were vested in Appellants as a matter of law. However, since Lot 10 was *not* expressly dedicated as a common area *on the face of the*

[7] *Armand I*, 141 Idaho at 714, 117 P.3d at 128 ("*Because the BBT plat does not designate Lot 10 as a common area*, Armands must prevail on the common law dedication theory in order to claim an interest in Lot 10.") (emphasis added).
[8] *Id.* at 716, 117 P.3d at 130.

recorded plat, it was necessary to enter into a factual inquiry as to whether or not a common law dedication took place, and this court discusses the elements which Appellants must show, i.e., intent to dedicate and acceptance. Thus, the District Court's Judgment should be reversed to the extent that it relies upon Idaho Code § 50-1309 and/or to the extent that it fails to apply the additional statutory provisions at issue in this case.

G. The District Court Erred in Allowing Respondents to Object to the BBT I plat in an Untimely Manner and/or on Behalf of Their Predecessors in Interest when their Predecessors in Interest Did Not Object.

By allowing Respondents to call into question the validity of, at least, the Section 7 common areas shown in the plat, in addition to failing to apply the Law of the Case, the District Court, in effect, allowed Respondents to object to the BBT I plat following any and all deadlines set forth by statute regarding raising objections to a proposed plat. Pursuant to statute and the operative case law, had Respondents' predecessors in interest wished to object to the BBT I plat, they had a limited time to do so. *Curtis v. City of Ketchum*, 111 Idaho 27, 33, 720 P.2d 210, 216 (1986). Furthermore, even if it were possible now to raise an objection to BBTI, there is no operative provision in Idaho Law which allows a successor in interest to raise said objection on behalf of the owner of the land at the time the plat is presented and recorded. As such, as set forth in section II.C above, Respondents have no standing to raise the objection with regard to BBT I.

Thus, the District Court's ruling regarding the BBT I plat in Section 7, in addition to the portions of said plat in Section 18 (namely the expressly named Common Areas) should likewise be reversed on these grounds as well.

H. The District Court's Subsequent Site Visit Constituted Reversible Error and the Court Erred by Bringing in Its Own Factual Evidence to Support its Legal Conclusions.

At the close of the initial trial, the District Court stated that it intended to conduct a visit of site of the BBT subdivisions prior to entering a ruling on the matter. In its ruling, the Court relies upon several of its observations from the site visit, relying upon said visit in its lengthy description of the topography of the site, its belief as to the impracticability of the original BBTI plat, and its conclusion that Smith may have been a "total air head." (Aug. R. at 123–28). However, since the information gained from the site visit went beyond simply "determining the weight and applicability of the evidence introduced at trial," and was "considered as evidence or [had] the effect of supplying evidence independent of, or in addition to, that taken in the course of the trial, or supplanted evidence adduced," the site visit was improper and amounts to reversible error. *Lobdell v. State Board of Highway Directors*, 89 Idaho 559, 567–68, 407 P.2d 135, 140 (1969).

I. The District Court Erred in its Determination that Appellants Possessed Only an Easement in Lot 10 for "lake access" Versus an Ownership Interest.

When determining the nature of an ambiguous conveyance of the a property right, it is a *cardinal* rule that the intent of the Grantor *controls*. *Porter v. Bassett*, 146 Idaho 399, 404, 195

P.3d 1212, 1217 (2008) ("In interpreting and construing deeds of conveyance, the primary goal is to seek and give effect to the real intention of the parties."). In this case, the language upon the Schafhausen Deed, further bolstered by the testimony of Smith, the original Grantor, in addition to the substantial weight of the evidence on the record, (Tr. at 265, 273-74, 275-77, 279, 280)), makes it *clear* that his original intent was to dedicate Lot 10 for the use of all of the lot owners of the (then proposed) BBT I plat. With regard to the nature of the title conveyed, the case of *Latham v. Garner*, 105 Idaho 854, 673 P.2d 1048 (1983) discusses several authorities which hold that, in the case of the grant of a purported easement interest in which the Grantor retains no rights to continued use of the servient estate, i.e., for the exclusive use for the Grantees, the nature of the title conveyed is that of fee simple. *Id.* at 856, 673 P.2d 1050. *See also Butler v. Haley Greystone Corp.*, 352 Mass. 252, 257–58, 224 N.E.2d 683, 687–88 (1967) (holding that, when the intention of the grantor of a beach easement, similar to Lot 10 in the instant case, is that it be exclusively a part of a development scheme and for the benefit of only the lots in said development, title may be quieted in the lot owners, and the developer may *not* grant interests in favor of lot owners in a second development).

As in *Butler*, the evidence on the record herein is clear that Smith intended for Lot 10 to be exclusively part of the BBT I development scheme, and for the benefit of only the lots in BBT I. There was *no* intent on the part of Smith to retain an interest in the Lot either for his own use, or for the use of other developments beyond BBT I. Therefore, pursuant to *Latham* and *Butler*, this Court should give effect to the clear intent of the grantor, and hold that the conveyance of Lot 10 via the Schafhauen Deed grants a fee simple interest to the lot owners in BBT I.

J. Even if the Interest in Lot 10 was Only an Easement, the District Court Erred in Restricting the Scope of the Easement More Narrowly than Intended by the Grantor by Declining to Allow Recreational Use in Addition to Lake Access, and Further Erred in Limiting the Geography Thereof Based Upon Conflict Between the Parties Rather Than the Intent of the Grantor.

Even in the event that this Court should determine that the nature of Appellant's interest in Lot 10 is an easement, rather than an ownership, interest, the substantial weight of the evidence on the record points toward a broad easement, for general recreational use incident to access to the lake, rather than simply crossing the lot on fixed paths. The District Court itself even appears to concede that the intent of the grantor was to grant a broad interest in favor of the BBT I lot owners. (Aug. R. at 134–36).

There is *no* finding, *no* conclusion, and, indeed, *no* evidence which would show that Smith intended to grant *anything less* than the *entirety* of Lot 10 for the purposes of access to the lake, and that "access to the lake" is anything less than *all* that may be implied from that phrase. *See Foster's Inc. v. Boise City*, 63 Idaho 201, 213, 118 P.2d 721, 726 (1941) ("*Dedication* or condemnation of a street contemplates the *most onerous and injurious mode of use to which it can lawfully be devoted*.") (emphasis added).

Moreover, the Schafhausen Deed states that "the Lake Frontage contained in Lot 10 of the proposed Berven Bay Terrace Subdivision may be used by the Grantee herein and its successors and assigns and by all the other owners of lots in proposed Berven Bay Terrace Subdivision for access to the lake." (Ex. 77.2). The evidence and testimony presented at trial

make it clear that the "location and width" of the easement ***is Lot 10***, which the District Court even notes in its own initial Memorandum Decision:[9] "[Smith] intended ***Lot 10*** to serve as a means for the residential lot owners to be able to claim some sort of right of access to the lake." (Aug R. at 128) (emphasis added). Interpreting the Schafhausen Deed: "[the] language states that the grantees and its successors and assigns may use ***Lot 10*** 'for access to the lake.'" *Id.* at 131 (emphasis added). The *only* issues raised during this case with regard to Lot 10 were: (1) whether or not a dedication took place; and (2) the nature of the interest conveyed by said dedication. Both were answered by the Memorandum Decision: (1) a common law dedication of Lot 10 did, in fact, take place, *id.* at 41, 44; and (2) the nature of the interest conveyed was an easement, rather than title in fee simple. No argument was made by *any* party to this case that Smith only intended to dedicate a *portion* of Lot 10. The "location and width" of said easements were the boundaries of the common areas and Lot 10 as shown on the plat.

In further support of the fact that the District Court's findings supported a common law *dedication* of the entirety of *Lot 10*, the property interest in which was the nature of an easement, Appellants would note this Court's citation to the *Ponderosa* cases. In the *Ponderosa* cases, the dispute was over the dedication of a parcel of land, which had also been dedicated for the purpose of "lake access." *Ponderosa Home Site Lot Owners v. Garfield Bay Resort, Inc.*, 139 Idaho 699, 85 P.3d 675 (2004) (hereinafter "*Ponderosa I*"); *Ponderosa Home Site Lot Owners v. Garfield Bay Resort, Inc.*, 143 Idaho 407, 146 P.3d 673 (2006) (hereinafter "*Ponderosa II*"). In

[9]By referring to the District Court's Memorandum Decision in this portion of the Brief, Appellant is not in any way waiving those errors of fact and law set forth therein, but, rather, is challenging the District Court's conclusion regarding the nature of the easement following from said finding even accepting, solely *ad arguendo*, the District Court's finding the Appellants only possess an easement interest.

Ponderosa II, cited on page 44 of the District Court's Memorandum Decision (Aug. R. at 131), this Court held that the common law dedication of the parcel of land at issue to that case: (1) conveyed an easement, rather than fee simple title to the servient land, thus allowing for conveyance of title to said land; and (2) said easement "[did operate] to *estop the owner from asserting rights of possession and ownership commonly associated with ownership*." *Ponderosa II*, 146 P.3d at 676 (emphasis added). Taken in this context, it becomes even more clear that the District Court's finding of an "easement" upon Lot 10 for "lake access" could *not* be based upon any intent to dedicate some small portion of Lot 10 for use as an easement in order to reach the lake, but that the *entire lot* was intended for use as lake access by *all* of the BBTI lot owners, with the owner of the servient land remaining free to transfer his limited remaining interest. Since there is *no question* as to the "location and width" of Lot 10, the second trial in May of 2008 was entirely unnecessary, and the District Court's Supplemental Memorandum Decision based thereon is *not* consistent even with its own prior factual findings.

Respondents may raise an argument that an that an easement may not unreasonably interfere with the rights of the owner of the servient estate. Initially, on that regard, Appellants would argue that the law of the case would mandate that Appellants and Respondents be treated equally with regard to their interests in Lot 10, as this Court held in *Armand I:*

> While Opportunity would like to have the BBT plat declared void so that the BBTII plat would take its place, there is no support for that in § 50-1309. Thus, the unilateral actions of subsequent property owners re-platting part of the property into BBTII has no effect on the validity of the BBT plat and those areas designated as common areas.

Armand I, 141 Idaho at 714, 117 P.3d at 128. Given that the attempt to re-plat over BBT I was ineffective, any interest in Lot 10 on the part of Respondents would flow from their ownership of the portions of land platted as BBT I located within the boundaries of BBT II, and, thus, Respondents and Appellants should not be treated as fee-owner versus easement-holder.

However, even if this Court chooses to treat Respondents as fee simple owners of Lot 10, a broad easement, consistent with the intent of the grantor, would not cause an undue interference with said interest.. The initial question which arises in such a determination is what, exactly, constitutes the "rights of the owners of the servient estate," vis-à-vis the Appellants, which question is answered directly by the *Ponderosa II* case. In that case, this Court affirmed the District Court's ruling that the "perpetual easement . . . *does operate to estop the owner from asserting rights of possession and ownership commonly associated with ownership*," and, essentially, the servient owner's interest simply allowed said owner to transfer title. *Ponderosa II*, 146 P.3d at 676 (emphasis added). It would appear that the "rights of possession and ownership" which the owner is "estopped" from asserting are the right to exclude other from using the property, and to control the use of the property by others who are entitled to use it pursuant to the dedication, and under *any* reasonable interpretation of the decision, Respondents are *certainly* estopped from attempting to confine Appellants to a geographically limited path, and, therefore, the District Court was in error in doing so.

Moreover, "[d]edication . . . contemplates the *most onerous and injurious mode* to which [the property] can be devoted." *Foster's Inc. v. Boise City*, 63 Idaho 201, 213, 118 P.2d 721, 726 (1941) (emphasis added). Certainly, travel across a lot to reach the lake, which has been

dedicated for this purpose, by any path, would fall within this standard.[10] Viewing *Ponderosa II* and *Foster's* in conjunction with the authorities cited by Respondents, the *only* restrictions which would be imposed upon Appellants would be to refrain from interfering with Respondents' entry upon the property, and to refrain from causing physical damage to the property. Mr. Siegwarth or Mr. Armand's use of Lot 10 for the purpose intended by the grantor causes no greater interference with the rights of the BBTII lot owners than does the use of Lot 10 (in its "alter ego," Lot 8 of BBTII) by Mr. Felsing, Mr. Schadel or Mr. Blanchette for the same intended purposes. The only "interference" which the Respondents would be able to assert would be with their right to exclude, which, under the rule in *Ponderosa II*, they are currently estopped from asserting. Therefore, since the route proposed by Respondents is *not* consistent with the findings made by the Court, is *not* supported by the evidence, and is *not* consistent with Idaho law relating to common law dedications, Respondents Motion the District Court should not have re-opened trial in this matter in order to limit the size of the "easement."

Since: (1) the evidence is clear that Smith intended for a common law dedication of Lot 10 as a common area; (2) the District Court held that the property interest received in Lot 10 was that of a easement, rather than fee simple title; (3) the "location and width" of Lot 10 is *not* in question; and (4) the use of entire dedicated parcel by the Appellants *in no way* interferes with the Respondents' rights to use the Lot, nor does it cause *any* undue burden upon the servient estate, there was *no need* to issue additional, findings of fact upon this matter, and the second trial was entirely unnecessary. *See also Mountainview Landowners Co-op. Ass'n, Inc. v. Cool*,

[10] It should be noted that to allow Appellants to travel across Lot 10 by any route would impose *less* of a burden upon the lot, as it would avoid the problems inherent with travel across a single path, such as wear, erosion, etc.

142 Idaho 861, 136 P.3d 332 (2006) (holding that on-shore uses incident to swimming were allowable pursuant to a use agreement allowing use of the land for "swimming.").

Therefore, even should this court choose to accept the District Court's determination that interest conveyed via the Schafhausen Deed in Lot 10 was merely an easement interest versus a fee simple interest, this Court should REVERSE the District Court's determination that the easement interest was only a right to cross the property via a fixed path to reach the lake.

K. The District Court Erred in Failing to Set Forth the Meaning of the Term "Lake Access" when Both Parties Requested the Same in Order to Define the Scope of the Easement After Making its Determination and Further Erred in refusing Appellants the right to present evidence at the continuation of trial related to their riparian, littoral or dock rights.

Idaho Rule of Civil Procedure 52(a) requires that the District Court make findings of fact and conclusions of law following a court trial. Following the District Court's decision to hear further evidence with regard to the location and scope of the easement, the District Court appeared to indicate that it would determine what activities constitute "lake access." (Tr. at 1164). However, in the Supplemental Memorandum Decision, the District Court failed to do so. (R at 138–54). Therefore, given that the District Court erred in failing to define the term Lake Access as required to do so pursuant to Idaho R. Civ. P. 52(a), after allowing an entire additional court trial partly for that specific purpose, the judgment should likewise be reversed on that regard.

Further, with regard to making a determination as to the scope of the "lake access easement" the District Court found to exist, at the time of the second Court Trial, the District Court ruled that it would not accept additional evidence as to whether or not Appellants would be entitled to place a dock on Hayden Lake, incident to the "lake access" interest found by the Court. (Tr. at 1199–1200). While it true that evidence regarding dock rights would not be pertinent to the *location* of the easement, it is both probative and material as to the *scope* of the easement for "lake access," *see* I.R.E. 401–402, since, as set forth in Section II.I above, the District Court was under a duty to make the necessary findings and conclusions regarding the meaning of "lake access" once it re-opened the matter in order to receive evidence pertaining to that issue. *See* I.R.C.P. 52(a).

Therefore, the District Court erred as a matter of law in failing to accept relevant evidence with regard to a central issue raised in the second trial. "[E]videntiary rulings involving relevancy are not discretionary matters, and as such, are reviewed de novo on appeal." *Gunter v. Murphy's Lounge, LLC*, 141 Idaho 16, 25, 105 P.3d 676, 685 (2005). Thus, the judgment of the District court should be likewise REVERSED on those grounds as well.

L. The District Court erred in concluding that it could not determine the Grantor's intent based on the evidence in the record.

Despite the fact that the grantor, Michael Smith, *clearly* testified *numerous* times that he intended Lot 10 to serve as a common area for recreational uses, (Tr. at 265, 273-74, 275-77, 279, 280), and the fact that, even though it acknowledges that, had the plan went forward, the upper common areas would have connected the upper lots to Lot 10 (Aug. R. at 118) the District

Court held that it could not determine his intent based upon the evidence in the record. *Id.* The District Court itself even stated that Lot 10 was unbuildable, and was included such that all of the lots could be marketed as having access to the lake. (Aug. R. at 128). It is also clear that Schafhausen *specifically negotiated* the inclusion of the language in the Schafhausen Deed in order to secure said interest. (Tr. at 380).

Therefore, the finding that Smith's intent could not be determined from the record is not supported by the substantial weight of the evidence on the record, and should likewise be REVERSED.

M. The District Court erred in allowing a quitclaim to transfer of ownership when said quitclaim purported to transfer property which either no longer existed and/or purported to transfer property already owned by other persons — but did so without the consent of the persons who already had an ownership interest in said property.

In its decision, the District Court essentially held that the quitclaim transfer of portions of the property at issue was effective, in order to allow the re-plat into BBT II. Under the operative law, a "quitclaim deed . . . conveys whatever interest legal or equitable, which the grantors possess at the time of the conveyance, including rights inchoate which later may ripen into a vested estate." *Scogings v. Andreason*, 91 Idaho 176, 180, 418 P.2d 273, 277 (1966). However, the District Court points to no authority (as there *is* no authority) which would contradict the proposition that the maxim "*nemo dat quod non habet*" ("one cannot give what one does not have") remains in effect in this context. As such, the Quitclaim deeds were *ineffective* with

regard to the Common Areas and Lot 10, and do not provide any basis for a replat of said areas by those to whom the deeds purport to convey the property.

Thus, once again, the District Court's findings should be REVERSED, to the extent that they rely upon the conveyance of common areas in BBT I in which those other than the grantors held rights to the property located therein.

N. The District Court erred in finding that the plat of Bervan Bay Terrace II was a valid plat, despite the fact that it purported to subsume property already platted in a prior valid plat, without the consent of the owners of that plat.

The District Court's Memorandum Decision essentially appears to attempt to avoid making a determination as to the effect of re-platting property already platted and conveyed to others, by searching for a method in which to determine that there was no overlap of the plats, with the exception of Lot 10/Lot 8. (Aug. R. at 107–09). By re-opening the matter of the upper Common Areas, the District Court (erroneously) found a manner in which to determine that a portion (but not all) of the BBT I plat was invalid. (Aug. R. at 101-06). Now faced with the issue of the Section 18/Lot 35 property, the District Court (again erroneously) rules that the dedication thereof was ineffective on the basis of their value and utility, (Aug. R. at 118), even though use, utility, and value have no legal effect with regard to ownership. *Worley Highway Dist. v. Yacht Club of Coeur d'Alene, Ltd.* 116 Idaho 219, 775 P.2d 111 (1989). Once again, pursuant to the maxim *nemo dat quod non habet* applies, and, pursuant to said maxim, any attempt to plat over, or otherwise convey, the common areas in BBT I in which the BBT I property owners possessed interests pursuant to the principles set forth hereinabove must

necessarily *fail*, and, therefore, the judgment of the District Court should likewise be REVERSED.

O. The District Court's determination that the Grantor abandoned the plat of Bervan Bay Terrace I. made factual findings which were not supported by the substantial weight of the evidence.

In its initial Memorandum Decision, the District Court ruled that Smith had abandoned the Berven Bay Terrace I project. (Aug. R. at 90). However, Smith's testimony indicated that he had simply re-conveyed the property back to the grantors once he was no longer financially able to continue the project himself. (Tr. at 286-87, 291). Further, he had the plat recorded on or about September of 1984, shortly before he attempted to re-convey the property at issue. There is no indication that he intended to abandon the plat; thus, the finding should be reversed as not being supported by substantial and competent evidence.

P. Whether the District Court erred in granting Respondents' Motion for Bifurcation and Deferring Ruling on Appellants' Request for Jury Trial.

Prior to trial, the District Court bifurcated trial in the instant case, choosing to determine the property rights in the first phase, and damages in the second phase. (Tr. of January 3, 2007 hearing at 50–51). Idaho Rule of Civil Procedure 42(b) provides that:

> The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Constitutions, statutes or rules of the court.

In this case, given the length that these proceedings have been pending, it is clearly not "conducive to expedition and economy" to reserve a second trial with regard to Appellants' damage claims. One of the few Idaho cases dealing with Rule 42(b) is *Rueth v. State*, 103 Idaho 74, 644 P.2d 1333 (1982). In that case, which involved a "taking," this court affirmed the trial court's denial of the Motion to Bifurcate, stating:

> If no jury had been impaneled until after the trial court had determined whether or not a taking had occurred, a significant period of time would have had to have elapsed between the bifurcated halves of the action. Moreover, the damages portion of the case would have required duplication of proof concerning the land, what had happened to it, what it had been used for, its size, its location, and its character.

Id. at 80; 644 P.3d at 1339. Similarly, in this case, should the District Court's judgment be reversed, "a significant time will have elapsed between the bifurcated halves of the action," and the damages portion will "require duplication of proof concerning the land." Therefore, the District Court abused its discretion in bifurcating trial in this case. Given that the bifurcation led directly to the failure to rule with regard to Appellant's request for a jury trial, that portion of the District Court's decision should be reversed as well.

Q. Conclusion of Argument.

Thus, based on the record herein, and discussion above, while Smith's testimony, and many of the facts as found by the District Court, point to the conveyance of an ownership interest on the part of the Appellants in Lot 10 and the labeled Common Areas, the District Court, essentially, only selectively applies said findings, in order to justify a decision that it deems to be "fair," rather than applying the facts as shown by the substantial weight of the evidence to the

operative legal principles at issue. The District Court appears to reject portions of Smith's testimony outright, which is supported by the BBTI plat, despite the lack of any testimony or evidence to the contrary. Furthermore, based upon this Court's prior finding in *Armand I* that the BBTII plat does *not* replace the BBTI plat, and that BBTI is valid, in addition to the foregoing, this Court should determine, unequivocally, as a part of its decision, that *BBTII* is invalid as a matter of law, and rule that Appellants have an undivided legal interest in the expressly labeled Common Areas and Lot 10.

IV. REQUEST FOR ATTORNEYS FEES AND COSTS

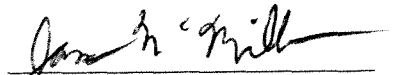
Appellant hereby requests an award of attorneys' fees and costs, pursuant to Idaho Appellate Rules 35(a)(5), 40 and 41; and Idaho Code §§ 12-107, 12-120, 12-121, and 12-123, as a prevailing party, and on the grounds that Respondents' defense to this this action was, in whole or in part, not supported in fact or warranted under existing law and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law

V. CONCLUSION

WHEREFORE, for the foregoing reasons, the judgment of the District Court should be REVERSED and the matter REMANDED to the District Court with instructions pursuant to the legal and equitable principles set forth hereinabove.

DATED this 9th day of April, 2012.

JAMES McMILLAN,



Attorney for Appellants.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10th day of April, 2012, I caused to be served two (2) true and correct copies of the foregoing on the following by the method indicated below:

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By: _____
James McMillan