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Burns Concrete, Inc. v. Teton County Appellant's Reply Brief Dckt. 43527

IN THE SUPREME COURT OF THE STATE OF IDAHO

BURNS CONCRETE, INC., an Idaho corporation, and BURNS HOLDINGS, LLC, an Idaho limited liability company,

Plaintiffs-Appellants,

v.

TETON COUNTY, a political subdivision of the State of Idaho,

Defendant-Respondent.

Supreme Court Docket No. 43527-2015

Teton County Case No. CV-2013-165

APPELLANTS' REPLY BRIEF

Appeal from the District Court of the Seventh Judicial District for Teton County, the Honorable Dane H. Watkins, Jr., District Judge, Presiding.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

I. INTRODUCTION

This dispute between Burns Holdings, LLC (jointly with its affiliate Burns Concrete, Inc., "Burns") and Teton County, Idaho ("Teton County") arises out of the terms of the Developer's Agreement for Burns Holdings, LLC (the "Agreement") attached as Exhibit 1 to both Burns' *Complaint*[1] and the *Appellants' Brief* filed in this appeal and as Exhibit B to the *Respondent's Brief* filed in this appeal.

Teton County's manifestly unfair treatment of Burns under the Agreement is illustrated by the following undisputed facts.

- Before Burns purchased the real property at issue in this lawsuit, both Teton County and the City of Driggs designated the property as the specific site where burns should construct a concrete batch plant (the "Permanent Facility"). *Complaint* ¶ 23 (R, p. 7).
- Following execution of the Agreement, Burns expended many hundreds of thousands of dollars constructing and implementing the commitments imposed under the Agreement, including without limitation (a) erecting and operating a temporary concrete batch plant (the "Temporary Facility") required under Paragraph 2.b(v) of the Agreement, which required Burns to incur substantial expense for site demolition, remediating the site for prior waste disposal, clearing and grubbing the site, extending utilities to the site, and transporting to and erecting on the site the Temporary Facility; (b) constructing the road and highway

[1] Verified Complaint for: (i) Declaratory Judgment, (ii) Breach of Contract and Rescission, (iii) Unjust Enrichment, filed May 21, 2013 ("*Complaint*") [R, pp. 1-24].

improvements required under Paragraph 2.d(iv) of the Agreement, which required Burns to incur substantial expense for barrier fencing with concrete foundations, new turn lanes, landscaping, and performance bonds; and (c) applying for and taking all actions necessary to obtain the CUP and zoning variance required to construct the Permanent Facility. *Complaint* ¶ 17 [R, p. 6].

- Burns undertook every act reasonably possible to obtain the CUP and zoning variance required by Teton County for Burns to construct the Permanent Facility, both of which Teton County refused to issue. *Complaint* ¶ 20 [R, p. 6].
- Burns cannot now construct the Permanent Facility without an amendment to the ordinances of Teton County. *Complaint* ¶ 21 [R, p. 7].
- Burns has operated the Temporary Facility in accordance with the terms of the Agreement; however, Burns has not ever been able to construct the Permanent Facility by reason of action and inaction by Teton County over which Burns has no control. *Complaint* ¶ 25 [R, p. 7].
- Nevertheless, Teton County seeks to rezone Burns' property to preclude its use as a concrete batch plant and force Burns to remove the Temporary Facility from the property, with Teton County maintaining the "free" public road improvements Burns was contractually obligated to construct under the Agreement and without reimbursing Burns for any of the several hundred thousand dollars in out-of-pocket costs Burns was contractually obligated to incur.

II. RESPONSE TO UNSUPPORTED AND DISPUTED FACTUAL ASSERTIONS

At no point during the litigation of this case, including in either *Appellants' Brief* or *Respondent's Brief*, has Burns or Teton County asserted that the Agreement is ambiguous in any respect. *See* Memorandum Decision and Order Re: Motions for Summary Judgment, filed December 19, 2014, at 8 ("Both parties agree that the Agreement is not ambiguous.") [R, p. 125].

Because the Agreement is not ambiguous, the following rule for construing its terms applies:

> Where a legal instrument is found to be unambiguous the legal effect must be decided by the district court as a matter of law; it is only when the instrument is found to be ambiguous that evidence as to the meaning of that instrument may be submitted to the finder of fact.

Knipe Land Co. v. Robertson, 151 Idaho 449, 455, 259 P.3d 595, 601 (2011). *See also Potlatch Educ. Ass'n v. Potlatch Sch. Dist. No. 285*, 148 Idaho 630, 633, 226 P.3d 1277, 1280 (2010) ("'In the absence of ambiguity, the document must be construed in its plain, ordinary and proper sense, according to the meaning derived from the plain wording of the instrument.'" (Citation omitted.)). In addition to the application of the parol-evidence rule to the interpretation of the Agreement, Idaho precedent requires that all factual matters considered in the appeal to be included in the record on appeal. *Feld v. Idaho Crop Improvement Ass'n*, 126 Idaho 1014, 1017, 895 P.2d 1207, 1210 (1995) ("Questions or matters not presented in the record will not be considered by this Court on appeal."). Teton County has repeatedly violated these two legal principles in *Respondent's Brief*.

Thus, in an effort to discredit Burns and thereby avoid the unambiguous terms of the Agreement, Teton County has quoted from, characterized, and attached copies of transcripts for

hearings held by the Teton County Board of Commissioners on February 26, 2007, which was six months *before* the Agreement was executed, and on November 15, 2007, which was more than two months *after* the Agreement was executed. *See Respondent's Brief* 2-3, 5-6, 8-9 and Exs. A & C. Neither of these transcripts (nor any of the quoted statements) are included in the record on appeal. Nor does Teton County provide any argument or authority establishing why consideration of the statements contained in these transcripts is not barred by the parol-evidence rule. Moreover, a fair reading of the February 26 transcript establishes that the Teton County Commissioners, or at least their chairman, understood "issues like building height and so on and so forth are going to be hammered out in this development agreement." *Respondent's Brief* Ex. A, p. 17, LL. 7-9. (*See also id.* at p. 25, LL. 7-11, where Kirk Burns qualified his response to Chairman Young's question, "what square footage and what height?" by stating: "We don't have that completely worked out.") Finally, the comments at the February 26 hearing attributed to Kirk Burns on page 2 of *Respondent's Brief* are all attributed in the transcript itself to an unidentified "Voice." *Id.* at pp. 31-32. And for all the foregoing reasons, those portions of *Respondent's Brief* identified in this paragraph should be wholly disregarded by the Court in deciding this appeal.

But in addition to violating the parol-evidence rule and relying on factual matters not in the record on appeal, Teton County has also repeatedly asserted "facts" for which there is no possible support and misstated the express terms of the unambiguous Agreement, including in the following instances:

1. Teton County asserts that "the Agreement also *allowed* Burns to construct and operate a temporary facility . . . ." *Respondent's Brief* 1 (emphasis added). But Paragraph 2.b(v)

of the Agreement expressly provides that Burns "*shall* erect and operate a temporary concrete batch plant on site . . . ." (Emphasis added.)

2. Teton County asserts that "Burns was required to bring their *private road* up to public works standards." *Respondent's Brief* 1 (emphasis added). However, not only is there nothing in the record suggesting that Burns even has a private road, but Paragraphs 2.c and 2.d(iv) of the Agreement expressly provide that the road improvements Burns was required to construct were to State Highway 33 and Casper Lane, which are both public roads and not private ones. *See also* Affidavit of Kirk Burns, filed November 5, 2014, at ¶¶ 3-4 [R, p. 89].

3. Teton County asserts that "*Burns attached* a sketch of their desired building as Exhibit "C" to the Agreement." *Respondent's Brief* 3 (emphasis added). But there is no support in the record or in fact for this assertion, which Burns denies.

4. Teton County asserts: "There is nothing in the body of the Agreement that states that the height of the building shall be 75 feet . . . . Paragraph 2(b)(iii) simply identifies Exhibit "C" as containing '*plans* for construction of Developer's *intended* permanent facility.'" *Respondent's Brief* 8 (emphasis in original). Yet Paragraph 2.b(iii) of the Agreement actually provides: "Attached as Exhibit "B"—Site Plan, and Exhibit "C"—Building Elevations, *and by this reference incorporated herein* are plans for construction of Developer's intended permanent facility ("Permanent Facility")." (Emphasis added.) And Exhibit "C" to the Agreement clearly depicts the Permanent Facility as being 75' high.

5. Teton County asserts that "Burns could build something that complies with current zoning, yet they refuse." *Respondent's Brief* 11. But there is no support in the record or

in fact for this assertion, and Burns disputes that it is economically feasible to limit the Permanent Facility to only 45' in height.

6. Teton County asserts that "Burns *hoped that by inserting an exhibit* into the zone change agreement that depicted their desired facility, that the Board would be bound to approve their application to build the 75-foot tall facility." *Respondent's Brief* 12 (emphasis added). But there is no support in the record or in fact for this assertion either, which Burns denies.

7. Teton County asserts that "Burns could have built a concrete batch plant that complied with zoning restrictions." *Respondent's Brief* 20. But again there is no support in the record or in fact for this assertion, and Burns disputes that it is economically feasible to build any concrete batch plant of only 45' in height.

8. Teton County asserts: "Paragraph 2(b)(iii) of the Agreement contains the only reference to Exhibit "C," calling it 'plans for construction of Developer's intended permanent facility.' The use of the word "intended" hardly supports a mandate that this exact building must be constructed." *Respondent's Brief* 20-21. Yet Paragraph 2.b(iii) and Exhibits "B" and "C" of the Agreement first specify the site plan and building elevations for the Permanent Facility, and Paragraph 2.b(iv) then provides: "Immediately upon execution of this Agreement, *Developer shall order and commence construction of the Permanent Facility.*" (Emphasis added.)

9. Teton County asserts that "Burns has explored no avenue for building other than the 75 foot tall plant." *Respondent's Brief* 21. But there is also no support in the record or in fact for this assertion, which Burns denies.

10. Teton County asserts that "[t]he purpose of the Agreement is to rezone the property to M-1, not to waive the height restriction in the M-1 zone." *Respondent's Brief* 22.

But the second recital in the Agreement specifically states that "the Developer has requested the zone change *for the purpose* of developing a concrete batch plant facility . . . ," and the third recital establishes that Teton County entered into the Agreement "*for the purpose* of allowing, by agreement, a specific development to proceed in a specific area and for a specific purpose or use . . . ." (Emphasis added.)

11. Teton County asserts that "the only position that the Board took on the height of the structure occurred at a public hearing where a conditional use permit was denied . . . and at a public hearing where a variance was denied . . . ." *Respondent's Brief* 23. Yet Teton County admits in its *Answer* that it entered into the Agreement and caused the Agreement to be recorded in the office of the Teton County Clerk, *Answer* ¶ 16 [R, p. 27], and Exhibit "C" of the Agreement expressly depicts the Permanent Facility as being 75' high. *See also* the signature page of the Agreement, which is impressed with the official seal of Teton County.

12. Teton County asserts that "[t]he fact that Burns improved *its own property* does not create an advantage for the County . . . ." *Respondent's Brief* 24 (emphasis added). Yet as pointed out in paragraph 2 above, the road improvements Burns was required to construct were to State Highway 33 and Casper Lane, which are both public roads—and if these public improvements did not advantage Teton County, why on earth did it require Burns to construct them?

13. Teton County asserts "that Burns agreed to *and benefitted from* the improvements they made." *Respondent's Brief* 25 (emphasis added). But again there is no support in the record or in fact for this assertion, which Burns disputes.

14. Teton County similarly asserts that "the temporary facility, which utilizes both the highway and road, has continued operating *to Burns' benefit*." *Respondent's Brief* 26 (emphasis added). But there is also no support in the record or in fact for the assertion that Burns has ever operated the Temporary Facility at a profit, and Burns most vehemently denies that it has.

15. Teton County asserts that "[t]he temporary plant exceeds the height limit allowed in its zone . . . . [and] has violated the law for over eight years . . . ." *Respondent's Brief* 26. But once again there is no support in the record or in fact for these assertions, which Burns disputes.

16. Teton County also asserts "[i]t is undisputed that the Temporary Facility is 70 feet tall . . . . [and] violates the height regulation in the M-1 zone." *Respondent's Brief* 27. But there is also no support in the record or in fact for these assertions, which Burns disputes.

Finally, in contrast to the foregoing numerous misstatements by Teton County, which form the essence of its equitable arguments, Burns requests this Court to take notice that Teton County has not disputed a single asserted fact or term of the Agreement contained in *Appellants' Brief*.

III. REBUTTAL OF RESPONDENT'S ARGUMENT

Teton County's legal arguments are founded on two general contentions set forth in the introduction to its argument. The first of these contentions is as follows:

> Yet Burns' entire argument is [i] based on the idea that the Agreement somehow allows them to build a 75-foot tall building, and [ii] that the County is preventing them, or making it impossible for them to do so.

Respondent's Brief 7-8.

Teton County, however, misstates the first leg of its foregoing compound contention (i.e., that Burns believes the Agreement *allows* Burns to build the 75' Permanent Facility). Rather,

Burns' argument is that the Agreement *requires* Burns to build the 75' Permanent Facility and that the very same paragraph imposing this construction obligation also extends the time for Burns to do so when delayed by "action beyond Developer's control." Agreement ¶ 2.b(iv). Moreover, the second leg of Teton County's compound contention (i.e., that Teton County has prevented Burns from constructing the Permanent Facility) is both indisputable—as well as undisputed by Teton County—and the very reason that the time for Burns to satisfy its construction obligation has been extended under Paragraph 2.b(iv) of the Agreement.

The second general contention on which Teton County's legal argument is founds is as follows:

> More importantly, the Board of County Commissioners could not have contracted for a 30-foot deviation from the height ordinance. Paragraph 12(f) of the Agreement contains a clause that "If any term of this agreement is declared invalid, illegal or unenforceable, the remainder of this agreement shall remain operative and binding." A contract provision that requires a party to violate the law by building a structure 30 feet in excess of what the zoning ordinance allows, is invalid, illegal and unenforceable.

Respondent's Brief 8.

But in making the foregoing argument Teton County ignores the following undisputed facts and interrelated contractual provisions:

- The parties at all times concurred that Burns was required to obtain Teton County's approval for constructing the Permanent Facility, and, as Teton County points out, over two months before the Agreement was executed "Burns applied for a conditional use permit (CUP) on June 13, 2007." *Respondent's Brief* 3.
- Paragraph 10 of the Agreement requires Burns to comply with all "county and local laws, rules and regulations, which appertain to the subject property."

- Paragraph 2.b(iv) of the Agreement doesn't only require Burns to construct the Permanent Facility within 18 months, but it also extends the time for Burns to do so when delayed by "action beyond Developer's control."
- Paragraph 2.b(v) of the Agreement doesn't only require Burns to construct "a temporary concrete batch plant on site . . . ," but it also allows Burns to operate the Temporary Facility until the Permanent Facility can be constructed.

Thus, not only did the Agreement require Burns to comply with all of Teton County's zoning ordinances, but the Agreement provided for Burns' use of its property as contemplated by the parties (i.e., as a concrete batch plant) from the date the Agreement was executed though today. Or stated otherwise, and contrary to Teton County's quoted argument, there is no "contract provision that requires [Burns] to violate the law by building a structure 30 feet in excess of what the zoning ordinance allows . . . "[2] Rather, what the Agreement requires is for Burns to continue to operate the Temporary Facility as it has been doing until Burns can construct the Permanent Facility. *See* Agreement ¶ 5 ("if the property . . . is not used as approved, or if the approved use ends or is abandoned, the Board of County Commissioners may . . . order that the property will revert to the [prior] zoning designation zone . . . .").

[2] In the unlikely event the Agreement was held to be void, Burns pleaded an alternative claim (Count III) against Teton County for unjust enrichment and the recovery of restitution damages. *Complaint* ¶ 39 [R, p. 10].

A. The Force Majeure Clause Suspends Burns' Obligation to Construct the Permanent Facility.

Burns' position with respect to the application of the Force Majeure Clause[3] is *not* that Teton County breached the Agreement or otherwise acted wrongfully when it denied Burns the zoning approvals and building permit required for construction of the Permanent Facility, but rather that Teton County's actions in denying the required zoning approvals and building permit requested by Burns were "actions beyond the Developer's control." And nowhere does Teton County contend that its actions in denying the requested approvals and permits were within Burns' control or that Burns might have constructed the Permanent Facility without first obtaining the requested approvals and permits. Thus, Teton County must argue that the unambiguous phrase "action beyond Developer's control" should be construed so as to exclude Teton County's actions in denying Burns the zoning approvals and building permit required for construction of the Permanent Facility.

In arguing that the wording of the Force Majeure Clause should not be construed to mean what it says, Teton County does not distinguish any of the following Idaho legal principles and precedents argued by Burns in *Appellants' Brief*:

- "'In the absence of ambiguity, the document must be construed in its plain, ordinary and proper sense, according to the meaning derived from the plain

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[3] Paragraph 2.b(iv) of the Agreement provides, in relevant part, as follows:

> The installation of the Permanent Facility shall be completed within eighteen (18) months of execution of this Agreement by the County, subject to delays resulting from weather, strikes, shortage of steel or manufacturing equipment or any other act of force majeure or action beyond Developer's control.

(Underscoring added.) (The foregoing contractual provision is hereinafter referred to as the "Force Majeure Clause.")

wording of the instrument.'" *Knipe Land Co. v. Robertson*, *supra*, 151 Idaho at 454, 259 P.3d at 600 (quoting *Potlatch Educ. Ass'n v. Potlatch School Dist. No. 285*, *supra*, 148 Idaho at 633, 226 P.3d at 1280).

- "We must construe this contract so as to give effect to every part of it, if possible." *Ace Realty, Inc. v. Anderson*, 106 Idaho 742, 749-50, 682 P.2d 1289, 1296-97 (Ct. App. 1984) (citing *Wright v. Village of Wilder*, 63 Idaho 122, 117 P.2d 1002 (1941). *Accord Daugharty v. Post Falls Highway Dist.*, 134 Idaho 731, 735, 9 P.3d 534, 538 (2000); *Twin Lakes Vill. Prop. Ass'n, Inc. v. Crowley*, 124 Idaho 132, 137, 857 P.2d 611, 616 (1993); *George v. Univ. of Idaho*, 121 Idaho 30, 36, 822 P.2d 549, 555 (Ct. App. 1991).
- "This Court has no 'roving power to rewrite contracts to make them more equitable.' Thus, when weighing various interpretations of contracts, we consider the language of the agreement as 'the best indication of [the parties'] intent.'" *City of Meridian v. Petra Inc.*, 154 Idaho 425, 437, 299 P.3d 232, 244 (2013) (internal and concluding citations omitted).

Accordingly, in its attempt to avoid the result dictated by the foregoing legal principles and precedents and the plain meaning of the Force Majeure Clause, Teton County argues that "[t]he act of force majeure or action beyond the Developer's control that Burns points to is the 45-foot height regulation that was in place at the time the property was purchased . . . ." *Respondent's Brief* 10. But this plainly misstates Burns' position, which, as stated above, is that Teton County's actions in denying the requested zoning approvals and building permit were "actions beyond the Developer's Control."

Teton County next argues facts not supported by the record and disputed by Burns (i.e., "Burns could build something that complies with current zoning, yet they refuse.") for the conclusion: "Refusal to build a structure that complies with the law is not a force majeure." *Respondent's Brief* 11. But nothing in the Agreement gives Burns the right to construct anything other than the 75' Permanent Facility, and nothing in the record supports a finding that it would be economically feasible for Burns to construct a concrete batch plant of less than 75' in height—let alone one complying with the existing 45' height limitation.

Teton County then argues that, because Burns assumed Teton County would approve the required approvals and permits that were requested, "Burns assumed the risk of obtaining a permit to exceed the height regulation . . . ." *Respondent's Brief* 11. Burns denies this is so. But even if it were for some reason, Burns also obtained the related contractual rights (i) to extend the deadline for constructing the Permanent Facility if delayed by "actions beyond the Developer's Control[,]" and (ii) to operate the Temporary Facility until the Permanent Facility can be constructed. Moreover, none of the authorities cited by Teton County support the proposition that action otherwise constituting an event of force majeure taken by one contracting party (such as Teton County's action in denying the requested zoning approvals and building permit) might constitute a risk assumed by the other contracting party, and therefore each of Teton County's cited authorities is readily distinguishable.[4] Nor does it even remotely make

[4] The readily distinguishable authorities cited by Teton County in support of its argument that, because Burns assumed Teton County would approve the required approvals and permits that were requested, "Burns assumed the risk of obtaining a permit to exceed the height regulation" are as follows: *Stand Energy Corp. v. Cinergy Servs., Inc.*, 760 N.E.2d 453, 455-56 (Ohio Ct. App. 2001) (relating to a party's defense of force majeure with respect to its inability to purchase a commodity at a favorable price from a third person for resale to the other party);

sense that Burns would voluntarily assume the risk of what Teton County might do after Burns incurred several hundred thousand dollars in out-of-pocket costs in constructing the public improvements and other work it was contractually obligated to Teton County to *immediately* construct.

Nevertheless, relying solely on the opinion of the federal district court for Rhode Island in *URI Cogeneration Partners, L.P. v. Board of Governors for Higher Education*, 915 F. Supp. 1267 (D.R.I. 1996), Teton County argues that Burns should be held to have assumed the risk that Teton County would deny Burns the required zoning approvals and building permit it had requested because these denials were "foreseeable."

The district court's opinion in *URI Cogeneration Partners* and the New York opinion on which it is purportedly based, *Kel Kim Corporation v. Central Markets, Inc.*, 519 N.E.2d 295 (N.Y. 1987), are distinguished and discussed, respectively, in *Appellants' Brief*. Also discussed in *Appellants' Brief* in conjunction with analyzing these two opinions is the appellate court opinion in *Specialty Foods of Indiana, Inc. v. City of South Bend*, 997 N.E.2d 23 (Ind. Ct. App. 2013), which held as follows:

Gulf Oil Corp. v. Fed. Energy Regulatory Comm'n, 706 F.2d 444, 448-49 (3d Cir. 1983) (relating to a party's defense of force majeure with respect to its insufficient production of a commodity for sale to a third person for reasons not attributable to the other party); *Dunaj v. Glassmeyer*, 580 N.E.2d 98, 100-01 (Ohio C.P. 1990) (relating to a party's defense of force majeure with respect to the inability to meet its performance standards for reasons not attributable to the other party); *Buono Sales, Inc. v. Chrysler Motors Corp.*, 363 F.2d 43, 44 (3d Cir. 1996) (relating to a party's defense of force majeure with respect to its discontinuance of a product line for reasons not attributable to the other party); *Austin Co. v. United States*, 314 F.2d 518, 519 (Ct. Cl. 1963) (relating to a plaintiff's claim to recover its expenses incurred under a contract that was terminated, where the "plaintiff's failure to perform was solely due to the fact that it was impossible for it to manufacture a workable system as set forth in the specifications, which were the plaintiff's own design."). Again, *none* of these authorities hold, not even suggest, that a contracting party's action otherwise constituting an event of force majeure might constitute a risk assumed by the other contracting party.

> The parties agree that the specific language from the force majeure provision in the UMO Agreement with which we are concerned is the phrase "any other reason not within the reasonable control of Century Center."
>
> Specialty Foods argues that the force majeure provision of the UMO Agreement is inapplicable to excuse the Century Center's performance because the termination of the Management and License Agreements was "not unforeseeable." However, the force majeure provision in this case contains nothing about foreseeability, and Specialty Foods points to neither terms in the provision nor in the remainder of the parties' contract in support of its argument. The scope and effect of a force majeure clause depends on the specific contract language.
>
> Further, there is no evidence before us that the bargaining between the parties was not free and open. The City, the Century Center, and Specialty Foods are sophisticated parties presumably represented by counsel who were at liberty to define the nature of force majeure in whatever manner they desired. We decline to rewrite the parties' contract by interjecting into the force majeure provision a requirement of foreseeability.

Specialty Foods, 997 N.E.2d at 27 (internal and concluding citations omitted).[5] And as is pointed out in *Appellants' Brief,* multiple other courts have also rejected the "foreseeable" limitation imposed on force majeure clauses in *URI Cogeneration Partners* for the reasons articulated in *Specialty Foods*. *See, e.g., Perlman v. Pioneer Ltd. P'ship*, 918 F.2d 1244, 1248 (5th Cir. 1990); *Vinegar Hill Zinc Co. v. United States*, 276 F.2d 13, 15-16 (Ct. Cl. 1960).

Finally, Teton County attempts to distinguish the Idaho Supreme Court's opinion in *Idaho Power Company v. Cogeneration, Inc.*, 134 Idaho 738, 9 P.3d 1204 (2000), which Burns

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[5] Teton County attempts to distinguish the foregoing holding by arguing: "the loss of the Hall of Fame completely obviated the need for a food and beverage vendor for the Hall of Fame. That there be a Hall of Fame in South Bend was a basic assumption of their agreement." *Respondent's Brief* 13-14. However, this argued "distinction" fails for the obvious reason that Burns' construction of the Permanent Facility was also a basic assumption of the Agreement.

also relied upon and extensively discussed in *Appellants' Brief*, with Teton County arguing: "The force majeure clause in *Idaho Power* specifically contemplates the revocation or suspension of government permits." *Respondent's Brief* 14. Yet the relevant portion of the force majeure clause in *Idaho Power* merely provided as follows:

> [F]orce majeure or an event of force majeure means any cause beyond the control of the Seller or of Idaho Power which, despite the exercise of due diligence, such Party is unable to prevent or overcome, including but not limited to an act of God, fire, flood, explosion, strike, sabotage, an act of the public enemy, **civil or military authority**, court orders, laws or regulations, insurrection or riot, an act of the elements or lack of precipitation resulting in reduced water flows for power production purposes.

134 Idaho at 747-48, 9 P.3d at 1213-14 (bolding in original). Thus, notwithstanding Teton County's assertion to the contrary, there is no reference at all in the foregoing provision to "the revocation or suspension of government permits," but only a vague reference to "civil or military authority."

Moreover, similar indiscrete references were held not sufficient to trigger application of the force majeure clause in *URI Cogeneration Partners*,[6] which is the principal authority relied

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[6] The relevant portion of the force majeure clause at issue in *URI Cogeneration Partners* is as follows:

> As used in this Agreement, "Force Majeure" means causes beyond the reasonable control of and without the fault or negligence of the party claiming Force Majeure. If either Party shall be unable to carry out any of its obligations under this Agreement due to events beyond the reasonable control of and without the fault or negligence of the party claiming Force Majeure—including, but not limited to an act of God; sabotage; accidents; appropriation or diversion of steam energy, equipment, materials or commodities by rule or order of any governmental or judicial authority having jurisdiction thereof; any changes in applicable laws or regulations affecting performance; war; blockage; insurrection; riot; labor dispute; labor or material shortage; fuel storage; fire; explosion; flood; nuclear emergency; epidemic; landslide; lightning; earthquake or similar

upon by Teton County. And for this reason the opinion of the federal district court for Rhode Island in Teton County's principal authority is irreconcilable with the opinion of the Idaho Supreme Court in *Idaho Power*.

Accordingly, application of the Agreement's Force Majeure Clause should be held to have suspended Burns' obligation to construct the Permanent Facility.

B. The Doctrine of Prevention Suspends or Discharges Burns' Obligation to Construct the Permanent Facility.

Just as with its position concerning the application of the Force Majeure Clause, Burns' position with respect to the application of the doctrine of prevention is *not* that Teton County breached the Agreement when it denied Burns the zoning approvals and building permit required for construction of the Permanent Facility. Burns' position, rather, is that in denying the requested zoning approvals and building permit, Teton County acted "outside the reasonable contemplation of the parties when the contract was executed." *Sullivan v. Bullock*, 124 Idaho 738, 743, 864 P.2d 184, 189 (Ct. App. 1993) (holding the evidence supported the jury's verdict that "when Mrs. Sullivan denied [Bullock] any further access to the home she acted in a manner that was outside the contemplation of the contract or the parties when they executed the contract."). *Accord Peck Ormsby Constr. Co. v. City of Rigby*, No. CV 10-545-S-WBS, 2012 WL 5273087, at *4 (D. Idaho Oct. 22, 2012) (finding a genuine issue of material fact precluding summary judgment "[s]ince it is not clear that rejection . . . was 'outside the reasonable contemplation of the parties when the contract was executed'" (quoting *Sullivan*)).

> catastrophic occurrence—this Agreement shall remain in effect, but the affected Party's obligations shall be suspended for the period the affected Party is unable to perform because of the disabling circumstances provided that: . . . .

915 F.Supp. at 1276.

Teton County therefore misleadingly frames Idaho law when it argues, without explaining the judicial gloss applied to the terms it uses, that "in order for the doctrine of prevention to apply, the actions of the party preventing performance must somehow be improper, wrongful, or in excess of their legal rights." *Respondent's Brief* 15. And for this reason, Teton County's extensive justification of its actions under the Local Land Use Planning Act are wholly beside the point.

Moreover, Teton County has completely failed to address the factual questions determining the application of the prevention doctrine to the present dispute, as presented in *Appellants' Brief.* Or as there argued, the question with respect to whether the prevention doctrine here applies under Idaho law is whether, at the time the Agreement was executed on August 31, 2007, the parties contemplated that Teton County would deny Burns the CUP and building permit required to construct the Permanent Facility and then, two years later, would first contest the validity of the applicable ordinance in order to avoid issuing Burns the zoning approvals Burns required.

And as also argued by Burns in *Appellants' Brief*, because Paragraphs 2.b(iv)-(v) of the Agreement *require* Burns to *immediately* commence construction of the Permanent Facility and to erect and operate the Temporary Facility, rather than delaying or conditioning Burns' performance until after Teton County approved the CUP application that was then pending before it, there can be no genuine question but that the parties contemplated Teton County would promptly issue Burns the CUP and building permit required to construct the Permanent Facility

when they executed the Agreement.[7] Indeed, construction of the Permanent Facility without the CUP and a building permit would have been both illegal and proscribed by the terms of the Agreement.[8] Therefore, unless Teton County intended for Burns to immediately breach the Agreement by either failing to commence construction of the Permanent Facility or by commencing construction before obtaining the required CUP and building permit—something Teton County has never asserted—Teton County must necessarily have "contemplated" it would promptly approve and issue the CUP Burns required when Teton County executed the Agreement on or about August 31, 2007.[9]

Accordingly, application of the doctrine of prevention should be held to have suspended or discharged Burns' obligation to construct the Permanent Facility based on the holding in *Sullivan v. Bullock* and the reasons discussed in *Appellants' Brief.*

C. The Doctrine of Impossibility Suspends or Discharges Burns' Obligation to Construct the Permanent Facility.

Burns argues in *Appellants' Brief* that the doctrine of impossibility should be held to have suspended or discharged Burns' obligation to construct the Permanent Facility based on the

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[7] If Paragraphs 2.b(iv)-(v) of the Agreement were not dispositive, there would then be a genuine issue as to a material fact. *See Sullivan*, 124 Idaho at 743 n.2, 864 P.2d at 189. However, Teton County has not submitted a scintilla of evidence supporting a finding that the parties did not intend Burns to immediately commence construction of the Permanent Facility following execution of the Agreement. Nor could any such evidence be considered without violating the parol-evidence rule.

[8] *See* Agreement ¶ 10 ("Developer agrees to comply with all federal, state, county and local laws, rules and regulations, which pertain to the subject property.").

[9] The City of Driggs' Planning and Zoning Commission heard on July 11, 2007 (or over a month prior to the execution of the Agreement) and unanimously recommended for approval by Teton County both the Agreement and the CUP requested by Burns. *Complaint* ¶ 15 [R, p. 5]. Teton County admits this fact in paragraph 15 of its *Answer*. [R, p. 27.]

opinion in *Landis v. Hodgson*, 109 Idaho 252, 706 P.2d 1363 (Ct. App. 1985), and the application of Sections 261, 264, and 266 of the *Restatement (Second) of Contracts* (1981) (hereinafter the "*Restatement*"). Teton County does not discuss, let alone rebut, any of the legal principles in the *Restatement* discussed in *Appellants' Brief*, which Burns contends should determine the question of whether the impossibility doctrine applies to the present dispute. The arguments Teton County does make with respect to the application of the doctrine are discussed below in the same sequence made in *Respondent's Brief*.

Teton County first argues the ruling by the Idaho Supreme Court that the CUP Burns sought could not be obtained because a provision in the relevant zoning ordinance was void[10] "was not a new law." *Respondent's Brief* 19. But as discussed and quoted in *Appellants' Brief*, and not rebutted by Teton County, the *Restatement* extends application of the impossibility doctrine to "where a judicial decision is handed down after the time that the contract was made giving an unanticipated interpretation to a statute enacted before that time." RESTATEMENT (SECOND) OF CONTRACTS § 266, cmt. a.

Next Teton County argues that "because Burns was aware that zoning approval was necessary, the doctrine of impossibility is not applicable." *Respondent's Brief* 20. But as argued in *Appellants' Brief*, and also not rebutted by Teton County, the difference between Burns having to obtain the CUP, as the parties expected when the Agreement was executed, or a variance, as the Idaho Supreme Court held to be required and for which the Property does not qualify, is material for multiple reasons. *See Burns Holdings I*, 152 Idaho at 444-45, 272 P.3d at 416-417.

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[10] *See Burns Holdings, LLC v. Teton Cnty. Bd. of Comm'rs*, 152 Idaho 440, 443-44, 272 P.3d 412, 415-16 (2012) (hereinafter "*Burns Holdings I*").

In fact, as a result of the change in the required approval Burns was deprived of any and all ability it had to construct the 75' Permanent Facility, including through a judicial challenge to Teton County's denial of the CUP.

Teton County then argues that the impossibility doctrine "is also not applicable to the Development Agreement signed by the parties because Burns could have built a concrete plant that complied with zoning restrictions." *Respondent's Brief* 20. But this and the related assertions Teton County makes with respect to what Burns could construct are contested above on the grounds that there is no support in the record or in fact for the assertions and that Teton County has misstated the terms of the Agreement. *See supra* Part II at ¶¶ 7-9.

Teton County's penultimate argument is that "Appellants have made no showing that a building height of 75 feet was a basic assumption on which the parties agreed." *Respondent's Brief* 22. But this assertion is also contested above on the grounds that Teton County has misstated the purpose of the Agreement as set forth in the second and third recitals to the Agreement, which establish that Burns' purpose was to "develop[] a concrete batch plant facility . . ." and that Teton County's purpose was to "allow[], by agreement, a specific development to proceed in a specific area and for a specific purpose or use . . . ." *See supra* Part II at ¶ 10. *See also* Paragraph 2.b(iii) and Exhibits "B" and "C" of the Agreement, which specify the site plan and building elevations for the Permanent Facility, and Paragraph 2.b(iv), which requires Burns to immediately "order and commence construction of the Permanent Facility."

Finally Teton County argues: "The height was not a basic assumption upon which *both* parties made the contract. The law does not allow either the County or the applicant to assume

the land use application would be granted." *Respondent's Brief* 23 (emphasis in original). Yet Teton County fails to cite *any* authority establishing what the law does or does not allow. And even more to the point, the issue relating to the impossibility doctrine arises out of the determination by the Idaho Supreme Court in *Burns Holdings I* that the CUP Burns sought could not be obtained because a variance was instead required—which ruling established the impossibility of Burns constructing the Permanent Facility—and does not relate to Teton County's denial of Burns' CUP application.

Accordingly, application of the doctrine of impossibility should be held to have suspended or discharged Burns' obligation to construct the Permanent Facility based on the holding in *Landis v. Hodgson* and the legal principles set forth in Sections 261, 264, and 266 of the *Restatement* discussed in *Appellants' Brief.*

D. The Doctrine of Quasi-Estoppel Should Apply and Estop Teton County from Rezoning Burns' Property.

Teton County does not dispute Burns' statement of controlling law for its defense that Teton County should be estopped from rezoning Burns' property, including Burns' contention that the elements of quasi-estoppel under Idaho law are as follows:

> The doctrine of quasi-estoppel applies when: (1) the offending party took a different position than his or her original position, and (2) either (a) the offending party gained an advantage or caused a disadvantage to the other party; (b) the other party was induced to change positions; or (c) it would be unconscionable to permit the offending party to maintain an inconsistent position from one he or she has already derived a benefit or acquiesced in.

Terrazas v. Blaine Cnty. ex. rel. Bd. of Comm'rs, 147 Idaho 193, 200 n.3, 207 P.3d 169, 176 (2009).

Teton County instead disputes Burns' contention that not only is the first element of quasi-estoppel satisfied in this controversy, but so is each and every one of the alternative grounds contained in the second element.

Thus, Teton County argues with respect to element #1 that "the only position that the Board took on the height of the structure occurred at a public hearing where a conditional use permit was denied . . . and at a public hearing where a variance was denied . . . ." *Respondent's Brief* 23. Yet as Burns notes above, Teton County admits in its *Answer* that it entered into the Agreement and caused the Agreement to be recorded in the office of the Teton County Clerk, and Exhibit "C" of the Agreement expressly depicts the Permanent Facility as being 75' high. *See supra* Part II at ¶ 11.

Teton County argues with respect to element #2.a (the first of the three alternatives under the second element of quasi-estoppel) that Teton County didn't gain an advantage or cause a disadvantage to Burns because (i) "Burns improved its own property," *Respondent's Brief* 24; (ii) "Burns agreed to and benefitted from the improvements they made," *id.* at 25; and (iii) "the temporary facility, which utilizes both the highway and road, has continued operating to Burns' benefit," *id.* at 26. But each of the foregoing assertions are contested by Burns on the grounds that Teton County has misstated the terms of the Agreement and that there is no support in the record or in fact for the assertions. *See supra* Part II at ¶¶ 12-14.

Moreover, Teton County effectively concedes satisfaction of the second element of quasi-estoppel because Teton County makes no argument at all with respect to alternative element #2.b (i.e., that Burns was induced by Teton County to change positions), nor with respect to alternative element #2.c (i.e., that it would be unconscionable to permit Teton County to

maintain an inconsistent position from the one by which it obtained the public road and highway improvements Burns constructed and after Burns incurred several hundred thousand dollars in out-of-pocket costs in constructing the public improvements and other work it was contractually obligated to Teton County to immediately construct).

Teton County does argue, however, that "[t]he only indication of exigent circumstances given by Burns is their assertion that they have expended a large sum of money." *Respondent's Brief* 25. But with respect to these expenditures Burns asks: If being induced into constructing public road and highway improvements for the benefit of one contracting party through the grant of contractual rights to the constructing party does not constitute "exigent circumstances," what on earth does? *Cf. Terrazas*, 147 Idaho at 201, 207 P.3d at 177 (where the Supreme Court found the absence of "exigent circumstances" because "Applicants have not asserted that actions of the Board induced them to change positions.").

Accordingly, Teton County should be held to be estopped from rezoning Burns' property based on the opinion in *Terrazas v. Blaine County* and the reasons discussed in *Appellants' Brief.*

IV. CONCLUSION

For the reasons discussed above and in *Appellants' Brief*, Burns contends that there is no basis in the record or the law supporting the trial court's grant of summary judgment to Teton County. Burns therefore respectfully requests this Court to reverse the trial court's judgment in favor of Teton County, including the award of attorney fees, and to remand the case to the trial court for further proceedings consistent with this Court's opinion.

Finally, because the ultimate disposition of the dispute between Burns and Teton County may be materially different if any of the four defenses asserted by Burns is held to be

inapplicable, and with the hope of heading off yet another appeal that might otherwise result, Burns respectfully requests this Court to rule in its opinion on the applicability of each the Force Majeure Clause, the doctrine of prevention, the doctrine of impossibility, and the doctrine of quasi-estoppel.

DATED this 19th day of April 2016.

PARSONS BEHLE & LATIMER

By _____
Brook B. Bond
Attorneys for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of April 2016, I caused two true and correct copies of the foregoing **APPELLANTS' REPLY BRIEF** to be served by the method indicated below and addressed to the following:

Kathy Spitzer
Teton County Prosecuting Attorney
230 N. Main Street, Room 125
Driggs, Idaho 83422-5124
Facsimile (208) 354-2994

(x) U.S. Mail, Postage Prepaid
( ) Hand Delivered
( ) Overnight Mail
( ) Facsimile

By _____
Brook B. Bond