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Bedard and Musser v. City of Boise City Respondent's Brief 1 Dckt. 44171

IN THE SUPREME COURT OF THE STATE OF IDAHO

BEDARD AND MUSSER, an Idaho partnership, and BOISE HOLLOW LAND HOLDINGS, RLLP, an Idaho limited liability partnership, Plaintiffs/Appellants, vs. CITY OF BOISE CITY, a body politic corporate of the State of Idaho, Defendant/Respondent.	)	Case No. 44171 **RESPONDENT'S BRIEF**

APPEAL FROM THE MAGISTRATE COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

HON. JONATHAN MEDEMA, DISTRICT JUDGE, PRESIDING

Terry C. Copple
Michael E. Band
DAVISON, COPPLE, COPPLE & COPPLE, LLP
Attorneys at Law
199 North Capitol Blvd., Ste 600
P.O. Box 1583
Boise, Idaho 83701

Attorneys for Plaintiffs/Appellants

Scott B. Muir
Deputy City Attorney
Abigail R. Germaine
Deputy City Attorney
Boise City Attorney's Office
P.O. Box 500
Boise, Idaho 83701-0500

Attorneys for Defendant/Respondent

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Deputy City Attorney
Abigail R. Germaine
Deputy City Attorney
Boise City Attorney's Office
P.O. Box 500
Boise, Idaho 83701-0500

Attorneys for Defendant/Respondent

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COMES NOW, the Respondent, by and through Abigail R. Germaine, Deputy City Attorney, and hereby files its Respondent's Brief in the above-captioned matter.

STATEMENT OF THE CASE

A. Nature of the Case

This is a case involving a claim for quiet title. This appeal arises from the Honorable District Court Judge Jonathan Medema's grant of the Defendant's/Respondent's ("Boise City") motion for summary judgment. The district court found that the Plaintiffs/Appellants do not possess a permanent and perpetual easement over Boise City's property.

The Appellants in this case are Bedard and Musser, an Idaho corporation ("Bedard and Musser"), and Boise Hollow Land Holdings RLLP ("Boise Hollow"). Boise Hollow is the owner of certain real property described as Lot 4, Block 2 of the Nibler Subdivision plat, and is recorded as Ada County Instrument No. 9205592 ("Lot 4").

The Defendant is the city of Boise City. Boise City is the owner and operator of the Quail Hollow Golf Course, described as Lots 2 and 6, Block 1 and Lot 1, Block 2, of the Nibler Subdivision plat, recorded as Ada County Instrument No. 9205592. The area at issue, which would be subject to Boise Hollow's claimed easement, runs across Lot 1, Block 2 ("Lot 1").

Boise Hollow asserts that it is the successor in interest to a permanent and perpetual easement over Boise City's land, Lot 1. Boise Hollow contends that an easement was conveyed in 1991 by a document entitled the "Permanent Easement Agreement" (the "Agreement"). The Agreement was executed by Vancroft Corporation ("Vancroft Corp.") and Tee, Ltd., whose sole members were Tommy and Roxanne Sanderson ("Tee, Ltd."). Vancroft Corp. was the

predecessor-in-interest to both Lot 4 (now owed by Boise Hollow) and Lot 1 (now owned by Boise City). In 1991, when the Agreement was executed, Tee, Ltd. was the lessee of Lot 1 and held a possessory leasehold interest of 99 years.

The district court below, correctly held that the Agreement did not create an easement. In 1991, Tee, Ltd. only held a leasehold interest in Lot 1, which is significant because Tee, Ltd. could only grant an interest which was no greater than it possessed. The district court agreed. In 1993, Tee, Ltd. transferred its leasehold interest to David Hendrickson ("Hendrickson") and the leasehold was terminated, by express agreement, in 2007. The district court rightly decided that any interest conveyed by Tee, Ltd., as the lessee, in 1991 by the Agreement, ended with the termination of the underlying leasehold interest in 2007.

Boise Hollow also claims that the Agreement executed by Tee, Ltd. not only created a permanent perpetual easement, but that the easement was of whatever width was necessary for the Plaintiffs to build a road and construct the infrastructure needed for development of Lot 4. The district court did not address this issue because it held that the Agreement did not convey an easement. However, had the issue been considered, the language of the Agreement plainly states that the affected area was, at most, forty feet (40') in width for the installation of utilities and access purposes only.

Boise Hollow filed a claim for quiet title alleging the arguments above. The matter was heard before the Honorable Judge Medema and the district court granted summary judgment in favor of Boise City. This appeal followed.

B. Course of Proceedings and Disposition.

On June 17, 2015, the original Plaintiff, Bedard and Musser, filed its Complaint for Quiet Title seeking to quiet its title in an alleged easement over Lot 1, purportedly granted by the Agreement. (R. pp. 000007-000013.)

Boise City responded on July 8, 2015, by filing its Answer to Complaint. (R. pp. 000052-000057.)

Since filing its Complaint for Quiet Title, Bedard and Musser assigned its interest in Lot 4, to Boise Hollow. (R. pp. 000105-000107.) On December 2, 2015, the district court entered an Order Joining Boise Hollow Land Holding, RLLP (Boise Hollow) as a Plaintiff. (R. pp. 000058-000059.) On the same day, Plaintiffs filed its First Amended Complaint joining Boise Hollow as a Plaintiff to the Complaint. (R. pp. 000060-000067.) Boise City filed its Answer to the First Amended Complaint on December 14, 2015. (R. pp. 000223-000228.)

1. Cross-Motions for Summary Judgment.

Both parties filed cross-motions for summary judgment.

i. Boise Hollow's Motion for Summary Judgment.

Boise Hollow filed its Motion for Summary Judgment on December 3, 2015. (R. pp. 000108-000109.) Filed concurrently with the Motion was Plaintiffs' Memorandum in Support of Plaintiffs' Motion for Summary Judgment (R. pp. 000198-000222), Affidavit of Rebecca W. Arnold (R. pp. 000134-000171), Affidavit of Kevin McCarthy, P.E. (R. pp. 000110-000133), and Affidavit of Dean Briggs, P.E. (R. pp. 000172-000197.)

On January 15, 2016, Boise City filed Defendant's Response in Opposition to Plaintiffs' Motion for Summary Judgment. (R. pp. 000375-000397.) In support of its Response, Boise City filed the Second Declaration of Counsel Abigail R. Germaine. (R. pp. 000398-000404.)

On February 2, 2016, Boise Hollow filed its Reply in Support of Plaintiffs' Motion for Summary Judgment. (R. pp. 000405-000420.)

ii. Boise City's Cross-Motion for Summary Judgment.

On December 31, 2015, Boise City filed Defendant's Cross-Motion for Summary Judgment. (R. pp. 000229-000230.) Filed in support of Boise City's Cross-Motion was its Memorandum in Support of Defendant's Cross-Motion for Summary Judgement (R. pp. 000231-000251), the Declaration of Tommy T. Sanderson (R. pp. 000352-000369) and the Declaration of Counsel Abigail R. Germaine (R. pp. 000252-000351.)

On February 2, 2016, Boise Hollow filed Plaintiffs' Memorandum in Opposition to Defendant's Cross-Motion for Summary Judgment. (R. pp. 000436-000452.) Concurrent with its Memorandum in Opposition, Boise Hollow filed a Second Declaration of Tommy T. Sanderson (R. pp. 000430-000431), and the Affidavit of Colin Connell (R. pp. 000432-000435.)

On February 9, 2016, Boise City filed its Reply in Support of Defendant's Cross-Motion for Summary Judgment. (R. pp. 000523-000536.) In support of its Reply, Boise City filed the Third Declaration of Counsel Abigail R. Germaine. (R. pp. 000537-000643.)

iii. District Court's Decision on Cross-Motions.

The district court heard argument on the parties' cross-motions on February 16, 2016. Michael Band appeared and argued on behalf of Boise Hollow. Abigail R. Germaine appeared and argued for Boise City. The district court took the matter under advisement. (Tr., p. 4.)

On February 17, 2016, Boise Hollow filed a document entitled "Post Summary Judgment Hearing Brief Re: Enforceability of Easement Covenant." (R. pp. 000659-000673.) Boise City filed a standard objection.

On April 1, 2016, the district court issued its Memorandum Decision and Order Re: Cross-Motions for Summary Judgment. (R. pp. 000680-000697.) The district court held that 1) Plaintiffs' motion for summary judgment was denied; 2) Defendant's motion for summary judgment was granted; and 3) Plaintiffs' complaint to quiet title was dismissed. (R. p. 000696.) In making these holdings, the district court stated numerous findings:

1) The Agreement did not convey a permanent easement across Lot 1 in favor of Lot 4 because the only grantor in the Agreement (Tee, Ltd.) only held a leasehold possessory interest in the land. (R. p. 000688, Ls. 11-21.)

2) Plaintiff, Bedard and Musser, conveyed all its title in Lot 4 to Plaintiff Boise Hollow RLLP in 2015. Therefore, Bedard and Musser currently have no interest in Lot 4 and Boise City is entitled to judgment as a matter of law dismissing Bedard and Musser's claim to quiet title to Lot 1. (R. p. 000688, Ls. 13-17.)

3) Any interest Tee, Ltd. could have conveyed in Lot 1 would have terminated with its interest in the land when the leasehold ended in 2007. (R. p. 000689, Ls. 12-13.)

4) In 1991, Vancroft Corp. as fee title owner of both Lot 1 and Lot 4, could not create an easement in its own land, by granting itself the right to use Lot 1 after Tee, Ltd.'s leasehold expired. (R. p. 000691, Ls. 15-17.)

On June 7, 2016, the district court entered its Amended Judgment. (R. pp. 000714-000715.)

2. Motions to Strike.

i. Motions to Strike Various Affidavits.

On January 15, 2016, Boise City filed Defendant's Motion to Strike the Affidavit of Rebecca W. Arnold. (R. pp. 000370-000374.) On February 2, 2016, Boise Hollow filed Plaintiffs' Opposition to Motion to Strike Affidavit of Rebecca W. Arnold. (R. pp. 000421-000429.) Concurrent to its Opposition, Boise Hollow filed an Affidavit of Counsel Michael E. Band. (R. pp. 000456-000522.) On February 17, 2016, Boise City filed its Reply Brief Regarding Defendant's Motion to Strike the Affidavit of Rebecca W. Arnold. (R. pp. 000655-000658.)

On February 9, 2016, Boise City filed Defendant's Motion to Strike the Affidavit of Colin Connell. (R. pp. 000644-000648.) In response, on February 16, 2016, Boise Hollow filed Plaintiffs' Opposition to Motion to Strike Affidavit of Colin Connell. (R. pp. 000649-000654.)

On February 2, 2016, Boise Hollow filed its Motion to Strike the Declaration of Abigail R. Germaine. (R. pp. 000453-000455.)

ii. District Court's Decision on Motions to Strike and Post-Hearing Brief.

The district court heard argument on these motions on February 16, 2016. Michael Band appeared and argued on behalf of Boise Hollow. Abigail R. Germaine appeared and argued for Boise City. The district court took the matter under advisement.

On April 1, 2016, the district court issued its Memorandum Decision and Order Re: Parties' Various Motions to Strike. (R. pp. 000674-000679.) Judge Medema held:

1) The affidavits of Rebecca Arnold, Colin Connell, and Tommy Sanderson contain testimony related to the intent of the parties, which is irrelevant to the determination that Tee, Ltd. could convey no more than it possessed; (R. pp. 000675-000676.)

2) The affidavit of Colin Connell, the second declaration of Tommy Sanderson, the initial declaration of Tommy Sanderson, not including one paragraph, and the affidavit of Rebecca Arnold, not including one paragraph were excluded; *Id.*

3) Boise Hollow's motion to strike the declaration of Abigail R. Germaine was denied in part and granted in part. The motion was granted only as it related to Paragraph 2 and Exhibit A. The motion was denied in all other respects; (R. pp. 000676-000677.)

4) Boise Hollow's motion to strike the third declaration of Abigail R. Germaine was denied. The declaration and the exhibits attached were admitted in full. (R.000677)

In regards to the Post Summary Judgment Hearing Brief submitted by the Plaintiffs, the district court agreed with Boise City and held that Idaho Rule of Civil Procedure 56 does not provide for the submission of a post hearing brief, and additionally, none was requested by the court. (R. pp. 000678.) The court denied admission of the Post Summary Judgment Hearing Brief and also noted that its consideration was not necessary to the court's holding, as its contents related to a cause of action that had not been pleaded or raised by the Plaintiffs. *Id.*

C. Statement of the Facts

Boise City adopts the following undisputed facts as presented in the District Court's Memorandum Decision and Order Re: Cross-Motions for Summary Judgment, which is found in the Record at pp. 000682-000686.

1. Ownership of the Fee Title and Leasehold Estates – Timeline.

In 1943, Victor and Ruth Nibler (the "Niblers") purchased a parcel of land in Sections 21, and 28, Township 4 North, Range 2 East, Boise Meridian. (R. pp. 000543-000544.) This property included both parcels at issue in this case: Lot 4 (now owed by Boise Hollow) and Lot 1 (golf

course property, now owned by Boise City). (R. pp. 000598-000599 and R. pp. 000613-000620, respectively.)

In July of 1980, the Niblers, as the lessor, entered into a 99-year lease of the golf course property (Lot 1). (R. pp. 000546-000550.) The original lessees were Dennis Labrum, Neil Labrum, Clyde Thomsen and David Samuelson. *Id.*

Between 1980 and 1986, this leasehold interest was acquired by A-J Corporation and subsequently assigned to Tee, Ltd., whose principals were Tommy and Roxanne Sanderson. (R. pp. 000566-574.) In 1986, the Shamanah Golf Course opened on the leased property. (R. p. 000283.) Although the lease agreement was amended, the length of its term remained for 99 years. (R. pp. 000561-000564.)

On or about June 8, 1990, the Niblers sold a significant portion of their property, including Lot 1 (the golf course property) and Lot 4 (property now owned by Boise Hollow) to Vancroft Corp. (R. pp. 000576-000581.) In selling their fee title interest in Lot 1, the Niblers also assigned their lessor interest in the leasehold to Vancroft Corp. (R. p. 000292.)

In 1991, the Agreement was executed by Tee, Ltd., lessee of Lot 1, as the grantor of the Agreement, and Vancroft Corp., the fee title holder of both Lot 1 and Lot 4, as the grantee. (R. pp. 000019-000030.) The Agreement was not recorded until November 3, 1993. (R. p. 000025.)

The Niblers recorded a subdivision plat with the Ada County Recorder's Office in 1992. Of significance, the plat showed the golf course property designated as Lots 2 and 6 in Block 1 and Lot 1 in Block 2 (Lot 1). The plat also showed the current Boise Hollow property as Lot 4 of Block 2 (Lot 4).

On June 30, 1993, Tee, Ltd. assigned its leasehold interest in Lot 1 to David Hendrickson. (R. pp. 000586-000591.)

On October 27, 1993, Vancroft Corp. conveyed Lot 4 to Bedard and Musser. (R. pp. 000598-000599.) Vancroft Corp. still owned Lot 1 in fee title.

In 1999, Vancroft Corp. conveyed its fee title in Lot 1 to Bluegrass, LLC ("Bluegrass"). (R. p. 000601.)

On October 4, 2007, Bluegrass, as the fee title owner of Lot 1 and the lessor of the leasehold interest, and Hendrickson, as the lessee of Lot 1, jointly terminated the lease. (R. pp. 000603-000605.) Bluegrass then conveyed Lot 1 to Quail Hollow, LLC, whose sole member was Hendrickson. (R. pp. 000322.) In 2007, the golf course property was owned by Quail Hollow, LLC, in fee simple, with no leasehold attached.

In 2013, Lot 1, the golf course property, was gifted to the city of Boise City. (R. pp. 000613-000620.)

In 2015, Bedard & Musser conveyed title in Lot 4 to Boise Hollow, RLLP. (R. pp. 000622-000623.)

2. The 1991 Agreement.

In 1991, Tee, Ltd. and Vancroft Corp. executed the Agreement. (R. p. 000063.) The Agreement was drafted by Vancroft Corp.'s attorney at the time, Rebecca Arnold. The Agreement refers to Tee, Ltd. as the "Grantors" and Vancroft Corp. as the "Grantee." (R. pp. 000094.) At the time the Agreement was executed in 1991, Tee, Ltd., as the lessee of Lot 1, possessed only a

leasehold interest in Lot 1. (R. pp. 000566-000574.) In 1991, Vancroft Corp. owned fee title to both Lot 1 and Lot 4, but leased Lot 1 to Tee, Ltd. (R. pp. 000576-000581; R. p. 000292.)

Paragraph 1 of the Agreement reads:

> Tee, Ltd. does hereby grant, convey, and remise to the Vancroft Corporation a forty (40') foot perpetual easement under, over and across the southwest quarter of Lot 1, Block 2, Nibler Subdivision, the legal description of which is attached hereto as Exhibit B and incorporated herein by this reference, for the purposes of providing utilities and access (i.e. ingress and egress) to Lot 4, Block 2, Nibler Subdivision.

(R. pp. 000094-000095.) Attached to the Agreement as Exhibit B is the Legal Description of the Easement Area, the "southerly (40') of Lot 1, Block 2, Nibler Subdivision." (R. p. 00084.) Also attached to the Agreement is the surveyed metes and bounds legal description of the area, similarly describing a forty foot (40') width. (R. p. 000085.)

The Agreement also stated Vancroft Corp. was requesting that Tee, Ltd. grant an easement to Vancroft Corp. "to provide access and utilities to Lot 4, Block 2, of the [Nibler] subdivision." *Id.* The Agreement further specified that Vancroft Corp. would be responsible for costs related to the installation of any utilities and any roadway within the easement area. *Id.* Pursuant to the Agreement, Vancroft Corp. would be responsible for all expenses related to any repairs, renovations, or changes to the existing golf course caused by installing the utilities or road. *Id.* The grantor, Tee, Ltd., reserved the right to approve all plans for the installation of the utilities and roadway and Grantor was limited to making these renovations within the easement area to the months of October through May to reduce interference with the golf courses operations. *Id.*

Lastly, the Agreement contains Paragraph 6 which provides:

> Upon the completion of the construction of the roadway, Grantee [Vancroft] shall have the right to dedicate said road to the Ada County Highway District or such other governmental agency then having jurisdiction and control over the public roads and highways in Boise, Ada County, Idaho. Such road shall meet all then existing ordinances and requirements, including the construction of roads, curbs, sidewalks, bonding, etc. Upon such dedication, Grantee shall have no further obligations hereunder, except for any obligation of this Agreement not assumed by the governmental agency.

(R. p. 000096.)

On October 27, 1993, Vancroft Corp. attempted to convey its rights in the Agreement to Bedard and Musser via the Assignment and Assumption of Permanent Easement Agreement (the "Assignment"). (R. p. 000089.) In the Assignment, Vancroft Corp. is signing as the "Assignor" and Bedard and Musser are signing as the "Assignee." Tee, Ltd. does not sign on this document in any capacity; neither as an "Assignor" nor as a "Grantor."

ISSUE ON APPEAL

Whether the district court correctly determined that the Agreement did not convey a permanent and perpetual easement across Lot 1 in favor of Lot 4.

STANDARD OF REVIEW

In reviewing the district court's grant of summary judgment this Court will apply the same standard the district court used in ruling on the motion. *Tiller White, LLC v. Canyon Outdoor Media, LLC*, 160 Idaho 417, 374 P.3d 580, 582 (2016). This Court will review a question of law de novo. *Cuevas v. Barraza*, 152 Idaho 890, 894, 277 P.3d 337, 341 (2012). When both parties have filed cross-motions for summary judgment the standard of review does not change. *Stafford v. Klosterman*, 134 Idaho 205, 207, 998 P.2d 1118, 1119 (2000). Summary judgment is appropriate

if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Mortensen v. Stewart Title Guar. Co.*, 149 Idaho 437, 441, 235 P.3d 387, 391 (2010) (see also I.R.C.P. 56(c)). "When an action will be tried before the court without a jury, the trial court as the trier of fact is entitled to arrive at the most probable inferences based upon the undisputed evidence properly before it and grant the summary judgment despite the possibility of conflicting inferences." *Shawver v. Huckleberry Estates, L.L.C.*, 140 Idaho 354, 93 P.3d 685 (2004) (citing *Brown v. Perkins*, 129 Idaho 189, 191, 923 P.2d 434, 436 (1996); *Loomis v. Hailey*, 119 Idaho 434, 437, 807 P.2d 1272, 1275 (1991)).

"The legal effect of an unambiguous written document must be decided by the trial court as a question of law." *Dr. James Cool, D.D.S. v. Mountainview Landowners Co-op Ass'n, Inc.*, 139 Idaho 770, 772, 86 P.3d 484, 486 (2003) (quoting *Latham v. Garner*, 105 Idaho 854, 857, 673 P.2d 1048, 1051 (1983)). This Court should not disturb the district court's "finding of fact that are supported by substantial and competent evidence, even if there is conflicting evidence." *Akers v. D.L. White Constr., Inc.*, 142 Idaho 293, 298, 127 P.3d 196, 201 (2005). The standard used when reviewing the inferences drawn by the trial court is whether the record reasonably supports those inferences. *Beus v. Beus*, 151 Idaho 235, 238, 254 P.3d 1231, 1234 (2011).

SUMMARY OF THE ARGUMENT

The district court's decision should be affirmed because the district court correctly held that the Agreement did not create a permanent and perpetual easement across Lot 1 in favor of Lot 4. At the time the Agreement was executed in 1991, Vancroft Corp. owned fee title to both Lot 1

and Lot 4. Vancroft Corp. was the lessor of a leasehold estate in Lot 1 which was leased to Tee, Ltd. for a term of 99 years. The Agreement purports to have Tee, Ltd., the lessee, convey to Vancroft Corp., the lessor, an easement across Lot 1 in favor of Lot 4. As the district court correctly points out, Tee, Ltd. was only capable of conveying no greater of an interest in Lot 1 than it itself possessed. Being that Tee, Ltd. only possessed a leasehold interest, it was limited to conveying a right of access that related to that interest. This right of access was not a permanent easement, but instead was a license, conveying access to a particular person for a limited time and specified purpose. This right of access most likely terminated in 1993 when Tee, Ltd. assigned its leasehold interest to Hendrickson who had no knowledge of the license. At the very latest, this interest would have ended in 2007 when Tee, Ltd.'s leasehold was terminated.

Boise Hollow bases its appeal on several issues, many of which are not properly before this Court, but in regards to the district court's main holding, Boise Hollow argues that a permanent easement could have been created by Tee, Ltd. because Vancroft Corp. allegedly consented to such a conveyance. However, Boise Hollow fails to cite any authority for the proposition that a leaseholder may encumber land beyond its limited interest and leasehold in the property. The district court's holding reiterates Boise City's position that Tee, Ltd. could not have encumbered Lot 1 with a permanent easement because doing so would encumber more than it had title to and would burden the reversionary interest which remained with Vancroft Corp. If Vancroft Corp. had attempted to consent to burdening its remainder interest, which Boise City contends it did not, doing so would have effectively granted Vancroft Corp. an easement in its own land, which is a legal impossibility.

ARGUMENT

A. THE DISTRICT COURT CORRECTLY HELD THAT A PERMANENT AND PERPETUAL EASEMENT WAS NOT CREATED BY THE AGREEMENT BECAUSE TEE, LTD. ONLY HELD A LEASEHOLD INTEREST IN THE SERVIENT ESTATE WHICH TERMINATED AT THE LATEST IN 2007 WITH THE TERMINATION OF THE LEASE.

The district court correctly bases its holding that a perpetual easement was not created by the Agreement on two main principles.

First, when the Agreement was executed in 1991 the grantor of the Agreement, Tee, Ltd., only held a leasehold possessory interest in the servient property. (R. pp. 000688-000690.) A leasehold tenant may not grant a greater interest in the servient estate than it itself possesses. (R. p. 000689; see RESTATEMENT (THIRD) OF PROPERTY, SERVITUDES, § 1.5 cmt. a, at 31.) Although a leaseholder may grant an encumbrance over its estate, it may not burden the underlying fee which it does not possess an interest in. (R. p. 000689; *see* JON W. BRUCE AND JAMES W. ELY, JR., THE LAW OF EASEMENTS & LICENSES IN SERVIENT AND DOMINANT ESTATES - SERVIENT AND DOMINANT ESTATES LESS THAN FEE SIMPLE § 2:9 (2015)). Because Tee, Ltd. only held a leasehold interest in the servient estate, the only right of access it could have conveyed in the Agreement would have been appurtenant to its interest, the leasehold, and would have ended in 2007 when the leasehold was terminated. (R. p. 000694.)

Second, the district court properly held that a perpetual easement was not created because Vancroft Corp. was incapable of granting an easement over its own land. (R. p. 000691.) A land owner cannot create an easement over its own land. (R. p. 000691); *see Capstar Radio Operating Co. v. Lawrence,* 153 Idaho 411, 420, 283 P.3d 728, 737 (2012). Because Vancroft Corp. was the

fee title owner of both the dominant (Lot 4) and the servient estate (Lot 1), even if Tee, Ltd. had possession of the servient estate as a leasehold, Vancroft Corp. held both fee title and all reversionary interests, in both title and possession, and could not have granted itself an easement over its own land in perpetuity. (R. p. 000691.) Therefore, because Vancroft Corp. could not obtain an easement over its own land, the most Tee, Ltd. could have granted to Vancroft Corp. was a right to access or use the property, a license. (R. p. 000693.) Such license would have terminated either in 1993 when the leasehold was transferred or at the latest, in 2007 when the leasehold interest itself was terminated. (R. 000694.)

1. Any Right or Interest Conveyed by Tee, Ltd. Terminated, at the Latest, in 2007 Because Tee, Ltd. Only Held a Leasehold Interest in the Servient Estate, Lot 1.

Tee, Ltd., as the lessee, could not convey an interest in the servient estate beyond that which it possessed in the property. At the time the Agreement was executed, Vancroft Corp. was the fee title owner of both Lot 4 (the dominant estate) and Lot 1 (the servient estate). (R. pp. 000576-000581.) This fact is undisputed by both parties. A lessee has only a limited ownership in the real property still owned in fee title by the landlord. *Krasselt v. Koester*, 99 Idaho 124, 125, 578 P.2d 240, 241 (1978). "An easement can be created only by a person who has title to or an estate in the servient tenement, and an easement may not create a right that the grantor did not possess." 25 AM. JUR. 2D *Easements and Licenses* § 12 (2015). A fee simple owner of the land is the only one who may grant a permanent easement in the property. SERVIENT AND DOMINANT ESTATES LESS THAN FEE SIMPLE, *supra*. Therefore, the greatest right that could have been conveyed by Tee, Ltd.

in the Agreement was a right of entry across the servient estate to which it had a possessory interest until 2007.

Boise Hollow argues at length that the title of the Agreement and the words used in the Agreement, of "permanent" and "perpetual" are dispositive that a permanent easement was created. (Appellant's Br., pp. 16-17.) In determining the nature of the agreement and what it legally creates, the title of the instrument is not controlling. *Rowan v. Riley*, 139 Idaho 49, 56, 72 P.3d 889, 896 (2003). Therefore, regardless of the language used by the drafter of the Agreement, Rebecca Arnold, there is no legal basis for the grantor to burden the estate for longer than it possesses an interest in that estate. The law is clear on this point. "An easement burdening or benefiting an estate less than a fee simple ends when the estate expires." SERVIENT AND DOMINANT ESTATES LESS THAN FEE SIMPLE, *supra* at § 10:15. Following, "an easement that burdens a leasehold is extinguished upon expiration of the lease." *Id.* Any right of access granted by Tee, Ltd. ended with the termination of the leasehold in 2007.

Boise Hollow also attempts to argue that a lessee of a servient estate may burden that estate beyond the duration of the leasehold, if the owner in fee title of both the dominant and servient estates consents to such perpetuity. (Appellant's Br., pp. 19-22.) However, Boise Hollow cites no legal authority that supports this proposition. *Id.* Even if Vancroft Corp. had consented to creating an easement over the servient estate for longer than Tee, Ltd. held a leasehold interest in the property, which Boise City does not concede that it did, there is no basis in law to allow for this. Boise Hollow incorrectly relies on the Montana Supreme Court case, *Leichtfuss v. Dabney*, 329 Mont. 129, 122 P.3d 1220 (2005), for the proposition that an easement burdening an estate less

than fee simple may continue on once the estate has expired if it is consented to by the dominant estate holder. However, *Leichtfuss* blatantly reaffirms Boise City's position and pointedly distinguishes the circumstances in that case from ours. The district court agreed.

The court in *Leichtfuss* in fact echoes Boise City's recitation of the law regarding the inability of the lessee of a servient estate to burden the land beyond its leasehold. The court begins by distinguishing the facts of its case from the facts of a case similar to ours, "[t]he precise issue, therefore, is whether an easement established by prescription for the benefit of a dominant tenement held as a life estate terminates as a matter of law upon the extinguishment of that life estate." *Id.* at 142, 122 P.3d at 1229. The *Leichtfuss* case, which is entirely divergent from ours, dealt with an easement for the benefit of a *dominant estate* which was held in less than fee title. Our case here involves a *servient estate* held in less than fee title. This distinction is essential to the *Leichtfuss* court's willingness to consider the ability of an easement created for the benefit of a dominate estate to potentially continue on past the duration of the dominant estate's limited leasehold. In making the distinction however, the court in *Leichtfuss* reiterates the law applicable in *this* case and affirms the principle that an easement burdening a servient estate held in less than fee title may not burden the land beyond that leasehold. "The foundation for this principle is easily understood where the servient tenement is held in less than fee simple: a person can convey no more or greater title than he holds." *Id. citing* RESTATEMENT (THIRD) OF PROP.: SERVITUDES, § 1.5 cmt. a, at 31. Going on the court states, "[i]n other words, a life tenant or a lessee generally cannot impose upon his land a burden that passes to the remainderman or the reversioner." *Leichtfuss*, at 142, 122 P.3d at 1230.

Therefore, despite Boise Hollow's argument that the fee title holder of a dominant and servient estate may consent to the leaseholder of the servient estate granting an interest beyond that which he possesses in the leasehold, there is no legal support for such a proposition. Even the main case cited by Boise Hollow simply reaffirms Boise City's position and the district court's holding that such a suggestion does not exist in the law. Whatever interest, if any, was conveyed by Tee, Ltd. in the Agreement, terminated when that interest was extinguished in 2007.

Additionally, of note, nowhere in the Agreement does Vancroft Corp. sign as a consenting party or a grantor of any interest in Lot 1. (R. pp. 000019-000030.) Instead the only grantor conveying any interest in the Agreement is Tee, Ltd.

2. A Permanent Easement was not Created Because Vancroft Corp. Could not Grant an Easement Over Its Own Land.

Vancroft Corp. being the fee title owner of both Lot 4 and Lot 1 in 1991 could not have "granted", "created" or "consented" to a permanent, perpetual easement over its own property. The district court below rightly rejected Boise Hollow's argument that Vancroft Corp. consented to or obtained an interest which essentially burdened Vancroft Corp.'s remainder interest in the servient estate. (R. p. 0000690.) It is a well-known principle in the law that the owner of real property cannot grant itself an easement across its own land. Because an easement is defined as the right of one person to use the land of another, one cannot grant oneself an easement in his own land. *Capstar Radio Operating Co. v. Lawrence,* 153 Idaho 411, 420, 283 P.3d 728, 737 (2012) (citing *Zingiber Inv., L.L.C., v. Hagerman Highway Dist.*, 150 Idaho 675, 681, 249 P.3d 868, 874 (2011) (quoting *Gardner v. Fliegel*, 92 Idaho 767, 771, 450 P.2d 990, 994 (1969)), *see also* 25

AM. JUR. 2D *Easements and Licenses* § 2 (2015) (an easement cannot exist as long as there is unity of ownership between the properties involved).

Boise Hollow cites no authority to support its claim that one may grant an easement over its own property. Instead they discuss the case *Johnson v. Gustafson*, 49 Idaho 376, 288 P. 427 (1930) which actually reaffirms Boise City's argument that Vancroft Corp. could not have granted itself an easement over its own land. To begin with, *Johnson* involved an action to establish a prescriptive easement. *Id.* Our case on the other hand, involves an alleged express easement. *Johnson* reads in pertinent part, "one cannot have an easement in his own lands . . . but where the owner of an entire tract . . . *sells* the one in favor of which such continuous and apparent quasi easement exists, such easement being necessary to the reasonable enjoyment of the property granted, will pass to the grantee by implication." *Id.* at 376, 28 P. at 429 (emphasis added). *Johnson* reaffirms that one may not have an easement over one's own property, but in the event that one sells the parcel benefited by a *current* use consistent with an easement, an easement may then be granted when the property is divided. *Id.* Those facts are completely different from our case, in that our case does not involve a prescriptive easement or a current, continuous use being transferred once the relevant parcels are separated as was the case in *Johnson.*

During Tee, Ltd.'s leasehold, all Vancroft Corp. needed was a right of access across Lot 1. As the district court appropriately pointed out, Vancroft Corp. had no need to create a permanent easement on its own property as it owned both parcels, Lot 4 and Lot 1. (R. p. 000690, Ls. 16-18.) Simply, Vancroft Corp. did not need an easement to access Tee, Ltd.'s property, it owned that property. What it did need, however, was the right to use the property subject to Tee, Ltd.'s

leasehold for the term of years. Even if Vancroft Corp. had attempted to convey or consent to a permanent, perpetual easement, this would have legally failed because at the expiration of the leasehold the property would have reverted back to Vancroft Corp. and it would again hold both parcels in title and possession. (R. p. 000690.)

3. At the Most, Tee, Ltd. Granted Vancroft Corp. a License in Lot 1 and Such License Ended in 1993 or at the Latest 2007, But in No Event is It in Existence Today.

The district court points out that based on the nature of the Agreement, Vancroft Corp. did not create a permanent, perpetual easement, but instead was attempting to establish a right to use the property currently subject to a leasehold held by Tee, Ltd. (Mem. of Decision and Order Re: Cross-Mot. for Summ. J. at R. p. 000692.) The district court states,

> [s]o if the Permanent Easement Agreement did not convey an easement, what was the Agreement? The plain language of the document answers this question as well. In order to construct the roadway it desired to construct, Vancroft needed permission from its tenant to access that portion of Vancroft's land to which the tenant had a possessory interest until the year 2079 [and which terminated in 2007]. The tenant, Tee, Ltd., was willing to grant such permission under certain conditions.

(Mem. of Decision and Order Re: Cross-Mot. for Summ. J. at R. p. 000693.)

As the lessee of the servient estate whose fee title was held by the owner of the dominant estate as well, Tee, Ltd. had the ability to grant a license. A license is the permission to do something on the land of another and is a mere personal privilege. THE LAW OF EASEMENTS AND LICENSE IN LAND, *General characteristics* § 11:1. Normally, a license is not viewed as an interest in the land. *Id.* "In contrast to an easement, '[a] license is a permissive use of land by which the owner allows another to come onto his land for a specific purpose.'" *Rowan*, 139 Idaho at 56, 72 P.3d at 896 (quoting 25 AM. JUR. 2D *Easements and Licenses* § 2 (1996)). Likewise, a license

normally is only binding as between the parties to the license and does not pass with the title to the property. *State v. Camp*, 134 Idaho 662, 667 (Ct. App. 2000); *see also Rowan*, 139 Idaho at 56, 72 P.3d at 896; THE LAW OF EASEMENTS AND LICENSE IN LAND, *Assignability* § 11:4 (licenses are generally not assignable as they are personal and limited to the original parties); *but see Branson v. Miracle,* 111 Idaho 933, 937, 729 P.2d 408, 412 (1986) (in certain circumstances a revocable license may continue where the servient estate is transferred, if the new owner makes no objection to the *existing* use and the dominant licensee's continued enjoyment of the license is not inconsistent with the rights of the grantee).

Therefore, Tee, Ltd. conveyed a license to Vancroft Corp. for access to Lot 1 while Tee, Ltd. had a possessory interest in that land. As licenses are normally an interest in the original parties, this license almost certainly terminated in June 1993 when Tee, Ltd. conveyed the leasehold to Hendrickson (R. pp. 000586-000591) or alternatively, when Vancroft Corp. attempted to assign the license to Bedard and Musser a few months later in October 1993. (R. p. 000089.) In addition, the Agreement contains no provision allowing assignability. (R. pp. 000094-000102.) Furthermore, there is no evidence Hendrickson assumed the Agreement or consented to its continuance; it is not referenced in the assignment of the lease. (R. pp. 000586-000591.) In fact, in June 1993 when Hendrickson took over the lease as the new lessee, the Agreement had not even been recorded and was not recorded until November 1993. (R. pp. 00094-000102.) Nothing in the record suggests Hendrickson had any knowledge of the Agreement when he took over the leasehold.

Likewise, at the time Vancroft Corp. decided to sell Lot 4, it could have conveyed an easement to Bedard and Musser in the fee title of Lot 1 and Bedard and Musser could have obtained a right of entry from Hendrickson related to its interest in the leasehold. However, this was never done. (R. pp. 000598-000599.) On October 27, 1993, Vancroft Corp. sold Lot 4 to Bedard and Musser, without any conveyance or reference to an easement over Lot 1. *Id.* (see also district court's recitation of this point at R. p. 000691). The only interest Vancroft Corp. attempts to convey to Bedard and Musser was its license interest obtained by the Agreement and it attempts to do so via the Assignment. (R. pp. 000089-000093.) However, Vancroft Corp. likely was incapable of assigning this right because it most likely terminated in June of 1993 when Tee, Ltd, conveyed the leasehold to Hendrickson. Even if this Court finds Vancroft Corp. could have conveyed its interest in the Agreement to Bedard and Musser the interest still terminates at the very latest in 2007 when the leasehold is terminated. (R. pp. 000603-000605.) The Assignment does not create a new interest, but merely assigns what was originally conveyed, a right of access attached to the leasehold which expired in 2007.

B. BOISE HOLLOW RAISES SEVERAL ISSUES ON APPEAL THAT ARE NOT PROPERLY BEFORE THIS COURT.

1. Boise City is Not Bound by the Interest Granted in the Agreement and is Not Estopped from Challenging Its Current Validity.

For the first time on appeal, Boise Hollow now argues that Boise City should be estopped from denying the existence of a permanent easement over Lot 1 in favor of Lot 4. (Appellant's Br., p. 28.) Boise Hollow, having not preserved this argument below, now claims that Boise City is bound by the terms of the Agreement because it not only had constructive notice of its existence

through Boise City's acceptance of the Deed of Gift, it also contractually subscribed to it by accepting the Deed of Gift. *Id.* (referencing R. p. 000618). Boise Hollow never raised this issue in any of its briefing, or at oral argument at the district court level, nor was this issue listed in Boise Hollow's Amended Notice of Appeal. (See generally, Mem. in Supp. of Pls.' Mot. for Summ. J., Plaintiffs' Mem. in Opp'n to Def.'s Cross-Mot. for Summ. J., Reply in Supp. of Pls.' Mot. for Summ. J., September 8, 2015, Transcript of Proceedings, and Am. Not. of Appeal.)

Issues not raised at the district court level, but instead raised for the first time on appeal will not be considered or reviewed by this Court. *Kirk v. Wescott*, __ Idaho __, 382 P.3d 342 (2016) (quoting *Whitted v. Canyon Cty. Bd. Of Comm'rs*, 137 Idaho 118, 121, 44 P.3d 1173, 1176 (2002); *Krempasky v. Nez Perce County Planning and Zoning*, 150 Idaho 231, 236, 245 P.3d 983, 988 (2010)). Because this issue was not raised below, this Court should decline to address this issue on appeal.

As a separate ground, this Court should refuse to consider this argument because Boise Hollow attempted to raise this argument in its Post Summary Judgment Hearing Brief Re: Enforceability of Easement Covenant. (R. pp. 000659-000664.) Boise City objected to the district court's consideration of the brief as Idaho Rule of Civil Procedure 56 does not provide for submission of a post-argument brief, and additionally, the court did not request such briefing. Judge Medema, in addition to agreeing with Boise City that I.R.C.P. 56 did not provide for such submission and that he had not requested additional briefing, denied admission of the brief noting,

> [t]he Court has not considered the briefing in making its decision as to the motions for summary judgment. Specifically when those argument [sic] appear to be

> regarding a claim for relief based in contract when the only cause of action plaintiffs have raised in their pleadings is one regarding title to property.

(R. p. 000678.) Boise Hollow now attempts to circumvent the district court's denial of admission of its post-hearing brief by including its argument, almost verbatim, in its appeal. (*Compare* Appellant's Br. at pp. 28-30 and Post Summ. J. Hr'g Br. Re: Enforceability of Easement Covenant, at pp. 3-5.) This Court should refuse to hear this argument by Boise Hollow as it was not raised below and because the district court denied its admission via a post-hearing brief.

In the event this Court nevertheless decides to hear this argument raised for the first time on appeal, Boise Hollow cites no law for their suggestion that even if an encumbrance is no longer valid or enforceable, a property owner is estopped from challenging its validity if it accepts the deed which contains notice of a separate document conveying a no longer valid encumbrance. Boise Hollow instead cites numerous cases discussing the contractual nature of servitudes, restrictive covenants and declarations. (*See* Appellant's Br., p. 28.) However, Boise Hollow's reliance on these authorities is misplaced, as those cases do not deal with an alleged express easement whose only notice is based on a referenced Agreement which conveys at most an interest which terminated in 2007. A deed which contains notice of a separate instrument conveying a no longer valid encumbrance cannot breathe new life into that terminated interest. *See*, *Machado v Ryan*, 153 Idaho 212, 219, 280 P.3d 715, 722 (2012) (stating "thus language in a deed providing that the conveyance is 'subject to' easements of record does not itself reserve an easement."). In addition, the alleged easement was not in use when Boise City took title to the servient estate. Boise City had no actual notice of the use or potential of an alleged easement beyond what was

conveyed in the Agreement. Boise City was only aware of a recorded Agreement, which under preliminary investigation, revealed a license between Tee, Ltd. and Vancroft Corp. that was extinguished in 1993 or no later than 2007.

Boise Hollow does not have an equitable servitude in favor of Lot 4 across Lot 1. After Boise Hollow raises the argument that Boise City is contractually burdened by the Agreement, it then attempts to raise for the first time on appeal the idea that the Agreement created an equitable servitude. Again, the Court should not consider this argument as it has not been raised at the district court. However, even if this argument is considered by the Court, it is clear the Agreement does not create an equitable servitude or a restrictive covenant. An equitable servitude or restrictive covenant is an agreement not to assert a right or refrain from using ones' land in a certain way. 20 AM. JUR. 2D *Covenants, Etc.* § 148 (2015). Those are not the facts of our case. Here, we have a drafter attempting to create an express easement and we have a document conveying a license to use the property in a certain manner, not a restrictive covenant or equitable servitude. The cases Boise Hollow cites do not stand for the proposition that by referencing an encumbrance in a deed, that particular encumbrance becomes effective against that deed holder even if the encumbrance is not valid on its face. (*See* Appellant's Br., pp. 28-30.) Again, a deed stating the property in question is "subject to" or includes similar language, referencing a list of exceptions or other encumbrances, does not create a new or automatically binding obligation related to that exception. Instead, this language is merely incorporated into the deed to create exceptions to the covenants in the warranty deed made by the person conveying the property. *Birdwood Subdiv. Homeowners'*

Ass'n, Inc. v. Bulotti Const., Inc., 145 Idaho 17, 21, 175 P.3d 179, 183 (2007); *Akers v. D.L. White Const., Inc.*, 142 Idaho 293, 301, 127 P.3d 196, 204 (2005).

2. The Plain Language of the Unambiguous Agreement is Controlling and Specifies a Maximum Width of Forty Feet (40').

Boise Hollow again attempts to raise the issue of the interpretation of the terms of the Agreement. That issue is not properly before this Court. Nowhere in the district court's decision does it address the issue of the plain language of the Agreement as it relates to the interpretation of the width or scope of the license area. (*See generally* Mem. Decision and Ord. Re: Cross-Mots. for Summ. J.) In finding that a permanent and perpetual easement does not exist, the width of the non-existent easement and Boise Hollow's claim that it is expandable, were never decided by the trial court.

As this Court has held on numerous occasions, only an issue which has received an adverse ruling by the court below may be appealed. *Whitted v. Canyon County Board of Com'rs*, 137 Idaho 118, 121, 44 P.3d 1173 (2002) (*see also*, *Kirk v. Wescott*, __ Idaho __, 382 P.3d 342). Unless the appellant receives a ruling on that specific issue from the court below it will not be heard by this Court. *State v. Pickens*, 148 Idaho 554, 557, 224 P.3d 143, 146 (2010), *citing Smith v. State*, 146 Idaho 822, 203 P.3d 1221 (2009); *State v. Yakovac*, 145 Idaho 437, 180 P.3d 476 (2008); *Jensen v. Doherty*, 101 Idaho 910, 623 P.2d 1287 (1981); *State v. Harrison*, 147 Idaho 678, 681, 214 P.3d 664, 667 (Ct. App. 2009); *State v. Huntsman*, 146 Idaho 580, 199 P.3d 155 (Ct. App. 2008); *State v. Harshbarger*, 139 Idaho 287, 77 P.3d 976 (Ct. App. 2003). This Court does not review a purported error by the trial court unless the record reveals an adverse ruling which forms the

assignment of error. *Ada Cnty. Highway Dist. v. Total Success Investments, LLC*, 145 Idaho 360, 368, 179 P.3d 323, 331 (2008). "This Court will not search the record for error. We do not presume error on appeal; the party alleging error has the burden of showing it in the record." *PHH Mortg. v. Nickerson*, 160 Idaho 388, 374 P.3d 551, 562 (2015), *citing VanderWal v. Albar, Inc.*, 154 Idaho 816, 822, 303 P.3d 175, 181 (2013) (quoting *Miller v. Callear*, 140 Idaho 213, 218, 91 P.3d 1117, 1122 (2004)).

In *PHH Mortg.*, the Nickersons appealed the lower court's grant of summary judgment against them in an action for judicial foreclosure. *Id.* at 388, 374 P.3d at 554. The Nickersons raised numerous issues on appeal and this Court addressed a majority of them, but devoted a section of its decision to address what issues were not before this Court. In refusing to hear these issues, the Court stated, "the Nickersons fail to provide a citation to the record showing the district court's decision on the issue, much less address the basis for that decision. Thus we will not address the Nickersons' claim...." *Id.* at 388, 374 P.3d at 562. Similarly, in our case the width and expandability of the easement was not pertinent to the district court's holding that a perpetual easement did not exist. There is no adverse holding on that issue which could form the basis of Boise Hollow's appeal of that issue. In addition, Boise Hollow has pointed to no alleged error on this issue which could be reviewed by this Court. Therefore, this Court should not address the claim that Boise Hollow has the right to an expandable easement.

In the event the Court decides to nonetheless address this issue, Boise City would refer this Court to the full argument on this issue within its Memorandum in Support of Defendant's Cross-Motion for Summary Judgment, pp. 10-16 at R. pp. 000240-000246, Defendant's Response in

Opposition to Plaintiffs' Motion for Summary Judgment, pp. 11-14 at R. pp. 000385-000388 and Reply in Support of Defendant's Cross-Motion for Summary Judgment, pp. 4-10 at R. pp. 000526-000532.

In short, the plain unambiguous language of the Agreement specifies a width of forty feet (40'). (R. pp. 000019-000030.) In addition to stating the width of the alleged easement area, the parties to the Agreement also include a legal description of forty feet (40') and the metes and bounds document depicting forty feet (40'). (R. pp. 000027-000028.) Nowhere in the Agreement is there any language stating the width of the easement may be enlarged or expanded beyond forty feet (40') at any time. (*See* R. pp. 000019-000030.)

When reviewing the language of an easement agreement, a strong emphasis is placed on the written expression of the parties' intent. RESTATEMENT (THIRD) OF PROP.: SERVITUDES, §§ 4.1(d) (2000). The plain language of a contract is controlling when the language is unambiguous. *Steel Farms, Inc. v. Croft & Reed, Inc.*, 154 Idaho 259, 266, 297 P.3d 222, 229 (2012). When the language of a contract is unambiguous, its meaning must be determined from its words. *Cristo Viene Pentecostal Church v. Paz*, 144 Idaho 304, 308, 160 P.3d 743, 747 (2007) (citing *Shawver v. Huckleberry Estates, LLC*, 140 Idaho 354, 361, 93 P.3d 685, 692 (2004)). The words used by the parties in drafting the contract offer the best evidence of the parties' mutual intent. *USA Fertilizer v. Idaho First Nat. Bank*, 120 Idaho 271, 815 P.2d 469 (Ct. App. 1991). When the parties to an easement describe with specificity the location, utility or width of the easement, such specification is "ordinarily construed to place an outside limit on the dimensions." RESTATEMENT (THIRD) OF PROP.: SERVITUDES, at § 4.8(d).

Paragraph 6 of the Agreement, which discusses potential dedication of a road created within the license area can be read in harmony with Paragraph 1 which designates its width, primarily because they address different elements of the Agreement: Paragraph 1 specifies the size and use of the 40' area, whereas Paragraph 6 *authorizes* dedication of any road constructed within the 40' area. (R. p. 000021.) Paragraph 6 does not modify the unambiguous dimensional language of Paragraph 1. *Id.* In fact, Paragraph 6 does not even reference Paragraph 1. *Id.* Paragraph 6 merely grants the "right" to dedicate a road that, when completed, meets ACHD's specifications. *Id.* Nowhere in Paragraph 6 does it mention the word 'expansion,' 'enlarge,' or 'widen.' *Id.* Furthermore, Paragraph 6 does not mention any width requirement or any ability to change the width to accompany such requirement. *Id.*

If Paragraph 6 were to be interpreted to allow the grantee of the Agreement to expand the width of the area, such interpretation would make Paragraph 6 in direct contradiction to Paragraph 1. "In construing a contract, an interpretation should be avoided that would render meaningless any particular provision in the contract." *Star Phoenix Min. Co v. Hecla Min. Co.*, 130 Idaho 223, 233, 939 P.2d 542, 552 (1997) (quoting *Top of the Track Assoc. v. Lewiston Raceways, Inc.*, 654 A.2d 1293, 1296 (Me. 1995)). Discussing conflicting provisions of a contract, the Supreme Court stated:

> While provisions of a contract are to be read together and harmonized whenever possible, yet if two clauses relating to the same thing are so repugnant that they cannot stand together, the first will be received and the later one rejected, especially when the latter is inconsistent with the general purpose and intent of the instrument and would nullify it.

Morgan v. Firestone Tire & Rubber Co., 68 Idaho 506, 518, 201 P.2d 976, 983 (1948). Applying the principles set forth by this Court in *Morgan*, if Paragraph 6 is given the interpretation Boise Hollow is seeking, it would be in contradiction with Paragraph 1 and the earlier (Paragraph 1) would be considered and the later (Paragraph 6) would be rejected, as it would be inconsistent with the general purpose and intent of Paragraph 1.

3. Parol Evidence is Not Admissible to Show the Agreement was Expandable.

Boise Hollow argues that should this Court find that the terms of the Agreement are ambiguous, this Court should rely on extrinsic evidence in determining the parties' intent. (Appellant's Br., pp. 37-40.) Again, this issue is not before the Court. The District Court made no rulings on the issue of whether parol evidence should be considered and Boise Hollow has failed to point to any adverse ruling on this issue for this Court to review for error. Therefore, this issue should not be addressed by this Court. For the sake of brevity, please refer to Section B(2) above for extensive legal authority supporting the fact that issues which were not ruled on below by the trial court should not be considered by this Court.

Boise Hollow suggests that in the event this Court finds the Agreement is ambiguous, the district court erred by excluding the affidavits of Rebecca Arnold and Colin Connell and the Second Declaration by Sanderson. (Appellant's Br., pp. 39-40.) Although, Boise Hollow provides a citation to the record to show an adverse ruling on the issue, Boise Hollow mischaracterizes the district court's holding in order to ask this Court to review it. (*Id.* at 40.) In asking this Court to find error with the district court, Boise Hollow misrepresents the lower court's holding by stating, "[t]he basis of the District Court's exclusion [of the affidavits] was the Court's conclusion that the

Permanent Easement Agreement is not ambiguous," to which they cite the Record at 000675. (Appellant's Br., pp. 39-40.) This is completely inaccurate. Instead, Judge Medema states almost the opposite,

> Because Tee, Ltd., could not convey a greater interest in what became of Lot 1, Block 2, Nibler subdivision than it possessed, and because Tee, Ltd., possessed only a term leasehold estate, it is not necessary to interpret the Agreement to determine what the parties thought Tee was conveying. It was not possible for Tee to convey an easement which burdened Lot 1 in perpetuity. Whatever Tee conveyed to Vancroft expired no later than when the leasehold Tee held was terminated. Therefore, defendant is entitled to summary judgment as a matter of law without interpreting the Agreement itself. Therefore, the various averments about the intent of the parties and circumstances surrounding the execution of the Agreement are irrelevant. The affiants' and declarants' statements about themselves, their backgrounds, and their opinions are also irrelevant."

(R. p. 000675.) Nowhere in the court's holding on this issue, does Judge Medema state that the affidavits are excluded because of a determination that the Agreement is unambiguous. As this Court has held before, it will not consider or address issues not supported by argument or authority. *Cowan v. Board of Com'rs of Fremont County*, 143 Idaho 501, 508, 148 P.3d 1247, 1254 (2006). Idaho Appellate Rule 35 requires parties to an appeal to adequately address each issue raised with argument, legal authority, and citation to the record. *Idaho Power Co. v. Idaho Dept. of Water Resources*, 151 Idaho 266, 278, 255 P.3d 1152, 1164 (2011). Boise Hollow has failed to provide an argument as to why these affidavits should be admitted and has failed to state how Judge Medema erred in excluding them based on their irrelevance.

If this Court believes there is a basis to hear this argument, the issue and determination of what the intent of the parties was in drafting the Agreement, should be remanded to the trial court for determination. "If the language of a deed is ambiguous, determining the parties' intent is a

question of fact and may only be settled by a trier of fact." *Hoch v. Vance*, 155 Idaho 636, 639, 315 P.3d 1212, 1217 (2008); *see also Marek v. Lawrence*, 153 Idaho 50, 53, 278 P.3d 920, 923 (2012) (citing *Porter v. Bassett*, 146 Idaho 399, 404-05, 195 P.3d 1212, 1217-18 (2008)). Therefore, any issue of the parties' intent or the credibility of others involved in the drafting of the Agreement should be remanded to the trial court.

For the Court's reference Boise City has addressed this issue of the intent of the parties to the district court below as the trier of fact. A full discussion of this issue can be found in Defendant's Response in Opposition to Plaintiffs' Motion for Summary Judgment, pp. 14-19 at R. pp. 000388-000393.

CONCLUSION

Based upon the foregoing reasons, the Respondent respectfully requests that this Court affirm the judgment of the District Court below, denying the Plaintiffs' Motion for Summary Judgment, granting the Defendant's Motion for Summary Judgment and Dismissing Plaintiffs' First Amended Complaint with prejudice.

DATED this 18 day of November 2016.

BOISE CITY ATTORNEY'S OFFICE

Abigail R. Germaine, Deputy City Attorney
Of the Office
Attorney for Plaintiff/Appellant

CERTIFICATE OF SERVICE

I hereby certify that I have on this 18 day of November 2016, served the foregoing document on all parties of record as follows:

Terry C. Copple
Michael E. Band
DAVISON, COPPLE, COPPLE & COPPLE, LLP
Attorneys at Law
199 North Capitol Blvd., Ste 600
P.O. Box 1583
Boise, Idaho 83701

- ☐ U.S. Mail
- ☒ Personal Delivery
- ☐ Facsimile
- ☐ Other: _____

Abigail R. Germaine
Deputy City Attorney