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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.	Supreme Court Docket No. 44171-2016 Ada County No. CV-2015-10297

APPELLANTS' BRIEF

Appeal from the District Court of the Fourth
Judicial District for the County of Ada

Honorable Jonathan Medema, District Judge, Presiding

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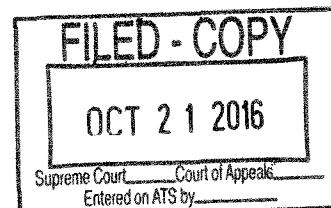

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A. Tee effectively conveyed a permanent easement to Vancroft because [1] Vancroft, as fee title owner Lot 1, consented to its being subject to a permanent easement, and [2] Vancroft never held concurrent unity of possession and title with respect to Lot 1 and Lot 4. The permanent easement was not subsequently extinguished by the termination of the lease because at no point has there been concurrence of the common law unities. 16

B. The City should be estopped from denying the existence of the easement because when it accepted the Deed of Gift it assumed and became bound to the known obligations and duties appurtenant to Lot 1, including the easement and the Permanent Easement Agreement. 28

C. The plain language of the Permanent Easement Agreement provides Boise Hollow the right to expand the road to meet ACHD's specifications and requirements. 31

D. If the Court finds that the language of the Permanent Easement Agreement was ambiguous, [1] the parol evidence establishes that the parties intended for the grantee and its successors to have the right to expand the road to meet ACHD's specifications and requirements, and [2] the District Court erred by striking the Arnold Aff., Connell Aff., and Second Sanderson Decl. 37

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STATEMENT OF THE CASE

A. Nature of the Case

The parties to this case are successors-in-interest to a 1991 agreement entitled PERMANENT EASEMENT AGREEMENT which purported to grant an access easement across land[1] now owned by Defendant-Respondent City of Boise (the "City") to an adjacent 63-acre parcel[2] owned by Plaintiff-Appellant Boise Hollow Land Holdings, RLLP ("Boise Hollow"). This case concerns the interpretation of the Permanent Easement Agreement.

It is Boise Hollow's position that the plain language of the Permanent Easement Agreement permits Boise Hollow to expand the easement area to such dimensions as are necessary to comply with the requirements of the Ada County Highway District (ACHD) and then dedicate the easement road to ACHD as a public road.

The City contends that the Permanent Easement Agreement does not call for the expansion of the easement area. Accordingly, Boise Hollow sought a declaration from the District Court that, under the Permanent Easement Agreement, the easement road may be expanded in order to meet ACHD's requirements.

Both parties filed motions for summary judgment under Rule 56 of the IDAHO RULES OF CIVIL PROCEDURE (I.R.C.P.). District Judge Jonathan Medema determined that the Permanent Easement Agreement did not successfully convey a permanent easement to Boise Hollow's

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[1] Lot 1, Block 2, Nibler Subdivision, Boise, Ada County, Idaho.

[2] Lot 4, Block 2, Nibler Subdivision, Boise, Ada County, Idaho.

predecessor-in-interest and that any interest which had been conveyed had since been extinguished. Judge Medema therefore entered judgment in favor of the City. Boise Hollow now appeals Judge Medema's decision.

B. Relevant Procedural History

The following District Court proceedings are pertinent to his appeal:

1. Pleadings and Parties

Plaintiff Bedard and Musser filed its COMPLAINT FOR QUIET TITLE (R. 000007-000051)[3] on June 17, 2015. The City filed its ANSWER TO COMPLAINT (R. 000052-000057) on July 8, 2015.

Subsequently, Bedard and Musser assigned its interest in the 63-acre parcel and the Permanent Easement Agreement to Boise Hollow. *See* R. 000105-000107. On December 2, 2016, it was ordered that Boise Hollow be joined as an additional party plaintiff to this matter. *See* R. 000058-000059. The parties stipulated to the filing by Plaintiffs of the FIRST AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL, which recites and incorporates Boise Hollow's interest into the factual allegations and prayer for relief.

The FIRST AMENDED COMPLAINT (R. 000060-000107) was filed on December 2, 2015. The City's ANSWER TO FIRST AMENDED COMPLAINT (R. 000223-000228) was filed on December 14, 2015.

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[3] The Clerk's Record on Appeal is cited herein as "R." The Reporter's Transcript on Appeal is cited as "Tr." The exhibits admitted at the trial are cited as "Ex."

2. Cross-Motions for Summary Judgment, and Related Motions

i. Boise Hollow's Motion for Summary Judgment, and City's Opposition

Boise Hollow filed its MOTION FOR SUMMARY JUDGMENT (R. 000108-000109) on December 3, 2015. Concurrently, Boise Hollow filed: [1] MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT (R. 000198-000222); [2] AFFIDAVIT OF REBECCA W. ARNOLD ("Arnold Aff.," R. 000134-000171); [3] AFFIDAVIT OF KEVIN MCCARTHY, P.E. (R. 000109-133); and [4] AFFIDAVIT OF DEAN W. BRIGGS, P.E. ("Briggs Aff.," R. 000172-000197).

On January 15, 2016, the City filed the following in direct opposition to Boise Hollow's Motion: [1] DEFENDANT'S RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT (R. 000375-000397); and [2] SECOND DECLARATION OF COUNSEL ABIGAIL R. GERMAINE (R. 000398-000404).

On February 2, 2016, Boise Hollow filed its REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT (R. 000405-000420).

The Court heard oral argument on this motion on February 16, 2016.

ii. The City's Cross-Motion for Summary Judgment, and Boise Hollow's Opposition

The City filed DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT (R.000229-000230) on December 31, 2015. Concurrently, the City filed: [1] MEMORANDUM IN SUPPORT OF DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT (R. 000231-000251); [2] DECLARATION OF TOMMY T. SANDERSON (R. 000352-000369).; and [3] DECLARATION OF COUNSEL ABIGAIL R. GERMAINE (R. 000252-000351).

On February 2, 2016, Boise Hollow filed the following in direct opposition to the City's Motion: [1] PLAINTIFF'S OPPOSITION TO DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT (R. 000436-000452); [2] AFFIDAVIT OF COLIN CONNELL ("Connell Aff.," R. 000432-000435); and (3) SECOND DECLARATION OF TOMMY T. SANDERSON ("Second Sanderson Decl.," R. 000430-000431).

On February 9, 2016, the City filed the following in further support of DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT: [1] REPLY IN SUPPORT OF DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT (R. 000523-000536); and [2] THIRD DECLARATION OF COUNSEL ABIGAIL R. GERMAINE (R. 000537-000643).

The Court heard oral argument on this motion on February 16, 2016.

iii. City's Motions to Strike Affidavits of Arnold and Connell

On January 15, 2016, in conjunction with its opposition to Boise Hollow's MOTION FOR SUMMARY JUDGMENT, the City filed its MOTION TO STRIKE THE AFFIDAVIT OF REBECCA W. ARNOLD (R. 000370-000374). Boise Hollow filed PLAINTIFF'S OPPOSITION TO MOTION TO STRIKE AFFIDAVIT OF REBECCA W. ARNOLD (R. 000421-000429) on February 2. The City filed its REPLY BRIEF REGARDING DEFENDANT'S MOTION TO STRIKE THE AFFIDAVIT OF REBECCA W. ARNOLD (R. 000655-000658) on February 17.

On February 9, 2016, the City filed its MOTION TO STRIKE THE AFFIDAVIT OF COLIN CONNELL (R. 000644-000648). Boise Hollow filed PLAINTIFF'S OPPOSITION TO MOTION TO STRIKE AFFIDAVIT OF COLIN CONNELL (R. 000649-000654) on February 15.

The Court heard oral argument on these motions on February 16, 2016.

iv. Oral Argument on Cross-Motions for Summary Judgment, and related Motions to Strike

The Court heard oral argument on the cross-motions for summary judgment, and related motions to strike, on February 16, 2016.

3. Judge Medema's MEMORANDUM DECISION AND ORDER RE: CROSS MOTIONS FOR SUMMARY JUDGMENT

The Trial Court issued its MEMORANDUM DECISION AND ORDER RE: CROSS MOTIONS FOR SUMMARY JUDGMENT ("Memorandum Decision Re: MSJ," R. 000680-000697) on April 1, 2016. Boise Hollow summarizes the essential findings of fact and conclusions of law which form the basis of Judge Medema's judgment in favor of the City as follows:

- *The Permanent Easement Agreement did not successfully convey a permanent easement across Lot 1, Block 2 of the Nibler Subdivision in favor of Lot 4, Block 2. As a matter of law, the Permanent Easement Agreement could not convey an easement permanently burdening the title of Lot 1 because the grantor held only a leasehold interest. See* R. 000688-000690.
- *The interest conveyed by the grantor under the Permanent Easement Agreement was extinguished when the grantor transferred its interest in the leasehold to another tenant in 1993, or upon termination of the lease in 2007. See* R. 000694.

4. Jedge Medema's MEMORANDUM DECISION AND ORDER RE: PARTIES' VARIOUS MOTIONS TO STRIKE

Concurrent to Memorandum Decision Re: MSJ, THE TRIAL COURT also entered its MEMORANDUM DECISION AND ORDER RE: PARTIES' VARIOUS MOTIONS TO STRIKE (Memorandum Decision Re: Motions to Strike, R. 000674-000679). Thereby, Judge Medema excluded all or some of the Arnold Aff., Connell Aff., and Second Sanderson Decl. as follows:

i. Arnold Aff.

On the basis that the Permanent Easement Agreement is unambiguous and testimony pertaining to the parties' intent is not relevant, the District Court excluded nearly all portions of the Arnold Aff. as follows:

> "The Court admits the assertions contained in the last full paragraph on page 2 of the affidavit of Rebecca Arnold, wherein Ms. Arnold asserts that, as Vancroft's attorney, she personally drafted the Permanent Easement Agreement and that a true and accurate copy of the Agreement is attached to her affidavit. The Court admits the copy of the Agreement attached to her affidavit. The Court excludes the remainder of the affidavit as irrelevant."

R. 000675-000676.

ii. Connell Aff. and Second Sanderson Decl.

On the basis that the Permanent Easement Agreement is unambiguous and testimony pertaining to the parties' intent is not relevant, the District Court excluded all portions of the Connell Aff. and Second Sanderson Decl. *See* R. 000675.

5. Entry of Final Judgment and Amended Judgment

Final judgment in compliance with IRCP 54(a) was entered on June 7, 2016, when the Trial Court entered its AMENDED JUDGMENT (R. 000714). Boise Hollow appeals therefrom.

C. Statement of Facts

1. Summary History of the Land

Boise Hollow substantially adopts the undisputed recitation of facts set forth by the District Court's Memorandum Decision Re: MSJ at R. 000682-000684:

In 1943 Victor Nibler purchased land in what is now northwest Boise, Idaho.[4] *See* R. 000543-000544. This land includes both parcels at issue in this case: "Lot 1" – the parcel owned by the City, and "Lot 4" – the parcel owned by Boise Hollow.[5]

In the 1970s Victor and Ruth Nibler (the "Niblers") constructed a golf course on portions of their land. Lot 1 is located within the golf course. In 1980, the Niblers leased the golf course, including Lot 1, to a group of individuals for a period of 99 years. *See* R. 000546-0005550.

In 1986, the leasehold was assigned to Tee, Ltd. ("Tee"), whose principals included Tommy and Roxanne Sanderson (the "Sandersons"). *See* R. 000566-000574.

In 1990, the Niblers sold much of their land, including Lot 1 and Lot 4, to Vancroft Corporation ("Vancroft"). *See* R. 000576-000584. The Niblers also assigned their interest as landlords of the golf course, including Lot 1, leasehold to Vancroft. *See* R. 000586-000591.

On September 14, 1991, Vancroft, Tee, and the Sandersons executed the Permanent

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[4] Nibler purchased (1) the Northeast ¼ of the Northeast ¼, the West ½ of the Northeast ¼, the Southwest ¼, and the West ¼ of the Southeast ¼ of Section 21, Township 4 North, Range 2 East, Boise Meridian; and (2) the Northwest ¼ and the Northwest ¼ of the Northeast ¼ of Section 28 in Township 4 North, Range 2 East from the Boise Meridian.

[5] "Lot 4" was commonly described by the parties in their briefing to the Trial Court as the "Development Parcel." For the sake of uniformity, Boise Hollow herein adopts the term "Lot 4" which was employed by Judge Medema in his Memorandum Decision Re: MSJ.

Easement Agreement (R.000144-000155). At this time, Tee possessed Lot 1 as tenants pursuant to the leasehold, while Vancroft held fee simple title to both Lot 1 and Lot 4.

In 1992, the Niblers, the Sandersons, and Vancroft recorded a subdivision plat with the Ada County Recorder's Office (R. 000182-000184). On the plat, the golf course was designated as being Lots 2 and 6 in Block 1 and Lot 1 in Block 2 (a.k.a. "Lot 1 ") of the Nibler subdivision. *See id.* The portion of Vancroft's land that was not subject to the leasehold held by Tee was designated as Lot 4 of Block 2 of the Nibler subdivision (a.k.a. "Lot 4"). *See id.*

The crux of the parties' dispute in this matter is [1] whether the Permanent Easement Agreement created an easement over Lot 1 for the benefit of Lot 4, and [2] if that easement can be expanded to meet the requirements of ACHD for the purpose of dedication and use as a public street. The terms of the Permanent Easement Agreement are discussed in depth later below.

In 1993, Tee, Ltd. assigned its interest in the leasehold in the golf course, including Lot 1, to a Mr. David Hendrickson. *See* R. 000593-000594.

In October of 1993, Vancroft transferred title in Lot 4 to Bedard & Musser. *See* R. 000598-000599. Vancroft likewise assigned its interest in the Permanent Easement Agreement to Bedard & Musser. *See* R. 000625-000643.

In 1999, Vancroft sold the golf course, including Lot 1, to BlueGrass, LLC. *See* R. 000601.

In 2007, Bluegrass, LLC and David Hendrickson terminated the lease. *See* R. 000603-0005605. Bluegrass then conveyed the golf course, including Lot 1, to Quail Hollow, LLC, the

only apparent member of which was Mr. Hendrickson. *See* R. 000607-000611.

In 2013, Quail Hollow, LLC conditionally gifted the golf course, including Lot 1, to the City. *See* R. 000613-000620.

In 2015, Bedard & Musser conveyed Lot 4 to Boise Hollow, LLC. *See* R. 000622-000623. Concurrently, Bedard & Musser assigned its interest in the Permanent Easement Agreement to Boise Hollow. *See* R. 000105-000107.

2. Current Status of Lot 1 and Lot 4

Boise Hollow holds title in fee simple to Lot 4 pursuant to that Quitclaim Deed dated June 26, 2015, and recorded with the Ada County Recorder on July 13, 2015, as Instrument No. 2016-062695. *See* R. 000622-000623.

The City holds a conditional possessory interest in Lot 1 pursuant to that certain Deed of Gift dated November 1, 2013, and recorded with the Ada County Recorder on December 4, 2014, as Instrument No. 113130306. *See* R. 000613-000620.

3. Platting the Nibler Subdivision

When the Niblers deeded a portion of the golf course property to Vancroft in 1990, they inadvertently violated the City's then-existing subdivision ordinances by illegally dividing the land. This prompted the Niblers, Sandersons, and Vancroft (collectively, the "Developers") to begin the process of preparing and filing a subdivision plat designated as the Nibler Subdivision parcels in order to properly subdivide the several segregations of land, comply with the City's subdivision ordinances, and legally prepare the land adjacent to the golf course for future development. This process, of course, necessarily involved a lengthy series of preliminary

applications and discussions between the Developers, the City, and ACHD.

Briggs Engineering, Inc. ("BEI") was retained by the Developers to provide engineering, land-use planning, and land surveying services with respect to the platting and development of the Nibler Subdivision. R. 000173. BEI drafted the preliminary and final Nibler Subdivision plats and worked closely with the City of Boise and ACHD during the plat review, revision, and approval process. *Id.*[6]

During the plat review and approval process, the City required that BEI and the Developers make certain revisions to the preliminary plat before the City would approve it to become the final plat. R. 000173. The City was aware that the Nibler Subdivision, and its parcels, might one day be developed into multi-residential subdivision(s) which would require vehicular access to the adjacent public roadways. *Id.* Accordingly, the City specifically required that the Developers include a notation on the plat to clarify that ACHD has jurisdiction and authority over any roads or applications to construct roads which would give the Nibler Subdivision direct vehicular access to North 36th Street, which is the main public road adjacent to the Nibler Subdivision and the Quail Hollow Golf Course. *Id.*

The City's requirement that access to 36th Street be subject to ACHD's jurisdiction and approval was communicated to the Developers by way of a letter from the City dated June 22, 1990. *See* Briggs Aff., EXHIBIT "A" (R. 000177-000180). At Paragraph 15 (the final paragraph

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[6] The testimony set forth in the Briggs Aff. is wholly uncontradicted. Moreover, the City has not challenged the admissibility of any portion of the Briggs Aff., nor did the District Court strike any portion thereof.

of Page 2, the letter sets forth the City's requirement that access to 36th Street be subject to ACHD's jurisdiction and approval:

> "No direct lot access shall be allowed to North 36th Way... **unless otherwise approved by Ada County Highway District**."

R. 000179 (emphasis added).

Per the City's instructions, BEI and the Developers revised the preliminary plat so that the final plat does reflect the City's requirement that access to 36th Street be subject to ACHD's jurisdiction, control, and approval. The final Nibler Subdivision plat was executed and recorded on January 29, 1991, as Instrument No. 9205592. *See* Briggs Aff., EXHIBIT "B" (R. 000181-000184).

Note "5" of the final plat contains the City's required notation:

> 5. Restricted Access: Except for Lots 3 and 4, Block 1, and Lots 2 and 3, Block 2, no lots in this subdivision shall be provided with a primary access to N. 36th Way, **unless said primary access is specifically approved by the Ada County Highway District.**

R. 000182 (emphasis added). This required note on the final plat confirms not only that the City was aware that the easement road might be expanded to meet ACHD's specifications, but that the City expressly required that the authority to approve or deny the landowner's application to do so be vested in ACHD.

4. The Permanent Easement Agreement

After finalizing the Nibler Subdivision plat, Vancroft and Tee/the Sandersons (collectively, Tee) negotiated the Permanent Easement Agreement to secure for Vancroft a vehicular access easement across the Golf Course to North 36th Street for the benefit of Lot 4. In

order to comply with the specifications communicated by the City and ACHD during the platting process, Vancroft and Tee requested certain information from BEI in order to draft their agreement. R. 000174. Specifically, the parties requested that BEI provide the then-existing road width requirements for both private and public roads. *Id.* It was communicated to BEI that the parties intended that the easement road would initially be of a limited width sufficient to satisfy the then-existing requirements of a private road, and that the road would be expanded to meet ACHD's requirements if it was later converted to public road and dedicated to ACHD. *Id.* Accordingly, BEI advised Vancroft and the Tee that an easement width of 40' would satisfy the then-existing requirements for a private road. R. 000175. BEI further advised that ACHD would require a width in excess of that amount when the road was converted to a public road. *Id.*

Accordingly, the Permanent Easement Agreement describes the initial width of the easement as being 40 feet wide. *See* Permanent Easement Agreement at 1 (R. 000160), numbered-paragraph "1". However, the Permanent Easement Agreement, being in harmony with City's requirements for the Nibler Subdivision plat, later provides that the size of the easement road may be expanded to meet ACHD requirements for a public road:

> 6. Upon the completion of the construction of the roadway, Grantee 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 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 the obligation of this Agreement not assumed by governmental agency.

Permanent Easement Agreement at 3 (R. 000162), numbered-paragraph "6" (emphasis added).

Local attorney Rebecca W. Arnold represented Vancroft at the time that the Permanent Easement Agreement was executed by Tee and Vancroft. R. 000135. She personally drafted the terms of the Permanent Easement Agreement. *Id.* The Arnold Aff. confirms the following facts:

- The primary purpose of the Permanent Easement Agreement was to secure for Vancroft a perpetual access easement across Lot 1 for the benefit of Lot 4. R. 000136.
- At the time that the Permanent Easement Agreement was drafted, it was agreed that the easement road would be 40 feet in width, which would be temporarily sufficient as a private road until Vancroft (or its successor-in-interest) was ready to develop the Lot 4 into a multi-lot residential subdivision. *Id.*
- When the parties executed the Permanent Easement Agreement, Tee understood that Vancroft intended to develop the Development Parcel into a multi-lot residential subdivision. Therefore it was contemplated and agreed by Vancroft and Tee that the easement road would eventually be dedicated to ACHD as a public road, and the easement area would be expanded to comply with whatever ACHD's requirements for a public road would be at the time of the dedication. The purpose of numbered-paragraph "6" of the Permanent Easement Agreement was to ensure that the owner of the Development Parcel would have the right to expand the easement road accordingly. R. 000136-000137.
- The anticipated dedication is expressly acknowledged in numbered-paragraph "2" of the Permanent Easement Agreement:

> 2. Grantee shall be solely and exclusively responsible for all costs and expenses of whatever kind or nature incurred connection with or related to the design, installation, construction and maintenance of the utilities or any road constructed within the easement area, including, but not limited to, all engineering, surveying, construction, and dedication, it being understood that the easement area is for the benefit of the Grantee and the owners, occupants and users of Lot 4, Block 2, Nibler Subdivision. All utilities shall be located in the easement area.

R. 000136.

ISSUES ON APPEAL

The primary issue on appeal is whether the District Court erred in determining that the Permanent Easement Agreement did not convey a permanent easement across Lot 1 in favor of Lot 4, which Boise Hollow may now expand to meet ACHD's requirements. The following issues are necessarily incidental to the primary question:

(1) Could Tee, as leasehold tenants of Lot 1, convey a permanent easement to Vancroft, fee simple owner of Lot 1?

(2) Was the interest conveyed by Tee under the Permanent Easement Agreement extinguished when the grantor transferred its interest in the leasehold to another tenant in 1993, or upon termination of the lease in 2007?

(3) Does Boise Hollow have the right under the plain language of the Permanent Easement Agreement to expand the road to meet ACHD's specifications and requirements, and then dedicate the road to ACHD?

(4) Was the language of the Permanent Easement Agreement ambiguous?

(5) If the language of the Permanent Easement Agreement is ambiguous, did the District Court err in striking or partially striking and excluding from its consideration the Arnold Aff, the Connell Aff., and the Second Sanderson Decl.?

STANDARD OF REVIEW ON APPEAL

The Court's review is limited "to a determination of whether the evidence supports the trial court's findings of fact, and whether those findings support the conclusions of law." *Sims v. Daker*, 154 Idaho 975, 303 P.3d 1231, 1233 (2013). This Court applies a *de novo* standard to legal questions and a clear error standard to findings of fact. *Herrera v. Estay*, 146 Idaho 674, 679, 201 P.3d 647, 652 (2009). When reviewing a trial court's conclusions of law, "this Court is not bound by the legal conclusions of the trial court, but may draw its own conclusions from the facts presented." *Steuerer v. Richards*, 155 Idaho 280, 311 P.3d 292, 294 (2013). This Court may set aside a trial court's findings of fact if they found to be clearly erroneous. I.R.C.P. 52(a); *Kennedy v. Schneider*, 151 Idaho 440, 442, 259 P.3d 586, 588 (2011).

SUMMARY OF ARGUMENT

A. Tee effectively conveyed a permanent easement to Vancroft because [1] Vancroft, as fee title owner Lot 1, consented to its being subject to a permanent easement, and [2] Vancroft never held concurrent unity of possession and title with respect to Lot 1 and Lot 4. The permanent easement was not subsequently extinguished by the termination of the lease because at no point has there been concurrence of the common law unities.

B. The City should be estopped from denying the existence of the easement because when it accepted the Deed of Gift it assumed and became bound to the known obligations and duties appurtenant to Lot 1, including the easement and the Permanent Easement Agreement.

C. The plain language of the Permanent Easement Agreement provides Boise Hollow the right to expand the road to meet ACHD's specifications and requirements.

D. If the Court finds that the language of the Permanent Easement Agreement was ambiguous, [1] the parol evidence establishes that the parties intended for the grantee and its successors to have the right to expand the road to meet ACHD's specifications and requirements, and [2] the District Court erred by striking the Arnold Aff., Connell Aff., and Second Sanderson Decl.

ANALYSIS

A. Tee effectively conveyed a permanent easement to Vancroft because [1] Vancroft, as fee title owner Lot 1, consented to its being subject to a permanent easement, and [2] Vancroft never held concurrent unity of possession and title with respect to Lot 1 and Lot 4. The permanent easement was not subsequently extinguished by the termination of the lease because at no point has there been concurrence of the common law unities.

The District Court based its holding primarily on two conclusions: first that Tee, being merely a lessee, was unable to encumber Lot 1 with a permanent easement; and second, that Vancroft, being the owner of Lot 1, could not have an easement over it. Boise Hollow concedes that typically, a lessee cannot burden its leasehold with an easement which outlasts the leasehold, and, typically, an owner cannot grant an easement to itself. However, the circumstances at work in this instance were not typical. Blind application of the foregoing rules under circumstances such as these does disservice to the rationales underlying the rules.

The Permanent Easement Agreement very plainly states that the parties' intent was to create a "permanent" and "perpetual" "easement" for the benefit of the dominant parcel.[7] The following verbiage appears on page 1 of the Permanent Easement Agreement:

> Vancroft has requested Tee, Ltd. to grant it an <u>easement</u> across the southwest portion of Lot 1, Block 2, Nibler Subdivision, to provide access and utilities to Lot 4, Block 2, of the subdivision, and Tee, Ltd. is willing to grant the <u>easement</u>

R. 000160 (emphasis added).

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[7] Based on the District Court's interpretation of Idaho law concerning the creation of easements, the District Court concluded that the parties to the Easement Agreement intended not to create an easement, but rather to create a license. *See* R. 000693. However, the plain language of the Easement Agreement very clearly and expressly states the parties' intent to create a permanent and perpetual easement rather than a temporary license. See R. 000160-000162.

> Tee, Ltd. does hereby grant, convey and remise to Vancorft Corporation a forty (40') foot perpetual easement under, over and across the southwest quarter of Lot 1, Block 2, Nibler Subdivision... for the purpose of providing utilities and access (*i.e.*, ingress and egress) to Lot 4, Block 2, Nibler Subdivision.

R. 000160-000161 (emphasis added). *See also* Paragraphs 2, 3, 4, and 5 of the Permanent Easement Agreement referencing the "easement area." *Id.* at 000161-000162. Surely the parties would not have contemplated the building of a road and its dedication to ACHD if the right were meant to be temporary. *See* Paragraph 6 of Permanent Easement Agreement (R. 000162).

The intent of Tee and Vancroft is self-evident from the language of the Permanent Easement Agreement. The Court's primary objective when interpreting a contract is to discover the mutual intent of the parties at the time the contract is made." *Straub v. Smith*, 145 Idaho 65, 69, 175 P.3d 754, 758 (2007). "Indeed, the cardinal principle of contract interpretation is that the intention of the parties must prevail unless it is inconsistent with some established rule of law." 11 Williston on Contracts § 32:2 (4th ed.).

In light of the parties' clear intent, the question is whether they were legally capable of accomplishing their mutual goal of burdening Lot 1 with a permanent access and utility easement for the benefit of Lot 4. To answer this question, the Court should seek to reconcile the plainly-stated intent of Tee and Vancroft with the applicable rules of law and the rationales underlying those rules. In doing so, the Court should conclude that Tee effectively conveyed a permanent easement to Vancroft because [1] Vancroft, as fee title owner Lot 1, consented to its being subject to a permanent easement, and [2] Vancroft never held concurrent unity of possession and title with respect to Lot 1 and Lot 4.

1. **A leasehold tenant may permanently encumber the leasehold property where the right to do so is bestowed by the fee simple owner and in this case Vancroft, as fee title owner Lot 1, consented to its being subject to a permanent easement.**

In concluding that Tee could not permanently encumber Lot 1 because it was merely a tenant, the District Court relied upon 25 Am. Jur. 2d Easements and Licenses § 12 which states that "[a]n 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."[8] However, while a lessee cannot grant a right in the servient parcel that it does not possess, the inverse is certainly also be true: a lessee *can* grant a right in the servient parcel which it does possess. Boise Hollow's position is equally simple: Tee had the right and authority to create the intended permanent easement across Lot 1 because Vancroft granted Tee the right to do so.

"[A] leasehold is an estate in real property." *Coppedge v. Leiser*, 71 Idaho 248, 251, 229 P.2d 977, 979 (1951). Specifically, a leasehold interest is an "estate for years," as opposed to a "freehold estate." *See Tobias v. State Tax Comm'n*, 85 Idaho 250, 256, 378 P.2d 628, 631 (1963). The holder of such estate has a possessory right in the land. A lessee has a possessory interest in the land, while the lessor retains a reversionary interest. *Wing v. Martin*, 107 Idaho 267, 272, 688 P.2d 1172, 1177 (1984).

"Any person with a possessory interest in land may create an easement burdening that person's interest." The Law of Easements & Licenses in Land, *Persons who may create*

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[8] Boise Hollow is unaware of any Idaho authority bearing upon the right of a tenant to encumber the leasehold property with an easement. Neither the City nor the District Court cited any during the proceedings below. Accordingly, this may be an issue of first impression in Idaho.

easement, § 3:4 (2015). Moreover, the nature and extent of the land rights held by the lessee necessarily depends on what rights have been conveyed by the owner. *See Russet Potato Co. v. Bd. of Equalization of Bingham Cty.*, 93 Idaho 501, 506, 465 P.2d 625, 630 (1970) ("It is recognized that in the instant case the appellant under the terms of the lease has practically all of the rights in and to the warehouse normally considered as incident to ownership of the property-use of the property, right to encumber it, the right to transfer it (subject to approval), the right to improve, alter and change it;..."); *see also* Restatement of Property § 124 (1942); *see also e.g.*, *Isely v. City of Wichita*, 38 Kan. App. 2d 1022, 1024, 174 P.3d 919, 921 (2008); *Martin v. Sun Pipe Line Co.*, 542 Pa. 281, 285–287, 666 A.2d 637, 639–640 (1995).

Generally, a leaseholder generally has no power to *permanently* burden the reversion. The Law of Easements & Licenses in Land § 3:4. Therefore an easement granted by a tenant does not last beyond the interest that the grantor held in the servient tenement. *Id.* In other words, a tenant-granted easement terminates with the tenancy. The *policy* underlying this rule is, of course, to protect the owner of the servient estate from being bound by an encumbrance granted unilaterally by his tenant without the owner's approval. *See Leichtfuss v. Dabney*, 329 Mont. 129, 122 P.3d 1220 (Montana 2005) (citing Rest.3d § 4.3 cmt. e, at 526).

The policy discouraging a tenant from permanently burdening the fee is not implicated where the party benefited by the easement, and indeed who seeks the easement, is also the owner of the servient parcel. In such case, the holder of the reversion has granted the leaseholder the power to burden the freehold estate. Therefore, it follows that where, as here, the easement is

granted not to a third party, but to the fee title owner, the easement may be permanent as all the interested parties intended. Such was the holding in *Leichtfuss v. Dabney*, *supra*, where the Montana Supreme Court opined that "that rigid application of a rule that prevents the benefit of an easement from running to a remainderman or reversioner is unsound" where the easement benefited reversion, consistent with parties' expectations. *Id.* at 141-45, 122 P.3d at 1229-1232.

In *Leichtfuss*, the question was whether an easement could persist where it was the dominant estate, rather than the servient, which was held in less than fee simple at the time of the encumbrance. The *Leichtfuss* court's discussion of the issues is particularly instructive, as it discusses how the policies underlying the rule come into play <u>where the owner of the fee is actually benefited rather than prejudiced by the encumbrance</u> (just as Vancroft was benefited rather than prejudiced by the easement in this case):

> ... a number of courts have held that an easement burdening or benefitting *an estate less than a fee simple* ends when that estate expires. *See* Jon W. Bruce & James W. Ely, Jr., The Law of Easements and Licenses in Land, § 10:15, at 10–28 (2001), and cases cited therein. As such, it may be more precise to say that an easement runs with the *estate* in land to which it is appurtenant, or that it follows ownership of the estate *for as long as that estate exists.*
>
> 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. *See* Rest.3d § 4.3 cmt. e, at 526 ("The duration of a servitude is normally limited to the duration of the estate of the creator of the servitude because the creator cannot *burden* a greater estate than he or she has.") (emphasis added). In other words, a life tenant or a lessee generally cannot impose upon his land a burden that passes to the remainderman or the reversioner.
>
> Where the *dominant* tenement is held in less than fee simple, however, the basis for the foregoing rule—which prevents the *benefit* of an easement from running to the remainderman or reversioner – is less obvious. A number of courts have ruled

> that an easement granted to a life tenant or lessee terminates as a matter of course with the life estate or lease. Yet, there is nothing inherent in a future estate that would preclude its benefitting from a servitude. To the contrary, a servitude may be created to burden or benefit *any* estate in land, including present possessory estates and future estates. *See* Rest.3d § 2.5 & cmt. a, at 99. In a factual scenario analogous to the case at hand, the Restatement posits the following illustration:
>
>> O, the owner of a fee simple in Blackacre, granted an easement to A, the owner of a 10–year lease term in Whiteacre, to use the driveway across Blackacre for access to Whiteacre. The deed states that the easement is intended to benefit the term and the reversion in Whiteacre. The servitude burdens the fee-simple estate in Blackacre and benefits both the leasehold estate *and the reversion* in Whiteacre.
>
> Rest.3d § 2.5 illus. 3, at 100 (emphasis added). As this illustration demonstrates, the termination of a dominant estate held in less than fee simple does not *automatically* extinguish an easement appurtenant thereto. Rather, it is the intent or expectations of the parties to the servitude which determine the duration thereof.
>
> Indeed, a careful reading of the opinions of each of the aforementioned courts which held that an easement granted to a life tenant or a lessee terminates with the life estate or lease reveals that the results in those cases were grounded, to some extent, on a presumption that the grantor of the easement was aware of the terminable nature of the grantee's estate and intended the easement to exist only for that limited duration, or that the life tenant or lessee did not intend to permanently burden the servient estate. The Third Restatement has succinctly described this approach in the following terms: **"A servitude should be interpreted to give effect to the intention of the parties ascertained from the language used in the instrument, *or the circumstances surrounding creation of the servitude,* and to carry out the purpose for which it was created."** Rest.3d § 4.1(1), at 496–97 (emphasis added).
>
> Having considered the foregoing authorities in the context of the facts of the case at hand, we conclude that rigid application of a rule that prevents the *benefit* of an easement from running to a remainderman or reversioner is unsound.

Id. at 142-44, 122 P.3d at 1229-31 (bold emphasis added, italic emphasis in original).

The same concerns are at stake in the instant case as were considered by the *Leichtfuss*

court and the Restatement that the *Leichtfuss* court relied upon bears repeating:

> A servitude should be interpreted to give effect to the intention of the parties ascertained from the language used in the instrument, or the circumstances surrounding creation of the servitude, and to carry out the purpose for which it was created."

Id. at 144, 122 P.3d at 1231 (quoting Restatement (Third) of Property, *Servitudes* § 4.1(1)).

The foregoing discussion is particularly applicable in this case. The Montana Supreme Court essentially asked one question: *Could the parties manifest intent be given effect without running afoul of the applicable rules of law?* To answer that question, the Court analyzed the policy underlying the rule generally prohibiting the permanence of the easement to determine if its application in this instance was well-served. Recognizing that the policy was for the protection of the fee simple owner, the Court determined that it did not make sense to prohibit the creation of a permanent easement where the fee simple owner would be hindered rather than protected.

The Montana Supreme Court's holding in *Leichtfuss* likewise comports with the rule that an easement appurtenant becomes "fixed as an appurtenance to the real property" and "[serve] the owner of the dominant estate in a way that cannot be separated from his rights in the land." *Hodgins v. Sales*, 139 Idaho 225, 230, 76 P.3d 969, 974 (2003). As an easement appurtenant follows the land which it benefits, it cannot be unilaterally terminated by an act of the owner of the servient estate. *See* 80 A.L.R.2d 743; Restatement (Third) of Property, *Servitudes* § 4.8 (2000); *Beckstead v. Price*, 146 Idaho 57, 190 P.3d 876 (2008); *Slauson v. Marozzo Plumbing & Heating, LLC*, 353 Mont. 75, 82, 219 P.3d 509, 515 (Montana 2009) (termination of lease did

not terminate easement appurtenant); *McReynolds v. Harrigfeld*, 26 Idaho 26, 140 P. 1096, 1097 (1914); *Checketts v. Thompson*, 65 Idaho 715, 152 P.2d 585, 585 (1944).

In this case, just as in *Leichtfuss*, this Court must look both at the manifest intent of the contracting parties and determine whether any rationale or policy is actually served by prohibiting the imposition of a permanent easement under these particular circumstances. As in *Leichtfuss*, doing so would hinder rather than protect the fee simple owner (Vancroft) and its successors-in-interest. Accordingly, prohibiting the permanent easement would disserve the underlying policy that the fee simple owner should not be harmed by an easement. To the contrary, in this case it is the prohibition of the easement that would harm the owner.

2. There are no grounds to prohibit a landowner from consenting to the creation of an easement across land owned but never possessed. In this case, Vancroft never held concurrent unity of possession and title with respect to Lot 1 and Lot 4 because Lot 1 was subject to a 99-year lease when Vancroft took ownership.

Superficially, Boise Hollow's position would seem to run counter to the rule that a landowner cannot create an easement in his own land. *See Capstar Radio Operating Co. v. Lawrence*, 153 Idaho 411, 420, 283 P.3d 728, 737 (2012). However, it would not be appropriate to apply that rule under these circumstances because at the time of the agreement Vancroft did not have possession of Lot 1 and was very unlikely to obtain possession of Lot 1 prior to divesting itself of both Lot 1 and Lot 4. Neither Vancroft, nor any of its successors-in-interest, ever had concurrent title and possession of Lot 1 and Lot 4.

The rule that "one cannot have an easement in his own lands" was first set forth in Idaho

in the case of *Johnson v. Gustafson*, 49 Idaho 376, 288 P. 427, 429 (1930). In that very case, this Court recognized that an easement may nevertheless arise out of commonly-owned lands where necessary for the reasonable use and enjoyment of either parcel:

> True, an easement is defined as a right in the lands of another, and therefore one cannot have an easement in his own lands (19 C. J. p. 863), but, where the owner of an entire tract employs a part thereof so that he "derives from the other a benefit or advantage of a continuous and apparent nature, and 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." 19 C. J. p. 914. See, also, 1 Thompson on Real Property, § 352; 9 R. C. L. p. 755, § 22; German Savings & Loan Society v. Gordon, 54 Or. 147, 102 P. 736, 26 L. R. A. (N. S.) 331.

Id. at 376, 288 P. at 429.

Moreover, the rule preventing a landowner from having an easement in his own land is ostensibly based in the doctrine of merger. The doctrine of merger operates to extinguish an easement when the dominant and servient parcels come under common ownership and possession. *See, e.g.*, *Davis v. Gowen*, 83 Idaho 204, 210, 360 P.2d 403, 406 (1961). However, operation of the doctrine of merger requires unity of both ownership *and possession.* Since Vancroft never had possession of the servient parcel, the doctrine of merger does not apply.

"For an easement to be extinguished under the doctrine of merger, there must be unity of title, and, according to some authorities, of possession and enjoyment of the dominant and servient estates." 28A Corpus Juris Secundum, *Easements* § 143, *Unity of title* (2016) (emphasis added). "The ownership of the two estates must be coextensive and equal in validity, quality, and all other circumstances of right. Accordingly, an easement is not extinguished under

the doctrine of merger by the acquisition by the owner of the dominant or servient estate of title to only a fractional part of the other estate." *Id.*

In Idaho, the essential "common law unities" consist of "interest, title, time and possession." *Ogilvie v. Idaho Bank & Trust Co.*, 99 Idaho 361, 366, 582 P.2d 215, 220 (1978) (emphasis added); *see also Matter of Estate of Ashe*, 114 Idaho 70, 75, 753 P.2d 281, 286 (Ct. App. 1988) *aff'd*, 117 Idaho 266, 787 P.2d 252 (1990) (reciting common law unities, including title and possession); *see also Guy v. State*, 438 A.2d 1250, 1253 (Del. Super. Ct. 1981) ("The doctrine of merger does not operate where the fee in the servient estate is subject to an outstanding estate in possession."). Of course, unity of possession would destroy an easement. *See Wilton v. Smith*, 40 Idaho 81, 231 P. 704, 705 (1924) (quoting *Quinlan v. Noble*, 75 Cal. 250, 17 P. 69 (1888) ("No easement exists so long as the unity of possession remains...")).

The binding authority discussing the doctrine of merger pertains to the scenario where an existing easement is extinguished because the dominant and servient parcels become united in interest, title, time, and possession. However, the rationale underlying the doctrine of merger functions both forwards and backwards. In other words: just as the concurrence of the unities is required to extinguish an easement, the absence of such concurrence functions to preserve an easement. Accordingly, an easement may be created over one parcel for the benefit of another, despite common ownership of both parcels, where unity is broken as regards interest, time, and, most significantly, possession. Such was the case at the time that Vancroft and Tee entered into the Permanent Easement Agreement.

In this case, neither Vancroft nor Tee, nor any of their respective successors-in-interest have ever held simultaneous title and possession of both Lot 1 and Lot 4.[9]

Throughout all the foregoing transfers, the dominant and servient parcels have never been owned and possessed by the same party at the same time. Accordingly, the creation of the easement was not prevented by concurrence in the common law unities.

3. The permanent easement was not subsequently extinguished by the termination of the lease because of the doctrine of merger. At no point has there been concurrence of the common law unities.

For the same reason that the easement was not prevented, nor has it been extinguished. The District Court concluded that the interest taken by Vancroft under the Permanent Easement Agreement would have been extinguished when Tee transferred its interest in the leasehold to another tenant in 1993, or upon termination of the lease in 2007. *See* R. 000694. However, this

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[9] In fact, at no time during its ownership was Vancroft ever entitled to have possession of Lot 1 due to the 99-year leasehold. As of the date of the Permanent Easement Agreement, Vancroft owned both Lot 1 and Lot 4, but Tee held possession of Lot 1. Vancroft assigned Lot 4 to Plaintiff Bedard & Musser in 1993 pursuant to that certain CORPORATE WARRANTY DEED dated October 19, 1993, executed by Vancroft Corporation, and recorded on November 3, 1993, as Ada County Instrument No. 9392443. *See* R. 000598-000599. Tee maintained possession of Lot 1. Tee assigned its *leasehold* interest in Lot 1 to David Hendrickson in 1993 pursuant to that certain ASSIGNMENT AND ASSUMPTION OF GOLF COURSE LEASE dated June 30, 1993, executed by Tee, Ltd., and recorded on June 30, 1993, as Ada County Instrument No. 9351843. *See* R. 000593-000594. Vancroft assigned its *ownership* of Lot 1 to Bluegrass, LLC in 1999 pursuant to that certain CORPORATE WARRANTY DEED dated March 29, 1999, executed by Vancroft Corporation, and recorded on March 30, 1999, as Ada County Instrument No. 99030645. *See* R. 000601. Bluegrass, LLC and Hendrickson agreed to the termination of the leasehold interest in 2007 pursuant to that certain TERMINATION OF LEASE dated October 4, 2007, executed by Bluegrass, LLC, and David Hendrickson, and recorded on October 4, 2007, as Ada County Instrument No. 107138040. *See* R. 000603-0005605. Lot 1 was conveyed to Quail Hollow, LLC, in 2007 pursuant to that certain WARRANTY DEED dated October 4, 2007, executed by Bluegrass, LLC in favor of Quail Hollow, LLC, and recorded on October 4, 2007, as Ada County Instrument No. 107138039. *See* R. 000607-000611. Plaintiff Bedard & Musser maintained ownership of Lot 4 until assigning it to Plaintiff Boise Hollow Land Holdings, RLLP in 2015 pursuant to that certain QUITCLAIM DEED dated June 26, 2015, executed by Bedard & Musser in favor of Boise Hollow Land Holdings, RLLP, and recorded on July 13, 2015, as Ada County Instrument No. 2015-062695. *See* R. 000105-000107.

conclusion was grounded in the District Court's belief that a permanent easement had failed to arise from the Permanent Easement Agreement. As set forth hereinabove, the Permanent Easement Agreement did successfully create a permanent access and utility easement across Lot 1 for the benefit of Lot 4.

Just as the mechanics of the doctrine of merger permitted the creation of the easement, so too did those mechanics prevent extinguishment of the easement when Tee assigned the lease in 1993, or when the lease ended in 2007. Neither of those events resulted in concurrence in the common law unities. Moreover, upon creation the easement became "fixed as an appurtenance to the [servient estate]" and "serves the owner of the dominant estate in a way that cannot be separated from his rights in the land." *Hodgins v. Sales*, 139 Idaho 225, 230, 76 P.3d 969, 974 (2003). As an easement appurtenant follows the land which it benefits, it cannot be unilaterally terminated by an act of the owner of the servient estate. *See* 80 A.L.R.2d 743; Restatement (Third) of Property, *Servitudes* § 4.8 (2000). Thus, neither Tee nor any of its successors had the right to terminate the easement by any unilaterally action such as terminating the lease.

B. The City should be estopped from denying the existence of the easement because when it accepted the Deed of Gift it assumed and became bound to the known obligations and duties appurtenant to Lot 1, including the easement and the Permanent Easement Agreement.

When the City acquired Lot 1, it did so with full knowledge of the encumbrance placed upon the land by the Permanent Easement Agreement and the specific terms of the thereof. *See* R. 000618. The City is bound by those terms not only because they run with the land as described hereinabove, but also because the City contractually subscribed to them.

Where one accepts a deed of real property, one assumes and becomes bound to the known obligations and duties appurtenant thereto. *See Lane v. Pac. & I.N. Ry. Co.*, 8 Idaho 230, 67 P. 656, 658 (1902). Covenants, agreements and restrictions relating to the real property are valid and enforceable. *See Jacklin Land Co. v. Blue Dog RV, Inc.*, 151 Idaho 242, 246, 254 P.3d 1238, 1242 (2011). Those Courts that have specifically considered the issue of the contractual nature of covenants have ruled that recorded covenants and declarations are contractual in nature because the acceptance of the terms of the covenants and chain of title agreements results from an owner voluntarily taking title to the property as part of a sale and thereby impliedly agrees and consents to the obligations contained in those recorded covenants and conditions. *See, e.g.*, *Pinnacle Museum Tower Assn. v. Pinnacle Mkt. Dev. (US), LLC*, 55 Cal. 4th 223, 237, 282 P.3d 1217, 1225 (2012). Thus, the recorded agreement and covenants therein become the rights and responsibilities of contracting parties determined by the terms of their recorded contract. *Frances T. v. Vill. Green Owners Assn.*, 42 Cal. 3d 490, 512, 723 P.2d 573 (1986).

Idaho law bearing on equitable servitudes is also instructive. An equitable servitude

arises "because of the actions of the parties, such as oral representations." *W. Wood Investments, Inc. v. Acord*, 141 Idaho 75, 84, 106 P.3d 401, 410 (2005); *see also Birdwood* at 23, 175 P.3d at 185 (2007) (quoting 20 Am.Jur.2d, Covenants, Etc., § 155 (2005) (an equitable servitude arises "by implication from the language of the deeds or the conduct of the parties."). It concerns a promise of the landowner to refrain from using his land in a certain way. *See, e.g., Idaho Power Co. v. State, By & Through Dep't of Water Res.*, 104 Idaho 575, 587, 661 P.2d 741, 753 (1983) ("restrictive covenants and equitable servitudes" relate to "[a]greements not to assert ownership rights"). An equitable servitude is therefore restrictive in character. *St. Clair v. Krueger*, 115 Idaho 702, 703 n.1, 769 P.2d 579, 580 n.1 (1989). This Court held in *W. Wood Investments*, supraruled as follows:

> Whether a successor in interest takes the interest subject to the equitable servitude is a question of notice. *Streets*, 898 P.2d at 379-81 (Wyo. 1995). Whether a party has notice of an issue or event is a question of fact. *See, e.g., Taylor v. Soran Restaurant, Inc.* 131 Idaho 525, 960 P.2d 1254 (1998) (Whether notice of injury subject to workers' compensation claim was given to employer was question of fact.)

141 Idaho at 85, 106 P.3d at 106.

> A purchaser is charged with every fact shown by the records and is presumed to know every other fact which an examination suggested by the records would have disclosed. *Kalange v. Rencher*, 136 Idaho 192, 195-96, 30 P.3d 970, 973-74 (2001) (citing *Cordova v. Hood*, 84 U.S. (17 Wall) 1, 21 L.Ed. 587 (1872); *Northwestern Bank v. Freeman*, 171 U.S. 620, 19 S.Ct. 36, 43 L.Ed. 307 (1898)). "This Court has stated: 'One who purchases or encumbrances with notice of inconsistent claims does not take in good faith, and one who fails to investigate the open and obvious inconsistent claim cannot take in good faith.' " *Middlekauff II*, 110 Idaho at 916, 719 P.2d at 1176 (quoting *Langroise v. Becker*, 96 Idaho 218, 220, 526 P.2d 178, 180 (1974)).

Id.

In point of fact, the Court could find that Lot 1 is bound by an equitable servitude in favor of Lot 4 because the City had notice of the physical and legal existence to the easement road prior to acquiring Lot 1. *See Middlekauff v. Lake Cascade, Inc.*, 103 Idaho 832, 654 P.2d 1385 (1982) ("*Middlekauff I*"); *Middlekauff v. Lake Cascade, Inc.*, 110 Idaho 909, 719 P.2d 1169 (1986) ("*Middlekauff II*"); *W. Wood Investments, supra*; *Ute Park Summer Home Association v. Maxwell Land Grant Co.*, 77 N.M. 730, 427 P.2d 249 (Ct.App.1967), aff'd, 83 N.M. 558, 494 P.2d 971 (1972). In any event, so strong is the binding nature of the recorded instrument on grantees in the chain of title that even if the instrument is misfiled by the county recorder, it is still binding on the grantees. *See Miller v. Simonson,* 140 Idaho 287, 291, 92 P.3d 537, 541 (2004).

In this case, the City took ownership of Lot 1 with knowledge of the existence of the easement and with the understanding that the easement and the Permanent Easement Agreement were both valid and enforceable. Further, the City contractually agreed to comply with the terms of the Permanent Easement Agreement. *See* R. 000460 (DONATION AGREEMENT between the City and Quail Hollow, LLC, incorporating DEED OF GIFT as Exhibit "A" thereto); *see also* R. 000618, ¶ 13 (referencing Permanent Easement Agreement).

Accordingly, when the City took ownership of the Golf Course, it expressly accepted the easement and assumed all rights and obligations under the Permanent Easement Agreement and it should be estopped from denying the existence of the easement in this case.

C. The plain language of the Permanent Easement Agreement provides Boise Hollow the right to expand the road to meet ACHD's specifications and requirements.

The most common-sense interpretation of the Permanent Easement Agreement is that Vancroft and Tee intended for Vancroft to have a 40 foot-wide private road easement until such time as Vancroft or its successor chose to develop Lot 4, at which point the road would be expanded to meet ACHD's requirements.

The dispute between Boise Hollow and the City with regard to the meaning of the Permanent Easement Agreement comes down to a difference in interpretation. "The interpretation of a contract begins with the language of the contract itself." *Cristo Viene Pentecostal Church v. Paz*, 144 Idaho 304, 308, 160 P.3d 743, 747 (2007) (quoting *Independence Lead Mines Co. v. Hecla Mining Co.*, 143 Idaho 22, 26, 137 P.3d 409, 413 (2006)). "If a contract's language is unambiguous, 'then its meaning and legal effect must be determined from its words.'" *Boise Mode, LLC v. Donahoe Pace & Partners Ltd.*, 154 Idaho 99, 108, 294 P.3d 1111, 1120 (2013) (quoting *Cristo Viene*, 144 304 at 308, 160 P.3d at 747). "The Court's 'primary objective when interpreting a contract is to discover the mutual intent of the parties at the time the contract is made. If possible, the intent of the parties should be ascertained from the language of the agreement as the best indication of their intent.'" *Guzman v. Piercy*, 155 Idaho 928, 936, 318 P.3d 918, 926 (2014) (quoting *Straub*, *supra*).

Two clauses of a contract related to the same thing must be "read together and harmonized" unless they are "so repugnant that they cannot stand together." *See Morgan v. Firestone Tire & Rubber Co.*, 68 Idaho 506, 518, 201 P.2d 976, 983 (1948). Furthermore, "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). "Apparently conflicting provisions must be reconciled so as to give meaning to both, rather than nullifying any contractual provision, if reconciliation can be effected by any reasonable interpretation of the entire instrument." *Madrid v. Roth*, 134 Idaho 802, 806, 10 P.3d 751, 755 (Ct. App. 2000) (quoting 17A Corpus Juris Secundum, *Contracts* § 324 (1999)). In other words, "[t]erms of a written instrument should be construed *in pari materia* and a construction adopted that gives effect to all terms used. Inconsistent parts in a contract are to be reconciled, if susceptible of reconciliation...." *Advance Tank & Const. Co. v. Gulf Coast Asphalt Co.*, 968 So. 2d 520, 526 (Ala. 2006).

The dispute in this case is a result of Permanent Easement Agreement containing two separate descriptions of the easement area: numbered-paragraph 1 of the Permanent Easement Agreement states that the width of the easement road is 40 feet, while numbered-paragraph 6 explains that in the event the owner dedicates the road to ACHD, the width of the easement road shall meet ACHD's requirements for a public road. As described above, these provisions can be read together and a common-sense reading of these provisions does not reveal a conflict. Thus, there are few similar controversies which have reached the appellate level in any jurisdiction. Nevertheless, the case law that is reasonably on point confirms the judicial policy of harmonizing supposedly "conflicting" provisions wherever possible.

For example, in *Thornton v. Hamilton*, 32 Idaho 304, 181 P. 700 (1919), a contract for

the leasing of horses provided that "If any of said horses shall die or be injured, so that it becomes necessary to kill the same, while in the possession of said lessee, the lessee will pay to the lessor the full value thereof as specified above." *Id.* A separate provision required the lessee, at the expiration or termination of the lease, to "restore the said personal property to the said lessor in like good condition in which it now is, wear and diminution resulting from reasonable use thereof excepted." *Id.* The lessor contended that these provisions were inconsistent, which contention was rejected outright by the Idaho Supreme Court: "The provisions of the contract are not inconsistent, and the intention of the parties that appellants should be insurers of the horses while in their possession is entirely clear from the language employed." *Id.*

The 2002 Fifth Circuit case of *Pers. Sec. & Safety Sys. Inc. v. Motorola Inc.*, 297 F.3d 388 (5th Cir. 2002) is perhaps more instructive. In that case, the court was called upon to determine whether a forum-selection clause in a stock-purchase agreement conflicted with an arbitration agreement contained in a licensing agreement that was executed alongside the stock-purchase agreement. The forum-selection clause stated: "Governing law. This agreement shall be governed by and construed in accordance with the laws of the State of Texas. Any suit or proceeding brought hereunder shall be subject to the exclusive jurisdiction of the courts located in Texas." 297 F.3d at 395 (some capitalization omitted). The plaintiff in that case, PSSI, argued that the forum-selection clause required that any dispute arising out of the stock-purchase agreement be litigated in Texas courts, thus expressly excluding arbitration. The court held:

> We do not find PSSI's interpretation of the forum selection clause persuasive. Standing alone, one could plausibly read the forum selection clause to mean that

> Texas courts have the exclusive power to resolve all disputes arising under the Stock Purchase Agreement. But the forum selection clause does not stand alone. To the contrary, we must interpret the forum selection clause in the context of the entire contractual arrangement and we must give effect to all of the terms of that arrangement. Given our conclusion that the arbitration provision in the Product Development Agreement applies to all claims related to the overall transaction, we must therefore interpret the forum selection provision in the Stock Purchase Agreement in a manner that is consistent with the arbitration provision.
>
> Reading the two provisions together, it becomes clear that the forum selection clause does not require the parties to litigate all claims in Texas courts, nor does it expressly forbid arbitration of claims arising under the Stock Purchase Agreement. Instead, we interpret the forum selection clause to mean that the parties must litigate in Texas courts only those disputes that are not subject to arbitration—for example, a suit to challenge the validity or application of the arbitration clause or an action to enforce an arbitration award. Rather than covering all "disputes" or all "claims" like the arbitration provision in the Product Development Agreement, the forum selection clause confers "exclusive jurisdiction" on Texas courts only with respect to "any suit or proceeding." This limitation suggests that the parties intended the clause to apply only in the event of a non-arbitrable dispute that must be litigated in court.

Personal Security, 297 F.3d at 395–96 (footnotes and internal citations and quotations omitted)

Turning to the clauses at issue in the Permanent Easement Agreement, numbered-paragraphs "1" and "6" are certainly not patently inconsistent. Vancroft and Tee carefully crafted an agreement whereby Vancroft took possession of an easement road which would be 40 feet wide until such time as Vancroft chose to dedicate it to ACHD, at which point it would be expanded to meet ACHD's requirements at the time. In this way, the parties purposely drafted flexible language that allowed their contract to fluidly incorporate ACHD's unknown future specifications while also providing an ascertainable width (*i.e.*, 40 feet) for use in the interim. In short, these provisions worked together, as the parties intended, to provide the parties with an

easement appropriate and useful for both the *then* and the *now*.

This interpretation derives meaning and legal effect from the plain language of the parties' agreement and gives effect to the parties' clear intent.

The City argued below that because Paragraph 1 does not use the word "initial" and because Paragraph 6 does not include a word such as "expand," they cannot be interpreted so as to call for subsequent expansion of the easement area. Therefore, the City contends that Paragraph 6 "simply authorizes Boise Hollow to dedicate any potential future road... if such road meets ACHD's then-current construction specification." R. 000243.

However, the City's argument fails by its very own logic: Paragraph 1 does not contain words which express any prohibition on future enlargement. More importantly, Paragraph 6 does *not* contain the word "if" or any other language suggesting a contingency which must be met before the road can be constructed and dedicated to ACHD. Paragraph 6 simply states that the "road" once constructed "shall meet all then-existing ordinances." R. 000162 (emphasis added). If the parties to the Permanent Easement Agreement had desired to restrict the size of the roadway, regardless of ACHD requirements at the time of its construction and dedication, the parties could easily have drafted a provision which stated that the roadway "shall not exceed 40' regardless of ACHD requirements for a roadway." That is not what the parties did. The plain language of Paragraphs 1 and Paragraph 6 do not employ any language whatsoever which would render the Grantees' right to construct and dedicate the road contingent upon ACHD accepting

the 40' limitation.[10] Accordingly, no such meaning may be inferred.

Furthermore, the use and placement of the word "shall" is significant. The word "shall" denotes a mandate. *See, e.g., State v. Lopez*, 100 Idaho 99, 102, 593 P.2d 1003, 1006 (1979) ("This Court on several occasions has construed the word 'shall' as being mandatory and not discretionary.") The structure of the sentence is such that the subject ("Such road") must perform the verb ("shall meet") necessary to conform to the object ("all then existing ordinances and requirements..."). Therefore, the state (*i.e.*, the size) of the subject ("Such road") must necessarily be malleable in order to perform its directive.

The most reasonable, logical, and plain interpretation of Paragraphs 1 and 6 of the Permanent Easement Agreement is Boise Hollow's: Vancroft and Tee intended for Vancroft to own a 40 foot-wide private road easement (being large enough to encompass the dirt road then existing) until such time as Vancroft chose to develop it, at which point it would be expanded to meet ACHD's requirements.

---

[10] A plain way to express such a condition would have been something to the effect of: *"If the dimensions of the roadway described herein are sufficient to meet all then existing ordinances and requirements, including the construction of roads, curbs, sidewalks, bonding, etc., then upon the completion of the construction of the roadway, Grantee 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 public roads and highways in Boise, Ada County, Idaho."*

D. If the Court finds that the language of the Permanent Easement Agreement was ambiguous, [1] the parol evidence establishes that the parties intended for the grantee and its successors to have the right to expand the road to meet ACHD's specifications and requirements, and [2] the District Court erred by striking the Arnold Aff., Connell Aff., and Second Sanderson Decl.

As illustrated above, the provisions of the Permanent Easement Agreement do not conflict and there is no ambiguity at work. However, should the Court deem otherwise it will find that the extrinsic evidence confirms the contracting intent of Vancroft and Tee that the easement road should be 40 feet wide until Vancroft or its successor chose to dedicate it to ACHD, at which point the easement road would be naturally expanded to meet ACHD's requirements.

A court may deem a contract ambiguous where it determines that the contract contains conflicting or inconsistent provisions. *Madrid* at 806, 10 P.3d at 75. The standard for identifying ambiguity is a high one: "For a contract term to be ambiguous, there must be at least two different reasonable interpretations of the term, or it must be nonsensical." *Steel Farms, Inc. v. Croft & Reed, Inc.*, 154 Idaho 259, 266, 297 P.3d 222, 229 (2012). "[W]here contractual provisions are conflicting, the interpretation of the written contract and of the intent of the parties is a matter for the trial judge's discretion." *Haener v. Ada Cnty. Highway Dist.*, 108 Idaho 170, 173, 697 P.2d 1184, 1187 (1985).

Typically, "[t]he parol evidence rule bars the use of extrinsic evidence when a court interprets a written contract." *AED, Inc. v. KDC Investments, LLC*, 155 Idaho 159, 165, 307 P.3d 176, 182 (2013). "Only when a document is ambiguous is parol evidence admissible to

discover the drafter's intent." *Buku Properties, LLC v. Clark*, 153 Idaho 828, 834, 291 P.3d 1027, 1033 (2012). When considering extrinsic evidence in aid of interpreting the meaning of a contract, the Court's primary goal must be to seek and give effect to the real intention of the parties at the time of the conveyance. *See Marek v. Lawrence*, 153 Idaho 50, 53, 278 P.3d 920, 923 (2012) (emphasis added) ("the court's primary goal [when considering parol evidence] is to seek and give effect to the real intention of the parties, which is determined according to the language of the instrument and the circumstances surrounding the transaction."). *See also, e.g.*, *Porter v. Bassett*, 146 Idaho 399, 404–05, 195 P.3d 1212, 1217–18 (2008); *Commercial Ventures, Inc. v. Rex M. & Lynn Lea Family Trust*, 145 Idaho 208, 213, 177 P.3d 955, 960 (2008) ("The purpose of interpreting a contract is to determine the intent of the contracting parties at the time the contract was entered."); *Farnsworth v. Dairymen's Creamery Ass'n*, 125 Idaho 866, 870, 876 P.2d 148, 152 (Ct. App. 1994); *Straub, supra*.

1. The parol evidence establishes that the parties intended for the grantee and its successors to have the right to expand the road to meet ACHD's specifications and requirements.

In this case, the most compelling evidence with respect to the intent of Tee and Vancroft is the sworn statement of the actual drafter of the Permanent Easement Agreement, Rebecca Arnold. *See* R. 000134-000171. In her affidavit, Ms. Arnold unequivocally confirms that Tee and Vancroft always intended that whoever owned the dominant parcel (*i.e.*, the Development Parcel) would have the right to expand the easement road to meet ACHD's requirements and then dedicate the road to ACHD. *See* R. 000135-000138. It is for this reason that the Permanent

Easement Agreement was drafted to allow for that very expansion in the future. R. 000136-000137.

The foregoing is corroborated by Dean Briggs' affidavit (R. 000172-000197), which confirms that the parties advised BEI that they intended that the 40' width be temporary and only effective until such time as the owner of the Development Parcel decided to develop it. R. 000174-000175.

In addition, it is also uncontradicted that the City required the Developers to include language in the Nibler Subdivision final plat which confirmed that access to the various parcels of the Nibler Subdivision (including the Development Parcel) to 36th Street would be at the discretion and to the standards of ACHD; not the City. Not only was the City aware that access might be granted to 36th street, it expressly ceded authority over that issue to ACHD. R. 000173.

Because the best extrinsic evidence available to the Court reveals that Tee and Vancroft so intended, Plaintiff requests that the Court grant Plaintiff's Motion and enter its judgment that Plaintiff has the right to dedicate the easement road to ACHD and expand the road to meet ACHD's requirements.

2. If this Court finds that the Permanent Easement Agreement is ambiguous, then it should also find that the District Court erred by striking the Arnold Aff., Connell Aff., and Second Sanderson Decl.

Of course the majority[11] of the foregoing extrinsic evidence was excluded by the District Court. R. 000675-000679. The basis of the District Court's exclusion was the Court's

[11] Notably, the District Court did not strike or otherwise exclude the Briggs Aff., nor did the City so request.

conclusion that the Permanent Easement Agreement is not ambiguous. *See* R.000675. Therefore, concluded Judge Medema, evidence pertaining to the parties' contracting intent was not relevant. *See id.*

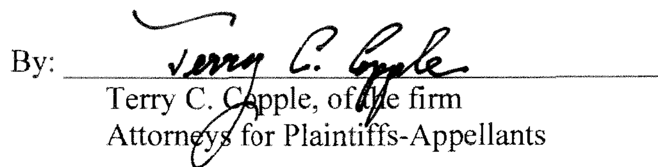
If, however, this Court deems that the Permanent Easement Agreement *is* ambiguous, then parol evidence pertaining to the parties' contracting intent becomes relevant. *Buku Properties*, at 834, 291 P.3d at 1033. In such case, the District Court erred by excluding the Arnold Aff., Connell Aff., and Second Sanderson Decl. from its consideration.[12]

CONCLUSION

For the reasons set forth herein, the above-named Plaintiffs-Appellants respectfully request that this Court reverse the District Court's ruling and instruct the District Court to enter its judgment in favor of Plaintiffs-Appellants as prayed for in Plaintiffs' FIRST AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL.

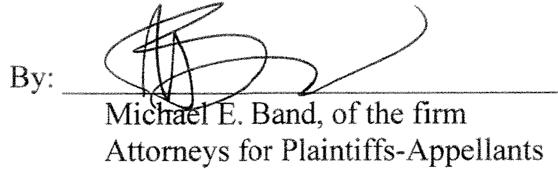
DATED this 21st day of October, 2016.

DAVISON, COPPLE, COPPLE & COPPLE, LLP

By: 
Terry C. Copple, of the firm
Attorneys for Plaintiffs-Appellants

[12] The District Court did not touch upon the Briggs Aff. in its Memorandum Decision Re: MSJ therefore it is unclear whether the District Court excluded it. If the District Court excluded the Briggs Aff. from its consideration, it erred in doing so. The District Court likewise erred to the extent that it simply failed to consider the Briggs Aff. *See, e.g.*, *Trunnell v. Fergel*, 153 Idaho 68, 70, 278 P.3d 938, 940 (2012) ("...it is the province of the trial court to weigh conflicting evidence and testimony and to judge the credibility of witnesses...")

DAVISON, COPPLE, COPPLE & COPPLE, LLP

By: 
Michael E. Band, of the firm
Attorneys for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of October, 2016, I caused a true and accurate copy of the foregoing document to be served upon the following individual, by the method indicated, and addressed as follows:

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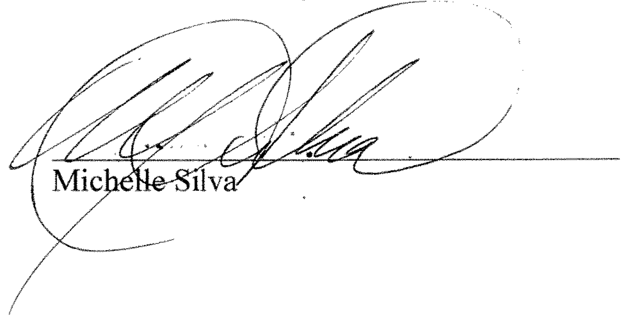
Michelle Silva