12-12-2016

Bedard and Musser v. City of Boise City Appellant's Reply Brief 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.	Supreme Court Docket No. 44171-2016 Ada County No. CV-2015-10297

APPELLANTS' REPLY 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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INTRODUCTION

Appellants Bedard and Musser, an Idaho partnership, and Boise Hollow Land Holdings, RLLP ("Boise Hollow") (collectively, "Appellants") respectfully request that this Court reverse the District Court's ruling that the Permanent Easement Agreement at issue in this case did not successfully convey a permanent easement to Boise Hollow's predecessor-in-interest and that any interest which had been conveyed had since been extinguished. To the extent that the District Court also held that any still-existing easement created by the Permanent Easement Agreement may not be expanded to meet the requirements of the Ada County Highway District (ACHD) for a public road, and dedicated to ACHD as a public road, Appellants also request that the Court reverse such ruling.

This brief is submitted by Appellants in reply to RESPONDENT'S BRIEF submitted by Respondent City of Boise City ("City") on November 18, 2016, and in further support of APPELLANTS' BRIEF submitted October 21, 2016.

As in the Appellant's Brief, the Clerk's Record on Appeal is cited herein as "R.;" the Reporter's Transcript on Appeal is cited as "Tr.;" and the exhibits admitted at the trial are cited as "Ex."

SUMMARY OF ARGUMENT IN REPLY

Appellants reply to the City's arguments as follows:

A. The rationales underlying the general rules relied upon by the City are the very same rationales which compel an exception under the unique circumstances present in this case.

B. All issues raised by Appellants were first raised below and are now properly before this Court.

C. The City is estopped to deny that the Permanent Easement Agreement created and easement across Lot 1 in favor of Lot 4 because the City accepted the Deed of Gift conveying 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.

D. The only interpretation of the Permanent Easement Agreement which gives effect to both Paragraph 1 and Paragraph 6 is that the easement area may be expanded by Boise Hollow to meet ACHD's requirements and then be dedicated to ACHD as a public road.

E. The parties agree that the District Court must consider the parol evidence in the record to determine the intent of the parties to the Permanent Easement Agreement if this Court finds that the Permanent Easement Agreement is ambiguous.

ANALYSIS

A. The rationales underlying the general rules relied upon by the City are the very same rationales which compel an exception under the unique circumstances present in this case.

The thrust of Appellants' argument that Tee effectively conveyed a permanent easement to Vancroft is that [1] Vancroft, as fee title owner Lot 1, consented to its being subject to a permanent easement, and [2] the easement was not prevented nor extinguished because at no point has there been concurrence of the common law unities.

Appellants' position is both simple and logical. Consider this scenario:

- Whiteacre and Blackacre are adjacent.
- Whiteacre is subject to a 99-year possessory interest held by T.
- V purchases Whiteacre and Blackacre, but due to T's interest, may only possess Blackacre and may not possess Whiteacre.
- Blackacre is landlocked.
- V and T agree to an easement across Whiteacre for the benefit of Blackacre. As a result, Blackacre is no longer landlocked; it may now properly be made use of.

- If V ever acquires both possession and ownership of both Blackacre and Whiteacre, the easement will automatically become extinguished by merger of title and possession.
- If, on the other hand, Blackacre and Whiteacre are never unified in title and possession, the easement persists as intended, maintaining the usefulness and marketability of Blackacre.

In the foregoing scenario, several important and well-recognized principles are well-served: first, there is an "underlying public policy against landlocked properties". *MacCaskill v. Ebbert*, 112 Idaho 1115, 1119, 739 P.2d 414, 418 (Ct. App. 1987). Furthermore, "Idaho public policy favors the full use of lands". *Backman v. Lawrence*, 147 Idaho 390, 394, 210 P.3d 75, 79 (2009). And finally, a primary goal of the Court when interpreting contracts is to "if possible, give effect to the intention of the parties." *See, e.g., Gardner v. Fliegel*, 92 Idaho 767, 770, 450 P.2d 990, 993 (1969).

On balance, the question is whether any important principles are offended. It is here that the City's argument falters and, indeed, it is the Montana Supreme Court's decision in *Leichtfuss v. Dabney*, 329 Mont. 129, 122 P.3d 1220 (Montana 2005) upon which the City first stumbles.

1. **The purpose of the rule generally prohibiting a lessee from burdening the lessor's interest with a permanent easement is to prevent the imposition of a *burden* upon the lessor. Enforcing the rule in this instance would contravene this purpose by instead preserving a burden and preventing a benefit to the lessor.**

The policy supporting the rule generally prohibiting a lessee from burdening the lessor's interest with a permanent easement is that one's land should not be subject to a burden to which the owner did not agree. In this case, that same policy compels recognition of the easement which was created in order to substantially relieve Vancroft of the burden imposed upon Lot 4 when the parties' predecessors subjected Lot 1 to a 99-year easement.

In *Leichtfuss*, the Montana Supreme Court recognized that the primary purpose of the rule that "that an easement burdening or benefitting an estate less than a fee simple ends when that estate expires" is to ensure that "a lessee... cannot impose upon his land a *burden* that passes to the remainderman or the reversioner." 329 Mont at 142, 122 P.3d at 1229 (emphasis added). However, enforcement of the rule simply doesn't comport with this rationale where doing so instead "prevents the *benefit* of an easement from running to the remainderman or reversioner." *Id.* at 143, 122 P.3d at 1230 (emphasis in original).

The City's argument omits this point, as well as the Montana Supreme Court discussion of Restatement (Third) of Property, *Servitudes* § 4.1(1): "it is the intent or expectations of the parties to the servitude which determine the duration thereof. ... '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 143-44, 122 P.3d at 1230 (discussing, and then quoting Restatement (Third) of Property, *Servitudes* § 4.1(1), at 496-97 (emphasis added by court).

The *Leichtfuss* Court's nuanced consideration of the issue reveals that permitting Tee to grant Vancroft a permanent easement over Lot 1 in this instance does *not* run afoul of the principle underlying the general rule. To the contrary, that principle and others can *only* be served by recognizing the permanence of the easement.

With that in mind, we turn to the other rule which, in this instance, demands adherence to the spirit over the letter.

2. The rule generally prohibiting a landowner from creating an easement over its own land also supports the creation of the easement where, as here, the landowner never has the opportunity to possess the servient parcel.

Appellants contend that the rule preventing a landowner from creating an easement across his own land is not implicated in this case because Vancroft never held concurrent ownership and possession of both Lot 1 and Lot 4.[1]

Appellants' argument relies on a very simple logic: [1] the rule preventing a landowner from having an easement in his own land is derived from the doctrine of merger; [2] the doctrine of merger operates only when the dominant and servient parcels come under common ownership and possession;[2] and [3] since Vancroft never had possession of the servient parcel, neither the rule nor its purpose is called upon.

Notably, the City declines to respond to the foregoing argument.[3] Instead, the City focuses its attention upon *Johnson v. Gustafson*, 49 Idaho 376, 288 P. 427 (1930), wherein, as stated in Appellant's Brief at p.23, this Court first adopted the rule that "one cannot have an easement in his own lands." The City rightly states that the facts of *Johnson* "are complete different from our case..." Respondent's Brief at 19. Again, however, the City's narrow gaze captures only the letter of the rule, irrespective of its underlying purpose. This perspective is too limited to be useful in this case. The applicability of *Johnson* is simply in this Court's long-standing view that an easement

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[1] In fact, no party has ever had concurrent ownership and possession of Lot 1 and Lot 4 since before Tee and Vancroft entered in the Permanent Easement Agreement.

[2] *See, e.g., Davis v. Gowen*, 83 Idaho 204, 210, 360 P.2d 403, 406 (1961).

[3] *Qui tacet non utique fatetur, sed tamen verum est eum non negare*: He who is silent does not indeed confess, but yet it is true that he does not deny.

should be recognized where necessary for the reasonable use and enjoyment of either parcel. Broken down to its elements, what the this Court implicitly recognized in *Johnson* was that when the common law unities (*i.e.*, title and possession) are broken, the policies against landlocking and in favor of the use of land become the primary concerns – even as against the ownership rights of the holder of the servient tenement. This is the premise underlying the doctrine of easement by necessity. *See, e.g.*, *Machado v. Ryan*, 153 Idaho 212, 219, 280 P.3d 715, 722 (2012).

With that in mind, consider again the circumstances of this case. Vancroft took ownership of Lot 1 and Lot 4 in 1990, but only possession of the Lot 4. Lot 1 was subject to a pre-existing 99-year lease not set to expire until 2079. Vancroft did not stand to obtain possession of Lot 1 during the lifetimes of its principals. Concurrently, Lot 4 was landlocked and could not be developed in any meaningful way without access to 36th Street across Lot 1. Therefore the parties simply acted as any other neighbors might act: one granted an access easement to the other. This resolved the landlocking and use problems affecting Lot 4, did not unduly burden the ownership rights appurtenant to the servient estate, benefited the owner of both the servient and dominant estate, and ultimately posed *no* danger of creating an easement over lands both commonly-owned and commonly-possessed because if Vancroft or a successor ever happened to obtain both possession and ownership of both lots, the easement would automatically terminate under the doctrine of merger.

Consequently the Court should not perceive the rules of law at issue as having prevented the easement, nor having later extinguished it when the leasehold ended. The critical fact is that there

has never been concurrence of the common law unities since the parties' entered into the Permanent Easement Agreement. Thus, *purpose* underlying those rules allowed the easement to be created and preserved it when the leasehold ended.

The City's argument requires the Court to infer a problem where none exists; Appellants' argument invites the Court to recognize the absence of a real dilemma under these facts.

B. All issues raised by Appellants were first raised below and are now properly before this Court.

1. Appellants argued to the District Court that the City should be estopped from denying the existence of a permanent easement over Lot 1 in favor of Lot 4.

The City argues that Appellants did not preserve their estoppel argument below and have asserted it only for the first time on appeal. Respondent's Brief at 22. This is inaccurate; Appellants first asserted this argument in PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT (filed February 2, 2016, R. 000436-52):

> Additionally, 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. The City became the owner of the Golf Course pursuant to a DONATION AGREEMENT and DEED OF GIFT, each dated November 1, 2013, (the latter being incorporated into the former). True and accurate certified copies of the foregoing documents are attached as Exhibits "A" and "B," respectively, to the AFFIDAVIT OF COUNSEL MICHAEL E. BAND ("Band Aff.," filed concurrently herewith). Pursuant to the foregoing, the City took ownership of the Golf Course "subject to and including rights of Grantor in" (1) the "Terms, conditions, provisions, easements and obligations set forth in that certain Permanent Easement Agreement" and (2) the "Terms, conditions, provisions, easements and obligations set forth in that certain Assignment and Assumption of Permanent Easement Agreement." *See* Exhibit 1 to DEED OF GIFT at 2. The dictionary definition of the phrase "subject to" is "[l]iable, subordinate, subservient, inferior, obedient to; governed or affected by; provided that; provided; answerable for." *Westrope & Associates v. Dir. of Revenue*, 57

S.W.3d 880, 883 (Mo. Ct. App. 2001) (quoting Black's Law Dictionary 1425 (6th ed.1990)).

R. 00449-50. This argument is an element of "Issues on Appeal" 3.a. and 3.b. set forth on Appellants' AMENDED NOTICE OF APPEAL. Accordingly, this argument has been preserved for appeal and is properly before this Court.

2. The issue of the interpretation of the terms of the Permanent Easement Agreement is properly before this Court because it was addressed by the District Court in the District Court's Memorandum Decision.

The City argues that the issue of interpretation of the terms of the Permanent Easement Agreement is not properly before this Court because "nowhere in the district court's decision does it address the issue of the plain language of the agreement as it relates to interpretation of the width or scope of the license area." Respondent's Brief at 26. Again, Appellants to believe this to be an inaccurate statement. Specifically, the District Court, in its MEMORANDUM DECISION AND ORDER RE: CROSS MOTIONS FOR SUMMARY JUDGMENT ("Memorandum Decision Re: MSJ," R. 000680-000697) addressed the meaning of the Permanent Easement Agreement as follows:

> If the Court were to conclude that the Agreement conveyed an easement appurtenant to Lot 4, the Court would have to conclude the Agreement granted the owner of Lot 4 not only a right to use the servient tenement in a manner or for a purpose that is not inconsistent with the general use of the property by the owner (An easement is defined as the right to use the land of another for a specific purpose that is not inconsistent with the general use of the property by the owner. *Akers v. D.L. White Const., Inc.* 142 Idaho 293, 30 l, 127 P .3d 196, 204 (2005)), but also granted the owner of Lot 4 – and notably *any* owner of Lot 4 – the right to destroy a portion of the interest of the owner of the servient tenement by dedicating the roadway to the public. The right to dedicate the roadway to the public would be inconsistent with the rights of the owner of the servient estate. It would also diminish the rights of the owner of the dominant estate by forever altering the 'easement' he held to simply be a right of way available to the general public. The term of the Agreement giving

> Vancroft the right to dedicate a portion of its property to the public, notwithstanding Tee's possessory interest in that land, clearly shows the Agreement was not intended to create a permanent easement over Lot 1 appurtenant to Lot 4. Vancroft simply wanted to build a road over one piece of land it owned to another piece of land it owned. In order to do that, it needed the permission of its tenant to make entry upon and make changes to the land while the tenant was in possession of that land. It also needed its tenant's permission to alter a portion of the leasehold in the future. Tee, Ltd., granted those permissions upon certain conditions and in exchange for certain promises.

Id. at 15-16 (R. 000694-95). The District Court also concluded that "The language of the 'PERMANENT EASEMENT AGREEMENT' is unambiguous." *Id.* at 16 (R. 000695) Appellants concede that the foregoing is not necessarily a discussion of the language of the Permanent Easement Agreement "as it pertains to the width" of the easement area, but it certainly pertains to whether or not the easement area can be expanded to meet the requirements of ACHD and then dedicated as a public road. Consequently, the issue of the interpretation of the terms of the Agreement is properly before this Court.

3. The issue of whether parol evidence should be considered is properly before this Court because it was addressed by the Court in its Memorandum Decision Re: MSJ as well as its Memorandum Decision Re: Motions to Strike.

The City argues that the issue of whether the District Court should have relied on extrinsic evidence is not before this Court because "[t]he 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." Respondent's Brief at 30. Again, Appellants do not believe this to be a wholly accurate summary of the District Court's holding.

Granted, the District Court, in its MEMORANDUM DECISION AND ORDER RE: PARTIES' VARIOUS MOTIONS TO STRIKE (Memorandum Decision Re: Motions to Strike, R. 000674-000679) stated:

> ...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 the circumstances surrounding the execution of the Agreement are irrelevant. The affiants' and declarants' statements about themselves, their backgrounds, and their opinions are also irrelevant.

Id. at 2 (R. 000675).

However, the District Court also concluded that "The language of the 'PERMANENT EASEMENT AGREEMENT' is unambiguous." Memorandum Decision Re: MSJ at 16 (R. 000695). The District Court further stated:

> As an independent ground for granting the defendant summary judgment, the Court finds that the unambiguous language of the Agreement itself makes clear that the parties did not intend to create an easement appurtenant to Lot 4.

Id. at 13 (R. 000693).

Concurrently, the District Court, in its Memorandum Decision Re: Motions to Strike noted that:

> Defendant has moved to strike certain statements contained in that affidavit largely on two grounds -that the statements are inadmissible because they are speculative or contain hearsay **and that the statements are parole evidence that is inadmissible to determine the parties' intent when executing the Permanent Easement Agreement because the language of the Agreement is unambiguous.**

Memorandum Decision Re: Motions to Strike at 1-2 (R. 00674-75).

Therefore, it appears that the foregoing did figure into the District Court's exclusion of the AFFIDAVIT OF REBECCA W. ARNOLD (R. 000134-000171), AFFIDAVIT OF COLIN CONNELL R. 000432-000435); and (3) SECOND DECLARATION OF TOMMY T. SANDERSON (R. 000430-000431).

Consequently, the issue of whether the District Court should have relied on extrinsic evidence is properly before this Court.

C. The City is estopped to deny that the Permanent Easement Agreement created and easement across Lot 1 in favor of Lot 4 because the City accepted the Deed of Gift conveying 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.

When the City acquired Lot 1 by Deed of Gift, it had, at a minimum, constructive knowledge of the Permanent Easement Agreement.[4] The Deed of Gift included a statement that Lot 1 was subject to the "terms, conditions, provisions, easements and obligations set forth in that certain Permanent Easement Agreement." R. 000618.

It is axiomatic that "[a] grantee, who accepts a deed to the property granted, is estopped to deny the truth of a recital that the grantor had previously granted an easement or interest in the property to another person." *Davis v. Auerbach*, 78 Ga. App. 575, 580, 51 S.E.2d 527, 532 (1949).

> As a general rule, all parties to a deed, and those claiming through, or under, them, are bound by the recitals therein legitimately appertaining to its subject matter. To put it another way, all parties to a deed are bound by the recitals therein, which operate as an estoppel, working on the interest in the land, and binding not only parties but privies in blood, privies in estate, and privies in law. Thus, recitals of

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[4] The Permanent Easement Agreement was duly recorded with the Ada County Recorder on November 3, 1993, as Ada County Instrument No. 09392442 (R.000144-000155); the City acquired Lot 1 via Deed of Gift twenty years later, on November 1, 2013, which was subsequently recorded on November 4, 2013, as Ada County Instrument No. 113130306 (R. 00613-20).

> matter of fact in a deed are ordinarily binding on the parties thereto, and they are estopped to dispute them; such recitals are binding on the grantee and the grantee's successors in estate if they claim under the deed, but not otherwise. Recitals do not bind mere strangers or those who claim by title paramount to the reciting deed.

31 C.J.S. Estoppel and Waiver § 43; *see also 37 Robinwood Associates v. Health Indus., Inc.*, 47 Ohio App. 3d 156, 157, 547 N.E.2d 1019, 1021 (1988) ("If a grantee accepts a deed, the knowledge of its provisions is legally imputed to him; and, by its acceptance, he is bound by all of its provisions and is estopped to deny their legal effect."); *Needham v. Caldwell*, 25 Tenn. App. 189, 154 S.W.2d 535, 537 (1941); *Gutensohn v. McGuirt*, 1944 OK 161, 194 Okla. 64, 147 P.2d 777, 778; *Erickson v. Wiper*, 33 N.D. 193, 157 N.W. 592, 598 (1916); *Hittinger v. Eames*, 121 Mass. 539, 545 (1877).

Likewise, "Where the owner of land plats the same into lots, blocks, streets, and alleys, and files such plat with the proper recorder of deeds, and sells lots therein with reference to such plat, he and his grantees are estopped from revoking the dedication of such streets and alleys." *Boise City By & Through Amyx v. Fails*, 94 Idaho 840, 845, 499 P.2d 326, 331 (1972) (quoting *Boise City v. Hon*, 14 Idaho 272, 94 P. 167 (1908)).

The City goes to some lengths in its brief to deny that Boise Hollow has an equitable servitude in favor of Lot 4 across Lot 1. Appellants do not so contend and did not assert this argument below. Rather, the purpose of the authority with respect to equitable servitudes in Appellants' Brief was merely to emphasize a critical concepts that play into the foregoing rule: [1] that "[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"; and [2] "[o]ne who purchases or encumbrances with notice of inconsistent claims does not take in good faith." *Kalange*

v. Rencher, 136 Idaho 192, 195-96, 30 P.3d 970, 973-74 (2001); *Langroise v. Becker*, 96 Idaho 218, 220, 526 P.2d 178, 180 (1974).

Consequently, it is significant that 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. Having done so, the City is now estopped to suddenly deny the existence of an easement now that it has become convenient to do so.

D. The only interpretation of the Permanent Easement Agreement which gives effect to both Paragraph 1 and Paragraph 6 is that the easement area may be expanded by Boise Hollow to meet ACHD's requirements and then be dedicated to ACHD as a public road.

The City contends that Paragraph 6 of the Permanent Easement Agreement only allows the easement road to be brought to ACHD's specifications and dedicated to ACHD "if" ACHD's specifications can be met within the 40' easement area. Neither the language of the Permanent Easement Agreement nor the attendant circumstances support this interpretation.

With respect to the particular language employed by the Permanent Easement Agreement, the City's argument is already addressed in Appellant's Brief at p. 35-36:

> 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. 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.

Appellant's Brief, 35-36 (emphasis in original).

Moreover, the City's position does not make sense given the circumstances already existing at the time the parties entered into the Permanent Easement Agreement. As stated in the AFFIDAVIT OF DEAN BRIGGS[5] (R. 000172-000197), the parties were advised prior to executing the Permanent Easement Agreement that, while 40' would be sufficient for a private road, 40' was not then sufficient to meet ACHD's specifications. *See* Briggs Aff. at 3-4 (R.000174-75). Thus, according to the City, the parties expressly agreed to an impossible act (*i.e.*, bringing the road up to ACHD's specs, which they were aware would be in excess of 40' in width, without exceeding 40' in width).

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[5] The Briggs Aff. was not challenged by the City below, nor excluded by the District Court. Accordingly, it remains a vital part of the record on appeal.

When interpreting an agreement, "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)). Should the Court adopt the City's interpretation, then the Court must also subscribe to the notion that Paragraph 6 had no meaning at the time it was drafted. On the other hand, Appellants' interpretation gives effect to both Paragraph 1 and Paragraph 6, allowing for the government of the former until the invocation of the latter.

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.

E. The parties agree that the District Court must consider the parol evidence in the record to determine the intent of the parties to the Permanent Easement Agreement if this Court finds that the Permanent Easement Agreement is ambiguous.

Though the parties disagree about the meaning of the Permanent Easement Agreement, both the City and Appellants agree that the document is unambiguous and can be interpreted without resorting to parol evidence.

If, however, this Court decides otherwise – that the Permanent Easement Agreement *is* ambiguous – then parol evidence pertaining to the parties' contracting intent is 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. The City contends that such a holding would necessitate remand back to the District Court with instructions to consider such evidence. Respondent's Brief at 31-32. Appellants agree.

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 12th day of December, 2016.

DAVISON, COPPLE, COPPLE & COPPLE, LLP

By: _____
Terry C. Copple, of the firm
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By: _____
Michael E. Band, of the firm
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CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of December, 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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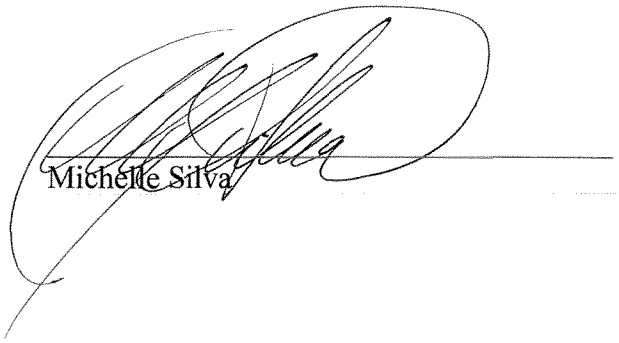

Michelle Silva