3-21-2018

Silverwing at Sandpoint, LLC v. Bonner County Appellant's Reply Brief Dckt. 45052

IN THE SUPREME COURT OF THE STATE OF IDAHO

SILVERWING AT SANDPOINT, LLC, an Idaho limited liability company, Plaintiff-Respondent, vs. BONNER COUNTY, an Idaho municipal corporation, Defendant-Appellant,	Supreme Court No. 45052-2017 Bonner County District Court No. CV2012-0840

APPELLANT'S REPLY BRIEF

Appeal from the District Court of the First Judicial District for Bonner County
Honorable Richard Christensen, Presiding

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SilverWing contends the County should be required to pay the "increased cost" that SilverWing incurred as a result of installing its taxiway in conformity with ALP Alternative 2(B). The problem with this argument is that SilverWing signed a contract stating that SilverWing "shall be responsible for the cost of installing and maintaining all… taxiways, in accordance with… FAA requirements." R. Exh. at 194, ¶ 3 (Plaintiff Exh. 76). That same contract expressly obligated SilverWing, not the County, to ensure that SilverWing's development complies with "all applicable present and future… rules, regulations, and other requirements of the FAA[.]" R. Exh. at 194, ¶ 4 (Plaintiff Exh. 76). This allocation of costs and risk was a part of the bargained-for consideration negotiated between the parties and accepted in the TTF Agreement. R. Exh. at 194 (Plaintiff Exh. 76). SilverWing cannot use promissory estoppel to circumvent the parties' written agreement.

SilverWing's remaining arguments depend on a remarkably misleading version of the facts. This Court is not the first court to receive a brief containing SilverWing's revisionist history. See SilverWing at Sandpoint, LLC v. Bonner Cty., 700 Fed. Appx. 715, 716 (9th Cir. 2017) (finding after a 29-month appeal: "It was not the County which frustrated SilverWing's plans"). No matter how SilverWing characterizes the evidence, promissory estoppel is simply a substitute for consideration, it is "not a doctrine designed to give a party to a negotiated commercial bargain a second bite at the apple[.]" See Walker v. KFC Corp., 728 F.2d 1215, 1220 (9th Cir. 1984).

The judgment should be reversed.

ARGUMENT

I. THE THROUGH-THE-FENCE AGREEMENT EXPRESSLY GOVERNS THE LOCATION OF SILVERWING'S TAXIWAY.

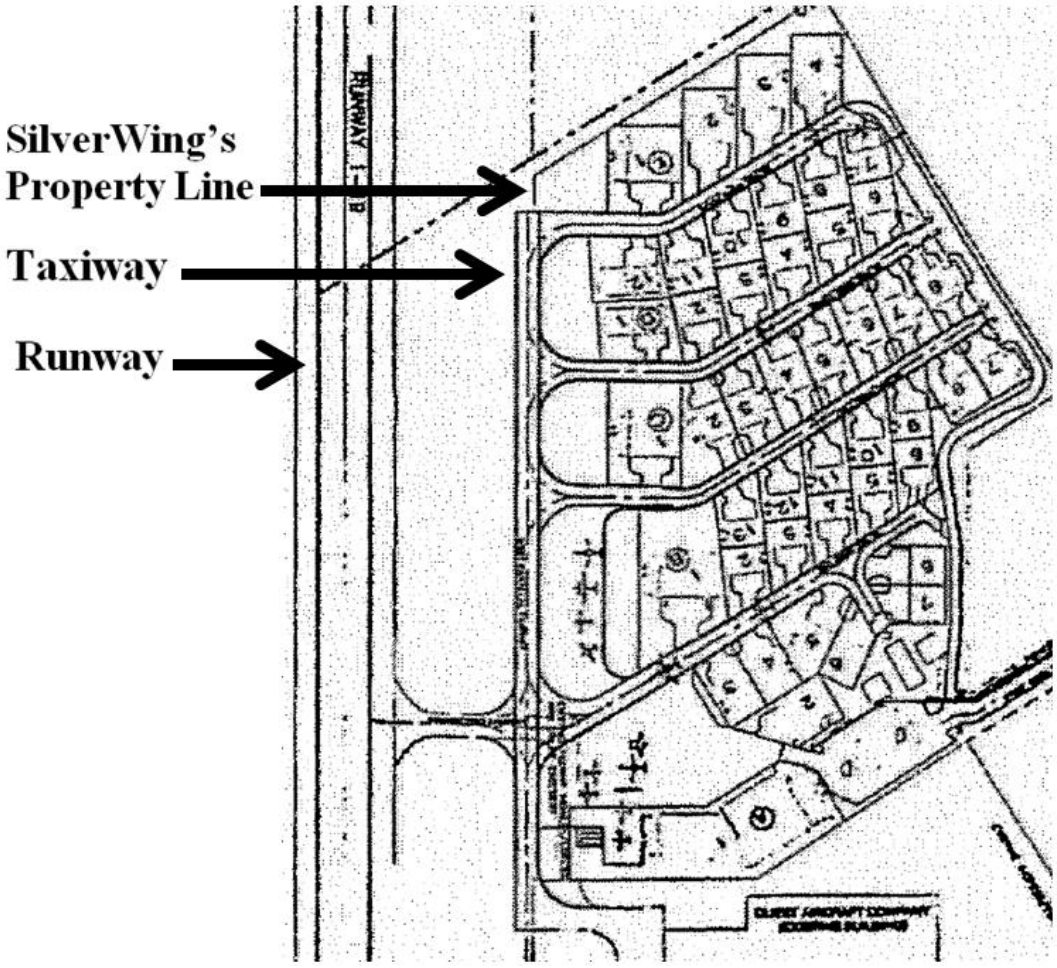
SilverWing argues the parties' written agreement should not foreclose the claim of promissory estoppel because the TTF Agreement governed SilverWing's "access" to the runway while the alleged oral promises pertained to the "location" of SilverWing's taxiway "and/or a particular ALP." Respondent's Brief at p. 24. This reasoning, which was expressly adopted by the trial court (R. at 5729) is incorrect for several reasons.

First, while SilverWing is correct that the TTF Agreement governed SilverWing's "access" to the runway, the TTF Agreement also expressly governed SilverWing's "means" of obtaining access to the runway (i.e., by installing a taxiway) and the "location" of that access. Specifically, the TTF Agreement states, "Bonner County hereby grants to Licensee access to the Airport in private aircraft **at the location designated in Exhibit "A" attached hereto** and made a part hereof by this reference." R. Exh. at 194, ¶ 1 (Plaintiff Exh. 76). It is undisputed that Exhibit A to the TTF Agreement is a map depicting the agreed-upon location of SilverWing's taxiway based on Alternative 2(B). R. Exh. at 199 (Plaintiff Exh. 76) (Tr. at 380:12-381:14). Thus, in addition to granting certain access rights, the TTF Agreement included the parties' agreement about the location of SilverWing's taxiway. R. Exh. at 194, ¶ 1 (Plaintiff Exh. 76).

One month before the trial of this action, SilverWing filed a brief in the trial court admitting that "SilverWing's promissory estoppel claim concerns promises not contained with the TTFA – despite being **related** to the subject matter of the TTFA." R. at 4119. SilverWing's brief in this Court states that the judgment requiring the County to pay SilverWing $250,000 (in

public funds) should be upheld because County's promises were "**unrelated** to the subject matter of the TTFA," (Respondent's Br. at p. 48).

Notwithstanding SilverWing's sleight of hand, Exhibit A to the TTF Agreement unambiguously depicts SilverWing's proposed taxiway being built on the County's property:



R. Exh. at 199 (Plaintiff Exh. 76) (arrows and text added). This clearly depicts SilverWing's taxiway being constructed on County property, as depicted in ALP Alternative 2(B). (Tr. at 380:12-381:14) SilverWing does not contend that it ultimately constructed its taxiway in a different location than the location depicted on Exhibit A to the TTF Agreement. Thus,

SilverWing's claim of damages for the "increased cost" of building the taxiway on County property is belied by the express terms of the written contract stating that SilverWing "shall be responsible for the cost of installing and maintaining all… taxiways," (R. Exh. at 194, ¶ 3 (Plaintiff Exh. 76)) and designating the taxiway's location on County property in Exhibit A (R. Exh. at 194, ¶ 1 (Plaintiff Exh. 76)).

"[P]romissory estoppel is not a doctrine designed to give a party to a negotiated commercial bargain a second bite at the apple in the event it fails to prove a breach of contract." Walker v. KFC Corp., 728 F.2d 1215, 1220 (9th Cir. 1984). Stated differently, "where . . . the performance which is said to satisfy the detrimental reliance requirement of the promissory estoppel theory is the same performance which represents consideration for the written contract, the doctrine of promissory estoppel is not applicable.'" General Aviation, Inc. v. Cessna Aircraft Co., 915 F.2d 1038, 1042 (6th Cir. 1990) (quoting the district court's decision, 703 F. Supp. 637, 647 n.10). In General Aviation, the court held that regardless of any promises made prior to the execution of the written contract, the plaintiff's reliance on those promises necessarily ended when the parties entered into the contract and received the consideration bargained for under the agreement. Id. Here, SilverWing has already sued the County for breach of the TTF Agreement and lost. See SilverWing at Sandpoint, LLC v. Bonner Cty., 2014 WL 6629600 (D. Idaho Nov. 21, 2014), aff'd, 700 F. App'x 715 (9th Cir. 2017); see also Walker, 728 F.2d at 1220.

In response to Exhibit A to the TTF Agreement, SilverWing first argues that the Court should ignore it. SilverWing states that "in interpreting contractual language, courts begin with the plain language of the contract." Respondent's Brief at p. 24. Fair enough. The TTF plainly

states that the taxiway providing SilverWing's access to the runway must be installed "at the location designated in Exhibit "A" attached hereto and made a part hereof by this reference." R. Exh. at 194, ¶ 1 (Plaintiff Exh. 76). The plain language of the TTF Agreement also expressly requires SilverWing to pay for the costs of building the taxiway at that location, and the cost of complying with all applicable laws, rules, and regulations. R. Exh. at 194, ¶ 3 (Plaintiff Exh. 76). Thus, the plain language of the TTF Agreement forecloses SilverWing's attempt to shift these costs to the County under a defective theory of promissory estoppel.

Next, SilverWing asks this court to ignore Exhibit A to the TTF Agreement on the grounds that Paragraph 1 of the TTF Agreement, which expressly references Exhibit A, contains the heading "Access to Airport." Respondent's Brief at p. 25. In doing so, SilverWing asks this Court to rely exclusively on a heading to skew the construction or interpretation of the agreement. Yet the TTF Agreement states: "The headings of the paragraphs and subparagraphs of this Agreement are included for purposes of convenience only, and **shall not** affect the construction or interpretation of any of it's [sic] provisions." R. Exh. at 197, ¶ 14(k). SilverWing asks this Court to interpret the TTF Agreement in a manner that contradicts the express language of the TTF Agreement. Instead, this Court should give effect to the plain meaning of the entire TTF Agreement, including Exhibit A, which depicts SilverWing's taxiway overlapping onto County property as required by ALP Alternative 2(B).

Thus, because the TTF Agreement expressly governed SilverWing's "means" of obtaining access to the runway (i.e., by installing a taxiway) and the "location" of that access

(depicted in Exhibit "A" to the contract), the TTF Agreement bars SilverWing's claim of promissory estoppel.

II. EVEN IF IT WERE TRUE THAT THE ORAL PROMISES WERE UNRELATED TO THE TTF AGREEMENT, SILVERWING'S CLAIM WOULD STILL BE BARRED BECAUSE THE TTF AGREEMENT IS A FULLY-INTEGRATED CONTRACT.

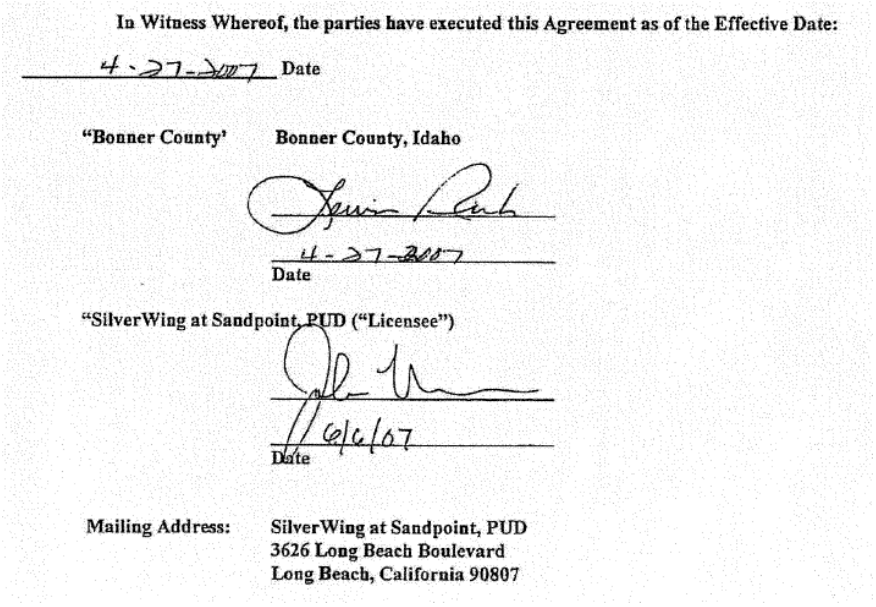
SilverWing contends the TTF Agreement is no bar to the claim of promissory estoppel because the County's promises "were unrelated to the subject matter of the TTFA," Respondent's Br. at p. 48. As discussed supra, SilverWing's contention contradicts the face of the contract. However, even if it were true that the County's promises were unrelated to the TTF Agreement (which it is not), the TTF Agreement would *still* bar SilverWing's claim because it was a fully integrated contract.

"A merger clause in a written agreement is one means of proving the integrated character of a writing." Valley Bank v. Christensen, 119 Idaho 496, 498, 808 P.2d 415, 417 (1991). "When a written instrument is complete on its face and is unambiguous, extrinsic evidence of prior or contemporaneous representations or negotiations are inadmissible to contradict, vary, alter, **add to**, or detract from the instrument's terms." Kepler-Fleenor v. Fremont Cnty., 152 Idaho 207, 211, 268 P.3d 1159, 1163 (2012) (emphasis added); Buku Props., LLC v. Clark, 153 Idaho 828, 834 (2012). Prior to the trial of this case, Bonner County filed a motion *in limine* under the Parole Evidence Rule expressly seeking the exclusion of the alleged oral promises that do not appear on the face of the TTF Agreement. R. at 3400. The trial court rejected the County's motion and allowed SilverWing to present evidence of the oral promises at trial.

Here, in the County's opening brief, the County explained that the TTF Agreement contains the following clauses:

> d. Modification. This Agreement shall not be modified by either party by oral representation made before or after the execution of this Agreement. All modifications must be in writing and signed by the parties….
>
> i. All negotiations are merged into this Agreement. This Agreement constitutes the entire understanding of the parties concerning the subject of this Agreement. This Agreement shall constitute a binding obligation between the parties and shall be applicable beyond the term of this Agreement.

R. Exh. at 197 (Plaintiff Exh. 76, ¶¶ 14(d), (i)). If SilverWing understood the alleged oral promises to represent binding commitments on behalf of the County, SilverWing fails to explain why those promises were not included within the fully-integrated written agreement which was signed by SilverWing on June 6, 2007, well after the oral promises were allegedly made:



In Witness Whereof, the parties have executed this Agreement as of the Effective Date:

4-27-2007 Date

"Bonner County' **Bonner County, Idaho**

4-27-2007
Date

"SilverWing at Sandpoint, PUD ("Licensee")

6/6/07
Date

Mailing Address: **SilverWing at Sandpoint, PUD**
3626 Long Beach Boulevard
Long Beach, California 90807

R. Exh. at 198 (Plaintiff Exh. 76).

This means that even if the Court finds there was evidence of a separate promise that did not appear on the face of the TTF Agreement, the promise would be barred under the terms of the Agreement because SilverWing admits no promises were made after entering into the TTF Agreement (Tr. at 453:2-454:23), and because the contract contained a fully-enforceable no-oral modifications clause. R. Exh. at 197 (Plaintiff Exh. 76, ¶¶ 14(d), (i)). SilverWing has not offered any response to the County's argument that the TTF Agreement, as a fully-integrated contract, bars SilverWing's claim of promissory estoppel regardless of whether the alleged promises are related to the subject matter of the TTF Agreement.

Thus, regardless of whether the TTF Agreement is related or unrelated to the alleged promises, SilverWing's claim of promissory estoppel is barred as a matter of law because the TTF Agreement is a fully-integrated contract. See Valley Bank, 119 Idaho 496, 498, 808 P.2d 415, 417.

III. THE "EVIDENCE" RELIED UPON BY SILVERWING DOES NOT ADD UP TO A PRIMA FACIE CLAIM OF PROMISSORY ESTOPPEL.

SilverWing's brief makes it clear that SilverWing's version of promissory estoppel requires no promise, just factual representations regarding the airport's plans. It requires no breach, just the showing that it took a few years for the County to obtain approval of the ALP conforming to SilverWing's property. It requires no showing of reliance damages, just hypothesized uncertainty regarding "increased costs" that have nothing to do with enforcement of an oral promise. See Profits Plus Capital Mgmt., LLC v. Podesta, 156 Idaho 873, 891, 332

P.3d 785, 803 (2014) (explaining promissory estoppel applies when "injustice can be avoided only by ***enforcement*** of the promise.") SilverWing's arguments fall flat on each of these points.

A. There Is Only One Promise Alleged in the Complaint and SilverWing Failed to Present Evidence of that Promise.

The doctrine of promissory estoppel requires reliance upon a ***specific*** and ***complete*** promise. Gilbert v. Caldwell, 112 Idaho 386, 390-392, 732 P.2d 355, 359-361 (Idaho Ct. App. 1987) (citing Restatement (Second) of Contracts § 98 (1979)); see also Lettunich v. Key Bank Nat'l Ass'n, 141 Idaho 362, 366-367, 109 P.3d 1104, 1108-1109 (Idaho 2005) (holding promissory estoppel did not apply because "there was no complete promise here to be enforced"); Zollinger v. Carrol, 137 Idaho 397, 399, 49 P.3d 402, 404 (2002).

SilverWing's brief relies on new promises that were never a part of this lawsuit. This begs the question: what is the exact promise that SilverWing seeks to enforce through its claim of promissory estoppel?

In the operative complaint (which contained the sole claim of promissory estoppel that was tried to a jury), SilverWing describes a much different promise than those alleged in its brief on appeal. The complaint alleges, "SilverWing relied on the County's promise, that there were no plans to change the **location of the Airport's runway**, to its substantial economic detriment." R. at p. 252 (emphasis added). Yet SilverWing's brief on appeal argues, "[T]estimony about the movement (or lack thereof) of the runway is irrelevant to SilverWing's promissory estoppel claim," (Respondent's Brief at p. 40). SilverWing's about-face on the only promise alleged in the complaint is SilverWing's last-ditch effort to save a defective claim because the runway has

never moved, meaning SilverWing's only alleged promise is moot on its face. The "promises" identified in SilverWing's brief have no relationship to the claim of promissory estoppel that was alleged in the complaint (and that was challenged by the County in a Motion for Judgment on the Pleadings and Motion for Summary Judgment in the trial court). Throughout this litigation (and even on appeal), SilverWing has continued to add to its creative list of alleged promises. But SilverWing failed to amend its pleadings to allege these promises against the County.

As is often the case, the truth is less exciting than the story told in SilverWing's brief. The FAA can (and did) require the County to alter the plans governing certain aspects of the Airport from 2009 to 2015, but the changes were solely on paper. The runway has not moved. SilverWing's taxiway has not been altered. Today, SilverWing is free to develop its property in conformity with the very plan which SilverWing claims the County encouraged it to use. The County's predictions – the statements upon which SilverWing allegedly relied – all came true with the FAA's approval of a new ALP in 2015. (R. at p. 768-785; Tr. at 1262:6-1263:6.)

Thus, SilverWing has failed to show a promise that was breached, or even a prediction that did not come true. This cannot serve as the basis for a claim of promissory estoppel.

B. SilverWing's Arguments Regarding Reliance Demonstrate that Such Reliance Was Not Reasonable and Justifiable.

SilverWing argues it justifiably relied on the County's oral representations yet signed the TTF Agreement which expressly denies the existence of those representations. That "sounds absurd, because it is." Sekhar v. United States, 133 S. Ct. 2720, 2727 (2013); see also Blumenstock v. Gibson, 2002 PA Super 339, 811 A.2d 1029, 1036 (Pa. Super. Ct. 2002) ("[A]

party cannot justifiably rely upon prior oral representations yet sign a contract denying the existence of those representations.").

Promissory estoppel requires a showing of action or inaction in reliance on the promise and such reliance must have been reasonable, justifiable, and detrimental. Brown v. City of Pocatello, 148 Idaho 802, 807-08, 229 P.3d 1164, 1169-70 (2010). Justifiable reliance does not exist when the party seeking estoppel has knowledge of contrary facts. Weitman v. Grange Ins. Asso, 59 Wash. 2d 748, 751-52, 370 P.2d 587, 589 (1962). Otherwise stated, the party asserting estoppel must show both the lack of knowledge and the absence of any convenient and available means of acquiring such knowledge. Overhulse Neighborhood Association v. Thurston County, 94 Wash.App. 593, 972 P.2d 470 (1999) (overruled on unrelated grounds).

In this case, there is no evidence of reasonable reliance because nine days after SilverWing was founded, according to SilverWing's own engineer, "the decision was made" to develop the property based on Alternative 2(B). (Tr. at 807:1-5; see also 804:25-805 [the November 3, 2006 decision was made in reliance on the FAA]); see also R. Exh. at 380 (Defendant Exh. B9) (showing reliance on FAA, not County). SilverWing failed to present evidence of any reliance on County promises during that nine day period. Id.; see also R. at 4611-4612) (no County promises made before October 25, 2006 because SilverWing did not exist until that date).

In addition to ignoring the plain language of the TTF Agreement, SilverWing's brief ignores the email exchange between SilverWing's engineers that conclusively demonstrates that SilverWing relied on the FAA, not on the County, in making their decision to move forward with

their plans based on ALP Alternative 2(B). Specifically, Corrie Esvelt-Siegford of ES Engineering emailed Debbie Van Dyk of Clearwater Engineering on November 3, 2006 stating "No Runway relocation – as far as Trang [Tran] knows." R. Exh. at 380 (Defendant Exh. B9). Trang Tran was the civil engineer at the FAA assigned to Sandpoint Airport. (Tr. at 734:1-14.) SilverWing's engineers concluded based on their conversation with Trang Tran that the runway would not be moved. (Tr. at 704:9-11; R. Exh. at 380 (Defendant Exh. B9.) Ms. Esvelt-Siegford testified at trial that "the decision was made" that day, November 3, 2006, to develop the property based on the ALP depicting Alternative 2(B). (Tr. at 807:1-5; see also 804:25-805 [the November 3, 2006 decision was made in reliance on the FAA].) SilverWing failed to present evidence of any reliance on County promises during the nine day period between the date SilverWing was formed (October 25, 2006) and the date SilverWing decided to proceed using Alternative 2(B). (Id.; see also R. at p. 4611-4612.) SilverWing attempts to minimize this exchange by arguing it was "preliminary" engineering. But it is undisputed that SilverWing selected Alternative 2(B) that day and never changed course in reliance on any County promise.

SilverWing's Statement of the Case repeatedly references the County's "approval" of SilverWing's project, yet fails to tell the Court the truth: that the County was neither the zoning authority (City of Sandpoint) nor the regulatory authority (FAA). In order to obtain City approval of its Applications, SilverWing was required to comply with applicable City Zoning Codes, which includes Sandpoint City Zoning Code, Chapter 12, Airport Overlay Zone District, § 9-12-3. R. at Exh. p. 422 (Defendant's Exh. H42A). That section states, in pertinent part: "In order to carry out the provisions of this chapter, there are hereby created and established certain

zones for existing and future planned airport conditions as they apply to Sandpoint Airport. . . Such zones are shown on the approved Sandpoint airport master plan 1993-2013, as amended from time to time, which by this reference is incorporated and made a part hereof as if set forth in full." R. at Exh. p. 422 (Defendant's Exh. H42A).

SilverWing cannot evade the fact that its conditional use, subdivision, and planned unit development applications were all submitted to City of Sandpoint, not Bonner County. Respondent's Brief at p. 11. Additionally, the regulatory authority required to approve or disapprove of SilverWing's Form 7460 and 7480 applications was the FAA, not Bonner County. Respondent's Brief at p. 28. SilverWing seeks to hold the County liable for its "support" of SilverWing's development both at the City planning stage and at the FAA stage (Respondent's brief at p. 11), but the law is clear that statements of "encouragement," or "of a hope or expectation" cannot form the basis of a claim of promissory estoppel. Gilbert, supra, 112 Idaho at 390-392, 732 P.2d at 359-361.

SilverWing's engineers admitted at trial that they knew it was "risky" to design the development based on an unapproved ALP showing Alternative 2(B) (Tr. at 804:17-805:5) but they relied on their discussions with the FAA and moved forward without waiting for the updated Master Plan. (Tr. at 807:1-5; R. Exh. at 380 (Defendant Exh. B9.)

Thus, SilverWing's arguments regarding reasonable and justifiable reliance are disingenuous at best.

C. SilverWing Fails to Show How the Alleged "Increased Costs" of Building the Taxiway In the Correct Location Constitutes Compensable Damages under the Doctrine of Promissory Estoppel.

Promissory estoppel requires a showing of "substantial economic detriment." See Grover v. Wadsworth, 147 Idaho 60, 64, 205 P.3d 1196, 1200 (2009).

SilverWing argues the $250,000 awarded to SilverWing for "out-of-pocket" reliance damages compensates a substantial economic detriment because SilverWing was required to incur "increased costs" as a result of building its taxiway on the County's property, at the present location. But SilverWing stops one step short of explaining the truth: SilverWing now benefits from having a taxiway in a location that conforms to the currently applicable ALP. (R. at p. 768-785; Tr. at 1262:6-1263:6.) The County explained this to the trial court as soon as it occurred:

> **TO THE COURT AND TO PLAINTIFF AND ITS ATTORNEYS OF RECORD:**
>
> **PLEASE TAKE NOTICE that on May 27, 2015, the Federal Aviation Administration officially signed a new Airport Layout Plan ("ALP") approving the current physical configuration for Sandpoint Airport, including an approved layout that is in complete conformity with the SilverWing development as built. *See* attached Affidavit of D. Scott Bauer, Exhibit A. This case is now moot. Bonner County submits this new ALP as supplemental evidence in support of the following dispositive points stated in its briefing:**
>
> **(1) SilverWing has suffered no reliance damages;**
>
> **(2) Any alleged representations by the County have been fulfilled; and**
>
> **(3) The Sandpoint Airport runway and SilverWing's taxiway have not been moved.**
>
> ***See* attached Affidavit of D. Scott Bauer, Exhibit A.**
>
> **DATED this 28th day of May, 2015.**

R. at 768.

Would SilverWing have preferred that it built its taxiway in a location that does not conform to the FAA's currently-approved plans for Sandpoint Airport? On May 27, 2015, when the Federal Aviation Administration officially signed the new ALP approving the current physical configuration for Sandpoint Airport, including an approved layout that is in complete conformity with the SilverWing development as built, SilverWing's claim of "reliance damages" became moot because SilverWing now enjoys the benefit of the funds it expended to design and build its taxiway in the current location.

SilverWing complained of lost sales resulting from the regulatory uncertainty, but no evidence was presented at trial that the physical configuration of the airport has been altered or that SilverWing has been deprived of the use or benefit of its improvements. When the trial court correctly ruled that SilverWing's speculative lost profits claim could not be presented to the jury, the result was to eliminate any possibility of SilverWing recovering damages at trial because SilverWing's out of pocket damages cannot fairly be characterized as damages – today SilverWing is free to use its property and any improvements on the property. (Tr. at 471:17-472:3).

Thus, because SilverWing has not suffered a substantial economic detriment, promissory estoppel does not apply.

IV. SILVERWING'S ATTEMPT TO SKIRT THE STATUTE OF FRAUDS ON THE GROUNDS THAT THE PROMISES WERE "INDEFINITE" IS FUTILE BECAUSE INDEFINITE PROMISES CANNOT SUPPORT A CLAIM OF PROMISSORY ESTOPPEL.

SilverWing's brief has no satisfactory response to the County's argument that the alleged promise that the runway would never be moved (the only promise alleged in the complaint) is clearly barred by Idaho's Statute of Frauds based on its inability to be performed within one year. Idaho Code § 9-505.1. SilverWing's only argument against application of this defense is the argument that contracts of uncertain duration do not violate the Statute of Frauds. Respondent's Brief at p. 40 (citing Frantz v. Parke, 111 Idaho 1005, 1008, 729 P.2d 1068, 1071 (Ct. App. 1986) ("We have allowed enforcement of an oral contract made for an indefinite period, to be determined by a stated future event, if it was possible-albeit unlikely-that the stated event could occur within a year."). However, SilverWing makes yet another critical error in its analysis: contracts of ***uncertain duration*** are distinguishable from contracts of ***infinite duration***. Under Idaho law, contracts of infinite duration (such as SilverWing's alleged "promises" that the County would *never* move the runway and *never* pursue a different airport plan) are unquestionably subject to dismissal under the Statute of Frauds. Idaho Code § 9-505.1. Frantz, supra, does not purport to exempt contracts of infinite duration from Idaho Code § 9-505(1).

This puts SilverWing between a rock and a hard place. Though it is clear that SilverWing's promissory estoppel claim depends on what it has framed as infinite "promises" of the County never to move the runway, never to rip up the taxiway, never to pursue an alternative ALP, (and the list continues to grow), these promises of infinite duration clearly cannot survive

the Statute of Frauds. On the other hand, SilverWing's decision to frame the County's promises as contracts of "indefinite" rather than "infinite" duration violates Idaho's rule against enforcement of uncertain promises under the stringent laws of promissory estoppel. See Gilbert, 112 Idaho at 391, 732 P.2d at 360 (promissory estoppel requires a specific and complete promise) (citing Restatement (Second) of Contracts § 98 (1979); see also Lettunich, 141 Idaho at 367, 109 P.3d at 1109 (holding promissory estoppel did not apply because "there was no complete promise here to be enforced"); Zollinger, 137 Idaho at 399, 49 P.3d at 404. In the context of real estate development, it would be irrational for SilverWing to argue that "timing" and "duration" would not have been material terms of an oral promise. Taking SilverWing's brief at face value, the fact that the County's promises omitted material terms of timing and duration means that they were not sufficiently definite and specific to form the basis of a claim of promissory estoppel. See Gilbert, 112 Idaho at 391, 732 P.2d at 360.

Thus, SilverWing's claim would be subject to dismissal regardless of whether SilverWing had presented evidence of promises of "infinite" or "indefinite" duration.

V. SILVERWING'S BRIEF IS TANTAMOUNT TO A FIELD GUIDE FOR CIRCUMVENTING THE PROCEDURES OF IDAHO'S OPEN MEETINGS LAW.

Nothing in SilverWing's Brief changes the fact that SilverWing's claim of promissory estoppel is **completely barred** under the Idaho Open Meetings Law, the Idaho Constitution and Idaho Code. To find otherwise is to disregard the intent of the Idaho Legislature.

Every municipality in Idaho recognizes that the requirements of Title 74, Chapter 2 of the Idaho Code ("Open Meetings Law") are slow, burdensome, and inefficient. For example, all

meetings of the board of commissioners must be public, and the books, records, and accounts of the meetings must be kept open for public inspection at the office of the clerk of the board of commissioners. The clerk of the board must give five days public notice of all special and adjourned meetings by posting three notices in conspicuous places, one of which shall be the courthouse door. Municipalities are truly burdened by complying with these procedures.

Ignoring the fact that these procedures ***exist to protect the public*** and commitments of public funds on a handshake outside of the watchful eye of the public, SilverWing's brief sets forth a guide on how every municipality in Idaho can circumvent the Idaho Legislature's "red tape" under the Open Meetings Law. Under SilverWing's "agency" argument, here's how every municipality in Idaho can now bypass the formalities of the Open Meetings Law for every future decision, commitment, or promise on behalf of the municipality:

STEP ONE: Properly notice and conduct a meeting of the Board of Commissioners (or governing municipal body).

STEP TWO: During the duly noticed meeting, have a majority of the Commissioners vote to expressly empower an agent to handle all County acts including discretionary acts, and specifically confer upon this agent the powers to unilaterally bind the County to *commitments outside of properly noticed Open Meetings* and without the red tape imposed on the commissioners every time they meet.

STEP THREE: The agent will handle County business on his/her own time in informal, private settings like restaurants, cafes, and conference rooms without any notice to the public.

STEP FOUR: No longer subject to the public oversight inherent in properly noticed and recorded Open Meetings, the agent is now free to bind the County to multi-million dollar promises without the inconvenience and red tape created by the Open Meetings Law.

STEP FIVE: Since the agent's promises on behalf of the County were not recorded in any minutes and since no members of the public were given the ability to attend a public hearing or speak against such commitments, the agent can exercise "greater flexibility" when covertly entering into commitments that may appear, to the outside, to be less than legal or ethical.

STEP SIX: The commissioners can communicate directly with the authorized agent, in private, if they wish for the agent to make some decision or take some action binding the County to an enforceable commitment to a private party (such as family members of the commissioners).

STEP SEVEN: The public loses.

SilverWing's Opposition requires the Court to accept that the above sequence of events would be legal and enforceable under the Open Meetings Law. The truth, of course, is that the Idaho Legislature ***absolutely and unambiguously intended to prevent*** what is described above and to prevent private parties like SilverWing from claiming a County promised it something outside of a properly conducted meeting under the Open Meetings Law. That statute exists to protect the public. Notably, SilverWing seeks to obtain in this case $250,000 in public funds based on a County "promise" without presenting evidence of a single instance in which the County made such a promise in a duly noticed Open Meeting of the Board of County Commissioners. The Idaho Legislature did not mince words when it directed the courts of this State to **reject attempts to enforce** such commitments: "**If an action, or any deliberation or**

decision-making that leads to an action, occurs at any meeting which fails to comply with the provisions of this chapter, such action shall be null and void." See I.C. § 74-208(1).

There is no "agency" exception allowing municipalities to circumvent the Idaho Open Meetings law. "Under the Open Meetings Act, the governing body is defined as *members* of a public agency, not *employees* of a public agency." Safe Air For Everyone v. Idaho State Dep't of Agric., 145 Idaho 164, 167, 177 P.3d 378, 381 (2008). Nor are private parties alleging privately-made promises entitled to hundreds of thousands of dollars in public funds when there is no evidence that the County ever took formal, valid action to issue a promise. This the mandate of the Idaho Legislature in order to protect the public from side-promises made on behalf of municipalities. The promises alleged in this case are unenforceable.

Further, SilverWing's argument that the Airport Advisory Board had the actual authority to bind the County without approval by the Board of Commissioners directly contradicts the County's own Resolution No. 99-25, which was admitted as evidence at trial and states: "The management, operation, maintenance, development, planning and improvements for the Sandpoint airport shall be based upon [t]he advice and recommendations of the Sandpoint Airport Board **subject to approval by the Board of County Commissioners**[.]" R. Exh. at p. 351-352 (Defendant's Exh. A7) at ¶ F (emphasis added).

SilverWing's reliance on a theory of "ratification" ignores the facts and the law. SilverWing argues that this case is similar to the Pennsylvania case Punxsutawney Mun. Airport Auth. v. Lellock, 2000 PA Super 18, 745 A.2d 666 (Pa. Super. 2000), where the doctrine of estoppel was used as a shield, not as a sword, by a tenant at the airport to evade back rent

payments in a suit filed by the airport authority. In that case, the fact that the airport authority had "watched and waited" while the tenant made improvements to the rented hangar led the Pennsylvania court to conclude that the airport authority had tacitly ratified an agreement to offset the amount of back rent owed by the value of the improvements made to the airport's property. Id.

Here, SilverWing's theory of "ratification of oral promises" does not track the reasoning stated in Punxsutawney for several reasons. First, the County's conduct in allowing SilverWing to build its taxiway was conduct in furtherance of a written agreement that had been officially adopted by the Board of County Commissioners, not "ratification of oral promises." See R. Exh. at 194, ¶ 1 (Plaintiff Exh. 76) ("Bonner County hereby grants to Licensee access to the Airport in private aircraft at the location designated in Exhibit "A" attached hereto and made a part hereof by this reference."). Bonner County's conduct does not ratify or reflect any extraneous promises that do not appear on the face of the TTF Agreement. Second, unlike the hangar tenant in Punxsutawney, SilverWing is not invoking estoppel as a shield to bar a claim brought by the County; SilverWing is using estoppel as a sword in an attempt to shift "increased costs" to the County contrary to the express terms of the parties' written agreement. (See Tr. at 427:21-428:1 (McKeown testified that the promises were made by "the commissioners when they signed the Through the Fence Agreement with the Attachment that showed where the taxiway was going.").

Although "passive" or "tacit" ratification might be a viable theory in some principal-agent relationships, this Court (and the Idaho Legislature) has already explained that the doctrine of ratification can be used to satisfy the Open Meetings Law only if the governing board

expressly adopts the action in subsequent meeting that complies with the Open Meetings Law. Specifically, in City of McCall v. Buxton, 146 Idaho 656, 201 P.3d 629 (2009), the court held the fact that a city manager did not have authority to authorize the commencement of a lawsuit did not require dismissal of the suit where the city council later ratified that action in a meeting that complied with the open meeting laws. The Court specifically reasoned that there was nothing in the open meeting laws that would prevent a governing board from later ratifying an unauthorized act by its agent. Id. Here, SilverWing's reliance on the theory of passive ratification is insufficient to satisfy the Open Meetings Law because it is undisputed that the County Board of Commissioners never adopted any of the alleged oral promises in a subsequent meeting that complied with the open meeting laws. See id.

Further, SilverWing has no answer for the decades of Idaho law holding a party cannot assert that an agent or employee has apparent authority when the law provides that only the governing body of that agency has such authority. Huyett v. Idaho State University, 140 Idaho 904, 908-910, 104 P.3d 946, 950-952 (2004); Totman v. E. Idaho Technical Coll., 129 Idaho 714, 717-718, 931 P.2d 1232, 1235-1236 (Ct.App.1997); Leon v. Boise State Univ., 125 Idaho 365, 369, 870 P.2d 1324, 1328 (1994); Woodward v. City of Grangeville, 13 Idaho 652, 658, 92 P. 840, 841 (1907).

Thus, because the promises alleged by SilverWing are "null and void" under Idaho's Open Meetings Law, the judgment should be reversed.

VI. IF THE JUDGMENT IS REVERSED, BONNER COUNTY WILL BE ENTITLED TO ITS FEES AND COSTS ON APPEAL AND BELOW.

SilverWing's arguments regarding attorney's fees are internally inconsistent. SilverWing claims the trial court properly awarded fees under Idaho Code § 12-120(3), which allows for an award of attorney's fees to the prevailing party in a civil action to recover "in any commercial transaction," but attorney fees "are not appropriate . . . unless the commercial transaction is integral to the claim, and constitutes the basis upon which the party is attempting to recover." Merrill v. Gibson, 139 Idaho 840, 845, 87 P.3d 949, 954 (Idaho 2004). "[I]n order for a transaction to be commercial, each party to the transaction must enter the transaction for a commercial purpose." Carrillo v. Boise Tire Co., 152 Idaho 741, 756, 274 P.3d 1256, 1271 (2012). As one court has explained, "I.C. § 12-120(3) has nothing to do with the duties of public officials. It simply adds an attorney fee entitlement to the terms on which two parties enter into certain commercial transactions." Idaho Newspaper Found. v. Cascade, 117 Idaho 422, 424, 788 P.2d 237, 239 (Idaho Ct. App. 1990).

Bonner County's argument (for which SilverWing has no response), is that if this Court determines that SilverWing's claim arises out of a commercial transaction sufficient to support an award of fees under I.C. § 12-120(3), this Court should reverse the underlying judgment on the merits (in addition to the underlying fee award) on the grounds that promissory estoppel does not apply where there is evidence of consideration (i.e., a "transaction"). See Nicholson v. Coeur D'Alene Placer Mining Corp., 161 Idaho 877, 883, 392 P.3d 1218, 1224 (2017). Such a determination would entitle the County to prevailing party attorney's fees on appeal and below

on the grounds that SilverWing's defective promissory estoppel claim arose from a commercial transaction subject to I.C. § 12-120(3).

Further, the "through-the-fence" agreement states in Section 14(g):

> Attorney's Fees. In the event any action is brought to enforce or interpret any of the terms and provisions of this Agreement, the "prevailing party" in such action shall be entitled to recover, as an element of costs of suit and not as damages, reasonable costs and expenses, including but not limited to taxable costs and a reasonable attorney's fee. The "prevailing party" shall be the party entitled to recover his costs of the suit, regardless of whether such suit proceeds to final judgment. A party not entitled to recover his costs shall not be entitled to recover attorney's fees. No sum for attorney's fees shall be counted in calculating the amount of a judgment for the purposes of determining if a party is entitled to recover costs or attorneys' fees.

R. Exh. at 197 (Plaintiff Exh. 76, ¶ 14(g)).

After SilverWing signed a contract stating that SilverWing "shall be responsible for the cost of installing and maintaining all… taxiways, in accordance with… FAA requirements," (R. Exh. at 194, ¶ 3 (Plaintiff Exh. 76)), SilverWing used the claim of promissory estoppel as a vehicle for forcing the County to pay the alleged "increased cost" that SilverWing incurred as a result of installing its taxiway in conformity with ALP Alternative 2(B). The TTF Agreement obligated SilverWing, not the County, to ensure that SilverWing's development complies with "all applicable present and future… rules, regulations, and other requirements of the FAA[.]" R. Exh. at 194, ¶ 4 (Plaintiff Exh. 76). This allocation of costs and risk was a part of the bargained-for consideration negotiated between the parties and accepted in the TTF Agreement.

R. Exh. at 194 (Plaintiff Exh. 76). Thus, the County is entitled to an award of reasonable fees under the attorney's fee provision in the TTF Agreement.

Further, the trial court's misguided reasoning on the attorney's fee award tacitly acknowledges that the promissory estoppel claim arises out of the TTF Agreement: "Without the TTFA, and corresponding development, the parties would never have been in a position to make promises to one another[.]" R. at 5852. This was supported by SilverWing's testimony at trial that its claim was based, at least in part, on Exhibit A to the TTF Agreement, which was a map depicting the planned location of SilverWing's taxiway based on the non-movement of the runway. (Tr. at 380:12-381:14; R. Exh. at 199 (Plaintiff Exh. 76.) Thus, if the Court reverses the judgment below, the County would be entitled to its fees and costs on appeal and below pursuant to the attorney's fee provision in the TTF Agreement.

Finally, if this Court reverses the judgment below, the County would be entitled to its fees and costs on appeal and below under I.C. § 12-117. Section 12-117(1) provides: "[I]n any administrative or civil judicial proceeding involving as adverse parties a state agency, a city, a county or other taxing district and a person, the court shall award the prevailing party reasonable attorney's fees, witness fees and reasonable expenses, if the court finds that the party against whom the judgment is rendered acted without a reasonable basis in fact or law." In this case, SilverWing "acted without a reasonable basis in fact or law," when it sued the County on a theory of promissory estoppel despite the fact that SilverWing has a written agreement with the County that contains a no-oral-modification and integration clause. R. Exh. at 197 (Plaintiff

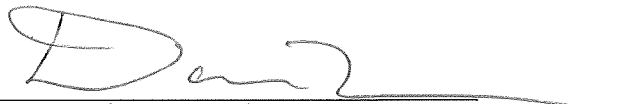
Exh. 76, ¶¶ 14(d), (i)). Because these facts have been known to SilverWing since the outset of the litigation, the County would be entitled to its fees under I.C. §12-117.

CONCLUSION

For the foregoing reasons, the judgment below should be REVERSED and SilverWing's claim of promissory estoppel should be DISMISSED, with attorney's fees and costs on appeal awarded to Bonner County. The case should then be REMANDED to the district court for a determination of the amount of Bonner County's prevailing party fees and costs from litigating the proceedings below.

DATED this 21st day of March, 2018.

MURPHEY LAW OFFICE, PLLC



By: Darrin L. Murphey
Attorney for Defendant-Appellant
Bonner County

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of March, 2018, I caused to be served a true and correct copy of the foregoing document by the method(s) indicated:

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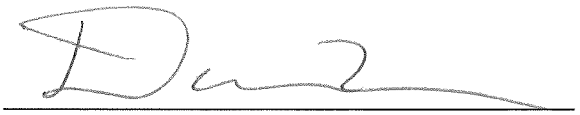

Darrin L. Murphey