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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

CITY OF EAGLE, a municipal corporation of the State of Idaho,

Plaintiff-Appellant,

vs.

TWO RIVERS SUBDIVISION HOMEOWNERS ASSOCIATION, INC., an Idaho Corporation, KEVIN ZASIO, President,

Defendants-Respondents.

Docket No. 47193-2019

Ada County District Court
Case No. CV01-17-18705

APPELLANT'S OPENING BRIEF

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

HONORABLE JONATHAN MEDEMA, DISTRICT JUDGE, PRESIDING

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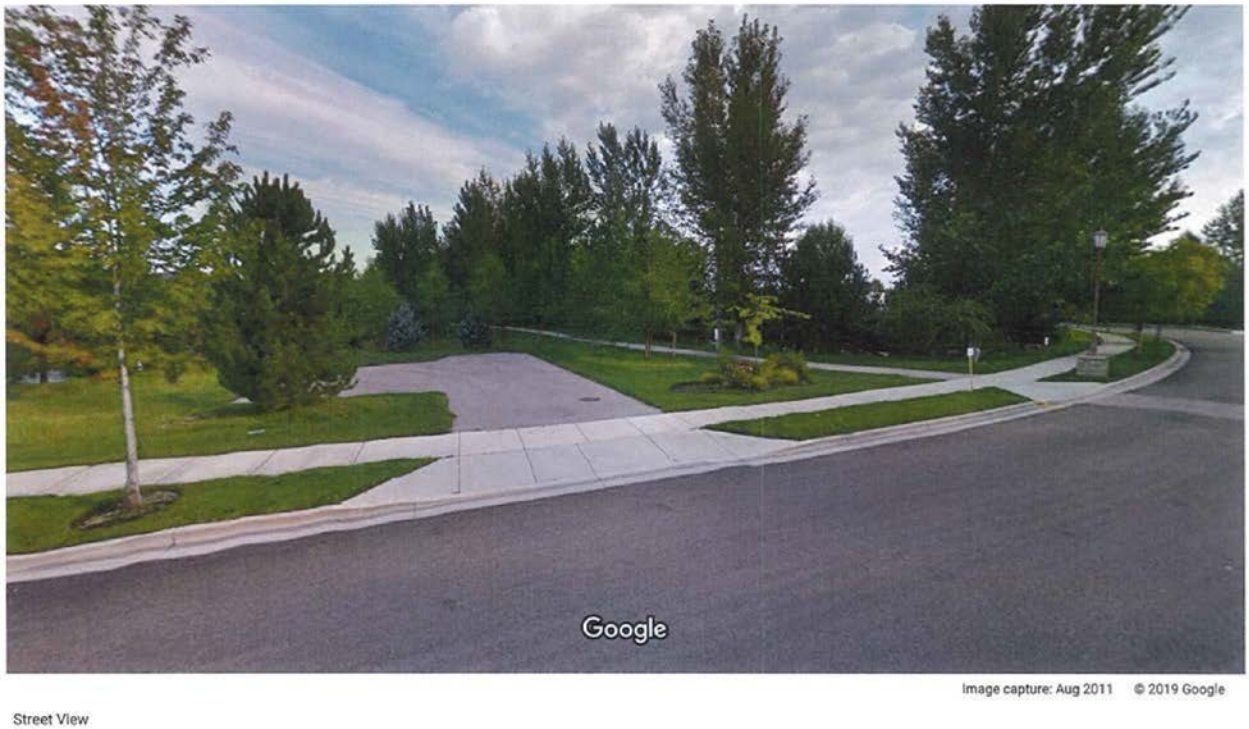
STATEMENT OF THE CASE

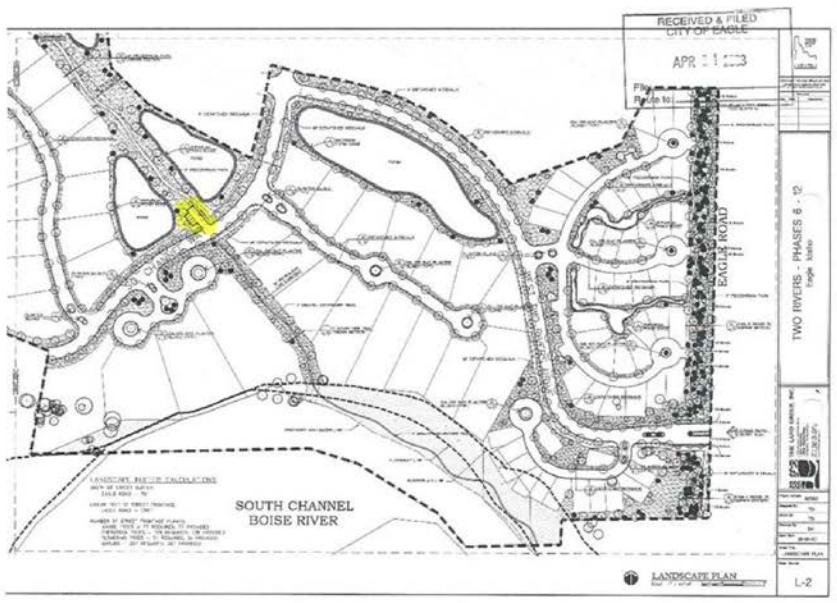
A. Nature of the Case

For twelve years the citizens of Eagle, Idaho enjoyed having a small public parking lot available to use near a public trailhead connecting to the beautiful Boise river. This parking lot is located in the Two Rivers subdivision ("**Two Rivers**") just west of Eagle Road. Two Rivers is governed by the Two Rivers Homeowners Association, Inc. (Defendants in the underlying action, Respondents here, and hereafter referred to as the "**HOA**"). The City of Eagle (Plaintiffs in the underlying action, Appellants here, and hereafter referred to as the "**City**") had approved Two Rivers in 1999 and amended that approval at the landowner's request in 2002. It was this 2002 approval that added the small public parking lot which forms the subject of this litigation and appeal. This parking lot is depicted below. R at 145.



This parking lot is located on "Lot 35". For reference, the location of this parking lot is within the circle depicted below. Lot 35 is owned by the HOA as a common area lot. R at 144.

The location of this parking lot is consistent with the developer's 2003 Design Review application to the City which showed its design and specific location right next to the trailhead, as noted below. R at 149.



For over 100 years, Idaho law has recognized that an owner of land may, without deed or writing, dedicate it to public uses. No particular form is necessary in the dedication; all that is required is the assent of the owner of the land, and acceptance by the public. That is what happened in this case. Standing before the Eagle City Council at a public hearing, this landowner/grantor offered some of his land for public use. Specifically, he offered to provide a small public parking lot adjacent to a public trailhead, to support public access to this valuable amenity. The City accepted the offer, among other conditions, by a public vote. Next, the landowner provided the City a $251,996.00 "Letter of Credit" to ensure certain improvements within Two Rivers, including the parking lot, were built as he had agreed. Soon thereafter, the landowner paid for and built the parking lot, just as the parties intended. Once construction was completed, the City released the Letter of Credit to the landowner. The parking lot was built on HOA property (Lot 35) at a time when the landowner still owned and controlled the HOA.

For over a dozen years the citizens of Eagle and residents of Two Rivers shared this public parking lot to access the adjacent public trailhead; <u>everyone got what they wanted</u>: the community could park adjacent to a community trailhead, the HOA/developer got private streets as he had requested, and the City got a connection for its citizens to access the Boise River. Then in 2016, years after the developer had released his ownership and control of the HOA, the HOA changed course and now wanted to stop the public from enjoying what had been preserved for them. The HOA was determined to keep the public out; first with signs, then by installing bollards to prevent *anyone* from using this parking lot. Litigation soon followed, with the City seeking a Declaratory Judgment affirming the public's right to park in this lot, and to enjoin the HOA's efforts to block access to it.

The District Court on summary judgment was presented with unique facts that necessitated a very narrow, case-specific application of Idaho's long-standing common law dedication standards. Specifically, the City provided affidavit evidence from (a) the grantor himself, describing his intent and his offer to dedicate his land for public use, and from (b) the grantee City, confirming its intent and actions to accept that dedication. The District Court was also presented with undisputed evidence that the grantor owned and controlled the HOA at all times surrounding these events. Upon these facts, the City respectfully believes the District Court erred in granting summary judgment in favor of the HOA.

On appeal, the City of Eagle requests that the Idaho Supreme Court reverse and remand the case to District Court with direction to enter judgment in favor of the City, declaring that this parking lot was dedicated by common law for public use, and to enjoin the HOA from interfering with the public's access to it.

B. Course of Proceedings

On October 10, 2017, the City of Eagle filed a lawsuit in the Fourth Judicial District against the Two Rivers Homeowners Association. (R. at 7). In that Complaint, the City sought declaratory and injunctive relief. Specifically, the City wanted the court to declare a certain parking lot within the Two Rivers Subdivision a public lot, consistent with its historical use and the intent of the original developer who provided it for public use.

On January 24, 2018, the HOA filed an IRCP 12(b)(6) Motion to Dismiss this Complaint. (R. at 47). The City filed its response in opposition on February 26, 2018. (R. at 66). On April 5, 2018, the District Court granted the HOA's motion to dismiss the Complaint in its entirety with one exception: common law dedication. (R. at 86). The Court allowed the City time to file an Amended Complaint to more clearly articulate its theory of common law dedication. The City filed

that Amended Complaint on April 18, 2018, which provided greater clarity on its common law dedication claim. (R. at 99). The Record on appeal does not reflect an apparent second motion to dismiss which was filed by the HOA, as it is referenced in the Court's Order on August 1, 2018. ("…Defendant [HOA]'s motion to dismiss Plaintiff [City]'s amended complaint is denied as to Plaintiff's claim alleging a common law dedication. The motion is granted as to all other claims.") (R. at 114). The HOA filed its Answer to the Amended Complaint on August 13, 2018. (R. at 116).

On March 18, 2019, the City filed a Motion for Summary Judgment on its claim of common law dedication. Four affidavits were provided in support of that Motion: Dan Torfin, the landowner's authorized representative (R. at 139-149); Sharon Bergmann, the City clerk (R. at 150-184); William Vaughn, the City zoning administrator (R. at 185-188) and plaintiff's counsel Joseph Borton (R. at 189-199). On April 1, 2019, the HOA filed an opposition in support of a "cross-motion" for summary judgment, although no actual motion was ever filed. Oral argument on the Motions soon followed.

On May 22, 2019, the District Court entered its Order denying summary judgment for the City and granting summary judgment for the HOA. (R. at 265-293). On June 5, 2019, a Judgment of Dismissal was entered. (R. at 294). On July 12, 2019, the City filed a Notice of Appeal. (R. at 296).

C. Statement of Facts

The District Court properly noted that the relevant facts were largely undisputed. R. at 267. However, the District Court's decision makes other factual findings which are not supported by the Record. Therefore, to supplement and correct the written Findings of the District Court, the City cites to the following additional facts:

1. "Two Rivers" is a luxury residential subdivision in Eagle, Idaho. It was developed over many years by T.R. Company, LLC, its owner Dennis Baker, and its representative Dan Torfin. Dan Torfin was the Project Manager for the Development. Throughout his work on this Development, Mr. Torfin was acting as an expressly authorized agent and representative of the landowner Dennis Baker, a fact that the HOA has conceded in its Answer. *R. at 104, 199, and 140.*

2. Two Rivers Subdivision Homeowners Association, Inc. (the "HOA") is the successor in interest to T.R. Company LLC. Dennis Baker was the original incorporator, officer and director of the HOA. Mr. Baker had sole control over the HOA from 2000 through 2004. R. at 190-199. The HOA manages, among other things, the common areas located within the Development, including Lot 35, Block 24 where the subject public parking lot was constructed. R. at 100, 117.

3. In 1999, the City received an application from Dennis Baker through his company T.R. Company LLC for a Planned Unit Development called Quarter Circle Ranch Subdivision, which is now known as "Two Rivers Subdivision," located in Eagle, Idaho, just west of Eagle Road. *R. at 140.*

4. The location of Two Rivers is generally depicted within the large black circle on the map marked as Exhibit 1 and attached to the *Affidavit of Dan Torfin. (R. at 143).*

5. In 2002, Dennis Baker and his representative Mr. Torfin submitted to the City a Planned Unit Development ("PUD") application seeking approval of changes to his Two Rivers development. The proposed changes included, among other things, the approval of private streets rather than public streets. To balance the exclusivity of private streets with the public's need to

access a public trailhead, the developer included a small public parking lot as part of his project. (R. at 140, 141, 155, 186).

6. The Eagle City Council was concerned with the use of private, gated streets within the development because access to the public pathways in the area would be limited. To address this concern, Messrs. Baker and Torfin offered to install a parking lot for use by the public so they could access the public pathway that was provided adjacent to the parking area. The City Council accepted that offer and the use of private streets and included in their motion for approval the requirement for Mr. Baker to build a parking lot open to everyone; not just the residents of Two Rivers. R. at 140, 141, 186.

7. At that hearing which occurred on November 26, 2002, Dan Torfin, the Project Manager, offered to provide a small parking lot that would be made available to the general public. Doing so was intended to help alleviate any public parking needs along the road system and capture some of the added demand for use of the trailhead and adjacent public pathway. R. at 158. At the end of the public hearing the City Council ultimately accepted the offer. It did so with a "Motion for approval" which was made by Councilwoman Sedlacek, who just prior to making her motion for approval stated the following rationale for her decision:

> So I'm going to support the private streets. My concern too was the narrowness. That's been raised to 36 feet wide. I was concerned about river access to the public. We have that. Not only that, **we have public parking**, which we haven't seen in some of the other subdivisions. A big plus. I appreciate that. So I support the request for a modification. And I'm ready to make a motion. R. at 164.

8. Councilwoman Sedlacek's motion to approve the land use application specifically included the condition that "**the public access remain the same with the public parking at the trailhead**." This Motion was approved on a 3-2 vote by the City. *R. at 164 and 180.* Minutes from that City Council meeting confirm that the parking lot was to be made available for public use. *R.*

at 179 (minutes) and 186. The Developer did not file any objection to the condition that a parking lot be open to the public. "[I]t was our intention to offer that for public use. We were very pleased that the City accepted our offer for the benefit of the public and approved our application with that condition. We did not appeal or object to the condition because that was our intent." *R. at 102, 141.*

9. On May 13, 2003, the city of Eagle approved the design review application for the common area improvements within Two Rivers Subdivision Phases 6 – 12. Part of that approval included the location and design for this public parking lot upon Lot 35, Block 24 in phase 8 of the Two Rivers Subdivision. R. at 116, 140, and 147. The Developer designed and built a parking lot in the location depicted in yellow. R. at 149. It was placed right next to the trailhead for the pathway and available for use by the general public. That pathway can take the public to the north all the way to the Boise River. R. at 140.

10. On August 10, 2004, City Planning staff issued a sign-off memorandum to the City Clerk indicating that all required improvements within Two Rivers Subdivision No. 8 had been completed (including the public parking lot) and authorized the release of the $251,996.00 letter of credit held by the City at that time. R. at 102, 117. For the next ten years, the public used this small parking lot to access the public trailhead, just as the landowner and the city had intended. R. at 187.

11. In 2016, the HOA began impeding the public's access to this parking lot, first with signs and then with bollards that prevented *anyone* from using the parking lot. R. at 103, 104, 187. The City notified the HOA that their conduct was contrary to the approval and use of this lot. The HOA refused to allow the public to use this small parking lot to access the trailhead as originally intended.

ISSUES PRESENTED ON APPEAL

A. Did the District Court err in granting in part Defendant's Motion to Dismiss, concluding that the City failed to allege any cause of action other than Common Law Dedication?

B. Did the District Court err in granting Summary Judgment in favor of the Defendant and dismissing Plaintiff's Complaint?

ARGUMENT

A. Standard of Review.

The City filed a Motion for Summary Judgment, the HOA did not. However, the District Court awarded summary judgment in favor of the HOA as the *non-moving* party, which it is entitled to do on issues of law. See., *Harwood v. Talbert*, 136 Idaho 672, 39 P.3d 612 (2001). Upon a grant of summary judgment to a *non-moving* party, this Court on appellate review is to liberally construe the record in favor of the City, as the party against whom the trial court entered summary judgment. *Id*. at 677-678. Conclusions of law by a district court are subject to *de novo* review by the Idaho Supreme Court. *Doolittle v. Meridian Joint School Dist*., 128 Idaho 805 (1996).

B. The District Court erred in granting Defendant's Motion to Dismiss which limited the City of Eagle to advancing a single basis of relief: common law dedication.

In accordance with IRCP 8(a), the City filed a short and plain statement (a 10 page lawsuit) making alternative demands for relief, the legal basis therefore, and it cited the specific relief requested. R. at 7-16. Specifically the City alleged three distinct ways in which it may be entitled to that relief: (1) a declaratory judgment that the City has a legally enforceable interest for preserving public parking in Lot 35, (2) a lawful exercise of statutory authority under Idaho Code §50-314, and/or (3) enforcement of Eagle City Code. The City also sought injunctive relief for

these claims, in hopes of stopping the HOA from physically blocking public access to this small parking lot. In support of these alternate claims of relief, the City provided the Court as an exhibit to the Complaint a complete transcript of the public hearing, as well as the official city minutes, all of which reference the developer's offer of a parking lot for public use. R. at 17-46. The HOA soon thereafter filed a motion to dismiss the complaint pursuant to IRCP 12(b)(6) and 12(b)(1). In doing so, the HOA asserted that (a) no cognizable claim was pled, and (b) that the City lacked standing to bring any claim. R. at 50. As to the second claim based on IRCP 12(b)(1), the District Court correctly rejected the argument. The City had standing to bring its claims. R. at 92. That finding is not on appeal. The second basis for the motion to dismiss, IRCP 12(b)(6), was found by the District Court to support a dismissal of "all claims by the City" other than one based upon a common law dedication. R. at 95. This conclusion of law was in error and should be reversed on appeal.

A complaint need only state a short and plain statement indicating the Plaintiff is entitled to the relief requested. IRCP 8(a)(2). *Gibson v. Ada County Sheriffs Dept*., 139 Idaho 5, 9, 72 P. 3d 845, 849 (2003). It is a simple notice pleading requirement which has been construed with great flexibility for decades. So long as the Defendant is put on notice what is claimed against it, courts have consistently denied 12(b)(6) motions to dismiss, despite inartful language used in the pleading. Furthermore, the court is required to construe all inferences in favor of the City in this case, and the court could only grant the motion to dismiss if it found that there was no conceivable set of facts which would have entitled the City to relief. *See*, *Orthman v. Idaho Power Co*., 126 Idaho 960, 895 P.2d 561 (1995). Applying this liberal pleading requirement and the inferences that can be drawn therefrom, the District Court should have denied the motion to dismiss.

For example, as to Count Two, the City alleged a statutory right pursuant to its statutory police powers to ensure the public retains the right to use the parking lot as it had been doing for years. Rather than a common law dedication basis for relief, this second claim for relief relied upon Idaho Code §50-314 and other applicable Idaho code. R. at 12-13. There was nothing about the language in Count Two that made it incapable of succeeding under any possible set of facts. Of note, discovery had not been completed and this Motion was considered without any affidavits or exhibits to rely on, as is the normal process for IRCP 12(b)(6) motions.

As to Count Three, the City cited to specific Eagle City Code sections 8-2A-20 and 8-7-2. These code sections as alleged would require the HOA to maintain the parking lot which was constructed by the developer upon HOA property for the public to use, consistent with the design review application approval. R. at 13-14. The Complaint specifically alleges how the City believed the actions of the HOA were in violation of these code sections, and that the Court could enforce these code provisions as a basis for ensuring the parking lot remain open to public use.

Count Four simply sought injunctive relief pursuant to IRCP 65. It asked the Court to prevent the HOA from continuing to exclude the public from using this parking lot, based upon the factual narrative set forth in paragraphs 1 through 48. R. at 15. The HOA, as alleged, had physically blocked the parking lot with bollards (which is undisputed) thereby necessitating an injunction to prevent the HOA from that continued harm to public access. R. at 104. The City alleged in paragraphs 21, 24, and 27 (R. at 11) escalating evidence of the HOA's immediate and continual interference in the public's ability to access this parking lot. First with the erection of "resident only" signs (twice) and finally with bollards which ironically blocked *anyone* from using the parking lot, residents included. It is clear that the City pled evidence of the injurious effects of the HOA's actions, and that evidence was sufficient to withstand a motion to dismiss. In fact,

the alleged harm is exactly the type of conduct which can be prevented with injunctive relief, as there is no remedy at law for the City (and the public) in this instance. "Wrongs which are the probable result of given means should be prevented, not awaited." *Lanahan v. John Kissel & Son, C.C.*, 135 F. 399, 903 (1905). That is exactly what the City intended to do.

Each of the counts look to alternative bases to allow the City to restore the public's right to use the parking lot on Lot 35 as the developer and city had expressly intended. Whether the City would prevail on any or all of these claims was not before the Court. Consistent with the liberal pleading standards of IRCP 8(a) and the inferences which must be drawn in favor of the City, the District Court's decision must be reversed.

C. The District Court erred in granting Summary Judgment in favor of the Defendant and dismissing Plaintiff's Complaint.

Review of the Court's conclusions, in light of how and why common law dedication has existed in Idaho for over one hundred years, reveals the fact that summary judgment should have been awarded in favor of the City, and that the decision and judgment of the Court should be reversed on appeal. For instance, the District Court stated on page 23 of its decision the following findings:

> "The Court finds T.R. intended to convey an easement over some portion of its land to the public to use that parcel as public parking. It is clear the City intended to accept that conveyance when it was made." R. at 287.
>
> "This court finds that as of November 26, 2002 hearing on T.R.'s rezoning application, T.R. intended to convey by dedication an easement to the public over lot 35, block 24 for use as public parking." R. at 288.

The Court then asserts that the conveyance, and the acceptance were never actually made. That was an erroneous conclusion. What the District Court failed to recognize is the temporal piece to the first element of a common law dedication.

"Dedication" arises when a private landowner sets aside land for public use. That dedication may be express or implied and may be established statutorily or by common law. A common law dedication operates by way of an equitable estoppel and creates a mere easement. A statutory dedication operates by way of grant, most commonly upon a plat, and transfers a fee interest in the property. There are two independent ways to dedicate land to public use. Here the City does not allege fee ownership in Lot 35, nor does the City allege that the plat noted a grant for public use.

The two elements of a "common law dedication" have been well settled for over 100 years, although never applied to the unique facts present in this case. In order for the City to prevail, it must establish (1) an offer by the owner, clearly and unequivocally indicated by his words or acts evidencing his intention to dedicate land to a public use, and (2) an acceptance of the offer by the public. *Paddison Scenic Properties v. Idaho County*, 153 Idaho 1, 3 (2012), citing *Worley Highway Dist. v. Yacht Club of Coeur d'Alene, Ltd*, 116 Idaho 219, 222 (1989). While public acceptance "requires no specific formality," *Paddison*, at 3, the intent to dedicate the land for public use must be clear. *See, Rowley v. Ada County Highway District*, 156 Idaho 275 (2014).

1. <u>An Offer was made.</u>

As to the first element, the Record reflects public statements made on the record at a city council meeting by the landowner (offeror) and the City (offeree). No other case in Idaho has considered direct evidence from both the offeror and offeree. In exchange for receipt of certain concessions on city development code (i.e., use of private streets), the City was in turn receiving for the public's use a parking lot adjacent to a public trailhead. This clear intent was then followed up with express action by the landowner and the City. On March 6, 2003, the Developer submitted as part of his design review application to the City the specific location and design for the

previously committed public parking lot. R. at 147-148. Even if the landowner here merely expressed an intent to offer in the future, in 2003 that offer was specific, depicted on the map, and complete. There was certainly no question of exactly what was available for the public to use once it was built and being used by the public.

a. A plat is not and never has been the exclusive way to complete a common law dedication of land for public use in Idaho.

As for the plat in this case, the fact that it does not reference this public parking lot is not dispositive. A plat is only one way that a court can find evidence of an offer to dedicate land. In fact, the plat has never been the sole source of evidence for a common law dedication, and no court has ever held as such. In fact, arguments made to the contrary have been expressly rejected by this Court. See, e.g., *Thiessen v City of Lewiston*, 26 Idaho 505, 550 (1914); *Ashbury Park, LLC v. Greenbriar Estates*, 152 Idaho 338 (2012). In *Ashbury Park,* the Court refused to consider the plat alone, noting that "the substance of an offer of dedication is not measured until the time of acceptance, and an accepted offer of dedication is irrevocable." *Id.*, at 342, citing *Ponderosa Home Site Lot Owners v. Garfield Bay Resort Inc.*, 143 Idaho 407, 409, 146 P.3d 673, 675 (2006).

b. Dan Torfin had authority to make the offer.

Here the offer was made by Dan Torfin, with actual authority. Paragraph 32 of Plaintiff's *First Amended Complaint* states:

> The Developer, owner of what is now known as the Two Rivers Subdivision, acted in the aforementioned application and approval process before the City, including at the November 26, 2002 public hearing, through its authorized principals and/or agent(s) Dennis Baker and Dan Torfin.
>
> R. at 104.

This fact was admitted in Defendant's Answer. (R. at 119). This fact was then re-affirmed within the uncontested affidavit of Dan Torfin. "I was acting at that public hearing, and at all other

times that I was working on this development, as an expressly authorized agent and representative of the landowner, T.R. Company LLC, an Idaho limited liability company that is owned by Dennis Baker. In fact, Dennis Baker was also present at the city council meeting and testified with me." R. at 140. A dedication can be lawfully made and binding if made by someone legally authorized to act on behalf of a landowner, or if the landowner consents. *See generally*, 23 Am.Jur.2d, *Dedication* (section 15). The conclusion of the District Court that Mr. Torfin did not have authority is simply contrary to the facts within the Record, facts which are to be construed in favor of the City. *Harwood, supra.*

c. The HOA knew its land had been offered for a common law dedication.

The District Court was also in error in concluding that "[t]here are issues of fact that would prevent the court from determining if the HOA took Lot 35 with notice that [the landowner] had promised to use it as public parking. … that promise may not be enforceable against the HOA." R. at 286. Not only was the offer made, but it was made by the same person who owned and operated the Defendant HOA, Dennis Baker, and his land company T.R. Company LLC, a fact which the defendant admitted in this litigation. R. at 100, 117. There is no "subsequent" purchaser of Lot 35 other than the HOA itself, which at the time was owned and controlled by the grantor.

These facts are very unique. The HOA knew that Lot 35 was encumbered with an equitable servitude when the HOA and the grantor are the same person. One who takes title to land with notice that the land is burdened with an easement takes title to that land subject to the easement. *Ponderosa Homesite Lot Owners v. Garfield Bay Resort*, 143 Idaho 407, 410 (2006) citing *Checketts v. Thompson*, 65 Idaho 715, 721, 152 P.2d 585, 587 (1944). That is exactly what happened here. Again, these facts are unique. The HOA, as fee owner of Lot 35, took title to that lot knowing that it was encumbered with a parking lot made available for public use. One who

takes title to property with actual or constructive notice that it is burdened with an existing easement takes the land subject to the easement. 28 C.J.S. *Easements*, p 711, §48. *See also, Checketts v. Thompson*, 65 Idaho 715 (1944).

2. <u>The Offer was accepted.</u>

As to the second element, the record clearly reflects acceptance by the public. First, the City voted to approve the land use application which included among its terms a quid pro quo: you can have private roads but you must provide a public parking lot at the trailhead. The transcript of the city council public hearing and the official city minutes reflect this exchange. Next, the landowner built the public parking lot in exchange for a return of his letter of credit. R. at 102. Once built the public used this parking lot for over ten years. Signs were installed signifying this parking lot as available for public use. R. at 187. Use by the public has been recognized as sufficient acceptance of a dedication for the purpose of establishing a common law dedication of land for public use. *Thiessen*, at 513, 550.

The substance of an offer is measured at the time of acceptance. *Ashbury Park*, at 343. If acceptance did not yet occur when the City voted to approve the land use application as the District Court found, the substance of that offer was made certain at the time the City approved the design review application in 2003, which included the map showing the specific location and design of the public parking lot. The parking lot was then used by the public for over ten years, without interruption. R. at 102 (¶17), and 187. That is acceptance.

> Use by the public is a sufficient acceptance of a dedication for the purpose of a way to invest a right of way to the public. *Thiessen*, though nearly one hundred years old, has not been overruled or even called into question.

Paddison v. Idaho County, 153 Idaho 1, 3 (2012).

Here, the public's use was clear, open, and continual. Public use alone can constitute acceptance, and once accepted "the servient estate owner has no right to obstruct the public's use." *Id.* The Record therefore reflects that an offer of public dedication was made by the landowner to the City, as evidenced by the grantor's undisputed affidavit confirming that fact. The City, as evidenced by the City's undisputed affidavit, accepted this offer and dedication. As a result, the parking lot was built as stated within the grantor's affidavit and it was used by the public for many years. In light of this specific and unique record, the decision of the District Court was in error.

D. The District Court erred in concluding that a common law dedication is not valid in Idaho due to Idaho Code § 9-503 (Statute of Frauds).

No case in Idaho which addresses common law dedication has raised the specter of the statute of frauds. The conclusion of the District Court casts aside the decision in *Thiessen,* which was reaffirmed in *Paddison*. See also*, Middlekauff v. Lake Cascade, Inc.*, 110 Idaho 909, 913 (1986) (where this Court reaffirmed the rule that oral representations without the use of a plat can be sufficient evidence to establish a legally enforceable interest. "**[T]he plat is not the only means by which a right can be created, oral representations could do so as well.**") An offer of dedication of property to a public use "may be made orally, without a writing or recording." *Pullin v. Victor*, 103 Idaho 879, 881 (1982).

Idaho Code § 9-503 allows for common law dedications. By its language this code section prevents an interest in property to be conveyed in any manner other than (i) by operation of law, **or** (ii) a conveyance or instrument in writing". The word "or" is important in that code, and highlights the fact that a writing is only one of two ways a property interest may be conveyed. While the "operation of law" prong in I.C. § 9-503 may be a narrow one, it is the one that

allows the City to prevail on appeal. The District Court's conclusion of law using the Statute of Frauds to close the door on 100 years of Common Law Dedication jurisprudence was in error.

CONCLUSION

For the reasons stated above, the City respectfully requests that this Court reverse the trial court and remand the case to the District Court with direction to enter judgment in favor of the City.

DATED this 25th day of November, 2019.

BORTON-LAKEY LAW & POLICY

By: _____
Joseph W. Borton
Attorneys for Plaintiff-Appellant, City of Eagle

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of November 2019, I caused a true and accurate copy of the foregoing document to be served upon the following as indicated below:

Michael E. Kelly KELLY LAW, PLLC 137 E. 50th St. Garden City, ID 83714 E-mail: mek@kellylawidaho.com	____ ____ ____ X	U.S. Mail Hand Delivery Facsimile Transmission E-filing/Email
Andrea D. Carroll CARROLL LAW, PLLC PO Box 2006 Boise, ID 83701 E-mail : adc@idahopropertylaw.com	____ ____ ____ X	U.S. Mail Hand Delivery Facsimile Transmission E-filing/Email

Joseph W. Borton