

2008

Western Land & Development v. Jordan Foothills, LLC : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

WESTERN LAND & DEVELOPMENT,
LC, a Utah limited liability company, and
EAST MAPLES INVESTMENT, LLC, a
Utah limited liability company,

Appellees,

v.

JORDAN FOOTHILLS, LLC, a Utah
limited liability company, and WALTER T.
KEANE, in his capacity as trustee of the
trust deed executed by Western Land &
Development, LC, and East Maples
Investment, LLC, as trustors and Jordan
Foothills, LLC, as beneficiary,

Appellants.

APPELLEES' BRIEF

Case No. **20080048**

ORAL ARGUMENT REQUESTED

**APPEAL FROM A JUDGMENT OF THE THIRD JUDICIAL
DISTRICT COURT, THE HONORABLE ANTHONY QUINN, JUDGE**

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TABLE OF CONTENTS

I.	JURISDICTION	1
II.	ISSUES PRESENTED FOR REVIEW	1
III.	DETERMINATIVE PROVISIONS	4
IV.	STATEMENT OF THE CASE	4
A.	The Course of Proceedings Below	4
B.	Statement of Facts	6
	Negotiation of the Option Agreement	7
	Terms of the Option Agreement	10
	The Platting Process	12
	The Collapsible Soils Issue	17
	Jordan Foothills's Default	20
	Liquidated Damages	21
V.	SUMMARY OF ARGUMENT	22
VI.	ARGUMENT	25
A.	JORDAN FOOTHILLS APPROVED THE TWO DESIGN CHANGES TO THE PRELIMINARY PLAT AND THEREFORE DEFAULTED UNDER THE OPTION AGREEMENT BY FAILING TO MAKE THE SECOND OPTION PAYMENT	25
1.	In Any Event, Jordan Foothills Approved the Two Design Changes After The City Approved the Final Plat	30
2.	The Option Agreement is Not Ambiguous	32

B.	JORDAN FOOTHILLS HAS FAILED TO DEMONSTRATE THAT THE TRIAL COURT’S FINDINGS THAT GLEZOS ACTED AS AUTHORIZED AGENT FOR JORDAN FOOTHILLS ARE CLEARLY ERRONEOUS	33
1.	Jordan Foothills Has Failed to Marshal the Evidence	33
2.	Glezos Had Actual Authority	36
	(a) Glezos Had Express Authority	37
	(b) Glezos Had Implied Authority	42
3.	Glezos Had Apparent Authority	43
4.	In Any Event, the Two Design Changes Were Not Material	46
C.	WESTERN LAND SHOULD BE AWARDED ITS REASONABLE ATTORNEYS’ FEES AND COSTS ON APPEAL	47
VII.	CONCLUSION	48

TABLE OF AUTHORITIES

CASES

<i>Alpha Partners, Inc. v. Transamerica Investment Management, L.L.C.</i> , 2006 UT App. 331, § 23, 153 P.3d 714	29
<i>Barnes v. Clarkson</i> , 2008 Ut App. 44, ¶18, 178 P.3d 930	47
<i>Bodell Const. Co. v. Stewart Title Guar. Co.</i> , 945 P.2d 119 (Utah App. 1997)	36
<i>Bonneville Distributing Co. v. Green River Dev. Assocs.</i> , 2007 UT App. 175, ¶ 18, 164 P.3d 433	3, 4
<i>Bristol-Meyers Squibb Co. v. United States</i> , 48 Fed. Cl. 350 (2000)	32
<i>Bushnell Real Estate v. Nielson</i> , 672 P.2d 746 (Utah 1983)	32
<i>C & Y Corp. v. General Biometrics, Inc.</i> , 896 P.2d 47 (Utah App.1995)	7
<i>Carsten v. Carsten</i> , 2007 UT App 174, ¶ 2, 164 P.3d 429	47
<i>Chen v. Stewart</i> , 2004 UT 82, ¶ 78, 100 P.3d 1177	34
<i>Express Recovery Services, Inc. v. Rice</i> , 2005 UT App. 495, ¶ 3, 125 P.3d 108 ...	32-33
<i>Glew v. Ohio Sav. Bank</i> , 2007 UT 56, ¶19, 181 P.3d 791	44
<i>Great Northern Insurance Co. v. ADT Security Services, Inc.</i> , 517 F. Supp. 2d 723 (W.D. Pa. 2007)	44
<i>Green River Canal Co. v. Thayn</i> , 2003 UT 50 ¶ 16, 84 P.3d 1134	3
<i>Itel Containers International Corp. v. Atlanttrafik Express Service Ltd.</i> , 909 F. 2d 698 (2 nd Cir. 1990)	42
<i>LDS Hosp. v. Capitol Life Ins.</i> , 765 P.2d 857 (Utah 1988)	28
<i>L. Smirlock Realty Corp. v. Title Guarantee Co.</i> , 421 N.Y.S. 2d 232 (1979)	37

<i>In re Lernout & Hauspie Securities Litigation</i> , 230 F. Supp. 2d 152 (D. Mass. 2002) . .	42
<i>Luddington v. Bodeninvest Ltd.</i> , 855 P.2d 204 (Utah 1993)	43
<i>Malia, State Bank Com'r. v. Giles</i> , 114 P.2d 208 (Utah 1941)	43-44
<i>Martinez v. Mediate Paymaster Plus/Church of Jesus Christ of Latter-day Saints</i> , 2007 UT 42, ¶¶ 17-21, 164 P.3d 384	35-36
<i>M.D. and Assocs. Inc. v. Sears, Roebuck & Co.</i> , 749 S.W.2d 454 (Mo. App. 1988) . . .	36
<i>Moriarty v. Glueckert Funeral Home, Ltd.</i> , 155 F.3d 859 (7 th Cir. 1998)	36
<i>Morris Silverman Management Corp. v. Western Union Financial Services, Inc.</i> , 284 F. Supp. 2d 964 (N.D. Ill. 2003)	32
<i>Pasant v. Jackson National Life Insurance Co.</i> , 52 F.3d 94 (5 th Cir. 1995)	43
<i>PDQ Lube Center, Inc. v. Huber</i> , 949 P.2d 792 (Utah App. 1997)	29
<i>Peoples Fed. Sav. & Loan Assoc. v. Myrtle Beach Golf & Yacht Club</i> , 425 S.E.2d 764 (So. Car. App. 1992)	36-37
<i>State v. Park</i> , 2005 UT 75, ¶ 17, 124 P.3d 235	34
<i>United Park City Mines Co. v. Stichting Mayflower Mt. Fonds</i> , 2006 UT 35, ¶¶ 24-27, 140 P.3d 1200	3, 34
<i>United States v. Fulcher</i> , 188 F. Supp. 2d 627 (W.D. Vir. 2002)	43
<i>Weil v. Murray</i> , 161 F. Supp. 2d 250 (S.D.N.Y. 2001)	42
<i>Wilson Supply Inc. v. Fradan Mfg. Corp.</i> , 2002 UT 94, ¶ 21, 54 P.3d 1177	34
<i>Zions First Nat. Bank v. Clark Clinic Corp.</i> , 762 P.2d 1090 (Utah 1988)	36, 43

STATUTES

Utah Code Annotated § 78A-4-103(2)(j) 1

Utah Rules of Appellate Procedure, Rule 24(a)(9) 34

OTHER AUTHORITY

Restatement (Second) of Agency, § 7, Comment c and § 26 37

I.

JURISDICTION

This is an appeal from a final judgment of the Third Judicial District Court, the Honorable Anthony B. Quinn, Presiding. This Court has jurisdiction of this appeal pursuant to Utah Code Annotated § 78A-4-103(2)(j).

II.

ISSUES PRESENTED FOR REVIEW

The parties entered into an Option Agreement on October 26, 2006 pursuant to which Appellant Jordan Foothills, LLC (“Jordan Foothills”) obtained the right to purchase from Appellee Western Land & Development, LC (“Western Land”) certain land located in West Jordan City known as Maple Hills 1 and 2 Subdivisions (the “Property”). Jordan Foothills agreed to and did pay a First Option Payment in the amount of \$1.5 Million as consideration for the grant of the option. This payment was nonrefundable except in two limited circumstances. In the event that Western Land was unable to obtain approval of a Final Plat or if, in the platting process, West Jordan City required design changes from the 146 lot conceptual design attached as Exhibit D to the Option Agreement and “final plat approval is obtained of a design not approved of” by Jordan Foothills, then Jordan Foothills was entitled to a refund of the First Option Payment.

The City did, in fact, require two design changes to the plat, which design changes were approved by Jordan Foothills's principal, Glen Pettit ("Pettit"), at the preliminary plat stage. That approval was communicated to Western Land by Jordan Foothills through its agent, Steve Glezos ("Glezos").

At the time the Final Plat was approved by the City on August 8, 2007, the City required that a note be included on the plat indicating the presence of collapsible soils which would have to be remediated. Despite the fact it had known of the collapsible soils all along and had agreed to purchase the Property "As Is," Jordan Foothills then purported to terminate the Option Agreement on the basis that the collapsible soils note constituted a design change from Exhibit D to the Option Agreement, and demanded a refund of its First Option Payment.

The trial court found that Jordan Foothills approved the two design changes that the City required, that Glezos was the agent of Jordan Foothills, and that the inclusion of the collapsible soils note on the plat map did not constitute a design change entitling Jordan Foothills to a refund of its First Option Payment.

The following issues are presented for review on this appeal:

Issue No. 1. Did the trial court correctly determine that the Option Agreement did not preclude Jordan Foothills from approving design changes to the plat map before the City approved the Final Plat?

Standard of Review. The trial court’s interpretation of the Option Agreement is reviewed for correctness. *Green River Canal Co. v. Thayn*, 2003 UT 50 ¶ 16, 84 P.3d 1134.

Issue No. 2. Has Jordan Foothills failed to meet its burden of marshaling the evidence supporting the trial court’s factual findings with respect to agency?

Standard of Review. This issue is reviewed as a matter of law. *United Park City Mines Co. v. Stichting Mayflower Mt. Fonds*, 2006 UT 35, ¶¶ 24-27, 140 P.3d 1200.

Issue No. 3. Has Jordan Foothills failed to demonstrate that the trial court’s findings that Glezos had express, implied and apparent authority from Jordan Foothills to communicate with Appellee Western Land and its principals, Terry Diehl (“Diehl”) and Lee Conant (“Conant”), on behalf of Jordan Foothills concerning the Property are clearly erroneous?

Standard of Review. This issue involves a mixed question of fact and law. The trial court’s factual findings are reviewed on a clearly erroneous standard. *Bonneville Distributing Co. v. Green River Dev. Assocs.*, 2007 UT App. 175, ¶ 18, 164 P.3d 433. The issue of whether the facts found by the trial court are sufficient to create an agency is a question of law reviewed for correctness. *Green River Canal Co. v. Thayn*, *supra*.

Issue No. 4. Has Jordan Foothills failed to demonstrate that the trial court's finding that the design changes to the plat were not sufficiently material to permit Jordan Foothills to terminate the agreement is clearly erroneous?

Standard of Review. The standard of appellate review with respect to this issue is whether the district court's factual determinations are clearly erroneous. *Bonneville Distributing Co. v. Green River Dev. Assocs.*, 2007 UT App. 175, ¶ 18, 164 P.3d 433.

III.

DETERMINATIVE PROVISIONS

None.

IV.

STATEMENT OF THE CASE

A. The Course of Proceedings Below.

As stated in Section II, this case arises out of an Option Agreement entered into between Western Land and Jordan Foothills on October 26, 2006 pursuant to which Jordan Foothills obtained the right to purchase the Property, consisting of approximately 51.2 acres of land located in West Jordan City. [Ex. P-1.] The dispute between the

parties is whether Jordan Foothills defaulted by failing to make the Second Option Payment and is therefore not entitled to a refund of the First Option Payment.

Western Land gave Jordan Foothills a Trust Deed encumbering the Property as security for Western Land's obligations under the Option Agreement. When Western Land refused to return the \$1.5 Million First Option Payment, Jordan Foothills's counsel, Walter Keane, as Successor Trustee, commenced a foreclosure proceeding by recording a Notice of Default and Election to Sell with the Salt Lake County Recorder's office. [Ex. P-9]

Western Land and East Maples Investment, LLC "(EMI)", the fee owner of the Property, then commenced this action seeking a determination that Jordan Foothills had breached the Option Agreement and that Western Land was entitled to retain the \$1.5 Million First Option Payment and to quiet EMI's title to the Property subject to its contract with Western Land. [R. 63.] Western Land and EMI moved for a preliminary injunction to enjoin the foreclosure. [R. 1.] The preliminary injunction hearing was consolidated with the trial of the action, which was held on December 6 and 7, 2007 before the Honorable Anthony B. Quinn. [R. 366-369 and 769-770.]

After hearing all of the evidence and considering the arguments of counsel, Judge Quinn ruled in favor of Western Land and EMI, finding that Jordan Foothills had breached the Option Agreement and that Western Land was entitled to retain the \$1.5

Million First Option Payment as liquidated damages. [R. 661-691 and 701-705.] Judge Quinn specifically ruled that Glezos had express, implied and apparent authority from Jordan Foothills to communicate on its behalf with Western Land with respect to subdivision approval of the Property. The Court further ruled that, in any event, even if it were assumed Glezos had no authority, any design changes were not sufficiently material to permit Jordan Foothills to terminate the agreement. [R. 678-681.] The district court also granted Western Land its attorneys fees incurred in the amount of \$93,759.75 and costs. [R. 703 and 760-763.]

Jordan Foothills filed its Notice of Appeal with the Supreme Court on January 9, 2008. The Supreme Court transferred the appeal to this Court by notice dated February 8, 2008. [R. 721-723 and 766.]

B. Statement of Facts.

Jordan Foothills has not challenged the trial court's findings except the findings that Glezos had express, implied and apparent authority to communicate with Western Land concerning the Property on behalf of Jordan Foothills. Even as to those findings, Jordan Foothills has not challenged the subsidiary factual findings upon which the agency conclusions are based. Thus, this Court assumes the findings are supported by substantial

evidence. *C & Y Corp. v. General Biometrics, Inc.*, 896 P.2d 47, 52 (Utah App.1995) (“Because appellants do not challenge the trial court's factual findings, we must accept this finding as true.”). Nevertheless, Western Land cites below the trial court’s findings and the evidence in the record which amply supports those findings.

1. Plaintiff EMI is the owner of the Property located in the City of West Jordan, Utah. The property consists of approximately 51.2 acres of land. Western Land acquired from EMI the right to develop and purchase the Property. [R. 662, Finding No. 1; R. 521, ¶2.]

2. Jordan Foothills is a limited liability company created specifically to purchase the Property from Western Land. Pettit is the principal of Jordan Foothills. Pettit has worked as a homebuilder for thirty years and as a real estate developer for over ten years. Over the course of his career, he has entered into hundreds of real estate purchase and development agreements. [R. 662, Findings Nos. 2 and 3; R. 769, pp. 66-68.]

Negotiation of the Option Agreement

3. Diehl and Conant are principals of Western Land and EMI and other entities that own and/or develop real estate. [R. 662, Finding No. 4; R. 521, ¶3; R. 535, ¶3.]

4. Prior to the negotiations concerning the Option Agreement, Glezos had approached Diehl on behalf of Pettit and negotiated the purchase of residential lots in an adjacent real estate development project, Jordan Hills Village, the Sycamores, Phase 9. Glezos had represented that he was working with and on behalf of Pettit in that transaction. Pettit also represented to Western Land's real estate agent, George Richards, that Glezos worked for him. Consistent with that representation, Pettit purchased the Sycamores Phase 9 property on terms negotiated primarily by Glezos. Subsequently, Glezos negotiated addenda on behalf of Pettit, which were performed by Pettit. [R. 662-663, Finding No. 5; R. 535-536, ¶4; R. 521, ¶4; R. 770, pp. 151-152.]

5. Shortly after arranging the purchase of the Sycamores Phase 9 property on behalf of Pettit, Glezos again contacted Diehl on behalf of Pettit and inquired about the purchase of another phase of lots in the Jordan Hills Village Subdivision. Diehl told Glezos that all of the lots had been sold, but that one of Diehl's companies owned another piece of property, the Property, which adjoined the Jordan Hills Village development. Glezos expressed interest on behalf of Pettit and later called Diehl again and began preliminary negotiations on Pettit's behalf. [R. 663, Finding No. 6; R. 536, ¶5.]

6. Shortly thereafter, Glezos met with Diehl at Western Land's office. At that meeting, Glezos told Diehl that Pettit had sent him to further discuss the Property and restated Pettit's interest in purchasing the Property. Diehl gave Glezos certain documents

he had relating to the Property, including a soils report specifically discussing the existence of collapsible soils on the Property which would have to be remediated in order to develop the Property as a residential subdivision. [R. 663, Finding No. 7; R. 536, ¶6 and Ex. P-3.]

7. Diehl and Glezos discussed Pettit's interest in purchasing the Property several times over the next two weeks. Ultimately Glezos invited Diehl to meet with Glezos and Pettit at Beans & Brew, a local coffee shop. [R. 663, Finding No. 8; R. 536, ¶7.]

8. Diehl met with Pettit and Glezos in the fall of 2006 at Beans & Brew. At this meeting, the terms of a potential contract for Pettit's purchase of the Property were negotiated. The negotiations centered around the amount and timing of payments. Glezos did nearly all of the talking and negotiating on Pettit's behalf. Pettit only said a few words here and there. [R. 663, Finding No. 9; R. 536-537, ¶8.] At the conclusion of the meeting, Pettit told Diehl that Diehl should continue negotiating the agreement with Glezos on behalf of Pettit and should deal directly with Glezos on Pettit's behalf. [R. 536-537, ¶8; R. 546, ¶¶47-48.]

9. Diehl continued negotiating the agreement with Glezos on behalf of Pettit and ultimately they agreed to terms for an option to purchase the Property. Western Land's attorney prepared a written agreement which Diehl sent to Glezos per Pettit's

instructions. On or about the evening of October 26, 2006, Glezos telephoned Diehl and requested that Diehl meet with him immediately to execute the Option Agreement. That same evening, Diehl met with Glezos at Western Land's office. Glezos personally handed Diehl the Option Agreement which had been signed by Pettit on behalf of Jordan Foothills. The agreement contained several additional terms that Glezos had written in by hand that Glezos said Pettit wanted and were initialed by Pettit. Diehl accepted Glezos's handwritten additional terms and signed the contract on behalf of Western Land. [R. 664, Finding Nos. 10 and 11; R. 522-523, ¶¶ 7-11; R. 769, p. 70.]

10. Glezos told Diehl that Glezos would take the Option Agreement to Merrill Title Company and that he would instruct Pettit to wire the First Option Payment in the amount of \$1.5 Million to Merrill Title. The next day, consistent with Glezos's representation, Pettit did wire the \$1.5 Million to Merrill Title and Diehl picked up a check for that amount the same day. [R. 664-665, Finding No. 14; R. 538, ¶12.]

Terms of the Option Agreement

11. Paragraph 3 of the Option Agreement provided that Jordan Foothills had made such inspections of the Property and reviewed such documents relating to the Property as it deemed necessary and was purchasing the Property "As Is" without any warranties or representations. [R. 665, Finding No. 15; Exhibit P-1, ¶3; R. 538, ¶13.]

12. The Option Agreement required Jordan Foothills to make two option payments as consideration for the grant of the option. These payments were non-refundable except under the limited conditions stated in paragraph 4(b). [Ex. P-1, ¶ 2.] Attached as Exhibit D to the Option Agreement was a first draft of the engineering design for development of the Property as a 146 lot residential subdivision. The Option Agreement gave Jordan Foothills the right to approve any design changes to the plan between that concept map and the Final Plat and set forth the two circumstances under which Jordan Foothills could obtain a refund of its option payments:

If in the platting process, the City makes changes in the Plan as shown in Exhibit D, [Jordan Foothills] shall have the right to approve the new Final Plat as a condition precedent to Closing on this transaction. Should Closing not occur as a result of [Western Land's] inability to obtain final plat approval, as stated herein, *or final plat approval is obtained of a design not approved of by [Jordan Foothills]*, all consideration paid under this Agreement shall be fully refunded. [Emphasis added]

[R. 665-666, Finding No. 16; Exhibit P-1, ¶ 4(b); R. 538, ¶15.]

13. The First Option Payment in the amount of \$1.5 Million was required to be made on or before October 27, 2006. Jordan Foothills was required to make the Second Option Payment in the amount of \$3,975,000 on or before the last to occur of January 15, 2007 or five business days following West Jordan City's grant of the Land Use Approvals described in the Option Agreement. [R. 666, Finding No. 17; Exhibit P-1, ¶ 1(k) and (n);

R. 538, ¶14.] As stated above , Jordan Foothills timely made the First Option Payment in the amount of \$1.5 Million. [R. 666, Finding No. 18; R. 538, ¶12.]

14. The Option Agreement also gave Jordan Foothills the right to elect at the time it made the Second Option Payment whether it would take the lots as “paper lots,” that is, lots without any infrastructure improvements, or as “finished lots” that did have the infrastructure improvements necessary so that the City of West Jordan would allow a builder to obtain the necessary building and occupancy permits. [R. 666, Finding No. 19; Exhibit P-1, ¶ 4(e) and (f); R. 538-539, ¶16.]

15. The Option Agreement also contained an attorney’s fees provision providing for reasonable attorney’s fees and costs and expenses to be awarded to the prevailing party. [R. 666, Finding No. 20; Exhibit P-1.]¹

The Platting Process

16. After execution of the Option Agreement, Western Land worked towards approval of the subdivision plat in close communication with Glezos on behalf of Jordan Foothills. Conant of Western Land met with Glezos over twenty times regarding the status of the platting process. Diehl and Conant on behalf of Western Land communicated with Glezos over sixty times by telephone regarding the Property and the

¹ The Option Agreement mistakenly contained two paragraphs 11s. The attorneys fees provision is contained in the second paragraph 11 entitled, “Litigation Expenses.”

platting process. [R. 667, Finding Nos. 21 and 24; R. 539-540, ¶¶ 17 and 22; R. 523-524, ¶¶ 12 and 15.] Importantly, Pettit admitted that Glezos kept him informed. Pettit admitted that he had ongoing conversations with Glezos about the project on a weekly or bi-weekly basis and that he knew Glezos was talking with Conant and Diehl on Pettit's behalf and that Glezos was reporting to Pettit on what was going on with the approval process. Pettit relied upon Glezos because he was older and more experienced. Glezos was Pettit's trusted associate and Pettit had worked with Glezos on numerous prior occasions in buying and selling properties for Pettit. [R. 769, pp. 94-96.] Glezos testified he acted as the "go between" between the parties. [R. 679, pp. 110-111.]

17. Pettit agreed with Glezos that in consideration for Glezos's services with respect to the Property, Glezos would receive from Jordan Foothills an option to purchase up to one-half of the lots on the Property at Jordan Foothills's cost plus \$5,000.00. [R. 769, pp. 97-100.]

18. The City of West Jordan requested two material changes to the plat design that was initially proposed by Western Land. The City requested that one intersection with 6400 West be removed and replaced with a cul-de-sac because the City believed that the two planned intersections with 6400 West were too close together. [R. 539-540, ¶¶ 18 and 19; R. 523, ¶¶ 13 and 14; R. 769, pp. 17 and 50-52.] The City also requested a

rectangular reconfiguration of streets in Phase 2. Other minor changes were necessary to accommodate these design changes. [R. 667, Finding No. 22.]

19. Western Land submitted to the City a First Revised Preliminary Plat on or about January 17, 2007, which incorporated the design changes described in paragraph 18 above. There were no further design changes to the design of the plat. [R. 667, Finding No. 23; Exhibits P-4A, P-4B and P-4C; R. 523, ¶14; R. 539, ¶19.]

20. On or about February 14, 2007, Conant of Western Land met with Glezos regarding the status of the platting process. At that time, Conant showed Glezos the First Revised Preliminary Plan incorporating the design changes from the concept plan attached as Exhibit D to the Option Agreement. These changes were actually beneficial to Jordan Foothills. [R. 769, pp. 50-52.] Glezos stated that he liked the design changes because cul-de-sac lots are more valuable than ordinary lots and told Conant that he would show the design changes to Pettit for his approval. Shortly thereafter, Glezos told Conant that he had shown the First Revised Preliminary Plat to Pettit and that Pettit had approved the design changes. At no point did Glezos or Pettit ever express any disfavor with the additional cul-de-sac lots or otherwise express anything other than unreserved

endorsement of the design of the plat. [R. 667-668, Finding No. 25; R. 524, ¶16; R. 539, ¶20.]²

21. Pettit, on behalf of Jordan Foothills, approved the preliminary plat and communicated that approval to Western Land through Glezos. This means of communication from Pettit through Glezos was consistent with the course of dealing between the parties with respect to the Property. [R. 673, Finding Nos. 41 and 42; R. 667-669, Finding Nos. 24-30; SOF Nos. 4-11 and 16-26.]

22. On May 2, 2007, the City of West Jordan approved the First Revised Preliminary Plat. The design of the plat was the same as that approved by Pettit via Glezos in February. [R. 668, Finding No. 26; R. 524, ¶17.]

23. On May 22, 2007, Glezos again met with Conant concerning the status of the platting process. Glezos asked to see a copy of the approved preliminary plat. By mistake, Conant showed Glezos what Conant thought was the approved preliminary plat, but was, in fact, a previous plat without the design changes required by the City. Glezos expressed concern that the cul-de-sac lots had been eliminated. Conant then realized he had given Glezos the old drawing and obtained the correct drawing, which was

² The trial court found these design changes were not sufficiently material to permit Jordan Foothills to terminate the Option Agreement even if Jordan Foothills had not approved the design changes. [R. 681, Conclusion No. 19; R. 769, pp. 50-52.]

unchanged in its design from the plat that the City had approved and that Pettit had approved through Glezos in February. Glezos expressed his relief that the additional cul-de-sac lots were still there. [R. 668, Finding No. 27; R. 524-525, ¶18.]

24. At the May 22, 2007 meeting, Glezos also requested that Conant have Western Land prepare updated cost estimates for the infrastructure build-out of the lots so that Glezos and Pettit could decide whether to take the lots as “paper lots” or “finished lots” under paragraphs 4(e) and (f) of the Option Agreement. Glezos also told Conant at that time that Pettit also required Glezos to prepare independent cost estimates. Conant provided Glezos the requested updated cost estimates which were based on the preliminary plat design with the two design changes that had been approved by the City on May 2, 2007 and which Pettit had approved through Glezos. [R. 668, Finding No. 28; R. 525, ¶19.]

25. Glezos also requested that Conant have Western Land provide him with engineering drawings with regard to the Property. Conant directed Western Land’s engineering firm, Ward Engineering, to provide Glezos with these drawings and Glezos, in fact, picked up the drawings from Ward Engineering. [R. 669, Finding No. 29; R. 525, ¶20.]

26. At no point did Glezos or Pettit object to the design of the plat. [Finding No. 30; R. 525-526, ¶21.]

27. On August 8, 2007, Western Land obtained the Land Use Approvals provided by the Option Agreement, including approval of the Final Plat design that Pettit, by way of Glezos, had approved. Glezos attended on behalf of Jordan Foothills the Planning and Zoning Commission hearing at which the approval was given. Jordan Foothills's attorney, Keane, also attended the hearing with Glezos at the direction of Glezos. After the hearing, Glezos and Conant spoke and Conant met Keane for the first time. Glezos did all of the talking on behalf of Jordan Foothills regarding the Property and did not express any concern or objection with the design of the plat that had just obtained final approval. Keane did not say anything beyond a greeting. [R. 669-670, Finding No. 31; R. 526, ¶22.]

The Collapsible Soils Issue

28. There were no design changes to the plat between the preliminary and final stages. The West Jordan Planning & Zoning Commission did recommend a notation be placed on the plat regarding collapsible soils, which the City did require. This was not a change in the design of the plat. Moreover, the zoning ordinances which were attached as Exhibit C to the Option Agreement required certain notations to appear. These are not design changes. [R. 670, Finding No. 32; R. 526, ¶¶22-23; R. 541, ¶25; R. 770, pp. 158-159 and 201-202.]

29. Neither Pettit nor Glezos made any negative remarks to Western Land about the Property before the August 8, 2007 hearing when the City required that the note regarding collapsible soils be placed on the Final Plat. After the August 8, 2007 hearing, the only concern raised by Pettit or Glezos concerning the Property was the requirement for the collapsible soils note on the Final Plat. [R. 670, Finding No. 33; R. 526-529, ¶¶ 24-36; R. 540-543, ¶¶ 22-36.]

30. However, the collapsible soils note on the Final Plat does not relate to the design of the plat. [SOF No. 28 above.] Moreover, the presence of collapsible soils on the Property was widely known and, in fact, Pettit had known for years that the City of West Jordan had built a fire station on land adjacent to the Property, which suffered significant settling due to collapsible soils, and the City of West Jordan had fixed the problem at some expense. Jordan Foothills also had no right to object to the collapsible soils condition on the Property because it had agreed in the Option Agreement to accept the Property “As Is.” [R. 541, ¶¶ 27-29; R. 527, ¶¶ 26-28; R. 769, pp. 71-74.] In this connection, Western Land had given Glezos a copy of the soils report specifically discussing the collapsible soils condition and necessary remediation *before* Jordan Foothills entered into the Option Agreement. And, the May 21, 2007 cost estimate given by Western Land to Glezos specifically referenced the cost of remediating the moisture

sensitive soil condition. [R. 670-671, Finding Nos. 34-37; Exhibits P-3 and P-5; R. 536, ¶ 6 and Ex. P-3; R. 541, ¶27 and Ex. P-5.]

31. When Jordan Foothills's counsel, Keane, sent his letter to Western Land electing not to proceed with the Option Agreement and demanding return of the \$1.5 Million First Option Payment, the only purported change mentioned was the requirement for the collapsible soils note on the Final Plat. The letter did not contain any statement concerning the design of the plat or any other concerns. [R. 671, Finding No. 38; Exhibit P-6.]

32. Moreover, on August 20 and 29, 2007, Western Land's Diehl and Conant met with Glezos. At those meetings, they discussed the collapsible soils note on the Final Plat. Glezos again confirmed that the note was the only concern that he and Pettit had with respect to the Property and repeatedly asserted that Pettit was a man of his word and would not break a deal without cause.³

33. There was no evidence that Pettit ever received additional information from Western Land regarding the transaction other than information requested by Glezos on

³ Glezos claimed that Pettit had talked to West Jordan City Manager, Gary Luebbers ("Luebbers"), who had supposedly stated that the notation would be required under any circumstance. To the contrary, Luebbers testified that he had not met or talked with Pettit. [R. 671, Finding No. 39; R. 528-529, ¶¶ 32-35; R. 542-543, ¶¶ 33-36.] In fact, the City was willing to remove the condition for the inclusion of a note concerning the collapsible soils upon approval of an acceptable remediation plan. The City ultimately approved a remediation plan. [R. 543, ¶¶ 36-37; R. 529, ¶¶ 35-36.]

behalf of Pettit and Jordan Foothills. Pettit never contended to Western Land, Conant or Diehl that Pettit or Jordan Foothills was not receiving adequate information from Western Land through Glezos. [R. 674, Finding No. 52; R. 532, ¶¶ 46 and 47; R. 546, ¶¶ 47-49.]

34. Neither Pettit, Glezos nor Jordan Foothills's attorney, Keane, ever communicated to Western Land a limitation of the authority of Glezos to act on behalf of Jordan Foothills. [R. 675, Finding No. 55; R. 532, ¶49; R. 546, ¶49.]

35. Glezos repeatedly assured Western Land that he was relaying to Pettit all information that Western Land gave him concerning the Property. Western Land reasonably relied upon Glezos's representations throughout the negotiation and platting process. [R. 675, Finding Nos. 55-56; R. 532, ¶49; R. 546, ¶49.]

Jordan Foothills's Default

36. Jordan Foothills failed and refused to make the Second Option Payment and, as stated earlier, demanded return of the First Option Payment. [Ex. P-6.] When Western Land denied that Jordan Foothills had the right to return of the \$1.5 Million First Option Payment, Jordan Foothills commenced non-judicial foreclosure of a Trust Deed encumbering the Property that had been given to Jordan Foothills by Western Land as security for the performance of Western Land's obligations under the Option Agreement by recording with the Salt Lake County Recorder's Office a Notice of Default and Election to Sell the Property on December 7, 2007. [Ex. P-9.] Western Land demanded

that the Trust Deed be reconveyed because of Jordan Foothills's default under the Option Agreement, but Jordan Foothills and Keane refused to reconvey. Western Land terminated the agreement based upon Jordan Foothills's default. [R. 673, Finding Nos. 47 and 48; Ex. P-8; R. 530, ¶38.]

Liquidated Damages

37. In addition to the fact the First Option Payment made in consideration for the grant of the option was non-refundable, the first paragraph 11 of the Option Agreement entitled "Seller's Remedy" contains a liquidated damages provision entitling Western Land to retain as liquidated damages the \$1.5 Million First Option Payment in lieu of any other remedies in the event Jordan Foothills failed to perform its obligations under the agreement. [R. 672, Finding No. 43; Exhibit P-1, ¶ 11.]

38. Western Land did retain the First Option Payment as liquidated damages, thereby waiving any other remedies. [R. 672, Finding No. 44; R. 530, ¶39.]⁴

⁴ Western Land's estimated damages from Jordan Foothills's default exceeded \$1.5 Million, including diminution in the value of the Property and carrying costs of the Property. [R. 673, Finding No. 46; R. 531, ¶41; R. 545, ¶42.] Jordan Foothills did not introduce any evidence at trial to attempt to meet its burden of demonstrating that the amount of liquidated damages was invalid. Instead, Pettit admitted that the residential market had declined between the time the Option Agreement was signed and the time final approval of the plat was obtained. [R. 769, p. 100.]

V.

SUMMARY OF ARGUMENT

Jordan Foothills approved the two design changes required by West Jordan City at the preliminary plat stage. Jordan Foothills's approval was communicated to Western Land by its agent, Glezos. The Option Agreement did not preclude Jordan Foothills from approving the two design changes until after the Final Plat was approved by the City. Instead, the plain language of the agreement contemplated that the City may require design changes during the platting process which Jordan Foothills would have the right to approve before the Final Plat was submitted to and approved by the City.

Jordan Foothills's argument that it could not approve changes to the design of the Final Plat until the Final Plat was approved by the City also ignores Jordan Foothills's own performance under the agreement. When during the platting process Western Land requested that Jordan Foothills approve the two design changes requested by the City, Jordan Foothills did so and did not take the position that it could not approve the design changes until the Final Plat was approved.

Jordan Foothills's argument also defies common sense. The Option Agreement was a multi-million dollar contract. It makes no sense that Western Land would have to pursue the plat approval process in the dark not knowing what changes Jordan Foothills would approve. It also makes no sense that if Jordan Foothills was not willing to approve

changes required by the City during the platting process, Jordan Foothills would nevertheless have to wait until after the Final Plat was approved to disapprove the changes, during which time Western Land would be entitled to retain the \$1.5 million First Option Payment.

Moreover, even if it is incorrectly assumed for argument that the Option Agreement did preclude Jordan Foothills from approving the two design changes before the Final Plat was approved by the City, Jordan Foothills, through Glezos, did, in fact, approve the two design changes after the Final Plat was approved. The only objection Jordan Foothills voiced to the Final Plat was the collapsible soils note required by the City, which did not constitute a design change that Jordan Foothills was entitled to approve.

The trial court's findings that Glezos had express, implied and apparent authority to communicate with Western Land concerning the approval process are not clearly erroneous, but are amply supported by the evidence. Initially, Jordan Foothills has failed to marshal the evidence supporting the trial court's findings. This Court will, in its discretion, refuse to disturb those findings.

Further, the evidence established that Pettit established a course of dealing whereby Jordan Foothills communicated with Western Land through Glezos. Pettit instructed Western Land to deal with Glezos on behalf of Jordan Foothills, Pettit

instructed Glezos to communicate with Western Land, Pettit knew that Glezos was communicating with Western Land concerning the approval process on behalf of Jordan Foothills, and, in fact, Pettit agreed to compensate Glezos handsomely for his efforts in assisting Jordan Foothills in the transaction.

Glezos had actual authority which consists of express and implied authority, and may be implied from the words and conduct of the parties and the facts and circumstances attending the transaction or inferred from a course of dealing between the principal and agent. Glezos also had apparent authority based upon Pettit's conduct, including his direction that Western Land deal with Glezos on behalf of Jordan Foothills and his establishment of a course of dealing with Western Land whereby all communications were through Glezos. As the trial court found, Pettit was aware of Glezos's efforts on behalf of Jordan Foothills and not only acquiesced in such conduct, but approved it.

In any event, the two design changes required by the City which Jordan Foothills had the right to approve were not material and did not give Jordan Foothills the right to terminate the agreement because those design changes were beneficial to Jordan Foothills and Jordan Foothills presented no contrary evidence.

Western Land should be awarded its reasonable attorneys' fees and costs on appeal pursuant to the second paragraph 11 of the Option Agreement.

VI.

ARGUMENT

A. **JORDAN FOOTHILLS APPROVED THE TWO DESIGN CHANGES TO THE PRELIMINARY PLAT AND THEREFORE DEFAULTED UNDER THE OPTION AGREEMENT BY FAILING TO MAKE THE SECOND OPTION PAYMENT.**

The trial court correctly found that the City of West Jordan only required two design changes from the conceptual plat map attached as Exhibit D to the Option Agreement. The first design change was that one intersection with 6400 West was to be removed and replaced with a cul-de-sac because the City believed that the two planned intersections with 6400 West were too close together. The City also requested a rectangular reconfiguration of the streets in Phase II. [SOF No. 18.] The evidence at trial established that these changes were actually beneficial to Jordan Foothills. [SOF No. 20.] The evidence established, and the trial court found, that Pettit, through Glezos, approved these changes on behalf of Jordan Foothills. [SOF Nos. 20 and 21.] Indeed, Pettit learned that there would be additional cul-de-sac lots at the coffee shop meeting before the Option Agreement was even executed. [R. 769, pp. 82-83.] There were no other design changes in the Final Plat. [*Id.*]

After the City approved the Final Plat on August 8, 2007, Jordan Foothills purported to terminate the Option Agreement and demanded a refund of its First Option Payment on the ground that the City required a note concerning collapsible soils to be

included on the plat. And, at trial, the principal argument raised by Jordan Foothills was that the collapsible soils note was a design change to the plat which entitled Jordan Foothills to a refund of the First Option Payment. However, the evidence was that the note was not a design change, and the trial court so found. [SOF No. 28.]⁵

With new counsel, Jordan Foothills has changed the focus of its argument on appeal. Jordan Foothills has jettisoned its collapsible soils argument and does not challenge the trial court's findings in that regard. Instead, Jordan Foothills only argues that as a matter of law the Option Agreement precluded it from approving the Final Plat until the Final Plat was approved by West Jordan City and that when the Final Plat was approved by the City Jordan Foothills promptly terminated the contract and demanded a refund of its First Option Payment. This argument ignores the plain language of the Option Agreement, Jordan Foothills's own performance under the agreement, and common sense.

First, Jordan Foothills's argument ignores the plain language of the agreement. Jordan Foothills paid the First Option Payment as consideration for the grant of the option. The payment was not refundable except as specifically provided in the agreement. [Ex. P-1, ¶¶ 2 and 11.] Attached as Exhibit D to the Option Agreement was

⁵ In addition, Jordan Foothills agreed to purchase the Property "As Is," and Jordan Foothills knew of the collapsible soils before the Option Agreement was executed.

a plat showing the design of a 146 lot subdivision of the Property. The agreement provided that in the event the City required changes in the plan shown on Exhibit D during the platting process, then Jordan Foothills had the right to approve the new Final Plat. Jordan Foothills was only entitled to a refund of its First Option Payment if Western Land was unable to obtain plat approval “or Final Plat approval is obtained of a design which has not been approved of by Buyer. . . .”

Paragraph 4(b) of the Option Agreement provided in this regard:

If *in the platting process*, the City makes changes in the Plan as shown in Exhibit D, [Jordan Foothills] shall have the right to approve the new Final Plat as a condition precedent to Closing on this transaction. Should Closing not occur as a result of [Western Land’s] inability to obtain final plat approval, as stated herein, *or final plat approval is obtained of a design not approved of by [Jordan Foothills]*, all consideration paid under this Agreement shall be fully refunded. [Emphasis added]

Thus, the Option Agreement contemplated that the City may require design changes during the platting process from the design set forth in Exhibit D to the Option Agreement and gave Jordan Foothills the right to approve such changes. There is nothing in the language of paragraph 4(b) that prevented Jordan Foothills from approving design changes required by the City in the platting process before the Final Plat was actually submitted and approved.

Jordan Foothills myopically focuses on only one sentence of this paragraph giving Jordan Foothills the right to approve the new Final Plat and ignores the rest of the

paragraph. Initially, this sentence does not preclude approval of design changes during the platting process. Moreover, it is the language of the next sentence which governs the only circumstances under which Jordan Foothills would be entitled to a refund of the First Option Payment. Of course, this Court must interpret the agreement as a whole and harmonize its provisions, if possible. *LDS Hosp. v. Capitol Life Ins.*, 765 P.2d 857, 858 (Utah 1988) (“[I]t is axiomatic that a contract should be interpreted so as to harmonize all of its provisions and all of its terms, which terms should be given effect if it is possible to do so.”). The language of the next sentence of paragraph 4(b) plainly contemplates that Jordan Foothills would approve design changes *before* the Final Plat was submitted to the City for approval by providing “if Final Plat approval *is* obtained of a design *which has not been approved of* by Buyer” the First Option Payment would be refunded.[Emphasis added] The use of the past tense phrase “has not been approved” plainly connotes that Jordan Foothills’s approval of the design changes could occur before approval of the Final Plat by the City “is” obtained.

That, of course, is exactly what occurred here. At the preliminary plat stage, the City required two design changes. That is the stage where design changes are typically required. Jordan Foothills approved those design changes. There were no design changes from the preliminary plat to the Final Plat. Therefore, Jordan Foothills approved the design of the Final Plat, as the trial court found.

Second, Jordan Foothills's misinterpretation of the Option Agreement ignores its own performance under the agreement. Once more, the evidence at trial established, and the trial court found, that Pettit, through Glezos, approved the two design changes at the preliminary plat stage. Contrary to the position it now urges, Jordan Foothills did not take the position at that time that it could not and would not approve the design changes until the Final Plat was approved by the City. A contract should be interpreted "by considering the contract language and the course of dealings between and conduct of the parties." *PDQ Lube Center, Inc. v. Huber*, 949 P.2d 792, 798 (Utah App. 1997).

Third, Jordan Foothills's strategic interpretation of the Option Agreement does not comport with common sense. In interpreting a contract, a court should avoid a construction which would lead to absurd results. *Alpha Partners, Inc. v. Transamerica Investment Management, L.L.C.*, 2006 UT App. 331, § 23, 153 P.3d 714. As the Option Agreement contemplates, changes in design of a plat are typically required by a City "in the platting process," not at the time a final plat is approved. The design of the final plat is typically the design of the approved preliminary plat, as in the present case. The Option Agreement was a contract involving many millions of dollars. It does not make any sense that Western Land would have to pursue approval of the plat in the dark, not knowing what changes Jordan Foothills would approve.

To put the shoe on the other foot, it makes no sense that Jordan Foothills could not disapprove design changes required by the City until the Final Plat was approved. To illustrate, Jordan Foothills has repeatedly emphasized, both at trial and in its brief, the time value of its \$1.5 million First Option Payment that Western Land held. If, in the first month after the Option Agreement was executed, the City required design changes which Jordan Foothills did not approve and Jordan Foothills demanded return of its money, it would certainly be nonsensical to interpret the Option Agreement so that Jordan Foothills did not have the right to approve or disapprove until nine months later when the Final Plat was approved by the City and that during the interim Western Land was entitled to keep the money, the time value of which Jordan Foothills argues was \$100,000.00.

In short, Jordan Foothills, through its authorized agent, Glezos, clearly approved the two design changes incorporated into the final plat months before the final plat was approved, as permitted and contemplated by the Option Agreement. Consequently, Jordan Foothills had no right to terminate the agreement and the trial court's finding that Jordan Foothills defaulted under the agreement must stand.

1. In Any Event, Jordan Foothills Approved the Two Design Changes After The City Approved the Final Plat.

Finally, even if it is incorrectly assumed for argument that Jordan Foothills was

somehow precluded from approving the two design changes before approval of the Final Plat, the trial court's findings must still be affirmed.

The undisputed evidence was that after the Final Plat was approved, Glezos stated to Western Land's Diehl and Conant on multiple occasions that the only objection that Jordan Foothills had to the Final Plat was the inclusion of the collapsible soils note on the plat. As the trial court determined, the collapsible soils note was not a design change and did not entitle Jordan Foothills to terminate the agreement. [SOF No. 28.] In this connection, when Jordan Foothills's counsel sent his termination letter to Western Land electing not to proceed with the Option Agreement and demanding return of the \$1.5 million First Option Payment, the only purported change mentioned in the letter was the collapsible soils note on the Final Plat. The letter contained no statement concerning design changes to the plat. [Finding No. 38, R. 671; Exhibit P-6.]

Thus, Jordan Foothills did not elect to terminate the Option Agreement because of the two approved design changes upon which it now attempts to rely. That is not surprising because those two changes benefitted the Property and Jordan Foothills did not put on a scintilla of evidence that the two changes were somehow detrimental. Jordan Foothills therefore had no right to a refund of its money for this additional reason.

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2. The Option Agreement is Not Ambiguous.

Neither party contended below that the Option Agreement is ambiguous. Both parties also agree on appeal that the agreement is not ambiguous. Therefore, the Court need not address Jordan Foothills's alternative argument that in the event the Court determines the agreement is ambiguous, the only extrinsic evidence was presented by Jordan Foothills and that evidence supports Jordan Foothills's position. Nevertheless, this contention is wrong.

The testimony upon which Jordan Foothills relies for its extrinsic evidence argument is Pettit's testimony in response to the question "Why did that language [of paragraph 4(b) of the Option Agreement] make you feel more protected?" Pettit then said why the language that was added to paragraph 4(b) made him feel more protected. He did not testify that he *communicated to Western Land* why he wanted the language in paragraph 4(b) included in the contract or why such a provision made him feel more protected. Of course, Pettit's secret, uncommunicated reason for wanting the right to approve design changes is irrelevant. *See Bushnell Real Estate v. Nielson*, 672 P.2d 746, 749 (Utah 1983) (stating that defendants' "unexpressed intent does not bind the plaintiff").⁶

⁶ Jordan Foothills also argues that the language of the agreement must be interpreted against Western Land as the drafter of the agreement. However, an agreement which is negotiated by the parties is not construed against the drafter. *See, e.g., Morris Silverman Management Corp. v. Western Union Financial Services, Inc.*, 284 F. Supp. 2d 964, 973, n. 3 (N.D. Ill. 2003); *Bristol-Meyers Squibb Co. v. United States*, 48 Fed. Cl. 350, 360-361 (2000). This rule of construction is used only as a last resort in non-negotiated agreements. *Express*

B. JORDAN FOOTHILLS HAS FAILED TO DEMONSTRATE THAT THE TRIAL COURT’S FINDINGS THAT GLEZOS ACTED AS AUTHORIZED AGENT FOR JORDAN FOOTHILLS ARE CLEARLY ERRONEOUS.

The trial court correctly determined that Glezos had express, implied and apparent authority to communicate with Western Land concerning the approval process for the Property on behalf of Jordan Foothills, and specifically to communicate Jordan Foothills’s approval of the changes to the design of the plat of the Property.

Jordan Foothills wrongly argues, as it did below, that Glezos was not its agent and therefore his actions in conveying approval of the design of the preliminary plat of the Property to Western Land is not binding upon Jordan Foothills. However, Jordan Foothills has failed to carry its burden of demonstrating that the trial court’s findings of agency are clearly erroneous. To the contrary, the evidence more than amply supports those findings.

1. Jordan Foothills Has Failed to Marshal the Evidence.

Jordan Foothills pays lip service to its obligation to marshal the evidence supporting the trial court’s findings on agency, but then largely neglects the evidence or minimizes that evidence and the reasonable inferences therefrom, which persuasively support the trial court’s findings that Glezos had express, implied and apparent authority

Recovery Services, Inc. v. Rice, 2005 UT App. 495, ¶ 3, 125 P.3d .

to act on behalf of Jordan Foothills. Jordan Foothills also fails to demonstrate how the evidence is insufficient to support the findings.

Both this Court and the Supreme Court have repeatedly admonished that pursuant to Rule 24(a)(9) of the Utah Rules of Appellate Procedure an appellant challenging the factual findings of the trial court must scour the record to marshal *all* of the evidence supporting the trial court's findings and then demonstrate that the evidence is insufficient to support the findings. *See, United Park City Mines Co. v. Stichting Mayflower Mt. Fonds*, 2006 UT 35, ¶¶ 24-27, 140 P.3d 1200; *State v. Park*, 2005 UT 75, ¶ 17, 124 P.3d 235; *Wilson Supply Inc. v. Fradan Mfg. Corp.*, 2002 UT 94, ¶ 21, 54 P.2d 1177. “[T]he challenging party must demonstrate how the court found the facts from the evidence and then explain how those findings contradict the clear weight of the evidence.” *Chen v. Stewart*, 2004 UT 82, ¶ 78, 100 P.3d 1177.

Among other things, Jordan Foothills neglects the evidence that Pettit expressly directed Western Land to deal with Glezos in the transaction; that Pettit instructed Glezos to communicate with Western Land concerning the Property; that Pettit knew that Glezos was communicating with Western Land on Pettit's behalf concerning the approval process and that Glezos was reporting back to Pettit concerning his communications with Western Land and the approval process; that Glezos was Pettit's trusted associate who had assisted Pettit in numerous real estate transactions over the years; that after the

Option Agreement was signed, Pettit did not communicate with Western Land, but rather all communications were through Glezos who testified the parties used him as the “go between”; that Pettit agreed to sell half of the Property to Glezos at a substantial discount in consideration for Glezos’s services with respect to the transaction; that Glezos *directed* Jordan Foothills’s attorney, Keane, to attend the August 8, 2007 meeting at which the City approved the Final Plat; and that after Jordan Foothills purported to terminate the agreement, Glezos continued to communicate with Western Land *on behalf of Jordan Foothills*. Jordan Foothills also neglects the reasonable inferences the trial court was entitled to make from the evidence.

Jordan Foothills has also failed to explain to the Court why the evidence presented at trial was insufficient to show that Glezos had authority to act on behalf of Jordan Foothills, other than to state in conclusory fashion that Jordan Foothills did not expressly tell Western Land that Glezos had such authority; that the only authority Glezos supposedly had was to negotiate the Option Agreement; and that Glezos’s conduct, as opposed to Pettit’s conduct, was not sufficient to demonstrate apparent authority.

Because Jordan Foothills has failed to marshal the evidence, the Court, in its discretion, will assume that the trial court’s findings are supported by the evidence and will refuse to review the findings. *Martinez v. Mediate Paymaster Plus/Church of Jesus*

Christ of Latter-day Saints, 2007 UT 42, ¶¶ 17-21, 164 P.3d 384. This failure alone disposes of all of the agency issues raised by Jordan Foothills on appeal.

2. Glezos Had Actual Authority.

Actual authority consists of both express authority and implied authority. Express authority is that authority which the principal expressly or specifically gives to the agent. *Zions First Nat. Bank v. Clark Clinic Corp.*, 762 P.2d 1090, 1094-1095 (Utah 1988).

Implied authority is the authority of the agent to perform acts which are incidental to, necessary, usual and proper to accomplish or perform the authority expressly given to the agent. Implied authority is actual authority based upon the premise that whenever the performance of certain business is confided to an agent, such authority carries with it by implication the authority to do collateral acts which are the natural and ordinary incidents of the main act or business authorized. *Id.*

Actual authority may be implied from the words and conduct of the parties and the facts and circumstances attending the transaction in question or inferred from a course of dealing between the principal and agent. *Id.*; *Bodell Const. Co. v. Stewart Title Guar. Co.*, 945 P.2d 119, 124 (Utah App. 1997); *M.D. and Assocs. Inc. v. Sears, Roebuck & Co.*, 749 S.W.2d 454, 456 (Mo. App. 1988); *Moriarty v. Glueckert Funeral Home, Ltd.*, 155 F.3d 859, 866 (7th Cir. 1998); *Peoples Fed. Sav. & Loan Assoc. v. Myrtle Beach Golf*

& Yacht Club, 425 S.E.2d 764, 773 (So. Car. App. 1992); *L. Smirlock Realty Corp. v. Title Guarantee Co.*, 421 N.Y.S. 2d 232, 238 (1979); Restatement (Second) of Agency, § 7, Comment c and § 26 (“ . . . authority to do an act can be created by written or spoken words or other conduct of the principal which, reasonably interpreted, causes the agent to believe that the principal desires him to act on the principal’s account.”).

(a) Glezos Had Express Authority.

In the case at bar, the evidence was more than ample to prove Glezos had express authority. Glezos had recently negotiated a separate real estate purchase agreement with Diehl on behalf of Pettit on adjacent property. Pettit represented that Glezos worked for him and Pettit purchased that property on terms negotiated primarily by Glezos.

Glezos represented to Western Land that he was working on behalf of Pettit with respect to the negotiation of the Option Agreement and the platting process. He requested that Diehl attend a meeting with Glezos and Pettit to negotiate the Option Agreement. At that meeting, Glezos negotiated essentially all of the terms, with Pettit observing but only making an isolated comment here and there. At the conclusion of the meeting, Pettit told Diehl to negotiate the remaining terms with Glezos and to deal directly with Glezos with respect to the Property. [SOF. Nos. 4-8.] Pettit did not in any way limit Glezos’s authority to act on Pettit’s behalf with respect to the Property. [SOF No. 34.] Consistent

with the instructions, Diehl negotiated the remaining terms of the agreement with Glezos and delivered the proposed Option Agreement to Glezos, who then made various handwritten changes and had Pettit sign the agreement. It was Glezos who then communicated Jordan Foothills's acceptance of the agreement by delivering the signed agreement back to Diehl. [SOF Nos. 9-10.]

After execution of the Option Agreement, Pettit did not communicate at all with Western Land concerning the Property and the platting process. Instead, all of Western Land's communications were with Glezos on behalf of Pettit and Jordan Foothills. Pettit never requested additional information from Western Land other than the information he received from Western Land through Glezos. [SOF Nos. 16-27.]

Pettit himself admitted that he knew Glezos was talking with Conant and Diehl on Pettit's behalf concerning the project, that Pettit had conversations with Glezos about the project on a weekly or bi-weekly basis, and that Glezos was reporting to Pettit on what was going on with the approval process. Pettit relied upon Glezos because he was older and more experienced. Pettit testified Glezos was "a trusted associate" and that he had worked with Glezos on numerous prior occasions in buying and selling properties for Pettit. [SOF No. 16; R. 769, pp. 89-90] Glezos testified that he acted as the "go between" between the parties. [SOF No. 16.] For example, Glezos testified that Pettit asked him to inquire of Western Land whether approval could be obtained to develop the Property in

four phases rather than two phases and that Glezos did in fact speak to Western Land concerning phasing and reported back to Pettit. [R. 769, p. 124.]

When Western Land's Conant showed Glezos the preliminary plat containing the design changes to the conceptual plan attached as Exhibit D to the Option Agreement on February 14, 2007, Glezos expressed his approval of the changes, but told Conant that he would show the revised plat to Pettit for approval and get back to Conant. Glezos did, in fact, get back to Conant within a couple weeks and told him that Pettit had approved the design changes. This means of communication was consistent with the course of dealings established between the parties. [SOF Nos. 20-21.]

Shortly thereafter, Glezos requested updated cost estimates (which included the design changes) on behalf of Jordan Foothills that Pettit admittedly asked Glezos to obtain and which Glezos told Conant were requested by Pettit. [SOF No. 23.]

Moreover, Pettit testified that he had an agreement with Glezos that in consideration for Glezos' services with respect to the transaction on behalf of Jordan Foothills, Glezos could purchase up to one-half of the lots for Jordan Foothills's cost plus \$5,000. [SOF No. 17.]

And, finally, it was Glezos – not Pettit – who attended the hearing on approval of the Final Plat. Jordan Foothills's attorney, Keane, attended that meeting on behalf of Jordan Foothills *at the direction of Glezos*. [SOF Nos. 11 and 23-26.]

This evidence was easily sufficient to support the district court's finding of express agency. As the trial court noted [R. 770, pp. 240-242], it is unimaginable that Pettit and Jordan Foothills would totally ignore the platting process and not communicate at all with Western Land concerning that process when the Option Agreement involved several million dollars and Jordan Foothills had lost the use of the \$1.5 Million First Option Payment, the time value of which Jordan Foothills puts at \$100,000. Jordan Foothills would have wanted to know as soon as possible if West Jordan City made any design changes that were not acceptable to Jordan Foothills so that Jordan Foothills could promptly demand return of its \$1.5 Million rather than letting Western Land retain that money during a lengthy platting process. As the trial court further noted, it is also unlikely that Glezos would have communicated with Western Land on such a continual and persistent basis if he had not been requested to do so by Pettit. [R. 675, Finding 57.]

In this connection, it is important to note that the only significant authority that Western Land was required to prove Glezos had in this case was the authority to communicate to Western Land on behalf of Jordan Foothills its acceptance of the two design changes. As stated earlier, when Conant discussed the design changes with Glezos, Glezos did not approve those design changes on behalf of Jordan Foothills, but stated that he would discuss the design changes with Pettit and get back to Conant. Within a couple weeks, Glezos did get back with Conant and tell him that Pettit had

approved the design changes. The trial court correctly found that Pettit was generally aware of Glezos's efforts on behalf of Jordan Foothills and not only acquiesced in the conduct, but approved it. [Finding No. 53(g), R. 675; SOF No. 17.]

The fact that both Glezos and Pettit denied at trial that Glezos had any authority to act on behalf of Jordan Foothills is unimportant. Significantly, the trial court specifically found that the testimony of Pettit and Glezos was not credible (citing, among other things, numerous instances where their testimony was impeached) and chose to believe the testimony of Conant and Diehl and the other relevant evidence. [Findings Nos. 57 and 59, R. 675-676.] A principal and agent cannot avoid responsibility for the agent's conduct by simply denying in unison that the agent had authority. Proof of express authority is not dependant upon an admission from the principal or agent, but may be proven based upon the words and conduct of the principal and agent and all the other surrounding facts and circumstances relevant to the agency determination. [See cases cited at p. 36-37, *supra*]

Presumably recognizing the substantial evidence set forth above demonstrating Glezos's authority, the *only* argument that Jordan Foothills makes in its brief (p. 27) that no express authority existed is that Pettit never expressly stated to anyone at Western Land that Glezos had authority to act on Jordan Foothills's behalf. Aside from ignoring the fact that Pettit told Western Land to deal with Glezos, this argument misapprehends the concept of express authority.

Express authority does not depend upon an express statement by the principal to the third party that the agent has authority. Rather, express authority exists where the principal manifests *to the agent* the principal's intent in words, conduct or by implication that the agent has authority to do a particular act. [See cases cited at pp. 36-37, *supra*.] “[W]hether express agency is formed depends on the actual interaction between the putative principal and agent, not any perception a third party may have of the relationship.” *Weil v. Murray*, 161 F. Supp. 2d 250, 258 (S.D.N.Y. 2001). *Accord, Itel Containers International Corp. v. Atlanttrafik Express Service Ltd.*, 909 F. 2d 698, 702 (2nd Cir. 1990); *In re Lernout & Hauspie Securities Litigation*, 230 F. Supp. 2d 152, 174 (D. Mass. 2002).⁷

(b) Glezos Had Implied Authority.

Because Glezos had express authority to act on behalf of Jordan Foothills with respect to communications with Western Land concerning the platting process, he also

⁷ According to Jordan Foothills's mistaken view, a principal could expressly grant an agent authority to perform an act, but then deny that the agent had express authority because the principal did not expressly state to the third party that the agent had authority. Such a result would be beyond reason. Indeed, in many, if not most, circumstances, the principal has no direct contact with the third party with whom the agent deals and therefore would not even have an occasion to make such a statement concerning authority.

had the implied authority to do all acts incidental to the approval of the design of the plat, which included authority to communicate Jordan Foothills's approval of the two design changes to the plat.[Conclusion No. 13, R. 680.] See, *Zions First Nat. Bank*, 762 P.2d at 1094. In this regard, such authority may be implied based upon a course of dealing between the parties. See, e.g., *United States v. Fulcher*, 188 F. Supp. 2d 627, 635 (W.D. Vir. 2002); *Pasant v. Jackson National Life Insurance Co.*, 52 F.3d 94, 97 (5th Cir. 1995).

3. Glezos Had Apparent Authority.

Apparent authority exists where the conduct of the principal “reasonably interpreted, causes the third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him.” *Luddington v. Bodenvest Ltd.*, 855 P.2d 204, 208 (Utah 1993). In order to prove apparent authority, a plaintiff is required to show (1) that the principal has manifested his consent to the exercise of such authority; (2) that the third person knows the facts and, acting in good faith, had reason to believe and did actually believe, that the agent possessed such authority; and (3) that the third person, relying on such appearance of authority, has changed his position and will be injured or suffer loss if the acts done or transaction executed by the agent does not bind the principal. 855 P.2d at 209. Apparently authority may be established based upon a course of dealing or based upon conduct in a single transaction. *Malia, State Bank*

Com'r. v. Giles, 114 P.2d 208, 211 (Utah 1941); *Great Northern Insurance Co. v. ADT Security Services, Inc.*, 517 F. Supp. 2d 723, 746 (W.D. Pa. 2007). This Court grants substantial deference to the trial court's application of this equitable doctrine. *Glew v. Ohio Sav. Bank*, 2007 UT 56, ¶19, 181 P.3d 791.

In the case at bar, the district court correctly found that Glezos had apparent authority to act on behalf of Jordan Foothills with respect to the Property based upon the conduct described above, including Pettit's representation to Western Land's real estate agent, Mr. Richards, that Glezos worked for Pettit; completing the Sycamore Phase 9 purchase on terms negotiated on Pettit's behalf by Glezos; directing Western Land to deal with Jordan Foothills through Glezos; directing Glezos to communicate with Western Land on Jordan Foothills's behalf; establishing a course of dealing between Jordan Foothills and Western Land whereby Pettit worked generally through the efforts of Glezos; permitting Glezos to negotiate the terms of the Option Agreement and make handwritten changes to the agreement on behalf of Jordan Foothills; transmitting all information and requests through Glezos; and allowing Glezos to act as Jordan Foothills's sole representative from the time the Option Agreement was negotiated and signed through the August 8, 2007 West Jordan City meeting at which approval of the Final Plat was obtained and thereafter.

Again, the trial court found, and the evidence established, that Pettit was generally aware of Glezos's efforts on behalf of Jordan Foothills and not only acquiesced in such conduct, but approved it. [Finding No. 53 and Conclusion Nos. 11 and 14, R. 674-675 and 679-680.] As demonstrated earlier, Pettit himself testified he knew Glezos was communicating with Western Land concerning the approval process on Pettit's behalf and that Glezos was reporting to Pettit concerning the approval process. [SOF No. 16.] This evidence is fully sufficient to support the trial court's apparent authority finding.

Jordan Foothills wants to narrowly and unnaturally limit the significance of Glezos's involvement in the negotiation and execution of the Option Agreement as supposedly only showing that Glezos had apparent authority to negotiate the remaining terms of the agreement not agreed to at the coffee shop. Although there is far more evidence of Glezos's authority, his negotiation and then his delivery of the signed contract to Western Land whereby he communicated to Western Land Jordan Foothills's approval and acceptance of the contract, is by itself evidence from which the trial court was entitled to make the reasonable inference that Glezos was authorized to communicate approvals concerning the Option Agreement and the Property from Jordan Foothills to Western Land. In this regard, Pettit did not limit Glezos's authority to the negotiation of the agreement. Indeed, Pettit told Western Land to deal with Glezos in the transaction and knew Western Land was doing so.

Jordan Foothills argues in its brief that apparent authority cannot be proven based on the words and conduct of the agent. Although that principle of law is certainly correct, it is irrelevant because Western Land is not simply relying on Glezos' conduct, but relies upon Pettit's very significant conduct discussed above.

Jordan Foothills also tells the Court that Western Land did not rely on Glezos having authority, but if Western Land did so "it might have a basis for asserting apparent authority." [Aplt's Br., p. 32.] To the contrary, Western Land relied on Glezos's authority in pursuing approval of the preliminary and final plats and in communicating with Glezos concerning the approval process rather than directly with Pettit, and the trial court so found. [Findings 54-56, R. 675.]

4. In Any Event, the Two Design Changes Were Not Material.

Even if it were erroneously assumed for argument that Glezos had no authority to communicate Jordan Foothills's approval of the two design changes made to the plat, the trial court found based on substantial evidence that the design changes were not sufficiently material to entitle Jordan Foothills to terminate the Option Agreement. [R. 681, Conclusion No. 19.] Once more, the evidence at trial demonstrated that the design changes actually benefitted the project because cul-de-sac lots are more valuable than ordinary lots and Jordan Foothills presented no evidence to the contrary. [SOF Nos. 20

and 23.] Jordan Foothills has failed to demonstrate that the trial court's determination is not supported by the evidence.

Jordan Foothills argues that the trial court found that the design changes were material, but supposedly inserted a higher standard that the changes were not "sufficiently material" and thus imposed a higher standard than provided in the contract. Reading the findings as a whole, however, as this Court must do, *cf. Carsten v. Carsten*, 2007 UT App 174, ¶ 2, 164 P.3d 429, it is clear that the trial court was finding that although the design changes were material in the sense they were significant, the design changes did not entitle Jordan Foothills to terminate the agreement and obtain a refund because, as stated above, the design changes actually benefitted Jordan Foothills. In Conclusion 19, the Court cited cases in support of its lack of materiality ruling in which deviations from the contract that did not significantly impact a party were insufficient to justify termination. [R. 681.] Not surprisingly, Jordan Foothills made no attempt below, and makes no attempt on appeal, to demonstrate that the design changes were in any way detrimental to Jordan Foothill's interests.

C. WESTERN LAND SHOULD BE AWARDED ITS REASONABLE ATTORNEYS' FEES AND COSTS ON APPEAL.

Under the second paragraph 11 of the Option Agreement entitled "Litigation Expenses," the prevailing party is entitled to recover all costs and expenses of litigation,

including reasonable attorneys' fees. Accordingly, if this Court affirms the trial court's judgment, Western Land should be awarded its reasonable attorneys' fees and costs incurred on appeal. *See, e.g., Barnes v. Clarkson*, 2008 Ut App. 44, ¶18, 178 P.3d 930, 934.

VII.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the trial court's judgment should be affirmed in all respects and that Western Land should be awarded its reasonable attorneys' fees and costs incurred on appeal.

DATED this 18th day of July, 2008.

BURBIDGE MITCHELL & GROSS

A handwritten signature in black ink, appearing to read 'Richard D. Burbidge', is written over a horizontal line.

Richard D. Burbidge
Attorneys for Plaintiffs/Appellees

CERTIFICATE OF SERVICE

On the date below written, the undersigned hereby certifies that two (2) true and correct copies of **APPELLEE'S BRIEF** was served via hand-delivery upon:

Michael D. Zimmerman
Troy L. Booher
Katherine Carreau
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DATED this 18th day of July, 2008.

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke at the end, positioned over a horizontal line.

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