

2008

Karl H. Seethaler v. Don W. Call, Linda Call : Brief of Appellant

Utah Court of Appeals

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Recommended Citation

Brief of Appellant, *Seethaler v. Call*, No. 20080228 (Utah Court of Appeals, 2008).

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| Plaintiff / Appellant, |) | |
| |) | |
| v. |) | |
| |) | |
| DON W. CALL and LINDA CALL, |) | Appeal No. 20080228 |
| |) | |
| Defendants/ Appellees, |) | District Court No. 030100618 |
| |) | |
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APPEAL OF ORIGINAL, INTERIM, AND FINAL FINDINGS OF FACT AND
CONCLUSIONS OF LAW AND JUDGMENTS AND DECREES
ENTERED BY THE FIRST JUDICIAL DISTRICT COURT OF CACHE COUNTY,
STATE OF UTAH, THE HONORABLE GORDON J. LOW AND TIMOTHY R.
HANSEN PRESIDING

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STATEMENT OF JURISDICTION

Jurisdiction in this matter is conferred upon the Utah Court of Appeals pursuant to Utah Code Ann. § 78-2a-3(2)(j) (2008) because the Supreme Court of Utah transferred this appeal to the Utah Court of Appeals.

STATEMENT OF ISSUES ON APPEAL

1. Whether, in a case involving Calls' construction of an encroaching cement wall on Seethaler's property, the trial court erred by awarding money damages to Seethaler rather than ordering Calls to remove the encroaching wall. (R. at 79, 433, 435, 442-444).

Standard of Review: Correctness with respect to Conclusions of Law and when considering the trial court's choice of remedy, an abuse of discretion standard.

Authorities for Standard of Review: In cases at law, findings of fact are reviewed under a clearly erroneous standard, *State v. Pena*, 869 P.2d 932, 935 (Utah 1994), and conclusions of law are reviewed for correctness. *Id.* at 936; *see also Scharf v. BMG Corp.*, 700 P.2d 1068, 1070 (Utah 1985). For cases in equity, the standard of review for both findings of fact and conclusions of law is the same as for cases at law. *RHN Corp. v. Veibell*, 2004 UT 60, ¶ 35, 96 P.3d 935. With respect to a trial court's choice of remedy the standard is abuse of discretion. *Johnson v. Hermes*, 2005 UT 82, ¶ 28, 128 P.3d 1151.

2. Whether the trial court erred in finding Calls acted in good faith. (R. at 437).

Standard of Review: Correctness; Clearly Erroneous

Authority for Standard of Review: In cases at law, findings of fact are reviewed under a clearly erroneous standard, *State v. Pena*, 869 P.2d 932, 935 (Utah 1994), and conclusions of law are reviewed for correctness. *Id.* at 936; *see also Scharf v. BMG Corp.*, 700 P.2d 1068, 1070 (Utah 1985). For cases in equity, the standard of review for both findings of fact and conclusions of law is the same as for cases at law. *RHN Corp. v. Veibell*, 2004 UT 60, ¶ 35, 96 P.3d 935.

3. Whether the trial court erred in granting Calls a *de facto* right of condemnation by allowing Calls to keep the encroaching wall in place in perpetuity, forever enclosing Seethaler's land within Calls' encroaching wall. (R. at 79, 433, 435, 438-39, 442).

Standard of Review: Correctness

Authority for Standard of Review: In cases at law findings of fact are reviewed under a clearly erroneous standard, *State v. Pena*, 869 P.2d 932, 935 (Utah 1994), and conclusions of law are reviewed for correctness. *Id.* at 936; *see also Scharf v. BMG Corp.*, 700 P.2d 1068, 1070 (Utah 1985). For cases in equity, the standard of review for both findings of fact and conclusions of law is the same as for cases at law. *RHN Corp. v. Veibell*, 2004 UT 60, ¶ 35, 96 P.3d 935.

DETERMINATIVE PROVISIONS OF LAW

There are no constitutional provisions, statutes, ordinances, rules, or regulations determinative or of central importance to this appeal. Cited case law precedent is determinative to the issues before this Honorable Court.

STATEMENT OF THE CASE

All facts contained in the Statement of Facts are referenced to the proceedings below.

The cited record of proceedings below shall be referred to in the following manner:

1. References to the Record Pleadings and Entries at Numbered Pages of the Record Index: (R. at ____).
2. References to the Findings of Fact and Conclusions of Law filed April 28, 2005: (Findings, 2005, R. at ____ ¶ ____).
3. References to the Judgment and Decree filed April 28, 2005: (Judgment, 2005, R. at ____ ¶ ____).
4. References to the Interim Supplemental Findings of Fact and Conclusions of Law filed July 27, 2007: (Interim Findings, 2007, R. at ____ ¶ ____).
5. References to the Interim Supplemental Judgment and Decree filed July 27, 2007: (Interim Judgment, 2007, R. at ____ ¶ ____).
6. References to the Final Findings of Fact and Conclusion of Law filed January 28, 2008: (Final Findings, 2008, R. at ____ ¶ ____).
7. References to the Final Judgment and Decree filed on January 28, 2008: (Final Judgment, 2008, R. at ____ ¶ ____).
8. References to the Official Transcript of Bench Trial dated June 29, 30, and July 1, 2004: (T. Vol. ____ at ____).
9. Reference to Transcript of Bench Trial dated November 28, 2006: (2006-T at ____).

A. Nature of the Case

This appeal arises from a Decision from the Bench made July 1, 2004 (T. Vol. 3 at 73); Judgment and Decree (Judgment, 2005, R. at 189; attached as Exhibit A), and Findings of Facts and Conclusions of Law (Findings, 2005, R. at 195; attached as Exhibit B) both filed April 28, 2005; Interim Supplemental Judgment and Decree (Interim Judgment, 2007, R. at 432; attached as Exhibit C), and Interim Supplemental Findings of Facts and Conclusions of Law (Interim Findings, 2007, R. at 437; attached as Exhibit D), both filed July 27, 2007; entered by the First District Court, Cache County, State of Utah, the Honorable Gordon J. Low presiding; and Final Judgment and Decree (Final Judgment, 2008, R. at 480), and Final Findings of Fact and Conclusions of Law (Final Findings, 2008, R. at 477), both filed January 28, 2008; entered by the First District Court, Cache County, State of Utah, the Honorable Timothy R. Hansen presiding, which collectively found Calls knowingly built an encroaching wall on Seethaler's property. (Findings, 2005, R. at 211-13). Nonetheless, the trial court found Calls acted in good faith and refused to order the removal of the encroaching wall, knowingly and intentionally built on Seethaler's property. (Interim Findings, 2005, R. at 437-38). Seethaler appeals the rulings of the First District Court to the extent monetary damages were awarded rather than requiring Calls to remove the wall, and the finding Calls acted in good faith. Seethaler also appeals the trial court's decision to grant Calls a *de facto* private right of condemnation.

B. Course of Proceedings

Seethaler originally filed a Complaint against Calls in this matter on March 31, 2003. (R. at 3). On April 28, 2003, Calls answered the Complaint and asserted a Counterclaim against Seethaler. (R. at 12). On June 22, 2004, Seethaler filed its Trial Brief requesting, *inter alia*, a judgment quieting title in the disputed parcel south of the reinforced concrete dividing wall built by Calls, a declaration that a long-standing fence line and consistent survey were reflective of the true and correct boundary line between Seethaler's and Calls' property, and that said encroaching wall be removed at Calls' expense. (R. at 77, 79). The trial court issued its decision from the Bench on July 1, 2004. (T. Vol. 3 at 73). On April 27, 2005, a Memorandum Decision served as notice to the parties of the entry of the Findings of Fact and Conclusions of Law and Judgment and Decree. (R. at 187).

The Court signed the Judgment and Decree and Findings of Fact and Conclusions of Law on April 28, 2005. (Judgment, 2005, R. at 189; Findings, 2005, R. at 195). They established that Seethaler had satisfied each and every requirement for the establishment of a boundary by acquiescence pursuant to Utah Law, and, thus, the wall built by Calls was located on Seethaler's property. (Judgment, 2005, R. at 191 ¶ 4; Findings, 2005, R. at 211 ¶ 4). However, the trial court reserved for later hearing the issue of how the parties were to address the removal or other handling of the encroaching wall. (Judgment, 2005, R. at 193 ¶ 8; Findings, 2005, R. at 214 ¶ 10). Additionally, the Calls' Counterclaim and all causes of action therein were dismissed with prejudice. (Judgment, 2005, R. at 194 ¶ 10; Findings, 2005, R. at 214 ¶ 11).

On July 27, 2007, after further evidentiary hearings regarding the matters reserved in the Judgment and Decree and Findings of Fact and Conclusions of Law, the trial court entered an Interim Supplemental Judgment and Decree and Interim Supplemental Findings of Fact and Conclusions of Law. (Interim Judgment, 2007, R. at 432; Interim Findings, 2007, R. at 437). The trial court determined that, although Calls built the wall on Seethaler's property, it may remain in place in perpetuity. (Interim Judgment, 2007, R. at 433 ¶ 2, 435 ¶ 16; Interim Findings, 2007, R. at 438 ¶ 2, 444 ¶ 14). The trial court also specifically found that all parties acted in good faith and that no party acted in bad faith. (Interim Findings, 2007, R. at 437 ¶ 1). Additionally, the trial court reserved for a later hearing in equity, matters concerning damage done to a tree on property of Seethaler's Co-Plaintiff; an issue resolved by the trial court and not being appealed. (Interim Judgment, 2007, R. at 435 ¶ 17; Interim Findings, 2007, R. at 444 ¶ 15). Finally, the interim judgments provided the time limit for appeal by either party should extend until thirty (30) days after final disposition of a pending motion, and each party waived any objection to and consented to the appeal time as provided. (Interim Judgment, 2007 R. at 435 ¶ 19; Interim Findings, 2007, R. at 445 ¶ 17).

The Court entered the Final Judgment and Decree and Final Findings of Fact and Conclusions of Law on January 28, 2008. (Final Judgment, 2008, R. at 477; Final Findings, 2008, R. at 480). On February 25, 2008, Seethaler filed a Notice of Appeal. (R. at 487).

C. Disposition in the Court Below

The trial court ruled in favor of Seethaler on the issue of the location of the correct boundary line between the Seethaler's property and Calls' property. The trial court determined Seethaler satisfied each and every requirement for the establishment of a boundary by acquiescence pursuant to Utah law. (Judgment, 2005, R. at 191 ¶ 4). Further, it was determined, even if Seethaler could not meet the boundary by acquiescence requirements, the Hansen Survey (a 2002 survey that is consistent with Seethaler's position as to the location of the boundary line) accurately delineates the true boundary line. (Findings, 2005, R. at 211 ¶ 5). The treatment of the encroaching wall built by Calls was reserved for later judgment. (Judgment, 2005, R. at 193 ¶ 8).

On July 27, 2007, an Interim Supplemental Judgment and Decree (Interim Judgment, 2007, R. at 432) and Interim Findings of Facts and Conclusions of Law (Interim Findings, 2007, R. at 437) were entered that dealt with the treatment of the encroaching wall. It was determined that the Hansen Survey should be recorded to reflect the property lines and boundaries between the Seethaler's and Calls' property. (Interim Judgment, 2007, R. at 433 ¶ 1). However, despite the true and correct property lines being recorded, the trial court allowed the existing cement wall to remain in place in perpetuity, and granted occupancy of Seethaler's property, now enclosed by the cement wall, to Calls. (Interim Judgment, 2007, R. at 433 ¶ 2, 435 ¶ 16). In other words, Seethaler's land, enclosed by Calls' encroaching wall, is to remain under the legal ownership of Seethaler (thus, subjecting him to taxes and other legal obligations and risks of an owner on the enclosed land), but granting Calls rights of

exclusive occupancy on a perpetual basis. (Interim Judgment, 2007, R. at 433 ¶ 3). Calls' encroaching wall was allowed to remain where wrongfully built.

As compensation for the taking, the trial court awarded Seethaler monetary damages: namely, \$8,900 for the loss of the property that was "taken" from Seethaler (Interim Judgment, 2007, R. at 433 ¶ 7; Interim Findings, 2007, R. at 439 ¶ 16) and \$500 for the anticipated taxes Seethaler will have to pay for the taken property over the next 20 years. (Interim Judgment, 2007, R. at 433 ¶ 8). Costs were also awarded to Seethaler in the amount of \$609.25. (Interim Judgment, 2007, R. at 435 ¶ 15).

In addition, the trial court found that all parties in this matter acted in good faith and that no party acted in bad faith. (Interim Findings, 2007, R. at 437 ¶ 1). This decision was made despite numerous findings showing Calls willfully, intentionally, and with notice of their wrongful trespass, commenced and continued building an encroaching wall on Seethaler's property. (See generally Findings, 2005, R. at 199-202). Further, the court found Calls entered the court with unclean hands. (Findings, 2005, R. at 205 ¶ 76). Nevertheless, the court found that Calls acted in good faith, and refused to order the removal of the encroaching wall, knowingly and intentionally built by Calls on Seethaler's property. (Interim Findings, 2007, R. at 433 ¶ 1-2).

STATEMENT OF FACTS

1. Appellant Karl H. Seethaler owns land (“Seethaler Property”) adjacent to land owned by Don W. Call and Linda Call (“Call Property”). The north boundary of the Call Property is the south boundary of the Seethaler Property (“Boundary Line”). (Findings, 2005, R. at 197 ¶ 4).

2. Construction on the Seethaler Property began in about 1972 and consists of four (4) apartment buildings and a total of thirty-six (36) rental units rented to single students. (Findings, 2005, R. at 197 ¶ 6). Typically, there are four (4) students in each unit, with a total capacity of approximately 140 students. (2006-T at 12). The parcel size is slightly over one acre.

3. The Call Property was approved by Logan City for development and construction in the early 1990’s and Don W. Call and Linda Call (collectively “Calls”) began constructing buildings on the Call Property in 1994. (Findings, 2005, R. at 197 ¶ 7).

4. In 1993, Calls hired Wayne Crow, a licensed surveyor, to survey and prepare a site plan for the Call Property (“Crow Survey”). The survey utilized and referenced a fence between the Call Property and the Seethaler Property as the northern line of the development of the Call Property, and as the boundary between the properties (“Fence Line”). (Findings, 2005, R. at 197 ¶ 10). The Crow Survey clearly placed the Boundary Line at the Fence Line. (Findings, 2005, R. at 202 ¶ 42). Wayne Crow notified Calls that the Fence Line plainly displayed a line of possession by Seethaler and the Crow Survey recognized the Fence Line

as the north boundary of the Call property. (Findings, 2005, R. at 202 ¶ 44). Calls provided this survey to Logan City as a basis for the development. (Findings, 2005, R. at 197 ¶ 10).

5. In 2001, Calls hired Layne Smith, a licensed surveyor, to resurvey the Call Property (“Smith Survey”). (Findings, 2005, R. at 197 ¶ 11). Before Smith conducted the survey, Don Call requested Smith give him a few extra feet of property and a description of the Fence Line as a “convenience fence.” (Findings, 2005, R. at 206 ¶ 85). Don Call informed Layne Smith of his need for additional property so he could add another apartment unit to his development. (Findings, 2005, R. at 206 ¶ 83). As a result, the Smith Survey reflects a self-serving purpose. (Findings, 2005, R. at 206 ¶ 83).

6. The Smith Survey gave Don Call what he requested and extended the Call Property Boundary Line north beyond the Fence Line with enough additional square footage to allow Calls to add an additional apartment unit. (Findings, 2005, R. at 197-98 ¶ 12).

7. The Fence Line had been the recognized division between the Call and Seethaler property since at least 1963. Seethaler and his predecessors in interest have occupied all land north of the Fence Line for longer than thirty-two (32) years. Calls had never pastured, utilized or occupied land north of the Fence Line until commencing construction of the wall in 2002, after the Smith Survey. (Findings, 2005, R. at 200 ¶¶ 28-30).

8. Calls and their predecessors in interest never objected to the location of the Fence Line, nor claimed it was anything other than a boundary fence, until Calls received a draft copy of the Smith Survey in late 2001. (Findings, 2005, R. at 201 ¶ 31).

9. Calls and the City of Logan relied on the Crow Survey from the time Calls began developing their land in the early 1990's until they commissioned the Smith Survey in 2001. (Findings, 2005, R. at 199 ¶ 18). Additionally, on February 28, 2002, Calls relied on the 1993 Crow Survey when successfully attempting to move the placement of a proposed building in a meeting with the Logan City Planning Commission. Plaintiff's Trial Exhibit 35.

10. In 2002, Calls began developing along the north boundary of Calls' Property consistent with the Smith Survey. (Findings, 2005, R. at 199 ¶ 19). Calls did not begin the encroaching development between the Call and the Seethaler Property until the Summer of 2003. (T. Vol. 1 at 25). This development interfered with Seethaler's use of his property. (Findings, 2005, R. at 199 ¶ 20).

11. During 2002 and 2003, Calls constructed a cement retaining wall ("Retaining Wall") north of the Fence Line and hauled in several feet of fill onto the Seethaler Property without permission from Seethaler. (Findings, 2005, R. at 199 ¶ 21).

12. A letter from Seethaler dated May 28, 2002, and a letter from Seethaler's counsel dated July 30, 2002, to Calls placed them on notice that they proceeded with the construction and development at their own risk, but even after court action commenced, Calls continued with the construction. (Findings, 2005, R. at 200 ¶ 22).

13. In 2002, at Seethaler's request, Jeff Hansen, a licensed surveyor, performed a survey ("Hansen Survey"). The Hansen Survey closely approximates and is consistent with the Crow Survey and shows the Fence Line as the Boundary Line between the Call Property

and the Seethaler Property. The Hansen Survey accurately delineates the true Boundary Line between the Seethaler and Call Properties. (Findings, 2005, R. at 198 ¶¶ 13-14).

14. The Hansen Survey is consistent with the Crow Survey commissioned by Calls that used the historic Fence Line as the boundary between the Call Property and the Seethaler Property. (Findings, 2005, R. at 199 ¶ 15).

15. The Hansen survey shows that the Smith Survey placed the deeded Boundary Line between two (2) to six (6) feet north of the true Boundary Line between the Call Property and the Seethaler Property as marked by the Fence Line. (Findings, 2005, R. at 199 ¶ 16).

16. On April 28, 2005, the court entered a Judgment and Decree and Findings of Fact and Conclusions of Law. (Judgment, 2005, R. at 189; Findings, 2005, R. at 195). The court found Seethaler had satisfied each and every requirement for the establishment of a boundary by acquiescence pursuant to Utah law as the Fence Line had been mutually acquiesced to as the Boundary Line between the Call Property and the Seethaler Property. (Judgment, 2005, R. at 191 ¶ 4; Findings, 2005, R. at 211 ¶ 4).

17. Calls unilaterally removed and obliterated the Crow Survey markers and the cedar post fence located on the Fence Line between the Seethaler Property and the Call Property. (Findings, 2005, R. at 200 ¶ 23).

18. Calls' Retaining Wall and fill created an unnatural dam that blocked the long-established flow of water run-off from the Seethaler Property, and has created potential flooding and drainage problems on the Seethaler Property. Calls also destroyed portions of

the Seethaler Property parking lot. Calls did all this without permission of Seethaler and without regard to Seethaler's objections. (Findings, 2005, R. at 200 ¶¶ 24, 27).

19. There is a utility pole north of the Fence Line which only serves the Seethaler Property. This pole predates the development of the Call Property in 1993. If the Smith Survey was accepted, the utility pole would be on the Call Property, and the Seethaler Property does not have a utility easement across the northern edge or any portion of the Call Property. The Hansen Survey places the pole on the Seethaler Property consistent with a utility easement along the south five feet (5') of the Seethaler Property. No similar easement exists on the northern portion of the Call Property. (Findings, 2005, R. at 201 ¶¶ 34-36).

20. The Calls' Retaining Wall sits north of the Seethaler's utility pole and related utility easement on the Seethaler's side of the Fence Line. (Findings, 2005, R. at 201 ¶ 37).

21. Calls acknowledged that the Fence Line was the legitimate Boundary Line between the Call Property and the Seethaler Property when they constructed a curb and gutter in 1993. The curb and gutter runs north and south along the eastern boundary of the Calls Property and stops at the Fence Line. (Findings, 2005, R. at 201 ¶ 39; Plaintiff's Trial Exhibit 28 photos m, o, r and t).

22. Seethaler's neighbors, the Wendts, constructed a canal Retaining Wall that ends at the same location as the Fence Line demonstrating that the Fence Line was widely recognized in the community as the Boundary Line. (Findings, 2005, R. at 201-02 ¶¶ 40-41; Plaintiff's Trial Exhibit 28 photos a and c).

23. No one, including the Calls, ever objected to the Boundary Line defined in the Crow Survey or the Fence Line as a Boundary Line until Calls commissioned the self-serving Smith Survey in late 2001. (Findings, 2005, R. at 202 ¶ 43).

24. Don Call admitted that he or his agents unilaterally removed all historical monuments during the construction process. These monuments included Seethaler's improvements and trees and the survey markers placed by Don Call's surveyor, Wayne Crow, in connection with the 1993 Crow survey. (Findings, 2005, R. at 203 ¶ 54).

25. Don Call acknowledged that the trees he removed and land beneath them were not his when he asked Seethaler, "shall I take these trees down for you?" in a conversation with Seethaler in 2001. (Findings, 2005, R. at 203 ¶ 55).

26. Don Call cannot unilaterally destroy all of the evidence of a boundary Fence Line, including his own survey markers, and later claim that no evidence existed concerning the location of the Fence Line. (Findings, 2005, R. at 205 ¶ 76).

27. The Calls did not bring "clean hands" into the Court, and they cannot now profit by their own destruction of relevant evidence. (Findings, 2005, R. at 205 ¶ 76).

28. Don Call himself testified that the historic location of the Fence Line was several feet south of his Retaining Wall. (Findings, 2005, R. at 205 ¶ 79).

29. On July 27, 2007, the Interim Supplemental Findings of Fact and Conclusions of Law and Interim Supplemental Judgment and Decree were entered. The trial court concluded all parties acted in good faith. (Interim Findings, 2007, R. at 437 ¶ 1). The Interim Judgments awarded Seethaler a monetary award rather than ordering the Retaining

Wall to be removed from Seethaler's property. (Interim Findings, 2007, R. at 439 ¶¶ 2, 15). The trial court determined the Retaining Wall may remain in place in perpetuity because it is economically unfeasible and unreasonable to require removal of the wall. (Interim Findings, 2007, R. at 438 ¶¶ 2, 6; 444 ¶ 14).

30. Don Call showed regard for his self-interest and not for his neighbors' interests when he or his agents built the Retaining Wall and unilaterally destroyed old survey monuments and evidence of natural drainage patterns. (Findings, 2005, R. at 208 ¶ 102).

31. Calls took 612 square feet of property from Seethaler. (Interim Findings, 2007, R. at 439 ¶ 15).

32. The Property that was wrongfully taken from Seethaler as a result of the Retaining Wall and fill hauled in north of the Fence Line reduced the size and effective use of the parking lot on the Seethaler Property. (Findings, 2005, R. at 204 ¶ 68).

SUMMARY OF ARGUMENT

All property owners have the right to the exclusive enjoyment of their property, free from interference of other private citizens. The issue before this court is whether Seethaler should have his lawfully obtained property rights of possession, use, enjoyment, disposition, and exclusion destroyed and revoked by a wrongful and intentional encroacher because, as determined by the trial court, equity so requires. This Court should find Seethaler was a victim of irreparable harm that the monetary damages awarded by the trial court do not

remedy. The wall must be removed, and this Court must reestablish Seethaler's constitutionally granted and protected property rights.

Utah law and equity require this Court to determine the trial court erred in awarding monetary damages because Seethaler suffered an irreparable injury, the encroachment was not made innocently, and monetary damages were not adequate compensation.

An irreparable injury is a wrong of a continuing character or a wrong which occasions damages that are estimated only by conjecture. Seethaler has been irreparably injured because Calls built an encroaching Retaining Wall on Seethaler's property which the trial court ruled could remain there in perpetuity. Seethaler was further irreparable injured because the trial court's award to Seethaler was based solely on the current market value of the square-footage taken by Calls and failed to consider other inconveniences, costs, and hardships Seethaler would or potentially could incur due to encroachment. This attempt by the trial court to put a price on the perpetual burden constructed on Seethaler's land was based purely on conjecture and was inappropriate.

Additionally, the trial court inappropriately applied the balancing of equities test in its determination to award monetary damages. Allowing Calls to benefit from their wrongful encroachment in the name of equity is a far cry from the goal of the balancing of equities test.

If the encroacher is not innocent, equity requires not that the encroachment remain as wrongfully built, but that the property is restored, without regard to the inconveniences or hardships that may result from removal of the encroachment. Calls had knowledge of the true and correct Boundary Line and had repeated notification that they were encroaching on

Seethaler's property; however, Calls continued with their encroachment. Thus, equity requires Seethaler's land be restored to its pre-encroachment state.

The trial court also erred in its determination that the Calls acted in good faith. Good faith requires an honest belief in the propriety of the activities in question. Despite findings intimating that Calls both subjectively knew and objectively should have known the location of the true and correct Boundary Line and determinations that Calls entered court with unclean hands and knew they were encroaching on Seethaler's property, no bad faith was found by the trial court.

Lastly, the trial court inappropriately granted Calls a *de facto* private right of condemnation. It is well established there is no private right of condemnation. Notwithstanding, the trial court allowed Calls to maintain the Retaining Wall on Seethaler's property in perpetuity for the exclusive use of Calls. This was an improper allowance of privatized eminent domain.

Accordingly, this Court should find the remedy of the trial court was improper, insufficient, and inequitable. Real property is a unique and often irreplaceable asset that monetary damages cannot and do not always remedy, regardless of the amount. In Seethaler's own words, "every foot [of property]... is very critical." The encroaching wall must be removed at Calls' cost and Seethaler's property must be restored to its pre-encroachment state.

ARGUMENT

I. THE TRIAL COURT ERRED BY AWARDING SEETHALER MONETARY DAMAGES RATHER THAN ORDERING CALL TO REMOVE THE ENCROACHING WALL FROM SEETHALER'S PROPERTY

The trial court erred by allowing Calls to maintain their encroaching wall on Seethaler's property because Seethaler suffered irreparable harm that monetary damages do not sufficiently satisfy, and because the trial court misapplied the balancing of equities test in determining the appropriate remedy.

A. The removal of the Retaining Wall was the only adequate remedy for the irreparable harm suffered by Seethaler.

Seethaler suffered an irreparable injury because the encroachment on his property was of a continuing character and, alternatively, because the monetary damages awarded by the trial court were estimated by conjecture. The monetary damages awarded by the trial court were not adequate to compensate Seethaler for the irreparable injury he suffered. The Supreme Court of Utah has held that relief requiring the removal of the interference is the mandatory remedy to prevent a private party from interfering with another private party's property rights "upon a showing of irreparable injury for which there is no adequate remedy at law." *Strawberry Elec. Serv. Dist. v. Spanish Fork City*, 918 P.2d 870, 881 (Utah 1996); *Gillmor v. Wright*, 850 P.2d 431, 438 (Utah 1993); *Carrier v. Lindquist*, 2001 UT 105 at ¶ 31, 37 P.3d 1112 (Utah 2001) (sets forth circumstances in which court can apply balancing of equities test rather than issue a "mandatory injunction" that would require the removal of the interference).

1. *Seethaler suffered an irreparable injury that mandates relief requiring the removal of the encroaching Retaining Wall because the encroachment is continuing in nature.*

Seethaler was injured irreparably by Calls' encroachment and the trial court's ruling to allow Calls to continue their encroachment in perpetuity. The Supreme Court of Utah defines "irreparable injury" as "wrongs of a repeated and continuing character, or which occasion damages that are estimated only by conjecture, and not by any accurate standard." *Systems Concepts, Inc. v. Dixon*, 669 P.2d 421, 427-28 (Utah 1983).

In applying the "irreparable standard," the Supreme Court of Utah held that if the damage from an encroachment was immeasurable in money damages, and was of a continuing nature, it constitutes irreparable injury that qualifies for injunctive relief requiring removal of the encroachment. *Carrier v. Lindquist*, 2001 UT 105 at ¶ 26. In *Carrier*, a newly built rock wall that partially obstructed an alley that was subject to an easement by adjoining landowners was in dispute. *Id.* at ¶¶ 7, 9. According to the defendants' deed, the wall was built on their property line; however, the alley was dedicated to the city for public use. *Id.* at ¶¶ 2, 4, 8. Therefore, the wall was built on the city's property. *Id.* The adjoining landowners, whose easement was partially obstructed, moved for and were granted injunctive relief to have the rock wall and all obstructions removed, and to have the alley restored back to its prior condition. *Id.* at ¶ 32.

Similar to the facts of *Carrier*, Calls have constructed an obstruction on property not their own that prevents Seethaler from full use and enjoyment of his property rights. (Findings, 2005, R. at 199-200 ¶¶ 20-27). Calls have constructed a Retaining Wall several feet onto Seethaler's property that is of a permanent and continuing nature. (Findings, 2005,

R. at 199-200, ¶¶ 21, 26, 204 ¶ 68; Interim Findings, 2007, R. at 439 ¶ 15). Such encroachment will continue to burden the Seethaler's land in perpetuity unless this court orders its removal. (Interim Findings, 2007, R. at 438 ¶ 7, 442 ¶ 2, 444 ¶ 14). Specifically, the Calls have "taken" 612 square feet from Seethaler. (Interim Findings, 2007, R. at 439 ¶ 15). By granting Calls "exclusive possession" of Seethaler's property now enclosed by Calls' Retaining Wall, Seethaler will have his property rights effectively extinguished forever. (Interim Findings, 2007, R. at 439 ¶ 16). The encroachment on Seethaler's property was of a continuing nature, and requiring the removal of the encroaching Retaining Wall and restoring Seethaler's property back to its pre-encroachment state was the only appropriate remedy.

2. *The monetary damages awarded by the trial court were estimated by conjecture, do not adequately compensate Seethaler, and the only way to cure Seethaler's irreparable injury is to order the Retaining Wall removed.*

No adequate remedy at law cures Seethaler's injury that resulted from the perpetual encroachment. "Irreparable injury justifying an injunction is that which cannot be adequately compensated in damages or for which damages cannot be compensable in money." *Systems Concepts, Inc. v. Dixon*, 669 P.2d 421, 427-28 (Utah 1983).

The monetary damages resulting from the encroaching wall are, like those in *Carrier*, capable of calculation only by conjecture. In *Carrier*, the Supreme Court of Utah held that injunctive relief requiring removal of the rock wall and restoration of the alley to its prior condition was appropriate, even though defendants had a real estate appraiser that estimated

the obstruction of the alley caused plaintiffs a loss of about \$600 in property value, which is “easily compensable in money.” *Carrier*, 2001 UT 105, at ¶ 26.

The court explained that the loss of \$600 in property value was not a complete look at the loss suffered by the plaintiffs. *Id.* Monetary damages were deemed inappropriate because they did not consider potential future uses of the alley by the plaintiffs and any attempt at such would be based on conjecture. *Id.* They further reasoned the plaintiffs were burdened by the wall every time they wished to deliver heavy or large items to the rear of their homes, and plaintiffs would suffer “obvious inconvenience, extra cost, and hardship” due to the alley obstruction. *Id.*

The court held “[i]t is clear that any amount to compensate plaintiffs for these losses would be based on conjecture of how plaintiffs may use the alley in the future and an estimate of how much money it would cost to carry out these conjectured plans without access through the alley.” *Id.* The court also dismissed the facts that only seven and a half feet of the alley was obstructed by defendants’ wall (the alley was fifteen feet wide), that the plaintiffs had alternative access to their homes, and plaintiffs had only lost the ability to transport large equipment through the alley. *Id.* at ¶ 25.

The fullness of the damages imposed on Seethaler by Calls’ encroachment are, like those in *Carrier*, capable of calculation only by conjecture. While the trial court considered testimony of a property appraiser and based its award on the appraiser’s determination of per square foot value of the property lost from the encroachment (Interim Findings, 2007, R. at 439 ¶ 15, 442 ¶ 7), the trial court did not consider other factors necessary to the determination

of the appropriate remedy. The *Carrier* standard requires courts to consider all “inconvenience, extra cost, and hardship” in encroachment award determinations. *Carrier*, 2001 UT 105 at ¶ 26. Reiterating the *Carrier* court’s analysis, any amount conjured up by the court to compensate Seethaler for losses due to a perpetual encroachment would be based on pure conjecture of how Seethaler may use the taken property in the future.

Engaging in what the Supreme Court of Utah refused to do in *Carrier*, the trial court in the case at issue calculated Seethaler’s damages caused by the perpetual encroachment by considering the effect of the encroachment on the injured parcel’s property value. (Interim Judgment, 2007, R. at 433 ¶¶ 6-8; Interim Findings, 2007, R. at 439 ¶ 15, 442 ¶ 7). The trial court entered judgment against Calls in favor of Seethaler in the sum of \$8,900.00 to compensate him for his property that was “taken.” (Interim Judgment, 2007, R. at 433 ¶¶ 6-8; Interim Findings, 2007, R. at 439 ¶ 15, 442 ¶ 7). (The trial court also awarded Seethaler \$500.00 for the anticipated taxes on the taken property over the next twenty (20) years (Interim Judgment, 2007, R. at 433 ¶ 8) and \$609.25 for costs (Interim Judgment, 2007, R. at 435 ¶ 15)).

Although the trial court put a price on the property taken from Seethaler, it failed to consider the other “inconvenience, extra cost, and hardship” that Seethaler would incur due to the perpetual encroachment allowed to remain on his property. As determined in *Carrier*, this court should determine that monetary damages based simply on the decrease in property value caused by the irreparable injury were insufficient because, even though they were

“easily compensable in money,” they failed to incorporate other factors, including future uses and inconveniences.

Seethaler’s property is used for rental purposes and requires the use of the several hundred square feet wrongfully taken by Calls for the successful operation of his venture. (Findings, 2005, R. at 197 ¶ 6; Interim Findings, 2007, 439 ¶ 15; 2006-T. at 12-18). As a landlord, Seethaler has a duty to provide a safe, convenient, and comfortable atmosphere for his tenants. Most tenants expect adequate parking accommodations to be provided by the landlord. Calls’ land-grab unnecessarily burdened Seethaler’s property by narrowing the driveway that accesses apartments and making the parking situation and maneuverability about the premises unnecessarily congested, unsafe, and inconvenient. (2006-T at 9-10; *see also* Plaintiff’s Trial Exhibit 16 (aerial photograph showing how encroaching Retaining Wall reduces effective size of parking lot and increases maneuverability problems)). These inconveniences and problems cannot be cured solely by giving Seethaler a monetary judgment; the continuing encroachment must be removed.

Due to city plans to make improvements to surrounding roads, Seethaler’s parking lot will be burdened even further. Currently, Seethaler’s rental premises has the capacity to house 140 students. (2006-T at 12). For these 140 students, Seethaler currently has 114 parking stalls (approximately 80% of tenants can have cars). (2006-T at 12). When the city constructs its planned improvements Seethaler will lose approximately 31 parking stalls, reducing his overall number of stalls to 83. (2006-T at 12). Thus, after the improvements only 60% of Seethaler’s tenants can have cars. (2006-T at 13). Parking is a significant factor

in the rental business and of grave concern to Seethaler. The loss of parking stalls effectively results in the loss of tenants.

Seethaler has been engaged in planning to obtain the maximum number of parking stalls on his property. (2006-T at 12-13). According to Seethaler's calculations, once the city starts its improvements, thereby reducing the number of Seethaler's parking stalls, he could obtain up to an additional eight (8) badly needed stalls in the southern portion of his property by switching from diagonal to perpendicular parking. (2006-T at 13). However, this plan is greatly limited by Calls' encroaching wall and Seethaler's loss of land. (2006-T at 13-14). Perpendicular parking requires greater space requirement for maneuvering in and out of the parking stalls (2006-T at 13). The ideal for maneuverability on a perpendicular parking arrangement is 25 feet. (2006-T at 14). With the encroaching wall in place, Seethaler has only approximately 15 feet for maneuvering. (2006-T at 14). Thus, as stated by Seethaler, "an extra two or three feet would be of tremendous help." (2006-T at 14). Getting back the property taken by Calls will greatly improve the feasibility, safety, and maneuverability of Seethaler's parking lot and proposed changes to it. (Interim Findings, 2007, R. at 439 ¶ 15; Findings, 2005, R. at 204 ¶ 68; 2006-T at 13-14). As emphasized in Seethaler's testimony, "[e]very foot ... is very critical" to making these contemplated changes a reality. (2006-T at 14).

Additionally, Calls' construction of the encroaching wall has caused, in Seethaler's words, "very serious [a]esthetic problem[s]." (2006-T at 9). Before Calls unilaterally removed them, there were trees on the south end of the Seethaler Property that provided

shade, privacy, and beauty to the property. (2006-T at 9). While the trial court awarded damages to Seethaler for loss of the trees, the trial court's decision also precluded all possibilities of future landscaping to "recover some of the [lost] [a]esthetics" by awarding possession to Calls. (2006-T at 9-10). Thus, Seethaler's future uses of his property are, once again, severely limited by the Retaining Wall.

The aforementioned parking, maneuverability, and aesthetic issues caused by the encroaching wall will have a detrimental effect on Seethaler's ability to obtain or retain tenants. (2006-T at 14). The rental business is highly competitive in Logan and, in the words of Seethaler, "[w]hen you're dealing with competition, like our managers on a daily basis, if there's any little negative thing it's very difficult to recruit. [Potential tenants] have so much to choose from. [The effects of the encroaching wall are] a serious negative." (2006-T at 18).

In awarding monetary damages, the trial court engaged in pure conjecture and did not consider how the aforementioned inconveniences and hardships would burden the property then, now, and in the future. Tenants expect to have parking spaces and expect to be able to navigate the rental premises in a safe and convenient matter. The precise effect of Calls' encroachment on Seethaler's future plans or uses of his property and his ability to re-rent the apartments or sell the complex is largely unknown, but undoubtedly will be detrimental. How does one evaluate the loss of parking maneuverability or the loss of the ability to provide landscaping and shade? It cannot be done. The Seethaler Property is "tight" with 140 residents and 114 parking stalls. Nothing can compensate for the loss of the land,

however small it may seem. Any damage award attempting to cover such circumstances was based on pure speculation and was not appropriate.

Seethaler has been permanently deprived of the use, possession, and control of his property by the Retaining Wall and by the trial court's judgment allowing the wall to remain in perpetuity. (Interim Judgment, 2007 R. at 433 ¶¶ 2-3, 6, 435 ¶ 16). This deprivation is of a continuing nature and its burdening effect on Seethaler's property is not compensable in money damages. (Interim Findings, 2007, R. at 438 ¶ 6, 444 ¶ 14). Thus, the factors of the "irreparable injury" test applied in *Carrier* were met and requiring the removal of the encroachment was the mandatory remedy. The wall must come down and Seethaler's property must be restored to its pre-encroachment state.

B. The trial court misapplied the balancing of equities test in determining to award monetary damages rather than ordering that the wall be removed from Seethaler's property.

Because Calls did not act in good faith and with clean hands in the placement of the Retaining Wall on Seethaler's property, and because the balancing of equities doctrine is reserved for the innocent defendant, the trial court erred when it applied this equitable doctrine to the case at hand. Further, equity requires the restoration of Seethaler's property to its original nature without regard to hardship of its removal. The Supreme Court of Utah holds that a "balance of equities" test is an appropriate alternative to issuing a mandatory injunction "where an encroachment does not irreparably injure the plaintiff; was innocently made; the cost of removal would be disproportionate and oppressive compared to the benefits derived from it, and plaintiff can be compensated by damages." *Papanikolas Bros. Enters.*,

535 P.2d 1256, 1259 (Utah 1975) (emphasis added). In regards to a defendant who is not innocent, “equity may require [the property’s] restoration, without regard for the relative inconveniences or hardships which may result from its removal.” *Id.*

In *Carrier*, the defendants admitted they had actual and repeated notification that the alley remained city property and that plaintiffs openly and repeatedly protested obstruction of the alley during the time of construction and before the construction began. *Carrier*, 2001 UT 105 at ¶ 31. Thus, the court determined the defendants were not innocent in their encroachment and the balancing of equities test was not appropriate. *Id.* Because defendants knowingly and intentionally encroached, the court would not even consider defendants’ arguments as to why it was inequitable to require them to remove the wall (such as defendants’ argument that Salt Lake City officials represented they could continue to build the wall). *Id.* at FN 8.

Like the *Carrier* defendants, the Calls in this case were not innocent encroachers. The trial court found Seethaler, Calls, and their predecessors in interest mutually acquiesced to the cedar post fence as the Boundary Line previous to Calls’ encroachment. (Judgment, 2005, R. at 191 ¶ 4(c); Findings, 2005, R. at 211 ¶ 4(c)). The trial court continued “all such behavior, events and circumstances that indicate the existence of a boundary by acquiescence have occurred for ... more than thirty-two (32) years.” (Judgment, 2005, R. at 192 ¶ 4(d)). That means, in effect, that Calls recognized, acknowledged and knew the Fence Line was the boundary.

The trial court determined the Calls had actual notice of the correct location of the Boundary Line after having commissioned Wayne Crow, a licensed surveyor, to survey and prepare a site plan for Calls' property in 1993. (Findings, 2005, R. at 197 ¶ 10). This survey placed the Fence Line as the correct Boundary Line. (Findings, 2005, R. at 197 ¶ 10). This was never disputed until Don Call informed surveyor Layne Smith of his need for additional property so he could add another apartment unit to his development. (Findings, 2005, R. at 206 ¶ 83). The trial court determined Don Call's commission of Layne Smith to conduct a survey reflected a "self-serving" purpose. (Findings, 2005, R. at 206 ¶ 83). The trial court held "Smith based conclusions in the Smith Survey on a single interview with Don Call and no one else" and that the Smith Survey "merely attempted to give Don Call what he had requested – a few extra feet of property and a description of the Fence Line as a 'convenience fence.'" (Findings, 2005, R. at 206 ¶¶ 84-85).

The Fence Line was widely recognized as the Boundary Line in the community. (Findings, 2005, R. at 202 ¶ 41). For example, the utility company placed utilities poles that served only Seethaler's property on the Seethaler's property that was taken by Calls. (Findings, 2005, R. at 201 ¶¶ 34-38). Also, Seethaler's neighbors, the Wendts, constructed a canal Retaining Wall that ended at the Fence Line which, in the words of the trial court, "clearly demonstrates that the Fence Line was widely recognized in the community as the Boundary Line." (Findings, 2005, R. at 201-02 ¶¶ 40-41). Calls themselves acknowledged the Fence Line as the legitimate Boundary Line when, in 1993, they constructed a curb and gutter which stopped at the Fence Line. (Findings, 2005, R. at 201 ¶ 39). Despite all

historical and actual notice that the Boundary Line was the Fence Line, Calls constructed the cement Retaining Wall several feet onto Seethaler's property without Seethaler's permission. (Findings, 2005, R. at 199 ¶ 21).

Additionally, a letter was sent by Seethaler dated May 28, 2002, and a letter was sent by Seethaler's counsel dated July 30, 2002, to Calls which placed Calls on notice that they were developing on Seethaler's land. (Findings, 2005, R. at 200 ¶ 22). The notice further warned that if construction was continued, Calls were doing so at their own risk. (Findings, 2005, R. at 200 ¶ 22). These notices did not deter Calls from continuing construction of their encroachment, even after legal proceedings were initiated March 31, 2003. (Findings, 2005, R. at 200 ¶ 22).

During construction Calls "unilaterally removed and obliterated the Crow Survey markers and the cedar post fence located on the Fence Line between the Emery Property, the Seethaler Property and the Call Property. (Findings, 2005, R. at 200 ¶ 23). Calls showed no regard for the rights and interests of others. (Findings, 2005, R. at 208 ¶ 102). In addition to using Seethaler's property for his wall, Don Call had the audacity to destroy and remove trees from Seethaler's property. (Findings, 2005, R. at 200 ¶¶ 25-26). The trial court determined Don Call was only concerned for his own self-interest and disregarded the interests of his adjoining neighbors. (Findings, 2005, R. at 208 ¶ 102). Such actions and disregard for others' rights were not the actions of an innocent party.

To be innocent one must be free from guilt through lack of knowledge of wrongdoing and be blameless. *Merriam-Webster Online* (2008). For Calls to have acted in innocence

they must have honestly lacked knowledge they were encroaching on Seethaler's property and be blameless for such lack of knowledge. Innocence was not maintained by Don Call's opting to rely on a self-serving survey the trial court dubbed "clearly and inherently unreliable," rather than historic monuments, thirty-two plus years of mutual acquiescence, reasonable assumptions and beliefs, and previous survey markers placed by a surveyor commissioned by Don Call himself. (Findings, 2005, R. at 205-07 ¶¶ 76, 79, 81, 84, 87, 89).

The foregoing demonstrates the encroachment was not constructed innocently and, thus, the equities should not favor Calls. As mentioned, the "benefit of the doctrine of balancing of equities ... is reserved for the innocent defendant, who proceeds without knowledge or warning that he is encroaching upon another's property rights." *Carrier*, 2001 UT 105 at ¶ 31 (quoting *Papanikolas Bros.*, 535 P.2d at 1259). In the situation at hand, it was clear Calls had knowledge, warning, and actual notice that they were encroaching upon the property rights of Seethaler. Calls received two (2) warning letters and a lawsuit and still continued construction of the Retaining Wall. The doctrine of balancing of equities was not properly applied by the trial court. This Honorable Court should determine monetary damages were not the appropriate remedy and order the Calls to remove the encroaching wall from Seethaler's property.

Further, because the trial court made findings showing Calls were not innocent in construction of their encroachment, the trial court wrongfully regarded the inconveniences, hardships, or costs that would be imposed on Calls if ordered to remove the Retaining Wall. *Papanikolas Bros.*, 535 P.2d at 1259. The trial court determined "[i]t is not equitable or

appropriate to order removal of the cement walls as erected by the Calls on what has been determined to be the Seethaler's property, because it is economically unfeasible and unreasonable to require removal of the wall and because of the cost to rebuild the wall a few feet away." (Findings, 2007, R. at 438 ¶ 2). This analysis was inappropriate due to the lack of innocence displayed by the Calls regarding their actions in constructing the encroaching wall.

Monetary damages were not appropriate in the situation at hand. The Retaining Wall must come down. Equity requires the restoration of Seethaler's property to its pre-encroachment state without considering relative hardships Calls may face in its removal and/or reconstruction. *Papanikolas Bros.*, 535 P.2d at 1259. Seethaler is entitled to the exclusive use and possession of the property he has owned and occupied since March 23, 1988. (Plaintiff's Trial Exhibit 1 (deed)).

II. THE TRIAL COURT ERRED BY FINDING THE CALLS ACTED IN GOOD FAITH SINCE CALLS DID NOT HAVE AN HONEST BELIEF IN THE PROPRIETY OF THE ACTIVITIES IN QUESTION.

Because Calls knowingly and intentionally constructed a Retaining Wall that encroached on property they knew or should have known to be Seethaler's property, the court erred in determining Calls acted in good faith. Good faith is defined as having "(1) an honest belief in the propriety of the activities in question; (2) no intent to take unconscionable advantage of others; and (3) no intent to, or knowledge of the fact that the activities in question will hinder, delay, or defraud others." *Cady v. Johnson*, 671 P.2d 149, 151 (Utah

1983). “To establish a lack of good faith, or ‘bad faith’ ... a party must prove that one or more of these factors is lacking.” *In re Discipline of Sonnenreich*, 2004 UT 3, P48.

Calls acted in bad faith because their encroachment was not premised on a reasonable and honest belief that they owned the land upon which they encroached. “The good faith of an occupying claimant must be premised upon a reasonable and honest belief of ownership.” *Ute-Cal Land Dev. Corp. v. Sather*, 645 P.2d 665, 667 (Utah 1982). Thus, if Calls subjectively knew the Fence Line was the Boundary Line, or objectively should have known the same, and, regardless, constructed the Retaining Wall on Seethaler’s property, this Court should determine Calls acted in bad faith.

The trial court determined Calls subjectively knew the Fence Line was the true and correct Boundary Line. In 1993, Calls hired Wayne Crow, a licensed surveyor, to survey and prepare a site plan for the Calls’ property which was submitted to Logan City in 1993 and again in 2002, even after Calls had a draft of the 2001 Smith Survey. (Findings, 2005, R. at 197 ¶10; *see also* Plaintiff’s Trial Exhibit 35 (original Crow Survey legal description used with Logan City Planning Commission on February 28, 2002)). This survey determined the Fence Line was the true and correct Boundary Line. (Findings, 2005, R. at 197 ¶10). Further, the trial court concluded that “Plaintiffs, Defendants and their predecessors in interest mutually acquiesced to the cedar post Fence Line as the Boundary Line.” (Findings, 2005, R. at 211 ¶4(c)).

Additionally, Don Call himself verbally acknowledged the Fence Line to be the true, correct, and widely recognized Boundary Line during a 2001 conversation with Seethaler.

Don Call had begun making improvements on his side of the Fence Line and, when approached by Seethaler, asked, “shall I take these trees down for you?” (Findings, 2005, R. at 203 ¶ 55). By “these trees” Don Call was referring to trees on Seethaler’s property that Don Call eventually removed, notwithstanding Seethaler’s opposition, to construct his encroaching Retaining Wall. The trial court found this question by Don Call was a personal acknowledgment that the trees he removed and land beneath them were not his. (Findings, 2005, R. at 203 ¶ 55).

Finally, Calls and their predecessors in interest never claimed the Fence Line to be anything other than a Boundary Line. (Findings, 2005, R. at 201 ¶ 32). In 1993 Calls constructed a curb and gutter which stopped at the Fence Line. (Findings, 2005 R. at 201 ¶ 39). The trial court determined that by stopping their curb and gutter at the Fence Line “[Calls] acknowledged that the Fence Line is the legitimate Boundary Line between the Call Property ... and the Seethaler Property.” (Findings, 2005, R. at 201 ¶ 39; *also see* Plaintiff’s Trial Exhibits 28 a, c, and w (photos)). Thus, the trial court determined that Calls subjectively knew that the Fence Line was the true, correct, and widely accepted Boundary Line.

After commissioning the 2001 Smith Survey, Don Call informed Layne Smith of his need for additional property so he could add another unit to his development, and it was determined by the court that this survey was “self-serving.” (Findings, 2005, R. at 206 ¶¶ 83, 85). The court determined “[t]he Smith Survey merely attempted to give Don Call what he had requested – a few extra feet of property and a description of the Fence Line as a fence of

convenience.” (Findings, 2005, R. at 206 ¶ 85). Don Call got what he wrongfully requested as the Smith Survey wrongfully extended Calls’ Boundary Line several feet into Seethaler’s property. (Findings, 2005, R. at 197-98 ¶ 12).

Because of the circumstances giving rise to Calls’ request that their land be re-surveyed, the process used by Smith in the survey, and because of the long-standing recognition of the Fence Line as the true and correct Boundary Line, the trial court held the Smith Survey “clearly and inherently unreliable.” (Findings, 2005, R. at 206 ¶¶ 82-87). Furthermore, the Smith Survey placed the property line at least two feet (2’) inside a storage shed present since before 1989 on Seethaler’s property. (Findings, 2005, R. at 202 ¶¶ 46-47). Thus, even if Calls subjectively believed the Smith Survey to be accurate, such reliance was objectively unreasonable, especially considering the numerous subjective factors heretofore discussed.

Several other court determinations showed it would be objectively unreasonable to believe that the Fence Line was not the true and correct Boundary Line. First, the City of Logan believed the Fence Line to be the Boundary Line and relied on such belief in approving Calls’ development. (Findings, 2005, R. at 199 ¶ 18).

Second, before the Calls commenced construction on Seethaler’s property the Calls were provided with letters from both Seethaler (dated May 28, 2002; *see* Plaintiff’s Trial Exhibit 2) and Seethaler’s counsel (dated July 30, 2002; *see* Plaintiff’s Trial Exhibit 3) placing them on notice that if they made improvements on Seethaler’s property they were doing so at their own risk. (Findings, 2005, R. at 200 ¶ 22). Regardless, in July 2003, more

than one year after receiving these letters, the Calls constructed the Retaining Wall on Seethaler's property. (2006-T at 4-6). Even after court action commenced, March 31, 2003, Calls began and continued construction. (Findings, 2005, R. at 200 ¶ 22). A reasonable person, facing a lawsuit and challenge to the accuracy of their purported Boundary Line, would stop construction and verify the accuracy of the property line, especially considering at least thirty-two years of history and surveys that supported the Fence Line as the Boundary Line. (Findings, 2005, R. at 200 ¶ 29).

Third, there was a utility easement on Seethaler's property taken by Call that houses utility poles and lines that service only Seethaler's property. (Findings, 2005, R. at 201 ¶ 34-38; *see also* Plaintiff's Trial Exhibit 28 photos a and c) looking west showing telephone riser and utility pole south of Retaining Wall.) A reasonable person would recognize such easement as notice that other reasonable people have relied on the Fence Line as the Boundary Line.

Fourth, the parties' neighbor constructed a canal Retaining Wall that ended at the Fence Line. (Findings, 2005, R. at 201-02 ¶¶ 40, 41; *see also* Plaintiff's Trial Exhibit 28 photos m, o, r and t). The court determined this "clearly demonstrates that the Fence Line was widely recognized in the community as the Boundary Line." (Findings, 2005, R. at 202 ¶ 41). The words of the trial court summarized the objective factors best:

Plaintiffs and their predecessors in interest occupied ... the Seethaler Property up to a visible line marked by old cedar post Fence Line with parking lots, sprinkler pipe, grass, asphalt, a shed, utility easements, utility poles, utility lines and trees; the Fence Line clearly indicated the existence of a demarcation line crossing between the Seethaler Property and the Call Property...; the cedar post Fence Line was an obvious, open and a recognized division between the

parties' properties; there is no question that the cedar post Fence Line delineated the proper Boundary Line.

(Findings, 2005, R. at 211 ¶ 4(b)). (emphasis added).

Regardless of all the aforementioned facts, the trial court precluded Seethaler's counsel from presenting evidence to establish that Call failed to exercise good faith, or, in other words, that Call exercised bad faith. (2006-T at 138). During Seethaler counsel's attempt to establish bad faith, the trial court interrupted the cross-examination of Appellee Don Call and, on the spot, entered a bench finding that neither party acted in bad faith. (2006-T at 138). The trial court found "both parties acted in their self-interest, but ... did so in good faith." (2006-T at 138). The trial court then precluded further testimony on the issue. (2006-T at 138).

During said finding, the trial court erroneously stated that "bad faith, good faith, [and] improper motives" have no application to this case. (2006-T at 138.) In later commentary on the finding that both parties acted in good faith, the trial court contradicted its position by citing a key principle of equity that was directly applicable to the case at hand: "those who seek equity must do equity." (2006-T at 144). By prohibiting further testimony regarding the issue of bad faith, the trial-court effectively precluded Seethaler from showing that Calls did not deserve to be benefited by an equitable ruling.

Good faith is a conclusion of law based on facts. Based on the facts found by the trial court, there was no basis for concluding Calls acted in good faith. Calls had subjective reason to know the Fence Line was the proper Boundary Line and all objective factors pointed towards the same. This Court should rule that the actions of the Calls were taken in

bad faith because they acted in contravention of both objective and subjective reason. Calls had no honest belief in the propriety of their activities and should not be rewarded for such behavior.

This Court should not allow Calls to benefit from such bad faith by allowing them to retain their encroachment on Seethaler's property in the name of equity. Repeating the words of the trial court, "those who seek equity must do equity," thus, making a good faith/bad faith determination is relevant. (2006-T at 144). The factual determinations of the trial court evidence no equity done by Calls or any good faith worthy of equitable protection. The facts show an intentional encroacher, concerned only about his self-interest while disregarding the interests of others. (Findings, 2005, R. at 208 ¶ 102). Seethaler was simply trying to protect what was rightfully his to protect.

Rewarding Calls' bad faith would serve no equitable purpose. Rather, equity, in this case, requires Seethaler's property to be given back and restored to its pre-encroachment state.

III. THE TRIAL COURT ERRED BY GRANTING CALLS A *DE FACTO* PRIVATE RIGHT OF CONDEMNATION.

The trial court erred in granting Calls a private right to condemn Seethaler's property by allowing Calls to keep the encroaching wall in place in perpetuity, forever enclosing Seethaler's land within Calls' encroaching wall. Condemnation is a power reserved for public entities taking land for public uses. Utah Const. Art. I, § 22; *see also* Utah Code Ann. § 78-34-1 (2008). There is no private right of condemnation. *Carrier*, 2001 UT 105, ¶ 19.

In *Carrier*, defendants argued that even if plaintiffs had established an easement over the alley in which defendants constructed their wall, the easement should have been limited to access that was “reasonably necessary” under the circumstances. *Id.* at ¶ 17. Defendants contended that access to the entire fifteen foot width of the alley was not “reasonably necessary” because Plaintiffs could still access the front of their homes and could access the back of their homes through the unobstructed portion of the alley. *Id.* However, the court held the “reasonable necessity” test was only appropriate in a conflict between private and public entities; it was only appropriate when the public entities were seeking to benefit the general public at the expense of some individual citizens. *Id.* at ¶ 18. Because no public entity was involved in the *Carrier* conflict, the court emphasized “[t]here is no private right of condemnation, nor is there a need for one.” *Id.* at ¶ 19. The court continued, “[o]ne citizen has no entitlement to another citizen’s property or a right to obstruct another citizen’s [property rights].” *Id.*

Because the *Carrier* defendants obstructed the alley with knowledge that the alley remained city property at the time they constructed their rock wall, the courts refused to condone such behavior based on the defendant’s rationale that their obstruction did not unreasonably inhibit plaintiffs’ access to their property. *Id.* at ¶ 21. The court refused to allow defendants to exercise what amounted to a private right of condemnation and ordered the wall removed, allowing plaintiffs’ unobstructed access to their property rights in the alley. *Id.*

The trial court did, in the case at issue, what the Supreme Court of Utah refused to do in *Carrier*. It granted a willful and intentional encroacher a private right of condemnation. (Interim Findings, 2007, R. at 438 ¶¶ 6-8). In essence, the trial court determined that the portion of Seethaler's property wrongfully taken by Calls was not "reasonably necessary" for the use and enjoyment of Seethaler's property. (Interim Findings, 2007, R. at 440 ¶ 18). Specifically, the court found, "the wall had a negligible effect on the Seethaler Property." (Interim Findings, 2007, R. at 440 ¶ 18). Thus, the court allowed the Calls to maintain their Retaining Wall on Seethaler's property in perpetuity, forever enclosing 612 square feet of Seethaler's property to be used exclusively by Calls. (Interim Findings, 2007, R. at 438-39 ¶¶ 7, 15, 17). This was an error by the trial court and in clear conflict with the trial court's earlier finding that the Retaining Wall "clearly reduced the size and effective use of the parking lot on the Seethaler Property." (Findings, 2005, R. at 204, ¶ 68).

As in *Carrier*, no public entity was involved in this dispute. Calls, being private citizens, had no entitlement to Seethaler's property or the right to obstruct Seethaler's property rights. *Carrier*, 2001 UT 105 at ¶ 19. The Seethaler's property rights that need be protected by this court have been described by the Supreme Court of the United States as "the rights to possess, use and dispose of [the property]." *Loretto v. Teleprompter Manhattan Catv Corp.*, 458 U.S. 419, 435 (U.S. 1982); *see also McGrew v. Industrial Comm'n*, 85 P.2d 608, 610 (Utah 1938) ("[p]roperty is the right of any person to possess, use, enjoy and dispose of a thing"). The Supreme Court further held that permanent occupation on physical property effectively destroys each of these constitutionally protected rights. *Id.*

The trial court's ruling has effectively destroyed Seethaler's right to exclusive possession, right of exclusive use, right to enjoy, and right to dispose of his property freely. Further, he has lost "one of the most essential sticks in the bundle of rights that are commonly characterized as property" – his right to exclude. *Loretto*, 458 U.S. at 433. The trial court's ruling excluded Seethaler from the use and enjoyment of his own property. (Interim Findings, 2007, R. at 438-39 ¶¶ 7, 15, 17).

Calls should not be granted a private right of condemnation based on the trial court's rationale that the encroachment was "negligible" or did not unreasonably inhibit the Seethaler's use and enjoyment of his property. This court, like the *Carrier* court, should require Calls to remove their Retaining Wall and, to the extent possible, restore Seethaler's land to its pre-encroachment state.

Even if this Court finds the removal of the encroaching Retaining Wall too onerous a burden to place on Call, it should, nevertheless, respect Seethaler's property rights, restore Seethaler's right of exclusive possession and allow Seethaler to determine the ultimate fate of the Retaining Wall.

CONCLUSION

In light of the foregoing, Seethaler respectfully requests that this Honorable Court determine the trial court erred in awarding monetary damages rather than ordering Calls to remove the encroaching wall, erred in determining the Calls acted in good faith, and erred by granting Calls a private right of condemnation. As a matter of equity, the encroaching wall

must be removed from Seethaler's property and Seethaler should be restored to possession of his deeded property and the rights appurtenant to ownership of that property.

DATED this 23rd day of July, 2008.

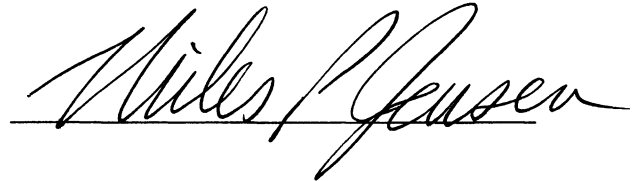
OLSON & HOGGAN, P.C.


Miles P. Jensen
Attorney for Plaintiff/Appellant

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CERTIFICATE OF MAILING

I hereby certify that on this 23rd day of July, 2008, I caused to be hand delivered, one (1) original and seven (7) copies of the foregoing **BRIEF OF APPELLANT**, to the Utah Court of Appeals, and hand delivered two (2) true and correct copies of the foregoing **BRIEF OF APPELLANT**, to Marty Moore, Bearnson & Peck, 399 North Main, Suite 300, Logan, Utah 84321.



J:\SR\MPJ\MPJ -- Emery v. Call -- Brief of Appellant 4.doc
N-0406724

ADDENDUM

EXHIBIT A

LOGAN COURTS
2005 APR 28 AM 11:47

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Attorneys for Plaintiffs

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF UTAH, IN AND FOR THE COUNTY OF CACHE**

LAWRENCE P. EMERY, JENNIFER J.
EMERY, and KARL H. SEETHALER

Plaintiffs

vs.

DON W. CALL and LINDA CALL,

Defendants.

JUDGMENT AND DECREE

Civil No.030100618

Judge Gordon J. Low

This matter came for trial on June 29, June 30, and July 1, 2004, the Honorable Gordon J. Low presiding. The Plaintiffs, Lawrence P. Emery and Karl H. Seethaler, were present in person and were represented by their attorneys, Olson & Hoggan, P.C., Miles P. Jensen. The Defendants, Don W. Call and Linda Call, were present in person and were represented by their attorneys, Malouf Law Offices, Ray Malouf. The parties having stipulated to certain evidence and facts, and the Court having heard the testimony of witnesses, having received certain exhibits into evidence, having heard the arguments of the parties, having issued its decision from the Bench, and having entered its Findings of Fact and Conclusions of Law, now makes and enters the following:

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120

JUDGMENT AND DECREE

1. Plaintiffs, Lawrence P. Emery and Jennifer J. Emery, own Parcel Tax ID Nos. 06-075-0004 and 06-075-0005 located at 558 and 568 Canyon Road in Logan, Utah, described by deed as follows:

BEGINNING 681.06 FEET WEST & 456 FEET SOUTH OF NORTHEAST CORNER LOT 6 NIELS MIKKELSEN ENTRY, NORTH 58°40' WEST 76.69 FEET NORTH 2°28' EAST 100 FEET SOUTH 58°03' WEST 60.1 FEET SOUTH 2°28' WEST 172.6 FEET NORTH 64°26'30" EAST 62.04 FEET TO BEGINNING SOUTHEAST QUARTER SECTION 34 TOWNSHIP 12 NORTH RANGE 1 EAST D2839A.

BEGINNING 634.49 FEET WEST & 436.73 FEET SOUTH OF NORTHEAST CORNER LOT 6 NIELS MIKKELSEN ENTRY NORTH 2°28' EAST 185.39 FEET SOUTH 59°03' WEST 60.1 FT SOUTH 2°28' WEST 100 FEET SOUTH 58°40' EAST 76.69 FEET NORTH 64°26'30" E 51.62 FEET TO BEGINNING SOUTHEAST QUARTER SECTION 34 TOWNSHIP 12 NORTH RANGE 1 EAST D2839B.

(hereafter the "Emery Property").

2. Plaintiff Karl H. Seethaler owns Parcel Tax ID No. 06-075-0006 located at 580 Canyon Road in Logan, Utah, described by deed as follows:

BEGINNING 410.84 FEET WEST & 115.15 FEET SOUTH FROM NORTHEAST CORNER LOT 6 NIELS MIKKELSEN ENTRY S 59°59'30" WEST 51.74 S 59°03' WEST 193.6 FEET SOUTH 2°28' WEST 185.39 FEET NORTH 64°26'30" EAST 35.54 FEET SOUTH 88°24' EAST 176.5 FEET NORTH 2° EAST 300.32 FEET TO BEGINNING SUBJECT TO RIGHT-OF-WAY SOUTHEAST QUARTER SECTION 34 TOWNSHIP 12 NORTH RANGE 1 EAST D2839.

(hereafter the "Seethaler Property").

3. Defendants Don W. Call and Linda Call own Parcel Tax ID No. 06-075-0007, located at 249 North 500 East in Logan, Utah, described by deed as follows:

BEGINNING AT POINT NORTH 88°11' WEST 411.05 FEET OF POINT SOUTH 2° WEST 700 FEET FROM NORTHEAST CORNER LOT 6 NIELS MIKKELSEN'S ENTRY, NORTH 2° EAST 265.7 FEET NORTH 88°18' WEST 176.5 FEET SOUTH 64° 27' WEST 149.2 FEET SOUTH 41° EAST 134.5 FEET ALG E BANK LOGAN HP CANAL SOUTH 29°55' EAST 151 FEET SOUTH 88°11' EAST 195 FEET TO

BEGINNING SOUTHEAST QUARTER SECTION 34 TOWNSHIP 12 NORTH RANGE 1 EAST D2867A.

BEGINNING IN THE NORTH LINE OF 2ND NORTH STREET AT A POINT NORTH 88°11' WEST 394.55 FEET OF A POINT SOUTH 2° WEST 700 FEET FROM THE NORTHEAST CORNER OF LOT 6 OF NIELS MIKKELSEN'S ENTRY; THENCE NORTH 2° EAST ALONG THE WEST LINE OF STREET 265.7 FEET; THENCE NORTH 88°18' WEST 193 FEET; THENCE SOUTH 64°27' WEST 149.2 FEET MORE OR LESS TO THE EAST BANK OF THE LOGAN AND HYDE PARK CANAL; THENCE SOUTH 41° EAST 134.5 FEET ALONG SAID BANK OF SAID CANAL; THENCE SOUTH 29°55' EAST 151 FEET MORE OR LESS TO THE NORTH LINE OF 2ND NORTH STREET; THENCE SOUTH 88°11' EAST ALONG THE NORTH LINE OF SAID STREET 212 FEET TO THE PLACE OF BEGINNING, AND FURTHER DESCRIBED AS BEING SITUATED IN THE SOUTHEAST QUARTER OF SECTION 34, TOWNSHIP 12 NORTH, RANGE ONE EAST OF THE SALT LAKE BASE AND MERIDIAN. THIS INCLUDES 1.2 SHARES OF WATER STOCK

(hereafter the "Call Property").

Boundary By Acquiescence

4. Plaintiffs have satisfied each and every requirement for the establishment of a boundary by acquiescence pursuant to Utah law:

- (a) Plaintiffs' Property and Defendants' Property adjoin one another;
- (b) Plaintiffs and their predecessors in interest occupied the Emery Property and the Seethaler Property up to a visible line marked by the old cedar post Fence Line with parking lots, sprinkler pipe, grass, asphalt, a shed, utility easements, utility poles, utility lines and trees; the Fence Line clearly indicated the existence of a demarcation line crossing between the Seethaler Property and the Call Property, as well as between the Emery Property and the Call Property; the cedar post Fence Line was an obvious, open and a recognized division between the parties' properties; there is no question that the cedar post Fence Line delineated the proper Boundary Line;
- (c) Plaintiffs, Defendants and their predecessors in interest mutually acquiesced to the cedar post Fence Line as the Boundary Line, and Defendants never disputed the old cedar post Fence Line as their north property Boundary Line until 2001; and

(d) All such behavior, events and circumstances that indicate the existence of a boundary by acquiescence have occurred for a long period of time, namely, more than thirty-two (32) years.

Deeded Boundary/Survey Boundary

5. The Jeff Hansen Survey dated July 15, 2002, accurately delineates the true Boundary Line between the Emery Property and the Call Property, as well as between the Seethaler Property and Call Property; and the Court accepts the surveyed descriptions of the Emery Property and of the Seethaler Property as follows:

(a) Surveyed legal description for Parcel 06-075-0004 - Emery:

A parcel of ground located in the Southeast Quarter of Section 34, Township 12 North, Range 1 East of the Salt Lake Base and Meridian, described as follows: Commencing at the Logan City GPS Monument #251 - NE:25, and running thence South 67°55'47" West 738.03 feet to the true point of beginning, a point located on the South right-of-way line of Canyon Road; and running thence South 02°28'00" West 100.00 feet; thence South 00°40" East 76.69 feet to a point described of record as being located 681.06 feet West and 456 feet South of the Northeast corner of the Niels Mikkelsens entry; thence South 64°26'30" West 62.04 feet; thence North 02°28'00" East 172.60 feet to a point on the aforementioned South right-of-way line; thence North 59°02'39" East (North 59°03' East by record) along said right-of-way line 60.10 feet to the point of beginning. Containing 0.21 acres.

(b) Surveyed legal description for Parcel 06-075-0005 - Emery:

A parcel of ground located in the Southeast Quarter of Section 34, Township 12 North, Range 1 East of the Salt Lake Base and Meridian, described as follows: Commencing at the Logan City GPS Monument #251 - NE:25, and running thence South 68°42'34" West 678.73 feet to the true point of beginning, a point located on the South right-of-way line of Canyon Road; and running thence South 59°03'36" West (South 59°03'00" West by record) along said right-of-way line 60.10 feet; thence leaving said right-of-way line South 02°28'00" West 100.00 feet; thence South 00°58'40" East 76.69 feet; thence North 64°26'30" East 51.62 feet to a point described of record as being located 634.49 feet West and 436.73 feet South of the Northeast corner of the Niels Mikkelsens entry; thence North 02°28'00" East 185.39 feet to the point of beginning. Containing 0.21 acre.

(c) Surveyed legal description for Parcel 06-075-0006 - Seethaler:

A parcel of ground located in the Southeast Quarter of Section 34, Township 12 North, Range 1 East of the Salt Lake Base and Meridian, described as follows: Commencing at the Logan City GPS Monument #251 - NE:25, and running thence South 73°58'06" West 438.47 feet to the intersection point of the South right-of-way line of Canyon Road and the West right-of-way line of 600 East Street at a point described of record as being located 410.84 feet West and 115.15 feet South from the Northeast corner of Lot 6 of the Niels Mikkelsens Entry, and is the true point of beginning; and running thence South 02°00'00" West along said West right-of-way line 300.32 feet; thence North 88°24'00" West 176.50 feet; thence South 64°26'30" West 35.54 feet; thence North 02°28'00" East 185.39 feet to the aforementioned South right-of-way line of Canyon Road; thence along said Canyon Road right-of-way line the following two courses: 1) North 59°03'00" East 193.60 feet; 2) thence North 60°11'33" East 51.82 feet (North 59°59'30" East 51.74 feet by record) to the point of beginning. Containing 1.12 acres.

The Hansen survey is attached as Exhibit A to this Judgment and Decree and is incorporated by reference.

Water Drainage

6. Plaintiffs have met all the elements for a prescriptive easement for water drainage over the Call Property consistent with the natural and artificial drainage that has historically occurred prior to the construction by Defendants of the Retaining Wall, subject to further review of case law and briefs of parties on the applicability of a prescriptive easement for water.

Tree Damage

7. Plaintiffs are awarded judgment against Defendants in the sum of \$19,375.00 for the destruction and removal of trees on Plaintiffs' Property.

Matters Reserved

8. The Court reserves for later hearing in equity how the parties must address the removal or other handling of the Retaining Wall, the change in grade created by the Defendants, the drainage problem, and the Cedar Post fence removal, to be included in a Supplemental Judgment in this matter.

9. Costs are awarded to the Plaintiffs, to be included in the Supplemental Judgment.

10. Defendants' Counterclaim and all Causes of Action therein are hereby dismissed with prejudice.

DATED this 25th day of April, 2005.



Gordon J. Low, District Judge

EXHIBIT B

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LOGAN COURTS
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Attorneys for Plaintiffs

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
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LAWRENCE P. EMERY, JENNIFER J.
EMERY, and KARL H. SEETHALER

Plaintiffs

vs.

DON W. CALL and LINDA CALL,

Defendants.

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

Civil No.030100618

Judge Gordon J. Low

This matter came for trial on June 29, June 30, and July 1, 2004, the Honorable Gordon J. Low presiding. The Plaintiffs, Lawrence P. Emery and Karl H. Seethaler, were present in person and were represented by their attorneys, Olson & Hoggan, P.C., Miles P. Jensen. The Defendants, Don W. Call and Linda Call, were present in person and were represented by their attorneys, Malouf Law Offices, Ray Malouf. The parties having stipulated to certain evidence and facts, and the Court having heard the testimony of witnesses, having received certain exhibits into evidence, and having heard the arguments of the parties and having issued its decision from the Bench, now makes and enters the following:

FINDINGS OF FACT

1. Plaintiffs, Lawrence P. Emery and Jennifer J. Emery, own Parcel Tax ID Nos. 06-075-0004 and 06-075-0005 located at 558 and 568 Canyon Road in Logan, Utah, described as follows:

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2. Plaintiff Karl H. Seethaler owns Parcel Tax ID No. 06-075-0006 located at 580 Canyon Road in Logan, Utah, described as follows:

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BEGINNING IN THE NORTH LINE OF 2ND NORTH STREET AT A POINT NORTH 88°11' WEST 394.55 FEET OF A POINT SOUTH 2° WEST 700 FEET FROM THE NORTHEAST CORNER OF LOT 6 OF NIELS MIKKELSEN'S ENTRY; THENCE NORTH 2° EAST ALONG THE WEST LINE OF STREET 265.7 FEET; THENCE NORTH 88°18' WEST 193 FEET; THENCE SOUTH 64°27' WEST

149.2 FEET MORE OR LESS TO THE EAST BANK OF THE LOGAN AND HYDE PARK CANAL; THENCE SOUTH 41° EAST 134.5 FEET ALONG SAID BANK OF SAID CANAL; THENCE SOUTH 29°55' EAST 151 FEET MORE OR LESS TO THE NORTH LINE OF 2ND NORTH STREET; THENCE SOUTH 88°11' EAST ALONG THE NORTH LINE OF SAID STREET 212 FEET TO THE PLACE OF BEGINNING, AND FURTHER DESCRIBED AS BEING SITUATED IN THE SOUTHEAST QUARTER OF SECTION 34, TOWNSHIP 12 NORTH, RANGE ONE EAST OF THE SALT LAKE BASE AND MERIDIAN. THIS INCLUDES 1.2 SHARES OF WATER STOCK

(hereafter the "Call Property").

4. Plaintiffs and Defendants own land adjacent to one another and share a common boundary. The North boundary of the Call Property is the South boundary of the Emery Property and the South boundary of the Seethaler Property (hereafter the "Boundary Line").

5. The Emery Property consists of two (2) fourplex rental units which were built and improved in about 1968 and 1969, respectively.

6. The Seethaler Property consists of four (4) buildings and a total of thirty-six (36) units rented to single students and was constructed in about 1972.

7. The Call Property was approved by Logan City for development and construction of five (5) four-plex buildings in the early 1990's.

8. Prior to the early 1990's, the Call Property was vacant, being used as pasture.

9. Defendants began constructing buildings starting at the South side of the Call Property in 1994.

10. Defendants hired Wayne Crow, a licensed surveyor, to survey and prepare a site plan (the "Crow Survey") for the Call Property in 1993, which was submitted to Logan City. The Crow Survey utilized and referenced the north line of the development as a fence between the Call Property and the Emery Property and between the Call Property and the Seethaler Property as the boundary between the properties (the "Fence Line").

11. Defendants hired Knighton & Crow, Layne Smith, a licensed surveyor, to resurvey the Call Property in 2001 (the "Smith Survey").

12. The Smith Survey extended the Call Property boundary line north beyond the Fence Line with enough additional square footage to allow the Defendants to add an additional apartment

unit to the same development they began constructing in the early 1990's, for a total of six (6) four-plexes.

13. A survey performed by Jeff Hansen, a licensed surveyor, in 2002, at Plaintiffs' request, closely approximates and is consistent with a long-standing cedar post boundary Fence Line (the "Hansen Survey"), a copy of which survey is attached and incorporated by reference as Exhibit "A".

14. The Hansen Survey dated July 15, 2002, accurately delineates the true Boundary Line between the Emery Property and the Call Property, as well as between the Seethaler Property and Call Property; and the Court accepts the surveyed descriptions of the Emery Property and of the Seethaler Property as follows:

(a) Surveyed legal description for Parcel 06-075-0004 - Emery:

A parcel of ground located in the Southeast Quarter of Section 34, Township 12 North, Range 1 East of the Salt Lake Base and Meridian, described as follows: Commencing at the Logan City GPS Monument #251 - NE25, and running thence South 67°55'47" West 738.03 feet to the true point of beginning, a point located on the South right-of-way line of Canyon Road; and running thence South 02°28'00" West 100.00 feet; thence South 00°40" East 76.69 feet to a point described of record as being located 681.06 feet West and 456 feet South of the Northeast corner of the Niels Mikkelsens entry; thence South 64°26'30" West 62.04 feet; thence North 02°28'00" East 172.60 feet to a point on the aforementioned South right-of-way line; thence North 59°02'39" East (North 59°03' East by record) along said right-of-way line 60.10 feet to the point of beginning. Containing 0.21 acres.

(b) Surveyed legal description for Parcel 06-075-0005 - Emery:

A parcel of ground located in the Southeast Quarter of Section 34, Township 12 North, Range 1 East of the Salt Lake Base and Meridian, described as follows: Commencing at the Logan City GPS Monument #251 - NE25, and running thence South 68°42'34" West 678.73 feet to the true point of beginning, a point located on the South right-of-way line of Canyon Road; and running thence South 59°03'36" West (South 59°03'00" West by record) along said right-of-way line 60.10 feet; thence leaving said right-of-way line South 02°28'00" West 100.00 feet; thence South 00°58'40" East 76.69 feet; thence North 64°26'30" East 51.62 feet to a point described of record as being located 634.49 feet West and 436.73 feet South of the Northeast corner of the Niels Mikkelsens entry; thence North 02°28'00" East 185.39 feet to the point of beginning. Containing 0.21 acre.

(c) Surveyed legal description for Parcel 06-075-0006 - Seethaler:

A parcel of ground located in the Southeast Quarter of Section 34, Township 12 North, Range 1 East of the Salt Lake Base and Meridian, described as follows: Commencing at the Logan City GPS Monument #251 - NE25, and running thence South 73°58'06" West 438.47 feet to the intersection point of the South right-of-way line of Canyon Road and the West right-of-way line of 600 East Street at a point described of record as being located 410.84 feet West and 115.15 feet South from the Northeast corner of Lot 6 of the Niels Mikkelsens Entry, and is the true point of beginning; and running thence South 02°00'00" West along said West right-of-way line 300.32 feet; thence North 88°24'00" West 176.50 feet; thence South 64°26'30" West 35.54 feet; thence North 02°28'00" East 185.39 feet to the aforementioned South right-of-way line of Canyon Road; thence along said Canyon Road right-of-way line the following two courses: 1) North 59°03'00" East 193.60 feet; 2) thence North 60°11'33" East 51.82 feet (North 59°59'30" East 51.74 feet by record) to the point of beginning. Containing 1.12 acres.

15. The Hansen Survey of the location of the deeded descriptions is also consistent with the Crow Survey using the historic fenceline as the boundary between the Call property and the Seethaler property, which survey was prepared by Wayne Crow, a licensed surveyor, and commissioned by the Defendants.

16. The Hansen Survey shows that the Smith Survey placed the deeded boundary line between two (2) to six (6) feet north of the true boundary line between the Call Property and the Emery/Seethaler Property as marked by the Fence Line.

17. The Crow Survey describes an extended Fence Line which is the cedar post Fence Line, as the boundary between the properties.

18. The Defendants and the City of Logan relied on the Crow Survey from the time Defendants began developing their land until they commissioned the Smith Survey in 2001.

19. In 2002, Defendants began developing along the North boundary of the Call Property consistent with the Smith Survey.

20. In so doing, Defendants began interfering with Plaintiffs' use of the Emery Property and Seethaler Property.

21. During 2002 and 2003, Defendants constructed a cement retaining wall (the "Retaining Wall") north of the Fence Line and hauled several feet of fill onto the Emery/Seethaler Property without Plaintiffs' permission.

22. A letter from Plaintiffs dated May 28, 2002 and a letter from Plaintiffs' counsel dated July 30, 2002 to Defendants placed the Defendants on notice that the Defendants proceeded with the construction and were developing at their own risk, but even after court action commenced, Defendants continued with construction.

23. Defendants unilaterally removed and obliterated the Crow Survey markers and the cedar post fence located on the Fence Line between the Emery Property, the Seethaler Property and the Call Property.

24. Defendants' Retaining Wall and the dirt fill created an unnatural dam that blocked the long-established flow of water run off from the Emery Property and the Seethaler Property onto the Call Property, and has created flooding and drainage problems on the Seethaler Property and on the Emery Property.

25. Defendants destroyed and removed six Box Elder trees and one Green Ash tree from Plaintiffs' property.

26. Additionally, the Retaining Wall and dirt fill placed on the Emery Property seriously injured two large blue spruce trees on the Emery Property.

27. Defendants also destroyed part of the sprinkling system and lawn on the Emery Property, and portions of parking lots on the Emery Property and the Seethaler Property, all without permission of Plaintiffs and without regard to the objection of Plaintiffs.

Boundary by Acquiescence/Deeded Property

28. The Fence Line has been the recognized division and boundary line between the Emery Property and the Call Property and between the Seethaler Property and the Call Property since at least 1963. Additionally, the cedar post fence on the Fence Line has never been moved or altered until Defendants' construction commencing in 2002.

29. Plaintiffs and their predecessors in interest have occupied all of the land north of the Fence Line for longer than thirty-two (32) years.

30. The Defendants and their predecessors in interest never pastured, utilized or occupied land north of the Fence Line until after the Smith Survey in 2001.

31. The Defendants and their predecessors in interest never objected to the location of the Fence Line until Defendants received a draft copy of the Smith Survey in late 2001.

32. The Defendants and their predecessors in interest never claimed the Fence Line to be anything other than a boundary fence.

33. The Plaintiffs and their predecessors in interest always claimed the Fence Line to be the Boundary Line between the Emery Property and the Call Property and between the Seethaler Property and the Call Property.

34. There are two (2) utility poles north of the Fence Line which only serve the Emery Property and the Seethaler Property.

35. Both utility poles predate development of the Call Property in 1993 and go back to at least 1988. If the Smith Survey was accepted, both utility poles would be on the Call Property, and neither the Emery Property nor the Seethaler Property has a utility easement across the northern edge or any portion of the Call Property.

36. The Hansen Survey places both poles on the Emery Property and the Seethaler Property, consistent with a utility easement along the South five feet (5') of the Seethaler Property and along the South five feet (5') of the Emery Property. No similar utility easement runs across the northernmost portion of the Call Property.

37. The Defendants' Retaining Wall sits north of the Seethaler's utility pole and related utility easement on the Plaintiffs' side of the Fence Line.

38. The power company placed a utility pole towards the South side of the Seethaler Property. The utility pole stood north of the Fence Line, but the Retaining Wall built by the Defendants now runs north of the utility pole, thereby separating the pole from the rest of the Seethaler Property.

39. Defendants constructed a curb and gutter in 1993 north and south along 600 East, Logan, Utah, the East boundary of the Call Property, which curb and gutter stopped at its north end at the Fence Line, and in so doing, Defendants acknowledged that the Fence Line is the legitimate Boundary Line between the Call Property and the Emery Property and the Seethaler Property.

40. Emerys' neighbor to the west, the Wendts, constructed a canal retaining wall that ends at the same location as the Fence Line.

41. The location of the Wendt canal retaining wall ending at the Fence Line clearly demonstrates that the Fence Line was widely recognized in the community as the Boundary Line.

42. The Crow Survey clearly placed the Boundary Line at the Fence Line.

43. No one, including the Defendants, ever objected to the Boundary Line defined in the Crow Survey or the Fence Line as a Boundary Line until Defendants commissioned the self-serving Smith Survey in late 2001.

44. In 1993, Wayne Crow notified the Defendants that the Fence Line plainly displayed a line of possession by the Plaintiffs and the Crow Survey recognized the Fence Line as the North boundary of the Call property.

45. Plaintiffs and Defendants clearly understood the Fence Line was the Boundary Line in 1993. Moreover, before Wayne Crow performed his 1993 Crow Survey, over twenty (20) years of use and occupation had already occurred on the Emery Property and the Seethaler Property north of the Fence Line.

46. A shed on the Seethaler Property currently sits entirely north of the Fence Line, but extends and encroaches one to two feet south of a line extending from the Defendants' new Retaining Wall.

47. Sometime before 1989, the current shed replaced an older shed in the same location.

48. Although the older shed was somewhat smaller, it had occupied a portion of the Seethaler Property no further south than the current shed.

49. The current shed's location indicates that the true Boundary Line is properly located south of the current shed along the Fence Line.

50. Prior to the Smith Survey in 2001, no one ever objected to the location of the current shed or the predecessor shed as not being on the Seethaler Property or as encroaching on the Call Property.

51. The Court accepts Lawrence Emery's testimony concerning the construction of the Seethaler shed and the occupation of the Property north of the Fence Line as true, because Lawrence Emery frequented the Property and lived nearby beginning as early as 1980.

52. The Court rejects Don Call's testimony regarding the construction of the shed because he lived in Salt Lake City and, by his own admission, did not begin regularly visiting the Property until after the old shed was replaced, namely, in the early 1990's.

53. Lawrence Emery also maintained a lawn, and since 1990 a sprinkler system, north of the Fence Line, to which neither the Defendants nor their predecessors in interest objected. Lawrence Emery's placement of a sprinkler system on his side of the Fence Line shows actual occupation of the Emery Property up to the Fence Line.

54. Don Call admitted that he or his agents in the construction process unilaterally removed all historical monuments, Plaintiffs' improvements and trees, and the survey markers placed by Don Call's surveyor, Wayne Crow, in connection with the 1993 Crow Survey.

55. Don Call acknowledged that the trees he removed and land beneath them were not his when he asked Plaintiffs, "Shall I take these trees down for you?" in a conversation with Plaintiffs in 2001.

56. Furthermore, Don Call removed trees south of the Fence Line before the trees along the Fence Line, indicating that Don Call recognized the Fence Line as the true Boundary Line.

57. The trees along the Boundary Line existed long enough to have barbed wire grow through them. The significant growth of the trees around the barbed wire reflects that the Fence Line had existed for an exceptionally long time.

58. Furthermore, the growth of the trees along the Fence Line is consistent with the Boundary Line established by the Crow Survey and the later Hansen Survey.

59. Lawrence Emery and/or his agents performed maintenance on the Fence Line from 1988 until the date when Don Call obliterated and destroyed the Fence Line.

60. The 1990 photographs found in Plaintiffs' Exhibit 30 substantiate Lawrence Emery's testimony that the Fence Line had been fairly well maintained.

61. The Fence Line was recognized as the Boundary Line as early as 1972 when Sherwin Kirby, a predecessor in interest to the Seethaler Property, began constructing the improvements on the Seethaler Property, now known as Cambridge Court Apartments.

62. Before and after Sherwin Kirby purchased the Seethaler Property, no one ever claimed that the Fence Line was not the Property Boundary Line.

63. Dallas Elder, who sold the Seethaler Property to Sherwin Kirby, told Sherwin Kirby that the Fence Line was the dividing line between the Seethaler Property and the Call Property.

64. The City of Logan relied on the location of the Fence Line as the Boundary Line when the City accepted the original parking lot plans for the Cambridge Court Apartments in 1972 on the Seethaler Property.

65. Sherwin Kirby purposely did not place asphalt for the parking lot on the Seethaler Property all the way south to the cedar post Fence Line so he could save money.

66. Sherwin Kirby also left space between the asphalt parking and the Fence Line to prevent any risk of damage to the fence or any risk of harming the Call Property.

67. Sherwin Kirby purposely left the space between the edge of the asphalt and the Fence Line to allow cars to pull forward and "hang over" the edge of the asphalt.

68. The Property that was wrongfully taken from Seethaler and that Seethaler lost when Defendants hauled in fill north of the Fence Line and constructed the Retaining Wall north of the Fence Line clearly reduced the size and effective use of the parking lot on the Seethaler Property.

69. The Court does not believe or accept Don Call's testimony or his assertions regarding the location and construction of concrete bases on the Fence Line some thirty-two (32) years ago.

70. Only one Fence Line existed, and the Crow Survey and Hansen Survey both accurately described the location of that Fence Line.

71. Steve Johnson observed "milled" wooden posts in cement bases near the Fence Line, but the wood and cement bases he saw could not have been remnants of the unmilled, unfinished, and uncemented Fence Line.

72. Moreover, the distance and spacing between these alleged "fence posts" testified to by Steve Johnson reflect that the cemented posts were something other than fence posts.

73. John Chase remembered the Fence Line, but he did not recall that the Fence Line posts had cement bases; yet Defendants have attempted to use his testimony to prove the cement bases he observed were bases for the Fence Line, which the Court rejects.

74. The Court rejects the testimonies of Steve Johnson and John Chase as inconsistent with other reliable testimonies and inconsistent with the surveyed location of the Fence Line as established by Defendants' own surveyor, Wayne Crow, in the 1993 Crow Survey.

75. The wooden posts in cement bases never constituted any part of the cedar post Fence Line, and therefore, the location of the cement bases is irrelevant.

76. Furthermore, Defendant Don Call cannot unilaterally destroy all of the evidence of a boundary Fence Line, including his own survey markers, and later claim that no evidence exists concerning the location of the Fence Line. The Defendants did not bring "clean hands" into the Court, and they cannot now profit by their own destruction of relevant evidence.

77. Finally, Don Call and his counsel, Ray Malouf, were warned several times of the repetitive nature of Don Call's testimony on July 1, 2004. The July 1, 2004 testimony of Don Call also contradicted and impeached Don Call's earlier testimony of June 29, 2004.

78. The Court warned Don Call and his counsel that the July 1, 2004 testimony appeared to be a "created" memory, but Don Call continued to testify to such contradictions.

79. Even Don Call testified that the historic location of the Fence Line was several feet south of his Retaining Wall.

Deeded Boundary Line/Surveyed Boundary Line

80. The Hansen Survey is persuasive, detailed and accurate. The Hansen survey clearly is more reliable and more thorough than the Smith Survey. Hansen performed more research and utilized "twenty or thirty" deeds in conducting his survey. Hansen also performed a more adequate and thorough survey by using information inside and outside the city block containing the Call, Emery and Seethaler Properties. The Call, Emery, and Seethaler deeds use a beginning point that relies on a location described in the Niels Mickelson survey and located outside of the city block containing the parcels. Because the deeds rely on locations outside of the city block, Hansen reasonably relied on his accurate research and evidence outside the city block.

81. The 1993 Crow Survey included language that the boundary between the Call Property and the Emery/Seethaler Properties ran "along an extended fence line." The Crow Survey contained a legal description that clearly placed the Call Property boundary along the Fence Line. Additionally, the 1993 Crow Survey contained no reservations that the Crow Survey constituted anything other than a boundary survey. The Crow Survey also demonstrates that as late as 1993, a professional surveyor, Wayne Crow, recognized the Fence Line as the Boundary Line.

82. Surveyor Layne Smith attempted to fit all of the properties within the same city block, and contrary to the deeds, he unreasonably relied on road improvements as his governing monuments and starting point. Smith's disregard for the Niels Mickelson survey essentially placed more importance on recent street improvements rather than older monuments and the original Niels Mickelson survey.

83. Don Call informed Layne Smith of his need for additional Property so he could add another apartment unit to his development. As a result, the Smith Survey reflects a self-serving purpose.

84. The Smith Survey makes the self-serving and bald legal assertion that the Fence Line was merely a "fence of convenience." Smith based conclusions in the Smith Survey on a single interview with Don Call and no one else. In the Smith Survey, Smith attempts to reverse more than thirty-two (32) years of history surrounding the Fence Line. He also disregards another professional surveyor's conclusion in 1993 that the Fence Line constituted the Boundary Line between the Call Property and the Emery/Seethaler Properties.

85. The Smith Survey merely attempted to give Don Call what he had requested— a few extra feet of Property and a description of the Fence Line as a "convenience fence."

86. Furthermore, Layne Smith testified that he could not recall whether the Fence Line had cement bases or any other features that a closer inspection would have revealed, yet he easily dismissed the fence as one of "convenience." Layne Smith lacked a sufficient foundation to characterize the Fence Line as a fence of convenience.

87. Layne Smith obviously did not closely inspect the construction of, or the purposes of, the Fence Line. The Smith Survey was nothing more than an attempt to reject the 1993 Crow Survey and site plan that Defendants had already relied upon for nearly a decade. The Smith Survey is clearly and inherently unreliable.

88. Preston Ward, Cache County Surveyor, lacked the personal knowledge to give reliable testimony concerning the validity of the Hansen Survey and the Smith Survey. Preston Ward has no familiarity with the property or the deeds in question. Preston Ward testified that in determining the location of roads and any roadway improvements, a surveyor must rely on the location of old fence lines and other older monuments.

89. Yet, the Smith Survey rejected old fence lines and other older and more reliable monuments, and instead relied on the location of road improvements.

90. Additionally, as a county surveyor, Preston Ward has a vested and conflicting interest in assuring that other surveyors limit their surveys to within the confines of roadway improvements.

91. The Court finds the Boundary Line between the Call Property and the Emery Property and the Seethaler Property to be the line shown in the Hansen Survey, which is largely consistent with the original Fence Line.

Water Drainage

92. Before and after the construction of Cambridge Court Apartments in 1972 on the Seethaler Property, water from the Seethaler Property and water from the Emery Property drained to the south and southwest onto the Call Property. The three parcels in question have always sloped from a high point along Canyon Road on the north to a low point in the center of the Call Property on the south. Water has always drained in a south and southwesterly direction across the Seethaler Property and across the Emery Property onto the Call Property.

93. The water from the Emery Property and the Seethaler Property always adversely drained onto the Call Property and without permission of the owners of the Call Property.

94. The conversation between Don Call, Lawrence Emery and Karl Seethaler in 1993 demonstrates Don Call was aware that the water draining across and from the Emery and Seethaler Properties onto the Call Property drained in an open, notorious and adverse manner.

95. During the 1993 conversation, Don Call never granted permission for Lawrence Emery and Karl Seethaler to continue draining water onto the Call Property.

96. Because the Cambridge Court Apartments were constructed in 1972, and the Emery apartments were constructed four or five years earlier (1967 or 1968), by 1993, water had drained openly, notoriously and adversely from the Emery Property and the Seethaler Property onto the Call Property for at least twenty-one (21) years.

97. Don Call brought several feet of dirt fill onto the Call Property and the southern edge of the Emery Property and the Seethaler Property, and constructed a large cement Retaining Wall, thereby damming the natural flow of water.

98. No pooling and flooding occurred on the Emery Property before Defendants constructed the Retaining Wall.

99. Lawrence Emery has experienced extensive flooding since Defendants constructed the cement Retaining Wall on the Emery Property.

100. The completion of Defendants' Retaining Wall on the Seethaler Property threatens even more drastic flooding because additional water from the Seethaler Property now drains westerly along the Retaining Wall dam and onto the Emery Property.

101. Don Call clearly intended to dam the water flowing from the Emery and Seethaler Property to the Call Property. He stated numerous times that one of his major reasons for constructing the Retaining Wall was to stop the flow of water from the Emery and Seethaler Properties onto the Call Property.

102. Don Call showed regard for his self-interest and not for his neighbors' interests when he or his agents built the Retaining Wall and unilaterally destroyed old survey monuments and evidence of the natural drainage patterns.

103. The flow of water from natural courses and across asphalted portions of the Emery Property and the Seethaler Property onto the Call Property has been open, notorious, adverse and without permission from at least 1968 until 2002.

Tree Damage

104. Don Call brought several feet of dirt fill onto the Call Property and the portions of the Emery Property and the Seethaler Property he wrongfully claimed by the Smith Survey, thereby covering existing tree roots with several feet of fill and wrongfully damaging Plaintiffs' trees. He also constructed a cement Retaining Wall near the two large spruce trees on the Emery Property and totally obliterated and removed trees north of the Fence Line on the Emery Property and on the Seethaler Property.

105. The Court accepts the testimony of Mark Malmstrom, Plaintiffs' tree expert, as unrebutted, uncontroverted and reliable. Mark Malmstrom possesses the expertise and experience to evaluate the health and aesthetics of the trees and their value.

106. Furthermore, Mark Malmstrom used a widely-accepted method for calculating the value of the destroyed and damaged trees. The damaged and removed trees adversely affected the Plaintiffs' current Property uses and the Property's aesthetics.

107. The west spruce tree suffered a 45% loss of a \$7,500 value for damages of \$4,975.00, and the east spruce tree suffered a 40% loss of an \$8,000 value for damages of \$3,200.00.

108. Additionally, the Defendants' total destruction and removal of Emery's Green Ash tree and Seethaler's six Box Elder trees are valued at \$1,600 per tree, for damages of \$11,200.00

109. The total damages to trees owned by Emery and Seethaler and caused by Defendants is \$19,375.00.

Conflict of Interest Waiver

110. On the afternoon of June 30, the second day of the trial, the Court became aware for the first time that Defendants' counsel, Ray Malouf, intended to call Ralph Call as a witness. In a private meeting held in Judge Low's chambers, counsel for both parties were informed that Ralph Call is a friend and acquaintance of Judge Low.

111. The Court impressed upon Ray Malouf the importance of filing pretrial witness disclosure lists, which Ray Malouf did not file, and warned of the possibility of a mistrial.

112. Ray Malouf then assured the Court that Ralph Call's testimony was repetitive and would add nothing to the existing testimony, and that he would not call him. After consulting with their respective clients, counsel for Plaintiffs and counsel for Defendants waived the potential conflicts of interest and assured Judge Low that recusal was not necessary and that the trial could proceed.

113. The Court finds Defendants have not proven any of the allegations of their Counterclaim and therefore should not be entitled to any recovery thereon.

From the foregoing Findings of Fact, the Court now makes and enters the following:

CONCLUSIONS OF LAW

1. Plaintiffs, Lawrence P. Emery and Jennifer J. Emery, own Parcel Tax ID Nos. 06-075-0004 and 06-075-0005 located at 558 and 568 Canyon Road in Logan, Utah, described as follows:

BEGINNING 681.06 FEET WEST & 456 FEET SOUTH OF NORTHEAST CORNER LOT 6 NIELS MIKKELSEN ENTRY, NORTH 58°40' WEST 76.69 FEET NORTH 2°28' EAST 100 FEET SOUTH 58°03' WEST 60.1 FEET SOUTH 2°28' WEST 172.6 FEET NORTH 64°26'30" EAST 62.04 FEET TO BEGINNING SOUTHEAST QUARTER SECTION 34 TOWNSHIP 12 NORTH RANGE 1 EAST D2839A.

BEGINNING 634.49 FEET WEST & 436.73 FEET SOUTH OF NORTHEAST CORNER LOT 6 NIELS MIKKELSEN ENTRY NORTH 2°28' EAST 185.39 FEET SOUTH 59°03' WEST 60.1 FT SOUTH 2°28' WEST 100 FEET SOUTH 58°40' EAST 76.69 FEET NORTH 64°26'30" E 51.62 FEET TO BEGINNING SOUTHEAST QUARTER SECTION 34 TOWNSHIP 12 NORTH RANGE 1 EAST D2839B.

(hereafter the "Emery Property").

2. Plaintiff Karl H. Seethaler owns Parcel Tax ID No. 06-075-0006 located at 580 Canyon Road in Logan, Utah, described as follows:

BEGINNING 410.84 FEET WEST & 115.15 FEET SOUTH FROM NORTHEAST CORNER LOT 6 NIELS MIKKELSEN ENTRY S 59°59'30" WEST 51.74 S 59°03' WEST 193.6 FEET SOUTH 2°28' WEST 185.39 FEET NORTH 64°26'30" EAST 35.54 FEET SOUTH 88°24' EAST 176.5 FEET NORTH 2° EAST 300.32 FEET TO BEGINNING SUBJECT TO RIGHT-OF-WAY SOUTHEAST QUARTER SECTION 34 TOWNSHIP 12 NORTH RANGE 1 EAST D2839.

(hereafter the "Seethaler Property").

3. Defendants Don W. Call and Linda Call own Parcel Tax ID No. 06-075-0007, located at 249 North 500 East in Logan, Utah, described as follows:

BEGINNING AT POINT NORTH 88°11' WEST 411.05 FEET OF POINT SOUTH 2° WEST 700 FEET FROM NORTHEAST CORNER LOT 6 NIELS MIKKELSEN'S ENTRY, NORTH 2° EAST 265.7 FEET NORTH 88°18' WEST 176.5 FEET SOUTH 64°27' WEST 149.2 FEET SOUTH 41° EAST 134.5 FEET ALGIE BANK LOGAN HP CANAL SOUTH 29°55' EAST 151 FEET SOUTH 88°11' EAST 195 FEET TO BEGINNING SOUTHEAST QUARTER SECTION 34 TOWNSHIP 12 NORTH RANGE 1 EAST D2867A.

BEGINNING IN THE NORTH LINE OF 2ND NORTH STREET AT A POINT NORTH 88°11' WEST 394.55 FEET OF A POINT SOUTH 2° WEST 700 FEET FROM THE NORTHEAST CORNER OF LOT 6 OF NIELS MIKKELSEN'S ENTRY; THENCE NORTH 2° EAST ALONG THE WEST LINE OF STREET 265.7 FEET; THENCE NORTH 88°18' WEST 193 FEET; THENCE SOUTH 64°27' WEST 149.2 FEET MORE OR LESS TO THE EAST BANK OF THE LOGAN AND HYDE

PARK CANAL; THENCE SOUTH 41° EAST 134.5 FEET ALONG SAID BANK OF SAID CANAL; THENCE SOUTH 29°55' EAST 151 FEET MORE OR LESS TO THE NORTH LINE OF 2ND NORTH STREET; THENCE SOUTH 88°11' EAST ALONG THE NORTH LINE OF SAID STREET 212 FEET TO THE PLACE OF BEGINNING, AND FURTHER DESCRIBED AS BEING SITUATED IN THE SOUTHEAST QUARTER OF SECTION 34, TOWNSHIP 12 NORTH, RANGE ONE EAST OF THE SALT LAKE BASE AND MERIDIAN. THIS INCLUDES 1.2 SHARES OF WATER STOCK

(hereafter the "Call Property").

Boundary By Acquiescence

4. Plaintiffs have proven each element of and satisfied each and every requirement for the establishment of a boundary by acquiescence pursuant to Utah law.

(a) Plaintiffs' Property and Defendants' Property adjoin one another;

(b) Plaintiffs and their predecessors in interest occupied the Emery Property and the Seethaler Property up to a visible line marked by the old cedar post Fence Line with parking lots, sprinkler pipe, grass, asphalt, a shed, utility easements, utility poles, utility lines and trees; the Fence Line clearly indicated the existence of a demarcation line crossing between the Seethaler Property and the Call Property, as well as between the Emery Property and the Call Property; the cedar post Fence Line was an obvious, open and a recognized division between the parties' properties; there is no question that the cedar post Fence Line delineated the proper Boundary Line;

(c) Plaintiffs, Defendants and their predecessors in interest mutually acquiesced to the cedar post Fence Line as the Boundary Line, and Defendants never disputed the old cedar post Fence Line as their north property Boundary Line until 2001; and

(d) All such behavior, events and circumstances that indicate the existence of a boundary by acquiescence have occurred for a long period of time, namely, more than thirty-two (32) years.

Deeded Boundary/Survey Boundary

5. Even if Plaintiffs could not meet the requirements for boundary by acquiescence, the Hansen Survey accurately delineates the true Boundary Line between the Emery Property and the Call Property, as well as between the Seethaler Property and Call Property, and a copy of the Hansen Survey is attached as Exhibit "A" and incorporated by reference.

6. The Hansen Survey dated July 15, 2002, accurately delineates the true Boundary Line between the Emery Property and the Call Property, as well as between the Seethaler Property and Call Property; and the Court accepts the surveyed descriptions of the Emery Property and of the Seethaler Property as follows:

(a) Surveyed legal description for Parcel 06-075-0004 - Emery:

A parcel of ground located in the Southeast Quarter of Section 34, Township 12 North, Range 1 East of the Salt Lake Base and Meridian, described as follows: Commencing at the Logan City GPS Monument #251 - NE25, and running thence South 67°55'47" West 738.03 feet to the true point of beginning, a point located on the South right-of-way line of Canyon Road; and running thence South 02°28'00" West 100.00 feet; thence South 00°40' East 76.69 feet to a point described of record as being located 681.06 feet West and 456 feet South of the Northeast corner of the Niels Mikkelsens entry; thence South 64°26'30" West 62.04 feet; thence North 02°28'00" East 172.60 feet to a point on the aforementioned South right-of-way line; thence North 59°02'39" East (North 59°03' East by record) along said right-of-way line 60.10 feet to the point of beginning. Containing 0.21 acres.

(b) Surveyed legal description for Parcel 06-075-0005 - Emery:

A parcel of ground located in the Southeast Quarter of Section 34, Township 12 North, Range 1 East of the Salt Lake Base and Meridian, described as follows: Commencing at the Logan City GPS Monument #251 - NE25, and running thence South 68°42'34" West 678.73 feet to the true point of beginning, a point located on the South right-of-way line of Canyon Road; and running thence South 59°03'36" West (South 59°03'00" West by record) along said right-of-way line 60.10 feet; thence leaving said right-of-way line South 02°28'00" West 100.00 feet; thence South 00°58'40" East 76.69 feet; thence North 64°26'30" East 51.62 feet to a point described of record as being located 634.49 feet West and 436.73 feet South of the Northeast corner of the Niels Mikkelsens entry; thence North 02°28'00" East 185.39 feet to the point of beginning. Containing 0.21 acre.

(c) Surveyed legal description for Parcel 06-075-0006 - Seethaler:

A parcel of ground located in the Southeast Quarter of Section 34, Township 12 North, Range 1 East of the Salt Lake Base and Meridian, described as follows: Commencing at the Logan City GPS Monument #251 - NE25, and running thence South 73°58'06" West 438.47 feet to the intersection point of the South right-of-way line of Canyon Road and the West right-of-way line of 600 East Street at a point described of record as being located 410.84 feet West and 115.15 feet South from the Northeast corner of Lot 6 of the Niels Mikkelsens Entry, and is the true point of beginning; and running

thence South 02°00'00" West along said West right-of-way line 300.32 feet, thence North 88°24'00" West 176.50 feet; thence South 64°26'30" West 35.54 feet, thence North 02°28'00" East 185.39 feet to the aforementioned South right-of-way line of Canyon Road; thence along said Canyon Road right-of-way line the following two courses: 1) North 59°03'00" East 193.60 feet; 2) thence North 60°11'33" East 51.82 feet (North 59°59'30" East 51.74 feet by record) to the point of beginning. Containing 1.12 acres.

7. Defendants' Warranty Deed states the Call Property is "subject to easements or claims of easements, not shown by the public records." Therefore, Defendants cannot rely solely on the metes and bounds description in the deed for their Property boundary. The very deed upon which the Defendants attempt to rely disclosed and placed the Defendants on notice of possible encroachments and adverse claims. There is no basis for the Defendants to infer otherwise. Thus, Don Call's demand that he receive his "deeded property" rings hollow in the Court's ears.

Water Drainage

8. Defendants unreasonably and purposely restricted the flow of drainage water from the Emery Property and the Seethaler Property, thereby purposely harming the Plaintiffs. Water has drained from the Emery Property and the Seethaler Property for at least thirty-two (32) years in an open, notorious and adverse manner. Therefore, Plaintiffs are entitled to a prescriptive easement for water drainage over Defendants' Property consistent with the natural and artificial drainage that has historically occurred prior to the construction by Defendants of the Retaining Wall, subject to further review of case law and briefs of the parties on this matter.

Tree Damage

9. Pursuant to Mark Malmstrom's calculations and Utah Code Ann. § 18-58-3 (2004), Defendants are liable to Plaintiffs for \$19,375.00 in damages to Plaintiffs for the destruction and removal of trees on Plaintiffs' Property and judgment should enter in favor of Plaintiffs and against the Defendants in the sum of \$19,375.00.

Miscellaneous

10. The Court reserves for later hearing in equity how the parties must address the removal or other handling of the Retaining Wall, the change in grade created by the Defendants, the drainage problem and cedar post fence removal, to be included in a Supplemental Judgment in this matter

11. The Defendants' Counterclaim should be dismissed with prejudice.

12. Costs are to be awarded to the Plaintiffs, to be included in the Supplemental Judgment.

DATED this 21st day of April, 2005.

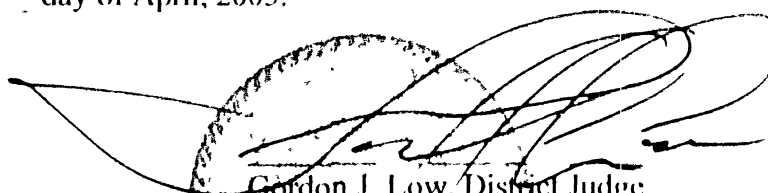

Gordon J. Low, District Judge

EXHIBIT C

Miles P. Jensen (#1686)
OLSON & HOGGAN, P.C.
Attorneys for Plaintiffs
130 South Main, Suite 200
P.O. Box 525
Logan, Utah 84323-0525
Telephone: (435) 752-1551

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF UTAH, IN AND FOR THE COUNTY OF CACHE**

| | | |
|--------------------------------|---|-----------------------------|
| LAWRENCE P. EMERY, JENNIFER J. |) | |
| EMERY, and KARL H. SEETHALER, |) | |
| |) | INTERIM SUPPLEMENTAL |
| Plaintiffs, |) | JUDGMENT AND DECREE |
| |) | |
| vs. |) | |
| |) | Civil No. 030100618 |
| DON W. CALL and LINDA CALL, |) | |
| |) | Judge Gordon J. Low |
| Defendants. |) | |
| |) | |

This matter came on for hearing on Tuesday, November 28, 2006, at 9:00 a.m., the Honorable Gordon J. Low presiding. Plaintiffs were represented by their legal counsel, Olson & Hoggan, P.C., Miles P. Jensen, and Defendants were represented by their legal counsel, Bearnson & Peck, L.C., Marty Moore. The Court, having heard the testimony and having received certain Exhibits into evidence, and having entered its Supplemental Findings of Fact and Conclusions of Law, hereby makes the following:

INTERIM SUPPLEMENTAL
JUDGMENT AND DECREE

1. The Hansen Survey shall be recorded reflecting the property lines and boundaries between the Seethaler and Call property and the Emery and Call property, respectively.
2. The existing cement walls may remain in place.
3. The property ownership shall remain as it is currently, with occupancy of the property from the cement wall south to be by the Defendants. Occupancy of the cement wall north shall be by the Plaintiffs.
4. In lieu of Plaintiffs' prescriptive easement or license for water drainage and flowage across Defendants' property, Plaintiffs are hereby awarded against the Defendants the sum of \$3,384.00 for the cost of constructing a sump to handle water drainage, and Defendants are hereby released from any and all liability for damages caused by flooding on the Emery and Seethaler Property caused by Plaintiffs' failure to construct the sump.
5. There shall be a credit on any sums awarded to the Plaintiffs in Defendants' favor in the sum of \$8,175.00 for the blue spruce trees.
6. Defendants shall continue to occupy the property from the cement wall south.
7. Seethaler is awarded against Calls the sum of \$8,900.00, and Emerys are awarded against Calls the sum of \$6,750.00.
8. Seethaler is awarded against the Defendants the sum of \$500.00 for the anticipated taxes over the next 20 years.
9. Emerys are awarded against the Defendants the sum of \$400.00 for the anticipated taxes over the next 20 years.
10. Emerys are hereby awarded judgment against Calls with an easement and right of exclusive use of the easternmost one (1) parking space on Defendants' property and vehicular and pedestrian access to and from the parking space to 600 East Street on Defendants' property. The parking space easement and access easement are located upon and are a burden to Defendants' property, which is described as follows:

BEGINNING AT POINT NORTH 88°11' WEST 411.05 FEET OF POINT SOUTH 2° WEST 700 FEET FROM NORTHEAST CORNER LOT 6 NIELS MIKKELSEN'S ENTRY, NORTH 2° EAST 265.7 FEET NORTH 88°18' WEST 176.5 FEET SOUTH 64° 27' WEST 149.2 FEET SOUTH 41° EAST 134.5 FEET ALGE BANK LOGAN HP CANAL SOUTH 29°55' EAST 151 FEET SOUTH 88°11' EAST 195 FEET TO BEGINNING SOUTHEAST QUARTER SECTION 34 TOWNSHIP 12 NORTH RANGE 1 EAST D2867A.
(Tax ID # 06-075-0007)

BEGINNING IN THE NORTH LINE OF 2ND NORTH STREET AT A POINT NORTH 88°11' WEST 394.55 FEET OF A POINT SOUTH 2° WEST 700 FEET FROM THE NORTHEAST CORNER OF LOT 6 OF NIELS MIKKELSEN'S ENTRY; THENCE NORTH 2° EAST ALONG THE WEST LINE OF STREET 265.7 FEET; THENCE NORTH 88°18' WEST 193 FEET; THENCE SOUTH 64°27' WEST 149.2 FEET MORE OR LESS TO THE EAST BANK OF THE LOGAN AND HYDE PARK CANAL; THENCE SOUTH 41° EAST 134.5 FEET ALONG SAID BANK OF SAID CANAL; THENCE SOUTH 29°55' EAST 151 FEET MORE OR LESS TO THE NORTH LINE OF 2ND NORTH STREET; THENCE SOUTH 88°11' EAST ALONG THE NORTH LINE OF SAID STREET 212 FEET TO THE PLACE OF BEGINNING, AND FURTHER DESCRIBED AS BEING SITUATED IN THE SOUTHEAST QUARTER OF SECTION 34, TOWNSHIP 12 NORTH, RANGE ONE EAST OF THE SALT LAKE BASE AND MERIDIAN.
(Tax ID # 06-075-0007)

(The above two legal descriptions are collectively "the Call Property".)

And the easements are for the benefit of the Emery Property, which is described as follows:

BEGINNING 681.06 FEET WEST & 456 FEET SOUTH OF NORTHEAST CORNER LOT 6 NIELS MIKKELSEN ENTRY, NORTH 58'40" WEST 76.69 FEET NORTH 2°28' EAST 100 FEET SOUTH 58°03' WEST 60.1 FEET SOUTH 2°28' WEST 172.6 FEET NORTH 64°26'30" EAST 62.04 FEET TO BEGINNING SOUTHEAST QUARTER SECTION 34 TOWNSHIP 12 NORTH RANGE 1 EAST D2839A.
(Tax ID # 06-075-0004)

BEGINNING 634.49 FEET WEST & 436.73 FEET SOUTH OF NORTHEAST CORNER LOT 6 NIELS MIKKELSENS ENTRY NORTH 2°28' EAST 185.39 FEET SOUTH 59°03' WEST 60.1 FT SOUTH 2°28' WEST 100 FEET SOUTH 58'40" EAST 76.69 FEET NORTH 64°26'30" E 51.62 FEET TO BEGINNING SOUTHEAST QUARTER SECTION 34 TOWNSHIP 12 NORTH RANGE 1 EAST D2839B.
(Tax ID # 06-075-0005)

(The above two legal descriptions are collectively "the Emery Property".)

11. It is ordered that the parking space shall remain exclusively open and accessible for Emerys and the Emery Property.

12. It is ordered that the parking space be specifically reserved with signage for the Emerys and the Emery Property on a continual and perpetual basis, subject to reasonable rules for parking established by the owner of the Call Property.

13. Defendants are given reasonable temporary access to Plaintiffs' property as needed if Defendants choose to erect a fence on top of the cement wall.

14. The cumulative total of sums awarded to Plaintiff, Karl Seethaler, is judgment against Defendants Don W. Call and Linda Call in the sum of \$9,000.00 plus costs of \$609.25.

15. The cumulative total of sums awarded to and charges against the Plaintiffs Lawrence Emery and Jennifer Emery is judgment against Defendants Don W. Call and Linda Call in the sum of \$2,359.00 plus costs of \$609.25.

16. All of the provisions of this Interim Supplemental Judgment and Decree are binding on parties, the successors in interest and assigns of the parties and on the properties in perpetuity.

17. The Court reserves for later hearing in equity the condition, status and damages, if any, of the west blue spruce tree on the Emery Property and the Court specifically reserves jurisdiction of the same to hear and resolve issues with respect to Plaintiffs' Motion for Supplemental Evidentiary Hearing in Equity (Motion).

18. This Judgment and Decree is res judicata for those items indicated and is not res judicata for purposes of Paragraph 17 above.

19. Because Plaintiffs' pending Motion may be treated as a Motion to Amend pursuant to Rule 4(b)(11)(2) of the Utah Rules of Appellate Procedure, and as a Motion pursuant to Rule 52(b) of the Utah Rules of Civil Procedure, the time limit for appeal by either party shall extend until thirty (30) days after final disposition of Plaintiffs' pending Motion, and each party waives any objection to and consents to the appeal time as provided herein.

DATED this 27th day of July, 2007.



Gordon J. Low
District Court Judge

APPROVED AS TO FORM
this 15th day of July, 2007.

BEARNSON & PECK

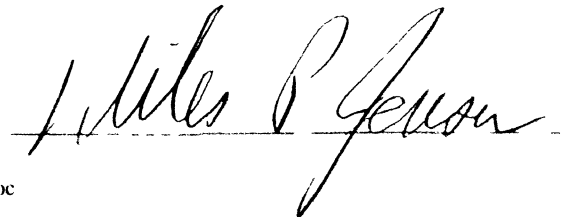

Marty E. Moore

RULE 7 (f) CERTIFICATE OF HAND DELIVERY

I hereby certify that on this 15th day of July, 2007, I hand delivered a true and exact copy of the foregoing **INTERIM SUPPLEMENTAL JUDGMENT AND DECREE** to the following address, in Logan, Utah:

Marty Moore
Bearnson & Peck
74 West 100 North
Logan, Utah 84323-0675

Pursuant to Rule 7(f) of the Utah Rules of Civil Procedure, if no objection to this **INTERIM SUPPLEMENTAL JUDGMENT AND DECREE** is submitted to the Court and counsel within five (5) days after service, the original will be submitted to the Court for signature.



J:\MPJ\Pleadings\Emery & Seethaler v Call\emery supp judg and decree 7.9.07.doc
N-4067 2A

EXHIBIT D

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF UTAH, IN AND FOR THE COUNTY OF CACHE**

Judge Gordon J. Low

ENT'D JUL 27 2007

2. It is not equitable or appropriate to order removal of the cement walls as erected by the Defendants on what has been determined to be the Plaintiffs' property, because it is economically unfeasible and unreasonable to require removal of the wall and because of the cost to rebuild the wall a few feet away.

3. Plaintiff Karl Seethaler has not lost any parking spaces as a result of the actions of the Defendants.

4. Plaintiffs Lawrence P. Emery and Jennifer J. Emery have lost one parking space as a result of the actions of the Defendants.

5. The Court reiterates the acceptance of the Hansen Survey as accurate and reliable, and the Survey is to be recorded reflecting the property lines and boundaries between the Seethaler and Call property and the Emery and Call property, respectively.

6. The Court finds that the existing cement walls may remain in place.

7. The Court finds it equitable to leave the property ownership as it is currently, with occupancy of the property from the cement wall south to be by the Defendants. Occupancy of the cement wall north shall be by the Plaintiffs.

8. The property from the cement wall south is being left in the Plaintiffs' names to protect and assist if any issues arise with Logan City with respect to their properties being a legal or illegal non-conforming use.

9. The Court finds that all of the elements for a prescriptive easement have been met by the Plaintiffs', both before and after the time of their acquisition of the respective properties, and that such use and prescriptive right has been open, notorious and adverse, and that even if a prescriptive easement for water drainage and flowage could not be established in the State of Utah, the Plaintiffs have a defacto license to place water upon the Defendants' property that flows across the Plaintiffs' properties, and Plaintiffs have made improvements on their properties relying upon the ability for such water flow to go onto the Defendants' properties.

10. It is not practical or equitable to require the surface water that has historically flowed from the Plaintiffs' properties to the Defendants' properties at this time, to continue to do so because

of the change in the height (grade) of the Defendants' property and the expensive improvements the Defendants have placed on the property.

11. The Court finds that the burden is on the Defendants to alleviate the drainage and water flow problem and assume the obligation to alleviate the problem with respect to the water flows from the Plaintiffs' properties.

12. The Court finds that the Defendants should not have to dig a trench to hold the water on their property, and that an equitable method and reasonable method is to require a sump to be placed on the Emery property.

13. The Court finds that a sump should be built to handle the Emery and Seethaler surface water at the Defendants' expense, and that the size of the sump should be as explained in Plaintiffs' Exhibit 11, with the sump being 20 feet by 34 feet by 4 feet, and that it is most economical and appropriate with a 100-year flood possibility to require such sump to be erected, and Plaintiffs should be awarded judgment against the Defendants in the sum of \$3,384.00 for the costs of construction of such sump. Defendants should be released from any and all liability for damages caused by flooding on the Emery and Seethaler Property caused by Plaintiffs' failure to construct the sump.

14. The Court finds that the blue spruce trees that the Court previously awarded damages to the Plaintiffs for in the sum of \$8,175.00 are not damaged and have thrived, and there should be a credit on any sums awarded to the Plaintiffs Lawrence P. Emery and Jennifer J. Emery in Defendants' favor in the sum of \$8,175.00.

15. The Court finds that the Defendants should continue to occupy the property from the cement wall south, and that there is 612 square feet that has been basically taken from Seethaler of a value of \$8,900.00 and 400 square feet taken from the Emerys of a value of \$6,750.00.

16. The Court finds that judgment should be entered in favor of Seethaler and against Calls in the sum of \$8,900.00, and in favor of Emerys and against Calls in the sum of \$6,750.00 for the property south of the cement walls to which Defendants are granted exclusive possession.

17. The Court finds that taxes will continue to be charged on the property for which ownership remains in the Plaintiffs, but the Defendants will be occupying the same, and finds that the taxes on the Seethaler property are approximately \$21.60 per year, and with anticipated property

tax increases, Seethaler is awarded damages in the sum of \$500.00 for the anticipated taxes over the next 20 years; and Emerys are awarded judgment against Calls in the sum of \$400.00 for the anticipated taxes over the next 20 years on the real property for which the Defendants are permitted to continue to occupy.

18. The Court finds that the wall had a negligible effect on the Seethaler property and that the parking problems which Seethaler has with respect to his property are not caused by Calls, but by Logan City's anticipated road construction.

19. The Court finds that Emerys have lost one parking space, and Emerys are granted the right of the easternmost one (1) parking space on Defendants' property, with a perpetual easement to use the parking space and right of vehicular and pedestrian access to and from the parking space location on the Call property, to 600 East, which parking space should remain reasonably open and accessible for Emerys' tenants, with the parking space to be specifically reserved with signage for the Emery apartments' use on a continual basis subject to reasonable rules for parking established by the owner of the Call Property. The easements described in this paragraph burden and are upon the following described real property:

BEGINNING AT POINT NORTH 88°11' WEST 411.05 FEET OF POINT SOUTH 2° WEST 700 FEET FROM NORTHEAST CORNER LOT 6 NIELS MIKKELSEN'S ENTRY, NORTH 2° EAST 265.7 FEET NORTH 88°18' WEST 176.5 FEET SOUTH 64°27' WEST 149.2 FEET SOUTH 41° EAST 134.5 FEET ALGE BANK LOGAN HP CANAL SOUTH 29°55' EAST 151 FEET SOUTH 88°11' EAST 195 FEET TO BEGINNING SOUTHEAST QUARTER SECTION 34 TOWNSHIP 12 NORTH RANGE 1 EAST D2867A (Tax ID # 06-075-0007)

BEGINNING IN THE NORTH LINE OF 2ND NORTH STREET AT A POINT NORTH 88°11' WEST 394.55 FEET OF A POINT SOUTH 2° WEST 700 FEET FROM THE NORTHEAST CORNER OF LOT 6 OF NIELS MIKKELSEN'S ENTRY; THENCE NORTH 2° EAST ALONG THE WEST LINE OF STREET 265.7 FEET; THENCE NORTH 88°18' WEST 193 FEET; THENCE SOUTH 64°27' WEST 149.2 FEET MORE OR LESS TO THE EAST BANK OF THE LOGAN AND HYDE PARK CANAL; THENCE SOUTH 41° EAST 134.5 FEET ALONG SAID BANK OF SAID CANAL; THENCE SOUTH 29°55' EAST 151 FEET MORE OR LESS TO THE NORTH LINE OF 2ND NORTH STREET; THENCE SOUTH 88°11' EAST ALONG THE NORTH LINE OF SAID STREET 212 FEET TO THE PLACE OF BEGINNING, AND FURTHER DESCRIBED AS BEING SITUATED IN THE SOUTHEAST QUARTER OF SECTION

34, TOWNSHIP 12 NORTH, RANGE ONE EAST OF THE SALT LAKE BASE AND MERIDIAN.

(Tax ID # 06-075-0007)

(The above two legal descriptions are collectively "the Call Property".)

and are for the benefit of the following described real property:

BEGINNING 681.06 FEET WEST & 456 FEET SOUTH OF NORTHEAST CORNER LOT 6 NIELS MIKKELSEN ENTRY, NORTH 58°40' WEST 76.69 FEET NORTH 2°28' EAST 100 FEET SOUTH 58°03' WEST 60.1 FEET SOUTH 2°28' WEST 172.6 FEET NORTH 64°26'30" EAST 62.04 FEET TO BEGINNING SOUTHEAST QUARTER SECTION 34 TOWNSHIP 12 NORTH RANGE 1 EAST D2839A.

(Tax ID # 06-075-0004)

BEGINNING 634.49 FEET WEST & 436.73 FEET SOUTH OF NORTHEAST CORNER LOT 6 NIELS MIKKELSENS ENTRY NORTH 2°28' EAST 185.39 FEET SOUTH 59°03' WEST 60.1 FT SOUTH 2°28' WEST 100 FEET SOUTH 58°40' EAST 76.69 FEET NORTH 64°26'30" E 51.62 FEET TO BEGINNING SOUTHEAST QUARTER SECTION 34 TOWNSHIP 12 NORTH RANGE 1 EAST D2839B.

(Tax ID # 06-075-0005)

(The above two legal descriptions are collectively "the Emery Property".)

20. The Court finds that it is reasonable that if the Defendants choose to erect a fence on top of the cement walls, Defendants may do so in accordance with Logan City Ordinances, and that Defendants are given reasonable access to Plaintiffs' property as needed to construct the same.

21. The Court finds that Plaintiffs should be awarded costs totaling \$1,218.50 against the Defendants.

22. All of the Findings of Fact should be binding on the parties, the successors in interest and assigns of the parties and on the properties in perpetuity.

23. The Court reserves for later hearing in equity the condition, status and damages, if any, of the west blue spruce tree on the Emery Property and the Court specifically reserves jurisdiction of the same to hear and resolve issues with respect to Plaintiffs' Motion for Supplemental Evidentiary Hearing in Equity (Motion).

24. These Findings are res judicata for those items indicated and are not res judicata for purposes of Paragraph 23 above.

25. Because Plaintiffs' pending Motion may be treated as a Motion to Amend pursuant to Rule 4(b)(11)(2) of the Utah Rules of Appellate Procedure, and as a Motion pursuant to Rule 52(b) of the Utah Rules of Civil Procedure, the time limit for appeal by either party shall extend until thirty (30) days after final disposition of Plaintiffs' pending Motion, and each party waives any objection to and consents to the appeal time as provided herein.

From the foregoing Interim Supplemental Findings of Fact, the Court now makes and enters the following:

INTERIM SUPPLEMENTAL CONCLUSIONS OF LAW

1. The Hansen Survey is to be recorded reflecting the property lines and boundaries between the Seethaler and Call property and the Emery and Call property, respectively.
2. The existing cement walls may remain in place.
3. The property ownership shall remain as it is currently, with occupancy of the property from the cement wall south to be by the Defendants.
4. In lieu of Plaintiffs' prescriptive easement or license for water drainage and flowage across Defendants' property, Plaintiffs should be awarded judgment against the Defendants in the sum of \$3,384.00 for the cost of constructing a sump to handle water drainage, and judgment should enter releasing Defendants from any and all liability for damages caused by flooding on the Emery and Seethaler Property caused by Plaintiffs' failure to construct the sump.
5. There should be a credit on any sums awarded to the Plaintiffs in Defendants' favor in the sum of \$8,175.00 for the blue spruce trees.
6. Defendants shall continue to occupy the property from the cement wall south.
7. Judgment should be entered in favor of Seethaler and against Calls in the sum of \$8,900.00, and in favor of Emerys and against Calls in the sum of \$6,750.00.
8. Seethaler is awarded judgment against the Defendants in the sum of \$500.00 for the anticipated taxes over the next 20 years

9. Emerys should be awarded judgment against the Defendants in the sum of \$400.00 for the anticipated taxes over the next 20 years.

10. Emerys should be awarded judgment against C'alls with an easement and right of exclusive use of the easternmost one (1) parking space on Defendants' property and vehicular and pedestrian access to and from the parking space to 600 East Street. The easements for parking and access are located upon and are a burden to C'alls' real property, which is described as follows:

BEGINNING AT POINT NORTH 88°11' WEST 411.05 FEET OF POINT SOUTH 2° WEST 700 FEET FROM NORTHEAST CORNER LOT 6 NIELS MIKKELSEN'S ENTRY, NORTH 2° EAST 265.7 FEET NORTH 88°18' WEST 176.5 FEET SOUTH 64° 27' WEST 149.2 FEET SOUTH 41° EAST 134.5 FEET ALGE BANK LOGAN HP CANAL SOUTH 29°55' EAST 151 FEET SOUTH 88°11' EAST 195 FEET TO BEGINNING SOUTHEAST QUARTER SECTION 34 TOWNSHIP 12 NORTH RANGE 1 EAST D2867A.
(Tax ID # 06-075-0007)

BEGINNING IN THE NORTH LINE OF 2ND NORTH STREET AT A POINT NORTH 88°11' WEST 394.55 FEET OF A POINT SOUTH 2° WEST 700 FEET FROM THE NORTHEAST CORNER OF LOT 6 OF NIELS MIKKELSEN'S ENTRY; THENCE NORTH 2° EAST ALONG THE WEST LINE OF STREET 265.7 FEET; THENCE NORTH 88°18' WEST 193 FEET; THENCE SOUTH 64°27' WEST 149.2 FEET MORE OR LESS TO THE EAST BANK OF THE LOGAN AND HYDE PARK CANAL; THENCE SOUTH 41° EAST 134.5 FEET ALONG SAID BANK OF SAID CANAL; THENCE SOUTH 29°55' EAST 151 FEET MORE OR LESS TO THE NORTH LINE OF 2ND NORTH STREET; THENCE SOUTH 88°11' EAST ALONG THE NORTH LINE OF SAID STREET 212 FEET TO THE PLACE OF BEGINNING, AND FURTHER DESCRIBED AS BEING SITUATED IN THE SOUTHEAST QUARTER OF SECTION 34, TOWNSHIP 12 NORTH, RANGE ONE EAST OF THE SALT LAKE BASE AND MERIDIAN.

(Tax ID # 06-075-0007)

And the easements are for the benefit of the Emery Property, which is described as follows.

BEGINNING 681.06 FEET WEST & 456 FEET SOUTH OF NORTHEAST CORNER LOT 6 NIELS MIKKELSEN ENTRY, NORTH 58°40' WEST 76.69 FEET NORTH 2°28' EAST 100 FEET SOUTH 58°03' WEST 60.1 FEET SOUTH 2°28' WEST 172.6 FEET NORTH 64°26'30" EAST 62.04 FEET TO BEGINNING SOUTHEAST QUARTER SECTION 34 TOWNSHIP 12 NORTH RANGE 1 EAST D2839A.

(Tax ID # 06-075-0004)

BEGINNING 634.49 FEET WEST & 436.73 FEET SOUTH OF NORTHEAST CORNER LOT 6 NIELS MIKKELSENS ENTRY NORTH 2°28' EAST 185.39 FEET SOUTH 59°03' WEST 60.1 FT SOUTH 2°28' WEST 100 FEET SOUTH 58°40' EAST 76.69 FEET NORTH 64°26'30" E 51.62 FEET TO BEGINNING SOUTHEAST QUARTER SECTION 34 TOWNSHIP 12 NORTH RANGE 1 EAST D2839B.
(Tax ID # 06-075-0005)

The parking space should remain exclusively open and accessible for Emerys' tenants, with the parking space to be specifically reserved with signage for the Emery Property use on a continual and perpetual basis, subject to reasonable rules for parking established by the owner of the Call Property.

11. Defendants are given reasonable temporary access to Plaintiffs' property as needed if Defendants choose to erect a fence on top of the cement wall.

12. The net effect of the Court ruling is that Plaintiff, Karl Seethaler, should be awarded judgment against Defendants in the sum of \$9,000.00 plus costs of \$609.25 for a total judgment of \$9,609.25.

13. The net effect of the Court ruling is that Plaintiffs Lawrence Emery and Jennifer Emery should be awarded judgment against Defendants in the sum of \$2,359.00 plus costs of \$609.25 for a total judgment of \$2,968.25.

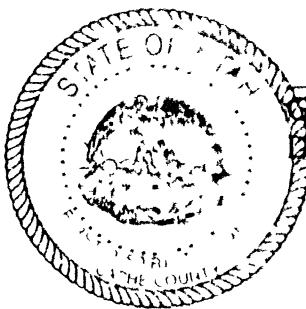
14. All of the Conclusions of Law shall be binding on the parties, the successors in interest and assigns of the parties and on the properties in perpetuity.

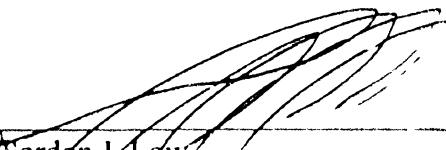
15. The Court reserves for later hearing in equity the condition, status and damages, if any, of the west blue spruce tree on the Emery Property and the Court specifically reserves jurisdiction of the same to hear and resolve issues with respect to Plaintiffs' Motion for Supplemental Evidentiary Hearing in Equity.

16. These Conclusions are res judicata for those items indicated and are not res judicata for purposes of Conclusion 15 above.

17. Because Plaintiffs' pending Motion may be treated as a Motion to Amend pursuant to Rule 4(b)(11)(2) of the Utah Rules of Appellate Procedure, and as a Motion pursuant to Rule 52(b) of the Utah Rules of Civil Procedure, the time limit for appeal by either party shall extend until thirty (30) days after final disposition of Plaintiffs' pending Motion, and each party waives any objection to and consents to the appeal time as provided herein.

DATED this 27th day of July, 2007.




Gordon J. Low
District Court Judge

APPROVED AS TO FORM
this 15th day of July, 2007.

BEARNSON & PECK

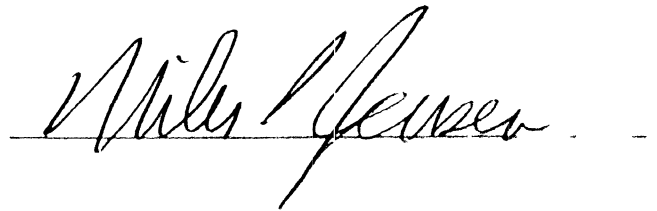

Marty E. Moore

RULE 7(f) CERTIFICATE OF HAND DELIVERY

I hereby certify that on this 11 day of July, 2007, I hand-delivered a true and exact copy of the foregoing **INTERIM SUPPLEMENTAL FINDINGS OF FACT AND CONCLUSIONS OF LAW** to the following address, in Logan, Utah:

Marty Moore
Bearnson & Peck
74 West 100 North
Logan, Utah 84323-0675

Pursuant to Rule 7(f) of the Utah Rules of Civil Procedure, if no objection to this **INTERIM SUPPLEMENTAL JUDGMENT AND DECREE** is submitted to the Court and counsel within five (5) days after service, the original will be submitted to the Court for signature.

A handwritten signature in cursive script, appearing to read "Marty Moore", is written over a horizontal line.

J:\MPJ\Pleadings\Emery & Seethaler v. Call\emery supp find of fact doc
N-40672

EXHIBIT E

May 28, 2002

Mr. Don Call
122 North 500 East
Logan, Utah 84321

Dear Mr. Call:

You have chosen to proceed with construction on your project without having completed a site plan and without having arrived at a Boundary Agreement with your neighbors to the North of your property, namely Larry Emery and Karl Seethaler.

This has forced us to alter our very busy schedules, when for reasons of both health and business demands our time has been fully occupied, in order to spend countless hours in consultation and other research into the boundary issue.

Please be advised that we have taken steps to do our own survey. Upon completion of the survey, we shall have sufficient information to enter into a meaningful discussion with you concerning our boundary and other matters. We cannot tell you precisely what the time frame will be on the survey, but we expect it to take two to three weeks. We will do all we can to expedite the survey.

Please be advised that we are not happy about your decision to proceed with your construction activities before coming to a Boundary Agreement with us. We strongly suggest that you discontinue these activities until a Boundary Agreement has been reached.

Sincerely,


Larry Emery and Karl Seethaler

Karl Seethaler
785 E 600 S
River Heights UT 84321

Larry Emery
65N 400 E
Providence, UT -
84332



EXHIBIT F

OLSON & HOGGAN, P.C.

ATTORNEYS AT LAW

IRENT HOGGAN
MILES P. JENSEN
BRUCE L. JORGENSEN
JAMES C. JENKINS
MARLIN J. GRANT
ROBERT B. FUNK
KEVIN J. FIFE
JEFFERY B. ADAIR
CHARLES P. OLSON (1916-1975)

88 WEST CENTER
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TELEFAX (435) 752-1295
TREMONTON OFFICE
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P.O. BOX 115
TREMONTON, UTAH 84317-0115
TELEPHONE (435) 257-3885
TELEFAX (435) 257-0165
E-MAIL: oh@oh-hoggan.com
www.olson-hoggan.com

July 30, 2002

Don W. and Linda Call
3098 Teton Drive
Salt Lake City, Utah 84109

*Re: Call Cluster Development and 600 East and 200 North, Logan, Utah
Our File No. N-4067.002*

Dear Mr. and Mrs. Call:

We represent Lawrence and Jennifer Emery and Karl Seethaler, who are the owners of property immediately to the North of the Call Cluster Development at 600 North and 200 East in Logan, Utah. In connection with this, I would raise a number of concerns and bring a number of issues to your attention which need to be addressed and resolved.

1. All the information we have suggests that the old fenceline that has been the boundary line between your property line and the property of Seethaler and Emery has been in existence for well over fifty (50) years. It was composed of barbed wire and cedar posts. In connection with this boundary fenceline, it has been recognized as the boundary for these many years. Some of the improvements, maintenance and evidence of ownership which our clients have undertaken in the last twenty (20) plus years to the fenceline are the following: asphaltting the property, parking cars on the property, landscaping the property with grass and underground sprinkling systems, replacing a storage shed, maintenance of asphalt, snow removal, and many other customary practices which evidence ownership.

2. Both you and Emery and Seethaler have surveys to suggest what is the correct boundary line. The Seethaler/Emery survey shows the correct surveyed boundary line to be the fenceline; your survey shows otherwise. We do not believe that either survey has any effect on what the real boundary line is in this case, because of the character of the fence and its utilization as a boundary over many years.

3. There are stakes that show where the original fenceline was, and you are hereby directed to honor those stakes and to cease and desist from making any changes or from entering onto the property north of the boundary fenceline as it has existed over the years. Any further entry will be an ongoing and continuing trespass and will require appropriate legal action and damages.



4. You have also erected a cement wall that is inside the boundary line fence and which is on the Seethaler and Emery property. That must be removed.

5. You have also hauled several feet of fill dirt into this same area, and that fill dirt must likewise be removed.

6. We have carefully reviewed Utah law, and it is clear that Seethaler and Emery's property have utilized your property as a natural drainage channel for well over twenty (20) years. As such, we believe there is no question that they have a prescriptive drainage easement across your property. What you have done to date creates a water dam and precludes appropriate and normal drainage from their properties. Unless you are prepared to provide adequate drainage or alternative ways of dealing with the excess water at your expense, there will be substantial damages caused to our clients' property, its improvements and its value.

7. We are in the process of researching the amount of damage that you have caused to the two (2) Blue Spruce trees by both putting field dirt around them, cement around them, and by severely cutting their root systems. We are very concerned that this will not only make the trees more vulnerable to wind and total loss, but also may effect their life expectancy and make them more vulnerable to insects and other diseases.

8. You are expected to compensate our clients for the damages to these trees or finding appropriate solutions to this.

9. You have also capped off and removed some of the sprinkling systems of the Emery's, and that must be restored and replaced and the grass put back in.

10. Our understanding is that your Logan City Building Permits require that you have at least ten (10) feet between your buildings and the adjacent owner's property line. Based on our inspection of the property, it appears that the northeast corner of the storage building is only seven (7) feet from the property line and much of the foundation for the new fourplex is only nine (9) feet from the property line. These buildings will either have to be removed or a variance obtained from the City.

11. A substantial amount of fill has been hauled throughout this property. As we have investigated the property even now, in those spots where there has not been as much fill placed, there is equisetum also known as snake grass, which we believe is indicative of wetlands. Have you received any permits from the appropriate government entities to haul all of this fill onto the property and have you had it evaluated by any professionals regarding its wetland status? Our clients recall many cattails and much water retention that was occurring, in part with the drainage from their property, on a good portion of the property. This could be a major issue with the

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ongoing development. As far as we are aware, Logan City has no authority to authorize construction on wetlands.

12. Even if the retaining wall as it is constructed were located on your property, you have indicated you plan to build a fence on it, and as far as we are aware, no permit for a fence has been obtained from the City.


13. Even if your survey were deemed correct and the fenceline were not deemed to be a boundary fenceline, it is clear that our clients would have a prescriptive easement for use of the property for the landscaping, lawn, parking, asphalt and storage shed, and it would not really change what you could or could not do with the property in any event. The property must be restored to its condition prior to your commencing construction, which commencement was done without any permission from our clients whatsoever.

We believe it is in your best interest and will avoid accruing additional substantial damages if the above issues are addressed immediately. If you proceed in any other manner, our clients will have no recourse but to bring legal action for all the damages that have been caused and will seek a specific court order that you handle drainage water from their properties as required by Utah law. This could be done at considerable expense in the event you do not take action before you continue with construction. IF YOU PROCEED FORWARD WITHOUT RESOLVING THESE ISSUES, YOU DO SO AT YOUR OWN RISK AND AT THE RISK OF CAUSING SUBSTANTIAL ADDITIONAL DAMAGES TO OUR CLIENTS.

I would ask for your response within seven (7) days of the date of this letter or we will proceed accordingly with respect to the above issues and concerns.

Sincerely yours,

OLSON & HOGGAN, P.C.

A handwritten signature in black ink, appearing to read "Miles P. Jensen", written over a horizontal line.

Miles P. Jensen

MPJ/kan