

2002

Lutheran High School Association v. Woodlands III Holdings : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

LUTHERAN HIGH SCHOOL)
ASSOCIATION OF THE GREATER)
SALT LAKE AREA, a Utah non-profit)
corporation, d.b.a. SALT LAKE)
LUTHERAN HIGH SCHOOL,)

Plaintiffs and Appellants,)

vs.)

WOODLANDS III HOLDINGS, LLC, a)
Utah limited liability company,)
WOODLANDS IV HOLDINGS, LLC, a)
Utah limited liability company,)
BEDFORD PROPERTY INVESTORS,)
INC., a Maryland corporation, JDJ)
PROPERTIES, INC., a Utah corporation,)
THE WOODLANDS BUSINESS PARK)
ASSOCIATION, a Utah non-profit)
corporation, WASATCH PROPERTY)
MANAGEMENT, INC., a Utah)
corporation and JOHN DOES 1-1,000,)

Defendants and Appellees.)

Appellate Case No. 20020808-CA

Argument Priority No. 15

BRIEF OF APPELLEES

Appeal from the Third District Court, Salt Lake County, Utah
Honorable Sandra N. Peuler, Presiding

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Pursuant to Rule 24(b) of the Utah Rules of Appellate Procedure, Appellees/Defendants Woodlands III Holdings, LLC, a Utah limited liability company, Woodlands IV Holdings, LLC, a Utah limited liability company, JDJ Properties, Inc., a Utah corporation, and The Woodlands Business Park Association, a Utah non-profit corporation, hereby submit the following Brief of Appellees.

LIST OF PARTIES

Pursuant to Rule 24(a)(1) of the Utah Rules of Appellate Procedure, the caption of this case contains the names of all parties to the proceeding in the Third District Court whose final order is sought to be reviewed.

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STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction over this case transferred from the Utah Supreme Court pursuant to Utah Code Ann. § 78-2a-3(2)(j).

STATEMENT OF ISSUES AND STANDARD OF REVIEW

STATEMENT OF ISSUES

The Appellant has misstated the issue on appeal because there has been neither an expansion of the dominant estate (i.e. Tract B), nor a connection of the Easement to a non-dominant parcel (i.e. Tract C). This misstatement of the issue is the result of the Lutheran High School's failure to acknowledge the effect of paragraph 7 of the September 9, 2002 Order Granting Defendants' Motion for Summary Judgment and Denying Plaintiff's Motion for Summary Judgment, whereby the district court ordered that the owners, tenants, subtenants and concessionaires of Tract C (the non-dominant parcel) may not use the Easement, and that Woodlands IV, LLC, shall take all steps necessary to restrict use of the Easement by Tower IV tenants, subtenants and concessionaires.¹

¹ In its argument before the district court, the High School was more accurate in stating the issue: "[i]f the parking terrace had been large enough to accommodate all of the needs of Tower III, this parking terrace on the eastern side of Tract B, we wouldn't be here today." (Transcript of Hearing on Summary Judgment, April 22, 2002, p. 21; R. at 694).

The accurate issue presented by this appeal is:

Did the district court properly grant summary judgment in favor of the Tract B Property Owners where the use of the Easement by the Tract B owners, tenants, subtenants and concessionaires and their customers, invitees and guests did not substantially increase the use of the servient estate beyond that contemplated by the parties at the time of the grant in 1983, considering the circumstances attending the transaction, the situation of the parties, and the object to be attained.

STANDARD OF REVIEW

A motion for summary judgment should be granted only when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. Utah R. Civ. P. 56(c); *Pigs Gun Club v. Sanpete County*, 2002 UT 17, ¶ 7, 42 P.3d 379. When the Court reviews a grant of summary judgment, it reviews the trial court's conclusions of law for correctness. *Lovendahl v. Jordan School District*, 2002 UT 130, ¶ 13, 2002 Utah LEXIS 220; *Laney v. Fairview City*, 2002 UT 79, ¶ 9, 57 P.3d 1007. As such, "we consider only whether [the trial court] correctly applied the law and correctly concluded that no disputed issues of material fact existed." *Pigs Gun Club*, 2002 UT 17, ¶ 7. The Court views all facts and reasonable inferences drawn therefrom in the light most favorable to the non-moving party. *Id.*

DETERMINATIVE CONSTITUTIONAL AND STATUTORY PROVISIONS

There are no constitutional or statutory provisions that are determinative.

STATEMENT OF THE CASE

NATURE OF THE CASE

The Lutheran High School filed its complaint in November 1996 and averred that a non-exclusive easement (the “Easement”) across the northern boundary of its property was being overburdened by the construction of an office building (known as Tower III) at the Woodlands Business Park on 700 East in Salt Lake County, and by what it averred was the expansion of the dominant parcel through the inclusion of additional property into the Woodlands Business Park.² At the time the Easement was granted in 1983, the owners of both the dominant and the servient parcels contemplated commercial development on their respective properties. The High School purchased the servient parcel in 1992, changed the use of the property, and averred in its complaint that the Easement posed a safety risk to its students.

COURSE OF THE PROCEEDINGS

Defendants Woodlands III Holdings, LLC, JDJ Properties, Inc., and The Woodlands Business Park Association, (hereafter collectively referred to as the

² A diagram that was used in the district court for illustrative purposes is attached in the Addendum at Tab “A.”

“Tract B Property Owners”) filed their Motion for Summary Judgment (“Defendants’ Motion For Summary Judgment”) on or about September 25, 2001. The High School thereafter filed its Supplemental Complaint on or about February 8, 2002, joining Woodlands IV Holdings, LLC, as a defendant. On or about March 25, 2002, the High School filed its Motion for Summary Judgment. Woodlands IV Holdings joined in the motion papers in support of Defendants’ Motion for Summary Judgment and in opposition to the High School’s Motion for Summary Judgment. The motions were fully briefed by the parties and submitted to the court for decision, accompanied by a request for oral argument. Both motions came on for hearing before the Honorable Sandra N. Peuler on April 22, 2002.

The district court entered its Minute Entry on April 26, 2002 (R. at 656-660), and thereafter entered its written Order Granting Defendants’ Motion for Summary Judgment and Denying Plaintiff’s Motion for Summary Judgment on September 8, 2002 (R. at 661- 666; Addendum at Tab “B”) granting Defendants’ Motion for Summary Judgment and denying the High School’s Motion for Summary Judgment. It is from this final order that the High School appeals.

STATEMENT OF THE FACTS

1. On or about October 27, 1983, Woodland Investment Company, a Utah limited partnership (“Woodland”) owned the real property located at

approximately 4020 South 900 East, Salt Lake City, Utah (hereinafter “Tract A”).
(R. at 3, ¶ 9.)

2. On or about October 27, 1983, Woodlands Associates (“Associates”), a joint venture of MHP-Woodlands, Ltd., a Utah limited partnership, and SLC-1 Limited Partnership, a Wisconsin limited partnership, owned the real property (hereafter “Tract B”) on 700 East, immediately west of Tract A. (R. at 3, ¶ 10.)

3. On or about October 27, 1983, Woodland and Associates entered into a Declaration of Easements, Covenants and Restrictions (the “1983 Declaration”), which was recorded in the records of the Salt Lake County Recorder on October 27, 1983, as Entry 3862259, Book 5502, Page 1559.³ (R. at 14-24; Addendum at Tab “C.”)

4. In the 1983 Declaration, Woodland and Associates granted each other reciprocal non-exclusive easements appurtenant to and across their respective tracts. (1983 Declaration ¶ 4 (a), (b); R. at 18-19; Addendum at Tab “C.”) The easement that benefits Tract B as the dominant estate, and burdens Tract A as the

³ The legal descriptions that were exhibits to the 1983 Declaration were reversed, so an Amended Declaration of Easements, Covenants and Restrictions (the “1984 Declaration”) was recorded on June 20, 1984 as Entry No. 3957731, Book 5566, Page 2146, to correctly set forth the respective parcels. A copy of the 1984 Declaration is at R. 188-193.

servient estate, is referred to as the “Associates Roadway” in the 1983 Declaration, and is referred to herein as the “Easement.”

5. The express grant of the Easement reads in part:

Woodland [predecessor to Lutheran High School] grants to Associates [owners of future Woodlands Business Park] a nonexclusive easement appurtenant to and across Tract A [High School Property] for the purpose of allowing vehicular access between the public streets and any and all parking areas or roadways and lanes situated on Tract B [Woodlands Business Park], provided, that the foregoing right of access shall be limited to use for such purposes and to such extent as may be customary for use of Tract B for commercial purposes (including, but not limited to, reasonable and customary deliveries). The easement granted by this subsection (a) shall be limited to the roadway described on Exhibit “D” (the “Associates Roadway”).

. . .

In addition to the foregoing, Associates shall have the right to elevate or sink the western twenty (20) feet of the Associates Roadway in order to align the same with the upper and/or lower decks of a parking ramp. . . .

(1983 Declaration, ¶ 4(a).)

6. The 1983 Declaration allows for: (1) the possibility that the zoning for Tract B might change over time; (2) a building complex on Tract B (*Id.* at ¶ 2(b)); (3) a theater-restaurant on Tract B (*Id.* at 2(c)); (4) a health club on Tract B (*Id.* at ¶ 2(d)); (5) more than one building on Tract B (*Id.* at ¶ 2(d)); (6) a parking ramp on Tract B with upper and lower levels (*Id.* at ¶ 4(a), 4(b)(iii)); and (7) parking areas, roadways and lanes on Tract B. (*Id.* at ¶ 4(a).)

7. Minutes of a November 22, 1983 Salt Lake County Planning Commission meeting that took place fewer than 30 days after the Easement was granted, confirm that the intention of the owner of Tract B, without any objection from the owner of Tract A, was to build retail space and three office towers on Tract B of five stories, eight stories and twelve stories in height, plus a four level parking structure east of the high rises. (Minutes of Salt Lake County Planning Commission, November 22, 1983; R. at 187, Addendum at Tab “D.”)

8. The 1983 Declaration also granted an easement across Tract B to provide access to Tract A from 700 East for commercial purposes on Tract A. This easement over Tract B to benefit Tract A (the “Woodland Roadway” in the 1983 Declaration), was restricted to seven (7) feet in height so it would not interfere with the parking structure to be built on Tract B. (1983 Declaration, ¶ 4(b); R. at 19.)

9. The respective easements appurtenant to Tracts A and B were for the benefit of the parties and their respective tenants, concessionaires, customers, invitees and guests as well as the concessionaires, customers, invitees and guests of the tenants and subtenants of the respective parties. (1983 Declaration, ¶ 4(d); R. at 19.)

10. The development of the Woodlands Business Park that was intended at the time of the 1983 Declaration proceeded; however, instead of three office

towers measuring five stories, eight stories and twelve stories in height (a total of twenty-five (25) stories), the office towers ended up being six stories, eight stories and four stories (a total of only eighteen (18) stories). Also, instead of concentrating the office tower parking in a single multi-level parking structure, a smaller parking structure was built on Tract B east of the office towers, and a second parking structure was built several years later on Tract C contiguous to and to the north of Tract B. This second parking structure can be accessed from within Tract B as well as from 700 East and 3900 South. (Dahlstrom Aff., ¶¶ 5-9; R. at 217, 218; Addendum at Tab “E.”)

11. While Tract B was developed as commercial property as expressly contemplated by the 1983 Declaration, Tract A was not. Neither a theater-restaurant, nor a health club was ever built. Instead, Tract A was sold in 1992 to the Lutheran High School Association of the Greater Salt Lake Area, a Utah non-profit corporation, dba Salt Lake Lutheran High School (the “High School”), which built a private high school on the property. (Complaint ¶¶ 1, 12; R. at 2-4.)

12. Woodlands III Holdings, LLC (“Woodlands III”) is a Utah limited liability company that owns two of the office towers (Towers II and III) and one retail building on Tract B. (Dahlstrom Aff. ¶¶ 4, 5, 7; R. at 217; Addendum at Tab “E.”)

13. JDJ Properties, Inc. (“JDJ”) is a Utah corporation that owns the one office tower (Tower I) and one retail building on Tract B. (*Id.* at 3; ¶¶ 3, 7; R. at 217.)

14. The Woodlands Business Park Association (“Woodlands Association”) is a Utah corporation that owns the parking structure on Tract B. (*Id.* at ¶ 8; R. at 217-218.)

15. The Woodlands Business Park has four main entrances on 700 East, that are the primary routes of most of the tenants and patrons of the Woodlands Business Park. (Peacock Aff. ¶ 5; R. at 563; Addendum at Tab “F.”)

16. Tower IV, owned by Woodlands IV Holdings, LLC (“Woodlands IV”), is built on Tract C, immediately north of Tract B. The construction of Tower IV was commenced in June 2000 and was completed in July 2001. (Supplemental Complaint, ¶ 3; R. at 402; Peacock Aff. ¶ 3; R. at 563.)

17. Woodlands IV is a Utah limited liability company and is a distinct business entity separate from the other defendants in this lawsuit. (Supplemental Complaint ¶ 3a; R. at 402; Answer to Supplemental Complaint ¶ 3, R. at 407.)

18. While Tract C was added to the Woodlands Business Park Association by virtue of a Sixth Amendment To Declaration Of Covenants, Conditions and Restrictions Of The Woodlands Business Park, recorded March 4, 1996, the parties to the amended CC&R’s “acknowledged and agreed that

admission of the Additional Property to the Association in no way permits the use of that certain ‘Associates Roadway’ adjacent to the boundary of the Association as defined in [the 1983 Declaration].” (R. at 490; Addendum at Tab “G.”) In other words, the right to the Easement was expressly withheld when Tract C was added to The Woodlands Business Park in 1996.

19. The Easement is non-exclusive and is also used by Lutheran High School students, neighborhood residents, and condominium owners who live in a condominium development immediately north of the High School (and the Easement). The Easement also provides needed access to fire trucks and ambulances. (Peacock Aff. ¶ 4; R. at 563.)

20. Although the 1983 Declaration requires it to do so, the High School does not maintain the Easement. The Property Owners in Tract B regularly maintain the easement year round, including snow plowing during the winter. (*Id.* at ¶ 6; R. at 564.)

SUMMARY OF ARGUMENT

An easement may not overburden the servient estate, and to determine whether an easement is being overburdened, a court must look back to the grant of the easement and determine the parties’ intent by considering the circumstances attending the transaction, the situation of the parties, and the object to be attained. The Utah courts have been called upon many times to determine the intent of the

parties at the time the easement was originally granted in order to ascertain what current use may be made of the servient estate for the benefit of the dominant estate. In Utah, appurtenant easements have been litigated since the nineteenth century. *See, e.g. Clawson v. Wallace*, 16 Utah 300, 52 P. 9 (Utah 1898).

In this instance, the parties who granted these reciprocal appurtenant easements across Tracts A and B intended that the Easement across Tract A in favor of Tract B was “*for the purpose of allowing vehicular access between the public streets and any and all parking areas or roadways and lanes situated on Tract B provided, that the foregoing right of access shall be limited to use for such purposes and to such extent as may be customary for use of Tract B for commercial purposes (including, but not limited to, reasonable and customary deliveries).*” (1983 Declaration, ¶ 4(a).)

The 1983 Declaration granting the Easement speaks of expansive commercial development of Tract B, including a building complex, parking lots, a parking ramp with upper and lower decks, roadways, and lanes. The 1983 Declaration anticipates possible zoning changes and further commercial growth on Tract B, including a dinner theater and a health club, neither of which has been built.

The record evidence of the minutes of the Salt Lake County Planning Commission, dated November 22, 1983, fewer than thirty days after the Easement

was granted, demonstrate that the owner of Tract B, without any objection from the owner of the servient parcel (Tract A), intended that the commercial development of Tract B would include retail space and three office buildings totaling twenty five stories in height, with all of the necessary parking, including a four story parking structure.

The servient estate (Tract A) has not been overburdened, which is the correct issue, and the notion that the dominant estate (Tract B) has been expanded is an inaccurate one. Although Tract C was added to The Woodlands Business Park, this additional property was never granted any right to use the Easement, and the district court specifically directed Woodlands IV to take all necessary steps to assure that all those associated with Tower IV located on the non-dominant parcel do not use the Easement. The order in pertinent part reads:

The owners, tenants, subtenants and concessionaires of Tract C and their customers, invitees and guests, may not use the Easement. Accordingly, Woodlands IV Holdings, LLC, shall take all steps necessary to restrict use of the Easement by the Tower IV tenants, subtenants and concessionaires and their customers, invitees and guests, including notifying them, restricting access as part of the lease agreements, and such other steps as may be appropriate.

(Order Granting Defendants' Motion for Summary Judgment and Denying

Plaintiff's Motion for Summary Judgment, ¶ 7; Addendum at Tab "B.") The High

School does not allege that this part of the district court's order was error, therefore no appealable issue is presented with respect to Tower IV.

This case does not present a case of first impression. When an easement is disputed, Utah law requires the courts to examine the intent of the parties at the time an easement was granted to determine if an unreasonable burden is currently being placed on the servient estate. There is no "Bright Line Rule" that can avoid this effort. Furthermore, the High School's "Bright Line Rule" is much more dim than the High School represents.

Existing Utah case law applied to the undisputed facts justifies granting summary judgment in favor of Woodlands III Holdings, LLC, JDJ Properties, Inc., and The Woodlands Business Park Association, where the use of the Easement is consistent with the burden on the servient estate that was intended by the original grantor and grantee.

ARGUMENT

I. THE INTENT OF THE PARTIES TO THE EASEMENT WAS FOR TRACT B TO BE DEVELOPED COMMERCIALY

In 1983, when the prior owners of Tracts A and B granted each other non-exclusive easements over their respective parcels, each envisioned broad commercial development. Tract B was to be developed into retail space and three office towers, with all of the necessary parking and roadways to accommodate the tenants, concessionaires and their customers. The parking needs for Tract B were

necessarily commensurate with the amount of square footage developed. *See, e.g.* R. at 577. Tract A, where the High School is now located, was to be developed into a dinner theater and a health club. The parties agreed that if a dinner theater and a health club were not built within a specified period of time on Tract A, the owners of Tract B could build both on Tract B. The High School came on the scene nearly a decade later and changed the use of Tract A. Although the High School does not have a right to the easement it presently uses over Tract B, the Tract B Property Owners have never complained.

In addition to the express grant of the Easement, the 1983 Declaration contains the following references evidencing the parties' intent for the nature of the burden to be placed on the servient estate:

No party shall attempt to obtain or consent to **any change or variance in zoning of Tract B** if such change would jeopardize the right of Woodland, its successors and assigns, to retain and maintain any sign described in Section 3 of this Declaration.

(1983 Declaration, ¶ 2(a)(emphasis added).)

The official name of **any building complex located on Tract B** will contain the word "Woodland" or "Woodlands" unless the use of such word is not permitted by applicable laws, regulations or ordinances. . . .

(*Id.* at ¶ 2(b) (emphasis added).)

No part of Tract B shall, for a period of twenty-five (25) years following the date of this Declaration, be used as a Theater-Restaurant; provided, that this restriction shall be

void if no Theater-Restaurant is operated on Tract A for a continuous period of sixty (60) months. . . .

(*Id.* at ¶ 2(c).)

If construction of a Health Club on Tract A is commenced before the latter of one (1) year from the date of this Declaration or nine (9) months **after the commencement of construction of the first building on Tract B**, then for as long as such Health Club is completed within a reasonable time and continuously available to the Parties with respect to Tract B and all tenants of such Parties and all of the personnel of such tenants, at prices competitive with or less than those being charged at Health Clubs open to the general public, **no Health Club will be operated on Tract B** or directly or indirectly by Associates (but not its successors) within a radius of 5/8s of a mile of Tract A.

(*Id.* at ¶ 2(d)(emphasis added).)

In addition to the foregoing, Associates shall have the right to elevate or sink the western twenty (20) feet of the Associates Roadway **in order to align the same with the upper and/or lower decks of a parking ramp**. On or before November 30, 1984 Woodland agrees to construct a paved roadway twenty-five (25) feet wide on the Associates Roadway in accordance with good construction practices.

(*Id.* at ¶ 4(a)(emphasis added).)

A parking ramp or any similar structure may be constructed on Tract B except over the Woodland Roadway, and Associates may route all traffic using the Connecting Roadway through such structure on the upper and/or the lower deck of any such structure.

(*Id.* at ¶ 4(b)(iii)(emphasis added).)

On November 22, 1983, fewer than thirty days following the 1983

Declaration, the owner of Tract B presented its development plans to the Salt Lake Planning Commission. The Planning Commission minutes read in pertinent part:

#PL-83-3013- The Woodland Assoc. - 4405 South 700 East-
Office/Commercial Complex – Zone C-2- (Millcreek)

This project was given conceptual approval previously. They have refiled as a PUD to allow a variance in the height requirements of the buildings. They are proposing the north retail building to be two stories a bank building on the south corner of the project. The south office tower will be 5 stories, the middle one 8 stories, and the tower to the north 12 stories in height. There will be a multi-level parking structure east of the high rises which will be four levels high at the highest point. The staff recommended approval subject to the conditions on file.

John Hampshire, representing the applicant, stated all the retail facility and the center 8 story tower building will be Phase I. The bank could be developed at anytime during the first phase. Basically they will construct the plateau and plaza level including all the front landscaping as part of the first phase. The 5 story tower would be Phase II, and the 12 story as the last phase. The completion date for the entire project being approximately four years.

There was no one else present for or against the application.

(R. at 224.)

The High School contends repeatedly in its brief that but for the additional parking structure on Tract C, the third office tower on Tract B would never have been approved. Whether or not this was the case, the record before the district

court does not yield the answer. The correspondence and conditional use approvals to which the High School refers make no suggestion that a parking structure on Tract C was a condition to construction of Tower III. In fact, the June 7, 1996 letter from Mark Brenchley to a senior planner at the Salt Lake County Planning Commission (R. at 577) refers specifically to Tower IV, not Tower III, and a letter Mr. Brenchley received from The Planning Commission (R. at 580) refers to an office building at 3949 South 700 East, which is the address for Tower IV. The High School had six years to conduct its discovery to flesh this out and cannot claim that there are inferences to be drawn from these documents in the High School's favor when none of these documents make any specific reference to a requirement for a parking structure to be built on Tract C before the Planning Commission would allow Tower III to be built on Tract B. The original approval for Tower III was granted in 1983, along with approval for a four story parking structure on Tract B, immediately east of the three high rises. (*See* R. at 224.) Conceptually, the parking structure on Tract B could have been enlarged to its originally intended four levels to accommodate the tenants of Tower III and the record does not suggest that Tower III was ever precluded from this option.

In any event, whether the approval of Tower III was ever conditioned on a parking structure being built on Tract C is a red herring. The issue is whether the

commercial development of Tract B has overburdened the servient estate beyond what the grantor and grantee intended in 1983.

II. THE USE OF THE EASEMENT DOES NOT EXCEED WHAT THE PARTIES INTENDED

As it turned out, much less development actually occurred on Tract B than was originally envisioned. Instead of retail space, plus three office towers totaling twenty-five stories, plus a four story parking structure, plus a health club, plus a theater-restaurant, there actually exists retail space, three towers totaling eighteen stories and a smaller parking structure. The anticipated health club and theater-restaurant were never built.

The volume of traffic and the amount of parking space needed for Tract B is quite logically commensurate with the square footage of the office and retail space that has been developed on Tract B. (*See R. at 577.*) Additional parking for Tract B tenants, concessionaires and their customers on Tract C does not increase the burden placed on the servient estate (Tract A) beyond what would otherwise occur had all of the parking for Tract B been built on the dominant parcel as originally intended.

Furthermore, the use of the Easement by the Tract B tenants meets the precise language of the grant. The non-exclusive Easement runs west from 900 East across the High School's property to the eastern edge of Tract B where it meets one of the roadways within Tract B. Only after an automobile has entered

one of the roadways does the driver elect to either proceed to parking lots on Tract B, or to parking on Tract C, or perhaps to curbside parking on 700 East. In other words, the Easement cannot be used to drive directly to Tract C. Instead, the Easement is used, as the 1983 Declaration directs, “*for the purpose of allowing vehicular access between the public streets and any and all parking areas or roadways and lanes situated on Tract B ... for such purposes and to such extent as may be customary for use of Tract B for commercial purposes.*” (Emphasis added.)

Woodlands IV developed Tract C immediately to the north of Tract B between approximately 1996 and 2001, by building an office building (Tower IV) and a parking structure. Tract C is accessed primarily from main entrances on 700 East or from 3900 South. Although Tract C was added to The Woodlands Business Park Association in 1996, any right of Tract C to use the Easement was specifically withheld by the Tract B Property Owners.

Woodlands IV was joined as a defendant in this lawsuit very late in the game, after the Tract B Property Owners had filed their motion for summary judgment. Woodlands IV joined in the Tract B Property Owners’ motion papers and, together Woodlands IV and the Tract B Property Owners, immediately conceded to the district court that there was no legal precedent that would allow

Woodlands IV and the tenants of Tower IV to use the Easement. Accordingly, the district court ordered Woodlands IV as follows:

The owners, tenants, subtenants and concessionaires of Tract C and their customers, invitees and guests, may not use the Easement. Accordingly, Woodlands IV Holdings, LLC, shall take all steps necessary to restrict use of the Easement by the Tower IV tenants, subtenants and concessionaires and their customers, invitees and guests, including notifying them, restricting access as part of the lease agreements, and such other steps as may be appropriate.

(Order Granting Defendants' Motion for Summary Judgment and Denying Plaintiff's Motion for Summary Judgment, ¶ 7.) The district court properly granted summary judgment because Tower IV tenants were precluded from the Easement and the Tract B tenants' use of the Easement is consistent with the intent of the parties at the time the Easement was granted.

III. THE LANGUAGE OF THE EASEMENT SHOULD BE CONSTRUED IN FAVOR OF THE TRACT B PROPERTY OWNERS AND IN LIGHT OF THE CIRCUMSTANCES

The correct statement of the relevant Utah law is that in construing instruments creating easements in land, the court should construe the instrument most strongly against the grantor, and most favorably to the grantee, and should ascertain and give effect to the intention of the parties by looking to the circumstances attending the transaction, the situation of the parties, the state of the thing granted, and the object to be attained. *Stevens v. Bird-Jex Co.*, 18 P.2d 292,

294 (Utah 1933); *Wood v. Ashby*, 253 P. 2d. 351, 353 (Utah 1952); *Wykoff v. Barton*, 646 P. 2d 756, 758 (Utah 1982). If the provisions of the instrument leave some doubt as to their meaning, the court may also look to the practical construction placed upon the instrument by the parties. *Id.*

The Restatement (Third) of Property (Servitudes) § 4.1 is consistent with Utah law and supports looking to the 1983 Declaration and to extrinsic evidence such as the minutes of the Salt Lake Planning Commission to determine what the parties intended in order to carry out that purpose. Section 4.1 of the Restatement reads in part:

A servitude should be interpreted to give effect to the intention of the parties ascertained from the language used in the instrument, or the circumstances surrounding creation of the servitude, and to carry out the purpose for which it was created.

The High School is unable to explain why the development plans for Tract B revealed in the Planning Commission minutes fewer than 30 days after the Easement was granted should not be relied upon to ascertain the parties' intent. We know the grantee's intent from the record evidence. In 1983, the developer proposed a plan that included retail space, three office towers totaling 25 stories of office space, plus a four-level parking structure. We know that this plan was approved by the Planning Commission. We also know the grantor's (Captain Nemo) intent because he had years to challenge these development plans, as well

as the actual construction, but failed to do so before he sold the servient estate (Tract A) to the High School in 1992. If the grantor of the Easement had opposed the development of Tract B, surely the High School would have uncovered some evidence of the grantor's opposition during the six years this lawsuit languished in the district court. The High School was simply unable to proffer even a scintilla of evidence to controvert the Planning Commission minutes that are entirely consistent with the 1983 Declaration and its specific references to more than one building, a building complex, future zoning changes, parking lots, a parking ramp with upper and lower decks, roadways, lanes, and perhaps eventually a health club and a theater-restaurant. The very fact that the 1984 Declaration,⁴ which was recorded to correct the reversed legal descriptions for Tracts A and B in the original 1983 Declaration, was not otherwise amended, is further evidence that the grantor had no objection to the announced development of Tract B and that the development was consistent with his intent.

IV. TRACT B'S PLANNED DEVELOPMENT AND RESULTING USE OF THE EASEMENT IS WITHIN THE SCOPE OF THE EASEMENT AND SUPPORTED BY CASE LAW

While overburdening an easement is not permitted, overburdening can only occur if the use of the easement substantially increases the use of the servient

⁴ See fn. 3, *supra*.

estate beyond that contemplated by the parties at the time of the grant. *Wood v. Ashby, supra*, 253 P.2d at 354.

When an easement grant contains general language without specific limits, the easement is construed to mean a general right of way capable of all reasonable use. F. T. Chen, Annotation, *Extent and Reasonableness of Use of Private Way in Exercise of Easement Granted in General Terms*, 3 A.L.R.3d 1256, § 2[a] (2001). The easement grant at issue here is very broad, its only nominal limitation being that it is restricted to the customary use of Tract B for commercial purposes.

The use that may be made of an easement is not static. When the grant contemplates commercial development, the easement should be interpreted to allow normal development of the dominant estate. This is the recommendation of the Restatement (Third) of Property (Servitudes) § 4.10 which has readily been adopted:

[T]he beneficiary of an easement or profit is entitled to make any use of the servient estate that is reasonably necessary for the convenient enjoyment of the servitude for its intended purpose. The manner, frequency, and intensity of the beneficiary's use of the servient estate may change over time to take advantage of developments in technology and to accommodate normal development of the dominant estate or enterprise benefited by the servitude.

Abington Ltd. Partnership v. Heublein et al., 717 A.2d 1232, 1240 (Conn. 1998) (citing Restatement (Third) Of Property (Servitudes) § 4.10); *Cooper v. Sawyer*, 405 P.2d 394, 401 (Hawaii 1965) (“where the grant of easement is unrestricted (as

it was here as to the right of ingress and egress) the use of the dominant tenement may reasonably be enlarged”); *see also*, 3 A.L.R.3d 1256 (reasonable use encompasses any purpose to which the dominant land may be naturally devoted, and the normal and necessary development the owner may choose to make, including improvements and modern inventions).

The Supreme Court of Rhode Island affirmed this approach in *Burke-Tarr Company v. Ferland Corporation*, 724 A.2d 1014 (R.I. 1999), where the plaintiff sought to terminate an easement because the defendant built an apartment complex on the dominant estate, where previously there had only been a single cottage. The court rejected the claim that the easement was only intended for access to a single cottage, saying “a right-of-way will be construed in favor of the grantee, limited only by what is reserved expressly in the instrument and the accompanying circumstances to demonstrate the intent of the parties.” *Id.* at 1018. The easement at issue created an unrestricted grant of access to the property, and the construction of a 191-unit apartment complex was an increase in degree, not type of use. *Id.* at 1019.

In the present case, Tract B has been developed commercially, and has actually been developed to a lesser degree than was originally intended.

Allowing Tract B tenants to use the Easement regardless of where their parking is located, does not run afoul of the rule recited in the Restatement (Third) of Property (Servitudes) § 4.11 which states:

Unless the terms of the servitude determined under §4.1 provide otherwise, an appurtenant easement or profit may not be used for the benefit of property other than the dominant estate. (Emphasis added.)

While Woodlands IV's use of the easement would admittedly violate this principle, the Tract B tenants who might use the right of way to access parking, even if that parking is not on the dominant estate, is certainly for the benefit of the dominant estate, rather than for the benefit of property other than the dominant estate. The grant language “[f]or the purpose of allowing vehicular access between the public streets and any and all roadways and lanes situated on Tract B” actually accounts for the use currently being made by the Tract B tenants to access parking on Tract C, especially when read in the context of the further language in the 1983 Declaration which declares the scope of the easement to be “to such extent as may be customary for use of Tract B for commercial purposes.” (1983 Declaration, ¶ 4(a).) Read together, the provisions of the 1983 Declaration grant access not only to the parking areas on Tract B, but also “to allow vehicular access to all roadways and lanes on Tract B as may be customary for use of Tract B for commercial purposes.” (*Id.*)

V. THE HIGH SCHOOL'S BRIGHT LINE IS REALLY QUITE DIM

The High School suggests, citing *State ex rel. Fisher v. McNutt*, 597 N.E.2d 539 (Ohio App. 1992), that there is a “universal rule” that if one acquires a right of way through one lot or parcel of land, he or she cannot use it to gain access to that parcel and thence over his or her own land to other lands belonging to him or her. (Brief of the Appellant, p. 17.) Although the case generally suggests the proposition that the High School says it does, it turns out that this is not necessarily the rule in Ohio, and it is certainly not a universal rule. When we were before the district court, the High School included the same supposed quote referencing a “universal rule” in its motion papers. (R. at 423.) We searched for this quote in the text of the opinion, all to no avail. We did find, however, that the High School, then as now, has blended two separate paragraphs from the *appellant's Assignments of Error* in the Ohio decision's appendix in order to formulate a quote supposedly attributable to the court about a “universal rule.” We find this deceptive, but more importantly, *State ex rel. Fisher* was subsequently distinguished by another Ohio appellate court, which referred to the language relied on in *State ex rel. Fisher* as being merely *dicta*. See, *Proffitt v. Plymessenger*, 2001 Ohio App. LEXIS 2801, *4 (June 25, 2001) (not reported in N.E.2d) attached at Addendum at Tab “H.” The *Proffitt* court held that an easement may indeed be

used to access additional property so long as the use does not increase the burden to the servient estate. *Id.* at *4-5.

In *Proffitt v. Plymessenger*, the owner of the servient estate alleged that the owner of the dominant estate had increased his farming operation from seventy acres in the original dominant estate to one hundred eighty-five acres and was using the easement that had originally been granted for ingress and egress to the seventy acres to also access the additional one hundred fifteen acres. *Id.* at *3. The Ohio Court of Appeals held that the use of the easement was proper absent a showing that there was any measurable increase in traffic on the right-of-way due to traffic accessing acreage beyond the seventy-acre plat. *Id.* at *4-5.

Proffitt v. Plymessenger is instructive on a number of points. It illustrates that the accurate issue is whether the use of the Easement overburdens the servient estate, not whether the dominant estate has been expanded. It further illustrates that there is no “bright line rule” that can be invoked to avoid litigation. The court in Ohio did precisely what a court in Utah must do – it gave effect to the intention of the parties at the time of the grant by looking to the circumstances attending the transaction, the situation of the parties, the state of the thing granted, and the object to be attained.

The Supreme Court of Connecticut took an approach similar to that taken in *Proffitt v. Plymessenger* when it addressed a situation where there was a question

about using an easement to access a parcel adjacent to the dominant parcel. In *Abington Limited Partnership v. Heublein, supra.*⁵ (acknowledged in Reporter's Note to Restatement (Third) of Property (Servitudes) § 4.11), a Science Center held an easement to permit access to its property where it conducted its science programs. The Science Center subsequently acquired the use of an adjacent parcel of property and constructed a building containing administrative offices, classrooms, television studios and a planetarium. The issue was whether the easement could be used to gain access to this second piece of property. The Connecticut Supreme Court, relying on its earlier precedent and the Restatement (Third) of the Law of Property (Servitudes), held that while an easement of access does not automatically attach to after-acquired property, in some circumstances the parties at the time of the creation of an easement may be found to have contemplated, as a matter of law, that its benefits might accrue to adjacent property that was not formally within the terms of the easement. To determine the intent of the parties at the time the easement was granted, a court reasonably may take into account the proposed use and the likely development of the dominant estate by examining the relevant documents at the time of the original conveyance.

⁵ See also, *Abington Limited Partnership v. Heublein*, 257 Conn. 570; 2001 Conn. LEXIS 336 (2001).

The High School also cites *DND Neffson Co. v. Galleria Partners*, 745 P.2d 206 (Ariz. App. 1987) and *Penn Bowling Recreation Center v. Hot Shoppes*, 1179 F. 2d 64, 66 (D.C.Cir. 1949), which are inapposite. These cases stand for the proposition that patrons from a non-dominant parcel should not have access to the easement through the dominant parcel. We agree. However, this proposition does not advance the High School's cause.⁶ The district court's order in our case unconditionally prevents Woodlands IV and the patrons of its Tower IV from using the Easement. The High School infers that the district court's order will be

⁶ Likewise, the High School cites to *McCammon v. Meredith*, 830 S.W.2d 577, 580 (Tenn. Ct. App. 1991); *McCann v. R.W. Duntelman Co.*, 609 N.E. 2d 1076 (Ill. App. Ct. 1993); *McLaughlin v. Bd. of Selectmen of Amherst*, 664 N.E. 2d 786, 790 (Mass. 1996) and others for the similar proposition that an easement may not be expanded to the benefit of property not part of the dominant estate. In the present case, allowing Tract B tenants to use the Easement to access roadways within Tract B that ultimately lead to a parking structure on Tract C benefits Tract B, not Tract C. Thus, these cases do not advance the High School's argument. *McCann* is further distinguishable because the court had specifically found that there was a substantial increase in the burden to the servient estate and that the burden benefited non-dominant estate property. Neither is the case here.

disobeyed. There is no record that this has ever occurred. Moreover, this issue is not on appeal, is not before this Court and does not present an appealable issue, but rather is appropriately a matter to address with the district court should the district court's order ever be disregarded.

The absence of a bright line rule is further indicated in the High School's own brief. After prominently relying on the analysis set forth in the Restatement (Third) of Property, a footnote is later dropped to explain that there are indications there may be a shift in the rule. For example, in *Ogle v. Trotter*, 495 S.W.2d 558 (Tenn.Ct.App.1973), the court stated that the purpose of the prohibition against extending the benefit of an easement to non-appurtenant land is to avoid increased burden. Accordingly, the Tennessee court reasoned that where there has been a reduction in the use of the easement, an injunction is not proper. Similarly, in *Carbone v. Vigliotti*, 610 A.2d 565 (Conn.1992), the court found that the addition of parcels to the dominant estate, forming a one-building lot, did not changed the character or extent of the easement's use. The court distinguished an earlier case, which held that an easement can only be used to benefit the dominant estate, because, unlike in *Carbone*, the earlier case involved a material increase in the use of the easement.

Likewise, in *Joiner v. Southwest Central Rural Electric Co-op.*, 786 A.2d 349 (Pa.Commw.Ct. 2001) the court vacated the lower court's ruling that relied on

the Restatement's prohibition against the use of an appurtenant easement to the benefit of a property other than the dominant estate. The Pennsylvania court reasoned that the Restatement provisions were "at variance with the pronouncements of [Pennsylvania's] Supreme Court." *Id.* at 351. It stated that the court was required to look to the language of the grant, and, if the "purposes of an express easement are not specifically stated, the court must ascertain the objectively manifested intention of the parties in light of the circumstances." *Id.* at 352.

In *Heartz v. City of Concord*, 808 A.2d 76 (N.H. 2002), the New Hampshire Supreme Court rejected a per se prohibition on property other than the dominant estate benefiting from an easement. Rather, the court examined the language of the easement and found that nothing in deed's language "indicates an intention to prevent non-dominant, third-party tenements from benefiting from the easement." *Id.* at 81. The court then addressed the contention that the use should not be allowed because it overburdened the easement. It held that the appellant's conclusory statements that the "property will be damaged is insufficient to satisfy his burden in opposing [the appellee's] summary judgment motion." *Id.* at 82.

VI. UTAH CASE LAW DOES NOT SUPPORT ENJOINING TRACT B TENANTS' USE OF THE EASEMENT

The High School's reliance on Utah cases including *Wood v. Ashby*, 253 P.2d 351 (1952) and *Alvey v. Mackelprang*, 2002 UT App 220, 51 P.2d 45 is

misdirected. These cases suggest that “. . . *an easement is extinguished when after the division of the dominant estate, a new created parcel does not abut the servient tenement.*” (Appellant’s Brief at pp. 14-15.) This is obviously not the circumstance in our case.

In *Alvey v. Mackelprang* the dominant estate was divided such that Alvey received the severed portion of the dominant estate that no longer abutted the servient estate. Alvey claimed that although his parcel had been severed from the dominant estate, that the prescriptive right-of-way was still appurtenant to his parcel. *Id.* The Court of Appeals found that there are at least four basic requirements that must be met for a prescriptive easement to survive a division of the dominant tenement, including the requirement that the newly created parcel must “abut the way.” *Alvey v. Mackelprang*, 2002 Ut. App. 220, at ¶ 13. The present case does not involve a prescriptive easement and, more importantly, the issue presented by this appeal is whether the Tract B tenants’ use of the Easement overburdens the Easement, not whether a portion of Tract B has been severed and whether the owner of the severed parcel continues to have a right to the Easement.

Wood v. Ashby involved a somewhat similar circumstance involving the division of the dominant estate. In that case the severed portion of the dominant estate continued to “abut the way,” and the court had to ascertain whether the intent of the original grantor and grantee of the easement was for a right of way

passing through a gate, or whether the easement could be drawn so as to allow access to the severed portion of the dominant estate as well.

The issue of whether an easement remains appurtenant to a parcel severed from the dominant estate is not before the court in this appeal and neither *Wood* nor *Mackelprang* is helpful in this regard. *Wood*, however, is helpful for its proposition that the court must determine whether the use being placed on the easement results in a substantial increase in the use of the servient estate other than that contemplated by the parties at the time of the grant, looking to the circumstances attending the transaction, situation of the parties, and the object to be attained. *Wood v. Ashby*, 253 P.2d at 354.

Such cases as *Wade* and *Weggeland*, both cited by the High School, are not helpful either. *Weggeland*, for instance, addresses whether the easement in that case was intended to be exclusive, or whether the grantor retained a right to use his own property. The court found that the easement was not exclusive unless the grant said so under the principle that “[t]he language of the grant is the measure and the extent of the right created.” *Weggeland v. Ujifusa*, 384 P.2d 590, 591 (Utah 1963).

In *Wade*, the grantor deeded a piece of property without mentioning whether he intended to also convey an accompanying easement for ingress and egress. The court found that the right of way was implicit in the conveyance, although the

width of the implied easement was limited to the width of the grantee's automobile, according to the principle that the "[c]haracter and extent [of the easement] is limited to such as is reasonably necessary and convenient to the dominate estate." *Wade v. Dorius*, 173 P. 564, 566 (Utah 1933)(citations omitted).

Obviously the principle in *Weggeland* is not helpful at all and the principle we get from *Wade* must be considered in view of the language of the 1983 Declaration that Tract B may use the Easement "*to such extent as may be customary for use of Tract B for commercial purposes.*" (1983 Declaration, ¶ 4(a).)

The Easement here has never been used for anything other than its intended purpose and has never been overburdened. Commercial development of Tract B was explicitly contemplated in the 1983 Declaration, and nothing in the 1983 Declaration otherwise restricts the commercial development. In fact, the 1983 Declaration clearly anticipates additional future development in the event Tract A was not developed. Most importantly, the development of Tract B proceeded just as planned as the record evidence of the minutes of the Salt Lake Planning Commission show, except that smaller office towers totaling only eighteen (18) stories, rather than twenty-five (25) stories, were actually built.

Whether parking for the office towers takes place in a single parking structure, or in two structures, makes no difference; the number of cars associated

with the originally contemplated twenty-five (25) stories of office space is the same. In fact, the number of cars originally intended would logically have been greater than the current use by the Tract B tenants.

VII. EXTINGUISHMENT OF THE EASEMENT IS NOT THE PROPER REMEDY FOR MISUSE OF AN EASEMENT, PARTICULARLY WHEN THE HIGH SCHOOL HAS FAILED TO PROVE ANY INJURY

Although we believe we have made a persuasive argument why the district court should be affirmed, the High School's demand for relief deserves some mention.

The High School demands that the Easement be extinguished. This is not the appropriate remedy, even if the court determines that the dominant estate has misused the easement. *McCann v. R.W. Dunteman Co.*, 609 N.E. 2d 1076, at 1084 (Ill. App. Ct. 1993) (finding that the forfeiture of the subject easement would be “thoroughly inappropriate” in part because the lower court had ordered that non-dominate estate traffic thereon be eliminated); *see, Jon W. Bruce and James W. Ely, Jr., The Law of Easements and Licenses in Land*, § 1026 (although the concept that an easement may be extinguished by misuse has been recognized by many courts and commentators, it has rarely been employed to terminate a servitude). In *Brown v. Voss*, 715 P.2d 514 (Wash. 1986), the Washington Supreme Court refused to extinguish an easement where the servient estate failed

to prove actual injury, and, in *Penn Bowling*, 1179 F. 2d at 66, the court ruled that misuse of an easement right is not sufficient to constitute a forfeiture.

In this case, the High School has not demonstrated any injury at all, although it has had six years to build a case. Obviously, if the High School's students had been placed at increased risk the High School would have undertaken preventative measures and asked for a preliminary injunction long ago. In fact, the purpose of this lawsuit appears to have been aimed at increasing the High School's endowment, rather than addressing some purported injury. The Woodlands Business Park Association has been maintaining and plowing the right of way for years, although the record evidence is that many of those who use the right of way are high school students and local residents, not Tract B tenants. The record does not suggest that the Easement is overburdened with vehicles or that the High School has suffered any injury. A forfeiture of the easement is simply not warranted.

CONCLUSION

For the foregoing reasons, the Tract B Property Owners respectfully requests that this Court affirm the district court's order.

DATED this 14th day of April, 2003.

A handwritten signature in black ink, appearing to read "Matthew L. Anderson", written over a horizontal line.

P. Bruce Badger

Diane H. Banks

Matthew L. Anderson

FABIAN & CLENDENIN

a Professional Corporation

Attorneys Appellees/Defendants Woodlands III
Holdings, LLC, Woodlands IV Holdings, LLC,
JDJ Properties, Inc., and The Woodlands Business
Park Association

MAILING CERTIFICATE OF SERVICE

I hereby certify that I caused to be mailed via United States Mail, first-class postage prepaid, two (2) true and correct copies of **APPELLEE'S BRIEF** to the following counsel of record:

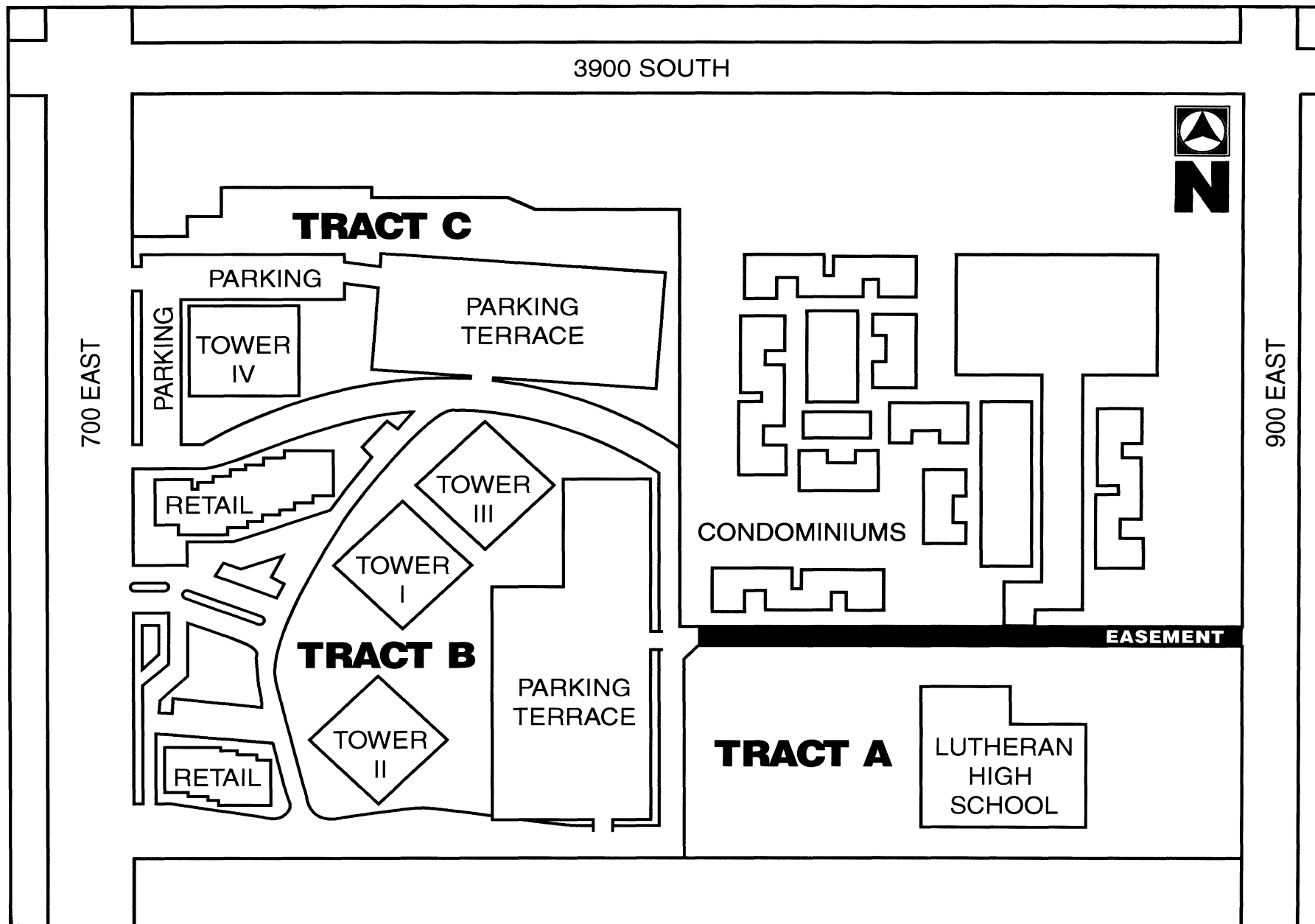
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Apr. 14, 2003 

ADDENDUM

Tab A	Diagram used in district court for illustrative purposes
Tab B	Order Granting Defendants' Motion for Summary Judgment and Denying Plaintiff's Motion for Summary Judgment
Tab C	1983 Declaration of Easements, Covenants and Restrictions
Tab D	Minutes of November 22, 1983 Salt Lake County Planning Commission Meeting
Tab E	Affidavit of John A. Dahlstrom, Jr.
Tab F	Affidavit of Dennis Peacock
Tab G	6 th Amendment to CCRs, Excerpt
Tab H	<i>Proffit v. Plymesser</i> , 2001 WL 708884 (Ohio App. 12 Dist.)

Tab A



Tab B

FILED DISTRICT COURT
Third Judicial District

SEP - 9 2002

By 
SALT LAKE COUNTY
Deputy Clerk

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IN THE THIRD DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

LUTHERAN HIGH SCHOOL)
ASSOCIATION OF THE GREATER SALT)
LAKE AREA, a Utah non-profit corporation,)
dba SALT LAKE LUTHERAN HIGH)
SCHOOL,)

Plaintiff,)

vs.)

WOODLANDS III HOLDINGS, LLC, a)
Utah limited liability company;)
WOODLANDS IV HOLDINGS, LLC, a)
Utah limited liability company; BEDFORD)
PROPERTY INVESTORS, INC., a)
Maryland corporation; JDJ PROPERTIES,)
INC., a Utah corporation; THE)
WOODLANDS BUSINESS PARK)
ASSOCIATION, a Utah non-profit)
corporation; WASATCH PROPERTY)
MANAGEMENT, INC., a Utah corporation;)
and JOHN DOES 1-1,000,)

Defendants.)

**ORDER GRANTING DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT
AND DENYING PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT**

Civil No. 960908063 PR

Judge Sandra N. Peuler

Defendants, Woodlands III Holdings, LLC, JDJ Properties, Inc., and The Woodlands Business Park Association, filed their Motion for Summary Judgment (“Defendants’ Motion For Summary Judgment”) on or about September 25, 2001. Plaintiff thereafter filed its Supplemental Complaint on or about February 8, 2002, joining Woodlands IV Holdings, LLC, as a defendant. On or about March 25, 2002, Plaintiff filed its Motion for Summary Judgment. Woodlands IV Holdings, LLC, joined in the motion papers in support of Defendants’ Motion for Summary Judgment and in opposition to Plaintiff’s Motion for Summary Judgment. The motions were fully briefed by the parties and submitted to the court for decision, accompanied by a request for oral argument. Both motions came on for hearing before the Honorable Sandra N. Peuler on April 22, 2002, at 10:00 a.m. The moving Defendants were represented by P. Bruce Badger and Matthew L. Anderson of Fabian & Clendenin. Plaintiff was represented by Stephen F. Hutchinson of Taylor, Adams, Lowe & Hutchinson. Defendant Bedford Property Investors, Inc., was represented by Ronald G. Russell of Parr, Waddoups, Brown, Gee & Loveless

The court heard argument of counsel and having fully considered the parties’ respective moving papers, including affidavits supporting and opposing the motions, and being otherwise fully advised, now enters its order.

IT IS HEREBY ORDERED:

1. Defendants’ Motion for Summary Judgment is granted for the reasons set forth in the Minute Entry dated April 26, 2002 (attached hereto as Exhibit “A” and incorporated herein by this reference) and as set forth in Defendants’ memoranda filed in support of Defendants’ Motion for Summary Judgment.

2. Plaintiff's Motion for Summary Judgment is denied for the reasons set forth in the Minute Entry (Exhibit "A" hereto) and as set forth in Defendants' memorandum opposing Plaintiff's Motion for Summary Judgment.

3. This action involves a non-exclusive easement (the "Easement") appurtenant to and across a parcel of property located in Salt Lake County which is currently owned by the Salt Lake Lutheran High School. The Easement runs west from 900 East at approximately 4000 South and was granted for the purpose of providing vehicular access to a portion of what is now the Woodlands Business Park located on 700 East. The Easement was created by a Declaration of Easements, Covenants and Restrictions (the "1983 Declaration"), which was recorded in the records of the Salt Lake County Recorder on October 27, 1983, as Entry 3862259, Book 5502, Page 1559. The legal descriptions that were attached as exhibits to the 1983 Declaration were reversed, so an Amendment to Declaration of Easements, Covenants and Restrictions (the "1984 Declaration") was recorded on June 20, 1984, as Entry 3957731, Book 5566, Page 2146, to correctly set forth the legal descriptions of the affected parcels. The Easement is referred to in the 1983 Declaration as the "Associates Roadway". The servient estate with respect to the Easement or the Associates Roadway is referred to as Tract A in the 1983 Declaration, and is more particularly described in Exhibit "B" hereto. The dominant estate with respect to the Easement or the Associates Roadway is referred to as Tract B in the 1983 Declaration, and is more particularly described in Exhibit "C" hereto.

4. Since the grant of the Easement, the Woodlands Business Park has expanded to property north of the dominant estate that the parties to this action have referred to variously as

Tract C, or the “Northern Parcel” or “Expansion Property”, which is more particularly described in Exhibit “D” hereto. Tract C contains both a high-rise office building (“Tower IV”) owned by Woodlands IV Holdings LLC, and a multi-level parking facility.

5. The Easement, which is for the benefit of the dominant estate, has not been overburdened by the use of the Easement by the owners, tenants, subtenants and concessionaires of Tract B and their customers, invitees and guests, including their use of the Easement to access parking on Tract C.

6. The owners, tenants, subtenants and concessionaires of Tract B and their customers, invitees and guests, may continue to use the Easement to access parking on Tract C.

7. The owners, tenants, subtenants and concessionaires of Tract C and their customers, invitees and guests, may not use the Easement. Accordingly, Woodlands IV Holdings, LLC, shall take all steps necessary to restrict use of the Easement by the Tower IV tenants, subtenants and concessionaires and their customers, invitees and guests, including notifying them, restricting access as part of the lease agreements, and such other steps as may be appropriate.

8. This Order is an adjudication of all of the claims in this action notwithstanding that Wasatch Properties Management, Inc., was joined as a defendant and has never appeared. Accordingly, the court expressly determines that there is no just reason to delay entry of final judgment and expressly directs entry of this Order as Final Judgment.

9. **Any person may record a certified copy of this Order in the official records of the Recorder of Salt Lake County, State of Utah. The recording of this Order shall serve**

to immediately release the *Lis Pendens* recorded in the records of the Salt Lake County Recorder on November 21, 1996, as Entry 6511599, Book 7540, Page 10, which referenced the real property described in Exhibits "B", "C" and "D" hereto.

DATED this 9 day of September, 2002.

BY THE COURT:

Sandra N. Reuler
Honorable Sandra N. Reuler
Third District Court



Approved as to form:

Robert M. Taylor
Stephen F. Hutchinson
Sue J. Chon
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

On the 1ST day of August, 2002, I hereby certify that I caused to be served a true and correct copy of the foregoing ***Proposed Order Granting Defendants' Motion For Summary Judgment and Denying Plaintiff's Motion For Summary Judgment*** by hand delivering said document as follows:

Robert M. Taylor
Sue J. Chon
Taylor, Adams, Lowe & Hutchinson
Attorneys for Plaintiff
2180 South 1300 East, Suite 520
Salt Lake City, UT 84106

Ronald G. Russell
Parr, Waddoups, Brown, Gee & Loveless
Attorneys for Bedford Property Investors, Inc.
185 South State, #1300
Salt Lake City, Utah 84111

Annette E Clark

EXHIBIT

"A"

THIRD DISTRICT COURT, STATE OF UTAH
SALT LAKE COUNTY, SALT LAKE DEPARTMENT

LUTHERAN HIGH SCHOOL
ASSOCIATION OF THE GREATER
SALT LAKE AREA, a Utah non-
profit corporation, dba SALT
LAKE LUTHERAN HIGH SCHOOL

Plaintiff,

vs.

WOODLANDS III HOLDINGS LLC, a
Utah limited liability
company, et. al.

Defendants.

MINUTE ENTRY

CASE NO. 960908063

JUDGE SANDRA N. PEULER

This matter is before the Court on the parties' cross Motions for Summary Judgment. Oral arguments were held on April 22, 2002. Following the conclusion of the hearing, the Court took the matter under advisement. Now, having fully considered the arguments of counsel, submissions of the parties and the applicable legal authority the Court enters the following ruling.

The relevant facts are as follows. In October 1983 Woodland Investment Company ("Woodland") owned the parcel of land located at 4020 South 900 East, Salt Lake City, Utah ("Tract A") and Woodland Associates ("Associates") owned the land located directly west of Tract A ("Tract B"). On October 27th, 1983 Woodland and Associates entered into a "Declaration of Easements Covenants and Restrictions" (the "1983 Declaration") under which the parties provided for: (1) an easement over Tract A which provided access to Tract B from 900 East; and (2) an easement over Tract B which

provided access to Tract A from 700 East. The language of the Declaration evidences the clear intent of the parties that both tracts would be commercial in nature. Eventually, Tract B developed commercially and currently contains: a parking facility, three high rise office buildings ("Towers I, II and III"), open parking areas and two retail centers. Tract A, on the other hand, was sold in 1992 to the Lutheran High School Association ("Plaintiff").

The current dispute revolves around a contiguous parcel of land owned by Woodlands IV and located immediately north of Tract B ("Tract C"). Tract C is an expansion of the original development and contains both a high rise office building ("Tower IV") and a multi level parking facility. Currently, Tract B tenants, working at Tower III, are permitted to use Tract C's parking facility. In order to reach the parking facility, Tract B workers use the easement over Tract A. Plaintiff objects to this use of the easement by claiming that it overburdens the easement in conflict with the original intention of the parties.

As an initial matter, both parties agree that the benefit of the easement may not be enlarged to include Tract C. Therefore, the tenants of Tower IV, located on Tract C, may not use the easement to access that property. Accordingly, defendants are ordered to take all necessary steps to restrict use of the

easement by Tower IV tenants, including notifying them, restricting access as part of the lease agreements, and such other steps as may be appropriate.

As to the remaining issue, the Court concludes that the easement is not overburdened by the Tract B tenants' use of the easement to access parking on Tract C.

Generally, the holder of an easement is entitled to use that easement in a manner "reasonably necessary for the convenient enjoyment of the servitude." RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 4.10 (2000). Additionally, the terms 1983 Declaration indicate that this easement was specifically designed for the "benefit" of the parties and their tenants. (Declaration of Easements Covenants and Restrictions Sec. 4 ¶ d). Here, the tenants of Tract B, for whom the easement was originally intended, make no greater use of the easement by parking on Tract C, than they would if they parked on Tract B; there is no evidence that the parking arrangement causes any additional vehicle traffic. In addition, although plaintiffs argued that the parking arrangement makes Tract C a beneficiary of the easement, there is no evidence in the record to support that. Rather, it appears that the tenants of Tract B only use the easement for the benefit and enjoyment of the servitude to which they are entitled.

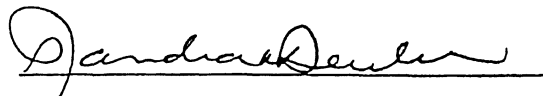
Accordingly, defendants' Motion for Summary Judgment is

granted, and plaintiffs' Motion for Summary Judgment is denied.

Defendants' counsel is directed to prepare an Order consistent with this Minute Entry and submit the same to the Court for review and signature.

Dated this 26 day of April, 2002.

BY THE COURT:

A handwritten signature in cursive script, appearing to read "Sandra N. Peuler", is written over a horizontal line.

SANDRA N. PEULER
DISTRICT COURT JUDGE

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 960908063 by the method and on the date specified.

METHOD NAME

Mail	MATTHEW L. ANDERSON ATTORNEY DEF 215 South State St. Suite 1200 P.O. Box 510210 Salt Lake City, UT 84151
Mail	STEPHEN F HUTCHINSON ATTORNEY PLA 2180 SOUTH 1300 EAST SUITE 520 SALT LAKE CITY UT 841060000
Mail	RONALD G RUSSELL ATTORNEY DEF 185 SOUTH STATE STE 1300 PO BOX 11019 SALT LAKE CITY UT 841470019

Dated this 6 day of June, 2012.

[Signature]
Deputy Court Clerk

EXHIBIT

"B"

EXHIBIT B

The following real property located in Salt Lake County, Utah:

TRACT I

Sidwell No.: 16-32-376-047

Commencing 145.67 feet South from the Northeast corner of Lot 12, Block 5, Ten Acre Plat A, Big Field Survey; thence South 237.13 feet; West 379.5 feet; North 0°06'10" East 383 feet; East 229.5 feet; South 145.67 feet; East 150 feet to BEGINNING. 2.82 acres.

TRACT II

Sidwell No.: 16-32-376-026

Commencing North 0°04' East 168.2 feet from the Southeast corner of Lot 12, Block 5, Ten Acre Plat A, Big Field Survey; thence North 0°04' East 23.2 feet; West 23 rods South 0°04' West 23.2 feet; East 23 rods to BEGINNING 0.2 acres.

TRACT III

Sidwell No.: 16-32-376-044

Commencing at the Southeast corner of Lot 11, Block 5, Ten Acre Plat "A", Big Field Survey; thence West 766.09 feet; North 327.21 feet; East 766.09 feet; South 327.21 feet to BEGINNING.

The foregoing notwithstanding Tracts I and II shall be benefited by the Woodland Easement only so long as its use is limited to use for apartment purposes.

EXHIBIT

"C"

EXHIBIT C

Sidwell Nos.: 16-32-352-051
16-32-352-057
16-32-352-058
16-32-352-059
16-32-352-060
16-32-352-061
16-32-352-062
16-32-352-063

BEGINNING at the Northeast corner of Lot 8, Block 5, Ten Acre Plot "A", Big Field Survey; and running thence south 0°09'59" West 572.84 feet to the Southeast corner of said Lot 8, thence South 0°09'59" West 19.83 feet to the South line of Lot 14A, CLEARVIEW ACRES SUBDIVISION; thence South 89°55' West 106.51 feet to the Southeast corner of Lot 15A; thence North 88°50'40" West 100.01 feet to the Southeast corner of Lot 16A; thence North 89°52'30" West 100.00 feet to the Southeast corner of Lot 17A; thence North 89°59'27" West 100.00 feet to the Southeast corner of Lot 18A; thence North 88°23'10" West 100.03 feet to the Southeast corner of Lot 19A; thence North 89°01' West 100.01 feet to the Southeast corner of Lot 20A; thence North 87°39'20" West 160.11 feet to the Southwest corner of said Lot 20A, CLEARVIEW ACRES SUBDIVISION; thence North 0°14'13" East 6.78 feet to the Southwest corner of said Lot 8; Block 5, Ten Acre Plat "A"; thence North 0°14'13" East 573.07 feet to the Northwest corner of said Lot 8; thence South 89°58'24" East 89.30 feet; thence along the arc of a 622.03 foot radius curve to the right 715.24 feet to the point of BEGINNING, said arc being subtended by a chord of South 89°58'24" East 676.48 feet.

EXHIBIT

"D"

EXHIBIT D

Real Property situated in Salt Lake County, Utah, described as follows:

Sidwell No.: 16-32-352-011

Commencing 352.1 feet South from the Northwest corner of Lot 9, Block 5, Ten Acre Plat "A", Big Field Survey, and running thence East 150 feet; thence South 65 feet; thence West 150 feet; thence North 65 feet to the point of beginning.

Sidwell No.: 16-32-352-012

Commencing 50 feet North from the Southwest corner of Lot 9, Block 5, Ten Acre Plat "A", Big Field Survey, and running thence East 150 feet; thence North 50 feet; thence West 150 feet; thence South 50 feet to the point of beginning.

Sidwell No.: 16-32-352-013

Commencing at the Southeast corner of Lot 9, Block 5, Ten Acre Plat "A", Big Field Survey, and running thence West along a 622.03 foot radius curve 715.24 feet, (said arc being subtended by a chord of South 89 degrees 59' East 676.48 feet) thence West 82.52 feet; thence North 50 feet; thence East 150 feet; thence North 50 feet; thence West 150 feet; thence North 56.52 feet; thence East 150 feet; thence North 130.58 feet; thence East 389 feet; thence South 13 feet; thence South 85 degrees 34' East 220.6 feet; thence South 257.1 feet to the point of beginning.

THE AFORESAID PARCELS ARE FURTHER DESCRIBED BY ALTA/ACSM SURVEY AS FOLLOWS:

WEST PARCEL – NORTH AREA WOODLANDS BUSINESS PARK

BEGINNING at the Southwest corner of Lot 9, Block 5, 10 Acre Plat "A", Big Field Survey and running thence North 0 degrees 14'13" East along the East line of 700 East Street 220.97 feet; thence South 89 degrees 57'56" East 150.00; feet; thence North 0 degrees 13'23" East 65.00 feet; thence South 89 degrees 57'38" East 110.00 feet; thence South 0 degrees 02'22" West 208.635 feet to a point on a curve to the left; the radius point of which bears South 15 degrees 30'15" East 622.03 feet; thence Southwesterly along the arc of said curve 189.008 feet; thence North 89 degrees 58'24" West 89.30 feet to the point of BEGINNING.

Exhibit D (con't.)

EAST PARCEL – NORTH AREA WOODLANDS BUSINESS PARK

BEGINNING at a point North 0 degrees 14'13" East along the East line of 700 East Street 220.97 feet and South 89 degrees 51'36" East 150.00 feet and North 0 degrees 13'23" East 65.00 feet, and South 89 degrees 57'38" East 110.00 feet from the Southwest corner of Lot 9, Block 5, 10 Acre Plat "A" Big Field Survey and running thence South 89 degrees 57'38" East 285.26 feet; thence South 0 degrees 11'14" West 17.30 feet; thence South 85 degrees 34'00" East 220.80 feet; thence South 0 degrees 09'59" West 251.59 feet to the Southeast corner of Lot 9, Block 5, 10 Acre Plat "A", Big Field Survey, said point also being on a curve to the left, the radius point of which bears South 32 degrees 58'02" West 622.03 feet; thence Westerly along the arc of said curve 526.228 feet; thence North 0 degrees 02'22" East 208.635 feet to the point of BEGINNING.

Tab C

11-123

2302

John M. [illegible]

UTAH TITLE & TRS.

Oct 27 2 45 PM '83

KATIE L. UICON
RECORDER
SALT LAKE COUNTY
SALT LAKE, UTAH

Attachment No. 2

WHEN RECORDED MAIL TO:

David E. Gee, Esq.
ROOKER, LARSEN, KIMBALL & PARR
185 South State Street, Suite 1300
Salt Lake City, Utah 84111

LT-09976

3802259

DECLARATION OF EASEMENTS,
COVENANTS AND RESTRICTIONS

THIS DECLARATION (the "Declaration") is made and entered into this 27 day of October, 1983; by and between WOODLAND INVESTMENT CO., a Utah limited partnership ("Woodland"), and THE WOODLANDS ASSOCIATES, a joint venture organized pursuant to the Utah Uniform Partnership Act ("Associates").

RECITALS

A. Woodland owns a tract of real property ("Tract A") located in Salt Lake County, State of Utah, the legal description of which is set forth on Exhibit "A."

B. Associates, contemporaneously with the execution of this Declaration, is acquiring a tract of real property ("Tract B") located in Salt Lake County, State of Utah, the legal description of which is set forth on Exhibit "B."

C. The parties desire to create certain cross easements and rights between and impose certain covenants and restriction on Tracts A and B.

THEREFORE, for TEN DOLLARS (\$10.00) and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

5502-1-1559

1. Definitions. As used in this Declaration:

(a) "Party" means each person executing this instrument and its heirs, assigns and successors in interest with respect to Tract A or Tract B, as the case may be, as the same may be shown by the records of Salt Lake County, State of Utah, as of the date of the exercise of powers granted hereunder or the performance of or failure of performance by such Parties of the obligations created by this Declaration. Without limiting the generality of the foregoing, the term Party refers to the persons who fit the following classifications:

(i) The person or persons holding fee title to all or any portion of Tract A or Tract B; and

(ii) The lessee or lessees under a ground lease of all or a portion of any Tract for a fixed minimum term of thirty (30) years, or longer, in which event the fee owner of the real property covered by such lease will not be deemed to be a Party as to such Tract or portion of such Tract for the purposes of this Declaration during the duration of such ground lease.

(b) "Parties" means every person who is a Party, taken in the aggregate.

2. Covenants and Restrictions with Respect to Tract B.

(a) No party shall attempt to obtain or consent to any change or variance in zoning of Tract B if such change would jeopardize the right of Woodland, its successors and assigns, to retain and maintain any sign described in Section 3 of this Declaration.

(b) The official name of any building complex located on Tract B will contain the word "Woodland" or "Woodlands" unless the use of such word is not permitted by applicable laws, regulations or ordinances. The owner of Tract B shall have the right to relieve Tract B of the obligation imposed by this Section 2(b) by paying to the owner of Tract A, in a lump sum, the amount of \$100,000 for the express and sole purpose of obtaining such relief.

(c) No part of Tract B shall, for a period of twenty-five (25) years following the date of this Declaration, be used as a Theater-Restaurant; provided, that this restriction

EX-5502 (X) 1560

shall be void if no Theater-Restaurant is operated on Tract A for a continuous period of sixty (60) months. For purposes of this Section 2(c), the term "Theater-Restaurant" shall mean a public or private dining facility, operated for profit, having 20 or more tables, where live vocal, theatrical or comedy entertainment is regularly provided.

(d) If construction of a Health Club on Tract A is commenced before the latter of one (1) year from the date of this Declaration or nine (9) months after the commencement of construction of the first building on Tract B, then for as long as such Health Club is completed within a reasonable time and continuously available to the Parties with respect to Tract B and all tenants of such Parties and all of the personnel of such tenants, at prices competitive with or less than those being charged by Health Clubs open to the general public, no Health Club will be operated on Tract B or directly or indirectly by Associates (but not its successors) within a radius of 5/8's of a mile of Tract A. For purposes of this Section 2(d), the term "Health Club" shall mean a public or private facility containing a jogging facility, exercise and weight room, a sauna, swimming pool, tennis or racquetball court, a jacuzzi or similar significant exercise facility.

3. Signs on Tract B. Subject to the limitations set forth below, Associates grants to Woodland the right to erect and operate on Tract B, at any time and from time to time, one free-standing double-sided sign (the "Woodland Sign"), which may be a "pylon" sign. The design and operation of the Woodland Sign shall comply with the following conditions:

(a) Any Woodland Sign may be electrically-lighted and may display lighted, electronically activated messages. The dimensions, height and style of any Woodland Sign shall be designated by Woodland but shall be subject to the approval of a licensed building architect. Such architect shall be chosen by the Party owning Tract B from a list of three licensed building architects selected by Woodland. The face or faces of any Woodland Sign shall be located within a square or rectangle, and said square or rectangle shall not exceed 275 square feet per side.

(b) Any Woodland Sign shall be erected on a parcel of land located in the Southwest corner of Tract B and described on Exhibit "C" (the "Woodland Sign Location"). To the

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extent feasible the Woodland Sign shall be located on the southern ten (10) feet of the Woodland Sign Location. The Woodland Sign may be altered or replaced from time to time as long as the alteration or replacement complies with the limitations set forth in this Section 3.

(c) The Woodland Sign may not be used to advertise or refer in any way to an office or offices for rent.

(d) The design and operation of any Woodland Sign will comply with all applicable laws, ordinances and regulations.

(e) Woodland, at its cost and expense, shall maintain any Woodland Sign in good and safe operating condition. If Woodland fails to maintain any Woodland Sign, then, on one hundred eighty (180) days' written notice to Woodland, Associates may either cause such maintenance to be performed or have the sign removed and shall have a lien on Tract A for the amount expended in maintaining (but not removing) any Woodland Sign; plus interest at the rate of twelve percent (12%) per annum from the date of such expenditure.

(f) Notwithstanding any other provision contained in this Section 3, the right of Woodland and its successors and assigns to erect any Woodland Sign and to possess the Woodland Sign Location shall be extinguished if such sign is not erected within five (5) years of the date hereof or if such sign, once erected, is abandoned for a continuous period of one (1) year thereafter.

(g) Woodland and each person constituting a Party with respect to Tract A shall indemnify, defend and hold Associates and each person constituting a Party with respect to Tract B harmless from and against any and all liabilities, losses, actions, proceedings, judgments, controversies, claims, costs or expenses (including attorneys' fees) arising out of the design, use or operation of any Woodland Sign.

(h) No right granted to Woodland by this Section 3 shall limit or restrict in any way the right of Associates to erect and operate (or permit to be erected and operated) signs on Tract B.

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(4) Associates may place on Tract A a sign advertising the office project to be located on Tract B. Such sign may remain until April 30, 1984.

4. Grant of Easement.

(a) Woodland grants to Associates a nonexclusive easement appurtenant to and across Tract A for the purpose of allowing vehicular access between the public streets and any and all parking areas or roadways and lanes situated on Tract B; provided, that the foregoing right of access shall be limited to use for such purposes and to such extent as may be customary for use of Tract B for commercial purposes (including, but not limited to, reasonable and customary deliveries). The easement granted by this subsection (a) shall be limited to the roadway described on Exhibit "D" (the "Associates Roadway"). At any time before December 31, 1983, by giving written notice to Associates, Woodland may relocate the Associates Roadway up to twenty-five (25) feet to the north or south of the centerline of the Associates Roadway as described on Exhibit "D." Thereafter, Woodland shall not move or relocate the Associates Roadway. In addition to the foregoing, Associates shall have the right to elevate or sink the western twenty (20) feet of the Associates Roadway in order to align the same with the upper and/or lower decks of a parking ramp. On or before November 30, 1984, Woodland agrees to construct a paved roadway twenty-five (25) feet wide on the Associates Roadway in accordance with good construction practices.

(b) Associates grants to Woodland a nonexclusive easement appurtenant to and across Tract B for the purpose of allowing vehicular access between the public streets and any and all parking areas situated on Tract A. The easement granted by this subsection (b) shall be limited to the roadway described on Exhibit "E" (the "Woodland Roadway"). In addition Associates shall provide a twenty-five (25) foot two-way access lane from the Woodland Roadway to the Associates Roadway in such location as Associates may designate (the "Connecting Roadway"). At any time before December 31, 1983, by giving written notice to Woodland, Associates may relocate the Woodland Roadway up to twenty-five (25) feet to the north or south of the centerline of the Woodland Roadway as described on Exhibit "E." Thereafter Associates shall not move or relocate the Woodland Roadway. On or before June 30, 1985 Associates agrees to construct a paved roadway twenty-five (25) feet wide on the Woodland Roadway and

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the Connecting Roadway in accordance with good construction practices. The foregoing notwithstanding the easements granted over the Woodland Roadway and the Connecting Roadway shall be subject to the following conditions:

(i) The easement for the Connecting Roadway is limited to seven (7) feet in height;

(ii) The easements for the Woodland Roadway and the Connecting Roadway are limited to use for such purposes and to such extent as may be customary for use of Tract A for commercial purposes (including, but not limited to, reasonable and customary deliveries consistent with the foregoing height restriction) and to erect and maintain any Woodland Sign;

(iii) A parking ramp or any similar structure may be constructed on Tract B except over the Woodland Roadway, and Associates may route all traffic using the Connecting Roadway through such structure on the upper and/or the lower deck of any such structure; and

(iv) The location of the Connecting Roadway may be altered, relocated or changed in any manner and at any time and from time to time without the prior written consent of Woodland upon sixty (60) days' prior written notice to Woodland.

(c) The Parties agree to keep and maintain at its sole cost and expense the roadways located on its Tract in good condition. If a Party fails to so keep and maintain the roadway for which it is responsible, or to construct the same, the other Party may on thirty (30) days written notice to perform such maintenance and/or construction and the performing party shall have a lien on the Tract owned by the defaulting Party for the amount expended plus interest at the rate of twelve percent (12%) per annum from the date of such expenditure.

(d) The easements granted pursuant to this Section 4 shall benefit each of the Parties and their respective tenants, concessionaires, customers, invitees and guests, and the concessionaires, invitees, customers and guests of any tenant or subtenant of the respective Parties.

5. Duration. This Declaration and each easement, covenant, restriction and undertaking of this Declaration shall

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be for a term of ninety-nine (99) years unless sooner terminated pursuant to Section 2.

6. Modification. This Declaration and any easement, covenant, restriction or undertaking contained herein may be terminated, extended, modified or amended as to the whole of the Tracts of any portion of them, with the unanimous consent of the Parties.

7. Not a Public Dedication. Nothing contained in this Declaration will be deemed to be a gift or a dedication of any portion of either Tract to the general public or for the general public or for any public purpose whatsoever, it being the intent of the Parties that this Declaration be strictly limited to and for the purpose expressed herein.

8. Mutuality, Benefits and Burdens Run with Land.

(a) Each and all of the easements, covenants, restrictions, rights and provisions granted or created herein are appurtenances to the Tracts and none of the easements, covenants, restrictions, rights and provisions may be transferred, assigned, or encumbered except as an appurtenance to such Tracts. For the purposes of the easements, covenants, restrictions, rights and provisions created by this Declaration, the Tract benefited will constitute the dominant estate, and the Tract burdened by such easements, covenants, restrictions, rights and provisions will constitute the servient estate.

(b) Each and all of the easements, covenants, restrictions, conditions, rights and provisions contained in this Declaration (whether affirmative or negative in nature) are made for the direct, mutual and reciprocal benefit of each Tract, will create mutual equitable servitudes upon each Tract running with the land, will bind and inure to the benefit of every person having any fee, leasehold, or other interest in any portion of the Tracts at any time or from time to time to the extent that such portion is affected or bound by the easement, covenant, restriction, right or provision in question, or that the easement, covenant, restriction, right or provision is to be performed on such portion, and will bind and inure to the benefit of the Parties and their respective heirs, successors and assigns as to their respective Tracts.

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9. Miscellaneous Provisions.

(a) The Parties do not by this Declaration, in any way or for any purpose, become partners or joint venturers of each other in the conduct of their respective businesses or otherwise.

(b) Each Party shall be excused for the period of any delay in the performance of any obligations hereunder when prevented from timely performing by a cause or causes beyond such Party's control, including labor disputes, civil commotion, war, governmental regulations, moratoriums or controls, fire or other casualty, inability to obtain any material or services, or acts of God.

(c) Failure of a Party to insist upon the strict performance of any provision or to exercise any option hereunder shall not be construed as a waiver for future purposes with respect to any such provision or option. No provision of this Declaration shall be deemed to have been waived unless such waiver is in writing and signed by the Party alleged to have waived its rights.

(d) If any provision of this Declaration or the application thereof to any person or circumstance shall to any extent be invalid, the remainder of this Declaration or the application of such provision to persons or circumstances other than those as to which it is held invalid shall not be affected thereby and each provision of this Declaration shall be valid and enforced to the fullest extent permitted by law.

(e) Except as otherwise provided, all provisions herein shall be binding upon and shall inure to the benefit of the Parties, their legal representatives, heirs, successors and assigns.

(f) Each person executing this Declaration for an entity represents and warrants that he is duly authorized to execute and deliver the same on behalf of the entity for which he is signing (whether it be a corporation, general or limited partnership or otherwise), and that this Declaration is binding upon such entity in accordance with its terms.

DEK5532 1411566

(g) This Declaration shall be construed in accordance with the laws of the State of Utah.

(h) All exhibits referred to in this Declaration are hereby incorporated by reference.

IN WITNESS WHEREOF, the parties hereto have executed this Declaration on the day and year first set forth above:

"WOODLAND":

WOODLAND INVESTMENT CO., a Utah
limited partnership

By Regina M. Woodard
Its general partner

"ASSOCIATES"

THE WOODLANDS ASSOCIATES, a
joint venture organized under
the Utah Uniform Partnership
Act by its two Venturers:
MWP-WOODLANDS, LTD., a Utah
limited partnership, by its
sole general partner MHC
PROPERTIES, INC., a Utah
corporation

By Gary J. Mathan
Its President

REC-502 141367

SLC-1 LIMITED PARTNERSHIP, a
Wisconsin limited partnership,
by its sole general partner
JOHNSON WAX DEVELOPMENT
CORPORATION, a Wisconsin
corporation

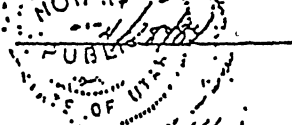
By James W. Smith
Its Vice President

STATE OF Utah }
COUNTY OF Salt Lake }

DO:

On the 17th day of October, 1983, personally
appeared before me James W. Smith who being by me
duly sworn, did say that he is General Partner of WOODLAND
INVESTMENT CO., a Utah limited partnership, and said
James W. Smith duly acknowledged to me that the
executed within and foregoing instrument was signed on behalf of
said partnership.

My Commission Expires:



Notary Public

Residing at Salt Lake City, Utah

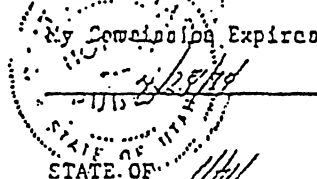
STATE OF Utah }
COUNTY OF Salt Lake }

On the 17th day of October, 1983, personally
appeared before me James W. Smith who being by me
duly sworn, did say that he is General Partner of MHC
PROPERTIES, INC., a Utah corporation, which is the general
partner of MHC-Woodlands, Ltd., a Utah limited partnership, which
is one of the members of The Woodlands Association, a joint
venture organized pursuant to the Utah Uniform Partnership Act,
and said James W. Smith duly acknowledged to me
that the executed within and foregoing instrument was signed on

BOOK 5502 PAGE 1568

behalf of said corporation in its capacity as the sole general partner of MHP-Woodlands, Ltd., on behalf of said partnership in its capacity as one of the venturers of The Woodlands Associates; on behalf of said partnership, by authority of its bylaws or a resolution of its board of directors.

My Commission Expires:



Caroline R. Rupp
Notary Public

Residing at:

Salt Lake City, Utah

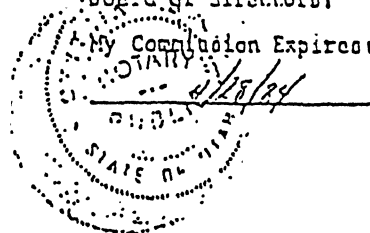
STATE OF Utah

COUNTY OF Salt Lake

ss.

On the 27th day of October, 1983, personally appeared before me Thomas W. Smith, who being by me duly sworn, did say that he is Vice President of JOHNSON WAX DEVELOPMENT CORPORATION, a Wisconsin corporation, which is the general partner of SLC-1 Limited Partnership, a Wisconsin limited partnership, which is one of the members of The Woodlands Associates, a joint venture organized pursuant to the Utah Uniform Partnership Act, and said Thomas W. Smith duly acknowledged to me that the executed within and foregoing instrument was signed on behalf of said corporation in its capacity as the sole general partner of SLC-1 Limited Partnership, on behalf of said partnership in its capacity as one of the venturers of The Woodlands Associates, on behalf of said partnership, by authority of its bylaws or a resolution of its board of directors.

My Commission Expires:



Caroline R. Rupp
Notary Public

Residing at:

Salt Lake City, Utah

Dec 5502 p. 1569

Tab D

Planning Commission
November 22, 1983

-3-

The applicant was not present. There was no one else for or against the application present.

By motion, seconded, the Planning Commission unanimously continued the application until December 20, 1983.

#PL-83-3013 - THE WOODLAND ASSOC. - 4405 SOUTH 700 EAST -
OFFICE/COMMERCIAL COMPLEX - ZONE C-2 - (MILLCREEK)

This project was given conceptual approval previously. They have refiled as a PUD to allow a variance in the height requirements of the buildings. They are proposing the north retail building to be two stories a bank building on the south corner of the project. The south office tower will be 5 stories, the middle one 8 stories, and the tower to the north 12 stories in height. There will be a multi-level parking structure east of the high rises which will be four levels high at the highest point. The staff recommended approval subject to the conditions on file.

John Hampshire, representing the applicant, stated all the retail facility and the center 8 story tower building will be Phase I. The bank could be developed at anytime during the first phase. Basically they will construct the plateau and plaza level including all the front landscaping as part of the first phase. The 5 story tower would be Phase II, and the 12 story as the last phase. The completion date for the entire project being approximately four years.

There was no one else present for or against the application.

By motion, seconded, the Planning Commission unanimously approved the staff recommendation, subject to the following conditions:

1. Staff review of the plans.
2. Receiving other recommendations
3. Submitting the drawings required by the PUD ordinance.
4. Showing the phasing.

#PL-83-2203 - CHARLOTTE MOLNAR - 237 WEST 3680 SOUTH - ALCOHOL
RECOVERY - ZONE M-1 - (MILLCREEK)

This is a request to allow a quasi-public use of an alcohol recovery unit. The staff recommended approval subject to the conditions on file.

Louise Clawson, representing the applicant, stated they will have maximum capacity of 40 people, who will be supervised 24 hours a day. The residents will be transported to work, and will not be allowed to drive their own cars. The average length of stay will be 90 days. The maximum length of stay would be 6 months. The residents are not a court order or criminal clientel. If approval is given, they anticipate being there 3 years. There will be three staff members on the premises all the time, however, there will be other staff members there during the day. The building will not be changed drastically making it possible to return it to an industrial use if this facility does not stay at this location.

Tab E

P. Bruce Badger (A4791)
Diane H. Banks (A4966)
Matthew L. Anderson (A7459)
FABIAN & CLENDENIN,
A Professional Corporation
215 South State Street, 12th Floor
P.O. Box 510210
Salt Lake City, Utah 84151
Telephone: (801) 531-8900
Facsimile: (801) 531-1716

Attorneys for Defendants Woodlands III Holdings, LLC; JDJ Properties, Inc.; and
The Woodlands Business Park Association

IN THE THIRD DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

LUTHERAN HIGH SCHOOL)
ASSOCIATION OF THE GREATER SALT)
LAKE AREA, a Utah non-profit corporation,)
dba SALT LAKE LUTHERAN HIGH)
SCHOOL,)

Plaintiff,)

vs.)

WOODLANDS III HOLDINGS, LLC, a)
Utah limited liability company, BEDFORD)
PROPERTY INVESTORS, INC., a)
Maryland corporation, JDJ PROPERTIES,)
INC., a Utah corporation, THE)
WOODLANDS BUSINESS PARK)
ASSOCIATION, a Utah non-profit)
corporation, WASATCH PROPERTY)
MANAGEMENT, INC., a Utah corporation,)
and JOHN DOES 1-1,000,)

Defendants.)

AFFIDAVIT OF
JOHN A. DAHLSTROM, JR.

Civil No. 960908063 PR

Judge Sandra N. Peuler

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

John A. Dahlstrom, Jr., having been duly sworn, deposes and says:

1. I am an attorney duly licensed to practice law in the State of Utah.

2. I am Executive Vice President, General Counsel of Wasatch Property Management, Inc., which is under contract to manage the Woodlands Business Park, located at approximately 4000 South 700 East, Salt Lake City, Utah.

3. Office Tower 1 at the Woodlands Business Park is eight (8) stories in height and is owned by JDJ Properties, Inc., a Utah corporation.

4. Office Tower 2 at the Woodlands Business Park is six (6) stories in height and is owned by Woodlands III Holdings, LLC, a Utah limited liability company.

5. Office Tower 3 at the Woodlands Business Park is four (4) stories in height and is owned by Woodlands III Holdings, LLC.

6. Office Tower 4 at the Woodlands Business Park is not owned by any of the Defendants named in this lawsuit.

7. There are also two retail buildings at the Woodlands Business Park; one is owned by JDJ Properties, Inc., the other is owned by Woodlands III Holdings, LLC.

8. The tenants and customers of the retail space and Office Towers I, II and III park in two parking structures. One parking structure with 2 levels, situated immediately east of the three office towers, is owned by the Woodlands Business Park Association, a Utah non-profit corporation. The second parking structure with 3 levels is situated northeast of Office Tower III, abutting the roadway within the Woodlands Business Park. Access to the parking


structure which is situated northeast of Office Tower III is via 700 East, 3900 South or the right-of-way from 900 East along the north boundary of the Lutheran High School property.

9. An accurate photograph of the right-of-way on the Lutheran High School Property leading to the parking structure situated to the east of Office Towers I, II and III is attached hereto as Exhibit "A".

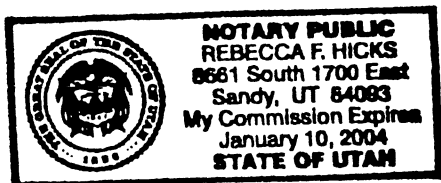
10. An accurate photograph of the parking structure situated to the northeast of Office Tower III is attached as Exhibit "B".

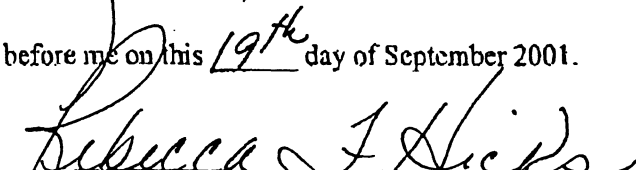
Further affiant sayeth not.

DATED this 19th day of September, 2001.


John A. Dahlstrom, Jr.

SUBSCRIBED AND SWORN TO before me on this 19th day of September 2001.




NOTARY PUBLIC

CERTIFICATE OF SERVICE

On the 25th day of September, 2001, I hereby certify that I served a true and correct copy of the foregoing **AFFIDAVIT OF JOHN A. DALHSTROM, JR., ESQ.** by depositing said document in the United States mail, postage prepaid, addressed as follows:

Robert M. Taylor
Sue J. Chon
TAYLOR, ADAMS, LOWE & HUTCHINSON
Attorneys for Plaintiff
2180 South 1300 East, Suite 520
Salt Lake City, UT 84106

Annexette E Clark

EXHIBIT "A"

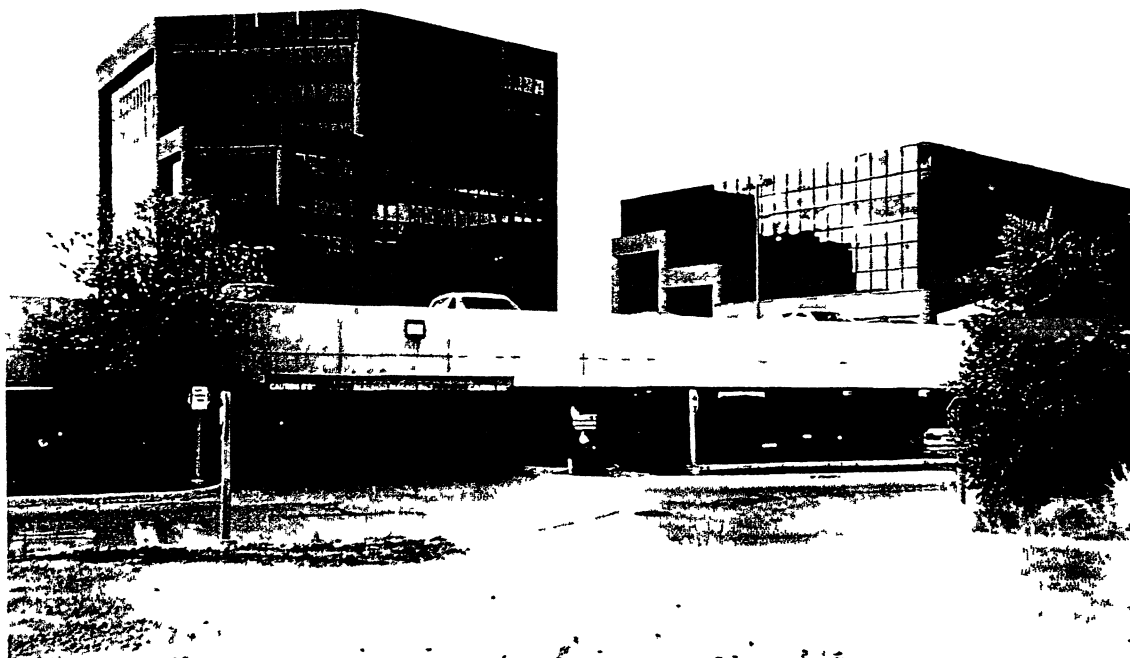
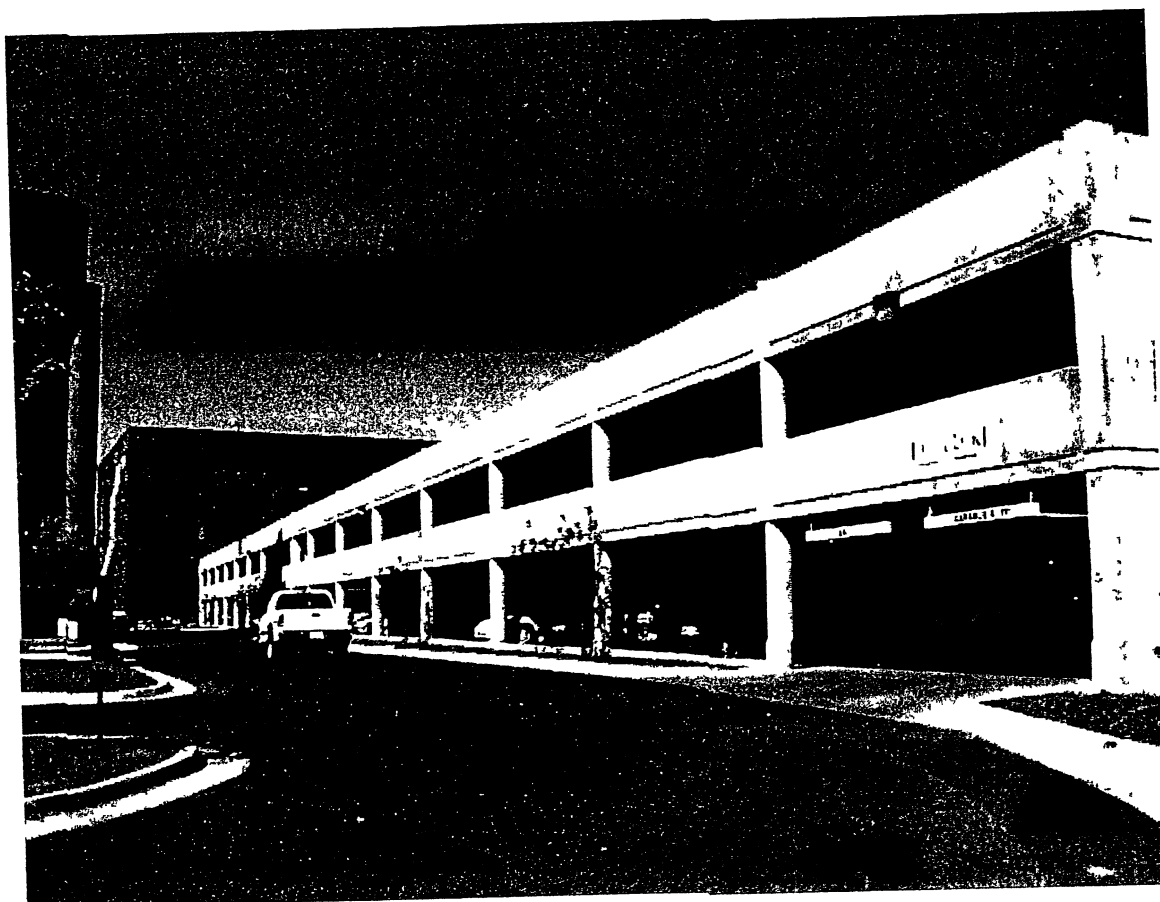


Exhibit "B"



Tab F

P. Bruce Badger (A4791)
Diane H. Banks (A4966)
Matthew L. Anderson (A7459)
FABIAN & CLENDENIN,
A Professional Corporation
215 South State Street, 12th Floor
P.O. Box 510210
Salt Lake City, Utah 84151
Telephone: (801) 531-8900
Facsimile: (801) 531-1716

Attorneys for Defendants Woodlands III Holdings, LLC; Woodlands IV Holdings, LLC; JDJ Properties, Inc.; and The Woodlands Business Park Association

IN THE THIRD DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

LUTHERAN HIGH SCHOOL)
ASSOCIATION OF THE GREATER SALT)
LAKE AREA, a Utah non-profit corporation,)
dba SALT LAKE LUTHERAN HIGH)
SCHOOL,)

Plaintiff,)

vs.)

WOODLANDS III HOLDINGS, LLC, a)
Utah limited liability company, BEDFORD)
PROPERTY INVESTORS, INC., a)
Maryland corporation, JDJ PROPERTIES,)
INC., a Utah corporation, THE)
WOODLANDS BUSINESS PARK)
ASSOCIATION, a Utah non-profit)
corporation, WASATCH PROPERTY)
MANAGEMENT, INC., a Utah corporation,)
and JOHN DOES 1-1,000,)

Defendants.)

AFFIDAVIT OF DENNIS PEACOCK

Civil No. 960908063 PR

Judge Sandra N. Peuler

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

DENNIS PEACOCK, having been duly sworn, deposes and says:

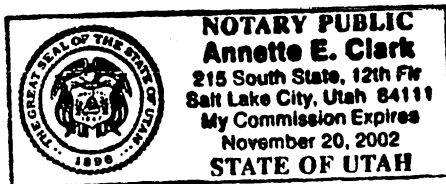
1. I state the following facts upon my own personal knowledge and if called upon to testify concerning these facts I would be competent to do so.
2. I am employed by Wasatch Property Management as the Facilities Manager of the Woodlands Business Park, which is located at approximately 4000 South 700 East in Salt Lake City, Utah. I am presently at the Woodlands Business Park on a daily basis and have been continuously employed at the Woodlands Business Park since approximately 1985.
3. The construction of Tower IV at the Woodlands Business Park was commenced in June 2000 and was completed in July 2001. It is today only partially leased and the most direct and best access to Tower IV is from 700 East, not the right of way easement from 900 East.
4. I have observed that many of those who use the right of way between 900 East and the Woodlands Business Park are Lutheran High School students who get to school by driving through the Woodlands Business Park from 700 East, or neighborhood residents who cut through the Woodlands Business Park from 900 East to 700 East, or residential condominium owners who live in a condominium development immediately north of the Lutheran High School. The right of way also provides access to fire trucks and ambulances.
5. The Woodlands Business Park has four main entrances on 700 East which is the primary route of most of the tenants and patrons of the Woodlands Business Park.

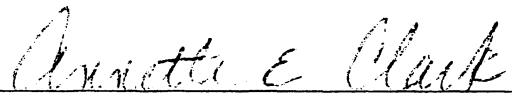
6. The right of way from 900 East is regularly maintained year round and is plowed throughout the winter by Wasatch Property Management under a maintenance contract with The Woodlands Business Park Association. The High School does not maintain the right of way.

DATED this 3rd day of April, 2002.


Dennis Peacock

SUBSCRIBED AND SWORN TO before me this 3rd day of April, 2002.




Notary Public

CERTIFICATE OF HAND DELIVERY

On the 9TH day of April, 2002, I hereby certify that I served a true and correct copy of the foregoing **AFFIDAVIT OF DENNIS PEACOCK**, by hand delivering said document as follows:

Robert M. Taylor
Sue J. Chon
TAYLOR, ADAMS, LOWE & HUTCHINSON
Attorneys for Plaintiff
2180 South 1300 East, Suite 520
Salt Lake City, UT 84106

Ronald G. Russell
Parr, Waddoups, Brown, Gee & Loveless
Attorneys for Bedford Property Investors, Inc.
185 South State, #1300
Salt Lake City, Utah 84111

Christie E. Clark

Tab G

Woodlands III Holdings LLC	5	Dell Loy Hansen 1 vote	Woodlands III Holdings LLC 399 North Main Suite 200 Logan UT 84321
Bedford Property Investors Inc	1A	Robert Prater 1 vote	Bedford Property Investors Inc 270 Lafayette Circle Lafayette CA 94549
Bedford Property Investors Inc	3	Robert Prater 1 vote	Bedford Property Investors, Inc 270 Lafayette Circle Lafayette, CA 94549
Bedford Property Investors, Inc	Additional Property	Robert Prater 1 vote	Bedford Property Investors Inc 270 Lafayette Circle Lafayette CA 94549

It is acknowledged and agreed by the Association and its Members that the owner of Parcel 3 shall not have any right or interest in the improvements now or hereafter developed with improvements in the future.

Section 6 No Parking Right Notwithstanding anything to the contrary contained in the Declaration as amended it is hereby acknowledged and agreed that admission of the Additional Property to the Association in no way transfers to Bedford or any subsequent owner of the Additional Property any right whatsoever any right to park on the existing Parking Structure (as it may be modified in the future), the Common Parking Areas or the Limited Parking Areas of the Woodlands Business Park as existed prior to this amendment, unless such parking is approved by the unanimous vote of the Members of the Association. Nothing contained in this Section 6 shall affect any right of Bedford, as the owner of Parcel 3, and the tenants, invitees and employees of the improvements thereon, to park within the existing Parking Structure.

Section 7 No Easement It is hereby acknowledged and agreed that admission of the Additional Property to the Association in no way permits the use of that certain "Associates Roadway" adjacent to the eastern boundary of the Association, as defined in that Declaration of Easements, Covenants and Restrictions recorded October 27, 1983 as Entry No. 3862259 in Book 1502 at Page 1559 of the official records of the Salt Lake County Recorder.

Section 8 Arbitration In the event that any vote of the Association becomes deadlocked, such that a majority of the votes are not cast for or against any item upon which the Association is required to vote, any Member of the Association, upon not less than ten (10) days' prior written notice to the other Members of the Association, may submit such matter to arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association. In connection with such proceeding the Owners of Parcels 2, 4 and 5 shall together be entitled to select one arbitrator, the Owners of Parcels 1A, 3 and the Northern Tract shall be entitled to select a second arbitrator and those two arbitrators shall together select a third arbitrator for the panel. The fees and expenses of the first two arbitrators shall be paid by the party selecting that arbitrator and the fees and expenses of the third arbitrator

Tab H

Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES FOR
REPORTING OF OPINIONS AND WEIGHT OF
LEGAL AUTHORITY.

Court of Appeals of Ohio, Twelfth District, Brown
County.

Michael D. **PROFFITT**, et al., Plaintiffs-Appellees,
v.
Michael **PLYMESSER**, et al.,
Defendants-Appellants.

No. CA2000-04-008.

June 25, 2001.

Robert F. Benintendi, Georgetown, OH, for
plaintiffs-appellees.

Danny R. Bulp and Richard D. Weghorst, West
Union, OH, for defendants- appellants.

OPINION

VALEN.

*1 Defendants-appellants, Michael D. and Leslie
Tricia **Plymesser**, appeal a Brown County Court of
Common Pleas decision resolving a dispute about
the use of a right-of-way. Based upon the analysis
that follows, the decision of the trial court is
affirmed.

Plaintiffs-appellees, Michael D., Jack W., and
Charlotte **Proffitt**, own land near Free Soil Road in
Georgetown, Ohio, adjacent to land owned by
appellants. Appellants and the **Proffitts** both farm
their land. Their properties share a common
boundary. The **Proffitts** have a right of ingress and
egress across appellants' land to access Free Soil
Road. The parties agree that this right- of-way was
created by a grant in the deed to the property now
owned by appellants. This easement is
acknowledged in the current deeds held by
appellants and the **Proffitts**.

The **Proffitts** filed a complaint against appellants

alleging, *inter alia*, that appellants had illegally
erected gates across the right-of-way. Appellants
filed a counterclaim that requested, *inter alia*, a
determination of the extent of the **Proffitts'** right to
use the right-of-way for ingress and egress.

The trial judge visited the land owned by
appellants and the **Proffitts** to view the right-of-way
and its surrounding area. After a two-day bench
trial, the trial court issued a decision resolving the
right-of-way dispute between the parties. Appellants
appeal, raising three assignments of error for our
consideration.

Assignment of Error No. 1:

THE TRIAL COURT ERRED BY ORDERING
APPELLANTS, THE SERVIENT ESTATE
OWNERS, TO REMOVE THEIR GATES
FROM THE TERMINI OF THE
RIGHT-OF-WAY EASEMENT.

An easement is "the grant of a use on the land of
another." *Alban v. R.K. Co.* (1968), 15 Ohio St.2d
229, 231. More specifically, an easement is "a right,
without profit, created by grant or prescription,
which the owner of one estate, called the dominant
estate, may exercise in or over the estate of another,
called the servient estate, for the benefit of the
former." *Trattar v. Rausch* (1950), 154 Ohio St.
286, paragraph one of the syllabus. An easement
"may be acquired only by grant, express or implied,
or by prescription." *Id.* at paragraph two of the
syllabus.

A trial court's interpretation of an easement will be
reviewed *de novo*, but any reasonable findings of
fact will be upheld if the reviewing court determines
that the trial court's decision is supported by
competent, credible evidence. *Murray v. Lyon*
(1994), 95 Ohio App.3d 215, 219. "The underlying
rationale of giving deference to the findings of the
trial court rests with the knowledge that the trial
judge is best able to view the witnesses and observe
their demeanor, gestures and voice inflections, and
use these observations in weighing the credibility of
the proffered testimony." *Myers v. Garson* (1993),
66 Ohio St.3d 610, 615, quoting *Seasons Coal Co.*
v. Cleveland (1984), 10 Ohio St.3d 77, 80.

In their first assignment of error, appellants
challenge the trial court's decision to order them to
remove the two gates that are located at the ends of
the right-of-way. The Supreme Court of Ohio has
previously held that "[t]he owner of the servient

estate may use the land for any purpose that does not interfere with the easement, and, in the absence of anything in the deed, or in the circumstances under which it was acquired or used, showing that the way is to be an open one, he may put gates or bars across it, *unless they would unreasonably interfere with its use.*" (Emphasis added.) *Gibbons v. Ebding* (1904), 70 Ohio St. 298, paragraph two of syllabus. Appellants argue that the trial court failed to properly follow the precedent established by *Gibbons* when it ordered the removal of the gates that had been erected by appellants. We disagree.

*2 The trial court determined that the gates at the ends of the right-of-way unreasonably interfered with the Proffitts' use of the right-of-way. Specifically, the trial court found that "[t]o require a person to stop, open the gate, traverse the gate, get out and close the gate, upon each and every entrance and exit would appear to be an unreasonable burden in this particular situation." Moreover, the trial court found that the gate located at the top of the right-of-way "does constitute a hazard, or at the very least a significant problem, for those attempting to negotiate the left turn onto the Proffitts' property."

The trial testimony of several witnesses demonstrated that the gates unreasonably burdened the use of the right-of-way. Michael Proffitt testified that after restrictive gates were erected at the ends of the right-of-way in 1998, he and his tenants began experiencing problems in driving farm equipment up the right-of-way. Several tenants of the Proffitts' land testified that it is a hazard to stop a tractor on the steep hillside and then to open the gate at the top of the right-of-way. One man who raised tobacco for the Proffitts testified that his tobacco cutter could not pass through the gate because it was too narrow. A man who boards horses at the Proffitts' farm testified that his trailer had once become stuck in one set of gates. In addition, a paramedic testified that he was unable to drive a life-squad vehicle up the right-of-way and through the narrow gates.

We find that the trial court's determination that the erection of gates unreasonably interfered with the Proffitts' use of the right-of-way is supported by competent, credible evidence. The first assignment of error is overruled.

Assignment of Error No. 2:

THE TRIAL COURT ERRED BY ORDERING THAT IT IS THE RESPONSIBILITY OF THE APPELLANTS, THE SERVIENT ESTATE OWNERS, TO BUILD A FENCE ALONG THE EAST SIDE OF THE RIGHT-OF-WAY EASEMENT IF THEY INTEND TO ENCLOSE LIVESTOCK FOR GRAZING PURPOSES.

At trial, Michael Plymesser testified that he intended to graze animals that would have access to the right-of-way and would graze on the right-of-way. He testified that his farm already has some horses and that he plans on raising cattle. Several witnesses testified that it would be a hazard to allow animals to graze along the right-of-way, where farmers move loads of hay, tobacco, and other crops using large farming vehicles. One witness testified that it would be dangerous for both the driver and the animals.

An owner of a servient estate may not exercise his rights in such a way as to unreasonably interfere with the special use for which the easement was created. *Cincinnati, Hamilton & Dayton Ry. Co. v. Wachter* (1904), 70 Ohio St. 113, 118; *Columbia Gas Transm. Corp. v. Bennett* (1990), 71 Ohio App.3d 307, 319. Recognizing that appellants intended to graze livestock along the right-of-way and that the gates that had previously kept the livestock away from the right-of-way were to be removed, the trial court ordered appellants to build a fence along the right-of-way to enclose such livestock. The trial testimony indicates that allowing livestock to graze in the right-of-way would create a hazard that would be an unreasonable burden upon the use of the easement. Therefore, we overrule appellant's second assignment of error.

*3 Assignment of Error No. 3:

THE TRIAL COURT ERRED BY FINDING THAT THE APPELLANTS DID NOT ESTABLISH BY A PREPONDERANCE OF THE EVIDENCE THAT THE APPELLEES' USE OF THE RIGHT-OF-WAY SHOULD BE LIMITED IN ANY FASHION WHATSOEVER.

The trial court denied appellants' fifth counterclaim, which alleges that the Proffitts' use of the right-of-way should be limited in accordance with the original intent of the grantor. Appellants argue that the Proffitts should not be permitted to increase the physical dimensions of the right-of-way. Appellants argue that whereas the right-of-way was never intended to be "anything

more than a narrow farm path for agricultural ingress and egress," the Proffitts now want to "traverse it with huge, modern farm equipment." The testimony at trial established that tenants of the Proffitts' farm routinely accessed the Proffitts' land by using the right-of-way, and that the size of the machinery used to farm the land had increased over the years.

In its decision and judgment entry, the trial court stated:

The Court specifically orders that * * * fencing shall not interfere with farm equipment or machinery of the size regarding which Plaintiffs' tenants testified during this trial. The Court specifically recall [*sic*] Scott Malott's four row setter as being a "big outfit." The Court does not believe that this right-of-way should be restricted to prevent such equipment or machinery.

The grant of an easement is not made for present use alone but anticipates future use; for example, easements for ingress and egress, which were originally granted to allow horse-drawn vehicles, later provided the owner of the dominant estate the right to travel with automobiles and trucks, modern means of transportation. *Realty Title & Investment Co. v. Fairport, Painesville & Eastern Rd. Co.* (1919), 12 Ohio App. 73, 79. "[T]he exercise of the right is not to be confined to the modes in vogue when it was first acquired. The owner * * * may keep pace with the progress of invention and ingenuity, so far as is necessary to a profitable working of his property in competition with rivals." *Id.* at 80, quoting *Marvin v. Brewster Iron Mining Co.*, 55 N.Y. 538, 551. We find that the trial court correctly determined that the size of the modern farming equipment in use should be accommodated.

Appellants further argue that the right-of-way is being used improperly for ingress and egress to property other than that specified at the easement's creation. Appellants claim that the original intent of the grant of the easement was to access a seventy-acre tract of land. Appellants assert that the seventy-acre tract is a part of the one hundred eighty-five acres of land currently owned by the Proffitts. Appellants reason that the right-of-way can be used only to access the seventy-acre tract of land.

The Proffitts argue that appellants did not even demonstrate that there has been an additional use of the right-of-way. The Proffitts contend that the

evidence presented at trial did not show that the farming activity on their land took place anywhere other than the original seventy-acre tract. However, the trial court assumed in its decision that the Proffitts were using the right-of-way to access additional acreage adjoining the seventy-acre tract. We defer to this factual finding by the trial court judge, who not only had the benefit of hearing the testimony from the trial but also visited the properties of the feuding parties.

*4 Appellants insist that according to *Berardi v. Ohio Turnpike Comm.* (1965), 1 Ohio App.2d 365, this court should find that an easement can only be used in connection with the estate to which it is appurtenant and cannot be extended by the owner to any other property which he may then own or afterward acquire, unless this is provided for in the instrument in which the easement is created. We note that although the Eighth District Court of Appeals makes this general statement of law in *Berardi*, that court thereafter acknowledged that this issue had not been raised by the pleadings and was not before that court. Therefore, this statement of law is merely dicta.

Nevertheless, we note that this statement of law from *Berardi* was adopted and followed by the Fifth District Court of Appeals in *State ex rel. Fisher v. McNutt* (1992), 73 Ohio App.3d 403. In that case, the court determined that an easement appurtenant originally granted for access to approximately seventy acres of land could not be used to gain access for managing an adjoining forest that was nearly five thousand acres in size, where such use enhanced the burden of servient estate by sixty times. *Id.* at 408. Among the activities included in the proposed management of this forest were timber harvesting, mineral management, and recreation development. *Id.* at 405. In its analysis, the *McNutt* court initially acknowledged that upon examining the instrument that created the easement reasonable minds could only conclude that intentions of the original grantor and grantee of the easement were that the right-of-way would be used solely for ingress and egress to the original seventy acres. *Id.* The court also stated:

Furthermore, the state's plan to use the right-of-way easement to conduct forest management on the entire 4,842.30 acres of land would enhance the burden on appellants' servient estate by sixty times. This certainly is an unreasonable increase in the burden to the

servient estate and could not have been intended by the original grantor and grantee.

In the case *sub judice*, appellants quote the original grant of easement from Brown County deed records, but this deed was not an exhibit at trial and is not part of the record before us. The current deeds to the land owned by the **Proffitts** and appellants were admitted into evidence at trial, but neither the **Proffitts** nor appellants owned their lands when the easement was created in 1924. Without the opportunity to examine the exact language used in the creation of the easement, we will not conclude, as did the *McNutt* court, that the intentions of the original grantor and grantee of the easement were that the right-of-way would be used only for ingress and egress of the adjoining seventy-acre lot.

In this case, the **Proffitts** are using the right-of-way to access an additional one hundred fifteen acres of land. Appellants failed to show that the additional use of the right-of-way to access acreage beyond the seventy-acre tract placed an additional burden upon the servient estate. Although appellants complain about the farming vehicles that traversed the right-of-way, appellants did not show that there was any measurable increase in traffic on the right-of-way due to traffic accessing acreage beyond the seventy-acre plat. See *Centel Cable Television Co. of Ohio v. Cook* (1991), 58 Ohio St.3d 8, 12 (holding that a new and additional use of an easement was permissible where it was similar to the use already granted and did not place an additional burden upon the servient estate).

*5 After considering the evidence presented to the trial court, we find that the **Proffitts'** use of the right-of-way is not an unreasonable increase in the burden to the servient estate that could not have been intended by the original grantor and grantee. See *McNutt*, 73 Ohio App.3d at 408. Therefore, the trial court properly determined that the **Proffitts'** current use of the right-of-way need not be limited. The third assignment of error is overruled.

Judgment affirmed.

WALSH and POWELL, JJ., concur.

2001 WL 708884 (Ohio App. 12 Dist.)

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