

2004

# Jamie Evans v. the Board of County Commissioners of Utah County : Brief of Appellee

Utah Court of Appeals

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ORAL ARGUMENT REQUESTED

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IN THE UTAH SUPREME COURT

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JAMIE EVANS,	)	
	)	
Plaintiff/Appellee,	)	
vs.	)	Supreme Court No. 20040739 - SC
	)	Court of Appeals No. 20020689-CA
THE BOARD OF COUNTY	)	
COMMISSIONERS OF UTAH COUNTY,	)	
	)	
Defendant/Appellant.	)	

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**APPEAL ON CERTIORARI FROM AN OPINION AND ORDER ISSUED BY  
THE UTAH COURT OF APPEALS ON JULY 29, 2004**

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**BRIEF OF APPELLEE**

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**ORAL ARGUMENT REQUESTED**

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## INTRODUCTION

The firmly established rule in American law is that if the grant or reservation of an easement does not fix its dimensions or location on the servient estate, the result is a “floating” or “roving” easement. Depending on the circumstances, the missing dimensions or location may then be fixed by the designation of one of the parties, by agreement of the parties, or by a court of equity. With minor variations, this general approach has been applied in scores of decisions across the nation – including Utah decisions – and affirmed in prominent legal treatises and law summaries. In their treatise, for example, Professors Thomas and Backman summarize Utah law as follows:

As a general rule, the party burdened by the easement is given the first opportunity to set the scope of an inadequately described easement. Thus, if the location of the easement is not defined, the burdened property owner may choose any reasonable location, subject to the right of the unsatisfied dominant easement holder to seek protection from the courts.

David A. Thomas & James H. Backman, Thomas and Backman on Utah Real Property Law [hereafter “Utah Real Property Law”] § 12.02(c), p. 532 (1999).

As demonstrated in this brief, the argument of defendant-appellant Board of County Commissioners of Utah County (“County”) that an express easement is void if its dimensions or location is not fixed contradicts the holdings of past Utah Supreme Court decisions and the overwhelming weight of American legal authority. The decision of the court below should be affirmed because it adheres to long-settled law and upholds the undisputed intent and expectations of the parties.

### **ADOPTION BY REFERENCE**

Plaintiff-appellee Jamie Evans (“Evans”) concurs in the County’s statements regarding jurisdiction and controlling constitutional and statutory provisions.

### **STATEMENT OF THE ISSUE**

By order dated November 5, 2004, this Court granted certiorari on the following question: “Whether the reservation of the easement in this case was sufficiently specific to be enforceable, and whether the easement may be deemed a floating or roving easement.”

Standard of Review: The County correctly states that whether an easement exists is a question of law that is reviewed for correctness. *See* Brief of Appellant (“Brf. Applt.”), at 1; *Carrier v. Lindquist*, 2001 UT 105, ¶ 11, 37 P.3d 1112 (“The ultimate determination of whether an easement exists is a conclusion of law, which we review for correctness.”). The County also quotes language from *Carrier* stating that appellate courts “‘accord the trial judge a measure of discretion when applying the correct legal standard to the facts, and overturn a ruling concerning the existence of an easement only if the judge exceeded the discretion granted.’” Brf. Applt. at 1 (quoting *Carrier*, 2001 UT at ¶ 11). However, this somewhat more deferential standard does not apply where, as here, the material facts are undisputed and the issue on appeal is purely one of law. In this appeal, the Court’s review is for correctness and no deference is owed the trial court’s ruling.

## STATEMENT OF THE CASE

### **A. Nature of the Case.**

This appeal on a writ of certiorari addresses whether the legal description of Evans' easement ("Easement") across a narrow strip of County land ("Strip") is sufficiently specific to be enforceable. It is undisputed that the parties intended to create the Easement. It is also undisputed that the reservation precisely defined the Easement's width, its purpose, and the boundaries of the servient estate (*i.e.*, the Strip) that the Easement would cross. However, the reservation did not fix the Easement's precise location on the Strip. The County argues that the Easement's description is not precise enough to be enforceable. Evans maintains that under settled law the Easement is a valid floating or roving easement whose location may be reasonably fixed by one or both of the parties or by a court of equity. The trial court agreed with the County but the Court of Appeals reversed. This appeal followed.

### **B. Course of Proceedings.**

#### **1. The District Court.**

On February 7, 1997, Evans filed his Amended Complaint in the Fourth Judicial District seeking, among other things, a declaration that the Easement (styled "right-of-way") was valid and enforceable. *See* Record on Appeal ("R.") at 14-13.<sup>1</sup> The case was assigned to the Honorable Fred D. Howard. On November 21, 2001, the County filed its Motion for Summary Judgment, which Evans opposed. R. 283-62; 343-21. On July 1,

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<sup>1</sup> The seemingly backward record citations are necessary because the page numbers in the record proceed in reverse order, the first page of a document having a higher page number than the last.

2002, the district court issued a memorandum decision granting summary judgment and dismissing Evans' claims. R. 446-32. On July 31, 2002, the district court affirmed the summary judgment in its Order and Judgment, which dismissed Evans' suit with prejudice after again setting forth in memorandum form the grounds for its decision. R. 463-49. The district court ruled that the Easement at issue here was invalid because (1) Pine Street had no physical existence or historical use, being merely a platted street, (2) the Easement area contained no existing fixtures to which an easement could attach, and (3) the Easement language was fatally vague. R. 453-50. It was unclear whether the trial court's ruling was also based on the County's statute of frauds defense. *See id.*

## 2. The Court of Appeals.

Evans appealed the district court's ruling on the Easement issues and the Court of Appeals unanimously reversed. *See Evans v. Board of County Comm'rs*, 2004 UT App 256, 97 P.3d 697. The court below first rejected the County's statute of frauds arguments on the ground that the deed reserving the Easement contained an adequate writing that "noted both the dominant and the servient estate, established the purpose of the easement or exception, and clearly indicated [the grantor's] intent to reserve an easement when it conveyed the property." *Id.* at ¶ 10. Moreover, the County had "accepted and recorded" the deed and was therefore charged with knowledge of its contents. *Id.*

The court next addressed the district court's conclusion that the Easement was void for vagueness. *See id.* at ¶ 12. Summarizing the general rule of easement law, the court noted that "it is not necessary to designate with definiteness the part of the land to which the [easement] right attaches" if other aspects of the easement are sufficiently

defined. *Id.* at ¶¶ 12-15 (citation and internal quotation marks omitted). The court then rejected the district court’s vagueness ruling because the intent of the parties was evident (*id.* at ¶ 13) and the deed provided a “clear and detailed” (*id.* at ¶ 15) description of important terms. The court reasoned:

From the language in the deed we are able to discern that the Strip is the servient estate, the Corner Property [Evans’ property] is the dominant estate, and the purpose of the easement is to allow the holder of the Corner Property to move between the Corner Property and the nearby state highway. To this end, the parties agreed to establish a fifty-six-foot wide roadway over the Strip, which would allow Bird [the original grantor and Evans’ predecessor in interest], or its assigns, to cross from the Corner Property and onto Pine Street. Pine Street would then be used as the transport portal to reach the highway. In light of this clear and detailed language, we conclude that the trial court erred in determining that the language in the deed was vague and therefore fatal to Evans’s easement.

*Id.* at ¶ 15.

The court below also rejected the district court’s conclusion that the Easement failed because its location could not be fixed by reference to physical improvements, fixtures, or past use. *Id.* at ¶¶ 16-22. The court reasoned that, although courts may indeed look to such facts to fix an easement’s location, there is no rigid rule “requiring reliance on such a construction” as the sole means for fixing an easement’s location. *Id.* at ¶ 19. Rather, the court below held, Utah courts may also look to any of the methods set forth in *Salt Lake City v. J.B. & R.E. Walker*, 253 P.2d 365 (Utah 1953), including “agreement of the parties, the rule of necessity, and the right of selection”. *Id.* at ¶ 22.

Lastly, the Court of Appeals reversed the district court’s ruling that Evans did not have a properly reserved right-of-way over Pine Street. *Id.* at ¶¶ 23-26. Following settled Utah law, the court held that “when a purchaser of property acquires its interest

with reference to a plat map upon which streets have been platted, the purchaser concomitantly acquires a private easement over the streets that cannot thereafter be unreasonably restricted.” *Id.* at ¶ 26. The court reversed and remanded for additional factual development on this point because the record did not indicate when the original purchaser bought the land and whether it did so with reference to the plat map. *Id.* at ¶¶ 25-27.

3. The Utah Supreme Court.

On November 5, 2004, this Court granted the County’s petition for a writ of certiorari on the issue stated above. The question presented does not include the Court of Appeals’ rulings on the statute of frauds or whether Evans has a valid right-of-way over Pine Street. Hence, those issues are not addressed in this brief.

**C. Statement of Facts.**

1. Background.

The following background facts – quoted from the decision below – provided helpful context in the Court of Appeals and may likewise assist this Court.<sup>2</sup>

In 1926, Knight Investment Company (Knight), with the knowledge and permission of Utah County and Provo City, subdivided land it owned south of Provo. Knight divided the property into several lots and platted a network of roads, including Pine Street, which Knight then dedicated for public use. Knight titled the area the “Ironton Plat.” At a later date, the R.L. Bird Company (Bird) purchased several pieces of property in and around the Ironton Plat. The property included: Several platted lots within the Ironton Plat (the Lots), a strip of land abutting the southeast boundary of the Ironton Plat (the Strip) – when used in conjunction we will address the Strip and the Lots as “the Property” – and an expanse of land

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<sup>2</sup> It is useful to track the Court of Appeals’ description of the various properties by referencing the map found at page A47 of the addendum to the County’s opening brief.

surrounding the southeast corner of the Ironton Plat and connected to the Strip (the Corner Property). Both the Strip and the Lots abut Pine Street. There is a conflict as to whether the Corner Property abuts Pine Street at its terminus.

Barring certain improvements not material to this case, neither Knight, nor its assigns, ever developed the Ironton Plat as intended.

In 1983, Bird quit-claimed its interests in the Lots and the Strip to [the County], reserving to itself and the Corner Property an easement and right-of-way over the Strip and Pine Street. The reservation allowed Bird to access the State highway from the Corner Property [by crossing the Strip to Pine Street and then proceeding westward to the State highway]. . . .

. . . .

The County accepted the deed as written and, subsequently, the County built a Public Works Facility upon some of the land. The facility currently includes a public works building, a service station, and a parking lot. In the course of construction, the County removed a large amount of earth from areas in and around Pine Street as platted. In 1995, Bird conveyed its interest in the Corner Property, including its easement and right-of-way, to Jamie and Terry Evans (Evans). The easement language in the corrected deed closely tracked the language from Bird's 1983 quit-claim deed to the County.

In 1996, the County vacated several of the platted and dedicated Ironton Plat streets, but left Pine Street as a dedicated street. Evans subsequently filed suit challenging the vacation order and seeking to enforce his easement.

2004 UT App, ¶¶ 2-6 (footnotes omitted); *see also* R. 462-61; 279-74; 343-34.

## 2. Facts Relevant to this Appeal.

For purposes of this appeal, Evans concurs with the facts stated in the County's "Statement of Facts Relevant to this Appeal" (*see* Brf. Applt., at 5-6), subject to the following clarifications and additions.



**First**, the quitclaim deed contains additional metes-and-bounds language defining the dimensions of the servient estate (the Strip) which the Easement crosses. The relevant Easement language reads in full:

ALSO; Beginning at the Southeast corner of the Ironton Subdivision Plat A, which point is at the east end of the south line of Pine Street, running thence South 32 Deg. 52. Min East **120 feet**; thence South 57 Deg. 08 Min. West **760 feet** to State Highway; thence North 32 Deg. 52 Min. West along said highway **120 feet** to South line of Pine Street, thence North 57 Deg. 08 Min. East **760 feet** to point of beginning.

Reserving to the grantor the public use and right-of-way over and into Pine Street from the State Highway and a **56 foot wide right-of-way over and across the last described parcel of land [i.e., the Strip described in the preceding paragraph]**, from Pine Street to connect with grantor's remaining property over which Utah County agrees to build a good gravel road within 90 days of the date of this instrument, to provide access to grantor's remaining land.

R. 241 (emphasis added); Brf. Applt., Addendum ("Add.") at A46.<sup>3</sup>

Accordingly, (1) the Strip is 760 feet long and 120 feet wide, (2) the Easement is 56 feet wide, and (3) at an unspecified location, the Easement runs across the 120-foot width of the Strip to Pine Street.

**Second**, the intent of the parties to the original quitclaim deed is undisputed. As the Court of Appeals noted, the quitclaim deed "clearly indicated Bird's intent to reserve an easement when it conveyed the property" to the County, and "the County's decision to

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<sup>3</sup> On the color version of the map, the Strip is the green rectangular section that runs parallel to Pine Street (marked in blue) and abuts Evans' property (identified by diagonal red lines). See Brf. Applt., Add. at A47. The "Southeast corner" mentioned in the description of the Strip is labeled on the map as "Southeast Corner Ironton Subdivision." *Id.*

accept and record the quit claim deed signaled its intention to be bound by the agreement.” 2004 UT App, ¶¶ 10 & 12, n.5.

**Third**, although the County has yet to construct Pine Street as a functioning road, it nevertheless remains a dedicated, legally platted street which the County has not chosen to vacate. *See* R. 461. In its brief, the County states that it “constructed public works buildings and a parking lot in the Iron-ton Plat over the locations of Pine Street and other dedicated but unopened streets within the subdivision.” Brf. Applt., at 3. To clarify, the County’s parking lot covers only a portion of Pine Street. *See* R. 312. The County’s “public works buildings” do not cover any of Pine Street. R. 312. Moreover, after building these improvements, no doubt in an effort to clean up the legalities of the situation, the County vacated those “other dedicated but unopened streets” – something it elected not to do with Pine Street. R. 461.

### **SUMMARY OF THE ARGUMENT**

Virtually all jurisdictions hold that if an easement’s location and dimensions are inadequately defined, the result is a valid floating or roving easement whose missing terms should be fixed through one of several practical means. Utah is no exception. Utah courts strive to uphold easements whenever reasonably possible. The paramount rule of construction under Utah easement law is to give effect to the intent of the parties. To this end, Utah courts have taken a practical approach when construing an easement that lacks a defined location or specific dimensions. Contrary to the County’s argument on appeal, Utah courts do not simply void otherwise valid easements that lack such terms. The only language in Utah case law arguably suggesting otherwise comes from *Potter v.*

*Chadaz*, 1999 UT App 95, 977 P.2d 533. But that language was clearly *dicta*.

Subsequent Utah decisions have not adopted the County's expansive reading of *Potter*, which contradicts an entire body of settled easement law.

The court below properly declined to follow the County's interpretation of the *Potter dicta* and instead held that Evans' Easement is a valid floating or roving easement whose location can be fixed by the trial court through various practical means. The court's careful, well-reasoned decision is uncontroversial and plainly correct under Utah law and the general law of easements. The deed creating Evans' Easement adequately identifies the parties; the nature of the Easement; its purpose, width, and length; and the dominant and servient estates. The parties' intent to create the Easement is undisputed. The only missing term is the Easement's precise location across the narrow Strip. Rather than void the Easement, the established rule is that the missing location term can be supplied by one of the parties, by agreement of the parties, or by a court of equity using a practical approach. As set forth below, Evans has no objection to the County designating a reasonable location for the Easement subject to appropriate judicial review. Under these circumstances, there is absolutely no reason to destroy Evans' valuable property rights by voiding the Easement.

## ARGUMENT

### **I. COURTS GENERALLY UPHOLD AND ENFORCE INADEQUATELY DEFINED EASEMENTS.**

#### **A. As A General Rule, An Inadequately Described Easement Is A Floating Or Roving Easement.**

Although relatively few Utah decisions have directly addressed the issue, the established rule in American law is that an express easement is valid even if the deed fails to specify its dimensions or location on the servient estate. As Professors Bruce and Ely explain in their authoritative treatise on easements, “[e]xpress easements that omit or inadequately describe the location or dimensions of the easement are commonplace.” Jon W. Bruce and James W. Ely, Jr., The Law of Easements & Licenses in Land [hereafter “Law of Easements”] § 7:4 (Thompson West 2004). Although missing or inadequate descriptions are not ideal, they typically do not void the easement:

Although the instrument must identify the servient estate, failure to indicate the easement’s dimensions or its location on the servient property usually is not fatal to the contemplated servitude. . . . The easement dimension that causes the most difficulty is width . . . .<sup>[4]</sup>

*Id.* § 7:2 (emphasis added); *accord* 25 Am. Jur. 2d, Easements and Licenses § 15 (2004)

(“[I]t is not necessary to designate with definiteness the part of the land to which the [easement] right attaches.”). Numerous decisions support this proposition.<sup>5</sup>

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<sup>4</sup> Of course, width is not an issue here because the deed defines the width as 56 feet. R. 241.

<sup>5</sup> *See, e.g., Harvey v. Bell*, 732 S.W.2d 138, 140 (Ark. 1987); *Howard v. Cramlet*, 939 S.W.2d 858, 859-60 (Ark. App. 1997); *Stevens v. Mannix*, 77 P.3d 931, 932-33 (Colo. App. 2003); *Colvin v. Southern Cal. Edison Co.*, 194 Cal. App. 3d 1306 (1987), *abrogated on other grounds by Ornelas v. Randolph*, 847 P.2d 560 (Cal. 1993); *Hynes v. City of Lakeland*, 451 So. 2d 505, 511 (Fla. App. 1984); *Murdock v. Ward*, 477 S.E.2d 835, 836 (Ga. 1996); *Joseph Giddan & Sons v. Northbrook Trust & Sav. Bank*, 501

For instance, the Washington Court of Appeals has held that although a deed must identify the servient estate, it is not essential that the deed precisely define an easement's location on the servient estate. *Berg v. Ting*, 850 P.2d 1349, 1353-55 (Wash. App. 1993) (“[T]he location of an easement, which need not be precisely described, is to be distinguished from the location of the servient estate, which must be accurately described.”) (emphasis in original), *rev'd on other grounds*, 886 P.2d 564 (1995).

“Unlocated easements . . . are often called floating easements,” “roving easements” or “blanket easements.” Law of Easements § 7:4 & 7:4 n.1; 28A C.J.S. Easements § 152 (Updated June 2004) (“Undesignated grants of rights of way may be termed ‘floating rights of way’ until located and utilized . . . .”); Black’s Law Dictionary 549 (8<sup>th</sup> ed. 2004) (“*floating easement*. An easement that, when created, is not limited to any specific part of the servient estate.”) (citing C.J.S. *Easements* § 152). As the California Court of Appeal has explained, “[a] ‘floating easement’ . . . is an easement . . . which, when created, is not limited to any specific area on the servient tenement.” *City of*

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N.E.2d 757, 760 (Ill. App. 1986); *Cheever v. Graves*, 592 N.E.2d 758, 761 (Mass. App. 1992); *Hall v. Allen*, 771 S.W.2d 50, 53 (Mo. 1989) (“An easement may be created even though its precise location is not described in the grant.”); *Hoelscher v. Simmerock*, 921 S.W.2d 676, 679 (Mo. App. 1996); *Village of Wagon Mound v. Mora Trust*, 62 P.3d 1255, 1265-66 (N.M. App. 2002), *cert. denied*, 63 P.3d 516 (N.M. 2003); *Clements v. Schultz*, 200 A.D.2d 11, 13-14 (N.Y. App. Div. 1994); *Mitchell v. Chance*, 149 S.W.3d 40 (Tenn. App. 2004); *Vinson v. Brown*, 80 S.W.3d 221, 227 (Tex. App. 2002); *Jones v. Fuller*, 856 S.W.2d 597, 602 (Tex. App. 1993); *Wilhelm v. Beyersdorf*, 999 P.2d 54, 59 (Wash. App. 2000).

*Los Angeles v. Howard*, 244 Cal.App.2d 538, 541 n.1 (1966). This definition is well established.<sup>6</sup>

The County advances the novel argument that floating easements are created only when parties expressly intend to create them, not by a simple “failure to describe fixed easements in sufficiently definite terms.” Brf. Applt., at 21. Supposedly, floating easements are a special class of easement “epitomize[d]” by unpredictable circumstances and thus requiring the flexibility to float until the needs of the easement holder arise and become known. *Id.* Hence, the County contends that the type of easements in *Flying Diamond Oil Corp. v. Newton Sheep Co.*, 776 P.2d 618 (Utah 1989) – which would come into being as needed to facilitate oil and gas development – are essentially the only kind of floating easement. *See* Brf. Applt., at 20-21.

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<sup>6</sup> *See also Sunnyside Valley Irr. Dist. v. Dickie*, 73 P.3d 369, 372 (Wash. 2003) (“An easement defined in general terms, without a definite location or description is called a floating or roving easement . . . .”); *Coughlin v. Anderson*, 853 A.2d 460, 466 n.7 (Conn. 2004) (“[A] ‘floating easement’ is an easement that, by the terms of its creating instrument, has not been confined to a specific location on the servient estate. Without language defining its location, the easement is said to float because it potentially could be exercised anywhere on the servient estate . . . .”) (citation omitted); *Edgcomb v. Lower Valley Power & Light, Inc.*, 922 P.2d 850, 855 (Wyo. 1996) (“An express easement not stating the location and dimensions is called a floating easement and is defined as an ‘[e]asement for right-of-way which, when created, is not limited to any specific area on srvient tenement.’”) (quoting Black’s Law Dictionary 640 (6<sup>th</sup> ed. 1990)); *Village of Wagon Mound v. Mora Trust*, 62 P.3d 1255, 1265-1266 (N.M. App. 2002) (same), *cert. denied*, 63 P.3d 516 (2003); *Umberger v. State ex rel. Dept. of Game, Fish & Parks*, 248 N.W.2d 395, 397 (S.D. 1976); *New Orleans & Northeastern R.R. v. Morrison*, 35 So.2d 68 (Miss. 1948) (“floating easement” created where user obtained right of passage “200 feet wide” through “two quarter sections”); *Scherger v. Northern Natural Gas Co.*, 575 N.W.2d 578, 579 (Minn. 1998) (“blanket easement”); *Missouri Public Service Co. v. Argenbright*, 457 S.W.2d 777, 780-83 (Mo. 1970) (“blanket easement”).

But the County's cramped definition of floating easements is not the law, either in Utah or generally.<sup>7</sup> To be sure, sometimes parties create floating easements with the express intent of ensuring flexibility in the face of "unpredictable circumstances," as was the case in *Flying Diamond*. 776 P.2d at 626. Yet this Court never suggested in *Flying Diamond* – nor elsewhere – that those factors must be present for a floating easement to exist. The accepted definitions quoted above certainly do not require intent to create a floating easement or unpredictability of circumstances – only that the location and/or dimensions of the easement be inadequately defined. Indeed, floating easement cases often involve situations where the parties merely omitted the dimensions or location of a right-of-way over the servient estate.

To take just one example, in *Howard v. Cramlet*, 939 S.W.2d 858 (Ark. App. 1997), the servient estate owner challenged the validity of a right-of-way easement for ingress and egress over her property. The parties had failed to fix the location of the easement and to define its precise dimensions, but there was no indication the omission was intentional or necessary to accomplish some end. Much like the County's argument here, the trial court ruled that the easement "was too vague for enforcement" because the "deed did not contain a metes and bounds description". *Id.* at 859. The appellate court reversed on the ground that no such description is necessary for a valid easement.

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<sup>7</sup> Utah law is more fully discussed in section II, *infra*.

The court reasoned:

[I]t is not essential to the validity of the grant of an easement that it be described by metes and bounds or by figures giving definite dimensions of the easement. The grant of an easement is valid when it designates the easement or right-of-way as such and describes the lands which are made servient to the easement. While the owner of the servient estate has the right to limit the location of an easement, where he fails to do so it may be selected by the grantee so long as his selection is a reasonable one taking into consideration the interest and convenience of both estates. Where the grant of a right-of-way is not bounded in the deed it is to be bounded by lines of reasonable enjoyment.

. . . .

. . . .

In this case, the grant of the easement is valid since it designates the right-of-way and describes the lands that are made servient to the easement.

*Id.* at 859, 860. The appellate court remanded for the trial court to “locate the easement.”

*Id.* at 860.<sup>8</sup>

In sum, the general rule in American law is that an express easement which lacks an adequate description of its location or dimensions is, by definition, a floating or roving easement. Although easements are sometimes intended to float to meet specific needs, they are also created by parties who simply failed to provide adequate descriptions.

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<sup>8</sup> See also *Mitchell v. Chance*, 149 S.W.3d 40 (Tenn. App. 2004) (upholding easement despite no legal description of right of way; applying approach in Law of Easements § 7:6); *Howard v. Cramlet*, 939 S.W.2d 858 (Ark. App. 1997) (see discussion *infra*); *Wood v. Ashby*, 253 P.2d 351 (Utah 1952) (upholding easement despite deed’s failure to specify which section of property reserved right-of-way easement would pass over); *Castle Associates v. Schwartz*, 63 A.D.2d 481 (N.Y. App. Div. 1978) (upholding 1903 grant that failed to locate easement for no apparent reason); *L.T. Adams v. Norsworthy Ranch, Ltd.*, 975 S.W.2d 424 (Tex. App. 1998) (fixing unlocated easement by using route easement owner had selected by past use); *Sacco v. Narragansett Elec. Co.*, 505 A.2d 1153, 1155-56 (R.I. 1986) (“The easement created was described only as ‘a certain way or drive along the Easterly line of [the grantees’] tract.’ Therefore, the court properly considered extrinsic evidence in order to ascertain the parties’ intention.”).



These basic principles are firmly established and largely uncontroversial. The real question is not whether such easements are valid but how to properly define and locate them so as to fairly and reasonably uphold the intent of the parties. That issue is addressed next.

**B. The Location And Dimensions Of A Floating Easement May Be Determined In Several Established Ways; Merely Voiding The Easement Is Not A Valid Approach.**

How to fix the location or dimensions of an inadequately described easement is a recurring question that often “taxes the best resources of judicial ingenuity.” *Daniel v. Clarkson*, 338 S.W.2d 691, 692 (Ky. 1960). “Sometimes the easement instrument [of an undefined easement] expressly provides that one of the parties has the right to select the location and dimensions of an undescribed easement.” Law of Easements § 7:5. In those instances, the designated party would supply the missing descriptions, subject to the limits of reasonableness. But most often the deed is silent on this point. Rather than void the easement, as the County urges here, courts use several methods for determining its dimensions and location.

Servient Estate Owner Decides. As Professors Bruce and Ely explain, one prominent approach is to give the owner of the servient estate the first opportunity to make a reasonable selection:

More commonly, the instrument is silent regarding the manner by which the location and dimensions of an undescribed easement should be determined. Many jurisdictions take a practical approach to this problem. In these states, the owner of the servient estate is entitled to designate a reasonable location for the easement. If the servient estate owner fails to make such a designation within a reasonable period, the easement holder

may select a reasonable route. If the parties are unable to reach an agreement, a court may specify a location for the easement.

*Id.*; accord 28A C.J.S. *Easements* § 152 (Where the location of an easement is undefined, “the grantor may designate the location, and if he fails to do so the grantee may then make the designation which in either case must be reasonable.”).<sup>9</sup>

Easement Owner Decides. Other courts have ruled that the easement holder has the initial right to supply the missing descriptions.<sup>10</sup> This approach appears to be the minority position.

Court Decides. The foregoing approaches require some agreement among the parties, at least as to whether the selection by one of them has been reasonable. Not

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<sup>9</sup> The following decisions noted the rule that the servient estate owner has the first opportunity to designate a reasonable location, failing which the dominant estate owner may make the selection. *Arkansas Val. Elec. Co-op. Corp. v. Brinks*, 400 S.W.2d 278, 279 (Ark. 1966); *Howard, supra*, 939 S.W.2d at 859-60 (Ark. App. 1997); *Ballard v. Titus*, 110 P. 118, 122 (Cal. 1910); *Daniel v. Clarkson*, 338 S.W.2d 691, 692-93 (Ky. 1960); *Bethel v. Van Stone*, 817 P.2d 188, 193-94 (Idaho App. 1991); *Larson v. Amundson*, 414 N.W.2d 413, 417 (Minn. App. 1987); *Graves v. Gerber*, 302 N.W.2d 717, 720 (Neb. 1981); *Sussex Rural Elec. Co-op. v. Wantage Tp.*, 526 A.2d 259, 263-64 (N.J. Super. App. Div. 1987); *Pomygalski v. Eagle Lake Farms, Inc.*, 596 N.Y.S.2d 535, 537 (N.Y. App. Div. 1993); *McConnell v. Golden*, 247 A.2d 909, 912 (R.I. 1968); *Smith v. Comm’rs of Public Works*, 441 S.E.2d 331, 337 (S.C. App. 1994); *Vinson v. Brown*, 80 S.W.3d 221, 228 (Tex. App. 2002); *Patch v. Baird*, 435 A.2d 690, 691-92 (Vt. 1981); *R.C.R., Inc. v. Rainbow Canyon, Inc.*, 978 P.2d 581, 588 (Wyo. 1999). See also *Lawson v. Sipple*, 893 S.W.2d 757, 762 (Ark. 1995) (location of floating easement for mailbox must be reasonable and is subject to servient estate owner’s “right to delimit”).

<sup>10</sup> See, e.g., *Colvin v. Southern Cal. Edison Co.*, 194 Cal. App. 3d 1306, 1312 (1987) (easement holder has right to select reasonable location on servient estate for unlocated easement) (*abrogated on other grounds*, *Ornelas v. Randolph*, 847 P.2d 560 (Cal. 1993)); *Sunnyside Valley Irr. Dist. v. Dickie*, 43 P.3d 1277, 1281 (Wash. App. 2002) (“When the description of an easement is not specified with the grant, the location is established and fixed when the grantee selects the location of the easement.”), *aff’d on other grounds*, 73 P.3d 369 (Wash. 2003); *Elliott v. Elliott*, 597 S.W.2d 795, 802 (Tex. App. 1980) (“An express grant of a right-of-way set out in general terms without specifying the exact place for its location can be made certain by the act of the grantee in selecting the easement.”).

surprisingly, “[p]arties frequently disagree over the location and dimensions of an express easement” and thus the “description issue is often litigated” and decided by the courts.

Law of Easements § 7:6.<sup>11</sup> Courts begin the analysis by seeking to determine the parties’ intent. If evidence of intent is lacking, the presumption is that the parties intended a reasonable location:

If the terms of description are inadequate or nonexistent, then extrinsic evidence generally may be considered to ascertain the intent of the parties as to the location and dimensions of the easement. The parties are presumed to have intended an easement that is reasonably convenient or necessary under the circumstances.

Law of Easements § 7:6 (emphasis added). In an influential opinion, the Supreme Court of Kansas likewise noted:

If . . . the width, length and location of an easement for ingress and egress are not fixed by the terms of the grant or reservation the dominant estate is ordinarily entitled to a way of such width, length and location as is sufficient to afford necessary or reasonable ingress and egress.

*Aladdin Petroleum Corp. v. Gold Crown Properties, Inc.*, 561 P.2d 818, 822 (Kan 1977).<sup>12</sup>

Courts look to various factors when called upon to determine the reasonable dimensions and location of a floating easement, including the easement’s purpose, surrounding geography, and past use:

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<sup>11</sup> See, e.g., *Bethel*, 817 P.2d at 193-94; *Maddox v. Katzman*, 332 N.W.2d 347, 352 (Iowa App. 1982); *Clarkson*, 338 S.W.2d at 693; *Graves v. Gerber*, 302 N.W.2d 717, 720 (Neb. 1981).

<sup>12</sup> This rule has been quoted with approval in a number of cases. See *Andersen v. Edwards*, 625 P.2d 282, 286 (Alaska 1981); *Squaw Peak Cmty. Covenant Church v. Arizona Dev., Inc.*, 719 P.2d 295, 298 (Ariz. App. 1986); *Consol. Amusement Co., Ltd. v. Waikiki Bus. Plaza, Inc.*, 719 P.2d 1119, 1123 (Haw. App. 1986); *Lindhorst v. Wright*, 616 P.2d 450, 453 (Okla. App. 1980).

Once a court concludes that the location or the dimensions of the easement are not adequately described in the instrument, it generally examines the surrounding circumstances to determine the intent of the parties in this regard. The parties may have fixed the location and dimensions of the easement by oral or collateral written agreement. If not, the courts look to various factors to establish a reasonable description of the easement. . . . One factor is the purpose of the easement, which is particularly important with respect to ascertaining the dimensions of an inadequately described easement. Other factors include the geographic relationship between the dominant and the servient estates, the use of each of the estates, the benefit to the easement holder compared to the burden on the servient estate owner, and admissions of the parties. But the factor that the courts most frequently rely on is use of the servient estate for the purpose for which the easement was created.

Law of Easements § 7:6.<sup>13</sup>

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<sup>13</sup> Cases supporting these propositions are legion. See, e.g., *Tanner v. Dream Island, Inc.*, 913 P.2d 641, 646 (Mont. 1996) (evidence of circumstances used to identify roads noted in 1932 deeds); *Sacco v. Narragansett Elec. Co.*, 505 A.2d 1153, 1155-1156 (R.I. 1986) (“[T]he court properly considered extrinsic evidence in order to ascertain the parties’ intention” where easement language not specific); *Tipperman v. Tsiatsos*, 915 P.2d 446, 449 (Or. App. 1996) (“The location of the easement . . . may be determined . . . by subsequent agreement.”), *decision aff’d in part and modified on other grounds*, 964 P.2d 1015 (Or. 1998); *Smith v. King*, 620 P.2d 542, 543 (Wash. App. 1980) (location of easement can be established by oral agreement); *Mitchell v. Chance*, 149 S.W.3d 40 (Tenn. App. 2004) (“If the description of the easement in the deed or other instrument is inadequate or nonexistent, the courts may consider extrinsic evidence to ascertain the parties’ intent regarding the location and dimensions of the easement,” including such factors as purpose, geography, relative benefits and burdens, party admissions, and historical use.); *Hynes v. City of Lakeland*, 451 So. 2d 505, 511 (Fla. App. 1984) (considering purpose of easement); *Patterson v. Duke Power Co.*, 183 S.E.2d 122, 124 (S.C. 1971) (“Where a deed or other instrument grants the right-of-way but does not specify the width of such way, the determination of the width becomes basically a matter of the construction of the instrument with strong consideration being given to what is reasonably convenient and necessary to accomplish the purpose for which the way was created.”); *Perkins v. Perkins*, 184 A.2d 678, 681 (Me.1962) (considering geography and relative burdens); see William B. Johnson, Annotation, *Location of Easement of Way Created by Grant Which Does Not Specify Location*, 24 A.L.R. 4th 1053, 1058, 1065-84 (updated Feb. 2005) (collecting cases where use was prominent factor).

Accordingly, contrary to the County's argument that inadequately defined easements are void, the law generally permits one of the two parties (most often the servient estate owner) to designate a reasonable location for the easement. Failing that, courts commonly intervene to supply the missing location or dimensions under a rule of reasonableness that gives due regard to all relevant circumstances.

## **II. UTAH EASEMENT LAW IS CONSISTENT WITH THE FOREGOING PRINCIPLES.**

Utah easement law closely tracks the general rules and principles outlined above; by no stretch have Utah courts struck out on an independent course and defined or adjudicated floating easements in an unconventional way. The County's appeal is based on the view that Utah law has a rigid rule that an express easement is void unless the deed specifies its precise dimensions and location on the servient estate. But that is plainly not the law. Rather, whenever possible Utah courts have sought to uphold the parties' intent to create an easement, not to defeat their intent based on technicalities. As this Court has explained, "[t]he paramount rule of construction of deeds is to give effect to the intent of the parties as expressed in the deed as a whole." *Hancock v. Planned Dev. Corp.*, 791 P.2d 183, 185 (Utah 1990).

### **A. This Court's Decisions Affirm That An Easement Is Valid Even If The Deed Inadequately Describes Its Location And Dimensions, And That The Easement's Location And Dimensions May Be Fixed Through Several Practical Methods.**

This Court has directly addressed floating easements in two decisions, both of which reached unremarkable results that fit comfortably within the established approach summarized above. These decisions support Evans' position that an easement is valid

despite the failure of the deed to specify its location or dimensions. In *Wood v. Ashby*, 253 P.2d 351 (Utah 1952), the “deed in question granted a fee simple to [the grantee]” and then “reserve[ed] a ‘right of way for road purposes across’ the land conveyed” – a narrow “strip” similar to the one at issue here. *Id.* at 353. The deed did not fix the location of the right of way nor its precise dimensions and thus was a classic floating easement, though the Court did not use that term in describing it. The issue in *Wood* was whether the easement should be assigned a reasonable location and boundaries or whether it was a general and unrestricted right of way covering the entire strip. *Id.*

Without any suggestion that the easement might be void for lack of specificity, this Court upheld the easement and fixed its location. The Court reaffirmed that in Utah “a deed should be construed so as to effectuate the intentions and desires of the parties, as manifested by the language made use of in the deed.” *Id.* Even so, deed language must be interpreted in light of the context: “when the deed creates an easement the circumstances attending the transaction, the situation of the parties, and the object to be obtained are also to be considered.” *Id.* (citing *Stevens v. Bird-Jex Co.*, 18 P.2d 292, 294 (Utah 1933)) (“[I]n construing instruments creating easements in land, the court will look to the circumstances attending the transaction, the situation of the parties, the state of the thing granted, and the object to be attained, to ascertain and give effect to the intention of the parties.”) (internal quotation marks omitted)). Moreover, “[w]here the provisions of a deed are doubtful the court may also look to the practical construction placed upon the instrument by the parties.” *Id.* Turning to the easement, the Court found that “[t]he object of the easement . . . was to obtain a way in and out of the remaining property.” *Id.*

Applying a “practical construction of the deed” – one focused on the past use of the easement – this Court affirmed the trial court’s decision to fix the “location of the right of way” with reference to an existing fence and gate that had traditionally defined the ingress and egress path used by the easement holder. *Id.* at 353-54. This is the exact approach set forth in the sources discussed above. *See, e.g., Law of Easements* § 7:6 (“courts look to various factors to establish a reasonable description of the easement” including *inter alia* “the purpose of the easement” and past “use of the servient estate for the purpose for which the easement was created”). *Wood* refutes the County’s position that an easement is void because its location is not specified in the deed.

This Court’s decision in *Salt Lake City v. J.B. & R.E. Walker*, 253 P.2d 365 (Utah 1953), likewise contradicts the County’s position. In *Walker*, this Court again upheld a floating easement with inadequately defined terms. The case involved a dispute over the undefined scope of an easement that allowed Salt Lake City to construct a water conduit over the grantor’s land. As in *Wood*, “[t]he deed creating the easement over [the property] . . . [did] not specifically fix the location nor width of the easement.” *Id.* at 368. This Court identified such an easement as a “‘floating’ or ‘roving’ easement,”

the location of which may be fixed by agreement of the parties, by the use of a particular way by the grantee [city] with the acquiescence of the grantor for a considerable period of time, or by one party in whom the grant vests the right of selection or the right to fix the grant, or where the rule of necessity determines the location because any other place would annul, ruin, or militate against the grant.

*Id.*

At the time of the suit, the location of the right of way had already been resolved as a practical matter by the city's installation of the conduit decades earlier. The issue in *Walker* was the width of the easement on either side of the conduit. Since "[t]he width was not specified in the deed, the court was under the necessity of determining what width was reasonably necessary" to accomplish the purposes for which the easement was created. *Id.* at 369. The Court reasoned:

The extent or width of the easement, being unfixed by the grant, must be determined by the purposes of the grant and the requirements for a safe, proper, reasonable and convenient enjoyment thereof. It must be a suitable and convenient way, and afford necessary ingress and egress, and such uses as are reasonably sufficient for accomplishment of the objects of the grant.

*Id.* at 368. Rather than voiding the easement for vagueness as required under the County's theory, the Court held that "the grant of a right of way where no width is fixed in the deed, *as a matter of law* creates an easement of such width as is reasonably necessary for full enjoyment of the easement granted." *Id.* at 369 (emphasis added). Based on these principles, this Court affirmed the trial court's assignment of a reasonable width to the easement. The missing dimension of width in no way voided the easement.

This Court's decision in *Flying Diamond Oil Corp. v. Newton Sheep Co.*, 776 P.2d 618 (Utah 1989), also mentioned floating easements, but only tangentially and certainly not to the extent suggested in the County's brief. The issue in *Flying Diamond* was whether a promise by the owner of a property's mineral rights to pay the owner of the surface rights certain royalties from oil and gas production was a covenant that ran with the land. The owner of the mineral rights had obtained extremely broad and imprecisely defined easement rights that enabled it to carry on oil and gas exploration and production



– such as the right to construct roads to any wells that might be discovered. *Id.* at 620-21. In *dicta*, this Court characterized *those* easements as “in effect ‘floating easements’” that “are subject to definition by such unpredictable circumstances as the locations of wells, density of well locations, storage facilities, roads to wells sites, and pipelines.” *Id.* at 626. But as noted above (and contrary to the County’s argument), this Court never so much as hinted that all floating easements must be as undefined or indeterminate as those in *Flying Diamond* – indeed, such a notion would be devoid of support in easement law and in serious tension with the decisions in *Wood* and *Walker*. In fact, floating easements were not even the issue in *Flying Diamond*. The Court mentioned them only to support its conclusion that the covenant ran with the land. *Id.*

**B. The Cases The County Cites Do Not Support Its View Of The Law.**

In the face of massive contrary authority, the County’s strategy on appeal is to dismiss out of hand adverse “extrajudicial case law” (Brf. Applt., at 10), advance the narrowest possible reading of this Court’s floating easement decisions, and then attempt to bolster the reasoning of a single paragraph in *Potter v. Chadaz*, 1999 UT App. 95. Brf. Applt, at 7-23. *Potter* is the lone Utah decision with any language directly supporting the County’s position, and the only Utah case that arguably conflicts with the principles set forth above. Much of the County’s argument on appeal rests on such language. However, a closer review demonstrates that *Potter* ultimately cannot bear the weight the County places on it.

In *Potter*, the Court of Appeals faced a convoluted series of deeds and transactions that the defendant claimed resulted in a right-of-way easement over a segment of the

plaintiffs' land. The deed language failed to specify the easement's boundaries or location. *Id.* at ¶ 10. In plaintiffs' action to quiet title to the land, the issue was whether an easement of some sort existed. In the course of rejecting the defendant's argument for an express easement, the Court of Appeals stated:

This conveyance [between two entities, not including the defendant] fails to meet the requirements of an express easement. Although it appears the parties intended to create an express easement, the language in the deed is not sufficiently detailed. In fact, it does not specify the boundaries of the easement or its exact location. This vague language does not constitute a definite and ascertainable description of the property.

*Id.* at ¶ 11 (citation omitted). However, this language was clearly *dicta* because the alleged easement suffered from a far more fundamental defect: it was purportedly created in a transaction to which the beneficiary was not a party. In the very next paragraph the court held that, regardless of vagueness, established Utah law would preclude recognition of the alleged easement:

However, even if we were to assume that this [deed] language were sufficient to create an express easement, Utah law prohibits parties from expressly creating an easement in a land transaction for the benefit of a third party who is not involved in the transaction – i.e., a “stranger to the deed.” *See Johnson v. Peck*, 90 Utah 544, 63 P.2d 251, 254 (Utah 1936). . . . Accordingly, [the defendant in *Potter*], a “stranger to the deed,” cannot claim any benefit to the right-of-way because she had no interest in the land at the time Heritage, Inc. conveyed the 1.58 acres to Villatek. Thus, we conclude *Johnson* is controlling in this case and reaffirm the holding that parties may not reserve an easement in favor of a third party who has no interest in the property.

*Id.* at ¶ 12 (emphasis added).

On the express easement issue, the underlined language just quoted was the panel's actual holding. The earlier vagueness discussion was unnecessary and ultimately

irrelevant to this holding because, even with perfectly clear and detailed deed language, parties may not reserve an easement in favor of a stranger to the deed. The court's vagueness discussion was therefore pure *dicta*. See Black's Law Dictionary (6<sup>th</sup> ed. 1990) (*dicta* – "Statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case in hand are obiter dicta, and lack the force of an adjudication."). No subsequent Court of Appeals' decision has adopted *Potter*'s vagueness *dicta* for the proposition the County advances here, and the court below distinguished *Potter* on its facts. *Evans*, 2004 UT App, at ¶ 14.

In any event, to the extent *Potter*'s *dicta* purports to require that a deed specify the exact location and dimensions of an easement, it misstates the law and should not be followed. As outlined above, both Utah case law and the general approach of other American jurisdictions contradicts this proposition. In fact, courts routinely enforce easements whose locations and dimensions are partly or wholly undefined. See, e.g., Utah Real Property Law § 12.02(c), p. 532 (setting forth "general rule" for defining "the scope of an inadequately described easement").<sup>14</sup>

The other cases the County cites to shore up *Potter*'s *dicta* address various norms of easement and contract interpretation, but they never come close to reaching the one conclusion the County needs to prevail: not one holds or even suggests that an otherwise

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<sup>14</sup> Even assuming *Potter* states the proper standard, it can still be distinguished from this case. In *Potter*, the deed failed to specify the boundaries of the easement and its exact location. 1999 UT App, ¶ 11. However, as explained more fully below, here the dimensions of the Easement are reasonably clear. Only a description of the location is missing.

valid easement is void merely because its dimensions or location on the servient estate are inadequately defined. *See* Brf. Applt., at 8-17. The County’s argument begins with the unremarkable proposition that “‘if the essential terms [of a contract] are so uncertain that there is no basis for deciding whether the agreement has been kept or broken, there is no contract.’” *Id.* at 12 (quoting *Nielsen v. Gold’s Gym*, 2003 UT 37, ¶ 12, 78 P.3d 600 (internal quotation marks and citation omitted)). The County then argues that four Utah decisions “demonstrate” that the location and dimensions of an easement are “essential terms” whose absence voids the Easement. Brf. Applt., at 13. None of these cases demonstrates any such thing.

This Court’s decision in *Wasatch Mines Co. v. Hopkinson*, 465 P.2d 1007 (Utah 1970), is wholly inapposite. The issue there was whether a confusing hodgepodge of non-deed documents collectively amounted to a valid conveyance of an interest in land. The documents were so inadequate that this Court concluded they did not even “reveal a present intention to convey an interest in real property to the defendant.” *Id.* at 1010. The documents failed to “identify the grantor, the grantee, the interest granted, or [contain] a description of the boundaries in a manner sufficient to construe the instruments as an interest in land.” *Id.* The facts in *Wasatch Mines* are far removed from those in the present case, where the intent of the parties is undisputed and the quit-claim deed clearly identifies all of these factors.

The situation in *Warburton v. Virginia Beach Federal Savings and Loan Assoc.*, 899 P.2d 779 (Utah App. 1995), likewise bears no resemblance to the instant case. In *Warburton*, the Court of Appeals held that a document bestowing a lifetime

“membership” in a country club was insufficient to create a real property interest under the statute of frauds because “there [was] nothing in the [agreement] that would suggest the right to use real property.” *Id.* at 782 (emphasis added). Obviously, a mere “‘membership’ is not an interest in real property.” *Id.* at 783. But just as obviously, an express right-of-way easement like Evans’ is an interest in real property. Moreover, there is no question here that the quit-claim deed satisfies the statute of frauds.<sup>15</sup>

The County discusses *Southland Corporation v. Potter*, 760 P.2d 320 (Utah App. 1988), and *Kelly v. Hard Money Funding, Inc.*, 2004 UT App 44, 87 P.3d 734, to assert the importance of the factors discussed in *Wasatch Mines*. But neither case provides the slightest insight into how those factors should be applied to Evans’ Easement, much less supports the County’s argument that the Easement is void. In *Southland*, the non-deed documents that supposedly established an easement lacked so many basic elements and were so vague that the court concluded “the language could mean anything.” 760 P.2d at 322. The drafter of a key document could not even be identified. *Id.* By contrast, Evans’ Easement is a model of clarity. In *Kelly*, the decision addressed the need to correct the misnomer of a corporation on a warranty deed and had nothing whatsoever to do with easements. The relevance of *Southland* and *Kelly* is a mystery.

In short, Utah case law provides no support for the County’s theory that an easement lacks is void if an otherwise valid deed fails to specify the easement’s location and precise dimensions. As seen, the overwhelming weight of authority holds that such

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<sup>15</sup> The court below held that the Easement “does not violate the statute of frauds.” 2004 UT App, at ¶ 10. The correctness of that holding is not before this Court on certiorari and thus may not be disputed.

an easement is indeed enforceable and that its location and dimensions may be fixed through practical means designed to uphold the parties' intent while preventing unreasonable burdens.

### **III. EVANS' EASEMENT IS SPECIFIC ENOUGH TO BE ENFORCEABLE AND MAY BE LOCATED THROUGH ESTABLISHED MEANS.**

Under settled easement law, this is an easy case. The County agrees that the deed reserving Evans' Easement "adequately identifies its purpose, the dominant and servient estates, and '[the grantor's] intent to reserve an easement.'" Brf. Applt., at 7 (quoting *Evans*, 2004 UT App, at ¶ 10). It is also clear that the County intended to be bound by the easement. *See Evans*, 2004 UT App, ¶¶ 10 & 12, n.5. The County further admits that "[t]he reservation also clearly states that the easement is fifty-six feet wide." Brf. Applt., at 7. Hence, there is no question the Easement is more precisely defined than the valid easements in *Wood*, *Walker*, and *Flying Diamond*.

The County's argument that the Easement is void for vagueness turns on the deed's alleged failure to define the length and location of the Easement as it crosses the narrow Strip. But in fact, the length of the Easement is reasonably clear from the deed. The undisputed evidence is that the purpose of the Easement is to allow ingress and egress from Evans' land, "across" the Strip, to Pine Street, and then to the State highway; the deed itself makes that clear. R. 241; *Evans*, 2004 UT App, ¶ 10. As defined in the deed, the Strip is 120 feet wide. R. 241. Unless there is some unknown mistake in the legal description, it follows under a reasonable reading of the deed that the length of the Easement is 120 feet – *i.e.*, the distance necessary to cross the Strip.

Therefore, the only undefined term is the Easement's location. But rather than voiding the Easement as the County urges, settled law holds that Evans has a valid floating easement over the Strip.<sup>16</sup> The location of the Easement – and even its length, if necessary – may therefore be reasonably fixed by one of several established methods. *See Walker*, 253 P.2d at 368 (methods include “agreement of the parties”, past use “by the grantee with the acquiescence of the grantor for a considerable period of time”, selection by one of the parties, or the “rule of necessity”). Since there has been no past use in this case, the rule explained above and summarized by Professors Thomas and Backman seems especially appropriate. They state that under Utah law “if the location of the easement is not defined, the burdened property owner [the County] may choose any reasonable location, subject to the right of the unsatisfied dominant easement holder [Evans] to seek protection from the courts.” Utah Real Property Law, § 12.02(c), p. 532. As noted, this appears to be the majority approach where the parties have not established a historical pattern of usage.<sup>17</sup>

Evans has no objection to the County selecting a reasonable location on the Strip for placement of the Easement – provided that the selection is truly reasonable, consistent

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<sup>16</sup> Professors Bruce and Ely provide two archetypal examples of deed language creating floating easements: (1) “A right of way fifteen feet wide over X’s farm.” (2) “A pipeline easement across Y’s ranch.” Law of Easements § 7:4. The descriptions in these examples are far less specific than the deed language that created Evans’ Easement. It follows *a fortiori* that Evans’ Easement is a valid floating easement.

<sup>17</sup> This Court in *Wood* properly looked to historic usage of the easement when called upon to fix its location. In *Walker*, the location had likewise become fixed by the actions of the easement holder and acquiescence of the servient estate owner. However, here there is no historical use of the Easement to guide the analysis, so other factors must be employed.

with the purposes and uses for which the Easement was reserved, and subject to judicial review. That is the course this Court should mandate on remand. If the County then refuses to choose an appropriate location within a reasonable time period, Evans should have the right to make a reasonable selection, again subject to judicial review. Failing that, or if the parties simply cannot agree, the trial court should be directed to fix the location in such a place “as is reasonably necessary for full enjoyment of the easement granted.” *Walker*, 253 P.2d at 369; *see id.* (“[F]loating easements’ . . . are fixed and determined by the extents and limitations required for the proper use and enjoyment of the easement . . .”).

This is the only course that makes sense and does not lead to serious inequities. The Easement was part of the good-faith bargain between the original grantor and Utah County; the parties intended that it exist and agreed to its purposes and terms. This Court should hold the County to that bargain rather than permit it to expand its property rights at Evans’ expense. Evans purchased his property with the reasonable expectation that the Easement was valid, and his development plans have long depended on that expectation. The value of Evans’ land is directly tied to the validity of the Easement and the access it provides to the State highway. As far as Evans is concerned, the precise location of the Easement along the Strip is unimportant so long as it results in reasonable and appropriate access to Pine Street and, from there, to the State highway. Indeed, given the undeveloped state of the Ironton Plat, it was entirely reasonable for the original parties to the deed to leave the Easement’s exact location for future determination. Voiding the Easement, as the County now advocates, would impose an economic hardship on Evans



and vitiate clearly established property rights that have long been upheld in the decisions of this Court and the vast majority of other courts across the nation. The County's novel easement theories should be rejected not only because they contradict established easement law, but also because they lead to harsh and inequitable results.

Finally, the County cannot be heard to complain that upholding the Easement would adversely impact its interests. The County vacated other platted streets that conflicted with its development plans. However, it chose not to vacate Pine Street, condemn the Easement, and justly compensate Evans for his loss. Instead, the County simply cut away a portion of the hill over which Pine Street and the Strip passed and constructed its improvements without regard for Evans' property rights. Even so, a significant portion of Pine Street and the Strip remain and the reasonable access Evans seeks – and to which he is lawfully entitled under the Easement – can still be provided. Of course, these are issues for the trial court and the parties to address on remand. The point here is that the validity of Evans' Easement does not turn on any alleged inconvenience or hardship which the County created for itself through its own choices.

### CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be affirmed. Evans has a valid and enforceable floating easement whose location on the servient estate may be determined on remand by the means discussed above.

### REQUEST FOR ORAL ARGUMENT

Evans hereby requests oral argument because it will materially assist this Court in resolving the issues in this case.

DATED this 25<sup>th</sup> day of February, 2005.

KIRTON & McCONKIE

A handwritten signature in black ink, appearing to read 'Alexander Dushku', is written over a horizontal line.

Alexander Dushku  
Jason Beutler  
Attorneys for Plaintiff/Appellee Jamie  
Evans

**CERTIFICATE OF SERVICE**

I hereby certify that on the 23<sup>rd</sup> day of February, 2005, I caused two copies of the foregoing **BRIEF OF APPELLEE** to be mailed first-class, postage prepaid, to the following:

Craig V. Wentz  
Barton H. Kunz II  
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A handwritten signature in black ink, appearing to read "Alfred D. [unclear]", is written over a horizontal line.

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