STATE OF IDAHO)
County of BONNER)ss

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CLERK OF DISTRICT COURT

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Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF BONNER

PHYLLIS A. GOODWIN,

Plaintiff,

vs.

LARRY DAVIDSON, et al..

Defendants.

Case No. **S CV 2005 974**

MEMORANDUM DECISION AND ORDER GRANTING MOTION FOR DECLARATORY JUDGMENT

I. PROCEDURAL HISTORY AND BACKGROUND.

Plaintiff filed her Motion for Declaratory Judgment on October 6, 2005. Plaintiff "moves for a declaratory judgment declaring that the easement is sufficiently broad to accommodate not only ingress and egress but also utilities benefiting Lots 1 through 5 of Sandy Cove Subdivision." Motion for Declaratory Judgment, p. 3. Oral argument was held October 20, 2005. After oral argument, the Court requested additional briefing, which was filed by both plaintiff Goodwin and defendants Davidson.

Plaintiff, Phyllis Goodwin (Goodwin), is the owner of Lot 5 of Sandy Cove subdivision, which is located in the County of Bonner, State of Idaho. Defendants, Larry M. Davidson and Julie A. Davidson (Davidsons) are the owners of the adjoining Lot 4 in Sandy Cove. Defendants, James D. Lambert and June C. Lambert are the owners of Lots

2 and 3 in Sandy Cove. Defendants Kenneth J. Piatt, trustee of the Audrey E. Piatt Credit Shelter Trust, is the owner of Lot 1 in Sandy Cove. Davidsons are the only individuals who presently reside full time on the property in Sandy Cove. At the time of filing this lawsuit Goodwin was in the process of constructing a permanent full time residence on her lot 5. The residence is now complete and the only remaining matter to be completed is to connect the residence to utilities.

Sandy Cove Subdivision was created in 1961 by the filing of a subdivision plat. That plat neglected to provide access to Lots 1 through 5 in Sandy Cove. Seven years later, an adjacent subdivision was created in 1968 by the filing of a plat for the Mountain Pine Shores Subdivision. In the plat the declarant dedicated a fifty (50') foot access easement for the exclusive use of Lots 1 through 5 of Sandy Cove. The language of that dedication reads:

> A fifty (50') foot access road easement is dedicated to the owners and all future owners of Lots 1, 2, 3, 4 and 5, Sandy Cove Addition for their exclusive use and control. Owners of said lots shall bear sole responsibility for maintenance and upkeep of said access road.

Goodwin alleges Davidsons have interfered and continue to interfere with public and private agencies to enable Goodwin to install the necessary utilities to service her residence. As a result of Davidsons' actions, Goodwin claims that she has been forced to file this action to obtain a utility easement over an access road easement.

Goodwin filed this motion for declaratory judgment pursuant to Idaho Code § 10-1201 et seq. and I.R.C.P. 57 and is based upon the pleadings on file and the affidavits of Phyllis Goodwin and Randy Thoreson. Goodwin, through her affidavit and that of Mr. Thoreson, claims that the residence is ready for occupancy as soon as the utilities can be installed. Goodwin argues the installation of utilities in the access easement can be

accomplished without unreasonably interfering with ingress and egress, and upon completion of installation, the roadway will be returned to as good or better condition than currently exists. Because of the above reasons, the affidavits on file and the pleadings, Goodwin moved for a declaratory judgment declaring that the easement is sufficiently broad to accommodate not only ingress and egress but also utilities benefiting Lots 1 through 5 of Sandy Cove Subdivision.

A declaratory judgment is proper to construe a written instrument. *Whitney v. Randall,* 58 Idaho 49, 56, 70 P.2d 384 (1937). It is improper to utilize a declaratory judgment when there are issues of fact. *Ennis v. Casey,* 72 Idaho 181, 185, 238 P.2d 435 (1951). On October 18, 2005, Davidsons filed an "Objection to Plaintiff's Motion for Declaratory Judgment", arguing Goodwin's and Thoreson's affidavits turn this matter into a summary judgment proceeding. However, the only thing added to this matter by the affidavit is the fact that construction of Goodwin's house is finished and utility hookup is needed. Those are facts which, if they are in dispute, are not material to the Court's construction of this written document, the easement. Those facts are not "determinative" facts. *Id.* Goodwin is "simply asking the Court for a declaratory ruling as to whether or not the fifty (50') foot access easement includes the ability to install underground utilities." Brief in Support of Motion for Declaratory Relief, p. 3.

However, it would be inappropriate for this Court to rule on any claim by Goodwin for an easement by necessity or by implication, as those theories go beyond an interpretation of the written easement. Davidsons are correct on this point. Memorandum in Opposition to Plaintiff's Motion for Declaratory Judgment, pp. 6-8. Goodwin created this confusion at page four of her "Brief in Support of Motion for

Declaratory Relief" where she mentions her complaint makes a claim for an easement by implication and by necessity.

Additionally, there was a Compromise and Settlement Agreement between these same parties in a different lawsuit, Bonner County Case No CV-00-01289. The subject matter of that case was a boundary dispute over the common boundary between the lots owned by Ms. Goodwin and Defendants. As a result of mediation conducted on November 8, 2001, the parties reached a compromise and settlement of that case, which included: a granting of an easement by Goodwin to the Davidsons relating to a cultured stone wall and walkway; specification where Goodwin could build her home; and Davidsons agreed to give Goodwin "…their good faith use of the common area of the access road to Sandy Cove Subdivision such that there shall be no unreasonable interference with Ms. Goodwin's driving and turning of vehicles for parking on her property." Davidsons filed an Amended Counterclaim and Third Party Claim in which they seek declaratory judgment against Goodwin based on that agreement. Davidsons have not placed that declaratory judgment action at issue. In the present case, the "Affidavit of Larry Davidson in Opposition to Motion for Declaratory Judgment" references the Compromise and Settlement Agreement (Affidavit of Larry Davidson, pp. 2-3), but such agreement is not at issue in Goodwin's motion for declaratory judgment.

II. ANALYSIS.

As mentioned above, Sandy Cove Subdivision was created in 1961 by the filing of a plat which neglected to provide access to Lots 1 through 5 in Sandy Cove. In 1968, the adjacent Mountain Pine Shores Subdivision was created by filing of a plat, and in that

plat the declarant dedicated a fifty (50') foot access easement for the exclusive use of Lots 1 through 5 of Sandy Cove. The language of that dedication reads:

> A fifty (50') foot access road easement is dedicated to the owners and all future owners of Lots 1, 2, 3, 4 and 5, Sandy Cove Addition for their exclusive use and control. Owners of said lots shall bear sole responsibility for maintenance and upkeep of said access road.

Goodwin brings this declaratory motion, asking for a declaratory ruling as to whether or not the fifty (50') foot access easement includes the ability to install underground utilities. Brief in Support of Motion for Declaratory Relief, p. 3. Essentially, the question is: "Does this express access road easement include the right to install underground utilities?" This Court finds that it does.

The first issue is whether this is a "general grant of easement". This Court finds that it is a general grant of easement. Goodwin argues this is a general grant of easement because the above language "does not include any 'limiting' language such as for 'road purposes only' or for 'ingress and egress only' or 'for access but not utilities'." Supplemental Brief in Support of Motion for Declaratory Relief, p. 2. Goodwin cites *McFadden v. Sein*, 139 Idaho 921, 88 P.3d 740 (2004) as authority for her argument. *Id.* pp. 2-3. In *McFadden*, the Idaho Supreme Court interpreted the following easement language as a general grant of easement:

> Grantor hereby grants and conveys unto grantee, its successors and assigns, a permanent and perpetual nonexclusive easement and right of way for the purpose of constructing and utilizing a roadway for access to parcel No. 4.

The Idaho Supreme Court found such "non-exclusive language creates a general grant of easement." 139 Idaho at 924, 88 P.3d at 743. The Idaho Supreme Court cited *Abbott v. Nampa School Dist. NO. 131*, 119 Idaho 544, 548, 808 P.2d 1289, 1293 (1991), where

they defined a general grant of easement as an "easement granted or reserved in general terms, without any limitations as to its use." 139 Idaho at 924, 88 P.3d at 743. Going back to the language of the present easement:

> A fifty (50') foot access road easement is dedicated to the owners and all future owners of Lots 1, 2, 3, 4 and 5, Sandy Cove Addition **for their exclusive use and control.** Owners of said lots shall bear sole responsibility for maintenance and upkeep of said access road.

(emphasis added). By the terms of that language, the owners of Lots 1, 2, 3, 4 and 5, which included Goodwin and Davidsons, have "exclusive use and control" over that easement. There is no limitation as to its use, as set forth in *Abbott.* Davidsons argue that the above language is not a general grant of easement, without ever discussing *McFadden* or *Abbott.* Memorandum in Opposition to Plaintiff's Motion for Declaratory Judgment, p. 8. Instead, Davidsons argue case law from other jurisdictions. This Court has read that authority and is not persuaded by such.

Davidsons cite *Castanza v. Wagner,* 43 Wash.App. 770, 776, 719 P.2d 949, 955 (Wash.Appl 1986), for the proposition that an easement for road purposes does not include an easement for utilities. Memorandum in Opposition to Plaintiff's Motion for Declaratory Judgment, p. 9. A review of that case shows the easement language as follows: "easement of right of way for road purposes to property in same section lying south of the property sold." 43 Wash.App. at 774, 729 P.2d at 951. In that easement there is no non-limiting language which is found in the easement in *Abbott* and which is found in the easement in present case: "for their exclusive use and control". The Washington Court of Appeal noted that missing feature: "The grant of easement in September 1955 from Westman and Best to McGovern does not contain language enlarging the easement." 43 Wash.App. at 775, 729 P.2d at 952.

The remaining cases cited by Davidson are not persuasive. Memorandum in Opposition to Plaintiff's Motion for Declaratory Judgment, p. 9. *Rowell v. Turnage,* 618 So.2d 81 (Miss. 1993) concerned an express easement with no non-limiting language such as in the present case and as in *Abbott.* The language in *Rowell* was simply: "a right-of-way from the old road which lies along the western part of the Northwest quarter of said section" 618 So.2d at 83. This Court is unable to understand how *Sumrall v. United Gas Pipeline Company,* 232 Miss. 141, 97 So.2d 914 (1957) is at all applicable, as it dealt with a utility's right to maintain its gas lines and the servient landowner's placement of a lake over those lines was an unreasonable interference with the gas company's easement right. *Spiak v. Zeglen,* 255 A.D.2d 754 (N.Y.A.D. 1998) concerned a deed that exceeded the scope of the contract and a contract that included the right to construct utilities. The Supreme Court Appellate Division, Third Department, New York held: "Absent express language to the contrary, however, [t]he grant of a mere right-of-way for ingress and egress does not ... include the right to install underground pipes or utility lines", 255 A.D.2d at 757, but the language of right of way in that case had no non-limiting language such as in the present case and such as in *Abbott. Ampagoomian v. Atamian,* 323 Mass. 319, 81 N.E.2d 843 (Mass. 1948). In that case, the Supreme Judicial Court of Massachusetts, Worchester, held that an easement for a "driveway" was granted in "general terms", which does not include the right to lay pipes or to erect structures in or upon the way. 81 N.E.2d at 845. The Idaho Supreme Court that decided *Abbott* would not likely find the language in *Ampagoomian* to be a "general grant of easement", even though that Massachusetts court 57 years ago said the easement was in "general terms." A review of that decision shows it had no non-limiting language such as in the present

case and such as in *Abbott.* Finally, Davidsons cite *Ferguson v. Producers Gas Co.*, 286 A.D. 521, 145 N.Y.S.2d 649 (N.Y.A.D. 1955). That case dealt with a private right of way for "highway and street purposes", with no additional language in the easement. Again, there was no non-limiting language such as in the present case and such as in *Abbott.* It is important to note that fifty years ago the Supreme Court of New York was tempted to include a grant of easement for utilities when the easement spoke of only "highway and street purposes". Fifty years ago that court resisted the temptation, writing:

> Under modern conditions, we have perhaps arrived at a time when the definition of 'street use' should be expanded to include the installation of poles, pipes, conduits, and tubes for various municipal uses, such as steam, electricity, telephone and gas, which would not impair the public easement. Even so, such a deviation from long-established authority is not justified or required under the circumstances here presented, where a mere private easement for street purposes exists over the lands of another.

286 A.D. at 524. It would seem that fifty years later, such need to expand the definition is even greater. This Court need not reach that issue, as the easement in the present case is a general grant of easement as set forth in *Abbott.*

This Court finds the cases cited by Goodwin to be much more on point. *Fleming v. Napili Kai, Ltd.*, 50 Haw. 66, 430 P.2d 316 (1967), noted that "Courts have held that a grant of easement of right of way in general terms should be construed as creating a general right of way for all reasonable purposes." 430 P.2d at 318. The easement language being interpreted read: "That the roads through the said lands, as laid out and shown upon the said map, as hereinafter more particularly described, be and the same are hereby set aside for the use of everyone having any interest in the said lands * * *." 430 P.2d at 317. The Supreme Court of Hawaii noted: "Said decree did not state that the

roadways were for purposes of ingress and egress only-in other words, the easement was without limitation or restriction." 430 P.2d at 318. This is essentially what we have in the present case. The easement here has no restriction for ingress and egress only, and the bold portion shows it is without limitation or restriction:

> A fifty (50') foot access road easement is dedicated to the owners and all future owners of Lots 1, 2, 3, 4 and 5, Sandy Cove Addition **for their exclusive use and control.** Owners of said lots shall bear sole responsibility for maintenance and upkeep of said access road.

(emphasis added). *PARC Holdings v. Killian,* 785 A.2d 106 (Pa.Super. 2001), shows that even with an easement that is limited to ingress and egress, the language of the easement may be general and without specific limitations, which would allow utility access. In that case, the Supreme Court of Pennsylvania noted that *Dowgiel v. Reid,* 359 Pa. 448, 59 A.2d 115 (1948), a decision that Court issued 53 years earlier, "illustrates that Pennsylvania has adopted the rule that where a right of way is granted or reserved without limit of use, it may be used for any purpose to which the land accommodated thereby may naturally and reasonably be devoted." 785 A.2d at 114. The Pennsylvania Supreme Court went on to hold:

> In addition to *Dowgiel,* these principles find further support from decisions in other jurisdictions. *See Atkinson v. Mentzel,* 211 Wis.2d 628, 566 N.W.2d 158, 163 (1977) (stating "[a]lthough at the time of the conveyance creating the easement the property was not served by utilities, the reasonable use of the property in current times requires utility services."); *Cline v. Richardson,* 526 N.W.2d 166 (Iowa App. 1994) (finding easement included right to install utilities); *Morrell v. Rice,* 622 A.2d 1156, 1158 (Me. 1993) (holding an easement of necessity was established and included right to install underground utilities); *Ware v. Public Ser. Co. of New Hampshire,* 412 A.2d 84, 86 (Me. 1980) (holding right to use road includes right to erect poles for electricity); *Kelly v. Schmelz,* 439 S.W.2d 211, 213 (Mo. Ct. App. 1969) (same); *Fleming v. Napili Kai, Ltd.,* 50 Haw. 66, 430 P.2d 316, 319 (1967) (stating "[i]t is the usual and common practice in this State to use roadway easements as rights of way for electricity, telephone, water and drainage facilities...."),

> *reh'g denied,* 50 Haw. 83, 431 P.2d 299 (1967). The fact some of the above cited cases deal with implied rather than express easements does not affect our decision. The same rationale is equally applicable in determining the scope of an easement granted by deed in general terms, or an easement implied by necessity. *Dowgiel, supra.*

785 A.2d at 115-16. This Court has read these cases cited by the Pennsylvania Supreme Court in *PARC Holdings.* This Court is convinced that in light of *Abbott* and in light of *Brown v. Miller,* 140 Idaho 439, 95 P.3d 57 (2004), discussed immediately below, this line of cases cited by Goodwin is more persuasive than the authority submitted by Davidsons. Additionally, this Court has read *Richards v. Land Star Group., Inc.*, 224 Wis.2d 829, 593 N.W.2d 103 (Ct.App. Wisc 1999). That case concerned an access easement, albeit by necessity, but the Wisconsin Court of Appeals held: "As we will explain, we conclude that the reasonable use and enjoyment of the dominant estate requires utilities, as long as such installation does not overburden the servient estate." 224 Wis.2d at 837, 593 N.W.2d at 107. In the present case, the servient estate is those who own land in Mountain Pine Shores subdivision. Goodwin cannot overburden the owners of Mountain Pine Shores subdivision. Davidsons are not owners of the servient estate. Davidsons are owners of the dominant estate, Sandy Shores, just as Goodwin is an owner of the dominant estate. Goodwin cannot overburden her co-owner in the easement, the Davidsons.

Although it concerns an easement by necessity (as opposed to an express easement in the present case), a review of *Brown v. Miller,* 140 Idaho 439, 95 P.3d 57 (2004) is in order. In that case, the Idaho Supreme Court affirmed a district judge's decision which stated that an easement by necessity included access to place the utilities underground to service a single family home. The district judge, relying on *Cordwell v.*

Smith, 105 Idaho 71, 665 P.2d 1081 (Ct.App. 1983) concluded "it is only logical that an easement by necessity also includes utilities, only so long as the necessity lasts." The district court in turn limited the utility easement to a single family residence. 140 Idaho at 441, 95 P.3d at 59. The Idaho Supreme Court affirmed the district court's decision. 140 Idaho at 442, 95 P.3d at 60.

An argument made by Davidsons in briefing and at oral argument is that there is no need for an easement for utilities via the "fifty (50') foot access road easement" since there is an easement in the Mountain Pine Shores plat over all the lots for public utilities. The Mountain Pine Shores plat has language in the "Owners Certification Certificate", immediately following the language relating to the "fifty (50') foot access road easement" for lots 1-5 in Sandy Shores, which reads: "The grantor reserves such easements as may be necessary over and along each lot for all public utilities." The problem with Davidsons' argument is that this language only applies to the Mountain Pines Shores subdivision because the grantor of the Mountain Pines Shores plat could not reserve anything over lots in Sandy Cove. While the grantor clearly reserved "such easements as may be necessary over and along each lot for all public utilities", the words "each lot" clearly only refers to the lots in Mountain Pines Shores. The only easement that pertained to Sandy Shores lot owners is the "fifty (50') foot access road easement" for Lots 1-5 in Sandy Shores. There is no construction of this language that would allow the owners of Sandy Shores lots to place utility easements over or under Mountain Pines Shores lots. Davidsons' argument in this regard is not relevant to the issue of declaratory judgment on the express easement language. Davidsons' argument would be relevant on the issue of easement by necessity, which is not before the Court at this point.

III. ORDER.

IT IS HEREBY ORDERED that based on the foregoing, plaintiff Phyllis A. Goodwin is granted declaratory judgment that the easement in the Mountain Pines Shores plat that runs in favor of Lots 1, 2, 3, 4 and 5, Sandy Cove Addition, is a general grant of easement with non-limiting language, which includes a utility easement.

Entered this 16th day of November, 2005.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of November, 2005, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer	**Fax #**	**Lawyer**	**Fax #**
James T. Diehl	(208)263-8983	Brent Featherston	(208))263-0400

_____
Secretary