

7-26-2010

Asbury Park, LLC v. Greenbriar Estate
Homeowner's Ass'n, Inc. Clerk's Record v. 2 Dckt.
37556

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LAW CLERK

Vol. 20 4

(VOLUME 2)

IN THE
SUPREME COURT
OF THE
STATE OF IDAHO

ASBURY PARK, LLC., an Idaho limited liability company; and JOHN ESPOSITO, an individual,

**Plaintiffs-Counterdefendants-
Respondents-Cross-Appellants,**

-VS-

GREENBRIAR ESTATES HOMEOWNER'S ASSOCIATION, INC., an Idaho non-profit corporation,

**Defendant-Counterclaimant-
Appellant-Cross-Respondent,**

And

DEBRA HOBBS a/k/a DEBBIE HOBBS, an individual d/b/a ACTION ASSOCIATION MANAGEMENT COMPANY,

Defendant-Counterclaimants.

Appealed from the District of the Third Judicial District for the State of Idaho, in and for Canyon County

Honorable THOMAS J. RYAN, District Judge

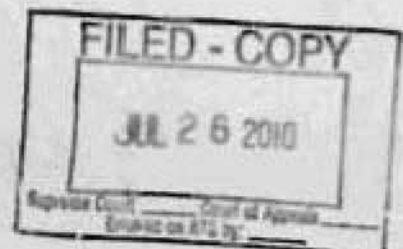
**Michelle R. Points
HAWLEY TROXELL ENNIS & HAWLEY, LLP.**

Attorney for Appellant

**David M. Penny
COSHO HUMPHREY, LLP.**

Attorney for Respondents

37556



IN THE SUPREME COURT OF THE
STATE OF IDAHO

ASBURY PARK, LLC., an Idaho limited liability company; and JOHN ESPOSITO, an individual,)

Plaintiffs-Counterdefendants- Respondents-Cross-Appellants,)

-vs-)

GREENBRIAR ESTATES HOMEOWNER'S ASSOCIATION, INC., an Idaho non-profit corporation,)

Defendant-Counterclaimant- Appellant-Cross-Respondent,)

And)

DEBRA HOBBS a/k/a DEBBIE HOBBS, an individual d/b/a ACTION ASSOCIATION MANAGEMENT COMPANY,)

Defendants-Counterclaimants.)

Supreme Court No. 37556

Appeal from the Third Judicial District, Canyon County, Idaho.

HONORABLE THOMAS J. RYAN, Presiding

Michelle R. Points, HAWLEY TROXELL ENNIS & HAWLEY, LLP.,
P. O. Box 1617, Boise, Idaho 83701-1617

Attorney for Appellant

David M. Penny, COSHO HUMPHREY, LLP.,
P. O. Box 9518, Boise, Idaho 83707-9518

Attorney for Respondents

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 COSHO HUMPHREY, LLP
 800 PARK BLVD., STE. 790
 BOISE, ID 83712
 PO BOX 9518
 BOISE, ID 83707-9518
 Telephone (208) 344-7811
 Facsimile (208) 338-3290

FILED
 A.M. P.M.

JUN 19 2009

CANYON COUNTY CLERK
 T. CRAWFORD, DEPUTY

Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF
 THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

ASBURY PARK, LLC, an Idaho limited liability company; and JOHN ESPOSITO, an individual,

Plaintiffs,

v.

GREENBRIAR ESTATES HOMEOWNERS' ASSOCIATION, INC., an Idaho non-profit corporation; DEBRA HOBBS a/k/a DEBBIE HOBBS, an individual d/b/a ACTION ASSOCIATION MANAGEMENT COMPANY.

Defendant.

Case No. CV 08-9740*C

AFFIDAVIT OF CHANDRA THORNQUEST

STATE OF IDAHO)
)ss.
 County of Ada)

CHANDRA THORNQUEST, being first duly sworn upon oath, deposes and says the following:

COPY

1. I am an individual over the age of eighteen (18) and I make this affidavit of my own personal knowledge.

2. I am a customer service representative for Stewart Title of Boise, located at 9196 W. Emerald Street, Suite 100, in Boise, Idaho.

3. At the request of David M. Penny of the law firm Cosho Humphrey, LLP, I collected a sampling of warranty deeds used at the time that Rocky Ridge Homes or Prestige Homes sold property in Greenbriar Estate Subdivision to customers.

4. Attached to my affidavit as Exhibit "A" are a sampling of the warranty deeds conveying lots from either Rocky Ridge Homes or Prestige Homes to their customers, and the sampling consists of two (2) warranty deeds prepared by Stewart Title of Boise, a warranty deed prepared by Title One, four (4) warranty deeds prepared by LandAmerica Transnation, and two (2) warranty deeds prepared by Pioneer Title Co.

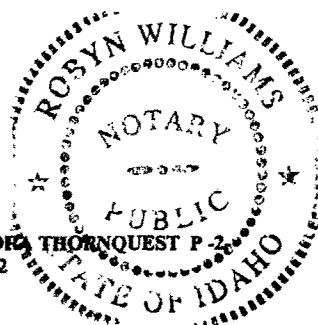
5. The documents attached to my affidavit are true and correct copies of the deeds recorded in the records of Canyon County, Idaho.

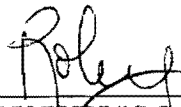
FURTHER YOUR AFFIANT SAITH NAUGHT



CHANDRA THORNQUEST

SUBSCRIBED AND SWORN to before me this 17th day of June, 2009.





NOTARY PUBLIC for Idaho
Residing at PO Box, Idaho
Commission expires: 3-13-10

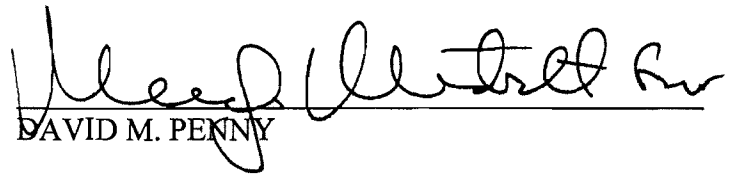
AFFIDAVIT OF CHANDRA THORNQUEST P-2
DMP/tls 20678-001/462032

000153

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 14 day of June, 2009, a true and correct copy of the within and foregoing instrument was served upon:

Michelle Renae Points
Hawley Troxell Ennis & Hawley, LLP
P. O. Box 1617
Boise, ID 83701-1617
Served by: U.S. Mail



DAVID M. PENNY

200665689

RECORDED

2006 AUG 11 PM 4 17

C NOEL SALES

CANYON CITY RECORDER

BY *[Signature]*

REQUEST STEWART TITLE/NAMPA

TRF DEED FEE *6-*

stewart
title of nampa

6045203 TN.

WARRANTY DEED

Corporate

Prestige Homes, Inc., a Corporation duly organized and existing under and by virtue of the laws of the State of Idaho, with its principal office at P.O. Box 104, Boise, ID 83701
Grantor hereby CONVEYS or GRANTS and WARRANTS unto

Donald L. Ewers and Janet L. Ewers, Husband and Wife

the Grantee, whose current address is 423 West Briar Hill Street, Nampa, ID 83686

the following described premises, to wit:

Lot 56, in Block 1 of Greenbriar Estates Subdivision, According to the official Plat thereof, filed in Book 36 of Plats at Page 36, records of Canyon County, Idaho.

Parcel Number: R29256153 0

SUBJECT TO: Current General Taxes, a lien in the process of assessments, not yet due or payable. Easements, restrictions, reservations, provisions of record, and assessments, if any.

TO HAVE AND TO HOLD the said premises, with their appurtenances unto the said Grantee, their heirs and assigns forever. And the said Grantor does hereby covenant to and with the said Grantee, that it is the owner in fee simple of said premises, that said premises are free from all encumbrances and that he will warrant and defend the same from all lawful claims whatsoever.

The officers who sign this deed hereby certify that this deed and the transfer represented thereby was duly authorized under a resolution duly adopted by the board of directors of the Grantor at a lawful meeting duly held and attended by a quorum.

IN WITNESS WHEREOF, the grantor has caused its corporate name to be hereunto subscribed by its authorized officers, this 8th day of August, 2006.

Prestige Homes, Inc.

By *[Signature]*
Patrick O. McMonigle
President

EXHIBIT
"A"
tabbies

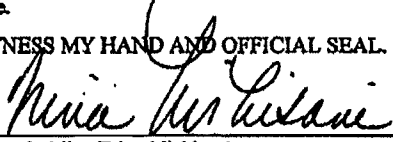
STATE OF Idaho)

) ss.

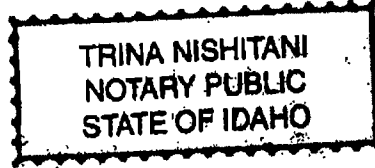
COUNTY OF Ada)

On this 10th day of August, 2006, before me, the undersigned, a Notary Public, in and for said State, personally appeared Patrick O. McMonigle, known to me, and/or identified to me on the basis of satisfactory evidence, to be the President, of the corporation that executed the instrument and that the foregoing instrument was signed on behalf of said corporation by authority of a resolution of it's board of directors and acknowledged to me that such corporation executed the same.

WITNESS MY HAND AND OFFICIAL SEAL.



Notary Public: Trina Nishitani
Residing at: Caldwell, Idaho
My Commission Expires: June 28, 2009



200676502

RECORDED

2006 SEP 20 PM 4 23

NOEL HILLS

CANYON CNTY RECORDER
BY *[Signature]*

REQUEST STEWART TITLE COMPANY

TYPE *[Signature]* FEE \$6.00



WARRANTY DEED
Corporation

Prestige Homes, Inc., a Corporation duly organized and existing under and by virtue of the laws of the State of Idaho, with its principal office at PO BOX 104, Boise, ID 83704
Grantor hereby CONVEYS or GRANTS and WARRANTS unto

William Pastoor and Sue Pastoor, Husband and Wife as to a
Undivided 35% Interest and Jeffrey Van Groningen and Judith Van
Groningen, Husband and Wife as to a Undivided 65% Interest,

the Grantee, whose current address is 15162 Kings Row Dr Caldwell, ID 83607

the following described premises, to wit:

Lot 59, in Block 1 of Greenbriar Estates Subdivision, According to the official Plat thereof,
filed in Book 36 of Plats at Page 36, records of Canyon County, Idaho.

Parcel Number: R29256156 0

SUBJECT TO: Current General Taxes, a lien in the process of assessments, not yet due
or payable. Easements, restrictions, reservations, provisions of record, and assessments, if any.

TO HAVE AND TO HOLD the said premises, with their appurtenances unto the said
Grantee, their heirs and assigns forever. And the said Grantor does hereby covenant to and with
the said Grantee, that it is the owner in fee simple of said premises, that said premises are free
from all encumbrances and that he will warrant and defend the same from all lawful claims
whatsoever.

The officers who sign this deed hereby certify that this deed and the transfer represented thereby
was duly authorized under a resolution duly adopted by the board of directors of the Grantor at a
lawful meeting duly held and attended by a quorum.

IN WITNESS WHEREOF, the grantor has caused its corporate name to be hereunto subscribed
by its authorized officers, this 18th day of September, 2006.

Prestige Homes, Inc.

By *[Signature]*
Patrick O. McMonigle
President

STATE OF Idaho)

) ss.

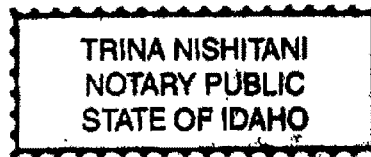
COUNTY OF Ada)

On this 18th day of September, 2006, before me, the undersigned, a Notary Public, in and for said State, personally appeared Patrick O. McMenigle, known to me, and/or identified to me on the basis of satisfactory evidence, to be the President, of the corporation that executed the instrument and that the foregoing instrument was signed on behalf of said corporation by authority of a resolution of it's board of directors and acknowledged to me that such corporation executed the same.

WITNESS MY HAND AND OFFICIAL SEAL.

Trina Nishitani

Notary Public: Trina Nishitani
Residing at: Caldwell, ID
My Commission Expires: June 28, 2009



51A

2007055488

RECORDED

2PM AUG 9 PM 4 24

WILLIAM H. BURST
CANYON CITY RECORDER
BY *[Signature]*

TITLEONE

REQUEST
TYPE *[Handwritten]* FEB 20 2007



www.titleonecorp.com

Order No.: C0719376 *SW/ED*

[Handwritten signature]

CORPORATION WARRANTY DEED

For Value Received

Prestige Homes Inc

A Corporation duly organized and existing under the laws of the State of Idaho hereby Grant, Bargain, Sell and Convey unto

Philip Jay Brown and Wesley Ann Brown, husband and wife,

Whose current address is: 507 W. Greenwood Street, Nampa, ID 83686

The following described real estate, to wit:

~~Lot 3 in Block 1 of Greenbriar Estates Subdivision, according to the official plat thereof, filed in Book 36 of Plats at Page(s) 36, official records of Canyon County, Idaho.~~ SEE ATTACHED EXHIBIT "A"

TO HAVE AND TO HOLD the said premises, with their appurtenances unto the said Grantee, its heirs and assigns forever. And the said Grantor does hereby covenant to and with the said Grantee, that Grantor is the owner in fee simple of said premises; that they are free from all encumbrances EXCEPT those to which this conveyance is expressly made subject and those made, suffered or done by the Grantor; and subject to all existing patent reservations, easements, right(s) of way, protective covenants, zoning ordinances, and applicable building codes, laws and regulations, general taxes and assessments, including irrigation and utility assessments (if any) for the current year, which are not due and payable, and that Grantor will warrant and defend the same from all lawful claims whatsoever. Wherever the context so requires, the singular number includes the plural.

IN WITNESS WHEREOF, the Grantor, pursuant to a resolution of its Board of Directors has caused its corporate name to be hereunto subscribed.

Dated: 08/08/2007

Prestige Homes Inc

By: *[Signature]*
Its President

State of Idaho
County of Canyon

On this 9th day of August in the year 2007, before me, the undersigned, a notary public in and for said state, personally appeared, Patrick O. McMonigle known to me to be the President of the corporation that executed this instrument and the person who executed the instrument on behalf of said corporation, and acknowledged to me that such corporation executed the same. In witness whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Signature]
Eddie R. O'Dell
Residing at Nampa, ID
My Commission Expires On: 04/17/09



EXHIBIT "A"

PROPERTY DESCRIPTION

Lot 3 in Block 1 of Greenbriar Estates Subdivision, according to the official plat thereof, filed in Book 36 of Plats at Page(s) 36, and as Amended by an Affidavit recorded July 31, 2007 as Instrument No. 2007052893, official records of Canyon County, Idaho.

(End of Exhibit "A")

RECORDER SCAN

Exhibit "A"
Property Description

000160



TRANSACTION TITLE
REQUEST
TYPE *Deed Fee 6-*

2006 AUG 3 PM 4:50
CANYON COUNTY RECORDER
BY *NOEL HALES*

RECORDED

200663129

Escrow No. 0600047734 *CAW*

CORPORATE WARRANTY DEED

FOR VALUE RECEIVED

Jared Enterprises, Inc dba Rokoy Ridge Homes

a corporation organized and existing under the laws of the State of Idaho, with its principal office at
533 E. Riverside Dr, Ste 100 Eagle Creek, Co ID 83616 State of Idaho,

GRANTOR(s), does(do) hereby GRANT, BARGAIN, SELL AND CONVEY unto: Sue Stanley, an
unmarried person

GRANTEES(s), whose current address is: 3809 S. Edgeview Drive Nampa, Idaho 83686
the following described real property in Canyon County, State of Idaho,
more particularly described as follows, to wit:

Lot 7 in Block 1 of GREENBRIAR ESTATES SUBDIVISION, Canyon County, Idaho, according to
the official plat thereof, filed in Book 38 of Plats at Page 36, records of said
County.

TO HAVE AND TO HOLD the said premises, with their appurtenances unto the said Grantee(s), and Grantee(s)
heirs and assigns forever. And the said Grantor(s) does(do) hereby covenant to and with the said Grantee(s), that

Grantor(s) is/are the owner(s) in fee simple of said premises; that said premises are free from all encumbrances,
EXCEPT those to which this conveyance is expressly made subject and those made, suffered or done by the
Grantee(s); and subject to reservations, restrictions, dedications, easements, rights of way and agreements, (if
any) of record, and general taxes and assessments, (including irrigation and utility assessments, if any) for the
current year, which are not yet due and payable, and that Grantor(s) will warrant and defend the same from all
lawful claims whatsoever.

The officers who sign this deed hereby certify that this deed and the transfer represented thereby was duly
authorized under a resolution duly adopted by the board of directors of the Grantor at a lawful meeting duly held
and attended by a quorum.

In witness whereof, the Grantor has caused its corporate name to be hereunto affixed by its duly authorized
officers this 1 day of August, in the year of 2006.

Jared Enterprises, Inc


by Jared Sherburne
It's President

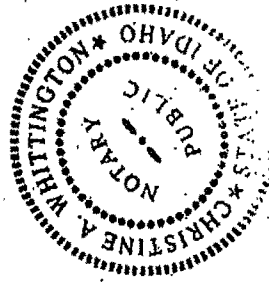
Notary Acknowledgment - see page 2

WARRANTY DEED - NOTARY ACKNOWLEDGMENT

State of Idaho, County of Ada, ss.

On this 1st day of August in the year of 2006, before me, the undersigned, a Notary Public in and for said State, personally appeared Jared Sherburne known or identified to me to be the President of the corporation that executed the instrument or the person(s) who executed the instrument on behalf of said corporation, and acknowledged to me that such corporation executed the same.


Christine A. Whittington
Residing at: Boise, Idaho
My commission expires: 08/15/2008



1

007063756



Order No.: 1058286-cw1

RECORDED

2007 SEP 19 PM 4 24

WILLIAM H. HURST
CANYON CITY RECORDER
RY. *William H. Hurst*

TRANSACTION TITLE

REQUEST TYPE *Deed* FEE *6.00*

WARRANTY DEED

FOR VALUE RECEIVED

Rocky Ridge GB, LLC

RM GRANTOR(s), does(do) hereby GRANT, BARGAIN, SELL AND CONVEY unto: The Rose M. Longley Living Trust

GRANTEES(s), whose current address is: **3726 S Edgeview Dr., Nampa, ID 83686** the following described real property in Canyon County, State of Idaho, more particularly described as follows, to wit:

Lot 81 in Block 1 of Greenbriar Estates Subdivision, according to the official plat thereof, filed in Book 36 of Plats at Page(s) 36, And Amended by Affidavit recorded July 31, 2007 as Instrument No. 2007052839, records of Canyon County, Idaho.

TO HAVE AND TO HOLD the said premises, with their appurtenances unto the said heirs and assigns forever. And the said Grantor(s) does(do) hereby covenant to and with the said Grantee(s), that Grantor(s) is/are the owner(s) in fee simple of said premises; that said premises are free from all encumbrances EXCEPT those to which this conveyance is expressly made subject and those made, suffered or done by the Grantee(s); and subject to reservations, restrictions, dedications, easements, rights of way and agreements, (if any) of record, and general taxes and assessments, (including irrigation and utility assessments, if any) for the current year, which are not yet due and payable, and that Grantor(s) will warrant and defend the same from all lawful claims whatsoever.

Dated this 19th day of September, 2007

Rocky Ridge GB, LLC

By: Jared Sherburne
Its: Managing Member

Order No. 1058286-cw1
Deed-Warranty

9/18/07 12:52 PM

State of Idaho

County of Ada

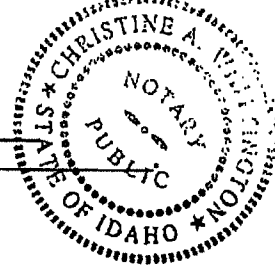
On this 19 day of September, 2007, before me the undersigned, a Notary Public in and for said state, personally appeared Jared Sherburne known or identified to me to be the person(s) whose name is/are subscribed to the within Instrument as the Managing Member of Rocky Ridge GB, LLC and acknowledged to me that executed the same as such Managing Member.

Christine A. Matthews

Notary Public Name: _____

Residing at: Boise

My Commission Expires: 8/15/2008



2007075834

RECORDED

2007 NOV 16 PM 4 33

WILLIAM H. HURST
CANYON CITY RECORDER
BY *[Signature]*

TRANSACTION TITLE
REQUEST TYPE *Warranty* FEE *6.00*



Order No.: 0700056362-cw1

WARRANTY DEED

FOR VALUE RECEIVED

Rocky Ridge GB, LLC

GRANTOR(s), does(do) hereby GRANT, BARGAIN, SELL AND CONVEY unto:

Carol S. Hedstrom, a single person

GRANTEES(s), whose current address is: **419 West Briar Hill St., Nampa, ID 83686**
the following described real property in Canyon County, State of Idaho, more particularly described as follows, to wit:

Lot 55 in Block 1 of Greenbriar Estates Subdivision, according to the official plat thereof, filed in Book 36 of Plats at Page(s) 36, records of Canyon County, Idaho.

TO HAVE AND TO HOLD the said premises, with their appurtenances unto the said heirs and assigns forever. And the said Grantor(s) does(do) hereby covenant to and with the said Grantee(s), that Grantor(s) is/are the owner(s) in fee simple of said premises; that said premises are free from all encumbrances EXCEPT those to which this conveyance is expressly made subject and those made, suffered or done by the Grantee(s); and subject to reservations, restrictions, dedications, easements, rights of way and agreements, (if any) of record, and general taxes and assessments, (including irrigation and utility assessments, if any) for the current year, which are not yet due and payable, and that Grantor(s) will warrant and defend the same from all lawful claims whatsoever.

Dated this 15th day of November, 2007

Rocky Ridge GG, LLC

By: *[Signature]*
Mike Pearson, managing member



Order No. 0700056362-cw1
Deed-Warranty

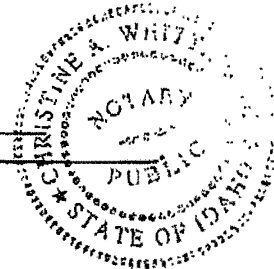
11/14/07 3:51 PM

State of Idaho

County of Ada

On this 15th day of November, 2007, before me the undersigned, a Notary Public in and for said state, personally appeared Mike Pearson known or identified to me to be the person(s) whose name is/are subscribed to the within instrument as the Managing Member of Rocky Ridge GB, LLC and acknowledged to me that executed the same as such Managing Member.

Christine A. Whitte
Notary Public Name: _____
Residing at 301st
My Commission Expires: 8/31/11



RECORDER SCAN

INSTRUMENT NO. 2008051288



Order No.: 1065704-cw1

READ AND APPROVED
INITIAL

CORPORATE WARRANTY DEED

FOR VALUE RECEIVED

Rocky Ridge GB, LLC

GRANTOR(s), does(do) hereby GRANT, BARGAIN, SELL AND CONVEY unto: **Kerry Bamrick and Marcie Bamrick, husband and wife, as community property with the right of survivorship**

GRANTEES(s), whose current address is: **3602 S Teakwood Dr., Nampa, ID 83686** the following described real property in Canyon County, State of Idaho, more particularly described as follows, to wit:

Lot 36 in Block 1 of Greenbriar Estates Subdivision, according to the official plat thereof, filed in Book 36 of Plats at Page(s) 36, amended by affidavit recorded July 31, 2007 as Instrument No. 2007052893, records of Canyon County, Idaho.

TO HAVE AND TO HOLD the said premises, with their appurtenances unto the said Grantee(s), and Grantee(s) heirs and assigns forever. And the said Grantor(s) does(do) hereby covenant to and with the said Grantee(s), that

Grantor(s) is/are the owner(s) in fee simple of said premises; that said premises are free from all encumbrances, EXCEPT those to which this conveyance is expressly made subject and those made, suffered or done by the Grantee(s); and subject to reservations, restrictions, dedications, easements, rights of way and agreements, (if any) of record, and general taxes and assessments, (including irrigation and utility assessments, if any) for the current year, which are not yet due and payable, and that Grantor(s) will warrant and defend the same from all lawful claims whatsoever.

The officers who sign this deed hereby certify that this deed and the transfer represented thereby was duly authorized under a resolution duly adopted by the board of directors of the Grantor at a lawful meeting duly held and attended by a quorum.

In witness whereof, the Grantor has caused its corporate name to be hereunto affixed by its duly authorized officers this 19th day of September, 2008 .

Rocky Ridge GB, LLC

By: Mike Pearson
Its: Member

2008 SEP 23 PM 4 34
RECORDED
9/19/08 9:42 AM
2008051288
WILLIAM H. HURST
CANYON COUNTY RECORDER
BY
LandAmerica
REQUEST
TYPE: W FEE: 6.00

Order No. 1065704-cw1
Deed-Corporate

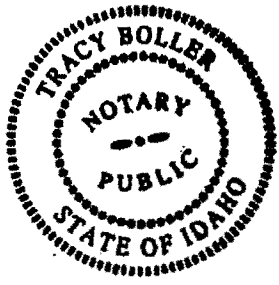
State of Idaho

County of Ada

On this 19th day of September, 2008, before me the undersigned, a Notary Public in and for said state, personally appeared Mike Pearson known or identified to me to be the person(s) whose name is/are subscribed to the within instrument as the Member of Rocky Ridge GB, LLC and acknowledged to me that executed the same as such Member.

Tracy Boller
Notary Public Name _____
Residing at: _____
My Commission Expires: _____

COMMISSION EXPIRES: 10-30-2012
RESIDING IN EAGLE, IDAHO



PC 607822



1872 S. Eagle Road / Meridian
Idaho 83642 / (208) 888-7230

REQUEST
PIONEER-CALDWELL
FEB 20 2006

BY *[Signature]*
CANYON COUNTY RECORDER

2006 JUN 29 PM 4 47

RECORDED

200651795

CORPORATE WARRANTY DEED

FOR VALUE RECEIVED,

Prestige Homes, Inc., an Idaho Corporation

a corporation duly organized and existing under the laws of the State of Idaho, grantor, does hereby Grant, Bargain, Sell and Convey unto

Angelo M. Azzolina, husband and wife

whose address is: 3721 S. GreenBrier Rd., Nampa, ID 83686, grantee, the following described real estate, to-wit:

Lot 86, Block 1 Greenbrier Estates Subdivision, according to the official plat thereof filed in Book 36 of plats, Page 36, records of Canyon County, Idaho.

SUBJECT TO current years taxes, irrigation district assessment, public utility easements, subdivision, restrictions, U.S. patent reservations, easements of record and easements visible upon the said premises.

TO HAVE AND TO HOLD The said premises, with their appurtenances unto the said Grantee, his heirs and assigns forever. And the said Grantor does hereby covenant to and with the said Grantee, that it is the owner in a fee simple of said premises; that they are free from all encumbrances and that it will warrant and defend the same from all lawful claims whatsoever.

IN WITNESS WHEREOF, The Grantor, pursuant to a resolution of its Board of Directors has caused its corporate name to be hereunto subscribed by its officers this 22nd day of June, 2006.

Prestige Homes, Inc., an Idaho Corporation

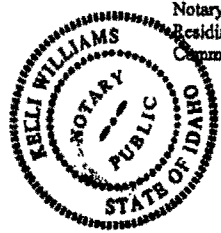
By: *[Signature]*
Patrick O. McMonigle, President

STATE OF Idaho, County of Ada, ss.

On this 2nd day of June, in the year of 2006, before me Kelli Williams, a notary public, personally appeared Patrick O McMonigle known or identified to me to be the President of the corporation that executed the instrument or the person/persons who executed the instrument on behalf of said corporation, and acknowledged to me that such corporation executed the same.

[Signature]

Kelli Williams
Notary Public of Idaho
Residing at Jordan Valley, Oregon
Commission expires: December 24, 2010



INSTRUMENT NO. 200610624



1872 S. Eagle Road / Meridian
Idaho 83642 / (208) 888-7230

**RECORDED TO CORRECT ADDRESS

PC(60497)

REQUEST
PIONEER-CALDWELL
FEE \$3

BY
G NOEL HALES
CANYON CITY RECORDER

RECORDED

2006 AUG 25 PM 4 34

200669912

CORPORATE WARRANTY DEED

FOR VALUE RECEIVED,

Prestige Homes, Inc. an Idaho Corporation

a corporation duly organized and existing under the laws of the State of Idaho, grantor, does hereby Grant, Bargain, Sell and Convey unto

Joseph E. Smith and Barbara J. Smith, husband and wife

whose address is: 22415 W. Briar Hill Street, Nampa, ID 83686, grantees, the following described real estate, to-wit:

Lot 54, Block 1, Greenbriar Estates Subdivision, according to the plat thereof filed in Book 36 of plats, Page 36, records of Canyon County, Idaho

SUBJECT TO current years taxes, irrigation district assessment, public utility easements, subdivision, restrictions, U.S. patent reservations, easements of record and easements visible upon the said premises.

TO HAVE AND TO HOLD The said premises, with their appurtenances unto the said Grantee, his heirs and assigns forever. And the said Grantor does hereby covenant to and with the said Grantee, that it is the owner in a fee simple of said premises; that they are free from all encumbrances and that it will warrant and defend the same from all lawful claims whatsoever.

IN WITNESS WHEREOF, The Grantor, pursuant to a resolution of its Board of Directors has caused its corporate name to be hereto subscribed by its officers this 16th day of August, 2006.

Prestige Homes, Inc. an Idaho Corporation
By: [Signature]
Patrick O. McMonigle, President

STATE OF Idaho, County of Ada, ss.

On this 17th day of August, in the year of 2006, before me Kelli Williams, a notary public, personally appeared Patrick O. McMonigle known or identified to me to be the President of the corporation that executed the instrument or the person/persons who executed the instrument on behalf of said corporation, and acknowledged to me that such corporation executed the same.



[Signature]
Kelli Williams
Notary Public of Idaho
Residing at Jordan Valley, Oregon
Commission expires: December 24, 2010

REQUEST
PIONEER-CALDWELL
FEE \$3

BY
G NOEL HALES
CANYON CITY RECORDER

RECORDED

2006 AUG 30 PM 1 05

200670626

FILED
A.M. 7:30 P.M.

AUG 06 2009

**CANYON COUNTY CLERK
T EARLS, DEPUTY**

Michelle R. Points, ISB No. 6224
HAWLEY TROXELL ENNIS & HAWLEY LLP
877 Main Street, Suite 1000
P.O. Box 1617
Boise, ID 83701-1617
Telephone: 208.344.6000
Facsimile: 208.954.5252
Email: mpoints@hawleytroxell.com

Attorneys for Defendants/Counterclaimants

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

ASBURY PARK, LLC, an Idaho limited liability company; and JOHN ESPOSITO, an individual,

Plaintiffs/Counterdefendants,

vs.

GREENBRIAR ESTATES HOMEOWNERS' ASSOCIATION, INC., an Idaho non-profit corporation; DEBRA HOBBS a/k/a DEBBIE HOBBS, an individual d/b/a ACTION ASSOCIATION MANAGEMENT COMPANY,

Defendants/Counterclaimants.

Case No. CV 08-9740

DEFENDANTS/COUNTERCLAIMANTS' RESPONSE TO PLAINTIFFS/COUNTERDEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendants/Counterclaimants Greenbriar Estate's Homeowners' Association, Inc. and Debra Hobbs, by and through their counsel of record Hawley Troxell Ennis & Hawley LLP, respectfully submit this Response to Plaintiffs/Counterdefendants' Motion for Partial Summary Judgment.

DEFENDANTS/COUNTERCLAIMANTS' RESPONSE TO PLAINTIFFS/COUNTERDEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT - 1

Because this motion addresses the Counterclaim brought by Greenbriar Estate's Homeowners' Association, Inc., the response set forth will reference the "HOA" as the responding Defendant, and "the Subdivision" as the Greenbriar Estates Subdivision. Plaintiffs will collectively be referred to as Esposito, unless otherwise stated.

I.

RELEVANT AND DISPUTED FACTS

Greenbriar does not dispute that Asbury Park, LLC purchased the property on which the Greenbriar Estates Subdivision is currently located, which deed from the Seller was recorded on May 9, 2005.

Esposito presented the preliminary plat to the City of Nampa Planning and Zoning Commission ("the Commission") on a several occasions, prior to the final plat being approved by the City Council on February 22, 2005. Affidavit of Aaron Randell, ¶ 3; *see also* Affidavit of John Esposito in Support of Motion for Partial Summary Judgment ("Esposito Aff."), ¶¶ 5, 6.

The approval Esposito obtained from the City of Nampa for the Subdivision did not include a private storage facility for which he could collect rents from lot owners. Affidavit of Aaron Randell, ¶ 7.

Members of the Commission would not have approved the plat for the Subdivision had they known that there was going to be the operation of private storage units, as a private business venture of the developer, forced upon the Subdivision lot owners by Esposito. Affidavit of Aaron Randell, ¶ 7.

As a result of learning of Esposito's actions with regard to the storage facilities, (running it as his own private business venture), and to prevent such a situation from happening again, the City Council adopted into law Ordinance No. 38-5, Section 10-27-1, which provides that all

common areas amenities will be owned and maintained by a homeowner's association and not privately owned. *Id.*, ¶ 8; *see also* Affidavit of Paul Pelletier, Exh. A.

The final plat for the subdivision was recorded on September 23, 2005. Esposito Aff., ¶ 6. The final plat represents in pertinent part that Lot 39, Block 1 shall be designated as a common area and shall be owned by the HOA "as established in the subdivision covenants." *Id.*

Esposito recorded the CC&Rs for the Subdivision on October 4, 2005 which contained the provision that the "Community Storage Facility" was privately owned by Esposito, notwithstanding the provision that stated that the owner of the Community Storage Facility "will not be a member" of the HOA. Esposito was a member of the HOA when he drafted the CC&Rs and still is a member of the HOA.

Esposito had an obligation to draft the CC&Rs in compliance with the recorded plat regarding ownership of Lot 39, Block 1, and failed in that obligation.

Esposito sold the residential lots in the Subdivision to the builders, by reference to the recorded final plat in the respective warranty. *Id.*, Exhibit 4. The builders to which Esposito sold residential lots (see Affidavits of Jared Sherburne and Mike Pearson) claim to have been advised by Mr. Esposito that he would privately own Lot 39, Block 1 and the storage units. However, Mr. Sherburne and Mr. Pearson assumed Esposito had obtained approval from the City of Nampa for such a privately owned facility, or were at least unsure of the ownership of Lot 39, Block 1 fact during the relevant time period. Affidavit of Debra Hobbs ("Hobbs Aff."), Exh. A, wherein Mr. Pearson states "just because John always told us that the storage sheds were going to be private does not mean that he set them up for private use legally, properly or ethically." In that same email Mr. Pearson recognizes that the storage facility was "changed from community to private in the CC&Rs, without [C]ity approval." In Exhibit B to the Hobbs Affidavit, both

Jared Sherburne and Mr. Pearson are copied on an email from Scott Zierler of Prestige Homes (another builder in the subdivision) wherein Mr. Zierler states that after he spoke with Roland Sesaulniers (the broker from John L. Scott Real Estate) he learned that Lot 39 **is owned** by the HOA. The broker for the lot sales in the subdivision was apparently of the opinion that Lot 39 was owned by the HOA.

The Articles of Incorporation for the Greenbriar Estates Homeowner's Association, Inc. ("HOA") were filed October 5, 2005, and state in pertinent part that the HOA is to provide for maintenance for common areas within the Greenbriar Estates Subdivision according to the plat thereof, filed in the official records of Canyon County, Idaho (other than Lot 49, Block 1). *See* Affidavit of Michelle R. Points, Exh. B. Although under the heading of "Dissolution," the Articles state that "[n]o part of the monies, properties or assets of the Association, *upon dissolution or otherwise*, shall inure to the benefit of any private person or individual or member of the Association." *Id.* The Articles are signed by Esposito on October 4, 2005. *Id.*

When Esposito turned the subdivision over to the HOA in July of 2007, he did not turn over ownership of Lot 39, Block 1 on the stated basis that he maintained ownership of that lot. Hobbs Aff. ¶ 5. At the time, no member of the Board of the HOA questioned Esposito's representation that he should retain ownership over that lot and the Board of the HOA also assumed that Esposito had drafted the CC&Rs in compliance with the final plat that had been approved by several City of Nampa Officials. *Id.*

In November or December of 2007, Kathy Kinney, an appraiser with the Canyon County Assessor's Office visited the Subdivision and spoke with a sales agent on site regarding the storage units. *See* Affidavit of Kathy Kinney ("Kinney Aff."), ¶ 2. During that visit it was represented to Ms. Kinney that when a residential lot was purchased in the Subdivision, the

storage unit was included with the lot, and considered a common area, which to Ms. Kinney was consistent with the recorded plat. *Id.*, ¶¶ 3-5; *see also* Wasbrough Aff., ¶ 3 (told by sales agent every house comes with a storage unit).

Esposito was not assessed any taxes for the storage units on Lot 39, Block 1 until a Mr. John Smart called in and told Ms. Kinney that the home owners paid rent on the units to the developer.¹ It is unclear from the tax records if Esposito has ever paid taxes on Lot 39, Block 1, and that lot is still classified as a common area with the Canyon County Assessor. *See* Kinney Aff., Exh. C.

Initially, the HOA paid Esposito rental fees for all the units, as they believed his purported ownership of the storage units was legitimate, based on the language contained in the CC&Rs. Hobbs Aff., ¶ 8.

In approximately October of 2007, it was discovered that Esposito did not have a Certificate of Occupancy for the storage units from the City of Nampa. *Id.*, ¶ 8. The Board of the HOA decided to only pay Esposito for the storage unit rental fees for the units that were already occupied, as it decided by the Board that if the remaining storage units could not be occupied, rents should not be paid to Esposito for those units. *Id.*

The discovery of no Certificate of Occupancy by the Board led to their further investigation into Mr. Esposito's representations. *Id.*, ¶ 10. The Board came upon the final plat to the Subdivision, which revealed that the original plat signed by Esposito and recorded in Canyon County showed that the storage units are to be owned and maintained by the HOA. *Id.*

¹ John Smart has never been president of the HOA. *See* Wasbrough Aff.,

At that point, the Board for the HOA decided to stop paying storage unit rental fees to Mr. Esposito all together. *Id.*

Esposito subsequently decided to not build an Assisted Living Facility in the Subdivision, but to instead re-plot that lot and divide it up into 17 single family lots with 1 common lot. Hobbs Aff., ¶ 11. The plat for Greenbriar Estates Subdivision No. 2 (“Greenbriar No. 2”) was submitted for review/approval on December 13, 2006 and the final plat was recorded January 16, 2008. *Id.*²

Esposito currently has lots for sale in the subdivision and uses a model home for a sales office, in which he is often present. *See Wasbrough Aff., ¶ 8.* The Subdivision continues to be marketed through John L. Scott, which includes a website. *See Affidavit of Michelle R. Points, Exh. A.* The storage units are still marketed as “community storage units”, along with a “community park;” see also Wasbrough Affidavit, Exhs. A and B.

² The creation of Greenbriar No. 2 significantly impacts the HOA’s finances going forward, as the income from 17 dues paying lots will only be \$15,300, (assuming the lots are sold and the owners pay) versus the \$28,665.00, dues that would have come from the Assisted Living Facility. *Id.*, ¶ 14.

II.

ARGUMENT

A. **Greenbriar Has Asserted Alternative, Viable Legal Theories To Ownership Of Lot 39, Block 1.**

Esposito asserts that the only argument advanced by Greenbriar regarding the HOA's ownership of Lot 39, Block 1 is the theory of common law dedication. Esposito is incorrect.

Esposito had a duty to deed Lot 39, Block 1 to the HOA as the developer of the Subdivision because Lot 39, Block 1 is a common area that should be owned by the HOA. Esposito's stated basis for not deeding that lot to the HOA is his claim that the CC&Rs *establish* that Lot 39, Block 1 is to be privately owned. Esposito's argument is without merit.

In Count One of the Counterclaim, the HOA seeks quiet title to Lot 39, Block 1, based on Esposito's fraudulent misrepresentation regarding ownership of that lot in the CC&Rs, as well as on Esposito's obligation to deed all common areas to the HOA upon turning over the Subdivision. Count One is not brought under the theory common law dedication.

Esposito repeatedly misrepresented to officials at the City of Nampa that Lot 39, Block 1 was in fact a common area that "shall" be owned and maintained by the HOA, when, according to Mr. Esposito's recitation of the facts, he intended from the beginning to draw substantial income from the lot owners in the form of rental fees and "at no time" intended to deed Lot 39, Block 1 to the HOA as a common area.

Esposito's "intentions" in this regard are questionable at best, and are contradicted by the record before the Court.

As set forth above in the relevant and disputed facts, not only did Esposito misrepresent to officials from the City of Nampa through the project development platting process, the

ownership of Lot 39, Block 1, but he marketed (and continues to market) the Subdivision as including the storage units as an amenity, Esposito never informed the County Assessor that he owned the lot and apparently has not paid taxes on the lot. At the same time he records the CC&Rs, which Esposito apparently claims “validates” his ownership of Lot 39, Block 1, he filed Articles of Incorporation for the HOA that provide that no monies of the HOA are to go to the benefit of any private party and confirms that the common areas in the recorded plat belong to the HOA.

In sum, Esposito’s claim of ownership cannot rely on the language contained in the CC&Rs which directly contradicts the final plat and the HOA Articles of Incorporation.

Notwithstanding Esposito’s fraudulent misrepresentations regarding ownership of Lot 39, Block 1, because Esposito designated that lot as a common area to be owned by the HOA in the final plat for the subdivision, he had a duty to transfer that property to the HOA.

According to the (restatement third of property – servitudes), § 6.19, Esposito had a duty to deed Lot 39, Block 1 to the HOA:

- (1) The developer of a common-interest-community project has a duty to create an association to manage the common property and enforce the servitudes unless exempted by statute.
- (2) After the time reasonably necessary to protect its interest in completing and marketing the project, **the developer has a duty to transfer the common property to the association**, or the members, and to turn over control of the association to the members other than the developer.
- (3) After the developer has relinquished control of the association to the members, the association has the power to terminate without penalty:
 - (a) any contract or agreement for the provision of management or maintenance services to the association;

(b) any contract or lease between the association and the developer, or an affiliate of the developer;

(c) any lease or recreational or parking facilities; or

(d) any contract or lease that is not bona fide, or was unconscionable to the members other than the developer at the time it was entered into, under the circumstances then prevailing.

Id., (emphasis added).

Courts can adopt the law as set forth in a Restatement provision if said provision is not inconsistent with Idaho precedent, or if the issue cannot be resolved by current Idaho law.

Dennett v. Kuenzli, 130 Idaho 21, 28, 936 P.2d 219, 226 (1997). Although there is no case law on point to this discrete in Idaho, this provision of the Restatement appears to be consistent with case law where other issues may be the gravamen, where the “turnover” language is contained in dicta.

Esposito cannot avoid his obligation to turn over the common areas designated in the final plat for the Subdivision by claiming there was an error on the face of the plat. Such an explanation is simply not believable and contrary to the record before the Court. Esposito clearly intended City Officials to rely upon his representation that Lot 39, Block 1, was to be owned by the HOA, and the City Officials did so rely. Had they known of Esposito’s misrepresentation they would not have approved the plat for the Subdivision.

B. Greenbriar Can Establish The Elements Of Common Law Dedication.

As an alternate theory of recovery in its Counterclaim, Greenbriar asserts that Esposito granted the HOA the right to use (along with the obligation to maintain) Lot 39, Block 1.

Although Esposito was the owner of Lot 39, Block 1, during the development of the Subdivision, and states that he intended to remain the owner, that does not negate the fact that

Esposito, through his actions, effectively dedicated Lot 39, Block 1 to the HOA.

“[W]hen an owner of land plats the land, files the plat for record, and sells the lot by reference to the recorded plat, a dedication of public areas indicated by the plat is accomplished.” *Saddlehorn Ranch Landowners, Inc., v. Dyer*, 146 Idaho 747, 752, 203 P.3d 677, 682 (2009), quoting *Monaco v. Bennion*, 99 Idaho 529, 533, 585 P.2d 608, 612 (1978) (other citations omitted).

Esposito clearly and unequivocally indicated, in his representation of the plat to the Commission and to the City Council, that Lot 39, Block 1 was to be owned by the HOA. That offer was accepted by the Commission and City Council, as evidenced by their respective approval of the plat.

As set forth above, the plat likely would not have been approved had Esposito disclosed that Lot 39, Block 1 was to be privately owned and arguably never income stream from the homeowners in Greenbriar for Esposito. *See Aaron Randell Aff.*

Moreover, Esposito sold the lot to builders with reference to the recorded plat. Esposito *Aff.*, Exh. 4. The builders to whom Esposito sold the lots then sold those lots to third parties, also with reference to the plat. *See Affidavit of Chandra Thornquest, Exh. A.*

Esposito cannot “take back” his dedication based on his claim that there was an error on the plat. To be sure, it is difficult to contemplate that if the surveyor, who claims to have been informed from the onset that Esposito intended to maintain private ownership of Lot 39, Block 1, would have ever listed Lot 39, Block 1 as a common area that “shall be owned” by the HOA in the first instance. It is even more difficult to believe that given the numerous preliminary plats that were submitted to the Commission, that this alleged “error” was not noticed or corrected by the surveyor or Esposito, as both the surveyor and Esposito reviewed and signed the final plat without identifying this dedication they subsequently alleged was erroneous.

It is even more difficult to accept Esposito's claim of error given the circumstances surrounding the development of the subdivision, including advertising and marketing (in which Esposito was involved), lack of tax assessments to Esposito (of which Esposito apparently did not bring to the Assessor's attention), and Esposito's filing of documents like the Articles of Incorporation for the HOA which appear to include Lot 39, Block 1 as a common area and state that the HOA will not pay any monies to a private entity. All actions taken by Esposito were consistent with the HOA owning Lot 39, Block 1 as a common area and amenity to the Subdivision.

Designating Lot 39, Block 1 as a common area lot was not an error by Esposito; he intended City officials to rely upon the plat, and approve the plat, with the hope that the inclusion of the "private ownership" of the storage units contained in the CC&Rs and his collection of rents would go unchallenged. Esposito's plan did not succeed.

C. Esposito's Argument That Asbury Park Did Not Offer To Sell Lots Directly To Homeowners Is Of No Consequence.

Esposito asserts that because he did not offer to sell any lot to the homeowners he could not offer to "dedicate" Lot 39, Block 1. Esposito's argument misses the point. The dedication occurred upon the submission of the plat, its subsequent recording, the conveyance of lots created by the plat, and circumstances surrounding the development of the subdivision. The dedication is not dependent on who sold a lot.

Esposito was the developer of the Subdivision, put marketing materials together for the Subdivision and currently owns and markets his own lots within the subdivision. In fact, one of Esposito's claims is that the HOA interfered with a sale of one of his lots in Greenbriar No. 2.

Certainly the homeowners in Greenbriar had a right to rely on Esposito's representation in the plat that the HOA would own and maintain Lot 39, Block 1. That Esposito subsequently sold the lots depicted on the plat to third parties is of no consequence. As previously set forth, where the owner plats the land, files the plat of record, and sells lots by reference to the recorded plat, a dedication of public areas indicated on plat is accomplished. *See Dyer, supra.*

There is no issue of fact that Esposito deeded the lots to builders in the subdivision on with reference to the recorded plat, and those builders deeded lots to homeowners with reference to the recorded plat.

Esposito would have the Court believe that the HOA can only assert a claim of ownership to Lot 39, Block 1, or an alternative claim of dedication, if Esposito was the party who actually sold lots to the homeowners. This argument is without merit and is not supported by any legal authority cited by Esposito.

Moreover, Esposito cannot circumvent the consequence of his fraudulent misrepresentations on the basis that he told the builders he sold lots to that he was maintaining ownership of the storage units. There are questions of fact with regard to what those builders actually knew or understood about Esposito's action and in fact whether Esposito was the rightful owner of Lot 39, Block 1.

The Counterclaim, as asserted by the HOA has to do with ownership of Lot 39, Block 1 – not who bought or sold the residential lots within the Subdivision.

D. That The CC&Rs Were Recorded Before Lots Were Conveyed Is Of No Consequence.

Esposito takes the position that because the CC&Rs were recorded before any lots were conveyed, and the purchasers of the lots were bound by the CC&Rs, that the HOA has no claim against Esposito; that the CC&Rs trump everything. Esposito is incorrect.

The final plat was recorded before the CC&Rs. The Articles of Incorporation were filed one day after the CC&Rs, and contradict the CC&Rs with regard to the designation of common areas and payment of HOA monies cannot benefit a private person or member of the HOA.

The CC&Rs are not a document of conveyance or instrument validating ownership. In any event, the HOA maintains that the CC&Rs contain a mistake and/or fraudulent misrepresentation that Esposito privately owns Lot 39, Block 1 and are invalid in that regard.

Esposito cannot be heard to argue that he had no obligation to convey ownership of Lot 39, Block 1 when he turned the Subdivision over to the HOA, or that he made no dedication of that lot, because he drafted the CC&Rs in a way so that he didn't have to.

The obligation arose for Esposito to turn over Lot 39, Block 1 to the HOA prior to Esposito recording the CC&Rs. Alternatively, Esposito dedicated Lot 39, Block 1 to the HOA prior to Esposito recording the CC&Rs.

That the CC&Rs were recorded before the conveyance of any lot does not effectuate or constitute a valid conveyance or transfer of ownership rights in real property. A developer cannot, as a matter of law, utilize CC&Rs to contradict the conditions imposed by the governing body as a requirement to approving the final plat and authorizing its recording. Idaho law makes no allowance for CC&Rs to contradict or modify a recorded plat.

That the lot owners were subject to the CC&Rs does not defeat the material fact that Esposito knew all along that he was going to (or intended to) maintain ownership of Lot 39, Block 1, and operate it as a lucrative private business venture, while at all times willfully misleading City Officials into believing it was a common area, to be owned and maintained by the HOA. The CC&Rs are invalid and unenforceable to the extent they speak to any ownership of Lot 39, Block 1, other than that of the HOA or contradict the final recorded plat.

III.

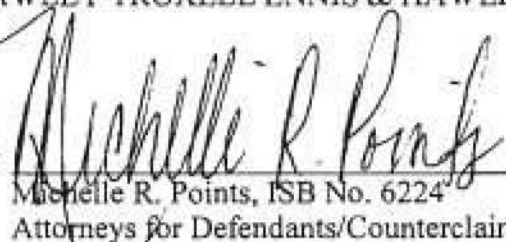
CONCLUSION

The arguments supporting Esposito's claim of ownership for Lot 39, Block 1 are flooded with issues of material fact. Esposito's representations and misrepresentations alone, through development and marketing of the Subdivision warrant denial of his motion for partial summary judgment. Based on the foregoing the HOA respectfully requests that Mr. Esposito's motion be denied.

DATED THIS 10th day of August, 2009.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By



Michelle R. Points, ISB No. 6224
Attorneys for Defendants/Counterclaimants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of August, 2009, I caused to be served a true copy of the foregoing DEFENDANTS/COUNTERCLAIMANTS' RESPONSE TO PLAINTIFFS/COUNTERDEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT by the method indicated below, and addressed to each of the following:

David M. Penny
COSHO HUMPHREY, LLP
800 Park Blvd., Suite 790
Boise, ID 83712
[Attorneys for Plaintiff]

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- E-mail
- Telecopy



Michelle R. Points

FILED
A.M. *4:30* P.M.

AUG 06 2009

**CANYON COUNTY CLERK
T EARLS, DEPUTY**

Michelle R. Points, ISB No. 6224
HAWLEY TROXELL ENNIS & HAWLEY LLP
877 Main Street, Suite 1000
P.O. Box 1617
Boise, ID 83701-1617
Telephone: 208.344.6000
Facsimile: 208.954.5252
Email: mpoints@hawleytroxell.com

Attorneys for Defendants/Counterclaimants

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

ASBURY PARK, LLC, an Idaho limited liability company; and JOHN ESPOSITO, an individual,

Plaintiffs/Counterdefendants,

vs.

GREENBRIAR ESTATES HOMEOWNERS' ASSOCIATION, INC., an Idaho non-profit corporation; DEBRA HOBBS a/k/a DEBBIE HOBBS, an individual d/b/a ACTION ASSOCIATION MANAGEMENT COMPANY,

Defendants/Counterclaimants.

Case No. CV 08-9740

AFFIDAVIT OF DEBRA HOBBS

DEBRA HOBBS, being first duly sworn upon oath, deposes and states as follows:

1. I am a named Defendant in this litigation personally, and through my business, Action Association Management Company. I have personal knowledge of the facts set forth herein and can testify as to the truth of the matters contained herein if called upon as a witness at the trial of this action.

2. I began providing management services for the Greenbriar Estates Subdivision ("Greenbriar") in the Fall of 2005. When I began working for Greenbriar I assisted Mr. Esposito, his attorney, and some of the builders that had purchased lots in Greenbriar with editing the CC&Rs for Greenbriar, focusing on management and enforcement issues. I had not reviewed the final plat for Greenbriar before my review of the CC&Rs and did not review that plat until some time later. My understanding is that developers obtain approval from City or County officials for their project (including a final plat) prior to drafting and recording the CC&Rs for the same. It is expected that the CC&Rs will conform with the final plat the City or County officials have approved.

3. At the time I was hired and began working with Mr. Esposito, I had no reason to believe that the CC&Rs were inconsistent with the plat for Greenbriar. Around this same time period, Mr. Esposito was working on marketing strategies for the Greenbriar Estates Subdivision to sell lots to prospective buyers, including the construction of additional amenities.

4. Based on my education and experience in subdivision management, developers customarily retain fee ownership of common areas until such time as a subdivision is turned over to a homeowners' association, at which time the common areas are deeded to the homeowners' association (of which the lot owners share equal ownership).

5. When Mr. Esposito turned the subdivision over to the Greenbriar Homeowners' Association (the "HOA") in July of 2007, he turned over ownership of the common areas, with the exception of Lot 39, Block 1, on the stated basis that he maintained ownership of that lot. At the time, neither I nor any of the members of the Board of the HOA questioned Mr. Esposito's representation that he should retain ownership over that lot and we

assumed that Mr. Esposito had drafted the CC&Rs in compliance with the plat that had been approved by several City of Nampa officials.

6. According to the CC&Rs, as drafted by Mr. Esposito, he would collect a mandatory rent for each of the storage units, whether or not that unit was occupied. The rate Mr. Esposito originally set for the rent was \$35 per month, per lot, or \$420 of the \$900 each owner was assessed in dues each year. This amount would be collected from each lot owner as a part of their homeowners' association dues and then I would cut a check from the HOA account payable to Asbury Park, LLC in the amount of \$3,290 per month (once all storage units were built), and send the check to Mr. Esposito.

7. Asbury Park, through the CC&Rs is allowed to increase the "rental rate" by 5% per year, even if the storage units are not used by the homeowners.

8. Initially the HOA paid Mr. Esposito rental fees for all the units, as they believed his ownership of the storage units was legitimate, based on the language contained in the CC&Rs.

9. In approximately October of 2007, it was discovered that Mr. Esposito did not have a Certificate of Occupancy for the storage units from the City of Nampa. The Board of the HOA decided to have me cut a check to Mr. Esposito for the storage unit rental fees only for the units that were occupied, as it decided by the Board that if the remaining storage units could not be occupied, rents should not be paid to Mr. Esposito for those units.

10. The discovery of no Certificate of Occupancy by the Board led to their further investigation into Mr. Esposito's representations. At a later date, the Board came upon the final plat to the Greenbriar Estates Subdivision, which revealed that the original plat signed by Mr. Esposito and recorded in Canyon County shows that the storage units are to be owned

and maintained by the HOA and not privately owned by Asbury Park, LLC. At that point, the Board for the HOA decided to stop paying storage unit rental fees to Mr. Esposito altogether.

11. Even though the HOA continued to collect the full assessments/dues, a subsequent budget showed that if the Association continued to pay Mr. Esposito storage unit rental fees, in the absence of the promised Assisted Living Facility contribution (referenced in the CC&R's), they would not be able to adequately maintain the subdivision (including the private streets/sidewalks – a considerable reserve expense). Landscaping of all common areas and individual lots in the subdivision are maintained by the HOA. The landscape maintenance bill for the HOA is the largest expense item in the HOA's operating budget.

12. Originally it appeared that Mr. Esposito's storage unit rental fees could be offset largely by the contribution of the Assisted Living Facility which was supposed to be built (but will not be built) and which would, according to the CC&R's, contribute 35% of the dues to the HOA(\$28,665/year). It was originally estimated that the storage unit rental fees to Mr. Esposito would be \$32,760(until all the storage units were built). Once the storage units were built, Mr. Esposito was paid \$39,480 per year (\$3,290 per month).

13. Mr. Esposito subsequently decided to not build an Assisted Living Facility, but to instead re-plat that lot and divide it up into 17 single-family lots with one common lot. The plat for Greenbriar Estates Subdivision No. 2 was recorded January 16, 2008.

14. The creation of Greenbriar Estates Subdivision No. 2 significantly impacts the HOA's finances going forward, as the income from 17 dues paying lots will only be \$15,300, versus the \$28,665.00, dues that should have come from the Assisted Living Facility.

15. Attached as Exhibit A is a true and correct copy of an email I received from Mike Pearson on March 6, 2008.

16. Attached as Exhibit B is a true and correct copy of an email I received from Mike Pearson on September 18, 2007, to which Scott Zierler, Jared Scherburne, and Roland Desaulniers were also copied.

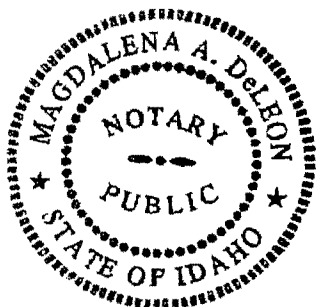
Further, your affiant sayeth naught.

Debra Hobbs

Debra Hobbs

STATE OF IDAHO)
County of ~~Ada~~ *Canyon*) ss.

SUBSCRIBED AND SWORN before me this 6th day of August, 2009.




Magdalena DeLeon
Name: *Magdalena DeLeon*
Notary Public for Idaho
Residing at *Canyon County Nampa ID*
My commission expires *January 17, 2013*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of August, 2009, I caused to be served a true copy of the foregoing AFFIDAVIT OF DEBRA HOBBS by the method indicated below, and addressed to each of the following:

David M. Penny
COSHO HUMPHREY, LLP
800 Park Blvd., Suite 790
Boise, ID 83712
[Attorneys for Plaintiff]

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- E-mail
- Telecopy



 Michelle R. Points

Debbie Hobbs

From: Debbie Hobbs [actionamanagement@msn.com]
Sent: Thursday, March 06, 2008 9:35 PM
To: 'Mike'
Subject: RE: Greenbriar

Mike, this is an unusual situation to say the least. Anyway.....

1. A revised concept plan provided by Mr. Esposito to, and approved by the City clearly has written on it "Community Storage...". The CC&R's were written after the plan was approved and clearly conflict with what was seen by/approved at the City based on that plan, their recollection and what the minutes, recorded after the plat was recorded say.
2. No City approval was sought for a change and the City never saw a copy of the CC&R's nor are they required to, nor would they normally ask to see them the way they currently do business...
3. The City code (10-3-2) does not allow stand alone "storage rental" facilities (run as a business like he is doing) in their Residential Professional zone. The storage facility in Greenbriar was understood to be a community/common subdivision amenity to serve Greenbriar residents just as a common park area where each owner owns a portion of the amenity -- and a revised concept plan from Esposito that I have on file represents that fact*.

Conversation with excellent legal counsel in Boise revealed their opinion that: By putting a note on the plat calling the storage facility out as a common/community lot, then improperly filing an Affidavit of Correction to change a plat note to re-identify the lot on which the facility is located as non-common/private thereafter (an illegal act), that by presenting to the City *a revised concept plan showing the facility as a "Community Storage Facility" which I have a copy of, and, that then changing its nature to suit his business plan without informing the City or seeking their approval, then Mr. Esposito operated in, also, an unethical and possibly a fraudulent manner...

4. We have access to a copy of the revised concept plan and the original approved/recorded plat that the Affidavit corrected and we have a copy of the Affidavit of Correction.

You might call my husband regarding the variance issue – I think a conversation with him might be beneficial to you. His number is 468-5457.

I believe the homeowners would want an amendment to the CC&R's asap. Do you have Pat McGonigle's (spelling?) phone number and perhaps Ted Mason Homes number also? I am happy to contact them immediately on behalf of the homeowners. If you are able to talk to either one of them about this also... give your opinion, that would be great.

Regards,

Debbie

From: Mike [mailto:mike@pearsonpad.com]
Sent: Thursday, March 06, 2008 3:26 PM
To: 'Debbie Hobbs'
Subject: RE: Greenbriar



GBHOA00040

10/29/2008

000192

Debbie, I'm waiting for a response from Nampa City. They have indicated that I'll have it today on the raised assessment prices.

Regarding an amendment on the storage units, I would be willing to sign that under the following conditions:

- 1 The subdivision was originally approved by the city with the storage facility as a community feature.
- 2 The storage facility was changed from community to private in the CC&Rs, without city approval.
- 3 Changes of community features, such as the storage units, from community to private is either banned by city ordinances and/or illegal.
- 4 The above information is documented information.

To be fair and clear, from the first time I ever talked with John Esposito, it was always conveyed to me as a private storage facility that he would collect income on. I remember thinking that because I thought for passive income, that would be a good source. With that said, John has told us many other things all along (like overly optimistic setback requirements that we ended up paying John to get a waiver on). So just because John always told us that the storage sheds were going to be private does not mean that he set them up for private use legally, properly or ethically.

What timeframe do you have in mind and have Prestige and Ted Mason Homes been notified of this issue?

Thanks and I'll keep you posted on the city fees issue.

Regards,
Mike Pearson

From: Debbie Hobbs [mailto:actionamanagement@msn.com]
Sent: Thursday, March 06, 2008 2:03 PM
To: 'Mike'
Subject: Greenbriar
Importance: High

Hi Mike, just wondering how things were going with you and Mr. Esposito.

Regarding Greenbriar, I'm sure the homeowners can lower their dues if they don't have to pay Mr. Esposito \$3,290.00 per month for storage unit rental fees (mostly on storage units that are empty). There would also be more money for street maintenance, etc. The Association does not feel he is justified as the plat was approved as a "common lot" by the City of Nampa and the CC&R's should have been drafted in accordance with the provisions of the plat and not as a "private lot" where he collects rents whether a storage unit is being used or not.

We are hoping that your company will be willing to sign an amendment to the CC&R's to state that the Storage Facility is either 1) not part of the Association or that 2) it is a "common lot" (as indicated on the plat approved by the Nampa City Council) in which case each homeowner will own a portion of the facility as it will be just like any other common area (such as park, etc.) and the Association will be responsible for the maintenance which will be minimal. Either way, hard earned dues money collected will not be paid to Mr. Esposito for empty storage units.

GBHOA00041

10/29/2008

000193

Please let me know your thoughts?

Thanks very much,

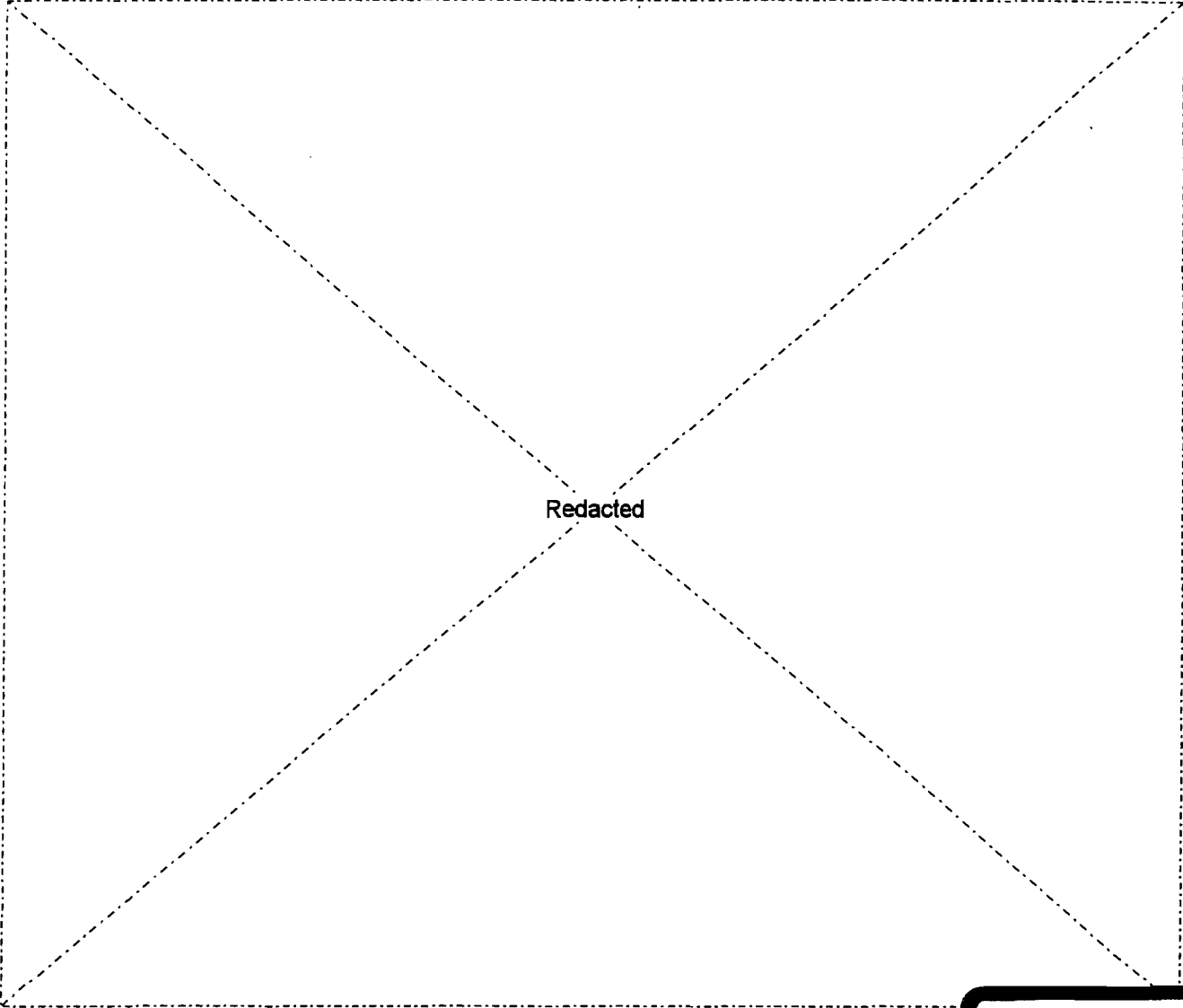
Debbie Hobbs
Action Association Management
(208) 442-9122

⋮
⋮
⋮

10/29/2008

GBHOA00042

000194



Redacted

**EXHIBIT
B**

From: Mike Pearson [mailto:Mike@rockyridgehomes.com]
Sent: Tuesday, September 18, 2007 10:03 AM
To: Scott Zlerler; Jared
Cc: Roland Desaulniers; Debbie Hobbs
Subject: RE: First supplement to the GB CC&R's

Scott, are you signing the new CC&Rs. As noted in the email, we are not signing until John works out his issues with the homeowners. Last I heard they were unhappy with his new intended use for the RV parking area. I don't know the details but I understood he was looking to change some easements for accessing the assisted living. We want to see John and the homeowners resolve their major differences before we commit to signing.

Regarding your specific points, there are ambiguities and some inconsistencies in this amendment.

Lot 39, to my understanding, is John's storage area. If John deeded this to the HOA, then he could have a battle on his hands since he has been charging and getting paid rent for this. I don't think this is owned by the HOA but Debbie can correct me if I'm wrong. As a related question, if this has been owned by the HOA then there may be

3/13/2009

GBHOA01593

000195

back taxes due since John would not have paid them

I believe article II Section 3 covers the application of all existing conditions and terms applying to lot 52 that applied to previous lots. However, the wording in Article III Section 1 could be interpreted to contradict this. Specifically when referring to Residential Units . . . regarding the apportionment of Assessments no longer being in effect I believe this is intended for the Assisted Living complex but it's vague in the new wording.

I assume Lot 100, Block one contains the new roads so the HOA fees must be adjusted to assure sufficient cash reserves for maintenance and repair of these roads This is referenced in Article III Section 2

Let us know what your plans are For now, we are not putting priority on this since we have plenty else going on and we want to see John and the homeowners work through this

Along those lines, Debbie, could you provide a brief update of what the homeowners concerns are with this document?

Thanks,
Mike

From: Scott Zierler [mailto:ScottZierler@Prestigehomesofidaho.com]
Sent: Tuesday, September 18, 2007 9:17 AM
To: Jared
Cc: 'Roland Desaulniers'; Mike Pearson; 'Debbie Hobbs'
Subject: First supplement to the GB CC&R's

Hi Everyone,

A few comments on the recently revised First Supplement to the CC&R's.

In Article I: Recitals. The declarant wishes to clarify that Lot 39 is not common area. However, it is not declared what it actually is...After speaking with Roland it is owned by the HOA. How should this be addressed?

Article IV: Specific Uses and Regulations

Is there a way to make sure that these lots will abide by the Architectural Controls in place? The last thing we need is a builder with vinyl sided boxes with one front window and door ☺

Thanks!

Scott L. Zierler, Designer
Prestige Homes, Inc.
723 N Mitchell St. Suite 201
Boise, Idaho 83704
scottzierler@prestigehomesofidaho.com

3/13/2009

GBHOA01594

000196

FILED
A.M. 4:30 P.M.

AUG 06 2009

**CANYON COUNTY CLERK
T EARLS, DEPUTY**

Michelle R. Points, ISB No. 6224
HAWLEY TROXELL ENNIS & HAWLEY LLP
877 Main Street, Suite 1000
P.O. Box 1617
Boise, ID 83701-1617
Telephone: 208.344.6000
Facsimile: 208.954.5252
Email: mpoints@hawleytroxell.com

Attorneys for Defendants/Counterclaimants

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

ASBURY PARK, LLC, an Idaho limited
liability company; and JOHN ESPOSITO, an
individual.)

Case No. CV 08-9740

Plaintiffs/Counterdefendants,)

AFFIDAVIT OF SULA WASBROUGH

vs.)

GREENBRIAR ESTATES HOMEOWNERS'
ASSOCIATION, INC., an Idaho non-profit
corporation; DEBRA HOBBS a/k/a DEBBIE
HOBBS, an individual d/b/a ACTION
ASSOCIATION MANAGEMENT
COMPANY.)

Defendants/Counterclaimants.)

SULA WASBROUGH, being first duly sworn upon oath, deposes and states as follows:

1. I currently serve as Secretary on the Greenbriar Estates Subdivision Homeowner's Association ("HOA"). I have personal knowledge of the facts set forth herein and can testify as to the truth of the matters contained herein if called upon as a witness at the trial of this action.

AFFIDAVIT OF SULA WASBROUGH - 1

2. In or about May of 2006, I visited the Greenbriar Estates Subdivision to look at the property and to inquire about the amenities and services. When I arrived at the subdivision the sales office was in a model home which contained a replica of the subdivision and its amenities, which included an assisted living facility. There were also other marketing materials for the subdivision in the sales office, including handouts that potential buyers could take with them. Attached hereto as Exhibit A is a true and correct copy of flyers I picked up in the sales office during my visit.

3. While at the sales office I asked about the amenities to the subdivision. The saleswoman there, who I later learned, was named Cindy Absmeier. She worked for John L. Scott Real Estate. She told me that every house in the subdivision "has a storage unit."

4. After my mother and I decided to build in Greenbriar, I worked with Cindy to get in contact with a builder, and she kept certain details in our file.

5. Attached hereto as Exhibit B is a true and correct copy of a newspaper advertisement which I kept from the Idaho Press Tribune that came out on August 24, 2008.

6. I did not receive a copy of the CC&Rs for Greenbriar Estates Subdivision at the time I closed on my lot.

7. After I closed on my lot I went to the sales office for John L. Scott and asked how I got my storage unit, and they said "just pick one out." I asked if I had to tell someone the number of the unit of anything of that nature, and they said "no, just buy your own lock and put it on there." There was never any paperwork involved.

8. John Esposito, or his entity Asbury Park, currently has lots for sale in the subdivision and he uses a model home for a sales office, in which he is often present.

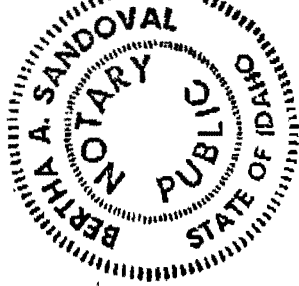
9. John Smart has never been President of the HOA.

Further, your affiant sayeth naught.

Sula Wasbrough
Sula Wasbrough

STATE OF IDAHO)
) ss.
County of Ada Canyon)

SUBSCRIBED AND SWORN before me this 6th day of August, 2009.



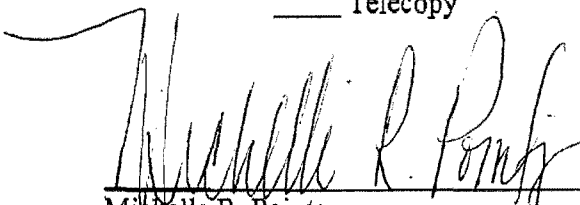
Bertha A. Sandoval
Name: Bertha A. Sandoval
Notary Public for Idaho
Residing at Lampa
My commission expires 05-05-2011

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of August, 2009, I caused to be served a true copy of the foregoing AFFIDAVIT OF SULA WASBROUGH by the method indicated below, and addressed to each of the following:

David M. Penny
COSHO HUMPHREY, LLP
800 Park Blvd., Suite 790
Boise, ID 83712
[Attorneys for Plaintiff]

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- E-mail
- Telecopy



 Michelle R. Points

GREENBRIAR ESTATES SUBDIVISION NO. 1

Lot/Block: 48A & 48B

Address: 3816 & 3812 S Teakwood Drive

Price: \$189,900

Model: Farmington 1402

Square Footage: 1,402

SUBDIVISION ELEMENTS

- Private gated community with front and back entrance
- RV storage onsite for homeowners use
- Storage complex onsite with homeowners owning one unit
- Putting green in 1 acre park with waterfalls and pathways
- Assisted living facility onsite (planned for Fall 2008)
- HOA dues include all front and back yard landscape maintenance

General

- Ceramic tile floor at entry
- 9' ceilings with 6" x 8" doors
- 2 panel smooth or arch top hollow interior doors
- 8' tall 2 bay garage
- Garage finished with drywall, tape and paint
- 50 gal. water heater
- Pre-plumbed for water softener
- Front and back yard landscaping with full sprinklers and fencing
- Digital/Programmable Thermostat

Electrical

- Decora switches
- Switched Christmas lighting outlet
- Freezer outlet in garage
- Can light at fireplace
- Wire for ceiling fan in great room and master bedroom
- Chandelier in dining room
- 4 - 5 can lights in kitchen, 2 pendants at bar

Kitchen/Bath/Utility

- High quality vinyl at Kitchen, Bathrooms and Utility
- Laminate counter tops at Kitchen, Bathrooms and Utility
- Full tile backsplash in kitchen
- Tile backsplash in bathrooms and utility
- Double master sink (where available) with adult height counter tops
- Installed electric and gas stub at kitchen range (no addition charge to buyer)
- 30" upper kitchen cabinets with staggered elevations (alder wood or nicer)
- Laundry sink in utility room (where possible)
- 30"x30" melamine cabinet over washer with rod and shelf over dryer
- Stainless steel appliances

FARMINGTON 1402 HOME SPECIFIC ELEMENTS

**EXHIBIT
A**

000201

cell RICHARD
208-890 6806

GREENBRIAR *estates*

RESIDENTIAL LOTS

80 single family homes, 14 townhouses

ASSISTED LIVING FACILITY

120 bed facility close to community park

OFFICE BUILDING

Two 2400 sq ft units proposed

R.V. PARKING

Secure facility for community storage

COMMUNITY STORAGE FACILITY

Secure area for your extra things

COMMUNITY PARK

Over one acre of park with amenities such as gazebo, bocce courts, horseshoe pits & putting green.

GATED ENTRIES

Provide a secure community atmosphere located at both Locust & Everell Dr.

IT'S YOUR GOLDEN YEARS MADE EASY.

So relax and enjoy the more important things - like having the time of your life.

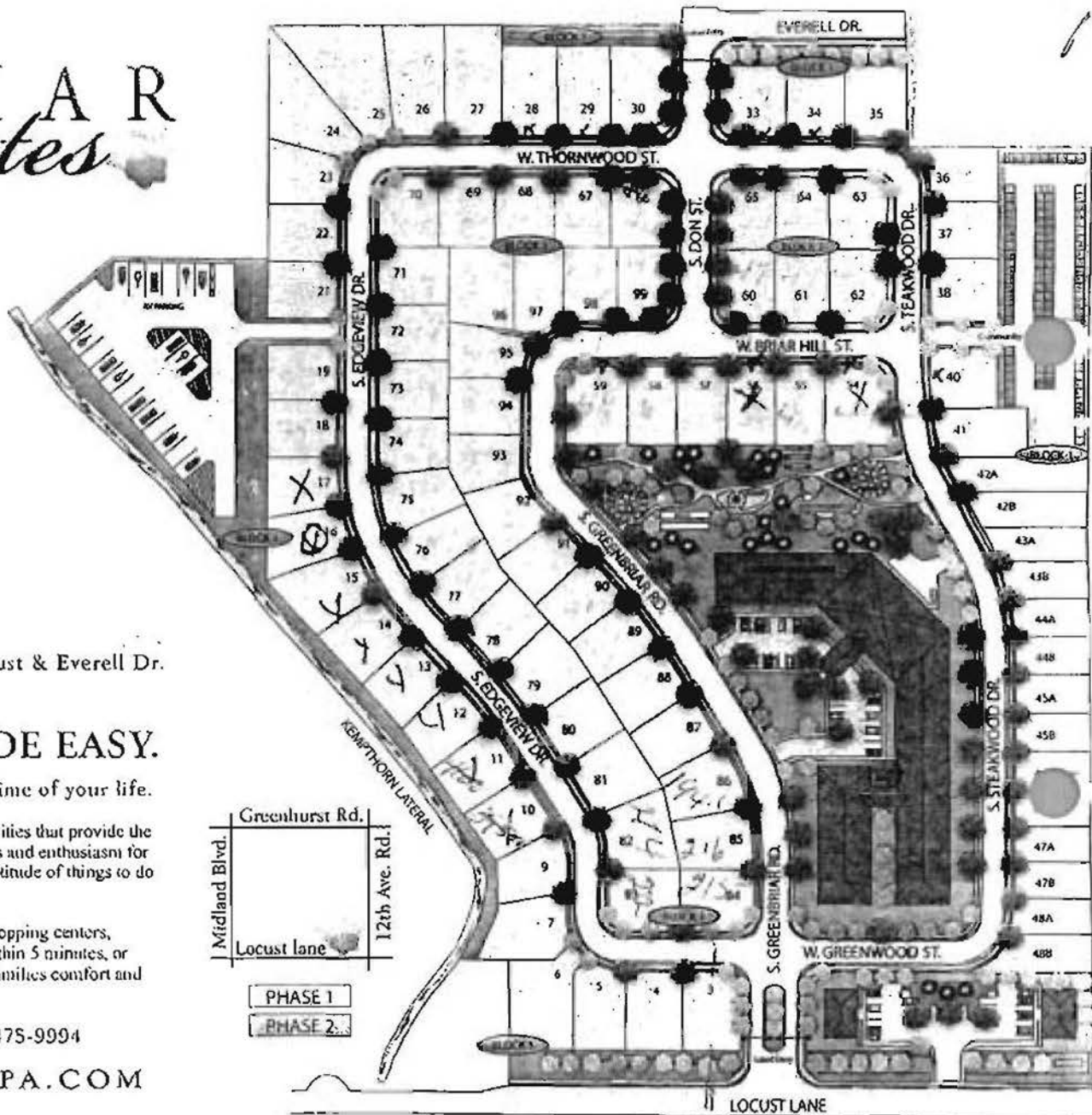
Greenbriar Estates is a gated community that is brimming with activities and amenities that provide the perfect social atmosphere to meet people just like you who share the same interests and enthusiasm for life. Enjoy neighborhood barbecues at the club house or the 1 acre park with a multitude of things to do including walking paths, rose garden, putting greens and more.

Other activities are just a short drive away including cultural and arts programs, shopping centers, restaurants movies and more. The airport is within a 30-minute drive. Hospital within 5 minutes, or there is an onsite assisted living center and two medical offices planned for your families comfort and convenience.

Information Center Open Now, Taking Reservations Please Call 475-9994

WWW.GREENBRIARESTATES-NAMPA.COM

A 55 & Up Community

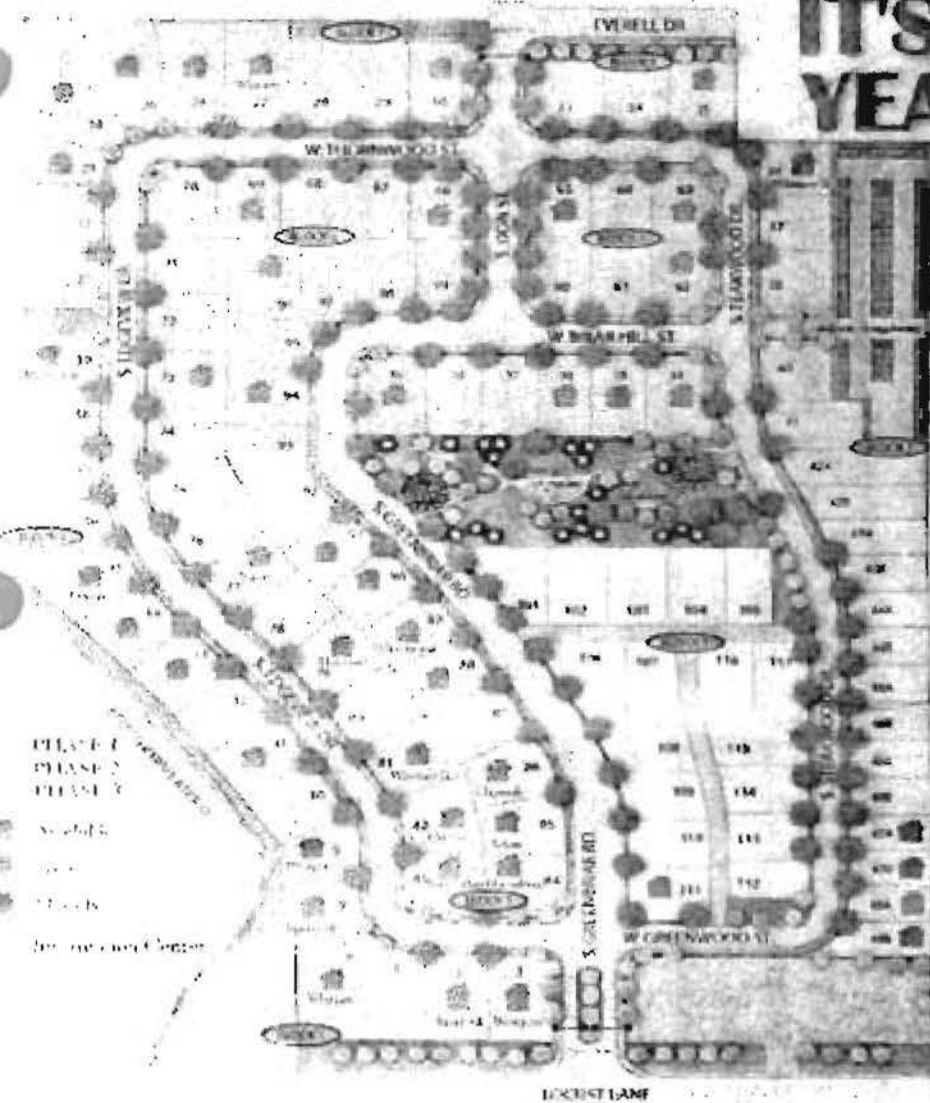


000202

GREENBRIAR *estates*

An Over 55 Community with Homes Starting at \$149,900

IT'S YOUR GOLDEN YEARS MADE EASY



Greenbriar Estates is definitely a place you'll be proud to share with family and friends. Savor neighborhood barbecues in the park, stroll along walking paths through the rose garden, or enjoy any of a multitude of other activities like practicing your putt on our exclusive greens, playing horseshoes, and more.

Our beautifully decorated single-level model homes are now open. Come by to view plans for our proposed onsite offices, just another added feature for your family's comfort and convenience. At Greenbriar Estates, you can relax and concentrate on more important things - like having the time of your life.

Information:

NO YARD MAINTENANCE

Yard maintenance and snow removal provided by HOA

OFFICE BUILDING

Two 2400 sq ft units proposed

COMMUNITY STORAGE FACILITY

Secure storage for each unit

COMMUNITY PARK

Over one acre of park with amenities such as gazebo, bocce courts, horseshoe pits and putting green

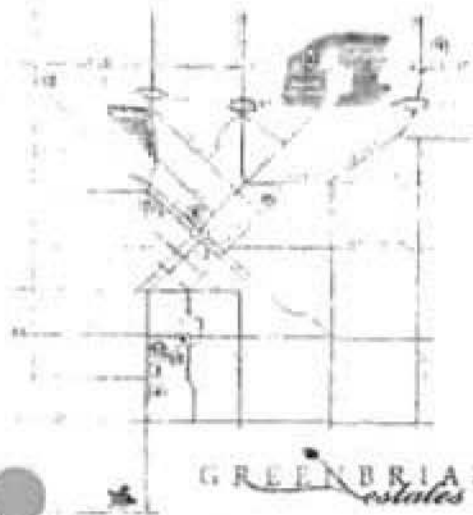
GATED ENTRIES

Provide a secure community atmosphere located at both ends of Greenbriar Estates

EXHIBIT
B

000203

Nampa



1. Mercy Medical Center - 1.9 miles
2. Chamber of Commerce - 3.82 miles
3. City Hall - 4.64 miles
4. Nampa Rec Center - 1.85 miles
5. NNU Brandt Center - 3.0 miles
6. Nampa Civic Center - 4.56 miles
7. Post Office - 4.0 miles
8. Library - 3.95 miles
9. Idaho Ctr & Sports Ctr - 8.74 miles
10. Golf Courses -
 - Broadmore - 4.97 miles
 - Centennial - 5.0 miles
 - Ridgecrest - 6.41 miles
11. Walmart - 1.57 miles
12. Mall - 5.63 miles
13. Restaurants - 1.5 miles
14. Lake Lowell Inlet - 2.5 miles



TED MASON SIGNATURE HOMES

- Ted Mason has been building homes and developing communities for satisfied customers throughout the Treasure Valley for over 15 years,

creating friends along the way. Our focus is on building great living environments. Our motto, "Built Around You," encompasses our dedication to quality, craftsmanship and customer satisfaction. From the moment you choose a Ted Mason Signature Home to the final walk-through with Ted, our mission is to make buying and owning YOUR home a gratifying experience. We invite you to take a look at everything our homes have to offer.

For current home information please call 208.338.0420

www.TEDMASON.com

St. Luke's Women's Fitness

Celebration

Ted Mason Signature Homes is a proud sponsor of this year's St. Luke's Celebration Women's Show.

Come see our virtual home with live actors at the

St. Luke's Celebration Women's Show

September 18th and 19th

at the Boise Centre on the Grove!

FILED
A.M. 4:30 P.M.

AUG 06 2009

**CANYON COUNTY CLERK
T EARLS, DEPUTY**

Michelle R. Points, ISB No. 6224
HAWLEY TROXELL ENNIS & HAWLEY LLP
877 Main Street, Suite 1000
P.O. Box 1617
Boise, ID 83701-1617
Telephone: 208.344.6000
Facsimile: 208.954.5252
Email: mpoints@hawleytroxell.com

Attorneys for Defendants/Counterclaimants

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

ASBURY PARK, LLC, an Idaho limited liability company; and JOHN ESPOSITO, an individual,

Plaintiffs/Counterdefendants,

vs.

GREENBRIAR ESTATES HOMEOWNERS' ASSOCIATION, INC., an Idaho non-profit corporation; DEBRA HOBBS a/k/a DEBBIE HOBBS, an individual d/b/a ACTION ASSOCIATION MANAGEMENT COMPANY,

Defendants/Counterclaimants.

Case No. CV 08-9740

AFFIDAVIT OF KATHY KINNEY

KATHY KINNEY, being first duly sworn upon oath, deposes and says:

1. I am a Certified Appraiser for Canyon County and, as such, I make this affidavit based on my personal knowledge.

2. In November or December of 2007 I went to the sales office located in Greenbriar Estates subdivision. While there, I met with the sales representative and questioned her regarding the storage units within the subdivision.

AFFIDAVIT OF KATHY KINNEY - 1

3. I asked her if they were available for rent or if the homeowners would pay to maintain the storage units through their homeowner association fees. This information is important for the Canyon County Assessor, because if the storage unit was sold with an individual lot, the additional value would be added to the lot. However, if the storage units were rented from the developer or owner of the storage unit lot, then the owner of the storage unit lot would be taxed for the value.

4. I was told that when the home was purchased the storage unit was included with the residential lot.

5. With that information, I valued the storage units and divided that value among all the lots in the subdivision, giving the storage units themselves no assessed value as they were considered a common area, which was consistent with the plat for the subdivision.

6. The owner of the lot containing the storage units was not assessed any taxes for the 2008 tax year at that point.

7. Later, in June of 2008, I was contacted by a man by the name of John Smart who questioned me regarding the value of his property. Mr. Smart told me that he was president of the Greenbriar homeowner's association. Mr. Smart informed me that the taxes should be paid by the owner of the lot containing the storage units because he believed the home owners were paying rent to the owner for the units.

8. I then discussed the issue with my supervisor and the County Assessor on how to proceed. It was decided that since the developer was essentially renting the storage units to the homeowners in the subdivision, the units should be treated as having their own value and taxed separately. At that point the storage units were given to the commercial department and valued as

a commercial property for the 2008 tax year which would equate to taxes being assessed to the owner of the storage units for 2008.

9. Attached as Exhibit A is a true and correct copy of a letter I drafted to the Greenbriar Estates Subdivision regarding taxation of the storage units.

10. Attached as Exhibit B is a true and correct copy of an email I sent to Ms. Hobbs (incorrectly indicating a Ms. "Holtz" which I later determined was Hobbs) which contained my notes regarding the storage units.

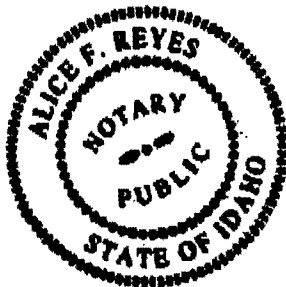
11. Attached as Exhibit C is a true and correct copy of the parcel listing for the common area lots in Greenbriar Estates Subdivision.

Further your affiant sayeth naught.

Kathy Kinney
Kathy Kinney

STATE OF IDAHO)
County of Canyon) ss.

SUBSCRIBED AND SWORN before me this 3rd day of ^{Aug.}~~July~~, 2009.



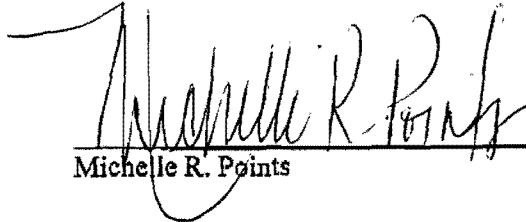
Alice Reyes
Notary Public for Idaho
Residing at Wilder Idaho
My commission expires 6/18/10

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of August, 2009, I caused to be served a true copy of the foregoing AFFIDAVIT OF KATHY KINNEY by the method indicated below, and addressed to each of the following:

David M. Penny
COSHO HUMPHREY, LLP
800 Park Blvd., Suite 790
Boise, ID 83712
[Attorneys for Plaintiff]

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- E-mail
- Telecopy



 Michelle R. Points



Canyon County Assessor Office

County Courthouse - 1115 Albany Street - Room 343

Caldwell, Idaho 83605

Telephone (208) 454-7431

Fax (208) 454-7349

Gene T. Kuehn
Assessor

Joseph R. Cox
Chief Deputy

March 2, 2009

Greenbriar Estates Subdivision
1300 W Hawk Pl
Nampa, ID 83651

To Whom It May Concern,

In November or December 2007, I spoke with the sales representative in the office located in Greenbriar Estates. I was questioning her as to the use of the storage units located in the subdivision so I would know how to value the units.

I asked if they were available for rent or if the homeowners would be charged for their use in their monthly Home Owners Association fees. If the homes were sold with the use of a storage unit, I would add their value to the land as is done with all common areas leaving the common areas themselves with no taxable value. If it is not included in the purchase price, I would value the unit separately and the developer would then be taxed for the units which he would most likely collect through the Home Owner Association Fee.

I was told that when a home was purchased the storage unit was included with it. With that information, I valued the storage units and divided that value among all of the lots in the subdivision, giving the storage units themselves no assessed value as they were considered common area and their taxable value was distributed among all the lots.

In June 2008, Joe Smart called me in regards to the value of his property. Through our conversation I told him that I had divided the value of the storage units among all of the lots since they were included with the purchase of the homes. He informed me that each home owner was paying for the taxes and the use of the storage unit through their monthly Home Owner Association fees and therefore was paying taxes for them twice. He informed me that he was the President of the Home Owners Association so he was sure of the distribution of the fees.

With that information, I then discussed with my supervisor & the County Assessor how to proceed. It was decided that since the developer was basically renting out the units they should be considered as having their own value.

I then removed the value of the storage units from all of the lots in the subdivision and placed that value on the storage units themselves so they would be taxed separately as their own account.

This is the information I have to the best of my recollection with the aid of the notes I kept.

Kathy Kinney

Appraiser,
Canyon County

EXHIBIT
A

000209

From: Kathy Kinney [mailto:kkinney@canyonco.org]
Sent: Friday, June 26, 2009 10:43 AM
To: actionmanagement@msn.com
Subject: Greenbriar Estates

Ms. Holtz,

Hope this helps.

Kathy Kinney
Certified Appraiser, Canyon County

COMMON AREA
4/25/08 VALUE ADDED TO LOTS FOR STORAGE UNITS
PER ONSITE SECRETARY 12/07 UNITS ARE INCLUDED
WITH PURCHASE OF HOME. KRK
3/2/09 DRAFTED AND SENT LETTER TO H/O ASSOC.
CONCERNING MY UNDERSTANDING OF UNITS BEING
INCLUDED IN PURCHASE OF A HOME. KRK

8/5/2009

000210

EXHIBIT
B

Canyon County, Idaho

generated on 7/21/2009 7:52:59 PM EST

Parcel

Parcel Number 29256100 0 **Site Address** 0 S GREENBRIAR RD NA ID, NA **Current Total Assessed Value** \$0

Owner Information

Owner Name ASBURY PARK LLC
Mailing Address 354 COVE COLONY WAY
 EAGLE ID 83616
Transfer Date
Document #
Deed Book/Page

Location / Description

Tax District 002-11	Section & Plat
Canyon County 001,	Routing #
Parcel Address 0 S GREENBRIAR RD NA ID, NA	Legal Desc. 04-2N-2W SW GREENBRIAR EST LTS
Deeded Acreage 5.7200	1,2,8,20,31,32,39,50,51,53 BLK 1 COMMON AR EA

Parcel Type		Topography		Services	
Property Class Code 525 - Common areas	Level Ground N	Water			
Neighborhood Code 100	High N	Sewer			
Neighborhood Factor .00	Low N	Natural Gas			
Street / Road Code A	Rolling N	Electricity		N	
	Swampy N	Sidewalk			
		Alley		N	

Assessment Information

Current Land Value \$0	Residential Land \$0	Adjustment Factor 0.00
Current Imp. Value \$0	Residential Imp. \$0	Average Value / Acre \$0
Current Total Assessed Value \$0	Residential Total \$0	Appraisal Date 2/8/2008
Commercial Land \$0	Non-Res Land \$0	Reason For Change 01
Commercial Imp. \$0	Non-Res Imp. \$0	Prior Land Value \$0
Commercial Total \$0	Non-Res Total \$0	Prior Imp. Value \$0
Dwelling Value \$0	Classified Land Value \$0	
Farmland Value \$0	Homesite Value \$0	



000211

Parcel | Land | Values | Sketch | Improv | Images | Comps | Records

Parcel Information
 Parcel ID: 29256100 0 Alt PIN: N32630010010
 Parent Parcel: City: NA
 Jurisdiction: 14 Section/Plat:
 Area: 001 Routing Number:
 District: 002-11 Assem. Parcel:

Owner Information
 ASBURY PARK LLC
 354 COVE COLONY WAY
 EAGLE, ID 83616

Parcel Address
 0 5 GREENBRIAR RD NA ID
 NA, ID

Certified Values

Valuation Method:	Cost	Land:	\$0
Posted Date:	5/5/2009	Building:	\$0
Change Reason:	01 - Rev	Total:	\$0
Effective Date:	01/01/2009		
Notice Printed:	NEEDED		

Current Transfer Info

Grantor:	Date:	Book:	Page:	Value:
----------	-------	-------	-------	--------

Current Land Info

Acres: 5.72 Legal Sq. Feet: 0

Legal Description:
 04-2N-2W SW GREENBRIAR EST LTS 1,2,8,20,31,32,39,50,51,53 BLK 1 COMMON AR
 EA



Checked by AVG - www.avg.com
 Version: 8.5.375 / Virus Database: 270.12.92/2203 - Release Date: 06/26/09 05:53:00

FILED
A.M. 4:30 P.M.

AUG 06 2009

**CANYON COUNTY CLERK
T EARLS, DEPUTY**

Michelle R. Points, ISB No. 6224
HAWLEY TROXELL ENNIS & HAWLEY LLP
877 Main Street, Suite 1000
P.O. Box 1617
Boise, ID 83701-1617
Telephone: 208.344.6000
Facsimile: 208.954.5252
Email: mpoints@hawleytroxell.com

Attorneys for Defendants/Counterclaimants

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

ASBURY PARK, LLC, an Idaho limited liability company; and JOHN ESPOSITO, an individual,

Plaintiffs/Counterdefendants,

vs.

GREENBRIAR ESTATES HOMEOWNERS' ASSOCIATION, INC., an Idaho non-profit corporation; DEBRA HOBBS a/k/a DEBBIE HOBBS, an individual d/b/a ACTION ASSOCIATION MANAGEMENT COMPANY,

Defendants/Counterclaimants.

Case No. CV 08-9740

AFFIDAVIT OF MICHELLE R. POINTS

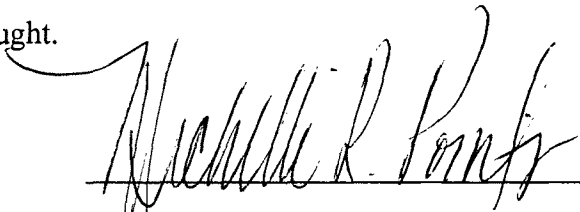
MICHELLE R. POINTS, being first duly sworn upon oath, deposes and states as follows:

1. I am an attorney with the law firm of Hawley Troxell Ennis & Hawley LLP, counsel of record for Defendants/Counterclaimants in the above-referenced matter. I make this affidavit based upon my own personal knowledge, and can testify as to the truth of the matters contained herein if called upon as a witness at the trial of this action.

2. Attached hereto as Exhibit A is a true and correct copy of the current online marketing information for Greenbriar Estates Subdivision which I located and printed on July 20, 2009, which markets the Greenbriar Estates Subdivision as having a "community storage facility" as an amenity to the Subdivision.

3. Attached hereto as Exhibit B is a true and correct copy of the Articles of Incorporation of the Greenbriar Estates Homeowner's Association, Inc., signed by John Esposito on October 4, 2005 and recorded October 5, 2005.

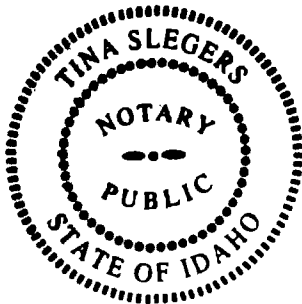
Further, your affiant sayeth naught.




Michelle R. Points

STATE OF IDAHO)
) ss.
County of Ada)

SUBSCRIBED AND SWORN before me this 6th day of August, 2009.





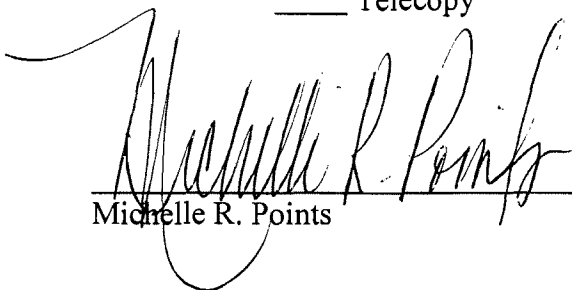
Name: Tina Slegers
Notary Public for Idaho
Residing at Nampa, ID
My commission expires June 11, 2015

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of August, 2009, I caused to be served a true copy of the foregoing AFFIDAVIT OF MICHELLE R. POINTS by the method indicated below, and addressed to each of the following:

David M. Penny
COSHO HUMPHREY, LLP
800 Park Blvd., Suite 790
Boise, ID 83712
[Attorneys for Plaintiff]

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- E-mail
- Telecopy



Michelle R. Points



Login | Register

Location: [Welcome](#) / [Information](#)

WELCOME

Welcome to Greenbriar Estates

AVAILABLE HOMES

Available homes and pricing

AVAILABLE LOTS

Available lots and pricing

COMMUNITY

View community maps

INFORMATION

Learn about community amenities and plans

BUILDERS

View our available builders

AREA

Explore the areas surrounding Greenbriar Estates

CONTACT

Request more information

Information

RESIDENTIAL LOTS

80 single family homes, 14 townhouses

COMMUNITY STORAGE FACILITY

Secure area for your extra things

COMMUNITY PARK

Over one acre of park with amenities such as gazebo, bocce courts, horseshoe pits & putting green.

GATED ENTRIES

Provide a secure community atmosphere located at both Locust & Everell Dr.



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FILED EFFECTIVE

**ARTICLES OF INCORPORATION
OF THE
GREENBRIAR ESTATES HOMEOWNERS' ASSOCIATION, INC.**

IDAHO SECRETARY OF STATE
10/05/2005 05:00
CK: 2003 CT: 192242 BH: 915247
1 P 38250 = 38.00 INC NUMP # 2

The undersigned, in compliance with the requirements of the Idaho Code, has this day incorporated a corporation not for profit and does hereby certify:

**ARTICLE I
NAME OF CORPORATION**

The name of the corporation is Greenbriar Estates Homeowners' Association, Inc., hereafter called the "Association."

**ARTICLE II
REGISTERED OFFICE**

The initial registered office of the Association is located at 354 N. Cove Colony Way, Eagle, Idaho 83616.

**ARTICLE III
REGISTERED AGENT**

John A. Esposito is hereby appointed the initial registered agent of this Association.

**EXHIBIT
B**

**ARTICLE IV
PURPOSE AND POWERS OF THE ASSOCIATION**

This Association is a nonprofit corporation. The general purposes for which it is formed are to provide for maintenance, preservation and architectural control of the residence lots, perimeter fencing, private roads and common area within that certain tract of property commonly known as the Greenbriar Estates Subdivision (other than Lot 49, Block 1) according to the plat thereof filed in the official records of Canyon County, Idaho, and any additions thereto as may hereafter be brought within the jurisdiction of this Association, hereinafter called the "Property", and to promote the health, safety and welfare of the residents within the Property. Without limiting the power and authority of the Association, the Association may take any of the following actions in furthering its purposes:

- (a) exercise all of the powers and privileges and perform all of the duties and obligations of the Association as set forth in that certain Declaration of Covenants, Conditions and Restrictions For the Greenbriar Estates Subdivision (A Community for Persons 55 or Older), hereinafter called the "Declaration," applicable to the Property and recorded in the office of the Recorder, Canyon County, Idaho, and as the same may be amended from time to time as therein provided, said Declaration being incorporated herein as if set forth at length;
- (b) fix, levy, collect and enforce payment by any lawful means, all charges or assessments pursuant to the terms of the Declaration; pay all expenses in connection therewith and all office and other expenses incident to the conduct of the business of the Association, including all licenses, taxes or governmental charges levied or imposed against the Property or the Association;
- (c) acquire (by gift, purchase or otherwise), own, hold, improve, build upon, operate, maintain, convey, sell, lease, transfer, dedicate for public use or otherwise dispose of real or personal property

C 162796

in connection with the affairs of the Association;

(d) borrow money, and, pursuant to the terms of the Declaration, mortgage, pledge, or deed in trust any or all of its real or personal property as security for money borrowed or debts incurred;

(e) dedicate, sell or transfer, pursuant to the terms of the Declaration, all or any part of the common area to any public agency, authority or utility for such purposes and subject to such conditions as may be agreed to by the members;

(f) participate in mergers and/or consolidations with other nonprofit corporations organized for the same purposes or annex additional residential property and common area, provided that any such merger, consolidation or annexation shall be in conformance with the terms of the Declaration;

(g) exercise any and all powers, rights and privileges which a corporation organized under the Idaho Nonprofit Corporation Act may by law now or hereafter have or exercise.

**ARTICLE V
MEMBERSHIP AND VOTING RIGHTS**

Membership in the Association and the voting rights associated therewith shall be as enunciated in the Declaration.

**ARTICLE VI
BOARD OF DIRECTORS**

The affairs of this Association shall be managed by a board of at least three (3) but no more than five (5) directors who need not be members of the Association. Initially, the board shall consist of three (3) directors. The number of directors may be changed by amendment of the Association's by-laws. The names and addresses of the persons who are to act in the capacity of the directors until the selection of their successors are:

<u>NAME</u>	<u>ADDRESS</u>
John A. Esposito	354 N. Cove Colony Way Eagle, Idaho 83616
Lexi R. Esposito	354 N. Cove Colony Way Eagle, Idaho 83616
Jared Sherburne	533 E. Riverside Drive Ste. 110 Eagle, Idaho 83616

At the first annual meeting, and at all annual meetings thereafter, the members shall elect all directors for a term of one (1) year.

**ARTICLE VII
DISSOLUTION**

The Association may be dissolved by a vote of not less than two-thirds (2/3) of each class of members at a duly noticed meeting. Upon dissolution of the Association, other than incident to a merger or consolidation, the assets of the Association shall be dedicated to an appropriate public agency to be used for

purposes similar to those for which this Association was created. In the event that such dedication is refused acceptance, such assets shall be granted, conveyed and assigned to any nonprofit corporation, association, trust or other organization to be devoted exclusively to such similar purposes. No part of the monies, properties or assets of the Association, upon dissolution or otherwise, shall inure to the benefit of any private person or individual or member of the Association.


**ARTICLE VIII
DURATION**

The corporation shall exist perpetually.

**ARTICLE IX
AMENDMENTS**

Amendment of these Articles shall require the assent of not less than two-thirds (2/3) of each class of members.

IN WITNESS WHEREOF, for the purpose of forming this Association under the laws of the State of Idaho, I, the undersigned, the incorporator of this Association, have executed these Articles of Incorporation this 4 day of Oct, 2005.



John A. Esposito
354 N. Cove Colony Way
Eagle, Idaho 83616



FILED
A.M. 430 P.M.

AUG 06 2009

**CANYON COUNTY CLERK
T EARLS, DEPUTY**

Michelle R. Points, ISB No. 6224
HAWLEY TROXELL ENNIS & HAWLEY LLP
877 Main Street, Suite 1000
P.O. Box 1617
Boise, ID 83701-1617
Telephone: 208.344.6000
Facsimile: 208.954.5252
Email: mpoints@hawleytroxell.com

Attorneys for Defendants/Counterclaimants

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

ASBURY PARK, LLC, an Idaho limited liability company; and JOHN ESPOSITO, an individual,

Plaintiffs/Counterdefendants,

vs.

GREENBRIAR ESTATES HOMEOWNERS' ASSOCIATION, INC., an Idaho non-profit corporation; DEBRA HOBBS a/k/a DEBBIE HOBBS, an individual d/b/a ACTION ASSOCIATION MANAGEMENT COMPANY,

Defendants/Counterclaimants.

Case No. CV 08-9740

AFFIDAVIT OF AARON RANDELL

AARON RANDELL, being first duly sworn upon oath, deposes and states as follows:

1. I have personal knowledge of the facts set forth herein and can testify as to the truth of the matters contained herein if called upon as a witness at the trial of this action.
2. I have been a member of the Planning and Zoning Commission ("the Commission") for the City of Nampa since 2004. I was on the Commission during the time that

John Esposito and his entity Asbury Park, LLC was obtaining plat approval for the Greenbriar Estates Subdivision.

3. As part of the process of presenting a preliminary plat, the developer is requested to designate those areas in the plat that are going to be common areas and/or areas to be owned and maintained by the homeowner's association.

4. The preliminary plat came before the Commission a few times, prior to final plat approval. Each time the preliminary plat was presented, the lot designated for RV Parking and Storage (Lot 39, Block 1) was represented to be owned by the homeowner's association for Greenbriar Estates Subdivision.

5. The final plat was certified by the surveyor retained by Mr. Esposito, and was approved by various other government agencies, including the Commission, based on the representations that were made in the plat, through the approval process.

6. Neither Mr. Esposito nor any agent of Mr. Esposito ever represented that Lot 39, Block 1 was going to be privately owned or that rents were going to be collected from homeowners for a storage unit that were to be built on that lot.

7. I would not have approved the Greenbriar plat had I known that there was going to be operation of private storage units as a private business venture, forced upon the Greenbriar lot owners by its developer.

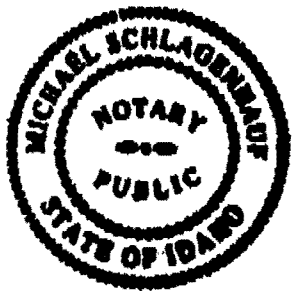
8. As a result of learning of Mr. Esposito's actions with regard to the storage facilities, the City Council adopted into law Ordinance No. 38-5, Section 10-27-1, which provides that all common area amenities will be owned and maintained by a homeowner's association and will not be privately owned.

Further, your affiant sayeth naught.

Aaron M. Randell
Aaron Randell

STATE OF IDAHO)
) ss.
County of Canyon)

SUBSCRIBED AND SWORN before me this 3rd day of August, 2009.



Michael Schlagenhaut
Name: MICHAEL SCHLAGENHAUT
Notary Public for Idaho
Residing at NAMPA, ID
My commission expires 8.19.14

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of August, 2009, I caused to be served a true copy of the foregoing AFFIDAVIT OF AARON RANDELL by the method indicated below, and addressed to each of the following:

David M. Penny
COSHO HUMPHREY, LLP
800 Park Blvd., Suite 790
Boise, ID 83712
[Attorneys for Plaintiff]

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- E-mail
- Telecopy



Michelle R. Points

Michelle R. Points

8/207

F I L E D
A.M. 4:30 P.M.

AUG 06 2009

CANYON COUNTY CLERK
T EARLS, DEPUTY

Michelle R. Points, ISB No. 6224
HAWLEY TROXELL ENNIS & HAWLEY LLP
877 Main Street, Suite 1000
P.O. Box 1617
Boise, ID 83701-1617
Telephone: 208.344.6000
Facsimile: 208.954.5252
Email: mpoints@hawleytroxell.com

Attorneys for Defendants/Counterclaimants

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
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vs.

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Defendants/Counterclaimants.

Case No. CV 08-9740

AFFIDAVIT OF PAUL PELLETIER


PAUL PELLETIER, being first duly sworn upon oath, deposes and states as follows:

1. I am a named Defendant. I have personal knowledge of the facts set forth herein and can testify as to the truth of the matters contained herein if called upon as a witness at the trial of this action.

2. In the Fall of 2008, I had requested information from the City of Nampa regarding zoning provisions that were applicable to the storage units located in the Greenbriar Estates Subdivision ("the Subdivision"), as the developer, Asbury Park, LLC and Mr. John Esposito were attempting to run a private business venture inside the Subdivision by renting - - by force - - individual storage units to homeowners in the subdivision, whether they chose to use the units or not.

3. On November 17, 2008, I received a letter from Norman Holm, Planning Director for the City of Nampa, explaining that the City had amended certain ordinances to prevent private ownership of subdivision amenities, specifically for a private business enterprise. A true and correct copy of the referenced letter is attached as Exhibit A, along with a copy of the new referenced ordinance.

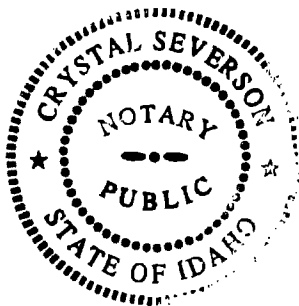
Further, your affiant sayeth naught.

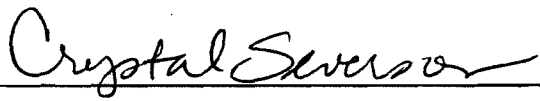


Paul Pelletier

STATE OF IDAHO)
) ss.
County of Ada)

SUBSCRIBED AND SWORN before me this 5th day of August, 2009.





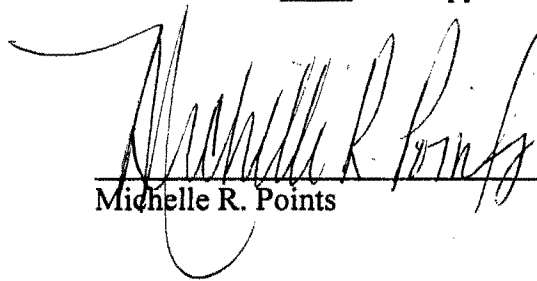
Name: _____
Notary Public for Idaho
Residing at Meridian, Idaho
My commission expires 10/24/09

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of August, 2009, I caused to be served a true copy of the foregoing AFFIDAVIT OF PAUL PELLETIER by the method indicated below, and addressed to each of the following:

David M. Penny
COSHO HUMPHREY, LLP
800 Park Blvd., Suite 790
Boise, ID 83712
[Attorneys for Plaintiff]

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- E-mail
- Telecopy



Michelle R. Points

Planning & Zoning Department

Nampa, Idaho... Today's Vision is Tomorrow's Reality

November 17, 2008

Paul Pelletier, President
Greenbriar Estates HOA
P.O. Box 1177
Nampa, ID 83652

Subject: Zoning code provisions added or amended by Ordinance No. 3805 passed by the Nampa City Council on July 7, 2008 and adopted into law August 18, 2008.

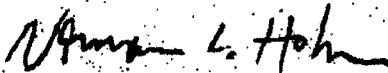
Dear Mr. Pelletier:

This letter is written in answer to your question concerning the intent of the City of Nampa regarding the preparation and adoption of the above stated zoning code provisions. Please be advised that the below listed provisions as a part of Ordinance No. 3805 were proposed by Staff, recommended for approval by the Planning & Zoning Commission, and approved by the City Council in reaction to issues and concerns arising from the development of the Greenbriar Estates Subdivision in Nampa:

- Section 10-3-2: Schedule of District/Zone Land Use Controls: Adding controls for ... Rental Storage.
- Section 10-13-5: Property Area, Width and Yard Requirements for the RP district. Adding lot/parcel legal access to public street provisions.
- Section 10-27-1: General Subdivision Policy, Jurisdiction Statement and Administrative Authority. Amending provisions requiring that residential subdivision common area amenities be located in common space(s) owned and maintained by a home/property owner's association and not be retained in private ownership by a developer.
- Section 10-27-6: General Development and Improvements: Requirements (for subdivisions): Adding lot/parcel legal access provisions to subdivision street requirements. Adding the requirement that the provision of subdivision amenities by a developer shall be held in common by property owners and shall not be retained in private ownership by a developer, or used, operated, or kept as a private business enterprise by a developer, or obligate property owners/residents within the development to pay fees or HOA dues to a developer for the feature.

These zoning code provisions were adopted by the city of Nampa with the intent that the concerns or issues realized in the development of Greenbriar Estates would not similarly arise in any future subdivision developments in the city. Should you need further information or the actual detailed language of the above listed zoning code amendments please do not hesitate to contact me.

Sincerely,



Norman L. Holm, Planning Director
CITY OF NAMPA, IDAHO

EXHIBIT
A

CHAPTER 27
SUBDIVISIONS

SECTION:

- 10-27- 1: General Subdivision Policy, Jurisdiction Statement And Administrative Authority
- 10-27- 2: Preliminary Plat Application Form, Content And Process
- 10-27- 3: Final Plat Application Form, Content And Process
- 10-27- 4: Special Subdivisions And Developments
- 10-27- 5: Appeals Of Actions On Plats
- 10-27- 6: General Development And Improvements; Requirements
- 10-27- 7: Construction Observation
- 10-27- 8: Subdivision Improvement Agreement
- 10-27- 9: Postplating Construction
- 10-27-10: Bonding And Guarantee
- 10-27-11: Dedications
- 10-27-12: Amended Plats; Vacations
- 10-27-13: Reserved
- 10-27-14: Fees

10-27-1: GENERAL SUBDIVISION POLICY, JURISDICTION STATEMENT AND ADMINISTRATIVE AUTHORITY:

- A. **Establishment And Enforcement:** Establishment, interpretation, application and enforcement of the land division regulations found in this chapter by the city of Nampa and its authorized personnel is sanctioned by Idaho Code title 50, chapter 13 and title 67, chapter 65, and article 12, section 2 of the Idaho constitution, as amended or subsequently codified. These standards or regulations shall apply to all land contained within the limits of the city of Nampa as presently constituted or as may be subsequently incorporated. They also shall apply to the area of city impact per agreement with the county, and shall be in force as allowed according to the city of Nampa and Canyon County's joint powers agreement, and as each jurisdiction's impact legislation may allow.

August 2008

City of Nampa

- B. Idaho State Code:** Idaho state code notes that a division of a tract of land into "five or more lots, parcels, or site for the purpose of sale or building development, whether immediate or future" constitutes a subdivision. Nevertheless, state code allows for individual cities or counties to "adopt their own definition of subdivision" in lieu of the state's. Nampa has defined a "subdivision" as one that creates three (3) or more lots from an original lot or parcel.
- C. Subdivision:** No person or party shall subdivide any zoned property that is located wholly or in part in the city after June 11, 2002, or subdivide land within the area of city impact after June 14, 1977, into more than two (2) parcels, unless he shall first have made, or cause to have made, a subdivision plat thereof as required by Idaho Code title 50, chapter 13, and as set forth within this chapter, save where allowed otherwise in this chapter.
- D. Review And Approval:** It is unlawful to receive or record any plat or replat within the above boundaries until such plat has been reviewed and approved by the planning and zoning commission and approved by the mayor and council, and bears the approval, by signature, of the city engineer, mayor, planning and zoning commission chairperson and the city clerk (in addition to the health district's and appropriate county official's signatures).
- E. Administrative Authority:** Discretionary administrative authority is considered retained by adoption of this legislation. That authority shall permit duly authorized representatives of the city of Nampa fire, police, forestry and parks departments to suggest subdivision design changes to the planning and zoning department. That authority shall permit duly authorized representatives of the Nampa planning and zoning department and engineering department to suggest design changes to subdivision plats undergoing review to the city's planning and zoning commission or the city council. The Nampa planning and zoning commission and city council shall carefully consider staff suggestions in their review and approval of plats.
- F. Reference Manuals:** The following manuals shall be included by this reference:
1. "Subdivision Process And Policy Manual";
 2. "Standard Construction Specification Manual".
- G. Severability And Disclaimer:** Where any word, phrase, clause, sentence, paragraph, section or other part of these regulations may

be held invalid by a court of competent jurisdiction, such judgment shall only affect that part so held invalid. City (planning and zoning commission or city council) approval of a preliminary or final plat or portion thereof shall not be considered as constituting approval of any engineering or construction drawings, applications or constructs. Such elements require separate city engineering approval. (Ord. 3573, 5-1-2006)

- H. **Common Areas:** The provision of all residential subdivision common areas along with special amenities such as/including, but not limited to: open space, tot lots, playgrounds, park area, walking path areas, water features, storage areas (e.g., for RVs, buildings that by nature of use/and or design basically equivalent to ministorage type facilities, etc.), pools and clubhouses, etc., by a project developer shall, unless otherwise specifically approved by the city council, be located in common space(s) owned and maintained by a home/property owners' association and shall not be retained in private ownership by a developer. (Ord. 3805, 7-21-2008)

10-27-2: PRELIMINARY PLAT APPLICATION FORM, CONTENT AND PROCESS:

- A. **Preapplication Conference:** After development of a concept plan, and prior to submitting a preliminary plat application or having their preliminary plat heard by the planning and zoning commission or city council, a subdivider and/or their engineer may schedule a preapplication conference with the city engineer and planning and zoning director or their designees and other agency officials.

Resubmittal(s) of plats to the planning office prior to planning and zoning commission review in a public hearing forum may necessitate rescheduling and possibly readvertising of those plats.

- B. **Application:** Every person seeking to subdivide land shall file with the planning and zoning director appropriate application materials including a completed subdivision application package including fifteen (15) copies of the preliminary plat (with supporting data as required in this section). One reduced copy eleven inches by seventeen inches (11" x 17") and one reduced copy eight and one-half inches by eleven inches (8½" x 11") of the preliminary plat together with requisite review fees shall also be concurrently submitted. An electronic copy of all preliminary plats shall be filed in AutoCAD format, version 14 or higher.

December 2008

City of Nampa

000230

FILED
A.M. 1:50 P.M.

AUG 13 2009 ✓

CANYON COUNTY CLERK
K CANNON, DEPUTY

DAVID M. PENNY ISB #3631
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Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

ASBURY PARK, LLC, an Idaho limited liability company; and JOHN ESPOSITO, an individual,

Plaintiffs,

v.

GREENBRIAR ESTATES
HOMEOWNERS' ASSOCIATION, INC., an Idaho non-profit corporation; DEBRA HOBBS a/k/a DEBBIE HOBBS, an individual d/b/a ACTION ASSOCIATION MANAGEMENT COMPANY.

Defendant.

Case No. CV 08-9740*C

**PLAINTIFFS' REPLY
MEMORANDUM IN SUPPORT OF
MOTION FOR PARTIAL
SUMMARY JUDGMENT**

I. INTRODUCTION

In order to oppose the Plaintiffs' Motion for Partial Summary Judgment, the Defendants must come forward with admissible evidence that creates a genuine issue of fact or law that supports the Defendants' position. The Defendants have not presented either to the Court in this case. For the reasons explained in this reply memorandum, the Defendants' Counterclaim must be dismissed, and judgment entered for the Plaintiffs on Count I of the Complaint.

II. ARGUMENT

A. The HOA's Fraud Theory Is Not Supported By Law Or Fact.

The HOA has not cited this Court to any case law in support of their theory that a court can award them ownership of Lot 39 based upon a claim that the developer committed fraud. This is because the legal principle known as common law dedication completely occupies that body of law. Since the HOA cannot, under any facts or circumstances, prove a case for common law dedication, it is searching for an alternative theory that simply does not exist.

Even if a fraud theory did exist, the facts of this case show that the HOA and its members have no claim.

1. **The Proceedings Before the City of Nampa Cannot Support a Fraud Claim by the HOA and its Members.**

Undisputed in the record is the Affidavit of Surveyor Gregory G. Carter, where he admits that he made a mistake when he listed Lot 39 as a common area. There was no nefarious plot to trick or deceive the City of Nampa.

Regardless, at the time that Plaintiffs went through the subdivision approval process with the City of Nampa, the HOA did not even exist. There is no evidence that the members had even heard of Greenbriar Estates. Further, while the HOA's Memorandum makes the sweeping statement that the Plaintiffs represented to the City of Nampa that Lot 39 would be a common area, there is no evidence of that issue ever coming up for discussion. While the HOA wishes to make it sound like the Plaintiffs repeatedly perpetuated a lie through the approval process, the fact is that the erroneous plat is the only "representation".

None of the facts presented by the HOA supports a theory that the HOA and its members were defrauded or misled by the plat approval process. Whether the City of Nampa feels that it was misled is between the City of Nampa and the Plaintiffs. The City of Nampa adopted a subsequent ordinance three (3) years later, however, that is irrelevant to the case before this Court.

2. The HOA and its Members Did Not Rely Upon the Plat.

The record of facts presented by both sides to this suit clearly show that the HOA and its members had both actual knowledge and record notice that the Plaintiffs owned the Lot 39 storage facilities and that rental fees would be collected for the storage units.

a) Actual Knowledge.

At Page 5 of the Defendant's Memorandum, it states:

Initially, the HOA paid Esposito rental fees for all the units, as they believed his purported ownership of the storage units was legitimate, based on the language contained in the CC&Rs. Hobbs Aff., ¶ 8.

The Defendant's Memorandum goes on to state that it was after October 2007, when an issue arose regarding a Certificate of Occupancy for the storage units, that the HOA Board or its members first discovered the error in the plat. The Defendants fully admit that they had actual knowledge of the Plaintiffs' position that Asbury Park owned Lot 39 and the rental arrangement for the storage unit as set forth in the C&Rs. According to the Defendants, they subsequently discovered the error in the plat which had been a matter of public record for more than two (2) years. Indulging the Defendants' argument that the plat was the "truth", i.e.

Lot 39 was common area, then the “truth” had been a matter of public record, before, during, and after their purchase of their lot and as a matter of law, they could not have been defrauded.

b) Record Notice.

It is ironic that the Defendants readily admit that they knew of the circumstances of which they complain, i.e. Plaintiffs’ claim of ownership to Lot 39 and the storage unit rental arrangement. As a matter of law, they are also charged with knowledge of the information in the plat and the CC&Rs. The CC&Rs were recorded October 4, 2005, and are Exhibit “3” to the Affidavit of John Esposito, as set forth in the Plaintiffs’ opening memorandum. Article IV of the CC&Rs at Section 4 clearly states that “The community storage facility shall be privately owned and operated.” The paragraph goes on to describe the storage unit rental arrangement. The HOA and its members are charged with knowledge of the recorded CC&Rs and the members took title to their property by deeds, which expressly state that title to their lots is subject to “easements, restrictions, reservations, provisions of record, and assessments, if any.” (See Affidavit of Chandra Thornquest and the warranty deeds attached thereto as Exhibit “A”.)

As cited in Plaintiffs’ opening memorandum, Idaho law recognizes that duly recorded documents provide constructive notice to subsequent purchasers of the content and information contained in the recorded document. *Miller vs. Simonson*, 140 Idaho 287, 290, 92 P.3 537 (2004). Courts in other states have specifically held that when CC&Rs are recorded before any of the parcels in a subdivision are sold, the recorded document provides constructive notice to subsequent purchasers that they will bound by the terms of the CC&Rs. *Citizens for Covenant Compliance vs. Anderson*, 12 Cal.4th 345, 906 P.2d 1314, 1330 (1996). A purchaser buying a lot

that is subject to recorded CC&Rs is deemed to have agreed to be bound by the covenants, conditions and restrictions set forth in the recorded document. *Treo @ Kettner Homeowners' Association vs. The Superior Court of San Diego*, 166 Cal.App.4th 1055, 83 Cal.Rptr.3rd 318 (2008).

3. The Plaintiffs Could Not Have Mislead or Deceived the HOA or its Members Because the Plaintiffs Did Not Sell Lots to the Members.

The Defendants' contention that the Plaintiffs were out to defraud them is refuted by the fact that the Plaintiffs did not sell to the HOA members and the original buyers from Plaintiffs unequivocally admit that they knew Asbury Park was the owner of Lot 39 and intended to rent the storage facilities to lot purchasers. The Affidavits of Mike Pearson and Jared Sherburne establish that John Esposito was up front with them, and prior to their purchase of lots clearly explained that Asbury Park would own Lot 39, construct the storage units on that lot, and then rent those storage units to the lot owners. Jared Sherburne states in his affidavit that he actually reviewed the CC&Rs for Greenbriar Estates prior to the purchase of the ninety-four (94) lots and his understanding was consistent with the CC&Rs. (Affidavit of Jared Sherburne, ¶¶ 4-6.)

The Defendants' purchase of lots after the recording of the CC&Rs and the language in their deeds preclude them from claiming fraud regarding the Plaintiffs' position that Asbury Park owns Lot 39 and the rental arrangement for the storage facilities. Their novel approach is to claim that the Plaintiffs concealed the truth and mislead them because the final plat actually stated that Lot 39 was to be a common area. They never discovered the error in the

plat until after October 2007, however, they discovered it by looking at the plat, which had been a public recorded document from prior to their purchase of their lots.

The Defendants simply cannot prove fraud. Indeed, in their Memorandum, they do not even attempt to address the elements of a fraud claim.

B. The HOA and its Members Do Not Address the Elements of Common Law Dedication as Established by Idaho Law.

The Defendants contention is that a developer who records a plat is unequivocally bound by that plat regardless of whether a mistake was made in the plat and any extreme consequences that may result. Defendants do not cite any law in support of that extreme position and their position is contrary to Idaho law.

The only citation provided by Defendants is to the restatement there to property regarding servitudes. It is the HOA's position that the Plaintiffs had a duty to transfer Lot 39 to the Association "the Common Property". This argument by the Defendants begs the question.

In order to determine the common areas, the first and primary issue is whether Lot 39 was dedicated as a common area under the doctrine of common law dedication. Since the answer to that question is a resounding "No", the duty cited by the defendants. In other words, Plaintiffs have no duty to transfer Lot 39 because it was never dedicated.

As set forth in the Plaintiffs' opening memorandum, the party contending that a dedication has occurred must prove a clear and unequivocal offer for dedication. When determining whether the owner intended to dedicate the land, the Court must consider the plat and the surrounding circumstances and conditions of development and sale of lots. (See

Saddlehorn Ranch Landowner's, Inc. v. Dyer, 2009-ID-0122.184 (Id. S.Ct. January 1, 2009) and the discussion of that case at Pages 5 through 6 of Plaintiffs' opening memorandum.)

Defendants suggest that the Court can only look at the plat and that since the plat states that Lot 39 is a common area, the Plaintiffs must deed Lot 39 to the HOA. Again, the Defendants ignore Idaho law and cite no law in support of their argument.

When considering all the facts and circumstances, there cannot be a clear an unequivocal dedication in the case at hand as a matter of law. First, Note 8 to the plat states that the common area lots are subject to the subdivision covenants, which covenants in this case state that Lot 39 is to be privately owned and used for the storage units. In addition, the Court has before it the Affidavit of Surveyor Gregory G. Carter stating that he made a mistake when he included Lot 39 in the list of common areas. There is no dispute that the CC&Rs were recorded prior to the sale of any lots and that the CC&Rs state that Lot 39, Block 1, as the storage facility, was to be privately owned by Asbury Park. Mike Pearson and Jared Sherburne as the owners of Rocky Ridge Homes knew that the Plaintiffs intended to own Lot 39 and operate it as the storage facility. The HOA and its members admit knowing the same information and are charged with record knowledge of the content of the CC&Rs. For this reason, it is impossible for a purchaser of a lot in Greenbriar Estates to claim that there was an unequivocal and clear offer to dedicate Lot 39 as a common area since they had actual and record knowledge that the Plaintiffs claimed ownership of Lot 39 at the time of sale. Further, if the purchase of a lot is a way to "accept" a dedication, the acceptance by all HOA members and the HOA are subject to the recorded CC&Rs.

C. Defendants Raise a Number of Issues That Are Irrelevant and Not Support by the Facts.

In an effort to present all possible positions, Defendant throw out some allegations which are irrelevant to the litigation before this Court and are factually wrong. Those issues will be addressed below.

1. The Statements and Conduct of John L. Scott and its Agents.

The Defendants wish to rely upon statements and information disseminated by John L. Scott and its agents and they wish to attribute that information to the Plaintiffs. The fact is that the Plaintiffs sold all ninety-four (94) lots to Rocky Ridge Homes. It was the builders that hired John L. Scott to market the property to the public. Regardless, the members had record notice of the CC&Rs at the time of their purchase and their deeds expressly made their ownership subject to matters of record. The Plaintiffs never hired John L. Scott to represent them for the sale of the lots. (See second Affidavit of John Esposito.) The representations of the builder's real estate agents are irrelevant hearsay.

2. The Limitations on Greenbriar Estates Homeowners' Association, Inc. as a Non-Profit Corporation.

Without attempting to explain the legal significance, Defendants mention that the Articles of Incorporation for Greenbriar Estates Homeowners' Association state that none of the assets of the Association upon "dissolution" shall inure to the benefit of any private person or individual. (Defendants' Memorandum, Pg. 4.) If this is a reference to the rental fees collected from the members by the HOA, it is without merit. The CC&Rs for Greenbriar at Section 4 make it clear that the rental fees are not property of the Association. The Association is simply

charged with the duty of collecting the funds from the members as part of the assessment and paying those funds over to Asbury Park.

3. Asbury Park Continues to Own Lots in the Subdivision.

The Defendants raise this issue knowing that it does not make a difference to the case. There can be no factual dispute that the Plaintiffs sold all ninety-four (94) of the building lots platted in Greenbriar Estates Subdivision No. 1 to Rocky Ridge Homes. When the Plaintiffs decided not to build an assisted care facility, that lot was platted as Greenbriar Estates Subdivision No. 2. The lots in Greenbriar Estate Subdivision No. 2 are subject to a separate plat. Prior to the marketing of lots in Greenbriar Estates Subdivision No. 2, the plat for Greenbriar Estates Subdivision No. 1 was corrected by Gregory G. Carter to make it clear that Lot 39 was not a common area. (See Affidavit of Gregory G. Carter and Exhibit "B" thereto.) None of the lots in Greenbriar Estates Subdivision No. 2 have been sold, and none of the members of the HOA are owners of lots in Greenbriar Estates Subdivision No. 2. (See second Affidavit of John Esposito, Pg. 2.)

4. The Assessment of Taxes by the Canyon County Assessor's Office.

That the Canyon County Assessor's Office was confused on the ownership of the storage unit is completely irrelevant to the issues before this Court. Defendants raise the issue through inadmissible hearsay and without tying it to any legal issue before the Court for determination.

5. The Reference to the Storage Facilities as a "Community Storage Facility."

As explained in Paragraph 10 of his affidavit, John Esposito referred to the storage facility as a "Community Storage Facility" to negate any concern that the storage facility

would be open to the public since Greenbriar Estates is a gated community. While the Defendants want to equate the word "Community" with the word "Common", the issue is irrelevant. The facts that all purchasers had at the time of acquiring a lot were set forth in the recorded CC&Rs which state that the storage facilities are privately owned by Asbury Park.

III. CONCLUSION.

Idaho has developed the body of law known as common law dedication to address the issue of whether a common area designation in a recorded plat is binding upon a developer. Application of Idaho law to the facts in this case show that the Plaintiffs did not make the requisite clear and unequivocal offer to dedicate Lot 39 as a common area because the plat contained an error and the CC&Rs made it clear that the Plaintiffs intended to retain ownership of Lot 39 as the storage facilities.

Finally, there is no fraud theory supported by law or facts. There is no genuine issue of fact and the Plaintiffs are entitled to summary judgment dismissing the Counterclaim and granting Plaintiffs judgment on Count I of the Complaint.

DATED this 12 day of August, 2009.

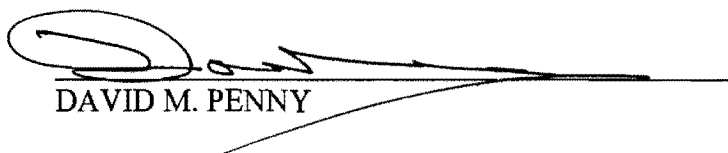
COSHO HUMPHREY, LLP


DAVID M. PENNY
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 12 day of August, 2009, a true and correct copy of the within and foregoing instrument was served upon:

Michelle Renae Points
Hawley Troxell Ennis & Hawley, LLP
P. O. Box 1617
Boise, ID 83701-1617
Served by: U.S. Mail and Facimile (954-5252)


DAVID M. PENNY

FILED
A.M. 1:50 P.M.

AUG 13 2009

CANYON COUNTY CLERK
K CANNON, DEPUTY

DAVID M. PENNY ISB #3631
COSHO HUMPHREY, LLP
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PO BOX 9518
BOISE, ID 83707-9518
Telephone (208) 344-7811
Facsimile (208) 338-3290

Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

ASBURY PARK, LLC, an Idaho limited liability company; and JOHN ESPOSITO, an individual,

Plaintiffs,

v.

GREENBRIAR ESTATES HOMEOWNERS' ASSOCIATION, INC., an Idaho non-profit corporation; DEBRA HOBBS a/k/a DEBBIE HOBBS, an individual d/b/a ACTION ASSOCIATION MANAGEMENT COMPANY.

Defendant.

Case No. CV 08-9740

AFFIDAVIT OF JOHN ESPOSITO

STATE OF CALIFORNIA)
)ss.
County of Riverside)

JOHN ESPOSITO, being first duly sworn upon oath, states as follows:

1. I am one of the Plaintiff's in the above-captioned matter. I am an individual over the age of eighteen (18) and I make this affidavit of my own personal knowledge.

CANCEL

2. Attached to my affidavit as Exhibit "A" is a true and correct copy of the plat recorded for Greenbriar Estates Subdivision No. 2.

3. None of the lots in Greenbriar Estates Subdivision No. 2 have been sold.

4. To date, the Greenbriar Estates No. 1 Homeowners' Association has opposed supplementing/amending the CC&Rs to bring the seventeen (17) lots of Greenbriar Estates Subdivision No. 2 into the Greenbriar Estates Subdivision No. 1 Homeowners' Association.

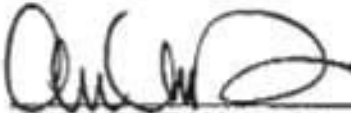
5. As stated in my first affidavit, I sold all of the ninety-four (94) building lots in Greenbriar Estates Subdivision No. 1 to Rocky Ridge Homes. I never hired or retained John L. Scott to represent me or Asbury Park, LLC for the sale of lots in Greenbriar Estates Subdivision No. 1.

FURTHER YOUR AFFLIANT SAITH NAUGHT.


JOHN ESPOSITO

SUBSCRIBED AND SWORN to before me this 11 day of August, 2009.




NOTARY PUBLIC ~~for Idaho~~ California
Residing at Riverside County
Commission expires: 8/2/2013

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 12 day of August, 2009, a true and correct copy of the within and foregoing instrument was served upon:

Michelle Renae Points
Hawley Troxell Ennis & Hawley, LLP
P. O. Box 1617
Boise, ID 83701-1617
Served by: U.S. Mail and Facsimile


DAVID M. PENNY

2400002781

PLAT SHOWING

GREENBRIAR ESTATES SUBDIVISION NO. 2

A RE-SUBDIVISION OF LOT 52, BLOCK 1 OF GREENBRIAR ESTATES SUBDIVISION
LOCATED IN A PORTION OF THE SW 1/4, OF THE SE 1/4, SECTION 4
T.2N., R.2W., B.M. CANYON COUNTY, IDAHO
2007

ACCEPTED

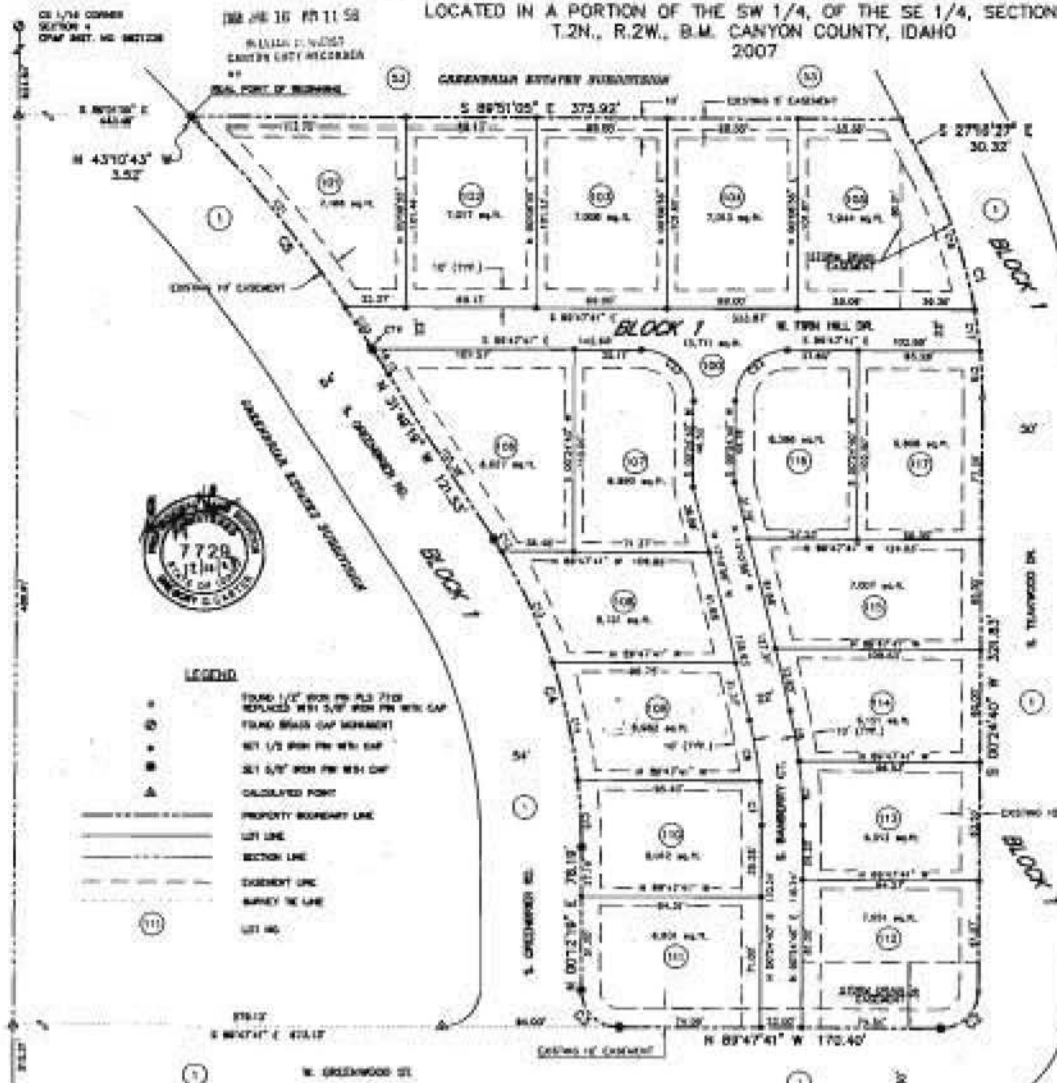
JUN 16 10 11 58

BY CLARENCE D. WOOD
CANYON COUNTY RECORDER

BY DAVID PORT OF BIRMINGHAM

CARRIAGEWAY ESTATES SUBDIVISION

(52)



NOTES:

1. ALL LOT LINES COMMON TO LOT 1, BLOCK 1 GREENBRIAR ESTATES SUBDIVISION (ORIGINAL PLAT) HAVE AN EXISTING 10% CLOSURE MUST BE MAINTAINED, PROPERTY DRAINAGE, AND EROSION CONTROL (AS SHOWN OTHERWISE SHOWN).
2. EACH SIDE OF WIDEN LOT LINES HAVE A FIVE (5) FOOT WIDE PUBLIC UTILITY, PROPERTY DRAINAGE, AND EROSION CONTROL (AS SHOWN OTHERWISE SHOWN).
3. MAINTENANCE OF ANY EROSION PREVENTION MEASURES OR WITHIN DRAINAGE, A LOT IS THE RESPONSIBILITY OF THE LOT OWNER. EROSION PREVENTION RESPONSIBILITY IS ASSIGNED BY AN EROSION CONTROL DISTRICT.
4. EROSION PREVENTION HAS BEEN PROVIDED BY THE CITY OF BIRMINGHAM (CANYON COUNTY) EROSION PREVENTION DISTRICT. IN COMPLIANCE WITH IDAHO CODE 31-200001, LOTS WITHIN THIS SUBDIVISION WILL BE SUBMITTED TO EROSION CONTROL DISTRICT, AND WILL BE SUBJECT TO ASSESSMENTS FROM THE CITY OF BIRMINGHAM.
5. ANY REVISIONS OF THIS PLAT SHALL COMPLY WITH THE APPLICABLE CANYON COUNTY ORDINANCES IN EFFECT AT THE TIME OF REVISIONS.
6. ALL LOTS IN THIS SUBDIVISION ARE DESIGNATED AS RESIDENTIAL LOTS UNLESS OTHERWISE NOTED.
7. A PORTION OF LOTS 10A AND 10B, BLOCK 1 ARE SUBJECT TO A EROSION PREVENTION EASEMENT, DEDICATED TO THE CITY OF BIRMINGHAM, AS SHOWN.
8. LOT 1, BLOCK 1 IS AN EXISTING PRIVATE STREET OWNED AND MAINTAINED BY THE HOMEOWNERS ASSOCIATION FOR LOT 1, BLOCK 1 ALSO SERVED AS AN EXISTING UTILITY ACCESS EASEMENT FOR THE LOTS IN GREENBRIAR ESTATES AND THIS SUBDIVISION AND SERVED AS A PUBLIC UTILITY EASEMENT.
9. LOT 10B, BLOCK 1 SHALL BE A PRIVATE STREET TO BE OWNED AND MAINTAINED BY THE HOMEOWNERS ASSOCIATION. LOT 10B, BLOCK 1 SHALL ALSO SERVE AS A UTILITY ACCESS EASEMENT FOR ALL LOTS IN THIS SUBDIVISION AND SERVED AS A PUBLIC UTILITY EASEMENT.
10. ALL LOT LINES COMMON TO LOT 10B, BLOCK 1 SHALL HAVE A TEN (10) FOOT WIDE PUBLIC UTILITY, PROPERTY DRAINAGE, AND EROSION CONTROL (AS SHOWN OTHERWISE SHOWN).
11. NO EROSION PREVENTION TO GREENWOOD ROAD IN GREENWOOD STREET IN S. TAYLOR DRIVE IS ALLOWED BY THE ADJACENT LOTS IN THIS SUBDIVISION.
12. LOTS 10A, 10B, 10C, 10D AND 10E HAVE AN EXISTING 10% CLOSURE MUST BE MAINTAINED, PROPERTY DRAINAGE, AND EROSION CONTROL (AS SHOWN OTHERWISE SHOWN) (SEE GREENBRIAR ESTATES SUBDIVISION JOURNAL PLAT).



LEGEND

- FOUND 1/2" IRON PIN WITH CAP
- FOUND 3/8" IRON PIN WITH CAP
- FOUND 1/2" IRON PIN WITH CAP
- FOUND 5/8" IRON PIN WITH CAP
- CALCULATED POINT
- PROPERTY BOUNDARY LINE
- LOT LINE
- SECTION LINE
- EASEMENT LINE
- SURVEY BENCH MARK
- LOT NO.

CURVE	BEARING	LENGTH	CHORD DIST.	CHORD BEG.	CHORD END
1	S 89°51'05" E	373.92'	373.92'	0.00'	373.92'
2	S 27°52'17" E	30.32'	30.32'	0.00'	30.32'
3	S 89°51'05" E	373.92'	373.92'	0.00'	373.92'
4	S 89°51'05" E	373.92'	373.92'	0.00'	373.92'
5	S 89°51'05" E	373.92'	373.92'	0.00'	373.92'
6	S 89°51'05" E	373.92'	373.92'	0.00'	373.92'
7	S 89°51'05" E	373.92'	373.92'	0.00'	373.92'
8	S 89°51'05" E	373.92'	373.92'	0.00'	373.92'
9	S 89°51'05" E	373.92'	373.92'	0.00'	373.92'
10	S 89°51'05" E	373.92'	373.92'	0.00'	373.92'
11	S 89°51'05" E	373.92'	373.92'	0.00'	373.92'
12	S 89°51'05" E	373.92'	373.92'	0.00'	373.92'
13	S 89°51'05" E	373.92'	373.92'	0.00'	373.92'
14	S 89°51'05" E	373.92'	373.92'	0.00'	373.92'
15	S 89°51'05" E	373.92'	373.92'	0.00'	373.92'
16	S 89°51'05" E	373.92'	373.92'	0.00'	373.92'
17	S 89°51'05" E	373.92'	373.92'	0.00'	373.92'
18	S 89°51'05" E	373.92'	373.92'	0.00'	373.92'
19	S 89°51'05" E	373.92'	373.92'	0.00'	373.92'
20	S 89°51'05" E	373.92'	373.92'	0.00'	373.92'
21	S 89°51'05" E	373.92'	373.92'	0.00'	373.92'
22	S 89°51'05" E	373.92'	373.92'	0.00'	373.92'
23	S 89°51'05" E	373.92'	373.92'	0.00'	373.92'
24	S 89°51'05" E	373.92'	373.92'	0.00'	373.92'

0000245

JOB NO. 06-193
SHEET 1 OF 3

DEVELOPER
JOHN COPPING
LAKE, IDAHO

IDAHO
SURVEY
ORIGIN

36 41 pr 2



GREENBRIAR ESTATES SUBDIVISION NO. 2

CERTIFICATE OF OWNERS

KNOW ALL MEN BY THESE PRESENTS: THAT ASBURY PARK, LLC, AN IDAHO LIMITED LIABILITY COMPANY, IS THE OWNER OF THE PROPERTY DESCRIBED AS FOLLOWS:

LOT 52, BLOCK 1 OF GREENBRIAR ESTATES SUBDIVISION AS FILE IN BOOK 36 OF PLATS AT PAGE 36, RECORDS OF CANYON COUNTY, IDAHO LOCATED IN THE SW1/4 OF THE SE1/4 OF SECTION 4, T.2N., R.2W., B.M., CANYON COUNTY, IDAHO MORE PARTICULARLY DESCRIBED AS FOLLOWS:

COMMENCING AT THE S1/4 CORNER SAID SECTION 4; THENCE ALONG THE NORTH-SOUTH CENTERLINE OF SAID SECTION 4 NORTH 07°24'00" EAST, 702.12 FEET; THENCE LEAVING SAID NORTH-SOUTH CENTERLINE SOUTH 88°51'05" EAST, 443.46 FEET TO THE NW CORNER OF SAID LOT 52, SAID POINT BEING THE REAL POINT OF BEGINNING; THENCE ALONG THE EXTERIOR BOUNDARY LINE OF SAID LOT 52 THE FOLLOWING COURSES: THENCE SOUTH 89°51'05" EAST, 376.82 FEET; THENCE SOUTH 27°18'27" EAST, 30.32 FEET TO THE BEGINNING OF A CURVE TO THE RIGHT; THENCE ALONG SAID CURVE 126.84 FEET, SAID CURVE HAVING A RADIUS OF 282.50 FEET, A CENTRAL ANGLE OF 27°41'07" AND A LONG CHORD OF 125.81 FEET WHICH BEARS SOUTH 13°26'53" EAST TO THE POINT OF TANGENCY; THENCE SOUTH 02°24'40" WEST, 321.83 FEET TO THE BEGINNING OF A CURVE TO THE RIGHT; THENCE ALONG SAID CURVE 31.34 FEET, SAID CURVE HAVING A RADIUS OF 20.00 FEET, A CENTRAL ANGLE OF 88°47'39" AND A LONG CHORD OF 28.23 FEET WHICH BEARS SOUTH 40°11'22" WEST TO THE POINT OF TANGENCY; THENCE NORTH 88°47'41" WEST, 170.40 FEET TO THE BEGINNING OF A CURVE TO THE RIGHT; THENCE ALONG SAID CURVE 31.42 FEET, SAID CURVE HAVING A RADIUS OF 20.00 FEET, A CENTRAL ANGLE OF 80°00'00" AND A LONG CHORD OF 28.28 FEET WHICH BEARS NORTH 44°47'41" WEST TO THE POINT OF TANGENCY; THENCE NORTH 07°12'18" EAST, 78.18 FEET TO THE BEGINNING OF A CURVE TO THE LEFT; THENCE ALONG SAID CURVE 174.40 FEET, SAID CURVE HAVING A RADIUS OF 312.00 FEET, A CENTRAL ANGLE OF 32°01'59" AND A LONG CHORD OF 172.14 FEET WHICH BEARS NORTH 15°40'30" WEST TO THE POINT OF TANGENCY; THENCE NORTH 31°40'18" WEST, 121.53 FEET TO THE BEGINNING OF A CURVE TO THE LEFT; THENCE ALONG SAID CURVE 163.32 FEET, SAID CURVE HAVING A RADIUS OF 773.62 FEET, A CENTRAL ANGLE OF 11°21'24" AND A LONG CHORD OF 163.07 FEET WHICH BEARS NORTH 37°30'01" WEST TO THE POINT OF TANGENCY; THENCE NORTH 43°10'43" WEST, 3.52 FEET TO THE REAL POINT OF BEGINNING, CONTAINING 3.02 ACRES, MORE OR LESS.

IT IS THE INTENTION OF THE UNDERSIGNED TO HEREBY INCLUDE THE ABOVE DESCRIBED PROPERTY IN THIS PLAT. THE EASEMENTS AS SHOWN ON THIS PLAT ARE NOT DEDICATED TO THE PUBLIC. HOWEVER, THE RIGHT TO USE SAID EASEMENTS IS HEREBY PERPETUALLY RESERVED FOR PUBLIC UTILITIES AND SUCH OTHER USES AS DESIGNATED WITHIN THIS PLAT, AND NO PERMANENT STRUCTURES ARE TO BE ERRECTED WITHIN THE LINES OF SAID EASEMENTS. ALL LOTS IN THIS PLAT WILL BE ELIGIBLE TO RECEIVE WATER SERVICE FROM THE CITY OF NAMPA EXISTING WATER SYSTEM AND THE CITY OF NAMPA HAS AGREED IN WRITING TO SERVE ALL THE LOTS IN THIS SUBDIVISION.

ASBURY PARK, LLC

John A. Esposito
JOHN ESPOSITO, MANAGING MEMBER

ACKNOWLEDGMENT

STATE OF IDAHO }
 } S.S.
COUNTY OF CANYON }

ON THIS 10 DAY OF December 2007 BEFORE ME, THE UNDERSIGNED, A NOTARY PUBLIC IN AND FOR SAID STATE, PERSONALLY APPEARED JOHN ESPOSITO, KNOWN OR IDENTIFIED TO ME TO BE THE MANAGING MEMBER OF ASBURY PARK, LLC, THE PERSON WHO EXECUTED THIS INSTRUMENT ON BEHALF OF SAID LIMITED LIABILITY COMPANY, AND ACKNOWLEDGED TO ME THAT SUCH LIMITED LIABILITY COMPANY EXECUTED THE SAME.

IN WITNESS WHEREOF, I HAVE HEREUNTO SET MY HAND AND AFFIXED MY OFFICIAL SEAL THE DAY AND YEAR IN THIS CERTIFICATE FIRST ABOVE WRITTEN.

Noelene M. Zedillo
BY COMMISSION EXPIRES



Noelene M. Zedillo
NOTARY PUBLIC FOR IDAHO
RESIDING IN Nampa, IDAHO

CERTIFICATE OF SURVEYOR

I, GREGORY G. CARTER, DO HEREBY CERTIFY THAT I AM A PROFESSIONAL LAND SURVEYOR LICENSED BY THE STATE OF IDAHO, AND THAT THIS PLAT AS DESCRIBED IN THE "CERTIFICATE OF OWNERS" WAS DRAWN FROM AN ACTUAL SURVEY MADE ON THE GROUND UNDER MY DIRECT SUPERVISION AND ACCURATELY REPRESENTS THE POINTS PLATTED THEREON, AND IS IN CONFORMITY WITH THE STATE OF IDAHO CODE RELATING TO PLATS AND SURVEYS.

GREGORY G. CARTER

GREGORY G. CARTER

IDAHO NO. 7729

000246

GREENBRIAR ESTATES SUBDIVISION NO. 2

APPROVAL OF CITY PLANNING AND ZONING COMMISSION

ACCEPTED AND APPROVED THIS 27th DAY OF January, 2007 BY THE PLANNING AND ZONING COMMISSION OF NAMPA, IDAHO.

Chung C. Uy
CITY ENGINEER

APPROVAL OF SOUTHWEST DISTRICT HEALTH DEPARTMENT

SANITARY RESTRICTIONS AS REQUIRED BY IDAHO CODE, TITLE 50, CHAPTER 13, HAVE BEEN SATISFIED BASED ON REVIEW BY A QUALIFIED LICENSED PROFESSIONAL ENGINEER (OLPE) REPRESENTING THE CITY OF NAMPA AND THE OLPE APPROVAL OF THE DESIGN PLANS AND SPECIFICATIONS AND THE CONDITIONS IMPOSED ON THE DEVELOPER FOR CONTINUED SATISFACTION OF THE SANITARY RESTRICTIONS. BUYER IS CAUTIONED THAT AT THE TIME OF APPROVAL, NO DRINKING WATER EXTENSIONS OR SEWER EXTENSIONS WERE CONSTRUCTED. BUILDING CONSTRUCTION CAN BE ALLOWED WITH APPROPRIATE BUILDING PERMITS IF DRINKING WATER AND SEWER EXTENSIONS HAVE SINCE BEEN CONSTRUCTED, OR IF THE DEVELOPER IS SIMULTANEOUSLY CONSTRUCTING THOSE FACILITIES. IF THE DEVELOPER FAILS TO CONSTRUCT FACILITIES THEN THE SANITARY RESTRICTIONS MAY BE REIMPOSED, IN ACCORDANCE WITH SECTION 50-1326, IDAHO CODE, BY A CERTIFICATE OF DISAPPROVAL, AND NO CONSTRUCTION OF ANY BUILDING OR SHELTER REQUIRING DRINKING WATER OR SEWER/SEPTIC FACILITIES SHALL BE ALLOWED.

DISTRICT HEALTH DEPARTMENT, REHS _____ DATE _____

COUNTY RECORDER'S CERTIFICATE

STATE OF IDAHO)
) S.S.
COUNTY OF CANYON)

I HEREBY CERTIFY THAT THIS INSTRUMENT WAS FILED FOR RECORD AT THE REQUEST OF _____
AT _____ MINUTES PAST _____ O'CLOCK _____ M., ON THIS _____ DAY OF _____, 20____
IN BOOK _____ OF PLATS AT PAGES _____ AND _____, INSTRUMENT NO. _____

DEPUTY _____

EX-OFFICIO RECORDER _____

APPROVAL OF CITY ENGINEER

I, THE UNDERSIGNED, CITY ENGINEER IN AND FOR THE CITY OF NAMPA, CANYON COUNTY, IDAHO, HEREBY APPROVE THIS PLAT.

John P. Pindler 12/14/07
CITY ENGINEER

APPROVAL OF CITY COUNCIL

I, THE UNDERSIGNED, CITY CLERK IN AND FOR THE CITY OF NAMPA, CANYON COUNTY, IDAHO, DO HEREBY CERTIFY THAT AT A REGULAR MEETING OF THE CITY COUNCIL HELD ON THE 27th DAY OF January, 2007, THIS PLAT WAS DULY ACCEPTED AND APPROVED.



Liana Lambing
CITY CLERK, NAMPA, IDAHO

CERTIFICATE OF COUNTY SURVEYOR

I, THE UNDERSIGNED, COUNTY SURVEYOR, IN AND FOR CANYON COUNTY, IDAHO, DO HEREBY CERTIFY THAT I HAVE CHECKED THIS PLAT AND THAT IT COMPLIES WITH THE STATE OF IDAHO CODE RELATING TO PLATS AND SURVEYS/VACATIONS

David E. Kinney 12/31/07
COUNTY SURVEYOR
DAVID E. KINNEY, PE/PLS 2659

CERTIFICATE OF THE COUNTY TREASURER

I, THE UNDERSIGNED, COUNTY TREASURER IN AND FOR THE COUNTY OF CANYON, STATE OF IDAHO, PER THE REQUIREMENTS OF I.C. 50-1308 DO HEREBY CERTIFY THAT ANY AND ALL CURRENT AND/OR DELINQUENT COUNTY PROPERTY TAXES FOR THE PROPERTY INCLUDED IN THIS SUBDIVISION HAVE BEEN PAID IN FULL. THIS CERTIFICATION IS VALID FOR THE NEXT THIRTY (30) DAYS ONLY.

DATE _____

COUNTY TREASURER _____

000247

F I L E D
A.M. 1:50 P.M.

AUG 13 2009

CANYON COUNTY CLERK
K CANNON, DEPUTY

DAVID M. PENNY ISB #3631
COSHO HUMPHREY, LLP
800 PARK BLVD., STE. 790
BOISE, ID 83712
PO BOX 9518
BOISE, ID 83707-9518
Telephone (208) 344-7811
Facsimile (208) 338-3290

Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

ASBURY PARK, LLC, an Idaho limited liability company; and JOHN ESPOSITO, an individual,

Plaintiffs,

v.

GREENBRIAR ESTATES HOMEOWNERS' ASSOCIATION, INC., an Idaho non-profit corporation; DEBRA HOBBS a/k/a DEBBIE HOBBS, an individual d/b/a ACTION ASSOCIATION MANAGEMENT COMPANY.

Defendant.

Case No. CV 08-9740*C

PLAINTIFFS' MOTION TO STRIKE PORTIONS OF THE AFFIDAVITS FILED BY DEFENDANTS

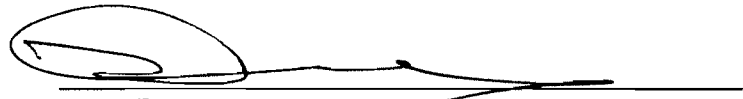
COMES NOW, the above entitled Plaintiffs, by and through their counsel of record, David M. Penny of Cosho Humphrey, LLP, pursuant to Idaho Rule of Civil Procedure 56(e) and move this Court for an order striking portions of the affidavits filed by the Defendants upon the grounds that the affidavits are based upon hearsay statements, are not admissible, and therefore should not and cannot be considered by this Court.

This Motion to Strike is based upon the supporting memorandum filed concurrently herewith.

Oral Argument is requested on this motion.

DATED this 12 day of August, 2009.

COSHO HUMPHREY, LLP

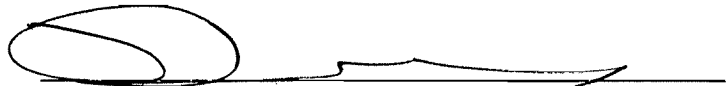


DAVID M. PENNY
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 12 day of August, 2009, a true and correct copy of the within and foregoing instrument was served upon:

Michelle Renae Points
Hawley Troxell Ennis & Hawley, LLP
P. O. Box 1617
Boise, ID 83701-1617
Served by: U.S. Mail and Facsimile (208) 954-5252


DAVID M. PENNY

F I L E D
A.M. 1:50 P.M.

AUG 13 2009

CANYON COUNTY CLERK
K CANNON, DEPUTY

DAVID M. PENNY ISB #3631
COSHO HUMPHREY, LLP
800 PARK BLVD., STE. 790
BOISE, ID 83712
PO BOX 9518
BOISE, ID 83707-9518
Telephone (208) 344-7811
Facsimile (208) 338-3290

Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

ASBURY PARK, LLC, an Idaho limited liability company; and JOHN ESPOSITO, an individual,

Plaintiffs,

v.

GREENBRIAR ESTATES HOMEOWNERS' ASSOCIATION, INC., an Idaho non-profit corporation; DEBRA HOBBS a/k/a DEBBIE HOBBS, an individual d/b/a ACTION ASSOCIATION MANAGEMENT COMPANY.

Defendant.

Case No. CV 08-9740*C

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION TO STRIKE PORTIONS OF AFFIDAVITS FILED BY DEFENDANTS PURSUANT TO I.R.C.P. 56(e)

I. INTRODUCTION

In an attempt to prevent entry of judgment for the Plaintiffs, Defendants have submitted a number of affidavits. Most of the affidavit testimony and exhibits submitted by Defendants must be stricken and disregarded by the Court because it fails to comply with I.R.P.C. 56(e) and/or is completely irrelevant to the issues to be decided by this Court.

II. ARGUMENT

A. Affidavits that Do Not Comply with I.R.C.P. 56(e) Must be Stricken and Disregarded by the Court.

I.R.C.P. 56(e) states as follows:

Rule 56(e). Form of affidavits - Further testimony - Defense required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of that party's pleadings, but the party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party.

I.R.C.P. 56 (e).

Inadmissible hearsay contained within an affidavit must be disregarded by the Court when deciding a motion for summary judgment. *Sammis vs. MagneTek, Inc.*, 130, Idaho 342, 941 P.2d 314 (1997). Under Idaho law, an affidavit that does not set forth facts admissible in evidence, but instead states an affiant's conclusions and opinions as to significance of evidence is insufficient under Idaho Rule of Civil Procedure 56(e). *Yribar vs. Fitzgerald*, 87 Idaho 336, 393 P.2d 588 (1964). The opinion of an affiant which is inadmissible as evidence cannot be considered on a motion for summary judgment. *Openshaw vs. All State Insurance Company*, 94 Idaho 192, 484 P.2d 1032 (1971). Conclusory statements that do not provide specific admissible facts cannot prevent the entry of summary judgment. *Hecla Mining Co. vs. Star-Morning*

Mining Co., 122 Idaho 778, 839 P.2d 1192 (1992). The affidavit must establish that the affiant had personal knowledge of the matters testified to in the affidavit. *Cates vs. Albertsons, Inc.*, 126 Idaho 1030, 895 P.2d 1223 (1995).

Pursuant to Idaho Rule of Evidence 802, hearsay is not admissible unless it falls within an exception recognized in Idaho Rule of Evidence 803 or 804. There are no exceptions to the prohibition against hearsay evidence for the letters, e-mails, and conversations used as part of the affidavits submitted in this case by the Defendants. Idaho Rule of Evidence 402 states that "Evidence which is not relevant is not admissible." Evidence that is offered without foundation is not relevant and therefore not admissible. *State vs. Goerig*, 121 Idaho 108, 822 P.2d 1005 (Ct. App. 1991).

As set forth below, each of the affidavits submitted by the Defendants in this matter is defective and some or all of the testimony must be stricken and given no weight in these proceedings.

1. Affidavit of Sula Wasbrough.

- Paragraphs 3 and 7 contain hearsay conversations Ms. Wasbrough had with agents for John L. Scott Real Estate. John L. Scott Real Estate and its agents worked for the builders who had purchased the lots from Asbury Park. They were not agents or representatives of Asbury Park. This hearsay testimony must be disregarded.

- Exhibits A and B to the Affidavit of Sula Wasbrough are hearsay statements contained in a flyer that she picked up at the John L. Scott sales office and a newspaper article from the Idaho Press-Tribune that came out August 24, 2008. Both documents are hearsay and

there is no foundation whatsoever as to the basis for the information contained in those documents. Both documents were generated long after Asbury Park had sold all of its lots to Rocky Ridge Homes.

- Paragraph 8 is not supported by any foundation or personal knowledge of Ms. Wasbrough. The general nature of her statement makes it misleading since the lots owned by Asbury Park are part of Greenbriar Estates Subdivision No. 2, under a separate plat, and are for sale after the correction was made to the plat for Greenbriar Estates Subdivision No. 1 in August 2007.

- In its entirety, Ms. Wasbrough's affidavit and the information she tries to convey is irrelevant since John L. Scott sold the lots for the builders and not for Asbury Park.

2. Affidavit of Paul Pelletier.

- Paragraph 2 of the Pelletier affidavit relates his conversations with undisclosed representatives of the City of Nampa and what he supposedly told them about the Plaintiffs. His self-serving statements are hearsay and lack foundation, and therefore must be disregarded.

- In Paragraph 3 of the Pelletier affidavit, he attaches a letter from the City of Nampa. The letter from the City of Nampa is hearsay and must not be considered.

- As with the other affidavits submitted by Defendants, the amendment of ordinances by the City of Nampa in 2008 is irrelevant to the case before this Court.

3. Affidavit of Kathy Kinney.

Kathy Kinney states in her affidavit that she was a certified appraiser for Canyon County in November or December 2007.

- Paragraphs 2, 3 and 4 of the Kinney affidavit recite her conversations with an undisclosed “sales representative” regarding the storage units in the subdivision. This testimony is hearsay and lacks foundation. From the affidavit, we do not even know who she spoke with.

- Paragraph 5 of the Kinney affidavit is also hearsay. Ms. Kinney testified to her treatment of the storage units for tax purposes based upon the hearsay conversations she had with the sales representative.

- Paragraphs 7 and 8 contain Ms. Kinney’s phone conversation with a Mr. Smart, as well as her conversations with her supervisor and the County Assessor. Again, all of these conversations are hearsay. There are also no facts provided in support of the statement, such as the identity of her supervisor or the County Assessor.

- Exhibit A is a hearsay letter that Ms. Kinney drafted “To Whom It May Concern” on March 2, 2009, essentially restating the hearsay statements in her affidavit.

- Exhibit B is an e-mail from Ms. Kinney to Debra Hobbs’ company, Action Management, dated Friday, June 26, 2009. That e-mail was created during the pendency of this summary judgment motion before the Court. Again, that e-mail is hearsay and a blatant attempt to create a supporting document that did not exist before the summary judgment motion was brought before the Court.

▪ The affidavit of Ms. Kinney is completely irrelevant. How taxes were assessed by the County has no bearing upon the issues of the case. The fact that Ms. Kinney did not go about the determination in a prudent manner is evident since she could have reviewed the CC&Rs and determined that Asbury Park owned Lot 39 and the storage units.

4. Affidavit of Debra Hobbs.

Ms. Hobbs was the individual who helped manage the Greenbriar HOA through her company known as Action Association Management Company. Instead of submitting an affidavit on facts known to her, her affidavit contains many conclusory and unsupported statements as well as hearsay.

▪ At the end of Paragraph 2, Ms. Hobbs states her understanding of how the City of Nampa approved the final plat without detailing how or why she has any personal knowledge whatsoever. Without any explanation, she offers her opinion that CC&Rs must conform to the final plat, however no foundation is laid for that opinion or her testimony as to what is “expected”. Conclusory statements without personal knowledge are not admissible evidence.

▪ In Paragraph 4 of her affidavit, Ms. Hobbs again attempts to provide her expert testimony on what is “customary” between a developer and a homeowners’ association. No information is provided with regard to her alleged “education and experience” and there is no attempt to explain why what she believes to be customary would apply in the case at hand. Her opinion is entitled to no weight by the Court.

▪ At the end of Paragraph 5 of her affidavit, Ms. Hobbs testifies to what the members of the Board of the HOA assumed, and of course she has no personal knowledge as to the assumptions by other individuals.

▪ With regard to Paragraph 9 of the Hobbs affidavit, what the HOA Board “decided” and the instructions given to Ms. Hobbs are hearsay.

▪ In Paragraph 10 of her affidavit, Ms. Hobbs’ attempts to testify as to the information stated in the original plat. The original plat speaks for herself and her testimony as to what it says lacks foundation, is conclusory, and is completely inaccurate. She attempts to testify that the original plat “shows that the storage units are to be owned and maintained by the HOA.” In fact, the original plat does not mention the storage units at all.

▪ Paragraphs 11, 12, and 14 of Ms. Hobbs’ affidavit reference budgeting issues for the Association which have no relevancy to the matter before this Court. In addition, she provides no analysis and makes conclusory statements about the HOA budgetary issues without any foundation.

▪ The most egregious attempt to present the Court with inadmissible information is the attachment of Exhibits A and B to Ms. Hobbs’ affidavit. Ms. Hobbs’ attempts to place before the Court hearsay conversations that she had with other people. The Defendants cannot use blatant hearsay in an attempt to erode the clear and unequivocal testimony of Rocky Ridge Home owners Mike Pearson and Jared Sherburne set forth in their affidavits. Both Exhibits A and B to the Hobbs’ affidavit concern conversations that arose after this dispute

began. Over 2/3 of Exhibit A are Ms. Hobbs own self-serving opinions. Hearsay e-mail chains are entitled to no weight or consideration by the Court.

5. Affidavit of Michelle Points.

▪ In Paragraph 2 of Ms. Points' affidavit, she attaches marketing information for Greenbriar Estates that she printed on July 20, 2009, long after Asbury Park sold all of its lots in Greenbriar Estates Subdivision No. 1. The document is hearsay, irrelevant, and there is no foundation offered as support for it. Her affidavit states that the purpose of attaching this information is to show that the storage facilities are referred to as "community". As explained in the affidavit of John Esposito, the word "community" was used to clarify that the storage facilities were not open to the "nonmember" public at large. The storage facilities are only available to lot owners in Greenbriar Estates.

6. Affidavit of Aaron Randell

▪ Aaron Randell states in his affidavit that he was a member of the Planning & Zoning Commission who voted for approval of the Greenbriar Estates Subdivision No. 1 final plat. As explained in the Plaintiffs' Reply Memorandum, Mr. Randell's affidavit is irrelevant. The fact of the matter is that the City of Nampa approved the Greenbriar Subdivision, and three (3) years later changed its ordinance as to future subdivisions.

III. CONCLUSION.


In order for the Defendants to argue that there is a genuine issue of material fact for resolution by the Court, the Defendants must rely upon admissible evidence. With rare exception, the information submitted by the Defendants is irrelevant to the determination before

this Court. Virtually all of the information offered to the Court by Defendants must be disregarded as conclusory, lacking foundation, and as inadmissible hearsay.

Plaintiffs respectfully request that the Court grant the motion to strike the testimony identified in this Memorandum.

DATED this 12 day of August, 2009.

COSHO HUMPHREY, LLP

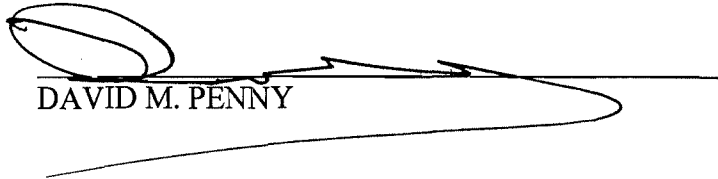


DAVID M. PENNY
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 12 day of August, 2009, a true and correct copy of the within and foregoing instrument was served upon:

Michelle Renae Points
Hawley Troxell Ennis & Hawley, LLP
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AUG 17 2009 ✓
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Attorneys for Defendants/Counterclaimants

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
 OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

ASBURY PARK, LLC, an Idaho limited liability company; and JOHN ESPOSITO, an individual,)
)
 Plaintiff s/Counterdefendants,)
 vs.)
)
 GREENBRIAR ESTATES HOMEOWNERS' ASSOCIATION, INC., an Idaho non-profit corporation; DEBRA HOBBS a/k/a DEBBIE HOBBS, an individual d/b/a ACTION ASSOCIATION MANAGEMENT COMPANY,)
)
 Defendants/Counterclaimants.)
)

Case No. CV 08-9740
 OPPOSITION TO PLAINTIFFS' MOTION TO STRIKE

Greenbriar Estates Homeowners' Association, Inc. (the "HOA"), by and through its counsel of record Hawley Troxell Ennis & Hawley, LLP, respectfully submits this Opposition to Plaintiffs' Motion to Strike portions of the affidavits filed by the HOA in response to Plaintiffs' Motion for Partial Summary Judgment.

A. Affidavit of Sula Wasbrough

Plaintiffs claim that because Ms. Wasbrough spoke with agents for John L. Scott Real Estate, and because those agents purportedly worked for the builders who purchased lots from Asbury Park, that Ms. Wasbrough's testimony should be disregarded. Plaintiffs' argument is incorrect.

Involvement by Esposito in terms of marketing of the lots after he sold them to builders is relevant to this litigation. Although Esposito states in his second affidavit (which is not admissible under Rule 56) that he did not hire John L. Scott to represent him (or Asbury Park) in the sale of lots does, that does not establish that Esposito had no input or control over how John L. Scott has and currently does market the Subdivision.

What Plaintiffs fail to acknowledge is Esposito's consistent involvement as the developer of the Subdivision, and his continued ownership of parcels within the Subdivision. The affidavit of Debra Hobbs establishes that "Mr. Esposito was working on marketing strategies for the Greenbriar Estates Subdivision to sell lots to prospective buyers, including the construction of addition amenities." Affidavit of Debra Hobbs, ¶ 3.

The marketing of the amenities goes to the "surrounding circumstances" pertaining to the HOA's claim of common law dedication.

This is not a case where Esposito, as developer, simply sold the lots to builders and walked away. It is true that there was a brief period of time that Esposito did not own a residential lot in the Subdivision, however, that does not preclude the HOA from asserting that agents for John L. Scott were working at Esposito's instruction and/or on his behalf.

Esposito or Asbury Park has owned portions of the Subdivision since its inception and certainly has an interest in its continued marketing and completion. It is the position of the HOA

that Esposito has, through agents of John L. Scott, represented (and continue to represent) that the storage facility is a common area feature and amenity owned by the HOA, which fact goes to the nature and extent of Esposito's representations, as well as his continued affirmations through marketing that the storage units are a common area feature.

Case law has established that "oral representations" even without the use of a plat "were sufficient parol evidence to establish a legally enforceable interest." *Middlekauff v. Lake Cascade, Inc.*, 110 Idaho 909, 913, 719 P.2d 1169, 1173 (1986).

In this case, it is the position of the HOA that Esposito did in fact make affirmative representations, though the development and marketing of the subdivision, that the storage units were common area amenities to be owned and maintained by the HOA, only to turn around and represent them as privately owned in the CC&Rs, developed for his financial gain.

Moreover, the statements contained in Ms. Wasbrough's affidavit are not necessarily offered to prove the truth of the matters asserted, but instead intended to reveal the nature of the representations that were being made to potential buyers, and to explain the basis of Ms. Wasbrough's opinion and/or belief that the storage units were owned by the HOA, or rather, were not privately owned.

That Plaintiffs' "argue" that the statements aren't relevant to the position they are taking in this motion does not render the statements inadmissible. The Court is perfectly capable of evaluating the testimony contained in Ms. Wasbrough's affidavit and weighing it appropriately.

Regarding the exhibits to Ms. Wasbrough's affidavit, Ms. Wasbrough testified those were items that she picked up in the sales office at the Greenbriar Estates Subdivision. Ms. Wasbrough certainly has personal knowledge of what materials she picked up. Despite the fact that Plaintiffs do not believe the issue of how the subdivision was marketed is relevant, the HOA

believes it is. The affidavits submitted establish that Mr. Esposito was involved in the development and marketing of the subdivision, and continues to market lots he owns within the subdivision. The circumstances surrounding the development and marketing of the subdivision can be looked to in evaluating the HOA's claim of dedication.

If Esposito holds the storage facilities as an amenity or common area, those representations are a confirmation of a dedication, arguably to induce homeowners to purchase property only to find out the CC&Rs say something else.

B. Affidavit of Paul Pelletier.

Plaintiffs assert that the amendment of the ordinances by the City of Nampa in 2008 is irrelevant to the case before the Court, and that Mr. Pelletier's communications with City officials on the subject is irrelevant and contain hearsay.

The amendment of the City ordinances is squarely relevant to this litigation. Esposito continually represented to the City of Nampa officials, the ownership of Lot 39, Block 1. At least one City Official testified that the plat was approved only based on representations contained therein and would not have been approved had it been known that "there was going to [the] operation of private storage units as a private business venture, forced upon the Greenbriar lot owners by its developer." Affidavit of Aaron Randell, ¶ 7. And that as a "result of learning Mr. Esposito's actions with regard to the storage facilities, the City Council adopted into law Ordinance No. 38-5, Section 10-27-1, which provides that all common area amenities will be owned and maintained by a homeowner's association and will not be privately owned." *Id.*, ¶ 8.

Esposito's representations made to City Officials – both during meetings before the Planning and Zoning Commission and in the plat – in addition to those made in marketing the subdivision, support the HOA's claim of common law dedication and/or fraudulent

misrepresentation against Esposito pertaining to the contents of the CC&Rs regarding Lot 39, Block 1.

The letter from Norman L. Holm, Planning Director for the City of Nampa, falls within the hearsay exception of 803(8) as a public record or report, as it is drafted by an agent of a public office or agency pertaining to regularly conducted activities and/or matters observed pursuant to a duty imposed by law. In this case, Mr. Holm has a duty to report on activities of the City of Nampa to its residents. In addition, the Court can take judicial notice of the referenced ordinance.

Statements made by Mr. Pelletier in paragraph 2 simply put the letter from Mr. Holm in context, and state the substance of his request to City Officials related to zoning provision. That Esposito considers Mr. Pelletier's statements to be self-serving does not render them inadmissible for the Court's consideration.

C. Affidavit of Kathy Kinney.

Plaintiffs seek to strike the affidavit of Kathy Kinney because she does not identify within the affidavit, who she spoke with at the Subdivision sales office in 2007, which sales agent represented that the storage units were owned by the HOA.

Nearly the entire affidavit of Ms. Kinney is contained in Exhibit A to her letter, which is a public record and falls within the exception of 803(8). The letter would also fall under 803(6) as a record of a regularly conducted activity including a memorandum or letter containing events and opinions, kept in the course of a regularly conducted business activity.

Moreover, the statement contained in Ms. Kinney's affidavit that she spoke with a salesperson is not offered for the truth of the matter asserted. Ms. Kinney entered into the public record/database that Lot 39, Block 1 was a common area owned by the HOA, consistent with the

plat. The basis for her treating the property as a common area owned by the HOA is not hearsay. That Ms. Kinney did not identify the sales agent by name, or her supervisor by name, does not render her testimony inadmissible.

Finally Plaintiffs appear to take the position that because a certain email was sent by Ms. Kinney to Ms. Hobbs, after Plaintiffs filed their motion for summary judgment, somehow renders the email inadmissible. There is no legal support for Plaintiffs' proposition. All exhibits to the affidavit to Ms. Kinney are public records. Exhibit A is a letter to the HOA regarding ownership issues related to Lot 39, Block 1. Exhibit B is a copy of Ms. Kinney's notes regarding Lot 39, Block 1 including a record explanation of communications regarding that lot, all of which predate the commencement of this litigation. Exhibit C. is the public record regarding assessment information for Lot 39, Block one, including its designation as a common area within the Subdivision.

Plaintiffs' claim that Ms. Kinney did not act in a "prudent" manner based on the apparent inference that she did not consult the CC&Rs is erroneous. CC&Rs do not effectuate or constitute a valid conveyance or transfer of ownership rights in real property. The City Council authorized the recording of the plat for the Subdivision based on the terms and representations contained therein.

The contents of Ms. Kinney's affidavit, generally, go to the surrounding circumstances the Court can consider on the HOA's claim of common law dedication.

D. Affidavit of Debra Hobbs.

Plaintiffs request that certain excerpts from Ms. Hobbs' affidavit not be considered on the basis that they believe they are conclusory or made without foundation. Specifically, Plaintiffs appear to take exception to Ms. Hobb's statement that the CC&Rs should conform to the final

plat. Apparently Plaintiffs do not believe that statement is correct. Or perhaps Plaintiffs take the position that notwithstanding what representations are made to City Officials, or notwithstanding what conditions are imposed by a governing body as a requirement to approving a plat, CC&Rs can nevertheless be recorded to contradict or modify that plat. Plaintiffs have not cited any authority to support that proposition, and the HOA does not expect that any such authority exists.

Plaintiffs then attack Ms. Hobb's statement regarding what she understands to be customary as between a developer and homeowner's association, based on her education and experience. In making this statement, Ms. Hobbs was simply attempting to put the facts in context for the Court. There is no indication that Plaintiffs believe Ms. Hobbs testimony to be incorrect in any way, but apparently Plaintiffs' take exception to the context Ms. Hobbs was attempting to provide. The referenced testimony is not necessarily material to the motion before the Court and if the Court chooses not to consider the informative testimony provided, that is certainly within the Court's discretion.

Next Plaintiffs object to Ms. Hobbs' testimony regarding decisions and/or assumptions made by the HOA Board. Ms. Hobbs states in her affidavit that she has personal knowledge of the facts which are testified therein, and she certainly can testify regarding her interaction with the HOA Board including what matters were discussed, the considerations the HOA Board took into account and the stated basis for their decisions, if she has personal knowledge of these issues, which she testified that she in fact has. Plaintiffs cannot strike portions of Ms. Hobbs' affidavit on the stated basis that "she has not personal knowledge", without more, when Ms. Hobbs testified that she in fact has said personal knowledge.

Next Plaintiffs object to Ms. Hobbs' testimony regarding budgeting issues, contained in paragraphs 11, 12 and 14 of her affidavit. These paragraphs, again, are simply provided to put

the monetary issues affecting the Subdivision in context for the Court. The Court does not need to operate in a "vacuum" and the HOA is certainly within its right to present the Court with a complete picture of the issues to consider. Again, this referenced testimony is not necessarily material to the motion before the Court and if the Court chooses not to consider the informative testimony provided, that is certainly within the Court's discretion.

Finally, Plaintiffs seek to strike Exhibits A and B to Ms. Hobbs' affidavit, which are email communications between Ms. Hobbs and Mike Pearson and Jared Sherburne. Plaintiffs state that the Defendants "cannot use blatant hearsay in an attempt to erode the clear and unequivocal testimony of Rocky Ridge Home owners Mike Pearson and Jared Sherburne as set forth in their testimony." Plaintiffs Memorandum in Support of Motion to Strike, p. 7. The point of introducing Exhibits A and B is to impeach the "clear and unequivocal" testimony of these witnesses. The present sense impression (803(1)) regarding ownership of Lot 39, Block 1, that Mr. Pearson and Mr. Sherburne had at the time the emails were exchanged certainly does not support the testimony contained in their affidavits, and creates an issue of material fact that this Court should consider in ruling on Esposito's motion for partial summary judgment. In addition, the contents of the emails may well also fall into the hearsay exception of 803(21) as a statement of the reputation of a person's character among the person's associates or in the community.

E. Affidavit of Michelle Points.

The Points Affidavit has attached to it current marketing information for the Subdivision which was printed off the web page for the Subdivision. This information is not offered for the truth of the matters asserted in the marketing information, but submitted to establish that Esposito, consistent with his marketing efforts since the inception of the development of the subdivision, is representing the nature of the storage units consistent with how they have been

marketed from the Subdivision's inception, as community and/or HOA amenities. Esposito certainly cannot deny that John L. Scott is acting on his behalf in marketing the Subdivision and that marketing confirms (or at the least the Court can find that one could infer that it confirms) that the storage units are a community and/or HOA amenities, not a privately owned business venture. The Court certainly has the discretion to consider such information.

F. Affidavit of Aaron Randall.

Finally Plaintiffs state that Mr. Randall's affidavit is irrelevant because "the City of Nampa approved the Greenbriar Subdivision, and three (3) years later changed its ordinance as to future subdivisions." Plaintiffs Memorandum in Support of Motion to Strike, p. 8.

As set forth above, the amendment of the City ordinances is relevant to this litigation and to the HOA's Counterclaim because Esposito continually represented to City of Nampa officials, that the HOA would own and maintain Lot 39, Block 1. Mr. Randall testifies in his affidavit that the plat was approved only based on Esposito's representations contained therein and would not have been approved had it been known that "there was going to [the] operation of private storage units as a private business venture, forced upon the Greenbriar lot owners by its developer." Affidavit of Aaron Randell, ¶ 7. And that as a "result of learning Mr. Esposito's actions with regard to the storage facilities, the City Council adopted into law Ordinance No. 38-5, Section 10-27-1, which provides that all common area amenities will be owned and maintained by a homeowner's association and will not be privately owned." *Id.*, ¶ 8.

Esposito's representations made to City Officials – both during meetings before the Planning and Zoning Commission and in the plat, support the HOA's claim of dedication, and its claim fraudulent misrepresentation against Esposito as it pertains to the contents of the CC&Rs

regarding Lot 39, Block 1. The contents of Mr. Randall's affidavit are relevant and should be considered by the Court.

RESPECTFULLY SUBMITTED THIS 17th day of August, 2009.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By Michelle R. Points
Michelle R. Points, ISB No. 6224
Attorneys for Defendants/Counterclaimants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this ___ day of August, 2009, I caused to be served a true copy of the foregoing OPPOSITION TO PLAINTIFFS' MOTION TO STRIKE by the method indicated below, and addressed to each of the following:

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Michelle R. Points
Michelle R. Points

8-20 Ryan
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A.M. 4:00 P.M.

AUG 18 2009

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Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

ASBURY PARK, LLC, an Idaho limited liability company; and JOHN ESPOSITO, an individual,

Plaintiffs,

v.

GREENBRIAR ESTATES HOMEOWNERS' ASSOCIATION, INC., an Idaho non-profit corporation; DEBRA HOBBS a/k/a DEBBIE HOBBS, an individual d/b/a ACTION ASSOCIATION MANAGEMENT COMPANY.

Defendant.

Case No. CV 08-9740*C

**PLAINTIFFS' REPLY
MEMORANDUM IN SUPPORT OF
MOTION TO STRIKE PORTIONS OF
AFFIDAVITS FILED BY
DEFENDANTS**

I. INTRODUCTION

Defendants try to defend the inadmissible and irrelevant information submitted to this Court by arguing that interesting hearsay should be exempt from the Rules of Evidence and citing exceptions to the prohibition against hearsay that are inapplicable. While most of the

response by the Defendant will be addressed at the hearing of this matter, the Defendants' citation to cases and the Rules of Evidence will be addressed in this memorandum.

II. ARGUMENT

A. There is No Exception to the Hearsay Rule for the Statements by John L. Scott Real Estate Agents.

Asbury Park had sold all of its building lots to Rocky Ridge Homes. Rocky Ridge Homes and Prestige hired John L. Scott to sell their lots. Asbury Park was not represented by the agents of John L. Scott, had no contractual relationship with the agents of John L. Scott, and had no control over the agents of John L. Scott. John L. Scott and its agents were real estate agents attempting to sell lots on behalf of the builders. While the Defendants claim that they have a right to "assert" that John Esposito influenced what the agents told potential buyers of lots being sold by the builders, the agents did not represent the Plaintiffs and the Plaintiffs were not parties to the sale of lots by John L. Scott for the builders.

B. The Public Records and Reports Exception Does Not Apply to the Letters Attached to the Affidavits of Pelletier and Kinney.

At various times, the Defendants or members acting on behalf of the Greenbriar Estates HOA have solicited information from the City of Nampa. Representatives for the City of Nampa have written letters back to the Defendants. The Defendants now wish to attach that correspondence and have it considered as "public records and reports" under Idaho Rule of Evidence 803(8). A letter written by an employee of a municipality does not magically become admissible. The design of the rule is to create an exception for public records and reports that are created and maintained because the law requires a governmental entity to create and maintain

the records and reports. Defendants try to skirt the requirement by relying on the phrase, "...or matters observed pursuant to duty imposed by law and as to which there was a duty to report." This exception to the hearsay rule is designed for matters such as meeting minutes and first-hand observation of the creation of the information that was then subsequently reported. Under the Defendants' interpretation, anything and everything that a municipal employee puts in a letter and sends out during their workday would be admissible, even though the reasons and protections for the exception would not exist.

The rule does not state that there is an exception for correspondence or letters generated by a municipal employee in response to an inquiry from a member of the public. In this particular case, it is also important to point out that the correspondence attached to the affidavits of Pelletier and Kinney contain hearsay within hearsay. For example, in Exhibit "A" to the Kinney affidavit, she is reciting what she was told by someone else in conversations she had with third parties. This information is then contained within the hearsay letter. As previously pointed out, Exhibit "B" to Ms. Kinney's letter is an e-mail that she sent to Ms. Hobbs and her company on June 26, 2009. As we know, Ms. Hobbs is a Defendant in this suit. Clearly, she has requested hearsay information from Ms. Kinney in connection with the defense of this case. The public records and reports exception and the basis for that exception to the hearsay rule do not apply.

Lastly, Defendants content that the attachments to Ms. Kinney's affidavit fall within the exception of Idaho Rule of Evidence 803(6) as regularly conducted activity. For the reasons stated above, it does not. The Defendants requested information from the City while this

litigation was pending and now wish to use that correspondence as a record of the municipality. The correspondence does not come within the list of permitted records under the rule. Further, there is no foundation provided by Ms. Kinney to support the conclusion that her correspondence is kept in the course of regularly conducted business activity.

C. There is No Hearsay Exception for the E-mail Chains Attached as Exhibits A and B to the Hobbs' Affidavit.

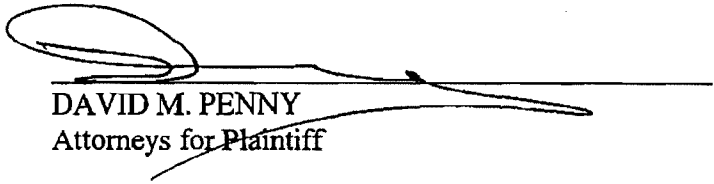
The Defendants' memorandum admits that they are trying to impeach the admissible affidavits of Mike Pearson and Jared Sherburne with inadmissible hearsay. The only justification for Exhibits "A" and "B" to the Hobbs' affidavit is that those e-mail chains come within the "present sense impression" exception to hearsay under Idaho Rule of Evidence 803(1). The present sense impression is defined by rule as, "A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." If that exception were to apply to the e-mail chains attached to the Hobbs' affidavit, then the exception has swallowed up and consumed the hearsay rule rendering all hearsay admissible. The present sense impression exception is for statements made by the declarant while observing an occurrence, accident or event. In order for the exception to apply, the declarant must be observing something occurring at the time that the declarations are made. In the case at hand, the subject matter of the e-mail chains was not something that the parties to the correspondence were observing other than perhaps looking at their computer screen. Most of Exhibit "A" contains e-mail correspondence authored by Debbie Hobbs and not either Pearson or Sherburne. There is no applicable exception and the exhibits to Ms. Hobbs' affidavit must be stricken.

III. CONCLUSION.

The Defendants' opposition to the motion for partial summary judgment is not supported by admissible evidence. Not only is the information submitted largely irrelevant, it is not admissible and must be disregarded by the Court.

DATED this 18 day of August, 2009.

COSHO HUMPHREY, LLP



DAVID M. PENNY
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 18 day of August, 2009, a true and correct copy of the within and foregoing instrument was served upon:

Michelle Renae Points
Hawley Troxell Ennis & Hawley, LLP
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Boise, ID 83701-1617
Served by: Facimile (954-5252)



DAVID M. PENNY

FILED
A.M. 03 P.M.

SEP 21 2009

CANYON COUNTY CLERK
T. CRAWFORD, DEPUTY

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

ASBURY PARK, LLC, an Idaho limited liability company, and JOHN ESPOSITO, an individual,

Plaintiffs,

-vs-

GREENBRIAR ESTATES HOMEOWNERS' ASSOCIATION, INC., an Idaho non-profit corporation; DEBRA HOBBS a/k/a DEBBIE HOBBS, an Individual d/b/a ACTION ASSOCIATION MANAGEMENT COMPANY,

Defendants.

Case No. CV 2008-09740*C

**MEMORANDUM DECISION ON
PLAINTIFFS' MOTION FOR
PARTIAL SUMMARY JUDGMENT**

On August 20, 2009, this matter came on for hearing upon Plaintiffs' Motion for Partial Summary Judgment. Appearing on behalf of the plaintiffs was David M. Penny, attorney at law. Appearing on behalf of the defendants was Michelle R. Points, attorney at law. The motion seeks dismissal of the Counterclaims filed in this case and judgment on Count I of the Complaint. Also before the Court is Plaintiffs' Motion to Strike Portions of the Affidavits Filed by the Defendants.

Factual Background as Drawn from the Motion, Pleadings & Affidavits

Plaintiffs Asbury Park, LLC, and John Esposito (hereinafter, collectively referred to as “Esposito”) are the developers of Greenbriar Estates Subdivision (hereinafter Subdivision). In 2005, Esposito began development of the Subdivision, including construction of a storage facility with ninety-four (94) storage units for use by the residents of the Subdivision. The Greenbriar Estates Homeowners’ Association, Inc. (hereinafter “HOA”) represents the interests of the property owners in the Subdivision. Debbie Hobbs runs the business Action Association Management and is engaged in the management of the HOA.

On September 23, 2005 the plat for the Subdivision, approved by the Nampa City Council, was recorded. Pursuant to Note 8 of the plat, Lot 39, Block 1, was designated as one of several “common area lots” which shall be maintained by the HOA “as established in the subdivision covenants.” The storage facility was constructed on Lot 39, Block 1, of Greenbriar Estates Subdivision.

On October 4, 2005 Esposito recorded the CC&Rs which identified the storage facility as private property belonging to Esposito. Pursuant to the CC&Rs, the budget for the HOA consisted of \$75/month/Single Family Lot, \$35 of which was allocated to the rental rate for the storage units. HOA was responsible for making the rental payments to Esposito and Esposito was responsible for the operation and maintenance of the storage facility.

The Articles of Incorporation for Greenbriar HOA (Articles) were recorded on October 5, 2005. The Articles provide that the HOA will provide maintenance to all common areas, with the exception of Lot 49, Block 1.

Initially, the HOA paid Esposito rental fees for all the units, as they believed his ownership of the storage units was legitimate, based on the language contained in the CC&Rs. (Defendants/Counterclaimants’ Response to Plaintiffs/Counterdefendants’ Motion for Partial Summary Judgment, page 5 paragraph 2, *See also*, Hobbs Aff. ¶8.). Specifically, the HOA paid Esposito rental fees for twenty-five (25) of the lots through January 1, 2008. As the remaining lots were constructed, HOA began to make payments on those as well.

All common areas of the Subdivision were turned over to the HOA on July 5, 2007 with the exception of the storage facility which was specifically reserved to Esposito. HOA did not

contest the exclusion of the facility at this time as “no member of the Board of the HOA questioned Esposito’s representation that he should retain ownership over that lot.” (Defendants/Counterclaimants’ Response to Plaintiffs/Counterdefendants’ Motion for Partial Summary Judgment, page 4 paragraph 2, *See also*, Hobbs Aff. ¶5).

On July 31, 2007, Esposito recorded an Affidavit Authorizing Correction to Plat, of Greenbriar Estates Subdivision. This is the affidavit of Gary Carter, the professional land surveyor who was involved in the preparation of the plat. The affidavit admits that the storage facility should not have been designated as a common area in Note 8 of the original plat. (See affidavit of Gregory Carter). At least several Warranty Deeds drafted after July 31, 2007 contain a reference to the amended plat which is recorded as Instrument No. 2007051839. (See affidavit of Chandra Thornquest).

In October 2007, it was discovered that Esposito did not have a Certificate of Occupancy for all of the storage units. Following this discovery, the HOA claims that it learned that the plat, as originally filed, showed that the common area, including Lot 39, Block 1, was to be “owned and maintained by the Homeowner’s Association as established in the subdivision covenants.” (See Note 8 of the original plat). Nevertheless, according to the language contained in the Warranty Deeds, Buyers took title to their parcels according to the official plat and subject to the CC&Rs. Thus, the existence of the original plat, including Note 8, had always been disclosed yet it was not until October, 2007 that the HOA raised the conflict. Prior to that time, HOA admittedly operated under the belief that Esposito’s ownership of the facility was legitimate. The HOA stopped paying the full obligation to Esposito beginning in October and in February, 2008, the HOA stopped making any payments to Esposito.

Although the original plat has been corrected, the CC&Rs have never been amended. Thus, Exhibit B containing the legal description of the common areas and the plat attached to the CC&Rs as Exhibit C has not been modified.

Standard for Summary Judgment

Summary judgment is proper when “the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” I.R.C.P. 56(c); *see also West*

Wood Investments, Inc. v. Acord 141 Idaho 75, 82, 106 P.3d 401, 409 (2005). In a motion for summary judgment, this Court should liberally construe all facts in favor of the nonmoving party and draw all reasonable inferences from the facts in favor of the nonmoving party. *West Wood Investments, Inc. v. Accord*, 141 Idaho at 82, P.3d at 409. Summary judgment must be denied if reasonable persons could reach differing conclusions or draw conflicting inferences from the evidence presented. *Id.* (citing *Iron Eagle Dev., L.L.C. v. Quality Design Sys., Inc.*, 138 Idaho 487, 491, 65 P.3d 509, 513 (2003) (citations omitted); see also *Willie v. Bd. of Trustees*, 138 Idaho 131, 133, 59 P.3d 302, 304 (2002)).

On a motion for summary judgment, the burden is always upon the moving party to prove the absence of a genuine issue of material fact. If, however, the basis for a properly supported motion is that no genuine issue of material fact exists with regard to an element of the non-moving party's case, it is incumbent upon the non-moving party to establish an issue of fact regarding that element. *Yoakum v. Hartford Fire Ins. Co.*, 129 Idaho 171, 923 P.2d 416 (1996).

A trial court, in ruling on a motion for summary judgment, is not to weigh evidence or resolve controverted factual issues. *American Land Title Co. v. Isaak*, 105 Idaho 600, 671 P.2d 1063 (1983).

The court must liberally construe facts in the existing record in favor of the party opposing the motion, and to draw all reasonable inferences from the record in favor of the nonmoving party. If the record contains conflicting inferences or reasonable minds might reach different conclusions, a summary judgment must be denied. *Loomis v. City of Hailey*, 119 Idaho 434, 807 P.2d 1272 (1991).

Summary judgments should be granted with caution. If the record contains conflicting inferences or reasonable minds might reach different conclusions, a summary judgment must be denied. *Bonz v. Sudweeks*, 119 Idaho 539, 808 P.2d 876 (1991).

Plaintiffs' Motion for Partial Summary Judgment

Plaintiff filed a motion for partial summary judgment on June 19, 2009 to obtain judgment dismissing the Counterclaims filed by Greenbriar Estates Homeowners' Association

(hereinafter HOA) and judgment in favor of Plaintiff Asbury Park, LLC (hereinafter Esposito) on Count I of the Plaintiffs' Complaint.

Esposito's Complaint alleges and the defendants do not refute that the CC&R's constitute a contract between the developer and the homeowners and HOA. Count 1 alleges that pursuant to Article IV, Section 4 of the CC&Rs, the Community Storage Facility was to be privately owned and operated. Paragraph 18 of Count 1 alleges that the HOA has breached the contract between the HOA and Esposito by failure to pay rent due to Esposito. The initial budget for the regular assessments to the homeowners called for monthly assessments of \$75.00, \$35.00 of which would be allocated as rent for the storage units.

In response, HOA asserts that it owns Lot 39, Block 1, and therefore the storage facility based upon several alternative and viable legal theories.

The HOA first claims ownership on the basis that Esposito made fraudulent misrepresentations to the planning and zoning department of the City of Nampa. Specifically, by declaring in the plat presented to the city council and to potential buyers that Lot 39, Block 1, designated as RV parking and storage shall be owned and maintained by the homeowners' association when he was representing to the buyers that he will privately own Lot 39, Block 1, upon which he will build and maintain a storage facility for which he will collect rent from the HOA.

Secondly, HOA argues that it is entitled to ownership because Esposito had an obligation to deed over all common areas, including Lot 39, Block 1, to the HOA upon turning over the Subdivision pursuant to the Restatement Third of Property – Servitudes § 6.19.

Finally, HOA argues when Esposito filed the original plat that declared Lot 39, Block 1, to be a storage facility that “shall be owned and maintained by the homeowners association”, that this filing constituted a common law dedication of the facility to the HOA.

Esposito moves the court to find as a matter of law that HOA cannot establish ownership of the facility upon any of the above stated theories.

Analysis

Although there is a dispute as to whether any or all of the legal theories advanced by the defendants create an ownership interest for the HOA in the storage facility, the facts as recited above are not in dispute. Therefore, the Court will analyze the viability of the legal theories of ownership.

A. Quiet Title based on Fraudulent Misrepresentation

The burden is on the HOA to show that the elements of fraud have been met. Fraud claims must be pled with particularity. *Dengler v. Hazel Blessinger Family Trust*, 141 Idaho 123, 127, 106 P.3d 449, 453 (Idaho 2005) (citing I.R.C.P. 9(b); *see also Estes v. Barry*, 132 Idaho 82, 86, 967 P.2d 284, 288 (1998); *G & M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 518, 808 P.2d 851, 855 (1991); *Witt v. Jones*, 111 Idaho 165, 168, 722 P.2d 474, 477 (1986)). The *prima facie* case of fraud requires:

- (1) a representation;
- (2) its falsity;
- (3) its materiality;
- (4) the speaker's knowledge of its falsity or ignorance of its truth;
- (5) his intent that it should be acted on by the person and in the manner reasonably contemplated;
- (6) the hearer's ignorance of its falsity;
- (7) his reliance on the truth;
- (8) his right to rely thereon;
- (9) his consequent and proximate injury.

Id., (citing *Samuel v. Hepworth, Nungester & Lezamiz, Inc.*, 134 Idaho 84, 89, 996 P.2d 303, 308 (2000)).

In this case, HOA alleges that Esposito's representations to the Nampa City Planning and Zoning (hereinafter Planning and Zoning) constituted an act of fraud. Specifically, that "Esposito repeatedly misrepresented to officials at the City of Nampa that Lot 39, Block 1 was in fact a common area that 'shall' be owned and maintained by the HOA, when, according to Mr. Esposito's recitation of the facts, he intended from the beginning to draw substantial income from the lot owners in the form of rental fees and 'at no time' intended to deed Lot 39, Block 1, to the HOA as a common area." (Defendants/Counterclaimants' Response to Plaintiffs/Counterdefendants' Motion for Partial Summary Judgment, page 7, ¶4).

Upon the record before the Court, the only false representation to Planning and Zoning is made in Note 8 of the original plat. Note 8 states: "LOTS 2, 8, 20, 32, 39, 50, 51, AND 53, BLOCK 1

ARE DESIGNATED AS COMMON AREA LOTS AND SHALL BE OWNED AND MAINTAINED BY THE HOMEOWNER'S ASSOCIATION AS ESTABLISHED IN THE SUBDIVISION COVENANTS."

HOA contends that the Nampa City Planning and Zoning Commission would not have approved the plat had it known that Lot 39, Block 1, was to remain private. In support, HOA submits the affidavit of Aaron Randell, a member of the Planning and Zoning Commission. Therein, he states that he would not have approved of the plat had he been aware of Esposito's intent to retain ownership of Lot 39, Block 1. (See Affidavit of Aaron Randell, page 2). Nevertheless, it is merely speculation as to opinion the entire commission.

HOA has also submitted the affidavit of Paul Pelletier, the President of the HOA, with a letter from Normal L. Holm, Planning Director for the City of Nampa, attached as Exhibit A. The letter, drafted after the Complaint in this case was filed, purports to establish that the City adopted Ordinance No. 3805 in reaction to issues and concerns arising from the development of the Greenbriar Estates Subdivision in Nampa. (See affidavit of Paul Pelletier, Exhibit A). The letter clearly constitutes hearsay and should be stricken pursuant to the plaintiffs' motion to strike.

Even if it can be established that the City never would have approved the plat had it specifically set forth that Lot 39, Block 1, and the storage facility would be privately owned and rented to the HOA, there is nothing in the record from which the Court could conclude or infer that the City suffered any injury or damage as a result of this misrepresentation. Certainly, the HOA cannot claim that it was defrauded. By its own admission, as far as the HOA was concerned, Lot 39, Block 1, was always represented to be privately owned by Esposito and that the HOA would pay rent for the facility.

To be fair, the representations made in the original plat contained in Note 8 were also made to many of the members of the HOA in their Warranty Deeds. However, the HOA clearly was relying upon the language in the CC&R's which established the storage facility as privately owned for which the HOA would pay rent. Thus, although the HOA can make the claim that the misrepresentation was also made to them, the facts do not establish that the HOA relied upon that misrepresentation.

B. Restatement Third of Property – Servitudes, § 6.19

The Restatement Third of Property – Servitudes, § 6.19 states:

- (1) The developer of a common-interest-community project has a duty to create an association to manage the common property and enforce the servitudes unless exempted by statute.
- (2) After the time reasonably necessary to protect its interests in completing and marketing the project, the developer has a duty to transfer the common property to the association, or the members, and to turn over control of the association to the members other than the developer.

Comment C states:

c. Transfer of common property. The common property that must be transferred includes all real and personal property intended for the community, including the governing documents of the community, rules and regulations, insurance policies, funds of the association, and the records of the association from its inception. REST 3d PROP-SERV § 6.19.

HOA argues that Lot 39, Block 1, was a common area and that, according to the restatement, Esposito had a duty to deed Lot 39, Block 1, to the HOA. Whether or not Lot 39, Block 1, was a common area is at issue in this case. The obligation, per the restatement, only arises if Lot 39, Block 1, is in fact a common area. The restatement cites to *Sun Valley Iowa Lake Ass'n v. Anderson*, 551 N.W.2d 621, 633 (Iowa 1996). In *Sun Valley*, the parties disputed whether or not certain lots were common areas. The common properties were not defined in the covenants, with a qualification that they would be designated. *Id.* at 626. The ambiguity was resolved by looking at the general scheme or plan for development, including the covenants, representations made to governmental authorities regarding common areas, statements by sales personnel made to prospective buyers, sales brochures, and videotapes. *Id.* at 633. In *Sun Valley*, the developer had signed a transfer agreement to the effect that he would transfer ownership of all common areas to the landowners' association. *Id.* at 626. Based on the Court's determination that certain areas were common areas and based on the existence of the transfer agreement, the Court awarded ownership of the common areas to the association. *Id.* at 633.

The analysis undertaken by the Court in *Sun Valley* is similar to that taken by Idaho courts in determining whether or not certain lots are common areas. See *Sun Valley Land and Minerals, Inc. v. Hawkes*, 138 Idaho 543, 66 P.3d 798 (2003); *Ponderosa Homesite Lot Owners*

v. *Garfield Bay Resort, Inc.*, 143 Idaho 407, 146 P.3d 673 (2006); *Saddlehorn Ranch Landowner's Inc., v. Dyer*, 146 Idaho 747, 203 P.3d 682 (2009). Idaho has adopted the doctrine of common law dedication, which provides that a lot may be deemed to be a common area by a showing that it was the intent of the developer to create a common area. The two approaches are similar in that both look to the circumstances surrounding the development and the sale of lots to determine the character of the lots in question. Since the doctrine of common law dedication occupies this field of law in Idaho, the analysis of whether or not Lot 39, Block 1, is a common area necessarily revolves around whether or not Lot 39, Block 1, was designated pursuant to Idaho law.

C. Common Law Dedication

A “[d]edication is essentially the setting aside of real property for the use or ownership of others. Idaho recognizes common law dedication of land both for public, as well as for private use.” *Sun Valley Land and Minerals, Inc. v. Hawkes*, 138 Idaho 543, 548, 66 P.3d 798, 803 (2003) (citing *Monaco v. Bennion*, 99 Idaho 529, 532, 585 P.2d 608, 611 (1978)).

The determination of a common law dedication is a question of law. See *Ponderosa Homesite Lot Owners v. Garfield Bay Resort, Inc.*, 139 Idaho 699, 85 P.3d 675 (2004). To establish common law dedication, a two prong test must be met. “(1) an offer by the owner clearly and unequivocally indicating an intent to dedicate the land and (2) an acceptance of the offer.” *Saddlehorn Ranch Landowner's Inc., v. Dyer*, 146 Idaho at Page 7, 203 P.3d at 681-681 (2009) (quoting *Ponderosa Homesite Lot Owners v. Garfield Bay Resort, Inc.*, 143 Idaho 407, 409, 146 P.3d 673, 675 (2006)). The party alleging that an act or omission manifested an intent to dedicate must show that the offer for dedication was clear and unequivocal, thereby indicating the owner’s intent to dedicate the land. *Id.* “[W]hen an owner of land plats the land, files the plat for record, and sells the lot by reference to the recorded plat, a dedication of public areas indicated by the plat is accomplished.” *Id.* (quoting *Monaco v. Bennion*, 99 Idaho 529, 533 (1978)).

“The offer to dedicate may be made in a number of ways, including the act of recording or filing a subdivision plat depicting the specific areas subject to dedication, so long as there is a clear

and unequivocal indication the owner intends to dedicate the land as depicted ... In determining whether the owner intended to offer the land for dedication, the court must examine the plat, as well as ‘the surrounding circumstances and conditions of the development and sale of lots.’” *Ponderosa Homesite Lot Owners v. Garfield Bay Resort, Inc.*, 143 Idaho at 409, 146 P.3d at 675 (2006) (quoting *Sun Valley Land and Minerals Inc. v. Hawkes*, 138 Idaho at 548, 66 P.3d at 803)).

The purpose of the doctrine of common law dedication is to protect the interests of purchasers who rely solely on the value of the public areas as reflected in the plat. *Saddlehorn Ranch Landowner’s Inc., v. Dyer*, 146 Idaho at Page 7, 203 P.3d at 682 (2009).

Esposito stresses that the HOA cannot meet the first prong of the two part test. That is, there was never an offer clearly and unequivocally indicating an intent to dedicate Lot 39, Block 1, as common area. In *Saddlehorn*, the Court held that a court must consider the plat, as well as the surrounding circumstances in determining the intent of the owner to dedicate a parcel of land. See *Saddlehorn Ranch Landowner’s Inc., v. Dyer*, 146 Idaho 747, at Page 7, 203 P.3d at 682 (2009). The only fact that the HOA points to is the disclosure in Note 8 of the originally recorded plat. But that fails to take into consideration the other surrounding circumstances such as: (1) the CC&R’s clearly set forth in writing that Lot 39, Block 1, and the storage facility thereon is privately owned and that the HOA would be paying a set rental fee; (2) that the HOA did pay rent; and (3) that the HOA admits that it understood from the CC&R’s and representations made by Esposito that Lot 39, Block 1, and the storage facility would be privately owned.

Esposito emphasizes and there is no dispute that Article IV, Section 4 of the CC&Rs made clear that the facility was to be privately owned. Article IV, Section 4 of the CC&Rs states:

“Section 4. Community Storage Facility. **The Community Storage Facility shall be privately owned and operated.** The Community Storage Facility owner will not be a member in the Association and shall not be required to pay Assessments. The Community Storage Facility owner will be entitled to fair market value rental rate, as determined in its sole and absolute discretion, for the use of the storage units within the Community Storage Facility; provided however, that such rental rate may not be increased by more than five percent (5%) during any twelve (12) month period. **The Community Storage Facility owner shall be solely responsible for the operation and maintenance of the Community Storage Facility.**

The Community Storage Facility shall only be available for use by Owners and Residents. Every Owner shall be entitled to use one storage unit within the Community Storage Facility. The rental rate for the use of these storage units shall be included in each Owner's Regular Assessments. Non-use by an Owner of a storage unit will not preclude him/her/them from paying Assessments associated with their storage unit. Subject to Availability, Owners may lease additional storage units and the rent associated therewith may be included in their Assessments or billed separately. Subject to Availability, Residents may also lease storage units within the Community Storage Facility."

Esposito further argues and there is no dispute that the initial transfer of all 94 lots to Rocky Ridge Homes was done with the clear understanding that Esposito was reserving ownership of Lot 39, Block 1 (the facility). (See affidavits of Jared Sherburne and Mike Pearson). There was no offer of dedication to the subsequent purchasers because those transfers were all made conditional to the recorded CC&Rs which reserved ownership in Esposito. (See affidavit of Chandra Thornquest).

In response, HOA argues that the surrounding circumstances in this case do demonstrate an intent to dedicate Lot 39, Block 1. "All actions taken by Esposito were consistent with the HOA owning Lot 39, Block 1 as a common area and amenity to the Subdivision." (Defendants/Counterclaimants' Response to Plaintiffs/Counterdefendants' Motion for Partial Summary Judgment, at Page 11, ¶¶1-2). HOA argues that "Esposito clearly and unequivocally indicated, in his representation of the plat to the Commission and to the City Council, that Lot 39, Block 1, was to be owned by the HOA. That offer was accepted by the Commission and City Council, as evidenced by their respective approval of the plat." (Defendants/Counterclaimants' Response to Plaintiffs/Counterdefendants' Motion for Partial Summary Judgment, at Page 10, ¶ 2.) HOA further argues that the plat likely would not have been approved had Esposito disclosed that Lot 39, Block 1, was to be privately owned. HOA also cites to the advertising and marketing of the Subdivision, the lack of tax assessments levied on Esposito, and the Articles of Incorporation which appear to include Lot 39, Block 1, as a common area as evidence of a clear and unequivocal intent to dedicate Lot 39, Block 1.

However, none of the HOA's arguments address the underlying purpose of the doctrine of common law dedication. That is, to protect the interest of purchasers who rely on the value of the public areas when making the decision to purchase.

"It is presumed that all such places add value to all the lots embraced in the general plan and that the purchasers invest their money upon the faith of this assurance that such open spaces, particularly access ways, are not to be the private property of the seller." *Monaco v. Bennion*, 99 Idaho 529, 533, 585 P.2d 608, 612 (1978).

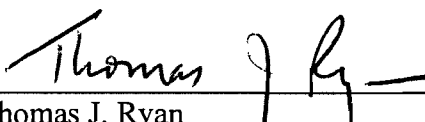
In this case, there is no dispute that the HOA and all of its members purchased their lots with the understanding that they would be paying rent for the storage facility on Lot 39, Block 1, as set forth in the CC&R's. The Subdivision was platted in 2005 and it was not until 2007 that the HOA even discovered the discrepancy in the original plat. The relevant inquiry is not based on the perceptions of the City Council in accepting the plat, but rather, on the parties who subsequently rely on the plat in deciding whether or not to purchase lots within the subdivision. In this case, the surrounding circumstances clearly refute the position that the members of the HOA relied on the plat to inform them about the storage facility. The HOA admits that it thought that the storage facility was privately owned. Moreover, HOA did not contest the exclusion of Lot 39, Block 1, when the common areas were turned over because they admittedly thought that it was owned by Esposito. Therefore, it is this Court's opinion that the only reasonable inference that can be drawn from these facts is that the purchasers did not rely upon Note 8 of the originally recorded plat in making a value determination.

The burden is on the party asserting that there has been a common law dedication to show that the owner clearly and unequivocally intended to dedicate the parcel. Even when the Court is required to make all reasonable inferences in favor of the party opposing a motion for summary judgment, this Court cannot find that the HOA can meet this burden.

Conclusion

The HOA has failed to advance a viable theory of ownership to Lot 39, Block 1. Accordingly, summary judgment is appropriate on Count I of the plaintiffs' Complaint and dismissal of the Counterclaims of the defendants. Counsel for the plaintiffs is directed to submit an Order for the Court's signature consistent with this Memorandum Decision.

DATED: 9/21/09




Thomas J. Ryan
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Memorandum Decision was mailed, postage prepaid, to the following persons on this 21 day of September, 2009.

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MICHELLE R. POINTS
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By: 

Deputy Clerk

FILED
A.M. 470 P.M.

OCT 05 2009

CANYON COUNTY CLERK
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Attorneys for Defendants/Counterclaimants

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

ASBURY PARK, LLC, an Idaho limited
liability company; and JOHN ESPOSITO,
an individual,

Plaintiffs/Counterdefendants,

vs.

GREENBRIAR ESTATES HOMEOWNERS'
ASSOCIATION, INC., an Idaho non-profit
corporation; DEBRA HOBBS a/k/a DEBBIE
HOBBS, an individual d/b/a ACTION
ASSOCIATION MANAGEMENT
COMPANY,

Defendants/Counterclaimants.

Case No. CV 08-9740

MOTION FOR RECONSIDERATION

COMES NOW Defendant/Counterclaimants Greenbriar Estates Homeowner's
Association, by and through their counsel of record Hawley Troxell Ennis & Hawley, LLP,
respectfully submits this Motion for Reconsideration pertaining to this Court's Memorandum
Decision on Plaintiffs' Motion for Partial Summary Judgment, filed September 21, 2009.

This motion is brought under Idaho Rule of Civil Procedure 11(a)(2)(B).

The basis of this motion is that the Court's Memorandum Decision did not address numerous issues of material fact raised by the Greenbriar Homeowner's Association in their Opposition to Plaintiffs' Motion for Partial Summary Judgment and further made several erroneous conclusions of law in granting said motion.

This motion is supported by the Memorandum in Support of Motion for Reconsideration, filed concurrently herewith.

DATED THIS 5th day of October, 2009.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By 

Michelle R. Points, ISB No. 6224

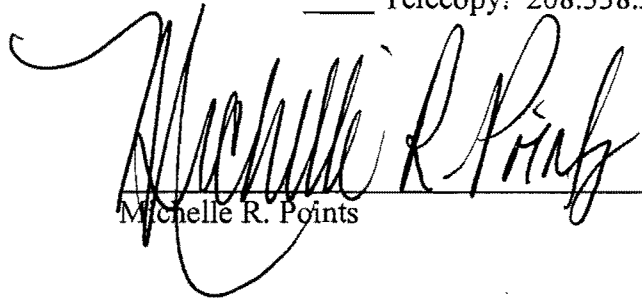
Attorneys for Defendants/Counterclaimants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of October, 2009, I caused to be served a true copy of the foregoing MOTION FOR RECONSIDERATION by the method indicated below, and addressed to each of the following:

David M. Penny
COSHO HUMPHREY, LLP
800 Park Blvd., Suite 790
Boise, ID 83712
[Attorneys for Plaintiff]

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- E-mail
- Telecopy: 208.338.3290



Michelle R. Points

F I L E D
A.M. 110 P.M.
OCT 05 2009
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Attorneys for Defendants/Counterclaimants

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

ASBURY PARK, LLC, an Idaho limited liability company; and JOHN ESPOSITO, an individual,

Plaintiffs/Counterdefendants,

vs.

GREENBRIAR ESTATES HOMEOWNERS' ASSOCIATION, INC., an Idaho non-profit corporation; DEBRA HOBBS a/k/a DEBBIE HOBBS, an individual d/b/a ACTION ASSOCIATION MANAGEMENT COMPANY,

Defendants/Counterclaimants.

Case No. CV 08-9740

MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION

Defendants/Counterclaimants Greenbriar Estates Homeowners' Association, Inc. ("the Greenbriar Homeowners"), by and through its counsel of record Hawley Troxell Ennis & Hawley, LLP, respectfully submits this Memorandum in Support of Its Motion for Reconsideration of this Court's Memorandum Decision on Plaintiffs' Motion for Partial Summary Judgment, entered September 21, 2009 ("Memorandum Decision") in favor of Plaintiffs (hereinafter "Esposito").

MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION - 1

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As the Court is aware, in its Counterclaim, the Greenbriar Homeowners asserted alternative claims of ownership in Block 1, Lot 39 in the Greenbriar Estates Subdivision; the storage unit lot.

In its Memorandum Decision, the Court granted Plaintiffs' Partial Summary Judgment finding that the Greenbriar Homeowners had no viable claim of ownership to the storage unit lot, and dismissed the Greenbriar Homeowner's Counterclaim in its entirety. Although it was not made clear in the Memorandum Decision, the Court did not identify any issue of fact that precluded the Court's granting Esposito's Motion.

The crux of the Court's decision appears to be that because the Greenbriar Homeowners purportedly agreed to abide by the CCR's when they purchased their lots (when they signed that contract document drafted by Esposito), and because Esposito never (in the Court's opinion) fraudulently misrepresented anything to the Greenbriar Homeowners, the Greenbriar Homeowners have no claim for relief. The Court's decision, respectfully, misses the mark, as it overlooks the Greenbriar Homeowner's legal arguments and numerous issues of fact raised by the Greenbriar Homeowners, which should have precluded the Court from granting Plaintiffs' motion.

Notwithstanding the fact that sufficient issues of fact were asserted by the Greenbriar Homeowners to warrant denial of Plaintiff's motion, in an effort to provide the Court with new and/or additional information, the Greenbriar Homeowners have submitted, along with this memorandum, the affidavits of Martin Thorne (Nampa City Council), Pam White (former Nampa Planning and Zoning Commission, current Nampa City Council), Rodney Emery (Nampa Planning and Zoning Commission), John Priester (Nampa Professional Engineer and Land Surveyor), Sheila Keim (Nampa Planning and Zoning Commission), Chris Veloz (Chair,

Nampa Planning and Zoning Commission), and Norman Holm (Director of Nampa Planning and Zoning). In addition to the issues of fact raised in opposition to Esposito's Motion filed previously; these affidavits clearly rebut argument and facts asserted by Esposito, and confirm that anything but a denial of Esposito's Motion would be in error.

I.

STANDARD OF REVIEW

Idaho Rule of Civil Procedure 11(a)(2)(B) provides authority to a court to reconsider and vacate interlocutory orders so long as final judgment has not yet been ordered. *Telford v. Mart Produce, Inc.*, 130 Idaho 932, 934, 950 P.2d 1271, 1273 (1998). Whether to grant a motion for reconsideration is within the sound discretion of the court. *See e.g., First Bank & Trust of Idaho v. Parker Bros., Inc.*, 112 Idaho 30, 31, 730 P.2d 950, 951 (1986); *Eliopulos v. Idaho State Bank*, 129 Idaho 104, 108, 922 P.2d 401, 405 (1996).

When considering a motion for reconsideration pursuant to Idaho Rule of Civil Procedure 11(a)(2)(B), the court should take into account any new facts presented by the moving party that bear on the correctness of an order. The moving party carries the burden of bringing to the trial court's attention facts that the court should consider that bear on the correctness of the court's earlier order. *Coeur d'Alene Mining Co. v. First Nat'l Bank*, 118 Idaho 812, 800 P.2d 1026 (1990); *Devil Creek Ranch, Inc., v. Cedar Mesa Reservoir & Canal Co.*, 126 Idaho 202, 205, 879 P.2d 1135, 1138 (1994).

II.

THE HOA'S FRAUDULENT MISREPRESENTATION CLAIM IS BASED ON THE REPRESENTATIONS MADE IN THE CCR'S - NOT TO THE CITY OF NAMPA

In Count One of the Counterclaim, the Greenbriar Homeowners seek quiet title to Lot 39, Block 1, based on Esposito's fraudulent misrepresentation regarding ownership of that lot **in the**

CC&Rs. Put another way, the Greenbriar Homeowner's fraudulent misrepresentation claim is based on those representations made by Esposito in the CCR's, and not to the City of Nampa.¹

It is true that the Greenbriar Homeowners allege that because Esposito takes the position that he "always" was forthright about representing the storage units as privately owned by him, then he cannot deny that he misrepresented his position to the City of Nampa. The affidavits submitted herewith by respective City of Nampa officials establishes that they at all times operated under the belief that Esposito would convey Lot 39, Block 1 to the Greenbriar Homeowners, and that that lot would be owned by the Greenbriar Homeowners, not Esposito. *See* Affidavit of Aaron Randell (previously filed) ¶ 4, Affidavit of Norman Holm ("Holm Aff."), ¶¶ 7, 9; Affidavit of Rodney Emery ("Emery Aff."), ¶¶ 6, 8; Affidavit of Chris Veloz ("Veloz Aff."), ¶¶ 3, 9, 10; Affidavit of Pam White ("White Aff."), ¶¶ 3, 4; Affidavit of Sheila Keim ("Keim Aff."), ¶¶ 3, 4.²

The Greenbriar Homeowner's claim in this regard is not dependent on the Court finding that Esposito did or did not commit any act of fraud in his course of dealings with the City of Nampa.

¹ *See* Memorandum Decision, p. 6, the Court focuses on misrepresentation made by Esposito to the Planning and Zoning Commission.

² Esposito even submitted marketing materials to the Commission which represented the amenity as "Community Storage Units". Keim Aff., Exh. A, 7th page. Notwithstanding this new submission by Greenbriar, the same marketing materials were attached to the Affidavit of Sula Wasbrough, but were not acknowledged by the Court. It was an abuse of discretion for the Court not to take them into account. The marketing material attached to Ms. Wasbrough's affidavit were sufficient to create an issue of fact and to deny Esposito's motion.

It is the Greenbriar Homeowner's position that Esposito fraudulently misrepresented in the CCR's that he, *not* the Greenbriar Homeowners, was the owner of Lot 39, Block 1; and the Greenbriar Homeowners relied upon that misrepresentation until it later learned of the plat and Esposito's actions before the City of Nampa. Simply because there was a delay in the Greenbriar Homeowners discovering this fraud does not mean the fraud does not exist or that they cannot seek relief as a result of that fraud, because they certainly can.

Members of the Nampa Planning and Zoning Commission (the "Commission") unequivocally state in their respective affidavits that Esposito always represented that he would to convey Lot 39, Block 1 to the Greenbriar Homeowners and they would not have approved the plat had Esposito represented otherwise. *See* Aaron Randell ("Randell Aff.") (previously filed) ¶ 7, Holm Aff., ¶¶ 11, 12; Emery Aff., ¶ 10; Veloz Aff., ¶ 11; White Aff., ¶ 5; Keim Aff.), ¶ 9.

The Court's finding that "it is mere speculation" that the Planning and Zoning Commission would not have approved the plat is erroneous and is contrary to the facts established by the record. Aaron Randell's affidavit certainly creates an issue of fact as to (1) whether Esposito intended to convey Lot 39, Block 1 to the Greenbriar Homeowners and/or whether Esposito communicated to City of Nampa officials that he would to do so; and (2) whether the Commission would not have approved the final plat if Esposito would have represented that he would maintain ownership over Lot 39, Block 1 and collect rents from homeowners. Mr. Randell's affidavit alone was sufficient to create an issue of act and to justify denial of Esposito's motion.

Whether or not the Planning and Zoning Commission would or would not have approved the plat raises an issue of fact regarding Mr. Esposito's representations regarding the future ownership of Lot 39, Block 1. That is, Esposito first represented in his first submission of a final

plat to the Commission that Lot 10, Block 4 (the storage unit lot) was going to be owned by the Greenbriar Homeowners, and then in a later version renumbered the blocks and lots and once again represented that Block 1, Lot 39 (the same storage unit lot) was to be owned and maintained by the Greenbriar Homeowners because the plat would not have been approved had he represented that he intended otherwise. *Id.* Esposito's claim that the listing of the lot was a mistake, as set forth below, is simply not credible.

Contrary to the Court's findings at issue is not whether the City of Nampa would have suffered an injury due to Esposito's stated intentions. Memorandum Opinion, p. 7. The issue is that the CCR's contain a fraudulent misrepresentation on which the home owners relied – they believed they had to pay Esposito rent - and they suffered injury and damage as a result; **they paid rents to Esposito which they were never obliged to pay.**³ Greenbriar members have suffered real ascertainable damage as a result of the fraudulent misrepresentations made by Esposito contained in the CCR's.

III.

THE COURT'S FINDING THAT THE "CORRECTION" TO THE PLAT WAS AMENDMENT IS ERRONEOUS

The Court found in the original plat had been "corrected" by Esposito's surveyor filing an affidavit purportedly correcting the final plat. Memorandum Decision, p. 3.

As was raised by Greenbriar several times previously, Esposito has pointed to **no legal authority** to support the proposition that the purported correction to the plat, filed by Mr.

³ Moreover, as set forth in the Affidavit of Kathy Kinney, the Greenbriar Homeowner's paid taxes (as owners) on the storage units/Lot 39, Block 1 for at least a two year period.

Esposito's surveyor (at a time after Esposito had turned the subdivision over to the Greenbriar Homeowners), is a valid amendment to the final plat for the subdivision or that it legally modifies the final plat approved and signed previously by Nampa City officials. The correction is of no force and effect with regard to the ownership of Lot 39, Block 1.

The Court's holding that the "original plat had been corrected" is erroneous as a matter of law and an abuse of discretion. *See* Memorandum Decision, p. 3. Idaho Code § 50-1301 et seq., provides no mechanism for a unilateral "correction" to a plat which materially changes the information set forth thereon.

Mr. Greg Carter (Esposito's surveyor) states that when the "plat was prepared, a mistake was made when Lot 39 was included in Note 8 to Greenbriar Estates Subdivision plat. Lot 39 was never intended to be a common area lot. It was so designated by error." This correction document recorded by Mr. Carter does not amend the plat and is further not credible.

John Priester, who is currently employed with the City of Nampa and who has been a licensed Professional Engineer and Land Survey for 30 years, states in his affidavit submitted herewith that he is aware of no statute, ordinance or other law that provides that ownership of property can be vested or divested through such a correction document. Affidavit of John Priester ("Priester Aff., ¶ 4. Mr. Priester goes on to state that corrections to plats don't and cannot change anything substantively within the plat, "but rather, explain items in the plat so they are understandable to the public; corrections that make the plat make sense." *Id.*, ¶ 5.

Finally, Mr. Priester affirms what the Greenbriar Homeowners have been arguing all along, that if a party wishes to substantively modify a plat, they must do so through the public plat approval process, as a substantive change to a plat cannot be made through a correction to a plat. *Id.*, ¶6.

Moreover, the statements contained in Mr. Carter's affidavit are directly contradicted by the record before the City of Nampa. As set forth above, Mr. Carter states that when the "plat was prepared, a mistake was made when Lot 39 was included in Note 8 to Greenbriar Estates Subdivision plat. Lot 39 was never intended to be a common area lot. It was so designated by error."

The first version of the final plat contained a plat note, Note 8, which listed the RV Parking and Storage area lot as Block 4, Lot 10 – to be owned and maintained by the Greenbriar Homeowners. That plat was drafted by Mr. Carter's company, Idaho Survey Group. Keim Aff., Exh. A, 5th page.

The final plat that was recorded has the Note 8 listing the common area lots that are to be owned and maintained by the Greenbriar Homeowners, but the lots and blocks had been renumbered, so the recorded document listed the RV Parking and Storage area lot Lot 39, Block 1, not Block 4, Lot 10 as previously submitted by Esposito. Esposito specified in his application for plat approval to the City of Nampa that he intended to convey Lot 39, Block 1 to the Greenbriar Homeowners and made the same representation in his filings with the Secretary of State in the Articles of Incorporation for the Greenbriar Homeowners.

Contrary to Mr. Carter's affidavit, the designation of the RV Parking and Storage area lot was not included by mistake; the lot was listed on the first version of the final plat and revised, and the lots reordered, and that remained listed in Note 8 as to be owned and maintained by the Greenbriar Homeowners.

Moreover, during meetings of the Nampa Planning and Zoning Commission and in numerous communications to Esposito, it was expressly required that all common areas be explicitly designated. *See* Holm Aff., ¶¶ 3 and 5; Keim Aff., ¶¶ 4 and 5.

Certainly Esposito cannot expect this Court to accept the proposition that despite the fact that the storage area lot was designated on three versions of the plat with references to various lot and block numbers which changed over time, submitted to the City of Nampa, that the designation of the Lot 39, Block 1 as a common area on the final plat was a mistake. Nor can Esposito expect the Court to accept the proposition that despite the fact that the RV Parking and Storage area lot is one of the largest lots on the final plat that both he and his surveyor “missed it”. If Esposito was banking on the approximate \$3,500 per month payment that would be realized from Lot 39, Block 1, one would certainly expect that a cursory review would have prompted him to reveal his substantial “error” to the City of Nampa. Esposito didn’t reveal this alleged “error” because he had to believe it would be questioned by the City of Nampa. Esposito and Carter’s explanation that its listing was an oversight is simply not believable and at the very least creates an issue of fact.

IV.

THE WARRANTY DEEDS DO NOT CIRCUMVENT THE COMMON LAW DEDICATION; ESPOSITO DID DEDICATE LOT 39

The Court next recognizes that “the representations made in the original plat contained in Note 8 were also made to many of the member is the HOA in their Warranty Deeds.” Memorandum Decision, p. 7. However the Court goes on to hold that “[h]owever, the HOA clearly was relying upon the language in the CC&R’s which established the storage facility as privately owned for which the HOA would pay rent.” *Id.* These are mutually exclusive inquiries and the Court is in error in finding that the CC&R’s can affect a common law dedication.

The Court is in error when it finds that the facts “do not establish that the HOA relied upon the misrepresentation.” *Id.* That is exactly what the HOA did - they relied upon the

misrepresentation in the CCR's that Esposito owned Lot 39 -- when he didn't -- because he had already dedicated Lot 39 when the HOA purchased their lots from builders:

Esposito takes the position, and the Court adopts the position, that because the CC&Rs were recorded before any lots were conveyed, and the purchasers of the lots were bound by the CC&Rs, that Greenbriar has no claim against Esposito; that the CC&Rs trump everything. Memorandum Decision, p. 7. Esposito is incorrect, and respectfully, the Court's holding is in error.

The final plat was recorded before the CC&Rs. The Articles of Incorporation were filed one day after the CC&Rs, and contradict the CC&Rs with regard to the designation of common areas and payment of Greenbriar monies cannot benefit a private person or member of the HOA.

The CC&Rs are not a document of conveyance or instrument validating ownership. In any event, Greenbriar maintains that the CC&Rs contain a mistake and/or fraudulent misrepresentation that Esposito privately owns Lot 39, Block 1 and are invalid in that regard.

Esposito cannot be heard to argue that he had no obligation to convey ownership of Lot 39, Block 1 when he turned the Subdivision over to the HOA, or that he made no dedication of that lot, because he drafted the CC&Rs in a way so that he didn't have to.

Again, Esposito's drafting the CCR's to pad his own pocketbook does not and cannot affect his dedication of the subject lot. A self-serving contract cannot contradict or circumvent a publicly approved, recorded document and there is not legal authority to support a holding otherwise.

That the CC&Rs were recorded before the conveyance of any lot does not effectuate or constitute a valid conveyance or transfer of ownership rights in real property. A developer cannot, as a matter of law, utilize CC&Rs to contradict the conditions imposed by the governing

body as a requirement to approving the final plat and authorizing its recording. Idaho law makes no allowance for CC&Rs to contradict or modify a recorded plat. *See also*, Priester Aff., ¶¶ 4, 5 and 6.

That the lot owners might be subject to the CC&Rs does not defeat the material fact that Esposito knew all along that he was going to (or intended to) maintain ownership of Lot 39, Block 1, and operate it as a lucrative private business venture, while at all times apparently willfully representing to City Officials that it was a common area, to be owned and maintained by Greenbriar. The CC&Rs are invalid and unenforceable to the extent they speak to any ownership of Lot 39, Block 1, other than that of Greenbriar or contradict the final recorded plat.

V.

THE RESTATEMENT DICTATES CONVEYANCE OF A COMMON AREA

In its Memorandum Decision, in sum, the Court held that Esposito would be under no obligation to convey a Lot 39, Block 1 under the Restatement unless Lot 39, Block 1 were found to be a common area through common law dedication.

The holding by the Court is based on the notion that analysis in determining whether a developer has a duty to convey a common lot is similar to that analysis taken by Idaho courts in determining whether there has been a common law dedication. *See Sun Valley Iowa Lake Ass'n v. Anderson*, 551 NW2d 621, 633 (Iowa 1996)

In sum, the Court finds that if there was a common law dedication, then Esposito had an obligation to convey Lot 39. Therefore, the Greenbriar Homeowners will address the issue of common law dedication.

VI.
ESPOSITO DEDICATED THE LOT 39, OR ALTERNATIVELY, THERE IS AN ISSUE OF FACT AS TO WHETHER HE DEDICATED LOT 39

The Greenbriar Homeowners assert, as an affirmative theory of relief, that Esposito dedicated Lot 39, Block 1 to the individual lot owners as common area under the doctrine of common law dedication.

Although Esposito was the owner of Lot 39, Block 1, during the development of the Subdivision, and states that he intended to remain the owner of that lot, that does not negate the fact that Esposito, through his actions, effectively dedicated Lot 39, Block 1 to the HOA.

“[W]hen an owner of land plats the land, files the plat for record, and sells the lot by reference to the recorded plat, a dedication of public areas indicated by the plat is accomplished.” *Saddlehorn Ranch Landowners, Inc., v. Dyer*, 146 Idaho 747, 752, 203 P.3d 677, 682 (2009), quoting *Monaco v. Bennion*, 99 Idaho 529, 533, 585 P.2d 608, 612 (1978) (other citations omitted).

As set forth above, Esposito on at least three occasions in his submissions to the City of Nampa that the storage unit lot would be conveyed to and owned and maintained by the Greenbriar Homeowners.

Esposito drafted the plat, applied for the plat to be approved, recorded the plat and conveyed property to the builders who bought up all the residential lots in the subdivision, with reference to the plat. His intention to dedicate the subject lot can be found in the very plats submitted to the City of Nampa.

Of course Esposito claims now that he didn't mean to dedicate lot, and that it was a “mistake” that the lot was listed in Note 8. That is the very essence of the Idaho Supreme Court cases on the issue of dedication, that is, developers coming forward after the dedication occurs,

claiming they didn't "mean to" or "intend to" make the dedication. Esposito's explanation regarding this mistake is simply not believable.

That homeowners signed the CCR's has no relevance to the inquiry of whether Esposito effectively dedicated the lot to the Greenbriar Homeowners, as the CCRs cannot modify the information contained on the plat or otherwise limit the legal significance of its contents. One has nothing to do with the other.

Esposito clearly and unequivocally indicated, in his representation of the plat to the Commission and to the City Council, that Lot 39, Block 1 he intended to be owned by the Greenbriar Homeowners. That offer was accepted by the Commission and City Council, as evidenced by their respective approval of the plat.

As set forth above, the plat would not have been approved had Esposito disclosed that Lot 39, Block 1 was to be privately owned and arguably a never ending income stream from the homeowners in Greenbriar for Esposito

To be sure, it is difficult to contemplate that if the surveyor, who claims to have been informed from the onset that Esposito intended to maintain private ownership of Lot 39, Block 1, would have ever listed Lot 39, Block 1 as a common area that "shall be owned" by the HOA in the first instance. It is even more difficult to believe that given the various drafts of the plat that were submitted to the Commission, which modified the lot and block references while retaining the "shall be owned" language, that this alleged "error" was not noticed or corrected by the Surveyor or Esposito, as both the surveyor and Esposito reviewed and signed the final plat without identifying this dedication they subsequently alleged was erroneous.

It is even more difficult to accept Esposito's claim of error given the circumstances surrounding the development of the subdivision, including advertising and marketing (in which

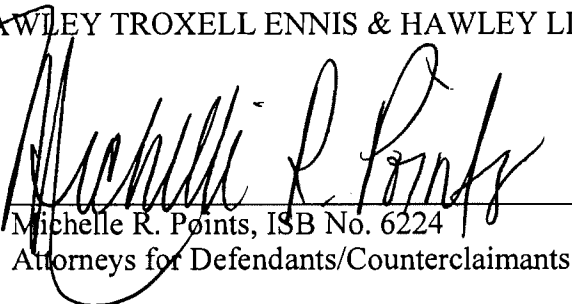
Esposito was involved), lack of tax assessments to Esposito (of which Esposito apparently did not bring to the Assessor's attention), and Esposito's filing of documents like the Articles of Incorporation for the HOA which appear to include Lot 39, Block 1 as a common area and state that the HOA will not pay any monies to a private entity. All actions taken by Esposito were consistent with the HOA owning Lot 39, Block 1 as a common area and amenity to the Subdivision and certainly create an issue of fact.

Designating Lot 39, Block 1 as a common area lot was not an error by Esposito; he intended City officials to rely upon the plat, and approve the plat, with the hope that the inclusion of the "private ownership" of the storage units contained in the CC&Rs and his collection of obligatory rents would go unchallenged.

DATED THIS 5th day of October, 2009.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By


Michelle R. Points, ISB No. 6224
Attorneys for Defendants/Counterclaimants

OCT 05 2009

CANYON COUNTY CLERK
C. DOCKINS, DEPUTY

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Attorneys for Defendants/Counterclaimants

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

ASBURY PARK, LLC, an Idaho limited liability company; and JOHN ESPOSITO, an individual,

Plaintiffs/Counterdefendants,

vs.

GREENBRIAR ESTATES HOMEOWNERS' ASSOCIATION, INC., an Idaho non-profit corporation; DEBRA HOBBS a/k/a DEBBIE HOBBS, an individual d/b/a ACTION ASSOCIATION MANAGEMENT COMPANY,

Defendants/Counterclaimants.

Case No. CV 08-9740

AFFIDAVIT OF PAM WHITE

STATE OF IDAHO)
County of Canyon) ss.

PAM WHITE, being first duly sworn upon oath, deposes and states as follows:

1. I have personal knowledge of the facts set forth herein and can testify as to the truth of the matters contained herein if called upon as a witness at the trial of this action.

2. I was a member of the Planning and Zoning Commission ("the Commission") for the City of Nampa from 2004 through June of 2007, and am currently serving on the Nampa City Council. I was on the Commission during the time that John Esposito and his entity Asbury Park, LLC applied for approval of the Greenbriar Estates Subdivision.

3. The preliminary plat application came before the Commission during meetings at which I was present. I remember that the applicant's presentations included references to an RV storage area within the subdivision that would be an amenity for homeowners in the subdivision.

4. Neither Mr. Esposito nor any agent of Mr. Esposito ever represented that the RV storage was going to be privately owned or that rents were going to be collected from homeowners for storage units that were to be built on that lot. The RV Parking and Storage lot was presented at all times as an amenity to those who owned lots in the subdivision.

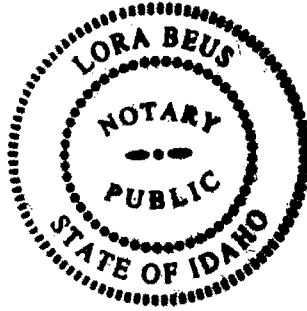
5. I would not have voted to recommend approval of the Greenbriar application had I known that there was going to be private storage units operated as a private business venture instead of a subdivision amenity.

Further, your affiant sayeth naught.



Pam White

SUBSCRIBED AND SWORN before me this 30th day of September, 2009.



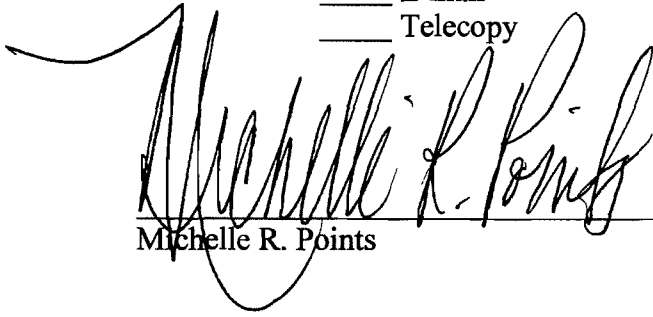
Lora Beus
Name: Lora Beus
Notary Public for Idaho
Residing at Nampa, Idaho
My commission expires 5-1-2012

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of October, 2009, I caused to be served a true copy of the foregoing AFFIDAVIT OF PAM WHITE by the method indicated below, and addressed to each of the following:

David M. Penny
COSHO HUMPHREY, LLP
800 Park Blvd., Suite 790
Boise, ID 83712
[Attorneys for Plaintiff]

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- E-mail
- Telecopy


Michelle R. Points

FILED
 A.M. 4:10 P.M.
OCT 05 2009
 CANYON COUNTY CLERK
 C. DOCKINS, DEPUTY

Michelle R. Points, ISB No. 6224
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Attorneys for Defendants/Counterclaimants

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
 OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

ASBURY PARK, LLC, an Idaho limited liability company; and JOHN ESPOSITO, an individual,
 Plaintiffs/Counterdefendants,
 vs.
 GREENBRIAR ESTATES HOMEOWNERS' ASSOCIATION, INC., an Idaho non-profit corporation; DEBRA HOBBS a/k/a DEBBIE HOBBS, an individual d/b/a ACTION ASSOCIATION MANAGEMENT COMPANY,
 Defendants/Counterclaimants.

Case No. CV 08-9740
 AFFIDAVIT OF RODNEY EMERY

RODNEY EMERY, being first duly sworn upon oath, deposes and states as follows:

1. I have personal knowledge of the facts set forth herein and can testify as to the truth of the matters contained herein if called upon as a witness at the trial of this action.
2. I have been a member of the Planning and Zoning Commission ("the Commission") for the City of Nampa for a number of years. I was on the Commission during

the time that John Esposito and his entity Asbury Park, LLC was obtaining plat approval for the Greenbriar Estates Subdivision.

3. As part of the process of presenting a Preliminary Plat, the developer is requested to designate those areas in the Plat that are going to be common areas and/or areas which will be conveyed and owned and maintained by the homeowner's association.

4. I first reviewed the Preliminary Plat for Greenbriar Estates Subdivision in July of 2004 and it was on the agenda at the Commission meeting held on August 24, 2004, at which I was present. The Commission voted to approve the Preliminary Plat, subject to numerous conditions, including that Plat note number 15 needed to be revised to list all of the common lots in the subdivision and that the information listed in the Plat note must match the lot/block numbering assigned to those lots in the Plat itself.

5. Mr. Esposito submitted another version of the Preliminary Plat or the first version of a Final Plat, for the Commission's review, which appeared to contain several corrections. This Plat was on the agenda for the Commission's February 8, 2005 meeting, at which I not was present. I did review the minutes for that meeting and noted that the Plat submitted confirmed that Block 4, Lot 1 (RV Parking and Storage) as a common area lot to be owned and maintained by the Homeowner's Association. During the February 8, 2005 meeting, it was voted to recommend to City Council Final Plat approval for Greenbriar subject to certain conditions.

6. To the best of my recollection, on each occasion that the Plat for the subdivision was presented, the lot designated for RV Parking and Storage Lot was intended to be owned by the Homeowner's Association for Greenbriar Estates Subdivision.

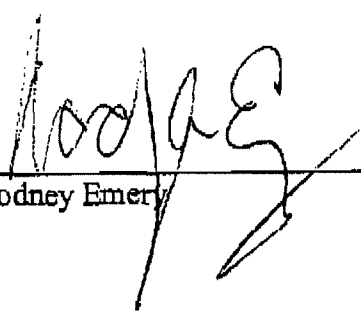
7. On February 23, 2005, I attended the Commission meeting during which Mr. Esposito was seeking annexation and zoning of a 1.7 acre portion (outside of the platted subdivision) to be used by homeowners in the Greenbriar Estates Subdivision for RV parking. When the issue of maintenance of the RV Parking area was discussed, it was represented by Ms. Julianne Shaw, then Associate Planner for the City of Nampa, that it was considered to be part of the homeowner's association responsibilities, to which Mr. Esposito did not object or clarify.

8. The Commission did recommend the Greenbriar final plat for approval based on the representations that were made in the plat, through the approval process, including the representation that Mr. Esposito intended to convey the RV Parking and Storage Lot to the homeowner's association.

9. Neither Mr. Esposito nor any agent of Mr. Esposito ever represented that the subject RV Parking and Storage Lot was going to be privately owned or that rents were going to be collected from homeowners for the storage units that were to be built on that lot.

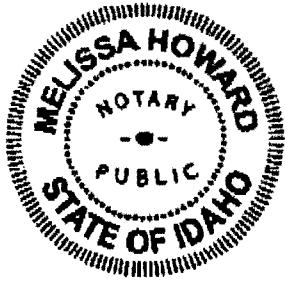
10. I would not have voted to recommend the final Greenbriar plat for approval had I known that there was going to be the operation of private storage units as a private business venture.

Further your affiant sayeth naught.


Rodney Emery

STATE OF IDAHO)
) ss.
County of Ada)

SUBSCRIBED AND SWORN before me this 2 day of October, 2009.



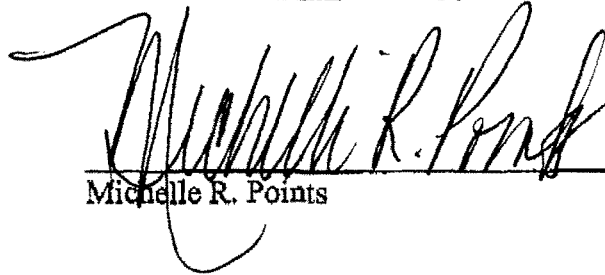
Melissa Howard
Name: Melissa Howard
Notary Public for Idaho
Residing at Canyon County Idaho
My commission expires 6-9-2014

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of October, 2009, I caused to be served a true copy of the foregoing AFFIDAVIT OF RODNEY EMERY by the method indicated below, and addressed to each of the following:

David M. Penny
COSHO HUMPHREY, LLP
800 Park Blvd., Suite 790
Boise, ID 83712
[Attorneys for Plaintiff]

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- E-mail
- Telecopy: 208.338.3290



Michelle R. Points