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IN THE SUPREME COURT OF THE STATE OF IDAHO

THOMAS WEISEL, a married man,)
Dealing in his sole and separate property)
)
Plaintiff/ Appellant,)
)
vs.)
)
BEAVER SPRINGS OWNERS)
ASSOCIATION, INC., an Idaho)
Corporation,)
)
Defendants/Respondent.)
)

Supreme Court No.

37800

RECORD ON APPEAL

Appeal from the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Blaine.

HONORABLE JOHN K. BUTLER, DISTRICT JUDGE

* * * * * * * * * * * *

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VOLUME 6 of 6

IN THE SUPREME COURT OF THE STATE OF IDAHO

THOMAS WEISEL, a married man, Dealing in his sole and separate property) Plaintiff/ Appellant, vs. BEAVER SPRINGS OWNERS ASSOCIATION, INC., an Idaho Corporation, Defendants/Respondent.	Supreme Court No. 37800

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* * * * * * * * * * * *

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VOLUME 6 of 6

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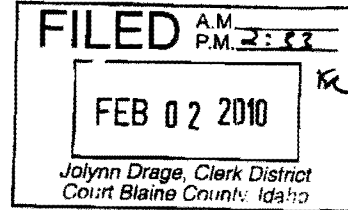

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

THOMAS WEISEL, a married man dealing in his sole and separate property,

Plaintiff,

vs.

BEAVER SPRINGS OWNERS ASSOCIATION, INC., an Idaho corporation

Defendant.

Case No. CV-09-124

DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

COMES NOW Defendant Beaver Springs Owners Association, Inc. ("Beaver Springs" or "Association"), by and through its counsel of record, Lawson Laski Clark & Pogue, PLLC, and submits the following opposition brief to Plaintiff Thomas Weisel's ("Weisel") Motion for Summary Judgment:

I. INTRODUCTION

In his motion for summary judgment, Weisel has stirred up a lot of dust in an attempt to obscure what is actually an extremely straightforward issue. The only issue in this case is whether Weisel should be held to the bargain that he entered into willingly and knowingly with

the Association over twenty-six years ago. As expressly set forth in the October 12, 1983 Agreement, Weisel *wanted* to unify his two lots in the Beaver Springs Subdivision ("Subdivision") into one parcel. He also wanted the Association's approval of his development plans for the unified parcel, which included constructing two single family homes on Lot 14, and not constructing any single family home on Lot 13. As a result of the Agreement, Weisel got what he wanted: the Association's agreement that the lot line between the two lots could be removed and Weisel could proceed with his desired development plans.

Despite having gotten exactly what he asked for, Weisel now contends that this Court should allow him to back out of the deal because land values have – not surprisingly – increased over the past two decades. In support of this remarkable and unprecedented request, Weisel presents four arguments: (1) the parties entered into the Agreement as a result of a mutual misunderstanding regarding a purported setback encroachment; (2) there is no consideration for the Agreement when it was executed because of the purported mutual mistake; (3) the consideration "failed" decades later because other homeowners developed their properties in accordance with the applicable County or City ordinances, and (4) the Agreement should not be enforced because five other owners purportedly were allowed to build guest houses that exceeded the size allowed by the zoning ordinances. As set forth below, these arguments fail as a matter of law.

Moreover, these asserted contract defenses are not based on undisputed facts. Instead, Weisel's arguments are based either on a strained interpretation of the Agreement, or on County Appraiser records that have no relevance to the City or County's planning function, and are not accurate reflections of the information presented to zoning officials by the homeowners. The Association, therefore, asks that Weisel's motion for summary judgment be denied in its entirety

and that the Association's motion for summary judgment – which is based on issues that can be decided as a matter of law – be granted.

II. STATEMENT OF FACTS

Beaver Springs hereby incorporates the Statement of Undisputed Facts set forth in the Memorandum In Support of Defendant's Motion for Summary Judgment filed on December 28, 2009.

III. ARGUMENT.

A. There Is No Reason The Agreement Should Be Construed Narrowly.

The first assertion made in Weisel's motion for summary judgment is that the 1983 Agreement should be narrowly construed because restrictive covenants are in derogation of the common law right to use land for all lawful purposes. Brief at p. 19. This legal theory, however, should relate only to blanket, non-negotiated, restrictive covenants restricting the use of land in a neighborhood. The Agreement at issue in this case does not contain blanket restrictions covering the entire neighborhood. Instead, the Agreement is a specifically negotiated bilateral agreement that allowed Weisel to unify his two lots and develop it as a single parcel:

> The parties agree that upon execution of this Agreement, Lot 13 and Lot 14 shall be deemed one parcel and that such single parcel shall not hereafter be split and/or developed as two separate parcels.

Clark Aff, Ex. A at ¶ 3. In connection with its determination that Weisel would be allowed to unify his two lots, the Association made a finding that the removal of the setback lines between the two lots would not "cause unreasonable diminution of the view from other lots." *Id.*, at ¶ 2. Thus, Weisel was allowed, but not required, to locate a future structure in the former setback area.

Since this Agreement was specifically negotiated, and not simply imposed as a result of purchasing a house in a planned neighborhood, there is no legitimate reason to interpret it

differently from any other bilateral contract. Indeed, since there is no dispute over the meaning of the Agreement, there is no need to construe it narrowly or broadly. The Agreement simply means what it says it means – that Lots 13 and 14 are a single parcel and cannot be split or developed as two separate parcels.

B. Weisel's Claims Relating To A Lack Of Consideration And Mutual Mistake Are Barred By the Statute of Limitations.

Weisel asserts that the Agreement is void because (1) it lacks consideration at the time it was made, (2) was based solely on a mutual mistake of both parties, and (3) was based on a condition precedent that did not occur. These claims, however, should be dismissed without any discussion of their merits because they were not timely asserted against the Association. As set forth in the Association's motion for summary judgment, these contract claims accrued on the day the Agreement was executed: October 12, 1983. Under Idaho Code Section 5-216, any "action upon any contract, obligation or liability founded upon an instrument in writing" must be brought within five years. Thus, Weisel needed to file these contract claims no later than October 12, 1988. He missed this deadline by more than twenty years. Therefore, these claims should be dismissed summarily.

C. Weisel Admits that the Agreement was Supported by Consideration.

Even if the statute of limitations was not a bar to Weisel's contract claims against the Association, the undisputed facts establish that Weisel cannot succeed on the merits of the claims as a matter of law. Weisel claims that the Agreement fails because there was no consideration for his agreement to unify his two lots. In making this argument, Weisel admits that Idaho Code § 29-103 provides that a written agreement is presumptive evidence of a consideration that can be rebutted only by "substantial" evidence. *See Dennett v. Kuenzli*, 130 Idaho 21, 25-26 (1997) (appellants failed to meet burden of proof rebutting the presumption of consideration in an option

agreement because the record demonstrated that – ten years after the execution of the agreement – no one involved had a clear memory of whether the $1.00 recited consideration had actually been paid). In this case, Weisel has failed to produce any, let alone substantial, evidence proving that he got no benefit whatsoever from the Agreement.

To the contrary, Weisel merely claims that the Agreement was entered into because the improvements in the 1983 development plan were to be constructed in the setback area between the two lots. That is, he asserts that the *only* benefit he sought from the Agreement was the right to build in the setback area. Notably, "the motive which prompts one to enter into a contract and the consideration for the contract are distinct and different things." 17A Am Jur 2d, Contracts, §115. In fact, the motive to enter into a contract actually does not comprise any part of the contract. *Id.*; *see also* CJS Contracts § 87 ("where valid consideration for a contract exists, the motive for entering into the contract is immaterial"). Consideration is instead a legal concept that is defined as any "right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other." *Id.* at §113.

Therefore, even if Weisel was able to present substantial evidence that his personal motive for entering into the Agreement was due to his belief the improvements were to be located in the setback, that evidence is totally irrelevant to whether or not the Agreement was supported by consideration. The issue of consideration is whether Weisel obtained any benefit whatsoever from the Agreement. As he himself *expressly admitted*, Weisel did obtain a benefit because the Association approved his development plans for Lots 13 and 14. Weisel Depo. at 99:22-101-15. He also benefitted from the Agreement because he was able to use it to obtain a variance from the County, which enabled him to build two single family homes on his property

in the Subdivision. Thus, he got something in return for the Association's acquiescence with his request to unify the two lots into a single parcel.

Furthermore, there is no evidence – other than his own self-serving testimony – that the Agreement was predicated on the improvements being located within the setback area. In fact, all other evidence points to contrary, including the following:

- The Agreement itself does not state in the recitals that the development plans included building in the setback area; it merely states that Weisel "further desires to obtain the Association's written consent to combine such lots into one parcel, removing the setback lines along the common boundary line of such lots." Clark Aff., Ex. A, page 1.

- The architect that created the 1983 development plan testified that he intentionally located all of the development on Lot 14 and never created a design that did not respect all of the setbacks. McLaughlin Depo. at 15:25-17:2.

- The August 18, 1983 site plan that was submitted to the Design Review Committee on September 1, 1983 for approval clearly shows that all of the development was outside of the setbacks that then existed on Lot 14. Ottley Deop., p. 44:15-46:23 and Ex. 5. Thus, the plans submitted to, and approved by, the Design Review Committee never included a setback encroachment.

- Weisel himself admitted in his May 28, 1987 letter to the Design Review Committee (which was written in opposition to a neighbor's planned development) that it was the "possibility of two families living on one lot" that led to his agreement to "give up the right ever to build on the second" lot. Clark Aff., Ex. P. He made no mention in this letter of his belief that the Agreement was made because he had wanted to locate the development in the setback area.

- Weisel claims that he moved the location of the caretakers' house prior to executing the Agreement *because* he wanted the ability to sell or build on Lot 13 in the future as a separate lot. *Id.*, at 41:7-18. If this was his motivation for moving the location of the caretakers' home, it makes no sense that he – a very sophisticated businessman – would have proceeded to sign an Agreement that clearly states that the two lots are unified in perpetuity.

It is Weisel's burden to establish through substantial evidence that there was no consideration for the Agreement. He has failed to satisfy this burden. Instead, after admitting he received benefits from making the Agreement, he merely makes an irrelevant assertion that – more than twenty years after executing the Agreement – he suddenly realized that he did not

need to unify his two lots because he did not actually build in the setback area. Therefore, his motion for summary judgment should be denied and the Association's motion on this claim should be granted.

D. There Is No Clear And Satisfactory Evidence Of A Mutual Mistake.

In his motion for summary judgment, Weisel next claims that he is entitled to rescind or modify the Agreement because it was purportedly based upon the mutual mistake that the improvements were to be located in the setback. To prove the existence of a mutual mistake, Weisel has the burden of proving *by clear and satisfactory evidence* that, at the time the Agreement was signed, both he and the Association entered into the Agreement *solely* because they believed the proposed development was located in the setback area between Lots 13 and 14. *Dennett v. Kuenzli*, 130 Idaho 21, 27 (App. 1997). As set forth above, Weisel has not, and cannot, meet his burden of proof on this issue.

Indeed, it defies common sense that Weisel would have entered into the Agreement after he purposefully changed the location of the caretakers' house during design review so as to be able to develop Lot 13 in the future. Furthermore, there is no evidence whatsoever that the Association entered into the Agreement solely because *it* believed that Weisel wanted to construct the caretakers' house in the setback area. To the contrary, Philip Ottley – a member of the Design Review Committee in 1983 – testified that the Association was concerned with the fact that Weisel was seeking to build another residence on one lot. Thus "[if Weisel] were to develop that Lot 13, or if he were to sell it to his family or a member and they built a building on it, they would be exceeding building densities." Ottley Depo. at 53:2-13.

Since, the Association entered into the Agreement due to its concern regarding the number of residences that Weisel wanted to locate on Lot 14, Weisel cannot establish the

elements of mutual mistake – that is, that both parties shared a misconception about a vital fact upon which they based their bargain. *Dennett, supra*, at 27. Therefore, Weisel's motion for summary judgment should be denied, and the Association's motion should be granted, on this issue.

E. The Agreement Does Not Contain A Condition Precedent.

Weisel next argues that he should be released from the promises he made in the Agreement because constructing the caretakers' house in the setback was a purported condition precedent to his obligations. This argument is without merit. A condition precedent is an event that is not certain to occur, but which must occur before performance under a contract becomes due. *World Wide Lease, Inc. v. Woodworth*, 111 Idaho 880, 887 (1986). Whether the parties intended a condition precedent is a question of fact. *Id., citing Wilkerson v. School District No. 15, Glacier County*, 700 P.2d 617 (Mont. 1985). Its existence is generally dependent on what the parties' intended, "as adduced from the contract itself." *Johnson v. Lambros*, 143 Idaho 468, 474 (2006). Condition precedents, however, are not favored by the courts. *World Wide Lease, supra*, at 887. Therefore, the intention to create a condition precedent must appear in the contract expressly or by clear implication. *Id.*

In this case, there is no express condition precedent in the Agreement. There is also no clear implication in the Agreement that the parties intended that the unification of the two lots in perpetuity was conditioned on whether or not Weisel built the caretakers' house in the setback area. Indeed, the plans that were reviewed and approved by the Design Review Committee showed that the proposed structure was *not* in the setback. Furthermore, as set forth in the Association's motion, the only paragraph in the Agreement that discusses improvements being located in the setback is paragraph 2. This paragraph, however, simply mimics the language of

the Declaration pertaining to the findings that must be made by the Design Review Committee prior to allowing the unification of two lots. Thus, the only rational interpretation of this paragraph is that the drafter of the Agreement – Weisel's attorney, Roger Crist – copied the language of the Declaration to insure that the unification was done properly. As a result of the Agreement, Weisel could build in the former setback area at some point in the future because it would not result in a diminution in the view from other lots, but he was not obligated to do so.

Moreover, even if Weisel was able to establish that the unification of his two lots was conditioned upon on his locating the caretakers' house in the setback area, the happening of that condition was entirely within his control. As such, he had an obligation to make a good faith effort to locate the structure in the setback area as originally contemplated by the parties. *See Johnson*, *supra*, 143 Idaho at 475 ("if the happening of the condition is within the exclusive or partial control of the party whose obligation is conditioned upon the event, there may arise an implied duty to make a good faith effort to perform that condition"). In this case, the decision to locate the caretakers' house was within the exclusive control of Weisel. As a result, he cannot now argue that – after obtaining all of the benefits he wanted from the Agreement, including using it to obtain a variance from the County – his obligations should be waived because he unilaterally chose to construct the caretakers' house in a different location. If the contract was dependent upon the location of the caretakers' house, he had a duty to make a good faith effort to locate the house in that location. Since, according to his own architect, he never made any effort to locate the caretakers' house in the setback, he cannot – as a matter of law – get out of his obligations under the Agreement by way of a condition precedent theory.

F. The Consideration Supporting The Agreement Did Not Fail.

In another attempt to undo the Agreement he knowingly entered into twenty-six years ago, Weisel claims that the consideration supporting the Agreement at the time it was entered into has now failed, thereby rendering the Agreement unenforceable. A "failure of consideration" exists when a proper contract was entered into, but due to supervening events, the promised performance does not occur. *World Wide, supra*, 111 Idaho at 884. In his motion, Weisel claims that the consideration failed for two reasons: (1) no structure was ever built in the setback area, and (2) the Association's concern with the "density" of the Subdivision purportedly no longer exists.

In making this argument, Weisel is again attempting to equate motive for executing the Agreement with consideration. That is, he is claiming that his motive was to build in the setback and the Association's motive was "density" considerations – motives that he contends are no longer served. As set forth above, however, motive is not the same thing as consideration. 17A Am Jur 2d, Contracts, §115. Indeed, motive is not part of the contract. *Id.* Therefore, Weisel's motivation for executing the Agreement – whether it was to build in the setback, or to build a residence near his existing home for his son's caretaker – is not relevant to the question of whether the Agreement is supported by consideration. Likewise, the Association's motivation for entering into the Agreement is not relevant to the issue of consideration.

Instead, the issue is whether each party obtained a right or benefit as a result of executing the Agreement. If there was no benefit whatsoever – such as not paying the recited consideration – there is a lack of consideration. If one party makes a promise, and then is unable to perform due to a supervening event, the consideration fails. *See* Restatement (First) Contracts § 274 ("any material failure of a promised performance by one party, not justified by the conduct of the other, discharges that party's duty to perform the agreed exchange"). Unless there is a duty to

perform in the future, however, there can be no issue of a failure of consideration. That is, if both parties have already performed the terms of the agreement, there can be no later failure of consideration because both parties already got the benefit of their bargain. *See e.g., Shore v. Peterson*, 146 Idaho 903, 912 (2009) (Court confirmed that, although a verbal agreement to reduce an existing contract price is void for lack of consideration, "where an agreement is fully executed on both sides, the question of consideration becomes immaterial.")

In this case, the third recital in the Agreement expressly states that Weisel "desires to obtain written approval by the Association of its proposed development of Lot 13 and Lot 14 and further desires to obtain the Association's written consent to combine such lots into one parcel, removing the setback lines along the common boundary line of such lots." Clark Aff., Ex. A. As a result of the Agreement, he got what he desired in 1983. He obtained the Association's written approval of his proposed development and he was permitted to combine his lots into one parcel and remove the setback lines. Similarly, the fourth recital states that the "Association desires the development and unification of said lots into one parcel to be in compliance with the Declaration of Restrictions of the Beaver Springs Subdivision." As a result of the Agreement, the Association got what it wanted – a unification done in compliance with the terms of the Declaration.

Once both parties got something in return, there could be no subsequent "failure" of the consideration. *See Shore, supra.* Indeed, if someone could argue a failure of consideration by simply claiming that his motivation for entering into the contract is no longer being satisfied, the enforceability of nearly every contract would be in question.[1] Anyone would be allowed to void contractual provisions that they no longer wished to abide by. Such could never be the law.

Therefore, Weisel's request for summary judgment on the basis that the consideration "failed" must be denied.

G. There Is No Legal Support For Weisel's Changed Circumstances Argument.

As an adjunct to his failure of consideration argument, Weisel also argues that due to the Association's purported approval of what Weisel self-servingly describes as "very dense development" on other lots in the Subdivision, the original intent of the Agreement has been frustrated and, therefore, it should be extinguished. In making this argument, Weisel presumes that the Agreement should be analyzed in the same manner as a restrictive covenant that affects an entire neighborhood. The Agreement at issue in this case, however, is a specifically negotiated bilateral contract between one homeowner and an owners' association regarding the unification of two lots into a single parcel – a single parcel that can still be developed in any manner allowed by the restrictive covenants governing the Association.

In fact, none of the law cited by Weisel supports the application of a "change in neighborhood" analysis to a single bilateral contract, even if that contract pertains to real property. *See Hecht v. Stephens*, 464 P.2d 258 (Kansas 1970) (lot owner brought action against other lot owner who installed a mobile home in violation of a restrictive covenant governing entire neighborhood); *Gomah v. Hally*, 113 N.W.2d 896 (Mich. 1962) (lot owner sought relief from setback restrictions contained in covenants purportedly restricting all lots in neighborhood); *Cevasco v. Westwood Homes, Inc.* 15 A.2d 140 (N.J. 1940) (plaintiff sought to restrain defendant from erecting a building that cost less than $6,500 because a restriction was set forth in the covenants contained in all deeds in the neighborhood); *Zasvislak v. Shipman*, 362 P.2d 1053

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[1] For example, people who are "under water" on their mortgages could argue that they should be released from their loan agreements because they entered the agreement for the purpose of making, not losing, money on the investment.

(Colo. 1961) (owner of lot in a subdivision sought relief from certain restrictive covenants covering the entire subdivision); and *Shippan Point Assn., Inc. v. McManus*, 1993 WL 88348 (Conn.Super. 1993) (owner of deed restricted lot in a neighborhood subject to the same restrictions sought relief from the one home per lot restrictions).

There is a reason that all of the case law applying a changed circumstances analysis involves neighborhoods where all lots are subject to the same restrictions: it is inequitable to allow some owners to violate a restrictive covenant and then enforce it against others. This type of inequity, however, is not an issue in the case at hand. In this case, Weisel knowingly unified Lots 13 and 14 in perpetuity. He realized that, by doing so, he would have a single lot, which would then be governed by the terms in the Beaver Springs Declaration. In other words, he got exactly what he asked for from the Association. Therefore, there is no inequity in this situation, as there can be in a case involving the uneven application of a universal restrictive covenant in a neighborhood.

Furthermore, if the courts were to allow the application of a changed circumstances argument to individual bilateral contracts, enforceability will be a constant issue over time. No one will be able to rely on the sanctity of the deal since its enforceability could change. Indeed, it could be found enforceable in one litigation, and unenforceable years later in a new litigation. Thus, an owner who records a conservation easement against his property would be able to argue later that, due to an increase in property prices, he should be allowed to develop his property in violation of the easement. Similarly, anyone who grants an easement over his property could later argue that he no longer desires to allow the easement to be used because traffic has increased. As one can see, allowing the application of a change in circumstances argument to a

simple bilateral agreement will lead to an untenable situation in which no one will be able to rely on the contracts they sign.

H. Weisel's Changed Circumstances Argument Is Without Merit.

Should the Court agree that there is no reason to apply a change in neighborhood analysis to a single lot unification agreement, the issue of changed circumstances can be decided as a matter of law. That is, the Court can simply review the contract and determine whether any of the alleged defenses to its formation are valid and timely. If there is no defense as a matter of law, the case is over.

If, however, the Court determines that the theory of changed circumstances can be applied to a single bilateral contract in the same manner as it is applied to a neighborhood restrictive covenant, Weisel's motion for summary judgment still fails because it is based on a misrepresentation of the Association's concern regarding "density," as well as incompetent and/or disputed evidence. That is, Weisel wants the Court to consider parole evidence of the purpose underlying the Agreement, even the though the purpose is unambiguously set forth in the recitals of the Agreement. Moreover, despite Weisel's attempt to imply differently, there simply is *no* evidence of "changed circumstances." Instead, the Beaver Springs Subdivision has developed over the years in the manner that the former planning administrator for both Blaine County and the City of Ketchum would have expected. Affidavit of Linda Haavik ("Haavik Aff.") at ¶3(d). There is, therefore, no basis for allowing Weisel to present his changed circumstances claim to a jury.

1. Weisel Uses Inadmissible Parole Evidence to Mistate the Purpose of the Agreement.

In his motion for summary judgment on the changed circumstances claim, Weisel asserts that the Association's only purpose in entering into the Agreement (besides the purported

setback "mistake") was to restrict density. The word "density," however, is never even used in the Agreement. Instead, the clear and unambiguous Agreement sets forth the purpose in the recitals of the Agreement: that Weisel wanted approval from the Association to combine his two lots for development purposes and the Association wanted the unification to be done in compliance with the Declaration. Clark Aff., Ex. A. There is no other purpose stated in the Agreement. Since there is no evidence that this purpose has been frustrated, all parol evidence relating to the post-Agreement development in the Subdivision is irrelevant and should not be admitted into evidence. The issue of the Agreement's purpose and whether it has been frustrated by other development in the Subdivision, therefore, should end here. *Hall v. Hall*, 116 Idaho 483, 484 (1989) ("Where the language of a deed is plain and unambiguous the intention of the parties must be determined from the deed itself, and parol evidence is not admissible to show intent.") Parol evidence is admissible only to explain the parties' intent when the express provisions in the written agreement are ambiguous. *Id., citing Ness v. Greater Arizona Realty, Inc.*, 117 Arix. 357 (App. 1977).

2. Weisel's Asserted Purpose is Highly Disputed.

Despite the fact that the parties' intent is unambiguously set forth in the Agreement, Weisel would like this Court to accept that the purpose of the Agreement was the density as measured by the percentage of lot coverage. Thus, he argues, because the Association has allowed "large" homes to be built within the Subdivision, the Association no longer has any concern regarding density. From this self-serving and unsupported conclusion regarding the Association's concern over density, Weisel then asserts that he should be allowed to subdivide his single parcel back into two lots because he believes Lot 13 is worth millions of dollars.

Parol evidence establishes, however, that lot coverage percentage was not the density concern that was voiced by either the Association or the County in 1983 when Weisel executed

the unification Agreement.[2] Instead, Philip Ottley, a former member of the Design Review Committee, testified that the Association's concern with the density of Weisel's 1983 development plans was that Weisel wanted to put two residences on one lot. Ottley Depo. at 53:2-13. The problem with Weisel's development plan was that the Declaration and County zoning ordinance both limited Weisel to one single family residence per lot. The Association was willing to allow two residences on Lot 14 if, through the unification agreement, Weisel effectively transferred the right to construct a residence on Lot 13 to Lot 14, thereby maintaining the one lot/one residence "density" allowed by both the Declaration and the County zoning ordinances. In fact, Weisel himself admitted in his 1987 letter to the Design Review Committee that the basis of the Agreement was concern over the "possibility of two families living on one lot." Clark Aff., Ex. P.[3]

The Association's one residence per lot density analysis was similar to the one utilized by the Blaine County Planning and Zoning Commission at the September 14, 1983 hearing on Weisel's application for a variance. As Nick Purdy stated at the hearing:

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2 Percentage of lot coverage – which is based on the footprint of the structures and not their total square footage – is also not the Association's density concern today. Instead, in 2008, the Association amended its Declaration to limit all development on any single lot – regardless of lot size – to 15,000 square feet. Rosenberg Aff. at ¶ 17; Exhibit 117 of Exhibit 1 of Haemmerle Aff. That is, the Association members voted to intentionally allocate a different allowable percentage lot coverage to each lot owner.

3 Despite this 1987 admission, Weisel now argues that the Court should ignore the Association's and County's concerns over having two single family homes on one lot simply because he thinks the caretakers' house should be characterized as an "outbuilding" instead of a "residence." Brief at 27. Thus, he argues, since there was no limit on the size of an "outbuilding" in the Association's original Declaration, the Association should have allowed him to build a caretakers' house of any size. This argument, however, is completely irrelevant. If Weisel thought that his caretakers' house was an outbuilding, and not subject to any size limitations, the time to object was in 1983, not twenty-six years later. Weisel is an extremely sophisticated and successful businessman. No one forced him to agree to unify his two lots in exchange for being allowed to construct a second residence on Lot 14. If he felt that the terms were not fair, he had every right to object and challenge the Association *and* the County – but that objection should have been lodged in 1983. **Instead, as Weisel testified, he entered into the Agreement with the undisclosed intention of challenging it later, after memories had faded and documents destroyed.** Weisel Depo. at 63:17-64:13.

> We have goals, which are reflected in the Comprehensive Plan, and we have implementations, which are reflected in the ordinances. We try to encourage cluster development off of the highway. And getting *two residences* in a .4 zone on 6.7 acres would be good for the county.

Johnson Aff., Ex. A at p. 13 (emphasis added). Thus, the County allowed Weisel to transfer his right to build a residence on Lot 13 to Lot 14, provided that he agree never to develop Lot 13. Haavik Aff., at ¶ 41. In fact, Mr. McLaughlin – Weisel's agent – admitted at the September 14, 1983 hearing before the Planning & Zoning Commission that Weisel's Agreement with the Association was the equivalent of vacating the lot line between Lots 13 and 14. *Id.* at p. 11. By agreeing to the equivalent of the vacation of the lot line, Weisel knew that he would not be entitled to construct another single family home on his single parcel in the Subdivision.

The County's and City's consistent desire over the past decades to limit each lot to one single residence is explained in detail in the Affidavit of Linda Haavik at ¶ 3(b). Ms. Haavik was the Planning/Zoning/ Building Department Administrator for Blaine County from 1992 to the end of 2005 and the City Planner and Planning Administrator for the City of Ketchum from 1978 through 1992. *Id.*, at ¶ 1. She, therefore, has thirty-two years of experience in land use and development, zoning, and subdivision matters in Blaine County. As she explains, the evolution of the City and County's zoning ordinances regarding accessory dwelling units ("ADUs") evidences a consistent desire to ensure that ADUs are *limited* living spaces that are subordinate and inconsequential to the primary use of the land for which it is zoned. *Id.* at ¶ 3(a). That is, there is to be one single family home per lot. The home that Weisel desired to build for his caretakers was not considered an ADU; instead, both the County and the Association considered it to constitute a second residence because it exceeded the County's limit of 900 square feet for an ADU by approximately 700 square feet, and it had more than one bedroom. *Id.* at ¶ 5.

Therefore, Weisel's "evidence" that large residences and pool houses have been built throughout the Subdivision has no relevance whatsoever to whether or not the benefits of the Agreement have been neutralized or the purpose frustrated. *See* Restatement 2nd Contracts § 265 (a party's obligations may be discharged under the theory of frustration of purpose only if an event occurs whose non-occurrence was a basic assumption on which the contract was made, thereby making the party's performance virtually worthless to the other). Likewise, his expert's calculations of floor area ratios and lot coverage percentage are meaningless to the case at hand.[4] The only possible issue is whether or not the Association has *knowingly* permitted so many other homeowners in the Subdivision to build more than one single family home on their lots that the unification of Weisel's two lots has been rendered "unreasonable, confiscatory, discriminatory, or [practically destroys] the purpose for which the restriction was originally imposed." *Pettey v. First National Bank of Geneva*, 225 Ill. App. 3d 539 (1992). As set forth below, Weisel has failed to present any competent evidence that such a situation exists today within the Subdivision.

3. Weisel's Changed Circumstances Argument is Based on Incompetent and/or Disputed Evidence.

In making his claim that the Subdivision is now so densely developed that the purpose of the Agreement has been rendered useless, Weisel contends that the Association allowed guest houses to be constructed on Lots 5, 11, 12, 16 and 20 that exceeded the maximum allowed at the time under the applicable county or City ordinances. Brief at p. 29. This contention is based on the "evidence" presented in the Affidavit of Garth McClure, a partner with Benchmark, a

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4 As Ms. Haavik explains, neither Blaine County nor the City of Ketchum use floor area ratios or lot coverage percentages in their definition of density for residential subdivisions. Instead, in single family zoning districts, the primary dwelling unit on any lot is considered the unit of density. Haavik Aff. at ¶¶ 28-30. Thus, each lot in the Subdivision has a unit of density of one (1).

surveying company. In Exhibit 6, Appendix A, of his Affidavit, Mr. McClure sets forth a Build Out Report ("McClure Report"), which purports to contain the actual square footages and uses of all of the structures currently existing in the Subdivision. Mr. McClure admits that, in determining the square footages and uses of the structures, he relied solely on the Blaine County Assessor's records. McClure Aff. at ¶ 13. As set forth below, however, the Assessor's records do not accurately reflect the sizes or uses of the structures in the Subdivision.

According to Linda Haavik, the Assessor calculates square footage by measuring the exterior of a building. Haavik Aff. at ¶¶ 20-22. In determining the size, the Assessor is not concerned about whether or not the structure meets the zoning requirements. Instead, the Assessor is merely trying to determine the general size of the structure in order to determine property value for tax purposes. *Id.* Thus, the Assessor may include square footage of components that the Blaine County and City of Ketchum zoning officials did not include, such as the exterior finishes, interior staircases, mechanical areas, etc. As a result, the zoning officials' calculations could very well differ from the Assessor's calculations. Moreover, as Ms. Haavik explains, and Mr. McLaughlin confirms, square footage calculations are somewhat subjective due to the various methods used. *Id.* As a result, one cannot use the Assessor's records as *proof* that a homeowner sought approval from the Association (or the City or County) to build a structure of that exact size. Instead, the homeowner may have calculated – and represented to the Association – a square footage that complied with the zoning ordinances.

The inability to use the Assessor's records to determine compliance with the then-in-effect zoning ordinances is exemplified by Weisel's caretakers' house. When Weisel sought a variance from Blaine County in 1983, he represented to the County that he sought to build a structure that was 1,570 square feet. Johnson 2nd Aff,, Ex. A. As a result, the County approved

his variance and granted him approval to build a 1,570 square foot caretakers' house. The Assessor's records, however, state that the caretakers' house is 1,631 square feet. Affidavit of Tammy Robeson, Ex. A. That is, the Assessor's records evidence a 61 square foot differential from the plans that were submitted and approved by the County (and the Association) and the Assessor's exterior measurement. Given the fact that different people will measure square footage differently, and for different purposes, the Assessor's records should not be used as evidence that other homeowners in the Subdivision sought and obtained approval from the Design Review Committee to build structures that exceeded the then-in-effect zoning ordinances regarding ADUs. Haavik Aff. at ¶ 23.

Moreover, the McClure Report contains several misrepresentations or mistakes regarding the asserted sizes and uses of the five lots that form the basis of Weisel's argument that, post 1983, the Association allowed over-sized guest houses for other owners without requiring them to relinquish development rights.[5] These misrepresentations and mistakes including the following:

- Lot 5: The McClure Report alleges that this lot has a "guesthouse and garage" that is 2,711 square feet that was built in 1978. Notably, since this structure was built prior to the execution of the Agreement, it cannot constitute a "changed" circumstance. In any case, the Assessor's records state that there is only 961 square feet of "finished living area." The remainder of the building is 1025 square feet of garage space and 725 square feet of unfinished attic space above the garage. Therefore, given the uncertainty with measuring square footage, there is no competent evidence that the guest house area exceeds the 900 square feet allowed under the County zoning ordinance in 1978.

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[5] Weisel also references the Association's willingness to allow the owner of Lots 18 and 19 to move the lot line between the two lots so that he could build a pool and pool house without violating the setback restrictions. Notably, the owner of these two lots was not seeking to build a second residence on one lot. Therefore, the Association's approval of the lot line shift has no relevance to Weisel's changed circumstances argument. Indeed, it simply proves that, if the motivation behind the Agreement was concern over a setback violation, Weisel could have sought only to move – not vacate – the lot line between his two properties. As evidenced by his desire to unify the lots, he sought to transfer the development rights allocated to Lot 13 over to Lot 14.

- Lot 11: The McClure Report states that this lot has a guest house that is 1,250 square feet and a guest apartment that is 1,151 square feet. According to the owner of the lot, Jeff Greenstein, this assertion is not accurate because there is no separate guest apartment on his property. Affidavit of Jeff Greenstein at ¶ 2. The main house has a garage attached to it, and attached to the other side of the garage is a bedroom and office. There are no separate cooking facilities in these rooms. As for the guesthouse, which was converted from a barn in approximately 1999, Mr. Greenstein is not aware of the square footage. There is, however, no competent evidence that the previous owner sought to exceed the 1200 square feet allowed under the Ketchum zoning ordinance. To the contrary, according to the City of Ketchum's Planning Assistant, since the Subdivision was annexed into the City in 1990, no homeowner in the Beaver Springs Subdivision has sought approval for any building plans that violated the then current City ordinances regarding building sizes. Affidavit of Rachel Martin at ¶ 2.

- Lot 12: The McClure Report states that this lot has a guest house that is 1,280 square feet. Again there is no competent evidence that the building exceeded the square footage allowance as the City zoning officials measured square footage or that the owners of the property informed the Association or the City that they were building a structure that exceeded the City's maximum of 1,200 square feet. To the contrary, no variance applications were filed by any Association member since the Subdivision was annexed into the City in 1990. *Id.*

- Lot 16: The McClure Report states that this lot has a guest house that is 1,568 square feet. According to the owner, Kiril Sokoloff, this contention is not accurate. Instead, this detached building has two separate levels. The top level has a guest sleeping area and game room, which is attached to a garage area. There is no kitchen in that upper level. The lower level, which does have a kitchen, is a caretaker's apartment that is approximately 700 square feet. The caretaker's apartment is completely separate from the guest area above and has its own entrance. Affidavit of Kiril Sokoloff at ¶ 3. The Assessor's records state that this caretaker's area is 784 square feet, not 1,568 square feet.

- Lot 20: According to the McClure Report, this lot has a guest house that is 1,423 square feet. Again, this contention is not accurate. Instead, according to Janet Jarvis, the architect employed by the then-owners of the lot, she created a guest wing that added approximately 1100 square feet to the end of the existing house, which already contained the garage and a maid's room. Affidavit of Janet Jarvis at ¶ 2. The size set forth in the Blaine County Assessor records includes the pre-existing square footage of the maid's room. The owners, however, did not intend for the maid's room to be part of the guest wing and the City planners never questioned Ms. Jarvis about the issue. Instead, the City simply approved an approximate 1100 square foot guest wing addition to the house. *Id.* at ¶ 4.

In addition to these mistakes regarding the five guesthouses identified by Weisel as constituting his "changed circumstances" argument, the McClure Report also contains a mistake

regarding Lot 7. The McClure Report states that Lot 7 contains a house, attached garage and attached guest house. This contention is not correct. Instead, this lot has no guest house whatsoever. Jarvis Aff., at ¶ 6. There is a room above the garage, but it was designed as a recreation/media room only, and has no kitchen facilities. *Id.*

As a result, Weisel has failed to present any evidence establishing that, post 1983, the Association knowingly allowed anyone to construct a guest house that was larger than what was allowed under the then-in-effect zoning ordinances. Instead, the *only* owner expressly allowed by the Association to construct a second residence on one lot was Weisel. Since there is no competent and undisputed evidence to support a changed circumstances argument, Weisel's motion for summary judgment must fail.

4. The Subdivision has been Built Out as Expected.

As set forth in detail in the Association's motion for summary judgment, and as Weisel himself admits, the standard for invalidating a restrictive covenant is very high. Brief at 31-32, *citing Hecht v. Stephens*, 464 P.2d 258 (Kansas 1970) (the change "must be so great or radical as to neutralize the benefits of the restriction and destroy its purpose."); *see also Deak v. Heathcote Assoc.*, 595 N.Y.S.2d 556 (Supr. Ct. N.Y. 1993) (invalidation of a restrictive covenant requires proof that the purpose of the restriction was incapable of being accomplished). In this case, the Association still benefits from the unification of the two lots. Indeed, Weisel admits that a lack of development on Lot 13 increases the value of Lot 14, and, thus, every other lot in Beaver Springs. Weisel Depo. at 182:14-18. Therefore, even if Weisel's evidence was competent, it does not establish a radical change in the neighborhood that destroys the underlying purpose for requiring the unification of the two lots.

To the contrary, the development in the Subdivision has been as one should have expected to occur over the years. According to the former planning administrator, the Beaver

Springs Subdivision was proposed and approved as a residential subdivision in a zoning district that permitted one single family residence per lot as its primary use in addition to variety of accessory, subordinate uses that could be located on the same lot. Haavik Aff., at ¶ 38. As she further opines, despite the lack of exact data on the square footages of the buildings in the Subdivision, it has developed in the manner that was permitted by the zoning in both the County and the City. *Id.* at ¶ 40. That is, the lots contain single family homes and allowable outbuildings.

I. Weisel's Claims Should Be Dismissed Under The Doctrine Of Laches.

As set forth above, Weisel relies solely on the Assessor's records to create an issue as to whether or not the Association knowingly allowed others in the Subdivision to violate the then-in-effect zoning ordinances without also requiring them to unify two lots. According to Linda Haavik, however, the Assessor's records do not reflect the square footages that were presented by the homeowners to the building departments. Haavik Aff. at ¶ 26. Instead, the only documents that should be relied upon to determine zoning compliance are the building plans that were submitted to the Design Review Committee and the applicable building department.[6] *Id.* at ¶ 27. These documents, however, are no longer available for the parties to review. *Id.* Instead, Blaine County maintained only the building permit application forms from 1980 to present and these forms contain little or no information about the size of the buildings or the type or purpose of the building being permitted. *Id.*

Furthermore, as a matter of housekeeping, the Association discarded all of the non-current building plans that had been submitted to the Design Review Committee several years prior to 2004. Affidavit of Karen Roseberry ("Roseberry Aff.") at ¶ 2. Weisel filed this suit in

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[6] It must be noted, however, that the City of Ketchum records evidence not a single request for a variance to build any structure in a manner not compliant with the zoning ordinances. *See* R. Martin Aff.

February 2009. Due to the fact that these documents are no longer in existence, the Association is unable to show the Court the building plans that other homeowners submitted to the Design Review Committee for review and approval, which would establish that the Association did not knowingly approve any structure that violated the then-current zoning ordinances.

Weisel's delay in bringing this lawsuit, therefore, has caused prejudice to the Association's ability to present its defense to this "changed circumstances" argument, as well as the other contract claims. As such, all claims in the Amended Complaint should be summarily dismissed under the theory of laches. The affirmative defense of laches is a creation of equity. *Kootenai Elec. Co-op, Inc. v. Lamar Corp.* 2003 WL 23914538 at *10 (Dist. Ct. 2003). The necessary elements to establish the defense of laches are:

(1) Defendant's invasion of plaintiff's rights;

(2) Delay in asserting plaintiff's rights, the plaintiff having had notice and an opportunity to institute a suit;

(3) Lack of knowledge by the defendant that plaintiff would assert his rights; and

(4) Injury or prejudice to the defendant in the event relief is accorded to plaintiff or the suit is not held to be barred.

Thomas v. Arkoosh Produce, Inc., 137 Idaho 352 (2002).

In this case, each of the elements of the affirmative defense is satisfied. First, according to Weisel, the Association invaded his rights by allowing various other homeowners to violate the zoning ordinances, all of which occurred according to the McClure Report prior to 2003. Indeed, according to Weisel, the Association invaded his rights back in 1983 when it purportedly "forced" him to sign the Agreement even though the Declaration did not restrict the size of "outbuildings."

The second element of the defense is whether Weisel delayed in bringing his claims against the Association. This element is clearly established. Indeed, Weisel testified at deposition that he signed the Agreement in 1983 with the undisclosed intention of later getting out of it and building on Lot 13. Weisel Depo. at 63:17-64:13. That is, he knew he was going to challenge the enforceability of the Agreement back in 1983. Despite this fact, he waited until 2009 to file the suit. Moreover, even if the Court was to look solely at Weisel's changed circumstances argument, Weisel still delayed in bringing this claim. According to the Assessor's records, the last guest house built in the Subdivision was on Lot 12 and it came on to the Assessor's records in 2003. Thus, Weisel delayed a minimum of six years after the current development situation was created before bringing suit. In addition to supporting a claim of laches, this six year delay also constitutes a violation of the statute of limitations, which is five years for actions based on a written contract. Idaho Code §5-216.

The third element of the laches defense is whether the Association lacked knowledge that Weisel would assert a claim against it. The first time that Weisel began challenging the Agreement was in 2004. Clark Aff., Ex. R. Thus, although Weisel knew he was going to challenge the Agreement back in 1983, the first time Weisel said anything about the Agreement to the Association – which did not constitute a demand – was in 2004. Weisel then waited another five years before filing suit.

The final element of the defense is whether the Association has been prejudiced by Weisel's delay in filing suit. It has been. The Association discarded the building plans that had been submitted to it by the homeowners several years prior to 2004. Roseberry Aff. at ¶ 2. At that time, it had no knowledge of Weisel's intent to claim that the Association had knowingly approved development plans that violated the County or City zoning ordinances. Thus, it cannot

establish with the best evidence possible that it did no such thing. Furthermore, the Association is prejudiced by the natural fading of memories that happens when a quarter of a century passes. The members of the Association have no clear memory of the negotiation of the Agreement because the events occurred twenty-six years ago. Weisel should not, therefore, be allowed to base his claims on parol evidence regarding the unstated purpose of the Agreement – especially since he has been planning this challenge to the Agreement since he signed it. Instead, the Agreement should be interpreted solely by the express – and undisputed – terms of the Agreement itself.

Therefore, the Association respectfully requests that the Court summarily dismiss the entire Amended Complaint because Weisel should have brought the claims sooner so as not to prejudice the Association's ability to defend itself.

J. Weisel Cannot Establish As A Matter Of Law That Neither The County Nor Jim Dutcher Are Not Indispensable Parties.

The final issue contained in Weisel's motion for summary judgment is a request that the court find, as a matter of law, that there are no indispensible parties in this action. Pursuant to I.R.C.P. Rule 19(a)(1), if a party is necessary, they must be joined if feasible. There are two separate tests for determining whether a party is necessary. The first test is if "in the person's absence, complete relief cannot be accorded among those already parties." *Id.* The second test is whether a person claims an interest relating to the subject of the litigation and their absence would either impair or impede the person's ability to protect that interest or would leave any of the persons already parties subject to a substantial risk of incurring multiple and inconsistent obligations. *Id.*

In this case, if the court determines that Weisel's claims should go to a jury, the issue of indispensible parties must be addressed. The Association claims that there are two indispensible

parties: Blaine County and Jim Dutcher. They are indispensible parties because they may have third party rights under the Agreement.

Under Idaho law, "if a party can demonstrate that a contract was made expressly for his benefit, he may enforce that contract, at any time prior to rescission, as a third party beneficiary." *Baldwin v. Leach*, 115 Idaho 713, 715 (Ct. App. 1989). The issue of whether someone is a third party beneficiary depends on whether the transaction reflects an intent to benefit the party. *Id.* If another party is a third party beneficiary, once that party has relied or acted upon the existence of that contract, the contract cannot be rescinded without his consent. *Id., citing* Restatement 2nd Contracts § 311(1981). Thus, if Blaine County or Jim Dutcher is a third party beneficiary of the Agreement and acted in reliance upon it, the Agreement cannot be rescinded without that party's consent. That is, complete relief in this action to rescind the Agreement cannot be accorded without their presence.

With regard to Blaine County, it is clearly a third party beneficiary of the Agreement. The County demanded, as a condition of approval of Weisel's variance application, that "a declaration or deed restriction be written satisfactory to the Zoning Administrator, which will not allow the construction of a residence upon lot 13." 2nd Aff. of Custodian of Records, Ex. C. In response, Weisel's attorney, Roger Crist, sent the Agreement to Blaine County Planning & Zoning stating "I believe the Agreement will satisfy the requirements of the county in this regard." Therefore, there are facts clearly indicating that the County was an intended beneficiary of the Agreement, and that it relied on the Agreement when it granted the variance to Weisel.

Weisel, however, contends that the County is no longer a third party beneficiary because it has no interest in enforcing the Agreement. This statement is based solely on the Affidavit of Timothy Graves, the Chief Deputy Prosecuting Attorney for Blaine County. In his affidavit, Mr.

Graves "opines" that the County had no interest in enforcing any lot restriction on Weisel's property because the lot had been annexed into the City of Ketchum. This "opinion," however, does not constitute a finding by the Blaine County Board of Commissioners that the County has no interest in enforcing the Agreement. There is no evidence whatsoever that this issue was raised at an open hearing before the Commissioners and voted upon. Therefore, Mr. Graves' opinion does not eliminate the County's status as a necessary party to this litigation.

Weisel's next argument is that the County no longer has jurisdiction over the "subject matter" because the property was annexed by the City. In making this argument, Weisel relies on the language in *Boise City v. Blaser*, 98 Idaho 789 (1977). In *Blaser*, the Idaho Supreme Court noted that a county cannot bind a municipality by a regulatory decision taken by the county affecting the property prior to annexation by the municipality. *Id.* at 791. Thus, a city has the right to rezone the property after annexation provided it respects non-conforming uses. *Id.* This statement of Idaho law, however, does not have any bearing on whether a County, as a third party beneficiary of a land use agreement, loses its right to enforce it after the property is annexed by the City. The County's potential desire to enforce its rights as a third party beneficiary of a bilateral contract is not the equivalent of trying to enforce a previous zoning ordinance. Its third party rights vested when it relied on the Agreement and approved the variance application and Weisel has set forth no law supporting a theory that these rights disappeared upon the annexation. Therefore, should the court allow Weisel to proceed on his claims, the County should be joined as an indispensible party.

With regard to Jim Dutcher, he has asserted to the Association that he is a third party beneficiary of the Agreement. Affidavit of Bill Fruehling, Ex. B. Weisel asserts that Mr. Dutcher is not a third party beneficiary because he believes that Mr. Dutcher was not an intended

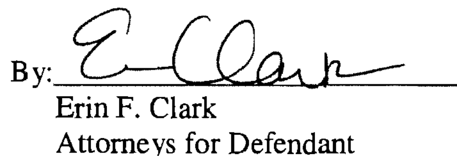
beneficiary of the Agreement. The Agreement, however, was executed by the president of the Association to benefit all of its members. Indeed, the Association acts only for the benefit of its members. Mr. Dutcher then claimed to the Association that he relied on the existence of the Agreement when he purchased his lot in Beaver Springs. *Id.* As a result, there is at least an issue of fact as to whether or not Mr. Dutcher is a third party beneficiary of the Agreement. If he is, there is every reason to join him as a party.

IV. CONCLUSION

For the reasons set forth above, Beaver Springs requests that the Court deny Weisel's motion for summary judgment in its entirety and instead dismiss all of Weisel's claims against it with the exception of his claim for reimbursement of any assessment he should not have been requested to pay during the period from 2005 to the present.

DATED this 2 day of February 2010.

LAWSON LASKI CLARK & POGUE, PLLC

By: 
Erin F. Clark
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2th day of February, 2010, I caused to be served a true copy of the foregoing document by the method indicated below, and addressed to each of the following:

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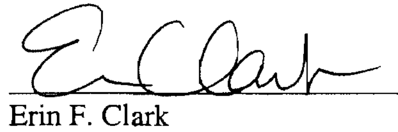

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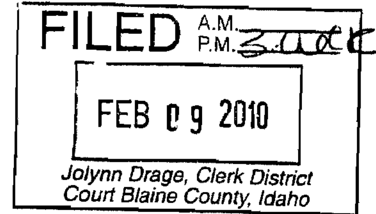

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

THOMAS WEISEL, a married man dealing in his sole and separate property, Plaintiff, vs. BEAVER SPRINGS OWNERS ASSOCIATION, INC., an Idaho corporation Defendant.	Case No. CV-09-124 **DEFENDANT'S REPLY TO PLAINTIFF'S RESPONSE BRIEF TO MOTION FOR SUMMARY JUDGMENT**

COMES NOW Defendant Beaver Springs Owners Association, Inc. ("Beaver Springs" or "Association"), by and through its counsel of record, Lawson Laski Clark & Pogue, PLLC, and submits the following Reply Brief to Plaintiff Thomas Weisel's ("Weisel") Response Brief:

I. INTRODUCTION

Although Weisel's Response Brief is over forty pages long, it is entirely based on the following two allegations: (1) the only reason the 1983 Agreement was executed was to allow Weisel to build in the setback area between his two lots; and (2) the Association's concern regarding "density" in the Beaver Springs Subdivision has been thoroughly thwarted due to the

large homes that have been built since 1983. Despite having the burden of establishing these allegations through admissible evidence to survive the Association's summary judgment motion, Weisel relies solely on his own self-serving "recollection" and irrelevant and inaccurate "facts" regarding subsequent development within the Subdivision.

With regard to Weisel's claim that the "only possible purpose" of the Agreement was to enable him to build in the setback area, Weisel has the burden of proving this purported sole purpose by *clear and satisfactory* evidence, not merely by a preponderance. The evidence he presents, however, does not even come close to satisfying his burden. Instead, Weisel appears to have adopted the theory that, if he repeats something enough times, it will become fact. Thus, in his Response Brief, Weisel completely ignores the evidence submitted by the Association – including Weisel's own admissions – that conclusively and unambiguously establish that the purpose of the Agreement was to obtain the Association's approval for his 1983 development plans, which included building two residences on the combined lots. Realizing the futility in arguing against the express terms of the Agreement and his own admissions, Weisel instead focuses on an irrelevant and inaccurate theme that the Association has some sort of personal vendetta against him.[1] The Association, however, is not motivated by personal feelings; it merely wants Weisel to live up to his end of the bargain.

The second allegation underlying Weisel's claims against the Association is that the Association has allowed other homeowners to develop their properties in a manner that Weisel considers dense. To prove this contention, Weisel presents the non-expert opinion of an

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1 For example, Weisel alleges that the Board elected Jamie Dutcher to the Board after he resigned and has allowed her to participate in matters relating to the Agreement even though her husband, Jim Dutcher, has claimed to be a third party beneficiary of the Agreement. This allegation is false. Jamie Dutcher did in fact recuse herself from the entire issue of the Agreement after the Association members elected her to the Board. Affidavit of Jamie Dutcher at ¶ 3.

employee of a surveying company who claims – not surprisingly – that there is more development in the Subdivision now than there was in 1983. Weisel also relies on the Assessor's records as proof that other lot owners have been able to exceed the City and County size restrictions. As set forth in the Affidavit of Linda Haavik, however, the Assessor's records are not competent evidence of what size information was presented to the zoning officials or the Design Review Committee at the time of construction when seeking approval to build. Therefore, Weisel has not presented adequate evidence to satisfy his burden of proving that the Association knowingly allowed the Subdivision to change so radically and completely that the purpose for the Agreement has been destroyed.

Weisel has not satisfied his burden of presenting sufficient admissible evidence to prove his claims. Nor has he provided an adequate legal rationale for why he should not be held to the statute of limitations. His complaint against the Association, therefore, must be dismissed.

II. ARGUMENT.

A. The Mutual Mistake Argument Is Based On A False Premise.

Weisel's claim of mutual mistake is entirely based on the assertion that a "fundamental, express premise of the Agreement was the location and construction of improvements in the setback along the boundary between Lot 13 and Lot 14." To establish a mutual mistake, Weisel must show by clear and satisfactory evidence – not just a preponderance – that at the time of contracting, both parties shared a misconception about a basic assumption or vital fact upon which they based their bargain. Restatement 2nd Contracts § 152. The only "facts" submitted by Weisel to support his claim that both he and the Association entered into the Agreement solely on the mistaken belief that the improvements were in the setback area are the following: (1) there is a single phrase in the Agreement that states that the Association will allow the removal

of the setbacks because "the improvements to be constructed in the setback lines along the common boundary of Lot 13 and Lot 14 will not cause unreasonable diminution of the view from other lots;" (2) Philip Ottley "recollected" that at some point in the process the caretaker's unit was located in the setback; and (3) the plans changed over time. As set forth below, these three pieces of "evidence" do not satisfy the clear and satisfactory burden required to prove that the Association based its decision to enter into the Agreement on the location of the improvements, especially when viewed in opposition to the undisputed evidence presented by the Association.

Indeed, it must be noted that Weisel failed to address most of the evidence submitted by the Association in support of its motion for summary judgment, including the following:

- Weisel's architect testified that he *never* located the caretakers' house in the setback area. McLaughlin Depo. at 22:24-23:11.

- The drawings submitted to, and approved by, the Design Review Committee sited the planned caretakers' house outside of the setback lines on Lot 14. Ottley Depo., pp. 44:15-46:23 and Ex. 5. Therefore, there was no reason for the Association to believe that the caretakers' house was located in the setback area.

- Weisel *admitted* in a 1987 letter to the Design Review Committee that it was the "possibility of two families living on one lot" that led to his agreement to "give up the right ever to build on the second" lot. Clark Aff., Ex. P.

- Weisel would not have signed the lot-unification Agreement if its sole purpose was to enable him to build in the setback area because Weisel testified that he intentionally moved the location of the caretakers' house during the design review process for the purpose of being able to build on Lot 13 later. Weisel Depo. at 41:7-18.

- Weisel's architect informed the County's Planning & Zoning Commission that Weisel wanted the caretakers' house to be close to the existing main house on Lot 14, not near Lot 13, because it was to house the person that was taking care of his teenage son. First Aff. of Custodian of Records, Ex. A at p. 11.

Instead of rebutting the undisputed evidence set forth above, Weisel primarily focuses on the single phrase in the "Removal of Setbacks" paragraph of the Agreement. He does not, however, address the several other provisions in the Agreement that expressly set forth the

understanding of the parties and the reasons for why they executed it. In fact, Weisel completely ignores the recitals in the Agreement, even though they set forth the expressed desires of the parties. The second recital states that "Lot 13 and Lot 14 are conterminous and Weisel desires to combine and develop said lots as one parcel."[2] The next recital states that Weisel desired to obtain the Association's written approval for his proposed development of the two lots and their unification. The final recital states that the Association desired the development and unification of the two lots to be in compliance with the Declaration. These recitals do not say that Weisel desired to unify the two lots so that he could locate the development in the setback area. It is inconceivable that, if the Agreement was solely premised on the location of the development in the setback, the recitals would not state that fact.

In addition to the clear expression of purpose set forth in the recitals, there is a rational explanation for the phrase in the Agreement that forms the basis for Weisel's mutual mistake argument. The phrase in the Agreement upon which Weisel bases his entire mutual mistake theory is:

> "the improvements to be constructed in the setback lines along the common boundary of Lot 13 and Lot 14 will not cause unreasonable diminution of the view from other lots."

Paragraph 17 of the Declaration, which governs whether two lots may be unified, provides:

> "any improvements to be constructed within these setback lines will not cause unreasonable diminution of the view from other property."

Since it was the Association's desire that the unification be done in accordance with the provisions of the Declaration, it needed to find that any improvements that may ever be

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2 Thus, the Agreement expressly states that it was *Weisel* that desired to unify his lots and develop them as one. There is no stated limitation or condition to this desire. Had this recital not been true, Weisel – with his sophisticated business background – certainly would have objected to it. He did not. Instead, he signed the Agreement acknowledging that it was his unconditioned desire – not acquiescence to an Association demand – to unify his two lots for development purposes.

constructed in the setback area not impair the views from other lots. Thus, the drafter of the Agreement likely adopted the language from the Declaration into the "Removal of Setbacks" paragraph. Notably, Weisel presents no evidence or argument in his Response Brief to rebut this explanation.

The second piece of evidence relied upon by Weisel to support his theory that a setback encroachment was a vital fact underlying the Agreement is the testimony of Philip Ottley. Mr. Ottley stated that he recalled that, at some point, the caretakers' unit was located in the setback. This testimony, however, must be viewed in connection with the fact that Mr. Ottley was deposed twenty-six years after the Agreement was executed, he was no longer a member of the Association, and he had recently reviewed the Amended Complaint filed by Weisel, which claims that the location of the caretakers' unit changed during the design review process. Therefore, whether he testified as to a true recollection or to what he thought he should remember is unclear. His "recollection" also could have been based on the fact that the location of Weisel's proposed garage structure – which was part of the 1983 development plan – was changed because it was originally located in the front setback. Aff. of Kathleen Rivers, Ex. 6. Mr. Ottley could simply be remembering that a setback issue existed with Weisel's plans and superimposing that issue onto the caretakers' house. Unfortunately, given Weisel's intentional decision to wait twenty-six years before filing this lawsuit, getting a clear recollection from any witness is very difficult.

The final piece of evidence presented by Weisel is that the "undisputed documentary evidence shows that the plans were changed many times." Brief at 11. This "fact," however, does not prove the existence of a mutual mistake. Instead, the evidence merely proves that the design was first created with drawings dated July 20, 1983 and were amended on August 18,

1983, before they were submitted to the Design Review Committee on September 1, 1983. Then, the only documented change was on September 23, 1983 when Mr. McLaughlin informed Jean Smith of the Design Review Committee that the garage was moved to a new location because the County Planning & Zoning Department realized that it was encroaching into the front setback. Rivers Aff., Ex. 6. Nothing in this evidence even implies that the location of the caretakers' house was initially located in the setback area, or that its location was a fundamental premise of the Agreement.

Realizing that the evidence does not support his claim regarding the sole purpose of the Agreement, Weisel then reverts to a logic argument. That is, Weisel asserts that the "only possible purpose" of unifying the two lots was to build in the setback area. The apparent basis for this argument is that the Association had no authority upon which to deny Weisel's 1983 development plan unless the development was to be located in the setback area. This contention is simply incorrect. Under the Declaration, every lot is limited to one single family home. Clark Aff., Ex. B at ¶13. As Weisel admitted in his 1987 letter to the Design Review Committee, he sought to build two single family homes on one lot. *Id.*, Ex. P. The Association, therefore, had the right to deny his development plans. Although Weisel now characterizes his caretakers' house as an outbuilding, in 1983 both the Association and the County considered it to be a primary residence. Thus, as clearly expressed in the Planning & Zoning hearing notes on Weisel's variance request, Weisel was permitted to construct two primary residences on Lot 14 if he gave up his right to build a residence on Lot 13. Affidavit of Custodian of Records, Ex. A. This condition was satisfied by the Agreement. Therefore, Weisel's "only possible purpose" argument is unavailing.

Weisel has the burden of establishing by clear and satisfactory evidence that the location of the caretakers' house in the setback area was a vital fact upon which both parties based the Agreement. The evidence presented by Weisel does not meet this burden. His claim of mutual mistake, therefore, must be dismissed.

B. The Agreement Is Support By Consideration.

The entire crux of Weisel's lack of consideration claim is based on his assertion that the only possible consideration for the Agreement was the location of the development in the setback area. As set forth above, Weisel has not presented adequate evidence to meet his burden of proof. Furthermore, in making this argument, Weisel implies that there can be only one form of consideration. That is, if he did not get the benefit he claims to have desired, there can be no consideration whatsoever for the Agreement. Consideration, however, is a legal concept that is defined as *any* right or benefit accruing to one party, or some forbearance given by the other. 17A Am Jur 2d Contracts § 115. Thus, if Weisel obtained *any* benefit or right, there was consideration for the Agreement.

Clearly, Weisel did obtain a benefit from the Agreement: he obtained the Association's approval of his development plan, which included constructing a second residence on Lot 14. Weisel even admitted this fact – an admission that he does not address in his Response Brief. Clark Aff., Ex. P. Weisel then used the Agreement to obtain a variance from the County. *See Sirius LC v. Erickson*, 144 Idaho 38, 42 (2007) (Court affirmed lower court's finding that consideration for an agreement may be provided by a third person). He, therefore, got something in return for unifying the lots in accordance with the terms of the Declaration – especially since it was Weisel himself that desired to unify his two lots.

Despite his admission, Weisel continues to claim that the Agreement was not supported by consideration. In making this argument, Weisel first asserts that the Association "admitted" that the consideration for the Agreement was the removal of the setbacks in lieu of a lot line shift to accommodate the development plan. Response Brief at 14. This contention is an outrageous attempt to prove a fact through highly unreliable hearsay evidence. Indeed, it is based entirely on the notes from a 2004 Board of Director's Meeting in which some unidentified member made a statement regarding the removal of the setbacks in lieu of a lot line shift. The truth of this statement, however, is not proven simply because someone said it. Indeed, it could have been Weisel himself who made this statement. Weisel's misleading evidence supporting this purported admission, therefore, should be stricken from the record.

Weisel's only other "support" for his lack of consideration argument is, once again, his unsupported assertion that the Association had no right to deny Weisel's development plans back in 1983. In addition to the fact that this assertion is false because both the Association and the County had the right to deny Weisel's request to locate two single family homes on one lot, this argument should have been made back in 1983, not today. If Weisel believed that the Association did not have the right to limit him to two single family homes for his two lots, he should not have signed the Agreement. He should have filed this lawsuit against the Association (and, presumably, the County) back in 1983 and tried to get an order enabling hiim to build what he wanted to build. Weisel did not do this because he knew that his proposed development exceeded the Association's and County's requirements.

C. Weisel's Rescission Claim Must Be Dismissed.

In its motion for summary judgment, the Association correctly claimed that the rescission claim must be dismissed because – even if Weisel could establish a mutual mistake or failure of

consideration – the parties cannot be put back to their pre-contract positions. *O'Connor v. Harger Construction, Inc.*, 145 Idaho 904, 909 (2008). As set forth below, not one of Weisel's responses rebuts this claim.

First, Weisel claims that the Association's attorney admitted that the Agreement can be rescinded. This assertion is purposefully misleading. The Board of Directors was advised that it could vote to rescind the Agreement if it believed that it was in the best interest of the Association to do so. That is, the Association, as a party to the Agreement, had the right to cancel Weisel's obligations under the Agreement if it chose to do so. This legal opinion, however, is totally unrelated to whether or not the parties can be put back into their pre-contract positions. Instead, it is merely an opinion that the parties to an agreement can agree amongst themselves to cancel an agreement should they so desire.

Second, Weisel appears to argue that the City and County ordinances are unimportant to the issue at hand because the City annexed the Subdivision without reference to the restriction. This fact, however, has no bearing on whether or not the parties can be put back to their pre-contract status. Prior to executing the Agreement, Weisel had one single family home on Lot 14 and he had no right to build a second primary residence on Lot 14. After executing the Agreement, he was allowed to build a second primary residence on Lot 14. This structure is still located on Lot 14. Notably, if Weisel wanted to try and build it today, he would have to obtain a variance from the City, and the approval of the Design Review Committee, to build the structure because it does not conform to the current zoning ordinances for accessory dwelling units. Therefore, simply because Weisel's second residence is considered "legally nonconforming" by the City and the Association, it does not follow that the parties can be put back to their pre-contract status in which there was only one single family home on Lot 14.

Third, Weisel argues that he is not barred by the doctrine of unclean hands from seeking an equitable remedy such as rescission. The Association based its request for the application of this doctrine on Weisel's admission that he purposefully entered into the Agreement with the belief that he could obtain its immediate benefits and later challenge its enforcement against him. Instead of rebutting this proof of his unfair, dishonest and deceitful conduct while negotiating and executing the Agreement, Weisel sets forth a list of irrelevant and/or untrue assertions that he contends proves he has been "seriously disadvantaged" by the Agreement because the Association has allowed others to develop their properties in the manner they desired. In making this claim, Weisel does not present any evidence that any other homeowner sought the Association's approval to develop their property in a manner that exceeded the then-in-effect zoning ordinances. There is, therefore, no evidence that the Association has treated him any differently than it would treat any other homeowner. Instead, the evidence proves that the Association accommodated Weisel's development desires in 1983 because Weisel dishonestly informed it that he and his heirs would never attempt to split and/or develop the single parcel as two separate parcels. Given this evidence of unclean hands, Weisel should not be allowed to seek an equitable remedy.

D. Weisel's Contract Claims Are Barred By The Statute Of Limitations.

Weisel next claims that, although he waited twenty-six years before filing his lawsuit against the Association, he is not barred by Idaho's five year statute of limitations for bring an action based on a written contract. Weisel first relies on the case of *Thompson v. Ebbert*, 144 Idaho 315, 318 (2007) for the proposition that there is no statute of limitations defense to a lack of consideration claim. The issue in Thompson, however, was whether a fifty-year lease of a garage in violation of the recorded covenants was void from the beginning because there was no

authority for its execution. That is, since the lease was deemed never to have existed in the eyes of the law, it could not have life breathed into it simply because more than five years had passed since its execution. Notably, the plaintiff in Thompson could not have filed suit within five years of the execution of the lease agreement because he was not yet a member of the association affected by the lease agreement until after the time period expired. Thus, the issue in *Thompson* was whether or not an agreement that was never legally authorized could become enforceable by the passage of time. The *Thompson* Court found that it could not.

This finding by the *Thompson* court is not instructive to this case because Weisel's assertions that the Agreement lacked consideration and/or was based on a mutual mistake – even if true – do not void all possible enforcement of it. Instead, a contract that lacks consideration can still be enforced under a theory of promissory estoppel. Under the theory of promissory estoppel, "a promise which the promisor should reasonably expect to induce action . . . on the part of the promisee and which does induce such action . . . is binding if injustice can be avoided only by enforcement of the promise. Restatement (First) of Contracts, § 90. Thus, even if the contract lacks consideration, life can be breathed into the contract if one side acted in reliance on the promise. Similarly, a contract based on a mutual mistake may be ratified by either party if that party accepts the benefits accruing under it. 17 CJS, Contracts, § 82. As such, an agreement based on a mistake is not a contract that is deemed never to have existed in the eyes of the law. *Id.*

In fact, in *Schmidt v. Grand Forks Country Club*, 460 N.W.2d 125, 128 (N.D. 1990), the North Dakota Supreme Court addressed an issue very similar to the one at hand. The plaintiff in *Schmidt* sought the rescission of a 1963 land purchase agreement he entered into with the seller. He filed suit in 1987, claiming he was entitled to rescission due to a failure of consideration in

that the defendant never sought approval of the preliminary plat that it had created at the time of the land sale. In rejecting the plaintiff's claim for rescission, the Court held that "an action for rescission based on failure of consideration accrues when the facts which constitute the failure of consideration have been, or in the exercise of reasonable diligence should have been, discovered by the party applying for relief." *Id.*; *see also* 54 C.J.S., *Limitations of Actions* § 238 ("Where equitable relief is sought on the ground of mistake, the statute of limitations ordinarily begins to run when the mistake is discovered or from the time when, by the exercise of reasonable diligence, it might have been discovered.")

Weisel, however, claims that the statute of limitation is *never* a bar to a claim that a contract is not supported by consideration or is based on a mutual mistake. Response Brief at 23. As support for this assertion, Weisel cites to 53 C.J.S, *Limitation of Actions*, § 104 and claims that it expressly states that the "statute of limitations is not available as a bar to a defense of mistake, absence or failure of consideration, in whole or in part of the contract sued on." Attached hereto as Exhibit A is a copy of this section of the treatise for the Court's review. As one can see, Section 104 of 53 C.J.S, does not either expressly or impliedly make this statement. Instead, as seen by Exhibit B, Section 238 of that treatise expressly provides that the statute of limitations begins to run when the mistake is or should have been discovered.

In this case, Weisel had all of the facts underlying his claim for rescission based on a lack of consideration and mutual mistake at the time he executed the Agreement. Indeed, he testified that he purposefully moved the location of the caretakers' home out of the setback area during his negotiation of the Agreement so that he could later argue that the Agreement was not enforceable against him. Therefore, he has no legitimate basis for arguing that the statute of limitations should not have started accruing on the day the Agreement was executed.

E. Weisel Is Not Entitled To Two Votes On Association Matters.

The Association also moved for summary judgment on Weisel's claim that it breached the Declaration when it found that Weisel was entitled to only one vote on Association matters. The basis for the motion was that, under the terms of both the original and First Amended Declarations, an owner who unifies two lots into a single parcel is entitled to one membership in the Association and, thus, one vote on Association matters. In response, Weisel first claims that the Association's determination is unfair because the owner of Lots 17 and 18 is allowed two votes. What Weisel fails to acknowledge in this argument, however, is that the owner of Lots 17 and 18 never unified his two lots into a single parcel. Therefore, he continues to have two memberships in the Association. Had Weisel never asked to combine his two lots into one parcel, he too would still have two memberships and two votes.

Weisel next argues that there is no express statement in the Agreement about the number of votes he would have after unifying the two lots. This argument, however, is irrelevant. As set forth in the Association's motion, the Agreement resulted in the permanent unification of the two lots. Clark Aff., Ex. A ("Lot 13 and Lot 14 shall be deemed one parcel and that such single parcel shall not hereafter be split and/or developed as two separate parcels.") Under the terms of the Declaration, which governs Weisel's membership in the Association, this unification resulted in a single membership in the Association. Therefore, the fact that the Agreement itself is silent as to the number of votes has no bearing on whether or not the Association breached the Declaration by determining that Weisel has one vote on Association maters.[3]

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[3] Weisel's reliance on *Lane Ranch Partnership v. City of Sun Valley*, 144 Idaho 584 (2007) is also misplaced. In *Lane Ranch*, the Court analyzed an annexation agreement and found that it did not provide that the plaintiff was barred from seeking a rezone of the area at a later date. This holding has no applicability to the case at hand because the issue of one vote versus two votes is not dependent on any disputed interpretation of the Agreement. Instead, it is based on the terms of the Declaration.

Weisel then argues that there is nothing in the Declaration providing that a unification of two lots "strips" the owner of one vote. While the word "strip" admittedly is not utilized in the Declaration, it does in fact state that there is one membership in the Association for each Lot and each membership is appurtenant to the title to a particular Lot or other property area. Clark Aff. Ex. B. The result of Weisel's request to unify his two lots was that he had a single parcel of land. The only rational interpretation of the Declaration is that this single parcel entitled Weisel to a single membership and, thus, a single vote.

Despite the obvious meaning of the Declaration, Weisel argues that he is entitled to two votes simply because the recorded plat still identifies his single parcel as two separate lots. In making this argument, however, Weisel fails to address the Association's arguments to the contrary. These arguments include:

- The Declaration defines "lot" as any tract described in a recorded instrument and the Agreement unifying the two lots into one is a recorded instrument;
- Weisel's agent represented to the County that the Agreement was the equivalent of the vacation of the lot line between the two lots;
- Under paragraph 7 of the Agreement, Weisel agreed to execute any documentation necessary to carry out and give effect to the terms of the Agreement, which obviously can include an official vacation of the lot line; and
- Weisel's unified property constitutes the "other property area" to which, under the Declaration, a single membership attaches.

Weisel did not address these arguments because he knows that the Agreement resulted in his ownership of a single lot, which entitles him to a single vote.

Weisel further argues that he is not subject to the express provision in the First Amended Declaration because he entered into the Agreement prior to the adoption of the First Amended Declaration. This argument is entirely based on Weisel's assertion that restrictive covenants can

only be applied prospectively. He does not, however, cite any direct law for this proposition. Instead, Weisel relies on the general statement that ambiguities must be resolved in favor of the free use of land. The language of the First Amendment could not be more clear. There is no ambiguity in its provision regarding the number of votes one has after unifying two lots. Therefore, the general law regarding ambiguities in restrictive covenants has no bearing in this case. Moreover, there is no rational reason that Weisel – who did not even vote against the First Amendment – should not be subject to its terms.

Finally, Weisel argues that the right to vote runs with the land, is appurtenant to each platted lot and cannot be taken away from Weisel. The Association does not disagree with the assertion that the voting rights are appurtenant to the properties in the Subdivision. There is, however, no ban on an Association recording a Declaration that provides if you choose to unify two separate lots into one, you reduce your number of memberships from two to one. Indeed, the case relied upon by Weisel, *Twin Lakes Village Property Association, Inc. v. Twin Lakes Investment*, 124 Idaho 132 (1993), does not even support the proposition that voting rights cannot be reduced in conjunction with the number of memberships one has in a homeowners association. In *Twin Lakes*, a majority of the association members voted to amend the bylaws so as to delete the prohibition against depriving any member of then-existing rights and privileges. The majority then voted to amend the bylaws such that the voting structure was changed from a weighted system based on square footage to a one-lot, one vote system. The court held that this amendment was improper because, due to the express language in the bylaws, they could not be amended to deprive a member of an existing right. That is, the very act of voting to delete the express prohibition on depriving a member of an existing right was a violation of an existing right and, therefore, was void. In this case, none of the Association's governing documents,

including the bylaws and the Declaration, contain a prohibition on depriving a member of an existing right. Furthermore, since Weisel voluntarily agreed to the unification of his two lots, thereby reducing his voting rights from two to one, he was not deprived of an existing right; he agreed to eliminate an existing right.

Therefore, Weisel's claim that he should be allowed to have two votes on Association matters fails as a matter of law.

F. Weisel Cannot Establish A Right To Quasi Estoppel.

The Association moved to dismiss Weisel's quasi estoppel claim because he has not presented any evidence to establish both elements of the claim, which are: (1) the Association intentionally asserted a position regarding Weisel's voting rights that is inconsistent with a previous position; and (2) allowing this change in position would be unconscionable. *Schoonover v. Bonner County*, 113 Idaho 916, 919 (1988). The Association argued that Weisel has not, and cannot, establish the required "unconscionability" element because Weisel admitted that (1) he never looked into whether he suffered any monetary damage as a result of the Association's 2006 determination that he is entitled to one vote, and (2) he has not suffered any non-monetary damage as a result. Furthermore, Weisel cannot identify any vote of the Association that would have been different had he had two votes. That is, Weisel cannot show that the Association has gained a benefit or he suffered a disadvantage as a result of having one vote instead of two.

As a result of the Association's motion, Weisel has the burden of presenting evidence of how he has been disadvantaged or the Association benefited by the change in position. Weisel has failed to meet this burden. In his Response, Weisel first claims that the Agreement does not

expressly say anything about eliminating a voting right. This claim, however, does not establish any advantage or disadvantage to either party. It is, therefore, irrelevant to the issue at hand.

Weisel next asserts that the Association benefitted because it collected assessments from Weisel from 1983 through 2006. This fact, however, does not establish any advantage to the Association that flowed from an intentional change in position. Indeed, since the Association benefitted from the collection of the assessments, it was actually to its detriment (and Weisel's benefit) to change its position. The evidence merely proves that the Association made a mistake after the Agreement was executed in that it failed to immediately change its membership records. That mistake continued over the years due to the change in management of the Association. Indeed, many members did not even know the Agreement existed. Affidavit of William Fruehling at ¶ 3; Affidavit of Vicki Rosenberg at ¶ 11. Furthermore, Weisel obviously knew that he had unified his two lots into one single parcel and that he should not have been assessed for two lots. Weisel could have, and should have, informed the Association of its mistake. He chose not to so that he could one day argue that the Association's mistake constitutes extrinsic evidence of an interpretation the Declaration, even though no such evidence should be admitted because the Declaration is unambiguous.

Since Weisel has been unable to present any evidence of a monetary or non-monetary damage to him resulting from the Association's determination that he has a single membership in the Association, or a benefit gained by the Association as a result of the identification of its mistake, his claim for quasi-estoppel must be dismissed.

G. The Assessment Reimbursement Issue.

The Association moved to dismiss Weisel's claim for reimbursement of the double assessments he paid from 1984 through 2004. The grounds for this motion were that, since

Weisel waited until 2009 to file his claim for reimbursement, he can seek reimbursement only for the double payments made during the applicable statute of limitations, which is five years. That is, Weisel should not be allowed to seek reimbursement for monies paid prior to 2005.

Weisel's sole objection to the Association's motion is that the Association should be estopped from claiming the statute of limitations defense. Equitable estoppel may be applied to prevent the assertion of the statue of limitations only if the defendant's conduct caused the plaintiff to refrain from prosecuting an action during the limitation period. *Johnson v. McPhee*, 147 Idaho 455, 210 P.2d 563, 572 (App. 2009). Weisel cannot establish the elements of this claim. Indeed, the Association realized its mistake regarding the voting/assessment issue in 2006. Weisel did not, however, file a claim for reimbursement at that time. Instead, Weisel waited three additional years before filing this lawsuit against the Association. Weisel, therefore, cannot establish that his delay in filing the suit was caused by the Association's conduct.

Moreover, Weisel knew that he had a single lot and was obligated to pay only a single assessment since 1983. He continued to pay the double assessments because he intended to use the fact as extrinsic evidence of the meaning of the Agreement. That is, Weisel paid the assessment so that he could contend that, despite the clear and unambiguous language of the Agreement, the parties did not intend to unify the two lots in perpetuity. Given that Weisel wanted to pay the extra assessment, he cannot now claim that he was lulled by Association's conduct into failing to file a lawsuit earlier.

Finally, as made clear in Weisel's Amended Complaint, Weisel desires to have two votes and is willing to pay two assessments to get them. The undisputed evidence establishes that during the years that Weisel paid two assessments, he was allowed two votes. Therefore, the

Association's mistake – which Weisel admits he was aware of from day one – did not cause Weisel to suffer any identifiable injury.

As a result, the Association's motion to dismiss any claim for reimbursement of overpaid assessments prior to 2005 should be granted.

H. Weisel's Changed Circumstances Argument Is Unavailing.

In his final claim against the Association, Weisel claims that the Association's "density" concerns have been frustrated and, therefore, the Agreement should not be enforced against Weisel. As set forth in the Opening Brief, and not rebutted by Weisel, there appears to be no published case applying a changed circumstances analysis to a single homeowner's agreement to combine two lots in perpetuity for development purposes. Therefore, this agreement should be analyzed like any other bilateral agreement, which includes the defense of frustration of purpose. Under the theory of frustration of purpose, a party's obligations may be discharged only if an event occurs whose non-occurrence was a basic assumption on which the contract was made, thereby making the party's performance virtually worthless to the other. *See* Restatement 2nd Contracts § 265. In this case, Weisel has presented no competent evidence that the parties based the Agreement on the assumption that other members of the Association would never build large homes or pool houses. Nor did Weisel present any evidence that Weisel's continued performance under the Agreement is virtually worthless to the Association.

If, however, the Court concludes that Weisel can proceed with a changed circumstances claim, the evidence he presents similarly does not satisfy his burden of proving that the purpose for which the restriction was originally imposed has been utterly destroyed. *See Pettey v. First National Bank of Geneva*, 225 Ill. App. 3d 539 (1992) (for a change in circumstances "to cancel the enforcement of a restriction, it must be so radical and complete as to render the restriction unreasonable, confiscatory, discriminatory, or as practically to destroy the purpose for which the

restriction was originally imposed.") As set forth in detail in the Association's Opposition to Weisel's Motion for Summary Judgment, Weisel relies on inaccurate and incompetent evidence, which even if true, does not satisfy the strict test for establishing the equitable claim of changed circumstances.

To analyze the viability of Weisel's changed circumstances claim, one must start with determining what, in fact, was the purpose for which the restriction was originally imposed. Weisel would like the Court to accept that the purpose was "density" and that "density" can *only* mean overall square footage or lot area coverage. Response at 34. This contention is absurd. Indeed, the only rationale provided for this conclusory statement is that, in 1983, there was no square footage restriction on outbuildings. The fact that the original Declaration did not have a square footage limitation on outbuildings, however, does not mean that the only meaning of "density" is overall square footage or lot area coverage. To the contrary, as Weisel himself admitted, he unified the two lots because he wanted to build a second primary residence (not an outbuilding) on Lot 14. Clark Aff., Ex. P. In order to comply with Weisel's development needs, the Association agreed that he could transfer his right to build a single family home on Lot 13 to Lot 14 provided he unified the two lots in accordance with the provisions of the Declaration.

Thus, the express and admitted purpose of the Agreement was to ensure that no more than two residences could be built on the combined lots. Weisel has not presented any competent evidence that this purpose has been thoroughly destroyed. Weisel, instead, relies solely on the Assessor's records – which do not represent the square footages that were presented by the homeowners to either the Association or the applicable zoning officials – to prove that the owners of other lots have built large homes. This fact is completely irrelevant to a finding of whether the true purpose of the Agreement has been nullified.

As to the remainder of Weisel's arguments contained in his Response Brief regarding his claim of changed circumstances, the Association incorporates its Opposition to Weisel's Motion for Summary Judgment. This opposition addresses each of one of Weisel's misstatements regarding the development that the Association has knowingly approved in the Subdivision. In fact, as set forth in the Opposition Brief, Weisel is the *only* homeowner in the Subdivision that has ever been allowed to build two primary residences on one lot. Therefore, he has not been treated arbitrarily or unfairly by the Association.

In fact, the Agreement exists because the Association was trying to cooperate with Weisel's development plans in 1983. Weisel wanted to combine his two lots. He knew he would have to combine his two lots so as to get the County to agree to his variance request. Both the Association and the County were concerned about the density of his plans – with density defined in the County ordinances as one residence per lot. Affidavit of Linda Haavik at ¶¶ 29-33. Thus, in order to enable Weisel to build his caretakers' house close to his existing house, as he stated he needed, the County and the Association allowed him to transfer the density allowance of Lot 13 to Lot 14. Furthermore, in order to enable Weisel to start building this caretakers' house quickly, the County allowed this Agreement to be recorded against Lot 13 as opposed to forcing Weisel to formally vacate the lot line. Weisel is now attempting to use these accommodations to argue that he has been treated unfairly. Weisel is far too sophisticated a businessman to allow himself to be treated unfairly. His claims against the Association, therefore, should be dismissed.

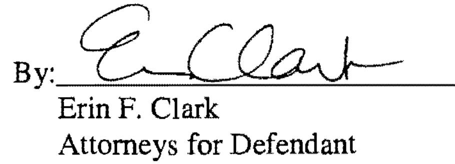
IV. CONCLUSION

For the reasons set forth above, Beaver Springs requests that the Court grant it motion to dismiss all of Weisel's claims against it with the exception of his claim for reimbursement of any

assessment he should not have been requested to pay during the period from 2005 to the present.

DATED this 9 day of February 2010.

LAWSON LASKI CLARK & POGUE, PLLC



By: ______________________
Erin F. Clark
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of February, 2010, I caused to be served a true copy of the foregoing document by the method indicated below, and addressed to each of the following:

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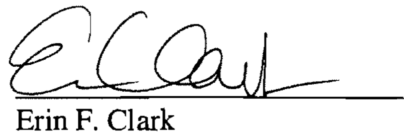

Erin F. Clark

Corpus Juris Secundum

Database updated June 2009

Limitations of Actions

by Paul Coltoff, J.D.; Jill Gustafson, J.D.; John R. Kennel, J.D., of the National Legal Research Group; Jack K. Levin, J.D.; Carmela Pellegrino, J.D.; Eric C. Surette, J.D.

IV. Limitations Applicable to Particular Actions

E. Liabilities Created by Statute

Topic SummaryReferencesCorrelation Table

§ 104.Liability of corporate officers or stockholders

West's Key Number Digest

West's Key Number Digest, Limitation of Actions 34(5)

The limitation relating to liabilities created by statute applies to an action to enforce the statutory liability of a stockholder of a corporation for a corporate debt, and also to an action against a director or officer, under a statute making him or her liable for certain acts or omissions.

The limitation relating to liabilities created by statute applies to actions against the directors and officers of a corporation, under statutes making them liable for certain acts or omissions.[1] This limitation applies to actions for acts or omissions of the directors or officers of a bank.[2]

The liability of a stockholder for a debt of a corporation is a liability created by statute within the meaning of limitation acts, and the period of limitation applicable is that governing other actions founded on statutory liability,[3] even though the action is equitable in nature and laches are not shown.[4] The limitation applies to an action to enforce the liability, created by statute, of the stockholders of an insolvent financial institution or moneyed corporation,[5] such as a bank,[6] or a national bank.[7]

[FN1] N.Y.—Van Schaick v. Aron, 170 Misc. 520, 10 N.Y.S.2d 550 (Sup 1938).

[FN2] Ohio—Squire v. Guardian Trust Co., 79 Ohio App. 371, 35 Ohio Op. 144, 47 Ohio L. Abs. 203, 72 N.E.2d 137 (8th Dist. Cuyahoga County 1947).

Failure of president to file annual statement

Ark.—Love v. Couch, 181 Ark. 994, 28 S.W.2d 1067 (1930).

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EXHIBIT A

[FN3] Ga.—Harris v. Taylor, 148 Ga. 663, 98 S.E. 86 (1919).

[FN4] U.S.—Ball v. Gibbs, 118 F.2d 958 (C.C.A. 8th Cir. 1941).

[FN5] Ohio—Everard v. Kroeger, 60 Ohio App. 123, 13 Ohio Op. 275, 28 Ohio L. Abs. 65, 19 N.E.2d 964 (2d Dist. Franklin County 1938).

[FN6] Okla.—Lawhead v. Knappenberger, 1937 OK 436, 180 Okla. 388, 70 P.2d 62 (1937).

Enforcement of assessment on stock

Ark.—Vandover v. Lumber Underwriters, 197 Ark. 718, 126 S.W.2d 105 (1939).

[FN7] U.S.—Briley v. Crouch, 115 F.2d 443 (C.C.A. 4th Cir. 1940).

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VI. Accrual of Particular Rights of Action

D. Fraud; Mistake

3. Mistake

Topic SummaryReferencesCorrelation Table

§ 238.Generally

West's Key Number Digest

West's Key Number Digest, Limitation of Actions 96 to 96(2)

Where equitable relief is sought on the ground of mistake, the statute of limitations ordinarily begins to run when [illegible] from the time when, by the exercise of reasonable diligence, it might have been discovered.

The principle which governs the running of the statute of limitations in cases where relief is sought on the ground of mistake is substantially the same as that applicable in cases of fraud.[1] However, the cause of action must be one for relief on the ground of mistake, and not one as to which the mistake is merely collateral or incidental,[2] or an action based on a mere mistake of law.[3]

The general rule, which often is applied in suits to correct or reform deeds and other written instruments,[4] is that if a plaintiff is ignorant of the mistake, without any fault or neglect on his or her part, the statute begins to run only when the mistake is discovered,[5] or from the time when the plaintiff, by the exercise of reasonable diligence, might have discovered his or her error.[6] Under some authority, however, the statute of limitations begins to run from the time the mistake was made,[7] unless discovery of the mistake was prevented by fraud or intentional concealment by the person benefited by the mistake,[8] or there existed a fiduciary relationship between the parties.[9]

The general rule does not dispense with the necessity of diligence on the part of the complainant where the means of discovery are at hand, and in such cases the statute of limitations runs from the time when he or she acquires such knowledge as would put an ordinarily intelligent person on inquiry which, if pursued, would lead to the discovery of the mistake.[10] That is, the applicable statute of limitations will run from the time when by the exercise of reasonable diligence the mistake might have been discovered.[11]

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EXHIBIT B

What will constitute reasonable diligence to discover the mistake and when the mistake might have been discovered by the exercise of such diligence are necessarily questions which must be determined from all the facts and circumstances in each particular case.[12] There must be circumstances to excite the plaintiff's suspicion or charge him or her with notice of the mistake,[13] and no duty to make inquiry arises where the defendant has so conducted himself or herself, to the plaintiff's knowledge, as to lull the plaintiff into a sense of security and justify him or her in believing that no mistake has been made.[14] Additionally, where conduct subsequent to the mistake on the part of both parties demonstrates a belief that no mistake existed, the plaintiff may avoid the bar of the statute of limitations.[15]

Shortage in quantity of land sold.

In case of a mistake as to the quantity of land sold, the statute of limitations begins to run when the mistake is discovered, or in the exercise of ordinary diligence should have been discovered.[16] The failure of the purchaser to make a survey within the period of statutory limitations may show an absence of due diligence,[17] but such failure is not conclusive.[18] Whether a survey should have been made in a given case depends on the particular conditions and facts,[19] but where the land is of an extended area, with irregular and indefinite lines and boundaries, failure to have the survey made may strongly, if not conclusively, manifest an absence of due diligence.[20]

[FN1] Ala.—Lewis v. Daniel, 387 So. 2d 160 (Ala. 1980).

Cal.—Davis Welding & Manufacturing Co. v. Advance Auto Body Works, 38 Cal. App. 2d 270, 100 P.2d 1067 (1st Dist. 1940).

Okla.—Hoskins v. Stites, 1938 OK 259, 182 Okla. 455, 78 P.2d 413 (1938).

As to the accrual of causes of action for fraud, generally, see § 230.

[FN2] Ky.—Francis v. Francis, 288 Ky. 685, 157 S.W.2d 289 (1941).

N.C.—Thacker v. Fidelity & Deposit Co. of Maryland, 216 N.C. 135, 4 S.E.2d 324 (1939).

Equitably sufficient mistake

The mistake of the parties must be recognizable as equitably sufficient in order to toll the statute of limitations.

Tex.—Kenney v. Porter, 604 S.W.2d 297, 30 U.C.C. Rep. Serv. 1095 (Tex. Civ. App. Corpus Christi 1980), writ refused n.r.e., (Apr. 8, 1981).

[FN3] Neb.—Jones v. Johnson, 207 Neb. 706, 300 N.W.2d 816 (1981).

Mistake of law not covered by common-law tolling doctrine

The common-law tolling doctrine does not allow a statute of limitations to be tolled on the basis of a mistake of law.

U.S.—Williams v. Sims, 390 F.3d 958 (7th Cir. 2004).

[FN4] La.—Freeman v. Williams, 450 So. 2d 1030 (La. Ct. App. 1st Cir. 1984), writ not considered, 456 So.

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2d 162 (La. 1984).

N.C.—Hice v. Hi-Mil, Inc., 301 N.C. 647, 273 S.E.2d 268 (1981).

N.D.—Ell v. Ell, 295 N.W.2d 143 (N.D. 1980).

[FN5] Ala.—Lewis v. Daniel, 387 So. 2d 160 (Ala. 1980).

Cal.—Arthur v. Davis, 126 Cal. App. 3d 684, 178 Cal. Rptr. 920 (4th Dist. 1981).

La.—Freeman v. Williams, 450 So. 2d 1030 (La. Ct. App. 1st Cir. 1984), writ not considered, 456 So. 2d 162 (La. 1984).

N.C.—Lee v. Keck, 68 N.C. App. 320, 315 S.E.2d 323 (1984).

Mistake as exception to statute of limitations in insurance coverage cases

N.H.—Craftsbury Co., Inc. v. Assurance Co. of America, 149 N.H. 717, 834 A.2d 267 (2003).
As to the accrual of rights or causes of action under the discovery rule, generally, see § 116.

[FN6] La.—Freeman v. Williams, 450 So. 2d 1030 (La. Ct. App. 1st Cir. 1984), writ not considered, 456 So. 2d 162 (La. 1984).

Neb.—Mangan v. Landen, 219 Neb. 643, 365 N.W.2d 453 (1985).

N.C.—Lee v. Keck, 68 N.C. App. 320, 315 S.E.2d 323 (1984).

As to the necessity that the plaintiff act diligently in seeking to discover a cause of action, see § 117.

[FN7] U.S.—Ciccarelli v. Carey Canadian Mines, Ltd., 757 F.2d 548 (3d Cir. 1985).

Mass.—Salinsky v. Perma-Home Corp., 15 Mass. App. Ct. 193, 443 N.E.2d 1362 (1983).

Pa.—Hunsicker v. Connor, 318 Pa. Super. 418, 465 A.2d 24 (1983).

[FN8] U.S.—Ciccarelli v. Carey Canadian Mines, Ltd., 757 F.2d 548 (3d Cir. 1985).

Mass.—Salinsky v. Perma-Home Corp., 15 Mass. App. Ct. 193, 443 N.E.2d 1362 (1983).

[FN9] Mass.—Salinsky v. Perma-Home Corp., 15 Mass. App. Ct. 193, 443 N.E.2d 1362 (1983).

[FN10] Idaho—Commercial Casualty Ins. Co. v. Boise City Nat. Bank, 61 Idaho 124, 98 P.2d 637 (1940).

[FN11] Cal.—Miller v. Bechtel Corp., 33 Cal. 3d 868, 191 Cal. Rptr. 619, 663 P.2d 177 (1983).

Mont.—Gregory v. City of Forsyth, 187 Mont. 132, 609 P.2d 248 (1980).

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[FN12] Mont.—Gregory v. City of Forsyth, 187 Mont. 132, 609 P.2d 248 (1980).

[FN13] U.S.—White v. Federal Deposit Ins. Corporation, 122 F.2d 770 (C.C.A. 4th Cir. 1941).

Mont.—Gregory v. City of Forsyth, 187 Mont. 132, 609 P.2d 248 (1980).

[FN14] Tex.—Broyles v. Lawrence, 632 S.W.2d 184 (Tex. App. Austin 1982).

[FN15] N.C.—Hice v. Hi-Mil, Inc., 301 N.C. 647, 273 S.E.2d 268 (1981).

N.D.—Ell v. Ell, 295 N.W.2d 143 (N.D. 1980).

Tex.—Broyles v. Lawrence, 632 S.W.2d 184 (Tex. App. Austin 1982).

[FN16] Cal.—Twining v. Thompson, 68 Cal. App. 2d 104, 156 P.2d 29 (2d Dist. 1945).

Ky.—Jordan v. Howard, 246 Ky. 142, 54 S.W.2d 613 (1932).

[FN17] Ky.—Harlan v. Buckley, 268 Ky. 148, 103 S.W.2d 946 (1936).

[FN18] Ky.—Jordan v. Howard, 246 Ky. 142, 54 S.W.2d 613 (1932).

[FN19] Ky.—Jordan v. Howard, 246 Ky. 142, 54 S.W.2d 613 (1932).

[FN20] Ky.—Jordan v. Howard, 246 Ky. 142, 54 S.W.2d 613 (1932).

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FILED A.M. P.M. 3:17
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Jolynn Drage, Clerk District Court Blaine County, Idaho

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

THOMAS WEISEL, a married man dealing in his sole and separate property, Plaintiff, vs. BEAVER SPRINGS OWNERS ASSOCIATION, INC., an Idaho corporation, Defendant.	Case No. CV-09-124 PLAINTIFF'S REPLY BRIEF

COME NOW the Plaintiff, Thomas Weisel ("Weisel"), by and through his attorney of record, Fritz X. Haemmerle of Haemmerle & Haemmerle, P.L.L.C., and hereby files this Reply Brief to Defendant, Beaver Springs Owners Association, Inc.'s ("Association") Response to Weisel's Motion for Summary Judgment.

I. REPLY

The 1983 Agreement ("Agreement) expressly refers to "improvements to be constructed in the setback." No improvement was ever constructed in the setback. Even if allowance of development in the setback was not the consideration, the Association has

undermined and rendered worthless what it claimed was its consideration – the approval of a "size and the quantity of the buildings that were substantially larger than what was ever envisioned for the subdivision." (*Fruehling Depo.,* p. 41, l. 20-22).

In spite of this, the Association obstinately insists that even though every other lot owner can now build out to a greater density than Weisel, and even though the Association violated the Amended Declaration for many years by allowing owners to build guest/caretaker's units in excess of the 900 square feet, and even though Weisel never violated any version of the Declaration, Weisel should be held to the "bargain" he made and that his desire to be relieved from it is "remarkable and unprecedented."

By this Declaratory Judgment action, Weisel is simply seeking relief from the covenant he entered into 27 years ago, a covenant which was based on improvements that were to be constructed in the setback on Lot 14, and a covenant that has become oppressive and purposeless by the Associations actions. In the intervening 27 years, Lot 13 has remained vacant and neither the City of Ketchum nor the County would prevent Weisel from building on that 3.1 acre parcel. In that same 27 years, the Association enjoyed 3.1 acres of open space at no cost, all the while permitting other owners in the Subdivision to build larger and larger buildings, some in excess of the Amended Declaration, to the point of expressly approving density on other lots well in excess of Weisel's 1983 development plan. It is the Association that has not held up its part of the "bargain."

Based upon the unbiased, documentary evidence in this case, there is no question of fact that Weisel is entitled to summary judgment on his Complaint for Declaratory Judgment that the 1983 Agreement was either void from the beginning or has failed. The

improvements were never constructed in the setback and the Association's approval of a "size and the quantity of the buildings that were substantially larger than what was ever envisioned for the subdivision," has in the 27 years since the Agreement, nullified it.

A. THE 1983 AGREEMENT RESTRICTS THE FREE USE OF WEISEL'S PROPERTY AND SHOULD BE NARROWLY CONSTRUED.

Idaho law is crystal clear. Since, covenants restricting the right to use land are in derogation of the common law, the courts will not extend by implication any restriction not clearly expressed. *Berezowski v. Schuman,* 141 Idaho 532 (2005), 112 P.3d 820 (quoting *Pinehaven Planning Bd. v. Brooks*, 138 Idaho 826, 829, 70 P.3d 664, 667 (2003). Further, no matter whether a covenant is deemed *unambiguous or ambiguous,* Idaho courts are to construe it strictly and in favor of the free use of property. *Id.*

Citing no authority whatsoever, the Association argues that this well established principle should only be applied to "blanket, non-negotiated, restrictive covenants restricting the use of land in a neighborhood." The Association made this same argument in Section I.1. of its *Opening Brief* and Weisel has already responded to it in Section H.1. of his *Response Brief.*

In short, the Association's argument is wrong and completely contrary to Idaho law.

> As has been said with respect to the provisions of contracts creating building restrictions claimed to be covenants running with the land, if parties desire to create mutual rights in real property they must say so and must say it in the only place where it can be given legal effect, namely, in the written instrument exchanged between them, which constitutes the final expression of their understanding . . . .; and a provision in an instrument claimed to create such a servitude is strictly construed, any doubt being resolved in favor of the free use of the land.

West Coast Power Co. v. Buttram, 54 Idaho 318, 323, 31 P.2d 687, (1934).

Neither the Idaho courts nor any other court has ever adopted such a severe limitation on the construction of covenants restricting the free use of land. See e.g. *Perelman v. Casiello*, 920 A.2d 782 (N.J. 2007) (court applied well established law that restrictions two parties placed on the land were to be strictly construed).

The 1983 Agreement expressly states that it is a covenant and that it runs with the land, and the only reason the Agreement was made at all was due to the covenants of the Original Declaration that were applicable to the entire Subdivision. Had there been no such covenants, the Agreement would not have been made.

B. THE STATUTE OF LIMITATIONS DOES NOT BAR COUNTS ONE THROUGH THREE.

The Association's *Opposition Brief* restates the arguments it made on this issue in Section E of its *Opening Brief* and Weisel has already responded to it in Section D of his *Response Brief*. In short, the Association's argument that Counts One through Three are barred by the statute of limitations was recently rejected by the Idaho Supreme Court in *Thompson v. Ebbert*, 144 Idaho 315, 318, 160 P.3d 754, (2007).[1]

The statute of limitations is never a bar to the claim that a contract is not supported by consideration, or is one based on mutual mistake, or that the consideration fails. 53 CJS, Limitation of Actions, § 104, pp 1088-1089: "The statute of limitations is not available as a bar to a defense of mistake, absence or failure of consideration, in whole or in part of the contract sued on." *See also*, *Madison National Bank v. Lipin*, 226 N.W.2d 834 (Mich.App. 1975).

There is no question that if Weisel had simply gone forward and built on Lot 13 and the Association attempted to stop him from doing so claiming that he was in breach

---

[1] The Association's counsel is well aware of the *Thompson* case because counsel for Weisel and counsel for the Association litigated that case.

of contract, Weisel could have raised the defenses of lack of and failure of consideration and mutual mistake to prevent the Association from prevailing on its action. Instead, Weisel has sought declaratory relief as to the validity of the Agreement. No statute of limitations has begun to run because there has been no breach of contract.

C. LACK OF CONSIDERATION.

1. William Freuhling's I.R.C.P. 30(b)(6) Deposition and the Haavik Affidavit.

Weisel sent an I.R.C.P. 30(b)(6) Deposition Notice to the Association. The Association produced the President, William Frehuhling, to testify. One of the items designated for questioning was a "witness with knowledge of the reason for and the drafting and execution of the 1983 Agreement between Thomas Weisel and the Association." (*Id.*, Exhibit 45).

Freuhling answers as to the reasons for the Agreement ran the gamut from stating a concern about the "mass" of development, (*Fruehling Depo.*, p. 41, l. 19; p. 42, l. 2; p. 65, l. 2-6; p. 67, l. 10-11) to allowing "the construction of guest quarters lager than what the County ordinance was at that time." (*Id.*, p. 84, l. 18 – 20). Yet, amidst all of the various reasons Fruehling posited, nowhere, not once, did he mention that the consideration or purpose for the Agreement was allowing Weisel a "second primary residence."

Despite this, the Association is now impeaching Freuhling's testimony with the *Affidavit of Linda Haavik*, who opined that the consideration for the 1983 Agreement is allowing Weisel a "second primary residence." This is not, and should not be, permissible. The case law on 30(b)(6) depositions is fairly strict. Some jurisdictions hold that answers given in 30(b)(6) depositions are binding. *See e.g., Marker v. Union*

Fidelity Life Inc. Co., 125 F.R.D. 121 (1989); *see e.g. contrary holding*, *AstenJohnson, Inc. v. Columbia Cas. Co.*, 562 F.3d 213 (3rd Cir. 2009). The reason for the rule is that since there is a duty to prepare a corporate 30(b)(6) witness to respond, to prevent corporate "flip-flopping," the witnesses' answers in a 30(b)(6) deposition should be binding.

Whether or not Freuhling's answers are binding, the Court should reject the *Affidavit of Linda Haavik* under the "sham" affidavit rule. Under this rule, a party cannot impeach its own witness in a summary judgment proceeding in an attempt to create a material issue of fact. This rule was expressed by the Ninth Circuit Court in *Kennedy v. Allied Mut. Ins. Co.*, 952 F.2d 262, 265 (9th Cir. 1991), wherein the Court stated:

> The general rule in the Ninth Circuit is that a party cannot create an issue of fact by an affidavit contradicting his prior deposition testimony. If a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact.

Id. at 265.

Idaho has not expressly adopted the "sham" affidavit rule announced in *Kennedy*. However, the rule and the *Kennedy* holding were considered in *Frazier v. J.R. Simplot Company*, 136 Idaho 100, 29 P.3d 936 (2001). The Court stated "we need not decide whether to adopt the ruling ["sham" affidavit rule] of the Ninth Circuit Court of Appeals [in *Kennedy*] because there was not sufficient conflict between Frazier's deposition testimony and her statements in her affidavit." *Id.* at 102.

In this case, the Court should deem the *Affidavit of Linda Haavik* a "sham"" because it creates new factual issues not previously disclosed or shared by Freuhling, the Association's designated 30(b)(6) witness. Again, Freuhling never stated that the

consideration was a "second primary quarters." This is an entirely new fact or opinion that is directly contrary to any fact or opinion Freuhling testified to in his 30(b)(6) deposition, and therefore, should be struck.

At the very least, it should be noted that the Association, by submitting the *Affidavit of Linda Haavik* is necessarily impeaching its own 30(b)(6) witness, President William Freuhling.

2. Reply to Association's arguments on consideration.

The Association's position as to its consideration for the Agreement has taken a winding path as the Association has been confronted with the contradictions of its various positions.

Yet, the best evidence of the consideration for the Agreement is the language of the Agreement itself. It stated that Weisel desired to obtain the Association's approval of his development plan for Lot 13 and Lot 14 and the Association's "written consent to combine such lots into one parcel, removing the setback lines along the common boundary line of such lots" and the Association "determined that the improvements to be constructed in the setback lines along the common boundary of Lot 13 and Lot 14 will not cause unreasonable diminution of the view from other lots."

Construing the Original Declaration and the 1983 Agreement narrowly, the only possible basis for the denial of the development plan was the construction of improvements in the setback since the plan did not otherwise violate the Original Declaration in any way. Ottley's deposition testimony was emphatic that there was a setback problem. He stated the following:

- "I do recall that in the application of Mr. Weisel, he had a proposed building on the north side of his property that had some concerns about setbacks. *Ottley Depo.*, p. 42, l. 22-25.

- "I think there was an earlier concern, and that this was a revised print, I suspect. That I remember clearly. It was much closer to the line. We asked that it be pulled back." *Id.,* p. 45, l.25 – p. 46, l. 1.

- "I recall that there was some at that time that we were talking about a setback concern." *Id.,* p. 46, l. 5-7.

A few years ago, the Association admitted that the consideration for the Agreement was the removal of the setbacks in lieu of a lot line shift to accommodate the development plan. (*Response to Second Request for Admissions No. 7*, admitting Exhibit 20).

Faced with the express language of the Agreement and the non-violation of the setback, the Association then moved on to claim that the consideration was the approval of the larger size, quantity, and mass of buildings in the development plan. Well before this lawsuit, William Fruehling stated that what the Association was concerned about was the "mass of the project." (*Fruehling Depo.,* Exhibit 54). Also well before this lawsuit, Jean Smith made the following statement as to the consideration for the Agreement.

> As time went by, it became apparent that people wanted bigger homes and more outbuildings. In Thom Weisel's case...I was the head of design review in those days. We let Thom put in larger than required buildings, that were not consistent with our CC&Rs, because he made an agreement with us to put his two lots together and develop it as one.

(*Robert Smith Depo.*, Exhibit 8, Jean Smith's Letter dated December 21, 2005).

Consistent with this, Jean Smith stated in her deposition that

> Q. So you base your opinion that Lot 14 was overbuilt based on the size of structures.
>
> A. Yes.

(*Jean Smith Depo.*, p. 43, l. 2-4).

Again, during this lawsuit, Weisel noticed a 30(b)(6) deposition of the Association and William Fruehling appeared on behalf of the Association. As to the consideration for the Agreement, he stated the following:

- "[T]he size and the quantity of the buildings were substantially larger than what was ever envisioned for the subdivision, and that bothered the design review committee at that time. Therefore, they made a condition to agree to his development plan if Mr. Weisel agreed to never build on Lot 13 and combine the two lots into one and never subdivide them again." (*Fruehling Depo.*, p. 41, l. 19; p. 42, l. 2).

- "I think that the design review committee, as I stated previously, is concerned about the mass of the buildings and as a result asked Mr. Weisel to give up his development rights on Lot 13, which he did." (*Id.*, p. 65, l. 2-6).

- "It's the mass of the project, the mass of the project." (*Id.*, p. 67, l. 10-11).

If greater "density" was the Association's consideration, the Association has rendered its approval completely worthless. As already shown in Weisel's previous Briefs, since the 1983 Agreement, the Association has approved huge homes, guest houses and caretaker's units in excess of the 1986 Amended Declaration, and by its recent adoption of the 2008 Amended Declaration to the Original Declaration, density well in excess of Weisel's 1983 development plan.

Weisel's 1983 development plan was for approximately 11,533 square feet of buildings on 3.7-acre Lot 14. (*McLaughlin Aff.*, ¶ 3). Neither the number nor size of the buildings in that plan violated the Original Declaration. (*Id*; *Response to Second Request for Admissions, Response No. 30,* admitting Exhibits 4, Third Amendment to Declaration).

The Association now allows 15,000 square feet of structures on 2-acre lots. (*Response to Second Request for Admissions No. 1,* admitting Exhibits 117, Third

Amendment to Declaration). It cannot be seriously disputed that by allowing such density in the Subdivision, the Association has rendered its approval of increased density for Weisel worthless. Instead of Weisel continuing to receive the benefit of the 1983 approval of greater density than the other lots, that approval has become a tremendous detriment because Weisel is forever limited to density much less than virtually all other lot owners. Futhermore, if he makes any changes to his property, his density will be even further reduced due to the 2008 Amended Declaration.

Faced with this contradiction, the Association now argues, for the first time, that the consideration for the Agreement was the Association's approval that Weisel could build "two single family homes" on Lot 14. This theory of consideration should be rejected for many reasons. First, and foremost, if the Agreement was made to allow Weisel to have a larger than allowed guest quarter under the County zoning laws in 1983, it should be noted that both the County, who originally approved the Agreement, and the City who currently has jurisdiction of the Subdivision, have stated that they do not claim any interest in the Agreement. *(See, Affidavits of Timothy Graves and Sandy Cady)*.

Second, there is nothing in the Agreement about the Association's approval for Weisel to build "two single family homes." The only person advancing this as the basis for the Agreement is Linda Haavik, who surmised that the Agreement was based on Weisel having a "second primary residence" on Lot 14. Not only did Haavik not work for the County at the time, she was not involved in, nor has any personal knowledge of the making of the Agreement. In fact, her involvement in the case began a few weeks ago and coincides with the Association's first ever presentation of this theory of its consideration for the Agreement.

Third, in reviewing Weisel's 1983 variance and conditional use permit request before the County, there is absolutely no mention or any decision granting Weisel a "second primary residence." The application was for a variance (size) and conditional use permit (allowable servant's quarters). (*McLaughlin Aff.*, Exhibit 5 and 6). The County noted that there was an employment agreement on file proving that it was only an accessory use. Also, none of the Assoication's correspondence or documents predating this lawsuit ever addressed a "second primary residence" on Weisel's lot and the Agreement does not make any mention of the County or this concept at all.

Fourth, as previously indicated, Weisel sent the Association an I.R.C.P. 30(b)(6) Deposition Notice to the Association. Again, nowhere, not once, did Freuhling, testifying on behalf of the Association, mention the consideration was a "second primary residence." The Court should not allow the Association to impeach Freuhling's testimony with their contrary opinions set forth in the *Affidavit of Linda Haavik* in an attempt to create a material issue of fact.

Aside from Haavik's unsupportable opinion, the only evidence the Association can point to support this new theory of consideration, that it allowed a "second primary residence" on Wesiel's lot, is a citation to a statement made by Ottley in his deposition. Yet, this citation does not support this theory of consideration. Ottley's statement about two residences on one lot stemmed entirely from the developers' concerns that "we didn't want owners getting to profit from commercial ventures in the densities." (*Ottley Depo.*, p. 54, l. 17-25).

The Association was not concerned about an owner having a caretaker's unit and a main house together on a lot because Ottley himself had a detached caretaker's unit on

his lot, and Davies had a guest house on their lot. (*Ottley Depo.*, p. 76, l. 8 – p. 77, l. 4; *Jean Smith Depo.*, p. 16, l. 17-25; *McClure Aff.*, Exhibit 4).

Q. [By Haemmerle] Okay. Did you have a guest quarters?

A. [By Ottley] We called them servants' quarters.

Q. Was it a separate building?

A. Yes.

Q. Did you allow someone not a member of your family to occupy that building?

A. Yes.

Q. Do you know who that might have been?

A. Yes. Marlo Near {phonetic} she still lives here, she's married, has another name.

Q. How long did she occupy that quarter?

A. Six, seven years.

Ottley Depo., p. 76, 18 – p. 77, l. 4

Furthermore, just two years later, William Fruehling built a caretaker's unit on his property so that he had two "residences" on his property. (*Fruehling Depo.*, p. 9, l. 25;p. 10, l. 7). Yet, the Association showed no concern at all about that because it was not the "use" that bothered the Association.

In sum, the 1983 Agreement fails because the consideration for Weisel's agreement to restrict development on Lot 13 was illusory. The improvements were not in the setback between Lot 13 and Lot 14, and the development plan did not otherwise violate any provision of the Original Declaration.

D. MUTUAL MISTAKE.

The Agreement was based upon the fundamental mutual mistake that the improvements were located in the setback. The Association argues that there is no clear and satisfactory evidence that the parties believed that the proposed development was located in the northern setback of Lot 14. Here again, the Association completely ignores the clearest statement as to what the parties believed, the plain language of the Agreement.

The Agreement could not be clearer. It expressly states the fundamental fact that the improvement is to be constructed in the setback line along the boundary between Lot 13 and Lot 14. (See Exhibit A attached to Weisel's Opening Brief). "Where the language of the contract makes the intentions of the parties clear, the interpretation and legal effect of the contract are questions of law over which this Court exercises free review." *Panike & Sons Farms, Inc. v. Smith*, 147 Idaho 562, 212 P.3d 992, 996 (2009).

In addition, evidence beyond the plain language of the Agreement also supports this fundamental fact. As already shown in Weisel's prior briefs, the undisputed documentary evidence shows that the plans were changed many times. (See, Wesiel's *Opening Brief*, Section C., and *Response Brief*, Section A). Also, Ottley was clear that:

- "I do recall that in the application of Mr. Weisel, he had a proposed building on the north side of his property that had some concerns about setbacks. *Ottley Depo.*, p. 42, l. 22-25.

- "I think there was an earlier concern, and that this was a revised print, I suspect. That I remember clearly. It was much closer to the line. We asked that it be pulled back." *Id.*, p. 45, l.25 – p. 46, l. 1.

- "I recall that there was some at that time that we were talking about a setback concern." *Id.*, p. 46, l. 5-7.

Yet, none of the buildings approved under the plans referenced in the Agreement were located or constructed in the northern setback of Lot 14. This case is much like

O'Connor v. Harger Construction, 145 Idaho 904, 188 P.3d 846 (2008), where a purchase contract was rescinded because an easement set forth in the agreement never came to fruition.

There is no dispute that a fundamental, express premise of the Agreement was the location and construction of improvements in the setback along the boundary between Lot 13 and Lot 14. The parties shared a misconception about a basic assumption or vital fact upon which they based the Agreement. For these reasons, a mutual mistake occurred at the time of contracting, and the Agreement should be rescinded.

E. FAILURE OF CONDITION PRECEDENT.

The construction of the improvements in the setback was a condition precedent to the requirement that Weisel not develop Lot 13. The Association argues that there is no clear implication that the parties intended that the unification of lots was conditioned on the construction of the improvements in the setback.

Again, the Association is asking the Court to ignore the plain language of the Agreement which states the future event of "the improvements to be constructed in the setback lines along the common boundary of Lot 13 and Lot 14." There can be no dispute that the "event" was not certain to occur because Weisel could have chosen not to build, and the Association could not have forced him to do so. Had Weisel chosen not to build, it would be absurd for the Association to continue to hold Weisel to the Agreement. The only way to construe the Agreement, without reaching absurd results, is that the Agreement with the Association was in the nature of an executory contract whereby Weisel became bound to the Association to restrict development on Lot 13 when the improvements were constructed in the setback.

The plain language of the 1983 Agreement states that it was based upon an event not certain to occur, which was the construction of improvements in the northern setback. In fact, Weisel chose not to build the improvements in the setback and thereafter, the Association continued to assess him for two lots and accord him two votes. The Agreement can only be understood, and only makes sense, if the construction of improvements in the setback was a condition precedent to Weisel's agreement not to develop Lot 13. To construe it otherwise would be to render Wesiel's agreement with the Association not to develop Lot 13 as gratuitous.

F. FAILURE OF CONSIDERATION.

The Association's only argument on this issue is that Weisel got what he wanted, approval of his development plan and the Association got what it wanted, an eternal restriction against building on Lot 13. Yet, the Association had no authority to disapprove the plan unless it violated the Original Declaration. Since there were no restrictions against size of buildings, the number of buildings was less than allowed under the Original Declaration, and guest houses and caretakers quarters were accepted and already existed as outbuildings, the only authority the Association would have had to deny the plan was if the setbacks were violated.

As already shown by Weisel's previous Briefs, none of the buildings approved under the 1983 Application were built in the northern setback of Lot 14. No building has ever been built in the setback of Lot 14. (*Weisel Depo.*, p. 55, l. 12-15, 64, l. 21-24, and Exhibit 3; *McClure Aff.*, Exhibit 6; *Jean Smith Depo.*, p. 29, l. 16-18; *Fruehling Depo.*, p. 41, l. 5-9). The Association had no other authority to deny the development plan since it was not in violation of the Original Declaration or the practices of the Association in

allowing guest houses and caretaker's quarters. Therefore, the only consideration cited in the 1983 Agreement (i.e. approval of construction of improvements in the setback) failed when construction never occurred in the setback.

Furthermore, even accepting the Association's position that it had complete authority to deny the development because of its greater mass, size, and number of buildings than what existed in the Subdivision, (a position that is not supported by the plain language of the Agreement), supervening events have caused that promised performance to fail. The Association approved and acquiesced in comparable and substantially larger development of the rest of the Subdivision over the ensuing 27 years culminating in its express approval of much denser development than that in Weisel's plan. Had the Association continued to limit the size, mass, and number of buildings, the failure would not have occurred and Weisel would have gotten what the Association claims he bargained for, much greater development than every other lot in the Subdivision in return for the restriction. Instead, the opposite has occurred, and Weisel is now restricted to development far less than what is allowed for his neighbors.

Even more egregious, the 2008 Amendment now restricts Lot 14 to no more than 15,000 square feet of development (except for the existing square footage and number of buildings which is grandfathered in), and the 2008 Amendment treats Lot 13 as though it does not exist. The result is that development on Lot 13 and 14 together are forever limited to 19,000 square feet. Therefore, if any change is made to the grandfathered buildings, Weisel will then be bound by the 15,000 square foot and the three building limit, even further restricting the property.

There is no dispute that no setbacks were violated and supervening events have caused the Association's consideration to fail. Weisel is entitled to summary judgment on this issue.

G. CHANGED CIRCUMSTANCES.

1. Courts routinely apply the doctrine of changed circumstances to defeat restrictions on land use made by agreement.

The Association's *Opposition Brief* restates the arguments it made on this issue in Section I.1. of its opening brief and Weisel has already responded to it in Section H.1. of his *Response Brief.*

In short, the proposition advanced by the Association that the "changed circumstances" doctrine only applies to restrictive covenants that cover entire neighborhoods and not to individual restrictions found in agreements between two parties, has no basis in the law.

Not surprisingly, the Association has cited no authority to support such a limited application of the changed circumstances doctrine. Instead, the doctrine is well established and routinely applied to agreements between two parties. *See e.g.*, *Cortese v. United States*, 782 F.2d 845, 850 (9th Cir. 1986); *Coury v. Robison*, 976 P.2d 518 (Nev. 1999); *Perelman v. Casiello*, 920 A.2d 782 (N.J. 2007); *Thompson v. Rorschach*, 416 P.2d 898 (Okl. 1966).

> The doctrine of changed conditions operates to prevent the perpetuation of inequitable and oppressive restrictions on land use and development that would merely harass or injure one party without benefiting the other. . . . [It] is an equitable doctrine which stays enforcement of unreasonably burdensome restrictions on land use, notwithstanding an agreement between the parties specifying the intended duration of the restrictions.

Cortese v. United States, supra, at 782 F.2d 850 (9th Cir. 1986).

Moreover, according to the Association, the Agreement was necessary because of its absolute authority under the Original Declaration to approve or disapprove Weisel's development plan. Had there been no Original Declaration, the Agreement would not have been made. Thus, a change in circumstances in the density of the neighborhood bears directly on the continuing validity of the Agreement.

2. **The evidence that no improvements were constructed in the setback and the course of development in the Subdivision since the restriction was placed on Lot 13 in 1983, is exactly the type of evidence relevant to issue of whether the restriction should be extinguished.**

Once again citing no authority, the Association argues in both Section H.1. and Section H.2. of its *Opposition Brief* that none of the "density" evidence is admissible on the change of circumstances issue because the approval of a development plan of greater density than existed in the Subdivision was not the consideration or purpose for the Agreement. This argument is without merit for the reasons already set forth above and herein.

The fact that the improvements were not constructed in the setback and the course of development of the Subdivision over the past 27 years is exactly the type of evidence relevant to the issue of whether changed circumstances supports the extinguishment of a covenant.

> Where the restriction is made with reference to the continuance of existing general conditions of the property and its surroundings, and there has occurred such a change in the character of the neighborhood as to defeat the purpose of the restrictions and to render their enforcement inequitable and burdensome, a court of equity will refuse to enforce them."

Hecht v. Stephens, 464 P.2d 258 (Kansas 1970).

The "continuance of existing general conditions of the property" has indisputably changed -- no improvements were constructed in the setback, and it is not disputed that

the Association now expressly allows density well in excess of that to which it objected with Weisel's 1983 development plan.

Moreover, the Association's position in this section is an about face from everything the Association has been asserting until it filed its *Opposition Brief.* As already shown, the Association has for the past several years claimed that the purpose of the Agreement was because Weisel's 1983 development plan exceeded the density or "mass" that was intended in the Subdivision. Yet now, after being confronted with its actions in approving increasingly larger homes and outbuildings to the point of now expressly allowing approving density well in excess of that it would only conditionally approve for Weisel in 1983, the Association for the first time claims that density or "mass" concerns was not the purpose of the Agreement.

Well before this lawsuit and before it retained the services of Haavik, the Association's position has been that it had complete authority to deny the development plan for any reason. Under this blanket authority, the Association asserted that it had complete discretion to conditionally approve Weisel's 1983 development plan because it wished to limit what it perceived as a high density or "mass" development which was greater than existed in the subdivision.

Until Haavik was involved, the Association stated that the purpose for the Agreement was:

- Concern about the "mass of the project". *Fruehling Depo.,* Exhibit 54
- "As time went by, it became apparent that people wanted bigger homes and more outbuildings. In Thom Weisel's case...I was the head of design review in those days. We let Thom put in larger than required buildings, that were not consistent with our CC&Rs, because he made an agreement with us to put his two lots together and develop it as one." (*Robert Smith Depo.*, Exh 8, Jean Smith's Letter dated December 21, 2005).

- "Although Lot 14 was overbuilt, this was tolerable because Lot 13 would remain open land." *Id.*, Exhibit 6. Letter dated December 21, 2005 from Bob Smith to the Board of Directors).

- "Q. So you base your opinion that Lot 14 was overbuilt based on the size of structures. A. Yes." *Jean Smith Depo.*, p. 43, l. 2-4.

- "The size and the quantity of the buildings were substantially larger than what was ever envisioned for the subdivision, and that bothered the design review committee at that time. Therefore, they made a condition to agree to his development plan if Mr. Weisel agreed to never build on Lot 13 and combine the two lots into one and never subdivide them again." (*Fruehling Depo.*, p. 41, l. 19 – p. 42, l. 2).

- "I think that the design review committee, as I stated previously, is concerned about the mass of the buildings and as a result asked Mr. Weisel to give up his development rights on Lot 13, which he did." (*Id.*, p. 65, l. 2-6).

- "It's the mass of the project, the mass of the project." (*Id.*, p. 67, l. 10-11).

Weisel was not the one to raise the density or "mass" issue. It has always been Weisel's position that the purpose for the Agreement is exactly what is stated in the Agreement - the approval of construction of improvements in the setback in return for the restriction on Lot 13. However, since the Association has been adamant that the purpose of the Agreement was because Weisel was allowed to build to a greater density or "mass" than what existed in the Subdivision, Weisel addressed that issue.

Faced with the evidence of development in the subdivision well in excess of what it would only conditionally approve for Weisel in 1983, the Association now, for the first time, takes an about face and refutes its own position, asserting "the Association's one residence per lot density analysis" was the purpose for the restriction. (*Opposition Brief*, p. 16). It is hard to believe the Association can make this argument in light of the fact that both before and after the Agreement was entered into, the Association allowed guest houses and caretaker units without extracting any conditions from various owners.

Worse yet, Phil Ottley, a member of the Design Committee who considered Weisel's 1983 development plan, had a separate caretaker's unit in which his caretaker lived for six or seven years. Jean Smith acknowledged that another lot owner by the name of Davies had four buildings on his property, including a separate guest house. A couple of years later, Fruehling added a caretaker's unit to his property. (*Fruehling Depo.*, p. 9, l. 25 – p.10, l. 7). Yet, none of these owners was required to surrender development rights for having two "residences" on their lots. (*Id.*)

The Association should not be permitted to refute everything it has been claiming for years, namely that it was the "mass" and density of Weisel's development plan that bothered the Association.

Very simply, the Association's arguments in Section H.1 and H.2 are neither supported by law or by the position it has taken for years.

3. The Association has not raised a material dispute of fact about the development of the Subdivision since the Agreement.

While in Section H.3. of its *Opposition Brief*, the Association goes to lengths to cast doubt on whether the various guest/caretaker's units exceed the 1200 square foot limit of the County or City zoning codes, it does not dispute at all that the units violated the Amended Declaration. From 1986 until 2008, the Amended Declarations restricted such units to 900 square feet or less. Even if Haavik's Affidavit raises an issue as to the exact measurement of the units or whether they violated City or County zoning codes, there is no dispute that the units violated the Association's Amended Declarations. The Association insists that Weisel should be held to his Agreement, yet there was no reciprocal effort by the Association to hold its members to their contractual obligations under the Amended Declarations.

Furthermore, as far as the reliability of the Assessor's records, the *Affidavit of Garth McClure* in response to the *Affidavit of Linda Haavik* states that the Assessor's records are a more reliable, single source of data as to the "as built" units than the plans submitted to the planning and building departments by owners and their architects. Haavik speculates that the Assessor's square footage data is not accurate. However, she presents no data in place of the Assessor's numbers, leaving the Assessor's data undisputed.

As for the particular lots in violation of the Amended Declaration, even accepting the *Affidavit of Linda Haavik* as true, she does not dispute certain facts. For example she does not dispute that the guest/caretaker's units on Lots 11 and 12 are approximately 1,200 square feet. In fact, the application for the unit on Lot 12 is for a 1,200 square foot unit. (*Garth McClure Affidavit in Response to Haavik Affidavit,* Exhibit 1).

As for Lot 20, the Assessor's records list a "Guest House 1st floor 1423 sq.ft." It is true that the Assessor and Janet Jarvis may be in disagreement as to what the various parts of this wing are called and when the various parts were built. Jarvis calls the part she designed a "guest house" and the part that was in existence a "maid's room." However, it is not disputed that the total square footage of the entire living area is 1,423 square feet and that the "maid's room" is configured exactly like the two other bedrooms with an inner door to the living room and kitchens. (*Garth McClure Affidavit in Response to Haavik Affidavit,* Exhibit 2).

As for Lot 16, the Assessor's records measure the guesthouse at 1,568 square feet. Neither the owner nor Haavik dispute the overall size of the building. Rather, they distinguish the two floors of that building, calling one floor a "guest area" and the other

floor a "caretaker's unit." The Assessor and the owner may be in disagreement as to exactly what each floor is called and to the exact square footage of each floor. However, there is no dispute that the Assessor did not include the "garage" space in its total calculation of 1,568 square feet for the guest/caretaker's unit and that figure accurately represents the square footage of the total living area of the building.

As for Lot 5, Haavik's only dispute is to whether the total square footage of the caretaker's unit includes the "unfinished" part of the second floor of the building. Haavik does not dispute the total size of that second floor.

Finally, McClure admits there was a typo as to Lot 7. Thus, there are at least five other properties that contain a "second residence," four of which were allowed in violation of the Association's Amended Declaration.

If the Court reviews the Assessor's records, it will see that the records are detailed and comprehensive. It goes without saying that if an owner felt that the records overstated what exists on his property, that owner could, and likely, would challenge and correct such records.

4. The Association has allowed violation of the Amended Declaration and now approves development in the Subdivision far in excess of Weisel's development plan, such that the continued restriction on development of Lot 13 is inequitable and oppressive.

A party's conduct, changed circumstances, or the relevant equities will preclude enforcement by that party or will warrant modification of the restrictive covenant. *See,* RESTATEMENT, *supra*, §§ 7.1, 7.10.

"Where circumstances have changed and enforcement of a restrictive covenant would impose *an oppressive burden without any substantial benefit*, the covenant must undergo modifications." *Cevasco v. Westwood Homes, Inc.*, 15 A.2d 140, 141 (N.J. 1940). "There must be a change in the character of the surrounding neighborhood sufficient to *make it impossible any longer to secure in a substantial degree* the benefits sought to be realized through the performance of the building restriction." *Hecht v. Stephens*, 464 P.2d 258 (Kansas 1970).

> "The right to enforce the restrictions may be lost by acquiescence in the violation of the provisions of such restrictions. Additionally, where the restriction is made with reference to the continuance of existing general conditions of the property and its surroundings, and there has occurred such a change in the character of the neighborhood as to defeat the purpose of the restrictions and to render their enforcement inequitable and burdensome, a court of equity will refuse to enforce them."

Id.

In Section H.3. of its *Opposition Brief*, the Association claims that the "Subdivision has been built out as expected." The only evidence the Association cites in support of this statement is the *Affidavit of Linda Haavik*, who cites no foundation for her knowledge as to the expectations of the developers or owners within the Subdivision. In fact, Haavik's opinion necessarily contradicts the Association's assertion that it could have denied any owner's development plan for any reason it chose. If that were the case,

how would Linda Haavik have any clue as to how the Subdivision might have developed?

Haavik bases her opinion totally on what was permitted under the applicable zoning ordinances. However, if the Association's expectations as to how the Subdivision would develop coincided with the applicable zoning codes, then the Association would allow lot owners in the Subdivision to build to a density of 25% lot coverage (the city limitations on lot coverage), which it expressly does not allow.

In contrast to Haavik's opinion, the Association has always been insistent that the Subdivision did not develop as expected. As stated by Jean and Bob Smith, two of the original developers of the Subdivision, the intent for the Subdivision was to have a "country feel." (*Robert Smith Depo.*, Exhibit 8, Jean Smith's letter dated December 21, 2005). However, the Association believed that the original intent of a development with a "country feel" was not being met because it had allowed larger and larger development over the years.

- "As time went by, it became apparent that people wanted bigger homes and more outbuildings. In Thom Weisel's case...I was the head of design review in those days. We let Thom put in larger than required buildings, that were not consistent with our CC&Rs, because he made an agreement with us to put his two lots together and develop it as one." (*Robert Smith Depo.*, Exh 8, Jean Smith's Letter dated December 21, 2005).

- "The size and the quantity of the buildings were substantially larger than what was ever envisioned for the subdivision, and that bothered the design review committee at that time. Therefore, they made a condition to agree to his development plan if Mr. Weisel agreed to never build on Lot 13 and combine the two lots into one and never subdivide them again." (*Fruehling Depo.*, p. 41, l. 19 – p. 42, l. 2).

In 1985, the Association acknowledged that lot owners were building bigger and bigger guest houses, caretaker's units, and other structures on their lots and requesting

approval to build outside the building envelopes. (*Beaver Springs Response to Second Request for Admission No. 16,* admitting Exhibit 103, Letter to Homeowners dated March 2, 1985). Following the December 26, 1985, annual meeting, the Association sent a letter to homeowners on January 26, 1986, acknowledging that "time and the makeup of the Beaver Springs neighborhood has outdated the original Declaration of Restrictions." (*Beaver Springs Response to Second Request No. 17,* admitting Exhibit 104). In the Annual Minutes from the December 27, 1990, the Association again acknowledged that owners were building larger and larger homes. (*Beaver Springs Response to Second Request No. 21, admitting Exhibit 108*). Owners continued to modify the building envelopes that had been laid out. (*Beaver Springs Response to Second Request No. 22,* admitting Exhibit 109). Bill Fruehling admitted that times had changed and the Declaration needed to be updated. (*Beaver Springs Response to Second Request No. 25,* admitting Exhibit 112).

Based on the Associations' own records, Haavik's opinion as to the development of the Subdivision is completely contrary to the how the developers and the Association perceived the development over time.

In sum, when the other units and dense development approved by the Association and the 2008 Amended Declaration are viewed together, there has been a change so "complete as to render the restriction unreasonable, confiscatory, discriminatory, and as practically to destroy the purpose for which the restriction was originally imposed."

The difference between the 1983 and 2005 aerial photos, which are attached as Exhibits 4A and 5 to *McClure's Affidavit,* makes the point clear. Weisel's 1983 development plan called for approximately 11,533 square feet of buildings on a 3.7-acre

lot, the number and size of which did not violate the Original Declaration but which, according to the Association, was greater than what existed or was intended for the Subdivision.

Then, in 2008, the Association expressly put its stamp of approval on development up to 15,000 square feet of structures *on any lot*, including the much smaller 2-acre lots. This now allows lot owners to build to a lot coverage greater than 16%, a density well in excess of Weisel's 1983 development plan and well in excess of the 4.8% lot coverage for Lot 13 and 14. In addition to that, due to the new limits, Weisel cannot remove any of his grandfathered structures without suffering even greater restriction on his property.

There is no dispute that the 1983 Agreement was "made with reference to the continuance of existing general conditions of the property and its surroundings, and there has occurred such a change in the character of the neighborhood as to defeat the purpose of the restrictions and to render their enforcement inequitable and burdensome." *Hecht v. Stephens*, *supra.* For all these reason, the Court should find that a change of circumstances has occurred, which renders the 1983 restriction null and void.

I. LACHES.

The Association claims that since the Association and building departments threw the owner's plans away, Weisel is prevented by laches from raising his change of circumstances argument. The Association's argument lacks any merit for many reasons.

First, under its Original Declaration and subsequent Amendments, the Association had an affirmative duty to "keep a permanent record of all such reported action" of the Design Committee. This requirement has survived each and every amendment to the

Declaration. (*Beaver Springs Response to Second Request for Admission No. 1*, admitting Exhibit 4; *Response to Second Request for Admission No. 30*, admitting Exhibit 117). If there are scant or no records, it is because the Association did not follow its own rules.

Second, the documents that were kept by the Association negate any inference that the missing documents would have helped the Association's case. For example, the documents obtained from the Association in discovery show that as to Lot 20, the plans dated May, 2002, depict a 1,050 square foot (at least), two-bedroom guest house with a kitchen was presented to and approved by the Association, the size of which violated the Amended Declaration. (*McClure Affidavit*, Exhibit 2). Likewise, the 2003 plans for Lot 12A were for a 1,200 square foot caretaker's unit which ended up being 1,280 square feet. (*Id.*, Exhibit 1). The Association approved those plans. (*Id.*) Therefore, the Association's own documents do not support its laches claim.

Third, the Association's argument hinges on an interpretation of the "change of circumstances" that is based solely on what changes the Association did or did not approve in the Subdivision. Yet, on a claim of change of circumstances, the inquiry is much more expansive than that.

> The jurisdiction of equity to enforce covenants restricting the use of property is not absolute. The right to enforce the restrictions may be lost by acquiescence in the violation of the provisions of such restrictions. Additionally, where the restriction is made with reference to the continuance of existing general conditions of the property and its surroundings, and there has occurred such a change in the character of the neighborhood as to defeat the purpose of the restrictions and to render their enforcement inequitable and burdensome, a court of equity will refuse to enforce them.
>
> * * *

> The extent of change in a neighborhood which will justify refusal to enforce restrictive covenants has not given rise to any hard-and-fast rule. Each case must rest on the equities of the situation as it is presented. A basic principle woven as a thread throughout all the decisions is that to warrant refusal of equitable relief, the change in conditions must be so great or radical as to neutralize the benefits of the restriction and destroy its purpose.

Hecht v. Stephens, 464 P.2d 258, 262 (Kansas 1970).

Putting aside the documents related to Lot 20 and Lot 12 that show the Association approved units in excess of the Amended Declaration, and assuming for the sake of argument that the Association was completely unaware of the larger and larger homes being built in the subdivision and the construction of guest houses and caretaker's units in violation of the Amended Declaration, simply the increasingly dense development in the Subdivision in the past 27 years alone can support the extinguishment of the restriction.

Finally, the claim that the Association was prejudiced by Weisel's delay in bringing his change of circumstances argument is circular and makes no sense. The very essence of a change of circumstances claim is a lapse of time. To extinguish a covenant due to change of circumstances, one must show that a change of circumstances has occurred. Laches relies on a change of circumstance to prevent such an action. The two are mutually exclusive. Indeed, virtually all cases applying the change of circumstances doctrine involve the passage of many years. *See e.g, Shippan Point Assn., Inc. v. McManus*, 640 A.2d 1014 (Conn.App. 1994); *Zavislak v. Shipman*, 362 P.2d 1053 (Colo. 1961); *Cevasco v. Westwood Homes, Inc.*, 15 A.2d 140 (N.J. 1940); *Gomah v. Hally*, 113 N.W.2d 896 (Mich. 1962); *Hecht v. Stephens*, 464 P.2d 258 (Kansas 1970); *Cortese v.*

United States, 782 F.2d 845, 850 (9th Cir. 1986); *Coury v. Robison*, 976 P.2d 518 (Nev. 1999); *Perelman v. Casiello*, 920 A.2d 782 (N.J. 2007).

With the 2008 Amendment, the Association for the first time has put it express stamp of approval on development far in excess of that it would only conditionally approve with Weisel. Weisel's Declaratory Judgment action was instituted within a short period thereafter.

In sum, there is no basis for the Association's argument that Weisel is prevented by laches from prevailing on his "change of circumstances" claim.

J. NECESSARY PARTY – THIRD PARTY BENEFICIARY

The Association has not raised any issues with respect to necessary parties or third-party beneficiaries that were not thoroughly addressed by Weisel in his *Opening Brief*. Therefore, Weisel stands on those prior arguments.

II. CONCLUSION

For all these reasons, the Court should grant Weisel's Motion for Summary Judgment, and deny the Association's Motion for Summary judgment.

RESPECTFULLY SUBMITTED this 9th day of February, 2010.

HAEMMERLE & HAEMMERLE, P.L.L.C.

FRITZ X. HAEMMERLE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of February, 2010, I caused to be served a true copy of the foregoing document by the method indicated below, and addressed to each of the following:

Ed Lawson
Erin Clark
LAWSON, LASKI, CLARK & POGUE, P.L.L.C.
P.O. Box 3310
Ketchum, ID 83340

______ By depositing copies of the same in the United States Mail, postage prepaid, at the post office at Hailey, Idaho.

✓ By hand delivering copies of the same to the office of the attorney(s) at his offices in Hailey, Idaho.

______ By telecopying copies of same to said attorney(s) at the telecopier number __________________, and by then mailing copies of the same in the United States Mail, postage prepaid, at the post office at Hailey, Idaho.

FRITZ X. HAEMMERLE

ORIGINAL

FRITZ X. HAEMMERLE
HAEMMERLE & HAEMMERLE, P.L.L.C.
400 South Main St., Suite 102
P.O. Box 1800
Hailey, ID 83333
Tel: (208) 578-0520
FAX: (208) 578-0564
E-mail: fxh@haemlaw.com
ISB # 3862

FILED A.M. P.M.
FEB 09 2010
Jolynn Drage, Clerk District Court Blaine County, Idaho

Attorney for Plaintiff, THOMAS WEISEL

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

THOMAS WEISEL, a married man dealing in his sole and separate property,	**Case No. CV-09-124**
Plaintiff,	**AFFIDAVIT OF GARTH MCCLURE IN RESPONSE TO AFFIDAVIT OF LINDA HAAVIK**
vs.	
BEAVER SPRINGS OWNERS ASSOCIATION, INC., an Idaho corporation,	
Defendant.	

STATE OF BLAINE,)
) ss.
County of Blaine.)

GARTH MCCLURE, being sworn upon oath, deposes and states as follows:

1. I am an individual residing in Blaine County, Idaho. I am over the age of 18 and make the averments contained herein of my own personal knowledge and would testify to the facts as presented herein if called upon to do so.

2. On February 2, 2010, I received Linda Haavik's Affidavit dated January 26, 2010. I was able to analyze and evaluate it on Wednesday and Thursday, February 4th and 5th. I previously submitted my Affidavit in this legal proceeding. At the time I

executed my Affidavit, Ms. Haavik's Affidavit was not available to me for any kind of evaluation. Prior to February 2, 2010, I did not know she had been identified as a witness in this matter, and therefore, I did not have an opportunity to comment on her opinions.

3. My Report evaluates the build out of Beaver Springs Subdivision and its compliance with the CC&R's, as amended over time, but does not include an evaluation of compliance with County or City Zoning regulations.

4. On Page 10, ¶19 Haavik states:

"It is my understanding that, based on these purported square footages, Weisel is arguing that there are several guesthouses within the Subdivision that exceed the size restriction in the applicable City or County zoning ordinances. The conclusion however cannot be made from the information contained in the McClure Report."

My Response: My report evaluates the size of accessory dwelling units and their compliance with the CC&R's (not City of County zoning regulations) in effect at the time the units were built. The report does not include an evaluation of compliance with Blaine County zoning regulations.

5. On Page 10 ¶20 Haavik states:

"The McClure Affidavit states that he relied solely on the Blaine County Assessor's records... ."

My Response: I relied solely on the Blaine County Assessor's records because it is the best available single data base, from one single source which reflects the "as-built" square footages for the entire life of the subdivision. This data was used because it is more consistent and reliable than Blaine County Planning Department's or City of Ketchum.

6. On Page 10 ¶21 Haavik states:

"The Blaine County Zoning and Building Department method of calculating square footage for ADU's changed over time, while they struggled with how to measure, which results in inconsistent data."

My Response: I used Blaine County Assessor's data for the exact reason of avoiding that inconsistency.

7. On Page 11 ¶22, Haavik discusses the "subjectivity" of square footage calculations. Her statement actually supports the use of Blaine County Assessor's records because it is one single source and not a source which used various methods.

8. On Page 11 ¶23, Haavik states:

"the Assessor's records do not always reflect the square footage that is represented to the building and zoning authorities at the time of construction."

My Response: This is true and supports the use of the Assessor's "as built" records. In my experience working for various governmental entities, including the city of Sun Valley and the city of Ketchum, the Assessor's records are the most reliable for the analysis used in my Report because they reflect "as-built" square footage rather that what is represented in the plans submitted to the building and planning departments by the owner or his architect. A building will usually not get built to exactly the square footage number planned. Neither the planning department nor the building department have adequate resources to enforce with any vigor the size or use limitations once the unit gets built. An example of that is shown by Lot 12A. Exhibit 1 shows the application for and approval by the City for a 1,200 square foot dwelling unit in 2003 but the unit was eventually built to 1,280 square feet. This is in excess of the 1986 Amended Declaration.

9. On Page 12 ¶24, Haavik states that "connecting zoning, building permit, and Assessor's records information is nearly impossible."

My Response: Again, the intent was not to evaluate zoning compliance. The use of "built years" in the McClure report was not used to reflect the year the zoning regulations applied, and this is not implied in the report.

10. On Page 12 ¶25, Haavik discusses my calculations as to certain guest/caretaker's houses.

My Response:

Lot 5: In Appendix A, the Building 2 improvements list "Guest House & Garage". Haavik is wrong. I did not represent that the guest house alone was 2,711 square feet.

Lot 7A: This is a typo. Haavik is correct, according to the Assessor's Records there is no guest house, and the house was built in 1977.

Lot 16: The Assessor's records list the Guesthouse at 1568 square feet as shown in Appendix A. Haavik and the owner divide the building into a guest area on one floor and a caretaker's unit on the other floor but they do not dispute they are in the same building. The Assessor and the owner may be in disagreement as to exactly what each floor is called and to the exact square footage of each floor, but it is clear that

the Assessor did not include the "garage" space in its total calculation of 1,568 square feet for the guest/caretaker's unit and that figure accurately represents the square footage of the total living area.

Lot 20: The Assessor's records list a "Guest House 1st floor 1423 sq.ft. The Assessor and Janet Jarvis may be in disagreement as to what the various parts of this wing are called since Jarvis calls part of it a "guest house" and part of it a "maid's room." However, Jarvis does not dispute that the total square footage of the entire living area is 1,423 square feet. The Assessor has included the "maid's room" in the square footage for the guest house. In reviewing Hascoe's plans that were obtained from the Association, the maid's room is attached to and enters into the guest house and the "guest house" has a kitchen. (See attached Exhibit 2). The Assessor's data does not appear to be inaccurate.

11. On Page 13 ¶26, Haavik states that my Report is not a reliable representation of the structures contained in the Subdivision because the Assessor is concerned with property values and because it misstates the information contained in the Assessor's records. With the exception of the guest house for Lot 7, there is no difference between what is in my Report and the Assessor's records. Further, my Report did not evaluate compliance with zoning ordinances. Finally, the Assessor is concerned about property values and in order to create values, the Assessor uses size and use of structures so that the data is relevant. The Assessor's method of obtaining the square footage data is not disputed by Haavik.

12. On Page 13 ¶27, Haavik states that the building plans should be relied on. However, as I mentioned previously, the "as built" square footages more accurately reflect what was in fact built. Haavik also points out that the building plans have not been kept and the applications between 1980 and 1990 contain little or no information about the size of buildings or type or purpose. This again supports using Blaine County Assessor's records, not the sparse records of the Blaine County Planning and Building Department.

13. On Page 14 ¶28, Haavik dismisses floor area ratios and lot coverage as indicators of density. Floor Area Ratio (FAR) and Lot Coverage are both widely use methods throughout the United States to determine development density on a given parcel of land. The two methods are widely used in the land use planning profession and are used as a regulatory tool in municipal and county zoning and subdivision regulations. In addition, my report does not evaluate compliance with County or City ordinances.

14. Even though Haavik says in ¶28 that lot coverage does not have any relevancy to density, on Page 14 ¶29, Haavik shows in this paragraph that it is being used by the city of Ketchum in other zone districts.

15. On Page 14 ¶30, Haavik states that ADU's are not included in density calculation for the City zoning compliance. However, they can and should be included for a "real picture" evaluation within a private subdivision.

16. Haavik dismisses using FAR on Page 15, ¶31, because it is not used as a regulatory tool in residential districts in the city of Ketchum. However, FAR is a valid, tested and accepted method in the planning profession for determining density.

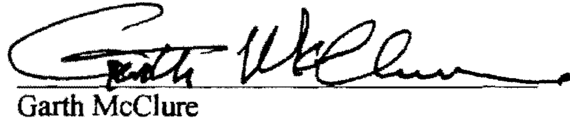
17. On Page 15 ¶33, Haavik mentions that the County used to require double the lot size for Accessory Dwelling Units (ADUs). The fact that the County at one time required double the lot size for detached ADUs shows their concern about ADUs contributing to lot and subdivision density.

18. In Page 16 ¶36, Haavik makes a statement about the fact that the Assessor does not ensure compliance with zoning codes. I never said otherwise. It is true that the Assessor does not enforce zoning codes. However, the Assessor records are valid for

determining "as-built" square footage of structures on a lot. Haavik does not dispute this fact.

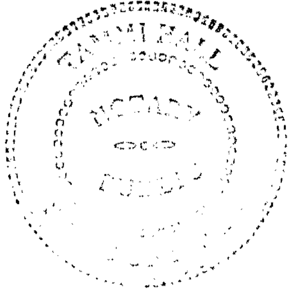
FURTHER YOUR AFFIANT SAYETH NOT.

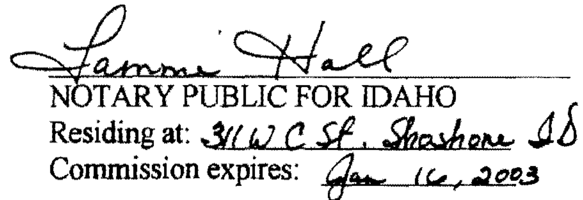
DATED this 8th day of February, 2010.



Garth McClure

SUBSCRIBED AND SWORN to before me this 8th day of February, 2010.





NOTARY PUBLIC FOR IDAHO
Residing at: 311 W C St. Shoshone ID
Commission expires: Jan 16, 2003

CERTIFICATE OF SERVICE

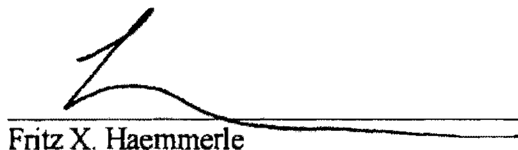
I hereby certify that on the 9th day of February, 2010, I served a true and correct copy of the within and foregoing document upon the attorney(s) named below in the manner noted:

Ed Lawson
Erin Clark
LAWSON, LASKI, CLARK & POGUE, P.L.L.C.
P.O. Box 3310
Ketchum, ID 83340

____ By depositing copies of the same in the United States Mail, postage prepaid, at the post office at Hailey, Idaho.

✓ By hand delivering copies of the same to the office of the attorney(s) at his offices in Hailey, Idaho.

____ By telescoping copies of same to said attorney(s) at the telecopy number ________________, and by then mailing copies of the same in the United States Mail, postage prepaid, at the post office at Hailey, Idaho.



Fritz X. Haemmerle

EXHIBIT 1

IN RE:)
)
Lacerte Accessory Dwelling Unit Design Review)

File Number: R03-012)

KETCHUM PLANNING AND ZONING COMMISSION - FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION

BACKGROUND FACTS

OWNERS: Larry and Joyce Lacerte, verified August 12, 2003 with Assessor

REQUEST: Design Review Approval of an Accessory Dwelling Unit

LOCATION: Lot 12A, Beaver Springs Subdivision (110 Adam's Rib Lane)

NOTICE: Adjacent property owners

ZONING: Limited Residential - Two Acre (LR-2)

FLOOR AREA: PROPOSED 1,200 sq.ft.

LOT AREA: 103,680 square feet (2.38 acres)

LOT COVERAGE: 7.3 percent (25 percent allowed)

BUILDING HEIGHT: 24 feet

PROPOSED SETBACKS:
FRONT: 70 feet **REAR:** 280 feet **SIDE:** 100 feet **SIDE (main house):** 42 feet

REQUIRED SETBACKS:
FRONT: 15 feet **REAR:** 20 feet **SIDE:** 12 feet **SIDE:** 12 feet

CURB CUT: 12.5 percent (35 percent allowed)

PARKING SPACES: one (1) for ADU (1 required)

REVIEWER: Stefanie Webster, City Planner

GENERAL FINDINGS OF FACT

1. The applicant is requesting design review approval of a 1,200 square foot studio/one (1) bedroom accessory dwelling unit (ADU). The lot size is 2.38 acres and the applicant is allowed to build a 1,200 square foot ADU on the property. A primary residence is existing.

FOUND:
Additional mature landscaping is proposed to the north of the ADU to further buffer the unit from adjacent neighbors. Mature vegetation presently exists to buffer the ADU from the view of neighbors and traffic on Adam's Rib Lane.

STANDARD 17.108.010(M)(3)(b):
Exterior lighting shall not have an adverse impact upon other properties and/or public streets.

FOUND:
One (1) exterior light fixture that shines down will be installed over the front door. All exterior lighting shall conform with the City of Ketchum Dark Sky Ordinance.

STANDARD 17.108.010(M)(3)(c):
Building design should include weather protection which prevents water from dripping or snow from sliding on areas where pedestrians gather and circulate or onto adjacent properties.

FOUND:
The plans do not indicate the use of weather protection devices.

STANDARD 17.108.010(M)(4)(a):
Traffic shall flow safely within the project and onto adjacent streets. Traffic includes vehicle, bicycle, pedestrian and equestrian use. Consideration shall be given to adequate sight distances and proper signage.

FOUND:
The existing ingress and egress traffic pattern on the project site is via a private driveway that is accessed from Adam's Rib Lane, a private road. Adam's Rib Lane is accessed off of Adam's Gulch Road which connects to State Highway 75. No sidewalks are located in the vicinity of the project site.

STANDARD 17.108.010(M)(4)(b):
Parking areas have functional aisle dimensions, backup space and turning radius.

FOUND:
Space for one (1) parking space measuring nine (9) feet in width by twenty (20) feet in length is available in front of the ADU. The vehicle is able to back directly out from the space and onto the private driveway in order to exit the property.

STANDARD 17.108.010(M)(4)(c):
Location of parking areas is designed for minimum adverse impact upon adjacent properties with regard to noise, lights and visual impact.

CONCLUSIONS OF LAW

1. The City of Ketchum is a municipal corporation organized under Article XII of the Idaho Constitution and the laws of the State of Idaho, Title 50, Idaho Code.

2. Under Chapter 65, Title 67 of the Idaho Code, the City has passed a land use and zoning code, Title 17.

3. The Commission has authority to hear the applicant's Design Review Application pursuant to Chapter 17.108 of Ketchum Code Title 17.

4. The City of Ketchum Planning Department provided adequate notice for the review of this application.

5. The project **does** meet the standards of approval under Chapter 17.108 of Zoning Code Title 17.

DECISION

THEREFORE, the Ketchum Planning and Zoning Commission **approves** this Design Review Application this 25th day of August, 2003, subject to the following conditions:

1. Ketchum Water, Sewer, Fire and Building Department requirements shall be met;

2. Design review approval shall expire six (6) months from the date of approval;

3. Design review elements shall be completed prior to occupancy;

4. This Design Review approval is based on the plans and information presented and approved at the meeting on the date noted herein. Building Permit plans must conform to the approved Design Review plans unless otherwise approved in writing by the Commission or Planning and Zoning Administrator. Any building or site discrepancies which do not conform to the approved plans will be subject to removal;

5. The accessory dwelling unit shall be secondary in nature to the primary residence;

6. The accessory dwelling unit shall not be sold separately from the primary residence;

7. The accessory dwelling unit shall be limited to long-term rental (60 day minimum);

File Number: [illegible]3-012

DESIGN REVIEW APPLICATION

Project Name: Lacerte Guest Cottage

Owner: Larry and Joyce Lacerte Phone No.: 214-265-4800

Mailing Address: 5323 Park Ln Dallas, Texas 75220

Architect/Representative: Engelmann, Inc. Phone No.: 208-726-9742

Mailing Address: P.O. Box 6240 Ketchum, ID 83340

Architect License No.:

Engineer License No.: Morrell Engineering #6589

All design review plans and drawings for public commercial projects, residential buildings containing more than four (4) dwelling units and development projects containing more than four (4) dwelling units shall be prepared by an Idaho licensed architect or an Idaho licensed engineer.

Preapplication Fee: Date Paid:

Design Review Fee: $200.00 Date Paid: 7-22-03 ✓SLW

Legal Land Description: Lot 12B (Pending approval of Envelope Shift, otherwise it is Lot 12A) Beaver Springs Subdivision (110 Adam's Rib Lane)

Lot Area: 103680 sq ft 2.38 acres Zoning District: LR-2

Overlay District: Flood ___ Avalanche ___ Pedestrian ___ Mountain ___

Anticipated Use: Residential

Type Construction: New X Remodel ___ Addition ___ Other ___

Number of Residential Units: One Number of Hotel Units:

Total Floor Area:

	Proposed	Existing
Basements:		
1st Floor:	600sf	
2nd Floor:	600sf	
3rd Floor:		
Mezzanine:		
Total:	1200sf	

Percent of Building Coverage: 7.3%

Floor Area Ratio (CC Zone):

Setbacks: Front 15' Side 100' Side 10' Rear 20'

Height: 24' Parking Spaces Provided: Two

Construction Phasing:

Will project be condominiumized? Yes ___ No x

Will project be townhoused? Yes ___ No x

Will fill or excavation be required? Yes ___ No X

Will existing trees or vegetation be removed? Yes ___ No x

Water System: Municipal Service ___ Ketchum Spring Water ___ Private Well Water X

NOTE: The term of Design Review Approval shall be six (6) months from the date approval is granted. Failure to file a complete Building Permit Application for a project within said six (6) months shall cause said approval to be null and void. (from Ordinance Number 409)

The Applicant agrees in the event of a dispute concerning the interpretation or enforcement of the Design Review Application in which the City of Ketchum is the prevailing party to pay the reasonable attorney fees, including attorney fees on appeal, and expenses of the City of Ketchum.

I, the undersigned, certify that all information submitted with and upon this application form is true and accurate to the best of my knowledge and belief.

Signature of Owner: Agent By Cynthia [illegible] Engelmann Inc Date: 7-21-03

Approved/Denied Date: August 25, 2003

NOTE: COMPLETE APPLICATION, FOUR (6) SETS OF PLANS AND FEE MUST BE SUBMITTED BEFORE NOON A MINIMUM OF TWENTY (20) DAYS PRIOR TO THE COMMISSION MEETING.

BEAVER SPRINGS OWNERS ASSOCIATION
Box 3934
Ketchum, Idaho 83340

August 18, 2003

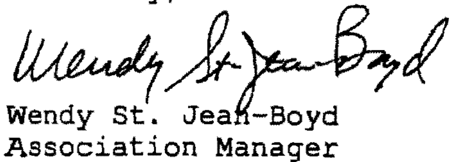
Englemann, Inc.
Attn: Cindy Mann
660 2nd Street South
P. O. Box 6240
Ketchum, Idaho 83340
Via FAX 726-9793

Re: Lacerte Residence Guest House

Dear Cindy,

The Beaver Springs Design Review Committee has approved the plans submitted August 15, 2003 for the above referenced project.

Sincerely,



Wendy St. Jean-Boyd
Association Manager

DESIGNRE.WPS

BEAVER SPRINGS OWNERS ASSOCIATION
Box 3934
Ketchum, Idaho 83340

June 7, 2002

The Jarvis Group
Attn: Bobbie
P.O. Box 626
Ketchum, ID 83340
208-726-4031
208-726-4097 FAX

RE: Design Review - Lot 20, Beaver Springs Subdivision/Hascoe Residence
Plan dated May 22, 2002 - Guest House

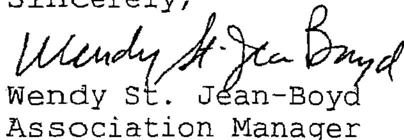
Dear Bobbie:

The Design Review Committee of Beaver Springs Subdivision has approved the above referenced plans for the 1050 sq.ft. guest house. The association also has approved the modification to the building envelope. This approval has been made with the understanding that the landscaping adjacent to Lot 19 will be installed under the supervision and approval of Lori Sarchett.

As a reminder, please make sure all contractors park on site and not on any Beaver Springs Roads.

If you need any additional assistance, please feel free to call.

Sincerely,

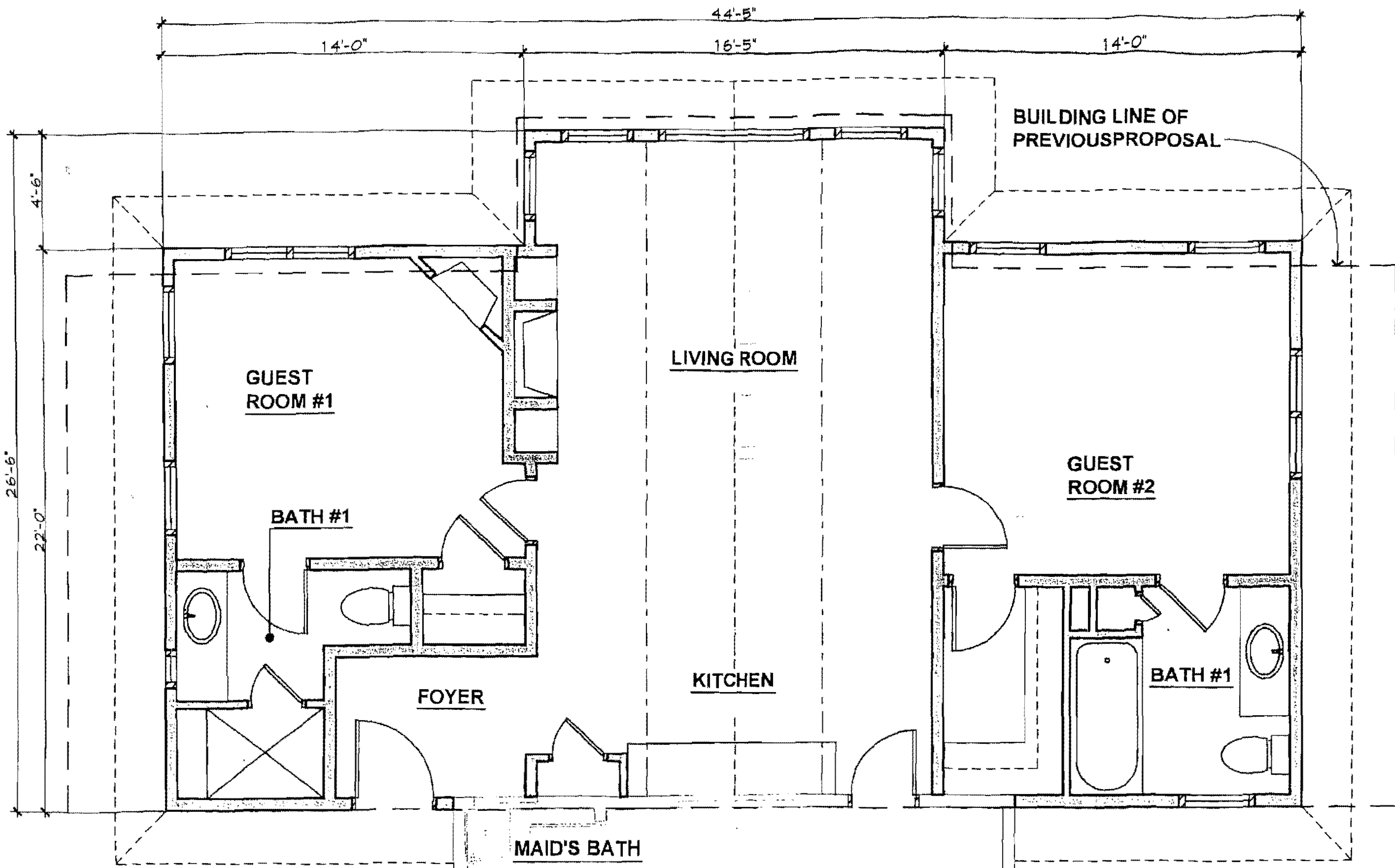


Wendy St. Jean-Boyd
Association Manager

DESIGNRE.WPS

1200

D0060



MAID'S ROOM

N

HASCOE GUEST HOUSE

SCALE: 1/4" = 1'-0" **05/22/02**

PREVIOUS PLAN 1196 SQ FT

NEW PROPOSED PLAN [redacted] SQ FT

1050 per Bibbi 5/23/02

NORTHWOOD LANE

SHEEP MEADOW LANE

LOT 22

LOT 21

LOT 20

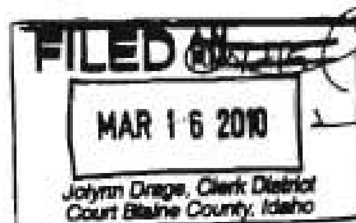
LOT 19

SITE PLAN

HASCOE RESIDENCE

LOT 20, BLOCK 1,
BEAVER SPRINGS SUBDIVISION

A1.0



IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

THOMAS WEISEL, a married man dealing in his sole and separate property,

Plaintiff,

vs.

BEAVER SPRINGS OWNERS ASSOCIATION, INC., an Idaho Corporation,

Defendants.

Case No. CV-2009-124

MEMORANDUM DECISION RE: CROSS MOTIONS FOR SUMMARY JUDGMENT

On February 16, 2010, the cross motions for summary judgment came on regularly for hearing. The plaintiff was represented by counsel, Fritz X. Haemmerle. The defendant was represented by counsel, Ed Lawson and Erin Clark. After considering the briefs, evidence and argument of counsel the Court took the matter under advisement for a written decision.

I.

FACTUAL AND PROCEDURAL BACKGROUND

This action concerns an agreement entered into on October 12, 1983 between the plaintiff and defendant combining two adjoining lots owned by the plaintiff.

The Beaver Springs Subdivision (the Subdivision) consists of 21 residential lots which range in size from 2 to 4 acres and was originally platted in March 1978 north of the City of

Ketchum in Blaine County. The Beaver Springs Owners Association, Inc. (the Association) was formed on April 4, 1978. The Covenants, Conditions and Restrictions (CC&R's) for the Association were first recorded on April 6, 1978. The original CC&R's in Article II paragraph 13 limited the development of the Lot to "one single family dwelling with no more than four detached outbuildings" and further provided that the "Single family dwelling shall have a minimum floor area on the ground floor of 1500 square feet." Article II, paragraph 17 provides in relevant part as follows:

> 17. Two or more adjoining Lots, or other parcels of property of the same land classification which are under the same ownership may be combined and developed as one parcel. Setback lines along the common boundary line of the combined parcels may be removed with the written consent of the Design Committee, if the Design Committee finds and determines that any improvements to be constructed within these setback lines will not cause unreasonable diminution of the view from other property. If setback lines are removed or easements changed along the common boundary lines of combined parcels, the combined parcels shall be deemed one parcel and may not thereafter be split and developed as two parcels.

The CC&R's have been amended on three separate occasions by the Association and the amendments were approved by at least two thirds of the membership as required by the CC&R's. The first such amendment, recorded on November 14, 1986, amended Article II, paragraph 13 to limit Lot development to one single family dwelling and three detached outbuildings and further limited a guest house, domestic servants' quarters, or horse stables to 900 square feet and sheds to 200 square feet. The first amendment further amended Article V, paragraph 2 to read as follows:

> 2. There is and shall be one (1) membership in the Association for each Lot. The owner or owners of each Lot or other property area automatically becomes the owner or owners of the membership for that Lot or other property area and automatically have the benefits and are automatically subject to the burdens attributable to such membership. Each membership is and shall always be appurtenant to the title to a particular Lot or other property area and shall automatically pass with the transfer of title to the same. Each membership is entitled to one (1) vote in matters submitted to a vote of the membership of the Association. If two (2) or more Lots are combined under single

> ownership, as provided by paragraph 17 of Article II, above, with permanent restrictions encumbering the combined Lots to permit the construction of only one (1) single family residence and other improvements as herein permitted for a single Lot, the combined Lots shall thereafter become and be treated as a single Lot entitling the owner to a single membership and one (1) vote in the Association.

The second amendment was recorded January 31, 2005 and it contained a definition for a single family residence to be "A structure designed to accommodate no more than a single family, its servants and occasional guests, plus an attached or detached garage with the capacity for not less than two (2) or more than six (6) automobiles . . . ."

The third and final amendment was recorded January 17, 2008. It amended Article II, paragraph 13 which effectively reduced the permitted detached outbuilding from three to two; the maximum square footage for all buildings was limited to 15,000 square feet, and of that total square footage, the size of a detached garage was limited to 2,500 square feet; the size of a detached guesthouse or servant quarters was increased from 900 square feet to 1200 square feet; and horse facilities were limited to 1500 square feet.

The Subdivision was governed by Blaine County planning and zoning regulations until it was annexed by the City of Ketchum on September 17, 1990.

On February 19, 1982, Thomas Weisel (Weisel) purchased Lot 14 and on January 21, 1983 he purchased Lot 13 in the Subdivision. Lot 13 consisted of approximately 3.01 acres and Lot 14 consisted of approximately 3.70 acres and the two lots are adjoining.

In 1983, Weisel retained the services of James McLaughlin, an architect to design improvements for Lot 14 consisting of (1) a main residence of approximately 6,148 sq. ft.; (2) a barn of approximately 2,645 sq. ft.; (3) a garage of approximately 1,100 sq. ft.; and (4) a guest house of approximately 1,640 sq. ft., for a total of approximately 11,533 sq. ft. of development. At the time of the proposed design for the improvements to Lot 14, the CC&R's for the

Association limited buildings on a Lot to "one single family dwelling with no more than four detached outbuildings" and provided for setbacks consisting of a 15 foot side yard setback, and a 25 foot front and rear yard setback. While there was a requirement of a minimum size of the family dwelling, there was no limit placed on the maximum size of any buildings on the Lot. However, the Blaine County planning and zoning regulations concerning accessory dwellings were conditionally permitted on lots one acre or larger, but the size limit for such dwellings was 900 sq. ft.

On October 12, 1983, Weisel and the Association entered into a written agreement (Agreement) whereby Lots 13 and 14 were to be combined as one parcel and Weisel agreed that the two lots "shall not hereafter be split and/or developed as two separate parcels." The Agreement was recorded in the Blaine County records on December 7, 1983. On October 14, 1983, the Blaine County Commissioners approved Weisel's application for a Conditional Use Permit on the condition that all buildings be located outside the 100 foot setback from Highway 75 and that "a declaration or deed restriction be written satisfactorily to the Zoning Administrator, which will not allow the construction of a residence upon Lot 13." The Commission also approved the granting of a variance for the construction of the guest house in excess of 900 sq. ft., *i.e.* 1,570 sq. ft.

According to Garth McClure (Appendix "A"), the improvements to Lot 14 were built in 1985, although at oral argument, counsel indicated that the existing improvements were built between 1993-1995. The improvements consisted of: (1) Main Residence with attached Garage, 12,770 sq. ft.; (2) Guest House, 1,631 sq. ft.; (3) Pool House/Rec. Building, 3,266 sq. ft.; and (4) Pilot House and Garage, 1,600 sq. ft. The total sq. ft. of developed floor area of Lot 14 is 19,266 sq. ft. As developed none of the improvements encroach into what would have been the

setback between Lots 13 and 14. The record is silent as to how Weisel's development of Lot 14 went from approximately 11,533 sq. ft. in 1983 to 19,266 sq. ft. in 1985 or 1995. The parties at oral argument do not appear to dispute that the original development proposed by McLauglin was constructed between 1983 and 1985 and that additional improvements were made by Weisel between 1993 and 1995, expanding the development of Lot 14 to approximately 19,266 sq. ft.

On May 28, 1987, Weisel wrote a letter to the Design Committee expressing concern over another Lot owner's proposal to construct an outbuilding which he described as a "self-sustained living quarter." He stated: "In order for us to have been allowed to build our care takers house, we had to own two lots and give up the right to ever build on the second."

In 2004, Weisel sought to have the Association modify or rescind the Agreement. Weisel retained the services of an attorney to represent him in his effort to rescind or modify the Agreement. His attorney wrote a letter to the Association on July 14, 2005 and acknowledged that Blaine County required Weisel to give up his development rights on Lot 13 in exchange for the approval of his variance as to the size of the guest house. The letter further stated that "There is no question that in hindsight giving up development rights on lot 13 to obtain Blaine County approval for less than 1000 additional square feet of the guest house was not a good deal." The request of Weisel was submitted to the Association's Board and the request was rejected on December 18, 2007.

II.

SUMMARY JUDGMENT STANDARD

Summary judgment under Idaho Rule of Civil Procedure 56(c) is appropriate only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. When a court considers a motion for summary judgment, all facts are to be liberally

construed in favor of the nonmoving party, and the court must draw all reasonable inferences in favor of the party resisting the motion. *G & M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 517, 808 P.2d 851, 854 (1991); *Sanders v. Kuna Joint Sch. Dist.*, 125 Idaho 872, 874, 876 P.2d 154, 156 (Ct. App. 1994). "[T]he motion must be denied if evidence is such that conflicting inferences may be drawn there from, and if reasonable people might reach different conclusions" unless the trial court is to be the ultimate fact finder, in which case the court itself may resolve the conflicting inferences. *Olsen v. J.A. Freeman Co.*, 117 Idaho 706, 720, 791 P.2d 1285, 1299 (1990). However, a mere scintilla of evidence or only a slight doubt as to the facts is insufficient to withstand summary judgment; there must be sufficient evidence upon which a jury could reasonably return a verdict for the party opposing summary judgment. *Corbridge v. Clark Equip. Co.*, 112 Idaho 85, 87, 730 P.2d 1005, 1007 (1986); *Petricevich v. Salmon River Canal Co.*, 92 Idaho 865, 871, 452 P.2d 362, 368 (1969). Where, as here, both parties file motions for summary judgment relying on the same facts, issues and theories, the judge, as the trier of fact, may resolve conflicting inferences if the record reasonably supports the inferences. *Riverside Dev. Co. v. Ritchie*, 103 Idaho 515, 518-20, 650 P.2d 657, 661-62 (1982). However, this is not to say that just because both parties have filed motions summary judgment, that the court should find or conclude that there are no triable issues of fact. *Id.*

Further, our courts have repeatedly held that "issues considered on summary judgment are those raised by the pleadings." *VanVooren v. Astin*, 141 Idaho 440, 111 P.3d 125 (2005).

III.

MOTIONS TO STRIKE

Both parties have filed various motions to strike portions of the affidavits submitted in support of the motions for summary judgment. The plaintiff has also filed a motion for the court

to allow a responsive affidavit of Garth McClure to contest the affidavit of Linda Havik. The motions are addressed below.

Affidavits supporting or opposing a summary judgment motion must be made on personal knowledge, must set forth such facts as would be admissible in evidence, and must show affirmatively that the affiant is competent to testify to the matters stated. Idaho Rule of Civil Procedure 56(e). These requirements "are not satisfied by an affidavit that is conclusory, based on hearsay, and not supported by personal knowledge." *State v. Shama Resources Ltd. Partnership*, 127 Idaho 267, 271, 899 P.2d 977, 981 (1995); *see also Sprinkler Irrigation Co., Inc. v. John Deere Ins. Co., Inc.*, 139 Idaho 691, 696-97, 85 P.3d 667, 672-73 (2004); *Oats v. Nissan Motor Corp. in U.S.A.*, 126 Idaho 162, 166, 879 P.2d 1095, 1099 (1994).

A. Weisel Affidavit

The Association seeks to have this court strike portions of the Affidavit of Thomas Weisel (¶¶ 3-4) on the basis of relevancy. In these two paragraphs Weisel testifies that the enforcement of the 1983 Agreement injures his property rights as to Lot 13, because he alleges he is precluded from developing that lot based on the CC&R's and he further testifies as to the value of what was Lot 13. Relevant evidence means "evidence having a tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." I.R.E. Rule 401. Whether evidence proffered by Mr. Weisel is relevant is necessarily determined by the factual and legal analysis below. To the extent that such evidence is not relevant, it is not considered by the Court in the analysis below.

B. McClure Affidavit

The Association seeks to strike portions of the Affidavit of Garth McClure on the basis that the affidavit "provides neither an expert opinion nor relevant evidence." The Court is satisfied for summary judgment that Mr. McClure has laid a sufficient foundation for his expertise in land use planning and his opinions in part are based on a review of public land use records. The testimony of Mr. McClure is relevant for the Court's analysis and the plaintiff's claim of changed conditions in Count VII of the complaint.

C. Haavik Affidavit

The plaintiff seeks to strike portions of the Haavik Affidavit on the basis that the evolution of Blaine County and Ketchum ordinances concerning accessory dwelling units is not relevant. This court would agree, except that the Blaine County ordinances for such dwelling units are relevant at the time of the 1983 Agreement.

The plaintiff seeks to strike the testimony of Haavik relative to the opinions of McClure as to floor ratios and lot coverage on the basis of relevance. The testimony of Haavik is relevant to the extent it is offered to rebut the opinions of McClure.

The plaintiff seeks to strike testimony of Haavik relative to compliance with zoning ordinances. The court would agree that since there are no allegations of noncompliance with building codes or zoning ordinances such testimony is not relevant.

The remaining objections to the Haavik affidavit are relative to her opinions as to the development and build out of the subdivision. The objection is based on foundation and/or relevance. The court is satisfied that there has been an adequate showing of foundation and the testimony is in part to rebut the opinions of McClure.

D. McClure Supplemental Affidavit

I.R.C.P. 56 does not specifically address the use of reply affidavits as part summary judgment proceedings. The rule does state that the "court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits." I.R.C.P. 56(e). Further, the Court "may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just." I.R.C.P. 56(f). In *Baugh v. City of Milwaukee*, 823 F.Supp. 1452, 1456-57 (E.D. Wisc. 1993) stands for the proposition that reply affidavits responding to an opposing party's brief are permissible. This Court agrees that reply affidavits are permitted by Rule 56. However, the issue then becomes whether the reply affidavit raises new evidence, and if so, whether the objecting party may have additional time to respond to such affidavit(s). The federal court in *Baugh* addressed this issue:

> That is not to say that reply affidavits may raise new evidence. Where new evidence is presented in either a party's reply brief or affidavit in further support of its summary judgment motion, the district court should permit the nonmoving party to respond to the new matters prior to disposition of the motion, *id.*, or else strike that new evidence. But, where the reply affidavit merely responds to matters placed in issue by the opposition brief and does not spring upon the opposing party new reasons for the entry of summary judgment, reply papers-both briefs and affidavits-may properly address those issues.

Id. at 1457.

The McClure affidavit does not present new evidence and is merely offered to reply to the Haavik Affidavit and will be only considered as such.

IV.

ANALYSIS

The plaintiff argues that he should be granted summary judgment for the following reasons:

1. That the Agreement lacks consideration because the improvements of Lot 14 ultimately did not encroach into the setback between Lots 13 and 14.

2. That the Agreement was based on a mutual mistake that the improvements would encroach into the setback between Lot 13 and 14.

3. That the Agreement had a condition precedent, which consisted of the improvements encroaching into the setback between Lots 13 and 14.

4. That even if there was consideration at the time the parties entered into the Agreement, the consideration later failed as a result of supervening events making the Agreement unenforceable.

5. That the Agreement is not enforceable due to changed circumstances within the Subdivision.

The defendant agues that it should be granted summary judgment for the following reasons:

1. That contrary to the claim of the plaintiff, the Agreement was supported with consideration.

2. That contrary to the claim of the plaintiff, there was no mutual mistake of fact at the time the parties entered into the Agreement.

3. That there are no grounds that exist for rescinding the Agreement.

4. That the causes of action asserted by the plaintiff are barred by the statute of limitations, Idaho Code § 5-216.

5. That the plaintiff is not entitled to two votes on Association matters.

6. That the plaintiff's claim of changed circumstances is not supported factually or legally.

7. That the plaintiff's claim for reimbursement of overpayment of his assessments in part is barred by the statute of limitations.

A. Contract Interpretation and Enforcement

Any contract is to be construed to give effect to the intention of the parties. *Wing v. Martin,* 107 Idaho 267, 688 P.2d 1172 (1984). The intent of the parties should, if possible, be ascertained from the language contained in the written contract, because usually this represents the best evidence of the parties' intent. *Abel v. School Dist. No. 413,* 108 Idaho 982, 703 P.2d 1357 (Ct. App. 1985). Oral statements and negotiations, which occurred prior to the execution of a written contract, are presumed merged therein and will not be admitted to contradict the plain terms of the contract. *Galaxy Outdoor Adver., Inc. v. Idaho Transp. Dept.,* 109 Idaho 692, 710 P.2d 602 (1985). "If a written contract is complete upon its face and unambiguous, no fraud or mistake being alleged, extrinsic evidence of prior or contemporaneous negotiations or conversations is not admissible to contradict, vary, alter, add to, or detract from the terms of the contract." *Howard v. Perry,* 141 Idaho 139, 106 P.3d 465, 467 (2005). See also *Valley Bank v. Christensen,* 119 Idaho 496, 498, 808 P.2d 415, 417 (1991). If a contract's terms are "clear and unambiguous, the determination of the contract's meaning and legal effect are questions of law, and the meaning of the contract and intent of the parties must be determined from the plain meaning of the contract's own words." *City of Idaho Falls v. Home Indemnity Co.*, 126 Idaho 604, 607, 888 P.2d 383, 386 (1995) (internal citation omitted). The Supreme Court in *Howard* affirms the common law rule that the presence of a merger clause in a written contract conclusively establishes that the agreement is integrated and therefore the written agreement is subject to the parol evidence rule. *Posey v. Ford Motor Credit Company,* 141 Idaho 477, 480, 111 P.3d 162, 165 (2005).

The Agreement at paragraph 4 expressly provides as follows:

> 4. Sole and Only Agreement. This instrument contains the sole and only agreement of the parties hereto relating to the unification and development of Lot 13 and Lot 14 as described above, and correctly sets forth the rights, duties and obligations of each of the other as of its date. Any prior agreements, promises, negotiations or representations not expressly set forth in this Agreement are of no force and effect.

Therefore unless there was a mistake at the time the parties entered into the Agreement, parole evidence is not admissible to alter the terms of the Agreement.

1. Mutual Mistake

Count I of the Amended Complaint seeks declaratory judgment based on "mutual mistake." The plaintiff argues that the Agreement was made between the Association and Weisel on the mistaken belief that the proposed improvements to Lot 14, *i.e.* the guest house, were going to encroach into the setback area between Lots 13 and 14. The plaintiff cites to the language used in the Agreement in paragraph 2. The Association argues that the language employed in the Agreement at paragraph 2, was merely the required finding by the Association in accordance with Article II, paragraph 17 of the CC&R's in order for the Association to approve the combination of two Lots and the elimination of the setbacks.

If the Agreement does not reflect the true intent of the parties due to mutual mistake, then reformation or rescission of the instrument may be a proper remedy. *O'Connor v. Harger Construction, Inc.*, 145 Idaho 904, 909, 188 P.3d 846, 851 (2008); *Bilbao v. Krettinger,* 91 Idaho 69, 72-73, 415 P.2d 712, 715-16 (1966). "A mutual mistake occurs when both parties, at the time of contracting, share a misconception regarding a basic assumption or vital fact upon which the bargain is based." *Hines v. Hines,* 129 Idaho 847, 853, 934 P.2d 20, 26 (1997). The mistake must be "so substantial and fundamental as to defeat the object of that party" and the "mistake must be common to both parties." *O'Connor v. Hager Construction, Inc, supra.* The party

alleging the mutual mistake has the burden of proving it by clear and convincing evidence. *Collins v. Parkinson,* 96 Idaho 294, 296, 527 P.2d 1252, 1254 (1974).

Weisel wanted to combine Lots 13 and 14 so that he could develop the residence and outbuildings on Lot 14 as he intended. The Association was required to make a finding before allowing the combining of the two lots that if improvements were to be located in the setback areas that there would be no "unreasonable diminution of the view from other property." There is no dispute in the evidence that the County was requiring the two lots be combined as a condition of the approval of the variance request. The claim of the plaintiff that the Agreement was based on a mutual mistake of fact is without merit as a matter of law based on the undisputed evidence. However even if there were a mutual mistake at the time the parties entered into the Agreement, relief based on a mutual mistake would be barred by the statute of limitations, I.C. § 5-218(4), for the reasons set forth below.

2. Lack of Consideration

Pursuant to Idaho Code § 29-103 "a written instrument is presumptive evidence of consideration." There is no dispute that Weisel and the Association entered into a written agreement on October 12, 1983. There being a presumption of consideration, it is the burden of Weisel to show the lack of consideration. *See* I.C. § 29-104. Weisel must show a lack of consideration by a preponderance of the evidence. *W. L. Scott, Inc. v. Madras Aerotech, Inc.,* 103 Idaho 736, 741, 653 P.2d 791, 796 (1982). Our courts have distinguished between a "lack of consideration" and "failure of consideration. *World Wide Lease, Inc. v. Woodworth,* 111 Idaho 880, 728 P.2d 769 (1986). The failure of consideration "refers to the failure of performance of the contract" while the lack of consideration "applies to instances where there was no consideration to support the existence of a contract." *Id.* at 884-85.

In Count II of the Amended Complaint the plaintiff seeks declaratory judgment based on lack of consideration on the basis that the improvements did not encroach into what would have been the set back area on Lot 14. In his deposition, Weisel testified that he thought his original plans had the guesthouse encroaching into the setback area of Lots 13 and 14. According to the deposition testimony of Mr. McLaughlin, the plans did not have the guesthouse encroaching into the setback area. On September 1, 1983, Mr. McLaughlin submitted to the Association Design Committee "addition and remodeling plans for the Weisel residence on Lots #13 and #14." On September 12, 1983, the Design Committee in writing "approves of the plans for the development of lots 13 and 14 . . . pursuant to plans prepared by James McLaughlin, architect." On September 15, 1983 the Blaine County Planning and Zoning Commission (the Commission) "considered [Weisel's] request for a Variance and Conditional Use Permit to construct servant quarters on lots 13 and 14 . . . ." As a condition of approval of the variance request, the Commission required "That a declaration or deed restriction be written satisfactory to the Zoning Administrator, which will not allow the construction of a residence upon lot 13." On September 15, 1983, Weisel's attorney Roger Crist, prepared the Agreement between Weisel and the Association and mailed the Agreement to Weisel for his signature. The letter states "In essence, the Agreement provides that the homeowners association is approving your development plan and in return, you agree to comply with paragraph 17 of the subdivision declarations. You will not hereafter attempt to resubdivide your property." Weisel signed the Agreement on October 12, 1983 and returned the signed Agreement to his attorney. On October 14, 1983, Mr. Crist sent a copy of the Agreement signed by Weisel to the Commission. Thereafter the Blaine County Commissioners approved the variance request as conditioned by the Commission.

"A promise for a promise is adequate legal consideration to support a contract." *Eastern Idaho Production Credit Ass'n. v. Placerton, Inc.*, 100 Idaho 863, 867, 606 P.2d 967, 971 (1980). When Weisel purchased Lots 13 & 14, they were subject to the CC&R's which included the provision of Article II, ¶ 17 relative to the effect of combining two adjoining lots. The Association promised to allow the combining of the two lots and Weisel promised not to later resubdivide the two lots. Based on the Agreement, the Association and its Design Committee approved the proposed development of Lot 13 and 14 in 1983 and approved what was built by Weisel between 1983 and 1985 and even approved more extensive development of Lot 14 between 1993 and 1995. Further, Blaine County approved the variance request of Weisel to allow him to build a guest house in excess of the size limit imposed by the then existing County planning and zoning regulations. There is no evidence that the Association in any way failed to perform under the terms of the Agreement so there is no showing of a failure of consideration. It is also clear, that while the original design may or may not have contemplated an encroachment of the guest house into the set back between Lots 13 and 14, the Agreement was necessary at the time in order for Weisel to obtain the County's variance for the size of the guest house and the Agreement was supported by an exchange of promises by the parties. Weisel in his deposition admitted that the agreement was supported by consideration when he entered into it, although he admitted "It was pretty stupid on my part." (Depo. p. 99-101.).

It is clear that it was the desire of Weisel in 1983 to combine lots 13 and 14 as a single parcel in accordance with Article II, paragraph 17 of the CC&R's. To do so, the approval of the Design Committee was required. The Design Committee made the findings it needed to make and approved Weisel's request to combine Lots 13 and 14. Mr. Weisel agreed in accordance with the CC&R's that he would not resubdivide the parcel in the future. "A promisee's

bargained for action or forbearance, given in exchange for a promise, constitutes consideration." *McColm-Traska v. Valley View, Inc.,* 138 Idaho 497, 501, 65 P.3d 519, 523 (2003). The Association promised to allow Weisel to combine his two lots if he promised not to split or resubdivide them in the future. These promises are adequate consideration and therefore the agreement is neither void nor voidable for lack of consideration.

The claims of the plaintiff that the Agreement was not supported by consideration or that it failed for consideration are without merit as a matter of law based on the undisputed evidence.

3. Rescission.

In Count III, the plaintiff seeks to rescind the Agreement based on "failure of consideration and mutual mistake." (Amended Complaint, ¶ 32.) Rescission is an equitable remedy aimed at restoring the parties to their pre-contract status quo. *Blinzer v. Andrews,* 94 Idaho 215, 485 P.2d 957 (1971). Rescission can be proper based on a mutual mistake or even a failure of consideration where such is material or fundamental to the creation of a contract. *Murr v. Selag Corp.,* 113 Idaho 773, 777, 747 P.2d 1302, 1306 (Ct. App. 1987). The court has determined that the relief sought based on mistake of consideration is without merit as a matter of law or is otherwise barred by the statute of limitations. Therefore, the claim for rescission based on mutual mistake and/or failure of consideration is without merit as a matter of law.

Further, it is well established that a party seeking rescission "must act promptly once grounds for rescission arise." *White v. Mock,* 140 Idaho 882, 888, 104 P.3d 356, 362 (2004). "Once a party treats a contract as valid after the appearance of facts giving rise to a right of rescission, the right of rescission is waived." *Farr v. Mischler,* 129 Idaho 201, 205, 923 P.2d 446, 450 (1996). The evidence is clear that the plaintiff herein waited in excess of 26 years to rescind the Agreement and not less than four years to rescind the Agreement after he felt is was

inequitable to enforce the Agreements. It is clear that any claim for rescission is untimely as a matter of law.

4. Condition Precedent

"A condition precedent is an event not certain to occur, but which must occur, before performance under the contract becomes due." *Woodworth, supra.,* 111 Idaho at 887, 728 P.2d at 776. A condition precedent may be expressed in the parties contract; implied in fact from the conduct of the parties or implied in law where the court constructs a condition in order to obtain a just result. *Id.* Further, the existence and operation of a condition precedent presents a mixed question of law and fact. *Id.*

The plaintiff argues that construction of the improvements within the setback between Lots 13 and 14 was a condition precedent to the enforcement of the Agreement and that because the improvements were not constructed within the setback, the Agreement is not enforceable. The claim that the location of the guesthouse within the setback lines was a condition precedent to the enforcement of the Agreement is not a claim or issue raised by the pleadings. The Amended complaint does not allege expressly or implicitly the failure of a condition precedent and therefore is not a basis to grant or deny summary judgment. *VanVooren v. Astin*, 141 Idaho 440, 111 P.3d 125 (2005). Even if such a claim were raised, it is clear that the location of the guesthouse within the setback lines was not a condition precedent. By the very terms of the Agreement and upon execution and recording of the Agreement, the two lots were combined, the setback lines were removed and the two lots became a single parcel.

The Agreement in paragraph 2 stated as follows:

> 2. Removal of Setbacks. Pursuant to paragraph 17 of the Declaration of the Beaver Spring Subdivision, the Association's Design Committee has reviewed said plans, and has determined that the improvements to be constructed in the setback lines along the common boundary of Lot 13 and Lot 14 will not cause unreasonable diminution of the

> view from other lots. The parties, therefore, agree that the setback lines along the common boundary of Lot 13 and Lot 14 are herby removed and are of no further force and effect.

The plaintiff's argument that the Agreement contains a condition precedent is based on one portion of a sentence contained in paragraph 2, ". . . the improvements to be constructed in the set back lines along the common boundary of Lot 13 and Lot 14." The court must construe the Agreement as a whole in arriving at the intent of the parties and must give the language used, its plain and ordinary meaning. The parties do not argue that the Agreement is ambiguous. There is no dispute that, based on the Agreement, the Association approved the proposed development as it agreed. There is no dispute that by the terms of the Agreement and the words used that the Lot line between Lots 13 and 14 "are hereby removed and of no further force and effect."

The claim that the Agreement and the enforcement of the Agreement was subject to a condition precedent is without merit as a matter of law based on the undisputed evidence.

B. Statute of Limitations.

The defendant argues that the first and second claims for declaratory judgment and the third claim for rescission are barred by the statute of limitations. *See* I.C. § 5-216. In *Barnett v. Aetna Life Ins. Co.,* 99 Idaho 246, 580 P.2d 849 (1978), city employees brought an action to recover from an insurer certain contributions paid into a retirement program. The district court dismissed the employees claims based on the statute of limitations. The court found that the three year statute of limitations (I.C. § 5-218) for fraud or mistake applied instead of the 5 year statute of limitations for written contracts (I.C. § 5-216). The employees alleged that the defendant had "made certain fraudulent misrepresentations which induced them to enter into the written agreement." The *Barnett* court stated that:

> The substance, not the form, of the action controls and determines the applicable Statute of Limitations. . . . "The test ...is not whether the fraud or mistake occurred in a contract

> or independently of contract, but the test rather is whether the action seeks relief from or on account of fraud or mistake." *Hillock v. Idaho Title and Trust Co.*, 22 Idaho 440, 450, 126 P. 612, 616 (1912)

Id. at 247, 580 P.2d at 850

It is clear that any claim for relief from the Agreement based on a mutual mistake would be governed by the three year statute of limitations provided for in Idaho Code § 5-218. Further, "where the mistake has a material effect on the agreed exchange of performances, the contract is voidable," not void. *Thieme v. Worst,* 113 Idaho 455, 459, 745 P.2d 1076, 1080 (Ct. App. 1987). It is clear that if Weisel and the Association held the mistaken belief that the development would encroach into the setback lines of Lot 13 and 14, such a mistaken belief was known or discovered by Weisel more than three years prior to the filing of the complaint. Therefore any claim based on mistake would be barred by the three year statute of limitations.

In *Galvin v. Appleby,* 78 Idaho 457, 305 P.2d 309 (1956), the plaintiff had entered into a conditional sales agreement to purchase certain real property. After purchasing the property the plaintiffs discovered that the improvements they purchased encroached partly into the street right of way and the plaintiffs were compelled by the city to remove the encroaching structures. The plaintiffs sought rescission or in the alternative damages. The defendant's argued that the plaintiff's relief was barred by the statute of limitations. I.C. §§ 5-216, 5-218. The district court found that the evidence established that the plaintiffs first knowledge of the encroachments was on December 29, 1952 and that the action was filed on January 18, 1954 and therefore the statute of limitations did not apply. The Supreme Court affirmed the district court.

Weisel was aware in 1985 that his development did not encroach into the setback between Lot 13 and 14; between 1985 and 2001 Weisel knew or should have known of the development that was going on in the Subdivision; and Weisel knew or should have known of

the increase in value of the Lots from 1985 to 2001. In fact Mr. Weisel knew in 2004 that it was a mistake for him to have entered into the Agreement.

Under any analysis of the facts of this case, the relief sought by Weisel is barred by the statute of limitations.

C. Changed Conditions.

The plaintiff in Count 7 of his complaint seeks to have the court set aside the Agreement on the basis that there has been a significant change in conditions relative to the development of the Lots within the subdivision. In this regard, the plaintiff argues that there has been a radical change in the density of development, that it would be inequitable to allow the Association to continue enforcement of the Agreement and to restrict Weisel's ability to develop Lot 13. Specifically the plaintiff alleges in his amended complaint that the Association "has permitted and acquiesced in the construction of large residences and outbuildings on other lots in the subdivision similar to and in excess of the size of plaintiff's residence and outbuildings." (Amended Complaint, ¶ 46.) The plaintiff further alleges that

> The reasons for and the purpose of the Agreement are no longer served, have been frustrated, and have been rendered obsolete, and the consideration, if any, provided by the Defendant has been rendered valueless by its own actions and the changes in the subdivision. Due to the above changes, the continued validity and enforcement of the Agreement is oppressive and inequitable to Weisel.

(Amended Complaint, ¶ 50).

The CC&R's of the Association since they were originally recorded in 1978 have continually provided in Article II, paragraph 17 as follows:

> 17. Two or more adjoining Lots, or other parcels of property of the same land classification which are under the same ownership may be combined and developed as one parcel. Setback lines along the common boundary line of the combined parcels may be removed with the written consent of the Design Committee, if the Design Committee finds and determines that any improvements to be constructed within these setback lines will not cause unreasonable diminution of the view from other property. If setback lines

> are removed or easements changed along the common boundary lines of combined parcels, the combined parcels shall be deemed one parcel and may not thereafter be split and developed as two parcels.

The plaintiff in Count 7 of his Amended Complaint seeks to set aside the Agreement and not Article II, paragraph 17. The evidence in the record shows that Weisel's architect, McLaughlin, submitted to the Association plans for the development of Lot 13 and 14 on September 1, 1983 and that the Association approved his plans for the development of Lots 13 and 14 on September 12, 1983. The record further shows that Weisel agreed to combine Lots 13 and 14 and that the setback lines were removed between the two lots. The agreement was signed by Weisel on October 12, 1983. It is clear from the CC&R's that once two parcels were combined and the setback lines were removed, that Weisel could not thereafter split Lots 13 and 14 and develop it as two parcels. Neither the Agreement nor Article II, paragraph 17 preclude development of improvements on what was Lot 13, they only preclude Weisel from again splitting and developing what was Lot 13 as a separate parcel. Weisel is not precluded from constructing improvements on the area that was Lot 13, provided the improvements can be constructed in accordance with the CC&R's. It was Weisel who chose to locate all of his improvements on what is Lot 14.

Our courts have not directly addressed the issue of the enforceability of a restrictive covenant where there has been shown to have been a change in conditions subsequent to the recording of a restrictive covenant. However, our courts have implicitly recognized such a theory. *See Ada County Highway District v. Magwire,* 104 Idaho 656, 662 P.2d 237 (1983). The court in *Magwire* upheld a condemnation award based on the likelihood the property would be rezoned. In doing so the court stated as follows:

> Normally, a change in zoning will occur if there has been sufficient change in the surrounding neighborhood. However restrictive covenants can only be declared

> unenforceable because of a change within the restricted area itself. *Exchange Nat'l. Bank v. City of Des Plains,* 32 Ill. App.2d 722, 336 N.E.2d (Ill.App. 1975). If a particular subdivision is subject to restrictive covenants restricting its use to residential, and the subdivision itself has not changed, then changes outside of the subdivision standing alone, even though adjacent, do not invalidate the restrictions. *Id.* An increase in noise or traffic in the surrounding area, or even within the subdivision itself, is not enough to indicate a sufficient change in the character of the neighborhood to invalidate the restrictions. *Cordogan v. Union Nat'l. Bank,* 64 Ill.App.3d 248, 21 Ill.Dec. 18, 380 N.E.2d 1194 (Ill.App. 1978); *Eilers v. Alewel,* 393 S.W.2d 584 (Mo. 1965). The fact that a particular piece of property would increase in value if used for a different purpose than that allowed in the covenant is not enough to invalidate the covenant. *Cordogan v. Union Nat'l. Bank, supra.; Eilers v. Alewel, supra."*

Id. at 659, 662 P.2d at 240.

> Restrictive covenants may be rendered invalid or unenforceable where there has been such a radical change in the character of the neighborhood within and surrounding the restricted area that the original purpose of the covenant has been defeated, it is no longer of substantial value to the benefited land, and its enforcement would be unduly oppressive to the burdened land.

76 A.L.R. 5th 337.

"Covenants restricting the free use of land are valid and enforceable in Idaho." *Berezowski v. Schuman,* 141 Idaho 532, 535, 112 P.3d 820, 823 (2005). Our courts have also recognized that such covenants are in "derogation of the common law right to use land for all lawful purposes" and it is only when a covenant is ambiguous that "all doubts are to be resolved in favor of the free use of land." *Id.* In this case, Weisel is not alleging that the Agreement preventing the development of Lot 13 is in anyway ambiguous. It is clear that a restrictive covenant may be set forth in CC&R's or a deed or a separate written agreement. Our courts apply "the general rules of contract construction to covenants" that relate to the use of real property. *Best Hill Coalition v. Halko, LLC,* 144 Idaho 813, 817, 172 P.3d 1088, 1092 (2007).

While our courts have recognized the doctrine of "changed conditions" they have not yet established the standard for such changed conditions so as to warrant not enforcing a restrictive covenant. It is clear that it is the plaintiff (Weisel) who has the burden to prove such changed

conditions. What is clear is that the courts in other jurisdictions which have considered the issue would require that the party who seeks to invalidate a restrictive covenant has the burden to prove a "radical change in condition." *See Citizens Voices Assoc. v. Collings Lakes Civic Assoc.*, 934 A.2d 669 (N.J. Supr. 2007); *Perelman v. Casiello*, 920 A.2d 782 (N.J. Supr. 2007); *Tippecanoe Assoc. II, LLC v. Kimco Lafayette 671, Inc.*, 811 N.E.2d 438 (Ind. App. 2004); *Country Club Dist. Homes Assn. v. Country Club Christian Church*, 118 S.W.3d 185 (Mo.App. 2003); *Pietrowski v. Dufrane*, 634 N.W.2d 109 (Wis. App. 2001); *Swenson v. Erickson*, 998 P.2d 807 (Utah 2007).

The Missouri Court of Appeals in *Country Club Dist. Homes Assoc.* established the standard for "changed conditions" as follows:

> To establish changed conditions warranting not enforcing a restrictive covenant, 'the burden rests on the defendant to prove: (1) The radical change in condition; (2) that as a result enforcement of the restrictions will work undue hardship on him; (3) and will be of no substantial benefit to the plaintiff.' *Rombauer v. Compton Heights Christian Church*, 328 Mo. 1, 40 S.W.2d 545, 554 (1931). "No hard and fast rule can be laid down as to when changed conditions have defeated the purpose of restrictions, but it can be safely asserted the changes must be so radical as practically to destroy the essential objects and purposes of the agreement." *Id.* at 553.

The Indiana Court of Appeals in *Tippecanoe Assoc. II, LLC*, *supra*, held that "a covenant that did not originally violate public policy can begin to violate public policy if the surrounding area changes in ways that 'are so radical in nature that the original purpose of the covenant has been defeated.'"

The Wisconsin Court of Appeals in *Pietrowski*, *supra*, held that "Courts of equity will not enforce such restrictive covenants where the character of the neighborhood has so changed as to make it impossible to accomplish the purpose intended by such covenants."

The Utah Supreme Court in *Swenson, supra*, held that "Conduct of property owners within a development, however, may terminate and render unenforceable a particular covenant

where such conduct so substantially changes the character of the neighborhood as to neutralize the benefit of the covenant."

Overall, this Court is of the opinion that the standard employed by the Missouri Court of Appeals appears to be the standard employed by the majority of the jurisdictions that have considered whether it is equitable to continue the enforcement of a restrictive covenant imposed upon real property. Therefore it is the burden of Weisel to prove (1) a radical change in condition; (2) undue hardship as a result of enforcement of the restrictions; and (3) will be of no substantial benefit to the Association. Further, whether a restrictive covenant is enforceable based on the doctrine of changed conditions is an equitable claim and as such there is not right to a jury trial and the trial court would be the trier of fact. *See Ada County Highway Dist. v. Total Success Investments, LLC,* 145 Idaho 360, 369, 779 P.3d 323, 332 (2008) (no right to a jury trial in equitable actions).

As to the claim of "changed conditions" within the subdivision, Weisel relies upon the Affidavit of Garth McClure and his analysis of the development of the Lots. Prior to the Agreement between Weisel and the Association, there were 21 Lots that ranged in size from 2.1 acres to 4.02 acres. By reason of the combining of Lots 13 and 14 there are now 20 Lots within the subdivision. As part of his affidavit, Mr. McClure attached a report on the 20 Lots (Exhibit 6) and Appendix "A" which describes what he perceives to be the development of each Lot. The affidavit also includes the dates of construction and the amount of the developed square footage for each Lot, as well as the improvements on each Lot. The Association as noted above has objected to the analysis conducted by McClure and has attempted to refute his characterization of the development with its Affidavits of Linda Haavik and various owners of some of the Lots. However, the question for this court is whether taking the affidavit and analysis of McClure at

face value, and considering the evidence in a light most favorable to Weisel, has the plaintiff created a triable issue of fact as to the claim of changed conditions.

In examining Appendix A, Mr. McClure opines as follows:

(1) That there are 10 Lots (Lot # 1, 2, 3, 7A, 8, 9, 15, 21, 22) which consist of a "House & Attached Garage and/or Guest House." As to these 10 Lots there are no separate detached outbuildings. The development of the improvements on these Lots range generally from 4,491 sq. ft. to 9,766 sq. ft., although there are two Lots that range from 11,684 sq. ft. to 13,426 sq. ft. These improvements were generally built between the years 1978 and 2000.

(2) That there are 6 Lots (Lot # 5, 6, 12C, 18A, 19, 20A) which have a "House & Attached Garage" as well as one detached outbuilding, such as a guest house. The development on these 6 Lots ranges from 4,491 sq. ft. to 9,241 sq. ft., although there is one Lot that has development of 14,846 sq. ft. of which 13,366 sq. ft. consist of a main residence with attached garage and pool house. The detached out building is characterized as a 1,280 sq. ft. guest house. McClure admits that the guesthouse on Lot 5 is not 2,711 sq. ft. itself and that includes the garage but he does not identify the square footage and does not dispute the affidavit of Haavik that the guesthouse itself is only 961 sq. ft.

(3) That there are 3 Lots (lots 11A, 13/14, 16) that have a House and Attached Garage and have two or more detached outbuildings. Lot 11A has development of 7,407 sq. ft. consisting of a 4,682 sq. ft. house and attached garage; a 1,250 sq. ft. detached guest house; a 1,151 sq. ft. apartment; and a 324 sq. ft. Spa house. Lots 13 and 14 (Weisel's lots) have all of the development on Lot 14. The total development on Lot 14 is 19,266 sq. ft. consisting 12,770 sq. ft. for his house and attached garage; 1,631 sq. ft. for his detached guest house; 3,265 sq. ft. for his detached pool house/rec. building; 1600 sq. ft. for his detached pilot house/garage. Lot 16 has

development of 17,483 sq. ft. consisting of 13,179 sq. ft. for the house and attached garage; 1,568 sq. ft. for a detached guest house; and 2,736 sq. ft. for a detached office and garage. However, according to McClure, the development of Lot 16 was in 1982 which was before Weisel entered into his Agreement with the Association to combine of Lots 13 & 14.

It is clear from the Amendments to the CC&R's over the years that the Association has made a concerted effort to control and reduce the extent of development of the Lots. The Amendments to the CC&R's indicate an effort to reduce the number of detached structures as well as to limit the Lots for a "single family residence." They have also attempted to control development in order to maintain the rural environment of the subdivision. In 2008 the Association limited to total development of any Lot to 15,000 sq. ft. The existing development by Weisel on Lot 14 has been in existence since at least 1995 and far exceeds the development that would be permitted for any Lot by current CC&R's. By McClure's analysis, there are only two lots that exceed the limitation of 15,000 sq. ft. (Lot 13 and 16) and Lot 16 was developed in 1982, before Weisel entered into his Agreement with the Association.

Philip Ottley, who was on the Design Committee at the time the Agreement was approved, testified that one of the concerns of the Association is that they wanted to limit the number of "single family residences" in the subdivision to 21 and the committee was concerned that given the size of the proposed guest house for Lot 14 there would in effect be "two single family residences" located on Lot 14 and it was for this reason the Association and Weisel entered into the development restriction for Lot 13. The Association was concerned about density in terms of the number of single family residences permitted within the subdivision. According to the deposition of McLaughlin, Weisel was willing to remove the lot line between Lots 13 and 14 so he would not have to go through the re-platting process so as to speed up

construction of his proposed improvements. According to Mr. Weisel he purchased Lot 14 in 1982 and purchased Lot 13 in 1983. In his deposition, Weisel had little recollection as to the reason for combining Lots 13 and 14, except that it was for the approval of his three outbuildings to be constructed on Lot 14, although he did testify that he thought about what the Association was proposing and he agreed to their proposal. However, Weisel cannot contest the fact that the County was requiring unification of the two Lots in order to approve his variance request for his proposed guesthouse. He had his attorney draft the Agreement and he signed it. He admitted that "I agreed not to build on Lot 13." Mr. Weisel also testified that it is his opinion "that the other lots have similar, if not greater, density than I have built" and that the land values have increased making Lot 13 more valuable today than in 1983. In his deposition Weisel said that he defines density as the "square footage as a percent of total square footage of the lot" regardless as to how the buildings are used. However, if the Court were to focus solely on Weisel's definition of density, it is clear from the analysis of McClure that the extent of development of Lot 14 is the exception and not the general characterization of development of the Lots in the subdivision. It is clear that the extent of the development of the vast majority of the Lots within the subdivision are modest by comparison to the development of Lot 14.

Weisel knowingly entered into the Agreement with the Association and agreed that, in exchange for the approval of his development plans, he would not thereafter split the parcel or develop the parcel as two separate lots. There is nothing ambiguous about what he agreed to.

The Agreement did not prevent him from developing his proposed improvements on what was Lot 13 as well as Lot 14. It was Weisel and his architect who elected to construct the improvements on Lot 14. There is no evidence that any other property owner in the subdivision had combined adjoining lots and was later permitted to split the single parcel and develop two

separate parcels. It is clear from the evidence that the Association has approved the improvements made to Lot 14 by Weisel in reliance upon not only the Agreement but also the express terms and conditions of Article II, paragraph 17 of the CC&R's as originally constituted and amended over the years. The evidence presented by the plaintiff does not establish that there has been (1) a radical change in condition of the subdivision; (2) that as a result enforcement of the restrictions will work undue hardship on him, since mere increase in value of Lot 13 is not a basis to invalidate a restrictive covenant and Weisel is not precluded from developing improvements on the combined parcel provided they are in compliance with the CC&R's. It is clear from all of the evidence presented to the Court that enforcement of the restrictive covenant is still of benefit to the Association, since the Association still has an interest to limit the number of single family residences as well as the overall development of the individual Lots.

D. Breach of Contract

The plaintiff in Counts IV, V, and VI asserts claims for breach of contract, quasi-estoppel and reimbursement relative to his voting rights on Association matters and the payment of Assessments. The Association and it's CC&R's have always afforded to each Lot owner one vote on Association matter and each Lot owner was assessed on a pro rata basis for the cost of maintenance of the Association. The assessments are not based on the value of improvements to the lots. If the lot owner was the owner of two lots, he was afforded two votes. In 1986 the Association amended Article V, paragraph 2 to read as follows:

> 2. There is and shall be one (1) membership in the Association for each Lot. The owner or owners of each Lot or other property area automatically becomes the owner or owners of the membership for that Lot or other property area and automatically have the benefits and are automatically subject to the burdens attributable to such membership. Each membership is and shall always be appurtenant to the title to a particular Lot or other property area and shall automatically pass with the transfer of title to the same. Each membership is entitled to one (1) vote in matters submitted to a vote of the membership of the Association. If two (2) or more Lots are combined under single

> ownership, as provided by paragraph 17 of Article II, above, with permanent restrictions encumbering the combined Lots to permit the construction of only one (1) single family residence and other improvements as herein permitted for a single Lot, the combined Lots shall thereafter become and be treated as a single Lot entitling the owner to a single membership and one (1) vote in the Association.

The CC&R's from their inception have continually defined the term "Lot" in Article 1, paragraph 1 as follows: "Lot. As used herein, a Lot shall be any tract described in a recorded instrument or shown on a recorded plat." The Agreement between the Association and Weisel was recorded by the parties and is sufficient to constitute a recorded instrument within the definition of a Lot for purposes of the CC&R's.

As to Count IV of the amended complaint, the plaintiff alleges that he "owns two (2) lots, Lots 13 and 14 and further alleges that "Lots 13 and 14 were never unified as contemplated by the Agreement, and the setback requirements along the common boundary between Lots 13 and 14 were never violated or removed." (Amended Complaint, ¶¶ 35-36.) For the reasons set forth above, the plaintiff's claim that the two lots were never "unified" and the setbacks were never "removed" is not supported by the evidence nor by the terms of the Agreement and Article II, paragraph 17. The combination and unification of the two lots was accomplished upon the signing and recording of the Agreement by the parties. The clear and unambiguous terms of Article V, paragraph 2 limits Weisel to one vote on Association matters. The Association did not breach the voting rights of Weisel.

As to Count V and VI, the plaintiff alleges and the evidence supports the conclusion that the Association had been allowing the plaintiff two votes on Association matters and was collecting Assessments based on two lots rather than one lot after the unification of the two lots in October, 1983. On this basis the plaintiff alleges that the Association is estopped from

denying him two votes on the theory of quasi estoppel and that he is entitled to recover the excess assessment payments.

The doctrine of quasi estoppel applies if (1) the Association took a different position than its original position, and (2) either (a) the Association gained an advantage or caused a disadvantage to Weisel; (b) Weisel was induced to change positions; or (c) it would be unconscionable to permit the Association to maintain an inconsistent position from one it had already derived a benefit or acquiesced in. *Allen v. Reynolds,* 145 Idaho 807, 812, 186 P.3d 663, 668 (2008). As for the voting rights exercised by Weisel, while the evidence shows that after the unification of the two lots the Association mistakenly allowed Weisel two votes on Association matters, the subsequent determination that Weisel should only be entitled to one vote did not cause either an advantage or disadvantage to either party. So as to the issue of Weisel's voting rights the theory of quasi estoppel does not apply.

In Count VI Weisel seeks reimbursement of the excess Association Assessments he paid after the unification of the two lots. There is no dispute that Weisel, after unification of the two lots, should have only paid one Assessment but in fact the Association mistakenly charged Weisel two Assessments. The Association does not dispute that Weisel is entitled to reimbursement from the Association for the excess Assessments paid by Weisel that are not barred by the Statute of Limitations. In turn the plaintiff argues that the Association should be equitably estopped from asserting the statute of limitations as to the claim of reimbursement. However, for equitable estoppel to apply, the plaintiff would have to show that the Associations conduct caused the plaintiff from seeking reimbursement at an earlier date. *Johnson v. McPhee,* 147 Idaho 455, 210 P.3d 563 (Ct. App. 2009). The plaintiff relies upon an out of state case, *Commonwealth v. Soffer,* 544 A.2d 1109 (Pa. 1988), however, it is clear that the conduct that

gave rise to the claim of equitable estoppel in that case was based on misrepresentations made by the party who was asserting the statute of limitations as a bar. The Court has not been pointed to any evidence in the record of any conduct of the Association that prevented Weisel from seeking reimbursement in a timely manner.

The parties do not dispute that the Association Assessment are subject to a five (5) year statute of limitations. Therefore, it is clear that Weisel may seek affirmative relief for reimbursement of excess Association Assessments paid by him within five (5) years prior to the filing of his complaint, but any additional claims for affirmative relief would be barred by the five year statute of limitations. However, while some of Weisel's claims for reimbursement as affirmative relief may be barred by the statue of limitations, that is not to say that he may not be entitled to equitable relief and to assert his affirmative claims defensively as a setoff as against any future Association Assessments levied against his Lot. *Beard v. George,* 135 Idaho 685, 687-688, 23 P.3d 147, 149-150 (2001); *Wilhelm v. Johnston,* 136 Idaho 145, 30 P.3d 300 (Ct. App. 2001).

Therefore, while Weisel's claim for reimbursement of excess assessments would be partially barred by the statue of limitations, there does remain a legal question not addressed by the parties as to asserting such a claim defensively as a setoff as to future assessments.

IV.

CONCLUSION AND ORDER

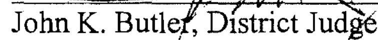
Based on the courts reasoning set forth above the court finds that there are no triable issues of fact and that the prevailing party is entitled to summary judgment as a matter of law as follows:

1. As to Counts I through V, VII of the plaintiff's complaint, the defendant's Motion for Summary Judgment is GRANTED and the Plaintiff's Motion for Summary Judgment is DENIED.

2. As to Count VI of the plaintiff's complaint, the defendant's Motion for Summary Judgment is GRANTED in part and DENIED in part.

IT IS SO ORDERED.

DATED this 16 day of March, 2010.



John K. Butler, District Judge

CERTIFICATE OF MAILING/DELIVERY

I, undersigned, hereby certify that on the 16 day of March, 2010, a true and correct copy of the foregoing MEMORANDUM DECISION RE: CROSS MOTIONS FOR SUMMARY JUDGMENT was mailed, postage paid, and/or hand-delivered to the following persons:

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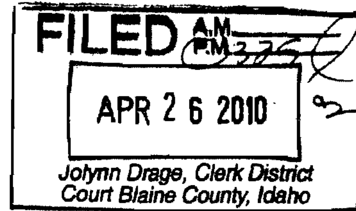

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

THOMAS WEISEL, a married man dealing in his sole and separate property,,

Plaintiff,

vs.

BEAVER SPRINGS OWNERS ASSOCIATION, INC., an Idaho Corporation,

Defendants.

Case No. CV-2009-124

MEMORANDUM DECISION AND ORDER RE: PLAINTIFF'S MOTION TO AMEND COMPLAINT

On April 2, 2010 the plaintiff filed his Motion to file an Amended Complaint to assert a cause of action for Setoff, as a result of the Court's Memorandum Decision Re: Cross Motions for Summary Judgment entered on March 16, 2010. On April 6, 2010 the court granted to the defendant 14 days to file any objection to the motion to amend and further granted to the plaintiff 7 days to reply to any such objection by the defendant. The court also advised counsel that upon conclusion of the briefing the motion would then be decided by the court without oral argument. The briefing was completed on April 23, 2010.

I.

PROCEDURAL BACKGROUND

On March 16, 2010 the court entered its Memorandum Decision Re: Cross Motions for Summary Judgment, wherein the court granted summary judgment in favor of the defendant as to Counts I through V and VII of the plaintiffs amended complaint. The plaintiff in Count VI of his amended complaint sought reimbursement from the defendant for a portion of the assessments that he had paid after the unification of his two lots. The defendant did not dispute that plaintiff was entitled for reimbursement of the excess assessments that were paid within the applicable statute of limitations. The court as to Count IV concluded that the reimbursement was limited to those excess assessments paid by the plaintiff within 5 years of the filing of the complaint, however, the court did determine that there may be a legal question as to whether those excess assessments that were barred by the statue of limitations could be used by the plaintiff as a setoff as to any future assessments. Based on this court summary judgment decision the plaintiff seeks to file a Second Amended Complaint to allege Count VIII, Declaratory Judgment-Setoff.

II.

DEFENDANT'S OBJECTION

On April 20, 2010 the defendant filed its objection to the motion to amend on the basis "ripeness". The defendant argues that there is no need for court action since the defendant is willing to negotiate the issue with the plaintiff and the plaintiff has rejected its attempt to negotiate. The defendant does not object to the timeliness of the plaintiff's motion based on the court's scheduling order and the defendant does not object that the granting of the motion would be prejudicial to the defendant based on the current trial date of May 5, 2010.

III.

STANDARD

Idaho Rule of Civil Procedure 15(a) provides that leave to amend a pleading shall be freely given when justice so requires. I.R.C.P. 15(a). Whether to grant the motion is a matter of discretion for the Court. *Silver Creek Computers, Inc. v. Petra, Inc.*, 136 Idaho 879, 881, 42 P.3d 672, 674 (2002). In considering a motion to amend pleadings our courts have recognized that the appropriate standard is an abuse of discretion and that in the interest of justice, courts should favor liberal grants of leave to amend. *Wickstrom v. N. Idaho College*, 111 Idaho 450, 725 P.2d 155 (1986).

IV.

ANALYSIS

The trial in the above entitled matter is currently set for May 5, 2010. The sole issue raised in the proposed second amended complaint is whether the plaintiff is equitably entitled to a setoff for the excess assessments paid by the plaintiff which are otherwise barred by the statue of limitations relative to any future assessments the defendant may charge to the plaintiff. There is no dispute that the plaintiff, after unification of his two lots, was charged annually for two assessments when in fact he should have only been charged one assessment. It is further reasonable to assume that the plaintiff will be charged for annual assessments in the future by the defendant.

The defendant argues that the cause of action for setoff is not "ripe" and relies on the holding in *Mannos v. Moss,* 143 Idaho 927, 155 P.3d 1166 (2007). In *Mannos*, the plaintiff sought a claim for indemnification of back sales taxes that had not been paid to the Idaho State Tax Commission, arising out of his purchase of stock in a closely held company that later

became insolvent. The court held that the claim for indemnification for back sales taxes was not ripe because there was "no indication that the Idaho State Tax Commission has dunned Mannos back taxes". The court stated as follows:

> "Ripeness is a fundamental prerequisite to invoke this Court's jurisdiction-a harm must be sufficiently matured to warrant judicial intervention. (citation omitted) The ripeness doctrine requires a 'plaintiff to prove 1) that the case presents definite and concrete issues, 2) that a real and substantial controversy exists, and 3) that there is a present need for adjudication.'"
>
> *Mannos v. Moss,* 143 Idaho at 936, 155 P.3d at 1175

A. Does the case present definite and concrete issues?

There is no dispute between the parties that Weisel was charged and paid twice the amount of assessments then he was required to pay after unification of his lots and that Weisel would have been entitled to reimbursement but for the statue of limitations. There is also no dispute that the CC&R's as presently constituted provides for the "levy of annual assessments" and if any owner shall fail to pay the assessment levied by the Association that the Association "shall have a lien...against the property to which such membership is appurtenant for the amount due and not paid,..." (Article V., ¶'s 3 & 4, Third Amendment and Restatement of Declaration of Restrictions). It is clear to this court that there are "definite and concrete issue" relative to Weisel's right to a setoff and his obligation to pay future assessments.

B. Does a real and substantial controversy exist?

The Association has stated its willingness to "negotiate the set off issue". The Association has not stated and does not argue that Weisel is in fact entitled to a setoff or the amount of the setoff that Weisel may be entitled too. In *Mannos* the court stated there was no indication that the State Tax Commission was going to assess *Mannos* with any back sales taxes. In this case there can be no doubt that Weisel will some time in the future be assessed an annual

levy by the association and the Association has not conceded that Weisel is entitled to a setoff to the extent of the non-reimbursed assessments that he paid. A willingness to negotiate does not resolve the controversy that clearly exists. It is clear to this court that a real and substantial controversy does in fact exist between Weisel and the Association as to his entitlement to a setoff and the amount of that setoff.

C. Is there a present need for adjudication?

The issue is before the court and if the issue is not now decided then Weisel and the Association will be engaged in litigation over this issue potentially on an annual basis. To litigate this issue annually is not a good use of judicial resources. Further, the court can anticipate that there will be changes in the makeup of the Association Board. This issue needs to be adjudicated and resolved by the parties now and not in the future.

Based on the foregoing, the motion to amend should be granted by this court.

V.

CONCLUSION AND ORDER

For the reasons set for the above, the plaintiff's motion for leave to file a Second Amended Complaint is GRANTED. The Second Amended Complaint is deemed filed as of the date of this order. **Since the court has granted the motion to amend and since the sole remaining issue is the equitable theory of setoff, the court hereby sua sponte will strike the request for a jury trial and the trial set for May 5, 2010 will be conducted as a court trial.**

IT IS SO ORDERED.

DATED this 23 day of April, 2010.

John K. Butler, District Judge

CERTIFICATE OF MAILING/DELIVERY

I, undersigned, hereby certify that on the 26 day of April, 2010, a true and correct copy of the foregoing MEMORANDUM DECISION AND ORDER RE: PLAINTIFF'S MOTION TO AMEND COMPLAINT was mailed, postage paid, and/or hand-delivered to the following persons:

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Attorneys for Plaintiff, THOMAS WEISEL

FILED A.M. P.M.
APR 2 6 2010
Jolynn Drage, Clerk District Court Blaine County, Idaho

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

THOMAS WEISEL, a married man dealing in his sole and separate property, **Plaintiff,** **vs.** **BEAVER SPRINGS OWNERS ASSOCIATION, INC., an Idaho corporation,** **Defendant.**	**Case No. CV-09-124** **SECOND AMENDED COMPLAINT**

Plaintiff, THOMAS WEISEL (hereinafter "Weisel"), an individual, by and through his attorney, Fritz X. Haemmerle of Haemmerle & Haemmerle, P.L.L.C., and for causes of action against Defendant, BEAVER SPRINGS OWNERS ASSOCIATION, INC. ("Association"), an Idaho corporation, alleges upon information and belief as follows:

JURISDICTION AND VENUE

1. Weisel is the record title holder of real property located at 114 Adams Rib Lane, Ketchum, Idaho by Warranty Deed to Weisel, recorded February 19, 1982, as Instrument No. 223948, records of Blaine County, Idaho, which is more particularly described as follows:

Lot 14, Beaver Springs Subdivision, Blaine County, Idaho, according to the official plat thereof recorded in Book 17 of Plats, page 12, records of Blaine County, Idaho.

("Lot 14")

2. Weisel is also the record title holder of real property located at 112 Adams Rib Lane, Ketchum, Idaho by Warranty Deed to Weisel, recorded January 21, 1983, as Instrument No. 234690, records of Blaine County, Idaho, which is more particularly described as follows:

Lot 13 of Beaver Springs Subdivision, Blaine County, Idaho, as shown on the official plat thereof, recorded February 10, 1978 in Book 17 of Plats, page 12, records of Blaine County, Idaho

("Lot 13", Lot 13 and Lot 14, also referred to as "Lots 13 and 14")

3. Association is an Idaho nonprofit corporation in good standing, with its principal place of business in Blaine County, Idaho.

ALLEGATIONS COMMON TO ALL CAUSES OF ACTION

4. The Declaration of Restrictions of Beaver Springs Subdivision was recorded April 6, 1978, as Instrument No. 181805, records of Blaine County, Idaho ("Declaration") covering real property described as Beaver Springs Subdivision, Blaine County, Idaho ("Beaver Springs"). The Declaration is attached and incorporated into this Complaint as Exhibit A.

5. Among other things, the Declaration:

a. established a setback requirement that no building could be constructed less than fifteen feet from the side boundary line of any lot. Subsequent amendments to the Declaration have not changed this setback requirement;

b. allowed a total of five structures to be built on a Lot, and established no maximum size for those structures;

c. did not reduce the number of votes a lot owner was entitled to following the unification of two or more lots pursuant to the Declaration.

6. At the request of Weisel, architect James McLaughlin prepared a development plan for Lot 14 ("Development Plan"). In addition to the existing main residence, the Development Plan provided for three outbuildings, consisting of a barn, detached garage, and a guest house ("Guest House"). No plans were prepared for the development of Lot 13.

7. The Guest House under the Development Plan did not violate the setbacks established by the Declaration, between Lots 13 and 14, as shown by a survey dated October 22, 2004, conducted by Benchmark Associates, P.A., an Idaho licensed civil engineering, planning and surveying professional corporation, a copy of which is attached and incorporated into this Complaint as Exhibit B. The Guest House was the building closest to the common boundary between Lots 13 and 14, but at all times was, and still is, 33.9 feet from the common boundary between Lots 13 and 14. This setback was, and still is, more than double the required setback between Lots 13 and 14. There has been no change to the setbacks since that time and the structures on Lot 14 continue to be within the setbacks established by the Declaration and all of its amendments.

8. The Beaver Springs Design Review Committee ("Design Committee") approved the Development Plan on September 12, 1983, without any conditions or limits. A letter indicating such approval from the Association to Blaine County is attached and incorporated into this Complaint as Exhibit C.

9. Thereafter, on October 12, 1983, Weisel and the Association entered into an agreement ("Agreement"). The Agreement was recorded December 7, 1983, as Instrument No. 246208, records of Blaine County, Idaho. The Agreement is attached and incorporated into this Complaint as Exhibit D.

10. At the time of the Agreement, there were no encroachment into the setbacks by any part of the proposed Development Plan, there was nothing in the Declaration prohibiting the proposed Development Plan, and the proposed Development Plan had already been unconditionally approved by the Association. Yet, the Agreement removed the setback lines along the common boundary of Lots 13 and 14, unified Lots 13 and 14 into a single parcel, and prohibited the single parcel from being split and/or developed as two separate parcels in the future.

11. Lots 13 and 14 have never been unified and the setback lines along the common boundary of Lots 13 and 14 have remained in place.

12. At all times Weisel paid dues and assessments for both Lots 13 and 14 and the Association accepted such payment for both lots.

13. The Association invoiced Weisel and accepted payment from Weisel for two lots from the time he purchased Lots 13 and 14, until 2006.

14. On November 14, 1986, the First Amendment to the Declaration of Restrictions of Beaver Springs was recorded as Instrument No. 278727, records of Blaine County, Idaho ("First Amended Declaration"), a copy of which is attached and incorporated into this Complaint as Exhibit E. The First Amended Declaration eliminated any reference to the developer of the Beaver Springs Subdivision and made other changes and additions to the Declaration.

15. The First Amended Declaration also amended paragraph 2 of Article V of the Declaration, so that when two or more lots were combined pursuant to paragraph 17 of Article II, the combined lots were to be treated as a single lot entitling the owner to a single membership and one vote in the Association.

16. The First Amended Declaration did not apply retroactively or state that it applied retroactively.

17. Following the adoption of the First Amended Declaration, the Association continued to permit Weisel to have two votes on Association matters, one vote for Lot 13 and one for Lot 14 and Weisel at all times registered both votes, until 2006.

18. Beaver Springs was annexed to the City of Ketchum on September 17, 1990, through the execution of the Beaver Springs Annexation Agreement and Agreement for Services ("Annexation Agreement"), a copy of which is attached and incorporated into this Complaint as Exhibit F. The Annexation Agreement does not contain any restriction on Lot 13.

19. On January 31, 2005, the Second Amendment to the Declaration of Restrictions of Beaver Springs was recorded as Instrument No. 515751, records of Blaine County, Idaho ("Second Amended Declaration"), a copy of which is attached and incorporated into this Complaint as Exhibit G. The Second Amended Declaration amends, restates, supercedes and replaces the Declaration and the First Amended Declaration in their entirety.

CAUSES OF ACTION

COUNT ONE
(Declaratory Judgment – Mutual Mistake)

20. Weisel repleads each and every allegation contained in Paragraphs 1 through 19, as if fully restated herein.

21. Both the Association and Weisel entered the Agreement on the mistaken belief that the proposed improvements under the Development Plan would violate the setback restrictions established in the Declaration, that Weisel needed the approval of the Association to eliminate the setback line from Lot 14, and that Lots 13 and 14 had to be unified into one parcel pursuant to Article II, paragraph 17 of the Declaration.

22. The mistaken belief that the Development Plan violated the setback requirements on the common boundary between Lots 13 and 14 and that the only way to remove such setbacks was to unify the lots into one lot was a fundamental mistake that led to and formed the basis for the Agreement.

23. The Benchmark Survey confirms that there never was a violation of the setback restrictions along the common boundary between Lots 13 and 14.

24. The Agreement would never have been entered into but for the mistaken belief by both parties that the Development Plan violated the setback restrictions.

25. Based on the mutual mistake of the parties, the Agreement is void and unenforceable.

COUNT TWO
(Declaratory Judgment – Lack of Consideration)

26. Weisel repleads each and every allegation contained in Paragraphs 1 through 25, as if fully restated herein.

27. Under the Agreement the Association permitted Weisel to ignore the setback requirements established in the Declaration in return for Weisel's agreement to unify Lots 13 and 14 and never separate the two lots.

28. The Association's promise to permit the violation of setback requirements along the common boundary between Lots 13 and 14 was illusory as the proposed improvements were never within the setbacks nor was there ever a violation of the setback requirements. As such, there was a lack of consideration by the Association in connection with the Agreement.

29. The Development Plan never violated any setback requirements contained in the Declaration or any subsequent amendments thereto. As such, Weisel did not receive any benefit from the Association for his agreement to combine the lots into one parcel.

30. Due to a lack of consideration by the Association, the Agreement is void and unenforceable.

COUNT THREE
(Rescission)

31. Weisel repleads each and every allegation contained in Paragraphs 1 through 30, as if fully restated herein.

32. Because of the failure of consideration and mutual mistake, the Agreement should be rescinded and declared null and void.

COUNT FOUR
(Breach of Contract)

33. Weisel repleads each and every allegation contained in Paragraphs 1 through 32, as if fully restated herein.

34. The Association's Declaration states that property owners are entitled to one (1) vote per lot.

35. Weisel owns two (2) lots, Lots 13 and 14.

36. Lots 13 and 14 were never unified as contemplated by the Agreement, and the setback requirements along the common boundary between Lots 13 and 14 were never violated or removed.

37. In January of 2006, the Board of Directors of the Association, by resolution, voted to reduce Weisel from two votes to one vote for both Lots 13 and 14, and informed Weisel of this by a letter (misdated 2005) enclosing the resolution. That letter and resolution are attached and incorporated into this Complaint as Exhibit H.

38. The failure of the Association to allow Weisel two votes, one vote per lot, constitutes a breach of the Association's Declaration.

COUNT FIVE
(Quasi Estoppel)

39. Weisel repleads each and every allegation contained in Paragraphs 1 through 38, as if fully restated herein.

40. By the Association's own admission in Exhibit H, for approximately twenty years after the Agreement, the Association continued to accord Weisel two votes on Association matters and continued to collect annual dues from Weisel for both Lots 13 and 14.

41. The annual dues Weisel paid for over 22 years for the two lots is an amount to be proven at trial, but on information and belief, is less than Twenty-Five Thousand and 00/100 Dollars ($25,000.00).

42. Based upon the Association's position treating the lots as two separate lots, collecting dues on the two separate lots, and according two votes for each lot, and Weisel's compliance with such position, it would be unconscionable to allow the Association to now take the position that the two lots are one and that Weisel is entitled to only one membership and one vote. Weisel is entitled to two memberships and two votes on Association matters and the Association is estopped from asserting otherwise.

COUNT SIX
(Reimbursement)

43. Weisel repleads each and every allegation contained in Paragraphs 1 through 42, as if fully restated herein.

44. If the Court finds that there is one Lot, then Weisel is entitled to reimbursement from the Association in a sum to be proven at trial, but on information and belief, does not exceed Twenty-Five Thousand and 00/100 Dollars ($25,000.00) in overpaid dues and fees.

COUNT SEVEN
(Declaratory Judgment – Changed Circumstances)

45. Weisel repleads each and every allegation contained in Paragraphs 1 through 44, as if fully restated herein.

46. Since the Agreement was entered into, the Association has permitted and acquiesced in the construction of large residences and outbuildings on the other lots in the subdivision similar to and in excess of the size of Plaintiff's residence and outbuildings.

47. Since the Agreement was entered into, the Declaration for the Association has been amended to specifically permit large residence and outbuildings on lots in the subdivision of a size similar to that of Plaintiff's buildings on Lot 14 and the existing buildings in the subdivision.

48. Since the Agreement was entered into, large residences and outbuildings have been constructed on other lots in the subdivision similar to Plaintiff's with no development restrictions on them as imposed on Plaintiff in the Agreement.

49. Due to the construction of large outbuildings and residences on the lots in the subdivision and the changes in the Declaration permitting large residences and outbuildings, the size of Plaintiff's residence and outbuildings is similar to that of the rest of the lots in the subdivision and to that permitted under the Declaration.

50. The reasons for and the purposes of the Agreement are no longer served, have been frustrated, and have been rendered obsolete, and the consideration, if any, provided by the Defendant has been rendered valueless by its own actions and the changes in the subdivision. Due to the above changes, the continued validity and enforcement of the Agreement is oppressive and inequitable to Weisel.

51. As such, Weisel seeks a declaration from this Court that the Agreement is invalid and unenforceable.

COUNT EIGHT
(Declaratory Judgment – Setoff)

52. Weisel repleads each and every allegation contained in Paragraphs 1 through 51, as if fully restated herein.

53. After the Agreement was entered into, Weisel paid dues and assessments for both Lots 13 and 14 and the Association accepted such payment for both lots.

54. The Association invoiced Weisel and accepted payment from Weisel for two lots from the time he purchased Lots 13 and 14, until 2006.

55. If the Court determines that Lots 13 and 14 were unified by the Agreement, as an alternative to Count Six, Weisel seeks a declaration from this Court that he has the right to setoff the total amount of dues and assessments he paid to the Association for a second lot from 1984 through 2005 against future Association dues and assessments on the unified lot.

DEMAND FOR ATTORNEY'S FEES AND COSTS

56. As a result of the Defendant's actions, the Plaintiff has had to retain the services of attorneys. For services rendered, the Plaintiff is entitled to attorneys' fees and costs should he prevail in this action pursuant to Idaho Code Sections 12-120 and 12-121, and pursuant to Idaho Rule of Civil Procedure 54, and pursuant to any agreement of the parties. In case of default, the Plaintiff is entitled to attorney's fees and costs of $5,000.

RIGHT TO AMEND

The Plaintiff reserves the right to amend this complaint in any respect as motion practice and discovery proceed in this matter.

WHEREFORE, Thomas Weisel prays for this Court to enter Judgment against Defendant, as follows:

A. On Count One, for a Declaratory Judgment that the Agreement is unenforceable on the basis of mutual mistake;

B. On Count Two, for a Declaratory Judgment that the Agreement is unenforceable for lack of consideration;

C. On Count Three, for an Order of the Court rescinding the Agreement;

D. On Count Four, for an order finding that the Association breached the Declaration by allowing the Plaintiff only one (1) vote;

E. On Count Five, alternatively, for judgment declaring that the Association is estopped from denying that the Plaintiff is the owner of two memberships in the Beaver Springs Owners Association, Inc., one for Lot 13 and one for Lot 14, and is entitled to one (1) vote for each membership;

F. On Count Six, alternatively if the Court does not find in the Plaintiff's favor on Counts Four or Five, for judgment not to exceed Twenty-Five Thousand and 00/100 Dollars ($25,000.00) for reimbursement of excess dues and fees paid to the Association.

G. On Count Seven, for a Declaratory Judgment that the reasons for and the purposes of the restriction are no longer served, have been frustrated, and have been rendered obsolete, and the consideration, if any, provided by the Defendant has been rendered valueless by its own actions and the changes in the subdivision, so that the Agreement is no longer valid and enforceable.

H. On Count Eight, for a Declaratory Judgment that Weisel has the right to setoff the total amount of dues and assessments he paid to the Association for a second lot from 1984 through 2005 against future Association dues and assessments on the unified lot.

I. Pursuant to Idaho Code Sections 12-12-120 and 12-121 and I.R.C.P. 54, for reasonable attorney fees, which amount shall be Five Thousand Dollars ($5,000.00) in the event judgment is entered by default, and for all costs incurred herein; and

J. For other such relief as the court deems just and proper.

DATED this 2 day of April, 2010.

Attorney for Plaintiff, THOMAS WEISEL

Fritz Haemmerle

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2 day of April, 2010, I caused to be served a true copy of the foregoing document by the method indicated below, and addressed to each of the following:

Edward Lawson
Erin F. Clark
Lawson Laski Clark & Pogue, PLLC
P.O. Box 3310
Ketchum, ID 83340

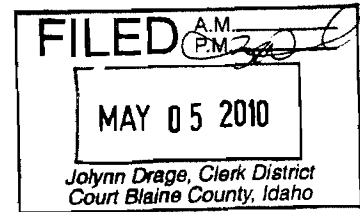
[✓] U.S. Mail
[✓] Via Facsimile & e-mail
[ ] Hand Delivered

Fritz X. Haemmerle

ORIGINAL

FRITZ X. HAEMMERLE
HAEMMERLE & HAEMMERLE, P.L.L.C.
400 South Main St., Suite 102
P.O. Box 1800
Hailey, ID 83333
Tel: (208) 578-0520
FAX: (208) 578-0564
E-mail: fxh@haemlaw.com
ISB # 3862

Attorney for Plaintiff, THOMAS WEISEL



IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

THOMAS WEISEL, a married man dealing in his sole and separate property, Plaintiff, vs. BEAVER SPRINGS OWNERS ASSOCIATION, INC., an Idaho corporation, Defendant.	Case No. CV-09-124 STIPULATION FOR ENTRY OF JUDGMENT

COME NOW the Plaintiff, Thomas (Thom) Weisel ("Weisel"), by and through his attorney of record, Fritz X. Haemmerle of Haemmerle & Haemmerle, P.L.L.C., and the Defendant, Beaver Springs Owners Association, Inc. ("Beaver Springs"), by and through Lawson, Laski, Clark & Pogue, P.L.L.C., and based on the allegations and various causes of action described in the Second Amended Complaint, hereby STIPULATE and AGREE for entry of Judgment as follows:

1. That plaintiff is awarded judgment on Count VI of his Complaint against defendant, Beaver Spring Owners Association, Inc. in the amount of $3,000.00, together with

prejudgment interest thereon in the amount of $1,000.00, for a total of $4,000.00.

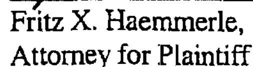
2. That plaintiff is awarded judgment on Count VIII of his second amended complaint against defendant Beaver Spring Owners Association, Inc. and thereby it is hereby declared that plaintiff, or the Thomas W. Weisel Trust Under Trust Agreement dated February 27, 1998, as Amended, or any other trust approved by the defendant, has the equitable right of offset against sums due the defendant, if any, in the amount of $17,000.00.

3. The written agreement ("Agreement") between plaintiff and defendant, dated October 12, 1983 and recorded in the records of Blaine County, Idaho as Instrument No. 246208, was not entered into based on a mutual mistake of fact, is supported by consideration and is otherwise valid and enforceable. Accordingly plaintiff's lots 13 and 14, as more particularly described in the Agreement, shall be deemed and remain as a single parcel and developed as a single parcel, and plaintiff is responsible for one annual assessment and has one vote on matters to be voted upon by members of the Beaver Spring Owners' Association.

4. Notwithstanding the form of Judgment or otherwise, each side retains the right to argue for attorney's fees and costs.

5. Notwithstanding the form of Judgment or otherwise, each party retains the right to file an appeal.

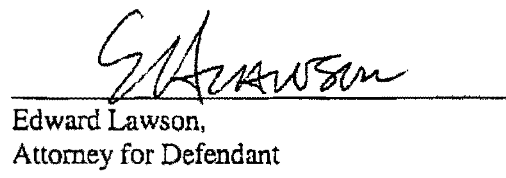
IT IS SO STIPULATED.



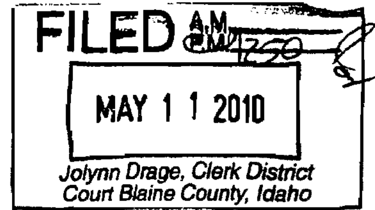
Date: 5/4/10

Fritz X. Haemmerle,
Attorney for Plaintiff

Date: 5/4/10



Edward Lawson,
Attorney for Defendant



IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

THOMAS WEISEL, a married man dealing in his sole and separate property,

Plaintiff,

vs.

BEAVER SPRINGS OWNERS ASSOCIATION, INC., an Idaho corporation

Defendant.

Case No. CV-09-124

JUDGMENT

This matter came on for hearing on February 16, 2010, before the Honorable John K. Butler on the cross motions for summary adjudication. Fritz X. Haemmerle of Haemmerle & Haemmerle appeared on behalf of the plaintiff, Thomas Weisel. Edward A. Lawson and Erin F. Clark of Lawson Laski Clark & Pogue, PLLC appeared on behalf of the defendant, Beaver Spring Owners Association, Inc.

The Court having considered the pleadings filed in support of and in opposition to the motion for summary adjudication, together with the argument of counsel, for the reasons recited in the Memorandum Decision, dated March 16, 2010, and pursuant to the stipulation of the parties,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, as follows:

1) Plaintiff is awarded judgment on Count VI of his Complaint against defendant, Beaver Spring Owners Association, Inc. in the amount of $3,000.00, together with prejudgment interest thereon in the amount of $1,000.00, for a total of $4,000.00.

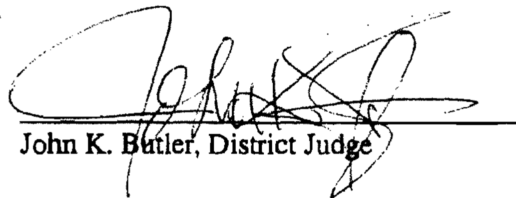
2) Plaintiff is awarded judgment on Count VIII of his second amended complaint

against defendant Beaver Spring Owners Association, Inc. and thereby it is hereby declared that plaintiff, or the Thomas W. Weisel Trust Under Trust Agreement dated February 27, 1998, as Amended, or any other trust approved by the defendant, has the equitable right of offset against sums due the defendant, if any, in the amount of $17,000.00.

3) The written agreement ("Agreement") between plaintiff and defendant, dated October 12, 1983 and recorded in the records of Blaine County, Idaho as Instrument No. 246208, was not entered into based on a mutual mistake of fact, is supported by consideration and is otherwise valid and enforceable. Accordingly plaintiff's lots 13 and 14, as more particularly described in the Agreement, shall be deemed and remain as a single parcel and developed as a single parcel, and plaintiff is responsible for one annual assessment and has one vote on matters to be voted upon by members of the Beaver Spring Owners' Association.

4) Except as otherwise provided in paragraph 1 and 2 above, Plaintiff's complaint is hereby dismissed in its entirety and plaintiff shall take nothing thereby; except notwithstanding, each party retains their respective rights under the pleadings filed to pursue claims for attorney's fees and costs.

DATED this 7 day of May 2010.



John K. Butler, District Judge

CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11 day of May, 2010, I caused to be served a true copy of the foregoing document by the method indicated below, and addressed to each of the following:

Fritz X. Haemmerle, Esq.
Haemmerle & Haemmerle, PLLC
400 South Main Street, Suite 102
PO Box 1800
Hailey, ID 83333

____ U.S. Mail, Postage Prepaid
____ Hand Delivered
____ Overnight Mail
✓ Telecopy – (208) 578-0564

Edward A. Lawson, Esq.
Lawson Laski Clark & Pogue, PLLC
675 South Main Street, Suite A
PO Box 3110
Ketchum, Idaho 83340

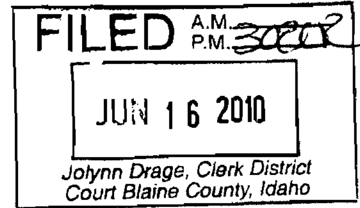
____ U.S. Mail, Postage Prepaid
____ Hand Delivered
____ Overnight Mail
✓ Telecopy – (208) 725-0076

Clerk

ORIGINAL

FRITZ X. HAEMMERLE
HAEMMERLE & HAEMMERLE, P.L.L.C.
400 South Main St., Suite 102
P.O. Box 1800
Hailey, ID 83333
tel: (208) 578-0520
FAX: (208) 578-0564
ISB # 3862

Attorneys for Plaintiff/Appellant. license



IN THE DISTRICT COURT OF THE FIFTH JUDICAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

THOMAS WEISEL, a married man dealing in his sole and separate property,	**Case No. CV-09-124**
Plaintiff/Appellant,	**NOTICE OF APPEAL**
vs.	**Fee: L(4) - $101.00**
BEAVER SPRINGS OWNERS ASSOCIATION, INC., an Idaho corporation,	
Defendant/Respondent.	

TO: THE ABOVE-NAMED RESPONDENT, BEAVER SPRINGS OWNERS ASSOCIATION, INC., ("Beaver Springs") AND ITS ATTORNEY, EDWARD LAWSON AND ERIN CLARK, OF LAWSON, LASKI, CLARK & POGUE, P.L.L.C., P.O. BOX 3310, KETCHUM, IDAHO 83340 AND THE CLERK OF THE ABOVE-ENTITLED COURT

1. The above-named Appellant, Thomas Weisel ("Weisel"), appeals the Court's Judgment Dated May 11, 2010 ("Decision"), including the memorandum decision on cross-motions

for summary judgment dated March 16, 2010, the costs and attorney fee rulings stemming from the Decision, and all other rulings made subsequent to the Decision, Honorable John K. Butler, District Judge for the Fifth Judicial District, in and for the County of Blaine, presiding.

2. That the party has a right to appeal to the Supreme Court, and the judgment described in paragraph 1 is appealable pursuant to I.A.R. 11(a)(1).

3. Issues on Appeal: Whether the trial court erred in denying Weisel's Motion for Summary Judgment and granting Beaver Spring's Motion for Summary Judgment on Counts I-V and Count VII, said rulings raising the following issues:

a. Whether the 1983 Agreement between Weisel and Beaver Springs was supported by adequate consideration?

b. Whether the 1983 Agreement was based upon the fundamental mutual mistake that the improvements were located in or to be located in the setback?

c. Whether the construction of the improvements in the setback was a condition precedent to Weisel's agreement with Beaver Springs not to develop Lot 13?

d. Whether the consideration for the 1983 Agreement failed by the subsequent actions of Beaver Springs?

e. Whether Beaver Springs' approval of development on the other lots in the Subdivision without any restriction on development on those lots has frustrated the original intent of the Agreement and supports its extinguishment?

f. Whether there are necessary parties that prevent Weisel from obtaining Declaratory Judgment?

g. Whether Weisel is entitled to one or two votes?

h. Whether Weisel is entitled to attorneys fees and costs incurred in the District Court and on appeal.

4. No order has been issued sealing all or any portion of the record.

5. (a) Is a reporter's transcript requested? Yes.

(b) The Appellant requests the preparation of the following portions of the reporter's transcript: the oral argument from the hearing on February 16, 2010 on the Cross Motions for Summary Judgment.

(c) The Appellant does not request preparation of the transcript in a compressed format.

6. The Appellant requests the following documents to be included in the clerk's record in addition to those automatically included under Rule 28, I.A.R., and the following documents, charts, or pictures offered or admitted as exhibits to be copied and sent to the Supreme Court:

(a) Depositions, with Exhibits to the Depositions of:

a. Thomas Weisel with Exhibits 1-44
b. James McLaughlin with Exhibits 1-12
c. Phillip Ottley with Exhibits 1-9
d. Robert Smith with Exhibits 1-10
e. Jean Smith with Exhibit 11
f. William Fruehling with Exhibits 45-59
g. Jim Dutcher with Exhibits 65-67

(b) Affidavits:

a. Affidavit of Fritz Haemmerle, with attached Exhibits 1-3
b. Affidavit of Tammy Robison, with attached Exhibit A-B
c. Affidavit of Garth McClure, with attached Exhibits 1-9, those being:
    i. Exhibits 1-5 - aerial photos
    ii. Exhibit 6 - Report with attached Appendices A-C containing surveys, aerial photographs and data
    iii. Exhibit 7 - Application for lot line shift and amended plat
    iv. Exhibit 8 - Survey
    v. Exhibit 9 - Curriculum Vitae
d. Affidavit of Garth McClure in Response to Linda Haavik, with attached Exhibits 1-2
e. Affidavit of Sandy Cady, with attached Exhibits A-C
f. Affidavit of James McLaughlin, with attached Exhibits A-B
g. Affidavit of Tim Graves, with attached Exhibit A
h. Affidavit of Ben Worst, with attached Exhibit A
i. Affidavit of Kathleen Rivers, with attached Exhibits 1-15
j. Affidavit of Valdi Pace, with Exhibits A-B

(c) Appellant's Brief, Response Brief, and Reply Brief lodged or filed in the District Court on the Motion for Summary Judgment.

7. I certify:

(a) That a copy of this notice of appeal has been served on the reporter at the address shown in the Certificate of Mailing;

(b) That the clerk of the district court has been paid the estimated fee for preparation of the reporter's transcript, to-wit: $300.00;

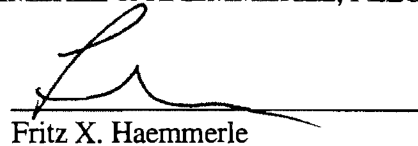
(c) That the estimated fee ($100.00) for preparation of the clerk's or agency's record has been paid;

(d) That the appellate filing fee has been paid; and

(c) That service has been made upon all parties required to be served pursuant to Rule 20.

DATED this 16 day of June, 2010.

HAEMMERLE & HAEMMERLE, PLLC



By: ______________________
Fritz X. Haemmerle

CERTIFICATE OF SERVICE

I hereby certify that on the 16 day of June, 2010, I served a true and correct copy of the within and foregoing document upon the attorney(s) named below in the manner noted:

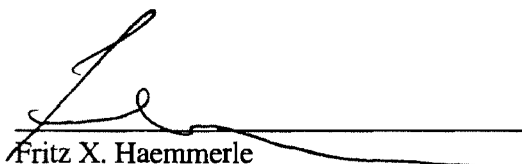
Ed Lawson
Erin Clark
LAWSON, LASKI, CLARK & POGUE, P.L.L.C.
P.O. Box 3310
Ketchum, ID 83340

Candace Childers
Court Reporter
233 W. Main St.
Jerome, ID 83338

_X_ By depositing copies of the same in the United States Mail, postage prepaid, at the post office at Hailey, Idaho.

____ By hand delivering copies of the same to the office of the attorney(s) at his offices in Hailey, Idaho.

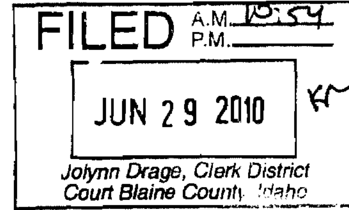
____ By telecopying copies of same to said attorney(s) at the telecopier number ____________, and by then mailing copies of the same in the United States Mail, postage prepaid, at the post office at Hailey, Idaho.



Fritz X. Haemmerle

Edward A. Lawson, Esq. ISB 2440
Erin F. Clark, Esq. ISB 6504
LAWSON LASKI CLARK & POGUE, PLLC
675 Sun Valley Road, Suite A
Post Office Box 3310
Ketchum, Idaho 83340
Telephone: (208) 725-0055
Facsimile: (208) 725-0076

Attorneys for Defendant
Beaver Springs Owners Association, Inc.



IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

THOMAS WEISEL, a married man dealing in his sole and separate property,

Plaintiff/Appellant,

vs.

BEAVER SPRINGS OWNERS ASSOCIATION, INC., an Idaho corporation

Defendant/Respondent.

Case No. CV-09-124

DEFENDANT/RESPONDENT'S REQUEST TO SUPPLEMENT THE CLERK'S RECORD ON APPEAL

TO: THE ABOVE NAMED APPELLANT, THOMAS WEISEL, AND HIS ATTORNEY OF RECORD, FRITZ HAEMMERLE, AND THE CLERK OF OF THE ABOVE ENTITLED COURT

NOTICE IS HEREBY GIVEN, that the Defendant/Respondent Beaver Springs Owners Association, Inc. ("Beaver Springs") in the above entitled proceeding hereby requests pursuant to I.A.R. 19 the inclusion of the following material in the clerk's record in addition to that required to be included by the I.A.R. and the notice of appeal.

1. Memorandum of Points and Authorities in Support of Defendant's Motion for Summary Judgment, filed 12/28/09.
2. Affidavit of Erin Clark in Support of Defendant's Motion for Summary Judgment, filed 12/28/09.
3. Affidavit of Vicki Rosenberg in Support of Defendant's Motion for Summary Judgment, filed 12/28/09.
4. Affidavit of William Fruehling in Support of Defendant's Motion for Summary Judgment, filed 12/28/09.
5. Affidavit of Custodian of Records of Blaine County Planning and Zoning, filed 12/28/09.
6. Second Affidavit of Custodian of Records of Blaine County Planning and Zoning, filed 1/11/10.
7. Defendant's Opposition to Plaintiff's Motion for Summary Judgment, filed 2/2/10.
8. Defendant's Objections to Plaintiff's Statement of Undisputed Facts, filed 2/2/10.
9. Defendant's Notice of Motion and Motion to Strike the Affidavit of Thomas Garth McClure, filed 2/2/10.
10. Defendant's Notice of Motion and Motion to Strike the Affidavit of Thomas Weisel, filed 2/2/10.
11. Affidavit of Karen Roseberry in Support of Defendant's Opposition to Plaintiff's Motion for Summary Judgment, filed 2/2/10.
12. Affidavit of Linda Haavik in Support of Defendant's Opposition to Plaintiff's Motion for Summary Judgment, filed 2/2/10.
13. Affidavit of Kiril Sokoloff in Support of Defendant's Opposition to Plaintiff's Motion

for Summary Judgment, filed 2/2/10.

14. Affidavit of Janet Jarvis in Support of Defendant's Opposition to Plaintiff's Motion for Summary Judgment, filed 2/2/10.

15. Affidavit of Jeff Greenstein in Support of Defendant's Opposition to Plaintiff's Motion for Summary Judgment, filed 2/2/10.

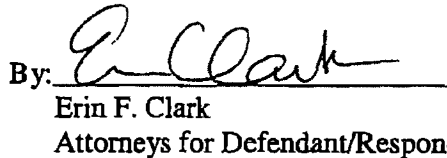
16. Affidavit of Rachel Martin in Support of Defendant's Opposition to Plaintiff's Motion for Summary Judgment, filed 2/2/10.

17. Defendant's Reply to Plaintiff's Response Brief to Motion for Summary Judgment, filed 2/9/10.

I certify that a copy of this request for additional record has been served upon the clerk of the district court and upon all parties required to be served pursuant to Rule 20.

DATED this 29th day of June 2010.

LAWSON LASKI CLARK & POGUE, PLLC

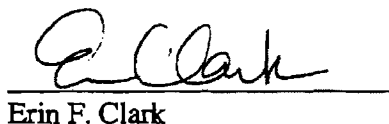


By: ______________________
Erin F. Clark
Attorneys for Defendant/Respondent

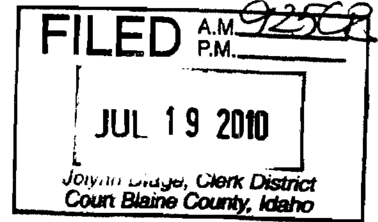
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of June, 2010, I caused to be served a true copy of the foregoing document by the method indicated below, and addressed to each of the following:

Fritz X. Haemmerle, Esq. Haemmerle & Haemmerle, PLLC 400 South Main Street, Suite 102 PO Box 1800 Hailey, ID 83333	____ U.S. Mail, Postage Prepaid ____ Hand Delivered ____ Overnight Mail __✓__ Telecopy – (208) 578-0564
Clerk of the Court Blaine County District Court 201 2nd Ave. S., Suite 110 Hailey ID 83333	____ U.S. Mail, Postage Prepaid ____ Hand Delivered ____ Overnight Mail __✓__ Telecopy – (208) 788-5512



Erin F. Clark



IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

THOMAS WEISEL, a married man dealing in his sole and separate property,	)	
Plaintiff,	)	Case No. CV-2009-124
vs.	)	
BEAVER SPRINGS OWNERS ASSOCIATION, INC., an Idaho Corporation,	)	
Defendant.		

MEMORANDUM DECISION RE: ATTORNEY FEES AND COSTS

On July 6, 2010, the cross motions for attorney fees and costs came on regularly for hearing. The plaintiff was represented by counsel, Fritz X. Haemmerle. The defendant was represented by counsel, Ed Lawson. After considering the briefs, evidence, and argument of counsel the Court took the matter under advisement for a written decision.

I.

PROCEDURAL BACKGROUND

This action was filed by the plaintiff seeking in part declaratory judgment as to 1) the enforceability of a 1983 Agreement which combined two of the plaintiff's lots into a single lot, 2) a determination as to whether the plaintiff's voting rights had been denied, and 3) recovery of an overpayment of assessments.

After substantial discovery had been conducted by the parties, the Court heard cross motions for summary judgment, and on April 26, 2010, the Court entered its Memorandum Decision Re: Cross Motions for Summary Judgment. The Court, as to Counts I through V, VII of the plaintiff's complaint, granted summary judgment in favor of the defendant, and as to Count VI of the plaintiff's complaint, the defendant's Motion for Summary Judgment was granted in part and denied in part.

On April 26, 2010, the Court granted plaintiff's motion to file an amended complaint to allege a claim of setoff. On May 5, 2010, the parties entered into a Stipulation for Entry of Judgment. On May 11, 2010, the Court entered Judgment in accordance with the stipulation of the parties.

On May 17, 2010 the defendant filed its Motion for Costs and Fees together with its Memorandum of Costs and Fees and the affidavit of Erin Clark in support. The defendant seeks an award of attorney fees based on contract, *i.e.* paragraph 5 of the October 12, 1983 Agreement [the Agreement]. On May 25, 2010, the plaintiff filed his Memorandum and Affidavit of Costs, Disbursements and Attorney Fees. The plaintiff seeks an award of attorney fees pursuant to Idaho Code §§ 12-120, 12-121, and paragraph 5 of the Agreement. On May 27, 2010 the plaintiff filed his Objection to Defendant's Memorandum of Fees and Costs. The defendant did not file a specific objection to the Memorandum of Costs and Fees filed by the plaintiff.

II.

STANDARD

It is within the Court's discretion to determine the prevailing party, if any, and to award the amount of costs and attorney fees based on a reasoned analysis of the law with application to the outcome in a specific case and within the outer boundaries of this discretion. *Sanders v.*

Lankford, 134 Idaho 322, 1 P.3d 823 (Ct. App. 2000).

> B) Prevailing Party. In determining which party to an action is a prevailing party and entitled to costs, the trial court shall in its sound discretion consider the final judgment or result of the action in relation to the relief sought by the respective parties. The trial court in its sound discretion may determine that a party to an action prevailed in part and did not prevail in part, and upon so finding may apportion the costs between and among the parties in a fair and equitable manner after considering all of the issues and claims involved in the action and the resultant judgment or judgments obtained.

I.R.C.P. 54(d)(1)(B).

Attorney fees are awarded only when authorized by statute or contract. I.R.C.P. Rule 54(e)(1); *Heller v. Cenarrusa,* 106 Idaho 571, 578, 682 P.2d 524, 531 (1984). Therefore, it is the burden of the party requesting attorney fees to establish an underlying basis for such an award and the party requesting attorney fees is required to state the basis for such an award in the affidavit of counsel in support of such an award. I.R.C.P. Rule 54(e)(5); *Eighteen Mile Ranch, LLC v. Nord Excavating & Paving, Inc.,* 141 Idaho 716, 720-21, 117 P.3d 130, 134-35 (2005). Where a party is entitled to an award of attorney fees the amount of such an award is generally a matter of discretion for the trial court, taking into consideration the factors set forth in I.R.C.P. 54(e)(3). *Property Management West, Inc. v. Hunt*, 126 Idaho 897, 894 P.2d 130 (1995); *Daisy Mfg. Co., Inc. v. Paintball Sports, Inc.*, 134 Idaho 259, 999 P.2d 914 (Ct. App. 2000).

When a party fails to timely object to a request for attorney fees, the party waives the right to contest the amount of the fees requested, however, the failure to object to attorney fees when they are not authorized by statute or rule does not result in a waiver of the right to object to an improper award of attorney fees. *Allison v. John M. Biggs, Inc.,* 121 Idaho 567, 826 P.2d 916 (1992); *Fearless Ferris Wholesale, Inc., v. Howell,* 111 Idaho 132, 721 P.2d 731 (Ct. App. 1986). Further, where a party has failed to object to an award of costs or fees, the court still has the discretion to examine the amounts requested and the "court is permitted to examine the

reasonableness of the time and labor expended by the attorney under I.R.C.P. 54(e)(3)(A) and need not blindly accept the figures advanced by the attorney." *Craft Wall of Idaho, Inc. v. Stonebreaker,* 108 Idaho 704, 706, 701 P.2d 324, 326 (Ct. App. 1985).

Lastly, when a party has asserted multiple claims and seeks attorney fees pursuant to a statute or contract, it is the burden of the party requesting attorney fees to "isolate or separate the fees attributable" to either the contract or statute that authorizes an award of fees. *Weaver v. Searle Bros.,* 129 Idaho 497, 927 P.2d 887 (1996); *Brooks v. Gigray Ranches, Inc.,* 128 Idaho 72, 78-79, 910 P.2d 744, 750-751 (1996).

III.

ANALYSIS

A. Prevailing Party

The defendant obviously prevailed as to the Counts where the plaintiff sought a declaratory judgment concerning the enforcement of the Agreement, as well as the plaintiff's voting rights after execution of the Agreement. The plaintiff prevailed partially as to his overpayment of assessments and the parties stipulated to a setoff on the amended claim of setoff.

The determination of which party is a prevailing party is committed to the sound discretion of the trial court. *J.R. Simplot Co. v. Western Heritage Insurance Co.,* 132 Idaho 582, 977 P.2d 196 (1999); IRCP 54(d)(1)(B). In this regard, the Court recognizes that the issue of prevailing party is a matter of discretion and that the Court must act within the outer bounds of that discretion through an exercise of reason.

The Court notes that, effective July 1, 2004, Idaho Rule of Civil Procedure 54(d)(1)(B) was amended so that the court should take a "more global view of the case" in regards to its determination of the prevailing party. *Highlights of the 2004 Rule Changes,* Catherine Derden,

Staff Attorney, Idaho Supreme Court Rules Advisory Committee. "In determining which party prevailed in an action where there are claims and counterclaims between opposing parties, the court determines who prevailed 'in the action'. That is, the prevailing party question is examined and determined from the overall view, not a claim-by-claim analysis." *Jorgensen v. Coppedge,* 148 Idaho 536, 538, 224 P.3d 1125, 1127 (2010) (*citing, Eighteen Mile Ranch, LLC v. Nord Excavating & Paving, Inc.,* 141 Idaho 716, 719, 117 P.3d 130, 133 (2005)). However, the court would note for purposes of this analysis, that this case did not involve competing claims and counterclaims. All of the claims were asserted by the plaintiff and the defendant only defended against the claims of the plaintiff.

In this case, the plaintiff sought many forms of relief, most of which related to the enforceability of the 1983 Agreement, wherein the plaintiff combined two of his lots into a single lot. The plaintiff sought to challenge enforceability of the Agreement based on four (4) causes of action (Mutual Mistake; Lack of Consideration; Recession and Changed Circumstances). As to each of these causes of action, summary judgment was granted in favor of the defendant. In two causes of action for breach of contract and quasi estoppel, the plaintiff sought the right of two votes in concerns of association matter. As to each of these causes of action, summary judgment was granted in favor of the defendant. In one cause of action, the plaintiff sought reimbursement for an over payment of assessments that he had made since 1983 (in a sum less than $25,000.00). Subsequent to the Court's summary judgment decision, the plaintiff amended his complaint to seek the right of setoff as to future assessments of the association for those amounts that were barred by the statute of limitations. The Court granted summary judgment on the plaintiff's claim of reimbursement, to the extent that the amounts sought were not barred by the statute of limitations. The parties ultimately stipulated that the plaintiff was entitled recover

the sum of $3,000.00 from the defendant, plus $1,000.00 for prejudgment interest on the reimbursement claim and $17,000.00 on his claim of setoff.

It is clear to this Court that the enforceability of the Agreement was the impetus of this litigation, and that the causes of action based on voting rights and monetary damages were no more than a mere afterthought. Based on the analysis of the claims and defenses asserted by the respective parties, the Court finds that the defendant prevailed as to those claims directly or indirectly related to the Agreement, as well as its enforceability. As to the monetary claim of damages and setoff, the plaintiff and defendant each prevailed in part, in that the plaintiff sought to recover not more than $25,000.00 on his reimbursement claim, although a substantial portion of that claim was barred by the statue of limitations, but some was recoverable in terms of a setoff. Therefore, the plaintiff overall is the prevailing party as to his monetary claims and the defendant is the prevailing party as to those claims related to declaratory judgment. The Court will therefore determine that the plaintiff prevailed in part on its monetary claim of reimbursement and the defendant prevailed as to the declaratory judgment claims..

B. Costs as a Matter of Right

The plaintiff seeks to recover costs as a matter of right, consisting of his filing fee, service fees, and deposition costs for the total sum of $3,096.02. The defendant did not file a specific objection to the plaintiff's costs as a matter of right, however, the defendant seeks to recover costs as a matter of right for filing fees, service fees, deposition costs, and expert fees in the total sum of $7,026.53. As indicated above, this action was filed by the plaintiff for the primary purpose of having this Court set aside the Agreement. The costs incurred by the parties were directly related to the plaintiff's claim that the Agreement was not enforceable. Idaho Rule of Civil Procedure 54(d)(1)(A) provides that "Except when otherwise limited by these rules,

costs shall be allowed as a matter of right to the prevailing party or parties, unless otherwise ordered by the court." The defendant, for the reasons stated above, is entitled to recover its filing fees, service fees, and deposition costs in the total sum of $ 3,096.53. The Court will address the amounts sought for Linda Haavik, below.

The Court hereby denies costs as a matter of right for the plaintiff, on the basis that those costs were incurred for the primary purpose of setting aside the Agreement upon which the plaintiff did not prevail.

The defendant seeks to recover the sum of $3,930.00 as "expert witness cost" for Linda Haavik based on the provisions of paragraph 5 of the Agreement. For the reasons set forth in Section D.2. *infra*, paragraph 5 is not applicable to the recovery of fees or costs in this action. Further, pursuant to I.R.C.P. 54(d)(1)(C)(8), a party is only entitled to recover expert witness costs for an expert who "testifies at a deposition or at a trial." In this case the witness did not testify and therefore there is no basis, as a matter of right, to recover such costs. The expert witness cost is hereby denied.

The defendant is therefore awarded costs as a matter of right in the sum of $3,096.53 and the plaintiff's costs as a matter of right are denied.

C. Discretionary Costs

Both parties seek an award of discretionary costs. The discretionary costs sought by the plaintiff totals $30,165.70 and are directly related to the plaintiff's claim that the Agreement was not enforceable; there is no showing that those costs have any relationship to his monetary claim. The plaintiff is denied recovery of his discretionary costs because he did not prevail on the claim that they are related to.

The defendant seeks recovery of $962.90, which is described to be "Association

bookkeeper costs" incurred for the bookkeeper's services in "gathering documents and information requested" by the plaintiff. Discretionary costs are to only be awarded if they are "necessary and exceptional costs reasonably incurred." I.R.C.P. Rule 54(d)(1)(D). There is no showing that this cost is "exceptional" and therefore discretionary costs for defendant are denied.

D. Attorney Fees

1. Plaintiff's Attorney Fees

The plaintiff prevailed in part on his monetary claim for reimbursement and also prevailed on his "equitable claim" of offset. However there is no statute that authorizes the recovery of attorney fees based on an equitable setoff. As to the monetary claim, the plaintiff seeks attorney fees pursuant to Idaho Code § 12-120(1) which provides in part that, "in any action where the amount pleaded is twenty-five thousand dollars ($25,000) or less, there shall be taxed and allowed to the prevailing party, as part of the costs of the action, a reasonable amount to be fixed by the court as attorney's fees . . . ." As a condition for this award, "written demand for the payment of such claim must have been made on the defendant not less than ten (10) days before commencement of the action . . . ." The plaintiff apparently made a written demand for $25,000.00 or less at least 10 days prior to filing the complaint. However, the action, which consisted of eight (8) causes of action, had only one cause of action potentially covered by Idaho Code § 12-120(1). When a party has asserted multiple claims and seeks attorney fees pursuant to a statute or contract, it is the burden of the party requesting attorney fees to "isolate or separate the fees attributable" to either the contract or statute that authorizes an award of fees. *Weaver v. Searle Bros.*, 129 Idaho 497, 927 P.2d 887 (1996); *Brooks v. Gigray Ranches, Inc.*, 128 Idaho 72, 78-79, 910 P.2d 744, 750-51 (1996). The plaintiff would have this Court award one seventh (1/7) of his total attorney fees. However, the affidavit of counsel is conclusory and does not

contain sufficient detail to "isolate or separate the fees." It is clear to this Court that the overwhelming amount of the attorney fees were attributable to the claims upon which the plaintiff did not prevail or for which there is no basis for an award of fees. Further, the affidavit of counsel and the attorney time set forth in the invoices does not adequately separate the attorneys time as to the various claims to allow this court to make a reasoned determination as to the amount of attorney time expended on the "reimbursement claim".

The plaintiff also seeks an award of attorney fees based on paragraph 5 of the Agreement. However, the Agreement has no direct bearing on the issue of the plaintiff's monetary claim, nor does it address the assessments due and owing, and only deals with the combination of two lots. The assessments are governed by the CC&R's and the plaintiff has not asserted the provisions of the CC& R's as a basis for recovery.

Lastly, the plaintiff seeks recovery based on Idaho Code § 12-121. For the plaintiff to recover, he would have to prove that the defense of the monetary claim was frivolous, which is not the case since the defendant had a valid statute of limitations defense to the majority of the monetary claim and the plaintiff did not raise a setoff claim until late in this litigation and had not even demanded such prior to the commencement of the litigation.

Therefore the plaintiff's request for attorney fees is denied.

2. Defendant's Attorney Fees

The defendant seeks to recover attorney fees pursuant to paragraph 5 of the Agreement, which provides as follows:

> 5. Enforcement. The parties hereto agree that in the event litigation should be commenced or in the case of default in performance of any of the terms or conditions of this Agreement, the provisions can be enforced by specific performance, injunction or other equitable remedies provided by law, and the party adjudged by the Court to have been in default shall be responsible for the payment to the other of all costs and expenses of enforcement of this Agreement,

including reasonable attorney's fees.

Both parties agree that the interpretation of this provision is a matter of the law of contracts.

The interpretation of a contract begins with the language of the contract itself. *Cristo Viene Pentecostal Church v. Paz,* 144 Idaho 304, 308, 160 P.3d 743, 747 (2007). Any contract is to be construed to give effect to the intention of the parties. *Wing v. Martin,* 107 Idaho 267, 688 P.2d 1172 (1984). The intent of the parties should, if possible, be ascertained from the language contained in the written contract, because usually this represents the best evidence of the parties' intent. *Abel v. School Dist. No. 413,* 108 Idaho 982, 703 P.2d 1357 (Ct. App. 1985). If a contract's terms are "clear and unambiguous, the determination of the contract's meaning and legal effect are questions of law, and the meaning of the contract and intent of the parties must be determined from the plain meaning of the contract's own words." *City of Idaho Falls v. Home Indemnity Co.*, 126 Idaho 604, 607, 888 P.2d 383, 386 (1995) (internal citations omitted). The determination of whether a contract is ambiguous is dependent upon whether it is reasonably subject to conflicting interpretations. *Cristo Viene*, *supra.* Whether a contract is ambiguous is a question of law. *Potlatch Educational Assoc. v. Potlach School District No. 285,* 148 Idaho 630, 226 P.3d 1277 (2010). If the Court determines that a contract is ambiguous and the parties' mutual intent cannot be understood from the language of the contract, the intent of the parties then becomes a question for the trier of fact. *Farnsworth v. Dairymen's Creamery Ass'n.,* 125 Idaho 866, 870, 876 P.2d 148, 152 (Ct. App. 1994). However, when a contract provision is found by the Court to be ambiguous, the "determination of the parties intent is to be determined by looking at the contract as a whole, the language used in the document, the circumstances under which it was made, the objectives and purpose of the particular provision, and any construction placed upon it by the contracting parties as shown by their conduct and dealings." *J.R. Simplot v.*

Bosen, 144 Idaho 611, 614, 167 P.3d 748, 751 (2006).

The question for this Court is under what circumstances is a party entitled to an award of attorney fees or costs. The defendant argues that paragraph 5 is ambiguous by the use of the word "or" in the second sentence and that the agreement should be construed against the plaintiff as the drafter. The defendant would therefore have this Court construe paragraph 5 to mean that if either parties were to commence litigation, that the prevailing party would be entitled to attorney fees and costs and by necessity would have this Court ignore the term "default." The plaintiff on the other hand argues that the term default is not ambiguous, and paragraph 5 does not apply because he has never been in default, and he was not adjudged to have been in default.

This Court must find that an ambiguity is created in the second sentence of paragraph 5 by use of the word "or." While it is true it is not for this Court to rewrite the contract for the parties, it is the duty of this Court to determine the parties' intent. The Court must therefore look at the whole contract. In this regard, the contract provides, in essence, that the Association approved the plaintiff's development and in exchange for such approval the plaintiff agreed to combine his two lots as one and agreed not to split them in the future. The Agreement at paragraph 5 is entitled "Enforcement" and, given the objective and purpose of the agreement, it is clear that the parties intended a legal mechanism in the event that either party did not follow through with their obligations under the terms of the Agreement. For example, if the Association did not approve the development after execution of the agreement, it would have been in default, or if the plaintiff attempted to sell or develop two lots he would have been in default. The Agreement also provides that each party would have equitable remedies available to them to compel compliance with the terms of the Agreement. This Court must conclude that the parties intended that, after commencement of litigation, if one of the parties was "adjudged by a court to

have been in default", then the defaulting party would be responsible for the other party's "reasonable attorney fees." The term "default" has a plain and ordinary meaning: "The omission or failure to perform a legal or contractual duty" or the "to fail to perform a contractual obligation" *Black's Law Dictionary (8th ed. 2004).* The litigation over the Agreement did not allege that any party had failed to comply with its respective obligations or duties under the terms of the Agreement. Further, the Court did not "adjudge any party to be in default." This was not an action to "enforce the agreement" but was only an action to "determine or test the enforceability of the agreement". Given the nature of the litigation, the Agreement does not form the basis for an award of attorney fees. *See Thieme v. Worst,* 113 Idaho 455, 745 P.2d 1076 (Ct. App. 1987); *Bennett v. Bliss,* 103 Idaho 358, 647 P.2d 814 (Ct. App. 1982). Therefore, the defendant's request for attorney fees based on paragraph 5 of the Agreement must be denied.

The defendant also now seeks an award of attorney fees pursuant to the CC&R's. However, this was not specified in their original memorandum of fees and costs or the affidavit in support. As indicated above, the party requesting attorney fees is required to state the basis for such an award in the affidavit of counsel in support of such an award. I.R.C.P. Rule 54(e)(5); *Eighteen Mile Ranch, LLC v. Nord Excavating & Paving, Inc.,* 141 Idaho 716, 720-721, 117 P.3d 130, 134-135 (2005). Further, this action was not based on a violation of the CC&R's or the enforcement of the CC&R's. The action was based on an Agreement that was separate and apart from the CC&R's. Therefore, the defendant's request for attorney fees is denied.

IV.

CONCLUSION AND ORDER

For the reasons set forth above, the plaintiff's motion for attorney fees and costs is DENIED; the defendant's motion for costs as a matter of right in the sum of $3,096.53 is

GRANTED and defendant's motion for attorney fees and costs is otherwise DENIED.

IT IS SO ORDERED.

DATED this 15 day of July, 2010.

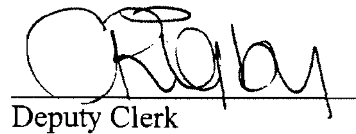
John K. Butler, District Judge

CERTIFICATE OF MAILING/DELIVERY

I, undersigned, hereby certify that on the 19 day of July, 2010, a true and correct copy of the foregoing MEMORANDUM DECISION RE: ATTORNEY FEES AND COSTS was mailed, postage paid, and/or hand-delivered to the following persons:

Fritz X. Haemmerle
Attorney at Law
P.O. Box 1800
Hailey, Idaho 83333

Edward A. Lawson
Attorney at Law
P.O. Box 3310
Ketchum, Idaho 83340



Deputy Clerk

ORIGINAL

FILED A.M. P.M. 1322

AUG 12 2010

Jolynn Drage, Clark District Court Blaine County, Idaho

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

THOMAS WEISEL, a married man dealing in his sole and separate property,

Plaintiff,

vs.

BEAVER SPRINGS OWNERS ASSOCIATION, INC., an Idaho corporation

Defendant.

Case No. CV-09-124

AMENDED JUDGMENT

This matter came on for hearing on February 16, 2010, before the Honorable John K. Butler on the cross motions for summary adjudication. Fritz X. Haemmerle of Haemmerle & Haemmerle appeared on behalf of the plaintiff, Thomas Weisel. Edward A. Lawson and Erin F. Clark of Lawson Laski Clark & Pogue, PLLC appeared on behalf of the defendant, Beaver Spring Owners Association, Inc.

On May 11, 2010, the Court Court entered Judgment in favor of Plaintiff on Count VI of his Complaint in the amount of $3,000.00, together with prejudgment interest thereon in the amount of $1,000.00, for a total of $4,000.00. The Court also entered Judgment in favor of Plaintiff on Count VIII of his second amended complaint and declared that plaintiff has the equitable right of offset against sums due the defendant, if any, in the amount of $17,000.00.

On July 6, 2010, the Court conducted a hearing on the parties cross motions for attorney

fees and costs. Upon considering the evidence and arguments of counsel, the Court denied Plaintiff's motion for attorneys' fees and costs and granted Defendant's motion for costs as a matter of right in the sum of $3,096.53. The Court denied the remainder of Defendant's motion for attorneys' fees and costs. As a result, the May 11, 2010 Judgment is hereby amended, pursuant to which it is:

HEREBY ORDERED, ADJUDGED AND DECREED, as follows:

1) Plaintiff is awarded judgment on Count VI of his Complaint against defendant, Beaver Spring Owners Association, Inc. in the amount of $3,000.00, together with prejudmgnet interest thereon in the amount of $1,000.00, for a total of $4,000.00.

2) Defendant is awarded costs against plaintiff Thomas Weisel in the amount of $3,096.53.

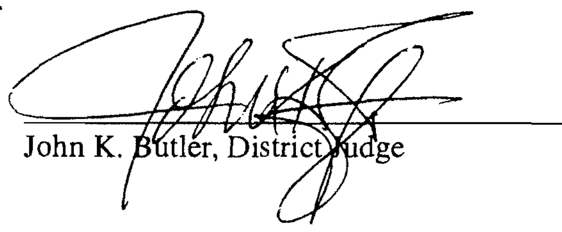
3) Therefore, plaintiff is awarded the total sum of $903.47 against defendant.

4) Plaintiff is awarded judgment on Count VIII of his second amended complaint against defendant, Beaver Spring Owners Association, Inc. and thereby it is hereby declared that plaintiff has the equitable right of offset against sums due the defendant, if any, in the amount of $17,000.00.

5) The written agreement ("Agreement") between plaintiff and defendant, dated October 12, 1983 and recorded in the records of Blaine County, Idaho as Instrument No. 246208, was not entered into based on a mutual mistake of fact, is supported by consideration and is otherwise valid and enforceable. Accordingly plaintiff's lots 13 and 14, as more particularly described in the Agreement, remain unified as a single lot and plaintiff is responsible for one annual assessment and has one vote on matters to be voted upon by members of the Beaver Spring Owners' Association.

6) Except as otherwise provided in paragraph 1 above, Plaintiff's complaint is hereby dismissed in its entirety and plaintiff shall take nothing thereby.

DATED this 11 day of August 2010.



John K. Butler, District Judge

CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12 day of Aug. 2010, I caused to be served a true copy of the foregoing document by the method indicated below, and addressed to each of the following:

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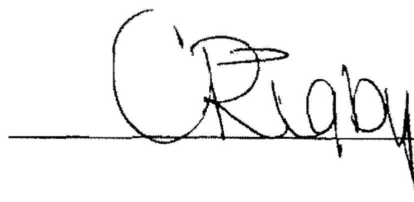

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ISB # 3862

Attorneys for Plaintiff/Appellant.

FILED A.M. P.M.
SEP 24 2010
Jolynn Drage, Clerk District Court Blaine County, Idaho

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

THOMAS WEISEL, a married man dealing in his sole and separate property,

Plaintiff/Appellant,

vs.

BEAVER SPRINGS OWNERS ASSOCIATION, INC., an Idaho corporation,

Defendant/Respondent.

Supreme Court Case No. 37800

District Case No. CV-09-124

OBJECTION TO AND REQUEST FOR CORRECTION OF CLERK'S RECORD

On the 1st day of September, 2010, Appellant was served with a copy of the Clerk's Record on appeal in this case. After reviewing the Record, pursuant to Idaho Appellate Rule 29(a), the above-named Appellant, Thomas Weisel, by and through his attorney of record, Fritz X. Haemmerle, objects to and requests correction of the Clerk's Record prepared in this case in the

following respects:

1. On the Caption, the wrong Judge is listed. The appeal is from decisions of Judge K. Butler, not Robert J. Elgee.

2. Volume 4 of 6, p. 718-723 – The original aerial photos were large size photos. In the record they are only 8½ x 11 copies and are difficult to decipher. Appellant requests that pp. 718-723 be replaced with copies that are the same size as the original aerial photos.

3. Volume 4 of 6, p. 716 refers to Exhibit 9, Garth McClure's curriculum vitae, attached to his affidavit. Exhibit 9 is not included in the Record.

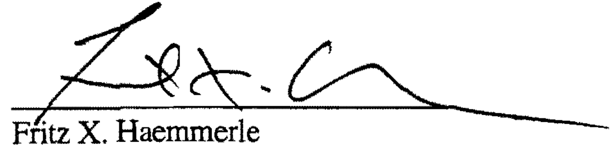
4. Volume 4 of 6, p. 737 - Appendix A to Exhibit 6 of Garth McClure's Affidavit – This page is not copied correctly in the copy of the Record served on Appellant. Appendix A was a landscape sized spreadsheet that included 18 columns. The one in the copy of the Record that was served on Appellant has only 7 columns. The middle 11 columns are not included in the service copy of the Record.

5. Volume 4 of 6, p. 739 - Appendix B to Exhibit 6 of Garth McClure's Affidavit – This page is not copied correctly in the copy of the Record served on Appellant. Appendix A was a landscape sized spreadsheet that included 18 columns. The one in the copy of the Record that was served on Appellant has only 7 columns. The middle 11 columns are not included in the service copy of the Record.

Pursuant to I.A.R. 29(a), this Objection and Request for Correction of Clerk's Record is filed within 28 days of service of the Record, and a notice of hearing in the District Court is filed with this Objection and Request.

DATED this 24th day of September, 2010.

HAEMMERLE & HAEMMERLE, PLLC

By: 
Fritz X. Haemmerle

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of September, 2010, I served a true and correct copy of the within and foregoing document upon the attorney(s) named below in the manner noted:

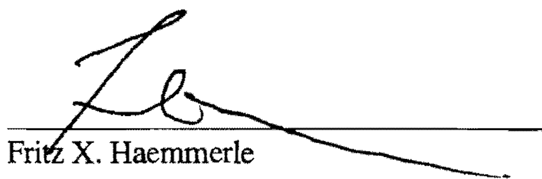
Ed Lawson
Erin Clark
LAWSON, LASKI, CLARK & POGUE, P.L.L.C.
P.O. Box 3310
Ketchum, ID 83340

Blaine County District Court Clerk
206 1st Avenue S, Ste 200
Hailey, Idaho 83333

X — By depositing copies of the same in the United States Mail, postage prepaid, at the post office at Hailey, Idaho.

_____ By hand delivering copies of the same to the office of the attorney(s) at his offices in Hailey, Idaho.

_____ By telecopying copies of same to said attorney(s) at the telecopier number _____________, and by then mailing copies of the same in the United States Mail, postage prepaid, at the post office at Hailey, Idaho.



Fritz X. Haemmerle

ORIGINAL

FRITZ X. HAEMMERLE
HAEMMERLE & HAEMMERLE, P.L.L.C.
400 South Main St., Suite 102
P.O. Box 1800
Hailey, ID 83333
tel: (208) 578-0520
FAX: (208) 578-0564
ISB # 3862

Attorneys for Plaintiff/Appellant.

FILED A.M. P.M. 2:18
SEP 24 2010
Jolynn Drage, Clerk District Court Blaine County, Idaho

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

THOMAS WEISEL, a married man dealing in his sole and separate property, Plaintiff/Appellant, vs. BEAVER SPRINGS OWNERS ASSOCIATION, INC., an Idaho corporation, Defendant/Respondent.	Supreme Court Case No. 37800 District Case No. CV-09-124 NOTICE OF HEARING

TO: CLERK OF THE COURT

YOU WILL PLEASE TAKE NOTICE that on October 19, 2010, at 3:00 p.m., or as soon thereafter as counsel can be heard, in the Blaine County Courthouse, Hailey, Idaho, the attorney for the named Defendant will call his Objection to the Clerk's record on Appeal.

DATED this 24 day of September, 2010.

HAEMMERLE & HAEMMERLE

By:
Fritz X. Haemmerle

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24 day of September, 2010, I caused to be served a true copy of the foregoing document by the method indicated below, and addressed to each of the following:

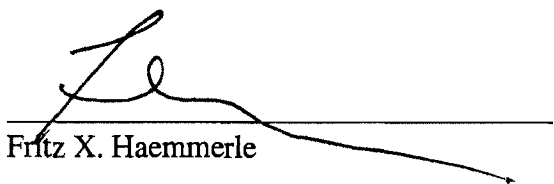
Ed Lawson
Erin Clark
LAWSON, LASKI, CLARK & POGUE, P.L.L.C.
P.O. Box 3310
Ketchum, ID 83340

Blaine County District Court Clerk
206 1st Avenue S, Ste 200
Hailey, Idaho 83333

__X__ By depositing copies of the same in the United States Mail, postage prepaid, at the post office at Hailey, Idaho.

_____ By hand delivering copies of the same to the office of the attorney(s) at his offices in Hailey, Idaho.

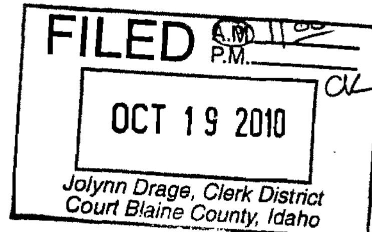
_____ By telecopying copies of same to said attorney(s) at the telecopier number __________________, and by then mailing copies of the same in the United States Mail, postage prepaid, at the post office at Hailey, Idaho.



Fritz X. Haemmerle

Edward A. Lawson, Esq. ISB 2440
Erin F. Clark, Esq. ISB 6504
LAWSON LASKI CLARK & POGUE, PLLC
675 Sun Valley Road, Suite A
Post Office Box 3310
Ketchum, Idaho 83340
Telephone: (208) 725-0055
Facsimile: (208) 725-0076

Attorneys for Defendant
Beaver Springs Owners Association, Inc.



IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

THOMAS WEISEL, a married man dealing in his sole and separate property,

Plaintiff,

vs.

BEAVER SPRINGS OWNERS ASSOCIATION, INC., an Idaho corporation

Defendant.

Case No. CV-09-124

DEFENDANT'S NON-OPPOSITION TO PLAINTIFF'S OBJECTION TO AND REQUEST FOR CORRECTION OF CLERK'S RECORD

COMES NOW Defendant Beaver Springs Owners Association, Inc., by and through its counsel of record, Lawson Laski Clark & Pogue, PLLC, hereby states that it has no opposition to Plaintiff's Objection to and Request for Correction of Clerk's Record.

DATED this 19 day of October, 2010.

LAWSON LASKI CLARK & POGUE, PLLC

By: [signature]
Edward A. Lawson
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of October, 2010, I caused to be served a true copy of the foregoing document by the method indicated below, and addressed to each of the following:

Fritz X. Haemmerle, Esq.
Haemmerle & Haemmerle, PLLC
400 South Main Street, Suite 102
PO Box 1800
Hailey, ID 83333

____ U.S. Mail, Postage Prepaid
____ Hand Delivered
____ Overnight Mail
__✓__ Telecopy – (208) 578-0564

Edward A. Lawson

FILED A.M. 10:47 P.M.
DEC - 1 2010
Jolynn Drage, Clerk District Court Blaine County, Idaho

FIFTH JUDICIAL DISTRICT COURT, STATE OF IDAHO
IN AND FOR THE COUNTY OF BLAINE
201 2ND AVENUE SOUTH, SUITE 106
HAILEY, IDAHO 83333

Thomas Wilson Weisel)
) Case No: CV-2009-0000124
vs.)
) **NOTICE OF HEARING**
Beaver Springs Owners Association, Inc., ID Corp.)

NOTICE IS HEREBY GIVEN that the above-entitled case is hereby set for:

Status	Tuesday, December 07, 2010	01:30 PM
Judge:	John K Butler	
Courtroom:	District Courtroom-judicial Bldg	

***PARTIES REQUESTING TO APPEAR VIA TELEPHONE CONFERENCE MUST GET COURT APPROVAL PRIOR TO THE HEARING DATE**

ALTERNATE JUDGES: Notice is hereby given that the presiding judge assigned to this case intends to utilize the provisions of I.R.C.P. 40(d)(1)(G). Notice is also given that if there are multiple parties, any disqualification pursuant to I.R.C.P. 40(d)(1)(A) is subject to a prior determination under I.R.C.P. 40(d)(1)(C). The panel of alternate judges consists of the following judges who have otherwise not been disqualified in this action: Judges Bevan, Brody, Butler, Crabtree, Elgee, Stoker, Wildman, Higer, Hurlbutt, Meehl, St. Clair and Wood.

I hereby certify that the foregoing is a true and correct copy of this Notice of Hearing entered by the Court and on file in this office. I further certify that copies of this Notice were served as follows on December 1st, 2010.

Copy to: Edward A. Lawson P.O. Box 3310, Ketchum, ID, 83340 (Defense Attorney);
Copy to: Fritz X. Haemmerle Po Box 1800, Hailey, ID, 83333 (Plaintiff Attorney)

✓ Mailed ____ Hand Delivered

Dated: December 1st, 2010
JoLynn Drage
Clerk Of The District Court

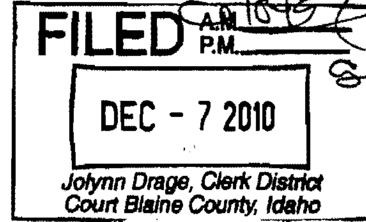
By: [signature]
Deputy Clerk

DOC22cv 7/96

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

THOMAS WEISEL, a married man dealing in his sole and separate property, **Plaintiff,** vs. **BEAVER SPRINGS OWNERS ASSOCIATION, INC., an Idaho corporation,** **Defendant.**	**Case No. CV-09-124** **ORDER GRANTING OBJECTION TO AND REQUEST FOR CORRECTION OF CLERK'S RECORD**



On September 24, 2010, the Plaintiff/Appellant, Thomas Weisel, by and through Fritz X. Haemmerle of Haemmerle & Haemmerle, PL.L.C., filed his Objection to and Request for Correction of Clerk's Record ("Motion"). On October 19, 2010, the Defendant/Respondent, Beaver Springs Owners Association, Inc., by and through its counsel, Edward A Lawson of Lawson Laski Clark & Pogue, PLLC, filed a Non-Opposition to Plaintiff's Objection and Request for Correction of Clerk's Record. Based on the non-opposition to the Motion; now therefore

1. IT IS HEREBY ORDERED THAT the Objection to the Clerk's Record is GRANTED, and that the record be corrected as set forth in the Motion, specifically:

   a. Volume 4 of 6, p. 718-723 – The original aerial photos were large size photos. In the record they are only 8½ x 11 copies and are difficult to decipher. Appellant requests that pp. 718-723 be replaced with copies

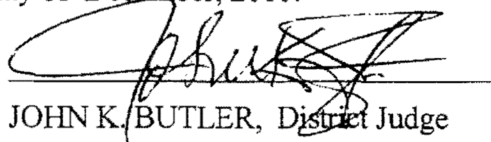
that are the same size as the original aerial photos.

b. Volume 4 of 6, p. 716 refers to Exhibit 9, Garth McClure's curriculum vitae, attached to his affidavit. Exhibit 9 is not included in the Record.

c. Volume 4 of 6, p. 737 - Appendix A to Exhibit 6 of Garth McClure's Affidavit – This page is not copied correctly in the copy of the Record served on Appellant. Appendix A was a landscape sized spreadsheet that included 18 columns. The one in the copy of the Record that was served on Appellant has only 7 columns. The middle 11 columns are not included in the service copy of the Record.

d. Volume 4 of 6, p. 739 - Appendix B to Exhibit 6 of Garth McClure's Affidavit – This page is not copied correctly in the copy of the Record served on Appellant. Appendix A was a landscape sized spreadsheet that included 18 columns. The one in the copy of the Record that was served on Appellant has only 7 columns. The middle 11 columns are not included in the service copy of the Record.

DATED this 7 day of December, 2010.



JOHN K. BUTLER, District Judge

CERTIFICATE OF SERVICE

I hereby certify that on the 7 day of December, 2010, I served a true and correct copy of the within and foregoing document upon the attorney(s) named below in the manner noted:

Fritz X. Haemmerle
HAEMMERLE & HAEMMERLE, P.L.L.C.
P.O. Box 1800
Hailey, ID 83333

Ed Lawson
Erin Clark
LAWSON, LASKI, CLARK & POGUE, P.L.L.C.
P.O. Box 3310
Ketchum, ID 83340

____ By depositing copies of the same in the United States Mail, postage prepaid, at the post office at Hailey, Idaho.

____ By hand delivering copies of the same to the office of the attorney(s) at his offices in Hailey, Idaho.

X By telecopying copies of same to said attorney(s) at the telecopier number 725-0076, 578-0564 and by then mailing copies of the same in the United States Mail, postage prepaid, at the post office at Hailey, Idaho.

____
Clerk

A cert copy Supreme Court

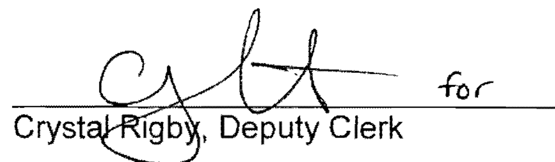
EXHIBIT LIST

Plaintiff's Exhibits:

Deposition of Thomas Weisel
Deposition of James McLaughlin
Deposition of Phillip Ottley
Deposition of Robert Smith
Deposition of Jean Smith
Deposition of William Fruehling
Deposition of Jim Dutcher

.

Dated this 1 day of September, 2010.



Crystal Rigby, Deputy Clerk

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

THOMAS WEISEL, a married man Dealing in his sole and separate property,

Plaintiff/ Appellant

vs.

BEAVER SPRINGS OWNERS ASSOCIATION, INC., an Idaho Corporation,

Defendants/ Respondent.

Supreme Court No. 37800

CLERK'S CERTIFICATE

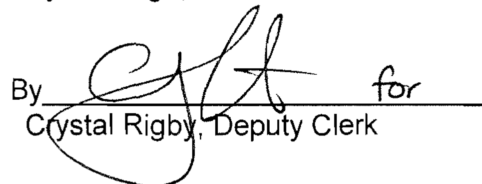
STATE OF IDAHO)
) ss.
County of Blaine)

I, Crystal Rigby, Deputy Clerk of the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Blaine, do hereby certify that the above and foregoing Clerk's Record on Appeal was compiled and bound under my direction and is a true, full and correct Record of the pleadings and documents as are automatically required under Rule 28 of the Idaho Appellate Rules as well as those requested by the Appellant.

I do further certify that all exhibits offered or admitted in the above-entitled cause and exhibits requested by the Appellant will be duly lodged with the Clerk of the Supreme Court along with the Clerk's Record on Appeal and the Court Reporter's Transcript on Appeal.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Hailey, Idaho, this 1 day of September, 2010.

Jolynn Drage, Clerk of the Court



By ____ for
Crystal Rigby, Deputy Clerk

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

THOMAS WEISEL, a married man Dealing in his sole and separate property,	)	Supreme Court No. 37800
Plaintiff/ Appellant	)	CERTIFICATE OF SERVICE
vs.	)	
BEAVER SPRINGS OWNERS ASSOCIATION, INC., an Idaho Corporation,	)	
Defendants/ Respondent.	)	

I, Crystal Rigby, Deputy Clerk of the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Blaine, do hereby certify that I have personally served or mailed, by United States mail, one copy of the Clerk's Record and Reporter's Transcript to each of the Attorneys of Record in this cause as follows:

Fritz Haemmerle PO Box 1800 Hailey, ID 83333	Edward Lawson P.O. Box 36310 Ketchum, ID 83340
Plaintiff / Appellant	Defendant / Respondent

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court this 1 day of September, 2010.

JOLYNN DRAGE, Clerk of the Court
By ______ for
Crystal Rigby, Deputy Clerk