

5-3-2013

ABC Agra v. Critical Access Group Clerk's Record Dckt. 40573

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IN THE SUPPREME COURT OF THE STATE OF IDAHO

ABC AGRA, LLC, an Idaho limited liability)
company)
)
Plaintiff/Appellant,)
)
vs.)
)
CRITICAL ACCESS GROUP, INC.,)
an Minnesota non-profit corporation,)
)
Defendant/Appellant.)
_____)

CLERK'S RECORD ON APPEAL

Supreme Court Docket No. 40573-2012

Fifth Judicial District
Jerome County

Honorable Robert Elgee
District Judge

Gary Slette
P.O. Box 1906
Twin Falls, ID 83303-1906

Attorneys for Appellant

Patrick Miller/Martin Hendrickson
P.O. Box 2720
Boise, ID 83701-2720

Attorney for Respondents

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Other Claims

| Date | | Judge |
|-----------|--|----------------|
| 5/11/2012 | New Case Filed | John K. Butler |
| | Filing: A - All initial civil case filings of any type not listed in categories B-H, or the other A listings below Paid by: Slette, Gary D. (attorney for Abc Agra, LLC,) Receipt number: 1204468 Dated: 5/11/2012 Amount: \$88.00 (Check) For: Abc Agra, LLC, (plaintiff) | John K. Butler |
| | Complaint for Declaratory Relief Filed | John K. Butler |
| | Summons Issued - Returned to Slette for Service | John K. Butler |
| 5/15/2012 | Acceptance Of Service | John K. Butler |
| | Summons Returned----faxed copy | John K. Butler |
| 6/4/2012 | Filing: I1 - Initial Appearance by persons other than the plaintiff or petitioner Paid by: Hendrickson, Martin C. (attorney for Critical Access Group, Inc,) Receipt number: 1205430 Dated: 6/7/2012 Amount: \$58.00 (Check) For: Critical Access Group, Inc, (defendant) | John K. Butler |
| | Motion to dismiss complaint | John K. Butler |
| | Memorandum in support of motion to dismiss complaint | John K. Butler |
| 6/5/2012 | Notice Of Hearing | John K. Butler |
| | Hearing Scheduled (Motion to Dismiss 07/02/2012 01:30 PM) | John K. Butler |
| 6/7/2012 | Motion for disqualification. | John K. Butler |
| 6/13/2012 | plaintff's response memorandum in opposition to motion to dismiss complaint | John K. Butler |
| | Plaintiff's motion for summary judgment | Robert Elgee |
| 6/14/2012 | Order of disqualification. | John K. Butler |
| 6/18/2012 | Order of assignment. | John K. Butler |
| | Change Assigned Judge | Robert Elgee |
| 6/27/2012 | Continued (Motion to Dismiss 07/02/2012 02:00 PM) to be held in Blaine county by phone | Robert Elgee |
| | Amended Notice Of Hearing | Robert Elgee |
| | Reply memorandum in support of motion to dismiss complaint. | Robert Elgee |
| 6/29/2012 | Withdrawal of Plaintiff's Motion for Summary Judgment | Robert Elgee |
| 7/2/2012 | Hearing result for Motion to Dismiss scheduled on 07/02/2012 02:00 PM: Hearing Held to be held in Blaine county by phone | Robert Elgee |
| | Court has taken case under advisement until 7-28-12 | Robert Elgee |
| 7/18/2012 | Plaintiff's second memorandum in opposition to motion to dismiss complaint | Robert Elgee |
| | Post hearing Brief in support of motion to dismiss complaint. | Robert Elgee |
| 7/27/2012 | Plaintiff's Reply Brief in Opposition to Motion to Dismiss Complaint | Robert Elgee |
| | Defendan'ts Reply to plaintiff's second memorandum in oppositin to motion to dismiss complaint. | Robert Elgee |
| 9/7/2012 | Memorandum decision on motion to dismiss | Robert Elgee |
| | Defense counsel to prepare order for the court to sign. | Robert Elgee |
| 10/3/2012 | Judgment - copy to Elgee | Robert Elgee |

Other Claims

| Date | | Judge |
|------------|--|--------------|
| 10/3/2012 | Civil Disposition entered for: Critical Access Group, Inc., Defendant; ABC Agra, LLC., Plaintiff. Filing date: 10/3/2012 | Robert Elgee |
| 10/16/2012 | defendant's memorandum of costs and atty fees with supporting statment | Robert Elgee |
| | Affidavit of martin C Hendrickson in support of defendant's memorandum of csots and atty's fees with supporting statement. | Robert Elgee |
| | Affidavit of Patrick J Miller in support of defendant's memorandum of costs and atty's fees fees with supporting statement. | Robert Elgee |
| 10/19/2012 | plaintiff's motion to disallow part of defendant's request for atty fees | Robert Elgee |
| | Memorandum in support of plaintiff's motin to disallow part of defendant's request for atty fees | Robert Elgee |
| | Affidavit of Gary D Slette in support of plaintiff's motion to disallow part of defendant's request for atty fees | Robert Elgee |
| 10/26/2012 | Memorandum in opposition to motion to disallow. | Robert Elgee |
| 11/13/2012 | Filing: L4 - Appeal, Civil appeal or cross-appeal to Supreme Court Paid by: Slette, Gary D. (attorney for ABC Agra, LLC,) Receipt number: 1210285 Dated: 11/13/2012 Amount: \$109.00 (Check) For: ABC Agra, LLC, (plaintiff) | Robert Elgee |
| | Bond Posted for Transcript (Receipt 1210286 Dated 11/13/2012 for 100.00) | Robert Elgee |
| | Notice of appeal | Robert Elgee |
| | Appealed To The Supreme Court | Robert Elgee |
| 11/16/2012 | Notice Of Hearing | Robert Elgee |
| 11/20/2012 | Amended Notice Of Hearing | Robert Elgee |
| 11/21/2012 | Hearing Scheduled (Motion for Attorney fees and Costs 12/12/2012 02:00 PM) | Robert Elgee |
| 12/12/2012 | Court Minutes | Robert Elgee |
| | Hearing type: Motion for Attorney fees and Costs | |
| | Hearing date: 12/12/2012 | |
| | Time: 2:00 pm | |
| | Courtroom: | |
| | Court reporter: Sue Israel | |
| | Minutes Clerk: Shelly Creek | |
| | Tape Number: | |
| | Gary Slette via telephone | |
| | Martin Hendrickson via telephone | |
| | Hearing result for Motion for Attorney fees and Costs scheduled on 12/12/2012 02:00 PM: District Court Hearing Held | Robert Elgee |
| | Court Reporter: Sue Israel | |
| | Number of Transcript Pages for this hearing estimated: to be held by phone | |
| | Mr. Hendrickson to submit appropriate order | Robert Elgee |
| 1/9/2013 | Order awardomg atty's fees and costs. | Robert Elgee |
| 1/22/2013 | Amended Judgment | Robert Elgee |
| 1/24/2013 | Miscellaneous Payment: For Certifying The Same Additional Fee For Certificate And Seal Paid by: Givens Pursley LLP Receipt number: 1300684 Dated: 1/24/2013 Amount: \$2.50 (Check) | Robert Elgee |

1 **Gary D. Slette**
2 ROBERTSON & SLETTE, PLLC
3 P.O. Box 1906
4 Twin Falls, Idaho 83303-1906
5 Telephone: (208) 933-0700
6 Facsimile: (208) 933-0701
7 ISB # 3198
8 \\rlm\litigation\complaint decl relief_ABC

2017 FEB 11 9 13 AM
Michelle Emerson

CLERK
BY *P. Bogue*
DEPUTY CLERK

8 IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
9 STATE OF IDAHO, IN AND FOR THE COUNTY OF JEROME

10 *****

11 ABC AGRA, LLC, an Idaho limited)
12 Liability company,)
13 Plaintiff,)
14)
15 v.)
16 CRITICAL ACCESS GROUP, INC.,)
17 A Minnesota non-profit corporation,)
18 Defendant.)
19 _____)

Case No. CY-2012-513

COMPLAINT FOR DECLARATORY
RELIEF

Fee: \$88.00
Fee Category: A

20 COMES NOW the Plaintiff, and for a cause of action, alleges as follows:

21 PARTIES

22 1. Plaintiff ABC Agra, LLC ("ABC"), is an Idaho limited liability company with its
23 principal place of business in Jerome County, Idaho. ABC is the developer of certain real property
24 known as Crossroads Point Business Center PUD, as shown on the recorded plat ("Plat") thereof,
25 and which is recorded as Instrument No. 2063855 in the records of Jerome County, Idaho. ABC
26 owns real property located therein, and is a party interested under a written contract as set forth
herein.

1 2. CAG is a Minnesota non-profit corporation owned by or affiliated with Essentia
2 Health ("Essentia"), which is also a Minnesota non-profit corporation. Both corporations are
3 active and in good standing in the state of Minnesota, and both corporations have registered office
4 addresses at 502 East Second Street in Duluth, Minnesota. See **Exhibits "A" and "B"** attached
5 hereto.

6 3. Defendant Critical Access Group, Inc. ("CAG") is a Minnesota non-profit corporation
7 that currently owns Lots 6, 7, 8 in Block 8 of Crossroads Point Business Center PUD Phase 1,
8 Jerome County, Idaho ("Subject Property"), as shown on the Plat thereof. CAG acquired its
9 property from St. Benedict's Family Medical Center, Inc. ("St. Benedict's") pursuant to a General
10 Warranty Deed recorded on October 3, 2011, as Instrument No. 2114629, in the records of Jerome
11 County, Idaho. A copy of said General Warranty Deed is attached hereto as **Exhibit "C"**.

12 JURISDICTION AND VENUE

13 4. This cause of action involves a claim for declaratory relief.

14 5. Venue in the Fifth District Court in and for the County of Jerome is proper.

15 FACTS

16 6. On or about March 14, 2007, St. Benedict's and St. Alphonsus Regional Medical
17 Center, Inc. ("St. Alphonsus") executed the Option Agreement (the "Option Agreement"), a true
18 copy of which is attached hereto as **Exhibit "D"**, and by this reference incorporated herein.
19 Pursuant to Recital "B" thereof, St. Alphonsus assigned all of its right in and to that Option
20 Agreement and the Subject Property to St. Benedict's. St. Alphonsus has no interest in the Subject
21 Property.

22 7. St. Benedict's at all times prior to the execution of the Option Agreement represented
23 to ABC that it would build a new hospital on the Subject Property. See documents attached hereto
24 as **Exhibit "E"**.

25 8. In order to facilitate St. Benedict's plan to build a new hospital on the Subject
26 Property, the Option Agreement contemplated that ABC would gift Lots 7 and 8 of the Subject
Property to St. Benedict's if St. Benedict's exercised its option to purchase the 8.89 acres of
property within Lot 6 of the Subject Property. Lot 7 contained 10.09 acres, and Lot 8 contained
11.55 acres.

9. A restrictive covenant in the Option Agreement contemplated that in the event the

1 Option was exercised, the Subject Property could only be used by St. Benedict's, or its successors
2 and assigns, for healthcare facilities. See paragraphs 4 and 14 of the Option Agreement. Notice of
3 the Option Agreement relative to the Subject Property was recorded as hereinafter set forth.

4 10. On May 14, 2007, St. Benedict's exercised its option. See **Exhibit "F"** attached
5 hereto, and made a part hereof by this reference. St. Benedict's purchased Lot 6 of the Subject
6 Property, and contemporaneously therewith, ABC honored its contract and executed a Gift Deed
7 conveying Lots 7 and 8 of the Subject Property to St. Benedict's. See **Exhibit "G"** attached
8 hereto, and made a part hereof by this reference.

9 11. In the event that St. Benedict's exercised its option, paragraph 4 of the Option
10 Agreement required ABC to execute a restrictive covenant applicable to all property within the
11 Crossroads Point Business Center PUD prohibiting the provision of healthcare services in
12 healthcare facilities on any other property in the Plat without the prior written permission of St.
13 Benedict's.

14 12. ABC and St. Benedict's undertook to draft the restrictive covenant contemplated by
15 paragraph 4 of the Option Agreement. At all times during the negotiations, St. Benedict's was
16 represented by the law firm of Givens Pursley LLP ("Givens").

17 13. Counsel for ABC completed an initial draft of a Supplemental Declaration of
18 Covenants, Conditions and Restrictions of Crossroads Point Business Center PUD
19 ("Supplemental Declaration"), and provided it for review to Judson Montgomery, an attorney with
20 Givens who was representing St. Benedict's.

21 14. The Supplemental Declaration drafted by ABC contemplated a list of medical uses in
22 order to define the term "healthcare services" that could be placed within healthcare facilities on
23 the Subject Property.

24 15. In response to the proposal submitted by ABC, Judson Montgomery of Givens sent a
25 facsimile letter to ABC which is attached hereto as **Exhibit "H"**, and by this reference
26 incorporated herein. For purposes of defining what could be constructed as a healthcare facility,
Mr. Montgomery eliminated all of ABC's proposed restrictions, and instead, substituted the
language of "private practice of medicine for the care and treatment of human beings" for the
definition of healthcare uses in a healthcare facility.

16. ABC agreed to St. Benedict's revisions as proposed, and on June 13, 2007, the

1 Supplemental Declaration was recorded in Jerome County, as Instrument No. 2073551, a true
2 copy of which is attached hereto as **Exhibit "I"**, and incorporated herein by this reference.

3 17. As referenced in paragraph 3 above, on October 3, 2011, St. Benedict's conveyed all
4 three lots of the Subject Property to Critical Access Group, Inc. ("CAG") pursuant to the General
5 Warranty Deed attached hereto as Exhibit "A". Notice of the Option Agreement had previously
6 been recorded in Jerome County by ABC in a Memorandum of Option Agreement recorded on
7 June 29, 2011, as Instrument No. 2113149, a true copy of which is attached hereto as **Exhibit**
8 **"J"**, and incorporated herein by this reference. Such notice was identified as a permitted
9 exception to the deed of the Subject Property to CAG from St. Benedict's.

10 18. St. Benedict's was previously owned by Benedictine Health Systems ("BHS"), which
11 is also a Minnesota non-profit corporation with a registered office address in Duluth, Minnesota.
12 Subsequently, BHS transferred its interest in St. Benedict's to Essentia, which also owns or is
13 affiliated with CAG. On October 4, 2011, one day after the Subject Property was recorded in
14 favor of CAG, the St. Benedict's name was changed to St. Luke's Jerome, Ltd.

15 19. CAG is either an affiliate or subsidiary of Essentia, and was at all times aware and had
16 actual notice of the restrictive covenant contained in the Option Agreement which provided that
17 the Subject Property could only be used for healthcare facilities.

18 20. ABC is a "person" interested under a written contract whose rights or status would be
19 affected if a use other than healthcare facilities was constructed on the Subject Property.

20 21. Pursuant to the clear and unambiguous language of the Option Agreement, only
21 healthcare facilities are allowed to be constructed on the Subject Property, unless and until the
22 parties, or their successors, agree to a written amendment thereof.

23 22. On January 30, 2012, counsel for ABC sent a letter to CAG in Duluth, Minnesota,
24 advising its president, Daniel McGinty, of the restrictions as to healthcare facilities on the Subject
25 Property consistent with the definition that had been provided by CAG's attorneys at the Givens
26 firm. See **Exhibit "K"** attached hereto, and made a part hereof by reference.

23 23. Daniel McGinty of CAG is the same individual to whom Arlen Crouch of ABC
24 corresponded with concerning a transfer of the Option Agreement to BHS on January 23, 2007.
25 See **Exhibit "L"** attached hereto, and made a part hereof by reference.

26 24. On February 9, 2012, the Givens firm responded to the letter sent to CAG and stated:

1 I was also asked to confirm that CAG is aware of the March 14,
2 2007 Option Agreement and does understand your client has taken
3 certain positions with respect to [the restrictive covenant in] that
4 document. **The fact that CAG is aware of your client's previous
5 position should not be interpreted as a statement that CAG
6 agrees with such positions.**

7 (Emphasis added). See **Exhibit "M"** attached hereto, and made a part hereof by reference.

8 25. An actual justiciable controversy exists between the parties within the meaning of
9 Idaho Code § 10-1201, et seq., in order to determine the rights, status and legal relations between
10 the parties relative to the question of construction or validity arising under the restrictive covenant
11 in the Option Agreement.

12 26. The court's declaratory judgment that the Subject Property can only be developed with
13 healthcare facilities, as expressly defined by the Givens law firm, unless otherwise amended in
14 writing between the parties thereto, or their successors, will finally resolve this controversy.

15 27. None of the parties have previously sought any adjudication or declaration of their
16 rights concerning the issues raised herein.

17 28. Plaintiff has been required to obtain the services of Robertson & Slette, P.L.L.C. to
18 pursue this action, and have and will incur costs and expenses related to the prosecution of these
19 claims, which fees and costs they are entitled to recover pursuant to Rule 54 of the Idaho Rules of
20 Civil Procedure, Idaho Code §§ 12-120(3) and 12-121, and paragraph 11 of the Option
21 Agreement. Plaintiff believes, and therefore alleges, that a reasonable attorney fee in the event of
22 default is the sum of \$5,000, not prejudicing any additional sums in the event that this matter
23 should be contested.

24 PRAYER FOR RELIEF

25 WHEREFORE, Plaintiff prays for relief as follows:

26 1. That this court issue a declaratory judgment declaring that the Subject Property may
only be used for the construction of "healthcare facilities" defined as being a facility constructed
for the "private practice of medicine for the care and treatment of human beings."

2. For attorney fees in the sum of \$5,000 in the event of default, not prejudicing such
further sums incurred by Plaintiff in this matter in the event CAG should contest this matter. In
the event of CAG's consent to entry of a final judgment consistent with the relief sought herein,
and provided that such consent provides a waiver of any appeal of the judgment by CAG, ABC


1 would agree to waive costs and attorney fees incurred herein.

2 3. For costs incurred by Plaintiff in this matter.

3 4. For such other and further relief as this court shall deem just and equitable.

4 DATED this 9th day of May, 2012.

5 ROBERTSON & SLETTE, PLLC

6
7 By:  _____
8 Gary D. Slette

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3 VERIFICATION

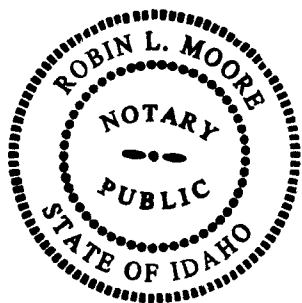
4 STATE OF IDAHO)
5 County of Twin Falls) .SS

6 Arlen B. Crouch, being first duly sworn upon oath, deposes and says:

7 That he is the Managing Member of the Plaintiff named in the foregoing document, knows
8 the contents thereof, and that the statements contained therein are true to the best of his knowledge
9 and belief.

10 Arlen B. Crouch
11 ARLEN B. CROUCH

12
13 SUBSCRIBED AND SWORN TO before me this 7th day of May,
14 2012.



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26

Robin L. Moore
Notary Public for Idaho
Residing at: Jerome
Commission Expires: 12-29-12

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Business Record Details »

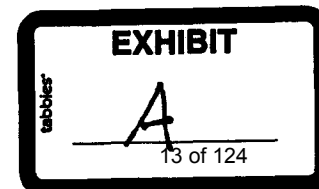
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| | |
|--|--|
| File Amendment or Renewal (/Business/Amendments/2541796-2?status=Active&itemType=Nonprofit%20Corporation%20(Domestic)) | |
| Order Copies | |
| Order a Certificate (/Business/Certificates/2541796-2?status=Active&itemType=Nonprofit%20Corporation%20(Domestic)&route=filing&productId=083dd338-fad3-e011-a886-001ec94ffe7f&originalFilingGuid=1911320e-61d5-e011-a886-001ec94ffe7f) | |

Minnesota Business Name
Critical Access Group

| | |
|--|---|
| Business Type Nonprofit Corporation (Domestic) | MN Statute 317A |
| File Number 2541796-2 | Home Jurisdiction Minnesota |
| Filing Date 10/11/2007 | Status Active / In Good Standing |
| Renewal Due Date: 12/31/2012 | Registered Office Address 502 E 2nd Str Duluth MN 55805 USA |
| Registered Agent(s) (Optional) None provided | President Daniel McGinty 502 E 2nd Street Duluth MN 55805 USA |
| Comments Holds RN-2505635-5 | |

| | |
|--------------------------------|---------------------------------|
| Filing History | Renewal History |
|--------------------------------|---------------------------------|



Renewal History

| | |
|------------|---|
| 11/07/2008 | Annual Renewal - Nonprofit Corporation (Domestic) |
| 08/31/2009 | Annual Renewal - Nonprofit Corporation (Domestic) |
| 04/09/2010 | Annual Renewal - Nonprofit Corporation (Domestic) |
| 02/10/2011 | Annual Renewal - Nonprofit Corporation (Domestic) |

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System Requirements

The MBLs application works with the following web browsers:

- Microsoft Internet Explorer (version 7+)
- Mozilla Firefox (version 3.5+)
- Apple Safari (version 3+)
- Google Chrome

Additional MBLs Information

- Terms & Conditions
 (<http://www.sos.state.mn.us/index.html?page=1667>)
- Contact Us
 (<http://www.sos.state.mn.us/index.html?page=42>)
- Frequently Asked Questions (FAQ)
 (<http://www.sos.state.mn.us/index.html?page=12>)

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| | |
|---|--|
| File Amendment or Renewal (/Business/Amendments/678610-2?status=Active&itemType=Nonprofit%20Corporation%20(Domestic)) | |
| Order Copies | |
| Order a Certificate (/Business/Certificates/678610-2?status=Active&itemType=Nonprofit%20Corporation%20(Domestic)&route=filing&productId=083dd338-fad3-e011-a886-001ec94ffe7f&originalFilingGuid=326570e7-6bd5-e011-a886-001ec94ffe7f) | |

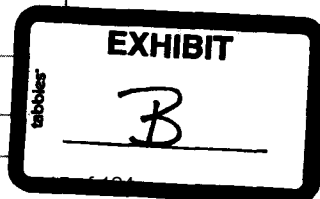
| |
|---|
| Minnesota Business Name Essentia Health |
|---|

| | |
|--|---|
| Business Type Nonprofit Corporation (Domestic) | MN Statute 317A |
| File Number 678610-2 | Home Jurisdiction Minnesota |
| Filing Date 11/03/2003 | Status Active / In Good Standing |
| Renewal Due Date: 12/31/2012 | Registered Office Address 502 E 2nd Str Duluth MN 55805 USA |
| Registered Agent(s) Teresa O'Toole | President Peter Person 502 E 2nd Street Duluth MN 55805 USA |

| | |
|--------------------------------|---------------------------------|
| Filing History | Renewal History |
|--------------------------------|---------------------------------|

Filing History

| | |
|------------|--|
| 11/03/2003 | Original Filing - Nonprofit Corporation (Domestic) |
| 11/03/2003 | Nonprofit Corporation (Domestic) Business Name |



| | |
|------------|---|
| 10/28/2004 | Nonprofit Corporation (Domestic) Business Name |
| 12/27/2007 | Nonprofit Corporation (Domestic) Restated Articles |
| 12/27/2007 | Registered Office and/or Agent - Nonprofit Corporation (Domestic) |
| 03/27/2009 | Nonprofit Corporation (Domestic) Restated Articles |

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System Requirements

The MBLs application works with the following web browsers:

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- Mozilla Firefox (version 3.5+)
- Apple Safari (version 3+)
- Google Chrome

Additional MBLs Information

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(<http://www.sos.state.mn.us/index?page=1667>)

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Frequently Asked Questions (FAQ)
(<http://www.sos.state.mn.us/index?page=12>)

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When recorded, please return to:

Givens Pursley LLP
Attention: Patrick J. Miller
801 West Bannock Street
Boise, Idaho 83702

Instrument # 2114629

JEROME COUNTY, JEROME, IDAHO
10-3-2011 02:45:40 No. of Pages: 4
Recorded for : LAND TITLE AND ESCROW
MICHELLE EMERSON Fee: 19.00
Ex-Officio Recorder Deputy Wilson

GENERAL WARRANTY DEED

FOR VALUE RECEIVED, the receipt and sufficiency of which are hereby acknowledged, St. Benedicts Family Medical Center, Inc., an Idaho non-profit corporation, whose mailing address is 709 North Lincoln, Jerome, Idaho 83338 (hereinafter referred to as the "**Grantor**"), hereby grants, bargains, sells, and conveys unto Critical Access Group, Inc., a Minnesota non-profit corporation, whose current address is 502 East Second Street, Duluth, Minnesota 55805 (hereinafter referred to as the "**Grantee**"), the following described real property, located in Jerome County, Idaho, to wit (hereinafter referred to as the "**Premises**"):

See Exhibit A attached hereto and incorporated herein by this reference.

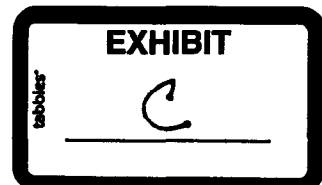
TOGETHER WITH all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, the reversion and reversions, remainder and remainders, rents, issues, and profits thereof; and all estate, right, title, and interest in and to the Premises, as well in law as in equity.

TO HAVE AND TO HOLD the Premises with its appurtenances, unto Grantee, its successors, heirs and assigns, forever.

SUBJECT TO the following: (a) general taxes and assessments for the current year, which are not yet due and payable, and will be prorated between Grantor and Grantee as of the date of execution of this deed; and (b) the easements, restrictions and conditions set forth on Exhibit B to this General Warranty Deed attached hereto and incorporated herein (the items listed in (a) and (b) are referred to herein collectively as "Permitted Exceptions").

AND Grantor does hereby covenant to and with Grantee, and its successors and assigns forever, that Grantor is owner in fee simple of the Premises; that Grantor has a good right to convey the fee simple; that the Premises is free from any and all liens, claims, encumbrances or other defects of title except the Permitted Exceptions; that Grantor shall and will warrant and defend the quiet and peaceful possession of said Premises by Grantee, and its successors and

GENERAL WARRANTY DEED - 1
1255742_2



assigns forever, against all other claims whatsoever, and that Grantor and its heirs and assigns will, on demand of the Grantee or its heirs or assigns, execute any instrument necessary for the further assurance of the title to the Premises that may be reasonably required.

DATED effective as of the 1st day of October 2011.

GRANTOR:

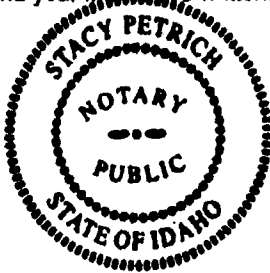
St. Benedicts Family Medical Center, Inc., an Idaho non-profit corporation

By: *Jess B. Hawley, III*
Jess B. Hawley, III, CEO

State of Idaho S.S.
County of Ada

On this 29th day of September, in the year of 2011, before me Stacy Petrich, a notary public, personally appeared Jess B. Hawley, III, known or identified to me to be the Chief Executive Officer of St. Benedicts Family Medical Center, Inc., an Idaho non-profit corporation, the Chief Executive Officer who subscribed said company name to the foregoing instrument, and acknowledged to me that such company executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.



Stacy Petrich
Notary Public for Idaho
Residing at Boise, Idaho
My Commission expires March 1, 2016

EXHIBIT A

Description of Premises

Lots 6, 7 and 8 in Block 8, CROSSROADS POINT BUSINESS CENTER PUD PHASE I, Jerome County, Idaho, as shown on the recorded plat thereof, recorded June 29, 2006 as Instrument Number 2063855, Jerome County Records.

GENERAL WARRANTY DEED - EXHIBIT A

EXHIBIT B

Permitted Exceptions

Right of way for roads, canals, laterals and waste ditches as contained in an Agreement by and between the State of Idaho, and the Twin Falls North Side Land and Water Company, dated August 21, 1967, recorded in Book 15 Page 589, Jerome County records.

Conditions and restrictions in Right of Way Deed given by Elmer R. Skiver and Bertha Jane Skiver, husband and wife, to the State of Idaho, dated May 12, 1951, recorded June 30, 1951 in Book 141 Page 469 as Instrument Number 113504, Jerome County records, wherein there is also granted hereby an easement adjacent to the above described highway right of way for relocation of all irrigation and drainage ditches and structures and such surface drain ditches as may be necessary to the proper construction of the highway, and grantor agrees that no buildings or structures, except irrigation or drainage structures, will be permitted to be constructed within 20 feet of the right of way line of the highway. Construction of a barbwire right of way fencing shall be by and at the sole expense of the State, and grantor further agree that no advertising or other signs will be permitted closer than 100 feet from the right of way line of the highway.

Conditions and restrictions contained in Warranty Deed given by Voit Hudspeth, Sr., and Minnie Mae Hudspeth, husband and wife, and Douglas J. Bradshaw and Mary E. Bradshaw, husband and wife, and Fred Stewart and Phyllis La Rae Stewart, husband and wife, to the State of Idaho, dated August 16, 1968, recorded October 21, 1968 in Book 182 Deeds Page 1091 as Instrument Number 178499, Jerome County records, wherein all rights of access between the right of way of the said project and the remaining contiguous real property belonging to the Grantors, except for a public road approach at Station 329+40 left and future public road approaches 40' in width at Stations 336+00 left, 342+60 left, 349+20 left and 355+40 left, and Grantors agree that no building or structures, except irrigation or drainage structures, will be permitted to be constructed within 20 feet of the right of way of the said project, and Grantors convey unto the Grantee the right to prohibit junkyards on any of their remaining land within 1000 feet of the right of way of the said project.

Settlement Agreement between ABC Agra, LLC, a limited liability company and the City of Twin Falls, Idaho, a municipal corporation, dated March 23, 2000, recorded March 24, 2000 as Instrument 2001418, Jerome County records.

An Agreement Between City of Jerome, Idaho and ABC Agra, L.L.C. for Municipal Water and Wastewater Service by and between City of Jerome, a municipal corporation and ABC Agra, L.L.C., an Idaho limited liability company dated March 29, 2005, recorded April 21, 2005 as Instrument No. 2052120, records of Jerome County, Idaho.

Easements and Restrictions as shown on the recorded plat of Crossroads Point Business Center, PUD as recorded June 29, 2006 as Instrument No. 2063855, records of Jerome County, Idaho.

Declaration of Covenants, Conditions and Restrictions of Crossroads Point Business Center, PUD as recorded June 29, 2006 as Instrument No. 2063856, records of Jerome County, Idaho.

Amendment to Declaration of Covenants, Conditions and Restrictions of Crossroads Point Business Center, P.U.D., dated August 21, 2006, recorded August 21, 2006 as Instrument Number 2065069, Jerome County records.

Supplemental Declaration of Covenants, Conditions and Restrictions of Crossroads Point Business Center, PUD dated June 13, 2007, recorded June 13, 2007 as Instrument No. 2073551, records of Jerome County, Idaho.

Memorandum of Option Agreement by and between ABC Agra, LLC, an Idaho limited liability company, "Optionor" and St. Benedict's Family Medical Center, Inc., an Idaho nonprofit corporation, "Optionee"; and Saint Alphonsus Regional Medical Center, Inc., an Idaho nonprofit corporation ("Saint Alphonsus"), recorded June 29, 2011 as Instrument Number 2113149, Jerome County records.

GENERAL WARRANTY DEED – EXHIBIT B

OPTION AGREEMENT

THIS OPTION AGREEMENT is made and entered into effective the 14th day of March, 2007 ("Effective Date"), by and between ABC AGRA, LLC, an Idaho limited liability company (hereinafter "Optionor"), and ST. BENEDICT'S FAMILY MEDICAL CENTER, INC., an Idaho nonprofit corporation (hereinafter "Optionee"), and SAINT ALPHONSUS REGIONAL MEDICAL CENTER, INC., an Idaho nonprofit corporation ("Saint Alphonsus").

RECITALS

- A. Optionor is the owner of certain real property located in Jerome County, Idaho, consisting of approximately ten (10) acres as more particularly described on Exhibit "C" attached hereto (hereinafter the "Real Property").
- B. Optionor originally entered into that certain Option Agreement for Purchase of Real Property dated March 19, 2002, which was superceded by that certain Option Agreement for the Purchase of Real Property dated December 8, 2003 and then amended by that certain First Amendment to Option Agreement dated March 3, 2006 (collectively the "Agreement"). The Agreement expires on March 14, 2007 and grants Saint Alphonsus Regional Medical Center, Inc. ("Saint Alphonsus") the right to purchase the Real Property. Saint Alphonsus no longer desires to purchase the Real Property and desires to substitute St. Benedict's Family Medical Center, Inc. as the Optionee. Accordingly, Saint Alphonsus hereby assigns any and all rights to the Agreement to Optionee, it being Saint Alphonsus' intent that it shall have no further rights to the Real Property. In addition to substituting St. Benedict's Family Medical Center, Inc. for Saint Alphonsus, the parties also desire to make additional modifications to the Agreement including without limitation a revised purchase price, option expiration date and legal description of the Real Property. The parties desire to supercede and replace the Agreement, and to obtain a new option to purchase the Real Property, which the Optionor is willing to grant pursuant to the terms of this Agreement.

NOW, THEREFORE, the parties hereto agree as follows:

1. OPTION. Optionor hereby grants unto the Optionee the right to purchase the Real Property subject to the following terms and conditions.
 - (a) Term. The term of the option herein granted shall commence on the date of execution hereof and shall terminate on the later of such time as Optionor installs city sewer and water, electricity and other utilities adequate for Optionee's intended use to the edge of the Real Property or May 14, 2007. Notwithstanding anything to the contrary contained in this Option Agreement, in the event Optionor has not installed city sewer and water, electricity and/or other utilities adequate for Optionee's intended use by May 14, 2007, and Optionee has not exercised the option, Optionor shall pay Optionee the sum of Three Hundred Thousand Dollars

(\$300,000) and upon Optionor's payment of such consideration to Optionee this Option Agreement shall automatically terminate and be of no further force and effect. Optionor acknowledges that Optionee has provided it with the minimum specifications for the utilities necessary for Optionee's intended use.

- (b) **Consideration.** Optionor acknowledges that it has received the sum of Three Hundred Fifty Thousand Dollars (\$350,000), the receipt of which is hereby acknowledged. In consideration for this option, the Optionee shall pay Fifty Thousand Dollars (\$50,000). All of the consideration paid or to be paid (totaling \$400,000) shall be non-refundable; provided, however, that at closing on the Real Property pursuant to this Agreement, if the same shall occur, such consideration shall be credited toward the purchase price set forth in subparagraph (c) hereinbelow. Saint Alphonsus hereby assigns to Optionee all rights to sums paid by Saint Alphonsus as consideration for the option.
- (c) **Price.** The purchase price for the Real Property shall be One Million Six Hundred and Seventy Eight Thousand Dollars (\$1,678,000) and shall be payable to Optionor in cash at closing, with the option consideration to be credited as provided for hereinabove.
- (d) **Closing.** At closing of the purchase of the Real Property by the Optionee, the Optionor shall provide good and marketable title to the Optionee by standard Idaho warranty deed, free and clear of all liens and encumbrances, except those which are set forth on Exhibit D, attached hereto and incorporated herein by this reference ("Permitted Exceptions"). Optionor shall obtain the prior, written approval of Optionee prior to granting or consenting to any additional liens or encumbrances against the Real Property. The parties acknowledge and agree that the Optionor, at its sole cost and expense, shall provide an ALTA owner's standard form of title insurance policy insuring Optionee in the full amount of the purchase price and insuring that fee simple title to the Real Property is vested in the Optionee, subject only to the Permitted Exceptions or as approved in writing by Optionee. No additional exceptions shall be included on the final title policy. The title policy shall be issued by Land Title and Escrow, Inc., Jerome, Idaho. Additional endorsements or coverage may be purchased by Optionee at its cost and expense.
- (e) **Exercise.** To exercise the option herein granted, the Optionee shall give written notice hereof by personal service or by certified mail or by overnight courier (i.e., Federal Express) to the Optionor, prior to the expiration of the option period specified in paragraph 1(a), at 112 South Lincoln, P.O. Box 378, Jerome, Idaho, 83338. Closing shall occur within thirty (30) days after exercise of the option.

2. GIFTS. In the event Optionee exercises its option to purchase the Real Property, as provided herein, Optionor will gift to Optionee at the closing on the Real Property the two (2) parcels described on Exhibit "A" and Exhibit "B" respectively, which consist of approximately ten (10) acres each. The property conveyed pursuant to this Section may be collectively referred to as the "Gift Property" and shall be free and clear of liens and encumbrances except the Permitted Exceptions.
3. LAND USE REGULATIONS. Optionee is familiar with the Real Property, and the zoning and other land use ordinances and regulations of Jerome County, Idaho, which govern the current use and development of the Real Property. Optionor acknowledges that Optionee intends to develop the Real Property and the Gift Property into a medical campus. Optionor agrees to support, at no cost and expense to Optionor, Optionee's efforts to obtain any approvals necessary to to develop the Real Property or the Gift Property.
4. USE OF LAND. Optionee covenants with Optionor that it will use the lands described on Exhibits "A," "B" and "C" for construction of healthcare facilities. Optionee agrees that this provision may be strictly enforced by Optionor, or its successors, by means of a restraining order and/or injunction in the event of a violation of this covenant. This covenant shall be perpetual, and shall bind successors and assigns of the Optionee in the event Optionee shall sell all or any portion of the real property described in Exhibits "A", "B" or "C." Optionor hereby agrees that the Optionee shall be the exclusive provider of healthcare services within the development currently known as Crossroads Point. Accordingly, Optionor agrees to record a mutually acceptable restriction against all property located within Crossroads Point which prohibits the provision of healthcare services without the prior written permission of the Optionee. Optionor agrees that this provision may be strictly enforced by Optionee, or its successors, by means of a restraining order and/or injunction in the event of a violation of this covenant.
5. DESIGN APPROVAL. Optionor hereby agrees that Optionee shall have the right to provide input regarding the architectural design and layout of any building located immediately adjacent to the Real Property and the Gift Property and/or across any public right of way and/or private road adjacent thereto.
6. INTENTIONALLY DELETED.
7. CONSTRUCTION REQUIREMENT. In the event Optionee does not commence construction of a healthcare facility on the Real Property within three (3) years of the date of its exercise of the option, then Optionor shall have an option to purchase the lands described on Exhibits "A", "B" and "C" for the total sum of One Million Six Hundred and Seventy-Eight Thousand Dollars (\$1,678,000). Such option in favor of Optionor shall be in effect for a two (2) year period which shall commence at the end of the third year following Optionee's exercise of the option on the Real Property.

8. **EXPIRATION.** Optionee understands and agrees that should this option expire without Optionee's exercise thereof, Optionee shall have no further right, title or interest in the Real Property.
9. **OPTIONOR'S REPRESENTATIONS AND WARRANTIES.** In addition to other representations herein, Optionor represents and warrants to Optionee that the statements contained in this Section are correct and complete as of the date of this Option Agreement and will be correct and complete in all material respects as of the closing. Following Optionee's exercise of this option, Optionee's obligation to close this transaction is subject to and conditioned upon Optionor's representations and warranties being true and correct and complete as of the date of closing and shall survive for a period of three (3) years following closing.
- (a) **Authority.** Optionor, and each person signing on behalf of Optionor, has full power and authority to execute this Option Agreement and perform Optionor's obligations hereunder, and all necessary action to authorize this transaction has been taken; and
- (b) **No Encumbrances.** The Real Property is not subject to any lease, tenancies or rights of persons in possession, and the Real Property and Gift Property are owned by Optionor free and clear of any monetary liens or encumbrances; and
- (c) **No Liens.** All persons and entities supplying labor, materials and equipment to the Real Property and Gift Property have been paid and there are no claims of liens; and
- (d) **Title.** Optionor has good and marketable title to the Real Property and the Gift Property; and
- (e) **Environmental Condition.** Optionor has not received notification of any kind from any agency suggesting that the Real Property or the Gift Property is or may be targeted for cleanup operations under the federal "Superfund" statute or any other federal or state environmental remediation statute, rule or regulation. Optionor has no knowledge that either the Real Property or the Gift Property or any portion thereof is or has been used (i) for the storage, disposal or discharge of oil, solvents, fuel, chemicals or any type of toxic or dangerous or hazardous waste or substance or (ii) as a landfill or waste disposal site. Optionor agrees to indemnify and hold Optionee harmless from and against any and all loss, damage, claims, penalties, liability, suits, costs and expenses (including, without limitation, reasonable attorneys' fees), and all costs of remedial action or cleanup, suffered or incurred by Optionee arising out of or related to any such use of the Property, or portion thereof, occurring prior to the conveyance to Optionee. Optionor further represents that it has obtained or will obtain a Phase One Environmental Site Assessment

Report, certified to both Optionor and Optionee, and provide a copy to Optionee within ninety (90) days of the Effective Date; and

- (f) Litigation. Optionor has no knowledge of any claims, actions, suits, arbitrations, proceedings, or investigations by or before any court or arbitration body, any governmental, administrative or regulatory agency, or any other body, pending or threatened against, effecting or relating to the Real Property or Gift Property, or the transactions contemplated by this Option Agreement, nor is Optionor aware of any basis for such claim, action, suit, arbitration, proceeding or investigation; and
- (g) Water and Sewer. Optionor hereby represents and warrants that the Real Property and Gift Property will be initially connected to an on-site sewer system (or other adequate sewer and water system) no later than October 1, 2007. Optionor hereby represents and warrants that the Real Property and Gift Property, will be connected, at Optionor's sole cost and expense, to the City of Jerome's city sewer and water system on or before October 1, 2007. In the event the water and sewer is not connected to the City of Jerome's sewer and water system by closing, the purchase price funds deposited by Optionee into escrow shall not be disbursed to Optionor and may be used by Optionee to complete the same. Upon completion of such improvements, the Optionor shall be entitled to all remaining funds held by escrow; and
- (h) Entrance to Development. Optionor hereby represents and warrants that it has completed the Crossroads development main entrance with appropriate landscaping. Optionor further represents and warrants that the main entry road into the Crossroads development is also completed.
- (i) Adjoining Property. Optionor hereby represents and warrants that none of Optionor's other real property adjacent to and within two hundred (200) feet of the lands in Exhibits "A", "B" and "C" will be used or developed except in accordance with the uses identified on Exhibit E attached hereto and incorporated herein by this reference. All other uses, including, without limitation, a fuel/service station, or an agricultural business which keeps or maintains animals upon the premises shall be subject to the prior written approval of Optionee, which shall not be unreasonably withheld. Optionor agrees that this provision shall be binding upon the Optionor and all future owners of such properties and may be strictly enforced by Optionee, or its successors, by means of a restraining order and/or injunction in the event of a violation of this covenant.

10. RIGHT OF ENTRY. Following the Effective Date, Optionee and its agents and independent contractors shall have the right to enter on the Real Property and Gift Property for the purpose of performing any and all studies Optionee deems necessary to determine the physical condition of the Real Property and/or Gift Property or such property's suitability for Optionee's intended use. The Optionee

shall reasonably repair any damage caused by Optionee's entry onto the Real Property and/or Gift Property and shall not allow any lien to be filed against the Real Property or Gift Property due to Optionee's entry and activities on such property prior to closing and such indemnities shall survive any termination of this Option Agreement prior to closing. Except as otherwise provided in this Option Agreement, any and all tests and studies shall be at Optionee's sole cost and expense, but Optionee shall not be responsible or liable for any environmental conditions discovered or for the findings, results or conclusions thereof, including any obligation to take remedial action.

11. ATTORNEY'S FEES. In the event that any action shall be brought by any party hereto against any other party hereto for the enforcement or declaration of any right or remedies in or under this Agreement for the breach of any covenant or condition herein contained, then, and in that event, the party in whose favor final judgment is entered shall be entitled to recover, and the other party agrees to pay, all fees and costs to be fixed by the court therein including, but not limited to, attorney's fees.
12. NOTICE. Unless otherwise provided for herein, any notice to be given or other document to be delivered by either party to the other hereunder shall either be delivered in person to either party or may be deposited in the United States mail, duly certified with postage prepaid, return receipt requested, addressed to the party for whom intended as follows:

To Optionor:
ABC Agra, LLC
112 South Lincoln
P.O. Box 378
Jerome, ID 83338

To Optionee:
St. Benedict's Family Medical Center, Inc.
709 North Lincoln
Jerome, Idaho 83338
Attention: President and CEO

Either party hereto may from time to time, by written notice to the other, designate a different address which shall be substituted for the one above specified. If any notice or other document is sent by certified mail or overnight courier, as aforesaid, the same shall be deemed delivered as of the date of deposit with the U.S. Postal Service by with an overnight delivery carrier.


13. NON-ASSIGNABILITY. Optionee shall have absolutely no right whatsoever to assign this Option Agreement or any right or privilege of Optionee hereunder to any third party; provided, however, Optionee shall be permitted to freely assign this Option Agreement and all rights and privileges hereunder to any parent

organization, successor in interest or any entity of which Optionee is an owner, shareholder or member.


14. **BINDING EFFECT.** This Agreement shall be binding upon the successors and assigns of the Optionor.
15. **JURISDICTION.** This Agreement shall be governed by and construed in accordance with the laws of the State of Idaho. The parties agree that Jerome County shall be the appropriate venue for any judicial dispute concerning this Option Agreement or the properties described herein.
16. **ENTIRE AGREEMENT.** This Option Agreement supercedes all prior agreements, written or oral, and contains the entire agreement of the parties hereto with respect to the matters covered hereby, and no other agreement, statement or promise made by either party hereto which is not contained herein shall be binding or valid.
17. **COUNTERPARTS.** This Option Agreement may be signed in counterparts and facsimiles of signatures shall be considered as originals thereof.
18. **RECITALS AND EXHIBITS.** The recitals to this Option Agreement and the exhibits attached hereto are incorporated herein by this reference.

IN WITNESS WHEREOF, the parties hereto have executed this Option Agreement the day and year first above written.

"OPTIONOR"
ABC AGRA, LLC

By: 
Its: OWNER

"OPTIONEE"
ST. BENEDICT'S FAMILY MEDICAL CENTER,
INC., an Idaho nonprofit corporation

By: 
Its: CEO

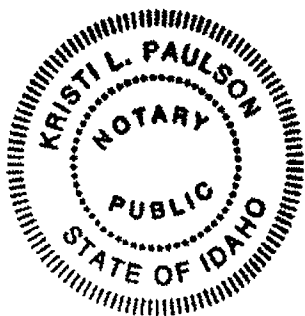
SAINT ALPHONSUS REGIONAL MEDICAL
CENTER, INC., an Idaho nonprofit corporation

By: *Sandra Bruce*
SANDRA BRUCE
Its: PRESIDENT & CEO

STATE OF IDAHO)
) ss.
County of _____)

On this 15 day of March, 2007, before me, a Notary Public in and for the State of Idaho, personally appeared Arden B. Crouch, known or identified to me to be the Managing Member of ABC AGRA, LLC, and the person who executed the instrument on behalf of said limited liability company, and acknowledged to me that such limited liability company executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.

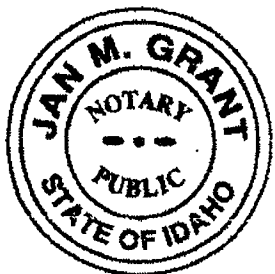


Kristi L. Paulson
Notary Public for Idaho
Residing at: Jerome, ID
My commission expires: 12-2012

STATE OF IDAHO)
) ss.
County of Jerome)

On this 16th day of March, 2007, before me, a Notary Public in and for the State of Idaho, personally appeared Alan Stevenson, known or identified to me to be the Administrator of ST. BENEDICT'S FAMILY MEDICAL CENTER, INC., and the person who executed the instrument on behalf of said corporation, and acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.

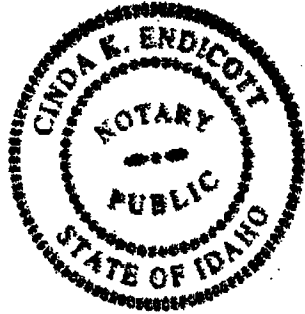


Jan M. Grant
Notary Public for Idaho
Residing at: Jerome County
My commission expires: 6/6/11

STATE OF IDAHO)
) ss.
County of Ada)

On this 19 day of March, 2007, before me, a Notary Public in and for the State of Idaho, personally appeared Sandra Bruce, known or identified to me to be the President + CEO of SAINT ALPHONSUS REGIONAL MEDICAL CENTER, INC., and the person who executed the instrument on behalf of said corporation, and acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.



Cinda K. Endicott
Notary Public for Idaho
Residing at: Boise, ID
My commission expires: 11/27/08

PROPERTY DESCRIPTION
FOR
SBFMC HOSPITAL

EXHIBIT "A"

MARCH 9, 2006

A tract of land located in the Southeast Quarter of Section 10, Township 9 South, Range 17 East, Boise Meridian, Jerome County, Idaho, more particularly described as follows:

Beginning at the Southeast corner of said Section 10;

THENCE North 89° 23' 33" West a distance of 363.72 feet along the southerly boundary of said Section 10 to the westerly boundary of Highway 93 IID Project F2391;

THENCE North 07° 38' 16" East a distance of 251.90 feet along said westerly boundary of Highway 93;

THENCE North 89° 23' 33" West a distance of 557.04 feet;

THENCE North 27° 19' 34" East a distance of 82.24 feet;

THENCE North 31° 08' 43" East a distance of 30.19 feet to the True Point of

Beginning;

THENCE North 31° 08' 43" East a distance of 28.60 feet;

THENCE North 43° 30' 59" East a distance of 88.54 feet;

THENCE North 51° 58' 17" East a distance of 67.70 feet;

THENCE North 33° 49' 21" West a distance of 160.16 feet;

THENCE North 52° 46' 01" East a distance of 34.01 feet;

THENCE North 62° 15' 46" East a distance of 58.51 feet;

THENCE North 29° 20' 01" West a distance of 183.83 feet;

THENCE North 63° 12' 31" East a distance of 68.38 feet;

THENCE North 26° 54' 30" West a distance of 86.64 feet;

THENCE North 61° 05' 48" East a distance of 64.39 feet;

THENCE North 25° 28' 48" West a distance of 39.30 feet;

THENCE North 63° 59' 32" East a distance of 58.18 feet;

THENCE North 17° 06' 25" West a distance of 149.62 feet;

THENCE North 77° 24' 53" East a distance of 140.57 feet;

THENCE North 11° 17' 16" West a distance of 107.59 feet to the southern right-of-way of a proposed new road;

THENCE North 89° 23' 33" West a distance of 628.37 feet along said right-of-way of a proposed new road;

THENCE South 00° 55' 25" West a distance of 366.49 feet;

THENCE South 30° 51' 10" East a distance of 66.03 feet;

THENCE South 40° 10' 49" West a distance of 204.04 feet;

THENCE South 53° 49' 23" East a distance of 641.20 feet to the True Point of

Beginning.

Containing 10.09 acres more or less.

PROPERTY DESCRIPTION
FOR
SBFMC HOSPITAL

EXHIBIT "B"

MARCH 9, 2006

A tract of land located in the Southeast Quarter of Section 10, Township 9 South, Range 17 East, Boise Meridian, Jerome County, Idaho, more particularly described as follows:

Beginning at the Southeast corner of said Section 10;

THENCE North 89° 23' 33" West a distance of 363.72 feet along the southerly boundary of said Section 10 to the westerly boundary of Highway 93 ITD Project F2391;

THENCE North 07° 38' 16" East a distance of 251.90 feet along said westerly boundary of Highway 93 and the True Point of Beginning;

THENCE North 07° 38' 16" East a distance of 360.30 feet along said westerly boundary of Highway 93 to a point of curvature;

THENCE northerly 697.98 feet on the arc of a curve to the left with a radius of 11,309.16 feet, a central angle of 3° 32' 11", and a chord which bears North 5° 52' 11" East a distance of 697.87 feet along the westerly boundary of said Highway 93 to the southerly right-of-way of a proposed new road;

THENCE North 89° 23' 33" West a distance of 408.47 feet along the southerly right-of-way of a proposed new road;

THENCE South 11° 17' 16" East a distance of 107.59;

THENCE South 77° 24' 53" West a distance of 140.57 feet;

THENCE South 17° 06' 25" East a distance of 149.62 feet;

THENCE South 63° 59' 32" West a distance of 58.18 feet;

THENCE South 25° 28' 48" East a distance of 39.30 feet;

THENCE South 61° 05' 48" West a distance of 64.39 feet;

THENCE South 26° 54' 30" East a distance of 86.64 feet;

THENCE South 63° 12' 31" West a distance of 68.38 feet;

THENCE South 29° 20' 01" East a distance of 183.83 feet

THENCE South 62° 15' 46" West a distance of 58.51 feet;

THENCE South 52° 46' 01" West a distance of 34.01 feet;

THENCE South 33° 49' 21" East a distance of 160.16 feet;

THENCE South 51° 58' 17" West a distance of 67.70 feet;

THENCE South 43° 30' 59" West a distance of 88.54 feet;

THENCE South 31° 08' 43" West a distance of 58.79 feet;

THENCE South 27° 19' 34" West a distance of 82.24 feet;

THENCE South 89° 23' 33" East a distance of 557.04 feet to the True Point of

Beginning.

Containing 11.55 acres more or less.

**PROPERTY DESCRIPTION
FOR
SBFMC HOSPITAL**

EXHIBIT "C"

MARCH 9, 2006

A tract of land located in the Southeast Quarter of Section 10, Township 9 South, Range 17 East, Boise Meridian, Jerome County, Idaho, more particularly described as follows:

Beginning at the Southeast corner of said Section 10;

THENCE North 89° 23' 33" West a distance of 363.72 feet along the southerly boundary of said Section 10 to the westerly boundary of Highway 93 ITD Project F2391;

THENCE North 07° 38' 16" East a distance of 251.90 feet along said westerly boundary of Highway 93;

THENCE North 89° 23' 33" West a distance of 557.04 feet to the True Point of Beginning;

THENCE North 89° 23' 33" West a distance of 648.55;

THENCE North 00° 36' 27" East a distance of 1052.53 feet to the southern right-of-way of a proposed new road;

THENCE South 89° 23' 33" East a distance of 276.85 along said right-of-way of a proposed new road;

THENCE South 00° 55' 25" West a distance of 366.49 feet;

THENCE South 30° 51' 10" East a distance of 66.03 feet;

THENCE South 40 °10' 49" West a distance of 204.04 feet;

THENCE South 53° 49' 23" East a distance of 641.20 feet;

THENCE South 31° 08' 43" West a distance of 30.19

THENCE South 27° 19' 34" West a distance of 82.24 feet to the True Point of Beginning;

Containing 8.89 acres more or less.

COMMITMENT FOR TITLE INSURANCE

SCHEDULE B - SECTION II

Order Number: J-32686

Schedule B of the policy or policies to be issued will contain exceptions to the following matters unless the same are disposed of to the satisfaction of the Company:

1. Any facts, rights, interests, or claims which are not shown by the public records but which could be ascertained by an inspection of the land or which may be asserted by persons in possession, or claiming to be in possession, thereof.
2. Basements, liens, encumbrances, or claims thereof, which are not shown by the public records.
3. Discrepancies, conflicts in boundary lines, shortage in area, encroachments, or any other facts which a correct survey of the land would disclose, and which are not shown by the public records.
4. Any lien, or right to a lien, imposed by law for services, labor, or material heretofore or hereafter furnished, which lien, or right to a lien, is not shown by the public records.
5. Taxes or assessments which are not now payable or which are not shown as existing liens by the records of any taxing authority that levies taxes or assessments on real property or by the public records; proceedings by a public agency which may result in taxes or assessments, or notices of such proceedings, whether or not shown by the records of such agency or by the public records.
6. Any service, installation, connection, maintenance or construction charges for sewer, water, electricity or garbage collection or disposal or other utilities unless shown as an existing lien by the public records.
7. Defects, liens, encumbrances, adverse claims or other matters, if any created, first appearing in the public records or attaching subsequent to the effective date hereof but prior to the date the proposed insured acquires of record for value the estate or interest or mortgage thereof covered by this Commitment.
8. Liens in favor of the State of Idaho that might be disclosed by any Notice of Lien filed in the Office of the Secretary of State of Idaho against the vested owner or prior owner or against the purchaser of the land described herein.
9. (a) Unpatented mining claims; (b) reservations or exceptions in patents or in Acts authorizing the issuance thereof; (c) Indian treaty or aboriginal rights, including, but not limited to, easements or equitable servitudes; or, (d) water rights, claims or title to water, whether or not the matters excepted under (a), (b), (c) or (d) are shown by the public records.
10. Taxes for 2006 and subsequent years, a lien, but not yet due or payable.

**CONTINUATION
SCHEDULE B - SECTION II**

Order Number: J-32686

11. Conditions and restrictions in Right of Way Deed given by Elmer R. Skiver and Bertha Jane Skiver, husband and wife, to the State of Idaho, dated May 12, 1951, recorded June 30, 1951 in Book 141 Page 469 as Instrument Number 113504, Jerome County records, wherein there is also granted hereby an easement adjacent to the above described highway right of way for relocation of all irrigation and drainage ditches and structures and such surface drain ditches as may be necessary to the proper construction of the highway, and grantor agrees that no buildings or structures, except irrigation or drainage structures, will be permitted to be constructed within 20 feet of the right of way line of the highway. Construction of a barbwire right of way fencing shall be by and at the sole expense of the State, and grantor further agree that no advertising or other signs will be permitted closer than 100 feet from the right of way line of the highway.
12. Conditions and restrictions contained in Warranty Deed given by Voit Hudspeth, Sr., and Minnie Mae Hudspeth, husband and wife, and Douglas J. Bradshaw and Mary E. Bradshaw, husband and wife, and Fred Stewart and Phyllis La Rae Stewart, husband and wife, to the State of Idaho, dated August 16, 1968, recorded October 21, 1968 in Book 182 Deeds Page 1091 as Instrument Number 178499, Jerome County records, wherein all rights of access between the right of way of the said project and the remaining contiguous real property belonging to the Grantors, except for a public road approach at Station 329+40 left and future public road approaches 40' in width at Stations 336+00 left, 342+60 left, 349+20 left and 355+40 left, and Grantors agree that no building or structures, except irrigation or drainage structures, will be permitted to be constructed within 20 feet of the right of way of the said project, and Grantors convey unto the Grantee the right to prohibit junkyards on any of their remaining land within 1000 feet of the right of way of the said project.
13. Settlement Agreement between ABC Agra, LLC, a limited liability company and the City of Twin Falls, Idaho, a municipal corporation, dated March 23, 2000, recorded March 24, 2000 as Instrument 2001418, Jerome County records.
14. Option Agreement for Purchase of Real Property, by and between ABC Agra, LLC, an Idaho limited liability company and Saint Alphonsus Regional Medical Center, Inc., an Idaho nonprofit corporation dated March 19, 2002, recorded March 25, 2002 as Instrument Number 2021391, Jerome County records.
15. Memorandum Of Option To Purchase by and between Saint Alphonsus Regional Medical Center, Inc., an Idaho nonprofit corporation, or its assigns and ABC Agra, LLC, an Idaho limited liability Company dated December 17, 2003, recorded December 18, 2003 as Instrument No. 2037983, records of Jerome County, Idaho.
16. An Agreement Between City of Jerome, Idaho and ABC Agra, L.L.C. for Municipal Water and Wastewater Service by and between City of Jerome, a municipal corporation and ABC Agra, L.L.C., an Idaho limited liability company dated March 29, 2005, recorded April 21, 2005 as Instrument No. 2052120, records of Jerome County, Idaho.

EXHIBIT E

USES

- Amphitheatre
- Automotive Dealerships
- Bank / Financial Services Complex
- Business Office Buildings
- Business Office Complexes
- Call Centers
- Central Park
- Church / Religious Center
- Department Stores
- Discount Retailers
- Education and Technology Complex
- Exposition and Convention Center
- Fast-Food Restaurants with Drive thru windows
- Fire / Emergency Station
- Furniture Store
- Health Clubs / Fitness Centers
- Home Improvement Centers
- Hospital
- Hotels / Motels
- Manufacturing and Technology Campus
- Medical Long-Term Care Center
- Medical Office Buildings
- Mixed Use Office and Civic Complex
- Multiuse Trail Corridor
- Recreational Complexes
- Restaurants
- Retail Outlet Mall
- Retail Stores
- Specialty Service and Production Complex
- Sports Athletic Complex
- Theaters
- Tourist and Hospital Center

Twin Falls Times News, Thursday, June 14, 2007 – by Chris Steinbach

St. Ben's closes deal on new property

JEROME - The buyer and seller completed the sale Wednesday of about nine acres at Crossroads Point Business Center - the first step toward building a new hospital in Jerome.

St. Benedicts Family Medical Center bought the property for an undisclosed sum from businessman Arlen B. Crouch, who also gave an additional 20 acres to the hospital.

With the sale's completion, Magic Valley residents can expect to continue receiving health care in Jerome County. What type of medical services St. Benedicts will offer, however, in a yet-to-be-built new medical center, has not been determined.

"The acquisition of land is with an eye to the future," said Alan Stevenson, the hospital's administrator. "St. Benedicts ... is studying how it can best develop the health care services for the residents of this area.

"Constructing a new campus is a vision which we are developing for our future and this land purchase is the beginning towards that vision."

Stevenson wasn't ready to say when construction of the new hospital would begin. "We've got a lot of work to do before we break ground," he said. That work includes scrapping plans for a new hospital that were drawn up more than three years ago and starting over because of the length of time that has passed.

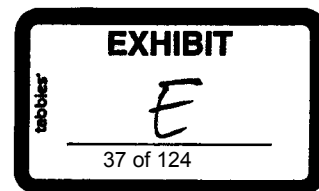
The hospital announced plans in September 2006 to build a 25-bed hospital at Crossroads Point at the northwest corner of Interstate 84 and state Highway 93. In March, St. Benedicts was acquired by Benedictine Health System, a Roman Catholic health care organization based in Duluth, Minn., which also owns hospitals in Orofino and Cottonwood.

Stevenson said St. Benedicts has been in discussions with St. Luke's Magic Valley Regional Medical Center to determine how the two hospitals could collaborate in providing health care services. These discussions will help define what services could be offered at a new health care campus at Crossroads Point, he said.

An example of where this type of collaboration has already paid off is the computerized radiographic system being shared by the two hospitals as well as Gooding County Memorial Hospital, Stevenson said.

"We are pleased with the opportunity to work collaboratively with St. Benedicts and Benedictine Health System to ensure high-quality health care facilities are available to serve patients in the Magic Valley," said John Kee, chief executive at St. Luke's Magic Valley Regional.

Officials from the Twin Falls and Jerome hospitals have discussed the idea of a regional diabetes facility, Stevenson said. "With the economic demands on everyone, we believe collaboration is critical to the future success of both organizations and to our mission of providing quality health care," Stevenson said.



*Care of the Sick
must take priority
over everything else,
for in them
Christ is served.*

May 14, 2007

Via Hand Delivery

Arlen Crouch
ABC Agra, LLC
112 South Lincoln
P.O. Box 378
Jerome, Idaho 83338

Regarding: Exercise of Option

Dear Arlen:

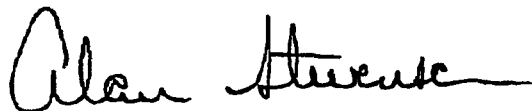
In follow-up to our call on Friday, this letter confirms St. Benedicts Family Medical Center, Inc's exercise of the option contained in that certain Option Agreement between ABC AGRA, LLC, St. Benedicts and Saint Alphonsus Regional Medical Center, Inc., dated effective March 14, 2007 ("Agreement"). Specifically, St. Benedicts is exercising its option to purchase the real property described on Exhibit C of the Agreement. Per the Agreement, St. Benedicts will close on the property within thirty (30) days following the delivery of this letter.

St. Benedicts is tremendously excited about this opportunity and appreciates your generosity and commitment to the community.

If you have any questions as we move toward closing, please contact me.

Sincerely,

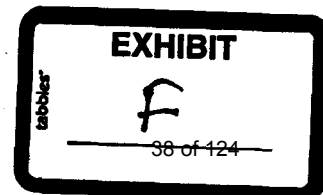
ST. BENEDICTS FAMILY MEDICAL CENTER



Alan Stevenson
Administrator

cc: Dan McGinty, BHS
Donna Loomis, BHS
Judd Montgomery, Givens & Pursley

709 North Lincoln
Jerome ID 83338
208.324.4301
Fax: 208.324.3878
www.stbenshospital.org



When recorded, please return to:

Givens Pursley LLP
Attention: Judson B. Montgomery
601 West Bannock Street
Boise, Idaho 83702

J-36656-A

GIFT DEED

ABC Agra, LLC, an Idaho limited liability company also known as ABC Agra L.C. (hereinafter referred to as the "Grantor"), hereby gifts, grants and conveys unto St. Benedicts Family Medical Center, Inc., an Idaho nonprofit corporation, whose current address is 709 North Lincoln, Jerome, Idaho 83338 (hereinafter referred to as the "Grantee"), that certain real property, located in Jerome County, Idaho, to wit (hereinafter referred to as the "Premises"):

Lot 7 and Lot 8, in Block 8, CROSSROADS POINT BUSINESS CENTER PUD PHASE 1, Jerome County, Idaho, as shown on the recorded plat thereof, recorded June 29, 2006 as Instrument Number 2063855, Jerome County records.

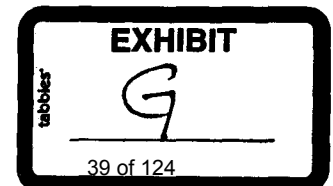
TOGETHER WITH all appurtenances thereunto belonging or in anywise appertaining, the reversion and reversions, remainder and remainders, rents, issues, and profits thereof; and all estate, right, title, and interest in and to the Premises, as well in law as in equity.

TO HAVE AND TO HOLD the Premises with its appurtenances, unto Grantee, its successors, heirs and assigns, forever.

SUBJECT TO the following: (a) general taxes and assessments, including utility assessments for the current year, which are not yet due and payable, and will be prorated between Grantor and Grantee as of the date of execution of this deed; and (b) easements, restrictions and conditions of record, including, without limitation those set forth on Exhibit A, attached hereto and incorporated herein (the items listed in (a) and (b) are referred to herein collectively as "Permitted Exceptions").

AND Grantor does hereby covenant to and with Grantee, and its successors and assigns forever, that Grantor is owner in fee simple of the Premises; that Grantor has a good right to convey the fee simple; that the Premises is free from any and all liens, claims, encumbrances or other defects of title except the Permitted Exceptions; that Grantor shall and will warrant and defend the quiet and peaceful possession of said Premises by Grantee, and its successors and assigns forever, against all other claims whatsoever except as excluded or excepted herein; and that Grantor and its heirs and assigns will, on demand of the Grantee or its heirs or assigns, execute any instrument necessary for the further assurance of the title to the Premises that may be reasonably required.

[end of text]



DATED effective as of the 13th day of June, 2007.

GRANTOR:

ABC Agra, LLC, an Idaho limited liability company

By: *Arden B Crockett*
Name: ARLEN B CROCKETT
Title: OWNER

State of Idaho)
) S.S.
County of Jerome)

On this 13th day of June, in the year of 2007, before me, a Notary Public in and for said State, personally appeared Arden B Crockett, known or identified to me to be a member or manager of ABC Agra, LLC, a limited liability company, the member or manager, or one of the members or managers, who subscribed said limited liability company name to the foregoing instrument, and acknowledged to me that he/she/it executed the same in said limited liability company name.

Rick Bernsen
Notary Public for Idaho
Residing at: Jerome
My Commission expires: 7-31-09

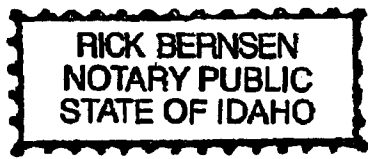


EXHIBIT A

1. Any facts, rights, interests, or claims which are not shown by the public records but which could be ascertained by an inspection of the land or which may be asserted by persons in possession, or claiming to be in possession, thereof.
2. Easements, liens, encumbrances, or claims thereof, which are not shown by the public records.
3. Any encroachment, encumbrance, violation, variation, or adverse circumstance affecting the Title that would be disclosed by an accurate and complete land survey of the Land, and that is not shown by the Public Records.
4. Any lien, or right to a lien, imposed by law for services, labor, or material heretofore or hereafter furnished, which lien, or right to a lien, is not shown by the public records.
5. Taxes or assessments which are not now payable or which are not shown as existing liens by the records of any taxing authority that levies taxes or assessments on real property or by the public records; proceedings by a public agency which may result in taxes or assessments, or notices of such proceedings, whether or not shown by the records of such agency or by the public records.
6. Any service, installation, connection, maintenance or construction charges for sewer, water, electricity, or garbage collection or disposal or other utilities unless shown as an existing lien by the public records.
7. Defects, liens, encumbrances, adverse claims or other matters, if any, created, first appearing in the public records or attaching subsequent to the effective date hereof but prior to the date the proposed insured acquires of record for value the estate or interest or mortgage thereon covered by this Commitment.
8. Liens in favor of the State of Idaho that might be disclosed by any Notice of Lien filed in the Office of the Secretary of State of Idaho against the vested owner or prior owner or against the purchaser of the land described herein.
9. (a) Unpatented mining claims; (b) reservations or exceptions in patents or in Acts authorizing the issuance thereof; (c) Indian treaty or aboriginal rights, including, but not limited to, easements or equitable servitudes; or, (d) water rights, claims or title to water, whether or not the matters excepted under (a), (b), (c) or (d) are shown by the public records.
10. Taxes for 2007 and subsequent years, a lien, but not yet due or payable.
11. Right of way for roads, canals, laterals and waste ditches as contained in an Agreement by and between the State of Idaho, and the Twin Falls North Side Land and Water Company, dated August 21, 1907, recorded in Book 15 Page 589, Jerome County records.

12. Conditions and restrictions in Right of Way Deed given by Elmer R. Skiver and Bertha Jane Skiver, husband and wife, to the State of Idaho, dated May 12, 1951, recorded June 30, 1951 in Book 141 Page 469 as Instrument Number 113504, Jerome County records, wherein there is also granted hereby an easement adjacent to the above described highway right of way for relocation of all irrigation and drainage ditches and structures and such surface drain ditches as may be necessary to the proper construction of the highway, and grantor agrees that no buildings or structures, except irrigation or drainage structures, will be permitted to be constructed within 20 feet of the right of way line of the highway. Construction of a barbwire right of way fencing shall be by and at the sole expense of the State, and grantor further agree that no advertising or other signs will be permitted closer than 100 feet from the right of way line of the highway. (Parcel No. 1)
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15. An Agreement Between City of Jerome, Idaho and ABC Agra, L.L.C. for Municipal Water and Wastewater Service by and between City of Jerome, a municipal corporation and ABC Agra, L.L.C., an Idaho limited liability company dated March 29, 2005, recorded April 21, 2005 as Instrument No. 2052120, records of Jerome County, Idaho. (Parcel No. 1)
16. Easements and Restrictions as shown on the recorded plat of Crossroads Point Business Center, PUD as recorded June 29, 2006 as Instrument No. 2063855, records of Jerome County, Idaho. (Parcel No. 1)
17. Declaration of Covenants, Conditions and Restrictions of Crossroads Point Business Center, PUD as recorded June 29, 2006 as Instrument No. 2063856, records of Jerome County, Idaho. Amendment to Declaration of Covenants, Conditions and Restrictions of Crossroads Point Business Center, P.U.D., dated August 21, 2006, recorded August 21, 2006 as Instrument Number 2065069, Jerome County records. (Parcel No. 1)

FAX COVER SHEET

DATE: Wednesday, June 13, 2007

PAGES (INCLUDING COVER): 15

ORIGINAL TO FOLLOW: No

RE: St. Benedicts / ABC Agra

OUR FILE: 3565-151

TO: Gary Slette

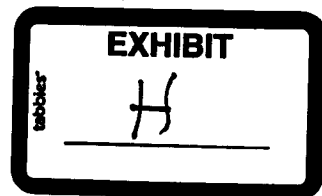
SEND TO FAX PHONE: 208-933-0701

MESSAGE:

Please see the attached.

— Judd Montgomery

JUDSON B. MONTGOMERY
GIVENS PURSLEY LLP
 601 W. Bannock Street
 Post Office Box 2720
 Boise, Idaho 83701-2720
 Telephone: 208-388-1202
 Fax: 208-388-1300
 Email: juddmontgomery@givenspursley.com



If this fax does not transmit fully or is difficult to read, please call Judi Ornellas at (208) 388-1242.

CONFIDENTIALITY NOTICE

This facsimile may contain confidential information that is protected by the attorney-client or work product privilege. It is intended only for the use of the individual(s) named above. If you are not a named recipient or an employee responsible for delivering the facsimile, you are instructed not to deliver, distribute or copy this facsimile, nor should you disclose its contents or take any action in reliance on the information it contains. If you have received this facsimile in error, please notify us immediately by telephone to arrange for the return of the transmitted documents to us. Thank you.

6/13/2007

From: Judi Ornellas
To: 'arlencrouch@aol.com'
Cc: 'gslette@rsidaholaw.com'; Judson B Montgomery
Sent: 6/13/2007 1:27PM
Subject: St. Benedicts / ABC Agra

Arten,

Per your conversation with Judd Montgomery, please see the attached redlines, for your review.

Judi

Judi Ornellas
Assistant to Judson B. Montgomery
Givens Pursley LLP
208-388-1242 - direct
208-388-1300 - fax
www.givenspursley.com

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**SUPPLEMENTAL
DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS
OF
CROSSROADS POINT BUSINESS CENTER P.U.D.**

THIS SUPPLEMENTAL DECLARATION made on the date hereinafter set forth, by **ABC AGRA, L.L.C.**, an Idaho limited liability company, hereinafter referred to as "Declarant".

RECITALS:

This Declaration is made in contemplation and furtherance of the following facts and purposes:

- A. Declarant is the owner of more than fifteen percent (15%) of that certain real property situated in Jerome County, State of Idaho, more particularly described as Phase I ("Phase 1 ") of the Crossroads Point Business Center P.U.D., according to the official plat thereof recorded as Instrument No. 2063855, records of Jerome County, Idaho ("Subdivision").
- B. Pursuant to Section 3 of Article II of the Declaration of Covenants, Conditions and Restrictions of Crossroads Point Business Center P.U.D., recorded on June 29, 2006, as Instrument No. 2063856, records of Jerome County, Idaho, Declarant is entitled to impose additional restrictions on land uses within the Subdivision.

DECLARATION:

Declarant hereby declares that the following supplemental restrictions shall apply to that real property identified on Exhibit "A", including, without limitation, all lots in the Subdivision:

Section 1: Provided that, within three (3) years of the date hereof, ~~St. Benedict's~~Benedict's Family Medical Center, Inc. ~~shall own and operate a hospital, has commenced the construction of a healthcare facility~~ upon Lots 6, 7, and 8 in Block 8 of the Subdivision, ~~St. Benedict's~~Benedict's Family Medical Center, Inc. shall be the sole provider of health care services within that real property identified on Exhibit "A", including, without limitation, the Subdivision. If such construction ~~and hospital operation shall occur within such time, has commenced and is diligently pursued to completion~~ no other lot within the Subdivision may be used for the provision of health care services without the express written consent and permission of ~~St. Benedict's~~Benedict's Family Medical Center, Inc. For purposes of this covenant, the provision of health care services shall mean any individuals, entities and/or facilities providing either (a) inpatient acute care (hospital) services, or (b) any of the following outpatient or inpatient services:

- (i) ~~general anesthesia, but not including conscious sedation or local anesthesia~~private practice of medicine for the care and treatment of human beings; or

- (ii) ~~commercial reference laboratory, interpreted as the provision of laboratory services to other physicians, but not including laboratory work or sample collections done for a physician's own patients for the purpose of providing surgical, procedural, diagnostic, therapeutic or ancillary medical services such as radiology, laboratory (including, without limitation, a pathology or clinical laboratory), physical therapy or other special procedures (including without limitation inhalation therapy, pulmonary physiological therapy, cardiology, X-ray, imaging, EEG, CT Scanner, or similar services) or any other surgical, diagnostic or therapy service; or~~
- (iii) ~~medical imaging, but not including medical imaging done for a physician's own patients; the operation of an acute care general hospital, a specialty hospital, a rehabilitation center, an extended care facility or nursing home, an outpatient or inpatient clinic, surgical center, emergency center, a home health service, or similar direct care provider, a birthing center or an inhalation or physical therapy center.~~
- (iv) ~~surgery done under general anesthesia, but not including surgery done under conscious sedation or local anesthesia.~~
- (v) ~~endoscopic procedures if done under general anesthesia, but not including such procedures performed under conscious sedation or local anesthesia.~~
- (vi) ~~arthroscopic procedures if done under general anesthesia, but not including such procedures performed under conscious sedation or local anesthesia.~~
- (vii) ~~radiation therapy.~~
- (viii) ~~cardiac imaging, but not including such services performed for a physician's own patients.~~
- (ix) ~~cardiac catheterization.~~
- (x) ~~obstetrical services, but not including such services performed for a physician's own patients.~~
- (xi) ~~obstetrical deliveries.~~

Section 2: In addition to the foregoing, no land within two hundred (200) feet of Lots 6, 7, and 8, in Block 8 of the Subdivision will be used or developed except in accordance with the uses identified on **Exhibit "A-B"** attached hereto and incorporated herein by this reference. All other uses within two hundred (200) feet of such Lots, including, without limitation, a fuel/service station or an agricultural business which keeps or maintains animals on the premises, shall be allowed only with the prior written approval of St. Benedict's Family Medical Center, Inc., which approval shall not be unreasonably withheld.

Section 3: This Supplemental Declaration, and the restrictions contained herein, shall run with and bind all of Phase 1 of the Subdivision, and the owners thereof, until and unless amended, terminated or revoked by an instrument signed by all the owners of Phase 1 of the Subdivision. Any amendment, termination or revocation shall be effective only upon recordation.

Section 4: If any of the provisions of this Supplemental Declaration, or any clause, paragraph, sentence, phrase or word or the application thereof shall be invalidated, such invalidity shall not affect the validity of the remainder of this Supplemental Declaration.

The provisions of the Supplemental Declaration shall be construed and enforced pursuant to the laws of the state of Idaho.

DATED this day of June, 2007.

"DECLARANT"
ABC AGRA, L.L.C.

By: _____
Its: _____

STATE OF IDAHO)

ss.

County of _____)

On this _____ day of June, 2007, before me, a Notary Public for said County and State, personally appeared _____, known or identified to me, to be one of the members in the limited liability company of ABC Agra, L.L.C., and the member or one of the members who subscribed said limited liability company name to the foregoing instrument, and acknowledged to me that he executed the same in said limited liability company name.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

NOTARY PUBLIC FOR IDAHO

Residing at _____

My commission expires _____

EXHIBIT A

EXHIBIT B**USES**

- Amphitheatre
- Automotive Dealerships
- Bark / Financial Services Complex
- Business Office Buildings
- Business Office Complexes
- Call Centers
- Central Park
- Church / Religious Center
- Department Stores
- Discount Retailers
- Education and Technology Complex
- Exposition and Convention Center
- Fast-Food Restaurants with Drive thru windows
- Fire I Emergency Station
- Furniture Store
- Health Clubs / Fitness Centers
- Home Improvement Centers
- Hospital
- Hotels / Motels
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- Medical Long-Term Care Center
- Medical Office Buildings
- Mixed Use Office and Civic Complex
- Multiuse Trail Corridor
- Recreational Complexes
- Restaurants
- Retail Outlet Mall
- Retail Stores
- Specialty Service and Production Complex
- Sports Athletic Complex
- Theaters
- Tourist and Hospital Center

Document comparison done by DeltaView on Wednesday, June 13, 2007 1:24:25 PM

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| Document 2 | file://S:/Clients/3565/151/Supplemental DEC GP02.doc |
| Rendering set | Standard |

| Legend: | |
|-------------------|--|
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| Deletion | |
| Moved from | |
| <u>Moved to</u> | |
| Style change | |
| Format change | |
| Moved deletion | |
| Inserted cell | |
| Deleted cell | |
| Moved cell | |
| Split/Merged cell | |
| Padding cell | |

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|----------------|-------|
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| Insertions | 13 |
| Deletions | 20 |
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| Moved to | 0 |
| Style change | 0 |
| Format changed | 0 |
| Total changes | 33 |

Instrument # 2073651

JEROME COUNTY, JEROME, IDAHO

2007-06-13

03:38:40 No. of Pages: 5

Recorded for : LAND TITLE & ESCROW

MICHELLE EMERSON

Fee: 15.00

Ex-Officio Recorder Deputy



**SUPPLEMENTAL
DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS
OF
CROSSROADS POINT BUSINESS CENTER P.U.D.**

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- B. Pursuant to Section 3 of Article II of the Declaration of Covenants, Conditions and Restrictions of Crossroads Point Business Center P.U.D., recorded on June 29, 2006, as Instrument No. 2063856, records of Jerome County, Idaho, Declarant is entitled to impose additional restrictions on land uses within the Subdivision.

DECLARATION:

Declarant hereby declares that the following supplemental restrictions shall apply to that real property identified on Exhibit "A", including, without limitation, all lots in the Subdivision:

Section 1: Provided that, within three (3) years of the date hereof, St. Benedicts Family Medical Center, Inc., has commenced the construction of a healthcare facility upon Lots 6, 7, and 8 in Block 8 of the Subdivision, St. Benedicts Family Medical Center, Inc. shall be the sole provider of health care services within that real property identified on Exhibit "A", including, without limitation, the Subdivision. If such construction has commenced and is diligently pursued to completion no other lot within the Subdivision may be used for the provision of health care services without the express written consent and permission of St. Benedicts Family Medical Center, Inc. For purposes of this covenant, the provision of health care services shall mean individuals, entities and/or facilities providing the following services:

- (i) private practice of medicine for the care and treatment of human beings; or
- (ii) for the purpose of providing surgical, procedural, diagnostic, therapeutic or ancillary medical services such as radiology, laboratory (including, without limitation, a pathology or clinical laboratory), physical therapy or other special procedures (including without limitation inhalation therapy, pulmonary

SUPPLEMENTAL DECLARATION OF COVENANTS, CONDITIONS & RESTRICTIONS - CROSSROADS POINT BUSINESS CENTER P.U.D. - 1

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EXHIBIT

I

52 of 124

- physiological therapy, cardiology, X-ray, imaging, EEG, CT Scanner, or similar services) or any other surgical, diagnostic or therapy service; or
- (iii) the operation of an acute care general hospital, a specialty hospital, a rehabilitation center, an extended care facility or nursing home, an outpatient or inpatient clinic, surgical center, emergency center, a home health service, or similar direct care provider, a birthing center or an inhalation or physical therapy center.

Section 2: In addition to the foregoing, no land within two hundred (200) feet of Lots 6, 7, and 8, in Block 8 of the Subdivision will be used or developed except in accordance with the uses identified on **Exhibit "B"** attached hereto and incorporated herein by this reference. All other uses within two hundred (200) feet of such Lots, including, without limitation, a fuel/service station or an agricultural business which keeps or maintains animals on the premises, shall be allowed only with the prior written approval of St. Benedict's Family Medical Center, Inc., which approval shall not be unreasonably withheld.

Section 3: This Supplemental Declaration, and the restrictions contained herein, shall run with and bind all of Phase 1 of the Subdivision, and the owners thereof, until and unless amended, terminated or revoked by an instrument signed by all the owners of Phase 1 of the Subdivision. Any amendment, termination or revocation shall be effective only upon recordation.

Section 4: If any of the provisions of this Supplemental Declaration, or any clause, paragraph, sentence, phrase or word or the application thereof shall be invalidated, such invalidity shall not affect the validity of the remainder of this Supplemental Declaration.

The provisions of the Supplemental Declaration shall be construed and enforced pursuant to the laws of the state of Idaho.

DATED this 13th day of June, 2007.


"DECLARANT"
ABC AGRA, L.L.C.

By: *Ardu B. Brown*
Its: *Owner*

STATE OF IDAHO)
)
) ss.
County of Sevier)

On this 19th day of June, 2007, before me, a Notary Public for said County and State, personally appeared Artes Crouch, known or identified to me, to be one of the members in the limited liability company of ABC Agra, L.L.C., and the member or one of the members who subscribed said limited liability company name to the foregoing instrument, and acknowledged to me that he executed the same in said limited liability company name.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.



NOTARY PUBLIC FOR IDAHO
Residing at Sevier, R.
My commission expires 7-2009

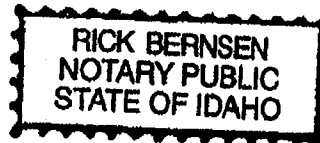


EXHIBIT A

CROSSROADS POINT PUD

LEGAL DESCRIPTION

March, 2005

That portion of the S1/2 of Section 10, T. 9 S., R. 17 E., Boise Meridian lying west of the US Highway 93 right-of-way; and that portion of the N1/2 of Section 15, T. 9 S., R 17 E., Boise Meridian, lying west of the US Highway 93 right-of-way and north of the Interstate 84 right-of-way; and that portion of the NE1/4 of Section 16, T. 9 S., R 17 E., Boise Meridian lying north of the Interstate 84 right-of-way. (Totaling approximately 499 acres)

**SUPPLEMENTAL DECLARATION OF COVENANTS, CONDITIONS & RESTRICTIONS – CROSSROADS
POINT BUSINESS CENTER P.U.D. - 4**

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EXHIBIT B

USES

- Amphitheatre
- Automotive Dealerships
- Bark / Financial Services Complex
- Business Office Buildings
- Business Office Complexes
- Call Centers
- Central Park
- Church / Religious Center
- Department Stores
- Discount Retailers
- Education and Technology Complex
- Exposition and Convention Center
- Fast-Food Restaurants with Drive thru windows
- Fire I Emergency Station
- Furniture Store
- Health Clubs / Fitness Centers
- Home Improvement Centers
- Hospital
- Hotels / Motels
- Manufacturing and Technology Campus
- Medical Long-Term Care Center
- Medical Office Buildings
- Mixed Use Office and Civic Complex
- Multiuse Trail Corridor
- Recreational Complexes
- Restaurants
- Retail Outlet Mall
- Retail Stores
- Specialty Service and Production Complex
- Sports Athletic Complex
- Theaters
- Tourist and Hospital Center

**SUPPLEMENTAL DECLARATION OF COVENANTS, CONDITIONS & RESTRICTIONS – CROSSROADS
POINT BUSINESS CENTER P.U.D. - 5**

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PROPERTY DESCRIPTION
FOR
SBFMC HOSPITAL

EXHIBIT "A"

MARCH 9, 2006

A tract of land located in the Southeast Quarter of Section 10, Township 9 South, Range 17 East, Boise Meridian, Jerome County, Idaho, more particularly described as follows:

Beginning at the Southeast corner of said Section 10;

THENCE North 89° 23' 33" West a distance of 363.72 feet along the southerly boundary of said Section 10 to the westerly boundary of Highway 93 ITD Project P2391;

THENCE North 07° 38' 16" East a distance of 251.90 feet along said westerly boundary of Highway 93;

THENCE North 89° 23' 33" West a distance of 557.04 feet;

THENCE North 27° 19' 34" East a distance of 82.24 feet;

THENCE North 31° 08' 43" East a distance of 30.19 feet to the True Point of

Beginning;

THENCE North 31° 08' 43" East a distance of 28.60 feet;

THENCE North 43° 30' 59" East a distance of 88.54 feet;

THENCE North 51° 58' 17" East a distance of 67.70 feet;

THENCE North 33° 49' 21" West a distance of 160.16 feet;

THENCE North 52° 46' 01" East a distance of 34.01 feet;

THENCE North 62° 15' 46" East a distance of 58.51 feet;

THENCE North 29° 20' 01" West a distance of 183.83 feet;

THENCE North 63° 12' 31" East a distance of 68.38 feet;

THENCE North 26° 54' 30" West a distance of 86.64 feet;

THENCE North 61° 05' 48" East a distance of 64.39 feet;

THENCE North 25° 28' 48" West a distance of 39.30 feet;

THENCE North 63° 59' 32" East a distance of 58.18 feet;

THENCE North 17° 06' 25" West a distance of 149.62 feet;

THENCE North 77° 24' 53" East a distance of 140.57 feet;

THENCE North 11° 17' 16" West a distance of 107.59 feet to the southern right-of-way of a proposed new road;

THENCE North 89° 23' 33" West a distance of 628.37 feet along said right-of-way of a proposed new road;

THENCE South 00° 55' 25" West a distance of 366.49 feet;

THENCE South 30° 51' 10" East a distance of 66.03 feet;

THENCE South 40° 10' 49" West a distance of 204.04 feet;

THENCE South 53° 49' 23" East a distance of 641.20 feet to the True Point of Beginning.

Containing 10.09 acres more or less.

PROPERTY DESCRIPTION
FOR
SHEMOC HOSPITAL

EXHIBIT "g"

MARCH 9, 2006

A tract of land located in the Southeast Quarter of Section 10, Township 9 South, Range 17 East, Boise Meridian, Jerome County, Idaho, more particularly described as follows:

Beginning at the Southeast corner of said Section 10;
THENCE North 89° 23' 33" West a distance of 363.72 feet along the southerly boundary of said Section 10 to the westerly boundary of Highway 93 TTD Project P2391;
THENCE North 07° 38' 16" East a distance of 251.90 feet along said westerly boundary of Highway 93 and the True Point of Beginning;
THENCE North 07° 38' 16" East a distance of 360.30 feet along said westerly boundary of Highway 93 to a point of curvature;
THENCE northerly 697.98 feet on the arc of a curve to the left with a radius of 11,309.16 feet, a central angle of 3° 32' 11", and a chord which bears North 5° 52' 11" East a distance of 697.87 feet along the westerly boundary of said Highway 93 to the southerly right-of-way of a proposed new road;
THENCE North 89° 23' 33" West a distance of 408.47 feet along the southerly right-of-way of a proposed new road;
THENCE South 11° 17' 16" East a distance of 107.59;
THENCE South 77° 24' 53" West a distance of 140.57 feet;
THENCE South 17° 06' 25" East a distance of 149.62 feet;
THENCE South 69° 59' 32" West a distance of 54.18 feet;
THENCE South 25° 28' 48" East a distance of 39.30 feet;
THENCE South 61° 05' 48" West a distance of 64.39 feet;
THENCE South 26° 54' 30" East a distance of 86.64 feet;
THENCE South 63° 12' 31" West a distance of 64.38 feet;
THENCE South 29° 20' 01" East a distance of 183.83 feet;
THENCE South 62° 15' 46" West a distance of 58.51 feet;
THENCE South 52° 46' 01" West a distance of 34.01 feet;
THENCE South 33° 49' 21" East a distance of 160.16 feet;
THENCE South 51° 58' 17" West a distance of 67.70 feet;
THENCE South 43° 30' 59" West a distance of 88.54 feet;
THENCE South 31° 08' 43" West a distance of 58.79 feet;
THENCE South 27° 19' 34" West a distance of 82.24 feet;
THENCE South 89° 23' 33" East a distance of 557.04 feet to the True Point of Beginning.

Containing 11.35 acres more or less.

**PROPERTY DESCRIPTION
FOR
SBFMC HOSPITAL**

EXHIBIT "C"

MARCH 9, 2006

A tract of land located in the Southeast Quarter of Section 10, Township 9 South, Range 17 East, Boise Meridian, Jerome County, Idaho, more particularly described as follows:

**Beginning at the Southeast corner of said Section 10;
THENCE North 89° 23' 33" West a distance of 363.72 feet along the southerly boundary of said Section 10 to the westerly boundary of Highway 93 ITD Project F2391;
THENCE North 07° 38' 16" East a distance of 251.90 feet along said westerly boundary of Highway 93;
THENCE North 89° 23' 33" West a distance of 557.04 feet to the True Point of Beginning;
THENCE North 89° 23' 33" West a distance of 648.55;
THENCE North 00° 36' 27" East a distance of 1052.53 feet to the southern right-of-way of a proposed new road;
THENCE South 89° 23' 33" East a distance of 276.85 along said right-of-way of a proposed new road;
THENCE South 00° 55' 25" West a distance of 366.49 feet;
THENCE South 30° 51' 10" East a distance of 66.03 feet;
THENCE South 40° 10' 49" West a distance of 204.04 feet;
THENCE South 53° 49' 23" East a distance of 641.20 feet;
THENCE South 31° 08' 43" West a distance of 30.19
THENCE South 27° 19' 34" West a distance of 82.24 feet to the True Point of Beginning;
Containing 8.89 acres more or less.**

Robertson & Slette, p.l.l.c.

ATTORNEYS AT LAW

J. EVAN ROBERTSON
GARY D. SLETTE

Robin L. Moore, PLS - Paralegal

134 Third Avenue East
P.O. BOX 1906
TWIN FALLS, IDAHO 83303-1906
TELEPHONE (208) 933-0700
FAX (208) 933-0701



GARY D. SLETTE
gslette@rsidaholaw.com

January 30, 2012

Critical Access Group, Inc.
Attn: Dan McGinty
502 East 2nd Street
Duluth, MN 55805

RE: Crossroads Point Business Center PUD Phase One, Jerome, Idaho

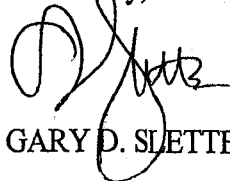
Dear Mr. McGinty:

Our law firm represents ABC Agra, LLC, the developer of Crossroads Point Business Center PUD. On behalf of my client, I recently obtained a Lot Book Report from Land Title and Escrow, Inc. in Jerome, Idaho. That report disclosed that you had been conveyed three lots within the subdivision that are expressly subject to the terms of an Agreement dated March 14, 2007. I note that your Warranty Deed contains a list of the permitted exceptions on Exhibit "B", one of which is the memorandum of Option Agreement recorded as Instrument No. 2113149. I am enclosing a copy of that Agreement so that there are no future misunderstandings regarding the limitations of allowable land use on the property. Pursuant to paragraph 4 of that Option Agreement, the entirety of the property you acquired is restricted to its use for health care facilities only. I am certain that you have discussed this issue with your grantor, and that it comes as no surprise, but my client and I wanted to make certain you were informed as to the restrictions and methodology of enforcement of those restrictions.

Should you desire to discuss any aspect of the use and potential development of this property, please do not hesitate to contact me at your convenience.

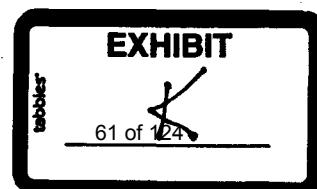
On a totally unrelated matter, I was glad to finally be able to write to someone in Duluth. As a graduate of UMD in 1977, I was particularly proud of the Bulldogs' hockey performance this past year. GO DAWGS!!

Yours truly,



GARY D. SLETTE

GDS:rlm
Encls.
cc: Client
rlm\gds\letter\critical access group



January 23, 2007

Dan McGinty
Al Stevenson

We enjoyed visiting with the two of you on January 16, 2007 and are excited for the day when construction can start on the hospital. We are energized to hear of your ideas for the hospital and also the working with Magic Valley/St. Lukes. All will be better served. We will do all we can to help you serve Jerome and the surrounding area in any way possible.

As we discussed, it would be very helpful to have some press releases about the progress and future plans for the hospital. We have many meetings every day and in nearly every meeting a question comes up about the hospital. We cannot speak for the hospital as we can say only what we know to be facts. We look forward to information coming from the hospital as soon as possible.

We were asked to transfer the option agreement from St Alphonus to Benedictine Health System. We gave you our permission to make that transfer. St Alphonus needs to give their permission and draw up the new agreement.

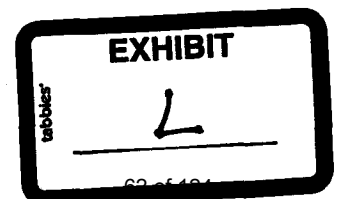
We were also asked to extend the option agreement two more months with a Monday, May 14, 2007 exercise date. As we mentioned, even though we also have obligations of which we have to be concerned, we gave our permission to extend the exercise date to Monday, May 14, 2007 with another deposit. We believe the extension should be accompanied with another \$50,000. This \$50,000 will not be refundable if the option is not exercised.

Thank you for visiting with us. We have many press releases that we will announce within the next few months and the hospital will be very proud of its surrounding businesses. I am eager for good weather so more construction can begin.

We look forward to receiving the new documents and we will respond quickly.

Best regards,

Arlen B. Crouch



GIVENS PURSLEY LLP

LAW OFFICES

601 W. Bannock Street
PO Box 2720, Boise, Idaho 83701
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Clint R. Bolinder
Erik J. Bolinder
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Jeremy C. Chou
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Michael C. Creamer
Amber N. Dina
Elizabeth M. Donick
Thomas E. Dvorak
Jeffrey C. Fereday
Justin M. Fredin
Martin Hendrickson

Steven J. Hippler
Donald E. Krickrehm
Debora K. Kristensen
Anne C. Kunkel
Michael P. Lawrence
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Kenneth R. McClure
Kelly Greene McConnell
Alex P. McLaughlin
Christopher H. Meyer
L. Edward Miller
Patrick J. Miller
Judson B. Montgomery

Deborah E. Nelson
Kelsey J. Nunez
W. Hugh O'Riordan, LL.M.
Angela M. Reed
Justin A. Steiner
Kenton H. Walker*
Robert B. White

Retired
Kenneth L. Pursley
James A. McClure (1924-2011)
Raymond D. Givens (1917-2008)
*Admitted only in IL

February 9, 2012

Gary D. Slette
Robertson & Slette, P.L.L.C.
Attorneys at Law
134 Third Avenue East
Twin Falls, ID 83303-1906

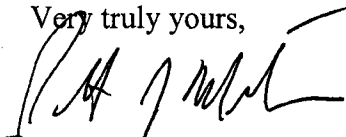
Dear Gary:

Dan McGinty of the Critical Access Group (CAG) passed on your January 30, 2012 letter to me and asked me to confirm that CAG did receive your letter. I was also asked to confirm that CAG is aware of the March 14, 2007 Option Agreement and does understand your client has taken certain positions with respect to that document. The fact that CAG is aware of your client's previous positions should not be interpreted as a statement that CAG agrees with such positions.

CAG did ask me to ask you to direct any future correspondence regarding this subject to me as legal counsel for CAG.

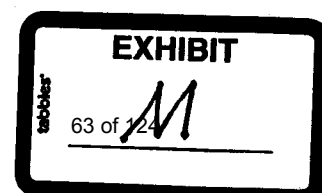
I hope all is going well for you.

Very truly yours,



Patrick J. Miller

PJM/sp
cc: Dan McGinty
1388263_1



Patrick J. Miller, ISBN 3221
Martin C. Hendrickson, ISBN 5876
GIVENS PURSLEY LLP
601 West Bannock St.
P.O. Box 2720
Boise, Idaho 83701-2720
Office: (208) 388-1200
Fax: (208) 388-1300

Attorneys for Defendant

DISTRICT COURT
FIFTH JUDICIAL DIST
JEROME COUNTY IDAHO
2012 JUN 4 PM 4 15
Michelle Emerson
CLERK
BY _____
DEPUTY CLERK

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

ABC AGRA, LLC, an Idaho limited liability
company,

Plaintiff,

v.

CRITICAL ACCESS GROUP, INC., a
Minnesota non-profit corporation,

Defendant.

Case No.: CV-2012-513

**MOTION TO DISMISS
COMPLAINT**

COMES NOW the Defendant, Critical Access Group, Inc., by and through its attorneys of record, Givens Pursley LLP and, pursuant to Rules 12(b)(1) and 12(b)(6) of the Idaho Rules of Civil Procedure, hereby moves this Court for an order dismissing the Plaintiff's Complaint in its entirety.

This motion is supported by the memorandum in support filed contemporaneously herewith.

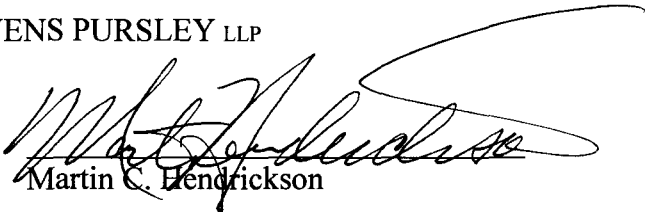
ORAL ARGUMENT IS REQUESTED.

DATED this 1st day of June, 2012.

Respectfully submitted,

GIVENS PURSLEY LLP

By



Martin C. Hendrickson

Attorneys for Defendant

I HEREBY CERTIFY that on this 1st day of June 2012, the foregoing was filed, served, and copied as follows:

ORIGINAL FILED

Fifth Judicial District Court
Blaine County Courthouse
206 1st Ave., Ste. 200
Hailey, ID 83333

U. S. Mail
 Hand Delivered
 Overnight Mail
 Facsimile
 E-mail

SERVICE PROVIDED

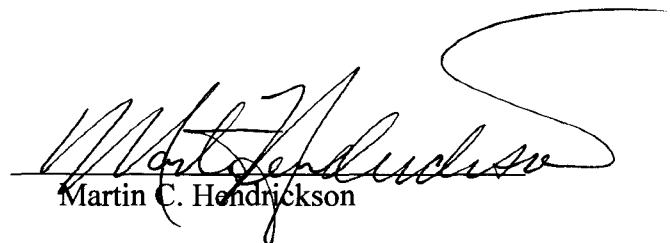
Gary D. Slette
Robertson & Slette, PLLC
P.O. Box 1906
Twin Falls, ID 83303-1906
Email: gslette@rsidaholaw.com

U. S. Mail
 Hand Delivered
 Overnight Mail
 Facsimile
 E-mail

COURTESY COPY PROVIDED

Hon. John K. Butler
District Judge
Jerome County District Court
233 W. Main
Jerome, ID 83338
Email: jbutler@co.jerome.id.us

U. S. Mail
 Hand Delivered
 Overnight Mail
 Facsimile
 E-mail



Martin C. Hendrickson

1 **Gary D. Slette**
 2 **ROBERTSON & SLETTE, PLLC**
 3 **P.O. Box 1906**
 4 **Twin Falls, Idaho 83303-1906**
 5 **Telephone: (208) 933-0700**
 6 **Facsimile: (208) 933-0701**
 7 **ISB # 3198**
 8 **lrlm\GDS\ABC\dismiss_rspns memo oppos**

DISTRICT COURT
 FIFTH JUDICIAL DIST
 JEROME COUNTY IDAHO

2012 JUN 13 AM 11 53

Michelle Emerson

 BY *[Signature]*

 CLERK
 DEPUTY CLERK

9 IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
 10 STATE OF IDAHO, IN AND FOR THE COUNTY OF JEROME

11 *****

12 ABC AGRA, LLC, an Idaho limited
 13 Liability company,
 14 Plaintiff,

Case No. CV-2012-513

15 v.

PLAINTIFF'S RESPONSE
 MEMORANDUM IN OPPOSITION
 TO MOTION TO DISMISS COMPLAINT

16 CRITICAL ACCESS GROUP, INC.,
 17 A Minnesota non-profit corporation,
 18 Defendant.

19
 20 COMES NOW the Plaintiff, ABC AGRA, LLC ("ABC"), by and through its attorney of
 21 record, Gary D. Slette of the firm Robertson & Slette, PLLC, and submits its Response
 22 Memorandum in Opposition to Motion to Dismiss Complaint.

23 **FACTS**

24 The facts as set forth in the Verified Complaint on file in this action have been accepted by
 25 the Defendant Critical Access Group, Inc. ("CAG") as true and correct. See Defendant's
 26 Memorandum at p. 2. It is true, as CAG has asserted, that ABC has not chosen to exercise its option
 to repurchase the Subject Property which includes the 21.64 acres that ABC gifted to CAG's

1 predecessor and affiliate. It is true, as CAG has asserted, that CAG has not sought to develop the
2 Subject Property, or at least, ABC is unaware of any plans or attempts by CAG to develop the
3 Subject Property at this time. What CAG has affirmatively stated through its counsel, however, is
4 that CAG does not agree that the Subject Property is burdened by the restrictive covenant in the
5 Option Agreement which allows only "healthcare facilities" to be constructed on the Subject
6 Property. The Subject Property is all commercially zoned, and is located adjacent to U.S. Highway
7 93 just north of Interstate 84. Presumably, CAG would prefer to delay this adjudication until a later
8 date, perhaps to a time when a non-healthcare commercial facility was being proposed by one of
9 CAG's grantees for a portion of the Subject Property, thus necessitating the requirement for a
10 restraining order and/or injunction as expressly contemplated in paragraph 4 of the Option
11 Agreement. It is submitted that a court would be in no better position then to adjudicate the matter
12 than it is now. The salient facts are all before this court relative to the recorded documents showing
13 the restriction as agreed to by the parties, and as set forth in the Option Agreement. The response
14 from CAG's attorney clearly indicates a lack of agreement of the validity regarding the restriction,
15 even though CAG's own attorneys were responsible for drafting and defining the term "healthcare
16 facilities".

15 It is true, as CAG asserts, that there has been no allegation that it has breached the Option
16 Agreement. However, Idaho Code § 10-1203 states:

17 A contract may be construed either before or after there has been a
18 breach thereof.

18 Specifically, ABC is proceeding in this action in accordance with Idaho Code § 10-1202 which
19 states, in pertinent part, as follows:

20 Any person interested under a ... written contract ... may have
21 determined any question of construction or validity arising under the
22 ... contract ... and obtain a declaration of rights, status or other legal
23 relations thereunder.

23 CAG has expressed its disagreement with ABC's letter regarding the restrictive covenant language
24 in the Option Agreement, and doesn't believe it to be valid, despite having record notice of the
25 Option Agreement. In order to resolve the uncertainty and lack of any agreement between the
26 parties as to the construction of that language, and in order to bring certainty and finality to the
27 validity of the restrictive covenant, a declaration of rights, status or other legal relations under the

1 Option Agreement is appropriate. In accordance with Idaho Code § 10-1206, a declaratory
2 judgment in this case will terminate any uncertainty as expressed by CAG which has given rise to
3 the need for this proceeding.

4 ARGUMENT

5 CAG has asserted that this case is not ripe, despite its attorney having sent the letter which
6 gives rise to the uncertainty or controversy in this proceeding. The instant case calls to mind one of
7 the seminal cases in Idaho jurisprudence regarding ripeness. In *Miles v. Idaho Power Company*, 116
8 Idaho 635, 778 P.2d 757 (1989), the Idaho Supreme Court considered a lack of ripeness assertion,
and stated as follows:

9 Deferring adjudication would add nothing material to the resolution
10 of the legal issues presented, and it would, in fact, delay
11 implementation of the agreement. "Generally, in determining
12 whether to grant a declaratory judgment, the criteria is whether it
13 will clarify and settle the legal relations at issue, and whether such
14 declaration will afford a leave from uncertainty and controversy
15 giving rise to the proceeding." *Sweeney v. Am. Nat'l Bk.*, 62 Idaho
16 544, 115 P.2d 109 (1941). Here, nothing can be gained by delaying
adjudication of the issue. It is clear that this issue will be before us
either now or in the future, and a declaration now of the various
rights of the parties will certainly afford a relief from uncertainty and
controversy in the future. "Since we are persuaded that 'we will be in
no better position than we are now' to decide this question, we hold
that it is presently ripe for adjudication." (Citation omitted).

17 778 P.2d at 765.

18 In 1996, another bellwether case entitled *Boundary Backpackers v. Boundary County*, 128
19 Idaho 371, 913 P.2d 1141 (1996) was decided by the Idaho Supreme Court. In determining that a
20 matter was ripe for judicial review, the Court stated:

21 The county and the board members assert that this case is not ripe for
judicial review. We disagree.

22 In *Miles*, the Court pointed out that "a declaratory judgment action
23 must raise issues that are definite and concrete, and must involve a
24 real and substantial controversy as opposed to an advisory opinion
25 based upon hypothetical facts. Ripeness asks whether there is any
26 need for court action at the present time." 116 Idaho at 642, 778 P.2d
at 764. All of these conditions are met in this case. The ordinance is
in place. It contains several edicts concerning the compliance of
federal and state agencies with the plan and announces that "[n]o

1 wilderness areas shall be designated in Boundary County." The
2 ordinance proclaims: "Boundary County shall enforce compliance
3 with [the plan]" The affidavit of the board members who enacted
4 the ordinance stating that they "deemed that it would not be proper to
5 seek enforcement of the ordinance by fines or penalties" does not
6 override the terms of the ordinance requiring enforcement. We will
7 not speculate whether the board members will choose another form
8 of enforcement or whether a new board will choose to enforce the
9 ordinance by fines or penalties. The ordinance requires the plan to be
10 enforced.

11 In *Harris v. Cassia County*, 106 Idaho 513, 681 P.2d 988 (1984), the
12 Court noted that the right sought to be protected by a declaratory
13 judgment "may invoke either remedial or preventative relief; it may
14 relate to a right that has either been breached or is only yet in dispute
15 or a status undisturbed but threatened or endangered; but, in either or
16 any event, it must involve actual and existing facts." (Citations
17 omitted). In the present case, the ordinance threatens to disturb the
18 status and management of federal and state public lands in Boundary
19 County. The issues are definite and concrete and there is a real and
20 substantial controversy.

21 913 P.2d at 1146.

22 That case was followed by the opinion in *Schneider v. Howe*, 142 Idaho 767, 133 P.3d 1232
23 (2006) where the Court stated:

24 The Howes assert that Schneider's claim is not ripe for review
25 because his land is currently zoned as agricultural land and he has
26 not submitted the proper applications to have the zoning changed or
submitted a subdivision plat to the County. Schneider concedes that
he has not applied to change the zoning or submitted a subdivision
plat. However, he contends that his claim is ripe because the
Declaratory Judgment Act allows parties with an interest in a
potential legal determination to seek redress regardless of whether
they can seek further relief and because he suffered harm the
moment the Howes refused to let him use the easement.

Ripeness asks whether court action is necessary at the present time.
Boundary Backpackers v. Boundary County, 128 Idaho 371, 376,
913 P.2d 1141, 1146 (1996).

Declaratory judgments by their very nature ride a fine line
between purely hypothetical or academic questions and
actually justiciable cases. Many courts have noted that the
test of justiciability is not susceptible of any mechanistic

1 formulation, but must be grappled with according to the
2 specific facts of each case.

3 (Citation omitted). "Generally, in determining whether to grant a
4 declaratory judgment, the criteria is whether it will clarify and settle
5 the legal relations at issue, and whether such declaration will afford a
6 leave from uncertainty and controversy giving rise to the
7 proceeding." (Citations omitted). If deferring the adjudication
8 "would add nothing material to the legal issues presented" so that a
9 court will be in no better position in the future and if a declaration of
10 the rights of parties will "certainly afford a relief from uncertainty
11 and controversy in the future" the case may be presently ripe for
12 adjudication.

13 Here, Schneider has asked the district court to determine the
14 existence of an easement as it appears in a plat. Delaying the
15 adjudication would add nothing material to the litigation and a court
16 would be in no better position to decide the existence of the
17 easement. A declaration regarding the existence of an easement will
18 afford both Schneider and the Howes relief from uncertainty and
19 controversy in the future. Additionally, local governmental entities
20 often do not want to become involved in pending lawsuits. The
21 County may be reluctant to approve any subdivision requested by
22 Schneider that would use the road easement in question as long as
23 there is a controversy about the existence of the easement. Therefore,
24 the issue is ripe.

25 *Id.*

26 CAG's reliance upon *Davidson v. Wright*, 143 Idaho 616, 151 P.3d 812 (2006) is misplaced.
In that case, Davidson attempted to compel the Sun Valley City Clerk to accept or reject a proposed
initiative based on the municipality's view of its constitutional merits. In ruling on the declaratory
judgment action, the Court stated:

The substance of Davidson's proposed initiative will not be ripe for
judicial review unless or until passage by the voters brings up the
problem of enforcing a potentially invalid law. ...Until then, any
judgment on the merits of this case would be an academic discussion
on a hypothetical set of facts.

151 P.3d at 817. In the instant case, there is no hypothetical set of facts. Either the covenant
contained in the Option Agreement is valid or it isn't. The controversy is definite and concrete, and
touches upon the legal relations of the parties. The controversy admits of specific relief through a

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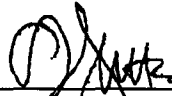
decree of a conclusive character. Deferring the adjudication of this matter to a later date will add nothing material to the resolution of the legal issue presented. Consistent with *Miles, supra*, the adjudication in this case will clarify and settle the legal relations at issue, and will provide the parties relief from any uncertainty or disagreement as specifically asserted by CAG's attorney.

CONCLUSION

For the foregoing reasons, the Complaint in this matter should not be dismissed.

DATED this 13th day of June, 2012.

ROBERTSON & SLETTE, PLLC


By: 
Gary D. Slette

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 13th day of June, 2012, I caused a true and correct copy of the foregoing instrument was served upon the following persons in the following manner:

| | | |
|----------------------|-----|--|
| Patrick J. Miller | [] | Hand Deliver |
| Givens Pursley | [] | U.S. Mail |
| 601 W. Bannock St. | [] | Overnight Courier |
| Boise, ID 83701-2720 | [x] | Facsimile Transmission - 208-388-1300 |
| | [] | Email pjm@givenpursley.com |

| | | | |
|-----------------------|----------------------|-----|--|
| <i>Courtesy Copy:</i> | Hon. John K. Butler | [] | Hand Deliver |
| | District Judge | [] | U.S. Mail |
| | Jerome County Courts | [] | Overnight Courier |
| | 233 W. Main Street | [] | Facsimile Transmission |
| | Jerome, ID 83333 | [x] | 208-644-2609 |
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Gary D. Slette

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DISTRICT COURT
 FIFTH JUDICIAL DIST
 JEROME COUNTY IDAHO

2012 JUN 13 AM 11 53

M. L. Emerson

 CLERK
 BY _____
 DEPUTY CLERK

9 IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
 10 STATE OF IDAHO, IN AND FOR THE COUNTY OF JEROME

11 ABC AGRA, LLC, an Idaho limited)
 12 Liability company,)
 13 Plaintiff,)
 14)
 15 v.)
 16)
 17 CRITICAL ACCESS GROUP, INC.,)
 18 A Minnesota non-profit corporation,)
 19 Defendant.)

Case No. CV-2012-513
 PLAINTIFF'S MOTION FOR
 SUMMARY JUDGMENT

20 COMES NOW the Plaintiff ABC AGRA, LLC ("ABC") by and through its attorney of
 21 record, Gary D. Slette and moves the above-named court for an order granting summary judgment
 22 against the Defendant, Critical Access Group, Inc. pursuant to I.R.C.P. Rule 56(c).

23 This Motion is supported by the Verified Complaint on file in this matter and ABC hereby
 24 incorporates its Response Memorandum in Opposition to Motion to Dismiss Complaint as the brief
 25 in support of this Motion for Summary Judgment.

26 Oral argument is requested.

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DATED this 13 day of June, 2012.

ROBERTSON & SLETTE, PLLC


By: 

Gary D. Slette

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 13 day of June, 2012, I caused a true and correct copy of the foregoing instrument was served upon the following persons in the following manner:

- | | | |
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By: 

Gary D. Slette

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1506888_1 (10797-8)

Attorneys for Defendant

DISTRICT COURT
FIFTH JUDICIAL DIST
JEROME COUNTY IDAHO

2012 JUN 27 PM 4 33

MARTIN C. HENDRICKSON

CLERK

BY

DEPUTY CLERK

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

ABC AGRA, LLC, an Idaho limited liability
company,

Plaintiff,

v.

CRITICAL ACCESS GROUP, INC., a
Minnesota non-profit corporation,

Defendant.

Case No.: CV-2012-513

**REPLY MEMORANDUM IN
SUPPORT OF MOTION TO
DISMISS COMPLAINT**

I. INTRODUCTION

Defendant, Critical Access Group, Inc., submits this Reply Memorandum in further support of its Motion to Dismiss. The case authority upon which both parties rely demonstrates that Idaho courts will only issue declaratory judgments in actions that are ripe for adjudication.

"Ripeness asks whether there is a need for court action at the present time." *Paddison Scenic Properties, Family Trust, L.C. v. Idaho County*, -- P.3d --, 2012 WL 1889230 (Idaho); *Boundary Backpackers v. Boundary County*, 128 Idaho 371, 376, 913 P.2d 1141, 1146 (1996); *Miles v. Idaho Power Company, et al.* 116 Idaho 635, 642, 778 P.2d 757, 764 (1989). Critical Access Group respectfully submits that Plaintiff's effort to put this matter before the Court is more a matter of gamesmanship and strategy than actual need for court intervention at the present time. This Court and Defendant should not be enforced to devote substantial time, effort and economic resources to a matter that does not now, nor perhaps ever, need to be submitted to the Court.

II. DISCUSSION

A. Facts in Complaint Assumed to Be Correct Only for Purposes of Motion to Dismiss

Defendant Critical Access Group ("CAG") filed its Motion to Dismiss on June 4, 2012, and stated on page 2 thereof, "For the purposes of the instant motion, CAG accepts the facts set forth in ABC's complaint as true." Plaintiff ABC Agra, LLC ("ABC") filed a response to the Motion to Dismiss and filed a Motion for Summary Judgment (that is not yet before the Court) wherein it incorporates its response to the Motion to Dismiss. In its response, ABC's counsel states, "The facts as set forth in the Verified Complaint on file in this action have been accepted by the Defendant, Critical Access Group, Inc. ('CAG') as true and correct." ABC's Response Memorandum at p. 1. ABC's counsel attempts, therefore, to obtain summary judgment on facts it alleges have been admitted, ignoring the disclaimer that the facts were admitted only for purposes of the Motion to Dismiss. This type of gamesmanship is reflective of the fact that this case is not about a real and present dispute, but rather is a matter of strategic positioning. To be clear, the facts in the Complaint are assumed true only for purposes of the motion to dismiss.

B. There is No Present Controversy—Only a Manufactured One

The basic real estate transaction discussed in Plaintiff's Complaint can be summarized as follows. Again, for purposes of the present Motion, Defendant will continue to assume the truth of the allegations of Plaintiff's Complaint.

- Plaintiff ABC granted an option in favor of Defendants predecessors in interest to purchase lot 6 in ABC's "Crossroads Point Business Center PUD." Complaint at ¶¶ 1 and 6.
- St. Benedicts, prior to the Option Agreement, represented (according to the Complaint) that it would build a new hospital on the property. Complaint at ¶ 7. The purchase price for lot 6 was \$1,678,000. Complaint, Exhibit D, at ¶ 1(c).
- Plaintiff ABC agreed to "gift two" lots to St. Benedicts (specifically lots 7 and 8) if St. Benedicts exercised its option to purchase lot 6. See Complaint at ¶ 8. See also Option Agreement (Exhibit D to the Complaint) at ¶¶ 1(a) and 2.
- The Option Agreement stated that the optionee (then St. Benedicts and Saint Alphonsus) covenanted with ABC that they would use the purchased lot and the two gift lots for the construction of healthcare facilities. Conversely, ABC agreed that optionee (St. Benedicts and Saint Alphonsus) "shall be the exclusive provider of health care services within the development currently known as Crossroads Point" and agreed to restrictions on development of adjacent properties. Option Agreement at ¶¶ 4 and 9(i).
- The Option Agreement provided ABC with a specific remedy in the event that St. Benedicts acquired the three lots but then did not build a healthcare facility. Specifically, paragraph 7 of the Option agreement stated that if St. Benedicts did not commence construction of healthcare facilities on the real property within three years of the date of the exercise of its option, then ABC had the right to buy back all three parcels (the purchased parcel and the two gift parcels) for \$1,678,000, which is the exact same price that St. Benedicts (i.e., the optionee) paid for lot 6. The buy-back right "shall be in effect for a two (2) year period which shall commence at the end of the third year following Optionee's exercise of the option on the Real Property."

According to the Complaint, St. Benedicts exercised the option on May 14, 2007. St. Benedicts had three years from that date to commence construction of a healthcare facility, making the deadline May 14, 2010. If it did not commence construction by that date, then ABC could then exercise its option to purchase all lots for the total sum of \$1,678,000. This provision

could be interpreted in two ways. It could mean that ABC had two years from the expiration of the three years during which time optionee had to commence construction (making the deadline May 14, 2012), or it could mean that ABC's option could be exercised up to two years from the end of the third calendar year in which St. Benedicts exercised its option (making the deadline December 31, 2012). Absent some allegation that CAG, as St. Benedicts successor plans to use the property for a non-healthcare related purpose, ABC can resolve any question over future use of the property by exercising its option.

The Complaint is devoid of any allegation that St. Benedicts or its successor, Critical Access Group, is seeking to use parcels 6, 7 or 8 for any purpose other than the construction of healthcare facilities. The Complaint is void of any allegation that Critical Access Group has threatened to use the property for anything other than healthcare purposes. In an apparent attempt to manufacture a controversy, counsel for ABC wrote a letter on January 30, 2012, to Critical Access Group enclosing a copy of the Option Agreement, "so that there are no future misunderstandings regarding the limitations of allowable use on the property." Counsel for CAG replied on behalf of CAG, confirming receipt of the letter, confirming awareness of the Option Agreement and included the simple statement that the fact that Critical Access Group was aware of ABC's position should not be interpreted as a statement that CAG agrees with such position. Counsel's letter did not state that CAG disagreed or agreed, but rather would remain neutral on the topic.

CAG wishes to avoid litigating a matter that does not need to be decided at the present time and may never need to be decided. ABC could exercise its option to purchase all three lots, CAG could build a healthcare facility, CAG could sell the property to a third party to build a healthcare facility, ABC might change directions with the entire project that would be

inconsistent with the use restrictions, or ABC might sell its property to a party willing to release CAG (or its successor) from the use restrictions. Any of these events (which could occur tomorrow or twenty years from now) would obviate the need to litigate this matter.

C. In the Absence of a Present Controversy, Defendant Should Not Be Required Present Defenses to the Hypothetical Dispute.

(1) The Doctrine of Merger Prevents Restrictions Such as Alleged Here From Being Enforced—This Complicated Issue Does Not Need to Be Litigated Now

If CAG's motion to dismiss is denied, then the parties (and the Court) will have to spend time and resources in the prosecution and defense of this case. CAG does not want to go to this unnecessary expense. For example, but not by way of limitation, ABC's claim that CAG's use of the land is permanently restricted may fail under the doctrine of merger. In Idaho, the doctrine of merger provides antecedent agreements merge into the deed and become unenforceable upon acceptance of a deed if not included in the deed itself. Specifically, as stated by the Idaho Supreme Court: "When a deed is delivered and accepted as performance of the contract to convey, the contract is merged in the deed. Though the terms of the deed may vary from those contained in the contract, the deed alone must be looked to to determine the rights of the parties. Devlin on Real Estate, s 850a. The rule is followed in practically all the cases." *Jolley v. Idaho Securities, Inc.*, 90 Idaho 373, 382, 414 P.2d 879, 884 (1966) (quoting *Continental Life Ins. Co. v. Smith*, 41 N.M. 82, 64 P.2d 377 (1946), quoting *Norment et ux. v. Turley et al.*, 24 N.M. 526, 174 P. 999, 1000 [1918]).

An exception to the doctrine of merger applies where the contract rights are collateral to the deed; but "[w]here the right claimed under the contract would vary, change, or alter the agreement in the deed itself, or inheres in the very subject-matter with which the deed deals, a prior contract covering the same subject-matter cannot be shown as against the provisions of the

deed." *Id.* at 383. 414 P.2d at 884 (quoting *Continental Life Ins. Co. v. Smith*, 41 N.M. 82, 64 P.2d 377 (1946), quoting *Norment et ux. v. Turley et al.*, 24 N.M. 526, 174 P. 999, 1000 [(1918)]).

In the absence of fraud, mistake, etc., the following stipulations and contracts for the sale of real estate are conclusively presumed to be merged into a subsequently delivered and accepted deed made in pursuance of such contract, to wit: (1) Those that adhere in the very subject matter of the deed, such as title, possession, emblements, etc.; (2) those carried into the deed and of the same effect; and (3) those of which the subject-matter conflicts with the same subject-matter in the deed. In such cases, the deed alone must be looked to in determining the rights of the parties.

Id. (quoting *Continental Life Ins. Co. v. Smith*, 41 N.M. 82, 64 P.2d 377 (1946)). See also *Christiansen v. Intermountain Assn.*, 46 Idaho 394, 267 P. 1074 (1928).

The use restriction at issue here relates to the very subject matter of the gift deed (i.e., title, possession, emblements). The gift deed attached to the Complaint as Exhibit G, however, does not restate, reference as a "permitted exception" or otherwise incorporate the "use of land" language contained in paragraph 4 of the Option Agreement. Likewise, the Supplemental Declaration of Covenants, Conditions and Restrictions of Crossroad Point Business Center PUD ("Supplemental Declaration") (Exhibit I to the Complaint) executed on the same day as the gift deed does not contain any restriction limiting St. Benedicts' use of the three parcels to the construction of healthcare facilities. The Supplemental Declaration documents St. Benedicts' right to be the exclusive provider of healthcare¹ and incorporates the restriction contained in paragraph 9(i) of the Option Agreement. To prevent merger, ABC could have, included any use

¹ The Supplemental Declaration also provides that if St. Benedicts does not built a health care facility on lots 6, 7 and 8 in three years from the date of that document, then St. Benedicts' right to be the exclusive provider of healthcare facilities in the subdivision expires. This "expiration language" was not included in the Option Agreement.

restrictions on parcels 6,7 and 8 either in the deed or in the Supplemental Declaration that was recorded prior to the gift deed.² ABC did not, however, do so.

In *Fuller v. Callister*, 150 Idaho 848, 252 P.3d 1266 (2011) the Idaho Supreme Court stated that "[W]here it is clear that the parties did not intend for a provision in a real estate contract to merge with a subsequently executed warranty deed, that provision shall not be deemed merged." 150 Idaho at 854, 252 P.3d at 1272. In *Fuller*, however, the obligation that did not merge was an obligation was "personal to parties involved" and did not "implicate alienation of the property." *Id.* As a result, it would appear under that under *Jolley*, a conclusive presumption of merger occurs as to non-collateral obligations and whether merger occurs with respect to obligations that are collateral and independent of the conveyance of the deed will be a matter of intent.

Admittedly, this is a complicated question of law and perhaps a question of fact regarding the parties' intent.³ Candidly, CAG does not want to waste time and money arguing about these issues when there is no present need to fight about them. ABC can essentially unwind the transaction and have complete control over the subject property by exercising its option to purchase all three lots for the same price that St. Benedicts paid for the single lot. Or, as previously noted, there are a number of other possibilities that would moot this question. The

² From the face of the gift deed, it was recorded as instrument number 2073553 and the Supplemental Declaration was recorded as instrument number 2073551.

³ CAG does not want to mislead the Court and, therefore, hereby notes that an amendment to the option agreement (not attached to the Complaint) contained a catch-all clause stating that covenants in the option agreement would not merge into the deed. However, that clause was a general "catch-all" provision and that amendment is not before the Court. The import of such provision, in light of the "conclusive presumption" articulated in *Jolley*, would have to be addressed by the parties and the Court if this case proceeds beyond the motion to dismiss. CAG's present motion is based only on the record currently before the Court. The point here is not to argue the merits of the merger question, but to point out that litigating complicated legal matters that may never need to be addressed is a waste of time, money, and judicial resources.

Idaho Supreme Court has held that a declaratory judgment action can be remedial or preventive, but that, in either case, "it must involve actual and existing facts." *Harris v. Cassia County*, 106 Idaho 513, 516-17, 681 P.2d 988, 991-92 (1984) (quoting *State ex rel. Miller v. State Board of Education*, 56 Idaho 210, 217, 52 P.2d 141, 144 (1935)). Here, the resolution of the enforceability of the use restriction and the application of the merger doctrine is based upon the hypothetical situation in which CAG uses, or threatens to use, the property for something other than the construction of a healthcare facility.

(2) If Forced to Litigate, the Other Rights and Restrictions in Option Agreement May Need to Be Resolved.

As noted in footnote 2 above, the Option Agreement contained covenants in favor St. Benedicts (CAG's predecessor in interest) including the right to be the exclusive provider of healthcare services (Option Agreement, ¶4) and the right not to have any property adjacent to or within 200 feet of lots 6, 7 or 8 developed except in accordance with uses identified on Exhibit E. (Option Agreement, ¶ 9(i)). CAG would be compelled, at a minimum, to cross-claim to clarify these rights if this litigation goes forward. In addition, there may be other rights that CAG needs to enforce, for fear if it does not, it would be barred by the doctrine of collateral estoppel from doing so. Where there is no present need to address the first issue, CAG should not now be compelled to determine what other rights may or may not exist that must be asserted now or forever lost.

III. CONCLUSION

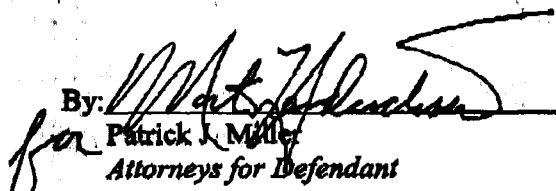
The standard for whether a claim is ripe for review has been articulated many times by the Idaho Supreme Court. A critical element of the test is whether there is any need for court action at the present time. In some cases, the court has appeared to relax this standard where it is clear the issue will in fact have to be decided and delay will not obviate the need to address it.

Here, circumstances may occur obviating the need to address the issues presented by way of this case. It is before the Court at the present time only because of Plaintiff's attempt to manufacture a present controversy. Given the cost to the parties and to the Court of litigating the applicability of the merger doctrine and the scope of not only ABC's, but also CAG's rights under the Option Agreement and the Supplemental Declaration, this Court can and should find this case is not yet ripe.

For these reasons, CAG respectfully submits that its Motion to Dismiss should be granted and this action should be dismissed in its entirety.

DATED this 27th day of June, 2012.

GIVENS PURSLEY LLP

By: 
for Patrick J. Miller
Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of June 2012, I caused to be served a true and correct
courtesy copy of the foregoing by the method indicated below, and addressed to the following:

Gary D. Slette
Robertson & Slette, PLLC
P.O. Box 1906
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- Hand Delivered
- Overnight Mail
- Facsimile
- E-mail

for Patrick J. Miller
 Patrick J. Miller

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DISTRICT COURT
FIFTH JUDICIAL DIST
JEROME COUNTY IDAHO

2012 JUN 29 AM 9 58

BY Michelle Emerson
CLERK
[Signature]
DEPUTY CLERK

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

ABC AGRA, LLC, an Idaho limited
Liability company,

Plaintiff,

v.

CRITICAL ACCESS GROUP, INC.,
A Minnesota non-profit corporation,

Defendant.

Case No. CV-2012-513

WITHDRAWAL OF
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT

COMES NOW the Plaintiff ABC AGRA, LLC ("ABC") by and through its attorney of record, Gary D. Slette, and hereby withdraws its Motion for Summary Judgment dated June 13, 2012, and reserves its right to re-file a Motion for Summary Judgment pursuant to I.R.C.P. Rule 56(c) at a later date.

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trfm\GDS\ABC\dismiss_rspns mcmo oppos_2

DISTRICT COURT
FIFTH JUDICIAL DIST
JEROME COUNTY IDAHO

2012 JUL 18 PM 2 23

Michelle Emerson
CLERK
BY _____
DEPUTY CLERK

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

ABC AGRA, LLC, an Idaho limited)
Liability company,)
)
Plaintiff,)
)
v.)
)
CRITICAL ACCESS GROUP, INC.,)
A Minnesota non-profit corporation,)
)
Defendant.)

Case No. CV-2012-513
PLAINTIFF'S SECOND
MEMORANDUM IN
OPPOSITION TO MOTION TO
DISMISS COMPLAINT

COMES NOW the Plaintiff, ABC AGRA, LLC ("ABC"), by and through its attorney of record, Gary D. Slette of the firm Robertson & Slette, PLLC, and submits its Second Memorandum in Opposition to Motion to Dismiss Complaint.

At the hearing of this matter conducted on July 2, 2012, the Court requested additional briefing on the issue of ripeness, despite acknowledging its decision on CAG's motion was going to be a "close call". Given the obvious hardship that would accrue to the Plaintiff if the Court declines to act, it appears that the facts of the instant case should tip the scales in favor of a ripeness determination in order to allow for a resolution of the contractual uncertainties advanced in this litigation. Since the issue is a "close call", and since declaratory judgment acts are to be liberally construed to obtain their objective, i.e., the ascertainment of uncertain rights, as discussed, *infra*,

1 this action should be allowed to proceed.

2 Questions posed by the court during the most recent hearing in this matter are stated as
3 follows:

4 1. Are defenses raised by virtue of the letter sent by CAG's attorney to ABC's attorney?

5 Are there defenses to the contract?

6 2. Can the court use CAG's Reply Brief to create demonstrable issues? Are there defenses
7 raised in the Reply Brief that need to be resolved?

8 3. Is the case ripe when one party is put to its defenses to see if they are valid? Is there a
9 possibility that there is not a dispute?

10 4. If the questions do not involve ambiguities, can the case be considered ripe?

11 FACTS

12 The facts are as stated in the Verified Complaint, which, for purposes of its motion, CAG
13 admits to be true. From a reading of CAG's original Brief, and its Reply Brief, it is apparent that
14 CAG would have ABC exercise its Option and purchase the property from CAG, or in the
15 alternative, ABC should attempt to market the remainder of its property in its development despite
16 having knowledge and uncertainty imparted to it by CAG regarding the validity of the restrictive
17 healthcare covenant. The dilemma regarding the second alternative was raised in oral argument
18 when ABC employed the example of a Chevron gas station that seeks an assurance from ABC that
19 it would be the exclusive provider of fuel sales in the project. This is the exact same type of
20 covenant that was required by CAG's predecessor-in-interest in Paragraph 4 of the Option
21 Agreement wherein it required that it would be the exclusive provider of healthcare services within
22 the entire development. CAG somewhat cavalierly argued at the hearing that Chevron could simply
23 conduct a title report, and satisfy itself with due diligence about what could and could not be done
24 within the Crossroads Ranch project. The problem with that approach, however, is the hidden
25 uncertainty pertaining to CAG's property that has been created as a result of the letter from CAG's
26 attorney, and now, the arguments placed before this court as set forth in CAG's Reply Brief. Title
reports and due diligence by Chevron would never disclose those matters. It is worthwhile for the
court to note the scope and extent of representations and warranties that were demanded by CAG's
predecessor in the Option Agreement at Paragraph 9(f). ABC was required to include the following
language:

1 Optionor has no knowledge of any claims, actions, suits, arbitrations,
2 proceedings, or investigations by or before any court or arbitration
3 body, any governmental, administrative or regulatory agency, or any
4 other body, pending or threatened against, effecting [sic affecting] or
5 relating to the Real Property or Gift Property, or the transactions
6 contemplated by this Option Agreement, nor is Optionor aware of
7 any basis for such claim, action, suit, arbitration, proceeding or
8 investigation.

9 (Emphasis added). *Id.* at p. 5.

10 LEGAL ARGUMENT

11 Based upon CAG's assertion that this court should look to federal court decisions for
12 guidance, ABC undertook research relative to federal declaratory judgment actions.

13 In *Reliance Life Insurance Company v. Burgess*, 112 F.2d 234 (8th Cir. 1940), the 8th Circuit
14 Court of Appeals stated:

15 The Declaratory Judgment Act, 28 U.S.C.A. 400, 'did not create any
16 new substantive right. It is procedural in nature, designed to expedite
17 and simplify the ascertainment of uncertain rights; and it should be
18 literally construed to attain that objective.'

19 (Emphasis added). 112 F. 2d at 238. The Idaho Supreme Court fully embraced the 8th Circuit's
20 statements in *Sweeney v. American National Bank, et al.*, 62 Idaho 544, 115 P.2d 109 (1941)
21 (*overruled on other grounds*), when the Court stated the following:

22 It was held in *Reliance Life Ins. Co. v. Burgess*, 112 F. 234,
23 as follows: "The Declaratory Judgment Act must be liberally
24 construed to attain its objective, which is to expedite and simplify
25 the ascertainment of uncertain rights."

26 Anderson on Declaratory Judgments, page 29, in stating the
general rule uses this language:

"The very purpose of the declaratory judgment statutes, as
expressed within the uniform act, is to settle and to afford relief for
uncertainty and insecurity with respect to rights, status, and other
legal relations, and to place a restricted construction upon this
language would be to delete from the statute a beneficent provision,
inserted therein by virtue of legislative authority. It should be kept
constantly in view, lest we lose the benefit of this instrumentality of
justice, that it is to be liberally construed and freely applied in cases
coming within its terms."

1 In *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development*
2 *Comm'n*, 461 U.S. 190, 201, 103 S.Ct. 1713, 75 L.Ed.2d 752 (1983), the U.S. Supreme Court
3 stated:

4 In *Abbott Laboratories*, which remains our leading discussion of the
5 doctrine [of ripeness] we indicated that the question of ripeness turns
6 on "the fitness of the issues for judicial decisions" and "the hardship
7 to the parties withholding court consideration."

8 461 U.S. at 201. In the instant case, the Court has already acknowledged that this case is a "close
9 call" in its analysis. If liberality is to be the watchword in terms of entertaining a declaratory
10 judgment action, then the facts of this case compel a denial of CAG's Motion to Dismiss. If
11 hardship to one of the parties results due to the withholding of judicial consideration, such a
12 hardship is a further basis for a denial of the Defendant's motion. The uncertainty placed upon ABC
13 in the conduct of its business due to CAG's posture in both the letter and in its Reply Brief is such
14 that it would be patently unfair to deny ABC the ability to proceed with this action. As
15 acknowledged by CAG, the issues appear to be legal in nature, a fact which supported a ripeness
16 finding by the United States Supreme Court in *Abbott Laboratories v. Gardener*, 387 U.S. 136, 87
17 S.Ct. 1507, 18 L.Ed.2d 681 (1967). CAG attempts to color the situation as being "contingent"
18 because CAG has not yet sought to develop its land for anything other than "healthcare facilities."
19 That argument falls wide of the mark, since it is CAG itself that has created the present uncertainty
20 regarding the contractual provisions between the parties, a condition which warrants the invocation
21 of the declaratory judgment statutes. In *Schugg v. Gila River Indian Community*, No. 2-05-AP-003-
22 84 (U.S.D.C., D. Az, May 25, 2012), the Court stated:

23 "Under the strictest interpretation of the ripeness doctrine, all
24 declaratory judgment claims would be suspect, because declaratory
25 relief involves plaintiffs seeking to clarify their rights or obligations
26 before an affirmative remedy is needed. The Supreme Court has
rejected that strict conception [rather] Article III requires that there
be a substantial controversy of sufficient immediacy and reality to
warrant the issuance of a declaratory judgment." *Aydin Corp. v.*
Union of India, 940 F.2d 527, 528 (9th Cir. 1991).

The *Schugg* case involved the plaintiffs' plan to pave certain easements, but they were told by the
defendant that they did not have a legal right to pave the easements, or to use them for their planned
development. The Court held that the ripeness doctrine did not require a party to infringe on

1 another's rights before an actual case or controversy existed, and that as such, there was a
2 substantial controversy of sufficient immediacy, even though paving of the easements was not
3 about to commence. In that case, there was apparently no writing whatsoever upon which the Court
4 relied in determining that declaratory relief was appropriate. The plaintiffs asserted that the
5 defendant had simply advised them it would not allow the easements to be paved, and that was
6 sufficient to allow the claim for declaratory relief to proceed in the face of a ripeness challenge. In
7 this case, the requisite uncertainty was initially created by the letter from CAG's attorney, and has
8 been subsequently bolstered by the legal issues raised in CAG's Reply Brief. There is clearly a
9 direct and immediate uncertainty that has befallen ABC as a consequence, given its inability to
10 make the specific warranties and representations to future buyers that had been expressly demanded
11 by CAG's predecessor when it acquired its property.

12 The court's internal struggle in this case was apparent as a result of statements made in open
13 court regarding this situation being a "close call". Additionally, it was apparent that the Idaho
14 Supreme Court's decision in *Davidson v. Wright*, 143 Idaho 616, 151 P.3d 812 (2006), has left a
15 bitter taste in the court's mouth. However, the hypothetical nature of the *Davidson* case differs
16 markedly from the existing facts of the instant case. The uncertainty that was created by CAG's
17 letter and Reply Brief is anything but hypothetical, unlike the facts in *Davidson*. CAG really seeks
18 to force ABC to exercise an option for more than \$1,600,000 at a time when property values have
19 declined and liquidity is difficult to come by in an era of sharply reduced credit. CAG's response
20 letter was calculated to lead to the current uncertainty in order to force ABC's hand to purchase the
21 property, or to face the prospect of having the inability of making the same warranties and
22 representations to prospective purchasers that CAG's predecessors demanded. Having raised the
23 legal issue of merger and other matters relative to contract terms in the Option Agreement in its
24 Reply Brief, the declaratory judgment action can give relief in a single action that will clarify and
25 settle all the legal relations at issue to afford relief from uncertainty and controversy.

26 The instant case brings the court squarely to arriving at an answer to the two-part test for
determining ripeness i.e., the fitness of the issues for judicial decision and the hardship to the
parties of withholding court consideration. It would be patently unfair to ABC to allow it to dangle
in the uncertainty created by CAG relative to the development of the remainder of ABC's property.
Given that the Idaho Supreme Court has embraced the federal court's notion of liberality in deciding

1 to grant declaratory relief, this court should deny CAG's Motion to Dismiss. Defenses to the
2 enforcement of the contract were clearly raised by virtue of the letter from CAG's attorney, and it is
3 clear that CAG's Reply Brief created more than demonstrable legal issues which deserve to be
4 heard and decided in a single proceeding. In each instance, the requisite need for a declaratory
5 judgment action was created. The Idaho legislature was quite purposeful in determining that a
6 declaratory judgment action could be maintained either before or after a contractual breach had
7 occurred. The sole purpose of having a contract issue determined prior to the time of such a breach
8 was to afford the parties the requisite certainty of their contract. If the documents are clear on their
9 face, the issues presented are solely legal issues for resolution as suggested by CAG in its briefs.
10 Delaying the litigation will change nothing, and will only serve to leave ABC hanging in a state of
11 limbo. When the Option Agreement was drafted, the language contained in Paragraph 9(f) relative
12 to warranties and representations was purposefully chosen by CAG's related predecessor-in-interest.
13 The language in paragraph 11 relative to the contemplation of an action for declaratory relief
14 pertaining to a right created in or under the Option Agreement was likewise purposeful.

15 With regard to this court's questions inquiring as to the sufficiency of the letter and Reply
16 Brief leading to a ripeness determination, the court's attention is directed to *Stormans, Inc. v.*
17 *Selecky*, 586 F.3d 1109 (9th Cir. 2009). That case was an employment case in which a pharmacist
18 raised religious objections to the dispensation of a contraceptive. Her employer apparently told her
19 that "it would not work for [her] to remain employed there." 586 F.3d at 1124. The Court observed
20 that although the employee had not yet suffered the consequences of the imposition of the new rules
21 regarding distribution of such contraceptives, the Court found that her case was ripe because she
22 was at serious risk of losing her job because of those new rules. *Id.* The Court noted while that she
23 had not yet suffered the consequences of the new rules, her risk of losing her job was sufficiently
24 real and immediate based upon a verbal statement made by her employer. If a simple oral statement
25 made in that case can give rise to a determination of ripeness, it is clear that CAG's letter, coupled
26 with the assertions contained in its Reply Brief, should lead this court to a conclusion that this case
is ripe for review. Additionally, if the verbal representation that was made in *Schugg, supra*, was
sufficient to precipitate uncertainty that led to ripeness for a declaratory judgment action, then
certainly the court must find in this case that both the letter from CAG's attorney and the issues
raised in the Reply Brief are sufficient to allow this case to proceed.


CONCLUSION

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This case, in the court's own words, presents a "close call." While ABC believes the declaratory judgment statutes were enacted for the very purposes advanced in this litigation, ABC will acquiesce to the court's characterization. That being the case, and because liberality is favored in attaining the objective of expediting and simplifying the ascertainment of uncertain rights, this case should be permitted to proceed. In *Sweeney, supra*, the Idaho Supreme Court reaffirmed that position and embraced the treatise on declaratory judgments which stated, "... to place a restrictive construction upon this language would be to delete from this statute a beneficent provision, inserted therein by virtue of legislative authority." If the scales of justice are to tip one way or the other in a case that is a "close call," it should tip in favor of the litigant whose rights in a contract have been created uncertain as a result of the other contracting party's espoused legal posture. To grant CAG's motion would be to summarily impose a hardship on ABC and the development of Crossroads Ranch for years to come. The issues raised by both ABC and CAG will have to be decided at some point in time, and delay will not obviate the need to address them. Given the uncertainty for ABC, its need for resolution is immediate. Withholding judicial action on its Verified Complaint will only serve to unnecessarily perpetuate a hardship for ABC. CAG's Motion to Dismiss should be denied.

DATED this 18th day of July, 2012.

ROBERTSON & SLETTE, PLLC

By:  _____
Gary D. Slette

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 18th day of July, 2012, I caused a true and correct copy of the foregoing instrument was served upon the following persons in the following manner:

| | | |
|----------------------|-------------------------------------|--|
| Patrick J. Miller | <input type="checkbox"/> | Hand Deliver |
| Givens Pursley | <input type="checkbox"/> | U.S. Mail |
| 601 W. Bannock St. | <input type="checkbox"/> | Overnight Courier |
| Boise, ID 83701-2720 | <input checked="" type="checkbox"/> | Facsimile Transmission - 208-388-1300 |
| | <input type="checkbox"/> | Email pjm@givenpursley.com |

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|-----------------------|--|-------------------------------------|------------------------|
| <i>Courtesy Copy:</i> | Hon. Robert Elgee | <input type="checkbox"/> | Hand Deliver |
| | District Judge | <input type="checkbox"/> | U.S. Mail |
| | Blaine County Court | <input type="checkbox"/> | Overnight Courier |
| | 201 2 nd Ave. South, Ste. 106 | <input checked="" type="checkbox"/> | Facsimile Transmission |
| | Hailey, ID 83333 | | 208-788-5527 |

By: 

Gary D. Slette

1 **Gary D. Slette**
 2 **ROBERTSON & SLETTE, PLLC**
 3 **P.O. Box 1906**
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 7 **ISB # 3198**
 8 trim\GDS\ABC\reply brief_dismiss

DISTRICT COURT
 FIFTH JUDICIAL DIST
 JEROME COUNTY IDAHO

2012 JUL 27 PM 1 13

Michelle Emerson

BY *[Signature]*
 CLERK
 DEPUTY CLERK

9 **IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE**
 10 **STATE OF IDAHO, IN AND FOR THE COUNTY OF JEROME**

11 **ABC AGRA, LLC, an Idaho Limited**)
 12 **liability company.**)
 13 **Plaintiff,**)
 14 **v.**)
 15 **CRITICAL ACCESS GROUP, INC.,**)
 16 **A Minnesota non-profit corporation,**)
 17 **Defendant.**)

Case No. CV-2012-513

**PLAINTIFF'S REPLY BRIEF
 IN OPPOSITION TO MOTION
 TO DISMISS COMPLAINT**

18 **COMES NOW** the Plaintiff, ABC AGRA, LLC ("ABC"), by and through its attorney of
 19 record, Gary D. Slette of the firm Robertson & Slette, PLLC, and submits its Reply Brief in
 20 **Opposition to Motion to Dismiss Complaint.**

21 **ABC has contended** from the very beginning of this case that CAG has created a substantial
 22 **controversy** between the parties as a result of its original letter response, and most recently, as a
 23 **result of the issues** advanced in its Motion to Dismiss. The parties clearly have adverse legal
 24 **interests,** and while CAG may not be faced with the same immediacy and need that faces ABC,
 25 **ABC has nonetheless** been placed in a position where a resolution at the present time is necessary.
 26 **It is CAG, and CAG alone,** that has created the uncertainty in the context of this private contract
 case. CAG's reference to the 9th Circuit Court of Appeals decision in *Clear Channel Outdoor Inc. v.*

1 *Bently Holdings California, LP*, 2011 WL 6099394 (N.D. Cal. Dec. 7, 2011) is compelling. The
2 instant case is not about contingent future events that may or may not occur. The instant case
3 pertains to ABC's present inability to make required warranties and representations to potential
4 purchasers of its property in Crossroads Ranch in the same fashion as it was required to make to
5 CAG's predecessor-in-interest. The court is urged to recall that when ABC discovered the
6 conveyance of the thirty acres to CAG last fall, ABC immediately sent CAG's president a letter
7 advising CAG of the existence of the healthcare restriction. Rather than acknowledging the
8 propriety and correctness of ABC's letter, CAG signaled a definite uncertainty regarding the
9 applicability of the restriction as a result of its response. Again, the uncertainty that has been created
10 makes resolution a necessity for ABC, while leaving CAG to assert, in effect, that its response
11 should simply be regarded as wholly inconsequential. Nothing can be further from the truth. The
12 controversy exists between two parties who clearly have adverse legal interests. There is sufficient
13 immediacy for one of the parties, and there is clearly a present reality that warrants the issuance of a
14 declaratory judgment. When CAG bolstered the contractual uncertainty as a result of the legal
15 issues it asserted in its Reply Brief, CAG only added fuel to the fire which it purposefully ignited
16 when it sent its response letter.

15 CAG has made no secret of its true desire to force ABC into a position of having to exercise
16 an option to purchase the thirty acres owned by CAG, twenty of which had been gratuitously gifted
17 to CAG's affiliate for purposes of constructing a hospital in the very heart of the Crossroads Ranch
18 project. By creating the uncertainty relative to the applicability of the restrictive covenant, CAG
19 clearly figured it could force ABC's hand. Legal action did not need to be threatened by CAG.
20 Rather, its purpose was accomplished by creating the uncertainty that places ABC in a position
21 where it must seek a judicial resolution of the issue. That is precisely the reason that the Idaho
22 legislature afforded a party affected by contractual uncertainty the ability to seek a declaratory
23 judgment of a private contract either before or after a breach had occurred.

22 It is understandable why CAG would assert a rather cavalier attitude about ABC's purported
23 ability to sell its other property in Crossroads Ranch. It is plain to see that CAG's letter and its brief
24 in support of its Motion to Dismiss have created a duty to speak on the part of ABC when a
25 potential purchaser requests the same warranties and representations demanded by CAG's
26 predecessor. The last thing ABC expected when it gave away twenty acres of its prime real estate

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for the development of a promised hospital was litigation regarding the contract that was to have made the hospital a possibility. The last thing that ABC expected when it sent the letter to CAG's president, Mr. McGinty, was a letter from his attorney advising ABC that its response was not to be construed as agreeing to the efficacy of the restrictive covenant on the entirety of the thirty acres. Not unlike CAG, ABC was not spoiling for a fight, and ABC certainly does not relish the idea of litigation over its beneficence. Rather than acknowledging the applicability of the restrictive covenant, CAG created the uncertainty, and then bolstered that uncertainty by advancing a legal position that the covenant itself had merged with the deed. The totality of the factual assertions by CAG warrants a finding of ripeness in order to allow this case to advance on its merits. It would be patently unfair to leave ABC hanging in a legal limbo only to be maneuvered by CAG's whims.

DATED this 27th day of July, 2012.

ROBERTSON & SLETTE, PLLC

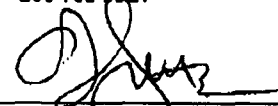
By: 
Gary D. Slette

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 27th day of July, 2012, I caused a true and correct copy of the foregoing instrument was served upon the following persons in the following manner:

| | | |
|----------------------|-------------------------------------|--|
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| | 201 2 nd Ave. South, Ste. 106 | <input type="checkbox"/> | Facsimile Transmission |
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By: 
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Attorneys for Defendant

DISTRICT COURT
FIFTH JUDICIAL DIST
County of Jerome, State of Idaho
Filed 7/27/2012
Michelle Emerson
CLERK
DEPUTY CLERK

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

ABC AGRA, LLC, an Idaho limited liability
company,

Plaintiff,

v.

CRITICAL ACCESS GROUP, INC., a
Minnesota non-profit corporation,

Defendant.

Case No.: CV-2012-513

**DEFENDANT'S REPLY TO
PLAINTIFF'S SECOND
MEMORANDUM IN OPPOSITION
TO MOTION TO DISMISS
COMPLAINT**

I. INTRODUCTION

Defendant Critical Access Group, Inc. ("CAG"), through its attorneys, responds to Plaintiff's Second Memorandum in Opposition to Motion to Dismiss Complaint ("Second Memorandum"). The principal focus of this Court's questions and request for additional briefing was whether CAG's assertion that it may have defenses to the restrictive covenants against the

**DEFENDANT'S REPLY TO PLAINTIFF'S SECOND MEMORANDUM
IN OPPOSITION TO MOTION TO DISMISS COMPLAINT**

subject property converts a case that would otherwise not be ripe into a case that is in fact ripe for judicial determination. For the reasons explained in CAG's post-hearing brief, such statements do not. The arguments raised by ABC Agra, LLC ("ABC") in its Second Memorandum do not change this analysis.

A. Plaintiff ABC's Speculation of What Might be a Concern to Potential Purchasers of Neighboring Land Do Not Create a Justiciable Controversy.

ABC argues (it is a just an argument) that it might have to disclose to a hypothetical purchaser of property adjacent to the subject property that CAG might have the right to use the subject property for purposes other than health care purposes. Plaintiff speculates that it might be foreclosed from granting an exclusive right to a particular purchaser for a particular use if CAG has the right to use or sell its property for other than health care purposes. This is pure speculation. There is no evidence that such a scenario has occurred, is even likely to occur or that if such a question came up, that CAG would not agree to the exclusive use in favor of another party. If we are going to engage in speculation, then we can also speculate that CAG would agree to a restriction to not be allowed to use its property for the hypothetical third party's use, as it is in everyone's interest for this development to gain momentum. As noted by CAG in its post-hearing brief, in the case *Principal Life Ins. Co. v. Robinson*, 394 F.3d 665, 673-74 (9th Cir. 2005), there was actual evidence in the record that a present dispute about rent adjustment language in the lease was actually affecting the marketability of a property subject to the lease. The court found that issue to be ripe. In this case, ABC's naked assertion that CAG's statement that CAG might have a defense to the subject restrictions affects the marketability of other property is merely speculative. 394 F.3d at 673-74 (9th Cir. 2005).

Additionally, the question this Court asked the parties to address is whether CAG's statement that it does not necessarily agree with ABC's position and that it might have defenses

to ABC's position, converted a matter that was not otherwise ripe into a ripe dispute. ABC's argument that it might have to disclose CAG's lack of definitive position would be no different than if CAG had taken no position at all. If ABC is really concerned with what third parties might think, then nothing but an unequivocal acceptance of ABC's position by CAG would eliminate that concern. Therefore, if CAG, in response to Mr. Slette's January 30, 2012 letter, would have simply stated, "We are in receipt of your letter," the claimed uncertainty would have still existed. If CAG had so responded, CAG would still have whatever defenses it has to the restrictions and, therefore, this same uncertainty would still exist. The fact that CAG was straightforward with ABC when it stated it might have defenses or when it stated that its receipt of Mr. Slette's letter should not be interpreted as an agreement with the positions taken therein, does not change the circumstances and convert what was not a ripe dispute into a ripe dispute.

B. The Cases Cited by ABC in its Second Memorandum Do Not Change the Analysis.

The law in Idaho as we all now know is that:

'A prerequisite to a declaratory judgment action is an actual or justiciable controversy.' *Weldon v. Bonner County Tax Coalition*, 124 Idaho 31, 36, 855 P.2d 868, 873 (1993). The doctrine of justiciability can be divided into several subcategories, including that of standing and ripeness. *Id.* 'Ripeness is that part of justiciability that asks whether there is any need for court action at the present time.' *Givens v. Cenarusso*, 140 Idaho 316, 317, 92 P.3d 1063, 1064 (2002).

Davidson v. Blakeley, 143 Idaho 616, 620, 151 P.3d 812, 816 (2007).

This same standard was used by the 9th Circuit Court of Appeals in the *Clear Channel*

Outdoor case cited in CAG's post-hearing brief:

More specifically, "[t]he 'central concern [of the ripeness inquiry] is whether the case involves uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all.'"

Clear Channel Outdoor, Inc. v. Bently Holdings California LP, 2011 WL 6099394 at *3

(N.D.Cal. Dec. 7, 2011). As pointed out in the post-hearing brief, the defendant in the *Clear*

Channel case had specifically reputed its obligations under the contract at issue (i.e., a lease) and had engaged in conduct that had constituted a current breach of the lease contract. Neither of these circumstances exists in the current case.

ABC cites the case *Schugg v. Gila River Indian Community* (Second Memorandum at p. 4), to support its argument that the present potential controversy needs to be decided at the present time. In the *Schugg* case, however, the plaintiffs had the present plan to actually pave certain easements, and the defendant had taken the unequivocal position that the plaintiffs could not pave those easements. *Schugg* did not involve uncertain or contingent events. *Schugg* was able to show that "withholding review would result in direct and immediate hardship and would entail more than possible financial loss." (2012 WL 1906527, p. 6). In the present case, ABC has made no such showing. The *Schugg* facts would be akin to CAG stating that it actually had the present plan to commence using the subject property for other than health care purposes. As previously stated, there is absolutely no allegation that CAG has in any way threatened to use the subject property inconsistent with the restrictions stated in the option agreement.

Likewise, in *Stormans, Inc. v. Selecky*, 586 F.3d 1109 (9th Cir. 2009) (quoted on page 6 of ABC's Second Memorandum), the defendant had taken an affirmative position that indisputably would affect the plaintiffs' job status in the near future. The harm to the employees was neither uncertain nor contingent. Unlike here, there was no uncertainty about whether that controversy was actually going to occur. The court stated the employees' injuries were "real and concrete rather than speculative and hypothetical." 586 F.3d at 1122. Here, the record is devoid of evidence that an actual dispute about CAG's rights of use with respect to the subject property will ever occur. Many things could occur that would negate any need to ever litigate this issue.

In the *Stormans* case, the policy at issue was going to be enforced and would in fact impact plaintiffs' jobs. *Id.* at 1123.

CONCLUSION

Idaho's declaratory judgment act does not permit the court to decide hypothetical disputes that do not need to be presently resolved and may never need to be resolved. This is such a case. CAG's statement that it did not necessarily agree with ABC's position or that it might have defenses to ABC's position did not ripen a dispute. Even if CAG had not made such statements (but instead had remained silent), the key circumstances would still exist: CAG would have whatever defenses it has (whether or not it voiced them); there would be no evidence or allegation that CAG is threatening to violate the covenants; there would be circumstances that may occur in the future that would render this entire issue moot; and ABC would not have offered any evidence that CAG's decision not to take a definitive position is causing it any actual harm.

The matter is not ripe, and CAG's statement that it may have defenses to the restrictions does not change that fact.

DATED this 27th day of July 2012.

Respectfully submitted,

GIVENS PURSLEY LLP

By: 

Patrick J. Miller

Attorneys for Defendant

CERTIFICATE OF SERVICE

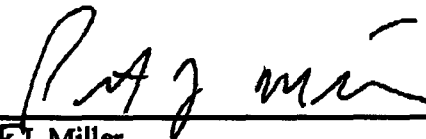
I HEREBY CERTIFY that on this 27th day of July 2012, the foregoing was served as follows:

Gary D. Slette
Robertson & Slette, PLLC
P.O. Box 1906
Twin Falls, ID 83303-1906
Email: gslette@rsidaholaw.com

- U. S. Mail
- Hand Delivered
- Overnight Mail
- Facsimile (208) 933-0701
- E-mail

Honorable Robert J. Elgee
Blaine County Courthouse
201 2nd Avenue South, Suite 106
Hailey, ID 83333

- U. S. Mail
- Hand Delivered
- Overnight Mail
- Facsimile (208) 788-5527



Patrick J. Miller

2012 SEP 7 AM 10 46

Mitchell Emerson
CLERK
BY _____
DEPUTY CLERK

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

| | | |
|--|---|-----------------------|
| ABC AGRA, LLC, an Idaho limited liability company, |) | |
| |) | |
| Plaintiff, |) | Case No.: CV-2012-513 |
| |) | |
| vs. |) | |
| |) | |
| CRITICAL ACCESS GROUP, INC., a Minnesota non-profit corporation, |) | |
| |) | |
| Defendant. |) | |

MEMORANDUM DECISION ON MOTION TO DISMISS

Appearances:

For the Plaintiff: Gary Slette, Twin Falls

For the Defendant: Patrick Miller, Martin Hendrickson, Boise

I. FACTUAL AND PROCEDURAL HISTORY

Plaintiff ("ABC") filed a complaint for declaratory relief on May 11, 2012 alleging that pursuant to an Option Agreement, and a corresponding restrictive covenant, only a "healthcare facility" can be constructed on certain property. The complaint further alleges that a declaratory judgment is needed to clarify the rights of the parties, because Defendant ("CAG"), by virtue of a letter sent from CAG's counsel, indicated that *if* there

is some disagreement down the road, CAG might, or does now, take issue with ABC's legal position that the Option Agreement can be enforced the way ABC thinks it may be enforced.

CAG moved to dismiss the complaint on the grounds of ripeness. The Court heard oral argument on July 2, 2012, and called for additional briefing. Additional briefs were submitted, and the Court took the matter under advisement on July 27, 2012.

For purposes of this motion, CAG accepts the facts set forth in ABC's Complaint as true. ABC entered into an Option Agreement with St. Benedicts. Notice of the Option Agreement has been recorded in Jerome County since June of 2011. CAG is the successor in interest to St. Benedicts, and is now the property owner. The facts as to how each party arrived at their present positions are more fully amplified in the Complaint and CAG's Memorandum in Support of Motion to Dismiss Complaint. As matters now stand, ABC has an option to repurchase the property for the amount stated in the Option Agreement.

While ABC and St. Benedicts were still parties to the Option Agreement, they agreed to a Supplemental Declaration restricting use of the property to a healthcare facility, defined as "private practice of medicine for the care and treatment of human beings." The Supplemental Declaration was recorded against the property in Jerome County in 2007. Thereafter, in 2011, St. Benedicts transferred its interests in the property to CAG. In January of 2012, counsel for ABC sent a letter to CAG advising CAG of the restrictions on the property as to healthcare facilities. On February 9, 2012, Idaho counsel for CAG wrote back. CAG confirmed that CAG was aware of the 2007 Option Agreement, but stated in the letter that awareness of ABC's legal position

“should not be interpreted as a statement that CAG agrees with such positions.” On this basis alone, ABC filed for declaratory relief. See, Complaint, paras. 24 and 25.

CAG filed its Motion to Dismiss on the basis that there is no present controversy for the Court to resolve, and therefore the case is not ripe. As pointed out by CAG, there is no allegation that CAG has breached any provision of the Option Agreement. There is no allegation that CAG has used or even threatened to use the property for any purpose other than construction of a healthcare facility. CAG has not commenced construction, nor is there any allegation it has any present intent to develop the property in a manner that could violate the use restriction. There are no allegations that anyone has suffered actual harm as of yet, and there are not as of yet any rights or claims of any third parties alleged. Thus, CAG contends the action by ABC for declaratory relief involves “uncertain or contingent events that may not occur as anticipated, or indeed may not occur at all.” *Richardson v. City and County of Honolulu*, 124 F.3d 1150, 1160 (9th Cir. 1997).

If the Court’s considerations were confined entirely to the pleadings, the Court would be left to decide, simply based on the Complaint, whether an assertion that “we disagree with your legal position or conclusion,” without more, would be sufficient to trigger and support a declaratory judgment action. However, in its Reply Memorandum in Support of Motion to Dismiss Complaint, commencing at pg. 5, CAG laid out a more specific reason why the Option Agreement might not be enforceable as to its use restriction, having to do with the doctrine of merger. The assertions in the Reply Memorandum raise complex legal issues over interpretation of the doctrine of merger. Whether those issues have merit is not before the Court at present. However, it is

important to note that CAG did not raise these issues in an attempt to show that a present and justiciable controversy exists. Quite the opposite. CAG raised these issues to show that, in fact CAG may have firm legal reasons for disagreeing with ABC's counsel regarding the enforceability of the Option Agreement, but that litigating these issues would be complicated and expensive, and might never be necessary. See CAG's Reply Memorandum in Support of Motion to Dismiss Complaint, fn. 3, pg. 7, filed June 27, 2012. In response, counsel for ABC points directly at this answer for support of his argument that a present controversy exists, requiring determination by a court.

II. ISSUE PRESENTED

(1) WHETHER ABC'S COMPLAINT SHOULD BE DISMISSED BECAUSE IT IS NOT RIPE FOR JUDICIAL DETERMINATION.

III. ANALYSIS AND CONCLUSIONS

Ripeness is that part of justiciability that asks whether there is any need for court action at the present time. *Gibbons v. Cenarrusa*, 140 Idaho 316, 317, 92 P.3d 1063, 1064 (2002).

This Court has described a justiciable controversy as one that is

distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot.... The controversy must be definite and concrete, touching the legal relations of the parties having adverse legal interests.... It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.

Weldon, 124 Idaho at 36, 855 P.2d at 873 (quoting *Harris v. Cassia County*, 106 Idaho 513, 516, 681 P.2d 988, 991 (1984)). Idaho has adopted the constitutionally based federal justiciability standard. *Noh v. Cenarrusa*, 137 Idaho 798, 801, 53 P.3d 1217, 1220 (2002). Idaho courts are authorized under I.C. § 10-1201 to render declaratory judgments

under certain circumstances, but even actions filed pursuant to that statute must present an actual or justiciable controversy in order to satisfy federal constitutional justiciability requirements. *Noh*, 137 Idaho at 801, 53 P.3d at 1220.

Davidson v. Wright, 143 Idaho 616, 620 151 P.3d 812,816.

Accordingly, Idaho has expressly adopted the federal justiciability standard. See *Harris v. Cassia County*, 106 Idaho 513 (1984); see also *Noh*, 137 Idaho 798.

'[T]he question of ripeness turns on the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.' *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 201, 103 S.Ct. 1713, 75 L.Ed.2d 752 (1983)(internal quotation marks omitted) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967), overruled on other grounds by *Califano v. Sanders*, 430 U.S. 99, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977)). 'The 'central concern [of the ripeness inquiry] is whether the case involves uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Richardson v. City and County of Honolulu*, 124 F.3d 1150, 1160 (9th Cir.1997) (quoting 13B Charles Alan Wright, Arthur R. Miller, Edward H. Cooper, Richard D. Freer, Joan E. Steinman, Catherine T. Struve, Vikram David Amar, *Federal Practice and Procedure* § 3532, at 112 (2d ed.1984)).

Chandler v. State Farm Mut. Auto. Ins. Co., 598 F.3d 1115, 1122-23 (9th Cir. 2010).

Unquestionably, this case involves uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all. Whether any controversy ever arises turns to a large degree, if not entirely, on what sort of a facility is proposed for development. As pointed out by CAG, there is no current threat, evidence or allegation that the property will not be developed in accordance with the specified definition of a healthcare facility, and thus it is as likely as not that a *possible defense* to the terms of the Option Agreement may never have to be raised or litigated. ABC argues, however, that CAG has put it on the horns of a dilemma from which it cannot escape, that the harm to it is real, and that it cannot market or sell its property (or at least its ability to do

so is limited) until a court determines the rights of the parties and resolves the pending legal question. At the very least, ABC argues that the property it holds is of significantly less value because ABC cannot offer necessary assurances to any potential buyer unless or until these legal questions are resolved. In short, it argues that under *Pacific Gas & Elec. Co.*, cited above, there is hardship to ABC if the Court withholds consideration of these issues.

There are some points to consider. First, in essence, ABC's complaint seeks to flush out and resolve any pending or potential defenses CAG might have under a "what if" scenario. (What if CAG decides to challenge the use restriction contained in the Supplemental Declaration?) If parties are able to bring contractual claims before the Court any time a proposed or possible defense is identified, then all contracts are subject to declaratory judgment actions at all times.¹ Second, even if such a practice was useful or utilized, new and unanticipated factual situations or contract dilemmas could always arise, rendering prior determinations valueless. Third, CAG did not provoke this dispute; CAG did not raise a defense to ABC in the course of threatening litigation, CAG did not indicate any intent to take, or not take, any present course of action, nor did CAG raise a defense in the course of any request or demand that CAG made of ABC. CAG was a sleeping dog. It only raised the possibility of a defense after ABC's counsel sought acquiescence or acknowledgements CAG was unwilling to give, and was not required to give. Fourth, it is entirely possible that if the Court denies CAG's Motion to Dismiss, and the parties litigate the merger issue to its conclusion, the

¹ Stretched to its extreme, this position would enable either party to a contract to identify any and all possible contract claims or defenses as soon as a contract is formed, and attempt to eliminate them by way of declaratory judgment before any problem has arisen. This is exactly what the ripeness doctrine seeks to prevent—needless adjudication of issues that may never arise.

Idaho Supreme Court could determine on appeal that this issue was never ripe for consideration, and should not have been heard by this Court. In that event, all is for naught. Strictly considering the efficiencies of the matter at hand, a dismissal for lack of ripeness is a discrete matter for appeal, and avoids resolution of the more complex issues which do not appear to be ripe. Fifth, this is not a contract with an identified ambiguity that is causing difficulties between the parties, or which will most certainly cause a problem within an identifiable or specified period of time. Rather, this case presents an existing contract with an identifiable *possible* contract defense that may never be raised, or never have to be raised.

One of the issues the Court has grappled with on CAG's Motion to Dismiss is whether and to what extent the Court can look outside the pleadings on a Motion pursuant to Rule 12(b). CAG's Motion to Dismiss is made pursuant to I.R.C.P. 12(b)(1) and 12(b)(6). Motions pursuant to Rule 12(b)(6) prohibit the Court from going outside the complaint, with the possible exception of judicial notice of common facts. *Hellickson v. Jenkins*, 118 Idaho 273 (Ct.App. 1990). While no specific authority has been found on this point, the Court is assuming, without deciding, that it may look to facts not contained or alleged in the pleadings when examining the issue of ripeness. It is in that setting that ABC's claim of hardship arises—outside the pleadings. Much of CAG's possible defense to ABC's contract assertions does not arise or is not exposed until CAG filed its Reply Memorandum in Support of Motion to Dismiss Complaint. It is there that CAG sets forth in some detail what it feels may be a viable defense to ABC's claims that the property at issue is encumbered by deed or use restrictions of record. Factual allegations or assertions as to facts, however, are in short supply. The only factual

allegations properly made in this action are contained in the verified complaint. By way of argument, however, set forth primarily in Plaintiff's Reply Brief in Opposition to Motion to Dismiss Complaint dated July 27, 2012, ABC asserts that this case is not about contingent events that may not occur. Instead, ABC claims that now, because CAG has raised possible contract defenses, ABC is presently unable to "make required warranties and representations to potential purchasers of its property in Crossroads Ranch in the same fashion as it was required to make to CAG's predecessor-in-interest." CAG further asserts that "When CAG bolstered the contractual uncertainty as a result of the legal issues it asserted in its Reply Brief, CAG only added fuel to the fire which it purposefully ignited when it sent its response letter." Further, by "creating the uncertainty relative to the applicability of the restrictive covenant, CAG clearly figured it could force ABC's hand," and that "CAG's letter and its brief in support of its Motion to Dismiss have created a duty to speak on the part of ABC when a potential purchaser requests the same warranties and representations demanded by CAG's predecessor." *Plaintiff's Reply Brief*, pg. 2. That is, ABC is asserting that because CAG has adopted a certain position, ABC will be unable to give the type of representation to any new purchaser of the property that ABC was able to make previously. For example, ABC contends it can no longer make the representation in the Option Agreement attached to the Complaint as Exhibit D. Specifically, the Representation and Warranty contained at para. 9(f) on pg. 5 of the Option Agreement entitled "Litigation." Thus, ABC contends, it is and will continue to suffer hardship because its property is of diminished value due to assurances it can no longer give to any potential buyer.

Indeed, due to the potential defenses CAG may be able to assert as to ABC's claimed use restrictions on the property, ABC may, or may not, be able to give litigation assurances in the manner and form set forth above to a prospective buyer. That may be true. And it must be noted that these facts or issues, though not pled or asserted in affidavit form, arise simply because of the *nature of the claims and/or defenses* which have been raised by the parties. However, it cannot be overstated that *CAG did not, as asserted by ABC, raise claims or defenses in pursuit of a plan or scheme to put ABC in some difficult legal position, in order to lower the value of the property or affect its marketability, or even enhance its legal position vis a vis ABC. Rather, CAG only responded to ABC's initial inquiry or request for contract assurances by stating that its awareness of ABC's previous position "should not be interpreted as a statement that CAG agrees with such positions."* Period. If ABC was concerned with being able to make representations as a seller, it could have left matters there. Instead, ABC filed suit requesting a declaratory judgment; when pressed for a legal position as to why litigation was not a good idea, CAG responded. It does not escape the Court that if ABC has been placed in an untenable legal position regarding its ability to give assurances to a future potential buyer, it put itself there. There is an old equitable maxim that a party should not be able to gain out of its own wrong. While neither party here has anything to "gain" if the Motion to Dismiss is denied except the possibility of expensive litigation, CAG stands to gain by its actions if it is able to make a case ripe for judicial determination by pressing for a legal resolution of a matter which the other side not only did not seek, but has steadfastly sought to avoid, and which, after all, may not be necessary.²

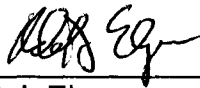
² Nor is the Court suggesting in any manner that ABC did anything "wrong." ABC only wrote to CAG (Ex K

In conclusion, if there be hardship to ABC, it was not caused by anything CAG did other than in an attempt to avoid litigation. Even assuming hardship exists to some degree to ABC, it does not outweigh the relative merits of the ripeness doctrine. The overriding fact is that, depending on how the property is sought to be developed, litigation may never be necessary. CAG's Motion to Dismiss on the grounds that the matter is not ripe for adjudication is hereby GRANTED.

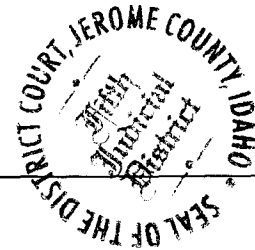
Counsel for CAG is requested to prepare an appropriate form of judgment for the Court's signature.

IT IS SO ORDERED.

DATED this 4th day of September, 2012.



Robert J. Elgee
District Judge



to the Complaint) to make sure CAG was aware of restrictions of record. The Court is not suggesting, either, that ABC was looking for an issue to litigate—the facts indicate an opposite intent initially. The point of this is that the snowball effect of each parties' actions was not due to provocation or "saber rattling" on the part of CAG. CAG certainly did not seek—at least not initially, to leave ABC "hanging in a legal limbo" so that it could maneuver ABC according to its whims. *Plaintiff's Reply Brief*, pg. 3.

I.C.R. RULE 49 (b)
NOTICE OF ORDER


I, Deputy Clerk for the County of Jerome, do hereby certify that on the 7th day of September, 2012, I have filed the original and caused to be served a true and correct copy of the above and foregoing document:

Gary D. Slette
Robertson & Slette, PLLC
P.O. Box 1906
Twin Falls, ID 83303-1906
Fax: (208) 933-0701

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

Patrick J. Miller
GIVENS PURSLEY LLP
P.O. Box 2720
Boise, ID 83701-2720
Fax: (208) 388-1300

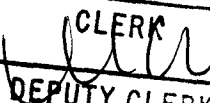
- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Telecopy
- Fax



Deputy Clerk

DISTRICT COURT
FIFTH JUDICIAL DIST
JEROME COUNTY IDAHO

2012 OCT 3 PM 12 10
Michelle Emerson

BY  CLERK
DEPUTY CLERK

Patrick J. Miller, ISBN 3221
Martin C. Hendrickson, ISBN 5876
GIVENS PURSLEY LLP
601 West Bannock Street
P.O. Box 2720
Boise, Idaho 83701-2720
Office: (208) 388-1200
Fax: (208) 388-1300
1578182_1 [10797-8]

Attorneys for Defendant

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

ABC AGRA, LLC, an Idaho limited liability
company,

Plaintiff,

v.

CRITICAL ACCESS GROUP, INC., a
Minnesota non-profit corporation,

Defendant.

Case No.: CV-2012-513

JUDGMENT

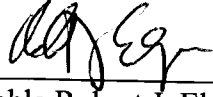
THIS MATTER having come before the Court pursuant to Defendant's *Motion to Dismiss Complaint*, and this Court having entered its *Memorandum Decision on Motion to Dismiss* on September 7, 2012, in which it granted Defendant's *Motion to Dismiss Complaint*;

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

That judgment is entered in favor of the Defendant and against the Plaintiff; and that all of Plaintiff's claims against the Defendant are dismissed.

DATED this 1 day of ~~September~~ 2012.

eddm



Honorable Robert J. Elgee, District Judge

CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of ~~September~~ October 2012, the foregoing was served

as follows:


Gary D. Slette
Robertson & Slette, PLLC
P.O. Box 1906
Twin Falls, ID 83303-1906
Email: gslette@rsidaholaw.com

- U. S. Mail
- Hand Delivered
- Overnight Mail
- Facsimile (208) 933-0701
- E-mail

Patrick J. Miller
Martin C. Hendrickson
Givens Pursley LLP
P O Box 2720
Boise, ID 83701

- U. S. Mail
- Hand Delivered
- Overnight Mail
- Facsimile (208) 388-1300

*cc: Judge Elgee
U.S. mail*



Clerk of the Court

2012 NOV 13 AM 9 22

Michelle Emerson

CLERK

BY

DEPUTY CLERK

1 **Gary D. Slette**
2 ROBERTSON & SLETTE, PLLC
3 P.O. Box 1906
4 Twin Falls, Idaho 83303-1906
5 Telephone: (208) 933-0700
6 Facsimile: (208) 933-0701
7 ISB # 3198
8 lrlm\GDS\ABC\ntc appeal

8 IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
9 STATE OF IDAHO, IN AND FOR THE COUNTY OF JEROME

10 * * * * *

11 ABC AGRA, LLC, an Idaho limited)
12 Liability company,)
13)
14 Plaintiff,)
15)
16 v.)
17)
18 CRITICAL ACCESS GROUP, INC.,)
19 A Minnesota non-profit corporation,)
20)
21 Defendant.)

Case No. CV-2012-513

NOTICE OF APPEAL

Filing Fee: \$109.00
Category: L.4.

20 TO: THE ABOVE-NAMED DEFENDANT, AND ITS ATTORNEYS OF RECORD,
21 AND THE CLERK OF THE ABOVE-ENTITLED COURT:

22 NOTICE IS HEREBY GIVEN THAT:

23 1. The above-named Plaintiff, ABC AGRA, LLC ("ABC"), appeals against the
24 above-named Defendant to the Idaho Supreme Court from the Judgment entered in the above-
25 entitled action on October 3, 2012, Honorable Robert J. Elgee presiding.

26 2. That ABC has a right to appeal to the Idaho Supreme Court, and the judgment

1 described in paragraph 1 above is appealable under and pursuant to Rule 11(a)(1) and (2) I.A.R.

2 3. The following is a preliminary statement of the issues which ABC intends to
3 assert in the appeal. Such preliminary list of issues on appeal shall not prevent ABC from
4 asserting other issues on appeal.

5 (a) Did the district court err in dismissing ABC's Complaint on the basis of a
6 lack of ripeness?

7 (b) Should any award of costs and attorney fees in favor of the Defendant be
8 vacated?

9 (c) Should ABC be awarded its costs and attorney fees on appeal?

10 4. Is a reporter's transcript requested? Yes. ABC requests a transcript of the July 2,
11 2012, hearing on Defendant's Motion to Dismiss.
12

13 5. ABC requests the following documents with all exhibits be included in the Clerk's
14 record in addition to those automatically included under Rule 28, I.A.R.
15

16 (a) Complaint for Declaratory Relief filed on or about May 11, 2012.

17 (b) Motion to Dismiss Complaint filed on or about June 4, 2012.

18 (c) Memorandum in Support of Motion to Dismiss Complaint filed on or
19 about June 4, 2012.

20 (d) Plaintiff's Response Memorandum in Opposition to Motion to Dismiss
21 Complaint filed on or about June 13, 2012.

22 (e) Plaintiff's Motion for Summary Judgment filed on or about June 22, 2012.

23 (f) Reply Memorandum in Support of Motion to Dismiss Complaint filed on
24 or about June 27, 2012.

25 (g) Withdrawal of Plaintiff's Motion for Summary Judgment filed on or about
26 June 29, 2012.

(h) Plaintiff's Second Memorandum in Opposition to Motion to Dismiss
Complaint filed on or about July 18, 2012.

(i) Post Hearing Brief in Support of Motion to Dismiss Complaint filed on or
about July 18, 2012.

(j) Plaintiff's Reply Brief in Opposition to Motion to Dismiss Complaint filed
on or about July 27, 2012.

(k) Defendant's Reply to Plaintiff's Second Memorandum in Opposition to
Motion to Dismiss Complaint filed on or about July 27, 2012.

- 1 (l) Memorandum Decision on Motion to Dismiss filed on or about September
2 7, 2012.
3 (m) Judgment filed on or about October 3, 2012.

4 5. I certify:

5 (a) That service of this Notice of Appeal has been made upon the reporter of
6 the hearing on Motion to Dismiss that took place on July 2, 2012, as follows:
7

8 Susan Israel, Court Reporter
9 Blaine County Courthouse
10 201 2nd Ave. S. – Ste. 106
11 Hailey, ID 83333

12 (b) That the estimated fee for preparation of the reporter's transcript of the
13 above-described hearing in the amount of \$100 has been paid to the reporter by ABC.

14 (c) That the estimated fee for preparation of the Clerk's record has not yet
15 been formally determined pursuant to I.A.R. Rule 27(d). As such, the estimated fee of
16 \$100 has previously been tendered until the actual fee has been computed.

17 (d) That the appellate filing fee has been paid.

18 (e) That service of this Notice of Appeal has been made upon the Defendant
19 and any other party required to be served pursuant to I.A.R. Rule 20.

20 DATED this 13th day of November, 2012.

21 ROBERTSON & SLETTE, PLLC

22
23
24 By: 

25 Gary D. Slette
26

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 13th day of November, 2012, I caused a true and correct copy of the foregoing instrument was served upon the following persons in the following manner:

| | | |
|----------------------|-----|--|
| Patrick J. Miller | [] | Hand Deliver |
| Givens Pursley | [] | U.S. Mail |
| 601 W. Bannock St. | [] | Overnight Courier |
| Boise, ID 83701-2720 | [✓] | Facsimile Transmission - 208-388-1300 |
| | [] | Email pjm@givenpursley.com |

| | | |
|--|-----|---------------------------------------|
| Hon. Robert J. Elgee | [] | Hand Deliver |
| District Judge | [] | U.S. Mail |
| Blaine Co. Courthouse | [] | Overnight Courier |
| 201 2 nd Ave. S. – Ste. 106 | [✓] | Facsimile Transmission - 208-788-5527 |
| Hailey, ID 83333 | | |

By: 
Gary D. Slette

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

| | | |
|--|---|--------------------------------------|
| ABC AGRA, LLC, an Idaho limited liability) company) | | |
| |) | Case No. CV2012-513 |
| Plaintiff/Appellant, |) | Supreme Court No. 40573-2012 |
| |) | |
| vs. |) | <u>CLERK'S CERTIFICATE OF APPEAL</u> |
| |) | |
| CRITICAL ACCESS GROUP, INC.,) an Minnesota non-profit corporation,) |) | |
| |) | |
| Defendant/Appellant. |) | |
| |) | |


APPEAL FROM: FIFTH JUDICIAL DISTRICT, HONORABLE
ROBERT J ELGEE, PRESIDING

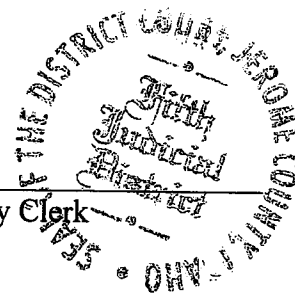
| | |
|---|---|
| Case Number from Court or Agency: | CV202-513 |
| Order or Judgment appealed from: | Judgment filed October 3, 2012. |
| Attorney for Appellant: | Gary D Slette, P.O. Box 1906 Twin Falls, ID 83303-1906 |
| Attorneys for Respondents: | Patrick J Miller, P.O. Box 2720 Boise, ID 83701-2720 |
| Appealed by: | ABC Agra, LLC Plaintiff/Appellant |
| Appealed against: | Critical Access Group, Inc. Defendant/Appellant |
| Notice of Appeal filed: | November 13, 2012 |
| Notice of Cross-appeal: | No |
| Appellate fee paid: | Yes |
| Request for additional Reporter's transcript: | No |
| CLERK'S CERTIFICATE OF APPEAL | 1 |

Request for additional Clerk's record: No
Was reporter's transcript requested: Yes
Court Reporters: Sue Israel
Additional Information: None

DATED This 18 day of Dec., 2012.

MICHELLE EMERSON
Clerk of the District Court

By 
Traci Brandebourg, Deputy Clerk



Mailed: 12-18-12

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

ABC AGRA, LLC, an Idaho limited liability)
company)

Plaintiff/Appellant,)

vs.)

CRITICAL ACCESS GROUP, INC.,)
an Minnesota non-profit corporation,)

Defendant/Appellant.)
_____)

Case No. CV2012-513
Supreme Court No. 40573-2012

CERTIFICATE OF EXHIBITS

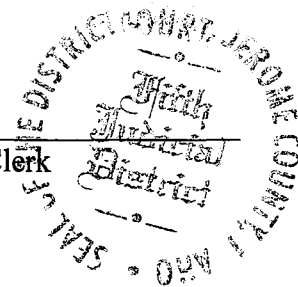
STATE OF IDAHO)
)ss.
County of Jerome)

I, hereby certify, that there are not exhibits to provide with the record.

DATED This 3 day of May, 2013.

MICHELLE EMERSON
Clerk of the District Court

By [Signature]
Traci Brandebourg, Deputy Clerk



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

ABC AGRA, LLC, an Idaho limited liability)
company)
)
Plaintiff/Appellant,)
)
vs.)
)
CRITICAL ACCESS GROUP, INC.,)
an Minnesota non-profit corporation,)
)
Defendant/Appellant.)
_____)

Case No. CV2012-513
Supreme Court No. 40573-2012
CERTIFICATE OF SERVICE

I, Michelle Emerson, Clerk of the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Jerome, do hereby certify that I have personally served or mailed, by United States Mail, one copy of the hearing transcript and record to each of the attorneys of record in this cause as follows:

Gary Slette
P.O. Box 1906
Twin Falls, ID 83303-1906

Patrick Miller/Martin Hendrickson
P.O. Box 2720
Boise, ID 83701-2720

Attorneys for Appellant

Attorney for Respondents

WHEREOF, I have hereunto set my hand and affixed the seal of said Court this 3
day of May, 2013.

MICHELLE EMERSON
Clerk of the District Court

By 
Traci Brandebourg, Deputy Clerk



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

ABC AGRA, LLC, an Idaho limited liability)
 company)

Plaintiff/Appellant,)

vs.)

CRITICAL ACCESS GROUP, INC.,)
 an Minnesota non-profit corporation,)

Defendant/Appellant.)
 _____)

Case No. CV2012-513
 Supreme Court No. 40573-2012

CLERK'S CERTIFICATE

STATE OF IDAHO,)
)ss.
 County of Jerome)

I, Michelle Emerson, Clerk of the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Jerome, do hereby certify that the above and foregoing transcript in the above-entitled case was compiled and bound under the direction as, and is a true, full and correct transcript of all the pleadings and proceedings therein contained and according to Rule 28, Appellate Rules of the Supreme Court.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Jerome, Idaho, this 3 day of May, 2013.

MICHELLE EMERSON
 Clerk of the District Court

By [Signature]
 Traci Brandebourg, Deputy Clerk

