1-24-2015

Adams v. Kimberley One Townhouse Owner's Ass'n., Inc. Appellant's Reply Brief Dckt. 42192

IN THE SUPREME COURT FOR THE STATE OF IDAHO

VIRGIL ADAMS a single man,

Plaintiff/Appellant,

vs.

KIMBERLEY ONE TOWNHOUSE OWNER'S ASSOCIATION, INC., an Idaho Corporation; RICHARD MORGAN, ANTHONY DAMER, JOANNE SPRINGER, JIM GREER, JON MARTIN, ANNE HAY, DAVID RICKS, DOUG MCWHORTER, CARA BROWN, BOB HAY, PAM HARDER AND KEN DUNBAR, MEMBERS OF THE BOARD OF DIRECTORS OF KIMBERLY ONE TOWNHOUSE OWNER'S ASSOCIATION, INC.

Defendants/Respondents.

Supreme Court Docket No. 42192-2014
Ada County No. 2013-21032

APPELLANT'S REPLY BRIEF

Appeal from the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada

Honorable Cheri C. Copsey presiding.

Kim J. Trout
Trout Law, PLLC
3778 N. Plantation River Dr., Ste. 101
Boise, ID 83703

Attorneys for Plaintiff-Appellant

Phillip J. Collaer
Anderson, Julian & Hull, LLP
PO Box 7426
Boise, ID 83707

Attorneys for Defendants-Respondents

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I. INTRODUCTION

The actions of the Respondents were not intended to preserve the nature of the neighborhood. "Preserve" means to keep something in its original state. Both the 1980 CC&R's and the 2007 Amended CC&R's allowed for unlimited rental.[1] Thus to preserve the nature of the neighborhood, no amendment would be required.

The Respondents assert the action had to be taken because of "persons that were disruptive and violative (sic) of the Association rules: e.g., parking in reserved parking spaces or other areas where parking was restricted, blocking traffic, and disturbing the peace and quiet enjoyment of other residents of their respective properties."[2] Respondents' assertion is a red herring. Both the 1980 CC&R's and the 2007 Amended CC&R's contained all of the tools necessary for the HOA Board to address theft, disturbing the peace, and parking.[3]

Finally, Respondent misstates the fundamental question in this appeal as only one dealing with the upholding and enforcing of the 2007 CC&R's. Respondent must make this misstatement, and seek to divert the Court from the real issue. Unlike in *Shawver*, Appellant challenges the validity and authority of the amendment provision of the

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[1] R. 000119, Art. III, § 1 ("Each Lot shall be used for single family residential purposes only, on an ownership, rental or lease basis..."); R. 136, Art. III, § 1 ("Each Lot shall be used for single family residential purposes only, on an ownership, rental or lease basis...").

[2] Respondents' Brief, pg. 1 (Dec. 18, 2014) ("Respondents' Brief").

[3] R. 000137, Art. III, § 1(b) ("Unenclosed parking spaces are restricted to use for parking of operative motor vehicles; parking on any portion of the Common Area shall be regulated by the Board ... The Board may require removal of ... any other vehicle, equipment or item improperly parked or stored. If the same is not removed the Board may cause removal at the risk and expense of the Owner thereof. Any other item or equipment determined by the Board to be objectionable may be similarly removed.").
R. 000138, Art. III, § 1(h) ("No noxious or offensive activity shall be carried on in any Dwelling Unit or Common Area, nor shall anything be done therein which may be or become an annoyance to other Owners.
R. 000138, Art. III, § 1(k) ("Either the Board or the Members of the Corporation upon a majority vote of the Board or the Members, as the case may be, are empowered to pass, amend and revoke detailed administrative rules and regulations, "House Rules," or rules of conduct necessary or convenient from time to time to insure compliance with the general guidelines of this Section.")

CC&R's, and the District Court's failure to conduct any analysis of Appellant's challenge.[4]

The District Court's failure to address this central issue mandates reversal, with direction to enter judgment in favor of Appellant.

II. ARGUMENT

A. A Principled Application of Idaho Law Mandates Reversal.

Respondents' recitation of Idaho law artfully fails to address the central issue of this appeal. Appellant's challenge to the validity of the amendment provision was ignored by the District Court. The District Court relied on *Shawver* without addressing the undisputed fact that the issue raised here was never addressed in *Shawver*:

> As the parties are aware, according to *Shawver*, restrictive covenants may provide for a method of abrogating or modifying such agreement, as for example by vote of a certain proportion of the property owners, and "such agreements are valid under the law."[5]

Appellant specifically identified Justice Shroeder's quote during oral argument to the District Court:

> The Supreme Court decided *Shawver* on the issue of the breach of the sale agreement. They decided *Shawver* on the issue of good faith and fair dealing with respect to the sale agreement. And they decided *Shawver* on the issue of whether or not the sale agreement was subject to the restrictive covenants.
>
> Specifically the issue that you have in this case, Judge, was never addressed by the Court in *Shawver* and it's plainly stated at page 362 and 363 of the decision. "The Shawvers do not challenge the validity of the amendment provisions contained in the original recorded CC&Rs."[6]

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[4] No Court in Idaho has directly addressed this issue. It is critical to note that Justice Schroeder acknowledged that *Shawver* had not challenged the validity of the amendment provision of the CC&R's: "The Shawvers do not challenge the validity of the amendment provision contained in the original recorded CC & Rs or the fact that the Second Amended CC & Rs were properly adopted in compliance with that provision. *Shawver v. Huckleberry Estates, L.L.C.*, 140 Idaho 354, 362-63, 93 P.3d 685, 693-94 (2004).

[5] SJ Transcript, p. 36, L. 12-17.

[6] SJ Transcript, p. 21, L. 24 - p. 22, L. 1.

The District Court failed to acknowledge either the distinction, or the issue, and proceeded to make its decision without analysis or application of the correct principles of Idaho law.

1. The District Court Failed to Determine The Original Intent of the Bargain Contained in the Original CC&R's.

Respondent fails to dispute that Appellant relied upon the covenants contained in the Original CC&R's at the time of his purchase of the real property. Respondent also fails to contest the nature of the contractual duty to the Appellant which arises from the covenants in effect at time of purchase. "A covenant is a duty under the contract, the breach of which gives a right to enforce the contract." *Weisel v. Beaver Springs Owners Ass'n, Inc.*, 152 Idaho 519, 528, 272 P.3d 491, 500 (2012).

Respondent fails to dispute the existence of the covenant allowing unlimited "rental" as a covenant that runs with Appellant's land. "A covenant represents a meeting of the minds and results in a relationship that is not subject to overreaching by one party or sweeping subsequent change." *Armstrong v. Ledges Homeowners Ass'n, Inc.*, 360 N.C. 547, 554, 633 S.E.2d 78, 84-85 (2006). Respondent also fails to dispute, and it is indisputable, that these fundamental principles are precisely consistent with the principles adopted in Idaho law. *See, Weisel v. Beaver Springs Owners Ass'n, Inc.*, 152 Idaho 519, 528, 272 P.3d 491, 500 (2012).

Here, the District Court failed to engage in any substantive analysis as to Appellant's reliance upon the covenants, nor did the District Court engage in any analysis to determine the intent, meaning, and legal effect of the existing covenant of "rental."

2. The District Court Erred By Failing to Determine the Enforceable Rights Promised to the Appellant in the CC&R's

Because the covenant of unrestricted "rental" originated in the contract in place at the time of purchase, i.e. the 1980 CC&R's, the District Court erred by failing to interpret and give effect to the original intent of the parties. *Armstrong v. Ledges Homeowner's Ass'n, Inc.*, 360 N.C. 547, 555-56, 633 S.E.2d 78, 85 (2006). Idaho law is in accord, and required that the District Court, when interpreting such covenants, apply the same rules of construction as are applied to any contract or covenant. *Nordstrom v. Guindon,* 135 Idaho 343, 345, 17 P.3d 287, 290 (2000) (citing *Brown v. Perkins,* 129 Idaho 189, 923 P.2d 434, 437 (1996)). The District Court erred by failing to engage in this analysis.

Further, had the District Court engaged in the substantive analysis, it would likewise have been required to resolve all doubts are to be resolved in favor of the free use of land. *Shawver v. Huckleberry Estates,* LLC, 140 Idaho 354, 363, 93 P.3d 685, 694 (2004).

The District Court's failure to engage in this analysis was error. The correct analysis, applying the foregoing legal principals, leads to only one conclusion: Appellant is entitled to the benefit of the bargain of unrestricted "rental."

This foundational legal conclusion, along with the required strict construction[7] protecting the benefit of Appellant's bargain, shapes the correct conclusion: "This Court will not permit the Association to use the Declaration's amendment provision as a vehicle for imposing a new and different set of covenants, thereby substituting a new obligation for the original bargain of the covenanting parties." *Armstrong v. Ledges Homeowners Ass'n, Inc.,* 360 N.C. 547, 633 S.E.2d 78 (2006). To hold otherwise, would condone the

[7] *Armstrong v. Ledges Homeowners Ass'n, Inc.,* 360 N.C. 547, 555, 633 S.E.2d 78, 85 (2006); P*inehaven Planning Bd. V. Brooks*, 138 Idaho 826, 70 P.3d 664 (2003)

District Court's use of a roving power to rewrite out of the CC&R's, the bargained-for-benefit held by Appellant. The District Court neither had, nor does it have the roving power to re-write the language of the parties bargain. *Shawver v. Huckleberry Estates,* LLC., 140 Idaho 354, 93 P.3d 685 (citing *Smith v. Idaho State Univ. Fed. Credit Union,* 114 Idaho 680, 684, 760 P.2d 19, 23 (1988)).

The District Court failed to engage in an analysis of the legal limitation of the authorizing language. Rather, the District Court simply chose to rewrite the amendment provision to say: "This Declaration may be amended **[and substantially changed]** during the first thirty (30) year period by an instrument signed by not less than sixty-six and two-third percent (66-2/3%) of the Lot Owners." The decision of the District Court must be reversed with direction in accord with the correct legal analysis.

B. The Respondents' Claims Are Not Founded In the Law

Respondent misstates the central issue, as one of mere "edits or non-substantive corrections".[8] Respondent then premises the majority of its argument on this distorted assertion. Respondent also erroneously asserts "this Court has upheld significant and substantial amendments to CC&R's in other cases."[9]

Respondent seeks to support its erroneous contention with the following citations:

1. *Shawver v. Huckleberry Estates, LLC,* 140 Idaho 354, 93 P.3d 685 (2004). Neither Respondent, nor the Court in *Shawver,* cite the precise language of the CC&R's, except the percentage voting requirement, which is not at issue in this case. More important, *Shawver* focuses on a purchase and sale agreement and its relationship to the existing CC&R's. Critically, as previously noted above,

[8] Respondents' Brief, p. 8.
[9] *Id.*

in *Shawver* the appellant did not challenge the validity of the amendment provision. Here, the Appellant specifically challenged the validity of the amendment provision. As such, the Respondents' reliance upon *Shawver* to support its argument of this Court upholding substantial changes is in error.

2. *Best Hill Coalition v. Halko, LLC*, 144 Idaho 813, 172 P.3d 1088 (2007): *Best Hill* was decided upon the issue of whether an ambiguity existed and whether new members had provided the necessary consideration to support an adoption of the amendments, neither of which is at issue in this case. Moreover, the language in the CC&R's in *Best Hill* differs markedly from the language at issue here. The amendment language is not cited in *Best Hill*, but is cited in *Nordstrom v. Guindon*, 135 Idaho 343, 17 P.3d 287 (2000), an earlier case that dealt with the same subdivision, but a different set of facts. The amendment section states: "These restrictive covenants may be *altered,* amended *or deleted* in whole or in part, if agreed to in writing by seventy-five percent (75%) majority of the then parcel owners in Nettleton Estates." *Nordstrom* supra. (emphasis added). Thus Respondents' reliance upon *Best Hill* or *Nordstrom* fails, as neither of those cases challenged the legal scope or validity of the amendment provision.

3. *Pinehaven Planning Bd. v. Brooks*, 138 Idaho 826, 70 P.3d 664 (2003): *Pinehaven* was decided on the issue of ambiguity, again not at issue in this case. The *Pinehaven* Court interpreted the existing CC&R's, not an amendment, as to the validity of an owner renting their property out as a short-term rental. The *Pinehaven* Court determined that the CC&R's were not ambiguous and clearly allowed short-term renting. *Pinehaven* is instructive as it

demonstrates that restrictions are to be strictly construed and interpreted by the plain language of the CC&R's.

4. Respondent asserts, for the first time in the Respondents' Brief that "Adams waived any objection to the change in the amendment process" because he voted in favor of the 2007 Amendment.[10] This argument is a red herring, because the percentage vote requirement is not at issue in this case. Further, Respondents' argument was not raised before the District Court, and is therefore waived by Respondent.

5. Respondents rely on *Black's Law Dictionary,* 6th ed., abridged 1990, to define "Amend." The complete definition of "Amend" is: "To improve. To change for the better by removing defects or faults. To change, correct, revise." It cannot be argued that the Second Amended CC&R's did not "improve" or remove "defects or faults" from the 2007 CC&R's. The 2007 CC&R's, as discussed below, gave the HOA Board the power to enforce the existing covenants, which addressed each of the Respondents' complaints.

6. *Responsible Urban Growth v. City of Kent*, 123 Wash.2d 375, 868 P.2d 861 (Wash. 1994): Respondent asserts: "Thus, 'amendment' was clearly viewed by the court to include additions to covenants." This assertion is patently false. *Responsible Urban Growth* does not address amending CC&R's, and in fact, only addresses a city's action with respect to a series of ordinances passed by the City Council. *Responsible Urban Growth* only speaks to defining the term "amend" as it relates to the Washington Statutes and the City of Kent Code. The case flatly does not address an addition to covenants or restrictions.

[10] Respondents' Brief, p. 12.

7. *Shafer v. Bd. Of Trustees of Sandy Hook Yacht Club Estates, Inc.*, 76 Wash. App. 267, 883 P.2d 1387 (Wash. App. 1994): Respondent claims this case holds that "amendment" allows "additional CC&R restrictions."[11] During the discussion of the procedural background, the Court in *Shafer* discloses that the HOA voted to change the amendments to the covenants to be amendments *to the bylaws*, because an amendment to the covenant would require a unanimous vote of all the homeowners.

Footnote 7 to the *Shafer* opinion is important and instructive here: "At oral argument, Sandy Hook acknowledged that the trial court had not addressed, and it was not contending, that it had the authority to amend the Original Covenants. Thus we limit our opinion to whether Sandy Hook is authorized to adopt new restrictions in the nature of restrictive covenants." *Id.* at 1392. As noted above, the restrictions were only adopted by amending the bylaws, not as amendments to the CC&R's.

As important, the *Shafer* Court concluded that "an express reservation of power authorizing less than 100 percent of property owners within a subdivision to adopt new restrictions respecting the use of privately-owned property is valid, **provided that such power is exercised in a reasonable manner** consistent with the general plan of the development." *Id.* (Emphasis added). Respondents' reliance on *Shafer* for allowing additional restrictions by way of amendment, while disregarding the language quoted above, is disingenuous.

8. *Harris v. Smith,* 250 S.W.3d 804 (Mo. App. 2008): Respondents assert that "under Missouri law, CC&R's cannot be amended to add new burdens

[11] Respondents' Brief, p. 15.

and restrictions not found in the original covenants." Respondents imply that this is Missouri statutory law. The assertion is false. The *Harris* Court undertakes a case law review of five cases, wherein the Court discusses amendatory language which includes the word "change." The *Harris* Court found that the protective covenant's amendatory language which allowed for automatic renewal "unless an instrument signed by a majority of the then owners of the lots has been recorded agreeing to change said covenants in whole or in part" prevented the addition of new restrictions. *Id.* at 806. Specifically the *Harris* Court found that "new restrictions...are invalid." *Id.* at 810. The *Harris* opinion supports the Appellant's contention that unless amendments are passed unanimously, they are to be judged by a reasonableness standard.

9. Respondent goes on to claim that *Shawver* and *Best Hill* actually address the language of the CC&R's as providing the authority to include new additional restrictions. As demonstrated above, neither case addressed the limiting language of "amend" in the CC&R's.

10. *Boyles v. Hausmann,* 246 Neb. 181, 517 N.W.2d 610 (Neb. 1994): Respondents' attempt to distinguish the pending matter from *Boyles* by an incomprehensible distinction between a "declaration" and a "covenant."[12] Respondents' representation of the *Boyles* opinion is inaccurate. The *Boyles* Court found that the amendatory language "follows the itemization of the land-use covenants, and the provision refers to 'these covenants' and provides that 'they' shall be automatically extended, unless the majority changes the 'same.' The references throughout this [amendatory] provision refer only to the

[12] Respondents' Brief, p. 17.

previously listed covenants." *Id.* at 616.

The Court in *Boyles* expressly states: "If a restrictive covenant agreement also contains a provision which provides for future alteration, the language employed determines the extent of that provision." *Id.* at 612. The *Boyles* Court stated: "...we find that the unambiguous language of this provision authorizes a majority of the lot owners to make changes to existing covenants, but *the provision does not authorize a majority to add new and different covenants.*" *Id.* at 616. (Emphasis added)

Respondents' assertion that the 2007 CC&R's at issue in this Case specifically allow amendments, which include substantially changed and additional restrictions on the rental term and substantially changed additional requirements for owners to rent, ignores the express holding in *Boyles.*

11. *South Ridge Homeowner's Ass'n v. Brown*, 226 P.3d 758 (Utah App. 2010): Respondents' inclusion of *South Ridge* in the Respondents' Brief implies that *South Ridge* addresses "amend" or "amendment" to include changes and modifications, including additions.[13] *South Ridge* is irrelevant to this pending case. *South Ridge* simply upholds a specific existing section of a CC&R. *South Ridge* does not address an amendment from allowing unlimited rentals, as is the case here, to not allowing rentals.

12. *Armstrong v. Ledges Homeowner's Ass'n, Inc.*, 633 S.E.2d 78 (N.C. 2006): Respondent strives to distinguish *Armstrong* based upon the difference between an affirmative covenant (i.e. the imposition of assessments) versus a restrictive covenant (i.e. the restriction of property rentals). In support of

[13] Respondents' Brief, p. 18.

the Respondents' argument, the respondents' argue that "the amendment was merely a further refinement of those limitations to address the problems caused by Appellant's use of his property as a vacation rental."[14] As discussed below, the Respondent Board had the proper tools in the 2007 Amendment to "address the problems caused by Appellant's use of his property as a vacation rental."[15]

Respondent further seeks to distinguish *Armstrong* because "the *Armstrong* court relied on "a 'reasonableness' standard which has not been adopted in Idaho."[16] Respondent again cites to *Shawver* for authoritative support.[17] Respondent suggests that the District Court here engaged in some type of public policy analysis when, in fact, the District Court engaged in a simple declaration, but no analysis of public policy issues.

Respondents' legal analysis and assertions are incorrect. As noted by Justice Schroeder in *Shawver*, the issue of language limiting the authority for changing the CC&R's was never raised nor addressed.

Respondent implies that no Idaho Court has adopted a reasonableness standard in this circumstance. The Respondents are correct, because a survey of Idaho case law reveals that no Idaho Court has ever addressed this issue of first impression.

Glaringly, Respondent fails to address the principles from *Armstrong* which follow Idaho legal principles:

1. "A covenant represents a meeting of the minds and results in a relationship that is not subject to overreaching by one party or sweeping

[14] Respondents' Brief, p. 18-19.
[15] *See*, ¶C below.
[16] Respondents' Brief, p. 19.
[17] *Id.*

subsequent change." *Armstrong v. Ledges Homeowners Ass'n, Inc.*, 360 N.C. 547, 554, 633 S.E.2d 78, 84-85 (2006).

2. "Covenants accompanying the purchase of real property are contracts which create private incorporeal rights, meaning non-possessory rights held by the seller, a third-party, or a group of people, to use or limit the use of the purchased property." *Armstrong v. Ledges Homeowners Ass'n, Inc.*, 360 N.C. 547, 554, 633 S.E.2d 78, 85 (2006).

3. "When a covenant infringes on common law property rights, " '[a]ny doubt or ambiguity will be resolved against the validity of the restriction.' " (quoting *Cummings,* 273 N.C. at 32, 159 S.E.2d at 517)); *J.T. Hobby & Son, Inc.*, 302 N.C. at 71, 274 S.E.2d at 179 ("The rule of strict construction is grounded in sound considerations of public policy: It is in the best interests of society that the free and unrestricted use and enjoyment of land be encouraged to its fullest extent.")" *Armstrong v. Ledges Homeowners Ass'n, Inc.*, 360 N.C. 547, 555-56, 633 S.E.2d 78, 85 (2006).

4. "Declarations of covenants that are intended to govern communities over long periods of time are necessarily unable to resolve every question or community concern that may arise during the term of years." *Armstrong v. Ledges Homeowners Ass'n, Inc.*, 360 N.C. 547, 557, 633 S.E.2d 78, 86 (2006). "For this reason, most declarations contain specific provisions authorizing the homeowners' association to *amend* the covenants contained therein." *Id.* (emphasis added).

5. "The law should facilitate the operation of common interest communities at the same time as it protects their long-term attractiveness by *protecting the legitimate expectations of their members.*" *Armstrong v. Ledges Homeowners Ass'n, Inc.*, supra, quoting 2 Restatement (Third) of Property: Servitudes § 6 Introductory Note at 71 (2000) (emphasis added).

6. The *Armstrong* Court stated: "We conclude that the disputed amendment is invalid and unenforceable. In so doing, we echo the rationale of the Supreme Court of Nebraska in *Boyles v. Hausmann,* 246 Neb. 181, 191, 517 N.W.2d 610, 617 (1994): "The law will not subject a minority of landowners to unlimited and unexpected restrictions on the use of their land merely because the covenant agreement permitted a majority to make changes in existing covenants." Here, petitioners purchased their lots without notice that they would be subjected to additional restrictions on use of the lots and responsible for additional affirmative monetary obligations imposed by a homeowners' association. This Court will not permit the Association to use the Declaration's amendment provision as a vehicle for imposing a new and different set of covenants, thereby substituting a new obligation for the original bargain of the covenanting parties." *Armstrong v. Ledges Homeowners Ass'n, Inc.*, 360 N.C. 547, 633 S.E.2d 78 (2006).

Respondents fail to acknowledge, nor address these substantive analytical issues which comport with the 'strict construction' required by the case law of Idaho as to covenants.[18]

[18] *Armstrong v. Ledges Homeowners Ass'n, Inc.*, 360 N.C. 547, 555, 633 S.E.2d 78, 85 (2006); P*inehaven Planning Bd. V. Brooks*, 138 Idaho 826, 70 P.3d 664 (2003)

Respondents' citation to *Hughes v. New Life Development Corp.*, 387 S.W.3d 453 (2012), likewise, does not apply in this case, because of the nature of the CC&R's in that case which allowed "amendment without substantive limitation." *Id.* at 476. Further, *Bryant v. Lake Highlands Development Co. of Texas, Inc.*, 618 S.W.2d 921 (1981) is not applicable because the amendment at issue removed property and did not add restrictions. *Id.*

Likewise, *LaBrayere v. LaBrayere*, 676 S.W.2d 522 (1984), does not apply because there was no challenge to the validity of the amendment language and the amendatory authorization specifically allowed "change" and "modification." *Id.*

Apple II Condominium Ass'n v. Worth Bank and Trust Co., 659 N.E.2d 93 (Ill. App. 1995), addressed the specific issue of a condominium which in Illinois "in the absence of a provision either in the Amendment or in the original Declaration, condominium owners do not have vested rights in the status quo ante." *Id.* at 349.

Lakemoor Community Club, Inc. v. Swanson, 600 P.2d 1022 (Wash. App. 1979), *Mission Shores Ass'n v. Pheil*, 166 Cal.App.4th 789, 83 Cal.Rptr.3d 108 (2008), and *Southeastern Jurisdictional Administrative Council, Inc. v. Emerson*, 603 S.E.2d 366 (N.C.2009) do not apply as presented by the Respondents either because of the application of state statutory law, which is different than Idaho, the application of a differing legal standard not at issue in Idaho, and because of the unique factual differences between those cases and the one at bar.

In *Miller v. Miller's Landing, LLC*, 29 So.3d 228 (2009), the Alabama Court of Civil Appeals addressed for the first time whether a reasonableness test was to be used in determining whether a developer could amend the recorded restrictions. The Alabama

Court found that the reasonableness test applied to amendments made by less than 100% of the owners. This case is instructive, because, as in Alabama, this is a case of first impression in Idaho, and this Court must determine whether it will adopt the reasonableness standard.

C. Respondents Fail to Admit That No "Change" In The CC&R's Was Necessary to Address the Claimed Issues of Conduct

Respondents claim that the new and added restrictions on rental were required "in order to maintain the nature of the neighborhood."[19] Respondents assert the "nature of the neighborhood" was threatened by: 1) "taking produce from another's garden;"[20] 2) "excessive noise;"[21] and 3) "parking issues."[22]

Assuming, arguendo, these acts, reportedly arising from merely two (2) incidents on separate days, the question which Respondents fail to address is: "Were there tools already in place to address these issues within the existing CC&R's and the law?"

The unequivocal answer is "Yes".

The existing 2007 CC&R's[23] and the criminal law of Idaho completely addressed each of these issues.

a. "Taking produce" – Common theft is governed by the Idaho criminal statutes. All that needed be done was report the theft to the police. It is undisputed by Respondent that the record and evidence in this case shows that no such report was ever made by anyone in the HOA or by any Owner.[24]

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[19] Respondents' Brief, p. 1.
[20] Respondents' Brief, p. 2.
[21] *Id.*
[22] *Id.*
[23] R. p. 000134-000163.
[24] R. p. 000323, Trans. p. 14, L. 9 – p. 16, L. 20.

b. "Excessive Noise" – "Article 3 – Use and Regulation of Uses," Section 1(h): "**No noxious or offensive activity shall be carried on** in any Dwelling Unit or Common Area, nor shall anything be done therein which may be or become an annoyance or nuisance to other Owners."[25]

Further, Article 9, General Provisions, Section 1. Enforcement. Provided additional authority for enforcement to the Corporation or any Owner: "The Corporation, or any Owner, shall have the right to enforce, by any proceeding at law or in equity, all restrictions, conditions, covenants, reservations, ... now or hereafter imposed by the provisions of this Declaration."[26]

c. "Parking issues" – are addressed in "Article 3 – Use and Regulation of Uses," Section 1(b): "Unenclosed parking spaces are restricted to use for parking of operative motor vehicles, parking on any portion of the Common Area shall be regulated by the Board and shall be shared by all Owners on an equitable basis ... The Board may require removal of ... any other vehicle, equipment or item improperly parked or stored. If the same is not removed the Board may cause removal at the risk and expense of the Owner thereof."[27]

"Parking issues" are further addressed in "Article 3 – Use and Regulation of Uses," Section 1(c): "Common drives and walks shall be used exclusively for normal transit and no obstructions shall be placed thereon or therein expect by express written consent of the Board."[28] Each of these includes the same enforcement authority as referenced above.

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[25] R. p. 000138 (Emphasis added).
[26] R. p. 000148
[27] R. p. 000137
[28] R. p. 000137

Respondents' assertion that a "substantial change" in the CC&R's was critical to "maintain the nature of the neighborhood" is simply untrue. The HOA Corporation, the Board, and each Owner already had an *existing* applicable, enforceable provision to address the claimed issue. Yet, the record is devoid of any attempt to use the existing covenants to address any of these issues.

Respondents' asserted premise that the "... restrictions are facially reasonable in order to maintain the nature of the neighborhood"[29] is simply false, when examined in light of the 2007 CC&R's

D. The Amended CC&R's Are Arbitrary and Discriminatory.

The District Court failed to consider, or address in any fashion, the Appellant's arguments as to the arbitrary and discriminatory nature of the amended CC&R's. Respondent suggests that Appellant fails to cite to the record to support his argument.[30] The District Court did not issue a written ruling for Appellant to cite to. The District Court issued an oral ruling from the bench, yet spoke no words regarding the argument as to discriminatory and arbitrary issues fully briefed by the Appellant below. Respondent is correct: there is no record to cite to because, as correctly asserted by Appellant, the District Court simply failed to address these issues, and there is no ruling to affirm.

Respondent then continues, and asserts: "The *Maata* holding is irrelevant *because Idaho does not follow the uniformity rule.*"[31] This pronouncement of Idaho law is consistent with the Respondents' distortion of the law addressed above. No Idaho Court has addressed, nor ruled on the uniformity rule. Respondent again cites, *Best Hill, supra,* but that case does not consider the uniformity rule.

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[29] Respondents' Brief, p. 1.
[30] *Id.* at 21.
[31] *Id.* at 22 (Emphasis added).

In a unique twist, Respondent then chooses to assert that this case is all Appellant's fault because "Appellant is the party that seeks to upset the "uniformity of development and use" by introducing vacation rentals to the Kimberly One neighborhood."[32]

It defies description that the Respondents would assert that the exercise of Appellant's undisputed right of unrestricted rental, pursuant to the validly existing covenants applicable to all lots, which right of unlimited rental existed from the inception of the subdivision, is somehow upsetting "uniformity of development."

Respondents' position that "each lot" is subject to the new rental restrictions is nonsensical. One need only to look to the precise language chosen by the Respondent HOA for its actions against the Appellant. The Amendment at issue reads:

> and (g) **the Board shall have the authority in its sole and unfettered discretion** (i) **to grant,** on a case-by-case basis for reasons of hardship **or for such other reasons as the Board may deem compelling, a written variance** from the requirements of this Article 3.1.(a) **with respect to Rental Activity or Lease of a particular Lot**; or (ii) **to adopt, repeal, amend, enact and enforce** as Bylaws or **"House Rules"** in accordance with Article 3.l(k) such other and further rules and regulations **as the Board in its sole and unfettered discretion may deem necessary to regulate Rental Activity** for the common good of all of the Owners."[33]

Respondents' claim of "uniformity" evaporates when examined in light of the Respondent HOA Board's **"sole and unfettered discretion"** to do whatever it "may deem compelling" or "may deem necessary" as to "**a particular lot.**"

A plain reading of the express language used by Respondent in the "Amendment" is an unequivocal demonstration revealed by the Respondent's argument show precisely

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[32] Id. at 24

[33] R. 235-36 (emphasis added).

why the Amendment is arbitrary and discriminatory on its face. The District Court's failure to address the argument is sufficient legal basis for reversal with direction.

ATTORNEY'S FEES

Appellant incorporates by reference its argument with respect to attorney's fees as stated in the Appellant's Opening Brief. Assuming, arguendo, that the Court were to find attorney's fees awardable pursuant to the language of the CC&Rs, then in that event, upon reversal of the District Court, Appellant is likewise entitled to attorney's fees both on appeal and below.

CONCLUSION

Appellant respectfully requests that the decision of the District Court be reversed and remanded with direction to the District Court to enter judgment in favor of appellant.

RESPECTFULLY SUBMITTED this 26th day of January, 2015.

TROUT LAW, PLLC

Kim J. Trout

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 26th day of January, 2015, a true and correct copy of the above and foregoing document was forwarded addressed as follows in the manner stated below:

Phillip J. Collaer
Anderson, Julian & Hull, LLP
PO Box 7426
Boise, ID 83707
Facsimile: (208) 344-5510

Hand Delivered ☐
U.S. Mail ☒
Fax ☐
Fed. Express ☐

Kim J. Trout