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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 OPENING 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.

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I. STATEMENT OF THE CASE

A. Nature of the Case

This is a case of first impression in Idaho. It arises from a declaratory judgment action challenging the validity of CC&R's changed by a majority of home owners, which placed substantial and additional burdens upon the Appellant's real property. The CC&R's in effect at the time of Appellant's purchase of the property, and a subsequent 2007 Amendment, specifically allowed for the unrestricted rental of Appellant's townhome.

In 2013, the HOA changed the CC&R's to, significantly and arbitrarily, restrict Appellant's ability to rent his property. The change was solely targeted at the Appellant, and added burdens and restrictions to Appellant's ability to rent his property. Appellant sought a declaration from the District Court that the Second Amended CC&R's were void abinitio, and of no force and effect as exceeding the authority for amendment of the CC&R's.

B. Course of Proceedings and Statement of Facts

Appellant is the owner of 1275 East Kimberley Lane, Boise, ID 83712, which is more particularly described as Lot 1 of Kimberley One Townhouses Subdivision, according to the official plat thereof, filed in Book 49 of Plats at Page(s) 3991, 3992 and 3993, Official Records of Ada County, Idaho ("1275"). R. Vol. I, p. 5, ¶1.

Kimberley One Townhouse Owner's Association, Inc., was formed in 1980. On August 12, 1980, the developer of the townhomes adopted and recorded a "Declaration of Covenants, Conditions and Restrictions and Easements for Kimberley One Townhouses," ("1980 CC&R's). R. Vol. I, p. 6, ¶4.

On September 11, 2007, Kimberley One Townhouse Owner's Association, Inc., caused to be recorded the Amended and Restated Declaration of Covenants, Conditions, Restrictions and Easements for Kimberley One Townhouses ("2007 Amendment") R. Vol. I, pp. 15-25.

Appellant spends 8 months of the year in China working as an analyst. After his purchase of 1275, Appellant desired to use 1275 as a summer vacation home. To offset the cost of maintenance, Appellant rents 1275 as a vacation rental. R. Vol. I, p. 311, ¶4. The rental of 1275, as well as the rental of any other unit in the Association, is an explicitly allowed use in both the 1980 CC&R's and the 2007 Amendment, under Article 3, Section 1, "Use." R. Vol. I, p. 12; R. Vol. I, p. 17. The Appellant relied upon the stated unlimited rental provisions contained in the 1980 CC&R's at the time of his purchase. R. Vol. I, p. 311, ¶3.

The action by the HOA to change the CC&R's was precipitated when other owners purportedly had issues related to rental tenants of Appellant residing in 1275. R. Vol. I, p. 312, ¶6. Instead of approaching the Appellant to discuss the issues, the HOA Board ("Board") held a meeting on October 10 and voted to enter into discussions with their attorney on amending the CC&R's. R. Vol. I, p. 312, ¶ 6; R. Vol. I, pp. 216-218.

The Respondents confirmed at the annual meeting held January 29, 2013, that the CC&R's would be amended to specifically restrict the ability of Appellant to lease 1275. R. Vol. I, pp. 344-345.

The Second Amended and Restated Declaration of Covenants, Conditions, Restrictions & Easements for Kimberley One Townhouses ("Second Amended CC&R's") were recorded with the Ada County Recorder on March 11, 2013. R. Vol. I, pp. 232-262. The Second Amended

CC&R's, under Article 3, Section 1, "Use," changed the formerly allowable use to newly require a written lease, reviewed and approved in advance in writing by the Board. In addition, any advertising for rental must be approved by the Board. Further, the written lease must be for not less than a 6 month minimum term, and contact information for the tenant(s) shall be regularly updated with the Board. R. Vol. I, pp. 235-236.

As further evidence that the Second Amended CC&R's were solely amended to affect the Appellant, the CC&R's allow the Board to grant on an arbitrary, case-by-case, written variance from the additional burdens "for reasons of hardship or for such other reasons as the Board may deem compelling." *Id.* There are no objective standards for the exercise of the Board's discretion in the event of such a "hardship or other reasons" application. R. Vol. I, p. 338 (Deposition of David Ricks, pp. 74, L. 17 – pp. 75, L. 14).

In furtherance of the Second Amended CC&R's, on August 20, 2013, the Board adopted "House Rules" which, among other things, imposed fees for unauthorized rental activities and unauthorized advertising of a unit. These House Rules, imposed a daily penalty of $300.00 for "unauthorized rental activity" and a $100 penalty for "unauthorized advertising of a unit." R. Vol. I, pp. 265-267.

On February 25, 2014, Respondents moved for Summary Judgment. R. Vol. I, pp. 108-110. Respondents argued that so long as the amendments to the CC&R's are validly enacted and are unambiguous, that Appellant's property is subject to each of the successive CC&R's, no matter how restrictive as to the use of Appellant's real property. R. Vol. I, pp. 285-301.

Respondents also argued that the "House Rules" authorizing the daily penalty was a "lawful exercise of the Board's and the Association's authority." *Id.* at 298-299.

On April 10, 2014, Appellant filed its Cross-Motion for Summary Judgment on the basis that the Second Amended CC&R's restrict the Appellant's free use of his land as allowed under the 1980 CC&R's and the 2007 Amendment. R. Vol. I., pp. 309-310. Appellant also moved for Summary Judgment on the basis that the CC&R's were not "amended" but were "changed," and that the changed CC&R's allowed for discriminatory application by the Board. *Id.*

The Court held its hearing on both Appellant's and Respondents' Motions for Summary Judgment on April 24, 2014. R. Vol. I, pp. 309-310. The Court granted Respondents' Motion for Summary Judgment, denied Appellant's Cross-Motion for Summary Judgment and entered Judgment against Appellant. M.S.J. Tr. pp. 33-43.

On April 28, 2014, Judgment was entered in favor of Respondents. R. Vol. I, p. 393-395.

On May 5, 2014, the Respondents filed a Memorandum of Costs. R. Vol. I, pp. 399-401.

On May 20, 2014, Appellant filed a Motion to Disallow Costs. R. Vol. I, pp. 413-414.

On June 4, 2014, Appellant filed its Notice of Appeal. R. Vol. I, pp. 421-423.

On July 9, 2014, the Court entered an Amended Judgment awarding Respondents all attorneys fees. R. Vol. I, pp. 476-477.

On July 31, 2014, Appellant filed its Amended Notice of Appeal. R. Vol. I, pp. 482-484.

II. ISSUES ON APPEAL

Appellant Adams presents the following issues on appeal:

A. The District Court Erred by Failing to Determine the Validity of the Second Amended CC&R's.

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

2. The District Court Failed to Determine the Enforceable Rights Promised to the Appellant in the CC&R's as of the Appellant's Purchase of the Real Property.

B. The District Court Erred by Liberally Construing the CC&R's in Favor of the HOA.

1. The District Court Erred by Re-writing the Agreement Contained in the CC&R's to Allow "Change."

2. The District Court Erred by Failing to Apply the Plain Language Ordinary Meaning of "Amend."

3. The District Court Erred by Declaring "Amend" to Have Identical Meaning to "Change."

C. The District Court Erred by Failing to Declare that Actions by the HOA Allowed for Arbitrary and Discriminatory Enforcement of the CC&R's.

D. The District Court Erred in Awarding Respondents' Attorneys' Fees and Costs.

III. ATTORNEY'S FEES ON APPEAL

Adams requests an award of attorney's fees on appeal pursuant to I.A.R. 41(a), Idaho Code sections 12-120(3) and Idaho Code section 12-121.

IV. ARGUMENT

A. Standard of Review

In an appeal from an order granting summary judgment, the standard of review is the same as the standard used by the district court in ruling on the motion for summary judgment. *East Lizard Butte Water Corp. v. Howell*, 122 Idaho 679, 781, 837 P.2d 805, 807 (1992). All disputed facts are to be construed liberally in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are to be drawn in favor of the non-moving party. *Bonz v. Sudweeks*, 119 Idaho 539, 541, 808 P.2d 876, 878 (1991).

Summary judgment is proper "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issues as to any material fact and that the moving party is entitled a judgment as a matter of law." Idaho R. Civ. P. 56(c). "The fact that the parties have filed cross-motions for summary judgment does not change these standards." *Bear Island Water Ass'n, Inc. v. Brown*, 125 Idaho 717, 874 P.2d 528 (1994).

B. The District Court Erred by Failing to Determine the Validity of the Second Amended CC&R's

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

It was undisputed below, and remains undisputed here, that Appellant relied upon the covenants contained in the CC&R's 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).

Consistent with Idaho's adopted definition: "The word covenant means a binding agreement or compact benefitting both covenanting parties. *See generally Black's* 369; *The American Heritage Dictionary of the English Language* 432 (3rd ed.1992) [hereinafter "*Heritage*"]; *Random House Webster's College Dictionary* 314 (1991) [hereinafter "*Webster's*"]. 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).

Here the covenant allowing "rental" is a real covenant, running with the land. "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). *See also, Karner v. Roy White Flowers, Inc.,* 351 N.C. 433, 436, 527 S.E.2d 40, 42 (2000) (stating that covenants create incorporeal rights).

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).

Idaho has adopted the fundamental principles which guide the Court here. When interpreting such covenants, the Court generally applies 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) (internal citations omitted). The Court must first determine the intent of the contracting parties at the time the contract was entered. *Opportunity, L.L.C. v. Ossewarde,* 136

Idaho 602, 607, 38 P.3d 1258, 1263 (2002). Second, in determining the intent of the parties, this Court must view the contract as a whole. *Daugharty v. Post Falls Highway Dist.,* 134 Idaho 731, 735, 9 P.3d 534, 538 (2000). After the Court determines the intent of the parties, the court "should seek to give effect to the intention of the parties." *Id.*

Here, the District Court erred by failing to engage in any of the foregoing analysis. The transcript of the District Court's decision reflects the short shrift given to any analysis.

The District Court erred by failing to give any considered analysis to the original intent of the covenant of the right to the use of Appellant's real property as an unrestricted rental, as expressly provided in the CC&R's in existence at the time of Appellant's purchase. This error mandates reversal.

2. The District Court Failed to Determine the Enforceable Rights Promised to the Appellant in the CC&R's as of the Appellant's Purchase of the Real Property.

Other Courts have similarly adopted the principles adopted in Idaho in examining the rights of the Appellant. The North Carolina Supreme Court stated in *Armstrong v. Ledges Homeowner's Ass'n, Inc.*,

> Because covenants originate in contract, the primary purpose of a court when interpreting a covenant is to give effect to the *original* intent of the parties; however, covenants are strictly construed in favor of the *free use of land* whenever strict construction does not contradict the plain and obvious purpose of the contracting parties. *Long v. Branham,* 271 N.C. 264, 268, 156 S.E.2d 235, 238 (1967) ("[T]he fundamental rule is that the intention of the parties governs" construction of real covenants.). *But see Wise,* 357 N.C. at 404, 584 S.E.2d at 737 (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.")

360 N.C. 547, 555-56, 633 S.E.2d 78, 85 (2006).

The fundamental purpose of this analysis is a determination of the enforceable right promised to the Appellant at the time of purchase.

The District Court erred by failing to give any consideration to the bargained for and enforceable right of the Appellant. Here, the fundamental contractually enforceable "real covenant" was, and remains, the unrestricted "rental" of Appellant's real property. There can be no contrary conclusion. The District Court neither considered, nor applied these principles of law in its decision.

C. The District Court Erred by Liberally Construing the CC&R's in Favor of the HOA.

1. The District Court Erred by Re-writing the Agreement Contained in the CC&R's to Allow "Change."

The slippery slope which the Respondent asked the District Court to adopt was that the CC&R's are subject to "substantial changes...when they are adopted through the amendment process." R. Vol. I, p. 367. The Respondent will ask this Court for the same liberal construction of the CC&R's.

The Idaho Supreme Court set forth the rules for the interpretation of restrictive covenants in *Shawver v. Huckleberry Estates, L.L.C.*, stating that "Idaho recognizes the validity of covenants that restrict the use of private property. *Nordstrom v. Guindon,* 135 Idaho 343, 345, 17 P.3d 287, 290 (2000) (citing *Brown v. Perkins,* 129 Idaho 189, 192, 923 P.2d 434, 437 (1996)). When interpreting such covenants, the Court generally applies the same rules of

construction as are applied to any contract or covenant. *Id.* However, because restrictive covenants are in derogation of the common law right to use land for all lawful purposes, the Court will not extend by implication any restriction not clearly expressed. *Post v. Murphy,* 125 Idaho 473, 475, 873 P.2d 118, 120 (1994) (citing *Thomas v. Campbell,* 107 Idaho 398, 404, 690 P.2d 333, 339 (1984)). Further, all doubts are to be resolved in favor of the free use of land. *Id.* " *Shawver v. Huckleberry Estates,* LLC., 140 Idaho 354, 363, 93 P.3d 685, 694 (2004).

The Respondent's asked, and in effect, the District Court chose to re-write the express language of the CC&R's to read: "This Declaration may be amended **and changed"** to add additional burdens to the land held by Owners.

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)).

Under the theory adopted by the District Court, the HOA may "amend" the CC&R's to deprive anyone, including the Appellant, of the benefit of his original bargain.

One might rhetorically ask: May the HOA "amend" the CC&R's to "change" Article 3, Section 1(a) of the Second Amended CC&R's from allowing "Rental Activity" to denying all "Rental Activity." Under the District Court's ruling, this substantial change would be perfectly permissible when adopted through the amendment process.

The slippery slope is this: Under the District Court's ruling, there is no protection for the interests of a minority of "one," from the power of those who run the association.

2. The District Court Erred by Failing to Apply the Plain Language Ordinary Meaning of "Amend."

The following analysis has never been addressed by the Court in Idaho, but has been followed by Court's across the land. The Respondents argued below that "amend" is synonymous with change. The District Court erred by adopting this proclamation as valid.

However, as shown below, in a survey of cases from across the United States, "amend," in the context of CC&R's, is not synonymous with "change" and does not allow homeowner's associations from using the amendment provision to add additional restrictions.

"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).

"The term *amend* means to improve, make right, remedy, correct an error, or repair. *See generally Black's* at 80; *Heritage* at 44; *Webster's* at 59. Amendment provisions are enforceable; however, such provisions give rise to a serious question about the permissible scope of amendment, which results from a conflict between the legitimate desire of a homeowners' association to respond to new and unanticipated circumstances and the need to protect minority or dissenting homeowners by preserving the original nature of their bargain." *Id.* (emphasis added).

"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).

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).

The 2 Restatement (Third) of Property: Servitudes §6 Introductory Note at 71 (2000) states: "The law of residential common-interest communities reflects these tensions between protecting freedom of contract, protecting private and public interests in security of the home both as a personal base and as a financial asset, and protecting the public interest in the ongoing financial stability of common-interest communities. It also reflects the tensions between protecting the democratic process at work in common- interest communities and *protecting the*

interests of individual community members from imposition by those who control the association. The law of residential common-interest communities reflects these tensions between protecting freedom of contract, protecting private and public interests in security of the home both as a personal base and as a financial asset." (Emphasis added).

Here the "change" authorized by the District Court radically changes the character of the right preserved to the Appellant by the contractual covenant which runs with the land. The District Court's failure to either consider or protect the bargained for interest of the Appellant is error requiring reversal.

3. The District Court Erred by Declaring "Amend" to Have Identical Meaning to "Change."

The "change" cannot rationally be described as the correction of an error, as there was none, nor does the District Court analyze, nor ever suggest, there was any error in the plain use of the term "rental" in the original CC&R's.

In *Responsible Urban Growth Grp. v. City of Kent*, 123 Wash. 2d 376, 868 P.2d 861 (1994), an organization filed petition for writ of review challenging validity of zoning ordinance. The Superior Court entered judgment invalidating the ordinance and voiding the building permit issued to developer. After granting direct review, the Supreme Court, Madsen, J., held, among other things, that the ordinance was an "amendment" or "rezone," rather than "correction" of prior ordinance. In making that holding, the Court talked about the definition of "amendment" (that it includes correction) and consulted both Webster's and Black's:

> The relevant statutes, however, appear to require notice whether the Council's action is in the form of a correction, an amendment, or a rezone. Although neither

> RCW 35A.63.070 nor KCC 15.09.050 specifically mentions "corrections" they do require notice for "amendments" to zoning ordinances. Neither do the statutes define "amendment." Where terms are not defined in a statute, the court will look to the plain, ordinary meaning of the words. *American Legion Post 32 v. Walla Walla,* 116 Wash.2d 1, 8, 802 P.2d 784 (1991). *Webster's* dictionary defines "amendment" as "a correction of errors, faults, etc." *Webster's New World Dictionary of the American Language* 47 (College Ed.1968). Black's Law Dictionary defines "amendment" in pleading and practice as "[t]he correction of an error committed in any process, pleading, or proceeding at law, or in equity...." Black's Law Dictionary 74 (6th ed. 1990). Courts have defined the word "amendment" to mean "correction of fault or faults" or "to change by freeing from faults, **to correct**, to reform." *United States v. Munday,* 211 F. 536, 538 (D.C.Wash.1914) *Pacific Gamble Robinson Co. v. Pay'n Save Drugs, Inc.,* 2 Wash.App. 728, 730, 469 P.2d 571, *review denied,* 78 Wash.2d 995 (1970). It appears, therefore, that a correction is included within the meaning of amendment and therefore, requires the same notice as that required for a rezone or an amendment.

Responsible Urban Growth Grp. v. City of Kent, 123 Wash. 2d 376, 386-87, 868 P.2d 861, 868 (1994) (footnote omitted) (emphasis added).

The Idaho Supreme Court has never been asked to define the term "amend." Thus, we rely on the plain language meaning from Merriam-Webster, which defines "amend" as:

> 1 : to put right; *especially* : to make emendation in (as a text)
>
> 2. a: to change or modify for the better : IMPROVE <*amend* the situation>
>
> b: to alter especially in phraseology; *especially* : to alter formally by modification, deletion, or addition <*amend* a constitution>

Webster's On-Line Dictionary, http://www.merriam-webster.com/dictionary/amend (emphasis added)

Of particular note, are Webster's antonym and near antonyms: "worsen, **damage**, endamage, **harm**, hurt, **impair**, injure, spoil, tarnish, **vitiate**; blemish, blight, deface, disfigure, flaw, mar; **diminish, lessen, lower, reduce."** *Id.* (emphasis added).

This to be contrasted with the term "change:"

1 a: to make different in some particular : ALTER

b: to make radically different : TRANSFORM

2 a: to replace with another

Webster's On-Line Dictionary, http://www.merriam-webster.com/dictionary/change. Of interest, are the related words to change, which include "mutate, regenerate, transfigure, and transform." *Id.* The Respondents didn't just amend (i.e. to put right) the CC&R's, but they changed the CC&R's to add substantial, additional and burdensome restrictions.

The District Court adopted the Respondents' theory that the plain meaning of "amend" is the equivalent of "change." R. Vol. I, p. 370. *See, Youngblood v. Higbee*, 145 Idaho 665, 668, 182 P.3d 1199, 1202 (2008), In *Youngblood*, Big O Tires, Inc. was named as a Defendant. After service of the Complaint, Big O Tires, Inc. moved for summary judgment arguing that it was not properly named in the complaint and that there was no entity named "Big O Tires." The Supreme Court correctly noted that "Youngblood never made a motion to amend the complaint to *change* 'Big O Tires' to 'Big O Tires, Inc.'" *Id.* (emphasis added).

The Respondent simply proves the point of the plain meaning distinction from Webster's. Amending the Complaint would have corrected or "put right" the name, as opposed "to make [the name] radically different."

Contrary to both the District Court's and the Respondents' unfounded assertion, the use of the word "change" has become synonymous in the law of Idaho with "make radically different."

For example, a "change order," defined by *Black's Law Dictionary* 264 (Bryan A. Garner ed., 9th ed. (West 2011), is "(1) [a] modification of a previously ordered item or service; (2) [a] directive issued by the federal government to a contractor to alter the specifications of an item the contractor is producing for the government." The Rules of Building Safety, adopted by the Idaho Building Code Board of the Division Building Safety, at *IDAPA* 07.03.01.028 defines Addenda and Change Orders as "[d]ocuments enforcing *changes* or *modifications*) (emphasis added). *See also Bouten Const. Co. v. M & L Land Co.,* 125 Idaho 957, 966, 877 P.2d 928, 937 (Ct. App. 1994) ("The contract was explicit about how changes in the work were to be documented and handled by the owner, the contractor and the architect").

As another example, *Black's Law Dictionary*, supra, defines "change of venue" as "[t]he transfer of a case from one locale to another court…to cure a defect in venue." The Idaho Supreme Court held in *Banning v. Minidoka Irr. Dist.,* 89 Idaho 506, 511, 406 P.2d 802, 804 (1965) , "In view of the statute (I.C. § 30-510) and the ruling in the Power Manufacturing Company case, we are constrained to hold that, for purposes of determining venue, the defendant Union Pacific Railroad Company must be regarded as a resident of Bannock county, where it maintains its principal place of business in this state, subject to the choice of the plaintiff in cases where the action may be maintained in either of two or more counties, and 'subject, however, to the power of the court to change the place of trial, as provided in this code.' I.C. §§ 5-404, 5-406."

Black's Law Dictionary, 9th ed., defines "change of condition" in worker's compensation as "[a] substantial worsening of an employee's physical health occurring after an award, as a

result of which the employee merits an increase in benefits." As the Idaho Supreme Court stated in *Boshers v. Payne*, 58 Idaho 109, 70 P.2d 391, 393 (1937) "[w]e have uniformly held that the burden of proof rests on the party who seeks an order declaring 'a change in conditions' arising from an injury sustained by the workman."

Black's Law Dictionary, 9th ed., defines "change in circumstances" as "[a] modification in the physical, emotional, or financial condition of one or both parents, used to show the need to modify a custody or support order; esp., an involuntary occurrence that, if it had been known at the time of the divorce decree, would have resulted in the court's issuing a different decree." The Supreme Court in *Evans v. Sayler*, 151 Idaho 223, 254 P.3d 1219 (2011), citing *Tomlinson v. Tomlinson*, 93 Idaho 42, 47, 454, P.2d 756, 761 (1969), held that "[a] divorce decree granting custody of a minor child to one of the parties may not be modified unless there has been a material, permanent and substantial change in conditions and circumstances subsequent to entry of the original decree which would indicate to the courts satisfaction that modification would be for the best interests of the child."

A final example, *Black's Law Dictionary*, 9th ed., defines "cardinal-change doctrine" as it relates to contracts as being "[t]he principle that if the government makes a fundamental, unilateral change to a contract *beyond the scope of what was originally contemplated*, the other party...will be released from the obligation to continue to work under the contract." Emphasis added. The Idaho Supreme Court stated in *City of Meridian v. Petra, Inc.*, 154 Idaho 425, 299

P.3d 232 (2013) that "[a] cardinal change is a change 'so profound that it is not redressable under the contract and thus renders [LMITCO] in breach."

As seen above, the *Van Deusen* decision and its rationale is supported by multiple pronouncements of Idaho law as to the meaning of the word "change." The District Court adopted the notion that *Van Deusen v. Ruth*, supra, and its rational pronouncement that "amend" does not mean "change" is simply out of date, and fails to comport with the plain meaning of "change."

The District Court's declaration that "amend" is the precise equivalent of "change" is in error.

There are multiplicities of decisions since the *Van Deusen* decision which adopt the legal rationale that the addition of additional burdens without unanimous consent is prohibited.

In *Harris v. Smith*, 250 S.W.3d 804 (Mo. Ct. App. 2008), the Missouri Court of Appeals, Southern District, Division One, the Court held that new restrictions placed on outbuildings, as contained in a supplementary declaration, purporting to amend declaration of covenants applicable to subdivision property, were invalid as they were not unanimously approved by lot owners; although the declarations authorized "amendment or termination" by a total of 60% of the lot owners, it did not authorize new or additional burdens to be added.

The *Harris* Court conducted a survey of recent cases. The *Harris* Court noted "[i]n *Jones v. Ladriere,* 108 S.W.3d 736 (Mo.App.2003), a majority of the property owners passed a new restriction prohibiting construction of a building on one owner's lot. *Id.* at 737–38. The subdivision restrictions provided that they could be "altered, amended, changed or revoked" by a

two-thirds vote. *Id.* at 739–40. Citing *Van Deusen,* the eastern district held that such amendatory language did not give property owners "the power to add new burdens or restrictions not found in the original Agreement by a two-thirds vote." *Id.* at 740. Therefore, the newly-adopted restriction was invalid. *Id.*" *Harris v. Smith*, supra.

"In *Webb v. Mullikin,* 142 S.W.3d 822 (Mo.App.2004), the subdivision restrictions could be "amended all or in part at any time by a majority of the lot owners." *Id.* at 823. Several owners challenged an amendment adding new yearly and special monetary assessments for club maintenance, which was approved by majority vote only. Citing *Van Deusen* and *Jones,* the eastern district held that the amendatory language in the restrictions did not authorize the imposition of new burdens on lot owners by majority vote. *Id.* at 827." *Harris v. Smith*, supra.

"In *Bumm v. Olde Ivy Development, LLC,* 142 S.W.3d 895 (Mo.App.2004), the covenants stated that they could be "amended, repealed or added to" by a majority of the lot owners. *Id.* at 904. A covenant adding a new burden on lot owners, which was approved by majority vote only, was challenged by affected owner. This Court held that: (1) absent a contractual provision to the contrary, a restrictive covenant can be amended by unanimous consent of all lot owners; but (2) "a new restrictive covenant, adopted by majority vote only, is invalid and unenforceable if it imposes new burdens upon the affected property owners." *Id.*" *Harris v. Smith*, supra.

The Supreme Court of Nebraska held that the unambiguous language of restrictive covenant agreement authorized a majority of subdivision lot owners to make changes to existing covenants, but did not authorize the majority to add new and different covenants, where agreement provided for all covenants on subdivision properties to continue until given date, after

which time "they" would be automatically extended for successive five-year periods, unless majority of landowners agreed "to change same" in whole or in part. *Boyles v. Hausmann*, 246 Neb. 181, 517 N.W.2d 610 (1994).

D. The District Court Erred by Failing to Declare that Actions by the HOA Allowed for Arbitrary and Discriminatory Enforcement of the CC&R's.

The District Court failed, entirely, to address the issue of discriminatory enforcement. The District Court erred by failing to perform any legal analysis of this issue, which again, is one of first impression in Idaho.

In *Maatta v. Dead River Campers, Inc.*, 263 Mich. App. 604, 689 N.W.2d 491 (2004) the Court of Appeals of Michigan found that non-uniform (not applying to all lots) amendments to restrictive covenants require the unanimous consent of affected property owners.

The *Maatta* case is particularly instructive in this matter. Here, the Respondent HOA Board made certain that the change in the CC&R's would apply solely to the Appellant, Mr. Adams, with its addition of the "good neighbor" exception to the term of lease requirements in Article 3(a):

> "...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."

R. Vol. I, p.31 (emphasis added). The Board failed to adopt any criteria for its discretion to grant a variance for compelling reasons. This *discretion* provision allows the Board to apply the amended CC&R provisions in a non-uniform manner, i.e. solely as against Appellant, Mr. Adams, and as such renders the entire provision invalid.

In *La Esperanza Townhome Ass'n, Inc. v. Title Sec. Agency of Arizona*, 142 Ariz. 235, 689 P.2d 178 (Ct. App. 1984) the Court of Appeals of Arizona held that restrictions and covenants contained in deeds to subdivision could only be changed, without unanimous consent, in a way that affected all property in the subdivision uniformly where deed did not provide for nonuniform modification of covenants and restrictions. Specifically the Court in deciding *Las Esperanza Townhome Ass'n, Inc.* held that "to construe the amendment language to permit 51 percent of the lot owners to exempt their property from some or all the restrictions while leaving the remainder of the subdivision subject to those restrictions would lead to an unintended result." *Id.*

Here it is clear that the Respondents and the neighbors sought to impose the new restrictions solely on Appellant. Respondent Mr. Ricks stated in his deposition:

> Q: As of October 10, 2012, did the board obtain and consider any empirical data of any kind to provide guidance on the length of term necessary to convert a good-time tenant to a responsible tenant?
>
> A: The only information that was bounced about was each board member's feelings and thoughts.

R. Vol. I, p. 331 (Deposition of David Ricks, pg. 44, L. 12-19).

> Q: All right. If I understand the recitation of this new business item on KIMB00173, your and the board's focus as of October 10, 2012, was exclusively as to Mr. Adams' Unit No. 1275; correct?
>
> A: I think it's kind of yes. Let me clarify. It was a discussion to discuss security issues in our complex, and what precipitated that discussion were the items that were discussed in regards to the problems at 1275.

R. Vol. I, pp. 333-334 (Deposition of David Ricks, pp. 55, L. 23 – pp. 56, L. 7.

Applying the rationale and legal principles set forth above, the Respondent Board's arbitrary vendetta directed solely as against Appellant has nothing to do with "the basic purpose of the covenants to preserve the value and nature of the community" as argued by the Respondent to the District Court. R. Vol. I, p. 372. As stated in the minutes of the Board meeting of October 10, 2012, and subsequent meetings and correspondence, this was solely directed at Appellant Adams:

> **Unit 1275 Rental Issues**: This unit is now being rented by the day, week, or month. *This* has created a number of problems:"

R. Vol. I, p. 217 (emphasis added). Mr. Ricks testified that the Board's actions were as a result of the "behavior" of the "short-term," "good time versus long-term tenants." R. Vol. I, p. 330 (Deposition of David Ricks, p.40, L. 17-24). Mr. Ricks also admitted that the length of the term of the lease was pure speculation:

> Q: I'm glad you acknowledge that you would admit, as a member of the board making decisions in October of 2012, that you were purely speculating as to how long of a term was necessary to convert what you called a short-term, good time tenant to long-term, not- good-time tenant; correct?
>
> A: Correct.

R. Vol. I, p. 330 (Deposition of David Ricks, p.43, L. 2-17).

There is no reasonableness to the arbitrary 6-month term. The Respondent HOA Board's arbitrary ability to relieve its friends from the application of the CC&R amendment directed solely toward Appellant's Unit 1275 is tainted with discrimination. Likewise, the adoption of the "house rule" for the imposition of the fine for violation of the lease restriction was based solely on the advice of legal counsel. R. Vol. I, pp. 339-340 (Deposition of David Ricks, p.79, L. 8 –

p.80, L. 4). Moreover, the board never considered the use of existing CC&R provisions to address the "behavior" issues. R. Vol. I, p.339 (Deposition of David Ricks, p.77, L. 6 – p.78, L. 7).

The District Court erred by failing to give any consideration to the issue of arbitrary enforcement and discriminatory application of the change. The Second Amended CC&R's should be found invalid, and the decision of the District Court reversed and remanded with direction.

E. The District Court Abused its Discretion in Awarding Respondents' Attorneys' Fees.

1. Standard of Review.

The grant or denial of attorney fees and discretionary costs is committed to the sound discretion of the district court, and will only be reviewed by an appellate court for an abuse of that discretion. *Inama v. Brewer*, 132 Idaho 377, 973 P.2d 148 (1999).

2. The District Court Abused its Discretion By Granting Respondents' Request for Attorneys' Fees Under the "Enforcement" Provision of the Second Amended CC&R's.

The Respondents moved for attorneys fees and costs on the basis that the CC&R's, specifically the Second Amended CC&R's, allowed recovery of those costs. The Second Amended CC&R's, addresses attorney's fees in Article 9, Section 1, titled "Enforcement."

Article 9, Section 1, "Enforcement" states:

> The Corporation, or any Owner, shall have the right to enforce, by any proceeding at law or in equity, all restrictions, conditions, covenants, reservations, liens and charges now or hereafter imposed by the provisions of this Declaration...In the event suit is brought to enforce the covenants contained herein, the prevailing

party shall be entitled to be awarded his reasonable attorneys fees in addition to allowed costs.

R. Vol. I, p.43.

Despite the fact that this case was brought as a declaratory judgment action, specifically seeking a declaration that the Second Amended CC&R's constituted a "legally impermissible increase in burden upon the [Appellant's] real property and [Appellant's] right of use of said real property," the District Court granted the Respondents Attorneys Fees under a single theory.

The theory was that this was actually an enforcement action, because the Appellant sought to "invalidate the changes to the homeowner's association to nullify the attempt on the part of the homeowners to preclude the rental of his...residence." Motion to Disallow Costs and Fees, Tr. p. 10, L. 8 – p. 11, L. 18 (July 3, 2014). *Black's Law Dictionary* defines "Enforce" as "to put into execution; to cause to take effect; to make effective; as, to enforce a particular law, a writ, a judgment, or the collection of a debt or fine; to compel obedience to." *Black's Law Dictionary* 529 (Bryan A. Garner ed., 6th ed., West 1991).

This action was not brought to "enforce" the CC&R's, or for the enforcement of a specific provision of the CC&R's. Nor did the Respondents file a counterclaim seeking the enforcement of a specific provision. This action was brought for the sole purpose of Mr. Adams understanding what his legal rights were, and for a declaration from the Court as to whether or not a majority of homeowners may change the CC&R's in opposition to the intent of the original declaration.

The District Court abused its discretion and erred in awarding attorneys' fees to Respondents.

F. Attorney's Fees Should be Awarded to Appellant.

Upon reversal of the District Court, pursuant to Idaho Code §§ 12-120(3) and 12-121, both on appeal and for the action below, Appellant should be awarded its costs and attorneys fees. The Appellant's entitlement to fees arise from the fee provisions of the CC&R's, and the Court's discretion to award fees to the Appellant as prevailing party upon reversal of the District Court.

V. CONCLUSION

The District Court failed to implement the legal analysis required by Idaho law.

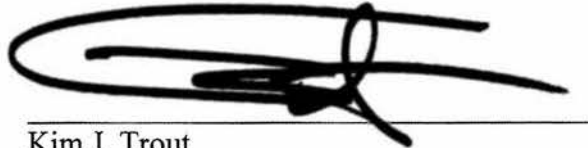
The District Court: 1) never undertook any analysis as to the validity of the authority for amendment in the CC&R's; 2) never considered the original intent of the CC&R's; 3) never considered the nature of the bargain obtained, and retained by the Appellant; 4) never considered the significant and practical difference between "amend" and "change"; and 5) never considered the arbitrary nature of implementation and enforcement as against the minority of "one," that being the Appellant.

The District Court erred by: 1) liberally construing the covenants against the free use of Appellant's land; 2) rewriting the language of the contractual covenants to add the word "change"; and 3) by failing to distinguish between a declaration of the parties rights and enforcement of the those rights.

The Appellant respectfully requests the decisions of the District Court be reversed with direction to enter summary judgment in favor of Appellant, and that Appellant be awarded its costs and attorneys fees both below and on appeal.

RESPECTFULLY SUBMITTED this 13th day of November, 2014.

TROUT LAW, PLLC



Kim J. Trout

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 13th day of November, 2014, a true and correct copy of the above and foregoing document was forwarded addressed as follows in the manner stated below:

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