12-18-2014

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

IN THE SUPREME COURT FOR THE STATE OF IDAHO

VIRGIL ADAMS, a single man,,

Plaintiff-Appellant,

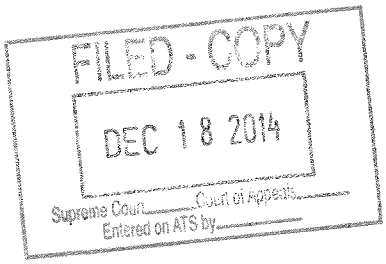
vs.

KIMBERLEY ONE TOWNHOUSE OWNER'S ASSOCIATION, INC., and 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 Case No. 42192-2014

Ada County District
Case No. CV-2013-21032



RESPONDENTS' BRIEF

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE HONORABLE CHERI C. COPSEY PRESIDING DISTRICT JUDGE

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I.
STATEMENT OF THE CASE

A. INTRODUCTION.

This case involves a dispute between members of a homeowner's association (Kimberley One Townhouse Owner's Association, Inc.), concerning certain amendments to restrictive covenants intended to protect the nature of a neighborhood of town houses by prohibiting short term rentals. The Plaintiff, Virgil Adams, rented his townhouse as a vacation property by the day or week to persons that were disruptive and violative 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. Plaintiff contends that the amendments were not properly enacted and constitute an impermissible burden upon his property.

Contrary to Adam's assertion, this is not a case of first impression. This Court has long upheld and enforced CC&Rs. Under the facts of this case, and Idaho precedent, the members of the Association were permitted to amend the CC&Rs to restrict short term rentals of lots, and validly did so. Moreover, such restrictions are facially reasonable in order to maintain the nature of the neighborhood. Although Appellant complains that the Amendment to the CC&Rs was not uniform, that assertion is also facially incorrect—the Amendment applies to all lots in the development. For these reasons, the Court should affirm the District Court's decision and award costs and fees to the Respondents.

B. STATEMENT OF FACTS.

1. Plaintiff/Appellant Virgil Adams (hereinafter, "Adams" or "Appellant") is the owner of a town-house style condominium located at 1275 East Kimberley Lane in Boise, Idaho. **R.** 5, ¶ 1. He purchased the condominium on or about September 26, 2003. **R. 116.** Pursuant to

the Deed, ownership was subject to "conditions, covenants, restrictions, reservations, easements, rights and rights of way, apparent or of record." ***Id.***

2. When Mr. Adams purchased his property, it was subject to the original Declaration of Covenants, Conditions, Restrictions and Easements for the Kimberley One Townhouses which had been recorded in August 1980. *See* **R. 6, ¶** 4; **R. 117, et. seq.** ("Original CC&Rs"). The original CC&R's addressed the use of property and rentals by stating, "[e]ach Lot shall be used for single family residential purposes only, on an ownership, rental or lease basis[.]" **R. 119** (Art. III, § 1(a)). The CC&R's could be amended by approval of 90% of the lot owners. **R. 131** (Art. IX, § 3).

3. The original CC&R's were subsequently amended by more than 90% vote of the property owners. An Amended Declaration of Covenants, Conditions, Restrictions and Easements for Kimberley One Townhouses (Amended CC&R) was recorded in September 2007. **R. 6, ¶** 5; **R. 134, et seq.**

4. The Amended CC&R provided that any future amendments would only require approval of 2/3 of the lot owners. **R. 149** (Art. IX, § 3). The Amended CC&R was approved by 26 of the 28 property owners. **R. 159 – 161.** Mr. Adams was one of the property owners that voted in favor of the Amended CC&R. **R. 21**; **R. 159**.

5. In October 2012, Mr. Adams became aware of complaints regarding renters staying in his condominium. **R. 169-70** (KIMB00050-51). This included complaints of renters taking produce from another owner's garden, excessive noise, and parking issues (including blocking other owner's vehicles). ***Id.*** Adams directed his property manager to address these issues. ***Id.***

6. The Board of the Homeowners Association (Board) reviewed the complaints and approved proposed amendments to the CC&Rs to be presented to the owners. These amendments

sought to limit short term rentals by requiring leases to last a minimum of six months. A copy of the minutes of the Board meeting and the proposed Amendments were made available to property owners, including Adams. **R. 186** (KIMB00171); **R. 202** (KIMB00231); **R. 216-218** (KIMB00172-174) (meeting minutes).

7. On December 5, 2012, David Ricks, a member of the Board, reminded residents of the proposed amendment and indicated that Board members would be available to discuss the amendment at the Community's annual holiday get-together. **R. 192** (KIMB00183). Adams acknowledged receiving the email. **R. 204** (KIMB00294).

8. The Board met on December 17, 2012, and discussed the problems and issues arising from short-term rentals. **R. 219-220** (KIMB00339-340) (Board minutes).

9. On December 19, 2012, Adams sent an email to all other owners regarding the proposed Amendments, and argued against their adoption. **R. 181-183** (KIMB00082-84). Among other things, Plaintiff pointed out it was more profitable for him to rent his unit as vacation property rather than renting it as a residence. **R. 182** (KIMB00083). He offered to take steps to prevent the recurrence of problems caused by his short-term guests, including limiting the number of guests, screening tenants, providing tenant contact information to the Board, and providing tenants with a set of rules. **R. 182** (KIMB0083); **R. 221-223** (KIMB00288-290). On December 20, 2012, Adams became aware of additional complaints regarding his short-term renters, including threats of vandalism. **R. 178-180** (KIMB00079-81).

10. On December 21, 2012, notice was provided to residents of an annual Association meeting scheduled for January 29, 2013. The proposed amendment to the CC&Rs was set on the agenda. **R. 187-188** (KIMB00178-179); **R. 224-225** (KIMB00344-345) (copy of agenda).

11. On January 4, 2013—months after Plaintiff was made aware of problems with his overnight rentals—Plaintiff finally offered to provide contact information for his local property

manager, and again stated he would enforce rules and regulations as to his short-term tenants. **R. 175-176**, and **R. 210** (KIMB00076-77 and KIMB00365).

12. On January 11, 2013, after the Board communicated its intent to propose the amendments to the CC&Rs to all property owners for consideration and approval, Adams responded by threatening to rent his property to college students if short term rentals were prohibited. **R. 173** (KIMB00074). His email to the other lot owners stated:

> Please go by my home and take a look at what's there now, and envision the place with six 18-21 year old boys, all with their own cars and trucks, holding parties, making noise, and vomiting all over the common areas at all hours of the night and morning....
>
> That's what I would do with my unit at Kimberley.

Id. He urged the members object to the Board and stated he intended to sue the Board. **R. 208** (KIMB00363).

13. Adams emailed David Ricks on January 28, 2013, stating his attorney would be attending the annual meeting. **R. 207** (KIMB00346). Ricks responded by reminding Adams the annual meeting was set for January 29, 2013. **R. 206** (KIMB00343). Adams attorney, William L. Smith, attended the meeting and presented comments on Adams' behalf. *See* **R. 226-230** (KIMB00190-194).

14. On February 26, 2013, David Ricks distributed copies of the minutes of the January 29, 2013, meeting to all the residents. **R. 193** (KIMB00184); **R. 226-230** (KIMB00190-194) (meeting minutes).

15. The Board met on March 10, 2013, and noted that the proposed amendment had passed, and that the new CC&Rs would be recorded with the County. **R. 231** (KIMB00170) (meeting minutes).

16. On March 11, 2013, the Second Amended and Restated Declaration of Covenants, Conditions, Restrictions & Easements for Kimberley One Townhouses (Second Amended CC&R) was recorded. **R. 6-7,** ¶ 6; **R. 232-262** (copy of Second Amended CC&R).

17. The Second Amended CC&R was adopted after considerable discussion between residents, including Plaintiff. *See, e.g.,* **R. 177-183** (KIMB00078-84); **R. 221-223**.

18. A copy of the recorded Second Amended CC&R was emailed to the residents. **R. 185** (KIMB00137).

19. On June 5, 2013, the Board attempted to set up a time to meet with Adams to discuss several issues, including the amendment to the CC&R governing short term rentals. **R. 215** (KIMB00374). Adams initially refused to meet. **R. 184** (KIMB00136); **R. 213-214** (KIMB00370-372). However, Adams eventually met with David Ricks. **R. 205** (KIMB00342).

20. The Board received several complaints about Plaintiff's tenants in July 2013. *See* **R. 196-199** (KIMB00222-225). Unfortunately, when the Board attempted to contact Adams' property manager, she was unresponsive to inquiries from the HOA president. **R. 171-172** (KIMB00053 and KIMB00054).

21. The Board met on August 20, 2013, and determined that Adams was violating the CC&R's provisions restricting short term rentals. **R. 263-264** (KIMB00176-177). The Board then enacted "House Rules" creating charges for violating the portion of the CC&Rs governing rentals. The Board's actions were authorized by Art. 3.1 (k) of the Second Amended CC&Rs. **R. 265-267**.

22. On September 5, 2013, the Board's attorney sent a letter to Mr. Adams to notify him that he was not renting the property in accordance with the CC&Rs, and that his actions could cause him incur charges authorized by the House Rules to be charged a penalty. *See* **R. 268-270** (KIMB0001-4).

II.
ADDITIONAL ISSUES ON APPEAL

1. Whether Respondents are entitled to an award of their fees and costs on appeal.

III.
RESPONDENTS' REQUEST COSTS AND ATTORNEY'S FEES

Pursuant to I.A.R. 40 and 41, Respondents hereby request that they be awarded their costs and attorney's fees on appeal.

IV.
ARGUMENT

A. IDAHO LAW PERMITS THE AMENDMENT OF CC&Rs.

The District Court found that the covenants were validly amended to restrict short-term rentals, that the Amendment was proper and enforceable, and plain on its face. **Transcript of Summary Judgment Hearing** ("SJ Transcript"), p. 36, Ll. 10-11 and p. 40, Ll. 14-17. Thus, Appellant was required to comply with the lease and advertising requirements. **SJ Transcript,** p. 40, Ll. 17-19. Appellant argues that the District Court misconstrued the word "amend" to allow changes in the rights or duties under a restrictive covenant, rather than limiting an "amendment" to the correction of an error.

The District Court's decision was correct. Appellant's argument is without legal basis and, in any event, been waived by Appellant's prior agreement to change the amending process.

1. Idaho Law Concerning CC&Rs.

"Restrictive covenants, which restrict the uses to which a party may put his or her property, are valid and enforceable." ***Brown v. Perkins***, 129 Idaho 189, 192, 923 P.2d 434, 437 (1996). *Accord* ***Nordstrom v. Guindon***, 135 Idaho 343, 345, 17 P.3d 287, 289 (2000). The general rules of contract construction apply to covenants. ***Best Hill Coalition v. Halko, LLC***, 144 Idaho 813, 817, 172 P.3d 1088, 1092 (2007). That is, the court must first determine if a covenant

is ambiguous. ***Id.*** "A covenant is ambiguous if it is capable of more than one reasonable interpretation." ***Id.*** However, an ambiguity is not established merely because a party presents differing interpretations to the court. ***Id.*** "If a covenant is unambiguous, the court must apply its plain meaning as a matter of law." ***Id.*** If "a restrictive covenant has been determined to be ambiguous, the court must determine the intent of the parties at the time the instrument was drafted, gathered from the language used and the circumstances which existed at its formulation." ***Thomas v. Campbell***, 107 Idaho 398, 690 P.2d 333 (1984). "[B]ecause 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." ***Pinehaven Planning Bd. v. Brooks,*** 138 Idaho 826, 829, 70 P.3d 664, 667 (2003).

CC&Rs may provide for a method for their amendment. ***Shawver v. Huckleberry Estates, LLC***, 140 Idaho 354, 362, 93 P.3d 685, 693 (2004) (citing 20 Am.Jur.2d *Covenants* § 236 (1995)). *See also* ***Nordstrom***, *supra*, 135 Idaho at 348 (upholding amendment to CC&Rs); ***Smith v. U.S.R.V. Properties, LC***, 141 Idaho 795, 118 P.3d 127 (2005) (upholding amended version of CC&Rs over original version as to a height restriction); ***Best Hill Coalition v. Halko, LLC***, *supra*, 144 Idaho 813, 172 P.3d 1088 (2007) (upholding amendment that added a density limitation).

The amendments to the CC&Rs at issue in this case restricted rentals to a six month term. The District Court ruled the language of the amendment was unambigious and, that the process utilized to adopt the amendment was appropriate. **SJ Transcript**, p. 39, L. 19 - p. 40, L. 19. That ruling is not challenged in appellant's opening brief. Any argument suggesting the method the Respondent utilized to amend the CC&Rs was legally flawed, or that the language of the amendment is ambiguous is, at this point, waived. *See* ***State v. Killinger***, 126 Idaho 737, 740, 890 P.2d 323, 326 (1995). ***State v. Raudebaugh***, 124 Idaho 758, 763, 864 P.2d 596, 601 (1993);

Thomas v. Medical Center Physicians, P.A., 138 Idaho 200, 205 – 206, 61 P.3d 551, 562-563 (2001). (The Court "will not consider arguments raised for the first time in the appellant's reply brief.") Accordingly, unless this Court concludes amendments to CC&Rs must be limited to edits or non-substantive corrections, the District Court's ruling should be affirmed.

2. There Is No Support Under Idaho Law For Restricting Amendments to Edits or Corrections.

Appellant recognizes that CC&Rs may be amended, but contends that an "amendment" cannot "change" the CC&Rs by adding additional restrictions. **Appellant's Brief,** pp. 10-11. Rather, Appellant argues that an "amendment" only allows for correction of an error or oversight in the drafting. *See* **Appellant's Brief,** pp. 10-20. This is not supported by Idaho law on CC&Rs, or by the cases cited by Appellant.

This Court has upheld significant and substantial amendments to CC&Rs in other cases. For instance, in ***Shawver v. Huckleberry Estates, LLC***, 140 Idaho 354, 93 P.3d 685 (2004), the developer (Huckleberry) and the Shawvers entered into a contract for the sale of a building lot in a subdivision. The existing CC&Rs provided certain design restrictions on houses in the subdivision, including minimum building sizes. ***Shawver,*** 140 Idaho at 357-58. The CC&Rs also contained a provision allowing for the amendment of the CC&Rs upon written approval of "at least seventy-five percent of the lot owners." ***Shawver,*** 140 Idaho at 358. After purchase of their lot, the Shawvers submitted floor plans consistent with the building size restrictions. However, the plans were rejected by Huckleberry, and thereafter, the CC&Rs were amended to change the minimum building size requirements. ***Id.*** It was undisputed the Shawvers' proposed plans did not comply with the requirements of the amended CC&Rs. ***Id.***

On appeal, this Court rejected the Shawvers' argument that they were bound only by the original CC&Rs and not the amended version. *See* ***Shawver,*** 140 Idaho at 361-62. The Court explained:

> This argument is inconsistent with the language of the Sale Agreement. Under the express terms of the Sale Agreement, the Shawvers agreed to purchase property governed by restrictive covenants, which could be amended by written consent of seventy-five percent of the existing lot owners. Such agreements are valid under the law. *See* 20 Am.Jur.2d Covenants § 236 (1995) ("[T]he restrictive agreements in a tract of land may provide for a method of abrogating or modifying such agreements, as, for example, by vote of a certain proportion of the property owners."). The Shawvers had no right under the Sale Agreement to override the amendment provision or to avoid compliance in the event amendments were properly adopted.

Id. The court further observed that "[t]o imply that Huckleberry was obligated to perform the Sale Agreement subject only to the original recorded CC&Rs would be contrary to the terms of the contract negotiated and executed by the parties." ***Shawver,*** 140 Idaho at 362. *See also* ***Shawver,*** 140 Idaho at 364-65 (holding that the Shawvers were further bound by a Second Amended CC&R[1] which had been properly adopted). The court also found that the trial court erred by not enforcing the amendment to the CC&Rs, because "[t]he district court's order eliminates the terms of the original recorded CC&Rs with respect to future amendments." ***Shawver,*** 140 Idaho at 365. *Accord* ***Hughes v. New Life Development Corp.,*** 387 S.W.3d 453, 476 (Tenn. 2012) ("When a purchaser buys into such a community, the purchaser buys not only subject to the express covenants in the declarations, but also subject to the amendment provisions of the declaration.").

[1] The Court's opinion noted that the first amendment to the CC&Rs were invalid because they had not been properly adopted by a 75% vote. However, a second amendment with the same restriction was adopted by the requisite vote and recorded after the parties filed cross motions for summary judgment. ***Shawver,*** 140 Idaho at 364-65.

In ***Best Hill Coalition v. Halko, LLC***, *supra*, 144 Idaho 813, 172 P.3d 1088 (2007), a developer who owned several lots in a subdivision notified the owners that, since it was not prohibited from subdividing lots by the CC&Rs, it planned on subdividing those lots to create a 35-lot planned unit development. ***Best Hill Coalition***, 144 Idaho at 815. Certain members of the subdivision attempted to amend the CC&Rs to add a density restriction requiring at least 2 acres per lot. ***Best Hill Coalition***, 144 Idaho at 816. However, they lacked sufficient votes. ***Id.*** The CC&Rs allowed the Homeowner's Association to recruit adjoining landowners to join the subdivision. ***Best Hill Coalition***, 144 Idaho at 815. After convincing several adjacent landowners to join the subdivision, the Coalition had sufficient votes to amend the CC&Rs and did so. ***Best Hill Coalition***, 144 Idaho at 816. The coalition then filed suit against the developer, in part, to enjoin the developer from any development of its property greater than the density allowed under the amendment. ***Id.*** Among other arguments, the developer "asserted that the density limitation was violative of public policy, apparently because restrictions on the use of private property are disfavored and because the restrictions here were partially imposed by new members to the subdivision." ***Best Hill Coalition***, 144 Idaho at 818. On appeal, this Court rejected that argument, noting the developer had failed to point to any public policy or legal authority that would prohibit new members of a subdivision from voting on amendments to subdivision covenants. ***Id.*** The Court upheld the amendments and the injunction entered by the trial court prohibiting development of property in violation of the density limit.

Pinehaven Planning Bd. v. Brooks, *supra,* 138 Idaho 826, 70 P.3d 664 (2003), is also instructive because in that case, the Court rejected an attempt by a homeowners association to prohibit vacation rental of homes within the subdivision. The Court noted:

> The central issue in this case is whether the Covenants prohibit the short-term rental of residential property. Three Covenants speak to the issue. The first, Section 10, provides "[n]o commercial or

> industrial ventures or business of any type may be maintained or constructed" upon any residential lot. The second, Section 12, further provides "no more than one (1) single family dwelling may be constructed" upon any residential lot. A third Covenant, Section 27, provides for interpreting the meaning of certain terms in the document: "The Uniform Building Code shall be used to define any term not defined herein." Further, if a term is used that is not defined in the Covenants or the Uniform Building Code, "Webster's Dictionary shall be the source used for definition of terms."

Pinehaven Planning Bd., 138 Idaho at 827-28. The court found that there was no ambiguity, but that the CC&Rs did not prohibit short term rentals. In reaching its conclusion, the court observed that the first two provisions cited above were not implicated: the rented house was not commercial property but was a single family dwelling. ***Pinehaven Planning Bd.,*** 138 Idaho at 829-30. Moreover, the UBC defined residential use to include "hotels, apartment houses, dwellings, and lodging houses." ***Pinehaven Planning Bd.,*** 138 Idaho at 830. Thus, the plain language of the CC&R did not support the prohibition advanced by the homeowners association.

In short, the Idaho Supreme Court holds that a CC&R is a type of contract and is to be interpreted according to the principles of contract interpretation. The District Court understood this. *See* **SJ Transcript,** p. 34, Ll. 10-12. "Freedom of contract is a fundamental concept underlying the law of contracts and is an essential element of the free enterprise system." ***Morrison v. Northwest Nazarene University,*** 152 Idaho 660, 661, 273 P.3d 1253, 1254 (2012). From the cases cited above, the Supreme Court has allowed and approved significant changes to CC&Rs when they were accomplished through the amendment process provided in the CC&Rs and the provisions are clear and unambiguous. If a declaration contains an amendment provision, the purchaser buys his or her property subject to the possibility of a later amendment to the declarations.

3. Adams Property Was Subject to the 2013 Amendment.

When Adams purchased his property in 2003, it was subject to CC&Rs. **R. 116**; **R 6**, ¶ 4. As the District Court observed, "[i]t's clear that the original CC&R's ran with the property at issue and that when Mr. Adams purchased the property, he knew that such covenants existed." **SJ Transcript,** p. 35, Ll. 15-18. The original CC&Rs, adopted in 1980 (hereinafter, "the 1980 CC&Rs") included an amendment provision, reading:

> The covenants and restrictions of this Declaration shall run with and bind the land, for a term of thirty (30) years from the date this Declaration is recorded, after which time they shall be automatically extended for successive periods of ten (10) years. This Declaration may be amended during the first thirty (30) year period by an instrument signed by not less than ninety percent (90%) of the Lot Owners, and thereafter by an instrument signed by not less than seventy-five percent (75%) of the Lot Owners. Any amendment must be recorded in the office of the Ada County Recorder.

R. 131. Thus, Adams bought his property subject to the Amendment Provision and with the possibility that the CC&Rs could be amended. ***Shawver,*** *supra,* 140 Idaho at 365. *See also* **SJ Transcript,** p. 41, Ll. 18-21.

In 2007, the CC&Rs were amended (hereinafter, "the 2007 CC&Rs"). *See* **R. 134** *et seq.* One of the provisions changed in the 2007 CC&Rs was the amendment provision, which was revised to allow future amendments by an approval of only 66-2/3 % of the Lot Owners. **R. 149.** Appellant was one of the lot owners that approved the amendment. **R. 159.** Thus, Adams waived any objection to the change in the amendment process.

The 1980 CC&Rs included restrictions and regulations on the use, maintenance, and appearance of property within the development. *See* **R. 119-122, 130-131.** Among other restrictions, the 1980 CC&Rs restricted the use of property:

> Each lot shall be used for single family residential purposes only, on an ownership, rental or lease basis; and for the common social,

> recreational or other reasonable uses normally incident to such use, and also for such additional uses or purposes as are from time to time determined appropriate by the Board. ...

R. 119. In 2013, the forgoing provision was amended to restrict the short-term rental of properties, to-wit:

> Each Lot shall be used for single family residential purposes only, on an ownership basis; and for the common social, recreational or other reasonable uses normally incident to such use, and also for such additional uses or purposes as are from time to time determined appropriate by the Board[.] Each Lot may be rented to others for single family residential purposes or otherwise used in a fashion that in substance amounts to a rental of a Lot ... only in strict accordance with the following: (a) A written document shall be executed between the Lot Owner and the person(s) occupying the Lot authorizing such Rental Activity (the "Lease"); (b) the form of the Lease shall have been reviewed and approved in advance in writing by the Board; (c) any advertising by an Owner soliciting tenants to enter into a Lease shall be subject to written approval in advance by the Board; (d) the Board shall not give approval to any Lease with a duration or term of less than six (6) months; (e) no Lease shall allow for subleasing; (f) the Owner of the Lot upon which Rental Activity is being conducted shall provide and regularly update contact information to the Board; 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 3.1(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. Any Lease that does not conform with the foregoing requirements is subject to being rendered null and void at the written election of the Board and the Board is empowered to take any other action it deems reasonable and necessary to enforce these restrictions on Rental Activity, including without limitation, seeking injunctive relief in court.

R. 235-36. The evidence showed that the Amendment was passed with the approval of the requisite number of Lot Owners, and Appellant does not argue otherwise. Accordingly, the District Court correctly held that Appellant's property was subject to the 2013 Amendment.

4. The Plain Meaning of Amendment Includes Making Changes.

Appellant argues that the plain meaning of "amend" does not include "change". This is incorrect and not even supported by the cases cited by Appellant. The District Court recognized Appellant's argument for what it was—an irrelevant distraction. The District Court held:

> [W]hen Mr. Adams entered into the original agreement as part of that agreement, it expressly provided for a method of abrogating and modifying that agreement. I think that the attempt to point to the language of amend and what does it mean or what's reasonable is a side issue that's not relevant. It is a red herring, not relevant to what I'm—what's happened here.
>
> The term amend as used in the original and in the amended CC&R's should be given a plain ordinary meaning. The Idaho Supreme Court has allowed the meaning of the word amendment to effectively mean change.

SJ Transcript, p. 39, L. 20 – p. 40, L. 8.

Black's Law Dictionary defines "amend" as: "To improve. To change for the better by removing defects or faults. To change, correct, revise." *Black's Law Dict.* 52 (6th ed. abridged 1990) (emphasis added). Similarly, "amendment" means: "To change or modify for the better. To alter by modification, deletion, or addition." ***Id.*** (emphasis added). As the District Court pointed out:

> *Black's Law* definition of amend includes words insert or change the wording of and together with the *Shawver* case demonstrates that the additions to Article III were within the power of the lot owners to vote on and establish.

SJ Transcript, p. 40, Ll. 8-13.

Appellant resorts to out-of-state cases to support his argument. He relies on ***Responsible Urban Growth Group v. City of Kent,*** 868 P.2d 861 (Wash. 1994), which he suggests stands for the proposition that "amendment" does not allow a "change." In ***Responsible Urban Growth Group,*** the city of Kent had annexed an area that included, among other properties, an apartment complex (Stratford Arms) and a second parcel (the Ward property) owned by a developer (SDM). ***Id.*** at 863. The City's planning department recommended that the newly annexed area be zoned as single-family residential except for the Stratford Arms and Ward properties, which should be zoned multifamily. ***Id.*** At a subsequent public hearing on the zoning issue, there apparently was some confusion among the council members as to the proposals before the council, and it adopted an ordinance (#2771) zoning all but the Stratford Arms parcel as single family residential. The Ward property, accordingly, was considered single family residential. ***Id.*** at 864. Subsequently, but without prior notice, a new ordinance (#2837) was adopted that zoned the Ward property as multifamily. This ordinance was characterized as correcting an error with the original ordinance. *See* ***Id.*** at 866. Under Washington law, adopting or amending a zoning ordinance required a public hearing and proper notice. ***Id.*** at 867. The argument raised by the parties was whether the word "amendment" in the relevant law included corrections. ***Id.*** at 868. The court, however, held that "[w]e need not reach that question, however, since the record does not support a conclusion that ordinance 2837 was a correction of ordinance 2771." ***Id.*** In support of its conclusion, the court pointed to the fact that when presenting ordinance 2837, "the Mayor presented the motion as one to 'approve Ordinance 2837 amending Ordinance 2771'." ***Id.*** at 868 n. 4 (emphasis added). Thus, "amendment" was clearly viewed by the court to include additions to covenants. That this is the understanding of the Washington courts is further supported by the holding in ***Shafer v. Bd. of Trustees of Sandy Hook Yacht Club Estates, Inc.,*** 883 P.2d 1387 (Wash. App. 1994), where the court referred to additional CC&R restrictions (restricting the

parking of vehicles) as "amendments." ***Id.*** at 1391 (noting, for instance, that "[t]his amendment was also passed in accordance with the procedures established in the Articles and the By-laws.").

Harris v. Smith, 250 S.W.3d 804 (Mo. App. 2008) is similarly unavailing to Appellant's argument. In that case, the plaintiff alleged that the defendants had misrepresented restrictions on constructing out-buildings when the plaintiff purchased the property. ***Harris,*** 250 S.W.3d at 807. The original CC&Rs allowed out-buildings, but out-buildings were prohibited under an amendment to the CC&Rs. ***Id.*** at 809. On appeal, the court upheld dismissal of the claims for the reason that under Missouri law, CC&Rs cannot be amended to add new burdens or restrictions not found in the original covenants. ***Id.*** at 809-810. Thus, the court's decision was based on Missouri law, not the plain meaning of "amend" or "amendment." Moreover, as even a cursory review of Idaho case law demonstrates, Idaho allows CC&Rs to be amended to include new restrictions. See ***Shawver v. Huckleberry Estates, LLC***, *supra,* 140 Idaho 354, 93 P.3d 685 (2004); ***Best Hill Coalition v. Halko, LLC***, 144 Idaho 813, 817, 172 P.3d 1088, 1092 (2007).

As already discussed, in ***Best Hill Coalition,*** *supra,* the court permitted the addition of a density restriction that had not previously existed. Although ***Best Hill*** did not quote the amendment language of the CC&Rs, it noted that the CC&R's had been the subject of the prior case of ***Nordstrom v. Guindon,*** 135 Idaho 343, 17 P.3d 287 (2000). See ***Best Hill Coalition,*** 144 Idaho at 815 n. 1. In ***Nordstrom***, the court noted that the pertinent provision allowed the covenants to "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...." ***Nordstrom,*** 135 Idaho at 347. Obviously, the density restriction was not the result of a deletion or alteration of a prior provision, so the change was authorized by an amendment. In fact, the Court in ***Best Hill*** refers to the change as an "amendment." See, e.g., ***Best Hill Coalition,*** 144 Idaho at 819.

Appellant also cites ***Boyles v. Hausmann,*** 517 N.W.2d 610 (Neb. 1994). There, the court's decision not permitting new or additional restrictions hinged on the specific wording of the CC&Rs under consideration. *See* ***Id.*** at 616. The CC&Rs provided that:

> *[t]hese covenants*, water use regulations, restrictions and conditions shall run with the land and continue until January 1, 1995, after which time they shall be automatically extended for successive periods of five years, unless an instrument signed by a majority of the then owners of said land shall have be recoded [sic] in the office of the County Clerk of Washington County, Nebraska, agreeing *to change same* in whole or in part.

Id. (brackets and italics in original). Based on this language, the court held that "the unambiguous language of this provision authorizes a majority of the lotowners [sic] to make changes to existing covenants, but the provision does not authorize a majority to add new and different covenants." ***Id.*** That is, the court's decision was based on distinguishing between "these covenants" and the declarations. Here, though, the Declarations make a clear distinction between the Declarations as a document, and the covenants and restrictions contained therein; and specifically allow amendment of the Declarations. **R. 131** and **149.**

In short, the Appellant's arguments to the contrary, "amend" or "amendment" includes changes and modifications, including additions. Idaho law allows amendments, including changes, of CC&Rs. Where CC&Rs clearly prohibit short-term or vacation rentals, courts will uphold those provisions. *See* ***South Ridge Homeowner's Ass'n v. Brown,*** 226 P.3d 758, 759-60 (Utah App. 2010) (upholding restriction on use of property as a timeshare or nightly rental). Accordingly, the Court should uphold the District Court's decision.

5. Idaho Does Not Require The Reasonableness Standard.

Appellant cites to ***Armstrong v. Ledges Homeowners Ass'n, Inc.,*** 633 S.E.2d 78 (N.C. 2006), for the proposition that amendments to CC&Rs must be reasonable. In that case, the plaintiffs purchased a house in a subdivision which, while governed by CC&Rs, did not mandate

membership in the homeowner's association (HOA) or provide the collection of dues or assessments except as to certain electrical utility charges for a lighted sign. ***Id.*** at 81-82. Subsequently, the HOA board adopted by-laws which purported to allow the HOA to assess fees for the HOA operating expenses, common charges for landscaping and snow removal services, impose fines, and place liens on property to enforce these assessments. ***Id.*** at 82-83. Under North Carolina law, real covenants may be either restrictive (such as limiting the use of land to a single family residence) or affirmative (such as paying dues or assessments). ***Id.*** at 85. In North Carolina, "affirmative covenants are unenforceable 'unless the obligation [is] imposed in clear and unambiguous language which is sufficiently definite to guide the courts in its application.'" ***Id.*** (brackets in original). Moreover, "[t]he existence of definite and certain assessment provisions in a declaration does not imply that subsequent additional assessments were contemplated by the parties, and courts are 'not inclined' to read covenants into deeds when the parties have left them out." ***Id.*** at 86. Based on the foregoing, the North Carolina Supreme Court held that the declaration's inclusion of the right to collect a specific assessment for electrical utilities did not provide a right to impose general assessments for other amenities. ***Id.*** at 87. In doing so, the Court held that "a provision authorizing a homeowners' association to amend a declaration of covenants does not permit amendments of unlimited scope; rather, every amendment must be *reasonable* in light of the contracting parties' original intent." ***Id.*** (italics in original).

Armstrong is distinguishable for several reasons, not the least of which is that it dealt with an affirmative covenant (imposition of assessments for amenities and services) while this case pertains to a restrictive covenant concerning the use of the property. Also, unlike the covenants in ***Armstrong***, which had specifically omitted assessments for any purpose other than electrical utilities, the CC&Rs here included limitations on the use of the property; and 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. In fact, the ***Armstrong*** court specifically recognized that "it may be reasonable to restrict the frequency of rentals to prevent rented property from becoming like a motel." ***Armstrong,*** 633 S.E.2d at 88 (underline added). Most significantly, though, the ***Armstrong*** court relied on a "reasonableness" standard which has not been adopted by Idaho.

As previously discussed, in the ***Shawver*** decision, this Court held that the trial court erred by not enforcing the amendment to the CC&Rs, because "[t]he district court's order eliminates the terms of the original recorded CC&Rs with respect to future amendments." ***Shawver,*** 140 Idaho at 365. The District Court similarly reasoned here:

> Restrictive covenants are a contract. Mr. Adams purchased this property with a knowledge of the covenants and that they could be changed by a majority of the landowners.
>
> Now, it is unfortunate there is this conflict, but I am also going to go one step farther and say that to the extent that Mr. Adams claims that these are not reasonable and they deprive him of the benefit of his original bargain, I find that's simply not true. He's still entitled to lease. There are certain restrictions placed on that entitlement. There is nothing to suggest that those restrictions are in any way in violation of public policy.

SJ Transcript, p. 41, Ll. 18-21 and 24-25 – p. 42, Ll. 1-7.

Other courts have taken the same stance, and concluded that because the amendments to the CC&Rs are governed by contract principles, "reasonableness" is not a requirement for a valid amendment. For instance, in ***Hughes v. New Life Development Corp.,*** 387 S.W.3d 453 (Tenn. 2012), the court rejected a reasonableness standard, explaining:

> Contract law in Tennessee plainly reflects the public policy allowing competent parties to strike their own bargains. *Ellis v. Pauline S. Sprouse Residuary Trust*, 280 S.W.3d 806, 814 (Tenn.2009) (citing 21 Steven W. Feldman, *Tennessee Practice: Contract Law & Practice* § 1:6, at 17 (2006)); *Hafeman v. Protein*

> *Discovery, Inc.*, 344 S.W.3d 889, 900 (Tenn.Ct.App.2011). Courts do not concern themselves with the wisdom or folly of a contract, *Chapman Drug Co. v. Chapman*, 207 Tenn. 502, 516, 341 S.W.2d 392, 398 (1960), and they cannot countenance disregarding contractual provisions simply because a party later finds the contract to be unwise or unsatisfactory. *Boyd v. Comdata Network, Inc.*, 88 S.W.3d 203, 223 (Tenn.Ct.App.2002); 28 Samuel Williston & Richard A. Lord, *A Treatise on the Law of Contracts* § 70:209, at 232 (4th ed.2003).
>
> These contract principles, applied in the context of a private residential development with covenants that are expressly subject to amendment without substantive limitation, yield the conclusion that a homeowner should not be heard to complain when, as anticipated by the recorded declaration of covenants, the homeowners' association amends the declaration. *See* Sterk, 77 B.U. L.Rev. at 282. When a purchaser buys into such a community, the purchaser buys not only subject to the express covenants in the declaration, but also subject to the amendment provisions of the declaration. Sterk, 77 B.U. L.Rev. at 282. And, of course, a potential homeowner concerned about community association governance has the option to purchase a home not subject to association governance. Sterk, 77 B.U. L.Rev. at 301. As one commentator has noted, people who live in private developments "are not just opting for private ordering in the form of covenants, but also are opting for a privatized form of collective decision making that can undo, replace, modify, or augment the private ordering already achieved." Fennell, 2004 U. Ill. L.Rev. at 848.

Hughes, 387 S.W.3d at 476 (underline added).

Similarly, in ***Bryant v. Lake Highlands Development Co. of Texas, Inc.,*** 618 S.W.2d 921 (Tex. App. 1981), where the plaintiffs complained that the amendments only impacted a portion of the lots in a development, the court upheld the amendments because "[h]aving purchased their lots subject to the Declarations which included a right of amendment the plaintiffs had no guaranty that the addition would remain exclusively comprised of townhouses." ***Bryant,*** 618 S.W.2d at 923. *See also* ***LaBrayere v. LaBrayere,*** 676 S.W.2d 522, 525 (Mo. App. 1984) ("One of the burdens [upon the plaintiff's lot] was that the use and occupancy restrictions which affected plaintiff's lot and the other lots within Briar Wood Manor were subject to change by the

owners of less than all the lots."); ***Apple II Condominium Ass'n v. Worth Bank and Trust Co.,*** 659 N.E.2d 93, 97 (Ill. App. 1995) (rejecting reasonableness standard where the owner had knowledge that declarations could be amended, and recognizing that self-governing associations were better equipped to make determinations regarding restrictions).

Even where the reasonableness standard has been applied, its use has been limited to ensuring that amendments do not destroy the general scheme or plan of development. *See, e.g.* ***Miller v. Miller's Landing, L.L.C.,*** 29 So.3d 228, 235 (Ala. App. 2009); ***Lakemoor Community Club, Inc. v. Swanson,*** 600 P.2d 1022, 1025 (Wash. App. 1979). Thus, as the court in ***Armstrong*** points out, restrictions on the frequency of rentals to maintain a general scheme of single family residences is reasonable. ***Armstrong,*** 633 S.E.2d at 88. Similarly, in ***Mission Shores Ass'n v. Pheil,*** 166 Cal.App.4th 789, 83 Cal.Rptr.3d 108 (2008), the court found that an amendment to CC&Rs prohibiting rentals of less than 30-days to be reasonable. ***Id.,*** 166 Cal. App.4th at 796, 83 Cal.Rptr.3d at 113. *See also* ***Southeastern Jurisdictional Administrative Council, Inc. v. Emerson,*** 603 S.E.2d 366, 371 (N.C. 2009) (holding that amendments to CCR's to charge service fees was reasonable as a matter of law in light of community's long history of detailed covenants and providing amenities).

In short, there is no requirement that an amendment must be "reasonable," but even if there was, restricting the frequency of rentals is reasonable as a matter of law. Accordingly, this Court should affirm the District Court's decision.

B. THE DISTRICT COURT DID NOT ERR BY FAILING TO DECLARE THE CC&Rs AS ARBITRARY AND DISCRIMINATORY.

The Appellant argues that the District Court failed to consider its arguments on discriminatory enforcement. **Appellant's Brief,** p. 20. However, Appellant does not cite to the record to support his argument, nor is there any evidence of discriminatory enforcement. This

Court has previously noted that "even if an issue is explicitly set forth in the party's brief as one of the issues on appeal, if the issue is only mentioned in passing and not supported by any cogent argument or authority, it cannot be considered by this Court." ***City of Meridian v. Petra Inc.,*** 154 Idaho 425, 450, 299 P.3d 232, 257 (2013) (internal quotations omitted). Accordingly, the Court should not consider Appellant's argument.

The Appellant also argues that non-uniform amendments require the unanimous consent of affected property owners, citing a Michigan case, ***Maata v. Dead River Campers, Inc.,*** 689 N.W.2d 491 (Mich. App. 2004). In that case, the covenants of a subdivision built around a lake restricted the use of lots to single family residency and incidental recreational use. A majority of lot owners voted to amend the covenants to exempt one lot from the foregoing restrictions so that it could be used to provide public access to the lake. ***Maata,*** 689 N.W.2d at 492 and 493. The plaintiffs were homeowners that opposed the amendment. They argued "that because the restrictive covenants were created and imposed uniformly on the lots they were intended to protect, property owners who assumed the burden of complying with restrictive covenants were entitled to receive the corresponding benefit of their neighbors' compliance unless the covenants stated otherwise." ***Id.*** at 493. The court agreed and held that "[n]on-uniform covenant amendments require the unanimous consent of the affected property owners." ***Id.*** at 498.

The ***Maata*** holding is irrelevant because Idaho does not follow the uniformity rule. In ***Best Hill Coalition v. Halko, LLC***, *supra*, 144 Idaho 813, 172 P.3d 1088 (2007), the court upheld an amendment to CC&Rs that restricted the density of development of lots to one lot per two acres, but excepted lots being added to the neighborhood that were smaller than two acres. ***Best Hill Coalition,*** 144 Idaho at 816. In other words, all the lots that were originally part of the platted development (including those that the developer wanted to subdivide) were subject to a density restriction that did not apply to the lots of new members joining the association.

Nevertheless, although the developer did not agree to the new restrictions, this Court upheld the amendment. ***Id.*** at 818. In rejecting the argument that the new members should not be allowed to vote because the density restriction did not apply to their lots, the Court wrote: "The consideration provided by the newly joining members was that they were to be burdened by the entirety of the covenants, regardless of whether each individual provision applied in their particular situation." ***Id.***

Even if this Court were to accept the uniformity rule, it would not require the Court to invalidate the Amendment. The fundamental flaw with Appellant's non-uniformity argument is that the Amendment is, in fact, uniform—it applies to all of the lots. See, e.g., ***LaBrayere v. LaBrayere,*** *supra,* 676 S.W.2d 522, 525 (Mo. App. 1984) (rejecting non-uniformity argument because the change in restrictions "was done uniformly with respect to *all* lots within Briar Wood Manor" and accomplished by the required procedure) (emphasis in original). Citing *Restatement (Third) of Property: Servitudes*, the court in ***Brockway v. Harkleroad*** noted that it was only when a change to CC&Rs applied to some of the lots (i.e., were non-uniform) that all lot-owners affected by the change needed to approve the change. ***Brockway v. Harkeroad,*** 615 S.E.2d 182, 185 (Ga. App. 2005). "As set forth in the restatement, servitudes in the nature of the declarations of covenants and restrictions at issue are regularly used to establish uniform schemes of residential development in common-interest communities, and they commonly contain provisions for amendment or termination of the declaration without the consent of all the lot owners." ***Id.*** In ***Montoya v. Barreras,*** 473 P.2d 363 (N.M. 1970), the court explained the reasoning behind the uniformity rule, stating:

> Historically, restrictive covenants have been used to assure uniformity of development and use of a residential area to give the owners of lots within such an area some degree of environmental stability. To permit individual lots within an area to be relieved of the burden of such covenants, in the absence of a clear expression

> in the instrument so providing, would destroy the right to rely on restrictive covenants which has traditionally been upheld by our law of real property.

Montoya, 473 P.2d at 365.

It is uncontroverted that Appellant is the party that seeks to upset the "uniformity of development and use" by introducing vacation rentals to the Kimberly One neighborhood. The Amendment to the CC&Rs retains the uniformity and environmental stability of the neighborhood by restricting the rental of all lots. The Amendment reads:

> **Each Lot** shall be used for single family residential purposes only, on an ownership basis; and for the common social, recreational or other reasonable uses normally incident to such use, and also for such additional uses or purposes as are from time to time determined appropriate by the Board[.] **Each Lot** may be rented to others for single family residential purposes or otherwise used in a fashion that in substance amounts to a rental of a Lot ... only in strict accordance with the following: (a) A written document shall be executed between the Lot Owner and the person(s) occupying the Lot authorizing such Rental Activity (the "Lease"); (b) the form of the Lease shall have been reviewed and approved in advance in writing by the Board; (c) any advertising by an Owner soliciting tenants to enter into a Lease shall be subject to written approval in advance by the Board; (d) the Board shall not give approval to any Lease with a duration or term of less than six (6) months; (e) no Lease shall allow for subleasing; (f) the Owner of the Lot upon which Rental Activity is being conducted shall provide and regularly update contact information to the Board; 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 3.1(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**. Any Lease that does not conform with the foregoing requirements is subject to being rendered null and void at the written election of the Board and the Board is empowered to take any other action it deems reasonable and necessary to enforce these restrictions on Rental

> Activity, including without limitation, seeking injunctive relief in court.

R. 235-36 (underline added). The Amendment applies to all lots within the development—it does not single out the Appellant. Thus, even under the uniformity rule, a unanimous vote was not required.

Finally, Appellant argues that because the Board has the discretion to allow a variance to the restriction under certain circumstances, it allows the Board to apply the amended CC&R provisions in a non-uniform manner. Appellant's Complaint is one for declaratory relief. *See* **R. 5** *et seq.* "[A]s a general rule, a declaratory judgment can only be rendered in a case where an actual or justiciable controversy exists." ***Noh v. Cenarrusa,*** 137 Idaho 798, 801, 53 P.3d 1217, 1220 (2002) (quoting ***Harris v. Cassia County,*** 106 Idaho 513, 681 P.2d 988 (1984)). The requirement for an actual or justiciable controversy means that the Court will not issue an opinion advising what the law would be based upon a hypothetical state of facts. ***Noh,*** 137 Idaho at 802; ***ABC Agra, LLC v. Critical Access Group, Inc.,*** 156 Idaho 781, 331 P.3d 523, 525 (2014).

Appellant's argument here relies on a hypothetical set of facts—i.e., that the Board would apply the rental restriction "solely as against Appellant, Mr. Adams[.]" **Appellant's Brief,** p. 20. There is no evidence offered that the Association's Board has applied the restriction solely against Mr. Adams while exempting any and all others from the requirements. Neither Mr. Adams nor any other lot owners have sought exemptions from the requirements. *See* ***ABC Agra, LLC,*** *supra,* 331 P.3d at 525-26 (holding that controversy was not ripe because the complaint was void of any threat, evidence or allegation that the property would be developed in violation of the CC&Rs). It does not follow from the fact that Mr. Adams' rental activity prompted the Amendment that the Association will only enforce the restrictions against Mr. Adams. Obviously,

the concerns about security, noise, parking, and so on, would apply to any other lot being used as a vacation rental or hotel. In short, Mr. Adams is asking this Court to opine on a set of hypothetical facts, which this Court has said it will not do. Accordingly, the Court should reject Appellant's arguments, and uphold the determination of the District Court.

C. THE AWARD OF ATTORNEY'S FEES WAS APPROPRIATE.

In its final argument, concerning attorney's fees, Appellant simultaneously argues that the District Court erred in awarding fees to the Association per the CC&Rs, while arguing that he is entitled to an award of fees on appeal and below "aris[ing] from the fee provisions of the CC&R's[.]" *See* **Appellant's Brief**, pp. 24 and 25.

Rule 54 provides that "[i]n any civil action the court may award reasonable attorney fees ... to the prevailing party ... when provided for by any statute or contract." **I.R.C.P. 54(e)(1).** "Attorney fees, when allowable by statute or contract, shall be deemed as costs in an action and processed in the same manner as costs and included in the memorandum of costs[.]" **I.R.C.P. 54(e)(5).** Appellant does not challenge the reasonableness of the fees, but only whether the fees could be awarded under a contract.

The Second Amended CC&Rs allow the Association or any Owner to enforce the covenants via a lawsuit. The CC&Rs also provide that "[i]n 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. 248** (Art. 9 § 1). Identical language was used in the earlier versions of the CC&Rs. *See* **R. 131** (Original CC&Rs); **R. 148** (Amended CC&Rs).

Although he now argues that his action had nothing to do with enforcement, Adams' Complaint alleged "this is a current and existing controversy as to the validity and enforceability of the second amended restrictions as to the use of Adams' real property." *See* **R. 7** (¶ 7)

(emphasis added). The allegations in the Complaint describe a controversy surrounding the enforcement of the CC&Rs. *See* **R. 60-61** (Exhibit D. to the Complaint—a demand letter from Kimberly One seeking Adams' compliance with the Amendment). Through his suit, Appellant was seeking to enforce the earlier versions of the CC&Rs that did not restrict short term rentals. Moreover, at ¶19 of his Complaint, Appellant sought mandatory attorney's fees pursuant to Article IX, § 1 of the CC&Rs. *See* **R. 9** (¶ 19).

The District Court recognized these facts in its decision on the matter. The District Court explained:

> I find that the – that this is covered by the homeowner's association agreement and that it is a contract. We have plenty of case law that says that it is. And that we—in looking at the plain language, what we see is that the parties by agreeing to the homeowner's association agreement have agreed to pay the fees of the prevailing party in any action that involves the enforcement of those provisions.
>
> Clearly that's what was involved here. What the plaintiff, Mr. Adams, sought was that we invalidate the changes to the homeowner's association to nullify the attempt on the part of the homeowners to preclude the rental of his—not just his, but everyone's, but his particular residence. The result of that would be that it would be—that provision would be gone, and, therefore, he would be allowed under the old homeowner's association agreement to continue the practice of renting.
>
> The logical understanding of the parties—and I would point out that Mr. Adams himself asked for fees in his original complaint. The logical understanding of what's occurred is this is the [sic] enforcement because in determining the validity of the homeowner's association, in effect it is the enforcement of it.

Transcript of July 3, 2014, Hearing, p. 9, L. 24 – p. 10, L. 25.

The District Court's holding is consistent with this Court's decision in ***Nordstrom v. Guindon,*** 135 Idaho 343, 17 P.3d 287 (2000). There, the plaintiff (Nordstrom) had previously brought suit against Guindon for keeping pigs on his property allegedly in violation of CCRs.

The parties stipulated that Guindon would remove his hogs, pay Nordstrom's attorney's fees and costs, and Nordstrom would be entitled to judgment if Guindon breached any term of the settlement. ***Id.,*** 135 Idaho at 344. After Nordstrom had judgment entered against Guindon, the CCRs were amended by a supermajority vote of owners to allow the keeping of hogs. ***Id.*** When the district court issued an order to show cause why Guindon should be held in contempt for failing to abide by the previous judgment, Guindon responded by filing an answer and counter-claim for declaratory relief based on the amendment to the covenants. ***Id.*** The district court found for Guindon on summary judgment, finding that the covenants allowed the keeping of swine. Nordstrom appealed that ruling. ***Id.,*** 135 Idaho at 345. After upholding the district court's determination that the amendment to the CCR was valid, the Court turned to the issue of attorney's fees on appeal. The CCRs in question provided: "In the event a person whose property is subject to these covenants is forced to seek litigation to enforce the terms of these covenants, the prevailing party shall be entitled to reasonable attorneys fees in addition to other allowable relief." ***Id.,*** 135 Idaho at 348. Based on that language, and although the appeal had to do with the cross-claim for declaratory relief, the Court awarded attorney's fees on appeal to Guindon.

Similarly, in ***Sky Canyon Properties, LLC v. Golf Club at Black Rock, LLC,*** 155 Idaho 604, 315 P.3d 792 (2013), a case "regarding the interpretation of covenants, conditions, and restrictions for a subdivision," the Court awarded attorney's fees to the prevailing party based on the attorney's fees provision of the CC&Rs. *See* ***Id.***, 155 Idaho at 605 and 610. The CC&Rs provided for attorney's fees for any legal proceeding "for damages or for the enforcement of the Black Rock Documents or the restraint of violations of the Black Rock Documents[.]" ***Id.,*** 155 Idaho at 610.

For the reasons set forth above, the Court should uphold the District Court's decision as to attorney's fees.

D. THE RESPONDENTS ARE ENTITLED TO COSTS AND ATTORNEY'S FEES ON APPEAL.

I.A.R. 40 provides that "[c]osts shall be allowed as a matter of course to the prevailing party unless otherwise provided by law or order of the Court." If the Respondents are found to be the prevailing party, as they should, they are entitled to costs.

I.A.R. 41 allows for an award of attorney fees. As noted above, the CC&Rs provide that "[i]n 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. 248** (Art. 9 § 1). Adams' Complaint alleged "this is a current and existing controversy as to the validity and enforceability of the second amended restrictions as to the use of Adams' real property." *See* **R. 7** (¶ 7) (emphasis added). Appellant similarly seeks an award of fees "aris[ing] from the fee provisions of the CC&R's," and thereby acknowledges that the CC&Rs provides for an award of fees on appeal. *See* **Appellant's Brief**, p. 25. Consequently, the Court should award attorney's fees to the Association on appeal.

V. CONCLUSION

For the reasons set forth above, the District Court's Judgment should be affirmed, and Respondents should be awarded their costs and fees on appeal.

DATED this 18 day of December, 2014.

ANDERSON, JULIAN & HULL LLP

By _____
Phillip J. Collaer, Of the Firm
Attorneys for Defendant/Respondent

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 18 day December 2014 I served a true and correct copy of the **RESPONDENT'S BRIEF** by delivering the same to each of the following attorneys of record, by the method indicated below, addressed as follows:

Kim J. Trout, ISB No. 2468	[X]	U.S. Mail, postage prepaid
TROUT LAW, PLLC	[ ]	Hand-Delivered
3778 N. Plantation River Dr. Ste. 101	[ ]	Overnight Mail
Boise, Idaho 83703	[ ]	Facsimile

Phillip J. Collaer