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IN THE SUPREME COURT OF THE STATE OF IDAHO

DALE LEE and KATHI LEE, husband and
wife,

Plaintiff/Appellant,

vs.

WILLOW CREEK RANCH ESTATES NO.
2 SUBDIVISION HOMEOWNERS'
ASSOCIATION, INC., an Idaho corporation,
and DOES I -X, inclusive,

Defendant/Respondent,

Supreme Court No. 45390-2017

Appeal from Canyon County
Case No. CV-16-3425

RESPONDENT'S BRIEF

Appeal from the District Court of the Third Judicial District of the State of Idaho,
In and for the County of Ada, Honorable Christopher S. Nye District Judge, Presiding

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I. STATEMENT OF THE CASE

A. Nature of the Case.

The Plaintiffs, the Lees, sought a declaration that they were entitled to use a private road (“Kemp Road”) that crossed a subdivision adjacent to their property, Willow Creek Ranch Estates. The Lees wanted to develop a subdivision and use Kemp Road to access a portion of the homes in the subdivision. The Defendant, Willow Creek Ranch Estates #2 and 3 Homeowner’s Association (“Willow Creek”), owns the road and denied the Lees were entitled to use Kemp Road. The Lees claimed the prior owner of the subdivision property (the “Kemp Family Trust”), entered into an agreement with them to permit them to use Kemp Road when and if the Lees developed their property. This agreement (the “1997 Agreement”) concerned the sale of property (the “Kemp Property”) from the Lees to the Kemp Family Trust and contained no legal descriptions of any of the property involved and provides no details about the location of the future accesses. The Lees have conceded the 1997 Agreement does not satisfy the statute of frauds. An illustrative map showing the locations of the properties and Kemp Road is attached as Exhibit A.

The Lees and the Kemp Family Trust subsequently closed on the real estate transaction that was the subject of the 1997 Agreement and the Lees executed a deed transferring the Kemp Property to the Kemp Family Trust as contemplated by the 1997 Agreement. At the time of the transfer, Kemp Road did not exist. The deed did not reserve or create an easement for the Lees to use Kemp Road.

The Lees argued below that they are entitled to use Kemp Road based on two legal theories. The Lees' first theory is that they have an equitable servitude that allows them to use the road. The Lees' second theory (which was not alleged in the Lees' Complaint, but was briefed by the parties and ruled upon by the district court) is that they have an easement that allows them to use the road.

The district court disagreed with the Lees on both theories. With respect to the equitable servitude theory, the district court correctly held that an equitable servitude does not afford a right of entry onto another's property. With respect to the easement theory, the district court held first that the Lees had no easement because the Lees did not reserve an easement in the deed that transferred the Kemp Property and second that the 1997 Agreement was not sufficiently detailed enough to avoid the statute of frauds based on the alleged partial performance of the 1997 Agreement.

The Lees appealed the district court's determination that an equitable servitude does not afford a right of entry onto another's property and the determination that the 1997 Agreement lack sufficient detail to be specifically enforced. The Lees have not addressed the district court's determination that the Lees do not have a right to use Kemp Road because the deed transferring the property that was the subject of the 1997 Agreement did not reserve or create an easement to use Kemp Road.

Willow Creek requests the Court affirm the district court's holding that equitable servitudes do not afford a right to enter and use another's land. Willow Creek also requests the Court affirm the district court's determination that the Lees do not have any right (whether called

an easement or an equitable servitude) to use Kemp Road, first because the Lees have not appealed the district court's determination that the Lees do not have an easement since the deed transferring the property that was the subject of the 1997 Agreement did not reserve any such easement and second, because the district court correctly determined the 1997 Agreement was not sufficiently complete to escape the statute of frauds via an action for specific performance.

Willow Creek requests costs and attorney fees on appeal pursuant to Idaho Code § 12-120(3).

B. Course of Proceedings.

The Lees filed their Complaint on April 11, 2016 and asked the district court to “make a final determination that the Kemp Property, including Kemp Road, is encumbered by equitable servitudes, conditions and restrictions allowing for access by the Lees as set forth in the Sale Agreement....” R. p.16. The Lees did not request the district court hold that the Lees had an easement to use Kemp Road in the Complaint. The Lees did not request a jury trial.

On May 18, 2007, Willow Creek moved for summary judgment on all claims raised by the Lees with respect to their alleged right to use Kemp Road. R. p.115-16. Willow Creek addressed the substance of the Lees' contention that they had an easement, but also argued that the Lees were not entitled to a declaration that they had an easement to use Kemp Road since the Lees had not requested that relief in their Complaint. R. p. 132-134. Willow Creek also argued the Lees did not have an easement to use Kemp Road because the document purporting to grant the easement did not comply with the statute of frauds. *Id.* Willow Creek also raised the argument that the Lees were not entitled to specific performance of the 1997 Agreement because

that claim (to the extent it was raised in the Complaint) was barred by the statute of limitations and laches. R. p.197-202. Willow Creek also pointed out that since Kemp Road did not exist at the time the parties executed the 1997 Agreement, any purported agreement concerning the use of the non-existent road was an unenforceable agreement to agree. *Id.*

The district court agreed with Willow Creek that the Lees did not have any legal right to use Kemp Road and granted summary judgment to Willow Creek. In its Memorandum Decision and Order, the district court held that the 1997 Agreement and the deed conveying the Kemp Property to the Kemps concerned the same subject matter and the court would look only to the deed to determine whether there was any grant or reservation of an easement or property interest. R. p.236-237 (“The deed is ambiguous. Even though the deed’s terms may vary from the earlier 97 Agreement, the Court looks only to the deed to determine the parties’ rights. Since the deed did not reserve or create an easement for the Lees’ use of Kemp Road, the Lees do not have an easement over Kemp Road.”). This holding has not been appealed.

The district court, after noting that the parties agreed the 1997 Agreement did not satisfy the statute of frauds, also held that the doctrine of part performance was not available to the Lees to enforce the 1997 Agreement. R. p. 237 (“Alternatively, the Court finds that the doctrine of part performance is unavailable to enforce the purported easement.”). The district court held that the 1997 Agreement, “is too indefinite, incomplete, and uncertain in its material terms, and does not contain provisions that are capable in themselves of being reduced to certainty, to allow enforcement by operation of the doctrine of part performance.” R. p. 238.

The district court entered judgment in favor of Willow Creek on September 14, 2017. R. p. 241.

On September 22, 2017, the Lees filed a notice of appeal. R. p. 24-43.

On January 31, 2018, the district court entered an amended judgment in favor of Willow Creek. The judgment reflects the award of costs and fees against the Lees in favor of Willow Creek. The Lees have not appealed the award of costs and attorney fees, other than to request, without argument, that the award of attorney fees and costs be vacated or reversed.

C. Statement of Facts.

This case concerns a land sale contract and subsequent deed between the Lees and the Kemp Family Trust. The Lees claim they were granted a right to use Kemp Road, which is a private road within the Willow Creek Ranch Estates subdivision. The Lees do not own any property within the Willow Creek Estates subdivision, but own property adjacent to the subdivision. R. 39. According to the Lees, the Kemp Family Trust granted them a right to use Kemp Road in the 1997 Agreement for the Sale of Real Property (referred to herein as the “1997 Agreement”). R. p. 40.

The 1997 Agreement does not contain a valid legal description of the purported easement.¹ R. p. 44. In fact, the 1997 Agreement does not have any legal description at all – not of the property to be sold, not of the Lees’ property that would be the dominant estate for purposes of the easement, and not of the servient estate of the easement. *Id.* The 1997

¹ For purposes of this appeal, Willow Creek will refer to the access sought by the Lees as an “easement”, not an equitable servitude.

Agreement is not notarized and the record contains no evidence that can establish the Kemp Family Trust executed the 1997 Agreement. *Id.* The record contains no evidence that can establish that the person that signed the 1997 Agreement was properly authorized by the Kemp Family Trust to execute documents on its behalf. The 1997 Agreement appears to have been signed by Dale Lee and J.M. Steele. *Id.* There is no evidence in the record as to who J.M. Steele is or that he was authorized to sign the 1997 Agreement by the Kemp Family Trust.

The 1997 Agreement contained a section labelled "Future Development" that contained the following language:

Both Seller and Buyer are contemplating future development of their existing properties which adjoin each other. Seller and Buyer agree that future development will not be in conflict with the rural residential character of Willow Creek Ranch Estates. Seller agrees that homes will be constructed on site and will not be modular mobile units. In the event that Buyer constructs a recreational center for use by residents of Willow Creek Ranch Estates, Seller shall be entitled to use and shall also be subject to payment of dues. Seller shall also be entitled to 3 driveway accesses from the gravel road to be constructed by Buyer adjoining Seller's property. Such accesses shall be constructed at Seller's cost and subject to Seller obtaining any necessary government approvals.

R. p. 44.

There is no evidence of any other written or oral agreement relating to the use of Kemp Road. The record contains no evidence to establish that the Lees have developed their property. There is no evidence in the record demonstrating that the Lees paid for the construction of any accesses to Kemp Road. The record contains no evidence to demonstrate the Lees made any

permanent or valuable improvements to Kemp Road. The record contains no evidence of any consideration given by the Lees for the purported accesses.

The 1997 Agreement was a commercial transaction that involved the transfer of real property for development purposes. *Id.* The Lees attempted to enforce the 1997 Agreement against Willow Creek. R. p. 15.

II. ATTORNEY FEES ON APPEAL

Willow Creek, if it prevails on this appeal, is entitled to its attorney fees in defending against the appeal pursuant to Idaho Code § 12-120(3) as the appeal stems from an action to enforce a commercial transaction.

III. ARGUMENT

A. Standard of Review

1. **Summary Judgment.** On appeal from the grant of a motion for summary judgment, this Court utilizes the same standard of review used by the district court originally ruling on the motion. *Liberty Bankers Life Ins. Co. v. Witherspoon, Kelley, Davenport, and Toole*, 159 Idaho 679, 689, 365 P.3d 1033, 1039 (2016).

2. **Equitable Servitude and Part Performance.** The district court's decision on the applicability of the doctrines of part performance and equitable servitudes are reviewed under the abuse of discretion standard. *See Sword v. Sweet*, 140 Idaho 242, 92 P.3d 492 (2004) ("The magistrate court's decision concerning the application of the doctrines of part performance, equitable estoppel, promissory estoppel, laches and/or unclean hands is reviewed under the abuse of discretion standard."); *West Wood Investments, Inc. v. Acord*, 141 Idaho 75, 82, 106 P.3d 401,

408 (2005) (“Because imposition of an equitable remedy requires a balancing of the equities, which is inherently a factual determination, the district court’s imposition of equitable servitudes should be reviewed for an abuse of discretion.”).

Whether a district court abused its discretion is a three-pronged inquiry to determine whether the district court: (1) correctly perceived the issue as one of discretion; (2) acted within the boundaries of such discretion and consistently with the legal standards applicable to the specific choices before it; and (3) reached its decision by an exercise of reason. *Sun Valley Potato Growers, Inc. v. Texas Refinery Corp.*, 139 Idaho 761, 765, 86 P.3d 475, 482 (2004).

While the decision as to whether the doctrine of part performance applies is reviewed under an abuse of discretion standard, what constitutes sufficient part performance is a matter of law. *Hoke v. Neyada, Inc.*, 161 Idaho 450, 453, 387 P.3d 118, 121 (2016), reh'g denied (Jan. 23, 2017) (“What constitutes part performance must depend upon the particular facts of each case and the sufficiency of particular acts is matter of law.”).

However, the question of whether an interest in property is an easement or an equitable servitude is a question of law. See *Dickson v. Kates*, 133 P.3d 498, 502 (Wash. App. 2006), as amended (Dec. 12, 2006) (holding determining whether property interest is an easement or a restrictive covenant is a question of law, not fact).

The Idaho Supreme Court exercises free review over matters of law. *Watkins v. Watkins*, 162 Idaho 600, 605, 402 P.3d 1053, 1058 (2017).

B. Analysis.

1. The District Court Correctly Concluded Equitable Servitudes Do Not Confer Access Rights.

This appeal can be boiled down to one question – whether or not Idaho law provides for an affirmative access right under the doctrine of equitable servitudes.² The district court correctly held that an equitable servitude does not, like an easement, afford a right of entry.

The Lees asked the district court to hold they had an enforceable equitable servitude burdening Kemp Road that permitted them to use Kemp Road to access their property. R. 16. However, the Lees have misunderstood the nature of the property right entailed in an equitable servitude and confuse a covenant (or an equitable servitude) with an affirmative right to use property for a specified use (an easement). The Lees' claim for an equitable servitude was properly dismissed since an equitable servitude will not provide the Lees an affirmative right to use Kemp Road. Furthermore, the Lees failed to establish the required elements of an equitable servitude. For these reasons, the Court should affirm the district court's grant of summary

² As argued below, the Lees waived any challenge to the primary holding by the district court as to whether or not the Lees have an easement. Because the Lees failed to appeal both independent grounds articulated by the district court as to why the Lees do not have an easement, the Lees' appeal as to the easement issue should be dismissed. *See Weisel v. Beaver Springs Owners Ass'n, Inc.*, 152 Idaho 519, 525, 272 P.3d 491, 497 (2012) (holding failure to address independent ground for granting summary judgment in opening brief and issue statement is fatal to an appeal). Additionally, if the Court determines that equitable servitudes can provide an affirmative access right, the district court's determination that the Lees do not have an access right based on their equitable servitude argument should be upheld because the district court's holding that the Lees have no property interest in Kemp Road since the deed executed subsequent to the 1997 Agreement did not grant or reserve any access right is equally applicable to the Lees equitable servitude and easement claims.

judgment in favor of Willow Creek and affirm the holding that the Lees are not entitled to an equitable servitude that would provide a right to use Kemp Road.

a. Equitable Servitudes Do Not Provide Access Rights

As a preliminary matter, the Lees seek an affirmative right of access, which is an easement, but try to characterize the affirmative access right as an equitable servitude. There are fundamental differences between an easement and an equitable servitude and the property rights involved with each.

An equitable servitude is another name used for a restrictive covenant. Restrictive covenants, as to the use of land or the location or character of buildings or other structures located thereon, are said to create rights in the nature of easements. A "negative easement" restrains a landowner from making certain use of his or her land which he or she might otherwise have lawfully done but for that restriction. In addition to using the term negative easement, the courts have referred to building and use restrictions by such terms as equitable easements, amenities, or servitudes, or reciprocal negative easements, or mutual, reciprocal, equitable easements of the nature of servitudes. However, although restrictive covenants are commonly classified as negative easements because they restrain landowners from making otherwise lawful uses of their property, a *negative easement is not a true easement, which, by contrast, entitles the owner of land to use the land of another for some purpose.*

...

Negative easements in the nature of restrictions on the use of land or buildings constructed thereon may be created in a number of different ways. Although ordinarily created by deed, they may also be created by contract not involving the transfer of title to land and by implication.

...

A negative easement may also arise by implication from the language of the deeds or from the conduct of the parties. Courts have given to implied restrictions such descriptive names as "reciprocal negative easements," "**equitable servitudes**," and the like.

62 AM. JUR. PROOF OF FACTS 3d 1 (Originally published in 2001) (emphasis added).

How can one tell easements and real covenants apart? Usually, this is not difficult. Most easements are affirmative in character, authorizing use of another's land. Many real covenants are negative or restrictive in nature, prohibiting certain use of land.

....

Several important legal ramifications flow from the easement/real covenant distinction:

1. *Easements as interests in land must meet the requirements of the Statute of Frauds*; opinion is divided as to whether real covenants are property interests covered by the Statute.

2. Easements may be created by implication in all jurisdictions;³ implied real covenants are not recognized in some states.

3. Easements in gross are permitted in this country; real covenants in gross generally are not.

4. The holder of an easement terminated by condemnation is entitled to just compensation; the beneficiary of a real covenant taken by eminent domain does not receive compensation in some states on the theory that a real covenant does not constitute property.

THE LAW OF EASEMENTS & LICENSES IN LAND § 1:29 (West 2017) (emphasis added).

³ Idaho recognizes the implied easement by necessity doctrine. *See Machado v. Ryan*, 153 Idaho 212, 220, 280 P.3d 715, 723 (2012). The Lees have not asserted they are entitled to an implied easement by necessity.

Idaho recognizes the distinction between easements and real covenants. This Court acknowledged that an easement is not a restrictive covenant. *See Thomas v. Campbell*, 107 Idaho 398, 404 n.2, 690 P.2d 333, 339 n.2 (1984) (“Although given the appellation of a ‘scenic easement,’ the document in question more closely resembles a restrictive covenant than it does an easement. A restrictive covenant is defined as a ‘[p]rovision in a deed limiting the use of the property and prohibiting certain uses,’ BLACK’S LAW DICTIONARY, p. 1182 (5th Ed.1979), whereas an easement is defined as a ‘right of use over the property of another.’ *Id.* at 457.”); *see also St. Clair v. Krueger*, 115 Idaho 702, 703 n.1, 769 P.2d 579, 580 n.1 (1989) (“Equitable servitudes and negative real covenants are two types of restrictive covenants that retain many similarities.”).

Washington courts also recognize the distinction. *See Dickson*, 133 P.3d at 502 (“Further, an easement is a right, distinct from ownership, to use in some way the land of another, without compensation. A restrictive covenant limits the manner in which one may use his or her land. The distinction between the two is that an easement allows its holder to go upon the land possessed by another and a covenant imposes upon the possessor restrictions on how he or she may use the land.”) (internal citations and quotations omitted).

There are “affirmative” equitable servitudes, but those do not confer a right of access to another party, but rather obligate a property owner to take some affirmative action with respect to his or her ownership. *See, e.g., Hills v. Greenfield Village Homes Ass’n, Inc.*, 956 S.W.2d 344, 348 (Mo. Ct. App. 1997) (“An affirmative covenant, as opposed to a restrictive one, does not restrict the use of the land in question, but instead imposes a duty on a party to perform an

affirmative act”). The affirmative covenants in play in *Hills* were an agreement to pay condominium assessments and, for the condominium association, to use the collected assessments in a certain manner. *Id.* But, these affirmative equitable servitudes do not provide a right of access.

Courts in other jurisdictions agree that equitable servitudes do not afford access rights.

The language in the Declaration at issue here clearly creates covenants running with the land or **equitable servitudes** as to lots 53, 62, 65 and 66. It creates restrictions as to the use of that land. (4 Witkin, Summary of Cal. Law, *supra*, Real Property, § 484, pp. 661-662.) **It does not give the owners of the other lots in the Beverly Highlands any interest in those lots or any right to use those lots for their own enjoyment.** Hence, it does not create any “mutual or reciprocal easement rights appurtenant to the separate interests” (Civ. Code, § 1351, subd. (b)). (4 Witkin, Summary of Cal. Law, *supra*, §§ 434, 435, pp. 614-616.)

Comm. to Save Beverly Highlands Homes Ass'n v. Beverly Highlands Homes Ass'n, 92 Cal. App. 4th 1247, 1270, 112 Cal. Rptr. 2d 732 (2001) (emphasis added); *see also Davista Holdings, LLC v. Capital Plaza, Inc.*, 741 S.E.2d 266 (Ga. App. 2013) (“An easement grants an affirmative right ‘to enter and use land in the possession of another and obligates the possessor not to interfere with the uses authorized by the easement.’... Conversely, a restrictive covenant, also known as a ‘negative easement,’ does not convey any affirmative rights.”); *see also Patterson v. Paul*, 863 N.E.2d 527 (Mass. S. Ct. 2007) (“A restriction on the use of land is a right to compel the person entitled to possession of the land not to use it in specified ways. Such a restriction may be imposed by a negative easement, an equitable servitude, or a covenant running with the land.... A negative easement consists solely of a veto power. The easement owner has, under such an easement, the

power to prevent the servient owner from doing, on his or her premises, acts that, but for the easement, the servient owner would be privileged to do.... . Significantly, however, the holder of such a [negative easement] has no right to use the land on which he holds the restriction as he would if he held an affirmative easement.”); *Elliott v. McCombs*, 109 P.2d 329, 333 (Cal. S. Ct. 1941) (holding principles of law relating to the creation of an equitable servitude are not applicable to the creation of easements since the interests created under each body of law are not the same).

The Lees are not seeking to limit Willow Creek’s use of Kemp Road (which would be the enforcement of a restrictive covenant). Nor are they seeking to enforce an obligation of Willow Creek to affirmatively take an action with respect to Kemp Road (which would be enforcement of a covenant in the form of an affirmative equitable servitude). Rather, they are seeking a right of use over Kemp Road (which is an affirmative easement). Because the Lees are not seeking to enforce a covenant, but rather they are seeking an affirmative right to use the land of Willow Creek, they must meet the legal requirements to establish an easement, not an equitable servitude.

This Court has not addressed whether equitable servitudes provide for affirmative access rights that can be equitably enforced.⁴ Willow Creek requests the Court hold that affirmative property access rights are not the type of rights that can be created and enforced under the doctrine of equitable servitudes. Willow Creek requests that this Court affirm the district court’s

⁴ This Court’s footnote in *Thomas v. Campbell*, 107 Idaho at 404 n.2, 690 P.2d at 339 n.2, did note the distinction and acknowledged that covenants do not provide access rights, but that was arguably dicta.

finding that the interest in land sought by the Lees (the affirmative right to use Kemp Road) is an easement, not an equitable servitude or real covenant, and affirm the dismissal of the Lees claim for an equitable servitude.

b. The Requirements to Create an Equitable Servitude Are Not Present

In addition to the legal fact that equitable servitudes do not provide for a right of entry, the Court should affirm the dismissal of the claim for an equitable servitude because the Lees failed to demonstrate they have met the requirements to establish a right to an equitable servitude.

A servitude is created

(1) if the owner of the property to be burdened

(a) enters into a contract or makes a conveyance intended to create a servitude that complies with § 2.7 (Statute of Frauds) or § 2.9 (Exception to the Statute of Frauds); or

(b) conveys a lot or unit in a general-plan development or common-interest community subject to a recorded declaration of servitudes for the development or community; or

(2) if the requirements for creation of a servitude by estoppel, implication, necessity, or prescription set out in §§ 2.9 through 2.17 are met, or if the requirements for creation of a servitude for public benefit under § 2.18 are met.

RESTATEMENT (THIRD) OF PROPERTY (Servitudes) § 2.1 (2000).

The Lees, whose property is not located within the Willow Creek subdivision, want an access right through that subdivision. The Lees have not argued that Kemp Road is burdened by

an equitable servitude created by estoppel,⁵ implication, necessity, or prescription. Because a subdivision is involved, the Lees have throughout this litigation cited to Idaho cases involving equitable servitudes in the context of common-interest communities or planned unit developments, as they did in their opening brief. But, the Lees' reliance is misplaced as their property is not contained within the Willow Creek subdivision.

It is undisputed the Lees' property is not within the Willow Creek subdivision. The legal authority on equitable servitudes cited by the Lees have nothing to do with an alleged right to access (i.e., an easement) across an adjacent property *not contained within a planned unit development or subdivision*.⁶

Before proceeding to review the facts and holdings of those cases relied upon by the Lees, it is necessary to review how the planned unit development line of cases fit within the legal framework of equitable servitudes. Reviewing these cases makes it clear that the Lees are calling the right they seek an equitable servitude when in fact it is an easement and, more

⁵ The Lees have argued the doctrine of part performance applies with respect to their easement claim, but not in the arguments related to the equitable servitude claim. The doctrines of equitable estoppel and part performance are viewed together. "Under Idaho law, part performance per se does not remove a contract from the operation of the statute of frauds. Rather, the doctrine of part performance is best understood as a specific form of the more general principle of equitable estoppel." *Sword v. Sweet*, 140 Idaho at 249, 92 P.3d at 499 (citation and quotation omitted). Willow Creek addresses the Lees' part performance arguments below with respect to the Lees' easement claim.

⁶ The Lees contend Kemp Road was "in essence, a common area" for the Lees' property and the adjacent subdivision. Brief of Appellant, p. 20. This contention has no support in the record.

importantly, that they cannot meet the requirements to create an equitable servitude without complying with the statute of frauds.

The doctrine of implied reciprocal negative easements applies when an owner of real property subdivides the property into lots and sells a substantial number of those lots with restrictive covenants designed to further the owner's general plan or scheme of development. *Evans v. Pollock*, 796 S.W.2d 465, 466 (Tex.1990). When the owner of a tract of land subdivides it into lots according to a general scheme or plan, and sells those lots by deeds containing substantially uniform restrictions, ***the grantees acquire by implication an equitable right*** to enforce similar restrictions against any lots retained by the grantor or sold by the grantor without such restrictions to a purchaser with actual or constructive notice of the restrictions. *Id.* (citing *Minner v. City of Lynchburg*, 204 Va. 180, 129 S.E.2d 673, 679 (1963)). This implied right is variously called an implied reciprocal negative easement or an implied equitable servitude. *Id.*

H.H. Holloway Trust v. Outpost Estates Civic Club Inc., 135 S.W.3d 751, 756 (Tex. Ct. App. 2004) (emphasis added).

“An easement is a right, distinct from ownership, to use in some way the land of another, without compensation”, whereas a restrictive covenant limits the manner in which one may use his or her own land. Restrictive covenants are frequently described as negative easements, often in the context of tax cases. *Halpin v. Poushter*, 59 N.Y.S.2d 338, 341 (1945) (“A tax foreclosure cannot be used to cut off restrictive covenants because the latter are easements.”); see *Alamogordo Imp. Co. v. Prendergast*, 43 N.M. 245, 254, 91 P.2d 428, 122 A.L.R. 1277 (1939); *Northwestern Imp. Co. v. Lowry*, 104 Mont. 289, 302, 66 P.2d 792, 110 A.L.R. 605 (1937). For example, *Annot., Easement or Servitude or Restrictive Covenant as Affected by Sale for Taxes*, 168 A.L.R. 529, 536 (1947), states:

That restrictive covenants as to the use of land or the location or character of buildings or other structures thereon create easements, frequently

described as negative easements, has been held or stated in a number of cases.

A negative easement has been defined as one the effect of which is to preclude the owner of the land subject to the easement from doing that which, if no easement existed, he would be entitled to do, or one which curtails the owner of the servient tenement in the exercise of some of his rights in respect of his estate in favor of the owner of the dominant tenement or tenements.

In PUDs [planned unit developments], restrictive covenants are the same as negative easements because they curtail the rights of the owner of the servient tenement in favor of the owners of all of the dominant tenements.

The objectives of a PUD include a more efficient and desirable use of open land, and flexibility and variety in the physical development pattern, in order to provide a more desirable living environment than would be possible through a strict application of zoning ordinance requirements. *Wiggers v. Skagit Cy.*, 23 Wash. App. 207, 213-14, 596 P.2d 1345 (1979); *Frankland v. Lake Oswego*, 267 Ore. 452, 517 P.2d 1042 (1973). **Restrictive covenants are imposed as part of a common plan of development to benefit all of the grantees of the developer.** See generally *Chimney Hill Owners' Ass'n v. Antignani*, 136 Vt. 446, 392 A.2d 423 (1978). The ability of *homeowners in a PUD to enforce restrictive covenants against original and subsequent property owners* helps ensure that the community will be able to maintain its planned character and provide the lifestyle sought by its residents in making their homes there. See generally 6 P. Rohan, *Homeowner Ass'ns and Planned Unit Devs.*, § 8.01 (1986).

City of Olympia v. Palzer, 728 P.2d 135 (Wash. 1986) (emphasis added).

Connecticut, like Washington and Texas (and as shown below Idaho), recognizes that the common development scheme, if it is to give rise to a right to enforce a covenant, must involve a common grantor, an element that is undisputedly missing from this case.

Restrictive covenants should be enforced when they are reflective of a common plan of development. See *Marion Road Assn. v. Harlow*, 1 Conn.App. 329, 333, 472 A.2d 785 (1984). The factors that help to establish the existence of an intent by a grantor to develop a common plan are: (1) a **common grantor** sells or expresses an intent to put an entire tract on the market subject to the plan; (2) a map of the entire tract exists at the time of the sale of one of the parcels; (3) actual development according to the plan has occurred; and (4) substantial uniformity exists in the restrictions imposed in the deeds executed by the grantor. *Contegni v. Payne, supra*, 18 Conn. App. at 53, 557 A.2d 122; 9 R. Powell, *Real Property* (1999) § 60.03[6], p. 60–29.

DaSilva v. Barone, 849 A.2d 902, 907 (Conn. 2004) (emphasis added).

More precisely, a reciprocal negative easement is created when a common owner of related parcels of land includes in each of the various deeds of the lots conveyed some restriction for the benefit of the land retained, evidencing a scheme or intent that the entire tract should be similarly treated, so that once the plan is effectively placed into operation, the burden is placed upon the land conveyed and by operation of law reciprocally placed upon the land retained by the grantor. Ordinarily, four elements must be established to prove the existence of a reciprocal negative easement applicable to lots in subdivision tract:

1. ***There must be a common grantor;***
2. There must be a designation of the land or tract subject to restrictions;
3. There must be a general plan or scheme of restriction in existence for the designated land or tract; and
4. The restrictions must run with the land.

62 AM. JUR. PROOF OF FACTS 3d 1 (Originally published in 2001) (emphasis added).

The Lees did not acquire any lots in the Willow Creek subdivision and have no right to enforce any equitable servitude or restrictive covenant with respect to the property contained

within the subdivision. There is no common grantor of the properties at issue here, or any allegation that the Lees want to include their property within the Willow Creek subdivision.

The Lees want an access right and assert that right is available under the line of cases discussing restrictive covenants. The Lees are mistaken. The cases on equitable servitudes cited by the Lees involve the rights of property owners that purchased lots within a planned unit development based upon statements or conduct that the courts found established an equitable right to restrict the developer of the planned unit development from taking certain actions with respect to other property contained within that development. In other words, when a developer markets property in a planned development by making promises about the amenities that will be provided and the character of the homes or units permitted in the development, persons induced to purchase lots within the development have enforceable implied restrictive covenants – or equitable servitudes.

Several decisions from this Court address equitable servitudes in the planned unit development context consistent with these other jurisdictions.

...[the Idaho Supreme Court], in *Middlekauff v. Lake Cascade, Inc.*, 103 Idaho 832, 654 P.2d 1385 (1982), stated that the statute of frauds did not preclude plaintiffs from introducing oral testimony in order to establish an equitable interest in adjoining land. In *Middlekauff*, the plaintiffs alleged that they were induced to purchase land pursuant to representations made by Lake Cascade, Inc., that the property adjacent to their property would be used as a common area for recreational activities.

Thomas v. Campbell, 107 Idaho at 403, 690 P.2d at 338.

The *Birdwood* case also concerned restrictive covenants in a planned community. “This is an appeal from a summary judgment holding that recorded restrictive covenants which were not signed by the owner of a platted subdivision, or the owner's agent, do not bind the subsequent purchaser of a lot in the subdivision.” *Birdwood Subdivision Homeowners' Ass'n, Inc. v. Bulotti Const., Inc.*, 145 Idaho 17, 19, 175 P.3d 179, 181 (2007). The plaintiff wanted to restrict the defendant from subdividing a lot within the subdivision into 4 separate lots, which would be a restrictive covenant (not an affirmative easement). *Id.* The Court discussed the creation of implied reciprocal negative easements (or equitable servitudes) in the context of a lot owner in a subdivision attempting to enforce such restrictive covenants on other lots within the subdivision.

“Generally speaking, a restrictive covenant may arise by implication from the language of the deeds, or from the conduct of the parties. Implied covenants are not favored, however, so that in order for a restriction to be thus created, the implication must be plain and unmistakable, or necessary.” 20 AM. JUR. 2d, Covenants, Etc., § 155 (2005). The problem with the Plaintiffs' argument regarding an equitable servitude is that there are no facts supporting it.

The Plaintiffs rely upon cases holding that if the common grantor of property develops land for sale in lots and includes substantially similar restrictions, conditions, and covenants against the use of the property in the deeds conveying various lots, the purchasers of those lots may enforce similar restrictions against the residential lot or lots retained by the grantor or the lots subsequently sold by the grantor without those restrictions. In this case, Bird did not include any restrictions, conditions, or covenants in the deeds conveying any of the lots in the Subdivision. Therefore, there is no factual basis for inferring reciprocal restrictions on the land she retained.

Birdwood, 145 Idaho at 23, 175 P.3d at 185.

In *Birdwood*, the Court found the plaintiffs were not entitled to equitable servitudes because there was no evidence the developer sold lots in a planned unit development with restrictions that could be imposed by other purchasers of lots. *Birdwood* also provides that equitable servitudes in planned unit development cases are only available when a common grantor of property is involved. In the case between the Lees and Willow Creek, there is no common grantor of the properties involved. Kemp Road is not common area for the Lees – as the Lees own no property in the Willow Creek subdivision.

This Court’s decision in the *West Wood* case also involved a planned unit development and the enforcement of a restrictive covenant by one of the unit owners. “This case addresses whether common area allegedly created by a developer/mortgagor may establish an equitable interest in persons who purchase a unit in the project, and whether such interests are enforceable against the mortgagee’s successor in interest.” *West Wood Investments, Inc. v. Acord*, 141 Idaho 75, 83, 106 P.3d 401, 409 (2005). The cases cited to in *West Wood* concerning equitable servitudes also dealt with equitable servitudes in the context of planned unit subdivisions. *Id.* at 84, 106 P. 3d at 409 (“The Sun Valley cases stem from the development of a residential subdivision.”).

The Lees characterization of the equitable servitude discussed in *West Wood* as an affirmative property right is incorrect. *West Wood* (which was a planned unit development case), concerned the developer of a subdivision with a common area lot (“Lot 5”) designated on the subdivision plat that planned to construct a pool and a community building on Lot 5, as noted on a recorded survey. *Id.* at 80-81, 106 P. 3d at 406-07. The developer’s lender foreclosed on Lot 5,

but the district court held that the foreclosure did not impair the rights of the subdivision residents with respect to Lot 5. *Id.* The district court held that the developer's successors would not be able to ignore the equitable rights of the subdivision residents to have Lot 5 remain common area and that the residents had the exclusive use and benefit of the common area and facilities constructed on Lot 5. *Id.*

This Court framed the issues as follows:

This case addresses whether common area allegedly created by a developer/mortgagor may establish an equitable interest in persons who purchase a unit in the project, and whether such interests are enforceable against the mortgagee's successor in interest.

Equitable enforcement of covenants **restricting the use of land** was recognized in the common law of England after the middle of the Nineteenth Century.

Id. at 82, 106 P. 3d 408 (emphasis added).

The restrictive covenant in *West Wood* was a restriction against developing Lot 5 for any purpose other than as common area for the use of the subdivision residents. While the Lees attempt to characterize this as an affirmative right, it is clear that this Court considered the equitable servitude to be a restrictive covenant, not an easement. The equitable servitude was a restriction against removing Lot 5 from the common area of the development – it was not affording the residents a right to use the common area. That right was not discussed in the case, but can be presumed to arise from the subdivision plat that was recorded (as a common law dedication) or from some other recorded document (such as the Covenants, Conditions, and Restrictions for the subdivision). In any event, the *West Wood* decision concerns a restriction against developing Lot

5 in a manner inconsistent with the use of Lot 5 as common area for the planned unit development. It does not stand for the proposition that an equitable servitude can be an affirmative right to use and cross over another's property. But, more importantly, *West Wood* and similar cases are not applicable here, since this case does not concern a planned unit development with a common grantor making promises about the property within the development.

Idaho law does not provide for the creation of an affirmative property right in the same manner as the creation of an equitable servitude in a planned unit development. If that were the case, the statute of frauds would never apply to the creation of easements – since (under the Lees' theory) easements and equitable servitudes are not distinguishable and both provide an affirmative right to use the property of another. However, Idaho (and all other jurisdictions) recognizes a distinction between an easement (which is an affirmative property right) and an equitable servitude (which is a restrictive covenant). Clearly, the Lees want an easement and not an equitable servitude. Because the Lees' legal theory based on the doctrine of equitable servitudes cannot provide the relief sought by the Lees (an affirmative access right), the claim for an equitable servitude was properly dismissed.

Even if the doctrine of equitable servitudes were applicable here, the Lees have not met the requirements to establish that an equitable servitude was created. There is no planned unit development involving a common grantor that promised certain amenities to the Lees who own property in that planned unit development. Rather, this is a situation where one property owner seeks to cross a neighboring property. That is an easement that can only be created by compliance

with the statute of frauds or the limited exceptions to the statute of frauds (discussed in the following section).

Willow Creek requests the Court affirm the district court's holding that the Lees do not have an equitable servitude that permits them to use Kemp Road.

2. The District Court's Holding the Lees do not Have an Easement Over Kemp Road Should be Affirmed

a. The Lees Waived the Easement Issue on Appeal Because the Lees Have Not Appealed Both Bases for the District Court's Determination the Lees Do Not Have an Easement to Use Kemp Road

As noted above, the district court provide two alternate bases for dismissing the Lees claim they had an easement over Kemp Road. The Lees waived any argument they have any right to use Kemp Road by failing to address both grounds for the district court's holding the Lees do not have an easement. Therefore, the Lees' request for this Court to remand this case back to the district court to hear additional evidence as to why the Lees have an easement despite the fact the 1997 Agreement, which purportedly granted the Lees an easement, did not comply with the statute of frauds should be denied.

Rule 35(a)(6), I.A.R., requires that the opening brief, "contain the contentions of the appellant with respect to the issues presented on appeal, the reasons therefor, with citations to the authorities, statutes and parts of the transcript and record relied upon." This Court has repeatedly stated that it will not consider an issue not supported by argument and authority in the opening brief. *See, e.g., Liponis v. Bach*, 149 Idaho 372, 374, 234 P.3d 696, 698 (2010). The Lees' failure to address both grounds for the district court's holding that they do not have an easement

is a bar to that claim. *See Shapley v. Centurion Life Ins. Co.*, 154 Idaho 875, 881, 303 P.3d 234, 239 (2013) (holding failure to address alternate reason for adverse holding below results in a waiver of appeal of the holding).

The district court clearly provided two distinct reasons for dismissing the Lees' request the district court hold they had an easement over Kemp Road. The district court first held that the deed transferring the property that was the subject of the 1997 Agreement failed to reserve or grant an easement and therefore the Lees did not have an easement since the district court would only look to the deed to determine the right to an easement. R. p. 237. As an aside, if this Court determines that an equitable servitude can provide an affirmative access right, Willow Creek requests the Court hold the Lees are barred from advancing their equitable servitude argument since the district court held that, as a matter of law, it would look to only the deed to determine the parties' rights with respect to Kemp Road. R. 237. That deed did not reserve or grant any rights with respect to Kemp Road. *Id.*

The district court then provided an alternate reason why the Lees did not have an easement: the failure to satisfy the statute of frauds and the unavailability of the doctrine of part performance to escape the statute of frauds. *See* R. p. 237 ("Alternatively, the Court finds that the doctrine of part performance is unavailable to enforce the purported easement."). Because the Lees failed to address both grounds for denying the Lees claim they had an easement (or an access right) over Kemp Road, they waived that issue on appeal. Willow Creek requests the Court affirm the district court's holding the Lees do not have an easement without considering any substantive arguments raised by the Lees on appeal.

b. The District Court Correctly Held the Lees Did not Establish they were entitled to specific performance of the 1997 Agreement

The district court held the 1997 Agreement could not be specifically enforced by operation of the doctrine of part performance since the agreement was “too indefinite, incomplete, and uncertain in all of its material terms, and does not contain provisions that are capable in themselves of being reduced to certainty.” R. 238. The Lees must demonstrate the district court abused its discretion in not applying the doctrine of part performance. *See West Wood*, 141 Idaho at 82, 106 P.3d at 408. The Lees failed to establish the district court abused its discretion.

The 1997 Agreement does not comply with the statute of frauds. The 1997 Agreement does not have a valid legal description of any of the parcels of real property involved in the transaction and is not signed by the Kemp Family Trust.

The statute of frauds renders an agreement for the sale of real property invalid unless the agreement or some note or memorandum thereof is in writing and subscribed by the party charged or his agent. I.C. § 9–505(4). **Agreements for the sale of real property that fail to comply with the statute of frauds are unenforceable both in an action at law for damages and in a suit in equity for specific performance.** *Hoffman v. S V Co., Inc.*, 102 Idaho 187, 190, 628 P.2d 218, 221 (1981) (citing 72 Am.Jur.2d Statute of Frauds § 285 (1974); 73 Am.Jur.2d Statute of Frauds § 513 (1974)). An agreement for the sale of real property must not only be in writing and subscribed by the party to be charged, but the writing must also contain a description of the property, either in terms or by reference, so that the property can be identified without resort to parol evidence. *Garner v. Bartschi*, 139 Idaho 430, 435, 80 P.3d 1031, 1036 (2003).

Ray v. Frasure, 146 Idaho 625, 628, 200 P.3d 1174, 1177 (2009) (emphasis added).

“An easement is the right to use the land of another for a specific purpose that is not inconsistent with the general use of the property by the owner. An express easement, being an interest in real property, may only be created by a written instrument.” *Capstar Radio Oper. Co. v. Lawrence*, 143 Idaho 704, 707, 152 P. 2d 575, 578 (2007). “For over 100 years, this Court has held that a contract for the sale of real property must speak for itself and that a court may not admit parol evidence to supply any of the terms of the contract, including the description of the property.” *Ray*, 146 Idaho at 628, 200 P.3d at 1177, citing *Kurdy v. Rogers*, 10 Idaho 416, 423, 79 P. 195, 196 (1904). “The parol evidence rule provides that when a contract has been reduced to a writing that the parties intend to be a final statement of their agreement, evidence of any prior or contemporaneous agreements or understandings which relate to the same subject matter is not admissible to vary, contradict, or enlarge the terms of the written contract.” *Simons v. Simons*, 134 Idaho 824, 828, 11 P.3d 20, 24 (2000), citing *Tusch Enterprises v. Coffin*, 113 Idaho 37, 44, 740 P.2d 1022, 1029 (1987); *Chapman v. Haney Seed Co., Inc.*, 102 Idaho 26, 624 P.2d 408 (1981).

The 1997 Agreement contains no legal descriptions of any of the involved properties and, thus, cannot, as a matter of law, be enforced in law or in equity. *Ray*, 146 Idaho at 628, 200 P.3d at 1177. Additionally, there is no evidence in the record to establish that the 1997 Agreement was signed by the Kemp Family Trust. Pursuant to Idaho Code § 9-508, the 1997 Agreement cannot be enforced. See *Commercial Ventures, Inc. v. Rex M. & Lynn Lea Family Trust*, 145 Idaho 208, 215, 177 P.3d 955, 962 (2008) (finding agreement not signed by property owner or its legal, appointed and duly qualified representative could not be enforced).

In response to the fact that the Lees cannot comply with the statute of frauds with respect to the 1997 Agreement, the Lees concede the 1997 Agreement does not meet the requirements of the statute of frauds, but argue they have partially performed the agreement and therefore argue that the district court should have admitted parol evidence to fill in the missing information not set forth in the 1997 Agreement (such as the location of the easement, the dominant estate, and the servient estate) and the identity of the person that signed the agreement on behalf of the Kemp Family Trust. The Lees contend the district court erred by focusing on the 1997 Agreement without the benefit of parol evidence to fill in the gaps. However, this Court has held that an agreement for the transfer of real property “must be complete, definite, and certain in all its terms, or contain provisions which are capable in themselves of being reduced to certainty, *before it will be specifically enforced by operation of the doctrine of part performance.*” *Chapin v. Linden*, 144 Idaho 393, 396, 162 P.3d 772, 775 (2007) (emphasis added).

The Lees argue that this Court permits the use of parol evidence to supply the terms of an agreement that has been allegedly partially performed. *See* Appellant’s Brief, p. 15. However, the Lees failed to preserve this argument since they never raised the admissibility of parol evidence before the district court. Moreover, the Lees misconstrue the holdings of this Court on when parol evidence would be admissible.

The district court correctly assessed the 1997 Agreement to determine whether the agreement could be specifically enforced by the operation of the doctrine of part performance *before* resorting to any parol evidence. With respect to identifying the purported easement, the 1997 Agreement purportedly describes Kemp Road as, “the gravel road to be constructed by

Buyer adjoining Seller's property." R. p. 44. That is the extent of the description. That is not sufficient.

This Court has adopted a general standard for determining the sufficiency of legal descriptions:

Although this court has never adopted a highly defined standard for determining the sufficiency of a description of land we have adopted a general standard which was set forth in *Allen v. Kitchen*, 16 Idaho 133, 142, 100 P. 1052, 1061 (1909), quoting *Craig v. Zelian*, 137 Cal. 105, 69 P. 853 (1902).

"An agreement for the sale of real property must not only be in writing and subscribed by the party to be charged, but the writing must also contain such a description of the property agreed to be sold, either in terms or by reference, that it can be ascertained without resort to parol evidence. Parol evidence may be resorted to for the purpose of identifying the description contained in the writing, with its location upon the ground, but not for the purpose of ascertaining and locating the land about which the particular parties negotiated, and supplying a description thereof which may have been omitted from the writing."

White v. Rehn, 103 Idaho 1, 3, 644 P.2d 323, 325 (1982).

In *White*, the legal description was "ambiguous on its face and will not support an award for specific performance." *Id.* The exact location of the property at issue (960 acres of farm land) was not known at the time of the transaction and the parties agreed the exact location of the property would be "determined by survey". *Id.* The Court held that parol evidence would not be permitted to clarify the terms of the agreement. *Id.* Implicit in this Court's holding in *White* is the requirement that the legal description must meet the general standard articulated by the Court

in *Allen* without the assistance of parol evidence before it can be enforced pursuant to the doctrine of part performance and parol evidence is only used to marry the property described in the written agreement with its location on the ground, not to supply a description that was not agreed to at the time by the parties. *Id.*

In this case, the district court acted within its discretion when it held the 1997 Agreement could not be specifically enforced by the operation of the doctrine of part performance. The legal description is so deficient that parol evidence would be needed to not only identify the description of the road with its location on the ground, but would be needed to ascertain and locate the road and supply a description that was omitted from the 1997 Agreement – which is not permissible. The gravel road did not exist in 1997, so parol evidence would be needed to ascertain where the road was eventually constructed and then identify the access points – since that information was not known in 1997. This Court has held that in that situation (where parol evidence is needed to ascertain the location of property), an award of specific performance is not available. *White v. Rehn*, 103 Idaho at 3, 644 P.2d at 325. The district court did not abuse its discretion in finding the facts in the record would not support the application of the doctrine of part performance. “There is no legal right to specific performance so the district court employs its discretion to make such an award after balancing the equities between the parties.” *Watson v. Watson*, 144 Idaho 214, 217, 159 P.3d 851, 855 (2007), citing *Kessler v. Tortoise Dev., Inc.*, 134 Idaho 264, 270, 1 P.3d 292, 298 (2000); see also *West Wood*, 141 Idaho at 82, 106 P.3d at 408.

The 1997 Agreement is an agreement to agree in the future and is unenforceable for the purposes of specific performance. See *Karterman v. Jameson*, 132 Idaho 910, 914, 980 P.2d 574,

578 (Ct. App. 1999) (holding specific performance not available to enforce an ambiguous or incomplete agreement). The 1997 Agreement, in a section entitled “Future Development” notes that the parties were both “contemplating future development” and that “[i]n the event that Buyer constructs a recreational center ... Seller shall be entitled to use.... Seller shall also be entitled to 3 driveway accesses from the gravel road to be constructed by Buyer adjoining Seller’s property.” *See R.* p. 44.

In 1997, Kemp Road had not been constructed. The agreement left for future negotiations the location of the driveway accesses – which could only be determined after Kemp Road was constructed. “No enforceable contract comes into being when parties leave a material term for future negotiations, creating a mere agreement to agree.” *Maroun v. Wyreless Systems, Inc.*, 141 Idaho 604, 614, 114 P.3d 974, 984 (2005) (quoting from 17A Am.Jur.2d Contracts § 181 (2004)). The location of the driveways was a material term of the agreement, if the agreement was meant to convey a right to use the driveways. Clearly, since the road had not been constructed, the parties had no idea where the purported driveways would be, leaving that issue open for future negotiations. The location of these accesses was an integral part of the agreement that could not have been negotiated, since the road did not exist.

Additionally, the accesses were “subject to seller obtaining any necessary government approvals.” *Id.* Since the purported access was subject to government approvals, the grant was conditional, not final, and is not enforceable. Consequently, the parties contemplated future negotiations and the 1997 Agreement was an unenforceable agreement to agree.

The district court did not abuse its discretion in not applying the doctrine of part performance. The district court's determination that the 1997 Agreement was too indefinite, incomplete, and uncertain in its terms to allow enforcement by the operation of the doctrine of part performance was consistent with the *White* and *Watson* decisions from this Court and is based on the facts (or lack thereof) in the record.

The Lees cite to *Simons v. Simons*, 134 Idaho 824 11 P.3d 20 (2000) for the proposition that parol evidence may be used to supply a legal description when an agreement does not meet the requirements of the statute of frauds. Appellant's Brief, p. 15. However, *Simons* has been limited to its unique factual situation. In a subsequent case, this Court has limited *Simons* as follows: "In one case where a real estate contract failed to meet the statute of frauds only because of an inadequate property description [Simmons] (sic), this Court permitted parol evidence to clarify an ambiguous property description **when the parties admitted that they agreed to the conveyance of some property in exchange for specific consideration and one of the parties fully delivered that consideration.**" *Bauchman-Kingston P'ship, LP v. Haroldsen*, 149 Idaho 87, 93, 233 P.3d 18, 24 (2008) (emphasis added). Here, there is no evidence concerning what specific consideration was given by the Lees for the purported easement to use Kemp Road. The only evidence of any consideration paid by the Lees is the \$9000 the Kemp Family Trust agreed to pay for the Kemp Property. R. p. 44. There is no evidence to support the contention that the purchase price for the Kemp Property was reduced or discounted in consideration of the alleged grant of an easement. In fact, the 1997 Agreement clearly indicates that the \$9000 was the

purchase price for the Kemp Property. The record contains no evidence of any consideration given for the alleged easement over Kemp Road.

Additionally, in this case, Willow Creek has not admitted that the prior owner of Kemp Road agreed to transfer an easement to the Lees. As noted above, the record contains no evidence that the Kemp Family Trust agreed to the transfer, since the 1997 Agreement was not signed by the Kemp Family Trust and there is no evidence demonstrating the person that signed the 1997 Agreement was authorized by the Kemp Family Trust to do so on its behalf. In *Simons*, the parties admitted the written memorandum of the property transfer agreement was signed by the parties. There is no such admission in this case nor any evidence to support the contention that the person that signed the 1997 Agreement on behalf of the Kemp Family Trust was authorized to do so.

The district court properly concluded the 1997 Agreement was too vague to be specifically enforced. The 1997 Agreement states that the Lees, “shall also be entitled to 3 driveway accesses from the gravel road to be constructed by Buyer adjoining Seller’s property.” R. p. 44. The 1997 Agreement fails to provide any further description of the alleged easement. At the time of the agreement, there was no road. Because the road did not exist at the time the parties allegedly executed the 1997 Agreement, the agreement is incomplete on its face. While the Lees argue this Court should hold that parol evidence can be used to clear up the lack of detail, this Court has held otherwise. *See Nicholson v. Coeur D’Alene Placer Mining Corp.*, 161 Idaho 877, 882, 392 P.3d 1218, 1223 (2017), reh’g denied (Apr. 14, 2017) (“Parol evidence may not be resorted to ‘for the

purpose of ascertaining and locating the land about which the particular parties negotiated.’’), citing *Allen v. Kitchen*, 16 Idaho 133, 142, 100 P. 1052, 1055 (1909).

The Lees ask this Court to resort to parol evidence to identify the location of Kemp Road after it was constructed and to enlarge the terms of the 1997 Agreement to include the location of the road – which necessarily is an enlargement of the 1997 Agreement since there was no gravel road at the time. The parol evidence rule does not permit the Court to enlarge the terms of the 1997 Agreement. *Simons v. Simons*, 134 Idaho 824, 828, 11 P.3d 20, 24 (2000) (“The parol evidence rule provides that when a contract has been reduced to a writing that the parties intend to be a final statement of their agreement, evidence of any prior or contemporaneous agreements or understandings which relate to the same subject matter is not admissible to vary, contradict, or enlarge the terms of the written contract.”). Therefore, the description is inadequate to support a cause of action for specific performance.

The district court did not abuse its discretion in not applying the doctrine of part performance. The district court considered the undisputed facts and cited to pronouncements from this Court that supported its conclusion. The Lees have not demonstrated the district court’s decision was an abuse of discretion. Willow Creek requests the Court affirm the district court’s holding that the 1997 Agreement cannot be specifically enforced.

c. The Lees Have Not Established Sufficient Part Performance

Even if the Court finds the 1997 Agreement was capable of enforceable via the doctrine of part performance, the record contains no evidence that the Lees made any valuable improvements to Kemp Road or that they used Kemp Road for the purposes outlined in the 1997 Agreement,

which are the most important acts in establishing sufficient part performance. Willow Creek requests the Court affirm the district court's holding the 1997 Agreement was not enforceable on the alternate ground that the record does not contain sufficient evidence to trigger operation of the doctrine of part performance.

Sufficient part performance by a purchaser of real property removes the contract from the operation of the statute of frauds, and although the equitable doctrine of part performance is inapplicable to an action at law, satisfaction of the doctrine of part performance would entitle [the plaintiffs] to specific performance.

The most important acts which constitute a sufficient part performance are actual possession, permanent and valuable improvements and these two combined.... In addition, improvements made by a party and upon which they rely for part performance must be substantial in relation to the value of the property.

Hoffman v. S V Co., 102 Idaho 187, 191, 628 P.2d 218, 222 (1981) (emphasis added).

Under the doctrine of part performance, when an agreement to convey real property fails to meet the requirements of the statute of frauds-as in this case where the alleged agreement was not reduced to writing-the agreement may nevertheless be specifically enforced when *the purchaser* has partly performed the agreement.

...

Improvements, in order to constitute part performance, must be substantial in relation to the value of the property.

...

The acts constituting part performance must be proven by clear and convincing evidence and the must also be definitely referable to the alleged ... contract.

Bear Island Water Ass'n, Inc. v. Brown, 125 Idaho 717, 722-23, 874 P.2d 528, 533-34 (1994).

The Lees have not established that they have been in possession of Kemp Road since 1997 for development purposes and they have presented no evidence that they have ever made any

substantial improvements to Kemp Road. Therefore, they have not established sufficient part performance to constitute an exception to the statute of frauds.

The Lees contend the construction of culverts and entries by the Kemp Family Trust is evidence of part performance. *See Appellant's Brief*, p. 15. However, the Lees need to demonstrate that they (not the Kemp Family Trust) made substantial improvements to Kemp Road. The record is void of any evidence of improvements to Kemp Road made by *the Lees*, let alone evidence of substantial improvements in relation to the value of the property.

Likewise, there is no evidence in the record establishing that the Lees have taken actual possession of Kemp Road under and for the purposes set forth in the 1997 Agreement. The Lees contend the access through Kemp Road was to be for development purposes. *See R.* p. 13 (“The purpose of [the 1997 Agreement] was to ensure access for the Lees *at a future date* when the Lees developed the Lee Development Property.”) (emphasis added). It is undisputed that the Lees have not developed their property. Therefore, the Lees have never accessed their property via Kemp Road pursuant to the 1997 Agreement. Consequently, the Lees have not met the requirements for partial performance and they are not entitled to specific performance of the 1997 Agreement. *See Simons*, 134 Idaho at 827, 11 P.3d at 23 (“The acts constituting part performance must be proven by clear and convincing evidence, and they must also be definitely referable to the alleged oral contract.”).

Willow Creek requests the Court affirm the dismissal of the Lees' easement claim because the record does not support application of the part performance doctrine.

d. The Lees Claim for Specific Performance was not raised below

The Lees explicitly argued to the district court that they were not seeking specific performance as a remedy. The Lees argued to the district court as follows:

The HOA makes a desperate attempt to argue that the Lees' are requesting new relief, "specific performance" of the 1997 Agreement. See HOA Reply Memo in Support of MSJ, pp. 8-10. The HOA makes up this "specific performance," argument because it provides the HOA a number of new and different defenses. However, the argument is based on a faulty premise—that the Lees are asking this Court for specific performance. **The Lees are not asking for specific performance** (the access points and the Lees already have access and the HOA has nothing to perform). Indeed, a review of the pleadings affirmative proves this.

See R. 219 (emphasis added).

The Lees took the position that they were not seeking specific performance as a remedy before the district court. Therefore because the Lees, by their own admission, did not raise the issue of specific performance before the district court, the issue is not properly before this Court. “It is clearly established under Idaho law that a cause of action not raised in a party's pleadings may not be considered on summary judgment nor may it be considered for the first time on appeal.” *Kelly v. State*, 149 Idaho 517, 523, 236 P.3d 1277, 1283 (2010). The Lees took the position that they were not seeking specific performance and argued that claim was not raised in their pleadings. Therefore, the claim should not be considered on appeal.

e. The Lees Claim for Specific Performance is Barred by the Statute of Limitations.

A cause of action for specific performance of a written real estate purchase and sale agreement is a form of breach of contract and is subject to a five-year statute of limitations. *See Peterson v. Gentillon*, 154 Idaho 184, 189, 296 P.3d 390, 395 (2013) (holding Idaho Code § 5-216

applies to claims for specific performance of a written agreement and statute of limitations period to bring claims for specific performance of a written agreement is 5 years). The 1997 Agreement was purportedly entered into by the Lees and the Kemp Family Trust in 1997. The Lees never developed their property and never took possession of the purported easement over Kemp Road for driveways to homes they intended (and still apparently intend) on building on their property. Therefore, the cause of action for specific performance accrued in 1997. *Id.* The statute of limitations on any claim for specific performance expired in 2002, well before the Lees filed their Complaint in this matter.

Willow Creek requests the Court affirm the district court's dismissal of the Lees' Complaint on this alternate ground.

3. Willow Creek is Entitled to Attorney Fees Pursuant to Idaho Code § 12-120(3)

The Lees Alleged the Existence of a Commercial Transaction and Sought to Enforce the Underlying Agreement that Comprised the Commercial Transaction Against Willow Creek.

Willow Creek requests attorney fees on appeal pursuant to I.A.R. 41 and Idaho Code 12-120(3). As the defendant, in order to establish it is entitled to attorney fees pursuant to Idaho Code § 12-120(3), Willow Creek need only demonstrate that the Lees *alleged* the existence of a commercial transaction, that the commercial transaction was the gravamen of the Lees complaint, and that the Lees sought to enforce the terms of the commercial transaction against Willow Creek.

Idaho Code Section 12-120(3) provides for attorney fees to the prevailing party in a civil action to recover on "any commercial transaction." Commercial transactions are all transactions except for personal or household purposes. I.C. § 12-120(3). Whether there is a commercial transaction is a question of law over which this Court

exercises free review. *See Great Plains Equip. v. Northwest Pipeline Corp.*, 136 Idaho 466, 470, 36 P.3d 218, 222 (2001). **“Where a party alleges the existence of a contractual relationship of a type embraced by section 12–120(3) ... that claim triggers the application of [I.C. § 12–120(3)] and a prevailing party may recover fees even though no liability under a contract was established.”** *Farmers Nat. Bank v. Shirey*, 126 Idaho 63, 73, 878 P.2d 762, 772 (1994). “This same principle applies where the action is one to recover in a commercial transaction, regardless of the proof that the commercial transaction alleged did, in fact, occur.” *Magic Lantern Prod. v. Dolsot*, 126 Idaho 805, 808, 892 P.2d 480, 483 (1995). **Idaho courts will consider whether the parties alleged the application of I.C. § 12–120.** *See Fritts v. Liddle & Moeller Const.*, 144 Idaho 171, 174–75, 158 P.3d 947, 950–51 (2007) (“[both parties] in their answer and counterclaim ... clearly allege that I.C. § 12–120 applies.”); *Cannon Builders, Inc. v. Rice*, 126 Idaho 616, 624, 888 P.2d 790, 798 (Ct.App.1995) (“**the nature of the suit, which includes a claim that Crooks was entitled to enforce the Rice–Cannon contract as a third-party beneficiary, was sufficiently based on a commercial transaction....**”).

De Groot v. Standley Trenching, Inc., 157 Idaho 557, 567, 338 P.3d 536, 546 (2014) (emphasis added).

The Lees clearly alleged the existence of a commercial transaction, namely the 1997 Sale Agreement. In their Complaint, the Lees alleged the purpose of the Sale Agreement was to further the development of their property and the development of the adjacent property that eventually became the Willow Creek Subdivision. *See* R. 13 (“the purpose of the above cited-cited language [of the Sale Agreement] was to ensure access for the Lees at a future date when the Lees developed the Lee Development Property.”). This Court has held that when a party enters into a real estate purchase and sale agreement with the purpose of furthering development of the property, that is a commercial transaction upon which attorney fees and costs must be awarded to the prevailing party. *See Lexington Heights Development, LLC v. Crandlemire*, 140 Idaho 276, 287, 92 P.3d 526,

537 (2004) (“The purpose of the alleged Agreement was for Lexington Heights to acquire the ninety acres to develop it into a subdivision. Therefore, the alleged Agreement was a commercial transaction.”)

The Lees alleged in the Complaint and throughout the litigation have taken the position that the Sale Agreement is enforceable against Willow Creek. For example, in the Complaint, the Lees allege the “Sale Agreement is binding on the Willow Creek HOA, because they had actual and constructive knowledge of the Sale Agreement....” R. 15.

In addition to the allegations in the Complaint and arguments in the pleadings that the commercial transaction can be enforced against Willow Creek, the Lees requested attorney fees in their Complaint pursuant to Idaho Code § 12-120. *See* R. 16 (“the Lees have had to retain counsel and are entitled to attorney fees pursuant to statute, including but not limited to Idaho Code §§ **12-120**, 12-121 and Rule 54(e)(1) of the Idaho Rules of Civil Procedure.”) (emphasis added). Although this Court has held that merely referencing § 12-120 in a complaint is alone not sufficient to be the basis of a fee award, the Lees citation to Idaho Code § 12-120 combined with the allegations in the Complaint concerning the Lees’ desire to enforce the 1997 Sale Agreement against Willow Creek is sufficient basis for the Court to award attorney fees to Willow Creek pursuant to § 12-120(3) on appeal. *See DeGroot* at 567, 338 P. 3d at 546 (holding prevailing party entitled to attorney fee award pursuant to Idaho Code § 12-120(3) when losing party alleged entitlement to attorney fees under § 12-120 and alleged the existence of a commercial transaction it sought to enforce against the prevailing party); *see also Fritts*, 144 Idaho at 174–75, 158 P.3d at

950–51 (finding “parties adequately raised the issue of attorney fees awardable under § 12-120” based, in part, on the fact that both parties alleged applicability of § 12-120 in their pleadings.).

This Court has held that the existence of a commercial transaction between the parties is not necessary when a defendant prevails in litigation brought by a plaintiff that sought to *enforce* the terms of a commercial transaction against the prevailing defendant. In *Cannon Builders, Inc. v. Rice*, 126 Idaho 616, 888 P.2d 790 (1995), the Court awarded attorney fees against a plaintiff that sought to enforce an agreement to which it was not a party to under a theory that it was a third-party beneficiary of the agreement. The Court held the plaintiff had sufficiently alleged the existence of a commercial transaction that warranted an award of attorney fees and reasoned as follows:

All three parties involved have requested an award of attorney fees on this appeal. Idaho Code § 12-120(3) authorizes an award of fees to prevailing parties in a civil action based on a commercial transaction. The transaction between Cannon and Rice clearly falls within the definition of commercial transaction found in § 12-120(3). Therefore, Cannon is entitled to an award of costs and attorney fees on this appeal against Rice. With respect to Crooks, we conclude that the nature of the suit, which includes a claim that Crooks was entitled to enforce the Rice-Cannon contract as a third party beneficiary, was sufficiently based on a commercial transaction to warrant an award of fees under § 12-120(3). Therefore, we award costs and attorney fees to Rice against Crooks.

Cannon Builders, 126 Idaho at 624, 888 P.2d at 798.

Even though the commercial transaction was not between Crooks and Rice, this Court affirmed the district court’s award of attorney fees against Crooks based on the fact that they had alleged the existence of a commercial transaction that they sought to *enforce* against Rice as the

alleged third-party beneficiary under the contract it had with Cannon. The situation here is the same. The Lees alleged the existence of a commercial transaction (the 1997 Sale Agreement) that the Lees sought to enforce against Willow Creek – even though Willow Creek was not a party to that transaction. Therefore, despite the fact that the Lees and Willow Creek were not parties to the commercial transaction that was the gravamen of the Lees’ complaint, the Lees sought to *enforce* the terms of that commercial transaction against Willow Creek. The Lees themselves also alleged in the Complaint that they were entitled to attorney fees pursuant to Idaho Code § 12-120. The Lees triggered the application of Idaho Code § 12-120(3). Willow Creek, if it prevails on this appeal, requests and award of attorney fees pursuant to Idaho Code §12-120(3).

IV. CONCLUSION

Willow Creek requests the Court affirm the district court’s dismissal of the Lees’ Complaint. Willow Creek also requests an award of attorney fees and costs on appeal.

DATED this 3 day of April, 2018.

ELAM & BURKE, P.A.

By: Matthew Parks
Matthew C. Parks, Of the firm
Attorneys for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 3 day of April, 2018, I caused a true and correct copy of the foregoing document to be served as follows:

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Matthew C. Parks

Dale and Kathy Lee Small Vicinity Map

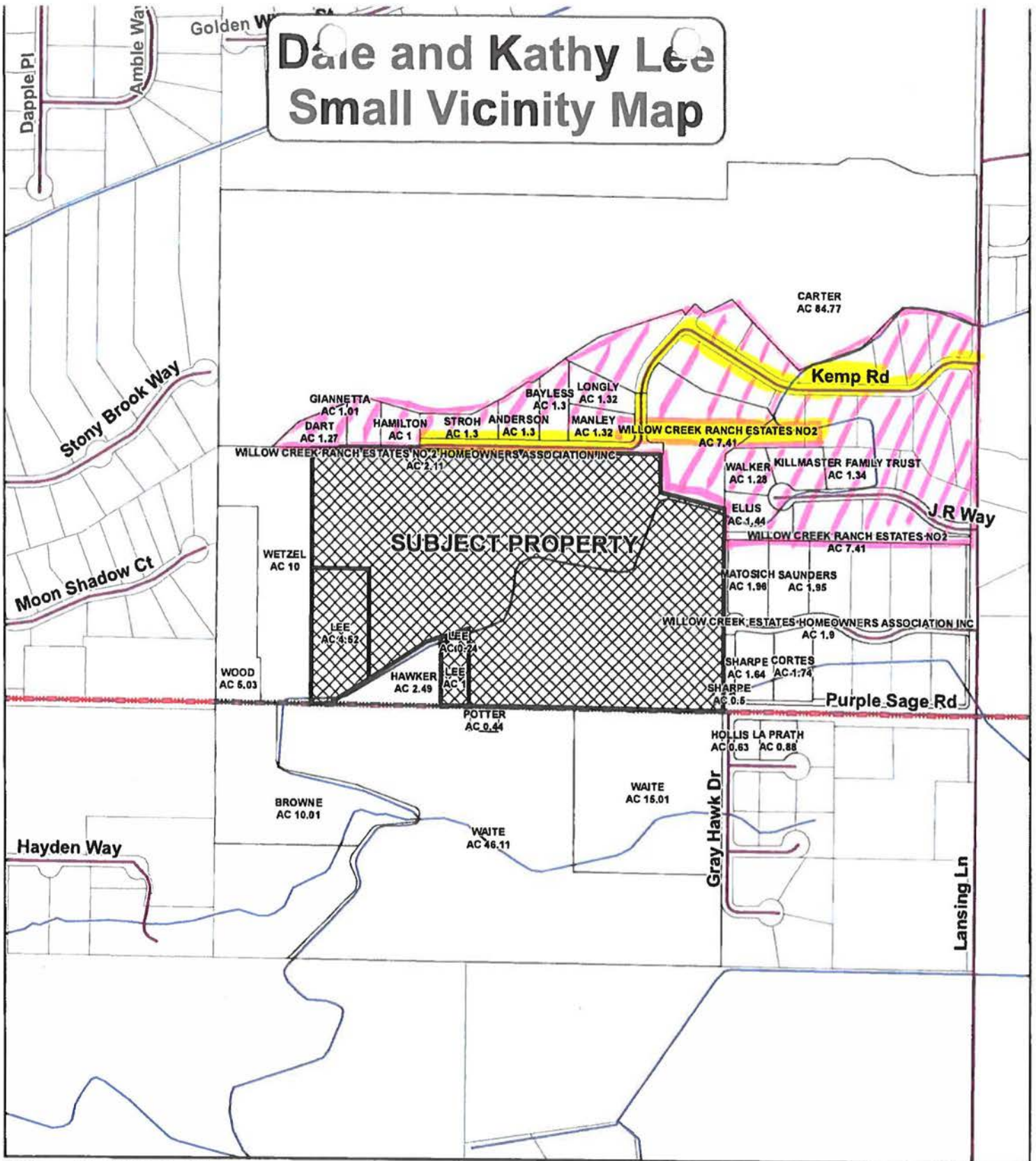
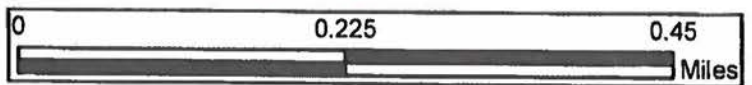


Exhibit A



• Illustrative Purposes only