12-15-2017

Lee v. Willow Creek Ranch Estates No. 2 Subdivision Homeowners' Association, Inc. Clerk's Record Dckt. 45390

IN THE SUPREME COURT OF THE

STATE OF IDAHO

DALE LEE and KATHI LEE, Husband and Wife, Plaintiffs-Appellants, -vs- WILLOW CREEK RANCH ESTATES NO. 2 SUBDIVISION HOMEOWNERS' ASSOCIATON, INC., and Idaho corporation, Defendant-Respondent, and DOES I-X, inclusive, Defendants.	)	Supreme Court No. 45390-2017

Appeal from the Third Judicial District, Canyon County, Idaho.

HONORABLE CHRISTOPHER S. NYE, Presiding

Daniel W. bower, STEWART TAYLOR & MORRIS, PLLC
12550 W. Explorer Drive, Suite 100, Boise, Idaho 83713

Attorneys for Appellants

Chris T. Troupis, TROUPIS LAW OFFICE, P.A.
701 E. State Street, Ste. 50, PO box 2408, Eagle, Idaho 83616

Attorneys for Respondent

CANYON COUNTY DISTRICT COURT

CASE SUMMARY

CASE NO. CV-2016-3425

Dale Thomas Lee, Kathi Lee	§	Location:	**Canyon County District Court**
vs.	§	Judicial Officer:	**Nye, Christopher S.**
Willow Creek Ranch Estates homeowners association	§	Filed on:	**04/11/2016**
	§	Appellate Case Number:	**45390-2017**
	§	Previous Case Number:	**CV-2016-3425-C**
	§		

CASE INFORMATION

Statistical Closures
09/22/2017 Closed

Case Type: **AA- All Initial District Court Filings (Not E, F, and H1)**

Bonds
Transcript Bond #CV-2016-3425 $100.00
9/22/2017 Posted

DATE — CASE ASSIGNMENT

Current Case Assignment

Case Number	CV-2016-3425
Court	Canyon County District Court
Date Assigned	04/11/2016
Judicial Officer	Nye, Christopher S.

PARTY INFORMATION

		Lead Attorneys
Plaintiff	**Lee, Dale Thomas**	**Bower, Daniel Wayne** *Retained* 208-345-3333(W)
	Lee, Kathi	**Bower, Daniel Wayne** *Retained* 208-345-3333(W)
Defendant	**Willow Creek Ranch Estates homeowners association**	**Parks, Matthew Christopher** *Retained* 208-343-5454(W)

DATE	EVENTS & ORDERS OF THE COURT	INDEX
04/11/2016	New Case Filed Other Claims *New Case Filed-Other Claims*	
04/11/2016	Complaint Filed *Complaint Filed*	
04/11/2016	Summons Issued *Summons Issued*	
04/12/2016	Miscellaneous *Filing: AA- All initial civil case filings in District Court of any type not listed in categories E, F and H(1) Paid by: Bower, Daniel W (attorney for Lee, Dale Thomas) Receipt number: 0022735 Dated: 4/12/2016 Amount: $221.00 (Check) For: Lee, Dale Thomas (plaintiff) and Lee, Kathi (plaintiff)*	
04/21/2016	Affidavit of Service *Affidavit of Service - 04.13.16 - Willow Creek Ranch HOA (Rhonda Curry) (Fax)*	
05/04/2016	Miscellaneous *Filing: I1 - Initial Appearance by persons other than the plaintiff or petitioner Paid by:*	

	Troupis, Chris T (attorney for Willow Creek Ranch Estates homeowners association) Receipt number: 0027529 Dated: 5/4/2016 Amount: $136.00 (Check) For: Willow Creek Ranch Estates homeowners association (defendant)
05/04/2016	Answer *Answer and Affirmative Defenses to Complaint*
05/04/2016	Notice of Service *Notice Of Service*
05/10/2016	Order *Order to File Stipulated Trial Dates*
05/25/2016	Stipulation *Stipulation for Scheduling Trial (fax)*
06/03/2016	Miscellaneous *Order Setting Pretrial Conference and Jury Trial*
06/03/2016	Hearing Scheduled *Hearing Scheduled (Jury Trial 02/28/2017 09:00 AM) 3 day*
06/03/2016	Hearing Scheduled *Hearing Scheduled (Pre Trial 12/22/2016 11:00 AM)*
06/06/2016	Notice of Service *Notice Of Service*
06/17/2016	Stipulation *Stipulation for Scheduling and Planning (Fax)*
06/20/2016	Motion *Plaintiff's Motion for summary judgment*
06/20/2016	Memorandum *Memorandum in support of Plaintiff's Motion for summary judgment*
06/20/2016	Miscellaneous *Declaration of Alan Mills*
06/20/2016	Miscellaneous *Declaration of Dale Lee*
06/20/2016	Certificate of Service *Certificate of Service*
06/20/2016	Notice of Hearing *Notice Of Hearing 8/18/16 9am*
06/20/2016	Hearing Scheduled *Hearing Scheduled (Motion Hearing 08/18/2016 09:00 AM)*
07/14/2016	Notice *Notice of Association of Counsel (fax)*
08/04/2016	Memorandum *Defendant's Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment*
08/04/2016	Affidavit *Affidavit of Matthew C. Parks in Support of Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment*

08/04/2016	Affidavit *Declaration of Ray Tschohl*
08/09/2016	Hearing Vacated *Hearing result for Motion Hearing scheduled on 08/18/2016 09:00 AM: Hearing Vacated-counsel to file amended notice moving the SJM to 9/15*
08/09/2016	Notice of Hearing *Amended Notice Of Hearing (fax)9/15/16*
08/09/2016	Affidavit of Service *Affidavit Of Service (fax)*
08/09/2016	Hearing Scheduled *Hearing Scheduled (Motion Hearing 09/15/2016 09:00 AM) Plts. Motn for summary judgment*
08/18/2016	*CANCELED* **Motion Hearing** (9:00 AM) (Judicial Officer: Nye, Christopher S.) *Vacated* *Hearing result for Motion Hearing scheduled on 08/18/2016 09:00 AM: Hearing Vacated-counsel to file amended notice moving the SJM to 9/15*
08/19/2016	Affidavit *Affidavit of Ray Tschohl fax*
09/08/2016	Memorandum *Reply Memorandum in Support of Plaintiff's Motion for Summary Judgment (Fax)*
09/15/2016	DC Hearing Held: Court Reporter: # of Pages: *Hearing result for Motion Hearing scheduled on 09/15/2016 09:00 AM: District Court Hearing Held* *Court Reporter: Patricia Terry* *Number of Transcript Pages for this hearing estimated: less than 100 pages Plts. Motn for summary judgment*
09/15/2016	Hearing Held *Hearing result for Motion Hearing scheduled on 09/15/2016 09:00 AM: Hearing Held Plts. Motn for summary judgment*
09/15/2016	Hearing Held *Hearing result for Motion Hearing scheduled on 09/15/2016 09:00 AM: Motion Held Plts. Motn for summary judgment*
09/15/2016	Miscellaneous *Hearing result for Motion Hearing scheduled on 09/15/2016 09:00 AM: Plan Denied Plts. Motn for summary judgment*
09/15/2016	**Motion Hearing** (9:00 AM) (Judicial Officer: Nye, Christopher S.) *Plts. Motn for summary judgment Hearing result for Motion Hearing scheduled on 09/15/2016 09:00 AM: District Court Hearing Held* *Court Reporter: Patricia Terry* *Number of Transcript Pages for this hearing estimated: less than 100 pages*
09/28/2016	Notice of Service *Notice Of Service of Plaintiffs Interrogartories - fax*
10/27/2016	Notice of Service *Notice Of Service of Discovery*
12/15/2016	Pretrial Memorandum *Defendant's Pre-trial Memorandum (fax)*

12/15/2016	Miscellaneous *Plaintiff's Pre-trial Statement (fax)*
12/22/2016	DC Hearing Held: Court Reporter: # of Pages: *Hearing result for Pre Trial scheduled on 12/22/2016 11:00 AM: District Court Hearing Held* *Court Reporter: Tamara Weber* *Number of Transcript Pages for this hearing estimated: Less than 100 pages*
12/22/2016	Hearing Held *Hearing result for Pre Trial scheduled on 12/22/2016 11:00 AM: Hearing Held*
12/22/2016	Hearing Scheduled *Hearing Scheduled (Conference - Status 01/23/2017 08:30 AM) telephonic; Court to initiate*
12/22/2016	**Pre Trial** (11:00 AM) (Judicial Officer: Nye, Christopher S.) *Hearing result for Pre Trial scheduled on 12/22/2016 11:00 AM: District Court Hearing Held* *Court Reporter: Tamara Weber* *Number of Transcript Pages for this hearing estimated: Less than 100 pages*
01/23/2017	DC Hearing Held: Court Reporter: # of Pages: *Hearing result for Conference - Status scheduled on 01/23/2017 08:30 AM: District Court Hearing Held* *Court Reporter: Tamara Weber* *Number of Transcript Pages for this hearing estimated: Less than 100 pages*
01/23/2017	Hearing Held *Hearing result for Conference - Status scheduled on 01/23/2017 08:30 AM: Hearing Held*
01/23/2017	Continued *Hearing result for Conference - Status scheduled on 01/23/2017 08:30 AM: Continued*
01/23/2017	Hearing Scheduled *Hearing Scheduled (Conference - Status 02/16/2017 08:45 AM) telephonic; court to initiate*
01/23/2017	**Status Conference** (8:30 AM) (Judicial Officer: Nye, Christopher S.) *Hearing result for Conference - Status scheduled on 01/23/2017 08:30 AM: District Court Hearing Held* *Court Reporter: Tamara Weber* *Number of Transcript Pages for this hearing estimated: Less than 100 pages*
01/24/2017	Motion *Defendant's Motion in Limine (Fax)*
01/24/2017	Memorandum *Memorandum in Support of Defendant's Motions in Limine (Fax)*
01/24/2017	Motion *Defendant's Motion to Shorten Time for hearing in Defendant's Motions in Limine (w/order) (Fax)*
01/30/2017	Memorandum *Memorandum in Opposition to Defendant's Motion in Limine*
01/30/2017	Affidavit *Declaration of Daniel W Bower in Support of the Lees' Memorandum in Opposition to Defendant's Motion in Limine*
01/31/2017	Hearing Scheduled *Hearing Scheduled (Motion Hearing 02/01/2017 01:00 PM) motion to shorten time/motion in limine*
01/31/2017	Hearing Scheduled

	Hearing Scheduled (Motion Hearing 02/01/2017 10:00 AM) motion to shorten time/motion in limine
02/01/2017	Hearing Vacated *Hearing result for Motion Hearing scheduled on 02/01/2017 10:00 AM: Hearing Vacated motion to shorten time/motion in limine*
02/01/2017	*CANCELED* **Motion Hearing** (10:00 AM) (Judicial Officer: Nye, Christopher S.) *Vacated* *motion to shorten time/motion in limine Hearing result for Motion Hearing scheduled on 02/01/2017 10:00 AM: Hearing Vacated*
02/10/2017	Motion *Joint Motion To Postpone Trial wo/order-Fax*
02/16/2017	DC Hearing Held: Court Reporter: # of Pages: *Hearing result for Conference - Status scheduled on 02/16/2017 08:45 AM: District Court Hearing Held* *Court Reporter: Tamara Weber* *Number of Transcript Pages for this hearing estimated: Less than 100 pages*
02/16/2017	Hearing Held *Hearing result for Conference - Status scheduled on 02/16/2017 08:45 AM: Hearing Held*
02/16/2017	Hearing Vacated *Hearing result for Court Trial scheduled on 02/28/2017 09:00 AM: Hearing Vacated 3 day*
02/16/2017	Hearing Scheduled *Hearing Scheduled (Conference - Status 06/15/2017 09:00 AM) all motions*
02/16/2017	**Status Conference** (8:45 AM) (Judicial Officer: Nye, Christopher S.) *Hearing result for Conference - Status scheduled on 02/16/2017 08:45 AM: District Court Hearing Held* *Court Reporter: Tamara Weber* *Number of Transcript Pages for this hearing estimated: Less than 100 pages*
02/28/2017	**Court Trial** (9:00 AM) (Judicial Officer: Nye, Christopher S.) **03/01/2017-03/02/2017** *3 day Hearing result for Court Trial scheduled on 02/28/2017 09:00 AM: Hearing Vacated*
05/18/2017	Motion *Motion to strike or in the alternative, postpone defendants motion for summary judgment (fax)*
05/18/2017	Motion *Defendant's motion for summary judgment w/out order*
05/18/2017	Memorandum *Memorandum in support of defendant's motion for summary judgment*
05/18/2017	Notice of Hearing *Notice Of Hearing on defendants motion for summary judgment June 15, 2017 9:00 am*
05/22/2017	Memorandum *Defendant's Memorandum in Opposition to Plaintiff's Motion to Strike or in the Alternative Postpone Defendant's Motion for Summary Judgment (Fax)*
05/30/2017	Memorandum *Reply memorandum in support of motion to strike or in the alternative, postpone, defendans motion for summary judgment (Fax)*
06/05/2017	Hearing Vacated *Hearing result for Conference - Status scheduled on 06/15/2017 09:00 AM: Hearing Vacated*

	all motions defnd motn for summary judgment
06/05/2017	Hearing Scheduled *Hearing Scheduled (Motion Hearing 07/14/2017 11:00 AM) all motions defnd motn for summary judgment*
06/06/2017	Notice of Hearing *Amended Notice Of Hearing- 07.14.2017*
06/15/2017	*CANCELED* **Status Conference** (9:00 AM) (Judicial Officer: Nye, Christopher S.) *Vacated* *all motions defnd motn for summary judgment Hearing result for Conference - Status scheduled on 06/15/2017 09:00 AM: Hearing Vacated*
07/14/2017	DC Hearing Held: Court Reporter: # of Pages: *Hearing result for Motion Hearing scheduled on 07/14/2017 11:00 AM: District Court Hearing Held* *Court Reporter: Tamara Weber* *Number of Transcript Pages for this hearing estimated: less than 100 pages*
07/14/2017	Hearing Held *Hearing result for Motion Hearing scheduled on 07/14/2017 11:00 AM: Hearing Held*
07/14/2017	Continued *Hearing result for Motion Hearing scheduled on 07/14/2017 11:00 AM: Continued*
07/14/2017	Hearing Scheduled *Hearing Scheduled (Motion Hearing 08/17/2017 09:00 AM) all motions pending / to be filed def. MSJ*
07/14/2017	Hearing Scheduled *Hearing Scheduled (Court Trial 09/21/2017 01:30 PM) Court Trial (1 1/2 days)*
07/14/2017	Notice of Hearing *Amended Notice Of Hearing on defendants motion for summary judgment and defendants motion in limine*
07/14/2017	**Motion Hearing** (11:00 AM) (Judicial Officer: Nye, Christopher S.) *Hearing result for Motion Hearing scheduled on 07/14/2017 11:00 AM: District Court Hearing Held* *Court Reporter: Tamara Weber* *Number of Transcript Pages for this hearing estimated: less than 100 pages*
07/21/2017	Memorandum *Memorandum in opposition to defendant's motion for summary judgment*
07/21/2017	Motion *Plaintiffs motion for summary judgment or alternatively partial summery judgment on issue of partial performance*
07/21/2017	Memorandum *Memorandum in support of plaintiffs' motion for summary judgment or alternatively partial summary judgment on issue of partial performance*
07/21/2017	Affidavit *Affidavit of Richard Horn*
07/31/2017	Notice of Hearing *Notice Of Hearing*
08/03/2017	Motion *Willow Creek Ranch Estates Motion To Amend Answer*

08/03/2017	Objection *Willow Creek Ranch Estates Opposition To Plaintiffs' Motion For Summary Judgment*
08/03/2017	Memorandum *Willow Creek Estates Rely Memorandum In Support Of Defendant's Motion For Summary Judgment*
08/03/2017	Affidavit *Declarayion Of Ray Tschohl*
08/07/2017	Memorandum *Plantiff's Memorandum in oppostion to defendants motion to amend answer*
08/07/2017	Memorandum *Reply Memorandum in support of plaintiff's motion for summary judgment or alternatively partial summary judgment*
08/09/2017	Answer *Willow Creek Ranch Estates Reply Memorandum in Support of Motion to Amend Answer (fax)*
08/17/2017	Hearing Vacated *Hearing result for Motion Hearing scheduled on 08/17/2017 09:00 AM: Hearing Vacated all motions pending / to be filed* *def. MSJ*
08/17/2017	*CANCELED* **Motion Hearing** (9:00 AM) (Judicial Officer: Nye, Christopher S.) *Vacated* *all motions pending / to be filed* *def. MSJ Hearing result for Motion Hearing scheduled on 08/17/2017 09:00 AM: Hearing Vacated*
08/31/2017	Decision or Opinion *Memorandum Decision and Order on parties' motion for summary judgment and HOA's motion to amend*
09/13/2017	Memorandum *Willow Creek Ranch Estates Memorandum of Costs and Attorney Fees*
09/13/2017	Affidavit *Affidavit of Matthew Parks in Support of Willow Creek Ranch Estates No 2 Subdivision Homeowners' Association, Incs Memorandum of Costs and Attorney Fees*
09/14/2017	Judgment *Judgment - Dismissed*
09/14/2017	Hearing Vacated *Hearing result for Court Trial scheduled on 09/21/2017 01:30 PM: Hearing Vacated Court Trial (1 1/2 days)*
09/14/2017	Civil Disposition Entered *Civil Disposition entered for: Willow Creek Ranch Estates homeowners association, Defendant; Lee, Dale Thomas, Plaintiff; Lee, Kathi, Plaintiff. Filing date: 9/14/2017*
09/14/2017	Status Changed *Case Status Changed: Closed*
09/14/2017	**Dismissed With Prejudice** Party (Lee, Dale Thomas) Party (Lee, Kathi) Party (Willow Creek Ranch Estates homeowners association)

09/21/2017	**Court Trial** (1:30 PM) (Judicial Officer: Nye, Christopher S.) *Court Trial (1 1/2 days) Hearing result for Court Trial scheduled on 09/21/2017 01:30 PM: Hearing Vacated*
09/22/2017	Miscellaneous *Filing: L4 - Appeal, Civil appeal or cross-appeal to Supreme Court Paid by: Stewart Taylor & Morris PLLC Receipt number: 0052805 Dated: 9/22/2017 Amount: $129.00 (Check) For: Lee, Dale Thomas (plaintiff) and Lee, Kathi (plaintiff)*
09/22/2017	Bond Posted - Cash *Bond Posted - Cash (Receipt 52806 Dated 9/22/2017 for 100.00) (Court Record)*
09/22/2017	Reopen (case Previously Closed) *Reopen (case Previously Closed)*
09/22/2017	Notice of Appeal *Notice of Appeal*
09/22/2017	Appeal Filed in Supreme Court *Appealed To The Supreme Court*
09/22/2017	Status Changed *Case Status Changed: closed pending clerk action*
09/25/2017	Motion *Motion to Disallow Memorandum of Costs and Attorney Fees (fax)*
09/25/2017	Memorandum *Memorandum in Support of Plaintiff's Motion to Disallow Willow Creek Ranch Estates Memorandum of Costs and Attorney Fees (fax)*
09/26/2017	Memorandum of Costs & Attorney Fees *Willow Creek Ranch Estates Amended Memorandum of Costs and Attorney Fees (fax)*
10/05/2017	Notice of Hearing *Notice Of Hearing*
10/05/2017	Hearing Scheduled *Hearing Scheduled (Motion Hearing 11/15/2017 09:00 AM) motn to disallow memo of costs and fees*
10/26/2017	Notice of Hearing *Amended*
11/17/2017	Response *Def Response to Plf Mot to Disallow Costs & Fees*
11/21/2017	Notice of Withdrawal of Attorney *as Co-Counsel*
11/27/2017	Notice of Hearing *Second Amended Notice of Hearing 1-18-18 9:00am*
12/01/2017	Order *(S C - Conditionally Dismissing Appeal)*
12/14/2017	Miscellaneous

	Balance paid for clerk's record on appeal, $61.85	
12/14/2017	Supreme Court Document Filed-Misc *Order Dismissing Appeal*	
12/14/2017	Supreme Court Document Filed-Misc *Order to Withdraw Dismissal and Reinstate Appeal*	
12/21/2017	*CANCELED* **Motion Hearing** (9:00 AM) (Judicial Officer: Nye, Christopher S.) *Vacated* *motn to disallow memo of costs and fees*	
01/18/2018	**Motion Hearing** (9:00 AM) (Judicial Officer: Nye, Christopher S.) *Plt Mo Disallow Costs*	

DATE	FINANCIAL INFORMATION	
	Defendant Willow Creek Ranch Estates homeowners association	
	Total Charges	136.00
	Total Payments and Credits	136.00
	Balance Due as of 12/15/2017	**0.00**
	Plaintiff Lee, Dale Thomas	
	Total Charges	411.85
	Total Payments and Credits	411.85
	Balance Due as of 12/15/2017	**0.00**
	Plaintiff Lee, Kathi	
	Total Charges	0.00
	Total Payments and Credits	0.00
	Balance Due as of 12/15/2017	**0.00**
	Plaintiff Lee, Dale Thomas	
	Civil Cash Bond Account Type Balance as of 12/15/2017	**100.00**

Daniel W. Bower, ISB #7204
STEWART TAYLOR & MORRIS PLLC
12550 W. Explorer Drive, Suite 100
Boise, Idaho 83713
Telephone: (208) 345-3333
Fax No.: (208) 345-4461
dbower@stm-law.com

Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

DALE LEE and KATHI LEE, husband and wife,

Plaintiffs,

vs.

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

Defendants.

Case No. CV-16-3425

COMPLAINT

Category: A.A.
Filing Fee: $221.00

COME NOW, Plaintiffs, Dale and Kathi Lee (collectively "Lees"), by and through their attorney of record, Daniel W. Bower, of the firm Stewart Taylor & Morris PLLC, and allege the following claims and causes of action against Defendants Willow Creek Ranch Estates No. 2 Subdivision Homeowners' Association, Inc. ("Willow Creek HOA"), and Does I-X, inclusive, as follows:

JUDGE
CHRIS NYE

ORIGINAL

I.

On June 10, 1997, the Lees and Kemp Family Trust executed an Agreement for Sale of Real Property ("Sale Agreement") whereby the Lees sold a 1.8 acre parcel of real property to the Kemp Family Trust.

II.

The Kemp Family Trust needed the 1.8 acre parcel to develop, as a subdivision, adjoining property, referred to as the "Kemp Development Property."

III.

That 1.8 acre parcel is described as being part of Lots 5 and 6 of Block 5, Willow Creek Estates No. 2, as is referred to herein as "Transferred Property."

IV.

The Transferred Property was adjacent to a larger parcel of property that the Lees intended to develop at a future date. The remaining Lee property is referred to herein as the "Lee Development Property." Attached hereto as Exhibit A, is a true and accurate depiction of the Transferred Property, the Kemp Development Property and the Lee Development Property.

V.

To be clear, the Sale Agreement contemplated that both parties would develop their respective properties, and as part of that contemplated action, granted the Lees certain accesses.

VI.

Significantly, the Sale Agreement provided that:

> FUTURE DEVELOPMENT. Both Seller [Kemp Family Trust] and Buyer [Lees] are contemplating future development of their existing properties which adjoin each other.
>
> ...
>
> 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 access shall be constructed at Seller's cost and subject to Seller obtaining any necessary government approvals.

A copy of the Sale Agreement is attached hereto as Exhibit B.

VII.

The purpose of the above-cited language was to ensure access for the Lees at a future date when the Lees developed the Lee Development Property.

VIII.

The terms of the Sale Agreement were at least partially performed by the parties.

IX.

The "gravel road" referenced in the Sale Agreement is now known as "Kemp Road."

X.

And, consistent with the "access" language of the Sale Agreement, the Kemp Family Trust, as the buyer under the Sale Agreement and the developer of the subdivision, constructed Kemp Road with three access points that presently abut Kemp Road and include culverts, gravel covering those culverts, and gates--clear and obvious to the public that access by the Lees was intended.

XI.

As part of the development process, the Kemp Family Trust, created and ran the Willow Creek HOA until it was transferred to the owners of the respective lots in the development in 2005 (referred to as the "HOA transfer").

XII.

At the time of the HOA transfer, Willow Creek HOA had actual and constructive knowledge of the existence of the Sale Agreement and its terms, including the terms that provided the Lees access to Kemp Road.

XIII.

In the fall of 2014, the Lees informed Willow Creek HOA that they intended to access Kemp Road to further develop the adjacent Lee property.

XIV.

On October 12, 2014, Rhonda Curry, the president of the Willow Creek HOA, informed Lees' counsel by written correspondence that "the board has decided to decline access to Kemp Road for any development by the Lee's [sic]."

XV.

Willow Creek HOA is claiming that because the Sale Agreement was not recorded at the time of the HOA transfer, and because the terms were not disclosed on the Subdivision Plat for the Willow Creek HOA, there is no enforceable easement or servitude and that it is not required to provide the Lees the access contemplated by the Sale Agreement.

XVI.

The Lees have objected to the claim asserted by the Willow Creek HOA and explained that the Lees' development, included planned access for the Lees, was part of a common scheme and plan by Willow Creek HOA's predecessor in interest, the Kemp Family Trust, and that the Sale Agreement is binding on the Willow Creek HOA, because they had actual and constructive notice of the Sale Agreement, or at least the portion of the agreement related to providing the Lees with access to Kemp Road.

XVII.

Indeed, a former board member of the Willow Creek HOA at or near the time of the HOA transfer, Alan Mills, has made clear to the parties, that at the time of the HOA transfer, Willow Creek HOA had knowledge of the Sale Agreement, including the agreement that the Lees would have three driveway access points to Kemp Road.

XVIII.

The Lees have relied upon the terms, conditions and agreements in the Sale Agreement, to provide them access points to Kemp Road, and are entitled to the benefit of those terms, conditions and agreements.

XIX.

The terms, conditions and agreements set forth in the Sale Agreement constitute an equitable servitude because the Lees have an enforceable interest against the original promisor, here the Sale Agreement and the Kemp Family Trust, and the successor in interest, Willow Creek HOA, had actual knowledge of the Sale Agreement.

XX.

Willow Creek HOA should be compelled by this Court to set forth what claim it has to preclude the Lees from moving forward with their planned development including allowing access to Kemp Road, consistent with the Sale Agreement; the Court should rule that there is no merit to such claim.

XXI.

The Lees, plaintiffs in this action, are entitled to a judgment and decree of this Court declaring that they are entitled to utilize the three accesses, referenced in the Sale Agreement, and that Willow Creek HOA is subject to an equitable servitude, covenant, condition and restriction allowing access as described in the Sale Agreement.

XXII.

As a result of Willow Creek HOA's refusal to allow the Lees access, 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.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, the Lees, pray that judgment be entered in their favor as follow:

1. That the Court make a final determination that the Kemp Development 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; and

2. That the Court enter its preliminary and permanent injunction prohibiting the Willow Creek HOA from doing any of the foregoing set forth in the preceding paragraph; and

3. Plaintiffs, the Lees, be awarded their reasonable costs and attorney's fees; and

4. For such other and further relief to which Plaintiffs, the Lees, may be entitled as the Court deems just and proper.

DATED: April 11, 2016.

STEWART TAYLOR & MORRIS PLLC

Daniel W. Bower
Attorneys for Plaintiffs

Christ T. Troupis, ISB #4549
TROUPIS LAW OFFICE, P.A.
801 E. State Street, Ste 50
P.O. Box 2408
Eagle, Idaho 83616
Tel: (208) 938-5584
Fax: (208) 938-5482

Attorney for Defendant Willow Creek Ranch Estates No. 2 Subdivision Homeowners' Association, Inc.

DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

DALE LEE and KATHI LEE, husband and wife,	
Plaintiffs,	**Case No. CV 16-3425**
vs.	**ANSWER AND AFFIRMATIVE DEFENSES TO COMPLAINT**
WILLOW CREEK RANCH ESTATES NO. 2 SUBDIVISION HOMEOWNERS' ASSOCIATION, INC., an Idaho corporation, and DOES 1-X, inclusive,	
Defendants.	

Defendant WILLOW CREEK RANCH ESTATES NO. 2 SUBDIVISION HOMEOWNERS' ASSOCIATION, INC., answers Plaintiffs' Complaint as follows:

1. Except for the allegations specifically admitted below, Defendant denies the allegations of each and every Paragraph of Plaintiffs' Complaint.

2. In response to Paragraph XI of the Complaint, Defendant admits that the Willow Creek HOA was transferred to the owners of the lots in the subdivision in 2005.

3. In response to Paragraphs XIII and XIV of the Complaint, Defendant admits that the Lees communicated with the Willow Creek HOA at some time in 2014 and the Willow Creek HOA responded to the Lees by written correspondence.

4. In response to Paragraph XV of the Complaint, Defendant denies that the allegations state all of the claims of this Defendant, and/or the facts supporting those claims.

AFFIRMATIVE DEFENSES

First Affirmative Defense

That the facts alleged by Plaintiff fail to state a claim upon which relief can be granted.

Second Affirmative Defense

This Defendant is not bound by, subject to, or encumbered with the Plaintiff's purported 'equitable servitude" because this Defendant did not receive timely actual notice of the purported "equitable servitude," nor could this Defendant be charged with the receipt of timely constructive notice of the purported "equitable servitude".

Third Affirmative Defense

The Plaintiffs are guilty of laches which bars their claims for equitable relief. Plaintiffs' purported equitable servitude is based on language in a sale agreement dated June 1, 1997. Plaintiffs did not record the sale agreement, or otherwise provide any prior notice to the members of Willow Creek HOA who purchased and improved residential lots in the subdivision, ignorant of the undisclosed claims of the Plaintiffs, and in reliance upon the existing state of the disclosed title to their respective lots and the common areas, including Kemp Road.

Fourth Affirmative Defense

Plaintiffs are estopped by their conduct from claiming an equitable servitude against this Defendant.

Fifth Affirmative Defense

Plaintiffs waived their claim of equitable servitude by their conduct in failing to preserve the purported accesses in record title at the time they entered into the sale agreement, in failing to require that the sale agreement be recorded, and in failing to timely notify lot owners affected by the equitable servitude.

Sixth Affirmative Defense

Plaintiffs' purported equitable servitude is subject to a condition precedent that was not fulfilled.

RESERVATION OF ADDITIONAL AFFIRMATIVE DEFENSES

The statement of affirmative defenses in this Answer is without prejudice to the Defendant's right to allege additional defenses to which it may be entitled. Defendant reserves the right to amend this Answer to allege additional affirmative defenses that are disclosed or developed during the pendency of this case through pretrial discovery.

ATTORNEYS' FEES

With respect to Paragraph XXII of Plaintiffs' Complaint, this Defendant denies that Plaintiffs are entitled to reasonable attorneys' fees and costs under any provision of Idaho law. In the event that this Defendant prevails in this action, it is entitled to recover its reasonable fees and costs pursuant to Idaho Code §12-120, 12-121 and the Idaho Rules of Civil Procedure 54(d) and 54(e).

PRAYER FOR RELIEF

Wherefore, Defendant prays for judgment as follows:

1. For the Plaintiffs' Complaint to be dismissed with prejudice;
2. For reasonable attorneys' fees and costs; and
3. For such other and further relief as the Court deems just and proper.

DATED this 2nd day of May, 2016.

TROUPIS LAW OFFICE, PA

Christ T. Troupis
Attorney for Defendant
Willow Creek Ranch Estates
No. 2 Subdivision Homeowners'
Association, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of May, 2016, I served a copy of the foregoing Answer and Affirmative Defenses by U.S. Mail, first class postage prepaid, addressed as follows:

Daniel W. Bower
STEWART TAYLOR & MORRIS
12550 W. Explorer Drive, Ste 100
Boise, Idaho 83713

Christ T. Troupis

Daniel W. Bower, ISB #7204
STEWART TAYLOR & MORRIS PLLC
12550 W. Explorer Drive, Suite 100
Boise, Idaho 83713
Telephone: (208) 345-3333
Fax No.: (208) 345-4461
dbower@stm-law.com

Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

DALE LEE and KATHI LEE, husband and wife,

Plaintiffs,

vs.

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

Defendants.

Case No. CV 16-3425

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

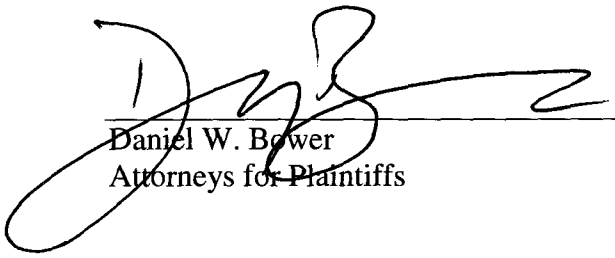
Plaintiffs, Dale and Kathi Lee (collectively "Lees"), by and through their attorneys of record, Stewart Taylor & Morris PLLC, hereby move this Court for summary judgment under Idaho Rule of Civil Procedure 56(a) finding in Lees' favor that certain real property owned by the Willow Creek Ranch Estates No. 2 Subdivision Homeowners' Association, Inc. is subject to valid encumbrances, conditions, servitudes and/or restrictions that allow the Lees to utilize already defined and improved access points to their adjoining real property.

This motion is based upon the supporting memorandum and declarations filed concurrently herewith as well as all pleadings and other papers on file in this action, and such other matters as may be presented to the Court at the time of the hearing.

Oral argument is requested.

DATED: June 16, 2016.

STEWART TAYLOR & MORRIS PLLC



Daniel W. Bower
Attorneys for Plaintiffs

Daniel W. Bower, ISB #7204
STEWART TAYLOR & MORRIS PLLC
12550 W. Explorer Drive, Suite 100
Boise, Idaho 83713
Telephone: (208) 345-3333
Fax No.: (208) 345-4461
dbower@stm-law.com

Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

DALE LEE and KATHI LEE, husband and wife,

Plaintiffs,

vs.

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

Defendants.

Case No. CV 16-3425

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs, Dale and Kathi Lee (collectively "Lees"), by and through their attorneys of record, submit this brief in support of Plaintiffs' Motion for Summary Judgment filed concurrently herewith.

INTRODUCTION

The Lees respectfully request this Court enter summary judgment in the Lees' favor, finding that certain real property owned by the Willow Creek Ranch Estates No. 2 Subdivision Homeowners' Association, Inc. ("Willow Creek HOA" or "HOA") is subject to valid encumbrances, conditions, servitudes and/or restrictions that allow the Lees to utilize already defined and improved access points to their adjoining real property. The legal issue here is simple--whether the defendant, Willow Creek HOA, is obligated to honor an easement agreement and/or equitable servitude encumbering property, as a successor in interest, to the Kemp Family Trust ("Kemps"), where it is incontrovertible fact that Willow Creek HOA had actual and constructive notice of the servitude at the time Willow Creek HOA received an interest in the subject real property.

STATEMENT OF UNDISPUTED FACTS

1. In the summer of 1997, Dale Lee was approached by the Kemps about a possible real estate transaction. *See* June 17, 2016 Declaration of Dale Lee ("Lee Decl."), ¶ 2.

2. The Kemps and the Lees both owned real property north of Purple Sage Road in Middleton, Idaho. *See* Lee Decl., Ex. A (A map of the property reflecting ownership of the land in 1997).

3. To develop the "Kemp property" the Kemps needed approximately 1.8 acres of real property owned by the Lees. The Lees were willing to sell them the 1.8 acres needed, but required as a condition of that sale, that they be given access to the road that was to be constructed by the Kemps. *See* Lee Decl., ¶ 4.

4. Significantly, the real estate agent for the Kemps was Alan Mills, of Mills & Co. Realty Inc. *See* Lee Decl., ¶ 5; *see also* June 14, 2015 Declaration of Alan Mills ("Mills Decl."), Exhibit A.

5. That road referenced above, presently known as Kemp Road, was to be constructed by the Kemps and was to run along the southern border of the Kemp property ("Kemp Road"). *See* Lee Decl., ¶ 6.

6. It was access to Kemp Road, that the Lees conditioned the sale of their 1.8 acre parcel. *See* Lee Decl., ¶ 7.

7. On June 1, 1997, the Lees and the Kemps executed an Agreement for Sale of Real Property ("Agreement"). *See* Lee Decl., Exhibit B.

8. In that Agreement the Lees agreed to sell to the Kemps the 1.8 acres of real property that the Kemps needed to develop their property into the present day subdivision. *Id.*

9. The Agreement clearly provided that the Kemps and the Lees were planning future development of their adjoining properties--both the Kemp property and the Lee property. *Id.*

10. The Agreement also made clear that the parties agreed to provide the Lees access to the road:

> Seller [Lees] shall also be entitled to 3 driveway access from the gravel road [Kemp Road] to be constructed by Buyer [Kemps] adjoining Seller's [Lees'] property. Such access shall be constructed at Seller's [Lees'] cost and subject to Seller [Lees] obtaining any necessary governmental approvals.

Id.

11. Accordingly, the Lees sold the Kemps the property and the Kemps began developing the subdivision that is now Willow Creek Ranch Estates #2. *See* Lee Decl., ¶ 12.

12. By executing the Agreement, the Kemps granted the Lees an express easement to construct the three access points and an implied easement to use Kemp Road.

13. In 2000, at the time that Kemp Road was constructed, consistent with the Agreement, the Kemps paid to have the three driveway access points constructed giving the Lees' property adjacent to Kemp Road access to Kemp Road. *See* Lee Decl., ¶ 13.

14. This construction included the creation of three access points, including 24 foot culverts, and gravel extending from Kemp Road to the Lees' property. Around that same time, wood fencing and metal gates corresponding to the three access points, were constructed along the property giving the Lees' property clear and obvious access to Kemp Road. *See* Lee Decl., ¶ 14, Exhibit C.

15. As part of the development of the Willow Creek Ranch Estates, the Kemps transferred Kemp Road to the HOA as a common area owned by the HOA. *See* Lee Decl., Exhibit D ("The Trust was the developer of Willow Creek Ranch Estates. It transferred Kemp Lane to the HOA as part of the common area owned by the Association.") (LEE0010).

16. In 2005, at the time the Kemps transferred Kemp Road to the HOA, the board of directors for the HOA was primarily controlled by the Kemps. *See* Mills Decl., Exhibit A.

17. Mary Kemp, trustee of the Kemps, and Alan Mills, the Kemps' real estate agent, served as the initial board members for the HOA. Mr. Mills served as president. *Id.*

18. Alan Mills has admitted that he had knowledge of the Kemps' agreement to provide access points along Kemp Road to the Lees. *Id.*

19. On or about June 11, 2015, Alan Mills, the former real estate agent for the Kemps and a former member of the HOA board of directors at the time the Kemps transferred Kemp Road to the HOA, provided a letter wherein he stated:

> During the development of the Willow Creek Subdivision, I served as one of the initial board of directors for the Willow Creek Ranch Estates No. 2, Subdivision Homeowner's Association Inc. (the "HOA") along with Mary Kemp, the trustee for the Kemp Family Trust. As the developer of the Subdivision and who also controlled the HOA, the Kemp Family Trust paid to have the three driveway access constructed just as the parties agreed to do in the Agreement For Sale of Property. As a former HOA board member, I can say with a high degree of certainty that the HOA at the time was aware of the Agreement and its terms regarding the three driveway access.

See Mills Decl., Exhibit A; *see also* Lee Decl., Exhibit D.

20. Thus, at the time that Kemp Road was transferred to the Willow Creek HOA in 2005, the Willow Creek HOA Board of Directors, had knowledge of the Agreement, including the Kemps' agreement to provide the Lees the three access points. *See* Lee Decl., ¶ 20.

21. Furthermore, the subsequent actions of the Lees, Kemps and the HOA, including the construction of the three access points, including culvert construction, gravel work, fencing and gates, evidence the promise found in the Agreement. *See* Lee Decl., ¶¶ 13 and 14.

LEGAL STANDARD

The purpose of a summary judgment proceeding is to "eliminate the necessity of trial where the facts are not in dispute and where the existent and undisputed facts lead to a conclusion of law which is certain." *Berg v. Fairman*, 107 Idaho 441, 444, 690 P.2d 896, 899

(1983). Summary judgment shall be granted if the "pleadings, depositions, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *See* Idaho Rule of Civil Procedure 56(c). A nonmoving party's failure to make a showing sufficient to establish the existence of an element essential to that party's case, on which the party bears the burden of proof at trial, requires the entry of summary judgment in favor of the moving party. *See Jarman v. Hale*, 122 Idaho 952, 955-56, 842 P.2d 288, 291-92 (Ct. App. 1992).

Here, the Lees are entitled to summary judgment. There is no genuine issue as to any material fact and the Lees are entitled to prevail on their claims as a matter of law.

DISCUSSION

The Lees are entitled to summary judgment on two alternative legal theories. First, the Agreement incontrovertibly created an express easement that is enforceable against Willow Creek HOA regardless of whether or not the Agreement was recorded because Willow Creek HOA had actual notice of the easement. Second, the Agreement, the acts of the parties, including the initial construction of the culverts, gravel road, wood fencing and metal gates that reflect the three access points, create an equitable servitude that is also enforceable against Willow Creek HOA.

I. The Agreement Constitutes An Enforceable Easement Because Willow Creek HOA Had Actual And Constructive Notice Of The Agreement

It is well-established law that "[o]ne who purchases land expressly subject to an easement, *or with notice, actual or constructive*, that it is burdened with an existing easement,

takes the land subject to the easement." *Checketts v. Thompson*, 65 Idaho 715, 152 P.2d 585, 587 (1944) (emphasis added). Here, it is not in dispute that the Agreement creates an easement. *See* Lee Decl., Exhibit D (September 22, 2014 Letter from Christ Troupis to Willow Creek Ranch Estates Board of Directors) ("In this case, the Seller (Dale and Kathy [sic] Lee) reserved an easement across land they were selling to the Buyer, the Kemp Family Trust. So, the Kemp Family Trust acquired property encumbered with an easement in favor of the Lees, allowing them to construct the three driveways and access the gravel road. The property the Kemp Family Trust acquired was subsequently improved with a gravel road, which now comprises a portion of Kemp Lane.")

Indeed, here, the only factual question is whether Willow Creek HOA had notice, actual or constructive, of the existing easement. And, as established by Allan Mills, Willow Creek HOA had actual notice of the Agreement at the time it obtained title to the real property that was encumbered.

> During the development of the Willow Creek Subdivision, I served as one of the initial board of directors for the Willow Creek Ranch Estates No. 2, Subdivision Homeowner's Association Inc. (the "HOA") alone with Mary Kemp, the trustee for the Kemp Family Trust. As the developer of the Subdivision and who also controlled the HOA, the Kemp Family Trust paid to have the three driveway access constructed just as the parties agreed to do in the Agreement For Sale of Property. As a former HOA board member, I can say with a high degree of certainty that the HOA at the time was aware of the Agreement and its terms regarding the three driveway access.

See Mills Decl., Exhibit A. Thus, to the extent that the Kemps had notice of the Agreement--and it is undisputable fact that they did as they were parties to the Agreement--the HOA also had notice. Mary Kemp, the trustee for the Kemps, was, along with Alan Mills, the Willow Creek

HOA board. *Id.* Furthermore, Alan Mills, who was the realtor for the Kemps, that facilitated the sale of the Lees' property to the Kemps, also had knowledge of the Agreement that created the at-issue easement. As explained by Mr. Mills:

> I was the real estate agent for the Kemp Family Trust, the party that purchased certain property from Mr. Dale Lee. As part of that agreement the Kemp Family Trust agreed to provide 3 driveway accesses from a gravel road. That gravel road in now known as Kemp Road that runs through Phase 2 of the Willow Creek Subdivision.

See Mills Decl., Exhibit A. There cannot be any meaningful dispute that, at the time that Willow Creek HOA received title to Kemp Road, the HOA had actual notice of the encumbrance that the Lees are seeking to enforce in this action. Accordingly, regardless of whether the encumbrance was recorded, it is enforceable as a matter of law against the HOA.

II. An Equitable Servitude Exists That Allows The Lees To Enforce The Agreement And Promise To Allow The Lees Access Points To Kemp Road

Even if there was no enforceable easement, the incontrovertible facts establish an equitable servitude that also provides the Lees with legal access. An equitable servitude is not an easement. *See Birdwood Subdivision Homeowner's Ass'n, Inc. v. Bulotti Const., Inc.*, 145 Idaho 17, 23, 175 P.3d 179, 185 (2007). It concerns a promise of the landowner to use his land in a certain way. *See, e.g., Idaho Power Co. v. State, By & Through Dep't of Water Res.*, 104 Idaho 575, 587, 661 P.2d 741, 753 (1983) ("restrictive covenants and equitable servitudes" relate to "[a]greements not to assert ownership rights.") Like an easement, an equitable servitude is restrictive in character. *See St. Clair v. Krueger*, 115 Idaho 702, 703 n.1, 769 P.2d 579, 580 n.1 (1989). However, an equitable servitude arises "because of the actions of the parties, such as

oral representations." *West Wood Investments, Inc. v. Acord*, 141 Idaho 75, 84, 106 P.3d 401, 410 (2005); *see also Birdwood*, 145 Idaho at 23, 175 P.3d at 185 (quoting 20 Am.Jur.2d, Covenants, Etc., § 155 (2005) (an equitable servitude arises "by implication from the language of the deeds or the conduct of the parties.").[1] Here, the conduct of the parties clearly creates an equitable servitude.

"The test relevant to determining if a promise regarding the use of land runs against a successor in interest of the original promisor is 1) whether or not the party claiming the enforceable interest actually has an interest against the original promisor; and 2) if such right exists, whether it is enforceable against the subsequent purchaser." *West Wood Investments*, 141 Idaho at 84, 106 P.3d at 410 (citing *Middlekauff v. Lake Cascade, Inc.*, 103 Idaho 832, 834, 654 P.2d 1385, 1387 (1982) (*Middlekauff I*)). Whether a party has an enforceable interest against

---

[1] The foregoing concepts were well summarized by a California appellate court in *Comm. To Save Beverly Highlands Homes Ass'n v. Beverly Highlands Homes Ass'n*, 92 Cal. App. 4th 1247 (2001):

> An easement is an interest in the land of another, which entitles the owner of the easement to a limited use or enjoyment of the other's land....
>
> An easement differs from a covenant running with the land and from an equitable servitude, in that these are created by promises concerning the land, which may be enforceable by or binding upon successors to the estate of either party, while an easement is an interest in the land, created by grant or prescription. A covenant running with the land is created by language in a deed or other document showing an agreement to do or refrain from doing something with respect to use of the land. An equitable servitude may be created when a covenant does not run with the land but equity requires that it be enforced.

Id. at 1269 (internal citations and quotation marks omitted).

the original promisor may depend on the original promisor's representations to the promise. *See Middlekauff*, 103 Idaho at 834-35, 654 P.2d at 1387-88. If it is oral, the terms of the agreement can be a question of fact. *See id.*; see also *Birdwood*, 145 Idaho at 23, 175 P.3d at 185. Here, where the terms are contained in the Agreement, there is no question of fact. Thus, the only question here is whether Willow Creek HOA, as the successor in interest, takes its interest in Kemp Road, subject to the agreement between the Kemps and the Lees.

"Whether a successor in interest takes the interest subject to the equitable servitude is a question of notice." *Id.* at 85, 106 P.3d at 411. Facts which may establish actual notice include whether a buyer has actual knowledge of agreements creating the servitude, or has actual knowledge of the *use* of the servitude at the time of purchase. *See West Wood Investments*, 141 Idaho at 85-86, 106 P.3d at 411-12. A purchaser who has notice of the servitude is not a bona fide purchaser. *Id.* (citing *Middlekauff I*).

Here, it is incontrovertible that Willow Creek HOA had actual notice of the Agreement. Mr. Mills, who is not a party to this action, establishes this plain and undisputed fact in his June 11, 2015 letter. Furthermore, it is indisputable that Willow Creek HOA had constructive knowledge of the servitude as the improvements--the gravel road extensions at the access points, the culverts and fencing with gates--are plain and obvious. *See* Lee Decl., Exhibit D (picture of access point). Here, as illustrated above, notice cannot be meaningfully contested. The same person who served as Trustee for the Kemps, Mary Kemp, was also on the board of the HOA. And, indeed, it was during the time period that Willow Creek HOA gained possession of Kemp Road.

In short, as a matter of law, regardless of any easement, the Lees are entitled to enforce an equitable servitude against Willow Creek HOA. The terms of an written agreement that allow access at three access points is undisputable fact. Further, it is undisputed fact that the promise was enforceable against Willow Creek HOA's predecessor in interest the Kemps. And, it is incontrovertible that Willow Creek HOA had knowledge of the servitude--the promise to allow the Lees access. Accordingly, a second independent basis exists that mandates summary judgment in favor of the Lees.

CONCLUSION

In light of the foregoing, the Lees respectfully request that the Court grant summary judgment finding that Kemp Road, owned by the Willow Creek HOA, is subject to an easement or servitude that allows the Lees to move forward with their designs to utilize the three access points already designated and improved.

DATED: June 16, 2016.

STEWART TAYLOR & MORRIS PLLC

Daniel W. Bower
Attorneys for Plaintiffs

Daniel W. Bower, ISB #7204
STEWART TAYLOR & MORRIS PLLC
12550 W. Explorer Drive, Suite 100
Boise, Idaho 83713
Telephone: (208) 345-3333
Fax No.: (208) 345-4461
dbower@stm-law.com

Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

DALE LEE and KATHI LEE, husband and wife,

Plaintiffs,

vs.

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

Defendants.

Case No. CV 16-3425

DECLARATION OF ALAN MILLS

STATE OF IDAHO)

County of Canyon)

Alan Mills, declare and state as follows and under penalty of perjury pursuant to the laws of the state of Idaho that the foregoing is true and correct:

1) I am over the age of eighteen (18) and make this declaration of my own personal knowledge and belief.

2) Attached to this declaration as Exhibit A is a true and accurate copy of a letter that I sent to legal counsel for Dale Lee, the above captioned plaintiff, on June 11, 2015.

3) The contents and representations in that letter are true and accurate.

Dated: June 14, 2016.

Alan Mills

June 11, 2015

RE: Driveway Access from Kemp Road

Dear Victor,

Thank you for your question regarding the three driveway accesses referenced in the Agreement For Sale of Property. As your client may recall, I was the real estate agent for the Kemp Family Trust, the party that purchased certain property from Mr. Dale Lee. As part of that agreement the Kemp Family Trust agreed to provide 3 driveway accesses from a gravel road. That gravel road in now known as Kemp Road that runs through Phase 2 of the Willow Creek Subdivision.

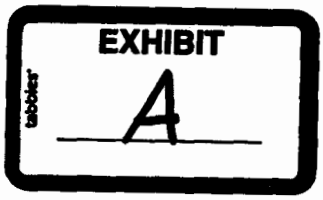
During the development of the Willow Creek Subdivision, I served as one of the initial board of directors for the Willow Creek Ranch Estates No. 2 Subdivision Homeowners' Association Inc. (the "HOA") along with Mary Kemp, the trustee for the Kemp Family Trust. As the developer of the Subdivision and who also controlled the HOA, the Kemp Family Trust paid to have the three driveway accesses constructed just as the parties agreed to do in the Agreement For Sale of Property. As a former HOA board member, I can say with a high degree of certainty that the HOA at that time was aware of the Agreement and its terms regarding the three driveway accesses.

Let me know if I can answer any more questions for you.

Sincerely,

Alan Mills

Mills & Co. Realty Inc.



LEE0014

Daniel W. Bower, ISB #7204
STEWART TAYLOR & MORRIS PLLC
12550 W. Explorer Drive, Suite 100
Boise, Idaho 83713
Telephone: (208) 345-3333
Fax No.: (208) 345-4461
dbower@stm-law.com

Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

DALE LEE and KATHI LEE, husband and wife,

Plaintiffs,

vs.

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

Defendants.

Case No. CV 16-3425

DECLARATION OF DALE LEE

STATE OF IDAHO)

County of Canyon)

I, Dale Lee, declare and state as follows and under penalty of perjury pursuant to the laws of the state of Idaho that the foregoing is true and correct:

1) I am over the age of eighteen (18) and make this declaration of my own personal knowledge and belief.

ORIGINAL

2) In the summer of 1997, I was approached by the Kemp Family Trust ("Kemps") about a possible real estate transaction.

3) We both owned real property north of Purple Sage Road in Middleton, Idaho. A map of the property reflecting ownership of the land in 1997 is attached as hereto as Exhibit A (LEE0016).

4) To develop the "Kemp property" the Kemps needed approximately 1.8 acres of real property owned by the Lees. My wife and I were willing to sell them the 1.8 acres needed, but as a condition of that sale, wanted to ensure that we would have access to the road for that was to be constructed by the Kemps.

5) The real estate agent for the Kemps was Alan Mills, of Mills & Co. Realty Inc. *See also* June 14, 2015 Declaration of Alan Mills, Exhibit A (LEE0014).

6) That road referenced above, presently known as Kemp Road, was to be constructed by the Kemps and was to run along the southern border of the Kemp property ("Kemp Road").

7) Access to Kemp Road, was given as a condition to the sale of the 1.8 acre parcel.

8) On June 1, 1997, the Lees and the Kemps executed an Agreement for Sale of Real Property ("Agreement"). A true and accurate copy of the Agreement is attached hereto as Exhibit B (LEE0008).

9) In that Agreement we agreed to sell to the Kemps the 1.8 acres of real property that the Kemps needed to develop their property into the present day subdivision. *Id.*

10) The Agreement clearly provided that the Kemps and the Lees were planning future development of their adjoining properties--both the Kemp property and the Lee property. *Id.*

11) The Agreement also made clear that the Kemps agreed to give us, the Lees, access to the road:

> Seller [Lees] shall also be entitled to 3 driveway access from the gravel road [Kemp Road] to be constructed by Buyer [Kemps] adjoining Seller's [Lee's] property. Such access shall be constructed at Seller's [Lee's] cost and subject to Seller [Lees] obtaining any necessary governmental approvals.

Id.

12) Accordingly, we sold the Kemps the property and the Kemps began developing the subdivision that is now Willow Creek Ranch Estates #2.

13) In 2000, at the time that Kemp Road was constructed, consistent with the Agreement, the Kemp Family Trust paid to have the three driveway access points constructed giving the Lee's property adjacent to Kemp Road access to Kemp Road.

14) This construction included the creation of three access points, including 24 foot culverts, and gravel extending from Kemp Road to the Lee's property. Around that same time, wood fencing and metal gates corresponding to the three access points, were constructed along the property giving the Lee property clear and obvious access to Kemp Road. See Exhibit C attached hereto (true and accurate copies of pictures of those improvements taken in May of 2016) (LEE00001-00005).

15) As part of the development of the Willow Creek Ranch Estates, the Kemps transferred Kemp Road to the HOA as a common area "owned by [Willow Creek Ranch Estates] for the common use and enjoyment of the Owners." *See* September 24, 2014 Letter from C. Troupis (LEE0009-0013) (Attached as Exhibit D) (explaining that "The Trust was the developer of Willow Creek Ranch Estates. It transferred Kemp Lane to the HOA as part of the common area owned by the Association."). As explained by Mr. Troupis, "The Association [Willow Creek HOA] is a successor in interest to the developer's legal title to the property that is subject to the unrecorded easement because the Association did not acquire the property by purchase. As such, it is not a bona fide purchaser for value." *Id.* at p.3 (LEE0011).

16) In 2005, at the time the Kemps transferred Kemp Road to the HOA, the board of directors for the HOA was primarily controlled by the Kemps. *See* Mills Decl., Exhibit A.

17) Mary Kemp, trustee of the Kemp Family Trust, and Alan Mills, the Kemps real estate agent, served as the initial board members for the HOA. Mr. Mills was serving as the president. *Id.*

18) In 2005, Alan Mills, who was the realtor for the Kemps had knowledge of the Agreement and of the provisions in the Agreement related to the access points as we discussed them during the time of the transaction.

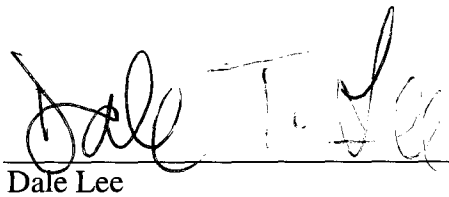
19) On or about June 11, 2015, Alan Mills provided a letter to our attorney wherein he stated:

> During the development of the Willow Creek Subdivision, I served as one of the initial board of directors for the Willow Creek Ranch Estates No. 2, Subdivision Homeowner's Association Inc. (the "HOA") along with Mary Kemp, the trustee for the Kemp Family Trust. As the developer of the Subdivision and who also controlled the HOA, the Kemp Family Trust paid to have the three driveway access constructed just as the parties agreed to do in the Agreement for Sale of Property. As a former HOA board member, I can say with a high degree of certainty that the HOA at the time was aware of the Agreement and its terms regarding the three driveway access.

See Mills Decl., Exhibit A.

20) I know, because I had discussions with Alan Mills, at the time that Kemp Road was transferred to the Willow Creek HOA in 2005, that the Willow Creek HOA Board of Directors, had knowledge of the Agreement, including the Kemps' agreement to provide us the access points.

Dated: June 17, 2016.



Dale Lee

Dale Lee Property

Legend

- Canal
- Fence
- AC Pad
- Boundary
- New PL
- Easement
- TaxParcels

N W E S

0 100 200 Feet

1 inch = 200 feet

160 GPM.

EXHIBIT

tabbies

A

LEE0016

AGREEMENT FOR SALE OF REAL PROPERTY

This agreement entered in to this 1 day of June, 1997, by and between Dale and Kathy Lee, husband and wife (hereafter referred to as Sellers) and the Kemp Family Trust (hereafter referred to as Buyer).

Whereas, Seller is the owner of 1.8 acres of real property described on Exhibit A attached hereto, and whereas this real property is owned free and clear of all encumbrances, and

Whereas, Buyer desires to acquire this real property,

Now therefore, the Seller and Buyer agree as follows:

PURCHASE PRICE. The purchase price for the real property shall be Nine Thousand Dollars, payable in cash at closing.

CLOSING. Closing shall take place at Transnation Title Company on or before JULY 1, 1997.

CONVEYANCE. Title shall be conveyed by Warranty Deed, free and clear of all encumbrances.

TITLE INSURANCE and SURVEY. Title insurance, closing cost and survey cost shall be paid by the Buyer.

FUTURE DEVELOPMENT. 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 or mobile units. In the event that Buyer constructs a recreational center for use by residents of Willow Creek Ranch Estates, Seller shall be entiled 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.

STOCK WATER. Seller shall be entitled to water stock at the reservoir until such time as Buyer provides an alternative watering location.

EXISTING DRAINAGE. Seller shall be entitled to maintain the existing drainage to the reservoir.

WATER RIGHTS. Seller desires to retain the existing water rights on the real property sold to Buyer. Seller understands that this transfer will have to be approved by Black Canyon Irrigation District.

EQUIPMENT and FENCING. Seller retains all irrigation equipment and fencing. Seller will remove the fence upon 30 days notice or Buyer may remove.

BUILDING RESTRICTED. Buyer acknowledges that the real property is not intended to be a building site, but will be included as part of what is identified as Lots 5 and 6 of Block 5, Willow Creek Ranch Estates No. 2.

RELOCATION OF SIPHON. All construction work for relocation of the siphon shall be performed on Buyer's property.

SELLER: _____
Dale Lee

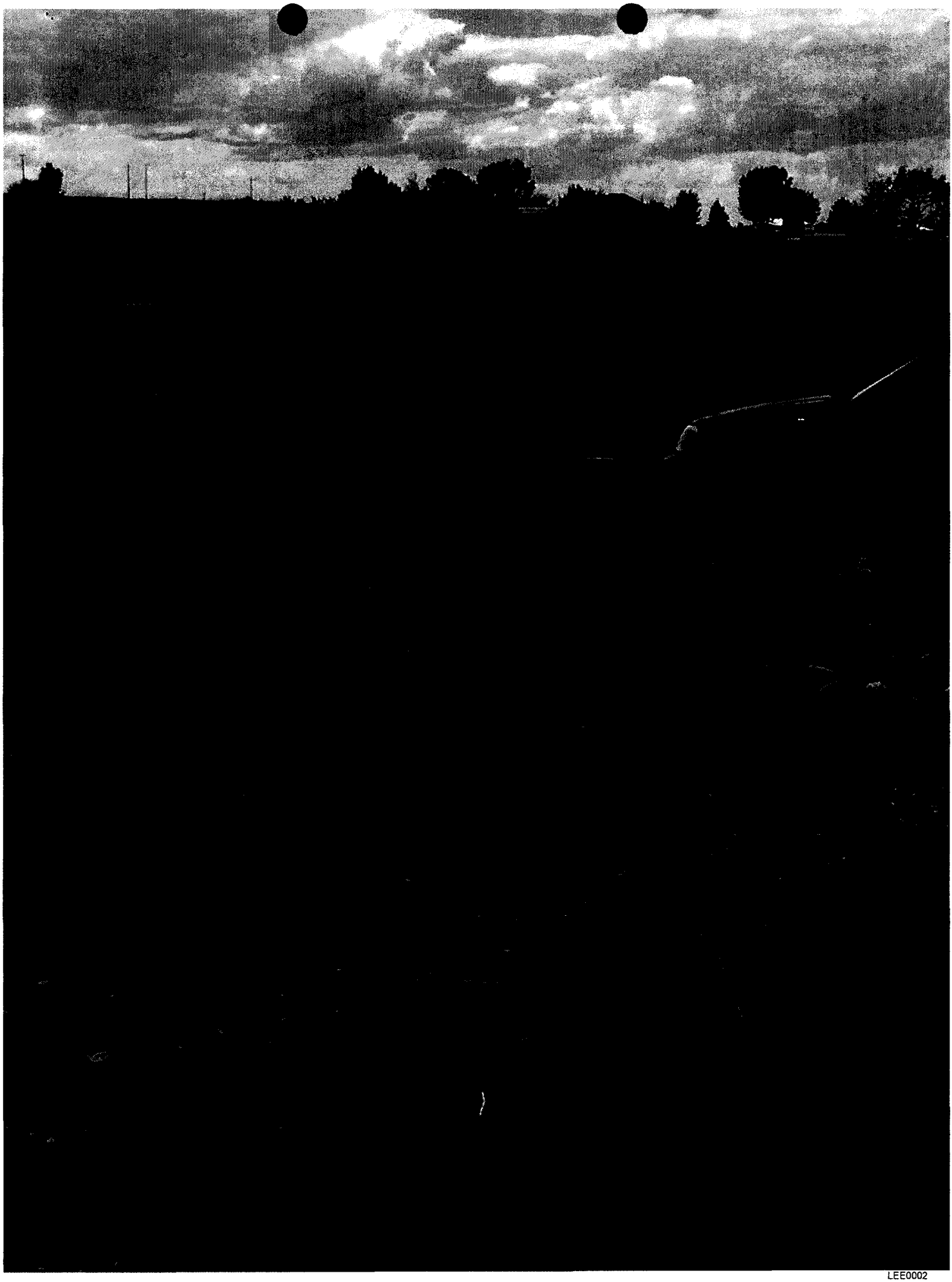
_____
Kathy Lee

BUYER: By _____
The Kemp Family Trust

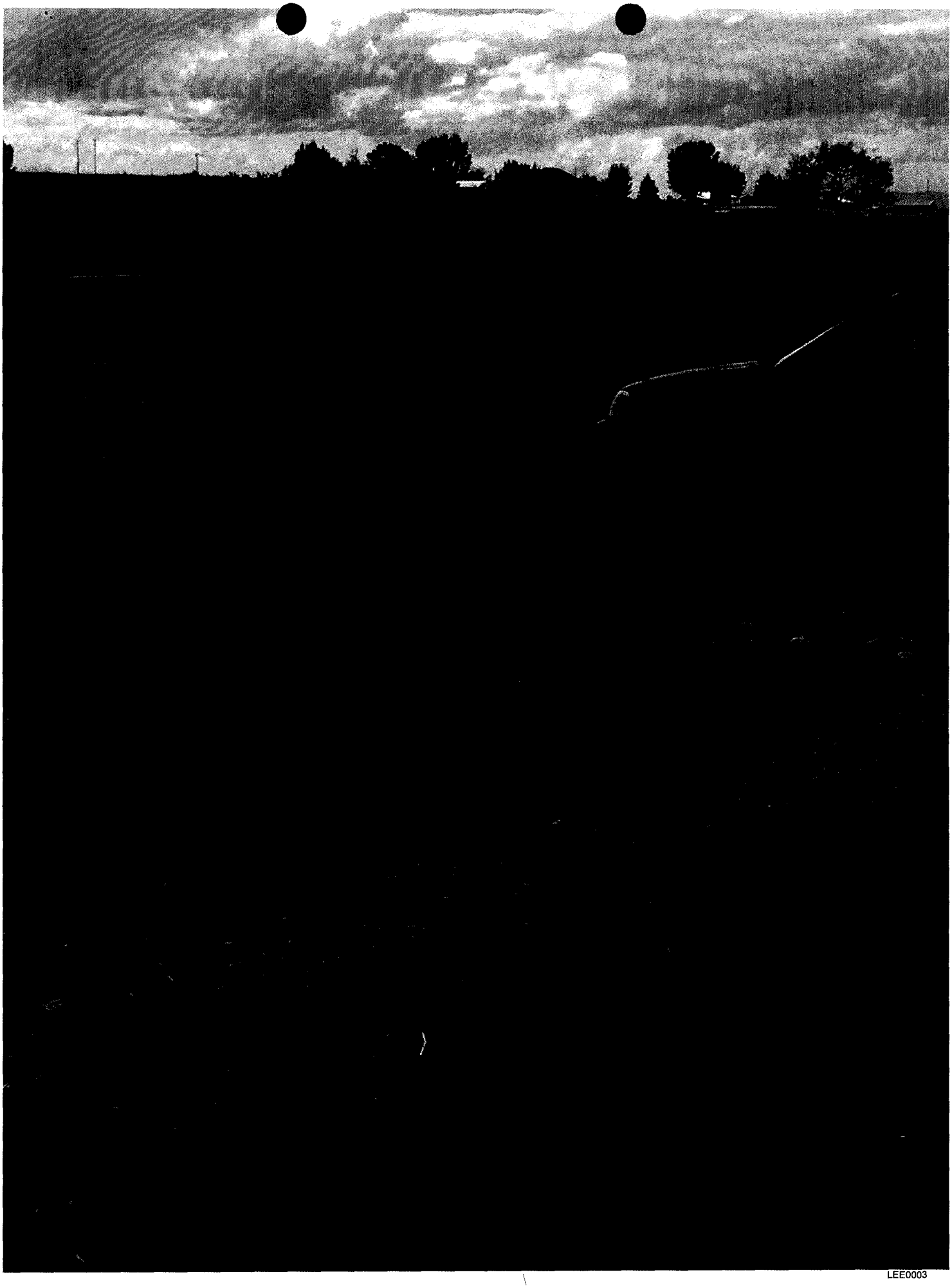
EXHIBIT
tabbies
B

LEE0008

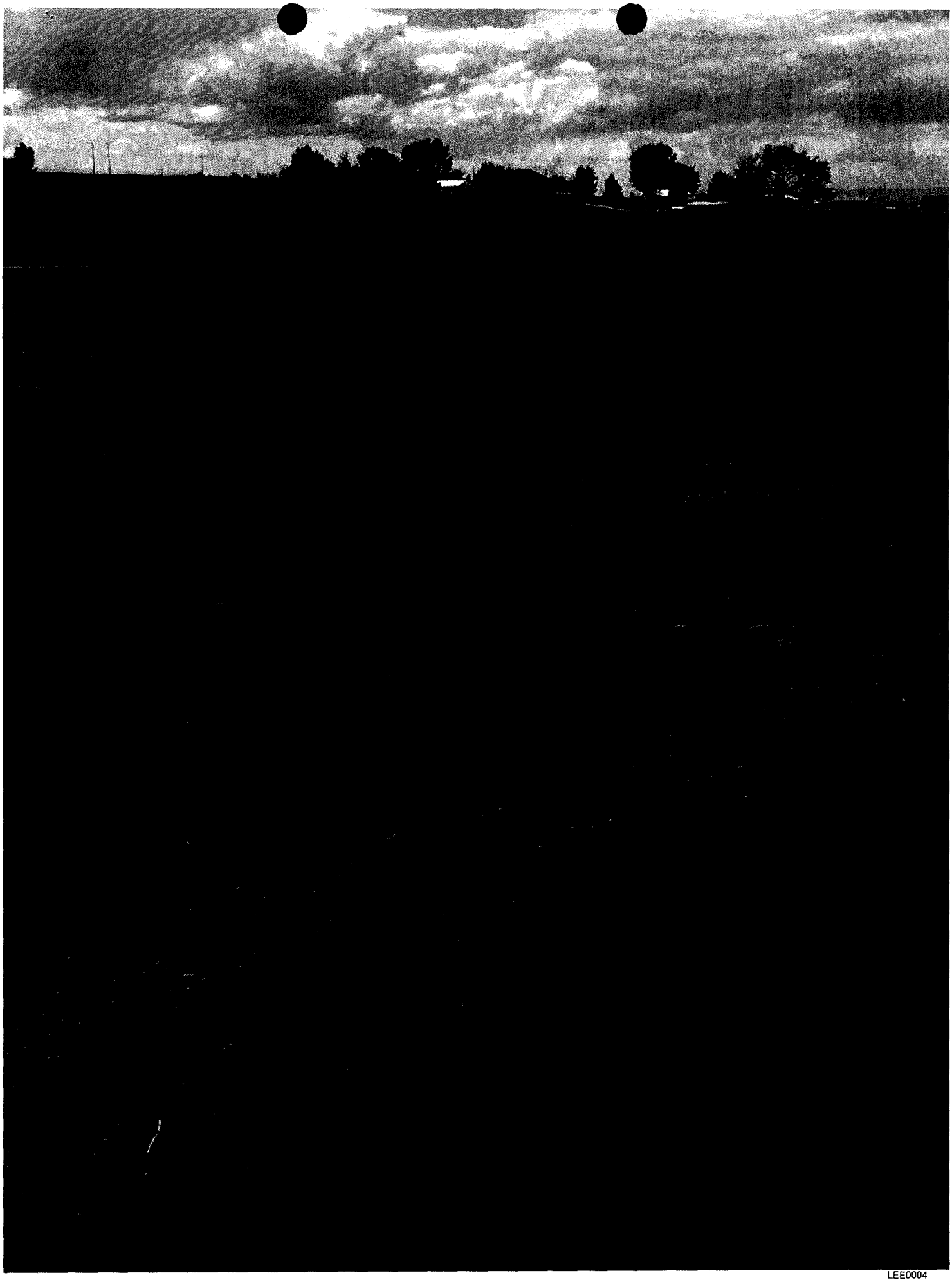
LEE0001



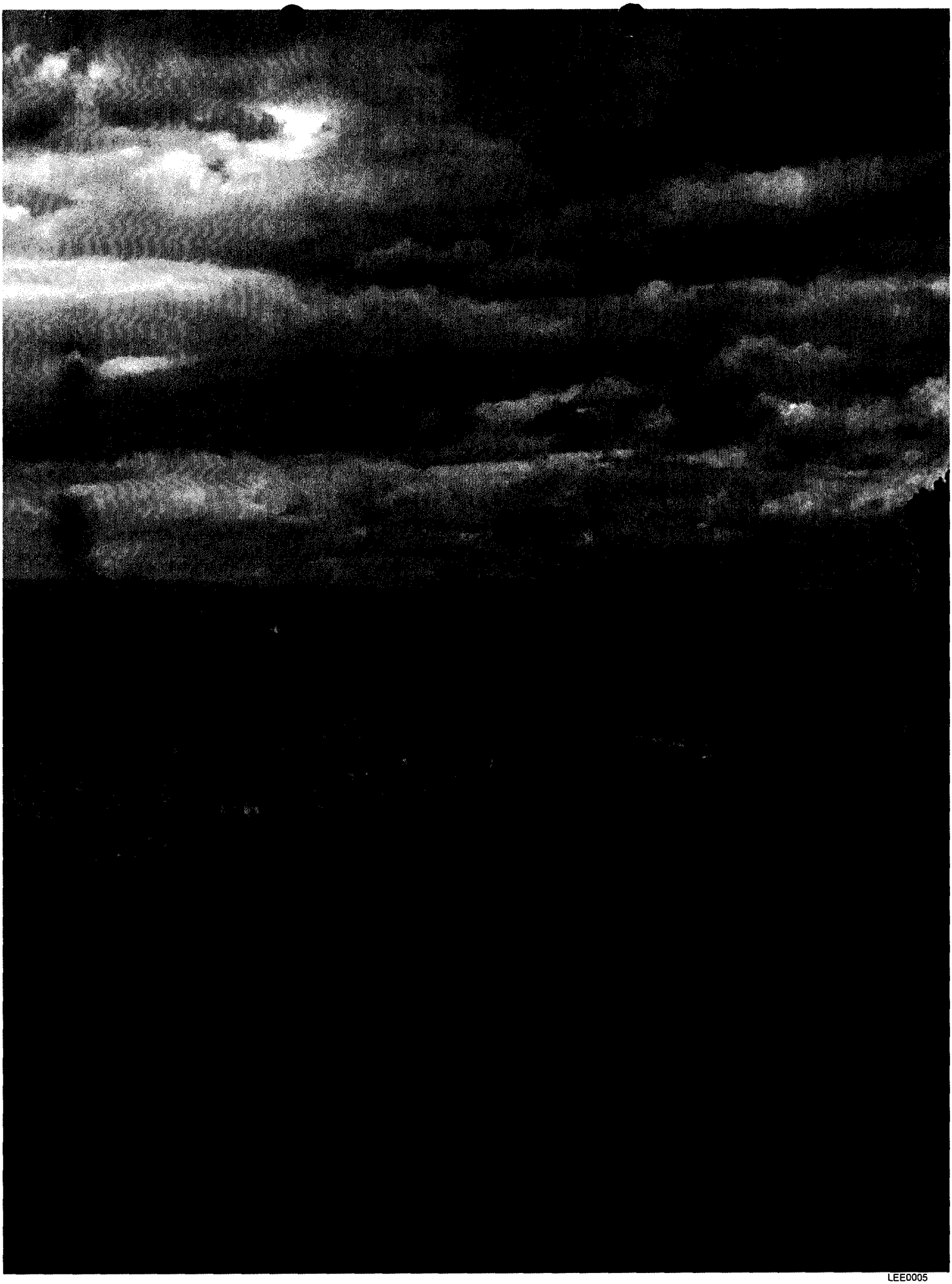
LEE0002



LEE0003



LEE0004



LEE0005

TROUPIS LAW OFFICE, P.A.

ATTORNEY AND COUNSELOR AT LAW

CHRIST T. TROUPIS
LICENSED IN IDAHO, OREGON,
CALIFORNIA, AND ILLINOIS

1299 E. IRON EAGLE, SUITE 130
P.O. BOX 2408
EAGLE, IDAHO 83616

(208) 938-5584
FAX (208) 938-5482
ctroupis@troupislaw.com

September 22, 2014

Willow Creek Ranch Estates Board of Directors
c/o Rhonda Curry, President
9420 Kemp Road
Meridian, ID 83644

Re: ***Re: Willow Creek Ranch Estates obligation under Driveway Access Agreement between Dale and Kathy Lee (Seller) and Kemp Family Trust (Buyer).***

Dear Members of the Board:

You have provided me with a copy of a June, 1997 Agreement for the sale of real property to the Kemp Family Trust by Dale and Kathy Lee. The property is described as 1.8 acres, being part of Lots 5 and 6 of Block 5, Willow Creek Ranch Estates No. 2. The Sale Agreement states that both parties are contemplating future development of their properties which adjoin each other. The provision of the agreement on which you have asked me to offer an opinion is this:

> "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."

Buyer provided Driveway Culvert, Gravel and Fence Panels steel vs Wire

The terms of this agreement grant an easement to the Seller to construct and use three (3) driveway accesses to the gravel road. The agreement does not state that there is an easement to use the gravel road, but since it refers to "accesses," an easement across the gravel road is probably implied.

Easements are either "in gross" or "appurtenant." If they are "in gross", the easement is granted only to the named party and not to subsequent land users or owners. If it is "appurtenant", the easement is attached to the land and passes on to subsequent landowners. The Court first looks to the written terms of the easement grant itself to determine what kind of easement has been created. Only if there is an ambiguity, will the court look at other facts surrounding creation of the easement to determine whether it attaches to the land. Here, the easement is granted only to the "Seller." It is not granted to

L for development

EXHIBIT
D

LEE0009

Get Alan Mills To testify as to the intent

the Seller's successors in interest or any other persons. But the easement is for "access", implying that subsequent owners of the Lee property would acquire the right to use it. Additionally, the first sentence in the paragraph creating the easement is titled "Future Development." It states that both Seller and Buyer are contemplating future development of their existing properties. So if there is an ambiguity as to whether the easement is personal to the Lees, or attaches to the land conveyed by them for the benefit of their successors, a court would likely construe the document as granting an "access" easement that attaches to the land sold to the Kemp Family Trust for the benefit of present and future landowners.

No, it does not attach to the Land Sold.

In this case, the Seller (Dale and Kathy Lee) reserved an easement across land they were selling to the Buyer, the Kemp Family Trust. So, the Kemp Family Trust acquired property encumbered with an easement in favor of the Lees, allowing them to construct the three driveways and access the gravel road. The property the Kemp Family Trust acquired was subsequently improved with a gravel road, which now comprises a portion of Kemp Lane.

Incorrect See Map.

The Trust was the developer of Willow Creek Ranch Estates. It transferred Kemp Lane to the HOA as part of the common area owned by the Association. At the time of the transfer, a number of third parties had purchased lots and improved them with homes adjacent to the road. All of the members of the Association own an equitable interest in the common areas owned by their Association. However, the Association is a 'successor in interest' to the Developer because the Association did not purchase the common areas. The Developer transferred the common areas to the development, and transferred control of the development to the Association.

You have advised me that the Sale Agreement was not recorded, and its existence and terms are not disclosed on the Subdivision Plat for Willow Creek Ranch Estates No. 2. Moreover, the driveways were never constructed and the Lee's property remains undeveloped. It should also be noted that the Lee property is not landlocked. Alternative access for vehicles is available, although at greater cost.

Future development

They were from Road to Lee Property

Following this sale, the Kemp Family Trust improved its property by platting the Willow Creek Ranch Estates Subdivision. It sold all of the residential lots in the development, which are now owned by third parties who acquired them without knowledge of the unrecorded claimed easement across a private road within the subdivision (Kemp Lane) reserved by the Lees when the developer acquired some of the property now within the subdivision. Common Area

The developer transferred control of the subdivision to the Willow Creek Ranch Estates Homeowners' Association in or about 2005. Kemp Lane is described on the Plat as part of the "Common Areas" which, under Article I(D) of the CCR's,

> "means all real property, including easements or other interests less than fee title, as well as the improvements thereon, owned by the Association for the common use and enjoyment of the Owners."

The primary legal issue presented by these facts is whether the Homeowners' Association, as a successor-in-interest of the Kemp Family Trust as developer of Willow Creek Ranch Estates, is legally obligated to honor an unrecorded easement encumbering property transferred to it by the Kemp Family Trust. There are no Idaho cases that discuss this issue, and therefore, it is a legal question of first impression in Idaho. As a result, I cannot give you a definitive answer to this legal question based on prior decisions of the Idaho courts or Idaho statutes. However, other general principles of law in Idaho can provide guidance to the Association on this legal issue that I believe you can reasonably rely upon. Understand however, that an Idaho court can always reach a different conclusion, and it is impossible to predict how a specific case will be decided.

Based on the facts provided to me and general principles of Idaho law applicable to those facts, it is my opinion that the Lees cannot enforce their unrecorded easement against the Willow Creek Ranch Estates Homeowners' Association, or any of the lot owners within the subdivision.

My opinion is based on the following facts and law:

1. The Lee's easement is unrecorded and therefore unenforceable against any subsequent bona fide purchaser for value, who acquired it without notice of the existence of the easement. Kemp responsibility to record

2. The Association is a successor in interest to the developer's legal title to the property that is subject to the unrecorded easement because the Association did not acquire the property by purchase. As such, it is not a bona fide purchaser for value. However, the beneficial interest in the property is owned by the Lot Owners, for whose sole use and benefit the Association is to control and maintain the road. Therefore the Association holds bare legal title, while the beneficial ownership is in the Lot Owners of Willow Creek Ranch Estates, who are the members of the Association.

3. **Idaho Code §55-606. CONCLUSIVENESS OF CONVEYANCE -BONA FIDE PURCHASERS**

> Every grant or conveyance of an estate in real property is conclusive against the grantor, also against every one subsequently claiming under him, except a purchaser or encumbrancer, who in good faith, and for a valuable consideration, acquires a title or lien by an instrument or valid judgment lien that is first duly recorded.

4. **Idaho Code § 55-812. UNRECORDED CONVEYANCE VOID AGAINST SUBSEQUENT PURCHASERS**

> Every conveyance of real property other than a lease for a term not exceeding one (1) year, is void as against any subsequent purchaser or mortgagee of the same property, or any part thereof, in good faith and for a valuable consideration, whose conveyance is first duly recorded

5. Every lot owner in the Willow Creek Ranch Estates Subdivision is a bona fide purchaser for value, and entitled to rely upon the protection of Idaho Code §55-812 against unrecorded conveyances, including easements.

6. A court of equity would likely rule that the lot owners (bona fide purchasers) as the sole persons for whose benefit the Association controls and maintains Kemp Lane, are entitled to protection against the unrecorded easement.

In ruling against enforceability of the easement, a court would likely consider the following facts to be significant. 1) the Lee's parcel is not landlocked; so they are not left with a worthless property; 2) the Lees could have protected their easement by recording it when they transferred property to the Kemp Family Trust. The Lees were solely responsible for the failure to give notice to subsequent lot purchasers in Willow Creek Ranch Estates Subdivision; 3) there is no provision in the Lee's reserved easement for contributing to maintenance of the private road; as a result, the burden of the additional traffic would fall solely upon the homeowners in the subdivision; 4) the agreement contemplated development, but the Lee parcel was still unimproved bare land when the subdivision was platted. At that time, the Lees again had an opportunity to give notice of

We are giving notice now.

Future kids in the Future

⇒ Kemp was expected.

We agree now to an equal HOA dues for maintenance

We never knew when this happened.

their reserved easement, before the Kemp Family Trust divested itself of control in 2005; 5) the Kemp Family Trust did not give notice of a reserved easement to lot purchasers at the time they acquired their properties. ← They Should have given Notice and let us know.

Based upon all of these facts and law, it is reasonable to conclude that a court would refuse to enforce the Lee easement against Willow Creek Ranch Estates HOA and/or the lot owners within the subdivision.

Very Truly Yours,

Christ T. Troupis

Christ T. Troupis, ISB #4549
Troupis Law Office, P.A.
801 E. State Street, Suite 50,
P.O. Box 2408,
Eagle, Idaho 83616
Telephone: (208) 938-5584
Facsimile: (208) 938-5482

Matthew C. Parks, ISB #7419
ELAM & BURKE, P.A.
251 East Front Street, Suite 300
Post Office Box 1539
Boise, Idaho 83701
Telephone: (208) 343-5454
Facsimile: (208) 384-5844
mcp@elamburke.com

Attorneys for Defendant Willow Creek Ranch Estates
No. 2 Subdivision Homeowners' Association, Inc.

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

DALE LEE and KATHI LEE, husband and wife,

Plaintiffs,

vs.

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

Defendants.

Case No. CV-16-3425*C

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Defendant Willow Creek Ranch Estates No. 2 Subdivision Homeowners' Association, Inc. ("Willow Creek") hereby opposes Plaintiffs Dale Lee and Kathi Lee's (the "Lees") motion for summary judgment. The Lees' motion for summary judgment should be denied because as a matter of law they have no right or title to the disputed property. Furthermore, the Lees have failed to establish facts necessary to shift the burden to Willow Creek to demonstrate a material question of fact concerning whether Willow Creek had notice of the agreement at the center of this dispute.

I. 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 an easement over Kemp Road, which is a private road within the Willow Creek Estates subdivision. Memorandum in Support of Plaintiffs' Motion for Summary Judgment ('Plaintiffs' Memo."), p. 2-4. According to the Lees, the Kemp Family Trust granted them an easement in the 1997 Agreement for the Sale of Real Property (the 1997 Agreement). *Id.* ("By executing the Agreement, the Kemps granted the Lees an express easement to construct the three access points and an implied easement to use Kemp Road.")

The 1997 Agreement submitted to the Court does not have a valid legal description of the purported easement. *See Declaration of Dale Lee* ("Lee Dec."), Ex. B. 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.*

On August 8, 1997, the Lees executed the deed contemplated by the 1997 Agreement. *Affidavit of Matthew C. Parks in Support of Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment* ("Parks Aff."), Ex. A. The deed transferred property owned by the Lees to the Kemp Family Trust. *Id.* Per the deed, the property was being transferred "free and clear from all encumbrances, EXCEPT those to which this conveyance is expressly made subject . . . ." *Id.* The deed did not contain any express reservations or exceptions. *Id.* The deed did not reference or incorporate the terms of the 1997 Agreement. *Id.*

On December 28, 1998, a plat of the Willow Creek Ranch Estates No. 2 was recorded. This subdivision contains Kemp Road. *Id.*, Ex. B. The plat map does not reference any easement or property right of the Lees with respect to Kemp Road.

On April 30, 1999, the Kemp Family Trust subsequently recorded the Willow Creek Ranch Estates No. 2 Declaration of Covenants, Conditions, and Restrictions and Neighborhood Association (the "Declaration"). *Id.*, Ex. C. The Declaration does not contain any reference to the alleged easement or equitable servitude claimed by the Lees over Kemp Road. *Id.*

The Kemp Family Trust transferred Kemp Road to Willow Creek via a warranty deed which indicated Kemp Road was being transferred free from all encumbrances except taxes and "covenants, conditions, restrictions, and easements of record." Parks Aff., Ex. D.

II. SUMMARY OF LEGAL ARGUMENT

The Lees contend they have either an easement or equitable servitude over Kemp Road pursuant to the 1997 Agreement. Plaintiffs' Memo., p. 6. As a matter of law, the Lees are mistaken.

First, Willow Creek disagrees that its predecessor in interest (the Kemp Family Trust) to Kemp Road ever granted any easement or servitude to the Lees. At the time the Lees and the Kemp Family Trust executed the 1997 Agreement, the Lees owned the subject property. The closing for the transfer was, per the 1997 Agreement, to take place on or before July 1, 1997. Lee Dec., Ex. B. Until closing, the Lees owned the subject property. The Kemp Family Trust did not own the property and did not have the power to grant the Lees any easement or servitude at the time the parties executed the 1997 Agreement. A party cannot grant an easement or servitude over property it does not own. *See Capstar Radio Oper. Co. v. Lawrence*, 143 Idaho 704, 708, 152 P. 2d 575, 579 (2007). Likewise, a party cannot grant itself an easement or servitude over its own property. *Id.*

Second, the Lees, after executing the 1997 Agreement subsequently executed a deed transferring the property upon which they claim an easement to the Kemp Family Trust. As a matter of law, the recitals and covenants in the 1997 Agreement merged with the deed. *See Jolley v. Idaho Securities, Inc.*, 90 Idaho 373, 414 P.2d 879 (1966). The deed does not mention the alleged easement or servitude. The Court may only look to the deed to determine the property rights that were

transferred as a result of the 1997 land sale between the Lees and the Kemp Family Trust.

Third, the 1997 Agreement does not have a legal description of any of the properties involved and is, thus, unenforceable in law or in equity. *See Ray v. Frasure*, 146 Idaho 625, 200 P.3d 1174 (2009).

Fourth, Willow Creek disagrees that it had knowledge, actual or constructive, of the 1997 Agreement. The Lees only evidence in support of the claim Willow Creek had knowledge of the 1997 Agreement fails to establish the absence of a question of fact concerning this point. According to the Lees, because Alan Mills, the real estate agent for the Kemp Family Trust, knew about the 1997 Agreement and Mills initially served as a board member of Willow Creek, the knowledge of the Kemp Family Trust is imputed to Willow Creek. But, the Lees failed to offer any evidence that Mills acquired any knowledge of the 1997 Agreement ***in his capacity as a board member of the association***, which is required in order to impute such knowledge to Willow Creek. *See Mason v. Tucker & Associates*, 125 Idaho 429, 433, 871 P.2d 846, 850 (Ct. App. 1994) ("Knowledge acquired by an agent ***during the course of the agency relationship***, and while the agent is not acting in an interest adverse to that of the principal, is imputed to the principal; and notice to an agent constitutes notice to the principal.") (emphasis added).

The records of the association contain no mention of the 1997 Agreement. Ray Tschohl, became president of Willow Creek in 2005, and when he became president, he did not have any knowledge of the 1997 Agreement. *See* Declaration

of Ray Tschohl, ¶ 1-3. Tschohl learned the Lees claimed they had an easement over Kemp Road. *Id.* Tschohl searched the records of the association and found no mention of the 1997 Agreement in any records of the association. *Id.* Willow Creek did not have actual or constructive knowledge of the 1997 Agreement.

For these reasons, Willow Creek requests the Court deny the Lees' motion for summary judgment. Willow Creek also requests the Court find that, as a matter of law, the 1997 Agreement does not contain any grant of an easement, servitude, or enforceable property right to the Lees.

III. LEGAL STANDARD

Summary judgment is proper if "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c). The Court must liberally construe all facts and draw all reasonable inferences in favor of the non-moving party. *Jenkins v. Boise Cascade Corp.*, 141 Idaho 233, 238 (2005). If the record contains conflicting inferences upon which reasonable minds could differ, summary judgment must not be granted. *Brown v. Matthews Mortuary, Inc.*, 118 Idaho 830, 833 (1990). This requirement is a strict one. *Clarke v. Prenger*, 114 Idaho 766, 768 (1988).

The burden of proving the absence of a material fact rests at all times upon the moving party. *G&M Farms v. Funk Irr. Co.*, 119 Idaho 514, 517 (1991). This burden is onerous because even "circumstantial evidence can create a genuine issue of material fact, [and] all doubts are to be resolved against the moving party." *Doe*

v. Durtschi, 110 Idaho 466,470 (1986). If the moving party meets this burden, the burden shifts to the nonmoving party to show a genuine issue of material fact does exist. *Asbury Park, LLC v. Greenbriar Estate Homeowners' Ass n. Inc.*, 152 Idaho 338, 343-44 (2012).

The adverse party may not rest upon mere allegations in the pleadings, but must set forth by deposition, affidavit, or otherwise, specific facts showing there is a genuine issue for trial. *Boise Mode, LLC v. Donahoe Pace & Partners Ltd.*, 154 Idaho 99, 104 (2013). The nonmoving party must submit more than just conclusory assertions that an issue of material fact exists to withstand summary judgment. *Northwest Bec-Corp. v. Home Living Sery.*, 136 Idaho 835, 839 (2002). A mere scintilla of evidence or only slight doubt as to the facts is not sufficient to create a genuine issue of material fact for the purposes of summary judgment. *Jenkins*, 141 Idaho at 238. However, "[t]he burden of the plaintiff when faced with a motion for summary judgment, is not to persuade the judge that an issue will be decided in his favor at trial. Rather, he simply must present sufficient materials to show that there is a triable issue." *G&M Farms*, 119 Idaho at 524 (emphasis in original).

"It is not the trial court's function to weigh the evidence, but to determine whether there is a genuine issue for trial." *G&M Fanns*, 119 Idaho at 517. "Facts in dispute cease to be material facts when the plaintiff fails to establish a prima facie case. In such a situation, there can be 'no genuine issue of material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's

case necessarily renders all other facts immaterial." *Post Falls Trailer Park V. Fredekind*, 131 Idaho 634, 637 (1998).

IV. LEGAL ANALYSIS

A. The 1997 Agreement Does Not Grant an Express Easement or Servitude

The Lees failed to establish that the 1997 Agreement grants them an express easement or express servitude over the subject property.

First the 1997 Agreement is merely an agreement to agree with respect to the referenced "3 driveway accesses." The Kemp Family Trust did not own the subject property at the time the 1997 Agreement was executed and, thus, could not have granted any easements or servitudes.

Second, the 1997 Agreement merged with the subsequent deed (which contains no mention of an access easement rights retained by the Lees). As a matter of law, the Court is precluded from looking to the 1997 Agreement to determine the rights of the parties with respect to the property transferred via the deed.

Third, the 1997 Agreement does not contain a legal description of the property and, thus, is unenforceable in law or in equity.

1. The Kemp Family Trust Never Granted an Easement or Servitude

The Lees incorrectly contend that Willow Creek does not dispute the assertion the 1997 Agreement creates an easement. *See* Plaintiffs' Memo., p. 7. The Lees cite to a letter drafted by Willow Creek's counsel in support of their position. First, the letter is hearsay and inadmissible. Second, the letter is only a

letter and not binding precedent. The Lees failed to establish the 1997 Agreement grants an easement or servitude. For that reason alone, the Lees' motion for summary judgment should be denied.

The 1997 Agreement is not a grant of any property interest, but an agreement by the Lees to transfer certain property to the Kemp Family Trust at the closing, contingent on the payment of money by the Kemp Family Trust. Lee Dec., Ex. B. As a matter of law, the 1997 Agreement does not contain an enforceable grant of any easement or servitude by the Kemp Family Trust to the Lees because the Lees owned both the property being sold (the unspecified 1.8 acres) and the property being retained by the Lees (and could not grant themselves an easement) and the Kemp Family Trust did not own the subject property (and could not grant the Lees an easement or servitude).

The Idaho Supreme Court has ruled on whether a purchase and sale agreement can be the source of the grant of an easement by the buyer to the seller in *Capstar Radio Oper. Co. v. Lawrence*, 143 Idaho 704, 152 P. 2d 575 (2007). In *Capstar*, the Idaho Supreme Court explained how an express easement or servitude can be created:

> 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. No particular forms or words of art are necessary [to create an express easement]; it is necessary only that the parties make clear their intention to establish a servitude. **An express easement may be created by a written agreement between the owner of the dominant estate and the owner of the servient estate.** It

> **may also be created by a deed from the owner of the servient estate to the owner of the dominant estate.** Where the owner of the dominant estate is selling the property to be subjected to the servitude, an express easement may be created by reservation or by exception. An express easement by reservation reserves to the grantor some new right in the property being conveyed; an express easement by exception operates by withholding title to a portion of the conveyed property.

Id. at 707, 152 P.3d at 578 (internal citations and quotations omitted) (emphasis added).

The *Capstar* case is very instructive and sets forth binding precedent directly applicable to the dispute between the Lees and Willow Creek. The facts in *Capstar* are remarkably similar to the facts in this case with respect to the sale agreement and the subsequent deed. The Lawrences and Capstar owned adjacent parcels of property. *Id.* at 706, 152 P. 3d at 577. Capstar alleged it had an easement over a portion of the Lawrences' property by virtue of a sale agreement between the Funks (who at one point owned both the Lawrences' property and Capstar's property) and the Lawrences' predecessor in interest (Human Synergistics) that contained a provision indicating the sale of the Lawrence property by the Funks was:

> Subject to and including an ingress egress easement over this and adjoining property in said sections 21 and 22 owned by the grantor and including an ingress egress easement over portions of Section 21 heretofore granted to the grantors. Said easement shall be over existing roads until such time as all record owners shall agree to the relocation, improvement and/or abandonment of all or any portions of any roads. This easement is also over similar lands in Section 15.

Capstar, 143 Idaho at 706, 152 P. 3d at 577.

However, the *deed* transferring the property from the Funks to Human Synergistics did not contain any language concerning the grant of any easements, though the deed did reference the sale agreement generally. *Id.*

Capstar, like the Lees, argued that the sales agreement contained a grant of an easement or servitude. The Court in *Capstar* noted, "[t]here is nothing in the sale agreement that indicates an immediate grant of easement rights." *Id.* at 708, 152 P.3d at 579. The Court held that the agreement was a "title retaining contract where the grant of the Lawrence parcel (and the creation of any easement over it) was contingent upon future fulfilment of the sale agreement." *Id.* Rather than an immediate grant of any easement or servitude, the Court held the contract gave the Funks the right to obtain an access easement in the future over the Lawrence parcel for the benefit of another property (which was not specified) after the buyers paid the purchase price at closing. *Id.* In this situation (where a purchase and sale agreement contains a provision concerning a right to obtain an easement once the purchase price is paid), the Court held that there would be no grant of any easement unless the deed itself contained language reserving or excepting an easement or servitude. *Id.* ("The sale agreement therefore does not, by itself, create any easement either by grant, reservation, or exception . . . . In order for an easement to be created, there needed to be language in the 1992 warranty deed reserving or excepting an easement.")

The deed from the Funks to Human Synergistics, the Lawrences' predecessor in interest, contained no such reservation or exception. Therefore, the Court held

that the sale agreement did not create any easement or servitude. *Id.* at 708-09, 152 P. 3d at 579-80.

The facts of this case parallel the facts in *Capstar*. The Lees, like Capstar, point to a sales agreement as the source of the grant of the easement or servitude. Though, the language in the sales agreement in *Capstar* is less ambiguous than the language in the 1997 Agreement. Both sales agreements lack any indication that there was an ***immediate*** grant of an easement. The Lees (like the Funks) owned both the servient and dominant estates at the time they executed the 1997 Agreement and, thus, could not grant themselves an easement. *See Capstar* at 707, 152 P.3d at 578 (holding one way to create an express easement or servitude is an agreement between the owner of the dominant estate and the owner of the servient estate); *see also W. Wood Investments, Inc. v. Acord*, 141 Idaho 75, 83, 106 P.3d 401, 409 (2005) (commenting that equitable servitudes arise in situations where the "equity is attached to the property by the owner") (citing *Streets v. J M Land & Developing Co.*, 898 P.2d 377, 379 (Wyo.1995). These cases establish that, as a matter of law, an owner of property cannot grant itself an easement or make a promise to itself that could be considered an equitable servitude.

In this case, there never was any agreement between the owner of the dominant estate and the owner of the servient estate that created an express easement or servitude. At the time of the 1997 Agreement, the Lees (just like the Funks in *Capstar*) owned both the servient estate and the dominant estate. Additionally, the Kemp Family Trust, like Human Synergistics, did not own the

servient estate and thus could not have granted any easement or servitude at the time the 1997 Agreement was executed. Therefore, pursuant to Idaho law, the 1997 Agreement did not create (and could not have created) an easement or servitude in favor of the Lees.

The terms of the 1997 Agreement do not contain an express ***grant*** of any easement or servitudes. Per the 1997 Agreement, the Lees would transfer title to the property to the Kemp Family Trust, "free and clear of all encumbrances." *Lee Dec.*, Ex. B. The 1997 Agreement notes the Lees and the Kemp Family Trust were "contemplating future development of their existing properties which adjoin each other." *Id.* In this "Future Development" section of the 1997 Agreement, the Lees and Kemp Family Trust referenced a future potential for 3 driveway accesses in unspecified locations along a road that the Kemp Family Trust was to construct in the future. *Id.* At most, the 1997 Agreement memorializes an intent to include an easement in the warranty deed transferring the 1.8 acres to the Kemp Family Trust. However, it should be pointed out that the 1997 Agreement also specifically notes that the 1.8 acres will be transferred free and clear of all encumbrances with no mention of any alleged driveway access easement. *Id.* But, most importantly, as in *Capstar*, the subsequent deed transferring the property failed to mention any easement or servitude.

The case at hand is on all fours with the holding in *Capstar*. In the case before this Court, we have a sales agreement that does not contain any express grant of an easement or servitude, but rather provides for the Lees' right to obtain

an easement in the future. Both the deed in this case and the deed in *Capstar* do not contain any grant, reservation, or exception for an easement or servitude. The *Capstar* holding is binding precedent. As a matter of law, the 1997 Agreement did not create any easement or servitude in favor of the Lees.

Willow Creek requests the Court follow the precedent in *Capstar* and hold the 1997 Agreement did not create an express easement or servitude. Willow Creek requests the Court deny the Lees' motion for summary judgment and find that the Lees do not have an easement or equitable servitude for the use of Kemp Road or three driveway accesses from Kemp Road.

2. The Language in the Deed Controls What Was Granted by the Lees, Not the 1997 Agreement

The Lees delivered to the Kemp Family Trust a deed for the subject property as performance of the 1997 Agreement. "When a deed is delivered and accepted as performance of the contract to convey, the contract is merged in the deed. Though the terms of the deed may vary from those contained in the contract, ***the deed alone must be looked to to determine the rights of the parties*** . . . ." *Tower Asset Sub Inc. v. Lawrence*, 143 Idaho 710, 715–16, 152 P.3d 581, 586–87 (2007) (citations omitted) (emphasis added). The deed between the Lees and the Kemp Family Trust contains no language that could be interpreted to reserve or except an easement for use of and access to driveways from Kemp Road. The deed contains no easement reservation or exception at all. *See* Parks Aff., Ex. A.

The Lees have not addressed the fact that the deed transferring the property at issue contained no reference to any easement or servitudes. "Under the doctrine

of merger, any recitals in the real estate contract were merged into the deed." 143 Idaho at 715–16, 152 P.3d at 586–87. As a matter of law, the court must look only to the deed and must not review the 1997 Agreement to determine the rights of the Lees and Willow Creek. The deed contains no mention of any easement or servitude. The 1997 Agreement merged with the deed and did not and cannot, as a matter of law, create any property rights for the Lees. The Lees do not have any easement or servitude over the property at issue.

Willow Creek requests the Court find the 1997 Agreement merged with the deed delivered by the Lees to the Kemp Family Trust, that the deed determines the rights of the parties, not the 1997 Agreement, and that the deed does not convey any easement or servitude to the Lees for the use of and access to Kemp Road. Willow Creek requests the Court deny the Lees' motion for summary judgment and dismiss the Lees' complaint.

3. The 1997 Agreement Does Not Contain a Valid Legal Description

The 1997 Agreement does not have a valid legal description of any of the parcels of real property involved in the transaction. There is no description of the land being sold other than that it is 1.8 acres. Lee Dec., Ex. B. There is a reference to adjoining lands owned by the Lees and the Kemp Family Trust, but there is no description of these lands either. *Id.*

> 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). 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.

B. Willow Creek Did Not Have Actual or Constructive Notice of the 1997 Agreement

It is undisputed that the 1997 Agreement was never recorded. There is no evidence that Willow Creek ever knew about the 1997 Agreement. The only argument offered by the Lees in support of the claim that Willow Creek had actual notice of the 1997 Agreement is a statement by Alan Mills, a former board member, that Willow Creek was aware of the 1997 Agreement. However, the Lees' argument is flawed in several substantial respects.

First, in order to impute the knowledge of a board member to its principal organization, the board member must have gained the knowledge in his or her official capacity. *See Sulik v. Cent. Valley Farms, Inc.*, 95 Idaho 826, 828, 521 P.2d 144, 146 (1974). In other words, the Lees must demonstrate that Alan Mills received the knowledge of the 1997 Agreement in his capacity as a board member of the association. The record contains no such evidence. While not exactly clear, it

can be assumed that Mills learned about the 1997 Agreement at the time it was executed, as he writes in his letter that he "was the real estate agent for the Kemp Family Trust . . . ." Declaration of Alan Mills, Ex. A. Mills learned about the 1997 Agreement while acting in his capacity as the agent of the Kemp Family Trust, not Willow Creek. Willow Creek did not exist when the 1997 Agreement was executed. Parks Aff., Ex. E (Willow Creek Articles of Incorporation).

The record contains no evidence to support a finding that the knowledge of Mills (or Mary Kemp) can be imputed to Willow Creek. Mills may have known about the 1997 Agreement, but there is no evidence in the record that Willow Creek, in 2005, when the Kemp Family Trust transferred Kemp Road to Willow Creek, knew about the 1997 Agreement. The knowledge of realtor Alan Mills cannot be imputed to Willow Creek.

The same argument applies with respect to Mary Kemp, the trustee of the Kemp Family Trust, who, according to Mills, also served as an initial board member of Willow Creek. First, Mary Kemp has not submitted any affidavit or statement, so any reliance on the allegation that Mary Kemp knew about the 1997 Agreement and her knowledge may be imputed to Willow Creek fails for lack of evidentiary support. But, in any event the argument would fail because Mary Kemp learned of the 1997 Agreement in her capacity as the trustee of the Kemp Family Trust at the time of the execution of the 1997 Agreement.

Second, as a matter of public policy, the Court should not impute the knowledge of the initial board members to the subsequent innocent home buyers in

the subdivision. The initial board members were acting in their own interests while serving on the board, as they were developing the land and hoping to make a profit. The developer never told the purchasers about the alleged agreement to provide access to the Lees. Innocent people purchased the lots in the subdivisions to construct homes without any knowledge of the 1997 Agreement. The equities favor not forcing these innocent home owners who own homes within the Willow Creek subdivision to open up the private road they maintain for the Lees. The Lees neglected to include the easement or servitude in the deed. The Kemp Family Trust neglected to include the easements in the plat for the Willow Creek subdivision or mention the alleged covenant in the declarations for the subdivision. These failures by the Lees and the Kemp Family Trust should not result in an adverse ruling against innocent home owners in the Willow Creek subdivision.

V. CONCLUSION

The Lees' motion for summary judgment is based upon the faulty assumption that the 1997 Agreement contains an enforceable grant of an easement or equitable servitude. Idaho law is clear that a title retaining sale agreement (like the 1997 Agreement) cannot create an easement or servitude without the exception or reservation being included in the subsequent deed. The deed from the Lees to the Kemp Family Trust did not provide for an easement or servitude to the Lees. Because the deed did not mention the easement or servitude, and the 1997 Agreement merged with the deed, as a matter of law, the Lees do not have an

easement or servitude over Kemp Road. Willow Creek requests the Court deny the Lees' motion for summary judgment and dismiss the Lees' complaint.

DATED this 4 day of August, 2016.

ELAM & BURKE, P.A.

By: _____
Matthew C. Parks, of the firm
Attorneys for Defendant Willow Creek Ranch Estates No. 2 Subdivision Homeowners' Association, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 4 day of August, 2016, I caused a true and correct copy of the foregoing document to be served as follows:

Daniel W. Bower STEWART TAYLOR & MORRIS, PLLC 12550 W. Explorer Drive, Suite 100 Boise, ID 83713	[ ] U.S. Mail [ ] Hand Delivery [ ] Federal Express [✓] Via Facsimile 345-4461
Honorable Christopher S. Nye Canyon County Courthouse 1115 Albany St Caldwell, ID 83605	[ ] U.S. Mail [✓] Hand Delivery [ ] Via Facsimile [✓] Email clerk copy – acahill@canyonco.org

_____
Matthew C. Parks

4841-0019-7941, v. 1

Christ T. Troupis, ISB #4549
Troupis Law Office, P.A.
801 E. State Street, Suite 50,
P.O. Box 2408,
Eagle, Idaho 83616
Telephone: (208) 938-5584
Facsimile: (208) 938-5482

Matthew C. Parks, ISB #7419
ELAM & BURKE, P.A.
251 East Front Street, Suite 300
Post Office Box 1539
Boise, Idaho 83701
Telephone: (208) 343-5454
Facsimile: (208) 384-5844
mcp@elamburke.com

Attorneys for Defendant Willow Creek Ranch Estates
No. 2 Subdivision Homeowners' Association, Inc.

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

DALE LEE and KATHI LEE, husband and wife,

Plaintiffs,

vs.

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

Defendants.

Case No. CV-16-3425*C

AFFIDAVIT OF MATTHEW C. PARKS IN SUPPORT OF MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

STATE OF IDAHO)
) ss
County of Ada)

MATTHEW C. PARKS, being first duly sworn, deposes and says as follows:

1. I am an attorney with the firm of Elam & Burke, P.A., and am one of the attorneys for Defendant Willow Creek Ranch Estates Subdivision No. 2 Homeowner's Association, in the above entitled action.

2. I am familiar with the files generated in this action and have knowledge of the contents thereof and make this affidavit based upon my personal knowledge.

3. Attached hereto as **Exhibit A** is a true and correct copy of a Warranty Deed, Canyon County Recorder's Office Instrument No. 9725936.

4. Attached hereto as **Exhibit B** is a true and correct copy of the subdivision plat for the Willow Creek Ranch Estates Subdivision No. 2, Canyon County Recorder's Office Instrument No. 9847975.

5. Attached hereto as **Exhibit C** is a true and correct copy of the Willow Creek Ranch Estates Subdivision No. 2 Declaration of Covenants, Conditions, and Restrictions and Neighborhood Association, Canyon County Recorder's Office 9916906.

6. Attached hereto as **Exhibit D** is a true and correct copy of a Warranty Deed, Canyon County Recorder's Office Instrument No. 200517952.

7. Attached hereto as **Exhibit E** is a true and correct copy of the Articles of Incorporation for Willow Creek Ranch Estates Subdivision No. 2 on file with the Idaho Secretary of State.

Matthew C. Parks

SUBSCRIBED AND SWORN to before me this 4th day of August, 2016.

KIMBRA S. KLINE
Notary Public
State of Idaho

Notary Public for Idaho
Residing at Boise, Idaho
My Commission Expires 3/31/2017

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 4th day of August, 2016, I caused a true and correct copy of the foregoing document to be served as follows:

Daniel W. Bower STEWART TAYLOR & MORRIS, PLLC 12550 W. Explorer Drive, Suite 100 Boise, ID 83713	[ ] U.S. Mail [ ] Hand Delivery [ ] Federal Express [✓] Via Facsimile 345-4461
Honorable Christopher S. Nye Canyon County Courthouse 1115 Albany St Caldwell, ID 83605	[✓] U.S. Mail [ ] Hand Delivery [ ] Via Facsimile [✓] Email clerk copy – acahill@canyonco.org

Matthew C. Parks

4823-7668-3062, v. 1

The Grantees herein have read and approved the following: _____

Title File No.: TN97-1237 9725936

WARRANTY DEED

FOR VALUE RECEIVED

Dale Lee and Kathi Lee, husband & wife

GRANTOR(s), does(do) hereby GRANT, BARGAIN, SELL and CONVEY unto: J. Robert Kemp, trustee of the Kemp Family Trust

GRANTEES(s), whose current address is: P O BOX 2724 BOISE ID 83701
the following described real property in Canyon County, State of Idaho,
more particularly described as follows, to wit:

see attached exhibit "A"

TO HAVE AND TO HOLD the said premises, with their appurtenances unto the said Grantee(s), and Grantee(s) heirs and assigns forever. And the said Grantor(s) does(do) hereby covenant to and with the said Grantee(s), that Grantor(s) is/are the owner(s) in fee simple of said premises; that said premises are free from all encumbrances, EXCEPT those to which this conveyance is expressly made subject and those made, suffered or done by the Grantee(s); and subject to reservations, restrictions, dedications, easements, rights of way and agreements,(if any) of record, and general taxes and assessments, (including irrigation and utility assessments, if any) for the current year, which are not yet due and payable, and that Grantor(s) will warrant and defend the same from all lawful claims whatsoever.

Dated: July 24, 1997

Dale Lee

Kathi Lee

STATE OF ID , County of Canyon , ss.

On this 8th day of August in the year of 1997 1997, before me, the undersigned, a Notary Public in and for said State, personally appeared

Dale Lee and Kathi Lee

known or identified to me to be the person whose name subscribed to the within instrument, and acknowledged to me that they executed the same.

STACEY STALLCUP NOTARY PUBLIC STATE OF IDAHO

Signature: Stacey Stallcup

Name: Stacey Stallcup

Residing at: Caldwell

My commission expires: 1/28/2003

Transnation Title & Escrow, Inc.

EXHIBIT A

Blumberg No. 5118

EXHIBIT "A"

This parcel is a portion of the Southwest quarter Southeast quarter of Section 28, Township 5 North, Range 2 West of the Boise Meridian, and is more particularly described as follows:

COMMENCING at the Southeast corner of said Southwest quarter Southeast quarter; thence North 0° 05' 13" west along the East boundary of said Southwest quarter Southeast quarter a distance of 1046.73 feet to the TRUE POINT OF BEGINNING; thence
North 76° 49' 56" West a distance of 342.25 feet; thence
North 0° 05' 13" West parallel with said East boundary a distance of 196.36 feet to a point on the North boundary of said Southwest quarter Southeast quarter; thence
South 89° 54' 59" East along said North boundary a distance of 333.13 feet to the Northeast corner of said Southwest quarter Southeast quarter; thence
South 0° 05' 13" East along the East boundary of said Southwest quarter Southeast quarter a distance of 273.84 feet to the TRUE POINT OF BEGINNING.

TRANSNATION TITLE & ESCROW, INC.
REQUEST
TYPE Deed FEE 6.

'97 AUG 8 PM 2 06
NED J KERR
CANYON CNTY RECORDER
BY

RECORDED

9725936

MAP # 516 B&C

Willow Creek Ranch Estates No. 2

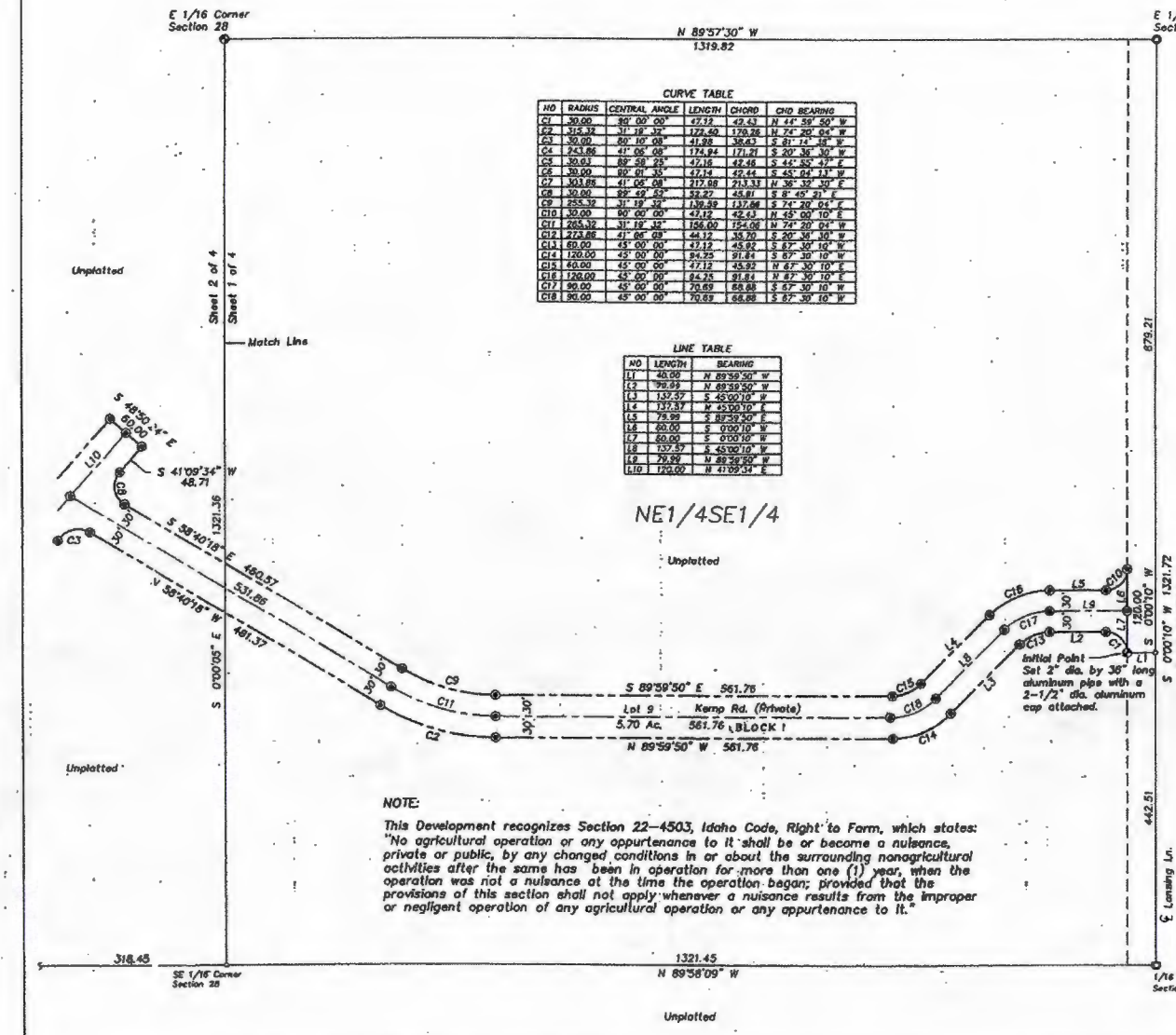
A PORTION OF THE NE1/4SE1/4, NW1/4SE1/4 AND THE NE1/4SW1/4 OF SECTION 28
TOWNSHIP 5 NORTH, RANGE 2 WEST, BOISE MERIDIAN
CANYON COUNTY, IDAHO
1998

Ø8479 15

RECORDED

'98 DEC 28 PM 1 15

NED J KERR
CANYON CNTY RECORDER
BY _____ DEPUTY
21.00



CURVE TABLE

NO	RADIUS	CENTRAL ANGLE	LENGTH	CHORD	CHD BEARING
C1	30.00	90° 00' 00"	47.12	42.43	N 44° 59' 50" W
C2	315.32	31° 19' 32"	172.40	170.26	N 74° 20' 04" W
C3	30.00	80° 10' 08"	41.98	38.63	S 81° 11' 18" W
C4	243.86	41° 06' 08"	174.94	171.21	S 20° 36' 30" W
C5	30.03	89° 58' 25"	47.16	42.46	S 44° 55' 47" E
C6	30.00	90° 01' 35"	47.14	42.44	S 45° 04' 13" W
C7	303.85	41° 06' 08"	217.98	213.33	N 36° 32' 30" E
C8	30.00	89° 49' 52"	52.27	45.81	S 8° 45' 21" E
C9	255.32	31° 19' 32"	139.59	137.84	S 74° 20' 04" E
C10	30.00	90° 00' 00"	47.12	42.43	N 45° 00' 10" E
C11	285.32	31° 19' 32"	156.00	154.06	N 74° 20' 04" W
C12	273.86	41° 06' 08"	44.12	35.70	S 20° 36' 30" W
C13	60.00	45° 00' 00"	47.12	45.92	S 67° 30' 10" W
C14	120.00	45° 00' 00"	94.25	91.84	S 67° 30' 10" W
C15	60.00	45° 00' 00"	47.12	45.92	N 67° 30' 10" E
C16	120.00	45° 00' 00"	94.25	91.84	N 67° 30' 10" E
C17	90.00	45° 00' 00"	70.69	68.88	S 67° 30' 10" W
C18	90.00	45° 00' 00"	70.69	68.88	S 67° 30' 10" W

LINE TABLE

NO	LENGTH	BEARING
L1	60.00	N 89°59'50" W
L2	79.99	N 89°59'50" W
L3	137.57	S 45°00'10" W
L4	137.57	N 45°00'10" E
L5	79.99	S 89°59'50" E
L6	60.00	S 0°00'10" W
L7	60.00	S 0°00'10" W
L8	137.57	S 45°00'10" W
L9	79.99	N 89°59'50" W
L10	120.00	N 41°09'34" E

NE1/4SE1/4

Unplatted

Unplatted

Unplatted

Unplatted

NOTE:

This Development recognizes Section 22-4503, Idaho Code, Right to Farm, which states: "No agricultural operation or any appurtenance to it shall be or become a nuisance, private or public, by any changed conditions in or about the surrounding nonagricultural activities after the same has been in operation for more than one (1) year, when the operation was not a nuisance at the time the operation began; provided that the provisions of this section shall not apply whenever a nuisance results from the improper or negligent operation of any agricultural operation or any appurtenance to it."

Sheet 1 of 4

0 100 200
Scale: 1" = 100'

LEGEND

- ALUMINUM CAP MONUMENT - SET
- BRASS CAP MONUMENT - FOUND
- 5/8" REBAR - FOUND
- 5/8" x 30" REBAR - SET
- 1/2" REBAR - FOUND
- 1/2" x 24" REBAR - SET
- PK NAIL & BRASS WASHER
- CALCULATED POINT
- PROPERTY BOUNDARY LINE
- W.C. WITNESS CORNER
- ( ) DATA OF RECORD
- Utility, drainage and irrigation easement. Unless otherwise noted widths shall be:
  - 10 feet along street frontage
  - 10 feet on each side of back lot lines
  - 5 feet on each side of interior lot lines

If a lot line is moved the easement(s) shall move with the lot line, provided that utilities have not been installed within the easement(s).

PROFESSIONAL SURVEYOR
3627
STATE OF IDAHO
GREG L SKINNER

Skinner Land Survey Co. Inc.

1914 E. Chicago, Suite C
Caldwell, Id. 83605
(208)-454-0935

Sheet 1 of 4

Bk. 76 Pg. 22

79

Blumberg No. 5118
EXHIBIT B

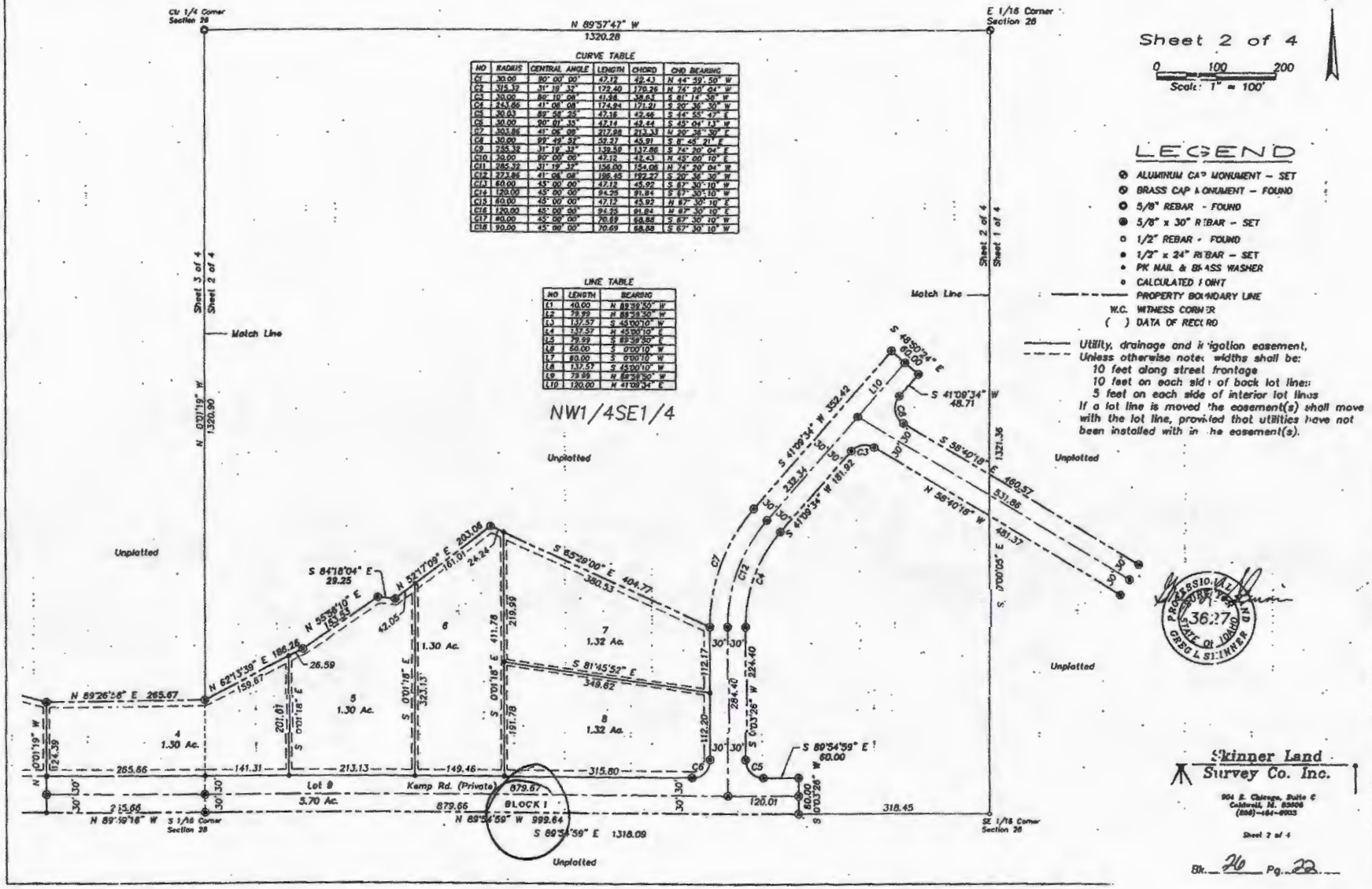
LEE0067

NOTE:

This Development recognizes Section 22-4503, Idaho Code, Right to Farm, which states: "No agricultural operation or any appurtenance to it shall be or become a nuisance, private or public, by any changed conditions in or about the surrounding nonagricultural activities after the same has been in operation for more than one (1) year, when the operation was not a nuisance at the time the operation began; provided that the provisions of this section shall not apply whenever a nuisance results from the improper or negligent operation of any agricultural operation or any appurtenance to it."

Willow Creek Ranch Estates No. 2

A PORTION OF THE NE1/4SE1/4, NW1/4SE1/4 AND THE NE1/4SW1/4 OF SECTION 28
TOWNSHIP 5 NORTH, RANGE 2 WEST, BOISE MERIDIAN
CANYON COUNTY, IDAHO
1998



Skinner Land Survey Co. Inc.
904 E. Chicago, Suite C
Caldwell, ID. 83605
(208)-454-8903

Sheet 2 of 4

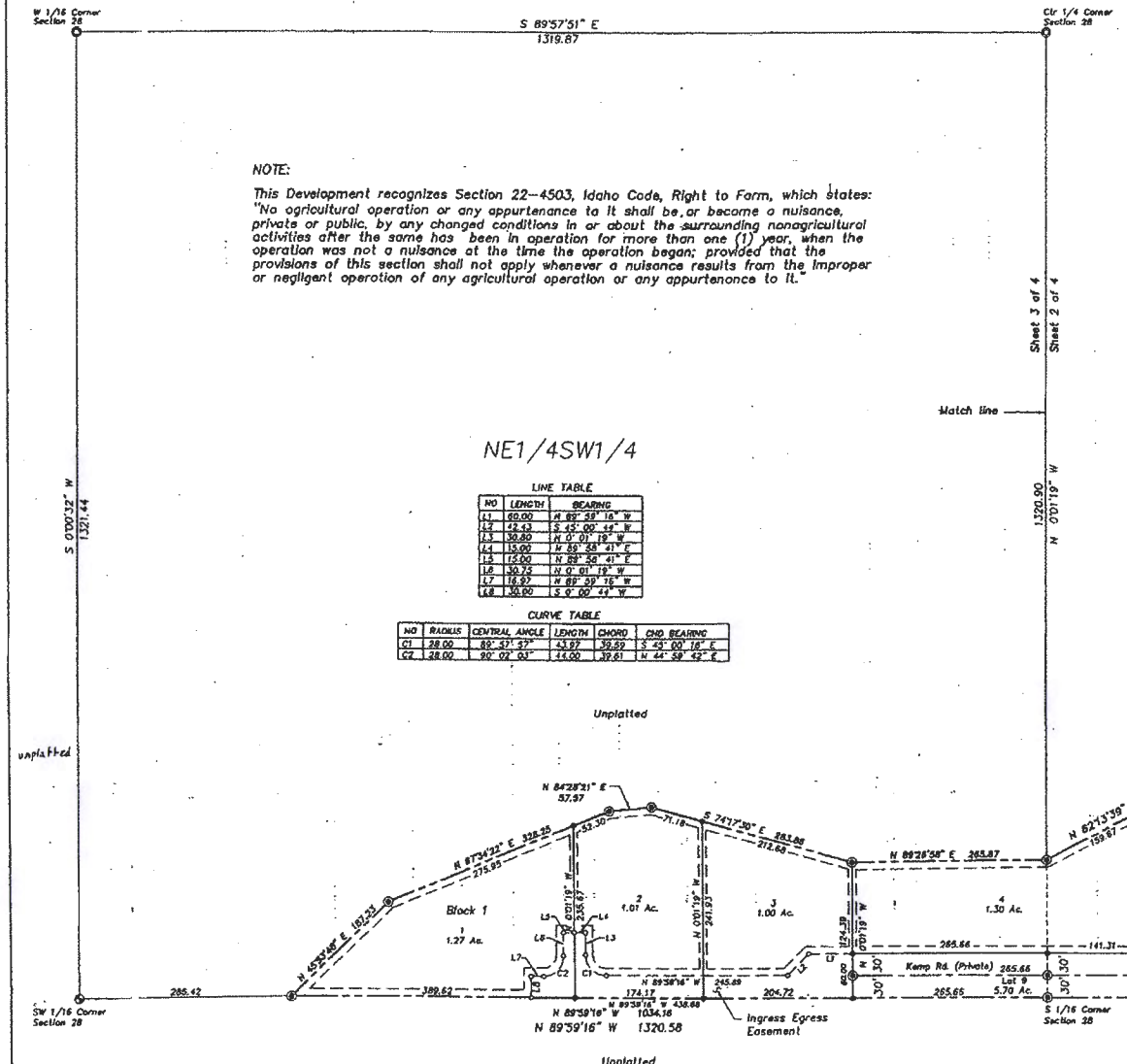
Bk. 26 Pg. 22

80

LEE0065

Willow Creek Ranch Estates No. 2

A PORTION OF THE NE1/4SE1/4, NW1/4SE1/4 AND THE NE1/4SW1/4 OF SECTION 28
TOWNSHIP 5 NORTH, RANGE 2 WEST, BOISE MERIDIAN
CANYON COUNTY, IDAHO
1998



NOTE:

This Development recognizes Section 22-4503, Idaho Code, Right to Farm, which states: "No agricultural operation or any appurtenance to it shall be, or become a nuisance, private or public, by any changed conditions in or about the surrounding nonagricultural activities after the same has been in operation for more than one (1) year, when the operation was not a nuisance at the time the operation began; provided that the provisions of this section shall not apply whenever a nuisance results from the improper or negligent operation of any agricultural operation or any appurtenance to it."

LINE TABLE

NO	LENGTH	BEARING
L1	60.00	N 89° 58' 16" W
L2	42.43	S 45° 00' 49" W
L3	30.80	N 0° 01' 19" W
L4	15.00	N 89° 58' 41" E
L5	15.00	N 89° 58' 41" E
L6	30.75	N 0° 01' 19" W
L7	16.97	N 89° 59' 16" W
L8	30.00	S 0° 00' 44" W

CURVE TABLE

NO	RADIUS	CENTRAL ANGLE	LENGTH	CHORD	CHD. BEARING
C1	28.00	89° 57' 57"	43.97	39.59	S 45° 00' 16" E
C2	28.00	90° 02' 03"	44.00	39.61	N 44° 58' 42" E

0 100 200
Scale: 1" = 100'

N

Sheet 3 of 4

LEGEND

- ALUMINUM CAP MONUMENT - SET
- BRASS CAP MONUMENT - FOUND
- 5/8" REBAR - FOUND
- 5/8" x 30" REBAR - SET
- 1/2" REBAR - FOUND
- 1/2" x 24" REBAR - SET
- PK NAIL & BRASS WASHER
- CALCULATED POINT
- PROPERTY BOUNDARY LINE
- W.C. WITNESS CORNER
- ( ) DATA OF RECORD

Utility, drainage and irrigation easement.
Unless otherwise noted width: shall be:
10 feet along street frontage
10 feet on each side of back lot lines
5 feet on each side of interior lot lines
If a lot line is moved the easement(s) shall move with the lot line, provided that utilities have not been installed within the easement(s).

PROFESSIONAL LAND SURVEYOR 3627 STATE OF IDAHO CAROL L SKINNER

Skinner Land Survey Co. Inc.
1904 1st Chicago, Suite C
Caldwell, Id. 83605
(208)-454-0933

Sheet 3 of 4

Bk. 26 Pg. 22

81

LEE0066

Willow Creek Ranch Estates No. 2

OWNERS CERTIFICATE

We, The Kemp Family Trust, and Stephen Damele and Pauline Damele, husband and wife, and Capello Corporation, an Idaho corporation, being first duly sworn depose and say we are the owners of WILLOW CREEK RANCH ESTATES No. 2 as more particularly described in the legal description below, state that it is our intention to include said property in this subdivision plat. The easements shown on this plat are intended only for the right and purposes set forth and no structures other than those for Utility, Irrigation or Drainage purposes are to be erected within limits of the easements. Also, we hereby certify that this subdivision is in compliance with paragraph 1, section 50-1334 of the Idaho Code.

This parcel is a portion of the NE1/4 SE1/4, the NW1/4 SE1/4 and the NE1/4 SW1/4 of Section 28, Township 5 North, Range 2 West of the Boise Meridian and is more particularly described as follows:

COMMENCING at the southeast corner of said NE1/4 SE1/4;

thence North 0° 00' 10" East along the east boundary of said NE1/4 SE1/4 a distance of 44.51 feet;

thence North 89° 59' 50" West a distance of 40.00 feet to the INITIAL POINT;

thence northwesterly 47.12 feet along the arc of a curve to the left having a central angle of 90° 00' 00", a radius of 30.00 feet, and a long chord which bears North 44° 59' 50" West a distance of 42.43 feet;

North 89° 59' 50" West a distance of 79.99 feet;

southwesterly 47.12 feet along the arc of a curve to the left having a central angle of 45° 00' 00", a radius of 60.00 feet, and a long chord which bears South 67° 30' 10" West a distance of 45.92 feet;

South 45° 00' 10" West a distance of 137.57 feet;

southwesterly 91.25 feet along the arc of a curve to the right having a central angle of 45° 00' 00", a radius of 120.00 feet, and a long chord which bears South 67° 30' 10" West a distance of 91.84 feet;

North 89° 59' 50" West a distance of 561.76 feet;

northwesterly 172.40 feet along the arc of a curve to the right having a central angle of 31° 19' 32", a radius of 315.32 feet, and a long chord which bears North 74° 20' 01" West a distance of 170.26 feet;

thence North 58° 40' 18" West a distance of 481.37 feet;

thence southwesterly 41.98 feet along the arc of a curve to the left having a central angle of 80° 10' 08", a radius of 30.00 feet, and a long chord which bears South 81° 14' 38" West a distance of 38.63 feet;

thence South 41° 09' 34" West a distance of 181.92 feet;

thence southwesterly 174.94 feet along the arc of a curve to the left having a central angle of 41° 06' 08", a radius of 243.86 feet and a long chord which bears South 20° 38' 30" West a distance of 171.21 feet;

thence South 0° 03' 26" West a distance of 224.40 feet;

thence southeasterly 47.15 feet along the arc of a curve to the left having a central angle of 89° 58' 25", a radius of 30.03 feet, and a long chord which bears South 44° 55' 47" East a distance of 42.46 feet;

thence South 89° 54' 59" East a distance of 60.00 feet;

thence South 0° 03' 26" West a distance of 60.00 feet to a point on the south boundary of said NW1/4 SE1/4;

thence North 89° 54' 59" West along said south boundary a distance of 999.64 feet to the southeast corner of said NE1/4 SW1/4;

thence North 89° 59' 16" West along the south boundary of said NE1/4 SW1/4 a distance of 1034.16 feet;

thence North 45° 53' 48" East a distance of 187.23 feet;

thence North 67° 14' 22" East a distance of 328.25 feet;

thence North 84° 28' 21" East a distance of 57.57 feet;

thence South 74° 17' 30" East a distance of 283.86 feet;

thence North 89° 26' 58" East a distance of 265.67 feet;

thence North 62° 13' 39" East a distance of 186.26 feet;

thence North 55° 56' 10" East a distance of 153.53 feet;

thence South 84° 18' 04" East a distance of 29.25 feet;

thence North 52° 17' 09" East a distance of 203.06 feet;

thence South 65° 29' 00" East a distance of 404.77 feet;

thence northeasterly 217.98 feet along the arc of a curve to the right having a central angle of 41° 06' 08", a radius of 303.86 feet, and a long chord which bears North 20° 38' 30" East a distance of 213.33 feet;

thence North 41° 09' 34" East a distance of 352.42 feet;

thence South 48° 50' 24" East a distance of 60.00 feet;

thence South 41° 09' 34" West a distance of 48.71 feet;

thence southeasterly 52.27 feet along the arc of a curve to the left having a central angle of 99° 49' 52", a radius of 30.00 feet, and a long chord which bears South 8° 45' 21" East a distance of 45.91 feet;

thence South 58° 40' 18" East a distance of 460.57 feet;

thence southeasterly 139.59 feet along the arc of a curve to the left having a central angle of 31° 19' 32", a radius of 255.32 feet, and a long chord which bears South 74° 20' 04" East a distance of 137.86 feet;

thence South 89° 59' 50" East a distance of 561.76 feet;

thence northeasterly 47.12 feet along the arc of a curve to the left having a central angle of 45° 00' 00", a radius of 60.00 feet, and a long chord which bears North 67° 30' 10" East a distance of 45.92 feet;

thence North 45° 00' 10" East a distance of 137.57 feet;

thence northeasterly 94.25 feet along the arc of a curve to the right having a central angle of 45° 00' 00", a radius of 120.00 feet, and a long chord which bears North 67° 30' 10" East a distance of 91.84 feet;

thence South 89° 59' 50" East a distance of 79.99 feet;

thence northeasterly 47.12 feet along the arc of a curve to the left having a central angle of 90° 00' 00", a radius of 30.00 feet, and a long chord which bears North 45° 00' 10" East a distance of 42.43 feet;

thence South 0° 00' 10" West a distance of 120.00 feet to the INITIAL POINT, containing 14.92 acres, more or less.

Mary M. Kemp

The Kemp Family Trust by Mary M. Kemp, Successor Trustee

T. W. Stivers

T. W. Stivers, President, Capello Corporation Accommodator for Stephen and Pauline Damele, husband and wife.

Stephen Damele

Stephen Damele

Pauline Damele

Pauline Damele

ACKNOWLEDGEMENT

Be it remembered that on this 29th day of Sept. 1998, personally appeared Mary M. Kemp, Successor Trustee who is known to me to be the owner of Willow Creek Ranch Estates No. 2 and that executed the above instrument.

In witness whereof, I have hereunto set my hand and notarial seal the day last above written.

Anne Marie Jones

Notary Public for Idaho
Residing at Caldwell
Commission expire: 10-03-2005

ANNE MARIE JONES NOTARY PUBLIC STATE OF IDAHO

ACKNOWLEDGEMENT

Be it remembered that on this 24th day of Sept. 1998, personally appeared Stephen Damele and Pauline Damele, who are known to me to be the owners of Willow Creek Ranch Estates No. 2 and that executed the above instrument.

In witness whereof, I have hereunto set my hand and notarial seal the day last above written.

Anne Marie Jones

Notary Public for Idaho
Residing at Caldwell, Idaho
Commission expires 10-03-2005

ANNE MARIE JONES NOTARY PUBLIC STATE OF IDAHO

ACKNOWLEDGEMENT

Be it remembered that on this 17th day of SEPTEMBER 1998, personally appeared T. W. Stivers, President, Capello Corp., who is known to me to be the owner of Willow Creek Ranch Estates No. 2 and that executed the above instrument As Accommodator for Stephen Damele and Pauline Damele, husband and wife.

In witness whereof, I have hereunto set my hand and notarial seal the day last above written.

Kathy C. Easterday

Notary Public for Idaho
Residing at Burley
Commission expires 1-27-2001

KATHY C. EASTERDAY NOTARY PUBLIC STATE OF IDAHO

APPROVAL OF COUNTY SURVEYOR

I, Dennis A. King, Canyon County Surveyor do hereby certify that I have examined the plat of Willow Creek Ranch Estates No. 2 and that it complies with the requirements of Idaho State Code.

Dennis A. King P.L.S. 944
10/5/98

SOUTHWEST DISTRICT HEALTH DEPARTMENT

Sanitary restrictions of this plat are hereby removed according to the letter to be read on file with the County Recorder or his agent listing the conditions of approval.

Southwest District Health Department 12-24-98

APPROVAL OF CANYON HIGHWAY DISTRICT No. 4

The Highway District has no responsibility for the streets shown on this plat, unless and until a petition has been received and approved together with dedication of High s-of-Way and evidence that said streets meet current District standards for Construction.

Chairman 23 Nov 1998 Date

SURVEYOR'S CERTIFICATE

I, Greg L. Skinner do hereby certify that I am a Professional Land Surveyor licensed by the State of Idaho, and that this plat of Willow Creek Ranch Estates No. 2 as described in the owner certificate and the attached plat, was drawn from an actual survey made by me and accurately represents the points thereon.

I further certify that I made this survey under the direction of the owner thereof and that the survey is in conformity with the State of Idaho Codes relating to plats and subdivisions.

PROFESSIONAL LAND SURVEYOR GREG L. SKINNER 3627 STATE OF IDAHO

Skinner
98

APPROVAL OF CANYON COUNTY COMMISSIONERS

Attest: Date

APPROVAL OF CANYON COUNTY PLANNING AND ZONING

3 Dec 1998
Date

CERTIFICATE OF COUNTY TREASURER

I, Tracie Lloyd, County Treasurer in and for the County of Canyon, State of Idaho, per the requirements of I.C. 31-1308, do hereby certify that any and all current and/or delinquent County Property Taxes for the property included in this proposed subdivision have been paid in full.

This certificate is valid for the next thirty (30) days only.

Tracie Lloyd 12/15/98
County Treasurer Date

Sheet 4 of 4

BK. 96 PG. 12

82

LEE0098

TN99-5697/CLH

INSTRUMENT NO. 9916906

WILLOW CREEK RANCH ESTATES NO. 2
DECLARATION OF
COVENANTS, CONDITIONS AND RESTRICTIONS
AND
NEIGHBORHOOD ASSOCIATION

THIS DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS AND NEIGHBORHOOD ASSOCIATION (hereinafter Declaration), executed on the date following her signature, is made by Mary Kemp, Trustee of the Kemp Family Trust (hereinafter Declarant) and is based on the following facts:

RECITALS

A. Declarant is the owner of certain real property in Canyon County, Idaho, commonly known as Willow Creek Ranch Estates, and as more particularly described in Exhibit 1 (hereinafter Willow Creek Ranch Estates or Property).

B. Declarant previously developed real property contiguous to the Property as Willow Creek Ranch Estates. This was intended to be the first phase of development of Willow Creek Ranch Estates (hereinafter Phase No. 1). Phase No. 1, more fully described in Exhibit 2, has been fully developed and all lots therein sold. Phase No. 1 is the subject of Declarations of Covenants, Conditions, and Restrictions for Willow Creek Ranch Estates recorded in the records of Canyon County as Instrument Nos. 9318476 and 9616562. Those Declarations are intended to apply only to the lots in Phase 1.

C. Phase 2 is commonly known as Willow Creek Ranch Estates No. 2 Subdivision (hereinafter Phase No.2), as shown in the Plat recorded as Instrument No. 9847975, Book 26 of Plats, Page 22, recorded December 28, 1998. This Declaration as set forth herein or amended by the Declarant, is intended to apply to Phase No. 2 and subsequent phases (hereinafter Willow Creek Estates).

D. Declarant desires to establish on the Property, an exclusive residential community which is designed to maximize the use of available land and which contains residential dwelling units thereon, with open space and walkways, created for the benefit of said community through the granting of specific rights, privileges and easements of enjoyment which may be shared and enjoyed by all of the residents thereof.

E. Declarant desires to assure the attractiveness of the individual lots and community Areas within the Property; to prevent future impairments thereof; to prevent nuisances; to preserve, protect and enhance the values and amenities of the Property; and to provide for the maintenance of the open spaces, walkways and other community capital improvements.

NOW THEREFORE, Declarant hereby declares that all of the properties above

EXHIBIT C

Blumberg No. 5118

LEE0069

described, with the exception of Phase No. 1, shall be held, sold and conveyed upon and subject to the easements, conditions, covenants, restrictions and reservations hereinafter set forth, each of which shall run with the properties and shall be binding on all parties now or hereafter having any right, title or interest therein or to any part thereof, and shall inure to the benefit of each owner thereof. Declarant reserves the right to amend this Declaration to set forth the easements, conditions, covenants, restrictions and reservations applicable to unsold lots in any phase and the lots to be developed in subsequent phases, nor shall the Declarant be required to obtain approval of the Architectural Control Committee for any activities or structures on lots owned by Declarant.

ARTICLE I
Definitions

A. "Architectural Control Committee" (hereinafter Committee) means the Committee charged with approval of any construction, erection, alteration or repair of any improvements on any Lot in the Property as hereinafter provided.

B. "Association" means Willow Creek Estates Subdivision Homeowners' Association. a non-profit corporation organized under the laws of the State of Idaho, or any successor or assign of the Association.

C. "Board of Directors" means the Board of Directors of the Association.

D. "Common areas" means all real property, including easements or other interests less than fee title, as well as the improvements thereon, owned by the Association for the common use and enjoyment of the Owners.

E. "Dwelling Unit" means that portion or part of any structure intended to be occupied by one family as a dwelling unit, together with the vehicular parking garage next thereto, and all projections therefrom.

F. "Household" means all persons residing in a Dwelling Unit.

G. "Lease" means any agreement for the leasing or rental of a dwelling unit, including a month-to-month rental agreement. All such leases shall be in writing.

H. "Lot" means all lots within and shown upon the Plat.

I. "Owner" means the owner of record, whether one or more persons or entities, of a fee simple title to any Lot, but excluding those having an interest merely as security for the performance of an obligation.

J. "Plat" means the official recorded plat of Willow Creek Ranch Estates No. 2 Subdivision or any amendments or additions thereto.

K. "Private Road System" means the private roads serving Lots in the Subdivision.

L. "Project" means the Property and all contemplated improvements thereto.

M. "Property" means the real property described in Paragraph A above of the RECITALS and any additions thereto, as may be made subject to this Declaration or otherwise brought within the jurisdiction of the Association.

N. "Single Family" means any one or more individuals, doing their own cooking and living on the premises as a separate housekeeping unit in a domestic relationship as distinguished from a group occupying a boarding house, lodging house, club, fraternity or hotel.

ARTICLE II
General Restrictions

A. Covenant: The Declarant hereby covenants for all of said property. Each Owner, whether by ratification of this Declaration or by acceptance of a deed or contract of purchase, whether or not these covenants, conditions and restrictions are expressly set forth in any such deed or other conveyance or agreement for conveyance is deemed to covenant and agrees to comply with and abide by these covenants, conditions and restrictions and agrees for the Owner or Owners, the Owner(s)' heirs, administrators, delegees or assigns to be personally bound by each of these covenants, restrictions, reservations and servitudes, and as may be amended from time to time, jointly, separately and severally.

B. Enforcement of Restrictions: The Declarant, Committee, Association or any Owner shall have the right to enforce, whether at law or in equity, all restrictions, conditions, covenants, reservations, liens, and charges now or hereafter imposed by the provisions of this Declaration or the Articles, Bylaws or Rules of the Association. Not less than ten (10) days prior to bringing an action of enforcement, the offending party shall be served with written notice setting forth with specificity the covenant, restriction, condition, reservation, lien or charge that the person is charged with failing to comply with. Failure to enforce any the foregoing shall in no event be deemed a waiver of the right to do so thereafter. These covenants, conditions and restrictions are cumulative and all remedies provided herein for breach are in addition to any rights and remedies provided by local or state laws and not in lieu thereof.

C. Judgment and Attorneys' Fees: Whether an action is prosecuted to judgment, the prevailing party shall be entitled to reasonable attorneys' fees and costs. In the event of judgment against any person, the court may award injunction against any person for violation, require compliance as the court deems necessary, award such damages, reasonable attorneys' fees, costs and expenses as well as such other or further relief as may be deemed just and equitable.

D. Mortgages or Deeds of Trust Not Invalidated: The breach of any of these covenants, conditions, restrictions or any repurchase by reason of such breach, shall not defeat or render invalid the lien of any mortgage or deed of trust made in good faith for value as to any Lot or Lots or portions of Lots in such premises, but shall be binding upon and effective against any such mortgagee or trustee or Owner thereof, whose title is or was acquired by foreclosure, trustee's sale, or otherwise.

ARTICLE III
Construction Restrictions

A. Antennae and Satellite "Dishes": No radio and or television antennae or satellite receiving equipment (dish) shall be permitted outside of a building without prior written consent of the Architectural Committee. In no event shall such equipment be installed outside a building unless adequately screened from the street view. No energy production devices, including but not limited to, generators of any kind and solar devices, shall be constructed and maintained upon any lot without the prior written approval of the Committee.

B. Basements, Swimming Pools and Subsurface Structures. Basements, swimming pools and other subsurface structures shall be approved in writing by the Committee prior to construction. The approval of such improvements shall not constitute an endorsement or certification of viability. Each owner proposing such structure shall be responsible to obtain appropriate engineering for such structure, taking into account the water table underlying the Property.

C. Building Location and Value: The value of any dwelling unit, including the cost of the real property, shall be not less than One Hundred Fifty Thousand Dollars ($150,000) based on August 1998 values.

D. Building Type Restrictions: No buildings shall be constructed on any Lot other than one (1) detached single-family dwelling and attached garage, containing at least the minimum floor area relevant to the height of the dwelling. No homes manufactured or built elsewhere and moved into the Property shall be permitted unless prior written authorization is obtained from the Committee. The size, location, configuration, style, and finish of each proposed building or structure on each lot shall be subject to architectural and aesthetic control by the Committee. No building, fence or other structure shall be commenced, placed, erected, or maintained on any lot, nor shall any exterior alteration or change of any building or other structure be made, obtained, or allowed except upon approval of the Committee.

E. Commencement and Completion of Construction Maintenance of Vacant Lots: Construction of any dwelling unit shall be commenced not later than two (2) years after the original purchase of a Lot. Provided, however, the Committee may grant reasonable extensions for good cause. Construction shall be diligently pursued after commencement and shall be completed not later than nine (9) months after commencing construction, unless prevented by causes beyond the control of the owner or builder and only for such time as that cause

continues. From the date of purchase, through the completion of landscaping, all Lots shall be kept free of rubbish and garbage, reasonably clean and weed free. The Committee shall have the right to enter upon any vacant lot for the purpose of burning or removing weeds, brush, growth, or refuse.

F. Construction Equipment and Material Storage: No machinery, building equipment, or material shall be stored on site until the Builder is ready and able to immediately commence construction. Such building materials must be kept within the property line of the Lot on which the dwelling unit or structure is to be constructed.

G. Damage to Improvements: It is the responsibility of the Builder of any structure in the Property to leave roads, fences, ditches, tiled irrigation lines or other improvements, if any, as well as utility facilities, free of damage and in good and sound condition at the conclusion of the construction period. It shall be conclusively presumed that all such improvements are in good sound condition at the time construction commences on each Lot. The builder is responsible for notification of the contrary, in writing to the Committee at the time construction commences.

H. Driveways: All driveways shall be paved with either asphalt or concrete. Driveways shall extend from the edge of the road to the entry to the garage. Any driveway constructed on any of the Lots shall have a pipe or conduit or culvert (hereinafter collectively pipes) thereunder at least twelve (12) inches in diameter, near the street line of the Lot and at any point where the driveway crosses any ditch or pipe or drainage area so as to permit the movement of irrigation waters or for drainage. The pipes may be made of tile, concrete, iron or steel, or any other substance of permanent nature. All pipe installations made within a dedicated right-of-way shall be made only after plans have been submitted to and approved by the appropriate highway district or city authority having jurisdiction over the roadways. All parking areas and driveways shall be constructed and maintained as approved in writing by the Committee.

I. Easements: In addition to the easements shown on the Plat, an easement is further reserved, ten (10) feet on each side of all Lot lines for installation and maintenance of utilities, irrigation, and drainage equipment and facilities. Within these easements, no structure, planting, or other material shall be placed or permitted to remain which may damage or interfere with the installation or maintenance of the utilities or drainage, or which may change the direction of the flow of water through drainage channels in the easements. The easement area of each Lot, and all improvements in the Lot, shall be maintained continuously by the Owner of the Lot, except for those improvements for which a public entity or authority is responsible.

J. Exterior Finishes and Roofs: All dwellings shall be constructed of frame, stone, or brick construction. In all cases, the builder shall submit samples for a particular dwelling unit to the Committee for approval prior to application of any exterior finishes. The Committee shall have the right to approve texture, design and color scheme of the outside walls, fences, roofs and patio roofs of all structures erected upon lots and to require front landscaping. The owner shall not repaint the outside walls of any structure or fence without first obtaining approval of the

Committee as to color. All patio roofs shall be of uniform design and color; metal, fiberglass sheets, and similar roofing materials are prohibited.

L. Exterior Lights: No exterior lighting shall be installed or maintained on any Lot that interferes with the use and enjoyment of adjacent Lots.

M. Fences and Other Boundaries: Fences, hedges, high plantings, obstructions or barriers shall be so situated as not to unreasonably interfere with the enjoyment and use of neighboring Lots and roads or constitute an undesirable nuisance or noxious use. The determination of the Committee is binding on all parties. Fences shall meet the following requirements unless an exemption is approved in writing by the Committee prior to construction:

1. No fence or boundary wall may exceed six (6) feet in height and may not in any event interfere with sight lines to or from the road or pose a hazard to safe entry onto such roadways;

2. Fences shall be of good quality and workmanship and shall be properly maintained. Materials and design shall be approved by the Committee.

Plantings shall meet the following requirements unless an exemption is approved in writing by the Committee prior to planting:

1. No hedge or shrub planting with an elevation above three (3) feet shall be permitted in the set-back areas in the front of the dwelling.

2. No hedge, shrub or tree shall be permitted or maintained which shall interfere with sight lines.

N. Landscaping. Prior to the beginning of construction of the dwelling on any lot, the owner or the owner's agent shall submit a landscaping plan to the Committee for approval. Such plan shall include at least one (1) tree in the front yard and shall be completed one hundred twenty (120) days after occupancy of the dwelling. The owner of any lot shall maintain and provide adequate water to all landscaping, specifically the trees located on the lot from the date of purchase by the owner.

O. Minimum Floor Area: Floor area shall be exclusive of eaves, steps, porches, entrances patios and garages. The floor area of all dwellings shall have at least one thousand eight hundred fifty (1,850) square feet. With the exception of barns, no outbuildings, including storage sheds, play houses and play equipment consisting of walls and a roof, shall exceed a height of fifteen (15) feet unless approved by the Committee.

P. Outbuildings: All outbuildings shall be constructed of quality building materials, completely finished and painted on the outside and shall be of quality and character that will be in harmony with the other buildings on said properties. No outbuilding shall be constructed

without prior written approval by the Committee.

Q. Roads: The roads serving the Property are separately platted lots which shall be conveyed to the Association not later than the time at which all phases are substantially completed.

R. Roofs: Roofs shall be of at least "5 in 12" pitch. No gravel roofs shall be permitted. Bay windows, broken roof lines, gables, hip roofs, etc. are encouraged to provide architectural variety. Shingles shall be, at minimum, twenty-five (25) year architectural. Roofing samples shall be submitted to the Committee for approval prior to application of finish roofing materials.

S. Setbacks: No improvements may be constructed or maintained on a Lot closer than thirty (30) feet from the front property line, twenty (20) feet from the rear property line, ten (10) feet from the interior side property lines, or twenty (20) feet from an exterior side property line.

T. Sewage Disposal/Sewer Locations: No sewage disposal system is provided by Declarant. Each Lot shall be served by individual sewage disposal systems to be designed, located and constructed in accordance with the requirements, standards and recommendations of the Southwest District Health Department. Approval of such system as installed shall be obtained from the jurisdiction and the entire system shall be paid for by the Lot Owner. All bathroom, sink and toilet facilities shall be located inside the dwelling unit and not contained within any accessory structure or outbuilding.

U. Solar Access: No building or structure shall be placed on said properties so as to obstruct the windows or light of any adjoining property owner.

V. Storm Water Retention Pond Maintenance: The Owners of the following Lots are specifically required to maintain surface area of the storm water retention ponds constructed on the respective Lots by the Declarant. The Lots shall be maintained in such a manner that all storm water is retained in the ponds and no structures are placed or constructed, or plants are planted in such areas which would interfere in any manner with the retention of water as originally constructed by Declarant. Provided, however, the Association is responsible for all subsurface maintenance of the storm water retention ponds. All Lot owners are required to maintain the barrow pits on their respective Lots in such a manner that there is no interference with the collection and disbursal of waste water either from irrigation or storm water retention.

W. Temporary Buildings: No house trailer, tent, shack, unattached garage, barn or other outbuilding or structure shall be used at any time for a residence, temporarily or permanently, nor shall any residence of a temporary character be permitted. No building of any kind shall be erected or maintained on a lot prior to the construction of the dwelling, except that a small building or mobile unit may be erected for the purpose of storing tools and other articles during the construction of a permanent dwelling, subject to such limitations as may be imposed by the Committee.

X. Water Supply. There is no domestic water supply provided for any Lot. Lot Owners shall be responsible for the drilling of their own domestic wells. Declarant makes no warranties as to the Lot Owner's ability to obtain a well permit. Any Lot Owner must first obtain the written approval for a domestic well permit from the State of Idaho, Department of Water Resources.

ARTICLE IV
Property Rights

A. Common Areas. The common areas shall be owned by the Association upon transfer to the Association by the Declarant. The common areas are as illustrated on the plats pertaining to the Property. The Owners of Lots on which easements for drainage or collection of storm water are located shall maintain the surface of the easements continuously and shall not erect any structure within the easements. Provided, however, fences may be erected that do not interfere with the drainage and which are approved in writing by the Committee prior to construction. The Association may maintain such easements if the Lot Owner fails to do so. In all events, the Association may:

1. Charge assessments for the maintenance of the common areas;

2. Suspend the voting rights as well as right to the use of the common areas, of an Owner for any period during which any assessment against the Owner's Lot remains unpaid;

3. Dedicate or transfer all or any part of the common areas to any public agency, authority, or utility for such purposes and subject to such conditions as may be agreed to by the Association. No such dedication or transfer shall be effective unless an instrument agreeing to such dedication or transfer signed by two-thirds (2/3) of each class of members has been recorded.

B. Right of Use of Areas: The right to use the common areas is appurtenant to the Lots and shall be available to any tenant, lessee or Owner so long as all assessments are paid and any respective easements are maintained.

ARTICLE V
Property Use Restrictions

A. Agricultural Activities and Animals: The subdivision is located in an agricultural area. Agricultural activities including livestock, cattle feeding and farming take place in adjoining areas. These activities may produce odors, dust, insects, and include nighttime operations. It is contemplated that owners may maintain livestock on their respective lots. The livestock shall be limited to the lot owners personal use and enjoyment and not for commercial purposes. No nuisance animals shall be kept. Not more than two (2) head of large livestock, horses or cows,

shall be kept on any lot. The only other animals allowed on or within any Lot shall be limited to the following number of animals per acre: two (2) sheep; or, two (2) lamas; and, six (6) chickens. If any Lot is less than one (1) acre, then said Lot shall be considered to an acre for the purposes of this subsection only. Provided, however that no roosters shall be allowed and, except that two dogs, cats or other household pets may be kept within a dwelling unit or within a fenced area in the backyard. Any animals outside a dwelling unit or fenced area must be on leashes or otherwise under physical control and the Owner or custodian of the animal shall be responsible for the immediate cleanup of the animal's droppings. All animals shall be fed and cared for. Fenced areas shall be screened from the street view and shall be constructed of materials adequate to keep the animal(s) from annoying or trespassing on the property of others.

B. Businesses: No business shall be conducted on any Lot that except completely within the dwelling unit and only as permitted by applicable state or local law, rule or ordinance. No signs shall be installed to advertise the business. No oil exploration or development of any nature or kind, including mining exploration, development or structure shall be permitted on any Lot or Common areas. Except that during construction the Declarant or its agents may conduct sales and construction business outside of a dwelling unit as provided above and hereinafter.

C. Garbage and Refuse Disposal: No part of any Lot shall be used or maintained as a dumping ground for rubbish, trash or other waste. No garbage, trash or other waste shall be kept or maintained on any part of any Lot except in a sanitary container. No incinerators shall be permitted. Any equipment for the storage or disposal of such material must not violate setback restrictions and must be enclosed with an aesthetic screen or fence and shall be kept in a clean and sanitary condition.

D. Excavation and Mineral Extraction. No excavation for stone, sand, gravel, earth or minerals shall occur on any lot unless such excavation is necessary for construction of an approved structure thereon.

E. Leasing Restrictions: Any lease between and Owner and tenant shall provide that the terms of the lease shall be subject in all respects to the provisions contained in this Declaration, the Association's Articles of Incorporation, Bylaws and rules and that any failure by the tenant to comply with the terms of such documents shall be a default under such lease.

F. Nuisances: Nothing of an offensive, dangerous, odorous, or noisy endeavor shall be conducted or carried on any Lot, nor shall anything be done or permitted on the Property which may be or become an annoyance or nuisance to other individuals or Owners. Weeds shall be cut to at least four (4) inches except on steep terrain which shall be reasonably maintained. No basketball courts or backboards shall be allowed in the front yard area of any residence. No lumber, firewood, grass, shrubs or tree clippings or scrap, refuse or trash shall be kept, stored, or allowed to accumulate on any lot unless screened as approved in writing by the Committee.

G. Residing in Other than Dwelling Units: No trailer, truck camper, tent, garage, barn, shack or other outbuilding shall at any time be used as a residence temporarily or permanently on any Lot. However, during the construction period, Declarant or its agent(s) may utilize a construction/sales office of a temporary nature as provided above.

H. Sight Distance at Intersections: No fence, wall, hedge or shrub planting which obstructs sight lines at elevations between three (3) feet and eight (8) feet above the roadways shall be placed or permitted to remain on any corner Lot within the triangular area formed by the street property lines and an imaginary line connecting them at a point thirty (30) feet from the intersection of the street lines. In the case of a rounded property corner, from the intersection of the street property lines extended. The same sight-line limitations shall apply on any Lot within ten (10) feet from the intersection of a street property line with the edge of a driveway or alley pavement.

I. Signs: No sign of any kind shall be displayed to public view on any Lot except a professionally designed and constructed sign of not more than (5) square feet advertising the property for sale or rent by an Owner, or to advertise the property during the construction sales period. If a property is sold or rented, any sign relating thereto shall be removed immediately. Except that the Declarant and its agent(s) may post a "Sold" sign for a reasonable period following the sale. Notwithstanding any provision to the contrary, signs of any and all sizes and dimensions may be displayed by the Declarant without limitation, on Lots owned by the Declarant. The Association may maintain subdivision identification signs, and appropriate informational signs of a size and design approved by the Committee.

J. Storage of Vehicles and Equipment: Recreational vehicles, except those owned or leased and enjoyed by the Lot Owner for personal use or enjoyment shall not be kept or stored on any Lot unless screened from view as approved in writing by the Committee. No non-working or commercial vehicles larger than one (1) ton and no junk cars shall be parked on any lot. Such vehicles or equipment shall not be parked on the street or between the front plane of the dwelling and the road. Such vehicles or equipment as permitted hereunder shall be screened from street view such as within the confines of an enclosed garage or other enclosure such as a fence, approved in writing by the Committee and no portion of same may project behind the enclosed area. Woodpiles, compost piles and facilities for handing, drying or airing clothing shall be screened from view.

ARTICLE VI
Architectural Control Committee

A. Initial Members: The initial members of the Committee are appointed by and serve at the discretion of the Declarant. The initial members shall be Alan Mills and Susan Wildwood. These individuals serve at the discretion of the Declarant who may increase the number of Committee members but may not decrease the numbers beyond three (3).

In the event of death or resignation of a member, the remaining members shall have full authority to act, and within a reasonable time after the occurrence of such vacancy, the Declarant, of if after the completion of the last dwelling unit, the Board of Directors of the Association shall appoint a replacement.

B. Action by Quorum and Majority: A majority of the Committee shall constitute a quorum. All action by the Committee shall be by majority vote of those members in attendance so long as a quorum is present at a meeting.

C. Liability for Committee Action: All Owners agree that the Committee and its successors shall incur no liability for any omissions or acts under this Declaration.

D. Duties: The duties of the Committee are to review, approve, deny or condition approval of all construction on such terms and conditions as the Committee shall deem appropriate. Its determination is binding on all parties. The Committee is further charged with enforcement of this Declaration until the Board of Directors takes over the responsibilities of the Committee pursuant to Paragraph H below. The Committee may, with the consent of the Declarant, appoint a sub-committee to enforce all areas of this Declaration not pertaining to new construction.

E. Duties of Sub-Committee: In the event that a Sub-Committee is appointed, its duties shall be to enforce, control and review for approval, non-approval or conditional approval, all areas encompassed by this Declaration not pertaining to new construction. However, upon completion of the last dwelling house, the sub-committee shall take over all duties of the Committee and its members will then be appointed by the Board of Directors of the Association. All Owners agree that the Sub-Committee and its successors shall incur no liability for any omissions or acts under this Declaration. In the event of death or resignation of a member, the remaining members shall have full authority to act, and within a reasonable time after the occurrence of such vacancy, the Committee and Declarant, of if after the completion of the last dwelling unit, the Board of Directors of the Association shall appoint a replacement.

F. Submission of Plans and Specifications: Prior to any construction, erection repair or alteration, including different color or materials, of structures, fences, outbuildings, etc., as herein provided, there shall be submitted to the Committee, one set of detailed plans and specifications.

G. Approval by Committee: No building or other structure shall be erected, placed, altered or maintained on any Lot until the construction plans and specifications and a plan showing the location of the structure have been approved by the Committee as to quality of workmanship and materials, harmony of external design with existing structures, and compliance with specific material type requirements.

The Committee shall have fifteen (15) days to review the plans, drawings and specifications. The Committee shall indicate its approval of the proposal by the dating and

signing of the plans by a designated member of the Committee. Such approval shall be construed as full compliance with this Declaration. Approval shall be transmitted to the applicant by letter. No proposal shall be deemed approved without the authorized signature of a Committee member. The Committee shall have the sole discretion to determine what is substantial or full compliance with this Declaration and may grant variances from the requirements herein. The Committee shall have the right to retain the plans and specifications.

H. Release of Initial Committee and Sub-Committee: Upon the sale of the last Lot in the Property, the work of the initial Committee and Sub-Committee shall be deemed completed, and said members shall then be automatically released from all responsibilities thereto. If the Association has been formed, then at the sale of the last Lot and not before, the then seated Board of Directors of the Association shall automatically become the Committee. Amending this Declaration shall not affect this provision.

ARTICLE VII
Homeowners' Association

A. Incorporation of Declaration: All the provisions of this Declaration shall be incorporated into the Articles of Corporation of the Homeowner's Association as if fully set forth therein. If there is a conflict between the Articles of Incorporation, Bylaws or rules of the Association and this Declaration, the provisions of this Declaration shall control.

B. Establishment of Association: Not later than the sale of the last Lot in Phase 2, the Declarant shall form the Association through filing of Articles of Incorporation as a nonprofit Idaho Corporation with the Idaho Secretary of State.

C. Membership: Every Owner of Lot shall be a member of the Association. Membership shall be appurtenant to and may not be separated from ownership of any Lot.

D. Membership Classes: The Association shall have two (2) classes of voting membership:

1. The Class A members shall all be Owners, with the exception of the Declarant, during the period when the Declarant is a Class B member. Each Class A member shall be entitled to one (1) vote for each Lot owned. When more than one (1) person holds an interest in any Lot, all such persons shall be members. The vote for such Lot shall be exercised as such Owners determine. However, there shall not be more than one (1) vote cast per Lot; fractional votes shall not be permitted. The vote applicable to any Lot being sold under contract of purchase shall be exercised by the contract seller, unless the contract expressly provides otherwise.

2. The sole Class B member shall be the Declarant, which shall retain 51% voting control until the last available Lot in the entire subdivision is sold. In that event, Declarant shall become a Class A member to the extent and under the same conditions as other Owners of Lots.

E. Officers and Directors: At an annual meeting called pursuant to written notice as herein provided for the establishment of annual assessments, a Board of Directors of the Association shall be elected by ballot of a majority of those attending said meeting or voting by proxy. The Board shall consist of three (3) Directors elected to serve for a period of one year. One member shall serve as the Chairperson of the Board, elected by majority vote. One person shall serve as Secretary to the Board.

F. Assessments: Each Owner of any Lot, by acceptance of a deed therefore, whether or not expressed in such deed, is deemed to covenant and agrees to pay to the Association for the maintenance, repair, and improvement of the private roads and other common areas:

1. An initial assessment of one hundred fifty dollars ($150) for each Lot, payable at closing.

2. Regular annual or other regular periodic assessments or charges including operation and maintenance of the private roads. The initial regular annual assessment shall be one hundred fifty dollars ($150.00) per Lot.

3. Special assessments for capital improvements, including repair or alteration of existing improvements or new improvements. Such special assessments to be fixed, established and collected from time to time as hereinafter provided.

No Owner may waive or otherwise escape liability for the assessments provided for herein by nonuse of the common areas or abandonment of the Owner's Lot.

G. Property Exempt from Assessments: The following property subject to this Declaration shall be exempt from the assessments created herein:

1. Properties expressly dedicated to and accepted by a local public authority;

2. Lots or common areas owned by the Association.

H. Due Date of Assessments: The annual assessments shall commence as to each Lot not later than the first day of the month following the recordation of this Declaration. The first annual assessment shall be adjusted according to the number of months remaining in the calendar year. The Board of Directors, or the Committee prior to the establishment of the Association, shall fix the amount of the annual assessment against each Lot at least thirty (30) days in advance of each annual assessment period. Written notice of the annual assessment shall be sent to every Owner subject thereto. The due dates shall be established by the Board of Directors or the Committee prior to establishment of the Association. The Association shall, upon demand, and for a reasonable charge furnish a certificate by an officer of the Association setting forth whether the assessments on the specified Lot have been paid. A properly executed certificate of the Association as to the status of assessments on a Lot is binding upon the

Association as of the date of its issuance.

I. Unpaid Assessments: Any assessment not paid within thirty (30) days after the due date shall bear interest from the due date at the rate of twelve percent (12%) per annum or at such other interest rate as may be established annually by the Board of Directors. The lien of the assessments shall be subordinate to the lien of any first mortgage provided that such first mortgage is held by a person or entity unrelated to the Lot Owner. However, the sale or transfer of any Lot pursuant to mortgage foreclosure or any proceeding in lieu thereof shall extinguish the lien of such assessments as to payments which became due prior to such sale or transfer. No sale or transfer shall relieve such Lot from liability for any assessments thereafter becoming due or from the lien thereof.

J. Use of Assessments: The assessments levied by the Association shall be used exclusively for the improvement and maintenance of the common areas including but not limited to the maintenance, improvement and repair of the common areas and private roads serving the subdivision.

K. Increase in Assessment Amounts: From and after January 1 of the year immediately following the conveyance of the first Lot to an Owner, the maximum annual assessment may be increased each year not more than 5% above the maximum assessment for the previous year without a vote of the membership. It may be increased above 5% only by a vote of two-thirds (2/3) of each class of members who are voting in person or by proxy at a meeting duly called for this purpose as set forth below.

L. Assessments a Charge Against the Lot: The regular and special assessments, together with interest, costs of collection and reasonable attorneys fees shall be a charge on any Lot and shall be a continuing lien on the Lot against which such assessment is made. Each such assessment, together with interest, costs of collection and reasonable attorney's fees, shall also be the person obligation of the Owner of such Lot at the time when the assessment fell due. The obligation shall remain a lien on the Lot until paid or foreclosed, but shall not be a personal obligation of successors in title, unless expressly assumed.

M. Notice and Quorum for Meetings: Written notice of any meeting called for the purpose of taking any action authorized under Paragraphs F and G shall be sent to all members not less than thirty (30) days nor more than sixty (60) days in advance of the meeting. At such meeting the presence of Owners or of proxies entitled to cast fifty percent (50%) of all the votes of each class of membership shall constitute a quorum. If the required quorum is not present, the meeting shall be adjourned and rescheduled for a time and place not less than ten (10) days and not more than thirty (30) days subsequent. Written notice of the rescheduled meeting shall be mailed to all members not less than five (5) days in advance of the rescheduled meeting date. The required quorum at the subsequent meeting shall be satisfied by those present in person or by proxy of twenty-five percent (25%) for each class of membership.

N. Common Area Matters: The Association shall have the right to dedicate or transfer all

or any part of the common areas to any public agency authority, or utility for such purposes and subject to such conditions as may be agreed to by the members. No such condition or transfer shall be effective unless authorized by members entitled to cast two-thirds (2/3) of the majority of the votes at a special or general member's meeting and an instrument signed by the Chairperson and Secretary has been recorded in the appropriate county deed records, agreeing to such dedication or transfer. Written notice of the proposed action and meeting at which action is intended to be taken shall be sent to every member of the Association not less than ten (10) days nor more than fifty (50) days prior to such dedication or transfer.

O. Association Duties: The Association is authorized to, but not limited, to the following:

1. Prepare an annual budget which shall indicate anticipated management, operating, maintenance, repair and other common expenses for the Association's next fiscal year and which shall be sufficient to pay all estimated expenses and outlays of the Association for the next calendar year which grow out of or are in connection with the maintenance and operation of common areas and improvements. This budget may include, but is not limited to the cost of maintenance, management, special assessments, insurance (fire, casualty and public liability, etc.), repairs, wages, water charges, legal and accounting fees, management fees, expenses and liabilities incurred by the Association from a previous period, and the creation of any reasonable contingency or other reserve fund.

2. Perform or have performed the repairs, upkeep and maintenance, normal servicing, development of rules for use, care and safety of common areas, payment of bills and related expenses for any common areas.

3. Any other responsibilities not inconsistent with this Declaration set forth in the Association's Articles of Incorporation, Bylaws or rules.

ARTICLE VIII
Insurance and Bond

A. Multi-Peril Insurance: The Association may obtain and keep in full force and effect at all times a multi-peril type policy covering any common area improvements, providing as a minimum, fire and extended coverage and all other coverage in the kinds and amounts commonly obtained by investors for projects similar in construction, location and use, on a replacement cost basis in an amount not less than one hundred percent (100%) of the insurable value (based on replacement cost).

B. Comprehensive Public Liability Insurance: The Association shall, if available at a reasonable cost, have a comprehensive policy of public liability insurance covering all of the common areas. Such insurance policy shall contain a severability of interest endorsement which shall preclude the insurer from denying the claim of an owner because of negligent acts of the Association or other Owners. The scope of coverage must include all other coverage in the

kinds and amounts required by private institutional mortgage investors for projects similar in construction, location and use.

C. Contribution: Insurance secured and maintained by the Association shall not be brought into contribution with insurance held by the individual Owners or their mortgage holders.

D. Subrogation Waiver: Each policy of insurance obtained by the Association shall where possible provide:

1. A waiver of the insurer's subrogation rights with respect to the Association, its officers, the Owners and their respective servants, agents and guests.

2. A Provision that the policy cannot be canceled, suspended or invalidated due to the conduct of any agent, officer or employee of the Association without a prior written demand that the defect be cured.

3. That any "no other insurance" clause therein shall not apply with respect to insurance held individually by the Owners.

E. Idaho Insurers: All policies shall be written by a company licensed to write insurance in the State of Idaho and all hazard insurance policies shall be written by a hazard insurance carrier holding financial rating by Best's Insurance Reports of Class VI or better.

F. FHLMC/FHMA Requirements: Notwithstanding anything herein contained to the contrary, insurance coverage must be in such amounts and meet other requirements of the Federal Home Loan Mortgage Corporation (FHLMC) and Federal National Mortgage Association (FNMA)

G. Worker's Compensation: The Association shall purchase workmen's compensation and employer's liability insurance and all other similar insurance with respect to employees of the Association in the amounts and in the forms now or hereafter required by law.

H. Miscellaneous: The Association may obtain insurance against such other risks, of a similar or dissimilar nature, as it shall deem appropriate with respect to the properties, including any personal property of the Association located thereon. The provisions of this Article shall not be construed to limit the power or authority of the Association to obtain and maintain insurance coverage, in addition to any insurance coverage required hereunder, in such amounts and in such forms as the Association may deem appropriate from time to time.

ARTICLE IX
Miscellaneous

A. Common Area Title and Improvements Transfer to Association: The common areas

located within easements shown on the Plat or the Irrigation Drainage Plan shall be considered conveyed to the Association upon the sale of the last Lot by the Declarant. Declarant shall retain the right to continuing access to the common areas to complete such improvements thereon or thereto as Declarant intends to construct.

B. Severability: Invalidation of any one of these covenants or restrictions by judgment or court order shall not invalidate or affect any other provisions hereof, which shall remain in full force and effect.

C. Amendment: This Declaration, except the easements herein granted, may be amended by the Declarant at any time prior to the sale of the last Lot within the Property. After the sale of the last Lot, this Declaration may be amended only by an instrument signed by not less than sixty-six and two-thirds percent (66 2/3%) of the then Lot Owners. Any amendment must be recorded.

D. Assignment by Declarant: Any or all rights, powers and reservations of Declarant herein contained may be assigned to the Association or to any other corporation or association which is now organized or which may hereafter be organized which will assume the specific rights, powers and duties of Declarant hereunder, evidencing its intent in writing to accept such assignment. All rights of Declarant hereunder reserved or created shall be held and exercised by Declarant alone, so long as Declarant owns any interest in any portion of the Property.

IN WITNESS WHEREOF, the Trustee for Declarant has executed this instrument on the date following her signature below.

Mary M. Kemp

Dated: April 29, 1999

Mary M. Kemp

STATE OF IDAHO)
)ss.
COUNTY OF CANYON)

On this 29th day of April, 1999, before me, the undersigned, a Notary Public in and for the State of Idaho, personally appeared Mary M. Kemp, known to me to be the person whose name is subscribed to the within instrument and acknowledged to me that she executed the same.

Notary Public for the State of Idaho
Residing at MIDDLETON
My Commission Expires: 1-24-1999

9916906

RECORDED

99 APR 30 PM 12 22

GLENDEL HALES
CANYON CNTY RECORDER
BY S McLaughlin Dep.

REQUEST TRANSNATION - NAMPA

TYPE misc FEE 5.00

LEE0086

100

2005017952

RECORDED

2005 APR 5 PM 2 37

C NOEL HALES
CANYON CNTY RECORDER
BY

FEE 60

WARRANTY DEED

This deed transfers common lots from the developer to the homeowners' association.

FOR VALUE RECEIVED, the Kemp Family Trust, Mary M. Kemp, Trustee, does hereby grant, convey, release to the Willow Creek Ranch Estates No. 2 Homeowners' Association, Inc., an Idaho corporation, whose legal representative's address is 518 Meadow Ct., Middleton, Idaho, 83644, the following-described premises with all appurtenances and subject to all existing easements and rights-of-way of record or implied:

Block 1 Lot 9 of Willow Creek Ranch Estates No. 2 as found in Book 26 on Page 22 of plats in Canyon County, Idaho and recorded as Instrument No. 9847975; and

Block 2 Lots 1, 5, and 15 of Willow Creek Ranch Estates No. 3 as found in Book 33 on Page 42, of plats in Canyon County, Idaho and recorded as Instrument No. 200410757.

TO HAVE AND TO HOLD the premises, with their appurtenances unto the Grantee, and its successors and assigns. Grantor does hereby covenant to and with the Grantee, that it is the owner in fee simple of said premises; that said premises are free from all encumbrances; except for general taxes and assessments for the year 2004 and subsequent years, and for covenants, conditions, restrictions and easements of record. Grantor will warrant and defend the said premises from all lawful claims.

DATED: March 28, 2005.

GRANTOR, Kemp Family Trust

Mary M. Kemp, Trustee

EXHIBIT D

Blumberg No. 5118

ACKNOWLEDGEMENT

STATE OF ARIZONA)
s.s.
County of Maricopa)

On this 28 day of March, in the year of 2005, before me, a notary public in and for the State of Arizona, personally appeared **MARY M. KEMP**, known by me, or proved to me on the basis of satisfactory evidence, to be the person whose name is subscribed to the within instrument as the Trustee of the Kemp Family Trust, and acknowledged to me that she executed the same as such Trustee.

Signature: Mila Djordjic
My Commission Expires: Nov 16, 2007

MILA DJORDJIC
NOTARY PUBLIC – ARIZONA
MARICOPA COUNTY
My Commission Expires
November 16, 2007

201

FILED/EFFECTIVE

ARTICLES OF INCORPORATION

(Non-Profit)

2002 MAR 20 PM 4:33

SECRETARY OF STATE
STATE OF IDAHO

(Instructions on back of application)

The undersigned, in order to form a Non-Profit Corporation under the provisions of Title 30, Chapter 3, Idaho Code, submits the following articles of incorporation to the Secretary of State.

Article 1: The name of the corporation shall be: Willow Creek Ranch Estates No. 2 Subdivision Homeowners' Association, Inc.

Article 2: The purpose for which the corporation is organized is: Operation of the subdivision according to recorded covenants, conditions, and restrictions.

Article 3: The street address of the registered office is: Alan Mills, 901 W. Main St, Middleton, ID 83644 and the registered agent at such address is: Alan Mills

Article 4: The board of directors shall consist of no fewer than three (3) people. The names and addresses of the initial directors are: Mary M. Kemp, Trustee, Kemp Family Trust, 901 W. Main St., Middleton, ID 83644
Alan Mills, 901 W. Main St., Middleton, ID 83644
Wendy Craig, 901 W. Main St, Middleton, ID 83644

Article 5: The name(s) and address(es) of the incorporator(s):
Darin J. Taylor, 25579 PAR DR., Caldwell, ID 83607

Article 6: The mailing address of the corporation shall be:
P.O. Box 286, Middleton, ID 83644

Article 7: The corporation (☒ does ☐ does not) have voting members.

Article 8: Upon dissolution the assets (if any) shall be distributed:
Subdivision lot owners.

Signature of all incorporators:

Darin J. Taylor — Typed Name: Darin J. Taylor

Typed Name:

Typed Name:

Typed Name:

Typed Name:

Customer Acct #:
(if using pre-paid account)

Secretary of State use only

g:\corp\formats\corp forms\articlsofincprofit.p65
Revised 01/2001

IDAHO SECRETARY OF STATE
03/21/2002 05:00
CK: CASH CT: 158632 BH: 453687
1 @ 30.00 = 30.00 INC NONP # 2

C143062

EXHIBIT
E
Blumberg No. 6118

Daniel W. Bower, ISB #7204
STEWART TAYLOR & MORRIS PLLC
12550 W. Explorer Drive, Suite 100
Boise, Idaho 83713
Telephone: (208) 345-3333
Fax No.: (208) 345-4461
dbower@stm-law.com

Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

DALE LEE and KATHI LEE, husband and wife,

Plaintiffs,

vs.

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

Defendants.

Case No. CV 16-3425

REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs, Dale and Kathi Lee (collectively "Lees"), by and through their attorneys of record, submit this reply memorandum in support of Plaintiffs' Motion for Summary Judgment and in opposition to Defendants' Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment ("Opposition Memo.").

INTRODUCTION

The Lees move for summary judgment on the basis that certain real property owned by the Willow Creek Ranch Estates No. 2 Subdivision Homeowners' Association, Inc. ("Willow

Creek HOA" or "HOA") is subject to valid encumbrances, conditions, servitudes and/or restrictions that allow the Lees to utilize already defined and improved access points to their adjoining real property. As explained in the opening memorandum, the Lees' argument is simple. It is uncontroverted fact that the HOA's predecessor in interest, the Kemp Family Trust, entered into an agreement whereby it promised to give the Lees access from Kemp Road:

> Seller [Lees] shall also be entitled to 3 driveway access from the gravel road [Kemp Road] to be constructed by Buyer [Kemps] adjoining Seller's [Lees'] property. Such access shall be constructed at Seller's [Lees'] cost and subject to Seller [Lees] obtaining any necessary governmental approvals.

In light of this agreement, the legal issue here is simple. Under Idaho law, is Willow Creek HOA obligated to honor that promise where it is incontrovertible fact that Willow Creek HOA had actual and constructive notice of the servitude at the time Willow Creek HOA received an interest in the subject real property.

RECONCILLED STATEMENT OF RELEVANT UNDISPUTED FACTS

1. In the summer of 1997, Dale Lee was approached by the Kemps about a possible real estate transaction. *See* June 17, 2016 Declaration of Dale Lee ("Lee Decl."), ¶ 2.

Response: This statement is uncontroverted.

2. To develop the "Kemp property" the Kemps needed approximately 1.8 acres of real property owned by the Lees. The Lees were willing to sell them the 1.8 acres needed, but required as a condition of that sale, that they be given access to the road that was to be constructed by the Kemps. *See* Lee Decl., ¶ 4.

Response: This statement is uncontroverted.

5. That road referenced above, presently known as Kemp Road, was to be constructed by the Kemps and was to run along the southern border of the Kemp property ("Kemp Road"). *See* Lee Decl., ¶ 6.

Response: This statement is uncontroverted.

6. It was access to Kemp Road, that the Lees conditioned the sale of their 1.8 acre parcel. *See* Lee Decl., ¶ 7.

Response: This statement is uncontroverted.

7. On June 1, 1997, the Lees and the Kemps executed an Agreement for Sale of Real Property ("Agreement"). *See* Lee Decl., Exhibit B.

Response: This statement is uncontroverted.

8. In that Agreement the Lees agreed to sell to the Kemps the 1.8 acres of real property that the Kemps needed to develop their property into the present day subdivision. *Id.*

Response: This statement is uncontroverted.

10. The Agreement also made clear that the parties agreed to provide the Lees access to the road:

> Seller [Lees] shall also be entitled to 3 driveway access from the gravel road [Kemp Road] to be constructed by Buyer [Kemps] adjoining Seller's [Lees'] property. Such access shall be constructed at Seller's [Lees'] cost and subject to Seller [Lees] obtaining any necessary governmental approvals.

Response: This statement is uncontroverted.

11. Accordingly, the Lees sold the Kemps the property and the Kemps began developing the subdivision that is now Willow Creek Ranch Estates #2. *See* Lee Decl., ¶ 12.

Response: This statement is uncontroverted.

12. By executing the Agreement, the Kemps granted the Lees an express easement to construct the three access points and an implied easement to use Kemp Road.

Response: This statement is disputed.

13. In 2000, at the time that Kemp Road was constructed, consistent with the Agreement, the Kemps paid to have the three driveway access points constructed giving the Lees' property adjacent to Kemp Road access to Kemp Road. *See* Lee Decl., ¶ 13.

Response: This statement is uncontroverted.

14. This construction included the creation of three access points, including 24 foot culverts, and gravel extending from Kemp Road to the Lees' property. Around that same time, wood fencing and metal gates corresponding to the three access points, were constructed along the property giving the Lees' property clear and obvious access to Kemp Road. *See* Lee Decl., ¶ 14, Exhibit C.

Response: This statement is uncontroverted.

15. As part of the development of the Willow Creek Ranch Estates, the Kemps transferred Kemp Road to the HOA as a common area owned by the HOA. *See* Lee Decl., Exhibit D ("The Trust was the developer of Willow Creek Ranch Estates. It transferred Kemp Lane to the HOA as part of the common area owned by the Association.") (LEE0010).

Response: This statement is uncontroverted.

16. In 2005, at the time the Kemps transferred Kemp Road to the HOA, the board of directors for the HOA was primarily controlled by the Kemps. *See* Mills Decl., Exhibit A.

Response: This statement is uncontroverted.

17. Mary Kemp, trustee of the Kemps, and Alan Mills, the Kemps' real estate agent, served as the initial board members for the HOA. Mr. Mills served as president. *Id.*

Response: This statement is uncontroverted.

18. Alan Mills has admitted that he had knowledge of the Kemps' agreement to provide access points along Kemp Road to the Lees. *Id.*

Response: This statement is uncontroverted.

19. On or about June 11, 2015, Alan Mills, the former real estate agent for the Kemps and a former member of the HOA board of directors at the time the Kemps transferred Kemp Road to the HOA, provided a letter wherein he stated:

> During the development of the Willow Creek Subdivision, I served as one of the initial board of directors for the Willow Creek Ranch Estates No. 2, Subdivision Homeowner's Association Inc. (the "HOA") along with Mary Kemp, the trustee for the Kemp Family Trust. As the developer of the Subdivision and who also controlled the HOA, the Kemp Family Trust paid to have the three driveway access constructed just as the parties agreed to do in the Agreement For Sale of Property. As a former HOA board member, I can say with a high degree of certainty that the HOA at the time was aware of the Agreement and its terms regarding the three driveway access.

See Mills Decl., Exhibit A; *see also* Lee Decl., Exhibit D.

Response: This statement is uncontroverted.

20. [A]t the time that Kemp Road was transferred to the Willow Creek HOA in 2005, the Willow Creek HOA Board of Directors, had knowledge of the Agreement, including the Kemps' agreement to provide the Lees the three access points. *See* Lee Decl., ¶ 20.

Response: This statement is uncontroverted.

21. Furthermore, the subsequent actions of the Lees, Kemps and the HOA, including the construction of the three access points, including culvert construction, gravel work, fencing and gates, evidence the promise found in the Agreement. *See* Lee Decl., ¶¶ 13 and 14.

Response: This statement is uncontroverted.

RESPONSIVE ARGUMENT

In response to the Lees' position in favor of summary judgment, the HOA asserts a number of faulty responsive arguments hoping to create a genuine issue of fact to preclude summary judgment. The HOA's arguments can be summed up as follows: 1) the 1997 Agreement is not a legally enforceable agreement; 2) the 1997 Agreement merged with the August 8, 1997 deed and, consequently, there is no legally enforceable easement; and 3) regardless of Mr. Mills' testimony, the HOA did not have "knowledge, actual or constructive" of the 1997 Agreement. Significantly, the HOA focus on the legalities of what is an enforceable easement and ignores the question of whether an equitable servitude exists and is presently enforceable.[1]

Regardless of any claim by the HOA that there was no enforceable "easement," the incontrovertible facts establish an equitable servitude that provides the Lees with legal access. As explained (although the HOA fails to appreciate this point), an equitable servitude is *not* an easement. *See Birdwood Subdivision Homeowner's Ass'n, Inc. v. Bulotti Const., Inc.*, 145 Idaho 17, 23, 175 P.3d 179, 185 (2007). It concerns a promise of the landowner to use his land in a certain way. *See, e.g., Idaho Power Co. v. State, By & Through Dep't of Water Res.*, 104 Idaho 575, 587, 661 P.2d 741, 753 (1983) ("restrictive covenants and equitable servitudes" relate to "[a]greements not to assert ownership rights.") Significantly, here, as explained in the opening

[1] This Reply Memorandum focuses exclusively on the Lees' second argument--an argument completely ignored in the Opposition Memo.--that separate and apart from any easement running with the land, an equitable servitude exists and is enforceable. As for its first assertion, that an easement exists and that the HOA had knowledge of it regardless of whether it was recorded, the Lees rest on their Memorandum in Support of Plaintiff's Motion for Summary Judgment.

brief, there was unquestionably a promise to not assert ownership rights that is reflected in both written agreement and by the actions of the parties: the 1997 Agreement and the uncontroverted subsequent construction of the access points at the time that Kemp Road was constructed. *See e.g., West Wood Investments, Inc. v. Acord*, 141 Idaho 75, 84, 106 P.3d 401, 410 (2005); *see also Birdwood*, 145 Idaho at 23, 175 P.3d at 185 (quoting 20 Am.Jur.2d, Covenants, Etc., § 155 (2005) (an equitable servitude arises "by implication from the language of the deeds or the conduct of the parties.")).

As explained in the opening brief, the test is simple. Whether a "promise regarding the use of land runs against a successor in interest of the original promisor is 1) whether or not the party claiming the enforceable interest actually has an interest against the original promisor; and 2) if such right exists, whether it is enforceable against the subsequent purchaser." *West Wood Investments*, 141 Idaho at 84, 106 P.3d at 410 (citing *Middlekauff v. Lake Cascade, Inc.*, 103 Idaho 832, 834, 654 P.2d 1385, 1387 (1982) (*Middlekauff I*)).[2]

Here, those questions are plainly answered by Mr. Mills' uncontroverted testimony:

> During the development of the Willow Creek Subdivision, I served as one of the initial board of directors for the Willow Creek Ranch Estates No. 2, Subdivision Homeowner's Association Inc. (the "HOA") along with Mary Kemp, the trustee for the Kemp Family Trust. ***As the developer of the Subdivision and who also controlled the HOA, the Kemp Family Trust paid to have the three driveway access constructed just as the parties agreed to do in the Agreement For Sale of Property.*** *As a former HOA board member, I can say with a high degree of certainty that the HOA at the time was aware of the Agreement and its terms regarding the three driveway access.*

[2] As explained in the opening brief, if the underlying agreement is oral, the terms of the agreement can be a question of fact. *See id.*; *see also Birdwood*, 145 Idaho at 23, 175 P.3d at 185. Here, where the terms are contained in the 1997 Agreement, there is no question of fact.

See Mills Decl., Exhibit A; *see also* Lee Decl., Exhibit D (Emphasis added). The HOA has not disputed Mr. Mills' testimony. Mr. Mills establishes that 1) there was an agreement to provide access; 2) the HOA was aware of the agreement; 3) the HOA was initially controlled by the Kemp Family Trust; and 4) construction, access points, culverts, gravel, and fencing, evidencing and consistent with the agreement were constructed and paid for by the Kemp Family Trust "just as the parties agree to do in the Agreement...." *Id.*[3]

Thus, here, the equitable servitude arose when the Kemp Family Trust promised the Lees that they would have access to Kemp Road and then consistent with that agreement acted consistent with that agreement by paying for the construction of the access points under the direction and with the involvement of the HOA.

And, also explained by Mr. Mills, the HOA had notice. "Whether a successor in interest takes the interest subject to the equitable servitude is a question of notice." *Id.* at 85, 106 P.3d at 411. Facts which may establish actual notice include whether a buyer has actual knowledge of agreements creating the servitude, or has actual knowledge of the *use* of the servitude at the time of purchase. *See West Wood Investments*, 141 Idaho at 85-86, 106 P.3d at 411-12. A purchaser who has notice of the servitude is not a bona fide purchaser. *Id.* (citing *Middlekauff I*).

Here, it is incontrovertible that Willow Creek HOA had actual notice of the Agreement. Mr. Mills, who is not a party to this action, establishes this plain and undisputed fact in his

[3] It is important to note that an "equitable servitude" is an "equitable" doctrine, thus, it is enforced by courts to ensure fairness. *See City of Meridian v. Petra Inc.*, 154 Idaho 425, 438, 299 P.3d 232, 245 (2013) ("In its broadest and most general signification, equity denotes the spirit and habit of fairness, justness, and right dealing which would regulate the intercourse of men.") (Internal quotations and citations omitted). Courts are instructed to enforce a land use restriction in equity when the conduct of one party is such that fairness and justice so require. Here, given the actions of the parties, fairness and justice dictate allowing the Lees the access they were promised when they agreed to sell their property to the Kemps.

June 11, 2015 letter. Furthermore, it is indisputable that Willow Creek HOA had constructive knowledge of the servitude as the improvements--the gravel road extensions at the access points, the culverts and fencing with gates--are plain and obvious and are being used to this very day. *See* Lee Decl., Exhibit D (picture of access point). Thus, here, as illustrated above and as asserted in the opening brief, notice cannot be meaningfully contested.

Indeed, Idaho case law is on point. In the *Middlekauff* cases, persons purchased property in a subdivision, with the representation that an adjacent property would be used as a common area for recreational activities. In *Middlekauff I*, the seller had entered bankruptcy and a part of the common area was conveyed to another party. While the property remained common for a while, eventually the new owner prohibited access to the property, which ultimately resulted in litigation. The trial court dismissed based because of a failure to meet the statute of limitation for filing an action. However, on appeal, the Idaho Supreme Court remanded for a determination as to whether it was possible that the owners of subdivision property could have acquired an interest in the common area based on the seller's representation and the time any statute of limitation began running needed to be determined. The Court indicated the necessary inquiry was whether the owner acquired an interest enforceable against the original promisor and whether such right should be enforceable against a subsequent purchaser. *Middlekauff I*, 103 Idaho at 834–35, 654 P.2d at 1387–88. On remand, the district court found and the appellate court affirmed that the subsequent purchasers were not bona fide purchasers because they had notice of the common area use at the time they made their purchase. *Middlekauff II*, 110 Idaho at 916, 719 P.2d at 1176.

Thus, here, Mr. Mills establishes the fact that at the time of the transfer, the HOA like the purchasers in *Middlekauff I* had notice of the agreement and use of the access points. Moreover, here, the actions of the parties involved, the Kemps, the HOA and the Lees evidenced knowledge of that agreement through the construction of the three access points, including the construction and use of the three access points. *See* Uncontroverted Fact No. 13 (Lee Decl., ¶ 13.) ("In 2000, at the time that Kemp Road was constructed, consistent with the Agreement, the Kemps paid to have the three driveway access points constructed giving the Lees' property adjacent to Kemp Road access to Kemp Road."). These improvements and construction are open and notorious to anyone driving on Kemp Road. In short, there can be no meaningful dispute that the HOA had and continues to have notice of the agreement--an agreement that is enforceable against the HOA and that provides the Lees access to Kemp Road.

CONCLUSION

In light of the foregoing, the Lees respectfully request that the Court grant summary judgment finding that Kemp Road, owned by the Willow Creek HOA, is subject to an equitable servitude that allows the Lees to move forward with their designs to utilize the three access points already designated and improved.

DATED: September 8, 2016.

STEWART TAYLOR & MORRIS PLLC

Daniel W. Bower
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on September 8, 2016, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Christ T. Troupis
TROUPIS LAW OFFICE, P.A.
801 E. State Street, Ste. 50
P.O. Box 2408
Eagle, ID 83616

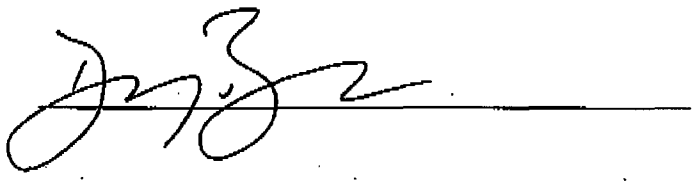
☒ U.S. Mail
☐ Hand Delivered
☐ Facsimile:
☐ Email: ctroupis@troupislaw.com

Attorneys for Defendant Willow Creek Ranch Estates No. 2 Subdivision Homeowners' Association, Inc.

Matthew C. Parks
ELAM & BURKE, P.A.
251 East Front Street, Suite 300
Post Office Box 1539
Boise, Idaho 83701

☐ U.S. Mail
☐ Hand Delivered
☒ Facsimile: (208) 384-5844
☐ Email: mcp@elamburke.com

Attorneys for Defendant Willow Creek Ranch Estates No. 2 Subdivision Homeowners' Association, Inc.



ORIGINAL

FILED
A.M. 4:48 P.M.

MAY 18 2017

CANYON COUNTY CLERK
J COTTLE, DEPUTY CLERK

Christ T. Troupis, ISB #4549
Troupis Law Office, P.A.
801 E. State Street, Suite 50,
P.O. Box 2408,
Eagle, Idaho 83616
Telephone: (208) 938-5584
Facsimile: (208) 938-5482

Matthew C. Parks, ISB #7419
ELAM & BURKE, P.A.
251 East Front Street, Suite 300
Post Office Box 1539
Boise, Idaho 83701
Telephone: (208) 343-5454
Facsimile: (208) 384-5844
mcp@elamburke.com

Attorneys for Defendant Willow Creek Ranch Estates
No. 2 Subdivision Homeowners' Association, Inc.

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

DALE LEE and KATHI LEE, husband and wife, Plaintiffs, vs. WILLOW CREEK RANCH ESTATES NO. 2 SUBDIVISION HOMEOWNERS' ASSOCIATION, INC., an Idaho corporation; and DOES I – X, inclusive, Defendants.	Case No. CV-16-3425*C DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant Willow Creek Ranch Estates No. 2 Subdivision Homeowners' Association, Inc. ("Willow Creek"), by and through its attorneys, Elam & Burke, P.A., and pursuant to Rule 56 of the Idaho Rules of Civil Procedure, moves this Court for an order granting summary

judgment in its favor as to all of the plaintiffs' claims against it. This motion is made on the ground that no genuine issue of material fact exists upon which liability can be found against the defendant, and the case against defendant should be dismissed as a matter of law.

This motion is supported by the Memorandum in Support of Defendant's Motion for Summary Judgment filed contemporaneously herewith, and the pleadings and materials in the record in this case.

ORAL ARGUMENT IS REQUESTED.

DATED this 18 day of May, 2017.

ELAM & BURKE, P.A.

By: Matthew Parks
Matthew C. Parks, of the firm
Attorneys for Defendant Willow Creek Ranch Estates No. 2 Subdivision Homeowners' Association, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 18 day of May, 2017, I caused a true and correct copy of the foregoing document to be served as follows:

Daniel W. Bower STEWART TAYLOR & MORRIS, PLLC 12550 W. Explorer Drive, Suite 100 Boise, ID 83713	[ ] U.S. Mail [ ] Hand Delivery [ ] Federal Express [✓] Via Facsimile 345-4461
Honorable Christopher S. Nye Canyon County Courthouse 1115 Albany St Caldwell, ID 83605	[ ] U.S. Mail [ ] Hand Delivery [ ] Via Facsimile [✓] Email clerk copy – acahill@canyonco.org

Matthew Parks
Matthew C. Parks

4833-1061-8952, v. 1

ORIGINAL

FILED
A.M. 4:56 P.M.

MAY 18 2017

CANYON COUNTY CLERK
J COTTLE, DEPUTY CLERK

Christ T. Troupis, ISB #4549
Troupis Law Office, P.A.
801 E. State Street, Suite 50,
P.O. Box 2408,
Eagle, Idaho 83616
Telephone: (208) 938-5584
Facsimile: (208) 938-5482

Matthew C. Parks, ISB #7419
ELAM & BURKE, P.A.
251 East Front Street, Suite 300
Post Office Box 1539
Boise, Idaho 83701
Telephone: (208) 343-5454
Facsimile: (208) 384-5844
mcp@elamburke.com

Attorneys for Defendant Willow Creek Ranch Estates
No. 2 Subdivision Homeowners' Association, Inc.

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

DALE LEE and KATHI LEE, husband and wife,

Plaintiffs,

vs.

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

Defendants.

Case No. CV-16-3425*C

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant Willow Creek Ranch Estates No. 2 Subdivision Homeowners' Association, Inc. ("Willow Creek"), submits this Memorandum in Support of Defendant's Motion for

Summary Judgment. Willow Creek requests the Court hold that the Plaintiffs (the "Lees") do not have an enforceable easement or equitable servitude over the property in dispute in this case, Kemp Road.

I. 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 an easement over Kemp Road, which is a private road within the Willow Creek Estates subdivision. The Lees do not own any property within the Willow Creek Estates subdivision, but own property adjacent to the subdivision. *See Declaration of Dale Lee*, filed June 20, 2016 ("Lee Dec."), pp 2-3. According to the Lees, the Kemp Family Trust granted them an easement in the 1997 Agreement for the Sale of Real Property (the "1997 Agreement"). *Id.*

The 1997 Agreement does not contain a valid legal description of the purported easement. *Id.*, Ex. B.[1] 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 Agreement is not notarized and the record contains no evidence that can establish the Kemp Family Trust executed the 1997 Agreement. *Id.* The Lees have not identified any representative of the Kemp Family Trust to testify that the person that signed the 1997 Agreement was properly authorized by the Kemp Family Trust to execute documents on its behalf. Nor have the Lees identified the person that signed the 1997 Agreement purportedly on behalf of the Kemp Family Trust as a witness. The 1997 Agreement appears to have been signed

[1] A copy of the 1997 Agreement is attached hereto for reference.

by J.M. Steele. *Id.* There is no evidence in the record as to who this person is and that he was authorized to sign the 1997 Agreement by the Kemp Family Trust.

II. SUMMARY OF LEGAL ARGUMENT

The Lees have only asked the Court to hold they are entitled to an equitable servitude over Kemp Road in their Complaint. *See Complaint*, p. 6 (requesting the Court determine the Lees are entitled to an equitable servitude over Kemp Road). If the Court finds the Lees are not entitled to an equitable servitude, the Court should dismiss the Complaint since the Lees have not asked for any additional relief.

The Lees are not entitled to an equitable servitude because the elements of establishing an equitable servitude cannot be established. Furthermore, the Lees are asking the Court to find they are entitled to an affirmative right to use Kemp Road. Since an equitable servitude is a negative covenant and not an affirmative property right (as discussed in detail below), the Lees' request for an equitable servitude fails as a matter of law.

In prior briefing, the Lees have not addressed the fact that the 1997 Agreement cannot grant the Lees an easement and appear to concede that it does not grant an easement. However, if the Court determines the *Complaint* is broad enough to encompass a request for relief in the form of an easement, as a matter of law that request should be denied since the 1997 Agreement is not signed by the Kemp Family Trust and contains no legal descriptions of any property. Since the 1997 Agreement does not comply with the statute of frauds, it cannot be the legal basis for an easement. To the extent the Lees have asked this Court to determine they have an easement over Kemp Road, that request should be denied.

For the reasons set forth herein and in the prior briefing, Willow Creek requests the Court find the 1997 Agreement is unenforceable and that the Lees are not entitled to an easement or

equitable servitude over Kemp Road. Willow Creek requests the Court dismiss the Complaint and grant summary judgment to Willow Creek.

III. LEGAL STANDARD

Summary judgment is proper if "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c). The Court must liberally construe all facts and draw all reasonable inferences in favor of the non-moving party. *Jenkins v. Boise Cascade Corp.*, 141 Idaho 233, 238 (2005). If the record contains conflicting inferences upon which reasonable minds could differ, summary judgment must not be granted. *Brown v. Matthews Mortuary, Inc.*, 118 Idaho 830, 833 (1990). This requirement is a strict one. *Clarke v. Prenger*, 114 Idaho 766, 768 (1988).

The burden of proving the absence of a material fact rests at all times upon the moving party. *G&M Farms v. Funk Irr. Co.*, 119 Idaho 514, 517 (1991). This burden is onerous because even "circumstantial evidence can create a genuine issue of material fact, [and] all doubts are to be resolved against the moving party." *Doe v. Durtschi*, 110 Idaho 466,470 (1986). If the moving party meets this burden, the burden shifts to the nonmoving party to show a genuine issue of material fact does exist. *Asbury Park, LLC v. Greenbriar Estate Homeowners' Ass n. Inc.*, 152 Idaho 338, 343-44 (2012).

The adverse party may not rest upon mere allegations in the pleadings, but must set forth by deposition, affidavit, or otherwise, specific facts showing there is a genuine issue for trial. *Boise Mode, LLC v. Donahoe Pace & Partners Ltd.*, 154 Idaho 99, 104 (2013). The nonmoving party must submit more than just conclusory assertions that an issue of material fact exists to withstand summary judgment. *Northwest Bec-Corp. v. Home Living Sery.*, 136 Idaho 835, 839

(2002). A mere scintilla of evidence or only slight doubt as to the facts is not sufficient to create a genuine issue of material fact for the purposes of summary judgment. *Jenkins*, 141 Idaho at 238.

"When an action will be tried before the court without a jury, the trial court as the trier of fact is entitled to arrive at the most probable inferences based upon the undisputed evidence properly before it and grant the summary judgment despite the possibility of conflicting inferences. The test for reviewing the inferences drawn by the trial court is whether the record reasonably supports the inferences." *Shawver v. Huckleberry Estates, L.L.C.*, 140 Idaho 354, 360–61, 93 P.3d 685, 691–92 (2004) (citations and quotations omitted).

IV. LEGAL ARGUMENT

A. The Lees' Claim for an Equitable Servitude Should be Dismissed

The Lees have asked this Court to grant them an equitable servitude over the road owned by Willow Creek. However, the Lees have misunderstood the nature of the property right entailed in an equitable servitude and confuse a negative restrictive 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 should be dismissed since the Lees mistakenly contend an equitable servitude will provide them an affirmative right to use Kemp Road. Furthermore, the Lees cannot establish the required elements of an equitable servitude. For these reasons, the Court should grant summary judgment in favor of Willow Creek and find the Lees are not entitled to an equitable servitude that would provide a right to use Kemp Road.

As a preliminary matter, we must identify what property right the Lees seek. To do so, we must distinguish between an easement and an equitable servitude. There are fundamental

differences between an easement and an equitable servitude and the property rights involved with each, differences the Lees have failed to address thus far in this litigation.

> 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).

> Real covenants, contractual agreements regarding the use of land, and easements overlap at certain points. Indeed, some commentators have advocated that because of their similarities, these two categories of rights be merged under the label "servitudes." The Restatement (Third) of Property—Servitudes takes this tack. Such an approach, however, is subject to criticism on several counts. Wholesale combination of these historically

distinct, but related fields of property law may obliterate helpful distinctions, introduce uncertainty into relatively well-settled areas of easement law, and add an unnecessary layer of legal doctrine at certain points.

Notwithstanding the efforts of the drafters of the Restatement (Third) of Property—Servitudes and others to unify the law of easements and real covenants, this is not likely to occur in the near future. Thus, it remains necessary to differentiate between these real property interests.

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;[2] 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).

Idaho recognizes the distinction between easements and real covenants. The Idaho Supreme 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

[2] 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.

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."). Washington courts also recognize the distinction. *See Dickson v. Kates*, 133 P.3d 498, 502 (Wash. App. 2006), as amended (Dec. 12, 2006) ("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).

The Lees are not seeking to limit Willow Creek's use of Kemp Road (which would be a restrictive covenant). Rather, they are seeking a right of use over Kemp Road (which is an affirmative easement). Because the Lees are not seeking a restrictive covenant, which may be created by conduct, but rather they are seeking an affirmative right to use the land of Willow Creek, in order to prevail at trial they must provide a written agreement complying with the statute of frauds.

Each of the cases cited by the Lees in support of the contention that they do not have to establish that they have an agreement to use Kemp Road that complies with the statute of frauds deals with negative easements, restrictive covenants, or equitable servitudes. The Lees have provided no authority for the proposition that an affirmative right to cross another's property for

access is considered an equitable servitude and may be created without a written agreement complying with the statute of frauds.[3]

The question of whether an interest in property is an easement or a restrictive covenant is a question of law. *See, e.g., Dickson v. Kates*, 133 P.3d at 502. This Court should find that the interest in land sought by the Lees (the affirmative right to use Kemp Road) is an easement, not an equitable servitude or restrictive covenant and dismiss the Lees claim for an equitable servitude.

B. The Lees' Reliance on *Middlekauf*, *West Wood*, and *Birdwood* is Flawed

If the Court does not dismiss the claim for an equitable servitude based on the fact that the Lees are seeking an affirmative right to use Kemp Road (which is not an equitable servitude), the Court should dismiss the claim for an equitable servitude because the Lees cannot demonstrate they have met the requirements to establish a right to an equitable servitude.

The Lees, whose property is not located within the Willow Creek subdivision, want an access right through that subdivision. Because a subdivision is involved, the Lees have throughout this litigation cited to Idaho cases involving equitable servitudes in the context of planned unit developments. 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 Lees claim an equitable servitude based on what the developer of the subdivision purportedly agreed to grant in the 1997 Agreement and "conduct" of the parties. *See, e.g., Plaintiffs' Pre-trial Statement*, pp. 7-9. *Middlekauf*, *West Wood*, and *Birdwood* (cases cited by the Lees in support of

[3] "An easement may be created by implication. An easement by implication is one which the law imposes by inferring the parties to a transaction intended that result although they did not express it. The common law recognizes two types of implied easements: easements by necessity and easements implied from prior use." 25 AM. JUR. 2d Easements and Licenses § 18.

the claim for an equitable servitude in their *Pre-Trial Statement*) 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.

Before proceeding to review the facts and holdings of those cases relied upon by the Lees, it is necessary to review how the common 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 (or implied reciprocal negative easement or restrictive covenant) when in fact it is an easement.

> 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 restrictive 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 have not articulated any restrictive covenants that they want to place on Kemp Road (unless they attempt to argue that they want to restrict Willow Creek from prohibiting their use of Kemp

Road – which is not really a restrictive covenant, but actually an argument they have an affirmative right to use the road).

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 cited by the Lees all involve the rights of property owners that purchased lots within a planned unit development based upon statements or conduct that the court 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 properties 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.

> ...[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 398, 403, 690 P.2d 333, 338 (1984).

> Similarly, in *Ute Park Summer Homes Ass'n v. Maxwell Land Gr. Co.*, the court found an implied restriction for the land's continuing use as a golf course. Although this case is not directly on point because it involved a suit by lot owners directly against the developer and not his successor, the court, in its decision, focused on the representations made to prospective purchasers and the materials used in the sales of the lots. When the developer in *Ute Park Summer Homes Ass'n* sold subdivided lots, he had distributed maps which pictured an area marked "golf course." After selling these lots, the developer tried to sell the golf course without any restrictions on its use. Even though the maps had not been recorded and none of the deeds contained any reference to the map or to any interest in the golf course, the court concluded that the lot

> owners had a legal right to use the area as a golf course. The court concluded that when a map or plat showing a park or other like open area is used to sell property, "the purchaser acquires a private right, generally referred to as an easement, that such area shall be used in the manner designated. As stated, this is a private right, and it is not dependent on a proper making and recording of a plat for purposes of dedication." Further, the court noted: The rationale of the rule is that a grantor, who induces purchasers, by use of a plat, to believe that streets, squares, courts, parks, or other open areas shown on the plat will be kept open for their use and benefit, and the purchasers have acted upon such inducement, is required by common honesty to do that which he represented he would do. It is the use made of the plat in inducing the purchasers, which gives rise to the legally enforceable right in the individual purchasers, and such is not dependent upon a dedication to public use, or upon the filing or recording of the plat.

Skyline Woods Homeowners Ass'n, Inc. v. Broekemeier, 276 Neb. 792, 808–09, 758 N.W.2d 376, 389–90 (2008).

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 Subdivision Homeowners' Ass'n, Inc. v. Bulotti Const., Inc., 145 Idaho 17, 23, 175 P.3d 179, 185 (2007).

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 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.

West Wood 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 have no evidence that they purchased a lot in a planned unit development from the Kemp Family Trust (or that there is some other common grantor of property) and they are not contending they have a right to impose negative restrictions on the use of Kemp Road. In the instant case, the Lees have no legal basis to claim they are entitled to an equitable servitude. Willow Creek requests the Court find that as a matter of law the Lees are not entitled to an equitable servitude to use Kemp Road.

C. The Lees Have Not Requested an Easement and Are Not Entitled to One

The Lees have not asked the Court to enter an order finding they have an easement over Kemp Road in their Complaint. *See generally* Complaint, filed April 11, 2016. They ***only*** requested a finding that they have an equitable servitude. *Id.* The Lees have never moved to amend the Complaint to seek an easement. If the Court grants summary judgment on the claim for an equitable servitude, the Court should dismiss the Complaint in its entirety.

Even if the Court determines the Lees have requested an easement in this case, Willow Creek is entitled to summary judgment on that claim based on 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).

The 1997 Agreement was not notarized, so there is no notary jurat to assist in identifying the name of the person that purportedly signed the agreement on behalf of the Kemp Family Trust. The Lees, to the extent they are claiming the 1997 Agreement granted them an easement over Kemp Road, have the burden of establishing the 1997 Agreement complies with the statute of frauds. The Lees have the burden of establishing that the 1997 Agreement was signed by the Kemp Family Trust or a duly qualified representative of the trust. There is no evidence in the record that would establish that a duly authorized representative of the trust signed the agreement. If the Court determines that the Lees properly asked the Court find they are entitled to an easement to use Kemp Road, Willow Creek requests the Court grant its summary judgment and dismiss the *Complaint*.

V. CONCLUSION

Willow Creek respectfully requests the Court dismiss the Lees' *Complaint* in its entirety with prejudice.

DATED this 18 day of May, 2017.

ELAM & BURKE, P.A.

By: Matthew Parks
Matthew C. Parks, of the firm
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 18 day of May, 2017, I caused a true and correct copy of the foregoing document to be served as follows:

Daniel W. Bower STEWART TAYLOR & MORRIS, PLLC 12550 W. Explorer Drive, Suite 100 Boise, ID 83713	[ ] U.S. Mail [ ] Hand Delivery [ ] Federal Express [✓] Via Facsimile 345-4461
Honorable Christopher S. Nye Canyon County Courthouse 1115 Albany St Caldwell, ID 83605	[ ] U.S. Mail [ ] Hand Delivery [ ] Via Facsimile [✓] Email clerk copy – acahill@canyonco.org

Matthew C. Parks

4839-1923-8728, v. 2

Christ T. Troupis, ISB #4549
Troupis Law Office, P.A.
801 E. State Street, Suite 50,
P.O. Box 2408,
Eagle, Idaho 83616
Telephone: (208) 938-5584
Facsimile: (208) 938-5482

Matthew C. Parks, ISB #7419
ELAM & BURKE, P.A.
251 East Front Street, Suite 300
Post Office Box 1539
Boise, Idaho 83701
Telephone: (208) 343-5454
Facsimile: (208) 384-5844
mcp@elamburke.com

Attorneys for Defendant Willow Creek Ranch Estates
No. 2 Subdivision Homeowners' Association, Inc.

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

DALE LEE and KATHI LEE, husband and wife, Plaintiffs, vs. WILLOW CREEK RANCH ESTATES NO. 2 SUBDIVISION HOMEOWNERS' ASSOCIATION, INC., an Idaho corporation; and DOES I – X, inclusive, Defendants.	Case No. CV-16-3425*C DEFENDANT'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION TO STRIKE OR IN THE ALTERNATIVE, POSTPONE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant Willow Creek Ranch Estates No. 2 Subdivision Homeowners' Association, Inc. ("Willow Creek"), by and through its attorneys, Elam & Burke, P.A., and hereby opposes

Plaintiff's Motion to Strike or in the Alternative, Postpone Defendant's Motion for Summary Judgment.

The Lees request the Court strike or postpone Willow Creek's Motion for Summary Judgment for two reasons: (1) the Lees claim the Court's Pre-trial Order dated June 3, 2016, is still in effect and prohibits the Motion for Summary Judgment; and (2) the Lees want additional time to file their own dispositive motion. Both reasons have no merit.

At the hearing on February 16, 2017, the Court vacated the trial that was to take place February 28 and March 1, 2017, at the request of the parties based on the health of Mr. Lee. Also during the February 16, 2017, hearing, the Court scheduled a status conference to take place on June 15, 2017. The Court also instructed the parties that if settlement negotiations were not successful, the parties could file dipositive motions to be heard on that date. Following this Court's instructions, Willow Creek filed its Motion for Summary Judgment in a timely manner to be heard on June 15, 2017.

Since the trial was vacated and has not been rescheduled, there currently are no deadlines for filing dispositive motions. The parties entered into a stipulation regarding deadlines to file summary judgment motions and agreed such motions would be filed 91 days prior to trial. *See* Stipulation for Scheduling and Planning filed June 17, 2016. Since no trial date has been set, there are no deadlines at this time to file motions for summary judgment.

The Lees' second reason for striking the Motion for Summary Judgment or vacating the hearing is also without merit. The Lees have not cited any rule or case law supporting their request to strike the Motion for Summary Judgment or vacate the hearing on the motion. The Lees have not sought relief under I.R.C.P. 56(f), which is arguably the only potential avenue to

postpone the Motion for Summary Judgment. The Lees' Motion to Strike or in the Alternative, Postpone Defendant's Motion for Summary Judgment is not supported by the facts or the law.

Willow Creek respectfully requests the Court deny the Lees' Motion to Strike or in the Alternative, Postpone Defendant's Motion for Summary Judgment.

DATED this 22 day of May, 2017.

ELAM & BURKE, P.A.

By: Matthew Parks
Matthew C. Parks, of the firm
Attorneys for Defendant Willow Creek Ranch Estates No. 2 Subdivision Homeowners' Association, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 22 day of May, 2017, I caused a true and correct copy of the foregoing document to be served as follows:

Daniel W. Bower STEWART TAYLOR & MORRIS, PLLC 12550 W. Explorer Drive, Suite 100 Boise, ID 83713	[ ] U.S. Mail [ ] Hand Delivery [ ] Federal Express [✓] Via Facsimile 345-4461
Honorable Christopher S. Nye Canyon County Courthouse 1115 Albany St Caldwell, ID 83605	[ ] U.S. Mail [ ] Hand Delivery [ ] Via Facsimile [✓] Email clerk copy – acahill@canyonco.org

Matthew Parks
Matthew C. Parks

4842-2794-1705, v. 2

Daniel W. Bower, ISB #7204
STEWART TAYLOR & MORRIS PLLC
12550 W. Explorer Drive, Suite 100
Boise, Idaho 83713
Telephone: (208) 345-3333
Fax No.: (208) 345-4461
dbower@stm-law.com

Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

DALE LEE and KATHI LEE, husband and wife,

Plaintiffs,

vs.

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

Defendants.

Case No. CV 16-3425

REPLY MEMORANDUM IN SUPPORT OF MOTION TO STRIKE OR IN THE ALTERNATIVE, POSTPONE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

On May 18, 2017 Dale and Kathi Lee (collectively "Lees"), by and through their attorneys of record, filed a Motion to Strike or in the Alternative, Postpone Defendant's Motion for Summary Judgment. The basis for that motion was to seek clarification from the Court regarding the procedural posture of the case, because, as noted, at the time of Mr. Lee's accident, all discovery and dispositive motion practice had been concluded. And, as further noted by the

Lees, no order has been entered modifying the June 3, 2016 Order Setting Pretrial Conference and Jury Trial. In response to the Lee's motion, the defendant, Willow Creek Ranch Estates No. 2 Subdivision Homeowner's Association, Inc.'s ("Defendant" or "Willow Creek HOA" or "HOA"), argues that "at the hearing on February 16, 2017, the Court vacated the trial that was to take place....at the request of the parties based on the health of Mr. Lee...[and] instructed the parties that if settlement negotiations were not successful, the parties could file dipositive [sic] motions to be heard on that date." Defendant's Memorandum in Opposition to Plaintiff's Motion to Strike or in the Alternative, Postpone Defendant's Motion for Summary Judgment, p.2.

The HOA's representation that this Court "instructed the parties" to file dispositive motions on June 15, 2017 is not accurate and not reflected in any document. The Court did not so instruct and that directive is incontrovertibly not reflected in any order or memorandum ruling that has been issued by this Court. Moreover, the HOA apparently claims that at this time there "currently are no deadlines" and that the HOA can just reset this entire case. *Id.* That approach makes no sense given the fact that at the time of Mr. Lee's accident, discovery and dispositive motion briefing had concluded and the parties were preparing for trial. The fact that the Court vacated the trial date from the bench does not somehow give the HOA the opportunity to relitigate this case. A new trial date should be set and the parties should be left in the same position as they were in at the time the trial date was vacated. Indeed, it is the Lees' position that this is what the Court intended on February 16, 2017 and that this is the reason why no "new" order has been entered modifying and/or replacing the June 3, 2016 Order.

DATED: May 30, 2017.

STEWART TAYLOR & MORRIS PLLC

Daniel W. Bower
Attorneys for the Lees

CERTIFICATE OF SERVICE

I hereby certify that on May 30, 2017, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Christ T. Troupis
TROUPIS LAW OFFICE, P.A.
801 E. State Street, Ste. 50
P.O. Box 2408
Eagle, ID 83616

☒ U.S. Mail
☐ Hand Delivered
☐ Facsimile:
☐ Email: ctroupis@troupislaw.com

Attorneys for Defendant Willow Creek Ranch Estates No. 2 Subdivision Homeowners' Association, Inc.

Matthew C. Parks
ELAM & BURKE, P.A.
251 East Front Street, Suite 300
Post Office Box 1539
Boise, Idaho 83701

☐ U.S. Mail
☐ Hand Delivered
☒ Facsimile: (208) 384-5844
☐ Email: mcp@elamburke.com

Attorneys for Defendant Willow Creek Ranch Estates No. 2 Subdivision Homeowners' Association, Inc.

Gabrielle Cole

Daniel W. Bower, ISB #7204
STEWART TAYLOR & MORRIS PLLC
12550 W. Explorer Drive, Suite 100
Boise, Idaho 83713
Telephone: (208) 345-3333
Fax No.: (208) 345-4461
dbower@stm-law.com

Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

DALE LEE and KATHI LEE, husband and wife,

Plaintiffs,

vs.

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

Defendants.

Case No. CV 16-3425

MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiffs, Dale and Kathi Lee (collectively "Lees"), by and through their attorneys of record, submit this brief in opposition to Defendant's Motion for Summary Judgment.

INTRODUCTION

The Lees' opposition to the motion for summary judgment submitted by Willow Creek Ranch Estates No. 2 Subdivision Homeowners' Association, Inc. ("HOA" or "Willow Creek HOA") is not complicated. The HOA's request for summary judgment is dependent on this

Court finding that "the 1997 Agreement [June 1, 1997 Agreement for Sale of Real Estate (referred to herein and in the briefing as "1997 Agreement" or "Agreement")][1] is unenforceable and that the Lees are not entitled to an easement or equitable servitude over Kemp Road." *See* Memorandum in Support of Defendant's Motion for Summary Judgment ("Defendant's Summary Judgment Memo."), p.3. And, indeed, the HOA submits that the statute of frauds precludes this Court from finding that the 1997 Agreement is enforceable as an interest. *See* Defendant's Summary Judgment Memo., p.16 ("Willow Creek [HOA] is entitled to summary judgment on that claim based on the statute of frauds."). The HOA also submits that it is entitled to summary judgment on the issue of equitable servitude because the HOA claims that the Lees are "seeking an affirmative right" as opposed to a restrictive covenant that, the HOA claims, can only be created by a written document that satisfies the statute of frauds. *See* Defendant's Summary Judgment Memo., p.8 (The Lees have provided no authority for the proposition that an affirmative right to cross another's property for access is considered an equitable servitude and may be created without a written agreement complying with the statue of frauds.").

Thus, as a threshold matter, if the Lees can establish a basis for overcoming the statute of frauds, regardless of any other argument, the HOA's motion for summary judgment fails. To be clear, that is precisely what the Lees have alleged and that is exactly what the undisputed facts show--that the 1997 Agreement has been partially performed and consequently can be enforced regardless of statute of fraud issues. As explained more fully below, the partial performance of an agreement, here the 1997 Agreement, allows the Court to enforce the agreement regardless of

[1] A copy of that agreement is attached to the June 17, 2016 Declaration of Dale Lee ("Lee Decl."), Ex. B.

statute of frauds concerns. *See Hoke v. Neyada, Inc.*, 161 Idaho 450, 387 P.3d 118, 121 (2016), *reh'g denied* (Jan. 23, 2017) (citing Idaho Code§ 9-504) ("[u]nder the doctrine of part performance, when an agreement to convey real property fails to meet the requirements of the Statute of Frauds, the agreement may nevertheless be specifically enforced" if the agreement is partially performed.). Accordingly, on this basis alone, the HOA's summary judgment motion should be denied. Furthermore, as explained more fully below, the HOA's legal arguments related to equitable servitudes is *not* consistent with Idaho law. Idaho takes a much more expansive approach to equitable servitudes than other jurisdictions. Accordingly, even if there was no partial performance of the 1997 Agreement, there is a factual and legal basis for this Court to conclude that an equitable servitude has been created and should be enforced.

BACKGROUND

Defendant's Motion for Summary Judgment begins with two (2) faulty assumptions that need to be addressed up front. The first faulty assumption is that the Lees have limited the legal basis for the relief they are seeking--that [t]he Lees have only asked the Court to hold that they are entitled to an equitable servitude over Kemp Road in their Complaint." *See* Memorandum in Support of Defendant's Motion for Summary Judgment ("Defendant's Motion for Summary Judgment Memo."), p. 3. This contention is incorrect and misconstrues the facts leading up to the dispute and the relief sought by the Lees.

The Lees from the beginning of this case have made clear that the relief they seek is based on two (2) legal theories: 1) that the 1997 Agreement is enforceable (regardless of statute of frauds issues) and 2) that even if there is no valid agreement, the acts of the parties involved, constitute an equitable servitude. *See, e.g.*, June 20, 2016, Memorandum in Support of

Plaintiff's Motion for Summary Judgment, p.2 ("The legal issue here is simple--whether the defendant, Willow Creek HOA, is obligated to honor an easement agreement and/or equitable servitude encumbering property, as a successor in interest, to the Kemp Family Trust ("Kemps), where it is incontrovertible fact that Willow Creek HOA had actual and constructive notice of the servitude at the time Willow Creek HOA received an interest in the subject real property.") (Emphasis added.).

Perhaps the most significant evidence is the pleading itself. The Complaint, a declaratory action, does not limit relief to just equitable servitude, but focuses primarily on the enforceability of the terms of the 1997 Agreement. *See, e.g.*, Complaint, ¶ XVI, p.5 ("The Lees have relied upon the terms, conditions and agreements in the Sale Agreement, to provide them access points to Kemp Road, and are entitled to the benefit of those terms conditions and agreements."); ¶ XX, p.6 ("Willow Creek HOA should be compelled by this Court to set forth what claim it has to preclude the Lees from moving forward with their planned development including allowing access to Kemp Road, consistent with the Sale Agreement; the Court should rule that there is no merit to such claim.") (Emphasis added.).

And, indeed, in the Complaint's "Prayer for Relief," the Lees further make clear that the relief requested is not just limited to equitable servitude. The HOA cites the Lee's prayer in its supporting memorandum, but conveniently omits the entirety of what is requested focusing entirely on "equitable servitude" and ignoring the fact that the HOA references the "conditions and restrictions as set forth in the Sale [1997] Agreement." For full clarity, the relevant portion of the Prayer for Relief is provided as follows in its entirety:

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, the Lees, pray that judgment be entered in their favor as follows:

1. That the Court make a final determination that the Kemp Development Property, including Kemp Road, is encumbered by equitable servitudes, conditions and restrictions that allow for access by the Lees as set forth in the Sale Agreement; and

...

See Complaint, Prayer for Relief, p.6. Thus, the idea that the Lees are limiting their relief to a finding by this Court of an "equitable servitude" is false. The Lees first argument is that the conditions and restrictions in the 1997 Agreement are enforceable and *alternatively* if they are not enforceable the equities involved justify the imposition of an equitable servitude.

The second faulty assumption that must be addressed at the outset is the HOA's apparent belief that the Lees submit that the 1997 Agreement, by itself, creates an enforceable easement agreement. To be clear, this is not what the Lees are submitting to this Court. The Lees position is that the 1997 Agreement *along with* the partial performance of the terms of the agreement relating to access to Kemp Road constitutes an enforceable agreement regardless of any statute of frauds issues. Indeed, a review of the "FACTS" section illustrates the HOA's reliance on this faulty assumption. The HOA takes issue with the fact that the 1997 Agreement did not provide a valid property description or otherwise comply with other statute of frauds requirements. *See* Defendant's Summary Judgment Memo., p.2. As addressed above and as explained below, none of these facts matter, and as a matter of law, do not make the 1997 Agreement unenforceable.

As set forth below, the partial performance of an agreement, here the 1997 Agreement, allows the Court to enforce the agreement. *See Hoke.*, 161 Idaho at 453, 387 P.3d at 121. In *Hoke*, the Idaho Supreme Court recognized that "[u]nder the doctrine of part performance, when an agreement to convey real property fails to meet the requirements of the Statute of Frauds, the agreement may nevertheless be specifically enforced" if the agreement is "partially performed." *Id.* Thus, here, the Lees are not claiming, as alluded to by the HOA, that the 1997 Agreement without more is enforceable. Quite the contrary, it is the 1997 Agreement plus partial performance that provide the basis for the Lees' claim that the conditions and restrictions contained therein must be enforced.

LEGAL STANDARD

The legal standard is not in dispute. Summary judgment shall be granted if the "pleadings, depositions, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *See* Idaho Rule of Civil Procedure 56(c). A nonmoving party's failure to make a showing sufficient to establish the existence of an element essential to that party's case, on which the party bears the burden of proof at trial, requires the entry of summary judgment in favor of the moving party. *See Jarman v. Hale*, 122 Idaho 952, 955-56, 842 P.2d 288, 291-92 (Ct. App. 1992).

Here, the HOA has not met their burden. A review of the undisputed facts show that the HOA's claims regarding the statute of frauds and the enforceability of the partially performed 1997 Agreement does not entitled the HOA to summary judgment. Moreover, their legal arguments regarding equitable servitude are misplaced and are not accepted in Idaho where the

Idaho Supreme Court has taken a more liberal approach to equitable servitudes than in other jurisdictions.

The burden of proving the absence of a material fact rests at all times upon the moving party, here, the HOA. *See G&M Farms v. Funk Irr. Co.*, 119 Idaho 514, 517 (1991). Indeed, as recognized by the HOA, their burden is "onerous" because even "circumstantial evidence can create a genuine issue of material fact, [and] all doubts are to be resolved against the moving party." *See* Defendant's Motion for Summary Judgment Memo., p.4 (citing *Doe v. Durtschi*, 110 Idaho 466, 470 (1986)). Here, the HOA has not met that onerous burden and, therefore, their motion should be denied.

DISCUSSION

I. The HOA Is Not Entitled To Summary Judgment Because Of The Partial Performance Of The 1997 Agreement.

It is well-established law that "[o]ne who purchases land expressly subject to an easement, *or with notice, actual or constructive, that it is burdened with an existing easement,* takes the land subject to the easement." *Checketts v. Thompson*, 65 Idaho 715, 152 P.2d 585, 587 (1944) (emphasis added). Here, there is no factual basis to dispute that there was an agreement between the Lees and the Kemp Family Trust to allow the Lees to access their property via Kemp Lane. This is reflected not only in the 1997 Agreement, but also in Mr. Lee and Mr. Mills' declaration (as well as the affidavit of former HOA member Richard Horn). *See* June 20, 2016 Declaration of Alan Mills ("Mills Decl."), Ex. A ("As part of that agreement the Kemp Family Trust agreed to provide three (3) driveway accesses from a gravel road. That gravel road now known as Kemp Road runs through Phase 2 of the Willow Creek

Subdivision."); June 20, 2016 Declaration of Dale Lee ("Lee Decl."), ¶11 ("The Agreement also made clear that the Kemps agreed to give us, the Lees, access to the road...."); July 13, 2017 Affidavit of Richard Horn ("Horn Aff."), ¶3 ("At the closing of our purchase of the lot, I became aware of an easement agreement between the Kemp Family Trust and the Lees that gave the Lees the right to access their property from Kemp Road."). Accordingly, regardless of enforceability, it is uncontroverted fact that there was an agreement.

Indeed, as alluded to above, the only basis the HOA takes with regard to the 1997 Agreement is that it "cannot grant the Lees an easement" as a matter of law "since the 1997 Agreement is not signed by the Kemp Family Trust and contains no legal descriptions of any property" and consequently, does "not comply with the statute of frauds." *See* HOA's Memorandum in Support of Defendant's Motion for Summary Judgment, p.3. The HOA's arguments are short cited and fail to appreciate all the circumstances of this case.

Indeed, as set forth above, as a threshold matter, the HOA fails to appreciate that Idaho Code § 9-504 provides that the statute of frauds "must not be construed to...abridge the power of any court to compel the specific performance of an agreement, in case of part performance thereof." *See Hoke.*, 161 Idaho at 453, 387 P.3d at 121 (2016), *reh'g denied* (Jan. 23, 2017) (citing Idaho Code§ 9-504). Per *Hoke*, "[u]nder the doctrine of part performance, when an agreement to convey real property fails to meet the requirements of the Statute of Frauds, the agreement may nevertheless be specifically enforced" if the agreement is partially performed. In *Hoke*, the Idaho Supreme Court recognized that issues like an adequate property description could be remedied so long as the "[a]cts constituting part performance" were "specifically

referable to the alleged agreement." *Id.* (citing *Simons v. Simons*, 134 Idaho 824, 827, 11 P.3d 20, 23 (2000). Here, there can be no real debate that terms of the 1997 Agreement were partially performed.

The agreement in this case, the 1997 Agreement, has been performed--at least in part. The uncontroverted facts establish that the Lees have been given access to Kemp Road as the 1997 Agreement contemplated. It is uncontroverted fact that culverts and entries have been constructed. *See* Lee Decl., ¶ 13 ("In 2000, at the time the Kemp Road was constructed, consistent with the Agreement, the Kemp Family Trust paid to have the three driveway access points constructed giving the Lee' property adjacent to Kemp Road access to Kemp Road."). Gates and culverts providing access to Kemp Road from the Lees property are in place and the Lees have been accessing their property via these provided access points. *Id.* at ¶ 14. Apply these uncontroverted facts to the law, it is uncontroverted fact that terms referenced in the 1997 Agreement have been performed and, accordingly, that the well-established doctrine of partial performance is applicable and defeats the HOA's claim that they are entitled, as a matter of law, to the argument that the 1997 Agreement is unenforceable. And, indeed, as set forth in the Lee's simultaneously filed motion for summary judgment, it is the partial performance of the 1997 Agreement, coupled with the HOA's actual and construction notice of the 1997 Agreement and the performance of that agreement, that entitles the Lees to the relief they seek as a matter of law.

For purposes of opposing the HOA's motion for summary judgment, these facts conclusively preclude entry of summary judgment in favor of the HOA.

II. The HOA Is Not Entitled To Summary Judgment Because The Conduct Of The Parties Created An Enforceable Equitable Interest.

Even if there was no enforceable easement, the incontrovertible facts establish a legal basis for an equitable interest that precludes summary judgment. *See generally, Birdwood Subdivision Homeowner's Ass'n, Inc. v. Bulotti Const., Inc.*, 145 Idaho 17, 23, 175 P.3d 179, 185 (2007). An equitable interest arises "because of the actions of the parties, such as oral representations." *West Wood Investments, Inc. v. Acord*, 141 Idaho 75, 84, 106 P.3d 401, 410 (2005); *see also Birdwood*, 145 Idaho at 23, 175 P.3d at 185 (quoting 20 Am.Jur.2d, Covenants, Etc., § 155 (2005) (an equitable servitude arises "by implication from the language of the deeds or the conduct of the parties."). Here, the conduct of the parties per Idaho law clearly creates an equitable interest for the Lees.

The HOA's arguments are misplaced because they attempt to impose a more narrow doctrine than what has been recognized in Idaho courts. A review of *West Wood* illustrates the HOA's folly.

In *West Wood* the plaintiffs were a group of owners and associations that asserted an equitable interest in certain real property--the claim, much like the claim here, was that they were entitled to use or have access to a common area. *See West Wood Investments, Inc.*, 141 Idaho 75, 83, 106 P.3d 401, 409 (2005) ("the interest asserted by the Owners [that they had a right to use a common area] was an equitable interest..."). This is significant because a primary argument asserted by the HOA is that the Lees claims are precluded because they assert an affirmative right to use property instead of a negative restrictive covenant. *See* Defendant's Motion for Summary Judgment Memo., pp.5-6 (The Lees are not seeking to limit Willow Creek's use of

Kemp Road (which would be a restrictive covenant). Rather, they are seeking a right of use over Kemp Road (which is an affirmative easement). Because the Lees are not seeking a restrictive covenant, which may be created by conduct, but rather they are seeking an affirmative right to use the land of Willow Creek, in order to prevail at trial they must provide a written agreement complying with the statute of frauds.)

Again, to be clear, the plaintiffs in *West Wood* were asserting an affirmative right to use a common area, just as here, the Lees are asserting the existence of an affirmative right to access and use Kemp Lane. The basis for that right is an agreement, the 1997 Agreement, of which, the Lees claim the HOA had actual and constructive notice.

This is inconsistent with what the Idaho Supreme Court recognized in *West Wood.* The Lees' appreciate that other jurisdictions and the common law may make a different distinction—however, this is clearly not the law in Idaho. Indeed, notwithstanding the long legal treatise provided by the HOA regarding the development of equitable servitudes, it cannot and has not identified any case that precludes this Court from recognizing the Lees' equitable interest in the enforcement of an agreement regarding a right to use land, of which the HOA had actual and constructive notice.

The HOA also claims that the equitable interest claimed by the Lees is precluded by their assertion that there is no "common grantor of the properties at issue...." Defendant's Motion for Summary Judgment, p.15-16 ("The Lees have no evidence that they purchased a lot in a planned unit development from the Kemp Family Trust (or that there is some other common grantor of property) and they are not contending they have a right to impose negative restrictions on the use

of Kemp Road.). Again, the HOA attempts to impose a test and a limitation that is not adopted in Idaho. Clearly, a "planned unit development" can be the basis for imposing an equitable interest in that it can be enforced based on actual or constructive notice. However, so can other equitable circumstances. Indeed, the limitation suggested by the HOA would clearly cut against the "equitable" nature of an "equitable" remedy and is contrary to the broad directives of the Idaho Supreme Court. As explained by the high court in *West Wood*, "[e]quitable interests may arise because of the actions of the parties" even including "oral representations." *West Wood Investments, Inc.*, 141 Idaho at 84, 106 P.3d at 410. Clearly, if this is the case, the Idaho Supreme is not limiting "equitable interests" to only equitable interests that develop from circumstances involving "planned unit development"--this would eliminate the concept of an equitable remedy all together.

In sum, the Lees submit that they have an equitable interest created by the 1997 Agreement and the partial performance of that agreement. There is no case law in Idaho that precludes this claim as a matter of law. Indeed, it is just the opposite. Idaho law recognizes that equitable interest can be created, not just by a written document, but by the conduct and even oral representations of parties. Accordingly, here, there is no basis for the HOA's demand for summary judgment.

CONCLUSION

In light of the foregoing, the Lees respectfully request that the Court deny Defendant's Motion for Summary Judgment. The uncontroverted partial performance of the 1997 Agreement preclude the statute of frauds as a basis for concluding that the 1997 Agreement is invalid as

argued by the HOA. Furthermore, there is no accepted Idaho law that precludes this Court from determining that the Lees have an equitable interest in the enforcement of the 1997 Agreement.

DATED: July 21, 2017.

STEWART TAYLOR & MORRIS PLLC

Daniel W. Bower
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on July 21, 2017, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Christ T. Troupis
TROUPIS LAW OFFICE, P.A.
801 E. State Street, Ste. 50
P.O. Box 2408
Eagle, ID 83616

☐ U.S. Mail
☐ Hand Delivered
☒ Facsimile: (208) 938-5482
☒ Email: ctroupis@troupislaw.com

Attorneys for Defendant Willow Creek Ranch Estates No. 2 Subdivision Homeowners' Association, Inc.

Matthew C. Parks
ELAM & BURKE, P.A.
251 East Front Street, Suite 300
Post Office Box 1539
Boise, Idaho 83701

☐ U.S. Mail
☐ Hand Delivered
☒ Facsimile: (208) 384-5844
☐ Email: mcp@elamburke.com

Attorneys for Defendant Willow Creek Ranch Estates No. 2 Subdivision Homeowners' Association, Inc.

Honorable Christopher S. Nye
Canyon County Courthouse
1115 Albany Street
Caldwell, ID 83605

☐ U.S. Mail
☐ Hand Delivered
☐ Facsimile:
☒ Email: acahill@canyonco.org
Clerk Copy

Gabrielle Cole

Daniel W. Bower, ISB #7204
STEWART TAYLOR & MORRIS PLLC
12550 W. Explorer Drive, Suite 100
Boise, Idaho 83713
Telephone: (208) 345-3333
Fax No.: (208) 345-4461
dbower@stm-law.com

Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

DALE LEE and KATHI LEE, husband and wife,

Plaintiffs,

vs.

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

Defendants.

Case No. CV 16-3425

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT OR ALTERNATIVELY PARTIAL SUMMERY JUDGMENT ON ISSUE OF PARTIAL PERFORMANCE

Plaintiffs, Dale and Kathi Lee (collectively "Lees"), by and through their attorneys of record, Stewart Taylor & Morris PLLC, hereby move this Court for summary judgment under Idaho Rule of Civil Procedure 56(a) finding in Lees' favor and declaring pursuant to the relief requested in the Complaint that certain real property owned by the Willow Creek Ranch Estates No. 2 Subdivision Homeowners' Association, Inc. is subject to valid encumbrances, conditions,

servitudes and/or restrictions that allow the Lees to utilize already defined and improved access points to their adjoining real property.

Alternatively, to the extent issues of act remain regarding notice of encumbrances, conditions, servitudes and/or restrictions, the Lees would request partial summary judgment on the issue of whether the Agreement for Sale of Real Property (referred to in the briefing as "1997 Agreement" or "Agreement") was partially performed.

This motion is based upon the supporting memorandum, prior declarations and an affidavit filed concurrently herewith as well as all pleadings and other papers on file in this action, and such other matters as may be presented to the Court at the time of the hearing.

DATED: July 21, 2017.

STEWART TAYLOR & MORRIS PLLC

Daniel W. Bower
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on July 21, 2017, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Christ T. Troupis
TROUPIS LAW OFFICE, P.A.
801 E. State Street, Ste. 50
P.O. Box 2408
Eagle, ID 83616

☐ U.S. Mail
☐ Hand Delivered
☒ Facsimile: (208) 938-5482
☒ Email: ctroupis@troupislaw.com

Attorneys for Defendant Willow Creek Ranch Estates No. 2 Subdivision Homeowners' Association, Inc.

Matthew C. Parks
ELAM & BURKE, P.A.
251 East Front Street, Suite 300
Post Office Box 1539
Boise, Idaho 83701

☐ U.S. Mail
☐ Hand Delivered
☒ Facsimile: (208) 384-5844
☐ Email: mcp@elamburke.com

Attorneys for Defendant Willow Creek Ranch Estates No. 2 Subdivision Homeowners' Association, Inc.

Honorable Christopher S. Nye
Canyon County Courthouse
1115 Albany Street
Caldwell, ID 83605

☐ U.S. Mail
☐ Hand Delivered
☐ Facsimile:
☒ Email: acahill@canyonco.org
Clerk Copy

Gabrielle Cole

Daniel W. Bower, ISB #7204
STEWART TAYLOR & MORRIS PLLC
12550 W. Explorer Drive, Suite 100
Boise, Idaho 83713
Telephone: (208) 345-3333
Fax No.: (208) 345-4461
dbower@stm-law.com

Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

DALE LEE and KATHI LEE, husband and wife,

Plaintiffs,

vs.

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

Defendants.

Case No. CV 16-3425

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT OR ALTERNATIVELY PARTIAL SUMMARY JUDGMENT ON ISSUE OF PARTIAL PERFORMANCE

Plaintiffs, Dale and Kathi Lee (collectively "Lees"), by and through their attorneys of record, submit this brief in support of Plaintiffs' Motion for Summary Judgment and Alternatively Partial Summary Judgment On Issue Of Partial Performance.

INTRODUCTION

The legal issue here is simple--whether this Court can rule, as a matter of law, that Kemp Road is encumbered by an agreement that has been partially performed and that Willow Creek

Ranch Estates No. 2 Subdivision Homeowners' Association, Inc. ("HOA" or "Willow Creek HOA") had both actual and construction knowledge. Alternatively, to the extent that this Court determines that the issue of actual or constructive knowledge is a disputed fact, the Lees would submit that they are entitled to summary judgment on the issue of that the agreement at issue was partially performed.[1]

STATEMENT OF UNDISPUTED FACTS

1. In the summer of 1997, Dale Lee was approached by the Kemps about a possible real estate transaction. *See* June 17, 2016 Declaration of Dale Lee ("Lee Decl."), ¶ 2.

2. The Kemps and the Lees both owned real property north of Purple Sage Road in Middleton, Idaho. *See* Lee Decl., Ex. A (Exhibit A is a map of the property reflecting ownership of the land in 1997).

3. To develop the "Kemp property" the Kemps needed approximately 1.8 acres of real property owned by the Lees. The Lees were willing to sell them the 1.8 acres needed, but required as a condition of that sale, that they be given access to the road constructed by the Kemps on the Kemps property. *See* Lee Decl., ¶ 4.

4. Significantly, the real estate agent involved in the transaction was Alan Mills. *See* Lee Decl., ¶ 5; *see also* June 14, 2015 Declaration of Alan Mills ("Mills Decl."), Exhibit A.

---

1 The Lees appreciate that the HOA is trying to corner them into an "equitable servitude or nothing" position. However, this is inconsistent with the pleadings and the Lee's briefing to the Court. The Complaint clearly requests that the "equitable servitudes, conditions *and* restrictions allowing for access by the Lees as set forth in the Sale Agreement" be enforced. *See* Complaint, Prayer for Relief, ¶1; *see also* Plaintiffs' Pre-Trial Statement, p.1 ("this issue is simply whether certain land, a road way, is encumbered either by an express easement or an equitable servitude."). This issue is more fully addressed in the Lees' Memorandum in Opposition to Defendant's Motion for Summary judgment and is incorporated herein by reference.

5. That road referenced above, presently known as Kemp Road, runs along the south border of the Kemp property ("Kemp Road"). *See* Lee Decl., ¶ 6.

6. The Lees conditioned the sale of their 1.8 acre parcel on access to Kemp Road. *See* Lee Decl., ¶ 7.

7. On June 1, 1997, the Lees and the Kemps executed an Agreement for Sale of Real Property ("1997 Agreement" or "Agreement"). *See* Lee Decl., Exhibit B.

8. In the 1997Agreement the Lees agreed to sell to the Kemps the 1.8 acres of real property that the Kemps needed to develop their property into the present day subdivision and the Lees were given access to Kemp Road. *Id.*

9. The 1997 Agreement also explained that the Kemps and the Lees were planning future development of their adjoining properties--both the Kemp property and the Lee property. *Id.*

10. Recognizing future development by the Lees, the 1997 Agreement expressly gave the Lees three access points to the road:

> Seller [Lees] shall also be entitled to 3 driveway access from the gravel road [Kemp Road] to be constructed by Buyer [Kemps] adjoining Seller's [Lees'] property. Such access shall be constructed at Seller's [Lees'] cost and subject to Seller [Lees] obtaining any necessary governmental approvals.

Id.

11. Accordingly, the Lees sold the Kemps the property and the Kemps began developing the subdivision that is now Willow Creek Ranch Estates #2. *See* Lee Decl., ¶ 12.

12. In 1999, Richard Horn, who purchased Lot 2 of Block 1 in the Willow Creek Ranch Estates #2 subdivision, was made aware of the agreement between the Kemp Family

Trust and the Lees that gave the Lees the right to access Kemp Road from their property. *See* July 12, 2017 Affidavit of Richard Horn, ¶3 ("Horn Aff.").

13. Mr. Horn was made aware of the Agreement at the closing of his purchase of his lot. *Id.*

14. In 2000, at the time that Kemp Road was asphalted, consistent with and in performance of the 1997 Agreement, three driveway access points were constructed giving the Lees' property adjacent to Kemp Road three access points to Kemp Road. *See* Lee Decl., ¶ 13.

16. The construction of the access points constituted partial performance of the Agreement.

17. This construction included the creation of three access points, including twenty-four foot culverts, and gravel extending from Kemp Road to the Lees' property. Around that same time, wood fencing and metal gates corresponding to the three access points, were constructed along the property giving the Lees' property clear and obvious access to Kemp Road. *See* Lee Decl., ¶ 14, Exhibit C.

16. One of the access points constructed was on the edge of the lot purchased by Mr. Horn. *See* Horn Aff., ¶6.

17. According to Mr. Horn, a member of the HOA, because of the gates, it was obvious to him and to the other HOA members living in the subdivision, that the Lees accessed their property through Kemp Road. *See* Horn Aff., ¶7 ("It was obvious to me and anyone living in the subdivision, that the Lees accessed their property from Kemp Road.").

18. In 2005, as part of the continued development of the Willow Creek Ranch Estates, the Kemps transferred Kemp Road to the HOA as a common area owned by the HOA. *See* Lee Decl., Exhibit D (LEE0010) ("The Trust was the developer of Willow Creek Ranch Estates. The Kemps transferred Kemp Lane to the HOA as part of the common area owned by the Association.").

19. Significantly, the "Warranty Deed" provided to the HOA from the Kemps, did not convey Kemp Road free from all encumbrances, but rather excepted from the conveyance "all existing easements and rights-of-ways of record or implied." *See* August 4, 2016 Affidavit of Matthew C. Parks in Support of Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment ("Aug. 4, 2016 Parks Aff."), Exhibit D.

19. From its inception until 2005 the HOA and the board of directions for the HOA was primarily controlled by the Kemps. *See* Mills Decl., Exhibit A.

20. Mary Kemp, trustee of the Kemps, and Alan Mills, the Kemps' real estate agent, served as the initial board members for the HOA. Mr. Mills served as president. *Id.*

21. Alan Mills has admitted that he had knowledge of the Kemps' agreement to provide access points along Kemp Road to the Lees. *Id.*

22. On or about June 11, 2015, Alan Mills, the former real estate agent for the Kemps and a former member of the HOA board of directors at the time the Kemps transferred Kemp Road to the HOA, provided a letter wherein he stated:

> During the development of the Willow Creek Subdivision, I served as one of the initial board of directors for the Willow Creek Ranch Estates No. 2, Subdivision Homeowner's Association Inc. (the "HOA") along with Mary Kemp, the trustee for the Kemp Family Trust. As the developer of the Subdivision and who also

> controlled the HOA, the Kemp Family Trust paid to have the three driveway access constructed just as the parties agreed to do in the Agreement For Sale of Property. As a former HOA board member, I can say with a high degree of certainty that the HOA at the time was aware of the Agreement and its terms regarding the three driveway access.

See Mills Decl., Exhibit A; *see also* Lee Decl., Exhibit D (emphasis added).

23. Thus, at the time that Kemp Road was transferred to the Willow Creek HOA in 2005, the Willow Creek HOA Board of Directors had actual knowledge of the Agreement, including the Kemps' agreement to provide the Lees the three access points. *See* Lee Decl., ¶ 20.

24. Furthermore, due to the construction of the three access points, including culvert construction, gravel work, fencing and gates (*i.e.*, the partial performance of the Agreement), the HOA and its members had constructive notice of an agreement whereby the Lees could use Kemp Road to access their property through those three access points.

LEGAL STANDARD

The legal standard is not in dispute. Summary judgment shall be granted if the "pleadings, depositions, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *See* Idaho Rule of Civil Procedure 56(c). A nonmoving party's failure to make a showing sufficient to establish the existence of an element essential to that party's case, on which the party bears the burden of proof at trial, requires the entry of summary judgment in favor of the moving party. *See Jarman v. Hale*, 122 Idaho 952, 955-56, 842 P.2d 288, 291-92 (Ct. App. 1992).

Here, the Lees are entitled to summary judgment on their claims. The statement of undisputed facts is incontrovertible. Furthermore, as set forth below, the legal doctrines are

sound and, as applied to the incontrovertible facts, justify summary judgment in favor of the Lees.

DISCUSSION

The Lees are entitled to summary judgment for two reasons. First, the 1997 Agreement (after it was partially performed) became an enforceable agreement regardless of the statute of frauds issues that have been proffered by the HOA. Furthermore, the 1997 Agreement was enforceable as to the HOA because it is uncontroverted fact that the HOA Board had knowledge of the 1997 Agreement and of its performance--*i.e.*, the construction of the three access points. The HOA ignores the above-presented statements of undisputed facts. It is incontrovertible that the access points were constructed. This is not controverted and at no time has been disputed by the HOA. Moreover, a former member of the HOA board of directors, Mr. Mills, has testified with a high degree of certainty that the HOA board of directors knew of the 1997 Agreement. Again, this is an uncontroverted fact. Also, even if the 1997 Agreement is not somehow unenforceable in law as a partially performed easement agreement, there can be little doubt that acts of the parties created an equitable interest that under Idaho law is enforceable.

Alternatively, the Lees would submit that if the question of notice constitutes a question of fact that precludes summary judgment as to the enforceability of the 1997 Agreement in law or in equity, the Lees at the very least are entitled to partial summary judgment as to the question of whether the 1997 Agreement has been partially performed.

I. The Agreement Constitutes An Enforceable Easement Because The 1997 Agreement Was Partially Performed And Because Willow Creek HOA Had Actual And Constructive Notice Of The Agreement

Here, there is no factual basis to dispute that there was an agreement between the Lees and the Kemp Family Trust to allow the Lees to access their property via Kemp Lane. This is reflected in Mr. Lee and Mr. Mills' declaration as well as the affidavit of former HOA member Richard Horn. *See* Mills Decl., Ex. A ("As part of that agreement the Kemp Family Trust agreed to provide 3 driveway accesses from a gravel road. That gravel road in now known as Kemp Road runs through Phase 2 of the Willow Creek Subdivision."); Lee Decl., ¶11 ("The Agreement also made clear that the Kemps agreed to give us, the Lees, access to the road...."); Horn Aff., ¶3 ("At the closing of our purchase of the lot, I became aware of an easement agreement between the Kemp Family Trust and the Lees that gave the Lees the right to access their property from Kemp Road.").

Indeed, the only basis the HOA takes with regard to the 1997 Agreement is that it "cannot grant the Lees an easement" as a matter of law "since the 1997 Agreement is not signed by the Kemp Family Trust and contains no legal descriptions of any property" and consequently, does "not comply with the statute of frauds." *See* HOA's Memorandum in Support of Defendant's Motion for Summary Judgment, p.3.

The HOA fails to appreciate Idaho Code § 9-504. Section 9-504 provides that the statute of frauds "must not be construed to...abridge the power of any court to compel the specific performance of an agreement, in case of part performance thereof." *See Hoke v. Neyada, Inc.*, 161 Idaho 450, 387 P.3d 118, 121 (2016), *reh'g denied* (Jan. 23, 2017) (citing Idaho Code§ 9-504). As explained by the Idaho Supreme Court in *Hoke*, "[u]nder the doctrine of part

performance, when an agreement to convey real property fails to meet the requirements of the State of Frauds, the agreement may nevertheless be specifically enforced" if the agreement is partially performed. Here, consistent with the directives in *Hoke*, it is incontrovertible fact that the 1997 Agreement has been partially performed. And, admittedly, the 1997 Agreement has statute of frauds issues.

However, as explained by the Idaho high court, statute of fraud issues, such as an inadequate property description, could be remedied so long as the "[a]cts constituting part performance" were "specifically referable to the alleged agreement." *Id.* (citing *Simons v. Simons*, 134 Idaho 824, 827, 11 P.3d 20, 23 (2000). Thus, here, where there may be statute of fraud issues, but where there is also no dispute that the terms of the 1997 Agreement were partially performed--this Court can rule as a matter of law that the 1997 Agreement is enforceable and valid.

Accordingly, because the Agreement is valid, to the extent that the HOA took the land "with notice, actual or constructive" the HOA is subject to the encumbrance. Thus, here, the only factual question is whether Willow Creek HOA had notice, actual or constructive, of the existing easement. And, as admitted by Allan Mills, the HOA had actual notice of the 1997 Agreement.

> As a former HOA board member, I can say with a high degree of certainty that the HOA at the time was aware of the Agreement and its terms regarding the three driveway access.

See Mills Decl., Exhibit A (emphasis added). To be clear, there is no qualification on this sworn statement--the HOA was aware of the 1997 Agreement.[2] And, significantly, the HOA has proffered no testimony or affidavit that contradicts Mr. Mills statement--again, the statement of a former "HOA board member" that the HOA was aware of the 1997 Agreement. Indeed, the HOA did not even depose Mr. Mills. Accordingly, regardless of whether the encumbrance or interest was recorded, the 1997 Agreement is enforceable against the HOA as a matter of law because the HOA had actual notice of the 1997 Agreement. *See Checketts v. Thompson*, 65 Idaho 715, 152 P.2d 585, 587 (1944) (emphasis added) ("It is well-established law that "[o]ne who purchases land expressly subject to an easement, *or with notice, actual or constructive, that it is burdened with an existing easement,* takes the land subject to the easement.") (Emphasis added.).

Here, the only evidence in the record establishes that at the time of the transfer of the property from the Kemps to the HOA in 2005, that the HOA already had knowledge of the 1997 Agreement.

In addition to having "actual" knowledge of the 1997 Agreement, it is also incontrovertible fact that the HOA had constructive knowledge of the 1997 Agreement. Again, to state the obvious, the 1997 Agreement was performed (at least in part). The access points were created and the Lees were provided access. This performance constitutes "constructive" notice that the agreement existed and, accordingly, that the HOA was not some "bona fide

[2] The Lees certainly appreciate that the HOA is arguing that regardless of the HOA's knowledge of the agreement at the time the HOA was initially created in 1999 and 2000, that the HOA Board at the time of the transfer in 2005 was no longer aware. While the Lees' appreciate this argument, there is no law supporting the novel argument that an organization once it obtains actual knowledge of an agreement, can somehow operationally loose that knowledge, and then escape the consequence resulting from that knowledge.

purchaser" that unknowingly purchased property without knowledge that the Lees had access to Kemp Road.

II. The Conduct Of The Parties Creates An Equitable Servitude And/Or Interest That Allows The Lees To Enforce The 1997 Agreement

Even if there was no enforceable easement, the incontrovertible facts establish an equitable interest that provides the Lees with legal and enforceable access.[3] Significantly, that interest arises "by implication from the language of the deeds or the conduct of the parties." *See Birdwood Subdivision Homeowner's Ass'n, Inc. v. Bulotti Const., Inc.*, 145 Idaho 17, 23, 175 P.3d 179, 185 (2007) (quoting 20 Am.Jur.2d, Covenants, Etc., § 155 (2005) (an equitable servitude arises "by implication from the language of the deeds or the conduct of the parties."); s*ee also Idaho Power Co. v. State, By & Through Dep't of Water Res.*, 104 Idaho 575, 587, 661 P.2d 741, 753 (1983) ("restrictive covenants and equitable servitudes" relate to "[a]greements not to assert ownership rights.").

It is important to note that Idaho's approach to "equitable servitudes" or "equitable interests" is unique. For example, the Idaho Supreme Court permits an equitable servitude to be created "because of the actions of the parties, such as oral representations." *West Wood Investments, Inc. v. Acord*, 141 Idaho 75, 84, 106 P.3d 401, 410 (2005). Consequently, Idaho is one of the few states that allows for the creation of equitable servitudes without a written agreement. The HOA fails to appreciate Idaho's unique approach to equitable interests in real

[3] The Lees' are responding in part to the arguments the HOA is making in its Motion for Summary Judgment, wherein it contends that the Lees arguments regarding "equitable servitudes" are precluded as a matter of law. Accordingly, much of the arguments asserted herein are also contained in the Lees' Memorandum in Opposition to Defendant's Motion for Summary Judgment.

property and has attempted to persuade this Court to apply a more narrow doctrine to "equitable servitudes" than has been adopted in Idaho courts. The *West Wood* case illustrates Idaho's unique approach to equitable interests and why the HOA's arguments do not prevent this Court from deciding as a matter of Idaho law, based on the undisputed facts, that the Lees are entitled to summary judgment.

In *West Wood* the plaintiffs were a group of owners and associations that asserted an equitable interest in certain real property--the claim, much like the claim here, was that they were entitled to use or have access to a common area. *See West Wood Investments, Inc.*, 141 Idaho 75, 83, 106 P.3d 401, 409 (2005) ("the interest asserted by the Owners [that they had a right to use a common area] was an equitable interest..."). This is significant because a primary argument asserted by the HOA is that the Lees claims are precluded because they assert an affirmative right to use property instead of a negative restrictive covenant.

> The Lees are not seeking to limit Willow Creek's use of Kemp Road (which would be a restrictive covenant). Rather, they are seeking a right of use over Kemp Road (which is an affirmative easement). Because the Lees are not seeking a restrictive covenant, which may be created by conduct, but rather they are seeking an affirmative right to use the land of Willow Creek, in order to prevail at trial they must provide a written agreement complying with the statute of frauds.

See Defendant's Motion for Summary Judgment Memo., pp.5-6. This argument is wrong. Again, to be clear, the plaintiffs in *West Wood* were asserting an affirmative right to use a common area, just as here, the Lees are asserting the existence of an affirmative right to access and use Kemp Lane. The basis for that right is an agreement, the 1997 Agreement, of which, the Lees claim the HOA had actual and constructive notice.

As set forth in the Lees' Memorandum in Opposition to Defendant's Motion for Summary Judgment, the Lees' appreciate that other jurisdictions and the common law may make a different distinction--however, this is clearly not the law in Idaho. Indeed, notwithstanding the long legal treatise provided by the HOA regarding the development of equitable servitudes, it cannot and has not identified any Idaho case that precludes this Court from recognizing the Lees' equitable interest in the enforcement of an agreement regarding a right to use land, of which the HOA had actual and constructive notice.

The HOA also claims that the equitable interest claimed by the Lees is precluded by their assertion that there is no "common grantor of the properties at issue...." *See* Defendant's Motion for Summary Judgment, p.15-16 ("The Lees have no evidence that they purchased a lot in a planned unit development from the Kemp Family Trust (or that there is some other common grantor of property) and they are not contending they have a right to impose negative restrictions on the use of Kemp Road.). Again, the HOA attempts to impose a test and a limitation that is not adopted in Idaho. Clearly, a "planned unit development" can be the basis for imposing an equitable interest in that it can be enforced based on actual or constructive notice. However, so can other equitable circumstances. Indeed, the limitation suggested by the HOA would clearly cut against the "equitable" nature of an "equitable" remedy and is contrary to the broad directives of the Idaho Supreme Court. As explained by the high court in *West Wood*, "[e]quitable interests may arise because of the actions of the parties" even including "oral representations." *West Wood Investments, Inc.*, 141 Idaho at 84, 106 P.3d at 410. Clearly, if this is the case, the Idaho Supreme is not limiting "equitable interests" to only equitable interests that

develop from circumstances involving "planned unit development"--this would eliminate the concept of an equitable remedy all together.

CONCLUSION

In light of the foregoing, the Lees respectfully request that the Court grant summary judgment finding that Kemp Road, owned by the Willow Creek HOA, is subject to an easement or servitude that allows the Lees to move forward with their designs to utilize the three access points already designated and improved. Alternatively, to the extent this Court determines that there are issues of fact regarding notice of the 1997 Agreement, that this Court find that the 1997 Agreement has been partially performed.

DATED: July 21, 2017.

STEWART TAYLOR & MORRIS PLLC

Daniel W. Bower
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on July 21, 2017, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Christ T. Troupis
TROUPIS LAW OFFICE, P.A.
801 E. State Street, Ste. 50
P.O. Box 2408
Eagle, ID 83616

☐ U.S. Mail
☐ Hand Delivered
☒ Facsimile: (208) 938-5482
☐ Email: ctroupis@troupislaw.com

Attorneys for Defendant Willow Creek Ranch Estates No. 2 Subdivision Homeowners' Association, Inc.

Matthew C. Parks
ELAM & BURKE, P.A.
251 East Front Street, Suite 300
Post Office Box 1539
Boise, Idaho 83701

☐ U.S. Mail
☐ Hand Delivered
☒ Facsimile: (208) 384-5844
☐ Email: mcp@elamburke.com

Attorneys for Defendant Willow Creek Ranch Estates No. 2 Subdivision Homeowners' Association, Inc.

Honorable Christopher S. Nye
Canyon County Courthouse
1115 Albany Street
Caldwell, ID 83605

☐ U.S. Mail
☐ Hand Delivered
☐ Facsimile:
☒ Email: acahill@canyonco.org
Clerk Copy

Gabrielle Cole

Daniel W. Bower, ISB #7204
STEWART TAYLOR & MORRIS PLLC
12550 W. Explorer Drive, Suite 100
Boise, Idaho 83713
Telephone: (208) 345-3333
Fax No.: (208) 345-4461
dbower@stm-law.com

Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

DALE LEE and KATHI LEE, husband and wife,

Plaintiffs,

vs.

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

Defendants.

AFFIDAVIT OF RICHARD HORN

CV 16-3425

STATE OF IDAHO)

County of Canyon)

RICHARD HORN, declare and state as follows and under penalty of perjury pursuant to the laws of the state of Idaho that the foregoing is true and correct:

1) I am over the age of eighteen (18) and make this affidavit of my own personal knowledge and belief.

2) In the spring of 1999, my wife and I purchased Lot 2 of Block 1 in the Willow Creek Subdivision accessed by Kemp Road from the Kemp Family Trust.

3) At the closing of our purchase of the lot, I became aware of an easement agreement between the Kemp Family Trust and the Lees that gave the Lees the right to access their property from Kemp Road.

4) We subsequently constructed a home on the lot and moved into the home in August of 2000.

5) Before Kemp Road was asphalted, three access points were created giving the Lees access to Kemp Road.

6) One of the access points was at the edge of our lot.

7) At each access point there was a metal gate. It was obvious to me and anyone living in the subdivision, that the Lees accessed their property from Kemp Road.

8) On March 28, 2005, the Willow Creek Ranch Estates No. 2 Homeowners' Association, Inc. ("HOA") was created and I became a member of the HOA and paid dues and fees as a member of the HOA.

9) I remained a member of the member of the HOA until I sold my residence and moved.

10) My understanding was that when the Lees subdivided their property and used the three access points constructed to access their lots, that they would impose the same or similar covenants, conditions and restrictions, as could have been enforced by the HOA.

FURTHER YOUR AFFIANT SAYETH NAUGHT

Richard Horn

Richard Horn

SUBSCRIBED AND SWORN to before me this 13th day of July, 2017.

NOTARY PUBLIC FOR IDAHO
Residing in Nampa, ID
My Commission Expires 8/15/2020

DANIEL W. BOWER
NOTARY
PUBLIC
STATE OF IDAHO

CERTIFICATE OF SERVICE

I hereby certify that on July 21, 2017, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Christ T. Troupis TROUPIS LAW OFFICE, P.A. 801 E. State Street, Ste. 50 P.O. Box 2408 Eagle, ID 83616 *Attorneys for Defendant Willow Creek Ranch Estates No. 2 Subdivision Homeowners' Association, Inc.*	☐ ☐ ☒ ☒	U.S. Mail Hand Delivered Facsimile: (208) 938-5482 Email: ctroupis@troupislaw.com
Matthew C. Parks ELAM & BURKE, P.A. 251 East Front Street, Suite 300 Post Office Box 1539 Boise, Idaho 83701 *Attorneys for Defendant Willow Creek Ranch Estates No. 2 Subdivision Homeowners' Association, Inc.*	☐ ☐ ☒ ☐	U.S. Mail Hand Delivered Facsimile: (208) 384-5844 Email: mcp@elamburke.com
Honorable Christopher S. Nye Canyon County Courthouse 1115 Albany Street Caldwell, ID 83605	☐ ☐ ☐ ☒	U.S. Mail Hand Delivered Facsimile: Email: acahill@canyonco.org Clerk Copy

Gabrielle Cole

Matthew C. Parks, ISB #7419
ELAM & BURKE, P.A.
251 East Front Street, Suite 300
Post Office Box 1539
Boise, Idaho 83701
Telephone: (208) 343-5454
Facsimile: (208) 384-5844
mcp@elamburke.com

Attorneys for Defendant Willow Creek Ranch Estates
No. 2 Subdivision Homeowners' Association, Inc.

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

DALE LEE and KATHI LEE, husband and wife, Plaintiffs, vs. WILLOW CREEK RANCH ESTATES NO. 2 SUBDIVISION HOMEOWNERS' ASSOCIATION, INC., an Idaho corporation; and DOES I – X, inclusive, Defendants.	Case No. CV-16-3425*C WILLOW CREEK RANCH ESTATES MOTION TO AMEND ANSWER

Defendant Willow Creek Ranch Estates No. 2 Subdivision Homeowners' Association, Inc. ("Willow Creek"), submits this Motion to amend its answer. Willow Creek seeks to amend its answer to include affirmative defenses based on the failure to comply with the statute of frauds, that the cause of action asserted by the Plaintiffs are bared by the applicable statute of limitations, and that the members of Willow Creek are bona fide purchasers for value of their respective interests in the common areas of the subdivision, including Kemp Road.

Rule 15(a) of the Idaho Rules of Civil Procedure provides that leave to amend a pleading before trial should be freely given when justice so requires. It is well settled that, in the interests of justice, courts should favor liberal grants of leave to amend. *Wickstrom v. North Idaho College*, 111 Idaho 450, 453, 725 P.2d 155 (1986) (citations omitted).

> In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of the allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, 'be freely given.' Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules.

PHH Mortgage v. Nickerson, 160 Idaho 388, 395-96, 374 P.3d 551, 558-59 (2016) reh'g denied (citations omitted).

> The court has liberal authority to grant leave to amend and permission to do so "shall be freely given when justice so requires...." I.R.C.P. 15(a). *See Wickstrom v. Northern Idaho College*, 111 Idaho 450, 453, 725 P.2d 155, 158 (1986). For example, in *Kugler v. N.W. Aviation, Inc.*, 108 Idaho 884, 886–67, 702 P.2d 922, 924–45 (Ct.App.1985), our Court of Appeals held the district court did not abuse its discretion in allowing an amendment of an Answer to assert a statute of limitations defense, even though the motion was not made until one week before trial.

West v. El Paso Prod. Co., 122 Idaho 133, 135, 832 P.2d 306, 308 (1992)

The Lees will not be prejudiced or delayed by the proposed amendments. With respect to the statute of frauds, Plaintiffs and Defendant have submitted numerous briefs on this issue. With respect to the affirmative defense based on the expiration of the statute of limitations for causes of action based on a written contract, Willow Creek's initial answer asserted a defense of laches based on the delay of the Plaintiffs to bring their cause of action seeking relief in the form

of an equitable servitude. Plaintiffs now assert they are entitled to an order of the Court compelling Willow Creek to grant Plaintiffs an easement. This relief is distinct from the relief sought by the Plaintiffs in that it is an action based on a written contract and governed by a different statute of limitations than the relief sought by the Plaintiffs in their Complaint. Moreover, the Plaintiffs cannot claim surprise or prejudice with respect to the statute of limitations affirmative defense when the initial answer included an affirmative defense of laches, putting Plaintiffs on notice that their delay in bringing this lawsuit would be an issue at trial. Therefore, in the interest of justice, Willow Creek should be permitted to amend its answer to include an affirmative defense to the Plaintiffs' request for specific performance.

In the interest of justice, Willow Creek requests the Court permit it to amend its answer to include affirmative defenses to causes of action and for relief not readily apparent in reviewing Plaintiffs' Complaint.

Plaintiffs had not indicated until filing their motion for summary judgment on July 21, 2017, that they sought specific performance as relief from this Court. In their Complaint, Plaintiffs had only requested a declaratory ruling that they were entitled to an equitable servitude. In prior pleadings, including Plaintiffs' prior motion for summary judgment, Willow Creek raised the defense of the statute of frauds and Plaintiffs failed to respond with any argument concerning why the statute of frauds did not apply. Likewise, Plaintiffs did not articulate their desire for specific performance in their Pre-trial Statement.

With respect to the affirmative defense based on the status of the members of Willow Creek as bona fide purchasers for value, Willow Creek raised as an affirmative defense in the Answer that, "Plaintiffs did not record the sale agreement, or otherwise provide any prior notice to the members of Willow Creek HOA who purchased and improved residential lots in the

subdivision, ignorant of the undisclosed claims of the Plaintiffs, and in reliance upon the existing state of the disclosed title to their respective lots and the common areas, including Kemp Road." Answer and Affirmative Defenses to Complaint, p. 2. Although this affirmative defense was combined with the affirmative defense of laches as the Third Affirmative Defense, Plaintiffs were still on notice that Willow Creek would be asserting a defense based on the residents of the subdivision not having notice of the alleged access rights when they purchased their lots and accompanying interest in Kemp Road. In other words, that residents are bona fide purchasers for value. Willow Creek seeks to clarify the affirmative defense to avoid any disputes at trial on the assertion of the bona fide purchaser affirmative defense.

Additionally, the Lees have a letter from Willow Creek's attorney to the Board identifying the bona fide purchaser defense as a legal defense to the Lees' claims. *See* Declaration of Dale Lee, filed June 17, 2016, Exhibit D.

No undue delay, bad faith, or dilatory motive on the part of Defendants being present, and there being facts which support the requested amendments, Defendants should be granted leave to file their proposed Amended Answer to Plaintiffs' Complaint in the interests of justice so that full and complete relief can be had.

Willow Creek requests permission to amend its Answer to the Complaint to include the following affirmative defenses:

> **Statute of Limitations.** Plaintiffs' cause of action is barred because it was not filed within the applicable time frame set forth in the statute of limitations, Idaho Code § 5-216, which bars any claims for relief, including but not limited to specific performance, based upon breach of a written agreement that are not filed within 5 years of the accrual of the cause of action.
>
> **Statute of Frauds.** Plaintiffs' cause of action is barred by the statute of frauds as the purported grant of access rights was not

made in a written agreement that satisfied the requirements of Idaho Code § 9-503.

Bona Fide Purchaser for Value. Plaintiffs did not record the sale agreement, or otherwise provide any prior notice to the members of Willow Creek HOA who purchased and improved residential lots in the subdivision for value, ignorant of the undisclosed claims of the Plaintiffs, and in reliance upon the existing state of the disclosed title to their respective lots and the common areas, including Kemp Road. Plaintiffs' claims are therefore barred by Idaho Code § 55-812.

V. CONCLUSION

Willow Creek respectfully requests the Court grant permission to file an amended answer to include the affirmative defenses set forth above.

A separate Memorandum in support of the motion will not be filed.

ORAL ARGUMENT IS NOT REQUESTED.

DATED this 3 day of August, 2017.

ELAM & BURKE, P.A.

By: _____
Matthew C. Parks, of the firm
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 3 day of May, 2017, I caused a true and correct copy of the foregoing document to be served as follows:

Daniel W. Bower STEWART TAYLOR & MORRIS, PLLC 12550 W. Explorer Drive, Suite 100 Boise, ID 83713	[ ] U.S. Mail [ ] Hand Delivery [ ] Federal Express [✓] Via Facsimile 345-4461
Honorable Christopher S. Nye Canyon County Courthouse 1115 Albany St Caldwell, ID 83605	[ ] U.S. Mail [ ] Hand Delivery [ ] Via Facsimile [✓] Email clerk copy – acahill@canyonco.org

Matthew C. Parks

4839-1923-8728, v. 2

Matthew C. Parks, ISB #7419
ELAM & BURKE, P.A.
251 East Front Street, Suite 300
Post Office Box 1539
Boise, Idaho 83701
Telephone: (208) 343-5454
Facsimile: (208) 384-5844
mcp@elamburke.com

Attorneys for Defendant Willow Creek Ranch Estates
No. 2 Subdivision Homeowners' Association, Inc.

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

DALE LEE and KATHI LEE, husband and wife,

Plaintiffs,

vs.

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

Defendants.

Case No. CV-16-3425*C

WILLOW CREEK RANCH ESTATES OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Defendant Willow Creek Ranch Estates No. 2 Subdivision Homeowners' Association, Inc. ("Willow Creek"), submits this Opposition to Plaintiffs' Motion for Summary Judgment. Willow Creek requests the Court deny Plaintiffs (the "Lees") motion for summary judgment and enter a finding that the Lees do not have an enforceable easement or equitable servitude over the property in dispute in this case, Kemp Road and enter summary judgment dismissing the Complaint.

I. SUMMARY OF OPPOSITION

The Court should enter summary judgment against the Lees because (1) they have not established the requisite facts to establish they are entitled to an equitable servitude, (2) their claims for an express easement are barred by the statute of frauds, and (3) the Lees have not requested specific performance in their Complaint, (4) any claim for specific performance would be barred by the statute of limitations, (5) any claim for specific performance is barred by the doctrine of laches, (6) the Lees have not established sufficient part performance of the 1997 Agreement to escape the statute of frauds, and (7) the 1997 Agreement is an unenforceable agreement to agree.[1]

II. REPLY ARGUMENTS

A. The Lees have failed to demonstrate an absence of material fact concerning Willow Creek's knowledge of the 1997 Agreement at the time Kemp Road was transferred to Willow Creek

Willow Creek disagrees that it had knowledge, actual or constructive, of the 1997 Agreement when Kemp Road was transferred to in in 2005.. The Lees only evidence in support of the claim Willow Creek had actual knowledge of the 1997 Agreement fails to establish the absence of a question of fact concerning this point. According to the Lees, because Alan Mills, the real estate agent for the Kemp Family Trust, knew about the 1997 Agreement and Mills initially served as a board member of Willow Creek, the knowledge of the Kemp Family Trust is imputed to Willow Creek. But, the Lees failed to offer any evidence that Mills acquired any

[1] The parties have filed cross motions for summary judgment. Many of these grounds for denying the Lees' motion for summary judgment are articulated in the pleadings Willow Creek submitted in support of its motion for summary judgment, its motion in limine, and prior opposition briefing on the Lees previously denied motion for summary judgment. The arguments in the pleadings filed by Willow Creek in support of its motion for summary judgment and its motions in limine are incorporated herein as if set forth in full, specifically but not limited to Willow Creek Ranch Estates Reply Memorandum in Support of Defendant's Motion for Summary Judgment, filed concurrently herewith.

knowledge of the 1997 Agreement ***in his capacity as a board member of the association***, which is required in order to impute such knowledge to Willow Creek. *See Mason v. Tucker & Associates*, 125 Idaho 429, 433, 871 P.2d 846, 850 (Ct. App. 1994) ("Knowledge acquired by an agent ***during the course of the agency relationship***, and while the agent is not acting in an interest adverse to that of the principal, is imputed to the principal; and notice to an agent constitutes notice to the principal.") (emphasis added).

In order to impute the knowledge of a board member to its principal organization, the board member must have gained the knowledge in his or her official capacity. *See Sulik v. Cent. Valley Farms, Inc.*, 95 Idaho 826, 828, 521 P.2d 144, 146 (1974). In other words, the Lees must demonstrate that Alan Mills received the knowledge of the 1997 Agreement in his capacity as a board member of the association. The record contains no such evidence. While not exactly clear, it can be assumed that Mills learned about the 1997 Agreement at the time it was executed, as he writes in his letter that he "was the real estate agent for the Kemp Family Trust . . . ." Declaration of Alan Mills, Ex. A. Mills learned about the 1997 Agreement while acting in his capacity as the agent of the Kemp Family Trust, not Willow Creek. Willow Creek did not exist when the 1997 Agreement was executed. *See* Affidavit of Matthew Parks, filed August 4, 2016, Ex. E (Willow Creek Articles of Incorporation).

The knowledge of realtor Alan Mills cannot be imputed to Willow Creek. The record contains no evidence to support a finding that the knowledge of Mills (or Mary Kemp) can be imputed to Willow Creek. Mills may have known about the 1997 Agreement, but there is no evidence in the record that Willow Creek, in 2005, when the Kemp Family Trust transferred Kemp Road to Willow Creek, knew about the 1997 Agreement. When the road was transferred to Willow Creek, Mills was no longer on the board. The same argument applies with respect to

Mary Kemp, the trustee of the Kemp Family Trust, who, according to Mills, also served as an initial board member of Willow Creek. First, Mary Kemp has not submitted any affidavit or statement, so any reliance on the allegation that Mary Kemp knew about the 1997 Agreement and her knowledge may be imputed to Willow Creek fails for lack of evidentiary support. But, in any event the argument would fail because Mary Kemp learned of the 1997 Agreement in her capacity as the trustee of the Kemp Family Trust at the time of the execution of the 1997 Agreement.

As a matter of public policy, the Court should not impute the knowledge of the initial board members to the subsequent innocent home buyers in the subdivision. The initial board members were acting in their own interests while serving on the board, as they were developing the land and hoping to make a profit. The developer never told the purchasers about the alleged agreement to provide access to the Lees. Innocent people purchased the lots in the subdivisions to construct homes without any knowledge of the 1997 Agreement and thus are bona fide purchasers for value of their respective interests in the common areas of the subdivision, including Kemp Road. The law and the equities favor not forcing these innocent home owners who own homes within the Willow Creek subdivision to open up the private road they maintain for the Lees. The Lees neglected to include the easement or servitude in the deed. The Kemp Family Trust neglected to include the easements in the plat for the Willow Creek subdivision or mention the alleged covenant in the declarations for the subdivision. These failures by the Lees and the Kemp Family Trust should not result in an adverse ruling against innocent home owners in the Willow Creek subdivision.

Finally, the testimony from Mills concerning what Willow Creek knew at the time of the transfer of Kemp Road is speculative. "A time-honored objection, speculation is generally

understood to be "the art of theorizing about a matter as to which evidence is not sufficient for certain knowledge." *Karlson v. Harris*, 140 Idaho 561, 565, 97 P.3d 428, 432 (2004) (discussing speculation in the context of a challenge to expert testimony) (quoting BLACK'S LAW DICTIONARY 1255 (5th ed.1979)). Our rules of evidence, specifically Rules 602 and 701, generally do not permit speculative testimony." *Schwan's Sales Enterprises, Inc. v. Idaho Transp. Dept.*, 142 Idaho 826136 P.3d 297 (2006). Despite Mills comment that he is reasonably certain about the knowledge of the Board members at the time of the transfer of Kemp Road, he provides no foundation for that statement and is speculating about what was in the minds of the members of the Board. His testimony lacks foundation, is not based on personal knowledge, is speculative, and should not be considered by the Court in ruling on the Lees' motion for summary judgment.

Similarly, the statements of Richard Horn cannot satisfy the requirement that the Lees demonstrate the members of the Board for Willow Creek knew about the 1997 Agreement and the purported grant of any permanent access rights. Richard Horn's testimony about the knowledge of the members of the Board for Willow Creek should be struck and should not be considered by the Court in ruling on the Lees' motion for summary judgment.

The records of the association contain no mention of the 1997 Agreement. Ray Tschohl, became president of Willow Creek in 2005, and when he became president, he did not have any knowledge of the 1997 Agreement. *See* Declaration of Ray Tschohl, filed August 4, 2016, ¶ 1-3. Tschohl learned the Lees claimed they had an easement over Kemp Road. *Id.* Tschohl searched the records of the association and found no mention of the 1997 Agreement in any records of the association. *Id.* Willow Creek did not have actual or constructive knowledge of the 1997 Agreement.

The Lees have also failed to demonstrate that Willow Creek had constructive knowledge of the purported access rights. The Lees acknowledge they have not recorded the 1997 Agreement, which would have provided constructive notice of the alleged easement. Willow Creek's president at the time of the transfer has stated that he was not aware of any easement rights held by the Lees to use Kemp Road at around the time of the transfer and that the Lees were told prior to 2006 that no easement existed for the Lees to use Kemp Road. See Declaration of Ray Tschol, filed concurrently here with, ¶ 4.

V. CONCLUSION

For the reasons set forth above in in Willow Creek's pleadings filed in support of its pending cross-motion for summary judgment, Willow Creek respectfully requests the Court deny the Lees' motion for summary judgment and dismiss the Lees' *Complaint* in its entirety with prejudice.

DATED this 3 day of August, 2017.

ELAM & BURKE, P.A.

By: _____
Matthew C. Parks, of the firm
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 3 day of August, 2017, I caused a true and correct copy of the foregoing document to be served as follows:

Daniel W. Bower STEWART TAYLOR & MORRIS, PLLC 12550 W. Explorer Drive, Suite 100 Boise, ID 83713	[ ] U.S. Mail [ ] Hand Delivery [ ] Federal Express [✓] Via Facsimile 345-4461
Honorable Christopher S. Nye Canyon County Courthouse 1115 Albany St Caldwell, ID 83605	[ ] U.S. Mail [ ] Hand Delivery [ ] Via Facsimile [✓] Email clerk copy – acahill@canyonco.org

Matthew C. Parks

Matthew C. Parks

4839-1923-8728, v. 2

Matthew C. Parks, ISB #7419
ELAM & BURKE, P.A.
251 East Front Street, Suite 300
Post Office Box 1539
Boise, Idaho 83701
Telephone: (208) 343-5454
Facsimile: (208) 384-5844
mcp@elamburke.com

Attorneys for Defendant Willow Creek Ranch Estates
No. 2 Subdivision Homeowners' Association, Inc.

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

DALE LEE and KATHI LEE, husband and wife, Plaintiffs, vs. WILLOW CREEK RANCH ESTATES NO. 2 SUBDIVISION HOMEOWNERS' ASSOCIATION, INC., an Idaho corporation; and DOES I – X, inclusive, Defendants.	Case No. CV-16-3425*C WILLOW CREEK RANCH ESTATES REPLY MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant Willow Creek Ranch Estates No. 2 Subdivision Homeowners' Association, Inc. ("Willow Creek"), submits this Reply Memorandum in Support of Defendant's Motion for Summary Judgment. Willow Creek requests the Court hold that the Plaintiffs (the "Lees") do not have an enforceable easement or equitable servitude over the property in dispute in this case, Kemp Road and enter summary judgment dismissing the Complaint.

I. SUMMARY OF REPLY ARGUMENT

The Court should enter summary judgment against the Lees because (1) they have not established the requisite facts to establish they are entitled to an equitable servitude, (2) their claims for an express easement are barred by the statute of frauds, and (3) the Lees have not requested specific performance in their Complaint, (4) any claim for specific performance would be barred by the statute of limitations, (5) any claim for specific performance is barred by the doctrine of laches, (6) the Lees have not established sufficient part performance of the 1997 Agreement to escape the statute of frauds, and (7) the 1997 Agreement is an unenforceable agreement to agree.

II. REPLY ARGUMENTS

A. The Lees are not entitled to an equitable servitude

The Lees have asked this Court to declare that they have the right to cross over Kemp Road to access their adjacent property. The right to cross over property is an easement and is an interest in property that is subject to the statute of frauds. The right to cross over property is not an equitable servitude.

The Lees contend that an equitable servitude can provide access across property. *See* Memorandum in Support of Plaintiff's Motion for Summary Judgment, p. 12. The Lees characterization of the equitable servitude discussed in *West Wood Investments, Inc. v. Acord*, 141 Idaho 75, 106 P. 3d 401 (2005), as an affirmative property right is incorrect. In *West Wood* (which was a planned unit development case), a developer if in a subdivision that had a common area lot ("Lot 5") designated on the subdivision plat 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.*

The Idaho Supreme 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 the Idaho Supreme Court considered the equitable servitude to be a restrictive covenant. The equitable servitude was restriction was 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. It does not stand for the proposition that an equitable servitude can be an affirmative right to use and cross over another's property.

In fact, the very case cited to by the Lees, in which they stated the concepts concerning equitable servitudes were "well summarized"[1] by that court held as follows:

> 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). The California case cited by the Lees differentiates between an easement and an equitable servitude and holds that equitable servitudes do not provide holders of such servitudes with any interest in or right to use the property subject to the equitable servitude. That case is consistent with the numerous cases cited by Willow Creek, including Idaho cases, holding that equitable servitudes are not affirmative property rights. *See* Memorandum in Support of Defendant's Motion for Summary Judgment, pp. 5-9.

Idaho law does not provide for the creation of an affirmative property right in the same manner as the creation of an equitable servitude. 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

[1] *See* Memorandum in Support of Plaintiff's Motion for Summary Judgment, filed June 16, 2016, p. 9 n.1.

is a restrictive covenant). Clearly, the Lees are seeking an easement and not an equitable servitude. Therefore, they must demonstrate compliance with the statute of frauds and the claim for an equitable servitude must be dismissed.

B. Statute of Frauds

The Lees have conceded the statute of frauds applies to the transfer of an easement.

C. Specific Performance not requested

In order to avoid the statute of frauds, the Lees argue the 1997 Agreement is enforceable since it was partially performed. However, the Lees have never taken the position that they are seeking specific performance of the 1997 Sale Agreement. That relief is not requested in the Complaint and is not mentioned in the Lees Pre-trial Statement. The Lees have characterized their theories of recovery as follows:

> The Lees are entitled to the relief sought on two alternative legal theories. First, the Agreement created an easement that is enforceable against Willow Creek HOA regardless of whether or not the Agreement was recorded – the Willow Creek HOA had actual notice of the easement. Second, the Agreement, the acts of the parties, including the initial construction of the culverts, gravel road, wood fencing and metal gates that reflect the three access points, create an equitable servitude that is also enforceable against Willow Creek HOA.

Plaintiffs' Pre-trial Statement, p. 5.

The Lees also succinctly stated that the "dispute between the parties is not complicated – the issue is simply whether certain land, a roadway, is encumbered by either an **express easement**[2]

[2] Requesting the Court determine that the Lees have an express easement is not the same as requesting the Court compel specific performance of the 1997 Agreement and require by order of the Court that Willow Creek grant the Lees and express easement. The Lees appear to be asking the Court to compel Willow Creek to perform the contractual obligations of the Kemp Family Trust as the successor in interest to Kemp Road. However, the Lees have not asserted a cause of action for breach of that written agreement. As will be discussed below, the statutory period to bring a cause of action for breach of the 1997 contract has expired. Therefore, the remedy of specific performance of the contract is barred by the statute of limitations.

or an equitable servitude." *Id.* p. 1 (emphasis added). The Lees did not make any reference to specific performance or request that the Court specifically enforce the 1997 Agreement in their complaint or any pleadings prior to July 21, 2017. The Lees have not move to amend their Complaint to add a claim for specific performance. If the Lees want to request the Court compel performance of the 1997 Agreement, the Lees need to amend their Complaint to request that relief. However, that claim is barred by the statute of limitations.

D. The Statute of Limitations for Specific Performance is 5 years

If the Lees were to move the Court to amend the complaint to add a claim for specific performance, that motion would be denied because 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 has long expired.

The Lees were informed by Willow Creek prior to 2006 that Willow Creek was not interested in allowing the Lees to use Kemp Road to access their property for the development of residential homes and told the Lees they did not have any easement. *See* Declaration of Ray

Tschohl, ¶ 4. The Lees were informed before 2006 that they did not have any easement to use Kemp Road and were on notice that their alleged property rights were in question. Even if the cause of action for specific performance did not accrue in 1997, it accrued before 2006 when the Lees were told they did not have any access easement rights over Kemp Road.

The five-year statutory limitations period for specific performance has expired. Willow Creek requests the Court find the Lees are not entitled to specific performance and, to the extent any cause of action for specific performance has been raised by the pleadings, that the cause of action be dismissed.

E. The Lees are barred from equitable relief under the doctrine of laches

"The rule is well settled that courts of equity do not favor antiquated or stale demands, and will refuse to interfere where there has been gross laches in commencing the proper action, or long acquiescence in the assertion of adverse rights." *Johnson v. Strong Arm Reservoir Irr. Dist.*, 82 Idaho 478, 486 (1960).

The necessary elements to maintain a defense of laches are:

> (1) defendant's invasion of plaintiff's rights; (2) delay in asserting plaintiff's rights, the plaintiff having had notice and an opportunity to institute a suit; (3) lack of knowledge by the defendant that plaintiff would assert his rights; and (4) injury or prejudice to the defendant in the event relief is accorded to plaintiff or the suit is not held to be barred.

Thomas v. Arkoosh Produce, Inc., 137 Idaho 352, 359, 48 P.3d 1241, 1248 (2002), *citing Henderson v. Smith*, 128 Idaho 444, 449, 915 P.2d 6, 11 (1996).

When Willow Creek informed the Lees prior to 2006 that there was no easement for the Lees to use Kemp Road, the Lees were on notice that Willow Creek would not recognize the Lees purported access rights for to be developed homes on the Lees' property. The Lees delayed

ten years from that time to bring this lawsuit and had notice of the dispute and an opportunity to bring this suit, but inexplicably waited. Willow Creek had no way of knowing that the Lees would wait ten years from being told there was no easement to bring this lawsuit. Finally, Willow Creek will suffer injury and prejudice if the Lees are afforded a right to use Kemp Road. Because of the passage of time, witnesses are no longer available and cannot recall with specificity discussions that occurred ten to twenty years ago. The residents of Willow Creek will be prejudiced if the Lees are afforded an access right based on the 1997 Agreement because the residents, who are bona fide purchasers for value of their interest in Kemp Road as common area of the subdivision without any knowledge of the 1997 Agreement, purchased their homes based on the understanding that the road their houses were on was private and that traffic would be minimal. By waiting between 10-20 years to bring this lawsuit, the Lees have unreasonably delayed and their claim for an access right is stale. Based on the doctrine of laches, the Lees complaint should be dismissed.

F. The Lees have not established sufficient part performance

In response to the fact that the Lees cannot comply with the statute of frauds with respect to the 1997 Agreement, the Lees argue they have partially performed the agreement and therefore appear to argue that this Court can compel specific performance of the agreement. As noted above, the Lees have not requested specific performance as a remedy. Nonetheless, even if the Lees had requested specific performance of the 1997 Agreement as relief and that the relief was not barred by the statute of limitations, the Lees have not sufficiently demonstrated a question of fact concerning whether or not they sufficiently performed any obligations under the 1997 Agreement to entitle them to specific performance.

> Specific performance is an extraordinary remedy that provides relief when legal remedies are inadequate. It is generally presumed that in an action for breach of a real estate purchase and sale agreement there is not an adequate remedy at law due to the perceived uniqueness of land. A greater degree of certainty is required to sustain a decree for specific performance than is required to sustain a judgment for damages at law. Specific performance is not available to enforce ambiguous or incomplete real estate agreements.

Garner v. Bartschi, 139 Idaho 430, 435, 80 P.3d 1031, 1036 (2003) (citations and quotations omitted)

> 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 the easement since 1997 and they have presented no evidence that they have 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 Memorandum in Opposition to Defendant's Motion for Summary Judgment*, p. 9. 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* Memorandum in Support of Plaintiff's Motion for Summary Judgment, filed July 21, 2017, ¶ 10 ("Recognizing future development by the Lees, the 1997 Agreement expressly gave the Lees three access points to the road."). 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.

G. The 1997 Agreement is an Unenforceable Agreement to Agree

The 1997 Agreement is an agreement to agree in the future and is unenforceable for the purposes of specific enforcement. *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* Declaration of Dale Lee, filed June 17, 2016, Ex. B (copy of 1997 Agreement).

In 1997, Kemp Road had not been constructed. The parties to the agreement left for future negotiations the location of the driveway accesses. "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 confidential, not final, and is not enforceable. Consequently, the parties contemplated future negotiations and the 1997 Agreement was an unenforceable agreement to agree.

V. CONCLUSION

Willow Creek respectfully requests the Court grant Willow Creek's motion for summary judgment and dismiss the Lees' *Complaint* in its entirety with prejudice.

DATED this 3 day of August, 2017.

ELAM & BURKE, P.A.

By: Matthew Parks
Matthew C. Parks, of the firm
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 3 day of ~~May~~ August, 2017, I caused a true and correct copy of the foregoing document to be served as follows:

Daniel W. Bower STEWART TAYLOR & MORRIS, PLLC 12550 W. Explorer Drive, Suite 100 Boise, ID 83713	[ ] U.S. Mail [ ] Hand Delivery [ ] Federal Express [✓] Via Facsimile 345-4461
Honorable Christopher S. Nye Canyon County Courthouse 1115 Albany St Caldwell, ID 83605	[ ] U.S. Mail [ ] Hand Delivery [ ] Via Facsimile [✓] Email clerk copy – acahill@canyonco.org

Matthew Parks
Matthew C. Parks

4812-1069-1148, v. 2

Daniel W. Bower, ISB #7204
STEWART TAYLOR & MORRIS PLLC
12550 W. Explorer Drive, Suite 100
Boise, Idaho 83713
Telephone: (208) 345-3333
Fax No.: (208) 345-4461
dbower@stm-law.com

Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

DALE LEE and KATHI LEE, husband and wife,

Plaintiffs,

vs.

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

Defendants.

Case No. CV 16-3425

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO AMEND ANSWER

Plaintiffs, Dale and Kathi Lee (collectively "Lees"), by and through their attorneys of record, submit this brief in opposition to Defendant's Motion to Amend Answer.

INTRODUCTION

As a threshold matter, Willow Creek Ranch Estates No. 2 Subdivision Homeowners' Association, Inc. ("HOA" or "Willow Creek HOA")'s Motion to Amend Answer is untimely and should be denied on this basis alone. The Motion to Amend is untimely for two reasons. First, per Court directive on July 11, 2017, all substantive motions were due on July 21, 2017. Second, even without that directive, the Stipulation for Scheduling and Planning clearly provides that

"120 days before trial is the last day to file a motion to amend the claims between existing parties to the lawsuit..." *See* June 16, 2016 Stipulation for Scheduling and Planning. Here, that deadline has long past and this Court should deny the HOA's motion on this basis alone. Accordingly, the Lees submit that the HOA's motion be denied. Additionally, even if those procedural bars did not exist, the HOA's request misstates the issues before this Court in an attempt to frame this legal action in an improper way. The HOA's attempt to "amend" is really an attempt to "frame" the relief that the Lees seek in a way that offers the HOA a defense--as it stands, the HOA cannot overcome the fact that the 1997 Agreement has already been substantially performed and therefore continues to be an enforceable encumbrance, condition and/or restriction against the HOA. Without any support, the HOA continues to misstate what the Lees actually seek in this action. The Lees seek a declaratory judgment that they have a right to continued access of their property from Kemp Road--the idea that the Lees are only seeking to enforce the 1997 Agreement as an equitable servitude or the idea that the Lees are seeking "specific performance" is not accurate.

To be clear, the Lees are arguing that the 1997 Agreement has been partially (if not fully performed) and consequently, that the 1997 Agreement is an enforceable encumbrance (either as a partially performed easement agreement and/or an equitable servitude against the HOA). The legal action, a declaratory action, simply asks that this Court to say just that. *See* Complaint, ¶VIII ("The terms of the [1997 Agreement] were at least partially performed by the parties."); Prayer for Relief ¶1 ("That the Court make a final determination that the Kemp Road, is encumbered by equitable servitudes, conditions and restrictions allowing for access by the Lees as set forth in the [1997 Agreement];..."). Significantly, the Lees are asking for a declaration of their rights *not* specific performance.

LEGAL STANDARD

It is well-established law that it is well within a trial court's discretion to deny a motion to amend a pleading "on the grounds that [the motion] was untimely under the scheduling order" and that, consequently, the opposition was prejudiced. *See Silver Creek Computers, Inc. v. Petra, Inc.*, 136 Idaho 879, 881–82, 42 P.3d 672, 674–75 (2002) (Recognizing that even where the motion was made "six weeks before trial" that '[g]ranting the amendment would have required the defendants to research the new causes of action and to alter their trial strategies, and it would have disrupted their trial preparation."); *see also DAFCO LLC v. Stewart Title Guar. Co.*, 156 Idaho 749, 756–57, 331 P.3d 491, 498–99 (2014) ("[O]ther factors must combine with timeliness to justify denying a motion to amend. Appropriate factors to consider include whether the proposed amendment would delay upcoming hearings or trial, whether the motion to amend comes after court-imposed deadlines have passed, and whether substantial work has already been completed.").

In *Maroun v. Wyreless Systems, Inc.*, the plaintiff filed motions to amend several months after the deadline for filing motion to amend pleadings had passed. 141 Idaho 604, 613, 114 P.3d 974, 983 (2005). There, "the district court stated: 'We are now two years into this case, the time to amend pleadings has passed, and two discovery deadlines have expired. It is now simply too late to further amend the substance of the pleadings....'" *Id.* The appellate court affirmed the district court's decision to deny on the basis that the untimeliness of the request put the plaintiff in a prejudicial position. *Id.* Here, it is uncontroverted that the motion to amend is untimely. And, as set forth below, to allow the amendment now, would, as it did with the respondents above, create prejudice for the Lees.

DISCUSSION

The HOA's Motion Should Be Denied As Untimely And Prejudicial And With Respect To Statute Of Limitations Defense, Fails To State A Valid Affirmative Defense Based On The Claims

It is incontrovertible fact that the HOA's Motion to Amend is untimely. First, all motions were to be filed by July 21, 2017. To the extent this is a substantive motion, and the Lees would submit that it is because it could potential change the ability of the parties to obtain dispositive relief, this motion is untimely per the Court' directive on July 14, 2017. Moreover, the motion is untimely based on the scheduling order stipulated by the parties and approved by the Court. *See* June 16, 2016 Stipulation for Scheduling and Planning. Consequently, here, the dispositive question for the Court is whether the untimeliness of the motion would require additional discovery and/or impact trial preparation, *i.e.*, is prejudicial to the Lees. It is uncontroverted fact that the parties have already begun trial preparation. Indeed, the parties have already submitted their Pre-Trial Statements. Thus, there can be little doubt that, at a minimum, allowing the HOA to amend its pleading to add new affirmative defenses would require the parties to redo their Pre-Trial Statements including revising the facts, witnesses and exhibits that they identified in those statements. In short, trial preparation will have to be redone. This is prejudicial, particularly to the Lees who are prepared to go to trial.

The HOA's request to amend should also be denied because two of the affirmative defenses identified would require additional discovery—namely "Bona Fide Purchaser for Value" and "Statute of Limitations." As explained below, each of these affirmative defenses requires additional discovery if the HOA was allowed to amend.

A. *Bona Fide Purchaser for Value*

To be considered a bona fide purchaser, "a party 'must show that at the time of the purchase he paid a valuable consideration and upon the belief and the validity of the vendor's claim of title without notice, actual or constructive, of any outstanding adverse rights of another.' " *Weitz v. Green*, 148 Idaho 851, 859, 230 P.3d 743, 751 (2010) (quoting *Imig v. McDonald*, 77 Idaho 314, 318, 291 P.2d 852, 855 (1955)). "Further, one who purchases property with sufficient knowledge to put him, or a reasonably prudent person, on inquiry is not a bona fide purchaser." *Imig v. McDonald*, 77 Idaho at 318, 291 P.2d at 855. Admittedly, the issue of notice has been addressed by the parties and could not be the basis for claiming prejudice. However, the issue of whether the HOA actually paid consideration and that it was "valuable" is a significant question mark and an issue that has not been fleshed out in this litigation. Given the nature of the transfer from the developer, Kemp Trust, to the HOA, this remains an unknown. Accordingly, to allow the HOA to assert this defense without an opportunity to conduct discovery on this issue is clearly prejudicial and a basis for denial.[1]

B. *Statute of Limitations*

This issue has never been addressed or even mentioned in any of the pleadings or motions. It appears that the HOA is trying to equate "laches" with "statute of limitations"—"Plaintiffs cannot claim surprise or prejudice with respect to the statute of limitations affirmative defense when the initial answer included an affirmative defense of laches, putting Plaintiffs on

[1] Further, it appears that the HOA maybe asserting that each individual HOA member (regardless of the fact that they have no direct ownership interest in Kemp Road) is a bona fide purchaser. This argument is completely new and would require that the Lees depose and conduct discovery as to each individual HOA member. Again, evidence of the prejudice that the Lees would suffer if the HOA were permitted to pursue this defense at this late stage of the process.

notice that their delay in bringing this lawsuit would be an issue at trial." Willow Creek Ranch Estates Motion to Amend Answer ("HOA Motion to Amend"), p.3.

This approach is misguided. As explained by a Georgia state court, statute of limitations and laches are not synonymous.

> [A] statute of limitation and laches are not synonymous. "A statute of limitation is the action of the state in determining that after a lapse of specified time, a claim shall not be enforceable in a judicial proceeding." 34 Amer.Juris. 15, § 3(1). The statute of limitation signifies the fixed period within which an action may be brought to preserve a right, while laches signifies a delay independent of the statute. And as to the lapse of time necessary for an invoking of the doctrine of laches, such time may or may not correspond with the time fixed by the statute of limitations. "The defense of laches is peculiar to courts of equity." *Equitable Bldg. & Loan Ass'n v. Brady*, 171 Ga. 576, 584, 156 S.E. 222, 226. Laches in a general sense is neglect for an unreasonable and unexplained length of time to do that which, by the exercise of due diligence, could have and should have been done earlier, if at all.

Prudential Ins. Co. v. Sailors, 69 Ga. App. 628, 26 S.E.2d 557, 561 (1943). Thus, here, where the defenses are not the same, different discovery and different arguments would be necessary to address the issue.

Moreover, this affirmative defense is not even relevant to the declaratory relief sought by the Lees. "If an amended pleading does not set out a valid claim or if the opposing party would be prejudiced by the delay in adding a new claim or if the opposing party has [an] available defense...it is not an abuse of discretion for the trial court to deny the motion to file an amended complaint." *DAFCO LLC*, 156 Idaho at 757, 331 P.3d at 499. Trial courts are directed to determine "to whether the opposing party would be prejudiced...., whether the pleadings set forth valid claim[s], and if the opposing party has an available defense." *Id.* Thus, to be allowed to amend to add this affirmative defense, the HOA must explain how this defense is valid.

Here, the HOA claims it needs to assert this new affirmative defense because the Lees are requesting something new--"specific performance." *See* HOA Motion to Amend, p.3. This is not accurate. The Lees are not asking for specific performance (the access points and the Lees already have access and the HOA has nothing to perform). Rather, the Lees simply claim that 1997 Agreement is enforceable as an easement or an equitable servitude because it has been performed. Consequently, there is no basis for amending the HOA's pleading to add an "affirmative defense" addressing performance that does not exist and that is not requested. The HOA's argument that the Lees are asking for specific performance is based on the fact that Idaho Code § 9-504 states that the statute of frauds "must not be construed to ... abridge the power of any court to compel the specific performance of an agreement, in case of part performance thereof." The Lees cite that code section and related case law not to require *performance* but rather *enforcement* or *recognition* of particular rights. As recently explained by the Idaho Supreme Court: "Under the doctrine of part performance, when an agreement to convey real property fails to meet the requirements of the Statute of Frauds, the agreement may nevertheless be specifically *enforced*...." *Hoke v. Neyada, Inc.*, 161 Idaho 450, 387 P.3d 118, 121 (2016), *reh'g denied* (Jan. 23, 2017) (Emphasis added.) (citing *Bear Island Water Association, Inc. v. Brown*, 125 Idaho 717, 722, 874 P.2d 528, 533 (1994)). Here, as clearly articulated in the Complaint, the Lees argue that because of the language of the 1997 Agreement and past performance (the construction and use of the access points that gave the Lees access from Kemp Road) the Lees are entitled to a declaration from the Court that Kemp Road is encumbered. *See* Complaint, p.6 (Prayer for Relief, ¶1(That the Court make a final determination that the Kemp Development Property, including Kemp Road, is encumbered by equitable servitudes, conditions and restrictions allowing for access by the Lees as set forth in the [1997] Agreement....").

Consequently, the Lees seek a declaration of their rights per the 1997 Agreement and the performance of that agreement by the parties. Statute of limitations is simply not a valid defense to that claim.

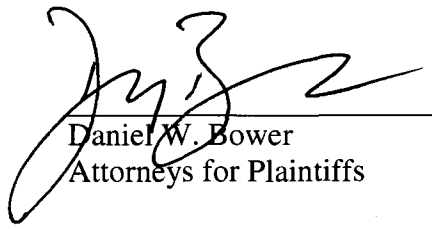
Accordingly, in addition to be being untimely and prejudicial, the HOA's request does not state a valid defense to the claims asserted and, consequently, the HOA's request to amend to add this defense should be denied.

CONCLUSION

In light of the foregoing, the Lees respectfully request the Court deny the HOA's Motion to Amend Answer. The motion is untimely for two reasons and clearly impacts trial preparation and potentially discovery. Furthermore, with respect to at least one of the desired new affirmative defenses, the HOA cannot state a valid defense because it is based on a non-existent claim. Accordingly, the Lees respectfully submit that the motion be denied.[2]

DATED: August 7, 2017.

STEWART TAYLOR & MORRIS PLLC



Daniel W. Bower
Attorneys for Plaintiffs

2 Regardless of whether this Court grants the HOA's motion, the Lees are entitled to summary judgment. As set forth in the Lee's supporting Memorandum, none of these claimed affirmative defenses have any impact on the Lee's request for summary judgment. The Lee's have also agreed to submit this issue to the court on the briefs without oral argument.

CERTIFICATE OF SERVICE

I hereby certify that on August 7, 2017, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Christ T. Troupis
TROUPIS LAW OFFICE, P.A.
801 E. State Street, Ste. 50
P.O. Box 2408
Eagle, ID 83616

☐ U.S. Mail
☐ Hand Delivered
☒ Facsimile: (208) 938-5482
☐ Email: ctroupis@troupislaw.com

Attorneys for Defendant Willow Creek Ranch Estates No. 2 Subdivision Homeowners' Association, Inc.

Matthew C. Parks
ELAM & BURKE, P.A.
251 East Front Street, Suite 300
Post Office Box 1539
Boise, Idaho 83701

☐ U.S. Mail
☐ Hand Delivered
☒ Facsimile: (208) 384-5844
☐ Email: mcp@elamburke.com

Attorneys for Defendant Willow Creek Ranch Estates No. 2 Subdivision Homeowners' Association, Inc.

Honorable Christopher S. Nye
Canyon County Courthouse
1115 Albany Street
Caldwell, ID 83605

☐ U.S. Mail
☐ Hand Delivered
☐ Facsimile:
☒ Email: acahill@canyonco.org
Clerk Copy

Gabrielle Cole

Daniel W. Bower, ISB #7204
STEWART TAYLOR & MORRIS PLLC
12550 W. Explorer Drive, Suite 100
Boise, Idaho 83713
Telephone: (208) 345-3333
Fax No.: (208) 345-4461
dbower@stm-law.com

Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

DALE LEE and KATHI LEE, husband and wife,

Plaintiffs,

vs.

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

Defendants.

Case No. CV 16-3425

REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT OR ALTERNATIVELY PARTIAL SUMMARY JUDGMENT

Plaintiffs, Dale and Kathi Lee (collectively "Lees"), by and through their attorneys of record, submit this reply memorandum in support of Plaintiffs' Motion for Summary Judgment and Alternatively Partial Summary Judgment and in Opposition to Defendant's Motion for Summary Judgment.

INTRODUCTION

The Lees maintain that the legal issue here is clear and simple--whether this Court can rule, as a matter of law, that Kemp Road is encumbered by an agreement that has been partially performed and that Willow Creek Ranch Estates No. 2 Subdivision Homeowners' Association,

Inc. ("HOA" or "Willow Creek HOA") had both actual and constructive knowledge. The HOA attempts to convolute that simple issue by making seven fragmented arguments. Those seven arguments fall into three categories of arguments provided as follows: 1) the HOA claims there is not sufficient factual basis to established an equitable servitude based primarily on its proffered definition of an equitable servitude; 2) the 1997 Agreement is barred by the statute of frauds and because the relief the Lees seek is "specific performance," something the HOA claims was not pled in the Complaint; and 3) that the HOA did not have knowledge, actual or constructive, of the 1997 Agreement when Kemp Road was transferred in 2005.[1] As set forth below, these arguments (and their subparts) are not supported. .

RESPONSIVE DISCUSSION

I. The Only Evidence In The Record Affirmatively Demonstrates That The HOA Had Knowledge, Actual And Constructive, Of The 1997 Agreement

The HOA "disagrees that it had knowledge, actual or constructive, of the 1997 Agreement when Kemp Road was transferred...." Willow Creek Ranch Estates Opposition to Plaintiffs' Motion for Summary Judgment ("HOA's MSJ Opposition Memo."), p. 2. Notwithstanding this pronouncement, the HOA has not identified any evidence that contracts HOA board member Alan Mills' statement that: "As a former HOA board member, I can say with a high degree of certainty that the HOA at the time was aware of the [1997] Agreement and its terms regarding the three driveway access." *See* Mills Decl., Exhibit A; *see also* Lee Decl., Exhibit D (emphasis added).

[1] Alternatively, to the extent that this Court rules that the issue of actual or constructive knowledge is a disputed fact, the Lees assert that they are entitled to summary judgment on the issue of whether the agreement at issue was partially performed, thereby narrowing the issues to be tried by this Court.

This statement could not be more plain or clear. Mr. Mills, a former member of the HOA board, has testified that *the* HOA was aware of the 1997 Agreement. In response, the HOA asserts--that only "knowledge acquired by an agent during the course of the agency relationship" constitutes notice to the principal. *See* HOA MSJ Opposition Memo., p. 3. This argument is a misdirection and not relevant. Mr. Mills's statement is not just that *he* knew of the 1997 Agreement and that the HOA knew because he knew. His unequivocal and unconditional statement is that the HOA was aware of the 1997 Agreement: "the HOA at the time was aware of the [1997] Agreement and its terms regarding the three driveway access." As a member of the HOA board, Mr. Mills is entirely able to make this plain admission--an admission by a party opponent.[2] Significantly, the HOA has not submitted any evidence to contradict this unconditioned statement. The fact that subsequent HOA board members and presidents, *e.g.*, Ray Tschohl, can provide testimony that they did not know about the 1997 Agreement because this information was not properly passed down by the HOA does not somehow disprove Mr. Mills's testimony that the HOA had actual knowledge of the 1997 Agreement when he was on the board. This evidence is damning to the HOA's argument. The uncontroverted evidence in the record is that the HOA had knowledge of the 1997 Agreement.

---

[2] It is incredible that the HOA argues in its brief that "the record contains no evidence to support a finding that the knowledge of Mills (or Mary Kemp) can be imputed to [the HOA]." Mr. Mills statement is what it is. It is up to the HOA to submit evidence that proves this statement was limited or inaccurate. The HOA has not done that—they have failed to meet their burden. There is no evidence in the record disproving Mr. Mills statement. Mr. Mills's statement, as a member of the HOA Board, is that the HOA had knowledge of the 1997 Agreement. It is significant that the HOA did not depose or make any attempt to obtain a sworn statement from Mr. Mills. There is no evidence in the record to contradict Mr. Mills's testimony because the HOA chose to not put it there. The HOA had knowledge of the 1997 Agreement. If the HOA wanted to qualify that statement, they should have deposed Mr. Mills so that they could submit evidence that that knowledge *only* came as a result of Mr. Mills work as the original real estate agent. The HOA did not do this and, accordingly, is not even in a position to submit contrary evidence necessary to preclude summary judgment as to this salient fact.

The HOA has not and really cannot assert that it did not have "constructive" notice of the 1997 Agreement. According to Mr. Horn, a member of the HOA, because of the gates, culverts and the access points constructed, it was obvious to him and to the other HOA members living in the subdivision, that the Lees accessed their property through Kemp Road. *See* Horn Aff., ¶7 ("It was obvious to me and anyone living in the subdivision, that the Lees accessed their property from Kemp Road."). Moreover, per Mr. Horn's testimony, he was told of the 1997 Agreement at the time he purchased his home in 1999. Again, this testimony is uncontroverted and unchallenged. The facts are what they are, the access points were uncontrovertibly constructed and anyone that drives on Kemp Road can see them. *See* Lee Decl., ¶ 14, Exhibit C (A color copy is attached hereto for convenience purposes). Nothing submitted by the HOA contradicts this fact. Indeed, there is not one statement from any member of the HOA claiming that they were unaware of the constructed access points--nor could they honestly submit the same. In sum, the uncontroverted evidence in the record affirmatively proves that the HOA had, not only actual notice but, constructive notice of the encumbrance.

II. The Partial Performance Of The 1997 Agreement Removes Claims And Defenses That The 1997 Agreement Is Not Enforceable

The HOA makes a number of arguments related to the ability of this Court to enforce the 1997 Agreement. Those arguments include i) that the 1997 Agreement is barred by the Statute of Frauds, ii) that the argument is barred because the Lees did not plead "specific performance," and iii) that the "Less have not established sufficient part performance of the 1997 Agreement...." *See* HOA MSJ Opposition, p.2. These responsive arguments all lack merit.

A. *The Uncontroverted Evidence Establishes Partial Performance Of The 1997 Agreement And Accordingly Precludes Application Of The Statute Of Frauds*

The argument that the Lees have not established sufficient part performance is not supported. The HOA argues the only thing it can, that the uncontroverted performance is not performance enough. This argument is affirmatively disproved by facts in evidence. The Idaho Supreme Court has explained that "what constitutes part performance must depend upon the particular facts of each case and the sufficiency of particular acts is a matter of law." *See Hoke v. Neyada*, Inc., 161 Idaho 450, 387 P.3d 118, 121–22 (2016), *reh'g denied* (Jan. 23, 2017). This makes sense because "[a]cts constituting part performance must be specifically referable to the alleged agreement." *Id.* (citing *Boesiger v. Freer*, 85 Idaho 551, 557, 381 P.2d 802, 805 (1963)). The Idaho Supreme Court has also explained that "[t]he most important acts which constitute a sufficient part performance are actual possession, permanent and valuable improvements and these two combined." Id. (citing *Roundy v. Waner*, 98 Idaho 625, 629, 570 P.2d 862, 866 (1977)). Here, the acts that the Lees contend constitute part performance, the construction of the access points and allowing the Lees access, is clearly related to the 1997 Agreement. Accordingly, the HOA is limited to arguing the later, that they have not established actual possession or permanent and valuable improvements: "[t]he Lees have not established that they have been in possession of the easement since 1997 and they have presented no evidence that they have made any substantial improvements to Kemp Road" and "[t]herefore, they have not established sufficient part performance to constitute an exception to the statute of frauds." *See* Willow Creek Ranch Estates Reply Memorandum in Support of Defendant's Motion for Summary Judgment ("HOA Reply Memo in Support of MSJ"), p.10.

Again, the facts belie this argument. There is evidence of both possession, *i.e.* access, and improvement, *i.e.*, construction of the access points, including culverts and fencing. Dale Lee

testified in his declaration that "culverts," "wood fencing and metal gates corresponding to the access points [constructed by the Kemp Family Trust] were constructed *giving the Lee property clear and obvious access to Kemp Road.*" *See* Lee Decl., ¶14. Mr. Horn, who was living in the subdivision and who was a member of the HOA also testified that improvements were made and that the Lees were given access: "It was obvious to me ... that the Lees *accessed* their property from Kemp Road." *See* Horn Aff., ¶7. These uncontroverted statements constitute evidence of both improvement and possession consistent with the 1997 Agreement--stated differently, that the 1997 Agreement has been sufficiently performed to justify enforcement regardless of the statute of fraud concerns.

The HOA also fails to appreciate the reason for the "partial performance" doctrine as it relates to the "statute of frauds." The purpose of the statute of frauds is to act as an assurance for the parties as a protectant of fraudulent behavior. To make sure the agreement is not a fraud. As explained by the Idaho Supreme Court, the idea is that the partial performance of the agreement is a recognition by the parties of the validity of an agreement, alleviating "validity" or "fraud" concerns. This is reflected in the case law.

> In the instant case it is alleged that the partition fence was erected under the oral agreement. As to maintenance the agreement was recognized and acted upon by appellants and respondent's lessor, in that it is alleged they maintained their respective portions of the partition fence from 1917 to 1920 during the occupancy of the land by respondent, who also recognized and acted upon the agreement. Even if appellants were correct in their contention that the agreement in question was one for the sale or lease of an interest in land, the statute of frauds would have no application for the reason that *both parties to the oral agreement recognized its validity and acquiesced in its terms by erecting the fence and maintaining it for three years, and the doctrine of part performance would take it out of the statute of frauds.*

See Tsuboi v. Cohn, 40 Idaho 102, 231 P. 708, 710 (1924) (citing 27 C. J. 343, § 427) (emphasis added). Here, there is no concern regarding the validity of the agreement because the parties

performed as per the terms of the agreement. The access points were created and the Lees were provided access. Indeed, at the time of the token transfer by the Kemp Family Trust to the HOA, there was nothing left for the Kemp Family Trust or the HOA to perform. The parties' actions confirmed the validity of the 1997 Agreement and the encumbrance. The improvements were permanent and substantial and actually provided the Lees with access. Accordingly, there is no basis for challenging the validity of the agreement. The actions of the parties clearly address that issue. Thus, the only real question left is whether the HOA had knowledge of the agreement, and, as explained above, it unquestionably did.

B. *The Lees Are Not Pleading Specific Performance But A Declaration Of Their Rights Related To The 1997 Agreement*

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. The Lees simply claim that the 1997 Agreement is enforceable as an easement or an equitable servitude because there has been performance and they seek to have a declaration of their rights.

The HOA's argument that the Lees are asking for specific performance is based on the fact that Idaho Code § 9-504 states that the statute of frauds "must not be construed to ... abridge the power of any court to compel the specific performance of an agreement, in case of part performance thereof." The Lees cite that code section and related case law not to require *performance* but rather *enforcement* or *recognition* of particular rights they have already been

given. As recently explained by the Idaho Supreme Court: "Under the doctrine of part performance, when an agreement to convey real property fails to meet the requirements of the Statute of Frauds, the agreement may nevertheless be specifically *enforced*...." *Hoke v. Neyada, Inc.*, 161 Idaho 450, 387 P.3d 118, 121 (2016), *reh'g denied* (Jan. 23, 2017) (Emphasis added.) (citing *Bear Island Water Association, Inc. v. Brown*, 125 Idaho 717, 722, 874 P.2d 528, 533 (1994)). Here, as clearly articulated in the Complaint, the Lees argue that because of the language of the 1997 Agreement and past performance (the construction and use of the access points that gave the Lees access from Kemp Road) the Lees are entitled to a declaration from the Court that Kemp Road is encumbered. *See* Complaint, p.6 (Prayer for Relief, ¶1(That the Court make a final determination that the Kemp Development Property, including Kemp Road, is encumbered by equitable servitudes, conditions and restrictions allowing for access by the Lees as set forth in the [1997] Agreement...."). Consequently, the Lees seek a declaration of their rights per the 1997 Agreement as confirmed by the past and present acts of the parties. Statute of limitations is simply not an applicable defense to that claim.[3] [4]

[3] Indeed, at least one court has recognized that partial performance is not limited to just specific performance. *See LaRue v. Kalex Const. & Dev., Inc.*, 97 So. 3d 251, 253 (Fla. Dist. Ct. App. 2012) ("There the contract is for the sale of land and the relief sought is for specific performance *or other equitable relief*, partial performance may remove an oral agreement from the statute of frauds.").

[4] The HOA also makes the assertion that because the Lees are seeking specific performance they are barred because they claim the 1997 Agreement was an "agreement to agree." HOA Reply Memo in Support of MSJ, p.10. The HOA claims that at the time of the agreement Kemp Road had not been constructed and that the access points had not been determined. *Id.* Again, the HOA fails to appreciate that these terms have all been fulfilled. Kemp Road was built, the access points were constructed. And, again, the purpose of this declaratory action is not to seek specific performance but a declaration of an encumbrance that will continue to allow the Lees access and that can be recorded.

III. HOA Claims No Equitable Servitude Because Claims There Is Not Sufficient Factual Basis to Established an Equitable Servitude Based Primarily on its Proffered Definition of an Equitable Servitude

Even if there was no enforceable easement, the incontrovertible facts establish an equitable interest that also provides the Lees with legal access. The parties are in agreement that an equitable servitude is not an easement. *See Birdwood Subdivision Homeowner's Ass'n, Inc. v. Bulotti Const., Inc.*, 145 Idaho 17, 23, 175 P.3d 179, 185 (2007). However it is like an easement in that it concerns a promise of the landowner to use his land in a certain way. *See Idaho Power Co. v. State, By & Through Dep't of Water Res.*, 104 Idaho 575, 587, 661 P.2d 741, 753 (1983) ("restrictive covenants and equitable servitudes" relate to "[a]greements not to assert ownership rights."). Here, it is incontrovertible fact that the Lees, in the event that the 1997 Agreement (and the performance by the parties) is construed to not give the Lees an encumbrance, are asking that this Court to impose an equitable servitude against the HOA. The Lees are asking this Court to preclude the HOA from asserting ownership rights that would preclude the Lees from continued to access Kemp Road.

The Lees appreciate that the HOA is trying to argue that an equitable servitude can only be construed as a negative restrictive covenant as opposed to an affirmative right to use. And that here, we are only dealing with what the HOA is trying to characterizes as the Lees affirmative right to use. As reflected in the HOA's opposition arguments, Idaho has clearly not made this distinction. Indeed, the HOA primarily rests its argument on an interpretation of the underlying encumbrance in *West Wood Investments, Inc.*, 141 Idaho 75, 83, 106 P.3d 401, 409 (2005). This focus is misplaced and fails to appreciate the equitable nature of the relief at issue in these cases. Significantly, the HOA concedes that "the right [meaning whether it was an affirmative right to use or a restrictive covenant] was not discussed in the case, but can be

presumed to arise from the some other recorded document." *See* HOA Reply Memo in Support of MSJ, p.3. The right was not discussed because it was irrelevant. As explained by the Supreme Court in *West Wood*, the equities turn on whether the parties had notice of the agreement and not on how the right can be characterized. Regardless, the HOA fails to appreciate what actually happened in *West Wood* and similarities between what the petitioners sought in that case and what the Lees seek here.

West Wood involved an agreement, reflected only in a conveyance, that a particular building lot would be used for recreational purposes *and* could be used by the other members of the planned community. It is difficult to appreciate how this underlying agreement is meaningfully different than the agreement here, where there was an agreement that would give the Lees access to a common area, here, a road, where the Lees have had access to that road and where the HOA could presumably prevent access. The court did not focus on the "kind of right" it was dealing with because that did not matter. *See West Wood Investments, Inc.*, 141 Idaho 75, 83, 106 P.3d 401, 409 (2005) ("the interest asserted by the Owners [that they had a right to use a common area] was an equitable interest..."). Indeed, the Supreme Court recognized that the trial court erred by not focusing on "notice." *West Wood*, 141 Idaho at 85, 106 P.3d at 411 ("The difficulty presented by this inquiry is that the district court did not ground its judgment in the question of notice.").

Here, for obvious reasons, the HOA would like to avoid the issue of notice. And, the primary argument asserted by the HOA is that the Lees claims are precluded because they assert an affirmative right to use property instead of a negative restrictive covenant.

> The Lees are not seeking to limit Willow Creek's use of Kemp Road (which would be a restrictive covenant). Rather, they are seeking a right of use over Kemp Road (which is an affirmative easement). Because the Lees are not seeking a restrictive covenant, which may be created by conduct, but rather they are

> seeking an affirmative right to use the land of Willow Creek, in order to prevail at trial they must provide a written agreement complying with the statute of frauds.

See Defendant's Motion for Summary Judgment Memo., pp. 5-6. Again, to be clear, the plaintiffs in *West Wood* were asserting for the same thing. The Petitioners in *West Wood* wanted to be able to use a common area, just as here, the Lees are wanting to use Kemp Road. Both asserted the the existence of an affirmative right to access and use common area, in *West Wood*, Lot 5, and here, Kemp Lane. In West Wood, the basis of that asserted right was reflected in a conveyance and the actions of the parties. Here, the basis for that right is an actual agreement, the 1997 Agreement, of which, an agreement of which the evidence in the record shows the HOA had actual and constructive notice. In terms of equitable relief, there is no difference.[5] Accordingly, the Lees submit that like the petitioners' in West Wood, they too are entitled to equitable relief, an equitable servitude that precludes the HOA from asserting any right that would preclude the Lees from using the access points created by the HOA's predecessor in interest the Kemp Family Trust.

---

[5] The HOA also that Idaho requires a "common grantor of the properties at issue...." Defendant's Motion for Summary Judgment, p.15-16 ("The Lees have no evidence that they purchased a lot in a planned unit development from the Kemp Family Trust (or that there is some other common grantor of property) and they are not contending they have a right to impose negative restrictions on the use of Kemp Road.). Again, the HOA fails to appreciate the equitable nature of the relief request and how Idaho focuses on these equities as opposed to other states.

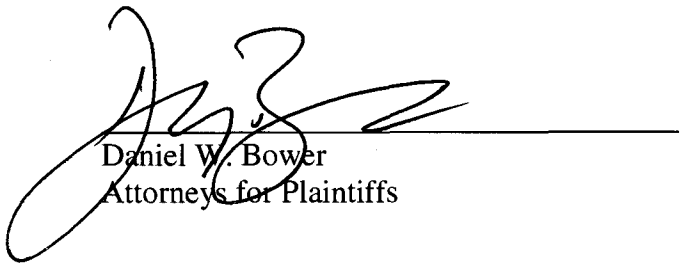
In Idaho, a "planned unit development" can be the basis for imposing an equitable interest in that it can be enforced based on actual or constructive notice. There does not have to be a written agreement. This is significant because it illustrates how Idaho focuses on the equitable circumstances of each case. As explained by the Supreme Court in *West Wood*, "[e]quitable interests may arise because of the actions of the parties" even including "oral representations." *West Wood Investments, Inc.*, 141 Idaho at 84, 106 P.3d at 410. Clearly, if this is the case, the Idaho Supreme is not limiting "equitable interests" to only subcategory of individuals that fall within a legal distinction. Idaho considers the circumstances in equity to determine whether relief should be granted.

CONCLUSION

In light of the foregoing, the Lees respectfully request that the Court grant summary judgment finding that Kemp Road, owned by the Willow Creek HOA, is subject to an encumbrance, an equitable servitude, condition and/or restriction that allows the Lees access to Kemp Road consistent with the directives of the 1997 Agreement. Alternatively, to the extent that this Court concludes that full summary judgment is precluded, the Lees would submit that they are entitled to partial summary judgment on the question of whether the 1997 Agreement has been partially performed.

DATED: August 7, 2017.

STEWART TAYLOR & MORRIS PLLC



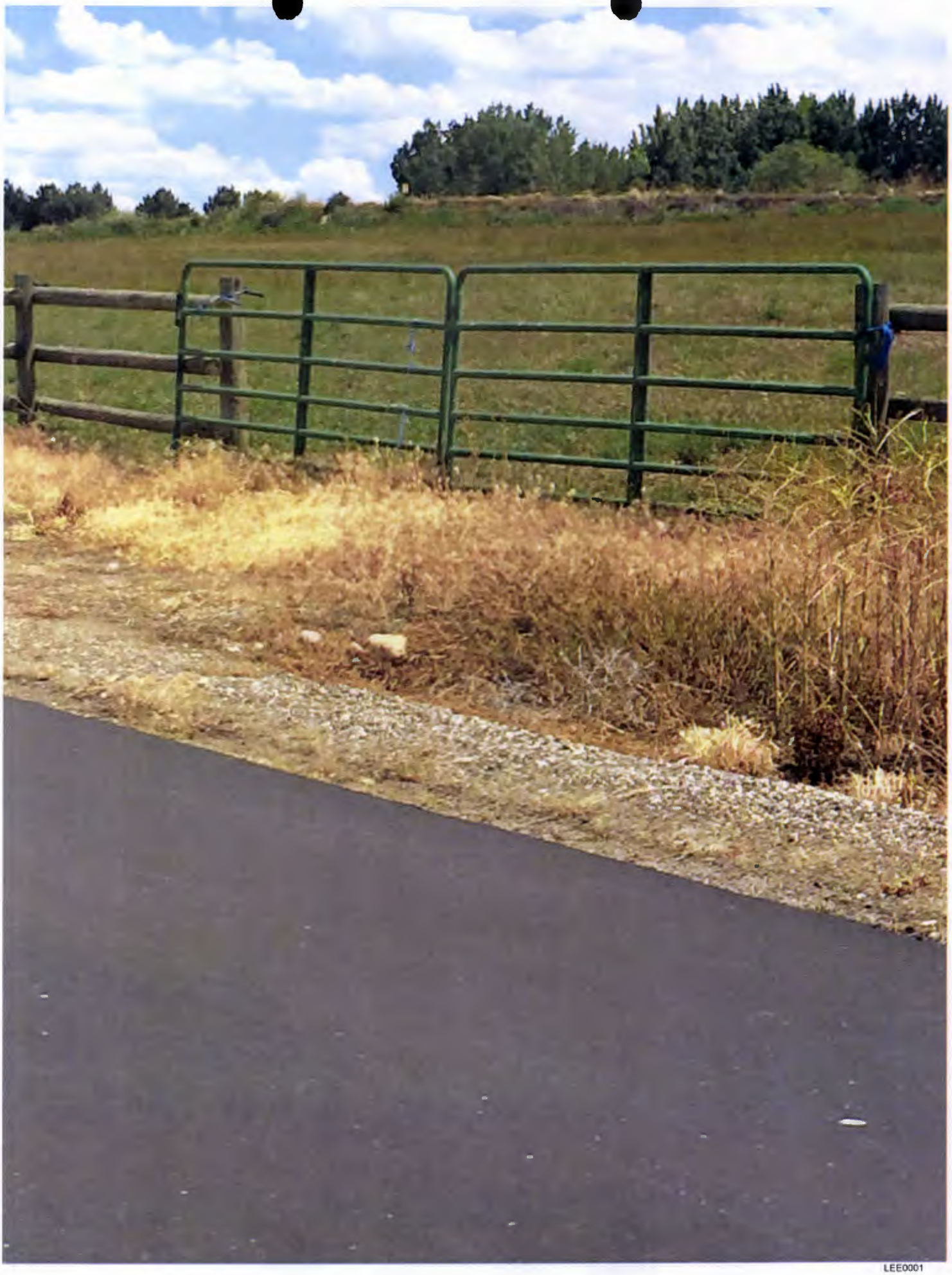
Daniel W. Bower
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on August 7, 2017, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Christ T. Troupis TROUPIS LAW OFFICE, P.A. 801 E. State Street, Ste. 50 P.O. Box 2408 Eagle, ID 83616 *Attorneys for Defendant Willow Creek Ranch Estates No. 2 Subdivision Homeowners' Association, Inc.*	☐ ☐ ☒ ☐	U.S. Mail Hand Delivered Facsimile: (208) 938-5482 Email: ctroupis@troupislaw.com
Matthew C. Parks ELAM & BURKE, P.A. 251 East Front Street, Suite 300 Post Office Box 1539 Boise, Idaho 83701 *Attorneys for Defendant Willow Creek Ranch Estates No. 2 Subdivision Homeowners' Association, Inc.*	☐ ☐ ☒ ☐	U.S. Mail Hand Delivered Facsimile: (208) 384-5844 Email: mcp@elamburke.com
Honorable Christopher S. Nye Canyon County Courthouse 1115 Albany Street Caldwell, ID 83605	☐ ☐ ☐ ☒	U.S. Mail Hand Delivered Facsimile: Email: acahill@canyonco.org Clerk Copy

Gabrielle Cole



LEE0001

LEE0002

LEE0003

LEE0004

LEE0005

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

DALE LEE and KATHI LEE, husband and wife, Plaintiffs, vs. WILLOW CREEK RANCH ESTATES NO. 2 SUBDIVISION HOMEOWNERS' ASSOCIATION, INC., and Idaho corporation; and DOES I-X, inclusive, Defendants.	Case No.: CV 2016-3425 **MEMORANDUM DECISION AND ORDER ON PARTIES' MOTIONS FOR SUMMARY JUDGMENT AND HOA'S MOTION TO AMEND**

I. INTRODUCTION

Both parties move for summary judgment. The Willow Creek Ranch Estates No. 2 Subdivision Homeowners' Association, Inc. ("HOA") moves to amend its answer to add affirmative defenses. The parties submitted these matters on the briefs. The court trial is set to begin on September 21, 2017.

II. FACTUAL BACKGROUND

This case is about whether Dale and Kathi Lee ("Lees") have a right to use Kemp Road. The HOA owns Kemp Road.

The Lees and the HOA's predecessor in interest, the Kemp Family Trust ("Kemp"), owned adjoining land in Middleton. The Lees and Kemp wanted to develop their respective

properties into subdivisions. In June 1997, the Lees and Kemp executed an "Agreement for Sale of Real Property" ("97 Agreement"), in which the Lees agreed to sell 1.8 acres to Kemp. The 97 Agreement provided:

> 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 governmental approvals.

(Dale Lee Decl., dated June 20, 2016, Ex. B). The Lees are the "Seller," Kemp is the "Buyer," and the "gravel road" ultimately became Kemp Road. The 97 Agreement did not have a legal description and it was not recorded.

In August 1997, the Lees executed a warranty deed transferring the 1.8 acres to Kemps. (Matthew C. Parks Aff., dated August 4, 2016, Ex. A). The deed did not reference or incorporate the 97 Agreement. The deed did not expressly reference or reserve an easement for the Lees or otherwise reference the Lees' right to use or access the road. The deed provided that the premises

> are free from all encumbrances, EXCEPT those to which this conveyance is expressly made subject and those made, suffered or done by the Grantee(s); and subject to reservations, restrictions, dedications, easements, rights of way and agreements, (if any) of record, and general taxes and assessments.

(Parks Aff., Ex. A).

Kemp began developing the Willow Creek Ranch Estates No. 2 subdivision. In April 1999, Kemp recorded the Willow Creek subdivision's declaration of covenants, conditions, and restrictions. Neither the CC&Rs nor the recorded plat of the subdivision mentioned an easement or any other right of Lees to use or access Kemp Road.

Kemp completed Kemp Road in 2000. At that time, Kemp constructed 3 driveway access points on Kemp Road. This construction included creation of 24-foot culverts and gravel

extending from Kemp Road to the Lees' property. Around this time, fencing and metal gates corresponding to the 3 access points were constructed along the property.

The HOA was formed in 2002. The Willow Creek subdivision homeowners took over control of the HOA board in February 2005. In April 2005, Kemp deeded Kemp Road to the HOA. The deed did not reference the 97 Agreement or any other right of the Lees' to use or access Kemp Road.

The parties presented disputed issues of fact as to whether the HOA knew about the terms of 97 Agreement or the Lees' purported interest in Kemp Road. The Lees' property is not landlocked.

Both parties move for summary judgment on the question of whether the Lees' have any enforceable right to access and use Kemp Road.

III. LEGAL STANDARD

Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." I.R.C.P. 56(a). "A material fact has 'some logical connection with the consequential facts,' and therefore is determined by its relationship to the legal theories presented by the parties." *State v. Yakovac*, 145 Idaho 437, 444 (2008) (quoting *Black's Law Dictionary*, 991 (7th Ed.1999)).

> A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:
>
> (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or
>
> (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

I.R.C.P. 56(c)(1). "The court need consider only the cited materials, but it may consider other materials in the record." I.R.C.P. 56(c)(3).

> In construing the record on a motion for summary judgment, all reasonable inferences and conclusions must be drawn in favor of the party opposing summary judgment. The nonmoving party, however, "may not rest upon the mere allegations or denials of that party's pleadings, but the party's response, by affidavits or ... otherwise ..., must set forth specific facts showing that there is a genuine issue for trial." "A mere scintilla of evidence is not enough to create a genuine issue of fact," but circumstantial evidence may suffice. Still, the evidence offered in support of or in opposition to a motion for summary judgment must be admissible.
>
> The fact that both parties file motions for summary judgment does not necessarily mean that there are no genuine issues of material fact. Moreover, the filing of cross-motions for summary judgment does not transform "the court, sitting to hear a summary judgment motion, into the trier of fact." When cross-motions have been filed and the action will be tried before the court without a jury, however, the court may, in ruling on the motions for summary judgment, draw probable inferences arising from the undisputed evidentiary facts. Drawing probable inferences under such circumstances is permissible since the court, as the trier of fact, would be responsible for resolving conflicting inferences at trial. Conflicting evidentiary facts, however, must still be viewed in favor of the nonmoving party.

Banner Life Ins. Co. v. Mark Wallace Dixson Irrevocable Trust, 147 Idaho 117, 123-24 (2009) (cites omitted); *Huskinson v. Nelson*, 152 Idaho 547 (2012); *Beus v. Beus*, 151 Idaho 235 (2011).

The Court can decide these motions as a matter of law, based upon undisputed facts.

IV. DISCUSSION

The Lees ask the Court to determine their rights and interests with respect to Kemp Road. They argue that they have an affirmative right to access and use Kemp Road, via either an equitable servitude or easement.

In determining what property right a party has (if any), the Court analyzes the case based on the nature of the right the party claims. *Thomas v. Campbell*, 107 Idaho 398, 404, n. 2 (1984); *St. Clair v. Krueger*, 115 Idaho 702 (1989); *Dickson v. Kates*, 133 P.3d 498 (Wash App. 2006).

a. The Lees do not have an equitable servitude

Application or "imposition of equitable servitudes" is within the trial court's discretion. *W. Wood Investments, Inc. v. Acord*, 141 Idaho 75, 82 (2005).

Based on a review of the record and relevant legal authorities, the Court finds that the Lees do not have an equitable servitude conferring a right to access or use Kemp Road.

An equitable servitude "restrict[s] the use of land." *Acord*, 141 Idaho at 83; *Greenfield v. Wurmlinger*, 158 Idaho 591 (2015); BLACK'S LAW DICTIONARY (10 ed. 2014) ("equitable servitude" defined as "restrictive covenant"). Examples include specifying or restricting lot size requirements, building lines, architectural styles, and the uses to which the property may be put. *Birdwood Subdivision Homeowners' Ass'n, Inc. v. Bulotti Const., Inc.*, 145 Idaho 17 (2007); *Acord, supra*; *Sun Valley* cases, 131 Idaho 657 (1998), 138 Idaho 543 (2002); *Middlekauff v. Lake Cascade, Inc.*, 110 Idaho 909 (1986); *Thomas, supra*; *Middlekauff v. Lake Cascade, Inc.*, 103 Idaho 832 (1982); *Restrictive covenant*, BLACK'S LAW DICTIONARY (10 ed. 2014). Unlike an easement, equitable servitudes do not confer an affirmative right to enter and use another's land. *See id.*; *see also, Easements differentiated from real covenants*, THE LAW OF EASEMENTS & LICENSES IN LAND § 1:29; *Fletcher v. Lone Mountain Rd. Ass'n*, 396 P.3d 1229, 1233 (Idaho 2017) ("[R]estrictive covenants are in derogation of the common law right to use land for all lawful purposes, [and] the Court will not extend by implication any restrictions not clearly expressed. All doubts are to be resolved in favor of the free use of land."). The Lees are really claiming an easement right. *Hodgins v. Sales*, 139 Idaho 225, 229 (2003) ("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."); REST. (THIRD) OF PROPERTY (SERVITUDES) §1.2; *Easements differentiated from real covenants*, THE LAW OF EASEMENTS & LICENSES IN LAND § 1:29.

Further support for this conclusion is the fact that more rigid formalities, like the statute of frauds, are required to create an affirmative right to use land (e.g. an easement), whereas equitable servitudes may arise from oral representations or the parties' conduct.

The Lees cite *Acord*, *Bulotti*, and *Middlekauff* to support their servitude theory. Those cases are distinguishable from this case and they do not hold that an equitable servitude confers an affirmative right to use land. Those cases dealt with rights of lot owners in planned unit developments or residential communities to enforce restrictive covenants upon other lots within their residential development. Though those cases talked about lot owners having a right to use common areas, the lot owners' enforceable right was really to restrict selling or changing the use of established common areas. None of those cases say that an equitable servitude confers an affirmative right to use or access land. *See also, Thomas, supra* (not a PUD case).

The Lees do not have an equitable servitude giving them a right to access or use Kemp Road. Therefore, summary judgment is granted in the HOA's favor on this theory.

b. The Lees do not have an easement

The Lees argue that the parties at least partially performed the terms of the 97 Agreement and thus that they have an easement over Kemp Road.

Based on a review of the record and relevant legal authorities, the Court finds that the Lees do not have an easement over Kemp Road.

After the Lees and Kemp executed the 97 Agreement, the Lees executed a warranty deed conveying the subject property to Kemp. The 97 Agreement and the deed both related to the same subject matter. See *Capstar Radio Operating Co. v. Lawrence*, 143 Idaho 704 (2007); *Estes v. Barry*, 132 Idaho 82 (1998); *Jolley v. Idaho Sec., Inc.*, 90 Idaho 373 (1966). The deed did not expressly create or reserve an easement for the Lees to use Kemp Road. The deed did not expressly reference or incorporate the 97 Agreement. Non-descript, generic, or general

"excepting" language in a deed is not sufficient to create or reserve an easement. *Machado v. Ryan*, 153 Idaho 212, 219 (2012); *Lawrence*, 143 Idaho at 709 n. 4; *Bulotti Const., Inc., supra*; *Akers v. D.L. White Const., Inc.*, 142 Idaho 293, 301 (2005). The deed is unambiguous. Even though the deed's terms may vary from the earlier 97 Agreement, the Court looks only to the deed to determine parties' rights. Since the deed does not reserve or create an easement for the Lees' use of Kemp Road, the Lees do not have an easement over Kemp Road. This outcome is supported by several appellate court decisions. *Camp Easton Forever, Inc. v. Inland Nw. Council Boy Scouts of Am.*, 156 Idaho 893, 899 (2014); *Bulotti Const., Inc., supra*; *Lawrence*, 143 Idaho at 708-09; *Goodman v. Lothrop*, 143 Idaho 622 (2007); *Sells v. Robinson*, 141 Idaho 767, 771 (2005); *Estes*, 132 Idaho at 85; *Jolley,* 90 Idaho at 382.

The issues of notice or knowledge of a bona fide purchaser are irrelevant and moot. *Goodman*, 143 Idaho at 626-27.

Alternatively, the Court finds that the doctrine of part performance is unavailable to enforce the purported easement.

The doctrine of part performance provides that, when an agreement to convey real property fails to satisfy the statute of frauds, the agreement may nevertheless be specifically enforced when the purchaser has partly performed; however, before specific enforcement may be obtained, the underlying contract must be proven by clear and convincing evidence, and the proof must show that the contract is complete, definite, and certain in all material terms, or that the contract contains provisions that were capable in themselves of being reduced to certainty. *Nicholson v. Coeur D'Alene Placer Mining Corp.*, 161 Idaho 877, 882 (2017); *Ray v. Frasure*, 146 Idaho 625, 629 (2009); *Bauchman-Kingston Partnership, LP v. Haroldsen*, 149 Idaho 87 (2008); *Chapin v. Linden*, 144 Idaho 393, 396 (2007); *Lexington Heights Development, LLC. V.*

Crandlemire, 140 Idaho 276 (2004); *Bear Island Water Ass'n, Inc. v. Brown*, 125 Idaho 717 (1994); *Thomas v. Campbell*, 107 Idaho 398, 404 (1984). Material terms include parties to contract, subject matter of contract, price or consideration, and description of property. *Id.*

The easement provision in the 97 Agreement is 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, to allow enforcement by operation of the doctrine of part performance.

Thus, summary judgment is granted in the HOA's favor on the question of whether the Lees' have an easement over Kemp Road.

V. CONCLUSION

For the reasons set forth above, the HOA is entitled to summary judgment.

ORDER

THEREFORE, IT IS HEREBY ORDERED THAT

1. The HOA's motion for summary judgment is GRANTED;
2. The Lees' motion for summary judgment is DENIED;
3. The HOA's motion to amend is DENIED as moot.
4. Counsel for the HOA is to submit a judgment that complies with this memorandum decision and order.

DATED: 3/Aug, 2017

Chris Nye
District Judge

CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 31 day of August, 2017, I caused to be served a true copy of the foregoing ORDER by the method indicated below, and addressed to each of the following:

Matthew C. Parks
ELAM & BURKE, P.A.
251 East Front Street, Suite 300
P.O. Box 1539
Boise, ID 83701

☑ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ E-mail
☐ Telecopy

Daniel W. Bower
STEWART TAYLOR & MORRIS, PLLC
12550 W. Explorer Drive, Suite 100
Boise, ID 83713

☑ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ E-mail
☐ Telecopy

Clerk of the Court

By _____
Deputy Clerk

ORIGINAL

FILED
8:21 A.M. P.M.
SEP 14 2017
CANYON COUNTY CLERK
T. PETERSON, DEPUTY

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

DALE LEE and KATHI LEE, husband and wife,

Plaintiffs,

vs.

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

Defendants.

Case No. CV-16-3425*C

JUDGMENT

JUDGMENT IS ENTERED AS FOLLOWS:

1. Plaintiffs' Complaint is dismissed with prejudice.

DATED this 13 day of Sept, 2017.

CHRIS NYE
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 14 day of September, 2017, I caused a true and correct copy of the foregoing document to be served as follows:

Daniel W. Bower
STEWART TAYLOR & MORRIS, PLLC
12550 W. Explorer Drive, Suite 100
Boise, ID 83713

[X] U.S. Mail
[ ] Hand Delivery
[ ] Via Facsimile 345-4461

Matthew C. Parks
ELAM & BURKE, P.A.
251 E. Front St., Ste. 300
P.O. Box 1539
Boise, ID 83701

[X] U.S. Mail
[ ] Hand Delivery
[ ] Via Facsimile 384-5844

Clerk of the Court

Daniel W. Bower, ISB #7204
STEWART TAYLOR & MORRIS PLLC
12550 W. Explorer Drive, Suite 100
Boise, Idaho 83713
Telephone: (208) 345-3333
Fax No.: (208) 345-4461
dbower@stm-law.com

Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

DALE LEE and KATHI LEE, husband and wife,

Plaintiffs/Appellants,

vs.

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

Defendants/Respondents.

Canyon County Case No. CV 16-3425

NOTICE OF APPEAL

FEE CATEGORY: L4
FILING FEE: $129.00

TO: THE ABOVE NAMED RESPONDENTS, WILLOW CREEK RANCH ESTATES NO. 2 SUBDIVISION HOMEOWNERS' ASSOCIATION, INC., AND THE PARTY'S ATTORNEY, MATTHEW C. PARKS, ELAM & BURKE, P.A., POST OFFICE BOX 1539, BOISE, IDAHO 83701, AND THE CLERK OF THE ABOVE-ENTITLED COURT

NOTICE IS HEREBY GIVEN THAT:

1. The above named Appellants, DALE LEE and KATHI LEE, appeals against the above-named Respondents to the Idaho Supreme Court from the final judgment entered on August 31, 2017 in the above-entitled action, Honorable Judge Chris S. Nye presiding.

2. That the party has a right to appeal to the Idaho Supreme Court, and the judgment described in paragraph 1 above is appealable under and pursuant to Idaho Appellate Rule 11(a)(1).

3. Appellants provide the following preliminary statement on appeal which the Appellants then intend to assert in the appeal. This preliminary statement, however, provides only preliminary issues and shall in no way prevent the Appellant from asserting other issues on appeal. The preliminary issues on appeal are:

a. Did the district court err in concluding that the Lees do not have an equitable servitude conferring a right to continued access and use of Kemp Road?

b. Did the district court err in concluding that the Lees do not have an easement over Kemp Road, where the easement agreement was performed by the parties and where the applicable deed related to Kemp Road states that it is "subject to all existing easements and rights-of-way of record or implied"?

4. The Appellants request the following documents to be included in the clerk's record in addition to those automatically included under Rule 28, I.A.R:

a. All pleadings, supporting memorandum, declarations and affidavits filed in this action, including but not limited to 1) June 20, 2016 Plaintiffs' Motion for Summary Judgment, supporting memorandum and documents (including the declarations of Alan Mills and Dale Lee); 2) May 18, 2017 Defendant's Motion for Summary Judgment, supporting and opposing documents (including opposition memorandum and June 21, 2017 Affidavit of Richard Horn); and July 21, 2017 Plaintiff's Motion for Summary Judgment or Alternatively Partial Summary Judgment on Issue of Partial Performance (and supporting documents).

5. I certify:

a. That we are not requesting a transcript and accordingly, no notice has been provided to any reporter;

b. The appellate filing fee in the amount of $129.00 has been paid; and,

c. That service has been made upon the trial court and all parties required to be served pursuant to Rule 20.

DATED: September 22, 2017

STEWART TAYLOR & MORRIS PLLC

Daniel W. Bower
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on September 22, 2017, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Christ T. Troupis
TROUPIS LAW OFFICE, P.A.
801 E. State Street, Ste. 50
P.O. Box 2408
Eagle, ID 83616

☒ U.S. Mail
☐ Hand Delivered
☐ Facsimile:
☐ Email: ctroupis@troupislaw.com

Attorneys for Defendant Willow Creek Ranch Estates No. 2 Subdivision Homeowners' Association, Inc.

Matthew C. Parks
ELAM & BURKE, P.A.
251 East Front Street, Suite 300
Post Office Box 1539
Boise, Idaho 83701

☒ U.S. Mail
☐ Hand Delivered
☒ Facsimile: (208) 384-5844
☐ Email: mcp@elamburke.com

Attorneys for Defendant Willow Creek Ranch Estates No. 2 Subdivision Homeowners' Association, Inc.

Gabrielle Cole

CV16-03425

In the Supreme Court of the State of Idaho

FILED
A.M.

DEC 14 2017

CANYON COUNTY CLERK
K WALDEMER, DEPUTY

DALE LEE and KATHI LEE, Husband and Wife, Plaintiffs-Appellants, v. WILLOW CREEK RANCH ESTATES NO. 2 SUBDIVISION HOMEOWNERS' ASSOCIATION, INC., an Idaho corporation, Defendant-Respondent, and DOES I-X, inclusive, Defendants.	ORDER DISMISSING APPEAL Supreme Court Docket No. 45390-2017 Canyon County No. CV-16-3425

An ORDER CONDITIONALLY DISMISSING APPEAL was issued by this Court on November 30, 2017, as it appeared that the balance due ($61.85) had not been paid to the District Court for preparation of the Clerk's Record. Appellants were instructed to pay the balance due ($61.85) to the District Court Clerk on or before Wednesday, December 6, 2017. Subsequently, the District Court advised this Court that the balance due remains unpaid.

WHEREAS, the balance due for preparation of the Clerk's Record having not been paid to the District Court Clerk; therefore,

IT HEREBY IS ORDERED that this appeal be, and hereby is, DISMISSED.

DATED this 13th day of December, 2017.

For the Supreme Court

Karel A. Lehrman, Clerk

cc: Counsel of Record
District Court Clerk
District Judge Christopher S. Nye

In the Supreme Court of the State of Idaho

FILED
A.M. P.M.
DEC 14 2017
CANYON COUNTY CLERK
K WALDEMER, DEPUTY

DALE LEE and KATHI LEE, Husband and Wife, Plaintiffs-Appellants, v. WILLOW CREEK RANCH ESTATES NO. 2 SUBDIVISION HOMEOWNERS' ASSOCIATION, INC., an Idaho corporation, Defendant-Respondent, and DOES I-X, inclusive, Defendants.	ORDER TO WITHDRAW DISMISSAL AND REINSTATE APPEAL Supreme Court Docket No. 45390-2017 Canyon County No. CV-16-3425

An ORDER DISMISSING APPEAL was issued on December 13, 2017, for the reason the balance due ($61.85) had not been paid by to the District Court, pursuant to this Court's Order Conditionally Dismissing Appeal entered on November 30, 2017. On December 14, 2017, Gabrielle Cole, a Paralegal in the law firm of Stewart Taylor & Morris, contacted this Court and advised their firm did not receive the previous electronic notifications in this appeal. Subsequently, the District Court confirmed counsel for Appellant has now paid the balance due ($61.85) by credit card. Therefore,

IT HEREBY IS ORDERED that the ORDER DISMISSING APPEAL issued by this Court on December 13, 2017, shall be WITHDRAWN and proceedings in this appeal are REINSTATED.

IT FURTHER IS ORDERED that the Clerk's Record shall be served on counsel and the due date for filing the CLERK'S RECORD with this Court is reset to January 19, 2018.

DATED this 14th day of December, 2017.

For the Supreme Court

Karel A. Lehrman, Clerk

cc: Counsel of Record
District Court Clerk
District Judge Christopher S. Nye

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

DALE LEE and KATHI LEE, Husband and Wife, Plaintiffs-Appellants, -vs- WILLOW CREEK RANCH ESTATES NO. 2 SUBDIVISION HOMEOWNERS' ASSOCIATION, INC., an Idaho corporation, Defendant-Respondent, and DOES I-X, inclusive, Defendants.	)	Case No. CV-16-03425*C CERTIFICATE OF EXHIBITS

I, CHRIS YAMAMOTO, Clerk of the District Court of the Third Judicial District of the State of Idaho, in and for the County of Canyon, do hereby certify that the following are being sent as exhibits as requested in the Notice of Appeal:

NONE

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court at Caldwell, Idaho this 15th day of December, 2017.

DISTRICT COURT STATE OF IDAHO COUNTY OF CANYON THIRD JUDICIAL DISTRICT

CHRIS YAMAMOTO, Clerk of the District Court of the Third Judicial District of the State of Idaho, in and for the County of Canyon.

By: K Waldemer Deputy

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

DALE LEE and KATHI LEE, Husband and Wife, Plaintiffs-Appellants, -vs- WILLOW CREEK RANCH ESTATES NO. 2 SUBDIVISION HOMEOWNERS' ASSOCIATON, INC., and Idaho corporation, Defendant-Respondent, and DOES I-X, inclusive, Defendants.	Case No. CV-16-03425*C CERTIFICATE OF CLERK

I, CHRIS YAMAMOTO, Clerk of the District Court of the Third Judicial District of the State of Idaho, in and for the County of Canyon, do hereby certify that the above and foregoing Record in the above entitled case was compiled and bound under my direction as, and is a true, full correct Record of the pleadings and documents under Rule 28 of the Idaho Appellate Rules.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court at Caldwell, Idaho this 15th day of December, 2017.

CERTIFICATE OF CLERK

DISTRICT COURT STATE OF IDAHO COUNTY OF CANYON THIRD JUDICIAL DISTRICT

CHRIS YAMAMOTO, Clerk of the District Court of the Third Judicial District of the State of Idaho, in and for the County of Canyon.

By: K Waldemer Deputy

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

DALE LEE and KATHI LEE, Husband and wife, Plaintiffs-Appellants, -vs- WILLOW CREEK RANCH ESTATES NO. 2 SUBDIVISION HOMEOWNERS' ASSOCIATION, INC., an Idaho corporation, Defendant-Respondent. and DOES I-X, inclusive, Defendants.	)	SUPREME COURT NO. 45390-2017 CERTIFICATE OF SERVICE

I, CHRIS YAMAMOTO, Clerk of the District Court of the Third Judicial District of the State of Idaho, in and for the County of Canyon, do hereby certify that I have personally served or had delivered by United State's Mail, postage prepaid, one copy of the Clerk's Record to the attorney of record to each party as follows:

Daniel W. Bower, STEWART TAYLOR & MORRIS, PLLC
12550 W. Explorer Drive, Suite 100, Boise, Idaho 83713

Chris T. Troupis, TROUPIS LAW OFFICE. P.A.
801 E. State Street,Ste. 50, PO Box 2408, Eagle, Idaho 83616

CERTIFICATE OF SERVICE

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court at Caldwell, Idaho this 15th day of December, 2017.

CHRIS YAMAMOTO, Clerk of the District
Court of the Third Judicial
District of the State of Idaho,
in and for the County of Canyon.
By: K Waldemer Deputy

CERTIFICATE OF SERVICE