7-3-2018

Galvin v. City of Middleton Appellant's Reply Brief Dckt. 45578

IN THE SUPREME COURT OF THE STATE OF IDAHO

MARTIN C. GALVIN AND PATRICIA L. GALVIN, Plaintiffs/Respondents, vs. CITY OF MIDDLETON, Defendant/Appellant.	Supreme Court No. 45578-2017 District Case No. CV-2016-6062

DEFENDANT/APPELLANT'S REPLY BRIEF

APPEAL FROM THE DISTRICT COURT OF THIRD JUDICIAL DISTRICT, IN AND FOR THE COUNTY OF CANYON

HONORABLE GEORGE SOUTHWORTH, DISTRICT JUDGE, PRESIDING

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I. INTRODUCTION

Pursuant to Idaho Appellate Rule 34(c) and 35(c), Appellant City of Middleton ("City") submits this Reply Brief in rebuttal to the arguments by Martin and Patricia Galvin (the "Galvins") in their Respondent's Brief filed on June 13, 2018. The City restates and incorporates the Statement of Facts and the Course of Proceedings in its *Appellant's Opening Brief* here. As set forth in the *Appellant's Opening Brief* and this *Reply Brief*, the District Court's grant of summary judgment should be reversed.

II. ARGUMENT

A. Material Issues Of Fact Exist That Should Have Precluded Summary Judgment Granted.

Galvins argue that summary judgment was proper in this because it was a bench trial rather than a jury trial and therefore with a bench trial the court is not required to draw inferences in favor of the non-moving party. *See Respondent's Brief pp. 18-19.* Applying that rule of law to this case, Galvins argue that their application to rezone their property to a golf course does not lead to an inference that they intended to abandon the prescriptive easement. The Galvins misapply the summary judgment standard where issues are tried on a bench trial.

The Galvins quote various decisions from this Court that state, "When an action will be tried before the court without a jury, the judge is not constrained to draw inferences in favor of the party opposing a motion for summary judgment but rather the trial judge is free to arrive at the most probable inferences to be drawn from uncontroverted evidentiary facts." See e.g. *Loomis v. City of Hailey*, 119 Idaho 434, 436–37, 807 P.2d 1272, 1274–75 (1991) (underlining added). The City agrees with that quoted language but disagrees with the Galvins' argument that this is the full

standard for summary judgement where the action involves a bench trial. What happens when there are "controverted" facts? This Court's answer in prior decisions is summary judgment is improper and should not be granted.

In *Losee v. Idaho Co.*, 148 Idaho 219, 222, 220 P.3d 575, 578 (2009), this Court explained that "[w]hen an action will be tried before a court without a jury, 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 because the court, as the trier of fact, would be responsible for resolving conflicting inferences at trial." However, where controverted facts exist, that is "reasonable persons could reach differing conclusions or draw conflicting inferences from the evidence presented, then summary judgment is improper." *Id.* (underlining added) *citing Boise Tower Assocs., LLC v. Hogland,* 147 Idaho 774, 778, 215 P.3d 494, 498 (2009). "Conflicting evidentiary facts, however, must still be viewed in favor of the nonmoving party." *Id. citing Banner Life Insurance Co., v. Mark Wallace Dixon Irrevocable Trust,* 147 Idaho at 124, 206 P.3d at 488 (2009).

In this case, the Galvins' attempt to minimize the significance of their actions that they took to get their property rezoned by arguing that their application to rezone their property is not enough to create a material issue of fact. Despite this matter being tried without a jury, the evidence submitted by the City on summary judgment raised conflicting evidentiary facts that the Galvins were going to stop faming their property and therefore the purpose for the agricultural prescriptive easement would no longer exist. Thus, summary judgment should not have been granted. Those actions included Mr. Galvin writing to the Canyon County Planning and Zoning

stating that his intent is to "convert 260 acres of agricultural and dry grazing ground...to approximately 120 lots and a 18 hole golf course." *See* **Exhibit F** to *Villegas Affd.*, R. 183-186. Importantly, Mr. Galvin stated in a letter to Canyon County, that he no longer desired to farm his land:

> This ground has been in my family for approximately 122 years I've farmed here for approximately fifty years and due to my health and age I no longer have the desire to farm and I feel this will be a good transition for the city of Middleton and the surrounding area.

Id. (underlining added). The Galvin application even stated that "[a]ll farm operations will stop and land will be converted to residential use." *See* **Exhibit C** to *Villegas Affd.* at p. 3, ¶ 9, R. 155. Canyon County entered its Findings of Fact and Conclusions of Law granting the rezone and conditional use permit for the golf course. In its Findings and Conclusions, Canyon County made a specific finding that "Martin Galvin has farmed the land for approximately fifty (50) years and is no longer able to farm the land." *See* **Exhibit G** to *Villegas Affd.*, R. 197.

Galvins' Reply Brief fails to address or discuss why those actions do not draw conflicting inferences and/or raise material issues of fact that the Galvins' present intent was to no longer farm their property thereby destroying the purpose of the prescriptive easement. Reasonable minds could reach different conclusions whether the Galvins no longer needed the easement because they were giving up farming their property. "The acts claimed to constitute the abandonment of an easement must show the destruction thereof, or that its legitimate use has been rendered impossible by some act of the owner thereof, or some other unequivocal act showing an intention to permanently abandon and give up the easement." *O'Brien v. Best*, 68 Idaho 348, 357–58, 194 P.2d 608, 613–14 (1948); *see also Chatham v. Blount Cty.*, 789 So. 2d 235, 241 (Ala. 2001) (Alabama

Supreme Court held that owner of an express easement as a railroad right-of-way had abandoned easement when the owner sold the rails, crossties, and track material, rendering impossible the use of the easement as a railroad right-of-way or for railroad purposes).

Rather than address the specific acts they took during the two-year rezone process City's arguments described above, the Galvins attempt to draw this Court's attention away from those acts and focus this Court's attention on the allegation that they continued to farm their property after the rezone and even had they turned their property to a golf course, the Galvins would have still have used the easement. Both arguments are unavailing.

First, abandonment looks at the present intent to abandon, which is defined as an intent "...to leave, quit, renounce, resign, surrender, relinquish, vacate, discard. Abandon denotes the absolute giving up of an object, often with the further implication of its surrender to the mercy of something or someone else." *Carrington v. Crandall*, 65 Idaho 525, 147 P.2d 1009, 1011–12 (1944) *quoting* Webster's New Internat'l. Dictionary, 1941. "Abandonment is a matter of intent, coupled with corresponding conduct; thus a question of fact." *O'Brien v. Best*, 68 Idaho 348, 357, 194 P.2d 608, 613 (1948). Here, it is irrelevant what the Galvins did after-the-fact from the date they obtained the rezone changing the use of their property. Anyone can change their mind after-the-fact. In fact, it is undisputed that beginning around the mid-1990s, Mike Wagner began farming the Galvin Property, and the Galvins stopped personally farming. *See* R. 70, ¶ 25. After the economy and the Galvins' financial situation did not permit them to immediately start development of the golf course, the Galvins had sufficient time to hedge against potential financial loss by continuing the "sharecropping arrangement" with Mike Wagner, who continued to farm

the Galvin Property. *Compare* R. 225, ¶¶ 4–5, *with* R. 121, ¶¶ 6–7. Thus, the analysis of abandonment in this case should focus on the Galvins' intent during that two-year timeframe they worked to get the rezone not what the property was used for after the rezone.

Galvins' argument that they would still use the easement if the property was a golf course (Respondent's Brief pg. 21) is likewise unavailing on the issue of abandonment. The evidence on summary judgment was the purpose of the prescriptive easement was for an agricultural use. Along those lines, Martin Galvin argued that the dimensions of the prescriptive easement must be wide enough to accommodate his agricultural use including the use of a farming combine. It is ridiculous to say that had the property been converted to residential homes and a golf course, the Galvins would still be using the prescriptive easement for agricultural uses such as driving a combine across a golf course and subdivision streets. There was also no evidence produced that the irrigation ditch would remain in the same location once the property was developed into a golf course.

B. Canyon County's Grant of Comprehensive Plan Amendment and Rezone Were Sufficient to Meet the "Further Acts" Requirement of Abandonment.

The Galvins argue that the Comprehensive Plan Amendment and Rezone they obtained to turn the property into a golf course was not sufficient to meet the "further acts" requirement for abandonment because the Canyon County's Findings of Fact Conclusions of Law allegedly state that the "rezone itself recognizes that it is for rezoning only and does not represent the current of future property or easements." See *Respondent's Brief pg. 22.* The Galvins however misconstrue the County's Findings of Fact, Conclusions of Law and Order because the language they are relying on is contained within an exhibit to the Order. *See* (R. 206, 208 and 210). That exhibit is

merely the survey submitted by the Galvins' surveyor Tealy for their property. The note in the survey (R. 206, 208 and 210) however is not an official finding or decision from Canyon County; the use of the exhibit was to identify the metes and bounds description of the Galvin property sought to be rezoned.

Galvins also argue that during their application to rezone their property, they never made representations to the county that they intended to abandon the prescriptive easement or irrigation ditch. That is not the case. In addition to the Tealy Survey attached to the Findings of Fact, Conclusions of Law and Order as an exhibit, there are two maps, one hand drawn (R. 212) and the other a scale map (R. 213). Both maps are attached to the back of this *Reply Brief.* On both maps, the Galvins do not identify the prescriptive easement they claim to have. In fact, on the hand drawn map, we see a roadway, Old Middleton Road, traverse though the Galvin property and turn into Willis and stop immediately in front of the Hazel Robinson property. Neither map shows that the Galvins had or were keeping an easement/roadway through the Robinson property.

On the date the requested Comprehensive Plan change/amendment and zoning ordinance was passed, the Galvins completed their clear, unequivocal and decisive act to abandon the easement because they obtained a valid protectable property right that could not be changed or taken away by the government without due process. *See e.g. Jasso v. Camas Cty.*, 151 Idaho 790, 796, 264 P.3d 897, 903 (2011) (held: "due process rights are substantial rights."); *Terrazas v. Blaine Cty. ex rel. Bd. of Comm'rs*, 147 Idaho 193, 198, 207 P.3d 169, 174 (2009) (held: the right to develop one's property is a substantial right). At any time during the two-year process to rezone their property from agriculture to a subdivision and golf course, the Galvins could have withdrawn

their application. The date Canyon County amended its Comprehensive Plan and simultaneously amended its zoning ordinance to rezone the Galvins' property to rural residential and a golf course solidified their position that "[a]ll farm operations will stop and land will be converted to residential use" as stated in their application. *See* **Exhibit C** to *Villegas Affd.* at p. 3, ¶ 9, R. 155. As such, the cessation of farm operations destroyed the purpose for the agricultural prescriptive easement.

III. THE DISTRICT COURT ERRED GRANTING ATTORNEY FEES.

The Galvins argue that the District Court properly awarded attorney fees to the Galvins because it applied the standard under Idaho Code § 12-117 whereas the City argued against granting fees under Idaho Code § 12-121 as if the standard is different which is not the case. Idaho Appellate Courts have equated the quoted language from § 12-117 to mean the same as the frivolous standard of Idaho Code § 12-121. "The standard for awarding attorney fees under Idaho Code section 12–121 is essentially the same as that under Idaho Code section 12–117." *Coeur D'Alene Tribe v. Denney*, 161 Idaho 508, 387 P.3d 761, 778–79 (2015). "This Court has stated that '[b]oth I.C. § 12–117 and § 12–121 permit the award of attorney's fees to the prevailing party if the court determines the case was brought, pursued or defended frivolously, unreasonably or without foundation.' *Nation v. State, Dep't of Correction,* 144 Idaho 177, 194, 158 P.3d 953, 970 (2007)." *Id.*

Next, the Galvins argue that the District Court correctly applied of the holding of *Turner v. Cold Springs Canyon Ltd. P'ship*, 143 Idaho 227, 230, 141 P.3d 1096, 1099 (2006) to find that the City's defense regarding the prescriptive easement's dimensions were frivolous. That *Turner*

holding is factually and procedurally distinguishable from this present case and therefore not applicable. The *Turner* court awarded attorney fees on appeal under § 12-121 holding:

> The Turners request attorney fees on appeal under I.C. 12–121. Under I.C. 12–121, attorney fees are appropriate if the appeal was brought frivolously, unreasonably, or without foundation. The Turners contend that this appeal was brought frivolously because Cold Springs improperly presented new issues and argument in the motions following the summary judgment order and on appeal and because Cold Springs did not provide proper legal authority to support its claims on appeal. At the summary judgment stage, Cold Springs' sole contention was that no easement existed. After losing at summary judgment, Cold Springs argued that an express easement existed and then introduced new issues and arguments. These new issues are the only issues on appeal. This creates a difficult situation because the attorneys on appeal have presented issues that would be debatable had they been argued in the district court by prior counsel. Nonetheless, the burden has fallen on the Turners to defend an appeal that under this record is unreasonable. They are entitled to attorney fees. Cold Springs could have argued these issues in the alternative at the summary judgment stage. It did not. The issues are not proper for appeal. Consequently, Cold Springs brought this appeal frivolously, unreasonably, and without foundation.

Turner v. Cold Springs Canyon Ltd. P'ship, 143 Idaho 227, 230, 141 P.3d 1096, 1099 (2006) (underlining added). Attorney fees were therefore awarded because Cold Springs raised new issues and arguments that should have been raised previously.

In this case, the Galvins' *Memorandum in Support of Summary Judgment* (R. 95-111) never addressed what the dimensions of the prescriptive easement should be. It was the City in its *Memorandum In Opposition To Plaintiffs' Motion for Summary Judgment* who first raised the argument that material issues of fact existed regarding the prescriptive easement's dimensions. Roman numeral III of the City's summary judgment brief was titled "There Are Genuine Issues Of Fact Establishing The Dimensions Of The Prescriptive Easement." *See* (R. 133). Even after the City raised this issue. The Galvins submitted their *Reply Memorandum In Support of Motion for Summary Judgment* (R. 224) and a *Supplemental Declaration of Martin C. Galvin In Reply to*

Opposition of Motion for Summary Judgment (R. 224) but still failed to put forth evidence of the easement's dimensions.

The *Turner* v. *Cold Springs* is distinguishable from this case because unlike Cold Springs who raised new issues after summary judgment was granted, the City raised its defenses during summary judgment arguments and raised this issue once again in its *Motion for Reconsideration* (R. 308) and *Memorandum In Support of Reconsideration* (R. 310). If the Galvins were certain that they submitted evidence on summary judgment regarding the dimensions of the easement they would not have needed to file a *Motion to Alter of Amend Judgment* (R. 340) and a proposed *Amended Judgment* (R. 367) that included a survey of the prescriptive easement's dimensions. The District Court's holding that the City "failed to present any evidence of the easement's dimensions prior to or at summary judgment stage in spite of the Galvins' request for twenty feet to accommodate a combine header," *See Memorandum Decision and Order for Attorney Fees and Costs* (R. 518) and *Order for Attorney Fees and Costs* (R. 559), is wrong and an abuse of discretion.

For the sake of brevity, the City restates and incorporates its arguments in *Appellant's Brief* herein, giving the reasons why the district court erred awarding attorney fees against the City.

IV. ATTORNEY FEES ON APPEAL SHOULD NOT BE AWARDED AGAINST THE CITY.

The Galvins argue that attorney fees should be awarded against the City because the appeal is frivolous. Citing to *State v. Hudson*, 162 Idaho 888, 894, 407 P.3d 202, 208 (2017), the Galvins argue that the City has presented the same argument without providing any additional persuasive law or bringing and therefore the appeal is frivolous. *See Respondent's Brief pg. 27.* Therefore,

the Galvins contend, "The City is simply rehashing its same old arguments. There is nothing new here." *Id.*

Contrary to the Galvins' position, the City has cited to additional persuasive case law on appeal and provided compelling arguments why material issues of fact exist in this case. For example, the Appellant's Brief cites to the holding of *Chatham v. Blount Cty.*, 789 So. 2d 235, 241 (Ala. 2001) to argue that reasonable minds might reach different conclusions whether Mr. Galvin no longer needed the easement because he was giving up farming his land thereby destroying the purpose for the prescriptive easement. *See Appellant's Brief pg.* 25. In *Chatham* the Alabama Supreme Court held that owner of an express easement for a railroad right-of-way had abandoned that easement when the owner sold the rails, crossties, and track material, rendering impossible the use of the easement as a railroad right-of-way or for railroad purposes. *Id.*

In addition to raising additional persuasive legal authority, the City has presented argument by directing this Court to the record on summary judgment as well as transcripts of the hearings to show that material issues of fact existed in this case whether the Galvins' abandoned the agricultural prescriptive easement when they obtained land use approvals to rezone their property to a subdivision and golf course. It cannot be said that the City's arguments on appeal were frivolous.

CONCLUSION

For the reasons stated above, and the reasons set forth in *Appellant's Brief,* the City respectfully requests that this Court reverse the District Court's grant of summary judgment and award of attorney's fees.

DATED this 3 day of July, 2018.

BORTON-LAKEY LAW OFFICES

By: Victor Villegas
Victor Villegas
Attorneys for Defendant/Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 3 day of July, 2018, I caused a true and accurate copy of the foregoing document to be served upon the following as indicated below:

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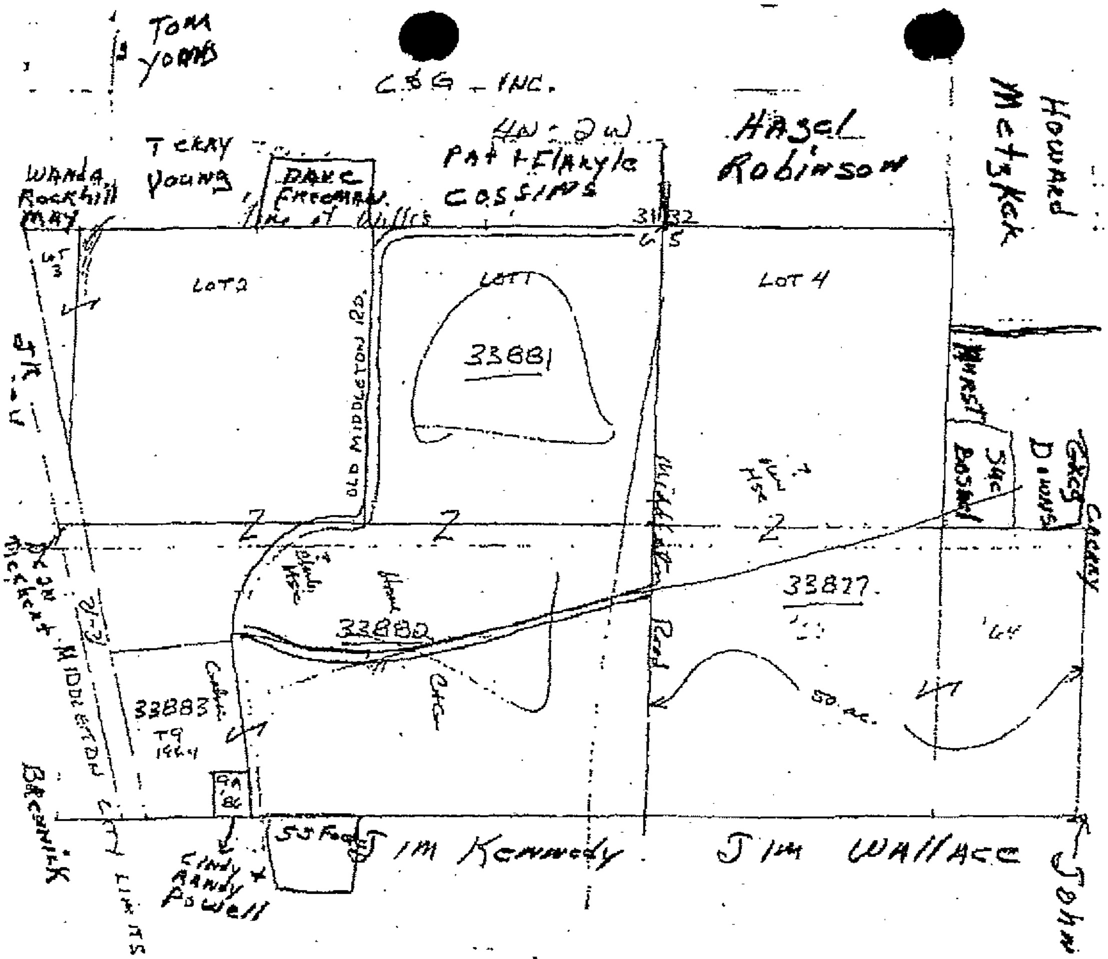


(See Rezone for R34013)

Golf Course + Subdivision

[redacted]

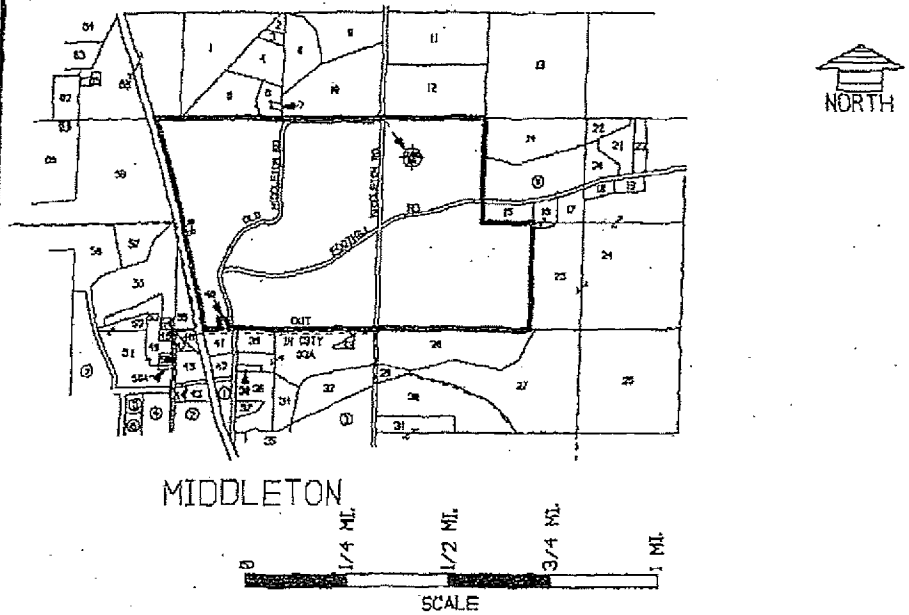
City000144

Case No.

961560L06-4N-2W

1/4 MILE PROPERTY OWNERS

A request by C & C, Inc. for a CONDITIONAL USE PERMIT for an 18 hole golf course and for a REZONE of approximately 55 acres from "A" Agricultural to "R-R" Rural Residential.



1. YOUNG
2. YOUNG
3. THOMAS
4. YOUNG
5. YOUNG
6. FREEMAN
7. FREEMAN
8. DORAMUS/YOUNG
9. SAGER
10. COSSINS
11. FAUERBACH
12. ROBINSON
13. METSKER
14. METSKER
15. DOWNS
16. SIGLOH
17. PAGE
18. G-ERDE
19. G-ERDE
20. PATRICK
21. ABBOTT
22. CITY OF MIDDLETON
23. SAGER
24. G-ERDE
25. G-ERDE
26. G-ERDE
27. G-ERDE
28. WALLACE
29. GERHAUSER
30. JOHNSON
31. SCHOOL DISTR. #134
32. GERHAUSER
33. FOOTE
33A. KENNEDY
34. GERHAUSER
35. FOOTE
36. GERHAUSER
37. FOOTE
38. KENNEDY
39. FOOTE
40. POWELL
41. KRUGER
42. STILLS
43. LEPEL
44. LEPEL
45. OWEN
46. HYDE
47. BRUMMETT
48. TEICHERT
49. TEICHERT
50. WINEHAM
50A. JONES
51. BUNT
52. BUNT
53. TEICHERT
54. TEICHERT
55. BRENNECK
56. TEICHERT
57. BROWN
58. IVIE
59. IVIE
60. HOWARD
61. HOWARD
62. LEHMUCK
63. TAYLOR
64. GERHAUSER
65. KATION
66. ROCKHILL

SUBDIVISIONS

① CROCKETT ADDITION
② MIDDLETON MOBILE HOME ESTATES
③ MOUNTAIN VIEW 1 & 2
④ WEBBER'S ACREAGE
⑤ MORGAN'S ESTATES
⑥ MORGAN'S ESTATES NO. 2
⑦ LLOYD BOWEN ESTATES
⑧ NORTH RIDGE ESTATES

OWNERS ON FILE

Date: 3-14-97 Location: 5,6-4-2, Zoning: A Aerial:

All proportions and dimensions shown on this drawing are approxim

Exhibit E5

#961560

[redacted]

City000145