STATE OF IDAHO)
County of KOOTENAI)ss
FILED April 19, 2021
AT 12:50 O'Clock P. M
CLERK OF DISTRICT COURT
Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

STEVE PARKES,

Plaintiff/Counter-Defendant,
vs.

THE VILLAGE CONDOMINIUM OWNERS, INC., an Idaho Corporation

Defendant/Counter-Claimant/Third party Plaintiff.
vs.

UNIVERSAL LAND COMPANY, an Oklahoma corporation,

Third Party Defendant.

Case No. **CV28-20-3249**

MEMORANDUM DECISION AND ORDER DENYING PLAINTIFF'S AND THIRD-PARTY DEFENDANT'S SECOND MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND

This matter is before the Court on cross motions for summary judgment. plaintiff Steve Parkes (Parkes) and third-party defendant Universal Land Company (Universal) filed their second motion for summary judgment on February 22, 2021, against defendant The Village Condominium Owners (The Village). The Village filed their Motion for Summary Judgment on February 24, 2021.

This is a dispute by a property owner, Parkes, against his homeowner association, The Village. Compl. 1-2, ¶1-3. Parkes owns two parcels of land in The Village. Parkes owns 100% of one parcel and 75% of the other parcel, with Universal owning the other 25% of that parcel. Answer to Compl., Countercl. and Third Party Compl., 4, ¶ 3, 7, ¶¶ 8, 9, and (Parkes') Statement of

Undisputed Facts 2, ¶ 3, 4. Collectively, Parkes and Universal will be referred to in this decision as "Parkes". Parkes' parcels have no improvements on those parcels and The Village now claims Parkes cannot build on those parcels. *Id.* at 2, ¶ 4-5. Parkes claims The Village changed the original CC&R's for the subdivision and failed to follow the proper procedures to change the CC&R's by failing to obtain all the required signatures from the owners of units and lots within the subdivision. *Id.* at, ¶ 6. On May 20, 2020, Parkes filed this lawsuit against The Village, seeking a "Judgment that Plaintiff may construct any improvements in either or both of Plaintiff's parcels consistent with the approved plat for the subdivision" and "Judgment that the modifications to the CC&R's which reduced the ability to rent units within the subdivision are not valid." *Id.,* at ¶ 8-9.

On June 29, 2020, The Village filed its Answer to Complaint, Counterclaim and Third-Party Complaint. The Village claims Parkes' claims are barred by his failure to comply with the Amended Condominium Declaration of The Village. Answer to Compl., Countercl. and Third-Party Compl. 2, ¶ 1. The Village also filed a counter-claim against Parkes and a third-party complaint against Universal (claiming it is a co-owner of one of Parkes' parcels), claiming that any building on these properties was to have been completed within seven years of the recording of the November 17, 1995, Declaration, and now, building on these properties is barred by that declaration. *Id.* 3- 10, ¶ 1-42. The Village seeks declaratory relief that "Pursuant to the terms and meaning of the 2010 Declaration and the Condominium Property Act, Idaho Code§ 55-1501, et seq., all of the Subject Properties are Common Area", and "In the alternative, if the Subject Properties are not Common Area, the time period to complete construction of the buildings has passed." *Id.* at 11, ¶ 44. On August 3, 2020, Parkes/Universal

filed their Answer to Counterclaim and Third-Party Complaint.

On November 6, 2020, Parkes filed a Motion for Summary Judgment, a Declaration of Arthur M. Bistline in Support of Motion for Summary Judgment, a Memorandum in Support of Motion for Summary Judgment, and Plaintiff and Third-Party Defendant's Request for Judicial Notice (requesting this Court take judicial notice of this Court's March 7, 2003, Order on Reconsideration in Kootenai County Case No. CV 2001 5057, *The Village Condominium Owners, Inc., v. The Village Development Group LLC*). On November 20, 2020, The Village filed its Opposition to Plaintiff and Third Party Defendant's Motion for Summary Judgment and a Declaration of Mike Tiffany in Support of Opposition to Plaintiff and Third Party Defendant's Motion for Summary Judgment. On November 25, 2020, Parkes filed Plaintiff and Third Party Defendant's Response to Defendant's Response to Plaintiff and Third Party Defendant's Motion for Summary Judgment. The same document was filed again two days later on November 27, 2020. Also, on November 27, 2020, Parkes filed a Motion to Strike Paragraphs 28 through 30 of the Declaration of Mike Tiffany's Declaration in Opposition to Plaintiff and Third Party Defendant's Motion for Summary Judgment.

Oral argument on these motions was held on December 2, 2020. At that hearing, the Court granted Parkes' motion to strike paragraphs 28-30 of Tiffany's affidavit, and granted Parkes's motion for judicial notice as it was required to under these circumstances pursuant to Idaho Rule of Evidence 201(c)(2). At the conclusion of oral argument, the Court took Parkes/Universal's motion for summary judgment under advisement, and issued a Memorandum Decision and Order on December 7, 2020, denying Parkes' Motion for Summary Judgment.

Parkes filed their Second Motion for Summary Judgment, as well as a

Second Memorandum in Support of Summary Judgment on February 22, 2021. The Village filed a Motion for Summary Judgment and a Memorandum in Support of Defendant's Motion for Summary Judgment on February 24, 2021. The Village filed an Opposition to Plaintiff/Third Party Defendant's Motion for Summary Judgment on March 8, 2021. Parkes filed a Response to Defendant's Response to Plaintiff and Third Party Defendant's Motion for Summary Judgment on March 15, 2021. Parkes filed a Plaintiff and Third Party Defendant's Response to Defendant's Motion for Summary Judgment on March 30, 2021. The Village filed a Reply in Support of Defendant's Motion for Summary Judgment on April 6, 2021. Oral argument on the cross motions for summary judgment was held on April 13, 2021, at the conclusion of which the Motions were taken under advisement.

II. STANDARD OF REVIEW

Idaho Rule of Civil Procedure 56 governs motions for summary judgment. According to Rule 56, summary judgment must be granted "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 party asserting that there is no genuine dispute as to any material fact, or a party asserting that a genuine dispute exists, must support that assertion by "citing to particular parts of materials in the record" or "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).

> If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:
>
> (1) give an opportunity to properly support or address the fact;
> (2) consider the fact undisputed for purposes of the motion;
> (3) grant summary judgment if the motion and supporting materials, including the facts considered undisputed, show that the movant is

entitled to it; or
(4) issue any other appropriate order.

I.R.C.P. 56(e).

The burden of proof is on the moving party to demonstrate the absence of a genuine issue of material fact. *Rouse v. Household Fin. Corp.*, 144 Idaho 68, 70, 156 P.3d 569, 571 (2007) (citing *Evans v. Griswold*, 129 Idaho 902, 905, 935 P.2d 165, 168 (1997)). "Once the moving party establishes the absence of a genuine issue of material fact, the burden shifts to the non-moving party" to provide specific facts showing there is a genuine issue for trial. *Kiebert v. Goss*, 144 Idaho 225, 228, 159 P.3d 862, 864 (2007) (citing *Hei v. Holzer*, 139 Idaho 81, 85, 73 P.3d 94, 98 (2003)). To do so, the non-moving party "must come forward with evidence by way of affidavit or otherwise that contradicts the evidence submitted by the moving party, and that establishes the existence of a material issue of disputed fact." *Chandler v. Hayden*, 147 Idaho 765, 769, 215 P.3d 485, 489 (2009) (citing *Kiebert v. Goss*, 144 Idaho 225, 228, 159 P.3d 862, 865 (2007)). "Circumstantial evidence can create a genuine issue of material fact. . . . However, the non-moving party may not rest on a mere scintilla of evidence." *Shea v. Kevic Corp.*, 156 Idaho 540, 545, 328 P.3d 520, 525 (2014) (quoting *Park West Homes, LLC v. Barnson*, 154 Idaho 678, 682, 302 P.3d 18, 22 (2013)).

> In determining whether material issues of fact exist, all allegations of fact in the record and all reasonable inferences from the record are construed in the light most favorable to the party opposing the motion. *City of Kellogg v. Mission Mountain Interests Ltd., Co.*, 135 Idaho 239, 240, 16 P.3d 915, 919 (2000). When a jury is to be the finder of fact, summary judgment is not proper if conflicting inferences could be drawn from the record and reasonable people might reach different conclusions. *State Dep't of Fin. v. Res. Serv. Co., Inc.*, 130 Idaho 877, 880, 950 P.2d 249, 252 (1997).

Edmondson v. Shearer Lumber Prod., 139 Idaho 172, 176, 75 P.3d 733, 737 (2003).

The moving party may also meet "the 'genuine issue of material fact'

burden. . . by establishing the absence of evidence on an element that the nonmoving party will be required to prove at trial." *Dunnick v. Elder*, 126 Idaho 308, 311, 882 P.2d 475, 478 (Ct. App. 1994). "Such an absence of evidence may be established either by an affirmative showing with the moving party's own evidence or by a review of all the nonmoving party's evidence and the contention that such proof of an element is lacking." *Heath v. Honker's Mini-Mart, Inc.*, 134 Idaho 711, 712, 8 P.3d 1254, 1255 (Ct. App. 2000) (citing *Dunnick* at 311, 882 P.2d at 478).

> Once such an absence of evidence has been established, the burden then shifts to the party opposing the motion to show, via further depositions, discovery responses or affidavits, that there is indeed a genuine issue for trial, or to offer a valid justification for the failure to do so under [I.R.C.P. 56(d)]. *Sanders v. Kuna Joint School Dist.*, 125 Idaho 872, 874, 876 P.2d 154, 156 (Ct.App.1994) (alteration added).

Dunnick at 311, 882 P.2d at 478; *see also Heath* at 712, 8 P.3d at 1255.

III. ANALYSIS OF CROSS-MOTIONS FOR SUMMARY JUDGMENT.

In its December 7, 2020, Memorandum Decision and Order, this Court denied Parkes' first motion for summary judgment and also found that "this is not properly a cross-motion for summary judgment and will only address the motion for summary judgment filed by Parkes/Universal." Mem. Decision and Order 5-6. The motions presently before this Court are truly cross motions for summary judgment.

A. There is no dispute of material fact that Parkes acquired his two parcels with notice of The Village CC&R encumbrances, thus, the encumbrances apply to Parkes.

First, Parkes argues that, "[n]othing in the deeds in this case indicate something less than fee simple was being passed to Parkes, therefore, if the declarant could have developed these parcels, then Parkes can." Mem. in Supp. of (Second) Mot. for Summ. J. 3. Parkes goes on to argue that the CC&R's speak of parties other than the Declarant that can develop undeveloped properties, and therefore they argue that not

only the Declarant can develop on the subject properties. *Id.* at 3-4. Next Parkes argues that, "even if The Village is correct that only the declarant could develop undeveloped parcels, that right was transferred to Parkes because nothing in the deed indicated otherwise." *Id.* at 4. Parkes argues that a fee simple is presumed in a grant of real property, and one of the property rights in a fee simple is "to make lawful use of the property." *Id.* (citing *Pinehaven Planning Bd. v. Brooks*, 138 Idaho 826, 829, 70 P.3d 664, 667 (2003). To this end, Parkes argues that:

> The grantee here had the right to construct residential units on the subject properties which is a lawful use of those properties. The respective grants contain no language that in anyway indicates that it intended to convey less than a fee simple interest and it therefor conveyed the right to construct residential units on the subject properties.

Id. at 5.

This Court finds that Parkes has not put forward any substantively new arguments or evidence in Parkes' Second Motion for Summary Judgment. Parkes has largely retreaded the same arguments presented in their first motion. At most, Parkes has presented a derivative argument, proposing that since the grant of the subject properties they received did not contain, "language that in anyway indicates that it intended to convey less than a fee simple interest... it therefor conveyed the right to construct residential units on the subject properties." *Id.* at 5. This line of reasoning completely ignores the principal issue of this case, which pertains to the question of what rights a successor in interest to the Declarant has under the CC&R's. This Court will address that issue further below.

The Village argues that this Court should grant its Motion for Summary Judgment, which would bar Parkes from building on the subject properties, because, "under the 2010 Declaration, the Declarant had until 2017 to complete the project...,

[d]evelopment on the Subject Properties was not completed within the required timeframe. As such, Parkes and Universal are prohibited from development." Mem. in Supp. of Def.'s Mot. for Summ. J. 5. To this end, The Village argues that, "if Parkes and Universal acquired property rights to the Subject Properties from the Declarant, they also acquired the obligations under the Declarations in effect on that date." Opp'n. to Pl.'s and Third Party Def.'s Second Mot. for Summ. J. 7. The Village also argues:

> The 7-year restriction applies to the development of the entire project—also referred to as the "Master Plan." *Id.* The 2010 Declaration is controlling, and states:
>
> > **Declarant shall complete <u>the project</u>** as shown in the Master Plan Map **in seven (7) years** from the date of the recording of this Declaration.
>
> *Tiffany Dec.*, Ex. A (2010 Declaration, § 3) (emphasis added). This provision sets forth two separate restrictions: 1) the entire project must be completed within 7 years; and 2) the project must be completed by the Declarant. The "project" is defined as "the entirety of The Village as master planned by the Declarant, approved by government agencies, and evidence in the recording of the Declaration." *Tiffany Dec.*, Ex. A (2010 Decl., § 1.1.23). The Subject Properties (as defined in The Village's Memorandum in Support of Motion for Summary Judgment, p.2) fall within the definition of the "project"—therefore, any development of the Subject Properties must comply with both restrictions described above.
>
> * * *
>
> Parkes and Universal have not presented evidence to support his position that the 7-year restriction does not apply to builders other than the Declarant. The 2010 Declaration expressly states that the "project" must be completed within 7 years. *Tiffany Dec.*, Ex. A (2010 Declaration, § 3). The Subject Properties fall within the scope of the "project", and should have been developed in accordance with the Master Plan Map no later than 7 years from the date of the 2010 Declaration's recording. Parkes and Universal did not complete construction on the Subject Properties within 7 years, and are consequently barred from development.

Reply in Supp. of Def.'s Mot. for Summ. J. 2-3.

The Idaho Supreme Court has found that:

> Idaho recognizes the validity of covenants that restrict the use of private property. *Nordstrom v. Guindon,* 135 Idaho 343, 345, 17 P.3d 287, 290 (2000) (citing *Brown v. Perkins,* 129 Idaho 189, 192, 923 P.2d 434, 437 (1996)). When interpreting such covenants, the Court generally applies the same rules of construction as are applied to any contract or

> covenant. *Id.* However, because restrictive covenants are in derogation of the common law right to use land for all lawful purposes, the Court will not extend by implication any restriction not clearly expressed. *Post v. Murphy,* 125 Idaho 473, 475, 873 P.2d 118, 120 (citing *Thomas v. Campbell,* 107 Idaho 398, 404, 690 P.2d 333, 339 (1984)). Further, all doubts are to be resolved in favor of the free use of land. *Id.*

D & M Country Ests. Homeowners Ass'n v. Romriell, 138 Idaho 160, 164, 59 P.3d 965, 969 (2002).

This Court finds that the seven-year limitation on construction imposed upon the Declarant, found in the 1995 Declaration and the 2010 Declaration, is a valid covenant under Idaho law. While it may be true, as argued by Parkes, that the deed did not specifically mention this covenant when granting the subject properties, the 1995 Declaration was recorded, and both parties agree that "[w]hen the subject properties were transferred to Parkes, they were encumbered by the 2004 CC&R's recorded as instrument number 1860998, records of Kootenai County." Statement of Undisputed Facts 2. Relevant to the transfer of the subject properties, the 2004 CC&R's read:

> 17. ASSIGNMENT BY DECLARANT. Declarant reserves the right to assign, transfer, sell, lease or rent all or a portion of the property then owned by it and reserves the right to assign all or any of its rights, duties and obligations created under this Declaration.

Decl. of Mike Tiffany at Ex. D, page 11, (page 148 of the PDF of the Declaration).

> 1.1.16.3. The Declarant for each Portion of the Project (Duplex, Fourplex, and Cluster Housing) shall have all Owner rights for each projected Unit membership until the Living Unit is completed and sold. At such time, the new owner of the Unit shall receive the membership rights at the date of transfer of the Unit.

Id. at p. 2, (page 139 of the PDF of the Declaration).

Both parties also agree that, "[t]he subject properties are presently encumbered by the 2010 CC&R's recorded as instrument number 2264152000." Statement of Undisputed Facts 3. Relevant to the transfer of the subject properties, the 2010

CC&R's reads:

> 17. ASSIGNMENT BY DECLARANT. Declarant reserves the right to assign, transfer, sell, lease or rent all or a portion of the property then owned by it and reserves the right to assign all or any of its rights, duties and obligations created under this Declaration.

Decl. of Mike Tiffany at Ex. A, page 12, (page 23 of the PDF of the Declaration).

> 1.1.16.1. The builder / developer of new Living Units in the Project is an Owner and shall have all Owner rights, responsibilities and obligations for each Unit membership from the date of completion (Certificate of Occupancy) until the Living Unit is sold. At such time, the new Owner of the Unit shall receive the membership rights responsibilities and obligations at the date of transfer of the Unit. This amendment change in responsibility and obligation shall only apply to Units completed after the date of recordation of this amendment ratified by the membership on November 18, 2009.

Id. at page 2, (page 13 of the PDF of the Declaration). The 2010 CC&R's also clearly state that "Declarant shall complete the project as shown in Master Plan Map in seven (7) years from the date of recording this Declaration." *Id.* at page 5 (page 16 of the PDF of the Declaration).

The term "Declarant" is clearly defined in the 1995 Declaration. Decl. of Mike Tiffany, Ex. C § 1.1.10. The term Declarant is used throughout the 2010 Declaration, but it is not defined within that document. This Court finds here, as found by this Court in its December 7, 2020, Memorandum Decision and Order, that both parties agree that Parkes is not the Declarant as defined in the CC&R's. Mem. Decision and Order Denying Pl.'s and Third-Party Def.'s Mot. for Summ. J. 7. Thus, this Court is ultimately left with same principal issue of what rights and obligations a successor in interest to the Declarant has. As described by this Court in in its December 7, 2020, Memorandum Decision and Order:

> This Court finds that both parties are in agreement that Parkes is not the Declarant under the Declaration." Opp. to Pl. Mot. for Sum. J. 7,9; Reply 2-3. This point has been argued by Parkes/Universal and

> conceded by The Village. *Id.* Parkes/Universal have put themselves in the precarious position of arguing for summary judgment on the grounds that "Parkes is not the Declarant" while at the same time claiming "he is clearly the successor in interest to the declarant". Reply 2. Parkes/Universal claim that "[t]he Declarant is not the only entity which had the right to construct new living units in the project and Parkes is entitled to develop his parcels." *Id.* at 3. The Village argues that, "the evidence before the Court establishes that Parkes and Universal did not have the right to complete the project." Opp. to Mot. for Summ. J. 9. There is nothing in the CC&Rs, or other documents thus far presented to the Court, that describes the rights or obligations of a "successor in interest to the declarant". For this reason, this Court finds that a genuine issue of material fact remains as to the rights and obligations of Parkes and his right to develop his parcels.

Id. at 7-8.

As shown above, this Court had previously denied Parkes' first motion for summary judgment because, "a genuine issue of material fact remains as to the rights and obligations of Parkes and his rights to develop his parcels." *Id.* at 8. This Court, is now presented with cross motions for summary judgment. For the reasons described by this Court above, this Court finds that no new evidence has been presented by Parkes regarding their second motion for summary judgment. For that reason, Parkes' second motion for summary judgment is denied. In regards to The Village's motion for summary judgment, this Court finds that no genuine issue of material fact remains regarding the issue of Parkes' right to develop the property in question because Parkes was on notice of the CC*R's and as such is beholden to the CC&R's and the 7-year time limit on construction contained in those CC&R's.

As described by The Village, "this seven-year restriction applies to development by Plaintiff and Third Party Defendant, not just the 'Declarant.'" Opp'n. to Pl. and Third Party Def.'s Second Mot. for Summ. J. 5. Furthermore, The Village argues that, "[i]f Parkes and Universal acquired property rights to the Subject Properties from the Declarant, they also acquired the obligations under the Declarations in effect on that

date. When Parkes and Universal acquired the subject properties, the 1995 Declaration was recorded, putting Parkes on notice of the seven-year restriction." Opp. to Pl. and Third Party Def.'s Second Mot. for Summ. J. 7.

This Court agrees with The Village's argument above. Both parties agree that Parkes is not the Declarant. This Court must decide whether Parkes acquired the subject properties free of encumbrances, or whether Parke's acquired the subject properties along with the obligations under the Declarations in effect on the date of acquisition. Parkes acquired the two subject properties on November 24, 2004, and August 4, 2005. Mem. in Supp. of (First) Mot. for Summ. J. 4, n. 9. Therefore, Parkes acquired the subject properties with full notice of the 7-year limit on construction because the 1995 Declaration had been recorded. After acquiring his parcels, Parkes then benefitted from the 2010 Declaration, which extended the time limit on construction for an additional 7 years. This resulted in the limit on construction upon the subject properties ending in 2017. Both parties agree that the "[t]he subject properties are presently encumbered by the 2010 CC&R's" (Statement of Undisputed Facts 3), and the 2010 CC&R's clearly provide a 7-year limit on construction. Decl. of Mike Tiffany 5 (page 16 of the PDF of the Declaration). For these reasons, this Court finds that, even if a builder other than the Declarant had the right to complete the project, the restriction such project was that it had to be completed within seven years of the 2010 declaration applies.

Parkes' argument that he is not the Declarant and as a result somehow the encumbrances of the CC&R's do not apply to him, 1) ignores the fact that at all times since Parkes purchased his two parcels, Parkes has been on notice of the encumbrances under the CC&R's, and 2) ignores the fact that seven years after the 2010 extension, **no one** (not the Declarant, not anyone) has the ability to develop, no

one has the ability to build within The Village. Additionally, Parkes is arguing that Parkes acquired the property rights of the subject properties, but somehow Parkes did not also acquire the obligations that run with the properties. This position is obviously untenable. For the reasons described above, this Court finds that no genuine issue of material fact exists regarding the issue of whether Parkes/Universal acquired the Subject properties free of the CC&R's encumbrances.

B. Judicial Admission.

In regards to Parkes' argument of judicial admission, Parkes argues that:

> The point of Steve Parkes' (hereinafter "Parkes") first summary judgment in this case was that the seven-year building requirement only applied to the Declarant and Parkes was not the Declarant. More importantly, Parkes argued that no evidence existed to show that he stood in the Declarant's shoes as regards to any of Declarant's obligations under the CC&R's. In response to this, the Village argued:
>
> > Parkes argues that "no evidence exists that [he] agreed to accept the declarants' obligations" to complete the project in seven years." He repeatedly states that he "does not stand in the declarant/developers' shoes." He is correct. (emphasis supplied)
>
> This statement is a judicial admission that Parkes did not accept the Declarant's obligations under the CC&R's and that no evidence exists to prove that fact. The Village cannot now controvert that admission by alleging that Parkes did accept the Declarant's obligations imposed by the CC&R's.

Pl.'s and Third Party Def.'s Resp. to Def.s' Resp. to Pl.'s and Third Party Def.'s Mot. for Summ. J. 2 (footnote omitted). Additionally, Parkes/Universal argues that:

> The Village is correct that the CC&R's encumber all the land in the development. The Village is also correct that the CC&R's unambiguously require the Declarant to complete the project within 7 years of the date of the declaration.
>
> As pointed out in Parkes' pending motion for summary judgment, the Village has already admitted that Parkes is not the Declarant. The Village has also already admitted the 7-year requirement only applies to the Declarant. "The Declarations include the following provision: '*Declarant shall* complete the project as shown in the Master Plan Map in seven (7) years from the date of recording of this Declaration.' Based on this provision, *only* the Declarant has the right to complete the project."[2] (emphasis supplied).

> The Village has admitted that the 7-year requirement applies only to the Declarant and relied on that argument to defend the first summary judgment. It has admitted that Parkes is not the Declarant and does not stand in the shoes of the Declarant. Therefore, the 7-year requirement does not apply to Parkes.

Pl. and Third Party Def.'s Resp. to Def.'s Mot. for Summ. J. 3 (underlining in original).

As shown above, Parkes is clearly attempting to construe The Village's affirmation that Parkes "does not stand in the declarant/developers' shoes" (Opp'n. to Mot. for Summ. J. 9.), as a judicial admission that the 7-year limit on construction does not apply to Parkes/Universal and only to the Declarant. This Court finds that Parkes's interpretation of The Village's statement is fallacious because it ignores the obvious context in which counsel for The Village wrote the two separate sentences, and it bastardizes the concept of judicial admission. As mentioned immediately above, counsel for Parkes quotes the following written by counsel for The Village, for Parkes' claim that The Village has made a "judicial admission that Parkes did not accept the Declarant's obligations under the CC&R's and that no evidence exists to prove that fact":

> Parkes argues that "no evidence exists that [he] agreed to accept the declarants' obligations" to complete the project in seven years." He repeatedly states that he "does not stand in the declarant/developers' shoes." He is correct. (emphasis supplied)

Pl.'s and Third Party Def.'s Resp. to Def.s' Resp. to Pl.'s and Third Party Def.'s Mot. for Summ. J. 2. This claim by Parkes is so blatantly false that it shocks this Court that Parkes' counsel would make such a claim. First, is the immutable fact simple context. The quotation which Parkes seeks to bind counsel for The Village is made up of two sentences. When read in context, it is clear that counsel for The Village, when he wrote "He is correct" was referring **only** to the sentence to which that statement immediately followed, which was the second sentence, and that is the statement that, "He

repeatedly states that he "does not stand in the declarant/developer's shoes." *Id.* Second, as noted by counsel for Parkes, the concept of judicial admission requires "a formal admission made by an attorney at trial." Plf.s and Third Party Def.'s Resp. to Def.'s Opp'n to Mot. for Summ J. 2, *citing McLean v. Spirit Lake*, 91 Idaho 779, 783, 430 P.2d 670, 674 (1967). Reading *McLean* shows that counsel there made a statement *at trial*, as it was a statement made at the end of the trial in a motion for a directed verdict, where such counsel clearly admitted the following: "I concede that the plaintiff did not plead this [presentation of claim to the city]." *Id.* Ignore for the moment that when counsel for The Village wrote, "Parkes argues that "no evidence exists that [he] agreed to accept the declarants' obligations" to complete the project in seven years", he did not do so *at trial*. Far more important is the fact that this sentence, written by counsel at summary judgment, is not a concession, it is not even a statement made by counsel for The Village. It is a statement made by counsel for The Village summarizing Parkes' argument: "Parkes argues that 'no evidence exists that [he] agreed to accept the declarant's obligations' to complete the project in seven years.'" No other interpretation can be made. Since it is a statement summarizing another attorney's argument, it is not a *formal admission* by counsel for The Village. Again, no other interpretation can be made. Third, such a claim of judicial admission would thwart the rules on summary judgment. Counsel for Parkes made this judicial admission argument in their reply brief, the final brief submitted by Parkes on Parkes' motion for summary judgment. Pl.'s and Third Party Def.'s Resp. to Def.s' Resp. to Pl.'s and Third Party Def.'s Mot. for Summ. J. 2. This Court has the discretion not to hear an argument raised for the first time in a reply memorandum. Franklin Building Supply, Co., Inc. v. Hymas, 157 Idaho 632, 640, 339 P.3d 357, 365 (2014). "Where a movant raises an

argument for the first time in a reply memorandum, the party opposing the motion has no apportunity to address the argument in writing." *Id.* Granted, the alleged admission was not made by counsel for The Village until after Parkes' first memorandum. However, raising the issue for the first time in reply in fact precluded counsel for The Village from a written response. The better procedure would have been for counsel for Parkes to admit this failure, ask the Court that counsel for The Village to have the opportunity to respond in writing prior to oral argument, even if that meant delaying oral argument. Fourth, there is no factual basis for this Court to adopt the statement Parkes seeks to foist upon The Village, and thus, foist upon the Court. Again, the statement written by counsel for The Village is, "Parkes argues that 'no evidence exists that [he] agreed to accept the declarants' obligations". Pl.'s and Third Party Def.'s Resp. to Def.s' Resp. to Pl.'s and Third Party Def.'s Mot. for Summ. J. 2 This Court finds that there is no evidence to show that Parkes agreed to accept the Declarant's obligations. More importantly, there is no evidence to show that Parkes did not agree to accept the Declarant's obligations. Most importantly, no evidence is required because the CC&R's were recorded and Parkes was on notice when they purchased the property that there was a seven-year time limit on construction of the property they purchased. Therefore, The Village's statement attributed to Parkes' argument does not matter. Counsel for The Village made no judicial admission.

C. Waiver.

In regards to Parkes' argument of waiver, Parkes argues that:

> In our case, the necessary finding for a waiver would be that the Village intended to waive the 7-year requirement and that the Village intended that it could not later change that position. Substantial evidence supports the conclusion that the Village did waive these rights. The Village entered into a settlement that expressly contemplated payments from the Declarant to the Village when the Declarant developed and sold properties within the Village. This shows an intent to later not change its

position and prevent the Declarant from developing and selling his property. The Village changing its position on the 7-year requirement would take money out of its own pocket. At least it creates a question of fact as to whether the Village intended to leave the option open and later enforce the 7-year requirement against the Declarant.

Pl.'s Resp. to Def.'s Mot. for Summ. J. 2-3, n 1 (citing, Decl. of Arthur M. Bistline In Supp. of Mot. for Summ. J. filed 11/6/20 at n 6.). The Village's argument in its entirety is:

> The Village has not waived any right to enforce the 2010 Declaration. In response to Parkes and Universal's first motion for summary judgment, the Court found "there has been no evidence presented that The Village intentionally relinquished its known right to pursue its enforcement of the Declaration in regards to Parkes' proposed development.["] *Mem. Decision and Order Denying Pls. and Third-Party Defs.' Mot. for Summary Judgment ("Order")*, p.9. Ultimately, the Court found in favor of The Village and concluded that there was a genuine issue of material fact. *Id.*, pp.9–10.
>
> Parkes and Universal have been afforded numerous opportunities to present evidence that The Village relinquished its right to enforce the Declaration against Parkes—specifically, Parkes and Universal have had opportunities to bring evidence in conjunction with his second motion for summary judgment. Parkes and Universal argue that "[s]ubstantial evidence supports the conclusion that the Village did waive these rights" because "The Village entered into a settlement that expressly contemplated payments from the Declarant to the Village when the Declarant developed and sold properties within the Village." *Pl. and Third Party Def.'s Response to Def.'s Mot. for Summary Judgment ("Response")*, p.2. This is the same evidence that was presented to the Court on Parkes and Universal's first motion for summary judgment, resulting in the Court's finding that "there has been no evidence . presented that The Village intentionally relinquished its known right to pursue its enforcement of the Declaration." *See Order*, p.9. In light of Parkes and Universal's lack of evidence, there is no genuine issue of material fact with respect to waiver. The anti-waiver provision in the 2010 Declaration, coupled with The Village's long history of consistently and diligently enforcing the Declarations, supports a finding of no genuine issue of material fact as to waiver of enforcement. *See Tiffany Dec.*, p.3, ¶ 10; Ex. A (2010 Declaration, § 18.7). Therefore, The Village's Motion for Summary Judgment should be granted.

Reply in Supp. of Def.'s Mot. for Summ. J. 3-4.

In this Court's December 7, 2020, Memorandum Decision and Order, this Court

found that "there has been no evidence presented that The Village intentionally relinquished its known right to pursue its enforcement of the Declaration in regards to Parkes' proposed development. Similarly, there has been no evidence presented that Parkes/Universal acted in reasonable reliance upon The Village's supposed waiver, and there has been no evidence presented that Parkes/Universal thereby has altered his position to their detriment." Mem. Decision and Order Denying Pl.'s Mot. for Summ. J. 9. This Court finds that Parkes has not presented any new evidence to alter this Court's earlier finding regarding waiver. As shown above, Parkes has purported that the settlement agreement shows that The Village has waived their right to enforce the seven-year limit on construction because "[a]t least it creates a question of fact as to whether the Village intended to leave the option open and later enforce the 7-year requirement against the Declarant." Pl.'s Resp. to Def.'s Mot. for Summ. J. This Court finds that there is simply nothing in the settlement agreement to support such an assertion by Parkes/Universal that The Village had waived its rights to enforce the seven-year time limit on construction found in CC&R's. Additionally, there is nothing found in The Village's conduct that would show an intent by the Village to waive its right to enforce the seven-year limit on construction against Parkes/Universal or any other purchasers of property.

IV. CONCLUSION AND ORDER

For the above-mentioned reasons, The Village's Motion for Summary Judgment is granted as no genuine issue of material fact exists. Additionally, for the above-mentioned reasons, as no genuine issue of material fact exists, Parkes'/ Universal's Second Motion for Summary Judgment is denied.

IT IS HEREBY ORDERED defendant The Village Condominium Owners' Motion for Summary Judgment is GRANTED.

IT IS FURTHER ORDERED the plaintiff/counter-defendant Parkes' and Third Party Defendant Universal Land Company's Second Motion for Summary Judgment is DENIED

IT IS FURTHER ORDERED that counsel for defendant The Village prepare a Judgment consistent with this Memorandum Decision and Order.

IT IS FURTHER ORDERED that defendant The Village is the prevailing party in this litigation.

IT IS FURTHER ORDERED the trial scheduled for July 12, 2021, is VACATED.

Entered this 19th day of April, 2021.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the 19th day of April, 2021, a true copy of the foregoing was emailed to each of the following:

Lawyer	email	Lawyer	email
Art Bistline	service@bistlinelaw.com	Peter Smith IV	service@smithmalek.com

Jeanne Clausen, Deputy Clerk