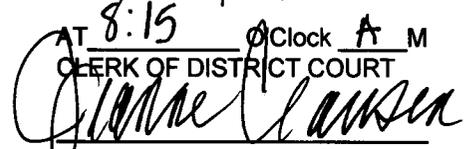


FILED 10/24/2022

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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**

498 W. GARWOOD, LLC, an Idaho limited liability company,)
)
 Plaintiff,)
 vs.)
)
 LARIVIERE HOLDINGS, LLC, an Idaho limited liability company,)
)
)
 Defendant.)

Case No. **CV28-22-2798**

**MEMORANDUM DECISION
DENYING PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT**

This matter is before the Court on a motion for summary judgment brought by plaintiff, 498 W. Garwood, LLC ("Garwood"), against defendant, LaRiviere Holdings, LLC ("LaRiviere Holdings"). Garwood and LaRiviere Holdings own adjacent parcels of land in Rathdrum, Idaho, with an easement on the northwestern corner of Parcel 2, burdening Garwood's property. *Def's Memo. in Opp'n to Pl's Mot. for Summ. J.* ("Def.'s Memo. In Opp'n") ¶ 3; *Decl. of Shannel Schumann in Supp. of Mot. for Summ. J.* ("Schumann Decl.") ¶¶ 19-21, Ex. 6; *Decl. of Thomas LaRiviere, III in Opp'n. of Pl's Mot. for Summ. J.* ("LaRiviere Decl.") ¶ 2. This case involves a dispute surrounding the validity and enforceability of this easement as Garwood claims that the easement is interfering with its use of the property and ability to develop into phase II of its development plans. *Compl.*, ¶ 38, Schumann Decl. ¶ 88.

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

On May 17, 2004, Waterford Park Homes, LLC ("Waterford") acquired all relevant property at issue in this matter. Schumann Decl. ¶ 7, Ex. 1. Waterford was

owned and operated by its managing member, Robert O. Holland, throughout Waterford's involvement. *Def.'s Memo. In Opp'n* at 4; *Wright Decl.* ¶ 4 Ex. C.

On November 5, 2004, Waterford recorded a plat over the property, which created Parcels 1, 2, and 3. Schumann Decl. ¶ 9, Ex. 2, *Pl's Br. in Supp. of Mot. for Summ. J.* ("*Pl.'s Br. In Supp.*") at 3. This plat additionally established the Hayden Lake Executive RV & Boat Condominiums Association ("Association") ("Association" and "HILERV" are used interchangeably in the Plaintiff's Briefing). *Def.'s Memo. In Opp'n* ¶ 7. (citing *Wright Decl.* ¶ 5; *Schumann Decl.* ¶¶ 9-11, Ex. 2).

Additionally:

The November 5, 2004 plat expressly notes the existence of a 20' waterline easement (hereinafter "Waterline Easement") on Parcel 2 dated May 20, 2004, which was conveyed by Waterford to Bar Circle Water, Inc. The Waterline Easement was recorded with Kootenai County under Instrument Number 1877033 and provided a perpetual easement for an underground water system underneath and over the westernmost 20 feet of Parcel 2. The Waterline Easement lies immediately adjacent to the easement at issue in this case, but is not mentioned by Plaintiff in any of its briefing or supporting materials. (*Wright Decl.* ¶ 6; Ex. D).

Df.'s Memo. In Opp'n ¶ 9. Emphasis added, underlining in original.

Below is a depiction of "Lot 1, Block 1" with the Parcel 1, Parcel 2, and Parcel 3 boundary lines highlighted in yellow:

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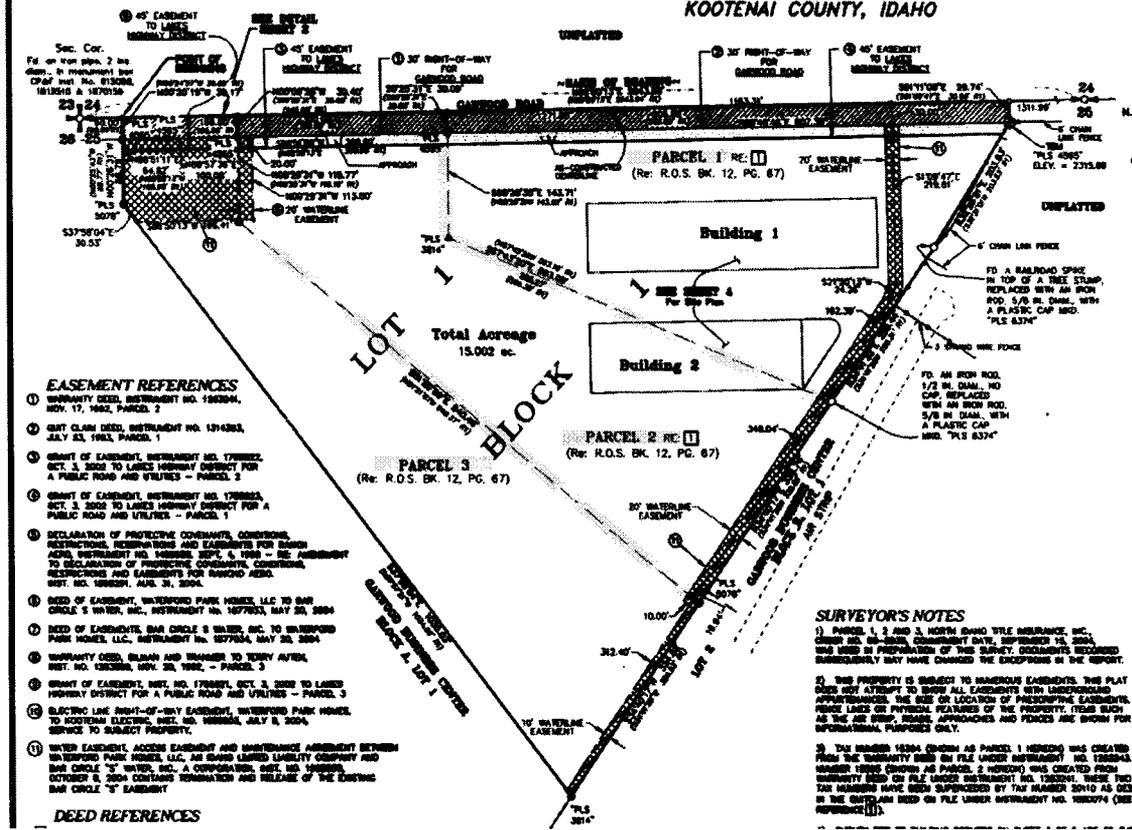
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HAYDEN LAKE EXECUTIVE RV & BOAT CONDO.

A PART OF THE N 1/2 NW 1/4,
SEC. 25, T.52N., R.4W., B.M.,
KOOTENAI COUNTY, IDAHO



Schumann Decl. ¶ 9, Ex 2.

On November 17, 2004, Waterford recorded the Declaration of Covenants, Conditions and Restrictions (“CC&Rs”) for the Association as Instrument No. 1913334 in Kootenai County, Idaho. Schumann Decl. ¶ 12, Ex. 3, *Pl.’s Br. in Supp.* at 2, *Df.’s Memo in Opp’n* ¶ 10 (citing Wright Decl. ¶ 7). In these CC&Rs, the Declarant, Waterford, is reserved “Development Rights.” See Kootenai County, Idaho case CV2013-1465, *Final Judgment* (July 1, 2015); see also Decl. Schumann, ¶¶13-14. This right is discussed and provided below. Schumann Decl. Ex. 3.

In December 2005, Race Olsen was conveyed Parcel 3 through one Warranty Deed executed by Waterford on December 2, 2005, which was later amended by

Quitclaim Deed on May 16, 2006, and a second Quitclaim Deed¹ executed by the Association on December 6, 2005. Schumann Decl. ¶¶ 16, Ex. 4, Ex. 5.

On December 8, 2005, the Association granted and recorded an Easement to Race Olsen for ingress and egress over Parcel 2. Schumann Decl. ¶¶ 19, Ex. 6. This Easement Agreement was recorded in the records of Kootenai County as Instrument No. 2000239. *Id.*, *Pl's Br. in Supp. at 2*. The Association amended its CC&Rs on February 24, 2006, to remove Parcel 3 from both the CC&Rs and the Association. Schumann Decl. ¶¶ 22, Ex. 7.

Creation of Easement

On December 8, 2005, Hayden Lake Executive RV & Boat Condo Owners' Association ("Association"), as grantor, granted Race Olson, an individual, as grantee, "a perpetual nonexclusive access easement over and across the ["Associations"] Property with a maximum width of 40 feet, ... for the use and the benefit of the OLSON Property, and shall be appurtenant thereto and for the benefit of the owners, lessees, guests, and invitees of said real property.." *Compl.*, Ex. 2, at 1, ¶ 1. "The purpose of this access easement is for a vehicle and utility access to provide ingress and egress to and from the OLSON Property. OLSON shall also be permitted to place signage on and within said easement." *Id.* ¶ 2.

This Easement is subject to "[a]ny existing easements, covenants, conditions, rights, reservations, restrictions or encumbrances of record or in view, including a non-exclusive right-of-way easement to Lakes Highway as described in Instrument Number 1755822." *Compl.*, Ex. 2's Ex. B, at 2.

/

¹ The Court notes that Garwood states that the property was conveyed via Warranty Deed, however, the Court's review of the record shows the property was conveyed by Quitclaim Deed.

Change in Ownership of Parcels

On September 25, 2007, Race Olsen conveyed Parcel 3 to Railton Cabball et al (“Cabball”) through Warranty Deed. Schumann Decl. ¶ 24, Ex. 8. On December 30, 2015, Cabball conveyed Parcel 3 to Thomas & Katrina LaRiviere, a married couple. Schumann Decl. ¶ 24, Ex. 9. On April 27, 2015, Thomas & Katrina LaRiviere, as a married couple, conveyed Parcel 3 to defendant LaRiviere Holdings, LLC. Schumann Decl. ¶ 24, Ex. 10.

On April 15, 2010, Waterford assigned its rights to Garwood Enterprises, LLC². Schumann Decl. ¶ 26, Ex. 11. On September 9, 2021, Garwood Enterprises, LLC assigned and conveyed its rights to Garwood. *Id.*, Ex. 12.

CC&Rs

In relevant part, the recorded CC&Rs provide that:

ARTICLE I DEFINITIONS

.....

(a) **“Act”** shall mean the Condominium Property Act, Sections 55-1501. et seq.. of the Idaho Code, pertaining to Condominiums in the State of Idaho.

.....

(g) **“Bylaws”** shall mean the Bylaws adopted by the Association pursuant to the Act for the purpose of regulating the affairs of the Association, as the same may be amended from time to time.

.....

(l) **“Common Elements”** or **“Common Area(s)”** shall mean the entire Property other than the Condominium Storage Units. The percentage of interest in the common areas are shall be stated on the Condo Plat. The undivided interest in the common area upon the recording of this Declaration shall be one-ninety first percent interest (1/91 %). That interest will be reduced to smaller percentage upon the recording of an amended Condominium Plat and/or Amendment to this Declaration. The “new percentage shall be based upon an increase of

² There is a Garwood Enterprises, LLC and a 498 W. Garwood, LLC in this matter. They are not the same entity. Garwood Enterprises, LLC is 498 W. Garwood, LLC’s predecessor in interest.

the denominator of the undivided interest fraction. equal to the total units in Phase (present phase covered by this Declaration) and Phase (the subsequent phase).

.....

(s) **"Plat"** means the recorded final condominium plat of the Property and showing thereon the Condominium Storage Units, each of which is identified by number. The original Plat is recorded in the records of the County Recorder of Kootenai County, Idaho, and any amendments, supplements or corrections thereto.

(t) **"Period of Declaration Control"** means the time period commencing on the date this Declaration is recorded and ending on the earlier of: five (5) years, or sooner, at the option of the Declarant, after the conveyance of ninety percent (90%) of the Condominium Storage Units, which may be created, to Owners other than the Declarant, or thirty (30) days after Declarant's notification to the Owner of each Condominium Storage Unit that the Declarant has resigned.

.....

**ARTICLE II
DECLARATION OF CONDOMINIUM**

Section 2.1. Property Subject to this Declaration

Declarant is the owner of the real property which is to be the subject of this Declaration and which is to be held transferred sold conveyed and/or occupied subject to this Declaration and which is more particularly described in Exhibit "A" attached hereto and incorporated by reference herein ("Property"). Notwithstanding any language herein to the contrary. Declarant expressly reserves the right to add additional real property, which would be subject to this Declaration, to the extent the same is permitted under applicable laws of the State of Idaho.

.....

ARTICLE III

.....

OWNERS ASSOCIATION

.....

Section 3.1 Establishment of Association. The name of the Association is Hayden Lake Executive RV Boat Condo Owners' Association, Inc., non-profit corporation to be organized under and by virtue of the laws of the State of Idaho governing non-profit corporations copy of the Articles of Incorporation are attached hereto as Exhibit "B", and by this reference are hereby incorporated herein ("Articles"). The Association does hereby accept responsibility for and provide such necessary and appropriate action for the proper maintenance, repair, replacement, operation, management, beautification and

improvement of that certain Property and improvements to be used In common by and for the benefit of the Owners; of the Condominium Storage Units constructed on the property. The Association will be governed consistent with the nonprofit laws of the State of Idaho. The Bylaws of said Association are attached hereto as Exhibit "C." and by this reference are hereby incorporated herein ("Bylaws").

Section 3.2 Authority of Declarant During Period of Declarant Control. During the period of Declarant Control, as that phrase is defined herein. all right. discretion. power and authority herein granted to the Association and the Condominium Storage Unit Owners through said Association. including the right to collect assessments (excepting reserves for replacement) shalt. at the option of Declarant remain with Declarant directly or through the Association. Further. during the period of Declarant Control, as that phrase is defined herein. the Declarant shall have the right to appoint and remove members of the Board of Directors and the Officers of the Owners Association. Further, directors and officers during the period of Declarant control need not be Condominium Storage Unit Owner

....

ARTICLE IX REPAIR AND MAINTENANCE

....

Section 9.3. General Maintenance.

In the event that the Association determines that an improvement of the Common Area Is in need of repair, restoration or painting, or that the landscaping is In need of installation, repair, or restoration, the Association shall undertake to remedy such condition and the cost thereof shall be charged to the Owners and shall be subject to levy, enforcement and collection by the Association in accordance with the assessment lien procedure provided for In this Declaration. The Association shall have limited fight of entry in and upon all Common Areas as defined above and the exterior of all Condominium Storage Units for the purpose of taking whatever corrective action may be deemed necessary or proper by the Association. Nothing In this Article shall in any manner limit the right of the Owner to exclusive control over the interior of his Condominium Storage Unit. Provided; however, that the Owner shall grant the right of? entry therein to the Association or any other person or other Owner or Owners, or their authorized representatives. (i) In case of any emergency originating in or threatening his Condominium Storage Unit whether the Owner is present or not. or (ii) when so required to enter his Condominium

Storage Unit for the purpose of performing installation, alterations or repair to the mechanical or electrical services, including water, and other utility services, provided that reasonable requests for entry are made and that such entry is at time reasonably convenient to the Owner whose Condominium Storage Unit is to be entered, in case of an emergency, such right of entry shall be Immediate without the necessity for request having to be made.

....

ARTICLE X EASEMENTS

10.4 Development Easement for Declarant

Until all phases of the project are constructed and all Condominium Storage Units have been sold by Declarant, there are hereby reserved to Declarant, together with the right to grant and transfer the same to others, including Declarant's sales agents, representatives and assigns, easements and rights upon, across, over, under and through the Property for construction, display (including the use of the Condominium Storage Units as models), maintenance, sales and exhibit purposes, Including the use of signs and other advertising devices, in connection with the erection and sale or lease of Condominium Storage Units within the Property: provided, however, that no such use by Declarant or Its agents shall otherwise restrict Owners in the reasonable use of their Condominium Storage Units.

Schumann Decl. Ex 7.

Dylan Court and Garwood Road Access

At the time that Easement was granted and acquired by LaRiviere Holdings' predecessor-in-interest, Garwood claims that LaRiviere Holdings' predecessor-in-interest did not have access to a public road. *Compl.*, ¶ 17. Garwood Road, the road adjacent to the properties in question, is subject to and regulated by the Lakes Highway District, which regulates approaches to all public right-of-ways under its control. *Compl.*, ¶ 22, 23, *Answer* ¶ 23. Among other requirements, "the Lakes Highway District requires that any private road or driveway approaching or intersecting with W. Garwood Road be approved and receive an 'approach permit.'" *Compl.*, ¶ 24. In 2015, LaRiviere Holdings

was denied an “approach permit” to access W. Garwood Road³, but was granted an access easement onto Dylan Court, the other road adjacent to the properties. *Compl.*, ¶¶ 26, 27, 29, *Answer* ¶¶ 26, 29. This access easement to Dylan Court was recorded on June 3, 2015, with the Kootenai County Recorder, as Instrument No. 2500606000. *Compl.*, ¶ 31, Ex. 4, *Answer* ¶ 31. Since 2015, LaRiviere Holdings has used Dylan Court for its main access point for ingress and egress, however, it has used W. Garwood Road’s access during “emergencies occurring in 2019 and 2021,” and “when the Dylan Court access was blocked by emergency vehicles” *Answer* ¶ 30, and that LaRiviere Holdings “continues to utilize the easement for its intended purposes.” *Answer* ¶ 37. It is noted by LaRiviere Holdings that:

“Lakes Highway District approached [“LaRiviere Holdings”] and requested that [“LaRiviere Holdings”] pay for and install a large berm along the northern boundary of the Easement area to prevent any unpermitted access. In accordance with the request and under the Easement that [“LaRiviere Holdings”] bear the sold cost of required improvements and maintenance, [“LaRiviere Holdings”] provided the requested material and installed a large berm, which is approximately 40 feet in width and 8 feet high. As a practical matter, although this berm presents a much more significant obstruction to Plaintiff’s proposed development and is substantially larger and less mobile than any of the vehicles parked in the Easement area, it is not mentioned in any of the Plaintiff’s materials in support of summary judgment. Further because installation of the berm was required by Lakes Highway District, it is unclear whether Plaintiff would even be entitled to remove the berm if its proposed development was authorized.

LaRiviere Decl. ¶ 25.

Previous Legal Matters

Though neither Garwood nor LaRiviere Holdings were a party, there is a previous lawsuit regarding the rights associated with the real property in question; more

³ It should be noted that Garwood’s predecessor-in-interest also sought and was denied an “approach

specifically, regarding if the Declarant's rights were transferred to the Declarant's assignee. See *Kootenai County, Idaho Case No. CV-2013-1465*. In relevant part, Judge Christensen held that as the Declarant's assignee, the Defendant in that matter had "all the same rights under the Declaration of Covenants, Conditions and Restriction for Hayden Lake Executive RV & Boat Condominiums as Declarant." See *Kootenai County, Idaho Case CV2013-1465, Order Regarding Plaintiff's Motion for Summary Judgment; Defendant's Motion for Summary Judgment (May 7, 2013)*. Further,

JUDGMENT IS ENTERED AS FOLLOWS:

1. The Defendant/Counter Plaintiff, Garwood Enterprises, LLC, an Idaho limited liability company (hereinafter referred to as "Garwood") has acquired all of the development rights of the original Declarant, Waterford Park Homes, LLC, an Idaho limited liability company, as set forth in that certain document entitled *Declaration of Covenants, Conditions and Restrictions for Hayden Lake Executive RV & Boat Condominiums Kootenai County, Idaho* that was recorded as Instrument No. 1913334 in the records of the County of Kootenai, State of Idaho on November 17, 2004 and as amended by that certain document entitled *Notice of 2006 Amendment to Condominium Declaration and Condominium Plat of Hayden Lake Executive RV & Boat Condominiums to Add Inadvertently Omitted Address, Articles, and Bylaws* that was recorded as Instrument No. 2015316 in the records of the County of Kootenai, State of Idaho- and as further amended by that certain document entitled *Amendment to Condominium Declaration Instrument # 1913334 and Condominium Plat Page 102 in Book J of Plats Instrument No. 191335 of Hayden Lake Executive RV & Boat Condominiums to Exclude Parcel 3* that was recorded as Instrument No: 2017071 in the records of the County of Kootenai, State of Idaho (hereinafter all of the foregoing instruments are referred to herein collectively as the "Declaration").
2. The Declaration relates to the development and use of real property located within the platted boundaries of the real property known as *Hayden Lake Executive RV & Boat Condominiums*, pursuant to a recorded plat thereof that was recorded as Instrument No. 191335 in Book "J" of Plats at pages 102 and pages 102-A through 102-L, inclusive, on November 17, 2004 in the records of the County of

permit" to access W. Garwood Road in 2016. *Compl.*, ¶ 33, 34.

Kootenai, State of Idaho (hereinafter referred to as the "Plat").

3. Garwood may exercise all of the development rights it has under the Declaration and the Plat for the further development and use of all of the common elements and common area(s) (hereinafter referred to collectively as "common areas") lying within the platted boundaries of the Plat without the consent or approval of the Plaintiff/Counter Defendant Hayden Lake Executive RV & Boat Condo Owners' Association, Inc., an Idaho nonprofit corporation (hereinafter referred to as the "HOA") pursuant to the terms and conditions of the Declaration and Plat, including but not limited to Section 10.4 of the Declaration
4. Garwood's development rights of the common areas lying within the platted boundaries of the Plat specifically include the right of Garwood to develop the common area of the Plat known as Phase II by the construction of additional buildings comprised of storage units therein for Garwood's sale or lease of the individual storage units to third parties, along with the right to construct and install any and all necessary infrastructure improvements, additions and/or alterations within Phase II and within any other common areas located within the Plat, without the consent or approval of the HOA.
 - a. The Phase II area of the Plat is more fully described in Court Exhibit 1, attached hereto and incorporated herein by reference.
5. The exercise of Garwood's development rights as set forth in the Declaration and Plat shall not restrict any Owner' in the reasonable use of any Owner's respective individual condominium storage unit(s).
6. Nothing in this Judgment affects the individual rights that any individual Owner has under the terms of the Declaration or the Plat.

CV2013-1465, *Final Judgment* (July 1, 2015).

Previous Negotiation Leading to Civil Lawsuit

There have been multiple conversations between the parties, and the parties predecessors in interests, regarding the property lines and the easement in question. Between 2015 and 2018, when both parties' predecessors in interest owned the properties, Thomas LaRiviere, III, defendant's predecessor, states that during his first encounter with the plaintiff's predecessor, there were several vehicles parked within the Easement area, which plaintiff's predecessor expressed no concerns over. LaRiviere

Decl. ¶ 19. Thomas LaRiviere, III, states that instead, Garwood Enterprises, LLC had no objection to the parking of vehicles in this area and acknowledged that LaRiviere Holdings “had the right to control and improve the Easement Area.” *Id.* After a subsequent conversation “discussing development plans and the establishment of a fence between the parcels, Garwood Enterprises, LLC installed a long fence spanning the entire length of Parcel 2.” *Id.* at ¶ 21.

In late 2021, representatives from Garwood approached LaRiviere Holdings to request that the company vacate or terminate the Easement. LaRiviere Decl. ¶ 28. This request was denied. *Id.* Garwood claims that on or about October 2021, pursuant to an oral agreement regarding the same, it provided LaRiviere Holdings with a written termination, which LaRiviere Holdings has failed to sign. ¶ 42, 43, 44. LaRiviere Holdings denies the existence of any oral agreement to terminate the easement. *Answer* ¶ 42, 43, 44.

In April 2022, a meeting was held between members of the two parties. LaRiviere Decl. ¶ 29. Declaration of Jennifer Oertli in Opposition to Plaintiff’s Motion for Summary Judgment (“Oertli Decl.”) ¶ ¶ 2-6. There are differing accounts regarding the details and exact words used during this meeting, however, the meeting unsuccessfully attempted to resolve the Easement dispute. *Id.* One morning after this meeting, Ms. Schumann and a Deputy from the Kootenai County Sheriff’s Office requested the vehicles parked alongside the fence dividing the two parcels be removed by LaRiviere Holdings; however there was no request that the vehicles parked within the easement be removed. *Id.* ¶ 32. See Schumann Decl. ¶¶ 80-83. The vehicles along this fence line were moved, LaRiviere Decl. ¶ 32, however, LaRiviere Holdings is still parking in the easement area. Schumann Decl. ¶ 81.

II. STANDARD OF REVIEW

A. Motion for Summary Judgment

Idaho Rule of Civil Procedure 56 governs motions for summary judgment. 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.” *Id.*

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.

Id. 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)). “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 v. Elder, 126 Idaho 308, 311, 882 P.2d 475, 478 (Ct. App. 1994)). “A material fact is one upon which the outcome of the case may be different.” *Peterson v. Romine*, 131 Idaho 537, 540, 960 P.2d 1266, 1269 (1998).

Once the moving party meets their burden of establishing 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. Bamson*, 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).

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

However, where . . . no jury has been requested and the facts are to be tried to the court, a somewhat different standard is employed.⁴ If the evidentiary facts are not in

⁴ It should be noted that LaRiviere Holdings states in their *Memo in Opp'n* At 10: “Even when a matter is to be tried by a judge, not a jury, when facts are in dispute, all inferences from such facts must be construed in favor of the non-moving party. See *Loomis*, 119 Idaho at 436.” The Court has reviewed *Loomis* and found that the case instead states the opposite, holding that: “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

dispute, the trial court may grant summary judgment despite the possibility of conflicting inferences, because the court alone will be in the position of resolving the conflicting inferences at trial. Findings which are based on such inferences will not be disturbed on appeal if the uncontroverted evidentiary facts are sufficient to justify them.

Crown v. State, Dept. of Agriculture, 127 Idaho 188, 191, 898 P.2d 1099, 1102 (Ct. App. 1994) (citing *Riverside Development Co. v. Ritchie*, 103 Idaho 515, 519, 650 P.2d 657, 661 (1982)) (internal citations omitted).

B. Judicial Notice of Case No. CV-2013-1465

Idaho Rule of Evidence 201 governs the Judicial Notice of adjudicative facts. *I.R.E. 201(a)*. (See also Idaho Rule of Civil Procedure Rule 44(b), “The Court must take judicial notice as provided by Law.”) The rule provides that the court “may judicially notice a fact that is not subject to reasonable dispute because” “it can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” *Id. (b)(2)*. Further, the court “must” take judicial notice if “a party requests it and the court is supplied with the necessary information.” *Id. (C)(2)*. The Court may also take judicial notice on its own. *Id. (C)(1)*. “When a court takes judicial notice of records, exhibits, or transcripts from the court file in the same or a separate case, the court must identify the specific documents or items so noticed. When a party requests judicial notice of records, exhibits, or transcripts from the court file in the same or a separate case, the party must identify the specific items for which judicial notice is requested or offer to the court and serve on all parties copies of those items.” *Id.* This Court takes judicial notice of the final judgment entered July 1, 2015, and the Order Re:

judge is free to arrive at the most probable inferences to be drawn from uncontroverted evidentiary facts.” *Loomis v. City of Hailey* 119 Idaho 434, 437 807 P.2d 1272, 1275 (1991) (quoting *Riverside Dev. Co. v. Ritchie*, 103 Idaho 515, 650 P.2d 657 (1982)).

Plaintiff's Motion for Summary Judgment filed May 7, 2013, in Kootenai County Case No. CV 2013 1465.

III. ANALYSIS.

Garwood moves for summary judgment asking this Court to “enter a summary judgment order granting Plaintiff’s relief, or a declaration stating that the Plaintiff is not bound by the Easement, that the Easement is void as to Plaintiff and that the Plaintiff may use the Easement area in any manner in which Plaintiff chooses.” *Plaintiff’s Brief in Support of Motion for Summary Judgment* (“*Br. In Supp.*”) at 10-11. Garwood’s main arguments are that (1) the Easement is unenforceable, (2) the purpose of the easement is frustrated and unable to be accomplished (*Compl.*, ¶ 40) and is interfering with the Plaintiff’s use of the property (*Compl.*, ¶ 38), and (3) the “Easement expressly declares that it is subject to the CC&Rs”, so the CC&Rs “are automatically superior to it and the Declarant’s Rights (which are set forth in the CC&Rs) are superior to the Easement and the Easement has no effect against the Declarant’s Rights.” *Br. In Supp.* at 11.

- 1. Because the CC&Rs expressly provide that the Declarant can convey the Easement through Waterford or the Association, Summary Judgment is Denied. Alternatively, there is an issue of material fact as to if it is ambiguous whether the Association had a right to grant the easement to the Defendant’s Predecessor in Interest through the CC&Rs, Articles of Incorporation, and/or Idaho Law, Summary Judgment is denied on that basis as well.**

Garwood argues that the Easement at issue was conveyed by the Association, who never owned the property but simply had “the right to maintain the property and regulate the members.” *Brief in Supp.*, at 7, 8. More specifically, Garwood argues:

The only rights [“Association”] ever had in the Property was granted to it by the CC&Rs. The CC&Rs do not grant [“Association”] an ownership interest in the Property. As such, when [“Association”] granted the Easement to Defendant’s predecessor-in-interest (Race Olson) on December 8, 2005, [“Association”] had only the

ability to subject its rights under the CC&Rs to the Easement. It did not have the rights to subject the underlying land or the underlying landowner to the Easement. Consequently, the Easement is ineffectual and void because the Association never had the rights or ability to grant the Easement. This is particularly true and accurate when it comes to Plaintiff, who actually owns the underlying property and rights.

Moreover, an easement by necessity does not exist because Defendant has ingress and egress to public roads (through Dylan Court), and thus, there is no “necessity.” Lastly, a prescriptive easement cannot exist because 20 years has not come and gone (the Property, Lots 1, 2, and 3 were all commonly owned by Waterford until Lot 3 was deeded to Race Olson in 2005, only 17 years ago).

As such, since there is no dispute that [“Association”], the Association, lacked the ability to encumber the rights of the underlying landowner, Plaintiff, the Easement is ineffectual and is not binding as to Plaintiff, who obtained ownership and rights from the original underlying landowner.

Brief in Supp., at 8-9.

In response, LaRiviere Holdings argues that the Easement is valid because under Section 3.2 of the CC&Rs, Robert O. Holland, as Managing Member of Waterford and as President of the Association, had the discretion to convey the Easement through Waterford or the Association. *Df.’s Memo. In Opp’n at 10*. In the alternative, LaRiviere Holdings argues that the Association possessed an independent right to convey the Easement, as provided in its Articles of Incorporation and under Idaho law, (*Id. at 13*), or, due to ambiguities arising from the CC&Rs internally conflicting provisions, there remains issues of fact as to whether the Association had the right to convey the Easement. *Id. at 15*.

a. Under CCRs

LaRiviere Holdings argues that, while generally only the owner of a property can properly convey or encumber the property, owners “possess the ability to form entities, associations, or corporations, to, amongst other things, hold property, sell property,

manage it, encumber it, or otherwise hold 'the same powers as an individual to do all things necessary or convenient to carry out its affairs.' See I.C. 30-30-302." *Id.* at 10-11. "An entity equipped with such authority may, in fact, appropriately convey property, property rights, or encumber such rights." *Id.* at 10. In November of 2004, with the recorded CC&Rs, the Association was "expressly granted" "any and all powers, rights, and privileges which a corporation organized under the Idaho Nonprofit Corporation Act' would possess." *Id.* at 11. Continuing, LaRiviere Holdings states:

Within the CC&Rs, Waterford reserved unto itself several powers, while also equipping the Association and Condominium Storage Unit Owners with a number of powers and authorities. Plaintiff contends that title to Parcel 2, the servient estate with respect to the Easement, at all times remained solely with Waterford as Declarant. However, the CC&Rs tend to support a slightly different conclusion: that all common areas lying outside of the individual condominium units, including the location of the Easement, were owned by the individual Condominium Storage Unit Owners. See CC&Rs, Section 2.3(e) (noting "At any stage of the development of the Property, the Common Elements shall always be considered to be owned by each Condominium Storage Unit Owner in proportion to the number of units existing and completed at the time.").

This distinction becomes crucial when considering Section 3.2 of the CC&Rs. Section 3.2 provided for a "Period of Declarant Control" lasting five years from the date the CC&Rs were recorded, under which Waterford had authority to act on its own accord or through the Association.

In pertinent part, Section 3.2 provides:

During the period of Declarant Control, as that phrase is defined herein, all right, discretion, power and authority herein granted to the Association and the Condominium Storage Unit Owners through said Association... shall at the option of Declarant remain with Declarant directly or through the Association.

See *CC&Rs, Section 3.2* (underlining added).

On November 14, 2005, the Association signed the Easement Agreement, conveying to Race Olson,

LaRiviere Holdings' predecessor in interest, the perpetual and nonexclusive Easement for vehicle and utilities access, and signage. The Easement was signed by Robert O. Holland as President of the Association. However, as noted above pursuant to Section 3.2 of the CC&R's, during the Period of Declaration Control, actions taken upon the rights of the Condominium Owners, or the Association, could properly be taken through either Waterford or the Association.

When Waterford created the plat and recorded the CC&Rs, it plainly indicated that it was a "Condominium Storage Unit Owner" pursuant to the CC&Rs. See CC&Rs, Article I(r) ("Declarant shall be considered the record Owner of any Condominium Storage Unit prior to its initial conveyance by Declarant"). Importantly, Section 2.3(e) of the CC&Rs expressly notes that ownership of the "Common Areas" including the area within which the Easement lies, was exclusively vested in the Condominium Storage Unit Owners "at any stage of the development of the Property[.]" See CC&Rs, Section 2.3(e) (emphasis added). Accordingly, regardless of the early stage of development when the Easement was granted, as an "Owner" under the CC&Rs, Waterford possessed an ownership interest in the Common Areas and thus, the location of the Easement. Consequently, when the Easement was granted, it was granted on behalf of Waterford as an "Owner" under the CC&Rs. Because the Easement was signed on November 14, 2005, well within the Period of Declaration Control, Waterford had the discretion to exercise the rights appurtenant to ownership of the common areas "either directly through the Declarant or through the Association." Thus, when Robert O. Holland, as the President of the Association, executed the Easement, he did so pursuant to the express authority granted by the CC&Rs. For this reason, the conveyance of the Easement was valid. At the very least, there is a question of fact as to whether the Association possessed the authority under Section 3.2 to convey the Easement.

Df.'s Memo. in Opp'n at 11- 13.

Pursuant to Section 3.2 of the CC&Rs, during the period of this Declarant Control, Waterford reserved, "all right, discretion, power and authority herein granted to the Association and the Condominium Storage Unit Owners through said Association... shall at the option of Declarant remain with Declarant directly or through the

Association.” Here, the Declarant, Waterford, acted through the Association. As the Declarant, acting through the Association or directly as Waterford was an option reserved under Section 3.2 of the CC&Rs. In other words, a valid Easement could be granted by either the Association or Waterford, at the decision of the Declarant. Therefore, the Court does not agree with Garwood’s argument that the Easement is ineffectual and void because the Association never had the rights or ability to grant the Easement. To the contrary, the Court finds the CC&Rs expressly grant such a right if the Declarant so chooses.

As such, Garwood’s Motion for Summary Judgment asking the court to find the Easement void under the CC&Rs is denied.

b. Under Articles of Incorporation or Idaho Law

In the alternative, LaRiviere Holdings contends that the Association had statutory and contractual authority to convey the Easement to LaRiviere Holdings’ predecessor-in-interest because the Association was formed as an Idaho corporation pursuant to I.C. § 30-30 et seq., the Idaho Non-Profit Corporation Act, prior to the creation and recording of the CC&Rs. *Df.’s Memo. in Opp’n* at 13.

Upon formation, the Association filed its Articles of Incorporation with the Idaho Secretary of State. (Wright Decl. ¶ 9, Ex. E). When the CC&Rs were recorded, they expressly established the Declarant as the record Owner and incorporated by reference the Articles of Incorporation. See CC&Rs, Section 1(r) and Section 3.1 (“a copy of the Articles of Incorporation are attached hereto as Exhibit “B”, and by this reference are hereby incorporated herein.”).

Notably, the Association’s Articles specifically note that the Association was to hold a number of broad powers, including the power to “[a]cquire (by gift, purchase, or otherwise), own, hold, improve . . . convey, sell, lease . . . or otherwise dispose of real or personal property,” “Make contracts and incur liabilities,” and “Dedicate, sell, transfer, or grant easements over all or part of any of the corporation’s property to any public

agency, authority, or utility for such purposes and subject to such conditions as may be agreed to by the members.” (*Id.*). The Articles go on to provide that in addition to the expressly enumerated powers, the Association also had “any and all powers, rights, and privileges which a corporation organized under the Idaho Nonprofit Corporation Act law” would possess. (*Id.*).

I.C. § 30-30-303 specifically provides that non-profit corporations formed under the Idaho Nonprofit Corporation Act hold the authority “[t]o purchase, receive, lease or otherwise acquire and to own, hold, improve, use and otherwise deal with real property, including water and water rights, and personal property, or any legal or equitable interest in property, wherever located.” While this statute does not specifically delineate the ability to grant easements or otherwise encumber real property, given the breadth of the foregoing definition, there is clearly a question of fact as to whether a corporation exercising this grant of authority could legally convey a valid easement.

Id. at 13-14. Underlining added.

Though it is not settled law in Idaho, LaRiviere Holdings also argues that the “prevailing law in most jurisdictions is that condominium owners associations possess the authority to grant easements of the common areas and elements.” *Id.* at 14. (citing to Washington State’s Revenue Code, Washington D.C.’s Code, and North Carolina’s General Statutes.) *Id.*

Given the powers granted to the Association under its Articles, the CC&Rs, the Idaho Nonprofit Corporation Act, and the generally accepted powers of condominium associations, there is substantial legal authority and documentation within the chain of property records to support that the Association had the power to convey the Easement. At the very least, and as noted further below, issues of fact regarding the Association’s authority to grant the Easement exist.

Id. at 14-15.

Here, LaRiviere cites to the Association’s Articles of Incorporation which grant the Association the power to “grant easements over all or part of any of the

corporation's property to any public agency, authority, or utility for such purposes and subject to such conditions as may be agreed to by the members." *Id.* at 13-14., Wright Decl. ¶ 9, Ex. E. However, in the case at hand, the easement was granted to an individual, and not a public agency, authority, or utility. Therefore, there is at least a question whether the Articles of Incorporation permit the Association authority to grant the Easement.

Because the court did find authority in the CC&Rs, however, this potential lack of authority does not effect the Court's ruling. Garwood's Motion for Summary Judgment asking the court to find the Easement void is denied.

c. Ambiguity

Finally, LaRiviere Holdings contends that ... "When various provisions of a legal instrument are in conflict with others with respect to a particular event or action, an ambiguity exists, and the ambiguity must be resolved by the finder of fact." *Df.'s Memo. in Opp'n at 14.* (citing to *Kessler v. Tortoise Dev., Inc.* (Kessler I), 130 Idaho 105, 108, 937 P.2d 417, 420 (1997)). *Id.*

In various sections of its briefing, Plaintiff asserts that Waterford's original ownership of Parcel 2 and the reservation of rights to Waterford contained within the CC&Rs demonstrates that only Waterford, as the Declarant, had the right to convey the perpetual, nonexclusive Easement at issue in this case for ingress, egress, utilities, and the placement of signage. However, as highlighted previously, numerous other provisions within the CC&Rs and the Articles of Incorporation conflict with this interpretation:

First, Section 2.3(e) of the CC&Rs vests the right of ownership in the common areas with the individual condominium owners. The individual owners act with respect to the Common Areas through the Association, not through Waterford.

Second, Section 4.1 of the CC&Rs provides that by a vote of 75% of the unit owners, the Association may dedicate or transfer all of or any part of the Common Areas to any public agency, authority, or utility.

Third, Section 10.2 of the CC&Rs states Waterford has authority to grant easements for the installation or maintenance of utilities, which directly conflicts with Section 4.1 of the CC&R's and the Association's Articles of Incorporation.

Fourth, as noted above, the Association's Articles of Incorporation specifically provide that the Association had the power to "convey, sell, lease . . . or otherwise dispose of real or personal property," "Make contracts and incur liabilities," and "Dedicate, sell, transfer, or grant easements over all or part of any of the corporation's property to any public agency, authority, or utility for such purposes and subject to such conditions as may be agreed to by the members."

Further, the Articles of Incorporation also equip the Association with "any and all powers, rights, and privileges which a corporation organized under the Idaho Nonprofit Corporation Act law." As stated above, such powers under the act include the right to convey and encumber real property. As the preceding points illustrate, there are multiple provisions which conflict as to ownership of the underlying parcels within the Plat and the right to convey easements. Given their conflicting nature and the fact that several reasonable interpretations of the various grants of authority could result, at the very least, the existence of ambiguities within the CC&Rs preclude summary judgment. These ambiguities are only furthered by the fact that while the Plaintiff contends that the Association lacked the authority to convey the Easement, and instead, only Waterford possessed such authority, it neglects to even mention that the Managing Member of Waterford and the President of the Association were the same person: Robert O. Holland, who also signed the Easement in question.

Id. at 15-16.

Though Garwood did not provide a Reply Brief, it did provide in its *Brief in Support of Motion for Summary Judgment* that the "Easement is unambiguous and clear on its face," *Br. In Supp.* at 13., and "[t]here is no ambiguity in the language set forth in the Easement." *Id.* at 11.

"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." *Hughes v.*

Fisher, 142 Idaho 474, 480, 129 P.3d 1223, 1229 (2006) (citing *Hodgins*, 139 Idaho at 229, 76 P.3d at 973 [internal citations omitted]). “An express easement may be created by a written agreement between the owner of the dominant estate and the owner of the servient estate.” *Capstar Radio Operating Co. v. Lawrence*, 143 Idaho 704, 707, 152 P.3d 575, 578 (2007). “[W]hether a contract is ambiguous is a question of law which may be freely reviewed by an appellate court.” *Hughes v. Fisher*, 142 Idaho 474, 480, 129 P.3d 1223, 1229 (2006) (citing *Clark v. St. Paul Prop. and Liability Ins. Cos.*, 102 Idaho 756, 757, 639 P.2d 454, 455 (1981)). When a Court interprets or construes a deed or an easement agreement, “the primary goal is to seek and give effect to the real intention of the parties.” *Machado v. Ryan*, 153 Idaho 212, 218, 280 P.3d 715, 721 (2012) (internal quotations omitted). “[I]t is not only the words in an instrument that must be considered, but also their context, in order to ascertain whether a deed is ambiguous.” *Lorenzen, Trustee of the Phyllis E. Lorenzen Revocable Trust v. Pearson*, 167 Idaho 385, 391, 470 P.3d 1194, 1200 (2020).

“Ambiguity may be found where the language of the deed is subject to conflicting interpretations.” *Marek v. Lawrence*, 153 Idaho 50, 53, 278 P.3d 920, 923 (2012). “However, ambiguity is not present merely because the parties present different interpretations to the court.” *Jasso v. Camas Cnty.*, 151 Idaho 790, 798, 264 P.3d 897, 905 (2011). To determine whether a deed is ambiguous, it must be reviewed as a whole.” *Neider v. Shaw*, 138 Idaho 503, 508, 65 P.3d 525, 530 (2003).

Hoch, 155 Idaho at 639, 315 P.3d at 827.

In *Marek*, the Idaho Supreme Court held:

Conflicting interpretations may arise when no potential boundary line unambiguously fits the language contained in the deed. In *Read [v. Harvey]*, 141 Idaho 497, 499-500, 112 P.3d 785, 787-88 (2005)], the

language of the deed stating 'centerline of the creek,' 'centerline of the main tributary of the creek,' and 'centerline of the main tributary to Gold Creek' may have referred to one of two drainage ditches or a comparatively dry historical natural creek channel. Neither of the drainage ditches, nor the creek channel, unambiguously fit the language contained in the deeds, making the intentions of the drafters unclear. [Where the intention of the drafters is unclear, the determination is a question] of fact with reference to the surrounding facts and circumstances.

[C]onflicting interpretations may arise when a phrase lends itself, without contortion, to a number of inconsistent meanings . . . [Also,] inconsistencies in a deed may throw such a shadow of ambiguity over [an] instrument as to warrant the introduction of parol evidence as an aid to discovering the intention of the parties.

Marek v. Lawrence, 153 Idaho 50, 53-54, 278 P.3d 920, 923-24 (2012) (quoting *Porter v. Bassett*, 146 Idaho 399, 404-05, 195 P.3d 1212, 1217-18 (2008)).

[W]here facts regarding intent are not yet fully developed, but appear to be disputed, summary judgment is not proper. *Currie v. Walkinshaw*, 113 Idaho 586, 591, 746 P.2d 1045, 1050 (Ct. App. 1987). In *Currie*, the deed description began with a call of "along the high water level" of the river "to a point exactly midway between the Northeast and Northwest corners of Lot 10." *Id.* at 590, 746 P.2d at 1049. The court noted that while marked corners would normally be conclusive in a property description, a meander line was also involved which opened up the possibility that the boundary line was to follow the sinuosities of the river. *Id.* The court determined the parties' respective arguments that the "midpoint" was to be found by following the shoreline of the river, or that it was to be a straight line between the two given points, were both reasonable, and, therefore, a question of fact existed.

Porter v. Bassett, 146 Idaho 399, 405, 195 P.3d 1212, 1218 (2008).

Here, as stated by LaRiviere Holdings, there are conflicting passages and authority granted to the Association by the CC&Rs and the Articles of Incorporation, which may render the CC&Rs ambiguous. If the CC&Rs were found to be ambiguous,

then the intent of the parties would control. As the intention of the parties at the time that the Easement was granted is either not pled, or to the extent that it is pled, it is in conflict, Summary Judgment on this issue is not proper. Therefore, Garwood's motion regarding this issue is denied.

2. Because there is a question as to Superiority of Rights, Summary Judgment is denied on this issue.

Garwood contends that because Idaho is a race-notice State, the Easement is subject to the "Declarant's Rights" set forth in the CC&Rs, because the CC&Rs were recorded in November 2004, while the Easement was not granted until December 2005. *Brief in Supp. at 9, 10.* Because the CC&Rs were recorded first, LaRiviere Holdings, and LaRiviere Holdings' predecessor-in-interest, were thus on notice that "that the 'Declarant' retained 'easements and rights upon, across, over, under and through the Property for construction . . . in connection with the erection and sale or lease of the Condominium Storage Units...' (i.e. the ["Declarant's Rights"]). See CC&Rs §10.04." *Brief in Supp. at 10.* Therefore, "the Easement is subject to and inferior to those rights to construct and maintain and sell condominium storage units" or, in other words, "Plaintiff's right to use the Easement area for the purpose of constructing and selling condominium storage units predates, and is therefore superior to, the rights of Defendant." *Id.*

Additionally, Garwood argues that the "Easement itself is actually expressly made subject to the CC&Rs and Declarant's Rights." *Brief in Supp. at 11.*

In the legal description for the property the Easement is encumbering expressly subjects it to the CC&Rs:

2000239

thence North 00°25'31" West, a distance of 113.38 feet to the Point of Beginning, containing 6,187 square feet of land, more or less;

Subject to:

Any existing easements, covenants, conditions, rights, reservations, restrictions or encumbrances of record or in view, including a non-exclusive right-of-way easement to Lakes Highway as described in Instrument Number 1755822.

See Decl. of Schumann, Ex. 6, p. 4-5. "Since [the Easement] is subject to the CC&Rs, the CC&Rs are automatically superior to it and the Declarant's Rights (which are set forth in the CC&Rs) are superior to the Easement and the Easement has no effect against the Declarant's Rights." *Id.* Br. In Supp. at 11.

In response, LaRiviere Holdings argues that:

Plaintiff first alleges that because Idaho is a "race notice" state and the CC&Rs were recorded when LaRiviere Holdings purchased Parcel 3 in 2015, it was able to investigate the "open and obvious" development rights held by Plaintiff's predecessor in interest. See *West Wood Investments, Inc. v. Acord*, 141 Idaho 75, 86, 106 P.3d 401, 412 (2005) ("one who fails to investigate the open and obvious inconsistent claim cannot take in good faith."). Ironically, the record itself makes quite clear that the nature of the development rights was anything but open and obvious. In fact, by Plaintiff's own admission, it took two full years of protracted litigation in a "hotly contested case" involving both the Association and Plaintiff's predecessor in interest, Garwood Enterprises, LLC, to even determine what the development rights consisted of. To claim that the mere recording of these "development rights" were sufficient to put LaRiviere Holdings on notice that its easement rights could be, under the Plaintiff's interpretation, unilaterally terminated without any compensation or means for redress, is grossly inaccurate.

When the Final Judgment was entered on July 1, 2015, purportedly declaring what the development rights consisted of, LaRiviere Holdings had already purchased and begun to develop Parcel 3. If the development rights themselves could not be ascertained without years of litigation and the independent judgment of a judicial officer, their mere existence within the CC&Rs was insufficient to put LaRiviere Holdings on notice of their

purported reach. Further, it is noteworthy that while Plaintiff contends that the Final Judgment impacts Plaintiff's property rights and the validity of the Easement, neither LaRiviere Holdings nor any of its predecessors in interest were provided notice or the opportunity to participate in the litigation. If LaRiviere Holdings' property rights were indeed impacted, it should have been a party.

Memo. In Opp'n at 19. As stated above, neither Garwood nor LaRiviere Holdings were a party in this previous litigation.

Plaintiff next alleges that pursuant to the plain language of the Easement, the Easement was expressly subject to the CC&Rs and thus, LaRiviere Holdings' rights in the Easement are inferior and subject to the development rights of Plaintiff. Here, the final paragraph of the Easement Agreement provides the following boilerplate language, followed by a specific reference to a recorded document:

Subject to:
Any existing easements, covenants, conditions, rights, reservations, restrictions or encumbrances of record or in view, including a non-exclusive right-of-way easement to Lakes Highway as described in Instrument Number 1755822.

While the Easement provides specific reference to a separately recorded right-of-way easement, it makes no reference to the CC&Rs. Given the date the Easement was granted, along with who granted it, this lack of specific reference is noteworthy. As noted previously, the Easement was signed by Robert O. Holland, President of the Association, and the Managing Member of Waterford. In fact, it was Robert O. Holland himself who signed the CC&R's. Despite the fact that the Easement was signed well after the CC&Rs were recorded, no reference was made to the previously recorded CC&Rs. Pursuant to the long recognized legal maxim of *expressio unius est exclusio alterius*, this absence should not be overlooked. See *Ace Realty, Inc. v. Anderson*, 106 Idaho 742, 749, 682 P.2d 1289 (Ct. App. 1984) (noting that the maxim "*expressio unius est exclusio alterius* (the expression of one thing is the exclusion of another) applies to contracts and, therefore, the expression in a contract of one or more things of a class implies the exclusion of all not expressed."). The inclusion of one instrument's number is evidence of an intent to exclude others, namely the CC&Rs. At the very least, questions over the intention behind the failure to include specific reference to the CC&Rs should preclude summary judgment.

Memo. In Opp'n at 20.

Here, there are disputes as to material facts that prevent the Court from granting Summary Judgment. First, there is a dispute as to if LaRiviere Holdings was a required party in Kootenai County Case No. CV2013-1465, which Garwood relies on to show it's development rights. LaRiviere Holdings was not provided Notice or an opportunity to participate in litigation, although it had already purchased Parcel 3 and began to develop the property. The dispute in Kootenai County Case No. CV2013-1465 arose "out of a disagreement between the ["Association"] about whether the declarant that formed the association can assign its reserved development interest to a third party, Garwood Enterprises, LLC..., and if so whether that Successor Declarant has the same rights to develop the association's common area as original declarant under the associations" CC&Rs. CV2013-1465, *Order Re: Plaintiff's Motion for Summary Judgment; Defendant's Motion for Summary Judgment* (May 7, 2015), at 1. The issue in that case was "simply a declaratory judgment of the rights of the Successor Declarant as enumerated in the CC&Rs." *Id.* at 7. Second, there is a dispute as if the Easement is subject to the CC&Rs even though the Easement lists what it is subject to, and it does not mention the CC&Rs.

Because there are disputes as to material facts, Summary Judgment cannot be granted.

- 3. Garwood's argument that the Easement is unenforceable because its use would violate highway district regulations: namely that ingress and egress are not allowed by Lakes Highway District at the location of the Easement, is not persuasive.**

Garwood contends that if the easement is "unenforceable because its terms contemplate an illegal use." *Pl.'s Br. In Supp.* at 11. To support this theory, Garwood cites to *Baccouche v. Blankenship*, 154 Cal.App.4th 1551, 65 Cal.Rptr.3d 659 (Cal.

App. 4th, 2007), a case from the Court of Appeals of the Second District, Division 4, of California, where an easement was held to be unenforceable, though valid, because the easement violated the zoning ordinances. Garwood cites to no binding authority or any Idaho cases to support this claim. Garwood then continues:

Here, in this scenario, the laws of the Lakes Highway District prevent the lawful use of the Easement for ingress and egress. See *Decl. Schumann*, Ex. 15. As is clearly evidenced by the Highway District's repeated denial of an approach request (i.e. a request to access the public right of way through the Easement area), it is simply not legal to ingress to, and egress from, the Easement Area.

Idaho has long held that an illegal contract is unenforceable. The Easement is, in essence, a contract to allow an illegal activity (i.e. ingressing and egressing onto the Lakes Highway District right of way without permission or approval). There is no dispute as to any material fact: ingress and egress are not allowed at the Easement location. Thus, the Easement is unenforceable and this Court should enter summary judgment declaring that the Easement is unenforceable.

Pl.'s Br. in Supp. at 12.

LaRiviere Holdings argues:

The Easement provides:

The purpose of this access easement is for vehicle and utility access to provide ingress and egress to and from the OLSON property. OLSON shall also be permitted to place signage on and within said easement.

Accordingly, despite Plaintiff's contentions, pursuant to the Easement's plain language, its scope includes not only vehicle access to provide for ingress and egress, but utilities and the placement of signage. Of these purposes, as highlighted in the *Declaration of Thomas LaRiviere III*, filed concurrently, ["LaRiviere Holdings"] currently runs all of its utilities for water, gas, and electricity through the Easement area. Additionally, ["LaRiviere Holdings"] utilizes the Easement for temporary signage and historically, with permission of Plaintiff's predecessor in interest, for parking and as a turnaround location to provide for ingress and egress to ["LaRiviere Holdings"] property. Additionally, ["LaRiviere Holdings"] plans to utilize the Easement in the future for the placement of additional utilities if further

subdivision or subletting occurs. Accordingly, there is no question that the Easement serves lawful purposes.

The only argument Plaintiff asserts in support of unlawfulness is that ["LaRiviere Holdings"] applied for an approach permit from Lakes Highway District, seeking to utilize the Easement as an access point to and from Garwood Road, and that permit was denied. However, Plaintiff presents no evidence that the intent of the parties to the Easement Agreement was to make all uses of the Easement inseverable. This, coupled with Idaho's strong public policy against forfeiture, indicates there is at least a dispute of fact as to the continuing existence of an intended use justifying the continued existence of the Easement. See *Taylor v. Taylor*, 169 Idaho 806, 816, 504 P.3d 342, 352 (2022), reh'g denied (Mar. 2, 2022) (intent as to severability "is essentially a question of fact to be determined by the trier of fact."); *Abercrombie*, 39 Idaho at 158 ("Courts are reluctant to declare and enforce a forfeiture if by reasonable interpretation it can be avoided.").

Finally, the fact that Lakes Highway District has not yet approved LaRiviere Holdings' approach permit is not determinative, and does not render the purpose of the Easement "illegal." Easement agreements are contracts. See *Sec. Inv. Fund LLC v. Crumb*, 165 Idaho 280, 287-90, 443 P.3d 1036, 1043 (2019) (applying principles of contract law to easement agreement). In general, a contract may be found unenforceable if performance becomes impossible, such as when the subject matter becomes illegal. See *Haessly v. Safeco Title Ins. Co. of Idaho*, 121 Idaho 463, 465-66, 825 P.2d 1119, 1121 (1992) (genuine issue of material fact where appellant alleged that a contract to transfer an easement necessary for access to a highway was rendered impossible by a government entity's refusal to grant access to the highway). However, under Idaho law, the doctrine of impossibility excuses performance of a contract only when performance is rendered objectively impossible. *State v. Chacon*, 146 Idaho 520, 523, 198 P.3d 749, 752 (Ct. App. 2008). Accordingly, impossibility that is only temporary will not act to nullify an agreement if the contract may ultimately be performed after impossibility ceases. See *Sutheimer v. Stoltenberg*, 127 Idaho 81, 896 P.2d 989 (Ct. App. 1995) (citing Restatement (Second) of Contracts § 269); see also *Culp v. Tri-County Tractor, Inc.*, 112 Idaho 894, 900, 736 P.2d 1348, 1354 (Ct.App.1987) (impossibility that is only temporary will not act to discharge a contractual obligation if the contract can yet be performed after the impossibility ceases).

Finally, as previously discussed, there are other purposes

for the Easement that are not frustrated, such as utilities and signage. Thus, the Easement's intended uses are not objectively impossible, and termination of the Easement is unwarranted.

Df.'s Memo. In Opp'n at 23-24.

Here, unlike in the non-binding California case, the Easement's main terms do not contemplate an illegal use. In *Baccouche*, the Easement's terms violated the zoning ordinance, and thus that Court found the Easement to be unenforceable. As stated by LaRiviere Holdings, however, in the case at hand there are other purposes of the Easement that are not claimed by Garwood to be illegal, including the placing of signage on the property. Further, LaRiviere Holdings states that it is continuing to petition for permission. With such, the Court does not find that the Easement is illegal, and summary judgment on this issue is denied.

4. There is a dispute as to material fact if suitable permission was granted to LaRiviere Holdings to park on the Easement, therefore an injunction cannot be granted. Summary Judgment on this matter is denied.

Garwood argues that LaRiviere Holdings is using the Easement in an unallowed and unpermitted way because the Easement is only for "access" and "ingress and egress," and the Defendant is parking vehicles and heavy equipment on the area without an express easement for parking. *Brief in Supp.* at 13. With this, Garwood is asking the Court to issue an "injunction against Defendant from parking vehicles or equipment on the Easement area." *Brief in Supp.* at 13.

"[A]n easement for ingress and egress, without additional rights, does not permit the parking of a vehicle and the permitting of the driver to walk on the land." *Brown's Boundary Control and Legal Principals*, 7th Ed., Walter G. Robillard and Donald A. Wilson, 2014, p. 249.

Id. at 13.

La Riviere Holdings argues:

While not entirely clear from Plaintiff's briefing on the issue of trespass, which does not contain any reference to legal authority or even the word "trespass," it appears that Plaintiff has sought summary judgment on its statutory trespass claim, contending that ["LaRiviere Holdings"] parking within the Easement area constitutes a trespass under I.C. 6-202, for which an injunction should be issued, prohibiting any such parking in the future.

Df.'s Memo. In Opp'n at 25. LaRiviere Holdings acknowledges that the easement does not expressly permit "parking," *Id.* at 26., but argues that "parking within the Easement area was expressly authorized by Plaintiff's predecessor in interest, Garwood Enterprises, LLC." *Id.*⁵

Plaintiff's predecessor in interest, met with Mr. LaRiviere to discuss the development plans and not only agreed on the location of the fence, but confirmed that ["LaRiviere Holdings"] use of the Easement, which included parking vehicles, was consistent with the intent of the parties. In the same way, even if Plaintiff was correct about its rights, it has waited over seventeen years to take action, and in the meantime, ["LaRiviere Holdings"] purchased the property and developed it based on its understanding that it had a perpetual Easement. At a minimum, there is a question of fact as to whether the Plaintiffs, including their predecessors in interest, unnecessarily delayed in asserting their rights and should be barred by the doctrine of laches. See *Sherman Storage, LLC v. Glob. Signal Acquisitions II, LLC*, 159 Idaho 331, 337, 360 P.3d 340, 346 (2015) (noting that whether a party is guilty of laches is a question of fact).

Id. at 21. Additionally, LaRiviere Holdings argues that "[a]s a practical matter, permanent concrete signage spanning the entire Easement area could be a perfectly acceptable use under the Easement. Furthermore, temporary movable signage, such as signage placed on or within vehicles parked in the Easement area could likewise conceivably be a permissible use." *Id.*

⁵ The Defendant further argues that no compensable damages to Plaintiff have been caused. *Memo. In. Opp'n* at 27. However, as discussed, damage is not a necessary element of Civil Trespass under Idaho Code 6-202(2)(a).

As highlighted in the Declaration of Thomas LaRiviere, III, filed concurrently, ["LaRiviere Holdings"] began utilizing the Easement as a turnaround point for large vehicles, as well as a location for overflow parking, upon the understanding with the Plaintiff's predecessor in interest, Garwood Enterprises, LLC that this was permitted. Recognizing ["LaRiviere Holdings"] right to use of the Easement area and its exclusive responsibility to maintain and improve the Easement, Plaintiff's predecessor in interest erected a fence bordering the Easement, effectively separating the Easement from the remainder of Parcel 2. Additionally, Plaintiff's predecessor in interest intentionally avoided any encroachment onto the Easement and authorized LaRiviere Holdings to utilize the Easement for a number of purposes, including parking. Until Plaintiff obtained development rights to Parcels 1 and 2 in late 2021, no concerns were ever raised related to such usage.

Id. at 26. LaRiviere Holdings additionally argues that:

While LaRiviere Holdings acknowledges that the Easement does not expressly use the term "parking" within its scope, it includes several additional purposes, such as "vehicle and utility access," as well as the placement of signage throughout the Easement area. Notably, the Easement contains no durational or size limitations on the signage allowed or the nature of the utilities allowed. As a practical matter, permanent concrete signage spanning the entire Easement area could be a perfectly acceptable use under the Easement. Furthermore, temporary movable signage, such as signage placed on or within vehicles parked in the Easement area could likewise conceivably be a permissible use.

Id.

Idaho Code § 6-202(2)(a) provides that "[a]ny person who enters or remains upon the real property of another person without permission commits a civil trespass." "Permission" means written authorization from the owner or his agent to enter upon private land, which shall include the signature of the owner or his agent, the name of the person being given permission, the appropriate dates that the permission is valid and a general description of the property; or another form of permission or invitation

recognized by law. *I.C. § 6-202(1)(f)*. Civil trespass is not committed by a person entering or remaining upon real property if the person entered or remained on the property pursuant to an invitation, whether express or implied, an easement, or a legally prescribed right to enter or remain upon the real property in question. *I.C. § 6-202(7)(a)(ii), (iii), and (c)*. A person found liable of civil trespass is liable for the greater of “a damage award of five hundred dollars (\$500)” or “[t]he amount of actual damages caused by the trespass.” *I.C. § 6-202(3)(a)(i)(1)-(2)*.

In the present case, LaRiviere Holdings compares its parking of vehicles to signage that is allowed under the Easement; as this claim is not disputed by Garwood, there is an issue if parking is allowed under the Easement. Further, it is disputed if Garwood’s claims are barred by the doctrine of laches.

Additionally, as a practical point, Garwood does not cite to authority that would allow this Court to enter an injunction against LaRiviere Holdings, as the damages provided in Idaho Code 6-202(3) are for monetary amounts.

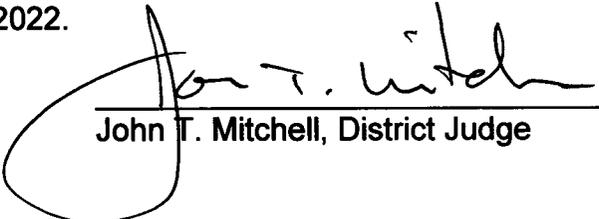
Therefore, Summary Judgment on this issue and the requested injunction are denied.

IV. CONCLUSION AND ORDER.

Based on the foregoing, the plaintiff 498 Garwood, LLC motion for summary judgment is denied to all counts.

IT IS HEREBY ORDERED the plaintiff 498 Garwood, LLC motion for summary judgment is DENIED in its entirety.

Entered this 24TH day of October, 2022.



John T. Mitchell, District Judge

Certificate of Service

I certify that on the 24th day of October, 2022, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail, email or facsimile to each of the following:

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Jeanne Clausen, Deputy Clerk