

Disqualification” of this Court on February 22, 2012. The Motion for Disqualification was “for cause” under “I.R.C.P. 41(d)(2)(B).” Motion for Disqualification, p. 1. The Court treated the Motion for Disqualification as actually being made under I.R.C.P. 40(d)(2)(B).”

The filing of the motion for disqualification divested this Court of taking any other action other than to hear the motion to disqualify. I.R.C.P. 40(d)(2)(B); *Davis v. Irwin*, 65 Idaho 77, 139 P.2d 474 (1943). The Motion to Disqualify was heard on March 27, 2012, and denied on that same date.

In support of Sky Canyon's Motion for Reconsideration filed on February 22, 2012, Sky Canyon also filed on February 22, 2012, an Affidavit of Jay Lockhart in Support of Motion for Reconsideration. On March 7, 2012, Sky Canyon filed its Memorandum in Support of Motion for Reconsideration. On March 26, 2012, Sky Canyon noticed up for hearing its Motion for Reconsideration for May 30, 2012. The hearing was later noticed for hearing on May 29, 2012, and finally, for hearing on June 6, 2012. On May 30, 2012, Golf Club filed its Memorandum in Opposition to Motion for Reconsideration, and an Affidavit of Rand Wichman in Opposition to Motion for Reconsideration. On June 4, 2012, Sky Canyon filed its Reply Memorandum in Support of Motion for Reconsideration. Prior to oral argument, this Court had read all briefing on Sky Canyon's Motion for Reconsideration. Prior to oral argument, the Court had read all pertinent briefing, but did not have the opportunity to read the Affidavit of Jay Lockhart. Oral argument was held on June 6, 2012, at the conclusion of which this Court took the matter under advisement. Since that time, the Court has re-read all briefing, has read the affidavits of Jay Lockhart and Rand Wichman, and has read the transcript of the June 6, 2012, hearing.

The following is from this Court's Memorandum Decision and Order on Motion to Strike and Cross Motions for Summary Judgment (omitting the sections on Standard of Review and analysis of the Motion to Strike):

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on the parties' cross-motions for summary judgment on the issue of whether defendant The Golf Club at Black Rock, LLC (Golf Club) is a proper successor "declarant" pursuant to the Assignment of Declarant Rights clause of the July 31, 2001, "Black Rock, Covenants, Conditions and Restrictions" (CCRs). Black Rock Development, Inc. (BRD) was the original developer of the Black Rock Development. Complaint, p. 2, ¶ 7. Plaintiffs (hereinafter Sky Canyon, collectively) are seven individual members of the Black Rock Homeowners Association (HOA) and each hold fee simple title to at least one lot in Black Rock. *Id.*, ¶¶ 1-2. The CCRs provided for formation of the HOA. *Id.*, at ¶ 9. The CCRs provide BRD is the "Declarant" and therefore "retained the exclusive power to appoint, remove, and replace Directors and officers" of the HOA until expiration of the "Period of Declarant Control." *Id.*, p. 3, ¶¶ 13-14. The period of Declarant Control began July 31, 2001, and ended the earlier of: (a) July 31, 2021 (twenty years from recordation of the CCRs) or (b) the date on which the Declarant has recorded the plats of all Expansion Property and sold 90% of the Lots to Owners other than Declarant or Builder in each of the Plats. *Id.*, at ¶ 15. There is no dispute that the parties are still in the "Period of Declarant Control.

On August 11, 2010, BRD assigned its declarant's rights to Washington Trust Bank (WTB) in conjunction with its property being foreclosed upon, including the golf course, club house and other club amenities. *Id.*, at ¶¶ 19-20. On August 23, 2010, WTB assigned the Declarant Rights to West Sprague Avenue Holdings, LLC. *Id.*, p. 4, ¶ 22. On October 29, 2010, West Sprague Avenue Holdings, LLC assigned the Declarant Rights to Golf Club in conjunction with conveyance of the club property to Golf Club. *Id.*, at ¶¶ 23- 24. On November 5, 2010, BRD assigned to Golf Club, via a "Conditional Assignment of Declarant Rights" any declarant rights it may have retained following its August 11, 2010, assignment to WTB. *Id.*, at ¶ 25.

On April 1, 2011, Sky Canyon filed its Complaint, seeking declaratory relief that "Defendant does not qualify as a Successor Declarant under the Declaration or alternatively, the period of declarant control has expired and Defendant shall not exercise the rights of the Declarant as provided in the Declaration." Complaint, p. 6, ¶ 41(1). Sky Canyon also seeks attorney's fees under I.C. § 12-121. *Id.*, p. 6, ¶ 2. Golf Club filed its Answer and Counterclaim on May 5, 2011, seeking "entry of declaratory relief adjudging and decreeing that it is the duly-qualified Successor to the Declarant Rights of BRD under the Declaration, it is entitled to all rights and benefits as Successor Declarant." Answer and Counterclaim, p. 9, ¶ 19. Golf Club also seeks an award of attorney's fees pursuant to I.C. § 12-120(3). *Id.*, at ¶ 21.

On October 19, 2011, Sky Canyon filed its motion for summary judgment on its claim for relief and seeking dismissal of Golf Club's counterclaim. Plaintiff's Motion for Summary Judgment, p. 2. Sky Canyon argues Section 27.7 of the CCRs only allows assignment of the

Declarant's Rights where any successor "...takes title to all or a part of the Property, in a bulk purchase for the purpose of development and sale." Plaintiff's Memorandum in Support of Motion for Summary Judgment, p. 8. It is Sky Canyon's contention that, although it concedes Golf Club took title to part of the "Property", there was no "bulk purchase" and the Golf Club did not purchase the portion of the property for the purpose of development and sale. *Id.*, pp. 9, *et seq.*

Also on October 19, 2011, Golf Club filed its cross-motion for summary judgment, requesting its counterclaim for declaratory relief be granted and Sky Canyon's claim for declaratory relief be denied. Motion for Summary Judgment, p. 2. Golf Club argues, *inter alia*, the Period of Declarant Control, defined in Article 2.43 of the CCR, remains in effect and retains the right to develop and sell potential expansion property; "a primary purpose of annexing Expansion Property in conformance with the terms of the CC&Rs would be to develop and sell the same." Memorandum in Support of Motion for Summary Judgment by Defendant/Counterclaim Plaintiff the Golf Club at Black Rock, LLC, p. 15.

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III. ANALYSIS.

* * *

B. Cross-Motions for Summary Judgment.

In its memorandum in support of its motion for summary judgment, Sky Canyon presents the issue before the Court as being whether Golf Club qualifies as a "successor declarant" to whom the Declarant's rights could have been assigned pursuant to Section 27.7 of the CCRs. Plaintiffs' Memorandum in Support of Motion for Summary Judgment, p. 5. Sky Canyon quotes Section 27.7 in its entirety:

27.7 Assignment. Declarant may assign all or any part of the Special Declarant Rights or any of Declarant's other rights and reservations hereunder to any successor who takes title to all or part of the Property in a bulk purchase for the purpose of development and sale. Such successor will be identified, the particular rights being assigned will be specified, and, to the extent required, concomitant obligations will be expressly assumed by such successor, all in a written instrument duly recorded in the records of the Recorder of Kootenai County, Idaho. (Emphasis Added).

Id., p. 8; *see also* Exhibit 2 to the Plaintiffs' Submission of Certified Documents in Support of Their Motion for Summary Judgment. (underlining added). Sky Canyon concedes that "there is no question that Defendant took title to part of the Property." Plaintiff's Memorandum in Support of Motion for Summary Judgment, p. 9. However, Sky Canyon argues there was no "bulk purchase" as that phrase is defined with either by BLACK'S LAW DICTIONARY or the Merriam-Webster website. *Id.*, p. 10. Sky Canyon notes the Plat of Black Rock created a number of blocks reserved for future residential lots, but these individual lots were not

platted at the time the Black Rock Plat was recorded. *Id.*, p. 11. Sky Canyon then argues it follows there can have been no undivided, bulk purchase based on the platting activity because there was no “purchase of part of the Property reserved for future residential use under the original Plat.” *Id.*, p. 12. Sky Canyon goes on to argue the purchase of Golf Club’s sale was not for development and sale as contemplated by the CCRs, but rather for development and sale of golf club memberships. *Id.*, p. 15. “[A]n intent to develop and sell the property contingent on future events (such as a plan to develop and sell the applicable property if the golf club is not profitable) does not meet the requirements of Section 27.7. *Id.* Ultimately, Sky Canyon argues, Golf Club fails to meet the definition of a “successor declarant”, found in Section 2.50 (defining “Successor Declarant” as any party or entity to whom a Declarant assigns any or all of its rights, obligations or interest as Declarant “as permitted by Section 27.7., evidenced by recordation of an assignment or deed of record) of the CCRs because it did not take title to part of the property “in a bulk purchase for the purpose of development and sale.” *Id.*, pp. 16-17.

In its memorandum in support of its cross motion for summary judgment, Golf Club makes several arguments: (1) the period of Declarant Control remains in effect such that “expansion property” can still be acquired; (2) Golf Club acquired part of the “Property” in bulk via its purchase of approximately 206 acres, the Clubhouse, all related equipment, fixtures, inventories, etc. for the discounted bulk sale price of \$6 million; (3) and at the time the Golf Club made the purchase, there were no existing memberships in or to the Club property, therefore, the intent to sell membership to “create a vibrant and collegial golf course and recreational community atmosphere”, while retaining the right to develop and/or sell the property, satisfies Section 27.2. Memorandum in Support of Motion for Summary Judgment by Defendant/Counterclaim Plaintiff The Golf Club at Black Rock, LLC, pp. 9, *et seq.*

In their responsive briefing, the parties have further clarified their arguments for the Court. In the Golf Club’s November 3, 2011, Memorandum in Opposition to Motion for Summary Judgment, Golf Club argues the period of Declarant control remains in effect, the CCRs’ definition of “property” includes both the Club Property purchased by Golf Club (the golf course, practice facilities, clubhouse, etc.) and possible future “expansion property”, the sale of the property was in bulk as it included within the 206 acre purchase the Clubhouse, all associated equipment, and fixtures etc. for the “bulk price of \$6 million”, where the property (including the Beach Club purchased for \$1.5 million) was assessed by the County shortly after purchase at over \$14 million, and Golf Club’s sale of 172 golf memberships alone satisfies Section 27.7’s requirement that the bulk purchase be for “development and sale.” Memorandum in Opposition to Motion for Summary Judgment of Plaintiffs/Counterclaim Defendants, pp. 3, *et seq.* Golf Club continues that even if the Court disagrees that selling of golf membership constitutes “development and sale” under the CCRs, it:

has the ability to develop and sell portions of the 206 +/- acre parcel that included, for any residential or other purpose not proscribed by the CC&Rs. This can be as an alternative to the operation as a golf club or in tandem with the same.

Id., p. 10. Finally, Golf Club argues its acquisition of the right to purchase potential “expansion property” in and of itself satisfies Section 27.7 as such “expansion property” constitutes “property” for the purposes of the CCRs, the rights to “expansion property” were acquired in bulk, and “the only purpose for acquiring ‘Expansion Property’ would be for development and sale.” *Id.*, pp. 11-12. In their objection to Golf Club’s motion for summary judgment, Sky Canyon again defines the term “bulk”, arguing “a ‘bulk purchase’ is a purchase of a part of the Property reserved for future residential use under the original Plat.” Plaintiff’s Objection to Defendant’s Motion for Summary Judgment, p. 7. Because the CCRs do not include personal property in the definition of “Property”, Sky Canyon posits that Golf Club’s “purchase of personal property is irrelevant” in response to Golf Club’s argument that it effected a bulk purchase via purchase of the 206 acres including the Clubhouse, associated equipment, fixtures, inventories, etc. *Id.*; see Memorandum in Opposition to Motion for Summary Judgment of Plaintiffs/Counterclaim Defendants, p. 7. And, Sky Canyon again vehemently argues Golf Club did not purchase the property “for the purpose of development and sale.” Plaintiff’s Objection to Defendant’s Motion for Summary Judgment, pp. 7, *et seq.* Essentially, Sky Canyon’s contention is Golf Club “purchased the Club Property for the purpose of owning and operating a golf club”, which Sky Canyon differentiates from the CCRs requirement of developing and selling property. *Id.*, pp. 8, *et seq.*

Two questions remain for this Court under Section 27.7: (1) whether the instant purchase of property qualifies as a “bulk purchase”, and (2) whether the intent to develop and sell golf club memberships can be treated as “development and sale” of Club Property.

As argued by the parties, Idaho recognizes covenants restricting the free use of land as valid and enforceable,

[h]owever, since 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. Further, all doubts are to be resolved in favor of the free use of land.

Berezowski v. Schuman, 141 Idaho 532, 535, 112 P.3d 820, 823 (2005). Courts apply the general rules of contract construction to covenants. *Pinehaven Planning Bd. v. Brooks*, 138 Idaho 826, 829, 70 P.3d 664, 667 (2003). A covenant is ambiguous if capable of more than one reasonable interpretation; if a covenant is unambiguous, the court must apply its plain meaning as a matter of law. *Id.*, 138 Idaho 826, 829, 70 P.3d 664, 667. If a covenant is ambiguous, its interpretation is a matter of fact. *Intermountain Eye and Laser Centers, PLLC v. Miller*, 142 Idaho 218, 221, 127 P.3d 121, 125 (2005). Ambiguity is not established simply because a

party presents differing interpretations to the court. *Rim View Trout Co. v. Higginson*, 121 Idaho 819, 823, 828 P.2d 848, 852 (1992). If the Agreement is ambiguous, this Court must view the Agreement as a whole to determine the intent of the parties at the time of contracting. See *Best Hill Coalition v. Halko, LLC*, 144 Idaho 813, 817, 172 P.3d 1088, 1092 (2007).

All of these tenets run contrary to Sky Canyon's position. Sky Canyon is advocating that this Court by implication extend this express language in the restrictive covenant (making it more restrictive), when the express language does not allow such additional restriction. This Court is prohibited from doing such. This Court is constrained only to give reasonable interpretation to the contract language, and Sky Canyon's interpretation is not reasonable. Because Sky Canyon's interpretation is not reasonable, it cannot be used to create ambiguity. Even if Sky Canyon's interpretation was reasonable, Sky Canyon is advocating an interpretation of Section 27.7 which is not supported by the agreement as a whole.

The terms "bulk" and "bulk purchase" have been defined by the parties, and, indeed, little disagreement exists regarding how the terms have been defined in dictionaries. The plain language of the CCR at issue reads:

27.7 Assignment. Declarant may assign all or any part of the Special Declarant Rights or any of Declarant's other rights and reservations hereunder to any successor who takes title to all or part of the Property in a bulk purchase for the purpose of development and sale. Such successor will be identified, the particular rights being assigned will be specified, and, to the extent required, concomitant obligations will be expressly assumed by such successor, all in a written instrument duly recorded in the records of the Recorder of Kootenai County, Idaho.

Exhibit 2 to Plaintiff's Submission of Certified Documents in Support of Their Motion for Summary Judgment, at p. 63. The terms "bulk purchase", "development" and "sale" are not defined in Article 2 (Definitions) of the CCRs. This Court is constrained to give the CCR language its ordinary, plain meaning if found unambiguous and not capable of more than one reasonable interpretation. *Pinehaven Planning Bd.*, 138 Idaho 826, 829, 70 P.3d 664, 667. This Court could find no Idaho or foreign jurisdiction case law explicitly defining the term "bulk purchase." For purposes of criminal law, "bulk amount" has been defined in state statutes, but such definition is inapplicable here. See e.g. Baldwin's Ohio Revised Code § 2925.01(D). As noted by the parties, BLACK'S LAW DICTIONARY provides the following definitions:

bulk, *adj.* (of goods) not divided into parts <a bulk shipment of grain>

bulk discount. See *volume discount* under DISCOUNT

bulk sale. A sale of a large quantity of inventory outside the ordinary course of the seller's business * Bulk sales are

regulated by Article 6 of the UCC, which is designed to prevent sellers from defrauding unsecured creditors by making these sales and then dissipating the sale proceeds- Also termed *bulk transfer*.

BLACK'S LAW DICTIONARY 190 (7th ed. 1999). It is Sky Canyon's contention that under its plain meaning:

...bulk means a purchase of a large quantity that is later divided into smaller quantities and sold. The Defendant [Golf Club] did not purchase a large quantity of land with the purpose of dividing and selling the real property. The Club Property was purchased to be used as a finished unit, not divided up into parts and sold.

Reply to Opposition to Motion for Summary Judgment of Defendant, p. 6. It is Golf Club's contention that no requirement existed in the CCRs:

...that the 'Club Property' be maintained in a static condition as it presently exists. Of the 206+/- acres, portions can be developed at the election of The Golf Club for purposes or development and sale.

Memorandum in Opposition to Motion for Summary Judgment of Plaintiffs/Counterclaim Defendants, p. 8.

Thus, the parties have differing interpretations of whether the phrase "for the purpose of development and sale" in Section 27.7 of the CCRs means development and sale of real property (as set forth by Sky Canyon), or development and sale of golf memberships with the possibility of future development and sale of expansion property (as argued by Golf Club). This Court finds Sky Canyon's interpretation not to be reasonable for several reasons. First, such an interpretation is not justified by the language itself. Section 27.7 is not limited by its terms to only "real" property. Second, such an interpretation requires this Court to imply more restrictive terms than are used in this section of the restrictive covenant, a task this Court is not allowed to perform. Third, as pointed out by counsel for Golf Club at oral argument, because The Club at Black Rock had terminated all golf memberships (Affidavit of Roger Rummel in support of Defendant's Motion for Summary Judgment, p. 5, ¶ 14), Golf Club was purchasing from the bank a property with no memberships. And as Rummel stated in his affidavit, Golf Club hoped to then sell memberships (*Id.*, pp. 5-6, ¶ 19), but if that didn't work out, Golf Club intended to and had the right to sell the golf course property. *Id.* Golf Club purchased this property for the "purpose of development and sale" of golf memberships, and, alternatively, sale of the golf course property. Both are allowed under Section 27.7. As mentioned above, ambiguity is not established simply because a party presents differing interpretations to the court. *Rim View Trout Co. v. Higginson*, 121 Idaho 819, 823, 828 P.2d 848, 852 (1992). The Court finds Sky Canyon's interpretation to not be reasonable. Thus, there is no ambiguity.

If this Court found Sky Canyon's interpretation (that the phrase "for the purpose of development and sale" in Section 27.7 of the CCRs means development and sale of real property only) to be reasonable, then the CCRs would be ambiguous as a matter of law, requiring the Court to read

the CCRs as a whole and determine the intent of the parties. While the Court does not find Sky Canyon's interpretation to be reasonable, the following analysis is provided by the Court as an additional or alternative ground for granting summary judgment in favor of Golf Club.

The CCRs Introduction states, in relevant part:

This Declaration is intended to regulate the [Black Rock] Project and use of the Black Rock Planned Unit Development for the mutual benefit of future Owners and occupants. The Project is to be an aesthetically pleasing family oriented residential development.

Exhibit 2 to Plaintiff's Submission of Certified Documents in Support of Their Motion for Summary Judgment, at p. 1. The Club Property is specifically addressed in Article 17, which reads:

17.1 Club Property. The golf course planned by Declarant will be privately owned and operated by the Club and is not part of the Common Area hereunder. Nothing in this Declaration nor any designation or reference on any Plat, Final Development Plan, Black Rock Document, planned unit development document, approval document issued by any government entity, drawing, advertisement, brochure, or any other document in any way relating to Community or any oral representation of any agent of the Declarant or any party related to the Declarant shall give rise to any right, whether expressed or implied, of an Owner to play golf, or have access to the Club Property, become a member of the Club, require the Declarant to construct or maintain an area as a Club Property, or otherwise impose any obligation of the Declarant relating in any way to the proposed Club Property. All arrangements relating to any Owner and the planned Club Property must be in writing signed by the Owner and the planned Club Property and shall be separate and apart from the Black Rock Documents. The Club has the exclusive right to determine from time-to-time, in its sole discretion and without notice or approval of any change, how and by whom the Club Property shall be used. By way of example, but not limitation, the Club has the right to approve users and determine eligibility for use, to reserve use rights for future purchasers of Lots, to terminate any or all use rights, to change, eliminate or cease operation of any or all of the Club Property or the operation thereof to anyone and on any terms which it deems appropriate, to limit the availability of use privileges, and to require the payment of a purchase price, initiation fee, membership deposit, dues, and other charges for the use privileges. **OWNERSHIP OF A LOT OR ANY PORTION OF THE PROPERTY DOES NOT GIVE ANY VESTED RIGHT OR EASEMENT, PRESCRIPTIVE OR OTHERWISE, TO USE THE CLUB PROPERTY, OR TO ACQUIRE A MEMBERSHIP IN THE CLUB AND DOES NOT GRANT ANY OWNERSHIP OR**

MEMBERSHIP INTEREST IN THE CLUB OR THE CLUB PROPERTY.

Exhibit 2 to Plaintiff's Submission of Certified Documents in Support of Their Motion for Summary Judgment, at p. 50. (emphasis in original). Given the breadth of Section 17.1, and its explicit separation from the general introductory purpose of Black Rock being a residential development, the question of whether the Club Property was purchased for the purpose of development and sale has been answered. There is simply no requirement in the CCRs that the Club Property be developed for sale of real property (as opposed to development and sale of golf club memberships), and to read such a requirement into the CCRs would be an inappropriate act on the part of this Court. See e.g. *Bondy v. Levy*, 121 Idaho 993, 997, 829 P.2d 1342, 1346 (1992) (Court may not revise a contract to create a better agreement for one of the parties). In fact, Section 17.1 provides the Club Property owner with the sole ability to determine how the property is to be used, including ceasing use of the property as a golf club at any time. But even if this Court were to find that "development and sale" inferred development and sale of real property only, Golf Club purchased this property to later sell it if the sale of memberships did not pan out. Affidavit of Roger Rummel in support of Defendant's Motion for Summary Judgment, p. 5, 6, ¶ 14, ¶ 19.

Thus, the only remaining question is whether the Golf Club's purchase of the Club Property was a "bulk purchase." Again, the parties do not argue about the definition of the term, but rather about its application to the facts before the Court. Golf Club argues: "Every property right that currently exists, or that could exist in the future (through Expansion Property), was purchased in one lump and bulk transaction at a bulk discount of fifty percent (50%) off of the assessed valuation." Memorandum in Opposition to Motion for Summary Judgment of Plaintiffs/Counterclaim Defendants, p. 9. On the other hand, Sky Canyon notes the purchase of the Club Property was of Tract A (holes 1-9 and 16-18 of the golf course), Tract C and a portion of Lot 1, Block 11 of the Plat (holes 10-15 of the golf course), Lot 1, Block 8 of the Fifth Addition (the Club House), A portion of Tract C (a short portion of Kimberlite Drive), the West 150 feet of the North half of the Southwest Quarter of the Southeast Quarter and Government Lot 10 (part of one hole of the golf course), and Lot 1, Block 15 of the Plat (the waterfront property), and argues that a "'bulk purchase' is a purchase of a part of the Property reserved for future residential use under the original Plat." Plaintiff's Objection to Defendant's Motion for Summary Judgment, pp. 5-7. The fact the Golf Club argues it received a "bulk discount" in its purchase of the Club Property and the Beach Club for 50% less than appraisal value is not determinative. Rather, the CCRs define Club Property as:

...all of the real property owned by the Club and its successors or assigns plus all of the recreational and social facilities and maintenance facilities constructed thereon, which will be operated by the Club or its successor or assigns and commonly known as the Club at Black Rock,

including without limitation, the golf course, the golf clubhouse, golf practice facilities, tennis courts, swimming pool, private beach, and any other recreational facilities offered by the Club...

Exhibit 2 to Plaintiff's Submission of Certified Documents in Support of Their Motion for Summary Judgment, at p. 3. Here, it is evident that Golf Club purchased an undivided portion of real property, known as the Club Property, which included but was not limited to the golf course, golf clubhouse, golf practice facilities, golf maintenance facilities, tennis courts, swimming pool, private beach, etc. Had Golf Club purchased but one or two of the properties listed immediately *supra*, Sky Canyon's argument would make more sense. However, given the fact that the Club Property's was deemed real property separate and apart, and involving different rights and limitations, from the Black Rock development as a whole, it would not be appropriate for this Court to only consider Golf Club's purchase a "bulk purchase" if it were in conjunction with additional property bought for future residential development, given the facts of this case and viewing the contract in its entirety.

Memorandum Decision and Order on Sky Canyon's Motion to Strike, and on Cross-Motions for Summary Judgment, pp. 1-17.

II. STANDARD OF REVIEW.

A trial court's decision to grant or deny a motion for reconsideration is reviewed for an abuse of discretion. *Jordan v. Beeks*, 135 Idaho 586, 592, 21 P.3d 908, 914 (2001). A party making a motion for reconsideration is permitted to present new evidence, but is not required to do so. *Johnson v. Lambros*, 143 Idaho 468, 147 P.3d 100 (Ct.App. 2006).

III. ANALYSIS OF SKY CANYON'S MOTION FOR RECONSIDERATION.

As mentioned above, at summary judgment this Court found:

This matter is before the Court on the parties' cross-motions for summary judgment on the issue of whether defendant The Golf Club at Black Rock, LLC (Golf Club) is a proper successor "declarant" pursuant to the Assignment of Declarant Rights clause of the July 31, 2001, "Black Rock, Covenants, Conditions and Restrictions" (CCRs).

Memorandum Decision and Order on Sky Canyon's Motion to Strike, and on Cross-Motions for Summary Judgment, p. 1. In its Motion for Reconsideration, Sky Canyon,

under I.C.R.P. 11(a)(2)(B), now claims it has new evidence via the Affidavit of Jay Lockhart, specifically Exhibits A-D of that affidavit, which show that the subject property does not qualify for “development and sale”, and that therefore, Golf Club cannot be the “successor declarant, and that this Court failed at summary judgment to consider land use implications of Golf Club’s intent to sell the subject property. Legal Memorandum in Support of Motion for Reconsideration, p. 2. This is an argument that does not appear to have been made by Sky Canyon during the cross-motions for summary judgment.

Lockhart is a Planner II with Kootenai County Community Development (previously Building and Planning). Lockhart Affidavit, p. 2, ¶ 3. Specifically, Sky Canyon argues Golf Club took title to only a small portion of Black Rock Development Property, and that such property is legally incapable of development and sale. Legal Memorandum in Support of Motion for Reconsideration, p. 5. Sky Canyon argues everything is zoned residential, and therefore, all development and sales must comply with Kootenai County Zoning requirements. *Id.*, p. 6. Since Golf Club’s land is a golf course, Sky Canyon argues Golf Club cannot alter its existing platted use to come under Kootenai County’s residential zoning requirements. *Id.*, p. 9. Sky Canyon argues that Black Rock must remain a predominantly residential development and the golf course property cannot be reconfigured without extensive public hearing and approval by the Kootenai County Board of Commissioners. *Id.*, p. 14. Sky Canyon claims the Declaration of Covenant requires the project is to be an aesthetically pleasing family-oriented residential development, that Golf Club does not own any property capable of residential development, and therefore, Golf Club cannot fulfill the express intentions of the Declarations of Covenant. *Id.*, p. 15. Finally, Sky Canyon argues that Golf Club did not take title to any “expansion property” and cannot develop or sell this property to qualify as a “successor declarant.” *Id.*, p. 17.

Golf Club argues it acquired two things: 1) the Club Property and 2) future expansion property as may be determined by the Successor Declarant during the remaining period of development. Memorandum in Opposition to Plaintiffs' Motion to Reconsider, p. 4. Golf Club argues Rand Wichman's Affidavit shows the Black Rock PUD could be amended to develop all or a portion of the Golf Club property for additional residential purposes, and that Lockhart failed to mention that the PUD had already been substantially amended twice. *Id.*, p. 7. Wichman was, from 1991 to 2001, an Associate Planner, Principal Planner, and Senior Planner with the Kootenai County Planning Department; from 2001 to 2004 was Kootenai County's Planning Director, and from 2004 to 2006 was Kootenai County's Building and Planning Director. Affidavit of Rand Wichman, pp. 2-3, ¶¶ 2-4. Golf Club argues that Sky Canyon's "new evidence" is not really "new" under I.R.C.P. 11(a)(2)(B), because everything now raised on Sky Canyon's Motion to Reconsider has been a matter of public record for the past ten years. Memorandum in Opposition to Plaintiffs' Motion to Reconsider, p. 9. Golf Club argues that it did not take title to a very small area as Sky Canyon now claims, but rather, Golf Club took title to 206 acres, or 30% of a 674-acre PUD. *Id.*, p. 10. Golf Club argues that there is no basis in the CCR or the PUD for Sky Canyon's claim that Golf Club is now "physically and legally incapable of further development and sale." *Id.* Golf Club argues that Sky Canyon's claim that Golf Club is unable to develop and sell, and therefore cannot qualify as a successor declarant, has no probative value and has no evidentiary support. *Id.*, p. 11. Golf Club recognizes that approval would be required by the Kootenai County Board of Commissioners, but that such approval has happened in the past. As correctly noted by counsel for Golf Club at oral argument, there is no evidence before the Court that amending the PUD would be impossible, illegal or even unlikely. Most

importantly, this Court cannot find, and has not been cited to, any portion of the CC&R's that specifically refer to which time period of County Ordinances control.

Sky Canyon correctly notes that in *Johnson v. North Idaho College*, Idaho Supreme Court Docket No. 38605 (May 31, 2012), the Idaho Supreme Court recently clarified that "new evidence" is not required under I.R.C.P. 11(a)(2)(B), but that the trial court must consider any new evidence that bears on the correctness of an interlocutory order if timely requested to do so under I.R.C.P. 11(a)(2)(B). Reply Memorandum in Support of Motion for Reconsideration, p. 2. Sky Canyon argues that even though Kootenai County Zoning Ordinance 159 has been amended and is no longer in effect, this Court has already determined that if the agreement is ambiguous, this Court must view the Agreement as a whole to determine the intent of the parties at the time of contracting. *Id.*, p. 3, citing the Memorandum Decision and Order on Sky Canyon's Motion to Strike, and on Cross-Motions for Summary Judgment, p. 11. This is a deceptive argument by Sky Canyon, as it infers that this Court found the CC&R's to be ambiguous. On summary judgment, this Court did *not* make any finding that the agreement (CC&R's) was ambiguous. To the contrary, the Court found that while the parties had differing interpretations of whether the phrase "for the purpose of development and sale" in Section 27.7 of the CC&R's, the Court specifically found Sky Canyon's interpretation to be "...unreasonable for several reasons." Memorandum Decision and Order on Motion to Strike and Cross-Motions for Summary Judgment, p. 13. The first reason was the language of that section was clear. *Id.* The Court specifically wrote:

As mentioned above, ambiguity is not established simply because a party presents differing interpretations to the court. *Rim View Trout Co. v. Higginson*, 121 Idaho 819, 823, 828 P.2d 848, 852 (1992). The Court finds Sky Canyon's interpretation to not be reasonable. Thus, there is no

ambiguity.

Memorandum Decision and Order on Sky Canyon's Motion to Strike, and on Cross-Motions for Summary Judgment, p. 14. In its Reply Memorandum in Support of Motion for Reconsideration, Sky Canyon uses this sleight of hand (that the Court found ambiguity when it explicitly stated there was no ambiguity) to launch its analysis of extraneous information, specifically, Kootenai County Ordinance 159. First of all, there is no need to turn to extraneous information when the language is unambiguous, and the Court had already made that finding. Sky Canyon does not seek to have the Court reconsider that finding. Thus, it would be error for the Court to consider extraneous information to construe something which the Court has already previously found to be unambiguous. Second, even if this Court were to consider this extraneous information, the request for reconsideration must be denied. Sky Canyon argues that when construed with Ordinance 159, Section 2.27 [27.7] of the CC&R's establishes that "development and sale" must be of "real property." Reply Memorandum in Support of Motion for Reconsideration, p. 4. [at oral argument, counsel for Sky Canyon conceded all references to Section 2.27 in Sky Canyon's briefing should actually be to Section 27.7] Sky Canyon then argues that the Court inserted terms into the CC&R's and erred in interpreting Section 2.27 to not be limited to "real property" and to include "personal property" because that section makes no mention of "personal property". *Id.* Such argument by Sky Canyon on reconsideration is entirely unpersuasive. Section 27.7 of the CC&R's simply mentions "property". This Court found such reference to "property" was not limited in its terms to only real property. Memorandum Decision and Order on Sky Canyon's Motion to Strike, and on Cross-Motions for Summary Judgment, p. 13. It is only logical if only the word "property" is written, that the word "property" is necessarily limited to real property. To make a contrary conclusion would be to insert the word "real" into the

CC&R language when the word “real” does not appear in that paragraph. Incredulously, Sky Canyon now argues that because this Court apparently interpreted the word “property” to possibly include personal and real property, this Court in doing so inserted the word “personal” into that contract language. Reply Memorandum in Support of Motion for Reconsideration, p. 4. That is absurd. All the Court did was to find that the word “property” when written without any limiting language, could include both real and personal property.

Sky Canyon next argued that the CC&R’s, as a whole, support limiting the meaning of “property” in Section 27.7 to only “real” property, only because Section 2.43 mentions “real property.” *Id.* Such argument is unpersuasive. There is no cross-reference from Section 27.7 to Section 2.43. To ask this Court to graft such a cross-reference is to invite error.

Sky Canyon argues that Kootenai County Documents approving the PUD and Ordinance 159 establish the contemplated “development” for the project was residential real property. *Id.*, pp. 5-6. Sky Canyon writes: “Regardless of whether they can be or have been subsequently amended, both Kootenai County’s approved Modified Order of Decision for the Black Rock PUD and Ordinance 159 establish that the primary purpose of the Project was for development of real property, not development for commercial personal property such as golf club membership.” *Id.* The “primary” purpose of the project is not at all pertinent to the issue. What is pertinent is that the word “property” is used in Section 27.7 without limitation. While the *primary* purpose of the project likely was for development of real property, it is undeniable that *another* purpose of the project was to develop and sell golf club memberships. The CC&R’s make no reference to primary or secondary or other purposes of the “property.” The fact that, as argued by Sky

Canyon, "...the CC&R's contemplated that the Project would be developed in accordance with the applicable zoning laws and county approvals, all of which considered the development of the Project to be residential in nature" (*Id.*, p. 5), does nothing to eliminate the possibility that personal property was meant to be included when the word "property", without limitation, was used in Section 27.7.

Next, Sky Canyon argues the CC&R's Section 2.17 show the drafters of the CC&R's intended for the Golf Club property to be used for a golf course and other recreational facilities, and Section 17.2.1 requires the Golf Club property to be used as an open space. *Id.*, pp. 6-8. Such is an inaccurate reading of Section 17.2.1, which reads in its entirety:

17.2. Acknowledgments. Each Owner, by acceptance of a deed or recorded contract of sale to a Lot acknowledges:

17.2.1. That privileges to use the Club Property shall be subject to the terms and conditions of the membership documents for the Club, as the same may be amended from time-to-time (the "Membership Plan Documents"). Acquisition of a membership in the Club requires the payment of a membership deposit, and the membership dues, fees and charges. These amounts shall be determined by the Club as set forth in the Membership Plan Documents for the Club. Notwithstanding the fact that the Club Property is open space or a recreation area for purposes of applicable zoning ordinances and regulations, each Owner, by acquisition of title to a Lot, releases and discharges forever the Declarant, the Club and their partners, officers, directors, managers, employees, agents and affiliates, from (1) any claim that the Club Property is, or must be, owned and/or operated by the Association or the Declarant, and (2) any claim that the Owners are entitled to use the Club Property by virtue of their ownership of a Lot without submitting a membership deposit, and paying dues, fees and charges established by the Club from time-to-time, and complying with the terms and conditions of the Membership Plan Documents for the Club.

That section notes that the club property is "open space or a recreation area", but nowhere does it require all Golf Club property (or Club Property in this section), to be used as open space. It is misleading for Sky Canyon to argue otherwise.

Finally, Sky Canyon argues that Golf Club took title only to Golf Club property, not “expansion property.” *Id.*, p. 8. Sky Canyon claims it did not take *title* to any of the Expansion Property, and thus, cannot qualify as a “successor declarant.” *Id.* At oral argument, counsel for Sky Canyon referred to Golf Club’s claim that it has a “right” to purchase the “expansion property” as a “red herring.” Counsel for Golf Club at oral argument correctly noted that expansion property is defined as property that now exists or may be subsequently determined in the future. Section 2.31 of the CC&R’s reads in its entirety:

2.32. **Expansion Property.** Such additional real property now owned or in the future acquired by Declarant (including any Successor Declarant) as Declarant may make subject to the provisions of this Declaration, by duly Recorded Declaration of Annexation.

As mentioned by this Court previously, the period of “declarant control” is not over for another nine years. That fact is undisputed. Someone is the “declarant”, and Sky Canyon conceded that the “declarant” is not them. The declarant is Golf Club, which received an assignment of all rights, without limitation, from the original declarant, Black Rock Development, who assigned all rights to Washington Trust Bank. The only evidence before the Court is that of Roger Rummel, Golf Club’s I.R.C.P. 30(b)(6) designee, and that evidence is that Golf Club purchased this property to later sell it if the sale of memberships did not pan out. Affidavit of Roger Rummel in support of Defendant’s Motion for Summary Judgment, p. 5, 6, ¶ 14, ¶ 19. Golfing memberships are not real property; they are a personal property right. Section 27.7 does not exclude real or personal property, it is not limited to only real or only personal property, but simply, and all inclusively, reads: “property.”

While it is certainly understandable that the members of Sky Canyon would be upset about the prospect that someday their home might not someday be adjacent to a

golf course, they have no property or contractual right to such golf course under Section 17.1, which reads in its entirety:

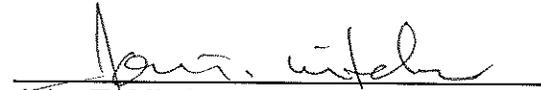
17.1. **Club Property.** The golf course planned by the Declarant will be privately owned and operated by the Club and is not a part of the Common Area hereunder. Nothing in this Declaration nor any designation or reference on any Plat, Final Development Plan, Black Rock Document, planned unit development document, approval document issued by any government entity, drawing.

IV. CONCLUSION AND ORDER.

Sky Canyon's Motion for Reconsideration of Final Judgment Entered February 8, 2012, must be denied.

IT IS HEREBY ORDERED Sky Canyon's Motion for Reconsideration of Final Judgment Entered February 8, 2012, is DENIED, said Judgment remains in effect.

Entered this 16th day of July, 2012.



John T. Mitchell, District Judge

Certificate of Service

I certify that on the 16 day of July, 2012, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

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Jeanne Clausen, Deputy Clerk