Stephen C. Balkenbush, Esq.
State Bar No. 1814
Thorndal, Armstrong, Delk, Balkenbush & Eisinger
6590 South McCarran Blvd., Suite B
Reno, Nevada 89509
(775) 786-2882
Attorneys for Defendants
Incline Village General Improvement District, John A. Bohn, Gene Brockman, Bea Epstein, Chuck Weinberger and Robert C. Wolf

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

STEVEN E. KROLL,
Plaintiff

vs.

INCLINE VILLAGE GENERAL IMPROVEMENT DISTRICT, aka IVGID, a governmental subdivision of the State of Nevada; JOHN A. BOHN; GENE BROCKMAN; BEA EPSTEIN, CHUCK WEINBERGER and ROBERT C. WOLF, individually and as Trustees of IVGID; DOES 1 through 25, inclusive, each in their individual and official capacities,
Defendants.
_____/

Case No. 3:08-CV-0166-ECR-RAM

MOTION TO DISMISS PLAINTIFF'S COMPLAINT

COME NOW, Defendants, INCLINE VILLAGE GENERAL IMPROVEMENT DISTRICT, JOHN A. BOHN, GENE BROCKMAN, BEA EPSTEIN, CHUCK WEINBERGER and ROBERT C. WOLF by and through their attorneys, Thorndal, Armstrong, Delk, Balkenbush & Eisinger and Stephen C. Balkenbush, Esq., and pursuant to FRCP 12(b)(1) and FRCP 12(b)(7), hereby move this Court to dismiss Plaintiff's complaint for lack of subject matter jurisdiction under Article III of the United States Constitution and for failure to join a necessary party under FRCP 19.

/ / /

/ / /

/ / /

Said motion is made and based upon the affidavits attached hereto, the memorandum of points and authorities set filed herewith and all other pleadings and papers on file herein.

DATED this 30th day of April, 2008.

THORNDAL, ARMSTRONG, DELK
BALKENBUSH & EISINGER

By: _____

Stephen C. Balkenbush, Esq.
Nevada Bar No. 1814
6590 S. McCarran Blvd, Suite B
Reno, Nevada 89509
(775) 786-2882
Attorneys for Defendant

Stephen C. Balkenbush, Esq.
State Bar No. 1814
Thorndal, Armstrong, Delk, Balkenbush & Eisinger
6590 South McCarran Blvd., Suite B
Reno, Nevada 89509
(702) 786-2882
Attorneys for Defendant
Incline Village General Improvement District

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

STEVEN E. KROLL

Plaintiff,

vs.

INCLINE VILLAGE GENERAL IMPROVEMENT DISTRICT, and DOES I through XX, inclusive,

Defendants.
_____/

Case No. 3:08-CV-0166-ECR-RAM

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT

I

INTRODUCTION

Plaintiff STEVEN KROLL filed his complaint in this Court on March 4, 2008, against the Incline Village General Improvement District (hereinafter referred to as "IVGID") and five individual Trustees of the Board of IVGID, including John Bohn, Gene Brockman, Bea Epstein and Chuck Weinberger. The action was subsequently removed to this Court on April 2, 2008.

Plaintiff's complaint is brought under 42 U.S.C. §1983 and requests declaratory, injunctive and monetary relief from the Court on the grounds that IVGID Ordinance No. 7, §62 violates the First and Fourteenth Amendment rights of Plaintiff under the United States Constitution. Plaintiff's complaint also purports to state a claim for relief for the taking of property without just compensation in violation of the Fifth Amendment of the United States Constitution.

The ordinance about which Plaintiff complains is based upon a restrictive covenant contained in the deed by which IVGID obtained certain properties at Lake Tahoe from Village Development Company in 1968. These two parcels of property abutting Lake Tahoe are currently known as Burnt Cedar Beach, Incline Beach, Ski Beach, and Hermit Beach. See, Exhibit "A," Affidavit of Ramona Cruz.

As shall be discussed herein, Plaintiff's complaint should be dismissed, as Plaintiff has failed to join necessary parties as required by FRCP 19, because Plaintiff lacks standing under Article III of the United States Constitution, and because Plaintiff's case is not ripe for review as required by Article III of the United States Constitution. In addition, Plaintiff cannot obtain relief under the Fifth Amendment of the United States Constitution as he has not alleged in his complaint the taking of any "property" by the Defendant without just compensation.

II

UNDERLYING FACTS

Plaintiff's lawsuit arises out of his allegations that Ordinance No. 7, §62 contained within an ordinance establishing rates, rules and regulations for recreational passes within the Incline Village General Improvement District, violates various of his constitutional rights. The section of the ordinance at issue provides as follows:

> Deed Restrictions. Parcels annexed to the District after May 30, 1968, are not eligible for District beach access per deed restrictions listed on the beach property.

See, Exhibit "B," Ordinance No. 7.

In 1968, Village Development Company deeded two beaches at Lake Tahoe to IVGID. See, Exhibit "A," Affidavit of Ramona Cruz. The deed contains a restrictive covenant limiting the use of the property to recreational purposes. Specifically, the deed contains the following language:

> "It is hereby covenanted and agreed that the real property above described, and any and all improvements now or hereafter located thereon, shall be held, maintained and used by grantee, its successors and assigns, only for the purposes of recreation by, and for the benefit of, property owners and their tenants (specifically including occupants of motels and hotels) within the Incline Village General Improvement District as now constituted, and, as the Board of Trustees of said District may determine, the guests of such property owners, and for such other purposes as are herein expressly authorized."

THORNDAL, ARMSTRONG, DELK, BALKENBUSH & EISINGER
6590 South McCarran Blvd. Suite B
Reno, Nevada 89509
(775) 786-2882

See, Exhibit "C," 1968 Deed.

The deed also contains the following language:

> "This covenant shall be in perpetuity, shall be binding upon the successors and assigns of grantee, shall run with and be a charge against the land herein described, shall be for the benefit of each parcel of real property located within the area presently designated and described as Incline Village General Improvement District and shall be enforceable by the owners of such parcels and their heirs, successors and assigns. . ."

Id. The deed goes on to provide that the Grantor, for its benefit and for the benefit of all owners of property located within the 1968 boundaries, specifically reserved an easement to enter upon the land to use the properties for recreational purposes. Id.

Plaintiff is a resident of property which was formerly a part of the Crystal Bay General Improvement District. On or about 1995, CBGID merged with IVGID in order to provide the CBGID properties with sewer service. Despite the fact that the boundaries of IVGID have expanded since 1968 as additional properties were annexed or merged, IVGID has consistently limited the access to the two beaches in accordance with the restrictive covenant within the deed.

With respect to the properties themselves, the same have been substantially improved since 1968 and now contain amenities such as a swimming pool, picnic areas, bocce ball courts, volleyball courts, and a boat launching facility. These properties were purchased in 1968 by IVGID through the use of public bonds. See, Exhibit "A," Affidavit of Ramona Cruz. The entire indebtedness resulting from the issuance of these public bonds was paid for solely by the owners of parcels of real property in IVGID as it was constituted in 1968. Id. These individual property owners have also paid for all of the improvements made to the real properties since 1968. Id.

The primary thrust of Plaintiff's complaint is his allegation that his First Amendment rights have been violated because he has not been permitted to access the subject properties.[1] As

---

[1]In addition to his attempt to advance a free speech justification in his efforts to gain access to the subject properties, Plaintiff alleges that, the moment his property located in the former Crystal Bay General Improvement District merged with IVGID in the 1990's, he began subject to taxation by IVGID. Thus, Plaintiff claims that he pays taxes which are used in support of the beach properties. There is no merit to this argument and, in fact, only those whose properties were located within the boundaries of IVGID in 1968 have paid for the purchase of the properties and all improvements made thereto. See, Exhibit "A," Affidavit of Ramona Cruz.

THORNDAL, ARMSTRONG, DELK, BALKENBUSH & EISINGER
6590 South McCarran Blvd, Suite B
Reno, Nevada 89509
(775) 786-2882

to this point, Plaintiff does not have a constitutional right to access these properties to take advantage of the recreational amenities provided thereon. It is access to conduct First Amendment activities which is the primary constitutional question presented in this case. As shall be discussed infra, in order to demonstrate that he has standing to pursue this matter, Plaintiff must demonstrate, in part, that he has suffered an injury in fact that is concrete and particularized and actual and imminent, as opposed to conjectural or hypothetical. See, Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982). Under this requirement, Plaintiff must demonstrate a real and immediate threat of irreparable injury. See, Cole v. Oroville Union High School Dist., 228 F.3d 1092, 1100 (9th Cir. 2000).

Plaintiff provides no evidence or sufficient allegations in his complaint which suggest that Plaintiff has suffered an injury in fact which would entitle him to maintain the instant lawsuit in terms of Article III standing. Rather, Plaintiff makes the generalized allegation that he has been denied access to the beach properties because he is not an owner of property which was within the boundaries of IVGID in 1968. He does not state that he has been denied access to the beach properties to further the exercise of his First Amendment rights. In reality, IVGID is unaware of Plaintiff ***ever*** making a request that he be granted access to the subject parcels to conduct First Amendment activities of any kind, including a request that he be permitted to speak in favor of his candidacy for the Board of Trustees of IVGID. See, Exhibit "D," Affidavit of Bill Horn. Nor is IVGID aware of any circumstance wherein access was denied to the subject properties to any other group or individual, including Plaintiff, wishing to exercise their First Amendment rights. Id. These particular facts highlight that this case is really about access to the recreational opportunities afforded by these properties, rather than about access for First Amendment purposes and, as shall be discussed below, compel the conclusion that Plaintiff does not have standing to bring the instant lawsuit.

/ / /

/ / /

/ / /

THORNDAL, ARMSTRONG, DELK, BALKENBUSH & EISINGER
6590 South McCarran Blvd. Suite B
Reno, Nevada 89509
(775) 786-2882

III

LEGAL ANALYSIS

I. PLAINTIFF LACKS STANDING TO BRING THE INSTANT ACTION.

A. Standing Issue

In addition to the fact that Plaintiff has failed to join all necessary parties in this case as mandated by FRCP 19, further grounds exist for dismissal of this case under the case and controversy requirements of Article III of the United States Constitution. Federal jurisdiction is limited by Article III to actual cases and controversies. See, Alaska Right to Life v. Feldman, 504 F.3d 840 (9th Cir. 2007). Thus, at an irreducible minimum, Article III requires that a party have proper standing and that his case be ripe for review.

Article III of the United States Constitution requires that the federal courts decide only cases or controversies. See, Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982). Thus, Article III requires the Plaintiff to show (1) that he has suffered an injury in fact that is concrete and particularized *and* actual or imminent, not conjectural or hypothetical; (2) that the injury is fairly traceable to the challenged action of the Defendant; and (3) that it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. Id. Additionally, the Ninth Circuit Court of Appeals has noted that, whenever a plaintiff seeks declaratory and injunctive relief, there must be a substantial controversy of sufficient immediacy and reality to warrant injunctive relief. See, Ross v. Alaska, 189 F.3d 1107, 1114 (9th Cir. 1999). "These justiciability limitations are reflected in the doctrines of standing, mootness, and ripeness." See, Lee v. State of Oregon, 107 F.3d 1382, 1387 (9th Cir. 1997).

With respect to the standing issue, in order to obtain injunctive relief, Plaintiff must demonstrate a real or immediate threat of an irreparable injury. See, Cole v. Oroville Union High School Dist., 228 F.3d 1092, 1100 (9th Cir. 2000).

In the instant case, Plaintiff cannot demonstrate the he has suffered an injury in fact that is concrete and particularized and actual or imminent. To the contrary, any injury to Plaintiff which might result from his efforts to access the properties in question is wholly speculative and

THORNDAL, ARMSTRONG, DELK, BALKENBUSH & EISINGER
6590 South McCarran Blvd, Suite B
Reno, Nevada 89509
(775) 786-2882

hypothetical. As was discussed above, there is no evidence in this matter that Plaintiff **ever** made a request to IVGID for permission to enter any of the subject properties to engage in First Amendment activities. See, Exhibit "D," Affidavit of Bill Horn. Rather, as is set forth in the affidavit of Bill Horn, IVGID's General Manager, Plaintiff has made no such request. Id. This fact underscores the true nature of this case as one in which Plaintiff seeks access to these recreational properties located in IVGID's Chapter 318 district for the use of the amenities thereon, rather than access merely for the purpose of exercising his First Amendment rights.

At no time has IVGID ever denied access to any group or individual, including Plaintiff, to the subject properties for purposes of engaging in First Amendment activities. See, Exhibit "D," Affidavit of Bill Horn. Plaintiff cannot demonstrate that he would be subject to prosecution, or the threat of prosecution, should he seek to engage in First Amendment activities on the properties in question.[2] Until Plaintiff has made such an attempt or presented evidence which supports his contention that he would be subject to prosecution as a result of the challenged ordinance, Plaintiff has not demonstrated any concrete or particularized injury in fact. Rather, any injury to Plaintiff purportedly caused by the ordinance in question is wholly speculative and hypothetical. Ordinance No. 7, §62 serves only to define those individuals permitted to take advantage of the recreational facilities and areas of the properties in question. It does not suggest that a person such as Plaintiff who is interested in accessing the properties to give a speech or otherwise exercise his First Amendment rights would be subject to prosecution or would even be denied permission to do so.[3]

Nor can Plaintiff demonstrate that any injury to him is traceable to Ordinance No. 7, §62, as Plaintiff cannot provide this Court with any evidence that he has been denied permission to

---

[2]The ordinance in question limits access to the recreational amenities provided on these properties and does not suggest that IVGID would deny access to anyone for First Amendment purposes.

[3]Requiring an individual to make a request of the governing agency prior to holding a rally, giving a speech or otherwise utilizing public property for First Amendment purposes is wholly permissible. See, Forsyth County v. Nationalist Movement, 505 U.S. 123, 130 (1992).

THORNDAL, ARMSTRONG, DELK, BALKENBUSH & EISINGER
6590 South McCarran Blvd. Suite B
Reno, Nevada 89509
(775) 786-2882

exercise his First Amendment rights on the subject properties by IVGID. See, Exhibit "D," Affidavit of Bill Horn. Until Plaintiff does so, he does not have standing under Article III of the Constitution and Plaintiff is not entitled to the injunctive relief sought in his motion.

B. Ripeness Issue

In addition to the standing issue, Plaintiff must also demonstrate that his case is ripe for review. Ripeness is a question of timing designed to "prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." See, Thomas v. Anchorage Equal Rights Comm'n., 220 F.3d 1134, 1138 (9th Cir. 2000). As the Ninth Circuit has stated, the court's "role is neither to issue advisory opinions nor to declare rights in hypothetical cases, but to adjudicate live cases or controversies consistent with the powers granted the judiciary in Article III of the Constitution." Id. The United States Supreme Court has stated that the ripeness doctrine is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction. Id. at 1138; *citing*, Reno v. Catholic Soc. Servs., Inc., 509 U.S. 43, 57 (1993). Thus, the ripeness analysis contains both a constitutional and a prudential inquiry. See, Thomas, supra. at 1138.

With respect to the constitutional issue of ripeness, it is often treated under the rubric of standing. Id. Whether the question is viewed in terms of standing or ripeness, however, the Constitution mandates that prior to the court's exercise of jurisdiction, there appear a case or controversy and that the issues presented are definite and concrete, not hypothetical or abstract. Id. at 1139.

By way of his complaint, Plaintiff has asked this court to issue what is, in essence, an advisory opinion based upon a set of facts which is wholly hypothetical. This is so because Plaintiff has not, at any time, been denied access to the subject properties to conduct First Amendment activities nor is there any evidence that Plaintiff would be so denied by IVGID. See, Exhibit "D," Affidavit of Bill Horn. As such, there is no case or controversy for this court to decide and Plaintiff cannot overcome the ripeness requirement set forth in Article III of the Constitution.

THORNDAL, ARMSTRONG, DELK, BALKENBUSH & EISINGER
6590 South McCarran Blvd, Suite B
Reno, Nevada 89509
(775) 786-2882

C. To the Extent Plaintiff Seeks to Pursue a Claim for Relief Premised on a "Taking" of Property Under the Fifth Amendment, he Lacks Standing to do so and Said Claim Should be Dismissed.

Plaintiff also asserts in his complaint that IVGID has violated his Fifth Amendment rights under the United States Constitution with respect to the beach properties in question. Specifically, Plaintiff contends that he has been assessed, and has paid, property taxes levied by IVGID since his property was annexed to IVGID in 1995, and that a portion of same have been used to maintain the beach properties, including Incline Beach and Burnt Cedar Beach.

Plaintiff's conclusory allegations notwithstanding, there is no basis in fact for the assertion that Plaintiff has been assessed any taxes whatsoever which have been utilized by IVGID to maintain the beach properties at issue in this case. In fact, as is clear from the evidence submitted by IVGID in connection with its motion, the entire indebtedness resulting from the issuance of the public bonds used for the initial purchase of the properties, as well as all monies used for the improvement and maintenance of the properties, has been borne by the property owners within IVGID's boundaries in 1968. See, Exhibit "A," Affidavit of Ramona Cruz. As such, Plaintiff's Fifth Amendment takings claim is factually untenable.

In addition, and importantly, Plaintiff lacks standing to assert such a claim in this Court, as there is no evidence set forth in Plaintiff's complaint that he has exhausted the administrative remedies provided to him by the Nevada legislature in terms of such a claim.

NRS 361.420, which is set forth in Chapter 361 of the Nevada Revised Statutes which governs property tax, provides as follows:

> 1. Any property owner whose taxes are in excess of the amount which the owner claims justly to be due may pay each installment of taxes as it becomes due under protest in writing. The protest must be in the form of a separate, signed statement from the property owner and filed with the tax receiver at the time of the payment of the installment of taxes.
>
> 2. The property owner, having protested the payment of taxes as provided in subsection 1 and having been denied relief by the State Board of Equalization, may commence a suit in any court of competent jurisdiction in the State of Nevada against the State and county in which the taxes were paid, and, in a proper case, both the Nevada Tax Commission and the Department may be joined as a defendant for a recovery of the difference between the amount of taxes paid and the amount which the owner claims justly to be due, and the owner may complain upon any of the grounds contained in subsection 4.

THORNDAL, ARMSTRONG, DELK, BALKENBUSH & EISINGER
6590 South McCarran Blvd, Suite B
Reno, Nevada 89509
(775) 786-2882

Subsection (3) of NRS 361.420 requires all actions regarding a dispute over property taxes to be paid within 3 months after the date of the payment of the last installment of taxes or within 3 months after the date of the issuance of a decision of the State Board of Equalization denying relief. If these limitations are not complied with, NRS 361.420(3) provides that such actions are ***forever barred***.

28 U.S.C. 1341 provides that, [t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts os such State." As has been stated by the United States Supreme Court, "[a] federal district court is under an equitable duty to refrain from interfering with a State's collection of its revenue except in cases where an asserted federal right might otherwise be lost." See, Tully v. Griffin, Inc., 429 U.S. 68, 73 (1976). This statute "has its roots in equity practice, in principles of federalism, and in recognition of the imperative need of a State to administer its own fiscal operations." Id.

Plaintiff premises his Fifth Amendment claim on his allegation that IVGID improperly assessed property taxes against him which were then used to maintain the subject beach properties. While there is no truth to this factual allegation, it is clear that Nevada offers a plain, speedy and efficient remedy under NRS 361.420. As such, this Court does not have subject matter jurisdiction under any claim premised on IVGID's assessment against Plaintiff of property tax.

II. PLAINTIFF'S COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO JOIN NECESSARY PARTIES UNDER FRCP 19 AND FRCP 12(b)(7).

As was set forth above, Plaintiff's complaint should be dismissed with prejudice because Plaintiff has not set forth a proper case and controversy, in terms of both standing and ripeness, for the court's consideration within the meaning of Article III of the United States Constitution. In addition, however, Plaintiff's complaint should be dismissed, as he has failed to join all parties necessary to permit this Court to properly order the relief sought.

THORNDAL, ARMSTRONG, DELK, BALKENBUSH & EISINGER
6590 South McCarran Blvd. Suite B
Reno, Nevada 89509
(775) 786-2882

Federal Rule of Civil Procedure 19 governs compulsory party joinder in federal courts. FRCP 19(a) provides as follows:

> (a) **Persons Required to Be Joined if Feasible.**
>
> **(A) Required Party.** A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:
>
> (A) in that person's absence, the court cannot accord complete relief among existing parties; or
>
> (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
>
> (i) as a practical matter impair or impede the person's ability to protect the interest; or
>
> (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

This rule prescribes the joinder of persons needed for the just adjudication of a particular case. See, Kettle Range Conservation Group v. United States, 150 F.3d 1083, 1086 (9th Cir. 1998). Whenever possible, all interested parties should be joined in a declaratory judgment action in order to avoid piecemeal litigation of the matters in controversy and a declaratory judgment should not be entered unless it disposes of the controversy, thus serving a useful and practical purpose. See, Delno v. Market Street Railroad Co., 124 F.2d 965 (9th Cir. 1942). "Rule 19(a) is concerned with consummate rather than partial or hollow relief as to those already parties, and with precluding multiple lawsuits on the same cause of action." See, EEOC v. Peabody Western Coal Co., 400 F.3d 774, 780 (9th Cir. 2005).

The Ninth Circuit Court of Appeals has set forth a three-part test to be used in addressing the question of the possible dismissal of an action for the failure to join necessary parties under FRCP 19. See, EEOC v. Peabody Western Coal Co., supra. at 779. First, the court must determine whether a non-party should be joined as a "necessary" party under the elements set forth in FRCP 19(a). A person who is subject to service of process and whose joinder will not deprive the court of subject matter jurisdiction shall be joined if, (1) in the person's absence, complete relief cannot be accorded among those already parties to the lawsuit or (2) the person

THORNDAL, ARMSTRONG, DELK, BALKENBUSH & EISINGER
6590 South M'Carran Blvd, Suite B
Reno, Nevada 89509
(775) 786-2882

claims an interest relating to the subject matter and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the person already parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations by reason of the claimed interest. See, United States v. Bowne, 172 F.3d 682, 688 (9th Cir. 1999) and FRCP 19(a).

There can be no question in this case that there are necessary persons who are not parties to this action whose rights would be impaired or impeded should this Court issue the injunctive relief sought by Plaintiff. As was set forth above, Plaintiff seeks, by way of his complaint, a determination by this Court that the restrictive covenant in the 1968 deed for the properties in question is unconstitutional and, in turn, that Ordinance No. 7, §62 is unconstitutional and unenforceable. At this time, there are 8,215 properties located within IVGID's boundaries. Of that number, 7,785 properties were within the 1968 boundaries of IVGID, thereby permitting them use of the beach properties, while 430 parcels were annexed after 1968 and do not. The deed in question provides that the restrictive covenant set forth therein was for the benefit of those properties owners situated within the 1968 boundaries of IVGID, provides these property owners with the right to express power to enforce the rights created thereunder and expressly reserves an easement for the benefit of these property owners. See, Exhibit "C," Deed.

In addition, as was discussed above, the properties were purchased by IVGID in 1968 through the use of public bonds. See, Exhibit "A," Affidavit of Ramona Cruz. The entire indebtedness resulting from the issuance of these bonds was paid for solely by the owners of parcels of real property within IVGID's boundaries as of 1968, as have all of the improvements made to the real properties since their acquisition. Id.

First, it should be noted that the joinder of these interested property owners would not deprive this Court of subject matter jurisdiction, as the same is premised, part, upon 28 U.S.C. §1331 (federal question). Further, all of these property owners are clearly subject to service of process.

Secondly, this lawsuit simply cannot proceed without the joinder of all property owners who arguably hold rights under the restrictive covenant set forth in the deed. In Kettle Range

THORNDAL, ARMSTRONG, DELK, BALKENBUSH & EISINGER
6590 South McCarran Blvd. Suite B
Reno, Nevada 89509
(775) 786-2882

Conservation Group v. United States, supra, the Ninth Circuit Court of Appeals affirmed the decision of the district court that it was without authority to grant injunctive relief without the joinder of certain private parties that were found to be indispensable. In that case, the plaintiffs (two environmental/conservation groups) sought the court's intervention in the exchange of 44 parcels (roughly 4,500 acres) of public forest land to private parties for 8 parcels (roughly 25,000 acres) of private, shrub-steppe land. Id. at 1085. The private parties were made up of timber companies seeking ownership of the land for commercial harvest of the trees located thereon. Id. The plaintiffs sued the Bureau of Land Management alleging that it had violated the National Environmental Policy Act in connection with the exchange. Id. at 1084. By the time the case reached the district court for decision, over 90% of the public lands had already been transferred to the private commercial timber companies. Id.

One of the remedies sought by the plaintiffs was the recission of the contract for the exchange of land between the BLM and the private timber companies. However, the private parties to whom the land had been transferred were not named as parties in the lawsuit. The district court concluded that it could not order the remedy sought, recission of the contract, because it would have had the effect of destroying legal entitlements to the land which had vested in the private parties. Id. at 1084-85. The Ninth Circuit affirmed and, in so doing, stated the following:

> "While we do not sanction the BLM's conduct during this transaction, we have found no precedent for destroying the legal entitlements of absent parties in order to vindicate public rights. Nor can we say that the district court abused its discretion in determining that equity might not be served by attempting to undo the completed portion of the transaction. . ."

Id.

The Ninth Circuit Court of Appeals then went on to agree with the district court that it would have been improper to issue the declaratory relief sought, as such action would impair and impede the rights of the private parties who were not before the court in contravention of FRCP 19(a). Id. at 1086.

If Plaintiff were to prevail in the instant matter, the practical result of such a victory would threaten the legal rights of the owners of the properties within the 1968 boundaries of

THORNDAL, ARMSTRONG, DELK, BALKENBUSH & EISINGER
6590 South McCarran Blvd. Suite B
Reno, Nevada 89509
(775) 786-2882

IVGID which are expressly recognized in the restrictive covenant set forth in the deed. As in Kettle Range, supra., any court action in which the restrictive covenant were held to be unconstitutional would impair and impede what are arguably property interests held by the 1968 property owners. As such, they are necessary parties within the meaning of FRCP 19.

In addition, and importantly, if the instant lawsuit is allowed to proceed absent these necessary parties, IVGID would be left vulnerable to multiple lawsuits in potentially numerous different forums. The restrictive covenant at issue contains language which expressly grants these property owners with rights to enforce their interests in same and IVGID could be subjected to repeated litigation as a result.

For all of these reasons, the owners of property within the 1968 boundaries of IVGID must be found to be "necessary" within the meaning of FRCP 19.

Where an absent party is found to be a "necessary" party, the second step is for the court to determine whether it is feasible to order that the absentee party be joined. See, EEOC v. Peabody Western Coal Co., supra. at 770. Joinder will not be considered feasible when venue is improper, when the absentee is not subject to personal jurisdiction and when jurisdiction would destroy subject matter jurisdiction. Id. In this case, joinder is feasible as all of these questions must be answered in the negative.

In the instant case, Plaintiff has not joined all parties necessary to this action as required by FRCP 19. In fact, Plaintiff does not appear to dispute that joinder of these additional property owners may well be necessary before relief of the type sought by Plaintiff can be ordered by this Court. See, Plaintiff's First Amended Complaint, p. 26, ¶85. As such, Plaintiff's complaint should be dismissed or Plaintiff ordered to join all indispensable parties within a reasonable period of time.[4]

/ / /

/ / /

---

[4]Dismissal under FRCP 12(b)(7) for failure to name necessary parties is without prejudice. See, Dredge Corp. v. Penny, 338 F.2d 456 (9th Cir. 1964).

THORNDAL, ARMSTRONG, DELK, BALKENBUSH & EISINGER
6590 South M'Carran Blvd. Suite B
Reno, Nevada 89509
(775) 786-2882

IV

CONCLUSION

Based upon all of the foregoing, IVGID respectfully asserts that Plaintiff's complaint should be dismissed in its entirety under Article III of the United States Constitution, as Plaintiff lacks standing in this matter and because Plaintiff's case is not ripe for review.

Plaintiff's complaint should also be dismissed under FRCP 19(a) or Plaintiff ordered to join all necessary property owners within a reasonable period of time.

DATED this 30th day of April, 2008.

THORNDAL, ARMSTRONG, DELK
BALKENBUSH & EISINGER

By: _____
Stephen C. Balkenbush, Esq.
Nevada Bar No. 1814
6590 S. McCarran Blvd, Suite B
Reno, Nevada 89509
(775) 786-2882
Attorneys for Defendant

THORNDAL, ARMSTRONG,
DELK, BALKENBUSH
& EISINGER
6590 South McCarran Blvd, Suite B
Reno, Nevada 89509
(775) 786-2882

Exhibit A

Stephen C. Balkenbush, Esq.
State Bar No. 1814
Thorndal, Armstrong, Delk, Balkenbush & Eisinger
6590 South McCarran Blvd., Suite B
Reno, Nevada 89509
(702) 786-2882
Attorneys for Defendants
Incline Village General Improvement District,
John A. Bohn, Gene Brockman, Bea Epstein,
Chuck Weinberger, and Robert C. Wolf

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

STEVEN E. KROLL,
Plaintiff
vs.
INCLINE VILLAGE GENERAL IMPROVEMENT DISTRICT, aka IVGID, a governmental subdivision of the State of Nevada; JOHN A. BOHN; GENE BROCKMAN; BEA EPSTEIN, CHUCK WEINBERGER and ROBERT C. WOLF, individually and as Trustees of IVGID; DOES 1 through 25, inclusive, each in their individual and official capacities,
Defendants.
_____/

Case No. 3:08-cv-00166-ECR-RAM

AFFIDAVIT OF RAMONA CRUZ

STATE OF NEVADA)
:ss
COUNTY OF WASHOE)

RAMONA CRUZ, being first duly sworn, deposes and says under penalty of perjury as follows:

1. I have been employed by Incline Village General Improvement District (hereinafter IVGID) for approximately 15 years and am currently employed as the Director of Finance, Accounting, and Information Technology for IVGID.

2. To the best of my recollection, in 1968, IVGID purchased two parcels of real property abutting Lake Tahoe, including APN 122-162-23 and APN 127-280-01. These parcels are currently known as Burnt Cedar Beach, Incline Beach, Ski Beach, and Hermit Beach (hereinafter referred to as "IVGID Beaches").

3. To the best of my recollection, the payment for the IVGID Beaches was made through the use of public bonds. The entire indebtedness resulting from the issuance of these public bonds was paid for solely by owners of parcels of real property in IVGID as it was constituted in 1968.

4. To the best of my recollection, since 1968, improvements has been made to the IVGID Beaches and these improvements have been paid for solely by owners of parcels of real property in IVGID as it was constituted in 1968.

5. To the best of my recollection, owners of real property annexed to IVGID after 1968 have not been assessed for the purchase of or improvements to IVGID Beaches.

Ramona Cruz
RAMONA CRUZ

SUBSCRIBED and SWORN to before before me this 30th day of April, 2008.

Susan A Herron
NOTARY PUBLIC

SUSAN A. HERRON
Notary Public - State of Nevada
Appointment Recorded in Washoe County
No: 98-2732-2 - Expires December 8, 2010

THORNDAL, ARMSTRONG, DELK, BALKENBUSH & EISINGER
6590 South McCarran Blvd. Suite B
Reno, Nevada 89509
(775) 786-2882

Exhibit B

ORDINANCE NO. 7

(As amended June 13, 1991; November 17, 1993; May 8, 1995; June 12, 1995; March 25, 1998)

AN ORDINANCE ESTABLISHING RATES, RULES AND REGULATIONS FOR RECREATION PASSES AND RECREATION PUNCH CARDS BY THE INCLINE VILLAGE GENERAL IMPROVEMENT DISTRICT

Index

ARTICLE IV. APPLICATION PROCEDURES

ARTICLE V. ASSIGNMENT OF PRIVILEGES

ARTICLE VI. RECREATION PASS

ARTICLE VII. RECREATION CARD

ARTICLE VIII. GENERAL USE REGULATIONS

ORDINANCE NO. 7

(As amended June 13, 1991; November 17, 1993; May 8, 1995; June 12, 1995; March 25, 1998)

An Ordinance Establishing Rates, Rules and Regulations for Recreation Passes and Recreation Punch Cards by the Incline Village General Improvement District

RECREATION PASS ORDINANCE

Be it ordained by the Board of Trustees of the Incline Village General improvement District, Washoe County, Nevada, as follows:

ARTICLE I. GENERAL PROVISIONS

1. **Short Title.** This ordinance shall be known and may be cited as the "Incline Village General Improvement District Recreation Pass Ordinance."

2. **Words and Phrases.** For the purpose of this ordinance, all words used herein in the present tense shall include the future; all words in the plural number shall include the singular number; and all words in the singular number shall include the plural number.

3. **Separability.** If any section, subsection, sentence, clause or phrase of this ordinance or the application thereof to any person or circumstances is for any reason held to be unconstitutional or invalid, such decision shall not affect the validity of the remaining portions of this ordinance or the application of such provision to other persons or circumstances. The Board hereby declares that it would have passed this ordinance or any section, subsection, sentence, clause or phrase hereof irrespective of the fact that any one or more sections, subsections, sentences, clauses or phrases be declared to be unconstitutional.

4. **Posting.** The adoption of this ordinance shall be entered in the minutes of the Board and certified copies hereof shall be posted in three (3) public places in the District for ten (10) days following its passage.

ARTICLE II. DEFINITIONS

When used in this ordinance, the following terms shall have the meanings defined below:

5. **Affinity** signifies the connection existing in consequence of marriage between each of the married persons and the blood relatives of the other.

6. **Agent** means the person designated by an owner to represent the owner in matters pertaining to the assignment of recreation privileges.

7. **Assignment** means the naming of persons to receive recreation privileges.

8. **Beach Pass** means a daily pass, good for one day only, sold by the District allowing entry onto the District-owned beaches.

9. **Board** means the Board of Trustees of the Incline Village General improvement District.

10. **Card Holder** means the person who is in possession of a Recreation Punch Card.

11. **Commercial Tenant** means an individual or corporation who rents, or leases, a commercial property for the purposes of conducting business or commercial activity.

12. **Consanguinity** means a blood relationship.

13. **County** means the County of Washoe, Nevada.

14. **Director of Parks and Recreation** means the person appointed as the department head of the Parks and Recreation Department.

15. **District** means the Incline Village General Improvement District (acting through its duly authorized officers or employees within the scope of their respective duties).

16. **Family** means a social unit consisting of people related to the property owner by marriage and to the extent of the first and second degrees of consanguinity and affinity, including parents, children, grandparents, grandchildren, brothers and sisters, and their spouses. *(See attached Exhibit A.)*

17. **General Manager** means the person appointed by the Board of Trustees as the General Manager of the District.

18. **Owner** means any person owning fee title to the property, or portion thereof, or any person in whose name the legal title to the property appears, in whole or in part, by deed duly recorded in the County Recorder's office, or any person exercising acts of ownership over same for himself, or as executor, administrator, guardian or trustee of the Owner.

19. **Parcel** means a single plot of land with or without a dwelling on it, or a single unit within a multi-unit residence as defined by the District Recreation Roll.

20. **Pass Holder** means an individual who has been issued a Recreation Pass.

21. **Recreation** means any leisure or sports facility, program, or service owned, operated or provided by the District, including, but not limited to, beaches, parks, playgrounds, athletic fields, trails, Nordic and alpine ski areas, golf courses, recreation centers, tennis courts, swimming pools, sports leagues, contests, events, classes, and special events.

22. **Recreation Punch Card** means the transferable punch card issued by the District to eligible parcel owners and/or their assignees that can be used to pay the difference between the resident rate and the retail or nonresident rate for access to various District recreation facilities and bears a face value established by the Board. The District can sell additional Recreation Punch Cards to eligible parcel owners or assignees for their personal use as provided in Article VIII, Item 69 herein.

23. **Recreation Fee** means the annual Recreation Standby and Service Charge assessed by the District to finance recreation programs and facilities.

24. **Recreation Pass** means the non-transferable photo identification pass issued by the District for free access to District beaches and for hourly, daily, and seasonal discounts at District-owned recreation facilities. Subject to the familial limitations described herein, the District can sell additional Recreation Passes to eligible parcel owners, residents or assignees for their personal use as provided in Article VIII, Item 69 herein. Additional Recreation Passes sold cannot be used to obtain a resident discount at the District-owned golf facilities.

25. **Recreation Privilege** means any privileges of recreation access or special rates afforded to pass holders or card holders, including the privilege to provide admission for guests.

26. **Resident** means any individual maintaining residence within the boundaries of the District as constituted by law.

ARTICLE III. RECREATION PRIVILEGE ELIGIBILITY

27. **Eligible Parcels**. Each District parcel which is assessed a recreation fee, is eligible to receive recreation privileges so long as the assessment on that parcel is current.

28. **Fees Kept Current**. All property taxes, special assessments and recreation fees on a parcel must be paid for the current and prior years to maintain the parcel's eligibility for recreation privileges. The District Recreation Fee must be paid by October 1 of the year billed in order to continue receiving recreation privileges.

29. **Resident Eligibility**. All residents are eligible for an assignment of recreation privileges, provided that they have proof of residency.

30. **Available Privileges**. Every eligible parcel may receive any combination of up to five (5) Recreation Passes or Recreation Punch Cards.

ARTICLE IV. APPLICATION PROCEDURES

31. **Application**. Application for recreation privileges must pertain to a specific, eligible parcel. An application will be accepted when filed on the Application Form provided by the District; when accompanied by proof of ownership as set forth in Section 32; and when signed by any owner of the parcel. The form must be filed with the District's Parks and Recreation office, in person, by fax, or by mail, prior to any issue of recreation privileges as provided by this ordinance.

32. **Proof of Ownership**. Proof of ownership shall be made in one of the following forms:

(a) Written copy of legal deed of title.

(b) Confirmation of ownership by the District from the County Assessor's office.

(c) Confirmation of ownership by the District from a local title company.

33. **Proof of Residence**. Proof of residence shall be made in one, or more, of the following forms:

(a) Written copy of legal lease signed by parcel owner, or authorized agent.

(b) Valid Nevada Driver's License indicating current street address.

(c) Verifiable copies of current utility (phone, electric, water and sewer, etc.) bills in assignee's name.

(d) Valid Washoe County, Nevada, voter's registration card.

34. **Proof of Commercial Tenancy**. Proof of commercial tenancy shall be made with the submittal of a written copy of legal lease signed by the parcel owner, or authorized agent.

Confirmation must be by written document. Written documents need not be certified; however, the District may require further confirmation of uncertified documents.

35. **Application Acceptance**. Application will not be accepted on any parcel if another valid parcel owner or resident application already exists on that parcel. Any application will expire with a change of ownership, residency or tenancy where no party listed on the application continues ownership, residency or tenancy.

36. **Application Approval**. Upon review and verification of the application by the District, the Director of Parks and Recreation, or the Director's designee, shall approve the application. It is the applicant's responsibility to provide the District with all information required for approval.

37. **Application Amendment**. To update information on the application, an approved application may be amended by any verified owner of the parcel, whether or not that owner signed or submitted the original application form.

ARTICLE V. ASSIGNMENT OF PRIVILEGES

38. **Assignment Procedures**. Assignment of recreation privileges will be accepted when filed on the Assignment Form and when accompanied by an approved application, or when an approved application is already on file, and when signed by any owner listed on the application

or any listed owner's designated agent. The assignment form must be filed with the District's Recreation office, in person, by fax, or by mail.

When there is an assignment of recreation privileges, the property owner and assignor shall be jointly and severally liable with assignee(s) respecting any sums of money assignee(s) owes the District related to the use of recreation facilities, including the use of all District-owned meeting facilities.

39. **Agent Designation** Any Owner listed on an approved application may designate an agent by filing and executing an Agent Authorization Form. An owner may only designate one agent. The agent form must be filed with the District's Parks and Recreation office, in person, by fax, or by mail. Upon review and verification of the agent form by the District, the Director of Parks and Recreation, or the Director's designee, shall approve the form. It is the owner's responsibility to provide the District with all information required for approval.

40. **Multi-Parcel Agent Designation**. If one agent is to serve as a representative of all units in a multi-parcel complex, an Agent Authorization Form signed by the president of the appropriate homeowners' association and a petition signed by owners representing at least two-thirds (2/3) of the affected parcels must be filed with the District's Parks and Recreation office, in person, by fax, or by mail.

41. **Assignment Acceptance**. Assignment will not be accepted, on any parcel, if another valid assignment already exists on that parcel. Assignment will expire with a change of ownership, where no party listed on the application continues ownership.

42. **Privileges Assignable - Residential Parcels**. Every eligible residential parcel may receive any combination of up to five (5) Recreation Passes or Recreation Punch Cards. A Recreation Pass may be assigned to any property owner's eligible family member, or resident, or resident's eligible family member.

43. **Privileges Assignable - Commercial Parcels**. Every eligible commercial parcel may receive any combination of up to five (5) Recreation Passes or Recreation Punch Cards. A Recreation Pass may be assigned to any property owner's family member, commercial tenant principal, or commercial tenant corporate officer.

44. **Assignment Approval**. Upon review and verification of the assignment by the District, the Director of Parks and Recreation, or the Director's designee, shall approve the assignment. It is the owner's or agent's responsibility to provide the District with all information required for approval.

45. **Assignment Amendments**. To update information, the assignment may be amended, and may only be amended, by the person signing the original assignment form. Provided, however, that any owner listed on the approved application or a designated agent of any listed owner may add names of persons to be assigned recreation privileges, to the extent additional privileges are available.

ARTICLE VI. RECREATION PASS

46. A **Recreation Pass**, subject to the other conditions and restrictions of this recreation pass ordinance, provides the pass holder:

a. free admission to all District-owned beaches; and

b. reduced season pass rates, at District-owned ski and tennis facilities; and

c. reduced daily rates at District-owned golf, ski and tennis facilities; and

d. reduced yearly, quarterly, monthly, or weekly membership rates at District-owned Recreation Center; and

e. reduced daily rates at the District-owned Recreation Center; and

f. reduced rates for the rental of the Chateau, Aspen Grove Community Building, Diamond Peak Ski Lodge, Recreation Center, and District-owned athletic fields; and

g. watercraft launching access at the District-owned boat ramp, for a fee; and

h. guest access to District-owned beaches for a fee; and

i. any other recreation privileges determined by the Board.

47. **Term of Pass Issuance**. The Recreation Pass of any person will be limited to a term of not less than six (6) months or more than five (5) years. If no term is specified, the minimum term shall apply.

48. **Pass Expiration**. A Recreation Pass expires when:

a. the stated expiration date has been exceeded; or

b. the parcel changes ownership; or

c. the pass is withdrawn or reassigned to another individual by the owner or his agent; or

d. payment of the District Recreation Fee is delinquent, or

e. the pass is voided pursuant to this ordinance.

49. **Ability to Transfer**. All Recreation Passes shall be issued for the sole use of the pass holder and are non-transferable.

50. **Responsibilities of Pass Holder**. It is the responsibility of the pass holder to:

a. renew his pass on or before the expiration date shown on the pass;

b. report lost, stolen, or destroyed passes;

c. return all valid passes when eligibility to use passes has expired or when asked by the District to surrender the passes;

d. be responsible for the conduct of his/her guests and for any liability resulting from the guests' use of the District's facilities, or the guests' presence in, or at, the facilities.

51. **Lost/Stolen Recreation Pass**. A charge of $15.00 per pass will be assessed to replace any Recreation Pass that is lost or stolen prior to its date of expiration.

52. **Reassignment Fee**. Reassignment will not be allowed within the initial six months of pass issuance except for the following conditions: (a) the parcel on which the pass is issued changes title; (b) the passholder is deceased; and (c) other circumstances that the Director of Parks & Recreation deems appropriate. In the event of a reassignment where the issued passes are not returned, there will be a charge of $15.00 per pass assessed to the parcel owner. New passes will not be issued for any other individuals unless this fee is paid or the passes are returned.

53. **Ownership Transfer Fee**. A charge of $25.00 per parcel will be assessed to the new owner of a parcel if the Recreation Passes issued on the parcel are not returned to the District when a property changes ownership.

ARTICLE VII. RECREATION PUNCH CARD

54. A **Recreation Punch Card** provides the cardholder with a face value of recreation privileges, determined by the Board, which may be applied toward:

a. the difference between the resident rate and the guest rate for daily beach access, daily boat and jet ski launching; and

b. the difference between the resident rate and the retail or nonresident rate for daily access to the District-owned golf, ski, recreation center, and tennis facilities; and

c. the difference between the resident rate and the retail or nonresident rate for any other recreation use fee or rental fee as may be determined by the Board.

55. **Expiration Date**. Recreation Punch Cards shall have a term of one year beginning on May 1. All Recreation Punch Cards expire on the first April 30th following the date of issuance, regardless of when issued during the course of that year.

56. **Transferability**. Recreation Punch Cards are issued against the parcel and are transferable to anyone.

57. **Replacement**. Recreation Punch Cards will not be replaced if lost, stolen, destroyed or used up.

58. **Exchange for Recreation Pass**. Once the Recreation Punch Card is used, it can be exchanged for a Recreation Pass only if all amounts that appear to be punched are paid for by the card holder and a $15.00 invalidation fee is paid to the District.

59. **Refund**. The Recreation Punch Card has no monetary exchange value and therefore cannot be returned to the District for any form of refund or credit, except as provided in paragraph 58 hereof.

ARTICLE VIII. GENERAL USE REQUIREMENTS

60. **Use of Recreation Pass and/or Card at Golf**. A maximum of five (5) Recreation Passes per parcel can be used to obtain discounts for daily access for the District-owned golf courses. No other Recreation Passes can be used to obtain daily discounts at the District-owned golf courses, beyond the five.

61. **Recreation Pass or Card Ownership**. All Recreation Passes and Cards are the property of the District and must be returned upon request, and/or upon the loss of eligibility by the pass holder or card holder.

62. **Deed Restrictions**. Parcels annexed to the District after May 30, 1968, are not eligible for District beach access as per deed restrictions listed on the beach property.

63. **Assumption of Risk**. The pass holder or card holder assumes all risk of personal injury to himself and loss of, or damage to, his personal property resulting from use of the recreation facilities.

64. **Fraudulent Use**. False or misleading information to obtain a Recreation Punch Card or Recreation Pass, or any fraudulent use of such card or pass, will be grounds for voiding all recreation privileges issued against the parcel. The District reserves the right to pursue any other legal action.

65. **Selling of Recreation Privileges**. It is strictly forbidden for any individual to sell an assignment of Recreation Privileges, or to sell individual Recreation Passes or Recreation Punch Cards. Any such sales of privileges, passes, or cards is considered to be fraudulent use and will be grounds for voiding all recreation privileges issued against the parcel. The District reserves the right to pursue any other legal action.

66. **Misconduct**. Use of the District's facilities by any pass holder or card holder is a privilege. For misconduct, a pass holder or card holder may be removed from the facilities and/or his/her privileges, including the immediate confiscation of the Recreation Pass or Recreation Punch Card, may be suspended for any period deemed appropriate by the District or those privileges may be revoked, at the District's sole discretion. Misconduct includes but is not limited to:

a. failure to abide by any rule, policy, procedure, or regulation established by the District and all such supplemental rules, policies, procedures, or regulations established for each recreational facility; or

b. violation of any law or ordinance; or

c. disorderly and/or abusive behavior; or

d. excessive or improper use of alcohol and/or drugs; or

e. vandalism or any other form of property damage.

The parent(s), conservator, or guardian of a child who engages in willful misconduct may be jointly and severally liable for the resulting damage. (NRS 41.470, as amended.)

67. **Disciplinary Procedures for Misconduct.**

a. **Incident Report.** An employee may, in a timely fashion, submit a written incident report of facts within that employee's own, personal knowledge concerning the alleged misconduct of a user, regardless of whether that user was removed from the premises for that same alleged misconduct.

b. **Removal.** Under exigent circumstances, a District employee may remove a user from District property, with or without the assistance of the Washoe County Sheriff's Office. Exigent circumstances include but are not limited to a threat of bodily harm, to him/herself or others, a risk of property damage, and/or a persistent refusal to obey the law and/or policies and procedures, or regulations of the District.

(1) Washoe County Sheriff Assistance. The District may request at any time the assistance of the Washoe County Sheriff's Office in maintaining order.

(2) Incident Report. The employee(s) involved in the removal shall file an incident report with the department head of that facility within 24 hours of the occurrence.

c. **Suspension, Revocation, or Other Disposition.**

(1) **Department Head.** Within a reasonable time following receipt of an incident report, the Department Head may determine that sufficient evidence of serious misconduct exists, indicating adequate grounds for suspension or revocation of privileges. Upon such an assessment, the Department Head shall provide the user with written notice of the accusation(s) and the possible sanction/penalty which may result. The notice shall also provide the user with the date, time and place at which the user may appear before the Department Head and the accusing employee(s), to respond to the claims and to explain the user's position concerning the incident.

(a) **Notice.** The written notice shall be signed by the Department Head and mailed, certified return receipt requested, to the District's record address of the user. Attached to the notice shall be a copy of the incident report(s). If the user is a minor, an additional copy of the notice shall be mailed to the parent(s) or person(s) in loco parentis of the user-child.

(b) **Hearing.** Within five (5) business days of mailing the written notice, unless otherwise agreed by the Department Head and the user, the Department Head shall hold a hearing to determine the accuracy of the representations contained in the Incident Report and to determine what, if any, further action shall be taken by the District. At this hearing, the employee(s) bringing the charges shall provide testimony and the user shall have opportunity to respond and explain. At the close of the hearing, the Department Head may render his/her opinion orally or take the matter under submission. The Department Head shall deliver a written decision concerning the allegations and any resulting suspension or revocation within two (2) business days following the hearing.

(c) **Decision.** The Department Head shall include findings of facts, conclusions of misconduct, and sanction/penalty, if any imposed, in the decision; additionally, the Department Head shall inform the user in the decision of the user's right to appeal the decision to the District's General Manager. Such disposition shall include, but not be limited to, the following: suspension, revocation, reprimand (oral or written), or a determination of no action of no misconduct.

(d) **Notice of Appeal.** In order to avail him/herself of the right to appeal to the General Manager, the user must so inform the General Manager by letter delivered to the District's Administrative Building (located at 893 Southwood Boulevard, Incline Village, NV 89451) within two (2) business days of issuance of the written opinion.

(2) **District General Manager.** Within five (5) business days of the user's notice of appeal letter, the General Manager shall hear the user's appeal. Also at this hearing shall be the charging employee(s) and the deciding Department Head, to respond to the user's assertions. The General Manager shall render his/her written decision within two (2) business days of the appellate hearing. In the decision, the General Manager shall uphold, modify, or reverse, in whole or in part, the Department Head's decision. The General Manager shall advise the user in this written decision of the user's right to appeal the General Manager's decision to the District's Board of Trustees. In order to avail him/herself of the right of final appeal to the Board of Trustees, the user must so inform the Board by letter delivered to the District's Administrative Building (located at 893 Southwood Boulevard, Incline Village, NV 89451) within five (5) business days of issuance of the written opinion from the General Manager.

(3) **Board of Trustees.** The Board of Trustees shall hear the user's duly agendized appeal at the Board's next regularly scheduled public meeting. (NRS 241.030 (3) (d): nothing contained in the Chapter 241 shall require that any meeting be closed to the public.) Also at this hearing shall be the charging employee(s), the deciding Department Head, and General Manager, to respond to the user's assertions. The Board shall render its decision at this

hearing. By its decision, the Board shall uphold, modify, or overturn, in whole or in part, the General Manager's decision. The Board's decision is final.

d. **Right of Representation**. The user may enlist the assistance of legal counsel, of the user's choice and at his/her expense, at any and all stages of these proceedings.

e. **Reservation**. Nothing herein shall preclude the District from utilizing any and all legal and/or equitable remedies, in the stead of or in addition to the present procedure.

68. **Other Issuance**. Nothing in this ordinance shall prevent the District from issuing recreation privileges to employees, former Board members, or anyone else, in the past, present or future, as approved by the Board of Trustees.

69. **Purchase of Additional Recreation Passes or Cards**. If any owner wishes to purchase additional Recreation Passes or Recreation Punch Cards, the owner may do so by paying an additional fee equal to one-fifth of the current District Recreation Fee for each Pass or Card for the parcel in question. Additional Recreation Passes are valid for a period of one (1) year from the date of purchase, unless they expire on an earlier date as provided in paragraph 48 hereof. Additional Recreation Passes can only be purchased for eligible family members of parcel owners or residents. Additional Recreation Punch Cards are valid from the date of purchase until the first April 30th following the date of purchase and can be used by any individual. Additional Recreation Passes or Cards cannot be purchased for commercial parcels and their tenants. An application for additional recreation passes or cards must be filed with the District's Parks and Recreation office.

70. **Personal Identification**. Prior to issuance of any recreation privilege, identification of the person receiving the privilege may be required in the form of a valid photo identification card, such as an automobile driver's license.

71. **Administration**. The General Manager may from time to time adopt, amend, or rescind rules consistent with this ordinance. The General Manager shall hold the final authority to interpret this ordinance and rules adopted thereunder. Such authority shall include the application of this ordinance and rules to specific people, parcels, and circumstances. The day-to-day administration of this ordinance is hereby delegated to the Director of Parks and Recreation.

ARTICLE IX. AMENDMENTS

72. **Modification of Privileges**. The recreation privileges issued under this ordinance shall be modified by the terms of any amendments to this ordinance subsequently adopted by the Board. Nothing in this ordinance shall be deemed to limit the Board's discretion to modify the terms of this ordinance or the application of any such modification to Recreation Passes, Recreation Punch Cards and other recreation privileges outstanding, including alterations in the terms or expiration dates thereof.

73. **Effective Date**. The effective date of this ordinance was January 1, 1988. The terms of this ordinance applied to all recreation privileges that were outstanding on that date. The

Director of Parks and Recreation is empowered to determine how to administer the application of this ordinance to existing privileges. The effective date of this amendment shall be March 26, 1998.

Exhibit A

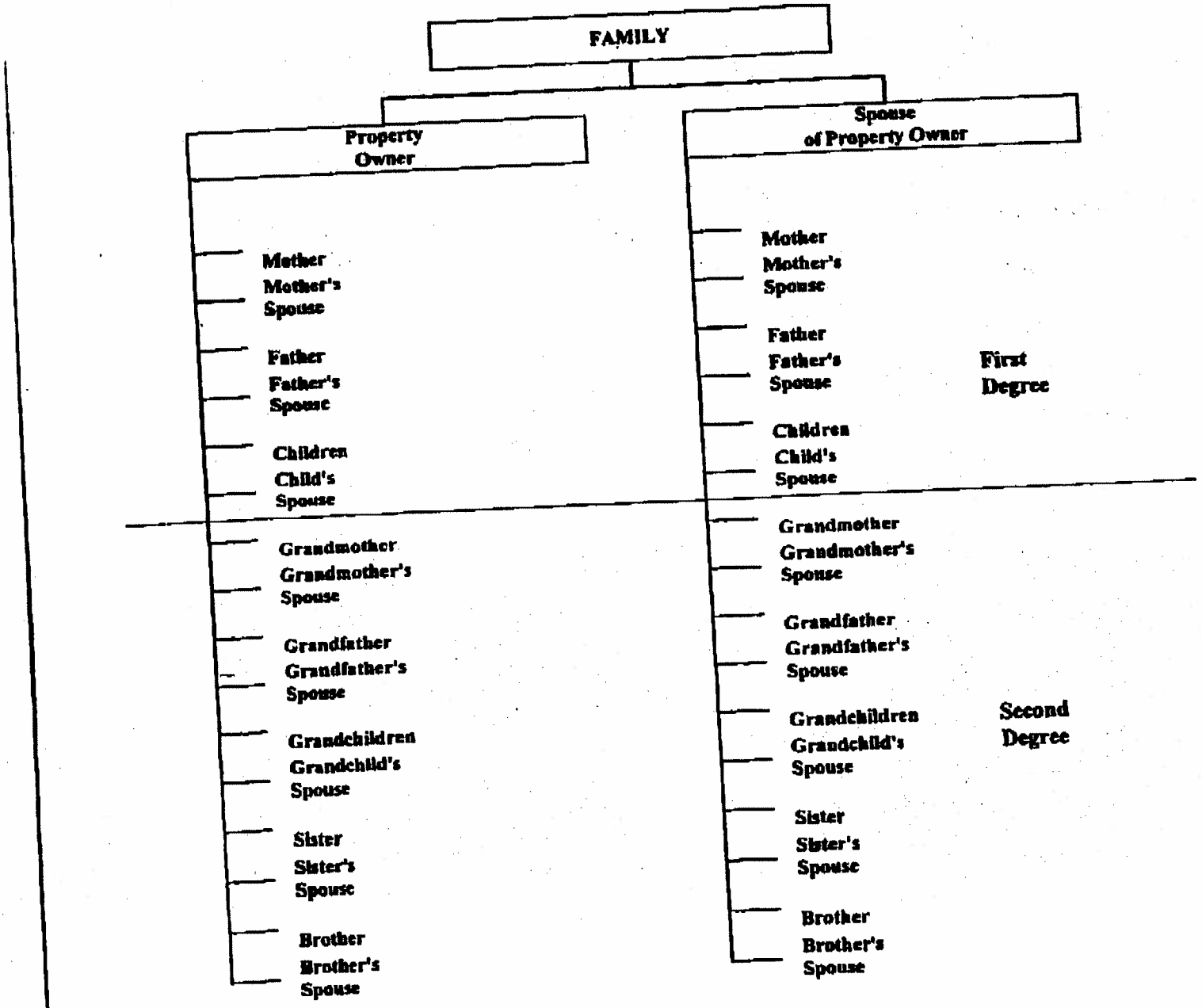

Exhibit C

D E E D

THIS INDENTURE, made this 7th day of June, 1968, between VILLAGE DEVELOPMENT CO., formerly known as CRYSTAL BAY DEVELOPMENT CO., a Nevada corporation, party of the first part, (hereinafter referred to as "Grantor"), and INCLINE VILLAGE GENERAL IMPROVEMENT DISTRICT, a quasi-municipal corporation organized and existing pursuant to the provisions of the General Improvement District Law, Chapter 318, Nevada Revised Statutes, party of the second part (hereinafter referred to as "Grantee"),

W I T N E S S E T H:

That the said party of the first part, for and in consideration of the sum of TEN DOLLARS ($10.00), lawful money of the United States, to it in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, does by these presents grant, bargain, sell and convey unto the said party of the second part, and to its successors and assigns, all that certain lot, piece or parcel of land situate in the County of Washoe, State of Nevada, more particularly described in Exhibit "A" attached hereto.

TOGETHER with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

TO HAVE AND TO HOLD, all and singular the said premises, together with the appurtenances, unto the said party of the second part, and to its successors and assigns forever.

It is hereby covenanted and agreed that the real property above described, and any and all improvements now or hereafter located thereon, shall be held, maintained and used by grantee,

BOOK 324 PAGE 192

Mahe, McDonald, Carson & Wilson
ATTORNEYS AT LAW
300 SOUTH VIRGINIA ST.
RENO, NEVADA 89505

Exhibit A

its successors and assigns, only for the purposes of recreation by, and for the benefit of, property owners and their tenants (specifically including occupants of motels and hotels) within the Incline Village General Improvement District as now constituted, and, as the Board of Trustees of said District may determine, the guests of such property owners, and for such other purposes as are herein expressly authorized.

This covenant shall be in perpetuity, shall be binding upon the successors and assigns of grantee, shall run with and be a charge against the land herein described, shall be for the benefit of each parcel of real property located within the area presently designated and described as Incline Village General Improvement District and shall be enforceable by the owners of such parcels and their heirs, successors and assigns; provided, however, that said Board of Trustees shall have authority to levy assessments and charges as provided by law, and to control, regulate, maintain and improve said property as in its sole discretion it shall deem reasonable and necessary to effectuate the purposes herein mentioned; and provided, further, the said District shall have the right to use the real property above described for the maintenance and operation of the water pumping facilities now located thereon and such other utility facilities necessary to the operation of the District.

Grantor, for the benefit of itself and its successors and assigns in the ownership of real properties located within the presently constituted boundaries of Incline Village General Improvement District, and for the benefit of all other owners of property located within said boundaries, and their respective successors and assigns in such ownership, hereby specifically reserves an easement to enter upon the above described real property and to

Mills, McDonald, Carnes & Wilson
ATTORNEYS AT LAW
300 SOUTH VIRGINIA ST.
RENO, NEVADA 89505

use said real property for the recreational uses and purposes specified herein. Said District shall have the authority to impose reasonable rules, regulations and controls upon the use of said easement by the owners thereof.

The easement hereby created and reserved shall be appurtenant to all properties located within the Incline Village General Improvement District, as said District is now constituted. Such easement may not be sold, assigned or transferred in gross, either voluntarily or involuntarily, but shall pass with any conveyance of real properties within said District as now constituted.

IN WITNESS WHEREOF, the said party of the first part has hereunto set its hand and seal the day and year first above written.

BOOK 324 PAGE 194

VILLAGE DEVELOPMENT CO.

ATTEST:

Secretary

By _____
President

ACCEPTED AND APPROVED:

INCLINE VILLAGE GENERAL IMPROVEMENT DISTRICT

ATTEST:

Secretary

By _____
President

Hale, Macdonald, Carman & Wilson
ATTORNEYS AT LAW
300 SOUTH VIRGINIA ST.
RENO, NEVADA 89503

STATE OF NEVADA)
) ss
COUNTY OF WASHOE)

On this ___ day of June, 1968, before me, a Notary Public in and for said County and State, personally appeared _____ and _____, known to me to be the President and Secretary of the corporation that executed the foregoing instrument, and upon oath, did depose that they are the officers of said corporation as above designated; that they are acquainted with the seal of said corporation and that the seal affixed to said instrument is the corporate seal of said corporation; that the signatures to said instrument were made by officers of said corporation as indicated after said signatures; and that the said corporation executed the said instrument freely and voluntarily and for the uses and purposes therein mentioned.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official stamp at my office in said County and State, the day and year in this certificate first above written.

_____
Notary Public

DOROTHY E. LOCKE
Notary Public — State of Nevada
Washoe County
My Commission Expires February 1, 1972

BOOK 324 PAGE 195

1671

ATTORNEYS AT LAW
100 SOUTH VIRGINIA ST.
RENO, NEVADA 89505

STATE OF NEVADA)
) ss
COUNTY OF WASHOE)

On this 12th day of June, 1968, before me, a Notary Public in and for said County and State, personally appeared [signature] and [signature], known to me to be the President and Secretary of INCLINE VILLAGE GENERAL IMPROVEMENT DISTRICT, the quasi-municipal corporation that executed the foregoing instrument, and upon oath, did depose that they are the officers of said corporation as above designated; that they are acquainted with the seal of said corporation and that the seal affixed to said instrument is the corporate seal of said corporation; that the signatures to said instrument were made by officers of said corporation as indicated after said signatures; and that the said corporation executed the said instrument freely and voluntarily and for the uses and purposes therein mentioned.

BOOK 324 PAGE 196

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official stamp at my office in said County and State, the day and year in this certificate first above written.

[signature]
Notary Public

DOROTHY E. LeBROKE
Notary Public — State of Nevada
Washoe County
My Commission Expires February 1, 1972

16771

Sala, McDonald, Carano & Wiens
ATTORNEYS AT LAW
300 SOUTH VIRGINIA ST.
RENO, NEVADA 89505

...uate in the County of Washoe, State of Nevada, as follows, to-wit:

PARCEL 1

A portion of Lots II, III and IV of Section 22, Township 16 North, Range 18 East, M.D.B.&M., more particularly described as follows:

Commencing at the Southwesterly corner of Lot 12 in Block N and the Northerly right of way line of Nevada State Highway No. 28, as said lot, block and Highway are shown on the map of Lakeview Subdivision, Washoe County, Nevada, filed in the office of the County Recorder of Washoe County, State of Nevada, on February 27, 1961; thence South 20°35'35" West 80.00 feet to a point in the Southerly right of way of said Highway; thence South 69°24'25" East 174.28 feet along the Southerly right of way line of said Highway to the true point of beginning of this description, said point of beginning also being the Northwest corner of that certain parcel conveyed to Crystal Bay Development Co. on September 30, 1963, under Filing No. 395633, Washoe County Records; thence continuing South 69°24'25" East 1251.79 feet along the Southerly right of way of said Highway to the Northwest corner of that certain parcel deeded to Pacific Bridge Company and Associates on October 23, 1963, under Filing No. 397736, Deed Records; thence South 20°35'35" West 574.75 feet, more or less, to Lake Tahoe; thence Westerly along Lake Tahoe to a point from which the true point of beginning of this description bears North 31°07'35" East; thence North 31°07'35" East to the true point of beginning of this description.

BOOK 324 PAGE 197

PARCEL 2

Beginning at the Southeasterly corner of Lot 24 in Block H of Lakeview Subdivision, Washoe County, Nevada, according to the map thereof, filed in the office of the County Recorder of Washoe County, State of Nevada, on February 27, 1961; thence South 15°11'27" East 111.13 feet to a point on the Southerly right of way line of Nevada State Highway 28 as it now exists and the true point of beginning of this description, said point of beginning being the Northwest corner of Lot 36 of Lakeshore Subdivision No. 1, as said Lot 36 is shown on the map of Lakeshore Subdivision No. 1, Washoe County, Nevada, filed in the office of the County Recorder of Washoe County, State of Nevada, on June 28, 1960, and being on a curve concave to the Northeast, having a central angle of 4°41'11", a radius of 5040.00 feet and a tangent which bears North 61°40'36" West 206.23 feet, thence Northwesterly along said curve and the Southerly boundary of said highway 28, an arc distance of 412.24 feet; thence continuing along the Southerly right of way line of said highway 28, North 56°59'25" West 907.76 feet; thence leaving said Highway 28, South 27°17'46" West 90.72 feet; thence South 00°50'05 West to Lake Tahoe; thence running Southeasterly along Lake Tahoe to a point from which the true point of beginning bears North 28°08'35" East (Lakeshore Subdivision No. 1 bearing North 27°16'00" East); thence North 28°08'35" East along the Westerly boundary of said Lakeshore Subdivision No. 1 to the true point of beginning of this description.

RESERVING FROM the above described parcel an easement for maintaining and operating an existing pumping plant and pipe lines.

116713

...Lakeview Subdivision.

Exhibit D

Stephen C. Balkenbush, Esq.
State Bar No. 1814
Thorndal, Armstrong, Delk, Balkenbush & Eisinger
6590 South McCarran Blvd., Suite B
Reno, Nevada 89509
(702) 786-2882
Attorneys for Defendants
Incline Village General Improvement District,
John A. Bohn, Gene Brockman, Bea Epstein,
Chuck Weinberger, and Robert C. Wolf

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

STEVEN E. KROLL,
Plaintiff
vs.

INCLINE VILLAGE GENERAL IMPROVEMENT DISTRICT, aka IVGID, a governmental subdivision of the State of Nevada; JOHN A. BOHN; GENE BROCKMAN; BEA EPSTEIN, CHUCK WEINBERGER and ROBERT C. WOLF, individually and as Trustees of IVGID; DOES 1 through 25, inclusive, each in their individual and official capacities,

Defendants.
_____/

Case No. 3:08-cv-00166-ECR-RAM

AFFIDAVIT OF BILL HORN

STATE OF NEVADA)
:ss
COUNTY OF WASHOE)

BILL HORN, being first duly sworn, deposes and says under penalty of perjury as follows:

1. I am employed as the General Manager for Incline Village General Improvement District (hereinafter IVGID) and have been employed in this capacity since November, 2001.

2. To the best of my recollection, at no time since I have been General Manager for IVGID has Plaintiff Steven Kroll requested that he be granted to Burnt Cedar Beach, Incline Beach, Ski Beach, or Hermit Beach in order to engage in speech which is protected by the First Amendment.

3. To the best of my recollection, at no time since I have been General Manager for

THORNDAL, ARMSTRONG, DELK, BALKENBUSH & EISINGER
6590 South McCarran Blvd. Suite B
Reno, Nevada 89509
(775) 786-2882

IVGID has IVGID ever denied access to any group or individual, including Plaintiff, to access Burnt Cedar Beach, Incline Beach, Ski Beach, or Hermit Beach for the purpose of engaging in First Amendment activities.

4. IVGID has been considering over the past year adopting a policy which addresses the use of District property and use of District facilities for speech and advocacy. A copy of this proposed policy is attached to my affidavit as Exhibit "1." This policy will be considered by the IVGID Board of Trustees at its regularly scheduled meeting on April 30, 2008.

BILL HORN

SUBSCRIBED and SWORN to before

before me this 30th day of April, 2008.

NOTARY PUBLIC

SUSAN A. HERRON
Notary Public - State of Nevada
Appointment Recorded in Washoe County
No: 98-2732-2 - Expires December 8, 2010

THORNDAL, ARMSTRONG, DELK, BALKENBUSH & EISINGER
6590 South McCarran Blvd. Suite B
Reno, Nevada 89509
(775) 786-2882