

IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

AFTEM LAKE DEVELOPMENTS,
INC. and GERALD LEE AFTEM,
individually,

Petitioners/Appellants,

vs.

RIVERVIEW HOMEOWNERS
ASSOCIATION,

Respondent/Appellee.

Supreme Court No.
20190221

Mountrail Co. Court No.
31-2017-CV-00045

APPELLANTS' BRIEF

**Appeal from Order Denying Plaintiffs' Motion for Summary Judgment
and Granting Defendant's Motion for Summary Judgment Entered on
March 15, 2019, North Central Judicial District, State of North Dakota,
The Honorable Todd L. Cresap Presiding.**

Judd M. Jensen (# 07313)
Troy L. Bentson (# 07316)
BROWNING, KALECZYC, BERRY & HOVEN P.C.
801 W. Main, Suite 2A
Bozeman, MT 59715-3336
Phone: 406-585-0888
Email: judd@bkbh.com; troy@bkbh.com
Fax: 406-587-0165
ATTORNEY FOR THE APPELLANTS

[¶ 1] TABLE OF CONTENTS

TABLE OF CONTENTS	¶ 1
TABLE OF AUTHORITIES	¶ 2
STATEMENT OF THE ISSUES	¶ 3
STATEMENT OF THE CASE	¶ 6
STATEMENT OF THE FACTS	¶ 11
ARGUMENT	¶ 19
 <i><u>The District Court Abused its Discretion by Ignoring Imperfections in the County's Statutory Dedications that Should Have Rendered Them into Common Law Dedications</u></i>	 ¶ 21
 <i><u>The District Court Abused its Discretion by Relying on Facts Not of Record to Disregard Plaintiff Gerald Aftem's Sworn Affidavit</u></i>	 ¶ 27
CONCLUSION	¶ 31

[¶ 2] TABLE OF AUTHORITIES

North Dakota Supreme Court Cases	¶ #
<u>Cole v. Minnesota Loan & Trust Co.</u> , 17 N.D. 409, 117 N.W. 354 (1908)	¶ 22
<u>Fetch v. Quam</u> , 2001 ND 48, 623 N.W.2d 357	¶ 28
<u>Larimore Pub. Sch. Dist. No. 44 v. Aamodt</u> , 908 N.W.2d 442, (N.D., 2018) ..	¶ 25
<u>Mckenzie Cnty. v. Reichman</u> , 2012 ND 20, 812 N.W.2d 332 (N.D., 2012).....	¶ 23
<u>Olson v. Cass County</u> , 253 N.W.2d 179, 183 (N.D., 1977)	¶ 24
<u>Tibert v. City of Minto</u> , 2004 ND 97, 679 N.W.2d 440	¶¶ 20, 22
<u>Winnie Dev. LLLP v. Reveling</u> , 907 N.W.2d 413 (N.D., 2018).....	¶¶ 20, 22
Statutes & Rules	¶ #
N.D.C.C. § 11-11-14	¶ 24
N.D.C.C. § 24-01-01	¶ 24
N.D.C.C. § 24-05-17	¶ 24
N.D.C.C. § 24-07-35	¶ 25
N.D.C.C. § 24-07-36	¶ 25
N.D.C.C. § 40-50-04	¶¶ 9, 22
Additional Citations	¶ #
Eugene McQuillin, <u>The Law of Municipal Corporations</u> § 33:5 (3d ed. Supp. 2017).....	¶ 22

[¶ 3] STATEMENT OF THE ISSUES

[¶ 4] Whether the District Court abused its discretion by finding that the County's refusal to accept any maintenance responsibilities for the interior subdivision road right-of-ways during the approval of the subdivision plats did not result in imperfections in the statutory dedications that rendered them into common law dedications.

[¶ 5] Whether the District Court abused its discretion by relying on facts not of record to disregard Gerald Aftem's sworn affidavit that that he had paid property taxes on the interior subdivision road properties for decades and had never abandoned his ownership interest in that property.

[¶ 6] STATEMENT OF THE CASE

[¶ 7] Aftem Lake Developments, Inc. and Gerald Aftem, individually, (hereinafter "Aftem") appeal from the District Court's Order Denying Plaintiffs' Motion for Summary Judgment and Granting Defendant's Motion for Summary Judgment, made final in the Judgment entered on May 17, 2019 and the Notice of Entry of Judgment entered on May 30, 2019.

[¶ 8] On or about March 9, 2017, Aftem served their complaint upon Defendant Riverview Home Owner's Association (hereinafter "Riverview HOA"). A.A. 11. This complaint alleged claims for (1) trespass, (2) intentional interference with prospective economic advantage and (3) negligence related to the installation of a drinking water utility system installed in the subdivision by Riverview HOA. A.A. 11. On March 30, 2017, Riverview HOA filed its Answer to Plaintiffs' Complaint denying the allegations. A.A. 18. After the conclusion of discovery, claims 2 and 3 were dismissed upon agreement of the parties. A.A. 23. Thereafter, on August 15, 2018, the parties filed a

stipulated set of undisputed facts in anticipation of filing cross motions for summary judgment to resolve the remaining trespass claim. A.A. 24-81. After then filed a Motion for Summary Judgment on August 31, 2018 contending in their motion that the interior subdivision roads were still owned by After Lake Developments, Inc. (“ALDI”) as the Mountrail County Commission specifically rejected adding the interior subdivision roads to the county system and refused any maintenance responsibility for the interior subdivision roads during plat approval. A.A.82-95. In the alternative, After argued that the recorded plats did not clearly define the location of the public right of ways and therefore should be treated as general common law dedications rather than statutory dedications. A.A. 91-92. If the court found in its favor under either theory, After alleged that Riverview HOA’s refusal to obtain a license, easement, or other permission from After meant that those portions of Riverview HOA’s drinking water system constructed under the platted interior subdivision roads were trespassing on ALDI’s property. A.A. 92-94.

[¶ 9] On September 28, 2018, Riverview HOA filed its own Motion for Summary Judgment on After’s remaining trespass claim. A.A. 99-111. Riverview HOA argued that the county’s refusal to accept maintenance responsibility for the interior subdivision roads was irrelevant under N.D.C.C. § 40-50-04 as the county had accepted the signed recorded plats. A.A. 104. Therefore, Riverview HOA argued that any imperfection in the process was moot as the statutory process of accepting the plats had created statutory dedications, not common law dedications. A.A. 105-107. In the alternative, Riverview HOA argued that even if the platted interior subdivision roads were common law dedications, such dedications included an implied easement for utilities to run their utility

lines under the surface of the public right-of-ways and thus Riverview HOA's water lines at issue in the litigation were not trespassing. A.A. 108-111.

[¶ 10] After filed its reply brief on October 12, 2018. A.A. at 125. Oral arguments were held on the cross motions on November 2, 2018. The court issued its order denying Plaintiffs' Motion for Summary Judgment and Granting Defendant's Motion for Summary Judgment on March 15, 2019. A.A. 160. This decision was made final in the Judgment entered on May 17, 2019. A.A. 172.

[¶ 11] STATEMENT OF THE FACTS

[¶ 12] On August 15, 2018, the parties filed a stipulated set of undisputed facts in anticipation of filing cross motions for summary judgment to resolve the remaining trespass claim. A.A. 24. A summary of this information is provided here for the court's convenience.

[¶ 13] This appeal involves the legal ownership interests of ALDI in portions of the following real property containing the interior subdivision roads:

Township 152 North, Range 93 West

Section 11: Lots 3, 4, 6, 7, and the North 67 Feet of Lot 8; and a tract of land situated in the SE1/4NE1/4, more particularly described as follows: Beginning at the SE corner of the SE1/4NE1/4; then Westerly along the South line of said SE1/4NE1/4, 965.00 feet; thence Northeasterly to a point on the East line of said SE1/4NE1/4 965 feet North of the SE corner of said SE1/4NE1/4; thence Southerly along the East line of said SE1/4NE1/4 to the point of beginning. Containing 10.69 acres, more or less, of which 0.58 of an acre, more or less, is contained within the county road right-of-way.

Section 12: Outlot 3 of SW1/4;
Lots 3, 4, 5, 6, and 7;
S1/2NW1/4;
N1/2S1/2SW1/4;
N1/2S1/2S1/2SW1/4 – less Outlots 2 and 4 of SW1/4 and further less a tract of land in the SW1/4, more particularly described as

follows: Commencing at a point of 20 rods North of the SE corner of the SW1/4, then 17 1/3 rods due North, then 37 rods due West, thence 17 1/3 rods due South, thence 37 rods due East to the starting point, containing 4 acres, more or less; and

A tract of land in the N1/2NW1/4, more particularly described as follows: Beginning at the SE corner of said N1/2NW1/4; thence Northerly along the East line of said N1/2NW1/4, 204.00 feet; thence Southwesterly to a point on the South line of said N1/2NW1/4 703 feet West of said SE corner; thence Easterly to the point of beginning, containing 1.65 acres, more or less, of which 0.73 of an acre, more or less, is contained in county road right-of-way

(hereinafter collectively referred to as “Subject Property”).

[¶ 14] ALDI subdivided part of the Subject Property into three platted and approved subdivisions; namely the Arrow Head Point Subdivision, the Bridgeview Subdivision and the Riverview Estates Subdivision. A.A. 29-30, Exhibit A, Map of Arrow Head Point Subdivision, the Bridgeview Subdivision and the Riverview Estates Subdivision. The plat of Arrow Head Point Subdivision was filed on February 24, 1999, in Book 1-Plat, Page 205, Document No. unreadable. A.A. 31-39, Exhibit B, Plat Documents for the Arrow Head Point Subdivision. The plat of the Bridgeview Subdivision was filed in the Mountrail County Clerks Office February 24, 1999, in Book 1-Plat, Page 206 Document No. unreadable. A.A. 40-43, Exhibit C, Plat Documents for the Bridgeview Subdivision. The plat for Riverview Estates Subdivision was filed on August 14, 2006, in Book 1-Plat, Page 228, Document No. 323037. A.A. 44-47, Exhibit D, Plat Documents for the Riverview Estates Subdivision. These three subdivisions are collectively referred hereinafter as the “Riverview Subdivisions”.

[¶ 15] The Riverview Home Owners Association (“Riverview HOA”) was originally created by ALDI to enforce the covenants in the Riverview Subdivisions. Lot owners from the Riverview Subdivisions are members of the Riverview HOA. A.A. 26.

[¶ 16] During the approval process for the three subdivisions, the County Commissioners for Mountrail County voted to approve the subdivision plats only on condition that they did not have to assume any maintenance responsibility for the platted roads that ALDI created within the subdivisions. A.A. 26, see also A.A.48-73, Exhibit E, County Commission Minutes for Arrow Head Point Subdivision. To date, Mountrail County has never expressly added the platted interior subdivision roads to its county system. A.A. 27.

[¶ 17] On or about September 5, 2015, the Riverview HOA entered into a contractual relationship with the Fort Berthold Rural Water Authority. A.A. 26. Thereafter, the Riverview HOA developed and built a water utility system for the subdivisions. A.A. 26. Portions of the rural water system developed by the Riverview HOA pursuant to the Rural Water Agreement run underneath the platted subdivision roads. A.A. 26. Riverview HOA has received an easement from the county to run its pipelines in the road easement along the county road which leads to the subdivisions. A.A. 26, see also A.A. 74-77, Exhibit F, County Pipeline Easement. Moreover, the majority of Riverview HOA’s water lines located within the subdivisions are located within the dedicated utility easements as platted and thus are not in dispute in this litigation. A.A. 27, see also A.A. 78-81, Exhibit G, Maps of Riverview HOA Pipeline System.

[¶ 18] The sole legal issue in dispute in the litigation is that a portion of Riverview HOA's water lines are also running underneath the platted subdivision roads to which ALDI asserts an ownership. Except as contained in the recorded subdivision plats, Riverview HOA has not received a license, easement or other permission from ALDI for the pipelines. A.A. 27.

[¶ 19] ARGUMENT

[¶ 20] Afterm argues on appeal that the district court erred in its order granting summary judgment to Riverview HOA by: (1) ignoring the imperfections in the plat approval process that should have rendered the public right of ways for travel into common law dedications, and (2) by utilizing facts that were not of record to disregard Plaintiff Gerald Afterm's affidavit that he had paid property taxes on the interior subdivision roads for almost two decades following plat approval. "Whether a common-law dedication has been made is a question of fact, and the trial court's determination will not be reversed unless it is clearly erroneous." Winnie Dev. LLLP v. Reveling, 907 N.W.2d 413, ¶ 8 (N.D., 2018) (citing Tibert v. City of Minto, 2004 ND 97, ¶¶ 14–17, 679 N.W.2d 440).

[¶ 21] The District Court Abused its Discretion by Ignoring Imperfections in the County's Acceptance of the Plats that Should Have Rendered the Public Right of Ways for Travel in the Interior Subdivision Roads into Common Law Dedications.

[¶ 22] In the normal course of subdivision approval, a developer files a plat with the county which designates right-of-ways and other public areas. See N.D.C.C. § 40-50-04. If the plat includes areas being designated to the public, this is considered an offer to dedicate. Thereafter, in the normal course of events, the approval of the proposed

subdivision plat by the county commission is typically considered acceptance of the offer to dedicate. The question before the court is to determine the result of such dedications when there is imperfection in how a county commission approves the plats. Imperfection can take many forms, such as an inadvertent mistake in the plat map or, in the present case, a decision by a county commission that has not been specifically addressed by the legislature. The Court recently addressed an issue of imperfection of an inadvertent error in a recorded plat map in Winnie Dev. LLLP v. Reveling, 2018 ND 47 (N.D., 2018), stating as follows:

“Private land may be dedicated to public use in two ways, pursuant to statute and under the common law. Two distinctions separate the different types of dedication. First, the common law dedication operates by way of an equitable estoppel, whereas a statutory dedication operates by way of grant. Second, a common law dedication usually creates a mere easement, whereas in a statutory dedication the fee of the property is in the public.” Eugene McQuillin, The Law of Municipal Corporations § 33:5 (3d ed. Supp. 2017). North Dakota has followed these general principles. Dedication arises when a private landowner sets aside land for public use. Tibert v. City of Minto, 2004 ND 97, ¶ 13, 679 N.W.2d 440. Dedication may be express or implied, and may be established statutorily or by common law. Tibert, ¶ 13 (citing Cole v. Minnesota Loan & Trust Co., 17 N.D. 409, 117 N.W. 354, 357 (1908)). “A statutory dedication is ‘in the nature of a grant,’ while a common-law dedication ‘rests upon the principles of estoppel in pais.’” Tibert, at ¶ 13 (citing Cole, at 357). “Statutory dedications are those made pursuant to the provisions of a statute. However, they are not exclusive of the common-law method. . . . In order to make a statutory dedication of land, the procedures outlined in the applicable laws must be carefully followed, although there is authority to the contrary.” McQuillin, § 33:4 (footnotes omitted) (3d. ed. 2009). “A statutory dedication is made pursuant to the terms of a statute, and is almost universally created by the filing and recording of a plat. . . . Statutory dedication generally vests the legal title to the grounds set apart for public purposes in the municipal corporation, while the common-law method leaves the legal title in the original owner.” “The authorization of statutory dedication does not in any way restrict the common-law power of the owner to devote his or her land, or some easement therein, to public use. Therefore, a statutory dedication which is imperfectly made is often

considered to be a valid common-law dedication” (emphasis added). Id. § 33:3.

Winnie Dev. LLLP v. Reveling, 2018 ND 47 (N.D., 2018).

[¶ 23] Based on this jurisprudence, there are two key questions for the Court to consider in the present case in making a determination on whether statutory dedications or common law dedications were created: (1) whether the statutory process was complied with by the Mountrail County Commission (“Commission”) during plat approval and (2) whether the recorded plats clearly indicate a donation to the public of the interior subdivision roads. For the purposes of this appeal, Aftem does not dispute Riverview HOA’s contention that the recorded plats of the Riverview Subdivisions each have clear dedication language granting the public a perpetual right of way in the interior subdivision roads. However, Aftem does dispute that the dedications in the Riverview Subdivision plats were accepted by the county in fee simple as the Commission expressly conditioned its acceptance of the recorded plats at the public meeting on an agreement with Aftem that the county would never accept maintenance responsibility for the interior subdivision roads. See A.A. 26; see also A.A. 61, Stipulated Statement of Undisputed Facts, Exhibit E, County Commission Minutes for Arrow Head Point Subdivision. Moreover, as it is undisputed that the county did not construct the interior subdivision roads, take responsibility for signage of the roads or ever maintain the roads for the past two decades, the county certainly has never established a clear ownership interest in fee simple. See e.g. Mckenzie Cnty. v. Reichman, 2012 ND 20, ¶ 25, 812 N.W.2d 332 (N.D., 2012).

[¶ 24] In its order granting summary judgment to Riverview HOA, the District Court correctly addresses the standard plat approval process, but then avoided addressing the legal impact of the Mountrail County Commissioners' decision to avoid maintenance responsibilities for the platted interior subdivision roads, holding that such discretion by a county commission is not contemplated by the statute. A.A. 163-165. While there is a simple elegance to strictly adhering to the statutory process set forth by the legislature, the District Court's decision fails to adequately address what jurisdiction a county commission has been given by the legislature related to the ownership and maintenance of public roadways. See Olson v. Cass County, 253 N.W.2d 179, 183 (N.D., 1977). For example, it is well established that the boards of county commissioners are responsible for the county road system. See N.D.C.C. § 11-11-14 (“[t]o maintain, in its discretion, all public roads and private highways and roads that are being used as part of regularly scheduled public school bus routes.”), N.D.C.C. § 24-01-01 (““[f]ee simple" means an absolute estate or ownership in property including unlimited power of alienation, except as to any and all lands acquired or taken for highway, road, or street purposes”) and N.D.C.C. § 24-05-17 (“[t]he boards of county commissioners in their respective counties have the sole authority and responsibility to acquire land for, construct, maintain, and operate the county road system as designated and selected by them”). Based on this clear statutory authority, the Commission had legislative authority to make the final decision whether to accept any ownership and maintenance responsibility for those interior subdivision roads so designated by the plats. As such, the question before the Court is not whether the Commission had legal authority to formerly declare the public dedications as common law dedications, or whether that decision would be right or

wrong. The question before the Court is whether the Commissions more ambiguous decision to accept the subdivision plats, but not accept any maintenance responsibility for the interior subdivision roads should render those grants to the public set forth in the plats into common law dedications.

[¶ 25] Critical to this decision is whether a county commission can accept ownership of a public roadway in fee simple without accepting responsibility for its proper signage and maintenance. Generally, “[p]olitical subdivisions are required to provide schools and educational opportunities to all children, police, fire, and emergency services, water, sewage, and trash disposal, street and road maintenance, and dozens of other public services. Political subdivisions are captives to the public’s needs.” Larimore Pub. Sch. Dist. No. 44 v. Aamodt, 908 N.W.2d 442, ¶35, (N.D., 2018). The one routine exception to this general rule related to public roadways is that a county commission can declare roadways to be minimum maintenance roads. N.D.C.C. § 24-07-35. However, the interior subdivision roads at issue in the present case would not qualify as minimum maintenance roads under North Dakota law as the roads are the only access to many of the residential dwellings located in the Riverview Subdivisions. Id. It is also uncontested that interior subdivision roads at issue in the litigation have never been signed by the County as minimum maintenance roads. N.D.C.C. § 24-07-36. Based on the review of these statutes, the Commission could have accepted a roadway in fee simple, without accepting maintenance, but only if it designated such public roadways as minimum maintenance roads.

[¶ 26] Ultimately, Mountrail County has exerted no ownership in the interior subdivision roadways in dispute for decades and it is self-serving of Riverview HOA to

claim the county owns the roads merely so it does not have to obtain an easement from ALDI, the entity that actually constructed, signed and maintained those roads during that same time period. Therefore, the Court should find that the dedications in the recorded plats are common-law dedications based on the undisputed facts of record.

[¶ 27] The District Court Abused its Discretion by Relying on Facts Not of Record to Disregard Plaintiff Gerald Aftem's Sworn Affidavit.

[¶ 28] It is well established that evidence must be viewed in the light most favorable to the party opposing the motion for summary judgment. Fetch v. Quam, 2001 ND 48, ¶ 8, 623 N.W.2d 357. In the present case, Plaintiff Gerald Aftem asserted in his affidavit that ALDI constructed, signed, maintained and paid all property taxes on those portions of the Subject Property that contain the interior subdivision roads for almost two decades. A.A. 96-98. If viewed in the light most favorable to Aftem, these assertions would indicate that ALDI still maintains some legal ownership of those portions of the roadway in dispute and thus a factual dispute would exist that would need to be decided at trial. However, instead of viewing these facts in the light most favorable to Aftem, the District Court chose to simply disregard Aftem's claim(s) related to the taxes and ownership of the Subject Property as the District Court felt those claims were inconsistent with what Gerald Aftem told the County Commission and the Corps of Engineers during the plat approval process related to the role of the Riverview HOA in enforcing the covenants. See A.A. 164; see also A.A. 62-63. This was improper as there is only a very incomplete record of the discussions between Gerald Aftem and the Commissioners in the meeting minutes of record which makes any attempt to interpret

Aftem's intended goals or mental impressions from twenty years ago extremely speculative, if not impossible.

[¶ 29] For example, the meeting minutes of the Commission do not include a lot of information as to their decision(s) related to the acceptance of the dedication(s) set forth in the plats. The most detailed discussion of the subdivision roads is in the public record from the February 16, 1999 meeting, as follows:

Gerald Aftem, Representing Aftem lake Developments Inc., met with the Board to discuss road issues. Mr. Aftem requested the Board to vacate the road between Sections 11 & 12, Township 152, Range 93. Mr. Aftem stated Neil Roggenbuck has been hired to build a new road directly east of this section line. Mr. Aftem stated Aftem Lake Developments will pay the cost to build a new road and upgrade any existing roads to Arrowhead Point and Bridge View Subdivisions located in Sections 11 & 12, Township 152, Range 93. After completion of building and upgrading roads, Mr. Aftem requested the County to maintain them.

Comm. Hynek stated the new road built would not be under the county system but would be a township road in an unorganized township.

Mr. Aftem ask(ed) if the County had any old concrete culverts as one area in the new road between the two sub-divisions will need culverts. Mr. Aftem was informed to contact the road supervisor as the County does have some old concrete culverts that could be used but Aftems would have to move them at their expense.

Mr. Aftem state(d) he has already notified the Riverview Cemetery Association about abandoning this section line and they had no objections except that the trees be left when building a new road.

Mr. Aftem ask(ed) about permission to install speed limit and other signs needed in the residential area. The Board stated they did not want to be responsible for signing within the residential area and had no objection of Aftems installing signs.

Mr. Aftem ask(ed) about patrolling within the sub-divisions. The board felt there would be no patrolling on a regular basis but would be available if called.

See A.A. 61-63, February 16, 1999 Minutes, pages 1 and 2, included with Stipulated Statement of Undisputed Facts, Exhibit E, County Commission Minutes for Arrow Head Point Subdivision.

[¶ 30] Ultimately, it is the District Court's role to base its decisions on summary judgment on the undisputed facts of record, not on pure speculation as to what Aftem's

motivations may have been twenty years ago in getting the plats approved. Pursuant to Aftem's affidavit, ALDI built the interior subdivision roads, signed the roads, maintained the roads for two decades and paid taxes on those portions of the property that contained the interior subdivision roads. As those facts were included in Gerald Aftem's affidavit and were indicative of who owned the Subject Property, they should have been viewed by the District Court in a light most favorable to Aftem when deciding whether or not to grant Defendant's Motion for Summary Judgment.

[¶ 31] CONCLUSION

[¶ 32] For the foregoing reasons, Aftem respectfully requests this Court vacate the order granting summary judgment to Defendant and remand the case back to the District Court for a new order consistent with the Court's holding.

Respectfully submitted this Tuesday, August 20, 2019.

/s/ Judd M. Jensen (#07313)

BROWNING, KALECZYC, BERRY & HOVEN P.C.

801 W. Main, Suite 2A

Bozeman, MT 59715-3336

Phone: 406-585-0888

Email: judd@bkbh.com

Fax: 406-587-0165

ATTORNEY FOR THE APPELLANTS

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ASSOCIATION,)	
)	
Respondent/Appellee.)	
)	

1. Appellants' Brief (.pdf and word formats);
2. Appellants' Appendix to Appeal Brief; and,
3. N.D.R.App.P. 32(e) Certificate of Compliance.

Clerk of the Supreme Court
North Dakota Supreme Court
supclerkofcourt@ndcourts.gov

All done by Electronic Filing pursuant to N.D. Sup. Ct. Admin. Order 14.

/s/ Judd M. Jensen (#07313)
BROWNING, KALECZYC, BERRY & HOVEN P.C.
 801 W. Main, Suite 2A
 Bozeman, MT 59715-3336
 Phone: 406-585-0888
 Email: judd@bkbh.com
 Fax: 406-587-0165
ATTORNEY FOR THE APPELLANTS

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)	
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)	

¶1 COMES NOW Judd M. Jensen, attorney for the Appellants, and preparer of documents filed in association with the above captioned case on this day.

¶2 Pursuant to N.D.R.App.P. 32(e) the documents filed on this day comply with the North Dakota Rules of Appellate Procedure as follows:

- a. Appellants' Brief –Word Count=4,124; Page Count = 18 (N.D.R.App.P 32(a)(8))
- b. Appellants' Appendix to Appeal Brief– (N.D.R.App.P.25(a))

/s/ Judd M. Jensen (#07313)
BROWNING, KALECZYC, BERRY & HOVEN P.C.
 801 W. Main, Suite 2A
 Bozeman, MT 59715-3336
 Phone: 406-585-0888
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