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DEPARTMENT OF
WATER RESOURCES

Attorneys for Lexington Home Owners' Association

**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

In Re: SRBA

Case No. 39576

)
) Subcase Nos. 63-00123D, 63-00123F &
) 63-00123G
)
) **LEXINGTON HILLS HOME**
) **OWNERS' ASSOCIATION'S**
) **RESPONSE TO LEXINGTON**
) **HILLS, INC.'S MOTION FOR**
) **SUMMARY JUDGMENT**
)

INTRODUCTION

Lexington Hills, Inc. ("Lexington Hills") failed to expressly retain any water when it conveyed lands within the developments to Lexington Hills Home Owners' Association ("Lexington HOA"). Indeed, the Master Declaration of Covenants Conditions and Restrictions ("Master Declaration"), which were drafted by Lexington Hills and to which all but one of the deeds to the Lexington HOA were made subject, indicates that Lexington Hills would convey "surface water for irrigation appurtenant to *each phase* of development of the Property." (Emphasis added). The term "property" is defined to include "the real property, consisting of"

the developments¹ and “*every* part, parcel, and Lot thereof.” Clearly, the intent of Lexington Hills, at the time that the Master Declaration was filed was to transfer all surface water for irrigation of *each phase* of the development to Lexington HOA. In fact, consistent with this intent, the deeds for the first six phases of the development convey water, which was *specifically intended* for use on those six phases.

Lexington Hills’ now argues that a single inconsistent sentence within the Master Declaration that it drafted overrides its clear intent. While the Master Declaration does indicate that Lexington Hills would reserve “all water and water rights over, upon or under or appurtenant to the Property,” this statement was immediately followed by the above-quoted statement of Lexington Hills intent to transfer the surface water appurtenant to the “property,” for irrigation of “each phase”, to Lexington HOA. Since 4.605 cfs of Jacobs water right was appurtenant to the “property” for irrigation purposes, the entire 4.605 cfs should be recommended in the name of Lexington HOA. As such, the Court should deny Lexington Hills Motion for Summary Judgment

STATEMENT OF FACTS

A complete statement of the applicable facts is provided in the *Memorandum in Support of Lexington Hills Home Owners’ Association’s Motion for Summary Judgment*, filed with this Court on February 28, 2007. Lexington HOA adopts that Statement of Facts for purposes of this Response.

STANDARD OF REVIEW

The Standard of Review appropriate for cross motions for summary judgment is set forth in the *Memorandum in Support of Lexington Hills Home Owners’ Association’s Motion for*

¹ Each phase of the development was made subject to the Master Declaration. See *Affidavit of Paul L. Arrington in Support of Lexington Hills Home Owners’ Association’s Motion for Summary Judgment* (“Arrington Aff.”) at Exs. D through R.

Summary Judgment, filed with this Court on February 28, 2007. Lexington HOA adopts that Standard of Review for purposes of this Response.

LEGAL ANALYSIS

I. As Recognized by Lexington Hills, The Director Erred by Failing to Recommend the Portion of Lexington HOA's Water Right that Lexington Hills Specifically Deeded to Lexington HOA.

While many of the deeds to Lexington HOA are silent as to specific quantities of water, it is indisputable that Lexington Hills expressly conveyed to Lexington HOA 2.388 cfs in the first six deeds specifically for irrigating the first six phases of the development. *See Arrington Aff.* Ex. D-I. The deeds are unambiguous and show that the Director's recommendation was in error. Lexington Hills recognizes this error: "Lexington [Hills] has conveyed a 2.388 cfs portion of the Jacobs Right to the Association. However, the recommendation for the Association's right 63-00123G is only for 2.152 cfs. Lexington concedes that this is an error." *Lexington Hills Br.* at 2 n.3.

The Director's recommendation is wrong. Lexington HOA is entitled to more water than recommended. Furthermore, as discussed below, and in the *Memorandum in Support of Lexington Hills Home Owners' Association's Motion for Summary Judgment*, Lexington HOA should be decreed the full amount of water appurtenant to the land of the developments.

II. Lexington Hills did not Retain any of Jacobs Water Through the Master Declaration

Lexington Hills recognizes that, on their face, the final 10 deeds do not address the remaining 2.217 cfs of Jacobs water right that was not specifically transferred to Lexington HOA. Rather, Lexington Hills argues that a statement in the Master Declaration, to which every deed was allegedly made subject, somehow constitutes a clear intent to reserve that remaining water. The facts do not support such a contention.

The law regarding the transfer and retention of water rights is clear. In essence, when considering whether or not a water right was conveyed with the property to which it is appurtenant, “the inquiry is not whether there is evidence indicating that the grantor intended to convey the water rights with the land. Rather, the inquiry is whether the water rights were expressly reserved in the deed conveying the land or whether there is clear evidence that the parties intended that the grantor would reserve them.” *Joyce Livestock Co.*, __ P.3d __, 2007 WL 428947, *13 (Feb. 9, 2007) (*Arrington Aff.* Ex. V) (emphasis added). In other words, decreed water rights will pass with the land to which they are appurtenant *unless* the intent to retain water rights is stated in clear and express language in the deed. See I.C. § 42-1402.

The “clear evidence” in this case – the deeds and the Master Declaration – unambiguously show that Lexington Hills did not reserve any of Jacobs water right. Indeed, they show that Lexington Hills did not intend to reserve any of Jacobs water right. The Master Declaration indicates that the surface water for irrigation that was appurtenant to the “property” would be conveyed to Lexington HOA as each phase was completed. *Arrington Aff.* Ex. I. “Property” is very broadly defined to include “*every* part, parcel and Lot” within the development. *Id.* (emphasis added). Notably, as the first six phases of the developments were completed, Lexington Hills conveyed water, totally 2 388 cfs, to Lexington HOA with the specific, and explicitly stated, purpose of irrigation the lands within those six phases. Surely, this is a clear indication that Lexington Hills intended to transfer all of the irrigation water – i.e. Jacobs water – to Lexington HOA. These indisputable facts “end this matter.” *Lexington Hills Br.* at 3.

Notwithstanding this clear intent, Lexington Hills argues that the Master Declaration somehow depicts an intent to retain “all waters and water rights over, upon or under or

appurtenant to the Property” (hereinafter referred to as the “retention statement”). *Arrington Aff* Ex. I. That this declaration did not apply to the 4.605 cfs of Jacobs water right appurtenant to the lands within the development is made clear by four indisputable facts.

First, the statement Lexington Hills now argues indicates its intent to retain Jacobs water right is immediately followed by the statement wherein Lexington Hills expressed its intent to transfer all appurtenant surface water to Lexington HOA as each phase was completed. *Id.* Clearly, Lexington Hills intended the retention statement to be limited by the intent to transfer water to Lexington HOA. *Cf. Webb v. Webb*, 143 Idaho 521, 148 P.3d 1267, 1271 (2006) (In interpreting a statute, the “Court must give every word, clause and sentence effect, if possible”). In fact, Lexington Hills demonstrated this intent by specifically transferring the waters appurtenant to the first six phases.

Second, Lexington Hills did expressly transfer 2.388 cfs of Jacobs water to Lexington HOA for use within the first six phases of the development. Had the Master Declaration truly meant that Lexington Hills would retain “all water and water rights,” as Lexington Hills would have this Court believe, such a transfer would not have occurred. Instead, it is evident that the Master Declaration’s retention statement did not apply to the portion of Jacobs water right (the surface water right for irrigation) appurtenant to the development. Indeed, there is no other way to construe this document.

Third, Lexington Hills’ after-the-fact interpretation of the Master Declaration would leave Lexington HOA *without water* to irrigate a large portion of the developments and would conflict with the deeds transferring the lands to Lexington HOA. It is important to note that the first six deeds, wherein water was specifically transferred to Lexington HOA, indicated that the transferred water was *specifically intended* for the irrigation of *specific areas* within Lexington

Hills Subdivision phases one through six. *Id.* at Ex. D-I.² It follows, therefore, that, under Lexington Hills' interpretation of the Master Declaration, no water has been transferred for the irrigation of the remaining phases of the development. It is important to note, however, that nine of the final ten deeds transferred to Lexington HOA "a pressurized pipe irrigation system" and made Lexington HOA responsible for the "maintenance and repair" of that system. *Id.* at J-S. Lexington Hills would have this Court believe that it intended (1) to transfer to Lexington HOA an irrigation system, (2) to make Lexington HOA responsible for irrigation of the common areas within the development, and (3) to have Lexington HOA hold water for the benefit of the land owner and yet, at the same time, intended to retain all appurtenant water rights. Such a conclusion defies logic.

Finally, Lexington Hill's interpretation of the relevant provisions of the Master Declaration would create significant ambiguities in that document. How could Lexington Hills have intended to retain *all* water, apparently without limit, and at the same intended to transfer all appurtenant surface water for irrigation? It could not. Lexington Hills' after-the-fact interpretation of the Master Declaration creates ambiguity and uncertainty in the document. Notably, Lexington Hills drafted the Master Declaration and provided no opportunity for negotiation of its terms. Accordingly, any conflicting provisions must be construed in favor of Lexington HOA and against Lexington Hills. *Moore v. Omnicare, Inc.*, 141 Idaho 809, 816, 118 P.3d 141, 148 (2005) (holding that the "Court should construe the conflicting provisions against ... the drafter of the agreement").

Lexington Hills is mistaken if it believes that it retained any of Jacobs water right appurtenant to the lands it no longer owns. There is no "clear evidence" that Lexington Hills

² For example, Exhibit D indicates that "30 60 miners inches of Jacob's water" was deeded "for purposes of irrigating Lexington Hills Subdivision No. 1."

“intended” to “reserve” any of Jacobs water right. *See Joyce Livestock Co.*, 2007 WL 428947 at *13 (*Arrington Aff.* Ex. V). The undisputed facts make clear that, at the time the Master Declaration was filed Lexington Hills intended to convey water for irrigation to Lexington HOA. The deeds for the first six phases of the developments clearly indicate this. Furthermore, it is undisputed that Lexington Hills failed to specifically retain any of Jacobs water right. Rather, Lexington Hills points to one sentence in the Master Declaration, which is inconsistent with and contrary to the rest of the Master Declaration as well as the transfer of a portion of Jacobs water right to Lexington HOA, to support its new argument. Accordingly, the entire right, all 4.605 cfs, should be decreed in the name of Lexington HOA. Idaho law does not support any other conclusion. Lexington Hills’ motion should be denied.

CONCLUSION

The Director erred in recommending that Lexington HOA be awarded anything less than the entire 4.605 cfs of Jacobs water appurtenant to the lands within the developments. As a matter of law, Lexington Hills conveyed all of the water rights it held when it deeded the lands to Lexington HOA. No water was retained. As such, the Court should disallow claims 63-123D (East Hills Development) and 63-123F (Lexington Hills) and should decree water right 63-123G (Lexington HOA) as claimed.

DATED this 27th day of March, 2007.

BY: Barker Rosholt & Simpson, LLP



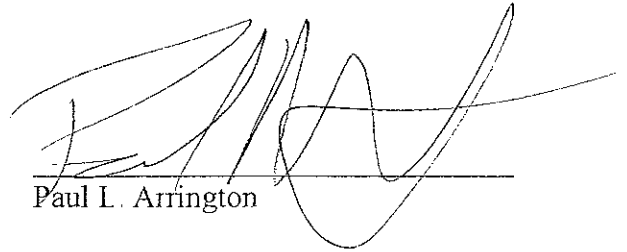
Paul L. Arrington
Attorney for Lexington Hills Home Owners' Association

CERTIFICATE OF SERVICES

I, hereby, certify that on the 27th day of March, 2007, I served a true and correct copy of the foregoing LEXINGTON HILLS HOME OWNERS' ASSOCIATION'S RESPONSE TO LEXINGTON HILLS, INC.'S MOTION FOR SUMMARY JUDGMENT on the following via first class mail:

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