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Attorney for Plaintiff

UNITED STATES DISTRICT COURT
 DISTRICT OF NEVADA

STEVEN E. KROLL,

Plaintiff,

vs.

INCLINE VILLAGE GENERAL IMPROVEMENT
 DISTRICT, a/k/a IVGID, a governmental subdivi-
 sion of the State of Nevada; et al.,

Defendants.

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

**Plaintiff's Motion to Strike the Filed Affi-
 davits of Bill Horn and Ramona Cruz**

and

**Memorandum of Points and Authorities in
 Support of Motion**

Affidavit of Ronald L. Code

and

Certificate of Service

COMES NOW Plaintiff STEVEN E. KROLL and by and through his attorney under-
 signed moves this Court to strike the AFFIDAVIT OF BILL HORN and the AFFIDAVIT OF RA-
 MONA CRUZ attached as Exhibits to the Defendants' Motion to Dismiss Complaint filed herein
 on April 30, 2008, on the ground that said Affidavits are not declared to be made on personal
 knowledge and appear not to be so made; and are otherwise so attenuated in the reliability of
 their declarations as to be rendered useless as evidence for any purpose.

This Motion is based upon FRCP Rules 12(d) and 56(e), the Affidavit of Ronald L. Code
 attached hereto, the Memorandum of Points and Authorities in Support which follows; and upon
 the other records and documents on file herein.

DATED: at Crystal Bay, Nevada this 3rd day of May, 2008.

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 Attorney for Plaintiff

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Case No. 3:08-cv-00166-ECR-RAM
**Memorandum of Points and Authori-
 ties in Support of Plaintiff's Motion to
 Strike the Filed Affidavits of Bill Horn
 and Ramona Cruz**

The evidentiary requirements for a Motion to Dismiss Complaint such as that filed by defendants in this case on April 30, 2008 are described in Fed. R. Civ. P. 56(e)(emphasis added):

(e) Affidavits; Further Testimony.

(1) In General.

A supporting or opposing affidavit must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated.

If a paper or part of a paper is referred to in an affidavit, a sworn or certified copy must be attached to or served with the affidavit. The court may permit an affidavit to be supplemented or opposed by depositions, answers to interrogatories, or additional affidavits.

Neither the Affidavit of Bill Horn nor that of Ramona Cruz recites the basic premise that it is made on personal knowledge, nor can that essential foundation be inferred from the other sworn declarations of the Affidavits. *Compare Barthelemy v. Air Lines Pilots Ass'n*, 897 F.2d 999, 1018 (9th Cir. 1990). Indeed, that such personal knowledge is completely *lacking* is what can be inferred

here, such as Affiant CRUZ's statement that she has been employed by defendant IVGID for approximately 15 years, meaning 1993 more or less, but that "to the best of my recollection, in 1968 IVGID purchased two parcels of real property abutting Lake Tahoe." It is self evident that she can not have personal knowledge of something that happened a quarter of a century before she started her employment with the Defendant.

But it is the mantra "to the best of my recollection" which in both Affidavits precedes each and every sworn allegation of fact except for the first (establishing the Affiants' employment with the District) that tears the guts out of any Declaration Made Under Penalty of Perjury and renders witnesses CRUZ and HORN incompetent to testify on the matters stated. If it were otherwise, all Mr. Horn would have to do when confronted on the witness stand with evidence contradicting his sworn statement that, for example,

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

would be: "oh yeah: I forgot about that one."

Such as: the sworn testimony of Ronald L. Code that he and another Crystal Bay man "were refused entry to Burnt Cedar Beach" on August 2, 2005 despite his obvious "First Amendment activities" (and the many letters protesting their denial attached to the Affidavit) that Mr. Horn cannot now recall:

"I was wearing a T-shirt which made a policy statement regarding Yucca Mountain, and it was my purpose to communicate my strong feelings against nuclear dumping in Nevada to my neighbors using these beach parks." ¶3, Affidavit of Ronald L. Code dated May 2, 2008 attached hereto.

IVGID's policy to exclude Mr. Code was confirmed by Affiant Horn the next day by telephone. ¶3.

Such as: the allegations in Paragraph 60 of his Amended Complaint herein for Damages and Equitable Relief for First Amendment infringements that IVGID "added insult to injury by barring and preventing plaintiff STEVEN KROLL and others from Crystal Bay from joining a Community Picnic and Fireworks event partly paid for by THE DISTRICT on July 4, 2007 at the BEACH PROPERTIES ... despite plaintiff's formal application to defendant IVGID to make an exception on that day at least ..."

There are many "such as" examples contradicting Affiant HORN's "recollection" in his April 30th Affidavit, which demonstrates the wisdom of imposing upon all witnesses the solemn penalty of perjury as an instrument to insure truth telling in their evidence giving. Allowing a witness to escape those penalties by saying: "like I said, it was only 'to the best of my recollection"

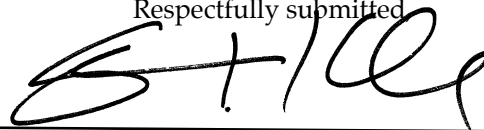
tion' and I forgot that one" renders their un-cross-examined statements of alleged fact in a piece of paper called an Affidavit utterly worthless and inadmissible in evidence. It is no wonder that after reading the Affidavit of BILL HORN challenged herein (§10 of the Code Affidavit) Mr. Code declares in Paragraph 11 of his own Affidavit attached hereto:

"Since I have been attending so many of the IVGID meetings and forums at which General Manager Bill Horn has usually been present ever since about August of 2005, it is very difficult for me to believe that Mr. Horn has no recollection of my letters or oral protests, especially in light of my continuing presence and my persistence regarding the beach access issue."

Why General Manager Horn would think in the first place that any citizen would have to apply to him or any other IVGID official for permission to "engage in First Amendment activities" on publicly-owned property; what exactly he conceives such activities to be or not to be; or how this governmental body had any power whatsoever to permit or deny such fundamentally sacred American rights are dealt with in Plaintiff's Amended Complaint, and in his soon-to-be-filed Opposition to Defendants' Motion to Dismiss Complaint and an upcoming "Motion to Enjoin Defendant IVGID's Policy No. 136 Imposing Content-Based and Standardless Free Speech Restrictions in Violation of the First Amendment". Here, only the evidentiary requirements of pleading under the Federal Rules are raised. And on that limited issue, the Affidavits of RAMONA CRUZ and BILL HORN dated April 30, 2008 being fatally deficient in form and content to support defendants' Motion to Dismiss Complaint or for any other purpose, said Affidavits must be stricken from the Record.

Dated at Crystal Bay, Nevada this 3rd day of May, 2008.

Respectfully submitted



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**UNITED STATES DISTRICT COURT
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STEVEN E. KROLL,

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INCLINE VILLAGE GENERAL IMPROVEMENT
DISTRICT, a/k/a I V G I D , a governmental
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Defendants.

Docket #3:08-cv-00166-ECR-RAM

Affidavit of Ronald L. Code

Declaration Under Penalty of Perjury of Ronald L. Code

County of Washoe)
State of Nevada) SS

RONALD L. CODE does hereby state under Penalty of Perjury the following:

1. I am a full-time resident of the Incline Village General Improvement District and have been since 1992.
2. The following facts are based upon my own personal knowledge except as to those matters set forth upon information and belief, and as to those matters I believe them to be true.
3. On August 2, 2005 Frank Wright and I were refused entry to Burnt Cedar Beach and Incline Beach parks by the IVGID employee attending the Gate at each venue. I was wearing a T-shirt which made a policy statement regarding Yucca Mountain, and it was my purpose to communicate my strong

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feelings against nuclear dumping in Nevada to my neighbors using these beach parks. When we were refused entry, Frank and I requested the gate attendant to verify the refusal with the office of Mr. William Horn, IVGID's General Manger. I was informed that Mr. Horn was not available, but his assistant, Ms. Susan Herron, confirmed that the gate attendant was following the district's directives. Later that day or the next, I received a telephone call from Mr. Horn, confirming the district policy.

4. On August 3rd of 2005 I wrote a letter to Mr. Horn and explained that the district was denying me rights guaranteed by the Constitution. My letter stated my intentions: "to see, meet and be with other members of our community, to enjoy the parks, and possibly engage in discussions with friends and neighbors". I demanded that the IVGID policy be changed. A true and correct copy of that letter is attached hereto marked **Exhibit A**.

5. I received a letter dated August 17, 2005 from Mr. Scott Brooke, IVGID General Counsel, acknowledging my August 3, 2005 letter to Mr. Horn and stating that the IVGID Board of Trustees would review this matter. Mr. Brooke's letter is attached hereto marked **Exhibit B**.

6. On October 3rd of 2005 I wrote another letter to Mr. Horn which reinforced my demands and expressed my impatience. That letter is marked **Exhibit C** and attached hereto.

7. I received a letter dated October 4, 2005 from Mr. Brooke requesting more time to research the matter. That letter is attached hereto marked **Exhibit D**.

8. Weeks and weeks passed before I finally received a letter from Mr. Brooke dated December 20, 2006 advising me "there is no present intention to take any action to modify the policy that the District has established...". A true and correct copy of that letter is attached hereto marked **Exhibit E**.

9. In June of 2007 I wrote a letter to the editor of the Tahoe Bonanza, our local newspaper, which was published, and I read this same letter at the Public Comment Session on Beach Access on June 18th of 2007. A copy of the published letter to the editor is attached to this Affidavit marked **Exhibit F**. In these public communications I strongly criticized the IVGID policy governing access to the beaches and claimed it violated my 1st Amendment rights. Mr. Horn was present at that meeting of June 18th, and the official Minutes of that Meeting so show.

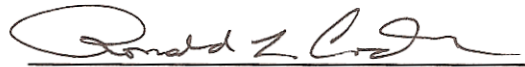
10. I have read the **Affidavit of Bill Horn dated April 30, 2008** and filed on that date in the above-captioned lawsuit where he swears that "To the best of my recollection, at no time since I have been General Manager for IVGID has IVGID ever denied to any group or individual, including Plaintiff, to

access Burnt Cedar Beach, Incline Beach, Ski Beach, or Hermit Beach for the purpose of engaging in First Amendment activities.”

11. Since I have been attending so many of the IVGID meetings and forums at which General Manager Bill Horn has usually been present ever since about August of 2005, it is very difficult for me to believe that Mr. Horn has no recollection of my letters or oral protests, especially in light of my continuing presence and my persistence regarding the beach access issue.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

Executed under Penalty of Perjury at Crystal Bay, Nevada this 2nd day of May, 2008.



Ronald L. Code

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Ronald L. Code
4 Somers Drive, P.O. Box 1693
Crystal Bay, NV 89402

August 3, 2005

Mr. Bill Horn, General Manager
IVGID, 893 Southwood Blvd.
Incline Village, NV 89450

Dear Mr. Horn:

On August 2, 2005 I was refused entry to both Burnt Cedar Beach park and Incline Beach park. At both locations, guards said that they would only admit specified persons. I called and spoke to Ms. Susan Herron who confirmed that the guards were following the District's directives.

My wish was to see, meet and be with other members of our community, to enjoy the parks, and to possibly engage in discussions with friends and neighbors.

I was disappointed, but not surprised, when I was refused admission. Mr. Frank Wright, my neighbor, was with me and likewise not admitted.

I am asking the Board to immediately change this policy. It directly violates my First Amendment rights. A recent Connecticut Supreme Court ruling (Brenden P. Leydon vs. Town of Greenwich et al.) leaves little doubt in this matter. Nevada's constitution mirrors Connecticut's when it comes to the issue at stake here. The precedent is clear.

If the Board, upon advice of counsel, is unwilling to change the policy, or believes it does not have the authority to do so, I must seek redress by other legal means.

Please do not confuse the issue I am presenting with those in the "2001 Beach Access" lawsuit. I am simply demanding my constitutional right as guaranteed under United States and Nevada law.

The access to the parks remains an unsettled problem. It would be best and most honorable if the Board acted now, rather than wishing this issue would go away.

Sincerely,

Ronald L. Code

Cc: IVGID Board of Directors

Exhibit A

BROOKE • SHAW • ZUMPF

T. Scott Brooke
brooke@brooke-shaw.com

17 August 2005

Mr. Ronald L. Code
Post Office Box 1693
Crystal Bay, NV 89402

Re: Incline Village General Improvement District

Dear Mr. Code:

I am General Counsel to the Incline Village General Improvement District and have been asked to review and respond to your letter to its General Manager, Bill Horn, dated 3 August 2005.

This matter is again being reviewed by the Board of Trustees, which has asked me to review and report on this issue. Following their review, I will again contact you with their determination.

In the meantime, should you have any questions, or if I can provide any information, please do not hesitate to contact me.

Sincerely,

BROOKE • SHAW • ZUMPF


T. SCOTT BROOKE

TSB/mmr

Printed on Recycled Paper

cc: IVGID Board of Trustees
cc: Bill Horn, General Manager

Ronald L. Code
4 Summers Drive
P.O. Box 1693
Crystal Bay, NV 89402

October 3, 2005

Mr. Bill Horn, General Manager
IVGID
893 Southwood Blvd.
Incline Village, NV 89450

Dear Mr. Horn:

On August 3rd I wrote you with a demand that access to the Incline parks be opened to residents such as me. On August 17th Mr. Brooke, General Counsel to IVGID wrote me and said that the Board was "reviewing" the matter.

Since then several Board meetings have occurred, and this issue was not discussed. I have now waited over 60 days for a response and, therefore, I conclude that a positive response to my demand will not be forthcoming.

Please note that by taking no action, the Board continues to deny me my rights. If the Board is deliberately ignoring the law, that would be very serious.

I apologize for stating this so bluntly, but I do not want the Board to be surprised.

I regret that this could not be resolved quickly.

Sincerely,

Ronald L. Code

cc: IVGID Board of Directors

Exhibit C

BROOKE • SHAW • ZUMPFT

T. Scott Brooke
brooke@brooke-shaw.com

4 October 2005

Mr. Ronald L. Code
Post Office Box 1693
Crystal Bay, NV 89402

Re: Incline Village General Improvement District


Dear Mr. Code:

This letter is in furtherance of my letter to you dated 17 August 2005, which was in response to yours of 3 August 2005. The Board of Directors of the Incline Village General Improvement District has asked me to conduct further factual and legal research regarding this matter. I will again contact you upon completion of this research and the Board's further review.

In the meantime, should you have any questions, or if I can provide any information, please do not hesitate to contact me.

Sincerely,

BROOKE • SHAW • ZUMPFT



T. SCOTT BROOKE

TSB/mmr
cc: IVGID Board of Trustees
cc: Bill Horn, General Manager

*called 10/27/05 @ 11⁴⁵ AM
left msg. to call. call not returned.*

Exhibit D 1

BROOKE • SHAW • ZUMPFT

T. Scott Brooke
brooke@brooke-shaw.com

20 December 2005

Mr. Ronald L. Code
Post Office Box 1693
Crystal Bay, NV 89402

Re: Incline Village General Improvement District

Dear Mr. Code:

This letter is in further response to the issues raised in your letter dated 3 August 2005 to Mr. Bill Horn, the General Manager of the District; our further correspondence; and, your discussions with both him and me.

As indicated, I was requested to further investigate and report on the issues pertaining to this matter.

This letter is to advise you that there is no present intention to take any action to modify the policy that the District has established regarding access to and use of its beach properties, pursuant to the provisions of the Deed dated 4 June 1968.

Should you have any questions, please feel free to contact me or Mr. Horn.

Thank you for your cooperation in this matter.

Sincerely,

BROOKE • SHAW • ZUMPFT



T. SCOTT BROOKE

TSB/mmr

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cc: IVGID Board of Trustees
cc: Bill Horn, General Manager

Exhibit E

The following was presented at the Public Comment Session on Beach Access on June 18th, 2007. It also appeared in the Tahoe Bonanza local newspaper.

The fundamental issue here is not about fairness or friendship. It is not about popularity or majority opinion. It is not about finding a middle ground or consensus building.

It's about rights and liberties.

I'm reminded of a scene from the movie Grand Canyon when Danny Glover, playing a tow truck driver, tries to persuade a gun toting gang member not to rob Kevin Klein, his customer. The gunman says "if I didn't have this gun you wouldn't be so respectful." Danny Glover replies, "if you didn't have that gun, we wouldn't be having this conversation at all."

So here we face off now. The deed restriction is the gun. If the restriction were not in the original purchase of the beach parks, we would not be discussing this, because there is no way you would deliberately partition this community into two groups with unequal rights.

Then two parties make a contract, they can put in it, just about anything. Usually contracts are written so that the invalidation of one portion will not automatically invalidate the whole agreement. Why? – because things in a contract can be invalidated for many reasons. It has been brought to your attention that many deeds for the older parcels in IVGID have a restriction which prevents the sale to any person who is not of the Caucasian race. Such a restriction may have been valid when it was written, but is certainly not enforceable now. Only enforceable portions of an agreement have any value.

Thus, the beach deed restriction can be the basis of your action, or inaction, only if that restriction is enforceable. This restriction has never been tested, nor has this or any previous board even asked the Attorney General for an opinion on this. In fact, any attempts in the past to test the validity of the deed restriction have been fought, and now the board has established a fund of a over 200 thousand dollars to insure that any challenge will be met by the maximum legal barriers.

Exhibit F

If I could convince you that the current beach park policy violates my First Amendment rights under both Nevada and US law, would that have any effect on how you act on this matter? For some, I suspect it would not. It is to the rest of you that I ask, "is it be permissible to use public funds to support a policy which is not lawful?" When you weigh the legal positions, especially in light of the Connecticut Supreme Court opinion, are you so self assured that you do not even want to hear, without cost, the opinion of the State Attorney General.

Some people act as if the deed restriction comes straight from the burning bush; it trumps the U.S. Constitution and it should be supported until armed troops force open the gates to the Incline Village Beach Club. You may enjoy lots of company and financial support, but I can only warn that history is not on your side.

If this goes to court -- let me explain how this may likely work: just one person, wishing to talk with his fellow residents will be denied entrance to the parks (that's what the beaches are). That person will then seek in either State or Federal court, a ruling that the ordinance, based on the deed restriction, is not valid because it violates his constitutional rights of assembly and speech. The legal costs for the plaintiff are not great, for almost all facts of the case will be stipulated. IVGID could appeal, but the beaches would likely be open during this period. The plaintiff will ask for legal fees, which are commonly awarded in civil rights cases.

When I explained that to one board member, his reaction was "bring it on". This is a recipe for an IVGID disaster for it will waste time, money and community spirit.

On the other hand, if you conclude that the deed restriction is no longer enforceable, you must act accordingly. You must establish legal support for that position so that those who will never agree will see that no other course of action is possible. Then you can devise a new access policy which will prevent overcrowding, a policy which may distinguish between residents and non-residents, but one which does not depend an archaic deed. This is what other communities, everywhere, do. In fact, you will then have more flexibility in your policy making than you have now.

Exhibit F

CERTIFICATE OF ELECTRONIC SERVICE

Pursuant to Rule 5(b) FRCP, I certify that I am the attorney for Plaintiff in the above entitled action, and that on this date I caused a true and correct copy of the **“Plaintiff’s Motion to Strike the Filed Affidavits of Bill Horn and Ramona Cruz; Memorandum of Points and Authorities in Support of Motion; and Affidavit of Ronald L. Code”** herein to be served upon the parties or attorneys by electronically filing the same with this Court pursuant to and in compliance with its CM/ECF filing system, to which the following named attorney for all named defendants is a signatory:

**Stephen C. Balkenbush, Esq.
Thorndal, Armstrong, Delk, Balkenbush & Eisinger
6590 South McCarran Blvd. Suite B
Reno, Nevada 89509**

DATED: at Crystal Bay, Nevada this 3rd day of May, 2008.


STEVEN E. KROLL