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9 (Owner of Assessor's Parcel No. 103-01-002K)

10 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**  
11 **IN AND FOR THE COUNTY OF YAVAPAI**

12 JOHN B. CUNDIFF and )  
13 BARBARA C. CUNDIFF, his wife, )  
14 *et. al.*, )  
15 )  
16 Plaintiff, )  
17 )  
18 v. )  
19 )  
20 DONALD COX and )  
21 CATHERINE COX, his wife, )  
22 *et. al.*, )  
23 )  
24 Defendants. )  
25 )

Action No. **P1300-CV2003-0399**

**MOTION TO AMEND ANSWER  
OF WILLIAM M. GRACE**

**Assigned to the Honorable  
David L. Mackey**

19 Defendant WILLIAM M. GRACE, Owner of Assessor's Parcel No. 103-01-002K, hereby  
20 moves the Court for an order permitting the filing of his attached *Amended Answer of*  
21 *Defendant William M. Grace* (the "**Amended Answer**") to *Plaintiffs' First Amended Complaint*  
22 (the "**Complaint**"), so as to amend his original answer filed by attorney Jeffrey Adams on  
23 September 15, 2010 on behalf of Defendant Grace and many other Defendants (the "**9-15**  
24 **Answer**") to better include the affirmative defenses described in the following *Memorandum*.  
25

## MEMORANDUM

1  
2 As stated in his proposed *Amended Answer*, Defendant Grace is the sole present owner of  
3 Assessor's Parcel No. 103-01-002K a 10 acre parcel located at 8850 East Pronghorn Lane (the  
4 "**Grace Parcel**"); (his ex-wife, Catherine Annette Filippinetti, formerly Catherine Annette Grace,  
5 having recently, and pursuant to the provisions of their divorce decree, conveyed to him any  
6 interest she may have held in said parcel by way of that certain *Quit Claim Deed* recorded on  
7 11/29/2010 at Book 4779, Page 221, and indexed under Fee No. 2010-4429930 of the Yavapai  
8 County Recorder).

9 Said Grace Parcel is located within the total property described in Paragraphs 1 of the  
10 Complaint ("**Coyote Springs Ranch**") and alleged in Paragraph 3 of the Complaint to be  
11 encumbered by the *Declaration of Restrictions* attached as EXHIBIT A to the Complaint (the  
12 "**Declaration**"), and the various restrictions therein (the "**Restrictions**").

13 Defendant Grace has recently retained and substituted separate counsel in order to more  
14 effectively pursue the additional affirmative defenses set forth in his proposed *Amended*  
15 *Answer*, and feels that proposed answer is necessary to properly set them forth in this case  
16 beyond the extent they may have been described in the 9-15 Answer.

17 A brief discussion of a few of these defenses will demonstrate their importance in this  
18 case:

### 19 **1. Partial Abandonment**

20 As Defendant Grace and his present counsel understand it, the primary issue in this case,  
21 and what caused the Court of Appeals to require that all of the parcel owners in Coyote Springs  
22 Ranch (the "**Coyote Springs Parcel Owners**") be given a chance to appear in the case, is  
23 whether or not the enforcement of the Restrictions in the Declaration have been "abandoned"  
24 by all of Coyote Springs Parcel Owners, or enough of them, to be no longer enforceable.  
25

1 The first question to ask, then, is whether or not the Court can properly conclude that  
2 enforcement of some of the Restrictions of the Declaration has been abandoned, while  
3 enforcement of other Restrictions has not. The answer is extremely important because, when  
4 you strip away the extra “private law” protections from the Restrictions provided in the  
5 Declaration, you “fall” from that higher level of protections back down to the lower level of the  
6 lesser protections found in the “public law” of the zoning ordinance and building codes, not  
7 always with the same outcome for the parcels within Coyote Springs Ranch, considered either  
8 individually and as a whole.

9 For example, Paragraph 2 of the Coyote Springs CC&Rs prohibits any “trade, business,  
10 profession or any other type of commercial or industrial activity”.<sup>1</sup> But the *Yavapai County*  
11 *Zoning Ordinance* (the “**Zoning Ordinance**”) also has significant restrictions against major  
12 commercial and industrial activity in this residential 2 acre zoning district. The Zoning  
13 Ordinance does allow a fair amount of quasi-commercial activity that is consisted with its rural  
14 character: (i) it has agricultural exemptions, (ii) it allows various types of home occupations,  
15 and (iii) it also allows other types of quasi-commercial activity subject to the extra controls of a  
16 special use permit. Many of the alleged violations of the prohibition against commercial  
17 activity in Paragraph 2 of the Declaration would fall within these permissible quasi-commercial  
18 activities. So, if the Court finds enforcement of Paragraph 2 has been abandoned by long term  
19 and widespread economic activities throughout Coyote Springs Ranch, the level of protections  
20 for the parcels within Coyote Springs Ranch would not fall that much, and its existing nature  
21 would not really change much, if at all.

22 \_\_\_\_\_  
23 <sup>1</sup> Paragraph 2 of the Declaration states:

24 2. No trade, business, profession or any other type of commercial or industrial activity  
25 shall be initialed or maintained within said property [Coyote Springs Ranch] or any portion  
thereof.

1           However, Paragraph 3 of the Declaration has a 9 acre minimum lot size,<sup>ii</sup> while Defendant  
2 Grace believes the zoning applicable to all or nearly all of Coyote Springs Ranch is the 2 acre  
3 minimum lot size applicable in the "R1-2A" residential two-acre zoning districts. If that is true,  
4 and, if the Court finds that enforcement of that 9 acre restriction has been abandoned, the  
5 level of protection would fall substantially, as there could be 4+ times as many homes built in  
6 the long run, and that would have a huge impact on the character of Coyote Springs Ranch, and  
7 the resulting property values and living experiences for the Coyote Springs Parcel Owners.

8           Paragraph 18 of the Declaration says a judicial invalidation of some of the restrictions  
9 does not automatically invalidate all of the others.<sup>iii</sup> So the plain language of that provision  
10 seems to allow the Court to conclude that enforcement of only some of the Restrictions has  
11 been abandoned, if the facts supported that conclusion.

12           And Defendant Grace believes that the facts do and will support such a conclusion. As an  
13 indication of those facts, he notes that there appear even at first glance to be: (a) widespread  
14 violations of the Restrictions against commercial activity within Coyote Springs Ranch, but (b)  
15 there are very few violations of the Restrictions for a 9 acre minimum lot size. This is  
16 important to the expectations and conclusions regarding enforcement of the Restrictions by  
17 the various present and prior Coyote Springs Parcel Owners, based on their observations and  
18

19 \_\_\_\_\_  
20 "<sup>ii</sup> Paragraph 3 of the Declaration states:

21           3. Said property [Coyote Springs Ranch] or any portions thereof shall not be conveyed or  
22 subdivided into lots, parcels or tracts containing less than nine (9) gross acres, nor shall  
23 improvements be erected or maintained in or upon any lot, parcel or tract containing less  
24 than such nine (9) gross acres.

25 "<sup>iii</sup> Paragraph 18 of the Declaration states:

18. Invalidation of any of the restrictions, covenants or conditions above by judgment or  
court order shall in no way affect any of the other provisions hereof, which shall remain in  
full force and effect.

1 research during the due diligence portions of their purchase contracts. If everywhere they  
2 turned they saw widespread evidence of the types of quasi-commercial activity allowed under  
3 the Zoning Ordinance in existence for many years, but failed to see parcels under the 9 acre  
4 minimum size of the Declaration, they could, and perhaps should, have reasonably concluded  
5 that there had already been a partial abandonment of the Restrictions.

## 6 **2. Statute of Limitations.**

7 As stated in Part 1 above, Paragraph 18 of the Declaration says a judicial invalidation of  
8 some of the restrictions does not automatically invalidate all of the others.<sup>iv</sup> Another possible  
9 way for many of the violations of the Restrictions within the Declaration to effectively be ruled  
10 unenforceable, while others are not, is through the impact of the statute of limitations.

11 For claims where the Complaint seeks damages for violations of the Declaration, the 6  
12 year statute of limitations under A.R.S. § 12-548 applies;<sup>v</sup> *Woodward v. Chirco Construction Co.,*  
13 *Inc.*, 141 Ariz. 520; 687 P.2d 1275 (Ariz.App. 1984). For other claims, such as those simply  
14 seeking declaratory judgment, the 4 year statute of limitations in A.R.S. § 12-550 applies.<sup>vi</sup>

15 If either statute applies to the claims in the Complaint, many of the obviously widespread  
16 violations of the Restrictions, particularly those that violate the prohibition against commercial

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17 <sup>iv</sup> See text of Paragraph 18 in Footnote 3 above.

18 <sup>v</sup> A.R.S. § 12-548 states:

19 § 12-548. Contract in writing for debt; six year limitation

20 An action for debt where indebtedness is evidenced by or founded upon a contract in  
21 writing executed within the state shall be commenced and prosecuted within six years after  
22 the cause of action accrues, and not afterward.

23 <sup>vi</sup> A.R.S. § 12-550 states:

24 12-550. General limitation

25 Actions other than for recovery of real property for which no limitation is otherwise  
prescribed shall be brought within four years after the cause of action accrues, and not  
afterward.

1 activity in Paragraph 2 of the Declaration, would be allowed to continue if they had existed  
2 openly for longer than that 6 or 4 year period.

3 Defendant Grace is aware of the language in Paragraph 19 of the Declaration, which  
4 effectively says that enforcement of some of the Restrictions against some of the Coyote  
5 Springs Parcel Owners is not a waiver of the right to later enforce the same or other  
6 Restrictions against the same or other Coyote Springs Parcel Owners.<sup>vii</sup> However, he does not  
7 believe that language, when properly read in its context and pursuant to the applicable Arizona  
8 case law, obviates the impact of the statute of limitations on violations of the Restrictions that  
9 openly exist for longer than the period of the applicable statute of limitations.

10 **3. Notice & Illusory Damages.**

11 Defendant Grace feels that Arizona's law on actual and constructive notice will have a  
12 significant impact in this case, both on their own, and on the application of both of the  
13 foregoing affirmative defenses, and that the damages claimed by Plaintiffs are to a great extent  
14 illusory as such damages were most likely absorbed, if not entirely swallowed, by the fair  
15 market value of the parcels they purchased, as reflected in the prices they actually paid.

16 \_\_\_\_\_  
17 <sup>vii</sup> Paragraph 19 of the Declaration states:

18 19. If there shall be a violation or threatened or attempted violation of said covenants,  
19 conditions, stipulations or restrictions, is shall be lawful for any person or persons owning  
20 said premises or portions thereof to prosecute proceedings at law or in equity against all  
21 persons violating or attempting, or threatening to violate any such covenants, conditions,  
22 stipulations or restrictions, and either prevent him from so doing or to recover damages or  
23 other dues for such violations. No failure of any other person or entity to enforce any of  
24 the restrictions, rights, reservations, limitations, covenants, and conditions contained  
25 herein shall, in any event, be construed or held to be a waiver thereof or consent to any  
further or succeeding breach or violation thereof. The violation of these restrictive  
covenants, conditions or stipulations or any one or more of them shall not affect the lien of  
any mortgage now of record, or which may hereafter be placed of record, upon said  
premises or any part thereof.

(emphasis added)

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**CONCLUSION**

Rule 15(a)(1) states:

“ . . . a party may amend the party's pleading only by leave of court or by written consent of the adverse party. Leave to amend shall be freely given when justice requires.”

See also: *Haynes v. Syntek Fin. Corp.*, 184 Ariz. 332, 909 P.2d 399 (Ariz.App. 1995 ); *Walls v. Arizona Dep't of Public Safety*, 170 Ariz. 591, 826 P.2d 1217 (Ariz.App. 1991 ).

At present, the only significant activity in this case between the initial appearance of Defendant Grace through the filing of the 9-15 Answer and the filing of this motion, comes from Plaintiffs' motion to for additional time for service of the Complaint upon all of the Coyote Springs Parcel Owners and the responses to that motion, which does not go to the merits of the Complaint or any defenses in either the 9-15 Answer or the proposed Amended Answer attached as Exhibit A. Allowing the amendments to that that 9-15 Answer through filing of the attached Amended Answer will not adversely impact any of the Plaintiffs or other parties to the case in any way that would justify denial of this motion.

RESPECTFULLY SUBMITTED this 17<sup>th</sup> day of February, 2011.



.....  
Noel J. Hebets, NOEL J. HEBETS, PLC  
-- Attorney for Defendant William M. Grace  
(Owner of Assessor's Parcel No. 103-01-002K)

1 The undersigned certifies that, on this 17<sup>th</sup> day of February, 2010, the original of the foregoing  
2 was mailed to the Clerk of the Court, while copies were either: (a) e-mailed to counsel or other  
3 parties at the email addresses shown below, and (b) only mailed to any parties for whom only  
4 postal addresses are shown below:

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9 (Owner of Assessor's Parcel No. 103-01-002K)

PROPOSED  
FORM OF

10 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**  
11 **IN AND FOR THE COUNTY OF YAVAPAI**

12 JOHN B. CUNDIFF and  
13 BARBARA C. CUNDIFF, his wife,  
14 *et. al.,*

15 Plaintiff,

16 v.

17 DONALD COX and  
18 CATHERINE COX, his wife,  
19 *et. al.,*

20 Defendants.

Action No. P1300-CV2003-0399

AMENDED ANSWER OF  
WILLIAM M. GRACE

Assigned to the Honorable  
David L. Mackey

21 Defendant WILLIAM M. GRACE, as a joined property owner in Coyote Springs Ranch,  
22 ("Defendant Grace"), by and through his undersigned counsel, and for his Amended Answer to  
23 Plaintiffs' First Amended Complaint (the "**Complaint**") in the above-captioned matter and  
24 admits, denies and alleges as follows:

25 1. Defendant Grace admits the allegations contained in Paragraph 1 of the Complaint,  
and will hereafter refer to the total property described therein as "**Coyote Springs Ranch**".

1           2. Defendant Grace asserts and alleges that he is an owner of property located within  
2 Coyote Springs Ranch; specifically, that he is the sole present owner of Assessor's Parcel No.  
3 103-01-002K, a 10 acre parcel located at 8850 East Pronghorn Lane in Coyote Springs Ranch  
4 (the "**Grace Parcel**"); (his ex-wife, Catherine Annette Filippinetti, formerly Catherine Annette  
5 Grace having recently, and pursuant to the provisions of their divorce decree, conveyed to him  
6 any interest she may have held in said parcel through that certain *Quit Claim Deed* recorded on  
7 11/29/2010 at Book 4779, Page 221, and indexed under Fee No. 2010-4429930 of the Yavapai  
8 County Recorder), and otherwise admits the allegations contained in Paragraph 2 of the  
9 Complaint.

10           3. Defendant Grace admits the allegations contained in Paragraph 3 of the Complaint  
11 pertaining to the recording of the *Declaration of Restrictions* attached as EXHIBIT A to the  
12 Complaint (the "**Declaration**"), and further agrees that said Declaration, and some or all of the  
13 various restrictions therein (the "**Restrictions**") thereby encumbered title to all of the property  
14 within Coyote Springs Ranch.

15           4.- 8. Defendant Grace admits the allegations contained in Paragraphs 4 through 8 of the  
16 Complaint.

17           9. Defendant Grace is without sufficient information to admit or deny the allegations  
18 contained in Paragraph 9 of the Complaint concerning the reliance of Plaintiffs on the  
19 Declarations or any Restrictions therein, and therefore denies the same, and alleges and  
20 asserts the affirmative defenses set forth in Paragraph 33 herein, particularly those pertaining  
21 to constructive notice to Plaintiffs of the existence and impact of widespread and longstanding  
22 violations of the Restrictions throughout Coyote Springs Ranch, including the resulting  
23 abandonment by the owners of parcels within Coyote Springs Ranch (the "**Coyote Springs**  
24 **Parcel Owners**") of some or all of those Restrictions.

1           10. Answering Paragraph 10 of the Complaint, Defendant Grace admits that the subject  
2 Restrictions were part of the public record at the time he and all prior and present Coyote  
3 Springs Parcel Owners acquired their respective properties, and that all such parties thereby  
4 had constructive notice of the recording and existence of the Declaration and the Restrictions  
5 therein, but deny that all of the Restrictions were applicable, enforceable or in effect at the  
6 time of their acquisition of their respective properties, and again alleges and asserts the  
7 affirmative defenses set forth in Paragraph 33 herein, particularly those pertaining to  
8 constructive notice to Plaintiffs of the existing and impact of widespread and longstanding  
9 violations of the Restrictions.

10           11.-14. Answering Paragraphs 11 through 14 of the Complaint, Defendant Grace is  
11 without knowledge or information sufficient to form a belief as to the truthfulness of the  
12 allegations contained therein, and therefore denies the same, at least with respect to his  
13 parcel, and again alleges and asserts the affirmative defenses set forth in Paragraph 33 herein.

14           15. Defendant Grace admits Paragraph 15 of the Complaint.

15           16. Answering Paragraph 16 of the Complaint, Defendant Grace realleges and  
16 incorporates by reference his answers to Paragraphs 1-15 of the Complaint as if each were fully  
17 set forth herein.

18           17.-18. Defendant Grace denies the allegations of Paragraphs 17 and 18 of the  
19 Complaint, at least with respect to his parcel, and again alleges and asserts the affirmative  
20 defenses set forth in Paragraph 33 herein, particularly those regarding the impact of the  
21 existence of widespread and longstanding violations of the Restrictions on the values and  
22 prices of Plaintiffs' parcels at the time of their acquisition and the resulting lack of any real  
23 damages to Plaintiffs.

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1           19. Answering Paragraph 19 of the Complaint, Defendant Grace realleges and  
2 incorporates by reference his answers to Paragraphs 1-18 of the Complaint as if each were fully  
3 set forth herein.

4           20.-21. Defendant Grace denies the allegations contained in Paragraphs 20 and 21 of  
5 the Complaint, at least with respect to his parcel, and again alleges and asserts the affirmative  
6 defenses set forth in Paragraph 33 herein, particularly those regarding the impact of the  
7 existence of widespread and longstanding violations of the Restrictions on the values and  
8 prices of Plaintiffs' parcels at the time of their acquisition, and the resulting lack of any real  
9 damages to Plaintiffs.

10           22. Answering Paragraph 22 of the Complaint, Defendant Grace reallages and  
11 incorporates by reference his answers to Paragraphs 1-21 of the Complaint as if each were fully  
12 set forth herein, and the resulting lack of any real damages to Plaintiffs.

13           23.-24. Defendant Grace denies the allegations contained in Paragraphs 23 and 24 of  
14 the Complaint, at least with respect to his parcel, and again alleges and asserts the affirmative  
15 defenses set forth in Paragraph 33 herein, particularly those regarding the impact of the  
16 existence of widespread and longstanding violations of the Restrictions on the values and  
17 prices of Plaintiffs' parcels at the time of their acquisition, and the resulting lack of any real  
18 damages to Plaintiffs.

19           25. Answering Paragraph 25 of the Complaint, Defendant Grace realleges and  
20 incorporates by reference his answers to Paragraphs 1-24 of the Complaint as if each were fully  
21 set forth herein.

22           26. Answering Paragraph 26 of the Complaint, Defendant Grace admits that a  
23 controversy exists as to the enforceability of the Declaration and Restrictions, and again alleges  
24 and asserts the affirmative defenses set forth in Paragraph 33 herein.

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1           27. Answering Paragraph 27 of the Complaint, Defendant Grace denies that such  
2 allegations pertain to his parcel, is without sufficient information to admit or deny that they  
3 pertain to the parcels of other Defendants, and again alleges and asserts the affirmative  
4 defenses set forth in Paragraph 33 herein.

5           28. Defendant Grace denies Paragraph 28 of the Complaint, at least with respect to his  
6 parcel, and again alleges and asserts the affirmative defenses set forth in Paragraph 33 herein.

7           29. Answering Paragraph 29 of the Complaint, Defendant Grace realleges and  
8 incorporates by reference his answers to Paragraphs 1-28 of the Complaint as if each were fully  
9 set forth herein.

10          30. Defendant Grace denies the allegations contained in Paragraph 30 of the Complaint,  
11 at least with respect to his parcel, and again alleges and asserts the affirmative defenses set  
12 forth in Paragraph 33 herein.

13          31. Defendant Grace denies each and every allegation in the Complaint not expressly  
14 admitted herein.

15          32. Defendant Grace denies that Plaintiffs are entitled to any of the relief or remedies  
16 requested in the Complaint or to any relief or remedy of any kind whatsoever.

17          33. Defendant Grace further and affirmatively alleges as follows:

18           a. he denies that some or all of the violations of Restrictions alleged by Plaintiffs  
19 exist on his parcel;

20           b. he denies that the notices and demands by any of the Plaintiffs on the  
21 Defendants named in the Complaint were made upon him;

22           c. there has been partial or complete abandonment by the Coyote Springs Parcel  
23 Owners of their rights to enforce the Restrictions, because of the existence of numerous,  
24 widespread, substantial, obvious and longstanding violations of some or all of the  
25 Restrictions within the Declarations;

1           d. Plaintiffs are bound to actual notice of all conditions and aspects of their  
2 parcels and of the remainder of Coyote Springs Ranch of which they had actual  
3 knowledge at the times they purchased their parcels, and to constructive notice of those  
4 conditions and aspects which were patently obvious to them at such times, or which  
5 would have become actually known to them had they made the reasonably diligent  
6 inquiry required of them (as described in *Shalimar Association v. D.O.C. Enterprises, Ltd.*,  
7 688 P.2d 682, 142 Ariz. 36, (App. 1984)), including the existence and impact of numerous,  
8 widespread, substantial, obvious and longstanding violations of certain Restrictions  
9 within the Declarations, and the likelihood of abandonment of some or all of the  
10 Restrictions by most or all of the Coyote Springs Parcel Owners;

11           e. the impact of any applicable statutes of limitations on any violations of the  
12 Restrictions alleged in the Complaint, particularly violations that were apparent and in  
13 existence for longer than the 6 or 4 year periods described in A.R.S. §§12-548 & 550, and  
14 had not been challenged in court within those periods;

15           f. the damages alleged by Plaintiffs were a direct and proximate result of acts  
16 and omissions of persons or entities other than Defendant Grace;

17           g. the lack of any real damages to Plaintiffs because: (i) of the impact on the  
18 values of parcels purchased by Plaintiffs, and the corresponding prices they paid, from  
19 the existence of numerous, widespread, substantial, obvious and longstanding violations  
20 of the Restrictions, and (ii) since those acquisition dates, no substantial impact in their  
21 parcel values has been caused by those continuing violations or any additional violations  
22 of the Restrictions;

23           g. the counts against him in this action are barred by the doctrines of estoppel,  
24 waiver and laches;

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h. the Complaint is barred because of Plaintiffs' own negligence, acts, omissions, carelessness and/or inattention;

i. discharge and release of Defendant Grace, if not other Defendants as well, from some or all of the Restrictions; and

j. any other matter constituting an avoidance or affirmative defense and also alleges that discovery may reveal the existence of other affirmative defenses as set forth in Rules 8(c) and 12(b), Ariz. R. Civ. P., and they reserve the right to amend this Answer to allege any and all of said affirmative defenses as may be applicable.

34. Defendant Grace is entitled to an award of his reasonable attorneys' fees incurred in defending against the Complaint pursuant to A.R.S. §§ 12-341.01 and 12-349.

WHEREFORE, having fully answered each and every Count of Plaintiffs' First Amended Complaint, Defendant Grace requests Judgment in his favor and against Plaintiffs as follows:

A. For an Order dismissing the Complaint, at least as it is asserted against him, with prejudice and ordering that Plaintiffs take nothing thereby;

B. For an Order declaring that the subject Declaration, or at least many of the Restrictions therein, are no longer enforceable as against any Coyote Springs Parcel Owner;

C. For an Order declaring that Defendant Grace, if not all Defendants, and their respective parcels, are not bound or encumbered by the subject Declaration or at least many of the Restrictions therein;

D. For an Order awarding Defendant Grace his reasonable attorneys' fees and costs pursuant to A.R.S. §§ 12-341.01 and 12-348 and interest thereon at the highest legal rate;

E. For such other and further relief as the Court deems just and necessary under the premises.



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RESPECTFULLY SUBMITTED this \_\_\_\_\_ day of February, 2010.

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Noel J. Hebets, NOEL J. HEBETS, PLC  
-- Attorney for Defendant William M. Grace  
(Owner of Assessor's Parcel No. 103-01-002K)

1 The undersigned certifies that, on this \_\_\_\_\_ day of \_\_\_\_\_, 2010, the original of  
2 the foregoing was mailed to the Clerk of the Court, while copies were either: (a) e-mailed to  
3 counsel or other parties at the email addresses shown below, and (b) only mailed to any

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