

1997

J. Rodney Dansie v. Hi-Country Estates Homeowners Association : Brief of Appellee

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca2



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

A. Howard Lundgren; Keller .

George A. Hunt; Williams .

Recommended Citation

Brief of Appellee, *Dansie v. Hi-Country Estates Homeowners Association*, No. 970517 (Utah Court of Appeals, 1997).
https://digitalcommons.law.byu.edu/byu_ca2/1041

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH SUPREME COURT

| | | |
|------------------------------|---|----------------------|
| J. RODNEY DANSIE, | : | |
| | : | |
| Plaintiff/Appellant, | : | Appeal No. 970517 |
| vs. | : | |
| HI-COUNTRY ESTATE | : | Argument Priority 15 |
| HOMEOWNERS ASSOCIATION, a | : | |
| Utah non-profit corporation, | : | |
| Defendant/Appellee. | : | |

BRIEF OF APPELLEE

Appeal from a Decision of the Third Judicial District Court,
Salt Lake County, The Honorable Pat B. Brian

A. Howard Lundgren, #2022
KELLER & LUNDGREN, L.C.
257 East 200 South, Suite 340
Mailbox 10
Salt Lake City, UT 84111
Telephone: (801) 532-7282

George A. Hunt, #1586
WILLIAMS & HUNT
257 East 200 South, Suite 500
P.O. Box 45678
Salt Lake City, UT 84145-5678
Telephone: (801) 521-5678

Attorneys for Plaintiff/Appellant

Sheleigh A. Chalkley, #5929
257 East 200 South, Suite 340
Mailbox 10
Salt Lake City, UT 84111
Telephone: (801) 532-7282

Attorneys for Defendant/Appellee

IN THE UTAH SUPREME COURT

| | | |
|------------------------------|---|----------------------|
| J. RODNEY DANSIE, | : | |
| Plaintiff/Appellant, | : | |
| vs. | : | Appeal No. 970517 |
| HI-COUNTRY ESTATE | : | Argument Priority 15 |
| HOMEOWNERS ASSOCIATION, a | : | |
| Utah non-profit corporation, | : | |
| Defendant/Appellee. | : | |

BRIEF OF APPELLEE

Appeal from a Decision of the Third Judicial District Court,
Salt Lake County, The Honorable Pat B. Brian

A. Howard Lundgren, #2022
KELLER & LUNDGREN, L.C.
257 East 200 South, Suite 340
Mailbox 10
Salt Lake City, UT 84111
Telephone: (801) 532-7282

George A. Hunt, #1586
WILLIAMS & HUNT
257 East 200 South, Suite 500
P.O. Box 45678
Salt Lake City, UT 84145-5678
Telephone: (801) 521-5678

Attorneys for Plaintiff/Appellant

Sheleigh A. Chalkley, #5929
257 East 200 South, Suite 340
Mailbox 10
Salt Lake City, UT 84111
Telephone: (801) 532-7282

Attorneys for Defendant/Appellee

TABLE OF CONTENTS

| | <u>PAGE</u> |
|---|-------------|
| STATEMENT OF JURISDICTION | 1 |
| DETERMINATIVE CONSTITUTIONAL AND STATUTORY PROVISIONS | 1 |
| STATEMENT OF JURISDICTION | 1 |
| STATEMENT OF FACTS | 1 |
| SUMMARY OF THE ARGUMENT | 9 |
| ARGUMENT | 11 |
| POINT I | 11 |
| THE TRIAL COURT CORRECTLY CONCLUDED THAT THE WESTERLY 40 ACRE PARCEL WAS MADE SUBJECT TO THE HI-COUNTRY COVENANTS AND RESTRICTIONS BY THE NOVEMBER 1986 QUIT CLAIM DEED. | 11 |
| A. The Trial Court Correctly Ruled that the Quit Claim is Unambiguous. | 12 |
| B. Dansie Did Not Unilaterally Subject the Westerly Parcel to the CC&Rs and Bylaws. | 14 |
| C. The Issue of Possible Extinguishment of the Quit Claim Deed Should Not be addressed by this Court. | 15 |
| POINT II | 16 |
| THE TRIAL COURT CORRECTLY CONCLUDED THAT DANSIE HAD ACTUAL NOTICE THAT THE HI- COUNTRY COVENANTS AND RESTRICTIONS APPLIED TO THE TWO FORTY ACRE PARCELS. | 16 |
| A. Dansie Fails to Cite the Governing Statute Regarding the Effect of Recordation of Conveyances. | 17 |

| | |
|--|----|
| B. Dansie Fails to Cite Controlling Utah Precedent. | 18 |
| C. Dansie had actual notice of the state of his property such that he was required to conduct further investigation to discover the true state of the title. | 19 |
| D. Dansie Fails to Properly Challenge the Trial Court's Findings of Fact. | 21 |
| E. The Doctrine of Merger does not Operate to Extinguish the Terms of the 1973 Contract. | 22 |
| POINT III | 24 |
| IN THE ALTERNATIVE, DANSIE'S PROPERTY IS SUBJECT TO THE PROTECTIVE COVENANTS, CERTIFICATE OF INCORPORATION, AND BYLAWS OF THE HI-COUNTRY ESTATES HOMEOWNERS ASSOCIATION BASED UPON THE DOCTRINE OF IMPLIED EQUITABLE SERVITUDE. | 24 |
| POINT IV | 26 |
| THE TRIAL COURT'S AWARD OF ATTORNEY'S FEES TO THE ASSOCIATION WAS PROPER. | 26 |
| CONCLUSION | 31 |

TABLE OF AUTHORITIES

| <u>CASES</u> | <u>PAGE</u> |
|--|---------------|
| <u>3W Partners v. Bridges</u> , 651 A.2d 387 (Maine 1994) | 25 |
| <u>Astill v. Clark</u> , Case No. 970180CA, 1998 WL 175083, at *7 (Utah App. April 8, 1998) | 15 |
| <u>Hansen v. Stichting Mayflower Recreational Fonds</u> , 898 F.Supp 1503 (D.Utah 1995) (citing Hartman, 596 P.2d at 656) | 12 |
| <u>Hartman v. Potter</u> , 596 P.2d 653 (Utah 1979). | 12 |
| <u>Haynes v. Hunt</u> , 85 P.2d 861 (Utah 1939) | 13 |
| <u>Hi-Country Estates Homeowners Association v. Maxfield</u> , No. 890471 (Utah App. Aug. 2, 1990) Unpublished Decision | 27-29 |
| <u>Homer v. Smith</u> , 866 P.2d 622 (Utah App. 1993) | 12 |
| <u>James v. Davies</u> , Civil No. C81-8560 | 27-29 |
| <u>Johnson v. Bell</u> , 666 P.2d 308 (Utah 1983) | 18-21, 31, 32 |
| <u>Limb v. Federated Milk Producers Assoc.</u> , 461 P.2d 290 (Utah 1969) | 24 |
| <u>Secor v. Knight</u> , 716 P.2d 790 (Utah 1986) | 23 |
| <u>State v. Montoya</u> , 937 P.2d 145 (Utah App. 1997) | 24 |
| <u>Stubbs v. Hemmert</u> , 567 P.2d 168 (Utah 1977) | 23 |
| <u>Toland v. Corey</u> , 24 P. 190 (Utah 1890) | 21 |
| <u>Turner v. Hi-Country Homeowner's Ass'n</u> , 910 P.2d 1223 (Utah 1996). | 14, 26 |
| <u>STATUTES</u> | |
| Utah Code Ann. § 57-3-3 (1989) | 17, 18 |
| Utah Code Annotated, § 57-1-6 | 1, 17-19, 21 |
| Utah Code. Ann. § 78-2-2-(3)(j) (1996) | 1 |

STATEMENT OF JURISDICTION

The Supreme Court has appellate jurisdiction over this appeal pursuant to Utah Code. Ann. § 78-2-2-(3)(j) (1996).

DETERMINATIVE CONSTITUTIONAL AND STATUTORY PROVISIONS

The determinative statute in this case Utah Code Ann. § 57-1-6. This statute provides:

Every conveyance of real estate, and every instrument of writing setting forth an agreement to convey any real estate or whereby any real estate may be affected, to operate as notice to third persons, shall be proved or acknowledged and certified in the manner prescribed by this title and recorded in the office of the recorder of the county in which such real estate is situated, which shall be valid and binding between the parties thereto without such proofs, acknowledgement, certification or record, and as to all other persons who have had actual notice.

Utah Code Ann. § 57-1-6 (emphasis added).

STATEMENT OF FACTS

1. J. Rodney Dansie ("Dansie") is the owner of two 40-acre parcels of real property (the "40-acre parcels") located in southwest Salt Lake County, Utah, and individually described as follows: The southwest quarter of the southwest quarter of section 5, township 4 south, range 2 west, Salt Lake Base and Meridian (the "westerly parcel"); and, the southeast quarter of the southwest quarter of section 5, township 4 south, range 2 west, Salt Lake Base and Meridian (the "easterly parcel"). Dansie's property is immediately adjacent (to the south and west) to the Hi-Country Estates Phase I Subdivision (the "Subdivision"). (R. 658, 661, 662, 874, 815, 1079, 1080).

2. The Dansie family have been residents of the Herriman area of Salt Lake County since at least the early 1900s. (R. 102, 107, 110, 801).

3. The Hi-Country Estates Homeowners Association ("Association") is a Utah non-profit corporation organized on or about January 2, 1973, for the purpose of providing the maintenance, upkeep, and preservation of the streets, roads, and common areas within the Subdivision, and also to include additional phases of Hi-Country Estates and the homeowners within such additional subdivisions as may be mutually beneficial for the Association members and homeowners of the adjoining subdivisions. The Association was also formed to promote the health, safety and welfare of the residents within the Subdivision and any additions thereto. (R. 119, 659, Br. of Appellants Add. Ex. H).

4. The Association is the owner of certain roads, rights of way and other common areas and improvements located within the Subdivision. (R. 2, 20, 659).

5. The Subdivision was originally developed by Gerald H. Bagley, Charles Lewton, and Keith Spencer beginning in or about 1970. (R. 659).

6. Dansie first met the developers of the Subdivision in or about 1970, when construction began, and in connection with the negotiation of a Well Lease Agreement between his father and the Hi-Country developers to provide water to the Subdivision. (R. 659, 807, 808, 837, 1036, 1037, 1038, 1051).

7. Dansie first learned of the development of the Hi-Country Estates Phase I Subdivision in or about 1970. At that time, he observed a sign announcing the development of this Subdivision and further spoke with area landowners regarding the sale of their

property to a developer from Wyoming (Charles Lewton) and a Salt Lake City optometrist (Dr. Gerald H. Bagley). (R. 659, 838, 1031).

8. At about this same time Dansie observed a sales trailer near the entrance to the property. He also reviewed a sales brochure which described the subdivision as a private community close to I-15 with access controlled by an electronic gate. The brochure included the lot sizes and their prices, and a diagram of the Subdivision master plan which depicted his 80 acres as part of the development. He also observed that lots had been surveyed and identified by stakes and number. (R. 659, 837, 839, 840, 841, 842, 843, 845, 846, 1032, 1043, 1044, 1045, 1049, 1061).

9. From approximately August 1970 through 1985, Dansie used Hi-Country Road in the Subdivision on a regular and almost daily basis to develop and maintain a water system for the Subdivision. Dansie completed this work at the request of and under the employ of the developers of this project, and particularly Gerald H. Bagley. (R. 659, 660, 852-859, 928, 929, 1052-1059, 1062, 1064, 1068).

10. In the early 1970s, Dansie observed the construction of stone walls or monuments approximately eight to ten feet tall identifying the entrance to the Subdivision. The electronic control gate at the entrance to the Subdivision was attached to these stone walls at a later date. (R. 659, 660, 848, 849).

11. In or about 1973, Dansie became acquainted with the project manager and sales staff at the Subdivision, namely John Cavanaugh Thomas and Shirleen James. At that time, Mr. Thomas was the primary sales agent for the Subdivision and the project manager of the development. Ms. James was the sales secretary. Dansie worked with Mr. Thomas in

connection with the maintenance and development of the Subdivision water system from this time until approximately 1985. (R. 660, 838, 839, 846, 849, 850, 851, 1046-1049).

12. On or about December 25, 1973, pursuant to a real estate contract ("1973 Contract"), Dansie's predecessor in interest, Gerald H. Bagley, as buyer, purchased from Hi-Country Estates Second and Charles Lewton, certain property adjacent to the Subdivision, including Dansie's 80 acres of real property. (R. 144, 145, 146, 660).

13. Pursuant to this contract, Hi-Country Estates Second and Lewton granted to Dr. Bagley and his assigns the right to use the Association's roads for ingress and egress to the property. (R. 131, 144, 145, 146, 660).

14. Also pursuant to the contract, Bagley was required to become a member of the Hi-Country Estates Homeowners Association and pay his proportionate share of costs for maintenance of roads and services rendered by the Association in accordance with the Articles of Incorporation and Bylaws of the Association. (R. 131, 144, 145, 146, 660).

15. The terms of the 1973 Contract specifically applied to and bound the heirs, executors, administrators, successors, and assigns of the respective parties. (R. 131, 144, 145, 146, 660).

16. The 1973 Contract was never recorded in the office of the Salt Lake County Recorder's Office. (R. 661).

17. In approximately 1978, Dansie assumed full responsibility for the Subdivision water system with the exception of billing duties. He performed these tasks as a contractor employed by Dr. Bagley. (R. 661, 812, 813, 1068, 1069).

18. In 1978, Dansie was present and participated with Dr. Bagley, John Thomas and Dee Halverson (an employee of Bagley & Company), on the westerly 40-acre parcel for the purpose of placing a 40,000 gallon water tank to serve the Subdivision. The development of this parcel of property was discussed in the presence of Mr. Dansie at this time. This westerly parcel of property had already been surveyed into eight five-acre lots. (R. 661, 856-859, 921-924, 926, 927, 1058, 1059).

19. From August 1970 through the present, Dansie has observed and been aware of the development and construction of the Subdivision. (R. 659, 661, 807, 808, 837, 1031, 1032, 1033, 1034, 1035, 1036, 1037, 1038, 1040, 1051).

20. The Association acquired its interest in the Subdivision property from Zions First National Bank by Quit Claim Deed dated September 25, 1975. (R. 58, 661, 646, 647).

21. Zions First National Bank conveyed the westerly parcel of Mr. Dansie's 80 acres to Gerald H. Bagley by Special Warranty Deed on March 12, 1977. (R. 59, 661, 646, 647).

22. Dansie acquired his interest in the westerly parcel of property from Gerald H. Bagley by Warranty Deed dated November 18, 1985. (R. 60, 661, 814, 815, 834).

23. Pursuant to a Quit Claim Deed dated November 13, 1986, Dansie conveyed his interest in the westerly parcel of property to himself and his then wife, Adrian. (R. 147, 662).

24. This Quit Claim Deed subjected the westerly 40-acre parcel of property to "covenants, conditions and restrictions on Hi-Country Estates, as recorded in Book 3541, page 68, Entry No. 2607748, official records, and the rules and regulations of the Hi-Country

Estates Homeowners Association. ALSO SUBJECT TO restrictions, rights of way and easements appearing of record or enforceable in law and equity." (R. 147, 662).

25. As a result of this language, the westerly 40-acre parcel of property was subjected to the Hi-Country Estates Homeowners Association Protective Covenants, Certificate of Incorporation and Bylaws and Dansie is a member of the Association. (R. 147, 649, 650, 651, 652, 658, 662, 668, 669, 739, 740, 759, 760).

26. Prior to conveying the westerly parcel to Dansie, Bagley had executed a trust deed in favor of United Bank. (R. 62; Br. of Appellant Add. Ex. C).

27. On Bagley's failure to pay amounts due to United Bank, the successor trustee foreclosed on the westerly parcel in February 1989 and sold the property to Fidelity National Insurance Co. (R. 65-67; Br. of Appellant Add. Ex. C, R. 103).

28. The westerly parcel was then purchased by Dansie's father-in-law and mother-in-law, Paul and Ida Evans, on or about March 17, 1989. Dansie acted as their agent in this transaction. (R. 68, 825, 826, 827, 1089, 1090, 1091, 1092, 1095).

29. On or about January 1, 1993, Dansie reacquired the westerly parcel from his in-laws. (R. 69, 1096, 1097, 1098).

30. Dansie's easterly 40-acre parcel of property was acquired by him on May 22, 1989, from Ralph Marsh and the law firm of Backman, Clark and Marsh. At the time of this conveyance and prior thereto, Dansie knew that Mr. Marsh was an attorney representing Dr. Bagley in connection with the development of the Subdivision. (R. 662, 815, 862, 1073).

31. The 1989 Warranty Deed from Backman, Clark and Marsh to Dansie does not contain any reservation or reference to an encumbrance or right to assess on behalf of the Association. (R. 662).

32. Dansie has been on notice of the Association's Protective Covenants, Certificate of Incorporation and Bylaws by virtue of his ownership of lots 43 and 51 within the Subdivision, and, therefore, his membership in the Association. (R. 131, 624, 662, 828).

33. Dansie acquired his interest in Lot 51 in 1984, and his interest in Lot 43 in or about November 1985. He acquired his interest in Lot 43 from Dr. Bagley. (R. 663, 814, 1025, 1026, 1027).

34. The roadways within the Subdivision provide the only reasonable means of ingress and egress to Dansie's 80 acres. (R. 663).

35. The primary access road through the Subdivision (Hi-Country Road) was located in approximately the same location prior to development of the Subdivision. It did not extend to Mr. Dansie's 80 acres until it was extended by the developers and the Homeowners Association in the mid-1970s. (R. 663, 892, 917, 918).

36. In or about 1990, the Association began to assess Dansie's 80 acres for annual and special assessments of the Association. At that time, Dansie again acted as the Evans' agent to deal with the assessment issue. (R. 148, 223-244, 826, 827, 828, 829).

37. On or about November 26, 1991, Backman-Stewart Title Services, Ltd., paid the 1991 Association assessment, gate repair fee, plus interest and penalties on behalf of Dansie. This payment was made under protest. (R. 148, 663).

38. Dansie knew the developers intended to develop his 80 acres as an addition to the Subdivision and he performed percolation tests at the request of Dr. Bagley on both the westerly and easterly parcels in connection with this planned development prior to his acquiring an interest in them. (R. 663, 864, 865, 866, 867, 868, 1098, 1099).

39. In or about February 1992, Dansie informed an appraiser, Edward P. Westra, that he knew of Gerald H. Bagley's intent to subdivide and develop the westerly parcel. (R. 644, 663, 887, 888).

40. Dansie was present with his father in 1973 when John Thomas informed them that the Protective Covenants, Certificate of Incorporation, and Bylaws of the Association applied to and bound the 80 acres which Dansie subsequently obtained. (R. 929, 931).

41. Pursuant to Article XI of the Association Bylaws, the Association is authorized to bring an action at law to collect unpaid assessments and to recover interest, costs and reasonable attorney's fees of this collection action. (R. 85, 663, 941, 942).

42. Dansie's 80 acre parcels benefit and their value is enhanced from the use of the Association roads, control gate and other common areas and amenities throughout the Subdivision. (R. 664).

43. Dansie does not presently receive certain services from the Association including water service or garbage pickup in connection with his 80 acres of property. The Association does not presently assess Dansie for any charges in connection with water service or garbage pickup. (R. 664).

44. In the event Dansie chooses to develop his 80 acres of property, this development will increase the burden upon the Association roads, common areas, electronic control gate and other amenities. (R. 664).

45. Dansie had actual notice of the developers' plans to develop and subdivide his 80 acres and actual notice of the Association's Protective Covenants, Certificate of Incorporation and Bylaws and their application to his property. (R. 664, 665, 927, 928).

SUMMARY OF THE ARGUMENT

There are essentially two issues on appeal: (1) whether the trial court correctly interpreted the November 1986 Quit-Claim Deed, and (2) whether the trial court erred in concluding that Dansie had actual notice of possible encumbrances upon his two 40-acre parcels prior to purchase such that he should have investigated further. If he had investigated further, the trial court found, he would have discovered that the 40-acre parcels were subject to the Association's covenants, restrictions, and Bylaws.

The first issue, interpretation of the Quit-Claim Deed, is a question of law which this Court will review de novo. It is the Association's position that time-honored rules of deed construction in Utah require that the Quit-Claim Deed be interpreted to mean that all parcels of property referred to in the granting clause be limited by restrictions in the habendum clause, unless the deed expressly states a contrary intent. Under this interpretation, because the habendum clause is silent, the westerly parcel was subjected by the Quit-claim Deed to the Association's covenants, restrictions, and Bylaws.

The second issue is whether the trial court correctly ruled that Dansie had "actual notice" that the Association's covenants, restrictions, and Bylaws applied to the two 40-acre

parcels. The Association submits that it would be difficult to find a case with more facts indicating that a purchaser of land had knowledge that his land was subject to encumbrances. Dansie was intimately familiar with the development of the Subdivision, and had in fact participated heavily in it. Additionally, he had spoken extensively with the developers, and had seen plans indicating that the 40-acre parcels would be part of the Subdivision. Further, Dansie had participated in initial stages of development of the 40-acre parcels prior to purchase. Finally, and most importantly, Dansie was expressly told that the Association's covenants, restrictions, and Bylaws applied to his future property.

At trial, Dansie essentially conceded that all these facts were true. However, he claims that because the 1973 Contract which required him to become a member of the Association was not recorded, he cannot be bound by it. This is simply not the case. Under the Utah case law argued at trial, and the Utah statute under which the parties proceeded, it is not necessary that all documents bearing upon encumbrances to title be recorded. This may not currently be the state of the law, in light of amendments to the recording statutes, but it was the law at trial.

In the alternative to the foregoing arguments, the Association asks this Court to affirm the trial court based upon the doctrine of implied equitable servitude. In brief, the theory, which was presented to the trial court on numerous occasions, is that it would be unjust under the circumstances of this case to permit Dansie to have all the benefits of belonging to the Association (including a gated entry, maintained streets, the regulated development of the subdivision, and the opportunity to develop his parcels as "extensions" of Hi-Country), without having to pay for these benefits.

Finally, because the trial court did not err in concluding that Dansie is a member of the Association, and is required to pay assessments, the Association asks that this Court affirm the trial court's award of attorney fees. Prior case law definitively establishes that the Association does have the right to make assessments on homeowners. These assessments explicitly include attorney fees. Where there is an obligation for payment of assessments, there can be an obligation for attorney fees incurred in an attempt to collect those assessments.

ARGUMENT

POINT I

THE TRIAL COURT CORRECTLY CONCLUDED THAT THE WESTERLY 40 ACRE PARCEL WAS MADE SUBJECT TO THE HI-COUNTRY COVENANTS AND RESTRICTIONS BY THE NOVEMBER 1986 QUIT CLAIM DEED.

Dansie contends that the trial court incorrectly determined that the November 1986 Quit Claim Deed subjected the westerly parcel to the Association's CC&Rs, Certificate of Incorporation, and Bylaws. Dansie first argues that the trial court erred as a matter of law in concluding that the Quit Claim Deed was unambiguous. Next, Dansie claims that even if the Quit Claim Deed were unambiguous, Dansie could not unilaterally subject his property to the Association's CC&Rs, Certificate of Incorporation, and Bylaws. These arguments are both without merit. The trial court correctly interpreted the Quit Claim Deed according to well-established guidelines, and Dansie jointly subjected his property to the Association's CC&Rs, Certificate of Incorporation, and Bylaws.

A. The Trial Court Correctly Ruled that the Quit Claim is Unambiguous.

It is well-settled Utah law that deeds are to be construed according to ordinary rules of contract construction. See Homer v. Smith, 866 P.2d 622, 629 (Utah App. 1993). Furthermore, “[i]n the absence of ambiguity, the construction of deeds is a question of law for the court.” Hartman v. Potter, 596 P.2d 653, 656 (Utah 1979).

In interpreting a deed, a court must keep the following in mind:

The main object in construing a deed is to ascertain the intention of the parties, especially that of the grantor, from the language used. The description of the property in a deed is *prima facie* an expression of the intention of the grantor and the term "intention" as applied to the construction of a deed, is to be distinguished from its usual connotation. When so applied, it is a term of art and signifies a meaning of the writing [T]he intention of the parties to a conveyance is open to interpretation only when the words used are ambiguous.

Hansen v. Stichting Mayflower Recreational Fonds, 898 F.Supp 1503 (D.Utah 1995) (citing Hartman, 596 P.2d at 656)).

All deeds have two specific sections. First, a deed contains the “granting clause” which includes the description of the property to be conveyed by the grantor to the grantee.

In this case, the granting clause of the Quit Claim Deed states:

J. Rodney Dansie of Herriman, County of Salt Lake, State of Utah, grantor, hereby QUIT-CLAIM to J. RODNEY DANSIE AND ADRIAN L. DANSIE, HIS WIFE, AS JOINT TENANTS, of Herriman, Salt Lake County, State of Utah, grantee, for the sum of Ten Dollars, and other good and valuable consideration the following described tract of land in Salt Lake County, State of Utah:

PARCEL ONE:

The Southwest Quarter of the Southwest Quarter of Section 5, Township 4 South, Range 2 West, Salt Lake Base and Meridian.

PARCEL TWO:

ALL of Lot 43, HI-COUNTRY ESTATES, according to the official plat thereof on file in the Office of the Salt Lake County Recorder, State of Utah.

TOGETHER WITH a right-of-way over and across and the private roads located within said subdivision.

The second section or portion of a deed was historically known as the "habendum clause." In this case, the habendum clause states:

SUBJECT TO covenants, conditions, and restrictions on HI-COUNTRY ESTATES, as recorded in Book 3541, Page 68, Entry No. 2607748, Official Records, and the Rules and Regulations of the HI-COUNTRY ESTATES Homeowner's Association.

ALSO SUBJECT to restrictions, rights-of-way, and easements appearing of record or enforceable in law and equity.

The purpose of a habendum clause is to curtail, limit, or qualify the entire estate conveyed in the granting clause. See generally Haynes v. Hunt, 85 P.2d 861 (Utah 1939). When examining the interplay between these two clauses, "clauses in the deed subsequent to the granting clause are given effect so as to curtail, limit, or qualify the estate conveyed in the granting clause." Id. at 863 (citations omitted).

In the instant case, the granting clause of the Quit Claim Deed clearly describes two parcels of property to be conveyed. Next, the habendum clause limits or qualifies the estate conveyed in the granting clause. Dansie argues that the failure of the habendum clause to

specify the parcel in the granting clause to which it refers creates ambiguity in the deed. To the contrary, failure to expressly dissect the granting clause means that, by default, the habendum clause applies to the entire granting clause. After all, if Dansie meant to accomplish something else by the habendum clause, he could have simply added the words "PARCEL TWO IS" before "ALSO SUBJECT TO."

In light of the language used, this Court must construe the deed to reflect that both parcels of property identified and described in the granting portion of the Quit Claim Deed are "SUBJECT TO covenants, conditions, restrictions on Hi-Country Estates." As a result of this limiting clause, Dansie is officially acknowledging his membership in the Hi-Country Estates Homeowners Association by virtue of his ownership of the property described in the deed. As a member of the Hi-Country Estates Homeowners Association, he is obligated to pay those assessments levied against him by the Association and, further, his use of his property is restricted by the provisions of the Hi-Country Estates Protective Covenants recorded in connection with that subdivision and as clearly set forth in the limiting clause in this deed. See Turner v. Hi-Country Homeowner's Ass'n, 910 P.2d 1223 (Utah 1996).

B. Dansie Did Not Unilaterally Subject the Westerly Parcel to the CC&Rs and Bylaws.

Dansie claims that even if the Quit Claim Deed could be construed so that the habendum clause applies to both parcels contained in the granting clause, it would be improper to permit him to "unilaterally" join the Association, and be subject to its benefits and restrictions. While this is a correct general statement of the law, it ignores the fact that the 1973 Contract, discussed below, expressly requires that the owners of the property conveyed, which includes the Westerly Parcel, become members of the Association.

Accordingly, Dansie did not “unilaterally” become a member of the Association, he simply acknowledged that purchase of the Westerly Parcel bound him to become a member. As Dansie was enjoying the benefits of being a member of the Association, it is appropriate that his property be subject to the obligations of belonging to the Association.

C. The Issue of Possible Extinguishment of the Quit Claim Deed Should Not be addressed by this Court.

Dansie also argues that after foreclosure of the United Bank Deed of Trust, the Quit Claim Deed was eliminated from the chain of title, and any legal effect it might have had is extinguished. This argument is not properly before the appellate court and should be summarily rejected because Dansie has not indicated where in the record this issue was preserved for appeal. To the best of the Association’s knowledge, this issue was never presented to the trial court. It was not raised at the summary judgment phase of this matter, it was not discussed in Dansie’s pre-trial brief, and, most importantly, it was not raised at trial.

The time to have raised this issue would have been at the hearing prior to trial on the Motion in Limine regarding the proper interpretation of the Quit-Claim Deed. Instead of arguing that the Quit-Claim Deed was extinguished, and had no further legal effect, counsel for Dansie argued only that the Quit-Claim Deed was ambiguous, and testimony was required to clarify the interest of the grantor. (R. at 753, 754, 755, 757, 758). “As the Utah appellate courts have reiterated many times, we generally will not consider an issue, even a constitutional one, which the appellant raises on appeal for the first time.” Astill v. Clark, Case No. 970180CA, 1998 WL 175083, at *7 (Utah App. April 8, 1998) (citations omitted).

Moreover, as Dansie eventually did reacquire the property, it would be inequitable for him to rely upon the fortuity of foreclosure to eliminate his obligation to pay for services and amenities from which he benefits, and for which he knows he is responsible.

Finally, even if the Quit Claim were to be considered to have disappeared from the chain of title, the Westerly Parcel would nonetheless be subject to the Association's covenants and restrictions. As discussed in the second section of this brief, Dansie was on abundant actual notice of the applicability of these covenants and restrictions to his property outside Hi-Country Estates such that he should have conducted further inquiry into the matter. If he had pursued the issue, he would have learned (if he did not in fact already know) that the covenants and restrictions applied.

POINT II

THE TRIAL COURT CORRECTLY CONCLUDED THAT DANSIE HAD ACTUAL NOTICE THAT THE HI-COUNTRY COVENANTS AND RESTRICTIONS APPLIED TO THE TWO FORTY ACRE PARCELS.

The trial court ruled that at the time Dansie purchased the two 40-acre parcels of property he “had information or facts which would put a prudent person upon inquiry and which, if pursued by [Dansie], would have lead [sic] to actual knowledge as to the state of the title and the restrictions imposed by the December 25, 1975 real estate contract.” Findings of Fact and Conclusions of Law at p. 9 ¶ 2. The trial court also ruled that Dansie had “actual notice” of the restrictions placed upon the property by the Hi-Country Protective Covenants, Certificate of Incorporation and Bylaws. Id. at ¶ 3.

Dansie challenges these rulings on essentially two grounds—one legal, and one factual. The legal argument advanced is that an individual held to possess “inquiry notice” is only required to check into the recorded documents in the chain of title. Because the Contract was not recorded, the argument goes, Dansie was not required to check into its existence, or whether there was any sort of agreement between the Association and Dansie's predecessors in interest regarding obligations running from the owner of the two 40-acre parcels to the Association. As a subsidiary legal issue, Dansie argues that the trial court's findings of fact fail to support the conclusion that he was or should have been placed on notice to inquire about encumbrances on the property.

The factual issue presented is whether the trial court's findings that Dansie had actual notice that the Association's restrictions and covenants were applicable to the two 40-acre parcels were supported by the weight of the evidence.

A. Dansie Fails to Cite the Governing Statute Regarding the Effect of Recordation of Conveyances.

Dansie asserts that Utah Code Ann. § 57-3-3 (1989), concerning the effect of failure to record documents pertaining to title, is the governing statute in this case. Because this statute does not mention an “inquiry notice” or actual notice” exception to the general rule that unrecorded documents are void as against a subsequent purchaser, Dansie contends that these concepts have no relevance in Utah law.

This argument overlooks the fact that at the time Dansie purchased the two forty acre parcels, an entirely different statute was in operation. U.C.A. 57-1-6 was the applicable

statute describing the effect of recording an instrument on notice to third persons. Section 57-1-6 stated:

Every conveyance of real estate, and every instrument of writing setting forth an agreement to convey any real estate or whereby any real estate may be affected, to operate as notice to third persons, shall be proved or acknowledged and certified in the manner prescribed by this title and recorded in the office of the recorder of the county in which such real estate is situated, which shall be valid and binding between the parties thereto without such proofs, acknowledgement, certification or record, and as to all other persons who have had actual notice.

Utah Code Ann. § 57-1-6 (emphasis added).

Dansie's argument also overlooks the fact that section 57-1-6 was specifically identified as the controlling statute at trial, with no objection from counsel.¹ R. at 775, lines 10-15. Thus, section 57-1-6 is the statute properly before this Court, and precedent interpreting this statute supplies the rule of decision.

B. Dansie Fails to Cite Controlling Utah Precedent.

Dansie cites exclusively and extensively to case law outside of Utah in support of his position that it is inequitable to impose unrecorded covenants and restrictions upon property on the basis of notice. This is, no doubt, due to Dansie's incorrect assumption that section 57-3-3 controls this case, and his failure to find apposite Utah cases interpreting section 57-3-3. As discussed above, the real governing statute in this case is section 57-1-6. This statute has been dispositively interpreted by Utah courts as it relates to the facts of this case.

In Johnson v. Bell, 666 P.2d 308 (Utah 1983), the Utah Supreme Court was called upon to interpret the "actual notice" provision of section 57-1-6 as it applied to a duty to

¹ Section 57-1-6 was repealed in 1988.

discover the existence of an unrecorded document. Greatly simplified, one of the issues before the Court was whether a bank which was foreclosing on a trust deed had actual notice of the fact that the property had been transferred to a third party by an unrecorded quit claim deed.

If the Court were to have interpreted section 57-1-6 along the lines that Dansie has suggested, the Court could have quickly and easily disposed of the issue by stating that the quit claim deed was not recorded, and therefore could not, ipso facto, have been the type of document regarding which an individual could ever have "actual notice." The Court did not adopt this approach. Instead, citing Utah precedent going back to 1890, the Court concluded there was "insufficient evidence of activity on the property at that time which would have reasonably have alerted [the bank] to the claims of [quit claim grantees] and which would have required its further attention." Id. at 310 (emphasis added). That is, "[t]here was no evidence that there were any cattle upon the property at that time, " "no one lived upon the property," and the "improvements to the property by the Dansies had been made [prior to the date of the quit claim deed]." Id.

Thus, Bell clearly stands for the proposition that an individual can have such actual notice of the state of the property that he or she will be required to conduct further investigation into both the recorded and unrecorded state of the title.

C. Dansie had Actual Notice of the state of his Property such that he was Required to Conduct Further Investigation to Discover the True State of the Title.

Dansie makes a fundamentally incorrect assumption about what knowledge he was required to have such that his duty to inquire further about the state of the title was

triggered. Dansie contends that he must have had actual notice regarding the existence of the contract before he will be bound by its terms. This is incorrect. Instead, under Bell, Dansie must merely have had actual notice that the two 40-acre parcels were likely to be subject to the Association's restrictions to be required to make further inquiry.

Next, Dansie argues that his knowledge of construction in the Subdivision, acquaintance with Hi-Country sales staff, review of a Hi-Country sales brochure and knowledge of the Association Covenants and other documents were legally not sufficient to put him on notice to inquire further about restrictions on the two 40-acre parcels. Dansie is correct. Those findings alone would probably not suffice to impose a legal duty to inquire further. However, Dansie has only cited about one-fifth of the facts which supported the trial court's conclusion that Dansie had actual notice. Omitted were the findings that Dansie met with the developers in 1970 (Finding of Fact 6); Dansie read a sale brochure in 1970 indicating that his 40-acre parcels were part of Hi-Country Estates (Finding of Fact 7); Dansie worked with the developers to develop and maintain a water system for the Subdivision (Finding of Fact 8); Dansie participated in placing a 40,000 gallon water tank on the westerly parcel of property to serve the Subdivision. The fact that the westerly parcel was subject to the Association's covenants and restrictions was discussed with Dansie at that time. (Finding of Fact 17, R. 931); Dansie knew the westerly parcel had already been surveyed into eight five-acre lots (Finding of Fact 17); Dansie had observed and participated in the entire development and construction of the Subdivision (Finding of Fact 18); Dansie testified that he knew the developers intended to develop his 80 acres and that he performed certain percolation tests on both 40-acre parcels in contemplation of their

development as extensions of the Subdivision (Finding of Fact 33); Dansie testified that he knew of Bagley's intent to subdivide and develop the westerly parcel (Finding of Fact 34).

In light of the overwhelming evidence that Dansie was intimately familiar with Hi-Country Estates and its plans for the two 40-acre parcels, the trial court did not err in concluding that he had actual notice of encumbrances or restrictions that should have caused him to inquire further into the issue.

D. Dansie Fails to Properly Challenge the Trial Court's Findings of Fact.

In addition, Dansie challenges the sufficiency of the trial court's findings that Dansie had actual notice that the restrictions and covenants were applicable to his property. Specifically, Dansie alleges, "There is, however, no evidence or factual finding that Dansie had actual notice that the Hi-Country restrictions and covenants applied to or were intended by the original developers to apply to the Dansie Property which lies outside the Subdivision." Br. of App. at p. 24.

At this juncture, it would probably be helpful for the Court to keep in mind that Dansie is using the term "actual notice" differently than it is used in section 57-1-6, and subsequently interpreted in Bell, and differently than the term was employed by the trial court. "Actual notice" under section 57-1-6 means that "a party dealing with land ha[s] information of facts which would put a prudent man upon inquiry and which, if pursued, would lead to actual notice as to the state of the title." Bell, 666 P.2d at 310 (quoting Toland v. Corey, 24 P. 190 (Utah 1890)). Dansie, citing New Mexico law, asserts that

“actual notice” means “information that was communicated directly to or received by a party.” See Br. of App. at 24.

Despite this confusion, the trial court clearly made findings that support a legal conclusion that “actual notice” existed under both Utah law and New Mexico law. That is, the trial court found in findings 6 through 10, 16 through 18, and 22 through 40 that Dansie had personal knowledge of a huge number of facts regarding the two 40-acre parcels that should have led him to inquire further, and if he would have consulted the Association, he would have learned that his property outside the subdivision was subject to the Association's covenants and restrictions. In addition, the evidence at trial was that Dansie was told that the covenants and restrictions applied to his property. (R. 931 lns. 9-21). This evidence was reflected in Finding of Fact 40, and Conclusion of Law 3.

Thus, Dansie's claim that the trial court made no findings regarding whether he had “actual notice” that the restrictions and covenants were applicable to his property is without merit, and should be rejected by this Court.

E. The Doctrine of Merger does not Operate to Extinguish the Terms of the 1973 Contract.

Dansie claims that under the doctrine of merger, the terms of the 1973 Contract were “merged into subsequent deeds conveying the property and were therefore extinguished as a matter of law.” Br. of App. at p. 24. Although Dansie correctly states the general definition of the doctrine of merger, he does not alert this Court to the fact that there are exceptions to this doctrine, “including fraud, mistake, and the existence of collateral rights

in the contract of sale.” Secor v. Knight, 716 P.2d 790, 793 (Utah 1986); see also Stubbs v. Hemmert, 567 P.2d 168, 169 (Utah 1977).

In this case, the “collateral rights” exception applies. The collateral rights exception states that “if the original contract calls for performance by the seller of some act collateral to conveyance of title, his [or her] obligations with respect thereto survive the deed and are not extinguished by it.” Secor, 716 at 793. The parties to the 1973 Contract agreed in paragraph five that buyers “will become members of the Hi-Country Estates Homeowners Association and pay their proportionate share of costs for maintenance of roads and services rendered by Hi-Country Estates Homeowners Association in accordance with the Articles of Incorporation and bylaws of said association.” See Br. of App. at Exh. J (emphasis added).

It is important to note that the 1973 Contract does not state that the buyers are members of the Homeowners Association and that the Articles of Incorporation and bylaws currently apply to the property. If that were the case, the failure of the final deed to include the restrictions on the property would be conclusive, and there would be no collateral rights exception. However, “[w]hen . . . performance is intended by the parties to take place at some time after the delivery of the deed it cannot be said that it was contemplated by the parties that delivery of the deed would constitute full performance . . . absent some manifest intent to the contrary.” Stubbs, 567 P.2d at 169-70.

The 1973 Contract requires the buyers to become members of the Homeowners Association at some point after the signing of the Contract. As such, it contemplates

performance after the delivery of the deed, and constitutes a collateral agreement. The Doctrine of Merger does not operate to extinguish such an obligation.

POINT III

**IN THE ALTERNATIVE, DANSIE'S PROPERTY IS
SUBJECT TO THE PROTECTIVE COVENANTS,
CERTIFICATE OF INCORPORATION, AND BYLAWS
OF THE HI-COUNTRY ESTATES HOMEOWNERS ASSOCIATION
BASED UPON THE DOCTRINE OF IMPLIED EQUITABLE SERVITUDE.**

It well settled that this Court may affirm the trial court's ruling on any proper ground as long as there is evidence in the record supporting such an affirmance. State v. Montoya, 937 P.2d 145, 149 (Utah App. 1997). In Montoya, the Utah Court of Appeals relied upon Limb v. Federated Milk Producers Assoc., 461 P.2d 290 (Utah 1969) and quoted the Supreme Court's decision as follows:

The appellate court will affirm the judgment order or decree appealed from it is sustainable on any legal ground or theory apparent on the record, even though such theory or ground differs from that stated by the trial court to be the basis of its ruling or action, and this is true even though such ground or theory is not urged or argued on appeal by appellee, was not raised in the lower court, and was not considered or past on by the lower court.

Id. at 149.

In this case, Hi-Country argued in its opposition to Dansie's Motion to Alter or Amend Findings of Fact, Conclusions of Law, and Judgment that Dansie's 80 acres of property were subject to the rules and regulations of the Association based upon the concept of implied equitable servitudes. In order to rely on that doctrine, the evidence must establish five elements: (1) a common owner must subdivide property into a number of lots for sale; (2) a common owner must have a "general scheme for development" for the

property as a whole, in which its use will be restricted; (3) the vast majority of the lots in the development must contain the use restrictions; (4) the property sought to be restricted must be part of the general scheme; and (5) the purchaser (in this case, Dansie) must have actual or constructive knowledge of the developer's intent to restrict the uses of the whole development. 3W Partners v. Bridges, 651 A.2d 387 (Maine 1994).

Hi-Country met its burden and established each of these elements. First, common owners (Dr. Bagley, Mr. Lewton, and Mr. Spencer) subdivided the property into a number of lots for sale. The common owners had a general scheme for development of the property as a whole in which the use of the property was to be restricted. The vast majority of the lots in the development contain these use restrictions in the form of Protective Covenants, and the Certificate of Incorporation and Bylaws of the Hi-Country Estates Homeowners Association.

The record is clear that Dansie was aware that his two 40-acre parcels of property were part of a general scheme and were intended to be developed by Dr. Bagley and others. Dansie testified that he knew of these development plans and performed percolation tests in connection with the development of both parcels of his property at the request of Dr. Bagley. (R. 866, 1098). Furthermore, Dansie told an appraiser, Edward P. Westra, that he knew of the developer's intent to develop and subdivide the property into five-acre lots. (R. 887, 888). Finally, based upon all these facts, the Court specifically determined that Dansie had actual knowledge of the developer's intent to restrict the uses of his two 40-acre parcels. (R. 665).

This implied equitable servitude argument is clearly in the record in both Dansie's Memorandum to Alter or Amend Findings of Fact, Conclusions of Law, and Judgment (R. 679, 680, 681), and in Hi-Country's Memorandum in Opposition to this Motion. (R. 710, 711). Therefore, although the trial court did not specifically consider or pass on this argument, it is a proper ground upon which this Court may affirm the trial court's ruling in view of all of the evidence in the record which supports this theory.

POINT IV

THE TRIAL COURT'S AWARD OF ATTORNEY'S FEES TO THE ASSOCIATION WAS PROPER.

As set forth above, the trial court correctly determined that at the time Dansie acquired his interest in the two 40-acre parcels of property, he had substantial and lengthy knowledge of the development scheme of the Hi-Country Estates Phase I Subdivision, and had adequate information or facts which would put a prudent person upon inquiry which, if pursued by Dansie, would have led to his actual knowledge that the Association's Protective Covenants, Certificate of Incorporation, and Bylaws applied to his property. These documents imposed certain obligations upon him with regard to the payment of assessments, compliance with the Protective Covenants, and an obligation to pay attorney's fees and costs incurred in connection with actions filed by the Association to collect assessments.

Dansie concedes that this Court has already determined that the Articles and Bylaws of this Association constitute a contractual agreement between the Association and its members. See Br. of Appellant at p. 36. See also Turner v. Hi-Country Homeowners Ass., 910 P.2d 1223 (Utah 1996). Notwithstanding Dansie's concession, he attempts to argue that

based upon prior decisions involving the Association (James v. Davies, Civil No. C81-8560, attached as Add. Ex. F to Br. of Appellant and Hi-Country Estates Homeowners Association v. Maxfield (Unpublished Decision 890471-CA, attached as Add. Ex. G to Br. of Appellant) that the Association has no authority to levy assessments, collect attorney's fees, or require other maintenance or service fees from property owners pursuant to the terms of its Protective Covenants. Dansie misunderstands the holding and final determination in both of these cases.

First, in the James case, Judge Scott Daniels considered whether or not an attempted amendment to the Hi-Country Estates Phase I Protective Covenants was valid. This particular amendment authorized the Association to levy assessments pursuant to the terms of the covenants. Judge Daniels found that the Association's basic set of covenants were executed on or about June 15, 1970. Subsequent to that date, an amendment was made on or about April 6, 1973. However, as Judge Daniels further found, the original set of covenants executed on June 15, 1970, by their terms, prohibited any amendment for a period of 25 years after their initial execution.

Judge Daniels determined, therefore, that the plaintiffs in that case were entitled to a judgment declaring that any amendments which occurred sooner than 25 years after June 15, 1970, were improperly enacted and, therefore, void. Judge Daniels did not rule that the inclusion of a provision regarding the levying of assessments in the Protective Covenants was improper. In fact, the Court specifically determined that the Association was entitled to a judgment declaring that the original June 15, 1970, Protective Covenants were not vague or

ambiguous and do, in fact, constitute a present and continuing servitude on property within the Hi-Country Estates Phase I Subdivision.

Dansie then argues that because the James case was not appealed, it is *res judicata* as to the issue of whether or not the Association is authorized to levy assessments pursuant to the provisions of its Protective Covenants. To support this proposition, Dansie cites Hi-Country Estates Homeowners Association v. Maxfield, No. 890471 (Utah App. Aug. 2, 1990), an unpublished opinion of the Utah Court of Appeals. (A copy of this opinion is attached as Br. of Appellant, Ex. G). Dansie misreads this opinion. In that case, the Court of Appeals discussed Maxfield's challenge of the trial court's determination that he was obligated to pay assessments to the Association based upon the doctrine of *res judicata* and, specifically, Maxfield's claim that James was a bar to the Association's action to recover any unpaid assessments.

In rejecting Maxfield's argument, the Court of Appeals discussed the doctrine of *res judicata* and its two distinct components known as claim preclusion and issue preclusion. The Court of Appeals then determined that the trial court had correctly ruled that the second requirement for claim preclusion had not been satisfied. Judge Jackson states:

It is clear from the case record of James v. Davies, that the parties did not litigate, and Judge Daniels did not rule upon, the Association's authority to levy and collect assessments from Maxfield and other subdivision property owners. . . . It is true that the prior decision in James invalidated the amendment to the subdivision's Protective Covenants. However, the Association does not base its assessment authority or its current cause of action for unpaid assessments on the invalidated amendment, but rather on the Articles of the Association, which are binding on Maxfield as an Association member since he took his property subject to them. Notwithstanding Maxfield's attempt to rewrite the history of the prior litigation,

the James court did not conclude either that the Association had no basis for levying and collecting assessments, or that Maxfield was not a mandatory member of the Association. Those issues simply were not before the James court, although Maxfield could have raised them.

Maxfield, No. 890471 at *4 (emphasis added).

Therefore, Dansie's argument that James and Maxfield precluded the Association levying assessments, or recovering attorney's fees from him is flatly incorrect. The trial court specifically determined the Association's Covenants, Conditions, and Restrictions apply to and restrict the use of Dansie's 80 acres, and that Dansie is a member of the Association. Accordingly, Dansie, must comply with the provisions of these rules.

The specific provisions of the Association's Certificate of Incorporation which relate to the authority and power of the Association state as follows:

Third: This Association is not organized for pecuniary profit or gain to the members thereof, and the specific purposes for which it is formed are to provide for maintenance, upkeep, and preservation of the streets, roads, and common area within that certain tract of property described as: Hi-Country Estates, located in Salt Lake County, State of Utah, Phase I. And also to include additional phases of Hi-County Estates and the homeowners located within such additional subdivisions as may be mutually beneficial for the members hereof and the homeowners of the adjoining subdivisions. The Association is also formed to promote the health, safety, and welfare of the residents within Hi-Country Estates, and any additions thereto as may hereafter be brought within the jurisdiction of this Association for this purpose to: . . .

(b) fix, levy, collect, and enforce payment by any lawful means, all charges or assessments pursuant to the terms of the Protective Covenants, as amended, and as provided in the Bylaws adopted by the Association;. . . .

See Br. of Appellant, Add. Ex. H.

Article XI of the Association Bylaws states:

As more fully provided in the Protective Covenants, as amended, each member is obligated to pay the Association annual and special assessments which are secured by a continuing lien upon the property against which the assessment is made. Any assessments which are not paid when due, shall be delinquent. If the assessment is not paid within 30 days after the due date, the assessment shall bear interest from the date of delinquency at the rate of 1.5% per month, and the Association may bring an action at law against the owner personally obligated to pay the same or foreclose the lien against the property, and interest, costs, and reasonable attorney's fees of any such action shall be added to the amount of such assessment. No owner may waive or otherwise escape liability for the assessment provided for herein by nonuse of the common area, roads, or abandonment of his lot. (emphasis added).

See Br. of Appellant, Add. Ex. I.

Clearly, the provisions of the Association's Bylaws specifically authorize the collection of attorney's fees if the Association is required to bring an action against a property owner to pay assessments properly levied by the Association against the landowner. In this case, the Association asserted a counterclaim against Mr. Dansie specifically seeking an award of all assessments it had levied against Mr. Dansie's property commencing in 1992. The Association was successful in the trial court in obtaining an Order and Judgment awarding it the sum of \$5,601.30 representing annual and special assessments for his two 40-acre parcels together with penalties and interest totalling \$2,335.68 for the period January 1, 1992, through March 31, 1997. The Court also awarded interest on this judgment at the rate of 18% percent per annum. Finally, the Court correctly determined that the Association was entitled to be awarded its reasonable attorney's fees and costs incurred in connection with the collection of the assessments through April 10, 1997, in the amount of \$32,796.45,

together with interest at 18% per annum from October 1, 1997, until paid, and "after incurred attorney's fees and costs association with the collection of this judgment."

In view of Mr. Dansie's clear actual knowledge of the restrictions imposed upon his property by the original developers of Hi-Country Estates Phase I, his specific knowledge of the existence of the Association's Protective Covenants, Certificate of Incorporation and Bylaws, and his knowledge that these Covenants, Conditions, and Restrictions effected and applied to his 80 acres of property, the Association is clearly entitled to recover not only all assessments and interest which have remained unpaid through April 10, 1997, but also the attorney's fees it has incurred in connection with this appeal, including all after-incurred attorney's fees associated with the collection of the Court's judgment.² Therefore, this Court should affirm the trial court's Amended Order and Judgment and Order awarding attorney's fees in this action and, further, should award the Association its attorney's fees associated with responding to and defending this appeal as a part of the continuing action to recover assessments from Dansie.

CONCLUSION

This case is probably the last case in which this Court will be asked to apply repealed section 57-1-6, and the case law interpreting it. It is unclear whether Bell's pronouncement

² Dansie argues that the Association's Certificate of Incorporation does not contemplate that an owner of land adjoining the Subdivision could be a "member" subject to assessments. However, the very language of the Certificate of Incorporation cited by Dansie undercuts his position. It clearly states that any owner of a lot subject to assessment is a member. Further, the Certificate of Incorporation expressly envisions that the Association will include members beyond the confines of Hi-Country Estates Subdivision Phase I. See Certificate of Incorporation of Hi-Country Estates Homeowners Association, attached as Ex. H to Br. of Appellant.

that a purchaser of real property can be bound by the terms of unrecorded documents would be good law today. However, it was good law at the time of trial, and both parties presented their cases under its aegis.

The trial court correctly applied Bell and ruled that Dansie had abundant "actual notice" of activity on his 40-acre parcels such that he should have inquired further and discovered the existence of the 1973 contract which bound him to become a member of the Association. His actual knowledge of the encumbrances of his 40-acres parcels is further reflected in his creation of a Quit-Claim Deed expressly subjecting one of his parcels to the covenants and restrictions of the Association.

Under all of the circumstances of this case, it would be unjust to permit Dansie to reap all of the benefits of membership in the Association, without paying his dues. The trial court's rulings should be affirmed, including the provision for attorney fees. Finally, the Association should be awarded fees on appeal on the same grounds as fees were awarded below.

DATED this 15TH day of May, 1998.


A. HOWARD LUNDGREN
Attorney for Appellees

CERTIFICATE OF DELIVERY

I hereby certify that I caused two true and correct copies of the foregoing to be hand
delivered on this 15th day of May, 1998, to:

George A. Hunt, Esq.
WILLIAMS & HUNT
Attorneys for Appellant
257 East 200 South, #500
P.O. Box 45678
Salt Lake City, Utah 84145-5678

A handwritten signature in black ink, appearing to be "GAH", is written above a horizontal line. The signature is stylized and cursive.