

1978

# Loren R. Brockbank et al v. Jay B. Baldwin Jr. et al : Brief of Plaintiffs-Respondents

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/uofu\\_sc2](https://digitalcommons.law.byu.edu/uofu_sc2)

 Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Earl S. Spafford; Bruce LaVar Dibb; Attorneys for Defendants and Appellants;

William T. Thurman; Attorneys for Plaintiffs and Respondents;

---

## Recommended Citation

Brief of Respondent, *Brockbank v. Baldwin*, No. 16009 (Utah Supreme Court, 1978).

[https://digitalcommons.law.byu.edu/uofu\\_sc2/1385](https://digitalcommons.law.byu.edu/uofu_sc2/1385)

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

IN THE SUPREME COURT OF THE STATE OF UTAH

LOREN R. BROCKBANK and  
ROSALIND W. BROCKBANK, his  
wife, and VON R. BROCKBANK  
and VICKY J. BROCKBANK,  
his wife,

Plaintiffs-  
Respondents,

-vs-

JAY B. BALDWIN JR. and DONNA  
B. BALDWIN, his wife; JOHN  
W. LONGSON and EMMA S.  
LONGSON, his wife; FREDERICK  
W. MCGOLDRICK and TERESA F.  
MCGOLDRICK, his wife; and  
DONALD SMITH and ELISABETH  
SMITH, his wife, and all other  
persons and concerns similarly  
situated (a class action),

Defendants-  
Appellants.

Case No. 16009

BRIEF OF PLAINTIFFS-RESPONDENTS

Appeal from a Judgment  
Of the Third Judicial District Court  
Of Salt Lake County, Utah  
Honorable David B. Dee, Judge

William T. Thurman  
McKAY, BURTON, THURMAN  
& CONDIE  
500 Kennecott Building  
Salt Lake City, Utah 84133

Attorneys for  
Plaintiffs-Respondents

Earl S. Spafford  
Bruce LaVar Dobb  
SPAFFORD & NIXON  
431 South Third East, Suite 209  
Salt Lake City, Utah 84111

Attorneys for  
Defendants-Appellants

IN THE SUPREME COURT OF THE STATE OF UTAH

---

LOREN R. BROCKBANK and	)	
ROSALIND W. BROCKBANK, his	:	
wife, and VON R. BROCKBANK	)	
and VICKY J. BROCKBANK,	:	
his wife,	)	
	:	
Plaintiffs-	)	
Respondents,	:	
	)	
-vs-	:	
	)	
JAY B. BALDWIN JR. and DONNA	:	Case No. 16009
B. BALDWIN, his wife; JOHN	)	
W. LONGSON and EMMA S.	:	
LONGSON, his wife; FREDERICK	)	
W. McGOLDRICK and TERESA F.	:	
McGOLDRICK, his wife; and	)	
DONALD SMITH and ELISABETH	:	
SMITH, his wife, and all other	)	
persons and concerns similarly	:	
situated (a class action),	)	
	:	
Defendants-	)	
Appellants.	:	

---

BRIEF OF PLAINTIFFS-RESPONDENTS

---

Appeal from a Judgment  
Of the Third Judicial District Court  
Of Salt Lake County, Utah  
Honorable David B. Dee, Judge

---

William T. Thurman  
McKAY, BURTON, THURMAN  
& CONDIE  
500 Kennecott Building  
Salt Lake City, Utah 84133

Earl S. Spafford  
Bruce LaVar Dobb  
SPAFFORD & NIXON  
431 South Third East, Suite 209  
Salt Lake City, Utah 84111

Attorneys for  
Plaintiffs-Respondents

Attorneys for  
Defendants-Appellants

## TABLE OF CONTENTS

TABLE OF AUTHORITIES . . . . .	ii
NATURE OF THE CASE . . . . .	1
DISPOSITION IN THE DISTRICT COURT . . . . .	1
RELIEF SOUGHT ON APPEAL . . . . .	1
STATEMENT OF FACTS . . . . .	2
ARGUMENTS . . . . .	
POINT I.           The Trial Judge Was Justified in Granting the Motion for Summary Judgment as there existed no Genuine Issue of Material Fact. . . . .	4
POINT II.          Where the Document to be Construed was Clearly Ambiguous, the Trial Court was Justified in Considering the Intent of the Subdivision Developer. . .	12
POINT III.         The Restrictive Covenants Clearly Were Not Intended to Apply to the Commercial Lot, and the Court was Justified in so Concluding. . . . .	15
POINT IV.          The Trial Court's Refusal to Consider Defendants-Appellants' Defense of Statute of Limitations is not Reversible Error Where the Plaintiffs-Respondents Were not Seeking Reformation of the Documents in their Motion for Summary Judgment . . . . .	18
CONCLUSION . . . . .	20

# TABLE OF AUTHORITIES

## CASES

<u>Allen's Products Company v. Glover, et al.,</u> 18 Utah 2d 9, 414 P.2d 93 (1966) . . . . .	5
<u>Baggs v. Anderson,</u> 528 P.2d 141 (Utah, 1974) . . . . .	9
<u>Bullfrog Marina, Inc. v. Lentz,</u> 28 Utah 2d 261, 501 P.2d 266 (1972) . . . . .	12, 13
<u>Clyde v. Eddington Canning Co.,</u> 10 Utah 2d 14, 347 P.2d 563 (1959) . . . . .	14
<u>Commercial Building Corporation v. Blair,</u> 565 P.2d 776, (Utah, 1977) . . . . .	14
<u>Continental Bank &amp; Trust v. Stewart,</u> 4 Utah 2d 228, 291 P.2d 890 (1955). . . . .	14
<u>First Western Fidelity v. Gibbons &amp; Reed</u> <u>Company,</u> 27 Utah 2d 1, 492 P.2d 132 (1971). . . . .	13
<u>Howick v. Bank of Salt Lake,</u> 28 Utah 2d 64, 498 P.2d 352 (1972) . . . . .	7
<u>J. P. Koch, Inc. v. J. C. Penney Company, Inc.,</u> 534 P.2d 903 (Utah, 1975) . . . . .	9
<u>Kelly v. Richards,</u> 83 P.2d 731 (Utah, 1938) . . . . .	10
<u>Metropolitan Investment Company v. Sine,</u> 14 Utah 2d 36, 376 P.2d 940 (1962) . . . . .	14
<u>Morgan v. Board of State Lands,</u> 549 P.2d 695 (Utah, 1976) . . . . .	9, 10
<u>Pioneer Savings and Loan Association v. Pioneer</u> <u>Finance and Thrift Company,</u> 18 Utah 2d 106, 417 P.2d 121 (1966) . . . . .	5

<u>Pulsipher v. Tolboe</u> , 13 Utah 2d 190, 370 P.2d 360 (1962) . . . . .	14
<u>Rich v. McGovern</u> , 551 P.2d 1266 (Utah, 1976) . . . . .	11
<u>Richard v. Credit Suisse</u> , 242 NY 346, 152 NE 110 (1926) . . . . .	5
<u>Walker v. Rocky Mountain Recreation Corp.</u> 29 Utah 2d 274, 508 P.2d 538 (1973) . . . . .	5, 7, 8

## STATUTES

Utah Code Annotated 78-12-26(3) . . . . .	19
---	----

## AUTHORITIES

20 Am. Jur. 2d <u>Covenants, Conditions and Restrictions</u> , § 186 . . . . .	13, 14
17A C.J.S., <u>Contracts</u> , § 299 . . . . .	12
Utah Rules of Civil Procedure, 56(c) . . . . .	6
<u>West's Annotated Code of Civil Procedure</u> § 437C. . . . .	8
4 <u>Williston on Contracts</u> (3rd Ed.) § 628 . . . . .	13
37A Words and Phrases, <u>Restrictive Covenants</u> . . . . .	12

IN THE SUPREME COURT OF THE STATE OF UTAH

---

LOREN R. BROCKBANK, et al.,	)	
	:	
Plaintiffs-	)	
Respondents,	:	
	)	Case No. 16009
-vs-	:	
	)	
JAY B. BALDWIN, JR., et al.,	:	
	)	
Defendants-	:	
Appellants.	)	

---

BRIEF OF PLAINTIFFS-RESPONDENTS

---

NATURE OF THE CASE

This is a class action suit brought by Plaintiffs-Respondents seeking a judicial determination of the inapplicability of a residential restrictive covenant to a subdivision lot intended for and specifically reserved and designated by the subdivision developer for commercial use.

DISPOSITION IN THE DISTRICT COURT

Plaintiffs-Respondents moved for summary judgment. On April 7, 1978, oral argument was had in the District Court of Salt Lake County. The Court, after taking the matter under advisement, granted Plaintiffs-Respondents' Motion.

RELIEF SOUGHT ON APPEAL

Plaintiffs-Respondents seek affirmance of the judgment of the

District Court.

STATEMENT OF FACTS

Plaintiffs-Respondents disagree with the Statement of Facts set forth in the brief of Defendants-Appellants and there follows a concise statement of the material facts of this case.

Plaintiffs-Respondents are the owners of an undeveloped tract of property in the Mt. Olympus Hills No. 1 Subdivision in Salt Lake County. (R 4, 35). The tract is slightly larger than five acres in size, however, at the time the official subdivision plat was recorded, the lot was in excess of ten acres in size.

In June of 1956, in the course of developing the subdivision, Plaintiffs-Respondents' predecessors in interest, Bernard P. and Nada R. Brockbank, caused the official plat of the Mt. Olympus Hills No. 1 Subdivision to be recorded. (R14, 114). The plat clearly shows the location of the large ten acre tract in the subdivision. Printed in the area of such tract on the plat are the numeral "1" and the words

"SHOPPING CENTER  
COMMERCIAL ZONE C-1"

The ten acre tract, now approximately five acres, is herein after referred to in this brief as "the commercial lot".

In October of that same year, Bernard P. and Nada R. Brockbank caused to be prepared and recorded a "Restrictive Covenants"



document referenced to the official plat previously recorded as the Mt. Olympus Hills No. 1 Subdivision. (R 15, 114). The covenants are largely designed to impose restrictions on the residential use of the several hundred small lots contained on the plat and were by their very language inapplicable to a lot the size, shape, location and character of the large commercial lot. Nevertheless, the all inclusive language of the covenant could seemingly be construed to include the commercial lot.

Pursuant to their plan to develop the commercial lot as a shopping center, the Brockbanks made application to the county to zone the commercial lot as Commercial Zone C-1 and such application was approved by the county. (R 116). Later, the Brockbanks, upon threat of condemnation, sold to the State Road Commission approximately five acres of the then ten acre tract. The Road Commission paid several times what the property was worth as a residential property recognizing it was intended and zoned for commercial use as a shopping center. (R 116). Some time thereafter, application was made to the county for a conditional use permit to develop the lot for commercial purposes. (R 116).

Title to the commercial lot was subsequently transferred to Loren and Von Brockbank, the sons of Bernard P. and Nada R. Brockbank, and still later, Von, along with his wife, Vickie, became the sole

in this action. (R 4).

In 1975, Plaintiffs-Respondents attempted to obtain financing to develop the commercial lot as a shopping center. It was at this time that Plaintiffs-Respondents learned that lending institutions would not finance the proposed development without a judicial determination as to the inapplicability of the residential restrictions contained in the restrictive covenants to the commercial lot. Plaintiffs-Respondents then brought this class action suit joining as defendants, all property owners of the lots to whose benefit the covenants inured.

Plaintiffs-Respondents' Motion for Summary Judgment was granted on the grounds that the commercial lot is not restrictively limited by the covenants which bound the other lots in the subdivision development to which issue the District Court found there were no issues of fact raised either by the pleadings, the Affidavits of Defendants-Appellants or of the arguments of their counsel which needed to be tried by a finder of fact.

## ARGUMENT

### POINT I

THE TRIAL JUDGE WAS JUSTIFIED IN GRANTING THE MOTION FOR SUMMARY JUDGMENT AS THERE EXISTED NO GENUINE ISSUE OF MATERIAL FACT.

An expeditious disposition of cases is a cardinal virtue of the administration of justice, and a judge is not justified in refusing to grant summary judgment where the facts are undisputed. *Cardozo* said: "The administration of justice is a public duty, and it is the duty of the courts to see that it is performed as efficiently as possible." *Cardozo*, *supra*.  
Sponsored by the Utah State Library, a division of the Utah State Office of Education, under the provisions of the Federal Library Services and Technology Act, administered by the Utah State Library.  
Machine-generated OCR, may contain errors.

The very object of a motion for summary judgment is to separate what is formal or pretended in denial or averment from what is genuine and substantial, so that only the latter may subject a suitor to the burden of a trial. Richard vs. Credit Suisse, 242 NY 346, 152 NE 110, 111 (1926).

This Court has long held that although a summary judgment must be reviewed in the light most favorable to the losing party,

. . . the trial judge not only can but should grant a motion for summary judgment if he feels certain that he would rule that way no matter what proof a party could produce in support of his contentions. Allen's Products Company vs. Glover, et al., 18 Utah 2d 9, 414 P.2d 93, 94 (1966). (See also Pioneer Savings and Loan Association vs. Pioneer Finance and Thrift Company, 18 Utah 2d 106, 417 P.2d 121 (1966).

In contesting the motion for summary judgment in the trial court, Defendants-Appellants relied upon the allegations of their answer (R 80) and three affidavits, (R 219, 237, 239) none of which raised any material issues of fact which necessitated a finding by a trier of fact.

In the case of Walker vs. Rocky Mountain Recreation Corp., 29 Utah 2d 274, 508 P.2d 538 (1973), which the Defendants-Appellants cite in their brief, this Court held that the entry of summary judgment is proper where the affidavit opposing the motion for summary judgment reveals no evidentiary facts, but merely sets forth the affiant's unsubstantiated opinions and conclusions. Further, the language the Defendants-Appellants omitted from their quotation is highly relevant to the determination of this issue. (Defendants-Appellants' Brief page 14). The

complete statement from the Court is:

The opposing affidavit submitted by defendant did not comport with the requirements of Rule 56(e), U.R.C.P., i.e., such an affidavit must be made on personal knowledge of the affiant, and set forth facts that would be admissible in evidence and show that the affiant is competent to testify to the matters stated therein. Statements made merely on information and belief will be disregarded. Hearsay and opinion testimony that would not be admissible if testified to at the trial may not properly be set forth in an affidavit.

A review of defendant's opposing affidavit reveals no evidentiary facts but merely reflects the affiant's unsubstantiated opinions and conclusions in regard to the transactions. (Id. at 542).

The same statement can be made as regards the affidavits of Defendants-Appellants. Rule 56(e), Utah Rules of Civil Procedure states, in pertinent part:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Subsection (e) of the same Rule states, in pertinent part:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of its pleading, but his response, by affidavit or as otherwise provided in this rule, must set forth specific facts, showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Despite the allegation in the affirmative defenses that "virtually all of the members of the Class had purchased their property in reliance on the restrictive covenant" (R 84) Defendants-Appellants were able to obtain from the over 300 class members, only two affidavits, one by their counsel. In his Affidavit, Defendant Don Smith states:

That he knew of the restrictive covenant covered by Lot 1 and relied thereon in his purchase of the property. (R 237)

A careful examination of this statement will reveal that the Affiant is not stating a material issue of fact, but rather an unsubstantiated conclusion, which would be an inadmissible opinion that the covenant was applicable to Lot 1, inasmuch as that is the basis of this class action suit. Under the Walker case, supra, this would be insufficient to oppose a motion for summary judgment. Smith does not say that he believed that the restrictive covenant applied to Lot 1 or that he relied on any such belief in purchasing his property. He is merely stating that he relied on a covenant which he described as "covered by Lot 1" (perhaps he meant covering Lot 1). Mr. Spafford's Affidavit, in addition to being merely the self-serving attempt by counsel to bolster his defense, and if given at trial would have likely been disbelieved by the finder of fact (See Howick vs. Bank of Salt Lake, 28 Utah 2d 64, 498 P.2d 352 (1972)), suffers the same deficiencies present in Mr. Smith's Affidavit described above. Mr. Spafford merely states that at the time he purchased some of the property in question "Affiant

was informed of and relied upon the language of said restrictive covenant".

(R 220). This unsubstantiated conclusion (Walker, supra) does not even mention the possibility of the application to Lot 1 of the restrictive covenants respecting residential use.

According to West's Ann. Code Civ. Proc. § 437 c:

An affidavit opposing motion for summary judgment does not raise triable fact issue, unless it states facts showing that [the] party has a good and substantial defense or that a good cause of action exists on merits.

It is no wonder that neither Smith nor Spafford came right out and alleged that they believed the residential use covenants applied to the commercial lot. In order to have the slightest notion that the restrictive covenants might have applied to the large ten, later five, acre tract of undeveloped land, one would have to look at the plat referred to in the restrictive covenants document since the plat was the only reference showing which property was arguably covered by the restrictive covenants. Even a cursory examination of the plat quickly discloses the fact that the commercial lot was reserved for development as a shopping center. The ten acre lot, appearing on the plat to be some thirty or forty times larger than the residential lots, was clearly and boldly identified in capital letters as "SHOPPING CENTER COMMERCIAL ZONE C-1". It would be patently unreasonable for Smith or Spafford or anyone else to conclude that the restrictive covenants respecting residential use applied to the

allege:

1. That he read the residential use restrictions, or
2. That he believed that the residential use restrictions applied to the ten acre commercial lot, or
3. That he relied on such a belief in purchasing his property.

Instead, they have made a bare assumption or conclusion not supported by the undisputed facts. Even if Mr. Smith or Mr. Spafford had asserted in their Affidavits that they had relied on the fact that the residential use restrictions applied to the large undeveloped tract and the trial court found such reliance, under the undisputed facts set forth above, the court was well within its discretion to rule as a matter of law that such reliance was not sufficient to estop Plaintiffs-Respondents from asserting that the residential use restrictions were never intended to apply to the commercial lot.

Under Utah law, the party alleging estoppel must establish:

1. That his reliance was reasonable and that in so relying he used reasonable prudence and diligence. (Morgan vs. Board of State Lands) 549 P.2d 695, 697 (Utah, 1976), Baggs vs. Anderson, 528 P.2d 141, 143 (Utah, 1974), and J. P. Koch, Inc. vs. J. C. Penney Company, Inc., 534 P.2d 903, 905 (Utah, 1975);
2. That he substantially changed his position to his detriment as a result of such reliance. Baggs, supra, at page 143 and J. P. Koch,

supra, at page 905; and

3. That he would not have so changed his position except for the conduct of the other party. (Kelly vs. Richards, 83 P.2d 731, 734 (Utah, 1938)).

With respect to the last two requirements neither Mr. Smith nor Mr. Spafford has stated in his Affidavit that he suffered any detriment or that he would not have bought his property but for his reliance.

With respect to the first requirement of reasonable reliance, not only have Mr. Smith and Mr. Spafford failed to assert reasonable reliance, but even if they had, the trial court was well within its discretion to rule that based upon the undisputed facts, such reliance, if any, was unreasonable as a matter of law. As indicated above, neither Mr. Smith nor Mr. Spafford could have had any inkling that the residential use restriction might have applied to the large undeveloped tract of land without first examining the recorded plat which plainly sets forth that the tract was reserved for commercial use as a shopping center. As such, Mr. Smith's and Mr. Spafford's reliance on the assumption that the residential use restrictions applied to Lot 1 would be patently unreasonable. Even if Mr. Smith and Mr. Spafford had not examined the recorded plat, (in which case they could not have had any idea that the restrictive covenants might have even arguably included the commercial lot) their reliance, if any, would still have been unreasonable, for as the Utah



The doctrine of equitable estoppel does not operate in favor of one who has knowledge of the essential facts or one who has convenient and available means of obtaining such knowledge.

Assuming arguendo, the alleged facts raised by the affidavits were established, they would not have precluded summary judgment, since they do not go to the basis of the Motion, that being the interpretation of the restrictive covenant to the large commercial lot. As this Court said in the case of Rich vs. McGovern, on the question of review of a summary judgment:

. . . [I]nasmuch as the party moved against is being defeated without the privilege of a trial, the court should carefully scrutinize the 'submissions' and contentions he makes thereon to see if his contentions and proposals as to proof of material facts, if resolved in his favor, would entitle him to prevail

. . .  
551 P.2d 1266, 1268 (Utah, 1976).

At most, the resolution of the issue of reliance in favor of the Defendants-Appellants would have given rise to a suit for monetary damages, not dismissal of the motion for summary judgment on the interpretation of the covenants' applicability. It is no wonder Defendants-Appellants did not rely on the element of damages since despite the unreasonableness of any alleged reliance, the homeowners in the class most affected have already received the benefit of the large lot being reserved for commercial use. It is undisputed that those lots facing the commercial lot were sold for one-half price. As such, any effort on the part of those homeowner

commercial lot for the purpose for which it was intended would result in an unjust enrichment to them.

It is clear that neither the answer nor the Affidavits filed by Defendants-Appellants raise any material issues of fact and as such, the trial court was amply within its discretion to grant the motion for summary judgment.

#### POINT II

WHERE THE DOCUMENT TO BE CONSTRUED WAS CLEARLY AMBIGUOUS, THE TRIAL COURT WAS JUSTIFIED IN CONSIDERING THE INTENT OF THE SUBDIVISION DEVELOPER.

It is unassailable that the language of the restrictive covenants explicitly refers to, and unquestionably incorporates, the subdivision plat. Indeed, the subdivision plat is critical in order to identify the property to which the restrictive covenants apply. The covenant describes the restricted property as:

All of Mt. Olympus Hills No. 1 and No. 3, according to the official plat thereof on file in the office of the County Recorder of Salt Lake County. (R 15).

A restrictive covenant is a contract. (37A Words and Phrases, Restrictive Covenants). It is well settled that:

. . . it is the general rule that where a contract refers to, and incorporates the provisions of another instrument they shall be construed together. 17A C.J.S. Contracts § 299.

This Court in Bullfrog Marina, Inc. vs. Lentz, 28 Utah 2d 261, 501 P.2d

266 (1972) held that:

. . . where two or more instruments are executed by the same parties contemporaneously, or at different times in the course of the same transaction, and concern the same subject matter, they will be read and construed together so far as determining the respective rights and interests of the parties . . . (Id. at 271). (See also 4 Williston on Contracts, 3rd Ed.) § 628 p. 904).

Reference to the official subdivision plat shows the large ten acre (now five acre) commercial lot clearly identified as "SHOPPING CENTER COMMERCIAL ZONE C-1". The restrictive covenants seem to indicate that all lots are to be used for residential purposes with the exception of two lots for schools and churches. As such, it is apparent that the intent of the developer cannot be ascertained from the four corners of the document itself. In the case of such an ambiguity, the court was justified in considering extrinsic evidence to establish the intent of the subdivision developer.

In a similar situation where this Court was addressing itself to the proper construction of a real estate covenant it said:

In view of the absence of a clear and definite expression in the contracts, it was proper for the trial court to take extraneous evidence and to look to the total circumstances to ascertain the intent. First Western Fidelity vs. Gibbons & Reed Company, 27 Utah 2d 1, 492 P.2d 132, 134 (1971).

It is well settled that:

The fundamental rule in construing restrictive covenants is that the intention of the parties as shown by the

covenant governs . . . In the determination of the intention of the parties, the entire context of the covenant is to be considered. [20 Am. Jur. 2d, Covenants, Conditions and Restrictions, §186 p. 753].

Further, this Court has stated with respect to the interpretation of restrictive covenants:

The intentions of the parties, as gathered from the surrounding circumstances, and purpose of the restriction, must be considered and given effect. Metropolitan Investment Company vs. Sine, 14 Utah 2d 36, 376 P.2d 940, 945 (1962).

Plaintiffs-Respondents do not dispute the proposition that extrinsic evidence is inadmissible to vary the terms of an unambiguous document, however, this clearly is not controlling in the instant case.

It is true that the express terms of an agreement may not be abrogated, nullified or modified by parol testimony; but where, because of vagueness or uncertainty in the language used, the intent of the parties is in question, the court may consider the situation of the parties, the facts and circumstances surrounding the making of the contract, the purpose of its execution and the respective claims thereunder, to ascertain what the parties intended. Continental Bank & Trust Company vs. Stewart, 4 Utah 2d 228, 291 P.2d 890, 892 (1955).

The blatant conflict between the language of the restrictive covenants and the official plat incorporated therein makes the intent of the parties unascertainable without reference to extrinsic evidence. Defendants-Appellants rely on the cases of Commercial Building Corporation vs. Blair, 565 P.2d 776, (Ut. 1977); Clyde vs. Eddington Canning Co., 10 Utah 2d 14,

347 P.2d 563 (1959); and Pulsipher vs. Tolboe, 13 Utah 2d 190, 370 P.2d

360 (1962), is as such unfounded. In each case, this Court dealt with documents in which the language was clear and unambiguous on its face, and in which reference was not required to a second document in order to determine the intent of the original document. Such is clearly not the case with regard to the restrictive covenants in the instant case. As such, the lower court did not commit reversible error in considering the intent of the subdivision developer who caused the restrictive covenants to be drafted.

### POINT III

#### THE RESTRICTIVE COVENANTS CLEARLY WERE NOT INTENDED TO APPLY TO THE COMMERCIAL LOT, AND THE COURT WAS JUSTIFIED IN SO CONCLUDING.

When the restrictive covenants document and the recorded plat are read together, the undisputed facts established clearly show that the express intent of the original subdividers and grantors was that the restrictive covenants regarding residential use did not apply to the then ten acre tract, which was being reserved for commercial use as a shopping center. The undisputed material facts established by Plaintiffs-Respondents' Affidavits are as follows:

(1) The restrictive covenant document explicitly refers to and incorporates the plat which clearly identifies the commercial lot as "SHOPPING CENTER COMMERCIAL ZONE C-1" on the face of the plat.

(2) It was never the intention of the grantors that the commercial lot was to be subject to the restrictive covenants. (R 114, 209).

(3) At the time the plat was recorded, there was no shopping center anywhere near the area. (R 115, 209).

(4) Prospective buyers asked which areas had been designated for schools and for shopping, and nearly all prospective buyers would not buy a residential building lot unless they knew where the schools and shopping centers were going to be located. (R 115, 209).

(5) Prospective buyers were shown the plat which identified the large tract as "SHOPPING CENTER COMMERCIAL ZONE C-1" and each customer was shown the location of various lots on the plat. (R 115, 209).

(6) Residential lots facing the ten acre tract including those on Westview Drive, were sold at one-half price of the other lots in the subdivision because they were facing the shopping center area, and purchasers of those lots were informed before their purchases that their lots were facing the proposed shopping center property which would be used for commercial purposes. (R 115, 209).

(7) Salt Lake County zoned the ten acre tract as commercial Zone C-1 upon the application of Bernard P. Brockbank, one of the original subdividers and grantors. (R 116, 209).

(8) Approximately five acres of the ten acre tract were sold to the state for road changes at a price several times what the five acres were worth as residential property, based on the value of the property for shopping center purposes because the ten acres had been reserved for commercial zoning and development as a shopping center. (R 116, 209).

(9) The Plaintiffs-Respondents are paying a commercial tax rate on Lot 1 even though it is not being used on a commercial basis and Plaintiffs-Respondents are incurring substantial loss for delay in such use. (R 103, 210).

None of these material facts have been disputed.

That the restrictive covenants document with respect to residential use was never intended to apply to the commercial lot is further evidenced by the fact that many of these restrictive covenants obviously could not apply to the large tract. For example, it would be economically unfeasible and patently unreasonable to expect that only one detached single-family dwelling not to exceed one and one-half stories in height could be built on a ten acre lot some thirty to forty times larger than all other surrounding lots, pursuant to Item 1 of the restrictive covenants. Furthermore, the side yard lines and interior lot lines mentioned in Item 4 of the restrictive covenants do not exist on the ten acre (now five acre) tract. Finally, the restriction against encroachment

in Item 4 cannot apply to the commercial lot because it is not adjacent to any other lots.

Plaintiffs-Respondents do not contend that the zoning of the property supersedes the language of the restrictive covenants, however, the fact that the subdivision developer, within two years of the recordation of the subdivision plat, made application to have the property zoned for commercial purposes clearly shows that the intent of the developer was that the restrictive covenants were inapplicable to the large commercial lot.

It is therefore obvious and the District Court was justified in finding, that the residential restrictions were never intended to apply to the commercial lot.

#### POINT IV

THE TRIAL COURT'S REFUSAL TO CONSIDER DEFENDANTS-  
APPELLANTS' DEFENSE OF STATUTE OF LIMITATIONS IS NOT  
REVERSIBLE ERROR WHERE THE PLAINTIFFS-RESPONDENTS WERE  
NOT SEEKING REFORMATION OF THE DOCUMENTS IN THEIR MOTION  
FOR SUMMARY JUDGMENT.

Plaintiffs-Respondents' First Cause of Action in their Complaint (R 2-6) requested a judicial determination of the applicability of the restrictive covenants to the large commercial lot, by construing the restrictive covenants document together with the recorded plat incorporated therein. Plaintiffs-Respondents' Second Cause of Action (R 6, 7) sought, only in the alternative, reformation of the restrictive covenants document.



to conform with the obvious intent of the developer. As such, the only issue in the motion for summary judgment was whether, as a matter of law, the restrictive covenants document applies to the large ten acre (now five acre) commercial lot when the restrictive covenants document and the recorded plat are read together, irrespective of any mistake or reformation. It was well within the prerogatives of the District Court to grant Plaintiffs-Respondents' Motion for Summary Judgment without considering Defendants-Appellants' defense of statute of limitations where such defense is clearly irrelevant, immaterial and inapplicable to the court's determination of the non-applicability of the restrictive covenants to the commercial lot.

The mere fact that Plaintiffs-Respondents originally alleged that the designation of the large commercial lot as No. 1 was done by mistake and/or inadvertence is not controlling inasmuch as the statute of limitations (Utah Code Annotated, 78-12-26(3)) is only applicable where relief is sought on the ground of mistake. In an instant case, Plaintiffs-Respondents sought, and the court granted, the summary judgment on the basis that the restrictive covenants are inapplicable to the large five acre tract and were never intended to be so. (R 241, 242). As such, Defendants-Appellants' defense of the statute of limitations is clearly without merit and the trial court was justified in so finding.

### CONCLUSION

Where there was no genuine issue of any material fact raised in opposition that was relevant or material to the disposition of the motion for summary judgment, the trial judge was justified in averting the substantial damage and delay caused by the burden of an unnecessary trial.

The record clearly establishes that the language of the restrictive covenants document with the plat incorporated therein is ambiguous the intent of which is unascertainable without reference to extrinsic evidence. The trial court was well within its discretion in considering extrinsic evidence of the intent of the subdivision developer.


In examination of the evidence before the trial judge on the motion for summary judgment, the decision that the restrictive covenants document does not apply to the large commercial lot did not constitute reversible error.

Defendants-Appellants' defense of the statute of limitations was without merit to the motion for summary judgment inasmuch as interpretation of the restrictive covenants precluded the necessity of reforming the document.

THEREFORE, the decision of the trial court should be affirmed.

DATED this 21st day of December, 1978.

Respectfully submitted,

  
\_\_\_\_\_  
William T. Thurman

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Brief of  
Plaintiffs-Respondents upon Defendants-Appellants by mailing two  
copies thereof, postage prepaid, to Earl S. Spafford and Bruce  
LaVar Dill of Spafford and Nixon, 431 South Third East, #209, Salt  
Lake City, Utah 84111, attorneys for Defendants-Appellants, this  
21st day of December, 1978.

  
\_\_\_\_\_