

2009

# Hillcrest Investment, Scandia Investment LLC, Legacy Communities Llc, Charles H. Horman, M. Gordon Johnson, Autumn Ridge Development LLC, Alta Ridge Development LLC, Bell Mountain Corporation v. Sandy City : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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HILLCREST INVESTMENT, a Utah	:	
Partnership; SCANDIA	:	
INVESTMENT LLC, a Utah Limited	:	Court of Appeals Case No. 20090481-CA
Liability Company; LEGACY	:	
COMMUNITIES, LLC., a Utah	:	District Court Civil No. 050408561
Limited Liability Company; CHARLES	:	
H. HORMAN, an Individual; and M.	:	
GORDON JOHNSON, an Individual;	:	
AUTUMN RIDGE DEVELOPMENT,	:	
LLC a Utah Limited Liability	:	
Company; ALTA RIDGE	:	
DEVELOPMENT, LLC, a Utah	:	
Limited Liability Company, all	:	
successors in interest to BELL	:	
MOUNTAIN CORPORATION,	:	
	:	
Plaintiffs,	:	
	:	
vs.	:	
	:	
SANDY CITY, a municipal	:	
corporation and JOHN DOES 1-20,	:	
	:	
Defendants.	:	

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**APPELLANTS** Hillcrest Investment, Scandia Investment LLC, Legacy Communities, LLC, Charles H. Horman, M. Gordon Johnson, Autumn Ridge Development, LLC, Alta Ridge Development, LLC, all successors in interest of Bell Mountain Corporation

**APPELLANTS' REPLY BRIEF ON APPEAL**

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Appeal from the Final Ruling of the Third District Court,  
Salt Lake County, West Jordan Division, The Honorable Judge Royal Hansen

FILED  
UTAH APPELLATE COURTS

FILED 1 2 2010

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**ORAL ARGUMENT REQUESTED**

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IN THE UTAH COURT OF APPEALS

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MOUNTAIN CORPORATION,	:	
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**LIST OF ALL PARTIES TO THE PROCEEDING BELOW**

The Plaintiffs-Appellants:

Hillcrest Investment, Scandia Investment LLC, Legacy Communities, LLC, Charles H. Horman, M. Gordon Johnson, Autumn Ridge Development, LLC, Alta Ridge Development, LLC, all successors in interest of Bell Mountain Corporation

The Defendants-Appellees:

Sandy City, a municipal corporation

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## **PRELIMINARY STATEMENT**

Plaintiffs presented six issues on appeal. However, Sandy City's (hereinafter "Sandy") Appellee Brief responded to only three of the issues: 1. The agreement runs with the land; 2. The validity of the assignment; and 3. Plaintiffs as third party beneficiaries. Because Sandy failed to respond to Plaintiffs' other three issues, they have been conceded as true since they are not contested. This brief responds only to the three issues Sandy contests.

This Court must decide whether Plaintiffs have standing to enforce the contractual rights of the June 25, 1975 Contract (hereinafter the "1975 Contract") originally between Sandy and Bell Mountain Corporation/Horman properties, which affected the rights of the approximate 1,000 acres of Horman properties located in and adjacent to Sandy.

Before trial, Sandy made three attempts to have this case dismissed for an alleged lack of standing. Each time the Lower Court refused. But the Lower Court concluded after trial, that Plaintiffs lacked standing. That conclusion is not supported by the law or the facts and should be reversed. The 1975 Contract provides for its continued enforcement by both the parties to the contract, the owners of lots within the development, those with rights to the "Horman properties," as well as successors and assigns to these parties. Plaintiffs are owners of lots within the development, they are the group referred to as "Horman properties," and they are the successors and assigns. This Court's review as to standing is *de novo* and gives no deference to the lower court. *Bio-Thrust v. Division of Corporations*, 80 P.3d 164, 166 (Utah Ct. App. 2003).

## ARGUMENT

### **I. Sandy Argues a Failure to Marshal the Evidence. Plaintiffs Have Supported Each of Their Claims with Reference to the Record and Have "Marshaled" the Evidence.**

To successfully challenge a trial court's decision on appeal, an appellant must marshal all the facts, including reasonable inferences, upon which the trial court relied in its judgment, and demonstrate that the evidence is insufficient to support the findings. *Encon Utah, LLC v. Fluor Ames Kraemer, LLC*, 210 P.3d 263, 271 (Utah 2009). Appellants have the burden of marshaling evidence supporting the finding appellant challenges, and then showing the fatal flaw in the evidence. The fatal flaw must be "sufficient to convince the appellant court that the [trial] court's finding resting upon the evidence is clearly erroneous." *West Valley City v. Majestic Inv. Co.*, 818 P.3d 1311, 1315 (Utah Ct. App. 1991).

An appellate court gives no deference to a trial court's legal conclusions and reviews them for correctness. *Citizens for Responsible Transp. v. Draper City*, 190 P.3d 1245, 1248 (Utah 2008). Since most trial court's legal conclusions are based upon findings of fact, appellants are still required to marshal the evidence. *Kearns-Tribute Corp. v. Wilkinson*, 946 P.2d 372, 373 (Utah 1997). A finding of fact is not reviewed *de novo*: an appellate court reviews a trial court's finding of fact under a clearly erroneous standard. *State v. Pena*, 869 P.2d 932, 935 (Utah 1994). A factual finding is clearly erroneous when it is not adequately supported by the record, conflicts with the "clear weight of evidence," or if the reviewing court has a "definite and firm conviction that a mistake has been made." *Id.* at 935-36; see also *Kimball v. Kimball*, 217 P.3d 733, 741 (Utah Ct. App. 2009).

Sandy's argument that Plaintiffs have failed to marshal the evidence is wrong. In each instance, where necessary for decision of this Court on appeal, Plaintiffs have pointed to all the evidence received by the Lower Court at the trial which specifically controverts findings made by the Lower Court. Plaintiffs have demonstrated the Lower Court's findings are incorrect. Nevertheless, Sandy attempts to minimize the Lower Court's incorrect application of the law by changing the subject to marshaling the facts. The argument is without merit.

Sandy argues Plaintiffs failed to marshal the evidence with regard to three issues. First, without any specific support, Sandy argues Plaintiffs have failed to marshal evidence to support the factual statement made in paragraph 49 of Appellants' Opening Brief. Appellee Brief (hereinafter "Sandy Br.") p. 5. Paragraph 49 states: "Plaintiffs are successors in interest, intended third party beneficiaries, and property owners described as 'Horman properties' with respect to Bell Mountain under the 1975 Contract with Sandy." (Appellants' Opening Brief (hereinafter "App. Op. Br."), p. 16.) That paragraph is supported by citations to the record, the trial transcript, and exhibits used in trial, including "R. 1464, p. 206, lns. 6-25; p. 207, lns. 1-25; p. 208, lns. 1-21; Trial Exhibit ("Tr. Ex.") 25; Tr. Ex. 142, ¶ 16." *Id.* Furthermore, paragraphs 50-55 and pages 20-26 of Appellants' Opening Brief are dedicated to addressing the issue. Sandy's argument is demonstrably without merit. Noticeably absent from Sandy's argument is any citation to any part of the record not presented for your review. Plaintiffs have shown the facts demonstrate Plaintiffs are successors in interest, intended third party beneficiaries, and property owners of the property at issue.

Second, Sandy argues Plaintiffs have not challenged the Lower Court's finding of fact that the 1975 Contract was not assigned during the winding up process of Bell Mountain.

(Sandy Br., p. 19.) Here again Sandy is mistaken. The only testimony provided on this subject during trial was that "a valid assignment was made as part of the tax-planning strategy for the Horman family," and that "a formal liquidation agreement was prepared 'generically assigning all contracts, agreements, so forth to the successor entity.'" (App. Op. Br.", p. 34 (citing R. 1464, p. 165, lns. 3-21).) These facts were uncontested. There were no facts in the record to the contrary. Therefore, these are the only facts to be marshaled. Again, Sandy's argument is without merit.

Finally, Sandy generically argues Plaintiffs failed to marshal the evidence that Plaintiffs are assignees and an assignment was made. (Sandy Br., p. 27.) This argument ignores the facts in Plaintiffs' opening brief. It fails to recognize the Lower Court found there were documents in 2005 making an assignment of the 1975 Contract to Plaintiffs. (R. 1117-1130, ¶ 17.) The Lower Court recognized there was an assignment made in 2005, but rejected it because the Lower Court established a new winding up period time limit by judicial fiat. *Id.* That was an error of law, not a factual error. Therefore, it requires a review of the legal principles applied, not the facts relied on by the Lower Court. Accordingly, Sandy's argument that Plaintiffs have failed to marshal the evidence is without merit.

## **II. Plaintiffs Have Standing to Pursue the Claims of the Complaint As Sandy's Obligations in the 1975 Contract Run with the Land.**

Sandy argues the Lower Court correctly concluded the 1975 Contract does not run with the land because there is no privity of estate and no intent by the parties for the agreement to run with the land. Sandy argues the 1975 Contract was never in the chain of



title to the Horman property and there is no written manifestation of intent of the parties for the 1975 Contract to run with the land. These arguments are wrong.

Everything about the 1975 Contract shows that, at the time the parties entered into the agreement, they intended the benefits to last so long as the 1,000 acres of Horman property remained under development. The 1975 Contract applied to a very specific 1,000 acres of land belonging to the Horman family. (R. 1464, p. 13, lns. 23-24; p. 14, lns. 16-18; p. 16, lns. 21-25; Tr. Ex. 6(C), ¶ 12; Tr. Ex. 138; Tr. Ex. 139.) It is the same family developing the same land now asking for the 1975 Contract to be enforced. (R. 1464, p. 76, lns. 13-25; p. 77, lns. 1-12; p. 167, lns. 7-23; Tr. Ex. 37.) Further, all the original signatories to the Agreement testified exactly the same way: It was the intent of the signatories that the 1975 Contract run with the land. (R. 1464, p. 57, lns. 14-23; Tr. Ex. 20, ¶ 3(d)-(e); Tr. Ex. 142, ¶ 16.) There was NO contrary proof.

**A. Lack of Privity is not a Defense Sandy can Use to Avoid its Contractual Obligations.**

Sandy, in exchange for the conveyance of valuable water rights, water tank and delivery system built by the Horman family, agreed to waive flood control fees and one-half of the park fees on all of the Horman 1,000 acre property. (Tr. Ex. 6C; Tr. Ex. 10.) It was wrong to decide Plaintiffs lacked privity to enforce the 1975 Contract.

Privity of contract is required for an agreement to "run with the land." *Flying Diamond Oil Corp. v. Newton Sheep Co.*, 776 P.2d 618, 627 (Utah 1989). Privity of estate requires a particular kind of relationship between the original contracting parties. *Forest Meadow Ranch Prop. Owners Ass'n v. Pine Meadow Ranch Home Ass'n*, 118 P.3d 871, 877-

78 (Utah Ct. App. 2005). Vertical privity exists when, as here, "the devolution of an estate burdened or benefitted by a covenant from an original covenanting party to a successor." *Id.* A person in privity with another is one who is "so identified in interest with another that he represents the same legal right." *Searle Bros. v. Searle*, 588 P.2d 689, 691 (Utah 1978) (quotations and citation omitted). Also privity is "a mutual or successive relationship to rights in property." *Id.*; see also *Clotworthy v. Clyde*, 265 P.2d 420, 421 (Utah 1954) ("[A] successor is by assignment or conveyance as well as by descent"). Privity exists here because Plaintiffs are the successors to the estate of the original contracting parties, Bell Mountain and Horman properties. (Tr. Ex. 37(A)-(H).) Plaintiffs are the successors to Bell Mountain and are the current and past owners of the Horman properties.

Bell Mountain transferred its interests in the real property to Plaintiffs, by descent and by a conveyance. (*Id.*) "Horman properties" was, is, and always has been owned by members of the Horman family, who are now Plaintiffs in this matter. (*Id.*) Sandy gave no evidence contrary to Plaintiffs' proof of standing as a successor in interest. Sandy is bound to honor and Plaintiffs are entitled to enforce the obligations in the 1975 Contract as the successors to Bell Mountain and owners of the Horman properties.

**B. The Parties to the 1975 Contract Clearly Intended the Deferment of Flood Control Fees and One-Half of the Park Fees to Benefit the Horman Properties.**

Sandy claims it is necessary to have written evidence of intent in order for the covenants of the 1975 Contract to run with the land. Sandy cites *Flying Diamond*, for the proposition that the intention of the parties must be in writing for an agreement to "run with

the land." (Sandy Br., p. 18.) But they misstate the holding and misread the required writing established in that case by the Supreme Court.

The writing required by *Flying Diamond* is related to the Statute of Frauds' requirement for interests in real property. The writing does not need to include the intention to run with the land as an express provision of the agreement:

Finally, for a covenant to run with the land, it must be in writing. Because covenants that run with the land must be based on some interest in land, the statute of frauds must be satisfied. Furthermore, a properly executed and recorded writing also serves the critical and important function of imparting notice to subsequent purchasers. The Agreement was both written and recorded.

*Flying Diamond*, 776 P.2d at 629.

The 1975 Contract is a written instrument and satisfies the writing requirement of the Statute of Frauds. The intent requirement is likewise satisfied by paragraph 12:

In consideration of the above mentioned efforts and expenditures of Bell Mountain Corporation, Sandy shall defer payment of all water connection fees and charges which would otherwise be made to Bell Mountain Corporation and Horman properties located east of 2000 east [sic], north of 12000 south [sic] and south of 10000 south [sic] until such time as building permits are applied for by the individual owners of the lots contained therein and shall require payment from the said individual owners rather than Bell Mountain Corporation such fees as may be required shall be charged as provided by the then covenant fee resolution except that with relation to lots located in the 'RP Zone', neither Bell Mountain Corporation nor the owners of said lots located in the Pepperwood subdivision shall be required to pay 'flood control fees' as part of a connection fee and shall pay only one-half of the otherwise required 'park fee'.

(Tr. Ex. 6(C), ¶ 12.) The 1975 Contract provides that **all** water connection fees and charges otherwise payable by Bell Mountain "and Horman properties" shall be deferred until building permits are requested, and shall be payable to Sandy from the individual lot owners. Most

important to this appeal – and to the Lower Court below – Sandy contractually agreed Bell Mountain and Horman properties, as "the owners of said lots located in Pepperwood Subdivision," would not be required to pay any flood control fees and would pay only one-half of any park fee. *Id.* Though unnecessary, Paragraph 12 of the 1975 Contract, along with Paragraph 20 stating the "agreement is binding upon both parties, their successor and assigns," establishes the intent for the waiver of flood control fees and one-half of the park fees to run with the land. This obligation is enforceable against Sandy, runs with the land, and was intended to benefit Horman properties.

Although Sandy argues it is not bound by the 1975 Contract because it was not recorded, yet by their own admission the 1975 Contract was recorded with Sandy's Recorder's Office. (See Rec. 1465, p. 315, Ins. 6-25, p. 316, Ins. 1-4.) Furthermore, Sandy is estopped from making this argument: Utah Code Ann. § 57-2-102(3) ("This section [Utah Recording Statute] does not affect the validity of a document with respect to **the parties to the document and all other persons who have notice** of the document"). (Emphasis added). The recording requirement is meant to give general notice. *Nature's Sunshine v. Watson*, 174 P.3d 647, 650-51 (Utah Ct. App. 2007). As Sandy is a party to the 1975 Contract, whether the agreement was recorded is not relevant to notice for Sandy. *Crowther v. Mower*, 876 P.2d 876, 879 (Utah App. 1994). Sandy had actual notice of the contractual obligation and honored that obligation for many years.

**C. The 1975 Contract Expressly States the Agreement Is "Binding upon Successors and Assigns."**

Paragraph 20 of the Agreement specifically states: "This agreement is binding upon both parties, their successors and assigns." (Tr. Ex. 6(C), ¶ 20.) The original negotiators Dewey Bluth, the former mayor of Sandy, Charles Horman and Gordon Johnson, the principals for Bell Mountain/Horman properties, testified of the parties' intent when negotiating the 1975 Contract. They signed an unrefuted affidavit declaring the intention of the parties was for the 1975 Contract to run with the land. (Tr. Ex. 20, 3(d)-(e).)

Gordon Johnson and Charles Horman testified to the intent during trial. Gordon Johnson, speaking of the parties exempted from flood control fees and one half of the park fees, testified that: "All of the Horman properties ... everything within those coordinates, within that orange area of the Horman properties would be exempted." (R. 1465, p. 267, lns. 18 - p. 268, lns. 5.) Charles Horman testified "[the 1975] contract applied to everything that had yet to be developed and didn't apply to everything that had already been done .... This was to solve the problem for all of the undeveloped land." (R. 1464, p. 42, lns. 19-24.) Mr. Bluth was deceased at the time of trial. The Lower Court ignored the unrefuted testimony of the original negotiators and signatories to the 1975 Contract.

Further, the evidence showed Sandy also interpreted the 1975 Contract to run to "successors and assigns." In Sandy's letter, dated July 7, 1998, it states "[p]ursuant to the prior agreement dated June 25, 1975 between the City and Bell Mountain Corporation, the developer's predecessor in interest, the developer is entitled to water letters for 468 connections in the area defined in Exhibit A." (Tr. Ex. 142, ¶ 16.) Sandy's letter shows it interpreted the 1975 Contract to apply to Bell Mountain's successors and assigns. Sandy

waived the flood control fees and one-half of the park fees for decades with no regard to which entity was the "Developer." (Tr. Ex. 21, 31.) The Lower Court failed to consider this evidence in its ruling. This was error.

The Lower Court ignored privity established by the document itself, by the fact it was recorded with Sandy, who had actual notice of the Agreement as a party. The Lower Court further ignored the Agreement language making it binding and enforceable upon "successors and assigns," and ignored Sandy's own conduct, waiving fees under the Agreement for more than 20 years. This was error and should be reversed.

### **III. Plaintiffs Received Rights to the Agreement by Assignment.**

The Lower Court erred in finding Plaintiffs did not have standing. First, Plaintiffs are the owners of lots located within the relevant property. They are specifically mentioned as having enforceable rights in the 1975 Contract. Second, the only testimony relating to assignment proved Bell Mountain assigned its interests to Plaintiffs as part of a complex, tax-planning liquidation process. The Court wrongfully decided an assignment made in 2005 was outside of an undefined "winding up" period invented by the Court.

#### **A. The 1975 Contract Controls the Relationship.**

The 1975 Contract between the parties inures to the benefit of Plaintiffs. The agreement is between Sandy and Bell Mountain/Horman properties. (Tr. Ex. 6(C).) However, the contract specifies Bell Mountain and the owners of lots located within the Pepperwood Subdivision are not required to pay all water connection fees. *Id.* Horman properties is defined in the 1975 Contract, and in the Minutes of the City Council Meeting upon which the contract was based, as the Pepperwood Subdivision. The Pepperwood

Subdivision was all property located "east of 2000 East, north of 12000 South and south of 10000 South." (Tr. Ex. 6(C); Tr. Ex. 10; *see* R. 1464, p. 40, lns. 7-20; p. 42, lns. 19-24; R. 1465, p. 267, lns. 18-25; p. 268, lns. 1-5.) The Sandy City Council minutes (Tr. Ex. 10) state:

AND SANDY CITY WOULD AGREE TO ...

...

4. a. Defer all water connection and associated water charges of the Bell Mountain Corp. and Horman properties located east of 2000 East, north of 12000 South and south of 10000 South until water is required by individual lot owners.
- b. Deduct park fees from all city assessments on lots in Pepperwood (being a private area with its own parks).
- c. Exempt Pepperwood from the flood maintenance fee (flood maintenance up to a 10 year storm is covered by the Pepperwood Homeowner's Association).

The Sandy minutes, from which the 1975 Contract was prepared, shows the intent to defer "water connection and associated water charges" for the 1,000 acre Pepperwood development. (*Id.*) Sandy agreed to deduct park fees from all lots in the 1,000 acre Pepperwood area. (*Id.*) Sandy intended to exempt the 1,000 acres from the flood maintenance fee. (*Id.*) Thus, Bell Mountain and the owners of lots located in Pepperwood have standing to enforce the 1975 Contract against Sandy. The Plaintiffs are owners of property located within Pepperwood, and have been the developers of all the property. It was error for the Lower Court to find they did not have standing.

**B. The Assignment in 1987 by Bell Mountain Transferred all Rights in the 1975 Contract to Plaintiffs.**

The only testimony or evidence the Lower Court heard regarding the assignment of the 1975 Contract by Bell Mountain was it occurred as part of a complex tax-planning

strategy. Dave Evans testified it occurred in 1987 as part of a liquidation agreement and process. (R. 1464, p. 206, lns. 13-25; p. 207, lns. 1-25; p. 211, lns. 1-14.) Though the documents had not been located for the trial, they were found shortly after trial and were filed with the Court as part of a Motion for Relief from Judgment. (R. 1164-1407.)

Sandy also attacks the validity of the 1987 assignment by arguing it was not made to Longview Development, to whom Bell Mountain transferred a portion of the affected property. The argument is without merit. It is not Longview Development who must have standing in this action, but rather, the Plaintiffs who must have standing. They are the owners of the affected property and they are the parties who have been charged the fees.

**C. The Assignment in 2005 was Made to Acknowledge that Bell Mountain Made a Valid Assignment of the 1975 Contract to Plaintiffs.**

Notwithstanding the undisputed evidence regarding an assignment in 1987, in November, 2005, Bell Mountain again executed an assignment of the 1975 Contract to the Plaintiffs. Sandy does not dispute the act, but only its validity. It wrongfully claims such an assignment is "prohibited by law" because Bell Mountain was administratively dissolved in 1993. Sandy cites Utah Code § 16-10a-1405(1) to support this argument. The Lower Court held Bell Mountain could not wind up its affairs because it had not applied for reinstatement within two years. (R. 117-1130, ¶ 19.) Utah Code § 16-10a-1405(1) states:

(1) A dissolved corporation continues its corporate existence but may not carry on any business except that appropriate to wind up and liquidate its business and affairs, including:

- (a) collecting its assets;
- (b) disposing of its properties that will not be distributed in kind to its shareholders;
- (c) discharging or making provision for discharging its liabilities;



- (d) distributing its remaining property among its shareholders according to their interests; and
- (e) doing every other act necessary to wind up and liquidate its business and affairs.

Utah Code Ann. § 16-10a-1405(1) (2008).

The statute does not prohibit an assignment. In fact, the statute makes the contrary quite clear. It provides a dissolved corporation "continues its corporate existence" to allow it to "[do] every other act necessary to wind up and liquidate its business and affairs." *Id.* There is no set time period limiting winding up. *Id.* It leaves the door open for an indeterminate time to wind up the affairs of a corporation.

Although other states may statutorily limit the time allowed for winding up to a specific number of years, the Utah statute has no such limitation. And [the Utah Court of Appeals is] not aware of, nor does [appellant] point to, any case law that would suggest that the time frame for winding up is otherwise restricted to a specific time period.

*Terry v. Wilkinson Farm*, 173 P.3d 204, 207-08 (Utah Ct. App. 2007); *see also Orvis v. Johnson*, 2006 UT App 296, ¶ 4 (Utah Ct. App. July 13, 2006); *see also Miller v. Celebration Mining Co.*, 29 P.3d 1231, 1235-36 (Utah 2001). Other courts, interpreting statutes similar to Utah's, have found that there is no statutory time limit for winding up.<sup>1</sup>

Utah's Legislature placed no time limit on winding up, during which a corporation could do "every other act necessary to wind up and liquidate its business and affairs." *Id.* at

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<sup>1</sup>*Curtis v. United States*, 63 Fed. Cl. 172, 174 (Fed. Ct. Cl. 2004); *see also City of Klamath Falls v. Bell*, 490 P.2d 515, 520-21 (1971); *Falcone v. Hinsdale Gyn. & Obstetrics, Ltd.*, 499 N.E.2d 694, 699 (Ill. App. Ct. 1986); *Smith v. Taylor-Morely, Inc.*, 929 S.W.2d 918, 924 (Mo. App. 1996) (In interpreting Missouri Code Section 351.476 RS Mo. Cum. Supp. 1991, which is substantially similar to the relevant Utah Code section, "We find assignment of contract rights of a dissolved corporation to be allowable under Missouri law").

§16-10a-1405(1)(e). "A corporation may continue to exist as an entity distinct from its shareholder and, at the same time, be restricted from conducting business as usual." *Murphy v. Crosland*, 886 P.2d 74, 83 (Utah Ct. App. 1994). For example, a dissolved corporation is allowed to commence, maintain, and defend a lawsuit. Utah Code Ann. § 16-10a-1405(2)(e)-(g) (2009). Nowhere does the Utah Code require a corporation to apply for reinstatement to continue in a lawsuit.<sup>2</sup> It is untenable a corporation must apply for reinstatement to make an assignment (which is inherently an act of winding up), when it is not required by the statute. The Lower Court erred by finding Bell Mountain did not have authority to wind up its corporate affairs in 2005 when the Legislature allowed it.

Nevertheless, Sandy argues Bell Mountain was statutorily barred from making any assignment. Despite the Utah courts holding to the contrary, Sandy argues this Court should follow the holdings of two minority jurisdictions, *Sturtevant v. Winthrop*, 732 A.2d 264 (Me. 1999) and *Rushing v. Int'l Aviation Underwriters, Inc.*, 604 S.W.2d 239, 242 (Tex. App. 1980). *Sturtevant* is a Maine case, interpreting the Maine corporate winding up statute. *Sturtevant*, 732 A.2d at 267. Unlike Utah, at the time of the *Sturtevant* decision, Maine had

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<sup>2</sup> As one basis for finding the Plaintiffs did not have standing, the Lower Court found "If Bell Mountain was still winding up its affairs after its administrative dissolution, then for Bell Mountain to continue to act as a legal entity it should have applied for reinstatement within two years pursuant to Utah Code Ann. §16-10a-1422." (R. 1117-1130, ¶ 19.) This finding is irreconcilable with the purposes of dissolution. The purpose of dissolution is for the corporation to cease its existence and discontinue its business. The reinstatement provision allows a corporation to apply for reinstatement to continue its existence as a corporation and conduct business. Utah Code Ann. §16-10a-1422 (2008). Here, Bell Mountain intended to dissolve. It intended to cease conducting business and wind up its affairs. It is irreconcilable that for a corporation to continue to wind up its affairs and dissolve it would need to apply for reinstatement. This finding is contrary to the purposes of dissolution and the purposes behind Utah's Revised Business Corporation Act.

a two-year survival statute<sup>3</sup> for winding up. *Id.* *Rushing* is a Texas case, interpreting the Texas corporate winding up statute. *Rushing*, 604 S.W.2d at 242. Unlike Utah, at the time of the *Rushing* decision, Texas had a three-year survival statute. *Id.*

Utah does not have a survival statute. Under Utah Code § 16-10a-1405(1), a corporation may conduct activities "appropriate to wind up and liquidate its business and affairs." There is no time limit for winding up. Instead, the Legislature has allowed an indeterminate time for a corporation to wind up because "[w]hat is reasonable in one setting may not be in another." (R. 761-763, ¶ 1.) Reliance on either *Sturtevant* or *Rushing* would be inappropriate because each rely upon state-specific survival statutes inapplicable to Utah.

Sandy also argues that since Utah lacks a survival statute to govern the time period for winding up a corporation, then winding up must occur within a reasonable time. (Sandy Br., p. 26.) Sandy relies upon *Alpha Partners, Inc. v. Transamerica Inv. Mgmt., LLC*, 153 P.3d 714 (Utah Ct. App. 2006) for the proposition that a reasonable time should be imposed. (Sandy Br., p. 26.) The assertion is incorrect. The *Alpha Partners* Court examined the provisions of a contract, not a statute. *Id.* at 719. While a "reasonable time" may be appropriate for the interpretation of a contract, it is not appropriate for a statute. The Utah Supreme Court has held that "[w]e read the plain language of [a] statute as a whole[] and interpret its provisions in harmony with other statutes in the same chapter and related

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<sup>3</sup>Interestingly, since the *Sturtevant* decision, the Maine legislature has appealed the survival period for winding up. Me. Rev. Stat. Ann. tit. 13-C § 1406 (2009); *Bayside Prop. Maint., Inc. v. Preston*, 2009 Me. Super. LEXIS 110, \* 5 ("A reasonable conclusion one can draw from this amendment is that the Legislature deleted the three-year timeframe because it was arbitrary and artificial").

chapters." *LPI Servs. v. McGee*, 215 P.3d 135, 139 (Utah 2009) (second alteration in original) (quoting *Miller v. Weaver*, 66 P.3d 592, 597 (Utah 2003)). "In interpreting the meaning of . . . [o]rdinance[s], we are guided by the standard rules of statutory construction." *Rogers v. W. Valley City*, 142 P.3d 554, 556 (Utah Ct. App. 2006), ¶ 15 (omission and alterations in original) (quoting *Brown v. Sandy City Bd. of Adjustment*, 957 P.2d 207, 210 (Utah Ct. App. 1998)). "Where statutory language is plain and unambiguous, this Court will not look beyond the same to divine legislative intent. Rather, we are guided by the rule that a statute should generally be construed according to its plain language." *Brinkerhoff v. Forsyth*, 779 P.2d 685, 686 (Utah 1989); accord *Salt Lake Child & Family Therapy Clinic, Inc. v. Frederick*, 890 P.2d 1017, 1020 (Utah 1995) ("When language is clear and unambiguous, it must be held to mean what it expresses, and no room is left for construction." (citation omitted)). The Lower Court could not impose a reasonable time, but rather, should have followed the plain language of the statute.

Utah Code Ann. § 16-10a-1405 does not impose any time limit for winding up. Though some states have imposed a time limit to wind up, Utah does not.<sup>4</sup> Utah and the vast majority of states follow the Model Business Corporation Act which does not have a time-

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<sup>4</sup>Del. Code Ann. tit. 8§ 278 (2009) (Delaware has a three-year time limit for winding up a corporation); Kan. Stat. Ann. § 17-6807 (2009) (Kansas has a three-year time limit for winding up a corporation); Okla. Stat. tit. 18 § 1099 (2009) (Oklahoma has a three-year time limit for winding up a corporation); R.I. Ge. Laws § 7-1.2-1325 (2009) (Rhode Island has a five-year time limit for winding up a corporation).

specific survival statute and allows a corporation to do all activities necessary to wind up with no time limitation.<sup>5</sup>

Had it intended to, the Utah Legislature could have followed these minority states and imposed a statutory time limit. It did not. The Utah Legislature has imposed time limits where it wishes to do so, but in this instance, the Legislature has given an indeterminate time for a corporation to wind up its business affairs. Thus, Sandy's argument must fail, and this Court should reverse the decision of the Lower Court because a valid assignment was made.

#### **IV. The Lower Court Erred in Finding Plaintiffs Lack Standing as Third Party Beneficiaries.**

##### **A. Plaintiffs are Third Party Beneficiaries as "Owners of the Said Lots Located in the Pepperwood Subdivision."**

Sandy argues the contract language does not establish an intent to confer a separate and distinct benefit on Plaintiffs and the beneficiary is the real property rather than an identifiable individual. However, Sandy misinterprets Plaintiffs' argument on appeal. Plaintiffs argue they are "owners of the said lots located in the Pepperwood Subdivision" and are entitled to the waiver of flood control fees and one-half of the park fees under Paragraph

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<sup>5</sup>Utah Code Ann. § 16-10a-1405 (2009); *c.f.* Ariz. Rev. Stat. § 10-1405 (2009); Ark. Code. Ann. § 14-27-1405 (2009); Colo. Rev. Stat. § 7-114-105 (2009); Conn. Gen. Stat. § 33-884 (2009); Fla. Stat. Ann. § 607.1405 (2009); Haw. Rev. Stat. Ann. § 414-385 (2009); Idaho Code Ann. § 30-1-1405 (2009); 805 Ill. Comp. Stat. Ann. 5/12-30 (2009); Ind. Code Ann. § 23-1-45-5 (2009); Iowa Code § 490.1405 (2009); Ky. Rev. Stat. Ann. § 271B.14-050 (2009); Me. Rev. Stat. Ann. tit. 13-C § 1406 (2009); Mass. Ann. Laws. ch. 156D, § 14.05 (2009); Miss. Code Ann. § 79-4-14.05 (2009); Mo. Rev. Stat. § 351.476 (2009); Rev. Code Wash. § 23B.14.050 (2009). Washington interprets the winding up period as "indefinite." *Ballard Sq. Condo v. Dynasty Constr.*, 108 P.3d 818, 823-24 (Wash. Ct. App. 2005).

12 of the 1975 Agreement. (App. Br., pp. 25-26.) This is a separate and distinct benefit upon an identifiable third party.

Whether Plaintiffs qualify as intended third-party beneficiaries must be determined from the intentions of the parties from the contract language. *Tracy Collins Bank & Trust vs. Dickamore*, 652 P.2d 1314, 1315 (Utah 1982); *see also Ron Case Roofing & Asphalt v. Blomquist*, 773 P.2d 1382, 1386 (Utah 1989) (Intent is also determined from the facts and circumstances.) "The intent of the contracting parties to confer a separate and distinct benefit must be clear." *Id. (citing Rio Algom Corp. v. Jimco Ltd.*, 618 P.2d 497, 506 (Utah 1980).

Plaintiffs are identifiable owners of lots in Pepperwood who are entitled to receive the separate benefit of waiving flood control fees under the 1975 Contract. The 1975 Contract was an agreement between Bell Mountain/Horman properties and Sandy. Paragraph 12 identifies parties to receive benefits under the contract including Bell Mountain, Sandy, Horman properties, and owners of lots in Pepperwood. (Tr. Ex. 6(C), ¶ 12.) Because Bell Mountain, Horman properties and Sandy are the original contracting parties, they cannot be intended third party beneficiaries. Only the owners of lots in Pepperwood can so qualify.

The Lower Court found Horman properties are intended third party beneficiaries of the benefit of deferring water connection fees (although they are a direct party, not a third-party to the contract). (*Id.*; *see also* Rec. 1117-1130, ¶ 20.) However, contrary to the Lower Court's findings, the "owners of the said lots located in the Pepperwood Subdivision" are also third party beneficiaries. They are an identified third party to the 1975 Agreement. They are a separate, clearly-designated group of parties in the 1975 Agreement. They are specifically named as the parties for whom Sandy shall waive all flood control fees and one-half of the

park fees. They received title to the property through various transfers by deed. (Tr. Ex., 37 (A)-(H).) Each transfer is accompanied by a warranty deed evidencing a transfer of a portion of the property to Plaintiffs. (*Id.*) Plaintiffs are "owners of the said lots located in the Pepperwood Subdivision." Thus, Plaintiffs are clearly-named and identifiable parties under the 1975 Contract with standing to enforce it.

Further, Plaintiffs, as the "owners of the said lots located in Pepperwood Subdivision," receive a separate and distinct benefit under the 1975 Agreement. Sandy agreed to waive the flood control fees and one-half of the park fees for them. Paragraph 12 clearly sets out a separate benefit to Bell Mountain "in consideration of the efforts, to waive water connection fees." (Tr. Ex. 6(C), ¶ 12.) But this benefit is not the benefit to the "owners of the said lots located in Pepperwood Subdivision." That benefit is separate and distinct. It was error to find that Plaintiffs lacked standing as third party beneficiaries. This Court should reverse.

**B. The Course of Dealings between the Parties Shows Intent for Plaintiffs to be Third Party Beneficiaries of 1975 Agreement.**

The course of conduct and dealings between the parties shows Plaintiffs are intended third party beneficiaries under the 1975 Agreement. Sandy fails to address this argument and ignores the parties' course of dealing.

To determine the meaning of an ambiguous contract, the court will look "not only to the language itself but to the acts and conduct of the parties." *Hawaiian Equipment Co., Limited v. Eimco Corporation*, 207 P.2d 794 (1949). The court must place itself "in the situation of the parties at the time the [1975 Contract] was prepared. The language used in the instrument should be construed in the light of the facts surrounding and leading up to the

written memorandum." *Id.* "In the interpretation of contract, the interpretation given by the parties themselves as shown by their acts will be adopted by the court." *Hardinge Co. v. Eimco Corp.*, 266 P.2d 494, 496 (Utah 1954).

Sandy and the Lower Court ignore the parties' course of dealings and conduct since 1975. In fact, the Lower Court did not even mention the parties' course of dealings or conduct. Charles Horman testified "[t]he city honored [the 1975 Contract] for over two decades and the fees changed during that time and they waived them every time." (R. 1464, p. 57, lns. 14-23.) He testified on "[e]very [phase of development Sandy] waived fee on, maybe 19 phases of Pepperwood ... [Sandy] waived the fees on each and every one of them and we did them in different entities, under different administrations and the contract was always honored." (R. 1464, p. 80:1-11.) Sandy continually waived the flood control fees on the 1,000 acres for over 20 years. (Tr. Ex. 21.) Sandy waived flood control fees for Legacy Development (Tr. Ex. 142), Longview Development Company (Tr. Ex. 21), Charles H. Horman Company (*Id.*), Horman Construction Company (*Id.*), and others, all of which developed or owned lots in the Pepperwood subdivision. (Tr. Ex. 142.) The course of conduct between these parties over so many years demonstrates Sandy's intention to continue to apply the benefits of the 1975 Contract to its third party beneficiaries. Thus, the Lower Court erred in failing to consider the parties conduct and contemporaneous interpretation of the 1975 Contract, as required by Utah law. *Ron Case Roofing*, 773 P.2d at 1386.

**C. The 1975 Contract Should be Construed Against Sandy as Drafter.**

The Lower Court erroneously ruled Plaintiffs were not intended third party



beneficiaries of the waiver of flood control fees because Plaintiffs are not RP Zone lot owners and, even if Plaintiffs were Horman properties, Horman properties never received the benefit of the waiver of flood control fees. (R. 1117-1130, ¶ 20.) The Lower Court interpreted Paragraph 12 to waive flood control fees only for lots located in the RP zone. However, this interpretation is contrary to the intent of the parties and the law.

"Under well-accepted rules of contract interpretation, [the court] look[s] to the language of the contract to determine its meaning and the intent of the contracting parties." *Café Rio v. Larkin-Gifford-Overton*, 207 P.3d 1235, 1240 (Utah 2009). "It is axiomatic that a contract should be interpreted so as to harmonize all of its provisions." *Jones v. Hinkle*, 611 P.2d 733, 735 (Utah 1980). Contracts should be construed as a whole and all terms given effect where practicable. *Id.* However, if the contract is ambiguous and the parties' intent cannot be gleaned from extrinsic evidence, the ambiguities should be construed against the drafter. *Wilburn v. Interstate Elec.*, 748 P.2d 582, 585 (Utah Ct. App. 1988).

First, the Lower Court failed to consider the circumstances of the 1975 Contract and development of the Horman properties at the time the 1975 Contract was signed. At the time the 1975 Contract was signed, only three phases of the Pepperwood property had been annexed into Sandy. (Rec. 1117-1130, n. 2.; R. 1464, p. 267, ln. 10-14.) These three phases were zoned RP (Residential-Private). None of the other 1,000 acres of "Horman properties" were annexed into Sandy and no other property had been zoned. *Id.* At the time, Horman properties expected the remaining acreage would be annexed to Sandy, but no other development had begun. Paragraph 12 of the 1975 Contract referenced the RP zone to identify only the three phases of development previously annexed into Sandy. It is

unreasonable the parties would tie benefits to future zoning when there was no guarantee of what the remaining Horman properties would be zoned when annexed into Sandy, and no guarantee the RP zone would exist in future phases. The reference to RP zone was merely to distinguish between the property in 1975 annexed and zoned by Sandy and the remaining acreage owned by Horman properties. For 20 years after the 1975 Contract was entered into, Sandy continued to waive the fees for Pepperwood properties, most of which were not zoned RP. (Tr. Ex. 21.) The RP zone was never a consideration until this case was filed.

Second, the Lower Court failed to harmonize all provisions in the 1975 Contract. The Lower Court failed to define "Pepperwood" and instead relied on the RP Zone lot owners to conclude the flood control fee waiver applied to them. (Rec. 1117-1130, p. 5.) That interpretation flies in the face of the Sandy minutes discussed above. (Tr. Ex. 10.) The minutes identify Bell Mountain Corporation and Horman properties as "located east of 2000 east, north of 12000 South and south of 10000 South ...." (*Id.*, (4)(a).) The subsequent paragraphs refer to that same property as "Pepperwood" and state the City will "[e]xempt Pepperwood from the flood maintenance fee." (*Id.*, (4)(c).) The introductory paragraphs state "Bell Mountain Corporation has previously and now is continuing to develop a large tract of land on the east side of Sandy; and ... the Pepperwood Subdivision is unique among its counterparts ... [and] Bell Mountain Corporation is the developer of the said 'Pepperwood' ...." (Tr. Ex. 6(C).) Sandy used the term "Pepperwood" to describe the entire 1,000 acres belonging to the Horman family. (R. 1464, p. 40, lns. 7-20; *see also* Tr. Ex. 10.)

Further, the Sandy minutes distinguish between each benefit in Paragraph 12. The deferment of flood control fees is a separate benefit from the deferment of water connection

fees and park fees. (Tr. Ex. 10.) Also, the RP zone lots owners is merely to distinguish between the already developed property, which had been annexed in 1975 by Sandy, and the remaining undeveloped Horman properties.

Third, the Lower Court failed to construe these provisions against Sandy as the party who drafted the 1975 Contract. At trial, Plaintiffs' counsel cross-examined Sandy's witness, Shane Pace, and asked numerous questions about the construction of Paragraph 12 and the placement of punctuation, stating:

Q. From the start of 12 period, "In consideration of" to the "the park fee" we don't encounter another period until after the quote after park fee, do we?

A. No, it doesn't appear we do.

Q. It's one sentence. In fact, if you were going to divide it there are only two commas that appear in this entire paragraph, aren't there?

...

A. There's one there and one after the RP zone.

Q. Yes, after the RP zone. There it is. Okay. This, comma, located east of 20<sup>th</sup> East, north of 120<sup>th</sup> South and south of 100 South, that comma appears to be in connection with the description of the Pepperwood area or the Horman property, correct?

A. Yes.

Q. Okay. The other comma, the only other bit of punctuation that's provided to us is right there after RP zone, do you see that?

A. Yes, I do.

Q. Let's assume for a moment that that comma divides this long run on sentence into two, okay? And I want you to assume that because that comma cuts that clause off from what follows after that clause, tell me what the thought, "Neither Bell Mountain Corporation nor the owners of the said lots located in Pepperwood Subdivision shall be required to pay flood control fees as part of the connection fee and shall pay only one half of the otherwise required park fee." What does that thought mean to you?

A. Well, it would be lot owners in the Pepperwood

Subdivision wouldn't be required to pay the flood control fee and half the park fee.

(Rec. 1464, pp, 397:8-14, 18-25; 398:1-15.)

The construction and punctuation of Paragraph 12 can only lead to the conclusion the lot owners in the RP Zone at the time of signing were excluded from any benefit. As such, they cannot receive any benefit under the 1975 Contract and cannot be considered third party beneficiaries. As Sandy's witness, Shane Pace, testified, the construction and punctuation of Paragraph 12 name the lot owners located in the Pepperwood Subdivision as third party beneficiaries to receive the benefit of the waiver of flood control fees. (*Id.*)

The 1975 Contract must be construed against Sandy. The circumstances under which the 1975 Contract was made, the negotiations and writings leading up to its formation, and the construction and punctuation of Paragraph 12 only lead to the conclusion that the "owners of the said lots located in Pepperwood Subdivision," not RP zone lot owners, are the intended third party beneficiaries of the flood control fee waiver. Plaintiffs are the "owners of the said lots located in Pepperwood Subdivision." Therefore, in construing the 1975 Contract against Sandy, Plaintiffs should receive the benefit of the flood control fee waiver.

Thus, the Lower Court again erred in failing to recognize the rights of the Appellants to enforce the 1975 Contract. In addition, Appellants are the actual owners of the property. By virtue of the clear language of the 1975 Contract, the waiver of the flood control fees and one half of the park fees was enforceable by the owners of the property. Furthermore, the Lower Court entirely failed to consider the conduct of the parties. For more than 20 years Sandy waived these fees. Without any basis apart from a desire to collect additional revenue,

Sandy began to ignore it. It was error for the Lower Court not to consider Sandy's own actions showing the contract's real meaning. It was also error for the Lower Court not to construe the terms of the 1975 Contract against Sandy. Though the language of paragraph 12 is clear, once found ambiguous the Lower Court failed to apply basic hornbook law. The ambiguous language should be construed against Sandy, as the drafter. That was error.

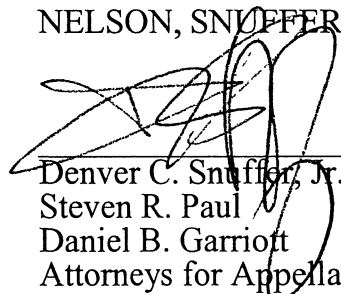
The Lower Court should have found Appellants have standing to enforce the Contract. Whether as owners of the property, successors or assigns, third party beneficiaries, or through the various theories of privity, Appellants have standing.

### CONCLUSION

In addition to the arguments set forth in Plaintiffs' Opening Brief, the Court must find that Plaintiffs are valid assignees of the 1975 Contract, and therefore have standing to enforce its terms. Alternatively, they are third party beneficiaries with valid rights to enforce or the 1975 Contract runs with the land. Given that Plaintiffs are owners of the property, they have standing to enforce its terms. The Lower Court erred and should be reversed.

DATED this 12 day of February, 2010

NELSON, SNIFFER, DAHLE & POULSEN



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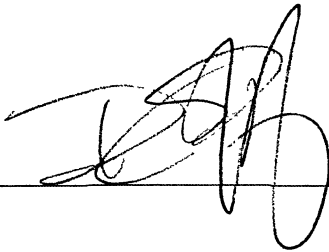
**CERTIFICATE OF SERVICE**

I hereby certify that two true and correct copies of the forgoing **APPELLANTS'**  
**REPLY BRIEF ON APPEAL** were mailed, postage prepaid, faxed or hand delivered to the  
party listed below and eight (one containing an original signature) were filed with the Utah  
Court of Appeals:

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Sent Via:  
☒ Mail (Postage Prepaid)  
☐ Hand Delivery  
☐ Facsimile

DATED this 12 day of February, 2010.

  
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