

2009

Hillcrest Investment, Scandia Investment LLC,
Legacy Communities LLC, CHarles Horman ,M.
Gordon Johnson, Autumn Rldge Development
LLC, Alta Ridge Development LLC v. Sandy City :
Brief of Appellee

Utah Court of Appeals

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George A. Hunt; Stephen T. Hester; Williams and Hunt; attorneys for appellees.

Denver C. Snuffer, Steven R. Paul, Daniel B. Garriott; Nelson, Snuffer, Dahle and Poulsen; attorneys for appellants.

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HILLCREST INVESTMENT, a Utah :
partnership; SCANDIA INVESTMENT, :
LLC, a Utah limited liability company; :
LEGACY COMMUNITIES, LLC, a Utah :
limited liability company; CHARLES : Case No. 20090481-CA
HORMAN, an individual; M. GORDON : (Third District Case No.
JOHNSON, an individual; AUTUMN : 050408561)
RIDGE DEVELOPMENT, LLC, a Utah :
limited liability company; and ALTA RIDGE: PRIORITY NO. 15
DEVELOPMENT, LLC, a Utah limited :
liability company, :
:
Plaintiffs and Appellants, :
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SANDY CITY, a municipal corporation; :
and JOHN DOES 1-20, :
:
Defendants and Appellees. :
:

**Appeal from a Final Judgment of the Third Judicial District Court,
Salt Lake County, West Jordan Division
Honorable Royal I. Hansen, Presiding**

FILED
UTAH APPELLATE COURTS
DEC 21 2009

DENVER C. SNUFFER (3032)
STEVEN R. PAUL (7423)
DANIEL B. GARRIOTT (9444)
**NELSON, SNUFFER, DAHLE
& POULSEN, P.C.**
10885 South State Street
Sandy, Utah 84070
Telephone: (801) 576.1400
Facsimile: (801) 576.1960
Attorneys for Plaintiffs/Appellants

GEORGE A. HUNT (1586)
STEPHEN T. HESTER (9981)
WILLIAMS & HUNT
257 East 200 South, Suite 500
Post Office Box 45678
Salt Lake City, Utah 84145-5678
Telephone: (801) 521.5678
Facsimile: (801) 364.4500
Attorneys for Defendant/
Appellee Sandy City

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**NELSON, SNUFFER, DAHLE
& POULSEN, P.C.**
10885 South State Street
Sandy, Utah 84070
Telephone: (801) 576.1400
Facsimile: (801) 576.1960
Attorneys for Plaintiffs/Appellants

GEORGE A. HUNT (1586)
STEPHEN T. HESTER (9981)
WILLIAMS & HUNT
257 East 200 South, Suite 500
Post Office Box 45678
Salt Lake City, Utah 84145-5678
Telephone: (801) 521.5678
Facsimile: (801) 364.4500
Attorneys for Defendant/
Appellee Sandy City

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STATEMENT OF JURISDICTION

The Court of Appeals has jurisdiction over this appeal pursuant to Utah Code Ann. § 78A-4-103(2)(j).

STATEMENT OF ISSUES AND STANDARD OF REVIEW

I. Whether the trial court correctly held that Plaintiffs/Appellants (“Plaintiffs”) do not have standing to enforce the terms of the June 25, 1975 Agreement (the “Agreement”) between Bell Mountain Corporation (“BMC”) and Defendant/Appellee Sandy City (the “City”) because the Agreement is not a covenant that runs with the land.

Preservation of Issue: This issue was preserved in the trial court in the City’s Memoranda in Support of its Motion to Dismiss [R. 66-83; 115-131], the City’s Memoranda in Support of its Motion for Summary Judgment [R. 237-302; 711-722] and during the bench trial in this matter. [R. 1464-65.]

Standard of Review: Interpretation of contract terms is a question of law which is reviewed for correctness. Canyon Meadow Homeowners Ass’n v. Wasatch County, 2001 UT App 414, ¶ 7, 40 P.3d 1148. The question of whether the evidence adequately supports a trial court’s findings of fact, which in turn form the basis of its interpretation of contract terms, is reviewed under a clearly erroneous standard. Menzies v. Galitka, 2006 UT 81, ¶ 55, 150 P.3d 480.

II. Whether the evidence supports the finding of the trial court that Plaintiffs do not have standing to enforce the Agreement because the Agreement was not lawfully assigned to the Plaintiffs.

Preservation of Issue: This issue was preserved in the trial court in the City's Memoranda in Support of its Motion to Dismiss [R. 66-83; 115-131], the City's Memoranda in Support of its Motion for Summary Judgment [R. 237-302; 711-722] and during the bench trial in this matter. [R. 1464-65.]

Standard of Review: The question of whether the evidence adequately supports a trial court's findings of fact is reviewed under a clearly erroneous standard. Menzies v. Galitka, 2006 UT 81, ¶ 55, 150 P.3d 480.

III. Whether the trial court correctly held that Plaintiffs do not have standing to enforce the Agreement because Plaintiffs are not third party beneficiaries to the Agreement.

Preservation of Issue: This issue was preserved in the trial court in Plaintiffs' Memoranda in Support of their Cross-Motion for Summary Judgment [R. 306-692] and during the bench trial in this matter. [R. 1464-65.]

Standard of Review: Interpretation of contract terms is a question of law which is reviewed for correctness. Canyon Meadows Homeowners Ass'n v. Wasatch County, 2001 UT App 414, ¶ 7, 40 P.3d 1148. The question of whether the

evidence adequately supports a trial court's findings of fact which in turn form the basis of its interpretation of contract terms is reviewed under a clearly erroneous standard. Menzies v. Galitka, 2006 UT 81, ¶ 55, 150 P.3d 480.

PROVISIONS OF STATUTES AND RULES

The interpretation of Utah Code Ann. § 16-10a-1405(1) (1992) is of importance to this appeal; a copy of this statute is attached hereto as Addendum A.

STATEMENT OF THE CASE

NATURE OF THE CASE AND COURSE OF PROCEEDINGS BELOW

This is a breach of contract case arising out of an Agreement between BMC and the City dated June 25, 1975. The City moved to dismiss and later for summary judgment arguing that Plaintiffs lacked standing to enforce the Agreement. Both motions were denied because of perceived factual questions. In order to resolve the factual matters, a bench trial was held on October 21 and 22, 2008 before the Honorable Royal I. Hansen. Following trial, Judge Hansen ordered the parties to submit Supplemental¹ Findings of Fact and Conclusions of Law with citations to the trial record, including citations to trial exhibits and the trial transcript. Judge Hansen also ordered the parties to submit post-trial briefs with similar citations to the trial record. Judge Hansen then heard closing arguments on December 10,

¹ The parties had each submitted proposed Findings of Fact and Conclusions of Law prior to trial.

2008. Judge Hansen issued his Findings of Fact and Conclusions of Law and Order on January 27, 2009, holding that the Plaintiffs lacked standing to enforce the Agreement, and further observing that even if standing did exist, under the contract terms, no breach had occurred. The Order of January 27, 2009, requested the City to submit a final Judgment which it did on February 12, 2009. Plaintiffs objected to the form of Judgment and then prior to its entry, filed a Motion for Relief from Judgment on April 17, 2009 under Rule 59(a) of the Utah Rules of Civil Procedure claiming they had acquired newly discovered evidence. Judge Hansen issued and entered Judgment of Dismissal on May 13, 2009. Plaintiffs filed their Notice of Appeal on June 1, 2009. After Plaintiffs had filed their Notice of Appeal, Judge Hansen issued his ruling on Plaintiffs' Motion for Relief from Judgment on June 30, 2009.² No other notice of appeal was filed thereafter.

STATEMENT OF FACTS

PRELIMINARY STATEMENT

Rather than follow the time-honored process of marshaling evidence and challenging Findings of Fact with which they disagree, Plaintiffs have chosen to characterize all issues in this appeal as legal issues and selectively cite to the record for

² Because the Notice of Appeal was filed prior to entry of the Ruling and Order on the post-trial motions, no matters raised in the Rule 59 Motion can be heard in this appeal. Rule 4(b)(2), Utah R. Appellate Proc.

factual statements to support their assertions, regardless of whether they conflict with the findings of the trial court. See, e.g., paragraph 49 of the Statement of Facts in Plaintiffs' Brief *vs.* Finding of Fact ¶ 5.B.1. They likewise state legal conclusions as facts, even though they directly conflict with conclusions of law drawn by the trial court. Id. This approach alone gives this Court the discretion to ignore such assertions and accept as true the findings of the lower court. United Park City Mines v. Stichting Mayflower Mountain Fonds, 2006 UT 35, ¶ 26, 140 P.3d 1200; Chen v. Stewart, 2004 UT 82, ¶ 20, 100 P.3d 1177.

The following Facts consist of those facts found by the trial court and unchallenged on this appeal that were relied upon by the trial court in reaching its conclusion that Plaintiffs had no standing to enforce the Agreement.

FACT STATEMENT

Context of the Agreement. This dispute arises out of the Agreement executed between the City and BMC on June 25, 1975. BMC was the owner and developer of a large tract of land on the east side of the City referred to as the "Pepperwood Subdivision" and identified as "Horman properties" in the Agreement. [R. 1118 at ¶ 1.]³ Plaintiff Charles Horman was the president and Plaintiff Gordon

³ For the Court's convenience, a true and correct copy of the trial court's Findings of Fact and Conclusions of Law and Order are attached hereto as Addendum B. [R. 1117-1130]. The City will hereinafter cite to the trial court's Findings of Fact and Conclusions of Law as Addendum B.

Johnson was the vice-president of BMC. [Ex. 32.] At the time the City and BMC entered into the Agreement, only a portion of the Pepperwood Subdivision had been annexed into the City, about 141 RP Zoned lots, some of which had been sold to individual lot owners. [Addendum B ¶ 3.] The only lots located in the RP Zone consisted of Phases I, II and III of the Pepperwood Subdivision. [Id. n.2.] The remaining property owned by BMC was either zoned "A-1" (agricultural), or had not yet been annexed into the City. [Id.]

Prior to 1975, Salt Lake County was responsible for flood control on the east side of the City, including the property then owned by BMC. [Addendum B ¶ 5.B.2.] The City assumed this responsibility in February of 1975. [Id.] Salt Lake County – and eventually the City – charged developers such as BMC flood control fees to provide a source of funds to construct and maintain infrastructure to control surface flood water resulting from storms. [R. 1465; Tr. p. 327.] If Salt Lake County or the City was not required to build and maintain infrastructure on a developer's property to control surface flood water, then neither the County nor the City charged the developer flood control fees for that development. [R. 1465; Tr. pp. 358-359.]

During the time Salt Lake County was responsible for flood control on the east side of the City, it developed a map which identified certain portions of the

Pepperwood Subdivision where it was anticipated that natural precipitation would be absorbed into the ground on site due to the sandy soil conditions and the relatively flat topography. [Addendum B ¶ 5.B.2; Ex. 114; R. 1465; Tr. pp. 322-324, 427-428.] The first nine (9) phases of the Pepperwood Subdivision are located in that certain portion of property identified on the map where it was anticipated that natural precipitation would be absorbed into the ground on site due to the sandy soil conditions and the relatively flat topography. [Addendum B ¶ 5.B.2.] Thus, minimal flood control infrastructure was required in the first nine phases of Pepperwood and, prior to the execution of the Agreement, neither Salt Lake County, nor the City charged BMC any flood control fees on Phases I and II of the Pepperwood Subdivision. [Id.]

Final approval of the Phase III plat was still pending before the City just prior to execution of the Agreement. [R. 1465; Tr. pp. 347-349.] Consistent with Phases I and II, BMC, through its president Plaintiff Charles Horman, originally requested that the County waive the flood control fees associated with Phase III of Pepperwood because “[a]ccording to our sources, the pervious sand conditions as exist in areas such as Pepperwood are more effective in collecting water than storm sewers, which carry water off too quickly and lower the water table.” [Ex. 4.] Mr. Horman subsequently requested that the City waive the flood control fees on Phase

III because “potential flood damage up to a ten (10) year storm becomes the responsibility of the Pepperwood Homeowners Association which owns the road system.” [Ex. 3.]

Prior to the execution of the Agreement, the City experienced a rapid growth of subdivisions being annexed into the City. [R. 1465; Tr. p. 340.] This rapid growth stressed the City’s ability to provide adequate water services to the newly annexed subdivisions. [R. 1465; Tr. pp. 340, 343.] In an effort to address the infrastructure shortage created by the volume of annexations, on April 23, 1975, the City declared a 90-day moratorium on the acceptance of new subdivisions within the City limits or any new annexations lying outside the exterior boundaries of the City due to a capacity problem in the City’s water system. [Ex. 110; R. 1465; Tr. pp. 344-345.] On May 7, 1975, the City also passed an ordinance requiring that prior to final approval of new subdivision plats by the City, developers must “pre-pay” the water connection fees for each lot identified on the proposed subdivision plat. [Ex. 124.] Because final approval of Phase III was still pending prior to the execution of the Agreement, the moratorium on approving subdivision plats precluded the final approval of Phase III of Pepperwood. [R. 1465; Tr. pp. 347-349.] In addition, the May 9, 1975 Ordinance would also have required BMC to “pre-pay” all water connection fees for the lots identified on the Phase III plat. [Ex. 124.]

In an effort to gain final approval of Phase III and move forward with development of its property, BMC entered into the Agreement with the City. [Addendum B ¶ 2 n.1; Ex. 6(c); R. 1464; Tr. pp. 33-34.] In the preamble of the Agreement, the parties acknowledged that the City “has a need to increase water storage and production in its corporate limits particularly on its east side” and that “Bell Mountain is developing a large tract of land on the City’s east side.” [Addendum B ¶ 2; Ex. 6(c).] The preamble further provides that BMC “desires to assist Sandy in achieving its goals regarding water development and distribution while likewise developing its own properties.” [Id.]

Under the terms of the Agreement, BMC agreed to design and construct a three-million gallon water reservoir which would help alleviate the stress on the City’s ability to provide adequate water services to the newly annexed subdivisions. [Ex. 6(c); R. 1464; Tr. pp. 33-34.] Pursuant to the terms of the Agreement, the City paid BMC \$300,000 for construction costs related to the reservoir.⁴ [R. 1465;

⁴ Throughout their Statement of Facts, Plaintiffs make multiple statements which either directly, or indirectly, suggest that “the water rights and well given up by the Hormans in the 1975 Contract are worth millions of dollars.” [Pls.’ Br. p. 13.] Despite Plaintiffs’ unsubstantiated statements, however, no credible evidence regarding the actual value of the water rights referred to was ever presented at trial. Moreover, any such evidence would have been wholly irrelevant and immaterial to the trial court’s interpretation of the Agreement and ultimate determination that Plaintiffs lack standing to enforce the Agreement.

Tr. p. 350.] The Agreement further provided that the City would not require BMC to pre-pay the water connection fees pursuant to the May 7, 1975 Ordinance, and the City confirmed its decision not to charge BMC flood control maintenance fees on Phase III of the Pepperwood Subdivision:

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 north of 12000 South and south of 10000 South 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 the 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.'

[Ex. 6(c) ¶ 12 (emphasis added).]

Consistent with the terms of the Agreement, BMC did not pay flood control fees on Phase III of Pepperwood.⁵ [Addendum B ¶ 5.B.2. n.3.] In addition, neither BMC, nor future developers were required to pay flood control fees on Phases IV

⁵ In 1975, park fees were paid by individual lot owners, not developers. [Addendum B ¶ 5.B.1.] Therefore, the only beneficiary of this portion of the Agreement was the RP Zone lot owners who purchased lots from the developers, not BMC or subsequent developers. [Id.]

through IX of Pepperwood because those phases were “located in that certain portion of property identified on the Salt Lake County map where the City anticipated that natural precipitation would be absorbed into the ground on site due to the sandy soil conditions and relatively flat topography.” [Id.] However, the City assessed the Plaintiffs’ flood control fees on Phase X – and subsequent phases – of Pepperwood because: (1) the topography and soil density of the land rendered it incapable of retaining or absorbing flood water on site; and (2) the City was required to fund and construct major flood control infrastructure in those areas to control flood water. [Addendum B ¶ 8.]

The Plaintiffs initiated this lawsuit seeking a refund of the flood control fees they had paid, and to avoid paying any future flood control fees on their Pepperwood developments. [R. 001 – 058.] Plaintiffs argued that: (1) they were either successors in interest to BMC or third party beneficiaries of the Agreement [Id.]; and (2) under the terms of the Agreement, the City agreed to waive flood control fees on all of the property described as the “Horman properties” in the Agreement, except those lots located in the RP Zone. [R. 1464; Tr. pp. 70, 188; Ex. 20.] The trial court entered Findings of Fact contrary to the Plaintiffs’ proposed interpretation of the Agreement.⁶ [Addendum B ¶ 5.] The primary basis of the trial

⁶ In their brief, Plaintiffs contend that through a course of dealing the City is essentially estopped to contest standing. [Pltfs’ Brief, pp. 26-7.] The trial court

court's dismissal of Plaintiffs' claims, however, was its determination that Plaintiffs lacked standing to enforce the Agreement. [See id.]

Plaintiffs' Lack of Standing. The City and BMC are the only parties to the Agreement. [Ex. 6(c).] None of the Plaintiffs were specifically named as beneficiaries of the Agreement. [Addendum B ¶ 5, n.2; ¶ 20; Ex. 6(c).] Indeed, none of the Plaintiff entities even existed at the time the Agreement was executed. [Addendum B ¶ 7.]

On October 23, 1987, BMC transferred by Warranty Deed to Longview Development, a Utah corporation, all of its right, title and interest in and to the remaining undeveloped property described in the Agreement as the "Horman properties." [Addendum B ¶ 10; Ex. 104; R. 1464; Tr. p. 211.] This Deed does not make any mention of the Agreement. [See Ex. 104.] Subsequent to the transfer of title to the remaining undeveloped property described in the Agreement as the "Horman properties" from BMC to Longview Development Corporation in 1987, BMC wound up in its corporate affairs, paid its creditors, filed its final tax returns and did not engage in any further business activity. [Addendum B ¶ 11; Ex. 102; R. 1464; Tr. p. 220.] During the liquidation and winding up process of BMC, the

ruled that the argument was not timely raised [Addendum B p. 6, fn. 4] and thus review here is precluded. Online Corp. v. Granite Mill, 849 P. 2d 602, 604 n.1 (UT App. 1993); Hart v. S.L. County, 945 P. 2d 125, 136 (UT App. 1997).

Agreement was not assigned. [Addendum B ¶ 16.] Indeed, the trial court specifically found that:

The Plaintiffs failed to meet their burden of proof that there was an act or manifestation by [BMC] indicating an intent to transfer its rights in the 1975 Contract to Longview Development at the time of transferring its assets to Longview Development, therefore, there was no intent to assign [BMC's] interest in the 1975 Contract to Longview Development.

[Addendum B n.6.] Further, none of the vesting deeds which transfer all or any portion of the undeveloped property referred to in the Agreement from Longview Development to any of the Plaintiffs, make any mention of the Agreement. [See Ex. 104.] Finally, the City was never in the chain of title to the undeveloped property referred to in the Agreement as “Horman properties,” nor was the Agreement ever recorded with the County recorder’s office. [Addendum B ¶ 21.]

BMC was last renewed with the Utah Department of Commerce on August 17, 1992. [Addendum B ¶ 12; Ex. 32.] On November 1, 1993, BMC was administratively dissolved pursuant to statute, and no application for reinstatement was filed within the two year period allowed for such action. [Addendum B ¶ 13; Ex. 32.] Approximately eighteen years after Bell Mountain Corporation was liquidated and wound up its corporate affairs, eleven years after BMC was administratively dissolved, and after the City had filed its Motion to Dismiss this

case, on November 8, 2005, Plaintiffs attempted to execute an assignment of the Agreement from BMC to themselves in response to the City's Motion to Dismiss. [Addendum B ¶ 17; Ex. 25.] Plaintiffs argued that the Assignment: (1) was validly executed as part of BMC's winding up process; and (2) was meant to substitute for an assignment previously made by BMC to Plaintiffs. [R. 88.] The November 8, 2005 assignment, however, does not refer to any previous assignments made by either BMC or Longview Development to any of the Plaintiffs. [*Id.*; R. 1464; Tr. p. 219.] Indeed, the trial court "did not find credible [Plaintiffs'] testimony that their (sic) was a past assignment from Bell Mountain that could not be located and this 2005 assignment was made to substitute that past assignment." [Addendum B ¶ 17 n.5.]

SUMMARY OF ARGUMENT

I. Plaintiffs lack standing to enforce the Agreement because the Agreement is not a covenant that runs with the land. The Utah Supreme Court has identified four elements required for a contractual covenant to run with the land: (1) the covenant must touch and concern the land, (2) the covenanting parties must intend the covenant to run with the land, (3) there must be privity of estate, and (4) the agreement must be in writing. The absence of any of the four elements prevents a covenant from running with the land. Here, two of the four required elements are

absent. The Agreement was not intended to run with the land, and there is no privity of estate.

II. Plaintiffs lack standing to enforce the Agreement because the Agreement was never lawfully assigned to the Plaintiffs. BMC did not execute an assignment of the Agreement to Longview when BMC transferred all of its rights, title and interest in the land comprising the various Pepperwood developments to Longview in 1987. Further, there is no evidence that Longview executed an assignment of the Agreement when it transferred the land to Plaintiffs. In addition, the 2005 Assignment allegedly executed by BMC to Plaintiffs is invalid. BMC was liquidated and wound up its corporate affairs and ceased engaging in any business activity after transferring the land to Longview in 1987. BMC was also administratively dissolved in 1993. Thus, under Utah Code Ann. § 16-10a-1405(1), BMC had no authority to engage in new business activity and execute the assignment in 2005 because it had wound up its corporate affairs and was liquidated almost twenty years earlier, and ceased to exist as a business entity at all over ten years earlier.

III. Plaintiffs lack standing to enforce the Agreement because Plaintiffs are not third party beneficiaries of the Agreement. First, neither BMC nor the City intended Plaintiffs to be third party beneficiaries because none of the Plaintiffs are

named in the Agreement. Indeed, none of the Plaintiff entities even existed at the time the Agreement was executed. Second, even if the Plaintiffs are treated as synonymous with the term “Horman properties” in the Agreement, Paragraph 12 clearly distinguishes between BMC, Horman properties and the RP Zone lot owners and the benefits conferred upon each. BMC and the RP Zone lot owners were to receive the benefit of the Fee Waiver Provision. Horman properties, however, was to receive the benefit of deferring payment of all water connection fees and charges until the individual lot owners applied for building permits. Finally, the facts that existed at the time the Agreement was executed demonstrate that neither BMC nor the City intended that all of the land that comprised Horman properties was to receive the benefit of the fee waiver.

ARGUMENT

I. THE TRIAL COURT CORRECTLY HELD THAT PLAINTIFFS LACK STANDING TO ENFORCE THE AGREEMENT BECAUSE THE AGREEMENT DOES NOT CREATE A COVENANT THAT RUNS WITH THE LAND.

The trial court ruled that the Agreement did not create a covenant running with the land because there was no privity of estate between the City and BMC, and because Plaintiffs failed to meet their burden to establish that BMC and the City ever intended the Agreement to run with the land. [Addendum B ¶ 21.] Plaintiffs have challenged that ruling, insisting that, as a matter of law, the Agreement runs with the

land.

An agreement creates a personal covenant when it gives rise to an enforceable duty only between the original covenanting parties. By contrast, a covenant running with the land creates an interest or burden based upon ownership of land. The Utah Supreme Court has identified four elements required for a contractual covenant to run with the land.

(1) the covenant must touch and concern the land, (2) the covenanting parties must intend the covenant to run with the land, (3) there must be privity of estate, and (4) the agreement must be in writing.

Flying Diamond Oil Corp. v. Newton Sheep Co., 776 P.2d 618, 627 (Utah 1989).

The absence of any of the required elements “prevents a covenant from running with the land.” Id. at 623.

The case law requires that the document creating a covenant running with the land be in the chain of title. This is the “privity of estate” element outlined by the Utah Supreme Court in Flying Diamond. “Privity of estate requires a particular kind of relationship between the original covenantor and the covenantee.” Id. at 628.

The types of privity [of estate] are (1) mutual, *i.e.*, a covenant arising from simultaneous interests in the same land; (2) horizontal, *i.e.*, a covenant created in connection with the conveyance of an estate from one of the parties to another; and (3) vertical, *i.e.*, the devolution of an estate

burdened or benefitted by a covenant from an original covenanting party to a successor.

Id. (citations, footnote omitted). The key is that by one or more of the three methods noted above, privity must exist between the original covenantor and covenantee. In the instant case, the Agreement lies outside the chain of title and lacks the requisite privity of estate. First, Sandy City was never in the chain of title to the property in issue. [See Addendum B ¶ 21; Ex. 104.] Second, the deed whereby BMC transferred the property mentioned in the Agreement to Longview Development makes no mention of the Agreement. [See Ex. 4.] Third, the deeds whereby Longview Development transferred the property mentioned in the Agreement to Plaintiffs also make no mention of the Agreement. [See id.] The absence of privity of estate precludes the argument that the Agreement created a covenant that runs with the land.

In addition, there is no evidence of intent by the parties that the Agreement was to run with the land. The Flying Diamond court held that an express written statement that the parties intend the covenant to run with the land is dispositive of the issue of intent. Id. at 627. The inverse of that rule of law exists here – there is no such express statement. There is no language in the Agreement evidencing intent that the Fee Waiver Provision extend beyond the property being developed at the time it was owned by BMC. Moreover, one cannot intend to create rights in entities

that do not even exist. The very proposition defeats itself. The boilerplate language in paragraph 20 of the Agreement providing that the Agreement is “binding on both parties, their successors and assigns” does not make the covenant “run with the land.” It merely acknowledges that the document is assignable. A successor to the contract is not necessarily a successor to all of the land mentioned in the contract – hence the inconsistency of Plaintiffs’ position. Different land was conveyed to different Plaintiffs and yet they all claim that they were assigned the Agreement. The Agreement is not severable to be carved up in so many pieces. The assertion makes no sense. Also, the Agreement was never recorded. Nothing in the chain of title to the property in question identifies or in any way mentions the Agreement.

As a result, two of the four requisites for a covenant to run with the land are absent here, *i.e.*, privity of estate and written evidence of intent. The Agreement, therefore, does not run with the land.

II. THE EVIDENCE CONCLUSIVELY SUPPORTS THE FINDING OF THE TRIAL COURT THAT PLAINTIFFS LACK STANDING TO ENFORCE THE AGREEMENT BECAUSE THE AGREEMENT WAS NEVER LAWFULLY ASSIGNED TO PLAINTIFFS.

The trial court found as a matter of fact that the Agreement was not assigned during the winding up process of BMC. [Addendum B ¶ 16.] This finding of fact has not been challenged. The only other possibility for assignment occurred when an assignment was created in response to the City’s initial Motion to Dismiss. The

trial court ruled that this 2005 assignment was void because BMC no longer existed as a viable entity by that time because by 2005 it had been dissolved by the state, its affairs had been wound up, assets transferred and too much time had passed to reasonably contend that any corporate viability remained in BMC. [Addendum B ¶ 19.] The trial court's legal conclusion has been challenged by the Plaintiffs in this appeal.

For Plaintiffs to achieve standing by demonstrating that BMC lawfully assigned its contractual rights under the Agreement to Plaintiffs in order for Plaintiffs to be lawful assignees to the Agreement, they needed to demonstrate by a preponderance of the evidence that BMC validly assigned the Agreement to Longview Development, and that Longview Development validly assigned the Agreement to each of the Plaintiffs. The evidence presented at trial (or rather the lack of it) conclusively demonstrated that no such assignments were ever made – and the court so found. [Addendum B ¶¶ 16, 17.]

Six years prior to its administrative dissolution in 1993, Bell Mountain distributed its real property assets – *i.e.*, the 900+ acres comprising the various Pepperwood developments – to Longview Development. According to Plaintiffs, upon transferring the property to Longview Development, BMC was “liquidated” and wound up its corporate affairs, paid its creditors, filed its final tax returns and

did not engage in any further business activity. [Ex. 102; R. 1464; Tr. p. 220.]

BMC did not, however, execute any assignment of its rights under the Agreement to Longview Development prior to or during BMC's liquidation and/or winding upon process:

Q [by Mr. Hunt]: And so it went to Longview, the assignment would have been from Bell Mountain to Longview, correct?

A [by Mr. Evans]: You know, the liquidation of Bell Mountain Corporation was a very complex liquidation. You're dealing with a company that had been in existence - so the answer to your question is no, it's more complex than that . . . So the answer to that is no.

[R. 1464; Tr. p. 211.] (emphasis added). Indeed, David Evans, Plaintiffs' accountant who managed the BMC liquidation, admitted that "I doubt that I was even aware of that specific contract when we did [the liquidation] back in '87. . . I don't recall specifically addressing the 1975 agreement as part of the liquidation."

[R. 1464; Tr. p. 165.] Moreover, Plaintiffs failed to present any evidence of assignments of the Agreement made by Longview Development to Plaintiffs – that is because no such assignments were ever made. Plaintiffs' assertion that they are lawful assignees of the Agreement is without merit – there is simply no evidence to support the proposition and they have utterly failed to marshal the evidence and attack the findings made by the trial court.

Further evidence of the lack of any lawful assignment of the Agreement is found in Plaintiffs' belated attempt to execute an assignment in response to Sandy City's Motion to Dismiss this action. On November 8, 2005 – over three months after they commenced this litigation, nearly twenty years after BMC wound up its corporate affairs and over ten years after BMC was administratively dissolved – Plaintiffs attempted to execute an “assignment” of the Agreement from BMC directly to Plaintiffs. [Ex. 25.] Not only is the November 8, 2005 assignment an indisputable confession that a valid assignment of the Agreement was never made, it is invalid on its face.

It is well-settled that Plaintiffs' attempt at assignment by a defunct business entity is prohibited by law. Under Utah Code Ann. § 16-10a-1405(1), after BMC was administratively dissolved by operation of law on November 1, 1993, it had authority only to conduct activities “appropriate to wind up and liquidate its business and affairs.” According to Plaintiffs' witness, David Evans, however, Bell Mountain had completed the winding up process and was “liquidated” six years earlier, namely, in 1987 when it transferred all of its undeveloped property to Longview Development. [Ex. 102; R. 1464; Tr. p. 220.] Indeed, according to Mr. Evans, following this “liquidation”, BMC ceased to engage in any further business activity. [Id.] Thus, under Utah Code Ann. § 16-10a-1405(1), BMC had no

authority to engage in new business activity and execute the assignment in 2005 because it had wound up its corporate affairs and was liquidated almost twenty years earlier, and had ceased to exist as a business entity at all over ten years earlier.

Case law from other jurisdictions confirms this conclusion. The Maine Supreme Court addressed the issue of assignment by a dissolved corporation in facts similar to those here. Sturtevant v. Winthrop, 732 A.2d 264 (Me. 1999). In Sturtevant, a corporation had entered into a snow removal contract with a town. The corporation was subsequently dissolved and the sole shareholder continued to perform snow removal services until the contract was terminated by the City for cause. The shareholder sued and the town asserted that he lacked standing because the contract was between the town and the corporation, not the shareholder. The shareholder based his standing claim on an affidavit in which he stated that all corporate assets and liabilities were distributed to him personally in the dissolution. The trial court found no evidence of a specific assignment and held that there was no assignment of the contract. The Maine Supreme Court affirmed.

The Sturtevant court first noted that the plaintiff had the burden of proof to establish the assignment by a preponderance of evidence. Id. at 267. The court concluded that the burden was not met.

For an assignment to be enforceable there must be an act or manifestation by the assignor indicating the intent to transfer the right to the assignee. In this case there was no evidence of a manifestation of the corporate intent to transfer the contract rights at the time the corporation was in existence, and the trial court was not compelled to find that an assignment had occurred. No corporate records were presented to show that an assignment had taken place while the corporation was in existence.

Id. (emphasis added and citations omitted).

In a footnote, the court suggested the possibility that even if the assignment were made, it would not be effective beyond the existence of the corporation, in that case two years after dissolution pursuant to statute.

Even if the court had found an assignment, it is not clear it would give Sturtevant the right to sue on the contract more than two years after the dissolution. Several courts have concluded that an assignee of a corporate right cannot assert that right after the expiration of the survival statute, because that would violate the rule that an assignee has no greater rights than his assignor and would defeat the statute's purpose of providing a fixed time limit for the wind up of corporate affairs.

Sturtevant at 267 n.4 (citations omitted); see also Davis v. St. Paul Fire and Marine Ins. Co., 727 F.Supp. 549, 553 (D. S.D. 1989) (extending corporate rights beyond the two-year renewal period “would expand the corporate survival statute beyond its terms and would interfere with its purpose of requiring the prompt and orderly winding up and finalization of corporate affairs.”) Utah law is in accord: Aird Ins.

Agency v. Zions 1st Nat'l Bank, 612 P.2d 341, 344 (Utah 1980) (“[A]n assignee gains nothing more, and acquires no greater interest than had his assignor . . .”); Lone Mountain Production Co. v. Natural Gas Pipeline Co., 701 F.Supp. 305, 309 (D. Ut. 1989) (“Once a valid assignment is made, the assignee stands in the shoes of the assignor; the assignee gains nothing more than his assignor had.”)

Moreover, absent evidence of intent to create the assignment prior to the assignment actually being made, the Sturtevant court refused to find an assignment based upon subsequent conduct.

Simply because a corporation is dissolved and the shareholder represents, in the boilerplate language of the articles of dissolution form, that the corporate assets have been distributed to the shareholder does not necessarily mean that a contract to which the corporation was a party has been assigned to the shareholder.

Sturtevant, 732 A.2d at 267 (distinguishing between “contracts” and “assets”).

A Texas appellate court reached a similar conclusion. “Obviously an assignee cannot sue on a claim obtained from the corporation after it [the corporation] loses the right to do business in Texas because such a rule would encourage assignment of claims rather than payment of [corporate] franchise taxes.” Rushing v. Int'l Aviation Underwriters, Inc., 604 S.W.2d 239, 242 (Tex. App. 1980). Likewise, to allow Plaintiffs to assign the Agreement after BMC lost the right to do business in Utah over ten years prior to the assignment would undermine the very purpose of Utah

Code Ann. § 16-10a-1405(1) and Utah's corporate laws generally.

The City is aware of Plaintiffs' argument that because the Utah statutory scheme does not expressly put a specific time limit on the winding up process, there is no boundary whatsoever to limit that process. [Pls.' Br. pp. 31-32.] It is an axiom of statutory and contract construction that if no time limit is stated for the performance of a particular act, a reasonable time is implied. 2A Sutherland Statutory Construction, § 45:12 (7th Ed.); Alpha Partners, Inc. v. Transamerica Inv. Mgmt., LLC, 2006 UT App 331, ¶ 24, 153 P.3d 714. Here, the lower court concluded that Plaintiffs' attempt to assign the Agreement 12+ years after administrative dissolution was not reasonable. [Addendum B ¶ 20.]

The only document presented by Plaintiffs purporting to be an assignment of the Agreement was executed almost twenty years after BMC wound up its corporate affairs, and over ten years after BMC completely ceased to exist as a business entity. As a result, the November 8, 2005 assignment is void as a matter of law. Further, Plaintiffs failed to present any evidence that Longview Development – Bell Mountain's successor entity – executed any assignments to the Plaintiffs at all. And the court so found. [Addendum ¶¶ 16, 17.] Indeed, Plaintiffs' belated attempt to invalidly assign the Agreement by a defunct corporation after they filed suit is nothing more than an admission that they lacked standing to enforce the Agreement

in the first instance.

Plaintiffs have completely failed to attack the findings of the trial court that no assignment was made. Thus, those findings are conclusive on the issue.

III. THE TRIAL COURT CORRECTLY HELD THAT PLAINTIFFS LACK STANDING TO ENFORCE THE AGREEMENT BECAUSE PLAINTIFFS ARE NOT THIRD PARTY BENEFICIARIES OF THE AGREEMENT.

Plaintiff's third-party beneficiary arguments fail for two fundamental reasons. First, the contract language does not establish an intent to confer a separate and distinct benefit upon them. Secondly, their derivation of beneficiary status is based upon reference to real properties rather than to an identifiable individual or entity.

It is well-established that the existence of third-party beneficiary status is determined from the face of the contract at issue. Wagner v. Clifton, 2002 UT 109, ¶ 11, 62 P.3d 440. That determination is appropriately made as a matter of law. American Towers Owners v. CCI Mechanical, 930 P.2d 1182, 1188 (Utah 1996).

Under Utah law, “[t]he written contract must show that the contracting parties clearly intended to confer a separate and distinct benefit upon the third party.”

Wagner, 2002 UT at ¶ 11 (punctuation omitted, emphasis added.) Plaintiffs here do not argue or demonstrate that the parties to the Agreement intended to confer a benefit which was separate and distinct from those conferred by the Agreement on the named parties. They argue that because they own the realty identified in the

Agreement as “Horman properties”, they are entitled to succeed to BMC’s interest in the agreement, and to procure the benefit which BMC would have had under the Agreement. That factual scenario does not satisfy the “separate and distinct benefit” element of the proof of third-party beneficiary status. The identity of the third party upon whom the benefit was to be conferred must have been in contemplation at the time the agreement was created – here it was not because those entities did not exist. A reference to “Horman properties” does not translate to “all known and unknown, existent and non-existent successors in title” as contended by Plaintiffs. The interpretive leap transcends reason.

Plaintiffs’ second problem is whether there was a clear intent expressed in the agreement to create a benefit to any third party. The problem lies in Plaintiffs’ attempt to characterize the term “Horman properties” as meaning anything other than real properties owned by the Horman family. Plaintiffs concede that there has never been any entity named “Horman properties.” [R. p. 324.] Instead, they seek to characterize the term as “a generic reference to all real estate and real estate entities belonging to or related in any way to the Horman family.” [Id.] What Plaintiffs want is for the Court to infer from the term “Horman properties” that the parties to the agreement clearly intended to confer a benefit on entities which did not exist and might never exist. That not being enough, they want to extend that

benefit to anyone to whom they might convey the properties at some indeterminate time in the future. The proposition means that third-party beneficiary status could be created incidentally by virtue of poor drafting without any expressed intent to do so. The scope of the third-party beneficiary law does not reach that far.

The trial court found that the waiver of flood control fees inured only to the benefit of those RP Zone Lot Owners. [Addendum B ¶ 20.] Plaintiffs have failed to advance any plausible reading of the Agreement to the contrary and none exists. The ruling of the lower court should stand.

CONCLUSION

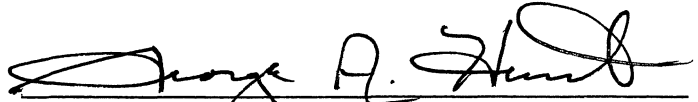
In this appeal, Plaintiffs seek to overturn, as a matter of law, the ruling of the trial court that they have no standing to enforce a 1975 Agreement to which none of them were parties. Through all of the briefing of two motions at the trial level, Plaintiffs maintained that the controlling issues were factual. Now on appeal when the burden has shifted, the Plaintiffs attempt to morph the controlling issues into legal questions. What the trial court actually did was to hear and review the evidence and make detailed, contextual findings of fact to establish contractual intent, find facts relevant to the standing issue and thus support the ultimate conclusion of law that Plaintiffs had no standing to enforce the 1975 Agreement. With those findings

intact and legally unassailed, no other plausible legal conclusion follows. The judgment of the trial court should therefore be affirmed in all particulars.

RESPECTFULLY SUBMITTED this 21st day of December, 2009.

WILLIAMS & HUNT

By

A handwritten signature in black ink, appearing to read "George A. Hunt", written over a horizontal line.

GEORGE A. HUNT

STEPHEN T. HESTER

Attorneys for Defendant/Appellee Sandy City

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of December, 2009, I caused two (2) true and correct copies of the foregoing to be mailed postage prepaid thereon, by First Class Mail in the United States Mail, to the following:

Denver C. Snuffer
Steven R. Paul
Daniel B. Garriott
Nelson, Snuffer, Dahle & Poulsen, P.C.
10885 South State Street
Sandy, Utah 84070

A handwritten signature in black ink, appearing to read "George A. Snuffer", is written over a horizontal line.

ADDENDUM A

16-10a-1405. Effect of dissolution.

(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.

(2) Dissolution of a corporation does not:

- (a) transfer title to the corporation's property;
- (b) prevent transfer of its shares or securities, although the authorization to dissolve may provide for closing the corporation's share transfer records;
- (c) subject its directors or officers to standards of conduct different from those prescribed in Part 8;

(d) change:

- (i) quorum or voting requirements for its board of directors or shareholders;
 - (ii) provisions for selection, resignation, or removal of its directors or officers or both; or
 - (iii) provisions for amending its bylaws or its articles of incorporation;
- (e) prevent commencement of a proceeding by or against the corporation in its corporate name;
- (f) abate or suspend a proceeding pending by or against the corporation on the effective date of dissolution; or
- (g) terminate the authority of the registered agent of the corporation.

History: C. 1953, 16-10a-1405, enacted by L. 1992, ch. 277, § 156.

ADDENDUM B

IN AND FOR THE THIRD DISTRICT COURT, WEST JORDAN DEPARTMENT
SALT LAKE COUNTY, STATE OF UTAH

HILLCREST INVESTMENT, a Utah Partnership; SCANDIA INVESTMENT LLC, a Utah Limited Liability Company; LEGACY COMMUNITIES, LLC., a Utah 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.

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW
AND ORDER**

Civil No. 050408561

Judge Royal I. Hansen

This matter came before the Court for trial on October 21st through the 23rd of 2008, with the Honorable Royal I. Hansen presiding without a jury. Denver C. Snuffer, Jr. and Dan B. Garriott appeared on behalf of Hillcrest Investment; Scandia Investment, LLC; Legacy Communities, LLC; Charles H. Horman; M. Gordon Johnson; Autumn Ridge Development, LLC; Alta Ridge Development, LLC (collectively referred to as "Plaintiffs"). George A. Hunt and Stephen T. Hester appeared on behalf of Sandy

City (“City”). At the end of the trial, the Court requested the parties submit post trial briefs and proposed findings of fact and conclusions of law and set the matter for argument on December 10, 2008.

With regard to the Dewey Bluth affidavit, the Court admitted the affidavit and gave it the weight and credibility the Court deemed necessary in making its findings of facts and conclusions of law. Having considered the evidence and testimony received at trial, the parties’ arguments and the law, the Court enters the following FINDINGS OF FACT AND CONCLUSIONS OF LAW:

FINDINGS OF FACT

1. On June 25, 1975, the City entered into a contract with non-party Bell Mountain Corporation (Bell Mountain) as the developer of a large tract of land on the east side of the city referred to as the “Pepperwood Subdivision,” which was a “‘private’ subdivision having development of its own streets, parks, etc.” (1975 Contract). At the time of entering into the 1975 Contract, Bell Mountain Corporation was a Utah for-profit corporation originally formed on August 6, 1971.
2. In the preamble of the 1975 Contract, the parties acknowledged that the City “has a need to increase water storage and production in its corporate limits particularly on its east side” and that “Bell Mountain is developing a large tract of land on the City’s east side.” Bell Mountain “desires to assist Sandy in achieving its goals regarding water development and distribution while likewise developing its own properties.”¹

¹ Prior to entering into the 1975 Contract, the City had passed a moratorium that prohibited any new home construction or lot development due to a lack of water resources that would provide adequate fire protection flow rates and water pressure required to comply with the Board of Health. The 1975 Contract was an attempt to address this problem and cause the City to remove the moratorium so that Bell Mountain could continue its development of the Pepperwood Subdivision.

3. At the time the City and Bell Mountain entered into the 1975 Contract, only a portion of the Pepperwood Subdivision was annexed into the City, about two phases containing 141 RP Zoned lots, some of which had been sold to lot owners.

4. Paragraph 12 of the 1975 Contract states:

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, north of 12000 south and south of 10000 south 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 the 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."

5. As reflected by the language in Paragraph 12, the City and Bell Mountain expressly intended to provide "Horman properties" and the RP Zone lot owners² in the Pepperwood Subdivision limited benefits under the 1975 Contract:

A. The City and Bell Mountain intended for "Horman properties," which was described as properties "located east of 2000 east, north of 12000 south and south of 10000 south," to receive the limited benefit of a deferment of "payment of all water connection fees and charges which would otherwise be made to Bell Mountain Corporation and Horman

² At the time the parties entered into the 1975 Contract, the only lots located in the "RP Zone" consisted of Phases I, II and III of the Pepperwood Subdivision. The remaining property then owned by Bell Mountain Corporation and identified as "Horman properties" in the 1975 Contract was either zoned "A-1" (Agricultural), or had not yet been annexed into Sandy City.

properties until such time as building permits are applied for by the individual owners of the lots contained therein.” Those fees would then be charged to the individual owners of the lots. The Horman properties as described in the 1975 Contract encompassed about 1000 acres that belonged to the Horman family and the family’s various legal entities.

B. The City and Bell Mountain also intended for the owners of the RP Zone lots located in the Pepperwood Subdivision to benefit from the 1975 Contract. Specifically, Bell Mountain and the RP Zone lot owners would (1) not be required to pay “flood control fees” as part of a connection fee, and (2) only be required to pay one half of the otherwise required park fee.

1. In 1975, park fees were paid by individual lot owners, not developers, therefore, the only beneficiary of this portion of paragraph 12 was the RP Zone lot owners that bought lots in the Pepperwood Subdivision.
2. With regard to flood control fees, prior to 1975, Salt Lake County was responsible for flood control in the east side of the City, including the property then owned by Bell Mountain Corporation and Horman properties. However, by Interlocal Agreement dated December 19, 1974 and amended February 3, 1975, flood control responsibility for surface waters on the east side was assumed by the City. Neither Salt Lake County nor the City charged Bell Mountain flood control fees on prior Phases I and II of the Pepperwood Subdivision.³ The City began charging developers

³ There was also sufficient evidence submitted to find that for Phase III neither Salt Lake County nor the City charged Bell Mountain Corporation flood control fees on Phase III of the

flood control maintenance fees around March 20, 1975, however, no fees were charged to Bell Mountain and later developers of the property, namely the Plaintiffs, for the first nine phases of the development of the area based upon a map prepared by Salt Lake County. During the time Salt Lake County had flood control responsibility over the initial phases of the Pepperwood Subdivision, Salt Lake County had developed a map which identified certain portions of the Horman property where it was anticipated that natural precipitation would be absorbed into the ground on site due to the sandy soil conditions and the relatively flat topography. The first nine phases of the Pepperwood Subdivision are located in that certain portion of property identified on the Salt Lake County map where the City anticipated that natural precipitation would be absorbed into the ground on site due to the sandy soil conditions and the relatively flat topography. Therefore, minimal, flood control infrastructure was required to be installed in the first nine phases.

6. Paragraph 20 of the 1975 Contract states: “This agreement is binding upon both parties, their successors and assigns.”

Pepperwood Subdivision because of (1) the County’s analysis of surface water drainage indicated that the property would be contained on site, and (2) Mr. Horman’s representation that “potential flood damage up to a ten (10) year storm becomes the responsibility of the Pepperwood Homeowner’s Association.”

7. All of the Plaintiffs claim an interest in the 1975 Contract between the City and Bell Mountain either as assigned successors in interest of Bell Mountain or as third party beneficiaries.⁴
- A. Plaintiffs Charles H. Horman (“Horman”) and M. Gordon Johnson (“Johnson”) are individuals who reside in Salt Lake County, State of Utah and who, variously, own and manage the other Plaintiff entities.
- B. Plaintiff Hillcrest Investment Company, LLC (“Hillcrest”) is currently a limited liability company. Originally, Hillcrest was formed as a limited partnership on October 16, 1978, and then later it was converted into a Utah limited liability company. Currently, Hillcrest is managed by Horman, Evans and Christopher A. Howells.
- C. Plaintiff Scandia Investment, LLC (“Scandia”) is a Utah limited liability company created on August 10, 1993. Scandia’s members are Johnson and his wife, Veedrienne H. Johnson. Veedrienne is the sister of Horman. Scandia is managed by Johnson, and non-parties David Evans (“Evans”) and David B. Bromley (“Bromley”).
- D. Plaintiff Legacy Communities, LLC (“Legacy”) is a Utah limited liability company that was created December 29, 2003. Legacy’s managers are Horman, Johnson and Evans.

⁴ The Court notes that in the Plaintiffs post trial brief and at closing argument seemed to be making an equitable claim that based upon the past actions of the City and reliance of the Plaintiffs that they were parties or beneficiaries of the 1975 Contract that the City was estopped from claiming otherwise now. However, as argued by the City at closing arguments, Plaintiffs did not make an estoppel claim, rather this case was tried as a breach of contract, therefore, the Court does not consider promissory estoppel to the extent such arguments were made by the Plaintiffs.

- E. Plaintiff Autumn Ridge Development, LLC (“Autumn Ridge”) is a Utah limited liability company created on January 21, 1994. Autumn Ridge’s members are Johnson and his wife, Veedrienne H. Johnson. Autumn Ridge is managed by Johnson, Evans and Bromley.
- F. Plaintiff Alta Ridge Development, LLC (“Alta Ridge”) is a Utah limited liability company created on April 12, 1994. Alta Ridge’s members are Horman and his wife, Katherine K. Horman. Alta Ridge is managed by Horman.
8. The City assessed the Plaintiffs flood control fees on Phase X of the Pepperwood development because (1) the topography and soil density of the land rendered it incapable of retaining or absorbing flood water on site, and (2) the City was required to construct major flood control infrastructure in those areas to control flood water.
9. The Plaintiffs paid flood control fees under protest and later sought refunds for the protested flood control fees claiming that pursuant to the 1975 Contract they were either successors in interest to Bell Mountain or third party beneficiaries. Specifically, Plaintiffs state in their answers to interrogatories that:

This is based upon the agreement between Bell Mountain Corporation and Sandy City, in which both Bell Mountain Corporation and “Horman Properties” are listed as the beneficiaries of the agreement. Although Bell Mountain Corporation was a signatory to the agreement the property was developed using various entities. “Horman Properties” was a way of referring to the property the Horman family would develop and retail. All of the named plaintiffs in this case are affiliated with Bell Mountain Corporation, and are included within the description “Horman Properties” and are therefore successors to the agreement or were intended to be covered by the agreement when it was originally entered into with Sandy City.

10. On October 23, 1987, Bell Mountain Corporation transferred by Warranty Deed to Longview Development, a Utah corporation, all of its right, title and interest in and to the remaining undeveloped property described in the June 25, 1975 Agreement as the “Horman properties.” This Deed does not mention the 1975 Contract, and the 1975 Contract was not recorded with the Salt Lake County recorders office.
11. In 1987, Bell Mountain wound up its corporate affairs, paid its creditors, filed its final tax returns and did not engage in any further business activity.
12. Bell Mountain was last renewed with the Utah Department of Commerce on August 17, 1992.
13. Thereafter, on November 1, 1993, Bell Mountain was administratively dissolved pursuant to statute, and no application for reinstatement was filed within the two year period allowed for such action.
14. At the time of its renewal in 1992, the directors of Bell Mountain were plaintiffs Horman and Johnson, as well as non-party Evans. At the time of the administrative dissolution in 1993, Horman was the president, Johnson was the vice-president and Evans was the secretary and treasurer.
15. According to the certified file on Bell Mountain kept by the Utah Department of Commerce, neither an articles of dissolution nor a plan of dissolution were ever filed with the Department of Commerce nor was a liquidation agreement whereby all contracts were assigned to Bell Mountain’s successor entity ever filed with the Department of Commerce. The last written document contained in the official certified file of Bell Mountain Corporation is dated August 2, 1989.
16. During the liquidation and winding up processes of Bell Mountain, the 1975 Contract was not assigned.

17. In 2006, over eleven years after Bell Mountain was administratively dissolved and only after Plaintiffs filed this law suit and the City filed a motion to dismiss in this case, Plaintiffs executed an assignment of the 1975 Contract by Bell Mountain directly to Plaintiffs.⁵

CONCLUSIONS OF LAW

18. “Generally, unless a plaintiff can recover on a contract as a third-party beneficiary or an assignee, only parties to a contract can bring suit under the contract.” *See Holmes Development LLC v. Cook*, 2002 UT 38; 48 P.3d 895; 445 Utah Adv. Rep. 20; 2002 Utah LEXIS 64. Plaintiffs were not party to the 1975 Contract they sue to enforce, therefore, to have standing to sue Plaintiffs must be assignees of Bell Mountain or intended third-party beneficiaries of the 1975 Contract.
19. Plaintiffs claim they have standing as successors in interest to Bell Mountain. A dissolved entity may only conduct activities “appropriate to wind up and liquidate its business and affairs.” Utah Code Ann. § 16-10a-1405(1). For an enforceable assignment there must be an act or manifestation by the assignor indicating the intent to transfer the right to the assignee at the time the corporation was in existence.⁶ With regard to the 2005 assignment to Plaintiffs that was executed by Bell Mountain such assignment was not made during Bell Mountain’s existence and therefore was

⁵ The Court notes the Court did not find credible the testimony that there was a past assignment from Bell Mountain that could not be located and this 2005 assignment was made to substitute that past assignment.

⁶ The Court notes that the Plaintiffs failed to meet their burden of proof that there was an act or manifestation by Bell Mountain indicating an intent to transfer its rights in the 1975 Contract to Longview Development at the time of transferring its assets to Longview Development, therefore, there was no intent to assign its interests in the 1975 Contract to Longview Development.

untimely. In 2005, Bell Mountain was an entity that had been administratively dissolved for over eleven years. The winding up of a corporation is not indefinite. The purpose of the liquidation and winding up period is to collect its assets, dispose of properties that will not be distributed in kind to its shareholders, discharge its liabilities, and to distribute its remaining property among its shareholders. Utah Code Ann. § 16-10a-1405. 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. Since Bell Mountain failed to do so, it was no longer a legal entity in 2005 when the assignment was executed, therefore, the Court will not give the assignment any legal effect from a dissolved entity with no legal capacity. *See, e.g. Bio-Trust, Inc. V. Division of Corporations*, 2003 UT App. 360 (concluding that the corporation lacked standing because it lacked legal capacity ten years after its administrative dissolution to challenge the dissolution). Furthermore, after two years, an administratively dissolved entity's name is available for use. Utah Code Ann. § 16-10a-1421(1). To allow a dissolved entity to continue liquidating and winding up its affairs after two years could create confusion if another entity legally registers to use its name. This case is not a close call. In this case, the 2005 assignment was made *eleven* years after Bell Mountain was dissolved. The Court concludes that the 2005 assignment did not constitute a timely liquidating or winding up activity because the assignment was made eleven years after Bell Mountain was administratively dissolved. To allow an entity to liquidate and wind up its affairs for such a long period of time would encourage a lack of diligence in the dissolution of a corporation and open the door for a plethora of problems with legally registered entities using the same name. Based upon the discussion above, the Court

concludes that Plaintiffs were not assignees of Bell Mountain. The Court concludes Plaintiffs claim that they have standing based upon an assignment fails.

20. The existence of a third-party beneficiary status “is determined by examining a written contract.” *American Towers Owners Assoc., Inc. v. CCI Mech., Inc.*, 930 P.2d 1182, 1188 (Utah 1996). “Generally, the rights of a third-party beneficiary are determined by the intentions of the parties to the subject contract.” *Tracy Collins Bank & Trust v. Dickamore*, 652 P.2d 1314, 1315 (Utah 1982). “The intent of the contracting parties to confer a separate and distinct benefit must be clear.” *Ron Case Roofing & Asphalt Paving, Inc. v. Blomquist*, 773 P.2d 1382, 1386 (Utah 1989). “A third party who benefits only incidentally from the performance of a contract has no right to recover under that contract.” *Broadwater v. Old Republic Sur.*, 854 P.2d 527, 537 (Utah 1993). “If the language within the four corners of the contract is unambiguous, the parties’ intentions are determined from the plain meaning of the contractual language, and the contract may be interpreted as a matter of law.” *WebBank v. Am. Gen. Annuity Serv. Corp.*, 54 P.2d 1139 (UT 2002)(*quotations omitted*). Whether a third-party beneficiary status exists is determined by examining a written contract. In Paragraph 12 of the 1975 Contract, there were two express third-party beneficiaries, “Horman properties” and the RP Zone lot owners. Even if the Court treats the Plaintiffs as the “Horman properties” described under the 1975 Contract, which this Court need not decide, the intended benefit conferred upon them was not for waiver of flood control fees. Rather, the benefit to Horman properties was to “defer payment of all water connection fees and charges which would otherwise be made to Bell Mountain Corporation and Horman properties.” The waiver of flood control fees as part of a connection fee

was to benefit Bell Mountain and the RP Zone lot owners.⁷ Paragraph 12 clearly distinguishes between Bell Mountain, Horman properties and RP Zone lot owners and the benefit conferred upon each. The Court concludes that even if the Plaintiffs are “Horman properties” under the 1975 Contract, they were not the intended third-party beneficiary for the waiver of flood control fees. The Court concludes that without third-party beneficiary status for the waiver of flood control fees, the Plaintiffs lack standing to sue to enforce that portion of the 1975 Contract.

21. Plaintiffs also claim standing based upon the waiver of flood control fees as a covenant that runs with the land. For a contractual covenant to run with the land:

(1) the covenant must touch and concern the land, (2) the covenanting parties must intend the covenant to run with the land, (3) there must be privity of estate, and (4) the agreement must be in writing. *Flying Diamond Oil Cor. v. Newton Sheep Co.*, 776 P.2d 618, 627 (Utah 1989).

The absence of *any* of the four elements “prevents a covenant from running with the land.” *Id.* at 623. The first and fourth elements are clearly met. However, the required privity of estate is lacking because (1) the City was *never* in the chain of title to the property at issue, and (2) the 1975 Contract is outside the chain of title because (a) it was not recorded with the County recorder’s office, (b) the deed whereby Bell Mountain transferred the property did not refer to the 1975 Contract, and (c) the deeds in which Longview Development transferred the property to Plaintiffs also failed to refer to the 1975 Contract. Furthermore, the Plaintiffs failed to meet its burden to show that the intent of the

⁷ The Court notes that whether the parties intended the waiver of flood control fees to be limited to the RP Zone lot owners existing at the time of the 1975 Contract or extended to all future RP Zone lot owners is not before the Court, therefore, the Court does not address that issue.

parties that the 1975 Contract or the waiver of flood control fees provision would run with the land. The boilerplate language in paragraph 20 of the 1975 Contract that it is “binding on both parties, their successors and assigns” merely acknowledges that the document is assignable, not that the flood control fee waiver was a covenant that would run with the land beyond that property being developed at the time. The Court concludes that the flood control fee waiver provision was not a covenant running with the land, therefore, the Plaintiffs’ claim for standing on that basis fails.

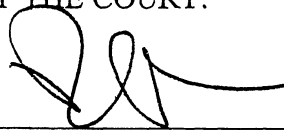
22. The Court concludes that Plaintiffs lack standing to sue for breach of the 1975 Contract flood control fee waiver provision for which they sue to enforce. Without standing, this Court may not grant the relief requested by Plaintiffs.
23. Based upon the Court’s decision that the Plaintiffs lack standing, the Court need not address the other claims and arguments raised by the parties.

ORDER

The Court hereby ORDERS the City to file a Final Judgment and Order for this Court to sign within twenty (20) days.

DATED this 27th day of January, 2009.

BY THE COURT:

A handwritten signature in black ink, appearing to be 'R. Hansen', written over a horizontal line.

ROYAL I. HANSEN
DISTRICT COURT JUDGE

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 050408561 by the method and on the date specified.

METHOD NAME

Mail	GEORGE A HUNT Attorney DEF 257 E 200 S #500 POB 45678 SALT LAKE CITY, UT 84145-5678
Mail	DENVER C SNUFFER Attorney PLA 10885 S STATE ST SANDY UT 84070

Dated this 27 day of January, 2009.

MSwift
Deputy Court Clerk