

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 : Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca3

 Part of the [Law Commons](#)

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

George A. Hunt; Williams and Hunt; attorneys for appellees.

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

Recommended Citation

Brief of Appellant, *Hillcrest Investment v. Sandy City*, No. 20090481 (Utah Court of Appeals, 2009).
https://digitalcommons.law.byu.edu/byu_ca3/1719

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

IN THE UTAH COURT OF APPEALS

---0000000---

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	:	PRIORITY NO.: 15
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.	:	

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

OPENING BRIEF ON APPEAL

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

George A. Hunt
WILLIAMS & HUNT
257 East 200 South, Suite 500
PO Box 45678
Salt Lake City, UT 84145-5678

Denver C. Snuffer , Jr. (3032)
Steven R. Paul (7423)
Daniel B. Garriott (9444)
NELSON, SNUFFER, DAHLE
& POULSEN, P.C.
10885 South State
Sandy, UT 84070
Telephone: (801) 576-1400

Attorneys for Defendants-Appellees

Attorneys for Plaintiffs-Appellants

ORAL ARGUMENT REQUESTED

IN THE UTAH COURT OF APPEALS

---ooo0ooo---

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	:	PRIORITY NO.: 15
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.	:	

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

OPENING BRIEF ON APPEAL

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

George A. Hunt
WILLIAMS & HUNT
257 East 200 South, Suite 500
PO Box 45678
Salt Lake City, UT 84145-5678

Denver C. Snuffer , Jr. (3032)
Steven R. Paul (7423)
Daniel B. Garriott (9444)
NELSON, SNUFFER, DAHLE
& POULSEN, P.C.
10885 South State
Sandy, UT 84070
Telephone: (801) 576-1400

Attorneys for Defendants-Appellees

Attorneys for Plaintiffs-Appellants

ORAL ARGUMENT REQUESTED

APPELLANT'S BRIEF

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, submit this brief in the appeal before this Court.

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

TABLE OF CONTENTS

LIST OF ALL PARTIES TO THE PROCEEDING BELOW	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
JURISDICTION OF APPELLATE COURT	1
ISSUES PRESENTED FOR REVIEW	1
STANDARD OF REVIEW	1
RULES AND REGULATIONS APPLICABLE TO APPEAL	3
STATEMENT OF THE CASE	4
Nature of the Case	4
Course of Proceedings and Disposition Below	6
Facts established in the District Court Record	8
SUMMARY OF ARGUMENTS	18
ARGUMENT	20
1. The Trial Court Erred in Finding the 1975 Contract Between Bell Mountain and Sandy Was Not Validly Assigned to Plaintiffs, Thus Denying Plaintiffs Standing to Pursue Their Claims Against the City.	20
2. If Plaintiffs Are Not Parties, Successors or Assigns to the 1975 Contract, They Are Intended Third-Party Beneficiaries to the Contract and Are Entitled to Enforce it.	24
3. The Course of Dealing Between the Horman Family and Sandy City Shows That Sandy City Interpreted the 1975 Contract to Waive Flood Control Fees and One-Half of the Park Fees on All of the Horman Properties.	26

4.	The Trial Court Erred in Failing to Interpret the Contract in Accordance with Established Principals of Contract Interpretation, Including <i>Contra Proferentum</i>	29
5.	The Trial Court Erred in Finding a Time Limit for "Winding Up" of a Corporation, Where No Such Time Limit Is Imposed by Statute.	31
6.	The Trial Court Erred by Failing to Find That Plaintiffs Have Standing to Enforce the Agreement Because the Agreement Runs with the Land.	35
A.	The Trial Court Erred in Not Finding Intent For the Agreement to Run with the Land Because the Original Signatories to the Agreement Testified to the Intent and the Parties Actions During the Past 30 Years Show Intent.	36
B.	The Trial Court Erred in Not Finding Privity of Estate Because Plaintiffs are Successors in Interest to Bell Mountain and Both Sandy City and Plaintiffs Had a Simultaneous Interest in the Horman Property.	39
CONCLUSION		42
CERTIFICATE OF SERVICE		43
APPENDIX		

TABLE OF AUTHORITIES

Court Cases and Other Authorities

<i>165 Broadway Bldg., Inc. v. City Investing Co.,</i> 120 F.2d 813 (2d Cir.), <i>cert. denied</i> , 314 U.S. 682 (1941)	35
<i>Am. Towers Owners Assoc., Inc. v. CCI Mech., Inc.,</i> 930 P.2d 1182 (Utah 1996)	2
<i>Brendonwood Common v. Franklin,</i> 403 N.E.2d 1136 (Ind.Ct.App. 1980)	36
<i>Brigham Young v. Tremco Consultants, Inc.,</i> 110 P.3d 678 (Utah 2005)	25
<i>City of Klamath Falls v. Bell,</i> 490 P.2d 515 (1971)	33
<i>Clotworthy v. Clyde,</i> 265 P.2d 420 (Utah 1954)	21, 23
<i>Curtis v. United States,</i> 63 Fed. Cl. 172 (Fed. Ct. Cl. 2004)	33
<i>Daines v. Vincent,</i> 190 P.3d 1269 (Utah 2008)	2
<i>Eagle Enterprises, Inc. v. Gross,</i> 349 N.E.2d 816 (N.Y. 1976)	35
<i>Express Recovery Services, Inc. v. Rice,</i> 125 P.3d 108 (Utah Ct. App. 2005)	29
<i>Fairbourn Commercial, Inc. v. Am. Hous. Partners, Inc.,</i> 94 P.3d 292 (Utah 2004)	3, 21
<i>Falcone v. Hinsdale Gyn. & Obstetrics, Ltd.,</i> 499 N.E.2d 694 (Ill. App. Ct. 1986)	33
<i>Flexfab, LLC v. United States,</i> 424 F.3d 1254 (Fed. Cir. 2005)	27

<i>Flying Diamond Oil v. Newton Sheep Co.</i> , 776 P.2d 618 (Utah 1989)	35, 36, 39, 40, 41
<i>Hardinge Co. v. Eimco Corp.</i> , 266 P.2d 494 (Utah 1954)	27
<i>Home Sav. & Loan v. Aetna Cas. & Sur. Co.</i> , 817 P.2d 341 (Utah Ct. App. 1991)	2
<i>Home Builders Ass’n of Central Ariz. v. City of Maricopa</i> , 158 P.3d 869 (Ariz. Ct. App. 2007)	22
<i>In re Estate of Orris</i> , 622 P.2d 337 (Utah 1980)	30
<i>Jones, Waldo, Holbrook & McDonough v. Dawson</i> , 923 P.2d 1366 (Utah 1996)	30
<i>Kearns-Tribune Corp. v. Wilkinson</i> , 946 P.2d 372 (Utah 1997)	1
<i>Levy v. Graham</i> , 347 So.2d 1180 (La.Ct.App. 1977)	36
<i>Mel Trimble Real Estate v. Fitzgerald</i> , 626 P.2d 453 (Utah 1981)	24
<i>Miller v. Celebration Mining Co.</i> , 29 P.3d 1231 (Utah 2001)	33
<i>Odessa Texas Sheriff’s Posse, Inc. v. Ector County</i> , 215 S.W.3d 458 (Tex. App. 2006)	22
<i>Ogden Electric Co. v. Engineers</i> , 151 F.2d 657 (10th Cir. 1945)	27
<i>Orvis v. Johnson</i> , 2006 UT App 296 (Utah Ct. App. July 13, 2006)	32, 33, 34
<i>Parks Enters., Inc. v. New Century Realty, Inc.</i> , 652 P.2d 918 (Utah 1982)	29

<i>Pedro v. Humboldt County</i> , 19 P.2d 776 (Cal. 1933)	36
<i>Peterson v. Sunrider Corp.</i> , 48 P.3d 918 (Utah 2002)	2
<i>Red Cliffs Corner v. J.J. Hunan, Inc.</i> , 2009 UT App 240	21
<i>Reichert v. Weeden</i> , 618 P.2d 1216 (Mont. 1980)	37
<i>Rio Algom Corp. v. Jimco Ltd.</i> , 618 P.2d 479, 506 (Utah 1980)	24
<i>Ron Case Roofing & Asphalt v. Blomquist</i> , 773 P.2d 1382 (Utah 1989)	24
<i>Rushton v. Salt Lake County</i> , 977 P.2d 1201 (Utah 1999)	3
<i>Sears v. Riemersma</i> , 655 P.2d 1105 (Utah 1982)	29
<i>Smith v. Taylor-Morely, Inc.</i> , 929 S.W.2d 918 (Mo. App. 1996)	34
<i>State v. Pena</i> , 869 P.2d 932 (Utah 1994)	1
<i>Tahitian Noni Intern. v. Dean</i> , 2009 WL 197525, (D.Utah 2009)	29
<i>Terry v. Wilkinson Farm</i> , 173 P.3d 204 (Ut. Ct. App. 2007)	32
<i>Tracy Collins Bank & Trust vs. Dickamore</i> , 652 P.2d 1314 (Utah 1982)	24
<i>Waterbury Equity Hotel, LLC v. City of Waterbury</i> , 858 A.2d 259 (Conn. App. 2004)	22

<i>Wells Fargo Bank v. Midwest Realty & Fin., Inc.</i> , 544 P.2d 882 (Utah 1975)	30
--	----

Constitutions, Statutes, and Regulations

Utah Const., Article VIII, § 5	1
Utah Code Ann. § 16-10a-1405 (1992, as amended)	3, 21, 31, 32, 33
Utah Code Ann. § 16-10a-1421 (2000, as amended)	33
Utah Code Ann. § 16-10a-1422 (2000, as amended)	31
Utah Code Ann. § 48-2c-1203 (2001, as amended)	33
Utah Code Ann. § 48-2c-1207 (2005, as amended)	33
Utah Code Ann. § 48-2c-1302 (2001, as amended)	33
Utah Code Ann. § 78-2-2(3)(j) (1953, as amended.)	1
Utah Code Ann. § 78-2-2(4) (1953, as amended)	1
Utah Code Ann. § 78-2a-3(2)(j) (1953, as amended)	1

Other Sources

20 Am.Jur.2d <i>Covenants, Conditions, and Restrictions</i> § 30 (1965 & Supp. 1989)	35
Berger, <i>A Policy Analysis of Promises Respecting the Use of Land</i> , 55 Minn.L.Rev. 167, 179-207 (1970)	39, 40
Black's Law Dictionary (6th ed. rev. 1999)	21
Black's Law Dictionary (8th ed. 2004)	21
David A. Thomas & James H. Backman, <i>Utah Real Property</i> § 12.04(b)(3) (2005)	35, 40
5 R. Powell, <i>The Law of Real Property</i> ¶ 673[1] (1988)	35, 37, 40
Restatement (Second) of Contracts § 206 (1981)	29, 30

Restatement (Second) of Contracts § 302(1)(a) (1981)	35
3 Williston on Contracts, § 623	27

JURISDICTION OF APPELLATE COURT

The jurisdiction of all appellate courts "shall be provided by statute."¹ Section 78-2-2(3)(j) of the Utah Code, provides that: "The Supreme Court has appellate jurisdiction..., over orders, judgments, and decrees of any court of record over which the Court of Appeals does not have original appellate jurisdiction[.]"² This is an appeal from the final judgment of the Third District Court in a civil matter, and although it has original appellate jurisdiction, the Supreme Court has transferred this matter to the Court of Appeals pursuant to § 78-2-2(4) and § 78-2a-3(2)(j), which provide that the Supreme Court may transfer any matter over which it has original appellate jurisdiction.

ISSUES PRESENTED FOR REVIEW

1. Whether the trial court erred in finding that Plaintiffs lacked standing to assert rights based on the June 26, 1975 contract between Bell Mountain Corporation and Sandy City and dismissing Plaintiff's claims following a two-day trial.

Standard of Review: A determination of standing is generally a question of law which the Court of Appeals reviews for correctness. *Kearns-Tribune Corp. v. Wilkinson*, 946 P.2d 372, 373 (Utah 1997); *State v. Pena*, 869 P.2d 932, 936 (Utah 1994).

2. Whether, if the Plaintiffs were not parties to the agreement, they were intended third-party beneficiaries to the agreement and entitled to enforce the agreement.

¹ Utah Const., Article VIII, § 5.

² Utah Code Ann., § 78-2-2(3)(j) (1953, as amended).

Standard of Review: Whether a third-party beneficiary' status exists is determined by examining a written contract and is reviewed for correctness. *Am. Towers Owners Assoc., Inc. v. CCI Mech., Inc.*, 930 P.2d 1182, 1188 (Utah 1996).

3. What significance should be given to the course of dealing between the parties (which shows that before any dispute arose both Plaintiffs and Sandy City interpreted the agreement to waive flood control fees and ½ of the park fees) in interpreting the meaning of the agreement here.

Standard of Review: Whether a contractual term or provision is ambiguous on its face is a question of law. *Daines v. Vincent*, 190 P.3d 1269, 1275-76 (Utah 2008). Once the court determines that the term or provision is facially ambiguous, it may determine the parties' intent through examination of parol evidence, the determination of which presents a question of fact. *Id.* ¶¶ 25-26. "In reviewing a trial court's contract interpretation, we defer to the trial court on questions of fact but not on questions of law." *Peterson v. Sunrider Corp.*, 2002 UT 43, ¶ 14, 48 P.3d 918, 924 (Utah 2002).

4. Whether the trial court erred in failing to interpret the contract in accordance with established principals of contract interpretation, including *contra proferentum*.

Standard of Review: We review a district court's interpretation of a written contract for correctness, granting no deference to the court below. *Home Sav. & Loan v. Aetna Cas. & Sur. Co.*, 817 P.2d 341, 347 (Utah Ct. App. 1991).

5. Whether the trial court erred in creating and imposing a time limit upon the "winding up" of a corporation, where no such time limit has been statutorily adopted.

Standard of Review: The proper interpretation of a statute is a question of law. *Rushton v. Salt Lake County*, 977 P.2d 1201, 1203 (Utah 1999). Therefore, "we accord no deference to the legal conclusions of the district court but review them for correctness." *Id.*

6. Whether the trial court erred by failing to find that Plaintiffs have standing to enforce the agreement, because the agreement runs with the land.

Standard of Review: When reviewing the trial court's interpretation of the contract, which presents a legal question, this court reviews for correctness. *Fairbourn Commercial, Inc. v. Am. Hous. Partners, Inc.*, 94 P.3d 292, 294 (Utah 2004).

RULES AND REGULATIONS APPLICABLE TO APPEAL

Utah Code Ann. 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.

STATEMENT OF THE CASE

Nature of the Case:

This appeal seeks the reversal of Judge Royal Hansen's decision, following a two-day trial, that Plaintiffs lacked standing to enforce a contract from June 26, 1975 (1975 Contract) between Bell Mountain Corporation (Bell Mountain), Horman properties and Sandy City regarding the development of the Pepperwood residential subdivisions. Plaintiffs/Appellants are the incorporators, owners, assigns and successors in interest to Bell Mountain who developed the "Horman properties."

In 1970, the Horman family purchased nearly 1000 acres of land in Salt Lake County, then adjoining Sandy City and later incorporated into Sandy City, for the purpose of annexing into Sandy City and creating a residential subdivision development. Pursuant to a written agreement dated June 26, 1975, Bell Mountain agreed to finance, design and construct a three million gallon underground reservoir and other water system improvements for Sandy City to allow development to continue. At the time, Sandy was considering a moratorium on all development because they had insufficient culinary water. The 1975 Contract provided that the Horman family would receive partial reimbursement over a ten year period for the cost of the reservoir construction, and most importantly, the waiver of the City's newly

adopted ordinances requiring developers to pay flood fees, park fees and water connection fees over the life of the development of the Horman family property.

The 1975 Contract provided the Horman family would assign their valuable water rights, well and land back to the City, which they did. Following the 1975 Contract, the Horman family continued their development. The water rights and well surrendered by the Hormans in the 1975 Contract are worth tens of millions of dollars.

For decades following the 1975 Contract, Plaintiffs continued to develop the Horman family property in phases of the Pepperwood development, using a variety of entities, corporations, LLC's and proprietorships. Sandy honored the 1975 Contract in dealing with the Horman family, long after Bell Mountain Corporation ceased to exist.

Within the last few years, however, Sandy City enacted substantially increased flood control fees and began to violate the 1975 Contract by charging the Harmon family entities the flood control fee and requiring payment of the full park fee.

This dispute arises from the recent change in Sandy's position, requiring payment of over one-and-a-half-million dollars in flood control fees plus park fees from the Horman family entities and their buyers, which fees were expressly waived in the 1975 Contract. Plaintiffs/Appellants sued Sandy City, alleging four causes of action: (1) Breach of Contract; (2) Breach of the Implied Covenant of Good Faith and Fair Dealing; (3) Conversion; and (4) Declaratory Judgment.

After a two-day bench trial, Judge Royal Hansen determined that Plaintiffs/Appellants did not have standing to enforce the terms of the 1975 Contract, and dismissed all of

Plaintiffs' claims. The issue of Plaintiffs' standing had been raised three previous times in these proceedings by Sandy City. Each time, the court denied the City's motions to dismiss and/or for summary judgment based on Plaintiffs' lack of standing.

Course of Proceedings and Disposition Below:

Plaintiffs filed their Complaint on September 7, 2005. A motion to dismiss was filed by Sandy City on October 17, 2005, on grounds and for the reason that "Plaintiffs do not have standing to bring this action, do not own the claims they assert, and have failed to plead adequate facts to establish ownership of the claims they assert." (Court Record (hereinafter designated as "R."), 63-83, Motion to Dismiss, dated October 17, 2005.)

The motion to dismiss was denied by Judge Christiansen on January 9, 2006. In ruling on the motion to dismiss, the court stated that, based on the pleadings and relevant case precedent, it "must assume . . . Plaintiffs are the successors in interest to the 1975 Agreement. How, why, when or even if they actually attained such status can be determined through discovery Accordingly, Plaintiffs have standing to sue to protect their interests under the June 25, 1975 Agreement with Sandy City[.]" (R. 207-209, Order dated January 9, 2006 by Judge Terry L. Christiansen.)

Following extensive discovery, Sandy City moved for Summary Judgment on the basis that the 1975 agreement "(1) is not a covenant running with the land; (2) has not been validly assigned to the plaintiffs; and (3) none of the plaintiffs are parties to the agreement, thus precluding any enforceable rights on which to base their claim." (R. 234-302, Motion dated October 13, 2006.) The Horman family responded that the 1975 Contract was properly

assigned to Plaintiffs; the 1975 Contract remains in effect; and, the 1975 Contract runs with the land. (R. 306-692, Memorandum in Response to Defendants' Motion for Summary Judgment dated November 8, 2006.)

On May 23, 2007, following oral argument, the court denied summary judgment, finding issues of fact remain as to the reasonable time for winding up the affairs of Bell Mountain, the meaning of paragraph 12 of the 1975 Agreement, and whether the contractual provisions "run with the land". (R. 761-763, Order on Cross-Motions for Summary Judgment, dated May 23, 2007.)

Trial was held on October 21-22, 2008, with a closing argument on December 10, 2008. Following trial, the court asked for submissions of findings of fact and conclusions of law. Rather than use the form of findings and conclusions submitted by the parties, the court relied on its own findings and conclusions. The court found the 1975 Contract was entered into by Bell Mountain and Sandy City. (R. 1117-1130, ¶ 1, Findings of Fact and Conclusions of Law and Order dated January 27, 2009.) The court found the 1975 Contract to be binding on both parties, their successors and assigns. (*Id.* ¶ 6.) However, the court concluded Plaintiffs were not assignees of Bell Mountain nor third party beneficiaries under the 1975 Contract. (*Id.* at ¶¶18-20.) The court also concluded the 1975 Contract did not run with the land. (*Id.* at ¶ 21.)

Based on its conclusions, the court then held that Plaintiffs lacked standing to enforce the 1975 Contract. (*Id.* at ¶22.)

Statement of Facts with Reference to the District Court Record

1. In 1970, the Horman family purchased nearly 1000 acres of land in Salt Lake County, which was known to Sandy from that time forward as "Horman properties³." (R. 1464, Trial Transcript ("Tr."), p. 13, lns. 23-24; p. 14, lns. 16-18; p. 16, lns. 21-25; R. 1464, Tr., p. 387, lns. 15-24; p. 390, lns. 17-23; *see also* Trial Exhibit 138; Trial Exhibit 139.)

2. The Horman family members owning the property planned to develop it into a subdivision and explored annexing it into Sandy. (R. 1464, Tr., p. 16, lns. 13-15; R. 1465, Tr., p. 259, lns. 19-25; p. 260, lns. 1-23.)

3. Prior to annexation, Sandy required culinary water to be available to the Horman properties, as the existing water companies and their assets were not sufficient to service the proposed subdivision. The Horman family had valuable water rights and proposed to use their water rights to create a water company to service their land. (R. 1464, Tr., p. 15, lns. 13-23; R. 1465, Tr., p. 269, lns. 2-8.)

4. After showing the feasibility of a new water company, Sandy allowed the land to be annexed. (R. 1464, Tr., p. 16, lns. 13-20.)

5. When annexed, the property began to be known as the "Pepperwood" area. This was the anticipated name to be used for the anticipated subdivision development. (R.

³ The property is described in various Sandy City documents, including the 1975 Contract, as follows: "Horman properties located east of 2000 east [sic], north of 12000 south [sic] and south of 10000 south [sic]." *See* Exhibit 6(C). This description was authored by Sandy City. (R. 1464, Tr., p. 40, lns. 1-23.) Within the area bounded by 20th East, 120th South and 100th South, the approximate 1,000 acres belonging to the Horman family was wholly located. (R. 1464, Tr., p. 14, lns. 16-26; p. 15, lns. 1-3; R. 1465, Tr., p. 266, lns. 17-25; p. 267, lns. 1-3; *see also* Trial Exhibit 41.)

1464, Tr., p. 17, lns. 2-12; R. 1465, Tr., p. 259, lns. 4-23; p. 262, lns. 8-11; p. 321, lns. 4-14; *see also* Trial Exhibit 139.)

6. The first portion of the Horman properties was annexed into Sandy in 1972. (R. 1464, Tr., p. 19, lns. 3-8.)

7. By 1974, the Hormans had recorded two phases of their Pepperwood development containing 141 lots (of which most had been sold), three water wells had been drilled, a pump ordered, construction on a reservoir commenced and several miles of water lines installed. (R. 1464, Tr., p. 20, lns. 1-25; p. 21, lns. 1-25; *see also* Trial Exhibit 2.)

8. Shortly after the initial work was done, Sandy City passed an ordinance which prohibited any water company, other than Sandy, to make new connections within the City. (R. 1464, Tr., p. 22, lns. 6-20; *see also* Trial Exhibit 8.)

9. This ordinance specifically targeted the Horman family water rights. (R. 1464, Tr., p. 22, lns. 9-20.) The family water rights were much more valuable than the property. (R. 1464, Tr., p. 25, lns. 2-7; R. 1465, Tr., p. 270, lns. 12-25.)

10. As a result, the Horman family had no reasonable alternative but to enter into an agreement dated May 31, 1974 (referred to herein as "1974 Contract") with Sandy. (R. 1464, Tr., p. 26, lns. 7-20; R. 1465, Tr., p. 271, lns. 1-20; *see also* Trial Exhibit 9.)

11. The 1974 Contract was signed by Charles Horman on behalf of the entity "S. M. Horman & Sons Company," a Utah partnership. (R. 1464, Tr., p. 25, lns. 8-17; *see* Trial Exhibit 9.)

12. The 1974 Contract required the Horman family to turn over all water rights, pipe lines and operating well to the City, including the land on which the well was located. (R. 1464, Tr., p. 28, lns. 13-25; p. 29, lns. 1-5; *see* Trial Exhibit 9.)

13. The consideration paid by Sandy to the Hormans was only a small fraction of the value of the water infrastructure transferred; however, the ability to proceed with development of their land without litigation motivated the Horman family to enter into the 1974 Contract. (R. 1464, Tr., p. 24, lns. 6-25; p. 25, lns. 1-7; p. 26, lns. 6-20.; *see* Trial Exhibit 8.)

14. The 1974 Contract contemplated that the City would meet the requirements mandated by the Board of Health, which included adequate water pressure and fire protection flow rates. This, however, would require the construction of a storage reservoir. (R. 1464, Tr., p. 28, lns. 13-25; p. 29, lns. 6-19; R. 1465, Tr., p. 271, lns. 4-25; *see* Trial Exhibit 9.)

15. By early 1975, Sandy City's water system was not in compliance with the requirements of the Board of Health because the City had failed to construct a reservoir which would provide adequate fire protection flow rates and water pressure. (R. 1464, Tr., p. 32, lns. 18-25; p. 33, lns. 1-25; R. 1465, Tr., p. 271, lns. 4-25.)

16. Consequently, Sandy City passed a moratorium which prohibited any new home construction or lot development on the Horman properties. The failure to provide water and adoption of the moratorium created a default under the 1974 Contract. (R. 1464, Tr., p. 32, lns. 18-25; p. 33, lns. 1-25; p. 34, lns. 1-6; *see* Trial Exhibit 10, p.2.)

17. In early 1975, Sandy City also passed an ordinance concerning development fees to be assessed by the Sandy City engineer for flood control drainage and maintenance, and provided that the fees would be collected from the developers in advance. Collection in advance was motivated by Sandy City's then-existing financial problems. (*See* Trial Exhibit 11.)

18. Sandy City acknowledged the default under the 1974 Contract, but represented to the Horman family that they intended to build a reservoir. (R. 1464, Tr., p. 33, lns. 10-15.) However, since it only served a small area and would be expensive, the new reservoir was a low priority and had not yet been budgeted by Sandy. (R. 1464, Tr., p. 33, lns. 15-17.)

19. In an effort to solve the water problems for Sandy City and to continue their development, the Horman family offered to build a reservoir for Sandy. (R. 1464, Tr., p. 33, lns. 18-25; R. 1465, Tr., p. 271, lns. 8-25; p. 272, lns. 1-3.)

20. On June 25, 1975 the Horman family contracted with Sandy City to solve the construction moratorium, rather than pursuing lengthy litigation for the default under the 1974 Contract. (R. 1464, Tr., p. 55, lns. 9-23; R. 1465, Tr., p. 295, lns. 17-24.)

21. The Sandy City Council proposed the terms of the 1975 Contract, which is set forth in the Sandy City Council minutes. (*See* Trial Exhibit 10.)

22. The language of the 1975 Contract was taken directly from the minutes of the Sandy City Council meeting. (*See* Trial Exhibit 6(C); Trial Exhibit 10.)

23. The Sandy City Council minutes state Sandy City would agree to "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 the individual lot owners." (See Trial Exhibit 10, emphasis added).

24. The Sandy City Council approved the agreement and proposed that the Mayor, then Dewey Bluth, sign the agreement on behalf of Sandy City. (See Trial Exhibit 6(C); Trial Exhibit 10.)

25. The 1975 Contract was signed by Charles Horman on behalf of "Bell Mountain Corporation" and refers to "Horman properties" as well as "successors and assigns." (See Trial Exhibit 6(C).)

26. Under the 1975 Contract, the Bell Mountain agreed to finance, design and construct a three million gallon underground reservoir for Sandy. (See Trial Exhibit 6(C), ¶¶ 1-2.)

27. The 1975 Contract also provided that Bell Mountain would receive some reimbursement over a ten year period for the cost of the reservoir construction, as well as the waiver of the newly passed ordinances requiring developers to pay flood fees, park fees and water connection fees over the life of the development of the Horman properties. (See Trial Exhibit 6(C), ¶¶ 9-12; see Trial Exhibit 13; Trial Exhibit 14.)

28. The 1975 Contract provided that the undeveloped portion of the Pepperwood Subdivision area would be exempt from paying Sandy initial flood control fees and one half of Sandy required park fees in exchange for Bell Mountain constructing water storage improvements for the benefit of Sandy. (R. 1464, p. 39, lns. 1-25; p. 40, lns. 1-14; p. 42, lns. 12-24; p. 70, lns. 7-25; p. 71, lns. 1-3; R. 1465, p. 259, lns. 4-18; see Exhibit 6(C).

29. In reliance on the terms of the 1975 Contract, Bell Mountain provided water storage improvements to Sandy, which included a three million (3,000,000) gallon underground concrete water reservoir, and drilling several wells in the vicinity of the Pepperwood Subdivision. (R. 1464, p. 28, lns. 13-24; p. 53, lns. 9-19; p. 87, lns. 1-7; p. 93, lns. 8-24; *see* Exhibit 6(C).)

30. The 1975 Contract also provided the Horman family would assign their valuable water rights, well and land back to the City. (R. 1465, Tr., p. 273, lns. 2-15; *see* Trial Exhibit 6(C), ¶ 18(1).)

31. The Horman family also received the ability to continue their development under the 1975 Contract. (R. 1464, p. 35, lns. 18-24; *see* Exhibit 6(C).)

32. The water rights and well given up by the Hormans in the 1975 Contract are worth millions of dollars. (R. 1464, p. 25, lns. 4-7; R. 1465, p. 295, lns. 1-14.)

33. For decades following the 1975 Contract, the Hormans continued to develop the Horman properties in phases of the Pepperwood development, using a variety of entities, corporations, LLCs and proprietorships. (R. 1464, p. 206, lns. 13-25; p. 207, lns. 1-25; p. 208, lns. 1-11.)

34. From 1975 until only recently, Sandy City's practice was not to charge the Horman properties for either flood maintenance fees or flood control basin fees, consistent with the 1975 Contract's requirements. (R. 1465, p. 402, lns. 4-25; p. 403, lns. 1-25; p. 404, lns. 1-6; *see* Exhibit 21.)

35. Sandy honored the 1975 Contract long after Bell Mountain Corporation ceased to operate. (R. 1464, p. 87, lns. 16-22.)

36. From 1975 until just recently, Sandy has honored the 1975 Contract. Only recently has Sandy wrongly imposed and collected flood control fees and/or park fees on Phases 10A, 10B, 10C, 10D, 11B, Pepperwood Terrace 2 and Pepperwood Creek, while development in the area was continuing, totaling approximately \$404,067.57 at the time of trial. (R. 1464, p. 87, lns. 12-22; p. 236, lns. 7-10; R. 1465, p. 281, lns. 11-21; *see* Exhibit 1; Exhibit 5; Exhibit 6(A); Exhibit 6(C).)

37. The 1975 Contract provided Sandy City with water rights that are extremely valuable and worth far more than the value of the Horman properties. (R. 1464, p. 15, lns. 21-23; p. 25, lns. 2-7; p. 104, lns. 7-25; R. 1465, p. 270, lns. 12-25; p. 274, lns. 2-5; *see* Exhibit 23.)

38. Sandy City's breach of the 1975 Contract has resulted in the payment of over one million dollars in flood control fees plus park fees from the Horman family entities and their buyers which were waived in the 1975 Contract. (R. 1464, p. 104, lns. 7-25; R. 1465, p. 281, lns. 11-21; *see* Exhibit 23.)

39. Since 1975, Sandy City has received from the Horman family entities the 3 million gallon water tank, a productive water well, and the water rights associated with two wells. For over 30 years Sandy has benefitted from these water rights. They have sold water from the water system to residents throughout the eastern portion of Sandy both within the

Horman properties and to surrounding properties owned by others. (R. 1464, p. 86, lns. 23-25; p. 87, lns. 1-11; p. 105, lns. 15-25; p. 106, lns. 1-10; *see* Exhibit 29.)

40. The area known as Pepperwood Subdivision is still not fully developed. Development began in 1973 and continues today. (R. 1464, p. 87, lns. 12-15.)

41. In 1975, Bell Mountain Corporation was a Utah corporation. (R. 1464, p. 13, lns. 15-21.)

42. From 1975 to 1993, Bell Mountain Corporation was a corporate entity used by the Horman family to develop land owned by the Horman Family in the area known as the Pepperwood section of Sandy. (R. 1464, p. 13, lns. 22-25; p. 14, lns. 1-20.)

43. Changes in tax and corporate laws made it advantageous to transfer development and sell portions of the property to separate Horman family entities, and to take advantage of these tax laws and secure long-term capital gains treatment for some of the revenues, title to the Horman properties was transferred to various family owned entities, which are the named Plaintiffs in this case. (R. 1464, p. 163, lns 10-25; p. 164, lns. 1-8.)

44. In 1987, Bell Mountain transferred by Warranty Deed to Longview Development, a Utah corporation, all right title and interest in the Horman properties. (*See* Trial Exhibit 37 (B)-(G).)

45. Bell Mountain closed operations in 1987, its last corporate income tax return was filed in 1987. (R. 1123, ¶ 11.)

46. On November 1, 1993, Bell Mountain was administratively dissolved by the Utah Department of Commerce. (R. 1464, p. 164, lns. 9-25; *see* Trial Exhibit 32.)

47. On January 1, 1993, Long View Development passed title to its properties within the Pepperwood Subdivision to other Horman family entities, which are the Plaintiffs in this case. (R. 1464, p. 76, lns. 13-25; p. 77, lns. 1-12; *see* Trial Exhibit 25; Trial Exhibit 32; Trial Exhibit 102.)

48. Although it had been done earlier, out of an abundance of caution, on November 8, 2005, Bell Mountain Corporation assigned again in writing its interest in the 1975 Contract to Plaintiffs as a valid winding up of its business affairs as allowed by the corporate statute governing the dissolution of a corporation. (R. 1464, p. 166, lns. 19-25; p. 167, lns. 1-6; *see* Trial Exhibit 25.)

49. 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. (R. 1464, p. 206, lns. 6-25; p. 207, lns. 1-25; p. 208, lns. 1-21; *see* Trial Exhibit 25; Trial Exhibit 142, ¶ 16.)

50. Before deciding to breach the Contract and collect money from Plaintiffs, Sandy City referred to the June 25, 1975 agreement as "between the City and Bell Mountain Corporation, the developer's (Legacy Development) predecessor in interest," clearly admitting Legacy Development is a successor in interest to Bell Mountain. (*See* Trial Exhibit 142, ¶16.)

51. For many years after Bell Mountain ceased operations, Sandy City acknowledged the successor status of Plaintiffs and allowed Plaintiffs to receive the benefits of the 1975 Contract. (*See* Trial Exhibit 142, ¶16.)

52. Sandy City upheld the terms of the Agreement for more than 20 years, even though the names of the entities developing the property changed. (R. 1464, p. 208, lns. 22-25; p. 209, lns. 1-2; *see* Trial Exhibit 6(C); Trial Exhibit 142, ¶16.)

53. Sandy waived the majority of fees after the assignment to Longview Development. (*See* Trial Exhibit 6(C); Trial Exhibit 7; Trial Exhibit 17; Trial Exhibit 142, ¶16.)

54. Sandy City never suggested that the various Horman family entities would not receive the benefits under the agreement. (R. 1464, p. 208, lns. 22-25; p. 209, lns. 1-23.)

55. Sandy City did not claim there was no privity or successor status until well after the litigation began. (R. 1464, p. 208, lns. 22-25; p. 209, lns. 1-23; *see* Trial Exhibit 17; Trial Exhibit 142.)

56. At the time of the filing of this action, Plaintiffs' damages totaled approximately \$142,917.66. (*See* Trial Exhibit 21.)

57. At the time of trial, Plaintiffs' damages had increased to approximately \$404,067.57. (R. 1464, p. 87, lns. 12-22; p. 236, lns. 7-10; R. 1465, p. 281, lns. 11-21; *see* Trial Exhibit 1, Trial Exhibit 5; Trial Exhibit 6(A).)

58. Sandy City obtained water rights (and water-related assets) from the Hormans that are extremely valuable and worth far more than the value of the Horman properties. R. 1464, p. 15, lns. 21-23; p. 25, lns. 2-7; p. 104, lns. 7-25; R. 1465, p. 270, lns. 12-25; p. 274, lns. 2-5; *see* Trial Exhibit 23.)

59. Sandy City has received tens of millions of dollars in income from those water rights since 1975. (R. 1464, p. 25, lns. 4-7; R. 1465, p. 295, lns. 1-14; *see* Trial Exhibit 29.)

SUMMARY OF ARGUMENTS

The Trial Court erred in finding the 1975 Contract between Bell Mountain and Sandy was not validly assigned to Plaintiffs, thus denying Plaintiffs standing to pursue their claims against the City. On three occasions the Court declined to rule this way in response to Sandy City's Motions to Dismiss and for Summary Judgment. Trial did not produce any additional or different information to support the conclusion that the Contract was not assigned. The Contract was assigned at the time of the original dissolution⁴, and then again assigned when the paperwork from the first assignment was lost. Both were sufficient to give the Plaintiffs' standing.

If Plaintiffs were not parties to the 1975 Contract, they are clearly intended third-party beneficiaries to the agreement and are entitled to enforce it. The 1975 Contract identifies the entire area described as Horman properties, a tract of approximately 1,000 acres, as the benefitted property. The 1975 Contract identifies successors in interest and the property itself, along with the unincorporated Horman properties as benefitting from the Contract.

⁴ Although unavailable during trial, in February 2009, while remodeling a building owned by the Horman family, approximately 50 boxes of old documents were found. Included in those previously lost files were the original corporate books of Bell Mountain Corporation, which also contained the original, signed Plan of Liquidation. The Plan of Liquidation states that all the assets of Bell Mountain Corporation are to be assigned to the shareholders of the corporation. Plaintiffs sought relief from the trial court's judgment based on the newly found evidence supporting an assignment of the 1975 Contract to the shareholders. The court denied Plaintiffs' request for relief from the judgment of dismissal. (R. 1456-1462, Ruling dated June 30, 2009.)

Subsequent changes in structure by the Horman family due to tax planning never altered the owners, never changed who was developing the property and never released Sandy from its obligations under the Contract.

Before any dispute arose, the course of dealing between the parties shows both Plaintiffs and Sandy City interpreted the 1975 Contract to waive flood control fees and one-half of the park fees on the Horman properties. When interpreting the terms of any agreement, the parties' own conduct before a dispute is relevant to meaning. Here, the parties both interpreted the agreement to waive these fees, despite various family entities being the identified developer. The ultimate breach by Sandy was motivated only by the need for money, and not a legitimate difference in view of the Contract's meaning.

The Trial Court erred in failing to interpret the 1975 Contract in accordance with established principals of contract interpretation, including *contra proferentum*. Contract terms are construed against the author of the language. Here Sandy City drafted the 1975 Contract. The City relied on the minutes of the Sandy City Council, which reflect the direction to legal counsel as to the meaning and intent of the 1975 Contract. In both the Minutes and the Contract, it is clear Sandy City intended the benefits of the fee waivers to apply to all 1,000 acres of developable land belonging to the Horman family.

The Trial Court erred in imposing a time limit upon the "Winding Up" of a corporation where no time limit is specified in the Utah corporate statute governing winding up. The Trial Court invented a deadline which the Legislature of Utah did not adopt, then

chose to impose it here as the new judicially created rule governing corporate wind up. This was wrong.

The Trial Court erred by failing to find that Plaintiffs have standing to enforce the 1975 Contract because the Contract runs with the land. Everything about the Contract terms make it clear the parties intended in 1975 for the benefits to last so long as the Horman properties remained under development. The 1975 Contract clearly applied to a 1,000 acres tract of land belonging to the Horman family. It is the same family developing the same land which is now asking for the Contract to be enforced. 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.

ARGUMENT

1. The Trial Court Erred in Finding the 1975 Contract Between Bell Mountain and Sandy Was Not Validly Assigned to Plaintiffs, Thus Denying Plaintiffs Standing to Pursue Their Claims Against the City.

The 1975 Contract was between Sandy City and two groups or entities. One of the groups was Bell Mountain Corporation. The other was Horman properties. Bell Mountain was a corporation owned by members of the Horman family, now dissolved. Horman properties was the land owned by the Horman family and its various members. While Bell Mountain may have needed to assign its interests, Horman properties IS the very group now suing to enforce their agreement. To the extent that the Contract was with Horman properties, these are the very Plaintiffs who sued. To the extent the Contract was with Bell Mountain Corporation, the Contract expressly states it is binding on the parties as well as

their "successors and assigns." (Trial Exhibit, 6C, ¶ 20.) The trial court was incorrect, as a matter of law, when it found:

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.

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 as the time the corporation was in existence. . . .

(R. 1122, ¶¶18-19.) The trial court's analysis focused exclusively on an assignment of the 1975 Contract, it never meaningfully considered whether Plaintiffs qualify as **successors** to Bell Mountain and Horman properties. The trial court improperly merged the analysis of Plaintiffs' rights as successors with their status as assignees. In interpreting a contract provision, such as paragraph 20 of the 1975 Contract, a court determines the parties' intentions from the plain meaning of the contractual language as a matter of law. *Red Cliffs Corner v. J.J. Hunan, Inc.*, 2009 UT App 240, ¶22; *Fairbourn Commercial, Inc. v. Am. Hous. Partners, Inc.*, 94 P.3d at 295.

The Utah Supreme Court has held, "[o]ne can be a 'successor in interest' by assignment or conveyance as well as by descent." *Clotworthy v. Clyde*, 265 P.2d 420, 421 (Utah 1954). The legal definition of a successor in interest is "[o]ne who follows another in ownership or control of the property." Black's Law Dictionary (6th ed. rev.)*quoted in* Trial Brief at 22. That same dictionary makes clear that "[a] successor in interest retains the same rights as the original owner, with no change in substance." Black's Law Dictionary (8th ed.

2004); *see also Waterbury Equity Hotel, LLC v. City of Waterbury*, 858 A.2d 259, 268 (Conn. App. 2004) ("The plaintiff, in the present case, is a successor in interest and therefore in privity with the previous owners because it gained title to the subject property by deed."); *Home Builders Ass'n of Central Ariz. v. City of Maricopa*, 158 P.3d 869, 874 (Ariz. Ct. App. 2007) ("The word successor has been defined as one who takes the place that another has left, and sustains the like part or character.")(internal quotation marks and citations omitted); *Odessa Texas Sheriff's Posse, Inc. v. Ector County*, 215 S.W.3d 458, 467 (Tex. App. 2006) (recognizing that, when corporations are involved, "a successor is ordinarily one that acquires the rights and liabilities of another by amalgamation, consolidation, or duly authorized succession.")

Plaintiffs are successors in interest to Bell Mountain and/or ARE Horman properties because Plaintiffs (1) own and control the Horman properties listed in the 1975 Contract and (2) received that ownership through conveyance by deed or express assignment (which has since been lost). Bell Mountain transferred real property by warranty deed to Plaintiffs. (Trial Exhibit 37 (A)-(H).) "Horman properties" was, is and always has been owned by members of the Horman family, who are the Plaintiffs in this matter. Plaintiffs retain and have always possessed ownership of the "Horman properties." As Dave Evans testified at trial, the Horman properties are held in various entities owned by Charles Horman and Gordon Johnson, who are the original shareholders of Bell Mountain and, with their children, are the current owners of Plaintiffs. (R. 1646, p. 167, lns. 7-23; *see* Trial Exhibit 37.) Additionally, Bell Mountain was dissolved, transferring all of its assets and liabilities to

Plaintiffs as part of a complex tax-planning strategy. (R. 1464, p. 206, lns. 13-25; p. 207, lns. 1-25; p. 211, lns. 1-14.) Therefore, Plaintiffs are successors in interest to Bell Mountain and the court erred in finding otherwise.

Sandy City gave no evidence contrary to Plaintiffs' proof of its standing as a successor in interest to Bell Mountain. They only offered an argument. That argument asserted without proof that Bell Mountain did not have the authority to transfer the 1975 Contract to Plaintiffs because it was an expired corporation. Sandy's flawed argument improperly merges the legal distinction between "successors" and "assigns" as used in the 1975 Contract.

It is an abuse of discretion and contrary to existing law for the trial court to merge these arguments. The 1975 Contract distinguished between "successors" and "assigns." The legal standard in Utah for a "successor in interest" is separate and distinct from an assignment. Specifically, Utah law states "a successor is by assignment or conveyance as well as by descent." *Clotworthy*, 265 P.2d at 421. Here, because Plaintiffs received title to the property *by descent* and by a conveyance from Bell Mountain, Plaintiffs are successors in interest. Alternatively, Horman properties ARE the Plaintiffs and are the same family as originally contracted to give away tens of millions of dollars in value in the water rights, build the water tank, and thereby qualify for waiver of the fees. Therefore, the trial court erred in concluding Plaintiffs cannot enforce the 1975 Contract against Sandy City.

2. . If Plaintiffs Are Not Parties, Successors or Assigns to the 1975 Contract, They Are Intended Third-Party Beneficiaries to the Contract and Are Entitled to Enforce it.

As an alternative to direct standing, Plaintiffs also qualified as third-party beneficiaries entitled to enforce the 1975 Contract against Sandy City. Whether Plaintiffs qualify as intended third-party beneficiaries must be determined from the intentions of the parties as set forth in the contract language. *Tracy Collins Bank & Trust vs. Dickamore*, 652 P.2d 1314, 1315 (Utah 1982). The trial court improperly concluded Plaintiffs were not intended third-party beneficiaries. (Findings of Fact, R. 1117-1130, ¶ 20.) The trial court rejected Plaintiffs' standing as third-party beneficiaries on one basis alone – that, even assuming Plaintiffs are part of "Horman properties" as used in Paragraph 12 of the 1975 Contract, "the intended benefit conferred upon them was not for a waiver of flood control fees" because it was only to "defer payment of all water connection fees and charges which would otherwise be made to Bell Mountain Corporation and Horman properties." (*Id.*) The trial court's conclusion is both overreaching and error.

"For a third party to have enforceable rights under a contract, then, that party must be an 'intended beneficiary' of the contract, and the intention of the parties is to be determined from the terms of the contract as well as the surrounding facts and circumstances." *Ron Case Roofing & Asphalt v. Blomquist*, 773 P.2d 1382, 1386 (Utah 1989). "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 4797, 506 (Utah 1980)); *see also Mel Trimble Real*

Estate v. Fitzgerald, 626 P.2d 453, 454 (Utah 1981) (one only incidentally benefitted may not maintain an action against the promisor).

Here, Plaintiffs are intended third-party beneficiaries of the 1975 Contract because they are "owners of the said lots located in the Pepperwood Subdivision." (*See* Plaintiffs Trial Exhibit 6(C), ¶ 12.) Paragraph 12 of the 1975 Contract states "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.'" (*See* Trial Exhibit 6C, ¶ 12)(emphasis added.)

Plaintiffs' position is supported by section 302 of the Restatement of Contracts, which provides that:

[u]nless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and . . . the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary.

Restatement (Second) of Contracts § 302(1)(a) (1981); *Brigham Young v. Tremco Consultants, Inc.*, 110 P.3d 678, 684 (Utah 2005).

A benefit is clearly intended for owners of the Horman property lots located in Pepperwood, which are undeniably the Plaintiffs. Specifically, Bell Mountain transferred its interests in the "Horman properties" to Plaintiffs with various transfers by deed to Plaintiff Johnson, Plaintiff Horman, Plaintiff Hillcrest Investment, and Plaintiff Scandia Investment. (*See* Trial Exhibit, 37 (A)-(H).) Each transfer is accompanied by a warranty deed evidencing a transfer of a portion of "Horman properties" to Plaintiffs. Therefore, Plaintiffs are

considered "owners of said lots," as they are in the chain of title to the property. Because the contract clearly intended to benefit the lot owners with a waiver of flood control fees and one-half of the park fees, and Plaintiffs are lot owners, Plaintiffs are entitled to enforce the obligations of the 1975 Contract against Sandy city as intended third-party beneficiaries. Therefore, the trial court erred in its conclusion and should be reversed.

The plain language of the 1975 Contract specifically identifies three parties: Sandy City, Bell Mountain, and lot owners. Sandy and Bell Mountain were the parties to the 1975 Contract and, therefore, could not be third-party beneficiaries. However, the lot owners are intended beneficiaries to the 1975 Contract. The Contract conveys a benefit to lot owners: a waiver of the flood control fees and one-half of the park fees. (R. 1464, p. 56, lns. 1-23.) Sandy, Horman properties and Bell Mountain intended the lot owners to benefit from these waivers, and the lot owners are Plaintiffs in this case. Therefore, the trial court erred and should be reversed.

3. The Course of Dealing Between the Horman Family and Sandy City Shows That Sandy City Interpreted the 1975 Contract to Waive Flood Control Fees and One-Half of the Park Fees on All of the Horman Properties.

The trial court erred in not considering the course of conduct between Plaintiffs and Sandy in interpreting the 1975 Contract. The trial court found "[b]ased upon the Court's decision that the Plaintiffs lack standing, the Court need not address the other claims and arguments raised by the parties," yet it also found "no [flood control maintenance] fees were charged to Bell Mountain and later developers of the property, namely the Plaintiffs" (R. 1126-1127, ¶ 5(B)(2).) The trial court acknowledged the course of conduct between the

parties, waiving the flood control fees and one-half of the park fees to Plaintiffs as developers of the property, yet ruled Plaintiffs' did not have standing. The trial court erred, by not finding Plaintiffs have standing when Sandy interpreted the 1975 Contract to waive flood control fees for property Plaintiffs were developing until it became a burden on Sandy City, and the City decided to breach the 1975 Contract.

"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) (*citing 3 Williston on Contracts*, § 623); *see also Ogden Electric Co. v. Engineers*, 151 F.2d 657, 659 (10th Cir. 1945) ("It is also the settled law of Utah that the construction which the parties themselves place upon a contract will be given consideration when it becomes necessary to interpret the terms of the contract."); *Flexfab, LLC v. United States*, 424 F.3d 1254, 1262 (Fed. Cir. 2005) ("[I]ntent is determined by looking to the contract and, if necessary, other objective evidence. In the absence of clear guidance from the contract language, the requisite intent on the part of the government can be inferred from the actions of the contracting officer. . . .")

Here, the trial court acknowledged the parties interpreted the 1975 Contract to waive flood control fees, yet failed to hold Sandy City to its own interpretation of the 1975 Contract. In failing to hold Sandy City to abide by its contractual obligations, the trial court erred. Specifically, 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 further testified "[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.) In Sandy's water approval letter, dated July 7, 1998, it states "[t]his letter confirms that Pepperwood Phase 10A subdivision development located at approximately 11200 South Wasatch Boulevard being developed by Legacy Development Company will be served culinary water as part of Sandy City's total water system." (See Trial Exhibit 142, p. 1.) In paragraph 16 of the letter, it states "[p]ursuant to a 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." (*Id.* at ¶16.) Additionally, attached to the letter was a copy of the 1975 Contract. *Id.* Sandy City sent this letter, acknowledging Legacy Development as a successor to Bell Mountain, nearly 23 years after the 1975 Contract was signed.

The trial court erred in not taking into account the parties' course of conduct. Plaintiff Charles Horman testified the parties interpreted the 1975 Contract to waive all flood control fees for any developing entity and Sandy had upheld this interpretation for over 20 years. Further, the July 7, 1998 letter drafted by Sandy shows Sandy's interpretation of the 1975 Contract was to waive flood control fees for Bell Mountain and its successors, Plaintiffs. See Trial Exhibit 142.

As shown by their conduct and interaction, both Plaintiffs and Sandy interpreted the 1975 Contract as waiving flood control fees and one-half of the park fees for all of the

"Horman properties." Specifically, for nearly 30 years, Sandy interpreted the 1975 Contract to include Bell Mountain successors, Legacy Development and Plaintiffs, and enforced the terms of paragraph 12 to waive those fees for all of "Horman properties." Therefore, the trial court erred in failing to consider the parties' contemporaneous interpretation and conduct relating to the 1975 Contract.

4. The Trial Court Erred in Failing to Interpret the Contract in Accordance with Established Principles of Contract Interpretation, Including *Contra Proferentum*.

The trial court erred in failing to interpret the 1975 Contract against its drafter, Sandy. The trial court found Paragraph 12 of the 1975 Contract to be ambiguous. (R. 1126-1128, ¶5 (A)-(B).) Notwithstanding that fact, the trial court failed to consider well established doctrines and rules of contract interpretation in determining the meaning of Paragraph 12.

The doctrine of *contra proferentem* requires the court to construe any ambiguities against the drafter. *Tahitian Noni Intern. v. Dean*, 2009 WL 197525, (D.Utah 2009); *see also Express Recovery Services, Inc. v. Rice*, 125 P.3d 108 (Utah Ct. App. 2005) ("We note that if there are any ambiguities in this contract, however, they should be construed against Express Recovery Services, as successor to the drafter."); Restatement (Second) of Contracts § 206 (1981). Several Utah cases have invoked the doctrine but have typically not elaborated on its proper role. *See, e.g., Sears v. Riemersma*, 655 P.2d 1105, 1107 (Utah 1982) ("The well-established rule in Utah is that any uncertainty with respect to construction of a contract should be resolved against the party who had drawn the agreement."); *Parks Enters., Inc. v. New Century Realty, Inc.*, 652 P.2d 918, 920 (Utah 1982) ("It is also settled law that a

contract will be construed against the drafter."); *In re Estate of Orris*, 622 P.2d 337, 339 (Utah 1980) (language of an ambiguous instrument should be construed most strictly against the party who drafted the instrument).

Utah recognizes where a document is ambiguous, it is appropriate to construe it "strictly against the party who wrote it," but also appropriate to "take extraneous evidence and look to the total circumstances to determine what the parties should reasonably be deemed to have understood thereby." *Wells Fargo Bank v. Midwest Realty & Fin., Inc.*, 544 P.2d 882, 885 (Utah 1975). While the opinion does not say so, it is obvious there is nothing left to construe - "strictly against the party who wrote it" or otherwise - if extraneous evidence clearly establishes "what the parties should reasonably be deemed to have understood" in executing an agreement. *Id.* "In choosing among reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds." *Jones, Waldo, Holbrook & McDonough v. Dawson*, 923 P.2d 1366, 1372 (Utah 1996) (citing Restatement (Second) of Contract § 206 (1981)).

The trial court failed to construe the 1975 Contract against Sandy, as required under Utah law. Though finding the language in Paragraph 12 to be ambiguous, the trial court did not construe the language against Sandy. Plaintiffs' interpretation of Paragraph 12 is reasonable and in line with the evidence at trial. Sandy agrees to "[d]efer 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 ... [and] [e]xempt

Pepperwood from the flood maintenance fee." (*See* Trial Exhibit 10.) As testified at trial, Sandy drafted the language in the 1975 Contract, including "how [Sandy] referred to [the Horman] property" and that "Pepperwood and that description were used interchangeably." (R. 1464, p. 40, lns. 7-20.) Further, the affidavit of Charles Horman, Gordon Johnson, and Dewey Bluth support the interpretation that Sandy agreed to waive all flood control fees and one-half of the park fees for the "Horman properties." (*See* Trial Exhibit 20, ¶ 3(d).)

The trial court failed to consider this evidence and failed to construe the 1975 Contract against Sandy. Therefore, the trial court erred and should be reversed.

5. The Trial Court Erred in Finding a Time Limit for "Winding Up" of a Corporation, Where No Such Time Limit Is Imposed by Statute.

The trial court found there was no valid assignment of the 1975 Contract by Bell Mountain because Bell Mountain had been administratively dissolved in 1993. (R. 1120-1122, ¶19.) The trial court accepted the City's argument that a dissolved corporation has only two years to complete all activities related to its winding up. This was error.

The Utah corporate code provides that "a corporation administratively dissolved under this section [16-10a-1422] continues its corporate existence but may not carry on any business except: (i) the business necessary to wind up and liquidate its business and affairs under Section 16-10a-1405[.]" Under Utah Code Anno. §16-10a-1405, a dissolved corporation "continues its corporate existence" and "may . . . carry on any business . . . appropriate to wind up and liquidate its business and affairs[.]" Utah Code § 16-10a-1405(1). Those activities include "disposing of its properties that will not be distributed in kind to its shareholders;" "distributing its remaining property among its shareholders

according to their interests;” and “doing every other act necessary to wind up and liquidate its business and affairs.” *Id.* at § 16-10a-1405(1)(b), (d), (e).

Nothing in the Utah corporations code specifies a date or deadline for undertaking winding-up 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 (Ut. Ct. App. 2007).

Notwithstanding the lack of any deadline contained in the statute, the trial court limited the time period for winding up activities to two years. This is reversible error. *Orvis v. Johnson*, 2006 UT App 296 (Utah Ct. App. July 13, 2006), is controlling on this question. In *Orvis*, the Utah Court of Appeals allowed a dissolved limited liability company (LLC) to transfer an interest in a judgment, rejecting arguments that the assignment was void due to the LLC's dissolved status. *Id.* at 296. This Court held that under Utah law, “a contract entered into by a dissolved corporation is, at most, merely voidable by the party who entered into the contract with the dissolved corporation,” but not void. *Id.* Although the decision does not indicate how long after the dissolution the transfer occurred, this Court expressed no concern about the timing of the transfer by the dissolved entity. *Id.*

The *Orvis* court cited Utah statutes governing LLCs that are very similar to the Utah statutes governing corporations, which (a) provide that both types of entities continue to exist after being dissolved (including administratively dissolved), (b) make clear that both types

of entities may carry on business necessary to wind up and liquidate their businesses and affairs after dissolution, (c) set no deadline for the conclusion of winding-up activities, yet (d) do provide that the dissolved entities' names will be available for use by others after two years. *Compare* Utah Code Ann. §§ 16-10a-1405(1)(b), (d), (e); 16-10a-1421(1)(f) (statutes governing corporations), *and* Utah Code Ann. §§ 48-2c-1203; 48-2c-1302(1), *cited in Orvis*, 2006 WL 1917915 at *2; Utah Code Ann. § 48-2c-1207. See also *Miller v. Celebration Mining Co.*, 29 P.3d 1231, 1235-36 (Utah 2001) (recognizing that contract executed by entity that had been administratively dissolved three years prior to contract was voidable at the option of the defendants and affirming decision by trial court that contract was void based on the defendants' election).

This rule of law is followed in other jurisdictions. In deciding whether a time limit could be set on a winding up period in Oregon, the Federal Court of Claims, applying Oregon law, stated that, "Oregon corporate law sets no time limit on the wind up period of a dissolved corporation and anticipates that the process may extend indefinitely[.]" *Curtis v. United States*, 63 Fed. Cl. 172, 174 (Fed. Ct. Cl. 2004). The *Curtis* court further held that a post-dissolution transfer of assets was valid three years after the entity administratively dissolved. *Id.* at 174, 176-77. The *Curtis* court relied heavily on an Oregon decision that recognized as valid a transfer that occurred over forty years into the wind up period. *Id.* at 177 (citing *City of Klamath Falls v. Bell*, 7 Or. App. 330, 490 P.2d 515, 520-21 (1971)). See also *Falcone v. Hinsdale Gyn. & Obstetrics, Ltd.*, 499 N.E.2d 694, 699 (Ill. App. Ct. 1986) ("Contrary to plaintiff's assertion, a lease to which a corporation is a party survives

dissolution of the corporation and it may be assigned in the course of liquidation and winding up.”) (internal citations omitted); *Smith v. Taylor-Morely, Inc.*, 929 S.W.2d 918, 924 (Mo. App. 1996).

The trial court stated the 2005 Assignment was "not made during Bell Mountain's existence and therefore was untimely [and] ... 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." (R. 1121, ¶ 19.) The trial court's conclusion is directly contrary to the Utah Supreme Court's holding in *Orvis, supra*, and the Utah Corporate Code. There is no time limitation imposed upon a corporation to wind up its affairs.

Further, there was testimony during trial that Bell Mountain made an assignment in 1987 as part of an estate- and tax-planning structure for the Horman family. (See R. 1464, p. 165, lns. 3-21.) The trial court stated it "did not find credible the testimony that their [sic] was a past assignment from Bell Mountain that could not be located." (R. 1122, fn. 5.) However, the only evidence at trial proved an assignment was made. Dave Evans, the Certified Public Accountant for Bell Mountain in 1987, testified a valid assignment was made as part of the tax-planning strategy for the Horman family. (R. 1464, p. 165, lns. 3-21.) Evans further testified a formal liquidation agreement was prepared "generically assigning all contracts, agreements, so forth to the successor entity." (*Id.* at p. 165, lns. 7-8.) However, the document was believed to have been destroyed after a complex IRS audit on Bell Mountain and the Horman family. (*Id.* at p. 165, lns. 1-18.) The trial court refused Plaintiffs'

motion for relief from the ruling when newly discovered evidence of the liquidation plan was discovered after trial. (*See* R. 1456-1462, Ruling dated June 30, 2009.)

The only evidence on record is that the 1975 Contract was assigned to Plaintiffs as part of the winding up of Bell Mountain. Sandy provided no evidence to the contrary. Therefore, the trial court ruled in error and should be reversed.

6. The Trial Court Erred by Failing to Find That Plaintiffs Have Standing to Enforce the Agreement Because the Agreement Runs with the Land.

In Utah, courts have held there is a four-part inquiry to determine if a covenant runs 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; and (3) there must be privity of estate.” *Flying Diamond Oil v. Newton Sheep Co.*, 776 P.2d 618, 627 (Utah 1989) (citing *e.g.*, 165 *Broadway Bldg., Inc. v. City Investing Co.*, 120 F.2d 813, 816 (2d Cir.), *cert. denied*, 314 U.S. 682, 62 S.Ct. 186, 86 L.Ed. 546 (1941); *Eagle Enterprises, Inc. v. Gross*, 39 N.Y.2d 505, 507, 349 N.E.2d 816, 819, 384 N.Y.S.2d 717, 718 (1976); 20 Am.Jur.2d *Covenants, Conditions, and Restrictions* § 30, at 600-01 (1965 & Supp. 1989); 5 R. Powell, *The Law of Real Property* ¶ 673[1], at 60-37 (1988)). In addition, some courts require a fourth element, that the covenant to be in writing.⁵ *Flying Diamond Oil*, 776 P.2d at 623 (citation omitted).

The trial court found “[t]he first and fourth elements are clearly met,” meaning the covenant in the 1975 Contract did touch and concern the land and the agreement is in

⁵This requirement is satisfied by the written 1975 Contract between the original parties. The fact that the 1975 Contract was not recorded does not defeat or prevent the argument that the covenants contained in the Agreement run with the land. Instead, the notice is necessary only against a *bona fide* purchaser of the burdened estate. *See David A. Thomas & James H. Backman*, Utah Real Property § 12.04(b)(3). Notice (2005).

writing.⁶ (R. 1119, ¶ 21.) However, the trial court erred as a matter of law in failing to find Plaintiffs have standing to enforce the 1975 Contract because privity of estate exists and the intent of the parties clearly shows an intent for the covenant to run with the land.

A. The Trial Court Erred in Not Finding Intent For the Agreement to Run with the Land Because the Original Signatories to the Agreement Testified to the Intent and the Parties Actions During the Past 30 Years Show Intent.

Under Utah law, the parties must intend the agreement to run with the land. *See Flying Diamond Oil, supra*. The trial court found:

Plaintiffs failed to meet its [sic] burden to show that the intent of the 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.
(R. 1119, ¶ 21.)

The trial court erred finding no intent of the parties. "An express statement in the document creating the covenant that the parties intend to create a covenant running with the land is usually dispositive of the intent issue. The parties' intent may also be implied by the nature of the covenant itself." *Flying Diamond Oil*, 776 P.2d at 628 (citing *Pedro v. Humboldt County*, 217 Cal. 493, 497, 19 P.2d 776, 777 (Cal. 1933); *Brendonwood Common v. Franklin*, 403 N.E.2d 1136, 1141 (Ind.Ct.App. 1980); *Levy v. Graham*, 347

⁶Though the trial court did not go into any detail on how the elements are met, Plaintiffs do not contest this finding.

So.2d 1180, 1181 (La.Ct.App. 1977); *Reichert v. Weeden*, 190 Mont. 95, 618 P.2d 1216, 1219 (Mont. 1980)).

Here, the parties intended the covenant to run with the land, as shown expressly by the affidavit and testimony of the original negotiators and impliedly in the contract itself. The original negotiators of the 1975 Contract each signed an affidavit acknowledging the intent of the parties. (See Trial Exhibit 20, Affidavit of Charles H. Horman, M. Gordon Johnson & Dewey Bluth, ¶ 3(d)-(e) ("The Agreement provides that all of the Pepperwood Subdivision be forever exempt from paying Sandy flood control fees and one half of Sandy required park fees. We agreed to that and both sides understood that was what we were accomplishing with the Agreement").⁷ It is undisputed Dewey Bluth, the negotiator of the 1975 Contract for Sandy and its mayor at the time, intended the Pepperwood subdivision to be forever exempt from the fees. He was deceased at the time of trial, but his affidavit had been provided years earlier while the parties were trying to resolve this matter. The affidavit was part of the evidence at trial, but the trial court failed to even acknowledge his affidavit in its ruling, instead stating Plaintiffs did not meet their burden to show intent of the parties with the "boilerplate" language.

⁷The Agreement runs with the land. The underlying purpose of the Agreement supports the contention that the Agreement was intended to create a covenant that would run with the land. See 9 *Powell*, *supra* § 60.04[3][b] at 60-50 to -51 (stating the focus in determining whether a covenant was intended to run with the land is on the subjective state of mind of the original parties, and that the intent is generally gleaned from "the language of their transaction, read in light of the circumstances of its formulation"). It should also be noted that Sandy City failed to interview, depose, or question Mr. Horman, Mr. Johnson, or Mr. Bluth regarding the affidavit. (See Testimony of Shane Pace, Tr., pp. 399-400.)

Further, the other two original negotiators, Charles Horman and Gordon Johnson, testified to the intent of the parties at the time of negotiating the 1975 Contract.⁸ As to the parties exempted from flood control fees and one half of the park fees, Gordon Johnson testified "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 also 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.) Again, the trial court failed to acknowledge the testimony of the original negotiators and signatories to the 1975 Contract. The trial court erred in failing to consider this evidence of intent. Sandy offered nothing in opposition.

While the affidavit and testimony make the intent of the parties to the Agreement clear, the language and nature of the Agreement implies the intent as well. (*See* Trial Exhibit 6C, ¶ 12.) For example, paragraph 12 of the Agreement provides protections to Bell Mountain Corporation, "Horman properties" and owners of the lots in question. (*Id.*) The protections given to non-parties to the Agreement shows the parties intended the covenant to run with the land and not be restricted as merely personal promises between the two signatories to the contract. Whether the parties intended that the covenants run with the land is answered by Sandy's practice, for decades, of charging the lot buyers one

⁸ Dewey Bluth was unavailable to testify because he passed away prior to the trial date.

half of the park fees when the owner builds his home. (*See* Trial Exhibit 21.) This contemporaneous and long-standing practice shows Sandy's interpretation of the agreement has always been the same as Plaintiffs'.

B. The Trial Court Erred in Not Finding Privity of Estate Because Plaintiffs are Successors in Interest to Bell Mountain and Both Sandy City and Plaintiffs Had a Simultaneous Interest in the Horman Property.

Privity of estate is one requirement for an agreement to run with the land. The trial court erred in not finding privity of estate. The trial court found:

[P]rivty 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 officer, (b) the deed whereby Bell Mountain transferred the propety 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. (R. 1119, ¶ 21.) (emphasis in original).)

The trial court erred in not finding privity of estate because there was evidence and testimony showing Plaintiffs were successors to the 1975 Contract and showing Sandy was in the chain of title to the property.

"The types of privity 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 a 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." *See Flying Diamond Oil*, 776 P.2d at 628 (citing Berger, *A Policy Analysis of Promises Respecting the Use of Land* , 55 Minn.L.Rev. 167, 179-207 (1970)

[hereafter Berger]]. "Mutual privity exists when the parties have a continuing and simultaneous interest in the same property." *Id.* (Citing Berger, at 180). "Horizontal privity exists when the original covenanting parties create a covenant in connection with a simultaneous conveyance of an estate." *Id.* (citing 5 R. Powell, ¶ 673[2][c], at 60-61; Berger, at 181). In this case, there is vertical privity and mutual privity.

Vertical privity mandates a connection between one of the original parties and the successor to the benefit or burden of the covenant. *See David A. Thomas and James H. Backman*, Utah Real Property Law, § 12.04(b)(2)(2005). In *Flying Diamond*, the Utah Supreme Court found vertical privity was present because "the person presently claiming the benefit ... is a successor to the estate of the original person so benefitted" and that person is not an adverse possessor. *Flying Diamond*, 776 P.2d at 628, fn. 12 (citation omitted).⁹ Here, Plaintiffs are successors and assigns to the original party (Bell Mountain). As Charles Horman and Dave Evans testified at trial, there was an assignment of all interests in Bell Mountain to Plaintiffs, as an estate- and tax-planning strategy. (R. 1464, p. 167, lns. 7-23; p. 206, 13-24.) These documents were believed to have been mistakenly destroyed in the process of cleaning out old files. (*Id.* at p. 165, lns. 1-18.) Further, an assignment occurred in 2005, transferring any interests in any property or contracts from Bell Mountain to Plaintiffs. (*Id.* at p. 166, lns. 19-25; p. 167, lns. 1-6.) Therefore, vertical privity exists

⁹The Utah Supreme Court also noted that courts have abandoned a strict approach to privity doctrine and held that substance should prevail over technical application. *Flying Diamond*, 776 P.2d at 628 fn. 13.

between Horman properties/Bell Mountain, the original parties and the successors, and Plaintiffs.

Further, contrary to the trial court's findings, Sandy City was in the chain of title to the property. As Charles Horman testified, the Horman well, the water rights and the well itself, the property for the well itself were deeded to Sandy City. (R. 1464, p. 53, lns. 9-19.) The real property, along with necessary easements, were transferred to Sandy City. (*Id.*) Plaintiffs also transferred the land underneath the pumping station for the reservoir. (*Id.* at p. 93, lns. 19-24.) The trial court erred in finding Sandy never had an interest in the property. Sandy was in the chain of title to the property and did receive the benefit from the 1975 contract: the well, water rights, and property. There was no evidence to the contrary. Therefore, the trial court erred and privity exists.

Mutual privity also existed between Bell Mountain and Sandy. Mutual privity is present when a covenant arises from simultaneous interests in the same property. *Flying Diamond*, 776 P.2d at 628. At the time of the Agreement, Bell Mountain Corporation owned the property. Sandy had an interest in the same property as the taxing authority imposing water connection fees and charges, flood control fees and park fees on the property. (R). 1464, p. 236, lns. 7-10; *see* Trial Exhibit 5.) The very covenant at issue in this proceeding concerns the deferral and abatement of those fees to Bell Mountain Corporation, Horman properties and the lot owners by Sandy. Sandy would certainly claim authority over such parties.

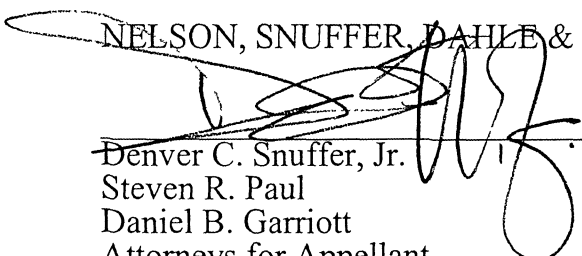
Therefore, Plaintiffs are successors in interests and assignees to the agreement with Sandy. Further, the agreement runs with the land, conferring a benefit on Plaintiffs, as successors and assigns.

CONCLUSION

Pursuant to the foregoing arguments and the law, Plaintiffs/Appellants respectfully request this Court reverse the error of the Third District Court, and remand this matter back for a decision on the merits.

DATED this 21st day of October, 2009.

NELSON, SNUFFER, DAHLE & POULSEN



Denver C. Snuffer, Jr.
Steven R. Paul
Daniel B. Garriott
Attorneys for Appellant

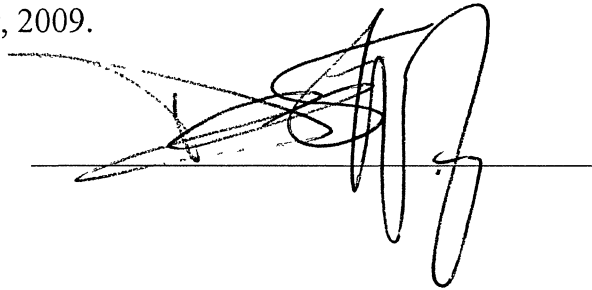
CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the forgoing **APPELLANT'S OPENING BRIEF** 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:

George A. Hunt
WILLIAMS & HUNT
257 East 200 South, Suite 500
PO Box 45678
Salt Lake City, UT 84145-5678

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

DATED this 21st day of October, 2009.

A handwritten signature in black ink, appearing to be "GAH", is written over a horizontal line.

APPENDIX

1. Judgment of Dismissal, dated May 11, 2009
2. Findings of Fact and Conclusions of Law, dated January 27, 2009.
3. 1975 Contract, Trial Exhibit 6(C).
4. Minutes of Sandy City Council, Trial Exhibit 10
5. Utah Code Ann. § 16-10a-1405 (1992)
6. Map of Pepperwood area.

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
OPENING BRIEF ON APPEAL

APPENDIX 1

COPY

FILED
THIRD DISTRICT COURT
MAY 13 2009
WEST JORDAN DEPT.

GEORGE A. HUNT (1586)
WILLIAMS & HUNT
Attorneys for Defendant, Sandy City
257 East 200 South, Suite 500
Post Office Box 45678
Salt Lake City, Utah 84145-5678
Telephone: (801) 521-5678
Facsimile: (801) 364-4500
Email: ghunt@wilhunt.com

Case is DISMISSED with PREJUDICE



VD28805128

pages: 2

050408561 SANDY CITY,

IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY

WEST JORDAN DEPARTMENT, 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.

JUDGMENT OF DISMISSAL

Civil No. 050408561

Judge Royal I. Hansen

This matter came on regularly for trial before the above-entitled Court on October 21st
through October 23rd, 2008, with the Honorable Royal I. Hansen presiding without a jury.
Plaintiffs were present and represented by counsel Denver C. Snuffer, Jr. and Daniel B. Garriott

Plaintiffs were present and represented by counsel Denver C. Snuffer, Jr. and Daniel B. Garriott of Nelson, Snuffer, Dahle & Poulsen, P.C. Defendant was present through its Director of Public Utilities, Shane Pace, and represented by counsel George A. Hunt and Stephen T. Hester of Williams & Hunt. Witnesses were sworn and counsel elicited testimony from the witnesses, presented documentary exhibits and argued their respective positions to the Court. The Court took the case under advisement and requested counsel to submit Post-Trial Briefs and annotated proposed Findings of Fact and Conclusions of Law. The Court then set the matter for final arguments on December 10, 2008. Final arguments were duly held and on January 27, 2009, the Court issued and entered its Findings of Fact, Conclusions of Law and Order. Based thereon, and good cause appearing, it is now hereby:

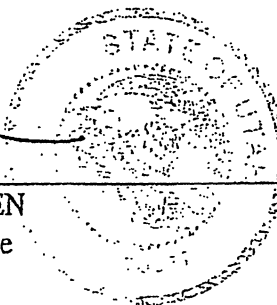
ORDERED, ADJUDGED and DECREED that this action shall be and the same hereby is dismissed in its entirety with prejudice and on the merits.

DATED this 11 day of ~~February~~ ^{May} 2009.

BY THE COURT:



ROYAL I. HANSEN
District Court Judge



APPROVED AS TO FORM:

NELSON, SNUFFER, DAHLE & POULSEN, PC

Denver C. Snuffer, Jr.
Attorneys for Plaintiffs

CERTIFICATE OF NOTIFICATION

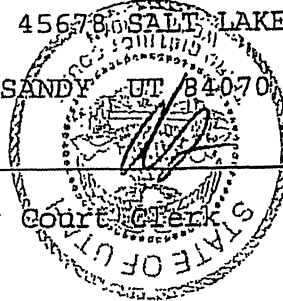
I certify that a copy of the attached document was sent to the following people for case 050408561 by the method and on the date specified.

MAIL: GEORGE A HUNT 257 E 200 S #500 POB 45678 SALT LAKE CITY, UT 84145-5678

MAIL: DENVER C SNUFFER 10885 S STATE ST SANDY UT 84070

Date: 5-14-09

Deputy Court Clerk



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
OPENING BRIEF ON APPEAL

APPENDIX 2

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” 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.

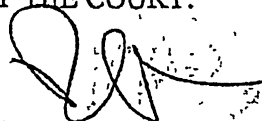
22. The Court concludes that Plaintiffs lack standing to sue for breach of the 1975 Contract flood control fee waiver provision for which they sue to enforce. Without standing, this Court may not grant the relief requested by Plaintiffs.
23. Based upon the Court's decision that the Plaintiffs lack standing, 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:



ROYAL E. HANSEN
DISTRICT COURT JUDGE

CERTIFICATE OF NOTIFICATION

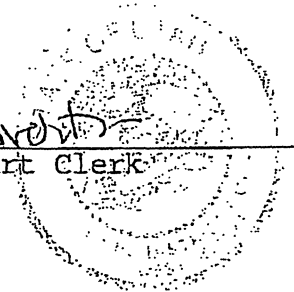
I certify that a copy of the attached document was sent to the following people for case 050408561 by the method and on the date specified.

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



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
OPENING BRIEF ON APPEAL

APPENDIX 3

EXHIBIT C

AGREEMENT

This agreement entered into this 25th day of June 1975
by and between Sandy City Corporation, a municipal corporation of the State of Utah
hereinafter called SANDY and Bell Mountain Corporation, a Utah Corporation herein-
after called BELL MOUNTAIN CORPORATION.

WITNESSETH:

WHEREAS, Sandy has a need to increase water storage and production in its
corporate limits particularly on its east side; and

WHEREAS, Bell Mountain Corporation has previously and now is continuing
to develop a large tract of land on the east side of Sandy; and

WHEREAS, the Pepperwood Subdivision is unique among its counterparts in
that it is a "private" subdivision having development of its own streets, parks, etc.;
and

WHEREAS, Bell Mountain Corporation is the developer of the said "Pepperwood"
and desires to assist Sandy in achieving its goals regarding water development and
distribution while likewise developing its own properties;

NOW THEREFORE, for and in consideration of the mutual promises and covenants
hereinafter set forth the parties hereto agree as follows:

1. Bell Mountain Corporation shall design and construct one three million
gallon underground concrete water reservoir in the foot hills of the Pepperwood develop-
ment. The said reservoir shall be designed and constructed so as to meet the standards
of the Utah State Division of Health and the City Engineer of Sandy. Such reservoir
shall and is hereby guaranteed against defects in material, workmanship and design
for one (1) year after acceptance by Sandy. Acceptance shall be upon satisfactory com-
pletion of reservoir.

2. Bell Mountain Corporation upon completion of the aforesaid reservoir
shall convey to Sandy by warranty deed the parcel of property upon which the reservoir



is constructed, including sufficient area for maintenance and an easement sufficient for the ingress and egress of Sandy vehicles.

3. Bell Mountain Corporation shall also, upon completion of the aforesaid reservoir execute a bill of sale for the reservoir itself and covenant that it is free of any encumbrances.

4. Bell Mountain Corporation shall, when the Sandy Council determines, drill one or more, up to a total of three (3) sixteen (16) inch diameter wells in the vicinity of Pepperwood at locations agreed upon by the parties hereto. The depth of each of the said wells shall not exceed seven hundred (700) feet unless mutually agreed upon by both parties. There shall be no obligation on the part of Bell Mountain Corporation to drill any wells beyond a period of five (5) years from the date of this agreement.

5. Sandy shall have no obligation to accept any well drilled unless it is capable of producing a continuous amount of potable water acceptable to Sandy City, but Sandy shall have the right to accept any or all of the said wells. Upon acceptance of the well or wells Bell Mountain Corporation shall convey clear title to the well, well site, and easement for access hereto to Sandy.

6. Bell Mountain Corporation shall use its best efforts to acquire a lot in LaRae Estates Subdivision immediately adjacent to the Pepperwood well pond for use as an overflow pond.

7. Sandy shall be responsible to acquire all necessary building and water permits and licenses relative to the construction of the water reservoir and drilling of the wells.

8. Sandy agrees to permit construction of and lease to Bell Mountain Corporation a tennis facility on the top of the reservoir. Said lease shall grant ingress and egress privileges and shall extend for a period of fifty (50) years at a cost of \$1.00 per year, payable in advance. Maintenance of the reservoir and

and associated land shall be the responsibility of Sandy and maintenance of the tennis facility shall be the responsibility of Bell Mountain Corporation or its assigns. Provided, however, that the said lease shall be assigned to the homeowners association of Pepperwood. Said tennis facility shall be constructed only if approved by the aforesaid Division of Health.

9. Sandy agrees to pay to Bell Mountain Corporation the fixed sum of \$300,000 as payment for the reservoir, payable as follows: \$150,000 to be paid in monthly progress payments during the construction period and \$150,000 to be paid from water connection revenues as here and after set forth: Sandy shall retain the total amount of water connection revenues up to the total amount of \$25,000 plus any additional funds spent on water lines in Pepperwood. Thereafter Sandy City shall convey to Bell Mountain Corporation sums equal to the water connection revenues received from property owners in Pepperwood as they connect to the system, and as shall be determined on a monthly basis, until the balance together with the interest is paid in full. Said interest shall be charged on the outstanding balance of the obligation of Sandy to Bell Mountain Corporation at a rate of 1% above the prime rate adjusted quarterly. The prime rate shall be determined according to the lending policy of Zions First National Bank, which institution is the lender for Bell Mountain Corporation. It is specifically agreed that interest on Sandy's obligation to Bell Mountain Corporation shall not be charged until 360 days after completion of the aforesaid reservoir and its acceptance by Sandy City. It is further understood that there is not a designated time for repayment period but that it shall be done as connections to the system are made from time to time, by the owners of the subdivision lots, provided that Sandy may pay the entire balance due at any time without penalty or forfeiture.

10. Sandy shall pay to Bell Mountain Corporation upon acceptance of any of the wells mentioned in five above the sum equal to the actual cost of drilling all of

the wells. If Sandy accepts none of the wells it shall never the less pay to Bell Mountain Corporation the actual cost of drilling involved in the wells. Payment of the obligation created hereby concerning the wells shall be paid to Bell Mountain Corporation as follows: Upon the completion of drilling of any given well the amount pertaining thereto shall become fixed and designated as the actual cost thereof. This provision shall apply both in the case of a "dry hole" and a producing well. The obligation thus created shall bear interest and be payable under the same terms and provisions as set forth in section nine (9) hereof.

11. Sandy shall pay all pipe cost which includes material cost only and not labor, over and above the cost of a six (6) inch diameter pipe line respecting the main and transmission water line between Pepperwood Phase Two and the proposed location of Wasatch Boulevard, as per previous agreements. Sandy shall pay the total cost of pipe and labor respecting the water line between the proposed location of Wasatch Boulevard and the reservoir; provided however, that in the event Bell Mountain Corporation or its assigns develops property to the east of the presently proposed route of Wasatch Boulevard, Bell Mountain Corporation shall pay a proportionate share of the cost of installing the aforesaid pipeline between Wasatch Boulevard and the reservoir. The said reimbursement shall be equal to the 1975 cost of materials and labor for that portion of the said pipeline which is equal to an eight (8) inch line. Respecting all other water lines within the area defined in item 12, Sandy shall pay for all pipe cost being material only and not labor, over and above the cost of eight (8) inch diameter pipe.

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, 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".

13. Sandy shall as agreed some time ago, complete all "long" laterals in Pepperwood, Phase 2. The said work to include only connecting the laterals to the main line and running them under the streets. No box or yoke shall be made or installed by Sandy but shall be the responsibility of individual lot owners. It is agreed that at the completion of all long laterals Sandy shall at its own cost and expense repair any street damage caused by the said installation of the laterals; and shall be responsible for maintenance of the portions of the street damaged thereby for a period of one (1) year only.

14. Sandy shall pay to Bell Mountain Corporation the actual cost of the property mentioned in item six (6) above upon conveyance of a warranty deed thereto vesting fee title without encumbrance in Sandy City.

15. With regard to construction of the aforesaid reservoir Sandy City by its City Engineer shall have the power in addition to review and approve the specifications of the said reservoir and approve such items as sand screens, land area used for access and flush water pond connected with wells.

16. Upon request, Sandy shall issue to Bell Mountain Corporation irrevocable letters assuring an adequate supply of water for the connection of 466 homes located within the area described in item twelve (12) above.

17. That certain agreement between S. M. Horman and Sons and Sandy City dated the 31st day of May, 1974, is hereby rescinded, cancelled and is agreed to have no further force and effect.

18. That in lieu of the said agreement of May 31, 1974, the parties substitute the following stipulations by way of agreement:

1. The Horman Well, along with all water rights owned by the Hormans or Bell Mountain Corporation, relating thereto as referred to in the said Agreement of May 31, 1974, shall be transferred to Sandy City, subject to an Agreement dated July 1, 1973, between S. M. Horman and Sons Company and Flying Diamond Oil Company.

2. The City will maintain the well pond and associated landscaping in an attractive manner and provide water and electricity for the same at no cost to Bell Mountain Corporation adjacent lot owners or the Pepperwood Homeowners Association. Bell Mountain Corporation shall install at its expense a fountain in said pond and Sandy City shall supply the water for the same and maintain water in the pond as per previous agreements.

3. The real property described in exhibits "A" and "B" of the said agreement of May 31, 1974, which exhibits are incorporated herein shall be transferred to Sandy City along with the easements necessary for proper ingress and egress pertaining thereto.

19. It is understood and agreed that in the event there is not developed under the terms of this contract an acceptable producing well,

W. H. H. T. H. G. G. G.

that, that Sandy shall cooperate and make every effort to effectuate the annexation of the area referred to in Section 12 hereof into the Salt Lake Conservancy District.

20. This agreement is binding upon both parties, their successor and assigns. ***

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed this day and year first hereinabove written.

BELL MOUNTAIN CORPORATION

By *Charles H. Horman*
Charles H. Horman, President

ATTEST:

James H. Horman

SANDY CITY CORPORATION

By *Dewey C. Bluth*
Dewey C. Bluth, Mayor

ATTEST:

Arthur D. Hunter
Arthur D. Hunter, City Recorder

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
OPENING BRIEF ON APPEAL

APPENDIX 4

It is proposed that Bell Mountain Corporation and Sandy City enter into an agreement whereby . . .

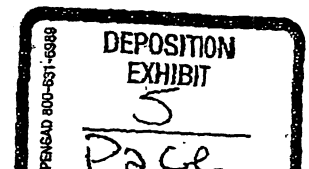
BELL MOUNTAIN CORPORATION WOULD AGREE TO . . .

1. Construct one three million gallon underground concrete water reservoir located in the foothills of the Pepperwood development. Such facility would be designed by Horman Construction Co. and would be constructed in 1975 in conformance to Board of Health standards.
2. Deed a parcel of land, approved by Sandy City, for the location of the reservoir. Said parcel to be deeded at no cost to the city.
3. Attempt to acquire one lot in the LaRae Estates subdivision immediately adjacent to the Pepperwood well pond . . . such to be used for overflow water collection and as a possible second well site.
4. Drill a 16 inch diameter well near the existing Pepperwood well for construction of an auxiliary pumping facility . . . said well to be drilled at a time mutually agreed upon by both parties.

AND SANDY CITY WOULD AGREE TO . . .

1. a. Pay BMC a fixed price of \$300,000. for the water storage reservoir, payable as follows: (to be discussed)
 - b. Allow the PW Homeowner's Association to have exclusive use of a tennis facility to be erected on top of the reservoir; with maintenance of the reservoir and associated land to be the responsibility of the City and maintenance of the tennis facility to be the responsibility of the association.
 - c. Pay the total cost of water pipe from the proposed location of Wasatch Blvd. to the storage reservoir.
2. Upon receipt of a deed for the lot in LaRae Estates (previously referred to), pay BMC its exact cost of acquiring said lot.
3. Pay BMC for drilling costs associated with the second well-- payment to be made as follows: (to be discussed)
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).
5. Complete all water laterals in Pepperwood, Phase II (Agreed to by the previous administration).

6" (US) 8" overage BREAKPT.



ACTUAL AND ESTIMATED COSTS, PEPPERWOOD
AREA WATER SYSTEM

SANDY CITY

Well	\$25,000.	
Pipe	17,000.	
Pump	15,000.	
Pump House	8,000.	ST. \$65,000.

Future Pipe	17,000.
(to Wasatch Blvd.)	
Pipe to tank &	
moving costs	20,000.
2,000,000 gal.	
tank	180,000.
Back-up	
system	30,000.

TOTAL : \$312,000.

BELL MOUNTAIN CORP.

Well	\$29,750.
Pipe	11,000.
Lake & Lot	10,000.
Tank site	25,000.

TOTAL \$75,750.

PRESENT & PROPOSED DEVELOPMENT - PEPPERWOOD AREA Water Connections

3/4 in. Connections

Lots

54	Willow Creek
	Mesa plat "C"
100	"Lost Canyon"

1 in. Connections

Lots

141	PW Phase I & II
102	PW Phase III & IV
200	PW Phase V & South Valley
100	East of Wasatch

Other

Inds. X \$7,000.
5560,000.
OR

180 Homes X \$943.
\$169,740.

164 X \$650. = \$106,600.

543 X \$943. = \$513,049.

TOTAL PAYMENT TO SANDY CITY

1025 connections = \$1,178,649.

887 connections = \$ 789,380. (single dwellings instead of
quads)

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
OPENING BRIEF ON APPEAL

APPENDIX 5

Title/Chapter/Section:

[Utah Code](#)

[Title 16](#) Corporations

[Chapter 10a](#) Utah Revised Business Corporation Act

Section 1405 Effect of dissolution.

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.

Enacted by Chapter 277, 1992 General Session

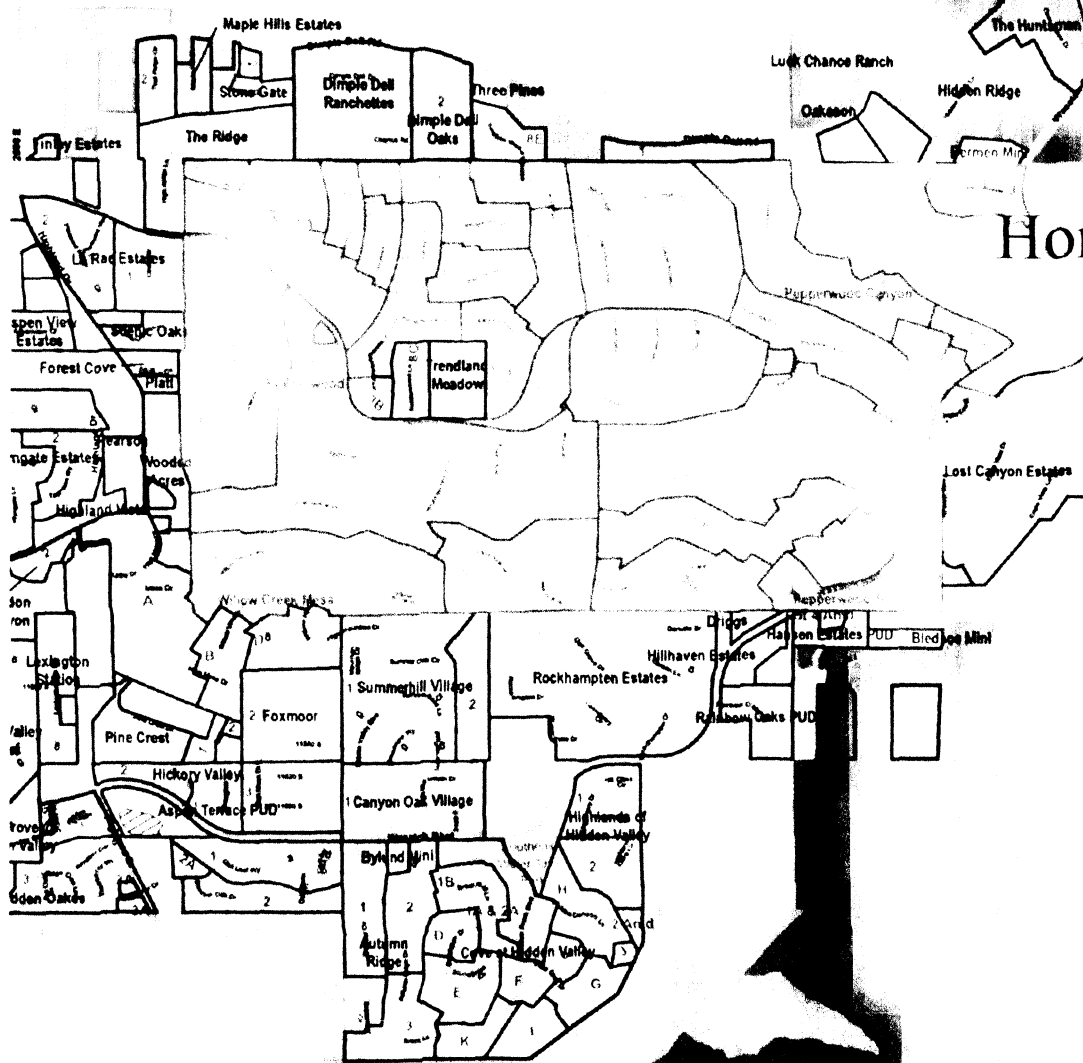
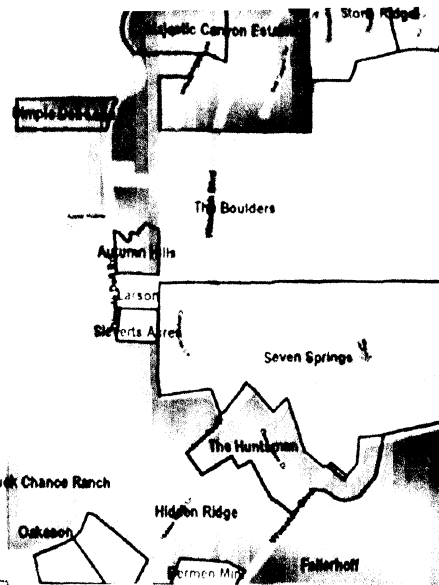
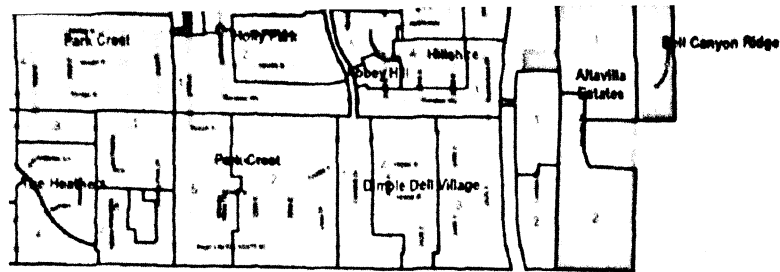
Download Code Section [Zipped](#) WordPerfect [16_10a140500.ZIP](#) 2,351 Bytes

[<< Previous Section \(16-10a-1404\)](#) [Next Section \(16-10a-1406\) >>](#)

[Questions/Comments](#) | [Utah State Home Page](#) | [Terms of Use/Privacy Policy](#)

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
OPENING BRIEF ON APPEAL

APPENDIX 6



Horman properties

