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Ruth B. Hardy Revocable Trust, Delcon Corporation Profit Sharing Plan FBO A. Wesley Hardy AKA Delcon Corp. PSP FBO A. W. Hardy, Finesse P.S.P., MJS Real Properties LLC AKA MJS Real Properties, Uintah Investments, LLC AKA Uintah Investments David D. Smith, Steven Condie, David L. Johnson, Berrett PSP, VW Professional Homes PSP, Ty Thomas, and D.R.P. Management PSP v. Eagle Mountain Lots, L.L.C., AKA Eagle Mountain Lots, LLC, Grant Bybee, BBandS, LLC, Robert A. Jones DBA BBandS, LLC, The Circle of Builders, LLC., Royal Richards,

Steven T. Gyuro, AKA Tom Gyuro, Eagle Mountain City and John Does I-X : Brief of Appellee

Utah Court of Appeals

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IN THE COURT OF APPEALS OF THE
STATE OF UTAH

RUTH B. HARDY REVOCABLE TRUST, DELCON CORPORATION PROFIT SHARING PLAN FBO A. WESLEY HARDY AKA DELCON CORP. PSP FBO A. W. HARDY, FINESSE P.S.P., MJS REAL PROPERTIES LLC AKA MJS REALPROPERTIES, UINTAH INVESTMENTS, LLC AKA UINTAH INVESTMENTS, DAVID D. SMITH, STEVEN CONDIE, DAVID L. JOHNSON, BERRETT PSP, VW PROFESSIONAL HOMES PSP, TY THOMAS, AND D.R.P. MANAGEMENT PSP, Plaintiffs and Appellees, VS. EAGLE MOUNTAIN LOTS, L.L.C. AKA EAGLE MOUNTAIN LOTS, LLC, GRANT BYBEE, BB&S, LLC, ROBERT A. JONES DBA BB&S, LLC, THE CIRCLE OF BUILDERS, L.L.C., ROYAL RICHARDS, HOMESPIN, LLC, EAGLE MOUNTAIN CITY AND JOHN DOES I-X, Defendants and Appellants.	Case No. 20110339 CA

BRIEF OF APPELLEES

APPEAL FROM ORDER OF THE FOURTH JUDICIAL DISTRICT COURT, UTAH COUNTY, THE HONORABLE STEVEN L. HANSEN, GRANTING APPELLEES' MOTION FOR SUMMARY JUDGMENT AND DENYING EAGLE MOUNTAIN CITY'S MOTION FOR SUMMARY JUDGMENT

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STATEMENT OF JURISDICTION

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

STATEMENT OF THE CASE

Appellees do not believe that it would be helpful to the Court to submit a statement regarding the nature of the case, the course of proceedings or the disposition in the trial court. They do, however, submit the following Statement of Facts (cited herein as "**Facts**").

STATEMENT OF FACTS

1. Plaintiffs/Appellees ("**Lenders**") made a $3.3 million loan (the "**Loan**") to Eagle Mountain Lots, L.L.C. ("**EML**") on or about May 25, 2007, when the closing occurred. Affidavit/Declaration of Justin G. Sutherland ("**Sutherland Declaration**") ¶¶4-10, R494-96, and Exhibit G thereto, R425-27; Declaration of John C. Strasser ("**Strasser Declaration**") ¶¶5-8, R649-50.

2. The Loan was evidenced by a Promissory Note (the "**Note**") executed by EML. Sutherland Declaration, ¶¶8-9, R494-95, and Exhibit C thereto, R447-51; Deposition of Robert A. Jones ("**Jones Depo.**") at 17-18, R590-91, and Exhibit 3 thereto, R576-79; Strasser Declaration ¶9, R649, and Exhibit A thereto, R640-44.

3. The Note was secured by a Trust Deed executed by EML affecting approximately 158 acres of land in Eagle Mountain City (the "**Land**"). Sutherland Declaration, ¶10, R494, and Exhibit E thereto, R434-40; Jones Depo. at 18-19, R589-90,

and Exhibit 4 thereto, R570-75; Strasser Declaration ¶9, R649, and Exhibit B thereto, R633-38. Lenders claimed that the Trust Deed also encumbered 160 acre feet of water rights (the "**160 Acre Feet**"). Third Amended Complaint, ¶¶2, 13-14, R148-150.

Extension of Loan Maturity and Default by EML Under the Note

4. EML paid an extension fee to Lenders, whereby the maturity date of the Note was extended to May 18, 2008. Strasser Declaration, ¶ 14(a), R648.

5. EML defaulted under the Note in that, among other things, it failed to pay interest due on February 18, 2008, and thereafter and failed to pay any part of the indebtedness owing under the Note when it came due on May 18, 2008 or at any time thereafter. Strasser Declaration, ¶¶13, 14, R647-48.

6. The entire balance owing under the Note came due on May 18, 2008, and was never paid. Strasser Declaration, ¶13, R648.

Interest Claimed by Eagle Mountain City (the "City")

7. The City claimed an interest in Water Right Number 54-1225 (a33129) (the "**Water Right**") or water associated with said Water Right by virtue of a conveyance it received from Circle of Builders on or about August 30, 2007. Answer of Eagle Mountain City, ¶11, R182; Third Amended Complaint, R149; Exhibit H to Memorandum supporting City's Motion, R350.

160 Acre Feet of Water Rights Appurtenant to the Land

8. As of the May 2007 closing of EML's purchase of the Land and 160 Acre Feet, the annual period of use of the 160 Acre Feet was from April 1 to October 31. See

Certificate of Beneficial Use, R519-20. That Certificate constitutes a certificate of appropriation within the meaning of Utah Code Ann. § 73-3-17.

9. The 160 Acre Feet had been used to irrigate the Land for the previous ten years before the May 2007 closing of the Loan. Berry Depo. at 56:1-5, R546.

10. On January 27, 1995, pursuant to Utah Code Ann. § 73-3-10, the Division of Water Rights approved an Application for Permanent Change of Water, R515-18. Such action constitutes an approval of an application to permanently change the place of use of water within the meaning of Utah Code Ann. § 73-1-11(5)(b)(vi).

Fraudulent Transfer of Water Rights by EML

11. EML acquired the 160 Acre Feet using proceeds of the Loan. Jones Depo. at 20:25, through 21:6, R587-88; Depo. Exh. 5, R568-69 (authenticated by Jones at R589).

12. On or about June 22, 2007, EML transferred the 160 Acre Feet to Circle of Builders. Jones Depo. at 29:22, through 31:14, R584-86, and Depo. Exhibit 8, R559-60.

13. EML did not receive anything from Circle of Builders in return for the 160 Acre Feet. Jones Depo. at 31:15, through 32:10, R583-84; 20:6-18, R588; 64:10-12, R582; Depo. Exhibit 7, R561-67.[1]

[1] Although Jones initially testified that EML received the contract for 1,125 acre feet of water rights marked as Depo. Exhibit 7 in return for the 160 Acre Feet, he ultimately conceded that EML did not own the 1,125 acre feet. On its face, Exhibit 7 shows that Circle of Builders conveyed the 1,125 acre feet to Mark and Brenda Rindlesbach in December 2007.

14. Apart from the Land and 160 Acre Feet of water rights, EML did not own any other assets. Jones Depo. at 19:25, through 20:18; 20:25, through 21:6, R587-89.

15. As of June 22, 2007, the Land (exclusive of water rights conveyed on that date to Circle of Builders) had a fair market value of $1,990,000. Declaration of Paul W. Throndsen, R652-718.

16. As of June 22, 2007, EML owed Lenders the entire $3.3 million principal balance of the Loan plus interest accrued thereon in the amount of $49,183.38. Strasser Declaration, ¶ 12, R648-49.

17. As of June 22, 2007, EML owed Summit 1031 Exchange for the benefit of Weston Glade Berry and Zane R. Berry the entire principal amount of $637,875 and accrued interest owing under a Promissory Note signed by EML in connection with the closing of EML's purchase of the Land and 160 Acre Feet. Berry Depo. at 39:20, through 42:9, R550-53; 45:3-8, R548, and Exhibit 9 thereto, R535-37.

18. As of June 22, 2007, EML owed Steven Glade Berry the entire principal amount of $212,625 and accrued interest owing under a Promissory Note signed by EML in connection with the closing of EML's purchase of the Land and 160 Acre Feet. Berry Depo. at 42:14, through 43:3, R549-50; 45:3-8, R548, and Exhibit 10 thereto, R532-34.

19. In the negotiations regarding water rights prior to the closing of the Loan Lenders were willing to exchange (*i.e.*, agree to a substitution of collateral whereby they would forego) the 160 Acre Feet in return for 1125 acre feet of other water rights. Robert A. Jones testified:

Q. [Mr. Swindler]. What I'm trying to do is make sure that we understand your testimony as well as we can.

A. My testimony is clear, I think. They forewent the 160 acre feet and allowed it to release in exchange for the 1,125 acre feet and were thrilled about it.

(Emphasis added.) Jones Depo. at 64:4-9, R582. Similarly, Jones testified:

A. The deal was, Hey, if you want all 1,125 acre feet you have to let me have the 160 acre feet. I have some things I could use it for.

Jones Depo. at 72:12-14, R580.

20. EML never performed its side of that exchange or substitution of collateral in that it never pledged the 1,125 acre feet to Lenders. Further, EML never had an interest in the 1,125 acre feet that it could have conveyed. Mr. Jones testified:

Q. What I'm trying to do is make sure that we understand your testimony as well as we can.

A. My testimony is clear, I think. They forewent the 160 acre feet and allowed it to release in exchange for the 1,125 acre feet and were thrilled about it.

Q. The 1,125 acre feet did not belong to Eagle Mountain Lots.

A. It did not.

Q. Did it belong to Circle of Builders?

A. Not at the time it was collateralized. It belonged to Mark Rindlesbach or whatever entity he held it in.

Q. We haven't been focusing on those dates but the chronology we have is Exhibit 6, the water purchase contract, John Jacob. It's got a date of December '06.

A. Okay.

Q. Then the note and trust deed are May of '07.

A. Okay.

Q. Then Exhibit 7, where the water goes to Rindlesbach, is December of '07. So we have –

A. Okay.

Q. We have a closing on the loan right in the middle, almost right in the middle of that one-year period. So at the time the loan was made by my clients, at the time you bought the land, the water was not Mark Rindlesbach's water.

A. Well, it still was partially.

Q. He was still seven months away from getting it. But it did belong to Circle of Builders, did it not?

A. Sounds like it may have.

Q. And Circle of Builders did not sign a mortgage or a trust deed in favor of my clients, did it?

A. I don't know. Circle of Builders didn't have anything to do with the deal with your clients.

Jones Depo. at 64:4-25, R582; 65:1-17, R581.

21. Lenders were unwilling to make the Loan to EML unless they received a security interest in substantial water rights in addition to the Land. Strasser Declaration, ¶ 16, R647.

22. EML never conveyed a security interest in the 1,125 acre feet of water to Lenders. Jones Depo. at 65:13-17, R581; Strasser Declaration, ¶ 17, R647.

23. The trial court entered a Judgment and Decree of Foreclosure (the "**Judgment**") on March 9, 2011, directing the Utah County Sheriff to sell the Land and "the remaining (*i.e.*, those which have not been released by Plaintiffs) banked entitlements (106.72 acre feet in total) of Water Right Number 54-1225 (a33129) (hereinafter the '**Water Right Entitlements**')" at public auction. R910-15.

SUMMARY OF ARGUMENTS

The trial court's decision that the Trust Deed included the 160 Acre Feet of water rights was based largely on Utah Code Ann. § 73-1-11(1). In its Brief the City acknowledges that this statute is "central" to its appeal, yet the City does not discuss it or make any argument that the trial court's application of the statute was incorrect. This issue has therefore been waived on appeal. Because the statute controls the outcome, the City's argument that the Trust Deed was ambiguous and that extrinsic evidence of intent should have been considered is rendered academic. But even if that issue is reviewed on its merits, there is no ambiguity to be found in the Trust Deed with respect to its inclusion of the 160 Acre Feet as appurtenant water rights. Moreover, the extrinsic evidence proffered by the City does not support its attempt to deprive Lenders of the 160 Acre Feet, but rather shows that Lenders would not have made the Loan without receiving water rights as collateral and that the borrower did not attempt to convey alternative water rights and did not even own them. The strained interpretation of the word "now" in the Trust Deed that is urged by the City also raises a purely academic issue in light of the

controlling provisions of Section 73-1-11(1). Further, the trial court's rejection of such interpretation as "artificial and unreasonably narrow" was correct.

The City's argument that, by virtue of Utah Code Ann. § 73-1-11(5)(e), only 126.4 acre feet of the 160 Acre Feet were included in the Trust Deed should be rejected for two reasons. First, the interpretation of the statute that the City relies upon would lead to absurd results. Second, because the trial court's alternative ruling avoided the fraudulent transfer of the 160 Acre Feet to the City's predecessor in interest, this issue makes no difference in the outcome unless the alternative ruling is also reversed. That ruling should be affirmed, as it was based on completely uncontroverted evidence and the City's theory of defense, that it was a good faith transferee and gave value to the debtor (EML), was properly rejected both because the City failed to plead that affirmative defense and because it submitted no evidence to support it.

Finally, the City's complaint that the trial court ordered the sale of Water Right Entitlements, rather than the remainder of the 160 Acre Feet that Lenders had not released, should be rejected because (1) the City failed to preserve this issue by giving the trial court an opportunity to address it, (2) the City provided no evidence that the Water Right Entitlements were materially different in substance from the remaining portion of the 160 Acre Feet, (3) if the trial court made an error in this regard, it was invited error in view of the City's pleadings and arguments that treated the Water Right Entitlements as synonymous with, or the beneficial and equitable interest in, the 160 Acre Feet, and (4)

there is no meaningful relief that can be afforded the City on this issue because a Sheriff's sale of the 160 Acre Feet would put the City in no better position than it is now.

ARGUMENT

I. BY VIRTUE OF UTAH CODE § 73-1-11, THE TRUST DEED CONVEYED A LIEN ON THE 160 ACRE FEET.

The Judgment was based on the trial court's Ruling and Order (the "**Ruling**") determining that, "as a matter of law the 160 Acre Feet were included in the conveyance effected by the Trust Deed as provided for in Utah Code Ann. § 73-1-11," R894, and that "[b]ecause none of the exceptions of Utah Code Ann. § 73-1-11 are present in this case, the appurtenant water rights (the 160 Acre Feet) passed with the Land in the Trust Deed." *Id.* The City's Brief (at 14-15) quotes this statute and acknowledges that it is "central" to its appeal, City's Brief at 13, but contains no analysis or discussion of the trial court's decision that the 160 Acre Feet were included in the Trust Deed by virtue of the statute. The City's silence on this pivotal issue constitutes an abandonment and waiver of the issue on appeal. *See Bearden v. Wardley Corp.*, 2003 UT App 171, ¶5, 72 P.3d 144, 147.

Utah Code Ann. § 73-1-11 provides in pertinent part as follows:

> (1) A water right appurtenant to land shall pass to the grantee of the land unless the grantor:
>
> > (a) specifically reserves the water right or any part of the water right in the land conveyance document;
> >
> > (b) conveys a part of the water right in the land conveyance document; or

> (c) conveys the water right in a separate conveyance document prior to or contemporaneously with the execution of the land conveyance document.

The land conveyance that lies at the heart of this matter is the Trust Deed from EML (grantor) to Lenders (grantee). A trust deed is a land conveyance. See, *Loosle v. First Fed. Sav. & Loan*, 858 P.2d 999, 1002 (Utah 1993). The general rule established by section 73-1-11 is that appurtenant water rights pass with the land conveyance. None of the three exceptions to the general rule applies. First, the Trust Deed contains no reservation of any water rights. Second, the Trust Deed does not purport to convey only a part of the 160 Acre Feet; rather, it conveys all appurtenant water rights. Third, the grantor, EML, did not convey the 160 Acre Feet in a separate conveyance document prior to or contemporaneously with the Trust Deed.

Further, the statute contains explicit criteria for determining whether a water right is appurtenant to land. Utah Code Ann. § 73-1-11(5)(c)(ii) provides:

> For purposes of land conveyances only, the land to which a water right is appurtenant is the authorized place of use of water as described in the . . . (iii) certificate [issued under Section 73-3-17 or] . . . (vi) approved application to permanently change the place of use of water.

The 160 Acre Feet were used to irrigate the Land for at least ten years prior to the Trust Deed's execution in May 2007. Facts ¶9. The State Engineer issued a Certificate of Beneficial Use, reflecting a "change of point of diversion, place, or nature of use . . ." Facts ¶8; *see* Utah Code Ann. § 73-3-17. By referring to all three (change of point of diversion, place and nature of use), the Certificate unquestionably establishes that the 160

Acre Feet of water rights were appurtenant to the Land at the relevant time for purposes of the statute. *See* Utah Code Ann. § 73-1-11(5)(b).

The 160 Acre Feet water right was appurtenant to the Land prior to the Berrys' conveyance to EML. The three Water Right Deeds and Assignments from the Berrys to EML were recorded simultaneously with the Berrys' Warranty Deed to the Land. R621, 540-45. Thus, the 160 Acre Feet were appurtenant to the Land while owned by Berrys and remained appurtenant to the Land when the water right and Land were conveyed to EML.

Upon the conveyance of the water right to EML there was no change in the status of the water right vis-à-vis the Land; both the water right and the Land were owned by the same entity, EML. The foregoing authorities and analysis establish that the 160 Acre Feet appurtenant to the Land were conveyed by the Trust Deed.

II. THE TRIAL COURT'S REFUSAL TO CONSIDER EXTRINSIC EVIDENCE OF THE PARTIES' "INTENT" WAS CORRECT AND SHOULD BE AFFIRMED ON THE ALTERNATIVE GROUND THAT SUCH EVIDENCE DID NOT SUPPORT THE CITY'S POSITION.

The City argues that the trial court should have considered extrinsic evidence of the parties' "intent" such as preliminary discussions and negotiations regarding the collateral to be provided for the Loan, claiming the Trust Deed to be ambiguous. Such evidence was submitted in an effort to prove that the Lenders did not intend to receive the 160 Acre Feet as collateral because they were to receive, in exchange for giving up that

water right, 1125 acre feet of water rights that are listed in the Note. The trial court correctly refused to base its decision on such parol evidence for two principal reasons.

First, not only does Utah Code Ann. § 73-1-11(1) control whether a water right is appurtenant to land for purposes of land conveyances, but it contains no exception based on the intent of the parties other than the three exceptions quoted above (reserving the water right, conveying only a part thereof or conveying the water right by a separate conveyance prior to or contemporaneous with the land conveyance). Thus, the trial court had no power to engraft upon the statute additional exceptions not contained in the plain language of the statute.

Second, the Trust Deed is not ambiguous. It included all of the following in addition to the Land:

> all buildings, fixtures and improvements thereon and all water rights, rights of way, easements, rents, issues, profits, income, tenements, hereditaments, privileges and appurtenances thereunto belonging, now or hereafter used or enjoyed with said property, or any part thereof . . . .

The phrase "all water rights . . . thereunto belonging" is not ambiguous. *See Spears v. Warr*, 2002 UT 24, ¶40 (similar deed language ruled unambiguous); *Loosle v. First Fed. Sav. & Loan*, 858 P.2d 999, 1003 (Utah 1993) ("pursuant to section 73-1-11, a perfected water right will pass as an appurtenance without specifically mentioning the vested water right . . . .").

A finding of ambiguity after a review of relevant, extrinsic evidence is appropriate only when "reasonably supported by the language of the contract." *Daines v. Vincent*,

2008 UT 51, ¶27. Thus, a claim of ambiguity in contractual language must be "plausible and reasonable" in light of the language used. *Id.* ¶31. The evidence of intent offered by the City could not be considered absent ambiguity in the language of the Trust Deed.

> A trial court may not consider parol evidence of intent without first finding ambiguity in the language of a contract. And, while relevant evidence proffered to demonstrate the alleged facial ambiguity must be considered, our analysis of such evidence is strictly limited to the determination of the existence of facial ambiguity and is "ultimately circumscribed by the language of the agreement." See *Daines*, 2008 UT 51, P 28, 190 P.3d 1269.

Flores v. Earnshaw, 2009 UT App 90, 209 P.2d 428, 433.

The City failed to show any plausible and reasonable interpretation of the Trust Deed that would exclude the 160 Acre Feet. It argues, however, that the recital in the Note stating that it is secured by the 1125 acre feet creates an ambiguity in the Trust Deed. No ambiguity is created by the language of the Note. The Note recited that it was secured by Parcel No. 59-019-0001, which by operation of law included all improvements, *appurtenant* water rights, and all other appurtenances. There was no need or reason to repeat the description of improvements or appurtenances in the Note. Thus, the Note itemized only the non-appurtenant water rights (the 1125 acre feet). There is no conflict between the Trust Deed and the Note with respect to the inclusion (in both documents) of appurtenant water rights. Since there is no ambiguity in the Trust Deed, the trial court properly refused to consider parol evidence of intent contrary to the language of the Trust Deed.

In addition to the foregoing, the trial court's decision that the Trust Deed conveyed the 160 Acre Feet should be affirmed on other grounds. *See Jensen ex rel. Jensen v. Cunningham*, 2011 UT 17, ¶ 36, 250 P.3d 465 ("We may affirm a grant of summary judgment upon any grounds apparent in the record."). Those grounds are that the extrinsic evidence upon which the City's argument hangs showed that Lenders had *no intention* of giving up the 160 Acre Feet unless they received a lien on the 1125 acre feet. The City relies on testimony of EML's principal, Robert Jones, that Lenders "forewent the 160 acre feet and allowed it to release in exchange for the 1,125 acre feet" (City's Brief at 12) and the following affidavit testimony of John Strasser, the principal of two of the Lenders:

> Mr. Jones later proposed providing other water, which he later characterized as 1125 acre feet, to replace the 160 acre feet of water appurtenant to or to be used on the land. The Loan Participants were willing to make that exchange, 1125 acre feet for 160 acre feet."

City's Brief at 12-13. This exchange or substitution never occurred because (1) EML never pledged the 1,125 acre feet to Lenders or purported to do so and (2) EML never had an interest in the 1,125 acre feet that it could have conveyed. Facts ¶¶14, 20, 22. Based on those facts, the trial court stated in its Ruling that, "[a]lthough Lenders were apparently willing to accept the 1125 acre feet instead of the 160 Acre Feet, they never received the 1125 acre feet and thus retained their rights to the 160 Acre Feet." R886. In substance, the City argues that Lenders, having been deprived of what they were to receive in the exchange, should have been forced by the trial court to disgorge the 160

Acre Feet that they would have given up if the exchange had taken place. When the proffered extrinsic evidence is considered in the context of relevant facts and circumstances, it is clear that (1) Lenders never intended to give up the 160 Acre Feet unless they received a lien on the 1125 acre feet and (2) Lenders never received a lien on the 1125 acre feet. Thus, such evidence would have been of no help to the City's cause even if it could have been considered under the strictures of the parol evidence rule.

III. THE TRIAL COURT'S INTERPRETATION OF THE TRUST DEED WAS CORRECT AND SHOULD BE AFFIRMED ON TWO ALTERNATIVE GROUNDS IN ANY EVENT.

The City further argues that the Trust Deed should be interpreted to exclude the 160 Acre Feet on the theory that the Land was not being irrigated at the exact moment when EML purchased it. City's Brief at 20-21. It relies on the Trust Deed's phrase "water rights . . . and appurtenances thereunto belonging, now or hereafter used or enjoyed with said property, or any part thereof," contending that the word "now" requires that the water have been used "at the time the Trust Deed was recorded." *Id.* at 20. In so arguing, the City makes no attempt to analyze the trial court's Ruling that the City's interpretation is "artificial and unreasonably narrow" and that "the 160 Acre Feet were in use substantially contemporaneously with the execution of the Trust Deed and were therefore included within the granting clause." R888-89. The evidence clearly showed that the Land had been irrigated using the 160 Acre Feet for ten consecutive years prior to the sale, that the irrigation season ran from April to October of each year and that EML's purchase of the Land was closed on May 25, 2007, early in the 2007 irrigation season.

Facts ¶¶1, 8-9. The City offers no rationale or authority for the proposition that the Ruling was incorrect.

The trial court's Ruling on this point should be affirmed on two alternative grounds. First, Utah Code Ann. § 73-1-11(1) renders the 160 Acre Feet appurtenant to the Land for purposes of the conveyance effected by the Trust Deed, whether or not it made any mention of water rights. Thus, even if the City's interpretation were correct, it would make no difference in the result because the 160 Acre Feet were included by operation of law. This conclusion is consistent with paragraph 20 of the Trust Deed, mandating that the instrument be "construed according to the laws of Utah." Hence, the provisions of Utah Code Ann. § 73-1-11 must be given full effect, including their clear and precise definition of what water rights are appurtenant "for purposes of land conveyances only." That definition includes water rights evidenced by a certificate of appropriation and water rights evidenced by an approval for a permanent change application. *Id.* 73-1-11(5)(b)(ii) and (vi). The 160 Acre Feet are evidenced by both such a certificate and such an approval. Facts ¶¶8, 10.

Second, Lenders submit that the elements of the phrase "thereunto belonging, now or hereafter used or enjoyed with said property" are disjunctive, or alternative, with the broadest application possible, for the benefit of the Lenders. Thus, for example, water rights would include those "thereunto belonging," or "now or hereafter used," or "enjoyed with said property." *See*, *Doctors' Co. v. Drezga*, 2009 UT 60, ¶ 11, 218 P.3d 598 (Utah 2009) ("the contract uses clearly disjunctive language, indicating that TDC can

either rescind or cancel the policy, but cannot do both."); *In re A.M.*, 2009 UT App 118, ¶ 14, 208 P.3d 1058; *Home Sav. and Loan v. Aetna Cas. and Sur. Co.*, 817 P.2d 341, 358 (Utah App. 1991); *Berger v. Minnesota Mut. Life Ins. Co.*, 723 P.2d 388, 390 (Utah 1986). Since the 160 Acre Feet, as appurtenant water rights, clearly fit within the term "thereunto belonging," they are included as appurtenances to the Land based on that phrase alone without regard to the alternative of being "now or hereafter used or enjoyed with said property."

IV. UTAH CODE § 73-1-11(5)(e) SHOULD NOT BE CONSTRUED IN A MANNER THAT PRODUCES ABSURD RESULTS.

A further argument made by the City is that Utah Code Ann. § 73-1-11(5)(e) reduces the extent of water rights conveyed by the Trust Deed to 126.4 acre feet because the entire "authorized place of use" for the 160 Acre Feet was not conveyed by the Trust Deed. The City thus argues that the remaining 33.6 acre feet were not encumbered by the Trust Deed and passed from EML to Circle of Builders to the City free and clear. This argument raises an issue of statutory construction.

The legislature appears to have enacted Section 73-1-11 in order to provide a set of default rules governing the circumstances under which, and the extent to which, water rights pass as part of a conveyance of land where the parties to the conveyance have failed to address those issues specifically in their instruments of conveyance. Subsection (1) establishes the general rule that appurtenant water rights pass to the grantee unless one of three exceptions applies. Subsection (2) identifies which grantee obtains the water

right if it has been used to irrigate multiple parcels (where all parcels are not conveyed to the same grantee). Subsection (3) allocates responsibility for unpaid water assessments. Subsection (4) excludes shares of stock in irrigation companies from the workings of the statute. Subsection (5)(b) defines which water rights are appurtenant. Subsection (5)(c) provides a rule for identifying the land to which a water right is appurtenant. Subsection (5)(d) presumes that, where part of a water right is expressly conveyed by a document, the remainder of the water right is reserved by the grantor. Finally, subsection (5)(e) deals with conveyances of only part of the "authorized place of use" for a water right by providing that the water right passes in proportion to the conveyed portion of the authorized place of use. Overall, the legislature must have concluded that the statute would accomplish what most parties to land conveyances would probably choose to do if they were to make a conscious decision.

Focusing specifically on subsection (5)(e), let us assume that a person owning 160 acres of land and 160 acre feet of appurtenant water rights conveys 40 acres of land to one buyer and 120 acres to another, without specifying what happens to the water rights. Rough justice is afforded by the statutory default rule allocating 40 acre feet of water rights to the first buyer and 120 acre feet to the other.

However, where a landowner owns only a portion of the entire authorized place of use, but conveys all that it owns thereof, the statute leads to absurd results. Let us assume that the authorized place of use is 200 acres and that grantor A conveys 160 acre feet of water rights to B by separate deed (removing that transfer from the statute's reach) and

158 acres of the authorized place of use to B. Since the statute does not control the amount of water conveyed, grantee B receives 160 acre feet of water. The authorized place of use, as per the certificate on file with the State Engineer, remains 200 acres. Then, grantor B conveys the 158 acres to C, making no mention of water rights. By literal application of subsection (5)(e), Grantee C receives only 126.4 acre feet of water, and B inadvertently retains 33.6 acre feet. As a grantor, C then conveys the land to D, making no mention of water rights. By literal application of subsection (5)(e), Grantee D receives only 101.12 acre feet of water, and C inadvertently retains 25.28 acre feet. At the end of the day, D owns 158 acres, but has only 101.12 acre feet of water. The remainder of the water right originally conveyed by A still remains in the unknowing hands of B and C, who have no ownership interest in any part of the authorized place of use.

A statute should not be construed or applied in a manner that produces absurd results. *State ex rel. Z.C.*, 2007 UT 54, ¶11, 165 P.3d 1206, 1209. What the legislature most likely intended was that the phrase "authorized place of use" in subsection (5)(e) meant only that portion of the authorized place of use owned by the grantor. This interpretation avoids absurd and anomalous results and is consistent with the apparent intent of the legislature. Applied here, that interpretation would result in the entire 160 acre feet of water rights acquired by EML being included in its conveyance of the Land by way of the Trust Deed. That would be a far more logical and reasonable outcome than the alternative of chopping up the water right and leaving parts of it strewn about in the unknowing hands of a party who (after foreclosure) owns no land.

V. IN VIEW OF THE AVOIDED FRAUDULENT TRANSFER, THE CITY WOULD NOT BENEFIT FROM RELIANCE ON UTAH CODE § 73-1-11(5)(e).

The Judgment granted Lenders relief under the Utah Fraudulent Transfer Act in the alternative, avoiding EML's transfer of the 160 Acre Feet to Circle of Builders as fraudulent. So long as such alternative relief remains in force, the City's argument based on Utah Code Ann. § 73-1-11(5)(e) seeks only an advisory opinion and could not change the outcome of this appeal. The City assumes in its argument that, if 33.6 acre feet of the 160 Acre Feet are excluded from the Trust Deed by virtue of Section § 73-1-11(5)(e), the City will emerge the owner of 33.6 acre feet. In reality, however, EML's transfer of those 33.6 acre feet to Circle of Builders has been alternatively set aside as fraudulent, leaving the City with no right, title or interest therein. The Utah County Sheriff has sold those water rights at an execution sale pursuant to express authorization granted in the Judgment, which provides that "[t]he sale of the Water Right Entitlements conducted by the Sheriff in accordance with this Judgment shall be deemed, in the alternative, to be a valid execution sale of such Water Right Entitlements." R912.

VI. SUMMARY JUDGMENT ON THE FRAUDULENT TRANSFER CLAIM SHOULD BE AFFIRMED.

EML transferred the 160 Acre Feet to its sister company, Circle of Builders, on June 22, 2007, without receiving any consideration in return. Facts ¶13. The 160 Acre Feet had a value at that time of $1,920,000. R703. Further, EML's liabilities exceeded the value of its remaining assets by more than $2.2 million immediately after the transfer.

Facts ¶¶14-18. None of these facts was disputed. R735-37; R895. Based on these facts, the trial court concluded that "Lenders have established all of the statutory requirements [under Utah Code Ann. § 25-6-6] for avoidance of EML's transfer of the 160 Acre Feet to Circle of Builders as a fraudulent transfer." Ruling at 11, R886. The City acknowledges that "the only fraudulent transfer was the transfer from Eagle Mountain Lots to Circle of Builders." City's Brief at 23.

Nevertheless, the City discusses a different transfer, contending that the *subsequent* transfer of the 160 Acre Feet from Circle of Builders to the City could not be avoided because the City "was a good faith transferee" and "provided reasonably equivalent value in the form of banked entitlements." City's Brief at 22. Lenders did not seek avoidance of the subsequent transfer, nor did they need to do so. Utah Code Ann. § 25-6-8(1) provides:

> (1) in an action for relief against a transfer or obligation under this chapter, a creditor, subject to the limitations in Section 25-6-9, may obtain:
>
> > (a) avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim . . . .

Section 25-6-9(1) provides protection for certain subsequent transferees by providing that transfers are "not voidable under Subsection 25-6-5(1)(a) against a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee." Neither Lenders nor the trial court relied on Subsection 25-6-5(1). The trial court granted relief solely under Subsection 25-6-6.

Once a transfer has been ruled void, any subsequent transfer of the same asset is likewise void except as otherwise provided by Utah's Uniform Fraudulent Transfer Act. The primary authority on which the City relies for the proposition that the transfer of water rights should not be voided as against the City is Utah Code Ann. § 25-6-8(4), providing that a "good-faith transferee" is entitled to "a lien on or a right to retain any interest in the asset transferred" to the extent of the "value given the debtor for the transfer." This statute gives rise to an affirmative defense (right to retain the asset upon showing that value was given to the debtor) and/or the right to assert a counterclaim (imposition of a lien on the asset to the extent of value shown to have been given the debtor). *See New Jersey Dept. of Environmental Protection v. Caldeira*, 768 A.2d 782, 793 (N.J. Super.A.D. 2001), *reversed on other grounds,* 794 A.2d 156 (N.J. 2002) ("the burden is on the transferee to demonstrate this affirmative defense" that the transferee took in good faith and for value,); *In re Agricultural Research and Technology Group, Inc.*, 916 F.2d 528, 535 (9th Cir. 1990) (under Hawaii's Uniform Fraudulent Transfer Act, transferee bears burden of proof to establish receipt of transfer in good faith).

The trial court rejected the City's good-faith-transferee-for-value theory on the grounds that the City (1) "did not assert it as a defense in its Answer," (2) "presented no evidence that it gave value for the water rights transferred to it by Circle of Builders or that it was an innocent purchaser," (3) submitted no admissible evidence as to the amount of the value it claimed to have given and (4) failed to show that value was "given *to the debtor*." Ruling at 10-11, R886-87. In its Brief, the City makes virtually no attempt

to show error in any of these independently sufficient grounds cited by the trial court for rejecting the City's good faith transferee defense.[1]

The City does argue, however, that the trial court's conclusion that Lenders could foreclose "banked entitlements" required a finding that the City "provided value in the form of banked entitlement in exchange for the 160 Acre Feet." City's Brief at 24. There was no evidence before the trial court supporting the City's contention that it credited Circle of Builders with "banked entitlements" *in exchange* for the 160 Acre Feet. Further, there was no evidence before the trial court as to the character or nature of "banked entitlements" or their value. In its pleadings and argument, the City led the trial court (and Lenders) to believe that the "banked entitlements" were in substance the 160 Acre Feet of water rights, albeit converted to different points of diversion and restricted to municipal use by virtue of a change application filed with the State Engineer, R352-55, resulting in the City holding legal title and the owner of the "banked water right" holding equitable title.

First, in its Answer, the City alleged that (1) Lenders released a portion of the "Water Rights"[2] in which Property Reserve, Inc. "claims the beneficial right" and (2) Lenders consented to the transfer of the "Water Rights" to the City "and are at most

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[1] The City also cites Utah Code Ann. § 25-6-9(2), which does not apply because Lenders did not seek a money judgment *for the value* of the water rights. In any event, the City did not plead this defense and did not bear its burden of proving that it acted in good faith and gave value.

[2] Although the City did not define this term, it appears based on the context in which it was used to have had reference to the 160 Acre Feet.

entitled to the equitable interest in the remaining banked portion of the Water Rights held by Eagle Mountain." City's Answer at 2(¶13), R182, and 5 (Ninth Defense), R179.

Second, in its argument to the Court, the following statements by the City's counsel characterized the nature of the water right as it existed after the City converted it to a municipal water right:

> It [the 160 Acre Feet] was the water [that] was owned by Circle of Builders. Circle of Builders came to the City and said, "We have this water right. We have some developments on the horizon. We'd like to get this water right to the City." The City went through the process of changing it to a municipal water right, and changing it into the name of Eagle Mountain City, and then allowed Circle of Builders to have 160 acre feet of banked water right.

Transcript, Dec. 17, 2010, R964, at 23:23-25 through 24:1-5. The City's counsel used the term "banked water right" or "banked water rights" at least seven times[3] in referring to the water rights to which the City holds legal title, essentially as nominee[4] for the equitable owners to whom Circle of Builders assigned the rights. Thus, the City used the terms "banked entitlements" and "banked water rights" as synonymous. It described the process the City went through as that of "changing" the 160 Acre Feet to "a municipal water right."[5]

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[3] Transcript, Dec. 17, 2010, R964, at 23:20, 24:5-6, 31:20-21, 59:23-24, 60:2.

[4] Lenders asserted that Defendants Richards and Gyuro "may claim that the City holds a portion of the Water Right as nominees for those Defendants." Memo. in Supp. of Motion for Summary Judgment, ¶14, R621. The City did not dispute this.

[5] In fairness, the City's counsel also argued that the City gave back to developers "a water right credit against development," Transcript, R964, at 23:19-21, but typically described what the City "gave" as "banked water rights." *Id.* at 31:19-21; 59:23-24.

In light of (1) the absence of evidence and (2) the City's characterization of the water right as described above, the trial court could not make a finding that the City gave "banked entitlements" in exchange for the 160 Acre Feet. Even if such a finding could have been made, the City did not plead the affirmative defense that it gave value in good faith and the record remains devoid of evidence to establish good faith, the amount of value given or that the City gave value to the debtor, EML, as the statute requires.

VII. THE PROVISION OF THE JUDGMENT DIRECTING THE SHERIFF TO SELL THE WATER RIGHT ENTITLEMENTS SHOULD BE AFFIRMED.

Lastly, the City takes exception to the provision of the Judgment directing the Utah County Sheriff to sell the Water Right Entitlements (*i.e.*, the remaining unreleased banked entitlements of the 160 Acre Feet) at public auction. R912-13.[6] The City failed to preserve this issue by raising it in the trial court, despite having had multiple opportunities to do so. In addition, the record contains no evidence from which it can be determined that the Water Right Entitlements are materially different in substance from the equitable ownership interest in the remaining part of the 160 Acre Feet. Moreover, if there was an error made, the City invited the error by its own pleadings and arguments. Finally, the City's arguments on this score are contradictory, and the City has not shown that it would benefit in any way from the relief it appears to seek—namely a decision of

[6] The Land and such Water Right Entitlements were sold at public auction to Lenders by the Utah County Sheriff on May 11, 2011. Certificate of Sale of Real Estate dated May 20, 2011 (in file 4 containing record on appeal).

this Court order requiring the trial court to set aside the Sheriff's sale of the Water Right Entitlements and to order that the remainder of the 160 Acre Feet be sold instead.

Preservation. The City had four opportunities to advise the trial court of its view that the decree of foreclosure should have directed the sale of the 160 Acre Feet (or 106.72 acre feet thereof) rather than the equitable interests therein held by the City and Defendants Royal Richards and Homespin, LLC. The first arose when Lenders served their proposed Order Granting Plaintiffs' Motion for Summary Judgment and Denying Eagle Mountain City's and Royal Richards' Motions for Summary Judgment (Addendum 1)[7] on January 4, 2011. It contained on page 21 thereof the following language:

> The Court will issue a judgment and decree of foreclosure consistent with the foregoing Order determining that the Trust Deed is prior and superior to the interests of all Defendants with respect to the Land and the remaining banked entitlements (106.72 acre feet) of the 160 Acre Feet that Lenders have not heretofore released and directing the Sheriff of Utah County to sell the Land and such banked entitlements.

The second opportunity arose when the trial court issued its Ruling on February 14, 2011, containing the above-quoted language verbatim. R885. The third opportunity for the City to raise this issue came when Lenders served the proposed Judgment and Decree of Foreclosure on the City's counsel on February 23, 2011. R911. Finally, after entry of the Judgment and Decree of Foreclosure on March 9, 2011, Lenders served a Notice of Entry of Judgment with a copy of the Judgment attached thereto on the City's counsel on

[7] This proposed Order was not found in the trial court's file constituting the record on appeal. A true and correct copy of such Order showing the trial court's filing stamp and service on counsel for the City on January 4, 2011, is included in the Addendum.

March 16, 2011. R916-25. Within ten days (*i.e.*, two weeks) after March 9, the City could have brought the issue to the attention of the trial court by filing a motion under Utah R. Civ. P. 59 to alter or amend the Judgment. Having failed to raise this issue below, the City should not be heard to complain about it on appeal. *Searle v. Searle*, 2001 UT App 367, ¶ 17, 38 P.3d 307 ("[t]o preserve an issue for appellate review, a party must first raise the issue in the trial court, giving that court an opportunity to rule on the issue.").

Lack of Evidence Showing that Banked Entitlements Were Materially Different from the 160 Acre Feet. As discussed at pages 22-24 above, the City never provided the trial court any evidence as to the nature of character of the "banked entitlements." Absent such evidence, the trial court was justified in regarding the banked entitlements as synonymous with other terms used by the City, such as "banked water rights," "beneficial right" and "equitable interest" in the 160 Acre Feet. Where the City had obtained regulatory approval changing the point of diversion, place of use and nature of use of the 160 Acre Feet, thereby restricting its use to municipal purposes within the City's boundaries, the banked entitlements appeared to represent the equitable ownership of and the right to make beneficial use of the 160 Acre Feet. Absent evidence showing that such appearance was incorrect, this Court is unable to determine that the banked entitlements were materially different from the 160 Acre Feet in the form in which they existed at the time of the Judgment.

Invited Error. If the trial court erred in ordering the Sheriff to sell Water Right Entitlements rather than 106.72 acre feet of the 160 Acre Feet, it was an error invited by

the City. As explained above, the City led the Lenders and the trial court to believe that the banked entitlements were in substance the same as "banked water rights," "beneficial right" and "equitable interest" in the 160 Acre Feet. Having invited the error, the City cannot complain thereof on appeal. *Kramer v. State Retirement Bd.*, 2008 UT App 351, ¶27, n. 11, 195 P.3d 925, 932 ("A party who either leads another to commit an error or by its conduct approves the error committed by another, cannot later take advantage of such error on appeal."). Further, the City argues that "Plaintiffs are only entitled to a claim against Circle of Builders and other defendants' interest in the banked entitlements." City's Brief at 24. Given that statement, the City is hard pressed to explain why the Judgment should not have directed the Sheriff to sell the banked entitlements, not only of the other defendants, but of the City as well. There was no basis in the evidence for treating the City differently from the other defendants.

Absence of Meaningful Relief that Could Be Afforded the City. The goal of the City's argument that the Judgment should not have ordered the sale of banked entitlements seems to be to obtain an order of this Court requiring the trial court to set aside the Sheriff's sale of the Water Right Entitlements and to order that the remaining 106.72 acre feet of the 160 Acre Feet be sold instead. Should that occur, the City would be divested of the same rights, benefits and interests that it lost through the Sheriff's sale of the Water Right Entitlements. For this reason alone, the Court should deny relief. It would be a pointless exercise in technicality benefiting none but imposing needless delay,

burdens and expenses on Lenders, as well as consuming resources of the trial court and the Sheriff.

CONCLUSION AND RELIEF SOUGHT

In light of the foregoing, the Court should affirm the Judgment in all respects.

DATED this 17th day of October, 2011.

PRINCE, YEATES & GELDZAHLER
A Professional Corporation

By: Wayne G. Petty
James C. Swindler
Wayne G. Petty
Attorney for Appellees

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of October, 2011, I served two copies of the foregoing by mail to the following:

Gerald H. Kinghorn
Jeremy R. Cook
Parsons Kinghorn Harris
111 East Broadway, 11th Floor
Salt Lake City, Utah 84111

K E Kinghorn

ADDENDUM TO BRIEF OF APPELLEES

1. [Proposed] Order Granting Plaintiffs' Motion for Summary Judgment and Denying Eagle Mountain City's and Royal Richards' Motions for Summary Judgment

ADDENDUM 1

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IN THE FOURTH JUDICIAL DISTRICT COURT FOR UTAH COUNTY
STATE OF UTAH

RUTH B. HARDY REVOCABLE TRUST, DELCON CORPORATION PROFIT SHARING PLAN FBO A. WESLEY HARDY AKA DELCON CORP. PSP FBO A. W. HARDY, FINESSE P.S.P., MJS REAL PROPERTIES LLC AKA MJS REALPROPERTIES, UINTAH INVESTMENTS, LLC AKA UINTAH INVESTMENTS, DAVID D. SMITH, STEVEN CONDIE, DAVID L. JOHNSON, BERRETT PSP, VW PROFESSIONAL HOMES PSP, TY THOMAS, AND D.R.P. MANAGEMENT PSP, Plaintiffs vs. **EAGLE MOUNTAIN LOTS, L.L.C. AKA EAGLE MOUNTAIN LOTS, LLC, GRANT BYBEE, BB&S, LLC, ROBERT A. JONES DBA BB&S, LLC, THE CIRCLE OF BUILDERS, L.L.C., ROYAL RICHARDS, HOMESPIN, LLC, EAGLE MOUNTAIN CITY AND JOHN DOES I-X** Defendants	**ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND DENYING EAGLE MOUNTAIN CITY'S AND ROYAL RICHARDS' MOTIONS FOR SUMMARY JUDGMENT** Case No. 090401015 LM Judge Hansen

On December 17, 2010, the Court heard oral argument on (1) Plaintiffs' Motion for Summary Judgment, (2) Eagle Mountain City's Motion for Summary Judgment with Respect to Water Rights and (3) Defendant Royal Richards' Joinder Motion for Summary Judgment to Defendant Eagle Mountain City's Motion for Summary Judgment with Respect to Water Rights, with James C. Swindler and Wayne G. Petty appearing for Plaintiffs ("**Lenders**"), Jeremy R. Cook appearing for Eagle Mountain City ("**City**") and Matt C. Osborne appearing for Royal Richards ("**Richards**"). The Court took the above-described motions ("**Motions**") under advisement. In their respective Motions, all parties contend that there is no genuine issue of material fact and that judgment should be entered as a matter of law. They disagree primarily as to whether certain facts have evidentiary support and as to the correct application of law to the undisputed facts. Based upon the papers on file and upon the arguments of counsel, the Court grants Lenders' Motion and denies the Motions of the City and Richards. Eagle Mountain Lots, L.L.C. is hereinafter referred to as "**EML**."

Summary of Court's Decision

i. Pursuant to Utah Code Ann. § 73-1-11, the Water Right (160 Acre Feet described below) was included in the conveyance of the Land effected by the Trust Deed.

ii. The City and Richards rely on a claimed oral agreement between EML and Lenders to exclude the Water Right from the Loan collateral in contradiction of the Trust Deed.[1] Such an oral agreement may not be enforced by the City or Richards for the following reasons: (a) Section 73-1-11 makes no exception for such an agreement; (b) the parol evidence rule precludes enforcement of

[1] The claimed agreement is that Lenders agreed to accept 1125 acre feet of Jordan River water rights as collateral in lieu of the 160 Acre Feet.

the claimed oral agreement, as the Trust Deed is not ambiguous; (c) the claimed oral agreement is void per Utah Code Ann. § 25-5-1; and (d) alternatively, the City and Richards are not parties to or third-party beneficiaries of the claimed oral agreement and lack standing to enforce it.

iii. The material facts supported by admissible evidence are not in dispute;

iv. The Note is in default and there is no dispute as to the amount owing thereunder;

v. The Note is secured by the Trust Deed, which is a valid lien on the Land and 160 Acre Feet (except for those portions heretofore released by Lenders); and

vi. Alternatively, EML's transfer of the 160 Acre Feet to The Circle of Builders, L.L.C. was a fraudulent transfer avoidable pursuant to Utah Code Ann. § 25-6-6.

Based upon the conclusions summarized above and as further explained below,

IT IS HEREBY ORDERED THAT:

1. The pleadings, affidavits and papers submitted to the Court do not raise a genuine issue of material fact. First, the Court determines that there is no dispute as to any of the facts set forth in Lenders' Statement, in Support of their Motion for Summary Judgment, of Facts as to Which No Genuine Issue Exists (the "**Lenders' Statement of Facts**"), which is quoted below in italics, followed by a discussion in standard typeface of those paragraphs contested by the City or Richards.[2]

$3.3 Million Loan and Loan Documents

¶1– *Lenders made the [$3.3 million] Loan to Eagle Mountain Lots, L.L.C. ("**EML**") in May 2007.*

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[2] The Court notes that Richards expressly admitted the facts stated in the following paragraphs of Lenders' Statement of Facts for purposes of Plaintiffs' Motion for Summary Judgment: ¶¶ 1-10, 12-16, 24-25, 29-30. The City disputed none of Lenders' Statement of Facts.

¶2– *The Loan is evidenced by a Promissory Note (the "**Note**") executed by Robert A. Jones and Bartley Curtis, as Managers of EML.*

¶3– *The Note is secured by a Trust Deed executed by Robert A. Jones and Bartley Curtis, as Manager or Managers on behalf of EML. The Trust Deed was recorded in the office of the County Recorder for Utah County on May 31, 2007, as Entry No. 80022:2007.*

¶4– *The legal description in the Trust Deed contained minor errors, which were corrected by means of an Affidavit of Correction to Recorded Document. Such Affidavit was recorded in the office of the County Recorder for Utah County on May 8, 2008, as Entry No. 54512:2008.*

¶5– *Sutherland Title Company received $3,300,000 from the Lenders representing the amount of the Loan.*

¶6– *Justin Sutherland prepared a Disbursement Worksheet in connection with the transaction. A copy is attached as Exhibit G to the Sutherland Affidavit.*

¶7– *Justin Sutherland disbursed the amount of $3,300,000 in the manner reflected in the Disbursement Worksheet.*

Extension of Loan Maturity and Eventual Default by EML Under the Note

¶8– *EML paid an extension fee to Lenders in January 2008, whereby the maturity date of the Note was extended to May 18, 2008.*

¶9– *EML is in default under the Note in that, among other things, it has failed to pay interest due on February 18, 2008, and thereafter and has failed to pay any part of the indebtedness owing under the Note when it came due on May 18, 2008 or at any time thereafter.*

¶10– *The entire balance owing under the Note came due on May 18, 2008, and has not been paid.*

Balance Owing on the Loan

¶11– *Under the terms of the Note, EML is indebted to Lenders in the amount of $6,666,000 as of August 18, 2010, plus $2,169.86 per day thereafter, Lenders' attorney fees and costs incurred in connection with this action; interest on the principal balance has been accruing at $66,000 per month from and after July 18, 2009, together with a 1% per month finance charge accruing at $33,000 per month.*

Discussion: As to this paragraph, Richards raises the purely legal issue that any deficiency

judgment is limited by Utah Code Ann. § 57-1-32. Inasmuch as this is a judicial foreclosure, § 57-1-32 has no application to this case.

Priority of Trust Deed Over Interests Claimed by Defendants

¶12– *Defendants BB&S, LLC, Grant Bybee, and Robert A. Jones dba BB&S, LLC claim or may claim an interest in the Property under and by virtue of a document entitled Declaration of Covenants, Conditions and Restrictions recorded in the office of the County Recorder for Utah County on September 25, 2008, as Entry No. 105644:2008. These Defendants were properly served, failed to answer the complaint, and their defaults have been entered, as reflected in the Court's files.*

¶13– *The City claims an interest in Water Right Number 54-1225 (a33129) (the "Water Right") or water associated with said Water Right by virtue of a conveyance it received from Circle of Builders on or about August 30, 2007.*

¶14– *Defendants Royal Richards and Steven T. Gyuro, aka Tom Gyuro ("Gyuro"),*[3] *claim or may claim an interest in a portion of the Water Right associated with or related to the conveyance of the Water Right by Circle of Builders to the City, or claim or may claim that the City holds a portion of the Water Right as nominee for those Defendants.*

¶15– *The following documents regarding the Land and Water Rights were recorded in the office of the Utah County Recorder on the respective dates indicated next to each document and were assigned the respect entry numbers indicated next to each document, as follows:*

DOCUMENT	*RECORDING DATE*	*ENTRY NUMBER*
Warranty Deed [Berrys to Eagle Mountain Lots LLC]	*May 25, 2007*	*78095:2007*
Trust Deed [Eagle Mountain Lots, LLC to "Lenders"]	*May 31, 2007*	*80022:2007*
Water Right Deed and Assignment [W. Glade Berry to EML]	*May 25, 2007*	*78092:2007*

[3] Guyro's interest in the Water Right is held by his company, Homespin, LLC, which was substituted in place of Guyro as the real party in interest. Stipulation for Substitution of Parties filed March 19, 2010, and Order Substituting Parties entered March 22, 2010.

Water Right Deed and Assignment [Zane Berry to EML]	*May 25, 2007*	*78093:2007*
Water Right Deed and Assignment [Steven Berry to EML]	*May 25, 2007*	*78094:2007*

¶16– *Defendants EML and Circle of Builders were properly served, failed to answer the complaint, and their defaults have been entered, as reflected in the Court's files.*

160 Acre Feet of Water Rights Appurtenant to the Land

¶17– *As of the May 2007 closing of EML's purchase of the Land and 160 Acre Feet, the annual period of use of the 160 Acre Feet was from April 1 to October 31.*

¶18– *The 160 Acre Feet had been used to irrigate the Land for the previous ten years before the May 2007 closing of the Loan. That water right was entitled to be used on a rotating basis to irrigate 40 acres (in any given year) of a total area of 200 acres, including the Land.*

¶19– *The Division of Water Rights, State of Utah ("**Division of Water Rights**") issued a Certificate of Beneficial Use on March 13, 1995, with respect to the 160 Acre Feet, a certified copy of which is included in Exhibit C attached [to Lenders' Memorandum]. That Certificate constitutes a certificate of appropriation within the meaning of Utah Code § 73-3-17.*

¶20– *On January 27, 1995, pursuant to Utah Code § 73-3-10, the Division of Water Rights approved an Application for Permanent Change of Water, a certified copy of which is included in Exhibit C attached hereto. Such action constitutes an approval of an application to permanently change the place of use of water within the meaning of Utah Code § 73-1-11(5)(b)(vi).*

Fraudulent Transfer of Water Rights by EML

¶21– *EML acquired the 160 Acre Feet using proceeds of the Loan.*

¶22– *On or about June 22, 2007, EML transferred the 160 Acre Feet to Circle of Builders.*

¶23– *EML did not receive anything from Circle of Builders in return for the 160 Acre Feet.*

Discussion: The City does not dispute this fact, but Richards denies it, contending that "Circle of Builders entered into an agreement with EML to allow the use of its 1125 acres of water

rights as collateral for the loan in return for the 160 acre feet to be used for other purposes." This claim does not have evidentiary support. Richards relies on page 65 of the Jones Deposition, but that testimony does not support his claim. He apparently meant to refer to page 66, where Jones testified that "there must have been a contract" but then said "[e]ither that or the title company really screwed up, huh?" Jones Depo. 66:10-11. Such testimony is not admissible to prove the existence or content of an agreement because foundation is lacking and the testimony is mere speculation, Jones gave no testimony as to the actual terms of the supposed contract, and the best evidence rule requires that the contract itself be offered to prove its terms. More importantly, the record is clear that the 1125 acre feet were never transferred to EML. See ¶28, *infra*. Finally, EML did not purport to convey any interest in that water right to Lenders. See Trust Deed. Richards and the City rely on a recital in the Note saying that it "is secured by a first mortgage on" the water rights comprising the 1125 acre feet. However, Utah Code Ann. § 25-5-1 provides that "[n]o estate or interest in real property . . . shall be created, granted, assigned, surrendered or declared otherwise than by act or operation of law, or *by deed or conveyance* in writing subscribed by the party creating, granting, assigning, surrendering or declaring the same." (Emphasis added). Such a recital in a note does not constitute a deed or conveyance.

¶24– *EML was a single asset entity whose purpose was to develop the Land.*

¶25– *EML did not undertake any construction work, never sold any lots or homes, had no income, and made no profit.*

¶26– *Robert A. Jones testified that he did not even know of a bank account of EML. When EML received a check from the closing of the Loan, it endorsed the check and deposited it into a Circle of Builders bank account; Jones did not recall ever seeing a check written on an EML account and conceded that it was possible that EML had no bank account.*

¶27– *EML had no employees.*

¶28– *Apart from the Land and 160 Acre Feet of water rights, EML did not own any other assets.*

¶29– *As of June 22, 2007, the Land (exclusive of water rights conveyed on that date to Circle of Builders) had a fair market value of $1,990,000.*

¶30– *As of June 22, 2007, EML owed Lenders the entire $3.3 million principal balance of the Loan plus interest accrued thereon in the amount of $49,183.38.*

¶31– *As of June 22, 2007, EML owed Summit 1031 Exchange for the benefit of Weston Glade Berry and Zane R. Berry the entire principal amount of $637,875 and accrued interest owing under a Promissory Note signed by EML in connection with the closing of EML's purchase of the Land and 160 Acre Feet.*

¶32– *As of June 22, 2007, EML owed Steven Glade Berry the entire principal amount of $212,625 and accrued interest owing under a Promissory Note signed by EML in connection with the closing of EML's purchase of the Land and 160 Acre Feet.*

2. Second, the Court determines that there is no genuine issue of material fact as to any of the facts set forth in the numbered paragraphs contained in "Richards' Additional Statement of Undisputed Facts" in the Reply Memorandum in Support of Royal Richards' Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment (the "**Richards Opposition**") at 11-13. These paragraphs are quoted in italics below, followed by the Court's analysis of each paragraph in standard typeface:

> *1. The 160 AF was not being used to secure Plaintiffs' loan. Some water rights were being used to secure Plaintiffs' loan, but all parties involved in the proceedings knew that the water rights being used to secure the loan were not those being acquired in the land transaction (i.e. the 160 AF). Rather, the water rights being used to secure Plaintiffs' loan were separate water rights, and the 160 AF were to be sold, and otherwise used, separately.*

This largely unsupported[4] statement repeatedly employs such vague phrases as "were being used" without identifying any specific act, who performed it or the time frame to which each of those phrases is intended to refer. The statement is not helpful to the Court. The critical issue is what rights were actually conveyed by the Trust Deed. The sources cited by Richards in support of this statement discuss pre-closing negotiations. Such preliminary discussions regarding potential loan collateral may not be used to contradict the express terms of the Trust Deed and are subject to the statute of frauds. Thus, this statement is material, if at all, only to the extent permitted by the parol evidence rule. The Court's analysis of that rule and the issues concerning it is set forth below.

> *2. Plaintiffs, as lenders, never prepared the proper documents to encumber the 1125 AF, but relied on Justin Sutherland of Sutherland Title, Plaintiffs' closing company, to ensure proper collateralization of the 1125 AF.*

This statement is not material. It matters not whether the1125 acre feet were described in the Trust Deed because EML did not own those water rights. Further, Richards' counsel asserted in oral argument that Sutherland Title was the Lenders' agent only. In fact, there is no evidence before the Court that Sutherland Title was exclusively Lenders' agent.

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[4] An incomplete copy of a purported interrogatory answer (without a signature) of one of the 12 Lenders in another case is inadmissible hearsay as to all of the other Lenders, to which they have objected. That interrogatory answer described the "facts or representations" relied upon by one Lender. It does not purport to state what was ultimately agreed upon. Richards also relies upon John Strasser's deposition testimony given in another case. Lenders properly objected to such testimony as being hearsay. Moreover, at that deposition, Lenders' counsel timely objected to the question (p. 51) for lack of foundation, as it called for a legal conclusion. The witness was not competent to make legal conclusions. The deposition of Justin Sutherland is also inadmissible hearsay, as it was taken in another case. The final source was the Jones Deposition taken in this case (although the copy submitted by Richards bears the caption of another case). The primary statement therefrom upon which Richards relies is inadmissible speculation by Jones about what the Lenders "cared about."

3. It was always understood that the 160 AF would be used by EML separately, and has in fact been used separately in favor of Richards and the City for good and valuable consideration.

This statement is not helpful to the Court.[5] "[I]t was always understood" does not establish who had the understanding or when. More importantly, any use thereof to alter the express language of the Trust Deed is precluded by the parol evidence rule. See discussion of parol evidence rule below. The alleged oral agreement is also barred by the statute of frauds, as discussed below.

4. Plaintiffs understood the value of the 1125 AF to be valued at $20,000 per acre foot at the time of the transaction.

This statement is not material because Lenders never received the 1125 acre feet, and EML never owned it. Further, it lacks admissible evidentiary support.[6]

5. The 1125 AF was encumbered at the time of the loan transaction, which Plaintiffs knew.

This statement is not material in that Lenders never received the 1125 acre feet, and EML never owned it.

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[5] The only source offered for this statement is two conclusory, ambiguous passages of the Jones Deposition which are not admissible for lack of foundation. Jones never identifies any actor or speaker, but refers to all 12 Lenders collectively by pronouns such as "they" and "them," never identifying a speaker, time, place or context.

[6] The Strasser deposition testimony from another case is inadmissible hearsay as used in this case. It lacks foundation, being based entirely on hearsay. Neither did Strasser say anything resembling this statement. He did not testify as to the value of the 1125 acre feet, but only the value of water rights "for residential hookups" in Eagle Mountain. The Jones testimony cited for this statement is not admissible in view of the question asked ("What was the perceived value of the 1,125 acres?") and the objection interposed ("Objection. Vague as to whose perception you're talking about."). Jones was not qualified to give expert opinion testimony and in fact did not give an opinion as to the value of the Jordan River water.

6. The 1125 AF had an equity-value in May 2007 of at least $8,850,000; more than enough to secure Plaintiffs' $3.3 million loan.

This statement is irrelevant because Lenders never received the 1125 acre feet, and EML never owned it. Further, it relies on paragraph 4's unsupported value conclusion.

7. Plaintiffs never demanded delivery of the 1125 AF even after the loan defaulted.

This unsupported statement is irrelevant. EML never owned the 1125 acre feet and could not deliver it. By the time the loan became delinquent, the 1125 acre feet had been transferred by Circle of Builders to Mark and Brenda Rindlesbach. Jones Depo. Exh. 7.

8. The Circle of Builders, LLC ("COB") acquired the 1125 AF from John Jacob under a Water Purchase Agreement on December 23, 2006.

This statement is not material.

9. EML and COB operated under an agreement and understanding, in association with the acquisition of the Land and Plaintiffs' loan, that EML would transfer the 160 AF to COB, to be used for Jones' "other purposes" in exchange for COB's transfer of the 1125 AF to EML.

This statement is substantially the same as that offered by Richards to dispute ¶23 of Lenders' Statement of Facts. The Court's discussion above regarding ¶23 applies equally to this statement.

10. EML did have rights in the 1125 AF because EML did in fact perform under its agreement with COB and transferred the 160 AF to COB by Water Right Deed and Assignment dated June 22, 2007 and filed for record on June 22, 2007 with the Utah County Recorder's Office as Entry No. 91288:2007.

Lenders agree that EML transferred the 160 AF to Circle of Builders by Water Right Deed and Assignment dated June 22, 2007. The rest of this statement has no evidentiary support. EML never owned the 1125 acre feet. It is of no help to the Court to claim that EML performed an agreement with Circle of Builders, when no such agreement is in evidence.

11. That the 1125 AF were used to secure Plaintiffs' loan was understood and carried on by the entities and their members, as exhibited by the Agreement buying out Mark and Brenda Rindlesbach's ("Rindlesbach") interest in the Robert Jones entities, and simultaneously transferring EML's rights under the Water Purchase Agreement, including the 1125 AF, to Rindlesbach.

This statement has no evidentiary basis. The only support offered is Exhibit 7, evidencing Circle of Builders' assignment of its water contract with John Jacob to Rindlesbach. EML had no rights under the Water Purchase Agreement as it was not a party to it. There is no support for the assertion that the 1125 acre feet were "used" to secure Lenders' loan because only a document of conveyance signed by the owner of the 1125 acre feet, effectively granting Lenders a lien thereon, could secure the loan. No such document has been shown to exist.

12. In the Agreement, dated December 5, 2007, Robert Jones and the Jones entities, including EML and COB, warranted that no encumbrance existed as to the water rights transferred, except the encumbrance created in favor of Plaintiffs as to the 1125 AF.

This statement mischaracterizes the written agreement, which speaks for itself. First, no warranty is made by EML in it. Second, the warranty on which Richards relies states only that Jones and Circle of Builders warrant that Circle of Builders has not assigned or encumbered its rights in the water agreement or the 1125 acre feet, "with the sole exception of any encumbrance created by [the Trust Deed and the Note]" (emphasis added). This does not establish that the Trust Deed actually created an encumbrance on the water agreement or the 1125 acre feet, but only that, if it did, there was no warranty against it. It is undisputed that EML never owned the 1125 acre feet or the water agreement relating to it.

3. Third, the Court determines that there is no dispute as to any of the following facts set forth in the "Statement of Additional Material Facts" (Lenders' initial Memorandum) pertaining

to the City's Motion and Richards' Motion:

¶1 – *Lenders were unwilling to make the Loan to EML unless they received a security interest in substantial water rights in addition to the Land.*

¶3 – *EML never owned any interest in and never conveyed any security interest in the 1,125 acre feet of water to Lenders.*

¶4 – *In a prior settlement Lenders released their interest in a total of 53.28 acre feet of the 160 Acre Feet to the following:*

Michael Moss	*48.28 acre feet*
Michelle Turpin	*3.00 acre feet*
Church of Jesus Christ of Latter-Day Saints	*2.00 acre feet*

Lenders claim a perfected security interest, by virtue of the Trust Deed, in the remaining 106.72 acre feet of the original 160 Acre Feet water right.

Legal Issues

4. Undisputed Legal Determinations. There being no dispute on the following points, the Court determines that:

(a) the Note and Trust Deed are valid and enforceable according to their terms;

(b) EML is in default thereunder;

(c) the amount owing to Lenders under the Note and secured by the Trust Deed as of August 18, 2010, is $6,666,000, with interest accruing thereafter at $2,169.86 per day after August 18, 2010, for which total amount Lenders are entitled to judgment against EML;

(d) Lenders are entitled to an award of their reasonable attorney fees and costs incurred in this action as against EML[7] and the inclusion of such fees and costs in the judgment against EML.

[7] Lenders have not requested an award of attorney fees against the City or Richards in this action.

(e) The Trust Deed constitutes a valid security interest in the Land described therein, and such Trust Deed is prior to any and all claims, right, title, or interest of Defendants and of all persons claiming by, through or under any of Defendants, and Lenders are entitled to a decree of foreclosure as to the Land.

5. Effect of Utah Code Ann. § 73-1-11. Utah Code Ann. § 73-1-11 provides in pertinent part as follows:

> (1) A water right appurtenant to land shall pass to the grantee of the land unless the grantor:
>
> (a) specifically reserves the water right or any part of the water right in the land conveyance document;
>
> (b) conveys a part of the water right in the land conveyance document; or
>
> (c) conveys the water right in a separate conveyance document prior to or contemporaneously with the execution of the land conveyance document.

The land conveyance at the heart of this matter is the Trust Deed from EML (grantor) to Lenders (grantee). The general rule established by Section 73-1-11 is that appurtenant water rights pass with the land conveyance. None of the three above-quoted exceptions to the general rule applies. First, the Trust Deed contains no reservation of any water rights. Second, the Trust Deed does not purport to convey only a part of the 160 Acre Feet. Third, the grantor, EML, did not convey the 160 Acre Feet in a separate conveyance document prior to or contemporaneously with the Trust Deed.

As to the last point above, the City and Richards argue that previous grantors in the chain of title, members of the Berry family, conveyed the 160 Acre Feet to EML by water rights deeds separate from the Warranty Deed conveying the Land. While that is indeed what occurred, that is not the conveyance in controversy. All parties agree that EML acquired both the Land and the 160

Acre Feet from the Berrys. Section 73-1-11 requires the Court to determine the effect of what occurred next–namely, EML's conveyance of the Land to the Lenders by way of the Trust Deed. If the 160 Acre Feet were appurtenant, as defined by Section 73-1-11(5)(b), to the Land at the time of the Trust Deed, they were included in the conveyance effected by the Trust Deed as a matter of law. Both the City and Richards argue that the Berrys effected a "severance" of the 160 Acre Feet from the Land. The Court need not make any determination on that issue because Section 73-1-11(5)(b) controls what water rights are included in a land conveyance after May 4, 1998. It provides as follows:

> For purposes of land conveyances only, a water right evidenced by any of the following documents is appurtenant to land: . . . (ii) a certificate issued under Section 73-3-17 . . . (vi) an approval for an application to permanently change the place of use of water issued under Section 73-3-10 . . . .

Utah Code Ann. § 73-1-11(5)(b).

There is no dispute that the Berrys held a certificate issued by the State Engineer under Section 73-3-17 for the 160 Acre Feet. There is no dispute that the Berrys obtained an approval from the State Engineer under Section 73-3-10 to permanently change the place of use of the 160 Acre Feet. Either of those regulatory acts suffices to make the 160 Acre Feet appurtenant to the Land "for purposes of land conveyances only" as prescribed by Section 73-1-11(5)(b). The Court therefore concludes as a matter of law that the Trust Deed conveyed the 160 Acre Feet.

6. Parol Evidence of Parties' Intent or Understanding. Utah Code Ann. § 73-1-11 does not contain any exception based on the intent of the parties other than the three exceptions quoted above (reserving the water right, conveying only a part thereof or conveying the water right by a separate conveyance prior to or contemporaneous with the land conveyance). The Court has no

power to amend the statute or to engraft upon it additional exceptions not contained in the plain language of the statute. Thus, the following analysis of parol evidence and interpretation issues is an alternative basis for the Court's decision that the Trust Deed included the 160 Acre Feet.

The City and Richards argue that the Court should consider extrinsic evidence of the parties' "intent" such as preliminary discussions and negotiations regarding the collateral to be provided for the Loan, claiming the Trust Deed to be ambiguous. The thrust of such evidence is that the Lenders did not intend to receive the 160 Acre Feet as collateral because they were to receive, in exchange for giving up that water right, 1125 acre feet of water rights that are listed in the Note. The Court notes that "[t]he basic rule of contract interpretation is that the intent of the parties is to be ascertained from the content of the instrument itself, the rationale for the rule being to preserve the sanctity of written instruments." *Utah Valley Bank v. Tanner*, 636 P.2d 1060, 1062 (Utah 1981).

The Trust Deed includes all of the following in addition to the Land:

> all buildings, fixtures and improvements thereon and all water rights, rights of way, easements, rents, issues, profits, income, tenements, hereditaments, privileges and appurtenances thereunto belonging, now or hereafter used or enjoyed with said property, or any part thereof . . . .

The phrase "all water rights . . . thereunto belonging" is not ambiguous. *See Spears v. Warr*, 2002 UT 24, ¶40 (similar deed language ruled unambiguous); *Loosle v. First Fed. Sav. & Loan*, 858 P.2d 999, 1003 (Utah 1993) ("pursuant to section 73-1-11, a perfected water right will pass as an appurtenance without specifically mentioning the vested water right . . . .").

A finding of ambiguity after a review of relevant, extrinsic evidence is appropriate only when "reasonably supported by the language of the contract." *Daines v. Vincent*, 2008 UT 51, ¶27. Thus, a claim of ambiguity in contractual language must be "plausible and reasonable" in light of the

language used. *Id.* ¶31. The evidence of intent offered by the City and Richards may not be considered absent ambiguity in the language of the Trust Deed.

> A trial court may not consider parol evidence of intent without first finding ambiguity in the language of a contract. And, while relevant evidence proffered to demonstrate the alleged facial ambiguity must be considered, our analysis of such evidence is strictly limited to the determination of the existence of facial ambiguity and is "ultimately circumscribed by the language of the agreement." See *Daines*, 2008 UT 51, P 28, 190 P.3d 1269.

Flores v. Earnshaw, 2009 UT App 90, 209 P.2d 428, 433.

The City and Richards have failed to show any plausible and reasonable interpretation of the Trust Deed that would exclude the 160 Acre Feet. They argue, however, that the recital in the Note stating that it is secured by the 1125 acre feet creates an ambiguity in the Trust Deed. No ambiguity is created by the language of the Note. Since the Note recited that it was secured by Parcel No. 59-019-0001 (which included all improvements, *appurtenant* water rights, and all other appurtenances), there was no reason to repeat the description of improvements or appurtenances in the Note. Thus, the Note itemized only the non-appurtenant water rights (the 1125 acre feet). There is no conflict between the Trust Deed and the Note with respect to the inclusion (in both documents) of appurtenant water rights. Since the Court is unable to find ambiguity in the Trust Deed, parol evidence of intent contrary to the language of the Trust Deed may not be considered.

7. Interpretation of the Trust Deed. The operative language states that EML conveys the Land "[t]ogether with . . . all water rights . . . and appurtenances thereunto belonging, now or hereafter used or enjoyed with said property, or any part thereof." The City argues that the Land was not being irrigated at the exact moment of EML's purchase and that, as a result the Trust Deed does not encumber the 160 Acre Feet. The City also asserts that the water rights have not been used on

the Land at any time since the recording of the Trust Deed. The Court rules as a matter of law that the elements of this language are disjunctive, such that water rights included with the Land are those "thereunto belonging," or "now or hereafter used," or "enjoyed with said property." *See*, *Doctors' Co. v. Drezga*, 2009 UT 60, ¶ 11, 218 P.3d 598 (Utah 2009) ("the contract uses clearly disjunctive language, indicating that TDC can either rescind or cancel the policy, but cannot do both."); *In re A.M.*, 2009 UT App 118, ¶ 14, 208 P.3d 1058; *Home Sav. and Loan v. Aetna Cas. And Sur. Co.*, 817 P.2d 341 (Utah App. 1991); *Berger v. Minnesota Mut. Life Ins. Co.*, 723 P.2d 388, 390 (Utah 1986).

Even if the disjunctive is ignored and inquiry is made as to whether the water rights fit within the term "now used" on the Land as of May 2007, the City's interpretation of "now" is artificial and unreasonably narrow. The City suggests "now" means only "today" or on the date of the Trust Deed. The Random House Dictionary of the English Language, 2nd Ed. Unabridged (1987) includes among the definitions of "now":

> 3. at this time or juncture in some period under consideration or in some course of proceedings described: *The case was now ready for the jury.* 4. at the time or moment immediately past: *I saw him just now on the street.* 5. in these present times; nowadays: *Now you rarely see horse-drawn carriages.* 6. under the present existing circumstances; as matters stand: *I see now what you meant.*

Several of the foregoing usages would mean that the water rights had been used "now," including those numbered 3 and 4 (the time period under consideration including the most recent past watering season) and 6 (the water could be used under the then existing circumstances, as matters stood on the date of the closing of the Loan).

The term "now" must be applied in context of the appurtenant water rights, which can be used only between April and October. There is no dispute that the water was used on the land in

2006. The Trust Deed was made in May 2007, early in the six-month period of permitted use in 2007. The Court must apply a practical and reasonable definition of the term "now" in construing the Trust Deed. Thus, the 160 Acre Feet were in use substantially contemporaneously with the execution of the Trust Deed and were therefore included within the granting clause.

8. Statute of Frauds. The City and Richards ask the Court to enforce a claimed oral agreement between EML and Lenders whereby Lenders supposedly agreed to give up a lien on the 160 Acre Feet and EML was to grant them a lien on the 1125 acre feet. Those water rights are interests in real property (*see In re Bear River Drainage Area*, 271 P.2d 846 (Utah 1954)) and therefore subject to the statute of frauds.[8] Utah Code Ann. § 25-5-1 provides that "[n]o estate or interest in real property . . . shall be created, granted, assigned, surrendered or declared otherwise than by act or operation of law, or by deed or conveyance in writing subscribed by the party creating, granting, assigning, surrendering or declaring the same." Since there is no document in evidence constituting a deed or conveyance of the 1125 acre feet to Lenders, the Court rejects all claims by Richards and the City that the Lenders obtained a lien thereon. In addition, since the Court concludes that the Trust Deed included the 160 Acre Feet, any surrender of Lenders' interest therein must be accomplished in a writing signed by Lenders to be valid. No such writing is in evidence. Not only is the Note not signed by Lenders (*see Eldridge v. Farnsworth*, 2007 UT App 243, ¶ 30, 166 P.3d 639), but it also does not purport to surrender an interest in the 160 Acre Feet conveyed to them by the Trust Deed. The Court should not consider the alleged oral agreement relied upon by

[8] See Utah Code Ann. § 73-1-10 (1)(a) ("A water right . . . shall be transferred by deed in substantially the same manner as is real estate.").

the City and Richards. *See* Utah Code Ann. § 25-5-3. Neither the City nor Richards has claimed that Lenders have waived the statute of frauds regarding the oral contract or that promissory estoppel applies. *See Eldridge v. Farnsworth, supra,* ¶¶ 29-32.

9. Fraudulent Transfer. Lenders' fraudulent transfer claim is asserted in the alternative to their claim that the Trust Deed includes the 160 Acre Feet. Utah Code Ann. § 25-6-6 provides the following definition as to when a transfer is fraudulent as to creditors:

> (1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if:
>
> > (a) the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation; and
> >
> > (b) the debtor was insolvent at the time or became insolvent as a result of the transfer or obligation.

The 160 Acre Feet that EML purported to transfer to its sister company, Circle of Builders, on June 22, 2007, had a value at that time of $1,920,000. Declaration of Paul W. Throndsen. The undisputed evidence is that EML received nothing in return for that transfer.[9] Thus, it did not receive a reasonably equivalent value in exchange for the 160 Acre Feet. The debtor, EML, was either already insolvent at the time of that transfer or was rendered insolvent by it, as shown by the facts that: (1) its only remaining asset, the Land, was worth $1,990,000 at that time; (2) it was indebted

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[9] Richards contends that EML received the 1125 acre feet of water rights in exchange. As discussed above, there is no evidence that Circle of Builders conveyed that water right to EML. Absent a signed conveyance in writing, no "exchange" would be effective. Utah Code Ann. § 25-5-1. Moreover, the evidence is undisputed that Circle of Builders transferred the 1125 acre feet to Mark and Brenda Rindlesbach. Jones Depo. Exh. 7.

to Lenders in the amount of $3,349,183.38; (3) it was indebted to Summit 1031 Exchange, LLC in the amount of $637,875 (plus interest accrued from May 21, 2007); and (4) it was indebted to Steven Glade Berry in the amount of $212,625 (plus interest accrued from May 21, 2007). These three debts amounted to $4,199,683.38 (plus interest on $850,500 for 32 days at 12% per annum). Thus, EML's debts exceeded the value of its assets on June 22, 2007, by more than $2.2 million. This clearly satisfies the definition of insolvency in Utah Code §25-6-3(1).

Richards and the City contend that they gave value in good faith in exchange for the portions of the 160 Acre Feet ultimately received by them and therefore are entitled to a lien for that value. Neither of them has submitted any admissible evidence that they gave value or what the amount of that value was.[10] Both of them fail to satisfy the statutory requirement of Utah Code § 25-6-9(4) that the value must be given *to the debtor*, which in this case is EML. Whatever the City or Richards gave to Circle of Builders, if anything, is irrelevant. They gave nothing to EML and therefore have no statutory lien right.

During oral argument the City contended for the first time that the Court cannot set aside the transfer of water rights by EML as fraudulent because the City is a good faith purchaser for value. The City has provided no authority for this argument and did not assert it as a defense in its Answer. Further, the City has presented no evidence that it gave value for the water rights transferred to it by Circle of Builders or that it was an innocent purchaser. The Court therefore cannot consider the

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[10] Richards submits an unauthenticated agreement, to which Lenders object for lack of foundation and on the basis that it constitutes hearsay. Inasmuch as those evidentiary objections are meritorious, the Court declines to consider that agreement. Even if it did, however, the agreement shows no value being conferred on EML by Richards giving up his ownership interests in multiple companies operated by Robert Jones.

City's argument for lack of a basis in the pleadings and for lack of legal and factual support.

Both Richards and the City argue that Lenders consented to EML giving away $1,920,000 worth of water rights to a sister company for no consideration, leaving EML insolvent and incapable of paying its debt to Lenders. Although Lenders were apparently willing to accept the 1125 acre feet instead of the 160 Acre Feet, they never received the 1125 acre feet and thus retained their rights to the 160 Acre Feet. Even if they had agreed not to include the 160 Acre Feet in the Trust Deed, there is no evidence that Lenders authorized their borrower, EML, to *give away* its assets without receiving equivalent value in exchange.

Lenders have established all of the statutory requirements for avoidance of EML's transfer of the 160 Acre Feet to Circle of Builders as a fraudulent transfer. Summary judgment should be granted in favor of Lenders on their fraudulent transfer claim in the alternative to their foreclosure claim. Any sale of the water rights conducted by the Sheriff in accordance with a decree of foreclosure shall be deemed, in the alternative, to be a valid execution sale of such water rights.

The Court will issue a judgment and decree of foreclosure consistent with the foregoing Order determining that the Trust Deed is prior and superior to the interests of all Defendants with respect to the Land and the remaining banked entitlements (106.72 acre feet) of the 160 Acre Feet that Lenders have not heretofore released and directing the Sheriff of Utah County to sell the Land and such banked entitlements. Within 10 days after entry of this Order, Lenders' counsel shall submit a proposed Judgment and Decree of Foreclosure including an amount for Lenders' attorney fees and expenses, along with an affidavit or declaration itemizing the attorney fees and costs incurred in connection with this action. Any objections to either document shall be served within 5

days pursuant to Utah R. Civ. P. 7(f)(2). The Court may resolve any such objections without further hearing.

Dated this ___ day of January, 2011

BY THE COURT:

_____

Honorable Steven L. Hansen
District Judge

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing was served by mailing the same on January 4, 2011, addressed to each of the following:

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