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Pioneer Builders Company of Nevada, Inc., a Nevada corporation a/k/a Pioneer Builders of Nevada, a Nevada corporation a/k/a Pioneer Builders, a Nevada corporation v. K D A Corporation, a Utah corporation a/k/a KDA Corporation a/k/a K.D.A. Corporation a/k/a/ The K.D.A. Corporation a/k/a K.D.A. Corporation, Inc.; et al. : Reply Brief

Utah Supreme Court

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IN THE SUPREME COURT OF UTAH

PIONEER BUILDERS COMPANY OF NEVADA, INC., a Nevada corporation a/k/a PIONEER BUILDERS OF NEVADA, a Nevada corporation a/k/a PIONEER BUILDERS, a Nevada corporation, Plaintiff/Appellant vs. K D A CORPORATION, a Utah corporation a/k/a KDA CORPORATION a/k/a K.D.A. Corporation a/k/a THE K.D.A. Corporation a/k/a K.D.A. CORPORATION, INC.; *et al.*, Defendants/Appellees.	Supreme Court Case No. 20110050-SC

REPLY BRIEF OF APPELLANT PIONEER BUILDERS COMPANY (ORAL ARGUMENT REQUESTED)

Appeal From a Final Judgment(s) or Decree(s) of the First Judicial District Court
In and For Cache County, State of Utah, Honorable Ben H. Hadfield, Presiding

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PIONEER BUILDERS COMPANY OF NEVADA, INC., a Nevada corporation a/k/a PIONEER BUILDERS OF NEVADA, a Nevada corporation a/k/a PIONEER BUILDERS, a Nevada corporation, Plaintiff/Appellant vs. K D A CORPORATION, a Utah corporation a/k/a KDA CORPORATION a/k/a K.D.A. Corporation a/k/a THE K.D.A. Corporation a/k/a K.D.A. CORPORATION, INC.; *et al.*, Defendants/Appellees.	Supreme Court Case No. 20110050-SC

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I. FILINGS DEFENDANTS' ARGUMENTS FOR SUSTAINING THE DISTRCT COURT'S PRIORITY DETERMINATIONS BASED ON OTHER THAN STATUTORY RECORDING ORDER ALL FAIL

There is no dispute that none of the Filing Defendants[1] recorded any documents relating to any of their respective interests sought to be foreclosed in this case until after the Pioneer Trust Deeds were recorded, and that some of them never recorded at all. The core issue in this appeal, therefore, is whether the District Court erred in failing to declare the Pioneer Trust Deeds prior and superior to all Filing Defendants' claimed interests, based on the order of recording, and by instead granting summary judgment declaring the Pioneer Trust Deeds were junior and subordinate to the interests of the Filing Defendants based on factors other than order of recording. For each of the reasons discussed below, the District Court erred, and this Court should reverse the District Court and declare Pioneer is entitled to a judgment of priority as a matter of law.

A. The District Court Erred in Imposing Constructive Inquiry Notice, As a Matter of Law and Because There Were Disputes of Material Facts

Filing Defendants debate whether constructive inquiry notice is an exception to recording order priority under the recording statutes, or whether inquiry notice analysis is a part of ascertaining whether one is a good faith or bona fide purchaser entitled to the protection of the recording statutes. In this case, however, that is a distinction without a difference. Regardless of how or when one arrives at the inquiry notice issue raised by

[1] Capitalized terms used throughout this brief shall have the same meanings set forth in Pioneer's opening brief to this Court, unless otherwise stated.

Filing Defendants, the analysis is the same. The District Court erred in conducting that analysis, and its ruling imposing inquiry notice is unsustainable.

This Court has repeatedly unanimously confirmed that to be subjected to a duty to inquire outside of or beyond county records, and potentially be precluded from or otherwise deprived of priority under or protection of the recording statutes, "a person must have '[actual] knowledge of certain facts and circumstances that are sufficient to give rise to a duty to inquire further.'" *Haik v. Sandy City*, 2011 UT 26, ¶ 14, 254 P.3d 171, 176 (quoting *First Am. Title Ins. Co. v. J.B. Ranch, Inc.*, 966 P.2d 834, 838 (Utah 1988)) (emphasis added) (alteration in *Haik*); *see also e.g., Arnold Indus. v. Love*, 2002 UT 133, ¶ 31, 63 P.3d 721, 730 (explaining inquiry notice is imputed in certain cases where "the fact that a person has knowledge of certain facts ... should impart to him, or lead him to, knowledge of the ultimate fact'") (quoting *J.B. Ranch, Inc.*, 966 P.2d at 837) (emphasis added).[2]

The primary and fatal failing in the District Court's analysis, and in the Filing Defendants' arguments to sustain it, is in identifying the facts and circumstances purportedly actually known to Pioneer and claimed to have given rise to a duty for Pioneer to inquire further. The facts and circumstances relied upon by the District Court

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[2] Defendants' Jensens and Taylors dispute the requirement to show actual knowledge, arguing that inquiry notice "seems to focus on the objective 'reasonable person' and what was reasonable inquiry under the circumstances." (Jensen and Taylor Brief, pp. 20-21). But as shown by the language of that quote itself, their analysis actually has to do with the second part of inquiry notice analysis, *i.e.*, what inquiries are required once one is determined to have a duty to inquire. That is a completely separate issue from the first required part of inquiry notice analysis, *i.e.*, the threshold issue of whether one has a duty to inquire to begin with, which as noted in the main text above can arise only based on actual knowledge of certain facts.

and argued by Filing Defendants either do not support imposing a duty to inquire, or there were disputes of those claimed material facts and circumstances precluding the District Court's grant of summary judgment based upon them, or both.

1. Recorded development documents, other peoples' recorded leases, and the "subject to" language of the deeds to the grantors of Pioneer's Trust Deeds.

The District Court and the Filing Defendants all reasoned that Pioneer had a duty to inquire about unrecorded interests in the Property because there were various recorded documents going back to 1988 showing the Property drawn out essentially as a subdivision of numerous RV pads and campsites, recorded Articles of Incorporation and Bylaws of a members' association (collectively, the "**Development Documents**"), as well as recordings of various leasehold claims and related interests of various people other than the Filing Defendants in various lots or parcels within the Property. They also point to the language in the deeds to the grantors of Pioneer's Trust Deeds as imposing inquiry notice because those deeds say they are "subject to" various interests "of record". As a matter of law, however, those factors do not give rise to inquiry notice. This Court has confirmed that "inquiry notice arises from knowledge of certain facts and circumstances, not from records." *Haik*, 2011 UT 26, ¶ 15 n.14, 254 P.3d 171 (quoting *J.B. Ranch*, 966 P.2d at 838) (emphasis added). *See also* Argument I.B. below.

2. Claimed uses and improvements, and Pioneer's site visit

The District Court and the Filing Defendants also all reasoned that Pioneer was placed on a duty to inquire about possible unrecorded interests in the Property because various people had made use of or improvements to their respective RV pad sites within

the Property before the last two of Pioneer's Trust Deeds were recorded in August of 2001, and because a visit to the Property by Pioneer's principal, Ralph Call, in April 2001 purportedly gave Pioneer actual knowledge of various such claimed uses and improvements. That ruling, however, must be reversed because there were disputes of the material facts on which that ruling was premised, and because even if not disputed the facts were insufficient as a matter of law to impose inquiry notice.

The District Court itself expressly acknowledged that "Plaintiff disputes that it had inquiry notice of the existence of the purported improvements and disputed any actual knowledge of these claimed improvements." (Initial Decision at R.4381 (emphasis added), Addendum 1). It was therefore inappropriate for the District Court to grant summary judgment for Defendants over those disputed facts.

Filing Defendants seek to uphold summary judgment arguing the acknowledged disputes as to the claimed uses and improvements, and as to which of them Pioneer's principal Ralph Call saw on his April 2001 site visit are immaterial in light of the District Court's conclusion that "[e]ven the minimal improvements Mr. Call states he observed would put a reasonable person on guard so as to require further inquiry on his part." (*Id.* at R.4383). That ruling, however, and the Filing Defendants' argument as to materiality of the disputed facts, is erroneous.

To begin with, this Court has recently confirmed unequivocally that inquiry notice is premised upon and requires that a person have actual knowledge of facts claimed to give rise to any duty to inquire further, as discussed above. *Haik v. Sandy City*, 2011 UT 26, ¶ 15 n.14, 254 P.3d 171 ("Inquiry notice is not an issue in this case because the Haik

Parties did not have actual knowledge of any facts … giving rise to a duty to inquire further") (emphasis added). So the acknowledged dispute as to what purported improvements Pioneer had actual knowledge of is material and itself requires reversal of summary judgment.

Additionally, the minimal improvements Mr. Call acknowledged seeing were only "[a]t most … four or five recreational vehicle camper trailers parked in various spots … a few concrete slabs in scattered places where the snow had melted … a lodge on the property, and some small, narrow roads." (October 2006 Affidavit of Ralph Call, at R.4250, Addendum 15). Those few improvements on the entire 40-acre Property are consistent with what one would expect to see on a property of this nature, being developed, as it was, as an RV park. As a matter of law, therefore, it does not excite or give rise to any need or duty to inquire. That is because the foundation for imposing the legal fiction of inquiry notice is that a party has actual knowledge of facts or circumstances that are out of the ordinary for or inconsistent with what one would expect given the nature of the property, the state of record title, or the transaction at issue. It is the aberrant nature of some known fact that could alert a prudent person to the need to inquire further about them. If one has no actual knowledge of any suspicious, aberrant, out of the ordinary, or inconsistent facts or circumstances, there is nothing to alert one to any need of further inquiry and therefore no basis to charge one with a duty to inquire further. *See e.g., Diversified Equities, Inc. v. American Savings and Loan Assoc.,* 739 P.2d 1133, 1137 & n.5 (Utah Ct. App. 1987) (noting it is "suspicious" circumstances that

call for inquiry, and that even "a duty to inquire is not a duty to disbelieve, aggressively investigate, and set straight").

Stumph v. Church, 740 P.2d 820 (Utah App. 1987) is instructive. In that case, the plaintiffs purchased two rental houses, but failed to record their deeds. Thereafter, their seller obtained a nonowner occupied loan which it secured by trust deeds on those same houses. The lender recorded its trust deeds. The plaintiffs then sued their seller's subsequent lender to quiet title. The plaintiffs argued since the lender's appraiser had inspected the two homes prior to the closing of the loan, and therefore had knowledge that renters were occupying the premises, the lender had a duty to inquire as to the identity of the landlord and thus should be charged with inquiry notice that plaintiffs were the true owners. *Id.* at 821. The Utah Court of Appeals rejected that argument, because "there was nothing about the property that would have alerted [Lender] to the ownership of plaintiffs. The appraiser expected to find, and did find, persons occupying the premises as tenants." *Id.* at 822. Since the known facts and circumstances were not out of the ordinary for or inconsistent with the contemplated transaction, the lender was not charged with any duty inquire beyond the record, and the lender's subsequently-executed but first-recorded trust deeds were held to have priority over the purchasers' earlier but unrecorded interests.

Based primarily upon *Mathis v. Madsen*, 261 P.2d 952 (Utah 1953) and *Meagher v. Dean*, 91 P.2d 454 (Utah 1939), Filing Defendants attempt to argue there is a blanket rule that their possession by itself gives rise to a duty to inquire as to their claims or interests. But both of those cases involved possession by someone out of the ordinary

from or inconsistent with what one would have expected given the facts and transactions there at issue. Neither they, nor any other of the authorities cited by Filing Defendants undermine the law that inquiry notice can arise only if one has knowledge of facts or circumstances that are suspicious, out of the ordinary, or inconsistent with what one would expect in a given case.

The minimal improvements Ralph Call saw during his site visit in April of 2001, and for that matter all of the purported use and improvement facts discussed by the District Court were, consistent with what one would have expected to see – use of the Property as an RV park, which is precisely what the Property was being developed to be. There was nothing suspicious or out of the ordinary. As a matter of law, therefore, such facts simply could not give rise to any duty to inquire further looking for unrecorded interests in the Property.

3. The appraisal.

The District Court and the Filing Defendants also claimed Pioneer had actual knowledge of various leasehold interests of the Filing Defendants and otherwise, giving a duty to inquire further about other leaseholds, purportedly based on Pioneer having an appraisal report referring to various leaseholds. As shown in its opening brief to this Court, however, Pioneer disputed below, and still disputes, that it had actual knowledge of any leaseholds or other interests in the Property when it made its loans, including from or based on the referenced appraisal. Indeed, Pioneer disputed and denied ever having seen any but the first two pages of the appraisal, without all of the lease information and other detail Filing Defendants and the District Court referred to and relied upon as the

basis for a purported duty to inquire further. (*E.g.*, Pioneer's opening brief to this Court, pp. 18-19). That dispute of fact material to the District Court's summary judgment ruling requires reversal.

Filing Defendants now attempt to downplay the significance of the appraisal report to the District Court's analysis, arguing it is irrelevant whether Pioneer actually read or reviewed the appraisal report, and that all the District Court held matters is that Pioneer had "access" to the appraisal. (*E.g.*, Jensen and Taylor Brief, p. 22; Anderson Defendants' Brief, pp. 41-43). Even if that were the case, it would merely confirm the District Court's ruling should be reversed because, as shown above, a person must have actual knowledge of certain facts in order to be held to a duty to inquire further, and inquiry notice does not arise from records to which one merely "has access". *E.g., Haik v. Sandy City*, 2011 UT 26, 254 P.3d 171.

B. The Andersen Defendants Incorrectly Claim Pioneer Did Not Appeal Constructive Record Notice; The District Court Erred in Imposing Any Constructive Record Notice As a Matter of Law

The Anderson Defendants (only) argue this Court should uphold the District Court's grant of summary judgment on the premise that Pioneer did not appeal the District Court's statement that Pioneer had constructive record notice of the Andersen Defendants' respective interests in the Property. (Anderson Defendants' Brief, p. 24). That is simply untrue. Constructive record notice has been part and parcel of the arguments and analysis throughout this case, including in Pioneer's opening brief to this Court. The Anderson Defendants acknowledge the only things cited by the District Court in support for its constructive record notice ruling were the recorded Development

Documents, various other peoples' recorded interests (admittedly none belonging to any of the defendants/appellees herein), and the language in the deeds to the grantors of Pioneer's Trust Deeds indicating those deeds were "subject to [certain interests] of record". (Anderson Defendants' Brief, pp. 22-23).[3] The other Filing Defendants also point to those things as the only support for any purported constructive record notice.

Pages 30 through 34 of Pioneer's opening brief to this Court discuss at length the error of the District Court's record notice ruling based on general Development Documents and other peoples' recorded interests, including seeking reversal because:

> The District Court's ruling that documents recorded to dedicate the Property as an RV park, the recorded plat of the RV park, and the various recorded leases on various of the RV sites (none of which are the Filing Defendants' leases on their claimed RV sites) somehow gives rise to a legal duty of lenders like Pioneer to inquire further than and outside the documents of record to determine who else may own or claim any interests in the other RV parks or lots within the Property development not reflected in the recorded documents is illogical and unsustainable. [Pioneer's opening Brief, p. 31 (emphases in original)].

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[3] Certain of the Filing Defendants also cited as a part of their "record notice" argument a September 2000 letter and an October 2000 sale agreement that were also cited by the District Court. They claim those documents show that Parcel -025 purportedly was not to be transferred to the trustor of Pioneer's Trust Deeds. There is no claim, however, that those documents were recorded, so there items do not impose any purported record notice. Nor has there ever been any claim that Pioneer had actual knowledge of those documents, so they would not fit any inquiry notice or actual notice analysis either. Moreover, and in any event, whatever those documents showed or said with regard to an intent to sell Parcel -025 in the year 2000 was indisputably replaced and superseded by the later Purchase and Sale Agreement dated June 5, 2001, which expressly did include Parcel -025 in the list of properties being sold to Pine Ridge. A copy of the June 5, 2001 Purchase and Sale Agreement was attached as Exhibit 7 to one of the Filing Defendants' summary judgment memorandum below, at R.3747-R.3751, and a copy is attached hereto as Addendum 1).

The Filing Defendants fail to explain how recorded general Development Documents and documents recorded as to various individual leasehold claims on various individual lots (admittedly not any of the interests of the Filing Defendants Pioneer seeks to foreclose) could somehow give notice to lenders like Pioneer of the existence of other unrecorded interests. By statute the duty is to protect one's self by recording. Utah Code § 57-3-102(3). This Court has long recognized "[t]he salutariness of [Utah's] recording statute is that it provides stability and certainty to land titles" upon which parties must be able to rely. *First Am. Title Ins. Co. v. J.B. Ranch, Inc.*, 966 P.2d 834, 839 (Utah 1988). This Court should therefore reject Filing Defendants' arguments, and any District Court ruling, that the noted recorded documents of other parties in the abstract somehow give notice of Filing Defendants' unrecorded interests.

Pioneer also has appealed the only other purported basis of record notice, the District Court's construction of the "subject to" language in the deeds to the grantors of two of Pioneer's Trust Deeds. (*E.g.*, Pioneer's opening brief, pp. 38-39). Pioneer showed that since the deeds said they were "subject to" certain interests "of record," as a matter of law those deeds, and Pioneer's Trust Deeds, gave notice only of possible interests that are "of record," and not of any Filing Defendants' non-record claims and interests. (*Id.*).

Filing Defendants respond that "of record" modified and applied only to the last item in the list preceding those words in the deeds, relying on the "last antecedent" rule. But when interpreting a deed of conveyance, the plain and ordinary meaning is paramount. *See, Panos v. Olsen & Assoc. Const., Inc.*, 2005 UT App 446, ¶ 15, 123 P.3d

816. "[H]elpful as rules of construction often are, they are useful guides, but poor masters; and they should not be regarded as having any such rigidity as to have the force of law, or distort an otherwise natural meaning or intent." *Salt Lake City v. Salt Lake County*, 568 P.2d 738, 741 (Utah 1977). A plain and ordinary reading of the deeds to the grantors of Pioneer's Trust Deeds shows the property was conveyed subject only to certain listed items "of record" and therefore put Pioneer on notice only of those interests that were actually recorded.[4] Reading the modifier "of record" as modifying the entire list of "subject to" items is the natural reading.

Contrary to Filing Defendants' arguments, this Court has explained, "the so called 'last antecedent' rule is not necessarily limited to [modification of] the one term immediately preceding [the modifier];" rather, "if there are several preceding terms of the same character, it may modify all of such terms, if the natural and sensible meaning of the wording so requires." *Salt Lake City*, 568 P.2d at 741. The Court in *Salt Lake City* was presented with the following phrase:

> The state and county officers mentioned in this title shall not in any case perform any official service unless the fees prescribed for such service are paid in advance, . . . provided, that no fees shall be charged the state, or any county or subdivision thereof, or any public officer acting therefor . . .

Id. at 740 (emphasis added). The Court held that the phrase "or subdivision thereof" modified both "county" and "state". *Id.* at 741; *see also, LPI Services v. McGee*, 2009

[4] The deeds both state the property is conveyed to the parties who in turn signed Pioneer's Trust Deeds "[s]ubject to all declarations, covenants, conditions and restrictions, certificate of beneficial use, regulations, canals, greenbelt provisions, easements, declarations, agreements, memberships, leases and right of ways of record." (Addenda 10 and 11).

UT 41, ¶ 15, 215 P.3d 135 ("the rule of the last antecedent . . . does not prevent us from deciding that qualifying words and phrases apply to 'several preceding terms of the same character.'") (quoting *Day v. Meek*, 1999 UT 28, ¶ 10, 976 P.2d 1202).[5]

It is logical and natural to read "of record" in the Pine Ridge Deed as a modifier of the entire list. The deeds therefore expressly gave constructive record notice to Pioneer only of the interests that were "of record," and not of any of the Filing Defendants' admittedly unrecorded interests.

C. The Andersen Defendants Incorrectly Claim Pioneer Did Not Appeal Actual Notice; The District Court Erred in Imposing Any Actual Notice, As a Matter of Law and Because There Were Disputes of Facts

The Anderson Defendants (only) argue this Court should uphold the District Court's grant of summary judgment on the premise that Pioneer did not appeal the District Court's statement that Pioneer had actual notice of the Anderson Defendants' claimed interests. (Anderson Defendants' Brief, pp. 20-21). That is simply untrue. Actual notice was part and parcel of the arguments and analysis throughout this case, including in Pioneer's opening Brief to this Court. The only asserted factual bases upon

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[5] Fatal to their argument, Appellees in their own briefs cite and rely upon the case of *Arnold Indus., Inc. v. Love**Error! Bookmark not defined.***, in which the phrase "Subject to: … Covenants, Conditions, Restrictions, Rights-of-Way, Easements, Leases and Reservations now of Record" was analyzed and the modifier "of record" applied to the entire list, making the conveyance "subject to any right-of-way 'now of Record," even though "right-of-way" was not the last antecedent. 2002 UT 133, ¶¶ 6, 12 & 28, 63 P.3d 721. That also is how Appellees in their briefing read the phrase "Minor typographical or clerical errors" in the corrective affidavit statute – they instinctively, without even recognizing the contradiction with their other arguments, read "minor" as modifying both "typographical" and "clerical errors." *See e.g.,* Jensen & Taylor Brief at 24 ("the omission of an entire parcel . . . was not the minor clerical error the legislature had in mind …").

which the District Court made any statement as to purported actual notice are "the undisputed recorded documents, improvements to the Property … and other factors." (January 2009 Judgment and Order, ¶18 at R.4915 & R.5425 – included as a part of Addendum 4). The only "other factors" the District Court ever identified in that regard were, in its Initial Decision (the May 10, 2007 Memorandum Decision cited in the introductory paragraph of the January 2009 Judgment and Order): again, recorded Development Documents and recorded documents regarding other peoples' individual interests, claimed use of and improvements to various lots purportedly seen on Pioneer's April 2001 site visit, the appraisal, and the "subject to [certain interests] of record" deed language. (Initial Decision at R.4370-77, R.4381 & R. 4384; Addendum No. 1). All of those purported "actual notice" facts have been and are being appealed by Pioneer, including without limitation as having been disputed by Pioneer in the District Court below and therefore precluding the grant of summary judgment to Filing Defendants which Pioneer asks this Court to reverse. By this reference Pioneer incorporates as though fully set forth here the facts and analyses relating to purported actual notice set forth in Pioneer's opening brief to this Court, including pages 17-21 and 30-38, and all parts of this Reply Brief further addressing each and any of the purported "actual notice" facts. Actual notice has been and remains a subject of this appeal, including based on disputes of facts material to any determination of actual notice as shown in the above-referenced and incorporated portions of this Reply Brief and Pioneer's opening brief.

D. Filing Defendants' "Wild Deed" Arguments Are Without Merit

Filing Defendants each also argue that Pioneer is not entitled to protection under Utah's recording statutes as to Parcel -025. They admit that Pioneer's Modified Trust Deed and Pioneer's Supplemental Trust Deed both were recorded and that they both expressly list and describe Parcel -025. But they argue those were "wild deeds" because the grantor, Pine Ridge, did not own Parcel -025 as a matter of record when it signed them. Filing Defendants therefore argue Pioneer's interests in Parcel -025 should not be deemed to arise for priority purposes until either: (i) September 24, 2002, when the Filing Defendants admit the Corrective Affidavit was recorded, expressly and unequivocally stating that Parcel -025 "was included in the transaction . . . and should have been included in the legal description attached to" the deed to Pine Ridge, or (ii) in 2005 when Filing Defendants admit the Settlement Deed was recorded which expressly and unequivocally conveyed Parcel -025 to Pine Ridge as a matter of record. Copies from the record below of the Corrective Affidavit and of the Settlement Deed are Addenda 12 & 13 submitted with Pioneer's opening brief to this Court.

Filing Defendants' "wild deed" arguments are wholly ineffectual in light of the dispositive after-acquired title statute cited in Pioneer's opening brief to this Court and undisputed (not even addressed) by any of the Filing Defendants. Pursuant to Utah's after-acquired title statute, since the Settlement Deed indisputably transferred title to Pine Ridge, Pioneer's Modified Trust Deed and Pioneer's Supplemental Trust Deed that were both signed by Pine Ridge, are deemed automatically and by operation of law valid and effective liens and encumbrances against Parcel -025 as of the dates they were recorded "as if [Parcel -025 had been] acquired before execution of the trust deed." Utah Code

Ann. § 57-1-20 (2006) (emphasis added). None of the "wild deed" cases cited by Filing Defendants was an after-acquired title case nor dealt with or addressed the after-acquired title statute. Each of those cases, and the entirety of Filing Defendants' "wild deed" analysis, is therefore wholly off-point and ineffectual to this case.

III. THE DISTRICT COURT ALSO ERRED IN HANDLING THE REMAINING ARGUMENTS AND ISSUES ON SUMMARY JUDGMENT.

A. The District Court Erred in Its Handling of the Corrective Affidavit.

Filing Defendants argue that the Corrective Affidavit (which clarified of record that the Pine Ridge Deed included Parcel -025) was ineffective and because an omission of one of several parcels from a legal description is not a "minor" error.

The Utah legislature has never defined or limited the phrase "minor typographical or clerical error" in the corrective affidavit statute, so the court must look to the plain language of the statute to interpret its meaning. *Stephens v. Bonneville Travel, Inc.*, 935 P.2d 518, 520 (Utah 1997). By the statute's plain terms, any minor typographical or clerical error may be corrected by the recording of an affidavit. Utah Code Ann. § 57-3-106(9). That is precisely what happened in this case. The Corrective Affidavit stated the omission of Parcel -025 from the legal description attached to the Pine Ridge Deed was an inadvertent mistake and referenced the parties' intent to have conveyed Parcel -025, including as evidenced by the inclusion of Parcel -025 in the Purchase and Sale Agreement that was executed concurrently with the Pine Ridge Deed. (Addenda 12 & 17).

Contrary to the Anderson Defendants' suggestion, the fact that the Corrective Affidavit was recorded by a title company employee does not render it ineffective. The statute does not contain any limitation as to who may record a corrective affidavit. *See* Utah Code Ann. § 57-3-106(9). Rather, the fact that the incorrect deed was recorded by a third party who had been hired to act as clerk/scrivener for the parties to the transaction serves to highlight that the omission of Parcel -025 was indeed a clerical error.[6]

Appellees' argument that a legal description is somehow sacrosanct and cannot be corrected by affidavit is unsupported and would require this court to legislate an

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[6] Filing Defendants Jensen and Taylor claim that the grantor under the Pine Ridge Deed, KDA, has "denied that Parcel -025 was included in the transaction." *See* Jensen & Taylor Brief at ¶ 15, p. 5. Jensen & Taylor, along with the other "Budd Defendants" as they were known, made this claim in their summary judgment memorandum filed with the District Court. *See* R. 3690, ¶ 12. They argued that the first page of the Sale agreement, which identified Parcel -025 as among the parcels to be conveyed, had been switched after signing and did not originally mention Parcel -025. Pioneer disputed those allegations in the summary judgment briefing to the District Court (*see* R. 4216-4219, disputing ¶ 12) and still disputes them. Disputes of those claimed facts are yet another example of why summary judgment in this case for Filing Defendants was inappropriate and should be reversed. Moreover, such claims by Defendants Jensen and Taylor are unsupported by the cited evidence, without foundation, and contrary to recorded documents. The only purported evidence they cited in support of the claim was (i) their summary judgment Exhibit 22 (R. 3961-62), a letter from KDA's counsel to Advanced Title Insurance Agency; and (ii) their summary judgment Exhibit 23 (R. 3965-4006), transcript of the deposition of Allison Bodily. In the letter, KDA's counsel refused to sign a corrective deed to clarify the conveyance of Parcel -025; but, as admitted by Defendants Jensen & Taylor, KDA later signed a "Settlement Deed" (Addendum 13) which did just that – again conveying Parcel -025 to Pioneer. And while Ms. Bodily had historically been an officer of KDA, she never stated in any of the cited portions of her deposition testimony that there was any switching of any pages of the referenced agreement after it was signed. By her own admission, she would not have had any foundation or basis to so state, even if she had, since she admitted she did not know anything about the purchase agreement that is the subject of that testimony, had not been involved in the transaction for some three months prior to her father signing that agreement, and was not present when her father signed that agreement. (Bodily deposition transcript, pp. 143 (R. 3971), 145 (R. 3973), and 622 (R. 4004)).

unspoken exception to the corrective affidavit statute. An error in a legal description is no different than an error in other required aspects of a deed. While a legal description is a fundamental part of a deed and required before a deed may be recorded, the same is true of the grantee's name and address. Utah Code Ann. § 57-3-105(3)(a) ("A document conveying title to real property . . . is entitled to be recorded . . . only if the document contains the names and mailing addresses of the grantees in addition to the legal description"). Under Appellees' interpretation, parties would not be able to correct a misspelled name or an error in a mailing address without re-executing and re-recording the instrument. Their unspoken exception would swallow the rule and render the corrective affidavit statute meaningless, as there would be nothing parties would be able to correct by affidavit. Utah courts have long treated errors in legal descriptions as mere "scriveners errors." *See e.g., Eliason v. Watts*, 615 P.2d 427, 430 (Utah 1980); *Thornock v. Cook*, 604 P.2d 934, 935 fn. 2 (Utah 1979); *Doxey-Layton Co. v. Clark*, 548 P.2d 902 (Utah 1976).

Appellees' resort to legislative history is not helpful. First, as a matter of law, when a statute can be understood from the plain language, the court "will not resort to other interpretive tools – in particular, legislative history." *Arnold v. Grigsby*, 2009 UT 88, ¶ 30, 225 P.3d 192 (Durham, C.J., concurring); *see also, In re Adoption of Baby E.Z.*, 2011 UT 38, ¶ 15, 687 Utah Adv. Rep. 17. Second, even if there were some ambiguity in the plain language of Utah Code § 57-3-106(9), which there is not, the legislative history Appellees cite does not help define the phrase "minor typographical or clerical errors." The deletion of the words "augmented" and "amended" from the statute in 2000

was not a policy decision, but simply a drafting suggestion from the Office of Legislative Research and General Counsel. *See* Bill Drafting and Research File – Drafts, SB0215 (2000 General Session) at page 11. The editors apparently recognized that the terms "augmented," "amended," and "corrected" could all be covered in one word -- "corrected." Indeed, what little has been said of the corrective affidavit statute in the legislative history indicates that the legislature did not intend a narrow or constrained application of the statute, as espoused by Filing Defendants and the District Court, but rather a common sense approach to fixing simple problems, as was done with the Corrective Affidavit in this case.

Finally, the Filing Defendants' arguments under the merger doctrine may not be used to nullify the corrective affidavit statute. *See Anderson v. UPS*, 2004 UT 57, ¶ 12, 96 P.3d 903 (common law must yield to statute). But, even if the merger doctrine were applied here, Pioneer has shown by clear and convincing evidence that the Pine Ridge Deed mistakenly did not conform to the intent of both parties and should therefore be reformed.[7] Indeed, Filing Defendants have admitted, and the District Court found, that that the Purchase and Sale Agreement that was executed contemporaneous with the Pine Ridge Deed "shows on its face that parcels -036, -037, -038, and -025 were to be conveyed to Pine Ridge." Initial Decision, ¶ 23 (R. 4373, Addendum 1) (emphasis added); *see also e.g.,* Addendum 1; Jensen & Taylor Brief at 5, ¶ 14; Anderson Defendant's Brief at 8 (adopting facts as stated in Initial Decision).

[7] Appellees Jensen & Taylor incorrectly argued that Pioneer did not allege mutual mistake or reformation of the deed. *See e.g., Third Amended and Supplement Complaint,* dated 1-25-06, R. 289-291, at ¶¶ 64-67, 77-79, 80-91).

B. The District Court Erred in Granting Priority to Claimants in the Payment Lots Contrary to Their Contract Language and Admissions.

It remains undisputed that the contracts by which the various claimed "ownership" (actually leasehold) interests in the various Payment Lots were to be transferred (the "**Payment Defendants' Contracts**") have never been paid in full. Nor has it been disputed that each of those contracts states:

> 3. CERTIFICATE. Buyer shall receive a certificate of ownership when contract is paid in full . . .

See e.g., R. 4683 at ¶ 3, R. 4687 at ¶ 3, and R. 4691 at ¶ 3 (emphasis added). The only argument is whether the claimed "ownership" interests passed to the Payment Defendants upon their *execution* of the contract (followed by a certificate evidencing that interest upon full payment); or whether "ownership" (evidenced by a certificate) would not pass until *full payment.*

Despite representations by the Jensen & Taylor Defendants to the contrary, the District Court did not rule on this issue of contract interpretation (which has been identified as Issue No. 5). The District Court, in a June 2, 2010 decision (R. 5288), denied Pioneer's motion on this issue, but inappropriately refused to interpret or apply the above-quoted language from the Payment Defendants' Contracts. Two months later, the District Court entered its findings and conclusions, determining on the basis of a lack of title to Parcel -025 and on the basis of actual and constructive notice, all discussed above in this brief, but not on the basis of any interpretation of the contract language, that the interests of the Payment Defendants in the Payment Lots were superior to that of Plaintiff. *See* August 2010 Judgment on Payment Lots (Addendum 4, R. 5438-5442).

The Jensen & Taylor Defendants' assertion that the District Court "decide[d] th[is] issue in Jensen's favor" is therefore wholly inaccurate. (Jensen & Taylor Brief at 32).

The District Court should have interpreted and applied the language of the Payment Defendants' Contracts because it is determinative of the Payment Defendants' priority – having never fully paid for their claimed interests in the Payment Lots, the Payment Defendants are not yet entitled to receive any ownership or other interest in those lots and their interests are therefore junior and inferior in priority to Pioneer's interests in the Payment Lots. The Payment Defendants' Contracts are, like the purchase contract at issue in *Haik*, executory. *See, Haik*, 254 P.3d at 178. In *Haik*, Sandy City entered into an agreement for the purchase of a certain water right. The language of the purchase agreement was unclear as to whether the terms had been fulfilled, so the court treated the contract as executory. But because the contract involved the conveyance of title, the court applied the doctrine of equitable conversion and held that Sandy City had an equitable interest in the water right from the date of the purchase agreement. Nevertheless this court still held that the Plaintiff, who had recorded his deed to the same water right after Sandy City's purchase but before Sandy City recorded its deed, took title to the water right in good faith and obtained priority over Sandy City's interest. Like Sandy City, the Payment Defendants' contracts in this case are executory. Payment Defendants are in an even weaker position than Sandy City, because not only have they failed to fulfill their executor contracts, they are not entitled to any benefits of the doctrine of equitable conversion which does not apply to their leasehold interests and

easement interests.[8] As a matter of law, therefore, Payment Defendants' interests will not pass until full payment by them, which has not yet occurred and which will therefore be junior and subject to Pioneer's Trust Deeds.

Filing Defendants' plea for the fashioning of some sort of unspecified "equitable" interpretation of this contract provision does help their case. First, this is a lawsuit for foreclosure and is therefore an action at law, not an equity action. Where, as in the instant case, a detailed statutory scheme governs the claim at issue, resort to equity is precluded. *Anderson*, 2004 UT 57 at ¶¶ 11-13; *see also,* Utah Code Ann. §§ 57-1-23, *et seq.*, and §§ 78-37-1, *et seq.* (setting forth detailed statutory scheme for trust deed foreclosures). Additionally, since Pioneer was the non-moving party, equity and law would require an interpretation that favors Pioneer against Filing Defendants' summary judgment motions. Appellees Jensen & Taylor themselves cite to the case of *Wingets, Inc. v. Bitters*, in which the court held that on summary judgment, the non-moving party is "entitled to the most favorable interpretation that could be placed upon [the contract] language by any person of ordinary intelligence and understanding and in the light of

[8] Equitable conversion is the concept that the "vendee of an executory land sale contract holds equitable ownership of the property but not legal title." *Cannefax v. Clement*, 818 P.2d 546, 549 (Utah 1991). Utah courts have applied the doctrine, but only with regard to the sale of fee title interests. *See e.g., Capital Assets Financial Svcs. v. Maxwell*, 2000 UT 9, ¶ 15 (equitable conversion applies only to realty, not personalty); *see also,* STANDARD PENNSYLVANIA PRACTICE § 150:92 (2011) ("Ordinarily, a lease for a term of years will not work an equitable conversion of the real estate subject to the lease because it does not create an interest in land for the benefit of the lessee."). Since the Payment Defendants' interests in the Payment Lots were only leasehold interests, and did not involve the conveyance of fee title, the doctrine does not apply and their interests.

existing circumstances." 500 P.2d 1007, 1010 (Utah 1972); *see also e.g., Alder v. Bayer Corp.*, 2002 UT 115, fn. 13, 61 P.3d 1068 (same).

C. Filing Defendants' References to Title Insurance Require Reversal.

Filing Defendants Jensens and Taylors also cite references to title insurance in support of their arguments for constructive inquiry notice and for actual notice. They admit they should not have made references to Pioneer's title insurance coverage in their memoranda to the District court. (Jensen & Taylor Brief at 30). But they argue that it caused no harm to Pioneer. *Id.* The harm, however, was the introduction of unfair prejudice against Pioneer. "Prejudice" means "[t]he harm resulting from a fact-trier's being exposed to evidence that is persuasive but inadmissible . . ." BLACK'S DICTIONARY (2011). Filing Defendants Jensens and Taylors, and others who joined in their memoranda to the District Court, expressly argued to the District Court that Pioneer's "recourse lies in an action against the trustor personally, and with the title company who insured the property." (R.3695). They further argued:

> In the context of this case, the risks contractually assumed by the title insurance company must not be overlooked or ignored. Should the court adopt the defendants' position [on issue as to encumbrance against Parcel -025], then Pioneer may file a claim on the title insurance policy ... [and] if the court adopts the defendants' position that Pioneer is not a BFP lender because Pioneer had actual or inquiry (constructive) notice of the defendants' interest in the land ... -- then this was a risk that Advanced Title and their underwriter Attorney Title Guaranty Fund also congractually assumed and would be obligated to Pioneer for any loss suffered due to persons in actual possession of the property. Such is the nature of title insurance. In either event, Pioneer has a contractual remedy to be made whole—something the defendants do not have. (R.3703 (emphasis added)).

Contrary to Filing Defendants Jensens' and Taylors' brash suggestion (p.31, n.9), in arguing that Pioneer was prejudiced by references to title insurance Pioneer does not imply the District Court had any improper motive to intentionally commit error. Rather, Pioneer merely pointed out it was in fact improperly prejudiced in this case by Filing Defendants, because their admittedly improper references to and arguments about the potential loss-shifting effects of insurance coverage appear to have impacted the outcome of this case in which the District Court indisputably inconsistently ranked certain parties' priorities on order of recording while ranking others' priorities based on other factors discussed above in this brief. Filing Defendants can hardly be heard to complain that their insurance arguments had their intended effect. Nor can they cast arrows at Pioneer for making note that Filing Defendants' title insurance arguments had precisely the persuasive and prejudicial effect the collateral source is designed to prevent. *See Gibbs M. Smith, Inc. v. U.S. Fidelity & Guar. Co.*, 949 P.2d 337, 345 (Utah 1997).

Filing Defendants alternatively attempt to justify their reference to title insurance, and preliminary title reports, on the grounds that it was permissible to show constructive notice of recorded leases. (*See* Jensen & Taylor Brief at 30; Anderson Brief at 49). But title reports and policies make note only of interests that appear of record. They do not, therefore, give notice (actual, record, or inquiry) of unrecorded interests like those of the Filing Defendants. Also, as shown above, any holders of recorded leases were not sued in this action.

IV. PIONEER SHOULD BE AWARDED ITS FEES AND COSTS INCURRED ON APPEAL

The promissory notes, for which Pioneer's Trust Deeds serve as security, indisputably provide that Pioneer is entitled to recover all costs and expenses of collection, including reasonable attorneys' fees. This does not mean, as some of the Filing Defendants appear to fear, that Pioneer is seeking a money judgment for those fees as against the Anderson Appellees. Rather, Pioneer is merely seeking to enforce its right to include its attorneys' fees and collection costs in the amounts for which it is entitled to foreclose. Filing Defendants Jensens and Taylors argue to recover fees under the reciprocal fee statute. But they have no reciprocal right to recover fees against Pioneer because they were not parties to the promissory notes under which Pioneer seeks to recover fees.

CONCLUSION

This Court should reverse the District Court's summary judgment rulings assigning priority other than by the order of recording interests. The District Court's decision granting priority to the interests of Filing Defendants on summary judgment based on other than order of recording was unsustainable on the facts of this case as a matter of law, and particularly on summary judgment in light of disputes of material facts.

By contrast, Pioneer's Trust Deeds indisputably were recorded prior to any interests of any of the Filing Defendants to any part of the subject Property. As a matter of law, therefore, Pioneer's Trust Deeds are superior to the interests of all Filing

Defendants. This Court should therefore reverse the District Court, assign priority for all parties' claims and interests in the order of recording, and allow Pioneer to foreclose its Trust Deeds as prior and superior to all interests of all Defendants in and to any and all parts of and interests in the Property.

RESPECTFULLY SUBMITTED this 29th day of September, 2011.

Bradley L. Tilt
FABIAN & CLENDENIN, PC
Attorneys for Plaintiff/Appellant Pioneer Builders Company of Nevada, Inc.

CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing **REPLY BRIEF OF APPELLANT PIONEER BUILDERS COMPANY OF NEVADA, INC.** were mailed by first-class mail with postage fully prepaid this 29th day of September, 2011, to each of the following:

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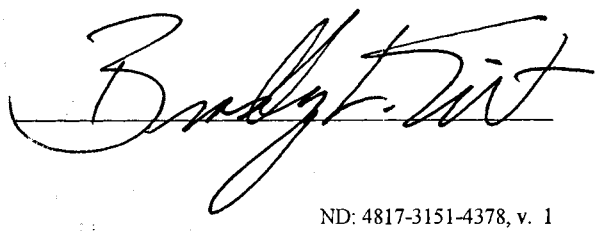


ND: 4817-3151-4378, v. 1

ADDENDUM 1

PURCHASE AND SALE AGREEMENT

THIS PURCHASE AND SALE AGREEMENT (this "Agreement") is by and between K.D.A. Corporation ("Seller") and Pine Ridge Properties, Inc., together with Joseph L. Hardy and S. Denise Hardy, individually, (collectively referred to as "Buyer"), effective the date of execution, below.

1. Seller agrees to transfer and convey by warranty deed to Buyer, the real property located at approx. 1135 North Bear Lake Boulevard, Rich County, Utah 84028, (parcel numbers 41-08-00-025, 41-08-00-036, 41-08-00-037, 41-08-00-038) (th "Subject Property"), located in Rich County, State of Utah, more particularly describec as:

See Attached Exhibit "A."

Including the right to lease 24 remaining unsold lots within parcel numbers 41-08-00-025, (the North Half of Lot 4, adjacent to the Subject Property); together with the right to collect all annual dues, membership dues and other dues associated with existing and future leases; together with the currently existing water rights through the pump house attributable to such parcel; together with all contract rights of Seller to purchase on a right of first refusal the Leonard and Joanne Butcher parcel; and the right title and interest of Seller to require the lease owners to obtain approval prior to any construction associated with their lease property; and together with a right of access across said property to the Subject Property as applicable.

Together with the right, title and interest of Seller in all RV memberships presently owned by Seller and associated with the above-described properties.

2. The parties hereto agree that the Subject Property is subject to various exceptions appearing of record and disclosed by the attached title commitment issued by Advanced Title Ins. Agency, L.C. All other liens, consentual or otherwise, shall be removed by Seller, except as provided otherwise by this Agreement or as the same are of the same character as the listed exceptions and are disclosed to Buyer by the title company before recording.

3. Buyer agrees to pay to Seller the sum of $2,500,000.00 as the purchase price of the Subject Property. In addition, Buyer agrees to indemnify and hold harmless the Seller as against any claim of Pioneer Builders of Nevada, a Nevada corporation, with respect the trust deed securing the loan to United West Investment Group, Inc., less the sum of $411,000.00 and interest earned on the account maintained for Seller with respect thereto in the possession of Seller as of the date hereof. The $2,500,000.00 purchase price and any improvement allowance to be used for Buyer's benefit shall be financed through Seller financing, as directed by Seller, including without limitation to a 1031 exchange accomodator for Seller. The Buyer agrees to obtain independent financing to pay off the Seller as soon as possible, and certainly no later that the dates set forth in the notes provided herewith. The remaining amount due from Buyer shall be further secured by deeds of trust secured by

the Subject Property. A breach as to the terms of any note and/or trust deed relatir to the Subject Property shall constitute a breach of this Agreement. All payments b Buyer pursuant to this paragraph 3, shall be paid by Buyer as directed by Seller, including the use of an escrow service if desired by Seller. Buyer agrees to be responsible for all charges by the escrow company reasonably anticipated by this Agreement or as added pursuant to the election of Seller.

4. The parties agree that Seller shall pay all county real property taxes for t year 2000. Subject to the foregoing, Buyer shall pay all property taxes for the year 2001 and as taxes and other assessments otherwise become due hereafter. Hazard insurance shall be purchased independently by the parties desiring insurance.

5. The parties agree that the Buyer shall pay all closing costs as the same become necessary to accomplish the transactions anticipated by this Agreement.

6. Seller agrees to deliver possession of the Subject Property to Buyer with 24 hours of the initial settlement, which shall occur on or before June 8, 2001. Buyer agrees that for a period of 2 years following the date of this Agreement, Buyer will no raise the homeowner's dues relating to the real property and interests sold pursuant t this Agreement, subject to any further mutual agreement between Buyer and Seller in the future.

7. An owner's policy of title insurance shall be provided at Buyer's expense, insuring marketable title in the Subject Property as provided by paragraphs 1 and 2 o this Agreement. Said title insurance shall be provided by Advanced Title Insurance Agency, L.C., effective the date of this Agreement, and shall be paid for at settlement and issued upon clearing and transfer of title to the satisfaction of the title insurance company.

8. In the event that Buyer fails to comply with the payment terms describec by paragraph 3 of this Agreement, including without limitation the payment terms of the Note referenced therein, then the Seller shall have the option to:

A. Enforce the terms of the Note and related deed of trust; or

B. Cancel this Agreement in accordance with the following procedure. First, Seller shall provide 30 days notice to Buyer of Seller's intent to cancel this Agreement unless Buyer makes the payments due, which amount shall be specified in such notice. Second, Buyer agrees to deliver to Seller at the time of Closing the attached Special Warranty Deed. In the event that Buyer fails to make the payment required by the notice described by this paragraph, Seller shall have absolute right to record the Special Warranty Deed, reclaim title to the Subject Property, and evict Buyer. Recording of said Special Warranty Deed by Seller, as permitted by this paragraph, shall be construed as a termination of this Agreement based on default by Buyer. Seller many elect to treat forfeiture of the Subject Property pursuant to the terms of the Special Warranty Deed as a liquidated damage; or either party may bring an action for determination of damages (including but not limited to lost benefit of the contract, reasonable rents, property taxes, property damage, encumbrances, and so forth) and either

augmentation or refund of amounts paid to Seller at the time of Closing and/or pursuant to payments on the Note.

The parties agree that the provisions of this paragraph are reasonable and necessary under the circumstances and as of the date of this Agreement, and the parties agree to hereafter execute such documents as may be reasonable or necessary to accomplish the intent of this paragraph, including without limitation any waiver of objection or claim with respect hereto. The parties agree that to the extent that the provision of this paragraph may be subject to non-enforcement as a result of any punitive effect, then the parties shall cooperate to adjust the effect so as to eliminate any objection to the forfeiture described herein. The intent of this paragraph is permit the Seller to retake ownership and possession of the Subject Property for purposes of mitigation and certainty without eliminating protection of either party with respect to any remedy associated with the damages involved as to the matter.

9. The provisions of this Agreement shall survive the delivery of the warrant deed from Seller. The parties agree to execute a final closing agreement abrogating this Agreement with sixty days following the date upon which the Buyer and Seller refinance all of the obligations secured by any deed of trust, described above.

In witness whereof, the parties have executed this Agreement this 5 day of June, 2001.

K.D.A. Corporation

Harold C Henriksen

by: HAROLD C HENRIKSEN

its: President

Pine Ridge Properties, Inc.

S Denise Hardy President

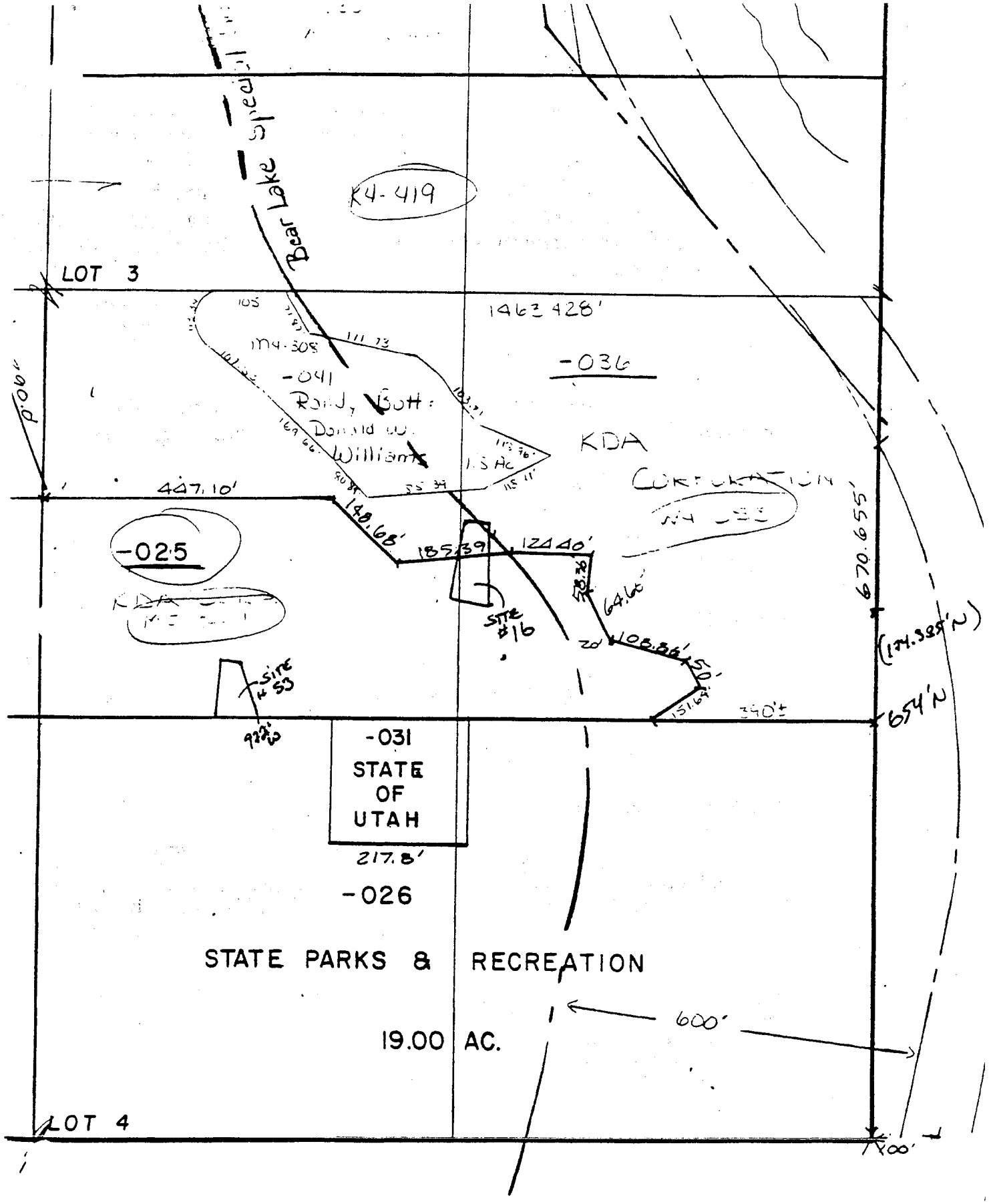
S. Denise Hardy, President

Joseph L Hardy

Joseph L. Hardy , individually

S Denise Hardy

S. Denise Hardy, individually



THIS PLAT IS MADE SOLELY FOR THE PURPOSE OF ASSISTING IN LOCATING THE LAND, AND THE RECORDER AS SUMES NO LIABILITY FOR ANY IF ANY, WITH AN ACTUAL SURVEY

SE 1/4 Section 8 T. 14N R. 5E

book

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