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John F. Collins, Jr. and June M. Collins; Michael Wiggins and Sandra Wiggins; P. G. Taylor and Leah Taylor; James W. Schuett and Lesley A. Davies v. Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints : Brief of Appellee

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

UTAH
DISTRICT COURT
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DOCKET NO. 930120

IN THE UTAH COURT OF APPEALS

JOHN F. COLLINS, JR. and JUNE :	
M. COLLINS: MICHAEL WIGGINS :	
and SANDRA WIGGINS; P. G. :	CASE NO. 930120-CA
TAYLOR and LEAH TAYLOR; :	
JAMES W. SCHUETT and :	(Priority No. 15)
LESLEY A. DAVIES, :	
Plaintiffs-Appellees, :	
vs. :	
CORPORATION OF THE PRESIDING :	
BISHOP OF THE CHURCH OF :	
JESUS CHRIST OF LATTER-DAY :	
SAINTS, :	
Defendant-Appellant. :	

BRIEF OF APPELLEES

APPEAL FROM FINAL ORDER OF THE
THIRD DISTRICT COURT OF SALT LAKE COUNTY,
JUDGE RICHARD H. MOFFAT

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FILED
Utah Court of Appeals

MAR 10 1993

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Clerk of the Court

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STATEMENT OF JURISDICTION

The Court of Appeals has jurisdiction of this case pursuant to Utah Code Annotated § 78-2a-3(j).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the Declaration of Building and Use Restrictions prohibits the construction of a chapel in the subdivision.

Standard of Review: Correction of error. Oberhansly vs. Sprouse, 751 P.2d 1155, 1156 (Utah App. 1988).

2. Whether the Declaration of Building and Use Restrictions may be amended, prior to the expiration of forty years from date of recording, by a majority of the lot owners to permit construction of a chapel on one lot in the subdivision.

Standard of Review: Correction of error. Cecala vs. Thorley, 764 P.2d 643 (Utah App. 1988).

DETERMINATIVE LEGAL PROVISIONS

None. The case involves interpretation of the written Declaration of Building and Use Restrictions reproduced in the Addendum (hereafter "Add.") at 3.

STATEMENT OF THE CASE

This is an action by a minority of lot owners in two contiguous residential subdivisions to enjoin construction of a chapel on one of the lots in one of the subdivisions. (Amended Complaint R. 9.) Both sides moved

for summary judgment on the issue of whether the Declaration of Building and Use Restrictions permits construction of a chapel and whether the Declaration could be amended by a majority of subdivision lot owners to permit construction of the chapel. [R. 32, 73.] The District Court granted plaintiffs' motion and denied defendant's motion, enjoining construction of the chapel. [R. 154, Add. 1.] The defendant thereafter filed this appeal. [R. 157.]

STATEMENT OF FACTS

The Montana Ranchos Subdivision ("MRS") numbers 1, 2, and 3, located in Salt Lake County, State of Utah, is a residential subdivision which was constructed during the early 1970's by Western Home Builders, Inc. A Declaration of Building and Use Restrictions was recorded on April 2, 1973, which covered Lots 25 to 51, inclusive, of Montana Ranchos Subdivision Number 2. The Declaration was signed by Arlen Fox, President of Western Home Builders, Inc. [R. 13-15; Add. 3-5.]

Lot 34 of MRS No. 2 was thereafter acquired by the defendant subject to the Declaration of Building and Use Restrictions pertaining to MRS No. 2.

In May, 1992, plaintiffs commenced this action to enjoin construction of a chapel contemplated by the defendant. On June 15, 1992, the defendant executed a purported amendment to the Declaration to delete a portion

of Lot 34 from the Declaration for the purpose of permitting construction of a chapel for religious worship. [R. 16.] The plaintiffs thereafter filed an Amended Complaint challenging the validity of the Amendment to the MRS No. 2 Declaration. [R. 9.] The defendant responded with an Answer and Counterclaim seeking a declaratory judgment confirming the validity of the Amendment. [R. 25, 28.]

The parties then each filed motions for summary judgment, the plaintiffs arguing that the Declaration clearly prohibited the construction of a chapel and that the attempted amendment by the defendant was null and void due to the fact that the Declarations could not be amended for a period of forty years from the date of recording. The defendant argued that the restrictive covenants were ambiguous and that the amendment to the Declaration was valid. [R. 35.] Following a hearing on the motions, the District Court denied the defendant's motion and granted plaintiffs' Motion for Summary Judgment, accepting the plaintiffs' argument and enjoining construction of the chapel. [Order, R. 154, Add. 1.]

SUMMARY OF ARGUMENT

The Court below properly granted summary judgment on the issues presented to it for decision. The relevant provisions of the Declaration of Building and Use

Restrictions are clear and unambiguous and no facts were in dispute as to those issues which would preclude summary judgment in favor of the plaintiffs.

The restrictive covenants in question clearly prohibit the construction of any type of building other than one detached single-family dwelling. Because the language and intent of the document is clear from the document itself, no resort to extrinsic evidence is necessary.

The Declaration of Building and Use Restrictions amendment to the Declaration for a period of forty years from the date of recording, April 2, 1973. Absent unanimous consent of all property owners, any amendment during that time period is null and void.

ARGUMENT

POINT I: THE RESTRICTIVE COVENANTS CLEARLY AND UNAMBIGUOUSLY PROHIBIT THE BUILDING CONTEMPLATED BY THE DEFENDANT.

Interpretation of restrictive covenants generally requires the application of the same rules of construction used to interpret contracts. Cecala vs. Thorley, 764 P.2d 643 (Utah App. 1988). Where the terms of a covenant are sufficiently clear, a covenant is to be construed without reference to attendant facts and circumstances or extrinsic evidence. Revelle vs. Schultz, 759 P.2d 1255 (Wyo. 1988). In interpreting contracts, courts should first look to the four corners of the agreement to determine the intentions of

the parties, and the use of extrinsic evidence is permitted only if the document appears to incompletely express the parties' agreement or if it is ambiguous in expressing that agreement. Ron Case Roofing and Asphalt Paving, Inc., vs. Blomquist, 773 P.2d 1382 (Utah 1989). Only when an ambiguity exists which cannot be reconciled by an objective and reasonable interpretation of the contract as a whole should resort be made to the use of extrinsic evidence. Utah Valley Bank vs. Tanner, 636 P.2d 1060 (Utah 1981). The subjective intentions of the draftsmen of restrictive covenants are not dispositive of the intentions of the parties as manifested by the document. Lenhoff vs. Birch Bay Real Estate, 585 P.2d 1087 (Wash. App. 1978). In construing restrictive covenants, it is generally held that unambiguous language in a covenant will be given its plain and reasonable meaning and courts will not apply a rule of construction when it will defeat the obvious purpose of the restriction. Sandy Point Improvement Co. vs. Huber, 613 P.2d 160 (Wash. App. 1980). A contract provision is not necessarily ambiguous just because one party gives that provision a different meaning than another party does. Plateau Mining Co. vs. Utah Division of State Lands and Forestry, 802 P.2d 720 (Utah 1990).

In the case of Leaver vs. Grose, 563 P.2d 773 (Utah 1977), the court stated:

"A restrictive covenant cannot be set aside in the absence of clear and convincing evidence. And where covenants are duly executed and recorded the law gives an interested party the right to enforce their terms." At 775.

Interpretation of a contract is a matter of law for the court to determine unless the contract is ambiguous and evidence of the parties' intention is necessary to establish the terms of the contract. Saunders vs. Sharp, 806 P.2d 198 (Utah 1991).

In the instant case, the Declaration of Building and Use Restrictions, Part B, Paragraph 1, entitled "Land Use and Building Type" [R. 13.] provides, in pertinent part, that

"No lot shall be used except for residential purposes. No building shall be erected, altered, placed or permitted to remain on any lot other than one detached single-family dwelling not to exceed two stories in height and a private garage and carport for not more than three vehicles." . . .

This paragraph succinctly and unambiguously provides that the lots in the subdivision shall be dedicated to residential purposes only and specifies the type of building that may be erected on any lot. The defendant herein argues that the residential covenant quoted above

permits construction of a chapel because either the covenant does not unambiguously prohibit a chapel or, in the alternative, that the covenant is ambiguous and extrinsic evidence establishes intent to permit the construction of a chapel. As to the first argument, the covenant in question clearly prohibits the erection of any building other than a single-family dwelling. Even if the court were to agree that erection of a church does not run afoul of the "residential purposes" clause, it clearly violates the clause regulating building type.

The defendant cites a number of cases in support of its proposition that a non-commercial use which is not inconsistent with residential purposes should be allowed under the restrictive covenant in question. All of these cases are distinguishable on their facts and should be examined closely.

For example, in the case of Emma vs. Silvestri, 227 A. 2d 480 (R.I. 1967), the two lots in the subdivision which were sold for church purposes (an issue which was not before the court in that case) were not subject to the restrictions imposed on the other lots in the subdivision. The court's ruling in that case had nothing to do with ambiguity in the restrictions or with the church construction being consistent with the residential purposes restriction.

In Parrish vs. Richards, 336 P.2d 122 (Utah 1959), the court held that under the language of the restrictive covenants in question that the construction of a tennis court and fence did not violate the covenants since no building was being constructed which would block the view of the neighborhood, reduce the beauty of the area, or increase crowding of buildings. The court concluded that the term "structure", as used in the covenants, referred to buildings of solid construction.

In St. Luke's Episcopal Church vs. Berry, 163 S.E. 2d 664 (N.C. App. 1968), the owners of certain lots whose deeds contained restrictive covenants prohibiting building of more than one residence on a lot brought suit against the Church which acquired title subsequent pursuant to a deed which contained no such restrictions. The issue which was presented on the appeal was whether the lots sold to the Church were nevertheless bound by the restrictive covenants contained in the deeds to the other grantees. The Court of Appeals held that the decision of the trial court was proper that where there was no deed which expressly imposed any restriction on plaintiff's lots, the restrictive covenants did not apply.

In the case of Bumgarner and Bowman Building, Inc., vs. Hollar, 171 S.E.2d 60 (N.C. 1969) the restriction at issue provided that no structure should be erected on any lot other than one detached single-family dwelling and that no trailer, shack, garage, or outbuilding should be used as temporary or permanent residences. The court held that construction of a storage shed did not violate this provision since it was not intended as a temporary or permanent residence.

In Ziemann vs. Village of North Hudson, 298 N.W.2d 233 Wis. App. 1980) the restrictions in question provided that the properties covered by the restriction should be used only for residential purposes and that any building erected on any of the lots be single-family dwellings. Since no buildings were being erected on the lot in question, but rather a park, the building restriction was not violated and the court concluded that a park was not inconsistent with residential purposes.

The case of West Hill Baptist Church vs. Abbate, 261 N.E.2d 196 (Oh. Com. Pl. 1969) is a trial court decision that, using Shelley vs. Kraemer, 334 U.S. 1 (1948) to support its reasoning, ruled that the restrictive covenants at issue could not be construed to prevent construction of a church in the area covered by the covenants. The judge took

note of the fact that there were already two churches in the restricted area and reasoned that it would be discriminatory, under Shelley vs. Kraemer, supra, to bar construction of plaintiff's church. The proposition that all private covenants which restrict the building of a church are violative of the First and Fourteenth Amendments to the Constitution of the United States has been rejected by appellate courts deciding that issue. Ginsberg vs. Yeshiva of Far Rockaway, 358 NYS 2d 477 (Second Dept.), aff'd 36 NY2d 706, 325 N.E.2d 876, 366 NYS 2d 418 (1975); Ireland vs. Bible Baptist Church, 480 S.W.2d 467 [Tex.] cert. den., Sub Nom., Bible Baptist Church vs. Ireland, 411 U.S. 906.

In the case of Connor vs. Clemmens, 213 S.W.2d 438 (Ky. 1948), cited by the defendant herein, the covenants in question read:

"1. The erection of any building or structure to be used for business purposes on any lot as now defined on the recorded Plat of the Henry Feltman Subdivision is prohibited.

"2. Not more than one structure to be used for residential purposes shall be erected on any one lot as now defined on the recorded Plat of the Henry Feltman Subdivision." Id. at 439.

The court stated that, in the absence of Restriction No. 1, it would adopt the construction applied in Dorsey vs. Fisherman's Wharf Realty Co., 207 S.W.2d 565

(Ky. 1948) (A case which held that the words "only one dwelling . . ." meant that only a dwelling house could be constructed on any of the lots in the subdivision). The court concluded, however, that Restriction No. 1 created an ambiguity by indicating that only business uses were prohibited and declined to extend the scope of the restriction to a church.

In Roberts vs. Congregation Shaarey Zedek, 218 N.W. 662 (Mich. 1928), the covenant at issue read:

"Any building erected upon said property shall be fifteen feet from the front line of said property and not less than one and one-half stories with fourteen-foot posts in height, and cost at least two thousand five hundred dollars, and no shanties or sheds shall be erected upon said premises to be used for said dwelling purposes." at 662.

The court held that there was nothing in that language that prevented the erection of a synagogue, stating:

"Restrictions on the use of real property ought not to rest in parol. Where building restrictions have been deliberately put in writing, in plain and unambiguous terms, they are so conclusively presumed to contain the whole agreement between the parties that parol evidence is inadmissible to contradict or vary their terms." [citations omitted] Id. at 663.

The case of Flinkingshelt vs. Johnson, 187 S.E.2d 233 (S.C. 1972) cited by defendant, does not involve construction of a chapel, as defendant seems to imply. The

court held in that case that where there was no breakdown in the general scheme of restrictions or a substantial violation or disregard of the restrictions within the restricted area, property owners were not entitled to have restrictive covenants declared void, even though unrestricted adjacent property was commercially developed.

The case of Corporation of the Presiding Bishop vs. Statham, 254 S.E.2d 833 (Ga. 1979) is also distinguishable on its facts. In that case, the restrictive covenant in question provided:

"No lot shall be divided in any manner but shall remain intact as a single-family residential unit, except upon the express written consent of John R. Carlisle."

The grantor in fact had consented to the waiver of that covenant in the deed to the Corporation of the Presiding Bishop and the Georgia Supreme Court held that the restriction did not preclude the construction of the church.

In short, none of the cases cited by the defendant support the proposition that defendant advances in this case - that a chapel can be constructed on Lot 34 of Montana Ranchos Subdivision No. 2 without violating the restrictive covenants. The language in the covenant in question is neither unclear nor ambiguous. It expressly prohibits the construction contemplated by the defendant. This is not a case where the question to be decided is whether the

covenant in issue is a "use" covenant or a "construction" covenant. In the case of Freeman vs. Gee, 423 P.2d 155 (Utah 1967), the court considered this precise issue where the covenant at issue provided that:

" . . . [N]o structure shall be erected, altered, placed or permitted to remain on any such 'residential lot' other than one detached, single-family dwelling not to exceed two stories in height . . . " at 157.

The Utah Supreme Court, after considering numerous cases from other jurisdictions, with contradictory opinions, held that:

"[I]n the case at bar . . . the stated provisions in Covenant I, namely, that 'no structure shall be erected, altered, placed or permitted to remain on any such "residential lot" other than one detached single-family dwelling,' relate to use after construction as well as to what may be initially erected." at 164.

The court in Freeman vs. Gee, supra, also rejected the argument asserted by the defendant in this case that certain other provisions of the covenants, considered alone, contradicted the "single-family dwelling" limitation, thereby creating ambiguity. The court responded to this argument, saying,

"The so-called use covenant should be examined in the light of the intended use of each lot, namely, residential purposes. Covenant V provides that no noxious or offensive trade or activity shall be carried on upon any lot nor shall anything be done thereon which may

become an annoyance or nuisance to other occupants; Covenant VI prohibits the use of trailers, basements, tents, shacks, garages, or other outbuildings from being used as a residence; Covenant VIII prohibits the erection or display of signs, billboards or advertising structures upon the lots; Covenant IX prohibits the throwing or dumping of trash, ashes, or other refuse on the lots. If these four covenants alone are a measure of the prohibitive uses of each lot, then one can only say that any use of a 'detatched single-family dwelling' erected thereon which does not fall within the ambit 'noxious or offensive trade or activity,' or which does not become 'an annoyance or nuisance' to other occupants, or which does not consist of posting signs or dumping rubbish, is permissible, regardless of what it may be. If Covenant I is not a 'use' restriction, how can the 'single-family dwellings' or the duplexes where permitted, be restricted to residential use if prohibited uses are to be found only in Covenants V, VI, VIII, and IX? Do not these restrictions more properly restrict conduct rather than go to the nature of the occupancy and the type of use permitted?" Id. at 160-161.

In the case at bar, the covenant in question addresses both use and construction. There is no ambiguity. As the Supreme Court of Wisconsin stated in Crowley vs. Knapp, 288 N.W.2d 815 (Wis. 1980):

"[O]nly the intent of the grantor as expressly set forth in the covenant is relevant . . . [O]ne does not look to an amorphous general intent in determining the meaning of the restrictive words, but, instead, must look to the very words used." at 823 n3.

Similarly, the very words used in the Declaration of Building and Use Restrictions of Montana Ranchos Subdivision No. 2, read as a whole, contain no inconsistencies. Part B. 10 of the Declaration [R. 14.] allows pets, livestock and poultry, "such as are generally associated with estate-type living and which are kept only for family use and/or food production and not for commercial purposes." . . . This is not inconsistent with the restriction limiting use of the property to residential purposes. Likewise, Part B. 8, which prohibits temporary structures from being used on any of the lots as a temporary or permanent residence is not ambiguous and is not contradictory to Part B. 1. [R. 13-15; Add. 3.]

The defendant also asserts that the very fact that Lot 34 is significantly larger than the other lots in the subdivision creates an ambiguity. However, if the covenants are read as a whole, the size of Lot 34 is entirely consistent with "estate-type living" and the provision for livestock and horses. If this court determined that extrinsic evidence were necessary to resolve the perceived ambiguity, then the testimony introduced by the plaintiffs in the case below by the affidavits of Don Adams and Jack Lochhead [R. 104-107.] would become relevant to rebut the argument of the defendant that the intention of Arlen Fox, was only to restrict commercial and industrial development.

In the event that this court were to agree with the defendant's argument that the covenants are ambiguous, the evidence which the defendant proffered below to prove the intentions of the parties consists of an affidavit signed by Arlen Fox, deceased, the President of Western Home Builders, Inc., the owner and sub-divider of Montana Ranchos Subdivision No. 2 [R. 68.] and the person who signed the Declaration of Building and Use Restrictions (as President of Western Home Builders, Inc.) which pertained to that subdivision.

It was the plaintiffs' contention in the court below that the affidavit of Arlen Fox was inadmissible hearsay under Rules 804(a)(4) and 804(b)(5) of the Utah Rules of Evidence. While this issue is not reached by the trial judge in deciding the respective motions for summary judgment, this issue will certainly arise if the case is remanded for disposition.

Rule 804(b)(5) of the Utah Rules of Evidence, the so-called "residual hearsay exceptions" provides as follows:

"The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

"(5) A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other

evidence which the proponent can procure through reasonable effort; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant."

Rule 804(b)(5) is a "catch-all" provision, which was added to the Federal Rules of Evidence by Congress when those rules were adopted. The provision was not intended to throw open a wide door for the entry of judicially-created exceptions to the hearsay rule. In fact, it is clear from the Senate's Advisory Committee Report, that the new exceptions were to be narrowly construed:

"It is intended that the residual hearsay exceptions will be used very rarely, and only in exceptional circumstances. The Committee does not intend to establish a broad license for trial judges to admit hearsay statements that do not fall within one of the other exceptions contained in Rules 803 and 804(b). The residual exceptions are not meant to authorize major judicial revisions of the hearsay rule, including its present exceptions. Such major revisions are best accomplished by legislative actions. It is intended that in any case in which evidence is sought to be admitted under these subsections, the trial judge will exercise no less care, reflection

and caution than the courts did under the common law in establishing the now recognized exceptions to the hearsay rule." S. Rep. No. 93-1277, 93rd Cong., 2nd Sess. 1, 20, reprinted in 1974 U.S. Code Cong. and Ad. News 7051, 7066.

In Huff vs. White Motor Corp., 609 F. 2d 286 (7th Cir. 1979), a leading case addressing the admissibility of hearsay evidence under Rule 804(b)(5), the court considered the admissibility of a statement made by a decedent reporting the events of an accident that he had been involved in two or three days earlier. The court listed five requirements that must be met for evidence to be admissible under the residual exception. The first of these is trustworthiness. The court stated that,

"The circumstantial guarantees of trustworthiness on which the various specific exceptions to the hearsay rule are based are those that existed at the time the statement was made and do not include those that may be added by using hindsight. Evidence admissible under the residual exception must have 'equivalent circumstantial guarantees of trustworthiness.' [Citations omitted] Therefore, the guarantees to be considered in applying that exception are those that existed when the statement was made." at 292.

The "equivalent circumstantial guarantees" refers to the other exceptions delineated under Rule 804(b). The court in Huff vs. White Motor Corp., supra, noted that the decedent's statement in that case was an unambiguous and explicit report of the events he had experienced two or

three days earlier. It contained neither opinion nor speculation. The decedent was not being interrogated, so there was no reason to give any explanation of how the accident happened unless he wanted to do so. There was no reason for him to invent the story because it was contrary to his pecuniary interest and there was no reason why the witness in that case, a friend and relative by marriage, would have manufactured the story. Id. at 292.

In the case before this court, the affidavit which the defendant proposes to offer into evidence is an affidavit that was procured by David Evans, an agent and representative of the defendant, who has filed an affidavit herein. [R. 114.] The affidavit of Arlen Fox appears to have been prepared by Mr. Evans, in advance of his interview with Arlen Fox, now deceased, and was procured obviously in anticipation of the litigation and the issues that are raised in this case. The affidavit does not have equivalent circumstantial guarantees of trustworthiness such as those that pertain to testimony given as a witness at another hearing of the same or different proceeding, a statement under belief of impending death, a statement against interest, or a statement of personal or family history. In fact, it appears that the affidavit was obtained solely to further the interests of the defendant and would be inherently suspect for that reason. All of the standard

reasons for excluding such testimony are present in this case. Mr. Fox cannot now be cross-examined or confronted with respect to the affidavit and it should not be admitted under Rule 804(b)(5).

The second requirement of admissibility is that the statement be offered as evidence of a material fact. As plaintiff has previously argued herein, the subjective intention of Arlen Fox is not a material fact and the court should look to the document itself in determining the rights of the parties. Ron Case Roofing and Asphalt Paving, Inc., vs. Blomquist, supra.

The third requirement is the probative importance of the evidence. To be admissible under the residual exception, the statement must be more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts. Inasmuch as the Declaration of Building and Use Restrictions at issue in this case were signed by Arlen Fox, as President of Western Home Builders, Inc., "by authority of resolution of its Board of Directors," [R. 15.] The best and most probative evidence on this issue would be a copy of the minutes of the board of directors of that corporation relating to this transaction.

The fourth requirement for the admissibility of such hearsay is that it be admitted only if doing so will best serve the general purposes of the rules of evidence and the interests of justice. The circumstances under which the affidavit in question was obtained are inherently suspect and the admission of that document would not serve the interests of justice and does not assist the court in ascertaining the truth in this matter.

The final requirement of the residual hearsay exception, notification, is not an issue in this case.

POINT II: THE DECLARATION OF BUILDING AND USE RESTRICTIONS CANNOT BE AMENDED FOR A PERIOD OF FORTY YEARS FROM THE DATE OF RECORDING.

Part D. ¶ 1 of the Declaration of Building and Use Restrictions of MRS2 [R. 15.] provides:

"1. Term. These covenants are to run with the land and shall be binding on all parties and all persons claiming under them for a period of forty years from the date these covenants are recorded, after which time said covenants shall be automatically extended for successive periods of ten years unless an instrument signed by a majority of the then owners of the lots has been recorded, agreeing to change said covenants in whole or in part."

The defendant argues that the phrase, "unless an instrument signed by a majority of the then owners of the lots has been recorded, agreeing to change said covenants in whole or in part," modifies the entire sentence and allows

amendment of the covenants even during the initial forty-year period. The trial court rejected this argument, pointing out that such a construction would render the reference to an initial forty-year period meaningless if the covenants could be amended at any time. Several courts confronting this issue have reached the same conclusion.

In Johnson vs. Howells, 682 P.2d 504 (Colo. App. 1984), the court considered restrictive covenants containing a provision that they were binding on all property owners for a period of twenty years, after which time they would be automatically extended for a successive twenty-year period unless an instrument signed by sixty percent of the then owners had been recorded agreeing to change the covenants in whole or in part.

The Colorado Court of Appeals rejected the trial court's ruling that the clause "unless an instrument has been recorded agreeing to change said covenants" modified the first phrase as well as the subsequent phrase, stating:

"We consider the crucial phrase to be 'after which time'. The plain meaning of the paragraph in question is that the covenants will be binding for twenty years, after which time they are automatically extended unless sixty percent of the property owners agree to change them. . . .

"To interpret the paragraph in question as the trial court did would be to render meaningless the reference therein to a twenty-year period. If the owners had intended that the covenants

could be amended at any time by sixty percent of the owners, they would not have needed to include any reference to a twenty-year period." at 505.

In the case of White vs. Lewis, 487 S.W.2d 615 (Ark. 1972), the restrictive covenants in question were binding for twenty-five years, after which they could be automatically extended for successive periods of ten years unless an instrument agreeing to change had been signed by a majority of owners of the lots. The court held that the covenants could not be changed during the twenty-five-year period even with the agreement of a majority of the property owners in the subdivision.

In Robinson vs. Morris, 272 So.2d 444 (La. App. 1973) the court held that where the clear and unambiguous terms of the restrictive covenants provided that they would run with the land for thirty-five years and thereafter for successive ten-year periods unless a majority of lot owners agreed to change them, the defendant, who owned a majority of the lots, could not amend or terminate the restrictions until the primary term of thirty-five years had elapsed.

In the Utah case of Freeman vs. Gee, supra, the Utah Supreme Court peripherally considered an amendment clause similar in wording to that in the instant case, in conjunction with the issue of "residential use" presented in that case. The court noted:

"Covenant X of the restrictions provides that all covenants and restrictions therein stated shall run with the land and shall be binding on all parties claiming any interest in the lots until twenty-five years from April 25, 1952, and longer by ten-year intervals unless a majority of the owners otherwise agree after the twenty-five-year period. Covenant XI provides that if any party having an interest in any lot shall violate or attempt to violate any of the covenants and restrictions prior to twenty-five years from the date thereof, any other person owning any other lot can prosecute an action to either prevent such violation or recover damages for it. Thus the intent that the subdivision should be maintained for 'single-family' occupancy for at least twenty-five years seems clear and unambiguous." at 160.

In Leaver vs. Grose, supra, the restrictive covenants provided that the covenants were enforceable for a period of twenty-five years and thereafter were automatically extended for successive periods of ten years, unless a vote of the majority of owners altered the restrictions. The covenants also contained a provision that persons owning properties and aggrieved by any violation during the twenty-five-year period could prosecute actions at law or in equity, but made no provision for legal action after the expiration of such time. The trial court ruled that the covenants were no longer enforceable in an action brought more than twenty-five years after the covenants were recorded. The Utah Supreme Court reversed, stating that the

paragraph in question was mere surplusage and not a necessary part of the restrictive covenants since it could not prevent a suit from being filed by an aggrieved person in any event because of the constitutional right afforded by Article I, Section 11 of the Constitution of Utah.

The defendant argues that amendment provisions such as the one at issue in this case are typically interpreted to allow amendment at any time, including the initial period. The defendant cites the case of Meyerland Community Improvement Association vs. Temple, 700 S.W.2d 263 (Tex. App. 1985) as an example. In that case, the restrictive covenants provided that, after passage of twenty-five years, a majority of the then existing owners could change the covenants in whole or in part. The issue in the case, on appeal, was whether an amendment executed after the twenty-five-year period had to be consistent with the general plan of development. The court held that it did not, commenting,

"[I]n construing a contractual provision, it is the objective and not the subjective intent of the parties that must be ascertained; it is the intent expressed or apparent in the writing that controls." at 267.

Another case on which defendant relies to support its argument for allowing amendment at any time is Schmidt vs. Ladner Construction Co., 370 So. 2nd 970 (Ala. 1979). The covenants in question in that case, however, contained a

provision allowing the covenants to be changed at any time if the declarant consented and agreed to each such change in writing.

The covenants at issue in the case at bar contain no provision for allowing an amendment at any time, and, unlike the ambiguity present in Leaver vs. Grose, supra, the covenants in this case are clear that the covenants may be enforced at any time. [See Part D. ¶ 2, R. 15.] Because the covenants are not ambiguous, it was not necessary for the court below to consider extrinsic evidence. Those cases cited by defendant which look to the parties' course of conduct or the parties' own interpretation of the contract are inapposite. There are no "parties" to the original covenants in the sense that these cases speak of parties. Unless there exist corporate minutes or the like which relate to the covenants in question, determining the intentions of the declarant will be very difficult, if not impossible. In any event, it is not necessary in this case to look outside the four corners of the document. The objective intent expressed in the clear language of the document is that the covenants may not be amended for a period of forty years. No other interpretation is plausible without ignoring the language of the covenants altogether. In the absence of clear and convincing evidence, the covenants should be enforced as written. Leaver vs. Grose, supra.

POINT III: THE RESTRICTIVE COVENANTS CONSTITUTE PROPERTY RIGHTS IN FAVOR OF ALL OWNERS OF PROPERTY IN THE RESTRICTED AREA WHICH CANNOT BE ABROGATED WITHOUT UNANIMOUS CONSENT.

Restrictions as to use of land are mutual, reciprocal, equitable easements in the nature of servitudes in favor of owners of property within the restricted area which constitute property rights that run with the land. Montoya vs. Barreras, 473 P.2d 363 (N.M. 1970). Unless expressly stated, the courts generally hold that existing prohibitions contained in restrictive covenants cannot be amended or terminated without the consent of all parties affected by such restrictions, or their successors. 5 Powell on Real Property, ¶ 677.

The purpose of restrictive covenants is well stated in Montoya vs. Barreras, supra:

"Historically, restrictive covenants have been used to assure uniformity of development and use of a residential area to give the owners of lots within such an area some degree of environmental stability. To permit individual lots within an area to be relieved of the burden of such covenants, in the absence of a clear expression in the instrument so providing, would destroy the right to rely on restrictive covenants which has traditionally been upheld by our law of real property." at 365.

Montoya vs. Barreras is instructive in that the issue in the case was the validity of a final decree that relieved and excluded from the burden of residential restrictions and covenants one lot owned by the plaintiff in

that case. The New Mexico Supreme Court held that the restrictive covenants did not permit changes as to only one lot, saying,

"The original restrictions were clearly imposed on all of the described property, and though the restrictions themselves may be changed in whole or in part, the change or changes which might be made must affect all of the described property." Id. at 365.

Similarly, in LaEsperanza Townhome Association, Inc., vs. Title Security Agency of Arizona, 689 P.2d 178 (Ariz. App. 1984), the Arizona Court of Appeals held that an amendment to covenants was void and of no force and effect since it did not affect the subdivision uniformly but sought to exempt only a portion of it from all covenants.

In the case of Crimmins vs. Simonds, 636 P.2d 478 (Utah 1981), the defendants in that case appealed from a decree permanently enjoining them from operating a beauty salon in their home in violation of a restrictive covenant which was recorded in 1962. The term of that restriction was twenty-five years, followed by automatic ten-year renewal unless modified by a majority of the owners. Prior to the opening of their salon, the defendants had circulated an agreement, ultimately signed by thirty-four or thirty-five of the forty-five owners in the plat, which recited the desire of the signers to change the covenants to allow a business to be conducted within the confines of a single-family residence.

While Justice Oaks, the author of the opinion in Crimmins vs. Simonds, supra, did not directly address the obvious fact that the purported amendment in that case took place within the original twenty-five-year period, he seems to have implicitly taken it into account, in stating:

"Though a unanimous modification may effectively alter a restrictive covenants agreement, [citations omitted], the modification in this case was not unanimous and thus does not nullify the original covenant prohibiting trade or business in the area. Persons who own property in a neighborhood subject to restrictive covenants are entitled to rely on the covenants according to their terms, even if some of their neighbors no longer desire their enforcement." Id. at 480-481.

In the case before this court, the plaintiffs purchased their respective properties subject to the restrictive covenants duly recorded against the property. Their properties are burdened with the limitations of those restrictions as well as enjoyment of the resulting benefits. A reading of the Declaration of Building and Use Restrictions [R. 13-15.] reveals a general intent to restrict the buildings in the area of the restrictions to single-family residences and to restrict the use of the property to residential uses, with the further provision for the keeping of pets, poultry and livestock such as would be consistent with "estate-type living." [R. 14 ¶ 10.] The plaintiffs and other owners within the restricted area

acquired the right to expect that the general character of the neighborhood would continue to reflect the unambiguous intention expressed by the language of the covenants that only single-family residential construction would prevail in the area, at least until the year 2013. The defendants have advanced no compelling authority or facts which would dictate that the covenants be declared unenforceable.

CONCLUSION

Based upon the foregoing, this court should affirm the Order of the District Court which enjoined the construction of a chapel on Lot 34 of Montana Ranchos Subdivision No. 2.

DATED this _____ day of March, 1993.

Respectfully submitted,

FRANKLIN L. SLAUGH
Attorney for Plaintiffs-
Appellees

CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing Brief of Appellees were mailed, first-class postage prepaid, this _____ day of March, 1993, to the following:

B. Lloyd Poelman
Merrill F. Nelson
KIRTON, McKONKIE & POELMAN
1800 Eagle Gate Tower
60 East South Temple
Salt Lake City, Utah 84111

ADDENDUM INDEX

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SEP 24 1992

By Richard Moffat

FRANKLIN L. SLAUGH, P.C. #2976
Attorney at Law
9341 South 1300 East
Sandy, Utah 84094
(801) 572-4412

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

JOHN F. COLLINS, JR., and JUNE M. COLLINS; MICHAEL WIGGINS and SANDRA WIGGINS; P. G. TAYLOR and LEAH TAYLOR; JAMES W. SCHUETT and LESLEY A. DAVIES,)	
	:	ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT
Plaintiffs,	:	
vs.)	
CORPORATION OF THE PRESIDING BISHOPRIC OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS,	:	Case No. 920902511PR
)	Judge: Moffat
Defendant.	:	

This matter came on for hearing on the 4th day of September, 1992, the Honorable Richard Moffat, District Judge presiding, Franklin L. Slauch appearing as attorney for the plaintiffs, and B. Lloyd Poelman appearing as attorney for the defendant, and the Court having reviewed the cross-motions for summary judgment filed by the plaintiff and the defendant, respectively, and having reviewed the memoranda filed by the parties in support of their respective motions and in opposition to the opposing parties' motion, and the Court having heard the oral argument of respective counsel and being fully advised in the premises, the Court now rules as follows:

1. That there is no issue as to any material fact in this case.

2. That the plain and unambiguous meaning of the language in Part D, sub-paragraph 1, of the Declaration of Building and Use Restrictions of Montana Ranchos Subdivision No. 2, is that the covenants cannot be amended for a period of forty years from the date of recording, April 2, 1973.

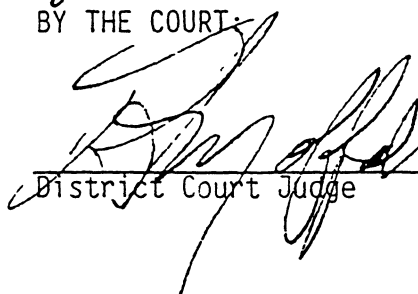
3. That, as a matter of law, the Amendment of Building and Use Restrictions of Montana Ranchos Subdivision No. 2, dated June 15, 1992, and recorded June 16, 1992, as Entry No. 5274543 of the Records of the Salt Lake County Recorder, is null and void and of no legal effect.

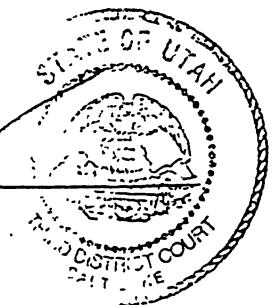
4. The Plaintiffs' Motion for Summary Judgment is granted and the Defendant's Motion for Summary Judgment is denied. The defendant, its servants, agents and employees, are hereby enjoined from commencing construction of the religious meetinghouse on the following-described real property situated in Salt Lake County, State of Utah:

All of LOT 34, Montana Ranchos Subdivision No. 2, except a parcel described as Beginning at the Southeast Corner of LOT 34, Montana Ranchos Subdivision No. 2, as shown by the Official Plat and the Records of the Salt Lake County Recorder's Office, and running thence South 89° 58' 15" West along the North right of way line of Alla Panna Way 325.645 feet to an existing fence corner; thence North 0° 37' 53" East along said existing fence 175.68 feet; thence North 89° 47' 16" East 324.815 feet to the East line of said LOT 34; thence South 0° 21' 28" West along said East line 176.71 feet to the point of beginning.

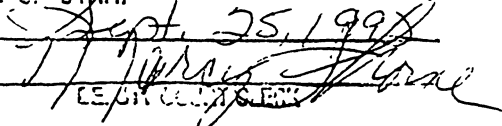
DATED this 24th day of September, 1992.

BY THE COURT:


District Court Judge



COPIED AND ATTESTED
TO THE PUBLIC RECORDS
IN THE THIRD
DISTRICT COURT, SALT LAKE COUNTY,
STATE OF UTAH.

DATE: Sept. 25, 1992

CLERK OF COURT

Western Home Builders, Inc.
3340 Escalante Drive
Sandy, Utah 84070
Attn: Arlen Fox

DEEDS HOUSE
157-396

20200351

DECLARATION OF BUILDING AND USE RESTRICTIONS

APR 2 1973
Request of SECURITY TITLE COMPANY
Fee Paid, JERADSEN MARTIN
Recorder, Salt Lake County, Utah
By [Signature] Deputy

PART A. PREAMBLE

KNOW ALL MEN BY THESE PRESENTS:

THAT WHEREAS, the undersigned, being the owners of the following described real property located in Sandy City, County of Salt Lake, State of Utah:

Lots 25 to 51, Inclusive, MONTANA RANCHOS SUBDIVISION NO. 2, according to the plat thereof, as recorded in the office of the County Recorder of said County.

do hereby establish the nature of the use and enjoyment of all lots in said subdivision and do declare that all conveyances of said lots shall be made subject to the following conditions, restrictions and stipulations:

PART B. RESIDENTIAL AREA COVENANTS

1. Land Use and Building Type. No lot shall be used except for residential purposes. No building shall be erected, altered, placed or permitted to remain on any lot other than one detached single-family dwelling not to exceed two stories in height and a private garage and carport for not more than three vehicles. All construction to be of new materials, and to be approved by Architectural Control Committee.

2. Architectural Control. No building shall be erected, placed, or altered on any lot until the construction plans and specifications and a plan showing the location of the structure have been approved by the Architectural Control Committee as to quality of workmanship and materials, harmony of external design with existing structures, and as to location with respect to topography and finish grade elevation. No fence or wall shall be erected, placed or altered on any lot nearer to any street than the minimum building setback line unless similarly approved. Approval shall be as provided in Part C.

3. Dwelling Cost, Quality and Size. No dwelling shall be permitted on any lot at a cost of less than \$28,000.00 including lot, based upon cost levels prevailing on the date these covenants are recorded, it being the intention and purpose of the covenants to assure that all dwellings shall be of a quality of workmanship and materials substantially the same or better than that which can be produced on the date these covenants are recorded at the minimum cost stated herein for the minimum permitted dwelling size. The ground floor area of the main structure, exclusive of one-story open porches and garages, shall be not less than 1200 square feet for a one-story dwelling, nor less than 1000 square feet for a dwelling of more than one story.

4. Building Location.

(a) No building shall be located on any lot nearer to the front lot line or nearer to the side street line than the minimum building setback lines shown on the recorded plat. In any event no building shall be located on any lot nearer than 30 feet to the front lot line, or nearer than 20 feet to any side street line.

(b) No building shall be located nearer than 8 feet to any interior lot line, except that a one-foot minimum side yard shall be required for a garage or other permitted accessory building located 55 feet or more from the minimum building setback line. No building shall be located on any interior lot nearer than 15 feet to the rear lot line.

(c) For the purpose of this covenant, eaves, steps, and open porches shall not be considered as a part of a building, provided, however, that this shall not be construed to permit any portion of a building on a lot to encroach upon another lot.

5. Lot Area and Width. No dwelling shall be erected or placed on any lot having a width of less than 100 feet at the minimum building setback line nor shall any dwelling be erected or placed on any lot having an area of less than 17,000 square feet, except that a dwelling may be erected or placed on all corner and cul-de-sac lots, as shown on the recorded plat, provided that the above front and side yard clearances are maintained.

6. Easement. Easements for installation and maintenance of utilities and drainage facilities are reserved as shown on the recorded plat and over the rear five feet of each lot. Within these easements, no structure, planting or other material shall be placed or permitted to remain which may damage or interfere with the installation

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and maintenance of utilities, or which may change the direction of flow of drainage channels in the easements, or which may obstruct or retard the flow of water through drainage channels in the easements. The easement area of each lot and all improvements in it shall be maintained continuously by the owner of the lot, except for those improvements for which a public authority or utility company is responsible.

7. Nuisances. No noxious or offensive activity shall be carried on upon any lot, nor shall anything be done thereon which may be or may become an annoyance or nuisance to the neighborhood. No clothes drying or storage of any articles which are unsightly in the opinion of the Architectural Control Committee will be permitted in carports, unless in enclosed areas built and designed for such purpose. No automobiles, trailers, boats, or other vehicles are to be stored on streets or front and side lots unless they are in running condition, properly licensed and are being regularly used.

8. Temporary Structures. No structure of a temporary character, trailer, basement, tent, shack, garage, barn or other outbuildings shall be used on any lot at any time as a residence either temporarily or permanently.

9. Signs. No sign of any kind shall be displayed to the public view on any lot except one professional sign of not more than one square foot, one sign of not more than five square feet advertising the property for sale or rent, or signs used by a builder to advertise the property during the construction and sales period.

10. Pets, Livestock & Poultry. Such as are generally associated with estate-type living and which are kept only for family use and/or food production and not for any commercial purpose are permitted on all lots, except that mink, swine and goats are not permitted on any lot, temporarily or permanently. However, there shall be permitted no more than two head of cattle in any combination of not more than six head of horse or cattle. All permitted animals and fowl to be adequately maintained in a sanitary and healthful manner.

11. Garbage and Refuse Disposal. No lot shall be used or maintained as a dumping ground for rubbish. Trash, garbage or other waste shall not be kept except in sanitary containers. All incinerators or other equipment for the storage or disposal of such material shall be kept in a clean and sanitary condition. Each lot and its abutting street are to be kept free of trash, weeds and other refuse by the lot owner. No unsightly materials or other objects are to be stored on any lot in view of the general public.

12. Sight Distance at Intersection. No fence, wall, hedge or shrub planting which obstructs sight lines at elevations between 2 and 6 feet above the roadway shall be placed or permitted to remain on any corner lot within the triangular area formed by the street property lines and a line connecting them at points 25 feet from the intersection of the street lines, or in case of a rounded property corner from the intersection of the street property lines extended. The same sight-line limitations shall apply on any lot within 10 feet from the intersection of a street property line with the edge of a driveway or alley pavement. No tree shall be permitted to remain within such distances of such intersections unless the foliage line is maintained at sufficient height to prevent obstruction of such sight lines.

13. Oil and Mining Operations. No oil drilling, oil development operations, oil refining, quarrying or mining operations of any kind shall be permitted upon or in any lot, nor shall oil wells, tanks, tunnels, mineral excavations or shafts be permitted upon or in any lot. No derrick or other structure designed for use in boring for oil or natural gas shall be erected, maintained or permitted upon any lot.

14. Landscaping. Trees, lawns, shrubs or other plantings provided by the developer shall be properly nurtured and maintained or replaced at the property owner's expense upon request of the Architectural Control Committee.

15. Slope and Drainage Control. No structure, planting or other material shall be placed or permitted to remain or other activities undertaken which may damage or interfere with established slope ratios, create erosion or sliding problems, or which may change the direction of flow of drainage channels or obstruct or retard the flow of water through drainage channels. The slope control areas of each lot and all improvements in them shall be maintained continuously by the owner of the lot, except for those improvements for which a public authority or utility company is responsible.

Page three

PART C. ARCHITECTURAL CONTROL COMMITTEE

1. Membership. A majority of the committee may designate a representative to act for it. In the event of death or resignation of any member of the committee, the remaining members of the committee shall have full authority to select a successor. Neither the members of the committee, nor its designated representative shall be entitled to any compensation for services performed pursuant to this covenant. At any time, the then record owners of a majority of the lots shall have the power through a duly recorded written instrument to change the membership of the committee or to withdraw from the committee or restore to it any of its powers and duties. The Architectural Control Committee is composed of Arlen Fox, Wilford Hansen, Janice Fox and Jill Hansen.
2. Procedure. The Committee's approval or disapproval as required in these covenants shall be in writing. In the event the committee, or its designated representative, fails to approve or disapprove within 30 days after plans and specifications have been submitted to it, or in any event, if no suit to enjoin the construction has been commenced prior to the completion thereof, approval will not be required, and the related covenants shall be deemed to have been fully complied with.

PART D. GENERAL PROVISIONS

1. Term. These covenants are to run with the land and shall be binding on all parties and all persons claiming under them for a period of forty years from the date these covenants are recorded, after which time said covenants shall be automatically extended for successive periods of ten years unless an instrument signed by a majority of the then owners of the lots has been recorded, agreeing to change said covenants in whole or in part.
2. Enforcement. Enforcement shall be by proceedings at law or in equity against any person or persons violating or attempting to violate any covenant either to restrain violation or to recover damages.
3. Severability. Invalidation of any one of these covenants by judgment or court order shall in no wise affect any of the other provisions which shall remain in full force and effect.

WESTERN HOME BUILDERS, INC.

By *Arlen Fox*
Arlen Fox, President

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

On the 2nd day of April, 1973 personally appeared before me ARLEN FOX, who being by me duly sworn did say, that he, the said ARLEN FOX is the President of WESTERN HOME BUILDERS, INC., and that the within and foregoing instrument was signed in behalf of said corporation by authority of a resolution of its board of directors and that ARLEN FOX duly acknowledged to me that said corporation executed the same and that the seal affixed is the seal of said corporation.



D. Gayle Nelson
NOTARY PUBLIC

Residing in Salt Lake City, Utah

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