

1992

First Security Bank of Utah, N.A., and First Security Financial v. Banberry Crossing, a Utah partnership; Banberry Development Corporation, a Utah corporation; Scandia Investment Company, a Utah general partnership; Hillcrest Investment Company, a general partnership; Sidney M. Horman; Charles H. Horman; Eugene L. Kimball; et al. : Unknown

Utah Supreme Court

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12-15-87

BI

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GARRETT AND STURDY

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920266

Defendants Banberry Crossing,  
Banberry Development Corporation,  
Scandia Investment Company, Hillcrest  
Investment Company, Sidney M. Horman  
and Charles H. Horman

IN THE SUPREME COURT  
OF THE STATE OF UTAH

FIRST SECURITY BANK OF UTAH, )  
N.A., and FIRST SECURITY )  
FINANCIAL, )  
 )  
Plaintiffs, )  
 )  
vs. )  
 )  
BANBERRY CROSSING, a Utah )  
partnership; BANBERRY )  
DEVELOPMENT CORPORATION, a )  
Utah corporation; SCANDIA )  
INVESTMENT COMPANY, a Utah )  
general partnership; )  
HILLCREST INVESTMENT COMPANY, )  
a general partnership; SIDNEY )  
M. HORMAN; CHARLES H. HORMAN; )  
EUGENE L. KIMBALL; et al., )  
 )  
Defendants/Appellants, )  
 )  
vs. )  
 )  
KEITH GARNER and SNOW, )  
CHRISTENSEN & MARTINEAU, )  
a partnership, et al., )  
 )  
Crossclaim Defendants/ )  
Respondents. )

MEMORANDUM

Case No. 20266

**FILED**

During oral argument on this case Justice Zimmerman requested a further memorandum setting forth the position of Appellants from the standpoint of the record made in the lower Court as to the earliest time that the Note and Trust Deed held by Kimball would be considered in default.

### I. The Accounting

Banberry introduced Exhibit 28 (copy attached) which is a chart showing the accounting between Banberry and Mr. Kimball. Each item on the account was explained by Mr. David Evans (TR. 43-52).

The promisory note (Exhibit 8), copy attached, calls for quarterly interest payments. Banberry did not make the interest payment for October, 1983 or the interest and principal payment due January 5, 1983, but these payments are accounted for on the Exhibit showing a total owing to Mr. Kimball of \$231,124.00. Credits due Banberry at that time totaled \$342,922.93 on various items of account between the parties to that date. Two checks from Mr. Kimball to Banberry totaling \$97,036.00 are credited. As of January 5, 1983, therefore, there was due and owing from Mr. Kimball to Banberry a \$14,762.93. That credit would not be fully used until the next interest payment was due on April 5, 1983.

Banberry's position on this point is that default could not be declared until April 5, 1983, which is a date

subsequent to the actual recording of the Notice of Default on March 14, 1983.

## II. Failure to Release Land

The Trust Deed (Exhibit 9) contains Schedule B (copy attached) which is a Land Release Program providing in substance that for each \$8,100.00 paid to principal one condominium pad will be released and for each \$25,200.00 paid to principal one single family lot will be released.

Before the dispute arose between these parties \$625,000.00 had been paid to the principal. (Note Exhibit 8). Dividing \$8,100.00 per pad into \$625,000.00 principal payments results in 77.2 condominium pads. Only 54 pads had been released at the time the dispute arose.

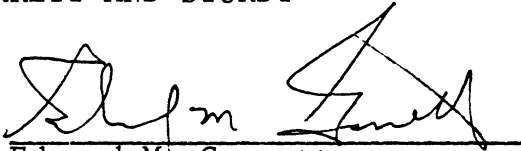
Dividing \$25,200.00 per lot into \$25,200.00 equal 24.80 lots. No single family lots had been released at the time the dispute arose. That there was a dispute concerning the amount of property released is evident from the testimony of Mr. Kimball (TR. 152).

The position of Banberry on this point is that default could not be declared by Mr. Kimball until the condominium pad and lot release provisions of the Trust Deed had been discharged. In other words, performance for performance. At the very least there was a duty on the part of the Trustee to tender the acreage release before Banberry could

be placed in default on its obligations under the Note and Trust Deed. Hence the Notice of Default was premature and should not have been filed at all.

Respectfully submitted,

GARRETT AND STURDY

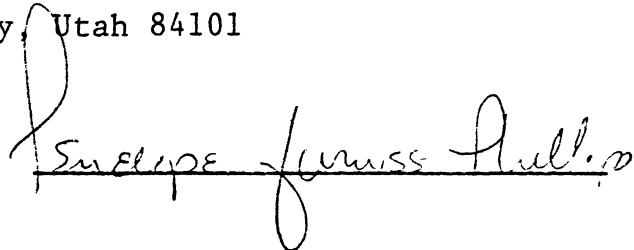
By   
Edward M. Garrett

CERTIFICATE OF MAILING

I hereby certify that on the 28<sup>th</sup> day of December, 1987, a true and correct copy of the foregoing Memorandum was mailed, postage prepaid, to:

Malcolm A. Misuraca, Esq.  
James L. Beyers, Esq.  
MISURACA, BEYERS & COSTIN  
900 College Avenue  
P.O. Box 878  
Santa Rosa, CA 95402

Ray R. Christensen, Esq.  
CHRISTENSEN, JENSEN & POWELL  
175 S. West Temple  
Suite 510  
Salt Lake City, Utah 84101

  
Envelope Furnish

# Prospector Ridge Subdivision Summary of Charges and Credits on Agreements with Mr. Kimball to January 5, 1983

July 14, 1981  
Letter

## Summary of Payments:

January 5, 1983 Principle Payment	\$ 162,500.00
October 5, 1983 Interest Payment	34,312.00
January 5, 1983 Interest Payment	<u>34,312.00</u>
Total Payments	<u>231,124.00</u>

## Summary of Credits:

** Silver Creek and Buffer Strip	<181,734.10>
** Prospector Recreation Park Boundary Dispute	<26,950.65> <490.00>
** Prospector Sewer Lift Station	0.00
** Park Meadows Sewer Lift Station	0.00
Plat Maps	<25,000.00>
** Overhead at 15 %	<35,126.21>
** Interest Estimated at 9 %	<25,246.97>
* Murry. First Thrift Modification	0.00
* Increased water fees due to delay	0.00
Three months interest due to delay	<u>&lt;48,375.00&gt;</u>
Total Credits	<u>&lt;342,922.93&gt;</u>

## Payments on Credits by Kimball:

July 14, 1981 Letter Agreement	
January 8, 1982 Check	63,000.00
January 8, 1982 Check	<u>34,036.00</u>
Total Payments on Credits	<u>97,036.00</u>
Credit Due From Kimball	<u>\$ &lt;14,762.93&gt;</u>

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File No. 2936

# TRUST DEED NOTE

DO NOT DESTROY THIS NOTE: When paid, this note, with Trust Deed securing same, must be surrendered to Trustee for cancellation, before reconveyance will be made.

\$ 2,150,000.00

October 6, 1980

FOR VALUE RECEIVED, the undersigned, jointly and severally, promise to pay to the order of Eugene L. Kimball

Two Million One Hundred Fifty Thousand and no/100-----DOLLARS (\$2,150,000.00),

together with interest from date at the rate of nine per cent (9.0%) per annum on the unpaid principal, said principal and interest payable as follows:

Two hundred thousand and no/100 dollars (\$200,000.00) on January 5, 1981 to be applied to principal.

Three hundred twenty-five thousand and no/100 dollars (\$325,000.00) in six annual installments commencing on January 5, 1982. Interest is payable quarterly commencing January 5, 1981.

Each payment shall be applied first to accrued interest and the balance to the reduction of principal. Any such installment not paid when due shall bear interest thereafter at the rate of \_\_\_\_\_ per cent (\_\_\_\_\_% per annum until paid.

If default occurs in the payment of said installments of principal and interest or any part thereof, or in the performance of any agreement contained in the Trust Deed securing this note, the holder hereof, at its option and without notice or demand, may declare the entire principal balance and accrued interest due and payable.

If this note is collected by an attorney after default in the payment of principal or interest, either with or without suit, the undersigned, jointly and severally, agree to pay all costs and expenses of collection including a reasonable attorney's fee.

The makers, sureties, guarantors and endorsers hereof severally waive presentment for payment, demand and notice of dishonor and nonpayment of this note, and consent to any and all extensions of time, renewals, waivers or modifications that may be granted by the holder hereof with respect to the payment or other provisions of this note, and to the release of any security, or any part thereof, with or without substitution.

This note is secured by a Trust Deed of even date herewith.

1/5/81	Received \$200,000.00	EJK
1/26/81	✓ 100,000.00	EJK
1/3/82	✓ 325,000.00	EJK

PLAINTIFF'S EXHIBIT 8 7457

Banberry Development Corp.  
By: *[Signature]*  
*[Signature]* Vice Pres

SCHEDULE "B"

Subsequent to the recordation of the Plat Map of Prospector Ridge Subdivision (which is contained within the described property), Trustor is entitled to receive partial reconveyances to parcels according to the following Schedule:

- A. For each \$8,100.00 paid to principal, one condominium pad will be released.

After each annual payment has been made according to the Trust Deed Note, the \$8,100.00 will be reduced by \$1,230.00 to obtain a release.

- B. For each \$25,200.00 paid to principal, one single family lot will be released.

After each annual payment has been made according to the Trust Deed Note, the \$25,200.00 will be reduced by \$3,820.00 to obtain a release.

- C. It is the responsibility of the Trustor to select the parcels to be released and so inform the Beneficiary. If no selection is made by the Trustor, then Beneficiary may make the selection.

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appeared before me VICTOR L FOWLER, who being by me duly sworn,  
 they are the President and Vice the President respectively of Banberry Development Corp.  
 the corporation that executed the above and foregoing instrument and that said instrument was  
 signed in behalf of said corporation by authority of its by laws (or by authority of a resolution  
 of its board of directors) and said Gregory P. Nelson & Victor L. Fowler acknowledged  
 to me that said corporation executed the same

*Gregory P. Nelson*  
 Notary Public residing at

My Commission Expires: 4-1-81

Park City, Utah