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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 : Reply Brief

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO. 930120

IN THE COURT OF APPEALS OF THE STATE OF UTAH

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

APPELLANT'S REPLY BRIEF

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

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COURT OF APPEALS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
DETERMINATIVE LEGAL PROVISIONS	1
ARGUMENT	1
POINT I: PLAINTIFFS HAVE FAILED TO DEMONSTRATE THAT THE DECLARATION UNAMBIGUOUSLY PROHIBITS A CHAPEL AND THAT THE AFFIDAVIT OF ARLEN FOX MAY NOT BE INVOKED TO PERMIT A CHAPEL.	2
A. Interpretation Of The Residential Covenant.	2
B. Admission Of The Affidavit Of Arlen Fox.	4
POINT II: PLAINTIFFS HAVE FAILED TO DEMONSTRATE THAT THE DECLARATION UNAMBIGUOUSLY PROHIBITS THE MAJORITY AMENDMENT TO PERMIT THE CHAPEL	6
A. Interpretation Of The Amendment Provision.	6
B. The Amendment Need Not Be Unanimous.	8
CONCLUSION	12

TABLE OF AUTHORITIES

Cases

	<u>Page</u>
<i>Appel v. Presley Companies</i> , 806 P.2d 1054 (N.M. 1991)	9
<i>Brown v. McDavid</i> , 676 P.2d 714 (Colo. App. 1983)	10
<i>Bryant v. Lake Highlands Development Co.</i> , 618 S.W.2d 921 (Tex. Civ. App. 1981)	10, 11
<i>Bumgarner & Bowman Building, Inc. v. Hollar</i> , 171 S.E.2d 60 (N.C. App. 1969)	3
<i>Cecala v. Thorley</i> , 764 P.2d 643 (Utah App. 1988)	9
<i>Copperweld Steel Co. v. Demag-Mannesmann-Bohler</i> , 578 F.2d 953 (3rd Cir. 1978)	5
<i>Crimmins v. Simonds</i> , 636 P.2d 478 (Utah 1981)	9
<i>Emma v. Silvestri</i> , 227 A.2d 480 (R.I. 1967)	3
<i>Flinkingshelt v. Johnson</i> , 187 S.E.2d 233 (S.C. 1972)	3
<i>Henretty v. Manti City Corp.</i> , 791 P.2d 506 (Utah 1990)	4
<i>Justak Bros. and Co. v. National Labor Relations Bd.</i> , 664 F.2d 1074 (7th Cir. 1981)	5
<i>L. Grauman Soda Fountain Co. v. Etter</i> , 16 P.2d 417 (Ariz. 1932)	4
<i>La Esperanza Townhome Ass’n v. Title Security Agency</i> , 689 P.2d 178 (Ariz. App. 1984)	8, 9

<i>Matthews v. Kernewood, Inc.</i> , 40 A.2d 522 (Md. 1945)	7
<i>Montoya v. Barreras</i> , 473 P.2d 363 (N.M. 1970)	8, 9
<i>Morgan v. Sigal</i> , 157 A. 412 (Conn. 1931)	11
<i>Parrish v. Richards</i> , 8 Utah 2d 419, 336 P.2d 122, 123 (1959)	7
<i>Rogers v. Zwolak</i> , 110 A. 674 (Del. Ch. 1920)	9
<i>St. Luke's Episcopal Church v. Berry</i> , 163 S.E.2d 664 (N.C. App. 1968)	3
<i>State v. Horton</i> , 1993 WL 57791 (Utah App., Mar. 3, 1993)	5
<i>Steve Vogli & Co. v. Lane</i> , 405 S.W.2d 885 (Mo. 1966)	11
<i>Valdes v. Moore</i> , 476 S.W.2d 936 (Tex. Civ. App. 1972)	7, 11
<i>Warren v. Del Pizzo</i> , 611 P.2d 309 (Or. App. 1980)	10

Rules

Utah Rules of Evidence	
Rule 804(b)(5)	4, 5

DETERMINATIVE LEGAL PROVISIONS

None. (*See* Brief of Appellant, hereafter "Br. of Aplnt.," at 1.)

ARGUMENT

The parties are in basic agreement on the facts, issues, standard of review, and standards for interpretation of restrictive covenants. The points of dispute are legal questions: whether the covenants permit construction of a chapel, whether the covenants may be amended to permit a chapel, and whether the covenants are ambiguous as to either of those questions. If an ambiguity does exist, this Court may resolve the question as a matter of law on the undisputed record before it, remanding for further factual development only if the existing evidence is considered inadequate to reach a conclusion.

The language of the Declaration of Building and Use Restrictions ("Declaration") for Montana Ranchos Subdivision ("MRS") No. 2 does not expressly prohibit a chapel; in fact, the residential covenant may be interpreted to permit a chapel. If the language is considered ambiguous, the Affidavit of Arlen Fox, the developer and grantor who imposed the restrictions, plainly resolves the ambiguity to permit a chapel. Furthermore, the language of the Declaration does not expressly prohibit amendment of its terms; in fact, the language authorizes changes by a "majority" of lot owners. If the amendment provision is considered ambiguous, evidence of majority amendment of the identical covenants for the related MRS No. 3, in which Janyce Fox, the co-grantor, participated, and in which some of the plaintiffs acquiesced, resolves the ambiguity to permit the chapel by amendment.

POINT I: PLAINTIFFS HAVE FAILED TO DEMONSTRATE THAT THE DECLARATION UNAMBIGUOUSLY PROHIBITS A CHAPEL AND THAT THE AFFIDAVIT OF ARLEN FOX MAY NOT BE INVOKED TO PERMIT A CHAPEL.

A. Interpretation Of The Residential Covenant.

Plaintiffs appear to accept by acquiescence the Church's interpretation that a chapel is consistent with the "residential purpose" covenant of Part B.1. of the Declaration, but they argue that a chapel structure would violate the "building type" restriction, which limits structures to a single-family dwelling and garage. (Brief of Appellees, hereafter "Br. of Aplees.," at 7.) However, the record contains no evidence of the *form* of the proposed chapel, or that the form was disapproved by the Architectural Control Committee. (See Part B.1., Addendum to Br. of Aplnt, hereafter "Add.," at 3.) If it is the form of the building, rather than its use, to which plaintiffs object, such an objection is purely hypothetical without record evidence. A chapel may be designed and landscaped to blend in with its residential setting, and there is no evidence that was not done here.

Plaintiffs cite no authority for their assertion that a chapel would necessarily violate the "building type" restriction; rather, they simply offer an abstract review of the cases cited by the Church in support of a chapel, without challenging the principles for which those cases are cited. (Br. of Aplees. at 7-13.) The cited cases establish two conclusions: One, that residential covenants are generally construed to prohibit only business, commercial, or other uses incompatible with a residential purpose (Br. of Aplnt. at 8); and two, that a chapel has been considered consistent with residential uses and covenants (*id.* at 9-10). Plaintiffs' attempted distinctions in the cited cases do not alter

those conclusions. The cases stand precisely for what they were cited, not for what plaintiffs claim they were cited.¹

Plaintiffs' emphasis on the "building type" language of Part B.1. also leads to the inescapable conclusion that the residential covenant is ambiguous. The language of Part B.1. does *not* "expressly" prohibit a chapel, as plaintiffs assert (Br. of Aplees. at 12). Neither the word "chapel" nor any similar reference is included. Moreover the restriction of buildings to a single-family dwelling cannot be strictly interpreted because Part B.8. *permits* barns, outbuildings, and other structures, as long as they are not used as a residence. Part B.10., authorizing the keeping of livestock, also implies that non-dwelling buildings will be tolerated as consistent with the intent of the residential covenant. It would appear that a chapel fits within the intent of the "single-family dwelling" provision as well as a barn or other structure. These inconsistent provisions at least create an ambiguity that requires resort to extrinsic evidence. *See Bumgarner & Bowman Building, Inc. v. Hollar*, 171 S.E.2d 60, 61-62 (N.C. App. 1969). The ambiguity of Part B.1. is amplified in this particular case, given the 5-acre size of Lot 34 relative to the other lots, which are all one-half acre in size. (*See* Br. of Aplnt. at 12-13.)

¹ For example, *Emma v. Silvestri*, 227 A.2d 480 (R.I. 1967), does illustrate that while a dental office is incompatible with a residential covenant, a chapel need not be. (Br. of Aplnt. at 8, 10). In *St. Luke's Episcopal Church v. Berry*, 163 S.E.2d 664 (N.C. App. 1968), the absence of a restriction in the church's deed, emphasized by plaintiffs here, demonstrates that developers generally do not consider chapels inconsistent with residential covenants. Similarly, there is no record of a restriction in the Church's deed in the present case. Finally, contrary to plaintiffs' reading of *Flinkingshelt v. Johnson*, 187 S.E.2d 233, 237 (S.C. 1972) (Br. of Aplees. at 11), that case does observe that "[t]he existence of schools and churches within a large residential area . . . is no indication of a breakdown or deviation from the general residential scheme or purpose of the [residential] restrictions.

In summary, the judgment may not be affirmed on the basis of either the "residential purpose" or "building type" provision of Part B.1. The cases cited by the Church demonstrate that such provisions do not prohibit a chapel as a matter of law, but may permit a chapel as consistent with the intent of the framers. At the very least, such language should be considered ambiguous as applied to construction of a chapel on the only 5-acre lot in the subdivision.

B. Admission Of The Affidavit Of Arlen Fox.

Plaintiffs argue that the Affidavit of Arlen Fox was inadmissible hearsay in the district court, because Mr. Fox is now deceased, and that his affidavit therefore may not be relied upon as evidence of his intent to permit a chapel in MRS No. 2. However, the record in this case contains no direct evidence of Mr. Fox's death. Moreover, because the district court admitted the evidence below, over plaintiffs' objections, and plaintiffs failed to file a cross-appeal challenging admission of the evidence, they may not now raise the issue on appeal. *See, e.g., Henretty v. Manti City Corp.*, 791 P.2d 506, 511 n.11 (Utah 1990) (appellate court lacks jurisdiction to address claim of appellees not preserved by cross-appeal); *L. Grauman Soda Fountain Co. v. Etter*, 16 P.2d 417, 419 (Ariz. 1932) (appellee failed to challenge admission of evidence by cross-appeal).

Even if this Court chooses to address plaintiffs' hearsay claim, it is evident that the Fox Affidavit was properly admitted under the residual hearsay exception of Rule 804(b)(5), Utah R. Evid., which states in relevant part:

(b) 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 efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. . . .

The Fox Affidavit satisfies the conditions of Rule 804(b)(5) for admission. First, the affidavit has sufficient "guarantees of trustworthiness" because it was given under oath, under circumstances to allow free expression of the truth, and without any motive for untruthfulness. *See Justak Bros. and Co. v. National Labor Relations Bd.*, 664 F.2d 1074, 1081 (7th Cir. 1981) (admitting pretrial affidavit under Rule 804); *Copperweld Steel Co. v. Demag-Mannesmann-Bohler*, 578 F.2d 953, 964 (3rd Cir. 1978) (admitting attorney's memorandum of witness interview). Second, the affidavit pertains to the material fact of Mr. Fox's intent, as framer of the Declaration, with regard to interpretation of the residential covenant. Plainly, Mr. Fox was the person best suited to express his own intent as developer. *See Copperweld Steel, supra*, at 964. Third, for the reason just stated, the affidavit is more probative on the point of Mr. Fox's intent than any other available evidence; in fact, no other evidence on that point is available. *Id.* *See also State v. Horton*, 1993 WL 57791, Slip Op. at 4 (Utah App., Mar. 3, 1993) (affirming exclusion of affidavit because five other witnesses had testified on same matter). Plaintiffs presented no contrary evidence. The Affidavits of Jack Lochhead and Don Adams do not dispute that Mr. Fox never intended the residential covenant to prohibit a chapel. Finally,

admission of the affidavit serves the interests of justice because it is the best evidence available of the framer's intent with regard to interpretation of the residential covenant. Plaintiffs could have deposed and cross-examined Mr. Fox, but did not do so.

In summary, this Court should reject plaintiffs' challenge to the Fox Affidavit because they failed to preserve the issue by cross-appeal, and the affidavit was properly admitted under Rule 804.

POINT II: PLAINTIFFS HAVE FAILED TO DEMONSTRATE THAT THE DECLARATION UNAMBIGUOUSLY PROHIBITS THE MAJORITY AMENDMENT TO PERMIT THE CHAPEL.

A. Interpretation Of The Amendment Provision.

The Church has demonstrated that the "unless" clause of Part D.1. of the Declaration permits majority amendment of the covenants during the initial 40 years, as well as during the extension periods, and alternatively, that the provision is ambiguous as to amendability. (Br. of Aplnt. at 14-18.) Plaintiffs maintain that Part D.1. "clearly" prohibits any amendment during the first 40 years, arguing that if the covenants could be amended at any time, the reference to an initial 40-year period would be "meaningless." (Br. of Aplees. at 22, 26.) However, that reasoning is not valid. Under the interpretation permitting amendment during the initial period, the 40-year provision would still serve the purpose of setting the duration of the covenants *in the absence of amendment*. The few foreign cases cited by plaintiffs overlook that fact, and the Utah cases cited do not decide the issue.

The two different plausible interpretations of the amendment language lead to the legal conclusion that the provision is ambiguous and may not be interpreted as a matter

of law. Whereas most restrictive covenants contain separate provisions governing duration and amendability, Part D.1. is made ambiguous by the combination of both subjects in a single provision. (See cases in Br. of Aplnt. at 17, cited for illustrative purposes, not for the points claimed in Br. of Aplees. at 25.) The court in *Valdes v. Moore*, 476 S.W.2d 936 (Tex. Civ. App. 1972), construing language similar to Part D.1., acknowledged the ambiguity:

A reading of the above quoted duration provision from the original restrictions clearly presents a question of construction. The proviso therein does not specifically limit the time as to which the restrictions may be amended. The language does not specifically say that the restrictions may be amended by the majority within the first 25 years, nor does it say that they may not be amended within such period. A literal reading of the language used would indicate that the owners of a majority of the lots could amend the restrictions before the first 25 year period had ended. [*Id.* at 939.]

The court concluded that, while such language "cannot be construed as a matter of law," *id.*, the summary judgment permitting majority amendment during the initial period should be upheld on the basis of "judicial admission" by the party challenging the amendment, *id.* at 940-41.

In summary, Part D.1. does not clearly prohibit majority amendment during the initial 40-year period. Accordingly, the Court should "resolve all doubts in favor of the free and unrestricted use of property." *Parrish v. Richards*, 8 Utah 2d 419, 336 P.2d 122, 123 (1959). See also *Matthews v. Kernewood, Inc.*, 40 A.2d 522, 526 (Md. 1945) (strictly construing amendment provision in favor of the free use of the property). The Church's unchallenged extrinsic evidence of intent to permit majority amendment justifies entry of judgment enforcing the amendment.

B. The Amendment Need Not Be Unanimous.

Plaintiffs argue that, regardless of the language of Part D.1. of the Declaration, the amendment deleting Lot 34 from the covenants required the *unanimous* approval of the lot owners because the amendment does not have a uniform effect. (Br. of Aplees. at 27-30.) However, the uniformity of effect involves factual questions that cannot be decided as a matter of law. A factfinder could conclude that the amendment *is* uniform in that all remaining lots continue to be governed by the Declaration and will be affected equally by the amendment permitting the chapel and park on Lot 34. Plaintiffs' argument would produce the anomalous result of requiring that the amendment permit a chapel and park on every half-acre lot in the subdivision. Given the vastly disproportionate size of Lot 34, perfect uniformity in the application of covenants and amendments, as between Lot 34 and the smaller remaining lots, is not possible. For example, Part B.10., permitting up to six head of horses and cattle on each lot, has had practical application only to Lot 34. The framer of the Declaration and the lot owners must reasonably have anticipated and expected some disproportionate impact in the application of covenants as between Lot 34 and the remaining lots.

Plaintiffs rely on *Montoya v. Barreras*, 473 P.2d 363 (N.M. 1970), and *La Esperanza Townhome Ass'n v. Title Security Agency*, 689 P.2d 178 (Ariz. App. 1984). Those cases invalidated majority amendments to delete certain lots from the restrictive covenants on the basis that the amendments did not have a uniform effect, despite express covenant language *permitting* majority amendment. Such an extreme rule has never been, and should not be, adopted in Utah, where permissibility of an amendment is governed by the

covenant language, not by the perceived effect of the amendment. *See generally Cecala v. Thorley*, 764 P.2d 643, 645 (Utah App. 1988). The New Mexico Supreme Court has since retreated from *Montoya*, permitting nonunanimous amendments under a factual "reasonableness" test. *Appel v. Presley Companies*, 806 P.2d 1054, 1056 (N.M. 1991). The cases cited by plaintiffs simply go far beyond Utah law.

Plaintiffs also cite *Crimmins v. Simonds*, 636 P.2d 478 (Utah 1981), in support of requiring a unanimous amendment, while conceding that the case did not address the precise issue here. (Br. of Aplees. at 29.) *Crimmins* rejected a purported majority amendment of a restrictive covenant against home businesses. However, *Crimmins* is distinguishable from *Montoya* and *La Esperanza* because the amendment in *Crimmins* did have the uniform effect of allowing a business in any of the residences. *Id.* at 480. Therefore, the court did not require unanimity because of nonuniform effect. Neither can *Crimmins* be read to require unanimity in *all* amendments of restrictive covenants; no other case in the country has gone that far, and the cases cited by *Crimmins* permit nonunanimous amendments consistent with the terms of the covenants. *See Rogers v. Zwolak*, 110 A. 674, 676 (Del. Ch. 1920). The only possible basis for the ruling in *Crimmins* is that the court interpreted the amendment provision *in that case* to prohibit nonunanimous amendment during the initial 25-year period of the covenants. *See* 636 P.2d at 479. However, because the amendment language there is not quoted by the court, no comparison can be made with Part D.1. in the present case. Accordingly, *Crimmins* is not helpful in resolving the issue here, whether Part D.1. requires the amendment

permitting a chapel and park on Lot 34 to be unanimous. Because the language of Part D.1. makes no mention of unanimity, but refers only to "majority" amendment, the amendment here should be upheld.

Cases from other jurisdictions support that conclusion. If the covenant language permits amendment or even termination by majority vote, property owners must be deemed to have constructive notice of such provisions, and those provisions must be enforced as written, even if it results in prejudice to some owners. *See, e.g., Warren v. Del Pizzo*, 611 P.2d 309 (Or. App. 1980) (majority amendment of building height restrictions); *Brown v. McDavid*, 676 P.2d 714 (Colo. App. 1983) (termination by 66 percent of owners). As stated in *Warren*:

While it is recognized that the challenged amendment to the "Declaration of Restriction" operates to the prejudice of plaintiffs and others similarly situated, the record shows that the proviso authorizing this amendment was a part of the "Declaration" at the time plaintiffs purchased their lots. Plaintiffs must therefore be deemed to have had constructive notice of this provision and the possibility at least that the building restrictions could conceivably be changed in this fashion. [611 P.2d at 311.]

The same principles apply to a majority amendment, such as the one under review, removing one lot, or a certain area, from the covenants. For example, in *Bryant v. Lake Highlands Development Co.*, 618 S.W.2d 921 (Tex. Civ. App. 1981), the required 90 percent of lot owners amended the declaration to remove certain lots from the covenant restrictions. The plaintiffs challenged the amendment on the basis alleged here, that "the alterations did not apply to all of the properties subject to the original restrictions." *Id.* at 923. The court rejected that argument:

The terms of the Declaration clearly allow for amendment if the requisite number of votes is achieved. *There are no limitations expressed as to the types of amendments allowed.* All of the developed lots remain subject to the original restrictions and are therefore affected alike. It appears that the effect of the amendment would be to merely reduce the size of the area subject to the original restrictions. . . .

Having purchased their lots subject to the Declarations which included a right of amendment the plaintiffs had no guaranty that the addition would remain exclusively comprised of townhouses. [*Id.*, emp. added.]

See also Valdes v. Moore, supra, 476 S.W.2d at 939-41 (upholding majority amendment during initial 25-year period removing portion of land from restrictions); *Steve Vogli & Co. v. Lane*, 405 S.W.2d 885, 888-89 (Mo. 1966) (upholding majority deletion of certain lots from restrictions--such amendment "need not be uniform as to all lots"); *Morgan v. Sigal*, 157 A. 412, 413 (Conn. 1931) (restrictions are terminable as to any lot with consent of majority).

In summary, the amendment at issue here, removing Lot 34 from the restrictions of the Declaration, need not be unanimous. The amendment may be considered uniform in effect, and even if not, the extreme cases cited by plaintiffs do not apply. The language of Part D.1. does not require unanimity, but permits amendment by a majority of owners. Moreover, as in *Bryant, supra*, the language does not limit the types of amendments allowed. Accordingly, the amendment to permit a chapel and park on Lot 34 is valid.

CONCLUSION

Based on the foregoing, this Court should reverse the Order of the district court and either order that the Church's motion for summary judgment be granted, or that the case be remanded for trial.

Dated this 19th day of March, 1993.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing Appellant's Reply Brief were mailed, first class postage prepaid, this 19th day of March, 1993, to the following:

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