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IN THE THIRD JUDICIAL DISTRICT COURT
SUMMIT COUNTY, STATE OF UTAH

SUMMIT COUNTY *Plaintiff and Petitioner,* vs. NATHAN A. BROCKBANK; JOSHUA J. ROMNEY; RB 248, LLC; NB 248, LLC; N. BROCKBANK INVESTMENTS, LLS; JJR VENTURES, LTD; WELLS FARGO BANK, NA; REDUS PARK CITY, LLC; UNITED PARK CITY MINES COMPANY; and JUSTIN LAMPROPOULOS *Defendants and Respondents* --- NB 248, LLC *Counterclaim and Third-Party Plaintiff* vs. SUMMIT COUNTY *Counterclaim Defendant* and PARK CITY MUNICIPAL CORP. *Third Party Defendant*	**REPLY MEMORANDUM IN SUPPORT OF PARK CITY'S MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO BROCKBANK** Case No. 200500346 Judge Richard Mrazik

PARK CITY MUNICIPAL CORP. *Counterclaim and Crossclaim Plaintiff* vs. NB 248, LLC *Counterclaim Defendant* NATHAN A. BROCKBANK; JOSHUA J. ROMNEY; RB 248, LLC; N. BROCKBANK INVESTMENTS, LLS; JJR VENTURES, LTD; WELLS FARGO BANK, NA; REDUS PARK CITY, LLC; and UNITED PARK CITY MINES COMPANY *Crossclaim Defendants*	

Pursuant to Rules 7 and 56 of the Utah Rules of Civil Procedure, Park City Municipal Corporation ("Park City") hereby submits this Reply Memorandum in Support of its Motion for Partial Summary Judgment (the "MPSJ") as to NB 248, LLC, Nathan A. Brockbank, Joshua J. Romney, RB 248, LLC, N. Brockbank Investments, LLC, and JJR Ventures, Ltd (collectively "Brockbank"). Brockbank's memorandum in opposition ("Opposition") raises new matters concerning the facts, the creation of Park City's conservation easement, and the Development Agreement. Those new matters are addressed in this Reply.

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INTRODUCTION

Unambiguous restrictive covenants are interpreted and enforced as a matter of law. *See, e.g., S. Ridge Homeowners' Ass'n v. Brown*, 2010 UT App 23, ¶ 1, 226 P.3d 758 (enforcing unambiguous restrictive covenant limiting short-term rentals); *Fort Pierce Indus. Park Phases II, III & IV Owners Ass'n v. Shakespeare*, 2016 UT 28, ¶ 19, 379 P.3d 1218 ("[R]estrictive covenants are to be interpreted using the same rules of construction that are used to interpret contracts.").

"When . . . statutory language is unambiguous, we do not look beyond the same to divine legislative intent because we are guided by the rule that a statute should generally be construed according to its plain language." *State v. Wilkerson*, 2020 UT App 160, ¶ 10, 478 P.3d 1048 (cleaned up). "We will not infer substantive terms into the text that are not already there." *In re Estate of Heater*, 2020 UT App 70, ¶ 19, 466 P.3d 728.

The Development Agreement at issue in this case is unambiguous. It granted Park City "real covenants, contract and property rights and equitable servitudes, which shall run with all of the land" and "bind . . . all successors in interest." [Dev. Agmt. (Ex. B to MPSJ) at § 8.1]. Those rights have existed – and have been enforced – for more than 20 years.

Likewise, the Land Conservation Easement Act is unambiguous. It defines a conservation easement as any "easement, covenant, restriction, or condition" in any "deed, will, or other instrument" "for the purpose of preserving and maintaining land." Utah Code § 57-18-2(1). That is exactly what the Development Agreement created. And that is how Richardson Flats has been maintained – for more than 20 years.

Brockbank's efforts to void Park City's long-standing contractual and property rights should be rejected. Park City's MPSJ should be granted.

FACTUAL SUMMARY

Brockbank does not dispute any of the facts set forth in Park City's MPSJ. [*See* Opp. at 2-6]. In summary, the undisputed facts are as follows:

1- In 1999, the Original Development Agreement was executed and recorded. [*See* SOF Nos. 1-3; Opp. at 2 (not disputed)].

2- In 2007, the Amended and Restated Development Agreement ("Development Agreement") was executed and recorded. [*See* SOF Nos. 3-4; Opp. at 2 (not disputed)].

3- The Development Agreement preserved Richardson Flats and limited its development. [*See* SOF Nos. 7-10; Opp. at 2-3 (no material dispute)[1]].

4- UPCM owned Richardson Flats and signed the Development Agreement. [*See* SOF Nos. 1, 3, 6; Opp. at 2 (not disputed)].

5- In 2020, Brockbank purported to acquire UPCM's interests in Richardson Flats East. [*See* SOF Nos. 12-19; Opp. at 4-5 (undisputed)].

6- Brockbank knew about the Development Agreement before he obtained UPCM's interests in Richardson Flats East. [*See* SOF No. 20; Opp. at 5 ("Undisputed . . . .")].

Brockbank's Opposition includes three additional statements of "fact." All three begin with argumentative statements followed by excised quotes from the Development Agreement. Park City objects to Brockbank's efforts to disguise argument as "fact."[2] Park City also objects to Brockbank's incomplete quotations. *See* Utah R. Evid. 106. However, Park City has no objection to, and indeed invites, the Court's careful review of the Development Agreement's plain language.

[1] Brockbank's "partial[] dispute" does not alter the substance of Park City's statement.

[2] Park City notes, with some banter intended, that as part of his declaration Brockbank's counsel testified that "the Brockbank Parties' Motion to Dismiss should be granted." [*See* Gross Dec. at ¶ 3]. If the Court finds such "testimony" beneficial, Park City's counsel will gladly offer their own declarations about what motions the Court should grant.

In summary, Park City and Brockbank both contend that the Development Agreement is unambiguous. There are no disputed issues of fact.

ARGUMENT

"The court shall grant summary judgment if the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Utah R. Civ. P. 56(a). The Court should grant Park City's MPSJ.

I. The Land Conservation Easement Act confirms and governs Park City's conservation easement.

"The proper interpretation and application of a statute is a question of law . . . ." *State v. Robertson*, 2017 UT 27, ¶ 14, 438 P.3d 491; *see also Wilkerson*, 2020 UT App 160, ¶ 10 ("[A] statute should generally be construed according to its plain language.").

The Land Conservation Easement Act enabled, created, and defined conservation easements. As set forth in Park City's MPSJ, that act unambiguously confirms Park City's conservation easement. Section 3 of the Development Agreement is

> an easement, ***covenant, restriction, or condition in a*** deed, will, or other ***instrument signed by*** or on behalf of ***the record owner*** of the underlying real property ***for the purpose of preserving and maintaining land*** or water areas predominantly in a natural, scenic, or open condition, or for recreational, agricultural, cultural, wildlife habitat or other use or condition consistent with the protection of open land.

Utah Code § 57-18-2(1) (emphasis added).

Brockbank cannot alter the legislative language or the Court's duty to enforce that plain language. Instead, he offers a series of alternative arguments. They all fail. *See generally Four B Properties, LLC v. Nature Conservancy*, 2020 WY 24, ¶ 28, 458 P.3d 832 (explaining conservation easements should "be protected against 'expedient exemptions which defeat the

purpose of preserving land'" (quoting *Goldmuntz v. Town of Chilmark*, 38 Mass. App. Ct. 696, 699 (1995)).

A. All of the options for Richardson Flats constitute an "open condition" or "recreational" use.

The Development Agreement provided three options for Richardson Flats: (1) golf, equestrian uses, and "other public recreational opportunities" with associated buildings; (2) two 18-hole golf courses with associated buildings; or (3) perpetually prevent all development. [*See* Dev. Agmt. (Ex. B to MPSJ) at § 3.1; *see also* Original Dev. Agmt. (Ex. A to MPSJ) at § 3.1]. The first two options required EPA/DEQ approval. The third option was triggered if there was not "EPA or DEQ approval of the aforementioned recreational improvements." [*Id.*].

The three options constitute a conservation easement. The law is clear. A conservation easement is defined as any "easement, covenant, restriction, or condition . . . for the purpose of preserving and maintaining land or water areas ***predominantly*** in a ***natural***, ***scenic***, or ***open*** condition, ***or*** for ***recreational,*** agricultural, cultural, wildlife habitat or other ***use*** or condition consistent with the protection of open land." Utah Code § 57-18-2(1) (emphasis added). All three of the options identified in the Development Agreement meet that statutory definition. The first two options ("golf," "equestrian uses," and "other public recreational opportunities") qualify as "predominately . . . recreational." *See id.*; *cf. id.* § 59-12-602(9) (defining "Recreation facility" to include "golf course"); *id.* § 57-14-102(6) (twice defining "Recreational purpose" to include "equestrian activities"); Utah Admin. Code R81-10A-1 (defining "Recreational Amenity" to include "golf course" and "equestrian park"). The third option preserves Richardson Flats in a predominately "open condition." *See* Utah Code § 57-18-2(1).

Brockbank recognizes that the first two Richardson Flats options are subject to the grant of EPA and DEQ approval, and the third option applies if that approval is not granted. He therefore argues that "[a] close review of the Agreement's language reveals that, at most, the Agreement created ***a conditional*** obligation." [Opp. at 9 (emphasis added)]. Even if he were right, his own description still confirms the applicability of the Land Conservation Easement Act. That Act unambiguously defines a conservation easement to include any "easement, covenant, restriction, ***or condition*** in a deed, will, or other instrument." Utah Code § 57-18-2(1) (emphasis added). By definition, a "condition" is a "future and uncertain event on which the existence or extent of an obligation or liability depends; an uncertain act or event that triggers or negates a duty to render a promised performance." Black's Law Dictionary (11th ed. 2019).[3] Thus, even under Brockbank's view of the Development Agreement, the Act still applies and controls.

Under different circumstances, the specifics of the three options for Richardson Flats might be more important. But not here. Brockbank is not arguing that he has the right to build a golf course or equestrian park. Rather, Brockbank wants the Court to authorize the construction of "mixed commercial and residential properties." [Brockbank Complaint at ¶ 12]. Nothing in the Development Agreement or the Land Conservation Easement Act supports his demand.

B. The Land Conservation Easement Act was followed.

Brockbank's Opposition cites Utah Code section 57-18-4 and makes conclusory arguments that Park City has not established compliance with its provisions. Brockbank also assumes,

[3] *See also* https://www.merriam-webster.com/dictionary/condition#legalDictionary ("an uncertain future act or event whose occurrence or nonoccurrence determines the rights or obligations of a party under a legal instrument and especially a contract") (last accessed February 16, 2021).

incorrectly and without legal support, that any potential failure would void Park City's conservation easement.[4] Brockbank is wrong.

1. The Development Agreement was recorded.

On multiple occasions Brockbank argues that "Park City did not provide any evidence showing that a conservation easement was recorded." [*See* Opp. at 11-13]. In so arguing, Brockbank implicitly and incorrectly assumes that recording an easement is a prerequisite to enforcing it against a party with actual notice, which Brockbank indisputably had. [*See* SOF No. 20 (undisputed Brockbank had knowledge of Park City's rights)]. Although Brockbank is incorrect,[5] it is not material to Park City's MPSJ. The relevant facts are undisputed.

Park City's SOF No. 2 is undisputed: "The Original Development Agreement ***was recorded*** with the Summit County Recorder on July 26, 1999, with the number 00544836." [*See* MPSJ at SOF No. 2. (emphasis added)]. Park City's SOF No. 4 also is undisputed: "The Development Agreement ***was recorded*** with the Summit County Recorder on March 2, 2007, with the number 00806100." [*Id.* at SOF No. 4 (emphasis added)]. *See generally* Utah R. Civ. P. 56(e) (authorizing court to "consider the fact undisputed" if not disputed by the opposing party).

Contrary to Brockbank's arguments, Park City did provide evidence of recording. The facts are undisputed.

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[4] Although the boldface for section 57-18-4 is "Requirements for creation," "[t]his boldface is not law." *See* Utah Code § 68-3-13. Nothing in the text of section 57-18-4 indicates that a violation of its provisions invalidates an otherwise valid conservation easement. Nor has Brockbank established that a conservation easement would be void. *Cf. Wittingham, LLC v. TNE Ltd. P'ship*, 2020 UT 49, ¶ 25, 469 P.3d 1035 ("[T]here is a rebuttable presumption that defective contracts are voidable rather than void.").

[5] *See* Utah Code § 57-3-103 (unrecorded documents enforceable unless "subsequent purchaser purchased the property in good faith"); *Pioneer Builders Co. v. K D A Corp.*, 2012 UT 74, ¶ 22, 292 P.3d 672 ("In the context of recording interests in real property, Utah is a race-notice jurisdiction.").

2. Park City was not obligated to provide notice to the Summit County assessor.

Brockbank questions whether Park City's conservation easement was "delivered to Summit County's assessor." [Opp. at 13]. His professed concern is misplaced.

Brockbank cites the wrong version of the Utah Code. Specifically, Brockbank cites Utah Code section 57-18-4(2)(b). [*Id.*]. That statutory provision was enacted in ***2011***. *See* 2011 Utah Laws Ch. 157 (H.B. 156). Park City's conservation easement was created in ***1999*** and restated in ***2007***. "A provision of the Utah Code is not retroactive, unless the provision is expressly declared to be retroactive." Utah Code § 68-3-3.[6] Section 57-18-4(2)(b) was not retroactive. Thus, the 2011 statutory amendment did not control the creation of an already existing conservation easement. *See generally* Utah Const. Art. I, § 18 ("No . . . law impairing the obligation of contracts shall be passed."); *Salter v. Nelson*, 39 P.2d 1061, 1064 (Utah 1935) (if effect of legislative action is "to take away all remedies for, or seriously interfere[] with, the enforcement of the obligations of the [contract] in question, then the amendment is unconstitutional").

Brockbank does not cite Utah Code section 57-18-4(2)(c). [*See generally* Opp.]. However, that subsection also was included as part of the 2011 amendment. It indicates that the "owner of property subject to a conservation easement recorded before May 10, 2011, shall deliver to the assessor of the county . . . proof that the conservation easement has been recorded" before "January 1, 2012." Utah Code § 57-18-4(2)(c). By its plain language, that provision does not apply to Park City. Park City is not the "owner of property subject to a conservation easement"; it is the holder

[6] *See also Waddoups v. Noorda*, 2013 UT 64, ¶ 6, 321 P.3d 1108 ("It is well established that the courts of this state operate under a statutory bar against the retroactive application of newly codified laws . . . . Thus, absent clear legislative intent to the contrary, we generally presume that a statute applies only prospectively." (cleaned up)).

of the conservation easement itself. *See id.* Moreover, the statutory amendment was part of a larger statutory change intended to clarify "the fair market value of the property" – and the owner's resulting real property taxes. *See* 2011 Utah Laws Ch. 157 (H.B. 156) (amending Utah Code 59-2-301.1). Even assuming UPCM failed to notify the county assessor after the 2011 amendment, Brockbank offers no explanation of why Park City should suffer for UPCM's alleged tax transgression. He provides zero legal support for the notion that UPCM could invalidate Park City's existing conservation easement.

3. The Development Agreement details its duration.

"The instrument that creates a conservation easement" should "include a termination date or a statement that the easement continue[s] in perpetuity." Utah Code § 57-18-4(3). The Development Agreement satisfies that provision.

Section 9.9 of the Development Agreement is entitled "Duration." It declares that "[t]his Agreement shall continue in force and effect until all obligations hereto have been satisfied." [*See* Dev. Agmt. (Ex. B to MPSJ) at § 9.9]. Thus, the specific obligations that exist for Richardson Flats also determine their duration. As previously noted, the Development Agreement presents three options for Richardson Flats. [*See* SOF No. 10]. Each option presents its own obligations, which then determine the duration under Section 9.9 of the agreement:

Option	Obligations/Restrictions	Duration
One	Developer: (1)"***must limit the use of Richardson Flats to golf*** (with the requisite clubhouse, maintenance buildings and other related improvements), ***equestrian uses*** (including the construction of an arena or indoor equestrian center), and/or such ***other public recreational opportunities*** or special events as the City may deem proper"	"[U]ntil all obligations hereto have been satisfied," including EPA/DEQ approvals and construction of the golf course, club house, and driving range.

	(2) "***obtain necessary approvals*** from EPA and/or DEQ" (3) "***construct*** on Richardson Flats ***a golf course, clubhouse, and driving range*** with adequate provisions for define public access."	
Two	Developer: (1) "***limit the use of Richardson Flats to an 18-hole golf course*** (with the requisite clubhouse, maintenance buildings and other related improvements)" (2) "***make available to the City a site*** for a second 18-hole golf course" (3) "***EPA or DEQ approval***."	"[U]ntil all obligations hereto have been satisfied," including transfer of the second site to Park City and EPA/DEQ approvals.
Three	***If Developer "cannot receive EPA or DEQ approval*** of the aforementioned recreational improvements," (1) "***[P]erpetually*** deed restrict Richardson Flats to ***prevent further development***."	Perpetual

In this case, EPA/DEQ approval has not been granted. Thus, further development in Richardson Flats is perpetually prevented. *Compare* Utah Code § 57-18-4(3) (easement should "include a termination date or a statement that the easement ***continue[s] in perpetuity***" (emphasis added)) *with* Dev. Agmt. (Ex. B to MPSJ) at § 3.1 ("***perpetually*** deed restrict Richardson Flats to prevent further development" (emphasis added)).

4. There was adequate disclosure to UPCM.

Brockbank argues that there is inadequate evidence showing "information was disclosed to UPCM." [Opp. at 13]. That argument suffers at least two flaws.

First, Brockbank lacks standing to argue that Park City failed to tell UPCM "the types of conservation easements available, the legal effect of each easement, and that [UPCM] should contact an attorney concerning any possible legal and tax implications." *See* Utah Code § 57-18-

4(4). UPCM signed the Development Agreement more than 20 years ago. At no point since has UPCM argued that it was mistaken or mislead. To the contrary, UPCM repeatedly ratified the Development Agreement – both by restating it in 2007 and by accepting its development benefits. *Cf. Francisconi v. Hall*, 2008 UT App 166, ¶ 18, 2008 WL 1971336 ("[Party] could not continue to receive the benefits of the bargain and simultaneously claim to be released from further performance of [its] own obligations."). Brockbank lacks the standing or ability to now argue that UPCM's decision was ill-advised. In fact, regardless of what UPCM knew or was told, Brockbank undisputedly knew about the conservation easement before obtaining his interest in Richardson Flats. [*See* SOF No. 20].

Second, even assuming Brockbank could assert unestablished allegations on the part of UPCM, the undisputed facts confirm that there was substantial compliance with any disclosure obligation. It is undisputed that the Development Agreement was "reviewed and revised by legal counsel for" UPCM. [*See* Dev. Agmt. (Ex. B to MPSJ) at § 9.4]. UPCM further is obligated to defend the Development Agreement. [*See id.* § 7.2]. And, it was UPCM that actually "offer[ed] the [Richardson Flats] inducements." [*Id.* § 3.1]. Given these undisputed facts, Brockbank cannot establish a material violation of any disclosure obligation that would justify recission. *Cf. Four B Properties, LLC*, 2020 WY 24, ¶ 28 (declaring conservation easements should "be protected against expedient exemptions which defeat the purpose of preserving land" (quotations omitted)).

C. Magic language is not required to create a conservation easement.

Finally, Brockbank incorrectly argues that because other provisions of the Development Agreement use the words "conservation easement," the Land Conservation Easement Act no longer applies to Richardson Flats. [*See* Opp. at 7-8, 10-11].

Brockbank's argument ignores the circumstances that explain the different language used in the Development Agreement when addressing different properties. As noted, Richardson Flats contemplated three different, potential uses. [*See* SOF No. 10]. "Lady Morgan Springs" (§ 2.9.5), the designated "ski terrain and open space" (§ 2.9.6), "Prospect Ridge" (§ 2.9.7), and "Bonanza Flats" (§ 5.2) did not. [*See* Dev. Agmt. (Ex. B to MPSJ)]. Not surprisingly then, the Development Agreement used more specificity when addressing Richardson Flats – focusing on the specific uses associated with each option, rather than the general nature of the easement. That additional specificity does not alter the unambiguous statutory or contractual provisions. The language in Section 3 of the Development Agreement remains a "covenant, restriction, or condition in a deed, will, or other instrument . . . for the purpose of preserving and maintaining" Richardson Flats. Utah Code § 57-18-2(1).

Brockbank's argument also fails to the extent it seeks to adds a specific intent element into the Land Conservation Easement Act. The Utah Legislature declared that any "easement, covenant, restriction, or condition in a deed, will, or other instrument . . . for the purpose of preserving and maintaining land" qualifies as a conservation easement. Utah Code § 57-18-2(1). In so doing, the Utah Legislature broadly defined conservation easements to include a wide array of promises ("easement, covenant,[7] restriction,[8] ***or*** condition[9]") stemming from a wide array of agreements ("deed, will, ***or*** other instrument"). *Id.* (emphasis added). So long as those broad

[7] *See* Black's Law Dictionary (11th ed. 2019) ("A formal agreement or promise, usu. in a contract or deed, to do or not do a particular act; a compact or stipulation.").

[8] *See id.* ("A limitation (esp. in a deed) placed on the use or enjoyment of property.").

[9] *See id.* ("A future and uncertain event on which the existence or extent of an obligation or liability depends; an uncertain act or event that triggers or negates a duty to render a promised performance.").

categories have "the purpose of preserving and maintaining land," the statute is satisfied. *Id.* No magic words or separate manifestation of intent is required.

II. The Development Agreement runs with the land.

There is no dispute that a conservation easement constitutes "an interest in land and runs with the land" under Utah law. *See* Utah Code § 57-18-2(2). In other words, once the Court confirms Park City's conservation easement, Brockbank's "run with the land" arguments become moot. Regardless, Park City's rights under the Development Agreement run with the land.

Park City's MPSJ identified both the outdated four-factor standard and the newer, contract-based standard endorsed by the Restatement (Third) of Property (Servitudes) and the Utah Supreme Court. Park City argued that regardless of which standard applies, the Development Agreement should be enforced. In his Opposition, Brockbank eschews the applicable, contract-based standard. In so doing, he implicitly concedes defeat under that analysis. Brockbank instead doubles-down on a legal standard that no longer controls.

A. Restrictive covenants are contracts and are both interpreted and enforced like any other contract.

The Utah Supreme Court has been clear. "We continue to reject strict construction of restrictive covenants and make it clear that restrictive covenants are to be interpreted using the ***same rules of construction that are used to interpret contracts***." *Fort Pierce Indus. Park Phases II, III, & IV Owners Assoc. v. Shakespeare*, 2016 UT 28, ¶ 19, 379 P.3d 1218 (emphasis added). This instruction repeatedly has been provided. *See e.g.*, *Swenson v. Erickson*, 2000 UT 16, ¶ 11, 998 P.2d 807 ("[I]nterpretation of the covenants is governed by the **s**ame rules of construction as those used to interpret contracts."); *View Condo. Owners Ass'n v. MSICO, LLC*, 2005 UT 91, ¶ 21, 127 P.3d 697 ("[W]e interpret it according to its plain language."). When providing that

instruction, the Utah Supreme Court has relied on the Restatement (Third) of Property (Servitudes). *See, e.g.*, *Fort Pierce Indus. Park*, 2016 UT 28, ¶ 19 (block-quoting section 4.1 of the Restatement); *View Condo. Owners Ass'n.*, 2005 UT 91, ¶ 21 (quoting section 2.1 of the Restatement). In fact, the Utah Supreme Court and Utah Court of Appeals have expressly relied on that Restatement at least 14 times since it was promulgated in 2000.[10] The federal district court and the Tenth Circuit have cited it an additional 10 times.[11] Yet Brockbank ignores it.

Park City's MPSJ asks the Court to do what the Utah Supreme Court has directed – apply the Development Agreement as written. It is a contract-based analysis. "A servitude is created [] if the owner of the property to be burdened [] enters into ***a contract*** or makes a conveyance intended to create a servitude that complies" with the statute of frauds. Restatement (Third) Property (Servitudes) § 2.1(1) (emphasis added).[12] "No privity relationship between the parties is

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[10] *See SRB Inv. Co., Ltd v. Spencer*, 2020 UT 23, 463 P.3d 654; *Harrison v. SPAH Family Ltd.*, 2020 UT 22, 466 P.3d 107; *Hall v. Peterson*, 2017 UT App 226, 409 P.3d 133; *Fort Pierce Indus. Park*, 2016 UT 28; *Clearwater Farms LLC v. Giles*, 2016 UT App 126, 379 P.3d 1; *Metro. Water Dist. of Salt Lake & Sandy v. Questar Gas Co.*, 2015 UT App 265, 361 P.3d 709; *Wellberg Investments, LLC v. Greener Hills Subdivision*, 2014 UT App 222, 336 P.3d 61; *Smith v. Simas*, 2014 UT App 78, 324 P.3d 667; *Union Pac. R.R. v. Utah Dep't of Transp.*, 2013 UT 39, 310 P.3d 1204; *Holladay Towne Ctr., L.L.C. v. Brown Family Holdings, LLC*, 2011 UT 9, 248 P.3d 452; *Lunt v. Lance*, 2008 UT App 192, 186 P.3d 978; *Gillmor v. Macey*, 2005 UT App 351, 121 P.3d 57; *Smith v. Osguthorpe*, 2002 UT App 361, 58 P.3d 854.

[11] *See L.K.L. Assocs., Inc. v. Union Pac. R.R. Co.*, No. 2:15-CV-00347-BSJ, 2018 WL 2433563 (D. Utah May 29, 2018); *Dejean v. Grosz*, 645 F. App'x 754 (10th Cir. 2016); *Intermountain Res., LLC v. Jorgensen*, No. 2:08-CV-80 TS, 2011 WL 129213 (D. Utah Jan. 14, 2011); *McClellan v. United States*, No. 2:06-CV-634 DB, 2011 WL 778113 (D. Utah Mar. 1, 2011); *Intermountain Res., LLC v. Jorgensen*, No. 2:08-CV-80 TS, 2010 WL 4237313 (D. Utah Oct. 21, 2010); *Kane Cty. Utah v. Salazar*, 562 F.3d 1077 (10th Cir. 2009); *Walker v. 300 S. Main, LLC*, No. 2:05-CV-442 TS, 2008 WL 4862424 (D. Utah Nov. 7, 2008); *Weyerhaeuser Co. v. Brantley*, 510 F.3d 1256 (10th Cir. 2007); *S. Utah Wilderness All. v. BLM.*, 425 F.3d 735 (10th Cir. 2005); *First Unitarian Church of Salt Lake City v. Salt Lake City Corp.*, 308 F.3d 1114 (10th Cir. 2002).

[12] *See View Condo. Owners Ass'n.*, 2005 UT 91, ¶ 21 (quoting section 2.1 of the Restatement).

necessary to create a servitude." *Id.* § 2.4[13] "Neither the burden nor the benefit of a covenant is required to touch or concern land in order for the covenant to be valid as a servitude." *Id.* § 3.2. Rather, "[a] servitude should be interpreted to give effect to the intention of the parties ascertained from the language used in the instrument." *Id.* § 4.1.[14]

Brockbank eschews that contract-based analysis and instead asks the Court to perpetuate the outmoded four-factor analysis. In so doing, he argues a distinction that does not exist. Specifically, Brockbank argues that Utah's recent appellate mandates are limited to the "***interpretation*** of the restrictive covenants at issue," not the ***enforcement*** of those same restrictive covenants. [*See* Opp. at 14]. He is flat wrong:

- "[U]nambiguous restrictive covenants should be ***enforced*** as written." *Fort Pierce Indus. Park*, 2016 UT 28, ¶ 19 (emphasis added).
- "[U]nambiguous restrictive covenants should be ***enforced*** as written." *Swenson*, 2000 UT 16, ¶ 11 (emphasis added).
- "[U]nambiguous restrictive covenants should be ***enforced*** as written." *Holladay Duplex Mgmt. Co. v. Howells*, 2002 UT App 125, ¶ 2, 47 P.3d 104 (emphasis added).

The instruction to both interpret and enforce restrictive covenants the same way as other contracts is so well-established that Utah courts have merged the analysis. For example, in *Vanderwood v. Woodward*, 2019 UT App 140, 449 P.3d 983, the Utah Court of Appeals addressed a restrictive covenant dispute between "next-door neighbors." *Vanderwood*, 2019 UT App 140,

[13] *Cf. Flying Diamond Oil Corp. v. Newton Sheep Co.*, 776 P.2d 618 n.13 (Utah 1989) ("[The privity] requirement is probably the greatest source of confusion in the subject . . . . [To] require that there must be some such succession between the covenanting parties themselves – that there must have been a grant or conveyance between them at the time of the covenant or possibly some continuing interest of tenure, easement, or otherwise – is supported neither by ancient land law nor by modern policy.").

[14] *See Fort Pierce Indus. Park*, 2016 UT 28, ¶ 19 (quoting section 4.1 of the Restatement).

¶ 1. There was no direct contract between the neighbors. Moreover, the restrictive covenants at issue were created "before any of the parties purchased property within the Subdivision" and therefore needed to run with the land to be enforced. *See id.* ¶ 2. When "Woodward built a large detached garage . . . [it] infuriated" Vanderwood, who moved to enforce the restrictive covenants. *See id.* ¶¶ 1, 6. In response, the Utah Court of Appeals did not apply a unique or antiquated legal theory to resolve the dispute. Instead, it acknowledged the "claim that Woodward breached the terms of the Restrictions" and declared ***"[t]his is a claim for breach of a contract."*** *Id.* ¶ 14 (emphasis added) (citing *Swenson*, 2000 UT 16, ¶ 11).

In *UDAK Properties LLC v. Canyon Creek Commercial Cntr. LLC*, 2021 UT App 16, __ P.3d __, "UDAK acquired several parcels" that were the subject of restrictive covenants created years earlier. *UDAK Properties LLC*, 2021 UT App 16, ¶¶ 2-3. UDAK and another property owner then became involved in a dispute concerning the restrictive covenants. The Utah Court of Appeals recognized that "[r]estrictive covenants that run with the land" are a type of contract. *Id.* ¶ 14. As such, their interpretation "is governed by the same rules of construction as those used to interpret contracts." *Id.* "Provided that the language within the four corners of the agreement is unambiguous, ***we look no further than the plain meaning of the contractual language."*** *Id.* (emphasis added). The court then enforced the restrictive covenants as written, without performing the outmoded analysis Brockbank advocates.

Brockbank brushes off the above authority. He also fails to explain how the Court could both interpret and enforce a restrictive covenant in the same manner as any other contract while also proctoring a multi-factor test that is unlike any other contract analysis. [*See* Opp. at 14-15 (advocating four-factor test)].

B. The limited authority Brockbank cites does not compel a different analysis.

As noted, Brockbank incorrectly argues that *Fort Pierce* and the other Utah appellate opinions were "concerned with the *interpretation* of" restrictive covenants, not their enforcement. [*See* Opp. at 14]. Brockbank then relies on two appellate opinions that reference the historic four-factor analysis. A careful analysis of those cases confirms their limitations.

First, Brockbank cites *LD III LLC v. Mapleton City*, 2020 UT App 41, 462 P.3d 816, which identified the traditional common-law elements. However, that court relied exclusively on a 2012 case – *Stern v. Metropolitan Water Dist. of Salt Lake & Sandy*, 2012 UT 16, 274 P.3d 935. *See LD III LLC*, 2020 UT App 41, ¶ 13. The *LD III* court did ***not*** cite, for example: (1) *Fort Pierce Indus. Park*, 2016 UT 28; (2) *Swenson*; 2000 UT 16; (3) *Holladay Duplex Mgmt. Co.*, 2002 UT App 125; (4) *Vanderwood*, 2019 UT App 140; or (5) the Restatement (Third) of Property (Servitudes). Nor did it need to. The *LD III* court found that "intent that the covenant run with the land – was unambiguously absent under the plain language of the Original Agreement." *Id.* ¶ 14. In other words, the Court interpreted and enforced the restrictive covenant the same as any other contract – as written. The court was not asked and had no reason to consider the other, historic common law factors. Their mention was unnecessary to the issue on appeal; it was dictum.

Brockbank's citation to *Stern,* 2012 UT 16, is similarly unhelpful. In that case, the court addressed what "[a] successor-owner ***claiming the benefit*** of a predecessor-owner's covenant must demonstrate." *Stern*, 2012 UT 16, ¶ 40 (emphasis added). In this case, Brockbank is a successor-owner. But he is seeking to invalidate the Development Agreement, not claim its benefit. Moreover, the only issue on appeal in *Stern* was the question of intent. *See id.* ¶ 41 ("[Defendant] takes issue only with the intent requirement."). As in *LD III,* reference to any other issue was

therefore dictum. And, it was sloppy dictum. Specifically, Brockbank relies on paragraph 40 of that opinion. In that paragraph, the Utah Supreme Court suggested the common law imposed "***three*** requirements," followed by a list of ***four*** factors. *Id.* ("***(4)*** the covenant must be in writing."). *Id.*[15] Notably, other appellate opinions have disregarded that dictum. *See, e.g.*, *Fort Pierce Indus. Park*, 2016 UT 28, ¶ 19; *Vanderwood*, 2019 UT App 140.

A federal circuit court judge reflected:

> I cannot tell you how many times I have read briefs asserting an improbable proposition of law and citing a case as authority. The proposition sounds so dubious that I immediately look it up to see if the cited court can really have made this ruling. So often I find the proposition is indeed there, but was uttered in dictum – where the court paid no price, and consequently paid little attention.

Pierre N. Leval, *Judging Under the Constitution; Dicta About Dicta*, 81 N.Y.U. L. Rev. 1249, 1263 (2006). Brockbank's argument and citations illustrate that sentiment. The Utah Supreme Court and Utah Court of Appeals have instructed this Court to both interpret and enforce restrictive covenants the same as any other contract. Outdated case law and inapplicable dicta should not interfere with that direction.

C. Regardless, the Development Agreement still runs with the land.

Even if Brockbank's obsolete interpretation controlled, the Development Agreement still satisfies that standard. Park City's position in this regard previously was explained in its MPSJ. Brockbank's opposition challenges that analysis but does not change it. Rather than repeat its prior arguments, Park City incorporates them again here.

[15] At times, commercial databases such as Westlaw can contain transcription errors. This does not appear to be such an instance. The mistake is the same in the opinion published on the Utah Court's website. *See* https://www.utcourts.gov/opinions/supopin/Stern1216032012.pdf (last accessed February 16, 2021).

III. The Development Agreement unambiguously was intended to run with the land and bind Brockbank.

Because this Court must analyze the Development Agreement "using the same rules of construction that are used to interpret contracts," the plain language of that agreement is controlling. *See Fort Pierce*, 2016 UT 28, ¶ 19.

"The first step in contract interpretation is to look within the four corners of the agreement." *UDAK Properties LLC*, 2021 UT App 16, ¶ 14. "Provided that the language within the four corners of the agreement is unambiguous, we look no further than the plain meaning of the contractual language." *Id.* "Whether a contract is ambiguous is a question of law . . . ." *Id.* at ¶ 13. "[W]ords and phrases do not qualify as ambiguous simply because one party seeks to endow them with a different interpretation according to his or her own interests." *Saleh v. Farmers Ins. Exchange*, 2006 UT 20, ¶ 17, 133 P.3d 428. Rather, the party must present a "plausible" interpretation. The Utah Supreme Court has clarified the meaning of that standard:

> "Plausible" entered the English language from the Latin verb "plaudere," to applaud. Although the primary meaning of the word has evolved to mean likely or reasonable to a degree falling somewhat short of certainty, vestiges of its root live on in its connotation. In other words, to earn the designation of plausible, a notion, explanation, or interpretation must impart confidence in its credibility sufficient to merit our applause.

Id. ¶ 16. When considering whether a party's contract interpretation is plausible, the Court must "look for a reading that harmonizes the provisions and avoids rendering any provision meaningless." *Peterson & Simpson v. IHC Health Svs., Inc.*, 2009 UT 54, ¶ 13, 217 P.3d 716.

In this case, there are three key provisions of the Development Agreement that the Court must consider, harmonize, and avoid rendering meaningless.

A. Brockbank is UPCM's successor and, therefore, is a "Developer" under the Development Agreement.

Section 1.4 defines how "Developer" is used throughout the Development Agreement. [*See* Dev. Agmt. (Ex. B to MPSJ) at §§ 1.4]. It does so in a manner that includes Brockbank. "'Developer" means UPCM " ***and each of its assigns***, joint venture partners, ***and successors in interest***, whether in whole or in part." [*Id.* § 1.4 (emphasis added)].

A "successor in interest" is "[s]omeone who follows another in ownership or control of property." Black's Law Dictionary (11th ed. 2019).[16] "[T]he terms 'successors' and 'assigns' have long been used to create easements that run with the land." *Canyon Meadows Home Owners Ass'n. v. Wasatch County*, 2001 UT App 414, ¶ 15, 40 P.3d 1148. Indeed, "the word 'assigns' has been used to create a covenant that would bind subsequent owners since [1583]." *Id.* Even when, as here, the property is obtained through (an alleged) foreclosure, it is the owner's rights that are being foreclosed and, therefore, the purchaser still is that owner's "successor in interest." *Cf. Hayes v. Gibbs*, 169 P.2d 781, 786-88 (Utah 1946) (enforcing covenants after tax foreclosure).

In this case, Brockbank is UPCM's successor in interest.[17] He "follows [UPCM] in ownership or control of [Richardson Flats]." Black's Law Dictionary (11th ed. 2019). Indeed, whatever interest Brockbank claims to have in Richardson Flats came from UPCM. Because Brockbank is UPCM's successor in interest, he also satisfies the Development Agreement's broad definition of the term "Developer." [*See* Dev. Agmt. (Ex. B to MPSJ) at § 1.4]. Said differently, when the Development Agreement uses the word "Developer," it includes Brockbank.

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[16] *See also* https://www.merriam-webster.com/legal/successor%20in%20interest ("a successor to another's interest in property") (last accessed February 16, 2021).

[17] This same concept can be both expressed ways: UPCM is the *predecessor* to Brockbank's interest; Brockbank is the *successor* to UPCM's interest.

Section III of the Development Agreement declares that ***Developer*** will "restrict development of Richardson Flats." [*Id.* § 3.1]. By definition, that obligation was intended to bind both UPCM ***and*** its successor in interest – Brockbank.

B. The Development Agreement "shall run with all of the land."

"Park City is correct that '[a]n express statement in the document creating the covenant that the parties intend to create a covenant running with the land is usually dispositive of the intent issue.'" [Opp. at 16 (quoting MPSJ at 18)].

Section 8.1 unambiguously declares that the Development Agreement was intended to run with the land and bind all successors in interest. That section declares as follows:

> **8.1 Covenants Running with the Land.** The provisions of this Agreement shall constitute real covenants, contract and property rights and equitable servitudes, ***which shall run with all of the land*** subject to this Agreement. ***The burdens*** and benefits hereof ***shall bind*** and inure to the benefit of each of the Parties hereto and ***all successors in interest*** to the Parties hereto. ***All successors in interest shall succeed*** only to those benefits and ***burdens of this Agreement*** which pertain to the portion of the Project to which the successor holds title. Such titleholder is not a third party beneficiary of the remainder of this Agreement or to zoning classifications and benefits relating to other portions of the Project.

[*See* Dev. Agmt. (Ex. B to MPSJ) at § 8.1 (emphasis added)].

"It is a court's duty to enforce the intentions of the parties as expressed in the plain language of the covenants." *Holladay Duplex Mgmt. Co., LLC*, 2002 UT App 125, ¶ 2 (cleaned up). "Such language is to be taken in its ordinary and generally understood and popular sense, and is not to be subjected to technical refinement nor the words torn from their association and their separate meanings sought in a lexicon." *Id.* The Court also should "avoid[] rendering any provision meaningless." *Peterson & Simpson*, 2009 UT 54, ¶ 13.

Brockbank's argument fails the applicable legal standard. He offers no plausible interpretation that would allow the Court to both recognize the unambiguous language declaring that the Development Agreement "shall run with ***all*** of the land" – and yet then declare that the Development Agreement does not run with Richardson Flats. [*See id.* § 8.1]. He similarly offers no plausible interpretation of how the Court could both declare that "[t]he burdens" of the Development Agreement "shall bind . . . ***all*** successors in interest" – and yet then declare that UPCM's successor in interest (i.e., Brockbank) is not bound. [*Id.*]. Such inconsistencies do not merit the Court's applause.

Rather than offer a plausible interpretation of the contract actually before the Court, Brockbank again cites *LD III LLC*, 2020 UT App 41. However, Brockbank does not detail the contract language at issue in that case. It is a stark contrast to the language in this case:

Agreement in *LD III, LLC*	Agreement Before this Court
10. Assignment of Agreement. Owner's rights under this Agreement ***shall be personal to Owner*** and shall ***only run with the land so long as*** Owner or a company which is affiliated with or under common ownership and control of Owner shall own and be the Owner of the Property. *LD III,* 2020 UT App 41, ¶ 3	**8.1 Covenants Running with the Land.** The provisions of this Agreement shall constitute real covenants, contract and property rights and equitable servitudes, ***which shall run with all of the land*** subject to this Agreement. ***The burdens*** and benefits hereof ***shall bind*** and inure to the benefit of each of the Parties hereto and ***all successors in interest*** to the Parties hereto. Dev. Agmt. (Ex. B to MPSJ) at § 8.1

The plaintiff in *LD III* was a developer who had no affiliation with the original "Owner" referenced in section 10 of the applicable agreement. *See id.* ¶¶ 2-7. Nevertheless, that plaintiff argued that benefits provided to the "Owner" under the agreement were not personal but rather ran with the land. *See id.* The Utah Court of Appeals disagreed. "Section 10 would be rendered meaningless

by [plaintiff's] reading." *Id.* ¶ 17. In this case, Section 8.1 would be rendered meaningless by Brockbank's argument.

Park City has not "ignore[d] the Utah Court of Appeal's decision in *LD III*." [Opp. at 16]. To the contrary, Park City encourages the Court to compare the contract language at issue in *LD III* with the language at issue in this case. It is not a comparison that favors Brockbank. Unlike *LD III*, the Development Agreement before this Court confirms that its provisions "run with ***all*** of the land" and bind "***all*** successors in interest." [*Id.* at § 8.1 (emphasis added)].

C. The Development Agreement granted Park City the right to enforce its terms against both UPCM's successors (§ 8.1) and against UPCM (§ 8.2).

Brockbank's argument that the Development Agreement was not intended to run with the land relies almost exclusively on Section 8.2 of the Development Agreement. As noted already, Brockbank makes his argument without offering an interpretation that is consistent with Section 8.1 of the Development Agreement. In contrast, Park City offers a unified interpretation:

Section	Language	Park City's Interpretation
8.1	"The provisions of this Agreement shall constitute real covenants, contract and property rights and equitable servitudes, which shall ***run with all of the land*** subject to this Agreement."	The Development Agreement runs with all the land.
8.1	"The burdens and benefits hereof shall ***bind*** and inure to the benefit of each of the Parties hereto and ***all successors in interest*** to the Parties hereto."	All successors in interests are bound.
8.2	"Developer and Deer Valley shall have ***the right***, without obtaining the City's consent or approval, ***to assign or transfer all or any portion of its rights***, but not its obligations, under this Agreement to any party acquiring an interest or estate in the Project, or any portion thereof." (capitalization altered).	Developers are free to transfer their *benefits* without City's consent. But, cannot unilaterally shed obligations, even if a successor ***also*** is bound under section 8.1.

8.2	"Third party assumption of Developer's or Deer Valley's obligations under this Agreement ***shall not relieve Developer or Deer Valley of any responsibility or liability with respect to the expressly assumed obligation***, unless the City expressly agrees in writing to the reduction or elimination of Developer's or Deer Valley's responsibility or liability." (capitalization altered).	Developer cannot unilaterally shed obligations, even if a successor ***also*** is bound by the same obligations.

Under Park City's interpretation, section 8.2 does not nullify section 8.1. To the contrary, those sections were intended to be – and must be – read in harmony. Section 8.1 affirms that the covenants run with the land and bind UPCM's successors. Section 8.2 then ***expands*** that liability. Under Section 8.2, UPCM guarantees the performance of its successors' obligations. Together then, these sections provide Park City with the right to enforce the Development Agreement against both UPCM's successors (§ 8.1) ***and*** against UPCM (§ 8.2). That is the only reading that harmonizes the agreement. It also is the only reading that comports with the underlying facts. The Development Agreement addressed approximately 4,000 acres and was negotiated over more than a decade. Yet Brockbank contends its obligations fall apart the minute any land is transferred. His interpretation is not plausible and should be rejected.

IV. Regardless, Park City can enforce an equitable servitude.

"[O]ne taking land with notice that it is subject to an agreement of this character will not, in equity and good conscience, be permitted to violate its terms." 3 Tiffany Real Prop. § 858 (3d ed.). "[T]here is a strong disinclination to be bound by technical rules in determining the right to enforce restrictive covenants in equity." 51 A.L.R. 3d 556 § 2[a]. Rather, the question primarily is one of notice. "[I]t would be inequitable to allow the original party burdened by the covenant

to escape liability by mere conveyance to a third party with notice." *Canyon Meadows Home Owners Ass'n*, 2001 UT App 414, ¶ 16 n.8.

It is undisputed that Brockbank had notice of the Development Agreement and the limitations it imposes over Richardson Flats. [*See* SOF No. 20]. He came into this transaction fully aware that the Development Agreement created "real covenants, contract and property rights and ***equitable servitudes."*** [*See* Dev. Agmt. (Ex. B to MPSJ) at § 8.1 (emphasis added)]. Because Brockbank cannot dispute that he was aware of the development restrictions, he argues there was no intent to create an ongoing servitude that touches and concerns the land. He is incorrect.

First, the Development Agreement was intended "to restrict development of Richardson Flats." [Dev. Agmt. § 3.1]. Nothing suggests that intent was short-term. Rather, the Development Agreement contemplated a "perpetual[]" restriction. [*Id.*]. When Brockbank (allegedly) purchased Richardson Flats East, he knew it was subject to an intended, long-term development restriction. [*See* SOF No. 20]. That is the same restriction Park City seeks to enforce.

Second, the agreement "to restrict development of Richardson Flats" touches and concerns that land. "[T]he clearest example of a covenant that 'touches and concerns' the land is one which calls for a party to do, or refrain from doing, a physical act on the land." 20 Am. Jur. 2d Covenants, Etc. § 24. "A covenant restricting the type of building upon the promisor's land satisfies the requirement that the covenant must touch and concern the land." 3 Tiffany Real Prop. § 854 (3d ed.). Here, the equitable servitude defines and limits how the property can be used. It is the definition of a real-property dispute.

V. Park City has the power to enforce its contract and real property rights.

Park City is not legislatively regulating Richardson Flats. It is seeking judicial enforcement of its contract and property rights.

Park City's MSPJ detailed the types of municipal powers that have existed for more than 100 years. [*See* Motion at 21-23]. As Park City further explained, "[t]he Utah Municipal Code itself dictates that '[t]he powers herein delegated to any municipality shall be liberally construed to permit the municipality to exercise the powers granted by this act except in cases clearly contrary to the intent of the law.'" *Pearson v. S. Jordan City*, 2012 UT App 88, ¶ 28, 275 P.3d 1035 (citing Utah Code § 10-1-103)). Park City's MPSJ therefore put the challenge to Brockbank – explain how Park City's enforcement of real property and contract rights is "clearly contrary to the intent of the law." *Id.* Brockbank did not rise to that challenge.

The ***only*** citation Brockbank provides in support of his argument is Utah Code section 10-9a-102. [*See* Opp. at 19]. Indeed, Brockbank declares that "Park City may be right except for Section 10-9a-102." [*Id.*]. Brockbank's keystone argument does not hold the weight of analysis.

First Brockbank cites the wrong version of the Utah Code. While it is true that section 10-9a-102 currently includes the words "development agreements," *see* Utah Code § 10-9a-102(2), those words were added in 2005 – six years ***after*** the original Development Agreement, *see* 2005 UT Laws Ch. 254 (S.B. 60). And although the Development Agreement was restated in 2007, the development restrictions for Richardson Flats were unchanged. [*Compare* Orig. Dev. Agmt. (Ex. A to MPSJ) at § 3 *with* Dev. Agmt. (Ex. B to MPSJ) at § 3]. Brockbank cannot explain how a 2005 legislative amendment invalidates contract and property rights granted and recorded in 1999.

Second, Brockbank concedes that Park City would "be right except for Section 10-9a-102." [Opp. at 19-20]. The Court must therefore examine whether the plain language of section 10-9a-102 withdraws the municipal powers that Brockbank concedes otherwise exist. It does not. Section 10a-9a-102 declares that a municipality "***may***" take certain actions. It is a recognition of municipal powers, not a revocation of otherwise existing municipal powers, nor an exclusive enumeration of municipal powers. "We will not infer substantive terms into the text that are not already there." *In re Estate of Heater*, 2020 UT App 70, ¶ 19.

Third and finally, even if he were right, Brockbank has failed to establish that the Development Agreement is void as a matter of law. *Cf. Wittingham, LLC v. TNE Lt'd Partnership*, 2020 UT 49, ¶ 25, 469 P.3d 1035 ("[T]here is a rebuttable presumption that defective contracts are voidable rather than void."). *See also supra* at n.4. Brockbank's effort to invalidate an agreement that has been ratified and acknowledged for decades fails.

Park City has the express right to "enter into contracts" and to obtain and enforce real property rights "within or without the municipality's corporate boundaries." *See* Utah Code § 10-8-2(1)(a)(iii); *id.* § 10-1-202. Those rights "shall be liberally construed" in Park City's favor "except in cases clearly contrary to the intent of the law." *Id.* § 10-1-103. Brockbank cannot establish that the 2005 statutory amendment "clearly" revoked and voided Park City's contract and property rights.

VI. Brockbank failed to establish abandonment.

Brockbank has the burden of establishing abandonment. To do so, he must show both "an action releasing the right to use the easement combined with clear and convincing proof of the intent to make no further use of it." *Lunt v. Lance*, 2008 UT App 192, ¶ 25, 186 P.3d 978.

Critically, Brockbank's Opposition tries to reverse the burden of proof. Instead of presenting evidence of abandonment, Brockbank argues that Park City has not proven the absence of abandonment. [*See* Opp. at 20]. That is not the standard. But in any event, Brockbank is wrong. The Development Agreement "restrict[s] development of Richardson Flats," and no such development has occurred. [*See* Dev. Agmt. (Ex. B) to MPSJ]. There is no abandonment when a property right has been used as intended for decades.

VII. There is no need for additional discovery.

"The court shall grant summary judgment if the moving party shows that there is no genuine dispute as to any material fact . . . ." Utah R. Civ. P. 56(a). The facts at issue in Park City's MPSJ are undisputed. There is no need to conduct discovery about undisputed facts.

CONCLUSION

The Court should interpret and enforce the unambiguous language in the Development Agreement. Park City's MPSJ should be granted.

Dated this 16th day of February, 2021.

JAMES DODGE RUSSELL & STEPHENS, P.C.

By: */s/ Mitchell A. Stephens*
Mark F. James
Mitchell A. Stephens

Counsel for Park City Municipal Corp.

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of February, 2021, I caused a true and correct copy of the foregoing to be served via the court's electronic filing system, GreenFiling, upon all counsel of record.

By: */s/ Mitchell A. Stephens*
Mitchell A. Stephens