

2007

Holladay Towne Center LLC v. Holladay City : Reply Brief

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca3



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Perrin R. Love; Clyde Snow Sessions and Swenson; Attorney for Plaintiff/Appellant.

H. Craig Hall; Patrick S. Malone; Chapman and Cutler; Attorney for Defendant/Appellee.

Recommended Citation

Reply Brief, *Holladay Towne Center v. Holladay City*, No. 20070535 (Utah Court of Appeals, 2007).
https://digitalcommons.law.byu.edu/byu_ca3/362

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

FILED
UTAH APPELLATE COURTS
FEB 25 2008

**HOLLADAY TOWNE CENTER
LLC, a Utah Limited Liability
Company,**

Appellant/Plaintiff,

VS.

HOLLADAY CITY, a municipal corporation,

Appellee/Defendant.

Case No. 20070535 CA

Priority No. 15

REPLY BRIEF OF APPELLANT

Appeal from a Final Judgment of the
Third District Court of Salt Lake County
State of Utah
Judge Glenn K. Iwasaki

Perrin R. Love (5505)
CLYDE SNOW SESSIONS & SWENSON
One Utah Center, Thirteenth Floor
201 South Main Street, Suite 1300
Salt Lake City, Utah 84111
Telephone: (801) 322-2516

Attorneys for Plaintiff/Appellant

H. Craig Hall (1307)
James K. Tracy (6668)
Patrick S. Malone (8914)
CHAPMAN & CUTLER
201 SOUTH Main Street, Suite 2000
Salt Lake City, Utah 84111
Telephone: (801) 536-1414

Attorneys for Defendant/Appellee

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTRODUCTION	1
ARGUMENT	3
I. In Opposition to Summary Judgment, HTC Has No Duty to Marshal the Evidence, and the District Court’s Findings of Fact Do Not Affect HTC’s Appeal, in any Event	3
II. The Legal Authorities Cited by Holladay Confirm that Exhaustion is Not Required When Futile, and the Facts Argued and Ignored by Holladay Confirm that Summary Judgment was Improper	4
III. HTC Properly Asserted Below that the UGIA Does Not Apply to Claims for Equitable Relief, but the District Court Committed Plain in Entering Summary Judgment, as the City Tacitly Acknowledges	8
IV. Holladay Cites No Authority Whatever for its Assertion that Utah Law Does Not Recognize a Claim for Vested Rights, and Essentially Acknowledges the Contrary	10
CONCLUSION	13

TABLE OF AUTHORITIES

Cases:

<i>American Tierra Corp. v. City of West Jordan</i> , 840 P.2d 757, 759-60 (Utah 1992)	8
<i>Crisman v. Hallows</i> , 2000 UT App. 104, 999 P.2d 1249	3
<i>El Rancho Enters, Inc. v. Murray City Corp.</i> , 565 P.2d 778 (Utah 1977)	8
<i>Heiner v. Groves & Sons</i> , 790 P.2d 107 (Utah App. 1990)	12
<i>Houghton v. Dept. of Health</i> , 2005 UT 63, 125 P.3d 860	8
<i>Johnson v. Utah State Ret. Office</i> , 621 P.2d 1234 (Utah 1980)	4
<i>Lamb v. B&B Amusement Corp.</i> , 869 P.2d 926 (Utah 1993)	11
<i>Maverick Country Stores, Inc. v. Indus. Comm’n of Utah</i> , 860 P.2d 944 (Ut. App. 1993)	5
<i>McFadden v. Cache County Corp.</i> , 2006 UT App. 256	5
<i>Mountain Fuel Supply Co., v. PSC</i> , 861 P.2d 414 (Utah 1993)	5
<i>Nebeker v. Utah State Tax Commission</i> , 2001 UT 74, 34 P.3d 180	5
<i>Patterson v. American Fork City</i> , 2003 UT 7, 67 P.3d 466	5, 8, 9
<i>Smith v. Four Corners Mental Health Center, Inc.</i> , 2003 UT 23, 70 P.3d 904	3
<i>State v. Irwin</i> , 924 P.2d 5 (Utah App. 1996)	10
<i>Western Land Equities, Inc. v. City of Logan</i> , 617 P.2d 388 (Utah 1980)	11
<i>Whipple v. American Fork Irrig. Co.</i> , 910 P.2d 1218 (Utah 1996)	12

Rules:

Utah R. Civ. P. 8(a)	9, 10
Utah R. Civ. P. 12(b)(6)	8, 9
Utah R. Civ. P. 15(a)	10
Utah R. App. P. 24(a)(9)	3

Appellant Holladay Towne Center LLC (“HTC”), by and through undersigned counsel, respectfully submits its Reply Brief of Appellant.

INTRODUCTION

Holladay City’s (“Holladay”) Brief (“Br. Opp.”) opposing HTC’s appeal rests on misstatements and unsupported characterizations of substantive and procedural Utah law, and factual disputes that cannot be resolved on summary judgment. First, Holladay incorrectly accuses HTC of failing to marshal the evidence that supports the District Court’s findings of fact. There is no duty to marshal the evidence on an appeal of a grant of summary judgment, but only to identify disputed issues of fact. And even if there were a duty to marshal the evidence, HTC’s alleged failure to marshal the evidence would have no effect at all on its appeal, because the District Court made no finding that administrative appeal was not futile, or that the administrative process was not inoperative and unavailable to HTC.

Second, Holladay suggests that Utah courts recognize an exception to the doctrine of exhaustion of administrative remedies only when an administrative appellate body lacks jurisdiction. No Utah court has held that administrative remedies are futile only when the administrative body lacks jurisdiction, and Holladay’s assertion is inconsistent with the court decisions it cites and which are cited by HTC. Holladay then characterizes the Denial and Rejection of HTC’s Application and otherwise disputes the facts in an attempt to argue that

the administrative process was not inoperative and unavailable to HTC. The factual dispute highlighted by Holladay simply underscores the impropriety of summary judgment.

Third, Holladay does not attempt to defend on the merits the District Court's dismissal of HTC's claims for equitable relief, and tacitly concedes that the UGIA does not apply to claims for equitable relief. Holladay instead argues that HTC did not preserve its appeal in the District Court. The pleadings and oral argument transcript, however, show that the issue was addressed and preserved below, and that Holladay admitted that the UGIA does not apply to claims for equitable relief. But even if the issue had not been preserved, the District Court's ruling is plain error and should be reversed.

Finally, Holladay cites not a single court decision that supports the District Court's ruling that Utah law does not recognize a claim for vested rights. Holladay attempts to characterize "vested rights" as a "concept" rather than a claim for relief, but the distinction finds no support in the *Western Land Equities* or other cases recognizing vested rights. Holladay's assertion that HTC did not identify a "place in the record" where HTC alleged that Holladay improperly applied a zoning ordinance retroactively, is wrong. It is also irrelevant, because the District Court did not rule that HTC failed to allege the necessary elements of a claim for vested rights, but that no such claim exists under Utah law. Even if the District Court had ruled that HTC had not alleged all the elements of a vested rights

claim, the ruling was incorrect under the notice pleading standards of Utah R.'s Civ. P. 8(a) and 15, because HTC can allege facts that would entitle it to relief on its vested rights claim.

For all of these reasons, this Court should reverse the District Court's rulings dismissing HTC's Claims for Relief.

ARGUMENT

I. IN OPPOSITION TO SUMMARY JUDGMENT, HTC HAS NO DUTY TO MARSHAL THE EVIDENCE, AND THE DISTRICT COURT'S FINDINGS OF FACT DO NOT AFFECT HTC'S APPEAL, IN ANY EVENT.

Holladay's assertion that "HTC has not marshaled the evidence as Required by Rule 24(a)(9) of the Utah Rules of Appellate Procedure" (Br. Opp. at 7), is a red herring. There is no duty to marshal evidence when appealing a grant of summary judgment:

When appealing a district court's grant of summary judgment, however, the appellant has no obligation to marshal the evidence. The marshaling obligation only arises after a party challenges the sufficiency of the evidence to support a jury's verdict or a district court's ruling containing specific findings of fact. At the summary judgment stage, the district court is not concerned about the sufficiency of any evidence because it does not resolve any factual disputes.

Smith v. Four Corners Mental Health Center, Inc., 2003 UT 23, ¶ 16 n. 6; 70 P.3d 904, 910 n. 6; *accord*, *Crisman v. Hallows*, 2000 UT App. 104, ¶ 8 n. 3, 999 P.2d 1249, 1250 n. 3.

But even if HTC has a duty to marshal evidence, HTC's alleged failure to do so would squarely remain a red herring. Holladay asserts that "District Court's findings of fact should therefore be affirmed," but makes no attempt to explain how affirming those factual findings would affect HTC's appeal. The reason is that there would be no effect at all, because the

District Court’s narrowly circumscribed findings of fact represent the starting point of HTC’s appeal. Specifically, the District Court made no factual findings as to whether administrative appeal to the Planning Commission or to the City Council was futile.¹

Because HTC has no duty to marshal the evidence, but only to identify disputed issues of fact, and because affirming the District Court’s findings of fact would not affect HTC’s appeal on the merits, this Court should reject Holladay’s assertions regarding the duty to marshal evidence on appeal.

II. THE LEGAL AUTHORITIES CITED BY HOLLADAY CONFIRM THAT EXHAUSTION IS NOT REQUIRED WHEN FUTILE, AND THE FACTS ARGUED AND IGNORED BY HOLLADAY CONFIRM THAT SUMMARY JUDGMENT WAS IMPROPER.

Holladay attempts to oppose HTC’s conclusion that administrative appeal was futile, by misconstruing the law and then by disputing the facts. Holladay misconstrues the law by stating that, since *Johnson v. Utah State Ret. Office*, 621 P.2d 1234 (Utah 1980), Utah courts “appear to have found that administrative appeals would serve ‘no useful purpose’ only in situations where the administrative body lacks the jurisdiction to grant the relief sought by a potential litigant.” (Br. Opp. at 10-11.)

¹ The District Court made only seven Findings of Fact: (1) on January 30, 2006, HTC filed its Application (Add. 13, ¶ 1); (2) on February 24, 2006, the City informed HTC of “deficiencies” in the Application, and requested revisions; (3) on March 30, 2006, the City “sent a letter” denying HTC’s Application, and refunding the application fee (*id.*, ¶ 3); (4) the City has adopted Ordinances §§ 13-84.100 and 13-84.110 (*id.*, ¶ 4); HTC did not appeal the March 30, 2006 decision to the Planning Commission or the City Council (*id.*, ¶ 5); (6) on May 1, 2006, HTC filed its legal action (*id.*, ¶ 6), and (7) HTC did not provide written notice of its claims before filing its Complaint (*id.*, ¶ 7).

Of course, no Utah court had held that administrative appeals serve no useful purpose or are futile only when the administrative body lacks jurisdiction, and the City's gloss is inconsistent with the language of the authorities it cites as well as the authorities cited in HTC's Brief. Utah courts have consistently and repeatedly stated that exceptions to the doctrine of exhaustion of administrative remedies exist where "it appears there is a likelihood that some oppression or injustice is occurring," *Nebeker v. Utah State Tax Com'n.*, 2001 UT 74, ¶ 14; where "there is a chance that irreparable injury would occur if exhaustion was required," *Maverick Country Stores, Inc. v. Indus. Comm'n of Utah*, 860 P.2d 944, 947 (Ut. App. 1993); where "it would be unconscionable not to review the alleged grievance," *McFadden v. Cache County Corp.*, 2006 UT App. 256, ¶ 1; or, as here, where the "entire administrative appeals process is inoperative or unavailable," *Patterson v. American Fork City*, 2003 UT 7, ¶ 20, 67 P.3d at 472.²

To support its assertion that HTC "never provided the Planning Commission the opportunity to rethink a determination made by a staff member" (Br. Opp. at 12), Holladay

² Holladay cites *Maverick Country Stores* and *McFadden* for the general principle that the failure to exhaust administrative remedies ordinarily deprives a court of jurisdiction (Br. Opp. at 9), but each decision recognizes the "exceptions" to the general principle quoted in the text, above. In *McFadden*, the court affirmed a factual finding that no exceptional circumstances existed, because the appellant conceded that he did not rely on a county employee's alleged misinformation in deciding not to appeal to the Board of Adjustment. See *McFadden v. Cache County Corp.*, *supra*, 2006 UT App. 256, ¶ 1.

Holladay also cites *Mountain Fuel Supply Co., v. PSC*, 861 P.2d 414 (Utah 1993) for the general principle, but it does not address exceptions to the principle.

then disputes and characterizes certain facts. Holladay states that the March 30 Denial and Rejection “was not a specific direction regarding HTC’s application; it was instead a general, common sense instruction that the Planning Commission did not want City staff to present applications that City staff did not believe complied with the requirements of the City zoning ordinances.” (Br. Opp. at 14 n. 5.) That characterization, however, is unsupported in the record, and is inconsistent with the plain language of the Denial and Rejection, which states that the Application cannot be approved by the Planning Commission:

The current plan, as drafted, cannot be approved by the Planning Commission and we, as staff, have been instructed by the Planning Commission not to bring applications before them that do not comply.

(HTC’s Br., Add. 3.) (Emphasis added.) In any event, Holladay’s characterization of the Denial and Rejection does nothing more than highlight a disputed issue of fact that could not be properly resolved on summary judgment, particularly in light of the reasonable inferences to which HTC was entitled.

Holladay attempts to downplay the significance of the moratorium and its revisions to its zoning ordinance, by arguing that they applied only to new applications. (Br. Opp. at 16.) Holladay ignores the surrounding facts, circumstances, and inferences, all of which compel the conclusion that the entire administrative appeals process was inoperative and unavailable. In brief summary, those facts, circumstances, and inferences include:

Immediately after Holladay hand-delivered the Denial and Rejection on March 30, 2006, at 4:50 p.m, the Holladay City Council held a special meeting. The sole purpose of the meeting, which lasted no longer than five minutes, was to place a six-month moratorium on new land use applications. During the moratorium, HTC met or communicated with City staff, the Mayor, and members of the City Council, all of whom encouraged HTC to submit site plans and architectural renderings. At the end of the moratorium, however, the City Council revised its zoning ordinance to specifically exclude HTC's Walgreen's Application. (See HTC's Brief, Statement of Facts, ¶¶ 3-7.)

As HTC argues in more detail in its opening Brief (at 12-14), all of these facts establish that the entire administrative process was inoperative and unavailable to HTC, and that appeal to either the Planning Commission or the City Council was futile. In opposition to summary judgment (and before any discovery was conducted), HTC was entitled to the compelling inference that City staff, the Planning Commission, and the City Council coordinated their actions to foreclose HTC's Application, and to ensure that HTC's project was never built.

Because Holladay misconstrues the law and improperly disputes the facts, this Court should reverse the District Court's entry of summary judgment dismissing HTC's claims for failure to exhaust administrative remedies.

III. HTC PROPERLY ASSERTED BELOW THAT THE UGIA DOES NOT APPLY TO CLAIMS FOR EQUITABLE RELIEF, BUT THE DISTRICT COURT COMMITTED PLAIN IN ENTERING SUMMARY JUDGMENT, AS THE CITY TACITLY ACKNOWLEDGES.

Holladay does not dispute but essentially concedes the fundamental principle that the UGIA does not apply to claims for equitable relief, but only to claims for money damages. Instead, Holladay argues merely that HTC “failed to present this argument in the court below.” (Br. Opp. at 17.) The assertion is squarely wrong, because Holladay presented and argued this issue before the District Court.

In its Reply Memorandum in Support of Motion to Dismiss, for example, Holladay admitted the principle that the UGIA does not apply to claims for equitable relief:

While Plaintiff would be right to argue that any equitable claims it may have are not subject to the notice requirements of UGIA, it is incorrect that “appeals of land use decisions under LUDMA” and that takings actions under Article I, Section 22 of the Utah Constitution are exempt from the notice provisions of UGIA.

(R. 126.) (Emphasis added.)

In his opening argument, Holladay’s counsel argued:

With regard to the Governmental Immunity Act, notice–written notice is required on certain claims. They [i.e., HTC] assert that because this is a land use decision claims, written notice is not required. They’re looking at the *Patterson* case. In *Patterson*, your honor, the Court does not say that equitable claims never need written notice. What they say is generally that is the case.

The real question here is, is the denial—is the claim for denial of a land use application an equitable claim to which the written notice requirement of the Governmental Immunity Act apply? That’s the question.

(R. 179 at 6-7.) (Emphasis added.)

The answer to counsel’s rhetorical question is, “yes.” Each of HTC’s claims (other than its takings claim for money damages) seeks equitable relief. Each of those claims is not subject to the notice provisions of the UGIA, as HTC’s counsel responded in argument below:

I’ll take 30 seconds on the Governmental Immunity Act, your honor. I may have handled—as a City Attorney and in private practice, I may have handled 30 of these claims and been involved in another 20 or 30 with the County, the City, everybody else that helped write the bloody statute. Not a soul has ever raised a Governmental Immunity Act notice defense in those claims, not Mr. Burnett, not anybody.

The reason is simple. Its not a claim for which the governmental Immunity Act applies. I’m not asking them for money, except in the takings claim which is self-effectuating and doesn’t require notice on the basic claims. I’m simply asking them to do what’s right, and I’m not asking them for money.

(R. 179, at 15-16.) (Emphasis added.)

These quotations show that the applicability of the UGIA to claims for equitable relief was addressed below and the issue preserved for appeal. Equally important, Holladay’s telling admission in its Reply Memorandum that HTC “would be right to argue that any equitable claims it may have are not subject to the notice requirements of UGIA,” and its

failure to address or dispute the unequivocal and overwhelming case law cited by HTC,³ establish that the entry of summary judgment dismissing HTC's equitable claims for relief was plain error.

Because the error was so plain, this Court should reverse the District Court's dismissal of HTC's claims for equitable relief for failure to comply with the UGIA, whether or not the issue was presented below. *See, e.g., State v. Irwin*, 924 P.2d 5 (Utah App. 1996), *cert. denied*, 931 P.2d 146 (Utah 1997).

IV. HOLLADAY CITES NO AUTHORITY WHATEVER FOR ITS ASSERTION THAT UTAH LAW DOES NOT RECOGNIZE A CLAIM FOR VESTED RIGHTS, AND ESSENTIALLY ACKNOWLEDGES THE CONTRARY.

Holladay argues that “vested rights” is not “a cause of action in and of itself” (Br. Opp. at 18), but cites not one supporting authority. Nor does Holladay cite a single court decision dismissing a vested rights claim pursuant to Rule 12(b)(6). Instead, Holladay attempts to draw an artificial distinction between a “doctrine” and a “claim,” and essentially acknowledges that Utah law recognizes a claim for vested rights:

Under Utah law, vested rights are tied to the issue of retroactive application of zoning laws. Under the vested rights doctrine, an applicant for a land use application is entitled to favorable action “if the application

³*Patterson v. American Fork City*, 2003 UT 7, ¶¶ 12-13, 67 9.3d 466, 470-71; *Houghton v. Dept. of Health*, 2005 UT 63, 125 P.3d 860, 866, n. 3; *American Tierra Corp. v. City of West Jordan*, 840 P.2d 757, 759-60 (Utah 1992); *El Rancho Enters, Inc. v. Murray City Corp.*, 565 P.2d 778, 779 (Utah 1977).

conforms to the zoning ordinance in effect at the time of the application, unless changes in the zoning ordinances are pending which would prohibit the use applied for, or unless the municipality can show a compelling reason for exercising its police power retroactively to the date of application.”

(Br. Opp. at 19) (quoting *Western Land Equities, Inc. v. City of Logan*, 617 P.2d 388, 391 (Utah 1980)).

This quotation states the essence of HTC’s vested rights claim: HTC has a vested right to develop its Property, because the Application met all applicable zoning ordinances and requirements, and was wrongly rejected by the City as a pretext to enable the City to enact a moratorium and amend its zoning ordinances to exclude HTC’s project.⁴

Holladay’s assertion that HTC has “waived” its claim for vested rights, by failing to “rebut the City’s argument that ‘vested rights’ is not a legitimate cause of action” (Br. Opp. at 20), is nonsensical. HTC alleged the vested rights claim in its complaint, Holladay moved to dismiss pursuant to Rule 12(b)(6),⁵ and the District Court granted the motion. HTC is fully entitled to appeal the District Court’s ruling dismissing the claim.

⁴ Contrary to Holladay’s assertion (Br. Opp. at 19 n. 7), HTC’s vested rights claim is not a restatement of its claim alleging Arbitrary, Capricious and/or Illegal Decision, or its takings or estoppel claims. But even if it were a restatement, HTC is allowed to allege its claims in the alternative, pursuant to Utah R. Civ. P. 8(a).

⁵ In support of its waiver argument, Holladay cites *Lamb v. B&B Amusement Corp.*, 869 P.2d 926 (Utah 1993), which held that a party who failed to object to the admission of evidence *at trial* had waived the issue on appeal. *See* 869 P.2d at 931. The case has no relevance to the appeal of a dismissal pursuant to Utah R. Civ. P. 12(b)(6).

Further, Holladay's assertion that "HTC has not identified any place in the record where HTC has ever alleged that Holladay improperly applied a new zoning ordinance retroactively" (Br. Opp. at 20), is wrong. Before the District Court below, HTC alleged that, at the end of the six-month moratorium, Holladay revised its zoning ordinance specifically to exclude HTC's Application and project. *See, e.g.*, R. 89, ¶ 12(Affidavit of Tom Hulbert); R. 78, 83 (HTC's Memorandum in Opposition to Defendant's Motion for summary Judgment and to Dismiss); R. 179 at 12-13 (oral argument).

In any event, whether or not HTC "identified any place in the record" where it alleged that Holladay has attempted to apply a zoning ordinance retroactively, is irrelevant. The District Court did not rule that HTC failed to state the elements of a vested rights claim; it incorrectly ruled that no such claim exists. If the District Court had ruled that HTC had failed to allege the necessary elements of a claim under the notice pleading requirements of Utah R. Civ. P. 8(a), this Court would uphold that ruling only if it appeared to a certainty that HTC would not be entitled to relief under any set of facts which could be proved to be true. *See, e.g., Whipple v. American Fork Irrig. Co.*, 910 P.2d 1218 (Utah 1996); *Heiner v. Groves & Sons, Co.*, 790 P.2d 107 (Utah App. 1990). And even then, HTC should be granted leave under Utah R. Civ. P. 15(a) to amend its complaint to allege the necessary elements of a vested rights claim.

Because the District Court incorrectly ruled that Utah law does not recognize a claim for vested rights, this Court therefore should reverse the dismissal of HTC's Second Claim for Relief.

CONCLUSION

For the reasons stated in this Reply Brief and in HTC's Brief of Appellant, this Court should reverse the District Court's (i) summary judgment dismissing all of HTC's claims for failure to exhaust administrative remedies, when pursuit of administrative remedies would have been futile; (ii) summary judgment dismissing HTC's First, Second, Fourth and Fifth Claims for Relief, because the notice provisions of the UGIA do not apply to claims for equitable relief; and (iii) dismissal of HTC's Second Claim for Relief, alleging that HTC has a vested right to develop its Property pursuant to its Application.

Respectfully submitted this 25 day of February, 2008.

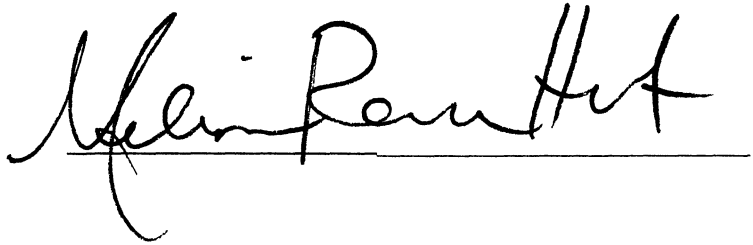


Clyde Snow Sessions & Swenson
Attorneys for Appellant Holladay Towne Center LLC

CERTIFICATE OF SERVICE

I, hereby certify that I caused a true and correct copy of the foregoing document to be served by U.S. Mail on this 25 day of February, 2008, postage prepaid and correctly addressed to the following:

H. CRAIG HALL
JAMES K. TRACY
PATRICK S. MALONE
201 SOUTH MAIN STREET, SUITE 2000
SALT LAKE CITY, UTAH 84111

A handwritten signature in black ink, appearing to read "Melvin R. Hunt", is written over a horizontal line.