

1996

Jane Harper, Richard D. Harper, Frank Cattelan,
Richard Richins, and The Dicker Hill Trust v.
Summit County : Brief of Appellee

Utah Court of Appeals

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DOCKET NO. 960486-CA

IN THE UTAH COURT OF APPEALS

JANE HARPER, RICHARD D. HARPER,
FRANK CATTELAN, RICHARD RICHINS,
and THE DICKER HILL TRUST,

Plaintiffs, Appellees,
and Cross-Appellants

v.

SUMMIT COUNTY, a body politic, the
SUMMIT COUNTY COMMISSION, and the
SUMMIT COUNTY PLANNING COMMISSION,
and UTELITE CORPORATION,

Defendants, Appellants
and Cross-Appellees.

BRIEF OF APPELLEES

Case No. 960486-CA

APPEAL FROM A DECISION OF THE
THIRD JUDICIAL DISTRICT COURT, SUMMIT COUNTY

Oral Argument Priority Classification No. 15

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COURT OF APPEALS

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FRANK CATTELAN, RICHARD RICHINS,	:	
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STATEMENT OF JURISDICTION

The Court of Appeals has appellate jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(j) (1996).

STATEMENT OF ISSUES AND STANDARD OF REVIEW

1. Was the Trial Court correct when it ordered Summit County to effectuate the removal of the Utelite facility where undisputed and admitted material facts proved as a matter of law that Summit County's decision to allow Utelite to place and operate a loading facility in a rural residential zone violated the Summit County Development Code and Utah statutes?

Standard of Review: Issue of law--correctness. Berenda v. Langford, 914 P.2d 45, 50 (Utah 1996); Kilpatrick v. Wiley, Rein & Fielding, 909 P.2d 1283, 1289 (Utah App. 1996).

Preservation of issue: See Appellants' Preservation of Issue No. 1, Appellants' Brief at 1.

2. Was the Trial Court's Order to remove the facility allowed under the Summit County Development Code and Utah law?

Standard of Review and Preservation of Issue: Same as Issue No. 1 above.

3. Was the Trial Court correct in determining that Summit County violated the Utah Open and Public Meetings Act when the undisputed facts established that there was no notice for the Planning Commission Meeting at which approval was given to Utelite to move to Echo?

Standard of Review and Preservation of Issue: Same as issue 1 above.

4. Was the Trial Court correct in determining that Summit County violated plaintiffs' due process rights when there was no notice for the Planning Commission Meeting at which approval was given to Utelite to move to Echo?

Standard of Review and Preservation of Issue: Same as issue 1 above.

5. Was the trial court correct when it denied plaintiffs' request for attorney's fees under 42 U.S.C. § 1983 and 42 U.S.C. § 1988?

Standard of review: A trial court's conclusions of law are reviewed on appeal for correctness. Sanders v. Sharp, 886 P.2d 198, 199-200 (Utah 1991).

Preservation of Issue: See Order re: Award of Plaintiffs' Attorney's Fees, (R. 2322).

6. Was the Union Pacific Railroad a necessary and indispensable party to this action when it was not required to be a party for the Court to enforce the Summit County Development Code and Utah zoning law.

Standard of Review and Preservation of Issue: See Appellants' Standard of Review and Preservation of Issue No. 6, Appellants' Brief at 2.

7. Did the trial court correctly determine that a claim of nuisance per se can be based on a prohibited use under zoning laws?

Standard of Review and Preservation of Issue: See Appellants' Standard of Review and Preservation of Issue No.

6, Appellants' Brief at 2.

8. Did the trial court commit reversible error by prohibiting discovery against Summit County although there were claims remaining against it, Summit County was participating in discovery, and was still a party after the Court entered its order for partial summary judgment?

Standard of review: A trial court's decision to limit discovery is reviewed on appeal for an abuse of discretion. In re Coordinated Pretrial Proceedings, Etc., 669 F.2d 620, 623 (10th Cir. 1982) (construing Rule 26 of the Federal Rules of Civil Procedure).

Preservation of Issue: Plaintiffs' Memorandum in Opposition to Summit County's Motion for Protective Order (R. 725); Protective Order (R. 775).

9. Did the trial court commit reversible error by denying the Plaintiffs' motion for leave to file an amended complaint when a trial date had not been set and the amendment sought to conform to evidence fully discovered and sought to clarify claims already made?

Standard of review: The trial court's determination of a motion for leave to file an amended complaint is reviewed on appeal for abuse of discretion. Westley v. Farmers Ins. Exch., 663 P.2d 93, 94 (Utah 1983).

Preservation of Issue: Plaintiffs' Motion to File Third Amended Complaint and Supporting Memorandum (R. 779); Plaintiffs' Motion for Reconsideration (R. 911, 918), and

Order Denying Motion to Amend and Motion for Reconsideration. (R. 1024).

10. Whether the trial court committed reversible error when it granted motions in limine precluding the plaintiffs from introducing evidence that the Utelite facility was built directly upon a public road and affected access of the plaintiff Richins and the Dicker Hill Trust?

Standard of review: A trial court's decision to admit or preclude evidence is reviewed on appeal for an abuse of discretion. State v. Rena, 869 P.2d 932 (Utah 1994).

Preservation of Issue: Plaintiffs' Memorandum in Opposition to Utelite's Motion in Limine, (R. 1488); Order re: Motions in Limine and Discovery Motion (R. 1762).

11. Whether the trial court committed reversible error in permitting the jury to view the Utelite site purportedly on the basis that the plaintiffs were seeking present and future damages when it limited the damages to those incurred only to the date of trial and when such a view was prejudicial and did not demonstrate the normal operation of the Utelite facility?

Standard of review: A trial court's decision to allow a jury to view a specific site is reviewed on appeal for abuse of discretion. State v. Carbututan, 861 P.2d 408 (Utah 1993).

Preservation of Issue: Plaintiffs' Opposition to Utelite's Motion for Jury View (R. 1460); Objection at Trial (R. 2663).

12. Whether the trial court committed reversible error by adopting clearly erroneous findings of fact and conclusions of law that purport to establish the Utelite facility as presently operating is not a nuisance.

Standard of review: The trial court's conclusions of law are reviewed on appeal for correctness. Saunders v. Sharp, 886 P.2d 198, 199-200 (Utah 1991). A trial court's findings of fact are reviewed under a clearly erroneous standard.

Alta Indust. Ltd. v. Hurst, 846 P.2d 1282, 1286 (Utah 1993).

Preservation of Issue: Plaintiffs' Objection to Utelite' Proposed Findings of Fact and Conclusions of Law re: Equitable Relief (R. 2198).

DETERMINATIVE STATUTORY PROVISIONS

Appendix 3	Development Code of Summit County
Appendix 14	Utah Code Ann. §§ 17-27-6.5, <u>et seq.</u> (1987)
Appendix 15	Utah Open and Public Meetings Act, Utah Code Ann. §§ 52-4-1, <u>et seq.</u> (1989).

STATEMENT OF THE CASE

NATURE OF THE CASE

Plaintiffs/appellees ("plaintiffs") brought this case to remove Utelite's loading facility which was illegally placed near their homes and businesses. (R. 7-8). Summit County and Utelite were named as defendants because: (1) the Summit County Planning Commission decided in a planning commission meeting, without any

notice to the plaintiffs or the public, that the loading facility could locate in Echo as a "permitted" use in a neighborhood zoned rural residential (R. 2); and, (2) Utelite applied for and Summit County issued a building permit for the facility more than six months after it was built and was operating without having a certificate of zoning compliance. (R. 3)

Because these actions directly violated the law, the plaintiffs primarily sought and continue to seek the remedy of removal of the facility under the Summit County Development Code ("Development Code") and Utah statutes. (R. 282-83; 313). Secondly, the plaintiffs sought and continue to seek damages for the harm suffered as a result of the illegal placement of the facility. (R. 312, 317-318)

In this appeal, the plaintiffs request the affirmance of the Trial Court's determination that Summit County effectuate the removal of the facility in accordance with the Development Code and Utah zoning law. Should the Court order a new trial, plaintiffs also request the Court permit them to seek damages and further equitable relief.

COURSE OF PROCEEDINGS

This action was originally commenced on July 31, 1990, seeking declaratory and injunctive relief that the acts and omissions of Summit County ("County") allowing the Utelite Corporation ("Utelite") to build a new loading facility and to operate next to the plaintiffs homes, businesses and farms violated the Development Code §§ 1.9, 1.15, 1.16, 12.7, 12.20;

Utah Code Ann. §§ 17-27-7, 18 and 23; Utah's Open and Public Meetings Act, §§ 52-4-1, et seq.; and due process guarantees, Utah Const. art. I, § 7, U.S. Const., amend. XIV. (R. 1-14). The plaintiffs sought to have the decision by Defendant Summit County locating the facility to be declared null and void, sought to have the facility removed and sought an award of costs and attorney's fees. (R. 7-8).

Plaintiffs' Complaint was amended to name the Utelite Corporation as a Defendant on November 2, 1990. (R. 78-79). Utelite filed a lengthy Answer and responded to written discovery. (R. 95; A. 1). The following material facts were established by the pleadings and official documents of the County:

- (1) Utelite received verbal permission from the Planning Commission in a Planning Commission meeting to move its facility to Echo (A. 1 at No. 14);
- (2) Utelite received a letter from the Chairman of the Planning Commission to confirm the discussion at the Planning Commission Meeting that it was the consensus of the Commission that the Utelite operation "presently" set-up in Wanship, Utah could move to Echo and would be considered a "permitted" use (R. 9, 35, para. 2, 97, 355);
- (3) There had not been notice to the public, or the plaintiffs that there would be a discussion concerning the location of the Utelite facility at the Planning Commission meeting. (R. 10, 35, para. 3, 97, 129);
- (4) The minutes from the Planning Commission meeting contained no reference to a discussion of the proposed location of the Utelite facility (R. 11-13, 35, para. 4, 124-127).
- (5) Utelite had applied for, and the County granted, a building permit six months after the facility had been built and was operating (R. 14, 36, para. 7, 98);

(6) The building permit approved the use/structure as a "permitted" use in an "AG-1" zone.¹ (R. 36, para. 7, 130);

(7) The specific site occupied by the Utelite facility was not used as a loading facility for more than one year prior to the erection of the facility. (R. 98, para. 9).

(8) The activities of the Utelite loading facility are neither permitted nor conditional uses under Chapter 12.20 of the Summit County Development Code within an RR-2 or AG-1 zone. (R. 37, para. 10).

There was no genuine issue as to these material facts. The plaintiffs, therefore, filed a Motion for Partial Summary Judgment under Rule 56, U.R.C.P. (R. 104). This Motion also relied upon specific provisions of the adopted Development Code which are not in dispute and which were adopted pursuant to Utah law. Utah Code Ann. §§17-27-7, 7.10, and 8 (1987) (R. 106-117).

Under the Development Code, the area in which the facility was located was and continues to be zoned as RR-2 ("rural residential"). (R. 36, para. 9). There was no provision that identified a loading facility like this as a "permitted" use. Development Code at 12.7; 12.20. Since the use was not permitted, the decision allowing the placement of the facility and the building permit was "null and void" under the Code. Development Code at 1.15. Removal was, therefore, expressly

¹ The County has admitted that pursuant to Chapter 12.7 of the Development Code, the area occupied by the Utelite facility is zoned "RR-2." (R. at 37, para. 10). However, Utelite's October 1989 building permit application indicates under the heading "Zoning Approval" that the area is zoned "AG-1." (A. 2). Regardless of whether the area occupied by the facility was zoned AG-1 or RR-2, the applicable zoning ordinances make it clear that the facility is neither a permitted nor a conditional use in these zones. Development Code at 12.20. (A. 3).

authorized. Development Code at 1.16; Utah Code Ann. § 17-27-23 (1987).

As a separate and independent basis for their claims, the plaintiffs based their Motion for Summary Judgment upon Utah's Open and Public Meetings Act, Utah Code Ann. §§ 52-4-1, et seq. (1953, as amended); (R. 114-16). Under this Act, actions taken in public meetings without notice are voidable. Utah Code Ann. § 52-4-8 (1953, as amended).

In addition, the plaintiffs sought removal because their due process rights had been violated. (R. 5, 116). A zoning decision made without notice violates due process. Utah Const. art. I, § 7; U.S. Const., amend. XIV.

The Trial Court, Judge Homer Wilkinson presiding, granted the Motion for Partial Summary Judgment and awarded the relief requiring Summit County to effectuate the removal of the facility. The Trial Court also granted a stay of this relief for 60 days to permit Summit County to appeal.² (A. 4, "Order").

Summit County petitioned for an interlocutory appeal from the Order for Partial Summary Judgment (R. 284). The Supreme

² In their opening brief the appellants note that the plaintiffs timely lodged Proposed Findings and an Order to which objections were made and heard on October 15, 1991. The appellants neglect to point out that new Findings of Fact and Conclusions were then sent to the Trial Court after objections were heard but for some inexplicable reason were never filed. (R. at 597) Changes as to the law on the finality of Orders occurred, and lengthy negotiations then took place as to the form of the Order. (Id.) The matter then came before the Court on a Order to Show Cause hearing scheduled by computer and after a full consultation with the Trial Court, the Order for the Motion for Partial Summary Judgment was executed. Id.

Court considered the Petition and denied it on October 27, 1993. (A. 5).

Plaintiffs then asked the Trial Court, Judge David Young, to remove the facility in accordance with the prior Order. Judge Young indicated plaintiffs would need to file an Order to Show Cause to seek enforcement of the prior Order. Judge Young further indicated that plaintiffs could amend their complaint to allow for their damage claims to be heard so that all claims would be resolved. (R. 303).

The plaintiffs amended their complaint on March 11, 1994. (R. 304). In the amended complaint the plaintiffs did not alter the allegations that had already been made and ruled upon. The only new claims arose from dust and noise, encumbrance of the water system that serves plaintiffs' homes, and interference with the comfortable enjoyment of plaintiffs' property caused by the facility. Plaintiffs specifically added damage claims for nuisance, statutory nuisance, trespass, negligence, and infliction of emotional distress. (R. 311-319). The plaintiffs also pleaded for their attorneys fees against Summit County specifically under 42 U.S.C. §§ 1983 and 1988. (R. 317-319).

On April 14, 1994, the plaintiffs formally requested the Trial Court issue an Order to Show Cause why the County should not be required to effectuate removal of the facility as required by the previous Order. (R. 400-407). Although Judge Wilkinson had heard the matter, ordered the facility removed, and denied objections to his Order, and the Utah Supreme Court had denied

the County's interlocutory appeal, Judge Young (signed by Judge Iwasaki) entered an Order stating "implementation of the Order to Show Cause is hereby stayed pending a final resolution of all remaining claims against all parties."³ (R. 599).

An expedited formal and informal discovery schedule on the damage claims then took place. Utelite served written discovery and Summit County and Utelite both participated in depositions of the plaintiffs. Among other things, this discovery focused upon a claim by plaintiff Richins and the Dicker Hill Trust (a family trust holding title to the Richins' family farm) that the facility was built upon a public road and restricted access to the farm. (R. 834-836). When the plaintiffs sought to undertake written discovery against the County, however, the Trial Court, Judge Glen Iwasaki, granted the County's Motion for Protective Order purportedly on the basis that the substantive claims against Summit County had been resolved. (R. 609-702, 775-76).

At the conclusion of the expedited discovery schedule, the plaintiffs sought to add two additional claims that were fully discovered by the defendants and that arose out of the same operative facts as the pending claims. (R. 779-780). First, plaintiffs alleged that the Utelite facility was located on a public road and encroached upon a court-ordered easement

³ In their brief the defendants comment upon the system of rotating judges. (Defendants' brief at 4). The reality of this case is that the defendants were the prime beneficiaries of the rotating judges because they urged Judge Young to not follow Judge Wilkinson's Order of removal, and Judge Young did not do so.

established in a prior condemnation case. Second, plaintiffs alleged that by allowing Utelite to locate its facility on the public road, the County had unlawfully abandoned the road in violation of Utah law. Utah Code Ann. § 27-12-102. (R. 805-806). Although a final pretrial date and trial date had not been established, the Trial Court, the Honorable Pat B. Brian presiding, denied leave to amend. (R. 1018-1019).

Before the trial, Utelite moved for summary judgment asserting, inter alia, that plaintiffs' claim for infliction of emotional distress had not been sufficiently pleaded and that plaintiffs had failed to elicit evidence of conduct that was sufficiently outrageous for emotional distress. (R. 1218-1219). Utelite also filed extensive motions in limine. (R. 1208-1222).

The plaintiffs vigorously disputed Utelite's motions on summary judgment and through deposition introduced facts in opposition to the Motion as support for their claim. (R. 1427-45). The Trial Court granted the Motion on the basis that there existed no genuine issues of material issues of fact with respect to the alleged "outrageousness" of Utelite's conduct. (R. 1766-68; A. 6).

The Trial Court also granted two of Utelite's Motions in Limine. It prohibited the introduction of evidence on the facility's blocking access to the Richins property and prohibited evidence about the plaintiffs worries of the impact of the Utelite facility on the town of Echo's water supply. (R. 1764).

The remaining claims came on for trial before Judge Frank G.

Noel on September 12, 1995. At the time of trial, Judge Noel ruled that Judge Wilkinson's previous Order for Partial Summary Judgment was the law of the case and that the defendants had not shown the facility was an accessory to a non-conforming use. (R. 2370). Since the use was prohibited, Judge Noel found that the nature of the facility, a rock aggregate loading operation, and the noise, dust and other conditions attendant to it, constituted a nuisance per se in this rural residential neighborhood. (R. 2371).

By stipulation of the parties, and to expedite the trial, the Trial Court dismissed all other remaining claims without prejudice and Utelite waived its right to assert a statute of limitations bar with respect to any such claim.⁴ (R. 2098).

Trial proceeded on the damage issues. During the trial the Court advised the jury that there was an order to remove the facility (R. 1985), that had been stayed pending appeal. (R. 1985). The Special Verdict allowed damages to be awarded only until the day of trial. (A. 8, para. 2). The Court also permitted the jury to view the facility while operating, over the plaintiffs' objection that such a view was prejudicial, was not "evidence" or reflective of the actual condition of the site in the past or at the time of trial. (R. 2663-2666).

At the conclusion of the trial the jury found the facility had been the proximate cause of damages to plaintiffs until the

⁴ Should this case be reversed, plaintiffs will bring all of their claims.

day of trial. (A. 8). It awarded damages to the plaintiffs in the following amounts: Jane Harper, \$5,000.00; Richard Harper, \$5,000.00; Frank Cattelan, \$3000.00 and Richard Richins and the Dicker Hill Trust, \$1500.00.⁵

At Utelite's request, the Court allowed some evidence on "further" equitable relief. Because of the rulings on the Motions in Limine, however, plaintiffs could not introduce all of the evidence that would support additional equitable relief, including the evidence that the facility blocked access and was on a public road. In addition, Judge Noel heard no evidence as to illegal procedures followed by Utelite and the County to locate the facility.

The Trial Court did not grant any further equitable relief except for the equitable relief to which the plaintiffs were entitled under the terms of Judge Wilkinson's Order. (R. 2101-2102; 2336, A. 8, para. 6, A. 9, para. 4). The Trial Court awarded some but not all of the plaintiffs' attorneys fees and costs under the Utah Open and Public Meetings Act but not attorneys fees under 42 U.S.C. § 1983 and § 1988. (A. 10; R. 2322-2323).

⁵ The appellants claim these awarded amount are "nominal." They fail to mention that the jury was expressly advised it could not award future damages and that there was an Order to remove the facility. It was not surprising the jury awarded these amounts in light of these instructions, and should the facility be removed, these "nominal" amounts will not limit Utelite's economic ability to move to another site.

STATEMENT OF FACTS

The plaintiffs in this action are owners of property in Echo, Utah. (R. 2374). Richard and Jane Harper obtained a certificate of zoning compliance from Summit County as prerequisite to the issuance of a building permit for their home. (R. 2381-83). A building permit was secured in 1987 (Trial Exh. 4) that properly identified the area as rural residential, and they built their home at that time in reliance thereon. (R. 2383-84).

Frank Cattelan, 68, has lived in Echo since August 28, 1947, and has owned property since 1954. (R. 2544-45). Mr. Cattelan operates a small cafe in Echo and serves as the President of the Echo Mutual Water Company, which provides the town with culinary water (R. 2544, 2548).

Plaintiff Rich Richins, 62, was born in Echo and purchased his family farm from his father in 1971. (R. 2663, 2670). Mr. Richins is the president of the Echo Ditch Company, an irrigation company formed to distribute irrigation water to land owners about and including Echo. (R. 2679). The primary access to Mr. Richins farm is on the road upon which the Utelite facility was built. (R. 2672-73). Mr. Richins and his family were provided court-ordered access to this class B road in 1971. (R. 945, 954).

In 1988, unbeknownst to the plaintiffs, Utelite began to prepare to construct a railroad loadout facility on a road near the railroad line running through Echo. (A. 1 at No. 16; Sept.

10, 1988, letter written by Doug Burton, the surveyor; R. 2876). The road had been travelled by the public for more than 10 years. Utelite did so because the Union Pacific Railroad expressed a desire to close the track from Echo to Park City, and there was a passing track in Echo, which was occasionally used to temporarily keep broken down railroad cars on a short term basis. (R. 2484; 2817; 2838). Utelite accepted cash, and received a discount on its freight charges from the railroad for the move. (R. 2839). Although other sites were available it chose Echo for economic reasons. (R. 2885-90).

There had never been commercial loading facilities on this track or anywhere else in Echo before this time. (R. 2381, 2796). The last time any loading had been done in Echo was decades earlier when the railroad loaded the last coal fired train engine that went through the town. (R. 2552; 2615-2616; 2795).

Utelite had been loading its rock product in Wanship, Utah before its move. It used a temporary conveyor for its operation which was substantially smaller than the one in Echo. (R. 2884). Some of the attributes of the facility at which it operated are compared to the facility in Echo in the following chart:

	<u>Wanship</u>	<u>Echo</u>
<u>Location</u>	Portable	Fixed
<u>Area</u>	10,000 sq. ft.	50,000 sq. ft.
<u>Hopper</u>	<15 tons	>40 tons
<u>Cars loaded</u>	386 from 1983-88	>300 per yr.
<u>Bag House</u>	No	Yes

(R. 2884; 2560-61; 2884-88).

On November 1, 1988, Utelite contacted Jerry Smith, an employee of the Summit County Planning Commission, to see what was required to construct the new facility.⁶ (A. 1 at No. 33). At Mr. Smiths request, Utelite went before the Summit County Planning Commission seeking approval for construction of the facility in Echo. (A. 1 at No. 7 & 33).

The proposed agenda for the December 13, 1988 meeting of the planning Commission provided no notice to the public that there would be a discussion concerning the proposed relocation and construction of the Utelite facility. (R. 97; 129, A. 11, 12).

The minutes of the December 13, 1988 meeting of the Planning Commission contain no reference to a discussion or any testimony concerning the proposed relocation and construction of the Utelite facility. (R. 124-127, A. 12).

⁶ Before the facility was moved, Utelite also contacted the Summit County Attorney in his "private practice" to assist Utelite in negotiating with the railroad. Additionally, the County Attorney represented Utelite in his "private practice" when it was cited for not having an air quality permit for the Echo facility. (R. 2908-2909).

Despite the lack of notice, and lack of discussion about the facility in the minutes, Utelite received verbal permission at the December 13, 1988 meeting of the Planning Commission to begin construction of the facility. (A. 1 at No. 14).

On January 13, 1989, Jack Willis on behalf of Robert McGregor, Chairman of the Planning Commission, sent a letter to Utelite confirming the discussion at the December 13, 1988 meeting of the Planning Commission regarding the proposed relocation of the Utelite facility. (R. 9, 97; 123, A. 13; A. 1 at Nos. 14 & 33).

This letter indicated that it was the consensus of the Planning Commission that the Utelite operation presently set up in Wanship could be moved to the Echo location and would be considered a "permitted use" at the Echo site. (R. 123, A. 13; A. 1 at Nos. 14 & 33).

Utelite began constructing the facility without a building permit on or about February 21, 1989. (R. 97; 356; A. 1 at No. 2).

The facility was substantially completed by April 25, 1989, at which time the first loading of railroad cars took place. (A. 1 at No. 2; R. 97).

In October 1989, six months after the facility was built, Utelite made application for a building permit from Summit County, which permit was issued on November 28, 1989 as building permit # 89291 for the construction of the loadout facility in Echo. (R. 97; 356; 2879; A. 2).

This application states that the facility is located within an "AG-1" zone and that the use/structure is a "permitted use." (R. 130, A. 2). At the time, the area in which the Utelite facility was built was zoned "RR-2" under chapter 12.7 of the Summit County Development Code. (A. 3 at 12.7). The Development Code required a building permit before the construction of any building or structure. Development Code at 1.9. (A. 3). A prerequisite to the issuance of a building permit was a certificate of zoning compliance. Development Code at 1.9.

The activities conducted by Utelite were not listed as "permitted" uses within an "RR-2" area in the Development Code.⁷ Development Code at 12.20. Also, the activities of the Utelite facility were not a permitted nor a conditional use within an "AG-1" zone under the provisions the Development Code. Development Code at 12.20. Thus, the Utelite facility is a prohibited use. (R. 2370-71).

The site occupied by Utelite had not been used as a loading facility for more than one year prior to the erection of Utelite's facility. (R. 98).

As soon as Utelite began operating there developed many problems. (R. 2387-2411). The operation was dusty and noisy. (Id.). Large, uncovered tractor trailers hauling the Utelite

⁷ A permitted use is one "for which no conditional use permit is required." Development Code at 1-6(53). Conditional uses are ones that would be improper under general conditions in the place of use. Development Code at 6.1. To obtain a conditional use permit, there must be notice and public hearing. Id.

product would go through town and park in front of the plaintiff's residence. (R. 2386, 2389). Rail cars were stored at the facility. (R. 2389). Utelite workers would bang the rail cars creating noise and dust. (R. 2388). When they cleaned the railcars, aggregate falls between the tracks. (R. 2675). A huge floodlight at the facility would illuminate the yard and home of the Harpers. (R. 2389). The facility would operate at night and on weekends. (R. 2391).

When it began to operate, Utelite did not keep the area clean, or bother to get a air quality permit although one was required. (R. 2897-2912). On June 1, 1989 the Division of Air Quality sent a letter to Utelite indicating that it was not supposed to operate without a permit. (R. 2907-2908). Utelite did not obtain an air quality permit until six or eight months after the facility began its operations. (R. 2987-2912).

Utelite aggregate contains approximately sixty percent silica. (R. 2880-81). Utelite requires its own employees to wear respirators in dusty areas, and the material is known to irritate the respiratory system, the eyes, and the skin. (R. 2881-82). During the load-out process, Utelite dust is left on the tracks. (R. 2910). The light-weight aggregate is easily airborne, blows over the railroad tracks as high as the railroad cars, and blows over the premises. (R. 2910-11). Mrs. Harper and her children cough, sneeze, and have watering eyes because of the aggregate dust. (R. 2390). It blows on their home. (R. 2394-2398). Pictures were taken just two weeks before trial

showing "Utelite" on the children's window sills. (R. 2386). Just before trial, samples were taken from Mrs. Harper's windows that were made up of "Utelite." (R. 2775-2780).

SUMMARY OF ARGUMENT

The Trial Court properly entered summary judgment requiring removal of the facility from Echo, Utah. There were no genuine issues of material fact and the plaintiffs were entitled to removal because the County, without notice, allowed the facility to locate in a rural residential zone without a building permit or certificate of zoning compliance. This violated the Development Code, Utah zoning law, Utah's laws on open and public meetings and due process guarantees.

The County has already attempted to appeal this Order to the Supreme Court on an interlocutory appeal and lost. The Appellants have not given any more reason in their brief to reverse the Trial Court than they gave the Supreme Court on the fundamental issue of removal. There were no disputes of fact on this issue, all indispensable parties were before the Trial Court, and the relevant zoning laws, including the County's Development Code, completely supported the Trial Court's decision.

The Trial Court, however, did commit error during the damage phase of this case by 1) refusing to allow plaintiffs to conduct discovery, 2) by denying leave to amend plaintiffs' claims to assert ones that provided additional basis for damages, 3) by limiting evidence the plaintiffs could introduce, and 4) by

allowing the jury to view the facility during atypical operating conditions. All of these errors unfairly prejudiced the plaintiffs, reduced the amount of the jury's award, and led to the Trial Court's erroneous findings and conclusions on further equitable relief.

ARGUMENT

I. THE DISTRICT COURT PROPERLY ORDERED THAT THE UTELITE FACILITY BE REMOVED WHERE THERE WERE NO ISSUES OF DISPUTED FACT

The Trial Court's Order to remove the facility is based upon undisputed facts and well established Utah law. The facts demonstrate the County violated Utah law and its own Development Code when it allowed the facility to be a "permitted" use in a rural residential zone and when it belatedly issued a building permit without obtaining a certificate of zoning compliance. Under Utah law and the Development Code, the Trial Court had the full authority to issue its Order to the County to remove the facility.

A. Allowing the loading facility to operate in a rural residential zone violated Utah and County Law.

The undisputed facts show that Summit County, acting without notice, allowed Utelite to locate its facility in an area zoned rural residential as a "permitted" use. A permitted use is a use expressly authorized within a particular zone. Development Code 12.20. The Development Code lists with great particularity those uses that are "permitted" in a residential rural zone and a loading facility like Utelite's is not included in the list. Development Code, § 12.20.

The Development Code constitutes the master planning document for Summit County. Development Code Chapter 1.8. As such, it is binding upon the County. Utah Code Ann. § 17-27-7 (1987). Once such a master plan has been duly enacted by the governing authorities, further actions by the governing authority must be taken in accordance with that plan to promote the health, safety and welfare of the community. It becomes the guiding instrument for future development and must be followed. See, Gibbons & Reed Company v. North Salt Lake City, 431 P.2d 559 (Utah 1967); Naylor v. Salt Lake City Corporation, 398 P.2d 27 (Utah 1965).

Zoning authorities like the County's Planning Commission are strictly bound by the terms and standards of a zoning ordinance. They are not at liberty to grant or deny permits in derogation of those legislative standards. Thurston v. Cache County, 626 P.2d 440, 444-45 (Utah 1981).

If there is a zoning violation, the Courts are fully authorized to order the zoning law be met. At the time Utelite built its facility, Utah law and the Summit County Development Code specifically authorized injunctive relief and abatement proceedings. Under Utah Law:

Violation of Chapter 27, Title 17, or of any county zoning, subdivision, or official map ordinance is punishable as a class C misdemeanor. The board of county commissioners, the county attorney, or any owner of real estate within the county in which a violation occurs, may, in addition to other remedies provided by law, institute injunction, mandamus, abatement, or any other appropriate action or proceeding to prevent, enjoin, abate, or remove any erection, construction, alteration, maintenance, or use in violation of this

Code.

Utah Code Ann. § 17-27-23 (1987).

Under Summit County's Development Code:

Any person, firm, or corporation, whether as principle, agent, employee, or otherwise, violating or causing the violation of any of the provisions of this Code shall be guilty of a misdemeanor and punishable as provided by law. The County Attorney, or any owner of real estate adversely affected by a violation of this Code, may institute injunction, abatement, or any other appropriate legal action to prevent, enjoin, abate, or remove any erection, construction, alteration, maintenance, or use in violation of this Code.

Development Code at 1.16.

So clear is the law that there need not be a showing of harm for an injunction to issue. In Utah County v. Baxter, 635 P.2d 61 (Utah 1981), the Supreme Court stated:

Under the statute, a specific showing of irreparable injury is therefore not required and the pleading thereof in the complaint is mere surplusage. Nevertheless, it fairly may be said that under the foregoing analysis, a showing that the zoning ordinance has been violated is tantamount to a showing of irreparable injury (to the public).

Baxter at 65. In this case the Trial Court properly found that the acts and omissions of the defendants were contrary to the Development Code. Applying Utah Code Section 17-27-23, the Summit County Development section 1.16, and Utah case law, the Court correctly ordered that the Utelite facility be removed.

The defendants do not ever mention that the area was zoned rural residential in their Brief. They attempt to transform a simple case into a complicated one by arguing that there is a fact issue whether Summit County's course of dealings were a legislative exercise of zoning power or simply administrative

action. Whether the County's conduct was administrative or legislative does not matter--the placement of the facility in a rural residential zone violated the law, and the Trial Court had the full authority to order the County to abide by its own laws.

Likewise, the defendants mistakenly attempt to avoid removal by labeling Union Pacific's railtracks as a "nonconforming use" and the facility as an "accessory" to this nonconforming use. In their argument, the defendants conspicuously disregarded that a "permitted use" is explicit and has concrete meaning in zoning law. A "permitted use" is specifically authorized--which this one was not.⁸

Moreover, even if the facts are disregarded, and the Planning Commission's decision that the use was "permitted" is overlooked, the defendants' argument is wrong. Summit County's Development Code does not allow the loading facility as an accessory to a nonconforming use.⁹

⁸ In their brief the County and Utelite refer to a letter written by the County Attorney in February of 1990, which was long after the facility had been built, describes the facility as an "accessory" to a nonconforming use. This letter does not reflect what happened before the planning commission and simply is the argument of the County and Utelite. It is not a fact.

⁹ The Appellants elusively cite Anderson's American Law of Zoning definition of "non-conforming use" in their Brief instead of the County's Development Code. Brief of Appellants at 19 n. 7 (quoting Young, Anderson's American Law of Zoning, 4 ed. (1995) § 6.01 at 481-82). They must do so because Anderson's definition does not address (1) the enlargement of the nonconforming use that occurred in this case; and (2) the lapse of more than one year since this area had been used for loading. Under the Development Code, these two facts alone establish that the loading facility is prohibited. Development Code at 3.7.

The Code defines a "nonconforming use" as:

3.7 Nonconforming use of Land

The nonconforming use of land, existing at the time this code became effective, may be continued, provided that no such nonconforming use of land shall in any way be expanded or extended either on the same or adjoining property, and provided that if such nonconforming use of land, or any portion thereof, is abandoned or changed for a period of one (1) year or more, any future use of such land shall be in conformity with the provisions of this Code.(emphasis added).

Development Code at 3.7. Under this provision the nonconforming use of land shall in no way be expanded or extended on the same or adjoining property and if the use is abandoned for more than one year the future use of such land shall be in conformity with the provisions of the code.

In State v. Holt's Estate, 381 P.2d 724 (Utah 1963), the Court interpreted a similar code provision,¹⁰ and held that the discontinuance of the nonconforming commercial use of property that burned down for more than one year proved an effective abandonment, and the property was thereafter subject to the new residential zoning requirement. Holt's Estate at 725 (citing Morrison v. Horne, 363 P.2d 1113 (Utah 1961)).

In this case the area in which the Utelite facility was built had never been the site of a commercial loading facility.

¹⁰ Bountiful City, Sec. 24-18, subsec. 4 provided:

One Year Vacancy- A building, structure or portion thereof, non-conforming as to use, which is, or hereafter becomes vacant, and remains unoccupied for a continuous period of one (1) year, shall not thereafter be occupied except by a use which conforms to the use regulations of the zone in which it is located.

No loading of railcars had taken place anywhere in Echo for decades when the last steam engine to roll through town was loaded with coal for fuel. (R. 2552; 2615-16). There was no loading facility in 1987 when plaintiffs Jane Harper obtained their building permit for their home in the RR-2 neighborhood.

Defendants' error is compounded by claiming that the facility is an "accessory" to a "preexisting use." Brief of Defendants' at 19-20. An "accessory use" is defined as:

A subordinate use customarily incidental to and located upon the same lot occupied by the main use and devoted exclusively to the main use of the premises.

Development Code at 1.6(63). Loading rock aggregate cannot be considered an "accessory" to the non-conforming use of a railroad track. Additionally, the use is devoted to loading rock aggregate for Utelite's commercial purposes. This is not an "accessory use" to a railroad right-of-way.¹¹

The defendants' argument, taken to its logical conclusion, would mean that any type of loading facility on a railroad would be considered an "accessory use." For example, a garbage loading facility could be located anywhere along a railroad track that runs through a rural residential zone. This is clearly not the law.

Finally, under the Development Code, "[a] non-conforming use shall be deemed abandoned if said use has not applied to the premises for a consecutive period of 12 months." Development

¹¹ The preexisting use to occasionally and temporarily hold railcars for repair may have been an "accessory use." A loading facility for a private company was not.

Code at 3.9. If a nonconforming use is deemed abandoned when not exercised on the premises for 12 months, an "accessory" to the nonconforming use would surely be abandoned.

B. Appellants Violated the Development Code By Belatedly Issuing a Building Permit Without a Certificate Of Zoning Compliance.

The undisputed facts also demonstrate the County violated its own Code because the facility was built without a certificate of zoning compliance and long before the issuance of a building permit.

The Summit County Development Code expressly provides that:

Construction or removal of any building or structure¹² or any part thereof as provided or as restricted in this Code shall not be commenced, or proceeded with, except after the issuance of a written permit for the same by the county building inspector Prerequisite to the issuance of a building permit shall be the obtaining of a certificate of zoning compliance from the zoning administrator or his authorized representative.

Development Code Chapter 1.9. The facts of this case leave no doubt that this provision was clearly disregarded by the Defendants in regards to the construction of the Utelite facility.

Because Summit County's acts were in derogation of the Development Code, they are null and void. The Development Code at Chapter 1.15 provides that:

All departments, officials, and public employees of Summit County vested with duty and authority to issue

¹² Chapter 1.6(61) of the Development Code defines structure as "[a]nything constructed or erected which requires location on the ground or attached to something having location on the ground." Utelite's loadout facility is a structure under this definition.

permits, licenses, or certificates of zoning compliance shall conform to the provisions of this Code and shall not issue a permit, license, or certificate of zoning compliance for use, building or other purposes where the same would be in conflict with this Code, and any such permit, license, or certificate issued in conflict with the provisions of this Code, shall be null and void.

Development Code at 1.15. The actions of Summit County in issuing the building permit were "null and void." The Trial Court had full authority to order Summit County to effectuate removal of the facility, and its Order must be upheld.

II. THE TRIAL COURT'S ORDER TO REMOVE THE FACILITY IS FULLY SUPPORTED BY THE DEVELOPMENT CODE AND UTAH LAW

In their brief the defendants challenge the remedy awarded by the Trial Court by maintaining that Judge Wilkinson's "confusion" extends to his "articulation of the relief granted." Brief of defendants at 30. Judge Wilkinson was not "confused." He properly understood this case "boiled down" to a violation of the Development Code and zoning laws. (Attached as "A-1" to Defendants' Brief at 3, line 24). In his Order, Judge Wilkinson indicated that Summit County "shall be required to effectuate the removal of Utelite from their currently occupied site." To allow Utelite an appeal, Judge Wilkinson stayed the effect of the Order for sixty (60) days. Unless the appeal was successful, and it was not, the facility had to move.

There is nothing confusing about this relief, and so far the Defendants have been the ones to benefit from the stay. Since the appeal, it has been fully understood. For example, Judge

Noel advised the jury in this case that there was an Order requiring Summit County to remove the facility. (R. at 1985).

The undisputed facts admitted by the defendants in their Answers and in discovery clearly establish a violation of the Development Code. The Trial Court fully intended that the facility be removed but permitted an appeal. Summit County had the opportunity to appeal, and lost.

At that point in time the facility should have been removed and Judge Young erred in failing to implement the removal Order. The Order was the law of the case. See Richardson v. Grand Central Corp., 572 P.2d 395 (Utah 1977). Since the Utah Supreme Court would not reverse the Order upon the fervent appeal of the County, this Court should not do so at this time.

In their Brief the defendants challenge the relief because it "overlooked the difficult position of Summit County." Brief of defendants at 31. Specifically, the defendants indicate that Utelite could have a claim of "equitable estoppel" against Summit County because the County told Utelite that the facility would constitute a "permitted use." Brief of defendants' at 31.

In making this argument the defendants implicitly acknowledge that the Planning Commission erred by indicating the "use" was "permitted". The defendants also implicitly acknowledge the real reason for these proceedings: the County unlawfully allowed Utelite to move to Echo in violation of its own law. There is the potential for a claim against the County from Utelite. However, that issue is between Utelite and the

County. It should not be the plaintiffs' problem.

So far Utelite has not had to formally make this claim. Instead, it has purposely and deliberately accepted the risks of staying in Echo. It has done so knowing the zoning in the area was rural residential, and knowing there are alternate locations to which it could move. (R. 2885-2890). Utelite has chosen to do this after the Court ordered removal.

Instead of complying with the law, Utelite and the County have undertaken a joint strategy, beneficial to both, to place blame on others, including the plaintiffs (for their alleged delay in bringing the action), and the Railroad (for requesting Utelite to abandon its Wanship site).

This blame is misplaced. In Utah, zoning violations are tolerated only in "exceptional" cases. Neither the County nor Utelite can persuasively argue that there are exceptional circumstances here. Our Supreme Court has made it clear that:

Estoppel, waiver or laches ordinarily do not constitute a defense to a suit for injunctive relief against alleged violations of the zoning laws, unless the circumstances are exceptional. Zoning ordinances are governmental acts which rest upon the police power, and as to violations thereof any inducements, reliances, negligence of enforcement, or like factors are merely aggravations of the violation rather than excuses or justifications thereof.

Baxter at 65 (quoting Salt Lake County v. Kartchner, 552 P.2d 136, 138 (Utah 1976)). In this simple case the law was met. The Development Code, Utah statutes and case law all permit removal.

III. THE TRIAL COURT WAS CORRECT IN DETERMINING THAT SUMMIT COUNTY'S ACTIONS VIOLATED THE OPEN MEETINGS LAW WHEN THE COUNTY FAILED TO GIVE NOTICE OF THE ACTION TAKEN AT THE PLANNING MEETING THAT ALLOWED UTELITE TO LOCATE ITS FACILITY IN AN AREA ZONED RR-2

The Utah Open and Public Meetings Act, Utah Code Ann. sections 52-4-1, et seq., expressly provides that the actions of the state, its agencies and political subdivisions "be taken openly and that their deliberations be conducted openly." Utah Code Ann. § 52-4-1. Each public body must "give not less than 24 hours public notice of the agenda, date, time and place of each of its meeting," Utah Code Ann. § 52-4-6(2) and must keep written minutes which must include ". . . the substance of all matters proposed, discussed, or decided, and a record, by individual member, or votes taken and the names of all citizens who appeared and the substance in brief of their testimony; . . ." Utah Code Ann. § 52-4-7. Any final action taken in violation of these provision is voidable by a court of competent jurisdiction. Utah Code Ann. § 52-4-8.

Furthermore, section 52-4-9 of the Utah Code provides:

(2) A person denied any right under this chapter may commence suit in a court of competent jurisdiction to compel compliance with or enjoin violations of this chapter or to determine its applicability to discussions or decisions of a public body. The court may award reasonable attorney fees and court costs to a successful plaintiff.

Utah Code Ann. § 52-4-9(2).

There is no dispute that the posted agenda for the Planning Commission meeting provided no notice to the public that there would be a discussion concerning the proposed relocation of the

Utelite facility and that the minutes of the December 13, 1988 meeting contain no reference to a discussion concerning the proposed relocation of Utelite facility. (R. 97; see R. 129, A. 11).

Being unable to contest this, the defendants argue that the decision to allow Utelite to move was a "routine" or "operational" one for which notice is not required. Brief of defendants at 30.

There is no support for this argument in the statute. It does not make exceptions for "operational" or "routine" decisions. It does not make distinctions because they would directly contradict the policy of the Open and Public Meetings law. The State's expressed policy is to have all of the "people's business" conducted openly. Utah Code Ann. § 52-4-1 (1996). The Act states that a "meeting" means the convening of the "public body" when a quorum is present "for the purpose of discussing or acting upon a matter over which the public body has jurisdiction or advisory power." Utah Code Ann. § 52-4-2(1) (emphasis added). This certainly applies to the Summit County Planning Commission and the decision in this case.

Moreover, the Act expressly indicates neither chance or social meetings can be used to circumvent the Act. Utah Code Ann. § 52-4-2(1). This provision underscores the importance of a broad application. The law expressly disallows the type of action the defendants suggest occurred in this case when the President of Utelite "dropped into" the Planning Commission

Meeting. Brief of defendants at 17.

Finally, granting Utelite a "permitted use" in a Planning Commission Meeting is the type of "final" action requiring appropriate notice. With notice, the plaintiffs could have been brought into the public process. The Planning Commission would have known the area was not zoned for use as a loading facility and the plaintiffs' objections to it. Input from neighbors affected by zoning decisions and variances is crucial for the zoning process to work legitimately. Tolman v. Salt Lake County, 20 Utah 2d, 437 P.2d 442, 445 (1968).

Perhaps the best way to illustrate the problems created by the appellants' analysis is to examine the suggestion they make that "the plaintiffs do not dispute the adequacy of the notice for the December 13, 1988, Summit County Planning Commission meeting . . . they focus on the level of detail required in the agenda for that meeting." Brief of defendants at 29. Of course the plaintiffs dispute the adequacy of the notice because it did not mention Utelite at all. In this case it was not a question of "level" of detail because there was no detail.

Defendants also argue that the plaintiffs should be barred by the Open and Public Meetings Act statute of limitations. However, the facts that the defendants rely upon, such as "commencement of construction," and "the first loading of railroad cars" were not sufficient to appraise the plaintiffs of a cause of action under the Act.

Under Utah law, where there are exceptional circumstances

that would make application of the general rule regarding running of statute of limitations irrational or unjust, the statute of limitations will be tolled. Warren v. Provo, 838 P.2d 1125 (Utah 1992); Myers v. McDonald, 635 P.2d 84 (Utah 1981). See also, Becton Dickinson & Co. v. Reese, 668 P.2d 1254, 1257 (Utah 1983) (concealment by a party prevents that party from relying on the statute of limitations).

This case presented such exceptional circumstances and the Trial Court properly tolled the limitations period. The actions of which plaintiffs complain were the Planning Commission's failure to provide notice as required by the Utah Code Ann. § 52-4-6(2) and to keep written minutes in accordance with the provisions of Utah Code Ann. § 52-4-7. Thus, the very action of which the plaintiffs complain also served to conceal the violations of the Act. It was not until months after an investigation of this matter that the Planning Commission's actions came to light. Upon discovery of the failure to comply with the Act, the plaintiffs sought assistance from their elected officials. (R. 2672, 2684). They went to the County Attorney¹³

¹³ All of the "facts" regarding placement did not come to light until discovery. For instance, Plaintiffs sought the assistance of the Summit County Attorney to remove the facility before they filed suit. (R. at 2644-45). Even though they met with him and physically inspected the site with him, they were never advised that the Summit County Attorney acted as Utelite's private counsel on this matter and had provided legal advice in his private practice to Utelite prior to the move. (R. 2685-86). Nor did they know the County Attorney, as part of his private practice, appeared on behalf of Utelite when it was cited for air quality violations arising out of the failure to obtain a permit to operate the loading facility. (R. 2908-09).

and to the County Commission. (Id.).

When neither one would act, this action, including the Open and Public Meetings Act claim was filed. Under these exceptional circumstances, the Trial Court correctly held that the statute of limitations contained in the open meeting law had not been violated due to the equitable tolling doctrine, and that Summit County's decision was made in violation of the Act. (R. 280-282; A. 4, "Findings"). That decision should be affirmed, together with the award of attorney's fees for having to prove the application of the Act.

IV. THE TRIAL COURT WAS CORRECT IN DETERMINING THAT SUMMIT COUNTY'S ACTIONS ARE VOID BECAUSE THE ACTIONS DEPRIVED PLAINTIFFS OF DUE PROCESS.

The Utah Supreme Court has always applied notice and due process principles to zoning decisions. In Tolman v. Salt Lake County, 20 Utah 2d. 310, 437 P.2d 442 (1968), the Utah Supreme Court cited Mullane v. Central Hanover Bank, 339 U. S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950) for the following:

The fundamental requisite of due process of law is the opportunity to be heard. *** An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present objections. *** A notice must be of such nature as reasonably to convey the required information *** and it must afford reasonable time to those interested to make their appearance.

In Tolman, like here, zoning authorities made zoning decisions that affectively allowed a change of use in a neighborhood.

Adjoining neighbors were not provided with adequate notice, and did not attend the meeting at which approval was granted. They subsequently went to the county commission, who did not assist them, and were forced to file a court action to have the action reversed. The Utah Supreme Court held that the failure to provide adequate notice violated due process.

Similarly, in Carter v. City of Salina, 773 F.2d 251 (10th Cir. 1985), the Tenth Circuit Court of Appeals, applying Utah law, held that a zoning ordinance enacted in violation of mandatory notice and hearing requirements was void, and property owners were therefore entitled to injunctive relief against the city. Carter at 256. The Carter Court stated:

It is the general rule that zoning ordinances are in derogation of common law property rights and find their authority through the state police power; accordingly, municipalities and other political subdivisions must scrupulously comply with statutory requirements, including notice and hearing, in order to provide due process of law.

Id. at 254 (citing Melville v. Salt Lake County, 536 P.2d 133 (Utah 1975)).

This is not a complicated case. The County did not meet the notice requirements of the Open and Public Meetings Act. Had it considered the use "conditional,"¹⁴ it would have had to give notice under the County's zoning ordinances. Development Code, § 6.1. Its silent agenda did not meet the rudimentary requirements of due process because it did not mention Utelite at all.

¹⁴ A conditional use, however, is only allowed after notice and hearing.

Without notice, the plaintiffs were not provided with the "fundamental and elementary" requirements of due process cited in Tolman, supra; and were not provided with an opportunity to object. The Trial Court properly found that such action violated due process and was well within its authority to deem the decision to permit Utelite to move to Echo as null and void.

V. THE TRIAL COURT ERRED WHEN IT DID NOT GRANT PLAINTIFFS' MOTION FOR AN ORDER AWARDING COSTS AND ATTORNEY'S FEES PURSUANT TO 42 U.S.C. §§ 1983 AND 1988

The Trial Court properly held that Summit County violated the plaintiffs' rights under the Open and Public Meetings Act, and violated plaintiffs' due process rights. Even though it correctly found their constitutional rights to due process were violated, and those rights are guaranteed by the United States Constitution, the Trial Court did not award the plaintiffs the attorney's fees to which they were entitled under the Civil Right Attorney's Fees Act of 1976, as amended.

Section 1988 of Title 42 U.S.C. authorizes an award of reasonable attorney's fees to prevailing parties in actions enforcing rights under 42 U.S.C. § 1983. A prevailing party is one who succeeds in any significant issue in litigation which achieves some of the benefit the party sought in bringing the suit. This section is interpreted broadly in favor of such awards. See e.g., The People of the State of New York v. 11 Cornwall Company, 718 F.2d 22 (2d Cir. 1983).

The Trial Court did not award plaintiffs' claim for attorney's fees and costs under section 1988 because it found

plaintiffs' original amended complaint did not assert a federal claim for due process. This result was in error because the original amended complaint carefully set out the conduct engaged in by county officials (who were operating under color of state law) and alleged plaintiffs' due process rights had been violated. Moreover, the Second Amended Complaint, which the Trial Court permitted, specifically cited 42 U.S.C. § 1983 as a basis for attorney's fees.

This Court can review the Amended Complaint and Second Amended Complaint as a matter of law. There is no need for a new trial. Both must be construed liberally. All that was required was a short and plain statement showing the pleader was entitled to relief. Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit., et al., ___ U.S. ___, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993).

Since the Amended and Second Amended Complaint alleges a violation of plaintiffs' constitutional rights and sets out the unconstitutional conduct of Summit County, they both are sufficient for an attorneys fee award. See e.g., First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1986) (zoning measures must observe due process). "Express reference to conduct as relating to section 1983 is not required." International Society for Krishna Consciousness, Inc., v. Colorado State Fair and Industrial Exposition, 673 P.2d 368 (Colo. 1983) (cited by the Utah Court of Appeals in Lorenc v. Call, 789 P.2d 46 (Utah App. 1990)); L.K. et al. v. Gregg, 425

N.W.2d 813 (Minn. 1988) (the test is not whether specific words are used for a constitutional claim).

VI. UNION PACIFIC RAILROAD COMPANY WAS NOT A NECESSARY AND INDISPENSABLE PARTY IN THIS CASE TO DETERMINE WHETHER THE UTELITE FACILITY WOULD BE REMOVED FOR THE DEFENDANTS VIOLATION OF THE DEVELOPMENT CODE AND UTAH LAW

In their opening Brief, Defendants claim that the Union Pacific Railroad was an indispensable party under Rule 19 of the Utah Rules of Civil Procedure. (Appellants' Brief at 33). Appellants assert that the plaintiffs alleged "the Railroad could not use its right-of-way in Echo to load the goods of rail customers such as Utelite." (*Id.*). The Appellants do not make a record cite for this bald allegation and cannot. The reason they cannot is that it is Utelite that violated the zoning laws when it moved to Echo and began loading its product.

Additionally, under Rule 19, a person shall only be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action. In reviewing a decision made under Rule 19, the trial court's determination must not be disturbed unless there is an abuse of discretion. Seftel V. Capital City Bank, 767 P.2d 941 (Utah App. 1989), affd. sub nom., Landes v. Capital City Bank, 795 P.2d. 1127 (Utah 1990).

In this case the complete relief that plaintiffs sought, and were awarded, was the removal of Utelite's illegally-placed facility and damages. There was no relief sought against the

Union Pacific. The Union Pacific did not need to be a party for the enforcement of the zoning laws. See e.g., Parish of Jefferson v. Bertucci Bros. Construction Co., Inc., 176 So.2d 688, 690 (La. App. 1965) (property owner not an indispensable party to enjoin tenant's zoning violation).

The Appellants, glossing over the first part of Rule 19, rely upon its second part, which indicates a party shall be joined if "he claims an interest relating to the subject of the action." At no time did the defendants move to join the Union Pacific, and it did not ask to intervene so that it could claim an interest. Under Utah law, the railroad was not "indispensable." Call v. City of West Jordan, 788 P.2d 1049 (Utah App. 1990), cert. denied, 800 P.2d 1105 (Utah 1990).

VII. THE TRIAL COURT CORRECTLY DETERMINED THAT A CLAIM OF NUISANCE PER SE CAN BE BASED ON A PROHIBITED USE.

Defendants assert that Judge Noel erred when he found that the Utelite facility constituted a nuisance per se. In reaching this result, Judge Noel carefully considered all of the arguments the defendants now make, and the cases upon which the defendants rely.

Defendants erroneously argue that the conduct engaged in by Utelite was not prohibited by a statute and that a county ordinance could not serve as the basis for a nuisance per se claim. This whole case arose out of the violation of County and the Utelite Corporation of specific zoning provisions that are have the force of state statutes. Under the Development Code, §§ 12.7 and 12.20 and Utah Code Ann. §§ 17-27-7, 8 and 23, the

loading activities and the conditions arising from them are prohibited. Under Utah law the statutes could serve as the basis for a nuisance per se claim. Branch v. Western Petroleum, Inc., 657 P.2d 267, 276 (Utah 1982); Turnbaugh v. Anderson, 793 P.2d 939, 943 (Utah 1990).

Judge Noel carefully considered the dicta from the cases cited by Defendants, including Padjen V. Shipley, 553 P.2d 938, 939 (Utah 1976), for the proposition that a zoning ordinance in an of itself cannot be the basis for a finding of nuisance per se. Padjen does not stand for the principle that a zoning violation can never be the basis for a nuisance per se claim. Rather, all that Padjen indicates is that zoning ordinance must prohibit the conduct and the plaintiff must suffer an injury distinct from members of the public. See Erickson v. Craig Construction, 877 P.2d 144 (Utah 1994). This is such a case.

VIII. DAMAGES SHOULD NOT BE CAPPED AND THERE IS EVIDENCE THAT MUST BE CONSIDERED FOR FURTHER EQUITABLE RELIEF SHOULD THE COURT REVERSE THIS CASE.

In their brief the defendants claim that the jury award and Findings and Conclusions of Law Re: Equitable Relief made by Judge Noel cannot be disturbed if there is another trial. There is no basis for a retrial on the removal issue because it was based upon undisputed fact. If the court reverses because of error during the damages phase, however, there were errors that must be corrected so that the jury and the court can be given a

full picture of the continuing harm suffered.¹⁵

A. The Trial Court Committed Error When It Refused to Permit Discovery Against Summit County.

After the plaintiffs filed their Second Amended Complaint, they attempted to engage in discovery with Summit County. The Trial Court granted Summit County's Motion for a protective order under Rule 26(c), U.R.C.P., and would not permit any discovery against the County purportedly on the basis that all substantive claims against the County had been resolved. At the time this order was entered, Summit County was still a party and there were claims pending against it.

It was fundamental error to preclude plaintiffs from conducting any discovery against Summit County. It precluded plaintiffs from the discovery of information and evidence to support the removal and damage claims in violation of the broad spirit of the Rules of Civil Procedure. State ex. rel. Bd. Comm'n v. Petty, 17 Utah 2d 382, 412 P.2d 914 (1966) (the purpose of discovery is to permit the parties to discover "relevant" information). If there is a retrial, the substantive claims will be at issue. This court must reverse the Protective Order precluding discovery against the County.

B. The Trial Court Committed Reversible Error When it Denied Plaintiffs' Motion to File a Third Amended Complaint.

At the conclusion of fact discovery (but before any party

¹⁵ The plaintiffs are not advocating a retrial. The primary relief they seek is removal. Once that occurs, it is unlikely the case will go further, because damages will end.

had designated experts or the setting of a final pretrial or trial) the plaintiffs sought to file a third amended Complaint pursuant to Rule 15(c), U.R.C.P. (R. 179). Plaintiffs sought to present two additional claims--one against Summit County and another against Utelite. (R. 782). The claim against Summit County was for its abandonment of the public road upon which the Utelite facility was built. (R. 782-840). The claim against Utelite is for its interference with the Richins' right-of-way. It is parallel to plaintiffs' nuisance claim.

In its ruling prohibiting amendment, the Trial Court denied plaintiff's Motion on the basis that it arose three days after the discovery cutoff, would involve third parties and would delay the trial. None of these reasons were sufficient under Rule 15, U.R.C.P., to deny the amendment.

There was no surprise when the claims were made. They had been fully discovered by Utelite in written discovery and depositions and the claims arose out of the same operative facts that were the subject of the action. See e.g., Hague v. Juab County Mill and Elevator, 37 Utah 290, 107 P. 249 (1910) (depriving access is the basis of nuisance and interference with egress claims). There would have been no delay because Utelite and the County conducted discovery on the claims.

Finally, there was and will be no need to have others, including the Union Pacific Railroad, appear as parties. The questions do not involve ownership of property. They arise out of a well-traveled road by the public and the County accepting

funds for maintaining the road. (R. 945). To the extent that the Railroad has information that bears on the issue, it can be subpoenaed and can appear.

There was no legitimate reason to foreclose the plaintiffs from proceeding with all of their claims. If a retrial occurs, the plaintiffs must be entitled to assert them and the trial court's order denying leave to amend the third-party complaint must be reversed.

C. The Trial Court Erred in Granting Utelite's Motion in Limine Precluding Evidence on the Lack of Access.

The Trial Court erroneously prohibited evidence regarding the affect of the Utelite facility on access to plaintiff Richins property. The fundamental reason for the trial court's ruling was that it had previously declined to allow the plaintiffs to amend their complaint. As noted, this was in error.

Further, lack of access was a basis for the pending nuisance claim. Hague v. Juab County Mill and Elevator, 37 Utah 290, 107 P. 249 (1910). When the trial court limited evidence in this respect, it would not permit evidence essential to the nuisance claims and damages. Therefore, the Court should reverse the motions in limine prohibiting evidence on lack of access, especially if it orders a retrial.

D. The Trial Court Erred When It Allowed the Jury to View the Facility.

The Trial Court, over the strenuous objection of the plaintiffs, permitted the Jury to travel to watch the "operation" of the Utelite facility. The plaintiffs objected in advance,

knowing that the jury view would be more prejudicial than probative and therefore not permitted under Rule 47(j) of the Utah Rules of Civil Procedure. (R. 2663). See Redd v. Airway Motor Coach Lines, 137 P.2d 374, 378-80 (Utah 1943).

The view, in fact, was not probative and was prejudicial. It did not reflect the facility as it had been or was presently operating. Utelite prepared for the visit for one to two weeks before it occurred. (R. 2640, 2675). It brought in a bobcat to pick up the debris and Utelite product which normally accumulates on the ground. (Id.). The conditions the jury saw did not represent those that typically existed. (R. 2400, 2906-2907). The jury visit lasted less than one hour. (R. 2677). The winds that usually blow dust were not present. (Id.).

Simply put, the jury view unfairly portrayed the facility. It was more prejudicial than probative of past or current conditions. It resulted in the jury placing undue weight on its impressions than on the testimony of witnesses. The Trial Court committed error by allowing it to occur. Should there be a retrial, the court must permit the jury to award damages that are not impacted by an unfair representation of the Utelite operation.

E. The Trial Court Committed Error when it Adopted Findings of Fact and Conclusions of Law Prepared by Utelite re: Equitable Relief.

Months after trial Judge Noel entered Findings of Fact and Conclusions of Law prepared by Utelite's Counsel Re: Equitable Relief. These findings did not accurately represent the evidence

that was admitted and purportedly relied, in part, on the jury's verdict on damages. Neither the Court or the jury had the benefit of all of the facts due to the prior Orders denying leave to amend, precluding discovery, limiting evidence on access and allowing a view of the facility that was not representative.

In addition, the Findings and Conclusions did not reflect the evidence at trial. The plaintiffs filed detailed objections to the Findings of Fact and Conclusions. (R. 2201). The key areas where the findings and conclusions departed from the facts include the findings that the facility was not injurious to the plaintiffs and does not adversely affect the plaintiffs use and enjoyment of their property.

As set forth above with specific citations to the record, the uncontradicted trial evidence demonstrated that dust continues to migrate to the plaintiffs property, that dust affects the plaintiffs health and causes them to sneeze and cough, and the "improvements" made by Utelite are not implemented fences remain open, Utelite is left on the ground to blow, that truckers continued to bang on the railroad cars to clean them.

There will be no need to reverse the Trial Court on these Findings of Fact and Conclusions of Law if the Court upholds Judge Wilkinson's Order. Should that Order be reversed, then the Findings of Fact and Conclusions of Law must also be reversed so that the Trial Court can hear all of the evidence that supports removal.

CONCLUSION

The Trial Court's Order requiring the removal of the facility is fully supported by the Development Code and Utah law. There were no disputes of fact when that Order was entered. This Court should affirm this Order and render an opinion that will require the removal of the facility.

RESPECTFULLY submitted this 16th day of December, 1996.

APPEL & WARLAUMONT

By



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CERTIFICATE OF SERVICE

I hereby certify that on the 16th of December, 1996, I delivered a copy of the foregoing Brief of Appellee's was mailed to the following:

Counsel for Defendants/Appellants, Summit County, et al.

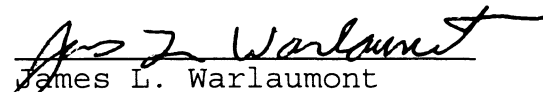
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Addendum 1-18

Addendum A. 1

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DEC 5

IN THE THIRD JUDICIAL DISTRICT COURT OF SUMMIT COUNTY

STATE OF UTAH

JANE HARPER, RICHARD D.)
HARPER, FRANK CATTELAN,)
RICHARD RICHINS, and)
ETHEL S. RAYMOND,)

Plaintiffs,)

vs.)

SUMMIT COUNTY, a body)
politic, the SUMMIT COUNTY)
COMMISSION, the SUMMIT)
COUNTY PLANNING COMMISSION)
and UTELITE CORPORATION,)

Defendants.)

DEFENDANT UTELITE
CORPORATION'S RESPONSE TO
PLAINTIFFS' FIRST SET OF
INTERROGATORIES AND REQUESTS
FOR PRODUCTION

Civil No. 10718

Honorable Pat. B. Brian

The defendant Utelite Corporation through counsel,
hereby submits its responses to Plaintiffs' First Set of
Interrogatories and Requests for Production to Utelite
Corporation as follows:

INTERROGATORIES

INTERROGATORY NO. 1: Identify the individual(s)
responding to these interrogatories and the relationship to the
answering party.

RESPONSE: Carsten N. Mortensen, Vice President,
General Manager of Utelite Corporation.

INTERROGATORY NO. 2: With regard to the Utelite
Facility please state:

- a. The date construction of the Facility began;
- b. The date when the Facility was completed or substantially completed;
- c. The purpose for which the Facility was constructed;
- d. The date the facility began operations;
- e. The date on which Utelite Corporation applied for a building permit;
- f. The date on which Utelite Corporation received a building permit;
- g. The fees which were paid in connection with the acquisition of the building permit.

RESPONSE:

- a. Ground breaking was during the last half of February, 1989.
- b. Site was substantially completed or useable to load cars by April 25, 1989.
- c. The Facility was constructed to load train cars with Utelite aggregate for out of area shipments.

- d. The first car was loaded April 25, 1989.
- e. Utelite first applied for a building permit on February 28, 1989.
- f. Utelite received a building permit on February 28, 1989, Permit No. 89007.
- g. February 28, 1989, Permit No. 89007, cost \$15.00.

INTERROGATORY NO. 3: Identify the individual(s) employed by Utelite Corporation who was or were responsible for the acquisition of the building permit.

RESPONSE: Carsten N. Mortensen.

Bruce Clark - Electric Contractor.

INTERROGATORY NO. 4: Identify the individual(s) either employed by Utelite or not employed by Utelite who was or were involved in the decision to locate the Utelite Facility in Echo City.

RESPONSE: Bob Barker, U.P.R.R.; Bob Jones, U.P.R.R.; Ray Nelson, U.P.R.R.; Ray Allamong, U.P.R.R.; Mike Crouse, U.P.R.R.; Bud Britton, U.P.R.R.; and Carsten N. Mortensen, Utelite.

INTERROGATORY NO. 5: With regard to the individual(s) identified in Interrogatory Nos. 4 and 5, identify each person's duties, responsibilities and/or involvement in the decision to move the Utelite Facility to Echo.

RESPONSE: Bob Barker, local sales representative in Salt Lake City; Bob Jones, local track supervisor; Ray Nelson, Regional Industrial Development; Ray Allamong was an U.P.R.R. employee over contracts; Mike Crouse, unknown; Bud Britton, believed to be a rate supervisor. Carsten N. Mortensen, vice president and general manager of Utelite Corporation had various conversations and negotiations with the above named individuals regarding various aspects of the site and loading facility.

INTERROGATORY NO. 6: Identify all persons employed by Summit County who were contacted regarding the construction of the Utelite facility.

RESPONSE: Jerry Smith, County Planner; all county commissioners; Eric Averett, County Building Inspector; Bob Taylor, County Building Inspector; Chris Schultz, Administrative Assistant; Frank Anderson, Assistant County Attorney; and Bob Adkins, County Attorney, Summit County Planning Commission.

INTERROGATORY NO. 7: With regard to the persons employed by Summit County whom Utelite contacted regarding the Utelite Facility, please state:

- a. The name of the person;
- b. The person's title or job description at Summit County; and

- c. The date or dates on which communications of any sort were made with the above-identified person or persons.

RESPONSE: Defendant Utelite objects to this interrogatory as being overly broad and burdensome, but notwithstanding this objection, responds only as completely as such information is available:

1. Jerry Smith, County Planner, November 1, 1988, and December 12-15, 1988.
2. Eric Averett, County Building Inspector, February 28, 1989.
3. Bob Taylor, County Building Inspector, October 23, 1989
4. Chris Schultz, Administrative Assistant, April 5, 1989 and October 26, 1989.
5. Frank Anderson, Assistant County Attorney, August 3, 1990.
6. Bob Adkins, Summit County Attorney, November 10-11, 1988, January 16-17, 1989, August 22 and 24, 1989, October 8 and 31, 1989, and November 27, 1989.
7. County Commissioners, February 1, 1989, April 5, 1989 and January 17, 1990.
8. Summit County Planning Commission, December 13, 1988.

In responding to this interrogatory, it is impossible to determine who contacted the Commissioners or what precisely was communicated. These responses have been reconstructed from all available information.

INTERROGATORY NO. 8: Identify all individuals employed by Summit County who contacted Utelite Corporation regarding the Utelite Facility.

RESPONSE: See Response to Interrogatory No. 7.

INTERROGATORY NO. 9: With regard to the persons employed by Summit County who contacted Utelite Corporation regarding the Utelite Facility, please state:

- a. The date on which such communication or communications occurred;
- b. The type of communication (e.g.) telephone, letter, personal communication;
- c. The substance of each and every communication regardless of type; and
- d. The person at Utelite Corporation to whom such communication was made.

RESPONSE: Communication was made by most of the county representatives mentioned in Interrogatory No. 6 above. Dates and particulars of these communications are uncertain but have been answered as fully as possible in Response to Interrogatory No. 7 above and subject to the same objection as set forth therein.

INTERROGATORY NO. 10: Identify all persons employed by Utelite Corporation who have contacted Summit County officials regarding the construction of the Utelite Facility in Echo. With respect to each such person, state:

- a. With what official at Summit County the contact was made;
- b. The date or dates of all such communications;
- c. The substance of each communication; and
- d. Identify all documents reflecting or pertaining to any such communication.

RESPONSE: Carsten N. Mortensen made communication to the individuals identified in its Response to Interrogatory No. 6 above and as best as can be reconstructed on the dates listed in its Response to Interrogatory No. 7. The substance of such communication related to approval, permitting and construction of the facility. Documents reflecting these contacts include building permit applications dated February 28, 1989, November 28, 1989, and October 23, 1990 and a letter from the Summit County Planning Commission dated January 13, 1989.

INTERROGATORY NO. 11: To the best of your knowledge, identify all persons not employed by Utelite Corporation who have contacted Summit County official on behalf of Utelite Corporation regarding the construction of the Utelite Facility in Echo. With respect to each such person, state (a) with what

official at Summit County the contact was made; (b) the date or dates of all such communications; (c) the substance of each communication; and (d) identify all documents reflecting or pertaining to any such communication.

RESPONSE: Utelite objects to this interrogatory on the basis that they are without sufficient knowledge to respond, although it is possible that Union Pacific Railroad personnel may have had some contact with Summit County.

INTERROGATORY NO. 12: Identify all persons employed by Utelite Corporation, or persons contacted on behalf of Utelite Corporation which officials from Summit County have contacted regarding the Utelite Facility in Echo. With respect to each state: (a) the name of the Summit County official who made the contact; (b) the person with whom the Summit County official made contact; (c) the date or dates of all such communications; (d) the substance of each communication; and (e) identify all documents reflecting or pertaining to any such communication.

RESPONSE: Other than Carsten Mortensen, only Utelite attorneys Mike Keller and John T. Nielsen have had contact with Summit County regarding the Utelite Facility in Echo. Such conversations have been with Summit County attorneys respecting the defense of this matter and thus privileged.

INTERROGATORY NO. 13: Did Utelite Corporation receive verbal or written permission to begin the construction of the Utelite Facility prior to the time Utelite received a building permit.

RESPONSE: Yes.

INTERROGATORY NO. 14: If the answer to Interrogatory No. 13 is yes, please state (a) the date on which permission was granted; (b) the person or persons who gave permission; (c) the manner in which such permission was given; (d) identify all documents which refer, reflect or relate to the granting of permission.

RESPONSE:

- a. January 13, 1989.
- b. Summit County Planning Commission, Robert McGregor, Chairman.
- c. Verbally in meeting on December 13, 1988 and in a letter dated January 13, 1989.
- d. Letter of January 13, 1989 from the Summit County Planning Commission.

INTERROGATORY NO. 15: On what date did Utelite Corporation first consider moving the Utelite Facility to Echo.

RESPONSE: Summer or Fall of 1988.

INTERROGATORY NO. 16: On what date did Utelite Corporation make its final decision to move the Utelite facility to Echo.

RESPONSE: Fall of 1988.

INTERROGATORY NO. 17: Please state with particularity each fact which led to the moving of the Utelite Facility in Echo.

RESPONSE: Utelite was informed as early as 1986 of the possibility that U.P.R.R. would abandon the railroad spur to Park City. It was hoped that even if the spur was abandoned, it would only be above the Utelite Facility at milepost 13.5. When the railroad told Utelite of their intent to abandon on May 19, 1988, several options were considered depending upon the extent of the abandonment as follows:

1. Move to a larger facility at Phoston;
2. Improve the facility at Wanship and abandon above MP 13.5.
3. Move to Coalville and abandon above Coalville;
4. Move to the abandoned Gas Plant site north of Coalville and abandon above that area;
5. Move the facility to North Salt Lake; and
6. Move to Echo.

INTERROGATORY NO. 18: Please state with particularity each fact that led to the final decision to locate the Utelite Facility in Echo.

RESPONSE: Options 1 through 4 were ruled out because of the extent of the abandonment of the railroad.

5. Economics because of the haul distance and discouragement by the U.P.R.R. ruled out option number 5.

6. The U.P.R.R. suggested the Echo option which, after considering the alternatives, all agreed would be the best site.

INTERROGATORY NO. 19: What was determined to be the advantages to Utelite Corporation of having the Utelite Facility at its present location.

RESPONSE: The closest location to the plant at an established railroad yard and siding.

INTERROGATORY NO. 20: Did Utelite consider other locations for the Utelite Facility?

RESPONSE: See Responses to Interrogatory Nos. 17 and 18.

INTERROGATORY NO. 21: Identify each and every location which was considered for the construction of the Utelite Facility.

RESPONSE: See Responses to Interrogatory Nos. 17 and 18.

INTERROGATORY NO. 22: Please state with particularity each fact which led Utelite to not locate its loadout facility in the other locations considered.

RESPONSE: See Responses to Interrogatory Nos. 17 and 18.

INTERROGATORY NO. 23: What consideration was given to other locations for the construction of the Utelite Facility.

RESPONSE: See Responses to Interrogatory Nos. 17 and 18.

INTERROGATORY NO. 24: What were the determinative factors in Utelite's decision to build the Utelite Facility in Echo rather than other locations.

RESPONSE: See Response to Interrogatory No. 18. Additionally, this was the preferred location of the Railroad.

INTERROGATORY NO. 25: At any time since the beginning of construction of the Utelite Facility has Utelite Corporation reevaluated or reconsidered its decision to locate the facility in Echo. If so state:

- a. The date of each such re-evaluation;
- b. The name of the person or persons making that re-evaluation on each such date;
- c. What was Utelite's decision regarding its evaluation or the present Utelite Facility site.

RESPONSE: No.

INTERROGATORY NO. 26: What, if any, communications regarding the Utelite Facility were made by Utelite Corporation to the citizens of Echo who lived in close proximity to the Utelite Facility. With regard to any such communication, state:

- a. The person or persons to whom such communications were made;
- b. The date on which such communications were made;
- c. The form of or manner in which such communications were made; and
- d. The substance of any such communication.

RESPONSE: Plaintiff Frank Cattelan was the first person from Echo contacted in the fall of 1988, and from the beginning had a few suggestions such as building approvals, etc. Cattelan never voiced objections until after Utelite had loaded our first few cars, when he complained of a dust problem. In the same time period, Utelite had contact with Richard Richins. He expressed concerns about moving the road.

Pete Clark was communicated with during the early phases of the project. He was concerned that people or animals might be caught in the "grizzly." The facility has since been fenced.

Richard and Jane Harper have expressed concerns about dust. It is unknown when such communications were had.

Utelite contends that all such concerns have been addressed and that Utelite has moved expeditiously and effectively to respond to citizen concerns.

INTERROGATORY NO. 27: What, do you contend, is the zoning classification of the area occupied by the Utelite Facility?

RESPONSE: Utelite objects to this interrogatory as not being directed to the party most able to answer. Utelite has relied upon the determination of Summit County that the facility is a "permitted use" at that location and contends that such a determination correctly characterizes Utelite's right to maintain and continue the use of the facility.

INTERROGATORY NO. 28: What, do you contend, was the zoning classification of the area occupied by the Utelite facility when construction of the Utelite facility began?

RESPONSE: See Response to Interrogatory No. 27.

INTERROGATORY NO. 29: What, do you contend, was the zoning classification of the area occupied by the Utelite facility on the day the building permit was issued?

RESPONSE: See Response to Interrogatory No. 27.

INTERROGATORY NO. 29: Did Utelite Corporation obtain a certificate of Zoning Compliance from Summit County. If so, state the date on which such certificate was issued.

RESPONSE: Utelite received a letter dated January 13, 1989 indicating that the Utelite operation "would be a permitted use at the Echo site."

INTERROGATORY NO. 30: With regard to Interrogatory Nos. 27, 28 and 29, please state with particularity the basis

upon which you claim such zoning classification exists presently or existed at the time construction of the Utelite Facility began or when the building permit was issued.

RESPONSE: See Response to Interrogatory No. 27.

INTERROGATORY NO. 31: State the name and current employer of the person employed by Utelite Corporation at the time when the planning and construction of the Utelite Facility in Echo was begun who you believe was the most knowledgeable of your employees regarding the decision to move the Utelite Facility to its present location.

RESPONSE: Carsten N. Mortensen, vice president, general manager.

INTERROGATORY NO. 32: State the name and current employer of the person employed by Utelite Corporation at the time the planning and construction of the Utelite facility in Echo was begun who you believe had the most contact with officials from Summit County.

RESPONSE: Carsten N. Mortensen.

INTERROGATORY NO. 33: Describe in detail the process and procedures which Utelite Corporation went through in obtaining approval or permission by Summit County to locate and construct the Utelite Facility at its present location.

RESPONSE: Following the railroad's decision respecting relocation and site choice, Carsten N. Mortensen

contacted Jerry Smith of Summit County Planning respecting the site. Smith indicated that he saw no problem but suggested that the matter be reviewed by the Planning Commission. Mortensen went before the Planning Commission on December 13, 1988 and received a letter dated January 13, 1989 indicating that the facility would be a "permitted use" at the Echo site.

INTERROGATORY NO. 34: What was the amount of the projected costs to construct the Utelite Facility in Echo.

RESPONSE: Around \$70,000.00

INTERROGATORY NO. 35: What was the total cost of construction of the Utelite Facility in Echo.

RESPONSE: Around \$120,000.00

INTERROGATORY NO. 36: On what date, if any, did Utelite file with Summit County a detailed site plan drawn to scale as part of the application for a building permit.

RESPONSE: It is believed to be when Carsten N. Mortensen met before the Planning Commission and when he applied for a building permit.

REQUEST FOR PRODUCTION OF DOCUMENTS

REQUEST NO. 1: All documents in your possession or under your control which were relied on, referred to or identified in your responses to the foregoing interrogatories.

RESPONSE: The only documents identified are the letters from the Summit County Planning Commission dated

January 13, 1989 and the Building Permit Applications. These documents are produced with this response.

REQUEST NO. 2: All documents addressing or discussing the Utelite Facility located in Echo. This request includes, but is not limited to, correspondence between Utelite and officials of Summit County, documents discussing the decision to move the Utelite Facility to its present location, documents regarding and including the request and application for a building permit to build the Utelite Facility, documents relating to the fees required or not required for the building permit and all other internally generated or externally generated documents which refer, reflect, or relate to the Utelite Facility.

RESPONSE: Utelite has entered into certain agreements with Union Pacific Railroad for use of the property at Echo rail yard. These agreements contain information, financial and otherwise, which is confidential and has no bearing on the subject matter of this lawsuit and for this reason the same are not produced. The Approval Order from the Bureau of Air Quality is produced herewith.

REQUEST NO. 3: Please produce any and all documents which refer, reflect, or relate to each and every communication received by Utelite or of which Utelite is aware that discuss, mention, or touch upon Summit County's approval of the Utelite

Facility or of Summit County's granting of a building permit for the Utelite Facility.

RESPONSE: See Response to Request No. 1 above,.

REQUEST NO. 4: Please produce the entire application for the building permit for the Utelite Facility.

RESPONSE: See Response to Request No. 1. Documents are produced herewith.

REQUEST NO. 5: Please produce the certificate of zoning compliance which Utelite received as part of the application procedure.

RESPONSE: See Response to Request No. 1.

REQUEST NO. 6: Please produce the building permit for the Utelite Facility.

RESPONSE: A copy of Permit No. 89201 is produced herewith. Permit No. 89007 issued February 28, 1989 is not available.

REQUEST NO. 7: Please produce all documents evidencing the fees which were paid to Summit County by Utelite Corporation in connection with the construction of the Utelite Facility including, but not limited to building permit fees and investigation fees.

RESPONSE: The only fees paid so far as are known are those required with the building permit application. Said

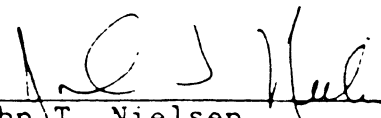
applications, produced herewith, show amount of fees actually paid.

DATED this 10 day of December, 1990.

As to Objections:

VAN COTT, BAGLEY, CORNWALL & McCARTHY

By


John T. Nielsen
Attorneys for Utelite Corporation
50 South Main Street, Suite 1600
P. O. Box 45340
Salt Lake City, Utah 84145
Telephone: (801) 532-3333

UTELITE CORPORATION

By


Carsten N. Mortensen
Vice President

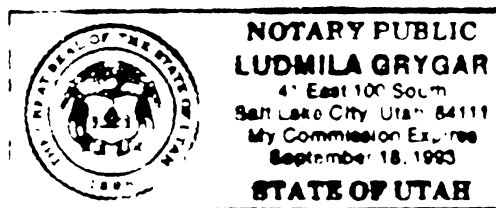
VERIFICATION

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

On December ___, 1990, appeared before me Carsten N. Mortensen, Vice President for the defendant Utelite Corporation who duly acknowledged under oath that he is the signer of the foregoing Defendant Utelite Corporation's Response to Plaintiffs' First Set of Interrogatories and Requests for Production, that he is duly authorized by the defendant to sign said responses, and that the information set forth therein is true and correct to the best of his knowledge.

NOTARY PUBLIC
Residing at: _____

My Commission Expires:



5280N(10)

Addendum A. 2

SUMMIT COUNTY BUILDING PERMIT APPLICATION

PHONE 336-4451 NOTE: 24 hours notice is required for all inspections

PC 243

Owner of Property <i>At-Lite Corp. (UPRR Lease)</i>		Phone <i>336-4451</i>	Receipt No. <i>0291</i>	Date Issued <i>11-28-89</i>	Permit Number <i>89291</i>
Mailing Address <i>P.O. Box 387 Coalville</i>					
Bldg. Address					
Proposed Use of Structure <i>Loadout Facility</i>			Assessors Parcel No. <i>15PRR LEASE</i>		
Lot #	Plat	Subd. Name			
Property Location <i>Felco</i>			<input type="checkbox"/> If metes and bounds, attach description		
Total Property Area in Acres or Sq. Ft.			Total Bldg. Site Area Used		
Date of Application <i>10-6-89</i>			Date Work Begins		
Previous Use of Land or Structure					
Dwell Units Now on Lot <i>None</i>			Accessory Bldgs. Now on Lot		
Type of Improvement, Kind of Const.					
<input type="checkbox"/> Sign <input checked="" type="checkbox"/> Build <input type="checkbox"/> Remodel <input type="checkbox"/> Addition <input type="checkbox"/> Repair <input type="checkbox"/> Move <input type="checkbox"/> Convert Use <input type="checkbox"/> Demolish					
No. of Offstreet Parking Spaces					
Covered Uncovered					
Architect or Engineer Phone					
Business Name-Address Business Lic. No.					
General Contractor Phone					
Business Address State Lic. No. City/Co. Lic. No.					
Electrical Contractor Phone					
Business Address State Lic. No.					
Plumbing Contractor Phone					
Business Address State Lic. No.					
Mechanical Contractor Phone					
Business Address State Lic. No.					

BUILDING FEE SCHEDULE

Square Ft. of Building	Valuation	
Other Floor	Building Fees	639
<input type="checkbox"/> Finish Basement	Plan Check Fees	
Carport Sq. Ft.	Electrical Fees	
Garage Sq. Ft.	Plumbing Fees	
Other	Mechanical Fees	
Type of Bldg. <i>Conveyor System</i>	Water	
No. of Dwellings <i>0</i>	Sewer	
No. of Bldgs. <i>0</i>	Storm Sewer	
No. of Stories <i>0</i>	Moving or Demo	
Occ. Group <i>M-1</i>	Temporary Conn.	
Type of Construction	Reinspection	
<input type="checkbox"/> Frame <input type="checkbox"/> Brick Ven <input type="checkbox"/> Log	Investigation Fee	639
<input type="checkbox"/> Brick <input type="checkbox"/> Block <input checked="" type="checkbox"/> Concrete <input checked="" type="checkbox"/> Steel	1% State Surcharge	6.39
Max. Occ. Load	per UCA 58.54	
Roof Snow Load		
No. of Bedrooms		
Fire Sprinklers Req. <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	Total	1288

Make all checks payable to Summit County Treasurer *\$645.19*

Plan Chk. OK by *Robert Taylor* *10-23-89*

Building Inspector Signature

SPECIAL APPROVALS AND REQUIREMENTS

Special Approvals	Required	Received	Not Req.
Board of Adjustment			
Conditional Use			
Fire Dept.			
Soil Report			
Water or Well Permit			
Sewer or Septic Tank			
Road Department	<i>N/A DH</i>		
Road Approach Permit			
Other (specify)			
Bond			

Address

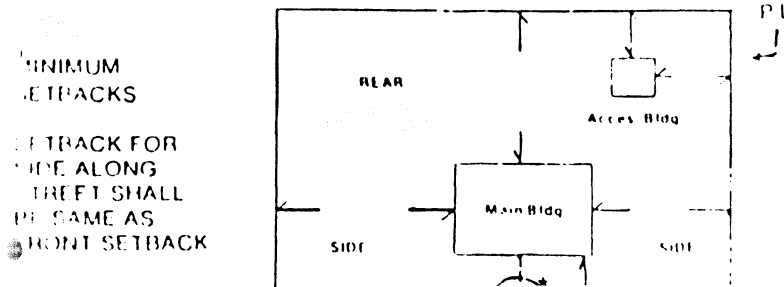
Must be Posted prior to Occupancy

Special Requirements or Comments
** Investigation fee waived by County Commission action in the meeting dated Nov. 15, 1989 B.S.*

ZONING APPROVAL

Use/Structure is Permitted ☒ Non Conforming ☐ Conditional ☐

Zone *AG-1* Approved by *[Signature]*



NOTICE:
Construction may require installation of underground utilities. Summit County will not allow open excavation of roadways after October 1st.

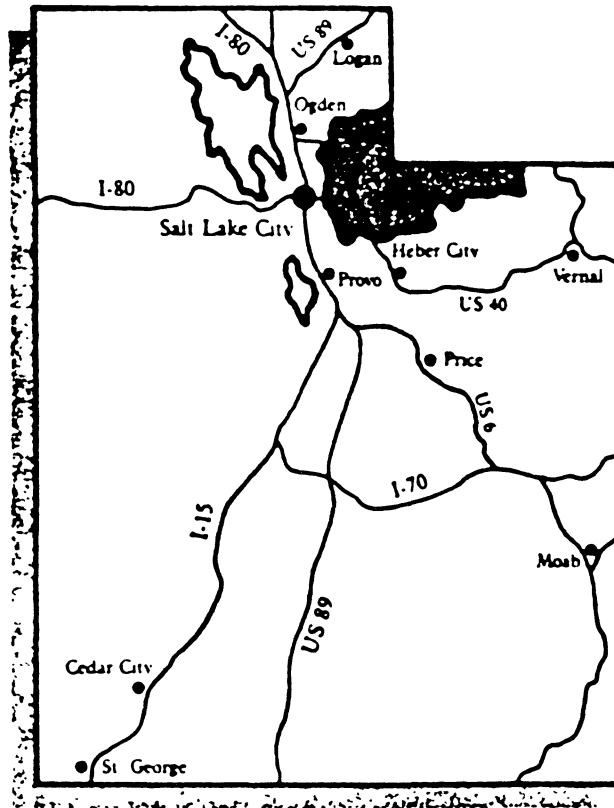
This permit becomes null and void if work or construction authorized is not commenced within 180 days, or if construction or work is suspended or abandoned for a period of 180 days at any time after work is commenced. I hereby certify that I have read and examined this application and know the same to be true and correct. All provisions of laws and ordinances governing this type of work will be complied with whether specified herein or not. The granting of a permit does not presume to give authority to violate or cancel the provisions of any other state or local law regulating construction or the performance of construction and that I make this statement under penalty of perjury.

000150

Addendum A. 3

The Development Code of Summit County

JULY 1989



Prepared for the purpose of guiding
the growth of Summit County
in harmony with its rich heritage,
serene environment
and exciting future!

(48) Mobile Home Lot A designated site within a mobile home park for the exclusive use of the occupants of a single mobile home.

(49) Mobile Home Park An area or tract of land of at least three (3) acres used to accommodate two (2) or more mobile homes and which remains in single ownership.

(50) Mobile Home Subdivision A subdivision of at least three (3) acres which is reserved for the placement of mobile homes and not other types of dwelling units.

(51) Non-conforming Building or Structure A building or structure or portion thereof, lawfully existing at the time this Code became effective, which does not conform to all height, area, and yard regulations of the zone in which it is located.

(52) Nonconforming Use A use which lawfully occupied a building or land at the time this Code became effective and which does not conform with the use regulations of the zone in which it is located.

(53) Permitted Use A use of land for which no conditional use permit is required.

(54) Rest Home (Nursing Home) A home for the aged, chronically ill, or incurable persons in which three (3) or more persons not of the immediate family are received, kept, or provided with food and shelter or care for compensation; but not including hospitals, clinics, or similar institutions devoted primarily to the diagnosis and treatment of the sick or injured.

(55) Recreation Vehicle Any trailer house, camper, van or similar vehicle used or maintained primarily as a temporary dwelling for travel, vacation, or recreation purposes and having a width of nine (9) feet or less or a length of 35 feet or less.

(56) Recreation Vehicle Park Recreational Vehicle Park shall mean an area or tract of land used to accommodate two (2) or more travel trailers, vacation vehicles, or camper units for a short period of time (less than 30 days.)

(56) Sanitary Landfill An area designated for the disposing of refuse on land without creating nuisances or hazards to public health or safety, by utilizing the principles of engineering to confine the refuse to the smallest practical area, to reduce it to the smallest practical volume, and to cover it with a layer of earth at the conclusions of operation or at more frequent intervals as may be necessary.

(57) Substantial Improvement Any repair, reconstruction, or improvement of a structure, the cost of which equals or exceeds 50 percent of the market value of the structure either:

(1) before the improvement or repair is started, or
(2) if the structure has been damaged and is being restored, before the damage occurred. For the purpose of this definition "Substantial improvement" is considered to occur when the first alteration of any wall, ceiling, floor, or other structural part of the building commences, whether or not that alteration affects the external dimensions of the structure. The term does not, however, include either;

(1) any project for improvement of a structure to comply with existing state or local health, sanitary, or safety code specifications which are solely necessary to assure safe living conditions, or

(2) any alteration of a structure listed on the National Register or Historic Places or a State Inventory of Historic Places.

(58) Setback A front, rear, or side setback shall be the minimum horizontal distance between the lot line and building or structure.

(59) Story That portion of a building included between the surface of a floor and the ceiling next above it.

(60) Street Any right-of-way serving as the principal means of access to property.

(61) Structure Anything constructed or erected which requires location on the ground or attached to something having location on the ground.

(62) Subdivision The term "subdivision" means the division of a tract or lot or parcel of land into three or more lots, plats, sites, or other divisions of land for the purpose, whether immediate or future, of sale or of building development; provided that this definition shall not include a bonafide division or partition of agricultural land for agricultural purposes, or of commercial, manufacturing, or industrial land for commercial manufacturing, or industrial purposes. For the purpose of this Code, the division of land into three (3) or more lots less than 20 acres in size by the same individual or party over any 12 year period shall be presumed to be for sale or for building development.

(63) Use, Accessory A subordinate use customarily incidental to and located upon the same lot occupied by the main use and devoted exclusively to the main use of the premises.

1.9 Building Permit Required

Construction or removal of any building or structure or any part thereof as provided or as restricted in this Code shall not be commenced, or proceeded with, except after the issuance of a written permit for the same by the county building inspector. Provided, however, construction that does not increase the enclosed floor space of the building shall be exempt from the requirement of a building permit. Prerequisite to the issuance of a building permit shall be the obtaining of a certificate of zoning compliance from the zoning administrator or his authorized representative. A detailed site plan, drawn to scale (scale and sheet size to be determined by the building inspector) shall be filed as part of any application prior to consideration for any building permit. The site plan shall show where pertinent:

- (1) Note of scale used.
- (2) Direction of North point.
- (3) Lot lines together with adjacent streets, roads, setbacks, and rights-of-way.
- (4) Location of all existing structures on subject property and adjoining properties (completely dimensioned, including utility lines, poles, etc.).
- (5) Location of the proposed construction and improvements, including the location of all signs.
- (6) Motor vehicle access, including individual parking stalls, circulation patterns, curb, gutter, and sidewalk location.
- (7) Necessary explanatory notes.
- (8) Name, address, and telephone number of builder and owner.
- (9) All other information that may be required as determined by the building inspector.

1.10 Fire District Review of Building Plans

Where buildings are to be used for industrial, commercial, or commercial/residential (fourplex or larger) purposes, building and site plans must be submitted for approval of the local fire protection district prior to the issuance of the building permit. In the case of disputes over fire district requirements, the Board of County Commissioners will make the final determination as to the requirements after consultation with the interested parties.

1.11 Fire Protection Facilities to be Installed Prior to Issuance of Building Permits

In subdivisions, commercial and industrial parks, planned unit developments, and condominium projects requiring the installation of water systems and storage capacity for fire protection under Chapter 13 of this Code, building permits will not be issued until facilities serving the construction sites are completely installed and operational, or alternatively, upon the approval of the local fire protection district, temporary facilities provided. In the case of disputes over fire district requirements, the Board of County Commissioners will make final determination as to the requirements after consultation with the interested parties.

1.12 Water Required for Building Permit

A source of water must be provided prior to the issuance of a building permit for a dwelling. If the dwelling is to be served by an existing water system the building permit application must be accompanied by a statement from a representative of the system indicating that the water hook-up will be allowed and that the system can deliver adequate quality, quantity, and pressure to the proposed dwelling.

If a private source of water is to be developed that building permit application must be accompanied by evidence of water rights or ownership of the proposed source or supply, application numbers from filings with the State Division of Water Resources, and evidence that the source can be adequately isolated from all present and potential sources of pollution in accordance with State standards.

1.13 Address Required for Building Permit

An address in conformance with the Summit County Addressing System must be assigned before issuance of a building permit. All addressess shall be assigned and/or approved by the County Planning Office.

1.14 Issuance of Building Permits Prior to Completion and Acceptance of Required Improvements

Building permits may be issued for construction in subdivisions and other projects prior to the completion and acceptance by the County of the required property improvements. In such cases, the County Building Inspector may require that the applicant for a building permit sign a statement indicating the following:

- (1) That the applicant is aware of the terms of the bond or escrow account established to guarantee completion of required improvements to the satisfaction of the County.
- (2) That the applicant releases Summit County from liability for installation, maintenance, or repair of the required improvements until the same have been completed and accepted by the County.
- (3) That the applicant assumes all risk in connection with construction on the subject property.

1.15 Enforcement

All departments, officials, and public employees of Summit County vested with the duty and authority to issue permits, licenses, or certificates of zoning compliance shall conform to the provisions of this Code and shall not issue a permit, license, or certificate of zoning compliance for use, building, or other purposes where the same would be in conflict with this Code, and any such permit, license, or certificate issued in conflict with the provisions of this Code, shall be null and void.

The Building Inspector and Zoning Administrator are charged with enforcement of this Code and are authorized either personally or through a duly authorized representative, to inspect or cause to be inspected all building and structures in the course of construction, modification, or repair and to inspect land uses to determine compliance with this Code.

1.16 Penalties

Any person, firm, or corporation, whether as principal, agent, employee, or otherwise, violating or causing the violation of any of the provisions of this Code shall be guilty of a misdemeanor and punishable as provided by law. The County Attorney, or any owner of real estate adversely affected by a violation of this Code, may institute injunction, abatement, or any other appropriate legal action to prevent, enjoin, abate, or remove any erection, construction, alteration, maintenance, or use in violation of this Code.

1.17 Time

In computing any period of time prescribed or allowed by this Code, the day of the act, event, or decisions from which the designated period of times begins to run is not included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday. Intermediate Saturdays, Sundays, and holidays shall be included in the computation. The date of a decision shall be the date of the hearing or the date the decision or recommendation is made. If no hearing is held on the matter, the date of decision or recommendation shall be the date written notice of such decision or recommendation is mailed to the applicant.

1.18 County Planning Commission

The Summit County Planning Commission shall operate pursuant to 17-27-2 Utah Code Annotated 1953, as amended. All members of the Summit County Planning Commission shall reside and own real property in Summit County and a majority of said commission shall reside in the unincorporated areas of the county.

Chapter 3

NONCONFORMING BUILDINGS AND USES

3.1 Maintenance Permitted

A nonconforming building or structure may be maintained and the occupancy of such building or structure may be continued.

3.2 Repairs and Alterations

Repairs and structural alterations may be made to a nonconforming building or to a building housing a nonconforming use.

3.3 Restoration of Damaged Buildings

A nonconforming building or structure and a building or structure occupied by a nonconforming use which is damaged or destroyed by fire, flood, or other calamity or act of nature may be restored, and the building or structure or use of such building, structure, or part thereof may be continued or resumed, provided that such restoration is started within a period of one year from the date of destruction and is diligently prosecuted to completion. Such restoration shall not increase the floor space devoted to the nonconforming use over that which existed at the time the building became nonconforming.

3.4 Discontinuance or Abandonment

A nonconforming building or structure or portion thereof or a lot occupied by a nonconforming use which is, or which hereafter becomes abandoned or which is discontinued for a continuous period of one year or more shall not thereafter be occupied, except by a use which conforms to the regulations of the zone in which it is located.

3.5 Change of Use

The nonconforming use of a building or structure may not be changed except to a conforming use; but where such change is made, the use shall not thereafter be changed back to a nonconforming use.

3.6 Expansion of Use Permitted

A nonconforming use may be extended to include the entire floor area of the existing building in which it is conducted at the time the use became nonconforming.

3.7 Nonconforming Use of Land

The nonconforming use of land, existing at the time this Code became effective, may be continued, provided that no such nonconforming use of land shall in any way be expanded or extended either on the same or adjoining property, and provided that if such nonconforming use of land, or any portion thereof, is abandoned or changed for a period of one (1) year or more, any future use of such land shall be in conformity with the provisions of this Code.

3.8 Non-Conforming Size of Lots

Any lot of record at the time of passage of this Code in any zone in which single family dwellings are permitted and which does not comply with the standards of this Code with regard to lot area may be used for a single family dwelling, excluding mobile homes unless the lot is at least one acre in size. A lot of record shall consist of a lot shown on a recorded subdivision plat or described in a recorded metes and bounds description as a deed, sales contract, or survey. In the event the lot was not recorded prior to the adoption of this Code, the Board of Adjustment shall determine whether or not there is sufficient evidence to deem that the lot existed prior to the date of the passage of this Code.

3.9 Abandonment

A non-conforming use shall be deemed abandoned if said use has not applied to the premises for a consecutive period of 12 months.

3.10 Permits Granted Prior to Passage of Code.

Authorization granted by the county to construct a building or structure shall not be denied or abridged in the event that a building permit has been issued and such permit is still valid.

3.11 Subdivision Approved Prior to Passage of Code

A subdivision which had received preliminary approval from the Planning Commission prior to the adoption of this Code shall be allowed in any zone, irrespective of zone requirements for lot size, if the requirements for final approval in accordance with Summit County Ordinance No. 65 have been met and the plat approved within fifteen (15) months of the adoption of this Code.

(4) where application of the above rules does not clarify the zone boundary location, the Planning Commission shall interpret the map.

12.5 Suburban residential zone (SR-1)

(1) Purpose. The SR-1 zone is established to provide residential developments on relatively flat terrain and in close proximity to service delivery centers or developments already receiving county services.

(2) Characteristics. This zone is characterized by clustered residences on flat terrain and on the most suitable soils for development purposes.

(3) Lot Requirements for Building Purposes. See Section 12.19

(4) Authorized Uses. See Section 12.20

(5) Special Provisions. None

12.6 Rural Residential Zone (RR-1)

(1) Purpose. The RR-1 zone is established to provide a location where residential development associated with country living and open space can be maintained in compatibility with the natural constraints of the land.

(2) Characteristics. This zone is characterized by uneven terrain with dwellings clustered in swells or valleys and/or placed on large lots on the steeper slopes.

(3) Lot Requirements for Building Purposes. See Section 12.19

(4) Authorized Uses. See Section 12.20

(5) Special Provision. None

12.7 Rural Residential Zone (RR-2)

(1) Purpose. The RR-2 zone is established to provide residential development in a rural setting without conflicting with agriculture.

(2) Characteristics. This zone is characterized by dwelling lots along public highways interspersed with agriculture land and associated buildings.

(3) Lot Requirements for Building Purposes. See Section 12.19

(4) Authorized Uses. See Section 12.20

(5) Special Provisions.

(a) This zone extended for 500 feet on either side of the center line of maintained public roadways which are designated on the Summit County zoning map. Residential dwellings are permitted on lots which have frontage along the indicated roadways. At least the required frontage width shall be maintained between side lot lines from the front property line to the front building setback. Cherry stem or other irregular shaped lots are prohibited.

(b) Duplexes are allowed upon the issuance of a conditional use permit with a minimum lot size of 3/4 of an acre, at least 165 feet of frontage on a maintained public roadway as designated on the Summit County zoning map, limited to only one (1) access point; and submittal of a site plan to be approved by the Planning Commission.

12.18 (E) Snyderville Basin District - SBD-1

- (1) Purpose. The SBD-1 zoning district is designed as a single "Code" consisting of planning policies and development regulations wherein development proposals are considered on their individual merits. As with other approaches to planning zoning this zone promotes the public health, safety and welfare by maximizing the positive impacts of development and minimizing the negative.
- (2) Characteristics. This zone is characterized by an innovative approach to planning and development approvals in that a permit to develop is granted or denied on the basis of a proposals compliance with pre-set performance standards (policies) covering a wide range of social, economic, environmental, design and public facilities factors. Processing and final decision on a development application focus on the developers "evidentiary package" which consists of: an application form, plans, drawings and rendering, and one-page evidentiary forms for each policy, and completed by the developer.
- (3) Lot Requirements for Building Purposes. See Snyderville Basin Development Code Chapter 5, Policy, Section 5.6 Absolute Policies, Section 5.7 Relative Policies, Section 5.9 Density, and Table 6.
- (4) Authorized Uses. See the Snyderville Basin Development Code Chapter 5, Policy, Section 5.6, Section 5.7.
- (5) Special Provisions.
 - (a) Permits required. A Class I or Class II development permit is required for all developments in the Sndyerville Basin Zoning District.
 - (b) Lot size, frontage width, front, side & rear setbacks and authorized uses. Due to the uniqueness of this development approval process, requirements for Section 12.19 and 12.20 will be obtained from the standards contained in Chapter 5 and Table 6 of the Snyderville Basin Development Code.

12.19 Lot Requirements for Building Purpose. Refer to table of page 12-8 b,c.

12.20 Authorized Uses in Zones. In the following table permitted uses of lands or building are indicated by a "P", conditional uses of lands or buildings are indicated by a "C", and if the use is not allowed it is either not named in the use list or it is indicated by a "_". See authorized use table on page 12.9.

17.20 Authorized Uses	SR-1	RR-1	RR-2	R-1	R-5	AG-1	WR-1	WF-1	C-1	CR-1	HS-1	LI-1
(1) Accessory buildings and uses customarily incidental to permitted and traditional uses.	P	P	P	P	P	P	P	P	P	P	P	P
(2) Agriculture												
A. The raising, cultivating, grazing, or breeding of plants or animals in unlimited quantities.	-	-	C	-	P	P	P	P	-	-	-	-
B. Animals and fowl for recreation or for family food production for the primary use of persons residing on the premises.	P	P	P	P	P	P	P	P	P	P	P	P
C. Agriculture industries or businesses involving agricultural production in manufacturing, packaging, treatment, sales, intensive feeding, or storage, including animal feed yards, kennels, fur farms, food packaging or processing plants, commercial greenhouses, commercial poultry or egg production, saw mills, and similar uses.	-	-	C	-	C	P	C	-	-	-	-	P
(3) Dwellings												
A. Single Family Dwellings	P	P	P	P	P	P	P	P	-	-	-	P
B. Two Family Dwellings	-	-	C	-	C	C	C	-	P	-	-	P
C. Multiple Family Dwellings in Planned Unit Developments	P	P	P	P	-	-	-	-	P	P	P	-
D. Multiple unit dwellings for commercial purposes, i.e., motels, hotels, condominiums, and boarding houses, providing that the density of units with kitchen facilities shall not exceed ten (10) per acre and units	-	-	-	-	-	-	-	C	P	P	P	-

	SR-1	RR-1	RR-2	R-1	R-5	AG-1	WR-1	WF-1	C-1	CR-1	HS-1	LI
without kitchen facilities, thirty (30) per acre, unless it can be shown that adequate fire protection is provided to safeguard human life to justify a greater height than permitted in Section 5.6 of this Code; in such cases densities may be increased, provided however that the density shall not exceed the above described densities for each two building levels above fire fighting grade.	-	-	-	-	-	-	-	-	P	P	P	-
E. Multiple unit dwellings for commercial purposes, i.e., hotels, motels, and condominiums, with no density requirements, provided however that at least seventy (70) percent of the project, excluding parking space and road rights-of-way, is maintained as natural or landscaped open space or outdoor recreation facilities, i.e., swimming pools, tennis courts, etc.	-	-	-	-	-	-	-	-	-	P	-	-
F. Mobile Homes on one acre minimum lots (but in no case less than the minimum lot size required in the zone) and subject to requirements of Chapter 10.	-	P	P	P	P	P	P	P	-	-	-	-
G. Mobile homes for housing agricultural employees and subject to the requirements of Chapter 10.	-	-	C	-	-	C	C	C	-	-	-	C
H. Mobile home parks and subdivisions subject to requirements of Chapter 10.	C	C	C	C	-	-	-	-	-	-	C	-
I. Recreation vehicle parks subject to requirements of Chapter 9.	-	-	C	C	C	C	C	C	C	-	C	C

	SR-1	RR-1	RR-2	R-1	R-5	AG-1	WR-1	MF-1	C-1	CR-1	HS-1	LI-1
J. Farm or ranch housing for employees of the farm or ranch.	-	-	C	-	-	P	P	P	-	-	-	-
(4) Outdoor commercial recreation activities including archery and rifle ranges, campgrounds, golf courses, dude ranches, public stables, ski lifts, public snowmobile trails, and other similar uses.	C	C	C	C	C	C	C	C	C	C	C	C
(5) Sales Activities												
A. Retail establishments such as grocery and general merchandise stores and novelty, gift, and photo supply stores.	-	-	-	-	-	-	-	C	P	P	P	-
B. Service establishments, including barber shops, confectionary shops, laundromats and dry cleaners, indoor recreation centers, mortuary, home appliance repair shops, banks, and other similar commerce.	-	-	-	-	-	-	-	-	P	P	P	-
C. Travel service and entertainment establishments such as automobile service stations, restaurants, drive-in food stands, and theatres.	-	-	-	-	-	-	-	C	P	P	P	-
D. Office buildings, including clinics, animal hospitals, and other office activities.	-	-	C	-	-	-	-	-	P	C	C	P
E. Liquor and beer sales and places for the drinking of liquor and beer.	-	-	-	-	-	-	-	C	P	P	P	-
F. Neighborhood convenience stores for the primary use of the residents in the immediate vicinity.	C	C	C	C	-	-	-	-	P	P	P	P

(6) Home Occupations

A. Home occupations conducted entirely within a dwelling by one or more persons residing within a dwelling not to include however the sale of commodities except those which are produced on the premises and involve the use of any accessory buildings or yard space. Qualifying home occupations include the use of the home by a physician, surgeon, dentist, or physical therapist for emergency consultation or treatment or for the use of a lawyer, engineer, or other professional person for consultation and for auxillary use; the occupation of an artist who gives private lessons in voice, dance, boxing, piano or other musical instrument limited to a maximum of eight (8) pupils at a time; a foster home or child care center for not more than eight (8) children at a time; the renting of one or more rooms to not more than four (4) persons provided that one additional space of off-street parking be provided for each two renting persons.

P P P P P P P P P P P P

B. Home occupations involving the use of yard space or accessory buildings and including the sale of commodities not produced on the premises, provided however that such occupation shall not be detrimental to adjacent property owners. Such occupation shall be subject to annual issuance and annual reissuance of home occupation permits by the Board of Commissioners. Such home occupations include home appliance repairs, carpentry, and the raising of animals for other than family use or consumption.

C C P C C C C C P P P P

[illegible]

	SR-1	RR-1	RR-2	R-1	R-5	AG-1	WR-1	WF-1	C-1	CR-1	HS-1	LI-1
C. Rock crushers, concrete batching plants, asphalt plants, and petroleum refineries.	-	-	-	-	-	C	C	C	-	-	-	P
D. Manufacturing, curing, compounding, processing, packaging, and treatment of bakery goods, candy, cereal, pharmaceuticals, toiletries, cosmetics, sporting goods, and other goods which will be manufactured by non-polluting methods.	-	-	-	-	-	-	-	-	C	-	-	P
E. Uses which because of their incompatibility with domestic activities are required to be located at least 300 feet from a zone boundary including foundry, casting of lightweight non-ferrous metals, blast furnaces, and similar uses. Such uses shall not exceed state or federal environment protection standards.	-	-	-	-	-	-	-	-	-	-	-	P
F. Manufacturing, processing, refining, treatment, distilling, storage, compounding or pipeline transmission of acid, ammonia, acetylene gas, disinfectants, plastics, pot ash, and other such materials.	-	-	-	-	-	C	C	-	-	-	-	P
G. Processing, treatment, stabilization or storage of liquid or solid wastes except agricultural wastes, i.e.; garbage, rubbish, trash and other refuse material, sewer sludge, raw sewage, oil or gas well drilling fluids, etc.	-	-	C	C	C	C	C	C	-	-	-	C
H. Pipeline transmission of petroleum and natural gas.	P	P	P	P	P	P	P	C	P	P	P	P
I. Welding and blacksmith shops, and auto-body repair shops.	-	-	-	-	-	C	-	-	P	-	C	P

	SR-1	RR-1	RR-2	R-1	R-5	AG-1	WR-1	WF-1	LI-1	CR-1	HS-1	LI-1
(10) Signs subject to Chapter 8	P	P	P	P	P	P	P	-	P	P	P	P
(11) Transportation												
A. Bus terminal	-	-	-	-	-	-	-	-	P	C	C	P
B. Freighting or trucking yard or terminal.	-	-	-	-	-	-	-	-	P	-	C	P
C. Airport	-	-	C	C	C	C	C	C	C	-	-	C
D. Truck stop and service facilities	-	-	-	-	-	-	-	-	P	-	P	P
(12) Storage and Warehousing												
A. Coal and fuel yards including but not limited to firewood, heating oil, propane, butane and kerosene.	-	-	C	C	C	C	C	C	C	-	C	P
B. Contractors equipment storage yard and plant.	C	C	C	-	-	C	C	C	C	-	-	P
C. Garage, public	-	-	-	-	-	-	-	-	C	-	C	P
D. Junk yard	-	-	-	-	-	C	C	-	-	-	-	C
E. Warehouse	-	-	-	-	-	-	-	C	P	-	-	P
F. Rental storage sheds	-	-	C	P	C	C	-	-	P	-	P	P
(13) Planned Unit Development subject to requirements of Chapter 11.	C	C	C	C	C	C	C	C	C	C	C	C
(14) Subdivisions, subject to Chapter 13 where each lot meets requirements of the zone in which it is located.	P	P	P	P	P	-	-	-	P	P	P	P

Addendum A. 4

"Findings"

IN THE THIRD JUDICIAL DISTRICT
IN AND FOR SUMMIT COUNTY, STATE OF UTAH

No.
FILED
AUG 23 1993

JANE HARPER, RICHARD D. HARPER,
FRANK CATTELAN, RICHARD RICHINS,
and ETHEL S. RAYMOND,

Plaintiffs,

v.

SUMMIT COUNTY, a body politic, the
SUMMIT COUNTY COMMISSION, and the
SUMMIT COUNTY PLANNING COMMISSION,
and UTELITE CORPORATION,

Defendants,

FINDINGS OF FACT
CONCLUSIONS OF LAW

By
Clerk of Summit County
Deputy Clerk

Civil No. 10718

Judge Homer F. Wilkinson

The above-entitled matter came on regularly for hearing July 8, 1991, the Honorable Homer F. Wilkinson presiding. The Plaintiffs were represented by Jeffrey W. Appel of Haley & Stolebarger, Defendants Summit County was represented by Franklin P. Anderson and Defendant Utelite Corporation was represented by John T. Nielsen. Argument was heard with respect to Defendant Utelite and Summit County's Motions to Dismiss and Plaintiffs' Motion for Partial Summary Judgment. Having heard the arguments of counsel and being fully advised of the premises, the Court makes its findings of fact and conclusions of law as follows:

FINDINGS OF FACT

The Court hereby adopts the following Findings of Fact:

1. In the Fall of 1988, Defendant Utelite Corporation (hereinafter "Utelite") decided to relocate a railroad loadout facility (hereinafter "Utelite facility") to Echo, Utah.

2. On December 13, 1988, Utelite went before the Summit County Planning Commission seeking approval for construction of the facility in Echo.

3. The posted agenda for the December 13, 1988 meeting of the Planning Commission provides no notice to the public that there would be a discussion concerning the proposed relocation and construction of the Utelite facility.

4. The minutes of the December 13, 1988 meeting of the Planning Commission contain no reference to a discussion or any testimony concerning the proposed relocation and construction of the Utelite facility.

5. Utelite received verbal permission at the December 13, 1988 meeting of the Planning Commission to begin construction of the facility.

6. On January 13, 1989, Jack Willis on behalf of Robert McGregor, Chairman of the Planning Commission, sent a letter to Utelite confirming a discussion at the December 13, 1988 meeting of the Planning Commission regarding the proposed relocation of the Utelite facility.

7. The January 13, 1989 letter indicated that it was the consensus of the Planning Commission that the Utelite operation could be moved to the Echo location and would be considered a "permitted use" at the Echo site.

8. Construction of the Utelite facility began on or about February 21, 1989 at a location directly across from and adjacent to a residential area of Echo in which Plaintiffs reside.

9. On February 28, 1989, Utelite applied for and received from Summit County, building permit # 89007, which is specifically designated as an "electrical permit."

10. The Utelite facility was substantially completed by April 25, 1989, at which time the first loading of railroad cars took place.

11. In October 1989, Utelite made application for a building permit from Summit County, which permit was issued on November 28, 1989 as building permit # 89291 for the construction of the loadout facility in Echo.

CONCLUSION

The Court concludes, as a matter of law, that:

1. Plaintiffs have standing to maintain this action pursuant to the terms of the Summit County Development Code, the laws of the State of Utah and the Constitution of the State of Utah.

2. Union Pacific Railroad is not an indispensable party to this action.

3. Plaintiffs in this instance were not required to exhaust administrative remedies for the reason that due process and other constitutional rights are involved and were violated.

4. The statute of limitations contained in the open meeting law Utah Code Ann. §52-4-1 et seq. has not been violated due to application of the equitable tolling doctrine.


5. The decision of Defendant Summit County concerning the

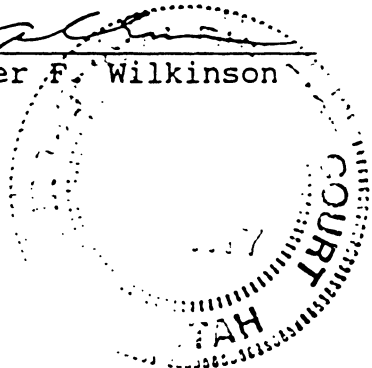
approval of utilization of the site currently occupied by Utelite Corporation was in violation of the provisions of the Summit County Development Code and, thus, that decision is null and void.

6. The decision of Defendant Summit County concerning the approval of utilization of the site currently occupied by Utelite Corporation was made in violation of the provisions of the Open Meeting Act Utah Code Ann. §52-4-1- et seq.

7. Injunctive relief requiring the County to ensure the removal of the Utelite facility is granted with the stay of the effectiveness of that portion of this order for sixty (60) days from the date of this order.

DATED this 23 day of August, 1993.


Honorable Homer F. Wilkinson



"Order"

No.

FILED

AUG 23 1993

Clerk of Summit County

Deputy Clerk

ORDER FOR PARTIAL SUMMARY
JUDGMENT

v.

Civil No. 10718

Judge Homer F. Wilkinson

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED Plaintiffs Motion for Partial Summary judgment is granted and that the actions of Defendant Summit County with respect to the zoning decision allowing Utelite to occupy its current site was accomplished in violation of law, the Summit County Development Code, and the Open Meeting's Act and is thus null and void for the following reasons:

1. The acts and omissions of the Defendants leading to the emplacement of the Utelite Facility in Echo, Utah, were contrary to the Summit County Development Code and are therefore null and void.

2. Defendants actions were in violation of the Open and Public Meeting's law, Utah Code Ann. § 52-4-1 et seq.

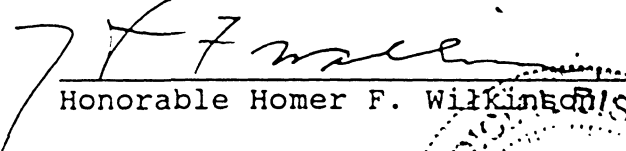
3. Defendants acts and omissions have harmed Plaintiffs without providing them due process of law.

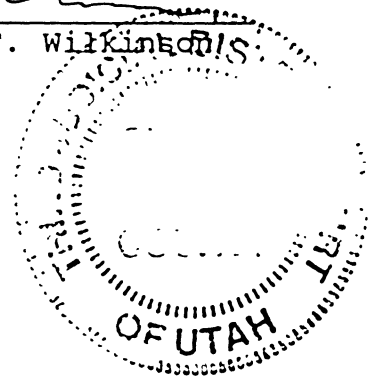
4. The effectiveness of this order is stayed for sixty (60) days from the date this order is entered. If no appeal is taken within that time period, then an injunction shall issue and Defendant Summit County shall be required to effectuate the removal of Utelite from their currently occupied site.

5. Defendant Utelite Corporation and Defendant Summit County's Motions to Dismiss are denied.

DATED this 23 day of August, 1993.

So Ordered:


Honorable Homer F. Wilkinson



Addendum A. 5

IN THE SUPREME COURT
STATE OF UTAH
332 STATE CAPITOL
SALT LAKE CITY, UTAH 84114

October 27, 1993

OFFICE OF THE CLERK

3rd Dist. Court Summit County
Appeals Clerk
Summit County Courthouse
PO Box 128
Coalville, UT 84017

No.

FILED

OCT 28 1993

Clerk of Summit County

By
Deputy Clerk

Jane Harper, et al.,
Plaintiffs and Appellees,
v.
Summit County, et al.,
Defendants and Appellants.

No. 930461
10718

THIS DAY, Petition for an interlocutory appeal having been heretofore considered, and the Court being sufficiently advised in the premises, it is ordered that an interlocutory appeal be, and the same is, denied.

Geoffrey J. Butler
Clerk

Addendum A. 6

VAN COTT, BAGLEY, CORNWALL & MCCARTHY
John T. Nielsen (#2408) ✓
Eric C. Olson (#4108) ✓
Attorneys for Defendant Utelite Corporation
50 South Main Street, Suite 1600
P. O. Box 45340
Salt Lake City, Utah 84145
Telephone: (801) 532-3333

FILED

SEP 7 1995

Clerk of Summit County

By _____
Deputy Clerk

*signed in
SL by Judge
Pat Brian
9-6-95*

IN THE THIRD JUDICIAL DISTRICT COURT OF SUMMIT COUNTY

STATE OF UTAH

JANE HARPER, RICHARD D.)
HARPER, FRANK CATTELAN,)
RICHARD RICHINS and THE)
DICKER HILL TRUST,)
)
Plaintiffs,)
)
vs.)
)
SUMMIT COUNTY, a body)
politic, the SUMMIT COUNTY)
COMMISSION, SUMMIT COUNTY)
PLANNING COMMISSION and)
UTELITE CORPORATION,)
)
Defendants.)
_____)

ORDER RE: MOTIONS FOR
PARTIAL SUMMARY JUDGMENT

Civil No. 90-03-10718

Honorable Pat B. Brian

On May 30, 1995, this Court heard argument in the above matter with respect to the various motions of the parties for partial summary judgment on claims and defenses in this action. The plaintiffs were represented by James L. Warlaumont. The Summit County defendants were represented by Jody K Burnett and Franklin P. Andersen. The defendant Utelite Corporation ("Utelite") was represented by Eric C. Olson. By agreement of the parties, the hearing took place in Salt Lake City, Utah rather than in Summit County, Utah.

The Court having reviewed the submissions of the parties, having heard the argument of counsel and being otherwise sufficiently advised,

IT IS HEREBY ORDERED AND ADJUDGED as follows:

1. Utelite's Motion for Partial Summary Judgment on the claim of nuisance per se is denied.

2. Utelite's Motion for Partial Summary Judgment on the claim of trespass is denied.

3. Utelite's Motion for Partial Summary Judgment on the claim of intentional and negligent infliction of emotional distress is granted. There exists no genuine issue of material fact with respect to the alleged outrageousness of Utelite's conduct and Utelite is entitled to judgment on the Tenth Cause of Action as a matter of law. Nothing in this Order, however, shall limit the plaintiffs from claiming damages for emotional distress under their nuisance and trespass claims.

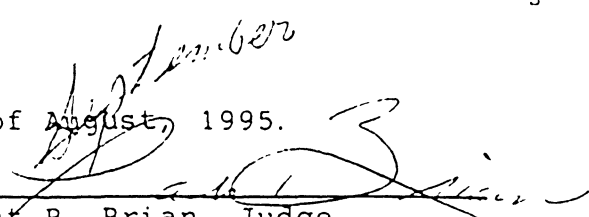
4. Utelite's Motion for Partial Summary Judgment on the claim for attorney's fees and costs pursuant to Utah Code Ann. § 78-27-56 is granted and the Eleventh Cause of Action is dismissed without prejudice to the plaintiffs' renewing said claim after the conclusion of trial.

5. The plaintiffs' Motion for Partial Summary Judgment on Utelite's defenses of estoppel, waiver and laches is denied.


6. The Court reserves until after the jury trial herein any ruling on Summit County's Motion for Partial Summary Judgment on the claim for award of attorney's fees and costs

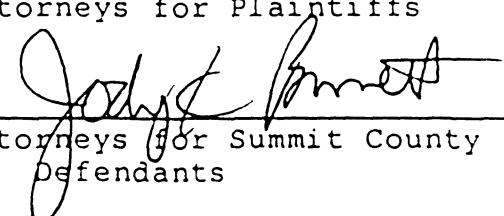
under 42 U.S.C. §§ 1983 and 1988 as well as Utah Code Ann. §
54-2-9.

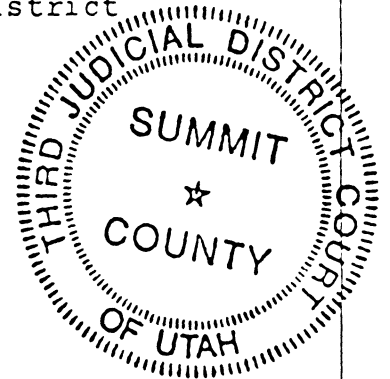
DATED this 6 day of August, 1995.


Pat B. Brian, Judge
Third Judicial District
Summit County

Approved as to Form:


Attorneys for Plaintiffs


Attorneys for Summit County
Defendants



Addendum A. 7

FILED

SEP 15 1995

Preliminary Instruction To The Jury

MEMBERS OF THE JURY:

Clerk of Summit County
By
Deputy Clerk

In order to clarify certain issues in this case the court instructs you as follows:

In 1991, Judge Homer Wilkinson, of this court, in ruling on a motion for summary judgment found that: (The ruling was signed August 23, 1993)

1. On December 13, 1988 Utelite received verbal permission from the Summit County Planning Commission to begin construction of its facility in Echo, Utah.

2. On January 13, 1989, a letter was sent to Utelite on behalf of the Planning Commission which indicated that it was the consensus of the Planning Commission that the Utelite operation could be moved to the Echo location and would be considered a "permitted use" at the Echo site.

The court ruled at that time, however, that the actions of Summit County allowing Utelite to occupy the site in Echo were contrary to the Summit County Development Code and in violation of Utah's Open Public Meeting law, and that, therefore, the County's actions were null and void.

The court then ordered that the county remove the Utelite facility from Echo. There was no express finding against Utelite and Utelite was not subject to the courts order.

The order to remove the facility has been stayed pending an appeal of that order by the county.

Implicit in Judge Wilkinson's ruling is the conclusion that the placement of the Utelite facility in Echo is in violation of the Summit County Development Code and this court has so ruled. Hence, my previous instruction to you that the location of the facility, being in violation of the Development Code is a nuisance per se, or as a matter of law.

This ruling by the court that the facility is a nuisance as a matter of law does not mean, by itself, that the plaintiffs have or have not suffered damages. You as the jury are to decide by a preponderance of the evidence whether the plaintiffs have suffered damages and, if so, the amount that will fairly compensate the plaintiffs. You will further be asked to decide whether the plaintiffs are entitled, by clear and convincing evidence, to receive punitive damages, and if so the amount of such damages.

Addendum A. 8

No.
FILED

FEB 27 1996 10:11

Clerk of Summit County

IN THE THIRD JUDICIAL DISTRICT COURT OF SUMMIT COUNTY
By Deputy Clerk

STATE OF UTAH

JANE HARPER, RICHARD D.)	
HARPER, FRANK CATTELAN,)	FINAL JUDGMENT ON SPECIAL
RICHARD RICHINS and THE)	VERDICT
DICKER HILL TRUST,)	
)	
Plaintiffs,)	Civil No. 90-03-10718
)	
vs.)	Judge Frank G. Noel
)	
SUMMIT COUNTY, a body)	
politic, the SUMMIT COUNTY)	
COMMISSION, SUMMIT COUNTY)	
PLANNING COMMISSION and)	
UTELITE CORPORATION,)	
)	
Defendants.)	
)	
)	

No.
FILED

FEB 27 1996

Clerk of Summit County

By Deputy Clerk

The damage claims by the plaintiffs herein against the defendant Utelite Corporation were tried to a jury in this Court on September 12 through 15, 1995. The Court also heard the evidence with respect to the plaintiffs' claim for equitable relief supplementary to any such relief already awarded in this action.

Judge Frank G. Noel presided at the trial. The plaintiffs were represented by James L. Warlaumont. The defendant was represented by Eric C. Olson. The Court now enters its Final Judgment in this action disposing of all remaining claims in this matter.

Before the commencement of trial, the Court determined that the Order Granting Partial Summary Judgment entered on August 23, 1993 by Judge Homer Wilkinson (the

"Wilkinson Order") was law of the case and, by implication, the Wilkinson Order included the finding that the Utelite loading facility was in violation of the Summit County Development Code. Based on this finding implicit in the Wilkinson Order, the Court further held that the Utelite loading facility in Echo, Utah was a nuisance per se.

The parties thereafter stipulated to the dismissal without prejudice of all remaining theories of liability--nuisance, trespass and negligence--advanced by the plaintiffs against the defendant Utelite Corporation. This stipulation did not affect or apply to the claims resolved by Judge Wilkinson's Order Granting Partial Summary Judgment. The defendant Utelite expressly waived its right to assert the bar of the statute of limitations with respect to any claim so dismissed without prejudice.

The issue of liability being resolved as a matter of law and all other remaining theories of liability being dismissed without prejudice, only the issues of actual and punitive damages were submitted for consideration by the jury. The Court submitted the following interrogatories to the jury as part of a Special Verdict, which were answered as indicated:

Please answer the following questions from a preponderance of the evidence. If you find the evidence preponderates in favor of the issue

BOOK U U PAGE 901

presented, answer "Yes." If you find the evidence is so equally balanced that you cannot determine a preponderance of the evidence, or if you find that the evidence preponderates against the issue presented, answer "No." Also, any damages assessed must be proven by a preponderance of the evidence.

1. Was Utelite loading facility a proximate cause of damages to:

Richard Harper	Yes <u>X</u>	No _____
Jane Harper	Yes <u>X</u>	No _____
Frank Cattelan	Yes <u>X</u>	No _____
Richard Richins & the Dicker Hill Trust	Yes <u>X</u>	No _____

If you answered question #1 "yes" as to any of the plaintiffs then go on to the next questions. Otherwise have the foreperson sign the verdict form and return to the courtroom.

2. If you answered question #1 "yes" as to any of the plaintiffs then as to that plaintiff answer the following questions:

What amount of money will fairly compensate the plaintiffs for damages sustained as a result of the loading facility and its operation?

General Damages: (adverse health effects, inconvenience, annoyance, discomfort, loss of

BOOK U U PAGE 902

enjoyment of home and property, mental distress and emotional injury to the date of trial.)

Richard Harper	\$5,000
Jane Harper	\$5,000
Frank Cattelan	\$3,000
Richard Richins & the Dicker Hill Trust	\$1,500

Reduction in Market Value of Property Affected:

Richard and Jane Harper	\$ <u>0</u>
Frank Cattelan	\$ <u>0</u>
Richard Richins & the Dicker Hill Trust	\$ <u>0</u>

Loss of Business Income:

Frank Cattelan	\$ <u>0</u>
----------------	-------------

Considering all the evidence in the case, do you find from clear and convincing evidence that plaintiffs are entitled to an award of punitive and exemplary damages, against Utelite Corporation?

Answer: Yes _____ No X

The Court having reviewed the Special Verdict of the jury, having heard the evidence at trial, having considered the argument and submissions of counsel and being otherwise duly and sufficiently advised,

IT IS HEREBY ORDERED AND ADJUDGED as follows:

BOOK U U PAGE 903

2100

1. The plaintiff Jane Harper is awarded judgment against the defendant Utelite Corporation in the amount of \$5,000 with interest thereon at the statutory rate from the date of this Judgment.

2. The plaintiff Richard Harper is awarded judgment against the defendant Utelite Corporation in the amount of \$5,000 with interest thereon at the statutory rate from the date of this Judgment.

3. The plaintiff Frank Cattelan is awarded judgment against the defendant Utelite Corporation in the amount of \$3,000 with interest thereon at the statutory rate from the date of this Judgment.

4. The plaintiffs Richard Richins and the Dicker Hill Trust are jointly awarded judgment against the defendant Utelite Corporation in the amount of \$1,500 with interest thereon at the statutory rate from the date of this Judgment.

5. With respect to the plaintiffs' claims for property damages, loss of business income and punitive damages, Judgment is hereby entered in favor of the defendant Utelite Corporation and against the plaintiffs and said claims are dismissed with prejudice.

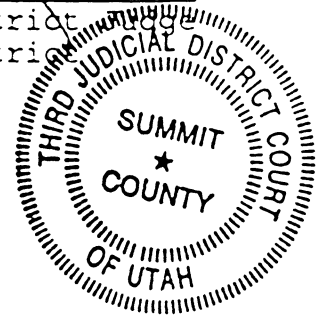
6. The court does not grant the plaintiffs any equitable relief apart from such equitable relief as the

plaintiffs may be entitled to pursuant to the terms of the
Wilkinson order.

DATED this 13th day of Feb., 1996.



Frank G. Noel, District Judge
Third Judicial District
Summit County



Addendum A. 9

No.
FILED

MAY 17 1996

VAN COTT, BAGLEY, CORNWALL & MCCARTHY
Eric C. Olson (#4108)✓
Attorneys for Defendant Utelite Corporation
50 South Main Street, Suite 1600
P. O. Box 45340
Salt Lake City, Utah 84145
Telephone: (801) 532-3333

Clerk of Summit County

By
Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT OF SUMMIT COUNTY

STATE OF UTAH

JANE HARPER, RICHARD D.)	
HARPER, FRANK CATTELAN,)	FINDINGS OF FACT AND
RICHARD RICHINS and THE)	CONCLUSIONS OF LAW
DICKER HILL TRUST,)	RE: EQUITABLE RELIEF
)	
Plaintiffs,)	
)	
vs.)	Civil No. 90-03-10718
)	
SUMMIT COUNTY, a body)	Honorable Frank G. Noel
politic, the SUMMIT COUNTY)	
COMMISSION, SUMMIT COUNTY)	
PLANNING COMMISSION and)	
UTELITE CORPORATION,)	
)	
Defendants.)	
)	

The Court heard evidence at the trial in this action held on September 12 through 15, 1995. The Court has issued Minute Entries dated February 13, 1996 and April 25, 1996 with respect to the plaintiffs' claim for equitable relief supplementary to any such relief already awarded in this action. The Court has also entered its Final Judgment of Special Verdict resolving, *inter alia*, the plaintiffs' claim for equitable relief.

On the basis of the jury's verdict and the Court's independent determination of facts based on its view of the evidence presented at trial including a personal view of the properties in question, the Court now enters the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The defendant Utelite Corporation ("Utelite") operates a loading facility (the "Facility") adjacent to the Union Pacific railroad tracks at Echo, Utah.
2. The plaintiffs own property in the vicinity of the Facility. The Union Pacific railroad tracks that run through Echo, Utah lie between the Facility and the property owned by Jane Harper, Richard D. Harper and Frank Cattelan. Trains go through Echo, Utah on these tracks in excess of fifteen to twenty times per day.
3. At the Facility on a weekly basis, Utelite loads an average of six and one-half railroad cars with its kiln dried aggregate products.
4. Semi-trucks transport the aggregate product to the Facility for loading. It takes four trucks approximately forty minutes to load a single railroad car.
5. The Utelite Facility currently operates, with occasional exceptions, on weekdays during daylight hours.

6. To deal with dust from the loading operations, Utelite has taken the following steps:

- a. Construction of a metal enclosure at the Facility.
- b. Installation of a bag house and duct work at the Facility.
- c. Paving of the access road to the Facility.
- d. Installation of curtains and an electric door at the Facility.
- e. Watering down aggregate at the Utelite plant.
- f. Installation of a hood and metal coverings over the conveyor belt and drop areas at the Facility.
- g. Response to resident complaints called in to the Utelite plant including termination of loading on windy days.

7. To deal with noise problems from the operation of the Facility, Utelite has taken the following steps:

- a. Installation of a muffler on the bag house.
- b. Instruction to truckers not to bang railroad cars in connection with loading.

8. To deal with other annoyances, Utelite has:

- a. Removed outdoor lighting at the Facility.
- b. Terminated night loading.

c. Instructed truck drivers to yield to other vehicles seeking access to the frontage road on the far side of Interstate 84 through the road at the Facility.

9. As a result of the actions taken by Utelite, confirmed by the Court's visit to the Facility while in operation and the Court's and third-party's review of videos, tapes and photographs of the Facility in operation, the Facility at present (a) is not injurious to the plaintiffs, (b) does not adversely affect the plaintiff's use and enjoyment of their property, and (c) does not cause any property damage to the plaintiffs.

CONCLUSIONS OF LAW

1. This Court has equitable power pursuant to Utah Code Ann. § 78-38-1 to enjoin or abate any nuisance created by Utelite at the Facility.

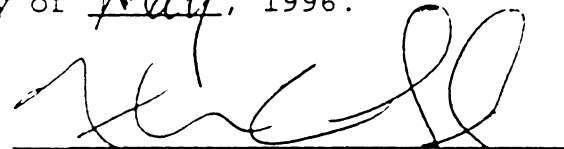
2. The Court has found solely by reason of Judge Wilkinson's August 23, 1993 Order and the findings implicit in that ruling that the Facility is a nuisance per se.

3. Notwithstanding the Court's finding that the Facility is a nuisance per se, in order to obtain further equitable relief from this Court with respect to the present operation of the Facility, the plaintiffs have the burden of proving that the Facility presently is injurious to their

health, is offensive to the senses, or obstructs the free use and enjoyment of their property.

4. The plaintiffs have failed to meet that burden of proof and are not entitled to any further equitable relief from this Court other than the equitable relief previously granted by Judge Wilkinson.

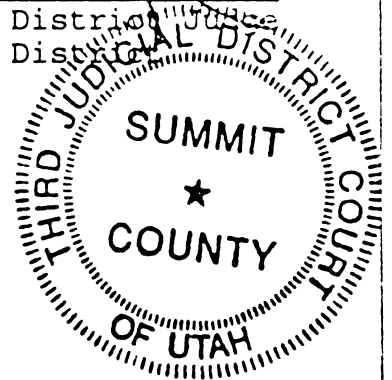
DATED this 19th day of May, 1996.



Frank G. Noel, District Judge
Third Judicial District
Summit County

Approved as to Form:

Attorneys for Plaintiffs



Addendum A. 10

JEFFREY W. APPEL (3630)
JAMES L. WARLAUMONT (3386)
BENJAMIN T. WILSON (5823)
COLLARD, APPEL & WARLAUMONT
1100 Boston Building
9 Exchange Place
Salt Lake City, Utah 84111
Telephone: (801)532-1252

Attorneys for Plaintiffs

NO.
FILED
MAY 1 1996
Clerk of Summit County
By Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT
IN AND FOR SUMMIT COUNTY, STATE OF UTAH

JANE HARPER, RICHARD D. HARPER,	:	
FRANK CATTELAN, RICHARD RICHINS,	:	
and THE DICKER HILL TRUST,	:	
	:	
Plaintiffs,	:	
v.	:	
	:	
SUMMIT COUNTY, a body politic, the	:	Civil No. 90-03-10718
SUMMIT COUNTY COMMISSION, and the	:	
SUMMIT COUNTY PLANNING COMMISSION,	:	Judge Frank G. Noel
and UTELITE CORPORATION,	:	
	:	
Defendants.	:	

Plaintiff's Motion for an Order Awarding Costs and Attorneys Fees and the Summit County Defendants Motion for Partial Summary Judgment on this issue came before the Court on November 13, 1995. Plaintiffs were represented by James L. Warlaumont; the Summit County Defendants were represented by Jody Burnett; and, Defendant Utelite was represented by Eric Olson. The Court heard oral argument thereon and took the matter under advisement. On February 13, 1996, the Court entered a Minute Entry denying the Plaintiffs'

motion for attorneys fees under 42 U.S.C. §§ 1983 and 1988 awarding attorney's fees under Utah's Open and Public Meetings Act, Utah Code Ann. §52-42-9 (1953, as amended).

In accordance with the Court's Minute Entry,

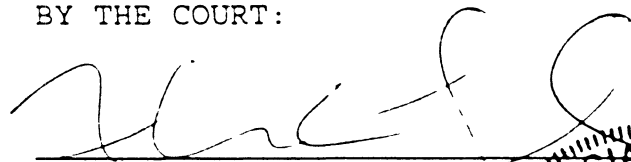
IT IS HEREBY ORDERED, ADJUDGED AND DECREED that

1. Plaintiffs' Motion for Attorneys Fees is granted under Utah Code Ann. § 52-42-9. The Court orders that the Summit County Defendants pay \$ 11,150⁰⁰ to the Plaintiffs for their attorneys fees.

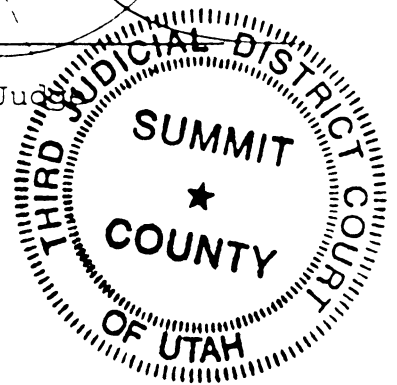
2. Plaintiffs' Motion for Attorney's Fees and Costs under 42 U.S.C. §§ 1983 and 1988 is denied.

DATED this 23 day of April, 1996.

BY THE COURT:



Frank G. Noel
Third District Court Judge



Addendum A. 11

Summit County Planning Commission

Summit County Court House
Coalville, Utah 84017

Notice is hereby given that the Summit County Planning Commission will hold their regular meeting on Tuesday December 13, 1988, beginning at 7:30 p.m. in the OLD SUMMIT COUNTY COURTHOUSE, County Courthouse, Coalville, Utah.

The proposed agenda is as follows:

Southwest Bank, Michael Riley - Continue review for extension of the Class 2 Development Permit for Sun Peak, a large-scale master planned equestrian/recreation community. (Location - Sections 25, 26 & 36 Township 1 So. Range 3 E. & Sections 30 & 31 Township 1 So. R 4E. SLB&M)

Action Snowmobile, Ken Myers - Request for renewal of a conditional use permit for seasonal snowmobile rentals 1/4 mile west of the US 40 and State Highway 242 intersection. (Southwest Quarter, Section 35 Township 1 South, Range 4 East SLB&M)

Commission & Staff - Review of Development Code revisions.

Not Legal

Published December 8, 9, 10

The Park Record
The Summit County Bee

Posted December 2, 1988

EXHIBIT B

000010

Addendum A. 12

MINUTES OF THE PLANNING COMMISSION
MEETING HELD
DECEMBER 13, 1988

PRESENT: Robert McGregor, Chairman Jerry Smith, Planning Director
 Lamar Pace Anita Lewis, Planning Coordinator
 Susan Glasmann Franklin Anderson, Dep. County Attorney
 DelRay Hatch

ABSENT: Ronald Robinson, Brent Ovard, Larry Stinckind

The meeting was called to order at 7:30 p.m. by Chairman, Robert McGregor.

Southwest Bank, Michel Riley - Continue review for extension of the Class 2 Development Permit for Sun Peak, a large-scale master planned equestrian/recreation community. (Location - Sections 25,26 & 36 Township 1 So. Range 3 E. & Sections 30 & 31 Township 1 So. R 4E. SLB&M)

Franklin Andersen stated at the November 22, 1988 Planning Commission meeting the Planning Commission asked Mr. Andersen to research if Southwest Bank could be considered the original applicant. Being the original applicant, the time limit on the permit could be extended. Mr. Andersen said he could not address the question with a "yes" or "no" answer. Mr. Andersen told the Planning Commission if they were very technical the Planning Commission could say Sun Peak Inc. was the original applicant. The Planning Commission could be equitable in saying the Southwest Bank was the original applicant as the participating financing party and owner of portion of the land. The Planning Commission in their own discretion can extend the permit.

Michel Riley said the Southwest Bank has had clear title of the property since mid summer. Mr. Riley said when potential buyers ask about the property the first question is price and the second question is what can be done with the property. Mr. Riley said millions of dollars have been invested in the property, the original owners intent was to develop the property this is the reason for the extension.

Robert McGregor asked if potential buyers of the property are interested in developing the property as was presented by Sun Peak?

Michel Riley said he does not have a potential buyer at the present time. Mr. Riley said interested buyers would probably not develop as an equestrian complex.

Robert McGregor said when Sun Peak Inc. received the Class 2 approval it was without a definite density.

Jerry Smith said the code states an extension of a permit can be for two years but cannot be extended beyond the two years.

LaMar Pace made a motion to grant the extension for two years as was presented with no densities determined.

Susan Glasmann seconded the motion.

All were in favor of the motion. The motion carried.

Action Snowmobile, Ken Myers - Request for renewal of a conditional use permit for seasonal snowmobile rentals 1/4 mile west of the US 40 and State Highway 248 intersection. (Southwest Quarter, Section 35 Township 1 South, Range 4 East SLB&M)

Ken Myers stated he is asking for a renewal of a conditional use permit for a snowmobile rental business. The location would be approximately .4 of a mile west of Quinns Junction. Mr. Myers said at the site there will be a trailer for the storage of repair tools. He will also provide off road parking. Mr. Myers said the fence line will be patrolled so there would not be a trespass problem.

LaMar Pace asked if the fuel storage had been approved by the Fire Marshall. Mr. Pace said during the last season the Fire Marshall expressed concerns over the fuel storage.

Ken Myers replied he had not checked with the Fire Marshall on the fuel storage.

DelRay Hatch made a motion to grant the conditional use permit for the winter season through April 16 subject to: 1) the fence line being patrolled, no trespassing 2) one sign banner placed on the mobile home that meets with the development code 3) approval from the Fire Marshall regarding the fuel storage.

LaMar Pace seconded the motion.

All were in favor of the motion. The motion carried.

Commission & Staff - Review of Development Code revisions.

Jerry Smith reviewed the Development Code Revisions with the Planning Commission. Robert McGregor asked that Jerry Smith and Franklin Andersen review the Development Code Revisions and form a language that can be added to the County Master Plan.

Page 3
Planning Commission Minutes
December 13, 1988

Minutes of the November 23, 1988 Planning Commission Meeting were approved as presented.

Meeting adjourned at 9:00 p.m.

Addendum A. 13

SUMMIT COUNTY BOARD
OF COMMISSIONERS

✓
FRANKLIN D. RICHARDS
SHELDON D. RICHINS
JAMES N. SOTER

SUMMIT COUNTY STATE OF UTAH

P.O. BOX 128
COALVILLE, UTAH
84017

(801) 336-4451

RON PERRY, ASSESSOR
ROBERT ADKINS, ATTORNEY
BLAKE T. TRAZIER, AUDITOR
DOUGLAS R. GEARY, CLERK
ALAN SPRIGGS, RECORDER
FRED FLEY, SHERRIFF
GLEN G. THOMPSON, TREASURER

January 13, 1989

FILE

Carsten Mortensen
P.O. Box 387
Coalville, UT 84017

RE: Relocation of Uteite Facilities

Dear Mr. Mortensen:

This is to confirm a discussion at the December 13th Planning Commission meeting regarding the relocation of the facilities.

It was the consensus of the Commission that the Uteite operation presently set-up in Wanship on the Union Pacific railroad lines could be moved to the Echo location. This would be considered a permitted use at the Echo site.

If you have any questions please call the Summit County Planning Office at 336-4451 ext. 306.

Sincerely,

Jack Willis in behalf of Robert McGregor

Robert McGregor, Chairman
Summit County Planning Commission

EXHIBIT A

000003

Addendum A. 14

grounds, places, spaces, properties, utilities, or terminals; methods to encourage energy-efficient patterns of developments, the use of energy conservation, solar and renewable energy sources, and assure access to sunlight for solar energy devices; the general character, location, and extent of community centers, town sites, or housing developments; the general location and extent of forest, and open development areas for purposes of conservation, and water supply, sanitary and drainage facilities, or the protection of urban development

History: L. 1941, ch. 23, § 4; C. 1943, 19-24-4; L. 1953, ch. 27, § 1; 1981, ch. 44, § 5.

NOTES TO DECISIONS

Power of commission before adoption of master plan.	to pass a valid zoning ordinance prior to adoption of a master plan. <i>Gayland v. Salt Lake County</i> , 11 Utah 2d 307, 358 P.2d 633 (1961).
A county planning commission has authority	

COLLATERAL REFERENCES

Utah Law Review, Utah Legislative Review, 1981-1982 Utah L. Rev. 125, 154
Am. Jur. 2d, 1982 Am. Jur. 2d Zoning § 69 to 75

C.J.S. 101 C.J.S. Zoning §§ 11 to 13
Key Numbers. -- Zoning -- 15.

17-27-5. General purposes in making master plan.

In the preparation of a county master plan, a county planning commission shall make careful and comprehensive surveys and studies of the existing conditions and probable future growth of the territory within its jurisdiction. The county master plan shall be made with the general purpose of guiding and accomplishing a co-ordinated, adjusted, and harmonious development of the county which will, in accordance with present and future needs and resources, best promote the health, safety, morals, order, convenience, prosperity, or the general welfare of the inhabitants, as well as efficiency and economy in the process of development, including, amongst other things, such distribution of population and of the uses of land for urbanization, trade, industry, habitation, recreation, agriculture, arboretum and other purposes, as will tend to create conditions favorable to health, safety, energy conservation, transportation, prosperity, civic activities, and recreational, educational and cultural opportunities; will tend to reduce the wastes of physical, financial, or human resources which result from either excessive congestion or excessive scattering of population; and will tend toward an efficient and economical utilization, conservation and production of the supply of food and water, and of drainage, sanitary, and other facilities and resources.

History: L. 1941, ch. 23, § 5; C. 1943, 19-24-5; L. 1981, ch. 44, § 6.

NOTES TO DECISIONS

Reclassification.

Where a floral company situated on "Agricultural Zone A-1" land and surrounded by residential and agricultural property requested and was granted reclassification of its property to "C-2" and "R-M" zones permitting the erection of multifamily dwellings, the reclassification

did not constitute "spot zoning" because it was compatible with the existing master plan and therefore not arbitrary, capricious, or an abuse of the zoning authority's discretion. *Crestview-Holladay Homeowners Ass'n v. Engh Floral Co.*, 545 P.2d 1150 (Utah 1976).

17-27-6. Method of adopting master plan.

A county planning commission may adopt the county master plan as a whole by a single resolution, or, as the work of making the whole master plan progresses, may from time to time adopt a part or parts thereof, any such part to correspond generally with one or more of the functional subdivisions of the subject matter which may be included in the plan. The commission may from time to time amend, extend, or add to the plan, or carry any part of it into greater detail. The adoption of the plan or any part, amendment, extension, or addition shall be by resolution carried by the affirmative votes of not less than a majority of the entire membership of the commission and after a full hearing shall have been had thereon after notice of such hearing shall have been given once each week for four successive weeks in a newspaper having general circulation in, and most likely to give notice to the residents of the locality which would be affected thereby. The resolution shall refer expressly to the plans and descriptive matter intended by the commission to form the whole or part of the plan, and the action taken shall be recorded on the plan or plans and descriptive matter by the identifying signature of the chairman of the commission. The master plan shall be available for public inspection in the office of the planning commission at all reasonable times, but its purpose and effect shall be solely to aid the planning commission in the performance of its duties.

History: L. 1941, ch. 23, § 6; C. 1943, 19-24-6; L. 1953, ch. 27, § 1.

COLLATERAL REFERENCES

A.L.R. Disqualification for interest or bias of administrative officer sitting in zoning proceeding, 10 A.L.R.3d 694

Right to cross examination of witnesses in hearings before administrative zoning authority, 27 A.L.R.3d 1304

17-27-7. Adoption of official map — Amendments.

The board of county commissioners of any county is hereby empowered, after receiving the advice of the county planning commission to adopt and establish an official map of the county showing the highways, freeways, parks, parkways and sites for public buildings or works, including subsurface facilities, in the acquisition, financing, or construction of which the county has participated or may be called upon to participate. Such map, in addition to showing existing public streets, may show the location of the lines of streets on plats of subdivisions which shall have been approved by the planning

17-27-9. Power of commission to regulate height and size of buildings and height and location of trees and other vegetation — Regulations to encourage use of solar and other forms of energy.

The county planning commission of any county may, and upon order of the board of county commissioners in any county having a county planning commission shall, make a zoning plan or plans for zoning all or any part of the unincorporated territory within such county, including both the full text of the zoning resolution or resolutions and the maps, and representing the recommendations of the commission for the regulation by districts or zones of the location, orientation, heights, bulk, and size of buildings and other structures, percentage of lot which may be occupied, the size of lots, courts, and other open spaces, the density and distribution of population, the height and location of trees and other vegetation, the location and use of buildings and structures for trade, industry, residence, recreation, public activities or other purposes, and the uses of land for trade, industry, recreation or other purposes. Regulations and restrictions of the height and number of stories of buildings and other structures, and the height and location of trees and other vegetation shall not apply to existing buildings, structures, trees, or vegetation except for new growth on such vegetation. These regulations may also encourage energy efficient patterns of developments, the use of solar and other renewable forms of energy, and energy conservation and may assure access to sunlight for solar energy devices.

History: L. 1941, ch. 23, § 9; C. 1943, 19-24-9; L. 1981, ch. 41, § 7.

NOTES TO DECISIONS

ANALYSIS

Unzoned land
Zoning power in general

Unzoned land.

Zoning ordinance does not apply retrospectively to deny a use permit to the owner of unzoned property who did everything required of him under the existing laws. *Contracts Funding & Mtg. Exch. v. Maynes*, 527 P.2d 1073 (Utah 1974).

Zoning power in general.

Courts would not permit a violation of a clear mandate of zoning authorities on the basis of reliance on advice of counsel, or on the basis of hardship due to compliance or on the basis that it was not shown that anyone else would suffer in perpetuating the status quo,

since to do so would open the door for indiscriminate abuse of zoning regulations. *Salt Lake County v. Hutchinson*, 8 Utah 2d 154, 329 P.2d 657 (1958).

Exercise of zoning power is a legislative function to be exercised by the legislative bodies of municipalities, the wisdom of a zoning plan, its necessity, and the nature and boundaries of the zoned district are all matters within the legislative discretion, and the Supreme Court will avoid substituting its judgment for that of the zoning authority. *Crestview-Holladay Homeowners Ass'n v. Engh Floral Co.*, 545 P.2d 1150 (Utah 1976).

COLLATERAL REFERENCES

Am. Jur. 2d. — 82 Am. Jur. 2d Zoning Key Numbers. — Zoning ¶ 13, 15, §§ 47 to 56
C.J.S. — 101 C.J.S. Zoning §§ 9, 11 to 13, 202

17-27-10. Planning commission "certification of" zoning plan to county commissioners — Public hearing

The county planning commission shall certify a copy of the plan or plan zoning all or any part of the unincorporated territory within the county, any adopted part or amendment thereof, or addition thereto, to the board of county commissioners of the county. After receiving the certification of zoning plan or plans from the commission and before the adoption of zoning resolution or resolutions, the board of county commissioners shall hold a public hearing thereon, of the time and place of which at least thirty days notice shall be given by four publications in a newspaper of general circulation in the county. Such notice shall state the place at which the text or map so certified by the county planning commission may be examined. No substantial change in or departure from the text or map so certified by the county planning commission shall be made unless such change or departure be submitted to the certifying county planning commission for its approval or approval or suggestions, and if disapproved shall receive the favorable vote of not less than a majority of the entire membership of the board of county commissioners. The county planning commission shall have thirty days to submit and after such submission within which to send its report to the county commissioners.

History: L. 1941, ch. 23, § 10; C. 1943, 19-24-10.

NOTES TO DECISIONS

Amendments. amendment *Melville v. Salt Lake County*, 10 A.L.R.3d 694
Unzoned land cannot be initially zoned by P.2d 133 (Utah 1975)

COLLATERAL REFERENCES

Utah Law Review. — Comment, *Melville v. Salt Lake County* — Technical Notice: A Judicial Lesson in Avoiding Inevitable Conflicts, 1975 Utah L. Rev. 520

Am. Jur. 2d. — 82 Am. Jur. 2d Zoning § 49
C.J.S. — 101 C.J.S. Zoning §§ 12, 14
A.L.R. — Disqualification for interest or

bias of administrative officer sitting in proceeding, 10 A.L.R.3d 694

Right to cross-examination of witnesses before administrative zoning authorities, 27 A.L.R.3d 1304

Key Numbers. — Zoning ¶ 15

17-27-14. Amending zone or zoning district.

The board of county commissioners may from time to time amend the number, shape, boundaries or area of any zone or zoning district, or any regulation of or within such zone or zoning district, or any other provisions of the zoning resolution, but any such amendment shall not be made or become effective unless the same shall have been proposed by or be first submitted for the approval, disapproval or suggestions of the county planning commission; and if disapproved by such commission within thirty days after such submission, such amendment, to become effective, shall receive the favorable vote of not less than a majority of the entire membership of the board of county commissioners. Before finally adopting any such amendment, the board of county commissioners shall hold a public hearing thereon, at least thirty days' notice of the time and place of which shall be given by at least one publication in a newspaper of general circulation in the county.

History: L. 1941, ch. 23, § 14; C. 1943, 10-24-14; L. 1983, ch. 70, § 1.
Amendment Notes. The 1983 amendment substituted "zone or zoning district" in two places in the first sentence for "district or districts."

NOTES TO DECISIONS

Previously unzoned land. amendment, *Melville v. Salt Lake County*, 536 P.2d 133 (Utah 1975).
 Unzoned land cannot be initially zoned by an

COLLATERAL REFERENCES

Utah Law Review. Comment, *Melville v. Salt Lake County* — Technical Notice: A Judicial Lesson in Avoiding Inevitable Conflicts, 1975 Utah L. Rev. 520.
Am. Jur. 2d. — 82 Am. Jur. 2d Zoning §§ 57 to 59.
C.J.S. — 101 C.J.S. Zoning § 81 et seq.

A.L.R. — Disqualification for interest or bias of administrative officer sitting in zoning proceeding, 10 A.L.R.3d 694.
 Right to cross-examination of witnesses in hearings before administrative zoning authorities, 27 A.L.R.3d 1304.
Key Numbers: — Zoning ⇨ 151 et seq.

17-27-15. Board of adjustment — Regulations — Meetings.

The board of county commissioners of any county which enacts zoning regulations under the authority of this act, shall provide for a board of adjustment of three to five members and for the manner of the appointment of such members. Not more than half of the members of such board may at any time be members of the planning commission. The board of county commissioners shall fix per diem compensation and terms for the members of such board of adjustment, which terms shall be of such length and so arranged that the term of at least one member will expire each year. Any member of the board of adjustment may be removed for cause by the board of county commissioners upon written charges and after a public hearing. Vacancies shall be filled for the unexpired term in the same manner as in the case of original appointments. The board of county commissioners may appoint associate members of such board, and in the event that any regular member be temporarily unable to act owing to absence from the county, illness, interest in a case before the board or any other cause, his place may be taken during such temporary disability by an associate member designated for the purpose.

The board of county commissioners shall provide and specify in its zoning other resolutions general rules to govern the organization, procedure, and jurisdiction of said board of adjustment, which rules shall not be inconsistent with the provisions of this act, and the board of adjustment may adopt supplemental rules of procedure not inconsistent with this act or such general rules.

Any zoning resolution of the board of county commissioners may provide that the board of adjustment may in appropriate cases and subject to appropriate principles, standards, rules, conditions and safeguards set forth in the zoning resolution, make special exceptions to the terms of the zoning regulations in harmony with their general purpose and intent. The commission may also authorize the board of adjustment to interpret the zoning maps and pass upon disputed questions of lot lines or district boundary lines or similar questions, as they may arise in the administration of the zoning regulations.

Meetings of the board of adjustment shall be held at the call of the chairman, and at such other times as the board in its rules of procedure may specify. The chairman or in his absence the acting chairman, may administer oaths and compel the attendance of witnesses. All meetings of the board of adjustment shall be open to the public. The board shall keep minutes of its proceedings, showing the vote of each member upon each question, or if absent or failing to vote, indicating such fact, and shall keep records of its examinations and other official actions, all of which shall be immediately filed in the office of the board and shall be a public record.

History: L. 1941, ch. 23, § 15; C. 1943, 19-24-15.
Meaning of "this act". — See the note under the same catchline following § 17-27.

NOTES TO DECISIONS

Special exceptions. This section authorizes, but does not require, the county commission to invest the board of adjustments with the power to issue special exceptions to general ordinances, however, county commission has authority to place the power to issue special exceptions in the planning commission, and to create a right of appeal directly to the county commission itself. *Thurston v. Cache County*, 626 P.2d 440 (Utah 1981).

COLLATERAL REFERENCES

Am. Jur. 2d. — 82 Am. Jur. 2d Zoning § 254 et seq.
C.J.S. — 101 C.J.S. Zoning §§ 204 to 207.
Key Numbers. — Zoning ⇨ 351, 352.

17-27-16. Appeals — Powers of board.

Appeals to the board of adjustment may be taken by any person aggrieved by his inability to obtain a building permit, or by the decision of any administrative officer or agency based upon or made in the course of the administration or enforcement of the provisions of the zoning resolution. Appeals to the board of adjustment may be taken by any officer, department, board or bureau of the county affected by the grant or refusal of a building permit or by other decision of an administrative officer or agency based upon or made in the course of the administration or enforcement of the provisions of the zoning resolution. The time within which such appeal must be made, and the form or other procedure relating thereto, shall be as specified in the regulations.

eral rules provided in writing by the board of county commissioners to govern the procedure of such board of adjustment or in the supplemental rules of procedure adopted by such board provided further, that said rules and regulations shall be available to the public at the office of the county commissioners at all times.

Upon appeals the board of adjustment shall have the following powers:

(1) To hear and decide appeals where it is alleged by the appellant that there is error in any order, requirement, decision or refusal made by administrative official or agency based on or made in the enforcement of the zoning resolution.

(2) To hear and decide, in accordance with the provisions of any such resolution, requests for special exceptions or for interpretation of the map or for decisions upon other special questions upon which such board is authorized by any such resolution to pass.

(3) Where by reason of exceptional narrowness, shallowness or shape of a specific piece of property at the time of the enactment of the regulation, or by reason of exceptional topographic conditions or other extraordinary and exceptional situation or condition of such piece of property, the strict application of any regulation enacted under this act would result in peculiar and exceptional practical difficulties to, or exceptional and undue hardships upon, the owner of such property, to authorize, upon an appeal relating to said property, a variance from such strict application so as to relieve such difficulties or hardship, provided such relief may be granted without substantial detriment to the public good and without substantially impairing the intent and purpose of the zone plan and zoning resolutions.

The concurring vote of four members of the board in the case of a five-member board, and of three members in the case of a three-member board, shall be necessary to reverse any order, requirement, decision or determination of any such administrative official or agency or to decide in favor of the appellant.

History: L. 1941, ch. 23, § 16; C. 1943, 19-24-16. Meaning of "this act". — See the note under the same catchline following § 17-27-2.

NOTES TO DECISIONS

ANALYSIS

Appeal to county commission
Exhaustion of administrative remedies
Findings required
Purpose
Violation of zoning resolution

Appeal to county commission.

The board of adjustments is constituted by statute a forum for review of all administrative zoning decisions, but nowhere is it made the exclusive repository of appellate powers, the county commission has authority to place the power to issue special exceptions to general or-

dinances in the planning commission, and to create a right of appeal directly to the county commission itself. *Thurston v. Cache County*, 626 P 2d 440 (Utah 1981).

Exhaustion of administrative remedies.

Where a planning board approved a trailer

park and issued a building permit to defendants, plaintiff, a landowner who sought to enjoin the defendants from building the park, was aggrieved by the decision although not a party to the proceedings before the board, and plaintiff was required to exhaust his administrative remedies provided in this section before an action for injunctive relief could be maintained. *Lund v. Cottonwood Meadows Co.*, 15 Utah 2d 305, 392 P 2d 40 (1964).

A party must exhaust administrative remedies before seeking judicial review of the denial of a building permit. *Hatch v. Utah County Planning Dep't.*, 685 P 2d 550 (Utah 1984).

Findings required.

Justification for denial of use permit to owner of unzoned land may not be based on hearsay and opinion evidence gathered at an informal meeting without opportunity to cross-examine, and without any findings of fact; nor may denial be based on the retrospective application of an ex post facto zoning ordinance. *Contracts Funding & Mtg. Exch. v. Maynes*, 527 P 2d 1073 (Utah 1974).

Purpose.

This section is designed to assure speedy appeal to the proper tribunal of any grievance that a party may have who is adversely affected by a decision of an administrative agency. Its evident purpose is to assure the expeditious and orderly development of a community. *Lund v. Cottonwood Meadows Co.*, 15 Utah 2d 305, 392 P 2d 40 (1964).

Violation of zoning resolution.

Landowners under § 17-27-23 have a separate cause of action in the courts when a violation of a zoning resolution is charged, where the alleged violation of the ordinance arose from the administration of the zoning ordinance by an administrative agency, as provided in this section, appeal from the administrative ruling should have been taken to proper administrative tribunal, or a writ should have been commenced in the courts within ninety days. *Lund v. Cottonwood Meadows Co.*, 15 Utah 2d 305, 392 P 2d 40 (1964).

COLLATERAL REFERENCES

Am. Jur. 2d. — 82 Am. Jur. 2d Zoning § 254 et seq

C.J.S. — 101 C.J.S. Zoning §§ 207 to 214
Key Numbers. — Zoning — 354 to 359

17-27-17. Repealed.

Repeals. — Section 17-27-17 (L. 1941, ch. 23, § 17; C. 1943, 19-24-17; L. 1953, ch. 27, § 1), relating to district planning commission, was repealed by Laws 1983, ch. 253, § 1.

17-27-18. Nonconforming uses — Property acquired in county.

The lawful use of a building or structure, or the lawful use of any land existing and lawful at the time of the adoption of a zoning resolution, or in the case of an amendment of a resolution, then at the time of such amendment may, except as hereinafter provided, be continued although such use does not conform with the provisions of such resolution or amendment and such use may be extended through the same building, provided no structural alteration of such building is proposed or made for the purpose of such extension. For purposes of this section, the addition of a solar energy device to such building shall not necessarily be considered a structural alteration. The board of county commissioners may provide in any zoning resolution for the restoration, reconstruction, extension or substitution of nonconforming uses upon such terms and conditions as may be set forth in the zoning resolution. The board of county commissioners may in any resolution provide for the termination of nonconforming uses, either by specifying the period or periods in which nonconforming uses shall be required to cease, or by providing a formulae whereby the compulsory termination of a nonconforming use may be so fixed as to allow for the recovery or amortization of the investment in the nonconformance.

If any county acquire title to any property by reason of tax delinquency and such properties be not redeemed as provided by law, the future use of such property shall be in conformity with the then provisions of the zoning resolution of the county, or with any amendment of such resolution, equally applicable to other like properties within the district in which the property acquired by the county is located.

History: L. 1941, ch. 23, § 18; C. 1943, 19-24-18; L. 1981, ch. 44, § 12.

NOTES TO DECISIONS

ANALYSIS

Effect of ordinance on nonconforming use
Estoppel to enforce zoning ordinance

Effect of ordinance on nonconforming use.

Where there was a protracted period of unexplained vacancy and no showing of any nonconforming use of residential property for a period of years, an ordinance against nonconforming use in the event of discontinuance of such use for one year precluded the issuance of a building permit for a gasoline filling station. *Morrison v. Horne*, 12 Utah 2d 131, 363 P.2d 1113 (1961).

Estoppel to enforce zoning ordinance.

County assessor's erroneous description of property as commercial instead of residential did not preclude zoning authorities from denying a permit for the construction of a service station on a nonconforming use basis. *Morrison v. Horne*, 12 Utah 2d 131, 363 P.2d 1113 (1961).

COLLATERAL REFERENCES

Am. Jur. 2d. — 82 Am. Jur. 2d Zoning §§ 178 to 236

C.J.S. — 101 C.J.S. Zoning §§ 180 to 200

A.L.R. — Amortization of nonconforming uses, validity of provisions for, 22 A.L.R.3d 1134

Construction and application of statute or or-

dinance requiring notice as prerequisite to granting variance or exception to zoning requirement, 38 A.L.R.3d 167.

Comprehensive plan, requirement that zoning variances or exceptions be made in accordance with, 40 A.L.R.3d 372.

Key Numbers. — Zoning — 321 to 338

17-27-19. Promulgation of temporary regulations.

The board of county commissioners of any county after appointment of a county or district planning commission and pending the completion by such commission of a zoning plan, may, where in the opinion of the board conditions require such action, promulgate by resolution without a public hearing regulations of a temporary nature, to be effective for a limited period only and in any event not to exceed six months, prohibiting or regulating in any part or all of the unincorporated territory of the county or district the erection, construction, reconstruction or alteration of any building or structure used or to be used for any business, industrial or commercial purpose.

History: L. 1941, ch. 23, § 19; C. 1943, 19-24-19; L. 1953, ch. 27, § 1.

COLLATERAL REFERENCES

A.L.R. — Validity and effect of "interim" zoning ordinance, 30 A.L.R.3d 1196

17-27-20. Repealed.

Repeals. — Section 17-27-20 (L. 1941, ch. 23, § 20, C. 1943, 19-24-20), relating to submission of plans to state planning commission, was repealed by Laws 1983, ch. 253, § 1.

17-27-21. Land plats — Approval — Sale before approval as violation.

All plans of streets or highways for public use, and all plans and plats of land laid out in subdivision or building lots, and the streets, highways, alley or other portions of the same intended to be dedicated to public use, or the use of purchasers or owners of lots fronting thereon or adjacent thereto, located within the county limits, except those located within any city or town within the said counties, shall be submitted to the county planning commission, if one has been created, and approved by such commission before they shall be recorded. It shall not be lawful to record any such plan or plat in the office of the county recorder unless the same shall bear thereon by endorsement or otherwise the approval of such commission. The approval of such plan or plat by such commission shall not be deemed an acceptance of the proposed dedication by the public. Such acceptance, if any, shall be given by action of the board of county commissioners. The owners and purchasers of such lots shall be conclusively presumed to have notice of public plans, maps, and reports of such commission affecting such property within its jurisdiction.

From and after the time when a county planning commission has been appointed no land located within a subdivision as defined in this act shall be sold until and unless a subdivision plat shall have been approved by the planning commission and recorded in the office of the county recorder, except that in subdivisions of less than ten lots, land may be sold by metes and bounds, without necessity of recording a plat if all of the following conditions are met: (a) The subdivision layout shall have been first approved in writing by the county planning commission, (b) the subdivision is not traversed by the mapped lines of a proposed street as shown on the official map or maps of the county, and does not require the dedication of any land for street or other public purposes, and (c) if the subdivision is located in a zoned area, each lot in the subdivision meets the frontage, width and area requirements of the zoning ordinance or has been granted a variance from such requirements by the board of adjustment.

Whoever, being the owner or agent of the owner of any land located within a subdivision in a county where a county planning commission has been created, transfers or sells any land in such subdivision before a plan or plat of such subdivision has been approved by such planning commission and, except as set forth in the preceding paragraph, recorded in the office of the county recorder, shall be guilty of a violation of this chapter for each lot or parcel so transferred or sold; and the description of such lot or parcel by metes and bounds in the instrument of transfer or other document used in the process of selling or transferring shall not exempt the transaction from such penalties or from the remedies herein provided.

History: L. 1941, ch. 23, § 21; C. 1943, 19-24-21; L. 1953, ch. 27, § 1; 1983, ch. 37, § 3.

Amendment Notes. — The 1983 amendment substituted "violation of this chapter" for "misdemeanor" in the last paragraph, and deleted "The county may enjoin such transfer or

sale or agreement by action for injunction brought in any court of equity jurisdiction or may recover the said penalty by civil action in any court of competent jurisdiction" at the end of the section.

Meaning of "this act". — See the note under the same catchline following § 17-27-2.

NOTES TO DECISIONS

No civil liability for violation.

The purpose of this section and § 57-5-5 is to impose a duty running to the sovereign, and a

violation thereof does not necessarily give rise to civil liability. *Elia v. Hale*, 13 Utah 2d 279, 373 P 2d 382 (1962).

17-27-22. Maximum regulation to govern.

Wherever the regulations made under authority of this act require a greater width of size of yards, court, or other open spaces, or require a lower height of buildings or smaller number of stories, or require a greater percentage of lot to be left unoccupied, or impose other higher standards than are required in or under any other statute, the provisions of the regulations made under authority of this act shall govern. Wherever the provisions of any other statute require a greater width or size of yards, courts, or other open spaces, or require a greater percentage of lot to be left unoccupied, or impose other higher standards than are required by the regulations made under authority of this act, the provisions of such statute shall govern.

History: L. 1941, ch. 23, § 22; C. 1943, 19-24-22.

Meaning of "this act". — See the note under the same catchline following § 17-27-2.

COLLATERAL REFERENCES

C.J.S. — 101 C.J.S. Zoning § 10
Key Numbers. — Zoning 4-761 et

17-27-23. Violation of chapter or ordinance as misdemeanor — Remedies of county and owners of real estate.

Violation of Chapter 27, Title 17, or of any adopted county zoning, subdivision, or official map ordinance is punishable as a class C misdemeanor. The board of county commissioners, the county attorney, or any owner of real estate within the county in which such a violation occurs, may, in addition to other remedies provided by law, institute injunction, mandamus, abatement, or any other appropriate action or proceedings to prevent, enjoin, abate, or remove the unlawful building, use, or act.

History: C. 1953, 17-27-23, enacted by L. 1983, ch. 37, § 4.

Repeals and Enactments. — Laws 1983, ch. 37, § 4 repealed former § 17-27-23 (L. 1941, ch. 23, § 23; C. 1943, 19-24-23; L. 1973,

ch. 197, § 2), relating to violations, and enacted present § 17-27-23.

Cross-References. — Sentencing for misdemeanors, §§ 76-3-201, 76-3-204, 76-3-301.

NOTES TO DECISIONS

Injunctions.

Under this section, injunctive relief is available as an alternative to criminal prosecution; a specific showing of irreparable injury is not

required to obtain injunctive relief against violation of a zoning resolution. *Utah C. v. Baxter* 635 P 2d 61 (Utah 1981).

COLLATERAL REFERENCES

Am. Jur. 2d. — 82 Am. Jur. 2d Zoning §§ 242 to 253

C.J.S. — 101 C.J.S. Zoning § 390 et
Key Numbers. — Zoning 4-761 et

17-27-24. Repealed.

Repeals. — Section 17-27-24 (L. 1941, ch. 23, § 24; C. 1943, 19-24-24), relating to the recording of zoning regulations and maps, repealed by Laws 1977, ch. 73, § 1.

17-27-25. Enforcement — Acceptance of grants.

The board of county commissioners is empowered to enforce the zoning regulations and restrictions which are adopted, and to accept grants of money and service for these purposes, and other purposes, in accordance with the from either private or public sources, state or federal.

History: L. 1941, ch. 23, § 25; C. 1943, 19-24-25.

Meaning of "the act". — See the note under "meaning of 'this act'" following § 17-27-2.

17-27-26. Conformity with plan — Exceptions.

None of the provisions of this act shall apply to any existing building, structure, plant or other equipment, except as provided in § 17-27-18. In the adoption of a plan, all extensions, betterments or additions to buildings, structures, plants or other equipment of a public utility shall be made in conformity with such plan, unless, after public hearing, the public service commission of the state or its successor commission, finds that the plan in relation to the extensions, betterments or additions is arbitrary and capricious and orders that such extensions, betterments or additions be made although they conflict with the adopted plan.

History: L. 1941, ch. 23, § 26; C. 1943, 19-24-26; L. 1953, ch. 27, § 1; 1983, ch. 244, § 1.

Amendment Notes. — The 1983 amendment deleted "as hereinbefore provided" after "adoption of a plan" in the second sentence; deleted "only" before "be made" in the second sentence, substituted "finds that the plan in relation to the extensions, betterments or additions is arbitrary and capricious and orders that such extensions, betterments or additions be made although they conflict with the adopted plan."

tions is arbitrary and capricious and orders the second sentence for "if any, order such extensions, betterments or additions to buildings, structures, plant or other equipment be reasonable and"; and made minor changes in phraseology.

Meaning of "this act". — See the note under the same catchline following § 17-27-2.

Addendum A. 15

When a public officer supervises a relative under Subsection (b):

- (1) the public officer shall make a complete written disclosure of the relationship to the chief administrative officer of the agency or institution; and
- (2) the public officer who exercises authority over a relative may not evaluate the relative's job performance or recommend salary increases for the relative.

An appointee may accept or retain employment if he is paid from public funds while he is under the direct supervision of a relative, except as follows:

- (1) the relative was appointed or employed before the public officer assumed his position; if the relative's appointment did not violate the provisions of this chapter in effect at the time of his appointment;
- (2) the appointee was or is eligible or qualified to be employed by a department or agency of the state or a political subdivision of the state as of the date of his compliance with civil service laws or regulations, or merit laws or regulations;
- (3) the appointee is the only person available, qualified, or eligible for the position;
- (4) the appointee is compensated from funds designated for vocational training;
- (5) the appointee is employed for a period of 12 weeks or less;
- (6) the appointee is a volunteer as defined by the employing entity; or
- (7) the chief administrative officer has determined that the appointee's services are the only person available or qualified to supervise the appointee's relative.

1931, ch. 13, § 1; R.S. 1933 & C. 1, § 1. 1953, ch. 79, § 1; 1955, ch. 159, § 1; 1988, ch. 25, § 1. **Statutory Notes.** The 1987 amendment to this section is effective April 25, 1988, substituted "an employee" for "a new employee" in Subsection (1)(a), added Subsection (2)(b)(ii), and redesignated former Subsections (2)(b)(i) to (2)(b)(vi) as present Subsections (2)(b)(iii) to (2)(b)(vii).

NOTES TO DECISIONS

On those who may not be qualified to serve. *Backman v. Bateman*, 1 Utah 2d 153, 263 P.2d 561 (1953).

Which anti nepotism statutes are in effect in public office by off-
g their relatives and appointing

COLLATERAL REFERENCES

2d. — 63A Am Jur 2d Public Officers § 101.
67 C.J.S. Officers and Public Employees § 29.
Validity, construction and effect of state constitutional or statutory provision regarding nepotism in the public service, 11 A.L.R.4th 826.
Key Numbers. — Officers and Public Employees — 29

52-3-2. Each day of violation a separate offense.

Each day any such person, father, mother, husband, wife, son, daughter, sister, brother, uncle, aunt, nephew, niece, first cousins, mother-in-law, father-in-law, brother-in-law, sister-in-law, son-in-law or daughter-in-law, is retained in office by any of said officials shall be regarded as a separate offense.

History: L. 1931, ch. 13, § 2; R.S. 1933 & C. 1943, 49-12-2.

52-3-3. Penalty.

Any person violating any of the provisions of this chapter is guilty of a misdemeanor.

History: L. 1931, ch. 13, § 3; R.S. 1933 & C. 1943, 49-12-3; L. 1953, ch. 79, § 2. **Cross-References.** — Sentencing for misdemeanors, §§ 76-3-201, 76-3-204, 76-3-301.

52-3-4. Exception in towns.

In towns, this chapter shall not apply to the employment of uncles, aunts, nephews, nieces or cousins.

History: L. 1931, ch. 13, § 4; R.S. 1933 & C. 1943, 49-12-4.

CHAPTER 4

OPEN AND PUBLIC MEETINGS

Section		Section	
52-4-1	Declaration of public policy		ings excluded — Disruption of meetings
52-4-2	Definitions		
52-4-3	Meetings open to the public — Exceptions	52-4-6	Public notice of meetings
52-4-4	Closed meeting held upon vote of members — Business — Reasons for meeting recorded	52-4-7	Minutes of open meetings — Public records — Recording of meetings
52-4-5	Purposes of closed meetings — Chance meetings and social meet-	52-4-8	Suit to void final action — Limitation — Exceptions
		52-4-9	Enforcement of chapter — Suit to compel compliance

52-4-1. Declaration of public policy.

In enacting this chapter, the Legislature finds and declares that the state, its agencies and political subdivisions, exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly.

History: L. 1955, ch. 133, § 1; 1977, ch. 180, § 1.
Cross-References. — Cemetery maintenance commissioners, board meetings public, § 8-1-13.

County commissioners, board meetings public, § 17-5-8.
County improvement district board of trustees meetings, § 17-6-3-4.

Judicial Council meetings, Rules of Judicial Administration, Rule 2-103
 Liquor control commission meetings to be open, § 32A-1-6(6)
 Municipal governing bodies, meetings subject to this chapter, § 10-3-601

State money management council meetings, § 51-7-16.
 State board of financial institutions subject to this chapter, § 7-1-203(3).

NOTES TO DECISIONS

ANALYSIS

Applicability
 Deliberations—

Applicability.

This chapter is not applicable to the Utah State Retirement Board. *Ellis v. Utah State Retirement Bd.*, 757 P.2d 882 (Utah Ct. App. 1988).

Deliberations.

Public Service Commission's deliberations are not required to be open to the public when they are part of the "decision making" or judicial phase of the commission's work. *Common Cause of Utah v. Utah Pub. Serv. Comm'n*, 598 P.2d 1312 (1979).

COLLATERAL REFERENCES

Utah Law Review. — *Common Cause v. Utah Public Service Commission — The Appli-*

cability of Open-Meeting Legislation to Quasi-Judicial Bodies, 1980 Utah L. Rev. 829.

52-4-2. Definitions.

As used in this chapter:

(1) "Meeting" means the convening of a public body, with a quorum present, whether in person or by means of electronic equipment, for the purpose of discussing or acting upon a matter over which the public body has jurisdiction or advisory power. This chapter shall not apply to chance meetings. "Convening," as used in this subsection, means the calling of a meeting of a public body by a person or persons authorized to do so for the express purpose of discussing or acting upon a subject over which that public body has jurisdiction.

(2) "Public body" means any administrative, advisory, executive, or legislative body of the state or its political subdivisions which consists of two or more persons that expends, disburses, or is supported in whole or in part by tax revenue and which is vested with the authority to make decisions regarding the public's business. "Public body" does not include any political party, group, or caucus nor any conference committee, rules or sifting committee of the Legislature.

(3) "Quorum" means a simple majority of the membership of a public body, unless otherwise defined by applicable law, but a quorum does not include a meeting of two elected officials by themselves when no action, either formal or informal, is taken on a subject over which these elected officials have jurisdiction.

History: C. 1953, 52-4-2, enacted by L. 1977, ch. 180, § 2; 1981, ch. 191, § 1; 1987, ch. 86, § 1.

Amendment Notes. — The 1987 amendment, effective March 16, 1987, substituted "chapter" for "act" in the introductory lan-

guage; substituted "in person" for "corporate" in Subsection (1), and in the second sentence of Subsection (2) substituted "nor any conference committee, rules or sifting committee" for "or rules or sifting committees."

52-4-3. Meetings open to the public — Exceptions.

Every meeting is open to the public unless closed pursuant to Sections 52-4-4 and 52-4-5.

History: C. 1953, 52-4-3, enacted by L. 1977, ch. 180, § 3.

Cross-References. — Violations, suit to void final action, § 52-4-8.

NOTES TO DECISIONS

Public Service Commission.

Public Service Commission meetings should be open to public during commission's "information obtaining" phase, but not during "decision making" or judicial phase; any final and formal action on ordinances, resolutions, rules,

regulations, contracts, or appointments should be announced or issued in a meeting open to the public. *Common Cause of Utah v. Utah Pub. Serv. Comm'n*, 598 P.2d 1312 (Utah 1979).

52-4-4. Closed meeting held upon vote of members — Business — Reasons for meeting recorded.

A closed meeting may be held upon the affirmative vote of two-thirds of the members of the public body present at an open meeting for which notice is given pursuant to Section 52-4-6; provided, a quorum is present. No closed meeting is allowed except as to matters exempted under Section 52-4-5; provided, no ordinance, resolution, rule, regulation, contract, or appointment shall be approved at a closed meeting. The reason or reasons for holding a closed meeting and the vote, either for or against the proposition to hold such a meeting, cast by each member by name shall be entered on the minutes of the meeting.

Nothing in this chapter shall be construed to require any meeting to be closed to the public.

History: C. 1953, 52-4-4, enacted by L. 1977, ch. 180, § 4.

NOTES TO DECISIONS

Public Service Commission.

Public Service Commission meetings should be open to public during commission's "information obtaining" phase, but not during "decision making" or judicial phase; any final and formal action on ordinances, resolutions, rules,

regulations, contracts, or appointments should be announced or issued in a meeting open to the public. *Common Cause of Utah v. Utah Pub. Serv. Comm'n*, 598 P.2d 1312 (Utah 1979).

52-4-5. Purposes of closed meetings — Chance meetings and social meetings excluded — Disruption of meetings.

(1) A closed meeting may be held pursuant to Section 52-4-4 for any of the following purposes:

- (a) discussion of the character, professional competence, or physical or mental health of an individual;
- (b) strategy sessions with respect to collective bargaining, litigation, or purchase of real property;

- (c) discussion regarding deployment of security personnel or devices; and
- (d) investigative proceedings regarding allegations of criminal misconduct.

(2) This chapter shall not apply to any chance meeting or a social meeting. No chance meeting or social meeting shall be used to circumvent this chapter.

(3) This chapter shall not prohibit the removal of any person who willfully disrupts a meeting to the extent that orderly conduct is seriously compromised.

History: C. 1953, 52-4-5, enacted by L. 1977, ch. 180, § 5.

COLLATERAL REFERENCES

A.L.R. - Construction and application of meeting requirement of Sunshine Act, 82 exemptions, under 5 USCS § 552(b)(1), to open A.L.R. Fed. 465.

52-4-6. Public notice of meetings.

(1) Any public body which holds regular meetings that are scheduled in advance over the course of a year shall give public notice at least once each year of its annual meeting schedule as provided in this section. The public notice shall specify the date, time, and place of such meetings.

(2) In addition to the notice requirements of Subsection (1) of this section, each public body shall give not less than 24 hours' public notice of the agenda, date, time and place of each of its meetings.

(3) Public notice shall be satisfied by:

- (a) posting written notice at the principal office of the public body, or if no such office exists, at the building where the meeting is to be held; and
- (b) providing notice to at least one newspaper of general circulation within the geographic jurisdiction of the public body, or to a local media correspondent.

(4) When because of unforeseen circumstances it is necessary for a public body to hold an emergency meeting to consider matters of an emergency or urgent nature, the notice requirements of Section 52-4-6(2) may be disregarded and the best notice practicable given. No such emergency meeting of a public body shall be held unless an attempt has been made to notify all of its members and a majority votes in the affirmative to hold the meeting.

History: C. 1953, 52-4-6, enacted by L. 1977, ch. 180, § 6; 1978, ch. 17, § 1.

Cross-References. - Closed meeting held upon vote at open meeting, § 52-4-4.
Violations, suit to void final action, § 52-4-8.

52-4-7. Minutes of open meetings — Public records — Recording of meetings.

(1) Written minutes shall be kept of all open meetings. Such minutes shall include:

- (a) the date, time and place of the meeting;
- (b) the names of members present and absent;

- (c) the substance of all matters proposed, discussed, or decided, and record, by individual member, of votes taken;
- (d) the names of all citizens who appeared and the substance in brief of their testimony;
- (e) any other information that any member requests be entered in the minutes.

(2) Written minutes shall be kept of all closed meetings. Such minutes shall include:

- (a) the date, time and place of the meeting;
- (b) the names of members present and absent;
- (c) the names of all others present except where such disclosure would infringe on the confidence necessary to fulfill the original purpose of closing the meeting.

(3) The minutes are public records and shall be available within a reasonable time after the meeting.

(4) All or any part of an open meeting may be recorded by any person in attendance; provided, the recording does not interfere with the conduct of the meeting.

History: C. 1953, 52-4-7, enacted by L. 1977, ch. 180, § 7; 1978, ch. 17, § 2.

52-4-8. Suit to void final action — Limitation — Exceptions.

Any final action taken in violation of Sections 52-4-3 and 52-4-6 is voidable by a court of competent jurisdiction. Suit to void final action shall be commenced within 90 days after the action except that with respect to any final action concerning the issuance of bonds, notes, or other evidences of indebtedness suit shall be commenced within 30 days after the action.

History: C. 1953, 52-4-8, enacted by L. 1977, ch. 180, § 8; 1978, ch. 17, § 3.

52-4-9. Enforcement of chapter — Suit to compel compliance.

(1) The attorney general and county attorneys of the state shall enforce this chapter.

(2) A person denied any right under this chapter may commence suit in a court of competent jurisdiction to compel compliance with or enjoin violation of this chapter or to determine its applicability to discussions or decisions of a public body. The court may award reasonable attorney fees and court costs to a successful plaintiff.

History: C. 1953, 52-4-9, enacted by L. 1977, ch. 180, § 9.

Addendum A. 16

COLLATERAL REFERENCES

Am. Jur. 2d. — 20 Am. Jur. 2d Counterclaim, Recoupment, and Setoff §§ 4, 9, 13, 15, 35, 56, 57, 68, 73, 87, 101, 117, 139, 149, 151, 155, 156; 20 Am. Jur. 2d Courts § 169, 59 Am. Jur. 2d Parties § 188 et seq.; 61A Am. Jur. 2d Pleading §§ 182 to 186.

C.J.S. — 21 C.J.S. Courts § 66; 50 C.J.S. Judgments § 684; 67A C.J.S. Parties §§ 88 to 110; 71 C.J.S. Pleading §§ 167 to 176; 80 C.J.S. Setoff and Counterclaim §§ 1 et seq., 13, 27, 36, 54.

A.L.R. — Bank's right to apply or set off deposit against debt of depositor not due at time of his death, 7 A.L.R.3d 908.

Proceeding for summary judgment as affected by presentation of counterclaim, 8 A.L.R.3d 1361.

Presentation of claim to executor or administrator as prerequisite of its availability as counterclaim or setoff, 36 A.L.R.3d 693.

Right of party-litigant to defend or counter-

claim on ground that opposing party or his attorney is engaged in unauthorized practice of law, 7 A.L.R.4th 1148.

Necessity and permissibility of raising claim for abuse of process by reply or counterclaim in same proceeding in which abuse occurred — state cases, 82 A.L.R.4th 1115.

Who is an "opposing party" against whom a counterclaim can be filed under Federal Civil Procedure Rule 13(a) or (b), 1 A.L.R. Fed. 815.

Joinder of counterclaim under Rule 13(a) or 13(b) of Federal Rules of Civil Procedure with jurisdictional defense under Rule 12(b) as waiver of such defense, 17 A.L.R. Fed. 388.

Effect of filing as separate federal action claim that would be compulsory counterclaim in pending federal action, 81 A.L.R. Fed. 240.

Key Numbers. — Courts — 189(6 1/2); Judgment — 622(2); Parties — 49 to 56; Pleading — 145, 149; Set-off and Counterclaim — 1 et seq., 3, 29(1), 40, 42 1/2, 48 et seq., 59.

Rule 14. Third-party practice.

(a) When defendant may bring in third party. At any time after commencement of the action a defendant, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. The third-party plaintiff need not obtain leave to make the service if he files the third-party complaint not later than ten days after he serves his original answer. Otherwise he must obtain leave on motion upon notice to all parties to the action. The person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in Rule 12 and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in Rule 12 and his counterclaims and cross-claims as provided in Rule 13. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third-party defendant.

(b) When plaintiff may bring in third party. When a counterclaim is asserted against a plaintiff, he may cause a third party to be brought in under circumstances which under this rule would entitle a defendant to do so.

Compiler's Notes. — This rule is similar to Rule 14(a) and (b), F.R.C.P.

NOTES TO DECISIONS

ANALYSIS

Appellate jurisdiction.

Third party by defendant

—Grounds.

Untimely motion to allow counterclaim.

Cited.

Appellate jurisdiction.

The final judgment rule, R.Civ.P. 54(b), applies when the trial court orders a separate trial of the claim, cross-claim, counterclaim, or third-party claim, and failure to have the case certified as final by the trial court, leaving issues and parties before that court, will deprive

the appellate court of jurisdiction over an appeal. First Sec. Bank v. Conlin, 817 P.2d 298 (Utah 1991).

Third party by defendant.

—Grounds.

If one named as a defendant tort-feasor impleads another alleged joint tort-feasor, the defendant in the initial action does so, not on the ground that a claim for relief then exists against the third-party defendant, but on the ground that the third-party defendant "may be liable" to the defendant in the principal action. Unigard Ins. Co. v. City of LaVerkin, 689 P.2d 1344 (Utah 1984).

COLLATERAL REFERENCES

Am. Jur. 2d. — 59 Am. Jur. 2d Parties § 188 et seq.

C.J.S. — 67 C.J.S. Parties §§ 72 to 84.

A.L.R. — Defendant's right to contribution

Untimely motion to allow counterclaim.

The trial court did not abuse its discretion in denying motions to allow a counterclaim and to bring in third party defendants which were filed 13 months after an answer to the complaint was filed and two weeks before the scheduled trial date, where reasons for the untimely motion were inadequate and where the parties failed to demonstrate that the court's denial of the motions resulted in prejudice. Tripp v. Vaughn, 746 P.2d 794 (Utah Ct. App. 1987).

Cited in Serr v. Rick Jensen Constr., Inc., 743 P.2d 1202 (Utah 1987).

or indemnity from original tortfeasor, 20 A.L.R.4th 338.

Key Numbers. — Parties — 49 to 56.

Rule 15. Amended and supplemental pleadings.

(a) Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(b) Amendments to conform to the evidence. When issues not raised by the pleading are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendments of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended when the presentation of the merits of the action will be subverted thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court shall grant a continuance, if necessary, to enable the objecting party to meet such evidence.

(c) Relation back of amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

(d) Supplemental pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

Compiler's Notes. — This rule is similar to Rule 15, F.R.C.P.

Addendum A. 17

Rule 25. Substitution of parties.

(a) Death.

(1) If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the deceased party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of a summons. Unless the motion for substitution is made not later than ninety days after the death is suggested upon the record by service of a statement of the fact of the death as provided herein for the service of the motion, the action shall be dismissed as to the deceased party.

(2) In the event of the death of one or more of the plaintiffs or of one or more of the defendants in an action in which the right sought to be enforced survives only to the surviving plaintiffs or only against the surviving defendants, the action does not abate. The death shall be suggested upon the record and the action shall proceed in favor of or against the surviving parties.

(b) **Incompetency.** If a party becomes incompetent, the court upon motion served as provided in Subdivision (a) of this rule may allow the action to be continued by or against his representative.

(c) **Transfer of interest.** In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. Service of the motion shall be made as provided in Subdivision (a) of this rule.

(d) **Public officers; death or separation from office.** When a public officer is a party to an action and during its pendency dies, resigns, or otherwise ceases to hold office, the action may be continued and maintained by or against his successor, if within 6 months after the successor takes office, it is satisfactorily shown to the court that there is a substantial need for so continuing and maintaining it. Substitution pursuant to this rule may be made when it is shown by supplemental pleading that the successor of an officer adopts or continues or threatens to adopt or continue the action of his predecessor. Before a substitution is made, the party or officer to be affected, unless expressly assenting thereto, shall be given reasonable notice of the application therefor and accorded an opportunity to object.

Compiler's Notes. — This rule is substantially similar to Rule 25, F.R.C.P.

Cross-References. — Amended and supplemental pleadings, U.R.C.P. 15.

Claims for relief, U.R.C.P. 8(a).

Cross demands not affected by death, U.R.C.P. 13(i).

Depositions, use following substitution of parties, U.R.C.P. 32(a).

Judgment against party dying after verdict decision, payment of, § 78-22-1.1.

Judgment may be rendered after death of party, U.R.C.P. 58A(e).

Limitation of actions, effect of death, §§ 78-12-37, 78-12-38.

Parties plaintiff and defendant; capacity, U.R.C.P. 17.

Permissive joinder of parties, U.R.C.P. 20.

Substitution of parties on appeal, Rule 38, Utah R. App. P.

Time, U.R.C.P. 6.

NOTES TO DECISIONS

ANALYSIS

Death.
Action against estate.
Failure to move to substitute.
Transfer of interest.
Conveyance by defendant.

Death.
Action against estate.
Where widow sought to continue separate maintenance action against deceased hus-

band's estate, existence of her claim was ground for appointment of Utah representative, and she was not entitled to have disinterested person substituted as defendant even though husband died in another state and left no property in Utah and his executrix in other state refused to appear. *Allred v. Allred*, 12 Utah 2d 325, 366 P.2d 478 (1961).

—Failure to move to substitute.

Where a defendant died and his death was immediately noted upon the court record, but

plaintiff never moved for a substitution of parties nor asked for an enlargement of the 90-day period within which to seek substitution, it was not error for the trial court to dismiss the complaint. *Connelly v. Rathjen*, 547 P.2d 1338 (Utah 1976).

Transfer of interest.

—Conveyance by defendant.

In quiet title action court did not lose juris-

diction when defendant conveyed during pendency of action; Subdivision (c) continues litigation with same litigants to determinative conclusion, to avoid stalemate by conveyance pendente lite, resulting in series of endless suits. *Briggs v. Hess*, 122 Utah 559, 252 P.2d 538 (1953).

COLLATERAL REFERENCES

Am. Jur. 2d. — 59 Am. Jur. 2d Parties §§ 225 et seq., 231 to 233.

C.J.S. — 87 C.J.S. Parties § 58 et seq.

A.L.R. — Enforceability of warrant of attorney to confess judgment against assignee, guarantor, or other party obligating himself for performance of primary contract, 5 A.L.R.3d 428.

Divorce or annulment of marriage, power of incompetent spouse's guardian, committee, or next friend to sue for granting or vacation of, or to make a compromise or settlement in such suit, 6 A.L.R.3d 681.

Bank's right to apply or set off deposit against debt of depositor not due at time of his death, 7 A.L.R.3d 908.

Validity and effect of agreement that debt or legal obligation contemporaneously or subsequently incurred shall be canceled by death of creditor or obligee, 11 A.L.R.3d 1427.

Applicability, as affected by change in parties, of statute permitting commencement of new action within specified time after failure of prior action not on merits, 13 A.L.R.3d 848.

Cause of death, official death certificate as evidence of in civil or criminal action, 21 A.L.R.3d 418.

Attorney's death prior to final adjudication or settlement of case as affecting compensation under contingent fee contract, 33 A.L.R.3d 1375.

Validity, in contract for installment sale of consumer goods, or commercial paper given in connection therewith, of provision waiving, as against assignee, defenses good against seller, 39 A.L.R.3d 518.

Conservator or guardian for an incompetent, priority and preference in appointment of, 65 A.L.R.3d 991.

Defamation action as surviving plaintiff's death, under statute not specifically covering action, 42 A.L.R.4th 272.

Sufficiency of suggestion of death of party, filed under Rule 25(a)(1) of Federal Rules of Civil Procedure, governing substitutions of party after death, 105 A.L.R. Fed. 816.

Key Numbers. — Parties ⇐ 59.

PART V.

DEPOSITIONS AND DISCOVERY.

Rule 26. General provisions governing discovery.

(a) **Discovery methods.** Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission.

(b) **Discovery scope and limits.** Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) **In general.** Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

The frequency or extent of use of the discovery methods set forth in Subdivision (a) shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or

(iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under Subdivision (c).

(2) **Insurance agreements.** A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement.

(3) **Trial preparation: Materials.** Subject to the provisions of Subdivision (b)(1) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under Subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) **Trial preparation: Experts.** Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of Subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A) (i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

(ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to Subdivision (b)(4)(C) of this rule, concerning fees and expenses as the court may deem appropriate.

(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is

impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result,

(i) The court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under Subdivisions (b)(4)(A)(ii) and (b)(4)(B) of this rule; and

(ii) With respect to discovery obtained under Subdivision (b)(4)(A)(ii) of this rule the court may require, and with respect to discovery obtained under Subdivision (b)(4)(B) of this rule the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(c) **Protective orders.** Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) that the discovery not be had;

(2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;

(5) that discovery be conducted with no one present except persons designated by the court;

(6) that a deposition after being sealed be opened only by order of the court;

(7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;

(8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(d) **Sequence and timing of discovery.** Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(e) **Supplementation of responses.** A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony.

(2) A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which (A) he knows that the response was incorrect when made, or (B) he knows that the response

though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

(f) **Discovery conference.** At any time after commencement of an action, the court may direct the attorneys for the parties to appear before it for a conference on the subject of discovery. The court shall do so upon motion by the attorney for any party if the motion includes:

- (1) a statement of the issues as they then appear;
- (2) a proposed plan and schedule of discovery;
- (3) any limitations proposed to be placed on discovery;
- (4) any other proposed orders with respect to discovery; and
- (5) a statement showing that the attorney making the motion has made a reasonable effort to reach agreement with opposing attorneys on the matters set forth in the motion. Each party and his attorney are under a duty to participate in good faith in the framing of a discovery plan if a plan is proposed by the attorney for any party. Notice of the motion shall be served on all parties. Objections or additions to matters set forth in the motion shall be served not later than ten days after service of the motion.

Following the discovery conference, the court shall enter an order tentatively identifying the issues for discovery purposes, establishing a plan and schedule for discovery, setting limitations on discovery, if any, and determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the action. An order may be altered or amended whenever justice so requires.

Subject to the right of a party who properly moves for a discovery conference to prompt convening of the conference, the court may combine the discovery conference with a pretrial conference authorized by Rule 16.

(g) **Signing of discovery requests, responses, and objections.** Every request for discovery or response or objection thereto made by a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the request, response, or objection and state his address. The signature of the attorney or party constitutes a certification that he has read the request, response, or objection and that to the best of his knowledge, information, and belief formed after reasonable inquiry it is: (1) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation. If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response, or objection, and a party shall not be obligated to take any action with respect to it until it is signed.

If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney fee.

(h) **Deposition where action pending in another state.** Any party to an action or proceeding in another state may take the deposition of any person

within this state, in the same manner and subject to the same conditions and limitations as if such action or proceeding were pending in this state, provided that in order to obtain a subpoena the notice of the taking of such deposition shall be filed with the clerk of the court of the county in which the person whose deposition is to be taken resides or is to be served, and provided further that all matters arising during the taking of such deposition which by the rules are required to be submitted to the court shall be submitted to the court in the county where the deposition is being taken.
(Amended effective Jan. 1, 1987.)

Compiler's Notes. — This rule corresponds to Rule 26, F.R.C.P.

Cross-References. — Admissibility of evidence, § 78-21-3; U.R.C.P. 43(a).

Continuance to permit discovery, U.R.C.P. 56(f).

Depositions upon oral examination, U.R.C.P. 30(c).

Depositions, use in court proceedings, U.R.C.P. 32.

Depositions, when taken, U.R.C.P. 30(a).

Discovery procedures, Rule 4-502, Rules of Judicial Administration.

Exclusion of deposition from evidence, U.R.C.P. 32(b).

Expert and other opinion testimony, U.R.E. 701 to 706.

Fee for filing notice of deposition concerning action in another state, § 21-1-5.

Liability insurance, admissibility of, U.R.E. 411.

Motions, evidence on, by depositions, U.R.C.P. 43(b).

Privileges, §§ 78-24-8, 78-24-9; U.R.E. 501 et seq.

Summary judgment, discovery supporting or opposing motion for, U.R.C.P. 56(e).

Terminate or limit examination, motion to, U.R.C.P. 30(d).

NOTES TO DECISIONS

ANALYSIS

Applicability of rule.

Appellate review.

—Denial of discovery request.

Privilege against self-incrimination.

Protective order.

—Trade secrets.

—Waiver.

Purpose of rule.

Scope of discovery.

—In general.

—Relevance.

—Insurance agreements.

—Official information privilege.

—Trial preparation.

—Adjuster's file.

—Discovery from state.

—Eminent domain.

—Otherwise discoverable records.

—Subjective matters.

—Testimony of witness.

Cited.

Applicability of rule.

The taking of depositions pursuant to the Utah Rules of Civil Procedure is applicable in an action to remove a public official from office for malfeasance pursuant to Title 77, Chapter 6. *State v. Geurts*, 11 Utah 2d 345, 369 P.2d 12 (1961).

Appellate review.

—Denial of discovery request.

When denial of a discovery request is determined on review to have been in error, the burden of demonstrating that the erroneous denial was not prejudicial is upon the party resisting discovery. *Askew v. Hardman*, 884 P.2d 1258 (Utah Ct. App. 1994), cert. granted, 892 P.2d 13 (Utah 1995).

Privilege against self-incrimination.

Privilege against self-incrimination may be

asserted in civil discovery proceedings to refuse to answer interrogatories, questions posed in depositions, demands for production of documents, and requests for admissions; however, to sustain an assertion of the privilege, a party must show that the response sought to be compelled might be incriminating. *First Fed. Sav. & Loan Ass'n v. Schamanek*, 684 P.2d 1257 (Utah 1984).

Protective order.

—Trade secrets.

Materials that are the subject of a protective order under Subdivision (c)(7) are not automatically privileged for purposes of Exemption 4 of the federal Freedom of Information Act because the determination of whether documents contain trade secrets under Exemption 4 is to be made solely by applying the express exemption for trade secrets and confidential commercial or financial information found in the exemption itself. *Anderson v. Department of Health & Human Servs.*, 907 F.2d 936 (10th Cir. 1990).

—Waiver.

Inaction and delay in filing a motion for protection with respect to documents alleged to be work product waives whatever right a defendant may have been able to assert. Moreover, a defendant's failure to demonstrate any diligence whatsoever in asserting the privilege is itself a waiver. *Gold Standard, Inc. v. American Barrick Resources Corp.*, 805 P.2d 164 (Utah 1990).

Purpose of rule.

The purposes of discovery rules are to make discovery as simple and efficient as possible by eliminating any unnecessary technicalities, and to remove elements of surprise or trickery so that the parties and the court can determine the facts and resolve the issues as directly,

Addendum A. 18

late on morning trial was commenced because he was unable to obtain from the Supreme Court a writ of prohibition to prevent the holding of the trial on that day due to absence of defense witnesses the trial court erred in granting a default judgment to plaintiff and refusing to allow defense counsel to participate in the proceedings or challenge plaintiff's evidence notwithstanding any ill advised irritating or contemptuous conduct from defense counsel during the action since the law prefers that a case be tried on its merits and the parties litigant should not be made to suffer for the misconduct of their counsel *McKean v Mountain View Mem Estates Inc* 17 Utah 2d 323 411 P 2d 129 (1966)

—Default entry necessary

No default judgment may be entered under Subdivision (b)(2) unless default has previously been entered. The entry of default is an essential predicate to any default judgment *P & B Land Inc v Klungervik* 751 P 2d 274 (Utah Ct App 1988)

—Failure to follow rule

Rule 54(c)(2) and this rule prescribe the procedure to be followed by trial courts in entering judgments against defaulting parties and courts are not at liberty to deviate from those rules just because one party is in default and is not entitled to be heard on the merits of the case *Russell v Martell* 681 P 2d 1193 (Utah 1984)

Judgment against defaulting party must be reversed where plaintiff's claims for damages were not for sums certain and a hearing was not conducted by the trial court to ascertain the amount of damages to which the plaintiffs were entitled *Russell v Martell* 681 P 2d 1193 (Utah 1984)

The entry of a default judgment by a court with jurisdiction over the parties and the subject matter where there is no default in law or in fact is improper and voidable *P & B Land Inc v Klungervik* 751 P 2d 274 (Utah Ct App 1988)

—Hearing on merits

No one has an inalienable or constitutional right to a judgment by default without a hearing on the merits. The courts in the interest of justice and fair play favor where possible a full and complete opportunity for a hearing on the merits of every case *Heathman v Fabian* 14 Utah 2d 60 377 P 2d 189 (1962)

—Punitive damages

Lower courts award of punitive damages without proof and upon default judgment was in and of itself justification for vacating judgment *Security Adjustment Bureau Inc v West*, 20 Utah 2d 292 437 P 2d 214 (1968)

Notice

This rule provides that a party in default need not be given notice of the entry of default judgment *Central Bank & Trust Co v Jensen* 656 P 2d 1009 (Utah 1982)

Setting aside default.

An entry of default may be set aside under this rule for good cause shown by the court once a judgment by default has been entered however it may be set aside only in accordance

with Rule 60(b) *Calder Bros Co v Anderson*, 652 P 2d 922 (Utah 1982)

Once a default judgment has been entered, it can only be set aside in accordance with Rule 60(b) *Amica Mut Ins Co v Schettler*, 768 P 2d 950 (Utah Ct App 1989)

—Collateral attack.

Where affidavit for publication of summons contained some evidence upon which the order for publication of summons could reasonably be based, a default judgment against the defendant could not be attacked collaterally, even if the evidence was insufficient to persuade the judge or clerk of the necessary facts *Bowen v Olson* 122 Utah 66, 246 P 2d 602 (1952)

—Direct attack

An action brought to vacate a default judgment on ground that service of summons by publication was obtained by fraud is a direct and not a collateral attack *Bowen v Olson*, 122 Utah 66 246 P 2d 602 (1952)

—Discretion of court.

A trial court is endowed with considerable latitude of discretion in granting or denying a motion to set a default judgment aside *Board of Educ v Cox*, 14 Utah 2d 385, 384 P 2d 806 (1963)

Where plaintiff sought relief from a default judgment pursuant to Rule 60(b) on three occasions before three different judges and his motions were denied in the first two proceedings, the third judge was barred by the law of the case from overruling the previous orders *Mascaro v Davis* 741 P 2d 938 (Utah 1987)

—Grounds

—Excusable neglect

A default certificate may be set aside upon grounds of excusable neglect *Heathman v Fabian* 14 Utah 2d 60 377 P 2d 189 (1962)

While reliance on an attorney's assurances that one's rights are being protected could, in the appropriate circumstances be seen as excusable neglect trial court properly refused to excuse the neglect of a defendant who failed to establish that she was so represented *Miller v Brocksmith* 825 P 2d 690 (Utah Ct App 1992)

—Judicial attitude

Where any reasonable excuse is offered by defaulting party courts generally tend to favor granting relief from a default judgment unless to do so would result in substantial prejudice or injustice to the adverse party *Westinghouse Elec Supply Co v Paul W Larsen Contractor*, 544 P 2d 876 (Utah 1976)

—Movant's duty

Party who seeks to have a default judgment set aside must proffer some defense of at least sufficient ostensible merit to justify a trial on that issue *Downey State Bank v Major Blakeney Corp* 545 P 2d 507 (Utah 1976)

—Setting aside proper

Where plaintiff served defendant with a summons and left a copy with the defendant which was not the same as the original the court had jurisdiction but sufficient confusion was created so that a motion to set aside the default judgment should have been granted and the defendant allowed to plead consistent

with our declared policy that in case of uncertainty, default judgments should be set aside to allow trial on the merits *Locke v Peterson* 3 Utah 2d 415 285 P 2d 1111 (1955)

Default judgment and writ of garnishment were properly set aside where trial court failed to obtain jurisdiction over defendant because summons was not timely issued *Fibreboard Paper Prods Corp v Dietrich*, 25 Utah 2d 65, 475 P 2d 1005 (1970)

Where appellants, plaintiffs in a civil action promptly objected to date set for trial on the ground that their counsel had an already scheduled appearance in another court on that date, but due to fact that there were no law or motion days between time objection was filed and trial date objection was never heard re

fusal to set aside default judgment entered when appellants failed to appear on trial date was an abuse of discretion *Griffiths v Hammon* 560 P 2d 1375 (Utah 1977)

Time for appeal

Under former Rule 73(h) the time for appeal from a default judgment in a city court ran from the date of notice of entry of such judgment, rather than from the date of judgment *Buckner v Main Realty & Ins Co* 4 Utah 2d 124 288 P 2d 786 (1955) (but see *Central Bank & Trust Co v Jensen*, supra, and Rule 58A(d))

Cited in *Utah Sand & Gravel Prods Corp v Tolbert*, 16 Utah 2d 407, 402 P 2d 703 (1965) *J P W Enters, Inc v Naef* 604 P 2d 486 (Utah 1979) *Katz v Pierce* 732 P 2d 92 (Utah 1986)

COLLATERAL REFERENCES

Brigham Young Law Review — Reasonable Assurance of Actual Notice Required for In Personam Default Judgment in Utah *Graham v Sawaya*, 1981 BYU L Rev 937
Am Jur 2d — 47 *Am Jur 2d* Judgments § 265 et seq
C.J.S. — 49 *C.J.S.* Judgments §§ 187 to 218
A L.R. — Necessity of taking proof as to liability against defaulting defendant 8 *A L.R.* 3d 1070

Appealability of order setting aside or refusing to set aside default judgment 8 *A L.R.* 3d 1272

Defaulting defendant's right to notice and hearing as to determination of amount of damages, 15 *A L.R.* 3d 586

Opening default or default judgment claimed to have been obtained because of attorney's mistake as to time or place of appearance trial or filing of necessary papers 21 *A L.R.* 3d 1255

Failure to give notice of application for default judgment where notice is required only by custom 28 *A L.R.* 3d 1383

Failure of party or his attorney to appear at pretrial conference 55 *A L.R.* 3d 303

Default judgments against the United States under Rule 55(e) of the Federal Rules of Civil Procedure 55 *A L.R.* Fed 190

Key Numbers — Judgment ⇨ 92 to 134

Rule 56. Summary judgment.

(a) For claimant. A party seeking to recover upon a claim, counterclaim or cross claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof

(b) For defending party. A party against whom a claim, counterclaim, or cross claim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof

(c) Motion and proceedings thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages

(d) Case not fully adjudicated on motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without sub

stantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) **Form of affidavits; further testimony; defense required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) **When affidavits are unavailable.** Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) **Affidavits made in bad faith.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Compiler's Notes. — This rule is similar to Rule 56, F.R.C.P.

Cross-References. — Contempt generally, §§ 78-7-18, 78-32-1 et seq.

NOTES TO DECISIONS

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Specific facts are required to show whether there is genuine issue for trial. *Reagan Outdoor Adv., Inc. v. Lundgren*, 692 P.2d 776 (Utah 1984).
When a motion for summary judgment is made under this rule, the affidavit of an adverse party must contain specific evidentiary facts showing that there is a genuine issue for trial. *Treloggan v. Treloggan*, 699 P.2d 747 (Utah 1985).
Affidavits submitted by plaintiff that contained opinion, legal conclusions, and facts not supported by adequate foundation but portions of which complied with Subdivision (e), because the objectionable statements did nothing more than supplement the arguments made in plaintiff's memorandum, did not prejudice defendants. *Broadwater v. Old Republic Sur.*, 854 P.2d 527 (Utah 1993).

—Corporation.

Where an affidavit is made by an officer of a corporation, it is generally considered to be the affidavit of the corporation itself. However, the personal knowledge of an agent of the corporation who is not a corporate officer regarding the facts to which he has sworn will generally not be presumed, and therefore, the specific "means and sources" of his information should be shown. *Utah Farm Prod. Credit Ass'n v. Watts*, 737 P.2d 154 (Utah 1987).

—Experts.

Utah Rule of Evidence 704 allows the expert to state his opinion concerning the ultimate issue in the case, and an expert affidavit must also contain a sufficient factual basis for the opinion proffered. Thus, the affidavit is sufficient if it articulates the facts upon which the opinion was based and if the facts were of the "type usually relied upon by experts in the field." *Gaw v. State*, 798 P.2d 1130 (Utah Ct. App. 1990).

Because the sole purpose underlying Utah R. Evid. 705 is to obviate the need to use hypothetical questions to elicit expert opinion, the rule's drafters did not intend to exempt expert affidavits in opposition to summary judgment from the requirement in Subdivision (e) of this rule that affidavits set forth specific facts

showing there is a genuine issue for trial; affidavits must include not only the expert's opinion, but also the specific facts that logically support the expert's conclusion. *Butterfield v. Okubo*, 831 P.2d 97 (Utah 1992).

—Inconsistency with deposition.

Party may not rely on a subsequent affidavit that contradicts his deposition to create an issue of fact on a motion for summary judgment unless there is some substantial likelihood that the deposition testimony was in error or the party-deponent is able to state in his affidavit an adequate explanation for the contradictory answer in his deposition. *Webster v. Sill*, 675 P.2d 1170 (Utah 1983); *Gaw v. State*, 798 P.2d 1130 (Utah Ct. App. 1990).

—Necessity of opposing affidavits.

Where a defendant's motion for summary judgment is based solely on his pleadings and is not made and supported by affidavits, as provided in Subdivision (e), plaintiff, pursuant to Subdivision (e), may rest on the allegations in his pleadings. *Parrish v. Layton City Corp.*, 542 P.2d 1086 (Utah 1975).

Fact that party opposed to the motion for summary judgment fails to submit documents in opposition does not preclude the denial of the motion; where the party opposed submits no documents in opposition, the moving party may be granted summary judgment only if appropriate, that is, he is entitled to judgment as a matter of law. *Olwell v. Clark*, 658 P.2d 585 (Utah 1982).

When a party opposes a properly supported motion for summary judgment and fails to file any responsive affidavits or other evidentiary materials allowed by Subdivision (e), the trial court may properly conclude that there are no genuine issues of fact unless the face of the movant's affidavit affirmatively discloses the existence of such an issue. *Franklin Fin. v. New Empire Dev. Co.*, 659 P.2d 1040 (Utah 1983); *Cowen & Co. v. Atlas Stock Transf. Co.*, 695 P.2d 109 (Utah 1984); *Busch Corp. v. State Farm Fire & Cas. Co.*, 743 P.2d 1217 (Utah 1987).

Summary judgment need not be affirmed merely because party opposing summary judgment did not file affidavits in order to avoid judgment against him. *Mountain States Tel. & Tel. Co. v. Atkin, Wright & Miles, Chartered*, 681 P.2d 1258 (Utah 1984).

When read in light of Subdivision (b), it is clear that the Subdivision (e) requirement that a party opposing the summary judgment motion file counter-affidavits applies only when the moving party has elected to and has filed affidavits in support of the motion. If the moving party chooses not to or simply fails to file affidavits, Subdivision (e) is inapplicable. *Gadd v. Olson*, 685 P.2d 1041 (Utah 1984).

When a motion for summary judgment is filed and supported by an affidavit, the party opposing the motion has an affirmative duty to respond with affidavits or other materials allowed by Subdivision (e). *D & L Supply v. Saurini*, 775 P.2d 420 (Utah 1989); *Thayne v. Beneficial Utah, Inc.*, 874 P.2d 120 (Utah 1994).