

1996

Jospeh D. Sanders v. The City and Municipality of Draper, The Draper City Board of Adjustment, The Draper City Planning Committee, The Draper City Council, Charles L. Hoffman, Robert Brown, Kim Stevens : Brief of Appellant

Utah Court of Appeals

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Reid W. Lambert; Nicholas E. Hales; Woodbury & Kesler, P.C..

Recommended Citation

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IN THE UTAH COURT OF APPEALS

UTAH COURT OF APPEALS
BRIEF

Appeal No. 960344

960833

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DOCKET NO. 960833-CA

JOSEPH D. SANDERS,
Plaintiffs and Appellants,

96-0833-CA

v.

THE CITY AND MUNICIPALITY OF DRAPER,
THE DRAPER CITY BOARD OF ADJUSTMENT,
THE DRAPER CITY PLANNING COMMITTEE,
THE DRAPER CITY COUNCIL, CHARLES L. HOFFMAN
Mayor of Draper, ROBERT BROWN, and KIM STEVENS,

Defendants and Appellees.

ADDENDUM TO BRIEF OF APPELLANTS

Appeal from a final judgment of the Third Judicial
District Court for Salt Lake County, Judge Ann M. Stirba

District No. 900902397 PR

Oral Argument Priority Classification No. 15

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FILED

Utah Court of Appeals

FEB 25 1997

Marilyn M. Branch
Clerk of the Court

IN THE UTAH COURT OF APPEALS

Appeal No. 960344

JOSEPH D. SANDERS,

Plaintiffs and Appellants,

v.

THE CITY AND MUNICIPALITY OF DRAPER,
THE DRAPER CITY BOARD OF ADJUSTMENT,
THE DRAPER CITY PLANNING COMMITTEE,
THE DRAPER CITY COUNCIL, CHARLES L. HOFFMAN
Mayor of Draper, ROBERT BROWN, and KIM STEVENS,

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APPENDIX

ITEM # 1

Complaint

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Robert E. Burgen

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

15
7.86338
B. N. GLANVILLE, JOSEPH D.
SANDERS and CHERYL M. SANDERS,

COMPLAINT

Plaintiffs,

vs.

Civil No. 900907397 PR

THE CITY AND MUNICIPALITY OF
DRAPER, THE DRAPER CITY BOARD
OF ADJUSTMENT, THE DRAPER CITY
PLANNING COMMITTEE, THE DRAPER
CITY COUNCIL, CHARLES L.
HOFFMAN, Mayor of the City of
Draper, ROBERT BROWN, KIM
STEVENS AND JOHN DOES I
through X,

Judge JUDGE LEONARD U. PIERCE

Defendants.

Plaintiffs, and each of them, complain of the Defendants,
and each of them, and allege in support of their Complaint as
follows:

PARTIES AND GENERAL ALLEGATIONS

1. That Plaintiffs Joseph D. Sanders and Cheryl M.
Sanders, hereinafter referred to as "Sanders", are presently
residents of San Diego County, State of California, at other

000001

times relevant hereto, they have been residents of Salt Lake County, State of Utah.

2. That Plaintiff B. N. Glanville, hereinafter referred to as "Glanville", is a resident of Malheur County, State of Oregon.

3. That the Plaintiffs, and each of them, are or have been at times relevant hereto, possessed of by way of legal and equitable ownership, a parcel or parcels of real property located at or about the street address commonly referred to as 13735 Shadow Mountain Lane, Salt Lake County, State of Utah.

4. That the parcels which the Plaintiffs own are more particularly identified in Exhibit "A" attached hereto and incorporated herein by this reference. The parcels referred to can be identified as parcels .018, .019 and .020.

5. That parcels .018 and .019 are presently owned by Plaintiff B. N. Glanville and shall hereinafter be referred to as "the Property".

6. That the Property is located within the boundaries of the City of Draper.

7. That the City of Draper is a city municipality organized and existing under and by virtue of the laws of the State of Utah.

8. That Defendants City of Draper Planning Committee, City of Draper Board of Adjustment, the City Council of the City of Draper, their respective members and Mayor Charles L. Hoffman, were duly elected or appointed and as such are commissioned, qualified and act as members of their respective municipal or

administrative bodies at times relevant hereto. These Defendants may be referred to from time to time collectively as "Draper City".

9. That Defendants City of Draper Planning Committee, City of Draper Board of Adjustment, the City Council of the City of Draper, their respective members and Mayor Charles L. Hoffman, at all times relevant hereto have purportedly acted within the scope of their authority in regards to the actions complained of hereafter.

10. That Defendants Robert Brown and Kim Stevens are both residents of Salt Lake County, State of Utah and shall hereinafter be referred to respectively as "Brown" and "Stevens".

11. That Brown and Stevens claim a legal and equitable ownership interest in real property which is a adjacent and contiguous to the Property.

12. That Brown and Stevens may own their respective parcels of property jointly with others who are unknown presently to the Plaintiffs but are designated herein as John Does I through X.

13. That at all times mentioned herein relevant to Brown and Stevens, John Does I through X, together with Brown and Stevens have acted jointly, within their respective capacity as property owners, and, with regard to John Does I through X, within the scope of their agency as to Defendants Brown and Stevens.

14. That B. N. Glanville is currently the owner of the Property.

15. That prior to B. N. Glanville's ownership of the Property, the Property was owned by Sanders and conveyed to Glanville on or about the 19th day of May, 1988.

16. That Defendant Draper City, et al. is empowered and entrusted with the responsibility and authority to manage, regulate and police the development and improvement of real property within its boundaries pursuant to the laws of the State of Utah and its own municipal ordinances.

17. That in the furtherance of the responsibility and authority granted Draper City by the laws of the State of Utah, Draper City has established and empowered a planning committee and Board of Adjustment to assist in the management, policing and regulation of real property and its development within the municipality of Draper.

18. That part of the authority exercised by the City of Draper, et al. is the power to control, regulate, approve and disapprove the subdivision of real property and to regulate the improvements and structures built on real property within the boundaries of the City of Draper granting variances and setting conditions for the development of real property and the construction of improvements thereon as might be just and equitable.

19. That in the furtherance of the power and authority of the City of Draper as set forth above, there has been established as political subdivisions of that municipality, a planning

committee and a Board of Adjustment to regulate, administer and administratively adjudicate petitions and applications relevant to real property.

20. That, among other things, the planning committee has the authority and the responsibility to regulate, approve and disapprove applications for the subdivision of real property.

21. That, among other things, the Board of Adjustment has the authority to regulate, approve and disapprove applications and petitions for variances from zoning ordinances in effect in the City of Draper.

22. That all of the acts undertaken by the City of Draper et al. complained of herein, were purportedly undertaken within the scope of their authority as represented by the laws of the State of Utah and the ordinances of the City of Draper and particularly those actions of the City of Draper in awarding variances and issuing building permits in regards to the Property and adjacent parcels of land.

23. That the Plaintiffs, at times relevant hereto, claim an interest under a deed, or written contract, and their interest in the Property is affected by a municipal ordinance and otherwise by the actions of the City of Draper.

SPECIFIC ALLEGATIONS

24. That Sanders purchased parcels .018 and .019 from individuals known as Martin S. Ovard, Reva S. Ovard, Ben F. Ovard and Helen F. Ovard, hereinafter referred to as "Ovard", on or about November 8, 1982.

25. That Sanders believed that parcels .018 and .019 were "lots", as to which a building permit would be issued and appropriately subdivided, within the meaning of state statutes and City of Draper ordinances.

26. That Sanders believed this because the home in which he was presently residing was also constructed by Ovard. Ovard constructed the home pursuant to a building permit issued by Draper City as to the one acre parcel.

27. That he believed that parcels .018 and .019 were properly subdivided lots for which he could receive a building permit in their present form, because a building permit had been previously issued as to parcel .020, the parcel upon which the home had been constructed.

28. That application had been previously made by one Layne Newman and others, to subdivide the Property and adjacent parcels, but the applications and petitions had been denied by the County of Salt Lake and the City of Draper.

29. That in fact, the Property and adjacent parcels had never been properly subdivided receiving the appropriate approvals from City of Draper political subdivisions.

30. That Sanders purchased parcels .018 and .019 for consideration assuming their value to be equivalent to a properly and legally subdivided lot as to which he could receive, without a variance or subdivision approval, a building permit.

31. That Sanders purchased those parcels for \$26,000. The parcels had a market value, for the reasons set forth herein, of \$8,000.

32. That in purchasing the Property, Sanders acted innocently and reasonably and in ignorance of the true status of the Property, relying upon the representations of the sellers and the actions of the City of Draper.

33. That on information and belief, the City of Draper and its political subdivisions granted Ovard a variance to build the home that was subsequently purchased by Sanders on an illegally subdivided two acre parcel of land.

34. That the subject home, constructed by Ovard and subsequently purchased by Sanders, was constructed contrary to the variance, the building permit and Draper City subdivision regulations because it was located on a one acre parcel.

35. That the sale of parcels .018, .019 and .020 by Ovard were illegal and constituted a class B misdemeanor under state statutes and Draper City ordinances. All subsequent sales have been likewise illegal.

36. That subsequent to the purchase of the parcels referred to above by Sanders, Sanders learned that the parcels were not properly subdivided and that the building permit would not be issued as to parcel .018 or .019 without further subdivision approval.

37. That since that time, the City of Draper has attempted, contrary to state law and City of Draper ordinance, to grant

variances which in effect attempt to approve the subdivision of the three parcels.

38. That the attempts of the City of Draper so to do, have been ineffective, and are contrary to state law and City of Draper ordinances.

39. That since the time the City of Draper has become aware of the conduct of Ovard which is contrary to state law and City of Draper ordinance, the City of Draper has ignored and continues to ignore those circumstances and has failed to enforce its laws and the laws of the State of Utah or has attempted to enforce those ordinances and laws in an ineffective manner.

40. That the City of Draper has a duty to police, manage and regulate the development of real property within its municipal borders and has utterly failed, in this case, in that duty.

41. That by reason of the action of Ovard and City of Draper, the Plaintiffs are reasonably confused and uncertain about their legal rights as regards to the Property and others.

42. That, among other things, there is a duty on the part of the City of Draper, by way of enforcement of its ordinances and the laws of the State of Utah to prosecute violations of those laws and ordinances. This duty has been ignored and the City of Draper has utterly failed to prosecute these violations.

43. That on or about July, 1988 the City of Draper, acting by and through its Board of Adjustment, attempted to ratify the illegal conduct of Ovard by granting a "variance" on the application of Mountain West Savings, a banking institution, represented by its purported agent, Ovard. That the so called "variance"

further confuses the legal rights and interest of not only the Plaintiffs, but the owners of adjacent parcels of land.

44. That the actions of City of Draper by and through its Board of Adjustment are without or beyond the jurisdiction of the Board of Adjustment.

45. That in any event, the City of Draper has ignored the enforcement of the conditions attached to the granting of the "variance" as they relate to adjacent property owners, all of which has damaged the Plaintiffs and created uncertainty as to their true legal status in regards to the Property.

46. That the Plaintiffs have been damaged by virtue of the conduct of the City of Draper alleged above, inasmuch as their property has been reduced in value, the Sanders have lost the ownership and equitable interest in parcel .020 altogether and the uncertainty surrounding these properties has resulted in litigation was necessary to ascertain the true legal rights and standing of the Plaintiffs. In addition, the Plaintiffs have been deprived of the full use and enjoyment of the Property.

FIRST CAUSE OF ACTION
(Writ of Mandate or Mandamus)

47. The Plaintiffs incorporate by this reference the allegations contained in paragraphs 1 through 46.

48. The Plaintiffs are entitled to a Writ of Mandate or Mandamus (hereinafter "Mandamus") requiring the City of Draper to perform its required duties and actions, and more particularly:

(a) To fully prosecute the violations of its laws and the laws of the State of Utah set forth above in relation to the illegal subdivision and sale of illegally subdivided "lots" (the Property).

(b) To enforce its conditions placed upon the granting of zoning variances by way of sanction, fine, a finding of nuisance or action authorized by law.

(c) Take such action as might be necessary through its appropriate political subdivisions, namely the planning committee, to correctly define the status of the Property.

(d) To declare null and void the action of the Board of Adjustment for the City of Draper insofar as it relates to the purported subdivision of the Property.

(e) To declare null and void the action of the Board of Adjustment of the City of Draper insofar as it relates to the Property and its action of July, 1988 due to the lack or want of jurisdiction for such action.

49. That the Plaintiffs have attempted to resolve the issues raised above informally and directly with the City of Draper, but without satisfaction.

50. That there exists no plain, speedy and adequate remedy other than this Complaint for the issuance of a Writ of Mandamus.

51. That the Plaintiffs have sustained damages by virtue of the conduct alleged above which should be ascertained and found by a jury.

SECOND CAUSE OF ACTION
(Declaratory Judgment)

52. That the Plaintiffs incorporate herein by this reference the allegations contained in paragraphs 1 through 51 of the Complaint.

53. That the Plaintiffs are entitled to and should receive a declaratory relief deciding the questions of construction and validity under the ordinances and actions of the City of Draper and more particularly pursuant to § 78-33-1, Utah Code Ann. (1953 as amended).

THIRD CAUSE OF ACTION
(Negligence)

54. That Plaintiffs incorporate herein by this reference the allegations contained in paragraphs 1 through 53 of the Complaint.

55. That the City of Draper has been negligent and Plaintiffs have sustained damages which were proximately caused by by the action or inaction of the City of Draper as alleged above, as well as the conduct set forth hereafter:

(a) The failure of the City of Draper to properly police the development and subdivision of real property within its boundaries.

(b) The de facto approval of the Ovard "subdivision" by the issuance of a building permit as well as the inaction of the City of Draper after being informed of the illegal attempted subdivision by Ovard.

(c) The failure of the City of Draper to ascertain violations of its ordinances and laws, as well as those of the State of Utah, and take reasonable steps to enforce the same.

56. That in addition to the damages set forth above, the Plaintiffs have suffered emotional distress, anxiety and upset to their damages in an amount not less than \$150,000.

57. That by virtue of the conduct of the City of Draper and as a direct and proximate result thereof, the Plaintiffs have suffered the damages more particularly described above, in an amount not less than \$150,000 and otherwise according to proof.

FOURTH CAUSE OF ACTION
(Trespass)

58. That the Plaintiffs incorporate herein by this reference the allegations contained in paragraphs 1 through 57.

59. That Defendants Brown and Stevens and John Does I through X ave trespassed on the Property of the Plaintiffs, to-wit: parcels .018 and .019, in the following particulars:

(a) As to Defendant Brown, Defendant Brown and those acting with him trespass on parcel .019 owned by Plaintiff Glanville by their ongoing traverse and use of that parcel by way of gaining access to their residence and garage and their construction of improvements over and across the Property owned by Plaintiff Glanville. Additionally, Brown and others have constructed a fence across or surrounding parcel .018 and have attempted to convert the same to their own use, have utilized the same for personal use, including

the grazing and running of horses without the permission or consent of Plaintiff.

(b) As to Defendant Stevens, his trespass consists of construction of improvements and the maintenance of improvements which occupy a portion of the Right-of-Way adjacent to parcel .019 owned by Plaintiff Glanville.

(c) Plaintiff has made demand on Defendants Brown and Stevens and those acting with them, to cease and terminate their ongoing trespass which demands have been utterly ignored and disregarded.

60. That the actions of Defendants Brown and Stevens and those acting with them, have not been approved or consented to by the Plaintiffs and are in direct and total disregard of their ownership and interest in the Property.

61. That as a direct and proximate result of the trespass of Defendants Brown and Stevens and those acting with them, the Plaintiffs have been damaged in an amount not yet determined, but no less than \$10,000 which should be proven and established at the trial of this matter.

62. That the actions of Brown and Stevens and those acting with them, have been intentional, malicious and in total disregard of the rights of the Plaintiffs as herein set forth, and as a result thereof, not only has this action been required, but the Plaintiff is entitled to exemplary and punitive damages in an amount not less than \$10,000 as to Defendant Brown, and \$10,000 as to Defendant Stevens.

63. That inasmuch as Defendants Brown and Stevens and those acting with them have disregarded the reasonable requests of the Plaintiff heretofore, it would be reasonable for the Court to make and enter, without delay and during the pendency of this action, on application of the Plaintiff, an injunction restraining these Defendants and those acting with them from ongoing trespass as described above, pending a finding as to the Plaintiffs' damages therefore.

WHEREFORE, Plaintiffs pray for judgment against the Defendants, and each of them, as follows:

1. As to the City of Draper, et al.;

(a) A Writ of Mandamus requiring the City of Draper and its political subdivisions to comply with the City of Draper ordinances and the laws of the State of Utah in the policing and management, as well as the enforcement of their ordinances and the laws of the State of Utah.

(b) For damages in connection with the Writ of Mandamus as provided by law in an amount not less than \$150,000.

(c) For declaratory relief fixing and describing the rights of the Plaintiff in regards to the Property, both as it relates to its current status under the laws of the State of Utah and the ordinances of Draper City, as well as adjoining and adjacent property owners.

(d) For judgment in the amount of \$150,000 based upon the negligence of the City of Draper.

2. As to Defendants Brown and Stevens:

(a) For a judgment finding that the actions of Defendants Brown and Stevens and those acting with them are trespass upon the properties of Plaintiffs.

(b) For the immediate issuance and entry of an injunction restraining Defendants Brown and Stevens and those acting with them from the actions described in the Complaint.

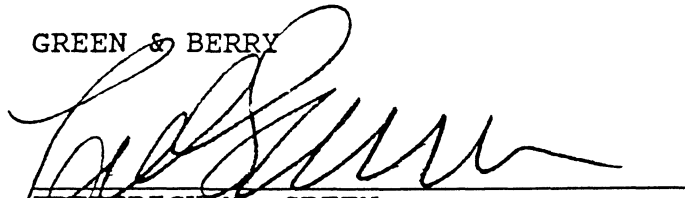
(c) For judgment in connection with the trespass of Brown and Stevens and those acting with them in an amount not less than \$20,000, in punitive damages and \$10,000 in general damages.

3. For such other and further relief as the Court may deem proper.

DATED THIS 23 day of April.

Respectfully Submitted,

GREEN & BERRY



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Attorney for Plaintiffs

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Poway, California

Plaintiffs Glanville's address:

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Westfall, Oregon

DISTRICT COURT COVER SHEET

I.(a) PLAINTIFFS

B. N. Glanville, Joseph D. Sanders
and Cheryl M. Sanders

DEFENDANTS

The City and Municipality of
Draper, et al.

**(b) ATTORNEYS (Attorney name,
Bar #, Address & Telephone #)**

Frederick N. Green (1240)
10 Exchange Place, Suite 528
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Telephone: (801) 363-5650

ATTORNEY (If known)

II. NATURE OF SUIT (Place an X in appropriate category)

DOMESTIC

_____ DA Divorce/Annulment
_____ SM Separate Maintenance
_____ PA Paternity
_____ SA Spouse Abuse
_____ UR URESA Action

PROBATE

_____ ES Estate
_____ GC Guardian/Conservator
_____ NC Name Change
_____ OT Other Probate

ABSTRACTS

_____ AJ Abstract of Judgment
_____ TL Tax Lien

ADOPTIONS

_____ AD Adoption

CIVIL

_____ AA Administrative Agency
_____ AP Appeal
_____ CV Other Civil
_____ CN Contract
_____ CS Custody and Support
_____ HC Writ-Habeas Corpus
_____ PD Property Damage
_____ PI Personal Injury
_____ XX PR Property Rights (Real)

MISCELLANEOUS

_____ MI Miscellaneous

MENTAL HEALTH

_____ MH Mental Health

III. JURY DEMAND:

() YES

(XX) NO

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APPENDIX

ITEM # 2

Ruling, 11/7/90

NOV 07 1990

SALT LAKE COUNTY
By *DeLundberg*

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

B. N. GLANVILLE, JOSEPH D.	:	RULING
SANDERS and CHERYL M. SANDERS,	:	
	:	CIVIL NO. 900902397 PR
Plaintiffs,	:	
	:	
vs.	:	
	:	
THE CITY AND MUNICIPALITY OF	:	
DRAPER, et al.,	:	
Defendants.	:	

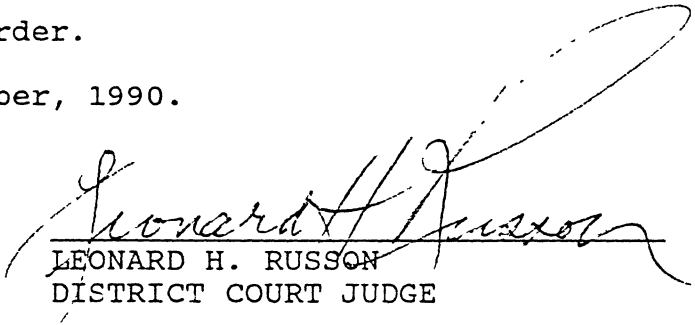
Defendants' Motion to Dismiss has been submitted to the Court for decision pursuant to Rule 4-501 of the Utah Code of Judicial Administration. Oral hearing was requested and was heard this date, at which time the matter was taken under advisement. The Memoranda of Points and Authorities filed by both parties has been reviewed, and the Court rules as follows.

Defendants' Motion to Dismiss is granted. The said Motion is granted for the reasons set forth in defendants' Memorandum and Reply Memorandum of Points and Authorities. Defendants owe no duty to the plaintiffs in regard to the alleged ordinance violations and variances. Defendants' duty is to the public, not to these individual plaintiffs. Plaintiffs' cause of

action rests with the seller of the property. The defendants cannot be liable for illegal subdivision any more than they could be liable for violation of the Uniform Building Code or traffic laws. Furthermore, the statute of limitations applies.

Defendant will ~~prepare~~ the Order.

Dated this 24 day of November, 1990.


LEONARD H. RUSSON
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Ruling, to the following, this 7 day of November, 1990:

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L. Lundberg

APPENDIX

ITEM # 3

Order of Dismissal, 11/26/90

NOV 26 1990

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ALDinberry

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

B. N. GLANVILLE, JOSEPH D.
SANDERS and CHERYL M. SANDERS,

Plaintiffs,

ORDER OF DISMISSAL

vs.

THE CITY AND MUNICIPALITY OF
DRAPER, THE DRAPER CITY BOARD
OF ADJUSTMENT, THE DRAPER CITY
PLANNING COMMITTEE, THE DRAPER
CITY COUNCIL, CHARLES L.
HOFFMAN, Mayor of the City of
Draper, ROBERT BROWN, KIM
STEVENS AND JOHN DOES I
THROUGH X,

Civil No. 900902397PR

Judge Leonard H. Russon

Defendants.

This matter came on regularly for hearing before the above-entitled court, the Honorable Leonard H. Russon presiding, on November 5, 1990, for consideration of a Motion to Dismiss for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6) of the Utah Rules of Civil Procedure,

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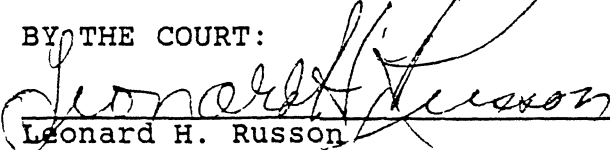
filed on behalf of defendants Draper City, Draper City Board of Adjustment, Draper City Planning Committee and Planning Commission, Draper City Council and Charles L. Hoffman as Mayor of the City of Draper.

The Court having heard the arguments of counsel and having reviewed the pleadings and memoranda filed with respect to this motion, and being fully advised, issued its Ruling dated November 7, 1990 in which it determined that the allegations of the plaintiffs' Complaint, even viewed in a light most favorable to plaintiffs, fails to state a claim upon which relief can be granted against the defendants for the reasons set forth in the Ruling of the Court and as more fully set forth in the defendants' memoranda. Based on that Ruling, it is hereby

ORDERED, ADJUDGED AND DECREED that defendants' Motion to Dismiss is hereby granted as to all claims made in the plaintiffs' Complaint as against defendants Draper City, Draper City Board of Adjustment, Draper City Planning Committee and Planning Commission, Draper City Council and Mayor Charles L. Hoffman, and plaintiffs' Complaint as against said defendants is hereby dismissed, with prejudice and upon the merits, no cause of action.

DATED this 26th day of Nov., 1990.

BY THE COURT:


Leonard H. Russon
District Court Judge

AFFIDAVIT OF SERVICE

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

Sharon Allhands, being duly sworn, says that she is employed by the law offices of Snow, Christensen & Martineau, attorneys for defendants Draper City, Draper City Board of Adjustment, Planning Commission, City Council and Charles L. Hoffman herein; that she served the attached ORDER OF DISMISSAL (Case No. 900902397PR, Third District Court) upon the parties listed below by placing a true and correct copy thereof in an envelope addressed to:

Frederick N. Green
Julie V. Lund
GREEN & BERRY
10 Exchange Place, #528
Salt Lake City, UT 84111

Hollis S. Hunt
Draper City Atty
HUNT AND RUDD
243 E 400 S, #200
Salt Lake City, UT 84111

Bruce A. Maack
KIMBALL, PARR, WADDOUPS, BROWN & GEE
185 South State Street, Suite 1300
P. O. Box 11019
Salt Lake City, UT 84147

and causing the same to be mailed, first class postage prepaid, as indicated, on the 13th day of November, 1990.

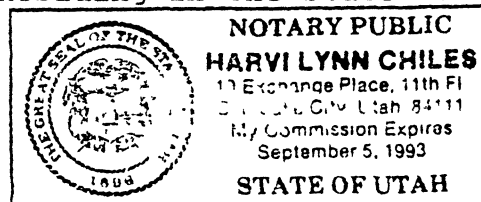
Sharon M Allhands
Sharon M. Allhands

SUBSCRIBED AND SWORN to before me this 13 day of November, 1990.

Harvi Lynn Chiles
NOTARY PUBLIC
Residing in the State of Utah

My Commission Expires:

09/05/93



APPENDIX

ITEM # 4

Amended Complaint

GREEN & BERRY
FREDERICK N. GREEN (1240)
JULIE V. LUND (4875)
Attorneys for Plaintiffs
622 Newhouse Building
10 Exchange Place
Salt Lake City, Utah 84111
Telephone: (801) 363-5650

FILED
JAN 12 4 55 PM '99

BY: *[Signature]*
CLERK

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

B.N. GLANVILLE, JOSEPH D.
SANDERS and CHERYL M. SANDERS,

AMENDED COMPLAINT

Plaintiffs,

vs.

THE CITY AND MUNICIPALITY OF
DRAPER, THE DRAPER CITY BOARD
OF ADJUSTMENT, THE DRAPER CITY
PLANNING COMMITTEE, THE DRAPER
CITY COUNCIL, CHARLES L.
HOFFMAN, Mayor of the City of
Draper, ROBERT BROWN, KIM
STEVENS and JOHN DOES I
through X,

Civil No. 900902397PR

Honorable Anne M. Stirba

Defendants.

Plaintiffs, and each of them, complain of Defendants, and
each of them, and allege in support of their Amended Complaint as
follows:

PARTIES AND GENERAL ALLEGATIONS

1. That Plaintiffs Joseph D. Sanders and Cheryl M.
Sanders, hereinafter referred to as "Sanders", are presently
residents of San Diego County, State of California, at other
times relevant hereto, they have been residents of Salt Lake
County, State of Utah.

000144

2. That Plaintiff B. N. Glanville, hereinafter referred to as "Glanville", is a resident of Malheur County, State of Oregon.

3. That the Plaintiffs, and each of them, are or have been at all times relevant hereto, possessed of by way of legal and equitable ownership, a parcel or parcels of real property located at or about the street address commonly referred to as 13735 Shadow Mountain Lane, Salt Lake County, State of Utah.

4. That the parcels which the Plaintiffs own are more particularly identified in Exhibit "A" attached hereto and incorporated herein by this reference. The parcels referred to can be identified as parcels .018, .019 and .020.

5. That parcels .018 and .019 are presently owned by Plaintiff B. N. Glanville and shall hereinafter be referred to as "the Property".

6. That the Property is located within the boundaries of the City of Draper.

7. That the City of Draper is a city municipality organized and existing under and by virtue of the laws of the State of Utah.

8. That Defendants City of Draper Planning Committee, City of Draper Board of Adjustment, the City Council of the City of Draper, their respective members and Mayor Charles L. Hoffman, were duly elected or appointed and as such are commissioned, qualified and act as members of their respective municipal or administrative bodies at all times relevant hereto. These

Defendants may be referred to from time to time collectively as "Draper City".

9. That Defendants City of Draper Planning Committee, City of Draper Board of Adjustments, the City Council of the City of Draper, their respective members and Mayor Charles L. Hoffman, at all times relevant hereto have purportedly acted within the scope of their authority in regards to the actions complained of hereafter.

10. That Defendants Robert Brown and Kim Stevens are both residents of Salt Lake County, State of Utah and shall hereinafter be referred to respectively as "Brown" and "Stevens".

11. That Brown and Stevens claim a legal and equitable ownership interest in real property which is an adjacent and contiguous to the Property.

12. That Brown and Stevens may own their respective parcels of property jointly with others who are unknown presently to the Plaintiffs but are designated herein as John Does I through X.

13. That at all times mentioned herein relevant to Brown and Stevens, John Does I through X, together with Brown and Stevens have acted jointly, within their respective capacity as property owners, and, with regard to John Does I through X, within the scope of their agency as to Defendants Brown and Stevens.

14. That B. N. Glanville is currently the owner of the Property.

15. That prior to B. N. Glanville's ownership of the Property, the Property was owned by Sanders and conveyed to Glanville on or about the 19th day of May, 1988.

16. That Defendant Draper City, et al. is empowered and entrusted with the responsibility and authority to manage, regulate and police the development and improvement of real property within its boundaries pursuant to the laws of the State of Utah and its own municipal ordinances.

17. That in the furtherance of the responsibility and authority granted Draper City by the laws of the State of Utah, Draper City has established and empowered a planning committee to assist in the management, policing and regulation of real property and its development within the municipality of Draper.

18. That part of the authority exercised by the City of Draper, et al. is the power to control, regulate, approve and disapprove the subdivision of real property and to regulate the improvements and structures built on real property within the boundaries of the City of Draper granting variances and setting conditions for the development of real property and the construction of improvements thereon as might be just and equitable.

19. That in the furtherance of the power and authority of the City of Draper as set forth above, there has been established as political subdivisions of that municipality, a planning committee to regulate, administer and administratively adjudicate petitions and applications relevant to real property.

20. That, among other things, the planning committee has the authority and the responsibility to regulate, approve and disapprove applications for the subdivision of real property.

21. That, among other things, the Board of Adjustment has the authority to regulate, approve and disapprove applications and petitions for variances from zoning ordinances in effect in the City of Draper.

22. That all of the acts undertaken by the City of Draper et al. complained of herein, were purportedly undertaken within the scope of their authority as represented by the laws of the State of Utah and the ordinances of the City of Draper and particularly those actions of the City of Draper in awarding variances and issuing building permits in regards to the Property and adjacent parcels of land.

23. That the Plaintiffs, at times relevant hereto, claim an interest under a deed, or written contract, and their interest in the Property is affected by a municipal ordinance and otherwise by the actions of the City of Draper.

SPECIFIC ALLEGATIONS

24. That Sanders purchased parcels .018 and .019 from individuals known as Martin S. Ovard, Reva S. Ovard, Ben F. Ovard and Helen F. Ovard, hereinafter referred to as "Ovard", on or about November 8, 1982.

25. That Sanders believed that parcels .018 and .019 were "lots", as to which a building permit would be issued and

appropriately subdivided, within the meaning of state statutes and City of Draper ordinances.

26. That he believed that parcels .018 and .019 were properly subdivided lots for which he could receive a building permit in their present form, because a building permit had been previously issued as to parcel .020, the parcel upon which the home had been constructed.

27. That application had been previously made by one Layne Newman and others, to subdivide the Property and adjacent parcels, but the applications and petitions had been denied by the County of Salt Lake and City of Draper.

28. That in fact, the Property and adjacent parcels had never been properly subdivided receiving the appropriate approvals from City of Draper political subdivisions.

29. That Sanders purchased parcels .018 and .019 for consideration assuming their value to be equivalent to a properly and legally subdivided lot as to which he could receive, without a variance or subdivision approval, a building permit.

30. That Sanders purchased those parcels for \$26,000. The parcels had a market value, for the reasons set forth herein, of \$8,000.

31. That in purchasing the Property, Sanders acted innocently and reasonably and in ignorance of the true status of the Property, relying upon the representations of the sellers and the actions of the City of Draper.

32. That on information and belief, the City of Draper and its political subdivisions granted Ovard a variance to build the home that was subsequently purchased by Sanders on an illegally subdivided two acre parcel of land.

33. That the subject home, constructed by Ovard and subsequently purchased by Sanders, was constructed contrary to the variance, the building permit and Draper City subdivision regulations because it was located on a one acre parcel.

34. That the sale of parcels .018, .019 and .020 by Ovard were illegal and constituted a class B misdemeanor under state statutes and Draper City ordinances. All subsequent sales have been likewise illegal.

35. That subsequent to the purchase of the parcels referred to above by Sanders, Sanders learned that the parcels were not properly subdivided and that the building permit would not be issued as to parcel .018 or .019 without further subdivision approval.

36. That since that time, the City of Draper has attempted, contrary to state law and City of Draper ordinance, to grant variances which in effect attempt to approve the subdivision of the three parcels.

37. That the attempts of the City of Draper so to do, have been ineffective, and are contrary to state law and City of Draper ordinances.

38. That since the time the City of Draper has become aware of the conduct of Ovard which is contrary to state law and City

of Draper ordinance, the City of Draper has ignored and continues to ignore those circumstances and has failed to enforce its laws and the laws of the State of Utah or has attempted to enforce those ordinances and laws in an ineffective manner.

39. That the City of Draper has a duty to police, manage and regulate the development of real property within its municipal borders and has utterly failed, in this case, in that duty.

40. That by reason of the action of Ovard and City of Draper, the Plaintiffs are reasonably confused and uncertain about their legal rights as regards to the Property and others.

41. That, among other things, there is a duty on the part of the City of Draper, by way of enforcement of its ordinances and the laws of the State of Utah to prosecute violations of those laws and ordinances. This duty has been ignored and the City of Draper has utterly failed to prosecute these violations.

42. That on or about July, 1988 the City of Draper, acting by and through its Board of Adjustment, attempted to ratify the illegal conduct of Ovard by granting a "variance" on the application of Mountain West Savings, a banking institution, represented by its purported agent, Ovard. That the so called "variance" further confuses the legal rights and interest of not only the Plaintiffs, but the owners of adjacent parcels of land.

43. That the actions of City of Draper by and through its Board of Adjustment are without or beyond the jurisdiction of the Board of Adjustment.

44. That in any event, the City of Draper has ignored the enforcement of the conditions attached to the granting of the "variance" as they relate to adjacent property owners, all of which has damaged the Plaintiffs and created uncertainty as to their true legal status in regards to the Property.

45. That the Plaintiffs have been damaged by virtue of the conduct of the City of Draper alleged above, inasmuch as the vacant property has been reduced in value, the Sanders have lost the ownership and equitable interest in the home located on parcel .020 altogether and the uncertainty surrounding these properties has resulted in litigation was necessary to ascertain the true legal rights and standing of the Plaintiffs. In addition, the Plaintiffs have been deprived of the full use and enjoyment of the Property.

FIRST CAUSE OF ACTION
(Writ of Mandate or Mandamus)

46. The Plaintiffs incorporate by this reference the allegations contained in paragraphs 1 through 46 of the Amended Complaint.

47. The Plaintiffs are entitled to a Writ of Mandate or Mandamus (hereinafter "Mandamus") requiring the City of Draper to perform its required duties and actions, and more particularly:

(a) To fully prosecute the violations of its laws and the laws of the State of Utah set forth above in relation to the illegal subdivision and sale of illegally subdivided "lots" (the Property).

(b) To enforce its conditions placed upon the granting of zoning variances by way of sanction, fine, a finding of nuisance or action authorized by law.

(c) Take such action as might be necessary through its appropriate political subdivisions, namely the planning committee, to correctly define the status of the Property.

(d) To declare null and void the action of the Board of Adjustment for the City of Draper insofar as it relates to the purported subdivision of the Property.

(e) To declare null and void the action of the Board of Adjustment of the City of Draper insofar as it relates to the Property and its action of July, 1988 due to the lack or want of jurisdiction for such action.

48. That the Plaintiffs have attempted to resolve the issues raised above informally and directly with the City of Draper, but without satisfaction.

49. That there exists no plain, speedy and adequate remedy other than this Amended Complaint for the issuance of a Writ of Mandamus.

50. That the Plaintiffs have sustained damages by virtue of the conduct alleged above which should be ascertained and found by a jury.

SECOND CAUSE OF ACTION
(Declaratory Judgment)

51. That the Plaintiffs incorporate herein by this reference the allegations contained in paragraphs 1 through 51 of the Amended Complaint.

52. That the Plaintiffs are entitled to and should receive a declaratory relief deciding the questions of construction and validity under the ordinances and actions of the City of Draper and more particularly pursuant to § 78-33-1, Utah Code Ann. (1953 as amended).

THIRD CAUSE OF ACTION
(Negligence of Draper City)

53. That the Plaintiffs incorporate herein by this reference the allegations contained in paragraphs 1 through 53 of the Amended Complaint.

54. That the City of Draper has been negligent and Plaintiffs have sustained damages which were proximately caused by the action or inaction of the City of Draper as alleged above, as well as the conduct set forth hereafter:

(a) The failure of the City of Draper to properly police the development and subdivision of real property within its boundaries.

(b) The de facto approval of the Ovard "subdivision" by the issuance of a building permit as well as the inaction of the City of Draper after being informed of the illegal attempted subdivision by Ovard.

(c) The failure of the City of Draper to ascertain violations of its ordinances and laws, as well as those of the State of Utah, and take reasonable steps to enforce the same.

55. That in addition to the damages set forth above, the Plaintiffs have suffered emotional distress, anxiety and upset to their damage in an amount not less than \$150,000.

56. That by virtue of the conduct of the City of Draper and as a direct and proximate result thereof, the Plaintiffs have suffered the damages more particularly described above, in an amount not less than \$150,000 and otherwise according to proof.

FOURTH CAUSE OF ACTION
(Trespass of Brown and Stevens)

57. That the Plaintiffs incorporate herein by this reference the allegations contained in paragraphs 1 through 57 of the Amended Complaint.

58. That Defendants Brown and Stevens and John Does I through X have trespassed on the Property of the Plaintiffs, to wit: parcels .018 and .019, in the following particulars:

(a) As to Defendant Brown, Defendant Brown and those acting with him trespass on parcel .019 owned by Plaintiff Glanville by their ongoing traverse and use of that parcel by way of gaining access to their residence and garage and their construction of improvements over and across the Property owned by Plaintiff Glanville. Additionally, Brown and others have constructed a fence across or surrounding parcel .018 and have attempted to convert the same to their own use, have utilized the same for personal use, including the grazing and running of horses without the permission or consent of Plaintiff.

(b) As to Defendant Stevens, his trespass consists of construction of improvements and the maintenance of improvements which occupy a portion of the Right-of-Way adjacent to parcel .019 owned by Plaintiff Glanville.

(c) Plaintiff has made demand on Defendants Brown and Stevens and those acting with them, to cease and terminate their ongoing trespass which demands have been utterly ignored and disregarded.

59. That the actions of Defendants Brown and Stevens and those acting with them, have not been approved or consented to by the Plaintiffs and are in direct and total disregard of their *ownership and interest in the Property.*

60. That as a direct and proximate result of the trespass of Defendants Brown and Stevens and those acting with them, the Plaintiffs have been damaged in an amount not yet determined, but no less than \$10,000 which should be proven and established at the trial of this matter.

61. That the actions of Brown and Stevens and those acting with them, have been intentional, malicious and in total disregard of the rights of the Plaintiffs as herein set forth, and as a result thereof, not only has this action been required, but the Plaintiff is entitled to exemplary and punitive damages in an amount not less than \$10,000 as to Defendant Brown, and \$10,000 as to Defendant Stevens.

62. That inasmuch as Defendants Brown and Stevens and those acting with them have disregarded the reasonable requests of the

Plaintiff heretofore, it would be reasonable for the Court to make and enter, without delay and during the pendency of this action, on application of the Plaintiff, an injunction restraining these Defendants and those acting with them from ongoing trespass as described above, pending a finding as to the Plaintiffs' damages therefore.

FIFTH CAUSE OF ACTION
(Negligence of Brown)

63. That the Plaintiffs incorporate herein by this reference the allegations contained in paragraphs 1 through 68 of the Amended Complaint.

64. That Brown and/or the representative of Mountainwest knew or should have known of the existence of problems related to the home due to the following:

- (a) Low asking price;
- (b) Mountainwest's negotiations with the previous owner in which they sought to require him to obtain a variance from Draper City;
- (c) The survey plat; and
- (d) The counteroffer made to Brown by Mountainwest.

65. That Defendant Brown disregarded the potential problems with the property and took advantage of the bargain price.

66. That Defendant Brown's purchase of this property has damaged the Plaintiffs herein.

67. That Defendant Brown has been unjustly enriched.

SIXTH CAUSE OF ACTION
(Illegality)

68. That the Plaintiffs incorporate herein by this reference the allegations contained in paragraphs 1 through 63 of the Amended Complaint.

69. That § 10-9-26 Utah Code Ann. (1953 as amended) prohibits the sale or transfer of a parcel of property created in violation of the subdivision ordinance.

70. That § 6-6-1(c) of the Draper City Subdivision Ordinances also prohibits the sale or transfer of parcels of property created in violation of the subdivision ordinance.

71. That the transfer or sale of the property to Mountainwest was in violation of the above laws and therefore illegal.

72. That the sale of the property by Mountainwest to Brown was in violation of the above laws and therefore illegal.

73. That pursuant to § 10-9-1002 Utah Code Ann. (1953 as amended) Plaintiff's seek to rescind the sales of this land which were made in violation of the above laws.

SEVENTH CAUSE OF ACTION
(Private Nuisance)

74. That the Plaintiffs incorporate herein by this reference the allegations contained in paragraphs 1 through 73 of the Amended Complaint.

75. That Defendants Brown's and Stevens' failure to comply with the subdivision requirements have obstructed and interfered with Plaintiffs' comfortable enjoyment of their property.

76. That pursuant to § 78-38-1 Utah Code Ann. (1953 as amended) Plaintiff seeks declaratory relief requiring these Defendants to abate the nuisance by complying with the subdivision requirements and an award of damages as shall be proven at trial.

WHEREFORE, Plaintiffs pray for judgment against the Defendants, and each of them, as follows:

1. As to the City of Draper, et al.:

(a) A Writ of Mandamus requiring the City of Draper and its political subdivisions to comply with the City of Draper ordinances and the laws of the State of Utah in the policing and management, as well as the enforcement of their ordinances and the laws of the State of Utah.

(b) For damages in connection with the Writ of Mandamus as provided by law in an amount not less than \$150,000.

(c) For declaratory relief fixing and describing the rights of the Plaintiff in regards to the Property, both as it relates to its current status under the laws of the State of Utah and the ordinances of Draper City, as well as adjoining and adjacent property owners.

(d) For judgment in the amount of \$150,000 based upon the negligence of the City of Draper.

2. As to Defendants Brown and Stevens:

(a) For a judgment finding that the actions of Defendants Brown and Stevens and those acting with them are trespass upon the properties of Plaintiffs.

(b) For the immediate issuance and entry of an injunction restraining Defendants Brown and Stevens and those acting with them from the actions described in the Complaint.

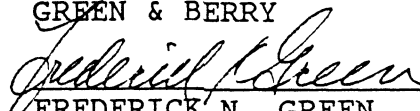
(c) For judgment in connection with the trespass of Brown and Stevens and those acting with them in an amount not less than \$20,000, in punitive damages and \$10,000 in general damages.

3. For such other and further relief as the Court may deem proper.

DATED this 21 day of January, 1993.

Respectfully Submitted,

GREEN & BERRY


FREDERICK N. GREEN
Attorney for Plaintiffs

Plaintiff Sander's address:

2717 NE 110 South
Vancouver, WA 98686

Plaintiff Glanville's address:

P.O. Box 128
Westfall, Oregon

CERTIFICATE OF HAND DELIVERY

STATE OF UTAH)
 :SS
COUNTY OF SALT LAKE)

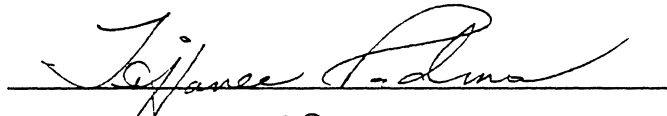
Tiffanee Padmos, being duly sworn, says:

That she is employed in the offices of GREEN & BERRY,
attorneys for Plaintiffs herein, that she served the attached
AMENDED COMPLAINT upon the following parties by placing a true
and correct copy thereof in an envelope addressed to:

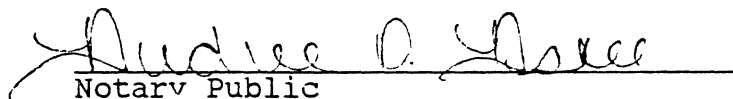
Bruce A. Maak, Esq.
KIMBALL, PARR, WADDOUPS, BROWN & GEE
185 South State, #1300
Salt Lake City, UT 84111

Jody K. Burnett, Esq.
WILLIAMS & HUNT
257 East 200 South, Suite 500
Salt Lake City, Utah 84111

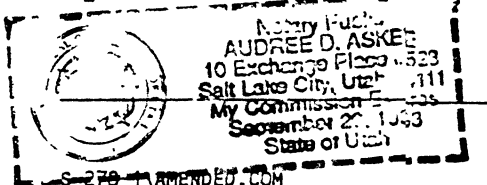
and hand delivering the same on the 22 day of January, 1993.



SUBSCRIBED AND SWORN to before me this 22 day of January,
1993.


Notary Public
Residing in Salt Lake
County, State of Utah

My Commission Expires:



APPENDIX

ITEM # 5

Title 9, Draper City Ordinances

TITLE 9

LAND USE AND DEVELOPMENT REGULATIONS

Chapter 2

PROCESSING PROCEDURES AND REGULATIONS

- 9-2-1. Name
- 9-9-2. Purpose
- 9-9-3. Building and Use Permits Required
- 9-2-4. Building Official/Zoning Administrator
- 9-2-5. Licensing Requirements
- 9-2-6. Fees
- 9-2-7. Inspection and Approval Required
- 9-2-8. Initial Application Process
- 9-2-9. Classification as to Use or Development
- 9-2-10. Types of Approval Processes
- 9-2-11. Appeal of Decision by Building Official/Zoning Administrator
- 9-2-12. Compliance - A Pre-requisite to Regulatory Approval
- 9-2-13. Time Computation
- 9-2-14. Interpretation
- 9-2-15. Conflict
- 9-2-16. Repealer
- 9-2-17. Penalty for Violations
- 9-2-18. Increase Fees

TITLE 9

LAND USE AND DEVELOPMENT REGULATIONS

Chapter 2

PROCESSING PROCEDURES AND REGULATIONS

9-2-1. Name.

This title shall be known as the Land Use and Development Regulations of Draper City Ordinances, 1990.

9-2-2. Purpose.

These regulations are designed and enacted for the purpose of promoting the health, safety, morals, convenience, order, prosperity, and welfare of the present and future inhabitants of Draper City, providing for, among other things, less congestion in the streets, the allowance and encouragement of energy conservation and renewable energy sources, better building and development practices, adequate light and air, a logical classification of land uses and distribution of land development and utilization, protection of the tax base, economy and government expenditures, encouragement of agriculture and industrial pursuits in appropriate locations and the protection of existing urban development. These regulations accomplish these purposes by zoning the area lying within Draper City and by regulating the location, height, bulk and size of buildings and other structures, the percentage of lot which may be occupied, the size of yard, courts, and open spaces, the use of buildings and structures for trade, industry, residence, recreation, public activities or other purposes, and the uses of land for trade, industry, residence or other purposes, and regulates the subdivision of land within Draper City.

9-2-3. Building and Use Permits Required.

Any construction, alteration, repair or removal of any building or structure or any part thereof, or the change of use of any land or building as provided or as required in this Title shall not be commenced, or proceeded with, except after the issuance of a written permit for the same by the Building Official of Draper City.

a. Unlawful.

Any building or structure erected, constructed, altered, enlarged, converted, moved or maintained contrary to provisions of this Title, and any use of land, building or premise

9-2-3. a.

establish, conducted or maintained contrary to provisions of this Title shall be, and the same hereby is, declared 9-2-3. (a) to be unlawful and a public nuisance.

b. Restraint of Use or Building.

The City shall upon request of the Building Official and with the approval of the City Council at once commence action or proceedings for the abatement and removal or enjoinder thereof in a matter provided by law, and take other steps as will abate and remove such buildings, use, or structure, and restrain or enjoin any person, firm, or corporation from erecting, building, maintaining or using said building or structure or property contrary to the provisions of this Title. The remedies provided for herein shall be cumulative and not exclusive.

9-2-4. Building Official/Zoning Administrator.

A Building Official/Zoning Administrator shall be designated and authorized by the City Council as the officer charged with the enforcement of this Title. From time to time, by resolution or ordinance, the City Council may entrust such administration in whole or in part to any other officer without amendment to this Title. The Building Official/Zoning Administrator shall enforce the provisions of this Title entering actions in the regulatory board, commissions or courts when necessary, and such failure to do so shall not legalize any violations of the provisions of this Title. The Building Official/Zoning Administrator shall not issue any permit unless the plans of the proposed erection, construction, reconstruction, alterations and use fully conform to all regulations then in effect.

9-2-5. Licensing Requirements.

All departments, officials, and public employees of the City which are vested with the duty or authority to issue permits or licenses shall conform to the provisions of this Title and shall issue no permits or licenses for use, building, or purpose where the same would be in conflict with the provisions of this Title and any such permit or license, if issued in conflict with the provision of this Title shall be null and void.

9-2-6. Fees.

Fees shall be charged applicants for building, occupancy, and conditional use permits, design review inspection and planned unit development and subdivision approvals, Planning Commission, and Board of Adjustment hearings, and such other services as are required by this Title to be performed by and for in behalf of the

9-2-16.

9-2-16. Repealer.

All such Land Use Regulations previously adopted by Draper City are hereby superceded and amended to read as set forth herein; provided, however that this Title shall be deemed to be a continuation of the previous ordinances, including amendments, and not a new enactment, insofar as the substance or revisions of previous provisions is included in those ordinances whether in the same or in different wording.

9-2-17. Penalty for Violations.

Whoever shall violate any of the provisions of this Title shall be guilty of a Class "B" Misdemeanor for each and every day such violation shall occur or continue and upon conviction of any such violation, shall be punishable by a fine of not more than \$1,000.00, or imprisonment for not more than six (6) months, or by both such fine and imprisonment for each infraction.

9-2-18. Increased Fees.

Notwithstanding that any violation of this Title is a Class "B" Misdemeanor, the City reserves the right to increase the permit fee up to twice the normal amount when, (1) an activity that complies with all applicable city, county, and state regulations has become, but has failed to first attain an appropriate permit, or (2) when a person/business to whom an appropriate permit has been issued has failed to comply with all the rules and regulations which apply to that permit, but has been able to obtain a variance from the Board of Adjustments after the non-compliance has been discovered.

a. Scheduled Increased Fees.

When the City exercises its right to increase its permit fee the following schedule shall apply:

- (1) An additional ten percent (10%) shall be added to the permit fee when the person/business in violation files within five (5) working days after notification of the violation from the City, an appropriate application to correct violation.
- (2) An additional one hundred percent (100%) shall be added to the permit fee for those who fail to file the appropriate application within five (5) working days after the notification from the City.

APPENDIX

ITEM # 6

Subdivision Application

EXHIBIT

A

ALL-STATE LEGAL SUPPLY CO

Salt Lake City, Utah

30 Aug 1978

City of Draper
12441 South 9th East
P.O. Box 336, 84020

ATTN: Planning and Zoning

Gentlemen:

We hereby submit application for a Minor Subdivision called Shadow Mountain Acres located at approximately 647 East 13800 South.

Enclosed is a filing fee of \$250.00 plus \$125.00 representing a fee of \$25.00 per lot.

At Enclosure 1 is nine copies of a Preliminary Plat which complies with your Subdivision Filing Procedures 2d.

At Enclosure 2 are Preliminary Engineering Reports on the sewer and water made by Templeton, Linke and Associates.

At Enclosure 3 is proof of our invested interest.

We respectfully request that this subdivision be reviewed as soon as possible. If there are any questions or problems that we can assist with please let us know.

Respectfully,

Layne J. Newman
232 E. 6715 So.
Midvale, Utah 84047
Telephone: 261-1128

Melbourne T. Yergensen
2518 Newport Circle
Salt Lake City, Utah 84121
Telephone: 942-1158, 561-1111

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+
Chair*

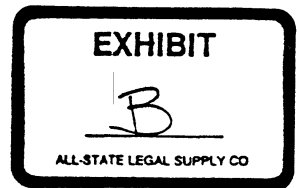
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APPENDIX

ITEM # 7

Board of Adjustments file, 4/12/1979

BOARD OF ADJUSTMENTS
The April 12, 1979 Meeting



Meeting called to order by Chairman Tom Mellenthin with the following present:

Duane Sadler; Gary Nelson; Elmer Sterling; and Andrea Zimmerman, Sec.

Meeting called to order at 8:24 p.m.

No. 1: Appeal - Phil Edmunds

Charge of \$138 for not getting building permit from it City of Draper. Also 50% charge added to fee because he didn't get a building permit.

Duane Sadler moved that the 50% charge be made as originally issued with second by Gary Nelson. Voting was in favor.

Question brought up as to whether he need to get business license.

No. 2: ARTIE PECK - Variance

Building is on a lot formerly less than one acre. Elmer Sterling moved to approval variance Second by Duane Sadler. Motion carried.

No. 3: ROYAL ANDERSON - Variance

Applying for 4-plex variance.

Tom Mellenthin moved to approve the variance on the duplex only. Second by Elmer Sterling. Motion carried.

No. 4: DENNIS BURNHAM - Variance

Duane Sadler moved to approve said variance with second by Gary Nelson. Motion carried.

No. 5: LYNN CARTER - Variance

Lynn Carter was present to request 100 ft. frontage variance at 845 E. 14800 South. Duane Sadler moved to approve variance with second by Elmer Sterling. Motion carried.

No. 6: LANE NEWMAN, SAM OVARD & DAVID DAY - Variance

All of above were present. A Mr. Stevens, neighbor, also present in favor. Tom Mellenthin moved to approve the variance based on the following conditions:

a) 70 foot cul de sac; (b) 16 ft. paved surface back from main road;
(c) fire hydrant and adequate waterline.
Second by Duane Sadler and motion passed unanimously.

No. 7: RONALD EASMUSSEN - Variance regarding the lot size from 1 acre to .90 acres.

Elmer Sterling moved to approve variance with second by Duane Sadler. Motion carried unanimously.

Meeting adjourned at 9:36 p.m.

March , 1979

To Whom it may concern:

M. Sam Ovard and Layne Newman are applying for a variance just North of 650 E. 13800 S.

A right of way 35 feet wide and 311 feet deep connects 13800 S. with a 5.16 acre peice of land.

The land is not being used for anything at the present time. There is nothing on the property or right of way exoept old shed foundations which will be removed and a concrete irrigation ditch which will stay for irrigation. The East Jordan Canal borders the Northern property line.

We plan to build two homes on the property for ourselves to live in.

M. Sam Ovard

4-2-79

Ovard and Newman have given me permission to add to this application a one acre parcel of ground adjacent to the above referred to 5.16 acres for the purpose of building a third home to use said 35 ft. right of way. I have drawn the additional acre on the plat. Most of this acre is part of tax notice 55-1475 (1.04 ac)

Layne Newman

000282

East Quarter
Corner Section 6
T4S, R1E, S1 & 4N
County Monument

060283

APPENDIX

ITEM # 8

Draper City Ordinances

EXHIBIT

C
ALL-STATE LEGAL SUPPLY CO.

6-3 REGULATORY PROVISIONS

6-3-1 Enforcement

- A. The Building Official is designated and authorized by the City Council as the officer charged with the enforcement of this Title, but from time to time, by resolution or ordinance, the City Council may entrust such administration, in whole or in part, to any other officer without amendment to this Title. The Building Official shall enforce the provisions of this Title, entering actions in the courts when necessary ~~and his failure to do so shall not legalize any violations of~~ the provisions. The Building Official shall not issue any permit unless the plans of the proposed erection, construction, reconstruction, alternation and use fully conform to all land use development regulations then in effect.
- B. It shall be the duty of the Building Official to inspect or cause to be inspected all buildings and improvements in course of construction or repair.
- C. The construction, alteration, repair or removal of any building or structure or any part thereof, or the change of use of any land or building as provided or as regulated in this Title shall not be commenced, or proceeded with, except after the issuance of a written permit for the same by the Building Official.
- D. Any building or structure erected, constructed, altered, enlarged, converted, moved or maintained contrary to provisions of this Title, and any use of land, building or premise established, conducted or maintained contrary to provisions of this Title shall be, and the same hereby is, declared to be unlawful and a public nuisance, and the City Attorney shall, upon request of the governing body, at once commence action or proceedings for abatement and removal or enjoinder thereof in a manner provided by law, and take other steps as will abate and remove such buildings use or structure, and restrain or enjoin any person, firm or corporation from erecting, building, maintaining or using said building, or structure or property contrary to the provisions of this Title. The remedies provided for herein shall be commulative and not exclusive.

*Officer
authorized
to enforce*

6-3-2 Planning Commission Review

All applicants for building permits, shall submit to the Planning Commission through their usual procedures and staff review process, a plan for the use and development of each parcel or structure for the purposes of meeting the requirements set forth in this Title.

6-3-3 Licensing

All departments, officials, and public employees of the City which are vested with the duty or authority to issue permits or licenses shall conform to the provisions of this Title and shall issue no permit or license for uses, building or purposes where the same would be in conflict with the

000084

provisions of this Title and any such permit or licenses, if issued in conflict with the provisions of this Title, shall be null and void.

6-3-4 Fees

Fees may be charged applicants for building, occupancy, and conditional use permits, design review and planned unit development approvals, Planning Commission and Board of Adjustment hearings, and such other services as are required by this Title to be performed by public officers or agencies. Such fees shall be established by the legislative body and be in amounts reasonably needed to defray costs to the public.

6-3-5 Interpretation

In interpreting and applying the provisions of this Title, the requirements contained herein are declared to be the minimum requirements for the purposes set forth.

6-3-6 Conflict

This Title shall not nullify the more restrictive provisions of covenants, agreements, other ordinances or laws, but shall prevail notwithstanding such provisions which are less restrictive.

If any provision of this Title or its application to any person or circumstance is, for any reason, held invalid, the remaining portion and/or portions of this Title or the application of the provision to other persons or circumstances shall not be affected.

6-3-7 Repealer

The existing Zoning Subdivision and other land use regulatory Ordinance of the City are hereby superseded and amended to read as set forth herein; provided, however that this Title shall be deemed a continuation of the previous ordinances, including amendments, and not a new enactment, insofar as the substance of revisions or previous provisions is included in those ordinances whether in the same or in different language.

6-3-8 Penalty for Violation

Whoever shall violate any of the provisions of this Title shall be guilty of a Class B misdemeanor for each and every day such violation shall occur or continue and upon conviction of any such violation, shall be punishable by a fine of not more than \$299 or by imprisonment for not more than six months, or by both such fine and imprisonment, or by the penalty for transfer and sale of property provided in Section 10-9-26 of the Utah Code Annotated, 1953.

6-6 SUBDIVISION

6-6-1 General Provisions

A. Purpose

This chapter shall provide for minimum standards relating to the platting and recording of land subdivision in the City of Draper, Utah, in particular it is intended, among other things, to:

1. Promote the health, safety, and general welfare of the residents of the City.
2. Promote the efficient and orderly growth of the City.
3. Provide a basis for determining the appropriateness of and method for approval of residential development.
4. Establish design and installation standards for streets, water and sewer facilities, drainage systems and other public utilities.

B. Evidence of Public Welfare

Any proposed subdivision and its ultimate use shall be in the best interests of the public welfare and the neighborhood and the subdivider shall present evidence to this effect when requested to do so by the City.

C. Restrictions of Subdivided Land

1. No person shall sell or exchange or offer to sell or exchange any parcel of land which is a part of a subdivision of a larger tract of land, or record for building purposes in the office of the County Recorder any subdivision plat unless the subdivision has been approved by the City according to the provisions of this Chapter.
2. All lots, plots, or tracts of land located within a subdivision shall be subject to the provisions of this Chapter, regardless of whether or not the tract is owned by the Subdivider or a subsequent purchaser, transferee, or holder of the land.

6-6-2 Designation of Subdivision

A. Regular Subdivisions

The owner/agent of any parcel of land proposed for regular subdivision shall apply to the Planning Commission for Conditional Use Permit designation as a regular subdivision. Such application shall include a legal description of the tract and a location map indicating the relation of the property to existing roads, adjoining property owners, and other information as may be required to adequately identify and describe the property. At a regular public meeting the Planning Commission shall hear the application and make

a matter of minutes evidence in support of the application, their determination of subdivision designation, and any conditions for development that may be peculiar to the subdivision. Upon approval of the designation and the Conditional Use Permit, the subdivider shall follow procedure and submit documents for preliminary and final plat processing as defined in this Chapter.

B. Non-Regular Subdivisions

The owner/agent of any parcel of land proposed for non-regular subdivision shall apply to the Planning Commission for Conditional Use Permit designation as a non-regular subdivision of a type herein described. Such applications shall include a legal description of the tract and a location map indicating the relation of the property to existing roads, adjoining property owners, and other information as may be required to adequately identify and describe the property. At a regular public meeting the Planning Commission shall hear the application and make a matter of minutes evidence in support of the application, their determination of subdivision designation, and any conditions for development that may be peculiar to the subdivision. Upon approval of designation and the Conditional Use Permit, the subdivider shall follow procedures and submit documents for processing consistent with type of non-regular subdivision requirements listed here:

1. **Large-Lot Subdivision.** Upon designation of large-lot subdivision the subdivider shall submit documents for both preliminary and final plat processing. All improvements and guarantees shall be as required for regular subdivision except, after recommendation by the Planning Commission, the City Council may allow lots to be sold with only partial improvements, provided that paved streets and culinary water, including fire protection capacity, shall be available and installed to City standard specifications.
2. **Minor Subdivision.** Upon designation of minor subdivision, the subdivider shall submit documents for preliminary plat processing in accordance with this Chapter. Approval of the preliminary plat by the Planning Commission and the City Council shall be authorization for the subdivider to sell lots within the subdivision covered by the preliminary plat by metes and bounds, and the requirements of a final plat shall be waived.
 - a. **Improvements** - When a final plat is not required, the subdivider shall provide all improvements required for standard subdivision, or large-lot subdivision when so approved. All such improvements shall be constructed in accordance with the provisions of this Chapter and as defined by the City Engineer.
 - b. **Guarantee** - In lieu of each lot being fully improved prior to the sale of lots, the subdivider shall provide improvement guarantee, which amount is to be set by the City

Engineer and approved by the City Council according to the procedures established for regular subdivision. All design and improvement standards of regular subdivision shall apply to Minor Subdivision.

3. One-Lot Subdivision. Upon designation of one-lot subdivision, the subdivider may request use of the property with the requirements for both preliminary and final plat waived, provided the use and lot meets all requirements of the City Zoning Ordinance. Improvements of one-lot subdivisions shall be consistent with regular subdivision or large-lot subdivisions where so approved. Guarantee of improvements shall be by building occupation restrictions or by bond or escrow at the discretion of the City Council.
4. Planned Development Subdivision. Upon designation of Planned Development Subdivision, the subdivider may submit documents for processing following the procedures for regular subdivision approval which must include the special provisions for Planned Development Subdivision as contained in this Chapter.

6-6-3 Subdivision Processing and Approval Procedure

A. Preliminary Plat

1. Preliminary Consultation. Each person or entity who proposes to subdivide land within the jurisdiction of the City shall become familiar with the City subdivision requirements and land use related plans for the territory in which the proposed subdivision lies by consultation with the Planning Commission staff. It shall be the obligation of the subdivider to have a knowledge of procedures, policies and to have an understanding of the availabilities of utility services before submission of the preliminary plat.
2. Zoning Requirements. The subdivider shall comply with all Zoning Ordinance regulations to accommodate intended lot size and type of development. Conditional use and subdivision designation approval shall be required of all subdivision applications before submission of the preliminary plat.
3. Preliminary Plat Filing. A preliminary plat shall be prepared in conformance with the standards, rules, and regulations contained herein, and eight (8) blue and white prints thereof shall be submitted to the City for distribution to various departments and interested entities for their information and recommendations prior to formal action by the Planning Commission.
4. Preliminary Plat Application Fee. At the time of filing the preliminary plat, the subdivider shall deposit with the City a non-refundable application fee made payable to the City. The City Council shall prescribe from time to time the amount of such fee, which shall be for the purpose of defraying expenses

incidental and in connection with the checking and reviewing of such preliminary subdivision plats.

5. Preliminary Plat Requirements. The preliminary plat shall be drawn to a scale not smaller than 100 feet to the inch, and shall be on standard 22 x 34 inch or 24 x 36 inch paper. The plat shall show:
 - a. The proposed name of the subdivision (acceptable names shall be approved by the County Recorder).
 - b. The subdivision location as forming a part of a larger tract or parcel. Where the plat submitted includes only a portion of a larger tract or only a part of a parcel or parcels of the same owner, a sketch plan of a prospective major street system shall be prepared showing logical connections to and through the larger parcel. The preliminary plat shall show all adjoining property owned or having an ownership interest by the subdivider.
 - c. Sufficient information to accurately locate the property including the nearest section corner tie. A copy of the County property ownership plat of the property and a legal description of the parcel must also be submitted.
 - d. The owners of all land adjoining and contiguous to the proposed subdivision.
 - e. The names and addresses of the subdivider(s), owner(s) of land, and the engineer or surveyor of the subdivision.
 - f. Contours at two-foot intervals to show the topography of the land.
 - g. The boundary lines of the tract to be subdivided including total acreage proposed for subdivision.
 - h. The location, dimensions and other details of all existing or platted streets and other important features such as easements, railroad lines, water courses (including irrigation canals and ditches), exceptional topography, bridges and buildings within or immediately adjacent to the tract to be subdivided.
 - i. Existing sanitary sewer, storm drains, water supply mains, and surface water control structures within the tract and immediately adjacent thereto. A commitment in writing from the appropriate agencies that utility services will be available for the project.
 - j. The flood hazard boundary as per Federal Flood Insurance Administration, when applicable.

- k. The locations, dimensions, and other details of proposed public street, private streets, alleys, utility easements, parks, open spaces used and lots, with proper labeling of parcels to be dedicated to the public or designated for private use.
 - l. Buffer zones and proposed mitigation where non-compatible uses adjoin the subdivision.
 - m. North point, scale and date.
 - n. A copy of proposed protective covenants.
 - o. A preliminary Storm Drainage Study.
 - p. The layout, dimension and numbering of all lots.
 - q. Proposed construction of permanent fencing along appropriate subdivision boundaries in conformance with the guidelines provided in this ordinance and staff recommendations.
 - r. The proposed method of dealing with all irrigation water systems relating to the properties, including a full consideration of all run-off water conditions.
7. Preliminary Plat Approval. The preliminary plat shall be reviewed by the Planning Commission, and either approved or rejected within 45 days after its presentation to the commission, or if modified, within 45 days of the presentation of the latest modification. If approved, the Planning Commission shall express its approval in writing or a matter of minutes, with whatever conditions are attached and return one copy of the preliminary plat, signed by the Commission Chairman, to the subdivider. If the preliminary plat is not approved, the Planning Commission shall indicate its disapproval in writing or as a matter of minutes and reasons therefore by a similarly signed copy. Upon the Planning Commission's action, the plat shall be referred to the City Council for review, when approved by the City Council, the subdivider is authorized to proceed with the preparation of the revised preliminary plat.
8. Time Limitation. Approval of the preliminary plat shall be effective for a maximum period of one (1) year after approval unless, upon application of the subdivider, the Planning Commission shall grant an extension which shall not exceed one (1) year. If the final plat has not been submitted within one (1) year, or the approved extension period, the preliminary plan must again be submitted to the Planning Commission for reconsideration. However, preliminary approval of a large tract shall not be voided, provided that the developer shall apply for time extension as part of the original plan of phasing, the Planning Commission shall, as part of the preliminary period for each proposed phase, and the final plat for each phase is filed within the maximum period so established.

- a. Bond - The subdivider shall furnish and file with the City Recorder a bond with corporate surety in an amount equal to 125% of the cost of the improvements as estimated by the City Engineer to assure the installation and construction of the improvements required by this Ordinance. Such bond shall be subject to approval of the City Council.
3. Release of Performance Guarantees. The City Council shall, at the request of the subdivider or his successors in interest, release from time to time, portions of the bond, for which the construction performance has been fully satisfied, provided however, there shall be retained with the City for a period of twelve (12) months from the date of acknowledgement by the City Engineer that all improvements are satisfactorily implaced, a sum or security of not less than ten (10) percent of the total improvement construction cost as a guarantee of good material and workmanship.

D. Recordation and Limitations

1. City to Record. When finally approved, the City Recorder shall be responsible for recording subdivision plats. The subdivider shall pay for all recording fees at the time of recordation. No final plats shall be recorded in the office of the County Recorder, and no lots included in such final plat shall be sold or exchanged, unless and until the plat is properly approved, signed and accepted by the City.
2. Time Limitation After Approval. Any final plat not offered for recording within one (1) year after the date of preliminary plat approval, unless the time is extended by the Planning Commission shall not be recorded, or received for recording, and shall have no validity whatsoever.
3. Changes in Final Plat Prohibited. It shall be unlawful for any person to change the lines, drawings, lot sizes or shapes, or any other provision of a plat or support document after it has received final approval by any entity whose approval is required.

E. Amended Plats

1. When changes are to be made in a plat of a subdivision which has been approved and recorded, said subdivision shall be vacated and an amended plat thereof shall be approved and recorded in accordance with the procedures established in this Chapter for approval and recordation of the final plat.

6-6-4 Required Subdivision Improvements

A. Permanent Improvements

The subdivider of any land located in or platted as a subdivision shall at his own expense, install the following improvements in compliance

- c. Blocks intended for business or industrial uses shall be designed specifically for such purposes, with adequate space set aside for off-street parking and delivery facilities.

C. Lots

1. Standards.

- a. The lot arrangement and design shall be such that lots will provide satisfactory and desirable sites for buildings, and be properly related to topography and to existing and probable future use requirements.
- b. All lots shown on the subdivision plat must conform to the minimum area and width requirements of the Zoning Ordinance for the zone in which the subdivision is located unless:
 - (1) A variance is granted by the Board of Adjustment.
 - (2) It is consistent with cluster subdivision approval as provided in this Title.
- c. Each lot shall have frontage on a public street dedicated by the subdivision plat, or an existing public street, or on a street which has become public by right of use and is at least forty (40) feet wide. Lots on private driveways, lanes or streets not dedicated to the public shall be subject to approval of the Planning Commission or Board of Adjustment as provided in this Title.
- d. Buildings constructed on corner lots shall comply with the minimum setback for both streets, as provided in the City Zoning Ordinance, and corner lot design shall anticipate the additional setback requirements.
- e. Side lines of lots shall be at approximately right angles to the street line, or radial to the street line.
- f. Where the land included in a subdivision includes two or more parcels in separate ownership and the lot arrangement is such that a property ownership line divides one or more lots, the land in each lot so divided shall be transferred by deed to either single or joint ownership before approval of the final plat, and such transfer shall be ordered by title report submitted with the final plat.

D. Natural Drainage and Irrigation Water

1. Standards.

- a. Natural Drainage and Other Easements - The Planning Commission shall, unless waived for good and sufficient cause,

APPENDIX

ITEM # 9

Partial Summary Judgment

FILED IN CLERK'S OFFICE
SALT LAKE COUNTY, UT

JUL 0 1983
By [Signature] Deputy Clerk

Bruce A. Maak, Of Counsel (A2033)
Thomas R. Lee (A5991)
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IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

B. N. GLANVILLE, JOSEPH D.
SANDERS and CHERYL M. SANDERS,

Plaintiffs,

vs.

THE CITY AND MUNICIPALITY OF
DRAPER, THE DRAPER CITY BOARD
OF ADJUSTMENT, THE DRAPER CITY
PLANNING COMMITTEE, THE DRAPER
CITY COUNCIL, CHARLES L. HOFFMAN,
Mayor of the City of Draper,
ROBERT BROWN, KIM STEVENS, and
JOHN DOES I through X,

Defendants.

PARTIAL SUMMARY JUDGMENT

Civil No. 900902397PR

(Hon. Anne M. Stirba)

ROBERT E. BROWN, JR. and
DIANE BROWN,

Counterclaim and Crossclaim
Plaintiffs,

vs.

B.N. GLANVILLE, M.D. GLANVILLE,
JOSEPH D. SANDERS, CHERYL M.
SANDERS, KIM STEVENS, REBECCA
STEVENS, and SUSAN B. DAY,

Counterclaim and Crossclaim
Defendants.

The Motion for Summary Judgment dated March 30, 1993 of defendant Robert E. Brown, Jr. came on regularly for hearing before the Court, the Honorable Anne M. Stirba presiding, at 3:00 p.m. on June 14, 1993, plaintiffs appearing through their counsel, Frederick N. Green, defendant Brown appearing through his counsel, Thomas R. Lee, and the Court having reviewed the submissions of the parties filed herein, having heard oral argument, and the Court having determined that there exists no genuine issue as to any material fact bearing upon defendant Brown's Motion and that defendant Brown is entitled to judgment dismissing with prejudice Fifth, Sixth, and Seventh Causes of Action of the Amended Complaint as a matter of law for the reasons set forth from the Bench and for all of the reasons set forth in defendant Brown's memoranda submitted in support of the Motion for Summary Judgment,


IT IS HEREBY ORDERED as follows:

1. The Motion for Summary Judgment of defendant Brown dated March 30, 1993 be and the same is hereby granted.

2. The Fifth, Sixth, and Seventh Causes of Action of the Amended Complaint herein dated January 21, 1993 of plaintiffs be and the same are hereby dismissed with prejudice and upon their merits.

MADE AND ENTERED this 6th day of June, 1993.

BY THE COURT


Honorable Anne M. Stirba
District Judge

CERTIFICATE OF SERVICE

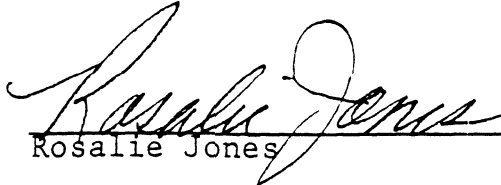
I HEREBY CERTIFY that the foregoing Partial Summary Judgment was served this 18 day of June, 1993 by mailing on said date copies thereof by United States mail, first class postage prepaid, addressed to:

Frederick N. Green, Esq.
Green & Berry
Attorneys for Plaintiffs
622 Newhouse Building
10 Exchange Place
Salt Lake City, Utah 84111

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Attorneys for Defendants Draper City,
Draper City Board of Adjustment, Planning
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Rosalie Jones

APPENDIX

ITEM # 10

Summary of Orders Previously Entered

Bruce A. Maak, Of Counsel (A2033)
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FILED
 DISTRICT COURT
 SEP 24 PM 3:41
 BY *Julie Leigh*

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

B. N. GLANVILLE, JOSEPH D. SANDERS)
 and CHERYL M. SANDERS,)

Plaintiffs,)

vs.)

THE CITY AND MUNICIPALITY OF)
 DRAPER, THE DRAPER CITY BOARD)
 OF ADJUSTMENT, THE DRAPER CITY)
 PLANNING COMMITTEE, THE DRAPER)
 CITY COUNCIL, CHARLES L.)
 HOFFMAN, Mayor of the City of Draper,)
 ROBERT BROWN, KIM STEVENS, and)
 JOHN DOES I through X,)

Defendants.)

**SUMMARY OF
 ORDERS PREVIOUSLY ENTERED
 AND
 STATEMENT OF ISSUES
 REMAINING FOR TRIAL**

Civil No. 900902397PR

(Hon. Anne M. Stirba)

ROBERT E. BROWN, JR. and)
 DIANE BROWN,)

Counterclaim and Crossclaim)
 Plaintiffs,)

vs.)

000653

B. N. GLANVILLE, M. D. GLANVILLE,)
JOSEPH D. SANDERS, CHERYL M.)
SANDERS, KIM STEVENS, REBECCA)
STEVENS, and SUSAN B. DAY,)
)
Counterclaim and Crossclaim)
Defendants.)
_____)

Pursuant to the Court's direction to counsel at pretrial, the following is a summary of the Orders previously entered in this action by the Court (attached are copies of the Orders in question) and a statement of the issues remaining for trial.

The Original Complaint. Attached as Exhibit "A" is a copy of the original Complaint filed in this action. It contained four causes of action:

First Cause of Action sought a writ of mandamus against Draper City requiring Draper City to prosecute violations of zoning and subdivision laws.

Second Cause of Action sought a declaratory judgment of the construction and validity of ordinances and actions of Draper City.

Third Cause of Action sought recovery of damages against Draper City because of its negligence in administration of zoning and subdivision laws.

Fourth Cause of Action sought damages against defendants Brown and Stevens because of their trespass upon the property of plaintiffs.

Order of Dismissal dated November 26, 1990. Draper City and its various committees, council, and mayor (collectively referred to as "Draper City") moved to dismiss all claims in the Complaint as against it. Draper City asserted that, for the following

reasons, the Complaint failed to state a claim for relief: First, Draper City does not owe plaintiffs any duty to enforce variances because enforcement of laws is a duty running to the public generally. Second, the statute of limitations expired with respect to any challenge to the variances in question. Third, Draper City's alleged misconduct was subject to governmental immunity. Judge Russon granted the Motion to Dismiss pursuant to the Ruling, a copy of which is attached hereto marked Exhibit "B," on November 7, 1990. That Ruling stated that Draper City's Motion was granted for the reasons set forth in its Memorandum and that Draper City owed no duty to Sanders/Glanville concerning alleged ordinance violations and variances and the statute of limitations applied. Judge Russon entered an Order of Dismissal on November 26, 1990, a copy of which is attached hereto marked Exhibit "C." The Court's Order effected a dismissal with prejudice of First, Second, and Third Causes of Action against Draper City.

The Amended Complaint. Plaintiffs by Stipulation filed an Amended Complaint, a copy of which is attached hereto marked Exhibit "D." The first four causes of action contained in the Amended Complaint were substantially identical to their counterparts in the original Complaint. After amendment of the Complaint, the following causes of action remained (First, Second, and Third Causes of Action having been dismissed by the Court's Order of November 26, 1990):

Fourth Cause of Action sought damages against Brown and Stevens for their trespass upon the property of Sanders/Glanville.

Fifth Cause of Action sought damages against Brown based upon the claim that Brown negligently purchased the property now owned by them, that Brown's purchase of the property damaged Sanders/Glanville, and that Brown had been unjustly enriched as a result.

Sixth Cause of Action sought the Court's order rescinding the sales of the Brown property because the sales thereof were illegal.

Seventh Cause of Action sought an order requiring Brown and Stevens to comply with subdivision ordinances and to abate the nuisance created by non-compliance with subdivision ordinances.

Partial Summary Judgment on Brown's Motion. On March 30, 1993, Browns moved the Court for summary judgment dismissing Fifth, Sixth, and Seventh Causes of Action of the Amended Complaint against defendant Brown. Browns' Memorandum asserted that those claims should be dismissed because (a) Draper City had by variance validated the subdivision and the time within which that variance could be challenged had expired, (b) Sanders/Glanville lacked standing to force compliance with subdivision laws, (c) Sanders/Glanville failed to establish any duty running from Browns to Sanders concerning Browns' purchase of the property and because Browns' purchase of the property did not harm Sanders.

Thereafter, the Court granted Partial Summary Judgment for the reasons set forth in Browns' memoranda and dismissed with prejudice Fifth, Sixth, and Seventh Causes of Action

of the Amended Complaint. A copy of the Partial Summary Judgment is attached hereto marked Exhibit "E."

Browns' Second Motion for Summary Judgment. Sanders/Glanville asserted that a right-of-way conveyed to Browns along with the fee simple property they purchased described a parcel of ground that was separated from Browns' fee simple property by a few feet (which few feet were owned by Sanders/Glanville) and that, accordingly, the Browns were trespassing upon the Sanders/Glanville property each time they accessed their property. Browns filed a Motion for Summary Judgment dated November 30, 1993 seeking the Court's determination as a matter of law that the subject right-of-way was contiguous with the Brown property and, with that determination, a dismissal with prejudice of all claims of Sanders/Glanville for trespass over the alleged strip of land separating the Brown fee simple property from their right-of-way. The Court granted Browns' Motion through a bench ruling. A transcript is attached hereto as Exhibit "F." In the Summary Judgment entered by the Court (attached as Exhibit "G"), the Court ruled, based upon the alternative grounds of proper construction of title documents, reformation, and/or easement by necessity, that the description of the parcel of land over which Browns had a right-of-way was located so as to touch the Brown property, thereby eliminating any "gap" between the right-of-way area and the Brown property. As a consequence, the Court dismissed with prejudice those portions of Fourth Cause of Action that alleged claims arising from Browns' trespass upon any land owned by Sanders/Glanville in any "gap" between the right-of-way, on the one hand, and the Brown property, on the other hand.

Issues Remaining for Trial. The foregoing orders have effected a dismissal with prejudice of all of the claims contained in the Amended Complaint except that portion of Fourth Cause of Action that seeks damages against Browns for their alleged trespass upon the Sanders/Glanville property other than any trespass that could arguably be said to have arisen through there existing a gap area owned by Sanders/Glanville between (i) the right-of-way owned by Browns and (ii) the fee simple property owned by Browns. In addition, all defenses of Browns to those claims remain at issue.

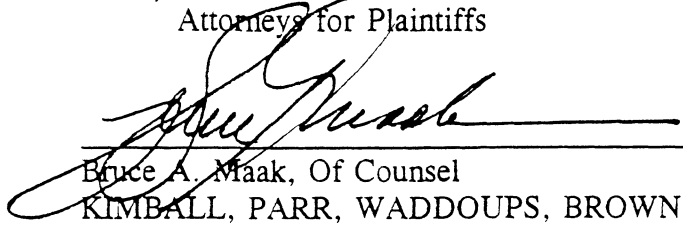
DATED this 13th day of FEBRUARY, 1995.

Woodbury & Kesler

By: 

Reid W. Lambert

Attorneys for Plaintiffs


Bruce A. Maak, Of Counsel

KIMBALL, PARR, WADDOUPS, BROWN
& GEE

Attorneys for Defendants Browns

APPENDIX

ITEM # 11

Designation of Additional Exhibit

FILED
DISTRICT COURT

95 JUL 10 PM 2:41

CLERK
Sally Koch
CLERK

Reid W. Lambert - #5744
Russell S. Walker - #3363
WOODBURY & KESLER, P.C.
265 East 100 South, Suite 300
P.O. Box 3358
Salt Lake City, UT 84110-3358
Telephone: (801) 364-1100

Attorneys for Plaintiff

IN THE THIRD JUDICIAL DISTRICT COURT
FOR SALT LAKE COUNTY, STATE OF UTAH

GLANVILLE, et al.,
Plaintiffs,

vs.

CITY OF DRAPER, et al.,
Defendants.

DESIGNATION OF ADDITIONAL
EXHIBIT

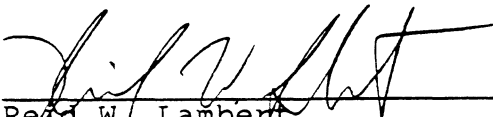
Civil No. 900902397 PR

Judge Anne M. Stirba

Plaintiff Joseph Sanders hereby designates one additional for the Trial in this matter to commence July 13, 1995. Specifically, Sanders designates the Assignment of Claim executed by Margaret Glanville July 6, 1995, a copy of which is attached hereto.

DATED this 10th day of July, 1995.

WOODBURY & KESLER, P.C.


Reid W. Lambert
Attorney for Sanders

000768

CERTIFICATE OF SERVICE

This certifies that I did deliver a true and correct copy of the above DESIGNATION OF WITNESSES AND EXHIBITS to the following by first class U.S. Mail this 12th day of July, 1995:

Bruce Maak
KIMBALL, PARR, WADDOUPS, BROWN & GEE
185 South State, Suite 1300
Salt Lake City, Utah 84111

Jody K. Burnett
257 East 100 South, Suite 500
Salt Lake City, Utah 84111

Kim R. Stevens and Rebecca Stevens
13755 South Shadow Mountain Lane
Draper, Utah 84020

Susan B. Day
621 East 13800 South
Draper, Utah 84020

A handwritten signature in cursive script, reading "Conrad M. Burnside", is written over a horizontal line.

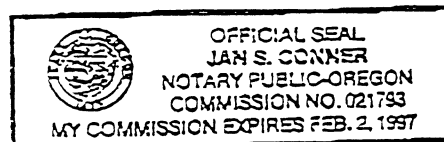
ASSIGNMENT OF CLAIM

I, Margaret Glanville, the personal representative of the Estate of Ben N. Glanville and the owner of real property located in Draper, Utah which is now a subject of the case known as Glanville, et al. v. City of Draper, et al., Case No. 900902397 PR, pending in the Third District Court for Salt Lake County, State of Utah before the Honorable Anna Stirba, do hereby assign any and all rights of action, damages, rights and claims which I may have in the above-described case to Joseph Sanders, my co-plaintiff, and do further state that the estate of Ben N. Glanville asserts no interest in the property, it having been held in joint tenancy with me at the time of his death.

DATED this 6th day of July, 1995.

Margaret Glanville
Margaret Glanville

State of Oregon)
~~Washington~~ : ss
County of Multnomah)



Subscribed and sworn this 6th day of July, 1995.

My Commission
expires: February 2, 1997

Notary: Jan S. Conner
Residing at: Gresham, OR 97080

000770

APPENDIX

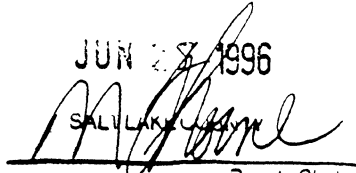
ITEM # 12

**Evidentiary Ruling, Findings of Fact
and Conclusions of Law**

FILED DISTRICT COURT
Third Judicial District

JUN 28 1996

By


Deputy Clerk

Bruce A. Maak, Of Counsel (A2033)
KIMBALL, PARR, WADDOUPS, BROWN & GEE
Attorneys for Robert E. Brown, Jr.
and Diane Brown
185 South State Street, Suite 1300
P.O. Box 11019
Salt Lake City, Utah 84147
Telephone: (801) 532-7840

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

B. N. GLANVILLE, JOSEPH D. SANDERS)
and CHERYL M. SANDERS,)

Plaintiffs,)

vs.)

THE CITY AND MUNICIPALITY OF)
DRAPER, THE DRAPER CITY BOARD)
OF ADJUSTMENT, THE DRAPER CITY)
PLANNING COMMITTEE, THE DRAPER)
CITY COUNCIL, CHARLES L.)
HOFFMAN, Mayor of the City of Draper,)
ROBERT BROWN, KIM STEVENS, and)
JOHN DOES I through X,)

Defendants.)

EVIDENTIARY RULING,
FINDINGS OF FACT,
AND
CONCLUSIONS OF LAW

Civil No. 900902397PR

(Hon. Anne M. Stirba)

ROBERT E. BROWN, JR. and)
DIANE BROWN,)

Counterclaim and Crossclaim)
Plaintiffs,)

vs.)

000894

B. N. GLANVILLE, M. D. GLANVILLE,)
JOSEPH D. SANDERS, CHERYL M.)
SANDERS, KIM STEVENS, REBECCA)
STEVENS, and SUSAN B. DAY,)
)
Counterclaim and Crossclaim)
Defendants.)
_____)

This action came on regularly for trial on July 13 and 14, 1995 before the Court, the Honorable Anne M. Stirba presiding, plaintiff Joseph D. Sanders appearing personally and through his counsel, Reid W. Lambert, defendants Brown appearing personally and through their counsel, Bruce A. Maak, and defendant Kim Stevens appearing on his own behalf, and the Court having heard the evidence, having heard and considered the arguments of counsel, having reviewed the file, being fully advised in the premises and good cause appearing therefor, hereby makes the following:

EVIDENTIARY RULING

During the course of trial, plaintiffs offered into evidence a certain "Assignment" marked as Exhibit 1. The Court at that time reserved its ruling upon the admissibility of that document. The Court now makes the following determinations and rules as follows as to the admissibility of Exhibit 1.

1. According to the representation of counsel, plaintiff B.N. Glanville, who is the brother-in-law of plaintiff Joseph D. Sanders, died in May 1995.
2. Rule 25, Utah Rules of Civil Procedure, prescribes a mechanism for the substitution of a personal representative, or other appropriate party, for a party who dies during

the course of an action. Plaintiffs did not pursue an appropriate substitution of parties for B.N. Glanville timely, or at all.

3. Plaintiffs offered no admissible evidence establishing that Margaret Glanville is the personal representative of the estate of B.N. Glanville.

4. Margaret Glanville did not appear at trial and, accordingly, was not available for cross-examination by defendants.

5. The only evidence offered to support the authenticity of the Assignment, Exhibit 1, was offered by Joseph D. Sanders, who testified that, although he did not see the document executed, he delivered the document to Margaret Glanville for her signature and thereafter received the document back from her with a signature appearing to be that of Margaret Glanville thereon and that Margaret Glanville told Joseph D. Sanders that she had executed the document. Margaret Glanville's statement to Mr. Sanders is inadmissible hearsay. The evidence offered to establish the authenticity of Exhibit 1 is thin at best.

6. The Assignment, itself, constitutes a hearsay statement that is not admissible under any exception to the hearsay rule.

7. The Court finds under Rule 803(24), Utah Rules of Evidence, that the statement is not more probative on the point for which it was offered than any other evidence which plaintiff could procure through reasonable efforts and that the general purpose of the Rules of Evidence and the interests of justice will not best be served by admission of the Assignment into evidence. Further, the proponent of the Assignment (Joseph D. Sanders) did not make the Assignment known to defendants sufficiently in advance of the trial to

provide defendants with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement, and the particulars of it, including the name and address of the declarant. The Assignment was first made known to defendants by serving a copy of it upon them by mail on July 10, 1995 -- just a few days before trial.

8. Joseph D. Sanders could timely have complied with Rule 25, Utah Rules of Civil Procedure, and could, substantially in advance of trial, have apprised defendants of his intention to rely upon the Assignment, but he did neither.

9. If the Assignment had been accepted into evidence, defendants would have been unreasonably prejudiced because, among other things, (i) defendants would be denied the opportunity to cross-examine declarant in the Assignment, (ii) defendants were precluded the opportunity to conduct discovery with respect to the Assignment and the testimony of its purported declarant, and (iii) the Assignment is, based upon all testimony concerning it, not sufficiently reliable to allow it fairly to be admitted under the circumstances presented here.

10. Plaintiffs did not timely advise defendants that Exhibit 1 was intended to be offered as a trial exhibit.

RULING

Based upon the foregoing, the Court hereby rules that the Assignment is inadmissible and may not properly be considered by the Court for any purpose.

FINDINGS OF FACT

1. This action concerns three parcels of real property and a right-of-way described as follows:

The "Brown Parcel" is presently owned by Robert and Diane Brown, is located in Salt Lake County, State of Utah, and is more particularly described as follows:

Beginning 716.85 feet North $00^{\circ}23'08''$ East from the East quarter corner of Section 6, Township 4 South, Range 1 East, Salt Lake Base and Meridian, and running thence South $76^{\circ}11'02''$ West 186.90 feet; thence North $0^{\circ}23'08''$ East 202.5 feet; thence North $76^{\circ}11'02''$ East 186.90 feet; thence South $0^{\circ}23'08''$ West 202.5 feet to the point of beginning.

The "Glanville Parcel" is located adjacent to and north of the Brown Parcel and is more particularly described as follows:

Beginning 919.35 feet North $0^{\circ}23'08''$ East from the East Quarter Corner of Section 6, Township 4 South, Range 1 East, Salt Lake Base and Meridian, and running thence South $76^{\circ}11'02''$ West 221.90 feet, thence North $0^{\circ}23'08''$ East 163.44 feet, thence North $57^{\circ}28'51''$ East 137.16 feet, thence North $62^{\circ}46'20''$ East 112.81 feet, thence South $0^{\circ}23'08''$ West 235.80 feet to the point of beginning.

The "Panhandle Parcel" is located adjacent to and west of the Brown Parcel and adjacent to and east of the Stevens Parcel described below and is more particularly described as follows:

Beginning at a point 716.85 feet North $0^{\circ}23'08''$ East and 186.90 feet South $76^{\circ}11'02''$ West from the East Quarter Corner of Section 6, Township 4 South, Range 1 East, Salt Lake Base and Meridian, and running thence South $76^{\circ}11'02''$ West 35 feet; thence North $0^{\circ}23'08''$ East 202.5 feet; thence North $76^{\circ}11'02''$ East 35 feet; thence South $0^{\circ}23'08''$ West 202.5 feet to the point of beginning.

The "Stevens Parcel" is presently owned by Kim and Rebecca Stevens, is located adjacent to and west of the Panhandle Parcel, and is more particularly described as follows:

Beginning at a point at the Southwesterly most point of property conveyed by Warranty Deed dated February 23, 1979, in which David H. Day and Susan

B. Day, his wife, are grantors and Layne J. Newman and Jessie S. Newman, his wife, are grantees, which deed was recorded April 2, 1979, at the office of the Salt Lake County Recorder, as Entry No. 3258663 Book 4838, Page 358, which point of beginning is South 57°28'51" West 137.16 feet from a point which is approximately 100 feet West and 725 feet North from the East Quarter Corner of Section 6, Township 4 South, Range 1 East, Salt Lake Base and Meridian and running thence South 57°28'51" West 39.65 feet to a point on the Southerly side of a concrete irrigation ditch at a corner fence post, said 39.65 feet call being directly in line with, as though it were an extension of, the Southerly side of said concrete irrigation ditch; thence North 32°31'09" West 319 feet, more or less, along a fence line and Westerly side of a concrete block wall, to the center of the East Jordan Canal; thence Northeasterly along the center of said East Jordan Canal 235.9 feet, more or less, to a point which is North 00°23'08" East of the point of beginning; thence South 00°23'08" West 361.75 feet, more or less, along the West line of the above described Newman deed, to the point of beginning.

The "Right-of-Way Parcel" is a parcel of land 35 feet in width, which at its northerly end lies between the Stevens Parcel and the Brown Parcel and proceeds south to 13800 South Street in Draper and is more particularly described as follows:

Beginning at a point which is 282.45 feet North 89°39'27" West from the East Quarter Corner of Section 6, Township 4 South, Range 1 East, Salt Lake Base and Meridian, said point being the Southwest corner of the property conveyed in that certain Special Warranty Deed to MGF Partnership, a limited Utah partnership, recorded July 17, 1979, as Entry No. 3309585, in Book 4903, at Page 540 of Official Records, and running thence North 0°23'08" East along the West boundary line of said "MGF Partnership" property 186.94 feet to the Northwest corner thereof; thence continuing North 0°23'08" East 124.36 feet, being parallel to and 17.5 feet, perpendicular distance from the Westerly boundary line of the property conveyed in that certain Special Warranty Deed to James Walter Fitzgerald and Betty Marie Fitzgerald, recorded July 20, 1978, as Entry No. 3140869, in Book 4709 at Page 990, of Official Records; thence North 17°28' East along the Easterly right of way line of that certain 35 foot wide right of way as described in that certain Warranty Deed to Ted A. Zimmerman and Julie G. Zimmerman, recorded August 14, 1991, as Entry No. 5111842, in Book 6346, at Page 911 of Official Records, 344.75 feet, more or less, to a point which is South 0°23'08" West from the Southwest corner of the property conveyed in that certain Utah Special Warranty Deed to Robert E. Brown, Jr. and Diane Brown, recorded January 27, 1989 as Entry

No. 4730055, in Book 6100, at Page 478 of Official Records; thence North 0°23'08" East 24.4 feet, more or less, to the Southwest corner of the aforesaid property of "Brown"; thence North 0°23'08" East, along the West boundary line of said "Brown" property 160.32 feet; thence West 35.0 feet; thence South 0°23'08" West 194.0 feet, more or less, to the point of intersection with the Westerly right of way line of the aforesaid 35 foot wide right of way; thence South 17°28' West along said Westerly line to a point on the East boundary line of a 0.15 foot strip of land as the same described in that certain Warranty Deed to Susan B. Day, recorded July 09, 1990, as Entry No. 4938604, in Book 6235, at Page 484, of the Official Records; thence South along said East boundary line of the "Day" property 314 feet, more or less, to the quarter section line of the aforesaid Section 6; thence South 89°39'27" East along said quarter section line 35 feet, more or less, to the point of beginning.

This Court by Summary Judgment dated February 17, 1994 established the location and description of the right-of-way to be as set forth above.

2. Between November, 1982 and September, 1988, Sanders owned the Glanville Parcel, the Panhandle Parcel, and the Brown Parcel subject to and together with a right-of-way over the Right-of-Way Parcel. The Brown Parcel together with a right-of-way over the Right-of-Way Parcel was encumbered by a Deed of Trust in favor of Mountainwest Savings and Loan, which was recorded on December 9, 1980 as Entry No. 3512297 in Book 5188 at Page 1463 of the records of the Salt Lake County Recorder's office (hereinafter referred to as the "Mountainwest Trust Deed").

3. Sanders failed to make various payments required under the Mountainwest Trust Deed and, as a result, the Mountainwest Trust Deed was nonjudicially foreclosed. Mountainwest was the purchaser at the trustee's foreclosure sale and, thereafter, received a conveyance of the Brown Parcel together with a right-of-way over the Right-of-Way Parcel

through a Trustee's Deed recorded on September 1, 1988 as Entry No. 4670769 in Book 6060 at Page 2702 of the records of the Salt Lake County Recorder's office.

4. Sanders transferred the Glanville Parcel and the Panhandle Parcel subject to a right-of-way over the Right-of-Way Parcel to his sister and brother-in-law, M.D. and B.N. Glanville, by "Grant Deeds" dated May 19, 1988. Sanders made those transfers shortly before and with actual knowledge of the impending entry of a judgment against Sanders and in favor of one Ovard and the foreclosure of the Mountainwest Trust Deed. Sanders transferred those properties to Glanvilles to place them beyond the reach of his creditors.

5. Glanvilles never transferred the Glanville Parcel or the Panhandle Parcel back to Sanders. No writing was ever executed by Glanvilles to evidence any transfer to Sanders of any interest relating to those parcels. Sanders had no ownership of or right to possession of the Glanville Parcel or the Panhandle Parcel following May 19, 1988.

6. Sanders and Glanvilles had an agreement that, upon sale of the Glanville Parcel and the Panhandle Parcel, Sanders would receive from Glanvilles a portion of the sale proceeds. Sanders' right to receive such proceeds was the entire extent of Sanders' interest -- his interest was not an interest in land, but rather a right to receive a future monetary payment.

7. After the foreclosure sale, Mountainwest sold and conveyed the Brown Parcel together with a right-of-way over the Right-of-Way Parcel to Browns by Utah Special Warranty Deed which was recorded on January 27, 1989 as Entry No. 4730055 in Book

6100 at Page 478 of the records of the Salt Lake County Recorder's office. Defendants Stevens own the Stevens Parcel together with a right-of-way over the Right-of-Way Parcel.

8. During the fall of 1989, Browns placed their two horses in a preexisting fenced area that included the Glanville Parcel and a portion of the Brown Parcel.

9. With no prior communication to Browns, on or about March 2, 1990, Sanders and Glanville, through their attorney, Frederick N. Green, demanded that Browns remove their horses from the Glanville Parcel and that Stevens cease trespassing. Within a reasonable time following receipt of that notice -- a few days -- Browns installed a new fence preventing their horses from moving from the Brown Parcel onto the Glanville Parcel. Browns' horses did not thereafter intrude upon the Glanville Parcel. Sanders, not Glanvilles, directed that attorney Green write the demand letter to Browns. Glanvilles did not object to Browns' horses occupying the Glanville Parcel. Sanders had previously given permission to Layne Newman for horses to occupy the Glanville Parcel. Neither Sanders nor Glanvilles directly advised Browns that their horses could occupy the Glanville Parcel. However, Sanders desired that horses occupy the Glanville Parcel to control plant growth there, and the Court finds that Sanders consented to horses occupying the Glanville Parcel until further notice. Sanders did not revoke that permission until attorney Green sent his letter of March 2, 1990.

10. Plaintiffs have not carried their burden of proving any damage flowing from Browns' horses' occupation of the Glanville Parcel.

11. Browns own a right-of-way over the Right-of-Way Parcel which entitles them to use the Right-of-Way Parcel for all purposes reasonably necessary or incident to furnishing access, ingress and egress to the Brown Parcel. The northerly end of the Right-of-Way Parcel is located upon the Panhandle Parcel. The northerly end of the Right-of-Way Parcel is adjacent to and west of the Brown Parcel. Most of the north-south length of the Panhandle Parcel is burdened with a right-of-way in favor of the owner of the Brown Parcel and the owner of the Stevens Parcel. The Panhandle Parcel is only 35 feet in width in the east-west direction and is not reasonably usable for any purpose other than furnishing access to parcels that are adjacent to it, including the Brown Parcel, the Stevens Parcel, and the Glanville Parcel. There are no structures or improvements located upon the Panhandle Parcel.

12. The driveway serving the house on the Brown Parcel has been in its present location since prior to Sanders' ownership and occupancy of the Brown Parcel. A portion of that driveway extends into the Panhandle Parcel. During approximately 1991, Browns installed grass and a sprinkler system in their yard area. They installed the grass entirely within the landscaping contours that had previously been established by Sanders during his ownership of the Brown Parcel. That grass extended over the boundary line between the Brown Parcel and the Panhandle Parcel to the extent of approximately 5-6 feet. There was no fence that marked the boundary between the Brown Parcel and the Panhandle Parcel in this area. In the area in which Browns installed lawn within the boundaries of the Panhandle Parcel, there was previously located only weeds. The area in which Browns installed lawn was never used by anyone for any purpose. The traveled area over the Panhandle Parcel that

was used to access the Glanville Parcel did not include the area in which Browns installed grass. Browns' installation of grass and a few sprinkler heads did not in any way interfere with plaintiffs' use or enjoyment of the Panhandle Parcel. The driveway is a use that is reasonably necessary to furnishing access, ingress, and egress to and from the Brown Parcel and does not interfere with the use of the Panhandle Parcel by its owner.

13. Because Sanders objected to the location of the grass and sprinklers within the boundaries of the Panhandle Parcel, Browns caused both all of the grass and the sprinklers to be removed during October, 1994.

14. A variance was granted by Draper City to Mountainwest with respect to the Brown Parcel. That variance allowed the Brown house to be located within 17 feet of the "private right-of-way," which referred to the right-of-way over the Right-of-Way Parcel. The literal metes and bounds description of the Right-of-Way Parcel located the Right-of-Way Parcel in such a way that there existed approximately 18 feet between the easterly edge of the Right-of-Way Parcel and one corner of the Brown house. This Court by Summary Judgment dated February 17, 1994 in this case ordered that the Right-of-Way Parcel, based upon the grounds stated therein, was located adjacent to the Brown Parcel, which resulted in there being as few as 11.2 feet between the easterly boundary of the private right-of-way and one corner of the Brown house.

15. Draper City has determined that the Brown house location is a valid non-conforming preexisting use and that the Brown house may be located in its present location without requiring that Browns occupy, control or make any claim to any portion of the

Panhandle Parcel. In any event, Browns' compliance or noncompliance with that variance has no effect on Sanders or Glanvilles.

16. Glanvilles did not object to the existence of the driveway or to Browns' installation of grass and/or sprinklers within the boundaries of the Panhandle Parcel.

17. Plaintiffs have not carried their burden of showing that they suffered any damage as a consequence of the existence of Browns' driveway or Browns' installation of grass and a sprinklers within the boundaries of the Panhandle Parcel.

18. Both Browns and Stevenses periodically and temporarily parked vehicles within the Right-of-Way Parcel and the Panhandle Parcel. That use was a reasonable use of the right-of-way owned by Browns and Stevenses and did not interfere with Glanvilles' or Sanders' use of the Panhandle Parcel.

19. The trespass claims asserted by Sanders in the action have no basis in law or fact. Under the clear evidence in this case, Sanders did not even have standing to pursue any claims because he did not even own the subject property. Glanvilles, who owned the property, were ambivalent about the claims. The claims, themselves, are devoid of merit.

20. Sanders brought claims in this action that were completely inconsistent with and contradictory to his own statements and actions during his ownership of the Brown Parcel. Among other things, both Sanders and Glanville admit that they understood that the right-of-way was adjacent to and connected to the Brown Parcel and, during the time that Sanders owned only the Brown Parcel (and not the Panhandle Parcel), Sanders used the right-of-way as his only access from 13800 South Street into his driveway. In this action, on

the other hand, Sanders asserts that the right-of-way did not connect to the Brown Parcel, that Browns' driving over the right-of-way into their driveway constitutes a trespass, that the Browns' driveway, which existed during Sanders' ownership of the property, constitutes a trespass, and that Browns' making the very same use of their property that Sanders made during the time that he owned it was wrongful. Sanders brought this action for the improper purpose of coercing Browns to pay large amounts of money in settlement.

21. Sanders testified that he brought this action against Browns and Stevenses because he could not sell the Glanville Parcel and the Panhandle Parcel and because subdivision violation problems precluded his separate ownership and sale of those parcels. Sanders, however, made no effort to resolve any subdivision problems that may have existed and made no effort to sell the Glanville Parcel or the Panhandle Parcel (except to Glanvilles).

22. Sanders did not make any reasonable good faith effort to resolve his complaints with Browns or Stevenses. Sanders did not initiate this action to resolve or receive fair compensation for any claim that he had against Browns or Stevenses, but rather in bad faith to coerce Browns or Stevenses into paying him money to which he was not entitled.

23. At multiple stages during this proceeding, Browns attempted to settle and resolve this case to avoid incurring the substantial expense that they incurred in defending. Sanders unreasonably persisted in pursuing his frivolous, baseless claim.

24. Sanders pursued his claims to hinder and take advantage of Browns and Stevenses. Sanders asserted that Browns' purchase of the property from Mountainwest, Sanders' foreclosing lender, violated Sanders' rights. He asserted that Mountainwest's sale

of the property to Browns (a transaction to which Sanders was not a party) was illegal and should be rescinded. He asserted that the Brown Parcel (which Sanders, himself, owned and occupied separately) violated zoning ordinances that should be enforced against the Browns. He asserted that the Browns' occupation of the same property that Sanders, himself, had previously occupied constituted a "private nuisance." Sanders claimed that he initiated this action to resolve what he believed to be a "subdivision problem," but he never made any effort to resolve that issue. Browns attempted repeatedly to resolve their differences with Sanders and even to pay Sanders money to which he was not entitled, but Sanders steadfastly refused to make any reasonable effort to resolve his differences with Browns. Instead, through taking the positions he took and pursuing this litigation, Sanders attempted to subject Browns to economic pressure and to bother and harass them to induce them to pay unreasonable amounts of money to Sanders.

25. This action was without merit and was not brought or asserted in good faith by plaintiff Sanders.

26. Browns incurred in excess of \$29,700.00 in defending against the claims of Sanders in this action, of which \$6,750.00 is attributable to time expended in the trial of this case. The Court finds the charges of Browns' counsel to be reasonable under all of the circumstances.

27. Defendants Stevens acted as their own counsel and did not incur any legal fees in defense against the claims of Sanders.

From the foregoing Findings of Fact, the Court hereby makes and enters the following:

CONCLUSIONS OF LAW

1. Browns and Stevenses are not liable to plaintiffs for trespass.
2. As a matter of fact and law, Glanvilles were the owners of the Glanville Parcel and the Panhandle Parcel at all material times. In any event, the Statute of Frauds has not been satisfied with respect to any claim of Sanders to ownership of any interest in that property. Sanders did not own any interest in the Glanville Parcel or the Panhandle Parcel at any time following May 19, 1988.
3. Since Sanders did not own or have the right to possess the Panhandle Parcel and the Glanville Parcel at the times that Browns and Stevenses are claimed to have trespassed, he has no standing to assert any trespass claim against Browns or Stevenses.
4. Sanders, who conveyed the Glanville Parcel and the Panhandle Parcel to Glanvilles to place it beyond the reach of his creditors, is estopped to assert that he has any ownership of or right to possession of that property.
5. Glanvilles, the owners of the Glanville Parcel, did not object to Browns' horses' brief occupation of the Glanville Parcel. B.N. Glanville had no personal complaint with the Browns and admitted that the Browns never did anything about which he was complaining. Although Glanville claimed that Sanders told him that the Browns trespassed on the Glanville Parcel, Glanville never communicated to the Browns that he did not want them trespassing on the Glanville Parcel.

6. Browns' horses' occupation of the Glanville Parcel was with permission and consent. Prior to the Browns' placing their horses on the property, Sanders had given permission to Layne Newman for horses to occupy the Glanville Parcel. Neither Sanders nor Glanvilles directly advised Browns that their horses could occupy the Glanville Parcel. Nevertheless, Sanders desired that horses occupy the Glanville Parcel to control plant growth there, and the Court concludes that Sanders consented to horses occupying the Glanville Parcel until such consent was withdrawn.

7. Browns and Stevenses did not trespass upon the Glanville Parcel.

8. Plaintiffs have not proved that they suffered any damages as a result of Browns' horses' occupation of a portion of the Glanville Parcel.

9. Browns' and Stevenses' periodic occupation of the Panhandle Parcel was allowed by and consistent with their right-of-way over it.

10. Browns' installation of minimal grass and sprinklers on the Panhandle Parcel did not in any respect interfere with plaintiffs' occupation or possession of the Panhandle Parcel. Browns are entitled to keep their driveway in its present position. That driveway is a reasonable use of Browns' right-of-way and does not improperly interfere with plaintiffs' use of the Panhandle Parcel.

11. Browns and Stevenses did not trespass on the Panhandle Parcel.

12. Plaintiffs have not proved any damage caused by Browns' or Stevenses' activities upon the Panhandle Parcel.

13. The location of Browns' house in relation to the location of the "private right-of-way," which is the Right-of-Way Parcel, is a valid non-conforming preexisting use and does not violate the variance issued by Draper City during 1988.

14. Plaintiffs do not have standing to assert any violation by Browns of any variance affecting the Brown Parcel, and even if Browns had violated the variance by having their house located closer than 17 feet from the "private right-of-way," that fact does not constitute a trespass.

15. This action is without merit and was not brought or asserted in good faith within the meaning of *Utah Code Ann.* §78-27-56.

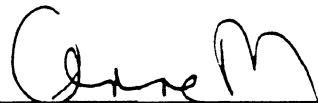
16. Plaintiff Sanders is liable to Browns in the amount of the attorney's fees incurred by Browns in preparing for and attending trial and any post trial proceedings in this action.

17. Browns reasonably and necessarily incurred reasonable attorney's fees in the amount of \$6,750.00 in preparing for and attending trial and preparing Findings of Fact, Conclusions of Law, and a Judgment, for which Sanders is liable.

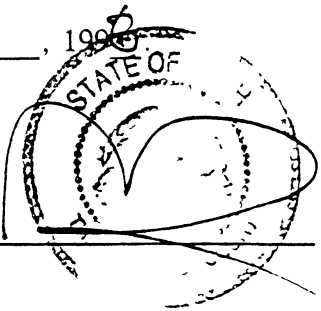
18. Sanders owes to Browns and Stevenses their taxable costs.

MADE AND ENTERED this 28th day of June, 1998

BY THE COURT:



Honorable Anne M. Stirba
District Judge



CERTIFICATE OF SERVICE

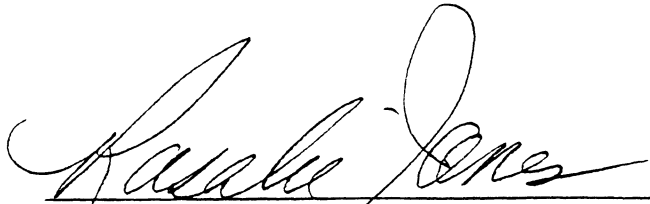
I HEREBY CERTIFY that the foregoing Evidentiary Ruling, Findings of Fact, and Conclusions of Law was served this 11 day of December, 1995 by mailing on said date copies thereof by United States mail, first class postage prepaid, addressed to:

Russell S. Walker, Esq.
Reid W. Lambert, Esq.
Woodbury & Kesler
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265 East 100 South, Suite 300
P.O. Box 3358
Salt Lake City, Utah 84110

Jody K Burnett, Esq.
Williams & Hunt
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City Board of Adjustment, Planning Commission,
Draper City Council, and Charles L. Hoffman
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13755 South Shadow Mountain Lane
Draper, Utah 84020

Susan B. Day, Pro Se
621 East 13800 South
Draper, Utah 84020



Rosalie Jones, Secretary

APPENDIX

ITEM # 13

Final Judgment

JUDGEMENT

Bruce A. Maak, Of Counsel (A2033)
KIMBALL, PARR, WADDOUPS, BROWN & GEE
Attorneys for Robert E. Brown, Jr.
and Diane Brown
185 South State Street, Suite 1300
P.O. Box 11019
Salt Lake City, Utah 84147
Telephone: (801) 532-7840

FILED DISTRICT COURT
Third Judicial District

JUL 9, 1996

By

SALT LAKE COUNTY

Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY STATE OF UTAH

B. N. GLANVILLE, JOSEPH D. SANDERS)
and CHERYL M. SANDERS,)

Plaintiffs,)

vs.)

THE CITY AND MUNICIPALITY OF)
DRAPER, THE DRAPER CITY BOARD)
OF ADJUSTMENT, THE DRAPER CITY)
PLANNING COMMITTEE, THE DRAPER)
CITY COUNCIL, CHARLES L.)
HOFFMAN, Mayor of the City of Draper,)
ROBERT BROWN, KIM STEVENS, and)
JOHN DOES I through X,)

Defendants.)

ROBERT E. BROWN, JR. and)
DIANE BROWN,)

Counterclaim and Crossclaim)
Plaintiffs,)

vs.)

FINAL JUDGMENT

2208930
7-16-96 - 8:03 am

Civil No. 900902397PR

(Hon. Anne M. Stirba)

000916

B. N. GLANVILLE, M. D. GLANVILLE,)
JOSEPH D. SANDERS, CHERYL M.)
SANDERS, KIM STEVENS, REBECCA)
STEVENS, and SUSAN B. DAY,)
)
Counterclaim and Crossclaim)
Defendants.)
_____)

This action came on regularly for trial on July 13 and 14, 1995 before the Court, the Honorable Anne M. Stirba presiding, plaintiff Joseph D. Sanders appearing personally and through his counsel, Reid W. Lambert, defendants Brown appearing personally and through their counsel, Bruce A. Maak, and defendant Kim Stevens appearing on his own behalf, and the Court having heard the evidence, having heard and considered the arguments of counsel, having reviewed the file, having entered its Evidentiary Ruling, Findings of Fact, and Conclusions of Law, being fully advised in the premises and good cause appearing therefor, hereby makes and enters the following Judgment:

1. Fourth Cause of Action of the Amended Complaint be and the same is hereby dismissed with prejudice and upon its merits.

2. Defendants Robert E. Brown, Jr. and Diane Brown be and they are hereby awarded Judgment against Joseph D. Sanders in the amount of \$6,750.00, together with interest thereon from and after the date of this Judgment at the rate prescribed by law.

3. Defendants Stevens shall have and recover their costs from Joseph D. Sanders in ~~the amount of \$~~ an amount to be determined upon the filing of the Defendants Browns shall have and recover their costs from Joseph D. Sanders in the amount of \$183.75, subject to objection by Mr. Sanders.

JMS { Stevens' reasonable and necessarily incurred costs by affidavit. -2-

900902397

MADE AND ENTERED this 9th day of July, 1995.

BY THE COURT:



Honorable Anne M. Stirba
District Judge

The address of Joseph D. Sanders is:

The Social Security number of Joseph D. Sanders is:

CERTIFICATE OF SERVICE

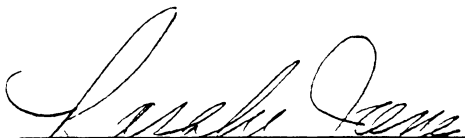
I HEREBY CERTIFY that the foregoing Final Judgment was served this 20 day of October, 1995 by mailing on said date copies thereof by United States mail, first class postage prepaid, addressed to:

Russell S. Walker, Esq.
Reid W. Lambert, Esq.
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Salt Lake City, Utah 84110

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City Board of Adjustment, Planning Commission,
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Rosalie Jones, Secretary

APPENDIX

ITEM # 14

**Court's Ruling on Brown's Motion for
Summary Judgment, 6/14/93**

1 the same statute. The same issues were at stake and it was
2 the same case. And Judge Russon squarely ruled that the
3 statute of limitation as employed -- if you look at the last
4 sentence of his ruling, which is at, I believe it's tab 8 of
5 the tabs attached to our Memorandum, he says, "Furthermore,
6 the statute of limitations applies." He fairly ruled that
7 the statute applies.

8 The Utah Supreme Court has squarely ruled that
9 there are not standing to bring the sorts of claims that are
10 being attempted here. And based on these two independent
11 reasons, we invite the Court to grant the Motion for Summary
12 Judgment.

13 THE COURT: All right. Thank you, counsel.

14 Well, this has been briefed very thoroughly and
15 very effectively. I am prepared to rule at this time on the
16 Motion for Summary Judgment by defendant Brown.

17 First of all, with regard to the argument
18 pertaining to the statute of limitations, plaintiffs'
19 argument is that -- or rather defendants' argument is that
20 the plaintiffs failed to challenge Draper City's validation
21 of the subdivision within the period prescribed by law.

22 It does appear to me, first of all, that this
23 issue was put before Judge Russon. And I think that, at
24 least my understanding of the issue is, that the same issue
25 then is being presented now. At least I am persuaded to that

1 effect. So in effect, Judge Russon's ruling can be
2 considered the law of the case.

3 But I have also looked at it separately. I view
4 that my rule is that if there is a previous ruling of this
5 court, that I am entitled to alter that if I feel that I
6 should. And I have looked at that. But I agree frankly with
7 Judge Russon's analysis of this.

8 And I do think that there was a 30-day statute of
9 limitations as it pertained to the Board of Adjustments
10 validation, if you will, of the subdivision. And clearly
11 there was not an appeal taken within that time period. So I
12 feel that for that reason the Motion for Summary Judgment is
13 valid.

14 The defendants' argument then is that that really
15 takes care of the nuisance and illegality claims as well.
16 And I understand -- clearly there is no 30-day statute of
17 limitations as it pertains to those two causes of action.
18 However, they are predicated upon a showing that there was an
19 illegality. And that showing cannot be made, at least
20 because that can no longer be challenged as being invalid,
21 what the Board of Adjustments did. So I understand the
22 defendants' argument with regard to that.

23 But turning also to whether the Board of
24 Adjustments had the authority to do that, I am persuaded that
25 the Board of Adjustments did have the authority to do what it

010812

1 did, for the reasons argued by Mr. Lee in court and also in
2 the Memorandum and also in light of the ordinances that were
3 presented to the Court here today.

4 I feel that the Board of Adjustments did act
5 within the scheme of -- with regard to the Ellis case,
6 that's a very interesting problem, because clearly Mr. Green
7 is correct. This statute is very clear in what it says, and
8 it's also clear the Ellis case didn't address that
9 language.

10 Now, it may be that in Ellis the Supreme Court
11 simply was not aware of a statute that said -- if one existed
12 in 1962 -- that said what the statute says now. But I think
13 that calls for this Court to speculate on what the Supreme
14 Court did. As an inferior court, this Court is generally
15 bound by what the appellate court says is the common law.

16 And I think that it's clearly an appealable issue,
17 and it may be that on appeal an appellate court in light of
18 that statute might rule differently. But I feel constrained
19 at this point to act conservatively from the judicial
20 standpoint. And I am going to follow Ellis, which does
21 appear to me otherwise to be on all fours with this
22 particular case.

23 So I am not going to rule differently from that in
24 Ellis. And clearly in Ellis the Utah Supreme Court held
25 that there is no private right of action to challenge a sale

APPENDIX

ITEM # 15

**Trial Transcript -- Cross Examination
of Joseph Sanders**

1 A Foreclosure for a time until we could straighten
2 things out.

3 Q And that property has been vested in the name of
4 your brother-in-law and sister for about seven years; is that
5 right?

6 A Yes, sir. But I stated many times it was done
7 solely for the purpose of trying to buy time so we could
8 resolve these issues. I have been in court since 1984 trying
9 to resolve this simple issue. Everybody that has come in
10 contact with this property, including the Browns, Ovars,
11 Mrs. France, has been damaged by it. It is time this is put
12 together.

13 I am not running from the problem. I am trying to
14 solve the problem. I transferred it to my brother-in-law to
15 buy time so I could solve the problem. I knew at the time it
16 was illegal. I was taking that chance.

17 Q There was nothing that prevented your
18 brother-in-law and sister from conveying the property back to
19 you some time during the past seven years, is there?

20 A That's right. We talked about that at times.
21 There is no real need to do it. It's common knowledge why
22 they have it. It's there.

23 Q And you agree with me, don't you, that since the
24 title is vested in their name, they have a right to sell the
25 property?

1 A Yes, sir.

2 Q And you agree with me that you don't have any
3 interest in the property?

4 A I don't have a legal interest, but I certainly
5 have a moral interest. And I have a right in this claim.

6 Q I'd like to show you now, Mr. Sanders, what has
7 been marked as Exhibit 6, Plaintiffs' Answers to Defendant
8 Robert E. Brown, Jr.'s Interrogatories. And first will you
9 tell me, everybody, you signed that document under oath on
10 the last page?

11 A Yes, sir, I did.

12 Q I'd like to direct your attention to Interrogatory
13 No. 1 where 2 states,

14 "State the name and address of each person who
15 owns any fee simple interest in the Glanville
16 property."

17 Do you see that?

18 A Yes, sir.

19 Q And the answer is, "B.N. Glanville and his wife

20 M.D. Glanville of Malhure County, Oregon, are the
21 sole owners of the Glanville property."

22 Is that correct? Do you see that?

23 A Yes, sir.

24 Q That question is "fee simple owner." And they are
25 fee simple owners, does it say, Mr. Sanders?

1 A The question does.

2 Q And with respect to Interrogatory No. 2, it asks

3 that you,

4 "Identify each holder of an encumbrance, lien,

5 mortgage, deed of trust, right-of-way, or other

6 interest in the Glanville Property."

7 And do you see in your answer there that you don't

8 identify any interest of your own?

9 A Well, I have no encumbrances, lien, mortgage, deed

10 of trust, right-of-way. Other interest I guess. I signed

11 that.

12 Q Mr. Sanders, do you or don't you have an interest

13 in the property?

14 A I have an equitable interest in the property and

15 it will be deeded to me when I ask it to be deeded to me.

16 Q And you will agree that the interrogatory asked

17 you to identify anybody who had any interest in the property;

18 is that right?

19 A I maybe misinterpreted the question.

20 Q Is that not what it says?

21 A It starts out "encumbrance, lien, mortgage, deed

22 of trust, right-of-way. I was looking for a legal document.

23 Q And you prepared these answers in consultation

24 with your attorney, Mr. Green; is that right?

25 A Yes, sir.

1 Q And no place in these interrogatory answers did
2 you state that you have a beneficial interest or equitable
3 interest or any other interests in the Glanville property.
4 Isn't that true?

5 A I would have to look at the rest of the
6 interrogatories.

7 Q If you feel you did, take a minute.

8 A If you say it's not there, I'll concede that.

9 Q As of the date you transferred the property to
10 Glanville, Mr. Sanders, the Browns did not own and had not
11 purchased the Brown property, had they?

12 A That's true.

13 Q And Mountain West had had a foreclosure sale, had
14 they not?

15 A No, sir.

16 Q So before the Browns ever appeared on the scene,
17 you conveyed the property to your brother-in-law and sister?

18 A Yes, sir.

19 Q If I understand you correctly, you are complaining
20 of the following: trespass problems -- first, driveway;
21 second, landscaping; third, horses; and fourth, car parking?

22 A The use of the yard.

23 Q Okay. Anything else?

24 A That covers it.

25 Q Browns' horses were not on the property at any

1 time before you conveyed the property to Glanville, were
2 they?

3 A No, sir.

4 Q During your ownership of the Glanville property
5 before you conveyed it, you gave Layne Newman permission to
6 run horses on the property. Is that right?

7 A Yes, sir.

8 Q And you didn't ever tell him that he could only
9 run horses that he, himself, owned there, did you?

10 A He asked me if he could run his horses. And I
11 replied, Yes, you can run your horses. There were no other
12 horses discussed.

13 Q Are you testifying that you can recall seven or
14 eight years ago saying, Newman, you can only run your horses?

15 A I didn't say that. I didn't say "only." He said,
16 May I run my horses on your property, or something to that
17 effect. And I said, Yes, you can run the horses on the
18 property, or something similar to that.

19 Q Did he tell you how many horses he would run?

20 A I knew how many he would run. I was his neighbor.

21 Q Did he tell you, is the question.

22 A No, sir.

23 Q So as far as you are concerned, he could run
24 whatever he had there?

25 A Yes.

APPENDIX

ITEM # 16

**Trial Transcript -- Cross Examination
of Joseph Sanders**

1 A Yes, sir.

2 Q And you were not a party to that transaction at
3 all, were you?

4 A No, sir.

5 Q You had nothing to do with that transaction.

6 A I had nothing to do with the transaction, no, sir.

7 Q Aside from at your deposition, you have never met
8 nor spoken with Bob and Diane Brown?

9 A No, sir.

10 Q And you filed this lawsuit against them because of
11 horses, the grass, the driveway and the variance. Is that
12 right?

13 A It's the use of the yard is the principle reason,
14 yes, sir.

15 Q It is a fact, is it not, Mr. Sanders, that you
16 have filed this lawsuit against the Browns because you want
17 to put intense pressure on them to pay you settlement money?

18 A I have two motives in my lawsuit. And the lawsuit
19 is all-inclusive; it involves the entire subdivision: One, I
20 would like to recover some of the very large money that I
21 have spent; and two, I would like to get a case built so that
22 the City of Draper will process their subdivisions properly
23 so we don't have to do this time and time again as more and
24 more people get involved this trap.

25 Q I want to ask you the question again, Mr. Sanders.

1 The question is, is it not a fact that you filed this lawsuit
2 against the Browns to put intense pressure on them to pay
3 settlement money to you.

4 A The reason for this lawsuit -- if you are talking
5 about this particular one right here?

6 Q Yes, sir.

7 A The reason we are doing it is, no one will certify
8 without going to appeal. No one would settle without giving
9 up appeal rights. If they would let us appeal, we would have
10 settled today.

11 Q Apart from this hearing, we are talking about the
12 whole lawsuit, Mr. Sanders, and this is the third time now,
13 is it not a fact that you have filed and pursued this lawsuit
14 against the Browns to subject them to intense pressure so
15 that they would pay you settlement money. Isn't that true?

16 A That is part of the answer, yes.

17 MR. MAAK: No further questions.

18 THE COURT: Redirect?

19 REDIRECT EXAMINATION

20 BY MR. LAMBERT:

21 Q Let's start where we left off, Mr. Sanders.
22 Wasn't the original reason for filing a lawsuit because there
23 was a gap between the right-of-way and the Brown property?

24 A Yes, sir.

25 Q And every time they drove across it it was a

APPENDIX

ITEM # 17

**Trial Transcript -- Cross Examination
of Bruce Maak**

1 not Mr. Sanders had ever understood that that agreement
2 included the entire strip?

3 A Mr. Green admitted to me that his client reneged.
4 I don't know what he told his client.

5 Q Of the time you testified to, it appears that 45
6 hours of that time was incurred from the time after the
7 second summary judgment motion up until projecting through
8 the end of today, I assume. Is that right?

9 A No. Forty-five hours was consumed in the second
10 summary judgment motion. And in addition, 45 hours has been
11 and will be consumed from the entry of that second summary
12 judgment through this morning.

13 Q Okay. I apologize for asking you a question that
14 wasn't clear. I meant from the time of the summary judgment
15 until today.

16 A Yes.

17 Q That is 45 hours. That 45 hours was spent on the
18 discrete trespass claims we have been addressing here today;
19 is that correct?

20 A That is correct.

21 Q Back in March, just before we were set to go to
22 trial the second time, you received a settlement offer to
23 settle the discrete claims in this proceeding that we have
24 gone through here for \$2500; is that right?

25 A An offer to settle these claims and still pursue

1 an appeal?

2 Q That's right.

3 A Yes.

4 Q And you didn't respond to that offer until our
5 phone conversation until on about Tuesday of this week; is
6 that right?

7 A I don't think that is right. When you and I met
8 and discussed exhibits, I told you that if there was going to
9 be an appeal we were not interested in settling.

10 Q That meeting took place before I sent you the
11 letter on March 15th, didn't it?

12 A I don't believe that's the case.

13 Q Okay. In any event, just prior to the
14 commencement of this trial yesterday, it was indicated to you
15 that to compromise just these discrete trespass claims
16 Mr. Sanders would come down to a figure of \$1,000. Is that
17 right?

18 A You told me that yesterday morning.

19 Q Right.

20 A You also told me he would continue to pursue an
21 appeal of all the other issues in this case. And I told you,
22 as I had always told you, we wanted to settle this case and
23 stop spending attorney's fees and settle this. The Browns
24 were interested in terminating litigation and not paying
25 piecemeal.

1 Q That perhaps answers the next question I was going
2 to ask. And the basis for rejecting both of those offers was
3 that any settlement that you would be willing to enter on
4 behalf of the Browns would require Sandy to give up his
5 appeal rights Is that right?

6 A That is not the basis at all. The basis is,
7 anybody who has litigated with Mr. Sanders in this case would
8 be a fool to pay a nickel unless they had absolute assurance
9 that he could not do anything more in the case.

10 Q So is it accurate for me to say you were unwilling
11 to settle the issues we were discussing yesterday and today
12 unless Sanders would also forego his right to appeal the
13 issues that had been decided previously on summary judgment?

14 A With the exception of the Offer of Judgment that
15 we filed, we offered to allow judgment to be taken for the
16 trespass claims for \$750. Mr. Sanders never responded to
17 that.

18 MR. LAMBERT: I think that's all I have, your
19 Honor.

20 THE COURT: Anything else?

21 MR. MAAK: I have nothing further, your Honor.

22 THE COURT: Mr. Stevens?

23 MR. STEVENS: No.

24 THE COURT: Very well. You may call your next
25 witness.

APPENDIX

ITEM # 18

**Trial Transcript -- Cross Examination
of Joseph Sanders**

1 that you abandon a claim or abandon a position on an issue or
2 omit a position on an issue and you agreed to go along with
3 that?

4 A Yes, they have suggested some things. Both you
5 and Rick suggested some things that wouldn't be appropriate
6 and I have agreed to drop them.

7 Q And as far as the investigation into the legal
8 basis for your claims, have you ever had a lawyer tell you
9 that the claims you were asserting were in bad faith?

10 A No, sir.

11 MR. LAMBERT: That's all I have.

12 CROSS EXAMINATION

13 BY MR. MAAK:

14 Q You say, Mr. Sanders, that the reason you brought
15 this lawsuit is to rectify an illegal subdivision problem.
16 Is that right?

17 A That's correct.

18 Q Have you ever proposed to the Browns that they
19 sign any document to assist you in that regard?

20 A I have not precisely done that, no, sir.

21 Q But that's why you brought the lawsuit, right?
22 You wanted to fix the subdivision problem, right?

23 A That's why -- we brought the lawsuit because I
24 refused to acknowledge the notice of claim and suggest
25 anything.

1 Q Please tell me, Mr. Sanders, what the Browns can
2 do to fix what you perceive to be a subdivision problem, what
3 can they do?

4 A They can acquire the rest of their side yard that
5 is required by them. And they can see to it that we can
6 record the property.

7 Q So they could buy your property, right? That's
8 the first thing they could do?

9 A That would be part of it.

10 Q And the second thing is to record a document; is
11 that right?

12 A That's correct. Someone has to record the
13 document.

14 Q And you have never asked them to record any
15 document ever, have you, Mr. Sanders?

16 A No, sir.

17 Q And, in fact, in this lawsuit you don't ask for
18 the Browns to sign anything, do you? Do you?

19 A I guess not.

20 Q What you ask for is money. Isn't that right,
21 Mr. Sanders?

22 A I don't think -- my testimony is not that.

23 Q Your Complaint in this case asks for only one
24 thing from the Browns, and that is money, is it not,
25 Mr. Sanders?

1 A In this precise case today?

2 Q In this lawsuit.

3 A In this case today?

4 Q In this entire lawsuit you ask for only one thing

5 from the Browns and that is money. Right?

6 A I don't think that's true, but I would have to

7 review the information.

8 Q What else do you ask for besides money?

9 A The one lawsuit was specifically to enforce the

10 subdivision ordinance.

11 Q I am asking you what in this lawsuit you ask the

12 Browns for other than money.

13 A The entire -- what do you mean by "lawsuit"? This

14 finite hearing today?

15 Q I mean everything in this case that has been

16 decided against you and is being considered today. What do

17 you ask of the Browns besides money?

18 A I ask to correct the -- as I understand it, the

19 two summary judgments with the Browns: One, that reformed

20 the right-of-way, if that's a proper term; and the other one

21 was that I didn't have the ability to force the Browns to

22 help us get the subdivision approved.

23 Q I am going to show you what's marked as Exhibit

24 16, Mr. Sanders. Can you identify that for us, please?

25 A Well, it says Amended Complaint for Civil Case

1 9009- -- whatever.

2 Q Who is the plaintiff there?

3 A B.N. Glanville.

4 Q Who are the defendants?

5 A Draper City, the Board of Adjustment, the Planning
6 Committee, The City Council, Mayor Charles L. Hoffman, Robert
7 Brown, Kim Stevens John Does I through X.

8 MR. MAAK: May I approach the witness briefly, your
9 Honor.

10 THE COURT: Yes.

11 Q In your Complaint in the prayer there is two
12 paragraphs. The first asks for relief as to the City of
13 Draper, et al. Do you see that?

14 A Yes.

15 Q And the second asks for relief as to defendants
16 Brown and Stevens. Do you see that?

17 A Yes.

18 Q Will you read the entirety of the relief you ask
19 for against Browns and Stevens, please.

20 A My counsel wrote this for me.

21 Q I'll just read it for you.

22 A Well, I'll read it.

23 "For a judgment finding that the actions of the
24 Defendants Browns --"

25 THE COURT: Wait, wait. You are going to have to

1 slow down. People tend to read faster than they speak and
2 you speak fast anyways. And for the reporter's sake and so I
3 hear clearly, please slow down.

4 A "For a judgment finding that actions of the
5 Defendants Brown and Stevens and those acting
6 with him are trespass on the properties of
7 Plaintiffs.

8 "For the immediate issuance and entry of an
9 injunction restraining Defendants Brown and
10 Stevens and those acting with them from the
11 actions described in the Complaint.

12 "For judgment in connection with the trespass of
13 Brown and Stevens and those acting with them in
14 an amount not less than \$20,000, in punitive
15 damages and \$10,000 in general damages."

16 Q Now, Mr. Sanders, you agree with me, don't you,
17 that you haven't asked the Browns and Stevens to do anything
18 to help you with your subdivision problem, have you?

19 A It appears not.

20 Q Okay. Did you read that ever before it was filed
21 or since it has been filed?

22 A I am not an attorney. I hired the best counsel I
23 know how and I haven't always had good judgment.

24 Q Did you read it?

25 A I read it, yes.

1 Q Is it important to you that you resolve this
2 subdivision problem?

3 A Yes.

4 Q In reading it now, you can tell, can't you,
5 Mr. Sanders, that you are not asking to resolve any
6 subdivision problem there, are you?

7 A Well, I have talked to my lawyer. And I say, This
8 is what I want, and he writes the words. And what I see here
9 it says, "For..entry of an injunction restraining defendants
10 Brown and Stevens and those acting withr them from the
11 actions described in the Complaint." If they would get the
12 subdivision they could stop trespassing.

13 THE COURT: Counsel, your point has been made.

14 MR. MAAK: Thank you, your Honor.

15 Q Did you ever ask Rick Green to sign a RICO
16 complaint?

17 A Yes, sir, I did.

18 Q Did he refuse?

19 A He did not refuse to sign it. He felt he was not
20 qualified and brought in other attorneys to do it.

21 Q Is it your testimony today, sir, under oath, that
22 Rick Green did not refuse to sign your RICO Complaint?

23 A He didn't prepare it.

24 Q Who prepared it?

25 A I guess he started to prepare it, but he brought

1 in the firm of --

2 Q Who prepared it?

3 A I don't recall all the details. But Rick prepared
4 it. We had a large meeting with Russ Walker, I think -- and
5 I don't know whether Reid was there or not, but there was
6 another attorney in this thing. And we talked at length and
7 they reviewed it and decided to go forward with it.

8 Q Rick prepared it. Correct?

9 A Yes.

10 Q And Rick wouldn't sign it. Correct?

11 A He didn't sign it.

12 Q He declined to sign it?

13 A Yes. The reason he gave me, that he poorly served
14 me and that he wasn't qualified to do it.

15 Q And you signed it, didn't you, Mr. Sanders?

16 A Yes, sir.

17 Q And you filed it?

18 A Yes, sir.

19 MR. MAAK: No further questions.

20 THE COURT: Mr. Stevens, do you have any other
21 questions?

22 MR. STEVENS: Yes, please.

23 CROSS EXAMINATION

24 BY MR. STEVENS:

25 Q Mr. Sanders, do you feel that you have been

1 wronged in this case?

2 A Yes.

3 Q Do you feel that you have been wronged by the
4 Browns?

5 A The Browns just stumbled into the middle of the
6 case. But the Browns have not done anything except they got
7 a piece of property that had problems associated with it.
8 And I am attacking the property, not the Browns.

9 Q Have you been wronged by the Newmans while you
10 lived in your home?

11 A The fact that Newman did not -- Newman and Ovard
12 did not record the subdivision they got permission to do has
13 hurt me greatly. Had they recorded their subdivision, none
14 of these problems, none of these problems would exist today.

15 Q Have you been wronged by the Days?

16 A It was the Days' property that was subdivided. It
17 was the Days that would not pay off Mrs. France so we could
18 have it recorded. I would have probably fixed the problems
19 myself had they been --

20 Q Have you been wronged by the Stevens?

21 A You unfortunately bought a part of the problem
22 when you bought from the Days.

23 Q Have you been wronged by the Ovars?

24 A Yes, sir, very greatly.

25 Q You have been wronged by everybody that surrounds

APPENDIX

ITEM # 19

Trial Transcript -- Judge's Bench Ruling

ORIGINAL

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY ~~FILED DISTRICT COURT~~
Third Judicial District

* * *

OCT 13 1995

B.N. GLANVILLE, JOSEPH D.
SANDERS and CHERYL M. SANDERS,

By B. Allen Koch
Deputy Clerk

Plaintiffs,

Case No. 900902397 PR

v.

Transcript of:

THE CITY AND MUNICIPALITY OF
DRAPER, et al.,

JUDGE'S BENCH RULING
after Trial Proceedings

Defendants.

* * *

BEFORE THE HONORABLE JUDGE ANNE M. STIRBA

Salt Lake City, Utah

Friday, July 21, 1995

APPEARANCES

For the Plaintiff:

DAVID R. WILLIAMS
Attorney at Law
Woodbury & Kesler
265 East 100 South, Suite 300
Salt Lake City, Utah 84110-3358

For the Defendants:

BRUCE A. MAAK
Robert & Diane Brown Attorney at Law
Kimball Parr Waddoups Brown & Gee
185 So. State Street, Suite 1300
Salt Lake City, Utah 84111

For the Defendant:

Pro Se

Kim Stevens

REPORTER: SUZANNE WARNICK, RMR, CSR
Official Court Reporter
240 East 400 South, #304
Salt Lake City, Utah 84111
Phone: 801-535-5470

1 FRIDAY, JULY 21, 1995; 2:15 P.M.

2 J U D G E ' S B E N C H R U L I N G

3

4 THE COURT: Back on the record. This is the matter
5 of Glanville versus The City of Draper, Case No. 900902397.
6 The record should reflect Mr. Stevens is here. And counsel,
7 would you state your appearances.

8 MR. MAAK: Your Honor, I am Bruce Maak and I
9 represent Diane and Robert Brown.

10 MR. WILLIAMS: Your Honor, I am David Williams and
11 I am here on behalf of the plaintiff Mr. Sanders.

12 THE COURT: Thank you, Mr. Williams.

13 First of all, I apologize for being a few minutes
14 late on the bench. I was double-checking some of the
15 exhibits to make sure that I was correct in my understanding
16 of some of the evidence. The record should also reflect that
17 since the conclusion of the trial last Friday I have had an
18 opportunity to read all of the evidence that was submitted to
19 the Court and the cases that were submitted. And I have
20 considered all of that.

21 I have considered the proposed Findings of Fact
22 and Conclusions of Law. I have considered the briefs. And I
23 had a transcript made of the closing argument and have
24 reviewed that. And in light of all of that, I feel very
25 well-informed and I am prepared to rule today.

1 Now, the record should also reflect that this
2 morning I attempted to initiate a telephone conference call
3 with all of the parties. Mr. Maak was available; Mr. Lambert
4 was available.

5 Mr. Stevens, there should be a message on your
6 answering phone to the effect that we tried to get in touch
7 with you and you had your answering machine on and we had no
8 other way to contact you. In light of the question that I
9 wanted to ask Mr. Lambert and Mr. Maak, it really pertained
10 to a legal issue. And because you really throughout the
11 trial deferred to Mr. Maak for the issues regarding the legal
12 issues, I felt that it would be all right to go ahead without
13 you.

14 And the legal issue that I was raising was
15 pertaining to Exhibit 1, the admissibility of which I had
16 reserved ruling on until this time. And I just indicated
17 that I had not made my decision yet as to whether I would
18 rule on Exhibit 1 or whether I might this afternoon request
19 some additional briefing on that issue. And I simply wanted
20 to alert counsel that that was a possibility and to notify
21 their respective clients to that effect. And I certainly
22 made no decision or gave an indication of how the Court was
23 going to rule ultimately in this case.

24 Mr. Stevens, do you feel uncomfortable in any way
25 that you were not involved in that particular conversation?

1 MR. STEVENS: No. I am fine.

2 THE COURT: All right. Do you have any questions
3 about that conversation?

4 MR. STEVENS: No, your Honor.

5 THE COURT: In light of that I am prepared to rule
6 at this time on the issues before the Court. And this is a
7 bench ruling. I no doubt will overlook some matters, and
8 certainly many findings. The prevailing party is entitled to
9 present in the proposed Findings of Fact and Conclusions of
10 Law any findings consistent with the Court's ruling. I know
11 my ruling will not be all encompassing. If there are any
12 objections to any of the findings that are proposed, I will
13 rule on the objections as to what I feel I can find or don't
14 find based on the evidence.

15 Now, the first issue that needs to be addressed is
16 the admissibility of the Assignment of Claim. I have
17 considered that in several different respects, and I just
18 want some verification, counsel. There is before the Court
19 various deeds, including: Ovars, Nipkos, Newmans, Sanders,
20 and then Sanders to Glanville. And the deed to Sanders, the
21 two deeds from Sanders to Glanville are to Mr. and Mrs.
22 Glanville. Is that consistent with your understanding?

23 MR. MAAK: That is correct, as joint tenants.

24 THE COURT: And you agree with that also?

25 MR. WILLIAMS: Yes, I do, your Honor.

1 THE COURT: And the status of the record also is
2 that what Mr. Sanders' interests are -- well, Mr. Sanders has
3 no standing in this lawsuit except that which he has
4 specifically received from the Glanvilles. Now,
5 Mr. Glanville appears to have been deceased -- or he is now
6 deceased. And correct me, I couldn't find in my notes the
7 date of that death. Does either one of you have that?

8 MR. MAAK: It was some time -- Mr. Lambert said it
9 was May of 1995. That's the only information I have.

10 THE COURT: Do you have reason to dispute that?

11 MR. WILLIAMS: I don't, your Honor.

12 THE COURT: I remembered May. I wasn't clear for
13 sure on that.

14 Now, Rule 25 of the Utah Rules of Civil Procedure
15 sets forth a procedure that is to be followed when a party
16 dies. And that is, within 90 days following the death, that
17 there be a Suggestion of Death filed with the court and there
18 was in this case a Suggestion of Death filed. After that
19 what is to happen is that there be a motion for substitution
20 of the parties. And the personal representative of the
21 estate of the deceased may move to be substituted as a party
22 plaintiff. And that is the procedure called for under Rule
23 25.

24 That did not happen in this case. What happened
25 is that, I believe it was the Friday before the trial which

1 began on Tuesday following that Friday, there was filed with
2 the Court an Assignment of Claim which is in the record as
3 proposed Exhibit No. 1. In that Assignment of Claim, which
4 is notarized, Mrs. Glanville purports to represent to the
5 Court that she is the personal representative of the estate
6 of her husband and the owner of the real property located in
7 Draper which is the subject matter of this litigation. And
8 that she does,

9 "Hereby assign any and all rights of action,
10 damages, rights and claims which she may have in
11 the above described case to Joseph Sanders, my
12 coplaintiff" -- he is actually not her
13 coplaintiff; he is coplaintiff with her deceased
14 husband -- "and do further state that the estate
15 of Ben N. Glanville asserts no interest in the
16 property, it having been held in joint tenancy
17 with her at the time of his death."

18 Now, that purports to bear her signature dated
19 July 6, 1995 and shows that it was notarized. I do not
20 recall testimony in the trial -- help me with this, if you
21 will -- as to whether Mr. Sanders authenticated her
22 signature.

23 MR. MAAK: Mr. Sanders gave evidence that he was
24 familiar with her signature and that it appeared to be her
25 signature. He said he did not see her sign the document but

1 testified that she told him she had signed the document. He
2 said he took the document to her, left and came back a day or
3 so later, or hours later, and she handed it to him executed
4 and notarized. That's the sum and substance of what I can
5 recall.

6 THE COURT: Is that consistent with your
7 recollection, Mr. Stevens?

8 MR. STEVENS: That is consistent.

9 THE COURT: That's consistent with the recollection
10 I have as to what his testimony was.

11 Now, obviously Exhibit 1, the Assignment of Claim,
12 is not a self-authenticating document. It needs to be
13 authenticated in some fashion. I think given the testimony
14 of Mr. Sanders at trial, that he recognizes his sister's
15 signature and that the signature on the document is her
16 signature, I think that does authenticate the document,
17 although given all the circumstances, it is very thin
18 authentication for a document of this type. Now, the notary
19 doesn't authenticate the document. But I don't believe that
20 authenticity is a bar to the Court considering this Exhibit.

21 Now, there was no evidence presented to the Court,
22 however, that Mrs. Glanville is, in fact, the personal
23 representative of the estate of Ben N. Glanville. While this
24 appears to be an assignment of claim, it also contains her
25 representation that she is the personal representative of the

1 estate of Ben Glanville. She did not testify at the trial.
2 She was not produced at trial nor were there any documents
3 certifying that she is, in fact, the personal representative
4 of the estate of Ben Glanville presented to the Court. And
5 accordingly, there is a hole here.

6 There has to be a sufficient chain showing what
7 all of this purports to show. And an affidavit, if you
8 will -- and this doesn't purport to be an affidavit; it is
9 merely an assignment of claim -- this doesn't contain any
10 probative evidence that she is, in fact, the personal
11 representative of the estate of Ben Glanville.

12 For that matter, if she had appeared at trial as a
13 witness and been subject to cross examination, that could
14 have been determined in that fashion. But she didn't appear.
15 And there was nothing, no court order for example appointing
16 her as personal representative, no indication if there are
17 any competing claims for this property. So there is a hole
18 in the proof; there is a failure of proof on that point.

19 I do not believe that the Assignment of Claim is
20 sufficiently probative to establish, in fact, there has been
21 an assignment of claim. That she is, in fact, legally
22 entitled to assign the claim, given the comments I have just
23 made. It is her burden to establish a bona fide legal claim
24 to this property, and that as personal representative she is
25 entitled to make this claim.

1 Now, this problem of the transfer, if you will, of
2 a claim of Mr. Glanville's and Mrs. Glanville's claims to
3 this property to Mr. Sanders is something that could have and
4 should have been dealt with well before it was. This was the
5 product of Mr. Sanders' own conduct and not that of the
6 Browns and Stevens. This is something that was known
7 certainly at the time of Mr. Glanville's death. I don't know
8 about the circumstances preceding his death or how sudden it
9 was, and I have no judgment about that. But certainly since
10 May, the time of his death, this is a subject that could have
11 been dealt with before it was right before trial.

12 Now, in my view there is prejudice to the
13 defendants, therefore, for this late filing. And there is
14 prejudice because there was no opportunity for the defendants
15 to do discovery regarding whether Mrs. Glanville is, in fact,
16 the personal representative of the estate of Mr. Glanville
17 and that there are no competing claims for this position.
18 Accordingly, there is a failure of proof in this Assignment
19 of Claim.

20 It is only through this Assignment of Claim that
21 Mr. Sanders has any standing whatsoever. And in light of the
22 finding that there is a failure of proof, the Court finds
23 that Mr. Sanders has no standing in this action.
24 Mrs. Glanville has never been made a party to this action.
25 And accordingly, the claims that were litigated at trial are

1 therefore dismissed and judgment will be rendered in favor of
2 the defendants.

3 Now, with regard to the defendants' bad faith
4 claim, Mr. Sanders testified that he undertook this lawsuit
5 to clear title and easement issues so that he could sell this
6 property. Mr. Sanders nor Mr. Glanville has ever put this
7 property on the market for sale. He made no effort, neither
8 one of them made any effort regarding attempts to cure this
9 problem short of five years of litigation.

10 Mr. Glanville in his deposition knew essentially
11 nothing about this property except in the vaguest of terms.
12 And obviously he was not pursuing this except at the request
13 of his brother-in-law, Mr. Sanders. And Mr. Sanders,
14 according to Mr. Glanville's testimony, was acting as his
15 agent in this lawsuit.

16 Putting aside any question about whether
17 Mr. Sanders could, in fact, do so, I think that it's fair to
18 say that Mr. Sanders and Mr. Glanville did intend that
19 Mr. Sanders deal with the attorneys, make litigation
20 decisions, and in that way act as Mr. Glanville's agent. So
21 I believe there was enough there for Mr. Sanders to act as
22 Mr. Glanville's agent.

23 I was very disturbed about the testimony at trial
24 that there were almost no efforts short of Mr. Green's letter
25 to advise the defendants of any of these problems, and

1 particularly the problems with -- well, I'll let that
2 statement stand. There were no efforts by Mr. Sanders to
3 attempt to resolve the problems that he perceived existed
4 without having filed a lawsuit.

5 Now, it is certainly Mr. Sanders' right to have
6 filed the lawsuit. He has a legal right to do so, and the
7 Court well recognizes that right. That is not the problem
8 here. The problem is that Mr. Sanders, based on the Court's
9 impression of him while he was testifying and the conduct
10 that was referenced in evidence and in oral argument, the
11 Court is persuaded that the weight of the evidence clearly is
12 that Mr. Sanders is someone who likes to litigate. That even
13 the remaining issues that were not resolved by way of partial
14 summary judgment previously could not be resolved without a
15 trial, notwithstanding the fact that the defendants did, in
16 fact, attempt to resolve this case prior to trial.

17 It is the Court's finding, based on all of the
18 circumstances involved in this case, that Mr. Sanders had no
19 apparent desire to settle this case or resolve it short of a
20 trial. In his own testimony he wanted a trial and he has
21 always wanted a full-fledged trial. I don't believe those
22 are his precise words but his testimony was similar to that
23 by his own admission.

24 While this is his right, and the Court recognizes
25 his right to litigate, under all of the evidence before the

1 Court regarding his actions, vis-a-vis some of the trespass
2 claims, the Court finds that his efforts were unreasonable
3 and in my judgment in bad faith. Specifically because of
4 this, also because he had the ability to deal with the
5 Assignment of Claim issue and because there was a failure for
6 properly proceeding under Rule 25, also a failure independent
7 of that of securing the evidence and presenting the evidence
8 necessary to support that claim, the Court finds that the
9 defendants, Browns and Stevens -- well, excuse me, Browns --
10 prevailed on the issues litigated in trial regarding the
11 trespass claims involving the horses, the grass and the
12 sprinklers. Actually the Court finds that Browns and Stevens
13 prevailed on all the issues litigated at trial. Specifically
14 with regard to whether these issues were without merit,
15 without any merit as the statute requires, the Court finds
16 that the claims involving the horses, grass and sprinklers
17 were without merit and that they were not asserted in good
18 faith.

19 With regard to the issues regarding the trailer
20 and regarding the portion of the cement driveway that is
21 occupying the premises -- for the driveway, obviously that's
22 continuing; for the trailer, that's periodic and has
23 continued beyond the litigation, it appears to be something
24 that has continued in the past -- with regard to those two
25 claims the Court finds that, while they prevailed on those

1 claims for the reasons I previously expressed, that the
2 claims of Mr. Sanders -- strike that. I correct myself on
3 this. The claims involving the horses -- excuse me, I am
4 rethinking this.

5 The claims regarding the driveway and the trailer,
6 when brought by Glanville and Sanders were not without merit
7 as a matter of fact and law. However, Mr. Sanders had no
8 claims to assert those issues. And accordingly, as to
9 Mr. Sanders, those issues are without merit. There is no
10 other party in the lawsuit as plaintiff at this time.

11 Therefore, as to all the claims that were
12 litigated at trial, the Court finds that as to Mr. Sanders,
13 those claims were pursued in violation of -- well, in such a
14 manner as I previously described so that attorney's fees,
15 reasonable attorney's fees are going to be awarded as to the
16 claims that were litigated at trial only. All the other
17 claims that were involved with regard to the partial summary
18 judgments are not included under the findings regarding
19 78-27-56.

20 Now, Mr. Stevens did not incur attorney's fees so
21 he is not awarded any attorney's fees. The Browns are
22 awarded reasonable attorney's fees consistent with the
23 Court's ruling here.

24 Are there any questions?

25 MR. MAAK: I have no questions, your Honor.

1 THE COURT: Very well.

2 Do you have any questions?

3 MR. WILLIAMS: I don't, your Honor.

4 THE COURT: Then Exhibit 1, implicit in this

5 ruling, is not received in evidence for the reasons I have

6 stated. And I want Mr. Maak to prepare proposed Findings of

7 Fact and Conclusions of Law and an Order of dismissal

8 consistent with this ruling, including the ruling on the

9 Assignment of Claim, Exhibit 1.

10 Very well. Hearing no questions then, court is in

11 recess. And I thank all counsel. Very well.

12 MR. MAAK: Thank you, your Honor.

13 (This concludes this Judge's Bench Ruling).

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C E R T I F I C A T E

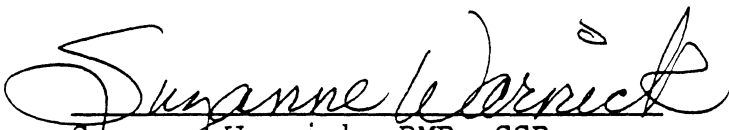
STATE OF UTAH)
 :
COUNTY OF SALT LAKE)

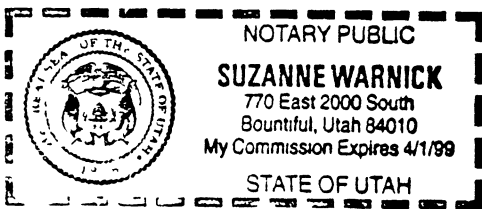
I, SUZANNE WARNICK, RMR, CSR, do certify that I am
a nationally certified Registered Merit Reporter, a state
Certified Shorthand Reporter, and a Notary Public in and for
the State of Utah.

That at the time and place of the proceedings in
the foregoing matter, I appeared as the court reporter in the
Third Judicial District Court for the Honorable Judge Anne M.
Stirba, and thereat reported in stenotype all of the
proceedings had therein.

That thereafter, my said shorthand notes of the
Judge's Bench Ruling were transcribed by computer into the
foregoing pages; and that this constitutes a full, true and
correct transcript of the same.

WITNESS MY HAND AND SEAL in Salt Lake City, Utah on
this, the 12th day of October 1995.


Suzanne Warnick, RMR, CSR



My commission expires:
1 April 1999

APPENDIX

ITEM # 20

Deposition of Joseph Sanders

1 Q In the four-and-a-half or five years since you
2 transferred the property to Glanville you haven't done
3 anything to transfer it back to yourself; is that right?

4 A We've talked about it and we figured why clutter
5 the thing, just leave it where it's at. It's been no
6 secret. We've said all that have asked what the arrangement
7 is.

8 Q If I had said to Mr. Glanville this morning during
9 his deposition, Mr. Glanville, I would like to buy from you
10 the panhandle property and the Glanville property, I'd like
11 to pay you X dollars for it, would there be anything to
12 prevent him from taking my money and giving me a deed?

13 A None whatsoever.

14 Q Okay. So I take it you would agree that he has
15 the right, in your opinion, free and clear of any interest on
16 your part, to sell and transfer that property whenever he
17 wants; is that right?

18 A He has the legal right, yes, sir. Morally I don't
19 think he does.

20 Q Okay. Do you own any interest in the Glanville
21 property or the panhandle property today?

22 A Not according to the law.

23 Q Okay. Well --

24 A My name is not on any instrument or document.
25 I've been paying taxes on it, but that's all.

1 Q If you go to Mr. Glanville and say, hey, Ben, why
2 don't you sign these and deed these back to me, would he do
3 that --

4 A Probably.

5 Q -- for free?

6 A Yes, sir.

7 Q Do you feel that's his obligation?

8 A We have a business arrangement. I think it's his
9 obligation, yes, sir.

10 Q So he holds the legal title, but basically you
11 have all of the other incidents of ownership?

12 A I think that's true, yes, sir.

13 Q Did Mr. Glanville ever hand you cash in the amount
14 of \$10 for that property?

15 A Not specifically, no, sir.

16 Q Not at all, did he?

17 A We have -- we're in a business together, we've
18 transferred money back and forth. But not specifically, no,
19 sir.

20 Q He never said, here is \$10 to buy that property?

21 A No, sir.

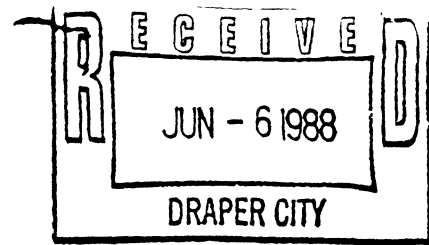
22 Q What was the purpose for which you transferred the
23 Glanville property and the panhandle property into
24 Mr. Glanville's name?

25 A Haven't I answered that several times?

APPENDIX

ITEM # 21

**Draper City Board of Adjustment File
1988 Variance Application**



APPLICATION FOR VARIANCE

Fee Title Owner Mt. West Savings Appl. Date 6-6-88
mail. addr: 2835 East 3300 S.
S.L.C. UT, 84109 Property Addr. 13755 Shadow Mt. Lane
telephone: 486-4431
Applicant/Agent Martin Sam Ovard Requesting Variance to the
mail. addr: 2316 E. 10375 S. requirements of the Building
Sandy 84092 and/or Land Use Regulations,
telephone: 942-4868 specifically sections: _____

Applicant requests a Variance on structures and/or property indicated above of 1 acres, and which legal description is:

SEE COPY OF TITLE INSURANCE FOR LEGAL DESC.

1. What is the present use of the property?

PRIVATE RESIDENCE

2. State the facts upon which you base your request to show that granting said request will not be contrary to the public interest. What special circumstances affect your property that do not affect other properties in the same zoning district? Do those circumstances deprive your property of privileges possessed by other properties in the area? What hardships or special difficulties would be imposed upon you by a literal enforcement of the City's Regulations?

THE ORIGINAL VARIANCE OBTAINED TO BUILD THIS HOUSE WAS WITH 2 ACRES. I REQUEST A VARIANCE TO HAVE THE HOUSE ON THE SOUTH ACRE ONLY.

I NEED THE VARIANCE TO OBTAIN FINANCING TO PURCHASE THE HOME AT A BANK FORECLOSURE SALE. MOUNTAIN WEST SAVINGS IS REQUIRING THIS VARIANCE BEFORE THEY WILL PROVIDE FINANCING TO ME OR ANYONE.

PAGE TWO

Application for Variance

Owner Mt. WEST SAVINGS

Property 13785 SHADON MT LANE

Date 6-6-88

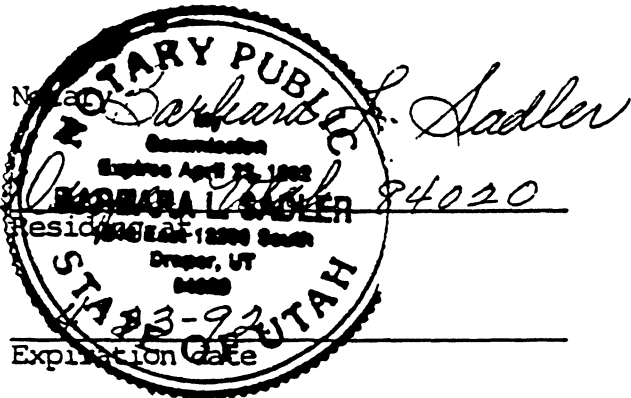
State of Utah }

Applicants Affidavit

County of Salt Lake }

I MARTIN Sam O'VARD, being duly sworn, depose and say that I am the owner/agent of the subject property of this application. The statements, informations, exhibits, and any and all plans herein or attached or submitted present the intentions of the applicant and are in all respects true and correct to the best of my knowledge and belief.

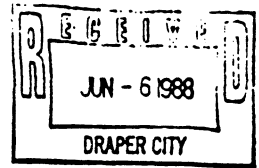
Signed: Martin Sam Ovard



121785

EA

SCALE 1" = 20'
6-6-88 MNO.



KIM STEVENS
HOME

DRIVEWAY

CONCRETE BLOCK FENCE

202.5'

35' R.O.W.

DRIVEWAY

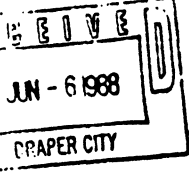
HOME NEEDING
VARIANCE
ON ONE ACRE
1355 SHADOW MT. LANE

ONE ACRE

221.90'

CUL DE SAC

POWER & GAS
TELEPHONE
FIRE HYDRANT
6" WATER MAIN

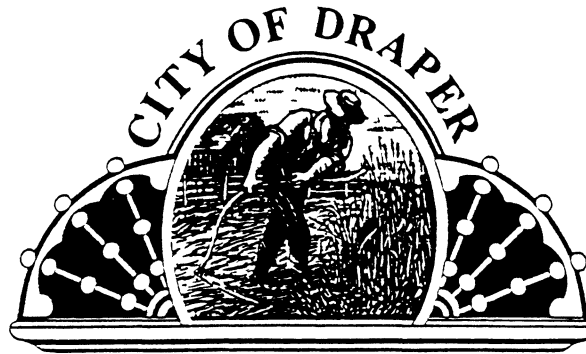


SHADOW MT. LANE
35' R.O.W.
CONNECTING TO
13800 SOUTH

LAYNE
NEWMAN'S
HOME

MAYOR
CHARLES L. HOFFMAN

COUNCIL MEMBERS
TODD ANDERSEN
WAYNE H. BALLARD
CLAIR L. HUFF
B. JEFF RASMUSSEN
B. LAMONT SMITH



12441 SOUTH 900 EAST, P.O. BOX 1020
DRAPER, UTAH 84020 (801) 571-4121

CITY ADMINISTRATOR
ANDREW HATTON-WARD

CITY RECORDER
BARBARA L. SADLER

CITY TREASURER
KAREN L. WILKINS

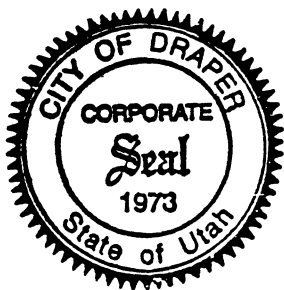
DOCUMENT CERTIFICATION

STATE OF UTAH, COUNTY OF SALT LAKE

This 12th day of July, 19 95,

I Barbara Sadler, Recorder of the City Of Draper, by my signature below, certify hereby that the documents described below and attached hereto are true and accurate copies of the original documents in the official City files.

1. Board of Adjustment Minutes for July 20, 1988.
2. _____
3. _____
4. _____



Barbara Sadler
Barbara Sadler, City Recorder
City Of Draper, State Of Utah

MINUTES OF THE REGULAR MEETING OF THE BOARD OF ADJUSTMENTS HELD
JULY 20, 1988, BEGINNING AT 7:05 P.M. IN THE COUNCIL CHAMBERS OF
THE DRAPER CITY HALL.

MEMBERS PRESENT: Chairman Duane Sadler, George Westbrook and
Floyd Nielsen.

OTHERS PRESENT: Attorney Hollis Hunt, Rick Smith, Pat Cutler,
Wayne King, Cindy King, Ben Cutler, Grant
Beagley, Barbara Sadler, Jean Hendricksen,
Mike Dowland, Norm Franz, Mr. & Mrs. Ovard,
Joseph Sanders, Mr. Stevens, Attorney Tom
Crowther and Kathy Anderson.

Approval of minutes for July 6, 1988.

Hollis Hunt indicated an error on page 3, paragraph 6 where
it reads: "Attorney Hollis Hunt then explained that the Board of
Adjustments is an appellate for the Planning and Zoning
Administrator of the City. . ." This should read: "Attorney
Hollis Hunt then explained that the Board of Adjustments is an
appellate Board for the Planning and Zoning Commission of the
City. . ."

George Westbrook made a motion to approve the minutes of
July 6, 1988, with the correction on Page 3 and a stipulation
that a copy be sent to Mr. Scott Jolley for his signature and
returned to the City. Duane Sadler seconded the motion. Floyd
Nielsen abstained due to his absence, George Westbrook and Duane
Sadler voted yes. Voting was unanimous in the affirmative.

Variance - Ben and Patricia Cutler are requesting a variance for
a lot split on 1.04 acres in an RR-43 zone district located at
240 East 13800 South.

Grant Beagley explained that the proposal is to take the
West end of an existing lot and create another lot with a 100
foot frontage which would contain .38 of an acre (a little larger
than 1/3 acre) leaving approximately 2/3 of an acre where the
existing house exists in an RR-43 (one acre) zone. The action
required is a motion to grant or deny a Variance to allow a lot
split on 1.04 acres in an RR-43 zone; and a motion to approve or
deny a site plan and authorization to issue a building permit on
subject property according to an approved site plan with or
without conditions. Grant explained that the Planning Department
took an adjacent area of 300 feet and checked the existing lot
sizes. The breakdown for those lots, consisting of 24 parcels,
are: 12 parcels of the 24 are 1/3 acre or less, 7 parcels are
larger than 1/3 but less than 1 acre and 5 lots are over 1 acre.
Should the Board approve the Variance, the issuance of a building
permit is subject to all stipulations of the Land Use
Regulations, Fire Marshall, all applicable fees, subject to
frontage improvements including curb, gutter, sidewalk and paved
streets including fire hydrant. Granting of this Conditional Use
and stipulations hereof does not constitute building permit
approval.

Minutes of the Board of Adjustments Meeting Held 7-20-88

Page 2

Rick Smith with Engineering Planning Group and the consulting engineer for the Cutlers explained the reason for the hardship on subject property is due to the existing home which is the old Riley & Erma Fitzgerald home, that has an old rock mound which has prevented any irrigation or farming and the soil is not conducive to this. They would like to build a home, plant grass and improve the looks of the property.

Floyd Nielsen made a motion to deny a variance based on the fact that this falls within proper zoning to have a one acre lot. Floyd suggested that the owners look at adjacent properties available that could be considered as a group in a larger mass of property that would be able to be rezoned and put into smaller lots compatible to this request for one lot. George Westbrook seconded the motion. Floyd Nielsen voted yes; George Westbrook voted yes and Duane Sadler voted yes. Voting was unanimous in the affirmative.

Variance - Martin Sam Ovard & Mountain West Savings are requesting a variance to allow a lot split in an RR-43 zone located at 13755 South Shadow Mountain Lane. b) A variance to allow a side yard setback of 6 feet on the west side of the street. c) A variance to allow a side yard setback of 13 feet on the east side of the street. d) A variance to allow the lot area of the lot owned by Mountain West Savings to be .84 acres in an RR-43 zone. e) A variance to waive the street improvements.

Grant Beagley explained that some years ago about the time that Draper became a City, a 3-lot Variance was created which resembled a subdivision but was not called a subdivision. There were conditions placed on that private lane with some improvements. The request is to take one of those original 3-lot variances and divide it. Grant read the 5 requests and 4 recommendations from the Planning Department's Review and Recommendation dated 7-14-88 (copy attached).

Attorney Tom Crowther, legal counsel for the Ovard's, explained briefly the background of the 3 lots and the legal discrepancies the Ovard's have encountered which in turn have inflicted hardships on the property. Mr. Crowther explained that when the home was built it did not totally meet the setback requirements, but it was approved and a building permit issued and this needs an adjustment. An adjustment may or may not be needed on the size of the acre as there is a dispute. Mr. Ovard has a certificate of survey that indicates this is one acre and the City's plat indicates it to be .8482 acres. If this is one acre, there would not need to be a Variance on the size. With respect to other requirements such as expanding the cul-de-sac to 100 feet, requiring fire hydrants and the water being close enough to the back lot, we believe these are hardships for several reasons: (1) They were not required for the building of the home which is what Mr. Ovard is acquiring now. What is there now, as soon as the improvements are completed for which he has

Minutes of the Board of Adjustments Meeting Held 7-20-88

Page 3

paid the money, will be adequate to meet the conditions of that Variance, but it is out of the Ovard's hands to accomplish these things and unfair to require Mr. Ovard the expense of widening the cul-de-sac and putting in the water mains and fire hydrants to benefit the back lot which he does not own and is owned by Mr. Sanders. Mr. Sanders may eventually wish to build on that lot and should bear the expense and burden of doing that. (2) With respect to widening the cul-de-sac which would only be necessary because of the back lot, the hardship is that there is not enough room to expand the cul-de-sac to 100 feet and Mr. Ovard has not physical or monetary means of doing so because other people own those properties and the Ovard's cannot force them to do this. The Ovard's asked the Board to leave in place the conditions that were required when the house was built on the front lot. The Ovard's would like for the improvements to be required whenever the back lot is developed.

Attorney Hollis Hunt explained in detail some the requirements and the reasoning for them. One of the main problems discussed was the 100 foot cul-de-sac needed for the Fire Department to turn a fire truck around. Hollis explained that if the 3 property owners have deeded or given a recorded easement for the existing 70 ft. cul-de-sac, the additional 30 foot radius would be a hardship. If in fact the record owner, and whoever the owner where the diameter of the turn-around is, have not yet given for record the 70 ft. easement, then they could be required to give the 100 ft. The problem however is that 70 feet is not adequate for the public safety vehicle to turn around.

Attorney Hollis Hunt briefly discussed another issue that would make a great difference especially to the Ovard's and in reality to the other property owners, Steven's and Newman's, and that is they have large lots in excess of an acre and if this area follows true to plan they may want to divide their lots in the future and they will be prohibited from doing so because they do not have an adequate turn around.

Mr. Stevens, one of the property owners, explained where his property was situated and stated several reasons why he was opposed to additional footage on his property indicating it would be ugly due to all the expenses. There was much discussion regarding Mr. Stevens' property, legal difficulties between the other two parties and a signed easement mainly for the cul-de-sac. Grant Beagley explained the recommendation in detail and that Mr. Stevens would be the benefactor of the recommendation. There was much discussion regarding this subject. Attorney Hollis Hunt clearly stated that unless the 100 foot turn around is in there, none of the property owners will ever be able to obtain a building permit, subdivide or modify existing lots or anything that will require regulatory approval due to the fact that we, the City, cannot service you with public safety.

Minutes of the Board of Adjustments Meeting Held 7-20-88

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Mr. Joseph Sanders submitted a recent survey map of the lots and explained briefly the court problems with the Ovard's over this.

After much discussion, Floyd Nielsen made a motion to approve the lot division subject to the following: (1) Granting of this variance and the stipulations hereof do not constitute Building permit approval; (2) A certified survey shall be provided and indicate whether the lot is .84 of an acre or in fact 1 acre and the property staked by a registered surveyor to verify property boundaries, setbacks and access right of ways; (3) Professionally drawn site plans and building plans, and required documentation shall be submitted to the City according to the usual procedures for review and approval of building permits; (4) All street improvements are required including 100 foot diameter turn around unless there is a recorded document which indicates and has been technically recorded with the City and is legal and binding for something less than that dated in the year 1979 and if not it would be the 100 feet required as indicated, pavement, water main extension, fire hydrants, drainage system and irrigation system, and must be satisfactorily designed and installed to City standards to the satisfaction of the City engineer except as modified by the Board of Adjustments, prior to issuance of any building permits or execute a completion agreement in an amount estimated by the City for the guaranteed installation of said improvements; (5) Issuance of a building permit is subject to all Stipulations of the Board of Adjustment; Fire Marshall approval; - City Engineer approval of offsite improvements and utilities; all building codes currently in effect, and payment of all applicable fees including; building permit, plan check, tradesman permits and impact. George Westbrook seconded the motion. George Westbrook voted yes; Floyd Nielsen voted yes and Duane Sadler voted yes. Voting was unanimous in the affirmative.

George Westbrook reviewed the applicant request for a Variance to allow a side yard setback from a private right of way to be 6 feet on the west side of the right of way; Title 6, section 6.5.2.D.3.(d), which requires minimum front or side yard setback from right of way to be 30 feet; and to approve a Variance to allow a side yard setback from a private right of way to be 13 feet on the east side of the right of way. Title 6, section 6.5.2.D.3.(d), which requires minimum front or side yard setback from right of ways to be 30 feet. George Westbrook made the motion based on staff recommendations to allow a side yard setback from the private right of way to be 17 feet on both the west and east sides of the right of way which said right of way shall be recorded and shall be 20 feet wide across parcel no. 34-06-277-019 (owned by Joseph D. Sanders), and no less than 30 feet wide from 13800 South across parcels no. 34-06-277-022 & 021 (owned by Layne Newman) to the south end of parcel no. 34-06-277-018. This motion requires a 54 ft. right of way, and the

Minutes of the Board of Adjustments Meeting Held 7-20-88

Page 5

installation of the 20 ft. asphalt roadway (Sander's lot) shall be installed by the property owner of Parcel #34-06-277-018 (Sander's lot) at the time a Building Permit is issued on this Parcel. Floyd Nielsen seconded the motion. Floyd Nielsen voted yes; George Westbrook voted yes; Duane Sadler voted yes. Voting was unanimous in the affirmative.

Floyd Nielsen made a motion to grant a Variance to allow the lot area of the lot owned by Mountain West Savings et.al., parcel ID no. 34-6-277-020 to be .84 acres. Title 6, section 6.5.8.C.1, requires minimum lot area to be 1.00 acre based on staff recommendations to allow the lot area of the lot owned by Mountain West Savings et.al., parcel ID no. 34-6-277--020 to be .84 acres, as per a certified survey. George Westbrook seconded the motion. George Westbrook voted yes; Floyd Nielsen voted yes, Duane Sadler voted yes. Voting was unanimous in the affirmative.

George Westbrook reviewed the request to allow the Variance to waive street improvements. Title 6, section 6.5.2.D.3 (b), which requires "improvements equivalent to...public streets" installed to City standards on private right of ways. George Westbrook made the motion based on staff recommendations to grant a variance to waive curb-gutter and sidewalk only. All other street improvements as enumerated under stipulation no. 4 are * required beginning from the North part of the cul-de-sac back to the beginning or southern boundary of Parcel #34-06-277-018. Floyd Nielsen seconded the motion. George Westbrook voted yes; Floyd Nielsen voted yes; Duane Sadler voted yes. Voting was unanimous in the affirmative.

Floyd Nielsen made a motion to adjourn at 8:30 p.m. George Westbrook seconded the motion.

CITY OF DRAPER
PLANNING DEPARTMENT

| TO: BOARD OF ADJUSTMENTS |
Hearing Date: 7-20-88

REVIEW And RECOMMENDATION
By Tom Spencer
7-14-88

APPLICATION: BOA-88-90
MARTIN SAM OVARD and MOUNTAIN WEST SAVINGS, owners;
13755 So. Shadow Mountain Lane, Draper

REQUEST:

Appeal to the BOARD OF ADJUSTMENT for the following VARIANCE(s).

1. Permit to divide a lot (parcel ID nos. 34-6-277-018, 019 & 020). Title 6, section 6.2.4.C., authorizes that the Board may "permit a redivision of a lot...."
2. Variance to allow a side yard setback from a private right of way to be 6 feet on the west side of the right of way. Title 6, section 6.5.2.D.3.(d), requires minimum front or side yard setback from right of ways to be 30 feet.
3. Variance to allow a side yard setback from a private right of way to be 13 feet on the east side of the right of way. Title 6, section 6.5.2.D.3.(d), requires minimum front or side yard setback from right of ways to be 30 feet.
4. Variance to allow the lot area of the lot owned by Mountain West Savings et.al., parcel ID no. 34-6-277-020 to be .84 acres. Title 6, section 6.5.8.C.1, requires minimum lot area to be 1.00 acre.
5. And, variance to waive street improvements. Title 6, section 6.5.2.D.3.(b), requires "improvements equivalent to...public streets" installed to City standards on private right of ways.

RECOMMENDATION:

The Board may find favorably for applicant only if in the Board's opinion the conditions for such appeal under Section 6.2.3.C. are satisfied.

Should the Board find favorably for the applicant, I recommend the following motions and stipulations as minimum conditions of the variance(s).

1. Motion to permit the redivision of the subject lot and authorize the issuance of building permits, conditional upon the prior satisfaction of the following stipulations;
 - 1) Granting of this variance and the stipulations hereof do not constitute Building permit approval.

- 2) A certified survey shall be provided and the property staked by a registered surveyor to verify property boundaries, setbacks and access right of ways.
- 3) Professionally drawn site plans and building plans, and required documentation shall be submitted to the City according to the usual procedures for review and approval of building permits.
- 4) All street improvements are required including 100 foot diameter turn around, pavement, water main extension, firehydrants, drainage system and irrigation system, and must be satisfactorily designed and installed to City standards to the satisfaction of the City engineer except as modified by the Board Of Adjustments, prior to issuance of any building permits or execute a completion agreement in an amount estimated by the City for the guaranteed installation of said improvements.
- 5) Issuance of a building permit is subject to all Stipulations of the Board Of Adjustment; Fire Marshall approval; City Engineer approval of offsite improvements and utilities; all building codes currently in effect, and payment of all applicable fees including; building permit, plan check, tradesman permits, and impact.

2. Motion to allow a side yard setback from a private right of way to be 17 feet on both the west and east sides of the right of way which said right of way shall be recorded and shall be 20 feet wide across parcel no. 34-06-277-019 (owned by Joseph D. Sanders), and no less than 30 feet wide from 13800 South across parcels no. 34-06-277-022 & -021 (owned by Layne Newman) to the south end of parcel no. 34-06-277-019.

3. Motion to allow the lot area of the lot owned by Mountain West Savings et.al., parcel ID no. 34-6-277-020 to be .84 acres.

4. Motion to grant a variance to waive curb-gutter and sidewalk only. All other street improvements as enumerated under stipulation no. 4) are required.

FACTUAL SUMMARY

1. The following comments refer to application and plan stamp dated June 6, 1988.

2. The property is 1.86 acres located in a RR-43 zone.

3. The applicants desire the above referenced variance(s) to allow the resale of a parcel of land (Mountain West's) smaller than was originally approved by the Board Of Adjustments April 12, 1979. The lot approved and upon which the Board authorized a building permit in 1979 was 2 acres in area. Mountain West apparently accepted a Trust deed on property less than the approved lot area.

4. Currently the property is accessed on an exclusive private right of way that varies in width from 16 feet to 35 feet. The redivision will require an extension of a right of way along the west side of the property to access the north half.

5. The north half will (under current circumstances) be unusable unless the Board also resolves the issues of access right of way and setbacks of the existing structures from the right of way to that lot. There is no reason to permit the lot redivision unless the issues of access to the north half are resolved. The current owner of the north half (Joseph Sanders) does have other alternatives that might be pursued, but, the probability of working out an alternate access is less.

PRIOR ACTION

April 12, 1979: The Board Of Adjustments approved the formation of three building lots reconfigured from 6 parcels. The subject lot under current consideration was approved as 2 acres in area. The Board also authorized three building permits (one on each lot) with certain stipulations regarding street improvements on the private right of way. The right of way has not been fully established nor have the required improvements been completed.

June 10, 1988: Mr. Ovard (the current co-applicant with Mountain West Savings) has executed a completion guarantee to the City for his potential share of the previously required improvements should he acquire the property.

REVIEW:

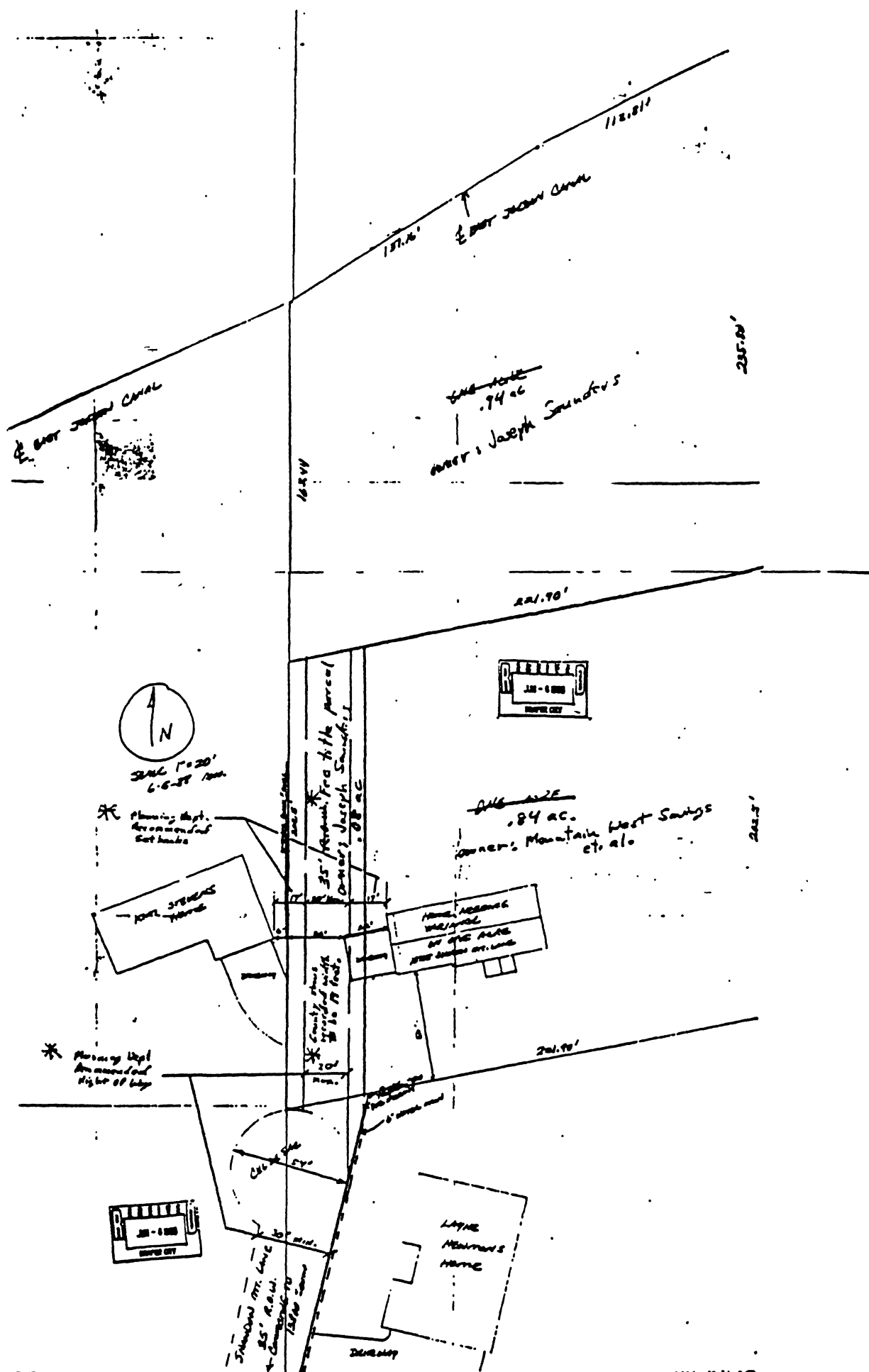
1. The site plan submitted is very incomplete, requested information on the application form has not been provided, i.e. fences, ditches, accurate parcel areas, parcel no. 34-06-277-019, canal easement, etc., and with some information shown being inaccurate such as parcel areas.

2. The original 2 acre lot was an authorized and approved lot. No space needed to meet the ... building requirements may be sold or leased away from such lot or building [6.5.2.B.4].

3. The design, right of way dedication, installation and guarantee for completion of full street improvements are required [6.5.2.D. or 6.5.2.E. as either may be applied].

4. Minimum setbacks from any street right of way (public or private) in a RR-43 zone is 30 feet [6.5.2.D.3.(d) and 6.5.8.D.1 & 3].
5. Minimum diameter of a turn around shall be 100 feet [6.5.2.D.3.(b) & (c).
6. A drainage plan and installation of drainage facilities is required by the City engineer conforming to standards of the Drainage Guide of Draper City and/or as modified and required by the City engineer.
7. The north half, if approved as a lot will more than likely need to extend the water main and install a firehydrant to be within 250 feet of any structure on that parcel.
8. Except for conditions upon which this appeal is requested and the stipulations imposed, the proposed redivision and uses shall otherwise be required to conform to all other minimum development standards of Draper City [6.3., 6.4.2.A.39., and 6.5.].

cc: Martin Sam Ovard, 2316 E. 10375 So., Sandy, 84092
Douglas Malan, Mountain West Savings,
Suite 500, 40 E. South Temple, SLC., 84111
Joseph D. Sanders, 13550 Aldrin, Poway, CA., 92064
Layne J. Newman, 13735 So. Shadow Mountain Lane, Draper, 84020
City Council
Planning Commission
Mayor Charles Hoffman
City Attorney, Hollis Hunt
City Administrator, A. Hatton-Ward
City Engineer, Palmer-Wilding
G. Beagley
file



SE¹ NE¹ SECTION 6 TP 4S R 1E
SOUTH LAKE BASIN & MERIDIAN

50. S.L. Mass A.D
54 Co Seneca Imp Dist of



APPENDIX

ITEM # 22

Utah Code Ann. §10-9-1002

with respect to property boundary lines, and other permissible forms of land use controls.

(2) The legislative body may refuse to approve or renew any plat or subdivision plan, or dedication of any street or other ground, if the deed restrictions, covenants, or similar binding agreements running with the land for the lots or parcels covered by the plat or subdivision prohibit or have the effect of prohibiting reasonably sited and designed solar collectors, clothes-lines, or other energy devices based on renewable resources from being installed on buildings erected on lots or parcels covered by the plat or subdivision.

History: C. 1953, 10-9-901, enacted by L. 1991, ch. 235, § 52.

PART 10

APPEALS AND ENFORCEMENT

10-9-1001. Appeals.

(1) No person may challenge in district court a municipality's land use decisions made under this chapter or under the regulation made under authority of this chapter until that person has exhausted his administrative remedies.

(2) Any person adversely affected by any decision made in the exercise of the provisions of this chapter may file a petition for review of the decision with the district court within 30 days after the local decision is rendered.

(3) The courts shall:

- (a) presume that land use decisions and regulations are valid; and
- (b) determine only whether or not the decision is arbitrary, capricious, or illegal. □

History: C. 1953, 10-9-1001, enacted by L. 1991, ch. 235, § 53; 1992, ch. 30, § 13.

Amendment Notes. — The 1992 amend-

ment, effective April 27, 1992, made grammatical changes in Subsection (1).

COLLATERAL REFERENCES

Am. Jur. 2d. — 83 Am. Jur. 2d Zoning and Planning § 1019 et seq.

C.J.S. — 101A C J S Zoning and Land Planning § 265 et seq.

10-9-1002. Enforcement.

(1) (a) A municipality or any owner of real estate within the municipality in which violations of this chapter or ordinances enacted under the authority of this chapter occur or are about to occur may, in addition to other remedies provided by law, institute:

- (i) injunctions, mandamus, abatement, or any other appropriate actions; or
- (ii) proceedings to prevent, enjoin, abate, or remove the unlawful building, use, or act.

(b) A municipality need only establish the violation to obtain the injunction.

(2) (a) The municipality may enforce the ordinance by withholding building permits.

(b) It is unlawful to erect, construct, reconstruct, alter, or change the use of any building or other structure within a municipality without approval of a building permit.

(c) The municipality may not issue a building permit unless the plans of and for the proposed erection, construction, reconstruction, alteration, or use fully conform to all regulations then in effect.

History: C. 1953, 10-9-1002, enacted by L. 1991, ch. 235, § 54.

COLLATERAL REFERENCES

A.L.R. — Laches as defense in suit by governmental entity to enjoin zoning violation, 73 A.L.R.4th 870.

10-9-1003. Penalties.

(1) The municipal legislative body may, by ordinance, establish civil penalties for violations of any of the provisions of this chapter or of any ordinances adopted under the authority of this chapter.

(2) Violation of any of the provisions of this chapter or of any ordinances adopted under the authority of this chapter are punishable as a class C misdemeanor upon conviction either:

(a) as a class C misdemeanor; or

(b) by imposing the appropriate civil penalty adopted under the authority of this section.

History: C. 1953, 10-9-1003, enacted by L. 1991, ch. 235, § 55; 1992, ch. 23, § 24.

Amendment Notes. — The 1992 amendment, effective July 1, 1992, added Subsection (1), designated Subsection (2), and added "ei-

ther" to precede new Subsections (2)(a) and (2)(b).

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

CHAPTER 10

CITIES OF FIRST AND SECOND CLASS

[REPEALED]

10-10-1 to 10-10-75. Repealed.

Repeals. — Laws 1988, ch. 169, § 66 repeals § 10-10-1, Utah Code Annotated 1953, relating to division of city into wards, effective April 25, 1988.

Sections 10-10-2 to 10-10-8 (Utah Code Annotated 1953; L. 1957, ch. 20, § 1), relating to budget system, were repealed by Laws 1961, ch. 24, § 2.

Sections 10-10-9 to 10-10-22 (Utah Code Annotated 1953; L. 1953, ch. 20, § 1; 1955, ch. 16, § 1; 1955, ch. 17, § 1), relating to the civil

service commission, were repealed by § 10-1-114, enacted by Laws 1977, ch. 48, § 1. For present provisions, see § 10-3-1001 et seq.

Sections 10-10-23 to 10-10-75 (L. 1961, ch. 24, § 1; 1967, ch. 24, § 1; 1971, ch. 14, § 1; 1972 (1st S.S.), ch. 1, §§ 1 to 12; 1973 (1st S.S.), ch. 1, § 1), the Uniform Municipal Fiscal Procedures Act, were repealed by Laws 1979, ch. 31, § 1. For present provisions, see §§ 10-6-101 to 10-6-159.

APPENDIX

ITEM # 23

Utah Code Ann. §78-27-56

COLLATERAL REFERENCES

Utah Law Review. — Utah's Inherent Risks of Skiing Act: Avalanche from Capitol Hill, 1980 Utah L. Rev. 355.

78-27-54. Inherent risks of skiing — Trail boards listing inherent risks and limitations on liability.

Ski area operators shall post trail boards at one or more prominent locations within each ski area which shall include a list of the inherent risks of skiing, and the limitations on liability of ski area operators, as defined in this act.

History: L. 1979, ch. 166, § 4.

Meaning of "this act." — See note following same catchline in notes to § 78-27-51.

78-27-55. Repealed.

Repeals. — Section 78-27-55 (L. 1979, ch. 166, § 5), relating to notice requirements in case of injury arising from the inherent risks of

skiing and the statute of limitations on such action, was repealed by Laws 1980, ch. 43, § 1.

78-27-56. Attorney's fees — Award where action or defense in bad faith — Exceptions.

(1) In civil actions, the court shall award reasonable attorney's fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith, except under Subsection (2).

(2) The court, in its discretion, may award no fees or limited fees against a party under Subsection (1), but only if the court:

(a) finds the party has filed an affidavit of impecuniosity in the action before the court; or

(b) the court enters in the record the reason for not awarding fees under the provisions of Subsection (1).

History: L. 1981, ch. 13, § 1; 1988, ch. 92, § 1.

Amendment Notes. — The 1988 amendment, effective April 25, 1988, inserted the Subsection designation (1); deleted "where not otherwise provided by statute or agreement"

following "civil actions" in Subsection (1); substituted "shall" for "may" following "the court" in Subsection (1); added "except under Subsection (2)" at the end of Subsection (1) and added Subsection (2).

NOTES TO DECISIONS

ANALYSIS

Breach of covenant of good faith by insurer.
Discretion of court.
Essential elements.
Findings.
Frivolous appeal.
Hearing.
State of mind.

"Without merit" and "good faith."
Cited.

Breach of covenant of good faith by insurer.

Proof of a breach of the covenant of good faith and fair dealing by an insurer does not show the bad faith necessary for an award under this section. Canyon Country Store v. Bracey, 781 P.2d 414 (Utah 1989).

APPENDIX

ITEM # 24

Leake v. Cain, 720 P.2d 152 (Colo. 1986).

James LEAKE, Jerry Couch, John Volpi, Daniel Garcia, James Green, and Commerce City, Colorado, Petitioners,

v.

H. Marie CAIN, nka H. Marie Burrows, individually and as natural mother and next friend of the deceased, Jeffrey Mark Cain, and Delores Chase and Jack Chase, individually and as natural parents and next friends of the deceased Jay Chase, Respondents.

No. 85SC66.

Supreme Court of Colorado,
En Banc.

June 9, 1986.

Wrongful death action was brought following death of pedestrians struck by an automobile driven by intoxicated person whom police officers had released in the custody of a younger brother. The trial court granted officers' motions for summary judgment. The Court of Appeals, 695 P.2d 798, reversed and remanded. The Supreme Court, Erickson, J., held that: (1) public-duty rule no longer applies in Colorado; (2) duty of public entity is determined in the same manner as if it were a private party for purposes of determining negligence liability; (3) police officers owed no duty to decedents after having detained intoxicated person at party and calmed him down and then released him to custody of his younger brother, who assured officers that he would drive intoxicated person home; (4) officers' failure to commit intoxicated person under the emergency commitment statute did not give rise to cause of action; and (5) officers exercised discretionary function in determining whether to release intoxicated person, and thus enjoyed qualified immunity.

Reversed and remanded.

Rovira, J., filed a specifically concurring opinion.

1. Municipal Corporations ⇨723

Public-duty rule cannot be used to avoid liability where special relationship exists between public entity and plaintiff.

2. Municipal Corporations ⇨723

Public-duty rule is not applicable where tortious conduct of public entity violates statute or ordinance enacted for benefit of class of persons to which plaintiff belongs.

3. Municipal Corporations ⇨723

Public-duty rule no longer applies in Colorado and, for purposes of determining liability in negligence action, duty of public entity is determined in same manner as if it were a private party; overruling *Miller v. Ouray Electric Light & Power Co.*, 18 Colo.App. 131, 70 P. 447; *People v. Hoag*, 54 Colo. 542, 131 P. 400; and *Richardson v. Belknap*, 73 Colo. 52, 213 P. 335; disapproving *Gold Run, Ltd. v. Board of County Commissioners*, 38 Colo.App. 44, 554 P.2d 317; disagreeing with *Shore v. Town of Stonington*, 187 Conn. 147, 444 A.2d 1379; *Fryman v. JMK/Skewer, Inc.*, 137 Ill.App.3d 611, 92 Ill.Dec. 178, 484 N.E.2d 909; *Cox v. Department of Natural Resources*, 699 S.W.2d 443 (Mo.App.); *O'Connor v. City of New York*, 58 N.Y.2d 184, 447 N.E.2d 33, 460 N.Y.S.2d 485; *Barratt v. Burlingham*, — R.I. —, 492 A.2d 1219; *Chambers-Castanes v. King County*, 100 Wash.2d 275, 669 P.2d 451; *Hage v. Stade*, 304 N.W.2d 283 (Minn.); *Riss v. City of New York*, 22 N.Y.2d 579, 293 N.Y.S.2d 897, 240 N.E.2d 860; and *Motyka v. City of Amsterdam*, 15 N.Y.2d 134, 256 N.Y.S.2d 595, 204 N.E.2d 635.

4. Negligence ⇨2, 10

Where person should reasonably foresee that his act or failure to act will involve unreasonable risk of harm to another, there is duty to avoid that harm; there is no duty to prevent third person from harming another absent special relation between actor and wrongdoer or between actor and victim.

5. Municipal Corporations ⇨747(3)

Police officers had duty to prevent intoxicated person from harming others

while he was handcuffed at party but they discharged their duty by restraining him until he calmed down and their duty began and ended at party and did not extend to period after he was released to his younger brother, who assured officers that he would drive intoxicated person home.

6. Municipal Corporations ⇨747(3)

Police officers who subdued apparently intoxicated person at party and then released him to his younger brother who assured officers that he would drive him home did not assume duty to persons thereafter killed when struck by automobile which intoxicated person was driving, did not induce any reliance on the officers' conduct, and did not create any peril or change the nature of any existing risk.

7. Negligence ⇨6

Breach of statutory duty is actionable only by one who is a member of class which the statute was designed to protect and only where the injury suffered by that person is the type of injury which the statute was enacted to prevent.

8. Municipal Corporations ⇨717(3)

Police officers' failure to make emergency commitment pursuant to statute does not create claim for relief by person who is injured by one who should have allegedly have been committed after officers have released intoxicated person into custody of apparently sober and responsible relative. C.R.S. 25-1-310(1).

9. Municipal Corporations ⇨170

Public official performing discretionary acts within scope of his office enjoys qualified immunity.

10. Chemical Dependents ⇨1

Municipal Corporations ⇨747(3)

Police officer who encounters intoxicated person who is not driving an automobile has no authority to take that person into protective custody unless he has probable cause to believe that the person is clearly dangerous, and officer exercises discretion in determining to do so, and thus

1. There were between thirty and sixty youths at the party.

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enjoys qualified immunity from negligence liability based on his decision. C.R.S. 25-1-310(1).

11. Municipal Corporations ⇨747(3)

Decision of officers as to whether to take intoxicated person into custody or release him to custody of his brother, who promised to drive him home, was discretionary and they were thus protected by official immunity in action brought by relatives of those killed when struck by automobile driven by the intoxicated person. C.R.S. 25-1-310(1).

Hall & Evans, Alan Epstein, Arthur R. Karstaedt, III, Denver, for petitioners.

Leland S. Huttner, P.C., Anne M. Vitek, Denver, for respondents.

ERICKSON, Justice.

In this wrongful death action, respondents seek damages for the deaths of their children, who were killed when they were struck by an automobile driven by Ralph Crowe. The trial court granted petitioners' motion for summary judgment. In *Cain v. Leake*, 695 P.2d 798 (Colo.App.1984), the court of appeals reversed and remanded the case for trial. We granted certiorari, and we now reverse and remand to the court of appeals with directions to reinstate the trial court's order granting summary judgment.

I.

FACTS

The tragic sequence of events leading to the accident in this case is undisputed. On the evening of September 9, 1978, Ralph Crowe, eighteen years of age, attended a large, outdoor party of teenagers in Commerce City.¹ Over the course of three and one-half hours, Crowe drank eight cups of beer and three cups of alcoholic punch.² At approximately 11:30 p.m., Commerce City police officers were dispatched to

2. In his deposition, Crowe stated that the cups held four or five ounces of liquid.

break up the party after a neighbor complained. When the officers arrived at the party, they ordered the teenagers to disperse. Ralph Crowe became disruptive and was handcuffed and detained by the officers. Shortly thereafter, the officers were approached by seventeen-year-old Eddie Crowe, Ralph Crowe's younger brother. Eddie Crowe requested that Ralph be released to him and told the officers that he would drive Ralph home. After noting that Eddie Crowe appeared sober and after checking his driver's license, the officers agreed to permit Ralph Crowe to leave the party with his brother.

Ralph Crowe and another individual left the party as passengers in a vehicle driven by Eddie Crowe. The Crowe brothers took the individual home and then proceeded to a convenience store, where Ralph Crowe purchased some cookies. When the two youths left the store, Ralph Crowe drove the car. He proceeded to a location near Stapleton Airport, where the party which had been broken up by the Commerce City police was to continue. At the new site of the party, the car driven by Ralph Crowe struck six persons on the street, killing two of them (respondents' decedents). Ralph Crowe's blood alcohol content at the time of the accident was .20, well in excess of the legal presumption of intoxication in Colorado.³

Respondents filed a wrongful death action⁴ in the Denver District Court against Ralph Crowe, James Crowe (the father of Ralph Crowe), the five Commerce City police officers who responded to the party which Ralph Crowe attended on September 9, 1978, and the City of Commerce City.⁵ Respondents alleged that the police officers

had reason to believe that Ralph Crowe was intoxicated at the time he was detained, and that they negligently failed to take him into custody. Respondents further alleged that the officers were negligent in releasing Ralph Crowe to his younger brother, that it was foreseeable that Ralph Crowe would drive an automobile in an intoxicated condition, and that injury to the public was a foreseeable consequence of the officers' failure to arrest Ralph Crowe.

The police officers and the City of Commerce City (petitioners) filed a motion for summary judgment, contending that the duty of the officers to enforce the law was a public duty, and that the officers' negligence, if any, was not actionable because they did not owe a special duty to the respondents' decedents. After a hearing, the trial court granted petitioners' motion for summary judgment, stating that:

in order for one to recover on a tort claim of negligence brought against a public official by an individual member of the public, they are required to prove by a preponderance of the evidence ... that the defendant owes a special duty to the plaintiff and that [the] duty was breached, resulting in damage or injury.

The court concluded that the Commerce City police officers, in exercising their discretion to release Ralph Crowe, did not owe a special duty to the respondents' decedents.

The court of appeals reversed and held that petitioners were not immune from suit. *Cain v. Leake*, 695 P.2d at 798. In denying immunity, the court of appeals reasoned that (1) the decision of the police officers to release Ralph Crowe was not a

accident, Ralph Crowe's blood was tested for alcohol content. The test indicated .20 grams of alcohol per one hundred milliliters of blood.

4. §§ 13-21-201 to -204, 6 C.R.S. (1973 & 1985 Supp.).

5. James Crowe was subsequently dismissed from the action by stipulation between the parties. Ralph Crowe is not a party to this appeal.

discretionary act and (2) denying immunity would not unduly interfere with the governmental function. The trial court's reliance upon the public duty/special duty distinction in granting summary judgment was not addressed by the court of appeals.

II.

DUTY

Nothing is more basic to tort law than the requirement that, in order to recover for the negligent conduct of another, the plaintiff must establish (1) the existence of a duty owed by the defendant to the plaintiff, (2) breach of that duty, (3) which actually and proximately caused (4) damage to the plaintiff. *Franklin v. Wilson*, 161 Colo. 334, 422 P.2d 51 (1966); *W. Keeton, D. Dobbs, R. Keeton & D. Owen, Prosser and Keeton on the Law of Torts* 164-65 (5th ed. 1984). This case focuses on the first element. We must decide whether the Commerce City police officers owed a duty to respondents' decedents to take Ralph Crowe into custody.

6. The public duty doctrine was apparently accepted by most state courts in the late nineteenth and early twentieth centuries. The leading treatise on tort law during the era stated:

The rule of official responsibility, then, appears to be this: That if the duty which the official authority imposes upon an officer is a duty to the public, a failure to perform it, or an inadequate or erroneous performance, must be a public, not an individual injury, and must be redressed, if at all, in some form of public prosecution. On the other hand, if the duty is a duty to the individual, then a neglect to perform it, or to perform it properly, is an individual wrong, and may support an individual action for damages.

T. Cooley, *A Treatise on the Law of Torts* 379 (1879). The author provides an example of particular relevance to this case:

The rule stated does not depend at all on the grade of the office, but exclusively upon the nature of the duty. This may be shown by taking as an illustration the case of the policeman; one of the lowest grade of public officers. His duty is to serve criminal warrants; to arrest persons who commit offenses in his view, to bring night-walkers to account, and to perform various offices of similar nature. Within his beat he should watch the premises of individuals, and protect them against burglaries and arsons. But suppose he goes to sleep on his beat, and while thus off duty a

A.

The Public Duty Doctrine

In granting petitioners' motion for summary judgment, the trial court relied upon what has become known as the "public duty doctrine." The origin of the public duty doctrine can be traced to *South v. Maryland*, 59 U.S. (18 How.) 396, 15 L.Ed. 433 (1855). In *South*, the plaintiff alleged that he was kidnapped and held for a period of four days and released only when he secured the ransom money demanded by his kidnappers. He also asserted that the local sheriff knew that he had been unlawfully detained yet did nothing to obtain his release. The plaintiff sued the sheriff for refusing to enforce the laws of the state and for failing to protect the plaintiff. The circuit court awarded plaintiff a substantial judgment. The Supreme Court reversed and declared that a sheriff's duty to keep the peace was "a public duty, for neglect of which he is amenable to the public, and punishable by indictment only." 59 U.S. (18 How.) at 403.⁶

robbery is committed or a house burned down, either of which might have been prevented had he been vigilant,—who shall bring him to account for this neglect of duty? Not the individual who has suffered from the crime, certainly, for the officer was not his policeman; was not hired by him, paid by him, or controlled by him; and consequently owed to him no legal duty. The duty imposed upon the officer was a duty to the public—to the State, of which the individual sufferer was only a fractional part, and incapable as such of enforcing obligations which were not individual but general. If a policeman fails to guard the premises of a citizen with due vigilance, the neglect is a breach of duty of exactly the same sort as when, finding the same citizen indulging in riotous conduct, he fails to arrest him; and if the citizen could sue him for the one neglect, he could also for the other.

Id. at 381 (footnote omitted). The public duty rule was repeated in subsequent editions of the treatise without criticism. See T. Cooley, *A Treatise on the Law of Torts* 446 (2d ed. 1888); 2 T. Cooley, *A Treatise on the Law of Torts* 756-57 (3d ed. 1906); 2 T. Cooley, *A Treatise on the Law of Torts* 385-86 (4th ed. 1932). See also W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on the Law of Torts* 1049 (5th ed. 1984).

1. *The Colorado Cases*

The public duty rule first surfaced in Colorado in *Miller v. Ouray Electric Light & Power Co.*, 18 Colo.App. 131, 70 P. 447 (1902). The plaintiff's decedent in *Miller* died while he was incarcerated in the Ouray County jail. The plaintiff alleged that defective wiring in the jail caused a fire which resulted in the death. Plaintiff sought to hold the county commissioners liable for the death based upon a statute that required the county commissioners to inspect the county jail and to correct irregularities. The court of appeals held that the statute created only a public duty to insure the safety of the jail, not an individual duty to any person who was incarcerated in the jail. The opinion stated that the obligation of the county commissioners was "an official duty, owing to the public by virtue of their office, and for a breach of it the statutes specifically provide a remedy by suit upon their official bonds." 18 Colo. App. at 138, 70 P. at 449. Without the protection afforded by the public duty rule, the court concluded, no person would be willing to serve as a public officer because of the fear of exposure to liability.

In *People v. Hoag*, 54 Colo. 542, 131 P. 400 (1913), we addressed the public duty rule when the plaintiff, the only newspaper in Prowers County, sued the county clerk for refusing to publish a list of candidates before an election. The plaintiff relied upon a statute requiring the county clerk to publish such a list and alleged that it suffered monetary damages as a result of the clerk's refusal to publish the list. The plaintiff conceded that the statute imposed a public duty but argued that the statute also imposed a duty to the publishing company, which suffered a special injury by virtue of the clerk's failure to employ the newspaper's services. We rejected the plaintiff's contention and affirmed the trial court's dismissal of the action against the clerk, stating:

The statute requiring the clerk to publish the list of nominations was clearly intended for the benefit of the public, and not for the benefit of newspapers.

The benefit to the latter was only incidental. Certainly the law was not passed with the idea of benefiting publishers. So that the duty imposed was purely a public one. When the duty imposed upon an officer is one to the public only, its non-performance must be a public, and not an individual injury, and must be redressed in a public prosecution of some kind, if at all. 2 Cooley on Torts, (3d Ed.) 756.

54 Colo. at 544, 131 P. at 401. The court distinguished cases outside of Colorado holding public officials liable where the plaintiff had parted with consideration in reliance on an official's representation or where the duty of the official was for the benefit of an identifiable class of persons to which the plaintiff belonged. *Id.*

We subsequently held that the duty of a county to maintain its highways is a public duty, and that any breach of the duty is not actionable by a person who suffers damages as a result of negligent highway design and maintenance. *Richardson v. Belknap*, 73 Colo. 52, 213 P. 335 (1923). The court thus reaffirmed the public duty rule set forth in *Miller v. Ouray Electric Light & Power Co.* and *People v. Hoag*. In *Richardson*, the court added a new rationale for the rule, stating that since counties were not liable for tortious conduct, it would be inconsistent to impose liability on their officers.

More recently, we discussed the public duty rule in the context of a claim against the Industrial Commission by an individual who was injured when a machine in the plant where he was employed malfunctioned. *Quintano v. Industrial Commission*, 178 Colo. 131, 495 P.2d 1137 (1972). The plaintiff relied on a statute charging the Industrial Commission with the responsibility of inspecting factories to protect employees and guests against defective or dangerous machinery. After holding that the Industrial Commission was protected by sovereign immunity, we concluded that the commission members were not individually liable. The issue was whether "the statutory duty is public or is for the action-

able benefit of an individual." *Id.* at 135, 495 P.2d at 1138. We observed that the statutes in *Miller*, *Hoag*, and *Richardson* clearly imposed duties for the benefit of the public generally and not for that of particular individuals or classes. In contrast, the statute here under consideration specifically designates the classes of individuals for whose benefit it is intended, viz.: employees and guests. Under [the public duty rule] it might be said that this duty was created for the benefit of the petitioner and that, therefore, non-feasance by the individual members of the commission subjects them to liability.

178 Colo. at 135, 495 P.2d at 1138-39. Relying on *Evanis v. Board of County Commissioners*, 174 Colo. 97, 482 P.2d 968 (1971), we said that in the area of sovereign immunity, courts should not attempt to infer the General Assembly's intent as to whether a statute may be relied upon as a source of duty in a civil action for damages. Because the statute in question did not authorize a private cause of action for its violation, we upheld the trial court's dismissal of the complaint.

In refusing to resolve the case on the basis of the public duty rule, *Quintano* left the viability of the doctrine in this state in considerable doubt. Predictably, subsequent decisions by the court of appeals reached opposite conclusions as to the continued validity of the doctrine in Colorado. *Compare Gold Run, Ltd. v. Board of County Commissioners*, 38 Colo.App. 44, 554 P.2d 317 (1976) (affirming dismissal of action on the basis of public duty rule) with

Martinez v. City of Lakewood, 655 P.2d 1388 (Colo.App.1982) (reversing summary judgment that was premised upon the public duty rule). In *Martinez*, the court of appeals stated:

[T]he concept of public duty, i.e., a general duty versus a special duty "is [merely] a function of municipal sovereign immunity and not a traditional negligence concept which has a meaning apart from the governmental setting. Accordingly, its efficacy is dependent on the continuing validity of the doctrine of sovereign immunity." *Commercial Carrier Corp. v. Indian River* [371 So.2d 1010 (Fla. 1979)]. The concept of a public duty cannot stand either with the enactment of the statute abrogating sovereign immunity, nor in instances where there is a common law duty of a public entity to the plaintiff. As noted in numerous opinions from various jurisdictions, application of the public duty—special duty dichotomy results in "a duty to none where there is a duty to all." *Stewart v. Schmieder*, 386 So.2d 1351 (La.1980); *Commercial Carrier Corp. v. Indian River*, [371 So.2d at 1010]; *Adams v. Alaska*, 555 P.2d 235 (Alaska 1976).

655 P.2d at 1390. In view of the trial court's reliance on the public duty rule in granting summary judgment in this case, and because of the conflicting decisions by the court of appeals in *Gold Run* and *Martinez*, we are squarely confronted with the question of whether the public duty rule is still good law in Colorado.⁷

granted on that basis. Respondents, in turn, filed a brief in opposition to summary judgment, contending that the public duty rule was no longer good law. As we have noted, the trial court relied upon the public duty rule in granting summary judgment. See *supra* text pp. 154, 155.

Respondents appealed the trial court's ruling to the court of appeals, where they again argued that the public duty rule was an improper basis for granting summary judgment. Thus, although the trial court awarded summary judgment on the basis of the public duty rule and although that rationale was contested on appeal, the court of appeals inexplicably did not address the issue. Justice Rovira correctly points out that the public duty rule was not briefed in this

7. In his special concurrence, Justice Rovira asserts that the validity of the public duty rule need not and should not be addressed in this case. He argues first that the issue was not properly identified when we granted certiorari and second that the issue was not briefed by the parties in this court. In granting certiorari, we phrased the duty issue in the broadest possible language: "Whether the defendants owed a duty to the plaintiffs and their decedents such that the defendants' failure to protect them is actionable." The public duty rule has been central to this case since the petitioners filed their motion for summary judgment in the trial court. In support of their motion, petitioners submitted a brief which fully discussed the public duty rule and argued that summary judgment should be

2. Abolition of the Public Duty Rule

The public duty rule is probably followed by the majority of courts. See, e.g., *Shore v. Town of Stonington*, 187 Conn. 147, 444 A.2d 1379 (1982); *Fryman v. JMK/Skewer, Inc.*, 137 Ill.App.3d 611, 92 Ill.Dec. 178; 484 N.E.2d 909 (1985); *Cox v. Department of Natural Resources*, 699 S.W.2d 443 (Mo. App.1985); *O'Connor v. City of New York*, 58 N.Y.2d 184, 447 N.E.2d 33, 460 N.Y.S.2d 485 (1983); *Barratt v. Burlingham*, — R.I. —, 492 A.2d 1219 (1985); *Chambers-Castanes v. King County*, 100 Wash.2d 275, 669 P.2d 451 (1983); Annot., *Modern Status of Rule Excusing Governmental Unit from Tort Liability on Theory that Only General, Not Particular, Duty was Owed Under Circumstances*, 38 A.L.R. 4th 1194 (1985). The two principal rationales offered in support of the doctrine are (1) protection against excessive governmental liability and (2) the need to prevent hindrance of the governing process. *J & B Development Co., Inc. v. King County*, 100 Wash.2d 299, 669 P.2d 468 (1983); *Miller v. Ouray Electric Light & Power Co.*, 18 Colo.App. at 131, 70 P. at 447. However, a growing number of courts have concluded that the underlying purposes of the public duty rule are better served by the application of conventional tort principles and the protection afforded by statutes governing sovereign immunity than by a rule that precludes a finding of an actionable duty on the basis of the defendant's status as a public entity. *Adams v. State*, 555 P.2d 235 (Alaska 1976); *Ryan v. State*, 134 Ariz. 308, 656 P.2d 597 (1982); *Com-*

court. During oral argument, petitioners maintained, contrary to their position in the trial court, that the public duty rule was not at issue. In our view, however, it is necessary to address the public duty rule because it was the basis of the trial court's ruling and because it fell within the issue that was formulated for review on certiorari.

Judicial economy favors an immediate resolution of the issue which Justice Rovira would have us postpone until a later date. As we have pointed out, our last decision involving the public duty rule, *Quintano v. Industrial Commission*, 178 Colo. 131, 495 P.2d 1137 (1972), cast doubt on the viability of the doctrine in this state. Two court of appeals' decisions since *Quintano* have reached opposite conclusions re-

mercial *Carrier Corp. v. Indian River County*, 371 So.2d 1010 (Fla.1979); *Wilson v. Nepstad*, 282 N.W.2d 664 (Iowa 1979); *Schear v. Board of County Commissioners of Bernalillo County*, 101 N.M. 671, 687 P.2d 728 (1984); *Brennan v. Eugene*, 285 Or. 401, 591 P.2d 719 (1979); *Coffey v. Milwaukee*, 74 Wis.2d 526, 247 N.W.2d 132 (1976). Significantly, the rule has been repudiated by two courts whose earlier decisions are frequently cited in support of its continued validity. See *Ryan v. State*, 134 Ariz. at 308, 656 P.2d at 597 (overruling *Massengill v. Yuma*, 104 Ariz. 518, 456 P.2d 376 (1969)); *Commercial Carrier Corp. v. Indian River County*, 371 So.2d 1010 (Fla.1979) (overruling *Modlin v. City of Miami Beach*, 201 So.2d 70 (Fla.1967)). The public duty rule has also been condemned by commentators and by judges dissenting to opinions upholding the doctrine. *Chambers-Castanes*, 100 Wash.2d at 275, 669 P.2d at 451, 460 (Utter, J., concurring); *Hage v. Stade*, 304 N.W.2d 283, 288 (Minn.1981) (Scott, J., dissenting); *Riss v. City of New York*, 22 N.Y.2d 579, 293 N.Y.S.2d 897, 899, 240 N.E.2d 860, 861 (1968) (Keating, J., dissenting); *Motyka v. City of Amsterdam*, 15 N.Y.2d 134, 256 N.Y.S.2d 595, 598, 204 N.E.2d 635, 637 (1965) (Desmond, C.J., dissenting); 1A C. Antieau, *Municipal Corporation Law* § 11.74 (1986); Note, *State Tort Liability for Negligent Fire Inspection*, 13 Colum. J.L. & Soc. Probs. 303 (1977); Note, *Court of Claims Act*, 58 St. John's L.Rev. 199 (1983).

garding the continued validity of the rule. In this very case, the trial court expressed some hesitation in ordering summary judgment on the basis of the public duty rule. In view of the inroads on sovereign immunity and the attendant increase in the number of lawsuits against public officials and governmental entities, we believe that the bench and bar are entitled to clear guidance on an issue which has in the past substantially controlled litigation involving tort claims against public entities and their employees. We are persuaded that this case provides the appropriate factual and legal basis for abolishing the public duty rule and substituting the more conceptually satisfactory conventional tort analysis. See *infra* text p. 160.

[1, 2] Even where the rule still prevails, its scope has been substantially narrowed by the creation of significant exceptions. For example, the public duty rule cannot be used to avoid liability where a "special relationship" exists between the public entity and the plaintiff. *Campbell v. Bellevue*, 85 Wash.2d 1, 530 P.2d 234 (1975) (city electrical inspector knew of nonconforming underwater lighting system and of extreme danger to residence near stream but failed to disconnect the lighting system). Nor is the rule applicable where the tortious conduct of the public entity violated a statute or ordinance enacted for the benefit of the class of persons to which the plaintiff belonged. Compare *Irwin v. Town of Ware*, 392 Mass. 745, 467 N.E.2d 1292 (1984) (statutes created duty on the part of police officer to arrest intoxicated driver for the benefit of the motoring public) with *Dinsky v. Town of Framingham*, 386 Mass. 801, 438 N.E.2d 51 (1982) (building code did not create special duty to individual property owners upon which an action for negligent issuance of building permits could be predicated).

The major criticism leveled at the public duty rule is its harsh effect on plaintiffs who would be entitled to recover for their injuries but for the public status of the tortfeasor. A duty to all, it has been said, is a duty to none. *Commercial Carrier*, 371 So.2d at 1010; *Adams*, 555 P.2d at 235. Courts that have abandoned the rule have sometimes relied on provisions in statutes abrogating sovereign immunity stating that public entities are to be treated like private parties for purposes of determining liability. E.g., *Schear v. Board of County Commissioners of Bernalillo County*, 687 P.2d at 728. Cf. § 24-10-107, 10 C.R.S. (1982) ("Where sovereign immunity is abrogated as a defense under section 24-10-106, liability of the public entity shall be determined in the same manner as if the public entity were a private person."). In apparent contravention of these statutes, the public duty rule makes the public sta-

tus of the defendant a crucial factor in determining liability. Courts rejecting the public duty rule reason that proof of one of the elements in an action for negligence should not be made more difficult simply because the defendant is a public entity.

It has also been argued that the same rationales that were used to justify absolute sovereign immunity—the financial impact on government and interference with governmental operations—are asserted in defense of the public duty rule. *Ryan*, 134 Ariz. at 308, 656 P.2d at 597; *Chambers-Castanes*, 100 Wash.2d at 275, 669 P.2d at 451, 460 (Utter, J., concurring). Those justifications were rejected with the abrogation of absolute sovereign immunity and should likewise be rejected as a policy basis for the public duty rule. The argument is particularly compelling if the public duty doctrine is seen as a function of sovereign immunity, rather than as an independent concept of negligence. See *Commercial Carrier*, 371 So.2d at 1010.

Perhaps the most persuasive reason for the abandonment of the public duty rule is that it creates needless confusion in the law and results in uneven and inequitable results in practice. *Ryan*, 134 Ariz. at 308; 656 P.2d at 597; *J & B Development Co., Inc. v. King County*, 100 Wash.2d 299, 669 P.2d 468, 474 (1983) (Utter, J. concurring); Note, *State Tort Liability for Negligent Fire Inspection*, 13 Colum.J.L. & Soc. Problems 303 (1977); Note, *Court of Claims Act*, 58 St. John's L.Rev. 199 (1983). As the Supreme Court of Arizona said in abandoning the public duty rule, "[w]e shall no longer engage in the speculative exercise of determining whether the tort-feasor has a general duty to the injured party, which spells no recovery, or if he had a specific individual duty which means recovery." *Ryan*, 656 P.2d at 597. Instead, the court stated, "the parameters of duty owed by the state will ordinarily be coextensive with those owed by others." *Id.*⁸

8. The Supreme Court of Washington has recently considered and rejected an attempt to discard the public duty doctrine. *Chambers-Castanes*,

100 Wash.2d at 275, 669 P.2d at 451. See also *J & B Development Co., Inc. v. King County*, 100 Wash.2d at 299, 669 P.2d at 468. In addition to

In our view, the problems associated with the public duty rule far outweigh the benefits of the rule, which are more properly realized by other means. The fear of excessive governmental liability is largely baseless in view of the fact that a plaintiff seeking damages for tortious conduct against a public entity must establish the existence of a duty using conventional tort principles, such as foreseeability, in the same manner as if the defendant were a private entity. *City of Kotzebue v. McLean*, 702 P.2d 1309 (Alaska 1985). Another hurdle the plaintiff must surmount in order to recover is proof of proximate cause. The traditional burdens of proof tied to tort law adequately limit governmental liability without resort to the artificial distinctions engendered by the public duty rule.

Nor do we believe that the abolition of the public duty rule will unduly interfere with governmental operations. By this decision, we create no new cause of action which would make a public official hesitant in the performance of his duties. Public officials will continue to enjoy qualified immunity. See *Trimble v. City and County of Denver*, 697 P.2d 716 (Colo.1985).

Finally, whether or not the public duty rule is a function of sovereign immunity, the effect of the rule is identical to that of sovereign immunity. Under both doctrines, the existence of liability depends entirely upon the public status of the defendant. The doctrine of sovereign immunity was abrogated in *Evans v. Board of County Commissioners*, 174 Colo. 97, 482 P.2d 968 (1971). Nothing in the provisions of the statutes dealing with governmental immunity, sections 24-10-101 to -118, 10 C.R.S. (1982 & 1985 Supp.), leads us to

the traditional rationales underlying the public duty doctrine, the Washington court discussed the use of the rule as a focusing device to determine whether a duty is owed to a specific individual or merely to the public at large. *Id.* The public duty rule serves to avoid the conclusion that every duty owed to the public is a duty to the individual members of the public. The court rejected the contention that the public duty doctrine is merely a function of sovereign immunity and declared that the abrogation of

conclude that the General Assembly intended to reintroduce a concept so closely related to absolute sovereign immunity. Quite the contrary, section 24-10-107 instructs courts to resolve the plaintiff's claim without regard to the public status of the defendant.

[3] Accordingly, we reject the public duty rule in Colorado. Henceforth, for purposes of determining liability in a negligence action, the duty of a public entity shall be determined in the same manner as if it were a private party.

B.

Duty of the Commerce City Police Officers

Having discarded the concept that the existence and extent of the police officers' duty is dependent on status, we now analyze the duty question by applying conventional tort principles.

1. *The Special Relation Rule*

[4] Where a person should reasonably foresee that his act, or failure to act, will involve an unreasonable risk of harm to another, there is a duty to avoid such harm. *Metropolitan Gas Repair Service, Inc. v. Kulik*, 621 P.2d 313 (Colo.1981); *Mile High Fence Co. v. Radovich*, 175 Colo. 537, 489 P.2d 308 (Colo.1971). However, there is no duty to prevent a third person from harming another, absent a special relation between the actor and the wrongdoer or between the actor and the victim. Restatement (Second) of Torts § 315 (1965).

Here, the Commerce City police officers were summoned to a party of teenagers where alcoholic beverages were being

sovereign immunity was not intended to create new claims for relief.

We are unpersuaded that the public duty rule is necessary as a focusing device. The existence of an actionable duty can, in our view, be more effectively determined by resort to the familiar principles of foreseeability and by balancing the social utility of the defendant's conduct against the risk of harm resulting from such conduct. See *infra* text p. 160.

served. Ralph Crowe was handcuffed after he attempted to interfere with the officers' efforts to disperse the group attending the party. The officers in this case did not release an intoxicated person knowing that he would thereafter operate an automobile. Instead, the officers permitted Ralph Crowe's younger brother, Eddie Crowe, who appeared sober, to drive Ralph Crowe home.

[5, 6] While the officers obviously had a duty to prevent Ralph Crowe from harming others while he was handcuffed at the party, see Restatement (Second) of Torts § 319 (1965) (duty of those in charge of person having dangerous propensities), the officers discharged their duty by restraining Crowe until he calmed down. The officers' duty, as it related to the conduct of Ralph Crowe, began and ended at the party. It did not extend to the period after Ralph Crowe was released to his younger brother, who assured the officers that he would drive Ralph Crowe home.⁹ The officers did not assume a duty to the respondents' decedents, induce reliance, or create a peril or change the nature of an already existing risk. See *Jackson v. Clements*, 146 Cal. App.3d 983, 194 Cal.Rptr. 553 (1983).¹⁰

In support of their contention that a special relationship existed between the Commerce City police officers and the respon-

9. The record also reflects that Ralph Crowe promised the officers that he would allow his brother to take him home.

10. In *Jackson v. Clements*, police officers investigated a party where alcoholic beverages were being served to minors. Although the officers knew that two of the minors were intoxicated and that each intended to drive, the officers failed to prevent the minors from driving. The plaintiffs, heirs and parents of three persons who were killed when the two minors were involved in a collision after leaving the party, sued the police officers and their employer, the county. The complaints asserted that, once the officers undertook to investigate the party and observed that the minors were intoxicated, the officers had a duty to prevent the minors from driving. Plaintiffs contended that a special relationship was created between the officers and the minors when the minors acted in a manner suggesting that they were too intoxicated to drive, which was evidenced by the detention of

decedents' decedents, respondents cite *Irwin v. Ware*, 392 Mass. 745, 467 N.E.2d 1292 (1984). In *Irwin*, police officers stopped a car suspecting that the driver was intoxicated. Plaintiffs alleged that the officers negligently failed to arrest the driver, and that plaintiffs were entitled to recover for injuries sustained when the driver collided with the plaintiffs' car after he was released by the police. The Supreme Judicial Court of Massachusetts held that "there is a special relationship between a police officer who negligently fails to remove an intoxicated motorist from the highway, and a member of the public who suffers injury as a result of that failure." 467 N.E.2d at 1303-04. *Contra Harris v. Smith*, 157 Cal.App.3d 100, 203 Cal.Rptr. 541 (1984). In finding a special relationship, the court relied on Massachusetts statutes relating to a police officer's authority to arrest intoxicated persons operating automobiles. The court determined that the statutes indicated a legislative intent to protect intoxicated persons and other members of the motoring public and concluded that the foreseeable consequences of releasing an intoxicated driver were all too obvious.

Quite apart from the question of whether this court would recognize a special relationship under the circumstances of *Irwin v. Ware*, the case is readily distinguishable

one minor. The trial court dismissed the complaints, and the court of appeal affirmed. Distinguishing prior cases that found a special relationship between state personnel and a wrongdoer, the court of appeal stated that in the instant case there was no allegation of an ongoing custodial relationship between the officers and the intoxicated minors. Accordingly, the court concluded that a special relationship did not exist between the police officers and the minors. The court then considered and rejected plaintiffs' contention that a special relationship existed between the officers and one of the victims, who was a passenger in one minor's car at the time of the collision. The court said that such a relationship could not be found because the police (1) did not voluntarily assume a duty of care toward the injured parties, (2) did not induce the victims to rely on a promise that the police would protect them, and (3) did not create the peril or change the nature of an existing risk against which the victims relied upon the police for protection.

from this case. Here, the Commerce City police officers did not contact Ralph Crowe while he was driving an automobile. During their entire encounter with Ralph Crowe, the officers had no reason to believe that he had been driving under the influence of alcohol or that he intended to do so in the immediate future. In fact, the officers released Ralph Crowe to his younger brother only after receiving assurances from both men that Eddie Crowe would drive Ralph Crowe home. The potential harm resulting from the release of Ralph Crowe was far less foreseeable than the release of the intoxicated driver in *Irwin v. Ware*.

2. The Emergency Commitment Statute

Respondents rely on section 25-1-310(1), 11 C.R.S. (1982), as a source of the officers' duty in this case. The statute provides:

Emergency commitment. (1) When any person is intoxicated or incapacitated by alcohol and clearly dangerous to the health and safety of himself or others, such person shall be taken into protective custody by law enforcement authorities or an emergency service patrol, acting with probable cause, and placed in an approved treatment facility. If no such facilities are available, he may be detained in an emergency medical facility or jail, but only for so long as may be necessary to prevent injury to himself or others or to prevent a breach of the peace. A law enforcement officer or emergency service patrolman, in detaining the person, is taking him into protective custody. In so doing, the detaining officer may protect himself by reasonable methods but shall make every reasonable effort to protect the detainee's health and safety. A taking into protective custody under this section is not an arrest, and no entry or other record shall be made to indicate that the person has been arrested or charged with a crime. Law enforcement or emergency service personnel who act in compliance with this section are acting in the course of their official duties and are not criminally or civilly liable therefor. Nothing in this

subsection (1) shall preclude an intoxicated or incapacitated person who is not dangerous to the health and safety of himself or others from being assisted to his home or like location by the law enforcement officer or emergency service patrolmen.

Id. Respondents contend that under section 25-1-310(1), the Commerce City police officers had a duty to take Ralph Crowe into "protective custody" or to escort him to his home. The respondents claim the officers were guilty of a breach of duty in releasing Ralph Crowe to his younger brother.

[7] A duty of care may be created by legislative enactment. *Dare v. Sobule*, 674 P.2d 960 (Colo.1984). However, the breach of a statutory duty is actionable only by one who is a member of the class the statute was designed to protect, and only where the injury suffered by such person is the type of injury which the statute was enacted to prevent.

[8] Section 25-1-310(1) was enacted as part of a comprehensive legislative scheme dealing with alcoholism and intoxication treatment. See §§ 25-1-301 to -316, 11 C.R.S. (1982). The legislative declaration preceding the statutory scheme states:

(1) It is the policy of this state that alcoholics and intoxicated persons may not be subjected to criminal prosecution because of their consumption of alcoholic beverages but rather should be afforded a continuum of treatment in order that they may lead normal lives as productive members of society. The general assembly hereby finds and declares that alcoholism and intoxication are matters of statewide concern.

§ 25-1-301(1). We recognize that a cursory reading of the emergency commitment statute may suggest that the statute was intended to protect members of the public against intoxicated persons who appear "clearly dangerous." However, in our view, the General Assembly did not intend to create a claim for relief against police officers who, in their discretion, release an

intoxicated person into the "custody" of an apparently sober and responsible relative.

Since we conclude that the respondents' decedents were not included within the class of persons that section 25-1-310(1) was designed to protect, the respondents may not rely on the statute as a source of the officers' duty in this case.

The respondents in this case have failed to establish that a duty was owed to their decedents by the Commerce City police officers. Therefore, they have not established a prima facie case of negligence. Although the trial court granted summary judgment on the basis of the public duty rule, which we have repudiated in this decision, the order of summary judgment was proper since respondents failed to establish a legally cognizable duty. Accordingly, the court of appeals erred in vacating the trial court's order of summary judgment.

Our conclusion that the Commerce City police officers did not owe a duty to respondents' decedents under the facts of this case is the basis for our decision reversing the court of appeals. However, it is necessary to address the issue of immunity because the court of appeals erroneously narrowed the scope of official immunity afforded police officers.

III.

IMMUNITY

[9] A public official performing discretionary acts within the scope of his office enjoys qualified immunity. *Trimble v. City and County of Denver*, 697 P.2d 716 (Colo.1985). He is protected against civil liability if his conduct is not willful, malicious or intended to cause harm. *Id.* The court of appeals held that the Commerce City police officers were not protected by official immunity because the decision to take Ralph Crowe into custody was not discretionary. We disagree.

The court of appeals relied on *Irwin v. Ware*, 392 Mass. 745, 467 N.E.2d 1292 (1984). We have already determined that *Irwin* is inapposite for purposes of determining the duty of the Commerce City po-

lice officers in this case. *Irwin* is also unpersuasive authority for the conclusion that the officers were not shielded from civil damages by official immunity.

In *Irwin*, the court held that the decision of a police officer to arrest a driver he knows or reasonably should know is intoxicated is not a discretionary act. The court said:

No reasonable basis exists for arguing that a police officer is making a policy or planning judgment in deciding whether to remove from the roadways a driver who he knows is intoxicated. Rather, the policy and planning decision to remove such drivers has already been made by the Legislature.

Id. at 467 N.E.2d 1299. Relying on *Irwin*, the court of appeals concluded: "The same reasoning applies to a decision by a police officer to release a disputatious, intoxicated person from custody, and to send that person onto the roadway under the ostensible supervision of a younger brother as caretaker." *Cain v. Leake*, 695 P.2d at 800-01.

This case does not involve the question of whether a police officer's decision to arrest a person suspected of driving under the influence of alcohol is a discretionary decision. Although we express no opinion on the issue, we note that at least one other court has taken a position contrary to *Irwin v. Ware*. See *Everton v. Willard*, 468 So.2d 936 (Fla.1985) (the decision to arrest is a basic judgmental or discretionary governmental function that is immune from suit).

[10] Assuming that an officer's decision to arrest an intoxicated driver is not a discretionary decision, it hardly follows that the decision whether to take an intoxicated person into protective custody under the emergency commitment statute is a nondiscretionary judgment. A person who operates an automobile under the influence of alcohol violates section 42-4-1202, 17 C.R.S. (1984). When a police officer stops a person he knows, or reasonably should know, is driving under the influence, the

officer arguably has no discretion but to arrest the suspect. By contrast, an officer who encounters an intoxicated person who is not driving has no authority to take such person into protective custody under section 25-1-310(1) unless the officer has probable cause to believe that the intoxicated person is "clearly dangerous to the health and safety of himself or others." § 25-1-310(1). While it may be said under *Irwin v. Ware* that the General Assembly has determined as a policy matter that an intoxicated driver is a public danger, and that an officer encountering such a person accordingly has no choice in determining whether to arrest or release the person, the same is not true with respect to the emergency commitment statute. Under section 25-1-310(1), it is the officer who must determine whether the intoxicated person is clearly dangerous. The General Assembly plainly did not intend for the police to take into protective custody every intoxicated person they meet. Instead, the General Assembly designated a specific class of intoxicated persons who are subject to emergency commitment and left the determination of whether a particular individual is clearly dangerous to the police. Accordingly, the decision to take a person into protective custody is discretionary and protected by official immunity.

[11] Respondents have also asserted that since the officers did not take Ralph Crowe into protective custody, the officers should have at least escorted him to his home. Section 25-1-310(1) states: "Nothing in this subsection (1) shall preclude an intoxicated or incapacitated person who is not dangerous to the health and safety of himself or others from being assisted to his home or like location by the law enforcement officer or emergency service patrolman." Whether the officers should have taken the action suggested by respondents was a discretionary judgment. Therefore, the decision by the Commerce City police

officers not to assist Ralph Crowe to his home is protected by official immunity.

Accordingly, we reverse the court of appeals and remand to the court of appeals with directions to reinstate the trial court's order granting summary judgment to petitioners.

ROVIRA, J., specially concurs.

ROVIRA, Justice, specially concurring:

I agree with the majority's conclusions that respondents' claims against the Commerce City police officers fail on conventional tort principles and that the decision by the officers not to take Ralph Crowe into custody or assist him home is protected by official immunity. However, I disagree with the conclusion that "we are squarely confronted with the question of whether the public duty rule is still good law in Colorado," majority op. at 157, and therefore do not join in part II A of the majority opinion.

Since respondents' claims fail under traditional tort analysis, I see no need to address the public duty issue in this case. As the majority points out, the public duty issue was not addressed by the court of appeals. Majority op. at 154. Moreover, the issue upon which certiorari was granted relating to petitioners' duty to respondents did not specifically raise the public duty question. In granting certiorari we asked the parties to address: "Whether the defendants owed a duty to plaintiffs and their decedents such that the defendants' failure to protect them is actionable." Both parties responded by presenting traditional tort duty arguments, and neither addressed the public duty issue.

In my view, the court should not decide an issue of considerable public importance, such as the abolition of the public duty rule, which was not briefed and is not necessary for resolution of the case at bar.¹ As the majority points out, the public duty rule is controversial; and while there may

was to be considered due to the failure of the court to frame the certiorari issue in a manner which would result in a discussion by the parties of the public duty doctrine.

be a trend towards abolition of the rule, majority op. at 158, the majority of states probably still adhere to the rule, majority op. at 158. Without the benefit of briefs by the parties and interested amici, the court is in a poor position to determine whether the public duty rule has force and content independent of the doctrine of sovereign immunity. A determination of the continuing vitality of the rule would be better left for a later day.

Finally, I note that to the extent that the public duty rule is either a function of sovereign immunity or identical in effect to sovereign immunity, see majority op. at 160, the legislature clearly has the power to reimpose the public duty rule in statutory form. "If the General Assembly wishes to restore sovereign immunity and governmental immunity in whole or in part, it has the authority to do so." *Evans v. Board of County Commissioners*, 174 Colo. 97, 105, 482 P.2d 968, 972 (1971).



The PEOPLE of the State of Colorado,
Plaintiff-Appellant,

v.

Michael Anthony ARMSTRONG,
Defendant-Appellee.

No. 84SA365.

Supreme Court of Colorado,
En Banc.

June 9, 1986.

Two counts of second-degree assault on a peace officer were dismissed by the District Court, Pitkin County, Judson E. DeVilbiss, J., and the People appealed. The Supreme Court, Vollack, J., held that: (1) statute proscribing assault on peace officer by one who is in custody applies to field arrest situations as well as to deten-

tion facilities; (2) one is in custody for purposes of the statute after arrest has been effected; and (3) conviction for both resisting arrest and assault on a police officer while in custody would not necessarily result in different sanctions for the same criminal conduct, in violation of equal protection guarantees, but required consideration of the facts of the case after evidence had been presented at trial.

Reversed and charges reinstated.

Lohr, J., concurred specially and filed opinion.

Dubofsky, J., dissented and filed opinion.

1. Statutes ⇨217.2

When meaning of statute is clear, it is unnecessary to examine its legislative history.

2. Assault and Battery ⇨60

Second-degree assault statute, which proscribes assault on a peace officer by one who is lawfully confined or in custody, applies to field arrest situations as well as to detention facilities. C.R.S. 18-3-203(1)(f).

3. Assault and Battery ⇨18

Definition of "in custody" as contained in pattern jury instruction is not controlling as to meaning of that term in second-degree assault statute which proscribes assault on a peace officer by one who is lawfully in custody. C.R.S. 18-3-203(1)(f).

4. Criminal Law ⇨805(1)

While pattern jury instructions carry weight and should be considered by trial court, opinion of an appellate court is controlling.

5. Constitutional Law ⇨250.3(1)

Statute prescribing different sanctions for what ostensibly might be different acts, but offering no rational standard for distinguishing such different acts for purposes of disparate punishment, contravenes equal protection guarantees of the State Constitution. Const. Art. 2, § 25.

1. Neither of the parties cited any of the cases discussed by the majority in part II A 1, The Public Duty Doctrine. This clearly reflects their lack of understanding that the public duty rule