

2008

Western Land and Development LC, East Maples Investment, LLC vs. Jordan Foothills, LLC, Walter T. Keane : Brief of Appellant

Utah Court of Appeals

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



Part of the [Law Commons](#)

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

Michael D. Zimmerman; Troy L. Booher; Katherine Carreau; Snell & Wilmer; Attorneys for Appellants.

Richard D. Burbidge; Jefferson W. Gross; Burbidge Mitchell and Gross; Attorneys for Appellees .

Recommended Citation

Brief of Appellant, *Western Land v. Jordan Foothills*, No. 20080048 (Utah Court of Appeals, 2008).
https://digitalcommons.law.byu.edu/byu_ca3/677

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

IN THE UTAH COURT OF APPEALS

WESTERN LAND & DEVELOPMENT,
LC, EAST MAPLES INVESTMENT, LLC,

Plaintiffs and Appellees,

vs.

JORDAN FOOTHILLS, LLC, WALTER
T. KEANE,

Defendant and Appellant.

Utah Court of Appeals No. 20080048

ORAL ARGUMENT REQUESTED

BRIEF OF THE APPELLANT

Richard D. Burbidge
Jefferson W. Gross
Benjamin W. Lieberman
BURBIDGE, MITCHELL & GROSS
215 South State Street, Suite 920
Salt Lake City, Utah 84111
Telephone: (801) 355-6677
Facsimile: (801) 355-2341

Attorneys for Appellees

Michael D. Zimmerman (3604)
Troy L. Booher (9419)
Katherine Carreau (11043)
SNELL & WILMER L.L.P.
15 West South Temple, Suite 1200
Salt Lake City, Utah 84101-1004
Telephone: (801) 257-1900
Facsimile: (801) 257-1800

Attorneys for Appellant

**FILED
UTAH APPELLATE COURTS**

JUN 23 2008

IN THE UTAH COURT OF APPEALS

WESTERN LAND & DEVELOPMENT,
LC, EAST MAPLES INVESTMENT, LLC,

Plaintiffs and Appellees,

vs.

JORDAN FOOTHILLS, LLC, WALTER
T. KEANE,

Defendant and Appellant.

Utah Court of Appeals No. 20080048

ORAL ARGUMENT REQUESTED

BRIEF OF THE APPELLANT

Richard D. Burbidge
Jefferson W. Gross
Benjamin W. Lieberman
BURBIDGE, MITCHELL & GROSS
215 South State Street, Suite 920
Salt Lake City, Utah 84111
Telephone: (801) 355-6677
Facsimile: (801) 355-2341

Attorneys for Appellees

Michael D. Zimmerman (3604)
Troy L. Booher (9419)
Katherine Carreau (11043)
SNELL & WILMER L.L.P.
15 West South Temple, Suite 1200
Salt Lake City, Utah 84101-1004
Telephone: (801) 257-1900
Facsimile: (801) 257-1800

Attorneys for Appellant

TABLE OF CONTENTS

Page

JURISDICTION.....	1
STATEMENT OF THE ISSUES AND STANDARDS OF REVIEW	1
DETERMINATIVE PROVISIONS	3
STATEMENT OF THE CASE.....	3
I. Nature of the Case and Course of Proceedings.....	3
II. Statement of Facts.....	4
A. The Option Agreement	4
B. The Final Plat.....	6
C. The Relationship Between Jordan Foothills and Mr. Glezos	7
SUMMARY OF THE ARGUMENT	9
ARGUMENT	12
I. Jordan Foothills Did Not Breach the Agreement, and Instead Exercised Its Contractual Right to Cancel the Agreement and is Entitled to a Refund of the Principal Amount of Its \$1.5 Million First Option Payment	12
A. The Plain Language of the Agreement Permits Jordan Foothills to Approve the Final Plat After Western Land Obtained the City's Final Approval of a Plat.....	13
B. If Section 4(b) Is Ambiguous, Extrinsic Evidence and the Doctrine that Ambiguous Provisions are Construed Against the Drafter Support Jordan Foothills' Interpretation of Section 4(b).....	16
II. The Trial Court Erred in Concluding that There Were Material Design Changes, but that Those Changes Were Insufficiently Material to Allow Jordan Foothills to Exercise its Contractual Rights Under Section 4(b)	19
III. Even if the Plat Could Have Been Approved by Jordan Foothills Prior to the City's Final Approval, Mr. Glezos Is Not an Agent of Jordan Foothills and Had No Authority to Act for Jordan Foothills	21
A. Marshaling of the Evidence in Favor of the Trial Court's Conclusion that Mr. Glezos Had the Authority to Act as Jordan Foothills' Agent and Approve Material Design Changes	22
1. Sycamores Phase 9 Transaction.....	22
2. Mr. Glezos' Involvement in the Jordan Foothills' Transaction.....	22
B. Mr. Glezos Had No Authority to Exercise Jordan Foothills' Rights Under Section 4(b) of the Option Agreement.....	26

TABLE OF CONTENTS
(continued)

	Page
1. Mr. Glezos Did Not Have Express Authority to Act for Jordan Foothills by Exercising Its Rights Under Section 4(b)	27
2. Mr. Glezos Was Not Cloaked with Apparent Authority to Act on Behalf of Jordan Foothills and Approve the Final Plat Under Section 4(b).....	29
3. Mr. Glezos Did Not Have Implied Authority to Exercise Jordan Foothills' Contractual Rights	32
CONCLUSION	34

TABLE OF AUTHORITIES

Page

FEDERAL CASES

<u>In re Braniff, Inc.</u> , 118 B.R. 819 (Bankr. M.D. Fla. 1989)	20
---	----

STATE CASES

<u>Bodell Constr. Co. v. Stewart Title Guar. Co.</u> , 945 P.2d 119 (Utah Ct. App. 1997)	30, 31, 32, 33
<u>City Elec. v. Dean Evans Chrysler-Plymouth</u> , 672 P.2d 89 (Utah 1983)	30, 31
<u>Commercial Union Assosc. v. Clayton</u> , 863 P.2d 29 (Utah Ct. App. 1993)	14, 15, 16
<u>Deep Creek Ranch, LLC v. Utah State Armory Bd.</u> , 2008 UT 3, 178 P.3d 886	17, 18
<u>Edwards & Daniels Architects v. Farmers' Props.</u> , 865 P.2d 1382 (Utah Ct. App. 1993)	18
<u>Glew v. Ohio Sav. Bank</u> , 2007 UT 56, 181 P.3d 791	2
<u>Green River Canal Co. v. Thayn</u> , 2003 UT 50, 84 P.3d 1134	2, 14
<u>Harper v. Great Salt Lake Council, Inc.</u> , 1999 UT 34, 976 P.2d 1213	15
<u>Holytrent Props., Inc. v. Valleepark L.P.</u> , 32 S.W.3d 27 (Ark. Ct. App. 2000)	20
<u>Horrocks v. Westfalia Systemat</u> , 892 P.2d 14 (Utah Ct. App. 1995)	31
<u>Luddington v. Bodenvest Ltd.</u> , 855 P.2d 204 (Utah 1993)	32
<u>McBride-Williams v. Huard</u> , 94 P.3d 175 (Utah 2004)	14
<u>Restoration Realty Corp. v. Robero</u> , 449 N.E.2d 705 (N.Y. 1983)	20
<u>Russell v. Park City Utah Corp.</u> , 548 P.2d 889 (Utah 1976)	20
<u>Utah County v. Butler</u> , 2008 UT 12, 179 P.3d 775	21, 27
<u>Utah Golf Ass'n v. City of N. Salt Lake</u> , 2003 UT 38, 79 P.3d 919	14
<u>Zions First Nat'l Bank v. Clark Clinic Corp.</u> , 762 P.2d 1090 (Utah 1988)	27, 29, 30

STATE STATUTES

Utah Code Ann. § 78A-4-103(2)(j)	1
--	---

ALL PARTIES ARE LISTED ON THE CAPTION

JURISDICTION

The court has jurisdiction under Utah Code section 78A-4-103(2)(j).

STATEMENT OF THE ISSUES AND STANDARDS OF REVIEW

On October 25, 2006, Jordan Foothills entered into an option agreement to purchase from Western Land over 51 acres of real property in West Jordan (the City). Because the City had not approved a final plat, the option agreement contemplated two scenarios. First, if the final plat approved by the City contained no material changes to a proposed plat, then Jordan Foothills was required either to purchase the property or to forfeit to Western Land its \$1.5 million option payment. Second, if the final plat contained material changes, then Jordan Foothills had “the right to approve the new Final Plat as a condition precedent to closing.” (R. 482 (emphasis added).) If Jordan Foothills did not approve the final plat, then Western Land had to return the principal amount of the \$1.5 million option payment. Western Land would retain the time-value of the option payment, which it was entitled to use pending close of the purchase or refund of the option payment. Using an 8% interest rate, the value of the use of the money amounted to nearly \$10,000 per month.

As the trial court later found, the final plat contained material changes. (R. 667.) This involved the second scenario. Exercising the choice given it by the agreement, Jordan Foothills rejected the final plat and sought return of the principal amount of its \$1.5 million deposit. Western Land refused.

Western Land brought suit, alleging that Jordan Foothills had an unconditional obligation to purchase the property because Jordan Foothills had failed to object to the

changes months before the final plat received the City's approval. After a bench trial, the trial court interpreted the language in the option agreement that provides to Jordan Foothills "the right to approve the new Final Plat as a condition precedent to closing," as allowing the condition precedent to be satisfied months before approval of the final plat. (R. 482.) The trial court then ruled that Jordan Foothills' rejection of the final plat after the City had approved the final plat was ineffective.

Issue 1: Whether the option agreement provides Jordan Foothills the right to refuse to purchase the property only after the City approved the final plat. This issue was preserved at R. 677-78; 681; 446-47.

Standard of Review: This court reviews a trial court's interpretation of a contract for correctness. Green River Canal Co. v. Thayn, 2003 UT 50, ¶16, 84 P.3d 1134.

Issue 2: Whether changes in the final plat that the trial court found to be material, but "not sufficiently material," triggered Jordan Foothills' right to reject the final plat and withdraw from the agreement. This issue was preserved at R. 667; 681; 440-47.

Standard of Review: This court reviews the trial court's interpretation of a contract for correctness. Green River Canal Co., 2003 UT 50 at ¶16.

Issue 3: Whether Mr. Glezos was an agent of Jordan Foothills authorized to exercise Jordan Foothills' contractual right to approve the final plat under the option agreement. This issue was preserved at R. 678-81; 769 at 100, 134.

Standard of Review: The issue of authority presents a mixed question of law and fact. The court grants significant deference to "the trial court's application of the equitable doctrines of . . . authority to the facts of this case." Glew v. Ohio Sav. Bank, 2007 UT 56, ¶19, 181 P.3d 791.

DETERMINATIVE PROVISIONS

None.

STATEMENT OF THE CASE

I. Nature of the Case and Course of Proceedings

This case involves an option agreement entitling Jordan Foothills to purchase real property from Western Land contingent upon certain conditions. The dispute centers around whether Jordan Foothills had the right to refuse to purchase the property after the City approved a final plat containing material changes.

On September 27, 2007, Western Land & Development, LC and East Maples Investment LLC (collectively “Western Land”), filed a complaint and motion for preliminary injunction against Jordan Foothills.¹ (R. 1; 63.) Western Land sought a declaratory judgment that Jordan Foothills was in breach of its obligations under an option agreement. (R. 66.) Western Land asserted that because Jordan Foothills had not made a second option payment of nearly \$4 million, Jordan Foothills was in breach and Western Land was therefore entitled to keep as liquidated damages the principal amount of Jordan Foothills’ \$1.5 million first option payment. (R. 66; 72.) Western Land also sought to quiet title to the property and reconveyance of the trust deed securing Jordan Foothills’ interest in the property. (R. 66-67.)

A bench trial was held on December 6 and 7, 2007. (R. 769-70.) The trial court rendered judgment in favor of Western Land on all issues. (R. 701.) Jordan Foothills filed a timely notice of appeal. (R. 721.)

¹ Jordan Foothills’ prior counsel, Walter Keane, was also listed as a defendant in his capacity as trustee of the trust deed at issue in the dispute. (R. 1, 703.) The trial court’s order dismissed Mr. Keane from the suit. (R. 703.)

II. Statement of Facts

Defendant Jordan Foothills is an entity formed by Glen Pettit, a home builder and real estate developer. (R. 662.) One plaintiff, East Maples Investment, owned just over 51 acres of real property in West Jordan, Utah, and the other plaintiff, Western Land & Development, held the right to develop and purchase that property. (R. 662.)

A. The Option Agreement

In October 2006, Jordan Foothills and Western Land negotiated an option agreement for the possible purchase of the property owned by East Maples Investment. (R. 280-313; 662.) Because the City had not yet approved a final plat, Jordan Foothills would agree only to a contract that provided Jordan Foothills the right to reject the deal if Jordan Foothills disapproved of the final plat. (R. 595.) Western Land—drafter of the option agreement—agreed to this demand, and inserted into the option agreement section 4(b), which provides that Jordan Foothills “shall have the right to approve the new Final Plat as a condition precedent to closing on this transaction.”² (R. 284.) If Jordan Foothills did not approve the final plat, then Western Land had to return to Jordan Foothills “all consideration” Jordan Foothills had paid to date. (R. 284.)

With this provision in place, the parties signed the option agreement on October 25, 2006. The option agreement required Jordan Foothills to make “option payments” in order to secure its right to purchase the property some time after final plat approval.

² The full text of section 4(b) is as follows: “If in the plating process, the City makes changes in the [proposed plan, then Jordan Foothills] shall have the right to approve the new Final Plat as a condition precedent to closing on this transaction. Should closing not occur as a result of [Western Land’s] inability to obtain final plat approval, as stated herein, or final plat approval is obtained of a design which has not been approved of by [Jordan Foothills], all consideration, including but not limited to First Option Payments, . . . paid under this Agreement shall be fully refunded.” (R. 284.)

(R. 282-83.) In return for the option payments, a trust deed was recorded in favor of Jordan Foothills to secure its interest in the property. (R. 6.) The trust deed was necessary because the option payments were made directly to Western Land, not placed in escrow, and therefore Western Land could use the money until closing on the property or return of the principal. (R. 282.)

On October 27, 2006, Jordan Foothills made the first option payment in the amount of \$1.5 million. (R. 281; 666.) While Jordan Foothills' interest in the \$1.5 million was secured by the trust deed, Jordan Foothills had no right to any accrued interest stemming from the \$1.5 million while it was controlled by Western Land, which, at an 8% interest rate, amounted to approximately \$10,000 each month.

The option agreement contemplated that the City would approve the final plat "on or about January 15, 2007." (R. 284.) For this reason, the second option payment of approximately \$4 million was due on the later of two dates: (i) January 15, 2007, or (ii) five business days following the receipt of the final plat from the City. (R. 282.) Western Land did not secure a final plat from the City until months later, on August 8, 2007. (R. 669.) Between the first option payment on October 27, 2006, and the final plat approval on August 8, 2007, the time-value of the \$1.5 million was approximately \$100,000.

B. The Final Plat

The trial court specifically found that the City had required “material changes to the design of the plat” including (i) “one intersection with 6400 West be removed and replaced with a cul-de-sac” and (ii) “a rectangular reconfiguration of streets in Phase 2.” (R. 667; 769 at 17.) The trial court also found that other changes were necessary to accommodate these two design changes.³ (R. 667.) The trial court therefore found the factual premise to Jordan Foothills’ contractual right to approve or disapprove of the final plat, a condition precedent to closing.

After the City approved a plat as “final,” Western Land hand-delivered to Mr. Pettit a copy of the final plat and a letter requesting that Jordan Foothills pay the second option payment of \$3,975,000.00 within five business days. (R. 282; 318; 669.) After reviewing the final plat, Mr. Pettit instead invoked section 4(b) of the option agreement and within five days (i) rejected the final plat with its material design changes; and (ii) requested a refund of the principal amount of the \$1.5 million first option payment. (R. 320, 339; 667; 769 at 17.)

In response, Western Land sent Jordan Foothills a notice asserting that Jordan Foothills’ rights under the option agreement had terminated because Jordan Foothills had breached the agreement by failing to make the second option payment. Western Land also contended that it was entitled to keep the \$1.5 million (principal and interest) and to have Jordan Foothills release the trust deed securing Jordan Foothills’ interest. (R. 5; 54-

³ Evidence at trial demonstrated that the following other changes were made: changes to the fencing plan, the entry monument, trails, retaining walls, and pedestrian path. (R. 769 at 20, 29, 139-43.) Additionally, some lots were removed and the City required a notation on the plat stating that notice of collapsible soils must be made to each purchaser. (R. 769 at 20, 142.)

55.) On September 7, 2007, Jordan Foothills filed a Notice of Default and Election to Sell the property under the trust deed due to Western Land's refusal to refund the principal amount of its \$1.5 million first option payment. (R. 6; 198.)

C. The Relationship Between Jordan Foothills and Mr. Glezos

The following facts relate only to an alternative ground to reverse the judgment of the trial court. The primary ground is that the trial court erred in interpreting the option agreement as requiring Jordan Foothills to reject or accept the final plat before the City had approved the final plat. The alternative ground is that the trial court erred in ruling that Steve Glezos was an agent of Jordan Foothills and, prior to the City's approval of a plat as final, had approved the design changes ultimately required by the City.

During negotiations of the option contract, Western Land was represented by Lee Conant and Terry Diehl, principals of Western Land. (R. 521.) Mr. Pettit, principal of Jordan Foothills, met with Western Land, executed the option agreement, and eventually sought to terminate the agreement because Jordan Foothills did not approve the final plat. (R. 295; 320.) In an attempt to avoid the impact of section 4(b)—which Western Land drafted—Western Land argued in the trial court that Steve Glezos—a friend of Mr. Pettit who is not affiliated with Jordan Foothills—had approved certain design changes on behalf of Jordan Foothills prior to the City's approval of the final plat and thereby had eliminated Jordan Foothills' rights under section 4(b). (R. 667.) In essence, Western Land argued that Mr. Glezos acted as an agent for Jordan Foothills and had exercised its rights under section 4(b), even though (i) the option agreement provides that all notices to Jordan Foothills had to be provided to Mr. Pettit and (ii) after the City approved the final plat, Western Land, in fact, sent a copy of the final plat to Mr. Pettit. (R. 289; 318; 669.)

In the letter transmitting a copy of the final plat, Western Land did not state that the final plat had already been approved by Jordan Foothills, but stated only that the approvals “as defined in the [option agreement] were granted by the West Jordan City Council on August 8, 2007.” (R. 318.)

The trial court accepted both of Western Land’s arguments. First, the trial court ruled that section 4(b) did not require Jordan Foothills’ approval after the City approved the final plat. (R. 678.) Second, the trial court ruled that Mr. Glezos acted as the agent of Jordan Foothills for purposes of exercising Jordan Foothills’ rights under section 4(b). (R. 678-80.) As set forth below, Jordan Foothills challenges both rulings.

SUMMARY OF THE ARGUMENT

The trial court interpreted section 4(b) of the option agreement as unambiguously requiring satisfaction of a condition precedent before the condition could be satisfied. Section 4(b) provides that Jordan Foothills “shall have the right to approve the new Final Plat as a condition precedent to closing on this transaction.”⁴ (R. 284.) Even though Jordan Foothills rejected the final plat just after the City approved a plat as the final one, the trial court ruled that this rejection was ineffective because Jordan Foothills should have voiced its objection months earlier. Instead, the trial court ruled that Jordan Foothills had satisfied the condition precedent months before the City approved the final plat when Steve Glezos—a friend of Jordan Foothills’ authorized representative, Glen Pettit—approved certain changes, but not the final plat.

The trial court’s interpretation of the option agreement warrants reversal on three separate grounds. First, section 4(b) means what its plain language says: Jordan Foothills’ approval of the final plat—which did not exist until the City approved a plat as final—was a condition precedent to closing. The trial court therefore erred in concluding that the condition precedent was satisfied, as Jordan Foothills rejected the final plat only days after City approval.

Second, at the very least section 4(b) is ambiguous. The trial court appears to have read the “condition precedent” sentence in section 4(b) as entirely separate from the

⁴ The full text of section 4(b) is as follows: “If in the plating process, the City makes changes in the [proposed plat, then Jordan Foothills] shall have the right to approve the new Final Plat as a condition precedent to closing on this transaction. Should closing not occur as a result of [Western Land’s] inability to obtain final plat approval, as stated herein, or final plat approval is obtained of a design which has not been approved of by [Jordan Foothills], all consideration, including but not limited to First Option Payments, . . . paid under this Agreement shall be fully refunded.” (R. 284.)

next sentence concerning the return of the \$1.5 million first option payment. The first sentence declares that Jordan Foothills’ approval of the final plat is a condition precedent to closing. The second sentence states that if closing does not occur because “final plat approval is obtained of a design which has not been approved of by Buyer, all consideration . . . paid under this Agreement shall be fully refunded.” (R. 284.)

The trial court interpreted the second sentence as permitting Western Land to keep the \$1.5 million first option payment because Steve Gelzos—who is not specified as the authorized representative of Jordan Foothills under the agreement—had expressed approval for certain design changes prior to the City’s approval of a plat as final. On the trial court’s interpretation, it was the approval of a design before the City’s action created a “Final Plat”—instead of an approval of the final plat after the City’s action—which extinguished Jordan Foothills’ right to a refund of the \$1.5 million option payment.

The trial court’s interpretation is flawed. Assuming the trial court’s interpretation of the second sentence concerning a refund of consideration is reasonable, then section 4(b) is ambiguous. One reasonable interpretation—and in Jordan Foothills’ view the only reasonable interpretation—is to read the second “refund of consideration” sentence in light of the first “condition precedent” sentence to conclude that section 4(b) means that if Jordan Foothills rejects the final plat, created by the City’s approval, then (i) the condition precedent not satisfied and (ii) Jordan Foothills is entitled to a refund of the principal amount of its \$1.5 million. The other interpretation—the one adopted by the trial court—is to read the first sentence in light of the second sentence to conclude that if Jordan Foothills expresses approval for design changes at any point in the process, then

(i) the condition precedent satisfied and (ii) Jordan Foothills has thereby forfeited its right to a refund after the City approves the final plat.

To the extent that these are both reasonable interpretations of section 4(b), the trial court erred in ruling that the unambiguous language of section 4(b) supports only the second interpretation. And because (i) the only parole evidence in the record supports the first interpretation and (ii) any ambiguity should be construed against Western Land as drafter of the option agreement, this error was not harmless. This court should reverse.

Third, even assuming the trial court was correct in interpreting section 4(b) to require approval only of design changes, not the final plat itself, the condition precedent was not satisfied. Under section 4(b), only Jordan Foothills can satisfy the condition precedent, and under the option agreement only Glen Pettit is the authorized representative of Jordan Foothills. However, the trial court ruled that Jordan Foothills approved certain design changes when Steve Glezos—a friend of Mr. Pettit—approved them. As demonstrated below, the trial court erred in concluding that Mr. Glezos acted as an agent for Jordan Foothills. Mr. Glezos lacked express, apparent, and implied authority to act on behalf of Jordan Foothills, and therefore, anything Mr. Glezos may have said could not bind Jordan Foothills.

This court should reverse on one of three grounds. First, the plain language of section 4(b) provides Jordan Foothills the right to cancel the agreement if it disapproves of the final plat, which it did. Second, to the extent section 4(b) is ambiguous, the trial court erred in construing it against Jordan Foothills. Finally, even if section 4(b) is construed against Jordan Foothills, the condition precedent was never satisfied because Mr. Glezos was not an agent for Jordan Foothills.

ARGUMENT

I. Jordan Foothills Did Not Breach the Agreement, and Instead Exercised Its Contractual Right to Cancel the Agreement and is Entitled to a Refund of the Principal Amount of Its \$1.5 Million First Option Payment

The trial court erred in concluding that Jordan Foothills (i) failed to terminate the option agreement by rejecting the final plat and (ii) thereby forfeited its right to a refund of the principal amount of its \$1.5 million first option payment. To demonstrate the trial court's error, Jordan Foothills provides some context.

In negotiating the option agreement, Jordan Foothills insisted that any agreement contain a provision allowing Jordan Foothills to refuse to purchase the property if Jordan Foothills rejected the final plat approved by the City. Western Land agreed to this demand. And when Western Land drafted the option agreement, it included section 4(b), which provides that Jordan Foothills "shall have the right to approve the new Final Plat as a condition precedent to closing on this transaction." (R. 284.)

In the event Jordan Foothills rejected the final plat, the agreement provided protection for both parties. On the one hand, Jordan Foothills was entitled to a refund of the principal amount of its \$1.5 million first option payment. (Id.) On the other hand, Western Land was entitled to keep the value of its use of the \$1.5 million, which amounted to approximately \$10,000 per month. (Id.) The agreement contemplated that Western Land would obtain approval of the final plat by January 15, 2007, meaning Western Land would be able to use the \$1.5 million for only a few months before Jordan Foothills had to disapprove or approve the final plat. (Id.)

In fact, Western Land received value for its use the \$1.5 million for nearly a year because Western Land did not obtain the City's approval of the final plat until August 8,

2007. (R. 669.) Pursuant to the notice provision in the agreement, Western Land delivered a copy of the final plat to Glen Pettit, Jordan Foothills' representative. Mr. Pettit then (i) promptly notified Western Land pursuant to section 4(b) that Jordan Foothills rejected the final plat and (ii) requested that Western Land return the principal amount of the first option payment of \$1.5 million. Western Land refused.

The trial court ruled that the condition precedent was satisfied when Jordan Foothills failed, long before the City had approved any plat as final, to reject the substance of what became the final plat. Specifically, the trial court found that Jordan Foothills "failed to make any timely objection to any design change in the plat" because Jordan Foothills objected only after the City approved the final plat and before the second option payment became due. (R. 681; 320.) The trial court ruled that section 4(b) allowed the approval of certain designs, not a final plat, to satisfy the condition precedent. As demonstrated below, the trial court's interpretation of the agreement contradicts the agreement's plain language.

A. The Plain Language of the Agreement Permits Jordan Foothills to Approve the Final Plat After Western Land Obtained the City's Final Approval of a Plat

The unambiguous language of the option agreement provided Jordan Foothills, as a condition precedent to closing, the right to consider the City's final approved plat containing any material changes the City required. In the event it did not approve the changes in the final plat, Jordan Foothills was entitled to have the principal amount of its first option payment refunded. It was clearly contemplated by the parties that Jordan Foothills, in its discretion, could choose not to complete the purchase after considering a final plat that differed materially from the original proposed plat.

“When interpreting a contract, we look to the writing itself to ascertain the parties’ intentions, and we consider each contract provision in relation to all of the others, with a view toward giving effect to all and ignoring none.” Green River Canal Co. v. Thayn, 2003 UT 50, ¶17, 84 P.3d 1134 (alteration and quotations omitted). Further, “[i]f the language within the four corners of the contract is unambiguous, the parties’ intentions are determined from the plain meaning of the contractual language, and the contract may be interpreted as a matter of law.” Id. (quotations omitted). Here, the contract provision is unambiguous and entitles Jordan Foothills to reject the final plat.

Under section 4(b) of the agreement, the City’s approval of a final plat is a condition precedent to Jordan Foothills’ exercising its right to reject the final plat approved by the City. “Conditions precedent are operative facts on which the existence of some particular legal relation depends.” Utah Golf Ass’n v. City of N. Salt Lake, 2003 UT 38, ¶13, 79 P.3d 919.⁵ Only after the City approved a materially changed plat as final was Jordan Foothills in position of being able to make a business decision as to whether it wanted to proceed with purchase and development of the property. This is what Jordan Foothills bargained for. That fact that it occurred 8 months later than the option agreement contemplated is not the fault of Jordan Foothills.

Section 4(b) provides, “[i]f in the plating process, the City makes changes in the plan shown as Exhibit “D”,^[6] [Jordan Foothills] shall have the right to approve the new

⁵ See also McBride-Williams v. Huard, 94 P.3d 175, 178 (Utah 2004) (defining conditions precedent as an act that must occur before a duty to perform arises and recognizing they are “nondiscretionary”); Commercial Union Assoc. v. Clayton, 863 P.2d 29, 37-38 (Utah Ct. App. 1993) (“Conditions precedent call for the performance of some act or the happening of some event after a contract is entered into and upon the performance or happening of which its obligations are made to depend.”).

⁶ Exhibit D was the preliminary plan attached to the Option Agreement.

Final Plat as a condition precedent to closing on this transaction.” (R. 284 (emphases added).) Further, section 4(b) states “[s]hould closing not occur as a result of [Western Land’s] inability to obtain final plat approval, as stated herein, or final plat approval is obtained of a design which has not been approved by [Jordan Foothills], all consideration, including but not limited to First Option Payments, . . . paid under this Agreement shall be fully refunded.” (R. 284.) This language is unambiguous. It provided Jordan Foothills “the right to approve the new Final Plat as a condition precedent to closing on this transaction.” And “condition precedent” is a term of art in the law. “A condition precedent is one which must be performed by the one party to an existing contract before the other party is obligated.” Commercial Union Assosc. v. Clayton, 863 P.2d 29, 37 (Utah Ct. App. 1993).

Here, the condition precedent—the right to approve or disapprove of the final plat itself—arises only upon the City’s approval of a plat as “final” on August 8, 2007. Jordan Foothills rejected the final plat, which contained material changes required by the City. And since Jordan Foothills’ approval of the final plat was a condition precedent to closing, the closing did not occur because of Jordan Foothills’ rejection of the final plat, a rejection it had a right to make under the agreement. Accordingly, Western Land had no right to demand the second option payment, and Jordan Foothills is entitled to a refund of the principal of its first option payment of \$1.5 million, which Western Land held, interest free, for nearly a year while it sought final approval from the City.⁷ Harper v.

⁷ Importantly, at the time of contracting, Western Land represented that the approval would likely occur eight months prior to when the City ultimately approved the final plat. (R. 284.) Assuming an 8% interest rate to determine the time value of money, Western Land received from Jordan Foothills’ first option payment an additional benefit of nearly \$80,000.

Great Salt Lake Council, Inc., 1999 UT 34, ¶14, 976 P.2d 1213 (“Under well-established principles of contract interpretation, where the duty of the obligor to perform is contingent upon the occurrence or existence of a condition precedent, the obligee may not require performance by the obligor, because the obligor's duty, and conversely the obligee’s right to demand performance, does not arise until that condition occurs or exists.”).

The trial court erred as a matter of law in ignoring the express condition precedent provided for in section 4(b), and this court should reverse. Commercial Union Assoc., 863 P.2d at 38 (“Courts must respect express conditions precedent.”). Jordan Foothills acted in accordance with the plain language of the option agreement in exercising its right to reject the final plat and, accordingly, Western Land is obligated to refund the principal agreement of Jordan Foothills’ first option payment or reconvey the trust deed so that Jordan Foothills may foreclose on the property.

B. If Section 4(b) Is Ambiguous, Extrinsic Evidence and the Doctrine that Ambiguous Provisions are Construed Against the Drafter Support Jordan Foothills’ Interpretation of Section 4(b)

Even if this court concludes that the language in section 4(b) of the option agreement is ambiguous, the only parol evidence in the record demonstrates that section 4(b) was added to protect Jordan Foothills in precisely the circumstances that have arisen in this case. In addition, because Western Land drafted the contract, any ambiguity should be construed in favor of Jordan Foothills. For both reasons, this court should reverse even if section 4(b) is ambiguous.

“A contractual term is ambiguous if, looking to the language of the contract alone, it is reasonably capable of being understood in more than one way such that there are

tenable positions on both sides.” Deep Creek Ranch, LLC v. Utah State Armory Bd., 2008 UT 3, ¶13, 178 P.3d 886. If this court determines that section 4(b) could reasonably be interpreted both in the manner suggested by Jordan Foothills—allowing approval only after the City acts to create a “final” plat—and in the manner suggested by Western Land—allowing approval of design changes prior to a final plat—then “the intent of the parties must be ascertained from extrinsic evidence.” Id. at ¶16.

All extrinsic evidence regarding the meaning of section 4(b) supports Jordan Foothills’ interpretation of the contract. The only such evidence is that, during the negotiations, Mr. Pettit insisted that the “condition precedent” language of section 4(b) be added to protect Jordan Foothills because the City had not yet approved a final plat. (R. 595.) Mr. Pettit testified that often cities will add “a trail, walls, fence, entry monuments, retention walls, reconfigure streets and so on,” which may put a builder in a troubling situation. (R. 596.) Western Land drafted section 4(b) specifically to provide Jordan Foothills an out and to allow a refund of the principal amounts of Jordan Foothills’ option payments in the event Jordan Foothills did not approve the final plat, once approved. (R. 595-96.) Western Land also had protection under the agreement. Western Land was permitted to keep the time value of any option payments as compensation for holding that right open for Jordan Foothills.

As the trial court found, two material changes to the design of the plat were present in the City’s final approved plat: (i) the addition of a cul-de-sac and (ii) a

reconfiguration of streets.⁸ Section 4(b) was designed to protect against just such an event. (R 667.)

Thus, if section 4(b) is ambiguous, this court should construe the provision in favor of Jordan Foothills. Not only does the only extrinsic evidence support Jordan Foothills' interpretation,⁹ any ambiguity should be resolved against Western Land as the drafter of the agreement. Edwards & Daniels Architects v. Farmers' Props., 865 P.2d 1382, 1386 n.5 (Utah Ct. App. 1993) ("If the extrinsic evidence was insufficient to determine the intent of the parties, we would resort to the rule of construction that we construe an ambiguous contract against the drafter."). (R. 664.)

For both reasons, if the court finds that section 4(b) is ambiguous—which it is not—it should reverse the trial court's interpretation of the contract. The extrinsic evidence supports Jordan Foothills' construction. And even if the extrinsic evidence is insufficient, because Western Land drafted the option agreement, it should be construed in Jordan Foothills' favor.

⁸ Western Land recognized in its Trial Brief that the reconfiguration of streets, increase in cul-de-sac lots, and a pedestrian path were, in fact, design changes. (R. 584.)

⁹ In the event the court concludes that there is insufficient parol evidence to determine the contract's meaning, then the court may remand the case to the trial court. In Deep Creek Ranch, LLC v. Utah State Armory Bd., 2008 UT 3, ¶¶12-16, 178 P.3d 886, both parties argued that a contractual term was unambiguous and the district court agreed with one parties' "unambiguous" interpretation. The Utah Supreme Court concluded that the term was ambiguous and remanded the case for the district court to make a determination as to its meaning based on extrinsic evidence. Id. at ¶16. The court stated "Because the district court rested its decision on the holding that, as a matter of law, the contract referred to both state and federal property, we are not convinced that the issue received a full evidentiary airing. Accordingly, on remand, the district court may rely on evidence presented at the first trial but should allow the parties an opportunity to present additional evidence in this regard." Id. at ¶27.

II. The Trial Court Erred in Concluding that There Were Material Design Changes, but that Those Changes Were Insufficiently Material to Allow Jordan Foothills to Exercise its Contractual Rights Under Section 4(b)

Jordan Foothills will next address an apparent confusion in the trial court's findings of fact and conclusions of law. While the trial court found that an addition of a cul-de-sac and the reconfiguration of streets were material changes in design, the trial court nonetheless later concluded that "the changes . . . [were] not sufficiently material to warrant cancellation of the Option Agreement by Jordan Foothills." (R. 681 (emphasis added).)

First, as a matter of logic, the second conclusion makes no sense. A change that is "material" is just that. It cannot be both "material" and "insufficiently material." There is no legal category of "insufficiently material."

Second, as a matter of contract, there is nothing in the option agreement that requires the changes in the plat design to be anything other than "material" before Jordan Foothills has a right to cancel the contract and receive back its deposit. (R. 284.) It simply states "[i]f . . . the City makes changes in the plan . . . , [Jordan Foothills] shall have the right to approve the new Final Plat as a condition precedent to closing." (R. 284.) It further states that if the approved final plat is of "a design which has not been approved by [Jordan Foothills], all consideration . . . shall be fully refunded." (R. 284.) At most, these changes must be "material," not more, as the trial court appears to have concluded.

Because the agreement does not set a threshold on the materiality of any City-required changes to the plat, the trial court erred as a matter of law in adding a "sufficiently material" change requirement to the option agreement. Jordan Foothills

contracted for and the parties mutually agreed upon a right to a refund, which arose upon the occurrence of a condition precedent—a material design change in the final plat. The trial court effectively altered the agreed-upon bargain. This is not permitted. Russell v. Park City Utah Corp., 548 P.2d 889, 891 (Utah 1976) (“parties are free to contract according to their desires in whatever terms they can agree upon; and further, . . . the contract should be enforced according to its terms, unless that result is so unconscionable that a court of equity will refuse to enforce it”).

As support for its conclusion that the City’s changes were not “sufficiently material” to trigger Jordan Foothills’ right to terminate, the trial court cited case law suggesting that “immaterial deviation[s] from a contract [are] insufficient to justify termination of the contract.” In re Braniff, Inc., 118 B.R. 819, 841 (Bankr. M.D. Fla. 1989) (emphasis added); see also Restoration Realty Corp. v. Robero, 449 N.E.2d 705, 706 (N.Y. 1983); Holytrent Props., Inc. v. Valleepark L.P., 32 S.W.3d 27, 30 (Ark. Ct. App. 2000). (R. 681.)

However, these cases are inapposite. Each case addresses deviations serious enough to constitute a material breach of a contract and concludes that the deviations in question were not material. In contrast, here the trial court found the changes material, but just not sufficiently so. In re Braniff, Inc., 118 B.R. at 841; Restoration Realty Corp., 449 N.E.2d at 706; Holytrent Properties, Inc., 32 S.W.3d at 30. These cases provide no support for the trial court’s ruling.

Here, it is undisputed that there were at least two material design changes. Western Land’s principals acknowledged this in their testimony, and the trial court’s ruling recognized this as well. (R. 539; 523; 667.) The plain language of the agreement

allowed Jordan Foothills the discretion to reject the final plat if it contained material changes. It rejected the final plat. The trial court's characterization of the material design changes as "insufficiently material" amounts to a ruling which either ignores the uncontested testimony on the "materiality" of the changes or alters the clear contractual terms of the parties.

The trial court's confusing conclusion that changes were not "sufficiently material" does not provide an alternative ground to affirm.

III. Even if the Plat Could Have Been Approved by Jordan Foothills Prior to the City's Final Approval, Mr. Glezos Is Not an Agent of Jordan Foothills and Had No Authority to Act for Jordan Foothills

The trial court ruled that Mr. Glezos was acting as an agent of Jordan Foothills with the express, implied, and apparent authority to exercise Jordan Foothills' condition precedent rights under section 4(b), and that he did so before the City approved the final plat. (R. 680.) This argument is independent of the previous arguments and provides an alternative ground to reverse.

Because Jordan Foothills is challenging the trial court's mixed findings related to Mr. Glezos' agency authority, it is obligated to marshal evidence supporting those findings. Utah County v. Butler, 2008 UT 12, ¶11, 179 P.3d 775. After marshaling the evidence, Jordan Foothills will demonstrate that any alleged approvals in February 2007 by Mr. Glezos could not have been effective to exercise Jordan Foothills' rights under section 4(b) of the option agreement.¹⁰ (R. 681.)

¹⁰ For the same reasons, the alleged approval by Mr. Glezos on May 22, 2007, August 8, 2007, August 9, 2007 also was not effective. (R. 676.) The August 20, 2007, and later meetings where Western Land alleges that Glezos approved the design changes also could not bind Jordan Foothills because in an August 14, 2007 letter, Jordan Foothills had objected to the City's "crucial changes to the Plat which were unacceptable to Jordan

A. Marshaling of the Evidence in Favor of the Trial Court's Conclusion that Mr. Glezos Had the Authority to Act as Jordan Foothills' Agent and Approve Material Design Changes

1. Sycamores Phase 9 Transaction

In support of its claim that Mr. Glezos had authority to act for Jordan Foothills in respect of the condition precedent in the option agreement, Western Land presented evidence that, in the past, Mr. Pettit, principal of Jordan Foothills, and Mr. Glezos had worked together on an entirely separate real estate transaction involving the principals of Western Land. The evidence was that in that transaction Mr. Pettit contacted George Richards, a real estate agent, about purchasing property in the Sycamores Phase 9 development. (R. 770 at 151; 517.) According to Mr. Richards, Mr. Pettit represented that Mr. Glezos worked for him. (R. 770 at 151.) The terms of that Sycamores Phase 9 purchase agreement, entered into in 2005, were negotiated by Mr. Pettit, Mr. Glezos, and Mr. Diehl. (R. 517; 521; 535.) An entity owned by Mr. Pettit subsequently purchased the property. (R. 517; 535.) According to Mr. Diehl, Mr. Glezos also negotiated addenda to that purchase agreement, which were executed and performed by Mr. Pettit. (R. 535-36.)

2. Mr. Glezos' Involvement in the Jordan Foothills' Transaction

Regarding the current transaction, according to evidence presented by Western Land in September 2006, Mr. Glezos approached Mr. Diehl, principal of Western Land, about purchasing the property involved here on his own behalf. (R. 536.) Subsequently,

Foothills" and demanded repayment of its \$1.5 million first option payment pursuant to section 4(b) of the Option Agreement. (R. 320, 676.) That letter mentioned the collapsible soil issue, but also identified that this was one crucial change, among many, of which Jordan Foothills did not approve. (R. 320.)

Mr. Diehl and Mr. Glezos discussed Mr. Pettit's possible purchase of the property.

Mr. Pettit, Mr. Glezos, and Mr. Diehl then met at a coffee shop to negotiate the main points of a potential option agreement. (R. 536.) At the meeting Mr. Glezos did most of the talking, and Mr. Pettit instructed Mr. Diehl "to work out the remainder of the agreement directly with Mr. Glezos." (R. 537.) After that meeting, Mr. Diehl communicated only with Mr. Glezos in negotiating the final terms of the option agreement; however, both Mr. Glezos and Mr. Pettit visited and inspected the property prior to execution of the agreement by Mr. Pettit on behalf of Jordan Foothills. (R. 537; 664.)

Western Land never received any written documentation that Mr. Glezos was an agent of Mr. Pettit or Jordan Foothills. (R. 769 at 60.) Nor did Mr. Pettit ever make any representations to Western Land that Mr. Glezos had authority to do anything beyond negotiate the option agreement. There was no testimony that any representations were made that Glezos had any authority to exercise Jordan Foothills' rights under section 4(b). (R. 769 at 100.)

According to Western Land, Mr. Glezos acted as an courier between Mr. Pettit and Western Land prior to the execution of the agreement. (R. 537.) When the final terms of the agreement were worked out, Western Land's attorney drafted the option agreement and delivered it to Mr. Glezos per Mr. Pettit's request. (R. 522; 537.) Mr. Pettit signed the agreement, containing handwritten additions by Mr. Glezos, and Mr. Glezos delivered the signed agreement to Mr. Diehl on October 26, 2006. (R. 537; 521-22.) Mr. Diehl signed the agreement on behalf of Western Land. (R. 30; 537.) Mr. Glezos took the

signed option agreement to the title company, and Mr. Pettit wired the first option payment of \$1.5 million to the title company. (R. 538.)

After the negotiation was completed and the contract was executed, Mr. Pettit never made any representations about Mr. Glezos' authority to continue working on the transaction other than his initial express direction that Mr. Glezos would negotiate the remaining contractual terms prior to execution. Specifically, no representations were made regarding Mr. Glezos' authority to approve the final plat pursuant to section 4(b). Importantly, Mr. Glezos is not mentioned in the option agreement, and section 13 of the agreement—which, again, Western Land drafted—expressly states that all notices must be delivered to Mr. Pettit, not Mr. Glezos. (R. 289; 597.)

Following execution of the contract, Mr. Diehl and Mr. Conant continued to communicate with Mr. Glezos, sometimes about this transaction, other times about separate real estate transactions, and at times Mr. Pettit asked Mr. Glezos to relay certain information to Western Land. (R. 524; 769 at 124, 136.) Mr. Diehl stated that Mr. Glezos represented himself to be part of Jordan Foothills by using the term “we” during those communications. (R. 546.) Mr. Pettit was aware that Mr. Glezos communicated with Mr. Diehl, and Mr. Pettit and Mr. Glezos spoke regularly, but Mr. Glezos did not communicate with him about developments regarding the City planning commission. (R. 769 at 92-97.)

According to Mr. Conant, on February 14, 2007, when he showed design changes to Mr. Glezos, Mr. Glezos expressed approval and stated he would discuss it with Mr. Pettit. (R. 524; 539.) A few days later, according to Mr. Conant, Mr. Glezos told Western Land that Mr. Pettit had approved the design changes. (R. 524.) Mr. Glezos

denies ever approving design changes, on his own behalf and especially on behalf of Jordan Foothills. (R. 770 at 181-82.) According to Western Land, however, Mr. Glezos again expressed approval of the added cul-de-sac change in May of 2007. (R. 525.)

Mr. Conant also stated that Mr. Glezos asked for cost estimates to help Mr. Pettit in his decision-making about the type of lots he would purchase pursuant to the option agreement. (R. 525.) Mr. Glezos requested and was provided engineering drawings. (R. 525.)

At the August 8, 2007 meeting where the City approved the final plat, Mr. Glezos and Walter Keane, Jordan Foothills' attorney, were in attendance. (R. 526.) On August 14, Jordan Foothills, through its attorney, informed Western Land that the final plat was unacceptable and demanded a refund of its first option payment. (R. 320.) On August 9, August 20, and August 29, Mr. Glezos met with Western Land and expressed concern over the collapsible soil notation required by the plat. (R. 527.)

Mr. Conant and Mr. Diehl stated that they relied on Mr. Glezos' representations throughout the negotiation and platting process which included Mr. Glezos' assurances that he was relaying information to Mr. Pettit. (R. 532; 546.)

B. Mr. Glezos Had No Authority to Exercise Jordan Foothills' Rights Under Section 4(b) of the Option Agreement

Throughout this litigation Western Land has asserted that, under section 4(b) of the option agreement, the critical legal question is not whether Jordan Foothills approved the final plat, but whether Jordan Foothills approved design changes prior to the final plat. Western Land then asserts that Mr. Glezos exercised Jordan Foothills' section 4(b) rights, even though his purported approval took place months before the final plat existed. Western Land then asserts that, as a consequence, Jordan Foothills is ineligible for a refund of the principal (or interest) amounts on its \$1.5 million payment. This reasoning is both legally and factually flawed.

The trial court ruled that, under the option agreement, if Jordan Foothills approved design changes made between concept and final stages, and if no further changes were made in the final City approval process, then Jordan Foothills would have exercised all its rights under section 4(b). The court then held that Mr. Glezos' actions with respect to design changes made before the final approval eliminated Jordan Foothills' ability to reject the final plat. The trial court found that Mr. Glezos had express authority, implied authority, and apparent authority to act on behalf of Jordan Foothills. (R. 680.)

First, as noted above, the plain language of the agreement provides Jordan Foothills the right to reject the final plat created by the City's approval of a plat. Jordan Foothills' section 4(b) right to approve the final plat as a condition precedent to its obligation to close could not be exercised until the City approved a plat as "final." Second, the evidence is insufficient to support a finding that Mr. Glezos was an agent of Jordan Foothills for the purposes of exercising its section 4(b) rights. Even when the

facts are considered in the light most favorable to the trial court's ruling, the trial court's findings and conclusions concerning the existence of all three types of authority are erroneous. Utah County v. Butler, 2008 UT 12, ¶11, 179 P.3d 775 (requiring a party challenging the factual findings of a lower court to marshal the evidence and "demonstrate that the evidence is legally insufficient to support the finding even when viewing it in a light most favorable to the court below").

1. Mr. Glezos Did Not Have Express Authority to Act for Jordan Foothills by Exercising Its Rights Under Section 4(b)

Mr. Glezos did not have express authority to exercise Jordan Foothills' contractual rights. "Express authority exists whenever the principal directly states that its agent has the authority to perform a particular act on the principal's behalf." Zions First Nat'l Bank v. Clark Clinic Corp., 762 P.2d 1090, 1094 (Utah 1988). Mr. Pettit testified that he never communicated to anyone at Western Land that Mr. Glezos had authority to act on Jordan Foothills' behalf. Mr. Diehl, on the other hand, testified that, at the close of his meeting with Mr. Pettit at the coffee shop, Mr. Pettit instructed him to "work out the remainder of the agreement directly with Mr. Glezos." (R. 537.) Other than this one statement, Western Land presented no evidence that Mr. Pettit, the principal, directly stated that Mr. Glezos had the authority to perform any particular act on Mr. Pettit's or Jordan Foothills' behalf.

This statement, at most, is evidence that Mr. Glezos had limited authority to negotiate the remaining terms of the contract before its execution.¹¹ This does not support a finding of express authority to perform parts of the agreement once executed, especially where Western Land drafted the agreement after these negotiations and listed Mr. Pettit as the authorized agent of Jordan Foothills. (R. 289-90.)

Importantly, the facts surrounding the execution of the option agreement make clear that Mr. Glezos had no authority to enter into the agreement. He was not mentioned in the agreement and did not sign it. Even though Mr. Glezos may have been able to negotiate the terms of the agreement and act as a messenger prior to its execution, only Mr. Pettit had authority to bind Jordan Foothills by entering into the agreement. There is no evidence to the contrary; nor evidence that Western Land was confused on this point. Thus, only Mr. Pettit could exercise Jordan Foothills' rights under the agreement.

There is no other evidence that could support a finding that Mr. Glezos had express authority to approve exercise Jordan Foothills' right under section 4(b). Under this section, Jordan Foothills had the right to approve the final plat, a right Mr. Pettit specially bargained for in the agreement. If Jordan Foothills elected in its sole discretion to refuse to approve the changes, it would receive a refund of its \$1.5 million first option payment, less the time value of money.

¹¹ Western Land and the trial court relied on Mr. Glezos' handwritten additions to the contract for support of their agency arguments and conclusion. The fact that Mr. Glezos wrote changes, which Mr. Pettit unequivocally approved by signing the option agreement after those handwritten changes were made, supports the fact that Mr. Glezos had authority to negotiate the terms of the contract prior to its execution and says nothing regarding any authority once Jordan Foothills executed the agreement. Further, the handwritten changes were expressly approved by Jordan Foothills when Mr. Pettit signed the agreement. No such approval exists regarding the changes to the design of the plat.

This is an important and critical provision in the agreement. Granting or withholding this approval is an entirely separate and independent matter, one for which there is no evidence Mr. Glezos had express authority to perform. Express authority requires the principal to manifest that the agent has authority “to perform a particular act” on the principal’s behalf. Zions First Nat’l Bank, 762 P.2d at 1094. Viewing the facts in the light most favorable to Western Land and the trial court’s ruling, there is no evidence to support the trial court’s express authority finding.

Evidence of Mr. Glezos’ role in the negotiation of the separate Sycamores Phase 9 development similarly cannot support the trial court’s finding of express agency in this case. According to Mr. Richards’ testimony, Mr. Pettit represented that Mr. Glezos worked for him during the Sycamores Phase 9 transaction. Mr. Richards is unaffiliated with Western Land and, even if his testimony is accurate, his third-party representations to Western Land about the relationship between Mr. Pettit and Mr. Glezos in the context of the Sycamores Phase 9 transaction cannot bind Mr. Pettit in a new, separate transaction. The acts engaged in by Mr. Glezos in the Sycamores Phase 9 transaction were similar negotiation-type actions and not acts which unilaterally bound Mr. Pettit or Jordan Foothills regarding the exercise of resulting contractual rights.

The trial court erred in finding express authority.

2. Mr. Glezos Was Not Cloaked with Apparent Authority to Act on Behalf of Jordan Foothills and Approve the Final Plat Under Section 4(b)

There also is no evidence to support the finding that Mr. Glezos had apparent authority to exercise Jordan Foothills’ section 4(b) contractual rights. In order to have apparent authority, the principal “must conduct itself in such a way to cause the third

party . . . to believe that the agent . . . has apparent authority to act on behalf of the principal.” Bodell Constr. Co., 945 P.2d at 124; City Elec. v. Dean Evans Chrysler-Plymouth, 672 P.2d 89, 90 (Utah 1983). One asserting that another had apparent authority cannot satisfy its burden of proof merely by showing that the supposed agent acted in a way that led the first party to believe the actor had authority. See City Elec., 672 P.2d at 90. Nor can the alleged agent’s own statements establish his authority. Id. at 91. The evidence must be of the principal’s actions or statements. Zions First Nat’l Bank, 762 P.2d at 1095. Here, there is no such evidence. Western Land cites only to Mr. Glezos’ own actions to suggest that he had authority to exercise those rights.

According to Western Land, Mr. Glezos represented that after discussions with Mr. Pettit, Mr. Pettit had approved those changes. However, no act or representation by the principal supported, confirmed, ratified, or approved Mr. Glezos’ authority or action in approving the final plat. And Western Land never confirmed this authority with the person who executed the agreement on behalf of Jordan Foothills—Mr. Pettit. Specifically, Mr. Pettit never spoke with anyone from Western Land between the time Jordan Foothills executed the contract until the City approved the final plat. At that point, a hand-delivered letter was sent by Western Land to Mr. Pettit demanding the second option payment. Mr. Pettit promptly rejected the final plat. Any claim of apparent authority fails.

Importantly, the undisputed evidence establishes that Western Land went directly to Mr. Pettit, and not through Mr. Glezos, when its important rights, such as obtaining payments, were at issue. This suggests Western Land knew Mr. Pettit, not Mr. Glezos, was the one with authority to act for Jordan Foothills. Despite the trial court’s conclusion

to the contrary, there was no course of dealing between Western Land and Jordan Foothills that could reasonably be construed as evidence that Western Land always went through Mr. Glezos to relay information to Mr. Pettit.

Further, any authority Mr. Glezos may have had was limited by Mr. Pettit's one statement concerning Mr. Glezos' authority—that Western Land should negotiate the remaining contractual terms with Mr. Glezos. This statement limited any authority Mr. Glezos held.¹² “[A]pparent authority vanishes when the third party has actual knowledge of the real scope of the agent's authority.” City Elec. v. Dean Evans Chrysler-Plymouth, 672 P.2d 89, 90 (Utah 1983); Horrocks v. Westfalia Systemat, 892 P.2d 14, 16 n.1 (Utah Ct. App. 1995) (“Knowledge of an agent's lack of authority defeats a claim for apparent authority.”). Mr. Glezos' only authority ceased after the agreement was executed. Any continued actions by Mr. Glezos after the agreement was executed by Jordan Foothills were unauthorized actions that cannot bind Jordan Foothills, and Western Land had no basis in Mr. Pettit's actions for believing otherwise.

Any authority that may have been established through the prior dealing on the Sycamores Phase 9 development also is insufficient to create apparent authority for the new, separate transaction. “[G]eneral expressions used in authorizing an agent are limited in application to acts done in connection with the act or business to which the authority primarily relates.” City Elec., 672 P.2d at 91 (quotations omitted). Thus, an entirely separate transaction cannot create apparent authority for Mr. Glezos to perform

¹² Western Land was also “under an obligation to ascertain the scope of [Mr. Glezos'] agency,” which it did not do. Bodell, 945 P.2d at 124. Western Land, based only on Mr. Glezos' actions, assumed that he had authority going well beyond the authority to negotiate contractual terms prior to the execution of the option agreement despite the express statement to the contrary.

acts under the new, separate option agreement. Moreover, Mr. Glezos' authority in the Sycamores Phase 9 transaction was similarly limited to negotiation of contractual terms.

If Western Land had changed its position in reliance on Mr. Glezos' actions, it might have a basis for asserting apparent authority. Luddington v. Bodenvest Ltd., 855 P.2d 204, 209 (Utah 1993). However, there was no such reliance. Western Land's position did not change between February 14, 2007, when Mr. Glezos allegedly approved the design changes, and the August City planning meeting. If anything, Western Land earned and received about \$80,000 in the time value of Jordan Foothills' deposit during this time. Therefore, the equitable doctrine of apparent authority does not apply.

3. Mr. Glezos Did Not Have Implied Authority to Exercise Jordan Foothills' Contractual Rights

For similar reasons, the trial court's finding of implied authority lacks evidentiary support. "Implied authority is actual authority based upon the premise that whenever the performance of certain business is confided to an agent such authority carries with it by implication authority to do collateral acts which are the natural and ordinary incidents of the main act or business authorized." Bodell Constr. Co. v. Stewart Title Guar. Co., 945 P.2d 119, 124 (Utah Ct. App. 1997). In other words, "[i]mplied authority . . . embraces authority to do those acts which are incidental to, or are necessary, usual, and proper to accomplish or perform, the main authority expressly delegated to the agent." Id.

According to the testimony, if Mr. Glezos had any authority at all, he had the implied authority to engage in acts incidental and necessary to negotiating the terms of the option agreement prior to its execution. There is no basis in these facts to support a finding of implied authority to exercise Jordan Foothills' rights under section 4(b), and

the exercise of a consequent contractual right is not incidental to, and does not ordinarily flow from, the authority to negotiate contractual terms prior the execution of the underlying agreement.

In a similar case, this court held that an agent's authority to issue title insurance did not cloak it with the implied authority to engage in escrows, closing, and settlements on the principal's behalf. Id. at 125. The court concluded that "[w]hile it may very well be true that issuing title insurance typically occurs concurrently with escrow, closing, and settlement functions, this does not necessarily make them mutually inclusive." Id. The same result follows in this case. Even if Mr. Glezos had the authority to negotiate the remaining contractual terms prior to the execution of the contract, the separate act of exercising contractual rights after the contract has been executed is entirely distinct and not "mutually inclusive." Moreover, unlike the acts contemplated in Bodell, the acts at issue in this case are not acts that typically occur concurrently. The very nature of the act of negotiating a contract and of later exercising the rights established by the executed contract cannot be performed concurrently and were not performed concurrently in this case.

Under Bodell, the trial court's finding of implied authority lacks the requisite evidentiary support. Any implied authority Mr. Glezos had terminated once Jordan Foothills entered into the agreement.

Mr. Glezos lacked any authority to exercise Jordan Foothills' section 4(b) rights. Even if section 4(b) permitted Jordan Foothills' approval of design changes instead of the final plat—which is incorrect—there is no evidence to support a finding that Jordan Foothills ever approved the design changes. This court should reverse the trial court's

decision and order Western Land to refund Jordan Foothills' \$1.5 million first option payment or, alternatively, order Western Land to reconvey the trust deed to Jordan Foothills and allow Jordan Foothills to foreclose on the property.

CONCLUSION

This court should reverse the trial court's judgment. First, the option agreement unambiguously provides to Jordan Foothills the right to reject the final plat approved by the City. Jordan Foothills did reject the final plat and is therefore entitled to a refund of the principle amount of its option payment. Second, even if section 4(b) of the option agreement were ambiguous, the language should be construed in favor of Jordan Foothills in light of the extrinsic evidence and the fact that Western Land drafted the agreement. Thus, whether or not section 4(b) is ambiguous, it supports Jordan Foothills' reading that it could reject the final plat after City approval and obtain a refund of its option payment.

Finally, even if section 4(b) did allow Jordan Foothills to exercise its right under section 4(b) prior to the City approving a plat as final, Jordan Foothills never approved of any changes in a plat. Mr. Glezos is not an agent of Jordan Foothills with the authority to exercise its section 4(b) contractual rights. Any alleged approval by Mr. Glezos cannot bind Jordan Foothills, even assuming that section 4(b) did not provide Jordan Foothills the right to reject the final plat after City approval.

This court should reverse the trial court and order Western Land either to refund Jordan Foothills' \$1.5 million first option payment or to reconvey the trust deed to Jordan Foothills so that it may foreclose on the property.

DATED this 23rd day of June, 2008.

SNELL & WILMER L.L.P.

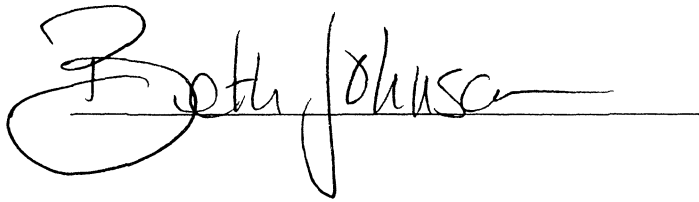
A handwritten signature in black ink, appearing to read "Michael D. Zimmerman", is written over a horizontal line.

Michael D. Zimmerman
Troy L. Booher
Katherine Carreau
Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of June, 2008, two true and correct copies of the foregoing were sent via first-class mail, postage prepaid, to the following:

Richard D. Burbidge
Benjamin Lieberman
Burbidge Mitchell & Gross
215 South State Street, Suite 920
Salt Lake City, Utah 84111

A handwritten signature in cursive script, reading "Beth Johnson", written over a horizontal line.

Tab A

IMAGED

ORIGINAL

Richard D. Burbidge (#0492)
Jefferson W. Gross (#8339)
Benjamin W. Lieberman (#11456)
BURBIDGE MITCHELL & GROSS
215 South State Street, Suite 920
Salt Lake City, Utah 84111
Telephone: (801) 355-6677
Facsimile: (801) 355-2341

FILED DISTRICT COURT
Third Judicial District

DEC 19 2007

By [Signature]
SALT LAKE COUNTY
Deputy Clerk

ENTERED IN REGISTRY
OF JUDGMENTS

DATE 12/24/07

Attorneys for Plaintiffs

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

WESTERN LAND &
DEVELOPMENT, LC, a Utah limited
liability company, and EAST MAPLES
INVESTMENT, LLC, a Utah limited
liability company,

Plaintiffs,

v.

JORDAN FOOTHILLS, LLC, a Utah
limited liability company, and
WALTER T. KEANE, in his capacity
as trustee of the trust deed executed by
Western Land & Development, LC, and
East Maples Investment, LLC, as
trustors and Jordan Foothills, LLC, as
beneficiary,

Defendants.

~~PROPOSED~~ JUDGMENT

Civil No. 070913972
Judge Anthony Quinn

Judgment (re: real property) @J



JD26085928

pages:

070913972 JORDAN FOOTHILLS LLC

A trial was held on the merits of this matter on December 6 and 7, 2007, before the Honorable Anthony Quinn, Third District Court, Salt Lake County. Richard D. Burbidge and Benjamin W. Lieberman of Burbidge, Mitchell & Gross appeared for and on behalf of Plaintiffs, and Walter T. Keane appeared for and on behalf of Defendants.

The Court, having entered its Findings of Fact, Conclusions of Law and Order of Court, and good cause appearing, HEREBY DECLARES, ORDERS, ADJUDGES AND DECREES as against Defendants as follows:

1. Judgment is hereby entered as against Defendant Jordan Foothills, LLC in favor of Plaintiffs, and as part of that judgment the Court hereby declares, orders, adjudges and decrees that:

(A) The Option Agreement has expired and Jordan Foothills, LLC has no rights thereunder; and

(B) Western Land & Development, LC is hereby entitled to retain the first option payment in the amount of One Million Five Hundred Thousand Dollars (\$1,500,000.00) as liquidated damages.

2. Judgment is hereby entered as against Defendants in favor of Plaintiffs respecting title to the real property located in West Jordan, Utah containing approximately 51.2 acres, as more fully described on Exhibit A hereto (“the Property”), and the Court hereby declares, orders, adjudges and decrees that title to the Property lies with Plaintiff East Maples Investment, LLC, subject only to its contract with Western Land & Development, LC. Defendant Walter T. Keane, as Trustee, is hereby ordered to reconvey

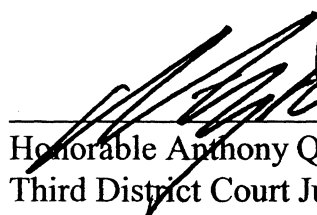
that certain Trust Deed dated October 25, 2006, by and between WESTERN LAND & DEVELOPMENT, L.C. and EAST MAPLES INVESTMENT, LLC, as Trustor, and JORDAN FOOTHILLS, L.L.C. as Beneficiary, recorded October 27, 2006 in Book 9371 at Page 9124-9126, Entry No. 9890319 (the "Trust Deed"), to Western Land & Development, LLC within five days of the entry of this judgment. Upon such reconveyance in accordance with the judgment of this Court, Mr. Keane shall be dismissed from the suit, as he was named as a defendant only in his capacity as the trustee under the Trust Deed. Upon completion of his duties as trustee in accordance with this judgment, no purpose will be served in Mr. Keane remaining as a defendant in this matter.

3. Judgment is hereby awarded in favor of Plaintiffs as against Defendant Jordan Foothills, LLC for costs and attorneys fees to be proven by affidavit filed by Plaintiffs within thirty days of the date of this judgment.

SO ORDERED.

DATED this 19 day of RM, 2007.

BY THE COURT



Honorable Anthony Quinn
Third District Court Judge

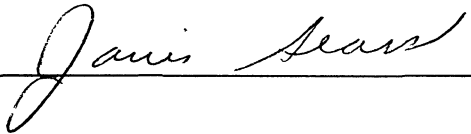


CERTIFICATE OF SERVICE

On the date below written, the undersigned hereby certifies that a true and correct copy of **[PROPOSED] JUDGMENT** was served via e-mail with a hard copy via U.S. mails upon:

Walter T. Keane
2150 South 1300 East, Suite 500
Salt Lake City, Utah 84106
Individually and as
counsel for Defendant
Jordan Foot hills, L.C.

DATED this 11th day of December, 2007.



P:\Clients\Diehl, Terry 2717\0701-Western Land Develop v. Jordan Hills\Pleadings\Judgment.wpd

Order No: SL079432UG
Reference No: 79158

Exhibit "A"
(Legal Description)

Commencing at the Northeast corner of Section 27, Township 2 South, Range 2 West, Salt Lake Base and Meridian, and running thence South 0°27'34" East 2635.88 feet along the East line of the Northeast quarter of said Section 27 to the East Quarter corner of said Section 27 and the point of beginning for this description; thence South 0°27'53" East 1402.31 feet along the East line of the Southwest quarter of said Section 27; and running thence South 89°53'28" West 384.00 feet; thence South 0°27'53" East 1233.00 feet to the South line of said Section 27; thence along said South line South 89°53'28" West 709.35 feet; thence North 0°27'53" West 1506.20 feet to the South line of the Maples at Jordan Hills Phase 3 Subdivision; thence along said subdivision the following 4 courses: (1) thence North 89°32'07" East 70.00 feet; (2) thence North 0°27'53" West 695.60 feet; (3) thence South 89°32'07" West 70.00 feet; (4) thence North 0°27'53" West 635.54 feet to the North line of the Southeast quarter of said Section 27; thence North 89°56'42" East 1093.6 feet to the East quarter corner of said Section 27.

Actual F.D. No. 20-27-400-003.

Tab B

Page 1 of 2

OPTION AGREEMENT

THIS OPTION AGREEMENT (the "Agreement") is made and entered into this 25th day of October 2006, by and between WESTERN LAND & DEVELOPMENT, L.C., a Utah limited liability company, and/or its assignee (hereinafter referred to as "Seller") and JORDAN FOOTHILLS LLC, a Utah LIMITED LIABILITY CO., and/or its assignee (hereinafter referred to as "Buyer").

RECITALS:

A. Seller has the contractual right to acquire certain real property in Salt Lake County, Utah containing approximately 51.2 acres (the "Property"). A preliminary legal description of the Property is attached hereto and incorporated herein by this reference as Exhibit "A."

B. Buyer desires to purchase, and Seller is willing to grant Buyer the option to purchase, the Property in accordance with the terms and conditions of this Agreement.

AGREEMENT:

NOW, THEREFORE, in consideration of the mutual promises and covenants herein contained, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

1. Definitions. As used herein, the following words and terms shall have the meanings set forth:

(a) "Base Price" shall mean Eighty-Five Thousand Dollars (\$85,000.00) per Lot; provided, however, if Buyer delivers the Finished Lot Election, then the Base Price shall be increased to One Hundred Twenty-Five Thousand Dollars (\$125,000.00) per Lot.

(b) "City" means the City of West Jordan, a Utah municipal corporation.

(c) "City Trade Parcel" is defined in Section 4(d) and shown in Exhibit "G".

(d) "Closing" shall mean consummation of the transaction by which Buyer acquires the Property.

(e) "Closing Date" shall mean the date on which a Closing occurs.

(f) "Construction Advances" shall mean money advanced by Buyer pursuant to Section 4(e) for payment of construction costs incurred in connection with Seller's

completion of the Infrastructure Improvements following Buyer's delivery of the Finished Lot Election.

(g) "Construction Cost Cap" is defined in Section 4(e).

(h) "Deed of Trust" shall mean a Deed of Trust to be recorded against the Property in a form mutually acceptable to Seller and Buyer, which Deed of Trust shall have a provision for partial release of the Seller Exchange Parcel.

(i) "Finished Lot" shall mean a single family residential lot within the Project for which the Infrastructure Improvements have been completed. *INCLUDING A FENCE AND RETAINING WALLS, FENCE WALLS* *COLLECTOR*

(j) "Finished Lot Election" shall mean Buyer's written election, communicated contemporaneously with Buyer's payment of the Second Option Payment, to have Seller complete the Infrastructure Improvements and deliver the Lots as Finished Lots.

(k) "First Option Payment" shall mean One Million Five Hundred Thousand Dollars (\$1,500,000.00), to be paid by Buyer to Seller as consideration for this Agreement and shall be due with available funds deposited at Merrill Title on or before October 27, 2006 at 12 noon.

(l) "Infrastructure Improvements" shall mean the improvements necessary to provide the Lots with permanent public access (inclusive of all City required grading and the installation of curb, gutter, sidewalks and asphalt on all applicable road surfaces), water, sewer, gas, power and telephone utilities stubbed to the Lots, all of the foregoing being completed in accordance with the plans approved by the City for installation of the same. For purposes of this Agreement, the Infrastructure Improvements shall also include the Reimbursable Improvements.

(m) "Land Use Approvals" is defined in Section 4(b). *SHALL INCLUDE GRADING OF BUYER ERECTS FINISHED LOTS*

(n) "Lot" shall mean a single family residential lot within the Project for which final plat approval have been obtained.

(o) "Paper Lot" shall mean a single family residential lot within the Project for which final plat approval has been obtained, but for which the Infrastructure Improvements have not been completed and the final plat has not been recorded.

(p) "Parties" shall mean Seller and Buyer.

(q) "Permitted Exceptions" means the liens and encumbrances described on the attached Exhibit "B."

(r) "Preliminary Plat" is defined in Section 4(a).

(s) "Project" shall mean a single family residential subdivision for which Seller shall obtain subdivision approval from the City, which residential subdivision is anticipated to include approximately one hundred forty-six (146) single family residential subdivision lots.

(t) "Property" is defined in Recital A.

(u) "Purchase Price" is defined in Section 8.

(v) "Reimbursable Improvements" shall mean the construction of those portions of 7775 South, 7800 South and 6400 West Street as are identified in the Preliminary Plan, together with water, sewer, gas, power, telephone and other utilities within such public rights-of-way.

(w) "Reimbursement Agreements" shall mean such agreements as Seller is able to secure with the City pertaining to the Reimbursable Improvements, which agreements, if any, may provide for reimbursement pursuant to the City's collection of impact fees or reimbursement from the City vis-à-vis collection from neighboring or adjoining property owners.

(x) "Second Option Payment" shall mean **Three Million Nine Hundred Seventy-Five Thousand Dollars (\$3,975,000.00)**, to be paid by Buyer to Seller as consideration for this Agreement.

(y) "Second Option Payment Date" shall mean the last to occur of: (i) January 15, 2007; or (ii) the date that is five (5) business days following the City's granting of the Land Use Approvals. *INCLUDING BONDING IF BUYER ELECTS TO BUY FINISHED LOTS.*

(z) "Title Commitment" means a commitment of the Title Company to issue the Title Insurance Policy in favor of the Buyer.

(aa) "Title Company" means Merrill Title Company, whose address is 6965 Union Park Ctr #200, Midvale, Utah.

(bb) "Title Insurance Policy" means an American Land Title Association ("ALTA") standard owners coverage policy of title insurance in the amount of the Purchase Price.

(cc) "Zoning Approval" is defined in Section 4(a).

2. Grant Of Option. In consideration of the payment of the First Option Payment paid this date by Buyer to Seller and payment of the Second Option Payment by Buyer to Seller on or before the Second Option Payment Date, Seller hereby grants to Buyer the right and option to purchase the Property for development by Buyer strictly in accordance with the provisions of this Agreement. Such right and option, as set forth below, shall be exercisable strictly in accordance with

the terms and conditions, and on or prior to the dates, set forth in this Agreement. If the option to purchase the Property is not timely and properly exercised or Buyer fails to pay the Second Option Payment by the Second Option Payment Date, Seller shall retain, to the extent previously paid, the First, the Second Option Payments and any Construction Advances as consideration for the rights granted to Buyer pursuant to this Agreement. Except as specifically provided herein, the First and Second Option Payments, and the Construction Advances are fully non-refundable to Buyer upon payment of the same to Seller. As security for Seller's performance of its obligations pursuant to this Agreement, Seller shall deliver to Buyer the Deed of Trust. In addition, to further secure Seller's obligations to construct the Infrastructure Improvements from and after Buyer's delivery of the Finished Lot Election, Terry C. Diehl and Lee Conant shall personally guaranty such completion, subject to Buyer's payment of all required Construction Advances up to the Construction Cost Cap.

3. Investigation. Prior to the execution of this Agreement, Buyer has made such on-site inspections of the Property and reviewed such documents relating to the Property as Buyer deems necessary. Upon Closing, except for Seller's obligation to complete the Infrastructure Improvements from and after Buyer's delivery of the Finished Lot Election and the express warranties stated in this Agreement and any Closing documents, Buyer shall accept the Lots "As Is" in their present condition without any representation or warranty, either express or implied. Buyer expressly acknowledges that Buyer has not relied on any warranties, promises, understandings or representations, express or implied, of Seller relating to the Property or the Lots that are not expressly set forth herein. Buyer acknowledges that any and all engineering data, cost estimates, feasibility or marketing reports, soil reports, or other information of any type which Buyer has received or may receive from Seller or Seller's agents is furnished on the express condition that Buyer shall make an independent verification of the accuracy of such information, all such information being furnished without any warranty. Notwithstanding the foregoing, Buyer and its authorized representatives shall, upon reasonable notice to Seller and at reasonable times prior to the applicable Closing or earlier termination of this Agreement, as the case may be, have access on and to the Property for the purpose of further investigating all matters pertaining to the transaction contemplated by this Agreement and as otherwise needed for surveys, inspections, examinations, soil tests, and other matters (the cost of any and all such reports or studies to be paid by Buyer). To the extent that Buyer damages or disturbs the Property as a consequence of such access, Buyer shall return the Property to substantially the same condition that existed prior to Buyer's (or its representatives') investigations. Buyer shall indemnify, hold harmless, and defend Seller from and against all losses, claims, actions, costs, or expenses that Seller incurs that are caused by any act or omission of Buyer or Buyer's representatives during such access. Buyer's obligations under the previous sentence shall survive the Closing or earlier termination of this Agreement. Buyer has no liability to Seller for any reduction in value to the Property that results from the discovery of matters or circumstances existing on the Property as of the date hereof through Buyer's studies and tests.

4. Land Use Approvals; Construction of Infrastructure Improvements.

(a) Zoning of the Property. Pursuant to City ordinance Nos. 04-27 and 05-18, copies of which are attached hereto as Exhibit "C", and acting upon the application of the

Seller, the City previously caused the Property to be re-zoned to the P-C (planned community) zoning classification (the "Zoning Approval"). Pursuant to the Zoning Approval, the density of the development on the Property may not exceed 2.87 units per acre. Consistent with the Zoning Approval, the Seller has previously submitted to the City a Preliminary Development Plan (the "Preliminary Plan") for the Property, which reflects the proposed creation of 146 residential development lots on the Property (together with the City Trade Parcel). A copy of the Preliminary Plan has been previously reviewed and approved by Buyer and is attached hereto as Exhibit "D".

(b) Additional Land Use Approvals. Consistent with the Preliminary Plan, Seller shall secure the approval of such development agreements, preliminary and final plats as are necessary to permit, upon recordation of such development agreements and final plat or plats, the development of the Property as a residential subdivision consistent with the Zoning Approval and Preliminary Plan (collectively, the "Land Use Approvals"). If in the plating process, the City makes changes in the plan shown as Exhibit "D", the Buyer shall have the right to approve the new Final Plat as a condition precedent to closing on this transaction. Should closing not occur as a result of Seller's inability to obtain final plat approval, as stated herein, or final plat approval is obtained of a design which has not been approved of by Buyer, all consideration, including but not limited to First Option Payments, Second Option Payments, Construction Advances, or payments under the Finished Lot Election, paid under this Agreement shall be fully refunded. For purposes of this Agreement, Land Use Approvals shall also include such Reimbursement Agreements as Seller is able to secure from the City and the design and engineering of the Infrastructure Improvements, including plans and specifications therefore approved by the City. Seller shall exercise reasonable diligence to obtain the Land Use Approvals, such that they shall be received as expeditiously as possible. Seller anticipates that it will receive such Land Use Approvals on or around January 15, 2007.

(c) Limitation on Land Use Approvals. Buyer expressly acknowledges that the Land Use Approvals shall not include approval of building permits or other agreements necessary to the construction of the Infrastructure Improvements or buildings on the Property or the Lots to be located thereon, and that the preparation and/or acquisition of all such permits and approvals other than the Land Use Approvals shall be the responsibility of Buyer and at Buyer's sole cost and expense. Buyer shall also pay all plat recording fees, utility connection fees, capital recovery fees, impact fees, secondary water fees, and any other fees or requirements normally associated with the recording of plats of subdivision, issuance of building permits or other similar charges and assessments against the Infrastructure Improvements, buildings or other structures constructed on the Property.

(d) Property Exchange With the City. Seller and Buyer acknowledge that the Preliminary Plan contemplates the inclusion of real property owned by the City (the "City Trade Parcel") in the residential development reflected thereon. Consistent with preliminary agreements with the City and the Seller, Seller shall, in connection with securing the Land Use Approvals, endeavor to secure such approvals and agreements from the City as are

necessary to cause the exchange of the City Trade Parcel for that portion of the Property identified as the "Seller Exchange Parcel" on Exhibit "A." Buyer acknowledges that the contemplated exchange of the Seller Exchange Parcel for the City Trade Parcel will require the execution of a development or other similar agreement addressing, among other things, the exchange of the Seller Exchange Parcel for the City Trade Parcel, the City's obligation to remediate that portion of the City Trade Parcel previously used for a gun range to a level that will permit the construction of residential housing thereon, the respective obligations of the City and Buyer in connection with the construction of portions of 7775 South, 7800 South and 6400 West Streets, the possible exclusion of a portion of the City Trade Parcel if it contains a viable water well, and the imposition of certain requirements on the Property pertaining to construction of the Reimbursable Improvements and the development of the Property generally. Seller shall be solely responsible for obtaining, at Seller's sole cost and expense, such appraisals as are required by the City in connection with the above-described exchange of the City Trade Parcel for the Seller Exchange Parcel. Buyer expressly agrees to cause the release of the Seller Exchange Parcel from the release of the lien of the Deed of Trust when necessary to accommodate the above-described exchange, whereupon the City Trade Parcel may be subjected to such lien at the request of Buyer.

(e) Finished Lot Election--Construction of Infrastructure Improvements. Buyer may elect to cause the Seller to complete the Infrastructure Improvements and deliver the Lots in Finished Lot condition by delivering the Finished Lot Election to Seller contemporaneously with Buyer's timely payment of the Second Option Payment. Upon delivery of the Finished Lot Election, Seller shall promptly commence and, subject to Buyer's payment of the Construction Advances as required herein, diligently pursue to completion the construction of the Infrastructure Improvements in accordance with the approved plans and specifications. From time-to-time during the construction of the Infrastructure Improvements, but not more frequently than twice per calendar month, Seller may submit construction draws to Buyer for fees incurred to records plats of subdivision and work completed in connection with the construction of the Infrastructure Improvements prior to the date of such draw, together with reasonable supporting invoices and conditional lien releases for such work. Within ten (10) days of Seller's submission of a construction draw, Buyer shall pay to Seller the full amount of such requested and properly supported draw in cash or other immediately available funds (each constituting a Construction Advance). Seller hereby agrees that Buyer's cumulative Construction Advances shall not exceed Fifty Thousand and 00/100 Dollars (\$50,000.00) per Lot based upon the City's current fee schedule. Notwithstanding the foregoing, the Construction Cost Cap shall be increased on a per-Lot basis commensurate with any increase in the City's current fee schedule between the date of this Agreement and the date the applicable fees are required to be paid to the City and any increase in design, engineering or construction costs attributable to change orders requested by Buyer following the City's approval of the final plans and specifications for the Infrastructure Improvements. A copy of the City's current fee schedule is attached hereto as Exhibit "F" of this Agreement. Except as provided above, Seller shall be solely responsible for cost to complete the Infrastructure Improvements in excess of the Construction Cost Cap. Buyer and Seller expressly agree that, provided Buyer has delivered the Finished Lot Election, Seller shall be entitled to any and all reimbursements due in

*Final
made
Cul*

connection with the Reimbursement Agreement. Each Construction Advance shall be applied towards the Purchase Price for the Property at Closing.

(f) No Finished Lot Election—Construction of Infrastructure Improvements. Buyer expressly acknowledges that if Buyer does not timely deliver the Finished Lot Election, Buyer shall be solely responsible to pay for and record the applicable plats of subdivision and for completion of the Infrastructure Improvements and that Seller shall deliver the Property to Buyer as Paper Lots only. Buyer further acknowledges and agrees that in connection with Buyer's completion of the Infrastructure Improvements, Buyer shall be required to comply with certain contractual covenants with Rulon J. and Paula Harper and/or Harper Contracting, Inc. and Harper Ready Mix Company, which contractual covenants are more fully identified in the Permitted Exceptions, and which covenants Buyer shall be deemed to have expressly assumed and hereby covenants to perform upon and/or in connection with Buyer's completion of the Infrastructure Improvements. Buyer's obligations under the previous sentence shall survive the Closing or earlier termination of this Agreement.

5. Termination. The term of this Option Agreement shall extend until August 27, 2007 (the "Termination Date").

6. Procedure for Continuing and Exercise of Option.

(a) On or before the Second Option Payment Date, Buyer shall deliver to Seller the Second Option Payment.

(b) Buyer may exercise its option with respect to the Property by delivering written notice to Seller of its exercise of the option and election to purchase the Property on or before the Termination Date. The Closing of the Property shall occur at a date and time designated by Buyer upon reasonable notice to Seller, but in no event earlier than September 3, 2007 nor later than September 14, 2007.

*OR EXTENDED 14 DAYS AFTER
COMPLETION ACCEPTANCE BY WEST GORDAN*

(c) The option herein granted shall be exercised in writing by giving notice in the manner set forth in this Section 6. If Buyer should neglect, or otherwise in any manner fail, to pay the Second Option Payment, exercise its option to purchase the Property or to close on the Property thereafter, strictly in accordance with the manner, procedure, or times set forth in this Agreement, Buyer's option to purchase the Property shall automatically terminate and no longer be of any force and effect upon Seller or the Property, Seller shall retain, to the extent previously paid, the First and Second Option Payments and any Construction Advances, and the Buyer shall immediately cause the release of the lien of the Deed of Trust.

7. Purchase Price. The purchase price ("Purchase Price") which shall be paid to Seller for the Property shall be determined and established as of the Closing Date and shall be equal to the applicable per Lot Base Price multiplied by the number of Lots approved pursuant to the Land Use Approvals. If Buyer makes the Finished Lot Election, the applicable per Lot Base Price shall be the Base Price for Finished Lots (i.e. \$125,000.00 per

Lot). If Buyer does not make the Finished Lot Election, the applicable per Lot Base Price shall be the Base Price for Paper Lots (i.e. \$85,000.00 per Lot). The Purchase Price for each Phase shall be paid in cash or other immediately available funds at the Closing for each such Phase. The First Option Payment, the Second Option Payment and any Construction Advances shall be applied towards the Purchase Price at Closing.

8. Closing.

(a) The Closing of the Property shall occur at the offices of the Title Company, and shall be held on a date and time selected by Buyer upon reasonable notice to Seller, which date shall not be later than the deadline for such Closing stated herein.

(b) As of the Closing Date, the Parties shall prorate all taxes and assessments on the Property being purchased in accordance with the most recent tax and assessment bills. All property taxes and assessments accruing after the Closing Date shall be the responsibility of Buyer; provided, however, that Seller shall pay all green belt roll back taxes due with respect to the Property, either before or after Closing.

(c) On or before the Closing Date, the Parties shall deliver to each other or an appropriate escrow officer of the Title Company the following:

(1) By Seller:

- (A) An executed and acknowledged special warranty deed subject only to the Permitted Exceptions, those matters arising in connection with the Land Use Approvals or the recording of the implementing documents relating thereto, any other matter specifically approved or deemed approved by Buyer, and any matters created or suffered to be created by Buyer.
- (B) A Title Policy in the amount of the Purchase Price for the Property, insuring Buyer's interest in the Property and showing Buyer's interest therein to be subject only to the Permitted Exceptions, those matters arising in connection with the Land Use Approvals or the recording of the implementing documents relating thereto, any other matter specifically approved or deemed approved by Buyer, and any matters created or suffered to be created by Buyer.
- (C) If Buyer does make the Finished Lot Election, an assignment of any development agreement pertaining to the Property entered into in connection with the Land Use Approvals.

(D) If Buyer does not make the Finished Lot Election, an assignment of the final approved plans and specifications for the Infrastructure Improvements and any development agreement and Reimbursement Agreements pertaining to the Property entered into in connection with the Land Use Approvals.

(2) By Buyer:

(A) The Purchase Price in cash or other immediately available funds.

(B) An assumption of such matters as are assigned by Seller to Buyer pursuant to Section 8(c)(2)(C) or (D), as applicable..

(d) Seller and Buyer agree to deliver to one another such further documents and instruments as may be necessary or appropriate to consummate the transactions contemplated hereby in the manner set forth in this Agreement.

(e) The cost of the title policy referred to in subsection (c) of this Section 8 shall be paid by Seller. Buyer shall pay the cost of any additional coverage or endorsements that Buyer may deem necessary. Closing costs shall be paid in the customary manner.

9. Real Estate Commissions. Each of the Parties represents to the other that it has not incurred and shall not incur any liability for brokerage fees or agents' commissions in connection with this Agreement; and Buyer, on the one hand, and Seller, on the other hand, each agree to indemnify and hold the other harmless from and against any and all claims or demands with respect to any brokerage fees or agents' commissions or other compensation asserted by any person, firm, or corporation in connection with this Agreement or the transactions contemplated hereby, insofar as any such claim is based upon any conversation or contract with the indemnifying party.

10. Buyer's Remedy. If Seller does not perform its obligations under this Agreement, Buyer may either terminate this Agreement or sue for specific performance. If Buyer terminates this Agreement due to Seller's default, the Seller shall promptly return, as applicable, the First and Second Option Payments and Construction Advances to Buyer. Upon return of, as applicable, the First and Second Option Payments and the Construction Advances, this Agreement shall automatically terminate and the parties shall thereafter have no further rights, liabilities, or obligations under this Agreement. Except for the remedies specified in this Section, Buyer waives all other remedies available at law or in equity. Seller's reimbursement obligation shall survive the termination of this Agreement.

11. Seller's Remedy. If Buyer does not perform its obligations under this Agreement for any reason Seller may, as its sole and exclusive remedy, waiving all other remedies, terminate this

Agreement. If Seller terminates this Agreement due to Buyer's default, the Seller shall retain, as applicable, the First and Second Option Payments and Construction Advances as liquidated damages, this Agreement shall be automatically terminated, and the parties thereafter have no further rights, liabilities, or obligations under this Agreement; provided, however, that Buyer shall have the obligation to immediately cause the release of the lien of the Deed of Trust on the Property. Seller's damages are difficult to ascertain and Buyer and Seller hereby agree that the amount of the First and Second Option Payments and Construction Advances are a fair approximation of Seller's damages. The foregoing limitation of remedies shall not apply with respect to the indemnifications of Seller by Buyer set forth in this Agreement or any obligations of Buyer that, by their terms, are intended to be performed after Closing, all of which shall specifically survive the Closing or earlier termination of this Agreement.

12. Like-Kind Exchange. Seller may at any time at or prior to the applicable Closing assign its rights under this Agreement to a "qualified intermediary" as defined in Treasury Reg. Section 1.1031(k)-1(g)(4), subject to Buyer's rights and obligations hereunder, in which event Seller shall promptly provide written notice of such assignment to Buyer. Buyer shall cooperate with all reasonable requests of Seller and such qualified intermediary in arranging and effecting the exchange as one which qualifies under Section 1031 of the Internal Revenue Code, provided, however, that Buyer shall not incur any substantive non-reimbursed expense or liability by reason of such cooperation.

13. General Conditions; Miscellaneous Provisions.

(a) Except when actual receipt is expressly required by the terms hereof, notice is considered given either (i) when delivered in person to the recipient named below, (ii) when delivered by nationally recognized overnight courier, or (iii) three (3) days after deposit in the United States mail in a sealed envelope or container, either registered or certified mail, return receipt requested, postage prepaid, addressed by name and address to the party or person intended as follows:

TO SELLER: Western Land & Development, L.C.
Attention: Terry C. Diehl
4198 East Prospector Drive
Salt Lake City, Utah 84121

WITH A COPY TO: Robert A. McConnell
Parr Waddoups Brown Gee & Loveless
185 South State Street, Suite 1300
Salt Lake City, Utah 84111-1537

TO BUYER: Glenn Pettit

WITH A COPY TO:

Either party may, by notice given at any time or from time to time, require subsequent notices to be given to another individual person, whether a party or an officer or representative, or to a different address, or both. Notices given before actual receipt of notice of change shall not be invalidated by the change. Such recipient named must be an individual person.

(b) Section titles or captions to this Agreement are for convenience only, shall not be deemed as part of this Agreement, and in no way define, limit, augment, extend, or describe the scope, content, or intent of any part or parts of this Agreement.

(c) Whenever the context may require, any pronoun used herein shall include the corresponding masculine, feminine, or neuter forms and the singular form of nouns, pronouns, and verbs shall include the plural and vice versa. Each of the foregoing genders and plurals is understood to refer to a corporation, partnership, or other legal entity when the context so requires.

(d) The Parties shall execute and deliver all documents, provide all information, and take or forebear from all such action as may be necessary or appropriate to achieve the purposes of this Agreement.

(e) This Agreement shall be construed in accordance with and governed by the laws of the State of Utah, except its choice of law rules.

(f) This Agreement shall be binding upon and inure to the benefit of the Parties and their respective heirs, executors, administrators, successors, legal representatives, and assigns; provided that this provision shall not be construed as permitting assignment, substitution, delegation, or other transfer of rights or obligations except strictly in accordance with the provisions of the other Sections of this Agreement.

(g) This Agreement constitutes the entire agreement among the Parties pertaining to the subject matter hereof and supersedes all prior agreements and understandings pertaining thereto.

(h) No failure by any Party to insist upon the strict performance of any covenant, duty, agreement, or condition of this Agreement or to exercise any right or remedy consequent upon a breach thereof shall constitute a waiver of any such breach or of such or any other covenant, agreement, term, or condition. Any Party may, by notice delivered in the manner provided in this Agreement, but shall be under no obligation to, waive any of its rights or any conditions to its obligations hereunder, or any duty, obligation, or covenant of any other party. No waiver shall affect or alter the remainder of this Agreement; but each

and every other covenant, agreement, term, and condition hereof shall continue in full force and effect with respect to any other then existing or subsequently occurring breach.

(i) In the event that any condition, covenant, or other provision herein contained is held to be invalid or void by any court of competent jurisdiction, the same shall be deemed severable from the remainder of this Agreement and shall in no way affect any other covenant or condition herein contained. If such condition, covenant, or other provision shall be deemed invalid due to its scope or breadth, such provision shall be deemed valid to the extent of the scope or breadth permitted by law.

(j) All exhibits referred to in this Agreement and the documents to be delivered at or prior to the Closing are expressly made a part of this Agreement as fully as though completely set forth in it. All references to this Agreement, either in the Agreement itself or in any of such writings, shall deem to refer to and include this Agreement and all such exhibits and writings. Any breach of or default under any provisions of any of such writings shall, for all purposes, constitute a breach or default under this Agreement and all other such writings.

11. Litigation Expenses. If any action, suit, or proceeding is brought by a Party with respect to a matter or matters covered by this Agreement, all actual costs and expenses of the prevailing Party incident to such proceeding, including reasonable attorneys' fees, shall be paid by the non-prevailing Party.

12. Authorization. Each individual executing this Agreement does thereby represent and warrant to each other person so signing (and each other entity for which another person may be signing) that he has been duly authorized to deliver this Agreement in the capacity and for the entity set forth where he signed.

13. Liens. Buyer agrees to discharge (either by timely payment or by filing the necessary bonds, or otherwise) any mechanics' or materialmen's liens arising from work or material claimed to have been furnished for the Property at the request of Buyer; provided, however, that so long as Buyer furnishes a surety bond or other reasonably satisfactory security, nothing contained herein is intended or shall be construed to prevent Buyer from contesting any such lien, and Buyer shall not be in violation under this Section 13 during the pendency of any such contest (provided such lien is removed from the Property before any final judgment of foreclosure is entered on the same).

14. Relationship of the Parties. This Agreement is not intended to create, nor shall it be in any way interpreted to create, a joint venture, a partnership, or any other similar relationship between the Parties.

15. Acceptance--Execution in Counterparts. The Parties agree that this Agreement may be executed in several counterparts, each of which shall be deemed an original and all such counterparts shall be deemed one and the same instrument.

16. Time of Essence. Time is of the essence with respect this Agreement and the performance thereof.

[Signatures appear on the following pages.]

JUN. 20. 2007 3:00PM

EXHIBIT "A"
TO
OPTION AGREEMENT

PRELIMINARY LEGAL DESCRIPTION OF PROPERTY

PARCEL A

COMMENCING AT THE NORTHEAST CORNER OF SECTION 27, TOWNSHIP 2 SOUTH, RANGE 2 WEST, SALT LAKE BASE & MERIDIAN; AND RUNNING THENCE SOUTH 0°27'34" EAST 2635.88 FEET ALONG THE EAST LINE OF THE NORTHEAST QUARTER OF SAID SECTION 27 TO THE EAST QUARTER CORNER OF SAID SECTION 27 AND THE POINT OF BEGINNING FOR THIS DESCRIPTION; THENCE SOUTH 0°27'53" EAST 1402.31 FEET ALONG THE EAST LINE OF THE SOUTHEAST QUARTER OF SAID SECTION 27; AND RUNNING THENCE SOUTH 89°53'28" WEST 384.00 FEET; THENCE SOUTH 0°27'53" EAST 1233.00 FEET TO THE SOUTH LINE OF SAID SECTION 27; THENCE ALONG SAID SOUTH LINE; SOUTH 89°53'28" WEST 709.35; THENCE NORTH 0°27'53" WEST 1505.20 FEET TO A POINT ON THE EAST LINE OF THE MAPLES AT JORDAN HILLS PHASE 3 SUBDIVISION; THENCE ALONG SAID SUBDIVISION THE FOLLOWING (4) FOUR COURSES:

- (1) THENCE NORTH 89°32'07" EAST 70.00 FEET;
- (2) THENCE NORTH 0°27'53" WEST 495.60 FEET;
- (3) THENCE SOUTH 89°32'07" WEST 70.00 FEET;
- (4) THENCE NORTH 0°27'53" WEST 249.00 FEET;

THENCE NORTH 89°50'29" EAST 309.69 FEET;
THENCE NORTH 0°03'16" WEST 385.97 FEET TO THE NORTH LINE OF SOUTHEAST QUARTER OF SAID SECTION 27;
THENCE NORTH 89°56'45" EAST 780.90 FEET TO THE EAST QUARTER CORNER OF SECTION 27;

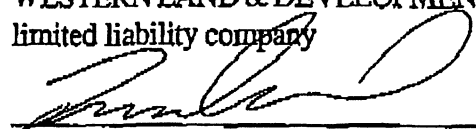
CONTAINS 2,253,523 SQUARE FEET OR 51.734 ACRES.

JUN. 20. 2007 3:00PM

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the date first set forth above.

SELLER:

WESTERN LAND & DEVELOPMENT, L.C., a Utah
limited liability company



Terry C. Diehl, Manager

BUYER:

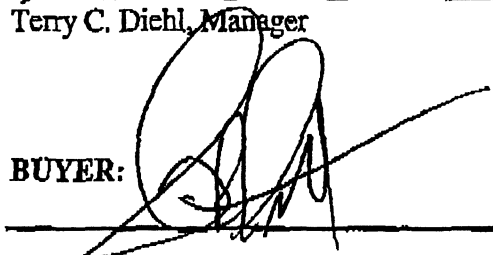


EXHIBIT "B"
TO
OPTION AGREEMENT

PERMITTED EXCEPTIONS

1. Taxes or assessments which are not shown as existing liens by the records of any taxing authority that levies taxes or assessments on real property or by the public records. Proceedings by a public agency which may result in taxes or assessments or notices of such proceedings, whether or not shown by the records of such agency or by the public record.
2. Any facts, rights interests or claims which are not shown by the public records but which could be ascertained by an inspection of the land or by making inquiry of persons in possession thereof.
3. Easements, liens or encumbrances, or claims thereof, which are not shown by the public records.
4. Discrepancies, conflicts in boundary lines, shortage in area, encroachments, or any other facts which a correct survey would disclose, and which are not shown by the public records.
5. (a) Unpatented mining claims; (b) reservations or exceptions in patents or in Acts authorizing the issuance thereof; and (c) water rights, claims or title to water.
6. Any adverse claim based upon the assertion that (a) some portion of the land forms the bed or bank of a navigable river or lake, or lies below the mean high water mark thereof; (b) the boundary of the land has been affected by a change in the course water level of a navigable river or lake; or (c) the land is subject to water rights, claims or title to water and to any law or governmental regulation pertaining to wetlands.
7. Lien of taxes for the year in which the Closing occurs, now accruing as a lien, but not yet due and payable.
8. The Property is located within the boundaries of West Jordan City and is subject to any assessments levied thereby.
9. The right of the Salt Lake County Assessor to reassess the Tax Assessment on the Property as disclosed by that certain Annual Application for Assessment and Taxation of Agricultural Land 1969 Farmland Assessment Act, dated and recorded December 14, 1978 as Entry No. 3211339 in Book 4786 at page 481 of the Salt Lake County Recorder.

10. A contractual covenant to allow Rulon J. and Paula Harper and/or their affiliated entities to wind down present grading operations on the Property, including the removal of certain stock piled materials located on the Property, which wind down and removal is to occur prior to December 31, 2006.
11. A contractual covenant to provide Rulon J. and Paula Harper and or their affiliated entities with reasonable access across the Property to adjoining property owned by the said individuals or entities until such time as permanent roads are established and completed providing access to the said adjoining property.
12. A contractual covenant in favor of Rulon J. and Paula Harper and/or Harper Contracting, Inc. and Harper Ready Mix Company requiring the Buyer to utilize the foregoing entities, respectively, for earthwork and the installation of concrete infrastructure improvements in connection with the development of the Property at competitive prices.

[THIS LIST SHOULD BE UPDATED TO REFLECT CURRENT STATUS OF TITLE]

< < > >

EXHIBIT "C"
TO
OPTION AGREEMENT

ZONING APPROVAL



City of West Jordan
8000 South Redwood Road
West Jordan, Utah 84088
(801) 569-5000
Fax (801) 565-8978

July 2, 2004

MAPLES IS

Lee Conant,
PO Box 711879
Salt Lake City, UT 84171-1879

Dear Lee Conant,

The City Council had a Public Hearing on June 22, 2004 regarding an Ordinance rezoning approximately 45.11 acres located at approximately 7400 South 6500 West. I have enclosed a copy of Ordinance No. 04-27, that was approved on June 22, 2004.

Sincerely,

Carol Herman
Deputy City Recorder

THE CITY OF WEST JORDAN, UTAH

A Municipal Corporation

ORDINANCE NO. 04-27

AN ORDINANCE REZONING APPROXIMATELY 45.11 ACRES OF TERRITORY,
LOCATED AT 7400 SOUTH 6500 WEST FROM A-5 (AGRICULTURAL ON A
MINIMUM OF 5 ACRES) TO P-C (PLANNED COMMUNITY)

Whereas, approximately 45.11 acres of territory, located at 7400 South 6500 West has been zoned to be in zone classification A-5 (agricultural on a minimum of 5 acres); and

Whereas, the owner of the said territory has requested the territory be rezoned to be in zone classification P-C (planned community); and

Whereas, on May 19, 2004 the land use of the property has been considered by the Planning and Zoning Commission, which has made a positive recommendation to the City Council concerning the amended land use to be applied to the territory; and

Whereas, a public hearing, pursuant to public notice, was held before the City Council on June 22, 2004; and

Whereas, the City Council finds and determines that the public health, welfare and safety of the community will be protected and that property values will be preserved and improved if the property is amended,

NOW THEREFORE, IT IS ORDAINED BY THE CITY COUNCIL OF WEST JORDAN, UTAH:

Section 1. The ZONING MAP OF THE CITY OF WEST JORDAN, UTAH, as adopted pursuant to Section 89-5-403 of the West Jordan Municipal Code, is amended, by removing from zone classification A-5 (agricultural with a minimum lot size of 5 acres) and including a zone classification P-C (planned community) the following described territory:

BEGINNING AT A POINT WHICH LIES SOUTH 89°53'28" WEST 384.00 FEET ALONG THE SOUTH LINE OF THE SOUTHEAST QUARTER OF SECTION 27, TOWNSHIP 2 SOUTH, RANGE 2 WEST, SALT LAKE BASE & MERIDIAN, AND NORTH 00°06'32" WEST 33.00 FEET FROM THE SOUTHEAST CORNER OF SAID SECTION 27; AND TRAVERSING THENCE SOUTH 89°53'28" WEST 709.55 FEET; THENCE NORTH 00°27'53" WEST 2210.8 FEET; THENCE NORTH 89°32'07" EAST 1093.32 FEET; THENCE SOUTH 00°27'53" EAST 1017.60 FEET; THENCE SOUTH 89°53'41" WEST 376.34 FEET; THENCE SOUTH 00°06'32" EAST 1200.00 FEET TO THE POINT OF BEGINNING.

CONTAINS 1,964,774 SQ. FT OR 45.11 ACRES, MORE OR LESS

Section 2. The territory shall hereafter be subjected to the land-use restrictions and limitations as are stipulated for zone classifications P-C (planned community) with the following conditions:

1. The proposal residential development is consistent with the General Plan.
2. The density of the development is consistent with the General Plan.
3. The development is consistent with the General Plan.

1. The proposal residential development shall not exceed 2.87 units per acre.
2. The density of the development shall not be less than 8,864 square feet.
3. The average lot size shall not be less than 8,864 square feet.

Section 3. This Ordinance shall become effective upon publication or upon the expiration of twenty days following passage, whichever is earlier.

Passed by the City Council of West Jordan, Utah, this 22th day of June, 2004.

BRYAN HOLLADAY
Mayor

ATTEST:

TEST:
MELANIE S. BRIGGS, CMC
City Recorder



Voting by the City Council:
Councilman _____

Councilmember Bennett
 Councilmember Hilton
 Councilmember Kellermeyer
 Councilmember Richardson
 Councilmember Rolfe
 Mayor Holladay

"AYE"

'NAY'

absent ✓

CITY RECORDER'S CERTIFICATE OF PUBLICATION

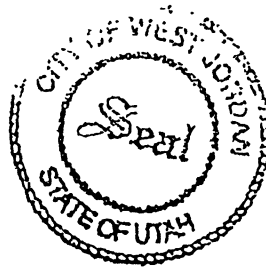
ORD 04-27

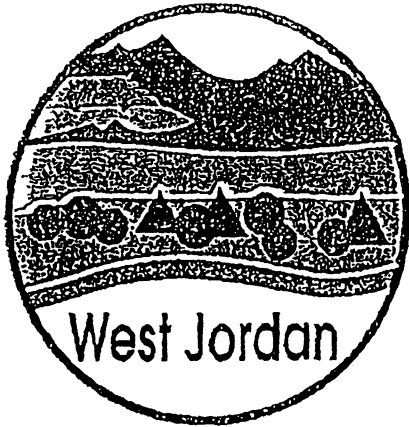
I, Melanie S. Briggs, certify that I am the City Recorder of the City of West Jordan, Utah, and that the foregoing ordinance was posted at the following locations on the 2nd day of ~~June~~ ^{July} 2004: West Jordan City Hall, 8000 South Redwood Road, West Jordan, Utah; West Jordan Library, 1970 West 7800 South, West Jordan, Utah and the Community Oriented Policing Substation, 7061 South 1700 West, West Jordan, Utah.

Melanie S. Briggs

MELANIE S. BRIGGS
City Recorder

[SEAL]





City of West Jordan
8000 South Redwood Road
West Jordan, Utah 84088
(801) 569-5000
Fax (801) 565-8978


May 5, 2005

LNC Investments
PO Box 711879
Salt Lake City, UT 84171-1879

Dear LNC Investments,

The City Council had a Public Hearing on May 3, 2005 to consider rezoning approximately 6.82 acres of territory, located at approximately 7725 South 6450 West from P-F (Public Facilities) to P-C (Planned Community). I have enclosed a copy of Ordinance No. 05-18, which was approved on May 3, 2005.

Sincerely,


Wendy Deppe
Deputy City Recorder

THE CITY OF WEST JORDAN, UTAH

A Municipal Corporation

ORDINANCE NO. 05-18

AN ORDINANCE REZONING APPROXIMATELY 6.82 ACRES OF TERRITORY,
LOCATED AT APPROXIMATELY 7725 SOUTH 6450 WEST FROM P-F (PUBLIC
FACILITIES) TO P-C (PLANNED COMMUNITY)

Whereas, approximately 9.82 acres of territory, located at approximately 7725 South 6450 West has been zoned to be in zone classification P-F (public facilities); and

Whereas, the owner of the said territory has requested the territory be rezoned to be in zone classification P-C (planned community); and

Whereas, on April 6, 2005 the land use of the property has been considered by the Planning and Zoning Commission, which has made a positive recommendation to the City Council concerning the amended land use to be applied to the territory; and

Whereas, a public hearing, pursuant to public notice, was held before the City Council on May 3, 2005; and

Where as, the City Council finds and determines that the public health, welfare and safety of the community will be protected and that property values will be preserved and improved if the property is amended,

NOW THEREFORE, IT IS ORDAINED BY THE CITY COUNCIL OF WEST JORDAN, UTAH:

Section 1. The General Plan Land Use Map for the City of West Jordan, Utah, as adopted pursuant to Section 89-5-402 of the West Jordan Municipal Code, is hereby amended by changing the designation of the land described in Exhibit 'A' attached hereto from "Public Facilities" to "Low-Density Residential."


Section 2. The zoning map of the City of West Jordan, Utah, as adopted pursuant to Section 89-5-403 of the West Jordan Municipal Code, is hereby amended by changing the zoning of the land described in Exhibit 'A' attached hereto from Public Facilities, with to Planned Community. The territory shall hereafter be subjected to the land-use restrictions and limitations as are stipulated for the Planned Community Zone except for the limitations specified in Section 3 below.

Section 3. The territory shall hereafter be subjected to the land-use restrictions and limitations as are stipulated for zone classifications P-C (Planned Community) with the following conditions:

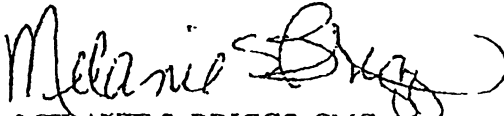
1. The proposal residential development is consistent with goals of the General Plan.
2. The density of the development shall not exceed 2.87 units per acre.
3. The average lot size shall not be less than 8,864 square feet.

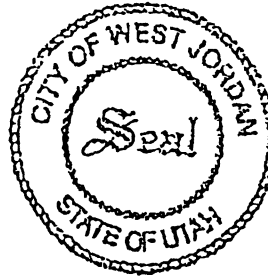
Section 4. This Ordinance shall become effective upon publication or upon the expiration of twenty days following passage, whichever is earlier.

Passed by the City Council of West Jordan, Utah, this 3rd day of May, 2005.


BRYAN HOLLADAY
Mayor

ATTEST:


MELANIE S. BRIGGS, CMC
City Recorder



Voting by the City Council:

Councilmember Bennett
Councilmember Hilton
Councilmember Kellermeyer
Councilmember Richardson
Councilmember Rolfe
Councilmember Summers
Mayor Holladay

"AYE" ✓

"NAY" _____

_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

CITY RECORDER'S CERTIFICATE OF PUBLICATION

I, Melanie S. Briggs, certify that I am the City Recorder of the City of West Jordan, Utah, and that the foregoing ordinance was posted at the following locations on the 10 day of May, 2005: City of West Jordan City Hall, 1st floor, 8000 South Redwood Road, West Jordan, Utah; Bingham Creek Library, 4834 West 9000 South, West Jordan, Utah; West Jordan Library, 1970 West 7800 South, West Jordan, Utah, and the Community Oriented Policing Substation, 7061 South 1700 West, West Jordan, Utah.

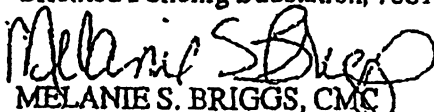

MELANIE S. BRIGGS, CMC
City Recorder



EXHIBIT "D"

TO

OPTION AGREEMENT

PRELIMINARY PLAN

[illegible]

SHEETS

EXHIBIT "E"

TO

OPTION AGREEMENT

UNIT COSTS
Intentionally Omitted

EXHIBIT "F"
TO
OPTION AGREEMENT

CITY FEE SCHEDULE

Miscellaneous Fees

September-06

Subdivision Fees		Application	Per Lot
1	Preliminary Plat Fee	\$ 480.00	\$ 30.00
2	Final Plat Fee	\$ 480.00	\$ 30.00
3	Construction Inspection		
4	Engineering Review	\$ 200.00	\$ 100.00

Impact Fees		Fee	Per Lot
1	Technology Fee		\$ 60.00
2	Storm Drain Impact Fee	\$ 5,146.00	Per Acre
3	Street Light Impact Fee	\$ 500.00	
4	Recording Fee	\$ 200.00	

Utility Company			
1	* Rocky Mountain Power		
2	Questar Gas		
3	Dry Utility Trenching		

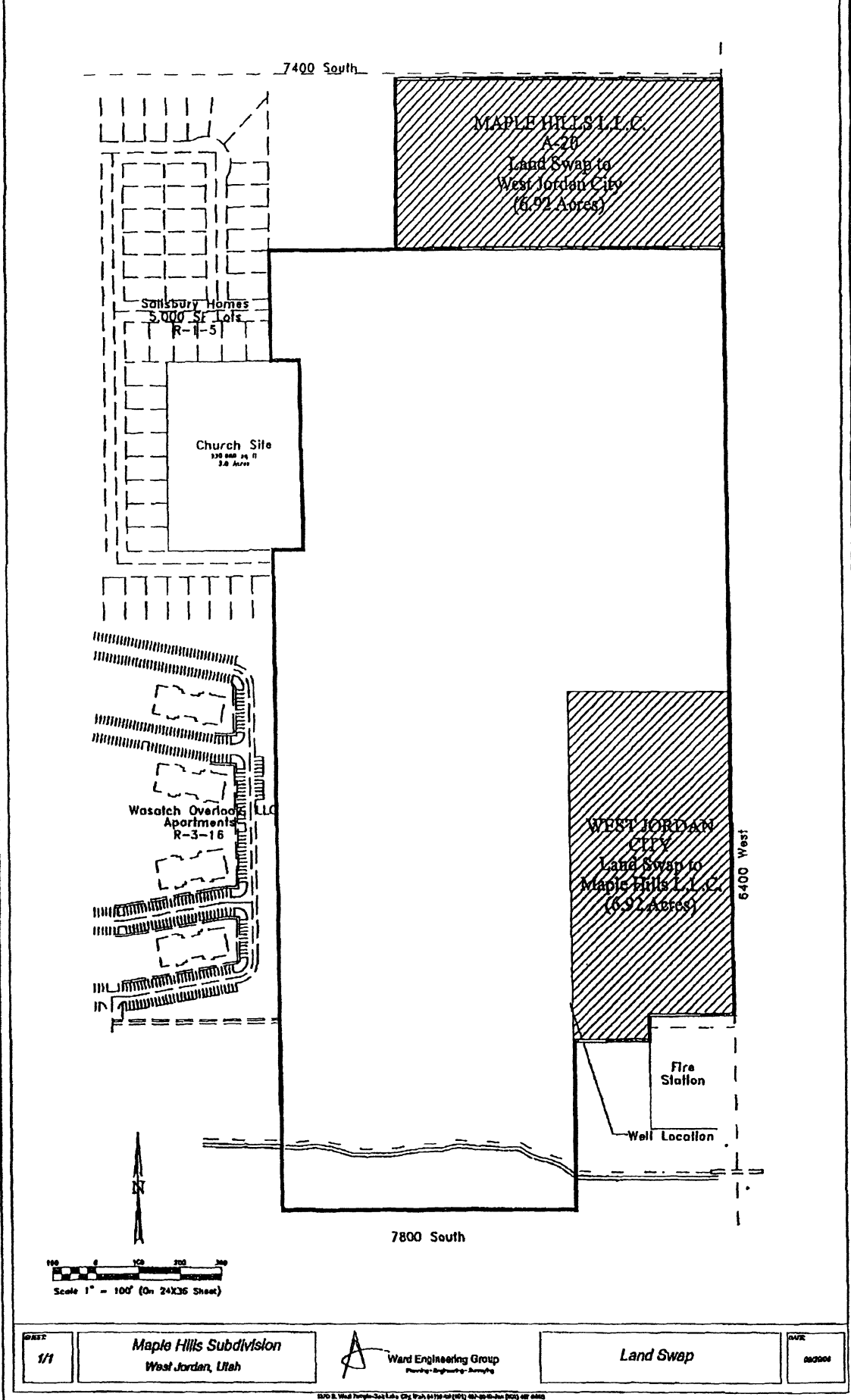
* Rocky Mountain currently does not require conduit for power installation, however, talks are that they will start requiring conduit through-out subdivision.

EXHIBIT "G"

TO

OPTION AGREEMENT

WEST JORDAN CITY TRADE PARCELS



Tab C

ORIGINAL

FILED DISTRICT COURT
Third Judicial District

DEC 19 2007

SALT LAKE COUNTY

By


Deputy Clerk

Richard D. Burbidge (#0492)
Jefferson W. Gross (#8339)
Benjamin W. Lieberman (#11456)
BURBIDGE, MITCHELL & GROSS
215 South State Street, Suite 920
Salt Lake City, Utah 84111
Telephone: (801) 355-6677
Facsimile: (801) 355-2341

Attorneys for Plaintiffs

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

WESTERN LAND & DEVELOPMENT, LC,
a Utah limited liability company, EAST
MAPLES INVESTMENT LLC, a Utah
limited liability company,

Plaintiffs,

v.

JORDAN FOOTHILLS, LLC, a Utah limited
liability company, and WALTER T. KEANE,
in his capacity as trustee of the trust deed
executed by Western Land & Development,
LC and East Maples Investment, LLC as
trustors and Jordan Foothills, LLC as
beneficiary,

Defendants.

**[PROPOSED] FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
ORDER OF COURT**

Case No. 070913972

Judge: Quinn

Trial was held on the merits of this matter on December 6 and 7, 2007, before the undersigned. At the trial, the parties were represented by counsel of record. The Court, having

heard and considered the evidence and the arguments of counsel and being fully advised in the premises, hereby enters the following Findings of Fact and Conclusions of Law, along with a corresponding Order.

FINDINGS OF FACT

The Parties

1. Plaintiff East Maples Investments, LLC (“East Maples”) is the owner of a parcel of real property located in West Jordan, Utah, containing approximately 51.2 acres (the “Property”). Pursuant to a contract, Plaintiff Western Land, LC (“Western Land”) acquired the right to develop and purchase the Property.

2. Defendant Jordan Foothills, LLC (“Jordan Foothills”) is an entity created specifically to enter into a contract with Western Land to purchase the Property.

3. Glen Pettit (“Pettit”) is the principal of Jordan Foothills. Mr. Pettit has worked as a homebuilder for thirty years and as a real estate developer for over ten years. Over the course of his career, he has entered into hundreds of real estate purchase and development contracts.

Contract Negotiation Regarding the Property

4. Terry Diehl (“Diehl”) and Lee Conant (“Conant”), principals of Plaintiffs in this action, are principals of several other entities that own and/or develop real estate.

5. Prior to the transaction from which this litigation arises, Steve Glezos (“Glezos”) approached Mr. Diehl on behalf of Mr. Pettit and negotiated the purchase of a phase of residential lots of a separate real estate development project, Jordan Hills Village, The Sycamores, Phase 9 (“The Sycamores Phase 9”). Consistent with Mr. Glezos’s representation

that he was working with and on behalf of Mr. Pettit, Mr. Pettit purchased The Sycamores Phase 9 on terms negotiated primarily by Mr. Glezos.

6. Shortly thereafter, Mr. Glezos again contacted Mr. Diehl on behalf of Mr. Pettit and inquired about the purchase of another phase of lots in the Jordan Hills Village subdivision. Mr. Diehl told Mr. Glezos that all such lots had been sold, but that one of his companies owned another piece of property, the Property, which was adjoining to the Jordan Hills Village development. Mr. Glezos expressed interest by Mr. Pettit and later called Mr. Diehl again and began preliminary negotiations on Mr. Pettit's behalf.

7. Shortly thereafter, Mr. Glezos and Mr. Diehl met at Western Land's office. Mr. Glezos told Mr. Diehl that Mr. Pettit had sent him to further discuss the Property, and Mr. Glezos restated Mr. Pettit's interest in purchasing the Property. At that time, Mr. Diehl gave to Mr. Glezos certain documents he had relating to the Property.

8. Over the next two weeks, Messrs. Diehl and Glezos spoke on the phone several more times regarding Mr. Pettit's interest in purchasing the Property. Mr. Glezos invited Mr. Diehl to an in person meeting with he and Mr. Pettit at Beans & Brews, a local coffee shop.

9. In the fall of 2006, a meeting at Beans & Brews took place where Mr. Diehl, Mr. Pettit, and Mr. Glezos were present. At this meeting, they negotiated the terms of a potential contract for Mr. Pettit's purchase of the Property. The discussion centered around the amount and timing of payments. Mr. Pettit said merely a few words here and there; Mr. Glezos did nearly all of the talking and negotiating on Mr. Pettit's behalf.

10. Ultimately, Messrs. Diehl, Pettit, and Mr. Glezos negotiated an agreement whereby Jordan Foothills, LLC (“Jordan Foothills”) would be granted an option to purchase the Property.

11. Western Land’s attorney prepared a written agreement, which Mr. Diehl sent to Mr. Glezos per Mr. Pettit’s instructions. On October 25, 2006, Mr. Glezos called Mr. Diehl on the telephone one evening and requested that Mr. Diehl meet with him immediately to execute the agreement. That evening, Messrs. Diehl and Glezos met at Western Land’s office, and Mr. Glezos personally handed the agreement to Mr. Diehl. The agreement had been signed by Mr. Pettit, and it contained several additional terms that Mr. Glezos had written in by hand. Mr. Diehl accepted Mr. Glezos’s hand-written additional terms and signed the contract on behalf of Western Land. The executed, written agreement is hereinafter referred to as the “Option Agreement.” (See Exhibit A.)

12. Mr. Glezos’s hand-written agreements show that Jordan Foothills had done some level of due diligence regarding the need to address certain slopes on the Property; they address, *inter alia*, rock walls, retaining walls, and collector fencing that could be required to build homes on the Property because of open and obvious slopes that exist.

13. Prior to the execution of the Option Agreement, both Mr. Pettit and Mr. Glezos visited and inspected the Property.

14. Mr. Glezos told Mr. Diehl that he would take the Option Agreement to Merrill Title Company and that he would instruct Mr. Pettit to wire the First Option Payment there. The

next day, consistent with Mr. Glezos's representation, Mr. Pettit did wire \$1.5 million to Merrill Title Company, and Mr. Diehl picked up a check that day.

The Option Agreement's Terms

15. Paragraph 3 of the Option Agreement states in pertinent part:

Investigation. Prior to the execution of this Agreement, [Jordan Foothills] has made such on site inspections of the Property and reviewed such documents relating to the Property as [Jordan Foothills] deems necessary.

...[Jordan Foothills] shall accept the lots "As Is" in their present condition without any representation or warranty, express or implied. [Jordan Foothills] expressly acknowledges that [Jordan Foothills] has not relied on any warranties, promises, understandings, or representations, express or implied, of [Western Land] relating to the Property or the Lots that are not expressly set forth herein.

(Option Agreement ¶ 3 (emphasis in original).) Any investigation into the condition of the land was to be made by Jordan Foothills prior to execution of the Option Agreement:

[Jordan Foothills] acknowledges that any and all engineering data, cost estimates, feasibility or marketing reports, **soil reports**, or other information of any type which [Jordan Foothills] has received or may receive from [Western Land] or [Western Land's] agents is furnished on the express condition that [Jordan Foothills] shall make an independent verification of the accuracy of such information, all such information being furnished without any warranty.

(*See id.* (emphasis added).) The Option Agreement further specified that Jordan Foothills would have access to the Property for any testing or investigation it wanted to perform. (*See id.*)

16. The Option Agreement incorporated and attached the first draft of the engineering design for the development of the Property as a residential subdivision. (Option Agreement at Exhibit D thereto.) The Option Agreement gave Jordan Foothills the right to approve design changes to the plat between the concept and final stages:

If in the platting process, the City makes changes in the plan as shown in “Exhibit D”, [Jordan Foothills] shall have the right to approve the new Final Plat as a condition precedent to closing on this transaction. Should Closing not occur as a result of [Western Land’s] inability to obtain final plat approval, as stated herein, or final plat approval is obtained *of a design* not approved of by [Jordan Foothills], all consideration ... paid under this Agreement shall be fully refunded.

(*Id.* ¶ 4(b) (emphasis added).)

17. Pursuant to the terms of the Option Agreement, and as consideration for the grant of the option, Jordan Foothills agreed to make two option payments. The First Option Payment was to be made on or before October 27, 2006, in the amount of \$1,500,000. (*Id.* ¶ 1(k).) The Second Option Payment was to be made on or before the last to occur of January 15, 2007, or five business days following West Jordan City’s granting of the Land Use Approvals described in the Option Agreement, and was to be in the amount of \$3,975,000. (*Id.* ¶ 1(y).)

18. Jordan Foothills timely made the First Option Payment.

19. The Option Agreement further provided for Jordan Foothills to elect at the time it made the Second Option Payment whether it would take the lots as “paper lots,” *i.e.*, lots without any infrastructure improvements, or “finished lots,” *i.e.*, lots that did have infrastructure improvements like public access and utility hookups so that the City of West Jordan would allow a builder to obtain the necessary building and occupancy permits. (*Id.* ¶ 4(e)-(f).)

20. The Option Agreement contains the following attorneys’ fees provision:

Litigation Expense. If any action, suit, or proceeding is brought by a Party with respect to a matter or matters covered by this Agreement, all actual costs and expenses of the prevailing Party incident to such proceeding, including reasonable attorneys’ fees, shall be paid by the non-prevailing Party.

(*Id.* ¶ 11.)¹

The Platting Process

21. After the Option Agreement was executed, Western Land worked towards approval of the subdivision plat by the City of West Jordan.

22. The City of West Jordan requested two material changes to the design of the plat that was initially proposed. It was requested that one intersection with 6400 West be removed and replaced with a cul-de-sac because it deemed the two planned intersections with 6400 West were too close together. It also requested a rectangular reconfiguration of streets in Phase 2. Other minor changes were necessary to accommodate these design elements.

23. On or about January 17, 2007, Western Land submitted to the City of West Jordan a First Revised Preliminary Plat, incorporating the above-mentioned change. From this point on, there were no further changes to the design of the plat.

24. Lee Conant (“Conant”) of Western Land met with Mr. Glezos over 20 times regarding the status of the platting process. Between Mr. Diehl and Mr. Conant, Western Land also communicated with Mr. Glezos over 60 times by telephone regarding the Property and the platting process for the Property.

25. In that regard, on or about February 14, 2007, Mr. Conant met with Mr. Glezos regarding the status of the platting process. Mr. Conant showed Mr. Glezos the revised plan, and Mr. Glezos approved of the plat design change. Indeed, Mr. Glezos expressed approval with the change because cul-de-sac lots are more valuable than ordinary lots. At no point did either Mr.

¹ The Option Agreement contains two paragraphs numbered “11.” The attorneys’ fees provision is the

Glezos or Mr. Pettit ever express any disfavor with additional cul-de-sac lots or otherwise given anything other than an unreserved endorsement of the design of the plat.

26. On May 2, 2007, the preliminary plat for the Property was approved by the City of West Jordan. The design of the preliminary plat was the same as that approved by Mr. Glezos on February 14, 2007.

27. On or about May 22, 2007, Mr. Conant met again with Mr. Glezos regarding the status of the platting process. Mr. Glezos asked to see a copy of the approved preliminary plat. Mr. Conant obtained what he thought was the operative drawing from Mark Garza, a Project Director for Western Land. Mr. Conant gave it to Mr. Glezos, who immediately expressed concern and asked why some cul-de-sac lots had been eliminated. Mr. Conant then realized he had given Mr. Glezos the old drawing, and he returned to Mr. Garza's office for the operative drawing, which was unchanged in its design from the last time Mr. Conant and Mr. Glezos met. Upon showing the correct drawing to Mr. Glezos, Mr. Glezos expressed his relief that the additional cul-de-sac lots were still there.

28. Also at the May 22, 2007 meeting, Mr. Glezos also requested that Western Land prepare updated cost estimates for the infrastructure build-out of the lots. Mr. Conant provided Mr. Glezos these updated estimates. Mr. Glezos told Mr. Conant that the purpose of the cost estimates was so that he and Mr. Pettit could decide whether to take the lots as "paper lots" or "finished lots" under Paragraphs 4(e) and (f) of the Option Agreement. Mr. Glezos also told Mr. Conant at this time that Mr. Pettit required Mr. Glezos to also prepare independent cost

second such paragraph, which is actually the fourteenth numbered paragraph.

estimates. The cost estimates were based on the preliminary plat design that had been approved by the City of West Jordan on May 2, 2007, and with which Mr. Glezos had repeatedly expressed approval as referenced above.

29. Mr. Glezos also requested that Western Land provide him with engineering drawings with regard to the Property. Mr. Conant directed Western Land's engineering firm, Ward Engineering, to provide Mr. Glezos with copies of these drawings. Mr. Glezos picked up many sets of such drawings.

30. At no point did Mr. Glezos object to the design of the plat. Rather, he repeatedly reiterated his acceptance of the design of the plat. The only change Mr. Glezos ever inquired about was a change to the construction phasing of the infrastructure improvements if Jordan Foothills elected to take the lots as paper lots; he inquired whether the infrastructure improvements could be done in three phases instead of two. Mr. Conant inquired with the City of West Jordan and learned that this could not be done without substantial delays in the project. Mr. Glezos never raised this issue with Western Land again.

31. Western Land obtained the Land Use Approvals provided by the Option Agreement on August 8, 2007, at a hearing before the West Jordan Planning and Zoning Commission. This approval included approval of the plat design that Jordan Foothills, by way of Mr. Glezos, approved. Mr. Glezos attended the Planning and Zoning Commission hearing on behalf of Jordan Foothills. Walter T. Keane ("Keane"), attorney for Jordan Foothills, also attended the hearing with Mr. Glezos on behalf of Jordan Foothills, at the direction of Mr. Glezos. Mr. Conant attended on behalf of Western Land. After the hearing, Mr. Glezos and Mr.

Conant spoke, and Mr. Conant and Mr. Keane met for the first time. At that meeting, Mr. Keane did not say a word beyond a greeting; Mr. Glezos did all of the talking on behalf of Jordan Foothills regarding the Property. Mr. Glezos did not express any concern or objection with the design of the plat that just obtained final approval.

32. There were no design changes to the plat between the preliminary and final stages. One difference between the Preliminary Plat and the Final Plat was that the West Jordan Planning and Zoning Commission recommended a notation be placed on the plat regarding collapsible soils. This was not a change in the design of the plat. Moreover, the zoning ordinances respecting the Property, attached as Exhibit C to the Option Agreement, require certain notations to appear. These are not design changes.

The Collapsible Soils Issue

33. Before the notation regarding collapsible soils was placed on the Final Plat regarding collapsible soils, neither Mr. Pettit nor Mr. Glezos remarked negatively to Western Land about the Property. It was only after the August 8, 2007 hearing when the notation was placed on the Final Plat that any concern was raised regarding collapsible soils.

34. The presence of collapsible soils on the Property was widely known.

35. Further, Mr. Pettit had known for years that the City of West Jordan built a fire station on land adjacent to the Property, which suffered significant settling due to collapsible soils, and the City of West Jordan had fixed it at some expense

36. The collapsible soils notation does not relate to the design of the plat.

37. Further, Jordan Foothills waived any right to object to the condition of the Property when it agreed to accept the Property “As Is.”

Remediation of Collapsible Soils and Jordan Foothills’ Reapproval of the Design

38. On or about August 14, 2007, Mr. Keane, as counsel for Jordan Foothills, sent a letter to Western Land objecting to proceeding under the Option Agreement because of the collapsible soils notation. The letter did not identify any concern regarding the design of the plat, nor other concerns of Jordan Foothills other than collapsible soils.

39. On or about August 20, 2007, Messrs. Diehl, Conant, and Glezos met again at the offices of Western Land to discuss further the collapsible soils notation. Mr. Glezos again confirmed that the notation was his and Mr. Pettit’s only concern with respect to the Property, and he repeatedly asserted that Mr. Pettit was a man of his word and would not break a deal without cause. Mr. Glezos claimed that Mr. Pettit had talked with West Jordan City Manager Gary Luebbers (“Luebbers”), who stated that the notation be required under any circumstance. Mr. Diehl reiterated to Mr. Glezos that the notation was not a design change to the plat, and it did not provide Jordan Foothills with a basis to refuse to make the Second Option Payment.

Jordan Foothills Defaults

40. The terms “plat” and “design” as used in paragraph 4(b) of Exhibit 1 refer to the plat map itself and the general layout of the streets and lots. The agreement does not provide a general right in the buyer to approve all development conditions. If that were the intention, different terms would have been used. Because the applicable zoning ordinance was attached to

and incorporated into Exhibit 1, most development conditions were either known or could have been reasonably anticipated.

41. Mr. Pettit, on behalf of Jordan Foothills, approved the preliminary plat and communicated that approval to Western Land through Mr. Glezos. There were no material changes to the plat after it was approved by Mr. Pettit.

42. This means of communication from Mr. Pettit through Mr. Glezos was consistent with the course of dealing between the parties.

43. The Option Agreement contains a liquidated damages clause. (Option Agreement ¶ 11.) In the event Western Land terminated the agreement because of Jordan Foothills' default, Western Land was entitled to retain as liquidated damages the First Option Payment in lieu of any other remedies:

Seller's Remedy. If [Jordan Foothills] does not perform its obligations under this Agreement for any reason [Western Land] may, as its sole and exclusive remedy, waiving all other remedies, terminate this Agreement. If [Western Land] terminates this Agreement due to [Jordan Foothills'] default, [Western Land] shall retain, as applicable, the First and Second Option Payments and Construction Advances as liquidated damages, this Agreement shall be automatically terminated, and the parties thereafter have no further rights, liabilities, or obligations under this Agreement ...

(*See id.*)

44. Western Land did retain the First Option Payment as liquidated damages and agreed to waive other remedies.

45. Western Land received final plat approval for subdivision of the Property for 146 lots. Under the agreement, Jordan Foothills agreed to pay \$85,000 per lot for a total of \$12,410,000.

46. Plaintiffs' estimated damages from Jordan Foothills' default, including diminution in the value of the Property and carrying costs of the Property, exceed \$1.5 million.

The Trust Deed and Defendants' Refusal to Reconvey

47. As security for the performance of Western Land's obligations under the Option Agreement, Western Land, as Trustor, executed in favor of Jordan Foothills as beneficiary a trust deed encumbering the Property (the "Trust Deed"). Defendant Keane is the successor trustee under the Trust Deed. Because of the termination of the Option Agreement based upon Jordan Foothills' default, Western Land requested Jordan Foothills and Keane to reconvey the Property encumbered by the, Trust Deed but they refused to do so unless Western Land returned the First Option Payment.

48. Instead, on September 7, 2007, Keane recorded with the Salt Lake County recorder's office a Notice of Default and Election to Sell the Property.

The Authority of Mr. Glezos

49. As stated above, prior to the transaction from which this litigation arises, Mr. Glezos negotiated a separate real estate purchase agreement with Mr. Diehl on behalf of Mr. Pettit. Consistent with Mr. Glezos's representation that he was working with and on behalf of Mr. Pettit, Mr. Pettit purchased that property on terms negotiated primarily by Mr. Glezos.

50. With respect to this transaction, Mr. Glezos continued to represent that he was working on behalf of Mr. Pettit. He requested that Mr. Diehl attend a meeting with he and Mr. Pettit. Consistent with that representation, he and Mr. Pettit appeared at a meeting with Mr. Diehl.

51. At that meeting, Mr. Glezos primarily negotiated the Option Agreement on behalf of Mr. Pettit, in Mr. Pettit's presence, without any expression of limitation of Mr. Glezos's authority by Mr. Pettit. Mr. Pettit instructed Mr. Diehl to draft a written agreement and give it to Mr. Glezos. Consistent with these instructions, Mr. Diehl did so, and Mr. Glezos returned the written agreement with his own hand-written interlineations. Mr. Glezos continued to process the transaction on behalf of Jordan Foothills from then on.

52. Mr. Pettit never requested additional information from Western Land regarding the transaction, nor did he contend that Jordan Foothills was not receiving adequate information from Western Land.

53. Jordan Foothills clothed Mr. Glezos with apparent authority to act on its behalf by the following:

- (a) Representing to Mr. Richards that Mr. Glezos worked for Mr. Pettit.
- (b) Completing the Jordan Valley Sycamore Phase 9 purchase that had been negotiated on Mr. Pettit's behalf by Mr. Glezos.
- (c) Establishing a course of dealing between Jordan Foothills and Western Land by Mr. Pettit working generally through the efforts of Mr. Glezos.

- (d) Permitting Mr. Glezos to negotiate the terms of Exhibit 1 and making handwriting changes to the agreement on behalf of Jordan Foothills.
- (e) Encouraging Western Land to deal with Jordan Foothills through Mr. Glezos and, in fact, transmitting all information and requests through Mr. Glezos.
- (f) Allowing Mr. Glezos to act as Jordan Foothills' primary actor from the time Exhibit 1 was signed through the approval meeting of August 8, 2007.
- (g) Mr. Pettit was generally aware of Mr. Glezos's efforts on Jordan Foothills' behalf and not only acquiesced in such conduct, but approved it.

54. Western Land representatives in good faith observed the conduct of Mr. Pettit and Jordan Foothills and reasonably concluded that all approvals and other elections under the contract were done through Mr. Glezos.

55. Neither Mr. Pettit, nor Mr. Glezos, nor Mr. Keane ever communicated to Western Land a limitation of the authority of Mr. Glezos to act on behalf of Jordan Foothills.

56. Mr. Glezos repeatedly assured Western Land that all information was being relayed to Mr. Pettit. Western Land reasonably relied upon Mr. Glezos's representations throughout the negotiation and platting process.

57. The testimony of Messrs. Pettit and Glezos with respect to agency issues was not credible given their appearance while testifying on the stand, the number of times they were impeached on these and other issues, and the general likelihood that someone would act so consistently and so pervasively for another without some authority.

58. Mr. Glezos expressed unequivocal approval of the design of the final plat on behalf of Jordan Foothills on numerous occasions, including, but not limited to: (1) at the February 14, 2007 meeting with Mr. Conant, where Mr. Glezos expressly approved of the design of the plat; (2) at the May 22, 2007 meeting with Mr. Conant, where Mr. Glezos expressly approved of the design of the plat and objected to the old design brought to him by mistake; (3) on August 8, 2007, where Mr. Glezos and Mr. Keane failed to make any objection to Mr. Conant regarding the design of the plat that had just been approved by the West Jordan Planning and Zoning Commission; (4) at the August 9, 2007 meeting with Messrs. Diehl and Conant where Mr. Glezos stated that Jordan Foothills' only objection to the plat was the collapsible soils notation; (5) at the August 20, 2007 meeting with Messrs. Diehl and Conant where Mr. Glezos again stated that Jordan Foothills' only objection to the plat was the collapsible soils notation; and (6) at a meeting at the end of August or the beginning of September, 2007, with Messrs. Diehl and Conant where Mr. Glezos again stated that Jordan Foothills' only objection to the plat was the collapsible soils notation.

59. Mr. Conant's testimony with respect to what occurred at the February 14, 2007 meeting with respect to approval and in the further conversation they had shortly thereafter reporting Mr. Pettit's reaction to the change in the configuration of the subdivision was more credible than that of Messrs. Pettit and Glezos, given the opportunity to observe their credibility while on the stand, the number of times that Messrs. Pettit and Glezos were impeached, and the general likelihood that Mr. Pettit would have been so non-chalant with respect to wanting to let

the transaction go further if he was aware at that time that the configuration of the subdivision was unacceptable.

CONCLUSIONS OF LAW

1. The Option Agreement constitutes an enforceable contract and should be enforced according to its terms. *Russell v. Park City Utah Corp.*, 548 P.2d 889, 891 (Utah 1976) (“parties are free to contract according to their desires in whatever terms they can agree upon; and further, that the contract should be enforced according to its terms, unless that result is so unconscionable that a court of equity will refuse to enforce it.”).

2. The Option Agreement must be enforced regardless of whether either party read or understood the terms:

Generally, one party to an agreement does not have a duty to ensure that the other party has a complete and accurate understanding of all terms embodied in a written contract. Rather, each party has the burden to read and understand the terms of a contract before he or she affixes his or her signature to it. A party may not sign a contract and thereafter assert ignorance or failure to read the contract as a defense. This rule is based upon the panoply of contract law upholding the principle that a party is bound by the contract which he or she voluntarily and knowingly signs.

John Call Engineering, Inc. v. Manti City Corp., 743 P.2d 1205, 1207-08 (Utah 1987).

3. Interpretation of a contract is a question of law for the Court. *Moore v. Smith*, 158 P.3d 562, 570 (Utah Ct. App. 2007).

4. In interpreting the Option Agreement, the Court must construe the document as a whole and give a reasonable meaning to all terms. *Gillmor v. Macey*, 121 P.3d 57, 65 (Utah Ct.

App. 2005) (“It is axiomatic that a contract should be interpreted so as to harmonize all of its provisions and all of its terms, which terms should be given effect if it is possible to do so.”).

5. Also, it is a well-settled principle of contract construction that to the extent a general provision and a specific provision in a contract conflict or cover the same subject matter, the specific provision controls. *Mutual Life Ins. Co. v. Hill*, 193 U.S. 551, 558 (1904); *Medcom Holding Co. v. Baxter Travenol Lab., Inc.*, 984 F.2d 223, 227 (7th Cir. 1993); *Medtronic, Inc. v. ConvaCare, Inc.*, 17 F.3d 252, 255 (8th Cir. 1994).

6. Here, the Court interprets the Option Agreement to allow Jordan Foothills the right to approve changes to the design of the plat between the concept and final stages. Paragraph 4(b) of the Option Agreement, read as a whole and in the context of the entire agreement, provides a right of approval with regard only to changes to the design of the plat.

The Authority of Mr. Glezos

7. Jordan Foothills contends that Mr. Glezos did not have the authority to make approvals or otherwise to bind Jordan Foothills.

8. There are three types of authority: express, implied, and apparent. *Zions First Nat. Bank v. Clark Clinic Corp.*, 762 P.2d 1090, 1094 (Utah 1988).

9. “Express authority exists whenever the principal directly states that its agent has the authority to perform a particular act on the principal's behalf. *Id.*

10. Implied authority, on the other hand, embraces authority to do those acts which are incidental to, or are necessary, usual, and proper to accomplish or perform, the main authority expressly delegated to the agent. *Id.* Implied authority is actual authority based upon

the premise that whenever the performance of certain business is confided to an agent, such authority carries with it by implication authority to do collateral acts which are the natural and ordinary incidents of the main act or business authorized. *Id.* This authority may be implied from the words and conduct of the parties and the facts and circumstances attending the transaction in question. *Id.* “Implied authority is actual authority based upon the premise that whenever the performance of certain business is confided to an agent such authority carries with it by implication authority to do collateral acts which are the natural and ordinary incidents of the main act or business authorized.” *Bodell Const. Co. v. Stewart Title Guar. Co.* 945 P.2d 119, 124 (Utah Ct. App. 1997). “Implied authority ... embraces authority to do those acts which are incidental to, or are necessary, usual, and proper to accomplish or perform, the main authority expressly delegated to the agent.” *Id.*

11. Apparent authority exists where conduct of the principal, “reasonably interpreted, causes the third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him.” *Luddington v. Bodenvest Ltd.*, 855 P.2d 204, 208 (Utah 1993). In order to demonstrate apparent authority, a plaintiff must show (1) that the principal has manifested his consent to the exercise of such authority; (2) that the third person knows of the facts and, acting in good faith, had reason to believe, and did actually believe, that the agent possessed such authority; and (3) that the third person, relying on such appearance of authority, has changed his position and will be injured or suffer loss if the act done or transaction executed by the agent does not bind the principal. *Id.* at 209.

12. The Court finds that Mr. Glezos had the express authority to act on behalf of Jordan Foothills with regard to its interest in the Property. *See Zions First Nat. Bank*, 762 P.2d at 1094. The Court finds the contentions of Jordan Foothills as to the purported limits of his authority not credible and therefore rejects them. *See Brookside Mobile Home Park v. Peebles*, 48 P.3d 968, 976 (Utah 2002) (the finder of fact is free to choose which witnesses to believe); *Nichol v. Wall*, 253 P.2d 355, 356 (Utah 1953) (“A finder of the fact is not necessarily bound to accept as conclusive the testimony of a witness. His credibility may be impeached by self interest or improbability so that it would be entirely within the realm of reason to discount or to entirely discredit it.”)

13. The Court also finds that Mr. Glezos had the implied authority to do all acts incidental to the approval of the design of the plat. *See Zions First Nat. Bank*, 762 P.2d at 1094. This authority included the authority to approve changes to the plat on behalf of Jordan Foothills.

14. Additionally, the Court finds that even in the absence of express or implied authority, Mr. Glezos had the apparent authority to act on behalf of Jordan Foothills with respect to the Property. By virtue the prior transaction and Mr. Pettit requesting that Mr. Glezos communicate information and agreements between Jordan Foothills and Western Land, Mr. Pettit and Jordan Foothills consented to Mr. Glezos exercising such authority. Western Land, and its agents and representatives, relied in good faith on the appearance of Mr. Glezos’s authority created by Mr. Pettit and Jordan Foothills, and at each point in the platting process, relied upon the authority of Mr. Glezos. *See Luddington*, 855 P.2d at 208-09.

15. Also, as stated above, Jordan Foothills repeatedly approved of the design of the final plat. Additionally, Jordan Foothills failed to make any timely objection to any design change in the plat.

16. The requirement on Jordan Foothills to accept this Property with a collapsible soil issue does not depend upon a waiver, but upon an express contractual provision by which they accepted the Property “As Is.”

17. The approval of the preliminary plat that occurred by Mr. Glezos at the February 14, 2007 meeting and later confirmed by Mr. Pettit through Mr. Glezos in a further conversation with Mr. Conant was not a waiver, but was an exercise of the buyer’s right to approve under the contract.

18. Jordan Foothills’ motion in limine was denied because the outcome of this case is not dependent upon any waiver on the part of the defendants.

19. Finally, the Court finds the changes to the plat design between the concept and final stages to be not sufficiently material to warrant cancellation of the Option Agreement by Jordan Foothills. *See, e.g., In re Braniff, Inc.*, 118 B.R. 819, 841 (Bkrtcy. M.D. Fla. 1989) (“An immaterial deviation from a contract is insufficient to justify a termination of the contract.”); *Restoration Realty Corp. v. Robero*, 449 N.E.2d 705 (N.Y. 1983); *Holytrent Properties, Inc. v. Valley Park LP*, 32 S.W.3d 27, 30 (Ark. Ct. App. 2000); *see also* Restatement (Second) of Contracts § 241.

Outcome

20. By virtue of Mr. Glezos's approval of all design changes to the plat the final approval of said plat by the City of West Jordan on August 7, 2007, Jordan Foothills was required to make the Second Option Payment five days thereafter.

21. Jordan Foothills is in default under the Option Agreement by virtue of its failure to make the Second Option Payment.

22. As a result of its default, the rights of Jordan Foothills under the Option Agreement and in the Property terminated. Defendant Keane and Jordan Foothills must reconvey the Trust Deed.

23. Accordingly, title to the Property lies with East Maples, subject only to its contract with Western Land.

Liquidated Damages

24. Jordan Foothills objects to the application of the liquidated damages clause of the contract. "Under the basic principles of freedom of contract, a stipulation to liquidated damages for breach of contract is generally enforceable." *Woodhaven Apts. v. Washington*, 942 P.2d 918, 921 (Utah 1997).

25. In order to find the liquidated damages clause unenforceable, Jordan Foothills, as the party contesting application of the clause, must establish that application of the liquidated damages would be "so grossly excessive" and disproportionate as to "shock the conscience." *See Bellon v. Malnar*, 808 P.2d 1089, 1096 (Utah 1991).

26. Jordan Foothills has failed to show that \$1.5 million, the amount of the First Option Payment, is excessive, disproportionate, or otherwise unreasonable as a measure of damages in this action. Indeed, it is a fraction of the value of the Property. Accordingly, Western Land entitled to retain that sum as liquidated damages pursuant to the express terms of the Option Agreement. (*See* Option Agreement ¶ 11.)

Costs and Attorneys' Fees

27. Where a contract provides for attorneys' fees to the prevailing party, the provision is generally enforced according to its terms. *Dixie State Bank v. Bracken*, 764 P.2d 985, 988 (Utah 1988).

28. The Option Agreement's provision granting attorneys' fees to the prevailing party is enforceable and will be enforced according to its terms.

ORDER OF COURT

Based on the foregoing, it is hereby ORDERED that:

1. As to the Plaintiffs' First Claim for Relief, JUDGMENT be ENTERED against Defendant Jordan Foothills, LLC and in favor of Plaintiffs. The Court DECLARES that (1) the Option Agreement has expired and Jordan Foothills, LLC has no rights thereunder; and (2) Western Land, LC is entitled to retain the First Option Payment as liquidated damages.

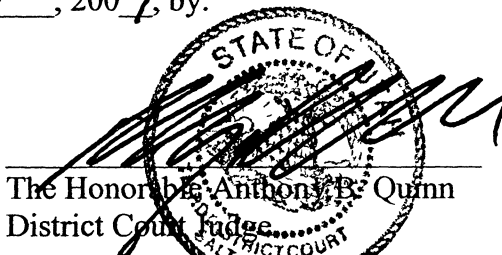

2. As to Plaintiffs' Second Claim for Relief, JUDGMENT be ENTERED against Defendants and in favor of Plaintiffs. The Court DECLARES that title to the Property lies with Plaintiff East Maples Investments, LLC, subject only to its contract with Western Land, LC. Defendant Walter T. Keane is ORDERED to reconvey the Trust Deed to Western Land, LC

within five (5) days of the date of this Order. Upon such reconveyance, Mr. Keane shall be dismissed from this suit, as he was named only in his capacity as Trustee.

3. Plaintiffs' Third Claim for Relief is DISMISSED as moot.

4. Plaintiffs are awarded their attorneys' fees and costs in this action, to be demonstrated by affidavit filed within thirty (30) days of the date of this Order.

So ORDERED this 19th day of Dec, 2007, by:


The Honorable Anthony R. Quinn
District Court Judge


CERTIFICATE OF SERVICE

On the date below written, the undersigned hereby certifies that a true and correct copy of **[PROPOSED] FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER OF COURT** was served via e-mail with a hard copy via U.S. mails upon:

Walter T. Keane
2150 South 1300 East, Suite 500
Salt Lake City, Utah 84106
Individually and as
counsel for Defendant
Jordan Foot hills, L.C.

DATED this 11th day of December, 2007.

