

2001

Joseph M. Quagliana, Paula L. Quagliana v.
Exquisite Home Builders, Inc., Allan Krucken-Berg,
Gary Margetts, KM Design : Brief of Appellant

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc2



Part of the [Law Commons](#)

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

Bryce E. Roe; Roe and Fowler; Attorneys for Plaintiffs and Appellants.

Orval C. Harrison; Attorney for Defendant and Respondent Exquisite Home Builders, Inc.; Donald Sawaya; Attorney for Defendants and Respondents Kruckenberg, Margetts and K M Design.

Recommended Citation

Brief of Appellant, *Joseph M. Quagliana, Paula L. Quagliana v. Exquisite Home Builders, Inc., Allan Krucken-Berg, Gary Margetts, KM Design*, No. 13723.00 (Utah Supreme Court, 2001).

https://digitalcommons.law.byu.edu/byu_sc2/885

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 Supreme Court 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.

RECEIVED
LAW LIBRARY

IN THE SUPREME COURT
OF THE STATE OF UTAH

1975
UNIVERSITY
Clark Law School

JOSEPH M. QUAGLIANA and
PAULA L. QUAGLIANA,
Plaintiffs and Appellants,

vs.

EXQUISITE HOME BUILDERS,
INC., and ALLAN KRUCKEN-
BERG, GARY MARGETTS, dba
K.M.DESIGN,
Defendants and Respondents.

Case No.
13723

BRIEF OF APPELLANTS

Appeal From a Judgment of the District Court of
Salt Lake County
Honorable Bryant H. Croft, Judge

Orval C. Harrison
15 East 400 South
Salt Lake City, Utah 84111
Attorney for Defendant
and Respondent Exquisite
Home Builders, Inc.

Donald Sawaya
2805 South State Street
Salt Lake City, Utah 84115
Attorney for Defendants
and Respondents Kruckenberg,
Margetts, and K M Design

Bryce E. Roe
ROE AND FOWLER
340 East Fourth South
Salt Lake City, Utah 84111
Attorneys for Plaintiffs
and Appellants

FILED
MAR 7 1975

TABLE OF CONTENTS

	<i>Page</i>
STATEMENT OF THE KIND OF CASE	1
DISPOSITION IN LOWER COURT	1
RELIEF SOUGHT ON APPEAL	2
STATEMENT OF FACTS	2
ARGUMENT:	
I. The Court Should Have Found That the Footings Placed by Exquisite Home Builders, Inc., Violated the Set Back Provisions of the Salt Lake City Zoning Ordinance and the Restrictive Covenants of the Subdivision	11
II. Other Findings of Fact Made by the Court Are Not Supported by the Evidence	13
III. Exquisite Home Builders, Inc., Materially Breachd Its Contract When It Located the Home in Such a Manner That It Did Not Comply with the Zoning Ordinance or the Restrictive Covenants for the Subdivision	16
IV. KM Design Materially Breached Its Contract with the Quaglianas	26

	<i>Page</i>
V. The Court Erred in Awarding to Exquisite Home Builders the Unreimbursed Costs It Had Put Into the Building	28
VI. The Quaglianas Are Entitled to Recover the Damages They Suffered as a Result of the Breach of Contract by Exquisite Home Builders, Together with a Reasonable Attorney's Fee	33
CONCLUSION	35

TABLE OF CASES AND AUTHORITIES CASES CITED

<i>Fleming v. Fleming-Felt Co.</i> , 7 Utah 2d 293, 323 P.2d 712 (1958)	25
<i>Golob v. George S. May International Co.</i> , 2 Wash. App. 499, 468 P.2d 707 (1970)	31
<i>Lynch v. McDonald</i> , 12 Utah 2d 427, 367 P.2d 464 (1962)	23
<i>McKay v. Barnett</i> , 21 Utah 239, 60 Pac. 1100 (1900)	18
<i>Phoenix Insurance Co. v. Heath</i> , 90 Utah 187, 60 P.2d 308 (1936)	23
<i>Schofield v. Zion's Cooperative Mercantile Institution</i> , 85 Utah 281, 39 P.2d 342 (1934)	19
<i>Scientific Packages v. Gwinn</i> , 134 Colo. 233, 301 P.2d 719 (1956)	24
<i>Sprague v. Boyle Bros. Drilling Co.</i> , 4 Utah 2d 344, 294 P.2d 689 (1956)	25

	<i>Page</i>
<i>Sumpter v. Hedges</i> , 1 Q.B. 673 (1898)	33
<i>Thomas v. Farrell</i> , 82 Utah 535, 26 P.2d 328 (1933)	12

AUTHORITIES CITED

13 <i>Am. Jur. 2d, Building and Construction Contracts</i> , §4	22
17 <i>Am. Jur. 2d, Contracts</i> , §254	19
17 <i>Am. Jur. 2d, Contracts</i> , §259	18
28 <i>Am. Jur. 2d, Estoppel and Waiver</i> , §158	23
76 <i>Am. Jur. 2d, Trial</i> , §1259	12
Annotation 67 A.L.R. 2d 1017 (1959)	21
17A <i>C.J.S., Contracts</i> , §395	22
<i>Restatements of Contracts</i> , §235(c)	18
<i>Restatement of Contracts</i> , §236(a)	19
<i>Restatement of Contracts</i> , §274	24
<i>Restatement of Contracts</i> , §357	28
<i>Restatement of Contracts</i> , §379	24
<i>Utah Rules of Civil Procedure</i> , Rule 52(a)	12
<i>Williston on Contracts</i> (3rd Ed.), §1475	30

IN THE SUPREME COURT OF THE STATE OF UTAH

JOSEPH M. QUAGLIANA and
PAULA L. QUAGLIANA,

Plaintiffs and Appellants,

vs.

EXQUISITE HOME BUILDERS,
INC., and ALLAN KRUCKEN-
BERG, GARY MARGETTS, dba
K M DESIGN,

Defendants and Respondents.

Case No.
13723

BRIEF OF APPELLANTS

STATEMENT OF THE KIND OF CASE

This is an action by property owners against a building contractor and designers for breaches of contract, with counterclaims that the property owners had breached the contracts.

DISPOSITION IN LOWER COURT

This action was tried to court without a jury. It dismissed the property owners' action and entered judg-

ment for the contractor in the amount of \$1,577.73, together with attorney's fees of \$1,182.00; and in favor of the designers for \$500.00; plus interest and costs.

RELIEF SOUGHT ON APPEAL

Appellants seek reversal of the judgment and remand to the district court with direction to dismiss the counterclaims of the defendants and enter judgment in favor of plaintiffs and against defendant Exquisite Home Builders, Inc., in the amount of \$4,303.72, together with an attorney's fee of \$2,257.00, interest and costs; or to make findings with respect to the damages and attorney's fees to which appellants are entitled; or to grant a new trial.

STATEMENT OF FACTS

In the spring of 1971, Dr. and Mrs. Quagliana (plaintiffs and appellants) wanted to have a home built in Salt Lake City, utilizing plans previously used by Mrs. Quagliana's father (R. 164). Some changes were desired in the plans that they had, and they contacted defendant K M Design (R. 1965), a partnership engaged in designing homes and apartments (R. 332). The partners in K M Design are defendants Gary Margetts and Allan Kruckenberg (R. 142, 126).

An oral agreement was entered into by the Quaglianas and K M Design under which K M agreed to prepare modified plans and specifications (R. 334).

There is a conflict in the evidence as to the other terms of the contract, but the court found that the Quaglianas were to pay \$1,000.00 for preparation of the plans and specifications, and that K M did not agree to supervise construction (R. 11, 65).

During the conversations with Gary Margetts of K M, the Quaglianas made it clear that they wanted a home in the Oak Hills area, with a view of the city from the rear window (R. 168, 346). At that time they did not own a building lot, and began looking for one upon which the house would fit and provide the desired view (R. 168).

During the Quaglianas' meetings with Margetts, he recommended some general contractors to build the home, among whom was defendant Exquisite Home Builders, Inc. (R. 167).

The Quaglianas contacted Philip Marstella, an employee and representative of Exquisite Home Builders (R. 167). Marstella was also a real estate broker and showed the Quaglianas property he thought might be suitable for the home (R. 279). Dr. Quagliana himself drove through the Oak Hills area and spotted a potential lot on Sherwood Drive (R. 168). At his request Marstella and Margetts went to look at the lot, and both advised him that the lot was suitable, and that the home would fit on the lot properly (R. 168, 346). Margetts said there would be a view (R. 346). The Quaglianas thereupon negotiated for and purchased

the lot (R. 170). K M prepared a plot plan showing the location of the house on the lot (R. 170, 346).

On or about October 7, 1971, a building contract was entered into by Marstella as agent for Exquisite Homes, and by the Quaglianas (Ex. 2-P). The contract contained the following provisions material to the issues in this case:

1. **SCOPE OF WORK:** Contractor agrees to provide all the labor and materials and do all things necessary for the proper construction and completion of the dwelling house and the other improvements for the Owner upon the building site above described in strict accordance with this contract, the plans of specifications hereunto attached and made a part hereof and identified by the signature of the parties hereto *and in strict compliance with all applicable laws, ordinances and other governmental regulations affecting such construction.*

* * *

4. **TIME OF COMPLETION:** The contractor agrees the work hereunder shall commence within 10 days after the notice that the mortgage covering the building site, given by the Owner to the Lender, has been recorded, and funds equal to the contract price have been deposited with the Lender in Construction Trust Fund Account No. as provided in Section 3 hereof, *time being of the essence, and contractor agrees to complete the construction of the dwelling house and improvements according to the plans and specifications, all applicable laws, ordinances and other government regula-*

tions applicable thereto, as well as in a manner satisfactory to the Owner and the Lender, within 180 days from the date of commencement.

* * *

8. PERMITS AND SURVEYS: * * *

Contractor shall, at his own cost and expense, provide the building permit. All other permits necessary for the construction of said dwelling house and improvements, including permits for sewer, water and other public utility connections shall be paid by the * * * Contractor.

The cost of the original inspections and surveys for the staking of the foundation shall be borne and paid by the Contractor.

The cost of re-inspections as required shall be paid by the Contractor.

The location of the building and improvements upon the above-described building site shall be made by the Contractor, and in making said location, he shall comply with all zoning ordinances and regulations and all building restrictions and protective covenants governing said real property.

* * *

17. LENDER'S COURTESY SERVICE:

As a matter of courtesy and favor, the Lender has supplied the Owner and Contractor with this suggested form of agreement. The parties hereto declare that it was entirely optional with them to use said form and that they voluntarily adopted and completed same. * * * (Emphasis added).

The contract was on a form provided by Prudential. Marstella had used the form previously and was familiar with its contents (R. 297).

Building restrictions had been recorded for the subdivision in which the property was located (Ex. 10-P). They included the following provisions:

9. SET BACKS: No dwelling house or other structure to be constructed or situated on any of said lots created except in conformity with the "set back" lines as established in each instance by the Architectural Supervising Committee and in conformity with any additional "set back" lines which may be fixed by the undersigned, its successors and assigns, in contract or deeds to any or all of the lots created on said property.

* * *

* * *

14. IMPROVEMENTS:

* * *

(b) Before the Architectural Supervising Committee may approve any plans for construction work of any kind on the premises, the lot owner or purchaser must submit the said committee an accurate plot plan showing the exact location of all buildings to be built on the lot. No construction of any kind or nature on any of the lots shall be commenced until either sidewalk or curb grade has been established.

(c) APPROVAL OF PLANS: No structures * * * shall be constructed upon any of the

said lots without the written approval as to location, height and design thereof first having been obtained from the Architectural Supervising Committee. Before construction work of any kind is started, the plans of the exterior design of any building to be constructed on any of the said lots shall first be submitted to the Architectural Supervising Committee for their approval, and said plans shall show the four exterior elevations of said building, together with the floor plan plotted on a map of said lot and any additional details of the house construction the Architectural Supervising Committee may require.

* * *

The set back established for the Quaglianas' Sherwood Drive property was 30 feet (R. 241).

After the contract had been entered into, Marstella went to Salt Lake City for a building permit (R. 258), and submitted the plans and specifications and plot plan. The plot plan showed a 30-foot set back on one street and a 20-foot set back on Sherwood Drive (R. 282). Before issuing the building permit, the city's representative struck out the words "20 feet" and inserted the word "average", meaning the average set back for houses located on the same side of Sherwood Drive. The average set back for such houses was 30 feet (R. 214-215, 298, 228).

Exquisite thereupon hired an engineering company to stake out lines for the excavation for the home. Marstella made no effort to determine the average set

back and directed the engineer to stake the lines exactly as shown on the original plot plan (R. 282, 300). Exquisite proceeded to excavate the lines staked by the engineering company.

At about the time the excavation was completed, Dr. Quagliana visited the property and discovered that the home was so located that there would be no view of the valley (R. 172). Marstella testified that it was fairly obvious at that time that the home would face directly onto the back of the other house, and "would look up into the front hill on the northeast part of the valley" (R. 283).

Marstella and Dr. Quagliana agreed that the house could be rotated at an angle so that it would face the valley (R. 172). It was Dr. Quagliana's desire to shift the house as far as possible and still meet the required side yard and rear yard set backs, Marstella said (R. 283). The set back in the front yard (Sherwood Drive) was not lessened, but was increased except for the corner, which was the axis for the rotation (R. 284, 299).

Marstella then had a new plot plan prepared in which the house had been shifted to provide the view that the Quaglianas had wanted in the first place (R. 284). The new plot plan, like the old one, showed a set back of 20 feet on Sherwood Drive; again the city changed it to "average" (R. 314); and again Marstella told his engineers to stake the excavation with a 20-foot

set back (R. 315). No effort was made to determine what the average set back was (R. 315). The footings and foundations were placed with a 20-foot set back on Sherwood Drive instead of the 30-foot set back required by the city regulations and the notation on the plot plan by the city.

Dr. Quagliana was informed that the plans and specifications had not been submitted to the Architectural Supervising Committee for the subdivision, and he told Marstella approval should be obtained (R. 175-176). There is a conflict in the evidence as to whether this conversation was before or after the concrete was poured, but it is clear that it was at about that time. The concrete was poured on December 7 (R. 301), and sometime prior to December 10 Marstella had left the plans and specifications with the committee with a note asking that they be approved (Ex. 11-P). On December 10, the committee wrote a letter to Marstella (Ex. 12-P) which contained the following:

We note that you only have a 20-foot set back to the garage from the front property line. Our minimum is 30 feet. You show a 4/12 pitch roof which must be lowered to 3½/12 pitch.

At about the same time, the exact date is not clear, the city inspectors placed a "stop order" on the construction (R. 217, 259). The court found that there was insufficient evidence to show the reason for the stop order (R. 19), but it is clear from the evidence that the building did not, in fact, conform to the set

back requirements. Harry Hurley, Zoning Enforcement Officer for Salt Lake City, testified that the set back was 10 feet short of that required by the average of houses in the block, and that notices were given to the contractor and the owner (R. 216).

Exquisite stopped construction work about the time of receipt of the letter from the Architectural Supervising Committee and the stop order from Salt Lake City, and no further construction was done on the home (R. 260).

Dr. Quagliana met with Glade Southam, president of Exquisite, and Marstella concerning what might be done. Dr. Quagliana said he would go to the Architectural Supervising Committee to see if it would be possible to work out a solution with them (R. 317). Thereafter, Dr. Quagliana did meet with the committee, but was unable to obtain any relief. He was told the only thing that could be done was to start over and try and meet requirements (R. 363). Mr. Muhlestein, a member of the committee, testified that the committee would not approve a set back of less than 30 feet (R. 243). Committee approval was never obtained (R. 261).

On January 3, 1972, Dr. Quagliana called Prudential Federal Savings and told them not to disburse any more funds to Exquisite without his approval (R. 189). Negotiations commenced between Dr. Quagliana and Exquisite on January 4, 1972, concerning what might be done to remedy the situation (R. 178, 304,

317), but no settlement was reached. Time went by, without any further construction work being done, and on March 9, 1972, Dr. Quagliana's counsel wrote to Exquisite terminating the company's right to proceed further with construction and telling them that the Quaglianas would look to them for damages for breach of contract (Ex. 16-DE).

In December, 1972, the Quaglianas sold the lot on Sherwood Drive (R. 183), having theretofore purchased a new home at another location (R. 182). An effort had been made to sell the home over many months and Dr. Quagliana had incurred expenses in selling it (R. 183, 264). He ultimately was able to sell it to a contractor for speculation for the sum of \$23,750.00 (R. 264).

The court concluded that Dr. Quagliana had breached his contract by refusing to let Exquisite Home Builders proceed further with construction and that Exquisite Home Builders was entitled to recover their unreimbursed costs. It also found that Dr. Quagliana's agreement with K M was to pay \$1,000.00 for the plans and specifications, that only \$500.00 had been paid, and that therefore K M was entitled to recover the balance of \$500.00 from Quaglianas.

ARGUMENT

I

The court should have found that the foundations and footings placed by Exquisite Home Builders, Inc.,

violated the set back provisions of the Salt Lake City zoning ordinance and the restrictive covenants of the subdivision.

Although requested to make a finding with respect to violation of the set back provisions of the ordinances and the building restrictions (R. 43) the court refused. This was a material issue in the case. Paragraph 4 of the complaint (R. 141) avers that the defendant Exquisite Home Builders "excavated for and poured the foundation of the home in such a location on the plaintiffs' property that it would not comply with the building restrictions on the property."

It is the duty of a trial court to make the findings of fact with respect to all of the contested issues in a case. See *Thomas v. Forrell*, 82 Uah 535, 26 P.2d 328 (1933); Rule 52(a), Utah Rules of Civil Procedure; 76 *Am. Jur. 2d, Trial*, §1259.

It is not necessary to send the case back to the trial court for a finding on this issue, however, because the facts with respect to violation of the set back restrictions were not seriously contested.

Mr. Harry Hurley, the Zoning Enforcement Officer for Salt Lake City, testified (and was corroborated by the testimony of Marstella) that when the plot plan was submitted the 20-foot set back was stricken and the word "average" was written in. The set back as actually established by Exquisite Homes was 20

feet, while the average set back for homes in that block was 30 feet.

Mr. Grant Muhlestein, a member of the architectural committee for St. Mary's Hills, Plat E, testified that the average set back, north side of Sherwood Drive, where the lot was located, was 30 feet, and that a 30-foot set back was required by the committee. He stated that the committee could not and would not have approved a 20-foot set back.

Thus, the evidence required a finding that the foundation as built by Exquisite Home Builders was in violation of the zoning ordinances, the building permit as approved by Salt Lake City, and the restrictive covenants that had been recorded for the subdivision.

II

Other findings of fact made by the court are not supported by the evidence.

The court's Finding No. 17 was that Dr. Quagliana had instructed Marstella to rotate the home and where to put it. Dr. Quagliana testified that he talked to Marstella about the problem and it was agreed between them that the house could be shifted to obtain a better view of the valley. Marstella testified that Dr. Quagliana did not expressly approve of the new plot plan, but after looking at it said it was better (R. 285). He also testified that he was "instructed" to shift the

house as far as he could and still meet the side yard and rear yard requirements (R. 283). He said the new drawing did not show the set back because it was greater than on the first drawing.

The court found that Dr. Quagliana inspected the job site after re-staking and approved of the re-staking (Finding No. 23). The testimony of Mr. Marstella with respect to that matter was as follows (R. 284):

Q: Did Dr. Quagliana inspect the staking prior to any excavation?

A: I wouldn't say for sure whether he did.

The court's Finding No. 31 is to the effect that Southam made various offers to the Quaglianas with respect to tearing out the foundations and footing, starting construction anew, buying the lot, and moving the garage to the opposite side of the house. The testimony indicates that there was no firm offer made. Marstella testified that no firm proposal had been made and that the conversation was to talk about possible solutions to the problem in which Exquisite Homes found itself (R. 304).

Southam testified that he felt it would be better to purchase the property and continue to build the house on its own account and that the company was trying to escape with the least possible cost (R. 322).

The court's Finding No. 33 was improper, although supported by some evidence. In the Quaglianas'

rebuttal case counsel offered evidence with respect to the conversations that occurred after the meeting of January 4, 1972, in an effort to show that no firm proposal had been made. The following occurred in the examination of Dr. Quagliana (R. 364-365):

Q: Can you tell us what, if any, contact you had with either Mr. Marstella or Mr. Southam subsequent to January 4?

A: Yes.

MR. SAWAYA: Excuse me, your honor. That is all matters which were part of the plaintiff's case in chief. I don't see that we really ought to have to listen to it again.

THE COURT: Well, what are you seeking to rebut here, Mr. Roe?

MR. ROE: Well, there was a good deal of testimony, if the court please, about what kind of negotiations went on and what kind of commitments were made in this case by Dr. Quagliana and by me after the meeting of January 4.

THE COURT: I really don't see what relevancy the negotiations after the work was stopped have with this lawsuit. I mean, they had a problem. It wasn't solved. And what their intentions were, their hopes were or their efforts to resolve it afterwards, do not impress me as being material or helpful here, because I can't see that the fact that they have negotiated in good faith or bad faith afterwards to try and correct the problem gives us any help with respect to how we should resolve this question.

MR. ROE: All right, I won't pursue it in that case, then.

Notwithstanding the court's declaration that evidence with respect to negotiations after January 4, 1972, were not material to the issues in the case, it made a finding with respect to those matters when it found that Exquisite Home Builders after February 23 advised plaintiff's counsel they were willing to tear out the foundation and start anew.

III

Exquisite Home Builders, Inc., materially breached its contract when it located the home in such a manner that it did not comply with the zoning ordinances or the restrictive covenants for the subdivision.

In reaching its decision, the trial court reasoned that it was the obligation of plaintiff, rather than Exquisite Home Builders, to obtain the initial approval from the Architectural Supervising Committee, that the approval was not obtained, that because of the failure to obtain it, the the committee sent the letter of December 10, 1972, proclaiming the violation, and that construction was stopped because of the letter.

In so doing, the court ignored the terms of the contract, and lost sight of the breach claimed and proved by the Quaglianas.

It was not the failure to obtain approval that con-

stituted the breach, but the building of the home in violation of the zoning ordinance and restrictive covenants. The contract required that the home be completed "in strict compliance with all applicable laws, ordinances and other governmental regulations affecting such construction." It also required the contractor to locate the building on the lot and "in making said location, [to] comply with all zoning ordinances and regulations and al building restrictions and protective covenants governing said real property."

The contract also provided that the contractor was to perform the work "in strict accordance" with the contract and the plans and specifications, but the provisions are not conflicting. The plans as approved by Salt Lake City did, in fact, provide for an "average" set back, and the permit issued by Salt Lake City provided for an "average" set back, not a 20-foot set back.

Moreover, a reasonable construction of the contract is that the plans and specifications are to be followed, but in those instances in which they conflict with the requirements of law, ordinances, or restrictive covenants, adjustment must be made. This is particularly true with respect to *location* of the house, the responsibility for which is expressly placed upon the contractor.

Any other construction would nullify parts of the contract and make it invalid.

It is fundamental that in interpreting contracts

the courts must, if possible, give effect to all provisions of the contract. See *Restatement of Contracts*, §235(c) :

A writing is interpreted as a whole and all writings forming part of the same transaction are interpreted together.

And 17 *Am. Jur. 2d, Contracts*, §259:

It is a fundamental rule of contract construction that the entire contract, and each and all of its parts and provisions, must be given meaning, and force and effect, if that can consistently and reasonably be done. An interpretation which gives reasonable meaning to all its provisions will be preferred to one which leaves a portion of the writing useless or inexplicable. So far as reasonably possible, effect will be given to all the language and to every word, expression, phrase and clause of the agreement. No word or clause should be rejected as mere surplusage if the court can discover any reasonable purpose thereof which can be gathered from the whole instrument. A construction will not be given to one part of a contract which will annul another part, unless such a result is fairly inescapable.

In *McKay v. Barnett*, 21 Utah 239, 60 Pac. 1100 (1900) this court said:

In construing the contract, each of its provisions must be considered in connection with the others, and, if possible, effect must be given to all. A construction which entirely neutralizes one provision should not be adopted if the contract is susceptible of another, which gives effect to all of its provisions.

It is also a generally accepted principle that an interpretation should be adopted which gives a lawful meaning to the contract, rather than an unlawful one.

The rule as stated in *Restatement of Contracts*, §236 (a), is as follows:

An interpretation which gives a reasonable, lawful and effective meaning to all manifestations of intention is preferred to an interpretation which leaves a part of such manifestations unreasonable, unlawful or of no effect.

The same rule is announced in somewhat different terms in *17 Am. Jur. 2d, Contracts*, §254:

It is a general principle that where a contract is fairly open to two constructions, by one of which it would be lawful and the other unlawful, the former will be adopted. Thus, if a contract is capable of a construction which will make it valid, legal, effective, and enforceable, it will be given that construction if the contract is ambiguous or uncertain. A construction which renders the contract valid is preferred to one which renders it invalid, and it will not be construed so as to be invalid unless that construction is required by the terms of the agreement in the light of the surrounding circumstances.

The rule was adopted by this court in *Schofield v. Zions Cooperative Mercantile Institution*, 85 Utah 281, 39 P.2d 342 (1934), in which the court said:

It is elemental, in construing a contract, that

its purpose, its nature, and subject matter should be considered. A construction giving an instrument a legal effect to accomplish its purpose will be adopted when it can reasonably be done, and between two possible constructions that will be adopted which establishes a valid contract.

It is not necessary to go beyond the plain language of the contract to see that Exquisite Home Builders had a legal duty to see that the home was located in such a manner that it did not conflict with zoning regulations or restrictive covenants. The set back requirements for both the city zoning regulations and the restrictive covenants was the "average" set back of the other buildings on Sherwood Drive, on the same side of the street, and in the block in which the Quagliana home was being built. The average set back in the area was 30 feet, but the foundation was placed with a 20-foot set back. This is a substantial and material breach of the contract.

The fact that a Salt Lake City inspector had approved the footings does not change the legal obligations of Exquisite Home Builders under the contract. The contract was to comply with the regulations, not merely to obtain approval of an inspector. A similar question has been presented in connection with contracts requiring construction in compliance with Federal Housing Administration or Veterans Administration Housing standards. It is consistently held that mere approval by an inspector does not control the question

of whether the structure meets the contract requirements. See Annotation, "Construction of clause in building contract that structure will comply with regulations, plans, or standards of the Federal Housing Administration or the Veterans Administration," 67 A.L.R.2d 1017 (1959). There the annotator says:

Generally, a clause in a building contract that the structure will comply with the regulations, plans, or standards of the Federal Housing Administration or Veterans Administration has been construed to mean that the structure, when completed, will conform to such regulations, etc., and not that the approval of the structure by those agencies is conclusive on the question of compliance.

Moreover, the decision to rotate the house did not affect the legal obligations of Exquisite Home Builders, either by way of a new agreement or by way of waiver.

It was known to all the parties, Exquisite Home Builders, the Quaglianas, and K M Design, that before purchasing the lot on Sherwood Drive the Quaglianas were interested in a lot which would accommodate the particular house, and with a view of the valley. When the foundation was first excavated, Dr. Quagliana visited the site and observed that the window faced the mountain. Thereafter Dr. Quagliana and Marstella discussed the possibility of rotating the house on its corner. Rotation was apparently discussed because of the fact that this would have to be done in order to

retain the original set back provision. There was no discussion about the front set back for the reason that it would not be affected. But Marstella himself testified that Dr. Quagliana was interested in shifting the house as much as possible within the requirements for side yard and rear yard set back requirements.

The method by which the problem was approached contains no suggestion that Dr. Quagliana intended to proceed with the house in contravention of the zoning ordinances or the restrictive covenants. It was legitimate for him to assume that Exquisite Home Builders had properly established the front yard set back; and it must be assumed that the parties intended to have the remaining portions of the contract remain in effect. As stated in *13 Am. Jur. 2d, Building and Construction Contracts, §4*:

When a building is in process of construction, and additions or alterations are made, the original contract, unless it is so entirely abandoned that it is impossible to trace it and say to what part of the work it shall be applied, is held still to exist, and to be binding on the parties so far as it can be followed. The additions or alterations, if the expense of the work is thereby increased, may be the subject of a new contract, either express or implied, but they do not affect the original contract, which still remains in force.

See also *17A, C.J.S., Contracts, §395*.

In this case there is absolutely no evidence that the parties intended to affect the provision that the building

would be located in conformance with regulations and covenants.

Neither is there any evidence showing an intention on the part of the Quaglianas to waive the provision requiring the contractor to properly locate the building. The case does not have the elements of waiver. In *Phoenix Insurance Co. v. Heath*, 90 Utah 187, 61 P.2d 308 (1936), the court set out the elements as follows:

A waiver is the intentional relinquishment of a known right. 27 R.C.L. 904. To constitute a waiver, there must be an existing right, benefit, or advantage, a knowledge of its existence, and an intention to relinquish it. It must be distinctly made, although it may be express or implied.

See also 28 *Am. Jur. 2d, Estoppel and Waiver*, §158.

Exquisite Home Builders was in default under the contract as of December 7, 1971, when they located the building contrary to the requirements of the zoning ordinance and the restrictive covenant. This being true, the Quaglianas were discharged from any further performance under the contract and had a right to do what they did on January 3, 1972, i.e., tell Prudential Federal Savings not to make any more payments to Exquisite Home Builders.

In *Lynch v. McDonald*, 12 Utah 2d 427, 367 P.2d 464, 469 (1962), the court said:

* * * It has been said that the party who commits the first breach of contract cannot maintain an action against the other for a subsequent failure to perform. * * *

In *Scientific Packages v. Gwinn*, 13 Colo. 233, 301 P.2d 719 (1956), plaintiffs had sought to restrain defendants from competing with them on the basis of a contract containing a non-competition agreement. The contract also provided, however, that the defendant and companies controlled by him, would be released from all liability under certain promissory notes guaranteed by him and another, and steps were to have been taken within 10 days to cause the guaranty to be cancelled and rescinded. At the time the action was brought, this had not been done, and the court denied injunctive relief to the plaintiff on the non-competition agreement. The court said:

We must conclude that plaintiffs' failure to release Gwinn from liability on the note held by the bank in accordance with Shapiro's promise was a substantial breach of the contract, which deprived plaintiffs of the right to demand performance by Gwinn of the agreement not to operate a competing business. The party who commits the first substantial breach of a contract is also deprived of the right to complain of a subsequent breach by the other party.

This is the general rule. See *Restatement of Contracts*, §§274, 379:

§274:

(1) In promises for an agreed exchange, any material failure of performance by one party not justified by the conduct of the other discharges the latter's duty to give the agreed exchange even though his promise is not in terms conditional. An immaterial failure does not operate as such discharge.

(2) The rule of subsection (1) is applicable though the failure of performance is not a violation of legal duty.

§379:

A breach or non-performance of a promise by one party to a bilateral contract, so material as to justify a refusal of the other party to perform a contractual duty, discharges that duty.

See also *Sprague v. Boyles Bros. Drilling Co.*, 4 Utah 2d 344, 294 P.2d 689, 693 (1956); and *Fleming v. Fleming-Felt Co.*, 7 Utah 2d 293, 323 P.2d 712, 716 (1958).

Exquisite Home Builders failed to locate the building in accordance with the contract; then it let a month pass without doing anything about it before Dr. Quagliana stopped payments under the contract. Further time passed, and while there were some settlement negotiations with respect to attempts to correct the problems created by Exquisite Home Builders, no settlement agreement was entered into, and the contractor did nothing to go forward with the building of the home. The Quaglianas were completely justified, there-

fore, when they notified Exquisite Home Builders that its right to proceed under the contract was terminated. Time was of the essence of the contract. Exquisite Home Builders had breached the contract on or before December 7, 1971, and more than three months had passed without any further construction work having been done on the home. The original contract provided for completion of the home within 180 days or by approximately April 7, 1972. Half of that period had been spent doing nothing, and it was apparent that it would be impossible to complete the home within the time specified, or within any extension to which the contractor might be entitled.

IV

K M Design materially breached its contract with the Quaglianas.

All of the parties agreed that before the Quaglianas purchased the lot on Sherwood Drive they wanted to be sure that the house would fit on the lot and would afford them a good view of the valley from the rear window. Although there was no written contract between the Quaglianas and K M Design, the conduct of the Quaglianas in having the plans and specifications drawn up, and in checking with the contractor and the designer before the purchase of the lot, makes it apparent that a material consideration of the Quaglianas in entering into the contract with K M Design was to not just obtain some plans and specifications,

but to obtain plans and specifications compatible with the lot they purchased and their desire for a view.

It was with the advice and approval of K M Design and Exquisite Home Builders that the Quaglianas purchased the Sherwood Drive lot. They were assured by both that the house could properly be placed on the lot. K M Design was well aware of the desire for a view of the valley, and yet the plot plan prepared by K M Design was prepared in such a manner that the house did not face the valley. It faced the rear of other houses, and the mountain.

Moreover, K M Design prepared a plot plan with a 20-foot set back despite the fact that zoning and restrictive covenants required a 30-foot set back. After it was determined that a 30-foot set back was required, Exquisite Home Builders attempted by overlays and plotting to determine whether the house could be built on the lot. It determined that it was possible to build the house on the lot, but not in such a manner that it would afford a view of the valley to the Quaglianas. It was testified to by Marstella that if the house were relocated with a 30-foot set back, the view of the valley would be worse than it had been when Dr. Quagliana first looked at the site after the original excavation (R. 292).

Certainly the designer had some obligation with respect to the location of the home and carrying out the desires of his client with respect to a view. It is ap-

parent from the evidence that he did not fulfill that obligation and did not fulfill the obligation to properly locate the house on the property so that it would meet the requirements of the zoning ordinances and restrictive covenants.

This being the case, K M Design first breached the contract, and was not entitled to recover the portion of the purchase price they claim was unpaid.

V

The court erred in awarding to Exquisite Home Builders the unreimbursed costs it had put into the building.

As pointed out under Point III, above, a party in default under a contract is not entitled to recover under the terms of the contract. Under some circumstances he is entitled to a remedy of restitution.

Restatement of Contracts, §357, provides:

(1) Where the defendant fails or refuses to perform his contract and is justified therein by the plaintiff's own breach of duty or non-performance of a condition, but the plaintiff has rendered a part performance under the contract that is a net benefit to the defendant, the plaintiff can get judgment except as stated in Subsection (2), for the amount of such benefit in excess of the harm that he has caused to the defendant by his own breach, in no case exceeding a ratable proportion of the agreed compensation, if

(a) The plaintiff's breach of non-performance is not willful and deliberate; or

(b) The defendant, with knowledge that the plaintiff's breach of duty or non-performance of condition has occurred or will thereafter occur, assents to the rendition of the part performance, or accepts the benefit of it, or retains property received although its return in space is still not unreasonably difficult or injurious.

* * *

(3) The measure of the defendant's benefit from the plaintiff's part performance is the amount by which he has been enriched as a result of such performance unless the facts are those stated in Subsection (1b), in which case it is the price fixed by the contract for such part performance, or, if no price is so fixed, a ratable proportion of the total contract price.

(The parties referred to in the Restatement should be reversed here, since we are dealing with the counterclaim and considering the right of a defendant to recover for its part performance.)

If the Exquisite has a right to any offset or recovery because of its part performance, it must be under the provisions of paragraph (1a) relating to a non-willful or non-deliberate breach, in which case the measure of recovery is the amount by which the Quaglianas were enriched as a result of such performance.

In order for a contractor to recover for the value

of benefit conferred, he must show that a benefit has been conferred.

In *Williston on Contracts* (3rd Ed.), §1475, it is recognized that the modern tendency among courts is to allow some recovery under certain circumstances, even though the contractor has not substantially performed. Referring to the doctrine of substantial performance, the writer says:

But the courts have generally abandoned it, and not hold that where a builder has supplied work and labor for the erection or repair of a house under lump sum contract, but has departed from the terms of the contract, he is entitled to recover for his services and materials, unless:

(1) The work that he has done has been of no benefit to the owner;

(2) The work he has done is entirely different from the work which he has contracted to do; or

(3) He has abandoned the work and left it unfinished.

In the instant case there was no proof that the work was of any benefit of the owner. There was proof that the work done was entirely different from that which Exquisite contracted to do, and that Exquisite had left the work unfinished.

If Exquisite Home Builders is relying upon a claim that they have conferred a benefit upon the property, they have the burden of proving the benefit. The

question of the right to recover on the principle of restitution was considered at some length in *Golob v. George S. May International Company*, 2 Wash. App. 499, 468 P.2d 707 (1970), in which the court said:

The alternate theory of restitution available to an aggrieved party for a substantial breach of contract permits recovery upon equitable principles of payments made under the contract. Restitution in such a case proceeds on the theory of disaffirmance of the contract and when there is no literal restitution, approximates the relief of rescission, that is, being restored to one's original position as if no contract had been entered into. If the defaulting party has partly performed and his breach is not willful and if the part performance has enriched the aggrieved party, the defaulting party may recover or set-off the monetary value of his part performance against the aggrieved party's claim. This is so because in equity and good conscience it would be improper for the aggrieved party to retain the benefits of the defaulting party's part performance without paying for it—the aggrieved party otherwise would be unjustly enriched. If, however, the part performance is worthless or if the fact of benefit or the monetary value of such part performance is not proved, there is neither a showing of enrichment nor a showing that the retention of benefits of such services is unjust. The burden of showing unjust enrichment and its value is upon the claimant defaulting party.

There is no evidence in this case that the performance by Exquisite Home Builders was a benefit to the Quaglianas. The only thing upon which the court might

have based such a finding of benefit is set out in findings numbers 39 and 40 (R. 21) :

39. The plaintiffs sold Lot 8 to Gale G. Smith on December 13, 1972, for the sum of \$23,750.00; and that the said Gale G. Smith utilized the existing excavation and nearly all of the existing foundation walls in the construction of a home.

40. That plaintiffs purchased said Lot 8 on May 4, 1971, for the sum of \$20,485.00.

This finding is not sufficient to support a determination that the Quaglianas were benefited by the performance of Exquisite Home Builders. There is no evidence as to the negotiations or circumstances under which the Quaglianas were able to obtain the lot for the price they did, or the negotiations or circumstances under which Gale G. Smith was willing to pay \$23,750.00 for the lot. There was no testimony by anyone that the value of the lot was increased by virtue of the "improvements" placed upon it by Exquisite Home Builders. The only evidence is that a purchase was made on May 4, 1971, for one price and that the property was sold some 19 months later for a higher price. There was no evidence as to the market value of the property at either time, or as to the factors that may have increased the price or as to whether the lot would have brought a higher value with the foundation than without it. Defendant Exquisite Home Builders has thus failed in its burden of proving that the labor and material furnished by it enhanced the value of the property or benefited the Quaglianas.

Moreover, where a recovery is allowed for the value of the benefit conferred, it is usually on the theory that the circumstances must be such as to give an option to the property owner to take or not to take the benefit of the work done. As stated by the court in *Sumpter v. Hedges*, 1 Q.B. 673 (1898):

* * * Where, as in the case of work done on land, the circumstances are such as to give the defendant no option whether he will take the benefit of the work or not, then one must look to other facts than the mere taking of the benefit of the work in order to ground the inference of a new contract.

VI

The Quaglianas are entitled to recover the damages they suffered as a result of the breach of contract by Exquisite Home Builders, together with a reasonable attorney's fee.

Inasmuch as the trial court ruled in favor of the defendants, and held that the Quaglianas were the ones guilty of the breach of contract, it made no finding with respect to the damages suffered by the Quaglianas.

Robert Roof, a loan officer for Prudential Federal Savings, testified that the lending institution had charged the Quaglianas a service fee at the inception of \$1,500.00; a credit report and appraisal fee of \$45.25; title insurance policy \$235.00; and fire insur-

ance \$189.00, which were deducted from the loan proceeds.

Prudential Federal Savings charged interest in the amount of \$47.48. It made disbursements of \$614.19 to Cook Lumber; \$442.18 to A & L Concrete for footings; \$498.92 to Exquisite Homes for permits and footings; \$396.00 for excavation; and \$118.50 for staking the lot. In addition, the Quaglianas paid one \$5.00 charge to Prudential for inspection fees. Of these charges Prudential Federal Savings refunded \$900.00 of the service charge and the \$47.98 interest (R. 99-100).

Dr. Quagliana had other expenses. He had to hire someone to remove weeds from the property, a cost of \$25.00; on another occasion in 1972 he had weeds removed at a cost of \$60.00. He paid Salt Lake County taxes of \$280.00 in 1972. He incurred costs with the Salt Lake Tribune of \$59.68 in trying to sell the property. He had a liability insurance policy which cost \$195.00, necessitated by the condition of the premises as left by Exquisite Home Builders. He paid K M Design \$500.00 and he paid \$25.00 for copying blueprints; and \$15.00 for posting signs on the property in an attempt to sell it. His damages totaled \$4,303.72, or \$4,803.72 if the K M judgment is not reversed.

The contract provided for a reasonable attorney's fee for the prevailing party.

Mr. R. Mont McDowell testified as to the method of record keeping and expressed his opinion that a reasonable attorney's fee for time spent up until the trial was \$1,697.00, and \$280.00 for each day of trial. There were two trial days. In addition, other time was spent in connection with motions for amendment of the findings of fact and conclusions of law, and motion for a new trial, indicating that the court should have allowed an attorney's fee of not less than \$2,257.00.

CONCLUSION

The Quaglianas, in an effort to have a home built to their liking, relied upon the skill and competence of two professionals, a designer and a contractor. Both of them ignored the zoning ordinances and building restrictions and, as a consequence, the Quaglianas obtained the beginnings of a home they couldn't use.

Under the trial court's ruling, however, they had to pay for the work even though it was not performed in accordance with their contracts.

They behaved as reasonably as anyone could be expected to behave under the circumstances, but reasonableness was not regarded by the trial court as a virtue.

The trial court misconceived the law, the facts and the issues, and entered judgment against the Quaglianas on legally unjustifiable grounds. The court

found no breach of contract on the part of the contractor even though it located the home in contravention of building restrictions; it found no breach by the designers even though they had as part of their contract approved a lot that wasn't suitable and had used a 20-foot set back instead of the required 30-foot set back.

The court held that the Quaglianas had breached the contract even though their obligation had been discharged by defendants' prior breaches.

The judgment should be reversed and remanded to the trial court for entry of judgment in favor of the Quaglianas against Exquisite Home Builders in the amount of \$4,303.72, plus \$2,257.00 attorney's fees, interest and costs (or determination of the amounts) and dismissal of the counterclaims.

Respectfully submitted,

Bryce E. Roe

ROE AND FOWLER

340 East Fourth South
Salt Lake City, Utah 84111

Attorneys for Plaintiffs
and Appellants