

1979

Ranch Homes , Inc. v. Greater Park City Corporation : Respondent's Petition For Rehearing And Supporting Brief

Utah Supreme Court

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Recommended Citation

Petition for Rehearing, *Ranch Homes v. Greater Park City Corp.*, No. 15467 (Utah Supreme Court, 1979).
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IN THE SUPREME COURT OF THE STATE OF UTAH

RANCH HOMES, INC.,

Plaintiff and
Respondent,

vs.

GREATER PARK CITY CORPORATION,

Defendant and
Appellant.

Case No. 15467

RESPONDENT'S PETITION FOR REHEARING
AND SUPPORTING BRIEF

Appeal from a Judgment
of the District Court of Summit County

Honorable James S. Sawaya, Judge

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FILED

MAR 30 1979

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AUTHORITIES CITED

Cases

- Barry v. United States, 501 F.2d 578, 584 (6 Cir. 1974)
- Byram v. Payne, 58 Utah 536, 201 P. 401, 404 (1921)
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- Commercial Casualty Ins. Co. v. Roman, 269 N.Y. 451,
199 N.E. 658, 660 (1936)
- Eason v. Weaver, 484 F.2d 459, 460 (5 Cir. 1973)
- Hassan v. Stafford, 472 F.2d 88, 96 (3 Cir. 1973)
- Indoor Recreation Enterprises, Inc. v. Douglas, 194 Neb 715,
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- Main Bank & Trust v. York, 498 S.W.2d 953, 957
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- Mendoyoma, Inc. v. County of Mendocino, 9 Cal. App. 3d 193,
87 Cal. Rept. 740 (1970)
- The Conqueror, 166 U.S. 110, 133, 17 S.Ct. 510, 41 L.Ed.
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- United States v. Pittman, 449 F.2d 623, 628 (7 Cir. 1971)
- Waletzko v. Herdegen, 226 N.W.2d 648, 653 (N.D. 1975)
- Wilson-Sinclair Company v. Griggs, 211 N.W.2d 133, 142
(Iowa 1973)

Texts and Treaties

- 31 Am.Jur. 2d, Expert and Opinion Evidence, § 183
- 5 Corbin on Contracts, § 1032
- 32 C.J.S., Evidence, § 567
- 2 Jones on Evidence (5th Ed.) § 440

Miscellaneous

- Jury Instructions for Utah, § 3.7

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RESPONDENT'S PETITION FOR REHEARING
AND SUPPORTING BRIEF

PETITION FOR REHEARING

Ranch Homes, Inc., plaintiff and respondent herein, petitions the court for a rehearing on the following grounds:

1. The court overlooked controlling case law in holding that the trial court was bound by the testimony of the defendant's expert witness.
2. The court disregarded the testimony of other witnesses in holding that the testimony of defendant's expert was uncontroverted, the record showing that the testimony was both controverted and impeached.
3. In holding that no compensation should be awarded for the services of Fahs and Tuckett, the court overlooked plaintiff's authorities regarding reliance damages.

BRIEF IN SUPPORT OF PETITION

NATURE OF CASE

This is an action for damages for breach of contract.

DISPOSITION ON APPEAL

A judgment for plaintiff-respondent in the amount of \$42,587 plus interest and costs was remanded to the trial court with directions to reduce the damage award by \$27,690. Defendant was awarded its costs.

RELIEF SOUGHT ON PETITION FOR REHEARING

Respondent, Ranch Homes, Inc., seeks a rehearing of the case and following rehearing, affirmance of the trial court's judgment.

STATEMENT OF FACTS

The facts are set out on pages one through eight of respondent's original brief herein. Because of the court's holding, the testimony of the defendant's expert and certain of plaintiff's witnesses is of importance and will be set out in greater detail in the argument.

ARGUMENT

I

THE COURT OVERLOOKED CONTROLLING CASE LAW IN HOLDING THAT THE TRIAL COURT WAS BOUND BY THE TESTIMONY OF THE DEFENDANT'S EXPERT WITNESS.

In holding that expenditures made by respondent in reliance upon the option agreement were perhaps unforeseeable, and for the most part unreasonable, the majority opinion relied heavily and unjustifiably upon the

testimony of Herbert Trayner, a general contractor called by the defendant as an expert witness.

With respect to Mr. Trayner's testimony, the majority opinion stated:

* * * defendant's expert witness, Henry Traynor [sic], established the industry standard for the steps to be taken by a reasonably prudent developer after obtaining an option but before exercising it. His testimony was uncontroverted and, in sum, consisted of the following: first, a developer must assure himself that the property can be rezoned, if necessary, for the intended use; and the expenditure of time consists of "a little leg work." Second, a preliminary plat may be required (at a maximum cost of \$500) but no other "renderings, working drawings, architectural or engineering plans are needed until after the option is exercised." With a preliminary plat, a developer should be able to get a commitment for financing but there is no need for any drawings of plans during the option period since "that's just too much expense to get into at this point." Third, a developer should get a preliminary estimate of costs which can be based on the preliminary plat. Fourth, if FHA financing is desired, a verbal understanding is sufficient; and during the option period, it is premature to submit any plans to FHA.

Mr. Trayner further testified:

With the exception of whatever charge the engineer may have to work a preliminary plan unless the community would require some sort of a filing fee, there shouldn't have to be any costs.

The majority opinion concluded none of the sums expended by the plaintiff in pursuit of the project after obtaining the option were reasonable, except for the \$10,000 paid for the option and approximately \$5,000 not contested by the defendant. The court also concluded that the corporation had expended amounts in preparation for the contract because of "corporate bad judgment." Considering the record made below, the majority's conclusion must have been based entirely on Mr. Trayner's opinions.

The majority of the court apparently was of the view that the trial court was bound to accept the testimony of Mr. Trayner because it was "uncontro-

verted." The opinion did not mention what appears to be the almost unanimous view respecting the trial court's right to decide whether any, and if so, how much, weight should be given to expert testimony.

There are hundreds of cases in accord. Of the dozens we have read the following are representative.

In Byram v. Payne, 58 Utah 536, 201 P. 401, 404 (1921), the defendant was found to be responsible for the death of the plaintiff's sheep notwithstanding expert testimony to the effect that the sheep died of a disease for which the defendant was not responsible. On appeal the defendant contended that the testimony of the expert should have been accepted by the jury as conclusive, but the court said:

* * * Counsel contend, however, that the expert testimony should have been accepted by the jury as conclusive. Possibly the jury failed to give to the testimony of these expert witnesses the weight to which it was entitled, but the weight of testimony, including that of expert witnesses, is wholly a subject for the jury's determination. Doubtless the defendant presented a strong defense, but it is evident from their verdict that the jurors believed the sheepmen and farmers and doubted or rejected the testimony of the veterinarians and biologists. It is not within the province of an appellate court to pass upon the evidence and say that the opinion of the jury was wrong. [Emphasis added.]

In Commercial Casualty Insurance Co. v. Roman, 269 N.Y. 451, 199 N.E. 658, 660 (1936), New York's highest court said:

The issue as to the value of the mortgaged premises at the time of the execution of the extension agreement presented a question of fact for determination by the jury. * * * The [defendant] called two real estate experts, each of whom testified that the value of the property was substantially in excess of the mortgages. Even though no testimony was offered by the plaintiff to contradict the testimony of these experts, it was still within the province of the jury to reject their testimony all together. The weight to be given to opinion evidence ordinarily is entirely for the determination of the jury. [Citations omitted. Emphasis added.]

In Eason v. Weaver, 484 F.2d 459, 460 (5 Cir. 1973), the court said:

The weight to be accorded unimpeached expert opinion evidence is solely for the judge sitting without a jury. While he may consider such testimony, he is not bound to accept it.

In Hassan v. Stafford, 472 F.2d 88, 96 (3 Cir. 1973), the court said:

Lynch's credibility on the question of what constituted current standards was a matter for the jury to consider: a trier of fact is not bound to accept an expert's opinion merely because it is uncontradicted. [Citations omitted.]

In Barry v. United States, 501 F.2d 578, 584 (6 Cir. 1974), the court, in considering the effect of expert testimony, said:

Moreover, we find no merit in the contention of the taxpayers that the trial court gave no weight to certain evidence offered by them and received by the court. Appellants do not assert that any evidence which they offered was erroneously excluded from presentation or consideration. It is the function of the trial court alone to weigh evidence and assess credibility of witnesses. As taxpayers themselves argue, even the testimony of an expert witness may be disregarded if it conflicts with the sound judgment of the trial court based on his evaluation of all the evidence. [Emphasis added.]

The Supreme Court of Nebraska in Indoor Recreation Enterprises, Inc., v. Douglas, 194 Neb. 715, 235 N.W.2d 398, 401 (1975), added its voice to the chorus:

The opinion conclusion of the expert witness is not required to be taken, by the court, even though uncontroverted. A trier of fact is not required to take the opinions of experts as binding upon him.

The Supreme Court of Iowa has held similarly. In Wilson-Sinclair Company v. Griggs, 211 N.W.2d 133, 142 (Iowa 1973), that court said:

* * * We have said an expert's opinion rises no higher than the level of evidence and logic on which it is predicated. [Citation omitted.] Even if uncontroverted, expert opinion testimony is not binding on the trier of fact; it may be accepted in whole, in part, or not at all. [Citation omitted.]

In United States v. Pittman, 449 F.2d 623, 628 (7 Cir. 1971), the court agreed:

As the court observed in Jones v. N. V. Nederlandsch-Amerikaansche Stoomvaart M., 374 F.2d 189, 190 (3 Cir. 1966), [cert. den.], the opinion of an expert, even if uncontradicted, is not required to be accepted as such testimony must pass through the screen of the fact trier's judgment of credibility.

One of the most often cited cases was decided by the United States Supreme Court in 1896, The Conqueror, 166 U.S. 110, 133, 17 S. Ct. 510, 4 L. Ed. 937. The court said:

In short, as stated by a recent writer upon expert testimony, the ultimate weight to be given to the testimony of experts is a question to be determined by the jury; and there is no rule of law which requires them to surrender their judgment, or to give controlling influence to the opinion of scientific witnesses.

In Main Bank & Trust v. York, 498 S.W.2d 953, 957 (1973), the Court of Civil Appeals of Texas stated the rule in slightly different form:

In the final analysis, the testimony of Dr. Benz, however persuasive, was nothing more than expert opinion testimony. The rule is well settled that this character of testimony is but evidentiary, and is never binding upon the trier of facts. Thus, the fact-finder is not cut off from exercising considerable personal judgment about how far such opinions are to be relied on.

The Supreme Court of North Dakota agrees. In Waletzko v. Herdegen, 226 N.W.2d 648, 653 (1975), the court said:

Waletzko asserts that the testimony of the physician as to a percentage of disability caused by the third accident is undisputed and must be accepted by the jury and court. The jury need not accept undisputed testimony, even of experts. Bird v. Lake Region Flying Service, Inc., 78 N.D. 928, 54 N.W.2d 339 (1952). It is customary in this state to instruct the jury that they need not accept the opinions of experts, but they should give them such weight as is reasonable in the light of all the circumstances.

In Utah, too, it is customary to so instruct the juries. In § 3.7 Jury Instructions for Utah, we find the following:

The rules of evidence ordinarily do not permit the opinion of a witness to be received as evidence. An exception to this rule exists in the case of expert witnesses. A person who by education, study and experience has become an expert in any art,

science or profession, and who is called as a witness, may give his opinion as to any such matter in which he is versed and which is material to the case. You should consider such expert opinion and should weigh the reasons, if any, given for it. [You are not bound, however, by such an opinion.] Give it the weight to which you deem it entitled, whether that be great or slight, and you may reject it, [if in your judgment the reasons given for it are unsound.]

See also City of Portland v. Ruggero, 231 Ore. 624, 373 P.2d 970, 973 (1962); 2 Jones on Evidence (5th Ed.) § 440; 31 Am. Jur. 2d, Expert and Opinion Evidence, § 183; 32 C.J.S., Evidence, § 567; and cases cited by those authorities.

Even if the testimony of Mr. Trayner was uncontroverted and unimpeached, the trial court was not duty-bound to accept the testimony and to be bound by it. A fortiori, he was not bound to accept it if it was controverted or impeached--which it was.

II

THE COURT DISREGARDED THE TESTIMONY OF OTHER WITNESSES IN HOLDING THAT THE TESTIMONY OF DEFENDANT'S EXPERT WAS UNCONTROVERTED, THE RECORD SHOWING THAT THE TESTIMONY WAS BOTH CONTROVERTED AND IMPEACHED.

If one goes beyond appellant's brief and looks at the record itself, it is easy to see why the trial court was not convinced of The Gospel According to Trayner. Set out below are portions of his testimony which must have made a great deal of difference with the trier of the facts.

Q Okay. Now let's suppose you make a decision to proceed with purchasing the option, what would be the accepted industry practice during the option period? What steps would you take now, for instance, with regard to zoning?

MR. ROE: Well, I object to the question on the grounds that there has been no showing that there is an accepted industry practice in that regard. Maybe he can establish that.

THE COURT: All right. Yes. I think it is a good objection.

Q (By Mr. Prince) Is there a--a practice? You have talked about general procedures a little while ago. Could it be said that the general procedure is to handle this thing in one way or another or at least in one general way?

A Well, I like to feel that it's a kind of a logical sequence. I am always investigating procedures in this business to quicken things up and keep the costs down. As a result, I subscribe to builder development magazines that are replete with case histories in other parts of the Country. They don't generally regard us as even being here but they are always giving case histories and how to effect the zoning and how to do this and I have had many hours of discussion with friends of mine who are in the same business, along the same lines, what is the most effective way of getting what we want--

Q Uh-huh.

A (continuing) --so we can continue on in business.

Q And what you are--

A And that's kind--

Q What you are going to testify to here is information you have gleaned from these case histories and from--

A And personal experience.

Q Uh-huh.

A Mainly personal experience because, you know, the proof of the pudding is in the eating, so to speak. After affecting some type of contract and option or such--

MR. ROE: Just--I don't think the witness has answered respecting general practices among subdividers from personal experience. Maybe if his personal experience is relevant then that's something else but I think the question was about general practice.

Q (By Mr. Prince) Have you dealt in options yourself?

A Yes.

Q A number of times or just once or twice?

A Generally that's the procedure.

Q Okay.

A Particularly, if you have to go through zoning.

Q Okay. All right. I'll ask you the question again: What steps would be taken by you and if that would differ from what a reasonably prudent contractor would do, let us know with regard to the zoning.

A Well, I regard myself as a reasonably prudent contractor so--

Q Okay. [R. 868-869.]

There is no other evidence with respect to industry standards, and there is no support in the record for the statement in the majority opinion that Mr. Trayner "established the industry standard for steps to be taken by a reasonably prudent developer after obtaining an option but before exercising it." (Mr. Trayner regarded himself as a reasonably prudent contractor, not developer. Either way, it's a term unused in the law.)

Another factor that must have had some influence on the trial court was that Mr. Trayner had had no experience developing property in the Park City area. In this regard, he testified as follows:

Q And with regard to just building homes, can you give us an estimate, a guess, as to how many or a ballpark area of how many homes you may have built over the period of your life as a contractor?

A Oh, I would estimate in the five hundred range.

Q Uh-huh. And where do you--have you worked? What areas?

A In Utah, generally in the Salt Lake Valley going as far North probably as Farmington, as far South as Orem. [R. 863]

* * *

Q Well, I want to know more what--if you are familiar--let me ask you this: Are you familiar with other subdividers in Salt Lake City?

A Yes. A number of friends of mine are subdividers.

Q And in the area?

A Yes.

Q And are you generally familiar with the practices of the subdividers in the Salt Lake area?

A Yes, I would say so. [R. 865]

* * *

Q And what information is required for zoning changes? What kind of things do you have to present to the Zoning Commission?

A Well, every community or civic organization is different but generally they will require that you submit proof of ownership [R. 870] [Emphasis added.]

* * *

Q Okay. Now, do you have--in getting zoning changes and assuming that it's not--well, is it generally what I call a "piece of cake" to get the zoning changes or do you have to work at it?

A Well, every case--

MR. ROE: Your Honor, I am objecting. I am going to object this because--

MR. PRINCE: Let me ask--

MR. ROE: (continuing) --the witness has experience in Salt Lake County. We are dealing here with zoning changes in the City of Park City which we have no basis for comparison of what's involved in one as compared with the other. He hasn't indicated any experience in this area.

THE COURT: Seems rather remote to me, Mr. Prince.

Q (By Mr. Prince) I am wondering as a general proposition how much time is required to get a zoning change in your experience from Farmington down to--where did you say?

A Orem.

Q Down to Orem. In your experience what have you found?

A It will average between six and eight weeks. [R. 872]

* * *

Q Have you ever developed any property or subdivided any property in Park City?

A No, I have not.

Q So you are not familiar are you with the problems that are present in Park City with respect to the obtaining of zoning approvals?

A I am not familiar with that.

Q Has most of your subdividing been in Salt Lake County?

A Yes. That's correct.

Q Now, in Salt Lake County do they have a Master Planning Committee that you have to meet with on zoning problems?

A They have a Master Planning, yes.

Q Generally the Master Plan has already been adopted hasn't it?

A I am not sure what you mean by "adopted." It's been generally laid out subject to variances, changes, et cetera.

Q Yes. Salt Lake City does have--or Salt Lake County does have a Master Plan for the County does it not?

A Yes, they do.

Q And has had for many years?

A Correct.

Q So that the zoning problems that you would anticipate when you build in Salt Lake County would be a matter of maybe getting a change in the zoning classification?

A That's correct. [R. 888-889] [Emphasis added.]

* * *

Q So mostly you are--what you are fighting about in Salt Lake County is the density of the--

A That's correct.

Q (continuing) --of the housing?

A Unless you get into multi-family which is, of course, a different classification again.

Q So you don't generally have sizes in which you have to demonstrate the--oh, the architectural worth of a particular subdivision or the types of houses that might be built there and things of that kind?

A Generally not. At least not in my experience.

Q If you had to do that sort of thing then I suppose it would make some difference in the time you would have to spend in obtaining zoning approval would it not?

A Yes. Yes. It would. [R. 890-891]

As pointed out in the authorities cited under Point I, the trier of fact is entitled to take his own knowledge and experience into account in determining what weight to give to the opinion of an expert. The trial court must be known, as everybody knows, that the metropolitan areas of Salt Lake City and Salt Lake County are markedly dissimilar to Park City, which is a residential community and recreation center. There is nothing in the evidence that would permit the trial court to find that the circumstances surrounding the development of property in Salt Lake City and Salt Lake County are the same as that for developing property in Park City, and even if he could so find, it is not required to so find. The testimony of other believable witnesses was to the effect that the Park City requirements for zoning were much more onerous than those discussed by Mr. Trayner. The trial court was entitled to consider the testimony of plaintiff's witness James D. Fahs.

Q And after the option agreement was entered into, Mr. Fahs, what did you do with reference to the project? That is, how did you proceed?

A Direct--immediately after the option was signed, the property--when we entered into the option agreement the property was unzoned. The Holiday Ranch had just been annexed to the City of--Park City then accepted it and we went through a zoning process at the time Park City was in the process of rewriting their entire Zoning Ordinance so it was necessary to meet with a committee that they had established that was called the Master Plan Committee, and we had various meetings throughout the Fall of '74 and into, I guess, early '75 before the Master Plan Committee approved cluster housing type development which would allow us to generate the three and a half units per acre density that we needed in order to make the project work.

At the time Park City's Zoning Ordinance for this type of subdivision called for seven thousand square foot lot. The Master Plan Committee was looking at changing that upwards substantially to, like, ten or twelve thousand square feet a lot so it was necessary for us to go in underneath a cluster exemption so we could do close cluster housing and still retain the seven thousand square foot lots. Early in '75 that was approved by the Master Plan Committee and was sent to the Planning Commission for Planning Commission Formal Action on it. Subsequent to that, the Planning Commission approved it and sent it to the City Council for their final approval and the final approval was granted sometime in the first of March or the first of April in '75--

Q Now--Pardon.

A (continuing) --which meant that the linen, the actual linen that needed to be recorded in the County Recorder's Office had been approved through all the Park City agencies. [R. 594-595] [Emphasis added.]

* * *

Q Well, there wasn't as much work as there was with regard to the FHA as there was with regard to the zoning? * * *

A Well, I would say they were comparable. I guarantee, Park City Master Planning and Planning Commission and City Council involved much, much more work than FHA. [R. 643] [Emphasis added.]

* * *

A Yeah, we had managed to talk the Park City Master Plan Committee, the Planning Commission and the City Council into us dedicating the street, building the planting island in the middle and landscaping it and then taking care of it.

Q What about the rest of the area here, Mr. Fahs, as long as we are on it. What did you plan on doing as far as landscaping in the common area? What was your idea? I notice some trees. What was going on there?

A Well, we wouldn't have done any of the landscaping.

Q You would not have done any of the landscaping?

A No. No. All this was--this was--this was to show how the landscaping would be. In other words, it was the desire of the Park City Master Plan Committee that we develop an overall plan that we work to and live to. In other words, if a guy wanted to build on that particular lot he had to build his house in that location and if he wanted to landscape, that landscaping would have to be approved through them also.

* * *

A Before we could get our final approval I believe it was the--from the City Council--before they would sign the plat we needed to have a survey of the property. In other words, they needed to have a boundary survey completely done so that it closed and I believe they needed the center line of the roads and they needed the--you know, all the radius points and whatever, the surveying of the whole subdivision so that John Probasco, the City Engineer, could go out there and look at it for one last time before the plat was signed.

Q Well, at this point you didn't own the property, however, did you?

A No, but we had permission from Park City to enter upon the property and do this work. [R. 644-645] [Emphasis added.]

From the foregoing testimony, a trier of the fact could reasonably that the situation with respect to obtaining zoning approval in Park City varied markedly from the procedures followed on the other side of the mountain, and that the expenditure of time and money with respect to obtaining of zoning approval was both foreseeable and reasonable under the circumstances. After all, the defendant itself was a company with its office in Park City, and it had been deeply involved in planning and developing subdivisions in the area. Before forming Ranch Homes, James D. Fahs

G. Michael Tuckett participated with the defendant in the development of property in Park City, so the trial court could legitimately conclude that all of them were aware of the procedures that were necessary in order to obtain needed zoning. Mr. Fahs testified that the \$5,000 paid to him was for architectural design drawings and architectural working drawings that were "necessary"--that "we needed"--to effectuate final FHA approval, and zoning approval and master plan committee approval.

Trayner notwithstanding, to obtain zoning approval in Park City involved much more than the "little leg work" that might have sufficed in Salt Lake County.

The majority of this court also took it to be a fact that if FHA financing was desired, a "verbal understanding" was sufficient and that during the option period, "it is premature to submit any plans to FHA." It certainly cannot be said that Mr. Trayner's testimony was "uncontroverted" in this respect. With respect to the FHA approval, Mr. Fahs testified at some length.

A Well, at the same time with the zoning process, we began working with the FHA, Federal Housing Administration. Preliminarily prior to buying the property we had some discussions with them as to if they would approve the subdivision, what they felt about it, the location. All of the indications from them were favorable. We proceeded with the project and went through a processing system with them in which you get a preliminary feasibility letter as far as whether they are going to insure it or not. Finally, you get a ASP-7 which means that subject to submitting the final working drawings or final detailed construction plans that the subdivision has been approved.

We got the ASP-7, submitted the final construction documentation that they required and then in the Spring of '75 received a ASP-9 feasibility letter which meant that we were entitled to submit loan packages for their review and they would value them and they would process them.

Q What types of presentation did you have to make to FHA in order to obtain these approvals?

A Well, it involved the preparation of--of presentation type drawings, renderings, floor plans, layouts of the subdivision, layouts of the cluster housing unit. One of the problems that we had with them was, in order to make our cluster housing work we had to do a zero lot line garage and the FHA--that was something that was somewhat strange to them zero lot line, even though they were implementing it at the time and we needed to go through that and get that whole process resolved and get it approved.

Also involved the preparation of architectural working drawings for the houses, the final drawings including the specs that the FHA appraiser could then take and place an actual value on to establish the amounts that the FHA would insure on that particular project. [R. 595-596.] [Emphasis added.]

Michael Tuckett, a qualified civil engineer, also testified about what to be done in order to obtain approval by Park City. He testified that design work for the site improvements, sewer, water lines, storm drain system and roadway system were necessary because Ranch Homes required to provide a legally designed boundary system of the lots dedicated roadways signed by the owners with the approval of the various people within Park City--the Park City engineer, the attorney, the council, and so forth. [R. 676] He testified that the \$5,000 paid to him was reasonable for his services [R. 679], and that none of the drawings were done before the option was signed [R. 680]. It was necessary to do engineering for all three phases of the contract "in order for everything to be done" [R. 682].

The majority opinion also found that with a preliminary plat, a developer should be able to get a commitment for financing, but there is no need for any drawings of plans during the option period since "that's just too much expense to get into at this point." This statement does not jibe with the testimony of Max Engeman, executive vice president of First Security Bank, or that of LaVern Nielson, vice president of Western Mortality Company. Mr. Engeman testified as follows:

A A builder will come in--I think Mr. Trayner covered it pretty well--but a developer--real estate developer would come in, show us a plat of a particular piece of property, the location. In the Salt Lake Valley, of course, there is a lot along the Wasatch Front. We know most of it pretty well having been in the business pretty long. We would check the location, whether we would extend credit in this location should he be able to put together a subdivision or develop the property and, of course, the utilization of the land creates value. That's an appraisal principle and we would take raw ground and change its usage and thereby there would be a profit for him hopefully.

After going into the location, the size of the land and so forth, we would say, "Well, it looks like it's feasible. Put it together and bring it to us." Then it's up to him to go out and get this zoning, the engineering, flood control work with the municipality for the extents of the improvements and most of them require bonds now so that they are sure that it will be completed and bring that to us and say, "Okay. This is--here is the plat. This is the preliminary plat. This is the way it looks it will work for us."

You say, "Well, after checking, it looks good to us," and so forth. Hopefully they would go FHA, VA and Mr. Trayner explained why, if there is any bail out there it is much easier to bail out on an FHA, VA subdivision than it is one on conventional loans and he would then take that plat to the Municipality, get it approved and after he got it approved, bring it to us. Then, of course, we would be willing to fund. [R. 901-902.] [Emphasis added.]

Additional testimony respecting the needs of the financing institution was presented by LaVern Nielson, whose primary duties included involvement in the financing of real estate developments such as housing subdivisions for Western Mortgage Company. She testified as follows:

Q Inviting your attention to a period between September, 1974, and April, 1975, April 15th, say, did you have occasion to give consideration to a housing project or a subdivision project of Ranch Homes in Park City, Utah?

A Yes.

Q Then that would be the Country Roads subdivision?

A Yes.

Q Now, with whom did you deal with respect to that?

A Mr. Fahs and Mr. Tuckett.

Q Was that in connection with the possibility of your making a loan for that property?

A Land acquisition or land development loan plus the construction of the homes.

Q In connection with that loan did Ranch Homes give you certain information about what their project involved?

A Yes.

Q What types of information did you receive from them in connection with the project?

A A copy of the overall plat and copies of the FHA commitment that they had secured through another lender--we didn't get those for them--copies of the plans and specifications.

Q And what is your purpose in obtaining documents of this type?

A Well, to determine whether or not we will make them a loan.

Q It is to determine the feasibility of the project?

A Yes.

Q Did you make a determination as to its feasibility?

A Yes. We agreed to extend the loan to them.

Q In making that decision what consideration, if any, did you give to market factors, that is, the ability to sell the houses and so on?

A Well, this is one reason we required the FHA approved subdivision so we could make certain the houses could be marketed. [R. 910-911] [Emphasis added.]

* * *

Q You say that you did indicate that you would make a loan to them?

A Yes.

Q Was this to be a loan for the acquisition and development of the land or just acquisition or development?

A Acquisition and development.

Q So that would--what would that include then? Buying the land, I guess? Is that one of things?

A Yes.

Q And then development would include what?

A What we call offsite improvements; curb, gutter, sidewalk, street.

Q Was this loan or this commitment that you talk of, was that conditional or unconditional?

A What do you mean by that?

Q Well I mean at that time were there any conditions that Ranch Homes had to fulfill in order for the loan?

A Yes. They had to have an access road to the property and we had to have the ASP-9 out of FHA. We had to have the plat recorded before we disbursed any money. Is that what you mean? [R. 912] [Emphasis added.]

The testimony of LaVern Nielson controverts the testimony of Mr. Trayner, and the finding of the majority of this court, that only a "verbal understanding" was needed from the Federal Housing Administration.

The statement in the appellant's brief, adopted by the majority opinion, that the testimony of Herbert Trayner was uncontroverted is thus shown to be incorrect. It was controverted with respect to the necessities in seeking zoning approval, the need for formal FHA approval on Form ASP-9, and the need for a complete set of plans. The testimony as a whole supports the finding of the trial court that the expenditures made by Ranch Homes were both foreseeable and reasonable. This being the case, defendant should compensate the plaintiff for the services of Fahs and Tuckett as corporate

officers, there being no basis for the statement in the majority opinion that the amounts expended were the result of "corporate bad judgment."

III

IN HOLDING THAT NO COMPENSATION SHOULD BE AWARDED FOR THE SERVICES OF FAHS AND TUCKETT, THE COURT OVERLOOKED PLAINTIFF'S AUTHORITIES REGARDING RELIANCE DAMAGES.

Without citing any authority therefor, the majority opinion stated that the services of Mr. Fahs and Mr. Tuckett were rendered by them in the performance of their normal corporate services and that these kinds of services are expected to be provided by an officer in the usual course of on-going corporate activities and are not proper as an item of damages in this breach here.

No authority is cited for this proposition. In plaintiff's original brief, authority to the contrary was cited. The general measure of damages is the amount expended in reliance on the contract, including the value of labor and material furnished by the injured party. See 5 Corbin on Contracts, § 100. And in Mendoyoma, Inc. v. County of Mendocino, 9 Cal. App. 3d at 15, 87 Cal. Rep. 740 (1970), the court allowed recovery for the value of the services of corporate officers, noting that the claim was not directed to the compensation due the officers for their service, but rather to the compensation due the corporation acting through its officers. That is the case here. The corporation performed those various services, expended the hours, in reliance upon the contract.

CONCLUSION

The trial court correctly held that the expenditures made by Ranch Homes, and the services performed by its officers, were foreseeable and reasonable under the circumstances of this case. This finding is virtually required by the testimony of Mr. Fahs, Mr. Tuckett, Ms. Nielson, and Mr. Engeman relating to the things done and needed to be done in order to proceed with the project. Much of the testimony is in direct controvention of the testimony of the defendant's expert, Herbert Trayner, who had never been involved in any development or construction in the Park City area, but had confined his activities to the metropolitan area along the Wasatch front. The testimony of Mr. Trayner was considerably weakened on cross-examination, and its application to this case was suspect from the beginning.

Not all options are the same. This was not a \$100 option. The plaintiff had paid \$10,000 up-front money to the defendant for the option. What the majority of the court has found, in essence, is that it would be unreasonable for Ranch Homes to spend more than \$5,000 to protect an investment of \$10,000 it had made in obtaining the option from Greater Park City Company; and that it should have exercised the option half-blind, committing itself to payment of a half-million dollars over the next three years.

It is easy to understand why a developer who had not spent a considerable sum of money for an option, and who buys plans off the shelf, would not want to risk much money in determining the feasibility of the project, but where a considerable sum has been paid in order to obtain the option, and its exercise results in a momentous financial undertaking, it is reasonable to believe that the optionee would want to take steps to protect

the investment he has already made and assure himself of the worth of the venture. Failure to recognize this, coupled with his lack of experience in the Park City area, renders Mr. Trayner's testimony inherently improbable and justified the trial court in disregarding it.

Moreover, the trier of fact does not need that type of justification from the record; the court as the trier of the fact may take into account his own training, knowledge, and experience in judging the weight to be given to the opinion of an expert and is not bound by that opinion in the sense that it must accept it, even though it is uncontroverted and unimpeached.

The foregoing points merit consideration by this court. Accordingly, rehearing should be granted, and upon rehearing the court should affirm the judgment of trial court in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Bryce E. Roe, attorney for respondent in the above-entitled action, hereby certify that on the ____ day of March, 1979, I served the attached Respondent's Petition for Rehearing upon F. S. Prince, Jr. and Donald J. Winder attorneys for appellants, by depositing copies thereof in the United States mails, postage prepaid, addressed as follows:

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