

1988

Brixon & Christopher Architects, a professional corporation v. Roger H. Elton and John H. Laub : Brief of Appellant

Utah Court of Appeals

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Recommended Citation

Brief of Appellant, *Brixon & Christopher Architects v. Elton*, No. 880199 (Utah Court of Appeals, 1988).

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**UTAH COURT OF APPEALS
BRIEF**

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DOCKET NO.

880199-CA

IN THE SUPREME COURT
FOR THE STATE OF UTAH

BRIXEN & CHRISTOPHER)
ARCHITECTS, a)
professional corporation,)

Plaintiff-Respondent,)

vs.)

ROGER H. ELTON and)
JOHN H. LAUB,)

Defendants-Appellants.)

88-0199-CA

Case No. 860576

Category No. 14(b)

BRIEF OF APPELLANTS ELTON AND LAUB

APPEAL FROM THE JUDGMENT OF THE
THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
THE HONORABLE SCOTT DANIELS, JUDGE

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FILED

AUG 4 1987

Clerk, Supreme Court, Utah

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IN THE SUPREME COURT
FOR THE STATE OF UTAH

BRIXEN & CHRISTOPHER)
ARCHITECTS, a)
professional corporation,)

Plaintiff-Respondent,)

vs.)

Case No. 860576

ROGER H. ELTON and)
JOHN H. LAUB,)

Defendants-Appellants.)

BRIEF OF APPELLANTS

STATEMENT OF JURISDICTION AND NATURE OF PROCEEDINGS

The Utah Supreme Court has jurisdiction of this appeal which is from a final civil judgment by the Third District Court involving an architectural services contract and the award of damages for breach thereof.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

A. Whether the trial court was entitled to render judgment in favor of Respondents (hereinafter Brixen & Christopher) contrary to the written provisions of Brixen & Christopher's own letter and architectural form contract

which combined documents the lower court specifically determined to be the contract between the parties.

B. Whether the trial court incorrectly determined that Appellants (hereinafter Elton and Laub) were estopped to deny that Brixen & Christopher's services were authorized.

STATEMENT OF THE CASE AND FACTS

This case generally involves a claim by Brixen & Christopher that Elton and Laub were liable for architectural services rendered in connection with a proposed but never constructed recreational building development by Elton and Laub in Weber County. After a court trial, the lower court specifically held that Brixen & Christopher's August 2, 1982 letter and architectural form contract attached thereto was the contract between the parties even though it was not signed by Elton or Laub as requested in the letter. The lower court awarded Brixen & Christopher damages in an amount of \$63,924.97 even though Brixen & Christopher's proposed design was never used and the specific terms of the contract were not complied with by Brixen & Christopher.

The following facts are divided into numbered paragraphs to make reference thereto more convenient. Copies of the pertinent documents referred to herein are included in the addendum.

1. Brixen & Christopher met with Elton and Laub in early March, 1982 and discussed the proposed recreational building project and the five possible design and construction phases in which Brixen & Christopher might be employed as architects. (R. 143).

2. By letter dated March 4, 1982 Elton and Laub authorized Brixen & Christopher to proceed only with the first phase entitled Programming and Schematic Design which included "insuring an accurate statement of needs and budget . . . design, . . . site plan, floor plans, sections, elevations and perspective." (Exhibit 1, pp. 1-3, R. 144-45). (It should be noted that Exhibit 1 is paginated in reverse order so that page No. 1 is the last page of the exhibit). (Addendum, Doc. 1).

3. The schematic design phase was generally to define the scope of the project (R. 145), and the maximum fee for this first phase was to be \$7,500. (Exhibit 1, p. 1). Elton and Laub required that the total cost of the project including site development be under \$800,000. (R. 395; R. 306-07; R. 445). Christopher stated that the \$800,000 was for the building alone and did not include the site development. (R. 478).

4. Before proceeding with any phase beyond the first phase, Brixen & Christopher were required to obtain approval from Elton and Laub. (R. 145; Exhibit 1, p. 1).

5. The first phase was expected to be completed within four to six weeks after March 10, 1982. (R. 401).

6. Brixen & Christopher proceeded immediately with the first phase which was to include "an accurate statement of needs and budget." (R. 145; Exhibit 1, p. 1).

7. Although Brixen & Christopher had a number of meetings with Laub's employees after March 10, 1982, Brixen & Christopher did not personally meet again with Elton and Laub until July 28, 1982. (R. 162; R. 447).

8. At the July 28, 1982 meeting with Elton and Laub, Brixen & Christopher reviewed the documents which Brixen & Christopher were proposing in regard to the overall design and first phase development and to seek Elton and Laub's approval of the first phase so that Brixen & Christopher could proceed with the subsequent phases of the project. (R. 165-66).

9. Christopher testified that Elton and Laub approved the first phase and gave Brixen & Christopher permission on July 28, 1982 to proceed with the other phases. (R. 165-66). Elton and Laub denied giving Brixen & Christopher approval to proceed with the other phases because Brixen & Christopher's preliminary design was not acceptable. (R. 403; R. 431; R. 449-50; see R. 482-83). Christopher testified that approval was given "subject to some more refinements in design", including changes in the roof required by Laub. (R. 317).

10. Elton and Laub testified that Christopher said Brixen & Christopher wanted to continue working on the first phase requirements until the first phase was approved. (R. 404-06; R. 451).

11. Brixen & Christopher proceeded thereafter to work on the changes in the first phase problems including cost reduction as required by Elton and Laub. (R. 411-12; R. 451).

12. In the letter dated August 2, 1982, Brixen & Christopher stated that the cost of the project was estimated to be approximately \$1,200,000 (Exhibit 1, p. 34) rather than the \$800,000 ceiling mandated by Elton and Laub in March, 1982. (R. 395; R. 306-07). (Addendum, Doc. 2).

13. Although Christopher testified that Brixen & Christopher's letter of August 2, 1982 was sent to confirm Elton and Laub's decision to go beyond the first phase and begins by stating that Brixen & Christopher are pleased that Elton and Laub "have elected to proceed with the architectural work" it ends with the following request for approval to proceed with the second phase:

A signed copy of this letter will verify your approval of this Agreement and serve as our notice to proceed with the Design Development Phase. (Exhibit 1, p. 33).

14. The proposed letter agreement of August 2, 1982 was never signed by Elton or Laub who both testified they told Christopher on a number of occasions that they

would not sign it until the design was acceptable and costs reduced. (R. 409-14; R. 454-55).

15. Thereafter, in two subsequent letters dated September 30, 1982 (Addendum, Doc. 3) and November 26, 1982 (Addendum, Doc. 4) Christopher requested that Elton and Laub sign the proposed letter agreement of August 2, 1982 so that Brixen & Christopher could proceed. (Exhibit 1, pp. 47, 76).

16. Also in the letter of November 26, 1982, Christopher proposed that it be an amendment to the alleged August 2, 1982 letter agreement and ends the letter as follows:

If you agree with these changes, please sign and return one copy of this document for our files. This document will become our Amendment to the Agreement, when returned, and all provisions of the original Agreement will apply. (Exhibit 11, p. 76).

The letter then provides for the signatures of Elton and Laub. (Exhibit 1, p. 76).

17. Neither Elton nor Laub ever signed the proposed letter amendment of November 26, 1982.

18. It should also be noted in the letter of November 26, 1982 that Brixen & Christopher had increased without any agreement the first phase charge to \$8,500 rather than the maximum of \$7,500 as stated in the agreement of March 4, 1982. (Exhibit 1, p. 76).

19. Although the lower court determined on disputed

evidence that on July 28, 1982 Elton and Laub approved the first phase involving programming and schematic design, there was never any specific documents identified as approved for the first phase and there was no evidence presented either of documents or testimony that Elton and Laub approved any phase thereafter. In fact, Christopher testified that he did not receive approval for the second phase involving design development (R. 364-65), and he did not receive approval for construction documents which would be the third phase. (R. 365).

20. Attached to Brixen & Christopher's letter of August 2, 1982 and incorporated therein was a form architect's contract which specifically requires that before proceeding with any subsequent phase, the prior phase documents, budget and construction costs, among other items, shall have been approved by the owner. (Exhibit 1, pp. 30-32 (reverse order)).

21. There was never an approved budget or approved cost of construction for any phase. In fact, Christopher testified that the first time there was a detailed breakdown of costs of the project was in October, 1982 (R. 328, Exhibit 1, p. 55) notwithstanding the alleged previous approval of the first phase on July 28, 1982.

22. Christopher admitted that Elton was concerned about the cost estimate submitted in October, 1982. (R. 329).

23. Christopher testified that the first time Brixen & Christopher had a comparison of different mechanical systems was in November, 1982 (R. 330) and admitted that selection of a particular system would have a significant impact on what the owner might decide to do and a significant impact on cost. (R. 330-31).

24. Christopher also admitted that in November, 1982 he was analyzing the engineer's October, 1982 cost estimate to see what average costs of the project might be. (R. 336; R. 340).

25. Christopher testified that neither Laub nor Elton ever told him in writing that the roof design was acceptable (R. 337-38), although Christopher claims Elton orally told him in August, 1982 that the roof design was fine. (R. 338).

26. Christopher then admitted that everything was conditional when he asked Elton to sign both the August 2, 1982 letter and the letter of November 26, 1982 (R. 344). He also admitted that Elton said " . . . if its okay, I'll have them both signed." (R. 344).

27. As of November 26, 1982 Brixen & Christopher had not received any written communication that the first phase involving the schematic design had been approved. (R. 345).

28. In November, 1982 Christopher increased Brixen & Christopher's charge for the first phase from

\$7,500 to \$8,500 partly as a result of work on the schematic design by engineers in the fall of 1982. (R. 343-45; R. 347-49).

29. Brixen & Christopher's work was never used. (R. 438).

30. Laub prepared a \$7,500 check in September, 1982 for delivery to Brixen & Christopher to pay for the first phase at the time it became acceptable. (R. 460; R. 465). The check was never delivered although Laub thought it might have been. (R. 461). Laub was the first person to mention that the check existed when his deposition was taken. (R. 475). Christopher was not aware that the check existed until Laub's deposition. (R. 475).

31. In spite of the fact that Brixen & Christopher were not paid, and Elton and Laub, even though requested to do so on many occasions, never signed the proposed letter agreement of August 2, 1982 or the proposed amendment of November 26, 1982, Brixen & Christopher allegedly continued to perform work on all phases of the project. (R. 321; R. 338).

32. All of Elton's communications after August 2, 1982 to Brixen & Christopher were in response to inquiries by Brixen & Christopher and were consistent with Elton and Laub's understanding that Brixen & Christopher was

allegedly trying to provide an acceptable design. (See Exhibit 1, pp. 82-84 (reverse order), Addendum Docs. 5 and 6). There is no evidence of any written communication from Elton which gave Brixen & Christopher approval of any phase.

33. After the start of this lawsuit, Christopher claimed that Laub met with Brixen & Christopher in July, 1984 and said Laub admitted owing Brixen & Christopher for the architectural work on the project (R. 476), regardless of the fact that Elton and Laub had already answered Brixen & Christopher's complaint and denied all liability. (R. 12; R. 480).

34. The lower court specifically determined that Brixen & Christopher's letter of August 2, 1982 and the attached form architect's contract was the contract between the parties although never signed by Elton or Laub. (Finding of Fact No. 8, R. 53; Conclusion of Law No. 3, R. 57).

SUMMARY OF ARGUMENT

A. Brixen & Christopher always maintained and the lower court determined that Brixen & Christopher's August 2, 1982 letter and attachment was a binding contract even though it was never signed by Elton or Laub. That contract requires approval of each separate phase prior

to proceeding with the next phase. Assuming that the lower court could determine on disputed evidence that Elton and Laub orally approved the first phase on July 28, 1982, it is undisputed that Brixen & Christopher were to make and thereafter made further refinements in the first phase. Thus, approval of the first phase by Elton and Laub was tentative at best. Christopher specifically testified that there was no approval for any subsequent phase. Because the contract specifically required such approval, the lower court could not award damages for fees allegedly earned by Brixen & Christopher for any other phase until approval for such phase was established. Moreover, without such proof damages beyond the first phase would be speculative. Because the court was not entitled to remake the contract, Brixen & Christopher is bound by the terms thereof and awarding damages was improper.

B. The lower court's conclusion that Elton and Laub were estopped to deny that Brixen & Christopher's services were authorized can only be sustained by showing reasonable reliance by Brixen & Christopher and setting aside the contract which clearly requires that specific documents for each phase be identified including an approval of anticipated construction costs. No such approval was shown and no documents were identified. Certainly Brixen

& Christopher cannot reasonably claim to have relied because Brixen & Christopher was always aware that the requested contract was not signed and admitted that no approval was given for the second phase or for the construction documents phase.

ARGUMENT

I. THE LOWER COURT WAS NOT ENTITLED TO DETERMINE THAT BRIXEN & CHRISTOPHER'S LETTER OF AUGUST 2, 1982 WAS THE PARTIES' CONTRACT AND THEN IGNORE THE TERMS THEREOF.

In this case, the August 2, 1982 letter and attached form contract contain specific requirements for each phase, the compliance with which by the architect and the approval thereof by the owner are prerequisite to proceeding with work by the architect on any other phase. The contract states the five phases and requirements thereof as follows:

1.1. SCHEMATIC DESIGN PHASE

1.1.1 The Architect shall . . . ascertain the requirements of the Project . . .

1.1.2 . . . shall provide a preliminary evaluation of the program and the Project budget requirements . . .

1.1.3 . . . shall review with the Owner alternative approaches to design and construction . . .

1.1.4 . . . shall prepare for approval by the Owner, Schematic Design Documents consisting of drawings and other documents illustrating the scale and relationship of Project components.

1.1.5 . . . shall submit to the Owner a Statement of Probable Construction Cost . . .

1.2. DESIGN DEVELOPMENT PHASE

1.2.1 Based on the approved Schematic Design Documents and any adjustments authorized by the Owner in the program or Project budget, the Architect shall prepare, for approval by the Owner, Design Development Documents consisting of drawings and other documents to fix and describe the size and character of the entire Project as to architectural, structural, mechanical and electrical systems, materials and such other elements as may be appropriate. (Emphasis added.)

1.2.2 . . . shall submit to the Owner a further Statement of Probable Construction Cost.

1.3. CONSTRUCTION DOCUMENTS PHASE

1.3.1 Based on the approved Design Development Documents and any further adjustments in the scope or quality of the Project or in the Project budget authorized by the Owner, the Architect shall prepare, for approval by the Owner, Construction Documents consisting of Drawings and Specifications setting forth in detail the requirements for the construction of the Project. (Emphasis added.)

1.3.2 . . . shall assist the Owner in the preparation of the necessary bidding information, bidding forms, the Conditions of the Contract, and the form of Agreement between the Owner and the Contractors.

1.3.3 The Architect shall advise the Owner of any adjustments to previous Statements of Probable Construction Cost indicated by changes in requirements or general market conditions.

. . . .

1.4. BIDDING OR NEGOTIATION PHASE

1.4.1 The Architect, following the Owner's approval of the Construction Documents and of the latest Statement of Probable Construction cost, shall assist the Owner in obtaining bids or negotiated

proposals, and assist in awarding and preparing contracts for construction. (Emphasis added.)

1.5. CONSTRUCTION PHASE - ADMINISTRATION OF THE CONSTRUCTION CONTRACT.

(R. 32) (Addendum, Doc. 2).

The lower court found the August 2, 1982 letter and its attachment to be the binding agreement of the parties. The Utah Supreme Court follows the rule that a court cannot alter obligations contracted for by the parties. Hal Taylor Associates v. Unionamerica, Inc., et al., 657 P.2d 743 (UT 1982); Provo City Corp. v. Nielson Scott Company, Inc., 603 P.2d 803 (UT 1979); Rio Algom Corporation v. Jimco Ltd., et al., 618 P.2d 497 (UT 1980); Highland Construction Company v. Union Pacific Railroad Company, et al., 683 P.2d 1042 (UT 1984). In the Rio Algom case, the plaintiff sought a declaratory judgment concerning computation and payment of royalties and objected to a settlement agreement of a lease. The trial court upheld the settlement agreement and the plaintiff appealed. The Supreme Court affirmed and in regard to the binding effect of the agreement stated as follows:

. . . A court will not, however, make a better contract for the parties than they have made for themselves. . . .

. . . An express agreement or covenant relating to a specific contract right excludes the possibility of an implied covenant of a different or contradictory nature. . . .

. . . A court will not enforce asserted rights that are not supported by the contract itself. . . .

618 P.2d @505.

The above rule is one of general application.

In 17A C.J.S. Contracts, §296(3), (4) it is stated as follows:

Competent parties are entitled to make their own lawful contracts or contractual arrangements. It is not within the province, function, duty or power of the court to alter, revise, modify, extend, rewrite or remake a contract by construction, or to make a new, or different, contract for the parties, whether in the guise of construction or otherwise; . . .

. . . the court must enforce, or give effect to, the contract as made or written . . .

The August 2, 1982 letter agreement is binding on the parties and the court and specifically requires that for each of the phases of the contract, the architect submit to the owner for approval the documents applicable to the prior phase and an updated statement of probable construction costs. The contract provides that the approval for each phase is a condition precedent to the next phase.

Even if Elton and Laub approved the schematic design phase on July 28, 1982, as the lower court found on disputed evidence, there was nothing in the evidence which showed approval of any subsequent phase. In fact, when asked about such approval, Christopher testified on cross-examination that there was no approval as to the

second and third phases involving design development and construction documents as follows:

. . .

Q. Mr. Christopher, when did you get approval for the design development phase?

A. I don't have any record of formal approval. . . . (R. 364).

. . .

Q. And what kind of approval did you get?
R. 364).

A. I have -- I have no approval. (R. 365).

Q. Now, Mr. Christopher, did you ever get approval of the construction documents?

A. They weren't quite complete.

. . .

Q. So you never got approval of those?

A. No. They weren't quite completed, that's right. (R. 365).

Also, Christopher admitted that Laub objected to plaintiff's designs submitted on July 28, 1982 and that Laub was concerned about the projected costs which then far exceeded the total cost limitation Laub had previously given Christopher in March, 1982.

By Christopher's own testimony, Brixen & Christopher was making changes in the mechanical system, a part of the design development, as late as February, 1983. Thus,

even though the lower court might have found that Brixen & Christopher may have done some work on the design development phase in regard to the site clearing documents and bid, it is clear that the design development documents and work were never identified or completed by Brixen & Christopher or approved by Elton and Laub as is specifically required by the contract. According to the terms of paragraph 1.3.1 of the contract, Brixen & Christopher was not authorized to proceed with the construction documents until the documents listed in paragraphs 1.2.1 and 1.2.2 had been approved. Those documents which would require approval by the owner were never identified. To be recoverable, damages must be shown by substantial evidence and not by conjecture. Highland Construction Company v. Union Pacific Railroad Company, et al., 683 P.2d 1042 (UT 1984); Bunnell v. Bills, 13 Utah 2d 83, 368 P.2d 597 (UT 1962).

The lower court granted Brixen & Christopher judgment for \$8,500 for the schematic design phase which amount is \$1,000 more than the maximum agreed amount stated in the March 4, 1982 letter and \$1,000 more than the amount stated in the August 2, 1982 contract. The lower court also granted judgment for \$16,500 for the design development phase, and \$25,500 for the construction documents phase. Such an award is not permissible under the August 2, 1982 letter agreement because even though the trial judge might

properly determine there had been approval of the schematic design phase on disputed evidence, there never was approval of the design development or construction documents phases as admitted by Christopher. To compensate plaintiff for unapproved work which amounts to no more than volunteer work, is contrary to the terms which the court found to be the binding contract of the parties.

Brixen & Christopher is not entitled to an increased payment above \$7,500 for the schematic design phase because any such increase would violate the terms of the letter agreement and constitute an improper award for speculative damages as stated in the Highland case. Because Brixen & Christopher did not comply with the remaining terms of the August 2, 1982 letter which Brixen & Christopher prepared and claimed was the contract between the parties, plaintiff is not entitled to compensation for voluntary services if the conditions precedent required by the contract were not performed.

II. THE LOWER COURT WRONGLY HELD THAT ELTON AND LAUB WERE ESTOPPED TO DENY THEY AUTHORIZED BRIXEN & CHRISTOPHER TO PROVIDE SERVICES BEYOND THE FIRST PHASE.

Estoppel is an equitable doctrine which allows damages to be awarded on a proven and innocent reliance.

In this case, Brixen & Christopher cannot show reasonable reliance except as to the first phase. Estoppel is not available to a person who acts with knowledge. In Larson v. Wycoff Co., 624 P.2d 1151, 1155 (UT 1981), this court stated the general rule that:

A party claiming an estoppel cannot rely on representations or acts if they are contrary to his own knowledge of the truth or if he had the means by which with reasonable diligence he could ascertain the true situation.

Also see, Xanthos v. Board of Adjustment of Salt Lake City, 685 P.2d 1032 (UT 1984). Section 67 of 31 C.J.S. Estoppel, states the general rule that there must be a concealment of material facts unknown to the person who claims estoppel.

None of the elements supporting a determination of estoppel are present in this case. Brixen & Christopher's own letters of August 2, 1982, September 30, 1982 and November 26, 1982 all unequivocally show that Brixen & Christopher continually asked for approval in writing and that Brixen & Christopher knew such approval had not been given. Moreover, Brixen & Christopher had stated the specific terms of the contract in the August 2, 1982 letter and any claimed reliance by Brixen & Christopher or alleged oral approvals by Elton thereafter are directly contrary to those terms. There were no specific documents submitted in evidence which indicated compliance with the terms of the contract

or identified the phases or portions of the project for which approval had supposedly been given. In addition, Christopher testified that he received no approval for the second or third phases. Under such circumstances the lower court's ruling on estoppel is an unwarranted conclusion completely repudiated by the facts where Brixen & Christopher's own letters and testimony show their knowledge of the truth.

CONCLUSION

Where the lower court determined the August 2, 1982 letter to be the contract of the parties, the court was bound by the terms of the contract and because Brixen & Christopher always acted with knowledge there was no reasonable reliance at least after July 28, 1982 when the alleged oral approval of the first phase was given. There could be no reasonable reliance after August 2, 1982 as is clearly shown by Brixen & Christopher's own documents. The judgment of the lower court should be reversed at least as to all damages awarded for work done beyond the first phase. In regard to the first phase it was never determined whether the refinements that Brixen & Christopher worked on after July 28, 1982 were ever completed or approved and what portion of the original \$7,500 fee applied to those refinements.

Respectfully submitted this 4th day of August, 1987.


WALTER P. FABER, JR.
Attorney for Appellants

CERTIFICATE OF MAILING

I hereby certify that I mailed four copies of Appellants' Brief to Messrs. Hardin A. Whitney and H. Dennis Piercey, 600 Deseret Plaza, No. 15 East First South, Salt Lake City, UT 84111, postage prepaid, this 4th day of August, 1987.

Walter P. Faber

A D D E N D U M

ADDENDUM

Document No.

- 1 March 4, 1982 letter Agreement from Brixen & Christopher to Elton and Laub.
- 2 August 2, 1982 letter Agreement from Brixen & Christopher to Elton and Laub.
- 3 September 30, 1982 letter from Brixen & Christopher to Elton and Laub
- 4 November 26, 1982 letter from Brixen & Christopher to Elton and Laub.
- 5 February 23, 1983 letter of Elton.
- 6 February 18, 1983 letter of Christopher.

①

225 SOUTH
SECOND EAST
SALT LAKE CITY
UTAH 84111

March 4, 1982

RECEIVED

MAR 12 1982

DIXON & CHRISTOPHER
ARCHITECTS

Messrs. Roger H. Elton and
John H. Laub
Attorneys at Law
3900 North Wolf Creek Drive
Eden, Utah 84310

Gentlemen:

We enjoyed meeting with you yesterday to discuss your planned recreational building at Wolf Creek Country Club Resort, Eden, Utah.

We are very pleased that we will be working with you on the project, and have included as Attachment "A" to the letter, the Scope of Services that we will perform as outlined in the February 24, 1982 letter to you from Maas Grassli and Associates. We understand that this initial agreement will be to perform Programming and Schematic Design services only, until authorized by you to continue with the project.

Our fee for complete basic architectural services would be based upon 6% of the construction cost of the work designed or specified by our firm, or our fee could be by another negotiated procedure (hourly, fixed fee, etc.) if you so preferred.

We feel that this is a very important project for the Wold Creek Resort and we are certain that we will be able to develop an outstanding solution.

Messrs. Roger H. Elton and
John H. Laub

Page 2

Your signatures of approval below will serve as our notice to proceed with Programming and Schematic Design. Please return one of these three signed letters of agreement to us for our records, the other two being for each of you.

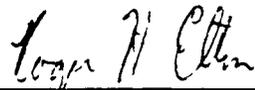
Sincerely,



James W. Christopher, FAIA

JWC/je
Encl.

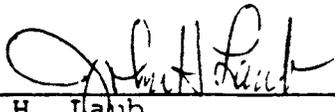
Approved:



Roger H. Elton

3/10/82

Date



John H. Laub

3/10/82

Date

RECEIVED

MAR 13 1982

DAVID L. & CHRISTOPHER
ARCHITECTS

SCOPE OF SERVICES

I. Programming and Schematic Design Phase:

Program requirements are reviewed/developed with the client to insure an accurate statement of needs and budget. Site design and architectural studies are prepared to indicate possible solutions to the problem and then, with the approval of the Owner, a design is established for development. Schematic drawings are prepared showing the design, including site plan, floor plans, sections, elevations, and perspective.

Our fee requirements for Phase I, Programming and Schematic Design, would be on an hourly basis as follows:

| | |
|------------------|-------------------|
| B & C Principals | \$ 50.00 Per Hour |
| MGA Principals | \$ 40.00 Per Hour |
| Associates | \$ 35.00 Per Hour |
| Professionals | \$ 30.00 Per Hour |
| Staff | \$ 15.00 Per Hour |

A limit or maximum fee for this phase of work would be \$7,500.00.

II. Design Development Phase:

4-6 week project

Based upon the approved Schematic Design, detailed drawings are developed, indicating materials, architectural, structural, mechanical and electrical systems. At this time, a more precise statement of probable construction cost is developed.

III. Construction Documents Phase:

Contract documents consisting of drawings and specifications are prepared during this phase, setting forth, in detail, the requirements for the construction of the project.

IV. Bidding or Negotiation Phase:

Bids or negotiated proposals are received and the construction contract is prepared and awarded to the successful contractor.

V. Construction Administration Phase:

The project is visited during the construction phase to track the progress and quality of the work. Payment requests are reviewed and approved, change orders initiated, shop drawings reviewed, and other administrative matters attended to as required.

ATTACHMENT "A"

August 2, 1982

Messrs. Roger H. Elton and
John H. Laub
Attorneys at Law
3900 North Wolf Creek Drive
Eden, Utah 84310

Gentlemen:

We are pleased that you have elected to proceed with the architectural work on the Wolf Creek Recreation Center in anticipation of an early construction start.

This letter, which is in accordance with our former agreement of March 4, 1982 will serve as a Letter of Agreement between you and our firm for architectural services for the project.

Our fixed fee for basic architectural services will be \$71,500 based upon our construction estimate of \$897,750 (19,950 square feet at \$45.00) plus site development costs of \$295,000 as estimated by Maas & Grassli.

Payments for architectural services will be phased according to Attachment "A" of our March 4th agreement in the following breakdown:

| | | |
|-----------|-------------------------------|-----------|
| Phase I | - Schematic Design | \$ 7,500. |
| Phase II | - Design Development | \$16,500. |
| Phase III | - Construction Documents | \$30,000. |
| Phase IV | - Construction Administration | \$14,000. |

We will issue statements to you monthly as our work progresses.

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In an effort to initiate construction as soon as possible, we plan to issue our contract documents in bidding packages as follows:

1. Site preparation and excavation
2. Reinforced concrete
3. General architectural, mechanical, electrical, and site development

It is our intent to bid the first two packages in time for this work to be accomplished in the fall of 1982. We will plan to issue the third bid package before the end of December.

Attached to this letter, and as a part of this Agreement, are the normal "Terms and Conditions of Agreement Between Owner and Architect" from AIA Document B141. These articles describe the services and responsibilities of the Owner and Architect during the course of the project.

A signed copy of this letter will verify your approval of this Agreement and serve as our notice to proceed with the Design Development Phase.

Sincerely,

James W. Christopher, FAIA

JWC/je

Approval:

Roger H. Elton

John H. Laub

TERMS AND CONDITIONS OF AGREEMENT BETWEEN OWNER AND ARCHITECT

ARTICLE 1

ARCHITECT'S SERVICES AND RESPONSIBILITIES

BASIC SERVICES

The Architect's Basic Services consist of the five phases described in Paragraphs 1.1 through 1.5 and include normal structural, mechanical and electrical engineering services and any other services included in Article 15 as part of Basic Services.

1.1 SCHEMATIC DESIGN PHASE

1.1.1 The Architect shall review the program furnished by the Owner to ascertain the requirements of the Project and shall review the understanding of such requirements with the Owner.

1.1.2 The Architect shall provide a preliminary evaluation of the program and the Project budget requirements, each in terms of the other, subject to the limitations set forth in Subparagraph 3.2.1.

1.1.3 The Architect shall review with the Owner alternative approaches to design and construction of the Project.

1.1.4 Based on the mutually agreed upon program and Project budget requirements, the Architect shall prepare, for approval by the Owner, Schematic Design Documents consisting of drawings and other documents illustrating the scale and relationship of Project components.

1.1.5 The Architect shall submit to the Owner a Statement of Probable Construction Cost based on current area, volume or other unit costs.

1.2 DESIGN DEVELOPMENT PHASE

1.2.1 Based on the approved Schematic Design Documents and any adjustments authorized by the Owner in the program or Project budget, the Architect shall prepare, for approval by the Owner, Design Development Documents consisting of drawings and other documents to fix and describe the size and character of the entire Project as to architectural, structural, mechanical and electrical systems, materials and such other elements as may be appropriate.

1.2.2 The Architect shall submit to the Owner a further Statement of Probable Construction Cost.

1.3 CONSTRUCTION DOCUMENTS PHASE

1.3.1 Based on the approved Design Development Documents and any further adjustments in the scope or quality of the Project or in the Project budget authorized by the Owner, the Architect shall prepare, for approval by the Owner, Construction Documents consisting of Drawings and Specifications setting forth in detail the requirements for the construction of the Project.

1.3.2 The Architect shall assist the Owner in the preparation of the necessary bidding information, bidding forms, the Conditions of the Contract, and the form of Agreement between the Owner and the Contractor.

1.3.3 The Architect shall advise the Owner of any adjust-

ments to previous Statements of Probable Construction Cost indicated by changes in requirements or general market conditions.

1.3.4 The Architect shall assist the Owner in connection with the Owner's responsibility for filing documents required for the approval of governmental authorities having jurisdiction over the Project.

1.4 BIDDING OR NEGOTIATION PHASE

1.4.1 The Architect, following the Owner's approval of the Construction Documents and of the latest Statement of Probable Construction Cost, shall assist the Owner in obtaining bids or negotiated proposals, and assist in awarding and preparing contracts for construction.

1.5 CONSTRUCTION PHASE—ADMINISTRATION OF THE CONSTRUCTION CONTRACT

1.5.1 The Construction Phase will commence with the award of the Contract for Construction and, together with the Architect's obligation to provide Basic Services under this Agreement, will terminate when final payment to the Contractor is due, or in the absence of a final Certificate for Payment or of such due date, sixty days after the Date of Substantial Completion of the Work, whichever occurs first.

1.5.2 Unless otherwise provided in this Agreement and incorporated in the Contract Documents, the Architect shall provide administration of the Contract for Construction as set forth below and in the edition of AIA Document A201, General Conditions of the Contract for Construction, current as of the date of this Agreement.

1.5.3 The Architect shall be a representative of the Owner during the Construction Phase, and shall advise and consult with the Owner. Instructions to the Contractor shall be forwarded through the Architect. The Architect shall have authority to act on behalf of the Owner only to the extent provided in the Contract Documents unless otherwise modified by written instrument in accordance with Subparagraph 1.5.16.

1.5.4 The Architect shall visit the site at intervals appropriate to the stage of construction or as otherwise agreed by the Architect in writing to become generally familiar with the progress and quality of the Work and to determine in general if the Work is proceeding in accordance with the Contract Documents. However, the Architect shall not be required to make exhaustive or continuous on-site inspections to check the quality or quantity of the Work. On the basis of such on-site observations as an architect, the Architect shall keep the Owner informed of the progress and quality of the Work, and shall endeavor to guard the Owner against defects and deficiencies in the Work of the Contractor.

1.5.5 The Architect shall not have control or charge of and shall not be responsible for construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work for the acts or omissions of the Contractor, Sub-

Contractors or any other persons performing any of the Work or for the failure of any of them to carry out the Work in accordance with the Contract Documents.

1.5.6 The Architect shall at all times have access to the Work wherever it is in preparation or progress.

1.5.7 The Architect shall determine the amounts owing to the Contractor based on observations at the site and on evaluations of the Contractor's Applications for Payment, and shall issue Certificates for Payment in such amounts provided in the Contract Documents.

1.5.8 The issuance of a Certificate for Payment shall constitute a representation by the Architect to the Owner, based on the Architect's observations at the site as provided in Subparagraph 1.5.4 and on the data comprising a Contractor's Application for Payment, that the Work is progressed to the point indicated; that, to the best of the Architect's knowledge, information and belief, the quality of the Work is in accordance with the Contract Documents (subject to an evaluation of the Work for conformance with the Contract Documents upon Substantial Completion, to the results of any subsequent tests required by or performed under the Contract Documents, minor deviations from the Contract Documents correctable prior to completion, and to any specific qualifications stated in the Certificate for Payment); and that the Contractor is entitled to payment in the amount certified. However, the issuance of a Certificate for Payment shall be a representation that the Architect has made an examination to ascertain how and for what purpose the Contractor has used the moneys paid on account of the Contract Sum.

1.5.9 The Architect shall be the interpreter of the requirements of the Contract Documents and the judge of performance thereunder by both the Owner and Contractor. The Architect shall render interpretations necessary for the proper execution or progress of the Work with reasonable promptness on written request of either Owner or the Contractor, and shall render written decisions, within a reasonable time, on all claims, disputes or other matters in question between the Owner and the Contractor relating to the execution or progress of the Work or the interpretation of the Contract Documents.

1.5.10 Interpretations and decisions of the Architect shall be consistent with the intent of and reasonably inferable from the Contract Documents and shall be in written or electronic form. In the capacity of interpreter and judge, the Architect shall endeavor to secure faithful performance by both the Owner and the Contractor, shall not be partial to either, and shall not be liable for the effect of any interpretation or decision rendered in good faith in such capacity.

The Architect's decisions in matters relating to performance shall be final if consistent with the intent of the Contract Documents. The Architect's decisions on other claims, disputes or other matters, including any question between the Owner and the Contractor, shall be subject to arbitration as provided in this Agreement in the Contract Documents.

The Architect shall have authority to reject Work that does not conform to the Contract Documents. However, in the Architect's reasonable opinion, it is

necessary or advisable for the implementation of the intent of the Contract Documents, the Architect will have authority to require special inspection or testing of the Work in accordance with the provisions of the Contract Documents, whether or not such Work be then fabricated, installed or completed.

1.5.13 The Architect shall review and approve or take other appropriate action upon the Contractor's submittals such as Shop Drawings, Product Data and Samples, but only for conformance with the design concept of the Work and with the information given in the Contract Documents. Such action shall be taken with reasonable promptness so as to cause no delay. The Architect's approval of a specific item shall not indicate approval of an assembly of which the item is a component.

1.5.14 The Architect shall prepare Change Orders for the Owner's approval and execution in accordance with the Contract Documents, and shall have authority to order minor changes in the Work not involving an adjustment in the Contract Sum or an extension of the Contract Time which are not inconsistent with the intent of the Contract Documents.

1.5.15 The Architect shall conduct inspections to determine the Dates of Substantial Completion and final completion, shall receive and forward to the Owner for the Owner's review written warranties and related documents required by the Contract Documents and assembled by the Contractor, and shall issue a final Certificate for Payment.

1.5.16 The extent of the duties, responsibilities and limitations of authority of the Architect as the Owner's representative during construction shall not be modified or extended without written consent of the Owner, the Contractor and the Architect.

1.6 PROJECT REPRESENTATION BEYOND BASIC SERVICES

1.6.1 If the Owner and Architect agree that more extensive representation at the site than is described in Paragraph 1.5 shall be provided, the Architect shall provide one or more Project Representatives to assist the Architect in carrying out such responsibilities at the site.

1.6.2 Such Project Representatives shall be selected, employed and directed by the Architect, and the Architect shall be compensated therefor as mutually agreed between the Owner and the Architect as set forth in an exhibit appended to this Agreement, which shall describe the duties, responsibilities and limitations of authority of such Project Representatives.

1.6.3 Through the observations by such Project Representatives, the Architect shall endeavor to provide further protection for the Owner against defects and deficiencies in the Work, but the furnishing of such project representation shall not modify the rights, responsibilities or obligations of the Architect as described in Paragraph 1.5.

1.7 ADDITIONAL SERVICES

The following Services are not included in Basic Services unless so identified in Article 15. They shall be provided if authorized or confirmed in writing by the Owner, and they shall be paid for by the Owner as provided in this Agreement, in addition to the compensation for Basic Services.

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~~1.7.1 Providing analyses of the Owner's needs and programming the requirements of the Project~~

1.7.2 Providing financial feasibility or other special studies

1.7.3 Providing planning surveys, site evaluations, environmental studies or comparative studies of prospective sites, and preparing special surveys, studies and submissions required for approvals of governmental authorities or others having jurisdiction over the Project

1.7.4 Providing services relative to future facilities, systems and equipment which are not intended to be constructed during the Construction Phase

1.7.5 Providing services to investigate existing conditions or facilities or to make measured drawings thereof, or to verify the accuracy of drawings or other information furnished by the Owner.

1.7.6 Preparing documents of alternate, separate or sequential bids or providing extra services in connection with bidding, negotiation or construction prior to the completion of the Construction Documents Phase, when requested by the Owner.

1.7.7 Providing coordination of Work performed by separate contractors or by the Owner's own forces

1.7.8 Providing services in connection with the work of a construction manager or separate consultants retained by the Owner

1.7.9 Providing Detailed Estimates of Construction Cost, analyses of owning and operating costs, or detailed quantity surveys or inventories of material, equipment and labor.

1.7.10 Providing interior design and other similar services required for or in connection with the selection, procurement or installation of furniture, furnishings and related equipment.

1.7.11 Providing services for planning tenant or rental spaces.

1.7.12 Making revisions in Drawings, Specifications or other documents when such revisions are inconsistent with written approvals or instructions previously given, are required by the enactment or revision of codes, laws or regulations subsequent to the preparation of such documents or are due to other causes not solely within the control of the Architect.

1.7.13 Preparing Drawings, Specifications and supporting data and providing other services in connection with Change Orders to the extent that the adjustment in the Basic Compensation resulting from the adjusted Construction Cost is not commensurate with the services required of the Architect, provided such Change Orders are required by causes not solely within the control of the Architect.

1.7.14 Making investigations, surveys, valuations, inventories or detailed appraisals of existing facilities, and services required in connection with construction performed by the Owner.

1.7.15 Providing consultation concerning replacement of any Work damaged by fire or other cause during construction and furnishing services as may be required in connection with the replacement of such Work

struction and furnishing services as may be required in connection with the replacement of such Work

1.7.16 Providing services made necessary by the default of the Contractor, or by major defects or deficiencies in the Work of the Contractor, or by failure of performance of either the Owner or Contractor under the Contract for Construction

1.7.17 Preparing a set of reproducible record drawings showing significant changes in the Work made during construction based on marked-up prints, drawings and other data furnished by the Contractor to the Architect

1.7.18 Providing extensive assistance in the utilization of any equipment or system such as initial start-up or testing, adjusting and balancing, preparation of operation and maintenance manuals, training personnel for operation and maintenance, and consultation during operation.

1.7.19 Providing services after issuance to the Owner of the final Certificate for Payment, or in the absence of a final Certificate for Payment, more than sixty days after the Date of Substantial Completion of the Work.

1.7.20 Preparing to serve or serving as an expert witness in connection with any public hearing, arbitration proceeding or legal proceeding

1.7.21 Providing services of consultants for other than the normal architectural, structural, mechanical and electrical engineering services for the Project

1.7.22 Providing any other services not otherwise included in this Agreement or not customarily furnished in accordance with generally accepted architectural practice

1.8 TIME

1.8.1 The Architect shall perform Basic and Additional Services as expeditiously as is consistent with professional skill and care and the orderly progress of the Work. Upon request of the Owner, the Architect shall submit for the Owner's approval, a schedule for the performance of the Architect's services which shall be adjusted as required as the Project proceeds, and shall include allowances for periods of time required for the Owner's review and approval of submissions and for approvals of authorities having jurisdiction over the Project. This schedule, when approved by the Owner, shall not, except for reasonable cause, be exceeded by the Architect.

ARTICLE 2

THE OWNER'S RESPONSIBILITIES

2.1 The Owner shall provide full information regarding requirements for the Project including a program, which shall set forth the Owner's design objectives, constraints and criteria, including space requirements and relationships, flexibility and expandability, special equipment and systems and site requirements.

2.2 If the Owner provides a budget for the Project it shall include contingencies for bidding, changes in the Work during construction, and other costs which are the responsibility of the Owner, including those described in this Article 2 and in Subparagraph 3.1.2. The Owner shall, at the request of the Architect, provide a statement of funds available for the Project, and their source.

2.3 The Owner shall designate, when necessary, a representative authorized to act in the Owner's behalf with respect to the Project. The Owner or such authorized representative shall examine the documents submitted by the Architect and shall render decisions pertaining thereto promptly, to avoid unreasonable delay in the progress of the Architect's services.

2.4 The Owner shall furnish a legal description and a certified land survey of the site, giving, as applicable, grades and lines of streets, alleys, pavements and adjoining property; rights-of-way, restrictions, easements, encroachments, zoning, deed restrictions, boundaries and contours of the site; locations, dimensions and complete data pertaining to existing buildings, other improvements and trees; and full information concerning available service and utility lines both public and private, above and below grade, including inverts and depths.

2.5 The Owner shall furnish the services of soil engineers or other consultants when such services are deemed necessary by the Architect. Such services shall include test borings, test pits, soil bearing values, percolation tests, air and water pollution tests, ground corrosion and resistivity tests, including necessary operations for determining subsoil, air and water conditions, with reports and appropriate professional recommendations.

2.6 The Owner shall furnish structural, mechanical, chemical and other laboratory tests, inspections and reports as required by law or the Contract Documents.

2.7 The Owner shall furnish all legal, accounting and insurance counseling services as may be necessary at any time for the Project, including such auditing services as the Owner may require to verify the Contractor's Applications for Payment or to ascertain how or for what purposes the Contractor uses the moneys paid by or on behalf of the Owner.

2.8 The services, information, surveys and reports required by Paragraphs 2.4 through 2.7 inclusive shall be furnished at the Owner's expense, and the Architect shall be entitled to rely upon the accuracy and completeness thereof.

2.9 If the Owner observes or otherwise becomes aware of any fault or defect in the Project or nonconformance with the Contract Documents, prompt written notice thereof shall be given by the Owner to the Architect.

2.10 The Owner shall furnish required information and services and shall render approvals and decisions as expeditiously as necessary for the orderly progress of the Architect's services and of the Work.

ARTICLE 3

CONSTRUCTION COST

3.1 DEFINITION

3.1.1 The Construction Cost shall be the total cost or estimated cost to the Owner of all elements of the Project designed or specified by the Architect.

3.1.2 The Construction Cost shall include at current market rates, including a reasonable allowance for overhead and profit, the cost of labor and materials furnished by the Owner and any equipment which has been de-

signed, specified, selected or specially provided for by the Architect

3.1.3 Construction Cost does not include the compensation of the Architect and the Architect's consultants, the cost of the land, rights-of-way, or other costs which are the responsibility of the Owner as provided in Article 2.

3.2 RESPONSIBILITY FOR CONSTRUCTION COST

3.2.1 Evaluations of the Owner's Project budget, Statements of Probable Construction Cost and Detailed Estimates of Construction Cost, if any, prepared by the Architect, represent the Architect's best judgment as a design professional familiar with the construction industry. It is recognized, however, that neither the Architect nor the Owner has control over the cost of labor, materials or equipment, over the Contractor's methods of determining bid prices, or over competitive bidding, market or negotiating conditions. Accordingly, the Architect cannot and does not warrant or represent that bids or negotiated prices will not vary from the Project budget proposed, established or approved by the Owner, if any, or from any Statement of Probable Construction Cost or other cost estimate or evaluation prepared by the Architect.

3.2.2 No fixed limit of Construction Cost shall be established as a condition of this Agreement by the furnishing, proposal or establishment of a Project budget under Subparagraph 1.1.2 or Paragraph 2.2 or otherwise, unless such fixed limit has been agreed upon in writing and signed by the parties hereto. If such a fixed limit has been established, the Architect shall be permitted to include contingencies for design, bidding and price escalation, to determine what materials, equipment, component systems and types of construction are to be included in the Contract Documents, to make reasonable adjustments in the scope of the Project and to include in the Contract Documents alternate bids to adjust the Construction Cost to the fixed limit. Any such fixed limit shall be increased in the amount of any increase in the Contract Sum occurring after execution of the Contract for Construction.

3.2.3 If the Bidding or Negotiation Phase has not commenced within three months after the Architect submits the Construction Documents to the Owner, any Project budget or fixed limit of Construction Cost shall be adjusted to reflect any change in the general level of prices in the construction industry between the date of submission of the Construction Documents to the Owner and the date on which proposals are sought.

3.2.4 If a Project budget or fixed limit of Construction Cost (adjusted as provided in Subparagraph 3.2.3) is exceeded by the lowest bona fide bid or negotiated proposal, the Owner shall (1) give written approval of an increase in such fixed limit, (2) authorize rebidding or re-negotiating of the Project within a reasonable time, (3) if the Project is abandoned, terminate in accordance with Paragraph 10.2, or (4) cooperate in revising the Project scope and quality as required to reduce the Construction Cost. In the case of (4), provided a fixed limit of Construction Cost has been established as a condition of this Agreement, the Architect, without additional charge, shall modify the Drawings and Specifications as necessary to comply

with the fixed limit. The providing of such service shall be the limit of the Architect's responsibility arising from the establishment of such fixed limit, and having done so, the Architect shall be entitled to compensation for all services performed, in accordance with this Agreement, whether or not the Construction Phase is commenced

ARTICLE 4

DIRECT PERSONNEL EXPENSE

4.1 Direct Personnel Expense is defined as the direct salaries of all the Architect's personnel engaged on the Project, and the portion of the cost of their mandatory and customary contributions and benefits related thereto, such as employment taxes and other statutory employee benefits, insurance, sick leave, holidays, vacations, pensions and similar contributions and benefits.

ARTICLE 5

REIMBURSABLE EXPENSES

5.1 Reimbursable Expenses are in addition to the Compensation for Basic and Additional Services and include actual expenditures made by the Architect and the Architect's employees and consultants in the interest of the Project for the expenses listed in the following Sub-paragraphs:

5.1.1 Expense of transportation in connection with the Project, living expenses in connection with out-of-town travel; long distance communications, and fees paid for securing approval of authorities having jurisdiction over the Project.

5.1.2 Expense of reproductions, postage and handling of Drawings, Specifications and other documents, excluding reproductions for the office use of the Architect and the Architect's consultants

5.1.3 Expense of data processing and photographic production techniques when used in connection with Additional Services

5.1.4 If authorized in advance by the Owner, expense of overtime work requiring higher than regular rates.

5.1.5 Expense of renderings, models and mock-ups requested by the Owner.

5.1.6 Expense of any additional insurance coverage or limits, including professional liability insurance, requested by the Owner in excess of that normally carried by the Architect and the Architect's consultants.

ARTICLE 6

PAYMENTS TO THE ARCHITECT

6.1 PAYMENTS ON ACCOUNT OF BASIC SERVICES

~~6.1.1 An initial payment as set forth in Paragraph 14.1 is the minimum payment under this Agreement~~

~~6.1.2 Subsequent payments for Basic Services shall be made monthly and shall be in proportion to services performed within each Phase of services, on the basis set forth in Article 14~~

~~6.1.3 If and to the extent that the Contract Time initially established in the Contract for Construction is exceeded~~

~~or extended through no fault of the Architect, compensation for any Basic Services required for such extended period of Administration of the Construction Contract shall be computed as set forth in Paragraph 14.4 for Additional Services~~

6.1.4 When compensation is based on a percentage of Construction Cost, and any portions of the Project are deleted or otherwise not constructed, compensation for such portions of the Project shall be payable to the extent services are performed on such portions, in accordance with the schedule set forth in Subparagraph 14.2.2, based on (1) the lowest bona fide bid or negotiated proposal or, (2) if no such bid or proposal is received, the most recent Statement of Probable Construction Cost or Detailed Estimate of Construction Cost for such portions of the Project.

6.2 PAYMENTS ON ACCOUNT OF ADDITIONAL SERVICES

6.2.1 Payments on account of the Architect's Additional Services as defined in Paragraph 1.7 and for Reimbursable Expenses as defined in Article 5 shall be made monthly upon presentation of the Architect's statement of services rendered or expenses incurred.

6.3 PAYMENTS WITHHELD

6.3.1 No deductions shall be made from the Architect's compensation on account of penalty, liquidated damages or other sums withheld from payments to contractors, or on account of the cost of changes in the Work other than those for which the Architect is held legally liable.

6.4 PROJECT SUSPENSION OR TERMINATION

6.4.1 If the Project is suspended or abandoned in whole or in part for more than three months, the Architect shall be compensated for all services performed prior to receipt of written notice from the Owner of such suspension or abandonment, together with Reimbursable Expenses then due and all Termination Expenses as defined in Paragraph 10.4. If the Project is resumed after being suspended for more than three months, the Architect's compensation shall be equitably adjusted.

ARTICLE 7

ARCHITECT'S ACCOUNTING RECORDS

7.1 Records of Reimbursable Expenses and expenses pertaining to Additional Services and services performed on the basis of a Multiple of Direct Personnel Expense shall be kept on the basis of generally accepted accounting principles and shall be available to the Owner or the Owner's authorized representative at mutually convenient times.

ARTICLE 8

OWNERSHIP AND USE OF DOCUMENTS

8.1 Drawings and Specifications as instruments of service are and shall remain the property of the Architect whether the Project for which they are made is executed or not. The Owner shall be permitted to retain copies, including reproducible copies, of Drawings and Specifications for information and reference in connection with the Owner's use and occupancy of the Project. The Drawings and Specifications shall not be used by the Owner on

ner projects, for additions to this Project, or for completion of this Project by others provided the Architect is not in default under this Agreement, except by agreement in writing and with appropriate compensation to the Architect.

2 Submission or distribution to meet official regulatory requirements or for other purposes in connection with the Project is not to be construed as publication in derogation of the Architect's rights.

ARTICLE 9

ARBITRATION

1 All claims, disputes and other matters in question between the parties to this Agreement, arising out of or relating to this Agreement or the breach thereof, shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then obtaining unless the parties mutually agree otherwise. No arbitration, arising out of or relating to this Agreement, shall include, by consolidation, binder or in any other manner, any additional person not a party to this Agreement except by written consent containing a specific reference to this Agreement and signed by the Architect, the Owner, and any other person sought to be joined. Any consent to arbitration involving an additional person or persons shall not constitute consent to arbitration of any dispute not described therein or with any person not named or described therein. This Agreement to arbitrate and any agreement to arbitrate with an additional person or persons duly consented to by the parties to this Agreement shall be specifically enforceable under the prevailing arbitration law.

9.2 Notice of the demand for arbitration shall be filed in writing with the other party to this Agreement and with the American Arbitration Association. The demand shall be made within a reasonable time after the claim, dispute or other matter in question has arisen. In no event shall the demand for arbitration be made after the date when institution of legal or equitable proceedings based on such claim, dispute or other matter in question would be barred by the applicable statute of limitations.

9.3 The award rendered by the arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.

ARTICLE 10

TERMINATION OF AGREEMENT

10.1 This Agreement may be terminated by either party upon seven days' written notice should the other party fail substantially to perform in accordance with its terms through no fault of the party initiating the termination.

10.2 This Agreement may be terminated by the Owner upon at least seven days' written notice to the Architect in the event that the Project is permanently abandoned.

10.3 In the event of termination not the fault of the Architect, the Architect shall be compensated for all services performed to termination date, together with Reimbursable Expenses then due and all Termination Expenses as defined in Paragraph 10.4.

10.4 Termination Expenses include expenses directly attributable to termination for which the Architect is not otherwise compensated, plus an amount computed as a percentage of the total Basic and Additional Compensation earned to the time of termination, as follows:

- .1 20 percent if termination occurs during the Schematic Design Phase; or
- .2 10 percent if termination occurs during the Design Development Phase; or
- .3 5 percent if termination occurs during any subsequent phase.

ARTICLE 11

MISCELLANEOUS PROVISIONS

11.1 Unless otherwise specified, this Agreement shall be governed by the law of the principal place of business of the Architect.

11.2 Terms in this Agreement shall have the same meaning as those in AIA Document A201, General Conditions of the Contract for Construction, current as of the date of this Agreement.

11.3 As between the parties to this Agreement: as to all acts or failures to act by either party to this Agreement, any applicable statute of limitations shall commence to run and any alleged cause of action shall be deemed to have accrued in any and all events not later than the relevant Date of Substantial Completion of the Work, and as to any acts or failures to act occurring after the relevant Date of Substantial Completion, not later than the date of issuance of the final Certificate for Payment.

11.4 The Owner and the Architect waive all rights against each other and against the contractors, consultants, agents and employees of the other for damages covered by any property insurance during construction as set forth in the edition of AIA Document A201, General Conditions, current as of the date of this Agreement. The Owner and the Architect each shall require appropriate similar waivers from their contractors, consultants and agents.

ARTICLE 12

SUCCESSORS AND ASSIGNS

12.1 The Owner and the Architect, respectively, bind themselves, their partners, successors, assigns and legal representatives to the other party to this Agreement and to the partners, successors, assigns and legal representatives of such other party with respect to all covenants of this Agreement. Neither the Owner nor the Architect shall assign, sublet or transfer any interest in this Agreement without the written consent of the other.

ARTICLE 13

EXTENT OF AGREEMENT

13.1 This Agreement represents the entire and integrated agreement between the Owner and the Architect and supersedes all prior negotiations, representations or agreements, either written or oral. This Agreement may be amended only by written instrument signed by both Owner and Architect.

September 30, 1982

Messrs. Roger H. Elton and
John H. Laub
Attorneys at Law
3900 North Wolf Creek Drive
Eden, Utah 84310

Gentlemen:

I'm sorry that we were not able to meet today to go over our progress on the Wolf Creek Recreation Center.

I had a good meeting with Scott Allen last Friday at Wolf Creek to review our contract documents in progress. We identified some areas where refinements to the design could produce a better solution and have subsequently incorporated these into our drawings.

We have completed our work on the Phase One Bid Package and will deliver the package to Wolf Creek on Monday the 4th for issuance to bidders. The package includes all of the earthwork, a security fence and a construction sign.

Developing an estimate for the work on this bid package has been extremely difficult. We have received estimating information from two earthwork contractors that varies considerably. Our pricing information develops earthwork costs anywhere from \$33,000 to \$81,000. The huge discrepancy in these figures is due, largely, to unknowns in the quality of the fill material available. If we can use material at the sewer lagoon site, the cost may approach the low figure, provided that eliminating the large boulders is not cost prohibitive. If imported fill is purchased from a remote source, the cost may approach the high figure. We remain hopeful that the material at the lagoon will be satisfactory.

Fred, Scott and Clair were here this afternoon so we had a chance to review this bid package with them.

Messrs. Roger H. Elton and
John H. Laub

Page 2

Work on the other contract documents is progressing well,
with all of our consulting engineers in full gear in order
to meet our next deadline.

I would like very much to receive an executed copy of the
Owner/Architect Agreement so that I can execute agreements
with our consulting engineers.

Thanks very much.

Sincerely,

James W. Christopher, FAIA

JWC/je
Encl.
cc: Clair Cox

November 26, 1982

Mr. Roger H. Elton
Attorney at Law
P. O. Box 2878
Reno, Nevada 89505

Dear Roger:

Pursuant to our telephone conversation of last Wednesday, I have prepared an amendment to our Letter of Agreement dated August 2, 1982 for architectural services for the Wolf Creek Recreation Center.

Since the date of the original Agreement, the scope of the project has been more closely defined (and expanded). Extra consulting fees will be required for structural design of the foundation system and retaining walls due to specialized sub-surface conditions as well as in mechanical design for a more complex mechanical system based upon our life cycle cost analysis. These additional consulting fees total an extra \$8,000.

Since the Agreement dated August 2, 1982 has not yet been signed by you, I am including two copies of it with the amendment for your signature. I've also included a statement for services to date through completion of Design Development, based upon the amended Agreement.

As you know, we are very anxious to have this Agreement signed and returned since we are well into the project and still have not been able to execute agreements with our consulting engineers.

Thanks very much for your prompt attention to this request.

Sincerely,

James W. Christopner, FAIA

JWC/je
Encl.

AMENDMENT NO. 1 TO ARCHITECT/OWNER AGREEMENT

Project: Wolf Creek Recreation Center
Architect: Brixen & Christopher Architects
Date: November 26, 1982

It is requested that our Agreement for the referenced project be changed to reflect additional services performed due to the expanded scope of structural and mechanical engineering services requested.

| | |
|---------------------------|-----------------|
| August 2, 1982 Agreement: | \$71,500 |
| Additional Fee Requested: | 8,000 |
| Total Fee: | <u>\$79,500</u> |

Payments made under this Agreement shall be in accordance with the following schedule:

| | |
|------------------------------------|-----------------|
| Phase I - Schematic Design | \$ 8,500 |
| Phase II - Design Development | 19,000 |
| Phase III - Construction Documents | 36,000 |
| Phase IV - Contract Administration | 16,000 |
| Total: | <u>\$79,500</u> |

If you agree with these changes, please sign and return one copy of this document for our files. This document will become our Amendment to the Agreement, when returned, and all provisions of the original Agreement will apply.

BRIXEN & CHRISTOPHER ARCHITECTS


James W. Christopher, FAIA 11/26/82 date

APPROVED:

Roger H. Elton date

John H. Laub date

ROGER H. ELTON, LTD.
ATTORNEYS AT LAW

PLEASE REPLY TO

Reno

LAS VEGAS OFFICE
NINTH FLOOR
VALLEY BANK CENTER
101 CONVENTION CENTER DRIVE
LAS VEGAS NV 89109

1702 733 5986

RENO OFFICE
777 WEST SECOND ST. SUITE 200
RENO NV 89503
MAILING ADDRESS
P O BOX 2878
RENO NV 89505
1702 786 3880

February 23, 1983

James W. Christopher, FAIA
Brixen & Christopher Architects
252 South Second East
Salt Lake City, Utah 84111

Dear Jim:

When Wolf Creek goes to bid on the Recreation Center,
we should have incorporated the mechanical systems change
you discussed with Scott.

Yours truly,


Roger H. Elton

RHE/mk

cc Scott Allen
John Laub

February 18, 1983

Mr. Roger H. Elton
Attorney at Law
P. O. Box 2878
Reno, Nevada 89505

Dear Roger:

This morning we met to discuss the change in mechanical systems for the Wolf Creek Recreation Center. In attendance were representatives from our office, Olsen & Peterson (our consulting mechanical engineer), Wolf Creek (Scott Allen), and Energy Control Systems (manufacturers of the heat pump system).

The study conducted by our office and Olsen & Peterson yielded the following results.

1. Initial Costs

| | |
|-------------------------|------------|
| a) Mechanical System | - \$12,488 |
| b) Electrical System | + 2,500 |
| c) Architectural System | + 3,500 |
| | <hr/> |
| Total Savings: | - \$ 6,500 |

2. Operating Costs

| | |
|---------------------|------------|
| a) Savings per year | - \$ 2,000 |
|---------------------|------------|

3. Additional mechanical, electrical,
and architectural redesign fees

| |
|------------|
| + \$ 4,380 |
|------------|

The figures look good to us, and our engineers are very comfortable with the heat pump system. Other advantages include reduced moisture in the building, no propane tank requirements, and no rooftop equipment.

Scott Allen seems very pleased with the way that the same system is performing in the Time Share units and is willing to sacrifice the additional space required for the units within the building. His recommendation is to design and install the heat pump system.

Scott suggested that I transmit this information to you for your consideration, but not to initiate any further work until we receive direction from you.

Sincerely,

James W. Christopher, FAIA

JWC/jse

cc: John H. Laub
Scott Allen