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William C. Masters, Helen C. Masters, Reid Evans,
Norma T. Evans, James R. Loosemore, Barabara J.
Loosemore v. The Lake View Heights
Homeowners Association, Honolulu Federal
Savings and Loan Association, Hnofed
Development Corporation, Ben Lomond Estates,
Honofed Ben Lomond Corporation, and P. Clay
Thomas : Brief of Respondent

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BRIEF

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DOCKET NO. 880465-CA

IN THE UTAH COURT OF APPEALS

WILLIAM C. MASTERS and HELEN C.
MASTERS, husband and wife, REID
EVANS, and NORMA T. EVANS,
husband and wife, and JAMES R.
LOOSEMORE and BARBARA J.
LOOSEMORE, husband and wife,

Plaintiffs/Appellants,

THE LAKEVIEW HEIGHTS HOMEOWNERS
ASSOCIATION, a Utah Non-Profit
Corporation, HONOLULU FEDERAL
SAVINGS AND LOAN ASSOCIATION, a
Hawaii Corporation, HONOFED
DEVELOPMENT CORPORATION, a
Hawaii Corporation, BEN LOMOND
ESTATES, a Utah General
Partnership, HONOFED BEN LOMOND
CORPORATION, a Hawaii
Corporation, and P. CLAY THOMAS,

Defendants/Respondents.

Case No. 880465-CA

Category No. 14b

APPEAL FROM A SUMMARY JUDGMENT GRANTED IN THE
SECOND JUDICIAL DISTRICT COURT, WEBER COUNTY,
STATE OF UTAH, JUDGE RONALD O. HYDE

BRIEF OF RESPONDENTS

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WILLIAM C. MASTERS and HELEN C.
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NORMA T. EVANS	PLAINTIFF/APPELLANT
WILLIAM M. MASTERS	(NOT PARTY TO APPEAL)
HELEN C. MASTERS	(NOT PARTY TO APPEAL)
JAMES R. LOOSEMORE	(NOT PARTY TO APPEAL)
BARBARA J. LOOSEMORE	(NOT PARTY TO APPEAL)
THE LAKEVIEW HEIGHTS HOMEOWNERS ASSOCIATION	DEFENDANT/RESPONDENT
HONOLULU FEDERAL SAVINGS AND LOAN ASSOCIATION	DEFENDANT/RESPONDENT
HONOFED DEVELOPMENT CORPORATION	DEFENDANT/RESPONDENT
BEN LOMOND ESTATES	DEFENDANT/RESPONDENT
HONOFED BEN LOMOND CORPORATION	DEFENDANT/RESPONDENT
P. CLAY THOMAS	DEFENDANT/RESPONDENT

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STATEMENT OF JURISDICTION

The Court of Appeals has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(j) and Rule 3(a), Rules of the Utah Court of Appeals. Defendants made a motion for summary judgment under Rule 56, Utah Rules of Civil Procedure. The Honorable Ronald O. Hyde of the Second Judicial District Court of Weber County, granted the motion in all respects except one: The trial court denied the motion insofar as it sought dismissal of plaintiffs' first cause of action for fraud based on misrepresentations allegedly made by defendants at or before the time plaintiffs bought their homes.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether plaintiffs presented specific facts showing that there is a genuine issue for trial on their claim of fraud based on misrepresentations allegedly made at or before the time they purchased their homes.

2. Whether the misrepresentations complained of by plaintiffs concern presently existing material facts.

3. Whether in the absence of a showing that defendants are in the business of supplying information, plaintiffs can state a claim for negligent misrepresentation.

STATEMENT OF THE CASE

Six individuals filed this action in the Second Judicial District Court, Weber County, complaining about the construction of a home by defendants in the Lakeview Heights Subdivision in North Ogden. (R. 1) Plaintiffs' Amended Complaint consisted of eight separate causes of action: fraud, negligent misrepresentation, negligence, breach of fiduciary duty, private nuisance, violation of easements of light, air and view, breach of declaration of covenants, conditions and restrictions, and punitive damages. (R. 112)

Defendants moved for summary judgment on each of plaintiffs' eight causes of action. (R. 226) In his Ruling on Defendants' Motion for Summary Judgment, filed on March 16, 1988 (R. 308), the trial court granted defendants' motion and dismissed all but one of the claims in plaintiffs' Amended Complaint, that portion of the first cause of action for fraud based on misrepresentations allegedly made at or before the time plaintiffs purchased their homes in the Lakeview Heights Subdivision. (R. 408) The case was scheduled to go to trial on plaintiffs' remaining cause of action on March 21, 1988. (R. 276) Rather than do that, plaintiffs moved to dismiss what remained of their fraud cause of action without prejudice. (R. 399) The trial court granted this motion at a hearing on March 18, 1988. (R. 378) Final orders were entered granting

defendants' motion for summary judgment and plaintiffs' motion to dismiss. (R. 408, 423)

Only two of the plaintiffs, Reid and Norma Evans, appealed from the trial court's order granting defendants' motion for summary judgment. (R. 410) Defendants appealed from the trial court's failure to dismiss plaintiffs' cause of action for fraud based on misrepresentations allegedly made at or before the time plaintiffs purchased their homes. (R. 421) Therefore, the matters before the Court of Appeals are:

1. The trial court's dismissal of all of Reid and Norma Evans' claims, except the one for fraud based on misrepresentations allegedly made at or before the time they purchased their home.

2. The trial court's failure to dismiss the fraud claims of all plaintiffs based on misrepresentations allegedly made at or before the time they purchased their homes.

The trial court noted in his Ruling on Defendants' Motion for Summary Judgment that plaintiffs had "fairly well conceded that, of the seven causes of action, they were relying primarily on the fraud and the breach of fiduciary duty, and that the other causes of action, private nuisance, violation of easements of light, air and view, breach of declaration of covenants, etc. were basically window dressing." (R. 308) Reid and Norma Evans have not seriously contested the dismissal

of their claims for negligence, breach of fiduciary duty, private nuisance, violation of easements of light, air and view, breach of declaration of covenants, conditions and restrictions, and punitive damages.

Finally, since this case involves a cross-appeal, defendants will, pursuant to Rule 24(h), Rules of the Utah Court of Appeals, answer plaintiffs' brief and argue their cross-appeal in this brief.

STATEMENT OF FACTS

Plaintiffs, three married couples, purchased homes in the Lakeview Heights Subdivision in North Ogden City. (R. 230, 314) The Evans purchased Lot 149, the Loosemores purchased Lot 148, and the Masters purchased Lot 129. (R. 230, 314) Attached hereto as Addendum A is a portion of the Plat for the Lakeview Heights Subdivision showing the location of plaintiffs' lots in the Subdivision. (R. 230, 314) Plaintiffs purchased their homes before the June 23, 1983 amendment to the Plat, referred to by plaintiffs on page 3 of their brief on appeal. (R. 230, 314)

Lot 150, the one complained of by plaintiffs, was empty when plaintiffs bought their homes. (R. 115) Plaintiffs claim that defendants induced them to buy their homes with representations about what defendants were going to do with Lot 150 after plaintiffs bought their homes. (R. 118) The Masters

claim that defendants told them something "low" would be built on Lot 150 (R. 230, 231); the Loosemores claim that defendants told them "nothing" would be built on Lot 150 except a stairway to the Subdivision common area (R. 231); and the Evans claim that defendants told them that a house would be built on Lot 150 on the other side of a "walkway" to the Subdivision common area. (R. 231) With the exception of the Loosemores, all of the plaintiffs concede that they knew at the time they purchased their homes that a home was to be built on Lot 150. (R. 230, 231)

Lot 150 was originally platted and zoned for twin homes. (Addendum A) Defendants determined that twin homes were no longer marketable and opted for detached, single family homes. (R. 115, 131) In order to build a detached home on Lot 150, defendants needed to amend the Subdivision Plat and get a change in the zoning from North Ogden City. (R. 115, 131)

The Amended Declaration of Covenants, Conditions and Restrictions for the Lakeview Heights Subdivision, attached hereto as Addendum B (R. 232), requires approval of seventy-five percent of the homeowners in the Subdivision for any change to the Plat. (Addendum B, Page 26, Section 11.01) It is undisputed that defendants obtained approval from more than seventy-five percent of the homeowners to amend the Plat to allow for construction of a detached home on Lot 150 and

others. (R. 308) Plaintiffs themselves approved the change. (R. 253) It is undisputed that even without plaintiffs' approval, defendants had more than enough votes to make the change. (R. 308) North Ogden City approved the Amended Plat and rezoned Lot 150 and others for detached, single family homes. (R. 115, 131)

Plaintiffs contend that defendants induced them to approve the change in the Plat and in the zoning with representations that "the Defendants would not construct any residential dwelling on Lot 150 which would obstruct, impair or in any way negate the view from the Plaintiffs' dwellings." (Page 4, Brief of Appellants) Plaintiffs contend that the home built on Lot 150 "obstructs, impairs and negates" their view. (R. 117)

Plaintiffs claim that the representations allegedly made both before and after they purchased their homes were fraudulent. (R. 118, 119) Plaintiffs were asked in their depositions about the factual basis for this allegation.

Helen Masters testified as follows:

- Q. You claim that the defendants knew that each of the representations that we have talked about and that are alleged in this complaint were false when they were made to you.
- A. I can't say that someone knew that they were lying, I would hate to have the feeling that that's how people were.

Q. You answered my question. Is there any factual basis that you know of?

A. No.

Q. To claim that they lied?

A. No.

Exhibit B to Memorandum in Support of Defendants' Motion for Summary Judgment (R. 228), page 76, lines 13-24.

William Masters testified as follows:

Q. Let's talk about the promises quickly, the ones that Bob Ward made to you. Do you believe that he was lying to you when he made those promises?

A. Absolutely not.

Q. How about Clay Thomas, do you believe that he was lying to you then at the time he made them?

A. I think Clay Thomas had--would do anything to sell a house. He'd build any kind of a house. He'd hurt anybody. If you went through the neighborhood of the people that originally lived there and interviewed them, you'd soon find out.

Q. Do you believe he was not telling you the truth?

A. Right.

Q. You believe that at the time he told you that the house would be only built so high to Second Street that he knew that that was not going to be the case?

A. I don't think he knew what he was doing.

Q. If I understand your testimony, do you believe at the time that he made those representations to you that he was not intending to build the home that he represented to you?

A. No. I think Clay Thomas was going to build those type bungalow houses until he got to where he was going to build them then he changed his mind completely.

Exhibit C to Memorandum in Support of Defendants' Motion for Summary Judgment (R. 228), page 31, lines 2-25.

Barbara Loosemore testified as follows:

Q. You allege in Paragraph 34 that Moskos and Thompson knew at the time they told you that the lot behind you would be a common area, that they knew that that wasn't the case; that they were lying to you. Is that what you believe?

A. No, I don't believe that.

Exhibit D to Memorandum in Support of Defendants' Motion for Summary Judgment (R. 228), page 72, lines 14-19.

James Loosemore testified as follows:

Q. 34, I'll ask you the same questions that I asked your wife as to the representations made prior to the purchase of your home. Do you believe today that they were made knowingly false at the time they were made?

. . . .

A. Prior, like from Margaret?

Q. Right.

A. No, I honestly believe that Margaret felt that way.

Exhibit E to Memorandum in Support of Defendants' Motion for Summary Judgment (R. 228), page 47, lines 9-18.

Norma Evans testified as follows:

Paragraph 34, that's a short one and I'd like [for] you to read that one carefully. . . . [T]he allegation is that the defendants and those who were acting on behalf of Lakeview Heights knew when they made the representations to you about construction on Lot 150, they knew that what they were saying was false at the time they said it.

. . . .

A. I presume they knew that they were false.

Q. Do you have any reason to believe that they were false when made?

A. Well, I don't know, I only know that I believed what they said.

Q. Other than the fact that what was said was not true, do you have any reason to believe that the person who made the statements knew at the time they made them that they were not true, that they were, in fact, lies?

A. I don't really have any way of knowing.

Exhibit F to Memorandum in Support of Defendants' Motion for Summary Judgment (R. 228), page 80, lines 5-24.

Reid Evans testified as follows:

A. I think that Clay Thomas knew exactly what he was going to do all three times he lied to me and told me he wasn't going to do it. I think he knew all the time what he was going to do, that he was going to build there and what kind of home he was even going to build--not the home he showed me on the wall.

Q. Do you have any facts upon which to base that allegation?

A. Well, he did it.

Q. Do you have any facts to support a belief that he knew that he was not going to do what he said he was going to do?

MR. DURBANO: I think just what he said. He followed through.

A. That's a big fact in itself, what a man does.

Q. I'm entitled to an answer to the question. Do you have any facts to support the belief that he was lying to you when he said that?

A. Just the completion of that home told me that he lied to me.

Exhibit G to Memorandum in Support of Defendants' Motion for Summary Judgment (R. 228), page 63, lines 5-24.

In their Memorandum in Opposition to Defendants' Motion for Summary Judgment (R. 312), plaintiffs tried to counter the foregoing deposition testimony with other deposition testimony of the plaintiffs. (R. 316) Plaintiffs cited the following passage from the deposition of Helen Masters:

A. Yes. I called him a deliberate liar to his face is what I did. The day the roof went up, I told him what I thought of him.

Q. You told him that he was a liar?

A. I told him that.

Q. What did he say?

- A. He said that would be a low, rambling house and it was not. And I believed him until the day the roof went up.

Exhibit 1 to Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment (R. 312), page 84, lines 10-19.

Plaintiffs cited the following passage from the deposition of William Masters:

- Q. Thank you for doing that. And I understand your testimony to mean more that Clay would do whatever he had to do to sell a house.

A. Absolutely.

- Q. Notwithstanding what he might have said before or after or anything like that.

A. His promises and word was no good as far as I can see.

- Q. What specific evidence can you point to? What have you seen or heard that would lead you to believe that was the case.

MR. DURBANO: In addition to what he has testified already? Do you want him to rehearse anything?

- Q. I don't want you to rehearse the events leading up to the purchase of your home. But is there anything else while you have been living in the subdivision?

A. You know what kind of person Clay Thomas is as well as I do.

- Q. Can you answer my question? Do you understand my question?

A. Say it again.

Q. Okay. What have you seen or heard that has led you to believe that Clay Thomas does what he has to do to sell a house?

A. Building those two houses across the street.

Exhibit 2 to Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment (R. 312), page 32, lines 1-25.

Plaintiffs cited the following passage from the deposition of Barbara Loosemore:

Q. What I'm getting at, I guess, is, at the time that Clay and you had conversations about that home, do you believe he was lying to you?

A. I definitely do.

Q. What do you base your belief on? What leads you to believe that he was lying to you?

A. That he went ahead and did that after we were told they weren't going to. He knew we were going to put up the fence. He knew we were going to do the deck. He knew that. The house could have been built differently.

Q. Did Clay Thomas ever tell you that they were not going to build a home behind you?

A. Yes, he did.

Q. When was that?

A. I don't remember. I don't remember when.

Q. It was after you purchased the home?

A. Clay Thomas wasn't there when we purchased the home.

Q. Was it at or about the time that you signed the variance, did he tell you that they would not build behind you?

- A. I don't remember that it was then.
- Q. Was it after then?
- A. I don't remember. I don't remember when it was.
- Q. And you believe that at the time he told you that, whenever it was, that he was lying to you?
- A. Yes I do.
- Q. And he knew that, Lakeview Heights knew that. He had no intention of doing otherwise. Is that your belief?
- A. Yes.
- Q. You must have some basis for that belief other than you don't like Clay Thomas, what leads you to believe that?
- A. Because everything Clay Thomas said to us, and in my opinion everything he said to everyone else, was a lie. Because he would say one thing and turn around two days later do exactly what he said he wasn't going to do. He did that constantly.

Exhibit D to Memorandum in Support of Defendants' Motion for Summary Judgment (R. 228), page 76, lines 18-25, page 77, lines 1-25, page 78, lines 1-5.

Plaintiffs cited the following passage from the deposition of James Loosemore:

- Q. Do you believe that they misrepresented to you, Marge and Clay, at that meeting?
- A. I definitely do.
- Q. Misrepresented to you what style of home would be built as a result of your giving approval to them?

- A. I believe that they knew what they were going to do and where they were going to build. And they didn't tell me.
- Q. Oh, okay. You didn't ask them?
- A. No. Because all they said is, all you are signing is the style of the home.
- Q. But you believed that they knew they intended to build on that lot behind you?
- A. I definitely believe that.
- Q. Do you believe at the time they made the representations to you that they knew representations had been made to you earlier about--
- A. Well, I would be almost positive, because they were made to Reid Evans.
- Q. Is that the sole basis for that belief?
- A. Yes.
- Q. Maybe I could ask it this way: What I'm getting at with all these questions is, it seems to me that the most important things in this lawsuit are what was said to you prior to the purchase of your home, what things that were said to you that might have induced you into the purchase of your home.

What I'm trying to understand is why things happening after you purchased your home would have any significance to this lawsuit. Does that make it easier?

- A. Yes. For one reason is, Lakeview Heights is Lakeview Heights. And when we were talked to, when Reid bought his home, it was Lakeview Heights. And Lakeview Heights had to have told the realtors how to market that home. In fact, Max Thompson told me after the fact that that is how they told him to market that home, that they were not going to build back there.

Q. Max Thompson told you that?

A. That's right.

Q. Just to save time, what I'm asking is, do you believe that any of those representations were lies, were made at a time when the person who made the representations knew what they were saying was false?

A. Yes. Not prior though, but after.

Q. Right. Tell me why you believe that.

A. Well, Barbara mentioned all the problems we had with Clay. And of course, we dealt with him because he was the manager of the project. And like she said, he would tell us he was going to do something and he wouldn't do it.

And it wasn't just us. It was everybody in that Lakeview Heights Twin Home Division. He had people on him all the time about lying. And I honestly believe that the guy would only lie when he opened his mouth. And that's my honest opinion.

Q. Is there anything you want to add to the reasons why you believe that?

A. Just from the experience that I had with the guy.

And I believe he knew all along when he said that it was going to be a low type of home, that he knew exactly what it was going to be like. I believe that he knew that he was going to take our view away. And I don't think he cared. I really don't.

Q. Let me just ask you again what the basis is for your belief that he knew that and he had no intention of building the home that he represented to you. What's the basis of that belief?

A. Just the way he would answer our questions, and things like that.

Q. This was after the fact?

A. Right. When the foundation was there, I asked him, Why are you building here when we were told that there was not going to be anything here? And his answers were similar to, Well, you signed the variance. It's not my problem; it's your problem. Things like that.

Everything he said was--you could never get a straight answer out of the guy, and that's all--and from what everybody else had said.

Q. So, you believe more from the way he answered the questions, he indicated that he had been lying before?

A. Well, he would tell us one thing; then he would do something else. I mean, that house was supposed to have low ceilings. And of course, when it was open house and that, we would walk up. The first time I walked in I couldn't believe it. Low ceiling? I bet it was 12 feet high. There was no reason to build that house that high.

Q. Is there anything else you want to add as to why you think Mr. Thomas was lying to you?

A. No.

Q. Do you believe that any of the other defendants or persons associated with them lied to you at any time.

A. I don't believe Margaret did. Somebody was lying to somebody. Because Dave Smith, who was working for Clay at the time, told Barbara and I one time, You guys are real lucky because they are not going to build back there.

Then Clay does. So, whether he was lying to his employees--somebody is lying to somebody. But I wasn't lying.

Exhibit 4 to Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment (R. 312), page 39, lines 16-25, page 40, lines 1-25, page 41, lines 1-4, page 48, lines 8-25, page 50, lines 2-25, page 51, lines 1-16.

Plaintiffs cited no passages from the depositions of Reid and Norma Evans to support their claim that the alleged representations were knowingly false when made. (R. 316) Plaintiffs cited passages from the Evans' depositions to support their claim that the alleged representations were made. (R. 315) This testimony of the Evans is the only deposition testimony to which plaintiffs refer in their brief on appeal. (Page 13, Brief of Appellants) Plaintiffs referred to the following passage from the deposition of Norma Evans:

A. And they said they would be--it was meant to upgrade the area, was the words that they used. And it would improve the value of our property.

Q. Did you want to add something to that?

A. (Indicating in the negative).

Q. That's fine. Did you look at the plans, themselves, you personally?

A. Yes. I remember. And that's when I asked the questions.

Q. Which questions?

A. I asked, If we sign this, that won't mean--would that mean that you could come in and on this lot next to us, to the west of us, build a monolith that would block out the sun? Oh, no, she said.

Then she called Clay Thomas to come over.

Q. And talk to you?

A. And talk to us about it.

Q. What did Clay say exactly, if you can recall?

A. I can't recall exactly, but I can tell you essentially what he told us.

Q. That's fine. Tell me.

A. When I repeated the same thing to him, he said, Oh, no. We would never do that. He said, We have no plans right away to build. But because of the shape of those lots--they are narrow--he said, When we do, he said, it will probably be a couple of years. But he said, When we do, it will be something long and low into the hill. Those were his--that's exactly what he said.

Q. Was this the first time that you learned that there were plans to build on Lot 150?

A. Yes.

Q. Were you angry?

A. Well, at about that time, I was through being surprised. But I was really shocked to think--because we had always--and I told them then. I said, What happened to this walkway?

Well, that's why he said, We want to change. He said, We want to change this.

And that's when I said, I'm afraid to sign this. I said, Because then you could come in and build a monolith that would block out the sun.

Q. Did Clay Thomas acknowledge that originally the plans were not to build a home on Lot 150?

A. Yes. He said we have plans to change that.

Q. So, he acknowledged that originally they wanted to build a walkway.

A. Yes. To my understanding, yes. Because he said, We want to change it and build a single family in with the twin homes. Then he said essentially the same thing. It will do nothing but improve the value of your property.

Exhibit 5 to Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment (R. 312), page 62, lines 1-25, page 63, lines 1-25.

Plaintiffs cited the following passage from the deposition of Reid Evans:

A. Then I asked him what the whole thing was about. And he says, Well, we are just--we feel that we are losing money. In fact, he said, We are losing money. And our financial statement isn't good. And we have got to get out of building these twin homes and build individual homes, because they will sell better.

And I said, Well, I don't want my house to depreciate. I want it to appreciate. So, are you going to build el-cheapo homes?

And he said, No. And he pointed to a home up on the wall, and he said, They will be like this, Reid.

Q. He pointed to a drawing?

A. Yes.

Q. It looked like an architect's drawing?

A. Right. And he said, These are the homes that are up above, some of them.

And I said, what's the price category? And he said, Around \$100,000. And I looked at Norma and I said, You know, that's good. So, there is no problem now, so just sign it.

Q. Did Mr. Thomas tell you at that time that they planned to develop Lot 150?

A. When I said, Let's sign it, Norma said, Not so fast. Clay are you going to take our view away? He said, No, I wouldn't do that to you.

I said, that's a good question. I said, Let me ask it. Are you going to take our view away? And he said, Mr. Evans, I wouldn't do that to you.

Q. Did you understand by his answer or anything else that he said to you that they intended to develop Lot 150?

A. I assumed that he was going to build down that street, because I asked him and he said, Yes; but it will be across the street before. And he said, We are going to go all the way across the street and then all the way around, and we are going to build some more homes on the upper. So, we are talking about at least two years before we even start on this side anyway.

Q. Did you ask him about the walkway on Lot 150?

A. No, at that time.

Eventually, yeah, but then I went out of that office feeling really good that there

was going to be a \$100,000 home next there,
and I could live with that.

Q. Next to your home?

A. Yes. Because if it was a home of \$100,000,
they would have to give them a big lot. And
[it] would have had to have been spread out,
and it wouldn't have been in my backyard.

Exhibit 6 to Plaintiffs' Memorandum in Opposition to
Defendants' Motion for Summary Judgment (R. 312), page 47,
lines 11-25, page 48, lines 1-25, page 51, lines 10-17.

With respect to plaintiffs' claim of breach of the
Amended Declaration of Covenants, Conditions and Restrictions,
plaintiffs cited some deposition testimony of Helen C. Masters
and James R. Loosemore in their Memorandum in Opposition to
Defendants' Motion for Summary Judgment. (R. 316) Plaintiffs
cited nothing in the record to support their claims of
negligence, breach of fiduciary duty, private nuisance,
violation of easement of light, air and view, and punitive
damages. (R. 312)

SUMMARY OF ARGUMENT

I.

Plaintiffs have offered no specific facts showing that
there is a genuine issue for trial on their claim of fraud
based on misrepresentations allegedly made at or before the
time plaintiffs purchased their homes. All plaintiffs have

offered is evidence that they believe the purported misrepresentations to have been knowingly false when made. Furthermore, the purported representations do not concern presently existing material facts and are not therefore actionable as fraud.

II.

Reid and Norma Evans' claim of fraud based on misrepresentations allegedly made after they purchased their home is not well taken. The only action taken by Reid and Norma Evans in reliance on those supposed representations was to approve an amendment to the Subdivision Plat. Their approval was not necessary and in any event the amendment to the Subdivision Plat had nothing to do with the size of the home that was built on Lot 150.

III.

Reid and Norma Evans have not stated a claim for negligent misrepresentation because they have failed to show that defendants were in the business of supplying information.

IV.

Reid and Norma Evans have abandoned their remaining claims (negligence, breach of fiduciary duty, private nuisance, violation of easement of light, air and view, breach of declaration of covenants, conditions and restrictions, and punitive damages).

ARGUMENT

- I. The trial court erred in denying defendants' motion for summary judgment on the issue of fraud at or before the time plaintiffs purchased their homes.

The first cause of action of plaintiffs' Amended Complaint is for fraud both before and after plaintiffs purchased their homes. The trial court dismissed plaintiffs' claim of fraud based on misrepresentations allegedly made after they purchased their homes. However, the trial court denied defendants' motion to dismiss plaintiffs' claim of fraud based on misrepresentations allegedly made before they purchased their homes. Defendants contend that this was error.

There are nine elements to the common law tort of fraud. Pace v. Parrish, 122 Utah 141, 144-145, 247 P.2d 273, 274-75 (1952). Defendants moved for summary judgment on two of those elements: scienter and representations concerning presently existing material facts. The way that defendants framed their motion for summary judgment made it unnecessary for the trial court or the parties to address the other seven elements. For purposes of the motion only, they were taken as established.

Inexplicably, plaintiffs have directed their appeal to everything but the two elements in issue. The question is not whether the purported representations were made, as plaintiffs have wrongly supposed. (Pages 11-15, Brief of Appellants) The

question is, assuming that the representations were made, (1) whether they were fraudulently made, and (2) whether they concern presently existing material facts. Plaintiffs have said nothing about these critical concerns and have stated no reason why the trial court should not have dismissed plaintiffs' claim of fraud based on misrepresentations allegedly made at or before the time they purchased their homes.

- A. Plaintiffs have failed to present any specific facts showing that there is a genuine issue for trial on their claim of fraud at or before the time they purchased their homes.

"[F]raud is a wrong of such nature that it must be shown by clear and convincing proof and will not lie in mere suspicion and innuendo." Lundstrom v. Radio Corporation of America, 17 Utah 2d 114, 117-18, 405 P.2d 339, 341 (1965). The Utah Supreme Court in Universal C.I.T. Credit Corporation v. Sohm, 15 Utah 2d 262, 391 P.2d 293 (1964), reversed a trial court judgment of fraud because it was "substantiated only by the self-serving testimony of one aggrieved person. . . ." 15 Utah 2d at 266, 391 P.2d at 296. The Court concluded that plaintiff's "opinion in that respect" did not amount to the proof necessary for the Court to reach a "clear and convincing conclusion" of fraud. Id. In other words, plaintiffs' "belief" that defendants lied to them will not support their fraud claim.

Therefore, plaintiffs came into this appeal with the burden of presenting evidence showing something more than their "belief" that defendants lied. Otherwise, there is no genuine issue requiring a trial. Reagan Outdoor Advertising, Inc. v. Lundgren, 692 P.2d 776, 779 (Utah 1984). The only time that plaintiffs have ever tried to present such evidence was in their Memorandum in Opposition to Defendants' Motion for Summary Judgment (R. 312). That evidence is set forth verbatim in this brief on pages 9-16. Plaintiffs did not see fit to argue that evidence to this Court. The reason for this is clear: When carefully reviewed, even in the light most favorable to plaintiffs, plaintiffs' "evidence" fails to raise a genuine issue of material fact requiring a trial.

The Masters "believe" that defendants lied to them. Helen Masters reported that she went so far as to call one of the defendants a "deliberate liar to his face." (Page 9, Brief of Respondents) When asked for the basis for this belief, all the Masters could come up with is that the purported representations turned out to be false. (Pages 9-11, Brief of Respondents) That says nothing about whether the purported representations were knowingly false when made and therefore fraudulent.

The Loosemores also believe that defendants lied to them. The principal basis for this belief is the same as the

Masters': the purported representations turned out to be false. (Pages 11-16, Brief of Respondents) In addition, James Loosemore reported that he did not like the "way [defendant P. Clay Thomas] would answer our questions." (Page 15, Brief of Respondents) Mr. Loosemore declined the invitation to be more specific. (Page 15, Brief of Respondents) Mr. Loosemore's indefinite and self-serving characterization of Mr. Thomas' pattern of speech is no evidence of fraud. Finally, Mr. Loosemore claimed that Max Thompson, one of defendants' realtors, told him that he (Max Thompson) had been told to market Lot 148, the one purchased by the Loosemores, by representing that "they were not going to build back there." (Page 13, Brief of Respondents) Mr. Loosemore did not suggest that the purported representation was false when made: i.e., that defendants had every intention of building "back there" when they purportedly made the representation. Therefore this purported representation is no evidence of fraud.

Plaintiffs offered no evidence from the Evans to support their fraud claim.

Plaintiffs offered absolutely no evidence of scienter in their brief on appeal. On page 11, plaintiffs claim that the June 23, 1983 amendment to the Plat raises undisclosed factual issues "that must be resolved." The June 23, 1983 amendment to the Plat had nothing to do with plaintiffs' claim

of fraud in the inducement because the amendment occurred after plaintiffs purchased their homes. The June 23, 1983 amendment is material only to plaintiffs' fraud claim based on representations purportedly made after they purchased their homes, which was dismissed by the trial court.

On page 12, plaintiffs claim that the representations purportedly made before plaintiffs bought their homes are inconsistent with the November 16, 1977 Plat and that this "creates a dispute of material fact." However, that would be true only if defendants denied the making of the representations which, for purposes of this appeal, they have not. The supposed discrepancy between the representations and the Plat goes to the reasonableness of plaintiffs' reliance on those representations, which again, for purposes of this appeal, is not in dispute.

On page 14, plaintiffs claim that the purported representation that the Masters would retain a horizon view from Second Street on "creates an issue of fact regarding justifiable reliance and promissory estoppel which must be tried." Again, reliance is not in issue here, and promissory estoppel was never plead by plaintiffs. This purported representation would raise an issue of fact only if defendants denied its making, which again, for purposes of this appeal, they have not.

On page 15, plaintiffs claim that defendants' purported representations formed a "consistent pattern." This is not true. The purported representations to each set of plaintiffs were different: i.e., the Masters were allegedly told that something "low" would be built on Lot 150; the Loosemores were allegedly told that "nothing" would be built on Lot 150; and the Evans were allegedly told that a house would be built on the other side of a "walkway."

Finally, on page 13, plaintiffs cite some deposition testimony of the Evans that supposedly creates a genuine issue of fact. This testimony is set forth verbatim on pages 16-20 of this brief. Once again, this testimony goes to the question of whether the representations were made, not whether they were knowingly false when made.

Plaintiffs cannot defeat a summary judgment motion with "allegations and conclusions, unsupported by specific facts." Reagan Outdoor Advertising, Inc. v. Lundgren, 692 P.2d at 778. The trial court struggled with whether to dismiss plaintiffs' claim of fraud in the inducement, but in the end gave plaintiffs the benefit of the doubt without specifying what issues of fact needed to be decided at trial. (R. 309) Having the benefit of enough time to closely scrutinize the record, this Court should not be so charitable.

B. Defendants' purported representations do not concern presently existing material facts.

Plaintiffs are also going to have to prove that defendants' purported representations concerned a material fact existing at the time of the representation. Pace v. Parrish, 122 Utah at 145, 247 P.2d at 274-75. Representations concerning a future act or intention, or representations which are promissory, will not support a claim for fraud. Adamson v. Brockbank, 112 Utah 52, 75, 185 P.2d 264, 276 (1947) ("The representation must relate to a past or present matter of fact, not a matter of law, must not be merely promissory, and must not be put forward simply as an expression of opinion"). The representation complained of in this case was that defendants would not take away plaintiffs' view. That is an expression of an opinion about what might happen in the future rather than a representation of a material fact existing at the time the representation was made and will not support plaintiffs' claim of fraud.

Plaintiffs might argue that the purported representations are actionable as a promise to perform. In order to prevail on this theory, they would have to show that at the time defendants purportedly made the promise, they had no intention of performing. Von Hake v. Thomas, 705 P.2d 766, 770 (Utah 1986). That is the same thing as saying that a

representation was knowingly false when made. As discussed above (Section IA), plaintiffs have no way of showing that.

II. Defendants' purported misrepresentations made after the Evans purchased their home are not actionable.

The representations complained of by Reid and Norma Evans after they purchased their home were supposedly made to induce them to approve the Plat Amendment. Obviously, those representations had nothing to do with the Evans buying their home in the first place. Furthermore, defendants did not need the Evans' approval to effect the change in the Plat, and the change in the Plat had nothing to do with the size of the home that ultimately was built on Lot 150. In other words, the Evans' reliance on the purported representations did not cause them any harm. On this basis the trial court correctly concluded that "there [are] insufficient facts to show that said representations would be actionable." (R. 308) The Evans, in their brief on appeal, made no attempt to upset the trial court's ruling on this matter and it should be affirmed.

III. Defendants were not in the business of supplying information and cannot be held liable for a negligent misrepresentation.

The only argument offered by Reid and Norma Evans on the dismissal of their negligent misrepresentation claim is that even if the purported representations are found not to be fraudulent they might be negligent, somewhat in the style of a "lesser included offense." The problem with this argument is

that not only have the Evans put on no evidence of scienter, they have put on no evidence of carelessness or negligence. Price-Orem Investment Company v. Rollins, Brown & Gunnell, 713 P.2d 55, 59 (Utah 1986). As a legal matter, however, the Evans' claim must be dismissed because defendants are not in the business of supplying information.

The Utah Supreme Court said that if

the information is given in the capacity of one in the business of supplying such information, that care and diligence should be exercised which is compatible with the particular business or profession involved. Those who deal with such persons do so because of the advantages which they expect to derive from this special competence. The law, therefore, may well predicate on such a relation, the duty of care to insure the accuracy and validity of the information.

Christenson v. Commonwealth Land Title Insurance Co., 666 P.2d 302, 305 (Utah 1983) (dictum not at issue in this case expressly disavowed, Price-Orem Investment Company v. Rollins Brown & Gunnell, 713 P.2d at 59 n.2).

The Utah Supreme Court in Ellis v. Hale, 13 Utah 2d 279, 373 P.2d 382 (1962), had the following to say about this subject:

In plaintiffs' complaint it is specifically alleged that the defendants had knowledge of the falsity of the supposed representation that induced the belief that the lots were part of an approved subdivision. We conclude that this knowledge forecloses an action for negligent misrepresentation, unless it can be said that

defendants might be liable for the manner of their communication, rather than in the ascertainment of the verity of the communication. Under the facts of this case, no such liability can be recognized. The parties were dealing at arm's length, there was no special duty between them arising out of a special expertise or competence on the part of one of the parties, and the plaintiffs could have very easily cleared up whatever ambiguity or equivocalness there was in the communications by the easy expedient of a simple question. The inherent ambiguity of most forms of communication compel us to the conclusion that usually, as a matter of law, there can be no liability for negligence in the manner of expression.

13 Utah 2d at 283, 373 P.2d at 385 (emphasis added).

The Evans offered no evidence that this was anything other than an "arm's length" transaction or that defendants possessed any "special expertise" upon which the Evans could rely. Defendants were in the business of selling realty. Unlike lawyers, accountants and the like, defendants were not in the business of supplying information.

The Evans might argue that the realtors employed by defendants had that "special expertise or competence" requiring them to search out the truth of their representations. See, e.g., Dugan v. Jones, 615 P.2d 1239, 1248-49 (Utah 1980) ("Though not occupying a fiduciary relationship with prospective purchasers, a real estate agent hired by the vendor is expected to be honest, ethical, and competent and is answerable at law for breaches of his or her statutory duty to

the public"). The Evans' action would then be against the realtors and not against defendants who employed them.

The Evans' claim of negligent misrepresentation is really rather ludicrous. Defendants' purported representation was that they would not "obscure" the Evans' view. As shown above (Section I B), the only way this representation can be actionable is as a promise to perform. The Evans would have to show that when defendants made the alleged promise they had no intention of performing it. In order for this alleged promise to form the basis of a cause of action for negligent misrepresentation, the Evans would have to show that defendants "negligently" formed the intention to perform the promise at the time they supposedly made the promise. The trial court was correct in dismissing the Evans' claim of negligent misrepresentation.

IV. Reid and Norma Evans abandoned all of their remaining claims.

Of Reid and Norma Evans' remaining claims (negligence, breach of fiduciary duty, private nuisance, violation of easements of light, air and view, breach of declaration of covenants, conditions and restrictions, and punitive damages) only breach of fiduciary duty was seriously argued to the trial court. In their brief on appeal, the Evans abandoned all of their remaining claims, including breach of fiduciary duty.

Those claims were never well taken and were properly dismissed by the trial court.

A. There was no fiduciary relationship between the Evans and defendants.

As a general rule in Utah, "no fiduciary obligations exist between a buyer and seller of any property." Dugan v. Jones, 615 P.2d at 1248. A confidential, fiduciary relationship arises only "when one party, having gained the trust and confidence of another, exercises extraordinary influence over the other party." Von Hake v. Thomas, 705 P.2d at 769. Reid and Norma Evans offered no evidence showing that the purchase of their homes was anything but an arm's length transaction. Therefore, the trial court correctly dismissed the Evans' claim of breach of fiduciary duty.

B. There is no basis for the Evans' negligence claim.

Reid and Norma Evans' case is built entirely on what they perceive to be deceitful representations. They have already argued a claim for negligent misrepresentation. They have never attempted to distinguish their supposed negligence claim from any of their other claims. (R. 120) Therefore, the trial court correctly dismissed the Evans' negligence claim.

C. The home built on Lot 150 is not a nuisance.

A private nuisance is defined in Utah Code Ann. § 78-38-1 as follows:

Anything which is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, is a nuisance and the subject of an action.

The definition is not as broad as it may seem. The Utah Supreme Court in Hatch v. W.S. Hatch Company, 3 Utah 2d 295, 283 P.2d 217 (1955), said the following:

The test of whether the use of the property constitutes a nuisance is the reasonableness of the use complained of in the particular locality and in the manner and under the circumstances of the case.

3 Utah 2d at 299, 283 P.2d at 220.

In Scharlack v. Gulf Oil Corp., 368 S.W.2d 705 (Tex. Civ. App. 1963), the court held that "a building or structure cannot be complained of as a nuisance merely because it obstructs the view of a neighboring property." 368 S.W.2d at 707.

Defendants put Lot 150 to the use for which it was intended. Reid and Norma Evans have failed to show why that use was unreasonable under the circumstances. There was no nuisance here.

D. There was no easement of light, air and view.

The Evans have produced no express, written instrument creating an easement of light, air and view. The Statute of Frauds prevents one from being created by implication. Utah Code Ann. § 25-5-1. Those states that have recognized an

implied easement of light, air and view have limited it to the air space directly over one's property and have concluded that in any event they are ill-suited for the modern day considering the comprehensive planning and zoning procedures presently in effect. See Slotoroff v. Nassau Associates, 428 A.2d 956, 957-58 (N.J. Super. 1980).

E. Defendants did not breach the Amended Declaration of Covenants, Conditions and Restrictions.

Reid and Norma Evans claimed in their Memorandum in Opposition to Defendants' Motion for Summary Judgment that defendants breached the following provisions in the Amended Declaration of Covenants, Conditions and Restrictions: Paragraph B of the Recitals; Article IV, Section 4.01(c), (f); Article VII, Section 7.01(a), (d), (l), (p); Article VIII, Sections 8.01, 8.02, 8.03 and 8.05. (R. 316) None of those provisions says anything about a "view." The Evans could not identify which provisions of the Amended Declaration had been breached. (R. 316) The trial court correctly dismissed this count of Reid and Norma Evans' Amended Complaint.

F. The Evans offered no evidence in support of their punitive damage claim.

In the Memorandum in Support of Defendants' Motion for Summary Judgment, defendants put forth deposition testimony of all plaintiffs refuting their claim of punitive damages. (R. 233) Reid and Norma Evans, in their Memorandum in Opposition

to Defendants' Motion for Summary Judgment made no reference to the record in rebuttal. (R. 317) The trial court correctly dismissed the Evans' punitive damages claim.

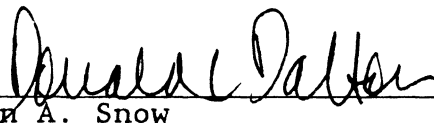
CONCLUSION

For the foregoing reasons, defendants request the Court to dismiss plaintiffs' claim of fraud based on representations allegedly made at or before the time that they purchased their homes and affirm the trial court's dismissal of all of the remaining claims of plaintiffs Reid and Norma Evans.

DATED this 24th day of October, 1988.

VAN COTT, BAGLEY, CORNWALL & MCCARTHY

By



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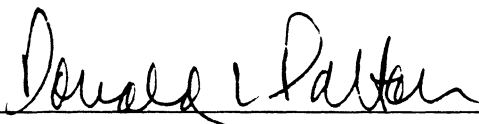
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CERTIFICATE OF SERVICE

I hereby certify that I caused four true and correct copies of the within and foregoing Brief of Respondents to be mailed, postage prepaid, this 24 day of October, 1988 to:

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Kenlon W. Reeve
John H. Geilmann
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Ogden, Utah 84403



5769D
101388

ADDENDUM A

ADDENDUM B

PLATTED ☐ VERIFIED ☒
ENTERED ☒ MICROFILMED ☐

JUN 4 10:52 AM '81

AMENDED DECLARATION OF
COVENANTS, CONDITIONS AND RESTRICTIONS OF
LAKEVIEW HEIGHTS
PLANNED UNIT DEVELOPMENT

FILED AND RECORDED FOR

Cordon Land
Title

THIS AMENDED DECLARATION is made and executed this 3rd day of June, 1981, by THE LAKEVIEW HEIGHTS HOMEOWNERS ASSOCIATION, a Utah nonprofit corporation (the "Association"), and by BEN LOMOND ESTATES, a general partnership (the "Developer"), with the written consent of all first mortgagees and at least seventy-five percent (75%) of the Owners of Residential Lots located within the Property which is hereinafter described.

RECITALS:

A. Developer is the record owner of those certain tracts of Property more particularly described in Exhibit "A" attached hereto and by this reference made a part hereof, except for certain Residential Lots located within said Property which have been conveyed to certain other Owners. Developer desires to create on said Property and additional adjacent property from time to time annexed thereto and made subject hereto a residential development with permanent landscaped open space areas, natural open space areas, community and recreation facilities and other Common Areas.

B. Developer desires to provide for preservation of the values and amenities of the Property and for maintenance of the Common Areas. To this end and for the benefit of the Property and the Owners thereof, Developer has subjected the Property to the covenants, restrictions, easements, charges and liens set forth in that certain Declaration of Covenants, Conditions and Restrictions of Lakeview Heights Planned Unit Development executed by Developer under date of January 12, 1979 and recorded in the Official Records of Weber County, Utah on January 12, 1979 as Entry No. 764193, in Book 1282 at Pages 543, et seq. (hereinafter referred to in these Recitals as the "Original Declaration").

C. Developer has deemed it desirable, for the efficient preservation of the values and amenities of the Property, to create an entity which possesses the powers to maintain and administer the Common Areas, collect and disburse the assessments and charges provided for in the Declaration and otherwise administer and enforce the provisions of the Declaration. For such purposes Developer has caused to be incorporated under the laws of the State of Utah, as a nonprofit corporation, The Lakeview Heights Homeowners Association (the "Association").

D. Developer anticipates that in the future additional Common Areas, Residential Lots and other areas may be established on portions of the Undeveloped Land adjoining the Property. In such event Developer desires to have the right to subject such

additional Common Areas, Residential Lots and other areas to the terms and provisions of this Declaration.

E. Since the time of the recording of the Original Declaration the Developer has discovered that the Articles of Incorporation of The Lakeview Heights Homeowners Association dated January 2, 1979 which were recorded with the Original Declaration in the Official Records of Weber County Recorder were not properly filed with the Utah Secretary of State. Accordingly, the Developer has caused the Association to be properly incorporated pursuant to a new set of Articles of Incorporation of The Lakeview Heights Homeowners Association dated March 23, 1981, a copy of which is attached hereto as Exhibit "D" and by this reference made a part hereof. Concurrently with the recording of this Amended Declaration, the Developer is also recording an amended Plat of the Property whereby the dimensions of certain of the unsold Residential Lots and certain of the Common Areas are being amended. The Association, the Developer and the other Owners who have purchased Residential Lots located in the Property have determined that it is in the best interest of the Property and the Owners thereof to make certain amendments of said Original Declaration to reflect the amendment of the Plat and the changes in the Articles of Incorporation of the Association which have occurred, to add certain land to the Undeveloped Land which may hereafter be annexed to the Property and to make certain other changes and additions to the Original Declaration, all of which amendments of the Original Declaration are deemed to be necessary or desirable: (a) To more accurately express the intent of the provisions of the Original Declaration in light of presently existing circumstances and information, and (b) To better insure, in light of presently existing circumstances and information, the workability of the arrangement which is contemplated by the Original Declaration.

NOW, THEREFORE, for the foregoing purposes the Developer and the Association, with the written consent of all first mortgagees and at least seventy-five percent (75%) of the Owners of Residential Lots, declare that the Declaration of Covenants, Conditions and Restrictions of Lakeview Heights Planned Unit Development dated January 12, 1979 and recorded as Entry No. 764193, in Book 1282 at Pages 543 et seq. of the Official Records of Weber County, Utah, is amended in its entirety to read as herein set forth, and that the Property is and shall be held, transferred, sold, conveyed and occupied subject to the covenants, restrictions, easements, charges and liens hereinafter set forth.

ARTICLE I

DEFINITIONS

When used in this Declaration (including in that portion hereof headed "Recitals") the following terms shall have the meaning indicated:

1.01 Association shall mean THE LAKEVIEW HEIGHTS HOMEOWNERS ASSOCIATION, a Utah nonprofit corporation.

1.02 Board shall mean the Board of Trustees of the Association.

1.03 Common Areas shall mean all property owned or designated on a Recorded Plat as being intended ultimately to be owned by the Association for the common use and enjoyment of the Owners, together with all improvements thereon and all easements appurtenant thereto. The initial Common Areas shall consist of all property described in Exhibit "B" attached hereto and made a part hereof.

1.04 Declaration shall mean this Amended Declaration of Covenants, Conditions and Restrictions of Lakeview Heights Planned Unit Development.

1.05 Design Committee shall mean the Design Committee established by and referred to in Article VIII of this Declaration.

1.06 Living Unit shall mean a structure which is designed and intended for use and occupancy as a single-family residence, together with all improvements located on the same Residential Lot and used in conjunction with such residence.

1.07 Managing Agent shall mean any person or entity appointed or employed as Managing Agent pursuant to Section 4.01(f) of Article IV of this Declaration.

1.08 Mortgage shall mean any mortgage, deed of trust or trust deed or the act of encumbering any property by a mortgage, deed of trust or trust deed; and mortgagee shall mean any mortgagee of a mortgage and any trustee or beneficiary of a deed of trust or trust deed.

1.09 Owner shall mean any person who is the owner of record (as reflected by the records in the office of the County Recorder of Weber County, Utah) of a fee or undivided fee interest in any Residential Lot, including contract sellers, but not including purchasers under contract until such contract is fully performed and legal title is conveyed of record. Notwithstanding any applicable theory relating to mortgages, no mortgagee shall be an Owner unless such party acquires fee title pursuant to foreclosure or sale or conveyance in lieu thereof. Developer shall be an Owner with respect to each Residential Lot owned by it.

1.10 Property shall mean all land covered by this Declaration, including Common Areas and Residential Lots and other land annexed to the Property. The initial Property shall be the land described in Exhibit "A" attached hereto and made a part hereof.

1.11 Residential Lot shall mean any lot of land within the Property designed and intended for improvement with a Living Unit. If any condominium project or apartment project is developed on any portion of the Property, each condominium unit and apartment unit, together with its appurtenant undivided interest

in land, if any, shall be a Residential Lot. The initial Residential Lots are shown on the Plat.

1.12 Undeveloped Land shall, at any point in time, mean all of the land more particularly described in Exhibit "C" attached hereto and made a part hereof, excluding any portion or portions of such land comprising the Property and any other portion or portions of such land improved with the completed above-ground residential structures and related on-site and off-site improvements ordinarily in existence when a tract of land is considered to be fully developed. So long as it is not arbitrary, Developer's determination as to when any of the land described in Exhibit "C" ceases to be Undeveloped Land shall be conclusive.

1.13 Plat shall mean and refer to the Amended Plat of Lakeview Heights Subdivision Phase I, A Planned Residential Unit Development prepared and certified by O. Neil Smith, a registered land surveyor, executed and acknowledged by Developer on June 3, 1981, which is being recorded in the Official Records of Weber County, Utah concurrently with the recording of this Declaration (which Plat amends and supersedes the original residential subdivision plat of Lakeview Heights Subdivision Phase I executed by Developer on October 13, 1977, and recorded in the Official Records of Weber County, Utah on November 16, 1977 in Book 20 of Plats, pages 95-100 as Entry No. 718548), as the same may be further amended from time to time, and Plats hereafter recorded by expansion of the Property.

1.14 Member shall mean and refer to every person who holds membership in the Association.

1.15 Developer shall mean Ben Lomond Estates, a general partnership and its successors and assigns.

ARTICLE II

PROPERTY DESCRIPTION AND ANNEXATION

2.01 Submission. The Property which is and shall be held, transferred, sold, conveyed, and occupied subject to the provisions of this Declaration consists of the real property situated in Weber County, State of Utah, described in Exhibit "A" attached hereto and by this reference made a part hereof.

2.02 Annexation by Developer. Developer may from time to time and in its sole discretion expand the Property subject to this Declaration by the annexation of all or part of the lands initially constituting the Undeveloped Land. The annexation of any such land shall become effective upon the recordation in the office of the County Recorder of Weber County, Utah, of (a) a subdivision plat or map covering the land to be annexed and (b) a supplemental declaration which (i) describes the land to be annexed or incorporated by reference to the description contained in the subdivision plat, (ii) declares that the annexed land is to be held, sold, conveyed, encumbered, leased, occupied and improved as part of the Property subject to this Declaration, (iii) sets forth such additional limitations, restrictions,

covenants and conditions as are applicable to the annexed land, (iv) states which portions of the annexed land are Common Areas and which portions are Residential Lots and which portions are within any new land classification, provided that the nature and incidents of any such new land classification shall be fully set forth in such supplemental declaration or in another supplemental declaration previously filed with respect to some portion of the Property, and (v) describes generally any improvements situated on the annexed land. When any such annexation becomes effective, the annexed land shall become part of the Property.

2.03 Limitation on Annexation. Developer's right to annex land to the Property shall be subject to the following limitations:

(a) The annexed land must be part of the land which is Undeveloped Land as of the date of this Declaration.

(b) Developer shall not effectuate any annexation of land which would cause the total number of Living Units existing on or planned for the Property to exceed 1,964.

(c) Developer's right to annex land to the Property shall expire January 12, 1999, said date being twenty (20) years after this Declaration was first filed for record in the office of the County Recorder of Weber County, Utah.

2.04 Annexation by the Association. Notwithstanding the limitations on annexation set forth in Section 2.03 of this Article, the Association may annex land to the Property by satisfying the requirements set forth in Section 2.02 of this Article and by obtaining approval of such annexation from (a) the owner or owners of the land to be annexed and (b) 2/3 of the Members of each class of the Association's voting membership. Nothing in this paragraph shall be construed to require any prior approval for, or to limit or prevent, any annexation performed by Developer pursuant to Section 2.02 of this Article so long as such annexation satisfies the limitations set forth in Section 2.03 of this Article.

2.05 No Obligation to Annex or Develop. Developer has no obligation hereunder to annex any additional land to the Property or to develop or preserve any portion of the Undeveloped Land in any particular way or according to any particular time schedule. No land other than the Property as defined on the date hereof and land annexed thereto in accordance with the terms of this Article shall be deemed to be subject to this Declaration, whether or not shown on any subdivision plat or map filed by Developer or described or referred to in any documents executed or recorded by Developer.

ARTICLE III

MEMBERSHIP AND VOTING RIGHTS IN THE ASSOCIATION

3.01 Membership. Every Owner upon acquiring title to a Residential Lot shall automatically become a Member of the Association and shall remain a Member thereof until such time as

his ownership of such Residential Lot ceases for any reason, at which time his membership in the Association with respect to such Residential Lot shall automatically cease and the successor Owner shall become a Member. Membership in the Association shall be mandatory and shall be appurtenant to and may not be separated from the ownership of a Residential Lot.

3.02 Voting Rights. The Association shall have the following described two classes of Voting membership:

Class A. Class A members shall be all Owners, but excluding the Developer until the Class B membership ceases. Class A members shall be entitled to one vote for each Residential Lot in which the interest required for membership in the Association is held.

Class B. Developer shall be the sole Class B Member. The Class B Member shall be entitled to the following votes: (i) four (4) votes for each Residential Lot which it owns; and (ii) twenty (20) votes for each acre of Undeveloped Land in which it holds an equitable or legal ownership interest. The Class B membership shall automatically cease and be converted to Class A membership on the first to occur of the following events:

(a) When the total number of votes held by all Class A Members equals the total number of votes held by the Class B Member; provided, however, that the Class B membership shall be restored upon the annexation of additional Residential Lots to the Property pursuant to Article II above if and so long as the number of Class B votes after such annexation exceeds the number of Class A votes.

(b) January 12, 1999, said date being twenty (20) years after the date on which this Declaration was first filed for record in the office of the County Recorder of Weber County, Utah.

3.03 Multiple Ownership Interests. In the event there is more than one Owner of a particular Residential Lot, the vote relating to such Residential Lot shall be exercised as such Owners may determine among themselves, but in no event shall more than one Class A vote be cast with respect to any Residential Lot. A vote cast at any Association meeting by any of such Owners, whether in person or by proxy, shall be conclusively presumed to be the entire vote attributable to the Residential Lot concerned unless an objection is made at the meeting by another Owner of the same Residential Lot, in which event a majority in interest of the co-owners as shown on the record of ownership maintained by the Association shall be entitled to cast the vote.

3.04 Record of Ownership. Every Owner shall promptly cause to be duly filed of record the conveyance document to him of his Residential Lot and shall file a copy of such conveyance document with the secretary of the Association, who shall maintain a record of ownership of the Residential Lots. Any Owner

who mortgages his Residential Lot or any interest therein by a Mortgage which has priority over the lien of any assessment provided herein shall notify the secretary of the Association of the name and address of the mortgagee and also of the release of such Mortgage; and the secretary of the Association shall maintain all such information in the record of ownership.

ARTICLE IV

DUTIES AND POWERS OF THE ASSOCIATION

4.01 Duties of the Association. Without limiting any other duties which may be imposed upon the Association by its Articles of Incorporation or this Declaration, the Association shall have the obligations and duties to do and perform each and every one of the following for the benefit of the Owners and the maintenance and improvement of the Property:

(a) The Association shall accept all Owners as Members of the Association.

(b) The Association shall accept title to all Common Areas conveyed to it by the Developer.

(c) The Association shall maintain, repair, replace, and landscape the Neighborhood Recreation Areas of the Common Areas (including easement areas appurtenant thereto but excluding any portions of the Common Areas left in their natural state by Developer or designated by Developer as Natural Open Space on any recorded subdivision plat or map) and, at the discretion of the Board, any property dedicated to any governmental authority and situated immediately adjacent to the Property if the Board determines that such dedicated property is not being maintained or landscaped in a condition comparable to the Common Areas.

(d) To the extent not assessed to or paid by the Owners directly, the Association shall pay all real property taxes and assessments levied upon any portion of the Common Areas, provided that the Association shall have the right to contest or compromise any such taxes or assessments.

(e) The Association shall obtain and maintain in force the policies of insurance required by Article IX of this Declaration.

(f) The Association shall at all times employ a responsible corporation, partnership, firm, person or other entity as the Managing Agent to manage and control the Common Areas, subject at all times to direction by the Board, with such administrative functions and powers as shall be delegated to the Managing Agent by the Board. The compensation of the Managing Agent shall be such as shall be specified by the Board. Any agreement appointing a Managing Agent shall be terminable by the Board for cause upon thirty (30) days' written notice thereof and at any time without cause or payment of a termination fee upon ninety (90) days' written notice thereof, and the term of any such agreement may not exceed one (1) year, renewable by agreement of

the parties for successive one-year periods. Any Managing Agent shall be an independent contractor and not an agent or employee of the Association.

4.02 Powers and Authority of the Association. The Association shall have all the powers set forth in its Articles of Incorporation, together with its general powers as a nonprofit corporation, and the power to do any and all things which may be authorized, required or permitted to be done by the Association under and by virtue of this Declaration, including the power to levy and collect assessments as hereinafter provided. Without in any way limiting the generality of the foregoing, the Association shall have the following powers:

(a) The Association shall have the power and authority at any time and from time to time and without liability to any Owner for trespass, damage or otherwise, to enter upon any Residential Lot for the purpose of maintaining and repairing such Residential Lot or any improvement thereon if for any reason the Owner fails to maintain and repair such Residential Lot or improvement, or for the purpose of removing any improvement constructed, reconstructed, refinished, altered or maintained upon such Residential Lot in violation of Article VIII of this Declaration. The Association shall also have the power and authority from time to time in its own name, on its own behalf, or in the name and behalf of any Owner or Owners who consent thereto, to commence and maintain actions and suits to restrain and enjoin any breach or threatened breach of this Declaration or any rules and regulations promulgated by the Board, or to enforce by mandatory injunction or otherwise all of the provisions of this Declaration and such rules and regulations.

(b) In fulfilling any of its duties under this Declaration, including its duties for the maintenance, repair, operation or administration of the Common Areas and Residential Lots (to the extent necessitated by the failure of the Owners of such Residential Lots) or in exercising any of its rights to construct improvements or other work upon any of the Common Areas, and provided that any contract for goods or services having a term of more than one (1) year shall state that it may be terminated by either party at the end of the first year or at any time thereafter upon not less than ninety (90) days' written notice, the Association shall have the power and authority (i) to pay and discharge any and all liens placed upon any Common Areas on account of any work done or performed by the Association in the fulfillment of any of its obligations and duties of maintenance, repair, operation or administration and (ii) to obtain, contract and pay for, or otherwise provide for:

(A) Construction, maintenance, repair and landscaping of the Common Areas on such terms and conditions as the Board shall deem appropriate;

(B) Such insurance policies or bonds as the Board may deem appropriate for the protection or benefit of Developer, the Association, the members of the Board, the members of the Design Committee and the Owners;

(C) Such utility services, including (without limitation) culinary water, secondary water, sewer, trash removal, electrical, telephone and gas services, as the Board may from time to time deem desirable;

(D) The services of architects, engineers, attorneys and certified public accountants and such other professional or nonprofessional services as the Board may deem desirable;

(E) Fire, police and such other protection services as the Board may deem desirable for the benefit of the Owners or any of the Property; and

(F) Such materials, supplies, furniture, equipment, services and labor as the Board may deem necessary.

(c) The Board may delegate to the Managing Agent any of its powers under this Declaration; provided, however, that the Board cannot delegate to such Managing Agent the power to execute any contract binding on the Association for a sum in excess of \$10,000 nor the power to sell, convey, mortgage or encumber any Common Areas.

(d) The Association shall have the power and authority from time to time to contract with any association of owners of a condominium project or association of owners of a subdivision within the Property for the performance by the Association for such association of owners of any maintenance or other services, and to contract with any Owner for the performance of maintenance or other services with respect to such Owner's Residential Lot; provided, however, that any such contract having a term of more than one (1) year shall provide that it may be terminated by either party at the end of the first year or at any time thereafter on not less than ninety (90) days' written notice.

(e) The Association shall have all the power and authority given to it expressly by the Declaration or by law, and every other power and authority reasonably implied from the existence of any power or authority given to it herein or reasonably necessary to effectuate any such power or authority.

4.03 Association Rules. The Board from time to time and subject to the provisions of this Declaration may adopt, amend, repeal and enforce rules and regulations governing, among other things, (a) the use of the Common Areas; (b) the use of any roads or utility facilities owned by the Association; (c) the collection and disposal of refuse; (d) the maintenance of animals on the Property; and (e) other matters concerning the use and enjoyment of the Property and the conduct of residents.

4.04 Limitation of Liability. No member of the Board acting in good faith shall be personally liable to any Owner, guest, lessee or any other person for any error or omission of the Association, its representatives and employees, the Board, the Design Committee or the Managing Agent.

ARTICLE V

ASSESSMENTS

5.01 Personal Obligation and Lien. Each Owner shall, by acquiring or in any way becoming vested with his interest in a Residential Lot, be deemed to covenant and agree to pay to the Association the monthly and special assessments described in this Article, together with late payment fees, interest and costs of collection, if and when applicable. All such amounts shall be, constitute, and remain: (a) a charge and continuing lien upon the Residential Lot with respect to which such assessment is made until fully paid; and (b) the personal, joint and several obligation of the Owner or Owners of such Lot at the time the assessment falls due. No Owner may exempt himself or his Residential Lot from liability for payment of assessments by waiver of his rights in the Common Areas or by abandonment of his Residential Lot. In a voluntary conveyance of a Residential Lot, the grantee shall be jointly and severally liable with the grantor for all unpaid monthly and special assessments, late payment fees, interest and costs of collection which shall be a charge on the Residential Lot at the time of the conveyance, without prejudice to the grantee's right to recover from the grantor the amounts paid by the grantee therefor.

5.02 Purpose of Assessments. Assessments levied by the Association shall be used exclusively for the purpose of promoting the recreation, health, safety and welfare of the residents of the Property. The use made by the Association of funds obtained from assessments may include payment of the cost of: taxes and insurance on the Common Areas; maintenance, repair, and improvements of the Common Areas; management and supervision of the Common Areas; establishment and funding of a reserve to cover major repair or replacement of improvements within the Common Areas; and any expense necessary or desirable to enable the Association to perform or fulfill its obligations, functions or purposes under this Declaration or its Articles of Incorporation. The Association shall maintain an adequate reserve fund or funds for maintenance, repairs and replacement of those elements of the Common Areas that must be maintained, repaired or replaced on a periodic basis.

5.03 Monthly Assessments. The Board shall from time to time and in its discretion set the amount of the monthly assessment in an amount reasonably estimated by the Board to be sufficient to meet the obligations imposed by this Declaration and on the basis specified in Section 5.07 below.

5.04 Special Assessments. From and after the date set under Section 5.08 of this Article, the Association may levy special assessments for the purpose of defraying, in whole or in part: (a) any expense or expenses not reasonably capable of being fully paid with funds generated by monthly assessments; or (b) the cost of any construction, reconstruction, or unexpectedly required repairs or replacement of the Common Areas. Any such special assessment must be assented to by a majority of the votes of the membership which Owners present in person or represented

by proxy are entitled to cast at a meeting duly called for that purpose. Written notice setting forth the purpose of such meeting shall be sent to all Owners at least ten (10) but not more than thirty (30) days prior to the meeting date.

5.05 Quorum Requirements. The quorum at any meeting required for any action authorized by Section 5.04 above shall be as follows: At the first meeting called, the presence of Owners or of proxies entitled to cast sixty percent (60%) of all of the votes of each class of membership shall constitute a quorum. If a quorum is not present at the first meeting or any subsequent meeting, another meeting may be called (subject to the notice requirements set forth in Section 5.04) at which a quorum shall be one-half of the quorum which was required at the immediately preceding meeting. No such subsequent meeting shall be held more than forty-five (45) days following the immediately preceding meeting.

5.06 Special Assessment on Specific Residential Lots. In addition to the monthly assessment and any special assessment authorized pursuant to Section 5.04 above, the Board may levy at any time special assessments (a) on every Residential Lot especially benefitted by any improvement to adjacent roads, side-walks, planting areas or other portions of the Common Areas made on the written request of the Owner of the Residential Lot to be charged, (b) on every Residential Lot the Owner or occupant of which shall cause any damage to the Common Areas necessitating repairs, and (c) on every Residential Lot as to which the Association shall incur any expense for maintenance or repair work performed, or enforcement action taken, pursuant to Section 4.02(a) of Article IV or other provisions of this Declaration. The aggregate amount of any such special assessments shall be determined by the cost of such improvements, repairs, maintenance or enforcement action, including all overhead and administrative costs, and shall be allocated among the affected Residential Lots according to the special benefit or cause of damage or maintenance or repair work or enforcement action, as the case may be, and such assessment may be made in advance of the performance of work. If a special benefit arises from any improvement which is part of the general maintenance obligations of the Association, it shall not give rise to a special assessment against the Residential Lots benefitted.

5.07 Uniform Rate of Assessment. All monthly and special assessments authorized by Section 4.03 or 4.04 above shall be fixed at a uniform rate for all Residential Lots; provided, however, that until a Residential Lot has been both fully improved with a Living Unit and occupied for the first time for residential purposes, the monthly assessment applicable to such Residential Lot shall be ten percent (10%) of the monthly assessment which would otherwise apply to such Residential Lot. No amendment of this Declaration changing the allocation ratio of such assessments shall be valid without the consent of the Owners of all Residential Lots adversely affected.

5.08 Monthly Assessment Due Dates. The monthly assessments provided for herein shall commence as to all Residential Lots as of the second month following conveyance to the

Association of the Common Areas shown on the Plat as NR-3 and NR-6. At least fifteen (15) days prior to such commencement date and at least fifteen (15) days prior to the effective date of any change in the amount of the monthly assessments, the Association shall give each Owner written notice of the amount and first due date of the assessment concerned.

5.09 Certificate Regarding Payment. Upon the request of any Owner or prospective purchaser or encumbrancer of a Residential Lot and upon the payment of a reasonable fee to the Association to cover administrative costs, the Association shall issue a certificate stating whether or not payments of all assessments respecting such Residential Lot are current and, if not, the amount of the delinquency. Such certificate shall be conclusive in favor of all persons who rely thereon in good faith.

5.10 Effect of Nonpayment-Remedies. Any assessment not paid when due shall, together with interest and costs of collection, be, constitute, and remain a continuing lien on the affected Residential Lot. If any assessment is not paid within thirty (30) days after the date on which it becomes due, the amount thereof shall bear interest from the due date at the rate of one and one-half percent (1 1/2%) per month; and the Association may bring an action against the Owner who is personally liable or may foreclose its lien against the Residential Lot, or both. Any judgment obtained by the Association in connection with the collection of delinquent assessments and related charges shall include reasonable attorney's fees, court costs and every other expense incurred by the Association in enforcing its rights.

5.11 Subordination of Lien to Mortgages. The lien of the assessments provided herein shall be subordinate to the lien of any first Mortgage to a bank, savings and loan association, insurance company or other institutional lender; and the holder of any such first Mortgage or purchaser who comes into possession of a Residential Lot by virtue of the foreclosure of such Mortgage or the exercise of a power of sale under such Mortgage, or by deed in lieu of foreclosure, shall take free of such assessment lien as to any assessment which accrues or becomes due prior to the time such holder or purchaser takes possession of such Residential Lot; provided, that to the extent there are any proceeds of the sale on foreclosure of such Mortgage or by exercise of such power of sale in excess of all amounts necessary to satisfy all indebtedness secured by and owed to the holder of such Mortgage, the lien shall apply to such excess. No sale or transfer shall relieve any Residential Lot from the lien of any assessment thereafter becoming due.

ARTICLE VI

PROPERTY RIGHTS AND CONVEYANCES

6.01 Easement Concerning Common Areas. Each Owner shall have a nonexclusive right and easement of use and enjoyment in and to the Common Areas. Such right and easement shall be appurtenant to and shall pass with title to each Residential Lot

and in no event shall be separated therefrom. Any Owner may delegate the right and easement of use and enjoyment described herein to any family member, household guest, tenant, lessee, contract purchaser, or other person who resides on such Owner's Residential Lot. Notwithstanding the foregoing, no Owner shall have any right or interest in any easements forming a portion of the Common Areas except for the necessary parking, access, communication, utility, drainage and sewer purposes for which such easements are intended for use in common with others.

6.02 Form of Conveyancing; Leases. Any deed, lease, mortgage, deed of trust, or other instrument conveying or encumbering title to a Residential Lot shall describe the interest or estate involved substantially as follows:

Lot No. _____ of The Lakeview Heights Subdivision Phase _____ according to the Plat thereof recorded in Book _____, Page _____, of the Official Records of Weber County, which lot is contained within the Lakeview Heights Planned Unit Development identified in the "Amended Declaration of Covenants, Conditions, and Restrictions of the Lakeview Heights Planned Unit Development" recorded in Book _____ at Page _____, TOGETHER WITH a right and easement of use and enjoyment in and to the Common Areas described, and as provided for, in said Amended Declaration of Covenants, Conditions and Restrictions, and SUBJECT TO the covenants, conditions, restrictions, easements, charges and liens provided for in said Amended Declaration of Covenants, Conditions and Restrictions.

Whether or not the description employed in any such instrument is in the above-specified form, however, all provisions of this Declaration shall be binding upon and shall inure to the benefit of any party who acquires any interest in a Residential Lot. Any lease of a Residential Lot shall be in writing and shall provide that the terms of the lease shall be subject in all respects to the provisions of this Declaration and the Articles of Incorporation and By-laws of the Association and that any failure by the lessee to comply with the terms of such documents shall be a default under the lease.

6.03 Transfer of Title to Common Areas. Developer shall convey to the Association title to the various Common Areas free and clear of all liens (other than the lien of current general taxes and the lien of any nondelinquent assessments, charges, or taxes, imposed by governmental or quasi-governmental authorities), as each such Common Area is substantially completed.

6.04 Limitation on Easement. An Owner's right and easement of use and enjoyment concerning the Common Areas shall be subject to the following:

(a) The right of the Association to govern by rules and regulations the use of the Common Areas by the Owners so as to provide for the enjoyment of the

Common Areas by every Owner in a manner consistent with the preservation of quiet enjoyment of the Residential Lots by every Owner, including the right of the Association to impose reasonable user charges for the use of facilities (other than open areas) within the Common Areas and reasonable limitations on the number of guests per Owner who at any given time are permitted to use the Common Areas;

(b) The right of the Association to suspend an Owner's right to the use of any amenities included in the Common Areas for any period during which an assessment on such Owner's Residential Lot remains unpaid and for a period not exceeding ninety (90) days for any infraction by such Owner of the provisions of this Declaration or of any rule or regulation promulgated by the Board;

(c) The right of the City of North Ogden, the County of Weber, and any other governmental or quasi-governmental body having jurisdiction over the Property to enjoy access and rights of ingress and egress over and across any street, parking area, walkway, or open area contained within the Common Areas for the purpose of providing police and fire protection, transporting school children, and providing any other governmental or municipal service; and

(d) The right of the Association to dedicate or transfer any part of the Common Areas to any public agency or authority for such purposes and subject to such conditions as may be agreed to by the Association; provided that such dedication or transfer must first be assented to in writing by (1) all holders of first mortgages secured by Residential Lots and (2) the Owners of at least seventy-five percent (75%) of the Residential Lots (not including Residential Lots owned by Developer).

6.05 Reservation of Access and Utility Easements.

Developer reserves easements for access, electrical, gas, communications, cable television and other utility purposes and for sewer, drainage and water facilities (whether servicing the Property or other premises or both) over, under, along, across and through the Property, together with the right to grant to the City of North Ogden, the County of Weber or any other appropriate governmental agency or to any public utility or other corporation or association, easements for such purposes over, under, across, along and through the Property upon the usual terms and conditions required by the grantee thereof for such easement rights; provided, however, that such easement rights must be exercised in such manner as not to interfere unreasonably with the use of the Property by the Owners and the Association and those claiming by, through or under the Owners or the Association; and in connection with the installation, maintenance or repair of any facilities as provided for in any of such easements, the Property shall be promptly restored by and at the expense of the person owning and

exercising such easement rights to the approximate condition of the Property immediately prior to the exercise thereof.

6.06 Easements for Encroachments. If any part of the Common Areas as improved by Developer now or hereafter encroaches upon any Residential Lot or if any structure constructed by Developer on any Residential Lot now or hereafter encroaches upon any other Residential Lot or upon any portion of the Common Areas, a valid easement for such encroachment and the maintenance thereof, so long as it continues, shall exist. If any structure on any Residential Lot shall be partially or totally destroyed and then rebuilt in a manner intended to duplicate the structure so destroyed, minor encroachments of such structure upon any other Residential Lot or upon any portion of the Common Areas due to such reconstruction shall be permitted; and valid easements for such encroachments and the maintenance thereof, so long as they continue, shall exist.

6.07 Easements for Construction and Development Activities. Developer reserves easements and rights of ingress and egress over, under, along, across and through the Property and the right to make such noise, dust and other disturbance as may be reasonably incident to or necessary for the (a) construction of Living Units on Residential Lots, (b) improvement of the Common Areas and construction, installation and maintenance thereon of roads, walkways, buildings, structures, landscaping, and other facilities designed for the use and enjoyment of some or all of the Owners, (c) construction, installation and maintenance on lands within, adjacent to, or serving the Property of roads, walkways, and other facilities planned for dedication to appropriate governmental authorities, and (d) development, improvement, use and occupancy of all or any portion of the Undeveloped Land, whether or not such land is intended to be made part of the Property. The reservations contained in this paragraph shall expire January 12, 1999, said date being twenty (20) years after the date on which this Declaration was first filed for record in the Office of the County Recorder of Weber County, Utah.

ARTICLE VII

LAND USE RESTRICTIONS AND OBLIGATIONS

7.01 General Restrictions and Requirements.

(a) No improvement, excavation, fill or other work (including the installation of any wall or fence) *which in any way alters any Residential Lot from its* natural or improved state existing on the date such Residential Lot is first conveyed by Developer to a purchaser shall be made or done except upon strict compliance with the provisions of this Article VII and the provisions of Article VIII.

(b) Residential Lots shall be used only for single-family residential purposes, and no more than one house shall be constructed on any Residential Lot, except that an additional guest house or servants

quarters meeting the requirements of all applicable laws in effect from time to time may be constructed on a Residential Lot with the approval of the Design Committee. The facilities and improvements constituting part of the Common Areas shall be used only for the purposes and uses for which they are designed. Unimproved or landscaped portions of the Common Areas shall be used only for natural recreational uses which do not injure or scar the Common Areas or the vegetation thereof, increase the cost of maintenance thereof or cause unreasonable embarrassment, disturbance or annoyance to Owners in their enjoyment of their Residential Lots and Living Units or the Common Areas.

(c) No business, profession or trade shall be operated or maintained on any Residential Lot or in any structure thereon without the prior approval of the Board, except that this provision shall in no way limit or restrict Developer in its activities prior to the sale of all Residential Lots nor prevent Owners from renting their Living Units to tenants.

(d) No noxious or offensive activity shall be carried on upon any Residential Lot, nor shall anything be done or placed thereon which may be or become a nuisance, or cause unreasonable embarrassment, disturbance, or annoyance to other Owners in the enjoyment of their Residential Lots and Living Units or the Common Areas. Without limiting the foregoing, no exterior speakers, horns, whistles, bells or other sound devices, except security devices used exclusively to protect the security of the Residential Lot and Living Unit thereon, shall be placed or used upon any Residential Lot without the prior written approval of the Design Committee;

(e) No furniture, fixtures, appliances or other goods and chattels shall be stored in such a manner as to be visible from neighboring Residential Lots, roads or Common Areas.

(f) Each Residential Lot and all improvements located thereon shall be maintained by the Owner thereof in good condition and repair, and in such manner as not to create a fire hazard, all at the Owner's expense. All walls and fences on common boundary lines or corners separating two or more Residential Lots shall be maintained jointly in equal shares by the Owners of the Residential Lots abutting such fence or wall, provided that each Owner shall be responsible for painting the side of any party wall or fence facing his Residential Lot. No fence or wall in the nature of a fence shall be constructed of any material other than wood unless a variance from this requirement shall be granted by the Board as provided in Section 8.06 below.

(g) Vegetation within any Residential Lot shall be planted and maintained in good condition at the Owner's expense in such a manner as to prevent or retard shifting or erosion.

(h) All garbage, rubbish, and trash shall be kept in covered containers. In no event shall such containers be maintained so as to be visible from neighboring Residential Lots, roads or Common Areas. The storage, collection and disposal of garbage, rubbish and trash shall be in strict compliance with applicable laws and the rules and regulations of the Board.

(i) No Residential Lot shall be resubdivided.

(j) All improvements shall be constructed in accordance with applicable building line and setback provisions of zoning ordinances.

(k) All structures constructed on any Residential Lot or the Common Areas shall be constructed with new materials unless otherwise permitted by the Design Committee; and no used structures shall be relocated or placed on any Residential Lot.

(l) No structure or improvement having a height of more than two and one-half (2 1/2) stories shall be constructed on any Residential Lot; provided, however, that the height of a structure or improvement may exceed two (2) stories if permitted by law and if the Design Committee determines that the proposed height is compatible with the physical site involved and adjoining properties.

(m) Each Owner shall construct and maintain on his residential Lot and shall cause to be lighted from dusk to dawn of each night a lamp post of a style approved by the Design Committee and in a location such that it will provide street lighting of the area in front of the Residential Lot. There shall be no exterior lighting of any sort installed or maintained on a Residential Lot if the light source shines directly into a neighboring residence.

(n) No accessory structures shall be constructed, placed or maintained upon any Residential Lot prior to the construction of a Living Unit thereon, except by written permit of the Design Committee; provided that this restriction shall not prohibit (i) temporary construction shelters or facilities maintained during, and used exclusively in connection with, the construction of a Living Unit, or (ii) any structure upon any Residential Lot to be used by Developer as a sales office or otherwise in conjunction with the development of Residential Lots by Developer.

(o) No Owner of any Residential Lot, except Developer, shall build or permit the building thereon

of any structure that is to be used as a model or exhibit unless a permit to do so is first granted by the Design Committee.

(p) No structure shall be occupied until the same is substantially completed in accordance with plans and specifications previously approved by the Design Committee.

(q) No improvement which suffers partial or total destruction shall be allowed to remain on any Residential Lot in such a state for more than three (3) months after the date of such destruction.

(r) No outside toilet, other than self-contained portable toilet units used during construction, shall be placed or constructed on any Residential Lot or the Common Areas. All plumbing fixtures, dishwashers, garbage disposals, toilets, and sewage disposal systems shall be connected to a sewage system.

(s) All fuel tanks or similar storage facilities shall be constructed only with the prior written approval of the Board and in a manner approved by the Design Committee.

(t) No exterior antenna of any sort shall be installed or maintained on any Residential Lot except of a height, size and type approved by the Design Committee. No activity shall be conducted within the Property which interferes with television or radio reception.

(u) Outside clotheslines and other outside clothes drying or airing facilities shall be maintained in such a manner and in such location as not to be visible from roads.

(v) No drilling (except for a water well expressly permitted), refining, quarrying or mining operations of any kind shall be permitted upon any Residential Lot or the Common Areas, and no derrick, structure, pump or equipment designed for use in any such activity shall be erected, maintained or permitted on any Residential Lot or the Common Areas. There shall be no water well developed on any Residential Lot by the Owner thereof unless (i) a permit is first obtained from the Board and (ii) the Board first approves the location and facilities used in connection with such well.

(w) There shall be no blasting or discharge of explosives upon any Residential Lot or the Common Areas except as permitted by the Board; provided that this provision shall in no way limit or restrict Developer in its activities in connection with and during the development and sale of Residential Lots.

(x) No signs whatsoever shall be erected or maintained upon any Residential Lot, except:

(i) Such signs as may be required by legal proceedings,

(ii) Such signs as Developer may erect or maintain on a Residential Lot prior to sale and conveyance,

(iii) One "For Sale" or "For Rent" sign having a maximum face area of three (3) square feet and referring only to the premises on which it is situated.

(y) Except to the extent used by Developer in connection with and during the development and sale of Residential Lots, no mobile home or similar facility, shall be placed upon any Residential Lot, the Common Areas or adjoining public streets except for temporary storage in strict accordance with the rules and regulations of the Board. No stripped down, wrecked or junk motor vehicles shall be kept, parked, stored or maintained on any Residential Lot, the Common Areas or adjoining public streets. No large commercial vehicle shall be parked on any Residential Lot, public streets or the Common Areas except within an enclosed structure or a screened area which prevents view thereof from adjoining Residential Lots, roads and Common Areas unless such vehicle is temporarily parked for the purpose of serving such Residential Lot or Common Areas.

(z) Subject to further control by rules and regulations promulgated by the Board, only a reasonable number of generally recognized house pets and no other animals shall be kept on any Residential Lot or in any Living Unit. No animals shall be permitted on the Common Areas except generally recognized house pets when accompanied by and under the control of the persons to whom they belong and horses upon paths and other areas from time to time designated as bridle paths by the Association and upon areas developed or maintained as equestrian facilities by the Association.

(aa) There shall be no exterior fires, except fires started and controlled by the Association incidental to the maintenance and preservation of any portion of the Property and barbecue and incinerator fires contained within facilities or receptacles and in areas designated by the Board for such purposes. No Owner shall cause or permit any condition which creates a fire hazard, creates a nuisance, or is in violation of any fire prevention regulations.

(bb) There shall be no camping upon any Residential Lot or the Common Areas, except as permitted by

the Board by written license. There shall be no hunting or discharge of firearms on any Residential Lot or the Common Areas.

7.02 Exemption of Developer. The provisions of Section 7.01 of this Article shall not apply to any improvement or structure constructed on any Residential Lot or the Common Areas by Developer prior to the time that such Lot or Common Areas are conveyed by Developer to a purchaser or the Association, as the case may be; and the Developer shall have the right to use any Residential Lot or Living Unit owned by it, and any part of the Common Areas reasonably necessary or appropriate, in furtherance of any construction, marketing, sales, management, promotional or other activities designed to accomplish or facilitate improvement of the Common Areas or improvement and sale of all Residential Lots owned by Developer.

7.03 Enforcement of Land Use Restrictions. The following persons shall have the right to exercise or seek any remedy at law or in equity to enforce strict compliance with this Declaration:

- (a) Developer, so long as it has any interest in any of the Property or any of the Undeveloped Land;
- (b) Any Owner; or
- (c) The Association.

The prevailing party in an action for the enforcement of any provisions of this Declaration shall be entitled to collect court costs and reasonable attorney's fees.

7.04 Control of Secondary Water and Ground Water. The Weber-Box Elder Conservation District has agreed to install and operate a secondary water system which will provide water to the Property to be used for irrigation and watering. Water from such secondary water system shall not be used, and the Residential Lots and the Commons Areas shall not be irrigated or watered in such a manner as to create excessive ground water either on the Property or on other property located below the Property, or in such a manner as to create excessive runoff which causes unreasonable or unnecessary erosion to other Residential Lots or the Common Areas. The Association shall have the right to regulate or restrict the use of water from such secondary water system on the Property in such a manner as it may deem necessary or appropriate to control ground water or erosion from runoff, and shall have the right to delegate all or part of such authority to the City of North Ogden and to enter into such other agreements with the City of North Ogden or the Weber-Box Elder Water Conservation District as the Association may deem necessary or appropriate to provide for the control, maintenance and operation of such secondary water system and of the runoff resulting from the use of such system. In this regard, the Association and the Developer have entered into a certain Agreement dated June, 1980 with the City of North Ogden wherein and whereby, among other things, the Association has granted to the City of North Ogden the right to

restrict or deny the use of the secondary water system to the entire Property or to any particular Residential Lot in order to control or limit the amount of ground water that may be caused by the secondary water system, all upon the terms and conditions more particularly set forth in said Agreement which is hereby ratified and confirmed. Reference is hereby made to such Agreement for the particulars of such Agreement and any amendment thereof shall be made available by the Association to any Owner upon reasonable advance request for inspection and/or copying during reasonable business hours.

ARTICLE VIII

ARCHITECTURAL CONTROL

8.01 Organization of the Design Committee. There shall be a Design Committee consisting of not fewer than three (3) members. The members of the Design Committee need not be Owners. Developer shall have the right to appoint, remove and increase the number of members of the Design Committee; provided that such right shall vest in the Board upon the expiration of any continuous period of eighteen (18) months during which Developer at all times owns less than ten percent (10%) of the Residential Lots then covered by this Declaration. Developer may voluntarily relinquish control of the Design Committee to the Board at any time. Whenever the Design Committee consists of more than three (3) members, it may designate subcommittees, each consisting of at least three (3) members. Unless authorized by the Board, the members of the Design Committee shall not receive any compensation, but all members shall be entitled to reimbursement from the Association for reasonable expenses incurred in the performance of any Design Committee function.

8.02 Actions Requiring Approval. No fence, wall, Living Unit, accessory or addition to a Living Unit visible from the Common Areas or public streets within the Property, or landscaping or other improvement of a Residential Lot visible from the Common Areas or public streets within the Property shall be constructed or performed, nor shall any alteration of any structure on any Residential Lot, including a change in exterior color, be made, unless complete plans and specifications showing the nature, color, kind, shape, height, materials and location of the same shall first be submitted to and approved by the Design Committee. No lamp post or mail box shall be erected or installed unless the same shall be in accordance with styles and specifications established by the Board, or unless the same shall first be submitted to and approved by the Design Committee if it is not strictly in accordance with styles and specifications which have been established by the Board.

8.03 Standard of Design Review. Before granting any approval of plans and specifications, the Design Committee shall determine to its reasonable satisfaction that such plans and specifications (a) conform to all architectural standards contained in this Declaration and all further architectural standards promulgated from time to time by the Board and (b) provide for a structure, alteration, landscaping or other improvements in

harmony as to external design and location with surrounding structures and topography.

8.04 Design Committee Rules and Architectural Standards. The Board may, upon recommendation from the Design Committee, adopt and file as a matter of public record reasonable rules related to the efficient review of plans and specifications including requirements as to the number of sets of plans and specifications to be submitted, the fixing of a review or variance request fee not exceeding Fifty Dollars (\$50.00) per review request or variance request, the details to be shown on plans and specifications, and design guidelines consistent with this Declaration and covering such matters as setbacks, height limitations, restrictions on minimum or maximum size and quality of structures and improvements and other design standards and guidelines. Such rules and guidelines may include specific styles and specifications for mailboxes and lamp posts in order to provide for reasonable uniformity throughout the Property or parts thereof. No such rules, standards or guidelines shall apply to any structures or improvement constructed in accordance with plans and specifications previously approved by the Design Committee.

8.05 Approval Procedure. The Design Committee and any subcommittees thereof shall meet from time to time as necessary to perform the duties of the Design Committee. The vote or written consent of a majority of the Design Committee or any authorized subcommittee shall constitute the act of the Design Committee. Any plans and specifications submitted to the Design Committee shall be approved or disapproved within thirty (30) days after receipt by the Design Committee. If the Design Committee fails to take action within such period, the plans and specifications shall be deemed to be approved as submitted.

8.06 Variance Procedure. If plans and specifications submitted to the Design Committee are disapproved because such plans and specifications are not in conformity with applicable architectural standards, the party or parties making such submission may submit a request for variance to the Design Committee, which shall make a written recommendation of approval or disapproval of the requested variance to the Board. The Board shall approve or disapprove the request for variance in writing. If the Board fails to approve or disapprove a request for variance within sixty (60) days after such request is submitted to the Design Committee, such request shall be deemed to be approved.

8.07 Nonwaiver. The approval by the Design Committee of any plans and specifications for any work done or proposed shall not constitute a waiver of any right of the Design Committee to disapprove any similar plans and specifications.

8.08 Completion of Construction. Once begun, any improvements, construction, landscaping or alterations approved by the Design Committee shall be diligently prosecuted to completion in strict accordance with the plans and specifications approved by the Design Committee.

8.09 Exemption of Developer. The provisions of this Article shall not apply to any improvement, construction,

landscaping or alteration made or performed by Developer on any Residential Lot or portions of the Common Areas at any time during the twenty-year period following the date on which this Declaration is filed for record in the office of the County Recorder of Weber County, Utah.

8.10 Estoppel Certificate. Within thirty (30) days after written demand therefor is delivered to the Design Committee by any Owner and upon payment therewith to the Association of a reasonable fee from time to time to be fixed by the Board, the Design Committee shall issue an estoppel certificate in recordable form executed by any two of its members, certifying with respect to any Residential Lot of such Owner that as of the date thereof either (a) all improvements and other work made or done upon or within such Residential Lot by the Owner, or otherwise, comply with this Declaration, or (b) such improvements or work do not so comply, in which event the certificate shall also (i) identify the nonconforming improvements or work, and (ii) set forth the nature of such noncompliance. Any mortgagee or purchaser from the Owner shall be entitled to rely on such certificate with respect to the matters therein set forth.

8.11 Disclaimer of Liability. Neither the Design Committee, nor any member thereof acting in good faith shall be liable to the Association or to any Owner for any damage, loss, or prejudice suffered or claimed on account of (a) the approval or rejection of, or the failure to approve or reject, any plans, drawings and specifications, (b) the construction or performance of any work, whether or not pursuant to approved plans, drawings and specifications, (c) the development or manner of development of any of the Property, or (d) any engineering or other defect in approved plans and specifications.

ARTICLE IX

INSURANCE

9.01 Hazard Insurance. The Board shall procure and maintain from a company or companies holding a rating of "AA" or better from Best's Insurance Reports a policy or policies of hazard insurance in an amount or amounts equal to or exceeding the full replacement value (exclusive of the value of the land, foundations, excavation and other items normally excluded from coverage) of the common property owned by the Association (including all building service equipment, if any, and the like) with an Agreed Amount Endorsement or its equivalent, if available, or an Inflation Guard Endorsement and, if required by any first mortgagee of any Residential Lot, Demolition and Contingent Liability from Operation of Building Laws Endorsements, an Increased Cost of Construction Endorsement, an Earthquake Damage Endorsement, and such other endorsements as any first mortgagee of any Residential Lot shall reasonably require. Such insurance policy or policies shall name the Association as insured for the benefit of the Owners and shall afford protection, to the extent applicable, against at least the following:

- (a) Loss or damage by fire and other hazards covered by the standard extended coverage endorsement,

and by sprinkler leakage, debris removal, cost of demolition, vandalism, malicious mischief, windstorm, and water damage; and

(b) Such other risks as shall customarily be covered with respect to projects similar in construction, location and use.

9.02 Liability Insurance. The Board shall procure and maintain from a company or companies holding a rating of "AA" or better from Best's Insurance Reports a policy or policies (herein called "the Policy") of Public Liability Insurance to insure the Association, the Board and the Managing Agent and employees of the Association against claims for bodily injury and property damage arising out of the conditions of the Common Areas or activities thereon under a Comprehensive General Liability form. Such insurance shall be for such limits as the Board may decide, but not less than those limits customarily carried by properties of comparable character and usage in the County of Weber nor less than \$1,000,000 for personal injury and property damage arising out of a single occurrence, such coverage to include protection against water damage liability, liability for non-owned and hired automobiles, liability for property of others and such other risks as shall customarily be covered with respect to property similar in construction, location and use. The Policy shall contain a "Severability of Interest" endorsement which shall preclude the insurer from denying the claim of any Owner because of negligent acts of the Association or other Owners and a cross-liability endorsement pursuant to which the rights of the named insureds as between themselves are not prejudiced. The Policy shall provide that the Policy may not be cancelled by the insurer unless it gives at least thirty (30) days' prior written notice thereof to the Board and every other person in interest who shall have requested in writing such notice of the insurer. Any such coverage procured by the Board shall be without prejudice to the right of the Owners to insure their personal liability for their own benefit at their own expense.

9.03 Additional Insurance; Further General Requirements. The Board may also procure insurance which shall insure the Common Areas and the Association, the Board, the Managing Agent or the Owners and others against such additional risks as the Board may deem advisable. Insurance procured and maintained by the Board shall not require contribution from insurance held by any of the Owners or their mortgagees. Each policy of insurance obtained by the Board shall, if reasonably possible, provide: (a) a waiver of the insurer's rights of subrogation against the Association, the Owners and their respective directors, officers, agents, employees, invitees and tenants; (b) that it cannot be cancelled, suspended or invalidated, due to the conduct of any particular Owner or Owners; (c) that it cannot be cancelled, suspended, or invalidated due to the conduct of the Association or any directors, officer, agent, or employee of the Association without a prior written demand that the defect can be cured and (d) that any "no other insurance" clause therein shall not apply with respect to insurance maintained individually by any of the Owners.

9.04 Fidelity Coverage. The Association shall maintain fidelity coverage to protect against dishonest acts on the part of officers, director, managing agents, trustees and employees of the Association and all others who handle, or are responsible for handling, funds of the Association. Such fidelity bonds shall:

- (a) name the Association as an obligee;
- (b) be written in an amount sufficient to provide protection which is in no event less than one and one-half (1 1/2) times the Association's estimated annual operating expenses and reserves;
- (c) contain waivers of any defense based upon the exclusion of volunteers or persons who serve without compensation from any definition of "employee" or similar expression; and,
- (d) provide that they may not be cancelled or substantially modified (including cancellation for nonpayment of premium) without at least thirty (30) days' prior written notice to all first mortgagees of Residential Lots.

9.05 Review of Insurance. The Board shall periodically, and whenever requested by twenty percent (20%) or more of the Owners, review the adequacy of the Association's insurance program and shall report in writing the conclusions and action taken on such review to the Owner of each Residential Lot and to the holder of any mortgage on any Residential Lot who shall have requested a copy of such report. Copies of every policy of insurance procured by the Board shall be available for inspection by any Owner.

9.06 Residential Lots Not Insured by Association. The Association shall have no duty or responsibility to procure or maintain any fire, liability, extended coverage or other insurance covering any Residential Lot and acts and events thereon.

ARTICLE X

CONDEMNATION

10.01 If at any time or times the Common Areas or any part thereof shall be taken or condemned by any authority having the power of eminent domain, all compensation and damages shall be payable to the Board and shall be used promptly by the Board to the extent necessary for restoring or replacing any improvements on the remainder of the Common Areas. Upon completion of such work and payment in full therefor, any proceeds of condemnation then or thereafter in the hands of the Board which are proceeds for the taking of any portion of the Common Areas shall be disposed of in such manner as the Board shall reasonably determine; provided, however, that in the event of a taking in which any Residential Lot is eliminated, the Board shall disburse the portion of the proceeds of the condemnation award allocable

to the interest of the Owner of such Residential Lot in the Association and the Common Areas to such Owner and any first mortgagee of such Residential Lot, as their interests shall appear, after deducting the proportionate share of said Residential Lot in the cost of debris removal.

ARTICLE XI

RIGHTS OF FIRST MORTGAGEES

Notwithstanding any other provisions of this Declaration, the following provisions concerning the rights of first mortgagees shall be in effect:

11.01 Preservation of Regulatory Structure and Insurance. Unless the Owners of at least seventy-five percent (75%) of the Residential Lots (not including Residential Lots owned by Developer) and such Owners' first mortgagees, if any, shall have given their prior written approval, the Association shall not be entitled:

(a) by act or omission to change, waive or abandon any scheme of regulations, or enforcement thereof, pertaining to the architectural design or the exterior appearance of Living Units, the exterior maintenance of Living Units, the maintenance of party walls or common fences and driveways, or the upkeep of lawns and plantings on the Property.

(b) to fail to maintain fire and extended coverage on insurable portions of the Common Areas on a current replacement cost basis in an amount not less than one hundred percent (100%) of the insurable value (based on current replacement cost); or

(c) to use hazard insurance proceeds for losses to the Common Areas for other than the repair, replacement or reconstruction of improvements on the Common Areas.

This Section 11.01 may be amended as provided in Section 13.02 of Article XIII hereof, except that such amendment must be approved by a vote otherwise sufficient to authorize action under this subsection prior to such amendment.

11.02 Preservation of Common Area; Change in Method of Assessment. Unless the Association shall receive the prior written approval of (1) all first mortgagees of Residential Lots and (2) the Owners of at least seventy-five percent (75%) of the Residential Lots (not including Residential Lots owned by Developer) the Association shall not be entitled:

(a) by act or omission to seek to abandon, partition, subdivide, encumber, sell or transfer the Common Areas, except to grant easements for utilities and similar or related purposes, as reserved in Section 6.05 of Article VI hereof; or

(b) to change the ratio or method of determining the obligations, assessments, dues or other charges which may be levied against a Residential Lot or the Owner thereof.

This Section 11.02 may be amended as provided in Section 13.02 of Article XIII hereof, except that such amendment must be approved by a vote otherwise sufficient to authorize action under this subsection prior to such amendment.

11.03 Notice of Matters Affecting Security. The Board shall give written notice to any first mortgagee of a Residential Lot requesting such notice whenever:

(a) there is any default by the Owner of the Residential Lot subject to the first mortgage in performance of any obligation under this Declaration or the Articles or Bylaws of the Association which is not cured within sixty (60) days after default occurs; or

(b) damage to the Common Areas from any one occurrence exceeds \$10,000.00; or

(c) there is any condemnation or taking by eminent domain of the Residential Lot subject to the first mortgage or of the Common Areas; or

(d) any of the following matters come up for consideration or effectuation by the Association:

(i) abandonment or termination of the Planned Development established by this Declaration;

(ii) material amendment of the Declaration or the Articles or Bylaws of the Association; or

(iii) any decision to terminate professional management of the Common Areas and assume self-management by the Owners.

11.04 Notice of Meetings. The Board shall give to any first mortgagee of a Residential Lot requesting the same, notice of all meetings of the Association; and such first mortgagees shall have the right to designate in writing a representative to attend all such meetings.

11.05 Right to Examine Association Records. Any first mortgagee shall have the same right to inspect the books and records of the Association and receive audited financial statements as the Owner of the Residential Lot securing the mortgage; provided, that the foregoing shall not be deemed to impose upon the Association any obligation to cause its financial statements to be audited.

11.06 Right to Pay Taxes and Charges. First mortgagees may, jointly or singly, pay taxes or other charges which

are in default and which may or have become a charge against any portion of the Common Areas and may pay overdue premiums on hazard insurance policies, or secure new hazard insurance coverage on the lapse of a policy, for the Common Areas; and first mortgagees making such payments shall be owed immediate reimbursement therefor from the Association. Developer, for the Association as owner of the Common Areas, hereby covenants and the Association by acceptance of the conveyance of the Common Areas, whether or not it shall be so expressed in such conveyance, is deemed to covenant and agree to make such reimbursement.

11.07 Exemption from Any First Right of Refusal. Any first mortgagee who obtains title to the Residential Lot subject to the first mortgage pursuant to the remedies provided in the first mortgage, or by foreclosure of the first mortgage, or by deed or assignment in lieu of foreclosure, or by sale pursuant to any power of sale shall be exempt from any "right of first refusal" which would otherwise affect the Residential Lot.

ARTICLE XII

PARTY WALLS

12.01 General Rules of Law to Apply. Each wall which is built as a part of the original construction of the Living Units upon the Property and placed on the dividing line between the Residential Lots shall constitute a party wall, and, to the extent not inconsistent with the provisions of this Article, the general rules of law regarding party walls and liability for property damage due to negligence or willful acts or omissions shall apply thereto.

12.02 Sharing of Repair and Maintenance. The cost of reasonable repair and maintenance of a party wall shall be shared by the Owners who make use of the wall in proportion to such use.

12.03 Destruction by Fire or Other Casualty. If a party wall is destroyed or damaged by fire or other casualty, any Owner who has used the wall may restore it, and if the other Owners thereafter make use of the wall, they shall contribute to the cost of restoration thereof in proportion to such use without prejudice, however, to the right of any such Owners to call for a larger contribution from the others under any rule of law regarding liability for negligent or willful acts or omissions.

12.04 Weatherproofing. Notwithstanding any other provisions of this Article, an Owner who by his negligent or willful act causes the party wall to be exposed to the elements shall bear the whole cost of furnishing the necessary protection against such elements.

ARTICLE XIII

MISCELLANEOUS

13.01 Notices. Any notice required or permitted to be given to any Owner under the provisions of this Declaration shall

be deemed to have been properly furnished if delivered or mailed, postage prepaid, to the person named as the Owner, at the latest address for such person as reflected in the records of the Association at the time of delivery or mailing. Any notice required or permitted to be given to the Association may be given by delivering or mailing the same to the Managing Agent or the President of the Association. Any notice required or permitted to be given to the Design Committee may be given by delivering or mailing the same to the Managing Agent or any member of the Design Committee.

13.02 Amendment. Except as provided below in this Section 13.02 or in Sections 11.01 and 11.02 of Article XI or in Section 13.08 of Article XIII, this Declaration may be amended by:

(a) the affirmative vote of a majority of the Owners, and

(b) the written consent of Developer, if such amendment is adopted at any time when Developer holds Class B membership in the Association, and

(c) the filing of an instrument for record in the office of the County Recorder of Weber County, Utah, executed by any two officers of the Association and certifying that such amendment has been duly adopted by the affirmative vote of a majority of the Owners, and, if required, has the written consent of Developer.

Until all portions of the Undeveloped Land are annexed to the Property or until Developer's right to annex land to the Property otherwise terminates, Developer reserves the right to amend this Declaration insofar as it applies to any land annexed at or after the date of such amendment, provided that (a) any such amendment shall be set forth in a supplemental declaration annexing land to the Property, (b) no such amendment may affect the voting rights of Owners and (c) no such amendment may decrease the proportionate share of Association assessments which would otherwise be payable by the owners of the annexed lands. Developer may at any time amend this Declaration so as to limit, diminish or eliminate all or any of the reserved rights or benefits of Developer herein, provided that any such amendment shall be effective only after being filed of record in the office of the County Recorder of Weber County, Utah.

13.03 Consent in Lieu of Vote. In any case in which this Declaration requires for authorization or approval of a transaction the assent or affirmative vote of a stated percentage of the Owners, whether present or represented at a meeting, such requirement may be fully satisfied by obtaining, with or without a meeting, consents in writing to such transaction from Owners entitled to cast at least the stated percentage of all membership votes outstanding in connection with the class of membership concerned. The following additional provisions shall govern any application of this Section 13.03:

(a) All necessary consents must be obtained prior to the expiration of ninety (90) days after the first consent is given by any Owner.

(b) The total number of votes required for the applicable authorization or approval shall be determined as of the date on which the last consent is signed.

(c) Except as provided in the following sentence, any change in ownership of a Residential Lot which occurs after a consent has been obtained from the Owner thereof shall not be considered or taken into account for any purpose. A change in ownership which would increase the total number of Class A votes outstanding shall, however, be effective in that regard and shall entitle the new Owner to give or withhold his consent.

(d) Unless the consent of all Owners whose memberships are appurtenant to the same Residential Lot are secured, the consent of none of such Owners shall be effective.

13.04 Developer's Rights Assignable. All or any portion of the rights of Developer under this Declaration or in any way relating to the Property may be assigned.

13.05 Interpretation. The captions which precede the Articles and Sections of this Declaration are for convenience only and shall in no way affect the manner in which any provision hereof is construed. Whenever the context so requires, the singular shall include the plural, the plural shall include the singular, and any gender shall include both other genders. The invalidity or unenforceability of any portion of this Declaration shall not affect the validity or enforceability of the remainder hereof, which shall remain in full force and effect. The laws of the State of Utah shall govern the validity, construction and enforcement of this Declaration.

13.06 Covenants to Run With Land. This Declaration and all the provisions hereof shall constitute covenants to run with the land or equitable servitudes, as the case may be, and shall be binding upon and shall inure to the benefit of Developer, the Owners, all parties who hereafter acquire any interest in a Residential Lot, and their respective grantees, transferees, heirs, devisees, personal representatives, successors, and assigns. Each Owner or occupant of a Residential Lot or Living Unit shall comply with, and all interests in all Residential Lots or in the Common Areas shall be subject to, the terms of this Declaration and the provisions of any rules, regulations, agreements, instruments, and determinations contemplated by this Declaration. By acquiring any interest in a Residential Lot or in the Common Areas, the party acquiring such interest consents to, and agrees to be bound by, each and every provision of this Declaration.

13.07 Duration. The covenants and restrictions of this Declaration shall remain in effect until January 12, 1999,

said date being twenty (20) years from the date this Declaration was first filed in the office of the County Recorder of Weber County, Utah, after which time they shall be automatically extended for successive periods of ten (10) years each unless terminated by an instrument filed in the office of the County Recorder, executed by any two (2) officers of the Association, certifying that the Owners of at least seventy-five percent (75%) of the Residential Lots and their first mortgagees, if any, voted in favor of such termination. If any of the privileges, covenants or rights created by this Declaration would otherwise be unlawful or void for violation of (a) the rule against perpetuities or some analogous statutory provision, (b) the rule restricting restraints on alienation, or (c) any other statutory or common law rules imposing time limits, then the provision herein creating such privilege, covenant or right shall, in any event, terminate upon the expiration of twenty-one (21) years after the death of the last survivor of the now living lawful descendants of James Earl Carter, the former President of the United States.

13.08 Developer's Right to Amend. Until all portions of the Undeveloped Land are included in the Development, or until the right to expand the Development through the annexation of all or part of the lands constituting the Undeveloped Land terminates, whichever event first occurs, Developer shall have, and is hereby vested with, the right to unilaterally amend this Declaration as may be reasonably necessary or desirable: (a) To more accurately express the intent of any provisions of this Declaration in light of then existing circumstances or information; (b) To better insure, in light of then existing circumstances or information, workability of the arrangement which is contemplated by this Declaration; or (c) To facilitate the practical, technical, administrative, or functional annexation of any Undeveloped Land to the Property.

13.09 Effective Date. This Declaration and any amendment hereof shall take effect upon its being filed for record in the office of the County Recorder of Weber County, Utah.

13.10 Certificate of Compliance With Requirements for Amendment. The undersigned officers of the Association hereby certify that the foregoing Amended Declaration of Covenants, Conditions and Restrictions of Lakeview Heights Planned Unit Development was adopted with the written consent and approval of (1) all first mortgagees of Residential Lots, (2) the Owners of at least seventy-five percent (75%) of the Residential Lots (not including Residential Lots owned by Developer), and (3) the Developer.

"Association"

THE LAKEVIEW HEIGHTS
HOMEOWNERS ASSOCIATION

By: Dave Smith
President

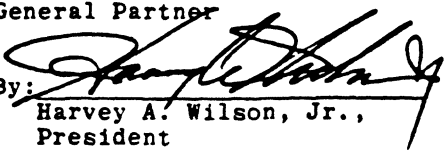
ATTEST:

Margie Blanton
Secretary

"Developer"

BEN LOMOND ESTATES

By Honofed Development Corp.,
General Partner

By: 
Harvey A. Wilson, Jr.,
President

STATE OF Utah)
: ss.
COUNTY OF Weber

On the 3rd day of June, 1981, personally appeared
before me Dave Smith and Margie Hanson,
who being by me duly sworn, did say that they are, respectively,
the President and Secretary of THE LAKEVIEW HEIGHTS HOMEOWNERS
ASSOCIATION, and that said instrument was signed on behalf of
said corporation by authority of a resolution of its Board of
Directors and the said Dave Smith and Margie Hanson
duly acknowledged to me that said corporation executed
the same.

My Commission Expires:
7-21-83


NOTARY PUBLIC
Residing at Ogden, Utah

STATE OF Hawaii)
City & : ss.
COUNTY OF Honolulu)

On the 17th day of March, 1981, personally appeared
before me HARVEY A. WILSON, JR., who being by me duly sworn did
say that he is the President of HONOFED CORP., a Hawaii corporation,
that said corporation is the managing general partner of BEN
LOMOND ESTATES, a general partnership, that the within and foregoing
instrument was signed by said corporation as general partner in and
on behalf of said BEN LOMOND ESTATES by and through said HARVEY A.
WILSON, JR., who duly acknowledged to me that said corporation
executed the same as general partner in and on behalf of said
BEN LOMOND ESTATES.

David A. Kyo Kame
NOTARY PUBLIC
~~Residing at~~ State of Hawaii
First Judicial Circuit

My Commission Expires:

3/05/82

NOTARY
PUBLIC