

1979

Glen T. Seal and Zelma T. Seal v. Mapleton City : Brief of Appellants

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

GLEN T. SEAL and ZELMA T. SEAL,

Plaintiff

vs.

MAPLETON CITY,

Defendant-Respondent.

Case No. 15,948

BRIEF OF APPELLANTS

Appeal from the Judgment of the Fourth Judicial
District Court of Utah County, State of Utah
Honorable David Sam, presiding

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IN THE SUPREME COURT OF THE STATE OF UTAH

GLEN T. SEAL and ZELMA T. SEAL,

Plaintiffs-Appellants

vs.

MAPLETON CITY,

Defendant-Respondents.

Case No. 15,948

BRIEF OF APPELLANTS

STATEMENT OF THE NATURE OF THE CASE

Plaintiffs commenced an action against the defendant, Mapleton City, by and through its mayor and board of city councilman requesting the lower court to adjudge and determine that plaintiffs were entitled to subdivide and build a proposed subdivision on their property in Mapleton City in accordance with the existing zoning ordinance; to determine that defendant's refusal to approve said subdivision preliminary and final plat and to issue appropriate building permits to be decreed as unreasonable, arbitrary, discriminatory, invalid and unconstitutional as applied to plaintiffs' property and that this constituted an unlawful taking without due process of law and without just compensation; that plaintiffs were entitled to damages as a result of said unlawful taking in the sum of \$150,000.00; asking in the alternative that plaintiffs are entitled to an order

compelling defendants to issue and approve all necessary plans and permits as required by law to enable plaintiffs to proceed with the lawful development of the proposed subdivision; to enjoin defendants from wrongfully refusing to issue the necessary approvals and permits; that the lower court adjudge that the plaintiffs are entitled to develop their proposed subdivision in accordance with Mapleton City Ordinances. Defendant denied any unlawful conduct; affirmatively alleged plaintiff was not entitled to compensation by reason of 10-7-77 & 78, UCA 1953; that said proposed preliminary plan was in conflict with the Mapleton City Master Plan in that two proposed Mapleton City streets had not been deleted by ordinance; that the refusal to approve said preliminary plan was lawful and that 63-30-3, UCA 1953, prohibited plaintiffs recovering damages; that plaintiff failed to comply with the Mapleton City Ordinances in its proposed plan; that the Mapleton City water works, water distribution and sewer systems were inadequate to provide the essential services for plaintiffs' proposed subdivision without jeopardizing existing owners using said utilities; that the acts of the defendants were in their sound discretion, not arbitrary, capricious or unlawful.

DISPOSITION IN LOWER COURT

The Honorable David Sam of the Fourth Judicial District Court for Utah County, without a jury, made and entered a decision dated June 14, 1978, which provided as follows:

"The court is impressed with the concept of the public welfare as being broad and inclusive and that the values it represents are spiritual as well as physical, aesthetic as well as monetary. It is in the opinion of the Court, within the power and province of City Councils in carrying out its governmental functions to determine that a community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled and that building permits, subdivisions and construction projects proceed in accordance with this concept.

Pursuant to this concept and the evidence presented in this case and applying the law that the court deems to be applicable, the Court finds as follows:

1. The acts complained of by the plaintiff against Mapleton City are deemed by the Court to be governmental functions and not proprietary in nature. Section 63-30-3 of the Utah Code Annotated, 1953, as amended is applicable in the instant case as well as the reasoning of the Court in Davis vs. Provo City Corp. 1 U2d 244, 265 P2d 415. Although a property owner such as the plaintiffs may feel that the acts of defendant were arbitrary, capricious and discriminatory as against them, the Court finds that their evidence does not sustain such a conclusion but is to the contrary. The Court finds that the evidence shows that if the City would have approved the plat and subdivision as presented by the plaintiff that such approval may have very well been a capricious, arbitrary and discriminatory act against all other citizens of the community and may have halted all other building projects except that of the plaintiffs. Such an act would have placed in plaintiffs the power to control the building within Mapleton City which would have been an improper delegation of the councils power and duty. Accordingly, the Court finds that the decision in the instant case by the City Council was proper, was not capricious, arbitrary or discriminatory and was for the common good of all the citizens of the community. It further appeared to the Court from the evidence before it that the administrative remedies available to plaintiff were not exhausted before suit was commenced. Plaintiffs' writ for Mandamus is denied.

2. The plaintiffs claim for damages has no foundation in the evidence. There is no evidence before the Court as to plaintiffs measure of damages. Counsel for plaintiff has so represented to the Court. Accordingly, plaintiffs claim for damages is ordered dismissed for lack of evidence.

Defendants Motion to Dismiss is granted, no cause of action, each party to bear their own costs.

As to the question of the ownership of the streets on the master plan as presented in question form by counsel for the plaintiff at the conclusion of argument on defendants Motion to Dismiss, the Court finds that this question is not properly before the Court, therefore the Court does not include in its ruling this question.

No Findings of Fact, Conclusions of Law or formal Judgment were prepared. They were not waived. Appellants commenced this appeal because of no Findings of Fact, Conclusions of Law or Judgment were submitted and appellant wished to perfect the appeal within the time allowed by law.

RELIEF SOUGHT ON APPEAL

Appellants seek reversal of the decision of the lower court; to have this court determine that appellants are entitled to a Writ of Mandamus ordering respondent herein to approve appellants' preliminary plat, final plat, comply with its own subdivision ordinance for the approval of appellants' proposed subdivision and to issue the necessary building permits for its construction; in the alternative, to determine that respondent's failure to perform its ministerial acts requested herein amount to an unlawful taking of plaintiffs'

property and rights and that plaintiff be entitled to compensation for said unlawful taking.

STATEMENT OF FACTS

On January 5, 1975, Mapleton City zoned appellants' property located in Mapleton City, Utah, from zone A-2 to RA-2, expressly for the purpose of a subdivision. Said RA-2 zone permits the construction of subdivisions. On May 18, 1975, a preliminary plat of the proposed Seals Estates Subdivision was approved by the Mapleton City Planning Commission subject to a condition that appellants work out the water problems for said proposed subdivision with Mapleton City Council. The approval and recommendations were forwarded to Mapleton City Council.

On June 3, 1975, appellants appeared before Mapleton City Council for the purpose of working out said water problems and to discuss the possibility of Mapleton City purchasing a water well owned by appellants herein and which is near the proposed subdivision; all pursuant to recommendations of the Planning Commission to resolve the water problem.

There are 6-inch water lines in front of and servicing the proposed subdivision (See Exhibits 4 and 7) Mapleton City has sufficient water for its present and growth needs, including proposed subdivision; distribution system for water is the only major problem. (TR 24) Mapleton City was responsible to

work out the water problem and petitioners were responsible only

for working out the problems within the proposed subdivision. (TR 67, Line 15 through 22) Several meetings were held and discussions had in which petitioners herein appeared before Mapleton City to work out the water problems but ultimately Mapleton City did not accept the tendered and offered solutions which would have solved the water problems of Mapleton City as it related to the proposed subdivision. (TR 88, Line 3) The feasibility of the water supply to the proposed subdivision was all in order; only the mechanics on how it was to be done remained to be solved by Mapleton City, which the city did not do. (TR 88, Lines 3-5)

Another reason that Mapleton City refused to approve appellants' preliminary plat was that the original preliminary plan contained two proposed but not constructed streets, namely proposed 1400 North Street and proposed 700 West Street. Mapleton City Street Plan contained a grid system of many streets that was not followed by Mapleton City, that were not surveyed and that interfered with many existing structures in Mapleton City. (Exhibit 2; Exhibit 18; TR 89, lines 13-15; TR 91, lines 9 through 13) Mapleton City had deleted seven (7) similar proposed roads located on Exhibit 2. On July 1, 1975, a public hearing was held to consider the regulation of Mapleton City Planning Commission to delete the two proposed streets to the Seal Subdivision. At a council meeting on July 1, 1975, by split vote, Mapleton City Council voted against deleting the proposed streets to the proposed subdivision. (Exhibit 44)

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Discussions were had during meetings with Mapleton City that an alternative preliminary plan utilizing the proposed streets would be submitted to Mapleton City. Mapleton City did not encourage or approve this proposal. A plan utilizing the proposed streets in the proposed subdivision was prepared. (Exhibit 39).

There were adequate roads for and to the proposed Seals Subdivision. (TR 178, Line 16-18) There was adequate water that could be delivered to the proposed Seal Subdivision if the homes were built within two to three years. (TR 180, Line 2-5) The Mapleton City Planning Commission determined that Mapleton City had enough water for the proposed Seal Subdivision and recommended that the Seal water well go into the city water system. (TR 219, Lines 5, 6 and Lines 19-23)

Another objection of Mapleton City was that there wasn't evidence of adequate sewage, drainage and facilities for the proposed subdivision. The approval of the preliminary plat does not require this be done for approval of the preliminary plat. (Mapleton City Ordinances-attached hereto as Exhibit "F") The Mapleton City analysis showed that there was sufficient drainage in the proposed Seals Subdivision for septic tanks to handle the proposed homes in said proposed subdivisions. (See Exhibit 44; -- TR 136, Line 22-26) Mapleton City Planning Commission used soil overlay map available to Mapleton City to determine the feasibility of the soil drainage and that Seal property was within good drainage feasibility area. (TR 136, Lines 26-29; Page 137, Line 10-16)

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The preliminary plat, approved by Mapleton City Planning Commission and disapproved by Mapleton City Commission fulfilled all of the statute ordinance requirements for a preliminary plat. (TR 227, Lines 25-27)

In an attempt to appease Mapleton City Council, appellants agreed to build a maximum of 5 homes per year for the first 3 years to solve the so-called water problems complained of by the City Council. (Exhibit 26; TR 195, Lines 16-30; Page 223, Lines 22-25) There was never any complaint made by Mapleton City to appellants herein as to the form or extent of the preliminary plan submitted for their proposed subdivision; this was the first time in the history of Mapleton City since the adoption of its ordinances in 1971 that any proposed subdivider was required to submit the detail and follow the procedure outlined by said ordinance; all previous subdividers had been authorized in a very informal manner and without most of the details and engineering information required by petitioners herein. (TR 181, Lines 8-10, Lines 15-18)

Approximately 6 other subdivisions have been submitted to Mapleton City Planning Commission and City Council and approved by Mapleton City prior to the filing of the proposed Seal Subdivision; one of which is within approximately 330 feet of the proposed Seal Subdivision. (TR 182, 183 and 184)

Mapleton City Ordinances required the approval of the preliminary plat before the preparation and filing of the final plat; that building permits may not be applied for or issued un-

after the final plat is approved and recorded as required by law. (See Mapleton City Ordinance attached hereto as Exhibit "F") Mapleton City Ordinances further provide for the Planning Commission to approve the preliminary plat and this must be done prior to the preparation of the filing of the final plat for approval, signatures and recording. (See Mapleton City Ordinances, a copy being attached hereto as Exhibit "F".

It was not until October 6, 1977, that Mapleton City, after numerous requests finally specified their specific objections they had to the preliminary plan of the proposed Seals Subdivision in the form of a letter. The reasons given in said letter were as follows:

- a) Proposed streets through "alleged master plan" had not been deleted.
- b) Approval of preliminary plat by Planning Commission was valid only after a maximum of 60 days (this even though final decision of preliminary plat was denied for an extended period of time and petitioners were not aware of the reasons for the final delay by the City Council until the time above described; and that Mapleton City Council failed to resolve the water problem.)
- c) City water supply and distribution system was not adequate to accommodate requirements of the proposed subdivision without impairing the service requirements of the present water needs.

Petitioners have complied with the ordinances of Mapleton City procedurally and otherwise and have tendered performance of any and other lawful requirements to complete the proposed subdivision and proceed with development of said

proposed subdivision. (See Complaint) During the progress of the trial in the lower court, Judge Sam suggested that the parties resolve the matter; at that time Mapleton City was expressly requested to specify what it would require of appellants herein to resolve the differences between the parties. At that time Mapleton City, through its council specified requirements. Pursuant to this, appellants made an offer to Mapleton City in accordance with the specifications of Mapleton City to resolve the matters that Mapleton City required. Mapleton City rejected the offer and the trial continued.

There is nothing in the Mapleton City Ordinances limiting the number of homes that can be built in a subdivision.

A R G U M E N T

POINT I

LOWER COURT ERRED IN RULING GOVERNMENTAL
IMMUNITY ACT, 63-30-3 UCA, 1953, APPLICABLE IN THIS CASE

Plaintiff and appellant sought compensation for the unlawful taking of plaintiffs' property for street purposes without compensation as an alternative relief to a Writ of Mandamus to approve the preliminary plat for the proposed subdivision. Although the word damages is used, as it is in the eminent domain statute, compensation was sought for the value of plaintiffs' land that Mapleton City claimed was to be used for street purposes. This land, for the proposed streets, is not dedicated, has not been surveyed, and is merely indicated on a master plan of Mapleton City for road development. There had been at least 7 deletions, some of them within two or three blocks of plaintiffs' property for its proposed subdivision. The Mapleton City Planning Commission recommended the deletion of the two proposed streets through plaintiffs' proposed subdivisions, but Mapleton City Council defeated an ordinance to delete said proposed streets. Mapleton City then turned right around and used as a justification for refusing to approve the preliminary plat, the fact that the first preliminary plat did not utilize the proposed streets. Subsequently, plaintiffs' tendered and offered to use the proposed streets in their preliminary plat and final plat for the proposed subdivision. All of this was rejected by

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Mapleton City.

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63-30-3, UCA 1953, states as follows:

"63-30-3. Immunity of governmental entities from suit. Except as may be otherwise provided in this act, all governmental entities shall be immune from suit for any injury which may result from the activities of said entities wherein said entity is engaged in the exercise and discharge of a governmental function."

It is interesting to note in the above statute that it relates to injuries. The Governmental Immunity Act was designed and intended to cover torts. Appellant does not seek damages for tort and has not from the inception of this matter; it seeks compensation for the taking of property for street purposes in the event the proposed subdivision is not approved by Mapleton City.

Under Title 78, Chapter 34, UCA 1953, the provisions for Eminent Domain are recited. Under 78-34-11 of said chapter, the words compensation and damages are used. Under Eminent Domain proceedings, the word damages is used repeatedly. The lower court has misconstrued the word "damages" in the plaintiff's Complaint as meaning damages for torts under the Governmental Immunity Act. This word, damages, was used to describe compensation for the taking of property for street purposes without just compensation. Appellant earnestly submits that the Governmental Immunity Act, Title 63, Chapter 30, of the Utah Code, does not apply to Eminent Domain matters and the taking of property without compensation. It is certain that this is not the intent nor the meaning of the Governmental Immunity Act.

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Appellants tendered evidence as to the value of the appellants' property that was taken for street purposes without compensation. (See Mapleton City Street Plan, Exhibit 2, which is attached hereto as Exhibit 2.)

POINT II

LOWER COURT ERRED IN RULING ACTS OF DEFENDANT WERE NOT ARBITRARY, CAPRICIOUS AND DISCRIMINATORY AGAINST PLAINTIFFS

The evidence is uncontroverted that Mapleton City deleted segments of the proposed streets on its master plan seven times prior to the requested deletion of the proposed streets on appellants' preliminary plat. The evidence is uncontroverted that these proposed streets were just lines that were not intended to be utilized by Mapleton City but was just used for design and planning purposes; that the major collector road system would be used; that the proposed streets on said plan conflicted with a church parking lot on the west side of the property, a house on the east side of the proposed subdivision and a house and other improvements on the south side of the proposed subdivision. The proposed street was not a major or collector road. The evidence is uncontroverted that there are adequate existing streets and there is no evidence that the amended plat road structure was inadequate.

The evidence is uncontroverted that the appellants herein had complied with all Mapleton City Ordinances

and statutory requirements for the amended plat.

That since appellants' preliminary plat was filed approximately 109 building permits including 19 building permits for subdivisional construction have been issued by Mapleton City; that in excess of 40 homes have been built within one-half mile radius of petitioners' proposed subdivision.

The evidence is uncontroverted that there is adequate water in Mapleton City to supply its present and future needs including proposed subdivision; that there are adequate water lines to appellants' proposed subdivision to supply the surrounding area and the homes in the proposed subdivision. Appellants' tendered and offered to construct only five homes a year to give Mapleton City additional time for its water distribution system.

The evidence is uncontroverted that the proposed subdivision property is suitable for septic tanks that appellants have and will comply with all state and city ordinances for septic tanks and sewer facilities, including the water distribution system within the proposed subdivision itself.

The evidence is uncontroverted that all ordinances and statutory requirements have been met for the preliminary plat and the appellants have offered to use their own water from their own well for the proposed subdivision plat. Appellants have

tendered performance of all state statutes and Mapleton City

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Ordinances regarding subdivisions

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In the case of Salt Lake County vs. Kartchner, 1976,
552 P2d 130, the Utah Supreme Court held as follows:

"Existence of six similar violations of set-back zoning ordinance with the vicinity of carport erected in violation of ordinance indicated that ordinance had been enforced in discriminatory manner and constituted sufficient ground for denial of injunction requiring removal of carport."

Appellant earnestly submits that the facts in this case clearly evidence arbitrary, capricious and discriminatory enforcement of Mapleton City ordinances by the respondents herein.

Black's Law Dictionary gives the following definitions:

"Arbitrary Without fair, solid and substantial cause; that is, without cause based upon the law."

"Discrimination In constitutional law, the effect of a statute which confers particular privileges on a class arbitrarily selected from a large number of persons, all of whom stand in the same relation to the privileges granted and between whom and those not favored no reasonable distinction can be found. In general, a failure to treat all equally; favoritism."

Appellant earnestly submits that the conduct of respondent herein is arbitrary and discriminatory as against these plaintiffs and that the facts of this case come within the definitions above described.

POINT III

LOWER COURT ERRED IN RULING ADMINISTRATIVE REMEDIES AVAILABLE TO PLAINTIFF WERE NOT EXHAUSTED BEFORE SUIT.

A copy of Chapter 6, Mapleton City Ordinances, Subdivisions, is attached hereto as Exhibit "F", and that are

applicable in the case now pending before this court.

9-6-3 of the Mapleton City Ordinances describe procedure to be followed and are as follows:

"9-6-3. PROCEDURE:

(a) At least one week before a Planning Commission meeting, three copies of the preliminary subdivision plat shall be submitted to the Planning Commission for examination, and subsequent approval or disapproval.

(b) After receiving preliminary approval of the plat, permanent survey monuments shall be set to finished grade at critical points in the subdivision and City approved drawings for the construction of necessary sewer and water systems shall be prepared and filed with the Planning Commission. Where such work or part of it completed by the City, the subdivider shall reimburse the City for such engineering time and expense.

(c) Within 60 days after receiving approval of a preliminary plat by the Planning Commission, the original and three copies of the final plat shall be submitted to the Planning Commission for final approval.

(d) After receiving final approval by the Planning Commission, the original and one copy of the final plat shall be presented to the City Council for its approval.

(e) Following approval by the City Council, the final plat, as approved, may be legally recorded in compliance with state statutes. Approval of the final plat by the City Council shall be null and void if the plat is not recorded within ninety (90) days after the date of such approval, unless application for an extension of time is made, in writing, during said ninety (90) day period to the City Council, and granted, or unless the subdivision creates less than ten (10) lots and does not require recordation under the provisions of Section 57-5-3, Utah Code Annotated, 1953, as amended."

The preliminary plat requirements for subdivision purposes are described as follows:

"9-6-4. PRELIMINARY PLAT:

(A) the preliminary plat shall be drawn to a scale not smaller than 100 feet to the inch and shall contain the following information.

- (1) The proposed name of the subdivision.
- (2) The location of the subdivision as forming a part of the larger tract or parcel where the plan submitted covers only a part of the subdivider's tract or only a part of the larger vacant area. In such case, a sketch of the prospective future street system of the unplanned parts shall be submitted and the street system of the part to be presently subdivided shall be considered in the light of adjustments and connections with the future street system of the larger area.
- (3) Sufficient information to locate accurately the property shown on the plan.
- (4) The names and addresses of the subdivider, engineer, or surveyor of the subdivision, and the owners of the land immediately adjoining the land to be subdivided.
- (5) Contour map at appropriate intervals where required by the Planning Commission or City Council.
- (6) The boundary lines of the tracts to be subdivided.
- (7) The location, widths, and other dimensions of all existing or platted streets and other important features such as railroad lines, water courses, exceptional topography, and buildings within the tract or within 200 feet of the tract to be subdivided.
- (8) Existing sanitary sewers, storm drains, water supply mains, and culverts within the tract or within 100 feet thereof.
- (9) The location, widths, and other dimensions of proposed streets, highways, easements, parks and other open spaces and lots with proper labeling of spaces to be dedicated to the public.

(10) North point, scale, and date.

(B) The Planning Commission or the City Council may approve or reject the preliminary plat or grant approval on condition stated. Approval of the preliminary plan by the Planning Commission or City Council shall not constitute final acceptance of the subdivision by the Planning Commission or City Council. One copy of the approved preliminary plan, signed by the Chairman of the Planning Commission, shall be retained in the office of the Planning Commission. One signed copy shall be given to the subdivider. Receipt of this signed copy shall be authorization for the subdivider to proceed with the preparation of plans and specifications for the minimum improvements required by the terms of this ordinance and with the preparation of the final plat. Prior to construction of any improvements required under the terms of this ordinance or to the submission of any bond, the subdivider shall furnish to the City Council all plans, information, and data necessary for said improvements. These plans shall be examined by the City Council and shall be approved if determined to be in accordance with the requirements of this ordinance. No construction of buildings shall be begun until after recording of the final plat when recording is required by law and with any other requirements of the Zoning Ordinances of this City.

(C) Approval of the preliminary plan by the Planning Commission shall be valid for a maximum period of sixty (60) days after approval, unless upon application of the developer, the Planning Commission may grant an extension. If the final plat has not been recorded within the time required by this ordinance, the preliminary plan must again be submitted to the Planning Commission for re-approval. The preliminary approval of a large tract subdivision shall not be voided, however, provided the final plat of the first section is submitted for final approval within the time limited by this ordinance or any extension of such time previously granted."

In a case before the court, as provided in Mapleton City Ordinances, the Mapleton City Planning Commission approved the preliminary plat considered upon the Mapleton City Council to work out the water problems for the proposed subdivision.

The matter was forwarded to the Mapleton City Council to solve the water problems. Mapleton City did not solve the water problems even though, during the negotiations, appellants offered to use their own water on their subdivision; and even through appellants offered to give water rights to Mapleton City and to give Mapleton City, in addition, an option upon an important and valuable well.

There is no provision in the Mapleton City Ordinances for appealing the matter. Under the terms of the ordinances, the final plat cannot be approved and is not required to be submitted, until the preliminary plat is unconditionally approved.

There is no appellate procedure for the refusal of either the Planning Commission or the Mapleton City Council to unconditionally approve the preliminary plat. During arguments in the lower court, counsel for the respondents suggested that Mapleton City Council was the ultimate body in the city. In this case, this matter had been approved by the Mapleton City Planning Commission, as provided by the City Ordinances and then referred to the Mapleton City Council for it to work out the water problems. The Mapleton City Planning Commission has jurisdiction to approve the preliminary plat. Finally, the Mapleton City Council did vote upon the preliminary plat but failed to give any reasons for its negative vote and it failed to resolve the water problems and refused to accept a gift of water rights and an option on other water rights to resolve and solve the problem. There was no other place for appellants to go. They had not been advised by Mapleton City of any

inadequacy in their preliminary plat. The only other recourse was for a Writ of Mandamus before the court, which appellants did.

Appellants earnestly submit they complied with all of the ordinance and statutory requirements for the approval of their preliminary plat in order that they could conclude and file the final plat for the proposed subdivision, all as required by law. Under Mapleton City Ordinances, appellants could not apply for buildings permits until the final plat had been approved.

POINT IV

LOWER COURT ERRED IN DENYING APPELLANT A WRIT OF MANDAMUS TO COMPEL MINISTERIAL ACT

Appellants sought a court order to mandamus Mapleton City to approve the preliminary plat, as amended and tendered, complying with all Mapleton City Ordinances and state statutes applicable. This was to require Mapleton City to perform a MINISTERIAL ACT.

In 83 Am Jur 2d, Zoning and Planning, Section 167, beginning on Page 669 states as follows:

"Section 167. Approval or Disapproval of Plat.

Subdivision-control laws, usually provide for the approval or disapproval of the subdivision plat after it is reviewed by the specified authority. The authority to approve or disapprove subdivision plats, which is the basic function of subdivision control, usually is vested either in the planning board or commission, or in the local legislative body. The action of a reviewing authority in approving a subdivision plat within the limits conferred by legislative enactment will not be interfered with by the courts unless it is found to be unreasonable, arbitrary, capricious, or

in violation of statutory or constitutional provisions.

On the other hand, the reviewing authority may disapprove a plat which does not comply with the subdivision control requirements, or if the developer fails to comply with the reasonable conditions. The reviewing authority may disapprove a plat which would, under pertinent zoning regulations, create sub-standard laws. However, the reviewing authority may not act arbitrarily in disapproving a subdivision plat, and under some subdivision-control laws, the reviewing authority must state its reasons if it disapproves a subdivision plat. Furthermore, it has been held that if a subdivider complies with all the requirements of the subdivision-control laws and regulations, approval of the plat becomes a MINISTERIAL ACT and the plat may not be disapproved, and especially not for reasons which have nothing to do with the intent and purposes of subdivision control."

Under the above Am Jur citation, it cites the following cases:

- a) People ex rel. Jackson & Morris, Inc., vs. Smuczynski, Illinois, 102 NE2d 168.

"The act of approval by Village Board when statutes and ordinances have been complied with in making plat or subdivision, is ministerial and may be enforced by a mandamus."

- b) Knutson vs. State, Indiana, 157 NE2d 469.

"Although public policy requires municipal control of area development, nevertheless the authority of a town to deny a land owner the right to develop his property by refusing to approve the plat of such development is by statute made to rest upon specific standards of the statute or an implementing ordinance and thereafter approval or disapproval of the plat on the basis of controlling standards is a MINISTERIAL ACT."

- c) Levitt & Sons, Inc., vs. Freehold, New Jersey, 295 A2d 397.

"Under the statute, the function of a municipal body in respect to approval of plats is administrative

and if the plat conforms to the requirements of the regulations, it must be approved, so that the municipality may not withhold approval of a subdivision plat even though the builder in the past has done an inadequate job in construction of homes."

- d) Daley Construction vs. Planning Board of Randolph, Massachusetts, 163 NE2d 27.

"A subdivision plan admittedly proper with an adequate water pipe layout approved by appropriate town officers and boards and filed in compliance with town bylaws and with applicable provisions of general statutes may not be denied approval by a planning board on the ground that its execution may accentuate an existing town water shortage."

It is clear from the above authorities that the approval of a preliminary plat is a ministerial act and may not be withheld unless the plat is not in compliance with the city ordinances. The evidence is uncontroverted that the preliminary plat was in conformity with the city ordinances.

POINT V

APPELLANTS ENTITLED TO COMPENSATION FOR TAKING OF PROPERTY FOR STREET PURPOSES. ISSUE WAS PROPERLY BEFORE LOWER COURT.


The Complaint in the lower courts specifically asked for compensation in the alternative for the court not issuing a Writ of Mandamus. Evidence was tendered during the trial for the value of the property taken for the proposed streets on the Mapleton City Master Plan in which traversed the proposed subdivision. Under Title 78, Chapter 34, UCA 1953, there are provisions for compensation for the taking of property under the

eminent domain power. This was the alternative relief appellants are seeking.

C O N C L U S I O N

The lower court erred in failing to grant appellants' Writ of Mandamus to compel Mapleton City to perform the ministerial act of approving the preliminary plat of appellant unconditionally when appellant had complied with all city ordinances and state statutes regarding the proposed subdivision. This is not a case of interfering with the legislative power of a municipality; it is merely compelling the city to comply with its own ordinances. The refusal of Mapleton City to unconditionally approve the preliminary plan, enable appellants to file the final plat for signatures and recording and then apply for building permits for the proposed subdivision is arbitrary and under the facts of this case, discriminatory; appellants have not been treated as other residents of Mapleton City as the law requires. The Governmental Immunity Act does not apply in this case; there being no claim for tortious damages. Appellants had exhausted all administrative remedies, there being no other entity within Mapleton City that had jurisdiction, the board of adjustments not being applicable in this case. Appellants are entitled to compensation for unlawful taking of their property for the proposed streets as an alternative remedy. The ruling of the lower court should be reversed and remanded.

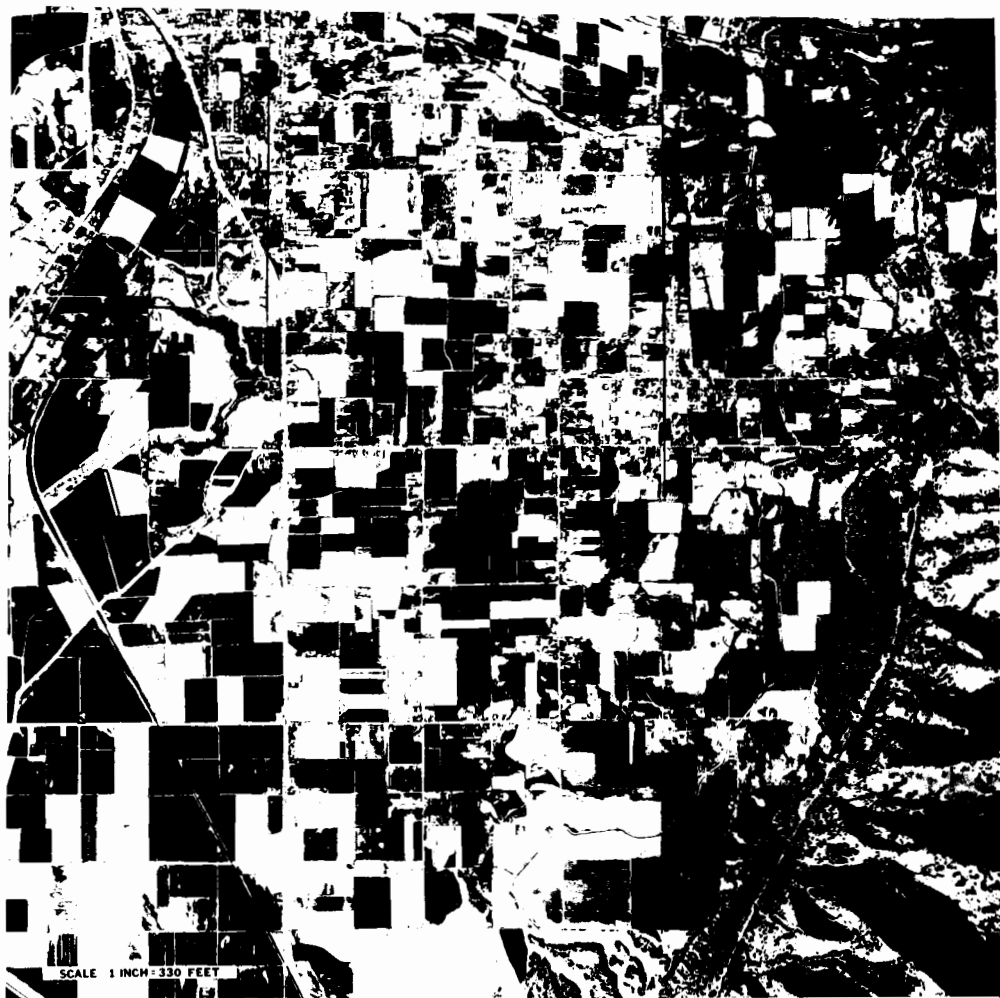
Respectfully submitted this 8th day of December, 1978.


THOMAS S. TAYLOR, for
CHRISTENSEN, TAYLOR & MOODY
Attorneys for Appellants
55 East Center Street
Provo, Utah 84601

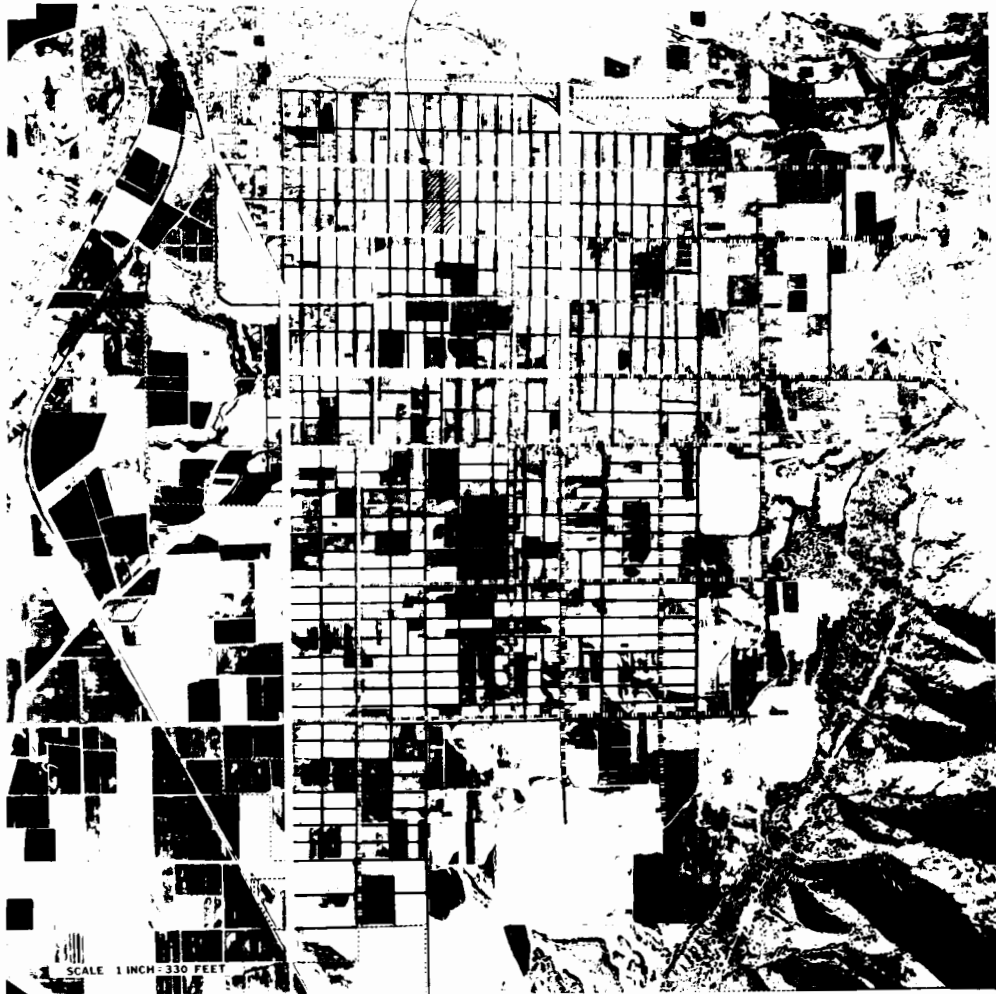
CERTIFICATE OF MAILING

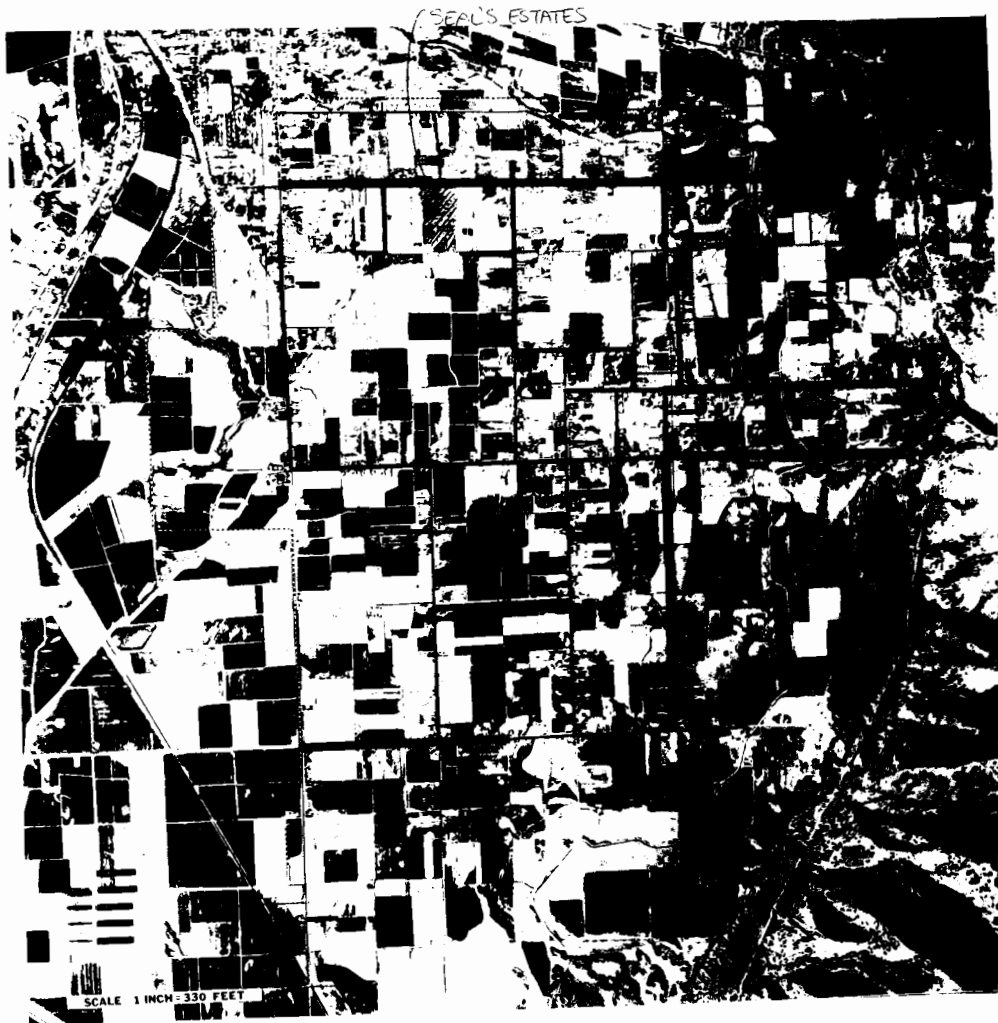
This is to certify that two true and exact copies of the foregoing Brief of Appellant were mailed to V. Pershing Nelson, Attorney for Respondent, to his office located at 43 East 200 North, Provo, Utah 84601, postage prepaid this 8th day of December, 1978.


THOMAS S. TAYLOR



SCAL'S ESTATES







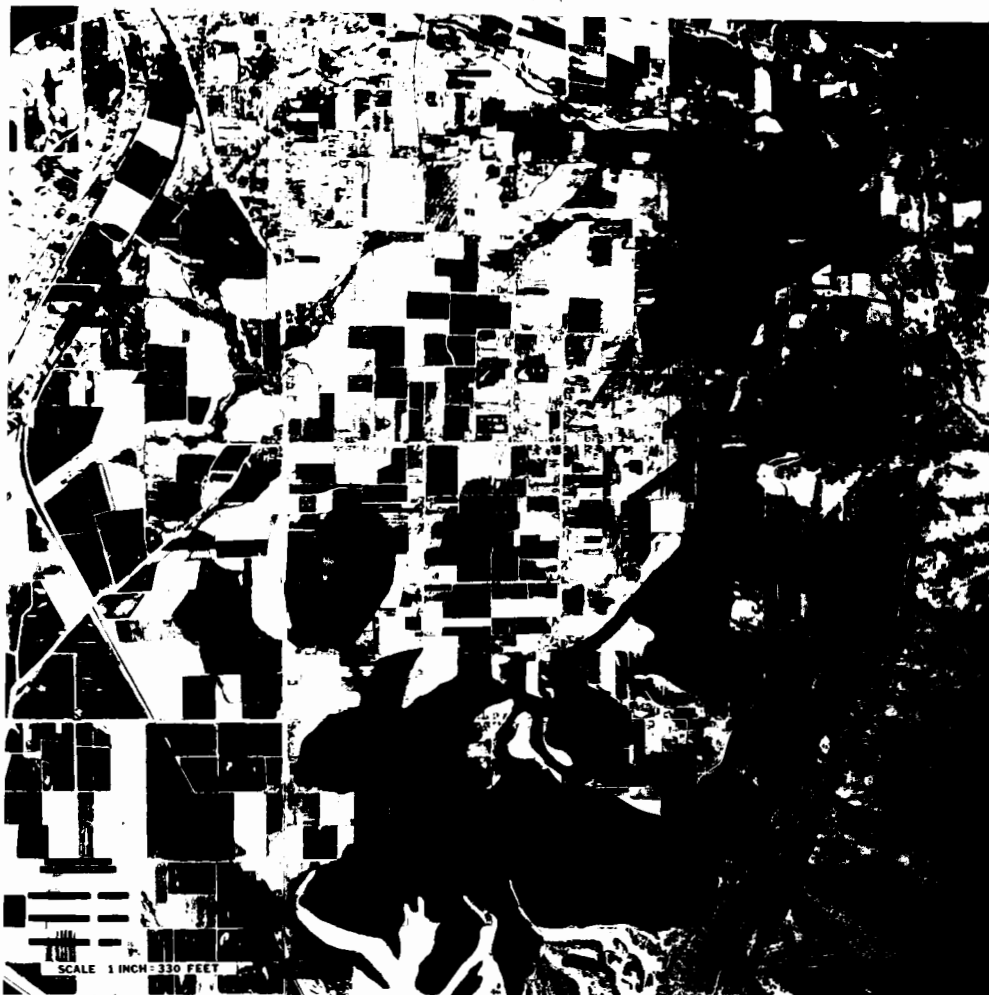


EXHIBIT 5 SOIL SURVEY

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Machine-generated OCR, may contain errors.

EXHIBIT "F"

9-6-1

9-6-1

CHAPTER 6

SUBDIVISIONS

SECTION:

- 9-6-1: Definitions
- 9-6-2: Sale of Plat or Plots Prior to Approval and Recordation Prohibited
- 9-6-3: Procedure
- 9-6-4: Preliminary Plat
- 9-6-5: Final Plat
- 9-6-6: Exception to Requirement of Recording Final Plat
- 9-6-7: Design Standards
- 9-6-8: Area for School, Recreational, or Other Public Uses
- 9-6-9: Improvements
- 9-6-10: Guarantee of Improvements - Bond
- 9-6-11: Engineering and Inspection Fees
- 9-6-12: Enforcement and Permits
- 9-6-13: Validity of Ordinance
- 9-6-14: Penalty
- 9-6-15: Protective Covenants
- 9-6-16: Easements and Street Dedication
- 9-6-1: DEFINITIONS: The following terms shall have the meanings respectively ascribed to them by this section:

- (A) Subdivision. The word "subdivision" means the division of a tract or lot or parcel of land owned as an undivided tract by one individual or by joint tenants or tenants in common or by the entirety into three or more lots, plots, sites, or other divisions of land of two and one-half acres each, or less, in area, for the purpose, whether immediate or future, of sale, or of building development; provided, however, that this term shall not include a bona fide division or partition of agricultural land for agricultural purposes into lots or parcels which are three acres or more in area and not for development purposes, and as the result of which no dedication of any street or road is required to serve any of the resultant lots or parcels; nor shall it include or apply to the allocation of land in the settlement of an estate or to a court decree for the distribution of property. For the purposes of this ordinance, a subdivision of land is deemed to occur when:

(1) There is a division of land into three or more lots or tracts with any resulting lot or tract containing less than two and one-half acres, or

(2) A dedication of a road, highway, or street occurs through a tract of land regardless of area, which results in a division of the land into three or more lots or parcels of less than two and one-half acres in area, or

(3) A re-subdivision is made of land previously divided or platted into lots, sites, or parcels.

- (B) Subdivider. The word "subdivider" shall mean any person or group of persons or business entity dividing or proposing to divide land so as to create a subdivision.

- (C) Plat. "Plat" means a map or drawing on which the subdivision plan or pro-

other requirements as are necessary to effect compliance with this ordinance.

9-6-2: SALE OF PLAT OR PLOTS PRIOR TO APPROVAL AND RECORDATION PROHIBITED: No person shall subdivide any tract of land which is located wholly or in part within the corporate limits of Mapleton City, nor shall any person sell, exchange, offer for sale, purchase, or offer to purchase any parcel of land which is any part of a subdivision of a larger tract of land, nor shall any person offer for recording any deed conveying such parcel of land or any interest therein unless there shall first be recorded a plat of such land which has been prepared and recorded in compliance with the requirements of this ordinance.

9-6-3: *Requirement*
PROCEDURE: Before subdividing any tract of land, a subdivider shall follow the procedure outlined below:

- (A) At least one week before a Planning Commission meeting, three copies of the preliminary subdivision plat shall be submitted to the Planning Commission for examination, and subsequent approval or disapproval.
- (B) After receiving preliminary approval of the plat, permanent survey monuments shall be set to finished grade at critical points in the subdivision and City approved drawings for the construction of necessary sewer and water systems shall be prepared and filed with the Planning Commission. Where such work or part of it is completed by the City, the subdivider shall reimburse the City for such engineering time and expense.
- (C) Within 60 days after receiving approval of a preliminary plat by the Planning Commission, the original and three copies of the final plat shall be submitted to the Planning Commission for final approval.
- (D) After receiving final approval by the Planning Commission, the original and one copy of the final plat shall be presented to the City Council for its approval.
- (E) Following approval by the City Council, the final plat, as approved, may be legally recorded in compliance with state statutes. Approval of the final plat by the City Council shall be null and void if the plat is not recorded within ninety (90) days after the date of such approval, unless application for an extension of time is made, in writing, during said ninety (90) day period to the City Council, and granted, or unless the subdivision creates less than ten (10) lots and does not require recordation under the provisions of Section 57-5-3, Utah Code Annotated, 1953, as amended.

9-6-4: PRELIMINARY PLAT:

- (A) The preliminary plat shall be drawn to a scale not smaller than 100 feet to the inch and shall contain the following information.
 - (1) The proposed name of the subdivision.
 - (2) The location of the subdivision as forming a part of the larger tract or parcel where the plan submitted covers only a part of the subdivider's tract or only a part of the larger vacant area. In such case, a sketch of the prospective future street system of the unplanned parts shall be submitted and the street system of the part to be presently subdivided shall be considered in the light of adjustments and connections with the future street system of the larger area.

(3) Sufficient information to locate accurately the property shown on the plan.

(4) The names and addresses of the subdivider, engineer, or surveyor of the subdivision, and the owners of the land immediately adjoining the land to be subdivided.

(5) Contour map at appropriate intervals where required by the Planning Commission or City Council.

(6) The boundary lines of the tracts to be subdivided.

(7) The location, widths, and other dimensions of all existing or platted streets and other important features such as railroad lines, water courses, exceptional topography, and buildings within the tract or within 200 feet of the tract to be subdivided.

(8) Existing sanitary sewers, storm drains, water supply mains, and culverts within the tract or within 100 feet thereof.

(9) The location, widths, and other dimensions of proposed streets, highways, easements, parks, and other open spaces and lots, with proper labeling of spaces to be dedicated to the public.

(10) North point, scale, and date.

(B) The Planning Commission or the City Council may approve or reject the preliminary plan or grant approval on condition stated. Approval of the preliminary plan by the Planning Commission or City Council shall not constitute final acceptance of the subdivision by the Planning Commission or City Council. One copy of the approved preliminary plan, signed by the Chairman of the Planning Commission, shall be retained in the office of the Planning Commission. One signed copy shall be given to the subdivider. Receipt of this signed copy shall be authorization for the subdivider to proceed with the preparation of plans and specifications for the minimum improvements required by the terms of this ordinance and with the preparation of the final plat. Prior to construction of any improvements required under the terms of this ordinance or to the submission of any bond, the subdivider shall furnish to the City Council all plans, information, and data necessary for said improvements. These plans shall be examined by the City Council and shall be approved if determined to be in accordance with the requirements of this ordinance. No construction of buildings shall be begun until after recording of the final plat when recording is required by law and with any other requirements of the Zoning Ordinances of this City.

(C) Approval of the preliminary plan by the Planning Commission shall be valid for a maximum period of sixty (60) days after approval, unless upon application of the developer, the Planning Commission may grant an extension. If the final plat has not been recorded within the time required by this ordinance, the preliminary plan must again be submitted to the Planning Commission for re-approval. The preliminary approval of a large tract subdivision shall not be voided, however, provided the final plat of the first section is submitted for final approval within the time limited by this ordinance or any extension of such time previously granted.

9-6-5: FINAL PLAT:

(A) After compliance with the provisions of this ordinance relating to the preliminary plat, the subdivider shall submit to the Planning Commission a final plat with two black and white prints of the subdivision. The final plat shall consist of a sheet of approved tracing linen to the outside or trimline dimensions of 24 x 30 inches and a border line of the plat shall be drawn in heavy lines leaving a space of at least one and one-half inch margin on all four sides. The plat shall be so drawn that the top of the drawing faces North. All lines, dimensions, and markings shall be made on the tracing linen with approved black, water-proof India drawing ink. The plat shall be made to a scale large enough to clearly show all details, in any case not smaller than 100 feet to the inch, and workmanship on the finished drawing shall be neat, clear-cut, and readable. The plan shall be signed by all parties mentioned herein duly authorized and required to sign and shall contain the following information:

- (1) Subdivision name, approved by the City Council and the County Recorder, and the general location of the subdivision, in bold letters at the top of the sheet.
- (2) A north point and a scale of the drawing.
- (3) Accurately drawn boundaries, showing the proper bearings and dimensions of all boundary lines of the subdivision properly tied to public survey monuments. These lines should be slightly heavier than streets and lot lines.
- (4) The names, widths, lengths, bearings, and curb data on center lines and property lines of proposed streets, alleys, and easements; the boundaries, bearings and dimensions of all portions within the subdivision intended to be dedicated to the use of the public; the lines, dimensions, bearings, and numbers of all lots, blocks, and parks reserved for any reason within the subdivision. All lots and blocks are to be numbered consecutively under a definite system approved by the Planning Commission. All proposed streets shall be named or numbered in accordance with and in conformity with the adopted street naming and numbering system of Mapleton City.
- (5) The standard forms approved by the Planning Commission lettered for the following:
 - (a) Description of land to be included in subdivision
 - (b) Registered professional engineer and/or land surveyor's "certificate of survey"
 - (c) Owner's dedication
 - (d) Notary Public's acknowledgement
 - (e) City Planning Commission's certificate of approval
 - (f) City Engineer's certificate of approval
 - (g) City Council's certificate of acceptance attested by the City Recorder

(6) Recording information in the lower right hand corner of the drawing.

(7) After approving and signing the final plat, the Planning Commission may submit the plat for approval to the City Council which shall collect a checking fee from the subdivider, and shall check the engineering requirements of the drawing. After check of the engineering requirements, the final plat shall be submitted to the City Council for approval and certificate of acceptance. The final plat, bearing all official approvals as above required, shall, when recording is required by law, be deposited in the office of the County Recorder for recording at the expense of the subdivider who shall be notified of such deposit by the office of the County Recorder. No subdivision shall be recorded in the office of the County Recorder and no lot included in such subdivision shall be sold or exchanged, and no offer shall be made to sell or exchange any such lot unless and until the plat is so approved and accepted.

(8) Before any subdivision plat will be accepted and approved, the subdivider shall furnish a cash deposit or other adequate guarantee in an amount calculated by the City to secure the performance of the following in a workmanlike manner and according to specifications of the City where they are required:

1. Water lines
2. Sanitary sewage disposal
3. Street grading and surfacing
4. Curbs and gutters
5. Storm sewers and drainage systems
6. Sidewalks
7. Irrigation systems
8. Survey monuments
9. Fire hydrants
10. Street and traffic signs
11. Any other improvement deemed necessary by the City Council.

Said guarantee shall not be released until all of the foregoing items have been accepted by the City Council in writing.

9-6-6: EXCEPTION TO REQUIREMENT OF RECORDING FINAL PLAT:
In subdivisions of less than 10 lots, land may be sold by meets and bounds without necessity of recording a plat if all of the following conditions are met:

- (A) The subdivision layout shall have been first approved in writing by the Planning Commission.
- (B) The subdivision is not traversed by the mapped lines of a proposed street as shown on any official map or maps, and does not require the dedication of any land for streets or other planning purposes.

- (C) If a subdivision is located in a zoned area, each lot in the subdivision meets the frontage width and area requirements of the Zoning Ordinance or has been granted a variance from such requirement by the Board of Adjustment.

All of the remaining provisions and requirements of this ordinance, excepting said requirement to record a subdivision plat in the office of the County Recorder shall be applicable to said subdivisions of 10 or less lots or parcels.

- 9-6-7: DESIGN STANDARDS: Design standards for streets, lots, blocks, alleys, and easements shall be set forth in regulations prepared by the Planning Commission and after public hearing, approved by the City Council.

The plans and specifications of all subdivisions shall conform to said subdivision regulations. Provision shall be made by the City for making all said regulations available to all subdividers or prospective subdividers.

- 9-6-8: AREA FOR SCHOOL, RECREATIONAL, OR OTHER PUBLIC
— USES: In considering applications for the subdivision of property, the Planning Commission and the City Council shall give consideration to the reservation and potential acquisition of suitable sites for schools, parks, playgrounds, and other areas for public use. Any provision for such open spaces should be indicated on the preliminary plat in order that it may be determined when and in the manner such areas will be dedicated to or acquired by the appropriate agency.

- 9-6-9: IMPROVEMENTS: The owner of any land to be subdivided shall be required to install or guarantee the installation of the following improvements under the specifications and inspection of the City Council, except for septic tanks which must be installed according to the specifications of the State Board of Health:

- (A) Water lines, including laterals to the property line of each lot. Where an approved public water supply is reasonably accessible or procurable, the subdivider or contractor shall install at his own expense, or provide a bond for the installation of such water lines to make the water supply available to each lot within the subdivision including laterals to the property line of each lot. The size of water mains shall be determined by the City Council.
- (B) Sewage Disposal. Where a public sanitary sewer is within 200 feet or is close enough in the opinion of the City Council to require a connection, the subdivider shall connect with such sanitary sewer and provide adequate lateral lines to the property line of each lot. Such sewer connections and subdivision sewer systems shall comply with the regulation of, and shall be approved by the City Council. Where a public sanitary sewer is not reasonably accessible, the subdivider shall provide for sewage disposal in a manner satisfactory to the City Council and County Board of Health as attested by a letter of approval from such agency, to the Planning Commission.
- (C) Street grading and surfacing. All new streets shall be graded, graveled, and hard-surfaced when required by the City, in accordance with City standard specifications. All grading and surfacing shall be done under the inspection and to the approval of the City.

(D) Curbs and gutters. As required by the City Council.

(E) Street drainage and drainage structures. The City Council shall require that the subdivider dispose of storm water and surface drainage if such provision is deemed necessary. If easements are required across abutting property to permit drainage of subdivision, it shall be the responsibility of the subdivider to acquire such easements.

In lieu of installing storm water and surface drains as above provided, the City Council may require the subdivider to make a payment into a capital improvement fund established by the City Council for the future installation of storm water and sewer drains which will serve the City generally. The amount of said payment shall be determined by means of a study made by the City Engineer, or other City agent, of the storm water and surface drainage problems to which the creation of the subdivision will give rise.

(F) Sidewalks. As required by the City Council.

(G) Irrigation Systems. To be installed, relocated, or improved as required by the City Council.

(H) Monuments. Permanent monuments shall be accurately set and established at such points as are necessary to definitely establish all lines of the plat except those outlining individual lots. Monuments shall be of a type approved by the City Engineer. All subdivision plats shall be tied to a corner or monument of record or established land office survey corner.

(I) Street trees. Street trees may be provided at the option of the subdivider, but when so provided the variety and location of such trees shall be approved by the Planning Commission or City Council.

(J) Fire hydrants. Fire hydrants of an approved type, and in proper locations, shall be installed as determined by the City Fire Department or the City Council.

Water and sewer lines and laterals shall be installed prior to the surfacing of the street.

(K) Minimum standards. Minimum standards of design and specifications for materials and construction for the improvements listed in this Ordinance shall be prepared in accordance with City public works standards and approved by the City Council.

9-6-10: GUARANTEE OF IMPROVEMENTS: In lieu of actual installation of the improvements required by this chapter, the subdivider may guarantee the installation thereof by one of the methods specified by the City, as follows, to-wit:

(A) The subdivider may furnish and file with the City Recorder a bond with corporate surety in an amount equal to the cost of the improvements not previously installed as estimated by the City Engineer conditioned for the installation of such improvements within a period of two years immediately following the approval of the final plat and subdivision by the City Council, which bond shall be approved by the City Council and City Attorney, or

(B) The subdivider may deposit in escrow with an escrow holder approved by the City Council an amount of money equal to 125% the cost of the improvement not then installed as estimated by the City Engineer, as aforesaid,

- under an escrow agreement conditioned for the installation of said improvements within two years from the approval of the final plat and subdivision by the City Council, as aforesaid. The escrow agreement aforesaid shall be approved by the City Council and City Attorney and shall be filed with the City Recorder, or
- (C) The subdivider may, with the express approval of the City Council, execute, acknowledge, and cause to be recorded in the office of the County Recorder of Utah County, Utah, a written agreement with the City of Mapleton by which he will covenant and agree that he will not lease or convey any of the subdivided property to anyone whomsoever unless he shall first, as a condition precedent thereto, either
- (1) Install and pay for all of the improvements aforesaid necessary to the full, effective and practical use and enjoyment thereof by the lessee or grantee of the lands so to be conveyed, including but not limited to, all street improvements in front of such property and then along the dedicated streets to a connection with existing improvements of the same kind or to the boundary of the subdivision nearest said existing improvements, whichever is closer, or
 - (2) File a bond as provided in subparagraph (A) of this section to secure the installation and/or completion of all uncompleted improvements in subparagraph (1) hereof specified, or
 - (3) Deposit in escrow, as provided in paragraph (B) of this section, money to secure the installation and/or completion of all uncompleted improvements in subparagraph (1) hereof specified.

The said agreement shall specifically provide that it shall be deemed to be a covenant running with the subdivided lands for the benefit of the City of Mapleton and shall particularly and accurately describe said lands. By said agreement the subdivider shall further give and grant to the City a lien on said lands to secure performance of the covenant and agreement hereinbefore specified and to secure the installation of all of the improvements required by this chapter, together with the payment of all costs, including a reasonable attorney's fee, which the City may incur in enforcing any of the terms and provisions of said agreement.

The City Council is authorized and directed from time to time at the request of the subdivider or his successors in interest to release of record from the burden of the covenant and lien aforesaid all lots and parcel of land as to which the covenant and agreement have been fully performed, either by installation of improvements, by the deposit of a bond or the deposit of funds in escrow, as aforesaid. The covenant and agreement aforesaid shall be approved as to form by the City Council and by the City Attorney. The City Council is authorized to prescribe by administrative rule or regulation filed for record with the City Recorder forms and procedures to insure the orderly, regular, and efficient processing of applications for the approval of a proposed subdivision and the strict compliance with the requirements of this ordinance.

Whenever the subdivider shall develop a subdivision a portion at a time, as contemplated by subparagraph (C) of this section, such development shall be in an orderly manner and in such a way that the required improvements will be continuous and all of the said improvements will be made available for the full, effective and practical use and enjoyment thereof by the lessees or grantees of any of the lands subdivided within the time hereinbefore specified.

9-6-11: ENGINEERING AND INSPECTION FEES: The subdivider or contractor, upon submission of his plans, shall deposit with the City of Mapleton a sum, in the amount estimated by the City Engineer to cover engineering and inspection of the above improvements.

9-6-12: ENFORCEMENT AND PERMITS: No officer of the City of Mapleton shall grant any permit or license for the use of any building or land if such use would be in violation of this ordinance. Whenever in this ordinance any plats, maps, or other documents are required to be recorded with the County Recorder of Utah County, such recording shall be done by the subdivider at his own expense and such recording shall be done within 30 days after final approval by the City Council.

9-6-13: VALIDITY OF ORDINANCE: If any section, subsection, sentence, clause, or phrase of this ordinance is for any reason held to be invalid, such holding shall not affect the validity of the remaining portion of this ordinance.

9-6-14: PENALTY: Any person who shall violate any of the provisions of this ordinance shall, upon conviction thereof, be punished by a fine not exceeding two hundred ninety-nine dollars (\$299.00), or imprisonment in the County Jail for three months, or by both fine and imprisonment.

9-6-15: PROTECTIVE COVENANTS: The subdivider shall file two copies of his protective covenants with the City Recorder.

9-6-16: EASEMENTS AND STREET DEDICATION: All subdivisions shall provide for easements and rights-of-way for all utilities and for irrigation ditches or pipe lines, and streets and sidewalks and other public ways and areas shall be conveyed or dedicated for public use as required by the City.

All streets in any subdivision shall be at least fifty feet (50') in width. All dead-end streets must provide at their terminus a turn around with a radius of at least fifty feet (50').

When streets within a subdivision conform to the major street plan, they shall be sixty-six feet (66') in width and the City will mark off such streets for the subdivider with its City grader.

1. For Statute authority see 10-9-25, 10-9-26 and 10-9-28, UCA 1953.