

1988

# Leon H. Saunders v. John C. Sharp and Sharp : Brief of Appellant

Utah Court of Appeals

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Donald J. Winder; Kathy A.F. Davis; Tamara K. Price; Winder & Haslam; Attorneys for Respondents.

Robert M. Anderson; Glen D. Watkins; Mark R. Gaylord; Hansen & Anderson; John B. Anderson; Anderson & Holland; Attorneys for Appellants .

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## Recommended Citation

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IN THE UTAH COURT OF APPEALS

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DOCKET NO.

88FC770

LEON H. SAUNDERS, ROBERT FELTON;  
SAUNDERS LAND INVESTMENT CORP.,  
a Utah corporation; WHITE PINE  
RANCHES, a Utah general  
partnership; WHITE PINE  
ENTERPRISES, a Utah general  
partnership; and KENNETH R.  
NORTON, dba Interstate Rentals,  
Inc., a Nevada corporation,

Plaintiffs-  
Appellants,

v.

JOHN C. SHARP and GERALDINE V.  
SHARP,

Defendants-  
Respondents.

Case No.  
880710-CA

Category 14b

APPELLANTS' BRIEF

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT  
OF SALT LAKE COUNTY, STATE OF UTAH  
THE HONORABLE J. DENNIS FREDERICK,  
DISTRICT JUDGE PRESIDING

Robert M. Anderson, Esq. (0108)  
Glen D. Watkins, Esq. (3397)  
Mark R. Gaylord, Esq. (5073)  
HANSEN & ANDERSON  
50 West Broadway, #600  
Salt Lake City, UT 84101  
Telephone: (801) 532-7520  
Attorneys for Appellants Leon H.  
Saunders, Robert Felton,  
Saunders Land Investment Corp.,  
White Pine Ranches and White  
Pine Enterprises

Donald J. Winder, Esq.  
Kathy A. F. Davis, Esq.  
Tamara K. Prince, Esq.  
WINDER & HASLAM  
175 West 200 South, #4004  
Salt Lake City, UT 84101  
Attorneys for Respondents

John B. Anderson, Esq.  
ANDERSON & HOLLAND  
623 East 100 South  
Salt Lake City, UT 84102  
Telephone: (801) 363-9345  
Attorneys for Appellant  
Kenneth R. Norton, dba  
Interstate Rentals, Inc.

DEPOSITED BY  
STATE OF UTAH  
AUG 17 1990

ED

JUL 28 1989

LEON H. SAUNDERS, ROBERT FELTON;  
SAUNDERS LAND INVESTMENT CORP.,  
a Utah corporation; WHITE PINE  
RANCHES, a Utah general  
partnership; WHITE PINE  
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Mark R. Gaylord, Esq. (5073)  
HANSEN & ANDERSON  
50 West Broadway, #600  
Salt Lake City, UT 84101  
Telephone: (801) 532-7520  
Attorneys for Appellants Leon H.  
Saunders, Robert Felton,  
Saunders Land Investment Corp.,  
White Pine Ranches and White  
Pine Enterprises

Donald J. Winder, Esq.  
Kathy A. F. Davis, Esq.  
Tamara K. Prince, Esq.  
WINDER & HASLAM  
175 West 200 South, #4004  
Salt Lake City, UT 84101  
Attorneys for Respondents

John B. Anderson, Esq.  
ANDERSON & HOLLAND  
623 East 100 South  
Salt Lake City, UT 84102  
Telephone: (801) 363-9345  
Attorneys for Appellant  
Kenneth R. Norton, dba  
Interstate Rentals, Inc.

## LIST OF PARTIES

<u>Party</u>	<u>Counsel</u>
1. Plaintiffs and Appellants White Pine Ranches White Pine Enterprises Leon H. Saunders Robert Felton Saunders Land Investment Corp. J. Richard Rees	Robert M. Anderson Glen D. Watkins Mark R. Gaylord HANSEN & ANDERSON Sixth Floor Valley Tower Bldg. 50 West Broadway Salt Lake City, UT 84101 (801) 532-7520
2. Counterclaim Defendant and Appellant Kenneth R. Norton dba Interstate Rentals, Inc.	John B. Anderson ANDERSON & HOLLAND 623 East 100 South P. O. Box 11643 Salt Lake City, UT 84147 (801) 363-9345
3. Surety and Appellant Commissioner of Financial Institutions as Receiver for Tracy Collins Bank and Trust Company	Stanford B. Owen Patrick L. Anderson FABIAN & CLENDENIN Twelfth Floor 215 South State Street Salt Lake City, UT 84111 (801) 531-8900
4. Defendants and Respondents John C. Sharp Geraldine Y. Sharp	Donald J. Winder Kathy A. F. Davis Tamara K. Prince WINDER & HASLAM 175 West 200 South Suite 4004 Salt Lake City, UT 84101 (801) 322-2222



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## B. STANDARD OF REVIEW

The district court's decision is fully reviewable by this Court because the issues presented in this appeal are questions of law reviewable by an appellate court for correctness, and the district court's conclusions should be accorded no particular deference. Mountain Fuel Supply Co. v. Salt Lake City Corp., 752 P.2d 884, 887 (Utah 1988); Olwell v. Clark, 658 P.2d 585, 586, n. 1 (Utah 1982) (when issue is one of law, the Supreme Court is not bound by trial court's conclusions).

This Court likewise need not defer to the decision of the district court when that decision is based on documentary evidence or when interpretation of contract is at issue. Gump & Ayers Real Estate, Inc. v. Domcoy Investors, 733 P.2d 128, 129 (Utah 1987); Faulkner v. Farnsworth, 714 P.2d 1149, 1150 (Utah 1986) (appellate court is free to make its own independent interpretation of written instruments); Carrier Brokers, Inc. v. Spanish Trail, 751 P.2d 258, 261 (Utah App. 1988) (whether guaranty was absolute or conditional presented legal question involving interpretation of unambiguous written contract and allows appellate court to make its own review).

## C. CITATION TO THE RECORD

This brief contains numerous references to the Record on Appeal, Trial Transcript and Exhibits entered during trial. Citations to the Record on Appeal will be by the abbreviation "R." Reference to portions of the Trial Transcript will be by the abbreviation "TR.," followed by the particular page of the transcript on which that fact can be found. Exhibits received during trial will be cited by the term "Ex."

Relevant portions of the Record and key Exhibits have been included in the Addendum. Citations to materials in the Addendum shall be by reference to the Record on Appeal or Exhibit, followed by the abbreviation "Add." for Addendum and the page of the Addendum wherein that fact or document may be found.

## II. JURISDICTION

The Judgment that is the subject of this appeal is a final order of the Third Judicial District Court of Salt Lake County. (R. 1370-77, Add. 1-8). The Utah Court of Appeals has jurisdiction of this matter pursuant to Utah Code Ann. § 78-2-3(2)(j). Pursuant to Rule 4A, Rules of the Utah Supreme Court, this appeal was transferred to the Court of Appeals for disposition by order of the Utah Supreme Court dated December 22, 1988.

## III. NATURE OF THE PROCEEDINGS

This is an appeal from the Judgment of the district court, dated September 26, 1988. (R. 1370-77; Add. 1). The Findings of Fact and Conclusions of Law were also entered on September 26, 1988. (R. 1326-1364, Add. 9-47). Pursuant to Rule 59, Utah R. Civ. P., Appellants timely filed their Motion for New Trial pursuant to Rule 59, Utah R. Civ. P., which was denied on October 31, 1988. On November 9 and November 16, 1988, notices of appeal were timely filed by Appellants. A Joinder of Appeal was filed by Kenneth R. Norton ("Norton") on November 16, 1988.

## IV. PRELIMINARY STATEMENT

Appellants purchased property from Respondents for the purpose of developing a residential subdivision. The purchase price was \$1,583,055. The agreement required a down payment of \$620,000 and the balance in five annual installments. Payment was secured by a trust deed given by Appellants to Respondents. The agreement also required Respondents to partially reconvey property, at the time of closing and thereafter, as installments were made. At closing, Respondents conveyed fee title to Appellants. After closing, Appellants constructed improvements on the property (including

utilities, a well and a private roadway) ultimately costing in excess of \$1,000,000.

Appellants paid Respondents \$1,546,400. However, Respondents refused to reconvey property to be released as payments were made, including the private roadway which was specifically mentioned in the agreement. Appellants demanded reconveyance of the property but Respondents refused. After Respondents failed to reconvey the property, Appellants ceased making further installment payments, and Respondents commenced a non-judicial foreclosure.

The court ruled that Appellants first breached the parties' agreement by failing to pay approximately \$3,200 in property taxes. That breach, the court ruled, excused Respondents' obligation to reconvey property. Respondents never claimed a default for non-payment of taxes until this action was filed. The non-payment of taxes occurred after Respondents refused to reconvey the roadway. The court entered judgment of foreclosure against Appellants.

This appeal is made to correct this inequitable and erroneous result.

#### **V. STATEMENT OF ISSUES PRESENTED ON APPEAL**

1. Did the court err in ruling that Respondents did not breach the parties' Contract by failing to reconvey portions of the property covered by the Trust Deed given by Appellants in favor of Respondents, even though Appellants satisfied all conditions precedent in the Contract for the reconveyances?

2. Did the court err in ruling that the Respondents reconveyed property covered by the Trust Deed when they consented to

Appellants' recording of a plat and protective covenants for the development of the Property?

3. Did the court err in ruling that the Respondents' breach of contract was excused because of their reliance upon advice of counsel?

4. Did the court err in ruling that Respondents were excused from their contractual obligation to reconvey portions of the Property because Appellants failed to make specific requests for reconveyance of lots prior to Appellants' alleged default under the Contract?

5. Did the court err in concluding that Respondents did not act in bad faith in withholding the reconveyances, and thus Appellants were not entitled to relief under Utah Code Ann. § 57-1-33?

6. Did the court err in not compelling Respondents to specifically perform the Contract by reconveying portions of the Property covered by the Trust Deed and not granting other relief to Appellants?

8. Did the court err in ruling that Appellants' first breached the Contract by failing to pay approximately \$3,200 in real estate taxes?

9. Did the court err in ruling that Respondents granted an easement over the Roadway to themselves?

10. Did the court err in ruling that Respondents were entitled to an award of attorneys' fees, and was the award of \$144,469 reasonable?

11. Did the court err in ruling that the temporary restraining order enjoining Respondents' foreclosure and sale of the Property was wrongfully issued?

## VI. STATEMENT OF THE CASE

### A. THE PARTIES' CONTRACT.

On November 9, 1980, the Appellants Leon H. Saunders ("Saunders"), Kenneth R. Norton ("Norton") and Robert Felton ("Felton"), together with other persons not parties to this action,<sup>1/</sup> agreed to purchase from Respondents, John C. Sharp and Geraldine Y. Sharp, 60.078 acres of unimproved real property near Park City, Utah (the "Property"). (F. ¶ 1, Add. 11; Ex. D-14; TR. 27, 81, 341). The Property was purchased for the purpose of developing four- or five-acre residential lots. (F. ¶ 2, Add. 11; TR. 341).

On July 16, 1981, at the closing of the sale (the "Closing"), the parties executed a Memorandum of Closing Terms ("Closing Memorandum") (Ex. D-15, Add. 71), a Trust Deed Note (Ex. D-3, Add. 64), a Trust Deed (Ex. D-2, Add. 60) and a Warranty Deed (Ex. D-17, Add. 83), collectively the "Contract". (TR. 30-31, 88, 358). These Closing documents were prepared by Respondents' counsel, Jon C. Heaton. (TR. 30-31).

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<sup>1</sup> Appellants include Saunders, Felton, Saunders Land Investment Corporation, a Utah corporation ("SLIC"), Norton, White Pine Ranches ("WPR"), a general partnership formed after the Closing, and White Pine Enterprises ("WPE"), a general partnership which acquired a twenty-five percent (25%) interest in a portion of the Property (see Ex. P-46). Only Appellants Saunders, Felton and Norton executed the Contract. Paul H. Landes, one of the purchasers, sold his interest to Daniel C. Hunter III, who, in October, 1983, transferred his interest to SLIC. (Ex. P-46).

The Appellants agreed to pay Respondents \$1,583,055.30 for the Property, \$620,000 of which was paid as a down payment at Closing. (Ex. D-14). Pursuant to the Trust Deed Note, Appellants agreed to pay Respondents the remaining \$963,055.30 in five annual \$192,611.06 installments. (Ex. D-3, Add. 64; TR. 33, 88-89). At Closing, Respondents conveyed fee title to the Property to Appellants subject to the Trust Deed, securing payment of the Trust Deed Note. (F. ¶ 10, Add. 13; Ex. D-2, Add. 60; Ex. D-3, Add. 64; Ex. D-15, Add. 71; and Ex. D-17, Add. 83; TR. 32-33, 37, 90, 94-95 and 358). Associated Title Company ("Associated Title") was named as the trustee under the Trust Deed. (Ex. D-2, Add. 60).

Respondents agreed in the Closing Memorandum that

after recordation of the PUD<sup>2/</sup> Plat and the Declaration of Covenants, Conditions and Restrictions, and upon receipt of each \$140,000.00 in principal (but not including the earnest money and down payment money), [Respondents] shall execute and deliver to [Appellants] a Partial Deed of Reconveyance for one (1) PUD lot.

(F. ¶ 15, Add. 14-15; Ex. D-15 ¶ 1, Add. 71 (emphasis added); TR. 41-42). Respondents also agreed that

Upon the payment of the release price, [Appellants] shall be entitled to the release of one (1) lot of [Appellants'] choice upon receipt of the payment or at any time thereafter.

(F. ¶ 16, Add. 15; Ex. D-15 ¶ 2, Add. 71 (emphasis added)).

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<sup>2</sup> The Contract's reference to "PUD lots" was intended to mean a Planned Unit Development, which is a private residential development having some characteristics in common with a subdivision and condominium, but not necessarily subject to the Utah Condominium Act, Utah Code Ann. §§ 57-8-1, et seq. (1953, as amended). The PUD involved in this case did not satisfy several of the requirements of the Utah Condominium Act and, therefore, is not subject to it.

The Closing Memorandum also provided that

at the time of execution of this Memorandum, [Appellants] have paid to [Respondents] the sum of \$620,000.00 which will release from the Deed of Trust three (3) PUD lots. Upon the recordation of the PUD Plat and Declaration of Covenants, Conditions and Restrictions with the Summit County Recorder, [Appellants] shall be entitled to the release from the Deed of Trust of three (3) PUD lots of [Appellants'] choice together with the said roadway. (emphasis added.)

(F. ¶ 17, Add. 15; Ex. D-15 ¶ 3, Add. 71; TR. 46, 89-90, 352-53).

A plat depicting a proposed development of the Property and showing an internal roadway to be constructed for access to the lots from a county highway was affixed to the Closing Memorandum. (F. ¶ 18, Add. 15-16; Ex. D-15 ¶ 5, Add. 72; Ex. D-124; TR. 561, 829). Respondents agreed that "[c]hanges in the proposed plat and Declaration of Covenants, Conditions and Restrictions when prepared shall be subject to the reasonable approval of [Respondents]." (F. ¶ 18, Add. 15-16; Ex. D-15 ¶ 5, Add. 72). The purpose of this provision was to assure Respondents, who owned adjacent property, that Appellants would construct a quality development. (TR. 138, 744).

It is undisputed Appellants paid Respondents a total of \$1,546,400, which amount includes the down payment, the 1982 through 1984 installments and part of the 1985 installment. (Ex. D-15, Add. 71, P-44; TR. 36-39, 53-55, 94-96, 353-358).

On December 23, 1983, the plat of White Pine Ranches Phase I (the "Plat") and the Declaration of Protective Covenants for White Pine Ranches, a Planned Residential Development (the "CCRs"), were recorded in the Office of the Summit County Recorder.. (F. ¶ 40, Add. 22; Ex. D-1, Add. 59; Ex. P-51, Add. 91-131; TR. 90-91). Six (6) lots and the private, internal roadway ("White Pine Lane" or



"Roadway"), were described on the Plat and dedicated as Phase I of the project. (Ex. D-1, Add. 59). The remaining Property (approximately one-half), abutting the Roadway to the south, was not platted. (F. ¶ 33, Add. 20). The Plat delineated the existence and location of certain utility easements, including those for water lines, a water tank and water system, substantial portions of which were to be constructed on the unplatted property. (F. ¶ 34, Add. 20; Ex. D-1, Add. 59). Appellants were prepared to plat the balance of the Property (the "unplatted property") at a later time and so advised the Respondents. (Ex. D-37; TR. 138, 202).

On December 23, 1983, Appellants satisfied all conditions in the Closing Memorandum and paid sufficient principal to entitle them to the release of five (5) lots and the Roadway. (Ex. D-7, Add. 67; Ex. P-51, Add. 91; and Ex. P-53; TR. 90-91; 96; 322-23). By June 30, 1984, they paid additional principal entitling them to the release of a sixth lot. (Ex. P-53; TR. 49-50; 95-96). As of June 30, 1985, Appellants had paid sufficient principal to entitle them to the reconveyance of 7.35 acres of the unplatted property. (Id.)

Respondents approved the recordation of the Plat and CCRs by executing a Consent to Record in accordance with paragraph 5 of the Closing Memorandum. (F. ¶ 39, Add. 22; Ex. D-7, Add. 67; TR. 39-40). Respondents' consent was obtained amid a disagreement involving Felton and Jon C. Heaton ("Heaton")<sup>3/</sup> regarding

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<sup>3</sup> Considerable confusion exists about whom Heaton was representing and when. Respondents called Heaton both as a fact and expert witness at trial. (TR. 755-56). It is undisputed that at least at different times he represented both Respondents and one of the Appellants, White Pine Ranches, concerning the transactions that are the subject of this action. (TR. 725-26, 789-94). Heaton also testified that after Closing he acted as a mediator for the parties. (TR. 792, 845). Despite numerous requests by Appellants,

Respondents' use and access rights over the Roadway. (See Ex. D-25, Add. 85; Ex. D-26A, Add. 86). According to Heaton, when Respondents were asked to approve the Plat and CCRs, they sought access rights over the Roadway. (Ex. D-25, Add. 85). Felton communicated his refusal to Heaton by letter dated November 21, 1983. (Ex. D-26A, Add. 86). After Respondents executed the Consent to Record (Ex. D-7, Add. 67), and prior to its recordation, Heaton claimed that, based upon a telephone conversation with Felton, Appellants agreed to grant an easement in favor of Respondents over the Roadway. Heaton claimed that during the conversation he wrote the following in the left margin of Felton's letter: "Felton agrees access over road retained if Sharp develops undeveloped property as Lots 7-12 White Pine Ranch." (F. ¶ 37, Add. 21; Ex. D-26A, Add. 86; TR. 750). Felton disputes any such agreement. (TR. 168). No writing expressly modifying the Contract was ever executed. (TR. 166-168, 372).

After recording the Plat and CCRs, Appellants began construction of improvements to the Property at a total cost of \$1,063,348.10. (Ex. P-60; TR. 102-103). The improvements included construction of the Roadway, on-site improvements (underground electrical, gas, water, fire hydrant and sewer systems) and off-site improvements, including lengthy sewer and utility systems. (TR. 138-39, 141-42, 249-50, 330). A culinary well to serve the Property was drilled on Lot 6, and a large water storage tank for culinary purposes and fire protection was constructed on the unplatted

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Heaton was unable to produce his billing records, which presumably would have detailed his representation of the parties. (See, e.g., TR. 843-51).

property. (Id.) These improvements were funded with a \$650,000 loan from Tracy Mortgage Company. (TR. 118).

On January 18, 1984, Respondents, without a formal written request from Appellants, wrote Associated Title directing it to release and reconvey Lots 1 through 5 from the Trust Deed. (F. ¶ 42, Add. 23; Ex. D-28, Add. 88; TR. 69-70). However, Respondents did not direct the release of the Roadway. (TR. 46, 457-59). To the contrary, they instructed that "[e]xcept for the property described above [Lots 1 through 5] all other portions of the property remain subject to the Trust Deed." (Ex. D-28, Add. 88).

On or soon after January 20, 1984, Respondents received a letter from Felton requesting Respondents deliver deeds reconveying Lots 1 through 5 and the Roadway. (Ex. D-30, Add. 89; TR 104-06). Felton stated he was at a "complete loss as to why the . . . deeds [had not] been delivered," although acknowledging that the "deeds (sic) for the roads (sic) may be difficult to do." (F. ¶ 44, Add. 23; Ex. D-30, Add. 89; TR. 104-05).

Although the Contract entitled Appellants to the reconveyance of Lots 1 through 5 no later than January 20, 1984, a Partial Reconveyance, reconveying Lots 1 through 5, was not recorded until March 28, 1986, more than two years later. (F. ¶ 43, Add. 23; Ex. P-45, Add. 90; TR. 68-70). Respondents could not explain the delay. (F. ¶ 43, Add. 23; TR. 70-71).

On November 30, 1984, property taxes for Lot 6 and the unplatted property of approximately \$4,725.00 became due and payable, of which Appellants paid \$1,515.24. (F. ¶¶ 48 and 49, Add. 24-25; TR. 707-708). Respondents never asserted Appellants were in default due to the non-payment of property taxes until they filed

their Answer and Counterclaim. (Compare Ex. D-24, D-36 and P-55 with Answer and Counterclaim, R. 67-89). Respondents never claimed that Appellants defaulted prior to June 30, 1985. (TR. 50).

**B. RESPONDENTS' FORECLOSURE OF THE UNRELEASED PROPERTY.**

Respondents recorded a Notice of Default on September 16, 1985 and published an Amended Notice of Trustee's Sale on December 19, 1985. (F. ¶ 51, Add. 25; Ex. P-55, P-56; TR. 66). Appellants objected because the Notices included Lots 1 through 5 and the Roadway. (F. ¶ 54, Add. 25-26; Ex. D-35, P-57; TR. 106-107, 109). Respondents later published an Amended Notice of Trustee's Sale excluding Lots 1 through 5, but not excluding the Roadway. (F. ¶ 55, Add. 26; Ex. P-58).

On February 27, 1986, Felton objected to the Notices and demanded the release of the Roadway and Lot 6. (Ex. D-35; TR. 109). Felton received no response other than an Amended Notice of Default, dated April 29, 1986. (F. ¶ 55, Add. 26; Ex. D-36; TR. 109-10). On May 7, 1986, Felton again demanded the reconveyance of Lot 6 and the Roadway. (Ex. D-37; TR. 110). Again, Respondents never responded to Felton (TR. 110); they simply published a Second Amended Notice of Trustee's Sale, which included Lot 6, the Roadway and all of the unplatted property. (Ex. D-5, Add. 66). Suit was filed and the scheduled trustee's sale was enjoined pursuant to a temporary restraining order entered by the Honorable Judith Billings. (R. 50-51, 61). The parties subsequently stipulated to an injunction. (R. 96-97).

**C. THE TRIAL.**

Appellants claimed Respondents materially breached the Contract because they had never reconveyed the Roadway, Lot 6 or the 7.35

acres. Appellants contended that Respondents were required to release the Roadway on December 23, 1983 (or no later than January 20, 1984), Lot 6 on June 30, 1984 and the 7.35 acres on June 30, 1985.<sup>4/</sup> (Ex. D-53; TR. 96). Respondents asserted, however, they were excused from reconveying this property because Appellants failed to request releases, or alternatively, because the Consent to Record in effect released the Roadway. (R. 1650, p. 45-47). Appellants sought specific performance of the Contract (i.e., release of Lot 6, the Roadway and the 7.35 acres) as well as damages arising from Respondents' breach of the Contract.<sup>5/</sup>

As a specific performance remedy, Appellants claimed Respondents' failure to release and reconvey portions of the Property on or about January 20, 1984, excused Appellants' obligation to make further installment payments, and tolled the accrual of interest on the unpaid principal balance. Appellants further asserted Respondents wrongfully refused to release and reconvey the Property, and Appellants were entitled to recover statutory damages under Utah Code Ann. § 57-1-33. (The text of Utah Code Ann. § 57-1-33 is set forth in the Addendum at 133.)

By counterclaim, Respondents alleged Appellants materially breached the Contract, sought a dissolution of the injunction to permit Respondents' non-judicial sale of the Property and claimed

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<sup>4</sup> Actually, Appellants became entitled to 5.35 acres on June 30, 1984 and the remaining 2.0 acres on June 30, 1985. (Ex. D-53).

<sup>5</sup> The damages included interest on construction loans (TR. 960-63), sales lost because of Appellant's foreclosure of the Property (TR. 270-90), damages in the amount paid for Lot 6, the Roadway and the 7.35 acres which were never conveyed plus interest, loss of Appellants' benefit-of-the-bargain (Ex. P-96), and attorney's fees.

damages for the wrongful issuance of the injunction. Before and throughout trial, Respondents sought to foreclose Lot 6, all of the unplatted acreage and the Roadway. Although Respondents offered a stipulation during closing argument that their non-judicial or judicial foreclosure of the Roadway would not extinguish the rights of access of Lots 1 through 5 to the Roadway, Respondents nonetheless sought the foreclosure of the Roadway. (R. 1641, p. 27-28; R. 1650, p. 43).

The court rejected every claim of Appellants. The court ruled, inter alia, Appellants materially breached the Contract by failing to pay property taxes for Lot 6 and the unplatted acreage on November 30, 1984 (approximately \$3,200.00) (C. ¶ 2, Add. 38); because this breach preceded any claimed breach of Respondents, Respondents were excused from releasing Lot 6, the Roadway and the 7.35 acres; Appellants were obligated to request and identify lots specifically for release, but failed to timely do so prior to their breach on November 30, 1984 (C. ¶¶ 8 and 9, Add. 39); and Respondents were entitled to foreclose and sell Lot 6 and all of the unplatted property. (C. ¶¶ 34-35, Add. 46-47). Judgment was entered against Appellants for \$742,984.67,<sup>6/</sup> and the property was ordered sold at Sheriff's Sale. (R. 1370, Add. 3-4; C ¶ 31-34, Add. 44-47).

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<sup>6</sup> The Judgment is comprised of \$371,739.35 in principal, \$171,033.54 in interest, \$14,869.57 in late fee charges, \$1,803.80 in trustee's fees, \$2,881.04 in court costs, \$144,088.75 in attorneys' fees and \$20,368.62 for 1984-1987 property taxes on Lot 6 and the unplatted property. These property taxes have been paid.

## VII. SUMMARY OF ARGUMENTS

A. The Contract expressly requires partial reconveyances of property as Appellants made payments. Even though Appellants paid sufficient principal sums for the release of the Roadway, Lot 6 and the 7.35 acres and requested the release of this property, Respondents never made those reconveyances. The Respondents' signing of the Consent to Record did not affect any reconveyance. Respondents' contractual obligation to make reconveyances was not excused by reliance upon advice of counsel, which is not a legally recognized defense to a breach of contract action. Respondents' performance was not excused because Appellants failed to make specific requests for reconveyances before failing to pay approximately \$3,200 in property taxes in 1984. Such requests, although not required under the Contract or by law, were in fact made. Respondents were nevertheless obligated to make reconveyances under the Contract which required reconveyances to be made "at any time [after]" installment payments were made.

The court erred in not ordering Respondents to specifically perform the Contract by releasing Property, tolling the payment of principal and accrual of interest under the Trust Deed Note and awarding the other relief and damages Appellants sought at trial. The court also erred in allowing Respondents' foreclosure of the Property and awarding them damages and attorneys' fees.

B. The court likewise erred in concluding that Appellants granted an easement to Respondents over the Roadway. None of the documents presented at trial, including the Consent to Record, created an easement in favor of Respondents. The court's decision, if not reversed, establishes precedent that a trust deed beneficiary

may create an easement in favor of himself, enforceable against the actual fee owners, without a writing signed by the fee owners.

C. Respondents' breach of the Contract precludes their recovery of attorneys' fees. Moreover, any award of attorneys' fees must be in accordance with the terms of the Contract, which in this case limits recovery, at most, to attorneys' fees strictly related to foreclosure of the Trust Deed. However, the court failed to make any finding as to the amount of fees related to the foreclosure, and, therefore, the award of attorneys' fees to Respondents cannot be supported by the evidence. Moreover, there is no evidence to support a finding that the award of attorneys' fees is reasonable.

## VII. ARGUMENT

The property rights at issue in this case are a refined part of Utah's law. Each involves a distinct set of rights, which are created in very specific and legally different ways. While some of these concepts may involve the same rights (e.g., ownership generally embodies a right of use), care must be taken not to confuse them. Unfortunately, the court's decision greatly confuses ownership, use and other property rights and ignores the contractual rights of the Appellants.

### A. THE DISTRICT COURT ERRED IN CONCLUDING APPELLANTS, NOT RESPONDENTS, BREACHED THE CONTRACT.

#### 1. The Contract Expressly Required Reconveyances Of Property.

The Contract expressly provides that Appellants, upon making the down payment (\$620,000) and recording the Plat and the CCRs, are "entitled to the release from the Deed of Trust of three (3) PUD



lots of [Appellants'] choice together with said roadway." (Ex. D-15 ¶ 3, Add. 71, emphasis added). The Contract also provides that, upon payment of each \$140,000 of principal thereafter by Appellants, Respondents "shall execute and deliver to [Appellants] a Partial Deed of Reconveyance for one (1) PUD lot." (Id. ¶ 1, Add. 71; emphasis added).

Thus, as payments were made, the Contract clearly required the release of property from the effect of the Trust Deed through a reconveyance of title. This could only be accomplished through the execution of a "Deed of Reconveyance" by the trustee. (See Ex. D-15, ¶¶ 1 and 3, Add. 71; D-28, Add. 88).

A trust deed is a "conveyance by which title to the trust property passes to the trustee". General Glass Corp. v. Mast Construction Co., 766 P.2d 429, 432 (Utah App. 1988). A "trust deed" is a deed executed in conformity with Utah Code Ann. §§ 57-1-20, et seq., "conveying real property to a trustee in trust to secure the performance of an obligation of the trustor to the beneficiary." Utah Code Ann. § 57-1-19(3) The "trustee" is a "person to whom title to real property is conveyed by trust deed". Utah Code Ann. § 57-1-19(4) (emphasis added). Therefore, the only statutory means for releasing property from a trust deed is the trustee's execution of a deed reconveying title to the trustor -- in this case, to the Appellants.<sup>7/</sup> See Mast, 766 P.2d at 432. This is

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<sup>7</sup> Respondents' purported real estate expert, Heaton, confirmed that a trustee's execution of a deed of reconveyance is the only way to remove a trust deed other than by judicial or non-judicial foreclosure or an equitable order of a court. (TR. 776-78).

precisely the performance required of Respondents under the Contract.<sup>8/</sup>

2. The Reconveyance Of Property By Respondents As Sellers Was A Material Term Of The Contract.

A material term of a contract is one that goes to the very substance of the contract and touches its fundamental purpose. Matter of the Estate of Bistro, 33 Or. App. 325, 576 P.2d 801, 804 (1978); Rogers v. Relyea, 184 Mont. 1, 8, 601 P.2d 37, 41 (1979); cf. Aldape v. Lubcke, 107 Idaho 316, 688 P.2d 1221, 1222-1223 (App. 1984) (a breach of a material term affects the substantive rights of the parties). See Restatement (Second) of Contracts § 241 (1981). Under facts similar to this case, courts in other jurisdictions have considered provisions requiring the "release" of property under an installment contract to be fundamental, material terms necessitating the seller's strict performance thereof. See Buckman v. Hill Military Academy, 190 Or. 194, 223 P.2d 172 (1950); Columbia Development, Inc. v Watchie, 252 Or. 81, 448 P.2d 360, 361-362 (1968).

In Buckman, the Oregon Supreme Court held the "release" provision to be so fundamental that the buyer's obligation to make future installment payments was excused by the seller's failure to release property. The Court stated:

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<sup>8</sup> This is precisely the performance Respondents made with respect to Lots 1 through 5, albeit two years later than required by the Contract. Consistent with Utah's statutory requirements, that Partial Reconveyance used the very language set forth in Utah Code Ann. § 57-1-33, reciting that it "does hereby reconvey . . . to the person or persons entitled thereto, a portion of the trust property now held by said Trustee." (Ex. P-45, Add. at 90).

Where there is an essential part of a contract that one party shall perform certain acts which are requisite to enable the other party to carry out his part of the agreement, a repudiation of the agreement on the part of the former party, such as failure to perform without warrant by existing conditions, absolves the other party from complying with his part of the contract and gives him the right to rescind (citation omitted).

Buckman, 223 P.2d at 175. Other courts have concluded that release provisions are so material and fundamental that enforcement thereof will survive the buyer's own default. Watchie, 448 P.2d at 361-62; Burroughs v. Garner, 43 Md.App. 302, 405 A.2d 301 (1979); Eldridge v. Burns, 76 Cal.App.3d 396, 142 Cal. Rptr. 845 (1978); see also Construction of Provision in Real Estate Mortgagor Land Contract, or Other Security Instrument For Release of Separate Parcels of Land as Payments are Made, 41 A.L.R. 3d 7, 67 (1972).

In this case, the release of Property as payments were made was so important that the parties made it an express requirement of the Contract. (Ex. D-15, ¶¶ 1 and 3, Add. 71). When a specific (and substantial) amount of principal was paid, portions of Property were to be released. (Id.) Otherwise, Appellants, while agreeing to pay \$1,583,055.30 (in principal alone) over a five year period and making \$1,000,000 of improvements to the Property, would have left the entire Property subject to foreclosure until the Trust Deed Note was fully paid. This was not the parties' intention.

The materiality of the release provision could not be more aptly demonstrated than by the court's decision: Appellants paid \$465,604 in principal for the Roadway, Lot 6 and the 7.35 acres. Yet, as a consequence of Respondents' refusal to honor their release obligations, this Property is now foreclosed and subject to sale under the court's ruling. (C. ¶ 34, Add. 46; Ex. P-54).

Moreover, the foreclosure and sale of the Property will extinguish the covenants and easements created by the Plat and CCRs, including non-exclusive easements created in favor of owners of Lots 1 through 5 to the improvements and the Roadway.<sup>9/</sup> Winn v. Mannhalter, 708 P.2d 444, 448 (Alaska 1985) (buyer at foreclosure of trust deed takes title equivalent to that of the trustor at the time the trust was created). See also, Frater Oklahoma Realty Corp. v. Allen Laughon Hardware Co., 245 P.2d 1144, 1148 (Okla. 1952) ("the proposition is fundamental that a mortgagor has no power or authority, in the absence of an express delegation or reservation thereof, to affect or impair the lien of a mortgagee"); Penn Mutual Life Ins. Co. v. Nelson, 170 Or. 248, 132 P.2d 979, 981 (1943) ("defendants . . . could not, by any act of theirs subsequent to the date of the mortgage, create an easement upon the mortgaged premises which would be paramount to the rights of the mortgagee"); Burlington & C.R. Co. v. Colorado Eastern R. Co., 38 Colo. 95, 88 P. 154, 155 (1906) (since lien of trust deed attached prior to granting easement, rights created by the easement were terminated and property passed to purchaser at foreclosure free of easement); see

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9 At trial, there was great disagreement about the effect of the foreclosure action on the Roadway. The Roadway was expressly included in Respondents' Second Amended Notice of Sale, (Ex. D-5, Add. 66), which Respondents, by way of their Answer sought to foreclose. (R. 67-78). While earlier suggesting the owners of Lots 1-5 would not lose their "right of access" over the Roadway, not until Respondents' closing argument, was there an offer of a "stipulation" that the foreclosure action would not eliminate rights of access to the Roadway from Lots 1 through 5. (R. 1650, p. 43). This ignored Appellants' entitlement to unencumbered fee ownership, rather than mere access to the Property. The materiality of the release is surely demonstrated by the very fact that the Roadway was the subject of Respondents' foreclosure action. (See R. 1641, p. 26-28; R. 1650, p. 43).

also Foreclosure of Mortgage or Trust Deed as Affecting Easement Claimed In, Over, or Under Property, 46 A.L.R. 2d 1197, 1200 (1952) and cases cited therein.

In effect, Appellants have suffered the very risks the release provisions were intended to avoid -- the risk of loss or loss of the very property for which Appellants bargained and paid. Appellants are deprived of a significant benefit they anticipated and expressly secured under the Contract. The release provisions of the Contract cannot be characterized as anything less than material.

3. Respondents Materially Breached The Contract By Failing To Reconvey The Property In Accordance With The Material Terms Of The Contract.

The court certainly erred when it concluded Respondents "substantially complied with all of their obligations under the terms of the Contract." (C. ¶ 6, Add. 39). According to the court, the Respondents' execution of the Consent to Record constituted a release of the roadway as required under the Closing Memorandum. (C. ¶ 10, Add. 39). The court did not find Respondents ever released Lot 6 or the 7.35 acres. Rather, it mistakenly ruled reconveyances were not required because Appellants failed under the Closing Memorandum to timely request the release of property, including the Roadway. (C. ¶¶ 7 and 8, Add. 39).<sup>10/</sup>

(a) The district court erred in applying the doctrine of substantial performance.

Material terms of a contract must be strictly and literally performed. Substantial performance of material terms is legally

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<sup>10</sup> The court erred. As a matter of law, requests were not required, and, even if required, such requests were timely made or unnecessary. See VIII.A.4.(b) infra, at p. 24.

insufficient. Ram Development Corp. v. Siuslaw Enterprises, Inc., 283 Or. 13, 580 P.2d 552, 555 (1977); Zions Properties, Inc. v. Holt, 538 P.2d 1319 (Utah 1975). When a party breaches a material term of a contract, there can be no "substantial performance" of that term as a matter of law. Measday v. Kwik-Kopy Corp., 713 F.2d 118, 123-124 (5th Cir. 1983); see also, Fortress Re, Inc. v. Jefferson Ins. Co. of New York, 465 F.Supp. 333, 335 (D. N.C. 1978) aff'd 628 F.2d 860 (4th Cir. 1980) (party cannot substantially perform condition when it has materially undermined incentive giving rise to the provision at the outset). Frank E. Penney Co. v. United States, 524 F.2d 668, 677 (Ct. Cl. 1975) (doctrine of substantial performance shall not be applied to compel non-defaulting party to accept performance not bargained for).

Since the release of property was a material term of the Contract, the court erred in applying a "substantial performance" standard and concluding that Respondents did not breach the Contract because they "substantially performed" it.

(b) Respondents did not reconvey the Property by executing the Consent to Record.

The court erroneously concluded that Respondents' execution of the Consent to Record (Ex. D-7, Add. 67) constituted a release of the Roadway. The Consent to Record is not a reconveyance. It was never signed by the Trustee (Associated Title) to which Appellants had conveyed the Property pursuant to the Trust Deed. See Mast, 766 P.2d at 432. The Consent to Record, therefore, is wholly ineffective because it contains no language purporting to reconvey the Property as required by Utah Code Ann. § 57-1-33 ("the trustee shall . . . reconvey the trust property"). The court flatly ignored

these requirements. In doing so, the court erred as a matter of law in concluding that the Consent to Record operated as a reconveyance.<sup>11/</sup>

(c) Since reconveyances were not made, Respondents breached the Contract.

A party's failure to perform a material term of an agreement constitutes a breach, which cannot be excused under any circumstances. Zions Properties, 538 P.2d at 1322. See Sagebrush Development, Inc. v. Moehrhe, 604 P.2d 198, 201 (Wyo. 1979); 17A C.J.S. Contracts § 494 (1963). Because the release of property was a material term of the Contract, Respondents' failure to reconvey the Roadway, Lot 6 and the 7.35 acres was a material breach of the Contract. Respondents also breached the Contract by not releasing and reconveying Lots 1 through 5 until March 28, 1986. (Ex. P-45, Add. 90; TR. 69-70). The reconveyance of these lots was required on December 23, 1983 when Appellants recorded the plat and the CCRs, or, at the latest, on January 20, 1984, when Appellants selected Lots 1 through 5 for release. (Ex. D-30, Add. 89). Respondents

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<sup>11</sup> It is painfully obvious the Respondents never regarded the Consent to Record as a reconveyance of the Roadway. When the Consent to Record was recorded on December 23, 1983, sufficient payments had been made to release five (5) lots and the Roadway. (Ex. P-44). On January 18, 1984, Respondents instructed Associated Title to "release from the Deed of Trust" Lots 1 through 5 (Ex. D-28, Add. 88; F. ¶ 42, Add. 23; TR. 69-70); those instructions expressly stated that "all other portions of the property [including the Roadway] remain subject to the Trust Deed." (*Id.*) In fact, a Partial Reconveyance for Lots 1-5 was later signed and recorded by the Trustee two years later. (Ex. P-45, Add. 90). If Respondents had regarded the Consent to Record as a reconveyance, a Partial Reconveyance for Lots 1-5 was unnecessary, as the Consent to Record would have operated to reconvey those lots as well as the Roadway. Clearly, Respondents never considered the Consent to Record to be a reconveyance of the Roadway, and, in fact, testified they never planned to reconvey the Roadway at all until the Trust Deed was paid in full. (TR. 45).

breached the Contract with respect to every release it required. The court erred in concluding otherwise.

4. Respondents' Performance Under The Contract Was Not Excused.

The court determined, alternatively, that Respondents' failure to release the property was excused and not done in bad faith because they relied upon the advice of Heaton, their counsel. (C. ¶ 7, Add. 39; C. ¶ 23, Add. 43). These findings constitute no legally recognized defense to a breach of contract action, but, even if they did, no such defense is supported by the evidence.

(a) Respondents' breach is not excused by reason of their claimed reliance upon the advice of counsel.

The Respondents' good or bad faith is immaterial to the question of their breach of the Contract. Their claimed reliance upon advice of counsel is simply no defense to an action for breach of contract:

The contract fixes the rights and obligations of the parties and a contracting party who refuses to perform, albeit in reliance on an attorney's advice, acts at his peril.

Mann v. Glens Falls Ins. Co., 418 F.Supp. 237, 251 (D. Nev. 1974), rev'd on other grounds 541 F.2d 819 (9th Cir. 1976).

Mr. Sharp's only testimony at trial concerning his reliance upon counsel was that "since we had a lawyer [Heaton], it behooved us to go on his advice and that's what we did." (TR. 62). Mrs. Sharp, although initially claiming Heaton decided not to release the lots or the roadway (TR. 457), later admitted at trial that she was not sure if Heaton made the decision or she simply relied on his advice (TR. 458-59), or that any such decision was ever made or by whom. (TR. 459). Even if reliance upon advice of



counsel could excuse Respondents' breach of the Contract (which it cannot), this testimony cannot support a finding of reliance upon advice of counsel.

Moreover, the claim of good faith reliance on advice of counsel must be considered in light of the Respondents' understanding of the Contract, which unambiguously fixed their obligation to release property as payments were made. Respondents testified they understood these obligations. (TR. 46). Nonetheless, Mr. Sharp testified he was not obligated to release the Roadway until the Trust Deed Note was fully paid. (TR. 45). Mr. Sharp admitted this understanding was "out of [his] head and nowhere else". (TR. 45). More importantly, he admitted that under the Closing Memorandum the Roadway was to be released when the first three lots were released and that nothing contained in the Closing Memorandum required complete payment of the Trust Deed Note before release of the Roadway was required. (TR. 46). Mr. Sharp also admitted that his decision not to release Lot 6 was made "totally independent of the amount of principal paid by Appellants." (TR. 49, emphasis added).

Mrs. Sharp's notes show the Respondents did not rely upon advice of counsel. Her notes contain calculations concerning the amount of each payment and the allocation thereof to principal and interest. (TR. 438, 445 and 447). Mrs. Sharp noted in her own handwriting the requirement of a "lot release on every \$140,000 paid," and the file contained calculations of the number of lots to be released based upon the payments made. (Ex. P-95; TR. 442).<sup>12/</sup>

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<sup>12</sup> All of Respondents' admissions are binding upon them and cannot be contradicted by other evidence. See Hayes v. Xerox Corp., 718 P.2d 929, 931 (Alaska 1986); Kempter v. Hurd, 713 P.2d 1274, 1280 (Colo. 1986); Bailey v. Mead, 492 P.2d 798, 800 (Or. 1971).

Heaton's testimony further demonstrates the court's error. He told the court he never advised Respondents not to release any portion of the Property from the effect of the Trust Deed. (TR. 797-803). In fact, by letter dated November 18, 1983, Heaton specifically told Respondents that Appellants were entitled to a release of the Roadway and Lots 1 through 5. Heaton's letter stated that:

[A]t a later time in the near future Hy [Saunders] has indicated he will seek release of Lots 1 through 5 of the platted subdivision along with his road (White Pine Lane) . . . . For your information, I have reviewed the payments under the Note and find that he is entitled to those releases.

(Ex. D-25, Add. 85, emphasis added). On July 1, 1986, Heaton again informed Respondents of property Appellants were entitled to under the Contract.<sup>13/</sup> (Ex. P-131, Add. 134).

There is simply no legal or factual basis for the court's decision that Respondents relied upon the advice of counsel or were legally entitled to do so.

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<sup>13</sup> Until the last day of trial, Heaton and Respondents, claiming attorney/client privilege, withheld the production of documents from Heaton's files concerning post-closing transactions and communications. (TR. 953-58, 963). Those documents, comprising two files, were not delivered to Appellants until the night before closing argument, after Heaton testified that he never represented the Sharps after Closing. (TR. 966-67). Pursuant to Rule 37 of the Utah Rules of Civil Procedure, Appellants moved to have Heaton's testimony stricken but the Court denied that motion. (TR. 970-80). The wrongful assertions of attorney/client privilege related to the very transactions involved in this case, and the withholding of Heaton's files until the last day of trial impaired Appellants' ability to assess the merits of Respondents' claims at trial. Heaton's testimony should have been stricken. See, e.g., W.W. & W.B. Gardner, Inc. v. Park West Village, Inc., 568 P.2d 734, 738 (Utah 1977).

(b) Respondents' obligation to reconvey property was not excused by Appellants' alleged failure to make specific requests for release of property prior to Appellants' alleged default.

The court ruled that Appellants "were obligated under the terms of the [Closing Memorandum] and pursuant to their own practice, to specifically request and identify lots, including Lot 6, for release by the [Respondents]". (C. ¶ 7, Add. 39, emphasis added). Respondents were thereafter excused from reconveying Lot 6, the Roadway and the 7.35 acres because Appellants' breach of the Contract "preceded [any] timely requests [by Appellants'] for such reconveyances." (C. at ¶ 8, Add. 39). In other words, "the [Respondents] were justified in and were excused from [this] performance under the Contract . . . because the [Appellants] were in breach of the parties' Contract at the time such reconveyances were requested." (C. ¶ 9, Add. 39). These Conclusions are not supported by the findings or the evidence.<sup>14/</sup>

The Closing Memorandum expressly provided that Appellants, upon making the down payment and recording the plat and CCRs, were "entitled to the release from the Deed of Trust of three (3) PUD lots of Buyer's [Appellants'] choice together with the said roadway." (Ex. 15 ¶ 3, Add. 71, emphasis added). This language

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<sup>14</sup> Appellants have contended throughout this proceeding they made numerous requests for release (TR. 104, 156, 197, 200 and 362), including a request for Lots 1 through 5 and the Roadway on January 20, 1984. (Ex. D-30, Add. 89). The court ignored this evidence and did not address it in its oral ruling, findings or conclusions. The court never made any finding that Appellants requested the release of Lots 1 through 5. The court only found that Appellants requested the release of lot 6, the Roadway and the 7.35 acres after their alleged default. Thus, the court's own findings (and omitted findings) concerning requests preclude a determination that there was a "practice" of making "timely" requests for the release of property.

does not require that Appellants request reconveyances, but merely permits them to choose which of the lots ("lots of Buyer's choice") shall be the subject of Respondents' mandatory reconveyance. (Id.; TR. 156, 321).<sup>15/</sup>

Apart from these three lots and the Roadway, the Closing Memorandum required Respondents to release additional lots as installment payments were made:

[U]pon receipt of each \$140,000.00 in principal (but not including the earnest money and down payment money), Seller shall execute and deliver to Buyer [Appellants] a Partial Deed of Reconveyance for (1) PUD lot.

(Ex. 15 ¶ 1, Add. 71, emphasis added). The Closing Memorandum required the unconditional release of property upon payment of the release price or "at any time thereafter." (Ex. D-15 ¶ 2, Add. 71, emphasis added).

Nowhere does the Closing Memorandum require either a request by Appellants for reconveyance, or that such a request be made prior to any default by Appellants. Nowhere does the Closing Memorandum require that a lot be selected prior to any such default. Nowhere does the Closing Memorandum remove the Respondents' obligation to release property if Appellants default in the future. Appellants were unconditionally entitled to a release upon payment "or at any time thereafter." (Id., emphasis added). Regardless of Appellants' choice of lots, the Roadway was to be released and reconveyed after payment of the down payment, and no selection was necessary.<sup>16/</sup>

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<sup>15</sup> When the Plat and CCRs were recorded on December 23, 1983, the Contract mandated the release of five lots and the Roadway.

<sup>16</sup> The selection of property in this case is a meaningless, hypertechnicality that should not excuse Respondents' breach. In December 1983 and January 1984, Appellants informed Respondents of their selection of Lots 1-5 and the Roadway for release. (Ex. D-30, (Fn Con't Next Page)

In Columbia Development, Inc. v. Watchie, 252 Or. 81, 448 P.2d 360 (1968), the court refused to impose a limitation on the release of property not contained in the parties' contract. The plaintiff brought a foreclosure action under a conditional sales contract. The contract required defendant to pay plaintiff \$165,000. Defendant defaulted, and later requested a partial release of property for which he had paid under the contract. Plaintiff refused. The trial court, however, ordered the release of the property requested by defendant upon condition that defendant pay the past due taxes.

The Oregon Supreme Court affirmed the decision and focused upon the purpose of the release provision and the inequities associated with plaintiffs' withholding the releases. The court reasoning is most instructive:

\* \* \* Whether the release privilege survives default depends, in the absence of equitable considerations, upon the intention of the parties, to be drawn from the language of the covenant read in the light of the other provisions of the contract and of surrounding circumstances at the time of execution. But, depending upon the facts of the particular case, the decision \* \* \* may be varied by a consideration of what now seems fair and just in the light of subsequent events. It is no unusual thing for equity to refuse recognition to express contractual provisions relating to security for loans where their enforcement would not be consonant with justice. (citations omitted).

Id. at 362 (emphasis added). The court also stated:

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Add. 89). In June 1984, sufficient principal payment was made for the release of Lot 6, the only remaining platted lot. (TR. 321). Requiring some formal selection of Lot 6 at that time was meaningless and not required. Utah State Building Bd. v. Walsh Plumbing Co., 16 Utah 2d 249, 399 P.2d 141, 144 (1965) (when contract requires giving of notice, unless failure to give it in some way puts a party to a disadvantage or adversely affects his rights, he should not be permitted to evade his obligations because of a mere technical failure to give notice).

If the mortgagee is paid the proportionate share of the accrued interest, and reimbursed for his expenses, we do not see how he can be prejudiced. His remaining security would be just as ample as if the release had been demanded before default, and, in case foreclosure proceedings had been commenced, they would not be defeated or affected, as to the remaining lots, by the execution of a partial release. On the other hand, a contrary construction might work harshly against purchasers from the mortgagors, and defeat the very purpose for which the covenant was inserted. \* \* \* Construing this covenant in connection with other provisions of the mortgage, and in the light of the manifest purpose which it was designed to subserve, we are of the opinion that the right to a partial release upon the stipulated terms continues until the mortgagee has fully executed the power by sale of the mortgaged premises. (citations omitted). \* \* \*

[R]elease clauses of this sort create vested rights which remain vested even beyond default and may be claimed at any time until a decree of foreclosure is entered.

Id. at 362-63 (emphasis added). Equally as persuasive in determining a party's entitlement to partial release of property are the following decisions: Burroughs v. Garner, 405 A.2d 301 and Eldridge v. Burns, 142 Cal. Rptr. 845.

This Court should follow Watchie and reverse the district court's decision. Any other ruling will impose a harsh and inequitable result for several reasons. First, Respondents knew exactly what Property Appellants wanted released before any alleged default. (Ex. D-23, Ex. D-25, Add. 85; Ex. D-30, Add. 89).<sup>17/</sup> Second, the Contract does not expressly preclude partial releases after default. The Contract, in fact, expressly states Appellants

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<sup>17</sup> Respondents were notified throughout the Contract period what lots Appellants wanted released. (Ex. D-23, D-25, Add. 85; D-30, Add. 89). Having executed the Consent to Record and having received Felton's letter of January 20, 1984, demanding deeds of reconveyance for Lots 1-5 and the Roadway (Ex. D-30, Add. 89), Respondents knew that Lot 6 was the only remaining lot to be released. Moreover, Appellants have contended from the outset Respondents breached the Contract no later than January 20, 1984, more than ten (10) months before any conceivable default by Appellants.

were entitled to partial releases upon payment "or at any time thereafter." Consistent with this language, Lots 1 through 5 were actually reconveyed to Appellants after the date on which the court found that Appellants materially breached the Contract by failing to pay less than \$3,200 in taxes. (See Ex. P-45, Add. 90). The other property should likewise have been reconveyed to Appellants.

Moreover, apart from making improvements costing \$1,000,000, Appellants paid Respondents in excess of eighty percent (80%) of the \$1.5 million Contract. But Respondents, by their failure to perform under the Agreement, chose to release only forty-six percent (46%) of the Property.<sup>18/</sup> The court's decision allows Respondents to withhold their performance based upon Appellants' mere failure to pay approximately \$3,200 in property taxes in November, 1984, after Respondents had breached the Contract by intentionally refusing to reconvey the Property.<sup>19/</sup> Such a result is grossly inequitable.<sup>20/</sup> As in Watchie, irrespective of any failure to pay taxes, Appellants had a vested right to the release of Lot 6, the Roadway and 7.35 acres under the Contract. The court's decision to the contrary is in error and must be reversed.

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<sup>18</sup> A release of the Roadway, Lot 6 and 7.35 acres of unplatted property would still leave 22.2180 acres subject to the Trust Deed. Assuming a fair market value of \$25,000 per acre (Ex. P-97), Respondents were still secured by property worth \$555,450 -- an amount far in excess of the principal balance.

<sup>19</sup> The \$3,200 in taxes represents less than one percent (1%) of \$1,546,400 paid to Respondents under the Contract.

<sup>20</sup> The court's decision should be reversed because it causes a forfeiture not allowed by the Contract. Such a result is contrary to public policy and applicable law. See First Security Bank of Utah v. Maxwell, 659 P.2d 1078, 1081 (Utah 1983) (the law abhors forfeitures); Moon Lake Electric Ass'n, Inc. v. Ultrasystems Western Constructors, Inc., 767 P.2d 125 (Utah App. 1988).

(c) Appellants' failure to pay taxes did not excuse Respondents' obligation to reconvey portions of the Property under the Contract.

The court concluded that Appellants first breached the Contract by failing to pay approximately \$3,200 in property taxes due on Lot 6 and the unplatted acreage on November 30, 1984 (C. ¶ 2, Add. 38). According to the court, this breach was "material, significant, continuing and uncured" when releases were first requested by Appellants (C. ¶ 4, Add. 38), and occurred prior in time to any alleged breach by Respondents, who did not materially or significantly breach the Contract. (C. ¶ 5, Add. 39). Since trial, Appellants have paid all unpaid Property taxes on Lot 6 and the unplatted property, the property covered by the Trust Deed. (R. 1687-91).

Appellants have demonstrated above why the release provisions were material and why Respondents' failure to comply with those provisions was a material breach of the Contract. See § VIII.A.2. and VIII.A.3., supra. p. 21-29. Under that same analysis, it is clear Appellants' failure to pay the 1984 taxes was not so significant as to excuse Respondents' obligation to reconvey property, nor did it fundamentally affect the purpose of the Contract. See Matter of the Estate of Bistro, 576 P.2d at 804; Rogers v. Relyea, 601 P.2d at 41. The payment of taxes, one of the many requirements of the Trust Deed, is not "requisite to enable the other party to carry out his part of the agreement" and, therefore,



did not excuse Respondents' performance.<sup>21/</sup> Buckman v. Hill Military Academy, 223 P.2d at 175.

This Court should be guided by the Oregon Supreme Court's decision in Watchie, which dealt with this very issue. The sellers argued they were not obligated to release real property under an installment contract because buyers' requests for release of property were made (i) after they defaulted in making principal and interest payments totaling \$101,767, and (ii) during the period of buyer's default in the payment of real estate taxes that continued over the four-year existence of the parties' agreement. Nonetheless, the court ordered the release of the property subject to the payment of the delinquent taxes. The court stated:

The non-payment of taxes had constituted a default earlier but, as already noted, in amount of money the unpaid taxes were much less than the money defendant had paid plaintiffs. The plaintiffs are not prejudiced for it is apparent that plaintiffs still have ample security and the substantial security for which they contracted, and the decree does require that all of the taxes on all of the property must be paid before the partial transfer of property occurs.

Watchie, 448 P.2d at 363 (emphasis added). In short, the non-payment of taxes did not excuse the seller's obligation to release property.

Applying Watchie, this Court should rule that Appellants' failure to pay taxes in 1984 was not a default excusing Respondents' obligation to release property under the Trust Deed. Consistent with Watchie, Appellants have paid all unpaid property taxes, and it would be most unconscionable for the non-payment of \$3,200 in taxes

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<sup>21</sup> The court failed to consider that if Respondents had released Lot 6 as required, Appellants' failure to pay taxes on the lot could not have been a breach of the Trust Deed.

(which has been cured) to excuse Respondents' obligation to release property for which Appellants paid \$465,604. Id.

5. The District Court Erred In Concluding That Respondents Did Not Act In Bad Faith, Thereby Refusing To Grant Relief To Appellants Under Utah Code Ann. § 57-1-33.

The district court concluded that Respondents did not withhold the reconveyances in bad faith (C. ¶ 23, Add. 43), and, therefore, no action for statutory damages existed under Utah Code Ann. § 57-1-33.<sup>22/</sup> As a matter of law, however, the court erred.

When a trustor satisfies the obligations secured by any trust deed, even if by partial performance, the trustee is required, upon written request from the beneficiary, to reconvey the trust property to the trustor. Utah Code Ann. § 57-1-33. This statutory requirement serves the purpose of protecting borrowers who secure debts with an interest in real estate from lenders who refuse to return the security when the debt is discharged. Hector, Inc. v. United Savings & Loan Association, 741 P.2d 542, 545 (Utah 1987). Although "good faith" may be a defense to the assessment of penalties under § 57-1-33, such good faith does not exist when the seller uses its leverage to obtain security for the payment of another debt. Hector, 741 P.2d at 545. See also Swaner v. Union Mortgage Co., 99 Utah 298, 105 P.2d 342, 346 (1940) (a party cannot justifiably refuse to perform under one contract to compel other party to the contract to perform under another contract).

Respondents' admissions concerning their withholding of releases contrary to the requirements of the Contract, are discussed

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<sup>22</sup> Of course, such a conclusion does not affect Appellants' independent claims for breach of contract, with respect to which good or bad faith is irrelevant.

in detail in § VIII A.4.(a) and (b), p. 21-29. Those admissions are binding, cannot be contradicted by other evidence and as a matter of law preclude a finding that Respondents acted in good faith. Hayes v. Xerox Corp., 718 P.2d at 931; Kempter v. Hurd, 713 P.2d at 1280; and Bailey v. Mead, 492 P.2d at 800. Respondents were not entitled to rewrite the Contract unilaterally to increase their leverage and security for payment. Hector 741 P.2d at 545. Likewise, the district court was not entitled to rewrite the parties' Contract, and its decision, which in effect did so, is in error.

6. This Court Should Rule That Appellants Are Entitled To Specific Performance, Decree That Principal Payments And The Accrual Of Interest Under The Trust Deed Note Were Topped No Later Than January 20, 1984, And Remand The Case To The District Court For A Determination Of Appellants' Damages.

This Court should reverse the decision of the district court and decree that Respondents, not Appellants, breached the Contract.<sup>23/</sup> In addition, this Court should address Appellants' remedies, which the court did not do, because of its fundamental determination that Appellants breached the Contract and, therefore, were not entitled to relief.

(a) Appellants are entitled to specific performance.

Specific performance should be ordered if the parties' intent as to the material terms of the Contract is clear. Barnard v. Barnard, 700 P.2d 1113, 1114 (Utah 1985); Eliason v. Watts, 615 P.2d

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<sup>23</sup> The material facts have been fully developed, and this Court has authority to render a judgment in favor of Appellants, which the district court failed to do. Coffey v. Stephen, 3 Kan. App. 2d 596, 599 P.2d 310 (1979); Carpenter v. Carpenter, 645 P.2d 476 (Okla. 1982); Matter of Magoon's Estate, 569 P.2d 884 (Haw. 1977) (when result is foreordained from the record, appellate court should exercise its power to render final judgment on reversal).

427, 429 (Utah 1980).<sup>24/</sup> The reconveyance of property was a material condition of the Contract sufficiently specific to require the Contract to be performed according to its terms. (Ex. D-15 ¶¶ 1 and 3, Add. 71). The parties clearly understood this obligation, including the fact that the Roadway was to be reconveyed along with the first three (3) PUD lots. (TR. 46). This being the case, Appellants were entitled to the release of property. The court thus erred in not ordering Respondents to specifically perform their obligations and reconvey the Roadway, Lot 6 and the 7.35 acres, and this Court should now award Appellants this relief. See Eliason, 615 P.2d at 429.

(b) The district court erred in not tolling Appellants' payment of principal and the accrual of interest under Trust Deed Note.

In awarding specific performance, courts are compelled to evaluate the equities and place the parties in a position they would have been had no breach occurred. Eliason, 615 P.2d at 430 (court awarded specific performance plus lost rent and profits offset by interest earned on purchase money). See also, Alexander v. Brown, 646 P.2d 692, 695 (Utah 1982). The Utah Supreme court has held that no interest shall accrue on the principal balance of payments due from a buyer if the buyer has not received the benefit of his bargain because of the seller's breach. Pack v. Hall Development Company, Inc., 667 P.2d 39, 40 (Utah 1983); Blomquist v. Bingham, 652 P.2d 900, 902 (Utah 1982); Amoss v. Bennion, 456 P.2d 172, 175 (Utah 1969). The Blomquist court stated:

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<sup>24</sup> Neither Respondents nor Appellants contend any ambiguity exists with respect to the release provisions of the Contract.

Where a purchaser's possession is not beneficial, or is incomplete or where the vendor has wilfully refused to perform his contract, a court of equity, decreeing specific performance, should postpone the date for commencement of interest and the date upon which installment payments are to be made . . . . [I]t would be unjust to allow the vendor interest on the unpaid balance of the purchase price when the failure to perform the contract was caused by his fault and the vendee had not been in possession.

Blomquist, 652 P.2d at 902 (emphasis added).

Respondents breached the Contract by failing to release property from the Trust Deed and by later commencing both non-judicial and judicial proceedings to foreclose that unreleased property. Appellants purchased the Property with an obvious intent to develop it. Respondents' breach precluded Appellants from effectively marketing and promoting the Property. (TR. 276-77). As an aspect of specific performance, the court should have extended the time to pay the remaining principal balance and ordered that interest was tolled from and after the date of Respondents' breach (not later than January 20, 1984). See Amoss, 456 P.2d at 175-76 (court affirmed the tolling of interest on unpaid balance due to seller's refusal to perform under the Contract); Blomquist v. Bingham, 652 P.2d at 902.

(c) Appellants were entitled to an award of damages due to Respondents' failure to reconvey.

The court concluded Appellants' damages were "too remote, conjectural and speculative," and Appellants "failed to establish that they have suffered actual damages resulting from any alleged breach by [Respondents]." (R. 1651, p. 8; C. ¶ 28). The court erred, however, in not awarding damages for interest on the money paid Respondents for property they failed to release.

When a party retains and makes use of money belonging to another, equity requires that interest be paid on the money retained. See Malechy v. Malechy, 148 Ariz. 121, 713 P.2d 322, 323 (App. 1985); Rose City Transit Co. v. City of Portland, 18 Or.App. 369, 525 P.2d 1325, 1339 modified 271 Or. 588, 533 P.2d 339 (1974). Since Respondents had the use of the money paid by Appellants, while simultaneously withholding reconveyance of extensive portions of the Property, Appellants are entitled to an award of damages representing a reasonable rate of return on the purchase money paid. "Neither party should enjoy the possession and use of the subject matter of the contract [i.e., the Property] and also the purchase price." Dillingham Commercial Co., Inc. v. Spears, 641 P.2d 1, 10-11. n. 9 (Alaska 1982). Appellants' damages need not be proved with mathematical certainty. Highland Construction Co. v. Union Pac. R. R. Co., 683 P.2d 1042, 1045 (Utah 1984), and this court should remand for a determination of those damages.

(d) The trial court erred when it failed to award Appellants the benefit-of-the-bargain.

In Utah the general theory of damages for breach of contract is to place the non-breaching party in as good a position as he would have been had the contract been performed. Alexander v. Brown, 646 P.2d 692 (Utah 1982); Keller v. Deseret Mortuary Co., 23 Utah 2d 1, 455 P.2d 197, 198 (1969). When a party refuses to reconvey land, the non-breaching party is generally entitled to the difference between the contract price and the market value at the time of the breach. Terry v. Panek, 631 P.2d 896, 897 (Utah 1981); Ranch Homes, Inc. v. Greater Park City Corp., 592 P.2d 620, 624 (Utah 1979); Smith v. Warr, 564 P.2d 771, 772 (Utah 1977).

The Contract provides for the purchase and sale of 60.078 acres for \$26,350 per acre. Thirty-seven (37) acres remain covered by the Trust Deed at a contract price of \$974,950.00. The fair market value of the Property on January 20, 1984, when Respondents refused to release, was \$37,500 per acre. (Ex. P-97; TR. 472-473). Appellants claimed at trial Respondents' breach caused general damages of at least \$123,944.00, representing the difference in market value. (Ex. 96; TR. 474-475). The court erred in failing to consider or award such damages, and this court should remand the case to the court for a determination of Appellants' damages. Associates Northwest, Inc. v. Beets, 112 Idaho 603, 733 P.2d 824 (1987).

(e) The district court erred in excluding evidence concerning damages which arose from Appellants' construction loans.

The court refused to admit evidence establishing the amount of interest that Appellants paid to Tracy Mortgage Company for loans they obtained to construct the improvements upon the Property. (TR. 120-124).<sup>25/</sup> The court based its decision upon an incorrect interpretation of Ranch Homes, supra. (Id.).

In Ranch Homes, developers entered into an option contract to purchase thirty (30) acres of real property in Park City, Utah for \$502,000. The developers, who paid \$10,000 for the option, timely exercised the option. The sellers subsequently repudiated the agreement. The developers sought to recover damages they incurred both prior to and subsequent to their exercise of the option. The trial court found in favor of the developers. Id. at 623. The Utah

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<sup>25</sup> Appellants proffered evidence showing interest costs of \$258,092 on this loan. (TR. 960-63).

Supreme Court affirmed, but reduced the amount recoverable since the developer's preparation of final architectural and engineering plans was not reasonably foreseeable "prior to the time the option was exercised." Id. at 625.

Unlike the developers in Ranch Homes, the damages sought by Appellants included only interest costs incurred after the execution of the Contract. This is not an option case; this was a completed sale with development underway. The costs were reasonably foreseeable by Respondents, who always knew and understood Appellants intended to develop the Property and construct improvements. (TR. 50-51). In fact, Respondents agreed to pay a pro-rata cost for use of some of the improvements. (Ex. D-14, Ex. D-15, Add. 71). It was foreseeable Appellants would incur interest costs as a natural and probable consequence of Respondents' material breach, and the court erred in excluding this evidence. Therefore, the court should be instructed on remand to consider the amount of interest paid upon this loan in determining Appellants' damages. Christensen v. Farmers Ins. Exchange, 21 Utah 2d 194, 443 P.2d 385 (1968).

**B. THE DISTRICT COURT ERRED IN CONCLUDING APPELLANTS GRANTED AN EASEMENT OVER THE ROADWAY TO RESPONDENTS.**

The court held Respondents and "owners and purchasers" of the unplatted property held a "non-exclusive appurtenant easement" (that "ran with the land") "for utilities and for access to and the right to use as a means for ingress and egress for vehicular and pedestrian access over, under and across" the Roadway. (C. ¶ 11, Add. 40). According to the court, this easement was created by the Respondents' "execution of the Consent to Record and the subsequent



recordation of the final plat and the CCRs." (Id.) As a fundamental part of its ruling the trial court expressly found that the Respondents, by their own conduct as trust deed beneficiaries, created an easement in favor of themselves. The court determined that Respondents' signing of the Consent to Record and "allowing its recording, together with the CCRs, "created nonexclusive easements or covenants running with the land in the owners of the lots to the use of the roadway, water line and sewer system. (R. 1651, Add. 52, emphasis added).

Respondents asserted no claims in their pleadings or at trial for this declaration. The Respondents claimed no easement by necessity, nor would the evidence support such a claim since Respondents' own property, abutting the unplatted property, can be accessed from an adjacent county road. (TR. 59). The court's gratuitous finding of an easement in favor of Respondents is contrary to law and not supported by the evidence.

1. As A Matter Of Law, Respondents Could Not Create An Easement In Favor Of Themselves.

Only the fee simple owner of real property may create an easement. Hollabaugh v. Kolbert, 604 P.2d 1359, 1363 (Wyo. 1980). At the closing in July 1981, Respondents conveyed fee title to Appellants without reservation of an easement. (Ex. D-17, Add. 83). When Respondents subsequently executed the Consent to Record in November 1983, they were merely beneficiaries of the Trust Deed given by Appellants to secure payment of the purchase price. Appellants, the absolute fee owners of the Property, did not sign the Consent to Record. (See Ex. D-7, Add. 67). The court erroneously focused on Respondents' conduct, although only

Appellants could grant the easement. Id. Respondents could not have conveyed an easement to themselves since they were not the fee owners.

**2. The Consent To Record Does Not Create An Easement In Favor Of Respondents And Evidences No Intention To Do So.**

Whether an easement is created depends upon the intent of the parties as expressed in the documents executed by them, taken as a whole. Labrum v. Richenback, 711 P.2d 225, 227 (Utah 1985); Chournos v. D'Angillo, 642 P.2d 710, 712 (Utah 1982) Creason v. Peterson, 24 Utah 2d 305, 470 P.2d 403, 405 (1970).

The Consent to Record evidences no intent to create an easement. The document was not signed by the Appellants, the fee owners. It contains no "granting" language<sup>26/</sup> purporting to convey any interest to anyone. No easement or access right is even mentioned. The Consent to Record repeats verbatim the boundary description of White Pine Ranches Phase I shown on the Plat but it does nothing else. (Compare Ex. D-7, Add. 67; with Ex. D-1, Add. 59). Respondents had no authority from Appellants as owners to grant themselves an easement.

The purpose of the Consent to Record was not to create an easement. Under the Closing Memorandum, the final plat and CCRs required the reasonable approval of Respondents. (Ex. 15, ¶ 5, Add. 72). Respondents own real property adjacent to the Property, and were concerned about the quality and extent to which the Property

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<sup>26</sup> See Utah Code Ann. §§ 57-1-12 (warranty deeds) and 57-1-13 (quit claim deeds). See also the strange acknowledgement at the end of the so-called Consent. The Consent and its acknowledgement make no sense. The Consent was apparently prepared by Heaton who at various times represented both parties.

would be developed. (TR. 138, 744). They had received earlier offers to develop the Property but did not like the nature of the developments proposed. (TR. 744). Thus, the purpose of paragraph 5 was to evidence Respondents' approval of the nature and extent of Appellants' development of the Property and nothing else.

3. The Declaration Of Protective Covenants Did Not Create An Easement In Favor Of Respondent.

As a part of the platting process, Appellants recorded the CCRs. (Ex. D-51, Add. 91, 92). The CCRs apply to "Phase I" of White Pine Ranches -- i.e., Lots 1 through 6 and the Roadway but not the unplatted property. (Ex. D-51, Add. 91-92).

References to easements and to the Roadway are collected in Articles XI and XII of the CCRs. (Ex. 51, Add. 112-15). No easements are granted to Respondents therein. To the contrary, the CCRs provide that

11.2 Easements Reserved: Easements over the Lots and common area properties for the installation and maintenance of electric, telephone, cable television, water, gas and sanitary sewer lines, water wells, private streets, water reservoir, private pathways, drainage facilities, and street entrance ways as shown on the recorded tract map of the properties, other documents of record or existing prior to October 30, 1983 are hereby reserved by Declarant, together with the right to grant and transfer the same.

(Ex. D-51, Add. 113, emphasis added). The CCRs unequivocally identify the "Declarant" to whom the foregoing easements are reserved "as the persons executing" the CCRs -- i.e., the Appellants. (Id., Add. 92).

The CCRs further dedicate the Roadway (White Pine Lane) for restricted private use of the "owners" of Lots 1 through 6. (Id., Add. 114). However, the Respondents are not "owners" under the CCRs

(Ex. P-51, Add. 92), and, therefore received no easement or other rights by reason of the CCRs.

**4. Contrary To The Court's Ruling, There Is No Evidence That An Easement Was Created By The "Mutual Intent And Agreement" Of The Parties.**

The court ruled that:

The evidence has established that the parties by both mutual intent and agreement granted to the [Respondents] the use of the roadway, Exhibits 25 and 25A, which agreement was later memorialized and recorded in the Consent to Record, Exhibit 7. Access to the unreleased and unpaid for land was intended to be given to the [Respondents] in case of default and this Court so determines.

(R. 1651, Add. 53). But, the court's reliance on Exhibits 25 and 25(a) is misplaced. These documents do not evidence a mutual intent to create the easement claimed by Respondents.

Exhibits 25 and 25A are copies of a letter dated November 18, 1983, written by Heaton to John Sharp, one of the Respondents. The letter addressed the Consent to Record transmitted with it. Saying nothing whatsoever about an easement, Mr. Heaton told Mr. Sharp in this letter that "[his] signature on the enclosed consent document only acknowledges your approval of [Mr. Saunder's] recording the plat and the [CCRs], copy here enclosed." (Id). In the letter, Heaton also told Mr. Sharp that:

By Hy's signature, which I will obtain to this letter prior to releasing your consent to the recordation of the subdivision plat, he agrees that you continue to have your right of approval with regard to how the southern portion of the property is platted.

(Ex. 25, Add. 85; Ex. 25A). At the bottom of the letter, Heaton placed the following signature block:

"Approved:

By \_\_\_\_\_"

The letter was never signed by Saunders or any other Appellant. (Tr. 372).

Heaton also told Mr. Sharp that Hy Saunders (one of the Appellants) intended to seek a "release of Lots 1 through 5 of the platted subdivision along with his road (White Pine Lane)." (Ex. 25, Add. 85; Ex. 25A). More importantly, Heaton unequivocally told Mr. Sharp he had "reviewed the payments under the Note" and found that Saunders "is entitled to those releases." Id. Heaton also stated:

When those releases [Lots 1 through 5 and the Roadway] are made, pursuant to your instruction we will insure that rights are reserved in White Pine Lane for access for the southern portions of the property purchased from you until your Deed of Trust is fully paid.

(Id.)

Obviously lacking authority to grant such access rights, Heaton delivered the letter to Saunders, who in turn delivered it to Felton for his review. (TR. 162). By letter dated November 21, 1983, Felton rejected the idea of creating an easement in favor of Respondents along the Roadway (White Pine Lane) and objected to the scope of the access rights Heaton proposed. (Compare Ex. 25, Add. 85 with Ex. D-26A, Add. 86). Admittedly, Felton discussed an access right over White Pine Lane, albeit one limited to "access to Lot 6 on the north half of the property." In contrast, however, Heaton's letter contemplated much broader "access to the southern portions of the property purchased from [Respondents]" -- i.e., to all the unplatted property. (Ex. 25, Add. 85). Yet, none of the Appellants ever signed Exhibit 25 or 25A nor did Appellants otherwise authorize the statements Heaton made therein. (TR. 372).

No document granting an easement or access rights of any scope to Respondents was ever prepared or recorded. Nevertheless, the court, relying solely on Heaton's letter (Exhibit 25), determined an easement had been granted to Respondents over the Roadway for access to the unplatted property by the "mutual intent and agreement of the parties". (R. 1651, Add. 53).

This ruling, however, ignores the fact that Heaton's letter was subject to at least two wholly unfulfilled conditions: (1) Saunders (or other Appellants) signing the letter; and (2) Respondents' release of Lots 1 through 5 and the Roadway. Respondents' failure to fulfill these conditions precludes Respondents' assertion that any easement or access rights were given to them.

It is settled law that parties to a contract may, by mutual consent, alter all or any portion of a contract by agreeing to its modification. Rapp v. Mountain States Telephone and Telegraph Co., 606 P.2d 1189, 1191 (Utah 1980); Provo City Corp. v. Nielson Scott Co., 603 P.2d 803, 806 (Utah 1979). But, the Closing Memorandum expressly states that it "may not be orally changed, modified, or terminated, except in writing, by the party against whom the same is sought to be enforced." (Ex. D-15 ¶ 10, Add. 74). Since the Contract was for the sale of real property, any modification of the Contract was governed by Utah's Statute of Frauds. Utah Code Ann. § 25-5-3 (1953, as amended). Golden Key Realty, Inc. v. Manta, 699 P.2d 730, 732 (Utah 1985); Strevell-Patterson Co., Inc. v. Francis, 646 P.2d 741, 742 (Utah 1982); Zions Properties, Inc. v. Holt, 538 P.2d 1319, 1322 (Utah 1975). No written memorandum or contract, however, was ever executed or agreed to by the parties satisfying the Statute of Frauds.

Even assuming Felton's letter grants access rights to Respondents (which it does not), the letter does not satisfy the Statute of Frauds because it was not executed by the other Appellants who owned the property jointly with Felton. (Ex. P-46). Williams v. Singleton, 723 P.2d 421, 423 (Utah 1986). The court made no finding that Felton had authority to modify the Contract on behalf of the other parties thereto or on behalf of those Appellants who acquired the property from such parties. Therefore, no easement or access rights were ever granted to Respondents. Id. The district court's conclusion that the Contract was modified to grant access rights to Respondents was in error.

**C. THE DISTRICT COURT ERRED IN AWARDING RESPONDENTS' ATTORNEYS' FEES.**

The district court held that Appellants "are responsible to pay attorneys' fees to [Respondents]" (R. 1651, p. 8-9), and that an award of \$144,469.75 is reasonable. (C. ¶ 29, Add. 44; R. 1370, Add. 3; R. 1401). This award includes every single hour claimed by Respondents' attorneys, except those fees "attributable to examination of [a] potential . . . malpractice [claim] against [Heaton]." (R. 1640, p. 67-69). The court also ruled Respondents are entitled to augment this amount for post-trial proceedings, and, if necessary, "after prevailing on appeal." (Id.) These rulings are not supported by evidence or law.

**1. Respondents Materially Breached The Contract And, Therefore, Are Not Entitled To An Award Of Attorneys' Fees.**

Attorneys' fees may be awarded only if provided for by contract or statute. Golden Key, 699 P.2d at 734 (Utah 1984); Turtle Management, Inc. v. Haggis Management, Inc., 645 P.2d 667, 671 (Utah

1982). The Closing Memorandum provided that "the defaulting party shall pay all expenses . . . arising out of the breach or default thereof." (Ex. 15, ¶ 11, Add. 74). Respondents materially breached the Contract and, thus, are the defaulting party. (See Section VIII. A.3, supra, p. 18-20). Therefore, the court erred in awarding attorneys' fees to Respondents.

**2. The Award Of Attorneys' Fees To Respondents Is Contrary To The Contract And Wholly Unreasonable.**

An "award of attorneys' fees is allowed only in accordance with the terms of the contract." Turtle Management, Inc., 645 P.2d at 671 (emphasis added); Faulkner v. Farnsworth, 714 P.2d 1149, 1150 (Utah 1986); Traynor v. Cushing, 688 P.2d 856, 858 (Utah 1984). A "prevailing party" may not recover attorneys' fees unless the contract expressly provides for such recovery. Traynor, 688 P.2d at 858; see, e.g., Faulkner, 714 P.2d at 1151 ("the contractual language does not award attorneys' fees to the prevailing party who succeeds in enforcing the agreement, but against the defaulting party whose default necessitates enforcement"). The award must also be reasonable. Associated Developments, Inc. v. Jewkes, 701 P.2d 486, 488 (Utah 1984); Traynor, 688 P.2d at 858; Turtle Management, Inc., 645 P.2d at 671.

The court's award of attorneys' fees to Respondents is not allowed under the documents comprising the Contract. None of the documents contain a "prevailing party" provision. (See Ex. D-2, Add. 62; Ex. D-3, Add. 64; Ex. D-15, Add. 74). The Closing Memorandum only provides that "the defaulting party shall pay all expenses . . . arising out of the breach or default thereof." (Ex. D-15, ¶ 11, Add. 74). The Closing Memorandum contains no covenants for the



payment of taxes or principal installments, which the court determined Appellants breached. Those covenants are found only in the Trust Deed and Trust Deed Note. Thus, the award of attorneys' fees cannot be based upon a "breach" or "default" of the Closing Memorandum.

The only remaining documents even mentioning attorneys' fees are the Trust Deed Note and Trust Deed. (Ex. D-2, Add. 62; Ex. D-3, Add. 64). The Trust Deed provides that the Respondents are entitled to recover, in a foreclosure, "all costs and expenses incident thereto." (Ex. D-2, ¶ 16, Add. 62). The Trust Deed Note provides that if it must be collected by an attorney after default, the Appellants "agree to pay all costs and expenses of collection, including reasonable attorneys' fees." (Ex. 3, Add. 64 emphasis added).

Respondents cannot, as a matter of law, recover attorneys' fees if such fees are incurred in matters unrelated to the Respondents' foreclosure action. Stubbs v. Hemmert, 567 P.2d 168, 171 (Utah 1977); Utah Farm Production Credit Association v. Cox, 627 P.2d 62, 66 (Utah 1981). Even if Respondents are entitled to attorneys' fees related to the foreclosure, the court made no finding concerning the amount of fees strictly related to the foreclosure of the Trust Deed.<sup>26/</sup> The Respondents, therefore, should not be entitled to

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<sup>26</sup> Absent such a finding, which is required pursuant to Rule 52(a), Utah R. Civ. P., the district court's decision awarding attorneys' fees must be vacated. Parks v. Zions First National Bank, 673 P.2d 590, 601 (Utah 1983) (failure of trial court to enter adequate findings require judgment to be vacated).

recover attorneys' fees at all in a foreclosure action upon property they failed to release pursuant to the Contract.

Moreover, there is no evidence to support the conclusion that the amount of attorneys' fees awarded to Respondents is reasonable. See Paul Mueller Co. v. Cache Valley Dairy Association, 657 P.2d 1279, 1287 (Utah 1982) ("it is well established that to justify a finding of reasonable attorneys' fees, there must be evidence in support of that finding"). See Richards v. Hodson, 26 Utah 2d 113, 485 P.2d 1044, 1046 (1971) (absent evidence of reasonableness, attorneys' fees should not be awarded).<sup>27/</sup>

In determining the reasonableness of the award, the court relied upon the Affidavits of Donald J. Winder filed in support of Respondents' request for attorneys' fees. (R. 713-805, 1218-1239, 1251-1260, and 1276-79). Mr. Winder, one of Respondents' lawyers, merely recited that his firm's services were "reasonably necessary" for the development of the case and the protection of Respondents' rights, and that the rates charged are "reasonable and in accordance with those rates generally charged by attorneys in this area for similar services." (Id.). The court's reliance on this self-serving opinion was improper and cannot support an award of attorneys' fees. Paul Mueller Co., 657 P.2d at 1287 (court's reliance on statement of prevailing party's counsel does not provide adequate evidentiary basis for awarding attorneys' fees). Sharp v. Hui Wahine, Ins., 49 Haw. 247, 413 P.2d 242, 246-47 (1966) (reliance on counsel's self-serving opinions to show reasonableness of attorneys'

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<sup>27</sup> It was Respondents' burden to show by a preponderance of evidence that the fees they claim are reasonable, Sharp, 413 P.2d at 246, and they failed to do so.

fees is not good practice and insufficient to support an award of attorneys' fees). Since, as a matter of law, Mr. Winder's opinion alone is insufficient to support the court's conclusion that its award of attorneys' fees was reasonable, the court erred in making the award.

**3. The District Court Erred In Awarding Post-Judgment Attorneys' Fees.**

The district court also awarded attorneys' fees to Respondents for post-judgment work, including this appeal. (C. ¶ 29, Add. 44). None of the operative documents comprising the Contract provide for the recovery of attorneys' fees after judgment or on appeal. Absent an agreement or statute awarding attorneys' fees on appeal, the allowance of such fees is improper. Ohio Realty Investment Corp. v. Southern Bank of W. Palm Beach, 300 So.2d 679 (Fla. 1974) ("to hold otherwise would place an unwarranted penalty on the prosecution of an appeal by a mortgagor"); Vantage Broadcasting Co. v. Wint Radio, 496 So.2d 969 (Fla. App. 1986). Because the Contract contains no express provision allowing recovery of attorneys' fees on appeal, the court's award of such fees is in error.

**D. THE DISTRICT COURT ERRED IN CONCLUDING THE ORDER WAS WRONGFULLY ISSUED.**

The court erred in concluding that the temporary restraining order, issued by the Honorable Judith Billings, was wrongful. (C. ¶ 32, Add. 45). Because Respondents' breach preceded any breach of Appellants, the temporary restraining order could not have been wrongfully issued. (See VIII.A.3., supra, p. 18-20). In addition to this argument, Appellants adopt the arguments asserted in the Brief of Surety/Appellant, Commissioner of Financial

Institutions, dated July 19, 1989, except Appellants do not adopt part IV therein.

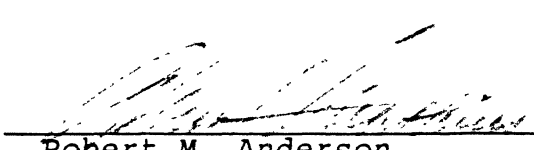
CONCLUSION

This Court should reverse the decision of the district court and order that Respondents, not Appellants, breached the Contract. Respondents should be ordered to specifically perform the Contract by reconveying Lot 6, the Roadway and the 7.35 acres to Appellants. The Court should decree that all interest on the unpaid balance of the Trust Deed Note is tolled from January 20, 1984 until the reconveyances are made, and that all principal payments remaining under the Trust Deed are excused pending the reconveyances. In addition, the case should be remanded to the district court to conduct further proceedings to determine Appellants' damages, including attorneys' fees, in accordance with the instructions of this Court. Any lesser relief from this Court will not remedy the harsh and inequitable decision of the trial court or correct its fundamental errors in reaching that decision.

DATED this 28th day of July, 1989.

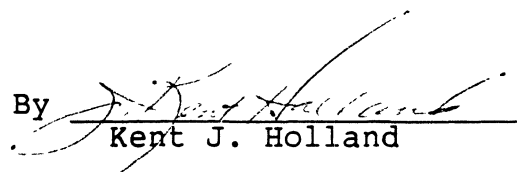
HANSEN & ANDERSON

By

  
Robert M. Anderson  
Glen D. Watkins  
Mark R. Gaylord

ANDERSON & HOLLAND

By

  
Kent J. Holland

Attorneys for Appellants

CERTIFICATE OF HAND DELIVERY

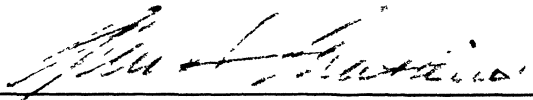
On this 28th day of July, 1989, I hereby certify that I caused to be hand delivered, a true and accurate copy of APPELLANTS' BRIEF, to the following:

Stanford B. Owen, Esq.  
Patrick L. Anderson, Esq.  
FABIAN & CLENDENIN  
215 South State, Twelfth Floor  
Salt Lake City, Utah 84111

Donald J. Winder, Esq.  
Kathy A. F. Davis, Esq.  
WINDER & HASLAM  
175 West 200 South, Suite 4004  
Salt Lake City, Utah 84101

John B. Anderson, Esq.  
ANDERSON & HOLLAND  
623 East 100 South  
Salt Lake City, Utah 84102

Robert Felton, Esq.  
310 South Main Street, Suite 1309  
Salt Lake City, Utah 84101

  
\_\_\_\_\_

IN THE UTAH COURT OF APPEALS

---

LEON H. SAUNDERS, ROBERT FELTON;	:	
SAUNDERS LAND INVESTMENT CORP.,	:	
a Utah corporation; WHITE PINE	:	Case No.
RANCHES, a Utah general	:	880710-CA
partnership; WHITE PINE	:	
ENTERPRISES, a Utah general	:	
partnership; and KENNETH R.	:	
NORTON, dba Interstate Rentals,	:	
Inc., a Nevada corporation,	:	
	:	
Plaintiffs-	:	
Appellants,	:	
	:	
v.	:	
	:	
JOHN C. SHARP and GERALDINE Y.	:	
SHARP,	:	
	:	
Defendants-	:	
Respondents.	:	

---

ADDENDUM TO APPELLANTS' BRIEF

---

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT  
OF SALT LAKE COUNTY, STATE OF UTAH  
THE HONORABLE J. DENNIS FREDERICK,  
DISTRICT JUDGE PRESIDING

Robert M. Anderson, Esq.  
Glen D. Watkins, Esq.  
Mark R. Gaylord, Esq.  
HANSEN & ANDERSON  
50 West Broadway, #600  
Salt Lake City, UT 84101  
Attorneys for Appellants  
Leon H. Saunders, Robert  
Felton, Saunders Land  
Investment Corp., White Pine  
Ranches and White Pine  
Enterprises

Donald J. Winder, Esq.  
Kathy A. F. Davis, Esq.  
Tamara K. Prince, Esq.  
WINDER & HASLAM  
175 West 200 South, #4004  
Salt Lake City, UT 84101  
Attorneys for Respondents

John B. Anderson, Esq.  
ANDERSON & HOLLAND  
623 East 100 South  
Salt Lake City, UT 84102  
Attorneys for Appellant  
Kenneth R. Norton, dba  
Interstate Rentals, Inc.

Donald J. Winder, Esq. (#3519)  
Kathy A. F. Davis, Esq. (#4022)  
Tamara K. Prince, Esq. (#5224)  
WINDER & HASLAM  
175 West 200 South, Suite 4004  
Salt Lake City, Utah 84101

Attorneys for Defendants Sharps

---

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR  
SALT LAKE COUNTY, STATE OF UTAH

---

LEON H. SAUNDERS; ROBERT  
FELTON; J. RICHARD REES;  
SAUNDERS LAND INVESTMENT  
CORPORATION, a Utah corpora-  
tion; WHITE PINE RANCHES, a  
Utah general partnership;  
WHITE PINE ENTERPRISES, a  
Utah general partnership,

Plaintiffs,

vs.

JOHN C. SHARP, and GERALDINE  
Y. SHARP; ASSOCIATED TITLE  
COMPANY, as Trustee, a Utah  
corporation,

Defendants.

JUDGMENT

Civil No. C87-1621

Judge J. Dennis Frederick

---

JOHN C. SHARP, and GERALDINE  
Y. SHARP,

Counterclaim-Plaintiffs,

vs.

ROBERT FELTON, LEON H.  
SAUNDERS; J. RICHARD REES;  
SAUNDERS LAND INVESTMENT  
CORPORATION, a Utah corpora-  
tion; KENNETH R. NORTON dba

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A PROFESSIONAL CORPORATION  
SUITE 4004  
175 WEST 200 South  
P.O. Box 2668  
SALT LAKE CITY, UTAH 84110-2668  
(801) 322-2222

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INTERSTATE RENTALS, INC., :  
and PAUL H. LANDES, indivi- :  
dually; WHITE PINE RANCHES, :  
a Utah general partnership, :  
and WHITE PINE ENTERPRISES, :  
a Utah general partnership, :  
: :  
Counterclaim-Defendants.:

---

This cause came on for trial before the Honorable J. Dennis Frederick on January 28, 1988 through January 29, 1988 and March 22, 1988 through March 25, 1988, with the defendants John C. and Geraldine Y. Sharp (hereinafter the "Sharps") appearing by counsel Donald J. Winder, Kathy A. F. Davis and Tamara K. Prince, the latter being admitted pro hac vice, and plaintiffs White Pine Ranches, White Pine Enterprises, Leon H. Saunders (hereinafter "Saunders"), Robert Felton (hereinafter "Felton"), J. Richard Rees and Saunders Land Investment Corporation appearing by counsel Robert M. Anderson, Glen D. Watkins and Mark R. Gaylord. Counterclaim defendant Kenneth R. Norton ("Norton") appeared through his counsel John B. Anderson, only to introduce a Stipulation and Indemnification Agreement between plaintiffs and counterclaim defendant Norton. Defendant Associated Title was never served in this action. Counterclaim defendant Paul H. Landes (hereinafter "Landes") was never served in this action.

Having heretofore made and entered its Findings of Fact and Conclusions of Law,

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NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiffs' Complaint be dismissed, no cause of action.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Saunders, Felton, Interstate Rentals, Inc. and Norton are indebted, jointly and severally, to the Sharps in the following amounts:

a.	i.	Principal:	\$ 371,739.35
	ii.	Interest through March 22, 1988:	\$ 171,033.54
	iii.	Late payment charge:	\$ 14,869.57
		TOTAL:	\$ 557,642.46

together with interest thereon at the per diem rate of \$183.32 from and after March 22, 1988.

b.	i.	Trustee's fees:	\$ 1,803.80
	ii.	Court Costs:	\$ _____
	iii.	Attorneys' fees through August 31, 1988:	\$ 144,469.75

together with interest thereon at the rate of 10% per annum from the date of expenditure by the Sharps until paid by plaintiffs.

c.		Delinquent property taxes:	\$ 20,368.62
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together with interest and penalties assessed thereon as provided by law, property taxes accruing for 1988, and post-judgment interest thereon at the rate of 12% per annum.

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IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this Judgment shall be supplemented and augmented in the amount of the Sharps' reasonable attorney's fees as established by affidavit and as incurred after August 31, 1988 in preparation of the Findings, Conclusions and Judgment, in responding to any post-trial motions, in collecting said Judgment by execution or otherwise, and after prevailing in any appeal.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Temporary Restraining Order entered in the above captioned matter by the Honorable Judith M. Billings on September 4, 1986 was wrongfully issued and it is hereby lifted and dissolved. The Sharps are hereby awarded judgment against the bond posted by plaintiffs with the Summit County Clerk in September 1986 in the amount of \$2,400.00 and against the security posted by Tracy Collins Bank with the Clerk of this Court in the amount of \$50,000.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Lot 6 as described in the final recorded plat of White Pine Ranches Phase I and the unplatted property more particularly described on Exhibit "A" attached hereto or such portions thereof as may be sufficient to pay the amounts found to be due and owing under this Judgment, together with interest as set forth hereinabove and accrued costs herein, and expenses of sale, be sold at public auction by the Sheriff of Summit County, State of Utah, in the manner prescribed by law for such sales; that said Sheriff, if and when the subject premises are sold by

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SUITE 400A  
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P.O. Box 2668  
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him, out of the proceeds of such sale shall retain first his costs, disbursements and commission, and then pay to the Sharps, or to their attorneys, the accrued and accruing costs of this action, then said sums for the Sharps' attorneys' fees, and the amount owing to the Sharps for principal, interest, costs and expenses of sale and maintenance, taxes, assessments and/or insurance premiums, together with accrued interest thereon, or so much of said sums as said proceeds will pay, and that the surplus, if any, shall be accounted for and paid over to the Clerk of this Court subject to this Court's further order.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all persons having an interest in the subject premises shall have the right, upon producing satisfactory proof of interest, to redeem the same within the time provided by law for such redemption; that from and after the expiration of the period of redemption as provided by law, that the plaintiffs above named, and each of them, and all persons claiming by, through or under them, or any of them, shall be forever barred and foreclosed of all right, title, interest and estate in and to the subject premises, and that from and after the delivery of the Sheriff's Deed to the subject premises that the grantees named therein be given possession thereof.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that if a deficiency results after due and proper application of the

proceeds of such Sheriff's Sale, the Sharps are hereby awarded a personal judgment against Saunders, Felton, Norton and Interstate Rentals, Inc., and each of them, jointly and severally, for the full amount of such deficiency.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Sharps shall have the right, at their request, to one connection to both plaintiffs' culinary water and sewer systems on White Pine Ranches Phase I for a connection fee of \$2,000 each.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that a non-exclusive appurtenant easement shall run with the land, as a covenant running with the land or as an equitable servitude, as the case may be, in favor of and for the use and benefit of the unplatted acreage described on Exhibit "A" attached hereto and incorporated herein by reference and the owners and purchasers thereof (including the Sharps) and their invitees, guests, heirs and successors in interest, for utilities and for access to and the right to use as a means for ingress and egress for vehicular and pedestrian access over, under and across the private roadway (White Pine Lane) shown on the recorded final plat of White Pine Ranches Phase I, recorded with the Summit County Recorder, and a non-exclusive appurtenant easement to run with the land, as a covenant running with the land or as an equitable servitude, as the case may be, in favor of and for the use and benefit of White Pine Ranches

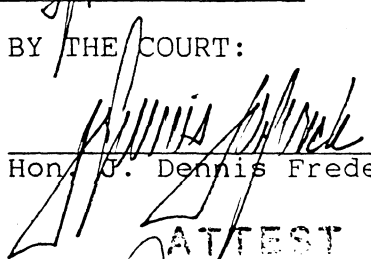
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Phase I and the owners and purchasers thereof (including the Sharps) and their heirs and successors in interest for water lines, water tank and water systems over, under and across the subject premises near the southwest corner of the unplatted acreage as also shown on the final recorded plat of White Pine Ranches Phase I.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the final plat and Declaration of Protective Covenants recorded for White Pine Ranches Phase I with the Summit County Recorder's Office and the non-exclusive easements set forth above shall remain in full force and effect, and not be affected by the foreclosure ordered herein, a purchase at the Sheriff's Sale, or a subsequent redemption of the subject premises, other than a complete redemption thereof by the plaintiffs herein coupled with plaintiffs' declaration for the extinguishment of the non-exclusive easement in favor of the unplatted acreage.

DATED this 26<sup>th</sup> day of Sept., 1988.

BY THE COURT:

  
Hon. G. Dennis Frederick

ATTEST  
H. D. KRONHARDT  
Clerk

By  \_\_\_\_\_  
Deputy Clerk

WINNEN & HANSEN  
A PROFESSIONAL CORPORATION  
SUITE 4004  
175 WEST 200 South  
P.O. Box 2668  
SALT LAKE CITY, UTAH 84110-2668  
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Beginning at a point South 89 degrees 43'36" West along the North line of Lot 8, 175.42 feet from the corner of Lots 1 and 8, a brass cap set by the U.S. General Land Office, said brass cap also being South 00 degrees 19'46" West along section line 1336.14 feet from the Northeast corner of Section 1, Township 2 South, Range 3 East, Salt Lake Base and Meridian; and running thence South 89 degrees 43'36" West along the North line of Lot 7 and 8 2948.98 feet to the Northwest corner of Lot 7; thence South 00 degrees 13'29" East along the West line of Lot 7, 1312.84 feet to the Southwest corner of Lot 7; thence North 89 degrees 47'41" East along the South line of Lot 7, 832.67 feet; thence North 61 degrees 00'00" East 1956.90 feet; thence North 47 degrees 33'15" East 462.75 feet; thence North 42 degrees 44'40" East 85.63 feet to the point of beginning.

LESS and excepting White Pine Ranches, Phase I, a Planned Residential Development, according to the official plat thereof on file and of record in the Summit County Recorder's Office, State of Utah.

EXHIBIT "A"

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Donald J. Winder, Esq. (#3519)  
Kathy A. F. Davis, Esq. (#4022)  
Tamara K. Prince, Esq. (#5224)  
WINDER & HASLAM  
175 West 200 South, Suite 4004  
Salt Lake City, Utah 84101

Attorneys for Defendants Sharps

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IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR  
SALT LAKE COUNTY, STATE OF UTAH

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LEON H. SAUNDERS; ROBERT  
FELTON; J. RICHARD REES;  
SAUNDERS LAND INVESTMENT  
CORPORATION, a Utah corpora-  
tion; WHITE PINE RANCHES,  
a Utah general partnership;  
WHITE PINE ENTERPRISES, a  
Utah general partnership,

Plaintiffs,

vs.

JOHN C. SHARP, and GERALDINE  
Y. SHARP; ASSOCIATED TITLE  
COMPANY, as Trustee, a Utah  
corporation,

Defendants.

FINDINGS OF FACT

AND

CONCLUSIONS OF LAW

Civil No. C87-1621

Judge J. Dennis Frederick

JOHN C. SHARP, and GERALDINE  
Y. SHARP,

Counterclaim-Plaintiffs,

vs.

ROBERT FELTON; LEON H.  
SAUNDERS; J. RICHARD REES;  
SAUNDERS LAND INVESTMENT  
CORPORATION, a Utah corpora-  
tion; KENNETH R. NORTON dba  
INTERSTATE RENTALS, INC.,

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A PROFESSIONAL CORPORATION  
SUITE 4004  
175 WEST 200 South  
P.O. Box 2668  
SALT LAKE CITY, UTAH 84110-2668  
(801) 322-2222

and PAUL H. LANDES, indivi- :  
dually; WHITE PINE RANCHES, :  
a Utah general partnership, :  
and WHITE PINE ENTERPRISES, :  
a Utah general partnership, :  
: :  
Counterclaim-Defendants.:

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This cause came on for trial before the Honorable J. Dennis Frederick on January 28, 1988 through January 29, 1988 and March 22, 1988 through March 25, 1988, with the defendants John C. and Geraldine Y. Sharp (hereinafter the "Sharps") appearing by counsel Donald J. Winder, Kathy A. F. Davis and Tamara K. Prince, the latter being admitted pro hac vice, and plaintiffs White Pine Ranches, White Pine Enterprises, Leon H. Saunders (hereinafter "Saunders"), Robert Felton (hereinafter "Felton"), J. Richard Rees and Saunders Land Investment Corporation appearing by counsel Robert M. Anderson, Glen D. Watkins and Mark R. Gaylord. Counterclaim defendant Kenneth R. Norton ("Norton") appeared through his counsel John B. Anderson, only to introduce a Stipulation and Indemnification Agreement between plaintiffs and counterclaim defendant Norton. Defendant Associated Title was never served in this action. Counterclaim defendant Paul H. Landes (hereinafter "Landes") was never served in this action.

The Court, having heard the testimony of witnesses, having reviewed and received exhibits, having heard the arguments of counsel, having received stipulations of counsel, having reviewed memoranda presented by counsel, having presented its oral ruling on the issues involved in the case on March 30,



1988, and for good cause appearing, hereby makes and enters the following:

FINDINGS OF FACT

1. On or about December 9, 1980, Leon H. Saunders, Robert Felton, Norton and Paul H. Landes entered into an Earnest Money Receipt and Offer to Purchase (hereinafter "Earnest Money") with the Sharps for the purchase of certain real property located in White Pine Canyon, Snyderville, Summit County, State of Utah (hereinafter "the Subject Property"). (Exhibit 14).

2. Plaintiffs' "development plans presently anticipated 12 to 15 four-acre to five-acre lots" and the Earnest Money provided "such plans shall be subject to the reasonable approval of Seller [the Sharps]."

3. The Earnest Money also provided, inter alia:

At a time desired by Seller, Purchaser shall allow Seller to hook into the culinary water system and sewer system developed by Purchaser on the subject Property at the same per-hook-up price charged by Purchaser to the buyers of lots developed on the subject Property.

4. The plaintiffs acted upon the understanding that before Summit County would approve any planned development, they, as the developer, must provide to Summit County for approval an environmental impact statement, a plat map and, if a planned residential development, a declaration of protective covenants. The Snyderville Basin Sewer Improvement District ("SBSID") required all sewer design improvements be approved and construction must receive final approval.

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5. Plaintiffs wanted to promptly develop the Subject Property and anticipated the approval process would be completed by June, 1981.

6. Prior to closing the transaction which was the subject of the Earnest Money, a Shared Water System Cost Estimate was prepared for Saunders by J. J. Johnson & Associates, engineers in Park City. The Estimate proposed two alternatives wherein 15 units at Saunders Ranch (subsequently White Pine Ranches), known herein as the "Subject Property", develop a water system sufficient for its needs and the needs of various adjacent properties in order to provide users of the water system an economy of scale resulting in lower water system costs to each user. (Exhibit 105). Although considered by him, Saunders never adopted any of these proposals.

7. In April, 1981, an Environmental Impact Statement (hereinafter "EIS") was prepared by J. J. Johnson for Saunders Land Investment Corporation concerning development of the Subject Property and was delivered to the Sharps prior to closing. (Exhibit 67).

8. The EIS provided the "sewer system will be connected to the Snyderville Basin Sewer Improvement District and a line extension agreement with the Sewer Improvement District will be signed." The EIS also provided two alternative water storage systems for the development on the Subject Property which would be available to other proposed developments, including Ranch Place and Landmark Plaza, as well. The EIS further pro-

SUITE 4004  
175 WEST 200 South  
P.O. Box 2668  
SALT LAKE CITY, UTAH 84110-2668  
(801) 322-2222

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175 WEST 200 South  
P.O. Box 2668  
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vided that the internal traffic circulation in the subject project would be via private road.

9. In April 1981, Felton, Norton, Saunders and Landes operated under the assumed name of White Pine Ranches. (Plaintiffs' Complaint, ¶¶1 and 5).

10. Thereafter, on or about July 16, 1981, the parties closed the sale of the Subject Property through the execution of a Memorandum of Closing Terms (Exhibit 15) executed by Saunders, Felton, Norton, Landes and the Sharps; a Special Warranty Deed (Exhibit 17) executed by the Sharps and conveying the title to the Subject Property to Landes, Felton, Saunders and Interstate Rentals, Inc.; a Trust Deed Note executed by Felton, Saunders, Landes, Norton and Interstate Rentals, Inc. by its president, Norton, in the amount of \$963,055.30, together with an addendum to the Trust Deed Note (Exhibit 3) outlining the schedule of payments, and a Trust Deed covering the Subject Property executed by Saunders, Landes, Felton and Interstate Rentals, Inc. by its president, Norton, and securing the Trust Deed Note (Exhibit 2) (hereinafter collectively referred to as "the Closing Documents").

11. A partnership agreement establishing White Pine Ranches was executed September 25, 1982 with Felton, Saunders, Dan Hunter and J. Richard Rees as general partners. (Exhibit 49). Saunders Land Investment Corporation subsequently assumed and bought out the interest of Dan Hunter in the White Pine Ranches partnership.

12. On June 30, 1982 White Pine Ranches and Howells Investment executed a Partnership Agreement of White Pine Enterprises for the purposes of "investing in, managing, leasing, developing, subdividing and selling unimproved real estate (Exhibit 48) described on Exhibit 'A' attached" thereto, which unimproved real estate was the approximately 27 southern acres of the Subject Property that was never platted.

13. Both partnerships, White Pine Ranches and White Pine Enterprises, are general partnerships.

14. Preliminary plats (Exhibits 18 and 19) of the Subject Property were prepared by J. J. Johnson & Associates for the development prior to closing, but were modified by plaintiffs because the County Commission was opposed to the private road concept. (Exhibit 109). These preliminary plats were not approved prior to closing because the County Attorney would not approve a private road system (Exhibit 114). A new plat was prepared for White Pine Ranches, a Planned Unit Development ("PUD") and attached as Exhibit "A" to the Memorandum of Closing Terms. This Exhibit "A" to the Memorandum of Closing Terms platted all of the Subject Property and was initialed by all the parties thereto except Felton. (Exhibit 20).

15. Paragraph 1 of the Memorandum of Closing Terms (Exhibit 15) provided as follows:

CHERRY LAGOON CONSTRUCTION  
SUITE 4004  
175 WEST 200 South  
P.O. Box 2668  
SALT LAKE CITY, UTAH 84110-2668  
(801) 322-2222

WINDEK & HASLAM  
A PROFESSIONAL CORPORATION  
SUITE 4004  
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P.O. Box 2668  
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1. It is mutually agreed and understood that after recordation of the PUD Plat and the Declaration of Covenants, Conditions and Restrictions, and upon receipt of each \$140,000.00 in principal (but not including the earnest money and down payment money), Seller shall execute and deliver to Buyer a Partial Deed of Reconveyance for one (1) PUD lot. (Emphasis added.)

16. Paragraph 2 of the Memorandum of Closing Terms provided as follows:

2. Upon the payment of the release price, Buyer shall be entitled to the release of one (1) lot of Buyer's choice upon receipt of the payment or at any time thereafter. (Emphasis added.)

17. Paragraph 3 of the Memorandum of Closing Terms provided as follows:

3. It is agreed that, at the time of execution of this Memorandum, Buyer has paid to Seller the sum of \$620,000.00 which will release from the Deed of Trust three (3) PUD lots. Upon the recordation of the PUD Plat and Declaration of Covenants, Conditions and Restrictions with the Summit County Recorder, Buyer shall be entitled to the release from the Deed of Trust of three (3) PUD lots of Buyer's choice together with the said roadway. (Emphasis added.)

18. Paragraph 5 of the Memorandum of Closing Terms provided as follows:

5. The proposed plat is attached hereto as Exhibit "A" and by this reference incorporated herein. Seller

hereby acknowledges and agrees to execute as a lienholder the original plat prior to recordation. Changes in the proposed plat and the Declaration of Covenants, Conditions and Restrictions when prepared shall be subject to the reasonable approval of Seller. (Emphasis added.)

19. The proposed plat, Exhibit "A" attached to the Memorandum of Closing Terms included a boundary description describing all of the Subject Property and an Owner's Dedication. The Owner's Dedication is a standard printed form used by J.J. Johnson, parallels dedications used in the city limits of Park City and is commonly used in plats to dedicate roads to public use, not as a dedication for a private road as originally contemplated in the EIS. The Owner's Dedication provides in pertinent part as follows:

Know all by these present that we the undersigned owners of the herein described tract of land, having caused the same to be subdivided into lots and streets to hereafter be known as White Pine Ranches Subdivision, do hereby dedicate for perpetual use of the public all parcels of land shown on this plat as intended for public use, and do warrant, defend, and save the city harmless against any easements or other encumbrances on the dedicated streets which will interfere with the city's use, operation, and maintenance of the streets and do further dedicate the easements as shown. (Emphasis added.)

(Exhibit 20).

20. Paragraph 6 of the Memorandum of Closing Terms provided in part as follows:

6. Seller agrees to grant to Summit County the ten and one-half (10-

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175 WEST 200 South  
P.O. Box 2668  
SALT LAKE CITY, UTAH 84110-2668  
(801) 322-2222

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1/2) foot strip of land outlined in red on Exhibit "A". Said conveyance shall be for the sole purpose of widening the County roadway. If possible, such grant shall be in the form of an easement. The County indicates that it is possible that the County road as it exists is not where it is platted.

21. The County roadway has not been widened, there are no current plans to do so, and Summit County has never requested such an easement from plaintiffs or the Sharps. (See Exhibit 107, p. 15; Exhibit 87, p. 8; and Exhibit 34).

22. Paragraph 7 of the Memorandum of Closing Terms provided in pertinent part as follows:

7. Buyer agrees to provide Seller with one (1) sewer connection and one (1) culinary water connection into Buyer's systems at such time as each is available, and Seller shall pay a connection fee and service fee equal to the pro rata cost to the purchaser of a lot in Buyer's proposed PUD plus any charges of Summit Water Distributing Company. The sewer and water connection granted above can be used by Seller in new construction if allowed on the 8.5 acre parcel or for connection to the existing residence of Seller....  
(Emphasis added.)

23. Subsequent to closing, attorney Jon Heaton represented Saunders in continuing plaintiffs' attempts, begun prior to closing, to obtain County approval of a private road for the development. (Exhibit 127).

24. Before signing the Closing Documents, on June 16, 1981 and subsequently on November 1, 1983, Plaintiff White

Pine Ranches entered into sewer extension agreements with the SBSID to install a sewer trunk line up White Pine Canyon pursuant to which agreements White Pine Ranches would receive reimbursement for their construction costs of the sewer line to the development from connection fees charged to third parties connecting to that line:

Said third parties will be allowed to connect to such lines only upon payment to the District of the applicable number of connection fees. The District shall retain \$100 plus the actual costs of construction and inspection from each such connection fee and pay the balance of each such connection fee to Applicant [White Pine Ranches].

(Exhibits 80 ¶5(c) and 81 ¶5C).

25. At the time plaintiffs were trying to obtain County approval of the development and agreeing to run the sewer line to Subject Property, it was anticipated that additional developments by third parties would occur in the White Pine Canyon vicinity, including the development of a ski resort in White Pine Canyon and the development of adjoining parcels of land, all of which future developments would hook into the sewer trunk line plaintiffs were to construct, allowing plaintiffs the opportunity to recoup expenditures for the sewer system through the connection fees paid pursuant to the provisions of the line extension agreements. (Exhibits 104, 105, 107 and 117).

26. On June 30, 1982, White Pine Ranches paid the Sharps the installment payment of \$308,177.69, by check (Exhibit 44)

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P.O. Box 2668  
SALT LAKE CITY, UTAH 84110-2668  
(801) 322-2222



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enclosed with a cover letter from Felton stating: "Upon final plat approval, we will notify you to obtain the releases for the lots and the road as per the contract." (Exhibit 21).

27. On June 28, 1983 and June 30, 1983, Felton and Saunders Land Investment Corporation paid to the Sharps the sum of \$178,165.23 by two checks in the amount of \$71,266.09 and \$106,899.14 respectively. (Exhibit 44). The remaining portion of the June 30, 1983 installment payment due from plaintiffs, a check from Dan Hunter in the amount of \$106,849.14 was returned for insufficient funds, resulting in a default in the June 30, 19823 installment payment. (Exhibit 22).

28. On or about July 19, 1983, while the June 30, 1983 payment was in default and prior to the recordation of a final plat on the Subject Property, Felton wrote a letter to attorney Jon Heaton, inquiring about obtaining a release from the Sharps of the road and five lots. The letter further explained that a final plat had not been recorded because "[a]s soon as we file the plat real estate taxes are going to go up significantly, which we would like to avoid until we have an actual buyer for one of the lots." (Exhibit 23).

29. On or about September 23, 1983, a Notice of Default was filed pursuant to the Trust Deed on the Subject Property for the default in the June 30, 1983 payment. (Exhibit 24.)

30. Plaintiffs made no claim during 1983 that the Sharps had breached the Closing Documents.

31. On or about November 14, 1983, the June 30, 1983 default under the Trust Deed was cured with a payment in the sum of \$118,397.39 from Saunders Land Investment Corporation (Exhibits 4 and 44).

32. On or about November 18, 1983, attorney Jon Heaton sent a letter to the Sharps enclosing for their approval a proposed final plat, which was later recorded with Summit County (hereinafter the proposed "final plat"), and a Declaration of Protective Covenants (hereinafter "CCRs"), which Declaration was prepared on behalf of Saunders by Heaton and which contained covenants, conditions and restrictions for use of respecting a portion of the Subject Property by lot owners. (Exhibit 25).

33. The proposed final plat enclosed with the November 18, 1983 letter did not plat the entire approximately 60 acre parcel as originally contemplated in the Earnest Money and the Memorandum of Closing Terms, but platted only the northern portion of the Subject Property into six PUD lots, leaving the southern portion (approximately 27 acres) of the Subject Property unplatted (hereinafter the "unplatted acreage"). (Exhibit 1).

34. The proposed final plat included an Owner's Dedication for a private road in the PUD and delineated the existence and location of the private road and certain utility easements, including easements for water lines, water tank and water systems. (Exhibit 1).

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35. The November 18, 1983 letter from attorney Jon Heaton to the Sharps further provided in pertinent part that:

At a later time in the near future, Hy [Saunders] has indicated he will seek release of Lots 1 through 5 of the platted subdivision along with his road (White Pine Lane).... We will handle that matter when it is presented.... When those releases are made, pursuant to your instruction we will insure that rights are reserved in White Pine Lane for access for the southern portions of the property purchased from you until your Deed of Trust is fully paid. (Emphasis added.)

(Exhibit 25 and 25a).

36. On or about November 21, 1983, Felton mailed a letter to Jon Heaton regarding the November 18, 1983 letter to John Sharp. The letter provided in pertinent part: "It is perfectly acceptable to us that he [Mr. Sharp] retain an easement over White Pine Lane to the southern part of his property as well as to Lot 6 from White Pine Canyon Road up to the western boundary of Lot 6." (Exhibit 26).

37. On or about November 28, 1983, Felton had a telephone conversation with attorney Heaton memorialized by notes of attorney Heaton in the margin of Felton's November 21, 1983 letter (Exhibit 26). Felton agreed that "access over road [White Pine Lane] retained if Sharp develops undeveloped property Lots 7-12 White Pine Ranch." (Exhibit 26a).

38. On or about November 23, 1983, the Sharps authorized the recording of a Cancellation of Notice of Default relating to the June 30, 1983 payment (Exhibit 27).

39. On or about November 23, 1983, the Sharps, in consideration of the agreement of plaintiffs to allow them access over the private roadway (White Pine Lane) in the event of foreclosure, and pursuant to their right of approval under paragraph 5 of the Memorandum of Closing Terms, also executed a Consent to Record Phase I of White Pine Ranches, which Consent after setting forth the metes and bounds description of Phase I of White Pine Ranches granted:

[A] non-exclusive easement for water lines, water tank and water systems over, under and across the property, shown here near the southwest corner of the subject property, and specifically described in the Declaration of Protective Covenants and reserving unto the owners, for granting to the owners of adjacent or nearby property, a non-exclusive easement for utilities and vehicular and pedestrian access over the private roadway shown on the plat and from the well sites as developed. (Emphasis added.)

(Exhibit 51). As additional consideration for signing the Consent to Record, the Sharps permitted the platting of only a portion of the Subject Property.

40. The proposed final plat of White Pine Ranches Phase I sent to the Sharps for approval on November 18, 1983 was recorded on December 23, 1983 in the office of the Summit County Recorder following the execution of the Consent to Record by the Sharps. (Exhibit 1). The CCRs were also recorded in the office of the Summit County Recorder on December 23, 1983 and the Consent to Record was attached as an exhibit thereto. (Exhibit 51).

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41. After recordation of the final plat, the CCRs and the Consent to Record, plaintiffs proceeded with construction of the improvements on the Subject Property. However, instead of adopting any of the alternatives described in Finding No. 6, supra, plaintiffs constructed a small, private water system for this development.

42. On or about January 18, 1984, the Sharps executed a direction to the Trustee under the Deed of Trust to release from the Deed of Trust Lots 1 through 5 of White Pine Ranches (Exhibit 28).

43. The Partial Reconveyance of Lots 1 through 5 directed and authorized by the Sharps, was not prepared by Associated Title, the trustee under the Trust Deed, until January 7, 1986 and was recorded March 26, 1986 (Exhibit 45). No explanation of the delay in preparing the Partial Reconveyance was provided at trial. Plaintiffs, although naming Associated Title as a defendant in this action, chose not to serve or pursue and question Associated Title for such delay. No other request for reconveyance was authorized by the Sharps.

44. On or about January 20, 1984, Felton sent a letter to attorney Heaton expressing astonishment that the deeds to Lots 1 through 5 had not been received but stating, "I realize that the deeds for the road may be difficult to do." (Exhibit 30).

45. On or about January 17, 1984, Felton sent a letter to attorney Heaton requesting the approval by the Sharps of a "multi-family development" on the unplatted acreage, "which is

the only way it [the development] will be economically feasible." (Exhibit 29). A multi-family concept was never adopted.

46. Felton testified at trial and affirmed on May 7, 1986 in a letter sent to the Sharps that the plaintiffs "were in a position to prepare and obtain approval of that plat [for the unplatted acreage] immediately." (Trial Transcript, p. 110, hereinafter "R." 110 and Exhibit 37).

47. It was the actual practice of plaintiffs and a requirement of paragraph 2 of the Memorandum of Closing Terms to make specific requests for the release of specific PUD lots from the Sharps after required payments were made and provided no defaults existed under the Closing Documents. (R. 334).

48. Property taxes on the unreleased property (Lot 6 and the unplatted acreage) became delinquent pursuant to law on November 30, 1984 when plaintiffs failed to pay all of the 1984 property taxes due on the Subject Property (Stipulation of counsel at Trial) in violation of paragraphs 5 and 14 of the Trust Deed, which provided in paragraph 5 that the Trustor [plaintiffs] agrees "to pay at least 10 days before delinquency all taxes and assessments affecting said property...." (Exhibit 2).

49. Except for \$1,515.24 in property taxes paid on the unplatted acreage in 1984, no taxes have been paid on the unreleased Subject Property (Lot 6 and the unplatted acreage) subsequent to November 30, 1984, and including 1985, 1986 and 1987 (Stipulation of counsel at Trial), and plaintiffs, there-

fore, remained in default under the provisions of paragraphs 5 and 14 of the Trust Deed.

50. Plaintiffs paid the 1984 installment payment. However, on or about June 27, 1985, the Sharps received only a portion of the June 30, 1985 installment payment in the form of a check from Felton in the amount of \$59,709.47 (Exhibit 44).

51. As a result of plaintiffs' defaults, a Notice of Default was recorded on September 16, 1985 covering the Subject Property as described in the Trust Deed, which description included Lots 1-5. (Exhibit 55).

52. On or about September 24, 1985, Felton sent a letter to Mr. Sharp acknowledging receipt of the September 1985 Notice of Default and assuring him "every attempt is being made to resolve the problem...." (Exhibit 31). Felton, in his letter made no allegation that the Sharps had slandered plaintiffs' title as a result of the inclusion of Lots 1-5 in the Notice of Default nor did Felton or any other plaintiff allege in 1984 or 1985 any breach of Closing Documents by the Sharps.

53. Significantly, as bearing upon the credibility of plaintiffs' arguments is the fact unrebutted that plaintiffs made no claims whatsoever of breach by the Sharps until after their own admitted breaches of the Closing Documents. (Exhibit 31).

54. On or about January 10, 1986, Felton wrote a letter to Blake G. Heiner of Associated Title Company, the Trustee under the Trust Deed, informing him that the Notice of Default

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(Exhibit 55) and Amended Notice of Sale (Exhibit 56) covering the Subject Property included Lots 1 through 5 which were to have been released, pursuant to the Sharps' direction. (Exhibit 57).

55. In response to Felton's letter (Exhibit 57), Blake Heiner for Associated Title Company prepared and recorded an Amended Notice of Trustee's Sale against the Subject Property, excluding Lots 1 through 5. (Exhibit 58). Other Notices filed subsequently against the Subject Property also excluded Lots 1 through 5. (Exhibits 3 and 36).

56. All of the Notices of Default and Notices of Trustee's Sale recorded against the Subject Property specifically provided that such Notices are:

SUBJECT TO Easements, Encroachments,  
Restrictions, Rights-of-Way and matters  
of record enforceable in law (sic)  
equity.

(Exhibits 5, 36, 55, 56, and 58).

57. No payment at all was made when the final installment under the Closing Documents was due on June 30, 1986.

58. The balance owing to the Sharps under the Trust Deed Note through March 22, 1988 is \$557,642.46, including \$371,739.35 principal; \$23,113.33 interest at 12%; \$147,920.21 default interest at 18%; and \$14,869.52 late payment charges of 4% on each overdue payment. Interest is accruing at a per diem rate of \$183.32. (Exhibit 122).

59. Plaintiffs made no written or oral request for the release of the roadway or Lot 6 prior to their default in

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SUITE 4004  
175 WEST 200 South  
P.O. Box 2668  
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November 1984, when the 1984 property taxes became delinquent, and prior to their default in failing to make the entire 1985 installment payment when due. Plaintiffs' first requests were made for such releases on February 27, 1986 and May 7, 1986, respectively. (Exhibits 35 and 37). Also for the first time in the letter dated February 27, 1986, plaintiffs requested a release from the Sharps for 7.5 acres of the unplatted acreage, despite the provision in paragraphs 1-3 of the Memorandum of Closing Terms for the release by the Sharps of "PUD lots" only. As of these dates, plaintiffs were still and are in of default for the 1984 and 1985 property taxes and the payment a portion of the 1985 payment and the full 1986 payment required under the Addendum to the Trust Deed Note.

60. The Sharps perceived that the execution by them of the Consent to Record constituted substantial performance of any obligation to release the roadway pursuant to paragraphs 3 and 6 of the Memorandum of Closing Terms.

61. As plaintiff Felton testified, "the contract [Memorandum of Closing Terms] says lots of buyer's choice and that would require a choice." After the release of Lots 1-5, plaintiffs may have chosen to prepare a plat of the then unplatted acreage and seek a release of a portion of it instead of Lot 6.

62. Also in the letter of February 27, 1986, Felton demanded from the Sharps for the first time approximately \$73,000.00 as their "cost of the sewer and water hook-ups which are now available." (Exhibit 35). No demand for such

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175 WEST 200 South  
P.O. Box 2668  
SALT LAKE CITY, UTAH 84110 2668  
(801) 322 2222

costs had been made of the Sharps prior to that time nor had plaintiffs provided an accounting of such costs. Before trial, plaintiffs claimed exorbitant expenses of \$1,638,753.61 for the complete costs for the construction of the improvements on and to the Subject Property (Exhibit 32a).

63. At trial, plaintiffs claimed costs for the construction of improvements on and to the Subject Property of \$1,063,348.10, (Exhibit 60) and plaintiffs modified their demand from the Sharps for water and sewer connection fees to \$43,706.00. (Exhibit 66).

64. Prior to actual construction of the sewer system, Saunders told the Summit County Planning Commission in a meeting on December 14, 1982 that they "would really like to have the septic tank system used because of the high cost of the sewer line but in the long run it may be the best way to go." (Exhibit 79). On or about September 16, 1983, Felton wrote Summit County challenging the requirement "to install a sewer line up the County road from Highway U-224 to the Project, a distance of about one and one-half (1-1/2) miles." (Exhibit 79). Felton concluded the letter by declaring: "In the event we are required to install the sewer line, we will test the validity of that requirement in court."

65. Plaintiffs made formal demand upon Summit County on or about July 26, 1984 for, inter alia, the following damages:

The sum of \$117,297.15 being the costs of off-site sewer which we were, under protest, required to install to service the subdivision.

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[W]e [plaintiffs] have lost one sale or more sales and anticipate the damages, loss of profit and interest at between \$250,000 and \$500,000.

\*\*\*

[D]amages for the loss of sale, reduction in business and damages suffered in reduction to profit ....

(Exhibit 84).

66. Soon thereafter plaintiffs brought suit in the United States District Court, District of Utah, Civil No. C84-2090W, against Summit County, the SBSID and various officials thereof to recover their claimed damages.

67. In answer to interrogatories dated December 28, 1984 in the Federal Court litigation, plaintiffs stated:

Because of the imposition of the requirement that Plaintiffs construct an off-site sewer approximately one mile in length, the costs of developing the entire project became prohibitive.

(Exhibit 116; see also, Exhibit 107, p. 7).

68. In further interrogatory answers on March 31, 1986, Saunders declared:

At the present time I have recently found out that the right-of-way servicing my property has been forfeited by Summit County contrary to law. This will not allow my development to proceed, will not allow me to recover costs for the capital improvement and significantly diminishes the value of the property.

(Exhibit 107, p. 15).

69. In Saunders' Federal Court affidavit dated March 17, 1986, he also swore:

WILLIAM W. SAUNDERS  
A PROFESSIONAL CORPORATION  
SUITE 4004  
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P.O. Box 2668  
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10. As a result of the various delays [caused by the County and the SBSID], which are detailed below, the market for exclusive building lots is now virtually non-existent, cost of improvements escalated to be several times what I had anticipated, and much of the real property in the project is threatened by foreclosure.

(Exhibit 86, p. 3).

70. Most of the damages sought to be recovered by the plaintiffs in the lawsuit against the SBSID and Summit County are the same damages plaintiffs sought to recover from the Sharps in the present case. (R. 252 and 263; cf. Exhibits 60 with 86; see also Exhibits 87, 88, 107, 116 and Plaintiffs' Verified Complaint herein).

71. No written or oral claim of default on the part of the Sharps under the Closing Documents was made by the plaintiffs until February 27, 1986, subsequent to plaintiffs' own defaults in failing to pay the 1984 and 1985 property taxes and failing to pay the full 1985 payment required under the Addendum to the Trust Deed Note.

72. The Sharps did not interfere with plaintiffs' attempts to market or sell the Subject Property.

73. Plaintiffs received only one invitation for an offer to purchase Lot 1 or Lot 6, which invitation was not consummated due to the failure of conditions imposed by the one, B. F. Sammons, and the failure of such conditions were unrelated to any actions or statements of the Sharps. (Exhibit 88).

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74. One of the conditions of purchase by Sammons was an independent appraisal supporting a \$220,000 proposed sales price (Exhibit 88). The plaintiffs provided Sammons with a letter appraisal, dated August 8, 1986, which had been prepared by LeRoy Pia. (Exhibit 9a). This appraisal stated that Lots 1 and 6 had a fair market value of \$220,000. On or about November 11, 1986, while Sammons and Saunders were still negotiating, a letter appraisal was obtained by Steve Clyde, attorney for the plaintiffs from the same appraiser, valuing the lots at an average of only \$190,000.00 (Exhibit 9). The November 11, 1986 appraisal was not shown to Sammons. (R. 283-4).

75. Saunders had given Sammons "the impression" that plaintiffs could convey Lot 6 to him even though it had not been released from the Trust Deed. (R. 389; see also R. 284).

76. On or about March 24, 1987, Felton, pursuant to the request of the real estate agent, Steve Clegg, employed by plaintiffs to list Lots 1, 2 and 5, wrote a letter to Clegg for dissemination to other Park City real estate agents, which letter stated "[t]he current litigation does not affect the marketability or encumber that [Subject] property." (Exhibit 89.)

77. After the commencement of this action, the Sharps took all reasonable steps to facilitate the sale and marketing of the Subject Property as evidenced by a letter dated September 30, 1986, to plaintiffs' prior attorney, Steven Clyde, who was notified by Donald J. Winder, the Sharps' attorney, that

the Sharps would take all steps reasonable to effect a sale of Lot 6 or the unplatted acreage (Exhibit 33), and the Sharps' Motion to Appoint a Receiver for the Subject Property in this proceeding dated May 14, 1987.

78. There have been no arms length sales to purchasers of PUD lots at the Subject Property wherein sewer and water connection and service fees have been assessed. The only conveyance of a PUD lot has been to Felton, a member of the partnerships. At trial, plaintiffs testified that they intended, at all times, to include the cost of the sewer and water connection and service fees within the sales price of lots. (R. 310-312).

79. Mr. Sammons was not to be charged any sum above and beyond a \$220,000 land price for sewer or water connection fees. (R. 285).

80. Felton testified that a purchaser of one of the PUD lots listed with real estate agent Clegg would only be charged "over and above ... the purchase price" "the hook-up fee to be charged by Snyderville Basin for sewer." (R. 310).

81. If plaintiffs sold a lot to Sammons at \$220,000, they would not have been "compensated for those [sewer and water] improvement costs...." At a \$220,000 sales price it's "impossible" to recover the costs of sewer and water improvements to the Subject Property. "You have to take a loss." (R. 311-312).

82. The sewer system, as of the date of trial, is not completed or operational, nor has its construction been

approved by the SBSID. (Exhibits 83, 83a and 99 through 103). The culinary water system as of the date of trial is also not operational. Under paragraph 7 of the Memorandum of Closing Terms, the Sharps do not have to pay connection fees for these systems until they are "available." (Exhibit 15).

83. The sewer system constructed by plaintiffs has a capacity to handle between 2,000 and 3,800 connections. (Exhibit 86).

84. Under the line extension agreements with the SBSID, a connection fee "at the rate in effect at the time of connection" shall be determined by the SBSID for the system on the Subject Property (Exhibit 81, paragraph 4D; see Exhibit 80, paragraph 4(d)). The "connection fee shall be paid by the property owner" before issuance of a building permit, to the Application (the plaintiffs herein), except that the SBSID, shall be entitled to "the first \$100 of the connection fee."

85. The parties intended the language in the Earnest Money concerning "same per-hook-up price" to be synonymous with the language contained in paragraph 7, Memorandum of Closing Terms, regarding "pro rata cost" to a PUD lot purchaser.

86. Average and reasonable connection fees for culinary water and sewer systems in the Park City and Snyderville Basin area are \$2,000.00 each. (See Testimony of John C. Brown and Rex Ausburn, cf. Exhibit 86, p. 6).

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87. The Sharps intended and wanted to be charged only what purchasers of a PUD lot would be charged as fees to connect to the culinary water and sewer systems on the Subject Property, and the plaintiffs should have understood that this was the intent of paragraph 7, Memorandum of Closing Terms.

88. The Sharps repeatedly assured plaintiffs that they did not intend, through their foreclosure, to interfere with access rights over the private roadway or to the utility easements shown on the Consent to Record which the Sharps signed. (R. 64; Exhibits 33 and 51; cf. Exhibits 25, 25a, 26 and 26a).

89. Correspondingly, it was both the mutual intent and agreement of the parties that the Sharps be granted use of the roadway in event of default (Exhibits 25, 25a, 26 and 26a), which agreement was later memorialized and recorded in the Consent to Record. (Exhibit 51).

90. The inclusion of Lots 1 through 5 in the September 1985 Notice of Default (Exhibit 55) and December 1985 Amended Notice of Trustee's Sale (Exhibit 56) was inadvertent, unintentional and without malice.

91. In refusing to reconvey Lot 6, the road, the unplatted acreage, the Sharps acted in good faith and relied on the advice of attorney Jon Heaton.

92. The Sharps have been charged trustees' fees by Associated Title in their efforts to foreclose the Subject Property in the amount of \$1,803.80 (Exhibit 42).



VERA L. BARNES  
A PROFESSIONAL CORPORATION  
SUITE 4004  
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93. Plaintiffs have not suffered any damages, special or otherwise, as a result of any act or failure to act by the Sharps.

94. Paragraph 13 of the Trust Deed provides that failure to promptly enforce any right thereunder does "not constitute a waiver of any other right or subsequent default." (Exhibit 2).

95. On September 4, 1986, the day before the scheduled Trustee's Sale, plaintiffs filed a Complaint commencing this action and obtained the issuance of a Temporary Restraining Order (TRO) from Judge Judith M. Billings to restrain the Sharps from conducting the Trustee's Sale of the Subject Property. The TRO required a bond in the amount of \$2,400. In a hearing held on January 4, 1988, this Court required that the bond be increased to \$50,000 "to protect the Sharps for the payment of such costs and damages as may be incurred or suffered if the Sharps are found to have been wrongfully enjoined or restrained...."

96. The Trust Deed Note provided that if it "is collected by an attorney after default in the payment of principal or interest, either with or without suit, the undersigned ... agree to pay ... a reasonable attorney's fee." (Exhibit 3)., Paragraph 16 of the Trust Deed provided: "Upon the occurrence of any default hereunder, Beneficiary [the Sharps] shall have the option to ... foreclose the Trust Deed ... and Beneficiary shall be entitled to recover ... a reasonable

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attorney's fee...." (Exhibit 2; see also ¶11 thereof). Further, paragraph 6 of the Trust Deed provided that Beneficiary (the Sharps) may "commence, appear in and defend any action or proceeding purporting to affect the security hereof or the rights of [sic] powers of Beneficiary ... and in exercising any such powers ... employ counsel, and pay his reasonable fees." Additionally, paragraph 7 of the Trust Deed requires Trustor to "pay immediately and without demand all sums expended hereunder by Beneficiary or Trustee, with interest from date of expenditure at the rate of ten per cent (10%) per annum until paid, and the repayment thereof shall be secured hereby." Paragraph 11 of the Memorandum of Closing Terms provided that "the defaulting party shall pay all expenses of enforcing the same or any right arising out of breach or default thereof, including reasonable attorneys' fees, whether incurred with or without suit and both before and after judgment." (Exhibit 15).

97. Legal services have been rendered to the Sharps by the law firm of Winder & Haslam in the nature of time expended by individual members, through August 31, 1988, in the amount of \$144,469.75.

98. The foregoing amount does not include any services performed on or after August 31, 1988, including those services of Winder & Haslam necessary for finalizing the Findings of Fact, Conclusions of Law and Judgment and preparing for, responding to and arguing any post trial motions. The legal fees for such matters may be supplemented later.

99. The services rendered by the law firm of Winder & Haslam were reasonably necessary for the development of the case and protection of the rights of the Sharps; and the rates charged are reasonable and are in accordance with those rates generally charged by attorneys in this area for similar services.

100. Plaintiffs breached the Memorandum of Closing Terms by, inter alia, failing to make the payments intended thereby to the Sharps and by failing to make available sewer and water connections at the same charge to purchasers of a PUD lot.

101. Pursuant to paragraph 12 of the Memorandum of Closing Terms, all "agreements contained [t]herein shall survive the closing of this transaction...." (Exhibit 15).

102. The Sharps' defense of plaintiffs' Complaint was an action purporting to offset the security under the Trust Deed and the rights and powers of the Sharps related to collecting the Promissory Note after default; related to foreclosing the Trust Deed; and related to enforcing the Memorandum of Closing Terms and rights arising out of a breach or default thereof.

103. After closing the sale on the Subject Property, on or about July 16, 1981, attorney Heaton represented White Pine Ranches relating to the development of the Subject Property (R. 789) until the filing by Associated Title of a Notice of Default on or about September 16, 1985. (R. 836; Exhibit 55). Attorney Heaton did not represent the Sharps between the closing of the sale and the filing of the first Notice of Default on or about September 23, 1983. (R. 791; Exhibit 24). Except

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for perhaps a period of time after the filing of the first Notice of Default on or about September 23, 1983, and perhaps after the filing of the Notice of Default on September 16, 1985. (R. 793), attorney Heaton did not represent the Sharps.

104. The Sharps have incurred costs of court in this action.

Having made the above Findings of Fact, the Court herewith makes and enters the following:

#### CONCLUSIONS OF LAW

1. The Closing Documents, which term is defined in Finding No. 10 above, are the operative documents relating to the parties' closing of the sale of the Subject Property by the Sharps to the plaintiffs, and this transaction constitutes the Contract between the parties (hereinafter the "Contract").

2. Plaintiffs, by their failure to pay the 1984, 1985, 1986 and 1987 property taxes on Lot 6 and the unplatted acreage on November 30 of each respective year, are thereby in breach of the Trust Deed.

3. Plaintiffs' failure to pay the entire June 30, 1985 installment payment and the 30, 1986 final installment payment required pursuant to paragraph 1D and 1E of the Addendum to the Trust Deed Note constitutes a breach of the Trust Deed Note, Trust Deed and Memorandum of Closing Terms.

4. Plaintiffs' breaches were material, significant and continuing and were uncured when plaintiffs releases were first requested by plaintiffs for the roadway and Lot 6 on February 27, 1986 and again on May 7, 1986.

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5. The breaches by plaintiffs of the Contract occurred prior in time to any alleged breaches by the Sharps, and this Court specifically holds there were no material or significant breaches on the part of the Sharps of their obligations under the parties' Contract.

6. The Sharps have substantially complied with all of their obligations under the terms of the parties' Contract.

7. Plaintiffs were obligated, under the terms of the Memorandum of Closing Terms and pursuant to their own practice, to specifically request and identify lots, including Lot 6, for release by the Sharps.

8. Because the plaintiffs' material and continuing breaches of the parties' Contract preceded timely plaintiffs' requests for reconveyance of Lot 6, the roadway and the unplatted acreage, defendants were not obligated to reconvey Lot 6, the roadway and the unplatted acreage.

9. The Sharps were justified in and were excused from performance under the Contract to reconvey Lot 6, the roadway or the unplatted acreage shown on the final plat of to the plaintiffs because the plaintiffs were in breach of the parties' Contract at the time such reconveyances were requested.

10. Alternatively, the Sharps' execution of the Consent to Record the final plat of and the CCRs constituted a release of the roadway shown on such plat in accordance with paragraphs 3 and 5 of the Memorandum of Closing Terms.

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11. The execution of the Consent to Record by the Sharps and the subsequent recordation of the final plat and the CCRs created a non-exclusive appurtenant easements to run with the land, as a covenant running with the land or as an equitable servitude, as the case may be, in favor of and for the use and benefit of the unplatted acreage and the owners and purchasers thereof (including the Sharps), and their invitees, guests, heirs and successors in interest, for utilities and for access to and the right to use as a means for ingress and egress for vehicular and pedestrian access over, under and across the private roadway (White Pine Lane) shown on the recorded final plat, and a non-exclusive appurtenant easement to run with the land, as a covenant running with the land or as an equitable servitude, as the case may be, in favor of and for the use and benefit of White Pine Ranches Phase I and the owners and purchasers thereof (including the Sharps) and their heirs and successors in interest for water lines, water tank and water systems over, under and across the Subject Property near the southwest corner of the unplatted acreage as shown on the final recorded plat of White Pine Ranches Phase I.

12. The Sharps are estopped to deny the dedication of White Pine Lane, pursuant to the final recorded plat, for the private use of the parcel owners, their invitees and guests, subject to the CCRs and the non-exclusive appurtenant easement for the use and benefit of the unplatted acreage described in Conclusion No. 11 above. Further, the Sharps are estopped to

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deny the non-exclusive utility easement also described in Conclusion No. 11 above.

13. The Sharps, by the execution of the Consent to Record, are estopped to deny the operative and legal effect of the recordation of the final plat and CCRs and the rights and obligations of the owners of PUD lots as set forth in the recorded final plat and CCRs for White Pine Ranches Phase I. The final recorded plat and CCRs and the non-exclusive easements set forth in Conclusion No. 11 above shall remain in full force and effect, and not be affected by the foreclosure ordered herein, a purchase at the Sheriff's Sale, or a subsequent redemption of the subject premises, other than a complete redemption thereof by the plaintiffs herein coupled with plaintiffs' declaration for the extinguishment of either non-exclusive easement.

14. Owners and purchasers of the unplatted acreage (including the Sharps), and their successors in interest are entitled to use of the private roadway (White Pine Lane) for access to the unplatted acreage of the Subject Property as set forth in the legal description attached hereto as Exhibit "A" and incorporated by reference herein, as a result of the mutual intent and agreements between the parties to grant to the Sharps the use of the roadway, which agreement was memorialized by the letters of Heaton and Felton and evidenced by the part performance and reliance of the Sharps on such letters and agreements in executing the Consent to Record.

15. General partners in a partnership are bound by the actions of other partners taken on behalf of the partnership and by the actions of the partnership itself.

16. The language in paragraph 7 of the Memorandum of Closing Terms "pro rata cost to the purchaser" is ambiguous, necessitating the use of extrinsic evidence to interpret the same.

17. The extrinsic evidence presented at trial demonstrated that the parties intended to allow the Sharps, at their request, one connection each to both the culinary water and sewer systems when and if such systems are available and operational.

18. The construction costs of the culinary water and sewer systems claimed by the plaintiffs are not reasonable, in violation of the reasonable value rule.

19. Seven years is an unreasonable time within which to complete the culinary water and sewer systems and require the Sharps to mandatorily hook into these systems, which systems still are not yet operational. The Sharps are not obligated, but have the option, to hook into the culinary water and sewer systems should such systems become operational.

20. It is an unreasonable interpretation of the language "pro rata costs" in the Memorandum of Closing Terms and the earlier language in the Earnest Money delineating "the same per-hook-up price" to require the Sharps to pay 1/13 of the exorbitant construction costs for culinary water and sewer hook-ups. Such an interpretation would recast the Sharps as

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(801) 322-2222



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P.O. Box 2668  
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developers rather than the mere sellers of Subject Property that they were and intended to be in this transaction.

21. A reasonable fee to be paid by the Sharps to the plaintiffs for a connection to the culinary water and sewer systems is \$2,000.00 each.

22. The inclusion of Lots 1-5 in the initial Notice of Default (Exhibit 55) and Notice of Trustee's Sale (Exhibit 56) on behalf of the Sharps was inadvertent, unintentional and without malice.

23. There was no improper holding by the Sharps of any requested reconveyance, but even if there were, it was not done in bad faith. The Sharps acted in reliance on the advice of their counsel, and did so in good faith.

24. Alternatively, the Sharps did not improperly withhold reconveyances and plaintiffs have failed to establish a cause of action for failure to reconvey under U.C.A. §57-1-33. U.C.A. §57-1-33 is applicable only when a beneficiary refuses to request a reconveyance within 30 days after written demand therefor is made by the Trustor. The Sharps requested the Trustee to reconvey Lots 1-5 on or about January 18, 1984, and because of plaintiffs' subsequent breaches were under no obligation to reconvey the remainder of the Subject Property.

25. As a result of plaintiffs' breaches of the Contract, the Sharps were entitled to record all of the Notices of Default and Notices of Sale described in the Findings against the Subject Property.

26. The Sharps acted in good faith and not maliciously in having recorded the Notices of Default and the Notices of Sale and in refusing to reconvey Lot 6 and the unplatted acreage.

27. The plaintiffs have not established a cause of action for slander of title against the Sharps. The Sharps did not act maliciously or cause any special damages to the plaintiffs.

28. All of the damages, including, without limitation, those under U.C.A. §57-1-33, claimed by the plaintiffs are too remote, conjectural and speculative. The plaintiffs have failed to establish they have suffered actual damages resulting from any alleged breach by the Sharps, and this Court concludes no such breach by the Sharps occurred.

29. The attorney's fees incurred by the Sharps in this matter through August 31, 1988 in the amount of \$144,469.75 are reasonable and the Sharps are entitled to an award of the same. Further, the Sharps are entitled to supplement and augment this amount by affidavit for their reasonable attorney's fees incurred after August 31, 1988 in preparation of the Findings, Conclusions and Judgment, in responding to any post-trial motions, in collecting said Judgment by execution or otherwise, and, if necessary, after prevailing on any appeal.

30. The Sharps are entitled to their costs of court in the amount as assessed or taxed pursuant to U.R.C.P. 54 and to post-judgment interest as provided by law.

31. By virtue of the significant and material breaches of the Contract by the plaintiffs, the Sharps are entitled to

judgment against Saunders, Felton, Interstate Rentals, Inc. and Norton, jointly and severally, in the following amounts:

a. i. Principal:	\$ 371,739.35
ii. Interest through	
March 22, 1988:	\$ 171,033.54
iii. Late payment charge:	\$ 14,869.57
TOTAL:	\$ 557,642.46

together with interest thereon at the per diem rate of \$183.32 from and after March 22, 1988.

b. i. Trustee's fees:	\$ 1,803.80
ii. Court Costs:	Pursuant to <u>U.R.C.P.</u> 54
iii. Attorneys' fees through	
August 31, 1988:	\$ 144,469.75

together with interest thereon at the rate of 10% per annum from the date of expenditure by the Sharps until paid by plaintiffs.

c. Delinquent property taxes:	\$ 20,368.62
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together with interest and penalties assessed thereon as provided by law, property taxes accruing for 1988, and post-judgment interest thereon at the rate of 12% per annum.

32. As a result of the significant and material breaches of the Contract by the plaintiffs, the Temporary Restraining Order entered in the above captioned matter by the Honorable Judith M. Billings on September 4, 1986 was wrongfully issued and the Sharps are entitled to have it lifted and dissolved.

33. The Sharps are entitled to be paid the bond posted by plaintiffs with the Summit County Clerk in September 1986 in the amount of \$2,400 and to be paid from the security posted by Tracy Collins Bank in the amount of \$50,000 for their attorney's fees, interest and other damages incurred as a result of the issuance of the wrongful Temporary Restraining Order.

34. The Sharps are entitled to have Lot 6 as described in the final recorded plat of White Pine Ranches Phase I and the unplatted property more particularly described on Exhibit "A" attached hereto or such portions thereof as may be sufficient to pay the amounts found to be due and owing under the Judgment, together with interest as set forth hereinabove and accrued costs herein, and expenses of sale, sold at public auction by the Sheriff of Summit County, State of Utah, in the manner prescribed by law for such sales; that said Sheriff, if and when the subject premises are sold by him, out of the proceeds of such sale shall retain first his costs, disbursements and commission, and then pay to the Sharps, or to their attorneys, the accrued and accruing costs of this action, then said sums for the Sharps' attorney's fees, and the amount owing to the Sharps for principal, interest, costs and expenses of sale and maintenance, taxes, assessments and/or insurance premiums, together with accrued interest thereon, or so much of said sums as said proceeds will pay, and that the surplus, if any, shall be accounted for and paid over to the Clerk of this Court subject to this Court's further order.

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P.O. Box 2668  
SALT LAKE CITY, UTAH 84110 2668  
(801) 322-2222

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SUITE 4004  
175 WEST 200 South  
P.O. Box 2668  
SALT LAKE CITY UTAH 84110 2668  
(801) 322 2222

Court subject to this Court's further order.

35. All persons having an interest in the subject premises shall have the right, upon producing satisfactory proof of interest, to redeem the same within the time provided by law for such redemption; that from and after the expiration of the period of redemption as provided by law, that the plaintiffs above named, and each of them, and all persons claiming by, through or under them, or any of them, shall be forever barred and foreclosed of all right, title, interest and estate in and to the subject premises, and that from and after the delivery of the Sheriff's Deed to the subject premises that the grantees named therein be given possession thereof.

36. If a deficiency results after due and proper application of the proceeds of such Sheriff's Sale, the Sharps are entitled to be awarded a personal judgment against Saunders, Felton, Norton and Interstate Rentals, Inc., and each of them, jointly and severally, for the full amount of such deficiency.

37. The Sharps are entitled to have the right, at their request, to one connection to both plaintiffs' culinary water and sewer systems on White Pine Ranches Phase I for a connection fee of \$2,000 each.

38. The Sharps are entitled to have the Complaint of the plaintiffs dismissed, no cause of action.

DATED this 26<sup>th</sup> day of Sept, 1988.

BY THE COURT:

Hon. J. Dennis Frederick

ATTEST  
H. CIXON

B.

COPY

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
SALT LAKE COUNTY, STATE OF UTAH

1  
2  
3 WHITE PINE RANCHES, ET AL, ) Civil No. C-87-1621  
4 Plaintiffs, )  
5 vs. ) JUDGE'S RULING  
6 JOHN C. SHARP, ET AL, )  
7 Defendants. )

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8  
9 REPORTER'S TRANSCRIPT OF JUDGE'S RULING

10 THE HONORABLE J. DENNIS FREDERICK

11 Wednesday, March 30, 1988

12  
13 For the Plaintiffs: ROBERT M. ANDERSON  
14 GLEN D. WATKINS  
15 MARK R. GAYLORD  
16 Attorneys at Law  
HANSEN & ANDERSON  
50 West Broadway, Suite 600  
Salt Lake City, Utah 84101  
17 For the Defendants: DONALD WINDER  
18 KATHY A. F. DAVIS  
TAMARA PRINCE  
19 Attorneys at Law  
WINDER & HASLAM  
20 175 West 200 South, Suite 4004  
Salt Lake City, Utah 84101

21  
22  
23 ANNA M. BENNETT, CSR  
24 240 East 400 South #A337  
25 Salt Lake City, Utah 84111

001651

March 30, 1988  
1:30 p.m.

P R O C E E D I N G S

THE COURT: We are meeting again in the instant matter, that is, White Pine Ranches, et cetera, versus the Sharps, case number C-87-1621. I note counsel are all present.

This Court has requested this opportunity to present its ruling post-trial on the issues involved in this case. This Court, having now heard the evidence, the arguments, reviewed the file materials, the trial briefs and the exhibits, is prepared to rule.

The Plaintiffs seek, inter alia, by their verified Complaint amended as to party designation only, a determination by this Court that the Defendants breached their contractual obligations arising out of the sale of July the 16th of 1981 as detailed by the so-called operative documents consisting of Exhibit 15, the Memo of Closing, Exhibit 3, the Trust Deed Note, Exhibit 2, the Trust Deed, and Exhibit 17, the Special Warranty Deed.

The Plaintiffs further allege that the Defendants slandered their title to the property in question and seek title to the disputed property to be quieted themselves.

Plaintiffs' claims for damages resultant from alleged misrepresentation of material facts were dismissed by Judge

1 Russon while this matter pended in Summit County.

2 Defendants, on the contrary, allege in their  
3 Counterclaim that the Plaintiffs breached their contractual  
4 duties pursuant to the same operative documents and the  
5 Defendants seek to have the temporary restraining order entered  
6 by Judge Billings on September the 4th of 1986 lifted,  
7 thereby allowing them to proceed with the trust deed fore-  
8 closure commenced prior to the filing of this action.

9 First the issues dealing with breach of contract. This  
10 Court is persuaded that the initial breach of the operative  
11 documents was by the Plaintiffs in failing, pursuant to  
12 paragraph 5 of the Trust deed, Exhibit 2, to pay the 1984  
13 and subsequent property taxes before delinquency. This  
14 breach commenced November 30, 1984, and has continued to  
15 date. A fortiori it was in effect without having been  
16 cured when Plaintiffs requested release of the roadway  
17 and lot 6 on May 7, 1986. Compare Exhibit 37 as well as  
18 stipulation of counsel during the course of the trial.

19 Plaintiffs yet again breached their obligation by  
20 failing to pay the June 30, 1985, and June 30, 1986,  
21 installment payments pursuant to the Addendum to the  
22 Trust Deed, which delinquencies continue to date resulting  
23 in a balance owing the Defendants through March 22nd, 1988,  
24 of \$557,642.46, including interest and penalties. Exhibit  
25 122.



1           This Court is persuaded that the evidence has established  
2   by a preponderance that the foregoing breaches were and are  
3   both material, significant and continuing. Plaintiffs'  
4   evidence has failed to establish by a preponderance that the  
5   Defendants breached the operative documents in any material  
6   or significant fashion. On the contrary, this Court is  
7   persuaded that the Defendants have substantially complied  
8   with their obligations under the terms of the operative  
9   documents.

10           The claim that the Defendants were required and failed  
11   to release lot 6 and the roadway prior to Plaintiffs'  
12   delinquencies having occurred is not supported by the  
13   record. There were no requests for release or identifica-  
14   tion of the lot or lots sought to be released after the  
15   release of lots 1 through 5 pursuant to paragraph 3 of  
16   Exhibit 15, the Memorandum of Closing, until after Plaintiffs  
17   breaches were in effect. Therefore, this Court determines  
18   that the Defendants' refusal to reconvey after the  
19   delinquencies was justified. If a trustor is in default  
20   at the time he requests reconveyance, the beneficiary is  
21   not obligated to reconvey. Plaintiffs' request for recon-  
22   veyance was untimely. Significant, in this Court's view,  
23   as bearing upon the credibility of Plaintiffs' argument  
24   in this regard is the fact unrebutted that the Plaintiffs  
25   made no claim of breach by the Defendants until after their

1 own admitted breaches. Exhibit 31.

2 As to the roadway and improvements, this Court is  
3 persuaded that the Defendants' conduct in having executed and  
4 allowed the recording of the Consent to Record, Exhibit 7,  
5 and the Declaration of Protective Covenants, Exhibit 51,  
6 constituted a release of the roadway sufficient to satisfy  
7 the terms of paragraph 3 of Exhibit 15. Such conduct  
8 constituted substantial performance by the Defendants  
9 with their obligation and indeed, was so perceived by the  
10 Defendants. Moreover, it is this Court's view that such  
11 conduct by the Defendants created nonexclusive easements  
12 or covenants running with the land in the owners of the lots  
13 to the use of the roadway, water line and sewer system.  
14 At the very least, equitably, the Defendants' conduct,  
15 coupled with their repeated assurances, admissions, and  
16 testimony during the course of the trial would estop them  
17 from denying to the lot owners rights to access and use  
18 of the roadway, the water and sewer systems, and this Court  
19 so determines.

20 Curiously, in the face of the foregoing, the Plaintiffs  
21 persist in advancing the unpersuasive argument that  
22 regardless of Defendants' assurances that there is no intent  
23 to interfere with Plaintiffs' access and use rights, the  
24 Plaintiffs will still lose the same if the Defendants are  
25 allowed to pursue their legal remedies. This Court is not

1 impressed with that argument. The evidence has established  
2 that the parties by both mutual intent and agreement  
3 granted to the Defendants the use of the roadway, Exhibits  
4 25 and 25A, which agreement was later memorialized and  
5 recorded in the Consent to Record, Exhibit 7. Access to the  
6 unreleased and unpaid for land was intended to be given  
7 to the Defendants in case of default and this Court so  
8 determines.

9 In part by the use of the language, quote, pro rata  
10 cost to the purchaser, end quote, this Court determined  
11 that paragraph 7 of Exhibit 15, the Memorandum of Closing,  
12 was ambiguous, necessitating the use of extrinsic evidence  
13 to interpret the same. An examination of the extrinsic  
14 evidence necessitates the conclusion that the parties  
15 intended to allow the Defendants at their request to  
16 connect to both the water and sewer systems for Defendants'  
17 private residence, when and if such systems are functioning.

18 To opt for Plaintiffs' interpretation of the meaning  
19 of pro rata cost and thereby require the Defendants to pay  
20 \$43,706 to hook up to said system would be to disregard  
21 the testimony and the language of the Earnest Money Receipt  
22 and Offer to Purchase, Exhibit 14. Moreover, such  
23 construction is not reasonable. It violates the so-called  
24 reasonable value rule. There is in the record no factual  
25 basis, in this Court's view, upon which to support the claim

1 of the Plaintiffs because there have been no arm's length  
2 purchasers wherein such costs have actually been assessed.  
3 The evidence supports the view that the Defendants wanted  
4 only to be charged what other purchases would be charged,  
5 but to require the Defendants to mandatorily hook up to  
6 Plaintiffs' systems after now some seven years, which are  
7 still not operational, and pay one-thirteenth of the exor-  
8 bitant total construction costs would be to recast the  
9 Defendants' role as that of developers, rather than as mere  
10 sellers of real property and hence, in this Court's  
11 view, an unreasonable strain interpretation of the language  
12 in question.

13 This Court finds that a reasonable fee to be paid by  
14 the Defendants to the Plaintiffs for connection to the water  
15 system and the sewer system is \$2000 each.

16 Failure to reconvey. The cause of action failure to  
17 reconvey is asserted in Plaintiffs' proposed Amended  
18 Complaint, not in the verified Complaint. Plaintiffs'  
19 motion to amend the verified Complaint was denied by this  
20 Court, except to the extent that it allowed additional  
21 parties Plaintiff to be added. Nevertheless, both parties  
22 have addressed the issue so this Court will deal with it.

23 The Plaintiffs, in this Court's judgment, have failed  
24 in their burden to establish entitlement to damages  
25 pursuant to Title 57-1-33, Utah Code Annotated. I am not

1 persuaded that there was an improper withholding of the  
2 requested reconveyances, but even if there were, it was not  
3 done in bad faith, in this Court's view. The record  
4 supports the finding that the Defendants acted in reliance  
5 upon the advice of their counsel and did so in good faith.

6 Slander of title. In this Court's view, the record  
7 is devoid of any showing that the Defendants acted  
8 maliciously in not excluding lots 1 through 5 from the  
9 notices of default, Exhibits 24, 55 and 36. On the  
10 contrary, this Court finds and so holds that the conduct  
11 was inadvertent and unintentional. Accordingly, this Court  
12 determines no cause of action on the slander of title claim.

13 As to the claim of Plaintiffs for damages, it is  
14 this Court's view that even if it were to find that the  
15 Defendants breached the operative documents, which I  
16 specifically do not so find, Plaintiffs' damages are too  
17 remote, conjectural and speculative. The Plaintiffs have  
18 failed to establish that they have suffered actual damages  
19 resulting from any alleged breach by the Defendants.

20 At the conclusion of the evidence in this trial, this  
21 Court took under advisement Plaintiffs' motion for Rule 37  
22 sanctions, and a review of that matter in the interim has  
23 led this Court to conclude that the request is inappropriate  
24 and accordingly, is denied.

25 As to the issue of attorney's fees, in light of the

1     foregoing, this Court determines that the Plaintiffs are  
2     responsible to pay attorney's fees to the Defendants. The  
3     Defendants are specifically herein awarded a reasonable  
4     attorney's fee, and to bring this matter to some ultimate  
5     conclusion, it is this Court's view that Mr. Winder should  
6     submit an affidavit in support of his claim for attorney's  
7     fees on behalf of the Defendants. If there is to be objec-  
8     tion to the affidavit, then counsel can contact my clerk  
9     and schedule an evidentiary hearing to inquire into the  
10    particulars of that objection. It might well, however,  
11    serve counsel and this Court more efficiently if Mr. Winder's  
12    deposition were to be taken with regard to any concerns  
13    about the reasonableness of the affidavit which I anticipate  
14    will be filed by Mr. Winder. That is merely a suggestion.

15           It is this Court's view that the Findings of Fact,  
16    Conclusions of Law and Judgment should be prepared, Mr.  
17    Winder, by yourself, submitted, of course, to the Plaintiffs'  
18    counsel in accordance with our Rule 5, and before submitting  
19    the same to the Court.

20           One of the purposes, Counsel, of having you all here  
21    again is to inquire at this stage, now that I have  
22    concluded my ruling, if there are questions about the  
23    ruling.

24           Mr. Anderson?

25           MR. ANDERSON: not at this point, your Honor. We'll

1 file appropriate motions.

2 THE COURT: Very well. Mr. Winder?

3 MR. WINDER: None, your Honor. Thank you.

4 THE COURT: Very well, Counsel. As I indicated at  
5 the conclusion of the evidentiary phase of this trial,  
6 while it may not seem so to all parties and counsel involved,  
7 I have been impressed with the manner in which counsel have  
8 handled themselves, in a professional and courteous  
9 fashion, and my attitude is the same as it was then, not-  
10 withstanding the fact that I have now ruled.

11 If there is nothing further at this time, this Court  
12 will be in recess.

13 (Whereupon, the proceedings were concluded.)

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REPORTER'S CERTIFICATE

STATE OF UTAH )  
 ) ss  
COUNTY OF SALT LAKE )

I, ANNA M. BENNETT, do hereby certify:

That I am a Certified Shorthand Reporter, License No. 220, and one of the official court reporters of the State of Utah; that on the 30th day of March, 1988, I attended the within matter and reported in shorthand the proceedings had thereat; that later I caused my said shorthand proceedings to be transcribed into typewriting, and the foregoing pages, numbered from 2 to 10, inclusive, constitute a full, true and correct account of the same to the best of my ability.

DATED at Salt Lake City, Utah, this 30th day of  
March, 1988.

Anna M. Bennett  
ANNA M. BENNETT, CSR



# ACKNOWLEDGEMENT

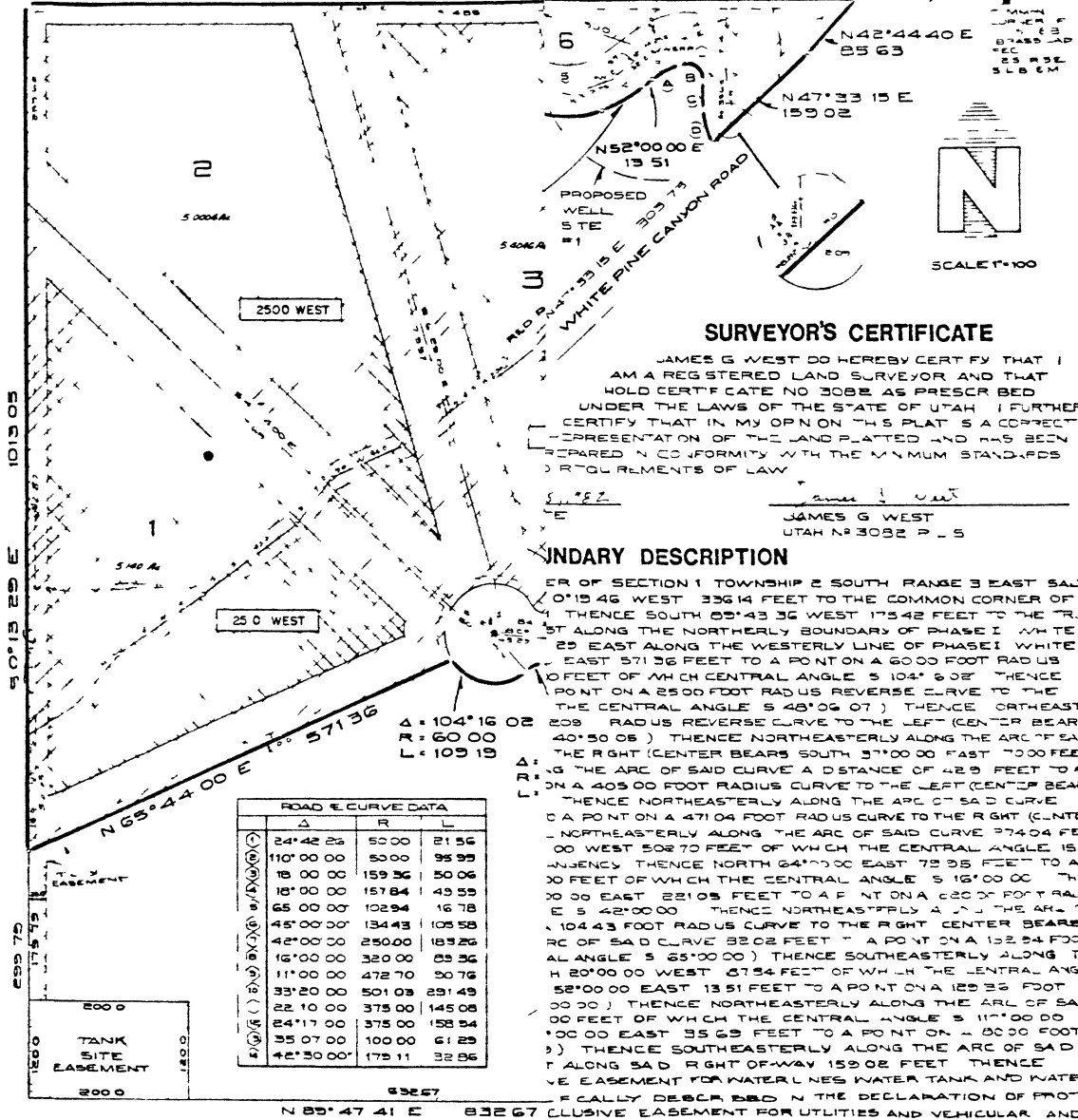
STATE OF UTAH  
COUNTY OF SUMMIT  
ON THE 13th DAY OF AUGUST 1996, I, D. 982 PERSONALLY APPRESENTED AND APPEARED BEFORE ME THE UNDERSIGNED NOTARY PUBLIC IN AND FOR THE STATE OF UTAH AND COUNTY OF SUMMIT LEON H. SAUNDERS, OWNER, WHO AFTER BEING DULY SWORN, ACKNOWLEDGED AND WEDGED TO ME THAT THAT HE IS AN OWNER THAT HE SIGNED THE OWNERS DEED DEDICATION FREELY AND VOLUNTARILY FOR AND IN BEHALF OF OF SAID OWNERS FOR THE PURPOSE THEREIN MENTIONED AND THAT SAID OWNER EXECUTED THE SAME ON THE SAME.

My COMMISSION EXPIRES

August 13, 1996

Shelby Horvath  
RESIDING AT Park City, UT

TRUE  
POB



## SURVEYOR'S CERTIFICATE

JAMES G. WEST DO HEREBY CERTIFY THAT I AM A REGISTERED LAND SURVEYOR AND THAT HOLD CERTIFICATE NO. 3082 AS PRESCRIBED UNDER THE LAWS OF THE STATE OF UTAH. I FURTHER CERTIFY THAT IN MY OPINION THIS PLAT IS A CORRECT REPRESENTATION OF THE LAND PLATTED AND HAS BEEN PREPARED IN CONFORMITY WITH THE MINIMUM STANDARDS AND REQUIREMENTS OF LAW.

JAMES G. WEST  
UTAH NO. 3082 P.L.S.

## BOUNDARY DESCRIPTION

OF SECTION 1 TOWNSHIP 2 SOUTH RANGE 3 EAST SALT  
0°19'46" WEST 33614 FEET TO THE COMMON CORNER OF  
4 THENCE SOUTH 00°43'36" WEST 17542 FEET TO THE TRUE  
ST ALONG THE NORTHERLY BOUNDARY OF PHASE I WHITE  
25 EAST ALONG THE WESTERLY LINE OF PHASE I WHITE  
EAST 571.36 FEET TO A POINT ON A 6000 FOOT RADIUS  
OF WHICH CENTRAL ANGLE S 104° 00' 00" THENCE  
POINT ON A 2500 FOOT RADIUS REVERSE CURVE TO THE  
THE CENTRAL ANGLE S 48°06'07" THENCE NORTHEAST-  
208 RADIUS REVERSE CURVE TO THE LEFT (CENTER BEARS  
40°50'05") THENCE NORTHEASTERLY ALONG THE ARC OF SAID  
THE RIGHT (CENTER BEARS SOUTH 37°00'00" EAST 7000 FEET  
Δ: NG THE ARC OF SAID CURVE A DISTANCE OF 423 FEET TO A  
R: ON A 40500 FOOT RADIUS CURVE TO THE LEFT (CENTER BEARS  
L: THENCE NORTHEASTERLY ALONG THE ARC OF SAID CURVE  
CA POINT ON A 47104 FOOT RADIUS CURVE TO THE RIGHT (CENTER  
NORTHEASTERLY ALONG THE ARC OF SAID CURVE 77404 FEET  
00 WEST 50270 FEET OF WHICH THE CENTRAL ANGLE IS  
N-ANCEY THENCE NORTH 64°00'00" EAST 7235 FEET TO A  
30 FEET OF WHICH THE CENTRAL ANGLE S 16°00'00" THENCE  
00 00 EAST 22105 FEET TO A POINT ON A 6200 FOOT RADIUS  
E S 42°00'00" THENCE NORTHEASTERLY ALONG THE ARC OF  
A 10443 FOOT RADIUS CURVE TO THE RIGHT (CENTER BEARS  
RC OF SAID CURVE 3202 FEET TO A POINT ON A 15254 FOOT  
AL ANGLE S 65°00'00") THENCE SOUTHEASTERLY ALONG THE  
H 20°00'00" WEST 8754 FEET OF WHICH THE CENTRAL ANGLE  
52°00'00" EAST 1351 FEET TO A POINT ON A 12536 FOOT  
00 00") THENCE NORTHEASTERLY ALONG THE ARC OF SAID  
00 FEET OF WHICH THE CENTRAL ANGLE S 11°00'00"  
00 00 EAST 3563 FEET TO A POINT ON A 6000 FOOT  
R) THENCE SOUTHEASTERLY ALONG THE ARC OF SAID  
F) ALONG SAID RIGHT-OF-WAY 15902 FEET THENCE  
VE EASEMENT FOR WATER LINES WATER TANK AND WATER  
FICALLY DESCRIBED IN THE DECLARATION OF PROTECT-  
CLUSIVE EASEMENT FOR UTILITIES AND VEHICULAR AND  
Y SHOWN ON THE PLAT AND FROM THE WELL SITES AS  
INTERFERE WITH CONSTRUCTION OR DEVELOPMENT OF THE  
SITE

## OWNER'S DEDICATION

KNOW ALL BY THESE PRESENT THAT WE THE UNDERSIGNED (OF LAND HAVING CAUSED THE SAME TO BE DIVIDED INTO PRIVATE COMMON AREAS AND PARCELS TO HEREAFTER BE KNOWN AS SEVERAL DEVELOPMENT DO HEREBY SUBMIT THE PARCELS OF DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS AND DO FURTHER DEDICATE THE COMMON AREA FOR THE USE AND ENJOYMENT OF THE SAID DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS HAVE SET OUR HANDS THIS

LEON H. SAUNDERS, DIVISIONAL  
1825 LONGVIEW DR. SALT LAKE CITY UT 84117  
DANIEL C. HUNTER, AN INDIVIDUAL

## SE I RANCHES INITIAL DEVELOPMENT

NE E. 1/4 OF SEC. 1,  
3 E., S. L. B. & M.

## COUNTY COMMISSION APPROVAL

PRESENTED TO THE BOARD OF  
COUNTY COMMISSIONERS THIS DAY OF  
AUGUST 1996 AT WHICH TIME THIS  
RECORD OF SURVEY WAS APPROVED

COUNTY CLERK

## COUNTY

APPROVED  
SUMMIT COUNTY  
MENT ON THIS  
AUGUST 19, 1996  
JEST OF

J J Johnson & Associates

Park Meadows Plaza  
Highway 248  
PO Box 661  
Park City, Utah 84060

WHEN RECORDED, MAIL IT

Space Above This Line For Recorder's Use

## TRUST DEED

With Assignment of Rents

THIS TRUST DEED, made this 30th day of June, 1981,  
between PAUL H. LANDES, ROBERT FELTON, LEON H. SAUNDERS,  
INTERSTATE RENTALS, INC. as tenants in common, as TRUSTOR,  
whose address is 44 Exchange Place, Salt Lake City, Utah  
(Street and number) (City) (State)  
ASSOCIATED TITLE COMPANY, as TRUSTEE,\* and  
JOHN C. SHARP and GERALDINE Y. SHARP, as BENEFICIARY,  
WITNESSETH: That Trustor CONVEYS AND WARRANTS TO TRUSTEE IN TRUST,  
WITH POWER OF SALE, the following described property, situated in Summit  
County, State of Utah:

SEE EXHIBIT "A" ATTACHED HERETO AND BY THIS REFERENCE INCORPORATED HEREIN.

Together with all buildings, fixtures and improvements thereon and all water rights, rights of way, easements, rents, issues, profits, income, tenements, hereditaments privileges and appurtenances thereunto belonging, now or hereafter used or enjoyed with said property, or any part thereof, SUBJECT, HOWEVER, to the right, power and authority hereinafter given to and conferred upon Beneficiary to collect and apply such rents, issues, and profits;

FOR THE PURPOSE OF SECURING (1) payment of the indebtedness evidenced by a promissory note of even date herewith, in the principal sum of \$ 963,055.30, made by Trustor, payable to the order of Beneficiary at the times, in the manner and with interest as therein set forth, and any extensions and/or renewals or modifications thereof, (2) the performance of each agreement of Trustor herein contained; (3) the payment of such additional loans or advances as hereafter may be made to Trustor, or his successors or assigns, when evidenced by a promissory note or notes reciting that they are secured by this Trust Deed; and (4) the payment of all sums expended or advanced by Beneficiary under or pursuant to the terms hereof, together with interest thereon as herein provided.

\*NOTE: Trustee must be a member of the Utah State Bar; a bank, building and loan association or savings and loan association authorized to do such business in Utah; a corporation authorized to do a trust business in Utah; or a title insurance or abstract company authorized to do such business in Utah.

Salt Lake Times, Inc.  
**DEFENDANT'S  
EXHIBIT**  
2

**TO PROTECT THE SECURITY OF THIS TRUST DEED TRUSTOR AGREES.**

1. To keep said property in good condition and repair not to remove or demolish any building thereon, to complete or restore promptly and in good and workmanlike manner any building which may be constructed, damaged or destroyed thereon, to comply with all laws, covenants and restrictions affecting said property, not to commit or permit waste thereof, not to commit, suffer or permit any act upon said property in violation of law, to do all other acts which from the character or use of said property may be reasonably necessary, the specific enumerations herein not excluding the general, and if the loan secured hereby or any part thereof is being obtained for the purpose of financing construction of improvements on said property, Trustee further agrees

(a) To commence construction promptly and to pursue same with reasonable diligence to completion in accordance with plans and specifications satisfactory to Beneficiary, and

(b) To allow Beneficiary to inspect said property at all times during construction.

Trustee, upon presentation to it of an affidavit signed by Beneficiary setting forth facts showing a default by Trustor under this numbered paragraph, is authorized to accept as true and conclusive all facts and statements therein and to act thereon hereunder.

2. To provide and maintain insurance of such type or types and amounts as Beneficiary may require on the improvements now existing or hereafter erected or placed on said property. Such insurance shall be carried in companies approved by Beneficiary with loss payable clauses in favor of and in form acceptable to Beneficiary. In event of loss Trustor shall give immediate notice to Beneficiary who may make proof of loss and each insurance company concerned is hereby authorized and directed to make payment for such loss directly to Beneficiary instead of to Trustor and Beneficiary jointly, and the insurance proceeds, or any part thereof may be applied by Beneficiary at its option, to reduction of the indebtedness hereby secured or to the restoration or repair of the property damaged.

3. To deliver to pay for and maintain with Beneficiary until the indebtedness secured hereby is paid in full, such evidence of title as Beneficiary may require including abstracts of title or policies of title insurance and any extensions or renewals thereof or supplements thereto.

4. To appear in and defend any action or proceeding purporting to affect the security hereof, the title to said property, or the rights or powers of Beneficiary or Trustee and should Beneficiary or Trustee elect to also appear in or defend any such action or proceeding to pay all costs and expenses including cost of evidence of title and attorney's fees in a reasonable sum incurred by Beneficiary or Trustee.

5. To pay at least 10 days before delinquency all taxes and assessments affecting said property, including all assessments upon water company stock and all rents assessments and charges for water appurtenant to or used in connection with said property to pay when due all encumbrances charges and liens with interest, on said property or any part thereof which at any time appear to be prior or superior hereto to pay all costs, fees and expenses of this Trust.

6. Should Trustor fail to make any payment or to do any act as herein provided then Beneficiary or Trustee but without obligation so to do and without notice to or demand upon Trustor and without releasing Trustor from any obligation hereof may make or do the same in such manner and to such extent as either may deem necessary to protect the security hereof. Beneficiary or Trustee being authorized to enter upon said property for such purposes commence appear in and defend any action or proceeding purporting to affect the security hereof or the rights or powers of Beneficiary or Trustee pay purchase contest or compromise any encumbrance charge or lien which in the judgment of either appears to be prior or superior hereto and in so executing any such powers incur any liability expend whatever amounts in its absolute discretion it may deem necessary therefor, including cost of evidence of title, employ counsel, and pay his reasonable fees.

7. To pay immediately and without demand all sums expended hereunder by Beneficiary or Trustee, with interest from date of expenditure at the rate of ten per cent (10%) per annum until paid, and the repayment thereof shall be secured hereby.

**IT IS MUTUALLY AGREED THAT:**

8. Should said property or any part thereof be taken or damaged by reason of any public improvement or condemnation proceeding or damaged by fire or earthquake or in any other manner Beneficiary shall be entitled to all compensation, awards and other payments or relief therefor and shall be entitled at its option to commence or appear in and prosecute in its own name any action or proceedings or to make any compromise or settlement in connection with such taking or damage. All such compensation, awards, damages, rights of action and proceeds including the proceeds of any policies of fire and other insurance affecting said property, are hereby assigned to Beneficiary who may after deducting therefrom all its expenses including attorney's fees, apply the same on any indebtedness secured hereby. Trustor agrees to execute such further assignments of any compensation award, damages, and rights of action and proceeds as Beneficiary or Trustee may require.

9. At any time and from time to time upon written request of Beneficiary payment of its fees and presentation of this Trust Deed and the note for endorsement (in case of full reconveyance for cancellation and retention) without affecting the liability of any person for the payment of the indebtedness secured hereby, Trustor may (a) consent to the making of any map or plat of said property (b) join in granting any easement or creating any restriction thereon (c) join in any subordination or other agreement affecting this Trust Deed or the lien or charge thereof (d) reconvey, without warranty all or any part of said property. The grantee in any reconveyance may be described as "the person or persons entitled thereto" and the recitals thereof of any nature or facts shall be conclusive proof of truthfulness thereof. Trustor agrees to pay reasonable Trustee's fees for any of the services mentioned in this paragraph.

10. As additional security Trustor hereby assigns Beneficiary during the continuance of these trusts all rents issues royalties and profits of the property affected by this Trust Deed and of any personal property located thereon. Until Trustor shall default in the payment of any indebtedness secured hereby or in the performance of any agreement hereunder Trustor shall have the right to collect all such rents issues royalties and profits earned prior to default as they become due and payable. If Trustor shall default as aforesaid Trustor's right to collect any of such moneys shall cease and Beneficiary shall have the right with or without taking possession of the property affected hereby to collect all rents issues royalties and profits. Failure or discontinuance of Beneficiary at any time or from time to time to collect any such moneys shall not in any manner affect the subsequent enforcement by Beneficiary of the right, power and authority to collect the same. Nothing contained herein nor the exercise of the right by Beneficiary to collect, shall be or be construed to be, an affirmation by Beneficiary of any tenancy lease or option, nor an assumption of liability under, nor a subordination of the lien or charge of this Trust Deed to any such tenancy, lease or option.

11. Upon any default by Trustor hereunder Beneficiary may at any time without notice, either in person by agent, or by a receiver to be appointed by a court (Trustor hereby consenting to the appointment of Beneficiary as such receiver), and without regard to the adequacy of any security for the indebtedness hereby secured enter upon and take possession of said property or any part thereof in its own name sue for or otherwise collect and rents, issues, and profits including those past due and unpaid and apply the same less costs and expenses of operation and collection, including reasonable attorney's fees, upon any indebtedness secured hereby, and in such order as Beneficiary may determine.

12. The entering upon and taking possession of said property, the collection of such rents, issues, and profits, or the proceeds of fire and other insurance policies or compensation or awards for any taking or damage of said property, and the application or release thereof as aforesaid shall not cure or waive any default or notice of default hereunder or invalidate any act done pursuant to such action.

13. The failure on the part of Beneficiary to promptly enforce any right hereunder shall not operate as a waiver of such right and the waiver by Beneficiary of any default shall not constitute a waiver of any other or subsequent default.

14. Time is of the essence hereof. Upon default by Trustor in the payment of any indebtedness secured hereby or in the performance of any agreement hereunder all sums secured hereby shall immediately become due and payable at the option of Beneficiary. In the event of such default Beneficiary may execute or cause Trustee to execute a writ of execution and of election to cause said property to be sold to satisfy the obligations hereof and Trustor shall file such notice for record in each county wherein said property or some part or parcel thereof is situated. Beneficiary also shall deposit with Trustee the note and all documents evidencing expenditures secured hereby.

default, and notice of default and notice of sale having been given as then required by law, Trustee, without demand on Trustor, shall sell said property at the date and at the time and place designated in the notice of sale, either as a whole or in separate parcels, and in such order as it may determine (but subject to the statutory right of Trustor to direct the order in which such property, if consisting of several known lots or parcels, shall be sold), at public auction to the highest bidder, the purchase price payable in lawful money of the United States at the time of sale. The person conducting the sale may, for any cause he deems expedient, postpone the sale from time to time until it shall be completed and, in every case, notice of postponement shall be given by public declaration thereof by such person at the time and place last appointed for the sale, provided, if the sale is postponed for longer than one day beyond the day designated in the notice of sale, notice thereof shall be given in the same manner as the original notice of sale. Trustee shall execute and deliver to the purchaser his Deed conveying said property so sold, but without any covenant or warranty, express or implied. The recitals in the Deed of any matters or facts shall be conclusive proof of the truthfulness thereof. Any person, including Beneficiary, may bid at the sale. Trustee shall apply the proceeds of the sale to payment of (1) the costs and expenses of exercising the power of sale and of the sale, including the payment of the Trustor's and attorney's fees; (2) cost of any evidence of title procured in connection with such sale and revenue stamps on Trustor's Deed; (3) all sums expended under the terms hereof, not then repaid, with accrued interest at 10% per annum from date of expenditure; (4) all other sums then secured hereby; and (5) the remainder, if any, to the person or persons legally entitled thereto, or the Trustee, in his discretion, may deposit the balance of such proceeds with the County Clerk of the county in which the sale took place.

16. Upon the occurrence of any default hereunder, Beneficiary shall have the option to declare all sums secured hereby immediately due and payable and foreclose this Trust Deed in the manner provided by law for the foreclosure of mortgages on real property and Beneficiary shall be entitled to recover in such proceeding all costs and expenses incident thereto, including a reasonable attorney's fee in such amount as shall be fixed by the court.

17. Beneficiary may appoint a successor trustee at any time by filing for record in the office of the County Recorder of each county in which said property or some part thereof is situated a substitution of trustee. From the time the substitution is filed for record, the new trustee shall succeed to all the powers, duties, authority and title of the trustee named herein or of any successor trustee. Each such substitution shall be executed and acknowledged, and notice thereof shall be given and proof thereof made, in the manner provided by law.

18. This Trust Deed shall apply to, inure to the benefit of, and bind all parties herein, their heirs, legatees, devisees, administrators, executors, successors and assigns. All obligations of Trustor hereunder are joint and several. The term "Beneficiary" shall mean the owner and holder, including any pledgee, of the note secured hereby. In this Trust Deed, whenever the context requires, the masculine gender includes the feminine and/or neuter, and the singular number includes the plural.

19. Trustee accepts this Trust when this Trust Deed, duly executed and acknowledged, is made a public record as provided by law. Trustee is not obligated to notify any party hereto of pending sale under any other Trust Deed or of any action or proceeding in which Trustor, Beneficiary, or Trustee shall be a party, unless brought by Trustee.

20. This Trust Deed shall be construed according to the laws of the State of Utah.

\*1. The undersigned Trustor requests that a copy of any notice of default and of any notice of sale hereunder be mailed to him at the address hereinbefore set forth.

Signature of Trustor

Paul H. Landes  
PAUL H. LANDES  
Robert Felton  
ROBERT FELTON  
Leon H. Saunders  
LEON H. SAUNDERS  
INTERSTATE RENTALS, INC.  
BY Kenneth R. Norton  
(If Trustor an individual) KENNETH R. NORTON, President

STATE OF UTAH  
COUNTY OF Salt Lake ss.

On the 16<sup>th</sup> day of July, A.D. 1981, personally

appeared before me PAUL H. LANDES, ROBERT FELTON, LEON H. SAUNDERS,  
the signer(s) of the above instrument, who duly acknowledged to me that they executed the same.

Marjie Stephens  
Notary Public residing at:  
Salt Lake County

My Commission Expires: 5-18-85

(If Trustor a Corporation)

STATE OF UTAH  
COUNTY OF Salt Lake ss.

On the 16<sup>th</sup> day of July, A.D. 1981, personally

appeared before me KENNETH R. NORTON, who being by me duly sworn,

says that he is the President of Interstate Rentals, Inc.,  
the corporation that executed the above and foregoing instrument and that said instrument was signed in behalf of said corporation by authority of its by-laws (or by authority of a resolution of its board of directors) and said KENNETH R. NORTON acknowledged to me that said corporation executed the same.

Marjie Stephens  
Notary Public residing at:  
Salt Lake County

My Commission Expires:  
5-18-85

EXHIBIT "A"

Beginning at a point South 89° 43' 36" West along the North line of Lot 8, 175.42 feet from the corner of Lots 1 and 8, a brass cap set by the U. S. General Land Office, said brass cap also being South 00° 19' 46" West along section line 1336.14 feet from the Northeast corner of Section 1, Township 2 South, Range 3 East, Salt Lake Base and Meridian; and running thence South 89° 43' 36" West along the North line of Lots 7 and 8 2948.98 feet to the Northwest corner of Lot 7; thence South 00° 13' 29" East along the West line of Lot 7, 1312.84 feet to the Southwest corner of Lot 7; thence North 89° 47' 41" East along the South line of Lot 7, 832.67 feet; thence North 61° 00' 00" East 1956.90 feet; thence North 47° 33' 15" East 462.75 feet; thence North 42° 44' 40" East 85.63 feet to the point of beginning.

SUBJECT TO Easements, Encroachments, Restrictions, Rights-of-Way and matters of record enforceable in law or equity.

*AK*

C. J. Sharp  
7/16/81

## TRUST DEED NOTE

DO NOT DESTROY THIS NOTE: When paid, this note, with Trust Deed securing same must be surrendered to Trustee for cancellation, before reconveyance will be made.

\$ 963,055.30

June 30, 1981

FOR VALUE RECEIVED, the undersigned, jointly and severally, promise to pay to the order of  
JOHN C. SHARP and GERALDINE Y. SHARP,

NINE HUNDRED SIXTY THREE THOUSAND FIFTY FIVE AND 30/100—DOLLARS (\$ 963,055.30 ),  
together with interest from date at the rate of TWELVE per cent ( 12.0%) per annum on  
the unpaid principal, said principal and interest payable as follows.

SEE ADDENDUM ATTACHED HERETO AND BY THIS REFERENCE MADE A PART HEREOF.

Each payment shall be applied first to accrued interest and the balance to the reduction of principal. Any  
such installment not paid when due shall bear interest thereafter at the rate of eighteen per  
cent ( 18.0%) per annum until paid, and shall be subject to a late payment charge of 4%  
of such overdue payment.

If default occurs in the payment of said installments of principal and interest or any part thereof, or in  
the performance of any agreement contained in the Trust Deed securing this note, the holder hereof, at its  
option and without notice or demand, may declare the entire principal balance and accrued interest due and  
payable.

If this note is collected by an attorney after default in the payment of principal or interest, either with  
or without suit, the undersigned, jointly and severally, agree to pay all costs and expenses of collection including  
a reasonable attorney's fee.

The makers, sureties, guarantors and endorsers hereof severally waive presentment for payment, demand  
and notice of dishonor and nonpayment of this note, and consent to any and all extensions of time, renewals,  
waivers or modifications that may be granted by the holder hereof with respect to the payment or other pro-  
visions of this note, and to the release of any security, or any part thereof, with or without substitution.

This note is secured by a Trust Deed of even date herewith.

INTERSTATE RENTALS, INC.,

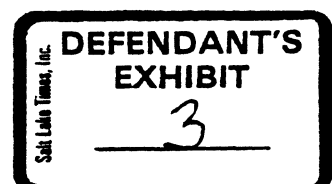
BY: Kenneth R. Norton  
KENNETH R. NORTON, President

Paul H. Landes  
PAUL H. LANDES

Robert Felton  
ROBERT FELTON

Leon H. Saunders  
LEON H. SAUNDERS

Kenneth R. Norton  
KENNETH R. NORTON



ADDENDUM

ADDENDUM to Trust Deed Note dated June 30, 1981, executed by PAUL H. LANDES, ROBERT FELTON, LEON H. SANDERS, INTERSTATE RENTALS, INC., as Trustor in favor of JOHN C. SHARP and GERALDINE Y. SHARP, as Beneficiary.

1. The entire principal balance of 963,055.30 together with accrued interest at the rate of twelve percent (12%) per annum shall be paid as follows:
  - A. On or before June 30, 1982, a principal payment of \$192,611.06, or more together with accrued interest on the entire unpaid principal balance shall be due and payable in full.
  - B. On or before June 30, 1983, a principal payment of \$192,611.06, or more together with accrued interest on the entire unpaid principal balance shall be due and payable in full.
  - C. On or before June 30, 1984, a principal payment of \$192,611.06, or more together with accrued interest on the entire unpaid principal balance shall be due and payable in full.
  - D. On or before June 30, 1985, a principal payment of \$192,611.06, or more together with accrued interest on the entire unpaid principal balance shall be due and payable in full.
  - E. On or before June 30, 1986, a principal payment of \$192,611.06, or more together with accrued interest on the entire unpaid principal balance shall be due and payable in full.
2. Trustor shall have the right to prepay up to 50% of the principal secured hereunder in any one calendar year but in the event of any prepayment a charge in the amount of \$10,000.00 shall be assessed for each calendar year reduced from the payment schedule by prepayment.
3. Kenneth R. Norton, President of Interstate Rentals, Inc., individually and personally does hereby guarantee the performance of Interstate Rentals, Inc.

DATED this \_\_\_\_\_ day of June 1981.

JOHN C. SHARP, Beneficiary

GERALDINE Y. SHARP, Beneficiary

ROBERT FELTON, Trustor

LEON H. SANDERS, Trustor

INTERSTATE RENTALS, INC., (Trustor)

KENNETH R. NORTON

PAUL H. LANDES, Trustor

KENNETH R. NORTON

SECOND AMENDED  
NOTICE OF TRUSTEE'S SALE

The following described property will be sold at public auction to the highest bidder, payable in lawful money of the United States at the time of sale, at the South door of the Summit County Courthouse in Coalville, Utah, on September 5, 1986, at 4:45 p.m. of said day, for the purpose of foreclosing at Trust Deed executed by Paul H. Landes, Robert Felton, Leon H. Saunders, Interstate Rentals, Inc., as tenants in common, as Trustors, in favor of Associated Title Company as Trustee, and John C. Sharp and Geraldine Y. Sharp, as Beneficiary, which said Trust Deed was recorded in the office of the County Recorder of Summit County, State of Utah, as Entry No. 181695, in Book M193, at Page 372, covering real property more particularly described as follows:

Beginning at a point South 89 degrees 43'36" West along the North line of Lot 8, 175.42 feet from the corner of Lots 1 and 8, a brass cap set by the U.S. General Land Office, said brass cap also being South 00 degrees 19'46" West along section line 1336.14 feet from the Northeast corner of Section 1, Township 2 South, Range 3 East, Salt Lake Base and Meridian; and running thence South 89 degrees 43'46" West along the North line of Lot 7 and 8 2948.98 feet to the Northwest corner of Lot 7; thence South 00 degrees 13'29" East along the West line of Lot 7, 1312.84 feet to the Southwest corner of Lot 7; thence North 89 degrees 47'41" East along the South line of Lot 7, 832.67 feet; thence North 61 degrees 00'00" East 1956.90 feet; thence North 47 degrees 33'15" East 462.75 feet; thence North 42 degrees 44'40" East 85.63 feet to the point of beginning.

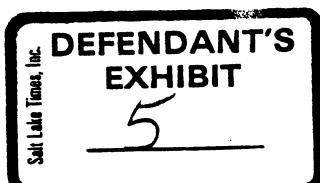
SUBJECT TO Easements, Encroachments, Restrictions, Rights-of-Way and matters of record enforceable in law equity.

NOTE: A portion of the above described property is now known as White Pine Ranches, Phase 1, a Planned Residential Development according to the official plat thereof on file and of record in the Summit County Recorder's Office. Less and excepting Lots 1 through 5, inclusive of said White Pine Ranches, Phase 1, a Planned Residential Development.

Dated this 4th day of August, 1986.

ASSOCIATED TITLE COMPANY,  
a Utah Corporation  
Trustee

By: Blake T. Heiner  
Its: Vice President





CONSENT TO RECORD  
PHASE I  
WHITE PINE RANCHES

Beginning at the Northeast Corner of Section 1, Township 2 South, Range 3 East, Salt Lake Base and Meridian; thence South  $0^{\circ} 19' 46''$  West 1336.14 feet to the common corner of government lots 1 and 8 of said Section 1; thence South  $89^{\circ} 43' 36''$  West 175.42 feet to the true point of beginning; thence South  $89^{\circ} 43' 36''$  West along the northerly boundary of Phase I, White Pine Ranches 2948.98 feet; thence South  $0^{\circ} 13' 29''$  East along the westerly line of Phase I, White Pine Ranches 1013.05 feet; thence North  $63^{\circ} 44' 00''$  East 571.36 feet to a point on a 60.00 foot radius curve to the left (center bears North  $60^{\circ} 00' 00''$  East, 60.00 feet of which central angle is  $104^{\circ} 16' 02''$ ); thence southeasterly along the arc of said curve 109.19 feet to a point on a 25.00 foot radius reverse curve to the right (center bears South  $44^{\circ} 16' 02''$  East 25.00 feet of which the central angle is  $48^{\circ} 06' 07''$ ); thence northeasterly along the arc of said curve 20.99 feet to a point on a 209.11 radius reverse curve to the left (center bears North  $03^{\circ} 50' 05''$  East 209.11 feet of which the central angle is  $40^{\circ} 50' 05''$ ); thence northeasterly along the arc of said curve 149.03 feet to a point on a 70.00 foot radius reverse curve to the right (center bears South  $37^{\circ} 00' 00''$  East 70.00 feet of which the central angle is  $35^{\circ} 07' 05''$ ); thence northeasterly along the arc of said curve a distance of 42.91 feet to a point of tangency; thence North  $88^{\circ} 07' 05''$  East 292.41 feet to a point on a 405.00 foot radius curve to the left (center bears North  $01^{\circ} 52' 55''$  West 405.00 feet of which the central angle is  $46^{\circ} 27' 05''$ ); thence northeasterly along the arc of said curve 323.35 feet to a point of tangency; thence North  $41^{\circ} 40' 00''$  East 78.91 feet to a point on a 471.04 foot radius curve to the right (center bears South  $48^{\circ} 20' 00''$  East 471.04 feet having a central angle of  $33^{\circ} 20' 00''$ ); thence northeasterly along the arc of said curve 274.04 feet to a point on a 502.70 foot radius reverse curve to the left (center bears North  $15^{\circ} 00' 00''$  West 502.70 feet of which the central angle is  $11^{\circ} 00' 00''$ ); thence northeasterly along the arc of said curve 96.51 feet to a point of tangency; thence North  $64^{\circ} 00' 00''$  East 79.95 feet to a point on a 350.00 foot radius curve to the left (center bears North  $26^{\circ} 00' 00''$  West 350.00 feet of which the central angle is  $16^{\circ} 00' 00''$ ); thence northeasterly along the arc of said curve 97.74 feet to a point of tangency; thence

North 48° 00' 00" East 221.05 feet to a point on a 220.00 foot radius curve to the right (center bears South 42° 00' 00" East 220.00 feet of which the central angle is 42° 00' 00"); thence northeasterly along the arc of said curve 161.27 feet to a point of tangency; thence North 90° 00' 00" East 188.36 feet to a point on a 104.43 foot radius curve to the right (center bears South 00° 00' 00" East 104.43 feet of which the central angle is 45° 00' 00"); thence southeasterly along the arc of said curve 82.02 feet to a point on a 132.94 foot radius reverse curve to the left (center bears North 45° 00' 00" East 132.94 feet of which the central angle is 65° 00' 00"); thence southeasterly along the arc of said curve 150.81 feet to a point on a 187.84 foot radius curve to the left (center bears North 20° 00' 00" West 187.84 feet of which the central angle is 18° 00' 00"); thence northeasterly along the arc of said curve 59.01 feet to a point of tangency; thence North 52° 00' 00" East 13.51 feet to a point on a 129.36 foot radius curve to the right (center bears South 38° 00' 00" East 129.36 feet of which the central angle is 18° 00' 00"); thence northeasterly along the arc of said curve 40.64 feet to a point on a 20.00 foot radius curve to the right (center bears South 20° 00' 00" East 20.00 feet of which the central angle is 110° 00' 00"); thence southeasterly along the arc of said curve 38.40 feet to a point of tangency; thence South 00° 00' 00" East 35.69 feet to a point on a 80.00 foot radius curve to the left (center bears North 90° 00' 00" East 80.00 feet of which the central angle is 31° 27' 59"); thence southeasterly along the arc of said curve 43.94 feet to a point on the westerly right-of-way of White Pine Canyon Road; thence North 47° 33' 15" East along said right-of-way 159.02 feet; thence North 42° 44' 40" East along said right-of-way 85.63 feet to the true point of beginning, together with a non-exclusive easement for water lines, water tank and water systems over, under and across the property, shown here near the southwest corner of the subject property, and specifically described in the Declaration of Protective Covenants and reserving unto the owners, for granting to the owners of adjacent or nearby property, a non-exclusive easement for utilities and vehicular and pedestrian access over the private roadway shown on the plat and from the well sites as developed but in such a manner as to not interfere with construction or development of the specific lot or lots containing the well site.

Contains 32.8495 acres, more or less.

State of Utah  
County of Summit

John C. Sharp 11-23-83  
John C. Sharp Date

On this 23 day of Nov, 1983, personally appeared before me the undersigned Notary Public in and for said State and County, John C. Sharp, who after being duly sworn, acknowledged to me that he is the beneficiary of a deed of trust Book M193 Page 372 recorded in Summit County, Utah, that he signed the owners dedication freely and voluntarily for and in behalf of said owners for the purpose therein mentioned and that said owners executed the same.

My commission expires  
Aug 5 - 1986

Theresa Mauss  
Notary Public

Residing at Salt Lake City Utah

State of Utah  
County of Summit

Geraldine Y. Sharp 11-23-83  
Geraldine Y. Sharp Date

On this 23 day of Nov, 1983, personally appeared before me the undersigned Notary Public in and for said State and County, Geraldine Y. Sharp, who after being duly sworn, acknowledged to me that she is the beneficiary of a deed of trust Book M193 Page 372 recorded in Summit County, Utah, that she signed the owners dedication freely and voluntarily for and in behalf of said owners for the purpose therein mentioned and that said owners executed the same.

My commission expires  
Aug 5 - 1986

Theresa Mauss  
Notary Public

Residing at Salt Lake City Utah

State of Utah  
County of Summit

Donna Bartlett Moore  
Assistant Vice President  
Foothill Thrift

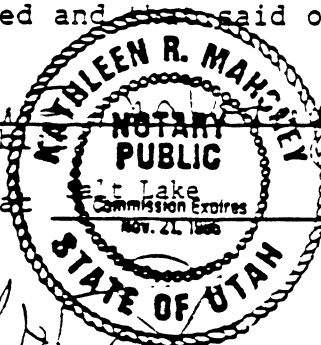
9-6-83  
Date

On this 6th day of Sept., 1983, personally appeared before me the undersigned Notary Public in and for said State and County, Larry E. Grant, who after being duly sworn, acknowledged to me that he is the beneficiary of a deed of trust Book M237 Page 696 recorded in Summit County, Utah, that he signed the owners dedication freely and voluntarily for and in behalf of said owners for the purpose therein mentioned and that said owners executed the same.

My commission expires \_\_\_\_\_

Kathleen R. Mahoney  
Notary Public

Residing at \_\_\_\_\_



State of Utah  
County of Summit

Harold E. Turley, Jr.  
President and Chief Executive Officer  
Utah First Bank

9-6-83  
Date

On this 6<sup>TH</sup> day of Sept., 1983, personally appeared before me the undersigned Notary Public in and for said State and County, Harold E. Turley, Jr., who after being duly sworn, acknowledged to me that he is the beneficiary of a deed of trust Book 259 Page 846 recorded in Summit County, Utah, that he signed the owners dedication freely and voluntarily for and in behalf of said owners for the purpose therein mentioned and that said owners executed the same.

My commission expires \_\_\_\_\_

Kathleen R. Mahoney  
Notary Public

Residing at MOORE, GLEN

MY COMMISSION EXPIRES SEPTEMBER 18, 1984

MEMORANDUM OF CLOSING TERMS

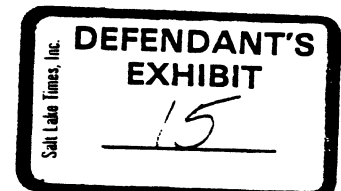
MEMORANDUM OF CLOSING TERMS dated June 30, 1981, executed by JOHN C. SHARP and GERALDINE Y. SHARP (hereinafter "Seller"), and ROBERT FELTON, LEON H. SAUNDERS, KENNETH R. NORTON, and PAUL H. LANDES (hereinafter collectively "Buyer").

This Memorandum is executed for the express purpose of describing those matters agreed upon by the parties hereto which survive the closing of the transaction.

1. It is mutually agreed and understood that after recordation of the PUD Plat and the Declaration of Covenants, Conditions and Restrictions, and upon receipt of each \$140,000.00 in principal (but not including the earnest money and down payment money), Seller shall execute and deliver to Buyer a Partial Deed of Reconveyance for one (1) PUD lot.

2. Upon the payment of the release price, Buyer shall be entitled to the release of one (1) lot of Buyer's choice upon receipt of the payment or at any time thereafter.

3. It is agreed that, at the time of execution of this Memorandum, Buyer has paid to Seller the sum of \$620,000.00 which will release from the Deed of Trust three (3) PUD lots. Upon the recordation of the PUD Plat and Declaration of Covenants, Conditions and Restrictions with the Summit County Recorder, Buyer shall be entitled to the release from the Deed of Trust of three (3) PUD lots of Buyer's choice together with the said roadway.



4. In the event Buyer should pay to Seller any principal sum in excess of the agreed upon release price, said sum shall be applied toward the next release price, i.e., should Buyer make a principal payment of \$160,000.00, the sum of \$20,000.00 (\$160,000.00 less \$140,000.00) shall be applied toward the next release price which shall require an additional principal payment of \$120,000.00 (\$20,000.00 plus \$120,000.00 equals \$140,000.00) to release the next lot.

5. The proposed plat is attached hereto as Exhibit "A" and by this reference incorporated herein. Seller hereby acknowledges and agrees to execute as a lienholder the original plat prior to recordation. Changes in the proposed plat and the Declaration of Covenants, Conditions and Restrictions when prepared shall be subject to the reasonable approval of Seller.

6. Seller agrees to grant to Summit County the ten and one-half (10-1/2) foot strip of land outlined in red on Exhibit "A". Said conveyance shall be for the sole purpose of widening the County roadway. If possible, such grant shall be in the form of an easement. The County indicates that it is possible that the County road as it exists is not where it is platted. If such proves to be a fact, Seller agrees that upon proper vacation, quit claim and abandonment of the platted road by the County, Seller shall grant to the County (by way of easement if possible) the County road as it exists as it is shown on Exhibit "A".

7. Buyer agrees to provide Seller with one (1) sewer connection and one (1) culinary water connection into Buyer's systems at such time as each is available, and Seller shall pay a connection fee and service fee equal to the pro rata cost to

the purchaser of a lot in Buyer's proposed PUD plus any charges of Summit Water Distributing Company. The sewer and water connection granted above can be used by Seller in new construction if allowed on the 8.5 acre parcel or for connection to the existing residence of Seller. Should Seller require another water and/or sewer connection, upon payment of the same charge set forth in the prior sentence, if well and sewer line capacity is available in Buyer's systems, and if Buyer shall convey to Seller whatever water rights the Board of Health would require for one (1) culinary connection (not to exceed one acre/foot) and the location of the residences to be located on the retained approximately 8.5 acre portion of Seller's property shall be subject to the reasonable approval of Leon H. Saunders and the residences to be constructed on the said 8.5 acre parcel shall be subject to the same restrictions as Buyer's residences are subject to under the Covenants, Conditions and Restrictions of White Pine Ranch PUD, Buyer shall grant to Seller another one (1) culinary connection and one (1) sewer connection. If Seller does not request the second culinary water connection and/or sewer connection, Seller is not subject to the conditions set forth in the immediately preceding sentence. The location through Buyer's property of the sewer line and culinary water line shall be designated by Buyer and Buyer will make such designation to the closest reasonable connection point to Seller's property.

8. Buyer and Seller agree that none of them have engaged a Real Estate Broker, Agent or Finder for the purposes of effecting this transaction and no commission, fee or other compensation shall be due and owing to any such Broker, Agent or Finder as a result of this closing.

9. This Memorandum and the closing documents executed simultaneously herewith contain all the understandings, warranties,

representations and agreements among the parties and the same are entered into after each party has personally and fully investigated all facts and circumstances concerning the transactions reflected by and contemplated herein and none of the parties are relying upon any statements or representations not embodied herein.

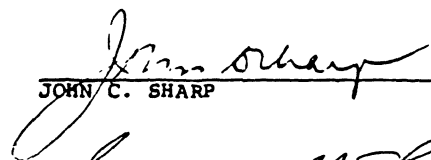
10. Time is of the essence of this Memorandum and it may not be orally changed, modified or terminated except in writing signed by the party against whom the same is sought to be enforced. The terms of this Memorandum shall apply to and bind the heirs, executors, administrators, successors and assigns of the respective parties hereto.

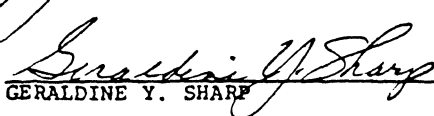
11. In the event of breach or default of any obligation under this Memorandum, the defaulting party shall pay all expenses of enforcing the same or any right arising out of breach or default thereof, including reasonable attorneys' fees, whether incurred with or without suit and both before and after judgment.

12. All warranties, covenants, obligations and agreements contained herein shall survive the closing of this transaction and any and all documents and instruments delivered in connection herewith and shall remain binding upon the parties hereto.


DATED this 16<sup>th</sup> day of July, 1981.

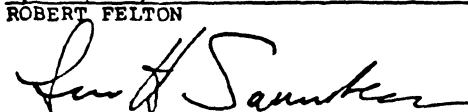
SELLER:

  
\_\_\_\_\_  
JOHN C. SHARP

  
\_\_\_\_\_  
GERALDINE Y. SHARP

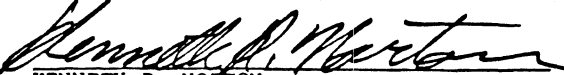
BUYER:

  
\_\_\_\_\_  
ROBERT FELTON

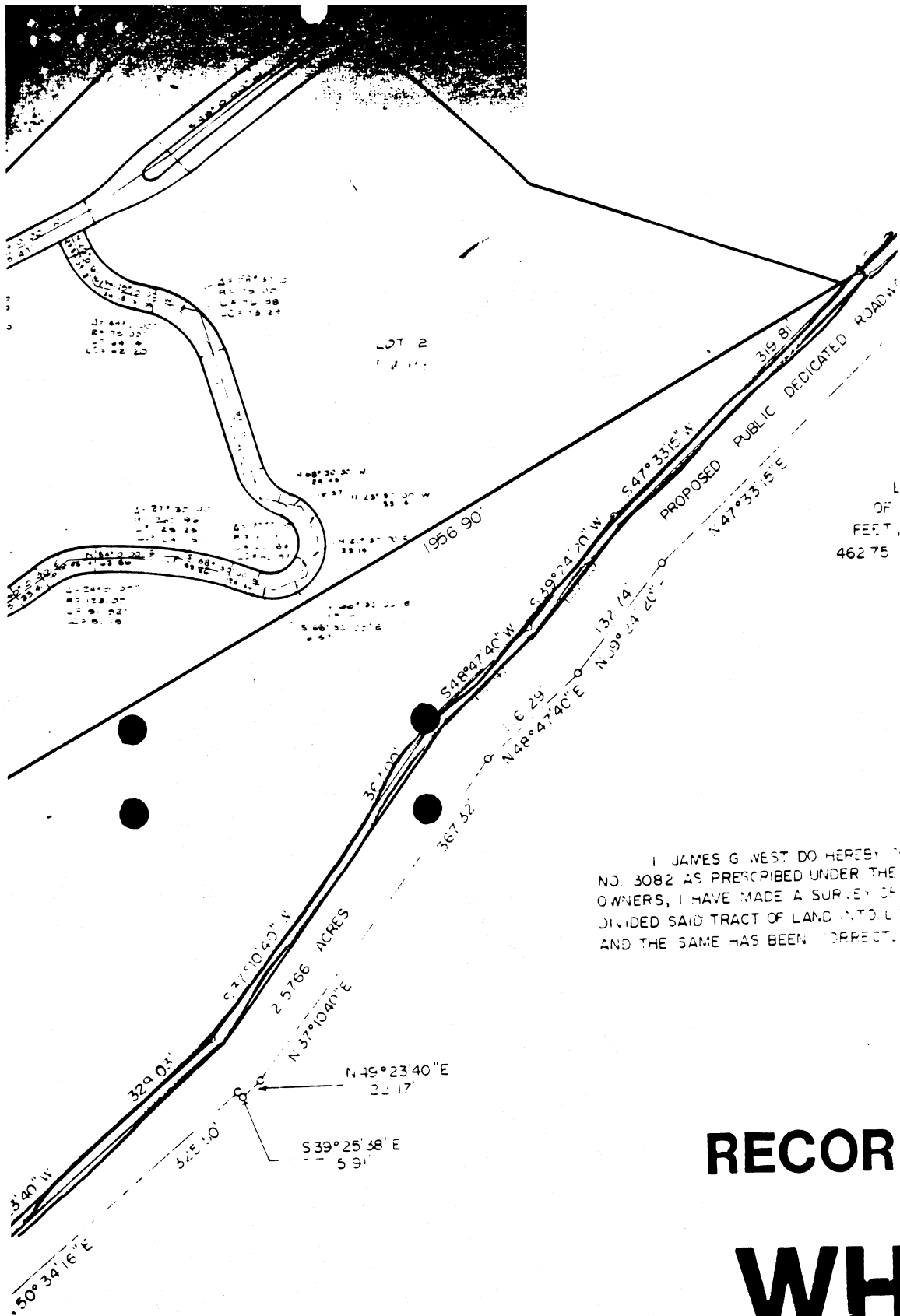
  
\_\_\_\_\_  
LEON H. SAUNDERS



BUYER:

  
KENNETH R. NORTON

  
PAUL H. LANDES



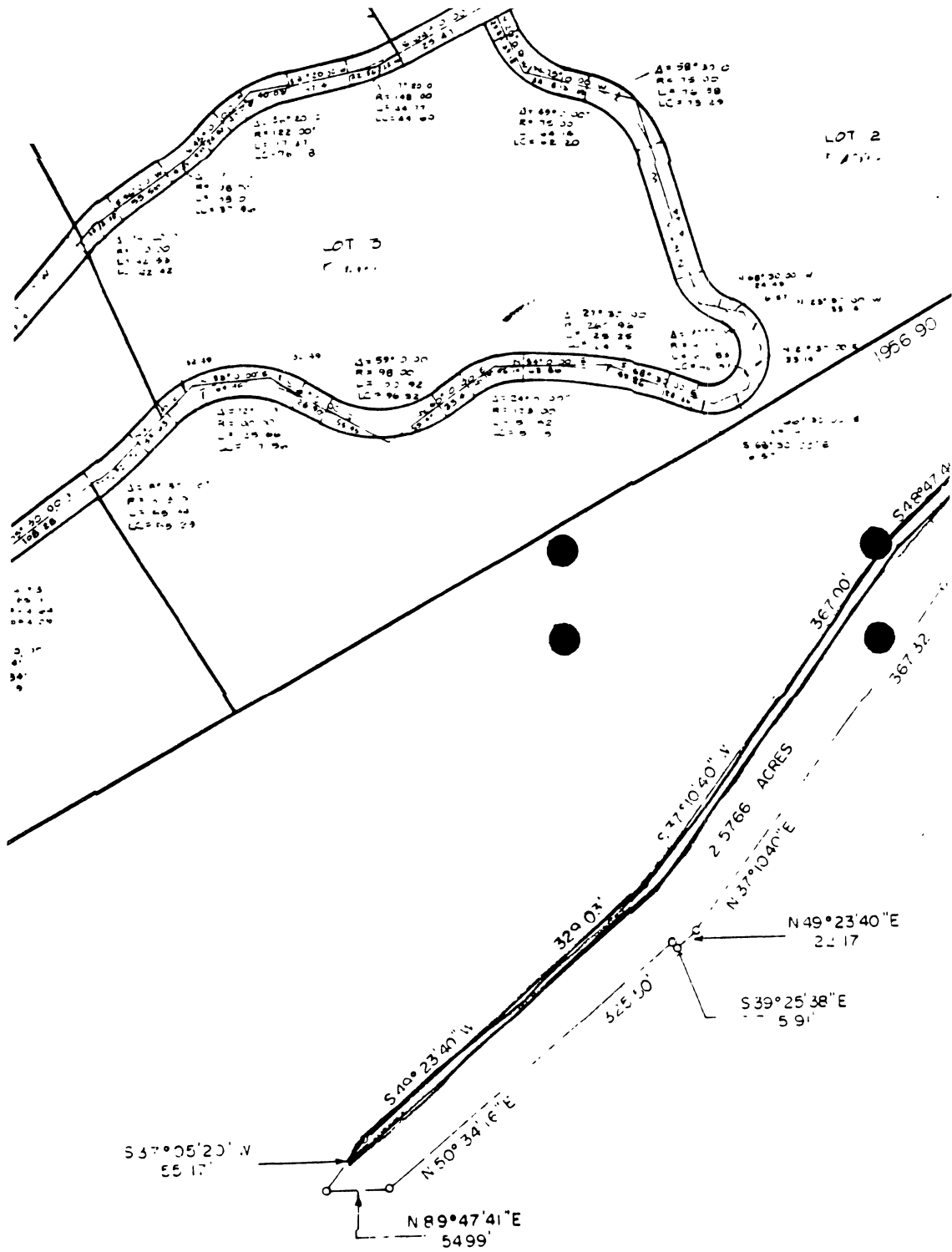
OF  
FEET,  
462.75

I JAMES G. WEST DO HEREBY  
NO. 3082 AS PRESCRIBED UNDER THE  
OWNERS, I HAVE MADE A SURVEY OF  
DIVIDED SAID TRACT OF LAND INTO L  
AND THE SAME HAS BEEN CORRECT.

RECOR

WH  
R

PLANNING



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bys

any  
S/S

Please Mail to Robert Felton

## EDGEMENT

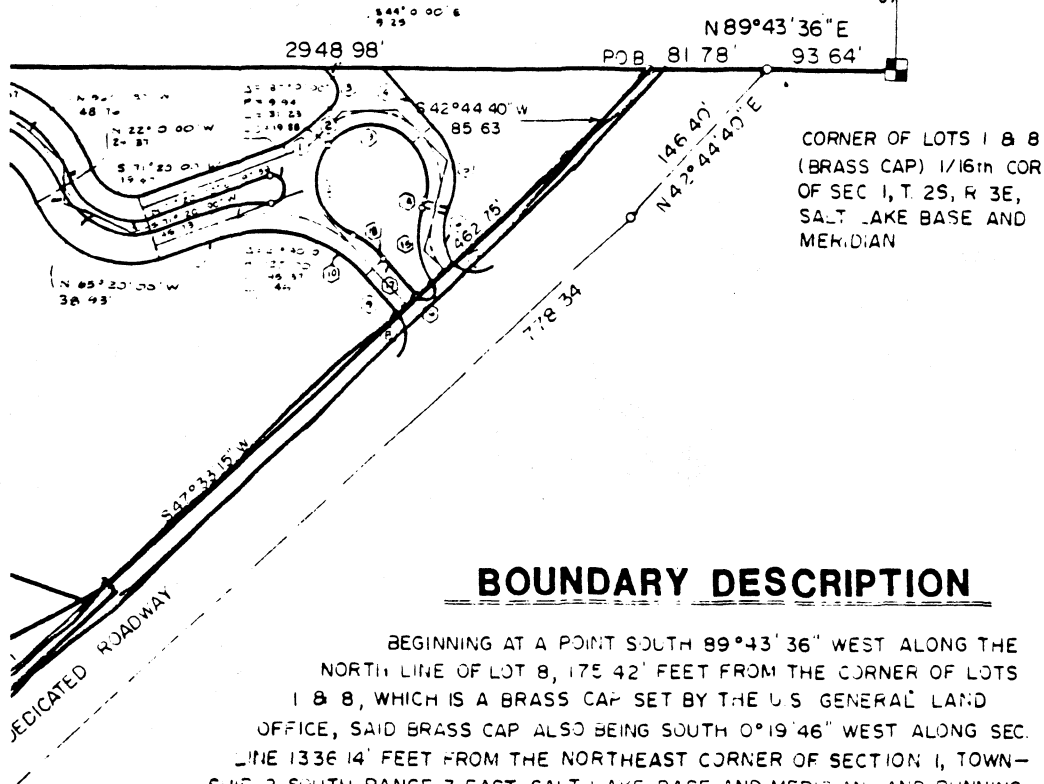
HIS \_\_\_\_\_ DAY OF \_\_\_\_\_, 1981 PERSONALLY  
UNDERSIGNED NOTARY PUBLIC, ROBERT FELTON,  
DULY SWORN, DID SAY THAT THE WITHIN AND  
FICATE AND CONSENT TO RECORD WAS DULY  
OR AND IN BEHALF OF SAID INDIVIDUAL AND  
EXECUTE THE SAME.

NOTARY PUBLIC \_\_\_\_\_

RESIDING AT \_\_\_\_\_

NORTHEAST CORNER  
OF SEC 1, T 2S, R 3E,  
SALT LAKE BASE AND  
MERIDIAN

BRASS  
CAP

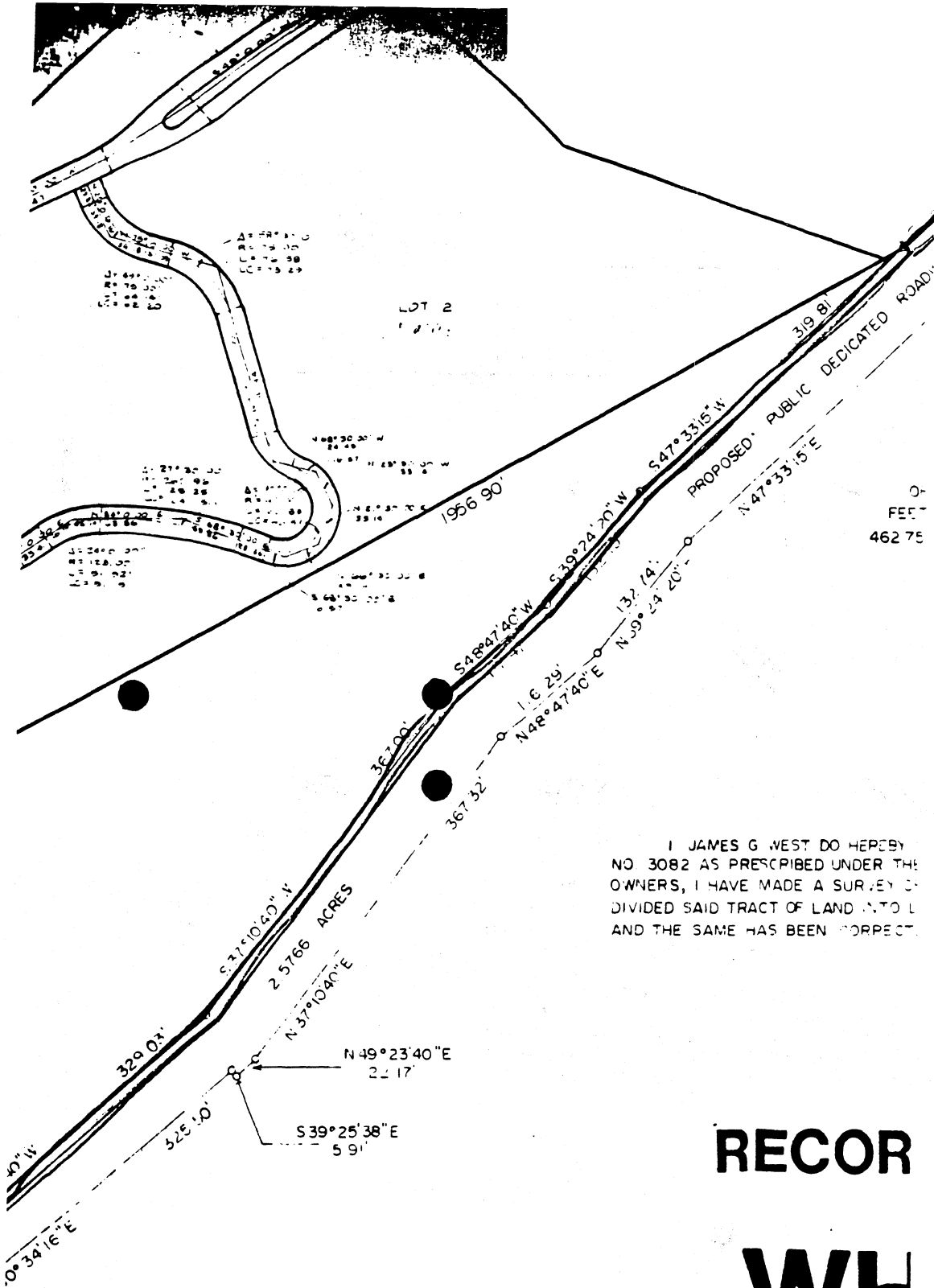


## BOUNDARY DESCRIPTION

BEGINNING AT A POINT SOUTH 89° 43' 36" WEST ALONG THE  
NORTH LINE OF LOT 8, 175 42' FEET FROM THE CORNER OF LOTS  
1 & 8, WHICH IS A BRASS CAP SET BY THE U.S. GENERAL LAND  
OFFICE, SAID BRASS CAP ALSO BEING SOUTH 0° 19' 46" WEST ALONG SEC.  
LINE 1336 14' FEET FROM THE NORTHEAST CORNER OF SECTION 1, TOWN-  
SHIP 2 SOUTH, RANGE 3 EAST, SALT LAKE BASE AND MERIDIAN, AND RUNNING  
THENCE SOUTH 89° 43' 36" WEST ALONG THE NORTH LINE OF LOTS 7 AND 8  
2948 98' FEET TO THE NORTHWEST CORNER OF LOT 7, THENCE SOUTH 0° 13' 29"  
EAST ALONG THE WEST LINE OF LOT 7, 1312 84' FEET TO THE SOUTHWEST CORNER  
OF LOT 7, THENCE NORTH 89° 47' 41" EAST ALONG THE SOUTH LINE OF LOT 7, 832 67'  
FEET, THENCE NORTH 61° 00' 00" EAST 1956 90' FEET, THENCE NORTH 47° 33' 15" EAST  
462 75' FEET, THENCE NORTH 42° 44' 40" EAST 85 65' FEET TO THE POINT OF BEGINNING

## SURVEYOR'S CERTIFICATE

O HEREBY CERTIFY THAT I AM A REGISTERED LAND SURVEYOR AND THAT I HOLD CERTIFICATE  
UNDER THE LAWS OF THE STATE OF UTAH. I FURTHER CERTIFY THAT BY AUTHORITY OF THE  
SURVEY OF THE TRACT OF LAND SHOWN ON THIS PLAT AND DESCRIBED ABOVE AND HAVE SUB-  
DIVIDED INTO LOTS AND STREETS HEREAFTER TO BE KNOWN AS WHITE PINE RANCHES  
CORRECTLY SURVEYED AND STAKED ON THE GROUND AS SHOWN ON THIS PLAT.



I JAMES G. WEST DO HEREBY  
 NO. 3082 AS PRESCRIBED UNDER THE  
 OWNERS, I HAVE MADE A SURVEY OF  
 DIVIDED SAID TRACT OF LAND INTO L  
 AND THE SAME HAS BEEN CORRECT.

RECOR

WH  
 R

Please Mail to Robert Felton

## DEED

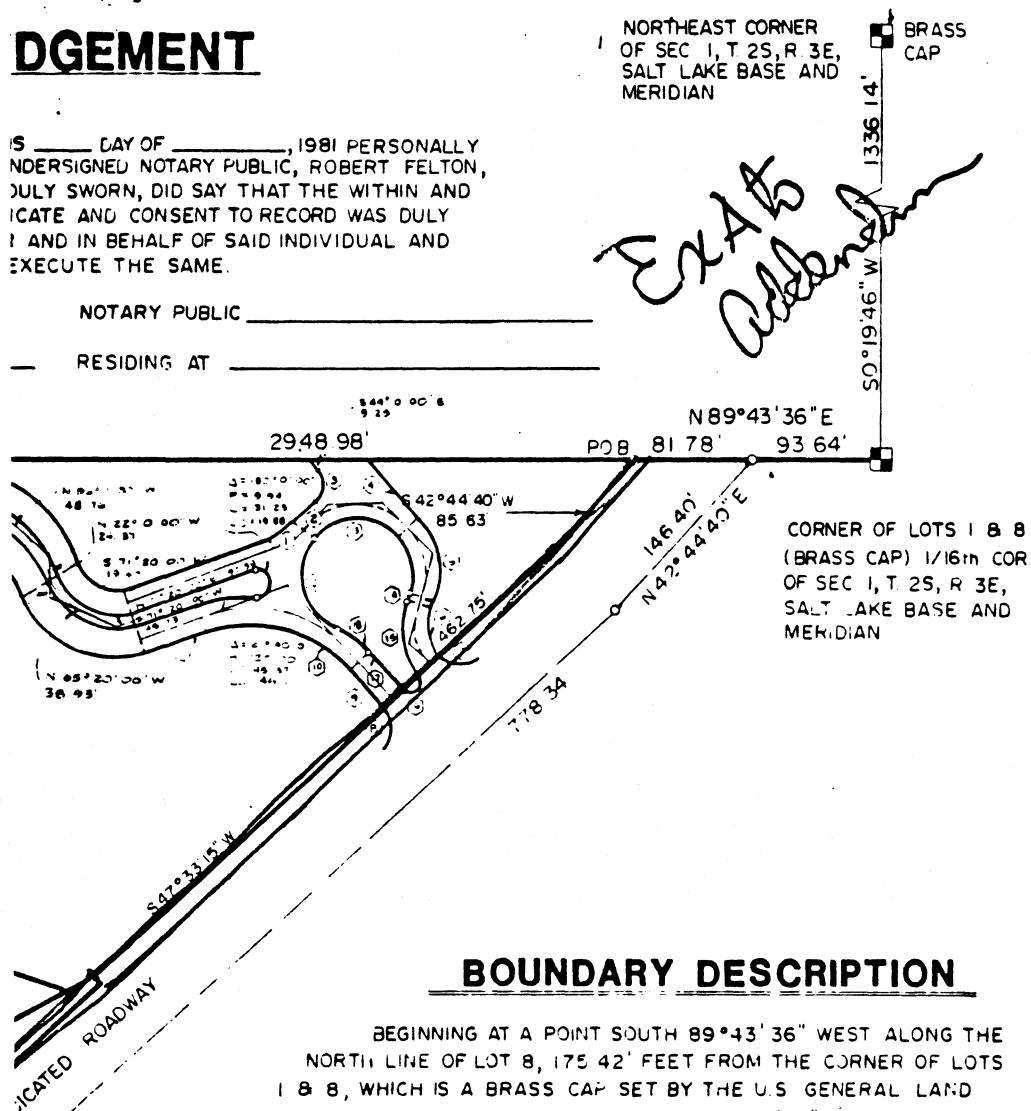
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NOTARY PUBLIC \_\_\_\_\_

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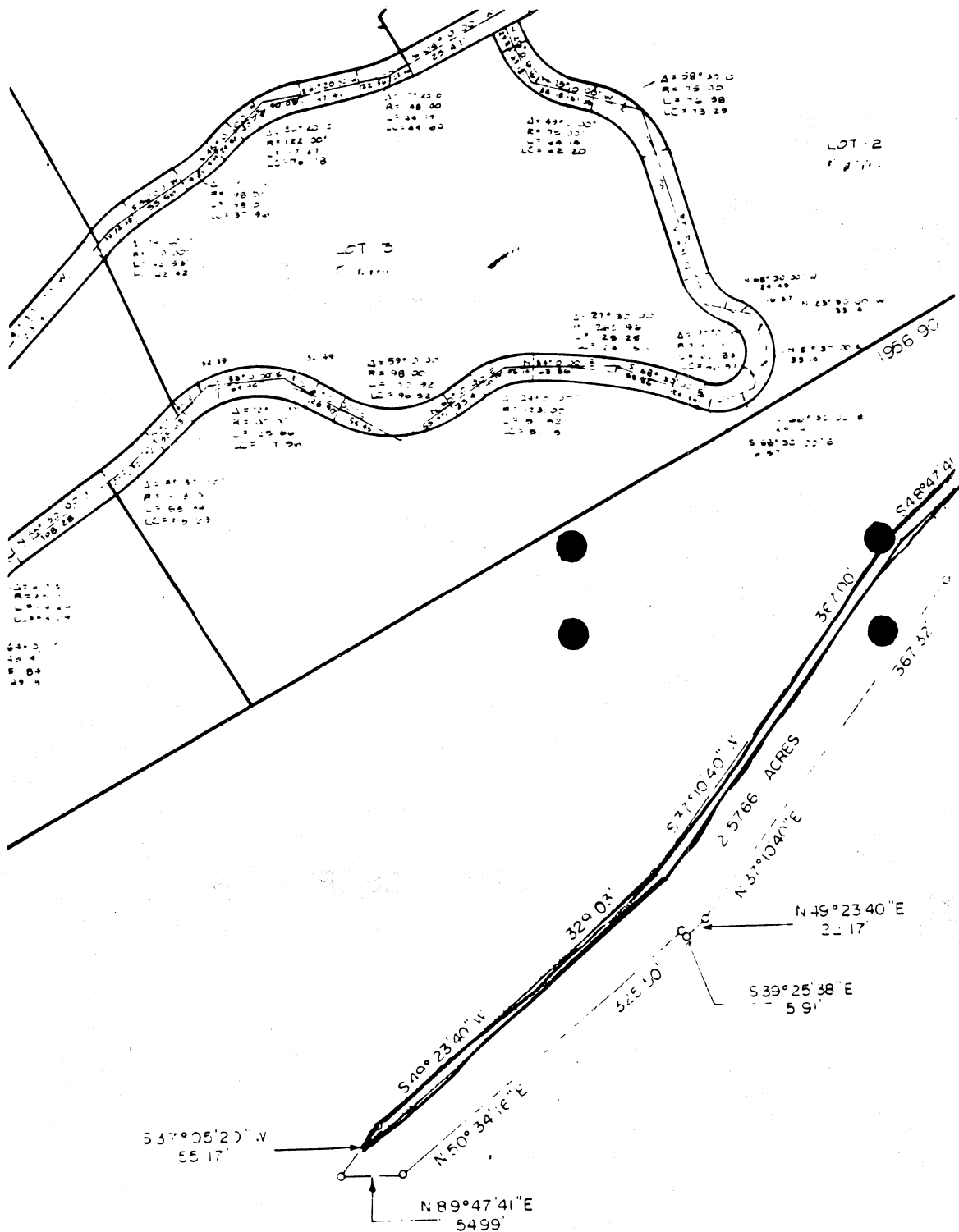


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UNDER THE LAWS OF THE STATE OF UTAH. I FURTHER CERTIFY THAT BY AUTHORITY OF THE  
SURVEY OF THE TRACT OF LAND SHOWN ON THIS PLAT AND DESCRIBED ABOVE AND HAVE SUB-  
DIVIDED INTO LOTS AND STREETS HEREAFTER TO BE KNOWN AS WHITE PINE RANCHES  
CORRECTLY SURVEYED AND STAKED ON THE GROUND AS SHOWN ON THIS PLAT.



100'

82  
bys

Amf  
S

EXHIBIT "A"

Beginning at a point South 89° 43' 36" West along the North line of Lot 8, 175.42 feet from the corner of Lots 1 and 8, a brass cap set by the U. S. General Land Office, said brass cap also being South 00° 19' 46" West along section line 1336.14 feet from the Northeast corner of Section 1, Township 2 South, Range 3 East, Salt Lake Base and Meridian; and running thence South 89° 43' 36" West along the North line of Lots 7 and 8 2948.98 feet to the Northwest corner of Lot 7; thence South 00° 13' 29" East along the West line of Lot 7, 1312.84 feet to the Southwest corner of Lot 7; thence North 89° 47' 41" East along the South line of Lot 7, 832.67 feet; thence North 61° 00' 00" East 1956.90 feet; thence North 47° 33' 15" East 462.75 feet; thence North 42° 44' 40" East 85.63 feet to the point of beginning.

SUBJECT TO Easements, Encroachments, Restrictions, Rights-of-Way and matters of record enforceable in law or equity.

*[Handwritten signature]*



Recorded at Request of \_\_\_\_\_  
at \_\_\_\_\_ M. Fee Paid \$ \_\_\_\_\_  
by \_\_\_\_\_ Dep. Brwk \_\_\_\_\_ Page \_\_\_\_\_ Ref.: \_\_\_\_\_  
Mail tax notice to Robert Felton Address 44 Exchange Place  
Salt Lake City, Utah 84111

## WARRANTY DEED

(Special)

JOHN C. SHARP and GERALDINE Y. SHARP, his wife, as tenants in common (the said John C. Sharp owning an undivided two-thirds (2/3) interest therein grantor and the said Geraldine Y. Sharp owning an undivided one-third (1/3) interest therein) of Salt Lake City, Utah hereby

CONVEY AND WARRANT against all claiming by, through or under said grantors

to PAUL H. LANDES, ROBERT FELTON, LEON H. SAUNDERS and INTERSTATE RENTALS, INC., a Nevada Corporation, each as to an undivided 25% interest as tenants in common and not as joint tenants grantee

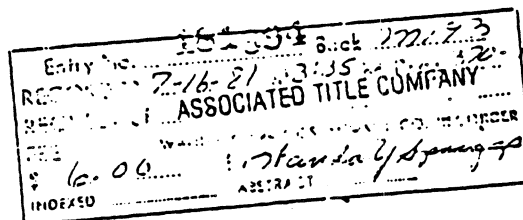
of Salt Lake City, Utah for the sum of

Ten Dollars and other good and valuable consideration ——— DOLLARS,

the following described tract of land in Summit County,

State of Utah:

SEE EXHIBIT "A" ATTACHED HERETO AND BY THIS REFERENCE INCORPORATED HEREIN.



WITNESS, the hand of said grantor, this 16th day of July, A. D. 19 81

Signed in the Presence of

JOHN C. SHARP

GERALDINE Y. SHARP

STATE OF UTAH,

County of Salt Lake

On the 16th day of July, A. D. 1981  
personally appeared before me JOHN C. SHARP and GERALDINE Y. SHARP

the signers of the within instrument, who duly acknowledged to me that they executed the same.

My commission expires 5-18-85 Residing in Salt Lake County

DEFENDANT'S  
EXHIBIT

17

EXHIBIT "A"

Beginning at a point South 89° 43' 36" West along the North line of Lot 8, 175.42 feet from the corner of Lots 1 and 8, a brass cap set by the U. S. General Land Office, said brass cap also being South 00° 19' 46" West along section line 1336.14 feet from the Northeast corner of Section 1, Township 2 South, Range 3 East, Salt Lake Base and Meridian; and running thence South 89° 43' 36" West along the North line of Lot 7 and 8 2948.98 feet to the Northwest corner of Lot 7; thence South 00° 13' 29" East along the West line of Lot 7, 1336.84 feet to the Southwest corner of Lot 7; thence North 89° 43' 41" East along the South line of Lot 7, 932.67 feet; thence North 61° 00' 00" East 1956.90 feet; thence North 47° 33' 15" East 462.75 feet; thence North 42° 44' 40" East 85.63 feet to the point of beginning.

SUBJECT TO Easements, Encroachments, Restrictions, Rights-of-Way and matters of record enforceable in law or equity.

*[Handwritten signature]*

11-10-1964

F. S. PRINCE  
 ROBERT M. YEATES  
 DAVID S. GELDZAHLER  
 FREDERICK S. PRINCE, JR.  
 DENIS R. MORRILL  
 JON C. HEATON  
 JOHN P. ASHTON  
 RONALD F. SYSAK  
 RICHARD L. BLANCH  
 JOHN M. BRADLEY  
 D. JAY GAMBLE  
 STEVEN L. TAYLOR  
 GORDON STRACHAN  
 C. CRAIG LILJENQUIST  
 ANITA J. TORTI  
 MARGARET N. BILLINGS  
 J. RANDALL CALL  
 JOHN S. CHINDLUND  
 WILLIAM A. HEADERS, JR.  
 GEOFFREY W. MANGUM  
 JAMES A. BOEVERS  
 THOMAS J. ERBIN  
 RONALD E. NEHRING  
 JEFFREY R. ORITT  
 ROSALIE E. WALKER  
 J. FREDERIC VOROS, JR.  
 DAVID K. BROADBENT

# PRINCE, YEATES & GELDZAHLER

LAWYERS  
 THIRD FLOOR MONY PLAZA  
 424 EAST FIFTH SOUTH  
 SALT LAKE CITY, UTAH 84111  
 (801) 521-3760

1800 PARK AVENUE  
 P. O. BOX 38  
 PARK CITY, UTAH 84060  
 (801) 521-3760 (801) 546-7440

TELECOPIER  
 (801) 521-9517

M. L. MULLINER 1883-1975  
 JOHN K. MANGUM 1930-1971

OF COUNSEL  
 MAX K. MANGUM  
 LYLE M. WARD

November 18, 1983

Mr. John Sharp  
 5068 Holladay Boulevard  
 Salt Lake City, Utah 84117

Re: White Pine Ranch Property

Dear Jack:

Enclosed please find the Covenants, Conditions and Restrictions and the subdivision plat that Hy Saunders proposes to record with your approval. The subdivision plat subdivides only a portion of the property he purchased from you, specifically the northern portions of the property. By Hy's signature, which I will obtain to this letter prior to releasing your consent to the recordation of the subdivision plat, he agrees that you continue to have your right of approval with regard to how the southern portion of the property is platted. Your signature on the enclosed consent document only acknowledges your approval of his recording the plat and the Covenants, Conditions and Restrictions, copy here enclosed. At a later time in the near future Hy has indicated he will seek release of Lots 1 through 5 of the platted subdivision along with his road (White Pine Lane) and the ten and one-half foot strip to the County Road Commission. We will handle that matter when it is presented. For your information, I have reviewed the payments under the Note and find that he is entitled to those releases. When those releases are made, pursuant to your instruction we will insure that rights are reserved in White Pine Lane for access for the southern portions of the property purchased from you until your Deed of Trust is fully paid. Please call me with any questions you may have.

Sincerely,

Jon C. Heaton

DEFENDANT'S  
 EXHIBIT

Salt Lake Times, Inc.

25

Approved:

JCH:pe  
 Encl.  
 1398B

By \_\_\_\_\_

25

**Law Offices**  
**SPECIALE & FELTON**  
Suite 220 Coordinated Financial Center  
324 South State Street  
Salt Lake City, Utah 84111-2303  
801 359-8218

**November 21, 1983**

Jon Heaton  
Attorney at Law  
424 East 5th South  
Salt Lake City, Utah 84111

RE: White Pine Ranch Property

**Dear Jon:**

By gave me your November 18, 1983 letter to Mr. John Sharp. We are in almost total agreement with that letter except for one item.

- Your letter states something regarding the reservation of an easement along White Pine Lane to be retained by Mr. Sharp for access. This was not part of the agreement and is not acceptable since it would mean rewriting our Covenants at this late date. With the release of Lots 1 - 5, Mr. Sharp only needs access to Lot 6 on the north half of the property. It is perfectly acceptable to us that he retain an easement over White Pine Lane to the southern part of his property as well as to Lot 6 from White Pine Canyon Road up to the western boundary of Lot 6. Actually, Mr. Sharp has no need for the reservation of any easement since all of the property which will not be released may be accessed from White Pine Canyon Road. Nevertheless, we think it is fair that an easement be retained as far as the western boundary of Lot 6.

You should be informed that we have spent almost two years "fussing" with the County for approval of this project and any future delays are intolerable. While I realize that we were late on a portion of the payment because Mr. Hunter did not contribute his partnership share, that problem has been rectified, including all penalty sums which were due. For that delay I can only apologize, but I must inform you that any delays in formalizing the items referred to in your letter and this letter will result in losing the construction financing on this project. That, as you may know, could be very expensive.

In any event, Mr. Sharp has required that we live up to the exact terms of our agreement. I can only insist that he now live up to the exact terms as written. There is no provision for the reservation of an unnecessary easement:

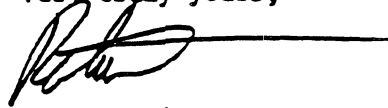


across our road which would result in rewriting the covenants on the property, place an unreasonable burden upon the property to be conveyed, and very possibly cause us to lose our construction financing.

In summary, I would just like to confirm our position that all rights of approval which Mr. and Mrs. Sharp retain pursuant to our original purchase contract certainly continue as to the southern portion of the property. I would again apologize for the late payment, but I certainly think we paid for it in full. The easement which Mr. Sharp retains should be limited to the property which is not deeded pursuant to the terms of the contract and we are certainly in agreement with that as described in this letter.

Please have your client sign his consent to the recordation immediately since time is very crucial to our construction financing.

Very truly yours,

A handwritten signature in dark ink, appearing to be 'R. Felton', followed by a horizontal line extending to the right.

Robert Felton

RF/tp

cc: Hy Saunders  
1899 Long View Drive  
Salt Lake City, Utah 84117

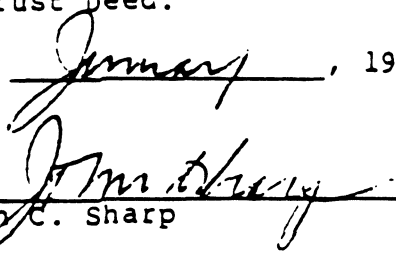
January 4, 1984

Associated Title Company  
Box 1705  
1161 Park Avenue  
Park City, Utah 84060

Gentlemen:

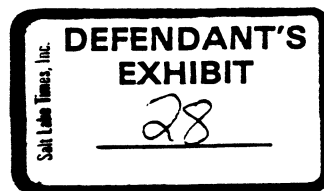
The undersigned John C. Sharp and Geraldine Y. Sharp, being the holders of all of the beneficial interest under that certain Deed of Trust dated June 30, 1981 in the original amount of \$963,055.30, recorded July 16, 1981 as Entry No. 181695 in Book M193 beginning at page 372 of the official records of Summit County, State of Utah, do hereby direct you as the Trustee under that Deed of Trust to release from the Deed of Trust to the person or persons entitled thereto, Lots 1 through 5 inclusive of White Pine Ranches, a planned residential development, according to the official plat thereof recorded as Entry No. 214524 on December 23, 1983. Except for the property described above, all other portions of the property remain subject to the Trust deed.

DATED this 18 day of January, 1984.

  
\_\_\_\_\_  
John C. Sharp

  
\_\_\_\_\_  
Geraldine Y. Sharp

1462B



Law Offices  
**SPECIALE & FELTON**  
Suite 220 Coordinated Financial Center  
324 South State Street  
Salt Lake City, Utah 84111-2303  
801 359-9216

January 20, 1984

John Heaton  
424 East 5th South  
No. 300  
Salt Lake City, Utah 84111

RE: Deeds to Lots 1, 2, 3, 4, and 5

Dear John:

Hy talked to me on January 20, 1984, and to my astonishment, told me that we have not received the deed on our lots from Mr. Sharp. Would you please call me and confirm or explain what the situation is.

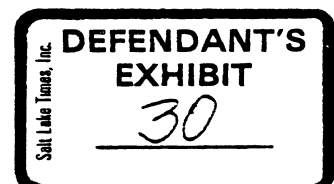
I realize that the deeds for the roads may be difficult to do, but I am at a complete loss as to why the other deed hasn't been received.

Very truly yours,



Robert Felton

RF/tp



Associated Title Company  
P.O. Box 1705  
Park City, Utah 84060

PARTIAL RECONVEYANCE

ASSOCIATED TITLE COMPANY, a corporation organized and existing under the laws of the State of Utah, with its principal office at Salt Lake, of County of Salt Lake, State of Utah, as Trustee under a Trust Deed dated June 30, 1981. Executed by Paul H. Landes, Robert Felton, Leon H. Saunders, Interstate Rentals, Inc., as tenants in common, as Trustor, and recorded on July 16, 1981, as Entry No. 181895, in Book 193, at Page 372 of the records of the County Recorder of Summit County, Utah, pursuant to a written request of the Beneficiary thereunder, does hereby reconvey, without warranty, to the person or persons entitled thereto, a portion only of the trust property now held by said Trustee under said Trust Deed, which portion so reconveyed consists of real property situated in Summit County, Utah, described as follows:

All of Lots 1 thru 5, White Pine Ranches, Phase 1 A, Planned Residential Development, according to the official plat thereof on file and of record in the Summit County Recorder's Office.

Dated this 7th day of January, 1986.

Entry No.	248619
REQUEST OF	ASSOCIATED TITLE CO.
FILED	MAN. SEC. REC. SUMMIT CO. RECORDER
S	3-11-86
RECORDED	3-11-86

ASSOCIATED TITLE COMPANY,  
Trustee

By: [Signature]  
Blake T. Heiner  
Its: Vice President

STATE OF UTAH )  
:SS.  
County of Salt Lake)

800- 378 PAGE 688

On the 7th day of January, 1986, personally appeared before me Blake T. Heiner, who being by me duly sworn, did say that he is the Vice President of Associated Title Company, and that the foregoing instrument was signed in behalf of said corporation by authority of a resolution of its board of directors, and the said Blake T. Heiner duly acknowledged to me that said corporation executed the same.

My commission expires:  
December 17, 1988

[Signature]  
NOTARY PUBLIC  
Residing at: Salt Lake, Utah





PLAINTIFF'S  
EXHIBIT

51

Entry No

214525

REQUEST OF

ASSOCIATED TITLE COMPANY

FEE

ALAN SPRIGGS SUMMIT CO. RECORDER

**DECLARATION OF PROTECTIVE COVENANTS FOR  
WHITE PINE RANCHES A PLANNED RESIDENTIAL DEVELOPMENT**

THIS DECLARATION is made this 27th day of September, 1983 by WHITE PINE RANCHES, a Utah partnership, and Leon Saunders, Robert Felton, Richard Rees and Dan Hunter as individuals.

**1. Purpose of Covenants**

1.1 White Pine Ranches owns property located in Summit County, State of Utah, described on Exhibit "A" attached hereto. The Exhibit "A" Property is referred to as the White Pine Ranches. The White Pine Ranches Property is property which is subject to this Declaration and to the Articles of Incorporation and By-Laws of the White Pine Ranches Association, a nonprofit association, copies of which are attached hereto as Exhibit "B".

1.2 It is the intention of White Pine Ranches, expressed by its execution of the instrument, that the property described on Exhibit "A" (the Property) be developed and maintained as a highly desirable residential area. It is the purpose of these covenants that the present natural beauty, view and surrounding of the White Pine Ranches Property shall be always protected insofar as it is possible in connection with the uses and structures permitted by this instrument. White Pine Ranches hereby declares that the property and every part thereof is held and shall be held conveyed, devised, leased, rented, encumbered, used, occupied and improved and otherwise affected in any manner subject to the provisions of this Declaration, each and all of which provisions are hereby declared to be in furtherance of the general plan and scheme of ownership referred to herein and are further declared to be for the benefit of the Property and every part thereof and for the benefit of each owner thereof. All provisions hereof shall be deemed to run with the land as covenants running with the land or as equitable servitudes as the case may be, and shall constitute benefits and burdens to the Declarant its successor and assigns, and to all parties hereafter owning any interest of the Property and

REQUEST OF

FILE

3

47.50

By

RECORDED

DEC 28 1983

at 2:21 PM

14-41  
100-200-1

## II. Definitions

2.1 Declarant: "Declarant" means the persons executing this document together with their successors and assigns.

2.2 Property: "Property" means that certain real property located in Summit County, Utah described on Exhibit "A" attached hereto.

2.3 Building: "Building" means any building constructed on the Property.

2.4 Lot: A "Lot" shall mean any parcel of Property shown as such on the recorded plat of the Planned Unit Development.

2.5 Owner: "Owner" shall mean the owner or owners of record of any Lot in the Planned Unit Development.

2.6 Development: "Development" shall mean the Planned Residential Development located on the Exhibit "A" property subject to this Declaration upon and after recordation of the plat thereof and this Declaration in the records of Summit County.

## 3. White Pine Ranches Association

3.1 General Purposes and Powers: White Pine Ranches Association ("Association") is formed as a not for profit corporation to be constituted and to perform functions as provided in this Declaration and to further the common interests of all owners of Property which may be subject, in whole or in part, to any or all of the provisions, covenants, conditions and restrictions contained in this Declaration. The Association shall be obligated to and shall assume and perform all functions and obligations imposed on it or contemplated for it under this Declaration and any similar functions or obligations imposed on it or contemplated for it under any Amended Declaration with respect to any Property now or hereafter subject to this Declaration. The Association shall have all powers necessary or desirable to effectuate these purposes. It shall not engage in commercial, profit-making activity.

3.2 Membership in White Pine Ranches Association: All persons who own any of the Lots in the Planned Residential Development, by whatever means acquired, shall automatically become Members of the Association, in accordance with the Articles of Incorporation and By-Laws of said Association as presently in effect and as the same may be duly amended from time to time and also filed or recorded in the Summit County records.

IV. Architectural Committee.

4.1 Architectual Committee: The Architectural Committee shall consist of three members. The Committee shall consist of two members selected by Declarant with the one remaining member being selected by the White Pine Ranches Association. At such time as two years have expired from the date of recordation hereof or at such earlier time as Declarant shall designate, Declarant's membership shall pass to the Association. Said Architectural Committee shall have and exercise all of the powers, duties and responsibilities set out in this instrument.

4.2. Approval by Architectural Committee: No improvements of any kind, including but not limited to dwelling houses, swimming pools, ponds, parking areas, fences, walls, tennis courts, garages, drives, bridges, corrals, barns, outbuildings, antennae, flag poles, curbs and walks shall ever be erected, altered or permitted to remain on any Lots within this Development, nor shall any excavating, alteration of any stream, clearing, removal of trees, shrubs, or natural vegetation, or landscaping be done on any Lots within the Development, unless the complete plans and specifications therefor are approved by the Architectural Committee prior to the commencement of such work. A fee of \$50.00 shall be paid to the Architectural Committee to cover costs and expenses of review. Improvements costing less than \$500.00 shall be submitted as directed to the Architectural Committee for approval but

the fee of \$50.00 shall not be required. The Architectural Committee shall consider the materials to be used on the external features of all buildings or structures, including exterior colors, harmony of external design with existing structures within said subdivision, location with respect to topography, finished grade elevations and harmony of landscaping with the natural setting. The complete architectural plans and specifications must be prepared by an architect licensed by the State of Utah and must be submitted in duplicate including at least four different elevation views. One complete copy of plans and specifications shall be signed for identification by the Owner and left with the Architectural Committee. In the event the Architectural Committee fails to take any action within 45 days after complete plans for such work have been submitted to it, then all of such submitted plans shall be deemed to be approved. In the event the Architectural Committee shall disapprove any plans, the person submitting the plans may appeal the matter at the next annual or special meeting of the Members of the Association, where an affirmative vote of at least two-thirds of the membership shall be required to change the decision of the Architectural Committee.

4.3 Variances: Where circumstances, such as topography, hardship, location of property lines, location of stream or other matters require, the Architectural Committee may, by an affirmative vote of a majority of the members of the Architectural Committee, allow reasonable variance as to any of the architectural covenants and restrictions contained in this instrument or any applicable Amended Declaration, on such terms and conditions as it shall require.

4.4 General Requirements: The Architectural Committee shall exercise its best judgment to see that all improvements, construction,

landscaping and alterations on the lands within the Development conform and harmonize with the natural surroundings and with existing structures with relation to external design, materials, comparable value, color, siting, height, topography, grade and finished ground elevation.

4.5 Preliminary Approvals: Persons who anticipate constructing improvements on Lots within the Development, whether they already own Lots or are contemplating the purchase of such Lots, may submit preliminary sketches of such improvements to the Architectural Committee for informal and preliminary approval or disapproval. All preliminary sketches shall be submitted in duplicate and shall contain a proposed site plan, together with sufficient general information on all aspects that will be required to be in the complete plans and specifications to allow the Architectural Committee to act intelligently to give an informed and preliminary or informal approval or disapproval.

4.6 Plans: The Architectural Committee shall disapprove any plans submitted to it which are not sufficient for it to exercise the judgment required of it by these covenants.

4.7 Architectural Committee Not Liable: The Architectural Committee shall not be liable in damages to any person submitting any plans for approval, or to the Association or to any Owner or Owners of Lots within the Development, by reason of any action, failure to act, approval, disapproval, or failure to approve or disapprove, with regard to such plans. Any person acquiring the title to any Property in the Development or any person submitting plans to the Architectural Committee for approval, by so doing shall be deemed to have agreed and covenanted that he will not bring any action or suit to recover damages against the Architectural Committee, its members as individuals, or its advisors, employees or agents.

4.8 Written Records: The Architectural Committee shall keep and safeguard complete written records of all applications for approval submitted to it (including one set of all preliminary sketches and all architectural plans so submitted) and of all actions of approval or disapproval and all other actions taken by it under the provisions of this instrument which records shall be maintained for a minimum of five years after approval or disapproval.

V. General Restrictions on All Property

5.1 Zoning Regulations: No lands within the Development shall ever be occupied or used by or for any Building or purpose or in any manner which is contrary to the Zoning regulations applicable thereto validly in force from time to time.

5.2 No Mining, Drilling or Quarrying: No mining, quarrying, tunneling, excavating or drilling for any substances within the earth, including oil, gas, minerals, gravel, sand, rock and earth shall be permitted on the surface of the Property.

5.3 No Business Uses: The Lots within the Property shall be used exclusively for residential living purposes, such purposes to be confined to approved residential buildings within the Property. No Lots within the Property shall ever be occupied or used for any commercial or business purposes, provided, however, that nothing in this Paragraph 5.3 shall be deemed to prevent (a) Declarant or its duly authorized agent from using any Lot owned by Declarant or such agent for the location of a sales office, or sales model, or (b) any owner or his duly authorized agent from renting or leasing said owner's residential building for residential uses from time to time, subject to all of the provisions of this Declaration but nightly rentals are prohibited and any allowed rental must be for no less than one month in

duration, under written lease with rent prepaid one month in advance and a copy of this Declaration

5.4 Restriction on Signs: With the exception of a sign no larger than three square feet identifying the architect and a sign of similar dimension identifying the prime contractor to be displayed only during the course of construction, no signs or advertising devices, including but without limitation, signs advertising the Lot or Building for sale or rent and commercial, political, informational or directional signs or devices, shall be erected or maintained on any of the Property, except signs approved in writing by the Architectural Committee as to size, materials, color and location: (a) as necessary to identify ownership of the Lots and its address; (b) as necessary to give directions (c) to advise of rules and regulations; (d) to caution or warn of danger; and (e) as may be required by law.

5.5 Restrictions on Animals: Except for no more than four horses per lot, and no more than 11 horses for Lot 5, all in approved barns and corrals, no animals other than ordinary household pets shall be kept or allowed to remain on any of the Property unless and until written authorization is obtained from the Board of Trustees of the Association. The Board of Trustees, in its sole discretion, shall have the right at any time in its sole discretion, to revoke any authorization given and shall additionally have the power to require any Owner, lessee or person in possession of lands in the Development to remove any animal or pet which is kept in violation of this restriction or any animal or pet which is not disciplined or which constitutes an undue annoyance to other Owners or lessees of land in the Development.

5.6 No Resubdivision: No Lot shall be subdivided and no Building shall be constructed or allowed to remain on any tract that comprises less than one full Lot.

5.7 Underground Utility Lines: All water, gas, electrical, telephone, and other electronic pipes and lines and all other utility lines within the limits of the Property must be buried underground and may not be exposed above the surface of the ground.

5.8 Service Yards: All clothes lines, equipment, service yards or storage piles on any Lot in the Property shall be kept screened by approved planning or fencing so as to conceal them from the view of neighboring Lots, streets, access roads and areas surrounding the Property

5.9 Maintenance of Property: All Property and all improvements on any Lot shall be kept and maintained by the owner thereof in clean, safe, attractive and sightly condition and in good repair. Landscaping of a front yard of approved size on each Lot must be complete within one year of the time of completion of the Building of the Lot. Where natural vegetation is kept, such natural vegetation must be maintained reasonably free of unsightly weeds and free of trash.

5.10 No Noxious or Offensive Activity: No noxious or offensive activity shall be carried on upon any Property nor shall anything be done or placed on any Property which is or may become a nuisance or cause embarrassment, disturbance or annoyance to others.

5.11 No Hazardous Activities: No activities shall be conducted on any Property and no improvements constructed on any Property which are or might be unsafe or hazardous to any person or property. Without limiting the generality of the foregoing, no firearms shall be discharged upon ay Property; and no open fires shall be lighted or permitted on any Propety except in a contained barbecue while attended and in use for cooking purposes or within safe and well-designed interior fireplace.



5.12 No Unsightliness: No unsightliness shall be permitted upon any of the Property. Without limiting the generality of the Property. Without limiting the generality of the foregoing, (a) any unsightly structures, facilities, equipment, tools, boats, vehicles other than automobiles, objects and conditions shall be enclosed within an approved Building or appropriately screened from view, except equipment and tools when in actual use for maintenance or repairs; (b) no trailers, mobile homes, tractors, truck campers or trucks other than pickup trucks shall be kept or permitted to remain upon the Property; (c) no vehicle, boat or equipment shall be constructed, reconstructed, repaired or abandoned upon any of the Property unless appropriately screened from view; (d) no lumber, grass shrub or tree clippings, plant waste, metals, bulk materials, weeds or scrap shall be kept, stored or allowed to grow or accumulate on any of the Property; (e) refuse, garbage and trash shall be placed and kept at all times in a covered container and such container shall be kept within an enclosed structure or appropriately screened from view; (f) hanging, drying or airing of clothing or household fabrics shall not be permitted within Buildings or on Lots if visible from Buildings, Lots or other areas surrounding the Property. Violation of this section or other restrictive sections of this Declaration shall allow the Association to correct the violation at the expense of the owner and if such cost is not paid by the Owner a lien upon the applicable Lot can be placed and foreclosed under Articles VIII and IX hereof.

5.13 No Annoying Lights, Sounds or Odors: No light shall be emitted from any Lot or Property which is unreasonably bright or causes unreasonable glare; no sound shall be emitted from any Lot or Property which is unreasonably loud or annoying, including, but without limitation, speakers, horns, whistles, bells or other sound devices, except security and fire alarm

devices used exclusively to protect any of the Property or Buildings; and no odors shall be emitted from any Lot or Property which are noxious or offensive to others.

5.14 Septic Tanks and Sewage Disposal: Underground sewer lines have been installed to service each lot on the property. This system terminates where the property intersects White Pines Canyon Road. In the event a sewer line has been installed from Highway U224 to the subject property, then, without exception, each Owner shall connect to that system within six (6) months of the installation of the main line. In the event any Owner fails or refuses to connect to the sewer system, then an action may be brought by the Association, Summit County, or the Synderville Basin Sewer Improvement District to compel said connection. This requirement shall exist in addition to all state or local laws governing the requirement to hook up to the sewer system. Septic tanks may be permissible if approved by the Architectural Committee, all governmental health authorities having jurisdiction and Summit County up and until six (6) months after the trunkline is installed.

5.15 Slopes or Terraces: All slopes or terraces on any Lot shall be maintained so as to prevent any erosion thereof upon adjacent streets or adjoining property.

5.16 Ingress and Egress: No ingress or egress to properties designated hereunder shall be permitted for use of any person or vehicle except through designated gateways and roadways, unless authorized in writing by the Board of Trustees. Any such authorization shall become null and void if the security of said area is diminished. However, Declarant, its successors or assigns, reserves the right to maintain and use or convey the right to use established easements and rights-of-way. Owners whose Lots are located along the perimeter of designated properties described herein shall be

responsible for maintaining any fencing placed along such perimeter by Developer or the Association according to its original state or replacing such with a wall or fence for the purpose of preserving or improving the security of the area. Alternative or replacement fencing shall meet the prior written approval of the Board of Trustee.

5.17 Landscaping Control: Each Owner shall maintain his Lot in an attractive and safe manner so as not to detract from the community. Natural vegetation shall not be disturbed until commencement of construction and then only as required for construction and approved landscaping.

5.18 Maintenance of Entrance Ways: Commencing at the time of occupancy or completion of the dwelling, each Owner of adjacent Lots shall be responsible to maintain in an attractive manner any special landscaping emplaced at street entrances or locations by the Declarant or the Association. Such maintenance shall include watering and weeding of planting areas. The Association shall be responsible for maintenance of signs and special lighting, if any.

5.19 Building and Landscaping Time Restrictions: The construction of all structures shall proceed diligently upon commencement and shall be completed within a period of eighteen months following commencement of construction. The approved front yard of each Lot shall be landscaped within a period of one (1) year following completion or occupancy of the dwelling. Areas covered with natural foliage will be considered landscaped so long as unsightly weeds are controlled. Any Owners possessing vacant lots shall be responsible for keeping such Lots clean in appearance and free from all refuse and potential fire hazards. No vacant Lot shall be used for storage of any kind except during the construction period.

5.20 Failure to Remove Rubbish or Comply: Upon failure or neglect of any Owner to remove rubbish, trash, weeds or unsightly debris from his Lot or to otherwise comply with these covenants within 10 days after written notice to remove such or to comply has been mailed to him by the Association, the Association may cause the same to be removed or the Property to be brought into compliance and the Lot Owner shall be responsible for the reasonable expenses of such removal or compliance. Failure to pay such expenses shall result in a special charge against the Lot Owner's account and may result in a lien against said Lot as outlined in Articles VIII and IX of these Covenants.

5.21 Permissible Building Area: With respect to Lots in White Pine Ranches, no construction of any kind, other than approved corrals and barns, shall take place beyond the permissible building area for each Lot (as shown on the plat) without special consideration and written approval by the Architectural Committee. Location of buildings within the permissible building area is subject to approval of the Architectural Committee. No corrals shall be located closer than 50 feet to any property line.

5.22 Erosion Control: Each owner of a Lot in White Pine Ranches shall be responsible to insure that no erosion or water drainage shall take place on his Lot which may adversely affect neighboring properties and/or roads.

5.23 Disturbance of Hillsides: Any disturbance of hillsides shall be controlled by the White Pine Ranches Association. Grading plans, retaining walls, revegetation, etc., shall be approved by the White Pine Ranches Association through its Architectural Committee.

5.24 Perimeter Fences: Perimeter fencing shall not be permitted in the Development except for such perimeter fencing as Declarant or the Association may install along Lot boundaries. Interior fencing if approved by the Architectural Committee shall be permitted.

5.25 Special Use: Declarant discloses that a covered water reservoir shall be constructed. Easements for the reservoir, access roads and distribution lines for any such reservoir erected may be declared at a later date.

5.26 Rules and Regulations: No owner shall violate the rules and regulations for the use of the Lots as adopted from time to time by the Association. No such rules or regulations shall be established which violate the intention or provisions of this Declaration or which shall unreasonably restrict the use of any Lot by the Owner thereof.

#### VI. Restrictions on Lots

6.1 Number and Location of Buildings: No Buildings or structures shall be placed, erected, altered or permitted to remain on any Lot other than one single-family dwelling house, and one garage together with related non-residential structures and improvements of the types described in Section 4.2 hereof. Each Lot must be improved with a garage with at least a two-car capacity at the time of construction of the dwelling house on the Lot.

The building sites for all Buildings and structures shall be approved by the Architectural Committee. In approving or disapproving the building sites, the Architectural Committee shall take into consideration the locations with respect to topography and finished grade elevations and the effect thereof on the setting and surrounding of the Development and the view of surrounding Owners.

6.2 Residence Floor Area: The residence structure which may be constructed on a Lot in the Property shall have a minimum living floor area, exclusive of garage, balconies, porches and patios of 2,000 square feet for a one floor structure and a minimum of 1,200 square feet per floor for split entry and a two story home.

6.3 Dwelling House to be Constructed First: No garage or other structure shall be constructed on any Lot until after commencement of construction of the dwelling house on the same Lot except as otherwise specifically permitted by the Architectural Committee. All construction and alteration work shall be prosecuted diligently, and each Building, structure, or improvement which is commenced on any Lot shall be entirely completed within eighteen (18) months after commencement of construction.

6.4 Setbacks: Unless specifically authorized hereunder, all Buildings and structures on all Lots shall be set back at least 50 feet from the side Lot lines and within the permissible building area for each Lot.

6.5 Height Limitations: No building or structure shall be placed, erected, altered or permitted to remain on any Lot, which exceeds a height of 28 feet measured vertically from the average finished grade elevation of the foundation of such building or structure. In all events building height must comply with applicable zoning ordinances.

6.6 Towers and Antennae: No towers, and no exposed or outside radio, television or other electronic antennae, with the exception of normal television receiving antennae, excluding satellite dishes, shall be allowed or permitted to remain on any Lot, unless the Committee is satisfied they cannot be seen from anywhere off the subject Lot.

6.7 Used or Temporary Structures: No used or previously erected or temporary house or structure and no house trailer, mobile home, camper or non-permanent outbuilding shall ever be placed, erected or allowed to remain on any Lot except during construction periods, and no dwelling house shall be occupied in any manner prior to its completion and the issuance of a certificate of occupancy.

6.8 Fire Sprinklers: All residences and ancillary buildings excepting sheds and small storage units shall have complete automatic sprinkling systems installed at the time of construction.

6.9 Fences: It is the general intention that fencing if installed on the Property have a continuity of appearance in keeping with the setting and surroundings of the Property. No fence shall be allowed to be constructed or remain across a stream on the Property. Fences, corral fences, screens or walls which are associated or connected with a Building or structure may be allowed if of such design, material and height as approved by the Architectural Committee.

6.10 Flashings and Roof Gutters: Flashing or roof gutters or other metal fittings on the exterior of Buildings shall be painted to match adjacent materials on Buildings.

## VII. Enforcement

7.1 Enforcement and Remedies: The obligations, provisions, covenants, restrictions and conditions contained in this Declaration or any Amended Declaration shall be enforceable by Declarant or by any Owner of a Lot subject to this Declaration by a proceeding for a prohibitive or mandatory injunction. If court proceedings are instituted in connection with the rights of enforcement and remedies provided in this Declaration, the prevailing party shall be entitled to recover its costs and expenses in connection therewith, including reasonable attorney's fees.

7.2 Protection of Encumbrances: No violation or breach of any provision, restriction, covenant or condition contained in this Declaration or any Amended Declaration and no action to enforce the same shall defeat or render invalid the lien of any first mortgage or first deed of trust taken in good faith and for value and perfected by recording prior to the time of

recording of an instrument giving notice of such violation or breach, or the title or interest of the Holder thereof or the title acquired by any purchaser upon foreclosure of any such first mortgage or first deed of trust. Any such purchaser shall, however, take subject to this Declaration and any Amended Declaration except only that non-continuing violations or breaches which occur prior to such foreclosure shall not be deemed breaches or violations hereof with respect to such purchaser, his heirs, personal representatives, successors and assigns.

7.3 Limited Liability: Neither Declarant, the Association, the Board of Trustees of the Association, the Architectural Committee nor any member, agent or employee of any of the same shall be liable to any party for any action or for any failure to act with respect to any matter if the action taken or failure to act was in good faith and without malice.

#### VIII. Covenant for Maintenance Assessments

8.1 Creation of the Lien and Personal Obligation for Assessments: Each Owner, by acceptance of a real estate contract or deed for a Lot, whether or not it shall be so expressed in any such contract or deed, is deemed to covenant and agree to pay to the Association: (1) regular assessments or charges and (2) special assessments for capital improvements, such assessments to be fixed, established and collected from time to time as hereinafter provided and (3) expenses incurred by the Association pursuant to Section 5.20 hereof. The regular and special assessments and expenses together with such interest thereon and costs of collection thereof, as hereinafter provided, shall be a charge on the Lot and shall be a continuing lien upon the Lot against which each such assessment or charge is made. Each such assessment or charge together with such interest, costs, and reasonable attorney's fees, shall also be the personal obligation of the person who was the Owner of such



property at the time when the assessment or charge fell due. The personal obligation shall not pass to his successors in title unless expressly assumed by them and approved by the Association. No membership may be transferred to a subsequent Lot owner until all due charges, assessments, interest and penalty charges have been paid in full.

All taxes or assessments due on the private road shall be a joint and several obligation with the Association and each homeowner. The Declarants believe that it is important to maintain the private nature of the road servicing this Project and if the Association, for any reason, fails to pay all taxes and assessments levied by Summit County upon this road, then the obligation shall be a joint and several obligation of the individual homeowners. In the event of nonpayment by the Association, Summit County may enforce this obligation against the land owners individually, including reasonable attorney's fees.

8.2 Purpose of Assessments: The assessments levied by the Association shall be used exclusively for the purpose of promoting the recreation, health, safety, security and welfare of the members of the Association and, in particular, for the improvement and maintenance of the properties, the private roadways and trails, the private water system and services and facilities devoted to these purposes and related to the use and enjoyment of the Owners, including specifically, security personnel and gatekeepers if utilized.

8.3 Regular Assessments: The amount and time of payment of regular assessments shall be determined by the Board of Trustees of the Association pursuant to the Articles of Incorporation and By-Laws of said Association after giving due consideration to the current costs and future needs of the Association. Written notice of the amount of an assessment, regular or

special, shall be sent to every Owner, and the due date for the payment of same shall be set forth in said notice.

8.4 Special Assessments for Capital Improvements: In addition to the regular assessments, the Association may levy in any calendar year, a special assessment applicable to that year only, for the purpose of defraying, in whole or in part, the cost of any construction or reconstruction, unexpected repair or replacement of a described capital improvement upon any common area, including the necessary fixtures and personal property related thereto, provided that any such assessment shall have the assent of two-thirds of the votes of the members who are voting in person or by proxy at a meeting duly called for this purpose, written notice of which shall be sent to all members not less than ten (10) days in advance of the meeting, setting forth the purpose of the meeting.

8.5 Uniform Rate of Assessment: Both regular and special assessments shall be fixed at a uniform rate for all Lots and may be collected on a monthly, quarterly or annual basis.

8.6 Date of Commencement of Regular Assessments and Fixing Thereof. The regular assessments provided for herein shall commence as to each Lot on the first day of the month following the purchase of each Lot by an individual Owner. Monthly, quarter, or annual assessments will be payable at times determined by the Board of Trustees of the Association.

8.7 Certificate of Payment: The Association shall, upon demand, furnish to any Owner liable for said assessment, a certificate in writing signed by an Officer of the Association, setting forth whether the regular and special assessment on a specified Lot have been paid, and the amount of the delinquency, if any. A reasonable charge may be made by the Board for the issuance of these certificates. Such certificate shall be conclusive evidence of payment of any assessment therein stated to have been paid.

## **IX. Non-Payment of Assessments or Charges**

9.1 Delinquency: Any assessment or charge provided for in this Declaration, which is not paid when due, shall be delinquent. With respect to each assessment or charge not paid within ten (10) days after its due date, the Association may, at its election, require the owner to pay a "late charge" in a sum to be determined by the Association, but not to exceed \$100.00 for each delinquent assessment or charge. If any such assessment or charge is not paid within ten (10) days after the due date, the assessment or charge shall also bear interest from the due date at the rate of 18% per annum, and the Association may, at its option, bring an action at law against the Owner personally obligated to pay the same, or, upon compliance with the notice provisions set forth in Section 9.2 hereof, to foreclose the lien (provided for in Section 8.1 hereof) against the Lot, and there shall be added to the amount of such assessment or charge the late charge, the interest and the costs of preparing and filing the notices and complaint in such action, and in the event a judgment is obtained, such judgment shall include said late charge, interest and a reasonable attorney's fee, together with the costs of action. Each Owner vests in the Association or its assigns, the right and power to bring all actions at law or lien foreclosure against such Owners for the collection of such delinquent assessment or charge.

In the event of the Association or any Owner's failure to pay all taxes due on the road or to connect to the water system as required by Paragraph 5.14, Summit County shall have standing and authority to bring whatever action it deems necessary to enforce the provision of these Covenants relative to the road and water system and in the event of suit may recover its attorney's fees and costs against the Association or any delinquent Owner. These powers shall be in addition to and not in lieu of any rights or responsibilities maintained by Summit County.

9.2 Notice of Lien: No action shall be brought to foreclose said assessment, charge or lien or to proceed under the power of sale herein provided less than thirty (30) days after the date a notice of claim of lien is deposited in the United States mail, certified or registered, addressed to the Owner of said Lot and such notice is recorded in Summit County property records.

9.3 Foreclosure Sale: Any such foreclosure and subsequent sale provided for above is to be conducted in accordance with the laws of the State of Utah relating to liens mortgages, or deeds of trust. The Association, through its duly authorized agents, shall have the power to bid on the lot at foreclosure sale, and to acquire hold, lease, mortgage and convey the same.

9.4 Curing of Default: Upon the timely curing of any default for which a notice of claim of lien was filed by the Association, the officers of the Association are hereby authorized to file or record, as the case may be, an appropriate release of such notice, upon payment by the defaulting owner of a fee to be determined by the Association, but not to exceed \$100.00 for each delinquent payment, to cover the costs of preparing and filing or recording such release, plus the payment of such other costs, interest or fees as shall have been incurred.

9.5 Cumulative Remedies: The assessment or charge lien and the rights to foreclosure and sale thereunder shall be in addition to and not in substitution for all other rights and remedies which the Association and its assigns may have hereunder and by law, including a suit to recover a money judgment for unpaid assessments and charges as above provided.

9.6 Subordination of Assessment and Charge Liens: If any Lot subject to a monetary lien created by any provision hereof shall be subject to a lien of a first mortgage or first deed of trust: (1) the foreclosure of any

lien created by anything set forth in this Declaration shall not operate to affect or impair the lien of such first deed of trust; and (2) the foreclosure of the lien of a first deed of trust or the acceptance of a deed in lieu of foreclosure of the the first deed of trust shall not operate to affect or impair the lien hereof, except that the lien hereof for said charges as shall have occurred up to the foreclosure or the acceptance of the deed in lieu of foreclosure shall be subordinate to the lien of the first deed of trust, with the foreclosure-purchaser or deed-in-lieu-grantee taking title free of the lien hereof for all said charges that have accrued up to the time of the foreclosure or deed given in lieu of foreclosure; but subject to the lien for all charges that shall accrue subsequent to the foreclosure or deed given in lieu of foreclosure.

**X. Duties and Powers of the Association**

10.1 Duties and Powers: In addition to the duties and powers enumerated in the Articles of Incorporation and By-Laws, or elsewhere provided for herein, and without limiting the generality thereof, the Association shall:

(a) Own, and/or maintain and otherwise manage or provide for the maintenance of all of the common areas and all facilities, improvements and landscaping thereon, including but not limited to the private streets and pathways, water system and fire hydrants, street fixtures, any guard house at the entrance to the properties and all other property acquired by the Association.

(b) Establish and maintain street entrance ways and the esquestrian and pedestrian pathways and maintain street signs and special lighting which may be placed by the Association. Watering and weeding of planting areas shall be the responsibility of Lot Owners as specified in Article V.

(c) Pay any real and personal property taxes and other charges assessed against any common areas.

(d) Have the authority to obtain, for the benefit of any common areas, any water, gas and electric services and refuse collection.

(e) Grant easements where necessary for utilities, and sewer facilities over the common areas to serve the common areas and the Lots.

(f) Maintain such policy or policies of insurance as the Board of Trustees of the Association deems necessary or desirable in furthering the purposes of and protecting the interests of the Association and its members.

(g) Have the authority to employ if required a manager or other persons and to contract with independent contractors or managing agents to perform all or any part of the duties and responsibilities of the Association, provided that any contract with a person or firm appointed as a manager or managing agent during the period of Declarant's control of the Association shall provide for the right of the Association to terminate the same by two-thirds majority vote at an annual meeting of the members of the Association.

(h) Have the power to establish and maintain working capital and contingency fund in an amount to be determined by the Board of Trustees of the Association.

(i) Have a duty to maintain any private streets, private pathways, guard house and parking within the common area.

## **XI. Easements**

11.1 Rights and Duties: The rights and duties of the Owners of Lots with respect to sanitary sewer and water, electricity, gas and telephone and cable television lines and drainage facilities shall be governed by the following:

(a) Wherever sanitary sewer connections and/or water connections or electricity, gas or telephone and cable television lines or drainage facilities are installed with connections, lines or facilities, or any portion thereof located in or upon property owned by the Association, the Association and the Owners of any Lot served by said connections, lines or facilities shall have the right, and are hereby granted an easement to the full extent necessary therefor, to enter upon the property or to have utility companies enter upon the property in or upon which said connections, lines or facilities, or any portion thereof, lie, to repair, replace and generally maintain said connections as and when the same may be necessary.

(b) Wherever sanitary sewer connections and/or water connections or electricity, gas or telephone or cable television lines or drainage facilities are installed within the properties, which connections serve more than one Lot, the Owner of each Lot served by said connections shall be entitled to the full use and enjoyment of such portions of said connections as service his Lot.

11.2 Easements Reserved: Easements over the Lots and common area properties for the installation and maintenance of electric, telephone, cable television, water, gas and sanitary sewer lines, water wells, private streets, water reservoir, private pathways, drainage facilities, and street entrance ways as shown on the recorded tract map of the properties, other documents of record or existing prior to October 30, 1983 are hereby reserved by Declarant, together with the right to grant and transfer the same.

11.3 Security: Easements for the purpose of installing and maintaining the security of any fencing surrounding the Property are hereby reserved by Declarant, together with the right to grant and transfer the same.

## XII. Private Roadways and Pathways

12.1 On the plat of the Planned Unit Development, there is set forth a certain fifty foot wide easement as common area of the Development which easement includes within its boundaries the private roadway of the Development and its adjacent esquestrian trail and pedestrian and jogger trail. The portions of the reserved property covered with hard surface or asphalt shall be restricted to vehicle use. The portions of the reserved area not hard surfaced shall be available for equestrian, pedestrian and jogger use. The hard-surfaced roadway of the Development is or will be constructed according to the following minimum standards:

1. Subgrades
2. 5" Gravel sub-base course 1 1/2" maximum
3. 3" Gravel base course 3/4" maximum
4. 4" Bituminous surface course
5. Total Width 24 feet, asphalt 18 feet

Each Owner of each Lot in the Development covenants and agrees that the above standards in some respects do not meet the minimum standards of Summit County, Utah for publicly dedicated roadway. Likewise, each owner of each Lot in the Development understands that the roadway is not and shall not be dedicated as public roadway but will remain private roadway for the use and benefit of the owners of Lots in the Development. Declarants believe that the preservation of the private road is important to maintain the integrity and unique nature of this Development. It is for this reason that each Owner bears a personal responsibility to pay the taxes which may be assessed on this roadway in the event they are not paid by the Association. This is necessary to insure to Summit County that the taxes will be paid on this property and that the Owners will not attempt to make this roadway public and thereby require Summit County to assume the maintenance thereof.



Each Lot Owner covenants and agrees on behalf of himself and his successors and assigns that no public dedication of the private roadway shall be sought. This covenant shall run with the land and this Paragraph 12, regardless of the other provisions of these Covenants, shall not be amendable by the Owners without the consent of the governing body of Summit County. Said consent may be withheld without cause.

12.2 The expense of maintaining, improving, plowing, and cleaning the private roadway and equestrian trail and pedestrian and jogger trail shall be a common expense of the Association in the manner set forth in this Declaration.

12.3 The Declarants reserve the right to expand this project without limitation. Declarant also reserves the right to service any or all of the additional property through the use of the private road, provided that any additional project shall contain covenants containing the restrictions contained in Paragraph 12.1 as to maintaining the privacy of this road.

#### **XIII. Private Water System**

13.1 The Association of Owners of Lots in White Pine Ranches Planned Unit Development is the owner of six residential connections to the well. The Association shall be responsible for upkeep and maintenance. The Declarants shall be entitled to the excess water, provided, however, that if such excess is utilized, Declarants or their assigns shall participate, pro rata, in the upkeep and maintenance charges. The Association shall also own and be responsible for a covered reservoir which may be located on the Development or at a suitable location off the property at the discretion of the Declarants. Costs and expenses of operation of this water system (but not the cost of construction of the required wells, pipelines and reservoir) shall be a common expense of the Lot Owners of White Pine Ranches pursuant to the terms and conditions of this Declaration.

#### XIV. General Provisions

14.1 Duration of Declaration: Any provision, covenant, condition or restriction contained in the Declaration or any Amended Declaration which is subject to the common law rule sometimes referred to as the rule against perpetuities, shall continue and remain in full force and effect for the period of 60 years from the date of recordation of this Declaration or until this Declaration is terminated as hereinafter provided, whichever first occurs. All other provisions, covenants, conditions and restrictions contained in the Declaration or any Amended Declaration shall continue and remain in full force and effect until January 1, 2060 A.D., provided, however, that unless at least one year prior to said time of expiration, there is recorded an instrument directing the termination of the Declaration, executed by the Owners of all of the Lots then subject to this Declaration, said other provisions, covenants, conditions and restrictions shall continue automatically for an additional ten years and thereafter for successive periods of ten years unless, at least one year prior to expiration of any such extended period of duration, this Declaration is terminated by recorded instrument directing termination signed by the Owners of all of the Lots then subject to this Declaration as aforesaid.

14.2 Amendment or Revocation: At any time while any provision, covenant, condition or restriction contained in this Declaration or any Amended Declarations in force and effect, it may be amended or repealed by the recording of a written instrument specifying the amendment or the repeal, executed by the Owners of all of the Lots then subject to this Declaration. No such amendment or repeal shall be effective with respect to the holder or successor or assign of the Holder of a first mortgage or first deed of trust recorded prior to recording of the instrument specifying the amendment or

repeal unless such holder executes the said instrument. Declarant may amend these Declarations at any time within 18 months of recordation.

Paragraph 5.14 regarding the requirement for each Owner to hook up to the sewer system once the trunkline is brought from Highway U224 to the entrance of the property shall not be subject to amendment or revocation under any circumstances whatsoever. This shall constitute a covenant and equitable servitude which shall run with the land and be binding on each Owner, their successors and assigns. Section 12 of these Covenants dealing with the roadway and the preservation of its private nature, as well as all provisions regarding the responsibility of the Association and the Owners to pay all taxes due on the road and maintain that road shall not be amended or revoked without the written consent of the governing body of Summit County, Utah.

14.3 Severability: Invalidity or unenforceability of any provision of this Declaration or any Amended Declaration in whole or in part shall not affect the validity or enforceability of any other provision or valid and enforceable part of a provision of this Declaration.

14.4 Captions: The captions and headings in this instrument are for convenience only and shall not be considered in construing any provision, restriction, covenant or condition contained in this Declaration.

14.5 No Waiver: Failure to enforce any provision, restriction, covenant or condition in this Declaration or in any Supplemental or Amended Declaration shall not operate as a waiver of any such provision, restriction, covenant or condition or any other provision, restriction, covenant or condition.

14.6 Construction: The provision of this Declaration shall be liberally construed to effectuate its purpose of creating a uniform plan for the development of a residential community or tract and for the maintenance of common recreational facilities and common areas and streets.

14.7 Nuisance: The result of every act or omission, whereby any provision, condition, restriction, covenant, easement or reservation contained in this Declaration is violated in whole or in part, is hereby declared to be and constitutes a nuisance, and every remedy allowed by law or equity against a nuisance, either public or private, shall be applicable against every such result, and may be exercised by the Association, or any other land owner in the tracts. Such remedy shall be deemed cumulative and not exclusive.

IN WITNESS WHEREOF, White Pine Ranches has executed this Declaration the day and year first above written.

WHITE PINE RANCHES, a Utah Partnership

By: Leon H. Saunders  
Leon H. Saunders, Partner

By: Dan Hunter  
Dan Hunter, Partner

By: Robert Felton  
Robert Felton, Partner

By: J. Richard Rees  
J. Richard Rees

STATE OF UTAH                    )  
  : ss.  
COUNTY OF SALT LAKE        )

On the 27 day of Sept, 1983, personally appeared before me Dan Hunter, who, being by me duly sworn did say that he is a Partner in White Pine Ranches, a Utah partnership, and that he executed the within and foregoing Declaration of Protective Covenants for White Pine Ranches on behalf of said Partnership.

Robert Felton  
Notary Public

Residing at: See ut

My Commission Expires:

2/24/84

STATE OF UTAH                    )  
  : ss.  
COUNTY OF SALT LAKE        )

On the 27<sup>th</sup> day of September, 1983, personally appeared before me Robert Felton, who, being by me duly sworn did say that he is a Partner in White Pine Ranches, a Utah partnership, and that he executed the within and foregoing Declaration of Protective Covenants for White Pine Ranches on behalf of said Partnership.

Lamie Page  
Notary Public

Residing at: Davis County Ut

My Commission Expires:

May 9, 1985

STATE OF UTAH                    )  
  : ss.  
COUNTY OF SALT LAKE        )

On the 27 day of Sept, 1983, personally appeared before me J. Richard Rees, who, being by me duly sworn did say that he is a Partner in White Pine Ranches, a Utah partnership, and that he executed the within and foregoing Declaration of Protective Covenants for White Pine Ranches on behalf of said Partnership.

Robert Felt  
Notary Public

Residing at: SLC UT

My Commission Expires:

2/24/84

STATE OF UTAH                    )  
  : ss.  
COUNTY OF SALT LAKE        )

On the 27 day of Sept, 1983, personally appeared before me  
Leon H. Saunders, who, being by me duly sworn did say that he is a Partner in White Pine  
Ranches, a Utah partnership, and that he executed the within and foregoing Declaration  
of Protective Covenants for White Pine Ranches on behalf of said Partnership.

Robert Felt  
Notary Public

Residing at: SLC UT

My Commission Expires:

2/24/84

" A "

CONSENT TO RECORD  
PHASE I  
WHITE PINE RANCHES

Beginning at the Northeast Corner of Section 1, Township 2 South, Range 3 East, Salt Lake Base and Meridian; thence South 0° 19' 46" West 1336.14 feet to the common corner of government lots 1 and 8 of said Section 1; thence South 89° 43' 36" West 175.42 feet to the true point of beginning; thence South 89° 43' 36" West along the northerly boundary of Phase I, White Pine Ranches 2948.98 feet; thence South 0° 13' 29" East along the westerly line of Phase I, White Pine Ranches 1013.05 feet; thence North 65° 44' 00" East 571.36 feet to a point on a 60.00 foot radius curve to the left (center bears North 60° 00' 00" East, 60.00 feet of which central angle is 104° 16' 02"); thence southeasterly along the arc of said curve 109.19 feet to a point on a 25.00 foot radius reverse curve to the right (center bears South 44° 16' 02" East 25.00 feet of which the central angle is 48° 06' 07"); thence northeasterly along the arc of said curve 20.99 feet to a point on a 209.11 radius reverse curve to the left (center bears North 03° 50' 05" East 209.11 feet of which the central angle is 40° 50' 05"); thence northeasterly along the arc of said curve 149.03 feet to a point on a 70.00 foot radius reverse curve to the right (center bears South 37° 00' 00" East 70.00 feet of which the central angle is 35° 07' 05"); thence northeasterly along the arc of said curve a distance of 42.91 feet to a point of tangency; thence North 88° 07' 05" East 292.41 feet to a point on a 405.00 foot radius curve to the left (center bears North 01° 52' 55" West 405.00 feet of which the central angle is 46° 27' 05"); thence northeasterly along the arc of said curve 328.35 feet to a point of tangency; thence North 41° 40' 00" East 78.91 feet to a point on a 471.04 foot radius curve to the right (center bears South 48° 20' 00" East 471.04 feet having a central angle of 33° 20' 00"); thence northeasterly along the arc of said curve 274.04 feet to a point on a 502.70 foot radius reverse curve to the left (center bears North 15° 00' 00" West 502.70 feet of which the central angle is 11° 00' 00"); thence northeasterly along the arc of said curve 96.51 feet to a point of tangency; thence North 64° 00' 00" East 79.95 feet to a point on a 350.00 foot radius curve to the left (center bears North 26° 00' 00" West 350.00 feet of which the central angle is 16° 00' 00"); thence northeasterly along the arc of said curve 97.74 feet to a point of tangency; thence

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North 48° 00' 00" East 221.05 feet to a point on a 220.00 foot radius curve to the right (center bears South 42° 00' 00" East 220.00 feet of which the central angle is 42° 00' 00"); thence northeasterly along the arc of said curve 161.27 feet to a point of tangency; thence North 90° 00' 00" East 188.36 feet to a point on a 104.43 foot radius curve to the right (center bears South 00° 00' 00" East 104.43 feet of which the central angle is 45° 00' 00"); thence southeasterly along the arc of said curve 82.02 feet to a point on a 132.94 foot radius reverse curve to the left (center bears North 45° 00' 00" East 132.94 feet of which the central angle is 65° 00' 00"); thence southeasterly along the arc of said curve 150.81 feet to a point on a 187.84 foot radius curve to the left (center bears North 20° 00' 00" West 187.84 feet of which the central angle is 18° 00' 00"); thence northeasterly along the arc of said curve 59.01 feet to a point of tangency; thence North 52° 00' 00" East 13.51 feet to a point on a 129.36 foot radius curve to the right (center bears South 38° 00' 00" East 129.36 feet of which the central angle is 18° 00' 00"); thence northeasterly along the arc of said curve 40.64 feet to a point on a 20.00 foot radius curve to the right (center bears South 20° 00' 00" East 20.00 feet of which the central angle is 110° 00' 00"); thence southeasterly along the arc of said curve 38.40 feet to a point of tangency; thence South 00° 00' 00" East 35.69 feet to a point on a 80.00 foot radius curve to the left (center bears North 90° 00' 00" East 80.00 feet of which the central angle is 31° 27' 59"); thence southeasterly along the arc of said curve 43.94 feet to a point on the westerly right-of-way of White Pine Canyon Road; thence North 47° 33' 15" East along said right-of-way 159.02 feet; thence North 42° 44' 40" East along said right-of-way 85.63 feet to the true point of beginning, **together with a non-exclusive easement for water lines, water tank and water systems over, under and across the property, shown here near the southwest corner of the subject property, and specifically described in the Declaration of Protective Covenants and reserving unto the owners, for granting to the owners of adjacent or nearby property, a non-exclusive easement for utilities and vehicular and pedestrian access over the private roadway shown on the plat and from the well sites as developed but in such a manner as to not interfere with construction or development of the specific lot or lots containing the well site.**

Contains 32.8495 acres, more or less.



State of Utah  
County of Summit

John C. Sharp 11-23-83  
John C. Sharp Date

On this 23 day of Nov, 1983, personally appeared before me the undersigned Notary Public in and for said State and County, John C. Sharp, who after being duly sworn, acknowledged to me that he is the beneficiary of a deed of trust Book M193 Page 372 recorded in Summit County, Utah, that he signed the owners dedication freely and voluntarily for and in behalf of said owners for the purpose therein mentioned and that said owners executed the same.

My commission expires

Aug 5 1986

L. K. Mauss  
Notary Public

Residing at Salt Lake City Utah

State of Utah  
County of Summit

Geraldine Y. Sharp 11-23-83  
Geraldine Y. Sharp Date

On this 23 day of Nov, 1983, personally appeared before me the undersigned Notary Public in and for said State and County, Geraldine Y. Sharp, who after being duly sworn, acknowledged to me that she is the beneficiary of a deed of trust Book M193 Page 372 recorded in Summit County, Utah, that she signed the owners dedication freely and voluntarily for and in behalf of said owners for the purpose therein mentioned and that said owners executed the same.

My commission expires

Aug 5 1986

L. K. Mauss  
Notary Public

Residing at Salt Lake City Utah

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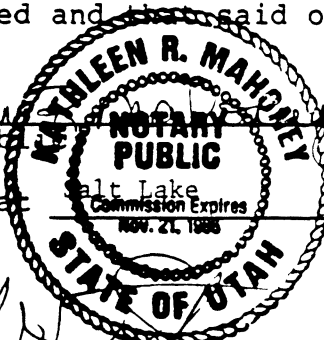
State of Utah  
County of Summit

Donna Bartlett Moore 9-6-83  
Donna Bartlett Moore Date  
Assistant Vice President  
Foothill Thrift

On this 6th day of Sept., 1983, personally appeared before me the undersigned Notary Public in and for said State and County, Larry E. Grant, who after being duly sworn, acknowledged to me that he is the beneficiary of a deed of trust Book M237 Page 696 recorded in Summit County, Utah, that he signed the owners dedication freely and voluntarily for and in behalf of said owners for the purpose therein mentioned and that said owners executed the same.

My commission expires \_\_\_\_\_

Kathleen R. Mahoney  
Notary Public  
Residing at Salt Lake  
Commission Expires NOV. 21, 1985



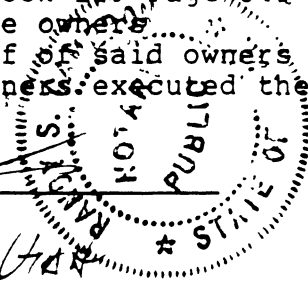
State of Utah  
County of Summit

Harold E. Turley, Jr. - 9-6-83  
Harold E. Turley, Jr. Date  
President and Chief Executive Officer  
Utah First Bank

On this 6<sup>TH</sup> day of SEPT, 1983, personally appeared before me the undersigned Notary Public in and for said State and County, Harold E. Turley, Jr., who after being duly sworn, acknowledged to me that he is the beneficiary of a deed of trust Book 259 Page 846 recorded in Summit County, Utah, that he signed the owners dedication freely and voluntarily for and in behalf of said owners for the purpose therein mentioned and that said owners executed the same.

My commission expires \_\_\_\_\_

Kathleen R. Mahoney  
Notary Public  
Residing at Murray, Utah



MY COMMISSION EXPIRES SEPTEMBER 18, 1984

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State of Utah  
County of Summit

SAUNDERS LAND INVESTMENT CORPORATION

By: Leon H. Saunders 11-30-83  
Leon H. Saunders, President Date

On this 22 day of Nov, 1983 personally appeared before me the undersigned Notary Public in and for said State and County, Leon H. Saunders, President of Saunders Land Investment Corporation, who after being duly sworn, acknowledged to me that he is the beneficiary of a deed of trust Book M193 Page 372 recorded in Summit County, Utah, that he signed the owners dedication freely and voluntarily for and in behalf of said owners for the purpose therein mentioned and that said owners executed the same



Leon H. Saunders  
Notary Public

Residing at: 1111 1st St

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SEC. OF STATE

**ARTICLES OF INCORPORATION  
OF  
WHITE PINE RANCHES HOME OWNERS ASSOCIATION**

WE, the undersigned, natural persons of the age of 21 years or more, acting as incorporators of a corporation under the Utah Non-Profit Corporation Cooperative Association Act, adopt the following Articles of Incorporation for such Non-Profit Corporation:

**ARTICLE I**

The name of the Corporation is:

WHITE PINE RANCHES HOME OWNERS ASSOCIATION

The principal place of business of the Corporation is 324 South State Street, No. 220, Salt Lake City, Utah 84111.

**ARTICLE II**

The period of its duration is perpetual.

**ARTICLE III**

The purpose or purposes for which the Corporation is organized are:

A. The Corporation is formed for purposes other than pecuniary profit, and shall operate entirely as a non-profit corporation, and no profits shall inure to the benefit of any member thereof.

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SEC. OF STATE

BOOK 283 PAGE 36

B. A particular object and purposes for which the Corporation is formed are the administration and management of the White Pine Ranches Planned Unit Development with the further purpose of promoting the general interest and welfare of its residents.

C. To do all and everything necessary, suitable, convenient, or proper for the accomplishment of any of the purposes or attainment of any one or more of the objects herein enumerated or incidental to the powers herein named or which shall, at any time, appear conducive or expedient for the protection or benefit of its members, with all the powers now or hereafter conferred by the laws of the State of Utah upon non-profit corporation under the general incorporation laws of the State of Utah.

#### ARTICLE IV

There shall be only one (1) classification among members of the Corporation who shall be admitted. The requirements for membership shall be:

A. The membership of the Corporation shall be limited to six (6) members who shall each be the owner of one (1) lot in White Pine Ranches, a planned unit development in Summit County, State of Utah.

B. In the event a lot is owned or is being purchased by more than one (1) person, written designation shall be given to the Association of the person who is entitled to vote the share represented by the designated lot.

C. All members shall pay assessment or fees as set by the Board of the Association or as otherwise required by the By-Laws or the Covenants, Conditions and Restrictions of White Pine Ranches.

D. Membership shall be regulated and governed by By-Laws adopted by the Board of the Association and by the Covenants, Conditions and Restrictions on file in the Summit County Recorder's office.

E. Each member shall be entitled to all rights and privileges as prescribed by these Articles, the By-Laws of the Corporation, and the Covenants, Conditions, and Restrictions of White Pine Ranches, a planned unit development.

#### ARTICLE V

The Corporation shall have no authority to issue shares of stock in said Corporation.

#### ARTICLE VI

The Corporation shall be governed by a Board of three (3) trustees who shall be elected by a membership for a term of two (2) years. The Board shall be elected annually in January of each year and shall serve for the term of two (2) years or until their successors are elected. Said Board shall be elected by members of the Corporation in attendance at the general annual meeting to be held for that purpose. The Board of the Corporation shall elect and shall decide who shall be president, vice-president, and secretary/treasurer.

The following shall be the Board of the Corporation until their successors are elected and qualified:

Robert Felton  
324 South State #220  
Salt Lake City, Utah 84111

Hy Saunders  
1899 Longview Drive  
Salt Lake City, Utah 84117

Dan Hunter  
P.O. Box 78  
Park City, Utah 84060

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The following shall be officers of the Corporation until their successors are elected and qualified:

President - Robert Felton

Vice-President - Hy Saunders

Secretary/Treasurer - Dan Hunter

#### ARTICLE VI

The name and addresses of each incorporator are:

Robert Felton  
324 South State #220  
Salt Lake City, Utah 84111

Hy Saunders  
1899 Longview Drive  
Salt Lake City, Utah 84117

Dan Hunter  
P.O. Box 78  
Park City, Utah 84060

#### ARTICLE VIII

The post office address of the Corporation's registered office is:

324 South State Street  
Suite 220  
Salt Lake City, Utah 84111

The name of the Corporation's initial registered agent is:

Robert Felton  
324 South State Street  
Suite 220  
Salt Lake City, Utah 84111

## ARTICLE IX

The Board is hereby empowered without further consent of its membership to negotiate necessary contracts or incur debt for and on behalf of the membership or as otherwise provided in its By-Laws or as established in the Covenants, Conditions and Restrictions of White Pine Ranches.

Further, the Board may make any further rules and regulations as well as amend the constitution and By-Laws of the Corporation.

## ARTICLE X

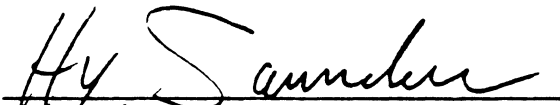
The incorporators, Board, officers, and members of this Corporation shall not be liable in any way, nor shall their property, real or personal, be liable for the obligations of the Corporation.

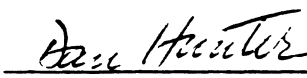
## ARTICLE XI

These Articles may be amended, altered, or changed at any time by vote of four (4) members of the Corporation.

IN WITNESS WHEREOF, we, Robert Felton, Hy Saunders, and Dan Hunter, being all of the incorporators hereinabove named have hereunto set our respective hands this 29<sup>th</sup> day of August, 1983.

  
Robert Felton

  
Hy Saunders

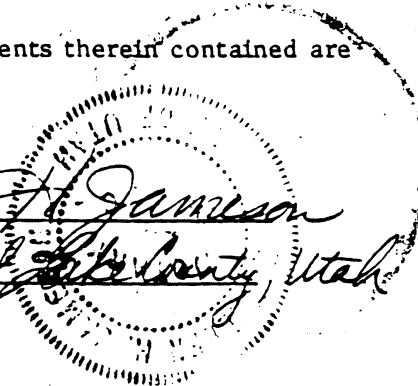
  
Dan Hunter



STATE OF UTAH                    )  
  : ss.  
COUNTY OF SALT LAKE        )

I, Kathleen H. Jamison a notary public, hereby certify that on  
the 29<sup>th</sup> day of August, 1983, personally appeared before me Robert Felton, Hy  
Saunders, and Dan Hunter, who being by me first duly sworn, declare that they ar the  
persons who signed the foregoing Articles of Incorporation of White Pine Ranches Owners  
Association, as the incorporators thereof, and that the statements therein contained are  
true.

Kathleen H. Jamison  
Notary Public  
Residing at: Salt Lake County, Utah



My Commission Expires:

8-24-86

### **57-1-19. Trust deeds — Definitions of terms.**

As used in Sections 57-1-20 through 57-1-36:

(1) "Beneficiary" means the person named or otherwise designated in a trust deed as the person for whose benefit a trust deed is given, or his successor in interest.

(2) "Trustor" means the person conveying real property by a trust deed as security for the performance of an obligation.

(3) "Trust deed" means a deed executed in conformity with Sections 57-1-20 through 57-1-36 and conveying real property to a trustee in trust to secure the performance of an obligation of the trustor or other person named in the deed to a beneficiary.

(4) "Trustee" means a person to whom title to real property is conveyed by trust deed, or his successor in interest.

(5) "Real property" has the same meaning as set forth in Section 57-1-1.

(6) "Trust property" means the real property conveyed by the trust deed.

**57-1-33. Satisfaction of obligation secured by trust deed—  
Reconveyance of trust property.**

When the obligation secured by any trust deed has been satisfied, the trustee shall, upon written request by the beneficiary, reconvey the trust property. The reconveyance may designate the grantee therein as "the person or persons entitled thereto." The beneficiary under such trust deed shall deliver to the trustor or his successor in interest the trust deed and the note or other evidence of the obligation so satisfied. Any beneficiary under such trust deed who refuses to request a reconveyance from the trustee for a period of thirty days after written demand therefor is made by the trustor or his successor in interest shall be liable to the trustor or his successor in interest, as the case may be, for double damages resulting from such refusal, or such trustor or his successor in interest may bring an action against the beneficiary and trustee to compel a reconveyance of the trust property and in such action the judgment of the court shall be that the trustee reconvey the trust property and that the beneficiary pay to the trustor, or his successor in interest, as the case may be, the costs of suit including a reasonable attorney's fee and all damages resulting from the refusal of the beneficiary to request a reconveyance as hereinabove provided.

July 1, 1986

Mr. Jack Sharp  
3000 Connor Street, #11  
Salt Lake City, Utah 84109

Re: Sale of White Pine Ranches

Dear Jack:

As you believed, we did receive a signed copy of the Order with regard to the FDIC. Please find a copy of it here enclosed. The California contact person who called me with regard to a possible purchase of the property or your position in it some months back was an attorney named Joel Bryan. His phone number is (805) 496-4293. I have not heard from him since about April. (He called July 1, 1986 after dictating this letter. I gave him your phone number.)

With regard to the conveyance of lots pursuant to your Deed of Trust, the following information would apply. As you recall, a plat was placed on a part of the property designating this part as Lots 1 through 6 inclusive, White Pine Ranches Phase I. The remaining portion of the property was not platted. There was released from your Trust Deed Lots 1 through 5 of the platted portion of White Pine Ranches. You will recall that the Trust Deed requires release only of platted lots. Lot 6 of the platted White Pine Ranches, all of the unplatted portions of the property and the roadway prepared and developed by Hy Saunders remains subject to your Deed of Trust. We have an agreement with Felton with regard to the roadway that though the roadway itself is subject to the Deed of Trust, it is so subject to insure access to you to the portions of the property remaining subject to your Deed of Trust should your Deed of Trust be foreclosed with regard to any portions of the property. You will recall there has been a lot of pressure to release the road. I have refused so to do

Mr. Jack Sharp  
July 1, 1986  
Page 2

because of your need of it for access and this is pursuant to a discussion I had with Felton that I have notes in my file regarding.

Information on unpaid balances of your Note has in most cases been furnished by you to me rather than the reverse but I think my notes indicate that as of December of 1985 there was owed \$199,649.06 composed of \$198,561.06 principal and interest to December 27, 1985, \$520.00 for attorney fees, \$368.00 for four days of interest to bring the sum to December 31, 1985 and \$200.00 for charges of Associated Title. I am not certain of these figures. They are my notes to conversations I had with you at that time. Once these figures are verified as accurate, we could work toward bringing those figures current by adding the additional fees, interest and costs.

Best wishes,

Jon C. Heaton

JCH:pe

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