

1988

Leon H. Saunders, Robert Felton, J. Richard Rees, Saunders Land Investment Corp., a Utah corporation, White Pine Ranches, a Utah general partnership, and White Pine Enterprises, a Utah general partnership v. John C. Sharp, Gerladine Y. Sharp and Associated Title Company, a Utah corporation, as Trustee v. Commissioner of Financial Institutions as Receiver for Tracy Collins Bank and Trust company, as Surety : Brief of Respondent



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IN THE UTAH COURT OF APPEALS

LEON H. SAUNDERS, ROBERT FELTON,
J. RICHARD REES, SAUNDERS LAND
INVESTMENT CORP., a Utah
corporation, WHITE PINE RANCHES,
a Utah general partnership, and
WHITE PINE ENTERPRISES, a Utah
general partnership,

Plaintiffs/Appellants,

vs.

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

Defendants/Respondents,

vs.

COMMISSIONER OF FINANCIAL
INSTITUTIONS AS RECEIVER FOR
TRACY COLLINS BANK AND TRUST
COMPANY, as Surety,

Surety/Appellant.

RESPONDENTS' BRIEF
TO SAUNDERS, ET AL.

Case No. 880710-CA

Priority 14(b)

APPEAL FROM JUDGMENT AND FINAL ORDER OF THE THIRD JUDICIAL
DISTRICT COURT OF AND FOR SALT LAKE COUNTY, STATE OF UTAH
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STATE OF UTAH

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STANDARD OF REVIEW

In its Brief, Appellants (hereinafter collectively "White Pine Ranches") claim only questions of law are on appeal, which questions do not require deference by this Court. White Pine Ranches' Brief, however, continually argues the inappropriateness of Judge Frederick's Findings of Fact.¹

The trial court's findings of fact will not be set aside on appeal unless clearly erroneous. Utah R. Civ. P. 52(a); Copper State Leasing Co. v. Blacker Appl. & Furn. Co., 770 P.2d 88, 93 (Utah 1988); Western Kane County Special Serv. Dist. No. 1 v. Jackson Cattle Co., 744 P.2d 1376, 1377 (Utah 1987). A finding is clearly erroneous only if it is without adequate evidentiary

¹ As examples, White Pine Ranches argues the "purpose" behind the Sharps' right of approval of the CC&R's and plat (Appellants' Brief, p. 6); that Heaton "claimed" there was a modification in the parties' agreement which Felton's testimony "disputed" (Id., p. 8); that Sharps never responded to White Pine Ranches' demands to release Lot 6 and the road (Id., p. 10); that White Pine Ranches did not agree with the Sharps' right of access over the internal roadway (Id., p. 17); that it was "painfully obvious" through the Sharps' testimony they never regarded the Consent to Record the CC&R's and plat as a reconveyance (Id., p. 21, n. 11); that Sharps did not rely in good faith on the advice of counsel (fn., pp. 22-25); and that the Sharps' access to the Property was "not supported by the evidence" (Id., p. 39). These are all arguments disputing Judge Fredericks' Findings of Fact. Alternatively, if only questions of law are on appeal, the Findings of Fact are conclusive and this Court is limited only to determining whether the Findings of Fact support the Conclusions of Law. Ebenezer A.M.E. Zion Church v. Corporate Loan & Sec. Co., 72 Wash. 2d. 128, 432 P.2d 291 (1967).

support. State v. Walker, 743 P.2d 191, 193 (Utah 1987); Accord Western Capital v. Knudsvig, 768 P.2d 989, 991 (Utah Ct. App. 1989).

This Court must begin its analysis with the trial court's Findings of Fact and not with White Pine Ranches' view of the way it thinks the facts should have been found. Ashton v. Ashton, 733 P.2 147, 150 (Utah 1987). White Pine Ranches must first marshall all evidence supporting the Findings (which is plentiful), and then demonstrate that these Findings are "so lacking in support as to be 'against the clear weight of the evidence.'" In re Estate of Bartell, 105 Utah Adv. Rep. 3, 4 (1989) (quoting Walker, 743 P.2d at 193). "[A]ppellants should recognize that the burden of overturning factual findings is a heavy one, reflective of the fact we do not sit to retry cases submitted on disputed fact." Id. at 4.

The trial court found it was necessary to interpret the parties' Contract with reference to contemporaneous and subsequent documents between the parties and between a party and various third parties, by reference to subsequent dealings (course of conduct) between the parties, and with reference to contemporaneous and subsequent events.² In such cases, this Court has held the standard of review is:

... [I]f the contract is ambiguous and the trial court makes factual findings about the intent of the parties

2 As examples, the trial court found that Exhibit 15 was "ambiguous" (Tr. 733, R. 1645), that the proposed PUD plat contained an internal roadway description (cont.)

based on extrinsic evidence, our review is strictly limited. If those findings are supported by substantial, competent evidence in the record, they are not clearly erroneous under Utah R.Civ.P. 52(a) and we will not disturb them on appeal.

Hansen v. Green River Group, 748 P.2d 1102, 1104 (Utah. Ct. App. 1988) (citations omitted).

2 (cont.):

"commonly used in plats to dedicate roads to public use," (Ex. 39; F. 19, R. 1333, Add. B24); that at the time of White Pine Ranches' development, it was "anticipated that additional developments by third parties would occur ... including the development of a ski resort in White Pine Canyon." (F. 25, R. 1335, Add. B26); that the proposed final plat included an Owner's Dedication for a private road and utility easements (F. 34, R. 1337, Add. B28); that in a subsequent conversation between Felton and attorney Jon Heaton, it was agreed that "access over the road retained if Sharp develops undeveloped property Lots 7-12" (F. 37, R. 1338, Add. B29); that it was the actual practice of White Pine Ranches to make specific requests for release of specific PUD lots after payments were made and no default existed (F. 47, R. 1341, Add. B32); that White Pine Ranches made no claims of breach by the Sharps until years after their own admitted breaches (F. 53, R. 1342, Add. C33; F. 71, R. 1337, Add. B38; F. 59, R. 1343-1344, B35-36); that the Sharps "perceived" their execution of the Consent to Record constituted substantial performance to release the road (F. 60, R. 1341, Add. B35); that most of the damages sought by White Pine Ranches from the Sharps were the same damages it sought in other litigation against SBSID and Summit County (F. 70, R. 1347, Add. B38); that the Sharps did not interfere with White Pine Ranches' attempts to market the Property (F. 72, R. 1347, Add. B38); that the Sharps repeatedly assured White Pine Ranches they did not intend, through foreclosure, to interfere with the lot owners' access rights to the road and utility easements (F. 88, R. 1351, Add. B42), that it was the mutual intent of the parties the Sharps be granted use of the road in the event of default (F. 89, R. 1351, Add. B42); and that the Sharps acted in good faith and in reliance on the advice of their counsel in refusing to reconvey Lot 6, the road and the unplatted acreage (F. 91, R. 1351, Add. B42).

CITATION TO THE RECORD

Citations to the record will be abbreviated as follows:

Record on Appeal	"R."
Trial Transcript	"Tr."
Exhibit	"Ex."
Findings of Fact	"F."
Conclusion of Law	"C."
Judgment	"J."

The Addendum includes relevant portions of the Record and Exhibits and shall be cited to as "Add." with the page number following the Record or Exhibit citation. White Pine Ranches attached only drafts of the Findings of Fact and Conclusions of Law and the Judgment to its Brief. Signed copies of the Findings of Fact and Conclusions of Law and the Judgment are attached in Addendum B. The Addendum has for ease of reference been numbered consecutively and has been divided into the following four parts:

- A - The Contract documents, i.e., Trust Deed, Trust Deed Note, Earnest Money Agreement, Memorandum of Closing Terms, the Owners Dedication of Exhibit "A" attached to the Memorandum of Closing Terms and the Warranty Deed.
- B - The Findings of Fact and Conclusions of Law and the Judgment.
- C - Subsequent correspondence between the parties.
- D - Various documents pertaining to White Pine Ranches' damage claims.

JURISDICTION

Section 3 of Article 8 of the Utah Const., Section 78-2-2(3) of the Utah Code Ann. and Rule 3(a) of the R. Utah Ct. App. confer jurisdiction on this Court to hear this appeal.

NATURE OF PROCEEDING

This appeal is from a final Judgment ("Judgment") of the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable J. Dennis Frederick presiding, dismissing White Pine Ranches' Complaint, no cause of action, and granting judgment against Leon H. Saunders ("Saunders"), Robert Felton ("Felton") and Kenneth R. Norton dba Interstate Rentals, Inc. ("Norton") on a Trust Deed Note, ordering the property as security under the Trust Deed ("the Property") be judicially foreclosed and entering judgment for damages suffered due to a wrongful injunction against Tracy Collins Bank and Trust Company as surety on a bond.

ISSUES PRESENTED FOR REVIEW

The issues presented by White Pine Ranches in this appeal appear in a different order in this Brief than in White Pine Ranches' Brief to avoid the redundancy in White Pine Ranches' Brief and to provide this Court with a succinct and logical organization of the Sharps' arguments.³

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White Pine Ranches' Brief

Point A 1, pp. 14-16
Point A 2, pp. 16-19

Sharps' Brief

Point III, pp. 26-29
Point V, pp. 31-35

(cont.)

STATEMENT OF THE CASE

This action arose when White Pine Ranches filed a Complaint the day before a scheduled Trustee's Sale of the Property located in White Pine Canyon, Snyderville, Utah. (R. 2-89; F. 95, R. 1352, Add. B43). The Complaint sought to enjoin the scheduled Trustee's Sale, alleging, inter alia, that the Sharps had breached the Contract between the parties⁴ by failing to release Lot 6 and

3 (cont).

Point A 3(a), pp. 19-20	Points I-V, pp. 20-35
Point A 3(b), pp. 20-21	Point III, pp. 26-29
Point A 3(c), pp. 21-22	Points I-V, pp. 20-35
Point A 4(a), pp. 22-24	Point VI, pp. 35-36
Point A 4(b), pp. 25-29	Point I, pp. 20-22
Point A 4(c), pp. 30-32	Point II, pp. 23-26
Point A 5, pp. 32-33	Point VI, pp. 35-38
Point A 6(a)-(e), pp. 33-38	Point VII, pp. 38-43
Point B 1-4, pp. 38-45	Point IV, pp. 29-31
Point C 1-3, pp. 45-49	Point VIII, pp. 43-49
Point D, pp. 49-50	Respondents' Brief to Commissioner of Financial Institutions

⁴ The Contract between the parties includes the Memorandum of Closing Terms (hereinafter the "Memo") (Ex. 15, Add. A9-13), a Special Warranty Deed (Ex. 17, Add. A16-17), a Trust Deed Note (Ex. 3, Add. 5-6) together with an Addendum to the Trust Deed Note and a Trust Deed (Ex. 2, Add A1-4) (collectively referred to as "the Contract"). (F. 10, R. 1330, Add. B21; C. 1, R. 1355, Add. B46.) The initial draft of a purchase agreement was prepared by Counterclaim Defendant, Paul H. Landes, a signatory to the final documents composing the parties' Contract. (Ex. 13; Tr. 728, R. 1645). The parties extensively negotiated the terms of the Contract. (Tr. 556, R. 1644). For instance, four drafts of the Earnest Money were discussed. (Tr. 729-730, R. 1645). The rule of construction that ambiguity in a contract is construed against its drafter is inapplicable where such contract is the result of extensive negotiations between (cont.)

the roadway and 7.35 acres of the unplatted portion of the Property. (R. 2-89). The Complaint further alleged the Sharps had breached the Contract by failing to pay their alleged pro rata share of the cost of constructing certain improvements on the Property by failing to grant an easement to the County on a 10-1/2 foot strip of land for the sole purpose of widening the County roadway,⁵ and asserted causes of action for fraud,⁶ slander of title, and failure to reconvey. The trial court granted a temporary restraining order on September 4, 1986, enjoining the Trustee's Sale and the matter proceeded to trial in January and March of 1988.

The case arose against the following background. The Property was purchased with a down payment at closing and a promise to make five annual installments payable on June 30 of

4 (cont.)

the parties. Centennial Enter. v. Mansfield Dev. Co., 568 P.2d 58 (Colo. 1977). Additionally, the rule only functions after the court has considered all pertinent extrinsic evidence and is still uncertain as to the contract's interpretation. Wilburn v. Interstate Elec., 748 P.2d 582 (Utah Ct. App. 1988).

5 The County roadway has not been widened, there are no current plans to do so and the County has never requested an easement from the Sharps. (Ex. 107, p. 15, Add. D99; F. 21, R. 1334, Add. B25).

6 The claimed misrepresentations were denied by summary judgment. (R. 124-125.)

each subsequent year in the amount of \$192,611.06 principal, together with accrued interest. (Ex. 3, Add. A6).⁷ The Property was intended to be promptly developed as a Planned Unit Development ("PUD") into twelve 4 or 5 acre lots, with an internal roadway dedicated to public use. (Ex. 14, Add. A7-8; Ex. 39, Add. A14; F. 5, R. 1329, Add. B20).⁸ The dedication of the roadway was of such vital importance to the parties that an initial plat was attached as Exhibit "A" to the Memo. (Exhibit "A" is partially reproduced in White Pine Ranches' Addendum ("WPR Add."), pp. 76-82). Paragraph 5 of the Memo further provided that "changes in the proposed plat and the Declaration of Covenants, Conditions and Restrictions when prepared shall be subject to the reasonable approval of Seller [the Sharps]." (Ex. 15, Add. A9). The Sharps were concerned that, in the event of default, they possessed access to the Property (Tr. 749-750, R. 1645) and Felton knew the Sharps "wanted the right to approve them [any changes] reasonably." (Tr. 138, R. 1642).

The Memo also provided after "the recordation of a PUD Plat and Declaration of covenants, conditions and restrictions"

⁷ See p. 1, n. 1 of White Pine Ranches' Brief regarding the transfers of White Pine Ranches' interest in the Property among the various partners and partnerships.

⁸ Prior to the parties' closing and execution of the Memo, Summit County had refused to approve a private road system. (F. 14, R. 1331, Add. B22).

("CCRs") that White Pine Ranches would be entitled to the release of three PUD lots of its "choice together with said roadway" in the proposed plat attached as Exhibit 'A.'" (Ex. 15, para 3., Add. A9) (emphasis added). For each \$140,000.00 in principal paid thereafter and after recordation of the PUD, White Pine Ranches "shall be entitled to the release of one (1) lot of Buyer's choice." (Ex. 15, para. 1 & 2, Add. A9) (emphasis added). The Memo further provided the Sharps were entitled to one sewer connection and one culinary water connection in the PUD systems "for a connection fee and service fee equal to the pro rata cost to the purchaser of a lot." (Ex. 15, para. 7, Add. A10-11).⁹

White Pine Ranches defaulted on its June 30, 1983 payment, which default was subsequently cured in November of 1983. (Ex. 22; F. 27, R. 1336, Add. B27; Ex. 4, 44; F. 31, R. 1337, Add. B28). In December of 1983, White Pine Ranches, with the written consent of the Sharps, recorded a plat and the CCRs, which platted

9 In their Brief, White Pine Ranches failed to address the lower court's finding that they also breached the parties' Contract "by failing to make available sewer and water connections at the same charge to purchasers of a PUD lot." (F. 100, R. 1354, Add. B45). Although construction primarily commenced in 1983 for the sewer and water systems, neither was completed or operational at the time of trial, nor had the sewer construction been approved by the Snyderville Basin Sewer Improvement District ("SBSID"). (Ex. 83, 83(a), 99-108; F. 82, R. 1349-1350, Add. B40-41). The trial court concluded seven years was an "unreasonable time within which to complete the water and sewer systems." (C. 19, R. 1359, Add. B50.) (Tr. 366, R. 1643; F. 40, R. 1340, Add. B31.)

only a portion of the Property, instead of the entire Property as originally intended. (Ex. 51, WPR Add. 91-131; F. 39-40, R. 1339, Add. B30). The plat also differed from White Pine Ranches' original intent by including an Owner's Dedication for a private roadway in the PUD. (Ex. 39, Add. A14; F. 19, R. 1333, Add. B24; Ex. 1; F. 34, R. 1337, Add. B28). The Sharps were concerned about access to the Property in the event they were required to take it back in a foreclosure. (Tr. 748-750, R. 1645). Had the entire Property been platted as originally contemplated, access would not have been an issue since if the Sharps took it back in a foreclosure sale, they would be owners and purchasers of PUD lots entitling them to access under the CCRs recorded. (Tr. 757-759, R. 1645). Had the roadway remained public, their access also would have been assured. Accordingly, at the time the Sharps were asked to approve the plat and the CCRs, their continued right of access was confirmed with White Pine Ranches both orally and in writing. (Ex. 25, 25(a), 26, 26(a), Add. C67-72; F. 35-39, R. 1338-1339, Add. B29-30).

Pursuant to the terms of the Memo and the request of White Pine Ranches, the Sharps directed Associated Title, the trustee under the Trust Deed covering the Property, to release Lots 1 through 5 of White Pine Ranches Phase I. (Ex. 23, Add. C65-66; Ex. 25, 25(a), Add. C67-68; F. 42, R. 1340, Add. B31; Ex. 15, para. 3-4, Add. A9-10).

White Pine Ranches again defaulted under the terms of the Contract in November of 1984 by failing to pay all of the property taxes due. The 1984 taxes and all subsequent property taxes remained unpaid (\$20,368.62) through the time of trial. (F. 48-49, R. 1341, Add. B32). White Pine Ranches further defaulted under the terms of the Contract by failing to make all of the June 30, 1985 installment payment (only \$59,709.47 was paid) and any remaining installment payment due under the Contract in 1986. (Ex. 44; F. 50, R. 1342, Add. B33).

The Sharps recorded a Notice of Default on September 16, 1985. (Ex. 55; F. 51, R. 1342, Add. B33). After White Pine Ranches received the Notice of Default, Felton assured "every attempt is being made to resolve the problem." (Ex. 31, Add. C75; F. 52, R. 1342, Add. B33). As the trial court found: "No written or oral claim of default on the part of the Sharps under the Closing Documents was made by the plaintiffs [White Pine Ranches] until February 27, 1986, subsequent to plaintiffs' own defaults." (Ex. 35, Add. C80-81; F. 71, R. 1347, Add. B38; Tr. 200-201, R. 1643). Nor did White Pine Ranches request the release of Lot 6 and the roadway until long after their own defaults under the Contract.¹⁰

¹⁰ The district court found that "Plaintiffs' first requests" for release of Lot 6 and the roadway were "February 27, 1986 and May 7, 1986, respectively." (F. 59, R. 1343-1344, Add. B34-35). Also, White Pine Ranches did not request the release of 7.5 acres of the unplatted property until February 27, 1986. *Id.* The Contract, however, specifically provides that (cont.)

Judge Frederick held White Pine Ranches had materially breached the Contract and the Sharps had substantially complied with its terms. (C. 5-6, R. 1355-1356; Add. B46-47.) The Judge concluded that the material, significant and continuing breaches of White Pine Ranches excused the Sharps from any obligation to reconvey, and found against White Pine Ranches on all other causes of action asserted. (C. 4, R. 1355, Add. B46.)

STATEMENT OF FACTS

The following facts are necessary for proper determination of this appeal in addition to and or to rectify the statements and omissions of facts in the Statement of the Case of the Brief of White Pine Ranches:

1. Exhibit "A" to the Memorandum of Closing Terms contained a dedication commonly used to dedicate roads to public use as follows:

Know all by these present that we the undersigned owners of the hereindescribed 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 further dedicate the easements as shown.

(See Ex. 39, Add. A14; Ex. 20, para. 3) (emphasis added).

10 (cont.)

only "PUD lots" are to be released. Id. As the district court found, "[a]s of these dates, plaintiffs [White Pine Ranches] were still and are in default." Id.

2. On July 19, 1983, prior to the recordation of the final plat of Phase I of the Property and while the June 30, 1983 payment was in default, Felton wrote a letter to attorney Jon Heaton in which he stated that the final plat had not yet been recorded because "[a]s soon as we file the plat real estate taxes on this property are going to go up significantly, which we would like to avoid until we had an actual buyer for one of the lots." (Ex. 23, Add. C65; Tr. 157-159, R. 1642; F. 28, R. 1336, Add. B27).

3. On November 18, 1983, Heaton prepared a letter to the Sharps on behalf of Saunders as an embodiment of the representations White Pine Ranches was making or willing to make to the Sharps to secure their consent to the final plat. (Tr. 751, R. 1645). The letter indicated:

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).... When those releases are made pursuant to your [the Sharps'] instruction we will ensure 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.

(Ex. 25 and 25(a), Add. C67-68).

4. On November 21, 1983, Felton wrote Heaton a reply in which he stated "[i]t is perfectly acceptable to us [White Pine Ranches] 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." (Ex. 26, Add. C69-70).

5. Since Felton's letter seemed to be partially contradictory to the assurances and the discussions Heaton had had with Saunders, he called Felton on November 28, 1983 (Tr. 748, R. 1645) and Heaton noted in the margin of a copy of the letter that Felton agreed "access over road [White Pine Lane] retained if Sharp develops undeveloped property Lots 7-12 White Pine Ranch." (Ex. 26(a), Add. C71-72; F. 37, R. 1338, Add. B29).

6. In reliance upon and consideration of the agreement for access, the Sharps executed the Consent to Record Phase I of White Pine Ranches, which platted only the northern portion of the Property. (F. 39, R. 1339, Add. B14; C. 14, R. 1350, Add. B50).

7. On January 18, 1984, pursuant to the request of Saunders, the Sharps directed Associated Title to release and reconvey Lots 1 through 5. (Ex. 23, Add. C65-66; Ex. 25, 25(a), Add. C67-68; F. 42, R. 1340, Add. B31; Ex. 15, para. 3-4, Add. A9-10.) The partial release was not prepared until January 6, 1986 and recorded on March 26, 1986. (Ex. 45; F. 43, R. 1340, Add. B31). White Pine Ranches named Associated Title in the action but chose not to serve or pursue Associated Title regarding the delay. (F. 43, R. 1340, Add. B31).

8. On January 17, 1984, Felton sent a letter to Heaton requesting Mr. Sharp to consent to a change in the development plan stating "[w]hat we plan to do is to do a very tasteful and discrete multi-family development on the thirty (30) acres which is

the only way it will be economically feasible." (Ex. 29, Add. C73; F. 45, R. 1340-1341, Add. B31).

9. On January 20, 1984, Felton sent a letter to Heaton conceding that "the deeds [sic] for the roads [sic] may be difficult to do." (Ex. 30, Add. C74; F. 44, R. 1340, Add. B31). The Sharps were never presented with a document in recordable form releasing the internal road from the Trust Deed. Felton testified that "Associated Title probably" would be the ones to prepare that reconveyance. (Tr. 178, R. 1642).

10. On February 24, 1986, Felton sent a letter to Mr. Sharp detailing the problems with the project which caused White Pine Ranches' "inability to now complete the timely payments to you." (Ex. 34, Add. C76). This letter concluded "we are certainly not blaming you as being directly responsible" and asked the Sharps to "be considerate or [sic] our problems as well as the factual cause, whether that be intentional, malfeasance (Summit County) or an implied or omitted condition of this development." (Ex. 34, Add. C79).

11. After Felton received a notice that the Trustee's Sale had been set again for April, Felton sent another letter to Mr. Sharp on February 27, 1986. (Ex. 35, Add. C80; F. 59, 62, R. 1344-1345, Add. B35-36). This letter, for the first time, made a claim of a breach of the Contract by the Sharps, requested conveyance of the road and approximately 7.5 acres of the unplatted Property and demanded approximately \$73,000.00 for the costs of

water and sewer hookups which Felton claimed were "now available."¹¹ (Ex. 35, Add. C80-81; F. 59, 62, R. 1344-1345, Add. B35-36).

12. The February 27th letter made no claim regarding any release of Lot 6. In a subsequent letter dated May 7, 1986, Felton requested for the first time the release of Lot 6.¹² (Ex. 37, Add. C82-83; F. 59, R. 1344, Add. B35).

SUMMARY OF ARGUMENT

Although White Pine Ranches asserts a plethora of alleged errors committed by the trial court, once its motivation in filing a complaint is revealed, this case becomes very simple. White Pine Ranches was a partnership of desperate men who ran out of the dollars needed to honor their obligations.¹³ After years of paying under the Contract without complaint, White Pine Ranches

¹¹ As noted above, the water and sewer systems in fact were not available at the time of trial, being neither built or operational. (R. 1349, Add. B40-41).

¹² White Pine Ranches claims on p. 26, n. 16 of its Brief the fact there was no request for the release of Lot 6 is a "hypertechnicality" since only one lot was remaining in the platted portion. However, the Sharps were advised in the May 7, 1986 letter and Felton so testified at trial that White Pine Ranches was "in a position to prepare and obtain approval of that plat [for the balance of the Property] immediately," which, of course, would have created choices between Lot 6 and the newly platted lots. (F. 46, R. 1314, Add. B32; Tr. 100, R. 1642; Ex. 37, Add. C82-83; Tr. 138, 202, R. 1642, 1643.)

¹³ Felton testified "we have this construction loan that's in default and we're desperate at this point. Make no mistake about it. Everybody's going bankrupt at this point." (Tr. 309, R. 1643).

was forced to invent excuses for their non-performance and finally took the startling and aggressive posture of filing a Complaint against the Sharps, even though it admittedly had failed to pay property taxes, installment payments and to provide to the Sharps certain utility connections. As the trial court found, these excuses were never mentioned to the Sharps until immediately prior to the filing of their Complaint in September of 1986:¹⁴

Significantly, as bearing upon the credibility of plaintiffs' [White Pine Ranches'] arguments is the fact un rebutted that plaintiffs made no claims whatsoever of breach by the Sharps until after their own admitted breaches of the Closing Documents.

(F. 53; R. 1342, Add. B33).

White Pine Ranches made the June 30, 1982 installment payment without complaint. (Cf. F. 26, R. 1335-1336, Add. B26-27). Although it was made late, no allegation of breach by the Sharps accompanied the June 30, 1983 installment payment. (Tr. 208, R. 1643; F. 30, R. 1336, Add. B27). On November 21, 1983, Felton sent a letter to the Sharps stating "I would again apologize for that late (1983) payment." (Ex. 26, Add. C69-70). The June 30, 1984 payment was also made without any claims of breach. (Ex. 31, Add. C75; F. 52, R. 1342, Add. B33).¹⁵ After failure to make the

¹⁴ White Pine Ranches' incredible claim on p. 2 of its Brief that "after Respondents failed to reconvey the property, Appellants ceased making payments," is without any citation to or support from the Record.

¹⁵ Also, on p. 2 of its Brief, White Pine Ranches' attempts to sympathetically exploit the amount of down and installment payments made to the Sharps. The (cont.)

June 30, 1985 installment payment in full and after receipt of a Notice of Default, Felton wrote the following to Mr. Sharp on September 24, 1985:

I wanted to touch base with you to assure you that I am not ignoring this problem and am very concerned since I made my portion of the payment and am prepared to complete the final payment next year.

In any event, I wanted to assure you that every attempt is being made to resolve the problem and I should have a better idea in a couple of weeks as to the ability of the remaining interest [in White Pine Ranches] to satisfy that obligation.

(Ex. 31; Add. C75) (emphasis added). Thus, less than a year before the commencement of this litigation, White Pine Ranches had made no claims whatsoever of breach by the Sharps.¹⁶

The true motivation behind the filing of a Complaint was that White Pine Ranches' development had turned sour. White Pine

15 (cont.)

trial court, however, entered Judgment against White Pine Ranches in the amount of \$557,642.46 for principal, interest and late charges not made through March 22, 1988, together with a daily per diem thereafter of \$183.32 (excluding trustee's fees, court costs, attorney's fees and interest thereon). (J. 3, R. 1370, Add. B56-63; C. 31, R. 1361-1362, Add. B52-53).

¹⁶ In F. 52, R. 1342, Add. B33, the district court also found:

Felton, in his letter [Ex. 31] made no allegation that the Sharps had slandered plaintiffs' [White Pine Ranches'] title as a result of the inclusion of Lots 1-5 in the Notice of Default [which was recorded on September 16, 1985 as described in F. 51, R. 1342, Add. B33], nor did Felton or any other plaintiff allege in 1984 or 1985 any breach of the Closing Documents by the Sharps. (Tr. 183-184, R. 1642).

The true motivation behind the filing of a Complaint was that White Pine Ranches' development had turned sour. White Pine Ranches purchased the Property from the Sharps intending to promptly develop a residential subdivision. (F. 5, R. 1329, Add. B20). Throughout the negotiations leading up the parties' Contracts, the Sharps declined to participate in the costs or risks inherent in the development of raw land. They were interested in selling the Property as they approached retirement. The development soured due to a sharply declining real estate market in Park City and the extraordinary improvement costs and development requirements imposed by Summit County and the SBSID. (Ex. 97; Tr. 473, R. 1644; Ex. 86, Add. D89-92; F. 69, R. 1346-1347, Add. B37-38).

At the time White Pine Ranches purchased the 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." (Ex. 104, 105, 107 and 117; F. 25, R. 1335, Add. B26). Instead, development potential soured as demonstrated by the testimony of White Pine Ranches' own appraiser.

At the hearing in January, 1988 on the Sharps' Petition for Additional Security, the court below found the Property was worth approximately \$17,500 to \$20,000 per acre. (Tr. 493-494, R. 1644). Previously, LeRoy Pia, White Pine Ranches' appraiser whose

valuations were exclusively used throughout the proceedings, valued the Property on June 30, 1985 at \$29,062.50 per acre. (Ex. 96). (The fair market value at the time of trial was found to be \$20,000 per acre. [Supp. F. 2, R. 1394, Respondents' Brief to Commissioner of Financial Institutions, Add. 2]). That this case is market motivated is again revealed in a letter authored by Felton on January 17, 1984, in which he requested 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." (Ex. 29, Add. C73; F. 45, R. 1340-1341, Add. B31-32). (A multi-family concept was not adopted.)

As the market declined, White Pine Ranches' development costs soared, through no fault of the Sharps. (Tr. 208, R. 1643). On July 26, 1984, more than one year prior to his letter of apology for non-payment to Mr. Sharp (Ex. 31, Add. C75), Felton made demand upon Summit County for up to \$1,000,000 because of an "unreasonable" requirement of an off-site sewer system as opposed to the use of septic tanks, the loss of one or more sales because of the County's refusal to plow White Pine Canyon Road and due to "the imposition of unreasonable and extreme requirements to have the subdivision approved." (Ex. 84, Add. D86-87; F. 65, R. 1345-1346, Add. B36-37). Soon thereafter, White Pine Ranches brought suit against Summit County, the SBSID and various officials thereof to recover damages in the United States District Court for

the District of Utah ("the Federal Court litigation"). (F. 66, R. 1346, Add. B37).

In Answers to Interrogatories in the Federal Court litigation dated December 28, 1984, White Pine Ranches 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." (Ex. 116; see also Ex. 107, p. 7; F. 67, R. 1346, Add. B37). Subsequently in that litigation, Saunders swore in an Affidavit dated March 17, 1986:

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, costs of improvements escalated to be several times what I had anticipated, and much of the real property in the project is threatened by foreclosure.

(Ex. 86, para 10, Add. D90; F. 69, R. 1346-1347, Add. B37-38). After careful review of the claims in this Federal Court litigation, Judge Frederick found "[M]ost of the damages sought to be recovered by the plaintiffs [White Pine Ranches] in the lawsuit against the SBSID and Summit County are the same damages Plaintiffs sought to recover from the Sharps in the present case." (F. 70, R. 1347, Add. B38).

Given the aggressive posture taken by White Pine Ranches below, it is no wonder that it has taken a shotgun approach on appeal.¹⁷ Eleven issues are presented on appeal in White Pine

¹⁷ Generally, authorities frown on alleging too many points of error. Judge Franklin Spears of the Supreme Court of Texas in 1985 stated: "If you cannot win reversal with your six best points, then the 20th or 30th will probably be unsuccessful, too." (cont.)

Ranches' Brief, pp. 2-4. However, the actual number of issues are greatly expanded in the body of the Brief, since there are more than two dozen argument headings set forth in the Table of Contents. The following summarizes the Sharps' response to the alleged plethora of trial court errors.

White Pine Ranches materially breached the Contract by failing to pay the entire 1984 or any of the 1985, 1986 and 1987 property taxes on the Property when due and by failing to pay the entire 1985 or any portion of the 1986 installment payment. (F. 100, R. 1354, Add. B45; C. 2-4, R. 1355, Add. B46). It was the specific practice of White Pine Ranches to request a release of a specific PUD lot after required payments were made and provided no default existed. (F. 47, R. 1341, Add. B32; Tr. 334, R. 1643). Accordingly, since White Pine Ranches' breaches preceded any request for releases, the Sharps were not obligated to release Lot 6, the roadway or the unplatted acreage. (F. 59, R. 1343, Add. B34; F. 100, R. 1354, C. 8, R. 1356, Add. B47). Should this Court agree, all of the remaining issues raised by White Pine Ranches are moot. The Sharps committed no breach of the parties' Contract

17 (cont.)

Spears, Presenting an Effective Appeal, 21 Trial 95(6) (November 1985). See also Baskin, Wasted Words or Persuasive Prose: Connecting with the Appellate Court, 58 Fla. B. J. 69-72 (1985) (A scatter-gun approach weakens an argument).

and were excused by White Pine Ranches' breaches from further performance. (C. 5, 6 & 9, R. 1356, Add. B47).

Moreover, the Contract provisions respecting release of the roadway were modified by the parties when it was agreed the Sharps could retain access until the Trust Deed Note was paid in full (C. 14, R. 1358, Add. B49; see C. 9, R. 1356, Add. B47). Alternatively, the Sharps' execution of the Consent to Record and the subsequent recordation of the final plat and the CCRs on the Property constituted a release of the internal roadway and was a non-exclusive easement, equitable servitude or covenant running with the land, allowing an owner of unplatted acreage access to the roadway the same as a PUD lot owner. (C. 11, R. 1357, Add. B48). Finally, the Sharps agreed not to and were estopped to deny the use of the roadway for the private use of a PUD lot owner. (C. 12 & 13, R. 1357-1358, Add. B48-49).

The district court did not err in concluding White Pine Ranches failed to show it was entitled to relief under Utah Code Ann. Section 57-1-33 since the Sharps, in fact, requested the trustee to release Lots 1-5 of the PUD. (C. 24, R. 1360, Add. B51). Since White Pine Ranches was not entitled to a release of Lot 6, the roadway or the unplatted acreage, there could be no cause of action for failure to request a release. Furthermore, the Sharps reasonably relied upon the advice of counsel, in good faith, which is a valid defense under the statute. (C. 23, R. 1360, Add. B51).

Because White Pine Ranches breached the Contract, it is not entitled to any damages. Moreover, the damages sought are too remote, speculative and conjectural. (C. 28, R. 1361, Add. B52). Further, White Pine Ranches has failed to establish it suffered any actual damages. Id.

The Sharps are entitled to recover their attorney's fees under numerous provisions of the parties' Contract in enforcing the Contract, in defending and protecting their right to collect on the Note and in prevailing on their Counterclaim. (F. 96, R. 1352-1353, Add. B43-44). Furthermore, White Pine Ranches failed to challenge below the amount of or the reasonableness of the award of attorney's fees sought. (R. 1261-1273; Tr. 62, R. 1640).

ARGUMENT

Since detailed citations to the Record and Exhibits have been set forth above in the Statement of the Case, Statement of Facts and Summary of Argument, citations in this section will, for the sake of brevity, generally be limited to the single principal reference, usually found in the Findings of Fact or an Exhibit.

POINT I

WHITE PINE RANCHES IS REQUIRED TO REQUEST LOTS TO BE RELEASED BEFORE THE SHARPS HAVE ANY DUTY TO RECONVEY

The Utah Supreme Court has consistently held that the meaning and intent of an agreement can be determined from the course of conduct and the action and performance of the parties to the

agreement. Zeese v. Estate of Siegel, 534 P.2d 85 (Utah 1975); Bullfrog Marina, Inc. v. Lentz, 501 P.2d 266 (Utah 1972).

The trial court concluded: "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." (C. 7, R. 1356, Add. B47; Accord, F. 47, R. 1341, Add. B32) (emphasis added). This Conclusion was based upon the following Exhibits, testimony and Findings by the lower court:

a) The Memorandum of Closing Terms expressly sanctions the release of "PUD lots of Buyer's [White Pine Ranches'] choice," given certain conditions discussed more fully above under the Statement of the Case. (Ex. 15, para. 3, see Ex. 15, para. 2, Add. A9).

b) Felton testified: "Wait a minute, wait a minute. No, just from recalling the contract, I'm going to recant that testimony because I do believe the contract says lots of the buyer's choice and that would require a choice." (Tr. 334, R. 1643).

c) White Pine Ranches recognized the limited entitlement to request the release of PUD lots only. In a letter Felton stated: "Upon final plat approval, we will notify you to obtain the releases for the lots and the road as per the contract." (Ex. 21, Add. C64) (emphasis added).

d) It was the practice of White Pine Ranches to request the release of specific PUD lots. In a letter, White Pine Ranches indicated in the near future it would seek the release of PUD lots 1-5. (Ex. 25, Add. C67).¹⁸

e) White Pine Ranches was "land banking." That is, White Pine Ranches delayed recording a final plat 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." (Ex. 23, Add. C65-66).¹⁹

f) White Pine Ranches wanted to keep open its options as to the unplatted acreage, requesting by letter the approval by the Sharps of a "multi-family development." (Ex. 29, Add. C73).

g) White Pine Ranches indicated to the Sharps they could plat the remaining Property any time. Accordingly, White Pine Ranches "may prepare a plat of the then unplatted acreage and seek a release of a portion of it instead of Lot 6." (F. 61, R. 1344, Add. B35). Accordingly, ample evidence and authority exists to support the trial court's conclusion that White Pine Ranches is required to request releases before any such duty arises.

¹⁸ White Pine Ranches could have chosen any other combination such as PUD lots 2-6.

¹⁹ Approximately one-half of the Property had not been platted at the time of trial. (C. 34, R. 1363, Add. B54.)

POINT II

SINCE WHITE PINE RANCHES MATERIALLY BREACHED THE CONTRACT IT WAS NOT ENTITLED TO ANY RELEASES

If this court affirms the lower court's findings that White Pine Ranches was required to specifically request and identify lots, including Lot 6, for release and White Pine Ranches was in breach of the Contract prior to any request for the release of Lot 6, the roadway and 7.5 acres of the unplatted acreage, then any duty to reconvey is excused. Further, the remaining issues raised by White Pine Ranches would be moot since they rest upon establishment of premises negative to a requirement of a specific request for lots to be released and to a finding that White Pine Ranches first breached the Contract.

The failure to pay real estate taxes is a material default which precludes a release of lots from of a mortgage. City Bank Farmers Trust Co. v. Heckmann, 164 Misc. 234, 297 N.Y.S. 592, 595 (Sup. Ct. 1937); Clason's Point Land Co. v. Schwartz, 237 A.D. 741, 262 N.Y.S. 756, 760 (App. Div. 1933). In Markowitz v. Republic Nat'l Bank, 651 F.2d 825, 827 (2nd Cir. 1981), the court held that because the debtor failed to pay taxes for 1972, 1973 and 1974, but in 1973, requested the release of certain lots, the debtor was precluded from demanding release of the property so long as he was in default. Moreover, if a trustor (White Pine Ranches) is in default at the time it requests reconveyance, the beneficiary (the Sharps) is not obligated to reconvey. Las Vegas

Ranch Club v. Bank of Nev., 97 Nev. 389, 632 P.2 1146, 1147-1148 (1981); see also Sharp v. Brock, 626 S.W.2d 166 (Tex. Civ. App. 1981) (Debtors not entitled to release where they fail to make timely demand for release or designate specifically which land was to be released).²⁰

Provisions requiring payment of taxes and certain installments are material. City Bank Farmers Trust Co., 297 N.Y.S. at 594-595. As the court in Clason's Point Land Co., 263 N.Y.S. at 759-760, noted:

To ascertain the objects and purposes of the mortgage, the instrument must be examined as a whole. The mortgagee [seller] was entitled to payment and satisfaction of the mortgage debt at a specified time and to the preservation of the security intact until such payment and satisfaction. The mortgagor [buyer] was bound, among other things, to make semiannual payments of interest, and to pay taxes, assessments, and water charges on the mortgaged premises. The release clause

²⁰ The cases of Burroughs v. Garner, 43 Md. App. 302, 405 A.2d 301 at 306 (1979) and Columbia Dev. v. Watchie, 252 Or. 81, 448 P.2d 360 (1963) cited by White Pine Ranches are distinguishable. In Burroughs, the payments entitling the plaintiff to a release were prior to any defaults by plaintiff and the condition requiring the land to be platted before the buyer was entitled to release had been waived. In the case at hand, the parties clearly intended the Property would be platted before being released. In Columbia Dev., the Oregon court, sitting in equity, determined under the wording of the contract and the "facts and circumstances" surrounding execution, entitlement to release survived default. The Court found the plaintiff was not prejudiced since there was ample security after release. In the matter at hand, the Property clearly was not ample security. (C. 33, R. 1368, Add. B59; J. 4, R. 1373, Add. B54.) Finally, in Eldridge v. Burns, 76 Cal. App. 3rd 396, 142 Cal. Rptr. 845 (1971), another case cited by Plaintiffs, the court only held that the buyer was entitled to release for entitlement accruing prior to default.

is not to be viewed as independent of the mortgagor's covenants. The various provisions of the mortgage must be construed as dependent stipulations. The right in the mortgagor to pay stipulated amounts for release of parts of the mortgaged premises was a privilege of which she might have availed herself, but apparently did not. The payment of the interest and taxes was, on the other hand, a definite obligation....

(citations omitted).

In a transaction where several documents are executed simultaneously and are clearly interrelated, they must be construed together and harmonized if possible. Atlas Corp. v. Clovis Nat'l Bank, 737 P.2d 225 (Utah 1987). It is the obligation of the court when interpreting and construing the documents to look at them in their entirety and in accordance with their purpose. Big Cottonwood Tanner Ditch Co. v. Salt Lake City, 740 P.2d 1357 (Utah Ct. App. 1987). In this case, the operative Contract documents were executed simultaneously at the closing on July 16, 1981 and should be construed together.²¹ In construing the operative Contract documents as an integrated whole, the release provisions in the Memo (Ex. 15, para. 1-4, Add. A9-10) must not be viewed as being independent of the provisions for payment of taxes and installments in the Trust Deed (Ex. 2, para. 5, Add. A2) and Trust Deed Note (Ex. 3, Add. A5).²² White Pine Ranches was in default

²¹ The integration provision of the Memo, para. 9, incorporates all other "closing documents executed simultaneously herewith." (Ex. 15, Add. A11-12).

²² White Pine Ranches directly breached the Memo in failing to make available to the Sharps within a reasonable time sewer and water connections. (F. 100, R. 1354, Add. B45).

under the Contract prior to any request for the release of Lot 6, the roadway, or the unplatted acreage²³ and was not entitled to release of Lot 6, the roadway or any unplatted acreage. Moreover, White Pine Ranches was not entitled to release of the unplatted acreage since it had not met another condition of release, recordation of a plat.

POINT III

PURSUANT TO A MODIFICATION OF THE CONTRACT, THE SHARPS RELEASED THE ROADWAY BY EXECUTING THE CONSENT TO RECORD

It is elementary that any contract may be modified by subsequent agreement provided that all the elements essential to the

²³ White Pine Ranches seems to imply that because the Sharps didn't assert a default with regard to the 1984 taxes, that, somehow, the failure to pay those taxes is no longer a default. A breach is a breach, however, at the time it occurs regardless of whether the non-breaching party seeks to enforce the agreement. Bjork v. April Indus., 547 P.2d 219 (Utah 1976), appeal after remand 560 P.2d 315, cert. den. 97 S.Ct. 2634, 431 U.S. 930, 50 L.Ed.2d 245 (Damages began to accrue once defendant breached agreement. Plaintiffs not required to take steps to enforce agreement); see Quin Blair Enter. v. Julien Const. Co., 597 P.2d 945 (Wyo. 1979) (Parties free to ignore provisions of contract but must understand that they bear the consequences of such disregard when breach becomes fact of life). Curiously, White Pine Ranches seeks to have the argument regarding notification both ways. Although White Pine Ranches asserts the Sharps should have claimed a default with regard to the taxes, White Pine Ranches also asserts that it had paid enough of the release price by December 23, 1983 for release of the roadway, apparently without notification to the Sharps. (See Appellants' Brief, p. 7). Further, White Pine Ranches provides no answer to the protection the Sharps insisted upon in event of default. If the roadway was to be automatically released from the Trust Deed, how would access rights be preserved for the Sharps?

formation of a contract are observed. See, Cheney v. Rucker, 14 Utah 2d 205, 381 P.2d 86 (1963). A party to a written contract may orally modify it regardless of any provision in the contract to the contrary. Dillman v. Massey Ferguson, Inc., 13 Utah 2d 142, 369 P.2d 296 (1962); Davis v. Payne & Day, Inc., 10 Utah 2d 53, 348 P.2d 337 (1960). Here, even if the Memorandum required a reconveyance of the roadway, the parties clearly modified the Contract by agreeing, through the negotiations and correspondence (including a letter (Ex. 31) signed by a general partner of White Pine Ranches) preceding the execution of the Consent to Record, that the Sharps would retain access in consideration of their Consent. Additionally, White Pine Ranches accepted the executed Consent without requiring more and should be estopped to deny its effect. Brown v. Holden, 410 P.2d 528 (Okla. 1965) (Party cannot deny making contract and retain benefits flowing from transaction).

The Sharps' execution of the Consent to Record the final plat and the CCRs constituted a release of the internal roadway, either in accordance with paragraphs 3 and 5 of the Memo or in accordance with the subsequent modification of the Contract. The term "release" has been defined as "the relinquishment, concession or giving up of a right, claim, or privilege by the person against whom it exists or to whom it accrues, to the person against whom it might have been demanded." Clearly, the Sharps conceded their right of "reasonable approval" of any changes under para. 5 of the

Memo. (Ex. 15, Add. A10). 76 C.J.S. Release Section 1 (1976); Coopey v. Keady, 73 Or. 66, 144 P. 99 (1914).

The Consent to Record allowed White Pine Ranches to record its plat and CCRs which reserved a non-exclusive easement for utilities and vehicular and pedestrian access over the private roadway...." (F. 39, Add. B30) (emphasis added). White Pine Ranches, on page 20 of its Brief, argues in one short paragraph that the execution of the Consent was not a "reconveyance."²⁴ White Pine Ranches did not argue below the concept of "reconveyance" as opposed to "release" nor was Judge Frederick asked to make such a distinction. White Pine Ranches cannot now raise this issue for the first time on appeal. Valley Bank & Trust Co. v. U.S. Life Title Ins. Co., 111 Utah Adv. Rep. 71 (1989).²⁵

The CCRs to which the Sharps consented may also be construed as covenants running with the land or equitable servitudes. Leaver v. Grose, 563 P.2d 773 (Utah 1977) (Covenants duly executed and recorded are enforceable by interested parties). Covenants,

²⁴ The only case cited by White Pine Ranches in that paragraph is General Glass Corp. v. Mast Constr. Co., 766 P.2d 429 (Utah Ct. App. 1988). That case, however, dealt with the priority of a trust deed and has nothing to do with the issue of release or even, reconveyance.

²⁵ Failure to raise the issue below is prejudicial. The Sharps may have cured by tendering a deed of reconveyance and the court may have fashioned a grant of an easement or some similar right in favor of the Sharps to protect access in event of default. Moreover, the court may have determined the parties' intent where the words "Deed of Reconveyance" are used in the Memo, para. 1, and the word "release" is thereafter used in paras. 2 & 3. (Ex. 15, Add. A9).

by agreement, can be made to run with the land. 165 Broadway Bldg. Inc. v. City Investing Co., 120 F.2d 813 (2nd Cir. 1941); 21 C.J.S. Covenants Section 62 (1978). Any person although owning a limited estate in property may make a valid covenant. Id. Section 3; CBN Corp. v. United States, 328 F.2d 316 (Ct. Cl. 1964).

The Consent and the recordation of the plat and CCRs released the road and these documents, together with the parties' "modification" agreement, granted access to all PUD lot owners as well as to the Sharps until the Trust Deed was paid in full. See Macaw v. Gross, 452 So.2d 1126 (Fla. Dist. Ct. App. 1984) (Partial release to be determined from whole instrument not just particular portions consistent with reason, probability and practical aspects of transaction between parties).

POINT IV

SUBSEQUENT DOCUMENTS CREATED AN EASEMENT OVER WHITE PINE LANE IN FAVOR OF THE SHARPS

White Pine Ranches argues that the trial court's finding of an easement in favor of the Sharps was gratuitous because it did not plead the existence of an easement in their Answer or Counterclaim. (WPR Brief, p. 39). It is well settled law, however, that even if both parties litigate the issue, it will be treated in all respects as if it had been raised in the pleadings. J.J.N.P. Co. v. State, 655 P.2d 1133 (Utah 1982). Here the issue of an easement was fully litigated below. In fact, attorneys for White Pine

Ranches extensively cross-examined Heaton on that issue. (Tr. 765-767, R. 1645).

Easements may be created by grant, express or implied, or by prescription. Wright v. Horse Creek Ranches, 697 P.2d 384 (Colo. 1985). Additionally, easements may be created by oral grant or estoppel. Freightways Terminal Co. v. Industrial & Commercial Constr., 381 P.2d 977 (Alaska 1963).

Here the trial court specifically found both parties by mutual intent and agreement granted the Sharps a right to use the roadway in event of default. (F. 89, R. 1351, Add. B42). The trial court further found such agreement was memorialized by letters between Felton and Heaton and by the recording of the Consent to Record. (Id).²⁶ Although White Pine Ranches argue that Heaton was not authorized to make the representations to the Sharps, Heaton testified otherwise (Tr. 751, R. 1645) and the court below has the discretion to believe one witness's testimony over another. Cook v. Gardner, 14 Utah 2d 193, 381 P.2d 78 (1963).²⁷ Heaton confirmed by telephone with Felton that "access over road [White Pine Lane] retained if Sharp develops undeveloped property." (F. 37, R. 1328, Add. B29). The conversation was

²⁶ Felton's letter of November 21, 1983 (Ex. 26, Add. C67) indicates the parties had agreed to an easement in favor of the Sharps: "It is perfectly acceptable to us [White Pine Ranches] that he [Sharp] retain an easement over White Pine Lane."

²⁷ Throughout Appellants' Brief, other citations to the testimony of Felton or Saunders are set forth as though the trial court is required to accept or believe such testimony. See, e.g., Appellant's Brief, p. 25, n. 14.

memorialized by margin notes of Heaton on a copy of Felton's November 21 letter. (Ex. 26(a), Add. C71-72). Moreover, Felton was a partner in the General Partnership and, accordingly, could bind the partnership with regard to the granting of an easement. (C. 15, R. 1359, Add. B50). Utah Code Ann. Section 48-1-6; Salt Lake City Brewing Co. v. Hawke, 24 Utah 199, 66 P. 1058 (1901).

White Pine Ranches claims that the Consent to Record does not create an easement in favor of the Sharps. In so arguing, however, White Pine Ranches ignores the fact that the Consent is attached as Exhibit "A" to the CCRs, which CCRs White Pine Ranches executed and recorded. (Ex. 51, WPR Add. 91-135). It also ignores the fact that White Pine Ranches agreed to allow access. (F. 39, R. 1339, Add. B30). This reliance and performance by the Sharps is sufficient to remedy any alleged defects under the Statute of Frauds, and create an easement by estoppel, if not by specific grant. Lyman Grazing Ass'n v. Smith, 24 Utah 2d 443, 473 P.2d 905 (1970); Randall v. Tracy Collins Trust Co., 6 Utah 2d 18, 305 P.2d 480 (1956).

POINT V

BY EXECUTING THE CONSENT TO RECORD,
THE SHARPS ARE ESTOPPED TO DENY
ACCESS TO PUD LOT OWNERS

The Sharps are estopped to deny access to the internal roadway and utilities to PUD lot owners. White Pine Ranches claims the Sharps' foreclosure will extinguish the covenants and easements created by the plat and CCRs, including the non-

exclusive easement over the roadway created in favor of the PUD lot owners. White Pine Ranches makes this argument despite:

a) The provision in all Notices of Default and Notices of Sale recorded against the Property that such Notices are: "SUBJECT TO Easements, Encroachments, Restrictions, Rights-of-Way and matters of record enforceable in law (sic) equity. (F. 56, R. 1343, Add. B34).

b) The Consent to Record grants "a non-exclusive easement for water lines, water tank and water systems [and] ... a non-exclusive easement for utilities and vehicular and pedestrian access over the private roadway." (Ex. 51, WPR Add. 91-131).

c) These same easements were reserved by White Pine Ranches when they recorded the final plat. (Ex. 1).

d) The plat and CCRs, with the Consent to Record attached as an exhibit, were recorded on December 23, 1983 by White Pine Ranches. (F. 40, R. 1339, Add. B30).

e) No objection was raised by this release procedure until after the Sharps recorded a Notice of Default on September 16, 1985. (See generally, Ex. 57; F. 40, R. 1339, Add. B30; F. 51 & 54, R. 1342-1343, Add. B33-34).

f) The Sharps perceived the Consent constituted substantial performance of any obligation under the Memo to release. (F. 60, R. 1344, Add. B35).²⁸

²⁸ See Alaska Housing Auth. v. Walsh & Co., 625 P.2d 831 (Alaska 1980) (Contractor substantially performed road construction contract where road was substantially serving its intended purpose). White Pine Ranches argues that there can be no substantial perform- (cont.)

g) A provision in the Trust Deed, paragraph 9, allows the Trustee upon request of the beneficiary (Sharps) to "(a) consent to ... any map or plat of said property; (b) join in granting any easement." (Ex. 2, Add. A2).

h) The parties' by mutual intent and agreement granted access to the Sharps in the event of default. (F. 89, R. 1351, Add. B42).

i) The Sharps repeated assurances, before and after trial, to White Pine Ranches that they did not intend to interfere through their foreclosure with White Pine Ranches' access and utility easements. (F. 88, R. 1351, Add. B42; see also, Ex. 33, Add. D85; Tr. 22-25, 27-28 & 43, R. 164).

j) Heaton's expert testimony at trial that recordation of the Consent estopped the Sharps from foreclosing upon the roadway. (Tr. 757, 765-766, R. 1645).

None of the cases cited by White Pine Ranches, however, deals with a situation as here, where the seller (mortgagee or

28 (cont.)

ance of a material term of a contract. Whether a term is material, however, is a question to be determined by the trier of fact, Matter of Bisio's Estate, 33 Or. App. 325, 576 P.2d 801 (1978) (cited by White Pine Ranches) as is the question of whether there has been substantial performance. American Petrofina Co. v. D & L Oil Supply, 283 Or. 183, 583 P.2d 521 (1978). Zions Properties v. Holt, 538 P.2d 1319 (Utah 1975), does not hold substantial performance of material terms is legally insufficient, as claimed by White Pine Ranches, but, instead, deals with the issue of whether a breach is sufficiently substantial to excuse performance by the non-breaching party.

beneficiary) consented to the recordation of CCRs and plat creating the easement. One who consents to an easement is estopped to deny its existence. North Clear Lake Dev. Corp. v. Blackstock, 450 S.W.2d 678 (Tex. Civ. App. 1970) (Successor to common grantor who deeded lots without including easement in the legal descriptions estopped to deny the existence of an easement to which its grantor had tacitly and specifically consented).

Similarly, in Monaco v. Bennion, 99 Idaho 529, 585 P.2d 608 (1978), the original owners of property depicted an access road on a plat of a subdivision of lakeshore property which was "dedicated" as a private road. A controversy arose as to the validity of the "dedication" on the filed plat. The court held "that the legal effect of illustrating a private road on a filed plat and 'dedicating' it is the creation of an easement in favor of the lot purchasers." Id. at 612. The court noted:

It is presumed that the existing private roadway added value to all of the lots embraced in the general plan of the plat, and that purchasers invested upon the faith of the assurance that such access ways to the lots and the boat launching area would not remain the totally private property of the owner. The original owner and platter, having "dedicated" the private roadway for the use of lot purchasers, is estopped to deny that which he has so plainly declared.

Id.; see also Cree Meadows, Inc. v. Palmer, 68 N.M. 479, 362 P.2d 1007 (1961) (Fee title of owner subordinate to easement granted lot owners in plat of subdivision); Ute Park Summer Homes Ass'n v. Maxwell Land Grant Co., 77 N.M. 730, 427 P.2d 249 (1967) (Purchaser of lot acquires enforceable right that common areas be used in manner designated).

That the Sharps have to argue this issue is further evidence of White Pine Ranches' straining to assert a default by the Sharps. In any other situation, it would be the developers who assert the estoppel against the Sharps. Under the common law principles cited above and in light of the nature of the executed Consent to Record cited above, its attachment to CCRs and plat, all circumstances of this case, the Sharps are estopped to deny the easement created by the Consent.

POINT VI

WHITE PINE RANCHES FAILED TO ESTABLISH A CAUSE OF ACTION UNDER SECTION 57-1-33 FOR FAILURE TO REQUEST A RELEASE

The Sharps did not violate Utah Code Ann. Section 57-1-33 by failure to reconvey.²⁹ This section is expressly applicable only when a beneficiary (Sharps) "refuses to request a reconveyance ... for a period of thirty days after written demand therefor is made by the trustor [White Pines]." The Sharps requested the Trustee, Associated Title, to reconvey Lots 1-5 on or about January 18, 1984, two days before Felton's request. (Ex. 30, Add. C74; F. 42, R. 1340, Add. B31). Because of White Pine Ranches' subsequent breaches, the Sharps were under no obligation to reconvey the roadway or the unplatted acreage. Further, the trial court found that even if there was an improper withholding by the Sharps, it was not done in bad faith. (F. 91, R. 1351, Add. B42). White Pine Ranches conceded on p. 32 of its Brief that "'good faith' may

²⁹ The text of this statute is set forth in WPR Add. 133.

be a defense ... under Section 57-1-33" and the case law amply supports such a conclusion.³⁰ See, e.g., Shibata v. Bear River State Bank, 115 Utah 395, 205 P.2d 251 (1949), and the case Hector, Inc. v. United Sav. & Loan Ass'n, 741 P.2d 542 (Utah 1987). The trial court found the Sharps' failure, if any, to request any written releases of the Property was based upon their reliance on Heaton³¹ and the modified agreement with White Pine Ranches for the retention of access to the road until the trust deed was satisfied in full. (F. 91, R. 1351, Add. B42; C. 10, R. 1356, Add. B47).

³⁰ The Sharps have never urged this defense except in reference to Section 57-1-33.

³¹ The district court did not abuse its considerable discretion in refusing to dismiss the Sharps' Counterclaim and related pleadings or in refusing to strike attorney Heaton's testimony when the Sharps produced certain of Heaton's documents on the last day of trial. (See Appellants' Brief, p. 24, n. 13). Teece v. Teece, 715 P.2d 106, 109 (Utah 1986), citing Carmen v. Slavens, 546 P.2d 601 (Utah 1976). White Pine Ranches either had these documents, they were of public record or they were not produced due to attorney/client privilege under Rule 37(b)(2)(c), Utah R. Civ. P. (Tr. 981, R. 1647). Judge Frederick was "not persuaded based on Heaton's testimony that there's been any effort afoot here to try to deprive inappropriately the Plaintiffs of their just discovery. The privilege could have easily been discovered by one as another party." (Tr. 955, R. 1646). Further, White Pine Ranches did not show any prejudice thereby. After inquiring of Heaton concerning the claimed failure to produce, White Pine Ranches rested (Tr. 975, R. 1647). Further, all of Heaton's documents were tendered to the lower court under seal in the event an in camera inspection is deemed appropriate. (Tr. 973, R. 1347). Any sanctions would be unwarranted given such circumstances. Carmen, 546 P.2d 601.

White Pine Ranches disputes the trial court's finding that the Sharps relied on the advice of counsel, alleging Sharps' testimony should be elevated to the status of a judicial admission. A judicial admission requires "the statement to be a clear, deliberate, unequivocal statement of fact, not opinion." Hayes v. Xerox Corp., 718 P.2d 929, 931 (Alaska 1986) (Counsel's estimate of damages an opinion). If the statement is not clear, is an inference or of uncertain memory or if a mistake is shown, a judicial admission does not exist. Bailey v. Mead, 260 Or. 410, 492 P.2d 798, 801 (1971); see also McCormick, Evidence Section 266 (2d ed. 1972). A "party is free to contradict and thus correct, his own testimony [or explain it]; only when his [or her] testimony taken as a whole unequivocally affirms the statement [or alleged admission] does the rule of conclusion apply." Id.³²

White Pine Ranches takes the statements claimed to be judicial admissions regarding release of the roadway and the lots out of the context of Mr. Sharp's full testimony. Mr. Sharp testified

32 Professor Wigmore notes "a party's testimony, uttered by a layman in the stress of examination, cannot with justice be given the conclusiveness of the traditional judicial admission in a pleading or stipulation, deliberately drafted by counsel for the express purpose of limiting and defining the facts in issue. Again, a general rule of conclusiveness necessitates an elaboration of qualifications and exceptions which represent a transfer to the appellate court of some of ... the judge's fact finding function. These duties call for an exercise of judgment of the judge who has heard and seen the witness. The supervision by appellate judges of this trial process can best be exercised under a flexible standard, rather than a rule of conclusiveness." Id.

and the lower court found it was his understanding he and White Pine Ranches had access to the road when he executed the Consent to Record. (Tr. 62-65, R. 1642; F. 39, 40, 42, R. 1339-1340, Add. B30-31; F. 88 & 89, R. 1351, Add. B42). Furthermore, Mr. Sharp testified, and the court found, he relied on and followed Heaton's advice concerning the releases. (Tr. 45 & 49-50, R. 1642; F. 91, R. 1351, Add. B42). In fact, Mrs. Sharp testified she also relied on Heaton's advice and Heaton may even have made the decision with regard to releasing the road. (Tr. 444-445 & 457-458, R. 1644; F. 91, R. 1351, Add. B42).

The evidence clearly supports the trial court's finding that the Sharps relied upon Heaton and the Sharps' testimony, taken as a whole, should not be termed a conclusive admission.

POINT VII

WHITE PINE RANCHES IS NOT ENTITLED TO DAMAGES OR SPECIFIC PERFORMANCE FOR ALLEGED BREACH OF CONTRACT

Because the trial court did not err in determining that White Pine Ranches breached the Contract, it is not entitled to damages, specific performance or to have the interest tolled.³³ Further, should this Court affirm the findings of the district court concerning liability, White Pine Ranches' damages arguments are moot.

³³ The court below specifically found that it was White Pine Ranches who breached the Contract, not the Sharps. (C. 3-5, R. 1355-1356, Add. B46-47). Accordingly, the trial court's rulings regarding White Pine Ranches' alleged damages, therefore, even if erroneous, were harmless and not prejudicial. Rule 5, Utah R. Evid.

A. White Pine Ranches' Contract Damages Claimed Are Too Speculative and It Is Not Entitled to Have the Difference Between Contract Price and Fair Market Value of the Property.

It is well settled law in Utah that an award of damages cannot be based on mere speculation or conjecture. Dunn v. McKay, Burton, McMurray & Thurman, 584 P.2d 894 (Utah 1978); Jamison v. Utah Home Fire Ins. Co., 559 P.2d 958 (Utah 1977); Robinson v. Hreinson, 17 Utah 2d 261, 409 P.2d 121 (1965); Bunnel v. Bills, 13 Utah 2d 83, 368 P.2d 597 (1962). Damages must be supported by proof on which reasonable minds acting fairly could believe that it was more probable than not that the damage was or will be actually suffered. Dunn, 584 P.2d 894; Jamison, 559 P.2d 958; Robinson, 409 P.2d 121; Bunnel, 368 P.2d 597. The evidence on the record must contain a degree of certainty which a reasonably accurate ascertainment of Contract damages would require. Bunnel, 368 P.2d at 602. Further, an uncertain cause of damages precludes recovery. Terry v. Panek, 631 P.2d 896, 897 (Utah 1981), citing Gould v. Mountain States Tel. & Tel., 6 Utah 2d 187, 309 P.2d 802, 805 (1957).

In the instant case, White Pine Ranches' alleged damages are too speculative. Instead, the evidence shows that White Pine Ranches failed to show any damages directly resulting from the Sharps' failure to release Lot 6, the roadway and the unplatted 7.5 acres. The trial court found:

a) The Sharps had not interfered with White Pine Ranches' attempts to sell the Property. (F. 72, R. 1347, Add. B38; see

also F. 73-74, R. 1347-1348, Add. B38-39; and F. 77, R. 1348, Add. 39-40).

b) Saunders had told a prospective purchaser he could convey Lot 6 even though it had not yet been released from the Trust Deed. (F. 75, R. 1348, Add. B39; Tr. 284, 389, R. 1643).

c) Felton had written White Pine Ranches' realtor, stating "[t]he current litigation does not affect the marketability or encumber that [Subject] property." (F. 76, R. 1348, Add. B39).

d) White Pine Ranches has "not suffered any damages, special or otherwise, as a result of any act or failure to act by the Sharps." (F. 93, R. 1352, Add. B43).

B. The District Court Properly Excluded White Pine Ranches' Evidence Regarding the Interest on the Construction Loan.

The Utah Supreme Court in Ranch Homes, Inc. v. Greater Park City Corp., 592 P.2d 620, 624 (Utah 1979) has set forth the guidelines for awarding special damages:

[T]he only damages recoverable are those that could be reasonably foreseen and anticipated by the parties at the time the contract was entered into. Mere knowledge of possible harm is not enough; the defendant must have reason to foresee, as a probable result of the breach, the damages claimed. Furthermore, before reliance damages may be awarded, the amount of the expenditure must be found to have been reasonably made.

Id. (emphasis in the original); see also Restatement (Second) of Contracts Section 47, comment e (1982). In Ranch Homes, the Court held that even though the sellers of the real property breached the option contract, the developers could not recover damages for managerial "quarter-backing," architectural, engineering, legal services or logo and brochure design because such expenditures

were not reasonably foreseeable. Id. See also Conner v. Southern Nev. Paving, 741 P.2d 800, 801 (Nev. 1987) (Interest on contractor's construction loan held not contemplated or foreseeable at the time of agreement).

As in Ranch Homes and Conner, the Sharps did not and could not reasonably foresee that White Pine Ranches would finance the improvements and thereby incur interest. (Tr. 72-73, R. 1642).³⁴ Instead, White Pine Ranches may have sought to raise the money through equity financing³⁵ or may have chosen to pay cash. Further, in both actions, White Pine Ranches admitted the construction damages were "unforeseeable," "unreasonable" and "intolerable." (Ex. 84, Add. D86; Tr. 209-210, 212, 222-223, R. 1643; Tr. 508, 528-529, R. 1644).

C. White Pine Ranches Is Not Entitled to Interest on Installments.

In order to be entitled to recover interest on the purchase price paid to a seller of real property, the buyer must be deprived of the use and possession of the property. Dillingham Commercial Co. v. Spears, 641 P.2d 1 (Alaska 1982); see also Bembridge v. Miller, 235 Or. 396, 385 P.2d 172, 178 (1963) (Purchaser has a right to possession and vendor a right to interest on

³⁴ In the Federal Court litigation, White Pine Ranches sought to recover these same damages from Summit County and the SBSID, alleging their actions caused the losses. (F. 70, R. 1347, Add. B38.)

³⁵ In fact, White Pine Ranches did just this when admitting new partners Rees and Howell. (Ex. 48, 49; Tr. 81-82, R. 1642.)

the unpaid purchase price. Fruits of possession and interest mutually exclusive, neither party has right to both).

Malecky v. Malecky, 148 Ariz. 121, 713 P.2d 322 (App. 1985), cited by White Pine Ranches, is not germane to the case at hand. In Malecky, a wife gave her husband money to purchase a home. The court later found the home was the ex-husband's separate property and, since the transaction was in the nature of a loan, accordingly awarded interest thereon. In Rose City Transit Co. v. City of Portland, 18 Or. App. 369, 525 P.2d 1325 (1974), the court recognized that interest and possession are mutually exclusive.

In this case, White Pine Ranches has continually enjoyed the continuous use and possession of the Property. There is no element of uncompensated use by the Sharps of White Pine Ranches' money.

D. White Pine Ranches Is Not Entitled to Specific Performance of the Contract or to Have the Principal Interest Accruing on the Trust Deed Note Tolloed.

Because the Sharps did not breach the agreement, as discussed above, White Pine Ranches is not entitled to specific performance. Shepherd v. French, 612 P.2d 727 (Okla. Ct. App. 1980). Thus, White Pine Ranches is not entitled to have the principal and interest on the Trust Deed Note tolled.

The cases on which White Pine Ranches relies, Pack v. Hall Dev. Co., 667 P.2d 39 (Utah 1983); Blomquist v. Bingham, 652 P.2d 900 (Utah 1982); Amoss v. Bennion, 23 Utah 2d 40, 456 P.2d 172 (1969); and Dillingham Commercial Co., 641 P.2d 1, do not support

a claim for tolling interest. In Pack, the court noted that interest will not be allowed if the seller has in some way prevented the buyer from taking possession.

In Blomquist, the court held where a vendor refused to close, the buyers were relieved of interest because they were not in "actual or beneficial possession and did not divest sellers of actual possession." 652 P.2d at 902. Amoss also deals with a buyer out of possession of the land. 456 P.2d at 174, 175. Once a purchaser is placed in possession, however, interest under the contract begins to accrue. The holding in Dillingham Commercial Co. is also similar. 641 P.2d at 10.

Unlike the above cases, White Pine Ranches here has never been out of possession of the Property, and its marketing efforts over the years clearly show it has enjoyed the use of the Property. (F. 72 & 77, R. 1347 & 1349, Add. B38-40). Finally, because White Pine Ranches breached the Contract and enjoyed the possession of the Property without interference by the Sharps, it cannot now substantiate a claim that the trial court erred in refusing to grant White Pine Ranches specific performance.³⁶

POINT VIII

THE SHARPS ARE ENTITLED TO THEIR ATTORNEY'S FEES, WHICH FEES WERE REASONABLE

A. The Terms of the Contract Authorize the Award of Attorney's Fees.

In Utah, where provided for by contract, the award of attorney's fees is left to the sound discretion of the trial court.

³⁶ White Pine Ranches cannot claim both specific performance and damages under the contract. The two claims are inconsistent remedies. Cook v. Clovey Ballard Motor Co., 69 Utah 161, 253 P. 196 (1927).

Dixie State Bank v. Bracken, 764 P.2d 985, 988 (Utah 1988); Turtle Mgt. v. Haggis Mgt., 645 P.2d 677 (Utah 1982). The parties' Contract includes numerous provisions for the award of attorney's fees to the Sharps. (F. 77, R. 1348-1349, Add. B39-40). "Provisions and written contracts providing for the payment of attorney's fees should ordinarily be honored by the courts." Soffe v. Ridd, 659 P.2d 1082 (Utah 1983). White Pine Ranches was found by the lower court to be in breach of the Trust Deed, Trust Deed Note and Memo. (C. 2-6, R. 1355-1356, Add. B46-47).

Three separate provisions of the Trust Deed alone provide for the recovery of attorney's fees. (Ex. 2, Add. A1-4). Paragraph 6 provides that the beneficiary (Sharps) "may commence, appear in and defend any action ... and ... employ counsel, and pay his reasonable fees." Paragraph 7 then requires trustor (White Pine Ranches) to "pay immediately" "all sums expended hereunder by Beneficiary," especially including sums expended in paragraph 6. Finally, under paragraph 16, the Sharps are entitled to "foreclose the Trust Deed [and] ... recover in such proceeding all costs and expenses incident therein, including a reasonable attorney's fee."

The word "incident" as used in paragraph 16 means pertaining to or involved in although not an essential part of another thing. Amarillo Lodge No. 731 v. City of Amarillo, 473 S.W.2d 264 (Tex. Civ. App. 1971), rev'd on other grounds, 488 S.W.2d 69 (Tex. 1973). As set forth below, the Sharps' "defending" of the Complaint pertains to the foreclosure of the Trust Deed.

The Trust Deed Note provides that if it "is collected by an attorney after default ... the undersigned [White Pine Ranches] ... agree to pay ... a reasonable attorney's fee." (Ex. 3, Add. A5-6).

In Stubbs v. Hemmert, 567 P.2d 168 (Utah 1977), the Utah Supreme Court denied attorney's fees to the plaintiff in defending a counterclaim which did not relate to the collection of a note or foreclosure of the property. The issues in this case all relate to the collection of the Trust Deed Note and foreclosure of the Property. It is White Pine Ranches who alleged the Sharps were not entitled to foreclose by virtue of the very issues it now claims to be unrelated to such foreclosure. See, e.g., Barker v. Johnson, 591 P.2d 886 (Wyo. 1979) (Award of attorney's fees proper even though action instituted by buyer for specific performance and seller asserted counterclaims of possession and quiet title); First State Bank v. Hoehnke Nursery Co., 63 Or. App. 816, 667 P.2d 1022 (1983) (In an action to foreclose on a mortgage or trust deed, bank's contractual right included right to collect attorney's fees in connection with actions or suits that might be required to collect its debt in full and to realize on its security).

Finally, under the Memo, para. 11, the defaulting party shall pay all expenses of enforcing the same or any right arising out of breach or default, including reasonable attorney's fees. (Ex. 15, Add. A12). The word "enforce" as used in the Memo generally means to give effect to or compel obedience to, including to

breach of the Contract. See Fortier v. Donna Anna Plaza Partners, 747 F.2d 1324 (10th Cir. 1984). The words "arising out of" as used in the Memo, mean a transaction which is connected with the subject of the action. See County Plains Corp. v. Nosband Corp., 234 A.D. 588, 256 N.Y.S. 10 (App. Div. 1932) (Defenses to a foreclosure action that the plaintiff wrongfully induced the lender to withhold final payment under the loan contract and failed to release lots as agreed were proper subjects of a counterclaim as "arising out of" the contract).

The Utah Supreme Court has held where rights under an agreement are denied, the non-defaulting party may take legal action to enforce the agreement and collect reasonable attorney's fees from the defaulting party. Trayner v. Cushing, 688 P.2d 856 (Utah 1984) (Award of attorney's fees denied to the "prevailing party" since each party was successful on one or more points).

White Pine Ranches breached the parties' Contract, requiring the Sharps to enforce the Contract and defend against the allegations of White Pine Ranches arising out of that breach. Accordingly the Sharps are entitled to recover their reasonable attorney's fees.

B. The Attorney's Fees Incurred by the Sharps Were Reasonable.

In this matter, White Pine Ranches has repeatedly asserted that the case was difficult and complex. The trial court also deemed the case to be "somewhat complicated." (Tr. 128, R. 1642). The Sharps were required to defend, in a trial which lasted nearly six days, issues dealing with breach of Contract,

failure to release, release of a particular lot and the internal roadway, release of unplatted acreage, failure to reconvey, slander of title, failure to convey a 10.5 strip of land to the County for another roadway, the demand to pay a 1/6 and then 1/13 share of White Pine Ranches' total costs for improvements on the Property, slander of title, allegations of fraud, and claims for unjust enrichment. (See generally White Pine Ranches' Complaint, R. 2-89). In the process, numerous witnesses were called to testify at trial and over 125 exhibits were introduced. Further, counsel for the Sharps was required to file, brief and argue numerous motions and engage in the extensive discovery. (See generally R. 128-1628). Given this background, it is obvious Sharps' counsel performed substantial legal services which were needed to prosecute their counterclaim and defend against White Pine Ranches' Complaint and the trial court so found. (F. 99, R. 1354, Add. B45) (see Cabrera v. Cottrell, 694 P.2 622 (Utah 1985)). Under the case law cited below, the trial court's finding should be sustained.

The amount involved in this controversy greatly exceeded one-half million dollars and the Sharps clearly prevailed on all issues asserted. Here, the trial court, without objection from White Pine Ranches, directed Mr. Winder to proceed by filing an Affidavit. "It is this Court's view that Mr. Winder should submit an affidavit in support of his claim for attorney's fees on behalf of the Defendants [Sharps]." (Tr. 9, R. 1651). The testimony of a prevailing party's attorney as to the reasonableness of attor-

ney's fees is sufficient evidence. Dixie State Bank, 764 P.2d. at 989.³⁷ The court accepted the unrebutted Affidavits of Mr. Winder, with itemized billing statements and a signed fee agreement letter attached thereto. (Cf. F. 97, R. 1353, Add. B44; Tr. 56, R. 1640; R. 1285-1320). Such an unrebutted affidavit is competent evidence for an award of attorney's fees. Freed Finance Co. v. Stoker Motor Co., 537 P.2d 1039, 1040 (Utah 1975) (Attorney's fees cannot be awarded without a stipulation, unrebutted affidavit or evidence).

Finally, White Pine Ranches' claim that post judgment attorney's fees and fees incurred on appeal are not recoverable is not the law in Utah. In Bates v. Bates, 560 P.2d 706 (Utah 1977), attorney's fees for pursuing an appeal were awarded and Rule 4-506(3) of the Utah Code of Judicial Administration specifically recognizes the award of post judgment attorney's fees in default judgments.

³⁷ The reasonableness of the number of hours spent on the case and the fee customarily charged in the community for similar services can be gauged from reviewing the redacted statements of attorney's fees attached to Plaintiffs' Third Supplemental Response to Defendants' First Set of Interrogatories dated February 27, 1988. (R. 1305-1320). White Pine Ranches' counsel, Mr. Anderson, bills his time at \$160.00 per hour, Mr. Watkins' time at \$135.00 per hour, and Mr. Gaylord's time at \$60.00 per hour; higher fees than are reflected in the Affidavits of Attorney's Fees submitted by the Defendants. Further, Hansen & Anderson charged higher fees than Winder & Haslam for the opposite side of the same case. For example, Hansen & Anderson's statement for November 16 through December 12, 1987 was \$14,786.75. In comparison, Winder & Haslam's statement for both November (\$2,401.00) and December (\$10,992.00), was less.

In summary, the Contract documents in this case should be treated as an integrated whole (see Point II, supra) and the attorney's fees provisions in each should be applicable to the breach of any. The issues litigated in this matter were clearly related to the rights of the Sharps to foreclose and to collect after White Pine Ranches defaults. White Pine Ranches itself recognized the Sharps' foreclosure activities in obtaining a temporary restraining order to restrain the Trustee's Sale of the Property in September of 1986. The factors for determining reasonableness have been met in this case and the un rebutted Affidavit of Mr. Winder is competent evidence from which the Court can determine an award of attorney's fees. The Sharps are, therefore, entitled to their attorney's fees in accordance with the terms of their Contract.

CONCLUSION

As noted in the Summary of Argument, this case is really very simple. The trial court found White Pine Ranches breached material terms of the Contract by, inter alia, failing to pay taxes and annual principal installments. When White Pine Ranches requested certain releases for the first time, it was already in default and the Sharps' performance was excused. Under the numerous attorney's fees provisions in the Contract documents, the Sharps are entitled to their reasonable attorney's fees. Thus, the Sharps respectfully request this Court to affirm the Judgment entered by Judge Frederick.

DATED this 27th day of September, 1989.

WINDER & HASLAM
Attorneys for Defendants/
Respondents Sharps

By Donald J. Winder
Donald J. Winder

By Kathy A. F. Davis
Kathy A. F. Davis

By Tamara K. Prince
Tamara K. Prince

CERTIFICATE OF MAILING

I hereby certify that I caused four true and correct copies of the foregoing RESPONDENTS' BRIEF TO SAUNDERS, ET AL. to be mailed, postage prepaid, on this 27th day of September, 1989, to the following:

Robert M. Anderson
Glen D. Watkins
Mark R. Gaylord
Sixth Floor
Valley Tower Building
50 West Broadway
Salt Lake City, Utah 84101

John B. Anderson
ANDERSON & HOLLAND
623 East 100 South
P. O. Box 11643
Salt Lake City, Utah 84147

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

Donald J. Winder

Tab A

WHEN RECORDED, MAIL TO:

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:

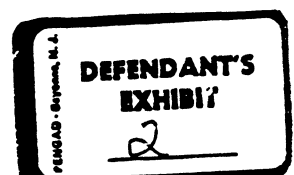
SEE EXHIBIT "A" ATTACHED HERETO AND BY THIS REFERENCE INCORPORATED HEREIN.

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.

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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, Trustor 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 exercising 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, 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, Trustee 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 therein of any matters 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, royalties, issues, 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 said 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 notice.

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 written notice of default and of election to cause said property to be sold to satisfy the obligations hereof and Trustee shall file such notice for record in each county wherein said property or some part or

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 on the date and at the time and place designated in said notice of sale, either as a whole or in separate parcels, in such order as it may determine (but subject to any 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 its 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 Trustee's and attorney's fees; (2) cost of any evidence of title procured in connection with such sale and revenue stamps on Trustee'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 its 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 hereto, 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.

21. 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

ROBERT FELTON

LEON H. SAUNDERS

INTERSTATE RENTALS, INC.

BY

(If Trustor an individual) KENNETH R. NORTON, President

STATE OF UTAH ss.
COUNTY OF Salt Lake

On the 16th 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.

Notary Public residing at:

My Commission Expires: 5-18-85

Salt Lake County

(If Trustor a Corporation)

STATE OF UTAH ss.
COUNTY OF Salt Lake

On the 16th 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.

Notary Public residing at:

My Commission Expires:


5-18-85

Salt Lake County

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.



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 mid 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 endorser 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 provisions 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 REVERLS, INC.,

BY: Herbert R. Norton
HERBERT R. NORTON, President

Paul H. Langer
PAUL H. LANGER

Robert F. Felt
ROBERT FELT

Leon H. Saunders
LEON H. SAUNDERS

Herbert R. Norton
HERBERT R. NORTON

ADDENDUM

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

1. The entire principal balance of 963,055⁴⁰/₁₀₀ 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. SAUNDERS, Trustor

INTERSTATE RENTALS, INC., (Trustor)

BY Kenneth R. Norton
KENNETH R. NORTON

PAUL H. LANDES, Trustor

Kenneth R. Norton
KENNETH R. NORTON

TO JOHN C. SHARP JR., SALT LAKE CITY, UTAH December 9, 1980

CONSIDERATION Leon H. Saunders, Robert Felton, Kenneth R. Norton & Paul H. Landes

Twenty-Five Thousand and no/100- DOLL

See attached plat locating approximate boundaries of property. Property consists of 70 acres, more or less, as generally outlined on the attached Exhibit "A". No water rights are transferred by Seller hereunder. Property is sold together with access from the County road but subject to easements, encroachments, restrictions, rights-of-way and matters of record or enforceable in law or equity.

Submit County State of Utah

Twenty-six thousand three hundred fifty per gross acre

25,000.00 which represents the agreed-upon deposit receipt of which is hereby acknowledged by you

100,000 on but no later than 1/31/81; \$495,000 on delivery of deed or final closing

equal annual installments of principal and interest, the first such payment being due one year after closing. Closing shall be immediately upon recording of Buyer's PUD. Buyer to provide as rapidly as possible to recording. In all events, closing shall be no later than 6/30/81.

As additional consideration from Purchaser to Seller, at closing, Purchaser shall sell to Seller at a cost to Seller of \$100,000 cash, 50 acre/feet of irrigation water rights from Weber River Decree Awards 411 (Priority 1860) and 416 (Priority 1861). Buyer, at his option at any time, may pay amounts in excess of payments upon the unpaid balance, but no more than 50% of total principal shall be paid by Buyer in any one calendar year without Seller's advance written approval.

Interest at 12% per annum on the unpaid portions of the date of closing

None

CONTRACT OF SALE OR INSTRUMENT OF CONVEYANCE TO BE MADE ON THE APPROVED FORM OF THE UTAH SECURITIES COMMISSION IN THE NAME OF THE PURCHASER OR ITS PARTNERSHIP WHILE PINE RANCH. This contract is not assignable by Purchaser without the written approval of the seller.

This payment is in full and does not constitute a loan or advance of the seller's funds.

In the event the purchaser fails to pay the balance of said purchase price or complete said purchase as herein provided the amounts paid herein shall be returned to the seller and agreed damages.

If a deed is not received and agreed to the terms written in this receipt constitute the entire Preliminary Contract between the purchaser and the seller, and that no verbal agreement shall be given by either party.

We do hereby agree to carry out and fulfill the terms and conditions specified above and the seller agrees to furnish good and marketable title with shortest time to date.

The contract to Seller or the note secured by deed of trust prepared by Seller, as Seller may elect, shall provide for late payment penalty and shall provide Purchaser with a release of lot for every principal payment of 130% of initial per lot principal balance of the obligation.

The down payment shall release three four-acre to five-acre lots and the property required for the approved roadway. Unless Seller agrees, no release of any property is required until the completion of the transfer of ownership of the water rights and the final recording of the Plat.

Purchaser's development plans presently anticipate 12 to 15 four-acre to five-acre lots and such plans shall be subject to the reasonable approval of Seller. Notwithstanding anything to the contrary contained within the language of this Earnest Money Agreement, the parties agree that Seller is not willing to sell the Property unless from the date of execution hereof to closing, all efforts fail to find suitable like property or properties qualifying for a tax-deferred exchange under the applicable provisions of the Internal Revenue Code for purchase by Purchaser and exchange with Seller.

Failing to find suitable like exchange property or properties by such time, Seller is willing to sell the Property but under no other circumstances. Purchaser is willing to exercise best efforts to consummate an exchange. Purchaser and Seller covenant that each will exercise its best efforts from and after the time of signing of this Agreement to seek out suitable exchange property or properties qualifying for a tax-deferred exchange of the Property.

Each party covenants and warrants that it will immediately notify the other should such property or properties so qualifying be found. The decision regarding the suitability of the property for exchange and ownership by Seller shall rest with Seller. The parties acknowledge that the provisions herein regarding the sale of the subject Property shall apply if and only if, despite the best efforts of the parties hereto, their agents and other parties in the real property business, suitable like property for exchange is not obtained, by closing.

At a time desired by Seller, Purchaser shall allow Seller to look 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. Purchaser and all of them (through Ken Norton or otherwise) shall exercise best efforts to transfer to Seller as the water rights (or with Seller approval in lieu of the water rights) alluded to above the irrigation water available to Purchaser or persons in concert with Purchaser that is most useful to Seller's adjacent property.

No work shall be allowed on the property until closing. Until closing, no publicity or release of information regarding this sale shall be made by any party except as necessary to perform actions required hereunder. If Buyer pays the note or contract through approved prepayment plan five years, Buyer shall pay as additional sums a prepayment charge of \$10,000 for each year less than five years that payment is made.

12-9-80

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DEFENDANT'S EXHIBIT 161

STAFF TRAINING

031228.1

100

1990

LOT 8 57.012

757 40.00 AC

2075-407

127 9 2508528-

01234567

EXHIBIT "A"

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").

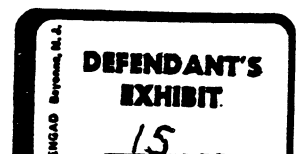
This Memorandum is executed for the express purpose of describing those matters agreed upon by the parties hereto which survive the closing of the transaction.

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 road-way.

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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.

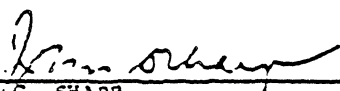
10. Time is of the essence of this Memorandum and it may not be orally changed, modified or terminated except in writing signed by the party against whom the same is sought to be enforced. The terms of this Memorandum shall apply to and bind the heirs, executors, administrators, successors and assigns 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 16th day of July, 1981.

SELLER:

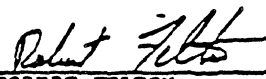


JOHN C. SHARP



GERALDINE Y. SHARP

BUYER:

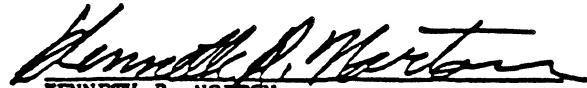


ROBERT FELTON



LEON H. SAUNDERS

BUYER:


KENNETH R. NORTON


PAUL H. LANDES

OWNER'S DEDICATION

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 INCUMBRANCES 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.

IN WITNESS WHEREOF, I HAVE UNTO SET MY HAND THIS _____ DAY OF _____, A. D. 1981.

LEON R. SAUNDERS, AN INDIVIDUAL



Recorded at Request of _____

at _____ M. Fee Paid \$ _____

by _____ Dep. Book _____ 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 thereingrantor 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

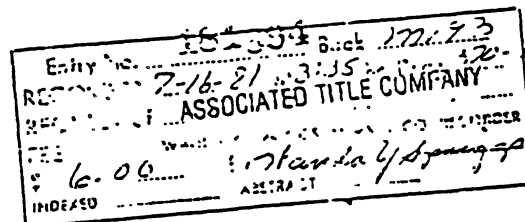
of Salt Lake City, Utah for the sum of

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, } ss.
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

ORDER NO. 15205-2935

0016

1772-1773

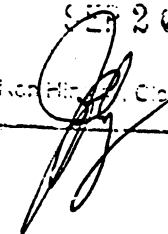
SUBJECT TO Easements, Encroachments, Restrictions, Rights-of-Way and matters of record enforceable in law or equity.

Tab B

FILED

FILED IN CLERK'S OFFICE
Salt Lake County Utah

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

SEP 26 1988
H. DICKER HILL, Clerk 3rd Dist. Court
By  Deputy Clerk

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.

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.,

FINDINGS OF FACT

AND

CONCLUSIONS OF LAW

Civil No. C87-1621

Judge J. Dennis Frederick

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

0017

001326

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.

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,

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

1988, having heard and ruled upon the Plaintiffs' Objections to Defendants' Proposed Findings of Fact and Conclusions of Law and Plaintiffs' Proposed Alternate and Additional Findings of Fact and Conclusions of Law and upon Plaintiffs' Objection to Affidavit in Support of Request for Attorneys' Fees (including a similar motion filed by Norton) on September 16, 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,

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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.

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

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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 provided 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:

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

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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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

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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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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.

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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).

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).

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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-

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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

(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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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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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.

[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:

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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

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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

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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).

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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

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.

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99. The services rendered by the law firm of Winder & Haslam, excluding legal research related to attorney's malpractice, 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 affect 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). For a period of time after the filing of the first Notice of Default on or about September 23, 1983, and after the filing of the Notice of Default on September 16, 1985 (R. 793), attorney Heaton did 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

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 the non-exclusive easement in favor of the unplatted acreage.

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.

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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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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

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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:	\$ 2,881.04
iii. Attorneys' fees through August 31, 1988:	\$ 144,088.75

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.

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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 \$28,570.63 for their interest, attorney's fees and other damages incurred as a result of the issuance of the wrongful Temporary Restraining Order, and for which amounts the Sharps are not secured by the fair market value of the Subject Property.

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

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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 26th day of Sept, 1988.

BY THE COURT:

Hon. J. Dennis Frederick

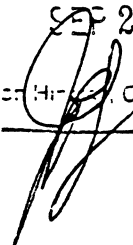
ATTEST
H. DIXON HINDLEY
Clerk

By [Signature]
Deputy Clerk

RECEIVED

FILED IN CLERK'S OFFICE
Salt Lake County Utah

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

SEP 20 1988
H. Dixon Hinkley, Clerk 3rd Dist. Court
By  Deputy Clerk

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.

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

Bk 214 No. 2836
9-27-88-8:05 am

JUDGMENT

Civil No. C87-1621

Judge J. Dennis Frederick

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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:	\$ 2,881.04
	iii.	Attorneys' fees through	
		August 31, 1988:	\$ 144,088.75

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 \$28,570.63, and for which amounts the plaintiffs are not secured by the fair market value of the subject premises.

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

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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' 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

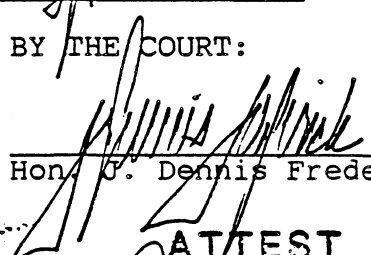
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Phase I and the owners and purchasers thereof (including the Sharps) and their heirs and successors in interest for water lines, water tank and water systems over, under and across the subject premises near the southwest corner of the unplatted acreage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

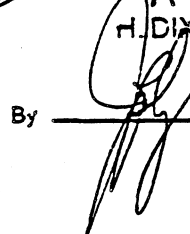
IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the final plat and Declaration of Protective Covenants recorded for White Pine Ranches Phase I with the Summit County Recorder's Office and the non-exclusive easements set forth above shall remain in full force and effect, and not be affected by the foreclosure 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 26th day of Sept., 1988.

BY THE COURT:


Hon. J. Dennis Frederick

ATTEST
H. DIXON HINDLEY
Clerk

By  Deputy Clerk

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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"

001377

Tab C

Law Offices
SPECIALE & FELTON
Suite 220 Coordinated Financial Center
324 South State Street
Salt Lake City, Utah 84111
801 359-9218

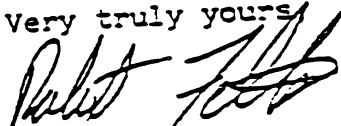
June 30, 1982

Mr. John Sharp

Dear Mr. Sharp:

Enclosed is the payment due June 30, 1982, for the purchase of the property in White Pine. The total payment of \$308,177.69 is composed of \$192,611.06 principal and \$115,566.64 interest. Upon final plat approval, we will notify you to obtain the releases for the lots and the road as per the contract.

Very truly yours,


Robert Felton

RF/tp

ENCLOSURE

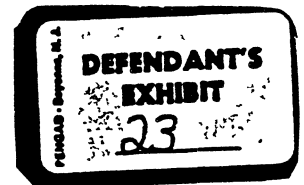
RECEIVED - Bureau, U.S.

DEFENDANT'S
EXHIBIT

21

Law Offices
SPECIALE & FELTON
Suite 220 Coordinated Financial Center
324 South State Street
Salt Lake City, Utah 84111-2303
801 359-8218
July 19, 1983

John Heaton
Attorney At Law
424 East 500 South No. 300
Salt Lake City, UT 84111



Re: Sharp Property

Dear John,

I was writing this letter to inquire about obtaining the release from Mr. and Mrs. Sharp for the road and five lots. Under the MEMORANDUM OF CLOSING TERM we are entitled to three lot plus one for the payment of each \$140,000.00 in principal. The principal has been reduced by over \$380,000.00 and under the terms of our agreement we would be entitled to the roadway and the five lots.

At the present time the plat has not been filed and that is why I am making this request. As soon as we file the plat real estate taxes on this property are going to go up significantly, which we would like to avoid until we have an actual buyer ready for one of the lots. At the same time, we are anxious to obtain an improvement loan and having title to the prescribed acreage would greatly assist us in that.

We redesigned the subdivision a little bit so that it will be in two phases. The first phase constitutes exactly five lots and I am enclosing a copy of the plat for your perusal. It is this property plus the road which we would like to have deeded to the partnership. I think this substantially complies with our agreement and I would appreciate it if you would talk to Mr. Sharp about it.

Also, you might tell Jack that I have put a horrendous amount of work dueling with Dr. Osguthorpe to guarantee the public nature of this road without any cost to him. At the present time we have obtained Summary Judgment that the road is a public road three rods wide. It is anticipated that this mat-

ter will be appealed since Dr. Osguthorpe is as mad as a wet hen.
Please let me know if this is alright and I will send the deeds
over for your clients' signature.

Very Truly Yours,

A handwritten signature in black ink, appearing to be 'Robert Felton', with a long horizontal stroke extending to the right.

ROBERT FELTON

RF/lm

PRINCE, YEATES & GELDZAHLER

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

LAWYERS
THIRD FLOOR MONT PLAZA
424 EAST FIFTH SOUTH
SALT LAKE CITY, UTAH 84111
1808 521-3780

1800 PARK AVENUE
P. O. BOX 38
PARK CITY, UTAH 84060
1808 521-3780-1808 646-7440

TELECOMER
(801) 521-9817

M. L. MULLNER 1883-1875
JOHN K. MANGUM 1930-1871

November 18, 1983

OF COUNSEL
MAX K. MANGUM
LYLE H. WARD

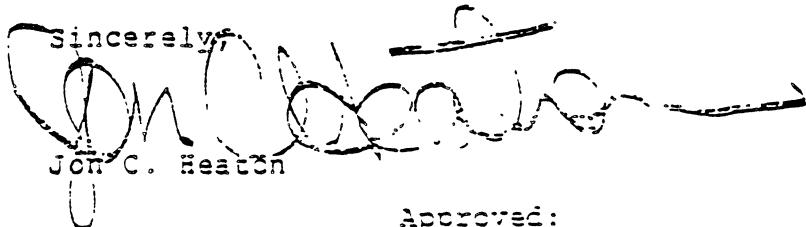
Mr. John Sharp
5068 Holladay Boulevard
Salt Lake City, Utah 84117

Re: White Pine Ranch Property

Dear Jack:

Enclosed please find the Covenants, Conditions and Restrictions and the subdivision plat that Ey 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 Ey'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 Ey 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.

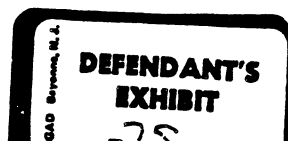
Sincerely,



John C. Heaton

Approved:

JCH:pe
Encl.
1988



PRINCE, YEATES & GELDZAHLER

F. S. PRINCE
ROBERT M. YEATES
DAVID S. GELDZAHLER
FREDERICK S. PRINCE, JR.
DENIS R. MORRILL
JOHN C. HEATON
JOHN P. ASHTON
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GEOFFREY W. MANGUM
JAMES A. BOEVERS
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RONALD E. NEHRING
JEFFREY R. ORITT
ROSALIE E. WALKER
J. FREDERIC VORCS, JR.
DAVID K. BROADBENT

LAWYERS
THIRD FLOOR HONY PLAZA
424 EAST FIFTH SOUTH
SALT LAKE CITY, UTAH 84111
1801 521-3760

1800 PARK AVENUE
P. O. BOX 38
PARK CITY, UTAH 84060
1801 521-3760-1801 648-7440

TELECOPIER
1801 521-9517

H. 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:

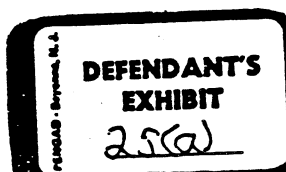
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Sincerely,

Jon C. Heaton

Approved:

JCH:pe
Encl.
13983



By _____

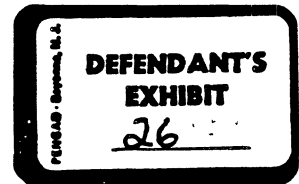
0000

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

November 21, 1983

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

RE: White Pine Ranch Property



Dear Jon:

Hy 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.

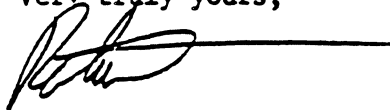
In any event, Mr. Sharp has required that we live up to the exact terms of our agreement. I can only insist that he now live up to the exact terms as written. There is no provision for the reservation of an unnecessary easement

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 'Robert Felton', followed by a long horizontal line extending to the right.

Robert Felton

RF/tp

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

Law Offices

SPECIALE & FELTON

Suite 220 Coordinated Financial Center

324 South State Street

Salt Lake City, Utah 84111-2303

801 359-9216

November 21, 1983

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

RE: White Pine Ranch Property

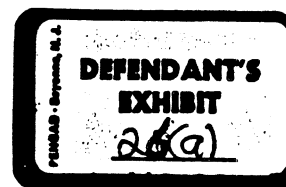
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In any event, Mr. Sharp has required that we live up to the exact terms of our agreement. I can only insist that he now live up to the exact terms as written. There is no provision for the reservation of an unnecessary easement

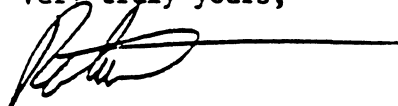


across our road which would result in rewriting the covenants on the property, place an unreasonable burden upon the property to be conveyed, and very possibly cause us to lose our construction financing.

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

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

January 17, 1984

John Heaton
424 East 500 South
Salt Lake City, Utah 84111

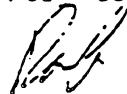
RE: White Pine Ranches

Dear John:

Because of the time, expense, and requirements which Summit County has imposed upon us, it appears that it will be impractical to develop the twelve (12) lots at White Pine as single family residential. It is our intent to develop tasteful, multi-family developments on the thirty (30) acres which have not been platted.

Would you please request Mr. Sharp for his consent as to this change in our original plan. I certainly don't have any problem if he retains some sort of review so he protects property and the development is not too obnoxious. What we plan to do is to do a very tasteful and discrete multi-family development on the thirty (30) acres which is the only way it will be economically feasible. I would appreciate it if you would ask Mr. Sharp to send us his consent for this change in concept.

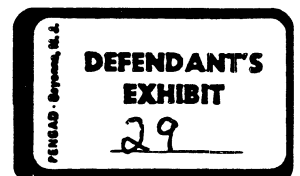
Very truly yours,



Robert Felton

RF/tp

0073



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:

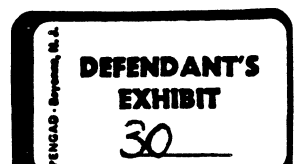
Hy talked to me on January 20, 1984, and to my astonishment, told me that we have not received the deed on our lots from Mr. Sharp. Would you please call me and confirm or explain what the situation is.

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



Law Offices
SPECIALE & FELTON
5 Trad Center, Suite 585
Salt Lake City, Utah 84180
(801) 359-9216

September 24, 1985

Mr. John Sharp
10 West 300 South
Suite 201
Salt Lake City, Utah 84101

RE: White Pine Ranches

Dear Mr. Sharp:

I received a Notice of Default regarding Hy's inability to pay his share of the June 30th payment to you.

I wanted to touch base with you to assure you that I am not ignoring this problem and am very concerned since I have made my portion of the payment and am prepared to complete the final payment next year.

In any event, I wanted to assure you that every attempt is being made to resolve the problem and I should have a better idea in a couple of weeks as to the ability of the remaining interest to satisfy that obligation.

When I have a better feel for what can be done I will give you a call and I would like to sit down and discuss it with you.

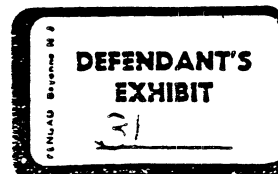
Very truly yours,



Robert Felton

RF/tp

0375



Law Offices
SPECIALE & FELTON
5 Triad Center, Suite 585
Salt Lake City, Utah 84180
(801) 359-9216

February 24, 1986

Mr. John Sharp
3000 Connor
Salt Lake City, Utah 84108

Dear Jack:

I will try and explain to you the difficulties we have encountered regarding White Pine Canyon Road which has been one of the fundamental problems in the delay of our project and is one of the causes of our inability to now complete the timely payments to you.

When the property was purchased from you it was understood that there was a 49.5 foot right-of-way from the State Highway up to the property. We operated on that assumption when we purchased the property.

In any event, as a condition of the approval of our development, Summit County imposed a requirement that we widen the County road in accordance with County standards to 24 foot driveable surface. After having us agree to that condition the County, and especially Mr. Strebel, informed us that D.A. Osguthorpe contested the existence of a County road and the width. The County was and continues to be unwilling to go to bat for us or pursue any legal remedies at all in regards to this road and, therefore, we were given the ultimatum that if we wanted to develop this property it was our problem to deal with Dr. Osguthorpe.

As a result we were forced to file a lawsuit against Osguthorpe which finally ended up in a Summary Judgment proceeding in the summer of 1983, almost two years later. The District Court Judge stated that where Osguthorpe has property just below you the County road was 49.5 feet wide.

Because of the financial constraints that this delay had placed upon us, in conjunction with other problems, we had no choice but to go ahead and perform the required task, even though that case has now been appealed to the Supreme Court and should it be overruled we would be out of business.

DEFENDANT'S
EXHIBIT

34

I think you have to understand that at no time had anyone, yourself or the County, ever come to our assistance to help accomplish or solve this problem and the result is still up in the air almost five years after we started.

There is another part of this dilemma which has further confused this issue. The County has used a tax-exempt description of a road three rods wide originating out of the Condas litigation in 1928 and 1980. Those cases described White Pine Canyon Road above us as a road three rods wide which appears to go right through the middle of your house.

If you will look on the attached map you will see a red line which goes through the middle of your property. That is the described White Pine Canyon Road as set forth in the County's tax-exempt description. The existing road is marked by the black line.

If these problems are not enough, there has been a further complication. In 1956 Jim Ivers and his wife deeded the County a three road right-of-way to try and clear up any discrepancy in White Pine Canyon Road where it abutted their property. However, because of a mistake by the surveyor, the road that was described does not conform exactly to that on the ground. If you will refer to the attached plat you will see the blue line which describes the description in the 1956 deeds. You will see that a majority of the description exists next to the long right-of-way coming off the State highway but at the bend appears to veer off the traveled surface somewhat. Also, the description does not join about half way up the straight-of-way. This problem, in and of itself, would not have been crucial except for a secret arrangement which the County entered into with the Estate of Jim Ivers commencing in 1981 and culminating in 1983.

You should keep in mind that during the period of 1981 to 1983 we are actively involved in litigating the existence and width of a portion of White Pine Canyon Road with Dr. Osguthorpe on behalf of the County.

In any event, in early 1981, Stan Strebel acting on behalf of the County enters into secret negotiations with the attorney for Jim Iver Sr.'s Estate to change the deeded right-of-way. In 1981 the Estate of Jim Ivers and Jim Ivers delivered deeds to Mr. Strebel for property in White Pine Canyon Road which all lays within the fence line but is not even close to the 49.5 width of the right-of-way. In fact, the map which shows the property which Ivers has given back to the County by these deeds in 1981 shows that the property is only 11 feet wide on one end of the road instead of 3 rods.

The County, at no point, ever tells us or anyone else about this transaction to swap deeds with the Ivers. In any event, Mr. Strebel keeps the deeds in his office for two years while we are involved in trying to litigate this issue with Osguthorpe.

On March 22, 1983 the Summit County Commission, once again without notice to anyone, authorizes the deeds to be recorded. I am enclosing a copy of the minutes of that day as well as a copy of the survey which describes the property which has now been deeded from Ivers to the County. In exchange for this the County deeded back the entire three rod right-of-way from 1956. This amounted to an exchange of over four acres for just over one acre of property by the County.

Last summer Jim Ivers threatened to sue us for trespassing because he asserts that the road is only 24 feet wide and to support that kind of a surface our pushing road base beyond the 24 feet was a trespass.

To keep you fully informed, I should note that in the 1956 deeds from Ivers to the County there was a reversionary clause that stated if the County didn't use the road or maintain it, it would revert back to Ivers. There was no time limit on that and you can clearly see that a majority of the description did lie in the maintained County road portion.

One now has to ask the question as to where everyone sits and as to the road issue alone what has been the problem. If you were to look at the map it appears that there is now a road from the highway up through Ivers' which varies from 11 to 37 feet wide. The County has given up a 49.5 foot right-of-way without notice to anyone, there is a case pending in the Utah Supreme Court which may completely shut down our project if it is lost because the road is not as represented, and there is a described, tax-exempt road which may go right through the middle of your house.

I have tried to be as detailed in describing the problem of this road as I can, and I would be happy to get together with you or Jon and tell you in more detail, but the bottom line is that this road mess has been a contributing factor to the delay in this project and my personal opinion is that we have been hung out to dry by everyone.

While it is unnecessary for me to go into the legal ramifications of this mess, I think the ethical considerations are certainly obvious.

One thing I should mention is that, against our wishes, the County made us install a sewer line up this Canyon which services your property as well as our. This line will service between 2,000 and 4,000 hook-ups and we had to put it in for our six units.

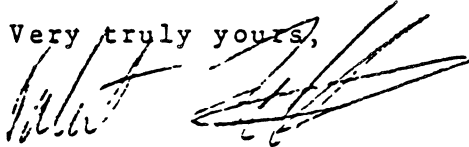
The transaction I have described with the Ivers family has probably narrowed the road to a degree that we will not be able to recover sums on hook-up fees, nor will this Canyon be able to be developed now to the capacity of the sewer because the roads would have to be 44 feet wide and the County has given away its right-of-way.

I understand that you may question your responsibility in this action and we are certainly not blaming you as being directly responsible, but it was represented to Hy prior to buying this property that there was a 49.5 Foot Road right-of-way up the Canyon which apparently does not exist and that fact has been one of the substantial causes of our problems in this development.

I hope this letter is informative and you can be considerate or our problems as well as the factual cause, whether that be intentional, malfeasance (Summit County) or an implied or omitted condition of this development.

I look forward to working with you in the future, and if you have been out of town I would urge you to give a Hy a call since he is anxious to get in touch with you and see what can be worked out.

Very truly yours,

A handwritten signature in dark ink, appearing to read 'Robert Felton', with a stylized flourish extending from the end.

Robert Felton

RF/tp
Enclosure

Law Offices
SPECIALE & FELTON
5 Triad Center, Suite 585
Salt Lake City, Utah 84180
(801) 359-9216

February 27, 1986

Mr. John Sharp
3000 Connor Street
Salt Lake City, Utah 84108

RE: Notice of Default and Contract

Dear Jack:

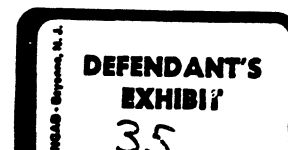
I received notice that the Trustee's Sale has again been scheduled for April. Since it appears inevitable that we will have to litigate the contractual rights of the parties I wanted to make sure that our position was clear to you.

The first problem that I need to address is that if we institute litigation, which now seems inevitable either in the form of a lawsuit or a bankruptcy, I will be requesting Prince, Yeates to withdraw as counsel. The reason for this is that Howell Investment Company is a partner in the remaining 30 acres and Jon Heaton also represents the Howells. Because of this conflict of interest I would appreciate knowing the name of your new attorney and maybe we can get some of the preliminary matters worked out should court action be necessary.

The other items which present a problem are, besides the road problem which I have addressed in a separate letter, the fact that you have not deeded us the property to which we were entitled and, also, under the terms of the contract you owe us approximately \$73,000.00 for the cost of water and sewer hook-ups which are now available.

Under the terms of the contract we have paid for approximately 7.5 acres of property located in the unrecorded area. In addition, in the event you did not pay us the sums due for the water and sewer, which we are hereby requesting, and thus that sum, approximately \$73,000.00, is applied to the amounts already paid, you would be required to deed us 10 acres of property. Before I get an exact survey of the property I would appreciate it if you would let me know which of the two alternatives you would like to pursue.

0020



Enclosed with this letter is a breakdown of the costs for the water and sewer line dated November 18, 1985. In addition to those sums, additional sums for drilling the well in the amount of \$85,000.00 to \$100,000.00 was expended and engineering costs in the sum of approximately \$75,000.00. The total cost for engineering of this project comes to approximately \$168,000.00.

The last item which concerns me is your apparent failure to deed the road located in White Pine Ranches Phase I which was suppose to have been done approximately three years ago.

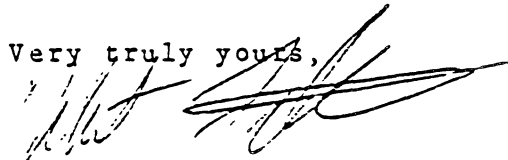
As you can tell, there are substantial terms of the contract which were caused by you and have existed for some years and I wanted to give you notice of these defects so that there is no allegation that you didn't know about them.

We would be happy to provide ~~accounting~~ accounting information and survey information if you will put in writing that you acknowledge liability, but I don't want to spend a lot of time and money if you do not plan to comply.

Also, since the described County road apparently goes through your living room and is not located where it is designated, I would appreciate it if you would comply with the contract and deed the road to the County in conformance with the contract.

I would be happy to discuss this matter with you or your new attorney at any time, but I would appreciate a written response as to your intentions.

Very truly yours,



Robert Felton

RF/tp

cc: Jon Heaton
Hy Saunders

Law Offices
SPECIALE & FELTON
5 Triad Center, Suite 585
Salt Lake City, Utah 84180
(801) 359-9216

May 7, 1986

John and Geraldine Sharp
3000 Conner
Salt Lake City, Utah 84108

RE: White Pine Ranches

Dear Mr. Sharp:

I have not heard from you or your new attorney as to my February 24, 1986 letter. I would like to reiterate the position set forth in that letter, as well as alert you to a couple of other problems which have arisen.

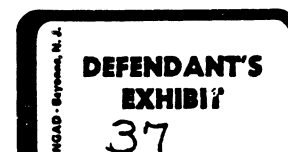
The first problem is that your failure to deed us the road and lot 6 as provided for in the contract are about to impair a sale of that lot and I would again request that you immediately deed us the road and the lot as provided for. Those items were to have been conveyed to us some years ago.

The last item which I wish to clear up is any dispute about the fact that you will not deed us any property for which we have paid on the left side of our road because it is not platted.

We are in a position to prepare and obtain approval of that plat immediately. If you will acquiesce, in writing, that you intend to comply with those terms of the contract, we will immediately perform that act.

I find it quite disturbing that we have received no response from you whatsoever, in spite of the fact that Hy has requested your input. It is my understanding that Mr. Heaton was instructed not to respond.

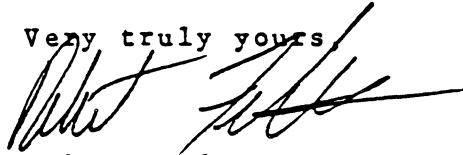
While you may know that Hy has his own difficulty which distrubed me from my position as a member of the partnership and a purchaser of the property, I am equally upset by your disregard of the contract term and your apparent unwillingness to attempt to resolve this matter.



It appears to me that unless the parties sit down, recognize the problems and responsibilities which both sides of this matter bear, that some judge or jury is going to be making a decision on this case and that title to the property is going to be clouded for years.

I would urge you to get in contact with Hy to see if the differences in this matter cannot be resolved, but maybe this is just one of those cases where we're going to have to let someone else make the decisions for us.

Very truly yours,



Robert Felton

RF/tp

cc: Hy Saunders

Law Offices
SPECIALE & FELTON
6 TRIAD CENTER, SUITE 585
SALT LAKE CITY, UTAH 84180
801-369-9216

March 24, 1987

Steve Clegg
P.O. Box 4365
Park City, Utah 84060

RE: White Pine

Dear Steve:

You asked me to write you a letter regarding some confusion as to the litigation as it relates to the three lots you have listed in White Pine Ranches.

The current litigation does not affect the marketability or encumber that property. It is essentially an action for a refund and damages as a result of the extraordinary delays but the services and water are done and guaranteed to those lots.

The status of the water is that the water system is completely done and water rights have been transferred to the well and will be available for those three lots.

The sewer system is completed and the only charge will be the hook-up fee assessed by Snyderville Basin Sewer Improvement District. The sewer line is completed all the way through the development to the highway. The electricity will be installed as soon as anyone wants to build there.

None of the pending litigation affects the three lots you have listed and the water and sewer are complete and ready to go.

Very truly yours



Robert Felton

RF/tp



Tab D

ATTORNEYS
AT
LAW

WINDER & HASLAM

DONALD J. WINDER

SUITE 4004
175 WEST 200 SOUTH
SALT LAKE CITY, UTAH 84101
(801) 322-2222

September 30, 1986

Mr. Steven E. Clyde
Attorney at Law
CLYDE & PRATT
American Towers, Suite 200
77 West 200 South
Salt Lake City, Utah 84101

Re: Sharp adv. White Pine Ranches

Dear Steve:

My clients wish to make their position abundantly clear regarding any potential sale of Lot 6 or of any of the unplatted acreage. My clients will not hinder or in any way prevent a sale of such property, upon reasonable terms. If they prevail in the litigation or otherwise and obtain a return of the property, such a sale could only be of benefit to them.

Accordingly, should Bob Sammons want to close on a purchase of Lot 6 or should you receive any other serious offer, please let me know immediately. We will make every effort to promptly take all steps reasonable under the circumstances to work with your clients concerning a sale of Lot 6 or the unplatted acreage.

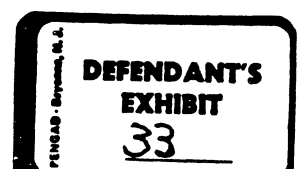
Sincerely yours,



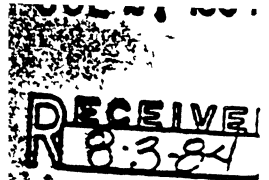
DONALD J. WINDER

DJW/cas

cc: John C. and Geraldine Y. Sharp



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



White Pine Ranches Off

July 26, 1984

Summit County
Governing Board
of Summit County Commissioners



Gentlemen:

The following claim is submitted for your consideration by White Pine Ranches, a Utah partnership. The submission of this claim should not be construed to imply that claimant believes it is necessary or required since the causes of action giving rise to our claim do not, in our opinion, require this notice.

In any event, the claimant, by and through its partner and attorney, Robert Felton, submit the following claim:

1. The sum of \$117,297.15 being the costs of the off-site sewer which we were, under protest, required to install to service the subdivision. This sum is arrived at due to our engineers estimate as to the cost and is supported by the attached letter. The basis for this claim is fundamentally described in my September 16, 1983 letter to the Board of Commissioners, a copy of which is attached to this claim. Further, the basis for this claim violates our rights as guaranteed under the laws of the State of Utah as well as the Constitution of Utah and the Constitution of the United States. While there are numerous cases supporting our position as will become apparent in the event litigation is necessary the fundamental basis is found in a statement by the Utah Supreme Court in that a municipal fee "related to services like water and sewer must not require a newly developed property to bear more than their equitable share of the capital share of costs in relationship to benefits conferred". Banberry Development v. South Jordan, Utah, 631 P2d 899 (1981). The Banberry decision sets forth seven factors in determining the reasonableness of the imposition of capital construction on newly developed property and at the requirement of the off-site sewer, in light of the fact that the Utah State Health Department was in a position to approve the use of septic tanks which were authorized by State law and by ordinances of the County renders this requirement unreasonable.

B226

Damages to be determined for the refusal of Summit County to plow the White Pine Canyon Road during the winter of 1983/1984. It is anticipated that because of this refusal we have lost one or more sales and anticipate the damages, loss of profit and interest at between \$250,000 and \$500,000.

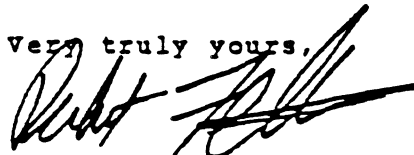
--- The discriminatory application of zoning laws with the specific intent to extract unreasonable demands from claimant as well as damage or prevent claimant's project from being accomplished. Claimant shall assert claims against the County and its employees pursuant to Section 42 U.S.C.A. 1983 et seq. for which no claim need be filed with this County Commission. Further, claimant shall allege damages for the loss of sale, reduction in business, and damages suffered in reduction to profit, incidental damages, loss of reputation, or otherwise because of the malicious and concerted misapplication and discrimination applied to claimant. Said acts on behalf of the County and its officers and agents acting in their official capacity or otherwise include, but are not limited to: (1) the imposition of unreasonable and extreme requirements to have the subdivision approved including litigating unnecessary claims; (2) discriminatory application of the laws and ordinances of the State of Utah that other land owners were allowed to subdivide and develop property with no requirement as to improvements of access or municipal services or compliance with County or State law; (3) refusal to provide services, including snow plowing based upon discriminatory application and thereby depriving claimants of access to their property.

Claimants assert that the damages and liability created by this continuing cause of action, to the best of claimant's ability, will be between \$300,000.00 and \$1,000,000.00.

The foregoing claims may be in part or wholly asserted against Stan Strebel as an employee and against Synderville Basin Sewer Improvement District in that Utah case law specifies that such special service district is a branch of county government.

The foregoing claims are hereby submitted for your consideration.

Very truly yours,



Robert Felton

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

B1139

SUBSCRIBED and SWORN to before me, a notary public, on this,

0087

the 26th day of July, 1984.

Fannie H. H. H.
Notary Public

Residing at: West End H. H. H.

My Commission Expires:

May 7, 1985

RF/tp
Enclosures

0088

B1140

Robert Felton, 1056
George H. Speciale, 3053
5 Triad Center
Suite 585
Salt Lake City, Utah 84180
Phone: (801) 359-9216
Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

* * * * *

WHITE PINE RANCHES, a
partnership,

Plaintiff,

v8.

SUMMIT COUNTY, RON PERRY,
CLIFF BLONQUIST, and GERALD
YOUNG, as Commissioners of
Summit County, STAN STREBEL,
individually and as Planning
Director of Summit County,
SNYDERVILLE BASIN SEWER
IMPROVEMENT DISTRICT, and
JOHN DOES I through X.

Defendants.

AFFIDAVIT OF
LEON H. SAUNDERS

Civil No. C84-2090W

★ ★ ★ ★ ★ ★ ★ ★ ★

STATE OF UTAH)

: 83.

COUNTY OF SALT LAKE)

I, Leon H. Saunders, being first duly sworn, depose and state:

7. Based upon my experience as a real estate developer specializing in developments in Summit County, I anticipated that final approval of White Pine Ranches Subdivision, as submitted, would be had in or about June, 1981, allowing two months either way for unforeseen circumstances.

8. The relevant market for exclusive building lot in the price range projected for White Pine Ranches Subdivision is out of state buyers, principally from the State of California, and in December, 1980, continuing through the end of 1981, the market for such lots was extremely active.

9. From December, 1980, continuing to the present, I have encountered continual delay in going forward with the project through delays in the approval process, most of which were caused by the Planning Commission and which might have been avoided or satisfied at an earlier time.

10. As a result of the various delays, 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.

11. Owing to the various delays, it became necessary to reduce the scope of the project from twelve (12) to six (6) five-acre lots, and to seek to utilize septic tank sewage disposal rather than connecting to the Snyderville Basin Sewer Improvement District.

landowner's accountant that he has not been in the State of Utah since 1985 and has no plans to come back to Utah. Apparently I will be unable to get his approval.

38. Plaintiff has incurred costs for the subdivision as follows:

Construction Financing	\$650,000.00
Additional Engineering and Architectural Fees	\$57,000.00
Water to Service Project Purchased from Outside Source	\$80,000.00
Well Drilling	\$65,000.00
Morley Construction Company for Additional Road Construction and Snowplowing	\$38,602.26
Harper Excavating for Excavation and Road Base	\$11,641.00
Armco Steel for Conduits for Road	\$4,470.25
Snyderville Basin Sewer Improvement District for Engineering Fees (we still owe over \$5,000)	\$2,090.17
Bruce Ericksen for Tree Removal	\$350.00
Steve Clyde for Legal Work for Transfer of Water Rights	\$4,227.01
Roger Dean for Gravel for Well	\$794.33
Bryce Montgomery for Hydrogeologic Service	\$75.00
Rhodes Brothers to Test Pump of Well	\$6,935.00
C. & R. Sales for Additional Construction	\$1,949.45

The total for these "municipal type services" is approximately \$923,130.00, or \$153,855.75 per lot.

DATED this 17th day of March, 1986.

Leon H. Saunders
Leon H. Saunders

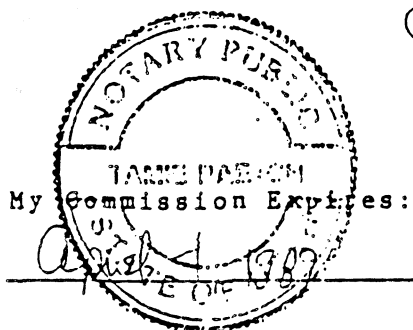
STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

I, the undersigned, do hereby represent that I am the signer of the foregoing instrument and that all information contained therein is true to the best of my knowledge and belief.

Leon H. Saunders
Leon H. Saunders

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

SUBSCRIBED and SWORN to before me, a notary public, by Leon H. Saunders on this, the 17th day of March, 1986.



James P. Hartsch
Notary Public
Residing at: Davis County, UT

B0276

Robert Felton 1056
George H. Speciale, 3053
5 Triad Center
Suite 585
Salt Lake City, Utah 84180
Phone: (801) 359-9216
Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

* * * * *

WHITE PINE RANCHES, a)	
partnership,)	
)	
Plaintiff,)	AMENDED COMPLAINT FOR
)	DAMAGES AND FOR DECLARATORY
vs.)	AND INJUNCTIVE RELIEF
)	
SUMMIT COUNTY, RON PERRY,)	Civil No. C84-2090W
CLIFF BLONQUIST, and GERALD)	
YOUNG, as Commissioners of)	
Summit County, STAN STREBEL,)	
individually and as Planning)	
Director of Summit County,)	
SNYDERVILLE BASIN SEWER)	
IMPROVEMENT DISTRICT, and)	
JOHN DOES I through X,)	
)	
Defendants.)	

* * * * *

Plaintiff complains of Defendants and alleges:

I.

JURISDICTION AND VENUE

1. This Court has jurisdiction under 28 U.S.C. §1337 of the First and Third Causes of Action of this Complaint which arise under Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§15 and 27, to enjoin the activities of Defendants hereinafter recited and to recover treble damages and the costs of suit, including reasonable attorney's fees, for injuries sustained by Plaintiff by reason of Defendants' violation of Sections 1 and 2 of the Sherman Anti-Trust Act, 15 U.S.C. §§1 and 2.

B0284

DEFENDANT'S
EXHIBIT

XVIII.

JURY DEMAND

61. Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, Plaintiff demands a jury trial.

XIX.

PRAYER FOR RELIEF

Plaintiff demands judgment against the Defendants and each of them.

1. Declaring that the conduct of the Defendants, and each of them, is unlawful,

2. For general damages in an amount to be determined caused by Defendants' imposition of unlawful restrictions and conditions arising from Defendants' violations of the Sherman Anti-Trust Act, the Utah Anti-Trust Act, 42 U.S.C. 1983, and the Constitution of the State of Utah,

3. Plaintiff is entitled to damages for the reduction in value of their property caused by Defendants, loss of the property, reasonable cost of work performed, additional costs incurred as a result of the actions of the Defendants in a sum not less than Six Million Dollars (\$6,000,000.00),

4. Plaintiff is entitled to judgment against the Defendant, Snyderville Basin Sewer Improvement District for the value of the benefit conferred upon them by the improvements unlawfully required to be installed by Plaintiff in an amount not less than Seven Million Dollars (\$7,000,000.00) representing the capital to be received by the Defendants from hook-up fees to the sewer installed by the Plaintiff,

B0302

0094

5. For punitive damages in an amount treble the amount of general damages awarded Plaintiff or as otherwise deemed appropriate;

6. For attorneys' fees and costs pursuant to Section 4 of the Clayton Act, Utah Code Ann. §76-10-919, and 42 U.S.C. §1988,

7. For injunctive relief to the extent justified by the proof,

8. For such other and further relief as the Court deems just in the premises.

DATED this 10 day of March, 1986.

SPECIALE & FELTON


George H. Speciale


Robert Felton

B0303

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

* * * * *

ANSWER. Plaintiff purchased the real property in approximately 1981 pursuant to the terms of a Uniform Real Estate Contract. The entire parcel of property which is being purchased is approximately sixty (60) acres and was purchased under contract from Jack and Geraldine Sharp. The portion of the



include Plaintiff's property in the district and Plaintiff was forced to litigate the necessity of this maintenance in the District Court of Salt Lake County, State of Utah. The District Court thereafter ordered Summit County to provide said maintenance which they have failed and refused to do.

Also see my deposition taken March 6, 1986.

INTERROGATORY NO. 9. With respect to the allegations contained in paragraph 25 of the plaintiff's Complaint, please identify all documents worksheets, compilations of data, correspondence or other written memoranda which support the expenditures identified therein, and set forth the method and manner by which the figure of One Million Dollars in damages was computed, including the identification of any and all worksheets, compilations of data, correspondence or other written memoranda or documents used in computing that figure.

ANSWER. The Amended Complaint sets forth different damages. It is anticipated that the damages will be as follows and the supporting documents are being produced for counsel.

(a) Loss of the property at 1981 appraised value 5.4 million dollars,

(b) Legal fees for litigation required by the County. There is no debt from the Partnership to Mr. Felton for these fees, nor did he keep time, but it is anticipated that a reasonable fee for all three cases would be around \$30,000.00,

(c) Engineering costs \$158,000 00,

(d) Improvements \$650,000.00 plus accrued interest to March, 1986 in the approximate sum of \$19,000 00. This interest accrues at the approximate rate of \$6,600.00 per month

(e) Benefit of the bargain as to the Defendant Snyderville Basin Sewer Improvement District for the amount realized by the sewer line under the illegal contract in the sum of \$7,000,000.00 to \$12,000,000.00,

(f) Cost of the well which is being lost approximately \$100,000.00.

(g) See my Affidavit attached hereto as to summary and additional costs and damages,

(h) These only reflect actual damages, not punitive or special damages.

The loan documents are being provided in separate documents. In the event there is any property left after foreclosure, compensation as to the value of that property as proven at trial will be deducted from the alleged damages.

INTERROGATORY NO. 10. Describe with particularity those facts upon which you rely in support of the contention in paragraph 27 of the Complaint that the acts of defendants constitute illegal and anticompetitive activities as alleged therein.-

ANSWER. Please refer to my deposition and to the Answer to Interrogatory No. 8. It is my understanding that there is an exemption in the Utah Anti-Trust Act for authorized action, but the actions complained of were without sanction of law and were beyond the authority of Mr. Strebel and Summit County. The result was to frustrate or prevent Plaintiff's development to the benefit of other developers, to illegally restrain Plaintiff from providing its own sewage removal service and to frustrate Plaintiff's development so the project would be lost, thereby

insuring greater development and more proceeds to the Sewer District to fully capitalize on the capital improvements required of Plaintiff. It is also my understanding that in Utah sewage disposal or sewer systems are not governmental type jobs but are "private".

INTERROGATORY NO. 11. State with particularity those facts upon which you base your claim in Paragraphs 36 through 46 of the Fifth Cause of Action of Plaintiff's Complaint that the actions of the Defendant herein constitute a deprivation of the Plaintiff's federal civil rights

ANSWER: Please see my deposition and Answer to Interrogatory No. 8 herein.

In addition, the facts and discriminations set forth are amply demonstrated by the minutes of the Summit County Commission, Summit County Planning Commission and J.J. Johnson and Associates. In addition, I have been deprived of my property without due process of law and contrary to law.

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. A 60 foot right-of-way has been taken as a requirement by Summit County. Summit County has taken large sums of money from me to improve capital plants which are not located on my property.

