

1989

Joseph D. Sanders and Cheryl M. Sanders v. Martin
S. Ovard, Reva S. Ovard, Ben F. Ovard, Helen T.
Ovard and Jax Hayes Pettey v. Joseph D. Sanders,
Cheryl M. Sanders, Utah State Tax Commission,
Salt Lake County, and Insurance Company of
North America : Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1

 Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Thomas N. Crowther; Parsons and Crowther; Attorney for Appellees.

Frederick N. Green; Julie V. Lund; Green and Berry; Attorneys for Appellants.

Recommended Citation

Brief of Appellant, *Sanders v. Ovard*, No. 890063 (Utah Court of Appeals, 1989).
https://digitalcommons.law.byu.edu/byu_ca1/1559

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

BRIEF

UTAH
DOCUMENT
KFU
50
.A10

DOCKET NO. 890063-CA IN THE UTAH COURT OF APPEALS

JOSEPH D. SANDERS and
CHERYL M. SANDERS,

Plaintiffs/Appellants,

v.

MARTIN S. OVARD, REVA S.
OVARD, BEN F. OVARD, HELEN T.
OVARD and JAX HAYES PETTEY,

Defendants/Appellees,

v.

JOSEPH D. SANDERS, CHERYL M.
SANDERS, UTAH STATE TAX
COMMISSION, SALT LAKE COUNTY,
and INSURANCE COMPANY OF
NORTH AMERICA,

Counterdefendants.

BRIEF OF THE APPELLANTS

Docket No. 890063-CA

Appeal from the Third Judicial District Court,
Salt Lake County, Judge Frank G. Noel

Argument Priority Classification 14(b)

Thomas N. Crowther
PARSONS & CROWTHER
Attorney for Appellees
Martin S. Ovard, Reva S.
Ovard, Ben F. Ovard,
Helen T. Ovard, and
Jax Hayes Pettey
455 South 300 East
Suite 300
Salt Lake City, Utah 84111

Frederick N. Green
Julie V. Lund
GREEN & BERRY
Attorneys for Appellants
Joseph D. Sanders and
Cheryl M. Sanders
528 Newhouse Building
10 Exchange Place
Salt Lake City, Utah 84111

F I

March 1989

Mary T. Noonan
Clerk of the Court

IN THE UTAH COURT OF APPEALS

JOSEPH D. SANDERS and)	
CHERYL M. SANDERS,)	
)	
Plaintiffs/Appellants,)	BRIEF OF THE APPELLANTS
)	
v.)	
)	
MARTIN S. OVARD, REVA S.)	Docket No. 890063-CA
OVARD, BEN F. OVARD, HELEN T.)	
OVARD and JAX HAYES PETTEY,)	
)	
Defendants/Appellees,)	
)	
v.)	
)	
JOSEPH D. SANDERS, CHERYL M.)	
SANDERS, UTAH STATE TAX)	
COMMISSION, SALT LAKE COUNTY,)	
and INSURANCE COMPANY OF)	
NORTH AMERICA,)	
)	
Counterdefendants.)	

Appeal from the Third Judicial District Court,
Salt Lake County, Judge Frank G. Noel

Argument Priority Classification 14(b)

Thomas N. Crowther
PARSONS & CROWTHER
Attorney for Appellees
Martin S. Ovard, Reva S.
Ovard, Ben F. Ovard,
Helen T. Ovard, and
Jax Hayes Pettey
455 South 300 East
Suite 300
Salt Lake City, Utah 84111

Frederick N. Green
Julie V. Lund
GREEN & BERRY
Attorneys for Appellants
Joseph D. Sanders and
Cheryl M. Sanders
528 Newhouse Building
10 Exchange Place
Salt Lake City, Utah 84111

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	iii
JURISDICTION	1
NATURE OF THE CASE	1
ISSUES PRESENTED	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	4
ARGUMENT	5
I. RULE 15(b) OF THE UTAH RULES OF CIVIL PROCEDURE MANDATES THAT PLEADINGS BE AMENDED TO CONFORM TO EVIDENCE WHICH IS ADMITTED WITHOUT OBJECTION	5
a. <u>Illegality</u>	6
b. <u>Mistake</u>	9
II. THE FACTS SUPPORT A FINDING OF FRAUD AND MISREPRESENTATION	11
a. <u>The Representations Made by Defendants Were Inaccurate and Made Fraudulently and/or Negligently</u>	12
b. <u>Plaintiffs' Reliance on Defendants' Representations Was Reasonable</u>	15
c. <u>Plaintiffs Sustained Damages as a Direct Result of Their Reliance Upon Defendants' Representation</u>	18
III. THE JUDGE IMPROPERLY BASED HIS DECISION ON HIS VIEW OF THE PROPERTY AS IT APPEARED IN 1986	18
CONCLUSION	21

ADDENDA

- Addendum A - Utah Rules of Civil Procedure, Rule 15
- Addendum B - §§57-5-3, 57-5-5 Utah Code Ann.
(1953 as amended)
- Addendum C - Exhibit 6-P, Plat submitted with Variance
Application
- Addendum D - Exhibit 7-P, Variance Application
- Addendum E - Exhibit 12-D, Earnest Money Agreement
(Ovard-Newman)
- Addendum F - Exhibit 13-D, Earnest Money Agreement
(Ovard-Newman)
- Addendum G - Exhibit 15-P, Original plat submitted to
Draper City
- Addendum H - Exhibit 8-P, Board of Adjustments granting
Variance
- Addendum I - Exhibit 10-P, Multiple Listing
- Addendum J - Exhibit 18-D, Earnest Money Agreement
(Sanders-Ovard)

TABLE OF AUTHORITIES

Cases

	<u>Page</u>
<u>Christensen v. Gensman</u> 333 P.2d 658 (Wash. 1958)	20-21
<u>Colman v. Colman</u> 743 P.2d 782 (Utah App. 1987)	10
<u>Dugan v. Jones</u> 615 P.2d 1239 (Utah 1980)	11-12, 17
<u>Greenberg v. Waterbury</u> 117 Conn. 67, 167 A. 83 (1933)	19
<u>Groff v. Circle K Corporation</u> 86 N. M. 531, 525 P.2d 891 (Ct. App. 1974)	20
<u>Lloyd's Unlimited v. Nature's Way Marketing, Ltd.</u> 753 P.2d 507 (Utah App. 1988)	9, 11
<u>O'Sullivan v. Scott</u> 25 Wash. App. 430, 607 P.2d 1246 (1980)	21
<u>Pace v. Parrish</u> 247 P.2d 273 (Utah 1952)	11
<u>Poulsen v. Poulsen</u> 672 P.2d 97 (Utah 1983)	10-11
<u>Vickridge First & Second Addition Homeowners Association, Inc. v. Catholic Diocese of Wichita</u> 212 Kan. 348, 510 P.2d 1296 (1973)	20

Statutes

Section 57-5-3 Utah Code Ann. (1953 as amended)	8
Section 57-5-5 Utah Code Ann. (1953 as amended)	8

Other Authorities

Utah Rules of Civil Procedure, Rule 15(b)	4
4 Wigmore, <u>Evidence in Trials at Common Law</u> , (Chadbourn rev. 1972)	19

JURISDICTION

The jurisdiction of this court is properly based upon the transfer of case no. 88-0464 by the Utah Supreme Court to this court under Rule 4A of the Rules of the Utah Court of Appeals and pursuant to §78-2a-3(2)(j) Utah Code Ann. (1953 as amended).

NATURE OF THE CASE

This is an appeal from a judgment in favor of the Defendants entered by the Honorable Frank G. Noel on June 6, 1988, and an Order denying Plaintiffs' Motion for a New Trial and to Amend the Pleadings to Conform to the Evidence entered on October 26, 1988.

ISSUES PRESENTED

1. Did the trial court err in denying Plaintiffs' Motion to Amend the Pleadings to Conform to the Evidence Under Rule 15 of the Utah Rules of Civil Procedure where evidence concerning the issues of mistake and illegality was presented and tried at trial without objection by the opposing party?

2. Was there sufficient evidence presented at trial to sustain a finding that the Defendants made a number of representations either negligently and/or fraudulently which induced the Plaintiffs to act to their detriment and thereby causing Plaintiffs to sustain substantial damages?

3. Did the trial judge err in basing his decision on his physical inspection of the property as it appeared at the time of trial without foundation for the view regarding its appearance at the time of Plaintiffs' purchase in 1982?

STATEMENT OF THE CASE

Plaintiffs, Joseph D. Sanders and Cheryl M. Sanders, appeal from a judgment allowing Defendants to foreclose upon their Trust Deed and awarding them money damages. Plaintiffs then filed a Motion for a New Trial and to Amend Their Pleadings to Conform to the Evidence Presented at Trial. The court denied that Motion on October 26, 1988. Plaintiffs appeal both those Orders.

In March of 1979, Defendants Ovard purchased two acres of property from Mr. Layne Newman. (Trial Transcript, (hereinafter "Tr.") 58, Trial Exhibits 12-D and 13-D) That transaction was accomplished by two trust deeds, each covering one acre. (Tr. 206) At approximately the same time, Mr. Ovard and Mr. Newman submitted a request for a variance to the City of Draper. (Tr. 61, Trial Exhibit 7-P) Their request was accompanied by a plat showing five acres divided into a three-acre lot (Mr. Newman's) and a two-acre lot (Mr. Ovard's). (Tr. 61, Trial Exhibit 6-P) The City of Draper granted them a variance to build one home on each lot subject to three conditions. (Tr. 61, 64, Trial Exhibit 8-P) Mr. Ovard then constructed his home on the two-acre parcel.

In July of 1982, the Sanders purchased the home built by Martin Ovard in Draper, Utah. (Tr. 151) Soon after occupying that home, they became aware of some activity on the unimproved acre directly to the north of their property which indicated that the land might be sold and built upon. (Tr. 152) Plaintiffs feared that construction on that adjoining acre would diminish their

enjoyment of their property. (Tr. 153) Therefore, Plaintiffs decided to make inquiries into purchasing the property for themselves.

Joseph Sanders contacted Fred Hale, the realtor who had sold them their residence. (Tr. 153) He explained that he and his wife might be interested in buying the adjoining property in order to prevent someone else from building upon it. (Tr. 155) They examined the listing agreement and a plat map which had been supplied by the Defendants' realtor and agreed to make an offer on the property owned by the Ovarads. (Tr. 153) The amount of their offer was based in part upon the asking price for other parcels of the same approximate size which could be built upon. (Tr. 156, 157) Plaintiff paid \$26,000.00 for the land. (R. 201, Trial Exhibits 1-P, 2-P and 3-P)

Subsequent to this time, Plaintiffs inadvertently learned that the unimproved north parcel was to be sold in a tax sale. (Tr. 159) Further investigation led Mr. Sanders to the discovery that the parcel he had purchased from the Defendants and the parcel upon which his residence was situated, had been split by the Defendants. (Tr. 17) Mr. Sanders further learned that both parcels were subject to a variance which imposed certain conditions upon the land and that the City of Draper would not issue a building permit for the unimproved property. (Tr. 168)

Plaintiffs approached Defendants in the hopes of resolving this matter informally and offered to reduce the purchase price to an amount which approximated the property's true value as an unimprovable lot. (Tr. 171) Negotiations broke down and when

Plaintiffs refused to make any further payments on the property, Defendants initiated a nonjudicial foreclosure proceeding. (Tr. 171)

Plaintiffs filed this fraud action in the Third Judicial District Court and the matter was tried before the Honorable Frank G. Noel on October 26 and 27, 1987. At the conclusion of those proceedings, Plaintiff moved to amend the pleadings to conform to the evidence. Judge Noel took the matter under advisement until he had an opportunity to physically inspect the property. (R. 142)

The court issued a memorandum opinion on December 4, 1987, finding in favor of the Defendants on their counter-claim and finding no cause of action on Plaintiffs' complaint. (R. 142-143) The court's decision sets forth certain observations about the property which were not consistent with the appearance of the property when purchased by the Plaintiffs in 1982. (R. 142-143)

Plaintiffs then filed a Motion for a New Trial and to Amend the Pleadings to Conform to the Evidence (R. 222) The trial court denied both of those Motions and Plaintiffs now appeal seeking a new trial. (R. 255)

SUMMARY OF ARGUMENT

I. Rule 15(b) of the Utah Rules of Civil Procedure mandates that pleadings be amended to conform to evidence which is heard without objection at trial. Evidence was presented at trial on the issues of illegality and mistake and Defendants impliedly consented to the introduction of those issues. Therefore, Judge Noel erred in denying Plaintiffs' Motion to Amend the Pleadings.

II. The evidence presented at trial is sufficient to sustain a finding of common law fraud and/or negligent misrepresentation on the part of the Defendants. Plaintiffs' reliance on those representations was reasonable and they were subsequently damaged as a direct result of their reliance in purchasing the property in question from the Defendants.

III. While it is proper for a trier of fact to view real property to clarify testimony at trial, it is improper for a trial judge to view premises for the purpose of determining facts not in evidence. Further, the power to view should be exercised with extreme caution where there is a likelihood that the condition of the property has changed with the passage of time. The judge relied upon his view of the property in finding that Plaintiffs did not exercise due diligence in investigating the property they were purchasing in 1982; this constitutes a reversible error.

ARGUMENT

I. RULE 15(b) OF THE UTAH RULES OF CIVIL PROCEDURE
MANDATES THAT PLEADINGS BE AMENDED TO CONFORM TO
EVIDENCE WHICH IS ADMITTED WITHOUT OBJECTION.

Rule 15(b) of the Utah Rules of Civil Procedure (attached as Addendum A) addresses the amendment of pleadings to conform to the evidence. It reads in relevant part:

(1) When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendments of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues.

a. Illegality.

In the trial of this matter the issues of illegality and mistake were raised and proved by Plaintiffs' counsel and tried with the implied consent of the Defendants.

There was evidence introduced at trial by Plaintiffs' trial counsel regarding the illegal division of Ovard's property into two one-acre parcels. The variance he received from the City of Draper, which allowed him to build on his land, was for one house on a two-acre parcel. (Tr. 61, Trial Exhibit 6-P) Thomas L. Spencer, the development director for the City of Draper, testified that the split of the two acres by Ovard, which occurred subsequent to the incorporation of the City of Draper, was subject to all the land use regulations for the city. (Tr. 17)

Q: And in researching the files (on the subject property), what did you determine needed to be done to obtain a building permit?

A: It appeared from the information in the files that the property in question had been a second split of the property, of the original property, from the time the city had incorporated, and would have to meet all the subdivision regulations.

Q: Why is that significant? What are the subdivision regulations here?

A: It entails a whole section on our land use regulations.

Q: Could you direct me to access; what would be required? Perhaps you could just summarize those and tell me what

would be required regarding access to comply with the subdivision requirement.

A: Generally speaking, access has to be by a dedicated street of a minimum right away (sic) width of 50 feet.

Mr. Spencer then testified that the subdivision regulations were in effect in November of 1982. (Tr. 19)

Q: Could a building permit have been issued on the lot of Mr. Sanders in November of 1982?

A: Yes, had they met all the subdivision regulations.

Q: Including access?

A: Including access.

In his cross-examination of Mr. Spencer, Defendants' counsel raised the possibility of a variance which might allow development on the north acre. (Tr. 23)

Q: Under the ordinances that were in effect in November of 1982, it would not be a given that you could not get a variance for a building on a lot that was not adjacent to a dedicated street; isn't that right?

A: Under the current land use regulations the process first would be determined whether he had to meet the subdivision requirements or not. That would be determined by probably the Planning Commission and the City Counsel. (sic) If it was determined that they do not have to be processed as a subdivision, then they would still have to receive a conditional use permit from the Planning Commission and probably a variance from the Board of Adjustments.

While it is true that the minimum right of way regulation can be circumvented with a variance, Mr. Ovard did not apply for another variance showing a division of the two acres before he sold the one-acre parcel to Mr. Sanders.

Utah state law is quite clear about the legality of the division and sale of the Ovard property. §57-5-3 Utah Code Ann. (1953 as amended) (attached as Addendum B) sets forth in detail the procedure for legally subdividing property. That statute requires that, "if the land is situated in any city or incorporated town such plat or map shall be approved by its governing body, or by some city or town officer for that purpose designated by resolution or ordinance of such governing body; . . . " Mr. Ovard's division of his two acres into two one-acre parcels did not comply with this requirement. That chapter of the Utah Code continues in §57-5-5 (attached as Addendum B) which reads:

If any person shall sell any lot so platted according to such plat before it is made out, acknowledged, filed and recorded as aforesaid, such person shall be guilty of a misdemeanor for each lot which he shall sell.

Mr. Ovard never acknowledged, filed and recorded his division of the two acres. Therefore he clearly violated this statute, as well as a number of the Draper City ordinances relating to the proper subdivision of real property, when he sold the vacant north acre to Mr. Sanders. This evidence of illegality supports a finding in favor of the Plaintiffs. This point was argued by

Plaintiffs' counsel during and subsequent to the trial and Defendants never raised any objection. (Tr. 175, 178, 179; R. 227-228)

The elements of both unilateral and mutual mistake are supported by the evidence presented at trial and it was an error for the court not to allow the Plaintiffs to amend their pleadings to conform to that evidence.

b. Mistake.

Mr. Sanders believed that the lot he purchased from the Ovarads was a lot which could be developed. (Tr. 157) This belief was reasonable in light of the facts established at trial. For example, a realtor and some potential buyers had staked out the outline of a home on the vacant acre next to Mr. Sanders' home. (Tr. 152, 153) The purchase price of the parcel was comparable to similarly sized lots which were developable in that area, the plat map shown to Mr. Sanders by the realtor indicated an access road passing through the lot where his home was located to the vacant back lot and there were homes being constructed on apparent lots on either side of his home. (Tr. 156-158) In other words, it appeared to be a legal subdivision.

The first part of Rule 15(b) has been interpreted as a mandatory requirement that the trial court grant leave to amend pleadings to conform to the evidence to include issues tried by the express or implied consent of the parties. Lloyd's Unlimited v. Nature's Way Marketing, Ltd., 753 P.2d 507, 509 (Utah App.

1988); Poulsen v. Poulsen, 672 P.2d 97, 99 (Utah 1983). This court most recently addressed the interpretation of Rule 15(b) in Colman v. Colman, 743 P.2d 782 (Utah App. 1987). In that case the court addressed the question of "implied consent" and found that it would exist "where one party raises an issue material to the other party's case or where evidence is introduced without objection, where it appears 'that the parties understood the evidence to be aimed at the unpleaded issues.'" Id. at 785. The court went on to state that the test for deciding whether pleadings should be deemed amended under Rule 15(b) is "whether the opposing party had a fair opportunity to defend and whether it could offer additional evidence if the case were retried on a different theory." Id.

In the present case, the elements of illegality and mistake were supported by uncontested evidence. The Defendants had ample opportunity to introduce evidence supporting the legality of Mr. Ovard's actions in dividing up his two-acre parcel. In addition, Plaintiffs initially made a verbal Motion to Amend at the conclusion of their case. (Tr. 200) At that time, Defendants were put on notice of Plaintiffs' intent to argue that there were issues of mistake involved in that matter. Defendants had the opportunity to rebut and defend the issue of mistake in presenting their case to the court.

In this case, as in Colman v. Colman, there is no indication in the record that the Defendants were surprised or

otherwise disadvantaged in addressing the issues of mistake and illegality. Under the first part of Rule 15(b), it is mandatory that the trial court grant leave to amend pleadings to conform to the evidence to include issues tried by the express or implied consent of the parties. Poulsen, 672 P.2d 97, 99; Lloyd's Unlimited, 753 P.2d 507, 509. The judge's failure to grant Plaintiffs' Motion is adequate basis for reversing his decision and granting Plaintiffs a new trial.

II. THE FACTS SUPPORT A FINDING OF FRAUD AND MISREPRESENTATION.

The elements of common law fraud in Utah are set forth in the case of Pace v. Parrish, 247 P.2d 273 (Utah 1952). Those elements are:

1. a representation made concerning a presently existing material fact which was false;
2. the representor either knew it to be false or made it recklessly knowing he had insufficient knowledge upon which to base such representation;
3. the representation was made for the purpose of inducing the other party to act upon it and that the other party acting reasonably and in ignorance of its falsity did so, in fact, rely upon it;
4. the party induced to act is injured and damaged.

Id. at 274, 275. These elements have been interpreted and applied in subsequent cases, the most relevant one being Dugan v. Jones, 615 P.2d 1239 (Utah 1980).

In Dugan, a parcel of land had been listed as comprising 22-3/4 acres. Apparently, less than half that amount was usable land because some acres lay beneath a river bed. The trial court found the vendor not liable for fraud apparently because it was unconvinced the vendor had knowledge of the falsity of his representation.

The Utah Supreme Court reversed, explaining:

[i]n a case where the circumstances impose upon the vendor a special duty to know the truth of his representations or where the nature of the situation is such the vendor is presumed to know the facts to which his representation relates, a misrepresentation is fraudulent even though not made knowingly, willfully or with actual intent to deceive. . . .

. . . .

'The reason, of course, is that the parties to a real estate transaction do not deal on equal terms. An owner is presumed to know the boundaries of his own land, the quantity of his acreage, and the amount of water available. If he does not know the correct information, he must find out or refrain from making representations to unsuspecting strangers. Even honesty in making a mistake is no defense as it is incumbent upon the vendor to know the facts.'

Dugan v. Jones at 1246. Even though the misrepresentation of acreage had been innocently made, the Defendants were found to have negligently misrepresented the facts.

a. The Representations Made by Defendants Were Inaccurate and Made Fraudulently and/or Negligently.

The Sanders contend that the judge erred in ruling that the statements and omissions relied upon by the Plaintiffs were not fraudulent nor were they made negligently. (Tr. 64) The record establishes that Defendant Ovard applied for a variance

with Layne Newman to build one home on a two-acre parcel of property. (Tr. 64, Trial Exhibits 6-P and 7-P) (attached as Addenda C and D) At approximately the same time, he was purchasing those two acres from Layne Newman under two earnest money agreements. (Trial Exhibits 12-D and 13-D) (attached as Addenda E and F) At one time, Mr. Newman had submitted a plat showing five one-acre lots for approval by Draper City. (Trial Exhibit 15-P) (attached as Addendum G) That petition was denied but Mr. Newman continued to use those plat designations in dividing the two acres he was selling to Mr. Ovard. (Tr. 59-60) Mr. Ovard knew that the two-acre parcel was not legally subdivided and that is why his application for the variance shows just one two-acre lot. (Trial Exhibit 6-P) The City of Draper granted the Newman-Ovard variance for two homes (with the Ovard home to be built on two acres-not one) on April 12, 1979. (Trial Exhibit 8-P) (attached as Addendum H)

Sometime later, Ovard encountered financial difficulties while constructing his home and deeded a portion of his interest in one of those artificially and illegally created "lots" to his father as security for a loan. (Tr. 65) He was eventually forced to sell the home on the southern acre and that home was subsequently purchased by the Sanders.

Still encountering financial trouble, Mr. Ovard listed the vacant northern acre with Gerry Whipple, a real estate agent. Mr. Whipple testified that Sam Ovard gave him a plat resembling

Exhibit 15-P, showing the two-acre parcel divided into two lots, never explaining that the two acres were not legally subdivided. (Tr. 81) Ovard admitted not telling Mr. Whipple about the variance on the property which had imposed a number of requirements on the two-acre parcel. (Tr. 71, 82) In addition, the listing agreement described the property as "down a private lane to tree-lined seclusion," with access to utilities, deliberately giving the impression that the site would be developed. (Tr. 83-86, Trial Exhibit 10-P) (attached as Addendum I) The plat did not accurately represent the status of the two-acre parcel. The Ovars failed to disclose the existence of the variance. The representations and omissions were and/or made negligently with the intent of securing a buyer for that property at an inflated price.

When the Ovars caused their property to be listed through the Multiple Listing Service of the Salt Lake Board of Realtors, the listing showed the property as zoned A-1. (Trial Exhibit 10-P) The meaning of the zoning designation at that time was agricultural with a single dwelling built on a one-acre lot. (Tr. 83) Again, the implication raised by the listing was that the property was developable which was intended to secure top dollar for that property even though the Ovars knew that the property could not be built upon without the approval of the city. (Tr. 71, 214)

When the Sanders began to suspect that someone might purchase the north acre of land, they made inquiries into

purchasing that property and relied upon the aforementioned representations in their decision to purchase the property for \$26,000.00. (Tr. 156-157) Their decision was based on the theory that they could eventually sell that lot to a party wishing to build a home on it for an amount in the neighborhood of what they paid for it. (Tr. 156)

b. Plaintiffs' Reliance on Defendants' Representations Was Reasonable.

The judge found that the Plaintiffs failed to exercise "due diligence" to determine the status of the property in their failure to be alerted to access problems to the property. This conclusion is directly contrary to the evidence.

1. The Subdivision Plat
(Trial Exhibit 15-P, attached as Addendum G)

This exhibit represents the proposed subdivision application submitted by Layne Newman to the City of Draper which was subsequently denied. (T-60) That plat shows a right of way passing through Lot 4 to Lot 5. The right of way was visible and apparent when the Sanders purchased their home and when they subsequently purchased the north acre from the Ovards.

2. The Listing Agreement
(Trial Exhibit 10-P, attached as Addendum I)

This exhibit describes the property as "down a private lane to tree-lined seclusion." The visual information contained in this exhibit indicates that there is access to the property along a private lane. That description was consistent with the

appearance of the property in 1982 when Plaintiffs purchased the lots. In fact, the Affidavits submitted by the Defendants in opposition to Plaintiffs' Motion for a New Trial support the fact that the property was indeed accessible in the fall of 1982 by a road passing through the southern parcel. (R. 238-239, 244) Those same Affidavits indicate that the appearance of the cul-de-sac has changed dramatically from the fall of 1982, to the time when the judge viewed the cul-de-sac in 1986. A curb had been installed, bushes and shrubs planted and a concrete wall was erected stemming from the cul-de-sac. (R. 239, 240, 243) Meanwhile, the access to the north lot had become overgrown from nonuse which might cause the judge to perceive the surroundings differently from how they might have been reasonably perceived in 1982 by the Sanders. (R. 244)

3. The Earnest Money Receipt and Offer to Purchase
(Trial Exhibit 18-D, attached as Addendum J)

This document clearly demonstrates that the Sanders were concerned with access to the north acre. Line 24 reads "Offer subject to 35' right of way adjacent to Sanders property and subject property be vacated and reverting to buyer." This condition is consistent with the information provided on the plat map which Plaintiffs relied upon in making their offer. (Trial Exhibit 15-P) That map shows a 35' right of way as a continuation of the main road past the Sanders residence to the northern property.

In the present case, the Ovards knew that the property could not be built upon without a variance. (Tr. 71, 214) Yet they represented it to be a subdivided lot suitable for building purposes. Their representations were material to the sale of that property because the price paid for that acre would be much lower if the buyer knew that it did not comply with the Draper subdivision regulations and that in order to get a building permit they would first have to petition the Board of Adjustments for a variance. Any potential purchaser would also risk the possibility that a variance would not be granted and that the property might never be developed. In addition, the buyer of that acre would be in violation of §57-5-5 Utah Code Ann. (1953 as amended) when he or she decided to sell that "lot."

The decision of the Utah Supreme Court in Dugan concerned precisely the same situation presented in this case. The Ovards, as owners, had a duty to affirmatively reveal the facts concerning the variance which had been granted on the two-acre parcel and that the north acre was not subdivided in accordance with applicable state and municipal laws. The Ovards further had a duty to inform all prospective buyers that the lot in its present state could not be developed but would require a variance from the city before a building permit would be issued. Their failure to disclose such information constitutes, at a minimum, negligent misrepresentation under the Dugan decision.

c. Plaintiffs Sustained Damages as a Direct Result of
Their Reliance Upon Defendants' Representation.

A great deal of evidence was presented at trial concerning the actual value of the acre of land purchased by the Plaintiffs. Johnathan L. Cook, M. A. I., a real estate appraiser, testified that the true value of an acre of undevelopable land in that area was \$8,000.00. Plaintiffs agreed to pay \$26,000.00 for that property. (Tr. 28) Plaintiffs sustained actual damages in an amount not less than \$18,000.00.

III. THE JUDGE IMPROPERLY BASED HIS DECISION ON HIS VIEW
OF THE PROPERTY AS IT APPEARED IN 1986.

At the conclusion of the trial proceedings, the judge indicated he would view the surroundings. He took the entire matter under advisement pending the view.

In the memorandum decision issued by the court, it was apparent that the court had relied heavily on the physical appearance of the property when he viewed it. The judge wrote:

Moreover, the court feels the Plaintiffs did not exercise due diligence at the time of the purchase to determine the status of the property. The court is also of the opinion, after having viewed the property, that due to the location of the property, the location and placement of the home in front of the property, the road leading from the main paved road ending in what appears to be somewhat of a cal-de-sac (sic), and under the totality of the circumstances, a reasonable person should have been alerted that there may be access problems associated with the back parcel of property that should be investigated. (emphasis added)

(R. 142-143, Findings of Fact #9 and 10)

It has been generally held that when the judge is the trier of fact, the judge may view the physical evidence under the same circumstances where a jury would be so allowed. 4 Wigmore, Evidence in Trials at Common Law (Chadbourn rev. 1972) §1169. One circumstance affecting the exercise of the court's discretion in allowing a view is whether a change of condition is likely to have occurred and that a view of the property in its present condition might be misleading. Id. at §1164. The power of the court to order a view should be exercised with caution. The trial judge should be satisfied that conditions at the time he views the premises are substantially the same as they were at the time that the claim arose. He must also be satisfied that a personal inspection by him will be fair to all parties concerned and is reasonably necessary to do justice between them. Id. at §1169 (quoting from Greenberg v. Waterbury, 117 Conn. 67, 73-74, 167 Atl. 83, 85 (1933)).

In the present case, it was clearly established that the appearance of the property in question had changed dramatically in the six intervening years. (R. 239, 240, 243) The Affidavits of neighboring residents submitted by the Defendants in opposition to Plaintiffs' Motion for a New Trial set forth the changes which had occurred around those properties since 1982. The installation of the curb, the planting of bushes and shrubbery and the construction of a concrete wall abutting the cul-de-sac are all examples of the dramatic changes in the appearance of those parcels of property. (R. 239, 240, 243)

Cases have limited the purposes for which a view might be used. Vickridge First & Second Addition Homeowners Association, Inc. v. Catholic Diocese of Wichita, 212 Kan. 348, 510 P.2d 1296, 1307 (1973); Groff v. Circle K Corporation, 86 N. M. 531, 525 P.2d 891, 893 (Ct. App. 1974); Christensen v. Gensman, 333 P.2d 658 (Wash. 1958). In Christensen, the Washington Supreme Court defined the proper purpose of a view by the trial judge. "The trial judge may view the premises for the purpose of clarifying and harmonizing testimony. In other words, his view of the premises is to aid him in his understanding of the evidence introduced in the case." (Citations omitted) Id. at 662. However, the court went on to state that it would be improper for the trial judge to view the premises for the purpose of proving some res gestae fact not in evidence, nor may he view the premises for the purpose of searching for extrinsic evidence to be applied in corroborating or discrediting the testimony of a witness. If he does so, and his judgment is based thereon, it is reversible error. Id. This case clearly prohibits the importance given by the judge to the present appearance of the properties at issue in this case. His finding that the Plaintiffs' reliance was not reasonable was based solely upon his physical impression of the property when he viewed it.

More recently, the Washington Supreme Court followed Christensen when it reversed and remanded a decision by the trial court after the judge viewed the property in dispute. In

O'Sullivan v. Scott, 25 Wash. App. 430, 607 P.2d 1246 (1980), the court found that the judge relied upon his viewing of the property in ruling in favor of the Plaintiffs. The judge had viewed the property after considering opposing Affidavits which addressed the compliance of the Defendant with a previous court order. The record on appeal contained no evidence disputing the Affidavit submitted by the Defendant stating that he had complied with the court's order.

In the present case, there is no evidence on the record that supports the judge's finding that there were access problems apparent when looking at the property as it existed in 1982. The judge clearly relied upon extrinsic evidence obtained in his view of the property in finding in favor of the Defendants. Under the Christensen and O'Sullivan cases, that constitutes reversible error and Plaintiffs should be awarded a new trial.

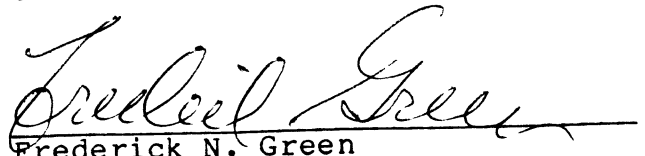
CONCLUSION

Plaintiffs ask this court to reverse the decision of the trial court below and grant them a new trial on three grounds. First, the failure of the court to amend Plaintiffs' pleadings to conform to the uncontested evidence. Second, the facts clearly support a finding of fraud and/or negligent misrepresentation on the part of the Defendants. And finally, Judge Noel erred in his reliance upon the appearance of the property in 1986 in finding that the Plaintiffs did not exercise due diligence when purchasing the northern acre four years earlier in 1982.

DATED this 30 day of March, 1989.

Respectfully submitted,

GREEN & BERRY

A handwritten signature in cursive script, reading "Frederick N. Green", written over a horizontal line.

Frederick N. Green

Julie V. Lund

Attorneys for

Plaintiffs/Appellants

ADDENDA

Rule 15. Amended and supplemental pleadings.

(a) **Amendments.** A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(b) **Amendments to conform to the evidence.** When issues not raised by the pleading are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendments of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court shall grant a continuance, if necessary, to enable the objecting party to meet such evidence.

(c) **Relation back of amendments.** Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

(d) **Supplemental pleadings.** Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

57-5-3. Maps and plats to be acknowledged, certified, approved, and recorded.

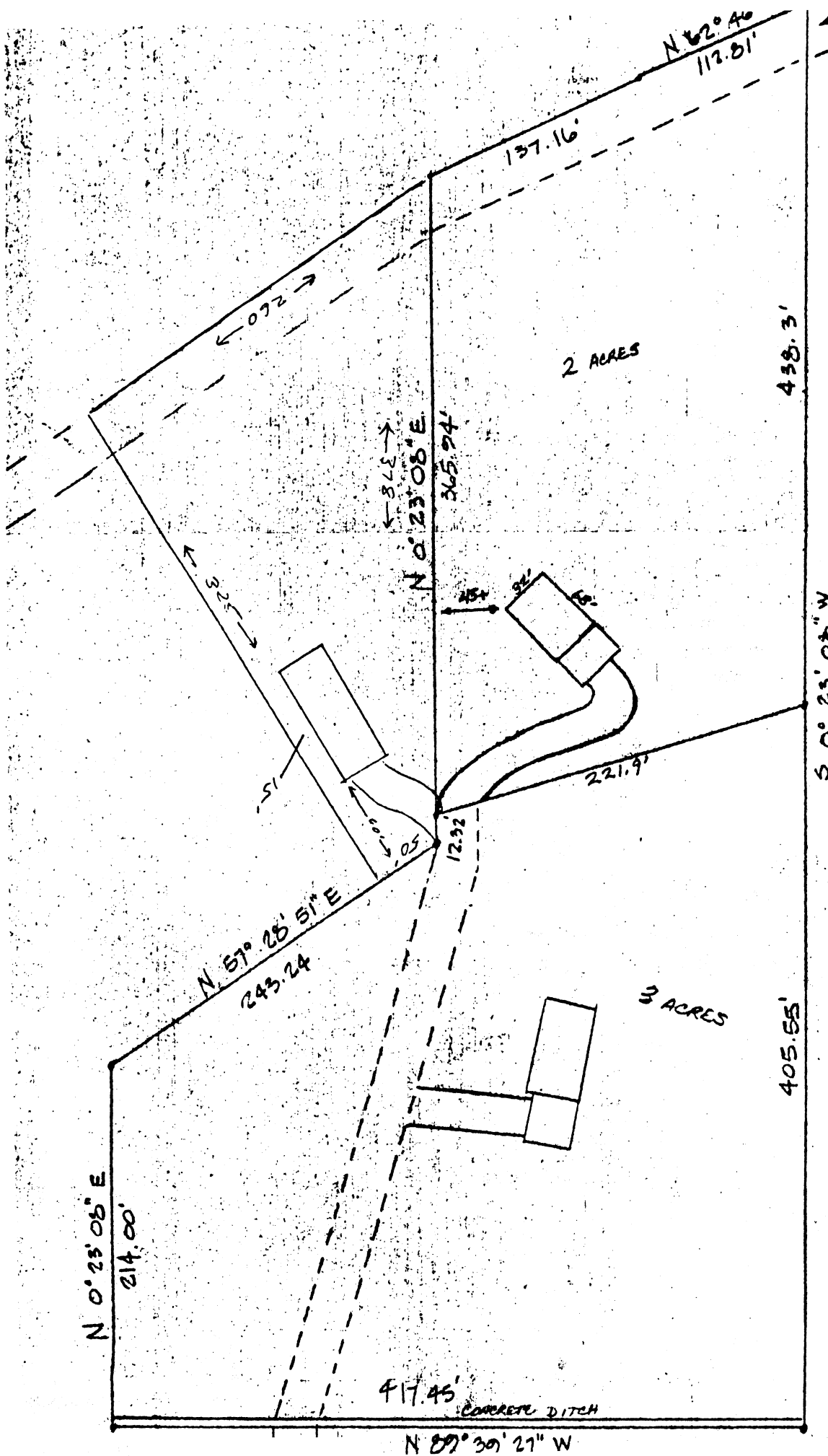
Such map or plat shall be acknowledged by such owner before some officer authorized by law to take the acknowledgment of conveyances of real estate, and certified by the surveyor making such plat; if the land is situated in any city or incorporated town such plat or map shall be approved by its governing body, or by some city or town officer for that purpose designated by resolution or ordinance of such governing body; and, if the land is situated outside of any city or incorporated town, shall be approved by the board of county commissioners of the county, or by some county officer for that purpose designated by resolution or ordinance of such board. When so acknowledged, certified and approved, it shall be filed and recorded in the office of the county recorder of the county in which the lands so platted and laid out are situated, except that in subdivisions of less than ten lots, which lots lie entirely within a city or incorporated town having a planning commission, or outside a city or incorporated town in a county having a county planning commission, land may be sold by metes and bounds, without necessity of recording a plat if all of the following conditions are met: (a) The subdivision layout shall have been first approved in writing by the planning commission, (b) the subdivision is not traversed by the mapped lines of a proposed street as shown on any official map or maps, and does not require the dedication of any land for street or other public purposes, and (c) if a subdivision is located in a zoned area, each lot in the subdivision meets the frontage, width and area requirements of the zoning ordinance or has been granted a variance from such requirements by the board of adjustment.

1953

57-5-5. Selling lots before recordation—Liability—Misdemeanor.

If any person shall sell any lot so platted according to such plat before it is made out, acknowledged, filed and recorded as aforesaid, such person shall be guilty of a misdemeanor for each lot which he shall sell.

1953



N
↑
SCALE
1" = 60'

Addendum C

This is to certify that this is a true and accurate copy of the records on file with the City of Draper.

7p

CITY RECORDER

Barbara L. Sadler
Barbara Sadler

March 28, 1979

To Whom it may concern:

M. Sam Ovard and Layne Newman are applying for a variance just North of 650 E. 13800 S.

A right of way 35 feet wide and 311 feet deep connects 13800 S. with a 5.16 acre peice of land.

The land is not being used for anything at the present time. There is nothing on the property or right of way except old shed foundations which will be removed and a concrete irrigation ditch which will stay for irrigation. The East Jordan Canal borders the Northern property line.

We plan to build two homes on the property for ourselves to live in.

M Sam Ovard

4-2-79

Ovard and Newman have given me permission to add to this application a one acre parcel of ground adjacent to the above referred to 5.16 acres for the purpose of building a third home to use said 35 ft. right of way. I have drawn the additional acre on the plat. Most of this acre is part of ~~map~~ notice 55-1475 (1.04 ac)

Layne Newman

Addendum D



EARNEST MONEY RECEIPT AND OFFER TO PURCHASE

This may be a legally binding form, if not understood seek other advice

TO: Valley Realty Draper 13 Feb. 19 79
Name of Broker Company

IN CONSIDERATION OF your agreement to use your efforts to present this offer to the seller, I/we Martin S. and Heva S. Ovard
hereby deposit with you as earnest money the sum of (\$ 29,000.00) Twenty-Nine Thousand DOLLARS

in the form of check
to secure and apply on the purchase of the property situated at: Lot #4 13300 So. 600 E. (Approximate street
address) (acre)

Draper City Salt Lake County, State of Utah

including any of the following items if at present attached to the premises: Plumbing and heating fixtures and equipment including stoker and oil tanks, water heaters, and burners, electric light fixtures excluding bulbs, bathroom fixtures, roller shades, curtain rods and fixtures, venetian blinds, window and door screens, linoleum, all shrubs and trees, and any other fixtures
except none

The following personal property shall also be included as part of the property purchased: One share of Draper Irrigation water

The total purchase price of \$ 29,000.00 Twenty-Nine Thousand DOLLARS

shall be payable as follows: \$ 29,000.00 which represents the aforesaid deposit, receipt of which is hereby acknowledged by you:
when seller approves sale: \$ 29,000.00 on delivery of deed or final contract of

sale which shall be on or before March 10 19 79 and \$ 0.00 each month commencing

purchase of (1) said property is subject to buyer selling property in Alrine.

1. The seller shall provide a gravel road to the lot. 2. Seller shall provide water main to said property. 3. Seller will run in gas and electric power to property. 4. Seller will take out some trees and provide buyer with legal description.

until the balance of \$ 0.00 together with interest is paid; provided, however, that buyer at his option, at any time, may pay amounts in excess of the monthly payments upon the unpaid balance, subject to the limitations of any mortgage or contract by the buyer herein assumed. Interest at 0% per annum on the unpaid portions of the

purchase price to be included in the prescribed payments and shall begin as of date of possession which shall be on or before 15 Mar 19 79. All risk of loss and destruction of property, and expenses of insurance shall be born by the seller until date of possession at which time property taxes, rents, insurance, interest and other expenses of the property shall be

incurred as of date of possession. All other taxes and all assessments, mortgages, chattel liens and other liens, encumbrances or charges against the property of any nature shall be paid by the seller except

The following special improvements are included in this sale: Sewer ☐ Connected ☒ Septic Tank and/or Cesspool ☐ Sidewalk ☐ Curb and Gutter ☐ Special Street Paving ☐ Special Street Lighting ☐ Culinary Water (City ☒ Other Community System ☐ Connected ☐ Private ☐ (Legend: Yes (x) No ())

Contract of Sale or Instrument of conveyance to be made on the approved form of the Utah Dept. of Business Regulation in the name of Martin S. and Heva S. Ovard

This payment is received and offer is made subject to the written acceptance of the seller endorsed hereon within 2 days from date hereof, and unless so approved the return of the money herein receipted shall cancel this offer without damage to the undersigned agent.

In the event the purchaser fails to pay the balance of said purchase price or complete said purchase as herein provided, the amount paid hereon shall, at the option of the seller, be retained as liquidated and agreed damages.

It is understood and agreed that the terms written in this receipt constitute the entire Preliminary Contract between the purchaser and the seller, and that no verbal statement made by anyone relative to this transaction shall be construed to be a part of this transaction unless incorporated in writing hereon. It is further agreed that execution of the final contract shall annul this Earnest Money Receipt and Offer to Purchase.

By Valley Realty Agent Ray A. Nicholson

to carry out and fulfill the terms and conditions specified above, and the seller agrees to furnish good and marketable title with abstract brought to date or at Seller's title insurance in the name of the purchaser and to make final conveyance by warranty deed or party deed

if of other than real property, seller will provide evidence of title or right to sell or lease, if either party fails so to do, he agrees to pay all expenses of enforcing this agreement, out of the proceeds thereof, including a reasonable attorney's fee.

In consideration of the efforts of the agent in procuring a purchaser, to pay said agent a commission of 4% or his equivalent into a future contract with any other agent and said contract is presently effective, this paragraph will be of no force or effect.

Date 2-13-79 Ray A. Nicholson Seller Martin S. Ovard Purchaser



Requires brokers to furnish copies of this contract bearing all signatures to buyer and seller. (Dependent upon the method used, one of the following forms must be completed.)

RECEIPT

acknowledge receipt of a final copy of the foregoing agreement bearing all signatures:

Seller Martin S. Ovard Date 2/20/79 Purchaser Heva S. Ovard Date

I personally caused a final copy of the foregoing agreement bearing all signatures to be mailed to the ☐ Seller, ☐ Purchaser, on

by registered mail and return receipt is attached hereto.





EARNEST MONEY RECEIPT AND OFFER TO PURCHASE

This may be a legally binding form, if not understood seek other advice

REALTOR®

TO: Valley Realty

Draper

Utah, 13 Feb.

1979

Name of Broker Company

Martin S. and Reva Ovard

IN CONSIDERATION OF your agreement to use your efforts to present this offer to the Seller, I/we hereby deposit with you as earnest money the sum of \$ 270,000.00, Two Hundred and Seventy Thousand and No/100ths DOLLARS

in the form of check Lot 5 13300 So. 663 E. (Approximate address) (Approximately 1 acre)

Draper City Salt Lake County, State of Utah

including any of the following items if at present attached to the premises: Plumbing and heating fixtures and equipment including stoker and oil tanks, water heaters, and burners, electric light fixtures excluding bulbs, bathroom fixtures, roller shades, curtain rods and fixtures, venetian blinds, window and door screens, linoleum, all shrubs and trees, and any other fixtures

except none

The following personal property shall also be included as part of the property purchased:

The total purchase price of \$ 270,000.00, Twenty-seven thousand DOLLARS

shall be payable as follows: \$ 270,000.00 which represents the aforescribed deposit, receipt of which is hereby acknowledged by you: \$ 270,000.00 when seller approves sale: \$ on delivery of deed or final contract of

sale which shall be on or before 1,000.00 down at closing and \$7,000.00 every six months plus interest for the period until the date of \$27,000.00. All interest is paid. Final payment is due on 10/1/91. Closing shall be on 10/1/91. Seller will provide a copy of the deed to the buyer. The buyer will be responsible for all taxes and assessments on the property from the date of closing.

until the balance of \$ 0.00 together with interest is paid, provided, however, that buyer at his option, at any time, may pay amounts in excess of the monthly payments upon the unpaid balance, subject to the limitations of any mortgage or contract by the buyer herein assumed. Interest at 10% per annum on the unpaid portions of the

purchase price to be included in the monthly payments and shall begin as of date of possession which shall be on or before 10/1/91. All risk of loss and destruction of property, and expenses of insurance shall be born by the seller until date of possession at which time property taxes, rent, insurance, interest and other expenses of the property shall be paid by the buyer as of date of possession. All other taxes and all assessments, mortgages, chattel liens and other liens, encumbrances or charges against the property of any nature shall be paid by the seller except:

The following special improvements are included in this sale: Sewer ☒ Connected ☐ Septic Tank and/or Latrine ☐ Sidewalk ☐ Curb and Gutter ☐ Special Street Paving ☐ Special Street Lighting ☐ Culinary Water (City ☐ Other Community System ☐ Connected ☐ Private ☐ (Legend: Yes (x) No (n))

Contract of Sale or Instrument of conveyance to be made on the approved form of the Utah Dept. of Business Regulation in the name of

This payment is received and offer is made subject to the written acceptance of the seller endorsed hereon within 10 days from date hereof, and unless so approved the return of the money herein receipted shall cancel this offer without damage to the undersigned agent.

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, at the option of the seller, be retained as liquidated and agreed damages.

It is understood and agreed that the terms written in this receipt constitute the entire Preliminary Contract between the purchaser and the seller, and that no verbal statement made by anyone relative to this transaction shall be construed to be a part of this transaction unless incorporated in writing herein. It is further agreed that execution of the final contract shall constitute the Earnest Money Receipt and Offer to Purchase.

By Martin S. and Reva Ovard Agent By Ray H. Nicholson

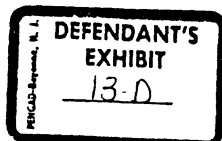
We do hereby agree to carry out and fulfill the terms and conditions specified above, and the seller agrees to furnish good and marketable title with abstract brought to date or at Seller's option a policy of title insurance in the name of the purchaser and to make final conveyance by warranty deed or

in the event of sale of other than real property, seller will provide evidence of title or right to sell or lease. If either party fails so to do, he agrees to pay all expenses of enforcing this agreement, or of any right arising out of the breach thereof, including a reasonable attorney's fee.

The seller agrees in consideration of the efforts of the agent in procuring a purchaser, to pay said agent a commission of 4%.

In the event seller has entered into a listing contract with any other agent and said contract is presently effective, this paragraph will be of no force or effect.

2-11-79 Date Seller Name J. Newman Purchaser Martin S. and Reva Ovard



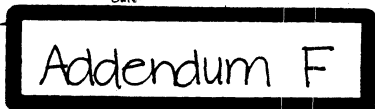
We encourage brokers to furnish copies of this contract bearing all signatures to buyer and seller. (Dependent upon the method used, one of the following forms must be completed.)

RECEIPT

I acknowledge receipt of a final copy of the foregoing agreement bearing all signatures: Seller Date Purchaser Date

I personally caused a final copy of the foregoing agreement bearing all signatures to be mailed to the ☐ Seller, ☐ Purchaser, on

19, by registered mail and return receipt is attached hereto.



This is to certify that this is a true and accurate copy of the records on file with the City of Draper.

OP

CITY RECORDER

Barbara L. Sadler
Barbara Sadler

BOARD OF ADJUSTMENTS
The April 12, 1979 Meeting

Meeting called to order by Chairman Tom Mellenthin with the following present:

Duane Sadler; Gary Nelson; Elmer Sterling; and Andrea Zimmerman, Sec.

Meeting called to order at 8:24 p.m.

No. 1: Appeal - Phil Edmunds

Charge of \$138 for not getting building permit from it City of Draper. Also 50% charge added to fee because he didn't get a building permit.

Duane Sadler moved that the 50% charge be made as originally issued with second by Gary Nelson. Voting was in favor.

Question brought up as to whether he need to get business license.

No. 2: ARTIE PECK - Variance

Building is on a lot formerly less than one acre. Elmer Sterling moved to approval variance Second by Duane Sadler. Motion carried.

No. 3: ROYAL ANDERSON - Variance

Applying for 4-plex variance.

Tom Mellenthin moved to approve the variance on the duplex only.
Second by Elmer Sterling. Motion carried.

No. 4: DENNIS BURNHAM - Variance

Duane Sadler moved to approve said variance with second by Gary Nelson.
Motion carried.

No. 5: LYNN CARTER - Variance

Lynn Carter was present to request 100 ft. frontage variance at 645 E. 14800 South. Duane Sadler moved to approve variance with second by Elmer Sterling.
Motion carried.

No. 6: LANE NEWMAN, SAM OVARD & DAVID DAY - Variance

All of above were present. A Mr. Stevens, neighbor, also present in favor. Tom Mellenthin moved to approve the variance based on the following conditions:

- a) 70 foot cul de sac; (b) 16 ft. paved surface back from main road;
- (c) fire hydrant and adequate waterline.

Second by Duane Sadler and motion passed unanimously.

No. 7: RONALD RASMUSSEN - Variance regarding the lot size from 1 acre to .90 acres.

Elmer Sterling moved to approve variance with second by Duane Sadler. Mot. i. carried unanimously.

Meeting adjourned at 9:36 p.m.

Addendum H

CONFIDENTIAL

FOR AUTHORIZED MULTIPLE LISTING MEMBERS ONLY-NOT FOR PUBLIC DISTRIBUTION.



REAL ESTATE FOR SALE IN



GREATER SALT LAKE

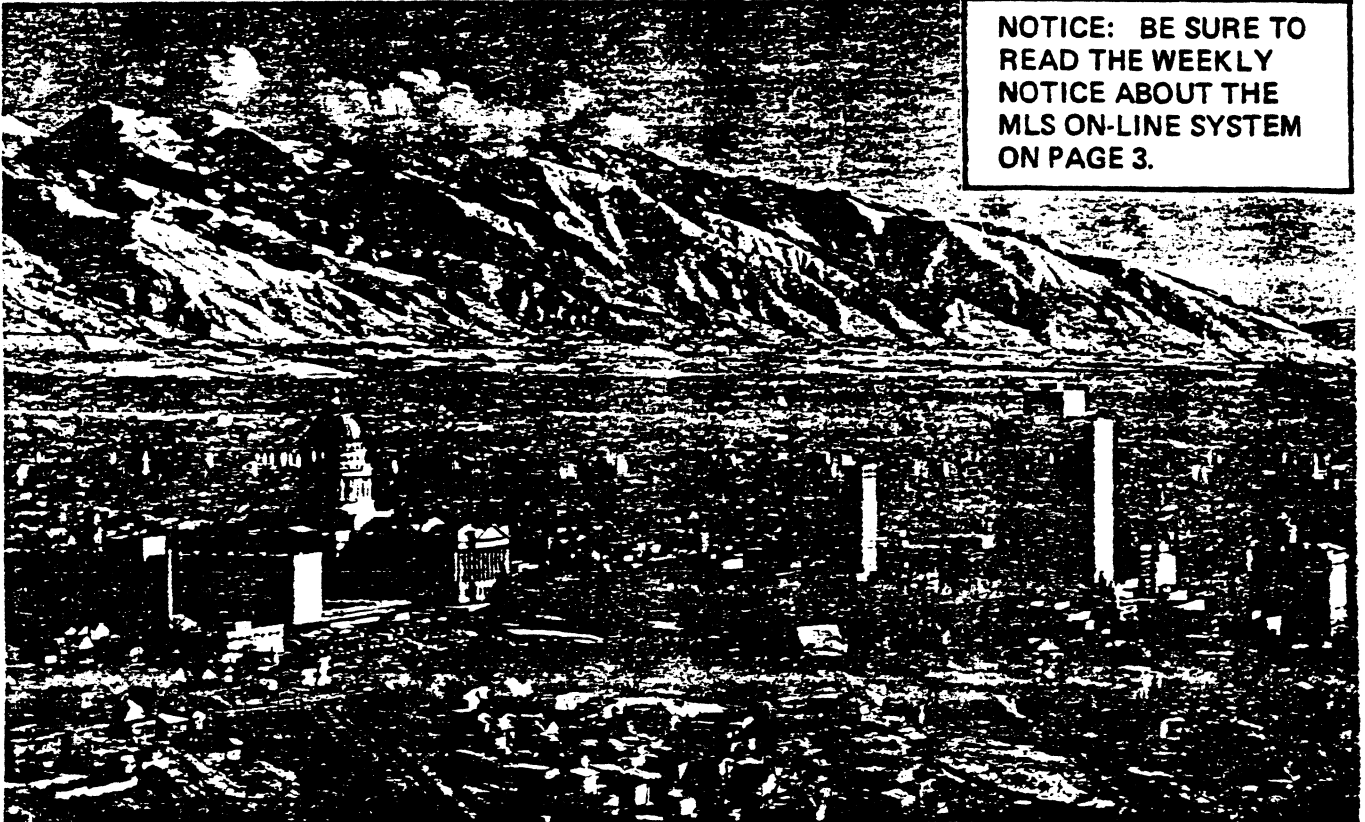
MULTIPLE LISTING SERVICE

SALT LAKE BOARD OF REALTORS

2970 EAST 3300 SOUTH • TELEPHONE: 486-4465

P. O. BOX 9228 • SALT LAKE CITY, UTAH 84109

© COPYRIGHT 1982 — SALT LAKE BOARD OF REALTORS®



NOTICE: BE SURE TO
READ THE WEEKLY
NOTICE ABOUT THE
MLS ON-LINE SYSTEM
ON PAGE 3.

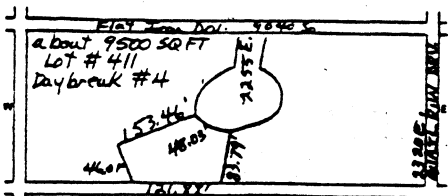
WARNING

WARNING: Persons using this book are reminded that the information here is intended for the confidential use of authorized persons only and is not intended to comply with public disclosure requirements to consumers pursuant to Regulation Z, the Truth in Lending Act or the Uniform Consumer Credit Code.

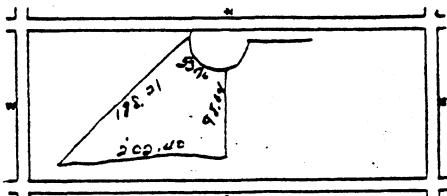
VIOLATION OF USE SHALL SUBJECT THE MEMBER TO LOSS OF
THIS BOOK PROPERTY OF _____ REAL ESTATE FIRM _____

INFORMATION HEREIN DEEMED RELIABLE BUT NOT GUARANTEED

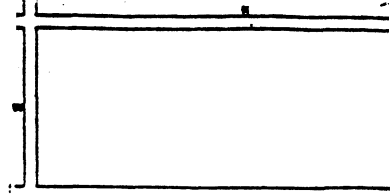
Addendum I



76833	Ac	9089 S DOUBLE DOWN COURT	25,000	
LB	Loc SE	9089 2255 Zoning R-1	1	Per
Size	OXO	Ac	30	City SANDY
Gas	Y	Curb	Y	Water Y
Power	Y	Sec	Y	Sec
Water	Y	Sec	Y	Sec
Notes	CONTRACT W 202 DOWN!!			
NO SUBORDINATION	To			
	Terms 204			
	Terms CONTRACT, CT, OF			
LS	JIM HENRICKSEN	Ph 487-1833	Lines	
LD	C21 MTNVEST	Ph 566-9291	DOC 33	

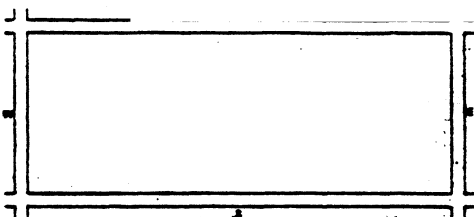


77771	Ac	1636 E PERLEREACH CTRC	28,900	
LB	Loc SE	11990 1636 Zoning R-1	1	Per
Size	98X202X18	OXO	Ac	30
Gas	Y	Curb	Y	Water Y
Power	Y	Sec	Y	Sec
Water	Y	Sec	Y	Sec
Notes	BALLOON SELLER WILL CL			
EAP, GREAT VIEW OF GOLF COURSE	IN TIONS			
E AND MOUNTAINS SURROUNDED	By			
Y 2200000 HOMES,	Terms 291			
LS DEN SUMMERHAYS	Ph 571-2622	Lines		
LD WARDLEY MURRAY	Ph 268-2818	DOC 33		

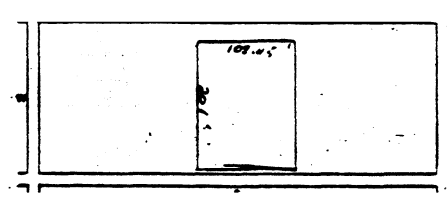


777370	Ac	11375 S WILLOW VIEW WAY	13	
LB	Loc SE	11375 2420 Zoning R-1	1	Per
Size	IRREGULAR	134X100	Ac	31
Gas	Y	Curb	Y	Water Y
Power	Y	Sec	Y	Sec
Water	Y	Sec	Y	Sec
Notes	PANDRATIC VIEW, DAY			
COVERED AREA OF QUALITY	To			
HOMES, SELLERS MOTIVATED-	Terms 227			
PRESENT ALL OFFERS,	Terms CONTRA			
LS GERTT JONES	Ph 355-2215	Lines		
LD GUMPEATERS	Ph 42-2277	DOC 33		

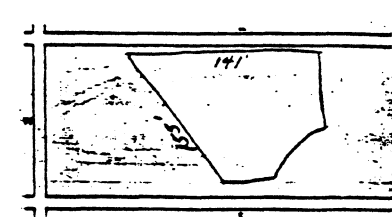
LN



780426	Ac	13575 S 1300 EAST	25,000	
LB	Loc SE	13575 1300 Zoning R-1	1	Per
Size	61 ACRE	100X240	Ac	21
Gas	Y	Curb	Y	Water Y
Power	Y	Sec	Y	Sec
Water	Y	Sec	Y	Sec
Notes	HORSES DR. VIEW LOT			
BEAUTIFUL DRAPER SETTING,	To			
NOTE COMMISSION,	Terms 250			
	Terms CONTRACT			
LS JERRY WHIPPLE	Ph 571-5873	Lines		
LD C21 MCAFFEE	Ph 943-5533	DOC 33		

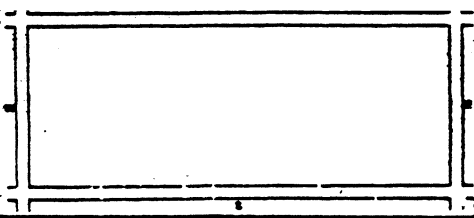


773535	Ac	1890 E ARLENWAY	29,900	
LB	Loc SE	9290 1890 Zoning R-1	1	Per
Size	108X201	Ac	30	City SANDY
Gas	Y	Curb	Y	Water Y
Power	Y	Sec	Y	Sec
Water	Y	Sec	Y	Sec
Notes	EX 1/2 ACRE HORSE PROPER			
ITY FENCED, VIEW EXCEL SANDY	To			
DC OWNER WILL SELL ON CONT A	Terms 1			
ND POSS SUBORDINATION,	Terms CONTRACT SUBOR			
LS DENNY GUEST	Ph 571-0846	Lines		
LD HANSELL GASSOC	Ph 946-3945	DOC 33		

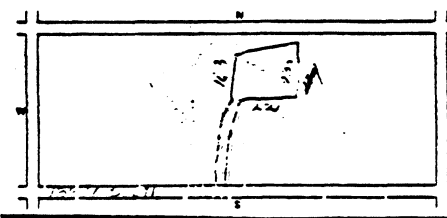


78459	Ac	10965 S PLEASANT HILL CIR	13	
LB	Loc SE	10965 2049 Zoning R-1	1	Per
Size	12503	155X141	Ac	33
Gas	Y	Curb	Y	Water Y
Power	Y	Sec	Y	Sec
Water	Y	Sec	Y	Sec
Notes	EXCELLENT VIEW LOT FAC			
ING VALLEY, CULDESAC, QUIET	To			
PEPPERWOOD RIM AREA, TERMS	Terms 254			
CONTRACT POSSIBLE, GREAT AREA	Terms ASSH			
LS M FLUCKIGER	Ph 948-9442	Lines		
LD HILL REST	Ph 942-2523	DOC 33		

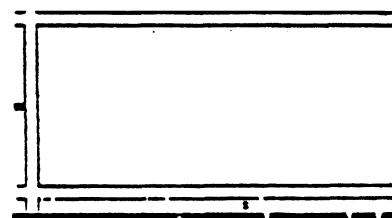
8



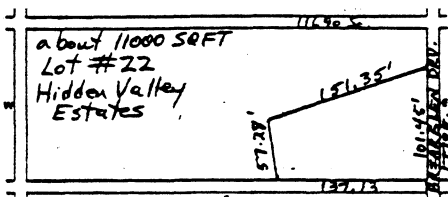
771118	Ac	1762 E BRIARLEIGH LANE	25,500	
LB	Loc SE	11690 1762 Zoning R-1	1	Per
Size	SQUARE	108X103	Ac	23
Gas	Y	Curb	Y	Water Y
Power	Y	Sec	Y	Sec
Water	Y	Sec	Y	Sec
Notes	FABULOUS MOUNTAIN VIEW			
BY HIDDEN VALLEY, POTENTIAL	To			
AND CHOICE OF VIEWS, CALL LA	Terms 225			
FDR INFO, DETAILS, TERMS,	Terms CT, CS, CV			
LS JIM CARLSON	Ph 561-0172	Lines		
LD ERA-VISTA	Ph 566-2493	DOC 33		



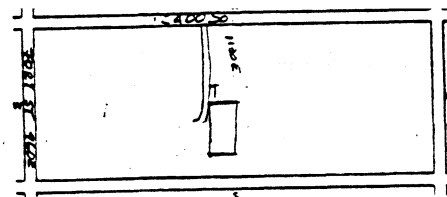
769126	Ac	651 E 13800 SOUTH	130,000	
LB	Loc SE	13800 651 Zoning A-1	1	Per
Size	ONE ACRE	OXO	Ac	1.00
Gas	Y	Curb	Y	Water Y
Power	Y	Sec	Y	Sec
Water	Y	Sec	Y	Sec
Notes	WILL SUBORDINATE,			
IRR. WATER AVAILABLE, DOWN	To			
A PRIVATE LANE TO TREE-LINED	Terms 350			
SECLUSION,	Terms CONT POSSIBLE			
LS JERRY WHIPPLE	Ph 571-5871	Lines		
LD C21 MCAFFEE	Ph 943-5533	DOC 33		



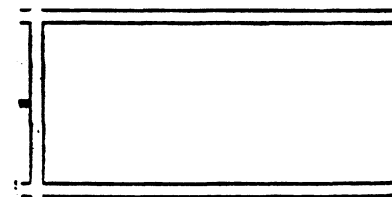
769402	Ac	11420 S 13800 EAST	13	
LB	Loc SE	11420 13800 Zoning A-1	1	Per
Size	RECTANGLE	187X195	Ac	0.83
Gas	Y	Curb	Y	Water Y
Power	Y	Sec	Y	Sec
Water	Y	Sec	Y	Sec
Notes	ZONED FOR ANIMALS, GREAT			
VALLEY AND MOUNTAIN VIEW,	To			
AREA OF EXPENSIVE HOMES LOOK	Terms 300			
AT FINANCING, YR CONTRACT	Terms 73 DO			
LS ACE AVERY	Ph 571-4000	Lines		
LD ACE AVERY ASSC	Ph 486-2050	DOC 33		



76837	Ac	11712 S BRIARLEIGH DRIVE	27,000	
LB	Loc SE	11712 1770 Zoning R-1	1	Per
Size	OXO	Ac	30	City SANDY
Gas	Y	Curb	Y	Water Y
Power	Y	Sec	Y	Sec
Water	Y	Sec	Y	Sec
Notes	CONTRACT W 205 DOWN!!			
NO SUBORDINATION	To			
	Terms 225			
	Terms CS, CT, OF			
LS JIM HENRICKSEN	Ph 487-1833	Lines		
LD C21 MTNVEST	Ph 566-9291	DOC 33		



769442	Ac	1130 E 12900 SOUTH	130,000	
LB	Loc SE	12500 1130 Zoning A-1	1	Per
Size	ONE ACRE	128X328	Ac	0.96
Gas	Y	Curb	Y	Water Y
Power	Y	Sec	Y	Sec
Water	Y	Sec	Y	Sec
Notes	VERY NICE HORSE PROPERTY			
Y, WATER ABOUT 200 FT FROM	To			
PROP MAKE OFFER, IRRIGATION	Terms 200			
WATER AVAIL. NEAR SUMMERVILLE	Terms ASSUME PREFER			
LS LOTS MARTT	Ph 250-9580	Lines		
LD WARDLEY CORP	Ph 268-2818	DOC 33		



777125	Ac	12650 S 800 EAST	13	
LB	Loc SE	12650 800 Zoning P143	1	Per
Size	ACRE	331X186	Ac	1.00
Gas	Y	Curb	Y	Water Y
Power	Y	Sec	Y	Sec
Water	Y	Sec	Y	Sec
Notes	SECLUDED DRAPER HORSE P			
PROPERTY, ASSUME AT SAME RATE	To			
UTILITIES APPX. 100 FT AWAY	Terms 262			
	Terms ASSURE			
LS VONDA CORNABY	Ph 571-7885	Lines		
LD C21, LAWLER	Ph 946-1266	DOC 33		

REALTOR TO: FRED HALE REALTOR SALT LAKE CITY Utah, SEPT 18 19 82

IN CONSIDERATION OF your agreement to use your efforts to present this offer to the Seller, I, Joseph D. Saunders

hereby deposit with you as earnest money the sum of (\$ 100) ONE HUNDRED DOLLARS

in the form of CHECK

to secure and apply on the purchase of the property situated at: 1 ACRE LAND ADJACENT to and Directly
NORTH of JOSEPH W. SAUNDERS PROPERTY AT 13735 South Shadow
MOUNTAIN (655 East) DRAPER Utah.

DRAPER City Utah SALT LAKE County, State of Utah

including any of the following items if at present attached to the premises: Plumbing and heating fixtures and equipment including stoker and oil tanks, water heaters, and burners, electric light fixtures excluding bulbs, bathroom fixtures, roller shades, curtain rods and fixtures, venetian blinds, window and door screens, linoleum, all shrubs and trees, and any other fixtures

except NONE

The following personal property shall also be included as part of the property purchased: 1 Share Draper Irrigation

water.

The total purchase price of \$ (26,000) Twenty Six Thousand DOLLARS

shall be payable as follows: \$ 100 which represents the aforesaid deposit, receipt of which is hereby acknowledged by you:

\$ 26,000 when seller approves sale: \$ 26,000 Note on delivery of deed or final contract of

sale which shall be on or before Sept 24 19 82 and each month commencing

\$26,000 Note TO BE paid in Full January 15, 1985. Property

TO BE Security For Note.

OFFER SUBJECT to 35' Right of way Adjacent to Saunders's

Property and Subtled Property, Be Vacated and Reverting

TO BUYER.

until the balance of \$ 26,000 together with interest is paid; provided, however, that buyer at his option, at any time, may pay amounts in excess of the monthly

payments upon the unpaid balance, subject to the limitations of any mortgage or contract by the buyer herein assumed. Interest at 0 % per annum on the unpaid portions of the

purchase price to be included in the prescribed payments and shall begin as of date of possession which shall be on or before Sept 24 19 82. All risk of loss and destruction

of property, and expenses of insurance shall be born by the seller until date of possession at which time property taxes, rents, insurance, interest and other expenses of the property shall be

prorated as of date of possession. All other taxes and all assessments, mortgages, chattel liens and other liens, encumbrances or charges against the property of any nature shall be paid by

the seller except: NONE

The following special improvements are included in this sale: Sewer ☒ Connected ☒ Septic Tank and/or Cesspool ☒ Sidewalk ☒ Curb and Gutter ☒ Special Street Paving

☒ Special Street Lighting ☒ Culinary Water (City) ☒ Other Community System ☒ Private (Legend: Yes (x) No (o)).

Contract of Sale or instrument of conveyance to be made on the approved form of the Utah Dept. of Business Regulation in the name of

Joseph D. Saunders, and Cheryl M. Saunders, his wife AS Joint Tenants

This payment is received and offer is made subject to the written acceptance of the seller endorsed hereon within Three days from date hereof, and unless so

approved the return of the money herein receipted shall cancel this offer without damage to the undersigned agent.

In the event the purchaser fails to pay the balance of said purchase price or complete said purchase as herein provided, the amounts paid hereon shall, at the option of the seller,

be retained as liquidated and agreed damages.

It is understood and agreed that the terms written in this receipt constitute the entire Preliminary Contract between the purchaser and the seller, and that no verbal statement made by

anyone relative to this transaction shall be construed to be a part of this transaction unless incorporated in writing herein. It is further agreed that execution of the final contract shall

validate this Earnest Money Receipt and Offer to Purchase.

Fred Hale Realtor Agent By Fred Hale

Broker Company

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 abstract brought to date or at Seller's

option a policy of title insurance in the name of the purchaser and to make final conveyance by warranty deed on Sept 24 19 82.

In the event of sale of other than real property, seller will provide evidence of title or right to sell or lease. If either party fails so to do, he agrees to pay all expenses of enforcing this agree-

ment, or of any right arising out of the breach thereof, including a reasonable attorney's fee.

The seller agrees in consideration of the efforts of the agent in procuring a purchaser, to pay said agent a commission of 6% of Sale Price.

In the event seller has entered into a listing contract with any other agent and said contract is presently effective, this paragraph will be of no force or effect.

Date Sept 18 1982 Seller Kevin J. Howard Buyer Joseph D. Saunders

Date Sept 18 1982 Seller Maren L. Howard Buyer Joseph D. Saunders

OFFER ACCEPTED With the Following changes:

1) NO IRRIGATION Water shares Included.

2) \$26,000 Note to Bear interest at 15% Per ANNUM.

3) Note to Be SECURED By TRUST Deed on Both Home & This Property.

4) Interest Only Payment Due JAN. 15, 1984.

5) IN THE EVENT BUYER'S HOME is EITHER PORTLAND OR DENVER Sell

Price to JAN. 15, 1984 Buyer Agrees to Pay \$3,000, Said Amount


TO Apply toward PRINCIPLE and Interest on Note.

Addendum J

CERTIFICATE OF SERVICE

This is to certify that four (4) copies of the foregoing Brief of the Appellants were mailed, postage prepaid, to the following attorney this 30 day of March, 1989.

Thomas N. Crowther
PARSONS & CROWTHER
Attorney for Appellees
455 South 300 East, Suite 300
Salt Lake City, Utah 84111


Frederick N. Green
Julie V. Lund
Attorneys for
Plaintiffs/Appellants