

1989

Hi-Country Estate Homeowners Association, a Utah corporation v. Steven K. Maxfield : Response to a Petition for a Writ of Certiorari

Utah Court of Appeals

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A. Howard Lundgren; Attorney for Respondent.

Steven K. Maxfield, Pro Se; Appellant.

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO.

890471-CA

IN THE UTAH SUPREME COURT

* * * * *

HI-COUNTRY ESTATES HOMEOWNERS	:	
ASSOCIATION, a Utah corporation,	:	Case No. 890471-CA
	:	
Plaintiff/Respondent,	:	Category No. 14
	:	
vs.	:	
	:	
STEVEN K. MAXFIELD,	:	
	:	
Defendant/Petitioner.	:	

* * * * *

BRIEF OF RESPONDENTS

-APPENDIX-

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RESPONSE TO A PETITION FOR A WRIT OF CERTIORARI

* * * * *

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FILED

JAN 4 1991

Clerk, Supreme Court, Utah

IN THE UTAH SUPREME COURT

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APPENDIX A

deposit and a list of all known claimants, including known addresses. The clerk shall notify the listed claimants within 10 days of receiving the affidavit of deposit.

(2) Any claimant may then file a petition for adjudication of priority to these funds and request a hearing before the court. The petitioner requesting the hearing shall give notice of the hearing to all claimants listed in the trustee's affidavit of deposit and any others known to the petitioner. All persons having or claiming an interest must appear and assert their claim or be barred thereafter.

(3) Pursuant to the determination hearing, the court will establish the priorities of the parties to the trustee's sale proceeds and enter an order with the clerk of the court or county treasurer directing the disbursement of funds as determined.

Rule 4-508. Unpublished opinions.

Intent:

To establish a uniform standard for the use of unpublished opinions.

Applicability:

This rule shall apply to all courts of record and not of record.

Statement of the Rule:

Unpublished opinions, orders and judgments have no precedential value and shall not be cited or used in the courts of this state, except for purposes of applying the doctrine of the law of the case, res judicata, or collateral estoppel. (Added effective January 15, 1990.)

ARTICLE 6.

CRIMINAL PRACTICE.

Rule 4-601. Victims and witnesses.

Intent:

To establish procedures which ensure that victims and witnesses of crime are treated with dignity, respect, courtesy, and sensitivity.

To establish procedures which ensure that child victims and child witnesses of crime are treated with consideration for their age and maturity and in a manner that is the least traumatic, intrusive or intimidating.

Applicability:

This rule shall apply to the judiciary, prosecutors, defense counsel, and law enforcement and corrections personnel in all felony cases in and all misdemeanor cases where personal injury is sustained by the victim. This rule also applies to all individuals who have been subpoenaed or called to testify as witnesses in any criminal proceeding.

Statement of the Rule:

(1) At the time of the arraignment or preliminary hearing, or as soon thereafter as possible, the prosecuting agency shall provide written verification to the court that all victims and subpoenaed witnesses have been informed of

Rule 32. Interest on judgment.

Unless otherwise provided by law, if a judgment for money in a civil case is affirmed, whatever interest is allowed by law shall be payable from the date the judgment was entered in the trial court.

COLLATERAL REFERENCES

Am. Jur. 2d. — 5 Am. Jur. 2d Appeal and Error § 941.

C.J.S. — 5 C.J.S. Appeal and Error § 1979.

A.L.R. — Date from which interest on judgment starts running, as affected by modification of amount of judgment on appeal, 4 A.L.R.3d 1221.

Right to interest pending appeal, 15 A.L.R.3d 411.

Running of interest on judgment where both parties appeal, 11 A.L.R.4th 1099.

Retrospective application and effect of state statute or rule allowing interest or changing rate of interest on judgments or verdicts, 41 A.L.R.4th 694.

Key Numbers. — Interest ⇨ 39(2).

Rule 33. Damages for delay or frivolous appeal; recovery of attorney's fees.

(a) **Damages for delay or frivolous appeal.** Except in a first appeal of right in a criminal case, if the court determines that a motion made or appeal taken under these rules is either frivolous or for delay, it shall award just damages, which may include single or double costs, as defined in Rule 34, and/or reasonable attorney fees, to the prevailing party. The court may order that the damages be paid by the party or by the party's attorney.

(b) **Definitions.** For the purposes of these rules, a frivolous appeal, motion, brief, or other paper is one that is not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law. An appeal, motion, brief, or other paper interposed for the purpose of delay is one interposed for any improper purpose such as to harass, cause needless increase in the cost of litigation, or gain time that will benefit only the party filing the appeal, motion, brief, or other paper.

(c) **Procedures.**

(1) The court may award damages upon request of any party or upon its own motion. A party may request damages under this rule only as part of the appellee's motion for summary disposition under Rule 10, as part of the appellee's brief, or as part of a party's response to a motion or other paper.

(2) If the award of damages is upon the motion of the court, the court shall issue to the party or the party's attorney or both an order to show cause why such damages should not be awarded. The order to show cause shall set forth the allegations which form the basis of the damages and permit at least ten days in which to respond unless otherwise ordered for good cause shown. The order to show cause may be part of the notice of oral argument.

(3) If requested by a party against whom damages may be awarded, the court shall grant a hearing.

decree (herein referred to as "decisions") of the Court of Appeals shall be initiated by a petition for a writ of certiorari to the Supreme Court of Utah.

Rule 46. Considerations governing review of certiorari.

Review by a writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for special and important reasons. The following, while neither controlling nor wholly measuring the Supreme Court's discretion, indicate the character of reasons that will be considered:

(a) When a panel of the Court of Appeals has rendered a decision in conflict with a decision of another panel of the Court of Appeals on the same issue of law;

(b) When a panel of the Court of Appeals has decided a question of state or federal law in a way that is in conflict with a decision of the Supreme Court;

(c) When a panel of the Court of Appeals has rendered a decision that has so far departed from the accepted and usual course of judicial proceedings or has so far sanctioned such a departure by a lower court as to call for an exercise of the Supreme Court's power of supervision; or

(d) When the Court of Appeals has decided an important question of municipal, state, or federal law which has not been, but should be, settled by the Supreme Court.

Rule 47. Certification and transmission of record; filing; parties.

(a) **Appearance, docketing fee, filing, and service.** Counsel for the petitioner shall, within the time provided by Rule 48, pay the certiorari docketing fee and file ten copies of a petition which shall comply in all respects with Rule 49. The case then will be placed on the certiorari docket. Counsel for the petitioner shall serve four copies of the petition on counsel for each party separately represented. It shall be the duty of counsel for the petitioner to notify all parties in the case of the date of filing and of the certiorari docket number of the case. Service and notice shall be given as required by Rule 21.

(b) **Joint and separate petitions.** Parties interested jointly, severally, or otherwise in a decision may join in a petition for a writ of certiorari; any one or more of them may petition separately; or any two or more of them may join in a petition. When two or more cases are sought to be reviewed on certiorari and involve identical or closely related questions, it will suffice to file a single petition for a writ of certiorari covering all the cases.

(c) **Cross-petition of respondent.** Counsel for a respondent wishing to file a cross-petition shall, within the time provided by Rule 48(d), pay the certiorari docketing fee and file ten copies of a cross-petition for a writ of certiorari which shall comply in all respects with Rule 49. The cross-petition will then be placed on the certiorari docket. Counsel for the cross-petitioner shall serve four copies of the cross-petition on counsel for each party separately represented. It shall be the duty of counsel for the cross-petitioner to notify all parties in the case of the date of the filing and of the certiorari docket number of the case. Service and notice shall be given as required by Rule 21. A cross-

petition for a writ of certiorari may not be joined with any other filing; the clerk shall not accept any filing so joined.

(d) **Parties.** All parties to the proceeding in the Court of Appeals shall be deemed parties in the Supreme Court, unless the petitioner notifies the Clerk of the Supreme Court in writing of the petitioner's belief that one or more of the parties below have no interest in the outcome of the petition. A copy of such notice shall be served on all parties to the proceeding below, and a party noted as no longer interested may remain a party by notifying the clerk, with service on the other parties, that the party has an interest in the petition.

(e) **Motion for certification and transmission of record.** A party intending to file a petition for certiorari, prior to filing the petition or at any time prior to action by the Supreme Court on the petition, may file a motion for an order to have the Clerk of the Court of Appeals or the clerk of the trial court certify the record, or any part of it, and provide for its transmission to the Supreme Court. Motions to certify the record prior to action on the petition by the Supreme Court should rarely be made, only when the record is essential to the Supreme Court's proper understanding of the petition or the brief in opposition and such understanding cannot be derived from the contents of the petition or the brief in opposition, including the appendix. If a motion is appropriate, it shall be made to the Supreme Court after the filing of a petition but prior to action by the Supreme Court on the petition. In the case of a stay of execution of a judgment of the Court of Appeals, such a motion may be made before the filing of the petition. Thereafter, the Clerk of the Supreme Court or any party to the case may request that additional parts of the record be certified and transmitted to the Supreme Court. Copies of all motions for certification and transmission shall be sent to the parties to the proceeding. All motions and orders shall comply with and be subject to the requirements of Rule 23.

Rule 48. Time for petitioning.

(a) **Timeliness of petition.** A petition for a writ of certiorari must be filed with the Clerk of the Supreme Court within 30 days after the entry of the decision by the Court of Appeals.

(b) **Refusal of petition.** The clerk will refuse to receive any petition for a writ of certiorari which is jurisdictionally out of time.

(c) **Effect of petition for rehearing.** The time for filing a petition for a writ of certiorari runs from the date the decision is entered by the Court of Appeals, not from the date of the issuance of the remittitur. If, however, a petition for rehearing is timely filed by any party, the time for filing the petition for a writ of certiorari for all parties runs from the date of the denial of rehearing or of the entry of a subsequent decision entered upon the rehearing.

(d) **Time for cross-petition.**

(1) A cross-petition for a writ of certiorari must be filed:

(A) within the time provided in subdivisions (a) and (c) of this rule
or

(B) within 30 days of the filing of the petition for a writ of certiorari.

(2) Any cross-petition timely only pursuant to paragraph (d)(1)(B) of this rule will not be granted unless a timely petition for a writ of certiorari of another party to the case is granted.

(e) **Extension of time.** The Supreme Court, upon a showing of excusable neglect or good cause, may extend the time for filing a petition or a cross-petition for a writ of certiorari upon motion filed not later than 30 days after the expiration of the time prescribed by paragraph (a) or (c) of this rule, whichever is applicable. Any such motion which is filed before expiration of the prescribed time may be ex parte, unless the Supreme Court otherwise requires. Notice of any such motion which is filed after expiration of the prescribed time shall be given to the other parties. No extension shall exceed 30 days past the prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

Rule 49. Petition for writ of certiorari.

(a) **Contents.** The petition for a writ of certiorari shall contain, in the order indicated:

(1) A list of all parties to the proceeding in the court whose judgment is sought to be reviewed, except where the caption of the case in the Supreme Court contains the names of all parties.

(2) A table of contents with page references.

(3) A table of authorities with cases alphabetically arranged and with parallel citations, agency rules, court rules, statutes, and authorities cited, with references to the pages of the petition where they are cited.

(4) The questions presented for review, expressed in the terms and circumstances of the case but without unnecessary detail. The statement of the questions should be short and concise and should not be argumentative or repetitious. General conclusions, such as "the decision of the Court of Appeals is not supported by the law or facts," are not acceptable. The statement of a question presented will be deemed to comprise every subsidiary question fairly included therein. Only the questions set forth in the petition or fairly included therein will be considered by the Supreme Court.

(5) A reference to the official and unofficial reports of any opinions issued by the Court of Appeals.

(6) A concise statement of the grounds on which the jurisdiction of the Supreme Court is invoked, showing:

(A) the date of the entry of the decision sought to be reviewed;

(B) the date of the entry of any order respecting a rehearing and the date of the entry and terms of any order granting an extension of time within which to petition for certiorari;

(C) reliance upon Rule 47(c), where a cross-petition for a writ of certiorari is filed, stating the filing date of the petition for a writ of certiorari in connection with which the cross-petition is filed; and

(D) the statutory provision believed to confer on the Supreme Court jurisdiction to review the decision in question by a writ of certiorari.

(7) Controlling provisions of constitutions, statutes, ordinances, and regulations that the case involves, setting them out verbatim and giving the appropriate citation. If the controlling provisions involved are

(2) Any cross-petition timely only pursuant to paragraph (d)(1)(B) of this rule will not be granted unless a timely petition for a writ of certiorari of another party to the case is granted.

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(D) the statutory provision believed to confer on the Supreme Court jurisdiction to review the decision in question by a writ of certiorari.

(7) Controlling provisions of constitutions, statutes, ordinances, and regulations that the case involves, setting them out verbatim and giving the appropriate citation. If the controlling provisions involved are

lengthy, their citation alone will suffice at this point and their pertinent text shall be set forth in the appendix referred to in subparagraph (10) of this paragraph.

(8) A statement of the case. The statement shall first indicate briefly the nature of the case, the course of the proceedings, and its disposition in the lower courts. There shall follow a statement of the facts relevant to the issues presented for review. All statements of fact and references to the proceedings below shall be supported by citations to the record and to the opinion of the Court of Appeals.

(9) With respect to each question presented, a direct and concise argument explaining the special and important reasons as provided in Rule 46 for the issuance of the writ.

(10) An appendix containing, in the following order:

(A) copies of all opinions, including concurring and dissenting opinions, and all orders, including any order on rehearing, delivered by the Court of Appeals in rendering the decision sought to be reviewed;

(B) copies of any other opinions, findings of fact, conclusions of law, orders, judgments, or decrees that were rendered in the case or in companion cases by the Court of Appeals and by other courts or by administrative agencies and that are relevant to the questions presented. Each document shall include the caption showing the name of the issuing court or agency, the title and number of the case, and the date of its entry; and

(C) any other judicial or administrative opinions or orders that are relevant to the questions presented but were not entered in the case that is the subject of the petition.

If the material that is required by subparagraphs (7) and (10) of this paragraph is voluminous, such may, if more convenient, be separately presented.

(b) **Form of petition.** The petition for a writ of certiorari shall comply with the form of a brief as specified in Rule 27. The cover of the petition shall be white. The clerk shall examine all petitions before filing, and if a petition is not prepared in accordance with Rule 27 and this paragraph, it will not be filed, but shall be returned to be properly prepared.

(c) **No separate brief.** All contentions in support of a petition for a writ of certiorari shall be set forth in the body of the petition, as provided in subparagraph (a)(9) of this rule. No separate brief in support of a petition for a writ of certiorari will be received, and the clerk will refuse to file any petition for a writ of certiorari to which is annexed or appended any supporting brief.

(d) **Page limitation.** The petition for a writ of certiorari shall be as short as possible, but may not exceed 20 pages, excluding the subject index, the table of authorities, any verbatim quotations required by subparagraph (a)(7) of this rule, and the appendix.

(e) **Absence of accuracy, brevity, and clarity.** The failure of a petitioner to present with accuracy, brevity, and clarity whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying the petition.

Brigham Young Law Review. — Reasonable Assurance of Actual Notice Required for In Personam Default Judgment in Utah: *Graham v. Sawaya*, 1981 B.Y.U. L. Rev. 937.

Am. Jur. 2d. — 47 Am. Jur. 2d Judgments §§ 1152 to 1213.

C.J.S. — 49 C.J.S. Judgments §§ 187 to 218.

A.L.R. — Necessity of taking proof as to liability against defaulting defendant, 8 A.L.R.3d 1070.

Appealability of order setting aside, or refusing to set aside, default judgment, 8 A.L.R.3d 1272.

Defaulting defendant's right to notice and hearing as to determination of amount of damages, 15 A.L.R.3d 586.

Opening default or default judgment claimed to have been obtained because of attorney's mistake as to time or place of appearance, trial, or filing of necessary papers, 21 A.L.R.3d 1255.

Failure to give notice of application for default judgment where notice is required only by custom, 28 A.L.R.3d 1383.

Failure of party or his attorney to appear at pretrial conference, 55 A.L.R.3d 303.

Default judgments against the United States under Rule 55(e) of the Federal Rules of Civil Procedure, 55 A.L.R. Fed. 190.

Key Numbers. — Judgment ⇨ 92 to 134.

Rule 56. Summary judgment.

(a) **For claimant.** A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) **For defending party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) **Motion and proceedings thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) **Case not fully adjudicated on motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) **Form of affidavits; further testimony; defense required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirma-

tively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) **When affidavits are unavailable.** Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) **Affidavits made in bad faith.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Compiler's Notes. — This rule is similar to Rule 56, F.R.C.P.

Cross-References. — Contempt generally, §§ 78-7-18, 78-32-1 et seq.

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APPENDIX B

REC'D AUG 3 1990

IN THE UTAH COURT OF APPEALS

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Hi-Country Estates Homeowners)
Association, a Utah)
corporation,)

Plaintiff and Appellee,)

v.)

Steven K. Maxfield, Richard)
James, Paul Stroh, and Fred)
Kwiatkowski,)

Defendants and Appellant.)

OPINION
(Not For Publication)

Case No. 890471-CA

FILED

AUG 2 1990

Mary Noonan
Mary Noonan
Clerk of the Court
Utah Court of Appeals

Third District, Salt Lake County
The Honorable Timothy R. Hanson

Attorneys: John B. Anderson, Salt Lake City, for Appellant
A. Howard Lundgren and Robert A. Bentley, Salt Lake
City, for Appellee

Before Judges Garff, Jackson, and Newey.¹

JACKSON, Judge:

Steven K. Maxfield appeals from a November 1988 judgment that required him to pay the Hi-Country Estates Homeowners Association ("the Association") past due assessments and attorney fees incurred by the Association in this action to collect the assessments. We affirm.

FACTS

Hi-Country Estates is a subdivision in Salt Lake County begun in 1969 or 1970. Protective covenants restricting the

1. Robert L. Newey, Senior Juvenile Court Judge, sitting by special appointment pursuant to Utah Code Ann. § 78-3-24(10) (Supp. 1990).

use of land within the subdivision and the types of structures allowed were executed in 1970 and recorded in March 1974. Also in March 1974, an amendment to the protective covenants was recorded, which, among other things, expressly provided for the creation of a homeowners' association to maintain the subdivision's roads and common areas. The amendment, which was to take immediate effect, made each lot owner a member of the association and provided that each lot owner agreed to pay a pro rata annual assessment for the cost of maintenance.

The appellee Association is a non-profit corporation comprised of owners of real property in Hi-Country Estates subdivision, formed for the purpose of maintaining the streets, roads, and common areas within the subdivision. The Association's articles of incorporation were executed in January 1972 and filed with the Office of the Lieutenant Governor in May 1973. The articles provide that the owner of a Hi-Country Estates subdivision lot "subject by covenants or record to assessment by the Association . . . shall be a member of the Association." They also charge the Association's directors with the obligations to: maintain the common area and road system; fix, levy, collect, and enforce "by any lawful means" all charges and assessments, pursuant to the terms of the amended covenants and as provided in the Association's bylaws; and pay all expenses incurred in conducting its business.

The bylaws elaborate by providing for the timing of the annual assessment of Association members, notice of assessment and payment due date, the amount of interest due on unpaid assessments, and specific authority to the Association to bring an action at law to collect the overdue assessments plus interest, costs, and "reasonable attorney fees of any such action."

Appellant Maxfield acquired Lot #91 in Hi-Country Estates subdivision by a special warranty deed executed June 23, 1978, that expressly states that the property is "[s]ubject to the protective covenants and the articles of the homeowners association." For some time after he became a subdivision lot owner, Maxfield was an Association member and paid his assessments.

In 1981, Maxfield and other members of the Association filed an action in district court captioned James v. Davies, No. C81-8560, in which they alleged that: the election of several Association directors was illegal because not in

conformity with the requirements of the Association's articles and bylaws; the Association had no valid authority either to hold or appear at zoning hearings or to enforce the subdivision's protective covenants by instituting legal actions against Association members; and the protective covenants and the amendment to them were void. After a bench trial, Judge Scott Daniels dismissed as moot the causes of action related to the directors' election. The court held that the original protective covenants were valid, but that the amendment was invalid because the original protective covenants were expressly not amendable until 1995. It also ruled that neither the Association's articles nor the subdivision's original protective covenants authorized the Association to take action against subdivision property owners to enforce the original protective covenants.

The Association filed this action in 1984 to collect assessments that Maxfield and other lot owners had refused to pay since 1982. It was eventually awarded judgment against Maxfield for \$1,190.49 of unpaid assessments, interest, and costs, plus attorney fees the court found were reasonably incurred in the action.²

I.

Maxfield first challenges the trial court's ruling that, under the doctrine of res judicata, the prior judgment in James v. Davies was not a bar to the Association's action to recover the unpaid assessments. This court reviews the trial court's conclusion of law about the applicability of res judicata to the circumstances of a case under the correction-of-error standard. Copper State Thrift & Loan v. Bruno, 735 P.2d 387, 389 (Utah Ct. App. 1987); see Madsen v. Borthick, 769 P.2d 245, 247 (Utah 1988).

The doctrine of res judicata has two distinct parts, known as the claim preclusion and issue preclusion branches. Madsen, 769 P.2d at 247; Copper State Thrift & Loan, 735 P.2d at 389. Claim preclusion bars a subsequent cause of action only if the prior suit and the subsequent suit satisfy three requirements:

2. The attorney fee award of \$3,260 was a joint and several liability of all four defendants. The other three defendants, who have not appealed, paid their pro rata portions of the attorney fee award, leaving \$815 of the award unsatisfied.

First, both cases must involve the same parties or their privies. Second, the claim that is alleged to be barred must have been presented in the first suit or must be one that could and should have been raised in the first action. Third, the first suit must have resulted in a final judgment on the merits.

Madsen, 769 P.2d at 247.

We agree with the trial court that the second requirement for claim preclusion has not been satisfied in this case. It is clear from the case record in James v. Davies that the parties did not litigate, and Judge Daniels did not rule upon, the Association's authority to levy and collect assessments from Maxfield and other subdivision property owners. Maxfield's second amended complaint in James states no cause of action seeking to avoid payment of assessments or challenging the validity of the Association's articles or bylaws.³ It is true that the prior decision in James invalidated the amendment to the subdivision's protective covenants. However, the Association does not base its assessment authority or its current cause of action for unpaid assessments on the invalidated amendment, but rather on the articles of the Association, which are binding on Maxfield as an Association member since he took his property subject to them. Notwithstanding Maxfield's attempt to rewrite the history of the prior litigation, the James court did not conclude either that the Association had no basis for levying and collecting assessments or that Maxfield was not a mandatory member of the Association. Those issues simply were not before the James court, although Maxfield could have raised them.

For these same reasons, the trial court properly concluded that the James judgment did not bar this action under the issue preclusion branch of res judicata, often referred to as collateral estoppel. The rules of issue preclusion bar relitigation of an issue if four requirements are met:

3. Maxfield, in his reply brief, refers us to a copy of a pleading ostensibly filed in the James action, captioned "Amended Verified Complaint." We decline to consider this document, however, because it is not part of the record before us.

First, the issue in both cases must be identical. Second, the judgment must be final with respect to that issue. Third, the issue must have been fully, fairly, and competently litigated in the first action. Fourth, the party who is precluded from litigating the issue must be either a party to the first action or a privy of a party.

Madsen, 769 P.2d at 250. Since the issue of the Association's authority to levy and collect assessments from Maxfield and other property owners was not raised or litigated at all in the prior action, the trial court correctly concluded that this action was not barred by res judicata.

II.

Maxfield next challenges the trial court's award of attorney fees incurred by the Association in this action. Attorney fees are generally recoverable in Utah if provided for by contract. Dixie State Bank v. Bracken, 764 P.2d 985, 988 (Utah 1988); G.G.A., Inc. v. Leventis, 773 P.2d 841, 846 (Utah Ct. App. 1989).

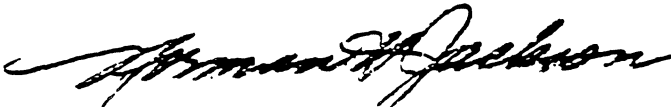
As noted above, the Association's articles provide that the owner of a lot that is subject to assessments is a mandatory member of the Association, a non-profit corporation. By taking his subdivision lot subject to the articles, Maxfield agreed to be bound by that requirement. As a member, he is contractually bound by the Association's articles and bylaws:

It is a well established precedent that the bylaws of a corporation, together with the articles of incorporation, the statute under which it was incorporated, and the member's application, constitute a contract between the member and the corporation. When duly enacted, the bylaws are binding upon all members of the corporation or association who are presumed to know them and contract in reference to them.

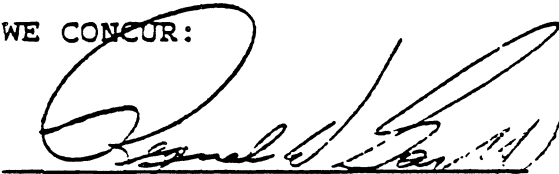
Appeal of Two Crow Ranch, Inc., 494 P.2d 915, 919 (Mont. 1972). Here, the articles and bylaws specify the authority and contractual obligations of the Association to maintain the

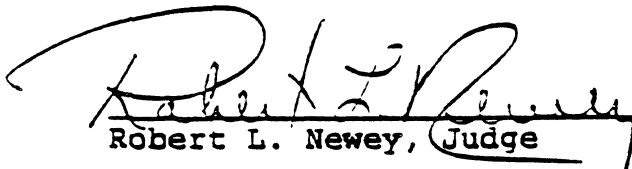
subdivision roads and common areas and to assess each member a proportionate share of those costs. They also spell out the contractual obligation of each member to pay the assessments in timely fashion and they restrict a member's ability to withdraw from Association membership.⁴ The bylaws also expressly provide that attorney fees incurred by the Association in an action against a member to collect overdue assessments are recoverable. Thus, the parties' contract provides a basis for the attorney fees awarded by the trial court.

The judgment is affirmed, and the case is remanded to the district court for its determination of the attorney fees reasonably incurred on appeal, which are also awardable under the terms of the contract between Maxfield and the Association. See G.G.A., Inc., 773 P.2d at 846-47.


Norman H. Jackson, Judge

WE CONCUR:


Regnal W. Garff, Judge


Robert L. Newey, Judge

4. Since the trial court found such authority and obligations to be a part of the parties' agreement, we need not address the merits of the trial court's alternative ruling that, even absent such an agreement, the Association could recover through assessments any reasonable expenses of maintaining common subdivision areas on an "equitable servitude" theory.

APPENDIX C

FILED

IN THE UTAH COURT OF APPEALS

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SEP 28 1990

Mary T. Noonan
Clerk of the Court
Utah Court of Appeals

Hi-Country Estate Homeowners Association, a Utah corporation,
Plaintiff and Appellee,
v.
Steven K. Maxfield, Richard James, Paul Stroh, and Fred Kwiatkowski,
Defendants and Appellant.

ORDER DENYING PETITION
FOR REHEARING

Case No. 890471-CA

THIS MATTER having come before the Court upon
Appellant's Petition for Rehearing, filed August 2,
1990,

IT IS HEREBY ORDERED that the Appellant's Petition for
Rehearing is denied.

Dated this 28th day of September, 1990.

FOR THE COURT



Mary T. Noonan, Clerk

APPENDIX D

FILED

OCT 24 1990

Clerk Supreme Court

STEVEN K. MAXFIELD. PRO SE
Defendant/Petitioner
3329 South 500 West
Salt Lake City, Utah 84105
(801) 268-2022

IN THE UTAH SUPREME COURT

HI-COUNTRY ESTATE HOMEOWNER'S ASSOCIATION, a Utah corporation,)	
	)	ORDER
Plaintiff/Respondent.)	
vs.)	
	)	Petition No.
STEVEN K. MAXFIELD,)	
	)	Case No. 890471-CA
Defendant/Petitioner.)	

Based upon the Ex Parte Motion of Defendant/Petitioner, Steven K. Maxfield, and pursuant to Rule 48(e) of the Utah Rules of Appellate Procedure and good cause and excusable neglect, therefore, Defendant/Petitioner is hereby granted an additional thirty (30) days until November 28, 1990 within which to file his Petition for Writ of Certiorari.

DATED this 24th day of Oct, 1990.

BY THE COURT:

S/

CERTIFICATE OF SERVICE

On the 24 day of Oct, 1990, the undersigned hereby certifies the a true and correct copy of the foregoing Order was mailed, postage prepaid, to A. Howard Lundgren, Attorney for Plaintiff/Respondent 257 Towers, Suite 340, 257 East 200 South, #10, Salt Lake City, Utah 84111.

Steven K. Maxfield

APPENDIX E

IN THE UTAH COURT OF APPEALS

HI-COUNTRY ESTATES HOMEOWNERS :
ASSOCIATION, a Utah
corporation, :

Appellee, : Case No. 890471-CA

v. :

STEVEN K. MAXFIELD, :

Appellant. :

APPELLEE'S BRIEF

APPEAL FROM THE GRANTING OF SUMMARY JUDGMENT AGAINST
STEVEN K. MAXFIELD, APPELLANT, ON NOVEMBER 3, 1988 IN
THE THIRD DISTRICT COURT FOR SALT LAKE COUNTY, UTAH,
THE HONORABLE TIMOTHY R. HANSON, PRESIDING

A. HOWARD LUNDGREN #2022
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Priority Classification 14(b)

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JURISDICTION

This appeal is taken pursuant to U.C.A. Sec. 78-2-2(3)(j) and Section 4 of Article VIII of the Utah Constitution.

NATURE OF PROCEEDINGS

This appeal is taken from summary judgment entered against Steven K. Maxfield ("Maxfield"), Appellant, by the Third District Court for Salt Lake County, State of Utah, and in favor of Hi-Country Estates Homeowners Association, a Utah corporation, Appellee.

STATEMENT OF ISSUES ON APPEAL

1. Does the judgment entered by the Third District Court for Salt Lake County, the Honorable Scott Daniels presiding, in the case of Richard L. James, et al. v. John W. Davies, et al., Case No. C-81-8560, constitute res judicata and/or collateral estoppel and therefore bar Plaintiff's present cause of action?

2. Is the doctrine of equitable servitude a proper legal basis for the entry of summary judgment against the Defendant in this case?

3. Do the Articles of Incorporation and Bylaws of Hi-Country Estates Homeowners Association, Inc. constitute a proper legal basis for Plaintiff to levy assessments against Defendant and other members of the Association?

4. Was the granting of Plaintiff's motion for summary judgment, with respect to its claim for attorneys fees, improper and prejudicial error?

DETERMINATIVE RULES

This case is governed by Rule 56, Utah Rules of Civil Procedure.

STATEMENT OF THE CASE

On or about August 29, 1983, Plaintiff obtained a judgment in the Fifth Circuit Court for Salt Lake County, Sandy Department, Small Claims Division, against Steven K. Maxfield for an annual homeowners assessment of \$115.00 per year for upkeep of roads, utilities and general administration, along with court costs in the amount of \$12.50 (R.8). Maxfield appealed this judgment to the Third District Court in and for Salt Lake County on or about September 12, 1984 (R.4). Thereafter, Plaintiff and Defendant, along with other Defendants in similar small claims actions, entered into a stipulation for consolidation and related procedural matters in connection with this case. Pursuant to this stipulation, Maxfield's appeal along with the appeals of other small claims defendants were consolidated and assigned to the Honorable Timothy Hanson, Third District Court. The stipulation was entered into by the parties on or about February 26, 1986 (R.13, 14). On or about March 12, 1986, the Third District

Court entered an Order of consolidation whereby this case along with others was consolidated. Pursuant to this Order of consolidation, Plaintiff was required to file a new complaint setting forth its claims against the Defendants in the same manner as though this matter had been initially filed in the District Court. Prior to the entry of the Order of consolidation, on or about February 25, 1986, Plaintiff filed its amended complaint with the District Court and sought (1) declaratory judgment, (2) account stated, (3) quantum meruit, and (4) open account (R.15, 16, 17, 18, 19, 20, 21).

On or about April 3, 1986, Defendant Maxfield along with others filed his answer to the Plaintiff's amended complaint as well as a counterclaim and, among other things, alleged that pursuant to a judgment entered by the Honorable Scott Daniels of the Third District Court for Salt Lake County in a prior action entitled Richard James, et al. v. John W. Davies, C81-8560, claimed, among other things, that the claims contained in the Plaintiff's amended complaint were barred by the doctrines of res judicata and/or collateral estoppel based upon the ruling in the James v. Davies case (R.27, 28, 29, 30).

On or about May 20, 1987, the Third District Court, the Honorable Timothy Hanson presiding, entered a scheduling order whereby the parties were required to submit uncontested and

contested statements of facts and further to brief the various legal issues raised by the pleadings of the parties (R.269, 270).

On or about October 9, 1987, argument was had before the Court with regard to the various issues raised by the parties in their pleadings and, by way of Minute Entry dated October 9, 1987, the Court stated, "If there is a basis for a levy the case is resolved and if not the matter will go to trial on a claim of unjust enrichment." (R.380). In a Memorandum Decision dated November 17, 1987, the Third District Court ruled on the disputed legal issues and found that the case entitled Richard James, et al. v. John W. Davies, C81-8560, did not constitute collateral estoppel and/or res judicata and therefore the Plaintiff was not prohibited from levying assessments. The Court further ruled that the principle of "equitable servitude" applied to this action and entitled the Association to make reasonable assessments (R.381, 382, 383, 384).

On or about November 3, 1988, the Honorable Timothy Hanson entered summary judgment in favor of the Plaintiff Association and against Maxfield in the principal amount of \$1,177.99, along with costs of \$12.50 for a total judgment of \$1,190.49 together with legal interest and attorneys fees in the amount of \$3,260.00 owed jointly and severally among all of the defendants in this action (R.473, 474).

On or about November 14, 1988, Defendant Maxfield filed a Motion to Amend Judgment under Rule 59 and Motion for Relief from Judgment under Rule 60 of the Utah Rules of Civil Procedure, seeking to amend the judgment and for relief from this judgment. These motions were denied by the Court on March 24, 1989 (R.503, 504, 514, 515).

STATEMENT OF FACTS

Hi-Country Estates is a subdivision within Salt Lake County, State of Utah, that was begun in 1969 or 1970 (R.152). In connection with the development of this project, the developer drafted protective covenants for Hi-Country Estates in June of 1970 (R.152). These protective covenants placed certain restrictions on the types of uses for the land in the subdivision and further, the type and nature of structures which were allowed to be built on the property within the subdivision. The protective covenants for Hi-Country Estates and an amendment to these covenants were recorded in the office of the Salt Lake County Recorder on or about March 22, 1974 (R.145-152).

On or about January 2, 1973, the developer of this project prepared a Certificate of Incorporation of the Hi-Country Estates Homeowners Association creating the Plaintiff Homeowners Association (R.205, 206). This Certificate of Incorporation was filed in the office of the Lt.Governor of the State of Utah on

May 17, 1973 (R.201). According to the Articles of Incorporation the Association was not organized for pecuniary profit but was created with the specific purpose to provide for the maintenance, upkeep and preservation of the streets, roads, and common area within the subdivision; to promote the health, safety and welfare of the residents within Hi-Country Estates; and to exercise all of the powers and privileges and to perform all of the duties and obligations of the Association as set forth in the protective covenants for Hi-Country Estates (R.202, 203). The Certificate of Incorporation authorizes the Association to:

Fix, levy, collect and enforce payment by any lawful means, all charges or assessments pursuant to the terms of the protective covenants, as amended, and as provided in the Bylaws adopted by the Association; to pay all expenses in connection therewith and all office and other expenses incident to the conduct of the business of the Association, including all licenses, taxes or governmental charges levied or imposed against the property of the Association. (R.203).

According to the provisions of this Certificate of Incorporation:

Every person or entity who is a record owner of a fee or undivided fee interest in any lot which is subject by covenants or record to assessment by the Association, including purchasers under contract, shall be a member of the Association. . . . Membership shall be appurtenant to and may not be separated from ownership of any lot which is subject to assessment by the Association. (R.201-206).

On or about April 6, 1973, an amendment to the protective covenants for Hi-Country Estates was prepared and executed by the developer of Hi-Country Estates, Inc. This amendment dealt with the creation of a Homeowners Association and further, the obligation of lot owners to pay his or her pro rata share of the cost to maintain the roads, streets and common areas within the Hi-Country Estates subdivision (R.154, 155). The original restrictive covenants and the amendment to the restrictive covenants were recorded in the office of the Salt Lake County Recorder on March 22, 1974 (R.154, 155).

On or about June 23, 1978, Defendant, Steven K. Maxfield, became an owner, along with his wife, of Lot 91 in the Hi-Country Estates subdivision. Maxfield obtained this ownership by receipt of a trustee's special warranty deed. Pursuant to the specific provisions of this trustee's special warranty deed, Defendant Maxfield took ownership of this property "subject to the protective covenants and the Articles of the Homeowners Association." (R.322).

The Hi-Country Estates, Phase I Subdivision, when created, was intended to be an exclusive area preserving a country living lifestyle with lot size restricted to a five-acre minimum. Entrance to the subdivision is possible at only one point through an electronic security gate. Within the subdivision there are

over five miles of interior roads which have been improved and paved but remain private having never been dedicated to the County. In addition to these interior roads, there are miles of bridle paths for horseback riding. Salt Lake County provides no services to the subdivision other than police and fire protection and so, the homeowners must cooperatively maintain the roads, provide snow removal, maintain the fence and electronic gate, dispose of garbage and other refuse, ensure an adequate water supply and delivery system, and pay for legal fees incurred on projects of mutual benefit (R.277, 278, 465). On or about September 25, 1979, the original developer deeded the roads and common areas to the Plaintiff Homeowners Association (R.319).

This present dispute arose when Defendant Maxfield refused to pay an annual assessment owed to Plaintiff Association for upkeep of the roads, utilities and general administration of the Association and which was due on July 1, 1983 (R.5).

Prior to the commencement of this action, some of the property owners in the Hi-Country Estates Subdivision, including Defendant Maxfield, became dissatisfied with the operation of the Hi-Country Estates Homeowners Association and, particularly, the conduct of certain members of the Board of Directors. Because of this dissatisfaction, Defendant, along with other property owners, commenced a lawsuit in the Third District Court for Salt

Lake County, entitled Richard L. James, et al. v. John W. Davies, et al., Case No. C81-8560 (R.326-332). In this lawsuit, Defendant (Plaintiff therein, and his co-Plaintiffs), sought an order of the Third District Court granting the following relief: (a) a determination that the current directors of the Hi-Country Estates Homeowners Association were not lawfully elected or appointed; (b) a determination that the Association had no authority to enforce protective covenants of the Hi-Country Estates subdivision upon individual members of the Association; (c) an determination that the protective covenants and amendments thereto filed against the subdivision are unlawful and should be removed; (d) a determination that the Association had no authority to participate on behalf of its members in the hearings before the Salt Lake Planning Commission with respect to a zoning change of the subdivision; and (e) for money damages (R.326-332).

The complaint filed by Defendant and his co-plaintiffs in the action of James v. Davies, supra, did not raise the issue of whether or not the Association could properly and lawfully assess its members for repair and maintenance of roads and common areas within the subdivision (R.326-332).

After a trial on or about March 22, 1984, Judge Daniels entered the Court's Findings of Fact, Conclusions of Law and a Judgment resolving the issues raised in the parties' pleadings.

Pursuant to the Findings of Fact, Judge Daniels found the issues raised by the plaintiffs regarding irregularities or illegal election of directors of the Association were moot and therefore dismissed those claims. Judge Daniels further found that the purposes for which the Hi-Country Estates Homeowners Association was incorporated did not include the enforcement of protective covenants against individual landowners, however; the court found that the original protective covenants prepared on June 15, 1970 were fully valid and enforceable. The Court found that the amendment to the protective covenants dated April 6, 1973 was not validly created and therefore determined it to be void and unenforceable because the purported grantor [developer] was not the equitable owner of a majority of the property within the subdivision and that the original covenants executed June 15, 1970 prohibit amendment for a period of 25 years following their execution (R.342). The Court also found that the Articles of Incorporation of the Hi-Country Estates Homeowners Association did not include a specific grant of authority allowing the Association to appear at zoning hearings to represent the members of the Association (R.343).

The Court did not make any ruling with regard to the appropriateness or legality of the Association's levying of assessments against lot owners within the subdivision (R.339-349).

Judge Daniels did not determine that the Hi-Country Estates Homeowners Association was not lawfully constituted or was illegally formed (R.339-349). No appeal was taken by the parties to the Judgment and Findings of Judge Daniels (R.339-349).

Subsequent to the ruling by Judge Daniels in this case, the Association continued to levy assessments and bring claims against delinquent lot owners in small claims court for the payment of assessments pursuant to the provisions of the Articles of Incorporation and Bylaws of the Association (R.5).

On or about November 4, 1988, Judge Hanson entered the Court's Findings of Fact and Conclusions of Law and Judgment. According to the Findings of Fact, the Court found that the Plaintiff Association was a non-profit corporation comprised of owners of real property located in Hi-Country Estates Phase I subdivision in Salt Lake County, Utah. The Court found that pursuant to the Articles of Incorporation, the Association was organized for the purpose of the maintenance, upkeep and preservation of the streets, roads and common areas within the Hi-Country Estates subdivision and was also formed to promote the health, safety and welfare of the residents within Hi-Country Estates (R.465).

Judge Hanson further determined that every person or entity who is a record owner of a fee or undivided fee interest in any

lot which is subject by covenants or record to assessments by the Association shall be a member of the Association; and that membership in the Association was appurtenant to and may not be separated from the ownership of any lot which is subject to assessment by the Association. The Court determined that pursuant to the Articles of Incorporation of the Hi-Country Estates Homeowners Association, the Association had the duty and power to

exercise all of the powers and privileges and to perform all of the duties and obligations of the Association as set forth in that certain protective covenants for Hi-Country Estates... (b) fix, levy, collect and enforce payment by any lawful means, all charges or assessments pursuant to the terms of the protective covenants, as amended, and as provided in the Bylaws adopted by the Association; to pay all expenses in connection therewith and all office and other expenses incident to the conduct of the business of the Association, including all licenses, taxes or governmental charges levied or imposed against the property of the Association. (R.465, 466).

Judge Hanson also found that pursuant to the Bylaws of the Association, the Association's Board of Directors had the duty to fix the amount of annual assessments against each lot and to foreclose any lien against any property for which assessments are not paid within thirty days after due date or to bring an action at law against the owner personally obligated to pay the same. The Court specifically found that pursuant to Article XI of these Bylaws, "No owner may waive or otherwise escape liability for the

assessment provided for him herein by non-use of the common area, roads or abandonment of his lot." (R.466, 467). The Court also found that Defendant Maxfield took his ownership interest in his property within the Hi-Country Estates subdivision "subject to the protective covenants and Articles of Incorporation of the Homeowners Association." (R. 467).

Judge Hanson found that the issues in the James v. Davies, supra, case were not identical with the issues raised in this action; "The ability of the Plaintiff Association, to levy, lien, assess and/or collect annual assessments was not raised by any of the parties therein;" (R.468) and "The court in Davies was not asked nor did it consider whether lot owners would be liable for homeowners assessments or whether membership in the Association could be considered mandatory on some basis other than the amended protective covenants." (R.469).

Based upon these Findings of Fact, Judge Hanson entered Conclusions of Law that Defendant Maxfield and his co-defendants, were mandatory members of the Plaintiff Association by virtue of their ownership of property in the subdivision and, further, could not unilaterally resign from this membership or escape liability for assessments (R.470). The Court specifically concluded as a matter of law that the Plaintiff Association is "legally and lawfully entitled to levy and collect assessments

from lot owners for expenses incurred by the Plaintiff in discharging its duties under the Articles, Bylaws and protective covenants." (R.470). The Court further concluded that the Articles of Incorporation, Bylaws and original protective covenants of the Plaintiff Association "constitute a present and continuing equitable servitude upon the property owned by the Defendants." (R.471).

Based upon these Findings of Fact and Conclusions of Law, Judge Hanson entered his Judgment on or about November 3, 1988.

SUMMARY OF THE ARGUMENT

The Findings of Fact entered by the Third District Court in this action are not clearly erroneous and therefore the judgment should be affirmed.

Plaintiff's claim is not barred by the doctrines of res judicata or collateral estoppel because the issues raised in the prior case of James v. Davies, supra, were different and Judge Daniels made no finding or decision with regard to the legality or appropriateness of the Association's power to levy assessments against property owners or members of the corporation. Further, Judge Daniels made no decision regarding the validity or legality of the Articles of Incorporation and Bylaws of the Hi-Country Estates Homeowners Association in the lawsuit known as James v. Davies.

Defendant Maxfield took ownership of his property within the Hi-Country Estates subdivision with notice of the restrictions placed upon his land by the protective covenants and Articles of Incorporation of the Hi-Country Estates Homeowners Association and therefore, these covenants and Articles constitute a valid and continuing equitable servitude upon his property allowing the Association to levy assessments against him and his property.

The Articles of Incorporation and bylaws of the Hi-Country Estates Homeowners Association constitute a legal and binding contract between the Association and Defendant Maxfield. Therefore, the Hi-Country Estates Homeowners Association is legally entitled to levy assessments against Defendant Maxfield pursuant to the terms of the Articles, Bylaws and in connection with the Association's duties to provide for the maintenance, upkeep and preservation of the streets, roads and common areas within the subdivision and, further to promote the health, safety and welfare of the residents within the Hi-Country Estates subdivision.

Plaintiff Hi-Country Estates Homeowners Association is legally entitled to be awarded attorneys fees against Defendant Maxfield by virtue of the contract which exists between the Plaintiff Association and Maxfield as created by the Articles of

Incorporation and Bylaws of the Hi-Country Estates Homeowners Association.

ARGUMENT

THE JUDGMENT OF THE DISTRICT COURT IS SUPPORTED BY THE EVIDENCE AND THERE ARE NO GENUINE ISSUES OF MATERIAL FACT WHICH WOULD PRECLUDE THE ENTRY OF SUMMARY JUDGMENT. THEREFORE, THE DISTRICT COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW ARE NOT CLEARLY ERRONEOUS AND JUDGMENT SHOULD BE AFFIRMED.

POINT I

PLAINTIFFS' CLAIMS ARE NOT BARRED BY THE DOCTRINES OF RES JUDICATA OR COLLATERAL ESTOPPEL . . . . .	16

In the Defendants' answer to the amended complaint in this action Defendants' raised as separate affirmative defenses the equitable doctrines of res judicata and collateral estoppel. In order to determine which, or if either, of these doctrines is to be properly applied, one must focus on whether the second claim, demand or cause of action claimed to be barred is different from its alleged predecessor.

In the case of Searle Brothers v. Searle, 588 P.2d 689, 690 (Utah 1978), the Utah Supreme Court stated:

In order for res judicata to apply both suits must involve the same parties or their privies and also the same cause of action; and if it applies, it precludes the relitigation of all issues that could have been litigated as well as those that were litigated in the prior action ... (Emphasis added).

Collateral estoppel on the other hand arises from a different cause of action and prevents

parties or their privies from relitigating facts and issues in a second suit that were fully litigated in the first suit.

Although the doctrines of res judicata and collateral estoppel are closely related, they are usually mutually exclusive. When the claim, demand or cause of action is the same in both cases, res judicata applies. But where the claim, demand or cause of action is different in the two cases, then collateral estoppel is applicable. Schaer v. State, by and through Utah Department, 657 P.2d 1337, 1340 (1983).

In the instant case, Defendant's defenses are based upon a prior proceeding, James, et al. v. Davies, et al., filed in November of 1981 in the Third District Court for Salt Lake County, Utah, Civil No. C81-8560. It is clear from a review of the amended complaint in that action that the claims raised in that case do not concern the same cause of action alleged by Plaintiff in this case.

In James, et al. v. Davies, et al., supra, the Plaintiffs alleged certain irregularities in the election of certain directors and the appropriateness and legality of the enforcement of land use restrictions set out in the protective covenants of the Hi-Country Estates Homeowners Association by the Association and against lot owners. No issue was raised by the Plaintiffs' pleadings in the James v. Davies case regarding the appropriate-

ness or authority of the Association to assess homeowners for road maintenance and other general administration expenses.

In James v. Davies, the District Court looked only to the amended covenants as a source of mandatory membership because that was one of its provisions. However, mandatory membership was not an issue in that litigation. Rather, the Court determined that the original protective covenants recorded against the Hi-Country Estates subdivision were valid and enforceable according to their terms. On the other hand, the Court determined that the amendment to these covenants was invalid because the grantor was not the equity owner of a majority of the property; and because the original covenants prohibited amendment prior to 25 years after their execution. The protective covenants and amended protective covenants are not an issue in this case, nor are they raised or relied upon by the Plaintiffs for the authority to levy assessments against property owners within the subdivision.

The only way res judicata could apply to this action would be if the court stretched the requirement that the prior action involve the same issues that "could or should have been raised therein," Krofcheck v. Downey State Bank, 580 P.2d 243 (Utah 1978), Wheadon v. Pierson, 14 Utah.2d 45, 376 P.2d 946 (1962).

The purpose of the res judicata doctrine is to avoid relitigation of issues and actions which have in fact been previously litigated. At the time the James v. Davies case was filed, there was no issue as to the delinquency of assessments levied but unpaid. Therefore, the issue was never raised before the court and no ruling was made. Additionally, the court in James v. Davies did not deal with or rule upon the validity of the Articles of Incorporation and Bylaws of the Association. Clearly, pursuant to the language of the Articles and Bylaws, the Association is required to levy and collect assessments from members of the organization. Because the issue of assessments and the validity of the Articles of Incorporation and Bylaws was not raised in the James v. Davies action, the doctrine of res judicata cannot apply.

With regard to the issue of collateral estoppel, a prior decision may be used against a party to preclude a further litigation of the issue by him only when four questions are answered in the affirmative: (1) Was the issue decided in the prior adjudication identical with the one presented in the action in question? (2) Was there a final judgment on the merits? (3) Was the party against whom the plea is asserted a party or in privity with the party in the prior adjudication? (4) Was the issue in

the first case completely, fully and fairly litigated? White Pine Ranches v. Osguthorpe, 731 P.2d 1076 (Utah 1986).

The first requirement; that the issue decided in the prior adjudication be identical with the one presented in the action in question, is not met here. The issue regarding the Association's authority and duty to levy assessments and sue to collect them against members of the Association and lot owners was never raised in the James v. Davies action. Rather, the issues raised in James v. Davies dealt with procedural matters involving the election of directors and the use of protective covenants by the Association to enforce alleged violation of the covenants. Clearly, the issues are not similar to those presented in this case. The only area of convergence between both actions is that Maxfield and the Association were among the 49 parties in the prior action. "This Court has previously stated that the doctrine of collateral estoppel does not apply to issues that merely could have been tried in the prior case, but operates only to issues which were actually asserted and tried in that case." Schaer v. State, by and through Utah Department, supra, citing International Resources v. Dunfield, 599 P.2d 515 (1979).

As previously stated, there was no issue raised as to the appropriateness or legality of the Association's levy of assessments and collection of them in the James v. Davies case. None

of the homeowners were delinquent in the payment of their assessments at that time. Further, the Articles of Incorporation and Bylaws of the Association were not alleged to be improper or illegally created. Judge Daniels made no ruling with respect to the validity of the Articles and Bylaws which clearly give the Association the authority and duty to levy assessments against lot owners within the subdivision. Since the issue of assessments was not before the court in James v. Davies, the court could not rule on that issue. For this reason the doctrine of collateral estoppel is not applicable to this case.

POINT II

THE DOCTRINE OF EQUITABLE SERVITUDE IS A PROPER LEGAL BASIS FOR THE ENTRY OF SUMMARY JUDGMENT IN THIS CASE

In Conclusion of Law No. 5, Judge Hanson determined, "The Articles of Incorporation, Bylaws and original protective covenants of the Plaintiff Association constitute a present and continuing equitable servitude upon the property owned by the Defendants." (R.471). "The real basis for the enforcement of equitable servitude is the doctrine that one who takes land with notice of a restriction thereon cannot in equity and good conscience be permitted to violate that restriction." BYU Summary of Utah Real Property Law, Vol.1 (1978), Chapter 4, pg. 136, Sec. 4.18.

In the case at bar, Defendant Maxfield took ownership of his property by way of a trustee's special warranty deed which specifically states that his ownership is "subject to the protective covenants and the Articles of the Homeowners Association." (Emphasis added), (R.322). Therefore, Maxfield had notice of the restrictions placed upon his land by the very language of his deed. The deed specifically refers to the protective covenants and the Articles of Incorporation of the Homeowners Association. Further, Maxfield took ownership of his property subsequent to the recording of these protective covenants the filing of the Articles of Incorporation and Bylaws of the Association.

Maxfield now apparently contends that the District Court intended to allow the Hi-Country Estates Homeowners Association to levy assessments against property owners within the subdivision based upon the doctrines of unjust enrichment or quantum meruit and simply mislabeled these doctrines as equitable servitude. Clearly, that is not the case. Judge Hanson, in his Conclusions of Law, specifically states that the Articles of Incorporation, Bylaws and original protective covenants of the Association constitute a present and continuing equitable servitude upon the property owned by the defendants. The fact that in his oral ruling Judge Hanson referred to the defendants'

enjoyment of the use of common areas and other amenities does not support Maxfield's claim that the District Court intended to apply unjust enrichment or quantum meruit principles.

Maxfield further contends that "the doctrine of equitable servitude is a restriction or limitation on the use of real property but by definition cannot create an association or allow the association to assess its members which must be created by another means." (Appellant's Brief, pg. 5). The Association has never contended that the doctrine of equitable servitude created the Association. Rather, the Association contends and has contended throughout the action, that it was created by way of the Articles of Incorporation and Bylaws which were filed with the Lt. Governor's office in 1973.

In Finding of Fact No. 1 Judge Hanson found: "Plaintiff is a non-profit corporation comprised of owners of real property located in the Hi-Country Estates Phase I subdivision located in Salt Lake County, State of Utah." (R. 465). Judge Hanson further found in Finding of Fact No. 4, "The Articles of Incorporation and Bylaws for the Plaintiff corporation are dated January 30, 1972 and were recorded by the original developer of the subdivision on May 17, 1973. The parties have stipulated that the wording of the Articles and Bylaws are not disputed." (Emphasis added), (R.465). The Court specifically found in its

Findings of Fact that one of the purposes of the Plaintiff Association was to maintain and preserve the streets, roads and common areas within the subdivision. It is clear that according to the Articles of Incorporation,

Every person or entity who is a record owner or a fee or undivided fee interest in any lot which is subject by covenants or record to assessment by the Association, including purchasers under contract, shall be a member of the Association . . . Membership shall be appurtenant to and may not be separated from ownership of any lot which is subject to assessment by the Association."

The Articles of Incorporation further charge the Association with a duty to

exercise all of the powers and privileges and to perform all of the duties and obligations of the Association as set forth in that certain protective covenants for Hi-Country Estates. . . (b) Fix, levy, collect and enforce payment by any lawful means, all charges or assessments pursuant to the terms of the protective covenants, as amended, and as provided in the Bylaws adopted by the Association; . . . (R.466).

The Bylaws of the Association charge the Association Board of Directors with certain duties. These duties include:

(c) as more fully provided in the protective covenants, as amended, to: (1) fix the amount of the annual assessment against each lot at least thirty days in advance of each annual assessment; (2) send written notice of each assessment to every owner subject thereto at least thirty days in advance of each annual assessment; (3) foreclose the lien against any property for which assessments are not paid

within thirty days after the due date or to bring an action at law against the owner personally obligated to pay the same.

The Bylaws of the Association further state in Article XI as follows:

As more fully provided in the protective covenants, as amended, each member is obligated to pay to the Association annual and special assessments which are secured by a continuing lien upon the property against which the assessment is made. Any assessments which are not paid when due shall be delinquent. If the assessment is not paid within thirty days after the due date, the assessment shall bear interest from the date of delinquency at the rate of seven percent per annum and the Association may bring an action at law against the owner personally obligated to pay the same or foreclose the lien against the property, and interest, costs, and reasonable attorneys fees for any such action shall be added to the amount of such assessment. No owner may waive or otherwise escape liability for the assessment provided for herein by non-use of the common area, roads or abandonment of his lot.

It is the Association's position that Defendant Maxfield ownership of his land with notice of the restrictions imposed upon the land by the protective covenants and the Articles of Incorporation of the Homeowners Association. The specific language of the Articles of Incorporation allow the Homeowners Association to levy assessments and collect these assessments from its members, the lot owners within the subdivision. In view of this restriction placed upon the Defendant's property, it was

not necessary for the District Court to reach the issue of unjust enrichment or quantum meruit. Rather, Judge Hanson specifically determined that the protective covenants and Articles of Incorporation constitute an equitable servitude on the property which Defendant Maxfield is subject to. Judge Hanson further found that the language of the Articles of Incorporation and the Bylaws of the Homeowners Association specifically allowed for the Association to levy assessments against the property owners. It is clearly stated in the Findings of Fact entered by Judge Hanson in this case, "The parties have stipulated that the wording of the Articles and Bylaws are not disputed." (R.465).

"The right to urge enforcement of a servitude against the burdened land 'depends primarily on the covenants having been made for the benefit of other land, either retained by the grantor or part of a perceptible neighborhood scheme.'" Peterson v. Beekmere, Inc., 283 A.2d 911 (N.J. 1971), citing Paullett v. Stanley Stillwell and Sons, Inc., 170 A.2d at 56.

In this case, the restrictions included in the protective covenants and the specific duties imposed upon the Homeowners Association by the Articles of Incorporation and Bylaws were made for the benefit of all of the land within the Hi-Country Estates Homeowners Association. There is no question that the Hi-Country Estates subdivision was created as part of a perceptible

neighborhood scheme. There is no requirement that an equitable servitude be a covenant of the type which runs with the land. Rather, equity will sometimes enforce the obligation by an injunction against breach. The covenant or restrictions at issue herein are affirmative covenants requiring land owners to pay assessments in connection with the maintenance of roads, bridle paths and the general administration of the Homeowners Association of which they became members when they acquired their property. The issue then, is whether or not Defendant Maxfield took his property with notice of the restrictions placed thereon. As previously stated, there is no question that the deed which conveyed him his ownership of property within the Hi-Country Estates subdivision clearly stated that it was subject to the protective covenants and the Articles of the Homeowners Association. Therefore, the Articles of Incorporation constitute an equitable restriction on an owner's use of his land and the doctrine of equitable servitude is an appropriate basis for the District Court to enter summary judgment and specifically allow the Plaintiff Association to levy assessments against lot owners within the Hi-Country Estates subdivision.

POINT III

THE ARTICLES OF INCORPORATION AND BYLAWS OF
HI-COUNTRY ESTATES HOMEOWNERS ASSOCIATION, INC.
CONSTITUTE A PROPER LEGAL BASIS FOR THE PLAINTIFF
TO LEVY ASSESSMENTS AGAINST DEFENDANT AND OTHER
MEMBERS OF THE HOMEOWNERS ASSOCIATION

Plaintiff Association is a Utah non-profit corporation organized pursuant to the provisions of the Utah Non-Profit Corporation and Cooperative Association Act, U.C.A. Sec. 16-6-18, et seq. Pursuant to the provisions of U.C.A. Sec. 16-6-22, the Articles of Incorporation and Bylaws of the Hi-Country Estates Homeowners Association constitute a proper legal basis for Plaintiff to levy assessments against the Defendant and other members of the Association.

It is well established precedent that the bylaws of a corporation, together with the articles of incorporation, the statute under which it was incorporated, and the member's application, constitute a contract between the member and the corporation. When duly enacted, the bylaws are binding upon all members of the corporation or association who are presumed to know them and contract in reference to them. . . . The general rule is that a corporation has the power to enforce its bylaws by pecuniary penalties proportionate to the offense. Appeal of Two-Crow Ranch, Inc., 494 P.2d 915, 919, 920 (Montana 1972).

In the case at bar, the Plaintiff Association was organized pursuant to the provisions of the Utah Non-Profit Corporation and

Cooperative Act found at U.C.A. Sec. 16-6-18, et seq. Pursuant to the provisions of U.C.A. Sec. 16-6-19(6), a member of a corporation is defined as "one having membership rights in a corporation in accordance with the provisions of its articles of incorporation or bylaws." According to the Articles of Incorporation of the Hi-Country Estates Homeowners Association,

Every person or entity who is a record owner of a fee or undivided fee interest in any lot which is subject by covenants or record to assessment by the Association, including purchasers under contract, shall be a member of the Association. . . . Membership shall be appurtenant to and may not be separated from ownership of any lot which is subject to assessment by the Association. (R.303).

Pursuant to Article II, Section 6 of the Bylaws of the Association, "Member shall mean and refer to those persons entitled to membership as provided in the protective covenants, Certificate of Incorporation, and these Bylaws." Therefore, according to the specific provisions of the Articles of Incorporation of the Association and its Bylaws, Maxfield is a member of the corporation. As has been previously stated, the Homeowners Association has the authority to:

(b) fix, levy, collect and enforce payment by any lawful means, all charges or assessments pursuant to the terms of the protective covenants, as amended, and as provided in the Bylaws adopted by the Association; . . .

Pursuant to Article XI of the Bylaws of the Association,

". . . each member is obligated to pay to the Association annual and special assessments which are secured by a continuing lien upon the property against which the assessment is made. Any assessments which are not paid when due shall be delinquent."

Pursuant to U.C.A. Sec. 16-6-22, "Each non-profit corporation shall have power: "(2) to sue and be sued, complain and defend, in its corporate name." This general power statute states in Section (16) that each non-profit corporation shall also have the power:

"to have and exercise all powers necessary or convenient to effect any or all of the purposes for which the corporation is organized, including the right to raise funds by such means or methods as the governing board may deem advisable, not inconsistent with law or its Articles of Incorporation or Bylaws."

Clearly, the provisions of the Articles of Incorporation and the Bylaws of the Association specifically grant to the Association the authority to raise funds by means of levying assessments against members/property owners within the subdivision. As has been previously stated, Maxfield is an owner of property within the subdivision. U.C.A. Sec. 16-6-26 in pertinent part states: "The articles of incorporation or the bylaws may contain provisions relating to the imposition of dues, assessments or other charges on members. . . ."

The rights of members of a private organization are governed by the articles of incorporation

and bylaws, which constitute a contract between the members and the organization, and among the members themselves. Rowland v. Union Hills Country Club, 757 P.2d 105, 108 (Ariz.App. 1988).

In First Federal Savings & Loan v. East & Mutual Electric, 735 P.2d 1073 (Idaho App. 1987), the Idaho appellate court discussed the characteristics of a cooperative organization. At page 1075 the Court stated:

Our analysis begins by noting the essential characteristics of a cooperative. It is 'an association which furnishes an economic service without entrepreneur profit and which is owned and controlled on a substantially equal basis by those for whom the association is extending service. . . . The governance of the cooperative and the rights of its members, ordinarily are set forth in the bylaws adopted by the board of directors. The bylaws are binding as a contract among the members.

In Jorgenson Realty, Inc. v. Box, 701 P.2d 1256, 1257 (Colo.App. 1985), the court stated: "The relationship between a voluntary association and its members is a contractual one and, by joining such an organization a member agrees to submit to its rules and regulations and assumes the obligations incident to membership." In the instant case, there is no question that Maxfield is a member of the Hi-Country Estates Homeowners Association. His right and obligation to membership is clearly set out within the Articles of Incorporation of the Homeowners Association and the Bylaws and amendments thereto of the corpora-

tion. Further, the language in his deed specifically states that the ownership of his property is subject to the Articles of the Homeowners Association. On this basis, and based upon the foregoing authority, Maxfield has a contract with the Hi-Country Estates Homeowners Association and is bound to comply with the provisions of the Articles of Incorporation and Bylaws which govern the operation of this organization.

The specific language of the Articles of Incorporation and Bylaws require and allow the Association to levy assessments against property owners and their property for the purpose of "maintenance, upkeep and preservation of the streets, roads and common areas" within the subdivision and further, to promote "the health, safety and welfare of the residents within Hi-Country Estates. . ." The language of Section (b) of the Articles of Incorporation specifically require the Association to fix, levy, collect and enforce payment of all charges or assessments pursuant to the terms of the protective covenants and as provided in the Bylaws adopted by the Association. Again, as previously stated, pursuant to Article XI of the Bylaws, "each member is obligated to pay to the Association annual and special assessments which are secured by a continuing lien upon the property against which the assessment is made." Based upon this specific language, Maxfield has no choice but to pay any and all reason-

able assessments which are made against him and his property by the Association. The very nature of his contractual relationship with the Association by virtue of his ownership of property within the subdivision creates this right and obligation.

We believe that the better view and the one which best serves the ends of justice is that the corporation should have the powers expressly given and those that are necessarily implied in order to enable it to efficiently and effectively carry on the purposes for which it is created. . . . Implied powers of a bank, or any corporation for that matter, are those incidental to and connected with the carrying into effect or accomplishing of the general purposes for the corporation, as expressed in the object clause of the articles. . . . Park v. Alta Dutch & Canal Company, 458 P.2d 625, 628 (Utah 1969), citing Tracy Loan & Trust Company v. Merchant's Bank, et al., 167 P.2d 353.

There is no question that the purpose of the creation of the Homeowners Association was to maintain the common areas within the subdivision known as Hi-Country Estates. It is also clear that pursuant to the specific provisions of the Articles of Incorporation and Bylaws, this Association is entitled to levy assessments against its members so as to perform this necessary function of maintaining the common areas for all of the members/property owners within the Association. On this basis, the Articles of Incorporation and the Bylaws of the Hi-Country Estates Homeowners Association provide a proper legal basis for

the levying of assessments against Maxfield. On this basis, the decision of the District Court in this case should be upheld.

POINT IV

THE COURT'S GRANTING OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT WITH RESPECT TO ITS CLAIM FOR ATTORNEYS FEES WAS NOT IMPROPER OR PREJUDICIAL ERROR

In his brief, Maxfield contends that there was no basis for an award of attorneys fees in favor of the Association and against him in the absence of either a contract or a statute. Maxfield correctly points out in his brief in citing Cluff v. Culmer, 556 P.2d 498, 499 (Utah 1976), "An award of contractually based attorneys fees must be based on a valid contract and incurred in the enforcement of expressed contractual covenants."

As has been previously stated in this brief, the bylaws of a corporation, along with the articles of incorporation and the statutes under which the corporation was incorporated and, a member's application for membership in the corporation constitute a contract between the member and the corporation. Appeal of Two-Crow Ranch, Inc., supra. "A corporate charter is a dual contract - one between the state and the corporation, and the other between the corporation and its stockholders. . . ." Jacobson v. Bachman, 401 P.2d 181, 183 (Utah 1965). In the instant case, the Articles of Incorporation of the Association specifically authorize the Association to:

(b) fix, levy, collect and enforce payment by any lawful means, all charges or assessments pursuant to the terms of the protective covenants, as amended, and as provided in the Bylaws adopted by the Association; to pay all expenses in connection therewith and all office and other expenses incident to the conduct of the business of the Association, including licenses, taxes or governmental charges levied or imposed against the property of the Association.

The specific provisions of the Utah Non-Profit Corporation and Cooperative Act, U.C.A. Sec. 16-6-22(2) authorize this non-profit corporation "to sue and be sued, complain and defend, in its corporate name." The general method for commencing a lawsuit is to retain counsel for the purpose of filing the action. The general power section of the Non-Profit Corporation Act specifically allows a non-profit corporation to commence litigation.

Article XI of the Bylaws regarding assessments by the Association against a member's property states:

As more fully provided in the protective covenants, as amended, each member is obligated to pay to the Association annual and special assessments which are secured by a continuing lien upon the property against which the assessment is made. . . . The Association may bring an action at law against the owner personally obligated to pay the same or foreclose the lien against the property, and interests, costs and reasonable attorneys fees of any such action shall be added to the amount of such assessment. (Emphasis added).

In view of the contractual nature between Maxfield and the Association, and the specific provisions of the Articles of Incorporation and the Bylaws of this Association, the Association is clearly entitled to collect attorneys fees in connection with actions filed by it for the purpose of collecting delinquent assessments owed it by the members of the Association. The contract between the Association and its members forms a proper legal basis for an award of attorneys fees against Maxfield.

CONCLUSION

The judgment of the Third District Court in this action is supported by the evidence and the Court correctly found there to be no genuine issues of any material fact which would preclude the entry of summary judgment against Defendant Maxfield and in favor of Plaintiff.

The decision in the James v. Davies, supra, case does not constitute res judicata or collateral estoppel which would bar the entry of judgment in this action by Judge Hanson. In the James v. Davies case, the issue of the Association's right to levy assessments against its members and the validity of the Articles of Incorporation and Bylaws of the Association was not litigated or raised by the parties. Therefore, the bars of res judicata and collateral estoppel are not applicable.

In view of the fact that Maxfield took ownership of his property with notice that it was subject to the protective covenants and Articles of Incorporation of the Homeowners Association, the Articles, Bylaws and protective covenants of the Association constitute a valid equitable servitude upon the property and therefore provide a legal basis for the Association to levy assessments against Maxfield and other property owners. Further, by virtue of the specific language contained in the Articles of Incorporation, the Bylaws and the Utah Non-Profit Corporation and Cooperative Act, the Association is legally empowered and required to levy assessments against its membership so as to perform the objects and purposes of the corporation. Notwithstanding the equitable servitude which the Articles of Incorporation place upon the property of Maxfield and other homeowners, the Association is specifically empowered to levy assessments against homeowners.

The Articles of Incorporation and Bylaws of the Association create a contract between Maxfield and the Association. The specific provisions of the Bylaws allow the Association to collect attorneys fees in connection with actions filed by it to recover delinquent assessments from property owners. This contract is a valid one between these parties and therefore con-

stitutes a proper legal basis for the award of attorneys fees against Maxfield.

DATED this ____ day of _____, 1989.

A. HOWARD LUNDGREN,
Attorney for Appellee

MAILING CERTIFICATE

I hereby certify that I mailed four true and correct copies of the foregoing, by first class postage prepaid, this ____ day of September, 1989, to:

John B. Anderson
ANDERSON & HOLLAND
623 East First South
P.O. Box 11643
Salt Lake City, Utah 84147-0643
Attorney for Appellant Maxfield

ADDENDUM

- 1) Rules and Statutes
- 2) Constitutional Provisions
- 3) Second Amended Verified Complaint in case of Richard L. James, et al. v. John W. Davies, et al., Third District Court Case No. C81-8560
- 4) Court's Ruling in case of Richard L. James, et al. v. John W. Davies, et al., Case No. C81-8560
- 5) Findings of Fact and Conclusions of Law in case of Richard L. James, et al. v. John W. Davies, et al., C81-8560
- 6) Judgment in case of Richard L. James, et al. v. John W. Davies, et al., C81-8560
- 7) Certificate of Incorporation of Hi-Country Estates Homeowners Association
- 8) Articles of Incorporation of Hi-Country Estates Homeowners Association
- 9) Trustees Special Warranty Deed (Zions First National Bank as Grantor, Steven K. and Susan E. Maxfield as Grantees) dated June 23, 1978
- 10) Memorandum Decision of Judge Timothy Hanson in lower court case of Hi-Country Estates Homeowners Association v. Maxfield, Third District Court Case No. C84-5500
- 11) Findings of Fact and Conclusions of Law in lower court case of Hi-Country Estates Homeowners Association v. Maxfield C84-5500
- 12) Judgment in lower court case of Hi-Country Estates Homeowners Association v. Maxfield, C84-5500

ADDENDUM 1

and the defendant allowed to plead consistent with our declared policy that in case of uncertainty, default judgments should be set aside to allow trial on the merits. *Locke v. Peterson*, 3 Utah 2d 415, 285 P.2d 1111 (1955).

Default judgment and writ of garnishment were properly set aside where trial court failed to obtain jurisdiction over defendant because summons was not timely issued. *Fibreboard Paper Prods. Corp. v. Dietrich*, 25 Utah 2d 65, 45 P.2d 1005 (1970).

Where appellants, plaintiffs in a civil action, promptly objected to date set for trial on the ground that their counsel had an already

scheduled appearance in another court on that date, but due to fact that there were no law or motion days between time objection was filed and trial date, objection was never heard, refusal to set aside default judgment entered when appellants failed to appear on trial date was an abuse of discretion. *Griffiths v. Hammon*, 560 P.2d 1375 (Utah 1977).

Cited in *Utah Sand & Gravel Prods. Corp. v. Tolbert*, 16 Utah 2d 407, 402 P.2d 703 (1965); *J.P.W. Enters., Inc. v. Naef*, 604 P.2d 486 (Utah 1979); *Katz v. Pierce*, 732 P.2d 92 (Utah 1986).

COLLATERAL REFERENCES

Brigham Young Law Review. — Reasonable Assurance of Actual Notice Required for In Personam Default Judgment in Utah: *Grisham v. Sawaya*, 1981 B.Y.U. L. Rev. 937.

Am. Jur. 2d. — 47 Am. Jur. 2d Judgments § 1152 to 1213.

C.J.S. — 49 C.J.S. Judgments §§ 187 to 218. **A.L.R.** — Necessity of taking proof as to liability against defaulting defendant, 8 A.L.R.3d 1470.

Appealability of order setting aside, or refusing to set aside, default judgment, 8 A.L.R.3d 1272.

Defaulting defendant's right to notice and hearing as to determination of amount of damages, 15 A.L.R.3d 586.

Opening default or default judgment claimed to have been obtained because of attorney's mistake as to time or place of appearance, trial, or filing of necessary papers, 21 A.L.R.3d 1255.

Failure to give notice of application for default judgment where notice is required only by custom, 28 A.L.R.3d 1383.

Failure of party or his attorney to appear at pretrial conference, 55 A.L.R.3d 303.

Default judgments against the United States under Rule 55(e) of the Federal Rules of Civil Procedure, 55 A.L.R. Fed. 190.

Key Numbers. — Judgment ⇐ 92 to 134.

Rule 56. Summary judgment.

(a) **For claimant.** A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) **For defending party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) **Motion and proceedings thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) **Case not fully adjudicated on motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a

trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) **Form of affidavits; further testimony; defense required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) **When affidavits are unavailable.** Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) **Affidavits made in bad faith.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Compiler's Notes. — This rule is similar to Rule 56, F.R.C.P.

Cross-References. — Contempt generally, §§ 78-7-18, 78-32-1 et seq.

NOTES TO DECISIONS

ANALYSIS

Affidavit.
 —Contents.
 —Corporation.
 —Inconsistency with deposition.
 —Necessity of opposing affidavits.
 —Resting on pleadings.
 —Sufficiency.
 —Hearsay and opinion testimony.
 —Superseding pleadings.
 —Unpleaded defenses.
 —Verified pleading.

78-2-1. Number of justices — Term — Chief justice and associate chief justice — Selection and functions.

(1) The Supreme Court consists of five justices.

(2) A justice of the Supreme Court shall be appointed initially to serve until the first general election held more than three years after the effective date of the appointment. Thereafter, the term of office of a justice of the Supreme Court is ten years and commences on the first Monday in January, next following the date of election. A justice whose term expires may serve, upon request of the Judicial Council, until a successor is appointed and qualified.

(3) The justices of the Supreme Court shall elect a chief justice from among the members of the court by a majority vote of all justices. The term of the office of chief justice is four years. The chief justice may not serve successive terms. The chief justice may resign from the office of chief justice without resigning from the Supreme Court. The chief justice may be removed from the office of chief justice by a majority vote of all justices of the Supreme Court.

(4) If the justices are unable to elect a chief justice within 30 days of a vacancy in that office, the associate chief justice shall act as chief justice until a chief justice is elected under this section. If the associate chief justice is unable or unwilling to act as chief justice, the most senior justice shall act as chief justice until a chief justice is elected under this section.

(5) In addition to the chief justice's duties as a member of the Supreme Court, the chief justice has additional duties as provided by law.

(6) There is created the office of associate chief justice. The term of office of the associate chief justice is two years. The associate chief justice may serve in that office no more than two successive terms. The associate chief justice shall be elected by a majority vote of the members of the Supreme Court and shall be allocated duties as the chief justice determines. If the chief justice is absent or otherwise unable to serve, the associate chief justice shall serve as chief justice. The chief justice, where not inconsistent with law, may delegate responsibilities to the associate chief justice.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-2-1; L. 1969, ch. 247, § 1; 1986, ch. 47, § 40; 1988, ch. 248, § 4.

Amendment Notes. — The 1988 amendment, effective April 25, 1988, in Subsection (2), rewrote the second sentence which read

"Thereafter, the term of office of a justice of the Supreme Court is ten years and until his successor is appointed and approved in accordance with Section 20-1-7.1" and, in Subsection (6), substituted "determines" for "decides" at the end of the fourth sentence.

78-2-2. Supreme Court jurisdiction.

(1) The Supreme Court has original jurisdiction to answer questions of state law certified by a court of the United States.

(2) The Supreme Court has original jurisdiction to issue all extraordinary writs and authority to issue all writs and process necessary to carry into effect its orders, judgments, and decrees or in aid of its jurisdiction.

(3) The Supreme Court has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

- (a) a judgment of the Court of Appeals;
- (b) cases certified to the Supreme Court by the Court of Appeals prior to final judgment by the Court of Appeals;
- (c) discipline of lawyers;

- (d) final orders of the Judicial Conduct Commission;
 - (e) final orders and decrees in formal adjudicative proceedings originating with:
 - (i) the Public Service Commission;
 - (ii) the State Tax Commission;
 - (iii) the Board of State Lands and Forestry;
 - (iv) the Board of Oil, Gas, and Mining; or
 - (v) the state engineer;
 - (f) final orders and decrees of the district court review of informal adjudicative proceedings of agencies under Subsection (e);
 - (g) a final judgment or decree of any court of record holding a statute of the United States or this state unconstitutional on its face under the Constitution of the United States or the Utah Constitution;
 - (h) interlocutory appeals from any court of record involving a charge of a first degree or capital felony;
 - (i) appeals from the district court involving a conviction of a first degree or capital felony; and
 - (j) orders, judgments, and decrees of any court of record over which the Court of Appeals does not have original appellate jurisdiction.
- (4) The Supreme Court may transfer to the Court of Appeals any of the matters over which the Supreme Court has original appellate jurisdiction, except:
- (a) capital felony convictions or an appeal of an interlocutory order of a court of record involving a charge of a capital felony;
 - (b) election and voting contests;
 - (c) reapportionment of election districts;
 - (d) retention or removal of public officers;
 - (e) general water adjudication;
 - (f) taxation and revenue; and
 - (g) those matters described in Subsection (3)(a) through (f).
- (5) The Supreme Court has sole discretion in granting or denying a petition for writ of certiorari for the review of a Court of Appeals adjudication, but the Supreme Court shall review those cases certified to it by the Court of Appeals under Subsection (3)(b).
- (6) The Supreme Court shall comply with the requirements of Chapter 46b, Title 63, in its review of agency adjudicative proceedings.

History: C. 1953, 78-2-2, enacted by L. 1986, ch. 47, § 41; 1987, ch. 161, § 303; 1988, ch. 248, § 5; 1989, ch. 67, § 1.

Amendment Notes. — The 1988 amendment, effective April 25, 1988, substituted "formal adjudicative proceedings" for "cases" in Subsection (3)(e); added Subsection (3)(f); redesignated former Subsections (3)(f) to (3)(i) accordingly; substituted "(i)" for "(h)" at the end

of Subsection (4)(g); and made minor stylistic changes.

The 1989 amendment, effective April 24, 1989, added "and Forestry" at the end of Subsection (3)(e)(iii); rewrote Subsection (4)(a) which read "first degree and capital felony convictions"; substituted "(f)" for "(i)" at the end of Subsection (4)(g); and made minor stylistic changes.

16-6-13.1 to 16-6-13.12. Repealed.

Repeals. — Sections 16-6-13.1 to 16-6-13.12 (L. 1955, ch. 25, §§ 2 to 4; 1969, ch. 37, §§ 1 to 6, 8, 9; 1977, ch. 138, §§ 3 to 6; 1983, ch. 153, §§ 1 to 3; 1984, ch. 66, § 33), relating to clubs storing or permitting consumption of liquor on premises, were repealed by Laws 1985, ch. 175, § 2. For present provisions regarding private club liquor licenses, see § 32A-5-1 et seq.

16-6-14 to 16-6-17. Repealed.

Repeals. — Sections 16-6-14 to 16-6-17 (C.L. 1917, §§ 898x1, 898x2, added by L. 1925, ch. 111, § 1; R.S. 1933 & C. 1943, 18-6-14, 18-6-15; L. 1979, ch. 59, §§ 2, 3; 1984, ch. 66, § 34), relating to entry into club rooms by police officers, state store on premises, and penalty for violations, were repealed by Laws 1985, ch. 175, § 2.

ARTICLE 2

GENERAL PROVISIONS

16-6-18. Short title.

This act shall be known and may be cited as the "Utah Nonprofit Corporation and Co-operative Association Act."

History: L. 1963, ch. 17, § 1.

COLLATERAL REFERENCES

Journal of Energy Law and Policy. — A Primer of Utah Water Law: Part II, 6 J. Energy L. & Pol'y 165 (1984).
A Primer of Utah Water Law: Part II, 6 J. Energy L. & Pol'y 1 (1985).

16-6-19. Definitions.

As used in this chapter:

- (1) "Corporation" or "domestic corporation" means a nonprofit corporation subject to the provisions of this chapter, except a foreign corporation.
- (2) "Foreign corporation" means a nonprofit corporation organized under laws other than Utah's.
- (3) "Nonprofit corporation" means a corporation which does not distribute any part of its income to its members, trustees, officers, or a nonprofit cooperative association.
- (4) "Articles of incorporation" includes the original articles of incorporation and all amendments to them, including the articles of merger.
- (5) "Bylaws" means the code of rules adopted for the regulation or management of the affairs of the corporation irrespective of the names by which such rules are designated.
- (6) "Member" means one having membership rights in a corporation in accordance with the provisions of its articles of incorporation or bylaws.
- (7) "Governing board" means the group of persons vested with the management of the affairs of the corporation irrespective of the name by which such group is designated.

(8) "Trustee" means one of the group of persons on the governing board irrespective of the name by which such person is designated.

(9) "Insolvent" means inability of a corporation to pay its debts as they become due in the usual course of its affairs.

(10) "Cooperative association" means a corporation organized or existing under this chapter subject to the provisions of § 16-6-108.

History: L. 1963, ch. 17, § 2; 1979, ch. 58, § 1; 1985, ch. 178, § 2.

Amendment Notes. — The 1985 amendment made stylistic changes in Subsections (1) through (10); substituted "laws other than Utah's" in Subsection (2) for "laws other than the laws of this state"; substituted "which does not distribute any part of its income" in Subsection (3) for "no part of the income of which is distributable"; substituted "to them, including

the articles of merger" at the end of Subsection (4) for "thereto, and include articles of merger"; deleted "or codes" and "name or" in Subsection (5); deleted Subsection (11) which read: "The words 'duplicate originals' mean identical copies of all documents, whether the copies are actual originals or photocopies, but bearing, however, original signatures"; and made minor changes in phraseology.

16-6-20. Applicability.

(1) The provisions of this act relating to domestic corporations shall apply to:

(a) all corporations organized hereunder;

(b) all nonprofit corporations organized and existing under the laws of this state on the effective date of this act, including all corporations not for pecuniary profit organized under any of the provisions of Chapter 6 of Title 16, Utah Code Annotated 1953, which are repealed by this act; and

(c) mutual irrigation, canal, ditch, reservoir and water companies and water users' associations organized and existing under the laws of this state on the effective date of this act.

(2) The provisions of this act relating to foreign corporations shall apply to:

(a) all foreign nonprofit corporations transacting business in this state for a purpose or purposes for which a corporation might be organized under this act; and

(b) all foreign nonprofit corporations which qualified to do business in this state under the provisions of Chapter 8 of Title 16, Utah Code Annotated 1953, which provisions were repealed by Chapter 28, Laws of Utah 1961.

This act shall not apply to corporations sole nor to domestic or foreign corporations governed by the Uniform Agricultural Co-operative Association Act.

History: L. 1963, ch. 17, § 3.

"Effective date of this act". — The term "effective date of this act," referred to in this section, means July 1, 1963, the effective date of Laws 1963, Chapter 17.

Meaning of "this act". — The term "this act," referred to in this section, means Laws 1963, Chapter 17, which appears as §§ 16-6-18 to 16-6-25, 16-6-26 to 16-6-99, and 16-6-100 to 16-6-111.

Compiler's Notes. — Laws 1961, ch. 28, § 142 repealed §§ 16-8-1 to 16-8-4. Section 16-8-5 was repealed by Laws 1985, ch. 178, § 72.

Cross-References. — Agricultural cooperative associations, § 3-1-1 et seq.

Consolidation of water companies and conservation districts, § 73-11-1 et seq.

Corporations sole, § 16-7-1 et seq.

16-6-21. Purposes.

Corporations whose object is not pecuniary profit may be organized under this act for any lawful purpose or purposes, including, but without being limited to, any one or more of the following purposes: charitable; benevolent; eleemosynary; educational; civic; patriotic; political; religious; social; fraternal; literary; cultural; athletic; recreational; scientific; agricultural; horticultural; animal husbandry; water development, diversion, storage, distribution or use; professional, commercial, industrial or trade association; co-operative association; and labor union or association; but organizations subject to any of the provisions of the insurance, banking, savings and loan or credit union laws of this state may not be organized under this act.

History: L. 1963, ch. 17, § 4.

Meaning of "this act". — See the note under the same catchline following § 16-6-20.

Cross-References. — Corporate purposes authorized under Utah Business Corporation Act, § 16-10-3.

NOTES TO DECISIONS**Evidence of nonprofit nature of corporation.**

Charitable or pecuniary nature of hospital association, sued for negligence, was to be determined by its articles of incorporation; the association could not establish the charitable

nature by parol evidence where the articles were in harmony with those of a business corporation and wholly inconsistent with those of a charitable organization. *Gitzhoffen v. Sisters of Holy Cross Hosp. Ass'n*, 32 Utah 46, 88 P. 691, 8 L.R.A. (N.S.) 1161 (1906).

COLLATERAL REFERENCES

Am. Jur. 2d. — 18 Am. Jur. 2d Corporations §§ 30, 32, 33.

C.J.S. — 18 C.J.S. Corporations § 47.
Key Numbers. — Corporations ⇐ 14.

16-6-22. General powers.

Each nonprofit corporation shall have power:

- (1) to have perpetual succession by its corporate name unless a limited period of duration is stated in its articles of incorporation.
- (2) to sue and be sued, complain and defend, in its corporate name.
- (3) to have a corporate seal which may be altered at pleasure, and to use the same by causing it, or a facsimile thereof, to be impressed or affixed or in any other manner reproduced.
- (4) to purchase, take, receive, lease, take by gift, devise or bequest, or otherwise acquire, own, hold, improve, use and otherwise deal in and with real or personal property, or any interest therein, wherever situated.
- (5) to sell, convey, mortgage, pledge, lease, exchange, transfer and otherwise dispose of all or any part of its property and assets.
- (6) to lend money to its employees other than its officers and trustees.
- (7) to purchase, take, receive, subscribe for, or otherwise acquire, own, hold, vote, use, employ, sell, mortgage, lend, pledge, or otherwise dispose of, and otherwise use and deal in and with, shares or other interests in, or obligations of, other domestic or foreign corporations, whether for profit or not for profit, associations, partnerships or individuals, or direct or indirect obligations of the United States, or of any other government,

state, territory, governmental district or municipality or of any instrumentality thereof.

(8) to make contracts and incur liabilities, borrow money at such rates of interest as the corporation may determine, issue its notes, bonds, and other obligations, and secure any of its obligations by mortgage or pledge of all or any of its property, franchises and income.

(9) to lend money for its corporate purposes, invest and reinvest its funds, and take and hold real and personal property as security for the payment of funds so loaned or invested.

(10) to conduct its affairs, transact its business, carry on its operations, and have offices and exercise the powers granted by this act in any state, territory, district, or possession of the United States, or in any foreign country.

(11) to elect or appoint officers and agents of the corporation, and define their duties and fix their compensation.

(12) to make and alter bylaws, or resolutions, not inconsistent with its articles of incorporation or with the laws of this state, for the administration and regulation of the affairs of the corporation.

(13) unless otherwise provided in the articles of incorporation, to make donations for the public welfare or for religious, charitable, scientific or educational purposes; and in time of war to make donations in aid of war activities.

(14) to indemnify any trustee or officer or former trustee or officer of the corporation, or any person who may have served at its request as a trustee, director or officer of another corporation, whether for profit or not for profit, against expenses actually and necessarily incurred by him in connection with the defense of any action, suit or proceeding in which he is made a party by reason of being or having been such trustee, director or officer, except in relation to matters as to which he shall be adjudged in such action, suit or proceeding to be liable for negligence or misconduct in the performance of duty; but such indemnification shall not be deemed exclusive of any other rights to which such trustee, director or officer may be entitled, under any bylaw, agreement, vote of the governing board or members or otherwise.

(15) to voluntarily dissolve and distribute its assets in accordance with the provisions of this act.

(16) to have and exercise all powers necessary or convenient to effect any or all of the purposes for which the corporation is organized, including the right to raise funds by such means or methods as the governing board may deem advisable, not inconsistent with law or its articles of incorporation or bylaws.

History: L. 1963, ch. 17, § 5.

Meaning of "this act". — See the note under the same catchline following § 16-6-20.

(3) The registered agent of a corporation may resign by filing an original written notice and one copy with the Division of Corporations and Commercial Code. The division shall mail a copy of the notice of resignation to the corporation at its principal office in the state or country under the laws of which it is incorporated. The appointment of the registered agent ends 30 days after receipt of the notice by the Division of Corporations and Commercial Code.

History: C. 1953, 16-6-25.2, enacted by L. 1985, ch. 178, § 5.

16-6-25.3. Service of process on registered agent or director of division.

(1) The registered agent who is appointed by a nonprofit corporation is an agent of the nonprofit corporation upon whom any process, notice, or demand required or permitted by law to be served upon the corporation may be served.

If a corporation fails to appoint or maintain a registered agent in this state, or if its registered agent cannot with reasonable diligence be found at the registered office, the director of the Division of Corporations and Commercial Code is an agent of the corporation upon whom any process, notice, or demand may be served. The director of the Division of Corporations and Commercial Code shall be served with any process, notice, or demand by delivering to the director, or with any clerk having charge of the corporation unit of the division, together with copies of the process, notice, or demand. If any process, notice, or demand is served on the director of the Division of Corporations and Commercial Code, he shall immediately forward a copy of it by registered mail to the corporation at its registered office. Any return of service on the director of the Division of Corporations and Commercial Code is due not less than 30 days after service on the director.

The Division of Corporations and Commercial Code shall keep a record of all processes, notices, and demands served on the director under this section. The division shall record the time of each service and the director's action on the service.

(2) This section does not limit or effect the right to serve any process, notice, or demand required or permitted by law upon a corporation in any other manner permitted by law.

History: C. 1953, 16-6-25.3, enacted by L. 1985, ch. 178, § 6.

16-6-26. Members — Classes — Provisions of articles of incorporation or bylaws — Liability.

A nonprofit corporation may have one or more classes of members, or may have no members. If the corporation has one or more classes of members, the designation of such class or classes, the manner of election or appointment, the qualifications and rights of the members of each class and any provisions for termination or forfeiture of membership shall be set forth in the articles of incorporation or the bylaws. The articles of incorporation or the bylaws may

contain provisions relating to the imposition of dues, assessments or other charges on members and provisions restricting the transfer of memberships.

Members are not individually or personally liable for the debts or obligations of the corporation.

History: L. 1963, ch. 17, § 9.

16-6-27. Meetings of members — Annual and special meetings.

Meetings of members may be held at such place, within or without this state, as may be determined from time to time by the governing board or as may be provided in the bylaws. In the absence of any such determination or provision all meetings shall be held at the principal office of the corporation in this state.

An annual meeting of the members shall be held at such time as may be provided in the articles of incorporation or the bylaws. Failure to hold the annual meeting at the designated time shall not work a forfeiture or dissolution of the corporation. If an annual meeting is not held within three months after the time provided in the articles of incorporation or bylaws, an annual meeting may be called by any ten members having voting rights or by members having the right to cast ten per cent of the votes entitled to be cast at such meeting, whichever is greater.

Special meetings of the members may be called by the principal officer of the corporation or by the governing board. Special meetings of the members may also be called by such other officers or persons or number or proportion of members as may be provided in the articles of incorporation or the bylaws. In the absence of a provision fixing the number or proportion of members entitled to call a meeting, a special meeting of members may be called by members having the right to cast one-third of the votes entitled to be cast at such meeting.

History: L. 1963, ch. 17, § 10.

COLLATERAL REFERENCES

Am. Jur. 2d. — 18A Am. Jur. 2d Corporations §§ 948, 949, 953 to 957; 18B Am. Jur. 2d Corporations §§ 1365 to 1367. Key Numbers. — Corporations ⇐ 191 to 194.
C.J.S. — 18 C.J.S. Corporations §§ 539 to 543.

16-6-28. Meetings of members — Notice.

Unless some other method of giving notice is prescribed by the articles of incorporation or the bylaws, written or printed notice stating the place, day and hour of all meetings of members and, in case of a special meeting, the purpose or purposes for which the meeting is called, shall be delivered not less than ten days before the date of the meeting, either personally or by mail, by or at the direction of any of the officers of the corporation, or the officers or persons calling the meeting, to each member entitled to vote at such meeting.

ADDENDUM 2

Mandamus as remedy to compel assertedly disqualified judge to recuse himself or to certify his disqualification, 45 A. L. R. 2d 937.

Number of changes of judges, statute limiting, 104 A. L. R. 1494.

Party's right, in course of litigation, to challenge title or authority of substitute judge, 144 A. L. R. 1214.

Power of successor judge taking office during term time to vacate, etc., judgment entered by his predecessor, 11 A. L. R. 2d 1117.

Power of successor or substituted judge, in civil case, to render decision or enter judgment on testimony heard by predecessor, 22 A. L. R. 3d 922.

Practice of law, propriety and permissibility of judge engaging in, 39 A. L. R. 2d 886.

Prior representation or activity as at-

torney or counsel as disqualifying judge, 72 A. L. R. 2d 443.

Relationship of judge to one who is party in an official or representative capacity as disqualification, 10 A. L. R. 2d 1307.

Relationship to attorney as disqualifying judge, 50 A. L. R. 2d 143.

Residence or ownership of property in city or other political subdivision which is party to or interested in action as disqualifying judge, 33 A. L. R. 1322.

Right of party, in course of litigation, to challenge title or authority of judge or of person acting as judge, 144 A. L. R. 1207.

Successor judge, authority in dealing with unfinished business of previous judge, 54 A. L. R. 952, 58 A. L. R. 848.

Time for asserting disqualification, 73 A. L. R. 2d 1238.

Sec. 3. [Selection of judges—Method of—Basis of selection.]

Judges of the Supreme Court and district courts shall be selected for such terms and in such manner as shall be provided by law, provided, however, that selection shall be based solely upon consideration of fitness for office without regard to any partisan political considerations and free from influence of any person whomsoever, and provided further that the method of electing such judges in effect when this amendment is adopted shall be followed until changed by law. (As amended November 7, 1944, effective January 1, 1945.)

Compiler's Notes.

The amendment of 1943 was proposed by Senate Joint Resolution No. 2, Laws 1943, p. 188, and was adopted at the general election November 7, 1944, and became effective January 1, 1945. The amendment deleted the provisions relative to the

qualifications of the justices and substituted therefor the method of selection and election.

Cross-Reference.

Election of Supreme Court and district court judges, 20-1-7.1 et seq.

Sec. 4. [Jurisdiction of Supreme Court—Terms.]

The Supreme Court shall have original jurisdiction to issue writs of mandamus, certiorari, prohibition, quo warranto and habeas corpus. Each of the justices shall have power to issue writs of habeas corpus, to any part of the State, upon petition by or on behalf of any person held in actual custody, and may make such writs returnable before himself or the Supreme Court or before any district court or judge thereof in the State. In other cases the Supreme Court shall have appellate jurisdiction only, and power to issue writs necessary and proper for the exercise of that jurisdiction. The Supreme Court shall hold at least three terms every year and shall sit at the capital of the State.

Cross-Reference.

Original and appellate jurisdiction, 73-2-2.

Appellate jurisdiction.

The jurisdiction of the Supreme Court, with the exception of extraordinary writs,

is appellate only. *State v. Kinder*, 14 U. (2d) 199, 381 P. 2d 82.

Certiorari.

Under this section the Supreme Court, and not a justice thereof, is authorized to issue a writ of certiorari, and a statute

ADDENDUM 3

FILMED

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Attorneys for PLAINTIFFS

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

RICHARD L. JAMES, SHIRLENE A. JAMES, DRYCE DEAN, CAMILLA DEAN, STEVEN K. MAXFIELD, SUSAN MAXFIELD, William Millgate, Betty L. Millgate, Paul E. Stroh, Susan Stroh, Mary K. Graves, Ronald Mackay, Marie Mackay, Rebecca M. Kirby, Edwin W. Kirby, Dr. Charles Hagan, Wayne Tondro, Sheila M. Tondro, Keith Carr, Boyd Prescott, Vaughn Prescott, Mike B. White, Ann G. White, James Tobbs, Emily Tabbs, Bonnie White, Fred Kwiatkowski, Anne H. Kwiatkowski, Darwin W. Colton, Lynda C. Colton, Kenneth Norton, Belva Norton, Larry Beagley, Esther Beagley, John Beagley, Sadie Beagley, Stan Tacy, Patricia Tacy, Ronald Vincent, Bonnie Vincent, Jay P. James, Emogene L. James

SECOND AMENDED
VERIFIED COMPLAINT

Plaintiffs,

vs.

JOHN W. DAVIES, ROBERT MILLARD, JOHN C. THOMAS, and JOANN ABPLANALP, and HI-COUNTRY ESTATES HOMEOWNERS ASSOCIATION, a non-profit Utah Corporation,

Defendants.

Civil No. C-81-8560

COME NOW, the Plaintiffs and for causes of action against the Defendants assert, allege and complain as follows:

1. The Plaintiffs are residents of Salt Lake County, State of Utah.

2. The Defendants, John W. Davies, Robert Millard, John C. Thomas, and Joanne Abplanalp, are residents of Salt Lake County, State of Utah.

3. The Defendant, Hi-Country Estates Homeowners Association, is a non-profit corporation formed under the laws of

EXHIBIT J

000326

1 the State of Utah with its principal place of business in the
2 County of Salt Lake, State of Utah.

3 4. Each of the Plaintiffs is a member of the Defendant,
4 Hi-Country Homeowners Association.

5
6 FIRST CAUSE OF ACTION

7 5. Plaintiffs' incorporate herein by reference the
8 allegations made in paragraphs 1, 2, 3, and 4 of this Amended
9 Verified Complaint.

10 6. On October 15, 1980, a special meeting was called of
11 the members of the Hi-Country Estates Homeowners Association for
12 the purpose of electing a new Director.

13 7. After said meeting, Robert Millard was appointed as
14 the new director.

15 8. Robert Millard was not duly elected at said meeting
16 on October 15, 1980 by reason of the fact that absentee ballots had
17 been illegally used.

18 9. Robert Millard is currently serving as a Director of
19 the Hi-Country Estates Homeowners Association and has no legal
20 authority to do so.

21 10. Robert Millard should be enjoined from taking any
22 further action as a Director of the Hi-County Estates Homeowners
23 Association, and unless he is so enjoined, the Plaintiffs will
24 suffer immediate and irreparable injury.

25
26 SECOND CAUSE OF ACTION

27 11. Plaintiffs incorporate herein by reference the
28 allegations made in Paragraphs 1, 2, 3, and 4 of this Amended
29 Verified Complaint.

30 12. On February 28, 1981, an annual meeting of the
31 Hi-Country Estates Homeowners Association was held for the purpose
32 of electing three new directors.

1 13. As a result of said meeting, John W. Davies, Robert
2 Millard and John C. Thomas were installed as Directors of the
3 Hi-County Estates Homeowners Association and are currently serving
4 in that capacity.

5 14. The above Defendants were not legally elected as the
6 new directors for the reason that Richard L. James, the lawful
7 holder of seven (7) proxy votes, one (1) given to him by John
8 Beagley and six (6) given to him by Larry Beagley, was denied the
9 use of the proxy votes.

10 15. Had Richard L. James been allowed to use said seven
11 (7) proxy votes, the Defendants would not have had sufficient votes
12 to be elected as Directors.

13 16. The above Defendants were not legally elected for the
14 reason that many of the proxy votes cast in favor of said
15 Defendants had not been legally obtained and voted.

16 17. But for the use of said illegal proxy votes cast in
17 favor of the Defendants, the Defendants would not have had
18 sufficient votes to be elected as Directors.

19 18. The above Defendants were not legally elected for the
20 reason that the By-Laws of the Hi-County Estates Homeowners
21 Association prohibit a Director from serving concurrent terms,
22 which the Defendants are now doing.

23 19. John W. Davies, Robert Millard, and John C. Thomas
24 should be enjoined from taking any further action as Directors of
25 the Hi-County Estates Homeowners Association, and unless they are
26 so enjoined, the Plaintiffs will suffer immediate and irreparable
27 injury.

28
29 THIRD CAUSE OF ACTION

30 20. The Plaintiffs incorporate herein by reference the
31 allegations made in Paragraphs 1, 2, 3, and 4 of this Amended
32 Verified Complaint.

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1 21. The Hi-Country Estates Homeowners Association has
2 taken legal action to enforce certain protective covenants of the
3 Hi-Country Estates Subdivision upon individual members of the
4 Hi-Country Estates Homeowners Association.

5 22. The Hi-Country Estates Homeowners Association has
6 expended the funds of the Association in taking said legal action.

7 23. The Hi-Country Estates Homeowners Association was
8 formed for the express purpose of maintaining and providing for the
9 common areas, including roads and streets.

10 24. The Hi-Country Estates Homeowners Association has no
11 authority to enforce the protective covenants of the subdivision
12 against individual members.

13 25. Said actions to enforce the restrictive covenants are
14 ultra vires and the Hi-Country Estates Homeowners Association
15 should be restrained from taken any further action to enforce said
16 covenants against the individual members, and unless the
17 Association is so restrained, the Plaintiffs will suffer immediate
18 and irreparable injury.

19
20 FOURTH CAUSE OF ACTION

21 26. The Plaintiffs incorporate herein by reference the
22 allegations made in Paragraphs 1, 2, 3, and 4 of this Amended
23 Verified Complaint.

24 27. There presently exists on record certain protective
25 covenants against the property contained in the Hi-Country Estates
26 Subdivision.

27 28. Said protective covenants are illegal and void
28 because they were not properly enacted and because they are vague.

29 29. There presently exists on record an amendment to the
30 protective covenants mentioned above.

31 30. Said amendment is illegal and void because it was not
32 properly enacted pursuant to the terms of the original protective
covenants and because the amendment is also vague.

1 FIFTH CAUSE OF ACTION

2 37. The Plaintiffs incorporate herein by reference the
3 allegations made in Paragraphs 1, 2, 3, and 4 of this Amended
4 Verified Complaint.

5 38. An application has been filed with the Salt Lake
6 Planning Commission seeking a zoning change for the Hi-Country
7 Estates Subdivision for which application hearings have been
8 scheduled in the near future.

9 39. The Hi-Country Estates Homeowners Association and its
10 current Directors intend in the future to participate in said
11 hearings.

12 40. Such participation by the Hi-Country Estates
13 Homesowners Association is expressly prohibited by its certificate
14 of incorporation. Unless the Hi-Country Estates Homeowners
15 Association and its current Directors are prohibited from
16 participating in the scheduled hearings before the Salt Lake
17 Planning Commission, the members of the Association will suffer
18 immediate and irreparable harm.

19
20
21 SIXTH CAUSE OF ACTION

22 41. The Plaintiffs incorporate herein, by reference, the
23 allegations made in Paragraphs 1 through 25 of this Amended
24 Verified Complaint.

25 43. The Defendants, John W. Davies, Robert Millard and
26 John C. Thomas have illegally and wrongfully acted as Directors of
27 the Hi-Country Estates Homeowners Association by attempting to
28 enforce protective covenants against members of the Association.

29 44. The Defendants, John W. Davies, Robert Millard and
30 John C. Thomas have illegally acted as Directors of the Hi-Country
31 Estates Homeowners Association by expending funds of the
32 Association in attempting to enforce protective covenants against
its members.

1 45. The Defendants, John W. Davies, Robert Millard,
2 and Joanne Abplanalp have illegally and wrongfully acted as
3 Directors of the Hi-Country Estates Homeowners Association in their
4 conduct of the elections which took place on October 15, 1980, and
5 February 28, 1981, as set forth above.

6 46. The Plaintiffs have made a demand on the Defendants
7 to redress the wrongs complained of herein, but the Defendants
8 failed and refused, and still fail and refuse, to comply with the
9 Plaintiffs' demand.

10 47. By reason of the unlawful acts of the Defendants
11 John W. Davies, Robert Millard, and Joanne Abplanalp the Defendant
12 Hi-Country Estates Homeowners Association has been damaged in the
13 sum of THIRTY THOUSAND DOLLARS (\$30,000.00)

14 48. The Plaintiffs have no adequate remedy at law.

15 WHEREFORE, Plaintiffs pray for judgment against the
16 Defendants as follows:

17 1. Pursuant to Plaintiffs' First and Second Causes of
18 Action, for an Order determining that the current Directors of the
19 Hi-Country Estates Homeowners Association were not lawfully elected
20 or appointed and enjoining such Directors from taking any further
21 actions on behalf of the Association.

22 2. Pursuant to the Plaintiffs' Third Cause of Action,
23 for an Order determining that the Hi-Country Estates Homeowners
24 Association has no authority to enforce protective covenants of the
25 Hi-Country Estates Subdivision upon individual members of the
26 Association and enjoining the Association from any further
27 enforcement or expenditure of monies therefor.

28 3. Pursuant to the Plaintiffs' Fourth Cause of Action,
29 for an Order determining that the protective covenants and
30 amendments thereto filed against the Hi-Country Estates Subdivision
31 are unlawful and shall be removed.

32 4. Pursuant to the Plaintiffs' Fifth Cause of Action,
for an Order determining that the Hi-Country Estates Homeowners

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1 Association has no authority to participate on behalf of its
2 members in the hearings before the Salt Lake Planning Commission
3 with respect to a zoning change for the Hi-Country Estates
4 Subdivision and for an Order enjoining any such actions by the
5 Association or its Directors.

6 5. Pursuant to the Plaintiff's Sixth Cause of Action,
7 for Judgment in favor of the Defendant, Hi-Country Estates
8 Homeowners Association, and against the Defendants, John W. Davies,
9 Robert Millard, John C. Thomas, and Joanne Abplanalp in the sum of
10 THIRTY THOUSAND DOLLARS (\$30,000.00).

11 6. For attorney's fees, costs of court and for such
12 further relief as to the Court appears just and equitable in the
13 premises.

14 DATED this 1st day of November, 1981.

15 HARDING & HARDING
16 ATTORNEYS AT LAW

17 *Ray M. Harding*
18 RAY M. HARDING
19 ATTORNEY FOR PLAINTIFFS
20 P.O. Box 126
21 American Fork, UT 84003
22 756-7658
23
24
25
26
27
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29
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32

ADDENDUM 4

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

3 * * * * *

4 RICHARD L. JAMES, ET. AL., *
5 Plaintiffs, * Civil No. C-81-8560
6 vs. * COURT'S RULING
7 JOHN W. DAVIES, ET. AL., *
8 Defendants. *

9
10 BE IT REMEMBERED that on the 17th day of February,
11 1984, in the above-entitled court at Salt Lake City, Utah,
12 commencing at the hour of 9:00 a.m. the above-entitled
13 matter came on for hearing before the Honorable Scott Daniels
14 sitting without a jury, and the following proceedings were
15 had.

16 APPEARANCES:

17 For the Plaintiffs:

R. Clark Arnold, Esq.
Lowe & Arnold
Valley Tower, Fourth Floor
50 West Broadway
Salt Lake City, Utah 84101

19 For the Defendants:

20 Con Kostopulos, Esq.
Attorney at Law
1095 East 2100 South, Suite 235
21 Salt Lake City, Utah 84106
22
23
24
25

EXHIBIT M

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EXHIBIT M

1 PROCEEDINGS

2 (Excerpt of proceedings)

3 THE COURT: This is the case of Richard L. Jones
4 and others verses John W. Davies and others, C-81-8560.

5 First cause of action related to the election and
6 it was dismissed.

7 The second cause of action related to the election
8 of officers, and it was also dismissed.

9 The third cause of action relates to authority to
10 enforce the covenants.

11 As I have read the covenants in light of the
12 testimony that's been presented, I'm of the opinion that the
13 type of homeownership that the Homeowners Association has
14 is not a type of homeownership or land ownership contemplated
15 in the restrictive covenants and rule that the Homeowners
16 Association has no authority to enforce the restrictive
17 covenants.

18 On the fourth cause of action, the first portion
19 relating to the covenants themselves was dismissed.

20 The second relating to the amendment, I think I'm
21 compelled to rule that the amendment was not properly enacted.
22 First of all I just can't really read the restrictive covenants
23 themselves in such a way as to allow amendment before the
24 expiration of that term in 1995. But even if there were
25 some method to do that, I think it requires the consent of
the equitable owners of the property. So on either ground
I rule that the amendment is not properly enacted; it is
void.

1 The fifth cause of action relating to the ability
2 of the Homeowners Association to appear and present its views in
3 the zoning actions. I've read the cases cited and the rule
4 cited, and I'm of the opinion that based upon the language in
5 the articles of incorporation, the Homeowners Association
6 does not have the right to hear zoning hearings.

7 On the sixth cause of action which relates to ultra
8 vires as well as I find as a matter of fact that there were
9 no funds used of the Homeowners Association used to prosecute
10 actions to enforce the covenants. Therefore, I rule for the
11 Defendants on that particular claim.

12 The third part of the sixth cause of action relating
13 to the elections is moot and is dismissed based upon the
14 fact that the first cause of actions were dismissed because
15 of the election question I find to be moot.

16 I do find that the directors acted in an ultra vires
17 matter in attempting to enforce the restrictive covenants.
18 And I suppose the issue of judgement they can't do that, but
19 I really find no damages in that respect since they didn't
20 use any Homeowner Association funds.

21 I think that the action was prosecuted on both sides
22 in good faith and both sides honestly felt they had a
23 legitimate position to take and do not feel that attorney fees
24 are appropriately awarded to either side in this case. And
25 really since I ruled in favor of the Plaintiffs on some of
the issues and in favor for the defendants on others, it's
difficult to see how there's a prevalent party, and therefore,
award no costs.

1 Now, did I cover everything or did I leave something
2 out?

3 MR. ARNOLD: No, Your Honor, just clarifying on the
4 judgement. The judgement would be that the permanent restraining
5 order would issue against enforcement of the covenants?

6 THE COURT: I think that's probably appropriate.
7 Any problem with the form of that procedure?

8 MR. KOSTOPULOS: No, Your Honor.

9 ^{RUN} The only additional question I might ask, the Court
10 may decline to respond, it being not perhaps properly before
11 the Court at the present time is this: In as much as the Court
12 has ruled that the amendment to the covenants is invalid in
13 as far as it being improperly enacted and in as much as the
14 amendment to the covenants is the source of mandatory membership
15 in the association itself, and in as much as we are coming
16 up very quickly to the February 28th annual meeting of the
17 association, I wonder if the Court would address the issue
18 of whether or not that meeting should go forth or if there's
19 any point in doing anything with it or whether the association
20 should simply be dissolved at this point?.

21 THE COURT: Well, I'm of the opinion that the amend-
22 ment was improperly enacted which seems to be the source of
23 mandatory participation in the association. I don't see any
24 reason why the association can't continue to hold its meetings
25 do what it wants to do, maybe even tell people if they can't
be members, they can't drive on the roads or something. But
as I read the documents, I just see no -- I just cannot come
to the conclusion that that amendment was validly enacted.

1 And I don't know if I can tell you what the next step is. I
2 really don't think it was --

3 MR. ARNOLD: I will prepare the findings.

4 THE COURT: Would you submit those to Mr. Kostopulos?

5 MR. ARNOLD: I will, Your Honor.

6 THE COURT: All right. Again, I appreciate the
7 way it was handled. It was a very well tried case and the
8 areas that were submitted were presented very well.

9 (Whereupon, the proceedings were concluded.)
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C E R T I F I C A T E

STATE OF UTAH)
 : ss
COUNTY OF SALT LAKE)

I, Susan S. Sprouse, do hereby certify that
I am a Certified Shorthand Reporter and Notary Public in
and for the State of Utah;

That as such Reporter, I attended the hearing
of the foregoing matter and thereafter reported in Stenotype
all of the testimony and proceedings had, and caused said
notes to be transcribed into typewriting, and the foregoing
pages numbered from 2 to 5 inclusive, constitute a full,
true, and correct report of the same.

DATED at Salt Lake City, Utah, this 23rd day of
February, 1984.

Susan S. Sprouse, CSR/RPR

My commission expires:
November 1987

ADDENDUM 5

D 6-
9-1-40

THE STATE OF
UTAH

MAR 29 1984

R. CLARK ARNOLD
Lowe & Arnold
Attorney for Plaintiff
Valley Tower, Fourth Floor
50 West Broadway
Salt Lake City, Utah 84101

By Keith Gurr
Deputy Clerk

Telephone: (801) 521-5466

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

RICHARD L. JAMES, et al.,)	
Plaintiffs,)	
vs.	)	FINDINGS OF FACT AND
JOHN W. DAVIES, et al.,	)	CONCLUSIONS OF LAW
Defendants,)	
vs.)	
BAGLEY & COMPANY, et al.,	)	Civil No. C-81-8560
Third Party Defendants.	)	Assigned to Judge Daniels

The above-entitled matter came on for hearing on Monday, January 9, 1984, at the hour of 10:00 a.m. Various of the plaintiffs were present and were represented by their attorney, R. Clark Arnold. Mr. Arnold did not represent all of the plaintiffs, however, some of them representing themselves individually; to wit: Edwin Kirby, Dr. Charles Hagen, Keith Gurr, Stan and Patricia Tacy, Emily Tebbs, and Sheila Tondro. Of the individual plaintiffs appearing pro se, only Keith Gurr appeared representing himself. The defendants were present and represented by their attorney, Con. Kostopulos. The trial con-

EXHIBIT L

EXHIBIT K

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tinued until January 17, 1984, at which time both parties rested. During the course of the trial, both parties presented witnesses and submitted evidence in support of their respective positions. Upon the closing of this matter, the Court continued until February 10, and later continued until February 17, 1984, closing arguments. In the interim, the parties submitted a Memorandum of Points and Authorities in support of their respective positions. The matter having finally been closed, and the Court having considered all of the evidence presented, and being fully advised in the premises, now makes and enters the following finding of fact and conclusions of law.

FINDINGS OF FACT

Findings With Regard to Jurisdiction of Venue

1. The Court finds that the plaintiffs and defendants were residents of Salt Lake County, State of Utah.
2. The Court finds that the property in dispute in this matter is situated in Salt Lake County, State of Utah.
3. The Court finds that the Hi-Country Estates, Phase I Homeowners Association is a non-profit corporation organized under the laws of the State of Utah with its principal place of business being in Salt Lake County, Utah.
4. All of the actions complained of in plaintiffs' Complaint and all actions complained of in defendants' Counterclaims occurred in Salt Lake County, Utah.

Findings With Regard to Plaintiffs' First Cause of Action

5. With regard to the plaintiffs' allegations in their first cause of action regarding the election of Mr. Robert Millard as a director of the Homeowners Association at the October 15, 1980 special meeting, the Court finds that Mr. Millard was subsequently properly appointed and/or elected on at

least one occasion as a director of the Association and therefore the complaints raised in plaintiffs' first cause of action are moot.

6 The Court finds that plaintiffs' have suffered no damages as a result of any alleged improper election of Mr. Millard as a director at the October 15, 1980 special meeting.

Findings With Regard to Plaintiffs' Second Cause of Action

7. With regard to the plaintiffs' second cause of action, the Court finds that John W. Davies, Robert Millard and John C. Thomas, defendants herein, were properly elected as directors of the Homeowners Association and therefore the allegations raised in the plaintiffs' second cause of action are moot.

8. The Court finds that the plaintiffs have suffered no damage as a result of any alleged improper election of Messrs Davies, Millard and Thomas at the February 28, 1981 annual meeting.

Findings With Regard to Plaintiffs' Third Cause of Action

9. The Court finds that the Hi-Country Estates, Phase I Homeowners Association has taken action to enforce the protective covenants upon owners of property in Hi-Country Estates, Phase I, to wit: filing various lawsuits, including a lawsuit against Shirlene and Richard James and has threatened to file lawsuits against other property owners.

10. The Court finds that the Association has expended no funds in taking such action.

11. The Court finds that the word "owner of property" as that term is used in the protective covenants, was not intended to include the homeowner's association as an owner such as would entitled it to bring action against another owner of property for violation of the covenants.

12. The Court finds that the purposes for which the Hi-Country Estates, Phase I Homeowners Association was incorporated do not include enforcement of the protective covenants.

13. The Court finds that unless the Association is restrained and enjoined from enforcing the protective covenants, the plaintiffs will suffer injury for which they have no adequate remedy at law.

Findings With Regard to Plaintiffs' Fourth Cause of Action

14. The Court finds that protective covenants were recorded against the property located in Hi-Country Estates, Phase I in two separate documents, both recorded on March 22, 1974, to wit: a basic set of covenants containing general restrictions and an amendment to that basic set of covenants.

15. The Court finds that the basic set of covenants was executed on the date it bears, June 15, 1970.

16. The Court finds that the amendment to the covenants was executed on the date it bears, April 6, 1973.

17. The Court finds that the basic set of covenants was prepared at a time when the grantor therein was the equitable owner of the property located within Phase I.

18. The Court finds that at the time the amendment to covenants was prepared, April 6, 1973, the purported grantor was not the equitable owner of a majority of the property located in Hi-Country Estates Phase I.

19. The Court finds that the protective covenants prepared on June 15, 1970 are not vague or ambiguous in their content.

20. The Court finds that the covenants executed June 15, 1970 by their terms, prohibit amendment for a period of twenty-five years following their execution.

21. The Court finds that the amendment dated April 6, 1973 was intended to take effect immediately thereafter and

therefore sooner than 25 years after the execution of the basic covenants.

Findings With Regard to Plaintiffs' Fifth Cause of Action

22. The Court finds that the Articles of Incorporation of Hi-County Estates Phase I Homeowners Association do not include a specific grant of authority allowing the Association to appear at zoning hearings to represent the members.

23. The Court finds that the Articles of Incorporation of Hi-County Estates Phase I Homeowners Association do not include as a purpose of the Association, acting in a representative capacity on behalf of the members of the Association at zoning hearings.

Findings With Regard to Plaintiffs' Sixth Cause of Action

24. The Court finds that the Articles of Incorporation and the Bylaws of the Hi-County Estates Phase I Homeowners Association do not provide a grant of authority for the directors to take action to enforce the protective covenants against owners of property in Hi-County Estates Phase I.

25. The Court finds that the actions by directors in attempting to enforce the covenants in the name of the Association against property owners in Hi-County Estates Phase I, as found above, was ultra vires to the power of the Association.

26. The Court finds that although the Association did take action in an attempt to enforce the covenants against individual property owners, no funds of the Association were expended in doing so and therefore there has been no damage suffered by the Association by reason of such actions.

Findings With Regard to Defendants' Counterclaims

27. The Court finds that the defendants voluntarily abandoned their counterclaims against the plaintiffs without presenting evidence thereon.

Findings With Regard to Attorneys' Fees

52/2-4

Findings, Page 5

28. The Court finds that both the plaintiffs and defendants presented their various claims in this lawsuit in good faith and did so based upon a legitimate belief in the correctness of their position.

Findings With Regard To JoAnn Abplanalp.

29. The Court finds that the only claims against the Defendant JoAnn Abplanalp involved the elections referenced in the First and Second causes of action. Inasmuch as the court has found those to be moot, all claims against Abplanalp are also moot.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Court now enters the following conclusions of law.

1. Jurisdiction and venue are properly before this Court to hear the Plaintiff's and Defendant's complaints against each other and to render relief thereon.

2. The plaintiffs' first cause of action should be dismissed with prejudice.

3. The plaintiffs' second cause of action should be dismissed with prejudice.

4. The plaintiffs should be granted relief on their first cause of action against the defendant Hi-Country Estates Phase I Homeowner's Association and the defendant directors thereof, and the Hi-County Estates Phase I Homeowners Association and the directors thereof, in their capacity as directors, should be permanently restrained and enjoined from attempting to enforce the protective covenants.

5. The defendants are entitled to a judgment by the Court declaring that the basic protective covenants executed on June 15, 1970 and recorded on March 22, 1974 are not vague or ambiguous and do constitute a present and continuing servitude upon

UJGFA

ADDENDUM 6

FILED

MAR 22 1984

H.D. *Paul* *Paul*
E, *Paul* *Paul*

R. CLARK ARNOLD
Lowe & Arnold
Attorney for Plaintiff
Valley Tower, Fourth Floor
50 West Broadway
Salt Lake City, Utah 84101

Telephone: (801) 521-5466

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

RICHARD L. JAMES, et al.,)	
Plaintiffs,)	
vs.	)	J U D G M E N T
JOHN W. DAVIES, et al.,)	
Defendants,)	
vs.)	
BAGLEY & COMPANY, et al.,	)	Civil No. C-81-8560
Third Party Defendants.	)	Assigned to Judge Daniels

The above-entitled matter came on for hearing on Monday, January 9, 1984, at the hour of 10:00 a.m. Various of the plaintiffs were present and were represented by their attorney, R. Clark Arnold. Mr. Arnold did not represent all of the plaintiffs, however, some of them representing themselves individually; to wit: Edwin Kirby, Dr. Charles Hagen, Keith Gurr; Stan and Patricia Tacy, Emily Tebbs, and Sheila Tondro. Of the individual plaintiffs appearing pro se, only Keith Gurr appeared representing himself. The defendants were present and represented by their attorney, Con Kostopulos. The trial con-

tinued until January 17, 1984, at which time both parties rested. During the course of the trial, both parties presented witnesses and submitted evidence in support of their respective positions. Upon the closing of this matter, the Court continued until February 10, and later continued until February 17, 1984, closing arguments. In the interim, the parties submitted Memorandum of Points and Authorities in support of their respective positions. The matter having finally been closed, and the Court having considered all of the evidence and memorandum presented, and being fully advised in the premises, and having heretofore signed and filed its findings of fact and conclusions of law, Now, therefore, it is hereby

ORDERED, ADJUDGED AND DECREED as follows:

1. The plaintiffs' first cause of action is hereby dismissed with prejudice.

2. The plaintiffs' second cause of action is hereby dismissed with prejudice.

3. The plaintiffs are hereby granted judgment against the defendants on their third cause of action, and the Defendant Homeowners Association and the Directors thereof, individually in their capacity as Directors, are hereby permanently restrained and enjoined from taking action or expending funds of the Association to attempt to enforce the protective covenants against property owners of property located in Hi-County Estates, Phase I.

4. The defendants are hereby granted a judgment against the plaintiffs on the plaintiffs' fourth cause of action to the extent that the Court hereby declares that the protective covenants executed June 15, 1970 and recorded on March 22, 1974 to be valid and enforceable restrictions and servitudes on the property located in Hi-County Estates, Phase I. The plaintiffs, however,

are hereby granted judgment against the defendants on said fourth cause of action to the extent that the Court hereby declares that the amendment to said protective covenants prepared April 6, 1973 and recorded March 22, 1974, is void and unenforcible.

5. The plaintiffs are hereby granted judgment against the defendants on their fifth cause of action and the Directors of the Hi-Country Estates Phase I Homeowners Association, in their capacity as directors are hereby permanently restrained and enjoined from appearing at Planning Commission or zoning meetings or hearings in a representative capacity on behalf of the association or of the individual property owners of property in Hi-County Estates, Phase I.


6. The plaintiffs are hereby granted judgment against the defendants on their sixth cause of action and the Hi-Country Estates Phase I Homeowners Association and the Directors thereof, in their capacity as Directors, are hereby permanently restrained and enjoined from taking any action or expending any Association funds to enforce or attempt to enforce the protective covenants against property owners of property located in Hi-County Estates, Phase I.


7. All claims against the Defendant JoAnn Abplanalp are hereby dismissed with prejudice.

8. The defendants having abandoned their counterclaims against the plaintiffs, the same are hereby dismissed with prejudice.


9. Each part is hereby ordered to assume their own costs and attorneys' fees incurred herein.

DATED this 22 day of March, 1984.


SCOTT DANIELS
District Judge

ATTEST
H. DIXON PROSEY

60034E

APPROVED AS TO FORM AND CONTENT:



Con Kostopoulos
Attorney for Plaintiffs

ADDENDUM 7

CERTIFICATE OF INCORPORATION
OF
HI-COUNTRY ESTATES HOMEOWNERS ASSOCIATION

KNOW ALL MEN BY THESE PRESENTS:

I, CHARLES E. LEWTON, acting as the incorporator of a corporation under the Utah act governing the formation of non-profit corporations, do hereby adopt the following Certificate of Incorporation for such corporation:

FIRST: The name of this Corporation is Hi-Country Estates Homeowners Association, hereafter called the "Association."

SECOND: The term of existence of this Association will be perpetual.

THIRD: This Association is not organized for pecuniary profit or gain to the members thereof, and the specific purposes for which it is formed are to provide for maintenance, upkeep and preservation of the streets, roads and common area within that certain tract of property described as:

Hi-Country Estates, located in Salt Lake County,
State of Utah, Phase I,

and also to include additional phases of Hi-Country Estates and the homeowners located within such additional subdivisions as may be mutually beneficial for the members hereof and the homeowners of the adjoining subdivisions. This Association is also formed to promote the health, safety and welfare of the residents within Hi-Country Estates and any additions thereto as may hereafter be brought within the jurisdiction of this Association for this purpose to:

(a) Exercise all of the powers and privileges and to perform all of the duties and obligations of the Association as set forth in that cer-

EVERETT E. DAHL
ATTORNEY AT LAW
700 EAST CENTER STREET
(SUITE 2)
MIDVALE, UTAH 84041

EXHIBIT A
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tain Protective Covenants for Hi-Country Estates, located in Salt Lake County, State of Utah, Phase 1, as amended, which is applicable to the property, and as the same may be amended from time to time as therein provided;

(b) Fix, levy, collect and enforce payment by any lawful means, all charges or assessments pursuant to the terms of the Protective Covenants, as amended, and as provided in the By-Laws adopted by the Association; to pay all expenses in connection therewith and all office and other expenses incident to the conduct of the business of the Association, including all licenses, taxes or governmental charges levied or imposed against the property of the Association;

(c) Acquire by gift, purchase or otherwise own, hold, improve, build upon, operate, maintain, convey, sell, lease, transfer, dedicate for public use or otherwise dispose of real or personal property in connection with the affairs of the Association;

(d) Borrow money, and with the assent of two-thirds of the members mortgage, pledge, deed in trust or hypothecate any or all of its real or personal property as security for money borrowed or debts incurred;

(e) Dedicate, sell or transfer all or any part of the common area or road system to any public agency, authority, or utility for such purposes and subject to such conditions as may be agreed to by the members;

(f) Participate in mergers and consolidations with other non-profit corporations organized for the same purposes or annex additional residential property, road systems and common area, for any contiguous areas;

(g) Have and to exercise any and all powers, rights and privileges which a corporation organized under the Non-Profit Corporation Law of the State of Utah may now or hereafter have or exercise;

(h) The Association shall have no capital stock and no divi-

dends or other pecuniary profits shall be declared or paid to any member or director of the Association as such;

(i) The Association has no power to carry on propaganda attempt to influence legislation, or take part in a political campaign.

Every person or entity who is a record owner of a fee or undivided fee interest in any Lot which is subject by covenants or record to assessment by the Association, including purchasers under contract, shall be a member of the Association. The foregoing is not intended to include persons or entities who hold an interest merely as security for the performance of an obligation, such as Mortgagees. Membership shall be appurtenant to and may not be separated from ownership of any lot which is subject to assessment by the Association.

Members shall be entitled to one vote for each Lot owned. A Lot shall mean any Lot as platted and/or divided as provided in the protective covenants. When more than one person holds an interest in any Lot, all such persons shall be members. The vote for such Lot shall be exercised as they among themselves determine, but in no event shall more than one vote be cast with respect to any Lot.

The affairs of this Association shall be managed by a Board of three Directors, who need not be members of the Association. The number of Directors may be changed by amendment of the By-Laws of the Association. The names and addresses of the persons who are to act in the capacity of Directors until the selection of their successors are:

<u>Name</u>	<u>Address</u>
Charles E. Lawton	P.O. Box 1901 Jackson, Wyoming
Keith Spencer	Casper, Wyoming
Tony Mascaro	4505 West 12600 South Riverton, Utah

At the first annual meeting the members shall elect three Directors
for a term of one year, and at each annual meeting thereafter the members
shall elect the number of Directors provided in the By-Laws for a term of
one year.

The Association may be dissolved with the assent given in writing and signed by not less than two-thirds of all members; provided, however, that the assets must then be dedicated to an appropriate public agency to be used for purposes similar to those for which this Association was created, or in the event that such dedication is refused acceptance, such assets shall be granted, conveyed and assigned to a non-profit corporation, association, trust or other organization to be devoted to such similar purposes.

The address of this Association's registered office in the State of Utah is P.O. Box 14, Riverton, Utah, and the name of its registered agent and his address is, Everett E. Dahl, Attorney at Law, 760 East Center Street, Midvale, Utah 84047.

Amendment of this Certificate shall require the assent of seventy-five percent of the entire membership.

The name and address of the Incorporator is: Charles E. Lewton, P.O. Box 1901, Jackson, Wyoming.

IN WITNESS WHEREOF, I have hereunto set my hand this 30th
day of January, 1972.


Charles E. Lewton

STATE OF UTAH)
) ss.
County of Salt Lake)

I hereby certify that on the 30th day of January, 1972, CHARLES E. LEWTON, personally appeared before me, who being by me first duly sworn, declared that he is the person who signed the foregoing document as incorporator, and that the statements therein contained are true.

WITNESS my hand and notarial seal the day and year last above
written.

Ernesto L. Loh
NOTARY PUBLIC

My commission expires:

Sept 4, 1973

Residing at:

Midvale, Utah

ADDENDUM 8

~~ARTICLE I~~
~~Name and Location~~

The name of the Association is Hi-Country Estates Homeowners Association, hereinafter referred to as the "Association." The principal office of the Association shall be located at 13300 South 7370 West, Salt Lake City, Utah, but meetings of members and directors may be held at such places within or without the State of Utah, as may be designated by the Board of Directors.

ARTICLE II
Definitions

Section 1. "Association" shall mean and refer to Hi-Country Estates Homeowners Association, its successors and assigns.

Section 2. "Properties" shall mean and refer to that certain real property known as Hi-Country Estates, located in Salt Lake County, State of Utah, Phase 1, and such additions thereto as may hereafter be brought within the jurisdiction of the Association.

Section 3. "Common Area" shall mean all real property owned by the Association for the common use and the enjoyment of the Owners, to include the road and street system, and the common areas used for mail delivery, garbage collection and school bus pickup.

Section 4. "Owner" shall mean and refer to the record owner, whether one or more persons or entities, of the fee simple title to any lot which is a part of the property, including persons or entities purchasing a lot under contract, but excluding those having such interest merely as security for the performance of an obligation.

Section 5. "Protective Covenants" shall mean and refer to the Declaration of Protective Covenants applicable to the property, as the same may be amended from time to time.

Section 6. "Member" shall mean and refer to those persons entitled to membership as provided in the Protective Covenants, Certificate of Incorporation, and these By-Laws.

ARTICLE III
MEETING OF MEMBERS

Section 1. ANNUAL MEETINGS. The first annual meeting of the members shall be held within one year from the date of incorporation of the Association, and each subsequent regular annual meeting of the members shall be held on the same day of the same month of each year thereafter, at the hour of 8:00 o'clock P.M. If the day for the annual meeting of the members is a legal holiday, the meeting will be held at the same hour on the first day following which is not a legal holiday.

Section 2. SPECIAL MEETINGS. Special meetings of the members may be called at any time by the President or by the Board of Directors, or upon written request by not less than one-fourth of the members.

Section 3. NOTICE OF MEETINGS. Written notice of each meeting of the members shall be given by, or at the direction of, the Secretary or person authorized to call the meeting, by mailing a copy of such notice, postage prepaid, at least fifteen days before such meeting to each member entitled to vote thereat, addressed to the member's address last appearing on the books of the Association or supplied by such member to the Association for the purpose of notice. Such notice shall specify the place, day and hour of the meeting, and, in the case of a special meeting the purpose of the meeting.

Section 4. QUORUM. The presence at the meeting of members entitled to cast, in person or by proxy, one-tenth of the votes shall constitute a quorum for any action except as otherwise provided in the Certificate of Incorporation or these By-Laws. If, however, such quorum shall not be present or represented at any meeting, the members entitled to vote thereat shall have power to adjourn the meeting from time to time, without notice other than announcement at the meeting, until a quorum as aforesaid shall be present or be represented.

Section 5. PROXIES. At all meetings of members, each member may vote in person or by proxy. All proxies shall be in writing and filed with the Secretary. Every proxy shall be revocable and shall automatically cease upon conveyance by the member of his lot.

EXHIBIT B-00306

Section 1. MANAGEMENT. The affairs of this Association shall be managed by a Board of Three Directors, who need not be members of the Association.

Section 2. TERM OF OFFICE. Each Director shall serve a three-year term, none of which shall be concurrent. This was enacted so that one Director would be elected each year at the Annual Meeting, replacing the outgoing Director whose term has expired, as was established by amendment as voted on by the members in the Annual Meeting held October 23, 1975.

Section 3. REMOVAL. Any Director may be removed from the Board, with or without cause, by a majority vote of the members of the Association. In the event of death, resignation or removal of a Director, his successor shall be elected by the remaining members of the Board and shall serve for the unexpired term of his predecessor.

Section 4. COMPENSATION. No Director shall receive compensation for any service he may render to the Association. However, any Director may be reimbursed for his actual expenses incurred in the performance of his duties.

Section 5. ACTION TAKEN WITHOUT A MEETING. The Directors shall have the right to take any action in the absence of a meeting which they could take at any meeting by obtaining the written approval of all the Directors. Any action so approved shall have the same effect as though taken at a meeting of the Directors.

ARTICLE V

Nomination and Election of Directors

Section 1. NOMINATION. Nomination for election to the Board of Directors shall be made by a Nominating Committee. Nominations may also be made from the floor at the annual meeting. The Nominating Committee shall consist of a Chairman, who shall be a member of the Board of Directors, and two or more members of the Association. The Nominating Committee shall be appointed by the Board of Directors prior to each annual meeting of the members, to serve from the close of such annual meeting until the close of the next annual meeting and such appointment shall be announced at each annual meeting. The Nominating Committee shall make as many nominations for the Board of Directors as it shall, in its discretion determine, but not less than the number of vacancies that are to be filled. Such nominations may be made from among members or non-members.

Section 2. ELECTION. Election to the Board of Directors shall be by secret written ballot. At such election the members or their proxies may cast, in respect to each vacancy, as many votes as they are entitled to exercise under the provisions of the Declaration. The persons receiving the largest number of votes shall be elected. Cumulative voting is not permitted.

ARTICLE VI

Meetings of Directors

Section 1. REGULAR MEETINGS. Regular meetings of the Board of Directors shall be held monthly without notice, at such place and hour as may be fixed from time to time by resolution of the Board. Should said meeting fall upon a legal holiday, then that meeting shall be held at the same time on the next day which is not a legal holiday.

Section 2. SPECIAL MEETINGS. Special meetings of the Board of Directors shall be held when called by the President of the Association, or by any two Directors, after no less than three days notice to each Director.

Section 3. QUORUM. A majority of the number of Directors shall constitute a quorum for the transaction of business. Every act or decision done or made by a majority of the Directors present at a duly held meeting at which a quorum is present shall be regarded as the act of the Board.

ARTICLE VII

Powers and Duties of the Board of Directors

Section 1. POWERS. The Board of Directors shall have power to:

(a) Adopt and publish rules and regulations governing the use of roads, streets, common area and facilities, and the personal conduct of the members and their guests thereon, and to establish penalties for the infraction thereof;

(b) Suspend the voting rights and right to use of the recreational facilities of a member during any period in which such members shall be in default in the payment of any assessment levied by the Association. Such rights may also be suspended after notice and hearing, for a period not to exceed sixty days for infraction of published rules and regulations;

000307

Protective Covenants.
(d) Declare the office of a member of the Board of Directors to be vacant in the event such member shall be absent from three consecutive regular meetings of the Board of Directors;

(e) Employ a manager, an independent contractor, or such other employees as they deem necessary, and to prescribe their duties.

Section 2. DUTIES. It shall be the duty of the Board of Directors to:

(a) Cause to be kept a complete record of all its acts and corporate affairs and to present a statement thereof to the members at the annual meeting of the members, or at any special meeting when such statement is requested in writing by not less than one-fourth of members who are entitled to vote.

(b) Supervise all officers, agents and employees of this Association, and to see that their duties are properly performed;

(c) As more fully provided in the Protective Covenants, as amended, to:

(1) Fix the amount of the annual assessment against each Lot at least thirty (30) days in advance of each annual assessment period;

(2) Send written notice of each assessment to every owner subject thereto at least thirty (30) days in advance of each annual assessment period;

(3) Foreclose the lien against any property for which assessments are not paid within thirty (30) days after due date or to bring an action at law against the owner personally obligated to pay the same.

(d) Issue, or to cause an appropriate officer to issue, upon demand by any person, a certificate setting forth whether or not any assessment has been paid. A reasonable charge may be made by the Board for the issuance of such certificates. If a certificate states an assessment has been paid, such certificate shall be conclusive evidence of such payment;

(e) Procure and maintain adequate liability and hazard insurance on property owned by the Association;

(f) Cause all officers or employees having fiscal responsibilities to be bonded, as the Board may deem appropriate;

(g) Cause the common area and road system to be maintained.

ARTICLE VIII Officers and Their Duties

Section 1. ENUMERATION OF OFFICERS. The officers of this Association shall be a President and Vice-President, who at all times will be members of the Board of Directors, a Secretary, a Treasurer, and such other officers as the Board may from time to time by resolution create. The Secretary and Treasurer may be the same person.

Section 2. ELECTION OF OFFICERS. The election of officers shall take place at the first meeting of the Board of Directors following each annual meeting of the members.

Section 3. TERM. The officers of this Association shall be elected annually by the Board and each shall hold office for one year unless he shall sooner resign, or shall be removed, or otherwise disqualified to serve.

Section 4. SPECIAL APPOINTMENTS. The Board may elect such other officers as the affairs of the Association may require, each of whom shall hold office for such period, have such authority, and perform such duties as the Board may, from time to time, determine.

Section 5. RESIGNATION AND REMOVAL. Any officer may be removed from office with or without cause by the Board. Any officer may resign at any time giving written notice to the Board, the President or the Secretary. Such resignation shall take effect on the date of receipt of such notice or at any later time specified therein, and unless otherwise specified therein, the acceptance of such resignation shall not be necessary to make it effective.

...Secretary and Treasurer may be held in person, but not more than one of any of the officers, except in the case of special officers created pursuant to Section 4 of this Article.

Section 8. DUTIES. The duties of the officers are as follows:

(a) PRESIDENT. The President shall preside at all meetings of the Board of Directors, shall see that orders and resolutions of the Board are carried out, shall sign all leases, mortgages, deeds and other written instruments and shall co-sign all checks and promissory notes.

(b) VICE-PRESIDENT. The Vice-President shall act in the place and stead of the President in the event of his absence, inability or refusal to act, and shall exercise and discharge such other duties as may be required of him by the Board.

(c) SECRETARY. The Secretary shall record the votes and keep the minutes of all meetings and proceedings of the Board and of the members; keep the corporate seal of the Association and affix it on all papers requiring said seal, serve notice of meetings of the Board and of the members; keep appropriate current records showing members of the Association together with their addresses, and shall perform such other duties as required by the Board.

(d) TREASURER. The Treasurer shall receive and deposit in appropriate bank accounts all monies of the Association and shall disburse such funds as directed by resolution of the Board of Directors; shall co-sign all checks and promissory notes of the Association; keep proper books of account; cause an annual audit of the Association books to be made by a Public Accountant at the completion of each fiscal year; and shall prepare an annual budget and a statement of income and expenditures to be presented to the membership at its regular annual meeting, and deliver a copy of each to the members.

ARTICLE IX
Committees

The Association shall have the right to appoint members of the Architectural Control Committee, as provided in the Protective Covenants, at such time as all Lots in the Tract have been sold by the Grantor, as stated in Protective Covenants. The Board shall also have the right to appoint a Nominating Committee, as provided in these By-Laws, and in addition thereto shall appoint other committees as deemed appropriate in carrying out its purposes.

ARTICLE X
Books and Records

The books, records and papers of the Association shall at all times, during reasonable business hours, be subject to inspection by any member. The Protective Covenants, Certificate of Incorporation and the By-Laws of the Association shall be available for inspection by any member at the principal office of the Association, where copies may be purchased at reasonable cost.

ARTICLE XI
Assessments

As more fully provided in the Protective Covenants, as amended, each member is obligated to pay to the Association annual and special assessments which are secured by a continuing lien upon the property against which the assessment is made. Any assessments which are not paid when due shall be delinquent. If the assessment is not paid within thirty (30) days after the due date, the assessment shall bear interest from the date of delinquency at the rate of seven (7) percent per annum, and the Association may bring an action at law against the owner personally obligated to pay the same or foreclose the lien against the property, and interest, costs, and reasonable attorney's fees of any such action shall be added to the amount of such assessment. No owner may waive or otherwise escape liability for the assessment provided for herein by non-use of the common area, roads or abandonment of his Lot.

ARTICLE XII
Corporate Seal

The Association shall have a seal in circular form having within its circumference the words "Hi-Country Estates Homeowners Association."

the Articles of Incorporation and these By-Laws, the Articles shall control; and in the case of any conflict between the Protective Covenants and these By-Laws, the Protective Covenants shall control.

ARTICLE XIV
Fiscal Year

The fiscal year of the Association shall begin on the 1st day of January and end on the 31st day of December of every year, except that the first fiscal year shall begin on the date of incorporation.

IN WITNESS WHEREOF, We, being all of the Directors of Hi-Country Estates Homeowners Association, have hereunto set our hands this _____ day of _____, 1976.

[REDACTED]

OR

HI-COUNTRY ESTATES HOMEOWNERS ASSOCIATION

Each Grantee and lot owner for himself, his heirs, executors, and assigns, covenants and agrees to pay annually his pro-rata share of the costs to maintain the roads, streets and common areas, including but not limited to, the common areas set aside for the delivery and pickup of mail, the pickup of children for school by school buses and other vehicles, and an area for garbage collection. Grantee's assessment in this regard shall be paid promptly when the same becomes due as provided in the By-Laws of the Homeowners Association, and the Grantee's failure to pay same promptly when due shall constitute a lien upon the owner's premises and the same may be enforced in equity or at law as in the case of any lien foreclosure. Such annual assessment shall not commence until adoption, and the first assessment shall be in the amount of \$(to be determined) per lot owned, said amount to be placed in an account and to be used exclusively by the Homeowner's Association for the purpose hereinabove mentioned, and for such other services as are deemed important to the development and preservation of an attractive community and to further maintain the privacy and general safety of the residential communities located in Hi-Country Estates. From and after adoption, the annual payment may be increased each year up to five (5%) percent of the maximum authorized payment for the previous year. The Homeowners Association is obligated to provide maintenance and all other services stated above only to the extent that such maintenance and services can be provided with the proceeds of such annual payments. The foregoing annual fee may be increased by an amount greater than five percent (5%) of the maximum authorized payment for the previous year, by the written consent of a majority of the lot owners. At such time as any public body shall undertake to maintain the roads and streets and provide the other services contemplated herein, this covenant shall cease, terminate, and be held for naught.

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ADDENDUM 9

Recorded - 10:32
Request of Security Title Company
Fee Paid \$10.00
Recorder, Salt Lake County, Utah
Edward J. M. [Signature]

3133334

SECURITY TITLE COMPANY

TRUSTEES

SPECIAL WARRANTY DEED

ZIONS FIRST NATIONAL BANK, a National Banking Association, as Trustee, of Salt Lake City, Utah, Grantor, hereby conveys and warrants against the acts of the Grantor only, to Steven K. Maxfield and Susan E. Maxfield, his wife, as Joint Tenants with Full Rights of Survivorship

Grantees

for the sum of TEN DOLLARS AND OTHER GOOD AND VALUABLE CONSIDERATION, the following described tract of land situated in SALT LAKE County, State of UTAH

uh
PROOF READ

"Lot #91, HI-COUNTRY ESTATES, a subdivision according to the official plat thereof recorded in the office of the County Recorder of said County, together with a right of way over and across the private roads, located within said subdivision."

"Subject to the protective covenants and the articles of the homeowners association."

John [Signature]

SECURITY TITLE CO.
JES No. 183 Dor

IN WITNESS WHEREOF, the Grantor this 21st day of June, 1978 has caused these presents to be executed in its corporate name, as trustee, and under its corporate seal, as trustee, by two of its Vice Presidents hereunto duly authorized.

ZIONS FIRST NATIONAL BANK, a National Banking Association, as Trustee

WITNESS:

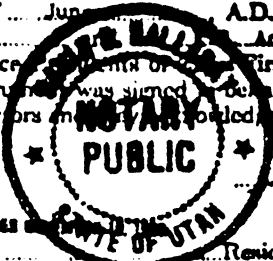
[Signature]

[Signature]
Sine Vice President

[Signature]
Vice President

STATE OF UTAH
COUNTY OF SALT LAKE } SS.

On the 23rd day of June, A.D. 1978, personally appeared before me, Noell Bennett, who being the duly sworn did say they are Vice Presidents of Zions First National Bank, a National Banking Association, and that said instrument was signed on behalf of said Association, as Trustee, by resolution of its Board of Directors and that said Association, executed the same, as Trustee.



[Signature]
Notary Public
Residing at [Signature]

My commission Expires [Signature] Residing at [Signature]

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EXHIBIT F

00322

ADDENDUM 10

NOV 17 1987

H. Dixon Hindley, Clerk 3rd Dist. Court

By [Signature]
Deputy Clerk

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

HI-COUNTRY ESTATES HOMEOWNERS	:	MEMORANDUM DECISION
ASSOCIATION, a Utah corporation,	:	
	:	CIVIL NO. C-84-5500
Plaintiff,	:	
	:	
vs.	:	
	:	
STEVEN MAXFIELD, et al.,	:	
	:	
Defendants.	:	

Before the Court are the respective positions of the parties dealing with disputed legal issues in this case. The parties requested, and the Court agreed that the disputed legal issues should be resolved by the Court at this stage of the proceedings, and govern the further processing of this dispute. The parties argued their respective positions orally to the Court, and have submitted extensive Memoranda. The Court, following argument, took the matter under advisement to further consider the Memoranda, exhibits attached thereto, and the positions of the parties. The Court has now considered the arguments and legal authorities of the parties, and being otherwise fully advised, enters the following Memorandum Decision.

The principal dispute in this case is whether or not the plaintiff has the authority to make assessments against the defendants that relate to the operation of common areas within

000361

the subdivision in question. The defendants take the position that the covenants that the plaintiff seeks to enforce have been declared invalid by Judge Scott Daniels' ruling in the case of Richard L. James, et al. v. John W. Davis, et al., Civil No. C-81-8560. In that case Judge Daniels, among other matters, declared the 1973 amendments to the prospective covenants prepared April 6, 1973, and recorded March 22, 1974 were void and unenforceable. Plaintiff takes the position that neither the concept of res adjudicata or collateral estoppel apply, inasmuch as the basic issues before the Court in the so-called Davis case were substantially different.

The Court is of the opinion that the defendants are mandatory members of the Association by virtue of their ownership of property within the subdivision in question. The Court is also of the opinion that the original concepts and covenants of the Homeowners Association carry with it not only the requirement of mandatory membership for property owners, but also the right to collect assessments on the part of the Homeowners Association for expenses related to areas of common usage and enjoyment. To the extent that the original covenants and agreements of the parties prior to the time of the voided amendments in accordance with Judge Daniels' Order do not provide for mandatory membership or the right to levy assessments for expenses on common ground the principle of "equitable servitude" applies. The defendants

enjoy the use of the common areas and other amenities held in common for the subdivision. The defendants' statement that they do not want to use roadways, the electronically controlled gate, and other amenities is without merit.


Accordingly, based upon the foregoing, the Court determines under the circumstances of this case, that first, the Davis case does not constitute collateral estoppel or res adjudicata that would prohibit the plaintiffs from levying assessment against the defendants in this case. Secondly, the Court having determined that the principal of equitable servitude applies in this case, the plaintiff would be entitled to make reasonable assessments for the expenses related to the common areas, even if the original covenants and purposes of the Homeowners Association did not allow such an assessment.

Finally, there being no dispute between the parties that a cause of action would exist for quantum merit, the plaintiffs likewise have that theory available to them, although because of the Court's determination of the disputed legal issues heretofore, the question of quantum meruit becomes moot.

Counsel for the plaintiff is to prepare an appropriate Order in accordance with this Memorandum Decision governing the resolution of these disputed legal issues, and submit the same to

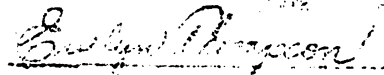
the Court for review and signature in accordance with the Local Rules of Practice.

Dated this 17 day of November, 1987.


TIMOTHY R. HANSON
DISTRICT COURT JUDGE

ATTEST

H. OGDEN HINDLEY


a. H. OGDEN HINDLEY
CLERK

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision, postage prepaid, to the following, this 17 day of November, 1987:

Robert A. Bentley
Attorney for Plaintiff
50 W. Broadway, Suite 1000
Salt Lake City, Utah 84101

R. Clark Arnold
Attorney for Defendants
455 South 300 East, Third Floor
Salt Lake City, Utah 84111

Evelyn H. [Signature]

ADDENDUM 11

NOV - 4 1988

ROBERT A. BENTLEY (0299)
Attorney for Plaintiff
50 West Broadway, #1000
Salt Lake City, UT 84101
Telephone: (801) 328-9085

H. Dixon Hindley, Clerk 3rd Dist. Court

By [Signature] Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

HI-COUNTRY HOMEOWNERS :
ASSOCIATION, a Utah Corporation, :
Plaintiff, :
vs. :

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

STEVEN MAXFIELD, RICHARD JAMES, :
PAUL STROH and FRED KWIATKOWSKI, :
Defendants. :

Case No. C84-5500
Judge Timothy Hansen

This matter came on for hearing on October 9, 1987 at 9:00 a.m. for argument on disputed legal issues before the Honorable Timothy Hanson, District Court Judge, presiding. Plaintiffs were represented by their attorney Robert A. Bentley and Defendants were represented by their counsel R. Clark Arnold. The parties having earlier pursuant to Order submitted Lists of Facts and Legal Issues, as well as memorandum in support thereof. The Court having heard the arguments of counsel, having read the pleadings and affidavits on file, together with the parties Memorandum of Points and Authorities and pursuant to the stipulation of counsel treating this matter as though it had come on for hearing on a motion for Summary Judgment, the Court having found that there is no genuine issue as to any material fact and that Plaintiff is entitled to a judgment as a matter of law, the Court makes and enters the following Findings of Fact and Conclusions of law:

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FINDINGS OF FACT

1. Plaintiff is a non-profit Corporation comprised of owners of real property located in the Hi-Country Estates Phase I subdivision located in Salt Lake County, State of Utah.

2. Entrance to the subject subdivision is possible at only one point which is fenced and controlled by an electronic security gate, one must know the combination which is periodically changed in order to gain access. lot size was restricted to five (5) acre minimums. Over five miles of interior roads are improved and paved but remain private and owned by the Plaintiff having never been dedicated to Salt Lake County.

3. Salt Lake County provides no services to the subdivision other than police and fire protection and the Plaintiff pursuant to its obligations under its Articles, Bylaws and Protective Covenants maintains the roads, provides snow removal, maintains the fence and electronic gate, disposes of garbage and other refuse, insures and adequate water supply and delivery system, and pays for legal fees incurred on issues of mutual benefit.

4. The Articles of Incorporation and Bylaws for the Plaintiff Corporation are dated January 30, 19782 and were recorded by the original developer of the subdivision on May 17, 1973. The parties have stipulated that the wording of the Articles and Bylaws are not disputed.

(a) The Articles state that the purpose of the Plaintiff association is

... for the maintenance, upkeep and preservation of the streets, roads and common area within that certain

100485

tract of property described as: Hi-Country Estates, located in Salt Lake County, State of Utah, Phase I,... The Association is also formed to promote the health safety and welfare of the residents within Hi-Country Estates...

(b) The Articles further state that:

Every person or entity who is a record owner of a fee or undivided fee interest in any Lot which is subject by covenants or record to assessment by the Association, including purchasers under contract, shall be a member of the Association... Membership shall be appurtenant to and may not be separated from ownership of any lot which is subject to assessment by the Association." (Emphasis added)

(c) The Articles charge the Association with the duty to:

(a) Exercise all of the powers and privileges and to perform all of the duties and obligations of the Association as set forth in that certain Protective Covenants for Hi-Country estates..., (b) Fix, levy, collect and enforce payment by any lawful means, all charges or assessments pursuant to the terms of the Protective Covenants, as amended, and as provided in the By-laws adopted by the Association; to pay all expenses in connection therewith and all office and other expenses incident to the conduct of the business of the Association, including all licenses, taxes or governmental charges levied or imposed against the property of the Association.

5. The Bylaws of the Association charge the Association Board of Directors with the following duties:

(c) As more fully provided in the Protective Covenants, as amended, to:

(1) Fix the amount of the annual assessment against each Lot at least thirty (30) days in advance of each annual assessment period;

(2) Send written notice of each assessment to every owner subject thereto at least thirty (30) days in advance of each annual assessment period;

(3) Foreclose the lien against any property for which assessments are not paid within thirty (30) days after due date or to bring an action at law against the owner personally obligated to pay the same.

6. The Bylaws of the Association further state in Article XI as follows:

As more fully provided in the Protective Covenants, as amended, each member is obligated to pay to the Association annual and special assessments which are secured by a continuing lien upon the property against which the assessment is made. Any assessments which are not paid when due shall be delinquent. If the assessment is not paid within thirty (30) days after the due date, the assessment shall bear interest from the date of delinquency at the rate of seven (7) percent per annum, and the Association may bring an action at law against the owner personally obligated to pay the same or foreclose the lien against the property, and interest, costs, and reasonable attorneys fees of any such action shall be added to the amount of such assessment. No owner may waive or otherwise escape liability for the assessment provided for herein by non-use of the common area, roads or abandonment of his lot. (Emphasis added)

7. Each of the Defendants is a recorded owner of one or more parcel of real property located within said subdivision.

8. The Property deeds of Defendants Maxfield, Kwiatkowski and James make their ownership interest "subject to the Protective Covenants and articles of the Homeowners Association." Further Defendant James has in the past served as President of the Plaintiff Corporation.

9. Plaintiff as required by the Articles and Bylaws imposes an annual assessment upon lot owners of record for the services it provides. Said assessments are due the first of each year and were \$115 per year for each year period to 1986, \$120 for 1986 and 1987 and \$125 in 1988. In addition since 1985 there has been a garbage collection assessment of \$48 imposed on all lot owners.

10. The Defendants enjoy and use the services and common areas own, held, maintained and provided by the Plaintiff. The Defendants

allegation that they do not want to use such services is transparent and without merit. The Association Bylaws provide that " No owner may waive or otherwise escape liability for the assessments provided for herein by non-use of the common area, roads or abandonment of his lot."

11. Defendants have conceded and stipulated that for at least a period of time after acquiring their property the Defendants were members of the Association and paid their assessments.

12. In late 1981 the Defendants herein, along with several other homeowners filed suit against the Plaintiff here in the Third District Count in and for Salt Lake Country, State of Utah in the case of James, et al. v. Davis, et al, Civil No. C-81-8560. Said action sought to invalidate the election of certain individuals as Directors of the Association, to enjoin the enforcement of both the original and Amended Protective Covenants by the Plaintiff, and to further enjoin the Plaintiff herein from appearing at zoning hearings.

13. Defendants herein, (Plaintiffs therein), alleged and admitted in that Complaint that they were in fact members of the association and that the association was formed for the purpose of maintaining and providing for common areas which all lot owners used and enjoyed.

14. The issues in the Davis case is not identical with the ones presented in this action. The ability of the Plaintiff Association, (Defendant therein) to levy, lien, assess and or collect annual assessments was not raised by any of the parties therein.

15. The Court in Davis held the original Protective Covenants relied in part on by Plaintiffs herein constituted a present and continuing servitude upon the property. The Amended Protective Covenants invalidated therein by the Court were not cited or relied upon by Plaintiff in seeking judgment herein.

16. The Court in Davis was not asked nor did not it consider whether lot owners would be liable for homeowners assessments or whether membership in the Association could be considered mandatory on some basis other than the Amended Protective Covenants.

17. Subsequent to the Courts decision in Davis, each of the Defendants herein notified the Plaintiff that they were withdrawing from membership in the association and would no longer consider themselves to be liable for annual assessments.

18. Defendant Steven Maxfield has failed to pay his assessments and charges of record and is now delinquent as of July 31, 1988 in the amount of \$1,177.99.

19. Defendant Fred Kwiatkowski has failed to pay his assessments of record and is now delinquent as of July 31, 1988 in the amount of \$982.36.

20. Defendant Richard James has failed to pay his assessments of record and is now delinquent as of July 31, 1988 in the amount of \$886.93

21. Defendant Paul Stroh has failed to pay is assessments of record and is now delinquent as of July 31, 1988 in the amount of \$1,010.13

22. The Plaintiff has incurred \$3,260 in attorneys fees in prosecuting this action and the Court finds said amount to be reasonable. Said fees can not be reasonable apportioned between individual defendants as the individual defendants were joined for the purpose of this appeal from a Small Claims Court Judgment.

23. The Court finds that the Plaintiff has necessarily incurred the following costs in the maintenance of this action and that such costs in conformance with Plaintiffs memorandum to Tax Costs should be assessed against the Defendants respectively as follows: STEVE MAXFIELD \$12.50, RICHARD JAMES \$36.75, PAUL STROH \$36.75, and FRED KWIATKOWSKI \$25.

From the foregoing the Court makes and enters the following:

CONCLUSIONS OF LAW

1. Jurisdiction and venue are properly before this Court to hear this cause of action and to render relief therein.

2. Defendants by virtue of their past actions, conduct and admissions are estopped from denying that they are members of the Plaintiff association or that they are not liable for Association assessments.

3. Defendants are mandatory members of the Plaintiff Association by virtue of their ownership of property in the subdivision and can not unilaterally resign from membership or escape liability for assessments.

4. The Plaintiff association is legally and lawfully entitled to levy and collect assessments from lot owners for expenses incurred by the Plaintiff in discharging its duties under the Articles, Bylaws and Protective Covenant.

5. The Articles of Incorporation, Bylaws and original Protective Covenants of the Plaintiff Association constitute a present and continuing equitable servitude upon the property owned by the defendants.

6. Plaintiffs cause of action against Defendants is not barred by the doctrines of res judicata or collateral estoppel.

7. The past assessments imposed by the Plaintiff are just and reasonable and each lot owner is liable for the amount assessed for each year.

8. Defendants are indebted to Plaintiff and Plaintiff is entitled to judgments against Defendants in the following amounts together with interest thereon from July 31, 1988 at the rate of 12%:

(a) Steven Maxfield \$1177.99

(b) Fred Kwiatkowski \$982.36

(c) Richard James \$886.93

(d) Paul Stroh \$1,010.13

9. Plaintiff is entitled to an award of attorneys fees against the Defendants individually and severally in the amount of \$3,260

10. Counts I and II of Defendants Counterclaims are hereby dismissed with prejudice. Count III of Defendants Counterclaim is dismissed without prejudice and Defendants are granted leave to refile said Counterclaim as an Order to Show Cause in the Davis case.

DATED this 3 day of ~~October~~ ^{November}, 1988.

BY THE COURT:


DISTRICT COURT JUDGE

CERTIFICATE OF MAILING

I hereby certify that I mailed, first class, postage prepaid a true and correct copy of the foregoing Findings of Fact and Conclusions of Law to R. Clark Arnold, PARSON AND CROWTHER, 455 South 300 East, Salt Lake City, UT 84111 and Steven K. Maxfield 3329 South 500 West, Salt Lake City, UT 84115 on this _____ day of October, 1988.

NOV - 4 1988

ROBERT A. BENTLEY (0299)
Attorney for Plaintiff
50 West Broadway, #1000
Salt Lake City, UT 84101
Telephone: (801) 328-9085

H. Dixon Hindley, Clerk 3rd Dist. Court
[Signature]
Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

HI-COUNTRY HOMEOWNERS
ASSOCIATION, a Utah Corporation,

Plaintiff,

vs.

STEVEN MAXFIELD, RICHARD JAMES,
PAUL STROH and FRED KWIATKOWSKI,

Defendants.

JUDGMENT

Case No. C84-5500
Judge Timothy Hansen

2143684
11-7-88 8:02 A.M.

This matter came on for hearing on October 9, 1987 at 9:00 a.m. for argument on disputed legal issues before the Honorable Timothy Hanson, District Court Judge, presiding. Plaintiffs were represented by their attorney Robert A. Bentley and Defendants were represented by their counsel R. Clark Arnold. The Court having read the memorandum of the parties, having heard the arguments of counsel and treating this matter as a motion for Summary Judgment and for other good cause:

IT IS HEREBY ORDERED, ADJUDGED AND DECREE as follows:

1. Judgment is entered in favor of Plaintiff and against Defendant Steven Maxfield in the principle sum of \$1,177.99 as of July 31, 1988, costs of \$12.50, for at total Judgment amount of \$1190.49 with interest thereon from date at the rate of 12% per annum, plus Judgment for attorneys fees as entered herein below.

2. Judgment is entered in favor of Plaintiff and against Defendant Fred Kwaitkwoski in the principle sum of \$982.36 as of

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July 31, 1988, costs of \$25.00, for a total Judgment amount of \$1,007.39, together with interest thereon from date at the rate of 12% per annum, plus Judgment for attorneys fees as entered herein below.

3. Judgment is entered in favor of Plaintiff and against Defendant Paul Stroh in the principle sum of \$1,010.13 as of July 31, 1988, costs of \$36.75 for a total Judgment amount of \$1046.88, together with interest thereon from date at the rate of 12%, plus Judgment for attorneys fees as entered herein below.

4. Judgment is entered in favor of Plaintiff and against Defendant Richard James in the principle sum of \$886.93 as of July 31, 1988, costs of \$24.25, for a total Judgment amount of \$911.18 together with interest thereon from date at the rate of 12%, plus Judgment for attorneys fees as entered herein below.

5. Judgment is further entered in favor of Plaintiff and against the Defendants jointly and severally in the sum of \$3,260.00 representing a reasonable attorneys fee incurred by Plaintiff in defending this matter.

6. The Clerk of the Court is directed to release and pay to the Plaintiff the appeal bonds posted by the Defendants herein.

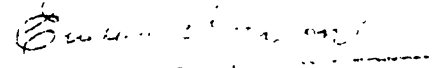
DATED this 3 day of ~~October~~ ^{November} 1988.

BY THE COURT:


DISTRICT COURT JUDGE

CERTIFICATE OF MAILING

AT
H.D.


JUDGE

I hereby certify that I mailed, first class, postage prepaid a true and correct copy of the foregoing Judgment to R. Clark Arnold, PARSON AND CROWTHER, 455 South 300 East, Salt Lake City, UT 84111 and to Steven K. Maxfield 3329 South 500 West Salt Lake City, UT 84115 on this _____ day of October, 1988.
