

1989

# Hi-Country Estate Homeowners Association, a Utah corporation v. Steven K. Maxfield : Brief of Appellant

Utah Court of Appeals

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John B. Anderson; Anderson and Holland; Appellant.

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BRIEF

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DOCKET NO.

89-471 CA

IN THE SUPREME COURT OF UTAH

HI-COUNTRY ESTATE HOMEOWNER  
ASSOCIATION, a Utah corporation,

Appellee,

vs.

STEVEN K. MAXFIELD,

Appellant.

APPELLANT'S BRIEF

Case No. 890183

Priority Classification  
14(B)

APPEAL FROM THE GRANTING OF A SUMMARY JUDGMENT  
AGAINST STEVEN K. MAXFIELD, APPELLANT ON NOVEMBER 3, 1988  
IN THE THIRD JUDICIAL DISTRICT COURT, STATE OF UTAH,  
HON. TIMOTHY R. HANSON, PRESIDING

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a Utah corporation.

FILED

JUL 28 1989

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

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IN THE SUPREME COURT OF UTAH

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HI-COUNTRY ESTATE HOMEOWNER	)	
ASSOCIATION, a Utah corporation,	)	
	)	APPELLANT'S BRIEF
Appellee,	)	
	)	
vs.	)	Case No. 890183
	)	
STEVEN K. MAXFIELD,	)	Priority Classification
	)	14(B)
Appellant.	)	
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### **JURISDICTION**

This appeal is taken pursuant to Utah Code Annotated Sec. 78-2-2(3)(j) and Sec. 3 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, State of Utah, in favor of the Hi-Country Estate Homeowners Association, a Utah corporation, (Association), Appellee.

### **STATEMENT OF ISSUES ON APPEAL**

1. Was the prior trial before the Honorable Scott Daniels, in the case of Richard L. James, et al. v. John W. Davies, et al, Case No C-81-8560, res judicata and/or collateral estoppel precluding Judge Hanson from entering Summary Judgment?

2. Was "equitable servitude" a proper legal basis for granting Summary Judgment rather than quantum meruit (unjust enrichment)?

3. Was the granting of the Association's Motion for Summary Judgment improper and prejudicial error, in that, there was no basis for attorney's fees either in contract or by statute and there existed genuine issues of material fact as to the reasonableness and necessity of assessments?

### DETERMINATIVE RULES

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

### STATEMENT OF THE CASE

The Association obtained judgment in Fifth Circuit Court, Salt Lake County, Sandy Department, Small Claims Division against Steven K. Maxfield, ("Maxfield") for an annual homeowners assessment of One Hundred and Fifteen Dollars (\$115.00) per year for upkeep of roads, utilities and general administration. (R.2, 8). Maxfield appealed to the Third District Court. (R.4). The parties then stipulated that Maxfield's case and several other Homeowner's appeals could be consolidated and assigned to the Honorable Timothy R. Hanson, C84-5500. (R.13). The Association would file a new complaint as though initially filed in the District Court and the action would, in all respects, be treated as initially filed in District Court. (R.14). Thereafter, the Association filed a new complaint against the Homeowners including Maxfield seeking (1) Declaratory judgment (2) Account Stated (3) Quantum Meruit and (4) Open Account. (R.15, 17, 18, 19, 20). The District Court, by Order dated March 12, 1986, approved the stipulation and allowed the action to be consolidated and initially filed. (R.23,24).

Maxfield answered and counterclaimed and, among other things, alleged that Judge Daniels, in a prior action, Richard L. James, et al, v. John W. Davies, C81-8560 (in which action Maxfield was also a Plaintiff), after trial, held that an

amendment to the restrictive covenants (Add. B) which required Homeowners to be members of the Association and allowed the Association to assess Homeowners (Maxfield) was void and unenforceable. (R.31 Para. 5, R.32 Para. 6, R.33 Para. 14, Add. A).

The District Court ordered the parties to submit uncontested and contested of facts and brief the legal issues. (R.269, 270).

The District Court on October 9, 1987, after argument ruled, that if there was a basis for levy, the case was resolved and if not the matter would go to trial on the claim of unjust enrichment. (R.380). The lower Court by Memorandum Decision, dated November 17, 1987, ruled on the disputed legal issues and found that the Davis case (supra) did not constitute collateral estoppel and/or res judicata that would prohibit the Plaintiff (Association) from levying assessments and the principal of "equitable servitude" applies entitling the Association to make reasonable assessments even if the original covenants and purposes of the Association did not allow such assessments. (R.382, 383).

On November 3, 1988, the lower court entered Summary Judgment in favor of the Association against Maxfield in the principle amount of One Thousand One Hundred Seventy-Seven Dollars and Ninety-Nine Cents (\$1,177.99), costs of Twelve Dollars and Fifty Cents (\$12.50) for a total judgment of One Thousand One Hundred Ninety Dollars and Forty Nine Cents (\$1,190.49) with legal interest and attorney's fees of Three



Thousand Two Hundred and Sixty Dollars (\$3,260.00) jointly and severally among all Defendants. (R.473, 474).

Maxfield made motions under Rules 59 and 60 U.R.C.P. seeking to amend the judgment and for relief from the judgment which were denied on March 24, 1989. (R.503, 504, 514, 515).

#### **STATEMENT OF FACTS**

Maxfield is a homeowner in Hi-Country Estates, a subdivision that was begun in 1969 or 1970. (R.82).

The developer initially drafted restrictive covenants covering the subdivision in 1970. (R.318). These restrictive covenants dealt only with the types of uses and structures in connection with the lots and made no provision for a homeowner's association, maintenance of common areas, assessments and collection of assessments. (R.312-318, Ex. C).

Since the first covenants did not deal at all with the Association, an amendment to the covenants was drafted in 1973 which provided for a homeowner's association, maintenance of common areas, assessments and their enforcement. (R.374, Ex. A, Add. B). The original restrictive covenants and the amendment were both recorded on March 22, 1974. (R.90). Hi-Country Estates Homeowner's Association filed Articles of Incorporation on May 17, 1973 and the Certificate of Incorporation was issued by the State of Utah on January 5, 1974. (R.360).

For several years things were tranquil between the lot owners and the Association. Control of the Association rotated

among the membership. Beginning in 1980, however, a group of property owners obtained proxies from owners of undeveloped lots and seized control. Exercising their control, and over the loud protests of many lot owners, they began a vigorous program of suing lot owners, at association expense, to force compliance with the restrictive covenants. Again over loud protests of some lot owners, the controlling members appeared at planning and zoning hearings in a representative capacity for all residents within the subdivision. At the annual meeting in 1983, the protestors claimed that these actions were beyond the authority granted in the restrictive covenants and the grant of power in the Articles of the Association. The protestors demanded that such actions stop and when the controlling members, exercising their captive proxies, refused, the protestors, including Maxfield, (as Plaintiff in the prior action) initiated suit in the Third District Court of Salt Lake County, assigned to the Honorable Scott Daniels, entitled Richard L. James, et al v. John W. Davies, et al. Case No.C81-8560. (R.360).

At trial, extensive materials and testimony were introduced tracing the development of the subdivision and the role played by the Association in that development. A central issue of that case was the source and scope of the authority of the Association. After a lengthy trial, Judge Daniels, on February 17, 1984, ruled that the amendment to the protective covenants (R. 374 Ex. A, Add. A pg. 2 l. 18-25) that created the Association, were void and unenforceable and, therefore, there

was no lawfully constituted Association. Judge Daniels ruled that the amendment was not properly enacted because it was before the expiration of the term of the original restrictive covenants in 1995 and the amendment lacked the consent of the equitable owners of the property. (Emphasis added) (R.351, Add. A, pg. 2 1.20-25). Judge Daniels also ruled that the directors of the Association acted in an ultra vires manner (sic) in attempting to enforce the restrictive covenants. (R.352, Add. A, pg. 3 1.14-15).

No appeal was taken by the parties to the judgment and findings of Judge Daniels. (R.339, 346). The Association, nevertheless, continued to levy assessments and bring claims against delinquent lot owners in small claims court although it had no legal authority to do so. (R.5). Maxfield refused to pay assessments; refused to be a member of the illegally formed association; refused the services of the association and denied liability for payment of assessment consistent with Judge Daniel's ruling. (R.86, 87).

#### **SUMMARY OF ARGUMENT**

Summary Judgment is a harsh remedy which should only be employed in cases where there clearly is no genuine issue of material fact which should go to trial by the trier of fact. Because of its harsh result, it should be employed cautiously by the court and all doubts should be resolved in favor of the party moved against, in this case, Maxfield.

Judge Hanson erred by failing to find res judicata and/or

collateral estoppel as a complete bar to the Association's cause of action against Maxfield based upon the prior trial before Judge Daniels in James v. Davies, C-81-8560 and his ruling that the Association had no right to assess or collect assessments against the homeowners and Maxfield had a right based upon that ruling to disassociate himself from the Association and refuse its services.

The trial court granted Summary Judgment on the theory of "equitable servitude" which has no application in this case where the Association is attempting to assess and levy assessments against homeowners. Equitable servitude is a restriction or easement against real property which effects its use or gives another certain rights to it based in equity. Davies, C81-8560 and his ruling that the Association had no right to assess or collect assessments against the homeowners and Maxfield had a right based upon that ruling to disassociate himself from the Association and refuse its services.

Even if the trial judge properly applied the "equitable servitude" theory there is no legal basis for attorneys fees and a trial would have been necessitated to determine whether the assessments against Maxfield were reasonable and necessary.

#### POINT I

THE PRIOR TRIAL BEFORE THE HONORABLE SCOTT DANIELS, C81-8560, WAS RES JUDICATA AND/OR COLLATERAL ESTOPPEL PRECLUDING JUDGE HANSON FROM ENTERING SUMMARY JUDGMENT

In Searle Bros. v. Searle, 588 P.2d 689 (Utah 1978), at 690, the Utah Supreme Court discussed res judicata and/or collateral

estoppel as follows:

"In general, a divorce decree, like other final judgment is conclusive as to the parties and their privies and operates as a bar to any subsequent action. 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 this precludes the relitigation of all issues that could have been litigated as well as those that were, in fact, litigated in the prior action. If the subsequent suit involved different parties, those parties cannot be bound by the prior judgment."

"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 the second suit that were fully litigated in the first suit. This means that the plea of collateral estoppel can be asserted only against a party in the subsequent suit who was also a party or in privity with a party in the prior suit."  
[Emphasis added, citations omitted]

Even though a later claim may be different than in a prior case, if the facts required to prove the claim in the later case are the same facts previously litigated, res judicata will operate to prevent relitigation. In Krofcheck v. Downey State Bank, 580 P.2d 243 (Utah 1978), the court applied the doctrine of res judicata to uphold the dismissal of a Plaintiff's action against an attorney based upon an alleged false affidavit where, in a previous case, the court had rejected the Plaintiff's assertion of the falsity of the attorney's affidavit as a defense. In Schaer v. State of Utah, 657 P.2d 1337 (Utah 1983), the court refused to apply the doctrine of res judicata and stated:

"Accordingly, we have determined that res judicata is not applicable to the present case because it is based on a different claim, demand, or cause of action than that of the 1967 litigation. The two causes of action rest on different states of facts and evidence of a different kind of character is necessary to sustain the two causes of action."

Moreover, the evidence of the two causes of action relates to the status of the property in two completely different and separate time periods. Thus, the doctrine of res judicata does not apply to preclude the Plaintiff from maintaining his present cause of action."

From the foregoing, clearly res judicata is applicable to this case:

**a. Same parties.** Although all of the parties in the James v. Davies case are not parties in this case, all of the parties in this case were also parties in the James v. Davies case and each were represented therein by counsel.

**b. Same issues.** In their fourth cause of action in the James v. Davies case (R.326, 329), the Plaintiffs Apellant herein alleged, inter alia:

"27. There presently exists on record certain protective covenants against the property contained in the Hi-Country Estate Subdivision.

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

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

30. Said amendment is illegal and void because it was not properly enacted pursuant to the terms of the original protective covenants and because the amendment is also vague. [Exhibit J to Plaintiff's Memorandum].

In their prayer for relief (R.331), they state:

3. Pursuant to the Plaintiff's Fourth Cause of Action, for an order determining that the protective covenants and amendments thereto filed against the Hi-Country Estate Subdivision are unlawful and shall be removed."

Attached to this brief as Addendum B is the Amendment to the Protective Covenants. Without question those covenants deal

specifically with the authority of the Association to levy assessments and to lien the property owner's land to secure collection of those levies, the central issue in this case.

Even if Judge Daniels had found that the amendment had been improperly enacted, he could have found the covenants valid servitude in the property and denied the prayer for relief therein that the covenants "be removed". Clearly, these issues were litigated or should have been litigated in the James v. Davies case.

**c. Final judgment.** Judge Daniels ruling, Add. A, clearly upheld the basic protective covenants and just as clearly struck down the amendment thereto. Since his judgment therein was not appealed, it is final and binding.

**d. Conclusion.** The doctrine of res judicata should be applied to bar relitigation of whether or not covenants running with the land or equitable servitude thereto, authorize the Association to impose and collect assessments.

Although the doctrine of res judicata is proper to this case, the Association's claim would similarly be barred by the doctrine of collateral estoppel. In Searle, the court listed the elements of collateral estoppel as:

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 a party to the prior adjudication?
4. Was the issue in the first case competently, fully and fairly litigated? [at 91].

Analyzing this case in light of the foregoing, clearly requirements 2, 3 and 4 are met. Judge Daniels ruling in James v. Davies, Add. A, clearly indicates that the issues were competently, fully and fairly litigated. The basic question litigated in James v. Davies was what authority, if any, does the Association derive from covenants. Judge Daniel's ruling clearly indicates that he decided "none". Clearly that identical question is presented in this case since if the Association derives no authority from covenants, certainly it does not derive any power to make mandatory assessments. Clearly the first requirement for collateral estoppel has been met and application of the doctrine would be applicable in this case.

#### POINT II

THE TRIAL JUDGE ERRED IN GRANTING SUMMARY JUDGMENT BASED ON THE DOCTRINE OF EQUITABLE SERVITUDE WHICH HAS NO APPLICATION TO THIS CASE.

Judge Hanson in his memorandum decision dated November 17, 1987, specifically ruled that;

"Secondly, the Court having determined that the principal of equitable servitude applies in this case, the Plaintiff (Association) would be entitled to make reasonable assessments for expenses related to the common areas, even if the original covenants and purposes of the Homeowners Association did not allow such an assessment. (R.383).

The Court in arriving at this conclusion based its decision on the doctrine of equitable servitude because, "The Defendants enjoy the use of the common areas and other amenities held in common for the subdivision." (R.382, 383). The Court admitted that if recovery on a theory of quantum meruit (unjust enrichment) was sought a trial would be necessary. (R.383 T 528



pg. 49 l. 11-25).

The trial Court erred by labelling unjust enrichment or quantum meruit as equitable servitude in the granting of Summary Judgment rather than allowing Maxfield a trial.

Covenants, conditions and restrictions which limit or restrict the use an owner may make of his land, as for example, those composed in a general plan of tract reservations, are sometimes referred to as negative easements. However, these are not true easements because they are not interests in land within the context of the definition of an easement. They arise by virtue of contract and are more properly referred to as equitable servitude. (Security Title, Title Standards Manual, 1700 A para. 7, Add. C). Even when a covenant does not run with the land, equity will sometimes enforce the obligation by an injunction against breach. The burden of the covenant thus becomes an "equitable easement or servitude" on the land of the covenantor. Restatement of Property Sec. 539. 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. Brigham Young University Legal Studies, J. Reuben Clark Law School, 1978, Summary of Utah Real Property Law, Vol 1. pg. 136.

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. The amendment to

restrictive covenants that created the Association was held by Judge Daniels to be void because it did not have the consent of the equitable owners. Thus its creation was defective and cannot be saved by calling it an equitable servitude. Van Deusen, et al, v. Ruth, et al., 125 S.W.2d, (1938).

### POINT III

THERE IS NO BASIS FOR AN AWARD OF ATTORNEY'S FEES AND THE ISSUE OF THE REASONABLENESS AND NECESSITY OF ASSESSMENTS SHOULD HAVE BEEN DECIDED BY THE TRIER OF FACT.

The trial judge awarded the Plaintiff \$ 3,260.00 for attorney's fees jointly and severally against the Defendants when he granted Summary Judgment. The attorney's fees have been satisfied with the exception of \$815.00 which the Association is seeking against Maxfield.

The general rule is that attorney's fees are recoverable if provided for by either contract or statute. Missouri Pac. R.R. Co v. Winburn Title Mfg. Co. 461 F.2d 984, 989 (8th Cir. 1972). The Utah Supreme Court has followed that rule since at least 1953. Hawkins v. Perry, 123 Ut. 16, 27, 253 P.2d 372, 377 (1953). Turtle Mgmt., Inc. v. Haggis Mgmt., 645 P.2d 667 (Ut. 1982). An award of contractually based attorney's fees must be based on a valid contract and incurred in the enforcement of express contractual covenants. Cluff v. Culmer, 556 P.2d 498, 499 (Utah 1976). Since there was no contract or statutory basis for attorney's fees and no exception could be found for awarding attorney's fees under an equitable servitude doctrine, an award of attorney's fees is without basis and in error.

Judge Hanson admitted that if the assessments were recoverable under an unjust enrichment (quantum meruit) theory a trial would be necessary to determine if the charges were necessary and reasonable. (T. 528 pg. 49 l. 11-21). Since this is the only theory that a Summary Judgment could have been awarded, Maxfield should have been allowed to try the matter on these issues.

#### CONCLUSION

The Summary Judgment entered by the Honorable Timothy R. Hanson, should be set aside and judgment entered in favor of Maxfield, no cause of action, on the grounds and for the reasons that the Association's cause of action is barred because of res judicata and/or collateral estoppel by Judge Daniel's decision in Richard L. James, et al, v. John W. Davies, et al., Case No, C81-8560, or in the alternative the case should be remanded to the trial court for trial to determine if under a theory of quantum meruit (unjust enrichment) the Association is entitled to recover and if so whether the assessments are reasonable and necessary with an instruction to the trial court that the Association is not entitled to attorney's fees as they are not provided by contract or statute and for Maxfield's cost of appeal.

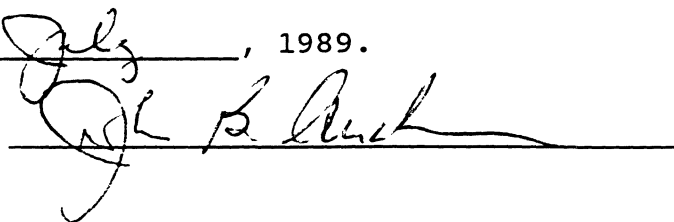
Respectfully submitted this 28<sup>th</sup> day of July, 1989.



JOHN B. ANDERSON  
Attorney for Appellant, Maxfield

**CERTIFICATE OF SERVICE**

I hereby certify that ten (10) copies of Appellant, Maxfield's Brief were hand delivered and served on the Clerk of the Supreme Court this 25<sup>th</sup> day of July, 1989 and four (4) copies were hand delivered and served on Robert A. Bentley, Appellee's attorney, at 50 West Broadway, #1000, Salt Lake City, Utah 84101 this 25<sup>th</sup> day of July, 1989.

  
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brief

## **ADDENDUM A**

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

★ ★ ★ ★ ★

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

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

APPEARANCES:

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

For the Defendants: Con Kostopulos, Esq.  
Attorney at Law  
1095 East 2100 South, Suite 235  
Salt Lake City, Utah 84106

For the Defendants:

Con Kostopulos, Esq.  
Attorney at Law  
1095 East 2100 South, Suite 235  
Salt Lake City, Utah 84106

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 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.

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Susan S. Sprouse, CSR/RPR

My commission expires:  
November 1987

## **ADDENDUM B**

AMENDMENT TO  
PROTECTIVE COVENANTS FOR HI-COUNTRY ESTATES,  
LOCATED IN SALT LAKE COUNTY, STATE OF UTAH,  
PHASE I.

This Amendment of Protective Covenants for Hi-Country Estates, located in Salt Lake County, State of Utah, Phase I, by the undersigned, being record owners of more than three-fourths in area of the property located within Hi-Country Estates, hereinafter called the "Declarants";

WITNESSETH:

WHEREAS, Declarants executing this amendment are the owners of record of more than three-fourths in area of the Lots contained in Hi-Country Estates, located in Salt Lake County, State of Utah, Phase I.; and

WHEREAS, Declarants executing this amendment desire to amend the Protective Covenants by adding thereto the provisions hereinafter contained;

NOW, THEREFORE, Declarants executing this amendment hereby subject said property to the covenants, restrictions and conditions previously in affect, together with this amendment thereto, and the acceptance of any deed or conveyance thereof by the Grantee or Grantees therein and their, and each of their heirs, executors, administrators, successors and assigns, shall constitute their covenant and agreement with the declarants and with each other, to accept and hold the property described or conveyed in or by such deed or conveyance, subject to such covenants, restrictions and conditions, with the following amendment, as follows, to-wit:

ARTICLE III.  
HOMEOWNERS ASSOCIATION AND MAINTENANCE OF COMMON AREAS

1. Homeowners Association. Hi-Country Estates, Inc., will form or cause to be formed a non-profit corporation or association for the purpose of maintaining and providing for the common areas, including roads and streets, and each lot owner or owners will be members of such association. Persons or entities purchasing a lot under a contract shall be deemed the owner of such lot for the purpose of membership in the association.

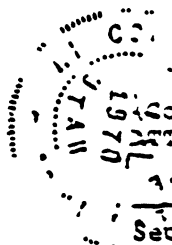
2. Assessment for Maintenance of Road, Street and Other Public Services. Each Grantee and lot owner for himself, his heirs, executors, and assigns, covenants and agrees to pay annually his pro-rata share of the cost to maintain the roads, streets and common areas, including, but not limited to, the common 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 of the Grantees failure to pay same promptly when due shall constitute a lien upon the owners'

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 January 1, 1973, and the first assessment shall be in the amount of \$85.00 per lot owned, said amount to be placed in an account and to be used exclusively by the Homeowners Association for the purposes 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 January 1, 1974, 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 (5) percent 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.

3. Extensions of Roads and Common Areas. Hi-Country Estates Inc., reserves the right to extend the road system into property adjoining Hi-Country Estates, and to plat additional subdivision areas which would be an extension of the road system and common areas as contemplated herein. Should such extension take effect, the lot owners within the adjoining subdivisions shall be required to become members of the Homeowners Association as contemplated herein and to pay their pro-rata share of the cost.

4. Effect of Amendment. Each and every other restriction and covenant contained in the Protective Covenants are hereby reaffirmed as hereinabove modified and amended.

DATED this 6th day of April, 1973.

  
\_\_\_\_\_  
Secretary

HI-COUNTRY ESTATES, INC.

By: \_\_\_\_\_  
President

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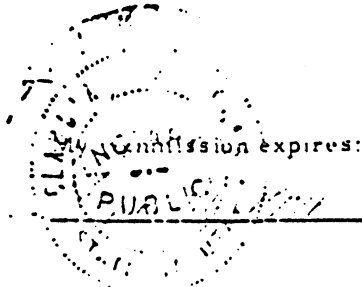
BOOK 3541

STATE OF UTAH )

ss.

County of Salt Lake)

On the 16 day of April, 1973, personally appeared before me  
CHARLES E. LEWTON and D. KIETH SPENCER who being by me duly  
sworn did say, each for himself, that he the said Charles E. Lewton  
is the president and he, the said D. Kieth Spencer is the secretary of  
HILL-COUNTRY ESTATES, INC, and that the within and foregoing instru-  
ment was signed in behalf of said corporation by authority of a resolution  
of its Board of Directors and said Charles E. Lewton and D. Kieth Spencer  
each duly acknowledged to me that said corporation executed the same and  
that the seal affixed is the seal of said corporation.



Charles E. Lewton  
NOTARY PUBLIC  
Residing at:  
1111 1st St. N.

## **ADDENDUM C**



17.00 IN GENERAL

A. Definitions, Characteristics, Distinctions

1. Easement

An easement is an interest in land of another which entitles its owner to a limited use and enjoyment of the land in which the interest exists.

- a. It must be created and transferred subject to the rules of real property.
- b. It constitutes an encumbrance on another's land, hence, an owner of land cannot be the owner of an easement over it.
- c. It is a limited and a non-possessory interest which restricts the owner to that dominion and control necessary to the enjoyment of his interest. The owner of an easement has no interest which he can assert against third persons unless they are interfering with his enjoyment of the easement.

2. Designation of lands benefitted or encumbered by easements.

a. Dominant Tenement

The land benefitted by and to which an easement is attached is called the dominant tenement.

b. Servient Tenement

The land upon which a burden or servitude is created or imposed is called the servient tenement.

3. Right of Way

A right of way is a privilege to pass over the land of another for a particular and expressly stated purpose. It is an easement. However the words "right of way" are susceptible to ambiguity. They are sometimes used to describe a right or an interest in land; or they are sometimes used to describe a strip of land over which the easement passes. A right of way may attach to and be incidental to the use of a parcel of land, or, it may attach to and benefit an individual independent of his ownership of land.

4. License

A license is a personal privilege, terminable at will, to do some act or acts upon the land of

17.00 IN GENERAL  
Cont.

another which is not an interest in land and which is not required to be created in the form or in the manner of a conveyance.

Rule of Title Practice

A recorded license shall be shown as an encumbrance on the property it burdens. However, it is not a proper interest to be insured by a policy of title insurance.

5. Profit a Prendre

A profit a prendre is a right to remove a part of the soil or a product from the soil such as water, wood, minerals, oil and gas from the land of another. Historically, it does not involve a use of land. However, the owner of a profit has a right to enter upon land and do whatever is reasonably necessary in the exercise of his right to a profit.

6. Natural Rights

There are certain rights and interests in land which are not created by conveyance or contract which benefit one parcel of land and burden another parcel which are not easements. They are natural property rights which are incidental to land ownership. These attach to and pass with transfers of the soil but they are never insured nor are they ever reflected as encumbrances in evidences of title. These include the following:

- a. The right of a land owner to have surface water flow without obstruction from his land in its natural state "as it is wont to flow" over the land of a lower owner.
- b. The right of a land owner to receive lateral support from his neighbor's land for the preservation of his land in its natural state.
- c. The right of an owner to enjoy the occupancy and use of his land free from unreasonable sights, sounds and smells occasioned by a neighbor's use of his land.

7. Equitable Servitudes

Covenants, conditions and restrictions which limit or restrict the use an owner may make of his land, as for example, those imposed in a general plan of

## EASEMENTS

17.00 IN GENERAL  
Cont.

tract restrictions, are sometimes referred to as negative easements. However, these are not true easements because they are not interests in land within the context of the definition of an easement. They arise by virtue of contract and are more properly referred to as equitable servitudes.

### B. Classification of Easements

#### 1. Appurtenant Easement

An easement is appurtenant to land when it is created to benefit, and does benefit, the owner of a dominant tenement in his use of his land.

For example: A, owner of lots 1 and 2, conveys lot 2 to B "together with and as appurtenant to lot 2 a non-exclusive easement for ingress and egress over the northerly 40 feet of Lot 1".

The easement constitutes an encumbrance on Lot 1 (servient tenement) for the benefit of the owner of lot 2 (dominant tenement).

#### 2. Easement in Gross

An easement is in gross when it is not created to benefit or does not benefit a grantee in the use or enjoyment of his land. In this instance the easement attached to the person instead of to other land. Hence, there is no dominant tenement.

For example: A, owner of lot 1, grants to Pacific Gas and Electric Co. an easement for pole line over the rear 5 feet of lot 1.

The easement constitutes an encumbrance on Lot 1 (servient tenement). However, it does not benefit land owned by the grantee.

### C. Determining Whether Easement is Appurtenant or in Gross

For title insurance purposes it is essential that a recorded easement be identified as either one appurtenant or as one in gross, and, if it is appurtenant, the dominant tenement must be identified. Procedures to be followed in examining, reporting, and insuring easements are dependent upon establishing these factors.

In many instances the documents creating an easement