

1989

# Hi-Country Estate Homeowner Association, a Utah Corporation v. Steven K. Maxfield : Reply Brief

Utah Court of Appeals

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John B. Anderson; Anderson and Holland; Attorney for Appellant.

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## Recommended Citation

Reply Brief, *Hi-Country Estate Homeowner Association v. Maxfield*, No. 890471 (Utah Court of Appeals, 1989).  
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BRIEF

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DOCKET NO. 89-471 CA IN THE COURT OF APPEALS  
OF THE STATE OF UTAH

HI-COUNTRY ESTATE HOMEOWNER  
ASSOCIATION, a Utah corporation,

Appellee,

vs.

STEVEN K. MAXFIELD,

Appellant.

APPELLANT'S REPLY BRIEF

**89-0471 CA**  
Case No. 890183

Priority Classification  
14(B)

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

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a Utah corporation.

FILED

OCT 27 1989

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

IN THE COURT OF APPEALS  
OF THE STATE OF UTAH

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

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## ARGUMENT

### POINT I

**THE ARTICLES OF INCORPORATION AND BY-LAWS OF HI-COUNTRY ESTATES HOMEOWNERS ASSOCIATION, INC. (ASSOCIATION) APPELLEE DO NOT PROVIDE A PROPER LEGAL BASIS TO LEVY ASSESSMENTS AGAINST APPELLANT (MAXFIELD) BECAUSE IT IS IN DIRECT VIOLATION OF JUDGE DANIELS ORDER IN JAMES v. DAVIES C81-8560 AND ULTRA VIRES.**

The Association has used selected sections from the Articles of Incorporation and By-Laws to support its contention that the Association can properly levy assessments. It is undisputed that the amendment to protective covenants (Add. D, Appellant's Brief) is the basis for assessments. The amendment provides for the formation of the Homeowners Association; details the basis for the assessment; what the assessment is for; lien rights and foreclosure; the amount of the assessment (\$85.00); assessment increases of five (5) percent annually; and for extension of roads and common areas. The amendment does not provide for attorney's fees and specifically provides "At such times as any public body shall undertake to maintain roads and streets and provide the other services contemplated herein, this covenant shall cease, terminate and be held for naught." It is undisputed that Judge Daniels found this amendment "improperly enacted and is void." (Add. 5, Appellant's Brief, Con. of Law, Para. 5 pg. 7).

Judge Daniels did consider the Articles and By-Laws when he specifically found:

"12. The Court finds that the purpose for which the

Hi-Country Estates Phase I Homeowners Association was incorporated do no include enforcement of the protective covenants."

"24. The Court finds that the Articles of Incorporation and the By-Laws of the Hi-Country 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-Country (sic) Estates Phase I."

"25. The Court finds that the action by directors in attempting to enforce the covenants in the name of the Association against property owners in Hi-Country (sic) Estates Phase I, as found above, was ultra vires to the power of the Association." (emphasis added) (Add. 5, Appellant's Brief pgs. 4 and 5).

The covenants referred to above are in two parts. The covenants themselves which Judge Daniels upheld (Add. D attached) and the amendment (Add. B, Appellant's Brief) which Judge Daniels ruled void. The covenants themselves deal with unrelated architectural matters. Judge Daniels' findings are crystal clear. The Articles and By-Laws do not provide a grant of authority for the directors (Associates) to take action to enforce the protective covenants against owners of property (Maxfield) to collect or levy assessments and any attempt to do so is ultra vires.

The Articles and By-Laws themselves are qualified by the amended protective covenants and cannot stand alone. The Articles cited by Association provide:

"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 covenant 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 . . . . ." (emphasis

added).

The By-Law cited by Association provides:

"(c) as more fully provided in the protective covenants, as amended ....." (emphasis added).

#### POINT II

**IN LIGHT OF JUDGE DANIELS FINDINGS THAT THE ARTICLES AND BY-LAWS GRANT NO AUTHORITY TO THE DIRECTORS TO LEVY ASSESSMENTS AND IS ULTRA VIRES THERE IS NO BASIS TO AWARD ASSOCIATION'S ATTORNEY'S FEES.**

The Association claims that the contractual basis for the award of attorney's fees is found in the assessment provisions of the Articles of Incorporation or the By-Laws. As discussed above, Judge Daniels squarely held that the Articles and By-Laws did not provide a grant of authority for the directors to take action to enforce the protective covenants (assessments) and any attempt to enforce the covenants (assessments) was ultra vires. The Articles have no provisions for attorney's fees. Both the Articles and the By-Laws are qualified by and subject to the protective covenant (assessment) which was declared void. Maxfield did not take his property subject to the By-Laws. The property was "subject to the protective covenants (which were held invalid) and the articles of the Homeowners Association." There is no contract or statute to support an award of attorney's fees.

#### POINT III

**PLAINTIFF'S CLAIMS ARE BARRED BY THE DOCTRINES OF RES JUDICATA OR COLLATERAL ESTOPPEL. THE APPELLEE MISCONSTRUED THE NATURE OF THE CLAIMS IN JAMES, et al. v.**



DAVIES, et al., C81-8560 WHICH WERE IDENTICAL OR COULD OR SHOULD HAVE BEEN RAISED (RES JUDICATA) OR AT THE VERY LEAST THE SAME FACTS AND ISSUES WERE FULLY LITIGATED IN JAMES v. DAVIES TO PRECLUDE THEIR RELITIGATION (COLLATERAL ESTOPPEL).

The entire Amended Verified Complaint is attached as Addendum E. The Appellee correctly summarizes the allegations except that not only was the appropriateness and irregularities of land use restrictions alleged (which were upheld) but the appropriateness and irregularities of the amendment to protective covenants (assessments) which were held invalid and void. The issue regarding the appropriateness or authority of the Association to assess homeowners for road maintenance and other expenses was squarely addressed and Judge Daniels ruled that the Directors had no authority and their attempts to enforce assessments were ultra vires. (Add. 5 Appellant's Brief, pg. 5) At the time James v. Davies was filed there were several delinquent homeowners. The FIFTH CAUSE OF ACTION concerned a \$909.00 lien for assessments against Maxfield. (Add. E pg. 5) The identical issue was raised in James v. Davies as the present case. At the very least the same issue "could or should have been raised therein." Krofcheck v. Downey State Bank, 580 P.2d 243 (Utah 1978), Wheadon v. Pierson, 14 Ut.Ed 45, 376 P.2d 946 (1962). The Association's argument as to collateral estoppel also fails. The same facts and issues were fully litigated in James v. Davies. Judge Daniels specifically found in his findings (12, 24 and 25) that the Association had no authority to enforce the protective covenants (assessments) and any attempt to

do so was ultra vires. Judge Daniels even went so far as to restrain the Association from attempting to enforce the protective covenants. (Add. 5, Appellee's Brief pg. 6 Para. 4) In theory, the Association is in contempt of Judge Daniel's order in bringing this action. The prior action focused on the authority of the Association to levy assessments and Judge Daniels held they could not.


#### **POINT IV**

#### **THE DOCTRINE OF EQUITABLE SERVITUDE CANNOT APPLY AND AT THE VERY LEAST MAXFIELD IS ENTITLED TO HAVE THE REASONABLENESS AND APPROPRIATENESS OF ASSESSMENTS TRIED.**

The Association in its brief finds support for the equitable servitude doctrine on the basis that Maxfield had notice on his deed that the property is "subject to the protective covenants and the Articles of the Homeowners Association." Judge Daniels found the protective covenants as to assessments void and also found that the "purposes for which the Hi-Country Estates, Phase I Homeowners Association was incorporated do not include enforcement of the protective covenants", (Add. 5, Appellee's Brief pg. 4 Para. 12.) It is undisputed that Maxfield had no notice that he was taking his property subject to the By-Laws. If Judge Hanson specifically determined that the protective covenants and Articles of Incorporation constituted an equitable servitude on the property as Appellee alleges, it is clearly error as Judge Daniels had previously ruled that they were void and the purpose for which Hi-Country was incorporated did not include enforcement of the protective covenants. Judge Hanson

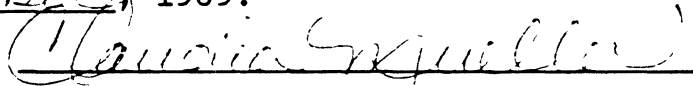
admitted and the Association concedes that if recovery was on the basis of quantum meruit or unjust enrichment a trial would be necessary. If Association claims are not barred by res judicata or collateral estoppel, (Searle Bros. v. Searle, 588 P.2d 688 (Utah 1978)) Maxfield is entitled to a trial as to the reasonableness and appropriateness of the assessments. The assessment amount, as contained in the amendment to the protective covenants, was the amount upon which summary judgment was based even though Judge Daniels declared the amendment to protective covenants void. There was no evidence or basis to support the summary judgment in the lower Court.

Respectfully submitted this 27<sup>th</sup> day of October, 1989.

  
JOHN B. ANDERSON  
Attorney for Appellant, Maxfield

#### CERTIFICATE OF SERVICE

I hereby certify that nine (9) copies and one (1) original of Appellant, Maxfield's Brief were hand-delivered and served on the Clerk of the Court of Appeals this 27<sup>th</sup> day of October, 1989 and four (4) copies were hand-delivered and served on A. HOWARD LUNDGREN, BUGDEN & LUNDGREN, Appellee's Attorney, at 257 Tower, Suite 340, 257 East 200 South-10, Salt Lake City, Utah 84111 this 27<sup>th</sup> day of October, 1989.



maxfield/brief3

## **ADDENDUM D**

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7571770 FEB 4 1974  
Recorded at N 54 A  
Request of SECURITY TITLE COMPANY  
Fee Paid, JERADEAN MARTIN  
Recorder, Salt Lake County, Utah  
12.50 By PROHIBITION

DEC 10 1973

11.30

PROTECTIVE COVENANTS  
(Corrected)  
For Hi-Country Estates, Phase II, Located  
in Salt Lake County, State of Utah

(See Attached Exhibit "A")

KNOW ALL MEN BY THESE PRESENTS:

That the owner of the herein described property, hereby subject said property to the following covenants, restrictions and conditions; 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 undersigned, and with each other, to accept and hold the property described or conveyed in or by such deed or conveyance, subject to said covenants, restrictions and conditions, as follows, to-wit:

#### ARTICLE I

##### GENERAL RESTRICTIONS

1. Land Use and Building Type: The herein described property shall be designated as a single family residential lot. Such designation shall not be construed as prohibiting the agricultural use of the property.

A single family residence is a dwelling for one family alone, within which no person may be lodged for hire at any time, provided that reasonable quarters may be built and maintained in connection therewith for the use and occupancy of servants or guests of said family and that such quarters may be built and maintained as a part of the detached accessory building or buildings on the same lot. Any lot may be re-subdivided when approved by the Architectural Control Committee and when in conformance with existing County regulations. Responsibility for compliance with any County regulations rests

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solely with the owner of the lot.

No other buildings shall be erected, altered, placed or permitted to remain on any lot, other than one barn and a private garage for not more than three (3) cars, except that in areas designated for trailer use a small storage building shall be permitted. The design and placement of such a storage facility is subject to approval of the Architectural Control Committee, as is the placement of a trailer itself.

2. Architectural Control: No building or trailer shall be erected, placed or altered on any lot without the approval by the Architectural Control Committee and compliance with the provisions of Article III, Section 6 of these Covenants. No fence, wall, swimming pool or other construction shall be erected, placed or altered on any lot without approval of the Architectural Control Committee.

3. Building Location: Any building location must be approved by the Architectural Control Committee.

4. Easements: Easements for installation and maintenance of utilities and drainage facilities and roads are reserved as shown by the plat. The easement area of each lot and all improvements in it shall be maintained continuously by the owner of the lot, except for those improvements for which a public authority or utility company is responsible.

There is to be reserved easements for electric power, gas, water or for any other utility, public or otherwise, the right to construct, maintain and operate along, upon and across all present or future streets, easements and roadways on said property. Developers may request other easements not heretofore mentioned, and they shall be so granted by any present or future owner of the property, provided that they shall not unduly harm the owner's property.

5. Nuisances: No noxious or offensive activity shall be carried on upon any lot, nor shall anything be done thereon which may be or may become an annoyance or nuisance to the neighborhood or development.

No trash shall be burned on the premises except in approved incinerators located indoors or within a service yard. No garbage shall be burned. Garbage shall be placed in covered containers, said containers to be concealed from public view by an attractive enclosure.

Control over and the ability to eliminate any nuisance vests with the Homeowner's Association.

6. Temporary and Other Structures: Structures of a temporary or movable nature such as trailers or temporary recreational tents shall be used only in designated areas as outlined in the DESIGNATED USE EXHIBIT which is attached hereto.

No old or second-hand structures shall be moved onto any of said lots.

All buildings, permanent and temporary, shall be of good quality and design, and shall be completed with good workmanship and materials.

7. Signs: No billboard of any character shall be erected, posted, painted or displayed upon or about any of said property. No sign shall be erected or displayed upon or about said property unless and until the form and design of said sign has been submitted to and approved by the Architectural Control Committee.

8. Oil and Mining Operations: No oil drilling, oil development operations, oil refining, quarrying or mining operations of any kind shall be permitted upon or in any lot. No derrick or other structure designed for use in boring for oil or natural gas shall be erected, maintained or permitted upon any lot.

9. Trade or Commercial Activities: No trade or commercial activity of any kind shall be carried on upon any lot, unless approved by the Architectural Control Committee and unless such activity creates no visual or aesthetic nuisance and does not violate Article I, Section 5 of these Covenants, in the judgment of the Homeowner's Association.

10. Garbage and Refuse Disposal: All garbage and refuse must be disposed of in the designated garbage disposal area. If such garbage disposal

area is now or ever erected by the Developers, said area shall be maintained by the Homeowner's Association.

11. Livestock-Poultry-Agriculture: No animal may be kept which constitutes an annoyance or nuisance to the area. Any animals to be kept outside shall be housed and managed, based upon a plan for such housing and management, which shall have had prior Architectural Control Committee approval.

12. Utilities, Water, Electricity, Gas: The development, implementation, utilization and extension of all utility services rests with the individual property owner, and must conform to all Salt Lake County and Utah State regulations relating to those services.

13. Natural Vegetation and Trees: Natural vegetation is to be left undisturbed as far as is practical on each lot, except for providing access to the property or for making the property available for improvements. The foregoing shall not be construed as prohibiting a property owner from removing any trees or other vegetation which he has himself planted.

14. Water, Butane, Propane or Storage Tanks: All storage tanks must conform to State regulations, and must be located and screened as far as practicable, so as not to detract from the appearance of the lot or neighboring lots. Any plan for a storage facility shall be approved by the Architectural Control Committee prior to the construction or erection of such facility.

15. Fences: All plans for fences must be submitted to the Architectural Control Committee for approval. The use of barbed wire fencing is prohibited on all road frontages.

16. Diligence in Building: When the erection of any residence or other structure is begun, work thereon must be prosecuted diligently and it must be completed within a reasonable length of time.

17. Covenants Binding on Subsequent Owners: All the reservations and restrictions here set forth are made for the benefit of each and every subsequent owner of any portion of the land in said development or interest therein; and shall inure to and bind all subsequent owners thereof.

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18. Fire, Casualty or Destruction: In the event that a structure is destroyed, wholly or partially, by fire, or by other casualty, said structure shall within a reasonable time be properly rebuilt or repaired to conform to this declaration, or, upon the election of the owner of the property, all the remaining structures, including the foundations thereof and all debris, shall be removed from the lot as soon as is practicable.

19. Roads: All roads, road maintenance and snow removal shall be under the jurisdiction of the Homeowner's Association.

## ARTICLE II

### HOMEOWNER'S ASSOCIATION AND MAINTENANCE OF COMMON AREAS

1. Homeowner's 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 Homeowner's 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 the \_\_\_\_ day of \_\_\_\_\_, 19\_\_, and the first assessment shall be in the amount of \$ \_\_\_\_\_ per lot owned, said amount to be placed

~~the~~ account and to be used exclusively by the Homeowner's 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 the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, the annual payment may be increased each year up to five per cent (5%) of the maximum authorized payment for the previous year. The Homeowner's 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 per cent (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.

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 Homeowner's Association as contemplated herein and to pay their pro-rata share of the cost.

### ARTICLE III

#### DURATION, ENFORCEMENT, AMENDMENT

1. Duration of Restrictions: All of the conditions, covenants and reservations set forth in this declaration of restrictions shall continue and remain in full force and effect at all times against said property in Exhibit "A" and the owners thereof, subject to the right of change or modification provided for below, until twenty-five (25) years, and shall as then in force be continued

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for a period of twenty (20) years, and thereafter for successive periods of twenty (20) years each without limitation, unless, within the six (6) months prior to 19\_\_ or within the six (6) months prior to the expiration of any successive twenty-year period thereafter, a written agreement executed by the then record owners of more than three-fourths (3/4) in area of said property, exclusive of streets, parks, and open spaces, be placed on record in the office of the County Recorder of Salt Lake County, by the terms of which agreement any of said conditions or covenants are changed, modified or extinguished in whole or in part as to all or any part of the property originally subject thereto, in the manner and to the extent therein provided. In the event that any such written agreement of change or modification be duly executed and recorded, the original conditions and covenants, as therein modified shall continue in force for successive periods of twenty (20) years each unless and until further changed, modified or extinguished in the manner herein provided for, by mutual written agreement with not less than seventy per cent (70%) of the then owners of record title of said property (including the mortgagees under record mortgages and the trustees under recorded deeds of trust), duly executed and placed of record in the office of the County Recorder of Salt Lake County, Utah, provided, however, that no change or modification shall be made without the written consent duly executed and recorded of the owners of record of not less than two-thirds (2/3) in area of all lands which are a part of said property and which are held in private ownership within five hundred (500) feet in any direction from any direction from the exterior boundaries of the property concerning which a change or modification is sought to be made.

2. Enforcement: Each and all of said conditions, covenants and reservations is and are for the benefit of each owner of land (or any interest therein) in said property and they and each thereof shall inure to and pass with each and every parcel of said property and shall apply to and bind the respective successors in interest of said Grantor. Each Grantee of the Grantor of any part or portion of said property by acceptance of a deed incorporating the substance

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~~of this~~ declaration either by setting it forth or by reference therein, accepts the same subject to all of such restrictions, conditions, covenants and reservations. As to each lot owner the said restrictions, conditions and covenants shall be covenants running with the land and the breach of any thereof, and the continuance of such breach may be enjoined, abated or remedied by appropriate proceedings by any such owner of other lots or parcels in said property, but no such breach shall affect or impair the lien of any bona fide mortgage or deed of trust which shall have been given in good faith, and for value; provided, however, that any subsequent owner of said property shall be bound by the conditions and covenants, whether obtained by foreclosure or at a trustee's sale or otherwise.

3. Violation Constitutes Nuisance: Every act or omission, whereby any restriction, condition or covenant in this declaration set forth, if violated in whole or in part is declared to be and shall constitute a nuisance and may be abated by Grantor or its successors in interest and/or by any lot owner; and such remedy shall be deemed cumulative and not exclusive.

4. Construction and Validity of Restrictions: All of said conditions, covenants and reservations contained in this declaration shall be construed together, but if it shall at any time be held that any one of said conditions, covenants, or reservations, or any part thereof, is invalid, or for any reason becomes unenforceable no other condition, covenant, or reservation, or any part thereof, shall be thereby affected or impaired; and the Grantor and Grantee, their successors, heirs, and/or assigns shall be bound by each article, section, subsection, paragraph, sentence, clause and phrase of this declaration, irrespective of the fact that any article, section, subsection, paragraph, sentence, clause or phrase be declared invalid or inoperative or for any reason becomes unenforceable.

5. Right to Enforce: The provisions contained in this declaration shall bind and inure to the benefits of and be enforceable by Grantor, by the owner, or owners, of any portion of said property, their and each of their legal

~~Grantor, or their legal representative, heirs, successors, or assigns~~, heirs, successors and assigns, and failure by Grantor, or any property owner, or their legal representative, heirs, successors, or assigns to enforce any of said restrictions, conditions, covenants, or reservations shall in no event be deemed a waiver of the right to do so thereafter.

6. Architectural Control Committee: The Architectural Control Committee which is vested with the powers described herein shall consist of three (3) persons appointed by the Grantor. Prior to the commencement of any excavations, construction or remodeling or adding to any structure, theretofore completed, there shall first be filed with the Architectural Control Committee two (2) complete sets of building plans and specifications therefor, together with a block or plot plan indicating the exact part of the building site the improvements will cover and said work shall not commence unless the Architectural Control Committee shall endorse said plans as being in compliance with these Covenants and are otherwise approved by the Committee. The second set of said plans shall be filed as a permanent record with the Architectural Control Committee. In the event said Committee fails to approve or disapprove in writing said plans within fifteen (15) days after their submission, then said approval shall not be required. When all lots in said tracts have been sold by Grantor, said plans and specifications shall be approved by an Architectural Control Committee approved by a majority of owners of lots in the property herein described and only owners of said lots shall be privileged to vote for said Architectural Control Committee. The Grantor shall have the right to appoint members of the Architectural Control Committee until such time as all lots in the tract have been sold by the Grantor.

7. Assignment or Powers: Any and all rights and powers of the Grantor herein contained may be delegated, transferred or assigned. Wherever the term "Grantor" is used herein, it includes assigns or successors in interest of the Grantor.

8. Invalidity: It is expressly agreed that in the event any covenant or condition or restriction hereinbefore contained, or any portion thereof is

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held invalid or void, such invalidity or voidness shall in no way affect any  
valid covenant, condition or restriction.



IN WITNESS WHEREOF, I have hereunto set my hand and seal

day of July, 1973.

HI-COUNTRY ESTATES

By

Charles Lewton  
Charles Lewton

STATE OF UTAH )

ss.

County of Salt Lake)

I hereby certify that on the 10th day of July, 1973.

CHARLES LEWTON, personally appeared before me, who being by

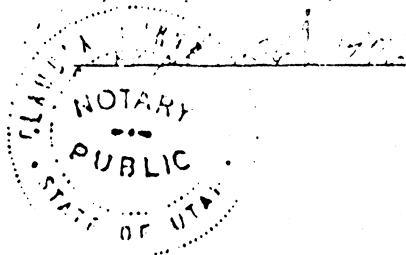
me first duly sworn, declared that he is the person who signed to

going instrument and duly acknowledged to me that he executed the same.

Notary Public  
NOTARY PUBLIC

My commission expires:

Residing at:



July 1974

## **ADDENDUM E**

FILED

JUL 13 1 52 PM '81

CLERK OF DISTRICT COURT  
Rosemary Mc Donnell  
DEPUTY CLERK

RAY M. HARDING

HARDING & HARDING  
ATTORNEYS AT LAW  
39 WEST MAIN STREET  
AMERICAN FORK, UTAH 84003  
TELEPHONE: 758-7658

PLAINTIFFS

Attorneys for

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

RICHARD L. JAMES, SHIRLENE A. )  
JAMES, BRYCE DEAN, CAMILLA DEAN, )  
STEVEN K. MAXFIELD, SUSAN MAXFIELD, )  
FREDERICK M. KWIATKOWSKI, ANNE H. )  
KWIATKOWSKI, BOYD PRESCOTT, )  
FAUN PRESCOTT, JAMES M. TEBBS, )  
EMILY W. TEBBS, WILLIAM MILLGATE, )  
BETTY MILLGATE, DARWIN W. COLTON, )  
LYNDA G. COLTON, RUSSELL W. GRADES, )  
MARY K. GRADES, TED S. CRUZ, )  
JANE CRUZ, LEONARD BARKER, ELSI )  
BARKER, DR. CHARLES HAGAN, )  
MIKE B. WHITE, JAY B. JAMES, )  
EMOGENE L. JAMES, WAYN D. TONDRO, )  
SHEILA M. TONDRO, RONALD G. MACKAY, )  
MARIE MACKAY, EDWIN W. KIRBY, )  
REBECCA M. KIRBY, KEITH L. GURR, )  
DELMA P. GURR, STAN TACY, )  
PATRICIA TACY, LARRY BEAGLEY, )  
ESTHER BEAGLEY, JOHN BEAGLEY, )  
SADIE BEAGLEY, KENNETH NORTON, )  
BELDA NORTON, RONALD K. VINCENT, )  
BONNIE VINCENT, DAVID WHITE, )  
and BONNIE H. WHITE, )

AMENDED  
VERIFIED COMPLAINT

Plaintiff,

vs.

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

Defendant.

Civil No. 281-8560

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



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-Country 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-Country 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-Country 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-Country 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.

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.

FIFTH CAUSE OF ACTION

31. The Plaintiffs, Steven K. Maxfield and Susan Maxfield, incorporate herein by reference the allegations made in Paragraphs 1, 2, 3, and 4 of this Amended Verified Complaint.

32. The Hi-Country Estates Homeowners Association has filed a lien against the property of the Plaintiffs, Steven K. Maxfield and Susan Maxfield in the amount of NINE HUNDRED NINE AND 44/100 DOLLARS (\$909.44).

33. Said lien is unlawful and constitutes a cloud against the title of the Plaintiffs, Steven K. Maxfield and Susan Maxfield.

34. Said lien is clearly without merit and was not filed in good faith.

35. By reason of said lien, the Plaintiffs, Steven K. Maxfield and Susan Maxfield, have been damaged in the sum of FIVE THOUSAND DOLLARS (\$5,000.00).

36. The Plaintiffs, Steven K. Maxfield and Susan Maxfield, are entitled to an award of attorney's fees, plus costs, in an amount to be proven at trial.

SIXTH CAUSE OF ACTION

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

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

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

40. Such participation by the Hi-Country Estates Homeowners Association is expressly prohibited by its certificate of incorporation. Unless the Hi-Country Estates Homeowners

1 Association and its current Directors are prohibited from  
2 participating in the scheduled hearings before the Salt Lake  
3 Planning Commission, the members of the Association will suffer  
4 immediate and irreparable harm.

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6  
7 SEVENTH CAUSE OF ACTION

8 42. The Plaintiffs incorporate herein, by reference, the  
9 allegations made in Paragraphs 1 through 25 of this Amended  
10 Verified Complaint.

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

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

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

25 46. The Plaintiffs have made a demand on the Defendants  
26 to redress the wrongs complained of herein, but the Defendants  
27 failed and refused, and still fail and refuse, to comply with the  
28 Plaintiffs' demand.

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

48. The Plaintiffs have no adequate remedy at law.

1 WHEREFORE, Plaintiffs pray for judgment against the  
2 Defendants as follows:

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

8 2. Pursuant to the Plaintiffs' Third Cause of Action,  
9 for an Order determining that the Hi-Country Estates Homeowners  
10 Association has no authority to enforce protective covenants of the  
11 Hi-Country Estates Subdivision upon individual members of the  
12 Association and enjoining the Association from any further  
13 enforcement or expenditure of monies therefor.

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

18 4. Pursuant to the Plaintiffs' Fifth Cause of Action,  
19 for an award of damages in favor of the Plaintiffs, Steven K.  
20 Maxfield and Susan Maxfield, and against the Defendants in the  
21 amount of FIVE THOUSAND DOLLARS (\$5,000.00) plus attorney's fees  
22 and costs for slander of title.

23 5. Pursuant to the Plaintiffs' Sixth Cause of Action,  
24 for an Order determining that the Hi-Country Estates Homeowners  
25 Association has no authority to participate on behalf of its  
26 members in the hearings before the Salt Lake Planning Commission  
27 with respect to a zoning change for the Hi-Country Estates  
28 Subdivision and for an Order enjoining any such actions by the  
29 Association or its Directors.

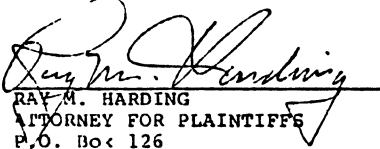
30 6. Pursuant to the Plaintiff's Seventh Cause of Action,  
31 for Judgment in favor of the Defendant, Hi-Country Estates  
32 Homeowners Association, and against the Defendants, John W. Davies,

1 Robert Millard, John C. Thomas, and Joanne Abplanalp in the sum of  
2 THIRTY THOUSAND DOLLARS (\$30,000.00).

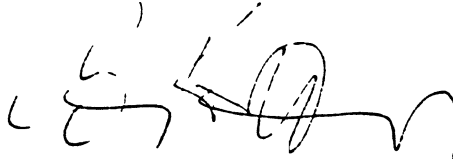
3 7. For such further relief as to the Court appears just  
4 and equitable in the premises.

5 DATED this 19<sup>th</sup> day of November, 1981.

6 HARDING & HARDING  
7 ATTORNEYS AT LAW

8   
9 RAY M. HARDING  
10 ATTORNEY FOR PLAINTIFFS  
11 P.O. Box 126  
12 American Fork, UT 84003  
13 756-7658

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17 Received a copy of the amended verified  
18 complaint on behalf of the defendants  
19 this 14th day of November, 1981.  
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On the 19 day of November, 1981, personally appeared before me,  
RICHARD L. JAMES, SHIRLENE A. JAMES, BRYCE DEAN, CAMILLA DEAN, STEVEN K.  
MAXFIELD, and SUSAN MAXFIELD, DR. CHARLES HAGAN, EMOGENE L. JAMES, JAY B. JAMES,  
KEITH L. GURR, DELMA P. GURR, WAYNE D. TONDRO, SHEILA M. TONDRO, STAN TACY,  
PATRICIA TACY, JAMES M. TEBBS, EMILY TEBBS, TED S. CRUZ, JANE CRUZ, LARRY BEAGLEY,  
ESTHER BEAGLEY, JOHN BEAGLEY, SADIE BEAGLEY, BILL MILLGATE, BETTY L. MILLGATE,  
EDWIN W. KIRBY, REBECCA M. KIRBY, DARWIN W. COLTON, LYNDA G. COLTON,  
RONALD G. MACKAY, MARIE MACKAY, BOYD PRESCOTT, VAUN PRESCOTT, KENNETH NORTON  
BELVA NORTON, FREDRICK M. KWATKOWSKI, ANNE H. KWATKOWSKI, RONALD K. VINCENT,  
BONNIE VINCENT, MIKE B. WHITE, DAVID WHITE and BONNIE H. WHITE, RUSSELL GRAVES  
and MARY K. GRAVES.

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Shiglene A. James

Camilla Dean  
Camilla Dean

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Mary K. Graves



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*Dr. Charles Hagan*  
Dr. Charles Hagan

*Emogene L. James*  
Emogene L. James

*Keith L. Gurr*  
Keith L. Gurr

*Wayne D. Tondro*  
Wayne D. Tondro

*Stan Tacy*  
Stan Tacy

*James M. Tebbs*  
James M. Tebbs

*Ted S. Cruz*  
Ted S. Cruz

*Larry Beagley*  
Larry Beagley

*John Beagley*  
John Beagley

*Bill Millgate*  
Bill Millgate

*Edwin W. Kirby*  
Edwin W. Kirby

*Jay B. James*  
Jay B. James

*Delma P. Gurr*  
Delma P. Gurr

*Sheila M. Tondro*  
Sheila M. Tondro

*Patricia Tacy*  
Patricia Tacy

*Emil Tebbs*  
Emil Tebbs

*Jane Cruz*  
Jane Cruz

*Esther Beagley*  
Esther Beagley

*Sadie Beagley*  
Sadie Beagley

*Betty L. Millgate*  
Betty L. Millgate

*Rebecca M. Kirby*  
Rebecca M. Kirby

1. Darwin W. Colton Lynda G. Colton  
2. Darwin W. Colton Lynda G. Colton  
3.  
4. Ronald G. Mackay Marie Mackay  
5. Ronald G. Mackay Marie Mackay  
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7. Boyd Prescott Vaun Prescott  
8. Boyd Prescott Vaun Prescott  
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10. Kenneth Norton Belva Norton  
11. Kenneth Norton Belva Norton  
12.  
13. Fredrick M. Kwiatkowski Anne H Kwiatkowski  
14. Fredrick M. Kwiatkowski Anne H Kwiatkowski  
15.  
16. Ronald K. Vincent Bonnie Vincent  
17. Ronald K. Vincent Bonnie Vincent  
18.  
19. Mike B. White \_\_\_\_\_  
20. Mike B. White  
21.  
22. David White Bonnie H. White  
23. David White Bonnie H. White  
24.  
25. SUBSCRIBED AND SWORN to before me this 19<sup>th</sup> day of November, 1981.  
26.  
27.  
28. \_\_\_\_\_  
29. Susan E. Morrison  
NOTARY PUBLIC  
30. My Commission Expires: Residing at:  
31. Sept 9, 1984 Darwin W. Colton  
32.