

2010

# L. Lane Blackmore v. L&D Development, Inc. : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

L. LANE BLACKMORE, et al.,  Plaintiffs/Appellees  v.  L&D DEVELOPMENT, Inc., et al.,  Defendants/Appellants.	Case No. 20100200-CA  Trial Case No. 030501322
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APPELLANTS' AMENDED BRIEF ADDENDUM

Appeal from an Interlocutory Order of the Fifth Judicial District Court, in and for  
Washington County, Trial Judge the Honorable James L. Shumate

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FILED  
UTAH APPELLATE COURT

AUG 08 2011

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## Tab 1

## **Rule 64. Writs in general.**

(a) Definitions. As used in Rules 64, 64A, 64B, 64C, 64D, 64E, 69A, 69B and 69C:

(a)(1) "Claim" means a claim, counterclaim, cross claim, third party claim or any other claim.

(a)(2) "Defendant" means the party against whom a claim is filed or against whom judgment has been entered.

(a)(3) "Deliver" means actual delivery or to make the property available for pick up and give to the person entitled to delivery written notice of availability.

(a)(4) "Disposable earnings" means that part of earnings for a pay period remaining after the deduction of all amounts required by law to be withheld.

(a)(5) "Earnings" means compensation, however denominated, paid or payable to an individual for personal services, including periodic payments pursuant to a pension or retirement program. Earnings accrue on the last day of the period in which they were earned.

(a)(6) "Notice of exemptions" means a form that advises the defendant or a third person that certain property is or may be exempt from seizure under state or federal law. The notice shall list examples of exempt property and indicate that other exemptions may be available. The notice shall instruct the defendant of the deadline for filing a reply and request for hearing.

(a)(7) "Officer" means any person designated by the court to whom the writ is issued, including a sheriff, constable, deputy thereof or any person appointed by the officer to hold the property.

(a)(8) "Plaintiff" means the party filing a claim or in whose favor judgment has been entered.

(a)(9) "Property" means the defendant's property of any type not exempt from seizure. Property includes but is not limited to real and personal property, tangible and intangible property, the right to property whether due or to become due, and an obligation of a third person to perform for the defendant.

(a)(10) "Serve" with respect to parties means any method of service authorized by Rule 5 and with respect to non-parties means any manner of service authorized by Rule 4.

(b) Security.

(b)(1) Amount. When security is required of a party, the party shall provide security in the sum and form the court deems adequate. For security by the plaintiff the amount should be sufficient to reimburse other parties for damages, costs and attorney fees incurred as a result of a writ wrongfully obtained. For security by the defendant, the amount should be equivalent to the amount of the claim or judgment or the value of the defendant's interest in the property. In fixing the amount, the court may consider any relevant factor. The court may relieve a party from the necessity of providing security if it appears that none of the parties will incur damages, costs or attorney fees as a result of a writ wrongfully obtained or if there exists some other substantial reason for dispensing with security. The amount of security does not establish or limit the amount of damages, costs or attorney fees recoverable if the writ is

wrongfully obtained.

(b)(2) Jurisdiction over surety. A surety submits to the jurisdiction of the court and irrevocably appoints the clerk of the court as agent upon whom papers affecting the surety's liability may be served. The surety shall file with the clerk of the court the address to which the clerk may mail papers. The surety's liability may be enforced on motion without the necessity of an independent action. If the opposing party recovers judgment or if the writ is wrongfully obtained, the surety will pay the judgment, damages, costs and attorney fees not to exceed the sum specified in the contract. The surety is responsible for return of property ordered returned.

(b)(3) Objection. The court may issue additional writs upon the original security subject to the objection of the opposing party. The opposing party may object to the sufficiency of the security or the sufficiency of the sureties within five days after service of the writ. The burden to show the sufficiency of the security and the sufficiency of the sureties is on the proponent of the security.

(b)(4) Security of governmental entity. No security is required of the United States, the State of Utah, or an officer, agency, or subdivision of either, nor when prohibited by law.

(c) Procedures in aid of writs.

(c)(1) Referee. The court may appoint a referee to monitor hearings under this subsection.

(c)(2) Hearing; witnesses; discovery. The court may conduct hearings as necessary to identify property and to apply the property toward the satisfaction of the judgment or order. Witnesses may be subpoenaed to appear, testify and produce records. The court may permit discovery.

(c)(3) Restraint. The court may forbid any person from transferring, disposing or interfering with the property.

(d) Issuance of writ; service

(d)(1) Clerk to issue writs. The clerk of the court shall issue writs. A court in which a transcript or abstract of a judgment or order has been filed has the same authority to issue a writ as the court that entered the judgment or order. If the writ directs the seizure of real property, the clerk of the court shall issue the writ to the sheriff of the county in which the real property is located. If the writ directs the seizure of personal property, the clerk of the court may issue the writ to an officer of any county.

(d)(2) Content. The writ may direct the officer to seize the property, to keep the property safe, to deliver the property to the plaintiff, to sell the property, or to take other specified actions. If the writ is to enforce a judgment or order for the payment of money, the writ shall specify the amount ordered to be paid and the amount due.

(d)(2)(A) If the writ is issued ex parte before judgment, the clerk shall attach to the writ plaintiff's affidavit, detailed description of the property, notice of hearing, order authorizing the writ, notice of exemptions and reply form.

(d)(2)(B) If the writ is issued before judgment but after a hearing, the clerk shall attach to the writ plaintiff's affidavit and detailed description of the property.

(d)(2)(C) If the writ is issued after judgment, the clerk shall attach to the writ plaintiff's application, detailed description of the property, the judgment, notice of exemptions and reply form.

(d)(3) Service.

(d)(3)(A) Upon whom; effective date. The officer shall serve the writ and accompanying papers on the defendant, and, as applicable, the garnishee and any person named by the plaintiff as claiming an interest in the property. The officer may simultaneously serve notice of the date, time and place of sale. A writ is effective upon service.

(d)(3)(B) Limits on writs of garnishment.

(d)(3)(B)(i) A writ of garnishment served while a previous writ of garnishment is in effect is effective upon expiration of the previous writ; otherwise, a writ of garnishment is effective upon service.

(d)(3)(B)(ii) Only one writ of garnishment of earnings may be in effect at one time. One additional writ of garnishment of earnings for a subsequent pay period may be served on the garnishee while an earlier writ of continuing garnishment is in effect.

(d)(3)(C) Return; inventory. Within 10 days after service, the officer shall return the writ to the court with proof of service. If property has been seized, the officer shall include an inventory of the property and whether the property is held by the officer or the officer's designee. If a person refuses to give the officer an affidavit describing the property, the officer shall indicate the fact of refusal on the return, and the court may require that person to pay the costs of any proceeding taken for the purpose of obtaining such information.

(d)(3)(D) Service of writ by publication. The court may order service of a writ by publication upon a person entitled to notice in circumstances in which service by publication of a summons and complaint would be appropriate under Rule 4.

(d)(3)(D)(i) If service of a writ is by publication, substantially the following shall be published under the caption of the case:

To \_\_\_\_\_, [Defendant/Garnishee/Claimant]:

A writ of \_\_\_\_\_ has been issued in the above-captioned case commanding the officer of \_\_\_\_\_ County as follows:

[Quoting body of writ]

Your rights may be adversely affected by these proceedings. Property in which you have an interest may be seized to pay a judgment or order. You have the right to claim property exempt from seizure under statutes of the United States or this state, including Utah Code, Title 78B, Chapter 5, Part 5.

(d)(3)(D)(ii) The notice shall be published in a newspaper of general circulation in each county in which the property is located at least 10 days prior to the due date for the reply or at least 10 days prior to the date of any sale, or as the court orders. The date of publication is the date of service.

(e) Claim to property by third person.

(e)(1) Claimant's rights. Any person claiming an interest in the property has the same rights and obligations as the defendant with respect to the writ and with respect to providing and objecting to security. Any claimant named by the plaintiff and served with the writ and accompanying papers shall exercise those rights and obligations within the same time allowed the defendant. Any claimant not named by the plaintiff and not served with the writ and accompanying papers may exercise those rights and obligations at any time before the property is sold or delivered to the plaintiff.

(e)(2) Join claimant as defendant. The court may order any named claimant joined as a defendant in interpleader. The plaintiff shall serve the order on the claimant. The claimant is thereafter a defendant to the action and shall answer within 10 days, setting forth any claim or defense. The court may enter judgment for or against the claimant to the limit of the claimant's interest in the property.

(e)(3) Plaintiff's security. If the plaintiff requests that an officer seize or sell property claimed by a person other than the defendant, the officer may request that the court require the plaintiff to file security.

(f) Discharge of writ; release of property.

(f)(1) By defendant. At any time before notice of sale of the property or before the property is delivered to the plaintiff, the defendant may file security and a motion to discharge the writ. The plaintiff may object to the sufficiency of the security or the sufficiency of the sureties within five days after service of the motion. At any time before notice of sale of the property or before the property is delivered to the plaintiff, the defendant may file a motion to discharge the writ on the ground that the writ was wrongfully obtained. The court shall give the plaintiff reasonable opportunity to correct a defect. The defendant shall serve the order to discharge the writ upon the officer, plaintiff, garnishee and any third person claiming an interest in the property.

(f)(2) By plaintiff. The plaintiff may discharge the writ by filing a release and serving it upon the officer, defendant, garnishee and any third person claiming an interest in the property.

(f)(3) Disposition of property. If the writ is discharged, the court shall order any remaining property and proceeds of sales delivered to the defendant.

(f)(4) Copy filed with county recorder. If an order discharges a writ upon property seized by filing with the county recorder, the officer or a party shall file a certified copy of the order with the county recorder.

(f)(5) Service on officer; disposition of property. If the order discharging the writ is served on the officer:

(f)(5)(A) before the writ is served, the officer shall return the writ to the court;

(f)(5)(B) while the property is in the officer's custody, the officer shall return the property to the defendant; or

(f)(5)(C) after the property is sold, the officer shall deliver any remaining proceeds of the sale to the defendant.



## **Rule 64A. Prejudgment writs in general.**

(a) Availability. A writ of replevin, attachment or garnishment is available after the claim has been filed and before judgment only upon written order of the court.

(b) Motion; affidavit. To obtain a writ of replevin, attachment or garnishment before judgment, plaintiff shall file a motion, security as ordered by the court and an affidavit stating facts showing the grounds for relief and other information required by these rules. If the plaintiff cannot by due diligence determine the facts necessary to support the affidavit, the plaintiff shall explain in the affidavit the steps taken to determine the facts and why the facts could not be determined. The affidavit supporting the motion shall state facts in simple, concise and direct terms that are not conclusory.

(c) Grounds for prejudgment writ. Grounds for a prejudgment writ include, in addition to the grounds for the specific writ, all of the requirements listed in subsections (c)(1) through (c)(3) and at least one of the requirements listed in subsections (c)(4) through (c)(10):

(c)(1) that the property is not earnings and not exempt from execution; and

(c)(2) that the writ is not sought to hinder, delay or defraud a creditor of the defendant; and

(c)(3) a substantial likelihood that the plaintiff will prevail on the merits of the underlying claim; and

(c)(4) that the defendant is avoiding service of process; or

(c)(5) that the defendant has assigned, disposed of or concealed, or is about to assign, dispose of or conceal, the property with intent to defraud creditors; or

(c)(6) that the defendant has left or is about to leave the state with intent to defraud creditors; or

(c)(7) that the defendant has fraudulently incurred the obligation that is the subject of the action; or

(c)(8) that the property will materially decline in value; or

(c)(9) that the plaintiff has an ownership or special interest in the property; or

(c)(10) probable cause of losing the remedy unless the court issues the writ.

(d) Statement. The affidavit supporting the motion shall state facts sufficient to show the following information:

(d)(1) if known, the nature, location, account number and estimated value of the property and the name, address and phone number of the person holding the property;

(d)(2) that the property has not been taken for a tax, assessment or fine;

(d)(3) that the property has not been seized under a writ against the property of the plaintiff or that it is exempt from seizure;

(d)(4) the name and address of any person known to the plaintiff to claim an interest in the property; and, if the motion is for a writ of garnishment,

(d)(5) the name and address of the garnishee; and

(d)(6) that the plaintiff has attached the garnishee fee established by Utah Code Section 78A-2-216.

(e) Notice, hearing. The court may order that a writ of replevin, attachment or garnishment be issued before judgment after notice to the defendant and opportunity to be heard.

(f) Method of service. The affidavit for the prejudgment writ shall be served on the defendant and any person named by the plaintiff as claiming an interest in the property. The affidavit shall be served in a manner directed by the court that is reasonably calculated to expeditiously give actual notice of the hearing.

(g) Reply. The defendant may file a reply to the affidavit for a prejudgment writ at least 24 hours before the hearing. The reply may:

(g)(1) challenge the issuance of the writ;

(g)(2) object to the sufficiency of the security or the sufficiency of the sureties;

(g)(3) request return of the property;

(g)(4) claim the property is exempt; or

(g)(5) claim a set off.

(h) Burden of proof. The burden is on the plaintiff to prove the facts necessary to support the writ.

(i) Ex parte writ before judgment. If the plaintiff seeks a prejudgment writ prior to a hearing, the plaintiff shall file an affidavit stating facts showing irreparable injury to the plaintiff before the defendant can be heard or other reason notice should not be given. If a writ is issued without notice to the defendant and opportunity to be heard, the court shall set a hearing for the earliest reasonable time, and the writ and the order authorizing the writ shall:

(i)(1) state the grounds for issuance without notice;

(i)(2) designate the date and time of issuance and the date and time of expiration;

(i)(3) designate the date, time and place of the hearing;

(i)(4) forthwith be filed in the clerk's office and entered of record;

(i)(5) expire 10 days after issuance unless the court establishes an earlier expiration date, the defendant consents that the order and writ be extended or the court extends the order and writ after hearing;

(i)(6) be served on the defendant and any person named by the plaintiff as claiming an interest in the property in a manner directed by the court that is reasonably calculated to

expeditiously give actual notice of the hearing.

### **Rule 64C. Writ of attachment.**

(a) Availability. A writ of attachment is available to seize property in the possession or under the control of the defendant.

(b) Grounds. In addition to the grounds required in Rule 64A, the grounds for a writ of attachment require all of the following:

(b)(1) that the defendant is indebted to the plaintiff;

(b)(2)(i) that the action is upon a contract or is against a defendant who is not a resident of this state or is against a foreign corporation not qualified to do business in this state; or

(b)(2)(ii) the writ is authorized by statute; and

(b)(3) that payment of the claim has not been secured by a lien upon property in this state.

## Tab 2

IN THE FIFTH JUDICIAL DISTRICT COURT  
OF WASHINGTON COUNTY, STATE OF UTAH

L. LANE BLACKMORE,

Plaintiff,

vs.

L&D DEVELOPMENT, et al,

Defendant.

Case No. 030501322

**ORIGINAL**

Hearing  
Electronically Recorded on  
January 19, 2010

BEFORE: THE HONORABLE JAMES L. SHUMATE  
Fifth District Court Judge

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**FILED**  
**UTAH APPELLATE COURTS**

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P R O C E E D I N G S

(Electronically recorded on January 19, 2010)

(Recording system malfunctioning and cuts in and out.  
Transcriber was unable to pick up all statements of  
Counsel and the Court)

THE COURT: Thank you, everyone. We are back on the  
record in Blackmore vs. L&D, et al. Counsel, I have your  
(inaudible).

MR. HEIDEMAN: Thank you, your Honor. I appreciate it.  
I appreciate the Court's indulgence to get this up and running.  
It's -- we wanted to use this hearing as a test run in case we  
have to do a trial fairly shortly. We thought we had already  
done that, but apparently it took a little while for us to get  
going.

Your Honor, at this point in time we are here on a pre-  
judgment writ of attachment with regard to one specific defendant  
in this case, that defendant being, of course, the Cannon trust  
entities or L&D.

Your Honor, at this point in time we would present to  
you the following information. I think it's important for the  
Court to note how this particular contract breaks out by way of  
refresher. As the Court will note, at the top we have an entity.  
It was formed by mutual contract between L&D Development and the  
home company. That entity was BCDC. The reciprocal relationship  
between these two entities and BCDC has already been outlined and

1 ruled upon by the Court, and has been provided to the Court by  
2 way of attachment with regard specifically to attachment No. 3 --  
3 excuse me, No. 4, which is the memorandum decision issued by this  
4 Court on July 10, 2009.

5 The Court had determined that there was in fact a  
6 breach, and that that breach or default occurred because L&D  
7 Development failed to transmit any of the relevant properties to  
8 which it was the owner and to which it was contractually required  
9 to transfer --

10 THE COURT: Not transfer (inaudible).

11 MR. HEIDEMAN: Convey. Thank you, your Honor.  
12 I apologize for that word. But certainly that's true.

13 THE COURT: I'm not sure how one (inaudible) Star Trek.

14 MR. HEIDEMAN: Your Honor, I watched that recently, and  
15 apparently that's my problem, but you're right, failed to convey  
16 the property to BCDC. At all points, however, with regard to the  
17 performance associated with the initial performance required by  
18 the home company, the plaintiff in this action did in fact  
19 perform.

20 Of specific relevance to this Court are three  
21 particular items. If the Court would turn the memorandum deci --  
22 or excuse me, to the memorandum in support of the motion for  
23 summary judgment, the Court will note in paragraph 2 that 1) a  
24 homeowner's association was formed. There were lots that were  
25 marketed and sold. Specifically there were some spec homes that



1 were built, and that because of that sale, the State Bank of Utah  
2 loan was paid off -- State Bank of Southern Utah. In addition,  
3 utilities were paid on the common areas through December of '02,  
4 and there was nearly completed two additional properties. We've  
5 identified those as Exhibit 2 to this memorandum.

6 Your Honor, that performance is key to this particular  
7 motion. What plaintiff seeks today is a Rule 64(a)(c) pre-  
8 judgment writ of attachment. We seek it because we qualify  
9 specifically underneath 64(a) and 64(c), the relevant provisions.

10 By way of affidavit, this Court has been provided with  
11 evidence indicating that plaintiff seeks to attach property that  
12 is not earnings. By definition and by case law, property cannot  
13 be earnings. That would typically be a W-2 or a 1099 or a K-1  
14 type of wage or distribution. As a result, we clearly meet that  
15 element.

16 There is no other predators that are relevant or that  
17 at this point in time we are aware of that have any particular  
18 interest in this property, certainly no interest that would  
19 supercede ours. Because the Court has already made a  
20 determination of a breach on the part of L&D, we are in fact  
21 a creditor by law, and hence we certainly cannot be hindering  
22 another creditor while we seek to obtain a judgment that we are  
23 entitled to.

24 Finally, with regard to the element of substantial  
25 likelihood of prevailing on the merits, this Court has already

1 made a ruling that there was a default. As a result -- because  
2 the Court determined that it was a primary breach, there can be  
3 no breach assessed against my client underneath relevant case law  
4 as previously argued and as identified in the memorandum decision  
5 of July 10<sup>th</sup>. Accordingly --

6 THE COURT: Counsel?

7 MR. HEIDEMAN: Yes.

8 THE COURT: My real concern with that is that the  
9 matter today stands really as an accounting. The interests  
10 of the parties are really what remains for trial.

11 MR. HEIDEMAN: Uh-huh.

12 THE COURT: How much value is there, who is entitled to  
13 what value.

14 MR. HEIDEMAN: Correct.

15 THE COURT: What set-offs are appropriately there.

16 MR. HEIDEMAN: Correct.

17 THE COURT: That's what the trial is going to show us.

18 MR. HEIDEMAN: Correct.

19 THE COURT: When we end up with findings of fact as a  
20 result of the trial, we will have those (inaudible) for us. A  
21 substantial likelihood of prevailing on the merits of the  
22 claim is you're telling me that your client is going to get  
23 all the (inaudible) claims.

24 MR. HEIDEMAN: No, your Honor.

25 THE COURT: That's what my concern (inaudible) do I take

1 it that far, or just that I say well, there's a breach here, so  
2 as a consequence to the breach, there's going to have to be an  
3 accounting.

4 MR. HEIDEMAN: Very good question, your Honor. The  
5 answer to that is actually somewhat easier in this particular  
6 instance. We have been informed of three specific assets that  
7 the Court is aware of. There's the \$150,000 held in trust in the  
8 trust. In addition to that, there are the two homes that are  
9 previously identified.

10 Those assets are clearly insufficient to satisfy the  
11 full -- even a marginal portion of what this verdict is likely  
12 to entail. So as a result, we believe that it is well within the  
13 purview of this Court to award those items specifically to us on  
14 a pre-judgment writ, particularly where the Court has the ability  
15 to have us bond if necessary.

16 Your Honor, by way of indulgence, I'm going to skip  
17 ahead in my power point and show the Court the main reason why  
18 I feel that way. The Court -- this case was just handed down.  
19 It's the case of Jones vs. Reich. The citation is 216 P.3d 357.  
20 This was published less than two weeks ago. It's a July 23, 2009  
21 opinion. It is absolutely on point. I've highlighted the  
22 relevant language on page 2 of the opinion.

23 "When a contract requires, as this one does, that the  
24 defaulting party pay attorney's fees, the sole criteria for a  
25 party to obtain attorney's fees is to show default by the other

1 contract party, Foote v. Clarke. Based on such contract  
2 language, the amount of the non-defaulting recovery is  
3 irrelevant, because unlike other contracts that require  
4 successful or prevailing parties, such a provision does not  
5 require an evaluation of the party's respective success in an  
6 action brought to remedy a default, and a finding that one party  
7 breached the contract is tantamount to a holding that the party  
8 defaulted.

9 "The jury in this case by special verdict found the  
10 Reiches breached the contract because the rental agreement  
11 clearly provided the defaulting party must pay the other side's  
12 attorney's fees. The jury's finding that the Reiches breached  
13 the rental agreement unavoidably leads to the conclusion that the  
14 Reiches are -- the Reiches are the defaulting party, and as such  
15 would be responsible" -- I went too far -- "for the Jones'  
16 attorney's fees incurred in enforcing the action."

17 The language actually goes on, your Honor, in very  
18 specific terms and indicates that in fact there is no discretion  
19 on the part of the Court when the language indicates a default.

20 As a result, your Honor, I would point the Court  
21 specifically to paragraph 15 of the development agreement. The  
22 language in par -- excuse me, paragraph 16. The language in  
23 paragraph 16 is nearly identical to the language at issue in  
24 this particular opinion.

25 It says, quote, "Should any party default in any of the

1 covenants or agreements herein contained, that defaulting party  
2 shall pay all costs and expenses, including reasonable attorney's  
3 fees which may arise or accrue from enforcing the development  
4 agreement, enforcing any covenant or term herein, or in pursuing  
5 any other remedy provided hereunder, or by applicable law whether  
6 such remedy is pursued by filing suit or otherwise."

7 THE COURT: Counsel, I have on the desk in front of me  
8 only volumes 20 and 21.

9 MR. HEIDEMAN: Uh-huh.

10 THE COURT: My (inaudible) from that, that the \$100,000  
11 cash represents not the entire (inaudible).

12 MR. HEIDEMAN: In fact, your Honor, you have an  
13 affidavit from Mr. Blackmore that was submitted as Exhibit 6.  
14 Mr. Blackmore indicates quite clearly he's paid over a half a  
15 million at this point in time in attorney's fees. So the fact  
16 that there is \$150,000 that is being held is clearly insufficient  
17 to meet even the attorney's fees award that this Court has  
18 already by law determined.

19 THE COURT: What about the real estate? Do the  
20 value of these two pieces of real estate (inaudible) closer to  
21 that 500,000.

22 MR. HEIDEMAN: Frankly, your Honor, there's an excellent  
23 response to that, if the Court looks specifically at -- I'll turn  
24 and point the Court's attention in the brief to the language of  
25 relevance in -- there we go. Page 4 in the original memorandum.

1 "Defendant Lester Cannon in paragraph 11 did so by quit claim  
2 deed without any consideration and after having Marie Cannon  
3 sign an acknowledgment of possible encumbrances on the property."  
4 There is no BFP argument in this particular instance, and where  
5 the Court has the ability to order security if necessary, that's  
6 fine.

7 Again, the Court has before it an affidavit indicating  
8 attorney's fees, but the Court also has before it significant  
9 record of what the actual value and damages would be, and they  
10 exceed well into the millions of dollars.

11 So as a result, when we look at two homes that were  
12 built, paid for, constructed at this sole expense of the non-  
13 breaching party, it's difficult for the Court, I believe, to come  
14 to any conclusion other than those should be returned to the non-  
15 breaching party, particularly where no consideration was paid by  
16 the parties in occupancy.

17 THE COURT: Well, Counsel, you (inaudible) by order of  
18 the Court the two pieces of real estate, what is (inaudible) for  
19 your pre-judgment writ, what other item of property are you  
20 seeking, or is there (inaudible).

21 MR. HEIDEMAN: That's it for this defendant.

22 THE COURT: Two pieces of real estate and one --

23 MR. HEIDEMAN: \$150 -- 150,000, yes.

24 THE COURT: All right. I think I'm fairly tightly  
25 focused on where you're going, Counsel.

1           MR. HEIDEMAN: Thank you, your Honor. By way of  
2 perfecting the record on this particular issue, Rule 64(a)(5)  
3 defined earnings as compensation, I think we've already covered  
4 that. The property sought consists of the assets held by the  
5 trust, including the money and real property. More particularly  
6 is the issue that we just discussed.

7           The property came from L&D Construction to the current  
8 residents. It was transferred into the Cannon family trust  
9 without consideration. None of the beneficiaries of the Cannon  
10 family trust performed any work whatsoever. There is no sweat  
11 equity associated with these pieces of property, and Marie Cannon  
12 took the property knowingly subject to possible encumbrances.  
13 Rule 64(a)(c)(1) is clearly satisfied.

14           With regard to the issue of hindering a creditor, it  
15 just simply cannot be. We are a creditor. The Court by the fact  
16 that a default has already been found underneath the Jones vs.  
17 Reich case, there is already a half million dollar debt that's on  
18 the books.

19           The substantial likelihood of prevailing on the merits,  
20 again, I believe that that only deals at this point in time with  
21 these -- this specific defendant, and the Court's already made  
22 that determination. In essence a judgment could -- we could  
23 request a judgment for attorney's fees if nothing else.

24           Clearly because the case is going to continue, it  
25 actually is in the benefit of the defendants -- this particular

1 defendant to have a judgment entered at some level at this point,  
2 because the longer we fight this case, the more that number goes  
3 up. Given we already know what the assets of this defendant are,  
4 that doesn't benefit my client at all. We need to have these  
5 assets where they're not going to be wasted, particularly on  
6 attorney's fees in a case where the Court has already found  
7 default.

8           The defendants in response have made several arguments.  
9 First of all in paragraph -- they identify in their motion  
10 response that the Court lacks jurisdiction because somehow they  
11 believe that L&D was not -- or the Cannon family trust was not  
12 added as a defendant. That's just simply inaccurate. The third  
13 amended complaint filed January 23<sup>rd</sup>, 2009 -- excuse me, 2008  
14 specifically added them, and then in paragraph 4 specifically  
15 cited them, so both there -- they're in both the header as well  
16 as the body of the document.

17           Furthermore, they've received actual and constructive  
18 notice. They have appeared at every single hearing, and they  
19 have made argument at every hearing. So as a result, they've  
20 been afforded due process. Their argument that the due process  
21 doesn't exist or hasn't been afforded to them is simply  
22 inaccurate.

23           When we look at all the elements of 64(a) and 64(c),  
24 it's quite clear that we meet those elements. There is obviously  
25 an opportunity for the property to be wasted or lost either



1 through use, i.e. of the real property, or alternatively, through  
2 some other method in terms of the spending of the funds by way of  
3 attorney's fees.

4 It's clear that we have an interest in the property,  
5 which is all that we're required. I apologize to the Court  
6 because I know that Court is a Utah fan.

7 THE COURT: Counsel, worse yet, were I to pull my tie  
8 out of my sweater, you would see that I'm wearing one of my Utah  
9 ties today.

10 MR. HEIDEMAN: That having been said, I thought --

11 MR. WINWARD: May the record reflect that the picture  
12 that is now pending before every Counsel table and the Judge --

13 THE COURT: Are two Utah defensive players engaged in  
14 what could only be described as buffoonery.

15 MR. HEIDEMAN: But it was good for the Mountain West  
16 because they went 4 and 1 should have gone 5 and 0. That having  
17 been said, your Honor, I would submit on the face of the document  
18 that there really is very little -- there just simply is not an  
19 element we don't meet. The damages are clearly in accord with  
20 the amount of the debt that can be established at this point in  
21 time. Furthermore, I think that there is a controlling case now  
22 that's directly on point on that issue.

23 THE COURT: Thank you, Counsel. Who wants to go first?  
24 Mr. Winward, you seem to want to be standing up. What do you  
25 want to tell me about it, Counsel?

1           MR. WINWARD: Your Honor, perhaps the last point first,  
2 and that is the claim that the Cannon family trust is a party to  
3 this lawsuit. I have appeared at every hearing in behalf of L&D  
4 and Shadow Canyon. I have never appeared in behalf of a trust.  
5 While they may have listed them as a party, they have never been  
6 served. They -- service of process has not been made upon them.  
7 They have never made an appearance, and I -- point blank, I don't  
8 think this Court has jurisdiction over the trust. I think that  
9 defeats their motion for pre-judgment writ of attachment in that  
10 regard.

11           THE COURT: Counsel, are all three of these assets two  
12 homes and the cash within the Cannon family trust?

13           MR. GALLIAN: No.

14           MR. WINWARD: They are not.

15           THE COURT: That's why we've got other lawyers here.  
16 Okay. What is in the hands of the Cannon family trust?

17           MR. GALLIAN: Nothing.

18           MR. WINWARD: They -- the Cannon family trust perhaps is  
19 the owner of L&D, which is a corporation, Shadow Canyon, which is  
20 an LLC.

21           MR. GALLIAN: That's correct, your Honor.

22           THE COURT: Okay. All right.

23           MR. GALLIAN: They do own the entities, but they hold no  
24 assets.

25           THE COURT: Okay. That helps us, then.

1           Go ahead, Mr. Winward.

2           MR. WINWARD: The Court when it granted the partial  
3 motion for summary judgment was very careful in its decision. On  
4 page 2 it says that you left open for later resolution the other  
5 claims and the propriety of any remedies sought, and later on  
6 page 5 indicated the plaintiffs are therefore entitled to summary  
7 judgment on the issue of whether defendants breached material  
8 terms of the development agreement, other claims in the complaint  
9 and the extent of damages remains for resolution.

10           This case contains multiple parties, contains multiple  
11 claims, and I think the Court was very careful in drafting that  
12 partial summary judgment because it left open the issues of  
13 waiver, the issues of affirmative defenses, the issues of set  
14 off, one that the Court has already mentioned today.

15           The fact of the matter is by analogy, if the Court --  
16 if the plaintiffs were to prevail on their claims against, for  
17 instance, one of the other parties -- Shadow Glen -- it may  
18 eliminate the damages against my clients. If they were to  
19 recover all the property and their attorney's fees from Shadow  
20 Glen under their theory of the case, they can't have damages both  
21 ways. It may be joint and several and it may not at that point  
22 in time. I think it's not as clear as the plaintiffs want to  
23 make it appear to the Court that they are going to win on the  
24 merits of the claim.

25           They make a bold statement that they've incurred

1 \$500,000 of attorney's fees. Again, they have not attempted to  
2 categorize those as against my client versus the other multiple  
3 parties to the lawsuit. They have not attempted to categorize  
4 those as against the contract claim against the other -- how many  
5 other claims are in the lawsuit. I think the law is very clear  
6 that they must do that before the Court could even consider any  
7 type of attorney's fee judgment.

8 THE COURT: Counsel, is it so unclear when these assets  
9 arising out the development agreement are what they're seeking?  
10 Does that serve to focus our attention more, or do you think it  
11 should stay as broad as possible because of all the other  
12 parties' claims?

13 MR. WINWARD: I think it stays as broad as possible  
14 because of all the other parties' claims, because they are all  
15 tied in to this property.

16 THE COURT: Okay.

17 MR. WINWARD: Plaintiff's success on any of -- on  
18 several of the other claims against other parties may obviate or  
19 negate or substantially reduce any potential damages against L&D  
20 and Shadow Canyon under the theory of that case.

21 THE COURT: Okay.

22 MR. WINWARD: The -- I had one other thought, and it  
23 probably just escaped me. I suppose --

24 (Counsel confers with Mr. Gallian)

25 MR. WINWARD: The Court will probably remember probably

1 from -- I suspect the very first hearing that was held in this  
2 several years ago where the Court listened to extensive testimony  
3 from Mr. Blackmore and extensive testimony from Mr. Snow, and  
4 made the observation at that point two very acute and well versed  
5 businessmen in our community, and the Court even at that point in  
6 time couldn't decide which one was telling the truth or which one  
7 was not. There was testimony on the part of V. Lowry Snow that  
8 Mr. Blackmore had told him, "I'm not going to proceed with this  
9 deal." There's testimony by Mr. Blackmore that, "I intended to  
10 proceed, I just needed additional time and/or going in a  
11 different direction."

12 THE COURT: Well, Counsel --

13 MR. WINWARD: That --

14 THE COURT: -- Mr. Heideman's argument really derives  
15 its root in the Court's partial summary judgment ruling. Were  
16 there to be the necessity of conducting a trial in this case,  
17 even if both parties waived a jury, I'd probably spend the tax  
18 payers' money and bring a jury in just because I was so evenly  
19 split between those two very persuasive witnesses, and a jury's  
20 assistance, I think, would be essential to this Court, me  
21 specifically.

22 As I see Mr. Heideman's argument, it really doesn't  
23 rest upon that. It represents the Court's finding with respect  
24 to default on the contract. You still think that that's an  
25 important factor for the Court to consider?

1           MR. WINWARD: It's still an important factor because if  
2 a jury or if this Court were to determine after that default --  
3 in essence they did not convey the property -- if the finder of  
4 fact comes in and finds that Mr. Blackmore did indeed say and/or  
5 agree, "I'm not going to pursue this claim any further," then  
6 there's no damages. They can find as an issue of waiver that  
7 he terminated his involvement in that particular contract at that  
8 moment in time, and everything that had happened since that point  
9 in time they try to resurrect afterwards --

10           THE COURT: I see your argument.

11           MR. WINWARD: -- and a trier of fact could say, "I'm not  
12 going to let you resurrect those issues, those damages or those  
13 fees."

14           Then a final point, if the Court were to grant a pre-  
15 judgment writ, it leaves L&D and Shadow Canyon without an ability  
16 to defend themselves. They would have no fund when which to pay  
17 attorney's fees, trustee's fees. Very likely if the Court -- as  
18 soon as the Court would issue such an order and sign it, I would  
19 be forced to file my motion to withdraw because I would not have  
20 a client with assets in order to do -- to pay for the defense,  
21 and therefore by stratagem they almost get a default judgment  
22 because no one would step in without an ability to be paid.

23           THE COURT: Thank you, Counsel.

24           Mr. Gallian, do you want to be heard on these issues,  
25 Counsel?

1           MR. GALLIAN: If I may, your Honor, briefly. I am the  
2 trustee of the trust. Not necessary acting as Counsel, but I  
3 have just a few things that the Court ought to know. First of  
4 all, there's been some facts banting about as if they were facts  
5 which they're not accurate, so it's probably best to let the  
6 Court know where things actually lie.

7           There were two lots that were involved in this  
8 situation, and as far as I'm concerned, before -- I believe it  
9 was probably a long time ago before this lawsuit even came up  
10 there was -- one of the lots was conveyed to Mr. Cannon's then  
11 wife Bertha Cannon. He shortly died thereafter. So one of the  
12 lots I have absolutely nothing to do with nor any control over  
13 it because it was already quit claim deeded a long time ago.

14           The second lot is sitting there and there is a home  
15 sitting there that's I think about 80 or 90 percent completed,  
16 as I understand it. It incurs expenses in the form of taxes and  
17 ongoing homeowner's dues, which I have been paying out of the  
18 funds to protect the assets.

19           Also, frankly, these are funds that are owned and  
20 controlled by a corporation known as L&D, which is the underlying  
21 supposed partner, not the Cannon estate. The Cannon estate owns  
22 no assets, other than owning the interest in those entities.

23           So this motion has been brought only against someone who  
24 has never been brought in as a party to this case. Whether we  
25 knew about it or not, it's a jurisdictional issue as to whether

1 or not they could bring a pre-judgment writ of attachment against  
2 a trust that has the -- that frankly has never been made a party  
3 to this case. They're obligated when they bring their amended  
4 complaint in to serve us and to do something towards bringing us  
5 in the case. They have never done that.

6 THE COURT: And there's never been a voluntary  
7 acceptance of service and entry of appearance on behalf of --

8 MR. GALLIAN: No. Of course, we've been appearing on --  
9 you know, to defend L&D's interests and Shadow Canyon interest,  
10 but -- who were served, but never the other. If you read their  
11 motion, and I'll just read it very quickly, it says -- the motion  
12 part, not their memo, because the memo doesn't really say  
13 anything different.

14 It says, "Plaintiff satisfies standard for pre-judgment  
15 writ as set forth in the rules that plaintiff requests that writs  
16 of attachment be issued against amounts presently held by Cannon  
17 family trust, as well as the following property."

18 Your Honor, the Cannon family trust doesn't have  
19 anything, number one. Number two, the Cannon family trust is  
20 not a party to this action. This whole pre-judgment writ is  
21 based upon a false premise. Lot 108 of Shadow Canyon is the one  
22 remaining lot that's in the name of L&D, and you know, we'd be  
23 happy to submit that to attachment because that's not going to  
24 go anywhere anyway. Frankly, we don't think it's appropriate  
25 that our ability to fund this case be taken away because there



1 are very substantial issues yet to be litigated.

2           The main one was mentioned by Lowry is -- excuse me, by  
3 Lamar -- let me get my L's right here -- is the fact that there  
4 was a lot going on. There was a tendered closing -- this is all  
5 in the record, your Honor. There was a tendered closing of this  
6 real estate, which Mr. Blackmore refused to do, ostensibly  
7 because he didn't like the terms of the refinance.

8           There was phone calls with Mr. Lowry Snow who was  
9 then representing Mr. Black -- excuse me, Mr. Cannon's interests  
10 in those entities. His testimony in this Court was that  
11 Mr. Blackmore said, "You know, I'm just not going to do this  
12 deal. I don't want to do it anymore."

13           Then Mr. Cannon then went and proceeded to sell it to  
14 another person, and only found out just days before the closing  
15 that they then objected to it after they had sent a letter that  
16 it just sat there for quite some time. You know, in a situation  
17 like this you would expect immediate response. I believe it was  
18 something like 30 days before they made any kind of response to  
19 it at all. By that time he had already contracted to sell it to  
20 another party after he had been told he wasn't going to go ahead  
21 and do the deal.

22           So I mean even if there -- even if the Court finds --  
23 has found that there was a default, which we candidly disagree  
24 with, as you know, but nevertheless, you know, we should have the  
25 right to proceed to have those issues litigated, because if that

1 default was waived there is -- the default is nothing at that  
2 point because he wasn't going to go ahead and perform on his part  
3 of the deal.

4 He was required to do a number of things which he never  
5 did -- pay \$50,000, refinance the property. None of that was  
6 ever done. When he goes ahead and says, "Hey, I'm not going to  
7 go ahead with the deal," which he had the right to do under the  
8 contract. He could say, "Look, I'm not happy with the terms of  
9 refinance so I'm just blowing the whole thing." That was  
10 actually in the contract.

11 Mr. Cannon, as far as I can tell -- he's not here to  
12 testify, but from what we've understand from Mr. Snow, he has  
13 testified. He understood the deal was off at that point, and  
14 that would excuse any of these breaches, and that is an issue yet  
15 to be litigated. So where do they get substantial likelihood of  
16 success when we have that facing us in this trial? This is not  
17 merely an accounting issue. This is an issue of whether or not  
18 he walked away from that contract or not.

19 THE COURT: So it is default versus waiver?

20 MR. GALLIAN: Yes.

21 THE COURT: Counsel, anything else you want to add to  
22 that?

23 MR. TOBLER: Just real quick, a point of clarification  
24 for myself. The plaintiff and the Court has mentioned two  
25 properties today. As Mr. Gallian just read, they're only asking

1 to attach one property, lot 108. I just wanted to make sure  
2 that's the only property at issue here today.

3 MR. GALLIAN: It's the only thing in the pleadings.

4 THE COURT: We'll find out. Mr. Heideman, which pieces  
5 of real estate or which piece of real estate are you seeking?

6 MR. HEIDEMAN: Your Honor, if you look at paragraph 10,  
7 we're looking at lot 79 and lot 108.

8 THE COURT: Okay. Counsel --

9 MR. HEIDEMAN: We identify it in paragraphs 10 and  
10 paragraph 12.

11 THE COURT: Focus, if you will, on this concept of  
12 waiver.

13 MR. HEIDEMAN: Sure.

14 THE COURT: If a finder of fact looks at the  
15 circumstance after the default --

16 MR. HEIDEMAN: Uh-huh.

17 THE COURT: -- because at the time that these telephone  
18 conversations that Mr. Snow testified to between himself and  
19 Mr. Blackmore existed, default had already occurred.

20 MR. HEIDEMAN: Uh-huh.

21 THE COURT: What about waiver?

22 MR. HEIDEMAN: Your Honor, very simple. The Court  
23 actually had this extensively briefed prior to issuing its  
24 partial summary judgment motion, and the case law that was given  
25 to the Court at that time addresses that issue specifically.

1           When a primary breach occurs there is no requirement  
2 for any further performance and no waiver can issue because no  
3 performance is required. So by -- as a -- it would be a legal  
4 fiction. It would be a legal impossibility for Mr. Blackmore to  
5 waive any right to which -- after a primary breach has occurred  
6 because all subsequent performance is excused and terminated.

7           THE COURT: And primary breach triggers that row of  
8 dominoes.

9           MR. HEIDEMAN: That's correct. That's the (inaudible)  
10 of breach doctrine, and we went through that ad nauseam in the  
11 original. Counsel's argument is just simply -- it just simply  
12 ignores that black letter law. To get up and argue that there's  
13 anything that goes beyond or survives beyond that initial moment  
14 in time just ignores the simple fact that it cannot by law -- it  
15 just cannot exist. There cannot be a waiver because there is no  
16 requirement to perform.

17           THE COURT: All right.

18           MR. GALLIAN: Your Honor, may I address that briefly?

19           THE COURT: Well, sure, but he's still going to get last  
20 say, Mr. Gallian.

21           MR. GALLIAN: Oh, I'm sorry. I thought he was done. I  
22 apologize..

23           THE COURT: Well, and if you want to speak to it fine,  
24 because I'm going to let Mr. Heideman still speak to it.

25           MR. GALLIAN: No, I'm not trying to cut him off. I just

1 thought he was done. I apologize.

2 I think the simple point there is a difference between  
3 saying that you don't have to perform because of the first  
4 primary breach and saying the things you were supposed to do  
5 you're excused from your duty of performance, and it's a quite a  
6 different fact to say, "Hey, I'm just not going to do this deal  
7 anymore. I'm walking away from it." The whole contract is over  
8 at that point, whether there was a breach or not. There's a  
9 waiver of the default at that point.

10 THE COURT: I see your point, Counsel, but Mr. Heideman,  
11 I agree with you. You may take your pre-judgment writ.

12 MR. HEIDEMAN: Thank you, your Honor.

13 THE COURT: All right. Thank you very much, Counsel.  
14 It's good lawyering.

15 MR. GALLIAN: May I, if I may, there's been talk about  
16 there being \$150,000. There is not \$150,000. There's obviously  
17 been money spent, and what is left is -- I don't have the exact  
18 figure -- 75,000, something like that.

19 THE COURT: Counsel, the accountings will speak for  
20 themselves. Counsel, the issue that I have, though, still, if we  
21 give you your writ, what kind of bond? I'm concerned about that,  
22 just because it's emptying out the assets here.

23 MR. HEIDEMAN: Can I address that, your Honor?

24 THE COURT: Certainly.

25 MR. HEIDEMAN: I think the Reich case actually helps the

1 Court on that, and that's why I've made such a big deal of that  
2 case. The Reich case indicates that the Court does not have  
3 discretion. It actually takes it away when the language --  
4 because normally the Court would have the ability to make all  
5 kinds of determinations as to what particular issues, and the  
6 Reich case says none of that matters. If there is a default, the  
7 party that's in default pays.

8           So the Court typically uses a bond as security against  
9 some type of a misdecision or a wrong decision in awarding those  
10 fees. Because the Court has already found the default, and  
11 because the other two properties were clearly built by BCDC, by  
12 Mr. Blackmore, I don't believe a bond should need to be issued.  
13 We're willing to do it if the Court would like it, but it should  
14 be a nominal amount at best, because it's difficult for me to  
15 justify BCDC having its funds used to fight itself.

16           The Court made a determination that Shadow Glen and L&D  
17 failed to transfer. The only reason they have these assets is  
18 because they failed to do what they were required to do, and now  
19 they're using the assets to fight us as we try to get that  
20 performance that we were entitled to. It seems irregular or  
21 unusual that the Court would award any type of large bond to  
22 protect what the Court has already determined to be wrongful  
23 conduct.

24           THE COURT: I see you, Counsel.

25           Mr. Winward, let me give you a chance to speak to the

1 bond issue.

2 MR. WINWARD: I think bond is appropriate, your Honor.  
3 We're talking about several thousands of dollars. Their -- my  
4 argument concerning how that would shake out as against the  
5 multiple parties, their accounting for their attorney's fees,  
6 the law is very clear that they have to segregate out attorney's  
7 fees. Just saying, "We've expended 500,000 of attorney's fees"  
8 does not address that issue, and so I think a bond is  
9 appropriate.

10 I just have one more point of clarification, your Honor.  
11 Is the Court issuing the writ as pursuant to their motion just  
12 against Cannon family trust and the assets that they hold?

13 THE COURT: Counsel, I am issuing the writ against all  
14 the joined parties.

15 MR. WINWARD: That's not what their motion says, your  
16 Honor.

17 THE COURT: And Counsel, I am not extending to the  
18 Cannon family trust because they're not a joined party.

19 MR. WINWARD: Their motion doesn't address a writ  
20 against L&D or Shadow Canyon.

21 THE COURT: I see your point, Counsel, but L&D and  
22 Shadow Canyon, I think, are represented here. That's where  
23 the motion goes, but the family trust is not a party to the  
24 litigation. I can't issue a writ against them. All right.

25 (Hearing concluded)

REPORTER'S CERTIFICATE

STATE OF UTAH            )  
                              ) ss.  
COUNTY OF UTAH        )

I, Beverly Lowe, a Notary Public in and for the State of Utah, do hereby certify:

That this proceeding was transcribed under my direction from the transmitter records made of these meetings.

That I have authorized Natalie Lake to prepare said transcript, as an independent contractor working under my license, appropriately authorized under Utah statutes.

That this transcript is full, true, correct, and contains all of the evidence and all matters to which the same related which were audible through said recording.

I further certify that I am not interested in the outcome thereof.

That certain parties were not identified in the record, and therefore, the name associated with the statement may not be the correct name as to the speaker.

\_\_\_\_\_  
Natalie Lake  
Official Court Transcriber

WITNESS MY HAND AND SEAL this 5<sup>th</sup> day of March 2010.

My commission expires:  
February 24, 2012

\_\_\_\_\_  
Beverly Lowe  
NOTARY PUBLIC  
Residing in Utah County



## Tab 3

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FIFTH JUDICIAL DISTRICT COURT  
2008 OCT 19 PM 3:53  
WASHINGTON COUNTY  
BY pt

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**IN THE FIFTH JUDICIAL DISTRICT COURT IN AND FOR  
WASHINGTON COUNTY, STATE OF UTAH**

---

LANE BLACKMORE, et al.,  
  
Plaintiffs,  
  
vs.  
  
LESTER E. CANNON, et al.,  
  
Defendants.

**MEMORANDUM IN OPPOSITION TO  
PLAINTIFFS' MOTION FOR  
PREJUDGMENT WRIT OF  
ATTACHMENT  
(REPLY TO AFFIDAVIT)**

Civil No. 030501322

Judge James L. Shumate

---

Defendants, by and through undersigned counsel, hereby file the following Memorandum in Opposition to Plaintiffs' Motion for Prejudgment Writ of Attachment.

**INTRODUCTION**

The above captioned case, still pending before this Court, consists of several different causes of action. On July 10, 2008, this Court issued a Memorandum Decision and Order on Pending Motions. Pursuant to that Order this court issued summary judgment for Plaintiffs on a single cause of action while holding that all remaining causes of action were yet to be determined. Plaintiffs subsequently filed a motion to obtain a prejudgment writ of attachment accompanied by a supporting memorandum and affidavits.

## ARGUMENT

A writ of attachment is an extreme measure used to seize a defendant's property before the court has rendered judgment and is rarely used in Utah today. Rule 64A(h) of the Utah Rules of Procedure requires any plaintiff seeking such an extraordinary measure to prove by affidavit all facts necessary to support the writ. A plaintiff seeking a prejudgment writ must strictly comply with a number of statutory requirements. First, Rule 64C(a), Utah Rules of Civil Procedure, requires that plaintiff show, by affidavit, that the property sought is in fact in defendant's possession or under defendant's control. Pursuant to Rule 64C(b), the plaintiff is also required to prove that the defendant is indebted to the plaintiff and that the action is based on contract. Second, Rule 64A mandates that the plaintiff prove, again by affidavit, that the property seized is not earnings or exempt property, that the writ is not sought to hinder, delay or defraud a defendant's creditor, and that there is a substantial likelihood of plaintiff prevailing on the merits of the claim. Additionally, a plaintiff must meet at least one of the elements contained in Rule 64A(c)(4)-(c)(10). Finally, Rule 64A(e) requires notice and hearing to determine whether a plaintiff has met his burden of proof.

### **I. THE CANNON FAMILY TRUST HAS NOT BEEN NAMED AS A PARTY TO THIS ACTION AND THEREFORE PLAINTIFFS' MOTION FOR PREJUDGMENT WRITS MUST BE DENIED**

"[T]he guarantee of due process prohibits the enforcement of a money judgment against [an entity] that was not designated as a party or served with process." *Brigham Young Univ. v. Tremco Consultants, Inc.*, 2007 UT 17 ¶ 31, citing *Richards v. Jefferson County*, 517 U.S. 793, 798 (1996). Without due process, a court can have no power over an entity "because a court

only acquires jurisdiction over a party through proper service of process, which provides notice to the defendant that he is being sued and that he must appear and defend himself. *Id.* (citing *Meyers v. Interwest Corp.*, 632 P.2d 879, 880 (Utah 1981)).

The Cannon Family Trust is not, nor has it ever been named a party to this action. Russell Gallian, Trustee of the Trust, was never served with process. Accordingly, the Cannon Family Trust has not filed answers to Plaintiffs' complaints, sought discovery, or otherwise participated formally in the above-captioned matter. While some profits from L&D Development that have been deposited with the Trust remain, both L&D Development and the Cannon Family Trust are established, maintained and operated as separate legal entities. Plaintiffs cannot attach property held in the Cannon Family Trust to satisfy legal fees incurred in pursuing their claims against L&D merely because the Trust holds some funds earned by L&D Development. More importantly, this Court lacks jurisdiction over the Cannon Family Trust because the Trust was never served or made a party to this action. Therefore, this court should deny Plaintiffs' motion for a writ of attachment against property held by the Trust.

## **II. THE WRIT FOR PREJUDGMENT INTEREST MUST BE DENIED TO ENSURE DUE PROCESS AND JUDGMENT ON THE MERITS**

Article 14, Section 1 of the Constitution of the United States of America declares that no "State shall deprive any person of life, liberty, or property without due process of law." The Constitution of Utah, Article 1, Section 7 likewise provides that "[n]o person shall be deprived of life, liberty, or property without due process of law."

Defendants have vigorously defended against Plaintiffs' claims. The merits of those claims remain hotly contested by Defendants. Plaintiffs' alleged damages, if any, also remain disputed and Plaintiffs have failed to make a claim for any sum certain. As will be discussed in more detail below, Plaintiffs have failed to assert any facts which demonstrate a likelihood that Plaintiffs will prevail on the merits of this case. However, Plaintiffs seek to effectively freeze assets that would allow Defendants to retain their legal counsel and ensure full and fair litigation of the matter on the merits. The net effect of Plaintiffs' prejudgment writ of attachment, if granted, would be to effectively deny Defendants legal representation. The Trustee of the Cannon Family Trust would have no choice except to resign, as well as counsel for the various beneficiary defendants because of the inaccessibility to funds. Thus, Plaintiffs would obtain judgment from this Court based on economic stratagem rather than legal merit. Pursuant to the Constitution of the United States of America and the Constitution of Utah, Plaintiffs are entitled to use their own funds to retain counsel and pursue judgment on the merits.

### **III. PLAINTIFFS' AFFIDAVITS FAIL TO STATE FACTS SHOWING GROUNDS FOR THE WRITS IN SIMPLE, CONCISE AND DIRECT TERMS THAT ARE NOT CONCLUSORY**

Under Rule 64A(a), Utah Rules of Civil Procedure, a plaintiff may obtain a writ of attachment after a claim has been filed and before judgment only by written order of the court. To obtain the writ, a plaintiff must "file a motion, security as ordered by the court and an affidavit stating facts showing the grounds for relief and other information required by [the]

rules.” Utah R. Civ. P. 64A(b). “The affidavit supporting the motion shall state facts in simple, concise and direct terms that are not conclusory.” *Id.*

The affidavits of Lane Blackmore and Patrick Ascione state in conclusory terms the grounds for requesting a prejudgment writ of attachment. The Affidavit of Patrick Ascione and Affidavit of Lane Blackmore merely contain a recitation of the grounds required for a prejudgment writ. Mr. Ascione’s affidavit addresses one of the grounds required by Utah Rules of Civil Procedure 64A(c) as follows:<sup>1</sup>

1. *To the best of my knowledge, none of the property named in the Affidavit of Lane Blackmore consists of earnings, and none of it is exempt from execution.*

The third requirement is not addressed. Mr. Blackmore’s affidavit is somewhat more descriptive but still conclusory. With regards to property that is not real property the affidavit states:

2. *[ ] Defendants L&D Development and the Cannon Family Trust derived profit of somewhere between \$140,000 and \$180,000 from the sale of certain properties at issue in this case; which funds are believed to be held and controlled by Russell Gallian as Trustee of the Canon[sic] Family Trust...*

These statements fail to show how “profit” from the “sale of certain properties” does not constitute earnings and/or is exempt from execution. Noticeably absent from the affidavits are any supporting facts indicating that Plaintiff is substantially likely to prevail on the merits of its remaining claims or that Plaintiff will obtain, at minimum, \$500,000 in attorney fees.

The requirement that the plaintiff have an ownership or special interest in the property is addressed in Mr. Blackmore’s affidavit by concluding:

10. *Plaintiff BCDC has an ownership or special interest in the property.*

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<sup>1</sup> For convenience of the Court, statements in italics are taken verbatim directly from the Affidavit of Lane Blackmore and Affidavit of Patrick Ascione, respectively.

Mr. Blackmore's affidavit similarly concludes that:

*14. Plaintiff BCDC has an ownership or special interest in the property.*

Again, these conclusions do not provide a factual bases or explanation as to how the alleged "ownership or special interest," if any, was acquired.<sup>2</sup>

The additional grounds required to obtain a writ of attachment under Utah Rules of Civil Procedure 64C are met in a similarly conclusive fashion. Under the rule, defendant must be indebted to the plaintiff and the action must be upon a contract or otherwise meet the requirements of Rule 64C(b). Utah R. Civ. P. 64C(b). Mr. Ascione's affidavit simply states that:

- 7. Defendants are indebted to Plaintiff BCDC in an amount not less than \$500,000 in attorney's fees.*
- 8. A component of Plaintiff BCDC's action against Defendants is based on Defendant's breach of contract.*

And from Mr. Blackmore's affidavit:

- 9. Defendants L&D Development and the Cannon Family Trust are indebted to BCDC in an amount not less than \$500,000 in attorney's fees.*
- 10. A component of BCDC's action against Defendants is based on breach of contract.*

Both affidavits state as fact that Defendants are indebted to BCDC for attorney's fees of at least \$500,000 but provide no factual bases for the debt or the amount. Similarly, both affidavits state that Plaintiffs' action is based in part on a breach of contract claim without providing supporting

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<sup>2</sup> Plaintiff, in its Memorandum in Support of Motion for Prejudgment Writs of Attachment, argues one additional ground for relief. Pursuant to Rule 64(A)(c)(10), Plaintiff argues probable cause exists that "Plaintiff will lose his remedy against Defendants unless the Court issues the writs." See Memorandum in Support of Motion for Prejudgment Writs of Attachment, ¶ 8. However, this ground for relief is not addressed in the Affidavits of either Mr. Blackmore or Mr. Ascione.

facts. Both affidavits fail to identify which “component” of BCDC’s action is based on breach of contract and both affidavits fail to set forth the specific facts constituting “breach of contract.” Because Plaintiffs’ affidavits fail to show the grounds for relief in simple, concise and direct terms that are not conclusory, Plaintiff is not entitled to a prejudgment writ of attachment.

#### **IV. PLAINTIFFS HAVE FAILED TO DEMONSTRATE A SUBSTANTIAL LIKELIHOOD OF PREVAILING ON THE MERITS OF THE UNDERLYING CLAIMS**

Under Rule 64A(c)(3), Utah Rules of Procedure, a plaintiff seeking a prejudgment writ must demonstrate a “substantial likelihood” of prevailing “on the merits of the underlying claim.” In Utah, the parties to litigation bear their own attorney fees absent some statute or contractual provision to the contrary. *Cobabe v. Crawford*, 780 P.2d 834, 836 (Utah App. 1989). Additionally, a party seeking attorney fees “must categorize the time and fees expended for (1) successful claims for which there may be an entitlement to attorney fees, (2) unsuccessful claims for which there would have been an entitlement to attorney fees had the claims been successful, and (3) claims for which there is no entitlement to attorney fees.” *Keith Jorgensen’s, Inc. v. Ogden City Mall Co.*, 2001 UT App 128 ¶ 30 (internal citations and quotations omitted).

Plaintiffs’ have failed to show they are likely to prevail on their claim for attorney fees. The affidavits attached to Plaintiffs’ motion are completely devoid of any facts that would indicate the likelihood of prevailing on Plaintiffs’ claim for attorney fees. As noted previously, Plaintiffs claim, through the attached affidavits, that they have incurred over \$500,000 in attorney fees for which they are entitled to compensation. However, Plaintiffs’ cite no applicable Utah statute under which they are allowed to recover attorney fees in this action. Likewise



Plaintiffs' provide no enforceable contractual provision under which any of the above named defendants is obligated to pay Plaintiffs' attorney fees. None of the numerous documents attached as "exhibits" is cited in either affidavit as containing a provision whereby Plaintiffs may recover attorney fees.

Further, even if Plaintiffs could demonstrate that they would likely recover attorney fees, Plaintiffs have failed to show that they are entitled to \$500,000 in attorney fees. Plaintiffs have failed to provide a single invoice, receipt, time record, or other document substantiating the amount of their claim. Additionally, Plaintiffs' claim for attorney fees of \$500,000 fails to allocate those fees among the various causes of action maintained in Plaintiffs' complaint. Even assuming Plaintiffs' had provided a factual basis upon which they could recover attorney fees, allocation of attorney fees at this stage of the litigation is not possible. This Court has decided only one of multiple causes of action in Plaintiffs' complaint. Thus, even if Plaintiff were able to distinguish between claims in which attorney fees were recoverable and those in which they were not, Plaintiffs could not distinguish between successful claims for which they could recover attorney fees and unsuccessful claims for which they could have recovered attorney fees had they been successful. Such a determination is only possible after this Court has issued a final ruling as to all causes of action.

Finally, the affidavits submitted by Plaintiffs fail to provide facts showing any likelihood that Plaintiffs will prevail on their remaining claims. Neither affidavit contains a statement as to what the remaining claims are, the elements required to succeed on each claim, or facts showing

that Plaintiffs will likely meet their burden of proof on the elements of those claims. The affidavits submitted by Plaintiffs simply neglect to address these issues.

**V. PLAINTIFFS FAIL TO SHOW THAT DEFENDANTS ARE INDEBTED TO PLAINTIFFS**

To obtain a writ of attachment, Rule 64C(b)(1), Utah Rules of Civil Procedure, requires “that the defendant [be] indebted to the plaintiff.”

The Defendants are not indebted to Plaintiffs; Plaintiffs’ claim that Defendants are indebted to Plaintiffs is based on a speculative claim for attorney fees. In this Court’s Memorandum Decision and Order on Pending Motions, Plaintiffs received summary judgment as to their breach of contract claims but Plaintiffs’ remaining claims were left unresolved. *See* Memorandum Decision and Order on Pending Motions, ¶ 5. Additionally, the extent of damages, if any, has not been determined by this Court. *Id.* Plaintiffs’ argument appears to be that because they claim attorney fees, Defendants have become indebted to them. Mr. Blackmore’s affidavit states, “Defendants L&D Development and the Cannon Family Trust are indebted to BCDC in an amount not less than \$500,000.00 in attorney’s fees.” *See* Affidavit of Lane Blackmore, ¶ 9. Mr. Ascione’s affidavit also states “Defendants are indebted to Plaintiff BCDC in an amount not less than \$500.00.00 in attorney’s fees.” *See* Affidavit of Patrick Ascione, ¶ 7. However, Plaintiffs have not been awarded attorney fees by this Court. Therefore, Defendants are not indebted to Plaintiffs.

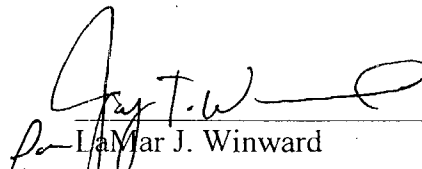
Moreover, Plaintiffs have failed even to show that it is likely they will receive an award of attorney fees. As discussed previously, Plaintiffs have failed to set forth any facts that would

substantiate a claim for attorney fees. No statute or enforceable contract provision allowing attorney fees has been cited. Even assuming Plaintiffs had established a basis for attorney fees, Plaintiffs have failed to produce a single billing invoice, receipt, time record or other document supporting a \$500,000 claim and have additionally failed to allocate the amount claimed between the various causes of action.

### **CONCLUSION**

For the reasons stated above, Defendants respectfully request that Plaintiffs' Motion for Prejudgment Writ of Attachment be denied.

DATED this 19 day of October, 2009.

  
Lamar J. Winward  
*Attorney for Defendants*

MAILING CERTIFICATE

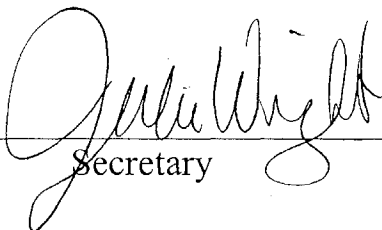
This is to certify that I mailed a true and exact signed copy of the above and foregoing MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR PREJUDGMENT WRIT OF ATTACHMENT (Reply to Affidavit), on this 19<sup>th</sup> day of October, 2009, to:

Mr. Patrick Ascione  
2696 N University Avenue, Suite 180  
Provo, UT 84604

Mr. David E. Jensen  
Slemboski & Associates  
P.O. Box 1717  
St. George, UT 84771

Mr. Eric Olmstead  
Barney McKenna & Olmstead  
43 South 100 East, Suite 300  
P.O. Box 2710  
St. George, UT 84770

Jerome Romero Jeffrey W. Shields  
1500 Wells Fargo Plaza  
170 South Main Street  
SLC, UT 84101-1644

  
Secretary

## Tab 4



**ORIGINAL**

**FILED**  
**FIFTH DISTRICT COURT**

**2010 FEB 26 AM 11:32**

**WASHINGTON COUNTY**

JUSTIN D. HEIDEMAN (USB #8897)  
R. BRETT EVANSON (USB #12086)  
**HEIDEMAN, MCKAY, HEUGLY & OLSEN, L.L.C.**  
2696 N. University Avenue, Suite 180  
Provo, Utah 84604  
Telephone: (801) 812-1000  
Fax: (801) 374-1724  
Email: [jheideman@hmho-law.com](mailto:jheideman@hmho-law.com)  
[bevanson@hmho-law.com](mailto:bevanson@hmho-law.com)

BY 

PATRICK J. ASCIONE (U.S.B. #6469)  
**ASCIONE & ASSOCIATES, L.L.C.**  
4692 North 300 West, Suite 220  
Provo, UT 84604  
Phone: (801) 854-1200  
Fax: (801) 854-1201  
Email: [patrick@ana-law.com](mailto:patrick@ana-law.com)  
Attorneys for Plaintiffs

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**IN THE FIFTH JUDICIAL DISTRICT COURT**  
**IN AND FOR WASHINGTON COUNTY, STATE OF UTAH**

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LANE BLACKMORE, et al.,

Plaintiffs,

vs.

LESTER E. CANNON, et al.,

Defendants.

**ORDER GRANTING PLAINTIFFS'  
MOTION FOR PREJUDGMENT  
WRIT OF ATTACHMENT AS TO  
L&D DEVELOPMENT AND  
SHADOW CANYON LAND  
COMPANY AND THE ESTATE OF  
LESTER CANNON**

Case No. 030501322

Judge: Honorable James L. Shumate

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Plaintiff's motion for Prejudgment Writ of Attachment came on for regular hearing on the 19<sup>th</sup> day of January, 2010. Defendants were represented by counsel of record Lamar J.

Winward, and Plaintiffs were represented by counsel of record, Justin D. Heideman, R. Brett

Evanson, and Patrick J. Ascione.

This matter having been fully briefed and oral argument having been take regarding all issues; and the Court being now fully apprised of all relevant law and facts does hereby rule and order that:

1. Plaintiff's Motion for Prejudgment Writ of Attachment is granted as to Defendants L&D Development and Shadow Canyon Land Company.
2. Plaintiff is awarded immediate possession of all monies held in either entity up to the amount of \$150,000.00.
3. Plaintiff is awarded immediate, sole, and exclusive legal title in Lot 108, Shadow Canyon Phase 1, Hurricane, Utah 84737.

DATED AND SIGNED this 26 day of February, 2010.

BY THE COURT:

  
\_\_\_\_\_  
JUDGE SHUMATE

## Tab 5



**COPY**

**DEVELOPMENT AGREEMENT**

21<sup>st</sup> This Development Agreement (hereinafter "Agreement") made and entered into as of the day of August, 2002, by and between L. Lane Blackmore, (hereinafter referred to as "Blackmore"), L & D Development, Inc., a Utah Corporation, Shadow Canyon Land Company, L.L.C., a Utah Limited Liability Company (hereinafter collectively referred to as "Shadow Canyon"), and Blackmore/Cannon Development Company, L.L.C., a Utah Limited Liability Company to be formed (hereinafter referred to as "BCDC").

**WITNESSETH:**

WHEREAS, Shadow Canyon owns certain real property located in Washington County, Utah, described on Exhibit A, attached hereto and by this reference made a part hereof (hereinafter referred to as "Shadow Canyon Property");

WHEREAS, a portion of the Shadow Canyon Property owned by L & D Development, Inc., is fully developed, a portion is partially developed for residential real estate and a portion of the Shadow Canyon Property owned by Shadow Canyon Land Company, L.L.C., is currently used for raw land purposes;

WHEREAS, the Shadow Canyon Property is security for debt owed to U.S. Bank National Association (hereinafter "US Bank") and State Bank of Southern Utah;

WHEREAS, the obligations to US Bank and State Bank of Southern Utah are past due;

WHEREAS, Blackmore personally and through his construction company has the experience, personnel, desire and the financial ability to develop and subdivide the Shadow Canyon Property for residential housing purposes;

WHEREAS, Shadow Canyon and Blackmore have formed BCDC for the purpose of developing the Shadow Canyon Property. A copy of the filed Articles of Organization for BCDC are attached hereto as Exhibit B and incorporated herein by this reference; and

WHEREAS, the parties hereto desire to enter into an agreement to allow for the continued development and subdivision of the Shadow Canyon Property in a manner as to provide for the maximization of the value of such property.

NOW, THEREFORE, in consideration of the above recitals and the mutual covenants and conditions contained herein, the parties agree as follows:

**BLACKMORE/CANNON DEVELOPMENT**

1. *Formation of LLC.* Shadow Canyon and Blackmore have formed BCDC for the purpose of developing the Shadow Canyon Property. Blackmore and Shadow Canyon are the Members of BCDC.

2. *Blackmore - Consideration.* In exchange for his fifty percent (50%) Member

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*LFC*

interest in BCDC, Blackmore shall do the following: (1) Bring current accrued interest owed to US Bank in the approximate amount of Seventy Thousand Dollars (\$70,000.00); (2) Pay current all property taxes owed on the Shadow Canyon Property which sum is approximately Sixty-three Thousand Dollars (\$63,000.00); (3) Take such reasonable steps as necessary to obtain an extension on the US Bank loan; and (4) Pay to Shadow Canyon the sum of Fifty Thousand Dollars (\$50,000.00) at closing.

3. *Marketing/Business Plan - Blackmore.* In addition to the foregoing, Blackmore shall do or cause the following to occur as additional consideration to induce Shadow Canyon to enter into this Agreement:

- Market and sell the three existing spec homes and all future lot and home sales;
- Build, at its own expense, three (3) new spec homes for standing inventory within the first six (6) months following the transfer of the Shadow Canyon Property to BCDC. Upon the sale of each new spec home, a new spec home shall be started within thirty (30) days of sale.
- Submit an updated development/business plan to Shadow Canyon for its approval each year setting forth goals and methods of achieving goals for the coming year. Shadow Canyon's approval of the plan shall not be unreasonably withheld.

4. *Shadow Canyon's Security.* In an effort to secure Blackmore and BCDC's performance under this Agreement, BCDC shall execute a Trust Deed in favor of Shadow Canyon to be released as lots sell as more fully set forth in the Lot Release paragraph below. The principal amount of the Trust Deed shall be Six Hundred Fifty Thousand Dollars (\$650,000.00) which represents the balance of the sum Shadow Canyon is to receive pursuant to this Agreement after Blackmore's initial payment of Fifty Thousand Dollars (\$50,000.00) as set forth in paragraph 2 above. Shadow Canyon's security interest shall be subordinate to the presently outstanding obligations to State Bank of Southern Utah and US Bank. In addition, Shadow Canyon shall take a second lien position with respect to subsequent lenders that refinance the obligations to State Bank of Southern Utah and US Bank upon similar terms. The intent of the prior sentence is to allow BCDC to refinance the presently outstanding debt with other lenders and place the other lenders in similar security positions now occupied by State Bank or Southern Utah and US Bank.

5. *Transfer of Shadow Canyon Property.* In exchange for its fifty percent (50%) Member interest in BCDC, Shadow Canyon shall transfer the Shadow Canyon Property to BCDC by good and sufficient Special Warranty Deed. BCDC, at BCDC's sole expense, may provide an owner's title insurance policy, insuring such title against liens and encumbrances at closing of transfer of the Shadow Canyon Property. All actual closing costs for the delivery of such title shall be the responsibility of BCDC. The parties hereto acknowledge and understand that the Shadow Canyon Property will be conveyed subject to indebtedness to US Bank in the approximate amount of Six Hundred Seventy Thousand Dollars (\$670,000.00), indebtedness to State Bank of Southern Utah in the approximate amount of Two Hundred Sixty Two Thousand Dollars (\$262,000.00) and all back property taxes. Property taxes shall not be prorated to the date of transfer and all property taxes incurred before the date of this Agreement shall be the responsibility of Blackmore. Thereafter, the property taxes on the Shadow Canyon Property shall

be the responsibility of BCDC.

5.1 *Condition of Shadow Canyon Property.* Except for warranties of title, the property will be conveyed "as is" without representations, promises of any kind, or warranties, limited, expressed, implied, for fitness for any particular purpose. It shall be the sole responsibility of BCDC to inspect all aspects of the property being transferred, including but not limited to: zoning matters, soil condition, survey issues, boundary line and title issues and to perform all due diligence without reliance upon Shadow Canyon.

5.2 *Inspection and Testing.* BCDC hereby represents that it has conducted or will conduct prior to transfer such investigations, inspections, surveys and testing as it desires with respect to any portion of the Shadow Canyon Property and BCDC accepts the Shadow Canyon Property based upon its own examination, reliance and judgment and not by reason of any representations, promises, or statements made by Shadow Canyon or Shadow Canyon's representatives whatsoever as to its condition, soils content, the existence or lack thereof of any water, suitability of soil for construction and development, size, total acreage, location, present value, future value, income, potential income, zoning, or compliance with any federal, state, or local code, ordinances, regulations, or statutes. BCDC expressly acknowledges that at the time of closing it will have conducted all necessary investigations, surveys, inspections, and tests to satisfy itself and accepts the Shadow Canyon Property in its present condition or waives the right to do so with the full understanding as to the consequences of such waiver, namely, a denial of asserting any claim against Shadow Canyon as it pertains to the condition of the Shadow Canyon Property.

6. *Management of LLC.* Blackmore, or an entity that Blackmore has legal authority to make management decisions for, shall be the Manager of BCDC.

6.1 *Manager Responsibilities.* The Manager shall be responsible for managing all aspects of the development project including but not limited to the following: (a) Be responsible for actually carrying out the subdivision and development of all of the Shadow Canyon Property subject to this Development Agreement and the Operating Agreement; (b) Be responsible for obtaining all necessary permits and approvals and for compliance with all applicable ordinances and statutes; (c) The Manager shall use good faith best efforts to develop, subdivide and construct residences on the Shadow Canyon Property to increase and maximize, as economically feasible, the value of the Shadow Canyon Property.

6.2 *Manager Authority.* For so long as Blackmore is directly involved, he shall have the authority, except as otherwise limited in this Agreement, to negotiate and execute any and all contracts for various aspects of the development, subdivision and sale of lots including the authority to convey and borrow. In addition, Shadow Canyon shall take steps necessary to give the Manager developer authority as it pertains to the homeowners association, architectural control, amenity fees and privileges. An assignment of Declarant's interest transferring the rights of the Declarant to BCDC is attached here to as Exhibit C and incorporated herein by this reference. Other than as set forth herein, the Manager shall keep the Shadow Canyon Property lien free of outside liens other than the current obligations to US Bank, State Bank of Southern Utah, Shadow Canyon (pursuant to paragraph 4 above) and construction financing consistent with paragraph 7.2 below. The Manager may refinance any of the foregoing

bank obligations on similar terms with other banks or a private lender.

7. *Distributions/Lot Release.*

7.1 Shadow Canyon shall receive distributions from the LLC on a lot release basis as follows: (1) Shadow Canyon shall not be entitled to a distribution upon the sale of the three existing homes; (2) Shadow Canyon shall be entitled to a distribution of Three Thousand Five Hundred Dollars (\$3,500.00) per lot upon the sale of the next fifteen (15) homes; (3) Shadow Canyon shall be entitled to a distribution of Four Thousand Dollars (\$4,000.00) per lot upon each lot sold after 1 and 2 above until the present obligation to US Bank is repaid; (4) After retirement of the present obligation to US Bank or any subsequent lender (upon similar terms) of the present obligation to US Bank, Shadow Canyon shall receive the sum of Twelve Thousand Dollars (\$12,000.00) per lot sold until Shadow Canyon has received the total sum of Seven Hundred Thousand Dollars (\$700,000.00) from BCDC and/or Blackmore.

7.2 *Construction Subordination.* Shadow Canyon shall subordinate the trust deed required by paragraph 4 above to trust deeds to be executed hereafter by BCDC covering lots as specified by BCDC sufficient to enable Blackmore, BCDC or entities affiliated with Blackmore to obtain construction financing thereby enabling Blackmore to perform consistent with paragraph 3 above. The money obtained following Shadow Canyon's subordination shall be used for the purpose of constructing and improving the subordinated lots. Upon recording any such trust deed, it shall be conclusively deemed that the entire amount thereof has been or will be used for or applied on the costs of construction of improvements on the identified lots. Shadow Canyon shall not be obligated to subordinate lots at any time that Blackmore or BCDC are in breach of this Agreement or any of its exhibits.

Notwithstanding the foregoing, it is understood that Shadow Canyon shall no longer be entitled to distribution under this paragraph once Shadow Canyon has received the equivalent of Seven Hundred Thousand Dollars (\$700,000.00). The Fifty Thousand Dollars (\$50,000.00) payable to Shadow Canyon under paragraph 2 above and the cost of the release of Lot 69 as set forth in paragraph 8 below shall be taken into account for purposes of this paragraph. If Shadow Canyon has received the foregoing sum and Shadow Canyon and its principals are no longer liable for debt secured by the property then Shadow Canyon shall release any Trust Deeds it has against the Shadow Canyon Property and Shadow Canyon shall transfer its Member interest in BCDC to Blackmore for no additional consideration. Thereafter, Shadow Canyon shall have no interest in BCDC or the Shadow Canyon Property and any additional profits shall accrue to Blackmore. It is agreed by the parties hereto that Shadow Canyon will have received its full Seven Hundred Thousand Dollar (\$700,000.00) pay out within fifteen (15) years of the transfer of the Shadow Canyon Property to BCDC. There will be no prepayment penalty and Blackmore shall have the right to buy out Shadow Canyon's interest at any point during the fifteen (15) years by paying the balance.

8. *Lot 69.* Shadow Canyon desires to receive clear title to Lot 69 within two years following the transfer of the Shadow Canyon Property to BCDC. It is agreed that BCDC shall expend funds necessary to obtain a release of Lot 69 from US Bank's Trust Deed and that Shadow Canyon shall receive clear title to Lot 69 within two years. It is anticipated that the sum of Twelve Thousand Dollars (\$12,000.00) plus simple interest at 6.75% per annum for two years shall be required to release US Bank's security interest in Lot 69; consequently, upon release and transfer of

Lot 69 to Shadow Canyon, the sum of Thirteen Thousand Six Hundred Twenty Dollars (\$13,620.00) shall be deducted from the outstanding obligation of BCDC to Shadow Canyon as set forth in paragraph 7 above.

9. *Outstanding Liability.* The parties hereto acknowledge that Shadow Canyon is in default on its obligations to US Bank and State Bank of Southern Utah. The parties hereto anticipate that they will be able to reach agreements with both banks regarding extensions of the loans. It is understood that obtaining the extensions will likely include but not be limited to requiring capital to bring interest current, capital to bring property taxes current and a change with regard to future principal and interest payments. In order to assist Blackmore in obtaining information from State Bank of Southern Utah and US Bank, Blackmore in his individual capacity and as Manager of BCDC is hereby authorized to obtain any and all bank documents and to negotiate with US Bank and State Bank of Southern Utah on behalf of Shadow Canyon for the purpose of extending, paying off or refinancing the loans.

9.1 *US Bank Documents.* The parties anticipate receiving proposed documents prepared by US Bank for the purpose of extending the term of the Note. In the event that the documents received from US Bank are not consistent with this Agreement then Blackmore shall have the right at his discretion to terminate this Agreement. Based upon parties communications with US Bank, the parties hereto anticipate that the terms contained in the US Bank documents will provide the following which the parties hereby agree are reasonable and consistent with this Agreement:

- The new LLC will assume the obligation and Les Cannon will guaranty the debt;
- The maturity date for the loan extension will be October 14, 2003;
- The sum of \$12,000.00 will be required to obtain a lot release;
- U.S. Bank is willing to subordinate its debt to no more than three (3) lots at a time and the subordination will require an \$8,000.00 per lot payment;
- Past interest will need to be brought current and future interests will be paid current on a monthly basis;
- Real property taxes must be paid current;
- U.S. Bank intends to charge a 1% origination fee plus all out of pocket costs including legal fees for drafting the loan extension documents;
- The parties hereto will not have more than five (5) spec homes on the project at any given time;
- Blackmore, Shadow Canyon and BCDC shall provide financial statements to US Bank annually;
- Shadow Canyon shall guarantee the debt to US Bank; and
- Provide an opinion of counsel concerning validity and enforceability.

10. *Operating Agreement.* The duties, rights and obligations of the Members and the Manager are more fully set-forth in the Operating Agreement for BCDC that is attached hereto as Exhibit D and incorporated herein by this reference.

11. *Wholesale/Bulk Transactions.* In the event that Blackmore determines that it would like to bulk sale a portion or all of the project L. Lane Blackmore shall have authority to do so as long as there is a pro rata reduction of Shadow Canyon's pay out required by paragraph 7 above. A



bulk sale shall be defined as the sale of raw acreage or the sale of five (5) or more improved lots in one transaction.

12. *Accounting and Records.* Throughout the development and subdivision of the Shadow Canyon Property, BCDC shall provide Shadow Canyon, as requested by Shadow Canyon, with copies of any and all documents and shall provide any and all information as may be reasonably necessary for Shadow Canyon to be informed as to the development and subdivision of the Shadow Canyon Property. The parties hereto agree that Adams Hafen & Co. shall be the accounting firm for BCDC and that each party to this Agreement shall have access to all accounting records at Adams Hafen & Co., that pertain to BCDC. In addition, BCDC and Blackmore shall invite Shadow Canyon to a quarterly meeting for purposes of discussing and updating Shadow Canyon on the status of the project. Shadow Canyon's agent, V. Lowry Snow, or such other designee as Shadow Canyon may appoint are hereby authorized to obtain documents from BCDC, Adams Hafen & Co., and attend quarterly meetings on behalf of Shadow Canyon.

13. *Assignment of Engineering.* Shadow Canyon shall assign and convey all engineering related to the Shadow Canyon property to BCDC including but not limited to any and all plats, soils tests and drawings. In addition, Shadow Canyon shall also assign, to the extent assignable, all approvals obtained from the appropriate municipalities involved and or development rights.

#### GENERAL PROVISIONS

14. *Notice.* All notices, demands, or other writings in this Development Agreement provided to be given or made or sent, or which may be given or made or sent, by either party to the other, shall be deemed to have been fully given or made or sent when made in writing and deposited in the United States mail, postmarked and addressed as follows:

Shadow Canyon Land Company, L.L.C.	L. Lane Blackmore
595 South 180 West #113-4	PO Box 390
Hurricane, UT 84737	LaVerkin, UT 84745

L & D Development, Inc.  
595 South 180 West #113-4  
Hurricane, UT 84737

And a copy to:  
V. Lowry Snow, Esq.  
Snow Jensen & Reece, PC  
P.O. Box 2747  
St. George, UT 84771-2747

The address to which any notice, demand, or other writing may be given or made or sent to any party as above provided may be changed by written notice given by such party as above provided.

15. *Waivers.* The failure of a party to insist on a strict performance of any of the

terms and conditions hereof shall be deemed a waiver of the rights or remedies that the party may have regarding that specific instance only, and shall not be deemed a waiver of any subsequent breach or default in any terms and conditions.

16. *Attorney Fees.* Should any party default in any of the covenants or agreements herein contained, that defaulting party shall pay all costs and expenses, including reasonable attorney fees, which may arise or accrue from enforcing this Development Agreement, enforcing any covenant or term herein, or in pursuing any other remedy provided hereunder or by applicable law, whether such remedy is pursued by filing suit or otherwise.

17. *Authorization.* Each person and entity executing this Agreement represents and warrants that such person or entity has been duly authorized to execute and deliver this Agreement in the capacity and for the person or entity set forth where such individual signed.

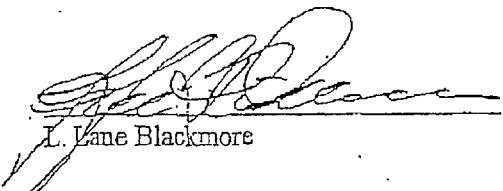
18. *Amendment.* This Development Agreement can only be amended by written agreement signed by the parties.

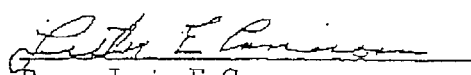
19. *Survival of Covenants.* It is expressly agreed that the terms, covenants and conditions contained herein shall survive the execution of this Agreement, the transfer of the property by deed and shall be enforceable by either party after the date thereof.

20. *Miscellaneous.* This Development Agreement and the Exhibits attached hereto contain the entire agreement between the parties. This Agreement and the terms and conditions hereof apply to and are binding on the heirs, legal representatives, successors and assigns of both parties. Nothing herein contained shall affect any restrictions on transfers or assignments set forth elsewhere in this Agreement. This Agreement shall be governed by and construed in accordance with the laws of the State of Utah.

IN WITNESS WHEREOF, the parties have executed this Development Agreement on the dates set forth below.

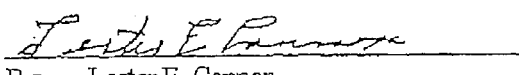
L & D DEVELOPMENT, INC.  
a Utah Corporation:

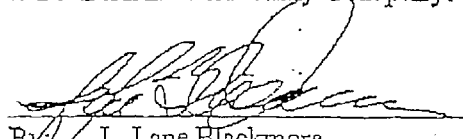
  
L. Lane Blackmore

  
By: Lester E. Cannon  
Its: President

SHADOW CANYON LAND COMPANY, LLC  
a Utah Limited Liability Company:

BLACKMORE/CANNON  
DEVELOPMENT COMPANY, LLC  
a Utah Limited Liability Company:

  
By: Lester E. Cannon  
Its: Manager

  
By: L. Lane Blackmore  
Its: Manager

)

## LIST OF EXHIBITS

- Exhibit A: Legal description of real property owned by Shadow Canyon
- Exhibit B: Articles of Organization for BCDC
- Exhibit C: Assignment of Declarant's Interest
- Exhibit D: Operating Agreement for BCDC



## EXHIBIT A

All of Lots 10, 29, 30, 31, 32, 45, 47, 48, 49, 51, 63 through 69, 79 through 83, 85 through 94, 107 through 110, 112 through 115, 117, 118, 119, 120, SHADOW CANYON PHASE 1, according to the Official Plat thereof on file in the Office of the Recorder of Washington County.

### PARCEL 1

Beginning at the Northwest Corner of the NE 1/4 of Section 15, Township 42 South, Range 13 West, Salt Lake Base and Meridian and running thence South, along the 1/4 Section Line, 660.00 feet; thence East 116.62 feet; thence North 660.00 feet, to a point on the Section Line; thence West, along the Section Line, 116.62 feet to the point of beginning.

Containing 1.767 acres.

### PARCEL 2

Beginning at a point South, along the 1/4 Section Line, 660.00 feet, from the Northwest Corner of the NE 1/4 of Section 15, Township 42 South, Range 13 West, Salt Lake Base and Meridian and running thence South, along the 1/4 Section Line, 660.00 feet, more or less, to the Southwest Corner of the NW 1/4 of said NE 1/4; thence East, along the 1/16 Section Line, 116.62 feet; thence North 660.00 feet, more or less; thence West 116.62 feet to the point of beginning. Containing 1.767 acres, more or less.

### PARCEL 3

Beginning at the Northeast corner of the Northwest Quarter of Section 15, Township 42 South, Range 13 West, Salt Lake Base and Meridian and running thence West 9.93 chains; thence South 20 chains; thence East 9.93 chains; thence North 20 chains to the point of beginning.

### LESS & EXCEPTING THE FOLLOWING:

Beginning at the North Quarter corner of Section 15, Township 42 South, Range 13 West, Salt Lake Base and Meridian and running thence South 0°01' West 706.00 feet; thence North 89°59' West 464.00 feet; thence South 0°01'00" West 18.14 feet; thence North 89°59' West 191.38 feet; thence North 0°01' East 723.00 feet; thence North 89°55' East 655.38 feet to the point of beginning.



TOGETHER With all rights, privileges, easements and appurtenances thereunto belonging or in any way appertaining.

SUBJECT TO Easements, Rights of Way, Restrictions and Reservations of record and those enforceable in law and equity.

#### PARCEL 4

Beginning at a point East, along the Section Line, 116.62 feet from the Northwest Corner of the NE 1/4 of Section 15, Township 42 South, Range 13 West, Salt Lake Base and Meridian and running thence South, parallel to the 1/4 Section Line, 660.00 feet; thence East 375.50 feet; thence N. 4°06'59" W. 661.71 feet to a point on the Section Line; thence West, along the Section Line, 328.00 feet to the point of beginning.

Containing 5.33 acres.

#### PARCEL 5

Beginning at a point South, along the 1/4 Section Line, 660.00 feet, and East 116.62 feet from the Northwest Corner of the NE 1/4 of Section 15, Township 42 South, Range 13 West, Salt Lake Base and Meridian and running thence South, parallel to the 1/4 Section Line, 660.00 feet, more or less, to the South Line of said NE 1/4; thence East, along the 1/16 Section Line, 423.00 feet; thence N. 4°06'59" W. 661.71 feet, more or less; thence West 375.50 feet to the point of beginning.

Containing 6.049 acres, more or less.

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STATE TAX COMMISSION

JUL 05 2002

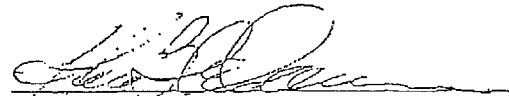
ARTICLES OF ORGANIZATION  
OF  
BLACKMORE/CANNON DEVELOPMENT COMPANY, L.L.C.  
a Utah limited liability company

OPERAT. - ST. GEORGE  
BY \_\_\_\_\_

THESE ARTICLES OF ORGANIZATION, forming a limited liability company under the laws of the State of Utah, are made and executed as of the 12<sup>th</sup> day of July, 2002, by the undersigned persons.

1. Name. The name of the limited liability company is BLACKMORE/CANNON DEVELOPMENT COMPANY, L.L.C. (herein sometimes referred to as the "Company").
2. Period of Duration. The period of duration of the Company shall be a term of ninety-nine (99) years from the date these Articles of Organization are filed, unless sooner terminated pursuant to law or the provisions of the Company's Operating Agreement.
3. Business Purpose. The business purposes of the Company are (a) to acquire, own, hold for investment, develop, construct upon, manage, sell, lease, and otherwise deal with the real property that is owned by the Company; (b) to purchase, lease, sell, own and operate, and to finance the acquisition and operation of, personal property for use at or on the real property that is owned by the Company; (c) to employ or contract with contractors for the services they provide related to work on the real property that is owned by the Company; and (d) to incur indebtedness, secured or unsecured, for any of the purposes of the Company.
4. Registered Office and Designated Office. The street address of the Company's registered office shall be 98 South State, LaVerkin, Utah 84745. The street address of the Company's designated office is 98 South State, LaVerkin Utah 84745.
5. Registered Agent. The name, street address, and signature of the Company's initial registered agent is as follows:

L. Lane Blackmore  
98 South State  
LaVerkin, Utah 84745

  
L. Lane Blackmore  
Registered Agent

The director of the division is appointed the agent of the Company for service of process if the registered agent has resigned and no successor has accepted the responsibility, the registered agent's authority has been revoked, or the registered agent cannot be found or served with the exercise of reasonable diligence.



6. Management. The Company is to be managed by a Manager or Managers, and management is not reserved to Members. The name and street address of the Company's initial Manager who shall serve as Manager of the Company until successor Manager(s) are elected shall be:

L. Lane Blackmore  
98 South State  
LaVerkin, Utah 84745

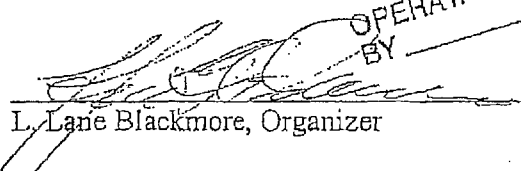
7. Transfer Restrictions. Interests in this Company owned by any Member of the Company shall be subject to the transfer restrictions provided for in the Operating Agreement of this Company.

8. Organizer. The name and street address of the Organizer of the Company is as follows:

L. Lane Blackmore  
98 South State  
LaVerkin, Utah 84745

The undersigned hereby affirm that they are the Organizers of the Company, the Company has one or more Members, and that the facts stated in the foregoing Articles of Organization are true.

RECEIVED  
STATE TAX COMMISSION  
JUL 05 2002  
OPERAT. - ST. GEORGE  
BY

  
L. Lane Blackmore, Organizer

Recorded at the request of:  
Snow Jensen & Reece  
PO Box 2747  
St. George, Utah 84771

### ASSIGNMENT OF DECLARANT'S INTEREST

This Agreement is made effective as of August \_\_\_\_\_, 2002, by and between L&D DEVELOPMENT, INC. (hereinafter "L&D") and BLACKMORE/CANNON DEVELOPMENT COMPANY, LLC, a Utah limited liability company (hereinafter "BLACKMORE").

#### RECITALS

WHEREAS, BLACKMORE received title to the lands herein described on Exhibit "A" attached hereto, by Special Warranty Deed recorded \_\_\_\_\_, as Entry No. \_\_\_\_\_, in Book \_\_\_\_\_, at Pages \_\_\_\_\_, of Official Washington County, State of Utah records (hereinafter the "Property").

WHEREAS, there is a certain Second Amended and Restated Declaration of Covenants, Conditions and Restrictions for Shadow Canyon, Phase 1, recorded August 10, 2000, as Entry No. 693259, in Book 1376, at Pages 2200-2222, Official Washington County Records, that affect the herein described property (hereinafter "CC&Rs") that are applicable to the Property.

WHEREAS, L&D wishes to assign any and all rights, duties and obligations it may have, if any, as Declarant under the CC&Rs as a result of the aforementioned Quit-Claim Deed.

WHEREAS, BLACKMORE desires to receive an assignment of all right, title, duty, obligation and interest that L&D may have as Declarant in the CC&Rs.

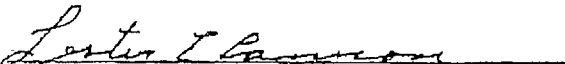
IN CONSEQUENCE THEREOF, L&D and BLACKMORE hereby agree as follows:

1. **Assignment of Interest.** In consideration for the sum of Ten Dollars (\$10.00) and other good and valuable consideration and in consideration for the acceptance by BLACKMORE of the duties and obligations, if any, assigned in this Agreement, L&D hereby assigns without


warranty or any representations whatsoever, all right, title, duty, obligation and interest, if any, that L&D has as Declarant under the CC&Rs that are applicable to the Property.

2. Acceptance of Assignment. BLACKMORE hereby accepts the assignment of all right, title, duty, obligation and interest, if any, that L&D may have as Declarant under the CC&Rs as a result of L&D recording the CC&Rs. In addition, BLACKMORE as Declarant hereby accepts any and all responsibility, if any, for completion of improvements for any and all lots and property to which the CC&Rs apply, including lots that are in the names of other owners. L&D shall have no responsibility or obligation whatsoever under the CC&Rs.

L&D DEVELOPMENT, INC.

  
Lester E. Cannon

BLACKMORE/CANNON DEVELOPMENT COMPANY, LLC

  
By: L. Lane Blackmore  
Its: Manager

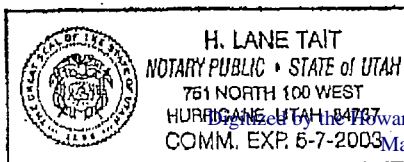
STATE OF UTAH, )  
: ss.  
County of Washington. )

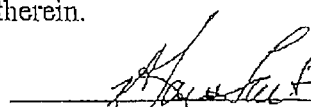
On the \_\_\_\_ day of August, 2002, personally appeared before me LESTER E. CANNON, who duly acknowledged before me that he is the President of L&D DEVELOPMENT, INC., and that he signed the foregoing Assignment of Declarant's Interest on the behalf of the company freely and voluntarily and for the uses and purposes stated therein.

\_\_\_\_\_  
Notary Public

STATE OF UTAH, )  
: ss.  
County of Washington. )

On this 20<sup>th</sup> day of August, 2002, personally appeared before me L. Lane Blackmore, authorized agent and duly appointed Manager of BLACKMORE/CANNON DEVELOPMENT COMPANY, L.L.C., a Utah limited liability company, and that he executed the foregoing Assignment of Declarant's Interest on behalf of said company being authorized and empowered to do so by the operating agreement, and he did duly acknowledge to me that such company executed the same for the uses and purposes stated therein.



  
\_\_\_\_\_  
Notary Public

Assignment and Declaration of Interest in Real Property to the Howard W. Hunter Law Library, Reuben Clark Law School, BYU.  
Machined and Blue Inked. May Contain errors.

OPERATING AGREEMENT  
OF  
BLACKMORE/CANNON DEVELOPMENT COMPANY, L.L.C.  
A Utah Limited Liability Company

THIS OPERATING AGREEMENT OF BLACKMORE/CANNON DEVELOPMENT COMPANY, L.L.C., a limited liability company organized under the laws of the State of Utah is made and entered into this 21 day of August, 2002, by and between the persons identified in Section 1.10 below, who are all of the Members of the limited liability company as hereinafter set forth.

ARTICLE 1  
DEFINITIONS

Certain terms used in this limited liability company Operating Agreement shall have special meanings as designated in this Article.

1.1 Act: The Utah Revised Limited Liability Company Act, as set forth in Utah Code Ann. §§ 48-2c-101 *et seq.*, 1953, as amended from time to time ("Utah Code").

1.2 Agreement or Operating Agreement: This Operating Agreement as the same may be modified or amended from time to time in accordance with Section 15.2 hereof.

1.3 Articles: The Articles of Organization of the Company which have been filed with the Division. The Articles shall be in the form attached as Exhibit "A" to this Agreement.

1.4 Capital Account: The term "Capital Account" shall refer to a Member's capital account in the Company as described and adjusted in Article 4 of this Agreement.

1.5 Code: The Internal Revenue Code of 1986, as amended, including any applicable Treasury Regulations promulgated thereunder.

1.6 Company: The Utah limited liability company to be formed hereunder, and as the same shall exist hereafter, pursuant to this Agreement and the Articles, and in accordance with the Act, the name of which is BLACKMORE/CANNON DEVELOPMENT COMPANY, L.L.C.

1.7 Division: The Division of Corporations and Commercial Code of the Utah Department of Commerce, or any other department or division of the State of Utah which hereafter may be given responsibility for administering the Act and accepting filings in behalf of the Company.

1.8 Effective Date: The date of the execution of the Articles.



1.9 Manager: One manager may be appointed by the Members from time to time pursuant to Article 7 hereof and as authorized by §§ 48-2c-110(9) of the Act. The term "Manager" shall mean any successor or additional manager designated in accordance with Article 7 hereof.

1.10 Member or Members: The term Member shall mean L. Lane Blackmore, (hereinafter "Blackmore"), L&D Development, Inc, a Utah corporation and Shadow Canyon Land Company, L.L.C., a Utah limited liability company (hereinafter "Shadow Canyon"), the entities forming the Company hereunder, or any person who is permitted to be and becomes a successor to all or any portion of the interests of any of them in the Company, or any persons who may become additional members of the Company in accordance with the provisions of Article 11 hereof and § 48-2c-703 of the Act.

1.11 Shadow Canyon Property: The term Shadow Canyon Property shall refer to any and all real property transferred to the Company from time to time by Shadow Canyon pursuant to the Development Agreement dated August 21, 2002.

1.12 Treasury Regulations: The term "Treasury Regulations" shall refer to the income tax regulations promulgated under the Code and effective as of the date hereof, as modified and supplemented or superseded after the date hereof. Where a specific Treasury Regulation is referenced, the reference shall be deemed to extend to any successor regulation of similar scope, whether or not denominated by the same section number or heading.

1.13 Member Voting: Whenever a provision of this Agreement requires a vote of the Members and no indication is given as to the required vote then that particular provision shall require the vote of Members holding a majority of the interest in the capital of the Company to make a decision. Based upon Exhibit B, it is understood that the initial voting rights will be held 50% by Blackmore and 50% by the two entities that make up Shadow Canyon.

1.14 Development Agreement: The term Development Agreement shall refer to that certain Development Agreement executed by and between Home Company, Shadow Canyon and the Company, dated August 21, 2002, attached hereto as Exhibit B and incorporated herein by this reference.

## ARTICLE 2 FORMATION OF LIMITED LIABILITY COMPANY

2.1 Creation: The Members agree to, and hereby do, form the Company pursuant to the Act, such formation to be completed on the Effective Date. The terms and provisions of this Agreement will be construed and interpreted in accordance with the terms and provisions of the Act. Upon return to the Company by the Division of a duly stamped copy of the Articles, or amended or restated Articles of Organization, the Company shall promptly deliver or mail a copy of the Articles, or said amended or restated Articles of Organization, to each Member.



2.2 Company Name: The name of the limited liability company created hereunder shall be BLACKMORE/CANNON DEVELOPMENT COMPANY, L.L.C., and the business of the Company shall be conducted under that name in the State of Utah and under such name or variations thereof as the Members deem necessary or appropriate to comply with the requirements of any other jurisdiction in which the Company may elect to do business. The Members will use their best efforts to take the action required to comply with the Act, assumed name act, fictitious name act, or similar statute in effect in each jurisdiction or political subdivision in which the Company proposes to do business.

2.3 Company Offices and Agent for Service of Process: The designated office of the Company, where the Company records as specified in the Act shall be kept, shall be 98 South State, LaVerkin, UT 84745. The address of the registered agent of the Company, where legal process may be served as designated in the Articles or amendments thereto, shall be 98 South State, LaVerkin, UT 84745, and the name of the current registered agent at that address is L. Lane Blackmore. The Members may from time to time change the registered office of the Company or the registered agent, and amend the Articles to reflect such change, and may in their discretion establish additional places of business of the Company.

2.4 Names and Addresses of Members: The full name and business street address of the Members of the Company are as follows:

Shadow Canyon Land Company, L.L.C. 595 South 180 West #113-4 Hurricane, UT 84737	L. Lane Blackmore 98 South State LaVerkin, UT 84745
---	--

L & D Development, Inc. 595 South 180 West #113-4 Hurricane, UT 84737
--

2.5 Number of Members: The Members identified herein shall constitute all of the members in the Company, and, except as expressly provided for herein, no additional Members shall be admitted to the Company. The Members shall not sell or assign their interests in the Company except as hereinafter provided in this Agreement.

2.6 Character of Business: The business purposes of the Company are (a) to acquire, own, hold for investment, develop, construct upon, manage, sell, lease, and otherwise deal with the real property that is owned by the Company; (b) to purchase, lease, sell, own and operate, and to finance the acquisition and operation of, personal property for use at or on the real property that is owned by the Company; (c) to employ or contract with contractors for the services they provide related to work on the real property that is owned by the Company; and (d) to incur indebtedness, secured or unsecured, for any of the purposes of the Company.

2.7 Period of Duration: The period of the Company's duration or term shall be ninety-nine (99) years commencing at the date and time indicated on the stamped or sealed copy of the Articles returned by the Division at the time of filing the Articles;

provided, however, the Company may be dissolved prior to the end of such term in accordance with the provisions of Article 12 below.

### ARTICLE 3

#### CAPITAL CONTRIBUTIONS

3.1 Contributions to Capital: The Members shall contribute to the Company all rights and interest in and to the Development Agreement entered into the 21 day of August, 2002, (Exhibit B).

3.2 Initial Capital Interests: The respective interests of the Members in the initial capital of the Company are as follows:

	<u>Percent Interest</u>
L. Lane Blackmore	50%
Shadow Canyon	50%

3.3 Interest on Contributions: No interest shall be paid on the initial capital accounts of the Company or on any subsequent capital contributions made by the Members.

3.4 Withdrawal of Capital: No withdrawals of the Company capital will be permitted except on the vote of all of the Members, or except in accordance with the provisions of Articles 4, 5 and 12 hereof.

3.5 Membership Interest Certificates: The Company may, but shall not be required, to issue certificates evidencing membership interest (Membership Interest Certificates) to Members of the Company. Once Membership Interest Certificates have been issued, they shall continue to be issued as necessary to reflect current membership interest held by Members. Membership Interest Certificates shall be in such form as may be approved by the Manager and shall be manually signed by the Manager. All issuances, reissuances, exchanges, and other transactions of membership interests involving Members shall be recorded in a permanent ledger as part of the books and records of the Company.

### ARTICLE 4

#### CAPITAL ACCOUNTS; DRAWING

#### ACCOUNTS

4.1 Capital Accounts: An individual capital account shall be maintained for each Member. The interest of each Member in the capital of the Company shall consist of his or her share of the capital of the Company as shown in Article 3 hereof, increased by (a) his or her additional contributions to capital and (b) his or her share of Company profits transferred to capital, and decreased by (i) distributions to him or her in reduction of his or her Company capital and (ii) his or her share of Company losses, if transferred from his or her drawing account. The capital account of Shadow Canyon shall be allocated sufficient profit such that Shadow Canyon shall receive a total distribution of

cash from the Company to equal Seven Hundred Thousand Dollars (\$700,000.00) consistent with the Development Agreement.

4.2 *Drawing Accounts*: Separate drawing accounts shall be maintained for each Member. All withdrawals made by a Member shall be charged to his or her drawing account. Each Member's share of profits and losses, as defined and determined in accordance with and by the Development Agreement, shall be credited or charged to his or her drawing account. Unless a balance in a Member's drawing account in his or her favor (a credit balance) is transferred to his or her capital account as hereinafter provided, it shall constitute a liability of the Company to that Member payable as provided in paragraph 4.3 of this Article 4, without interest; it shall not constitute a part of his or her capital account or his or her interest in the capital of the Company.

4.3 *Transfers from Drawing Accounts to Capital Accounts*: The Managers may transfer all or part of any credit balances or debit balances in the Members' drawing accounts to the Members' capital accounts at any time, provided the transfers are made proportionately to each Member's interest in capital unless otherwise agreed in writing by all the Members.

4.4 *Allocation of Losses in Excess of Capital Accounts*: No allocation shall be made to a Member to the extent that the allocation causes or increases a deficit balance in the capital account of that Member at the end of the taxable year of the Company to which the allocation relates after the capital account has been reduced as required by Treasury Regulation § 1.704-1(b)(2)(ii)(d).

4.5 *Qualified Income Offset*: In the event any Member unexpectedly receives an adjustment, allocation, or distribution that results in a deficit balance in such Member's capital account, there shall be allocated to such Member items of Company income and gain in an amount and manner sufficient to eliminate such deficit balance as quickly as possible in accordance with Treasury Regulation § 1.704-1(b)(2)(ii)(d).

4.6 *Return of Capital*: Each Member shall look solely to the Company assets for the return of his or her contributions to Company capital, and if the Company assets are insufficient to return such contributions, he or she shall have no recourse against any other Member for that purpose. There is no right given the Members to receive upon liquidation of the Company any property other than cash in return for his or her contributions. The provisions of Article 12 hereof shall govern the procedure and computation of amounts available for distribution upon dissolution of the Company. Nothing in this paragraph is intended to modify the priority returns provided in the Development Agreement and elsewhere in this Agreement.

4.7 *Compliance with Rules Relating to Partnership Taxation*: Although the Company is a limited liability company, it is contemplated that for Federal Income Tax purposes it will be treated as a partnership and its Members will be treated as partners. Accordingly, the capital accounts of the Members (including the allocation of profits and losses, etc.) shall be established, maintained and adjusted in accordance with the

requirements of Treasury Regulations § 1.704-1(b)(2)(iv) and any successor regulations, as the same may be determined by the Internal Revenue Service. All particular accounting requirements of those regulations necessary to have the allocations of the Agreement recognized shall be deemed incorporated by this reference.

4.8 Allocations of Losses: The net losses of the Company shall be charged to the Members at the end of each fiscal year of the Company in the ratios set forth in paragraph 3.2 of Article 3 above, or according to the Development Agreement, or in the adjusted ratios if an adjustment in the proportionate shares of a Member or Members has been made pursuant to this Article.

4.9 Allocation of Profits: Profits from the Company shall be allocated consistent with the Development Agreement.

#### ARTICLE 5 DISTRIBUTIONS

Distributions of Company assets may be made in cash or in kind as the Members of the Company shall agree.

#### ARTICLE 6 ACCOUNTING FOR THE

#### COMPANY

6.1 Accounting Methods; Fiscal Year: Profits and losses of the Company shall be determined on a cash basis in accordance with generally accepted accounting principles and shall include gains or losses from the sale of Company assets. The Company shall also report for income tax purposes on a cash basis. The fiscal year of the Company, for both accounting and tax reporting purposes, shall be the calendar year.

6.2 Review of Financial Statements: Not less than quarterly, and as soon as possible after completion of the tax returns, a meeting of the Members shall be held. The tax returns and any financial statements shall be reviewed and discussed at that meeting. On written request, any Member shall be entitled to copies of tax returns and any financial statements prepared for the Company. In addition, at the quarterly meetings, the Manager shall update the Members on the status of the development project and provide such development documentation and accounting as may be reasonably requested by the Members. The Company shall invite Shadow Canyon to a quarterly meeting for purposes of discussing and updating Shadow Canyon on the status of the project. Shadow Canyon's agent, V. Lowry Snow, or such other designee as Shadow Canyon may appoint are hereby authorized to obtain documents from the Company and attend quarterly meetings on behalf of Shadow Canyon.

6.3 Records: The Company shall keep at its principal place of business the records required to be kept there pursuant to Section 48-2c-112 of the Utah Code. Said records are subject to inspection and copying at the reasonable request and at the expense

of any Member during ordinary business hours.

6.4 Additional Records and Meeting: In addition to the foregoing, Throughout the development and subdivision of the Shadow Canyon Property, the Company shall provide Shadow Canyon with copies of any and all master plan documents and shall provide any and all information as may be reasonably necessary for Shadow Canyon to be informed as to the development of the Shadow Canyon Property. In addition to keeping all records and filing appropriate tax returns as required by law, the Manager of the Company shall provide quarter annual accountings to Shadow Canyon.

## ARTICLE 7

### MANAGEMENT OF COMPANY

7.1 Management by Manager: Management of the Company shall be vested in a Manager who need not be a Member. The Manager of the Company is appointed in accordance with the provisions of this Article 7 below. The Manager of the Company shall serve until such time as new Managers are appointed, or until their death or resignation.

7.2 Authority of Managers: The Managers may exercise all the powers of the Company whether derived from law, the Articles of Organization, the Development Agreement or this Agreement (except such powers as are by statute, by the Articles of Organization, by the Development Agreement or by this Agreement vested solely in the Members), and shall have the right, power and authority to do on behalf of the Company all things which are necessary or desirable to carry out the business purpose of the Company, including, but not limited to, the right, power and authority: to sell, exchange, or grant an option for the sale or exchange of all or any portion of the property of the Company; to invest and reinvest any available funds; to incur all reasonable expenditures; to employ and dismiss from employment any and all employees, agents, independent contractors, attorneys, and accountants; to lease all or any portion of any property for any purpose and without limit as to the term thereof, provided such term does not exceed the term of the Company as set forth in the Articles and in Section 2.7 above; to prepay in whole or in part, refinance, modify, or extend any indebtedness; to negotiate any and all contracts for development and subdivision of Company property, including but not limited to special improvement districts, economic development areas, the installation and construction of infrastructure and roadways; to do any and all of the foregoing at such price, rental or amount, for cash, securities, or other property and upon such terms as the Manager deems proper; to place record title to property in the name of the Company; to adjust, compromise, settle or refer to arbitration any claim against or in favor of the Company or any nominee, and to institute, prosecute, and defend any legal proceeding relating to the business or property of the Company; to delegate all or any portion of the powers granted hereunder to one or more attorneys-in-fact; and to execute, acknowledge and deliver any and all instruments to effectuate any and all of the foregoing. Notwithstanding the foregoing, the Manager shall keep the Shadow Canyon Property lien free of outside liens other than the current obligations to US Bank and State Bank of Southern Utah.



7.3 Restrictions on Managers: No Manager or Managers shall, without the written consent or written ratification of the specific act by all the Members:

(a) Do any act in contravention of law, the Articles of Organization, or this Agreement.

(b) Do any act to make it impossible to carry on the ordinary business of the Company.

(c) Confess a judgment against the Company.

(d) Possess Company property in their own name or assign their rights in specific Company property for other than a Company purpose.

(e) Admit a person as a Member except as otherwise provided in this Agreement.

(f) Continue the business with Company property after its bankruptcy, dissolution, cancellation or other cessation to exist.

(g) Sell any portion of the Company property in a bulk sale transaction or at a price less than fair market value.

(h) Sell any portion of the Company property to a person or entity that is related or in part owned by the Manager, including any relatives of the Manager or Members at less than fair market value.

(i) Lien, encumber or pledge Company property as security for a debt, except as may be authorized by the Development Agreement.

7.4 Number, Term and Qualifications: The Company shall have one Manager. The Manager of the Company shall be L. Lane Blackmore.

7.5 Appointment and Removal: The Manager may not be removed, with or without cause, without the unanimous written request or approval of all of the Members, including Members who are Managers.

7.6 Responsibilities: Each Member and Manager shall, in all events, account to the Company and to the Members for any benefit, and hold, as trustee for the Company and the Members, any profits derived by a Member or Manager from any transaction connected with the formation, conduct or liquidation and winding up of the Company, or from any use by a Member or Manager of Company property, and such duty extends to the personal representatives of any deceased Member or Manager. A Member or Manager shall not be liable or accountable in damages or otherwise to the Company or the Members for any action taken or failure to act on behalf of the Company unless the act or omission constitutes gross negligence or willful misconduct.

In addition, the Manager shall be responsible for managing all aspects of the development project including but not limited to the following: (a) Be responsible for actually carrying out the subdivision and development of all of the Shadow Canyon Property subject to this Development Agreement and the Operating Agreement; (b) Be responsible for obtaining all necessary permits and approvals and for compliance with all applicable ordinances and statutes; (c) The Manager shall use good faith best efforts to develop, subdivide and construct residences on the Shadow Canyon Property to increase and maximize, as economically feasible, the value of the Shadow Canyon Property.

7.7 Bank Accounts: The Company shall maintain checking or other accounts in such bank or banks as the Managers shall determine and all funds received by the Company shall be deposited therein and withdrawn therefrom under such general or specific authority as the Members shall grant to the Managers.

7.8 Time and Attention Required of Managers: The parties understand that the Managers have other business activities that take a substantial portion of their time and attention. Accordingly, the Managers are required to devote to the business of the Company only the time and attention that they shall deem necessary in order to fulfill their responsibilities hereunder.

## ARTICLE 8 COMPENSATION TO MANAGERS

The Manager of the Company shall not be entitled to additional compensation for its services hereunder because the Manager received its ownership interest in the Company based upon the Manager's agreement to perform services as set forth herein and in the Development Agreement between the initial Members hereto.

## ARTICLE 9 CONTINUATION OF COMPANY

### UPON THE DEATH,

### RESIGNATION, EXPULSION, OR DISSOLUTION OF A MEMBER

9.1 Termination of Member: In the event a Member dies, is expelled, becomes bankrupt, or dissolves, or the occurrence of any other event which terminates the continued membership of a Member (said Member being hereinafter sometimes referred to as a "terminating Member"), the Company shall continue its operations and no dissolution of the Company shall take place until the Company is dissolved in accordance with the provisions of Article 12 below. If under the Act the loss of the Member is an event which requires that an amendment regarding the Company's Articles be filed with the Division or some other authority, or that some other action be taken by the Company, then within the time provided for under the Act for the filing of such an amendment or taking such other action, the remaining Members shall cause such an amendment to be properly filed or such other action to be taken.

The Company, or if the Company determines that it is not able or willing to do so,

then the remaining Members, in that order, shall have the right, at their election, to purchase the terminating Member's interest in the Company, upon such terms and conditions as they and the terminating Member, or the legal representative or representatives of the terminating Member, if he or she is deceased, may agree. If the parties cannot agree upon the value of the terminating Member's interest for such a sale, then the terminating Member or his authorized representative shall appoint an appraiser and the remaining Members shall appoint an appraiser, and the appraisers so appointed shall determine the fair market value of the interest being acquired. If the appraisers are not able to agree on the fair market value, then they shall appoint a third appraiser, and the decision of a majority of the three (3) appraisers shall be binding upon all interested parties. The purchasing parties and the terminating Member or his estate, as appropriate, shall share equally the costs of the appraisal.

If the interest of the terminating Member is not purchased by the Company or the remaining Members as provided for above, then the interest of the terminating Member shall be treated as a permissible transfer, under the provisions of Article 10 below of the terminating Member's interest to the person holding the interest immediately after the event resulting in the termination of the Member's interest; provided, however, that the holder of the terminating Member's interest at that time shall only become a substitute Member if the procedures established in this Agreement for substituting that interest holder as a Member have been satisfied in full.

## ARTICLE 10

### TRANSFER OF COMPANY

#### INTEREST

10.1 Transfers by Members: A Member may sell, assign or transfer his or her interest in the Company to one of the other Members, provided the Manager has first given written consent to such sale, assignment or transfer. A Member may not sell, assign or otherwise transfer all or any part of his or her interest in the Company to a person who is not already a Member of the Company, except on the following conditions:

(a) The interest shall first be offered in writing to the Company at the price and on the terms on which it is proposed to be sold ("the price" and "the terms"), and the Company shall have a period of thirty (30) days to accept or reject the offer at the price and on the terms.

(b) If the offer is rejected by the Company, the interest of the Member shall next be offered in writing to the other Members of the Company for a period of twenty (20) days next following expiration of the thirty (30) day period. The offer to the other Members shall be prorated in accordance with the ratio of the capital interests of each Member to the total capital interests of all the Members other than the one making the offer, on the terms and at prices (as to each offeree) determined by prorating the price. If not all the remaining interest is disposed of under the apportionment, each Member desiring to purchase a portion of the remaining interest shall be entitled to purchase the portion that remains undisposed of in the proportion that his interest in the capital of the Company bears to the



interest in the capital of the Company of all other Members desiring to purchase portions of the remaining interest.

(c) If the Company or the Members do not purchase the interest offered for sale, then the Member may sell his or her interest to a third person or third persons during the (3) month period following the expiration of the twenty (20) day period referred to in paragraph (b) of this Section 10.1, but at a price not lower than the price, and on terms no more favorable than the terms offered to the Company and the Members as provided above. After the expiration of the three (3) month period, the interest shall not be sold without first being re-offered to the Company and the remaining Members in accordance with subparagraphs (a) and (b) above.

10.2 Transfer Provisions Binding: Any sale, assignment or transfer or purported sale, assignment or transfer of any interest in the Company, whether voluntary or involuntary, shall be null and void unless made strictly in accordance with the provisions of this Article. Any transferee who has properly acquired the interest of a Member of the Company shall be subject to all the terms, conditions, restrictions, and obligations of this Agreement, including the provisions of this Article. A transferee who has properly acquired the interest of a Member of the Company may become a Member of the Company only if the transferee is admitted as a Member in accordance with the provisions of this Agreement. If such transferee is not so admitted as a Member of the Company, then such transferee shall have no right to participate in the management of the business and affairs of the Company, to vote on any matter on which Members are eligible to vote, or to become a Member; and the only rights to which such transferee shall be entitled are the share of profits or other compensation by way of income and the return of contributions to which the transferor was entitled.

#### ARTICLE 11 ADMISSION OF NEW MEMBERS

Additional Members may be admitted to the Company with prior written consent of all of the Members. In the event that a new Member makes a contribution to the Company in return for admission into the Company, the share of such new Member and all other Members in the capital and the profits and losses of the Company shall be in such proportion as may be agreed upon between all of the Members. In the event new Members are admitted to the Company, the Members may file with the Division an amendment to the Articles, as may be required by law.

#### ARTICLE 12 DISSOLUTION, WINDING UP AND CANCELLATION

12.1 Events Causing Dissolution: The Company shall be dissolved and its affairs shall be wound up when any one or more of the following occurs:

(a) The term of the Company expires.

- (b) There are no Members.
- (c) All Members vote to dissolve the Company.
- (d) The Company is not the successor company in the merger or consolidation of two or more companies.
- (e) Administrative dissolution under § 48-2c-1207, subject to right or reinstatement under § 48-2c-1208.
- (f) Entry of a decree of judicial dissolution under § 48-2c-1213.

12.2 Method of Winding Up and Cancellation: Upon the occurrence of any event causing dissolution as provided in paragraph 12.1 above, the Company shall immediately commence to liquidate and wind up its affairs as set forth in the Act except that any distributions to Members as a return of capital or distribution of profits shall be allocated among the Members on the percentages as though a sale had occurred under Article 4.9.1 above, or a bulk sale had occurred in accordance with Article 4.9.2 above, as the case may be. When all debts, liabilities, and obligations of the Company have been paid or discharged, or adequate provision has been made to do so, and all of the remaining property and assets of the Company have been distributed to the Members, Articles of Dissolution shall be executed and filed with the Division as required by Section 48-2c-1204 of the Act.

## ARTICLE 13

### ENCUMBRANCES

Except as provided in Article 10 hereof, no Member shall in any way encumber, pledge, hypothecate, or otherwise use his or her Company interest as collateral or security for an obligation, without the prior written consent of all the Members.

## ARTICLE 14

### INDEMNITY

The Company shall indemnify and save harmless the Manager from any personal loss or damage incurred by such Manager by reason of any act performed by such Manager for and on behalf of the Company and in furtherance of its interests.

## ARTICLE 15

### MISCELLANEOUS

15.1 Notices: Any notices to or between the Members shall be in writing and shall be sent registered mail, return receipt requested, to the address of each Member as the same appears in the books and records of the Company. Notice shall be deemed to be received on the earlier of the date actually received or the third day after being deposited

in the United States mail as above described.

15.2 Entire Agreement; Amendments: This Agreement and the Development Agreement shall constitute the entire agreement between the parties, and there are no other or further agreements outstanding not specifically mentioned herein; provided, however, that this Agreement may be amended, altered, supplemented or modified by the written agreement of all the Members.

15.3 Invalidity: If any part of this Agreement is or shall be invalid or unenforceable for any reason, the same shall be deemed severable from the remainder hereof, and shall in no way affect or impair the validity of this Agreement, or any other portion thereof.

15.4 Gender: The feminine includes the masculine and the neuter, the singular includes the plural, and vice versa, as the context may require.

15.5 Execution of Further Instruments: The Members shall cooperate with each other in good faith to accomplish the objectives and purposes hereof and to that end from time to time, they shall make, execute and deliver such other and further instruments as may be necessary or convenient in the fulfillment of this Agreement.

15.6 Headings: The headings in this Agreement are included solely for convenience of reference and shall not be construed as limiting or in any other way modifying the text of the Agreement.

15.7 Agreement to be Binding: This Agreement shall be governed by the laws of the State of Utah and shall inure to the benefit of and shall be binding upon each of the Members and their respective personal representatives, executors, heirs, successors and assigns (including successors and assigns by operation of law and involuntary event, as well as by voluntary act).

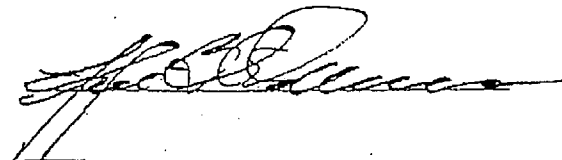
15.8 Counterparts: This Agreement may be executed in counterparts, each of which shall be an original and all of which together shall constitute one instrument.

15.9 Provisions Contrary to Act; Severability: To the extent any provision of this Agreement varies or contradicts the general provisions of the Act, each Member hereby consents to such variation or contradiction. If any provision of this Agreement or the application of such provision to any person or circumstance shall be held invalid, the remainder of this Agreement, or the application of such provision to persons or circumstances other than those to which it is held invalid, shall not be affected thereby.

15.10 Conflicting Provisions: The terms of the Development Agreement shall control to the extent the provisions of this Agreement conflict with provisions of the Development Agreement. The terms and conditions contained in the Development Agreement are incorporated herein by this reference.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date first above written. The undersigned hereby acknowledge that they have read this Agreement.

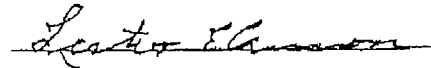
L & D Development, Inc.



L. Lane Blackmore

Shadow Canyon Land Company, LLC

LLC

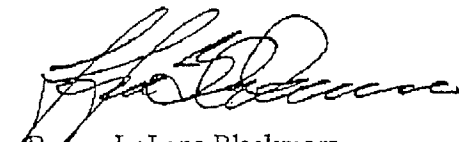


By: Lester E. Cannon  
Its: President

Blackmore/Cannon  
Development Company,



By: Lester E. Cannon  
Its:



By: L. Lane Blackmore  
Manager Its: Manager

EXHIBIT B

To Operating Agreement of  
BLACKMORE/CANNON DEVELOPMENT COMPANY, L.L.C.

(a Utah Limited Liability Company).

Attach a signed copy of the Development Agreement as Exhibit B.

## Tab 6

**FILED**  
JUL 10 2008  
FIFTH DISTRICT COURT  
WASHINGTON COUNTY

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**IN THE FIFTH JUDICIAL DISTRICT COURT  
IN AND FOR WASHINGTON COUNTY, STATE OF UTAH**

---

L. LANE BLACKMORE, et al.,  
Plaintiffs,

vs.

LESTER E. CANNON, et al.,  
Defendants.

**MEMORANDUM DECISION AND  
ORDER ON PENDING MOTIONS**

Civil No. 030501322

Judge James L. Shumate

Before the Court are competing motions for summary judgment, as well as Plaintiffs' Motion to Strike Defendants' Response to Statement of Disputed Facts, Plaintiffs' Motion to Amend, and Plaintiffs' Motion in Limine. A hearing was held on the pending motions on May 27, 2008, at which the Court heard the arguments of counsel for both sides; at the hearing the Court also received testimony from Plaintiffs' expert witness, Professor David A. Thomas, over Defendants' objection. Having the benefit of the arguments of counsel at the hearing, and having reviewed the motions, memoranda, and exhibits, the Court rules as follows:

**1. Summary Judgment**

Plaintiffs' Cross Motion seeks summary judgment specifically on "the issue of whether Defendants ... breached material terms of the Development Agreement." Although not so expressly limited, Defendants' motion is also addressed to the question of whether Plaintiffs' conduct constituted a material breach of contract. The Court's analysis on summary judgment is therefore

limited to the issue of breach of contract, leaving for later resolution other claims and the propriety of the remedies sought.

Under Rule 56(c), “The judgment sought shall be rendered 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.” The Court therefore recites the facts it deems to be undisputed.

**a. Factual Background**

On August 21, 2002, Plaintiffs, Blackmore and BCDC, entered into a written development agreement with Defendants and Shadow Canyon Land Company to develop a residential subdivision called Shadow Canyon. An Operating Agreement for BCDC was also executed that day, and the Articles of Incorporation for BCDC and an Assignment of Declarant’s Interests had been executed previously. The Shadow Canyon property, already partially developed, was security for debts owed to US Bank and State Bank of Southern Utah, and the obligations to the banks were past due; taxes on the property were also owed. One portion of the agreement between the parties stated,

In exchange for his fifty percent (50%) Member interest in BCDC, Blackmore shall do the following:

(1) Bring current accrued interest owed to US Bank in the approximate amount of Seventy Thousand Dollars (\$70,000); (2) Pay current all property taxes owed on the Shadow Canyon Property[,] which sum is approximately Sixty-three Thousand Dollars (\$63,000); (3) Take such reasonable steps as necessary to obtain an extension on the US Bank loan; and (4) Pay to Shadow Canyon the sum of Fifty Thousand Dollars (\$50,000) at closing.

Development Agreement at ¶ 2 [capitalization as in original]. The Development Agreement does not define the term “closing,” nor does it specify a contractual timeline by which the property taxes

were to be paid. As detailed in the previous hearings, however, the taxes were due on November 30, 2002 and would have gone to a tax sale in March of 2003.

Moreover, under paragraph 3 of the Development Agreement, “as additional consideration to induce Shadow Canyon to enter this agreement,” Blackmore was to, among other duties, “[m]arket and sell the three existing spec homes and all future lot and home sales,” and to “[b]uild, at its [sic] own expense, three (3) new spec homes for the standing inventory within the first six (6) months following the transfer of the Shadow Canyon Property to BCDC.” As a manager, Blackmore was conferred certain powers including “the authority to convey and borrow,” *id.* at ¶ 6.2; to seek refinancing of the bank loans with other banks or private lenders “on similar terms,” *id.*; and to work with the banks on Shadow Canyon’s behalf “for the purpose of extending, paying off, or refinancing the loans,” *id.* at ¶ 9.

In return, the Development Agreement called for a transfer of property to BCDC: “In exchange for its fifty percent (50%) Member interest in BCDC, Shadow Canyon shall transfer the Shadow Canyon Property to BCDC by good and sufficient Special Warranty Deed.” *Id.* at ¶ 5. The Assignment of Declarant’s Interest executed with the Development Agreement recited that the transfer by Special Warranty Deed to BCDC had already taken place. The August 14, 2002 letter to Mr. Blackmore from Thomas J. Bayles of Snow, Jensen & Reece stated that the deeds would be transferred “as detailed in the Development Agreement.” In fact, Shadow Canyon never transferred the deeds to the property to Plaintiff BCDC as required by the Development Agreement and as recited in the Assignment. Affidavit of Lane Blackmore at ¶ 9.

Plaintiffs did not pay current the property taxes by November 30, 2002, when they were due, nor did plaintiffs pay the taxes thereafter. Neither has Blackmore made the \$50,000 payment



required, under the vague terminology of the Development Agreement, “at closing.” Blackmore, however, did perform such duties as resolving issues with the homeowners’ association; marketing and selling the three existing spec homes, and in that process paying off the debt to State Bank of Southern Utah; paying utilities in the common area through December of 2002; and nearly completing construction of two homes on the property. Affidavit of Lane Blackmore at ¶¶ 15-18. Blackmore contends that these two houses were to be converted to liquid assets after the end of September 2002 to meet his duties under the Development and Operating Agreements. *Id.* at ¶¶ 4-6.

Defendants engaged in negotiations to sell the property to another party before the November 30, 2002 tax due date. See January 11, 2005 Testimony of Frank Lindhardt at 154:17-24. The Shadow Canyon property was sold in early 2003, the conveyance being recorded on February 3 of that year.

#### **b. Analysis**

Each side claims the other first breached the contract in a material way and thus its performance is excused. “[U]nder the ‘first breach’ rule ‘a party first guilty of a substantial or material breach of contract cannot complain if the other party thereafter refuses to perform.’ ‘He can neither insist on performance by the other party nor maintain an action against the other party for a subsequent failure to perform.’” *CCD, L.C. v. Millsap*, 2005 UT 42, ¶ 29 (citation omitted). See also *Bonneville Distrib. Co. v. Green River Dev. Assocs.*, 2007 UT App 175, ¶ 32. (“The law is well settled that a material breach by one party to a contract excuses further performance by the nonbreaching party”)(citations omitted). Of course, not every breach is serious enough to amount to a material breach, but “certainly a failure of performance which ‘defeats the very object of the contract’ or ‘[is] of such prime importance that the contract would not have been made if default in

that particular had been contemplated' is a material failure." *Coalville City v. Lundgren*, 930 P.2d 1206, 1210 (Utah Ct. App. 1997)(citations omitted.)

The Court concludes that the Defendants' obligation to convey the property through special warranty deed was a matter of "prime importance" and a failure of performance which went to "the very object" of the contract. The conveyance was certainly the most significant duty required of Shadow Canyon, the very essence of the performance required of it under the contract. No prudent businessperson would undertake to pay large tax liabilities or other debts on property, or to make substantial improvements on it, knowing that title had not in fact been conveyed. Defendants argue that a breach by Plaintiffs occurred by November 30, 2002, when delinquent property taxes were not paid and a tax lien arose, correctly noting that at the April 12, 2005 hearing, the Court stated that "the tax due date, November 30<sup>th</sup>, was an extremely important date with respect to this transaction" (11:19-20). At no time, however, did the Court go so far as to make a finding of fact that performance was required by Plaintiffs as of that date. See 11:14-25. The Court still deems the November date to have been a very important one, but Defendants' material breach, its failure to convey the property as called for in the development agreement, predated that due date and any associated breach by Plaintiffs and excused subsequent performance by the latter. Moreover, no identifiable "closing" occurred under the terms of the Development Agreement that would have triggered Blackmore's duty to make the \$50,000 payment. Plaintiffs are therefore entitled to summary judgment on the issue of whether Defendants breached material terms of the development agreement. Defendants' motion for summary judgment will be denied. Other claims in the complaint and the extent of damages remain for resolution. Obviously the Court's determination is not dispositive of any new issues raised in the amended complaint, discussed below.

## **2. Motion to Amend**

Plaintiffs seek to amend their complaint to add certain theories of recovery and new defendants. The Court had already granted Plaintiffs leave to file “a final and third” amended complaint at the April 20, 2006 hearing, but for reasons not clear to the Court, they did not immediately do so. The Court grants Plaintiff’s motion for the reasons articulated at the previous hearing, finding that the intervening amount of time has not appreciably changed its earlier analysis of the prejudice an amendment will cause Defendants; however, in so doing, the Court reiterates its statement that it will be the third and *final* amended complaint.

## **3. Other Motions**

Plaintiffs’ Motion in Limine and Motion to Strike Defendants’ Response to Statement of Disputed Facts are rendered moot by Court’s resolution of the motions for summary judgment and are therefore denied.

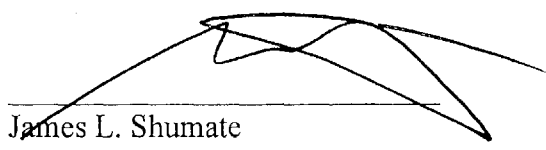
## **ORDER**

Based on the foregoing, it is therefore ordered:

- A. Plaintiffs’ Motion for Summary Judgment is granted and Defendants’ Motion for Summary Judgment is denied;
- B. Plaintiffs’ Motion to Amend is granted;
- C. Plaintiffs’ Motion in Limine and Motion to Strike are denied as moot;

D. The parties are to arrange and attempt in good faith to mediate the issues remaining in this matter.

Dated this 10 day of July, 2008.



James L. Shumate  
Fifth District Court Judge

CERTIFICATE OF MAILING/DELIVERY

I hereby certify that on this 10 day of July, 2008, I provided a true and correct copy of the foregoing MEMORANDUM DECISION AND ORDER to each of the parties/attorneys named below by placing a copy in such attorney's file in the Clerk's Office at the Fifth District Courthouse in St. George, Utah and/or by placing a copy in the United States Mail, first-class postage prepaid, and addressed as follows:

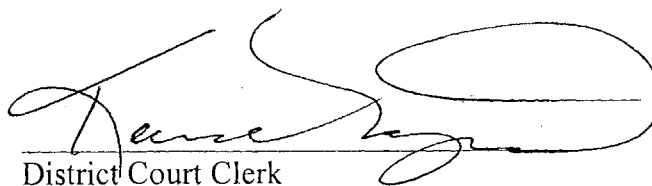
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Jerome Romero  
Jeffrey Shields  
JONES WALDO HOLBROOK &  
MCDONOUGH  
170 South Main Street, Suite 1500  
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District Court Clerk

Tab 7

FILED  
CLERK OF DISTRICT COURT  
2000 SEP 11 PM 4:38  
WASHINGTON COUNTY

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*Attorneys for Shadow Glen 420, Inc.; Gemstone Homes, Inc.;  
Gemstone Properties, Inc.; Frank Lindhardt; and Eugene Buckley*

IN THE FIFTH JUDICIAL DISTRICT COURT IN AND FOR  
WASHINGTON COUNTY, STATE OF UTAH

L. LANE BLACKMORE, et al.,

Plaintiffs,

v.

LESTER E. CANNON, et al.,

Defendants.

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
MOTION FOR RECONSIDERATION**

Civil No. 030501322

Honorable James L. Shumate

Defendants Shadow Glen 420, Inc., Gemstone Homes, Inc., Frank Lindhardt, and Eugene Buckley (collectively “Shadow Glen”), by and through counsel of record, hereby submit this memorandum of points and authorities in support of their motion for reconsideration. In support of their motion, Shadow Glen represents as follows:

## FACTUAL BACKGROUND

1. On August 21, 2002, plaintiffs L. Lane Blackmore ("Blackmore") and Blackmore Cannon Development Company ("BCDC") entered into a written "Development Agreement" with defendants L and D Development, Inc., and Shadow Canyon Land Company, LLC (collectively "Shadow Canyon"). Memorandum Decision, p. 2.

2. Under the terms of the Development Agreement, Blackmore was obligated, among other things, to "pay to Shadow Canyon the sum of Fifty Thousand Dollars (\$50,000.00) at closing." Memorandum Decision, p. 2.

3. Blackmore did not make the \$50,000 payment required under the Development Agreement. Memorandum Decision, pp. 3-4. Nor has Blackmore ever tendered the \$50,000 payment. Transcript of May 27, 2008 Hearing ("Transcript") pp. 35-36. A copy of the relevant portions of the Transcript is attached hereto as Exhibit A.

4. In support of its motion for summary judgment, Blackmore offered the opinion of its proposed expert, David Thomas. In his written opinion, Thomas identified the existence of a material ambiguity, and then proceeded to offer his own personal opinion as to how to resolve that ambiguity. Specifically, Thomas said as follows:

The payment of \$50,000 from Blackmore to Shadow Canyon was to be made "at closing." "Closing" is not defined in any of the agreements. It could refer to closings associated with extensions or refinancing of bank loans.

Rule 26(a)(2)(B) Written Report From Plaintiffs' Expert Witness (the "Thomas Report"), p. 4.

5. Likewise, when called to testify, Thomas acknowledged the ambiguity of the term at closing:

Q: (Mr. Winward) And, in the last sentence, it refers to a closing; doesn't it?



A: (Thomas) It refers to a closing with respect to item four is one way you could look at it. But I just don't know. Its ambiguous.

Transcript p. 30.

6. In his opinion, Thomas did not rule out the possibility that Blackmore was obligated to pay \$50,000 at the closing of the transfer of the subject property. Instead, he merely suggested that the Development Agreement could be read as to require the payment on the "closing" of the US Bank refinance. "The earlier reference to closing in paragraph 2 is quite a bit more open and **could** refer to the extension or refinancing closing." Transcript p. 42 (emphasis added).

7. In its memorandum decision, the Court relied heavily on the Thomas Report, first noting that the "[t]he Development Agreement does not define the term 'closing,' . . ." and then finding that "no identifiable 'closing' occurred under the terms of the Development Agreement that would have triggered Blackmore's duty to make the \$50,000 payment." Memorandum Decision, pp. 2, 5.

8. The Court found, as a matter of law, that Shadow Canyon's obligation to convey the subject property was a matter of "prime importance" and that defendants' failure to transfer the property was a default under the Development Agreement notwithstanding the fact that Blackmore neither paid, nor tendered payment of the \$50,000.

## ARGUMENT

### **I. THE DEVELOPMENT AGREEMENT IS, AT BEST, AMBIGUOUS**

Under the express terms of the Development Agreement, Blackmore was required to pay Shadow Canyon the sum of \$50,000 at closing. As the court noted, the Development Agreement, however, does not specify the intended closing event. It is important to note that the term "closing" in and of itself is not an ambiguous term. In the context of a real estate

transaction, closing occurs when money passes to the seller simultaneously with the transfer of title to the buyer. Thus, the phrase “at closing” is ambiguous only because the Development Agreement does not specify **which** “closing” the parties contemplated.

Plaintiffs’ designated expert noted that the term “closing” was ambiguous, and offered one possible example, the closing of US Bank loan extension. Thomas Report, p. 4. Thomas did not point out that the term “closing” appeared elsewhere in the Development Agreement, specifically at ¶ 5, and again ¶ 5.2, both in reference to Shadow Canyon’s obligation to transfer the subject property to BCDC. Under examination, however, Thomas acknowledged that the Development Agreement contemplated that the underlying property would be transferred at a closing.

Q: (Winward) The reasonable reading of that, the parties contemplated some type of closing; will you read that in that fashion?

A: (Thomas) That would be the suggestion of that, yes.

Transcript p. 32.

Thomas’ acknowledgment of this plain meaning of the Development Agreement contradicted his earlier testimony when he opined that “[t]here appears to be an assumption in this case that the title itself would have been conveyed without a closing.” Transcript, p. 23. This “assumption,” however, was not based on any language in the underlying Development Agreement, but because the Development Agreement had, at p. 3 a proposed, but unrecorded “Assignment of Declarant’s Interest (“Assignment”),” which in a recital noted that the property had been recorded. This Assignment, however, did not include the recording information, was not itself recorded, and did not include the legal description to the subject property. Under examination, Thomas undermined his “assumption” when he acknowledged that the parties could have contemplated recording the Assignment at the time of closing. Transcript, p. 29.

Movants assert that the most reasonable, if not the only plausible interpretation of the Development Agreement, is that Blackmore's obligation to pay the \$50,000 due to Shadow Canyon was to occur at the closing of the transfer of the subject property from Shadow Canyon to BCDC. Thus, Shadow Canyon's obligation to convey title to the property was expressly tied to Blackmore's obligation to pay Shadow Canyon \$50,000.

The term "at closing" only becomes ambiguous if the Court accepts Thomas' assertion that the term "at closing" could have referred the extension of the US Bank loan. While this interpretation is possible, it is not by any stretch plausible. First, in the Agreement, unlike the property transfer, the parties did not refer to the US Bank loan extension as a "closing," but merely as a "loan extension." See ¶¶ 2, and 9.1. While a new loan requires both a transfer of funds as well as title for collateral purposes, and is usually occurs at closing, a closing is not required for a loan extension where the parties are simply signing the same legal document. Second, since the property was to be assigned to BCDC subject to the US Bank loan, see ¶ 5, neither Shadow Canyon nor Blackmore would be a party to the loan extension. Thus, there is no plausible reason for the parties to tie Blackmore's obligation to pay Shadow Canyon \$50,000, to BCDC's refinance of its assumed obligation to US Bank. Third, this interpretation could lead to an absurd result. In the event BCDC was unable to secure a loan extension, and US Bank foreclosed, Blackmore would not have the obligation to pay \$50,000 as the "closing event" never occurred. It is not reasonable to interpret the contract to treat Shadow Canyon's right to receive the \$50,000 payment for transferring the property to BCDC as a mere contingency.

Accordingly, the term "at closing" referred to the closing of the transfer of the property from Shadow Canyon to BCDC, as a matter of law or, alternatively, the term is ambiguous and the meaning of which becomes a question of fact. Despite this "ambiguity," and

notwithstanding the fact that Blackmore failed to pay or tender the \$50,00 payment, the court held, as a matter of law, that Shadow Canyon was in default of its obligation to convey title to BCDC. The court did so, without any attempt to discern what the parties intended by the use of that term at closing. Memorandum Decision p. 4. Instead, the court merely noted that no discernable closing event occurred which would have triggered Blackmore's duty to pay the \$50,000.

## **II. CANNON'S OBLIGATION TO PAY \$50,000 WAS OF EQUAL IMPORTANCE TO SHADOW CANYON'S OBLIGATION TO TRANSFER PROPERTY TO BCDC**

The timing of Blackmore's obligation to pay the \$50,000 is a material issue of fact. If the jury were to conclude that "at closing" refers to the date the property is to transfer to BCDC, Shadow Canyon's obligation to transfer the property was an obligation that was to occur simultaneously with Blackmore's obligation to pay \$50,000. In that case, unless and until Blackmore was ready, willing, and able to pay the required \$50,000, Shadow Canyon could not be found to have been in breach of the Development Agreement.

It is both Utah law, and black letter law that in a real estate transaction when performance is to occur simultaneously by both parties (i.e., at a closing), "neither party can be said to be in default (and thus susceptible to a judgment for damages or decree of specific performance until the other party has tendered his own performance)." Century 21 All Western Real Estate and Inv. Inc. v. Webb, 645 P.2d 52, 55-6 (Utah 1982) (citing 6 Corbin on Contracts § 1258 (1962)). Stated another way, "a party must make a tender of his own agreed performance in order to put the other party in default." Id. See also Kelley v. Leucadia Financial Corp., 846 P.2d 1238, 1243 (Utah 1992); Fisher v. Johnson, 525 P.2d 45, 46-47 Utah 1974).

Accordingly, since Blackmore took no steps to put Shadow Canyon in breach by performing or tendering performance of his payment obligation, if a jury were to conclude that by the phrase "at closing" the parties intended that Blackmore's \$50,000 payment obligation was to occur simultaneously with the transfer of the property from Shadow Canyon to BCDC, then Shadow Canyon cannot be found to have been in breach of the Development Agreement.

### **III. THE COURT COMMITTED CLEAR ERROR IN THE FACE OF A MATERIAL CONTRACTUAL AMBIGUITY**

Utah law recognizes that a motion for summary judgment is only proper when the pleadings, depositions, answers, interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact in dispute. Norton v. Blackham, 669 P.2d 857, 859 (Utah 1983). By contrast, when it is determined that an ambiguity exists, "the intent of the parties is a question of fact to be determined by the jury." Plateau Mining Co. v. Utah Div. of State Lands & Forestry, 802 P.2d 720, 735 (Utah 1980). The Utah Supreme Court in Faulkner v. Farnsworth, 665 P.2d 1292, 1293 (Utah 1983), expressly held that "a motion for summary judgment may not be granted if a legal conclusion is reached that an ambiguity exists in the contract and there is a factual issue as to what the parties intended." More importantly, for present purposes, the Supreme Court has expressly noted that "[f]ailure to resolve an ambiguity by determining the parties' intent from parol evidence is error." Plateau Mining Co., *supra*, 802 P.2d at 725 (citing Winegar v. Smith Inv. Co., 590 P.2d 348, 350 (Utah 1979)).

In granting plaintiffs' summary judgment on a material factual issue, without allowing defendants the opportunity to present the ambiguity to a jury, the court relied on Thomas' expert opinion. Unfortunately the opinion that Thomas provided was shaped by an erroneous understanding of the legal principles underlying contract interpretation. In his written report, he erroneously stated: "All vagaries and ambiguities in the terms of these documents are to be

construed against the defendants, who provided the drafting of all the documents.” Thomas Report, p. 4. Similarly, at the hearing, he made the same legal mistake when presented with another ambiguity: “Well, if that’s a possibility, the its an ambiguity which, again, is the responsibility of the drafter.” Transcript, p. 41.

Thomas’ opinion was premised on a common but fundamental legal error. He gave Blackmore the benefit of the doubt if the face of ambiguity, merely because Shadow Canyon drafted the Agreement. The correct legal doctrine was explained by the court in Wilburn v. Interstate Elec., 748 P.2d 582, 585 (Utah App.1988) as follows:

Once a contract is deemed ambiguous, the next order of business is to admit extrinsic evidence to aid in interpretation of the contract. It is only after extrinsic evidence is considered and the court is still uncertain as to the intention of the parties that ambiguities should be construed against the drafter. In other words, the doctrine of construing ambiguities in a contract against the drafter functions as a kind of tie-breaker, used as a last resort by the fact-finder after the receipt and consideration of all pertinent extrinsic evidence has left unresolved what the parties actually intended.

(Citations omitted).


Accordingly, with the court having determined that the Development Agreement was ambiguous with regard to a material obligation, the timing of Blackmore’s obligation to pay \$50,000 to Shadow Canyon, the court could not and should not have resolved the motion on summary judgment.

CONCLUSION

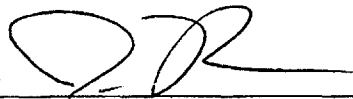
For the above reasons, the Court should set aside the Memorandum Decision finding that Shadow Canyon defaulted on its obligation under the Development Agreement.

DATED this 10 day of September, 2008.

BARNEY McKENNA & OLMSTEAD, P.C.

By   
M. Eric Olmstead  
Bryan J. Pack

JONES, WALDO, HOLBROOK & McDONOUGH  
PC

By   
Jeffrey W. Shields  
Jerome Romero

Attorneys for Shadow Glen 420, Inc.; Gemstone  
Homes, Inc.; Gemstone Properties, Inc.; Frank  
Lindhardt; and Eugene Buckley

CERTIFICATE OF SERVICE

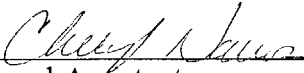
I HEREBY CERTIFY that on the 17<sup>th</sup> day of September, 2008, I caused a true and correct copy of the foregoing MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR RECONSIDERATION to be served, by first class mail, postage prepaid, on the following:

LaMar Winward  
150 North 200 East, #204  
St. George, UT 84770

David Jensen  
Slemboski & Associates  
32 East 100 South, Suite 203  
St. George, UT 84770

Andy M. Leger  
Hughes & Randall, P.C.  
187 North 100 West  
St. George, UT 84770

Patrick J. Ascione  
Justin R. Elswick  
Ascione Heideman & McKay, LLC  
2696 North University Ave, Suite 180  
Provo, UT 84604

  
\_\_\_\_\_  
Legal Assistant



# EXHIBIT A

IN THE FIFTH JUDICIAL DISTRICT COURT  
IN AND FOR WASHINGTON COUNTY, STATE OF UTAH

L LANE BLACKMORE, ET AL,

Plaintiff,

VS.

L & D DEVELOPMENT, ET AL.

Defendant.

CASE NO. 030501322

BEFORE THE HONORABLE JAMES L. SHUMATE

FIFTH DISTRICT COURT

220 NORTH 200 EAST

ST. GEORGE, UTAH 84770

REPORTER'S TRANSCRIPT OF PROCEEDINGS

MOTIONS HEARING

MAY 27, 2008

TRANSCRIBED BY: Russel D. Morgan

**COPY**

1           **THE COURT:** Well, I guess that is the next question  
2 that I can come up to. Is there some reason that the parties  
3 to this agreement could not have all worked forward to a  
4 closing date where some of these activities would have gone  
5 right down at the title company's closing table and the U.S.  
6 Bank loan would have been ready to get paid down or  
7 satisfied, the taxes on the property would be ready to be  
8 paid, the deed could be executed? All of those things happen  
9 at once with a title company standing there as the escrow  
10 agent taking all the money together that was needed to start  
11 the project and then recording the paying everything out and  
12 giving BCDC good and valuable title that they could then take  
13 and go subdivide this property in order to satisfy the  
14 subdivision requirements of either Washington County or  
15 Hurricane City -- I can't remember which one it was? Isn't  
16 there just kind of an assumption in this that we would do all  
17 these things in order to get this title cleared up, meet at  
18 closing table, and then go forward and develop?

19           **THE WITNESS:** There appears to be an assumption in  
20 this case that the title itself would have been conveyed  
21 without a closing. And I'm referring specifically to the  
22 assignment of declarant's interest. The first recital is,  
23 Wherever -- "Whereas, Blackmore received title to the lands  
24 herein described on Exhibit A by special warranty deed,"  
25 da-duh da-duh da-duh. That seems to assume that at least the

1 BY MR. WINWARD:

2 Q Is it possible that was an exhibit that was designed  
3 to be recorded at the time of closing?

4 A That the assignment of declarant's interest was?

5 Q Yes.

6 A I was looking for the reference to it in the  
7 operating agreement. And it appears it was to be executed on  
8 August 21st, 2002, at the same time the development and  
9 operating agreements were to be executed.

10 Q Isn't it common, however, when documents are created  
11 in this nature, that several closing documents are created at  
12 the same time, signed at the same time, held in escrow  
13 pending the closing?

14 A Yeah, that is a common practice.

15 Q Okay. So, I'm asking, is it possible that this was a  
16 document in that nature, one created, signed at the time this  
17 document was created to be held for the time of closing?

18 A That's possible. Although, I know of no such  
19 circumstance in connection with this document.

20 Q Okay. Isn't it the document agreement itself,  
21 paragraph 2 -- I think you have that in front of you -- it  
22 talks about the consideration with Blackmore; is that  
23 correct?

24 A Correct.

25 Q And it refers to four specific items; is that

1 correct?

2 A Yes.

3 Q And (inaudible) number four, it makes it sound like  
4 all four are mandatory because it has the conjunction or --  
5 "and" before paragraph 4; is that correct?

6 A I would disagree with your assumption that it makes  
7 it look like dot, dot, dot. I can't tell what it refers to.

8 Q Okay.

9 A And I have no opinion on that.

10 Q Okay. It does say that Blackmore shall do the  
11 following; is that correct?

12 A Yes.

13 Q And there are four numbered paragraphs or four  
14 numbered sentences?

15 A Yes.

16 Q And, in the last sentence, it refers to a closing;  
17 doesn't it?

18 A It refers to a closing with respect to item four is  
19 one way you could look at that. But I just don't know. It's  
20 ambiguous.

21 Q Is it possible that (inaudible) closing referenced  
22 all four paragraphs?

23 A It's possible.

24 Q Okay. And then, turning over to the page on  
25 paragraph 5.2, first sentence says, "BCDC hereby represents

1       A     It suggests that there would be a closing, yes.

2       Q     Okay. And in the context of that paragraph, that  
3     transfer was not going to occur until those testings, and had  
4     that testing been done then came to a closing? Isn't that a  
5     reasonable reading of paragraph 5.2?

6       A     Yes.

7       Q     Then, going back to paragraph 5 itself, and this is  
8     on page 2, "Transfer Shadow Canyon property in exchange for  
9     its 50 percent member interest in BCDC, Shadow Canyon shall  
10    transfer the Shadow Canyon property to BCDC by good and  
11    sufficient and special warranty deed. BCDC, at BCDC's sole  
12    expense, may provide an owner's title of insurance policy  
13    ensuring such title against such liens and encumbrances at  
14    closing of the transfer of the Shadow Canyon property." Do  
15    you recall reading that as well?

16      A     Yes. And the next sentence as well. "All actual  
17    closing costs shall be the responsibility of BCDC."

18      Q     The reasonable reading of that, the parties  
19    contemplated some type of closing; will you read that in that  
20    fashion?

21      A     That would be the suggestion of that, yes.

22      Q     And that particular sentence, again, talking about a  
23    title insurance policy, says they can obtain that prior to  
24    closing, which would be prior to the transfer of the property  
25    under that reading; is that correct?

1 property. Do you recall that testimony?

2 A Yes.

3 Q That would certainly be to Mr. Blackmore's benefit.  
4 Wouldn't -- isn't it a reasonable assumption to state that on  
5 behalf of the Cannon entities the most important aspect of  
6 this contract was to get the money, to get their  
7 consideration?

8 A I don't think that is necessarily true. Obviously,  
9 to receive cash consideration was an important part. But I  
10 believe the main purpose of the agreement was for the parties  
11 to develop that property, using Mr. Blackmore's expertise,  
12 and then the profit from the development was to be given to  
13 BCDC, which would share it with its two 50 percent members.  
14 That was probably the more important part of the agreement.

15 Q Okay. As you have read it?

16 A Correct. My opinion.

17 Q You haven't talked to any of the Cannon entities to  
18 know what they thought; have you?

19 A That's correct. I have just read the documents that  
20 they have drafted.

21 Q Okay. Are you aware if Mr. Blackmore ever tendered  
22 his performance of the taxes due?

23 A I understand that he has not.

24 Q Are you aware if he's ever tendered performance of  
25 the \$50,000 to Shadow Canyon?

1 A Same answer.

2 Q Are you aware if he has paid the interest current on  
3 the US Bank loan or made arrangements to do so?

4 A Same answer.

5 Q Were you aware that he was asked to close on the  
6 extension agreement with US Bank on or about October 30th?

7 A Um, I have been told that. I have seen no primary  
8 documentary evidence for that.

9 Q And who told you that, if you recall?

10 A Mr. Blackmore.

11 Q Okay. Did he also tell you that he did not close on  
12 the extension agreement for the US Bank documents?

13 A Yes.

14 Q As you have read, are you aware that the special  
15 warranty deed referenced in our earlier conversation was  
16 actually tendered in that US Bank closing documents?

17 A No.

18 Q You indicated that you reviewed some deposition  
19 testimony. Do you recall whose testimony you reviewed?

20 A Well, there were so many. Most recent, I reviewed  
21 Mr. Lindhardt's testimony. But that's not at issue this  
22 morning, so --

23 Q Okay. Do you recall if you reviewed Lane Tait's  
24 testimony?

25 A I don't recall.



1 declarant in that same subdivision?

2 A Well, if that's a possibility, then it's an ambiguity  
3 which, again, is the responsibility of the drafter.

4 MR. WINWARD: Okay. I don't believe I have anything  
5 else. Thank you, Professor Thomas.

6 A Thanks, Mr. Winward.

7 THE COURT: Mr. Heideman, anything more for your  
8 witness?

9 MR. HEIDEMAN: A couple of questions, Your Honor.

10 REDIRECT EXAMINATION

11 BY MR. HEIDEMAN:

12 Q Professor Thomas, with regard to the three lots, is  
13 it your understanding that those three lots were part of  
14 Exhibit A, that they were part of the entire subdivision, or  
15 were they separate?

16 A I'm afraid I don't have an understanding about that.  
17 I have understood that they were not part of the Shadow  
18 Canyon property referred to in the development agreement.  
19 But Exhibit A, I'm not sure.

20 Q With regard to looking at the development agreement,  
21 looking specifically at 5.2, it's been proposed -- sorry --  
22 it's been proposed, that the language indicates that BCDC  
23 offers an express acknowledgment that at the time of closing  
24 it will have conducted a necessary investigation, surveys and  
25 things of that nature. Is there anything that indicates that

1 when it says at the time of closing that that means a closing  
2 on the property, or is it just as equally feasible that that  
3 could be interpreted as a closing on the US Bank refinance or  
4 some other refinance?

5 A Well, and this may not be the answer you would like  
6 to hear from me, but paragraph five refers to the closing of  
7 transferring of the Shadow Canyon property. The earlier  
8 reference to closing in paragraph 2 is quite a bit more open  
9 and could refer to the extension or refinancing closing.

10 Q Well, I guess next question that I would ask, then,  
11 is this: You've reviewed the Bayles letter, correct?

12 A The August 14th letter? Yes.

13 Q Yes. And you reviewed the assignment of declarants'  
14 interest?

15 A Yes.

16 Q And the Bayles letter is dated August 14th, correct?

17 A Correct.

18 Q And it talks about here's a copy of the deeds for the  
19 transfer pursuant to the development agreement?

20 A Correct.

21 Q And the assignment of declarant's interest indicates  
22 a date in August of 2002, correct?

23 A August 21st, yes.

24 Q And would that in fact be in accordance or complicit  
25 with your original evaluation, or with your evaluation,

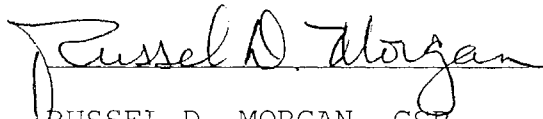
CERTIFICATE

STATE OF UTAH

COUNTY OF WASHINGTON

THIS IS TO CERTIFY THAT THE FOREGOING  
PROCEEDINGS WERE TAKEN BEFORE ME, RUSSEL D. MORGAN, A  
CERTIFIED SHORTHAND REPORTER IN AND FOR THE STATE OF  
UTAH, RESIDING AT WASHINGTON COUNTY, UTAH;

THAT THE PROCEEDINGS WERE TAKEN BY ME  
IN STENOGRAPHY FROM AN ELECTRONIC RECORDING, AND  
THEREAFTER CAUSED BY ME TO BE TRANSCRIBED INTO  
TYPEWRITING, AND THAT A TRUE AND CORRECT TRANSCRIPTION  
OF SAID TESTIMONY SO TAKEN AND TRANSCRIBED TO THE BEST  
OF MY ABILITY IS SET FORTH IN THE FOREGOING PAGES  
NUMBERED FROM 3 TO 61 INCLUSIVE.

  
RUSSEL D. MORGAN, CSR  
LICENSE #87-108442-7801

AUGUST 27, 2008

Tab 8

FILED  
FIFTH DISTRICT COURT

2009 OCT -2 PM 3:13

WASHINGTON COUNTY

BY JS

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JUSTIN D. HEIDEMAN (USB #8897)  
R. BRETT EVANSON (USB #12086)  
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Attorneys for Plaintiffs

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**IN THE FIFTH JUDICIAL DISTRICT COURT, IN AND FOR WASHINGTON  
COUNTY, STATE OF UTAH**

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LANE BLACKMORE, et al.,

Plaintiffs,

vs.

LESTER E. CANNON, et al.,

Defendants.

**MEMORANDUM IN SUPPORT OF  
MOTION FOR PREJUDGMENT  
WRITS OF ATTACHMENT**

Case No. 030501322

Judge: Honorable James L. Shumate

# EXHIBIT 1

COPY

## DEVELOPMENT AGREEMENT

21<sup>st</sup> This Development Agreement (hereinafter "Agreement") made and entered into as of the day of August, 2002, by and between L. Lane Blackmore, (hereinafter referred to as "Blackmore"), L & D Development, Inc., a Utah Corporation, Shadow Canyon Land Company, L.L.C., a Utah Limited Liability Company (hereinafter collectively referred to as "Shadow Canyon"), and Blackmore/Cannon Development Company, L.L.C., a Utah Limited Liability Company to be formed (hereinafter referred to as "BCDC").

### WITNESSETH:

WHEREAS, Shadow Canyon owns certain real property located in Washington County, Utah, described on Exhibit A, attached hereto and by this reference made a part hereof (hereinafter referred to as "Shadow Canyon Property");

WHEREAS, a portion of the Shadow Canyon Property owned by L & D Development, Inc., is fully developed, a portion is partially developed for residential real estate and a portion of the Shadow Canyon Property owned by Shadow Canyon Land Company, L.L.C., is currently used for raw land purposes;

WHEREAS, the Shadow Canyon Property is security for debt owed to U.S. Bank National Association (hereinafter "US Bank") and State Bank of Southern Utah;

WHEREAS, the obligations to US Bank and State Bank of Southern Utah are past due;

WHEREAS, Blackmore personally and through his construction company has the experience, personnel, desire and the financial ability to develop and subdivide the Shadow Canyon Property for residential housing purposes;

WHEREAS, Shadow Canyon and Blackmore have formed BCDC for the purpose of developing the Shadow Canyon Property. A copy of the filed Articles of Organization for BCDC are attached hereto as Exhibit B and incorporated herein by this reference; and

WHEREAS, the parties hereto desire to enter into an agreement to allow for the continued development and subdivision of the Shadow Canyon Property in a manner as to provide for the maximization of the value of such property.

NOW, THEREFORE, in consideration of the above recitals and the mutual covenants and conditions contained herein, the parties agree as follows:

### BLACKMORE/CANNON DEVELOPMENT

1. *Formation of LLC.* Shadow Canyon and Blackmore have formed BCDC for the purpose of developing the Shadow Canyon Property. Blackmore and Shadow Canyon are the Members of BCDC.

2. *Blackmore - Consideration.* In exchange for his fifty percent (50%) Member

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interest in BCDC, Blackmore shall do the following: (1) Bring current accrued interest owed to US Bank in the approximate amount of Seventy Thousand Dollars (\$70,000.00); (2) Pay current all property taxes owed on the Shadow Canyon Property which sum is approximately Sixty-three Thousand Dollars (\$63,000.00); (3) Take such reasonable steps as necessary to obtain an extension on the US Bank loan; and (4) Pay to Shadow Canyon the sum of Fifty Thousand Dollars (\$50,000.00) at closing.

3. *Marketing/Business Plan - Blackmore.* In addition to the foregoing, Blackmore shall do or cause the following to occur as additional consideration to induce Shadow Canyon to enter into this Agreement:

- Market and sell the three existing spec homes and all future lot and home sales;
- Build, at its own expense, three (3) new spec homes for standing inventory within the first six (6) months following the transfer of the Shadow Canyon Property to BCDC. Upon the sale of each new spec home, a new spec home shall be started within thirty (30) days of sale.
- Submit an updated development/business plan to Shadow Canyon for its approval each year setting forth goals and methods of achieving goals for the coming year. Shadow Canyon's approval of the plan shall not be unreasonably withheld.

4. *Shadow Canyon's Security.* In an effort to secure Blackmore and BCDC's performance under this Agreement, BCDC shall execute a Trust Deed in favor of Shadow Canyon to be released as lots sell as more fully set forth in the Lot Release paragraph below. The principal amount of the Trust Deed shall be Six Hundred Fifty Thousand Dollars (\$650,000.00) which represents the balance of the sum Shadow Canyon is to receive pursuant to this Agreement after Blackmore's initial payment of Fifty Thousand Dollars (\$50,000.00) as set forth in paragraph 2 above. Shadow Canyon's security interest shall be subordinate to the presently outstanding obligations to State Bank of Southern Utah and US Bank. In addition, Shadow Canyon shall take a second lien position with respect to subsequent lenders that refinance the obligations to State Bank of Southern Utah and US Bank upon similar terms. The intent of the prior sentence is to allow BCDC to refinance the presently outstanding debt with other lenders and place the other lenders in similar security positions now occupied by State Bank or Southern Utah and US Bank.

5. *Transfer of Shadow Canyon Property.* In exchange for its fifty percent (50%) Member interest in BCDC, Shadow Canyon shall transfer the Shadow Canyon Property to BCDC by good and sufficient Special Warranty Deed. BCDC, at BCDC's sole expense, may provide an owner's title insurance policy, insuring such title against liens and encumbrances at closing of transfer of the Shadow Canyon Property. All actual closing costs for the delivery of such title shall be the responsibility of BCDC. The parties hereto acknowledge and understand that the Shadow Canyon Property will be conveyed subject to indebtedness to US Bank in the approximate amount of Six Hundred Seventy Thousand Dollars (\$670,000.00), indebtedness to State Bank of Southern Utah in the approximate amount of Two Hundred Sixty Two Thousand Dollars (\$262,000.00) and all back property taxes. Property taxes shall not be prorated to the date of transfer and all property taxes incurred before the date of this Agreement shall be the responsibility of Blackmore. Thereafter, the property taxes on the Shadow Canyon Property shall



be the responsibility of BCDC.

5.1 *Condition of Shadow Canyon Property.* Except for warranties of title, the property will be conveyed "as is" without representations, promises of any kind, or warranties, limited, expressed, implied, for fitness for any particular purpose. It shall be the sole responsibility of BCDC to inspect all aspects of the property being transferred, including but not limited to: zoning matters, soil condition, survey issues, boundary line and title issues and to perform all due diligence without reliance upon Shadow Canyon.

5.2 *Inspection and Testing.* BCDC hereby represents that it has conducted or will conduct prior to transfer such investigations, inspections, surveys and testing as it desires with respect to any portion of the Shadow Canyon Property and BCDC accepts the Shadow Canyon Property based upon its own examination, reliance and judgment and not by reason of any representations, promises, or statements made by Shadow Canyon or Shadow Canyon's representatives whatsoever as to its condition, soils content, the existence or lack thereof of any water, suitability of soil for construction and development, size, total acreage, location, present value, future value, income, potential income, zoning, or compliance with any federal, state, or local code, ordinances, regulations, or statutes. BCDC expressly acknowledges that at the time of closing it will have conducted all necessary investigations, surveys, inspections, and tests to satisfy itself and accepts the Shadow Canyon Property in its present condition or waives the right to do so with the full understanding as to the consequences of such waiver, namely, a denial of asserting any claim against Shadow Canyon as it pertains to the condition of the Shadow Canyon Property.

6. *Management of LLC.* Blackmore, or an entity that Blackmore has legal authority to make management decisions for, shall be the Manager of BCDC.

6.1 *Manager Responsibilities.* The Manager shall be responsible for managing all aspects of the development project including but not limited to the following: (a) Be responsible for actually carrying out the subdivision and development of all of the Shadow Canyon Property subject to this Development Agreement and the Operating Agreement; (b) Be responsible for obtaining all necessary permits and approvals and for compliance with all applicable ordinances and statutes; (c) The Manager shall use good faith best efforts to develop, subdivide and construct residences on the Shadow Canyon Property to increase and maximize, as economically feasible, the value of the Shadow Canyon Property.

6.2 *Manager Authority.* For so long as Blackmore is directly involved, he shall have the authority, except as otherwise limited in this Agreement, to negotiate and execute any and all contracts for various aspects of the development, subdivision and sale of lots including the authority to convey and borrow. In addition, Shadow Canyon shall take steps necessary to give the Manager developer authority as it pertains to the homeowners association, architectural control, amenity fees and privileges. An assignment of Declarant's interest transferring the rights of the Declarant to BCDC is attached here to as Exhibit C and incorporated herein by this reference. Other than as set forth herein, the Manager shall keep the Shadow Canyon Property lien free of outside liens other than the current obligations to US Bank, State Bank of Southern Utah, Shadow Canyon (pursuant to paragraph 4 above) and construction financing consistent with paragraph 7.2 below. The Manager may refinance any of the foregoing

bank obligations on similar terms with other banks or a private lender.

7. *Distributions/Lot Release.*

7.1 Shadow Canyon shall receive distributions from the LLC on a lot release basis as follows: (1) Shadow Canyon shall not be entitled to a distribution upon the sale of the three existing homes; (2) Shadow Canyon shall be entitled to a distribution of Three Thousand Five Hundred Dollars (\$3,500.00) per lot upon the sale of the next fifteen (15) homes; (3) Shadow Canyon shall be entitled to a distribution of Four Thousand Dollars (\$4,000.00) per lot upon each lot sold after 1 and 2 above until the present obligation to US Bank is repaid; (4) After retirement of the present obligation to US Bank or any subsequent lender (upon similar terms) of the present obligation to US Bank, Shadow Canyon shall receive the sum of Twelve Thousand Dollars (\$12,000.00) per lot sold until Shadow Canyon has received the total sum of Seven Hundred Thousand Dollars (\$700,000.00) from BCDC and/or Blackmore.

7.2 *Construction Subordination.* Shadow Canyon shall subordinate the trust deed required by paragraph 4 above to trust deeds to be executed hereafter by BCDC covering lots as specified by BCDC sufficient to enable Blackmore, BCDC or entities affiliated with Blackmore to obtain construction financing thereby enabling Blackmore to perform consistent with paragraph 3 above. The money obtained following Shadow Canyon's subordination shall be used for the purpose of constructing and improving the subordinated lots. Upon recording any such trust deed, it shall be conclusively deemed that the entire amount thereof has been or will be used for or applied on the costs of construction of improvements on the identified lots. Shadow Canyon shall not be obligated to subordinate lots at any time that Blackmore or BCDC are in breach of this Agreement or any of its exhibits.

Notwithstanding the foregoing, it is understood that Shadow Canyon shall no longer be entitled to distribution under this paragraph once Shadow Canyon has received the equivalent of Seven Hundred Thousand Dollars (\$700,000.00). The Fifty Thousand Dollars (\$50,000.00) payable to Shadow Canyon under paragraph 2 above and the cost of the release of Lot 69 as set forth in paragraph 8 below shall be taken into account for purposes of this paragraph. If Shadow Canyon has received the foregoing sum and Shadow Canyon and its principals are no longer liable for debt secured by the property then Shadow Canyon shall release any Trust Deeds it has against the Shadow Canyon Property and Shadow Canyon shall transfer its Member interest in BCDC to Blackmore for no additional consideration. Thereafter, Shadow Canyon shall have no interest in BCDC or the Shadow Canyon Property and any additional profits shall accrue to Blackmore. It is agreed by the parties hereto that Shadow Canyon will have received its full Seven Hundred Thousand Dollar (\$700,000.00) pay out within fifteen (15) years of the transfer of the Shadow Canyon Property to BCDC. There will be no prepayment penalty and Blackmore shall have the right to buy out Shadow Canyon's interest at any point during the fifteen (15) years by paying the balance.

8. *Lot 69.* Shadow Canyon desires to receive clear title to Lot 69 within two years following the transfer of the Shadow Canyon Property to BCDC. It is agreed that BCDC shall expend funds necessary to obtain a release of Lot 69 from US Bank's Trust Deed and that Shadow Canyon shall receive clear title to Lot 69 within two years. It is anticipated that the sum of Twelve Thousand Dollars (\$12,000.00) plus simple interest at 6.75% per annum for two years shall be required to release US Bank's security interest in Lot 69; consequently, upon release and transfer of

Lot 69 to Shadow Canyon, the sum of Thirteen Thousand Six Hundred Twenty Dollars (\$13,620.00) shall be deducted from the outstanding obligation of BCDC to Shadow Canyon as set forth in paragraph 7 above.

9. *Outstanding Liability.* The parties hereto acknowledge that Shadow Canyon is in default on its obligations to US Bank and State Bank of Southern Utah. The parties hereto anticipate that they will be able to reach agreements with both banks regarding extensions of the loans. It is understood that obtaining the extensions will likely include but not be limited to requiring capital to bring interest current, capital to bring property taxes current and a change with regard to future principal and interest payments. In order to assist Blackmore in obtaining information from State Bank of Southern Utah and US Bank, Blackmore in his individual capacity and as Manager of BCDC is hereby authorized to obtain any and all bank documents and to negotiate with US Bank and State Bank of Southern Utah on behalf of Shadow Canyon for the purpose of extending, paying off or refinancing the loans.

9.1 *US Bank Documents.* The parties anticipate receiving proposed documents prepared by US Bank for the purpose of extending the term of the Note. In the event that the documents received from US Bank are not consistent with this Agreement then Blackmore shall have the right at his discretion to terminate this Agreement. Based upon parties communications with US Bank, the parties hereto anticipate that the terms contained in the US Bank documents will provide the following which the parties hereby agree are reasonable and consistent with this Agreement:

- The new LLC will assume the obligation and Les Cannon will guaranty the debt;
- The maturity date for the loan extension will be October 14, 2003;
- The sum of \$12,000.00 will be required to obtain a lot release;
- U.S. Bank is willing to subordinate its debt to no more than three (3) lots at a time and the subordination will require an \$8,000.00 per lot payment;
- Past interest will need to be brought current and future interests will be paid current on a monthly basis;
- Real property taxes must be paid current;
- U.S. Bank intends to charge a 1% origination fee plus all out of pocket costs including legal fees for drafting the loan extension documents;
- The parties hereto will not have more than five (5) spec homes on the project at any given time;
- Blackmore, Shadow Canyon and BCDC shall provide financial statements to US Bank annually;
- Shadow Canyon shall guarantee the debt to US Bank; and
- Provide an opinion of counsel concerning validity and enforceability.

10. *Operating Agreement.* The duties, rights and obligations of the Members and the Manager are more fully set-forth in the Operating Agreement for BCDC that is attached hereto as Exhibit D and incorporated herein by this reference.

11. *Wholesale/Bulk Transactions.* In the event that Blackmore determines that it would like to bulk sale a portion or all of the project L. Lane Blackmore shall have authority to do so as long as there is a pro rata reduction of Shadow Canyon's pay out required by paragraph 7 above. A

bulk sale shall be defined as the sale of raw acreage or the sale of five (5) or more improved lots in one transaction.

12. *Accounting and Records.* Throughout the development and subdivision of the Shadow Canyon Property, BCDC shall provide Shadow Canyon, as requested by Shadow Canyon, with copies of any and all documents and shall provide any and all information as may be reasonably necessary for Shadow Canyon to be informed as to the development and subdivision of the Shadow Canyon Property. The parties hereto agree that Adams Hafen & Co. shall be the accounting firm for BCDC and that each party to this Agreement shall have access to all accounting records at Adams Hafen & Co., that pertain to BCDC. In addition, BCDC and Blackmore shall invite Shadow Canyon to a quarterly meeting for purposes of discussing and updating Shadow Canyon on the status of the project. Shadow Canyon's agent, V. Lowry Snow, or such other designee as Shadow Canyon may appoint are hereby authorized to obtain documents from BCDC, Adams Hafen & Co., and attend quarterly meetings on behalf of Shadow Canyon.

13. *Assignment of Engineering.* Shadow Canyon shall assign and convey all engineering related to the Shadow Canyon property to BCDC including but not limited to any and all plats, soils tests and drawings. In addition, Shadow Canyon shall also assign, to the extent assignable, all approvals obtained from the appropriate municipalities involved and or development rights.

#### GENERAL PROVISIONS

14. *Notice.* All notices, demands, or other writings in this Development Agreement provided to be given or made or sent, or which may be given or made or sent, by either party to the other, shall be deemed to have been fully given or made or sent when made in writing and deposited in the United States mail, postmarked and addressed as follows:

Shadow Canyon Land Company, L.L.C.	L. Lane Blackmore
595 South 180 West #113-4	PO Box 390
Hurricane, UT 84737	LaVerkin, UT 84745

L & D Development, Inc.  
595 South 180 West #113-4  
Hurricane, UT 84737

And a copy to:  
V. Lowry Snow, Esq.  
Snow Jensen & Reece, PC  
P.O. Box 2747  
St. George, UT 84771-2747

The address to which any notice, demand, or other writing may be given or made or sent to any party as above provided may be changed by written notice given by such party as above provided.

15. *Waivers.* The failure of a party to insist on a strict performance of any of the

terms and conditions hereof shall be deemed a waiver of the rights or remedies that the party may have regarding that specific instance only, and shall not be deemed a waiver of any subsequent breach or default in any terms and conditions.

16. *Attorney Fees.* Should any party default in any of the covenants or agreements herein contained, that defaulting party shall pay all costs and expenses, including reasonable attorney fees, which may arise or accrue from enforcing this Development Agreement, enforcing any covenant or term herein, or in pursuing any other remedy provided hereunder or by applicable law, whether such remedy is pursued by filing suit or otherwise.

17. *Authorization.* Each person and entity executing this Agreement represents and warrants that such person or entity has been duly authorized to execute and deliver this Agreement in the capacity and for the person or entity set forth where such individual signed.

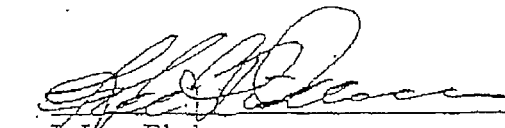
18. *Amendment.* This Development Agreement can only be amended by written agreement signed by the parties.

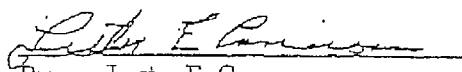
19. *Survival of Covenants.* It is expressly agreed that the terms, covenants and conditions contained herein shall survive the execution of this Agreement, the transfer of the property by deed and shall be enforceable by either party after the date thereof.

20. *Miscellaneous.* This Development Agreement and the Exhibits attached hereto contain the entire agreement between the parties. This Agreement and the terms and conditions hereof apply to and are binding on the heirs, legal representatives, successors and assigns of both parties. Nothing herein contained shall affect any restrictions on transfers or assignments set forth elsewhere in this Agreement. This Agreement shall be governed by and construed in accordance with the laws of the State of Utah.

IN WITNESS WHEREOF, the parties have executed this Development Agreement on the dates set forth below.

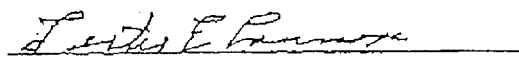
L & D DEVELOPMENT, INC.  
a Utah Corporation:


  
L. Lane Blackmore

  
By: Lester E. Cannon  
Its: President

SHADOW CANYON LAND COMPANY, LLC  
a Utah Limited Liability Company:

BLACKMORE/CANNON  
DEVELOPMENT COMPANY, LLC  
a Utah Limited Liability Company:

  
By: Lester E. Cannon  
Its: Manager

  
By: L. Lane Blackmore  
Its: Manager

)

## LIST OF EXHIBITS

Exhibit A: Legal description of real property owned by Shadow Canyon

Exhibit B: Articles of Organization for BCDC

Exhibit C: Assignment of Declarant's Interest

Exhibit D: Operating Agreement for BCDC



## EXHIBIT A

All of Lots 10, 29, 30, 31, 32, 45, 47, 48, 49, 51, 63 through 69, 79 through 83, 85 through 94, 107 through 110, 112 through 115, 117, 118, 119, 120, SHADOW CANYON PHASE 1, according to the Official Plat thereof on file in the Office of the Recorder of Washington County.

### PARCEL 1

Beginning at the Northwest Corner of the NE 1/4 of Section 15, Township 42 South, Range 13 West, Salt Lake Base and Meridian and running thence South, along the 1/4 Section Line, 660.00 feet; thence East 116.62 feet; thence North 660.00 feet, to a point on the Section Line; thence West, along the Section Line, 116.62 feet to the point of beginning.

Containing 1.767 acres.

### PARCEL 2

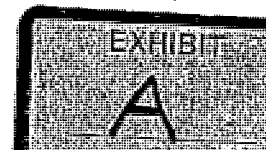
Beginning at a point South, along the 1/4 Section Line, 660.00 feet, from the Northwest Corner of the NE 1/4 of Section 15, Township 42 South, Range 13 West, Salt Lake Base and Meridian and running thence South, along the 1/4 Section Line, 660.00 feet, more or less, to the Southwest Corner of the NW 1/4 of said NE 1/4; thence East, along the 1/16 Section Line, 116.62 feet; thence North 660.00 feet, more or less; thence West 116.62 feet to the point of beginning. Containing 1.767 acres, more or less.

### PARCEL 3

Beginning at the Northeast corner of the Northwest Quarter of Section 15, Township 42 South, Range 13 West, Salt Lake Base and Meridian and running thence West 9.93 chains; thence South 20 chains; thence East 9.93 chains; thence North 20 chains to the point of beginning.

### LESS & EXCEPTING THE FOLLOWING:

Beginning at the North Quarter corner of Section 15, Township 42 South, Range 13 West, Salt Lake Base and Meridian and running thence South 0°01' West 706.00 feet; thence North 89°59' West 464.00 feet; thence South 0°01'00" West 18.14 feet; thence North 89°59' West 191.38 feet; thence North 0°01' East 723.00 feet; thence North 89°55' East 655.38 feet to the point of beginning.



TOGETHER With all rights, privileges, easements and appurtenances thereunto belonging or in any way appertaining.

SUBJECT TO Easements, Rights of Way, Restrictions and Reservations of record and those enforceable in law and equity.

PARCEL 4

Beginning at a point East, along the Section Line, 116.62 feet from the Northwest Corner of the NE 1/4 of Section 15, Township 42 South, Range 13 West, Salt Lake Base and Meridian and running thence South, parallel to the 1/4 Section Line, 660.00 feet; thence East 375.50 feet; thence N. 4°06'59" W. 661.71 feet to a point on the Section Line; thence West, along the Section Line, 328.00 feet to the point of beginning.

Containing 5.33 acres.

PARCEL 5

Beginning at a point South, along the 1/4 Section Line, 660.00 feet, and East 116.62 feet from the Northwest Corner of the NE 1/4 of Section 15, Township 42 South, Range 13 West, Salt Lake Base and Meridian and running thence South, parallel to the 1/4 Section Line, 660.00 feet, more or less, to the South Line of said NE 1/4; thence East, along the 1/16 Section Line, 423.00 feet; thence N. 4°06'59" W. 661.71 feet, more or less; thence West 375.50 feet to the point of beginning.

Containing 6.049 acres, more or less.

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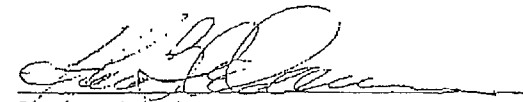
ARTICLES OF ORGANIZATION  
OF  
BLACKMORE/CANNON DEVELOPMENT COMPANY, L.L.C.  
a Utah limited liability company

OPERAT. - ST. GEORGE  
BY \_\_\_\_\_

THESE ARTICLES OF ORGANIZATION, forming a limited liability company under the laws of the State of Utah, are made and executed as of the 21 day of July, 2002, by the undersigned persons.

1. Name. The name of the limited liability company is BLACKMORE/CANNON DEVELOPMENT COMPANY, L.L.C. (herein sometimes referred to as the "Company").
2. Period of Duration. The period of duration of the Company shall be a term of ninety-nine (99) years from the date these Articles of Organization are filed, unless sooner terminated pursuant to law or the provisions of the Company's Operating Agreement.
3. Business Purpose. The business purposes of the Company are (a) to acquire, own, hold for investment, develop, construct upon, manage, sell, lease, and otherwise deal with the real property that is owned by the Company; (b) to purchase, lease, sell, own and operate, and to finance the acquisition and operation of, personal property for use at or on the real property that is owned by the Company; (c) to employ or contract with contractors for the services they provide related to work on the real property that is owned by the Company; and (d) to incur indebtedness, secured or unsecured, for any of the purposes of the Company.
4. Registered Office and Designated Office. The street address of the Company's registered office shall be 98 South State, LaVerkin, Utah 84745. The street address of the Company's designated office is 98 South State, LaVerkin Utah 84745.
5. Registered Agent. The name, street address, and signature of the Company's initial registered agent is as follows:

L. Lane Blackmore  
98 South State  
LaVerkin, Utah 84745

  
L. Lane Blackmore  
Registered Agent

The director of the division is appointed the agent of the Company for service of process if the registered agent has resigned and no successor has accepted the responsibility, the registered agent's authority has been revoked, or the registered agent cannot be found or served with the exercise of reasonable diligence.



6. Management. The Company is to be managed by a Manager or Managers, and management is not reserved to Members. The name and street address of the Company's initial Manager who shall serve as Manager of the Company until successor Manager(s) are elected shall be:

L. Lane Blackmore  
98 South State  
LaVerkin, Utah 84745

7. Transfer Restrictions. Interests in this Company owned by any Member of the Company shall be subject to the transfer restrictions provided for in the Operating Agreement of this Company.

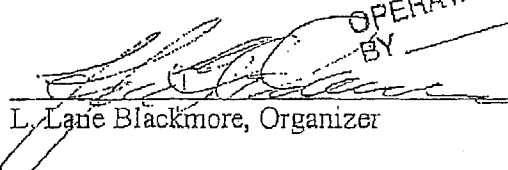
8. Organizer. The name and street address of the Organizer of the Company is as follows:

L. Lane Blackmore  
98 South State  
LaVerkin, Utah 84745

The undersigned hereby affirm that they are the Organizers of the Company, the Company has one or more Members, and that the facts stated in the foregoing Articles of Organization are true.

RECEIVED  
STATE TAX COMMISSION  
JUL 05 2002

OPERAT. - ST. GEORGE  
BY

  
L. Lane Blackmore, Organizer

Recorded at the request of:  
Snow Jensen & Reece  
PO Box 2747  
St. George, Utah 84771

### ASSIGNMENT OF DECLARANT'S INTEREST

This Agreement is made effective as of August \_\_\_\_\_, 2002, by and between L&D DEVELOPMENT, INC. (hereinafter "L&D") and BLACKMORE/CANNON DEVELOPMENT COMPANY, LLC, a Utah limited liability company (hereinafter "BLACKMORE").

### RECITALS

WHEREAS, BLACKMORE received title to the lands herein described on Exhibit "A" attached hereto, by Special Warranty Deed recorded \_\_\_\_\_, as Entry No. \_\_\_\_\_, in Book \_\_\_\_\_, at Pages \_\_\_\_\_, of Official Washington County, State of Utah records (hereinafter the "Property").

WHEREAS, there is a certain Second Amended and Restated Declaration of Covenants, Conditions and Restrictions for Shadow Canyon, Phase 1, recorded August 10, 2000, as Entry No. 693259, in Book 1376, at Pages 2200-2222, Official Washington County Records, that affect the herein described property (hereinafter "CC&Rs") that are applicable to the Property.

WHEREAS, L&D wishes to assign any and all rights, duties and obligations it may have, if any, as Declarant under the CC&Rs as a result of the aforementioned Quit-Claim Deed.

WHEREAS, BLACKMORE desires to receive an assignment of all right, title, duty, obligation and interest that L&D may have as Declarant in the CC&Rs.

IN CONSEQUENCE THEREOF, L&D and BLACKMORE hereby agree as follows:

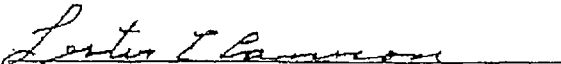
1. **Assignment of Interest.** In consideration for the sum of Ten Dollars (\$10.00) and other good and valuable consideration and in consideration for the acceptance by BLACKMORE of the duties and obligations, if any, assigned in this Agreement, L&D hereby assigns without



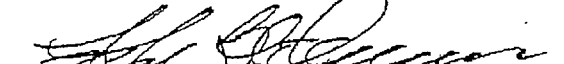
warranty or any representations whatsoever, all right, title, duty, obligation and interest, if any, that L&D has as Declarant under the CC&Rs that are applicable to the Property.

2. Acceptance of Assignment. BLACKMORE hereby accepts the assignment of all right, title, duty, obligation and interest, if any, that L&D may have as Declarant under the CC&Rs as a result of L&D recording the CC&Rs. In addition, BLACKMORE as Declarant hereby accepts any and all responsibility, if any, for completion of improvements for any and all lots and property to which the CC&Rs apply, including lots that are in the names of other owners. L&D shall have no responsibility or obligation whatsoever under the CC&Rs.

L&D DEVELOPMENT, INC.

  
Lester E. Cannon

BLACKMORE/CANNON DEVELOPMENT COMPANY, LLC

  
By: L. Lane Blackmore  
Its: Manager

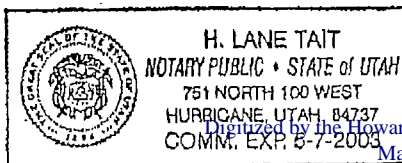
STATE OF UTAH,                     )  
  : ss.  
County of Washington.         )


On the \_\_\_\_ day of August, 2002, personally appeared before me LESTER E. CANNON, who duly acknowledged before me that he is the President of L&D DEVELOPMENT, INC., and that he signed the foregoing Assignment of Declarant's Interest on the behalf of the company freely and voluntarily and for the uses and purposes stated therein.

\_\_\_\_\_  
Notary Public

STATE OF UTAH,                     )  
  : ss.  
County of Washington.         )

On this 20<sup>th</sup> day of August, 2002, personally appeared before me L. Lane Blackmore, authorized agent and duly appointed Manager of BLACKMORE/CANNON DEVELOPMENT COMPANY, L.L.C., a Utah limited liability company, and that he executed the foregoing Assignment of Declarant's Interest on behalf of said company being authorized and empowered to do so by the operating agreement, and he did duly acknowledge to me that such company executed the same for the uses and purposes stated therein.



  
\_\_\_\_\_  
Notary Public

OPERATING AGREEMENT  
OF  
BLACKMORE/CANNON DEVELOPMENT COMPANY, L.L.C.  
A Utah Limited Liability Company

THIS OPERATING AGREEMENT OF BLACKMORE/CANNON DEVELOPMENT COMPANY, L.L.C., a limited liability company organized under the laws of the State of Utah is made and entered into this 21 day of August, 2002, by and between the persons identified in Section 1.10 below, who are all of the Members of the limited liability company as hereinafter set forth.

ARTICLE 1  
DEFINITIONS

Certain terms used in this limited liability company Operating Agreement shall have special meanings as designated in this Article.

1.1 Act: The Utah Revised Limited Liability Company Act, as set forth in Utah Code Ann. §§ 48-2c-101 *et seq.*, 1953, as amended from time to time ("Utah Code").

1.2 Agreement or Operating Agreement: This Operating Agreement as the same may be modified or amended from time to time in accordance with Section 15.2 hereof.

1.3 Articles: The Articles of Organization of the Company which have been filed with the Division. The Articles shall be in the form attached as Exhibit "A" to this Agreement.

1.4 Capital Account: The term "Capital Account" shall refer to a Member's capital account in the Company as described and adjusted in Article 4 of this Agreement.

1.5 Code: The Internal Revenue Code of 1986, as amended, including any applicable Treasury Regulations promulgated thereunder.

1.6 Company: The Utah limited liability company to be formed hereunder, and as the same shall exist hereafter, pursuant to this Agreement and the Articles, and in accordance with the Act, the name of which is BLACKMORE/CANNON DEVELOPMENT COMPANY, L.L.C.

1.7 Division: The Division of Corporations and Commercial Code of the Utah Department of Commerce, or any other department or division of the State of Utah which hereafter may be given responsibility for administering the Act and accepting filings in behalf of the Company.

1.8 Effective Date: The date of the execution of the Articles.

1.9 Manager: One manager may be appointed by the Members from time to time pursuant to Article 7 hereof and as authorized by §§ 48-2c-110(9) of the Act. The term "Manager" shall mean any successor or additional manager designated in accordance with Article 7 hereof.

1.10 Member or Members: The term Member shall mean L. Lane Blackmore, (hereinafter "Blackmore"), L&D Development, Inc, a Utah corporation and Shadow Canyon Land Company, L.L.C., a Utah limited liability company (hereinafter "Shadow Canyon"), the entities forming the Company hereunder, or any person who is permitted to be and becomes a successor to all or any portion of the interests of any of them in the Company, or any persons who may become additional members of the Company in accordance with the provisions of Article 11 hereof and § 48-2c-703 of the Act.

1.11 Shadow Canyon Property: The term Shadow Canyon Property shall refer to any and all real property transferred to the Company from time to time by Shadow Canyon pursuant to the Development Agreement dated August 21, 2002.

1.12 Treasury Regulations: The term "Treasury Regulations" shall refer to the income tax regulations promulgated under the Code and effective as of the date hereof, as modified and supplemented or superseded after the date hereof. Where a specific Treasury Regulation is referenced, the reference shall be deemed to extend to any successor regulation of similar scope, whether or not denominated by the same section number or heading.

1.13 Member Voting: Whenever a provision of this Agreement requires a vote of the Members and no indication is given as to the required vote then that particular provision shall require the vote of Members holding a majority of the interest in the capital of the Company to make a decision. Based upon Exhibit B, it is understood that the initial voting rights will be held 50% by Blackmore and 50% by the two entities that make up Shadow Canyon.

1.14 Development Agreement: The term Development Agreement shall refer to that certain Development Agreement executed by and between Home Company, Shadow Canyon and the Company, dated August 21, 2002, attached hereto as Exhibit B and incorporated herein by this reference.

## ARTICLE 2 FORMATION OF LIMITED LIABILITY COMPANY

2.1 Creation: The Members agree to, and hereby do, form the Company pursuant to the Act, such formation to be completed on the Effective Date. The terms and provisions of this Agreement will be construed and interpreted in accordance with the terms and provisions of the Act. Upon return to the Company by the Division of a duly stamped copy of the Articles, or amended or restated Articles of Organization, the Company shall promptly deliver or mail a copy of the Articles, or said amended or restated Articles of Organization, to each Member.



2.2 Company Name: The name of the limited liability company created hereunder shall be BLACKMORE/CANNON DEVELOPMENT COMPANY, L.L.C., and the business of the Company shall be conducted under that name in the State of Utah and under such name or variations thereof as the Members deem necessary or appropriate to comply with the requirements of any other jurisdiction in which the Company may elect to do business. The Members will use their best efforts to take the action required to comply with the Act, assumed name act, fictitious name act, or similar statute in effect in each jurisdiction or political subdivision in which the Company proposes to do business.

2.3 Company Offices and Agent for Service of Process: The designated office of the Company, where the Company records as specified in the Act shall be kept, shall be 98 South State, LaVerkin, UT 84745. The address of the registered agent of the Company, where legal process may be served as designated in the Articles or amendments thereto, shall be 98 South State, LaVerkin, UT 84745, and the name of the current registered agent at that address is L. Lane Blackmore. The Members may from time to time change the registered office of the Company or the registered agent, and amend the Articles to reflect such change, and may in their discretion establish additional places of business of the Company.

2.4 Names and Addresses of Members: The full name and business street address of the Members of the Company are as follows:

Shadow Canyon Land Company, L.L.C. 595 South 180 West #113-4 Hurricane, UT 84737 State LaVerkin, UT 84745	L. Lane Blackmore 98 South State LaVerkin, UT 84745
L & D Development, Inc. 595 South 180 West #113-4 Hurricane, UT 84737	

2.5 Number of Members: The Members identified herein shall constitute all of the members in the Company, and, except as expressly provided for herein, no additional Members shall be admitted to the Company. The Members shall not sell or assign their interests in the Company except as hereinafter provided in this Agreement.

2.6 Character of Business: The business purposes of the Company are (a) to acquire, own, hold for investment, develop, construct upon, manage, sell, lease, and otherwise deal with the real property that is owned by the Company; (b) to purchase, lease, sell, own and operate, and to finance the acquisition and operation of, personal property for use at or on the real property that is owned by the Company; (c) to employ or contract with contractors for the services they provide related to work on the real property that is owned by the Company; and (d) to incur indebtedness, secured or unsecured, for any of the purposes of the Company.

2.7 Period of Duration: The period of the Company's duration or term shall be ninety-nine (99) years commencing at the date and time indicated on the stamped or sealed copy of the Articles returned by the Division at the time of filing the Articles;

provided, however, the Company may be dissolved prior to the end of such term in accordance with the provisions of Article 12 below.

### ARTICLE 3

#### CAPITAL CONTRIBUTIONS

3.1 Contributions to Capital: The Members shall contribute to the Company all rights and interest in and to the Development Agreement entered into the 21 day of August, 2002, (Exhibit B).

3.2 Initial Capital Interests: The respective interests of the Members in the initial capital of the Company are as follows:

	<u>Percent Interest</u>
L. Lane Blackmore	50%
Shadow Canyon	50%

3.3 Interest on Contributions: No interest shall be paid on the initial capital accounts of the Company or on any subsequent capital contributions made by the Members.

3.4 Withdrawal of Capital: No withdrawals of the Company capital will be permitted except on the vote of all of the Members, or except in accordance with the provisions of Articles 4, 5 and 12 hereof.

3.5 Membership Interest Certificates: The Company may, but shall not be required, to issue certificates evidencing membership interest (Membership Interest Certificates) to Members of the Company. Once Membership Interest Certificates have been issued, they shall continue to be issued as necessary to reflect current membership interest held by Members. Membership Interest Certificates shall be in such form as may be approved by the Manager and shall be manually signed by the Manager. All issuances, reissuances, exchanges, and other transactions of membership interests involving Members shall be recorded in a permanent ledger as part of the books and records of the Company.

### ARTICLE 4

#### CAPITAL ACCOUNTS; DRAWING

#### ACCOUNTS

4.1 Capital Accounts: An individual capital account shall be maintained for each Member. The interest of each Member in the capital of the Company shall consist of his or her share of the capital of the Company as shown in Article 3 hereof, increased by (a) his or her additional contributions to capital and (b) his or her share of Company profits transferred to capital, and decreased by (i) distributions to him or her in reduction of his or her Company capital and (ii) his or her share of Company losses, if transferred from his or her drawing account. The capital account of Shadow Canyon shall be allocated sufficient profit such that Shadow Canyon shall receive a total distribution of



cash from the Company to equal Seven Hundred Thousand Dollars (\$700,000.00) consistent with the Development Agreement.

4.2 *Drawing Accounts*: Separate drawing accounts shall be maintained for each Member. All withdrawals made by a Member shall be charged to his or her drawing account. Each Member's share of profits and losses, as defined and determined in accordance with and by the Development Agreement, shall be credited or charged to his or her drawing account. Unless a balance in a Member's drawing account in his or her favor (a credit balance) is transferred to his or her capital account as hereinafter provided, it shall constitute a liability of the Company to that Member payable as provided in paragraph 4.3 of this Article 4, without interest; it shall not constitute a part of his or her capital account or his or her interest in the capital of the Company.

4.3 *Transfers from Drawing Accounts to Capital Accounts*: The Managers may transfer all or part of any credit balances or debit balances in the Members' drawing accounts to the Members' capital accounts at any time, provided the transfers are made proportionately to each Member's interest in capital unless otherwise agreed in writing by all the Members.

4.4 *Allocation of Losses in Excess of Capital Accounts*: No allocation shall be made to a Member to the extent that the allocation causes or increases a deficit balance in the capital account of that Member at the end of the taxable year of the Company to which the allocation relates after the capital account has been reduced as required by Treasury Regulation § 1.704-1(b)(2)(ii)(d).

4.5 *Qualified Income Offset*: In the event any Member unexpectedly receives an adjustment, allocation, or distribution that results in a deficit balance in such Member's capital account, there shall be allocated to such Member items of Company income and gain in an amount and manner sufficient to eliminate such deficit balance as quickly as possible in accordance with Treasury Regulation § 1.704-1(b)(2)(ii)(d).

4.6 *Return of Capital*: Each Member shall look solely to the Company assets for the return of his or her contributions to Company capital, and if the Company assets are insufficient to return such contributions, he or she shall have no recourse against any other Member for that purpose. There is no right given the Members to receive upon liquidation of the Company any property other than cash in return for his or her contributions. The provisions of Article 12 hereof shall govern the procedure and computation of amounts available for distribution upon dissolution of the Company. Nothing in this paragraph is intended to modify the priority returns provided in the Development Agreement and elsewhere in this Agreement.

4.7 *Compliance with Rules Relating to Partnership Taxation*: Although the Company is a limited liability company, it is contemplated that for Federal Income Tax purposes it will be treated as a partnership and its Members will be treated as partners. Accordingly, the capital accounts of the Members (including the allocation of profits and losses, etc.) shall be established, maintained and adjusted in accordance with the

requirements of Treasury Regulations § 1.704-1(b)(2)(iv) and any successor regulations, as the same may be determined by the Internal Revenue Service. All particular accounting requirements of those regulations necessary to have the allocations of the Agreement recognized shall be deemed incorporated by this reference.

4.8 Allocations of Losses: The net losses of the Company shall be charged to the Members at the end of each fiscal year of the Company in the ratios set forth in paragraph 3.2 of Article 3 above, or according to the Development Agreement, or in the adjusted ratios if an adjustment in the proportionate shares of a Member or Members has been made pursuant to this Article.

4.9 Allocation of Profits: Profits from the Company shall be allocated consistent with the Development Agreement.

## ARTICLE 5

### DISTRIBUTIONS

Distributions of Company assets may be made in cash or in kind as the Members of the Company shall agree.

## ARTICLE 6

### ACCOUNTING FOR THE

### COMPANY

6.1 Accounting Methods; Fiscal Year: Profits and losses of the Company shall be determined on a cash basis in accordance with generally accepted accounting principles and shall include gains or losses from the sale of Company assets. The Company shall also report for income tax purposes on a cash basis. The fiscal year of the Company, for both accounting and tax reporting purposes, shall be the calendar year.

6.2 Review of Financial Statements: Not less than quarterly, and as soon as possible after completion of the tax returns, a meeting of the Members shall be held. The tax returns and any financial statements shall be reviewed and discussed at that meeting. On written request, any Member shall be entitled to copies of tax returns and any financial statements prepared for the Company. In addition, at the quarterly meetings, the Manager shall update the Members on the status of the development project and provide such development documentation and accounting as may be reasonably requested by the Members. The Company shall invite Shadow Canyon to a quarterly meeting for purposes of discussing and updating Shadow Canyon on the status of the project. Shadow Canyon's agent, V. Lowry Snow, or such other designee as Shadow Canyon may appoint are hereby authorized to obtain documents from the Company and attend quarterly meetings on behalf of Shadow Canyon.

6.3 Records: The Company shall keep at its principal place of business the records required to be kept there pursuant to Section 48-2c-112 of the Utah Code. Said records are subject to inspection and copying at the reasonable request and at the expense

of any Member during ordinary business hours.

6.4 Additional Records and Meeting: In addition to the foregoing, Throughout the development and subdivision of the Shadow Canyon Property, the Company shall provide Shadow Canyon with copies of any and all master plan documents and shall provide any and all information as may be reasonably necessary for Shadow Canyon to be informed as to the development of the Shadow Canyon Property. In addition to keeping all records and filing appropriate tax returns as required by law, the Manager of the Company shall provide quarter annual accountings to Shadow Canyon.

## ARTICLE 7

### MANAGEMENT OF COMPANY

7.1 Management by Manager: Management of the Company shall be vested in a Manager who need not be a Member. The Manager of the Company is appointed in accordance with the provisions of this Article 7 below. The Manager of the Company shall serve until such time as new Managers are appointed, or until their death or resignation.

7.2 Authority of Managers: The Managers may exercise all the powers of the Company whether derived from law, the Articles of Organization, the Development Agreement or this Agreement (except such powers as are by statute, by the Articles of Organization, by the Development Agreement or by this Agreement vested solely in the Members), and shall have the right, power and authority to do on behalf of the Company all things which are necessary or desirable to carry out the business purpose of the Company, including, but not limited to, the right, power and authority: to sell, exchange, or grant an option for the sale or exchange of all or any portion of the property of the Company; to invest and reinvest any available funds; to incur all reasonable expenditures; to employ and dismiss from employment any and all employees, agents, independent contractors, attorneys, and accountants; to lease all or any portion of any property for any purpose and without limit as to the term thereof, provided such term does not exceed the term of the Company as set forth in the Articles and in Section 2.7 above; to prepay in whole or in part, refinance, modify, or extend any indebtedness; to negotiate any and all contracts for development and subdivision of Company property, including but not limited to special improvement districts, economic development areas, the installation and construction of infrastructure and roadways; to do any and all of the foregoing at such price, rental or amount, for cash, securities, or other property and upon such terms as the Manager deems proper; to place record title to property in the name of the Company; to adjust, compromise, settle or refer to arbitration any claim against or in favor of the Company or any nominee, and to institute, prosecute, and defend any legal proceeding relating to the business or property of the Company; to delegate all or any portion of the powers granted hereunder to one or more attorneys-in-fact; and to execute, acknowledge and deliver any and all instruments to effectuate any and all of the foregoing. Notwithstanding the foregoing, the Manager shall keep the Shadow Canyon Property lien free of outside liens other than the current obligations to US Bank and State Bank of Southern Utah.

7.3 Restrictions on Managers: No Manager or Managers shall, without the written consent or written ratification of the specific act by all the Members:

(a) Do any act in contravention of law, the Articles of Organization, or this Agreement.

(b) Do any act to make it impossible to carry on the ordinary business of the Company.

(c) Confess a judgment against the Company.

(d) Possess Company property in their own name or assign their rights in specific Company property for other than a Company purpose.

(e) Admit a person as a Member except as otherwise provided in this Agreement.

(f) Continue the business with Company property after its bankruptcy, dissolution, cancellation or other cessation to exist.

(g) Sell any portion of the Company property in a bulk sale transaction or at a price less than fair market value.

(h) Sell any portion of the Company property to a person or entity that is related or in part owned by the Manager, including any relatives of the Manager or Members at less than fair market value.

(i) Lien, encumber or pledge Company property as security for a debt, except as may be authorized by the Development Agreement.

7.4 Number, Term and Qualifications: The Company shall have one Manager. The Manager of the Company shall be L. Lane Blackmore.

7.5 Appointment and Removal: The Manager may not be removed, with or without cause, without the unanimous written request or approval of all of the Members, including Members who are Managers.

7.6 Responsibilities: Each Member and Manager shall, in all events, account to the Company and to the Members for any benefit, and hold, as trustee for the Company and the Members, any profits derived by a Member or Manager from any transaction connected with the formation, conduct or liquidation and winding up of the Company, or from any use by a Member or Manager of Company property, and such duty extends to the personal representatives of any deceased Member or Manager. A Member or Manager shall not be liable or accountable in damages or otherwise to the Company or the Members for any action taken or failure to act on behalf of the Company unless the act or omission constitutes gross negligence or willful misconduct.

In addition, the Manager shall be responsible for managing all aspects of the development project including but not limited to the following: (a) Be responsible for actually carrying out the subdivision and development of all of the Shadow Canyon Property subject to this Development Agreement and the Operating Agreement; (b) Be responsible for obtaining all necessary permits and approvals and for compliance with all applicable ordinances and statutes; (c) The Manager shall use good faith best efforts to develop, subdivide and construct residences on the Shadow Canyon Property to increase and maximize, as economically feasible, the value of the Shadow Canyon Property.

7.7 Bank Accounts: The Company shall maintain checking or other accounts in such bank or banks as the Managers shall determine and all funds received by the Company shall be deposited therein and withdrawn therefrom under such general or specific authority as the Members shall grant to the Managers.

7.8 Time and Attention Required of Managers: The parties understand that the Managers have other business activities that take a substantial portion of their time and attention. Accordingly, the Managers are required to devote to the business of the Company only the time and attention that they shall deem necessary in order to fulfill their responsibilities hereunder.

## ARTICLE 8 COMPENSATION TO MANAGERS

The Manager of the Company shall not be entitled to additional compensation for its services hereunder because the Manager received its ownership interest in the Company based upon the Manager's agreement to perform services as set forth herein and in the Development Agreement between the initial Members hereto.

## ARTICLE 9 CONTINUATION OF COMPANY UPON THE DEATH, DISSOLUTION OF A MEMBER RESIGNATION, EXPULSION, OR

9.1 Termination of Member: In the event a Member dies, is expelled, becomes bankrupt, or dissolves, or the occurrence of any other event which terminates the continued membership of a Member (said Member being hereinafter sometimes referred to as a "terminating Member"), the Company shall continue its operations and no dissolution of the Company shall take place until the Company is dissolved in accordance with the provisions of Article 12 below. If under the Act the loss of the Member is an event which requires that an amendment regarding the Company's Articles be filed with the Division or some other authority, or that some other action be taken by the Company, then within the time provided for under the Act for the filing of such an amendment or taking such other action, the remaining Members shall cause such an amendment to be properly filed or such other action to be taken.

The Company, or if the Company determines that it is not able or willing to do so,



then the remaining Members, in that order, shall have the right, at their election, to purchase the terminating Member's interest in the Company, upon such terms and conditions as they and the terminating Member, or the legal representative or representatives of the terminating Member, if he or she is deceased, may agree. If the parties cannot agree upon the value of the terminating Member's interest for such a sale, then the terminating Member or his authorized representative shall appoint an appraiser and the remaining Members shall appoint an appraiser, and the appraisers so appointed shall determine the fair market value of the interest being acquired. If the appraisers are not able to agree on the fair market value, then they shall appoint a third appraiser, and the decision of a majority of the three (3) appraisers shall be binding upon all interested parties. The purchasing parties and the terminating Member or his estate, as appropriate, shall share equally the costs of the appraisal.

If the interest of the terminating Member is not purchased by the Company or the remaining Members as provided for above, then the interest of the terminating Member shall be treated as a permissible transfer, under the provisions of Article 10 below of the terminating Member's interest to the person holding the interest immediately after the event resulting in the termination of the Member's interest; provided, however, that the holder of the terminating Member's interest at that time shall only become a substitute Member if the procedures established in this Agreement for substituting that interest holder as a Member have been satisfied in full.

## ARTICLE 10

### TRANSFER OF COMPANY

#### INTEREST

10.1 Transfers by Members: A Member may sell, assign or transfer his or her interest in the Company to one of the other Members, provided the Manager has first given written consent to such sale, assignment or transfer. A Member may not sell, assign or otherwise transfer all or any part of his or her interest in the Company to a person who is not already a Member of the Company, except on the following conditions:

(a) The interest shall first be offered in writing to the Company at the price and on the terms on which it is proposed to be sold ("the price" and "the terms"), and the Company shall have a period of thirty (30) days to accept or reject the offer at the price and on the terms.

(b) If the offer is rejected by the Company, the interest of the Member shall next be offered in writing to the other Members of the Company for a period of twenty (20) days next following expiration of the thirty (30) day period. The offer to the other Members shall be prorated in accordance with the ratio of the capital interests of each Member to the total capital interests of all the Members other than the one making the offer, on the terms and at prices (as to each offeree) determined by prorating the price. If not all the remaining interest is disposed of under the apportionment, each Member desiring to purchase a portion of the remaining interest shall be entitled to purchase the portion that remains undisposed of in the proportion that his interest in the capital of the Company bears to the

interest in the capital of the Company of all other Members desiring to purchase portions of the remaining interest.

(c) If the Company or the Members do not purchase the interest offered for sale, then the Member may sell his or her interest to a third person or third persons during the (3) month period following the expiration of the twenty (20) day period referred to in paragraph (b) of this Section 10.1, but at a price not lower than the price, and on terms no more favorable than the terms offered to the Company and the Members as provided above. After the expiration of the three (3) month period, the interest shall not be sold without first being re-offered to the Company and the remaining Members in accordance with subparagraphs (a) and (b) above.

10.2 Transfer Provisions Binding: Any sale, assignment or transfer or purported sale, assignment or transfer of any interest in the Company, whether voluntary or involuntary, shall be null and void unless made strictly in accordance with the provisions of this Article. Any transferee who has properly acquired the interest of a Member of the Company shall be subject to all the terms, conditions, restrictions, and obligations of this Agreement, including the provisions of this Article. A transferee who has properly acquired the interest of a Member of the Company may become a Member of the Company only if the transferee is admitted as a Member in accordance with the provisions of this Agreement. If such transferee is not so admitted as a Member of the Company, then such transferee shall have no right to participate in the management of the business and affairs of the Company, to vote on any matter on which Members are eligible to vote, or to become a Member; and the only rights to which such transferee shall be entitled are the share of profits or other compensation by way of income and the return of contributions to which the transferor was entitled.

#### ARTICLE 11 ADMISSION OF NEW MEMBERS

Additional Members may be admitted to the Company with prior written consent of all of the Members. In the event that a new Member makes a contribution to the Company in return for admission into the Company, the share of such new Member and all other Members in the capital and the profits and losses of the Company shall be in such proportion as may be agreed upon between all of the Members. In the event new Members are admitted to the Company, the Members may file with the Division an amendment to the Articles, as may be required by law.

#### ARTICLE 12 DISSOLUTION, WINDING UP AND

#### CANCELLATION

12.1 Events Causing Dissolution: The Company shall be dissolved and its affairs shall be wound up when any one or more of the following occurs:

(a) The term of the Company expires.

- (b) There are no Members.
- (c) All Members vote to dissolve the Company.
- (d) The Company is not the successor company in the merger or consolidation of two or more companies.
- (e) Administrative dissolution under § 48-2c-1207, subject to right or reinstatement under § 48-2c-1208.
- (f) Entry of a decree of judicial dissolution under § 48-2c-1213.

12.2 Method of Winding Up and Cancellation: Upon the occurrence of any event causing dissolution as provided in paragraph 12.1 above, the Company shall immediately commence to liquidate and wind up its affairs as set forth in the Act except that any distributions to Members as a return of capital or distribution of profits shall be allocated among the Members on the percentages as though a sale had occurred under Article 4.9.1 above, or a bulk sale had occurred in accordance with Article 4.9.2 above, as the case may be. When all debts, liabilities, and obligations of the Company have been paid or discharged, or adequate provision has been made to do so, and all of the remaining property and assets of the Company have been distributed to the Members, Articles of Dissolution shall be executed and filed with the Division as required by Section 48-2c-1204 of the Act.

#### ARTICLE 13

##### ENCUMBRANCES

Except as provided in Article 10 hereof, no Member shall in any way encumber, pledge, hypothecate, or otherwise use his or her Company interest as collateral or security for an obligation, without the prior written consent of all the Members.

#### ARTICLE 14

##### INDEMNITY

The Company shall indemnify and save harmless the Manager from any personal loss or damage incurred by such Manager by reason of any act performed by such Manager for and on behalf of the Company and in furtherance of its interests.

#### ARTICLE 15

##### MISCELLANEOUS

15.1 Notices: Any notices to or between the Members shall be in writing and shall be sent registered mail, return receipt requested, to the address of each Member as the same appears in the books and records of the Company. Notice shall be deemed to be received on the earlier of the date actually received or the third day after being deposited



in the United States mail as above described.

15.2 Entire Agreement; Amendments: This Agreement and the Development Agreement shall constitute the entire agreement between the parties, and there are no other or further agreements outstanding not specifically mentioned herein; provided, however, that this Agreement may be amended, altered, supplemented or modified by the written agreement of all the Members.

15.3 Invalidity: If any part of this Agreement is or shall be invalid or unenforceable for any reason, the same shall be deemed severable from the remainder hereof, and shall in no way affect or impair the validity of this Agreement, or any other portion thereof.

15.4 Gender: The feminine includes the masculine and the neuter, the singular includes the plural, and vice versa, as the context may require.

15.5 Execution of Further Instruments: The Members shall cooperate with each other in good faith to accomplish the objectives and purposes hereof and to that end from time to time, they shall make, execute and deliver such other and further instruments as may be necessary or convenient in the fulfillment of this Agreement.

15.6 Headings: The headings in this Agreement are included solely for convenience of reference and shall not be construed as limiting or in any other way modifying the text of the Agreement.

15.7 Agreement to be Binding: This Agreement shall be governed by the laws of the State of Utah and shall inure to the benefit of and shall be binding upon each of the Members and their respective personal representatives, executors, heirs, successors and assigns (including successors and assigns by operation of law and involuntary event, as well as by voluntary act).

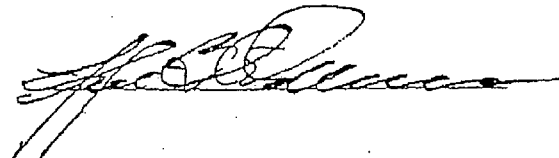
15.8 Counterparts: This Agreement may be executed in counterparts, each of which shall be an original and all of which together shall constitute one instrument.

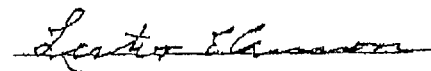
15.9 Provisions Contrary to Act; Severability: To the extent any provision of this Agreement varies or contradicts the general provisions of the Act, each Member hereby consents to such variation or contradiction. If any provision of this Agreement or the application of such provision to any person or circumstance shall be held invalid, the remainder of this Agreement, or the application of such provision to persons or circumstances other than those to which it is held invalid, shall not be affected thereby.

15.10 Conflicting Provisions: The terms of the Development Agreement shall control to the extent the provisions of this Agreement conflict with provisions of the Development Agreement. The terms and conditions contained in the Development Agreement are incorporated herein by this reference.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date first above written. The undersigned hereby acknowledge that they have read this Agreement.


L & D Development, Inc.

  
L. Lane Blackmore

  
By: Lester E. Cannon  
Its: President

Shadow Canyon Land Company, LLC  
LLC

Blackmore/Cannon  
Development Company,

  
By: Lester E. Cannon  
Its:

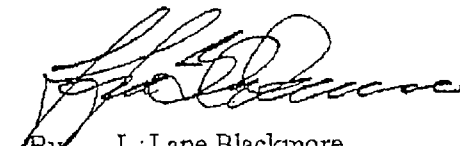
  
By: L. Lane Blackmore  
Manager Its: Manager

EXHIBIT B

To Operating Agreement of  
BLACKMORE/CANNON DEVELOPMENT COMPANY, L.L.C.  
(a Utah Limited Liability Company).

Attach a signed copy of the Development Agreement as Exhibit B.

# EXHIBIT 2

RECEIVED

JUL 14 2008

FILED

JUL 10 2008

FIFTH DISTRICT COURT  
WASHINGTON COUNTY

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IN THE FIFTH JUDICIAL DISTRICT COURT  
IN AND FOR WASHINGTON COUNTY, STATE OF UTAH

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L. LANE BLACKMORE, et al.,  
Plaintiffs,

vs.

LESTER E. CANNON, et al.,  
Defendants.

MEMORANDUM DECISION AND  
ORDER ON PENDING MOTIONS

Civil No. 030501322

Judge James L. Shumate

Before the Court are competing motions for summary judgment, as well as Plaintiffs' Motion to Strike Defendants' Response to Statement of Disputed Facts, Plaintiffs' Motion to Amend, and Plaintiffs' Motion in Limine. A hearing was held on the pending motions on May 27, 2008, at which the Court heard the arguments of counsel for both sides; at the hearing the Court also received testimony from Plaintiffs' expert witness, Professor David A. Thomas, over Defendants' objection. Having the benefit of the arguments of counsel at the hearing, and having reviewed the motions, memoranda, and exhibits, the Court rules as follows:

**1. Summary Judgment**

Plaintiffs' Cross Motion seeks summary judgment specifically on "the issue of whether Defendants ... breached material terms of the Development Agreement." Although not so expressly limited, Defendants' motion is also addressed to the question of whether Plaintiffs' conduct constituted a material breach of contract. The Court's analysis on summary judgment is therefore

limited to the issue of breach of contract, leaving for later resolution other claims and the propriety of the remedies sought.

Under Rule 56(c), “The judgment sought shall be rendered 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.” The Court therefore recites the facts it deems to be undisputed.

**a. Factual Background**

On August 21, 2002, Plaintiffs, Blackmore and BCDC, entered into a written development agreement with Defendants and Shadow Canyon Land Company to develop a residential subdivision called Shadow Canyon. An Operating Agreement for BCDC was also executed that day, and the Articles of Incorporation for BCDC and an Assignment of Declarant’s Interests had been executed previously. The Shadow Canyon property, already partially developed, was security for debts owed to US Bank and State Bank of Southern Utah, and the obligations to the banks were past due; taxes on the property were also owed. One portion of the agreement between the parties stated,

In exchange for his fifty percent (50%) Member interest in BCDC, Blackmore shall do the following:

(1) Bring current accrued interest owed to US Bank in the approximate amount of Seventy Thousand Dollars (\$70,000); (2) Pay current all property taxes owed on the Shadow Canyon Property[,] which sum is approximately Sixty-three Thousand Dollars (\$63,000); (3) Take such reasonable steps as necessary to obtain an extension on the US Bank loan; and (4) Pay to Shadow Canyon the sum of Fifty Thousand Dollars (\$50,000) at closing.

Development Agreement at ¶ 2 [capitalization as in original]. The Development Agreement does not define the term “closing,” nor does it specify a contractual timeline by which the property taxes

were to be paid. As detailed in the previous hearings, however, the taxes were due on November 30, 2002 and would have gone to a tax sale in March of 2003.

Moreover, under paragraph 3 of the Development Agreement, “as additional consideration to induce Shadow Canyon to enter this agreement,” Blackmore was to, among other duties, “[m]arket and sell the three existing spec homes and all future lot and home sales,” and to “[b]uild, at its [sic] own expense, three (3) new spec homes for the standing inventory within the first six (6) months following the transfer of the Shadow Canyon Property to BCDC.” As a manager, Blackmore was conferred certain powers including “the authority to convey and borrow,” *id.* at ¶ 6.2; to seek refinancing of the bank loans with other banks or private lenders “on similar terms,” *id.*; and to work with the banks on Shadow Canyon’s behalf “for the purpose of extending, paying off, or refinancing the loans,” *id.* at ¶ 9.

In return, the Development Agreement called for a transfer of property to BCDC: “In exchange for its fifty percent (50%) Member interest in BCDC, Shadow Canyon shall transfer the Shadow Canyon Property to BCDC by good and sufficient Special Warranty Deed.” *Id.* at ¶ 5. The Assignment of Declarant’s Interest executed with the Development Agreement recited that the transfer by Special Warranty Deed to BCDC had already taken place. The August 14, 2002 letter to Mr. Blackmore from Thomas J. Bayles of Snow, Jensen & Reece stated that the deeds would be transferred “as detailed in the Development Agreement.” In fact, Shadow Canyon never transferred the deeds to the property to Plaintiff BCDC as required by the Development Agreement and as recited in the Assignment. Affidavit of Lane Blackmore at ¶ 9.

Plaintiffs did not pay current the property taxes by November 30, 2002, when they were due, nor did plaintiffs pay the taxes thereafter. Neither has Blackmore made the \$50,000 payment

required, under the vague terminology of the Development Agreement, “at closing.” Blackmore, however, did perform such duties as resolving issues with the homeowners’ association; marketing and selling the three existing spec homes, and in that process paying off the debt to State Bank of Southern Utah; paying utilities in the common area through December of 2002; and nearly completing construction of two homes on the property. Affidavit of Lane Blackmore at ¶¶ 15-18. Blackmore contends that these two houses were to be converted to liquid assets after the end of September 2002 to meet his duties under the Development and Operating Agreements. *Id.* at ¶¶ 4-6.

Defendants engaged in negotiations to sell the property to another party before the November 30, 2002 tax due date. See January 11, 2005 Testimony of Frank Lindhardt at 154:17-24. The Shadow Canyon property was sold in early 2003, the conveyance being recorded on February 3 of that year.

#### **b. Analysis**

Each side claims the other first breached the contract in a material way and thus its performance is excused. “[U]nder the ‘first breach’ rule ‘a party first guilty of a substantial or material breach of contract cannot complain if the other party thereafter refuses to perform.’ ‘He can neither insist on performance by the other party nor maintain an action against the other party for a subsequent failure to perform.’” *CCD, L.C. v. Millsap*, 2005 UT 42, ¶ 29 (citation omitted). See also *Bonneville Distrib. Co. v. Green River Dev. Assocs.*, 2007 UT App 175, ¶ 32. (“The law is well settled that a material breach by one party to a contract excuses further performance by the nonbreaching party”)(citations omitted). Of course, not every breach is serious enough to amount to a material breach, but “certainly a failure of performance which ‘defeats the very object of the contract’ or ‘[is] of such prime importance that the contract would not have been made if default in

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that particular had been contemplated' is a material failure." *Coalville City v. Lundgren*, 930 P.2d 1206, 1210 (Utah Ct. App. 1997)(citations omitted.)

The Court concludes that the Defendants' obligation to convey the property through special warranty deed was a matter of "prime importance" and a failure of performance which went to "the very object" of the contract. The conveyance was certainly the most significant duty required of Shadow Canyon, the very essence of the performance required of it under the contract. No prudent businessperson would undertake to pay large tax liabilities or other debts on property, or to make substantial improvements on it, knowing that title had not in fact been conveyed. Defendants argue that a breach by Plaintiffs occurred by November 30, 2002, when delinquent property taxes were not paid and a tax lien arose, correctly noting that at the April 12, 2005 hearing, the Court stated that "the tax due date, November 30<sup>th</sup>, was an extremely important date with respect to this transaction" (11:19-20). At no time, however, did the Court go so far as to make a finding of fact that performance was required by Plaintiffs as of that date. See 11:14-25. The Court still deems the November date to have been a very important one, but Defendants' material breach, its failure to convey the property as called for in the development agreement, predated that due date and any associated breach by Plaintiffs and excused subsequent performance by the latter. Moreover, no identifiable "closing" occurred under the terms of the Development Agreement that would have triggered Blackmore's duty to make the \$50,000 payment. Plaintiffs are therefore entitled to summary judgment on the issue of whether Defendants breached material terms of the development agreement. Defendants' motion for summary judgment will be denied. Other claims in the complaint and the extent of damages remain for resolution. Obviously the Court's determination is not dispositive of any new issues raised in the amended complaint, discussed below.



## 2. Motion to Amend

Plaintiffs seek to amend their complaint to add certain theories of recovery and new defendants. The Court had already granted Plaintiffs leave to file "a final and third" amended complaint at the April 20, 2006 hearing, but for reasons not clear to the Court, they did not immediately do so. The Court grants Plaintiff's motion for the reasons articulated at the previous hearing, finding that the intervening amount of time has not appreciably changed its earlier analysis of the prejudice an amendment will cause Defendants; however, in so doing, the Court reiterates its statement that it will be the third and *final* amended complaint.

## 3. Other Motions

Plaintiffs' Motion in Limine and Motion to Strike Defendants' Response to Statement of Disputed Facts are rendered moot by Court's resolution of the motions for summary judgment and are therefore denied.

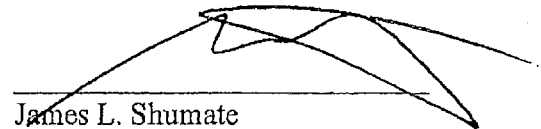
## ORDER

Based on the foregoing, it is therefore ordered:

- A. Plaintiffs' Motion for Summary Judgment is granted and Defendants' Motion for Summary Judgment is denied;
- B. Plaintiffs' Motion to Amend is granted;
- C. Plaintiffs' Motion in Limine and Motion to Strike are denied as moot;

D. The parties are to arrange and attempt in good faith to mediate the issues remaining in this matter.

Dated this 10 day of July, 2008.



James L. Shumate  
Fifth District Court Judge

CERTIFICATE OF MAILING/DELIVERY

I hereby certify that on this 10 day of July, 2008, I provided a true and correct copy of the foregoing MEMORANDUM DECISION AND ORDER to each of the parties/attorneys named below by placing a copy in such attorney's file in the Clerk's Office at the Fifth District Courthouse in St. George, Utah and/or by placing a copy in the United States Mail, first-class postage prepaid, and addressed as follows:

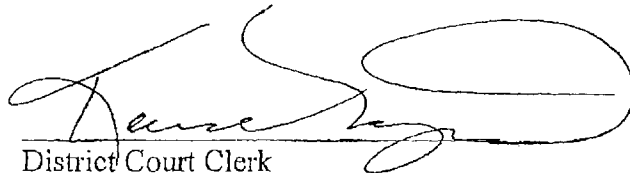
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District Court Clerk

## Tab 9

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R. BRETT EVANSON (USB #12086)  
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Attorneys for Plaintiffs

---

IN THE FIFTH JUDICIAL DISTRICT COURT,  
IN AND FOR WASHINGTON COUNTY, STATE OF UTAH

---

L. LANE BLACKMORE, et al.,

Plaintiffs,

vs.

LESTER E. CANNON, et al.,

Defendants.

ORDER GRANTING PLAINTIFFS'  
MOTION FOR PREJUDGMENT  
WRIT OF ATTACHMENT AS TO  
L&D DEVELOPMENT AND  
SHADOW CANYON LAND  
COMPANY AND THE ESTATE OF  
LESTER CANNON

Case No. 030501322

Judge: Honorable James L. Shumate

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Plaintiff's motion for Prejudgment Writ of Attachment came on for regular hearing on  
the 19<sup>th</sup> day of January, 2010. Defendants were represented by counsel of record Lamar J.

Winward, and Plaintiffs were represented by counsel of record, Justin D. Heideman, R. Brett Evanson, and Patrick J. Ascione.

This matter having been fully briefed and oral argument having been taken regarding all issues; and the Court being now fully apprised of all relevant law and facts does hereby rule and order that:

1. Plaintiff's Motion for Prejudgment writ of attachment is granted as to Defendants L&D Development and Shadow Canyon Land Company.
2. Plaintiff is awarded immediate possession of all money's held in either entity up to the amount \$150,000.00.
3. Plaintiff is awarded immediate, sole, and exclusive legal title in Lot 108, Shadow Canyon Phase 1, Hurricane, Utah 84737.
4. Defendants' argument that the issue of whether Plaintiff Blackmore waived his involvement in the contract is irrelevant due to the doctrine of Primacy of Breach.

DATED and SIGNED this \_\_\_\_ day of January, 2010.

BY THE COURT:

---

JUDGE SHUMATE

Approved as to Form:

---

Lamar J. Winward

**CERTIFICATE OF SERVICE**

I hereby certify that I mailed via First Class US Mail, a true and correct copy of the foregoing proposed **Order**, postage prepaid, and addressed as follows:

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St. George, Utah 84770

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Jerome Romero  
Jeffery W. Shields  
1500 Wells Fargo Plaza  
170 South Main Street  
Salt Lake City, 84101-1644

DATED and SIGNED this \_\_\_\_ day of January, 2010.

\_\_\_\_\_  
Legal Assistant

## Tab 10



IN THE FIFTH JUDICIAL DISTRICT COURT  
OF WASHINGTON COUNTY, STATE OF UTAH

L. LANE BLACKMORE,

Plaintiff,

vs.

L&D DEVELOPMENT, et al,

Defendant.

Case No. 030501322

**ORIGINAL**

Hearing  
Electronically Recorded on  
February 25, 2010

BEFORE: THE HONORABLE JAMES L. SHUMATE  
Fifth District Court Judge

APPEARANCES

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**FILED**  
**UTAH APPELLATE COURTS**

**MAY 12 2010**

**20100020 CA**

P R O C E E D I N G S

(Electronically recorded on February 25, 2010)

(Recording system malfunctioning and cuts in and out.  
Transcriber was unable to pick up all statements of  
Counsel)

COURT BAILIFF: Hear ye, hear ye, the Fifth District  
Court in and for Washington County is now in session, the  
Honorable James L. Shumate presiding.

THE COURT: Thank you, everyone. We are in session  
on February 25, 2010. It's at 4 o'clock, and the matter before  
the Court is an objection to a proposed order in the matter of  
Blackmore vs. L&D Development, et al.

Mr. Winward, these are your objections. Counsel, as  
I understand it, you are concerned that the paragraphs of the  
proposed order drafted by Mr. Heideman is problematic where it  
awards immediate possession of the \$150,000 held by L&D  
Development and Shadow Canyon. You also complain about the  
language awarding possession of lot 108 of Shadow Canyon Phase I,  
and the ruling on Blackmore's alleged waiver of his involvement  
and the contract is irrelevant due to doctrine of primary breach.  
Those are the three things that you're focusing on.

MR. WINWARD: That is, your Honor.

THE COURT: All right. Counsel, the writ of attachment  
as proposed is simply to grant the plaintiff rights in these  
dollars. I thought that's what I ordered at the last hearing.

1 Where are we wrong on that?

2 MR. WINWARD: Your Honor, their motion for a pre-  
3 judgment writ of attachment is to attach those, not to give  
4 them to them. The writ of attachment is simply to secure their  
5 position so the assets are not dissipated or utilized during the  
6 pendency of the action. It doesn't give them title. It doesn't  
7 give them ownership. It simply attaches them.

8 The case law is clear on that point, especially under  
9 the real property law, but it applies to the personal assets as  
10 well. The case of Houghton vs. Miller, which is 118 P.3d 293  
11 talked about the -- it was actually an argument between homestead  
12 exemption and pre-judgment writ of attachment on a parcel of real  
13 estate.

14 The Court indicated there, as cited by several earlier  
15 cases, "When property is levied upon pursuant to a writ of  
16 attachment, plaintiff acquires an inchoate or contingent lien  
17 or interest in the property attached." It's simply a lien.

18 Their paragraph 2 says they want possession of it.  
19 They can't have possession of something. They can actually have  
20 a lien against it. We can file it in a court, we can put it in  
21 the Court's coffers for a period of time.

22 Paragraph 3 they say they want immediate sole and  
23 exclusive legal title to lot 108. Well, they can't have legal  
24 title. It's a lien, it's inchoate. It means contingent. It  
25 means pending the outcome of the case. So the writ of attachment

1 can only do that. It can't go any further than that. That's the  
2 problematic reasons for paragraphs 2 and 3.

3 Paragraph 4 I have a problem with as I'm not entirely  
4 sure all the reasoning that the Court -- and the Court doesn't  
5 have to state all the reasons on the record as to granting or  
6 not granting a pre-judgment writ, but if they're using paragraph  
7 4 to somehow establish, "Well, this is now the law of the case,"  
8 that's inappropriate.

9 The Court may have had several reasons for granting the  
10 writ, including the argument that they made earlier that L&D and  
11 Shadow Canyon didn't have any other funds other than the cash  
12 that we indicated and the lot, and that their damages were in  
13 excess of that, and therefore that met part of the requirements  
14 for a pre-judgment writ.

15 THE COURT: I think I follow you, Counsel. Thank you.

16 Mr. Heideman, let me give you a chance to respond.  
17 Should the \$150,000 be paid into the clerk of the court, or  
18 should the plaintiff take possession of it?

19 MR. HEIDEMAN: Your Honor, we went to some length  
20 to intuit the objection because the objection cites no rule or  
21 case. So that having been said, we've responded specifically to  
22 Rule 64(a) (inaudible) or information that indicates there's a  
23 basis for Counsel's argument.

24 In our response we quote (inaudible) pre-judgment writ  
25 of attachment (inaudible) and obtain it, again, intuiting

1 Counsel's basis for this motion. (Inaudible) the only place that  
2 indicates that as an officer (inaudible) or excuse me, I'm sorry,  
3 Rule 64.

4           However, Rule 64 is a definitional section, and what it  
5 does is it provides the terms and the definitions for those terms  
6 that are applicable across Rule 64(a) through (f) -- excuse me,  
7 (e).

8           That having been said, the term "officer" only appears  
9 in Rule 64(d)(j)(4) (inaudible) and therefore it does not appear  
10 in Rule 64(a) (inaudible) pre-judgment writ of attachment  
11 (inaudible). If the legislature had intended (inaudible)  
12 specifically in Rule 64(d)(j)(4).

13           THE COURT: Well, let's not blame this on the  
14 legislature, Counsel. These are the Supreme Court's rulings.

15           MR. HEIDEMAN: Well, that's true, and well stated, your  
16 Honor. That having been said (inaudible) still the same. If  
17 they intended for officers (inaudible) they could have included  
18 it (inaudible) and they did very specifically in those other  
19 three.

20           So as a result, I don't believe that there is any  
21 basis. The Houghton case (inaudible) and a lien that would be  
22 (inaudible) underneath that exemption. It doesn't mean that the  
23 lien is eviscerated, it just means that you can't enforce it to  
24 the exclusion (inaudible). We don't have a homestead exemption  
25 here (inaudible) asserted or pled, and so (inaudible) I don't --

1 well, I just don't believe it did.

2 Furthermore, the Court -- I mean this is the whole  
3 purpose for a finding (inaudible) of any type of (inaudible)  
4 therefore it should be, frankly, fairly straightforward.

5 THE COURT: What about paragraph 4 of your order,  
6 Counsel? Frankly, I'm happier just to issue orders based upon  
7 powers of the Court broad based rather than focusing on it.  
8 Do you have any heartburn over getting rid of paragraph 4?

9 MR. HEIDEMAN: I don't have heartburn over it, your  
10 Honor. The reason it was included (inaudible) specifically  
11 because of the conversation that we had (inaudible). Mr. Gallian  
12 brought (inaudible) logically it's impossible. You cannot be  
13 held to perform (inaudible) you can't waive a duty that you don't  
14 have, and you can't perform on an obligation that you have no  
15 (inaudible).

16 So to the extent that a primary breach excuses any  
17 future performance, there is no duty. It can't -- logically it  
18 (inaudible) so that's why I included it. If the Court wants that  
19 stricken, we're happy to do that. We just want the property that  
20 we have been awarded.

21 THE COURT: Okay. Mr. Heideman, prepare the order  
22 without paragraph No. 4, and I'll sign it in that form.

23 MR. HEIDEMAN: Thank you, your Honor.

24 MR. WINWARD: Your Honor, can I ask for a clarification?  
25 I don't want the plaintiff to be using the property pending the

1 outcome of the trial.

2 THE COURT: I understand that, Counsel, but the Court's  
3 order is going to be issued in that form.

4 MR. HEIDEMAN: Thank you, your Honor.

5 THE COURT: We're adjourned.

6 (Hearing concluded)

REPORTER'S CERTIFICATE

STATE OF UTAH           )  
                          ) ss.  
COUNTY OF UTAH        )

I, Beverly Lowe, a Notary Public in and for the State of Utah, do hereby certify:

That this proceeding was transcribed under my direction from the transmitter records made of these meetings.

That I have authorized Natalie Lake to prepare said transcript, as an independent contractor working under my license, appropriately authorized under Utah statutes.

That this transcript is full, true, correct, and contains all of the evidence and all matters to which the same related which were audible through said recording.

I further certify that I am not interested in the outcome thereof.

That certain parties were not identified in the record, and therefore, the name associated with the statement may not be the correct name as to the speaker.

\_\_\_\_\_  
Natalie Lake  
Official Court Transcriber

WITNESS MY HAND AND SEAL this 2<sup>nd</sup> day of March 2010.

My commission expires:  
February 24, 2012

\_\_\_\_\_  
Beverly Lowe  
NOTARY PUBLIC  
Residing in Utah County



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*Attorneys for Defendant-Appellants Shadow Glen 420, Inc.; Gemstone Homes, Inc.; Gemstone Properties, Inc.; Frank Lindhardt; and Eugene Buckley*

---

**IN THE UTAH COURT OF APPEALS**

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L. LANE BLACKMORE, et al.,

v.

L&D DEVELOPMENT, et al.,

**CERTIFICATE OF SERVICE OF  
APPELLANTS' AMENDED BRIEF  
ADDENDUM**

Case No. 20100200-CA

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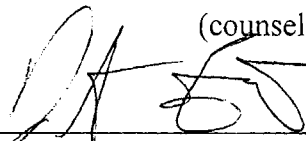
Pursuant to Rule 21(d) of the Utah Rules of Appellate Procedure, I hereby certify that on August 8, 2011, I caused two copies of the foregoing Appellants' Amended Brief Addendum to be served on the following, by first-class mail:

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