

1988

William and Judy McCleery, et al. v. Landforms Construction Corp., et al. : Brief of Appellant

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc1

 Part of the [Law Commons](#)

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

Melvin C. Wilson; Davis county attorney; Gerald E. Hess; Chief Civil Deputy; Layne B. Forbes; Bountiful City Attorney; Attorneys for third Party Defendants.

Robert A. Burton; Strong and Hanni; Attorneys for Landforms Construction Group; Lowell V. Smith; Hanson, Epperson, and Smith; Attorneys for Third Party Plaintiffs.

Recommended Citation

Brief of Appellant, *McCleery v. Landforms Construction Corp.*, No. 880401.00 (Utah Supreme Court, 1988).
https://digitalcommons.law.byu.edu/byu_sc1/2352

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

BRIEF

880401

IN THE SUPREME COURT OF THE STATE OF UTAH

WILLIAM & JUDY MCCLEERY, et al.,

Plaintiffs,

v.

LANDFORMS CONSTRUCTION CORP., et al.,

Defendants.

Case No. 880401

LANDFORMS CONSTRUCTION CORP.; LANDFORMS
DEVELOPMENT INC.; MARK S. SANDBERG;
L. WAYNE REDD; LYLE A. HALE; HALE/REDD
INVESTMENT GROUP, a general partnership,
a/k/a REDD HALE INVESTMENT GROUP; and
HALE/REDD LAND INVESTMENT, a joint venture,

Third-Party Plaintiffs
and Appellants,

v.

BOUNTIFUL CITY and DAVIS COUNTY,

Third-Party Defendants
and Respondents.

BRIEF OF APPELLANTS

Appeal from the Judgment of the Second Judicial District Court,
Davis County, State of Utah, Honorable Rodney S. Page Presiding

MELVIN C. WILSON
Davis County Attorney
GERALD E. HESS
Chief Civil Deputy
Davis County Courthouse
P. O. Box 618
Farmington, Utah 84025

LAYNE B. FORBES
Bountiful City Attorney
P. O. Box 331
Bountiful, Utah 84010

ROBERT A. BURTON, 516
STRONG & HANNI
Attorneys for Landforms Construction
Group, Landforms Development, Inc.
Sixth Floor Boston Building
Salt Lake City, Utah 84111

LOWELL V. SMITH, 3006
HANSON, EPPERSON & SMITH
Attorneys for Mark S. Sandberg,
L. Wayne Redd, Lyle A. Hale,
Hale/Redd Investment Group, and
Hale/Redd Land Investment
175 South West Temple, Suite 650
Salt Lake City, Utah 84101

IN THE SUPREME COURT OF THE STATE OF UTAH

WILLIAM & JUDY McCLEERY, et al.,)	
)	
Plaintiffs,)	
)	Case No. 880401
v.)	
)	
LANDFORMS CONSTRUCTION CORP., et al.,)	
)	
Defendants.)	
<hr/>		
LANDFORMS CONSTRUCTION CORP.; LANDFORMS)	
DEVELOPMENT INC.; MARK S. SANDBERG;)	
L. WAYNE REDD; LYLE A. HALE; HALE/REDD)	
INVESTMENT GROUP, a general partnership,)	
a/k/a REDD HALE INVESTMENT GROUP; and)	
HALE/REDD LAND INVESTMENT, a joint venture,)	
)	
Third-Party Plaintiffs)	
and Appellants,)	
v.)	
)	
BOUNTIFUL CITY and DAVIS COUNTY,)	
)	
Third-Party Defendants)	
and Respondents.)	

BRIEF OF APPELLANTS

Appeal from the Judgment of the Second Judicial District Court,
Davis County, State of Utah, Honorable Rodney S. Page Presiding

	ROBERT A. BURTON, 516
	STRONG & HANNI
	Attorneys for Landforms Construction
MELVIN C. WILSON	Group, Landforms Development, Inc.
Davis County Attorney	Sixth Floor Boston Building
GERALD E. HESS	Salt Lake City, Utah 84111
Chief Civil Deputy	
Davis County Courthouse	LOWELL V. SMITH, 3006
P. O. Box 618	HANSON, EPPERSON & SMITH
Farmington, Utah 84025	Attorneys for Mark S. Sandberg,
	L. Wayne Redd, Lyle A. Hale,
LAYNE B. FORBES	Hale/Redd Investment Group, and
Bountiful City Attorney	Hale/Redd Land Investment
P. O. Box 331	175 South West Temple, Suite 650
Bountiful, Utah 84010	Salt Lake City, Utah 84101

PARTIES

1. Plaintiffs are William and Judy McCleery, Mark and Teresia Pantelakis, Dennis and Gloria Anderson, James and Linda Stover, David C. Fricke, Barrie D. and Katherine Brewer, Ronald and Kerma Jones, Richard and Barbara Kristensen, Lyle and Alice Laraine Gordon, and S. Michael and Sandra J. Inman. Plaintiffs are Davis County homeowners who claim to have sustained property damage. Plaintiffs are not parties to this appeal.

2. Defendants and third-party plaintiffs are Landforms Construction Corp., Landforms Development Inc., Mark S. Sandberg, L. Wayne Redd, Lyle A. Hale, Hale/Redd Investment Group, a general partnership, a/k/a Redd Hale Investment Group and Hale/Redd Land Investment, a joint venture. These parties are landowners and developers of property known as Bridlewood located near homeowners' property in Davis County. (The partnership or joint venture formed by Mark S. Sandberg, L. Wayne Redd and Lyle A. Hale has been referred to by different titles; therefore, it is referred to in different ways in the pleadings.)

3. Defendants who are not third-party plaintiffs are Verl G. Smart, an owner of property located near homeowners' property in Davis County and the Consortium, Inc., an engineering company which did engineering work on Bridlewood. These defendants are not parties to the appeal.

4. Third-party defendants are Bountiful City and Davis County.

TABLE OF CONTENTS

	<u>Page</u>
PARTIES	i
TABLE OF AUTHORITIES.....	v
JURISDICTION OF THE COURT.....	1
ISSUES ON APPEAL.....	1
CONSTITUTIONAL PROVISIONS AND STATUTES.....	2
STATEMENT OF THE CASE.....	2
STATEMENT OF FACTS.....	2
SUMMARY OF ARGUMENT.....	10
ARGUMENT.....	14
POINT I. THE ACTIONS TAKEN BY BOUNTIFUL CITY AND DAVIS COUNTY IN RELATION TO THE BRIDLEWOOD PROJECT DID NOT INVOLVE THE MANAGEMENT OF FLOOD WATERS OR THE CONSTRUCTION, REPAIR, AND OPERATION OF FLOOD AND STORM SYSTEMS.....	14
A. Roadway.....	15
B. Delay.....	16
C. Management of Flood Waters.....	17
D. Construction, Repair and Operation of a Flood and Storm System.....	19
E. Summary.....	24
POINT II. THE DISTRICT COURT ERRED IN CLASSIFYING THE ACTIVITIES OF BOUNTIFUL CITY AND DAVIS COUNTY AS GOVERNMENTAL FUNCTIONS WITH ABSOLUTE IMMUNITY.....	25
A. The Actions Taken By Bountiful City and Davis County Do Not Constitute Govern- mental Functions and the Governmental Entities Are Therefore Not Entitled to Immunity.....	25

	<u>Page</u>
B. Even if it is Determined That the Activities of Bountiful City and Davis County Constitute Governmental Functions Under Case Law, the Statutory Waivers of Immunity Remain Applicable.....	28
C. If the Court Concludes That Utah Code Ann. §63-30-3 Applies, the Immunity Granted by That Provision is Not Absolute and the Waivers of Immunity Are Still Applicable.....	31
D. Summary.....	32
POINT III. UTAH CODE ANN. §63-30-3 (1986) IS UNCONSTITUTIONAL IN LIGHT OF ARTICLE I, SECTION 22 OF THE UTAH CONSTITUTION.....	34
POINT IV. TO EFFECTUATE THE PURPOSE OF THE UTAH COMPARATIVE FAULT ACT, THE FAULT OF ALL TORTFEASORS MUST BE COMPARED. GRANTING BOUNTIFUL CITY'S AND DAVIS COUNTY'S MOTION FOR SUMMARY JUDGMENT WOULD MAKE THAT COMPARISON IMPOSSIBLE.....	39
CONCLUSION.....	47
ADDENDUM.....	A1-A31
Summary Judgment.....	A1-A6
Amended Complaint.....	A7-A15
Amended Crossclaim and Amended Third-Party Complaint.....	A16-A26
Determinative Authorities.....	A27-A31
Utah Constitution, Article I, Section 22.....	A27
Utah Code Annotated, Section 63-30-2.....	A27
Utah Code Annotated, Section 63-30-3.....	A28
Utah Code Annotated, Section 63-30-8.....	A29

	<u>Page</u>
Utah Code Annotated, Section 63-30-9.....	A29
Utah Code Annotated, Section 63-30-10.....	A29
Utah Code Annotated, Section 63-30-10.5.....	A31
Utah Code Annotated, Section 78-27-38.....	A31
Utah Code Annotated, Section 78-27-40.....	A31
Utah Code Annotated, Section 78-27-41.....	A31

TABLE OF AUTHORITIES

Page

CONSTITUTIONAL PROVISIONS CITED

Utah Constitution, Art. I, Section 22	1, 2, 13, 34, 35, 36, 37, 38, 39, 48
---	---

STATUTES CITED

Utah Code Annotated, Section 63-30-2 (Supp. 1988)	2, 27
Utah Code Annotated, Section 63-30-3 (1986)	1, 2, 13, 14, 17, 19, 21, 24, 29, 31, 33, 34, 35, 37, 38, 39, 47, 48
Utah Code Annotated, Section 63-30-8 (1986)	2, 12, 28, 29, 48
Utah Code Annotated, Section 63-30-9 (1986)	2, 12, 29, 48
Utah Code Annotated, Section 63-30-10 (1986)	2, 10, 12, 30, 48
Utah Code Annotated, Section 63-30-10.5 (Supp. 1988)	2, 13, 28, 30, 38, 48
Utah Code Annotated, Section 78-27-38 (1987)	2, 39
Utah Code Annotated, Section 78-27-40 (1987)	2, 39
Utah Code Annotated, Section 78-27-41 (1987)	2, 31

CASES CITED

<u>American Motorcycle Assn. v. Superior Court of Los Angeles County</u> , 578 P.2d 899 (Ca. 1978)	46
<u>Bartlett v. New Mexico Welding Supply, Inc.</u> , 646 P.2d 579 (N.M. App. 1982)	43

CASES CITED (Continued)

<u>Barron v. United States</u> , 473 F.Supp. 1077 (D. Hawaii 1979)	46
<u>Bode v. Clark Equip. Co.</u> , 719 P.2d 824 (Okla. 1986)	45
<u>Brown v. Keill</u> , 580 P.2d 867 (Kan. 1978)	41, 42
<u>Connar v. West Shore Equipment of Milwaukee</u> , 227 N.W.2d 660 (Wisc. 1975)	44
<u>Couch v. Thomas</u> , 497 N.E.2d 1372 (Ohio App. 1985) .	45
<u>Fairclough v. Salt Lake County</u> , 10 Utah 2d 417, 354 P.2d 105 (1960)	35, 37
<u>Frank v. State</u> , 613 P.2d 517 (Utah 1980)	32
<u>Gray v. Salt Lake City</u> , 44 Utah 204, 138 P. 1177 (1914)	36, 37
<u>Johnson v. Salt Lake City Corp.</u> , 629 P.2d 432 (Utah 1981)	26
<u>Katsos v. Salt Lake City Corp.</u> , 634 F.Supp. 100 (D. Utah 1986)	36, 37
<u>Larsen v. Brigham City</u> , First Judicial District, Civil No. 18979, January 31, 1986	19
<u>Lines v. Ryan</u> , 272 N.W.2d 896 (Minn. 1978).....	46
<u>Loveland v. Orem City Corp.</u> , 746 P.2d 763 (Utah 1987)	25
<u>Pocatello Ind. Park Co. v. Steel West, Inc.</u> , 621 P.2d 399 (Idaho 1980)	45
<u>Sioux Falls Constr. Co. v. City of Sioux Falls</u> , 297 N.W.2d 454 (S.D. 1980)	22, 23
<u>Springville Banking Co. v. Burton</u> , 10 Utah 2d 100 349 P.2d 157 (1960)	35
<u>Standiford v. Salt Lake City Corp.</u> , 605 P.2d 1230 (Utah 1980)	11, 25, 26

CASES CITED (Continued)

<u>State Road Comm'n v. Parker</u> , 13 Utah 2d 65, 368 P.2d 585 (1962)	35, 36
<u>State-by-State Road Comm'n v. District Court</u> , Fourth Judicial District, 94 Utah 384, 78 P.2d 502 (1937)	36
<u>Stephens v. Henderson</u> , 741 P.2d 952 (Utah 1987)....	27
<u>Webber v. Salt Lake City</u> , 40 Utah 221, 120 P. 503 (1911)	36
<u>Wilson v. Probst</u> , 581 P.2d 380 (Kan. 1978)	42

OTHER AUTHORITY

Heft and Heft, <u>Comparative Negligence Manual</u> , (1978)	45
Heft and Heft, <u>Comparative Negligence Manual</u> , (Rev. Ed.)	46
Schwartz, <u>Comparative Negligence</u> , (2d Ed. 1986)....	46

JURISDICTION OF THE COURT

The Supreme Court of Utah has jurisdiction to consider and hear this appeal pursuant to the provisions of Section 3 of Article VIII of the Constitution of Utah, Rule 3 of the Rules of the Utah Supreme Court, Utah Code Ann. §78-2-2(3)(j) (1988), and Rule 54(b) of the Utah Rules of Civil Procedure. The Second Judicial District Court entered Final Summary Judgment in favor of the third-party defendants, Bountiful City and Davis County, on October 11, 1988, and certified the Judgment for appeal. A notice of appeal was filed on October 25, 1988.

ISSUES ON APPEAL

1. Was the District Court correct in concluding that the acts complained of in the First Amended Complaint and the Amended Third-Party Complaint involved the management of flood waters and the construction, repair and operation of flood and storm systems?

2. Was the District Court correct in classifying the activities of Bountiful City and Davis County, set forth in the Amended Third-Party Complaint and established during discovery, as governmental functions with absolute immunity?

3. Is Utah Code Ann. §63-30-3 (1986) unconstitutional in light of Article I, Section 22 of the Utah Constitution?

4. Should the negligence and/or fault of Bountiful City and Davis County be compared by the jury on a special verdict form, along with the negligence and/or fault, if any,

of other parties to the litigation.

CONSTITUTIONAL PROVISIONS AND STATUTES

1. Utah Constitution, Article I, Section 22.
2. Governmental Immunity Act, Utah Code Annotated, Sections 63-30-3, 8, 9, 10 and 10.5.
3. Comparative Fault Act, Utah Code Annotated, Sections 78-27-38, 40 and 41.

STATEMENT OF THE CASE

This case began as a property damage action brought by the plaintiffs (hereinafter "homeowners") against several defendants, including the owners and developers of land known as the Bridlewood Development. The homeowners' complaint, in substance, sought to recover compensation for property damage resulting from floods which occurred in 1986. Third-party plaintiffs brought an action against Bountiful City and Davis County for contribution, indemnity, and a comparison of fault by way of a third-party complaint.

Third-party plaintiffs seek review of the Order of the Second Judicial District Court granting summary judgment to third-party defendants (Bountiful City and Davis County) which was entered on October 11, 1988 (Addendum p. 1)

STATEMENT OF FACTS

1. Third-party plaintiffs owned an interest in (hereinafter "landowners") or were involved in the planning, development and construction (hereinafter "developers") of improvements to real property located in Bountiful and known

as Bridlewood.

2. On or about October 19, 1987, homeowners filed an amended complaint wherein they alleged that the landowners and developers are liable to them for damages. (R. 40; Addendum p. 7)

3. The landowners and developers subsequently filed an amended third-party complaint against Bountiful City and Davis County alleging that they are entitled to indemnity, contribution, and/or comparison of fault of all parties, including Bountiful City and Davis County, pursuant to current comparative fault statutes. (R. 414; Addendum p. 16)

4. The landowners retained the developers to develop the property. (Sandberg Depo. p. 14)

5. The developers worked closely with Bountiful City and Davis County to comply with their rules, regulations and ordinances regarding the development of a residential subdivision. (R. 484)

6. The developers complied with or exceeded all County and City ordinances while constructing the Bridlewood Subdivision. (R. 484)

7. The developers were required to obtain final approval of their plans from the Bountiful City Planning and Zoning Commission, City Council, and City Engineer prior to beginning actual construction of the project. (R. 488)

8. The developers were aware that flood control measures would be required during the construction process. The

developers agreed to abide by the requirements of Bountiful City.

9. It was represented to the developers by Jack Balling, Bountiful City Engineer, that he (Balling) would also require the approval of Davis County before he allowed the developers to proceed with flood control measures in the subdivision project. (Sandberg Depo. pp. 29, 264; Jenkins Depo. pp. 100-105) Throughout the entire construction of the Bridlewood project, Davis County was aware of what was transpiring. (Sandberg Depo. p. 32)

10. The storm drainage system for the Bridlewood project had to be specifically approved by Davis County. (Jenkins Depo. p. 100; Sandberg Depo. p. 265) When the Bridlewood project was annexed by Bountiful City, it was agreed that Davis County would look over the plans to ensure the plans met the County's standards (Jenkins Depo. p. 101) The County was to review the progress of the storm drainage system as the project developed. (Jenkins Depo. p. 101)

11. Davis County inspectors periodically visited the Bridlewood job site to inspect the work being done, including the installation of interim flood control facilities. (Sandberg Depo. pp. 72-73, 75, 105, 174, 240)

12. The developers were granted final approval to proceed with the development of the Bridlewood project on September 11, 1985. (Sandberg Depo. p. 49)

13. The developers planned to, and did in fact, develop Bridlewood in three separate phases. (Balling Depo.

p. 85) However, Bountiful City and Davis County imposed a requirement on the developers that an access road be constructed in Bridlewood from the top of the subdivision to the bottom prior to the development of the first phase. (Balling Depo. p. 85)

14. The developers initially intended to construct a dead-end road in the first phase of Bridlewood and extend the road into the second and third phases when development of those phases commenced. (Balling Depo. p. 90) However, when development of Bridlewood actually started, the developers were required by the City and the County to construct the access road in its entirety, rather than in phases. (Balling Depo. pp. 128-129) The purpose of the access road was to provide access to emergency vehicles, fire, police, and other service vehicles and personnel. (Balling Depo. p. 88)

15. When the access road was excavated, the property was necessarily denuded of some vegetation. (Balling Depo. p. 90)

16. Construction of the road in Bridlewood required that deep cuts be made in the terrain, some at a depth of 20 feet. (Sandberg Depo. p. 52)

17. Immediately subsequent to making the cuts for the road in the fall of 1985, the developers planned to install a storm sewer system and build an on-site detention basin. (Sandberg Depo. p. 54) In the plans submitted by the developers and approved by Bountiful City, the developers proposed

constructing their own on-site detention basin to accommodate runoff. (Sandberg Depo. p. 38; Balling Depo. p. 27; Jenkins Depo. p. 104-105)

18. Prior to and at or near this time period, Davis County was also in the process of deciding whether or not to build a regional detention basin. (Sandberg Depo. p. 65) Davis County had been considering constructing a regional storm detention basin since 1984 or 1985. Davis County had been working with North Salt Lake to bring a major storm drainage line up 3800 South to a point on the east side of Main Street or U.S. 89 with the intent of eventually bringing that facility on east to serve the areas east of Orchard Drive (the area of the Bridlewood Subdivision). (R. 350-51)

19. Nevertheless, it was the understanding of the developers when they received final approval for the Bridlewood project that the decision to either build their own on-site detention basin or to participate in a regional detention basin was entirely within the control of the developers. (Sandberg Depo. p. 56)

20. In the minutes of a special meeting of the Bountiful City Planning Commission, final approval was given to the Bridlewood project subject to the condition that the developers "provide storm detention for the runoff in the Hooper Canyon drainage basin with a release rate of 2 cfs. This may be provided on the Bridlewood property or on the site for South Davis Boulevard through an agreement with Davis

County Commission" (Deposition Exhibit No. 65)

21. The developers began the excavation and construction of the Bridlewood project with the clear understanding that they could utilize their own on-site detention basin if they desired. (Sandberg Depo. p. 66)

22. In December of 1985 or January of 1986, the developers were informed by Jack Balling that, instead of constructing an on-site detention basin, they would have to contribute to the regional detention basin, which the County had decided to build, and that he (Balling) would not allow the developers to move ahead with the project until appropriate arrangements had been made. (Sandberg Depo. p. 56)

23. After Bountiful City imposed the requirement that developers participate in the regional detention basin, Bountiful City and Davis County delayed until May of 1986 in reaching an agreement with the developers. (Sandberg Depo. p. 66)

24. The delay of Bountiful City and Davis County with respect to the regional detention basin was a constant concern to third-party plaintiffs. On January 16, 1986, Mark Sandberg, one of the developers, sent a letter to Davis County Commissioner Tippetts outlining his concern that the County would not have the regional detention basin on line on time. He stated:

We are now ready to start construction of our storm drainage system. It is our desire to move ahead immediately with construction of the storm retention pond prior to the spring run off.

During earlier discussions with the county, you have expressed a desire for us not to construct

our detention pond and participate with you in construction of a larger detention pond at a future crossing site at the Hooper Draw by Davis Blvd. We would still like to participate with the county on this venture, however, retention of our spring run-off and moving ahead with our lot development has become a critical item." (Emphasis added) (Deposition Exhibit No. 87)

25. On January 23, 1986, Sid Smith, Davis County Flood Control Director, informed David Bird (a representative of the Consortium, the engineering company retained by the developers) that he (Smith) believed construction could begin on the regional detention basin within 90 days (i.e., approximately March 23, 1986). (Deposition Exhibit No. 57)

26. By April, 1986, frustrated by the lengthy delay and in an effort to speed up the construction of the regional detention basin, the developers sent Davis County a \$28,500 check, which constituted one-half of developers' monetary obligation toward the regional detention basin. This money was sent even before an "official" agreement was reached on May 12, 1986, regarding construction of the regional detention basin. (Jenkins Depo. p. 145; Deposition Exhibit 106)

27. On May 12, 1986, one of the landowners executed a contract with Davis County which obligated Davis County to put the regional detention basin on line within eight months (i.e., approximately December of 1986). (Sandberg Depo. p. 73; Deposition Exhibit No. 67)

28. The regional detention basin was not timely completed. It did not begin to offer any protection from flood waters until late April of 1987 and was not fully com-

pleted until early October of 1987. (Smith Depo. p. 37)

29. The controversy concerning the location of the regional detention basin site delayed the Bridlewood project approximately six months. If the developers had been allowed to utilize an on-site detention basin as originally designed and approved, a fully operational storm sewer system would have been in operation at the time of the major summer storms which caused damage alleged by plaintiffs. (Sandberg Depo. p. 103)

30. The developers attempted to remedy the failure of the County to have the regional detention basin in place by installing temporary flood control measures. These temporary flood control devices were approved by, and in some cases directed by, Bountiful City. (Sandberg Depo. pp. 57, 58, 154) The temporary measures were better than what was suggested or expected by Bountiful City. (Balling Depo. p. 75) Davis County characterized the interim flood control measures as "state of the art." (Smith Depo. pp. 98, 99)

31. Heavy "100-year storms" occurred on July 23 and August 20, 1986, which combined with the conditions then existing on the Bridlewood Subdivision caused the plaintiffs to sustain the damages for which they seek recovery in this lawsuit. (R. 40)

32. When the rainstorms did occur, neither Bountiful City nor Davis County undertook to manage the "flood waters" generated from the rainfall in the Bridlewood development area.

SUMMARY OF ARGUMENT

The judgment of the trial court should be reversed for several fundamental reasons, any one of which standing alone is sufficient to merit reversal.

A. Utah Code Ann. §63-30-3 (1986) is Inapplicable to This Case.

The activities of Bountiful City and Davis County which are at issue in this action do not involve decisions relating to the management of flood waters or the construction, repair, and operation of flood and storm systems. The acts complained of involve unwarranted delays in decision making, as well as improper requirements imposed on those involved with the development and construction of the Bridlewood Project.

Bountiful City and Davis County are attempting to escape liability by arguing that their actions involved the construction, repair, and operation of flood and storm systems. This argument is made by focusing on the result of the negligent acts (or inaction) rather than the acts themselves. The activities of Bountiful City and Davis County primarily involve delay in making a decision regarding the regional detention basin, requiring the developers to participate in a regional detention basin, and foreclosing the option of constructing their own on-site detention basin, as well as negligent decision making in requiring the roadway to be cut in one phase, rather than three phases. Davis County and Bountiful City were not involved in managing the flood waters even after the tremendous 100-year storms. Further, Davis

County and Bountiful City did not construct, repair, or operate a flood or storm system on the Bridlewood Project. That their negligent acts resulted in a flood should not operate to place them within the confines of the Utah Governmental Immunity Act.

B. Bountiful City's and Davis County's Activities Do Not Constitute Governmental Functions. Even if the Acts of Davis County and Bountiful City Are Found to be Governmental Functions, Such a Conclusion Results Merely in the Granting of Qualified Immunity.

Because Bountiful City's and Davis County's activities are not acts involving the management of flood waters or the construction, repair or operation of flood or storm systems, such activities are not statutorily accorded "governmental function" status. Since the activities do not involve governmental functions, the qualified immunity bestowed by the Governmental Immunity Act is inapplicable.

The acts of Bountiful City and Davis County do not constitute a governmental functions under Utah case law. "[T]he test for determining governmental immunity is whether the activity under consideration is of such a unique nature that it can only be performed by a governmental agency or that it is essential to the core of governmental activity."

Standiford v. Salt Lake City Corp., 605 P.2d 1230, 1236-37

(Utah 1980). (The expanded statutory definition of governmental function did not become effective until 1987 and therefore is inapplicable to this action.) Bountiful City's and Davis County's actions in requiring the road to be cut in one phase instead of three distinct phases, the requirement that the

developers participate in a regional detention basin as opposed to constructing their own on-site facilities, and the delay in getting the regional detention basin operational, clearly do not satisfy the "governmental function" test. Because Bountiful City's and Davis County's actions cannot be classified as governmental functions, they therefore enjoy no immunity for those actions.

Even if this Court concludes that Bountiful City's and Davis County's activities do satisfy the case law or statutory definition of governmental function, the existence of governmental immunity is not established. The Utah Governmental Immunity Act grants only qualified immunity to governmental entities involved in governmental functions subject to the express waivers of immunity contained in Utah Code Ann. §§63-30-8 through 10.5.

Utah Code Ann. §63-30-8 (1986), covering injuries caused by defective or dangerous roadways, applies to Bountiful City's and Davis County's requirement that the access road be built in one phase. Utah Code Ann. §63-30-9 (1986) provides for the waiver of immunity for injuries caused by the dangerous or defective condition of any public improvement. This provision is also applicable to the access road issue. Utah Code Ann. §63-30-10 (1986) covers the waiver of immunity for negligent acts committed by employees of governmental entities. This waiver pertains to the improper and unwarranted requirements imposed upon the third-party

plaintiffs by the City and County. Finally, Utah Code Ann. §63-30-10.5 (Supp. 1988) provides for the waiver of immunity when a governmental entity takes or damages private property without just compensation.

C. Utah Code Ann. §63-30-3 (1986) is Unconstitutional.

Article I, Section 22 of the Utah Constitution provides that "Private property shall not be taken or damaged for public use without just compensation." It is apparent that the manner in which Utah Code Ann. §63-30-3 (1986) is being applied at the trial level is inconsistent and in contravention of this constitutional mandate. In this case, §63-30-3 is being applied so as to take or damage private property without just compensation.

D. The Fault of Davis County and Bountiful City Must Be Compared.

A final important point raised on appeal is the apportionment of liability, even if Bountiful City and Davis County are eventually found to be immune.

The Utah Comparative Fault Act states that no defendant is liable to a person seeking recovery for any amount greater than the proportion of fault attributable to that defendant. This in effect abolishes the concept of joint and several liability in Utah. If Bountiful City's and Davis County's negligence is not allowed to be weighed and apportioned by the jury, it is highly likely that the third-party plaintiffs will be assessed a damage award that is much greater than the proportion of fault actually attributable to them. This result

is in conflict with the statutory purpose. Releasing Bountiful City and Davis County from all liability, and not allowing the jury to apportion their negligence, will in effect subject third-party plaintiffs to joint and several liability.

ARGUMENT

POINT I.

THE ACTIONS TAKEN BY BOUNTIFUL CITY AND DAVIS COUNTY IN RELATION TO THE BRIDLEWOOD PROJECT DID NOT INVOLVE THE MANAGEMENT OF FLOOD WATERS OR THE CONSTRUCTION, REPAIR, AND OPERATION OF FLOOD AND STORM SYSTEMS.

The Utah Governmental Immunity Act §63-30-3 (1986) states in pertinent part:

The management of flood waters and other natural disasters and the construction, repair, and operation of flood and storm systems by governmental entities are considered to be governmental functions, and governmental entities and their officers and employees are immune from suit for any injury or damage resulting from those activities.

The immunity granted by this section applies to governmental entities in only two specific situations: (1) the management of flood waters and other natural disasters, and (2) the construction, repair, and operation of flood and storm systems. Bountiful City and Davis County assert that their actions concerning the Bridlewood development are specifically granted immunity by this statute. Such reliance is misplaced.

Before analyzing the two distinct activities granted governmental function status by the act, it is useful to discuss the two main areas in which the third-party plaintiffs' claim can be divided. First, Bountiful City and Davis County

imposed a requirement that an access road be constructed in a single phase, rather than in the three phases as had been initially planned. Second, the County and City delayed in getting the regional detention basin on line, and foreclosed the developers' option to construct their own on-site detention facilities.

A. Roadway

As a condition to allowing construction to proceed on the Bridlewood Project, Davis County and Bountiful City required the developers to construct an access road from top to bottom of the Bridlewood Project. The developers initially intended to construct the road in three phases, but the City and County forced the developers to construct the entire road at once.

Despite the concerns voiced by the developers, particularly Mark Sandberg, a large cut was required to be made through the entire length of the Bridlewood Project. In constructing the roadway, a significant amount of vegetation had to be stripped from the area.

The unfinished road operated as an artificial stream bed for runoff water which increased the amount and speed of runoff flowing through the Bridlewood Project. Additionally, the denuding of vegetation in constructing the road contributed to the problem.

If the developers had been allowed to construct the road in three separate phases, the amount of runoff flowing through the Bridlewood Project would have been significantly

decreased. First, the amount of vegetation required to be removed would have been reduced. In other words, vegetation would have been removed in three phases. Second, constructing the actual roadway in three phases would have drastically reduced the amount of water flowing through the project. By constructing only one section of the road at a time, and having the section terminate in a dead end, a natural impediment to the flow of runoff would have been created. This would dramatically reduce the damages sustained by the plaintiffs.

B. Delay

This case involves a situation in which a developer was led to believe that it could construct an on-site detention facility to safeguard its project and nearby homeowners from the danger of runoff flooding. After initially agreeing with the choice by the developers to build an on-site detention basin, Davis County delayed and delayed, both in its decision as to what to do and how to do it. Finally, after the Bridlewood Project had been given approval and was already under construction, the County finally decided that it wanted a regional detention basin. Bountiful City then forced the developers to modify their plans concerning the on-site detention basin, tie in to the regional basin, and contribute to the cost of the regional detention basin to be constructed by the County. After obtaining the agreement of the developers to participate in the regional detention basin, the City and County then failed to move ahead with the actual construction

of the regional detention basin. Sid Smith represented to David Bird of the Consortium that construction would start on the regional detention basin by March of 1986. In fact, no work at all was done on the basin and the County did not draw up a final agreement until May of 1986.

The foregoing delays by the County resulted in a six-month delay of the Bridlewood Project. If the developer had been allowed to proceed with the initially agreed upon on-site detention basin, the necessary permanent flood control measures would have been in place in time to substantially reduce the damage resulting from the July and August, 1986 storms.

C. Management of Flood Waters.

A distinction must be made between "management of flood waters" and claims involving water damage. Only if a governmental entity can establish that it was involved in the actual "management of flood waters" and that damage was caused as a result of such management, does the immunity accorded by Utah Code Ann. §63-30-3 (1986) apply.

In this case, homeowners assert that flooding did occur and that their damage was caused by such flooding. However, there is no claim made in any pleading suggesting that either Bountiful City or Davis County acted negligently in the "management" of the flood waters created by the tremendous "100-year" rainfalls. None of the activities performed by Davis County and Bountiful City involved the "management of flood waters" as anticipated by the statute.

If a governmental entity is involved in the actual management of flood waters (such as occurred in Salt Lake City during the 1983 spring runoff periods, resulting in massive flooding down State Street in Salt Lake City, with resulting loss to business entities in the area, property damage to many homeowners, etc.) such activities would most likely fall within the purview of the statute. The governmental entity is faced with a natural disaster which needs to be dealt with in a timely and effective manner without concern over potential lawsuits for each difficult decision to be made. The situation is similar to a governmental entity dealing with a raging fire which is spreading rapidly to other buildings. The governmental agency may determine to destroy a building "in harms way" to prevent further spread of the fire. Such a decision must be made without concern for potential lawsuits resulting from the decision.

Here, if Bountiful City and Davis County were on the property site during the flooding, and decided to dig ditches, for example, across the landowner's property to prevent further damage, such acts would appear to fall within the purview of the Governmental Immunity Act since the activities would be in furtherance of the legislative mandated duty to "manage flood waters."

But the decision to require construction of the roadway in one phase rather than in three separate phases and the requirement that the third-party plaintiffs "tie into" a regional detention basin, as opposed to constructing their own

on-site facilities, and the corresponding delay in completing the regional detention basin cannot be classified as decisions involving the "management of flood waters."

Neither Bountiful City nor Davis County were on the property sites during the flooding, and neither entity took steps to manage the flood waters. In fact, their only involvement at that point was to call the developers. They do not, therefore, fall within the purview of the "management of flood waters" portion of the statute.

D. Construction, Repair and Operation of a Flood and Storm System.

Utah Code Annotated §63-30-3 (1986) also grants governmental entities qualified immunity for acts involving the construction, repair, and operation of flood and storm systems. Bountiful City and Davis County did not and were not involved in the construction, repair, or operation of flood and storm systems on the Bridlewood project.

It may be helpful to analyze one of the District Court cases cited by Bountiful City in support of its motion for summary judgment to determine what is meant by "the construction, repair and operation of flood and storm systems." In Larsen v. Brigham City, First Judicial District, Civil No. 18979, January 31, 1986, an action was brought by a landowner for injuries allegedly sustained because of defendant city's negligence in constructing earthen dams and drainage ditches surrounding the Mantua Reservoir. The plaintiff asserted that these structures forced water onto his land. The court held

the city to be immune in these circumstances. This case falls squarely within the realm of constructing, repairing, or operating flood and storm control systems. (R. 188-9)

In contrast, Bountiful City and Davis County did not actually physically construct, repair or operate a flood or storm system on the Bridlewood project. In the court below, Bountiful City purported to define the access road as part of the flood and storm system devised by Bountiful City and Davis County, thus asserting that the decision to require the construction of the road was encompassed within the grant of immunity. Also in the court below, Bountiful City argued that "one of the purposes of said streets and the purposes of the curbs, gutters, inlet boxes, storm drain lines and storm detention basins are for the collection and management of storm waters." (R. 136) These arguments are misplaced and stretch the applicability of the statute to an untenable extent.

The legislature when enacting the Utah Governmental Immunity Act surely did not intend to confer immunity on a government entity if it merely showed that "one of the purposes" or a peripheral result of a particular act or decision impacted in some slight manner upon anything having to do with a flood. The roadway was not required to be constructed in one section to convey storm waters because there was no designated place to convey the water to. The regional detention basin was not even remotely near existence when the road was cut. Bountiful City should not be heard to argue that the decision to con-

struct the roadway in one section falls within the ambit of the phrase "construction, repair, and operation of flood and storm systems" contained in Utah Code Ann. §63-30-3 (1986).

The City and County are trying to define their conduct by focusing on the result of the conduct, rather than the conduct itself. The fact that their inappropriate and negligent action in requiring the road to be constructed in one phase resulted in a flood, cannot be construed to render the decision to require construction in one phase a flood control decision.

Additionally, the requirement imposed by the City and the County on the developers obligating them to tie into a regional detention basin, rather than proceed with their own on-site facilities, and then delaying in getting the regional detention system on line, cannot be construed as being encompassed within the qualified immunity granted to governmental entities involved in the construction, repair and operation of flood and storm systems.

The terms "construction," "repair" and "operation" all denote an activity actually undertaken by a governmental entity. The requirement that the developers participate in a regional detention basin can hardly be termed a construction of a storm/flood system or a repair of a storm/flood system or even the operation of a storm/flood system. This phrase was intended to shield the governmental entity from activities actually undertaken, not for requirements imposed upon others.

If Bountiful City and Davis County are held to be

immune for the consequences of a decision that they required the developers to carry out, then equity demands that the third-party plaintiffs also enjoy comparable immunity. The City and County should not be allowed to impose a requirement on a private party and then escape the consequences for the imposition of that requirement through immunity while the private party is held liable to injured third parties for damages. Either they both should be held immune, or both should not be accorded immunity.

Further, if this Court applies the governmental immunity provisions to this type of conduct, this Court would encourage inaction rather than action in the management of flood waters. The City and County "talked about" flood control measures, but took no action to control flooding until after the damage to plaintiffs' residences.

In Sioux Falls Constr. Co. v. City of Sioux Falls, 297 N.W. 2d 454 (S.D. 1980), the South Dakota Supreme Court was faced with determining whether certain conduct engaged in by a governmental entity was entitled to the benefit of governmental immunity under the guise of flood control. South Dakota did not have a statutorily enacted governmental immunity act, but it adhered to the common law governmental immunity doctrine.

Sioux Falls Constr. involved an action brought by a contractor who had been engaged by Sioux City to build a bridge over a diversion channel. After a storm, the city failed to open flood gates above the area of construction,

which resulted in a substantial amount of the contractor's equipment being washed away. The contractor alleged negligence and breach of contract as the basis of the city's liability. The city countered by claiming that because the channels and flood gates were part of a "flood control system", the governmental immunity doctrine applied and the city was therefore immune from suit. In response to the governmental immunity argument, the court stated:

We agree to the extent that a city is protected by governmental immunity from injuries arising while it is engaged in the task of controlling flood waters. In this case, however, there is nothing in the record that would support a determination by the trial court that the runoff could be denominated a flood. In fact, the trial court made no specific determination as to the character of the water. That is to say, the mere fact that the channel is part of a flood control system does not automatically render all water going through it flood water. We would distinguish between the rampaging waters of a river at or near flood stage and the ordinary flow of water from runoff. The record discloses that the height of the flow in the channel rose only some 4-5 feet. In dealing with flood waters, city officials are making a judicious decision on how best to minimize the possible damages. In that function they are entitled to immunity. Viewing, as we must, the evidence most favorably to the non-moving party, we find nothing in the fact situation that would bring the case within that framework. We therefore reverse the entry of summary judgment in favor of the city. Id. at 457.

The Sioux Falls Constr. case serves to illustrate the fact that the result of conduct should not necessarily operate to define the conduct. Bountiful City and Davis County did not construct, repair or operate the temporary flood control devices employed by the developers at the Bridlewood Project.

Requirements were imposed on the developers (which were followed) but neither the City nor the County constructed, repaired or operated the flood control measures. The fact that flood damage occurred does not insulate the City or the County from liability.

E. Summary

It is not possible to construe the City and County's inactivities and activities as falling within the scope of flood control activities immunized by Utah Code Ann. §63-30-3 (1986). The City and County are attempting to rely on the statute by focusing on the result of the wrongful act, rather than on the act itself. The City and County characterize their activities as involving flood control decisions. However, it would be extremely illogical and wrong to allow the result of negligent conduct to define the conduct itself.

In the present case, it is obvious that if the driver of a Bountiful City or Davis County vehicle negligently drove the vehicle so as to strike and break an exposed water main which then allowed water to flood homes of Davis County residents, then neither the City nor the County could claim that the actions of the employee were shielded by immunity. This is so because one needs to focus on the cause of the problem (negligent driving) and not the result of the problem (flooding). In this case, the result of the negligence of Bountiful City and Davis County may be characterized as flooding, but the cause was the commission by the City and

County of negligent acts and unwarranted delay for which they are entitled to no immunity.

POINT II.

THE DISTRICT COURT ERRED IN CLASSIFYING THE
ACTIVITIES OF BOUNTIFUL CITY AND DAVIS COUNTY
AS GOVERNMENTAL FUNCTIONS WITH ABSOLUTE IMMUNITY.

A. The Actions Taken By Bountiful City and Davis County Do Not
Constitute Governmental Functions and the Governmental
Entities Are Therefore Not Entitled to Immunity.

The Utah Governmental Immunity Act specifically grants governmental entities immunity from suit for any injury resulting from the exercise of a governmental function. The Utah court in Standiford v. Salt Lake City Corp., 605 P.2d 1230, 1236-37 (Utah 1980), set forth the reasoning to be utilized in determining whether the act in question involves the exercise of governmental function.

[T]he test for determining governmental immunity is whether the activity under consideration is of such a unique nature that it can only be performed by a governmental agency or that it is essential to the core of governmental activity.

This reasoning was confirmed and clarified in a later Utah Supreme Court case which stated:

The first part of the Standiford test--activity of such a unique nature that it can only be performed by a governmental agency--does not refer to what a government may do, but to what government alone must do. . . . [T]he second part of the Standiford test--"essential to the core of governmental activity"-- . . . refers to those activities not unique in themselves (and thus not qualifying under the first part) but [to those activities] essential to the performance of those activities that are uniquely governmental.
Loveland v. Orem City Corp., 746 P.2d 763, 775

(Utah 1987) (quoting Johnson v. Salt Lake City Corp., 629 P.2d 432 (Utah 1981)).

The activities of Bountiful City and Davis County which are at issue, i.e., the requirement that the roadway be constructed in one phase rather than in three phases, and the requirement that the developers participate in the regional detention basin instead of constructing their own on-site detention basin, as well as the unwarranted delay in getting the regional detention basin on line, clearly do not constitute governmental functions.

In respect to the decision to require the roadway to be constructed in one phase, it is clear that such activity does not satisfy the first tier of the Standiford test. Because the developers cut the roadway themselves, it is clear that this activity is not of such a unique nature that it can only be performed by a governmental agency. Secondly, the requirement that the roadway be constructed in one phase rather than three phases surely cannot be classified as being essential to the core of governmental activity.

The decision requiring the developers to participate in a regional detention basin, as opposed to constructing their own on-site detention basin, and the unwarranted delay in getting the regional basin on line, similarly cannot be classified as constituting a governmental function. The construction of a detention basin is not uniquely governmental as evidenced by the fact that the developers wished to, and were initially led to believe, that they could construct their own

on-site detention basin.

At the trial level, the City and the County argued that this definition of governmental function is not applicable in light of Utah Code Ann. §63-30-2(4)(a) (Supp. 1988), which has been amended to provide:

"Governmental function" means any act, failure to act, operation, function, or undertaking of a governmental entity whether or not the act, failure to act, operation, function, or undertaking is characterized as governmental, proprietary, a core governmental function, unique to government, undertaken in dual capacity, essential to or not essential to a government or governmental function, or could be performed by private enterprise or private persons.

This new definition of governmental function is not relevant to the instant case. This provision was not effective until 1987. The activities at issue in this case occurred in 1986. The only way in which this definition would apply is if the legislature had specifically provided that such definition would have retroactive effect, which it failed to do.

In Stephens v. Henderson, 741 P.2d 952 (Utah 1987), the Utah Supreme Court held that the Liability Reform Act adopted in 1986 would not have retroactive application. The court stated:

The starting point for our analysis is Utah Code Ann. §68-3-3, which provides: "No part of these revised statutes is retroactive, unless expressly so declared." The application of a statute is retroactive if it alters the substantive law on which the parties relied. [Citations omitted] Law is substantive if it "creates, defines and regulates the rights and duties of the parties and . . . may

give rise to a cause of action, as distinguished from adjective law which pertains to and prescribes the practice and procedure or the legal machinery by which the substantive law is determined or made effective. Id. at 953-4.

In the instant case, the definition of governmental function is without doubt a substantive law. The new definition obviously expands the definition of governmental function to include activities which prior case law had excluded. When the cause of action in this case arose, the case law definition of governmental function was applicable. To now require the application of the new definition would work a substantial change in the relationship between the respective parties. A party who under prior law would not be entitled to immunity could now conceivably benefit from the grant of immunity. Such a result is clearly substantive, therefore this statutory definition cannot be retroactively applied.

B. Even if it is Determined That the Activities of Bountiful City and Davis County Constitute Governmental Functions Under Case Law, the Statutory Waivers of Immunity Remain Applicable.

Assuming, arguendo, that Bountiful City's and Davis County's activities are found to constitute actions that are uniquely governmental or essential to the core of governmental activity, the existence of governmental immunity is not conclusively established. Such a conclusion results merely in the classification of the activities as governmental functions subject to the express waivers of immunity contained in Utah Code Ann. §§63-30-8 through 10.5.

Except as may otherwise be provided in this

chapter, all governmental entities are immune from suit for any injury which results from the exercise of a governmental function . . . Utah Code Ann. §63-30-3 (1986).

1. Utah Code Ann. §63-30-8 (1986)

Immunity from suit of all governmental entities is waived for any injury caused by defective, unsafe, or dangerous condition of any highway, road, street, alley, cross-walk, sidewalk, culvert, tunnel, bridge, viaduct or other structure located thereon.

Utah Code Ann. §63-30-8 (1986) provides for waiver of immunity for injury caused by the defective, unsafe, or dangerous condition of roads, streets, and highways. As a condition to allowing construction to proceed on the Bridlewood Project, Davis County and Bountiful City required the developers to construct an access road from the top to the bottom of the Bridlewood Project. As mentioned above, the developers initially intended to construct the road in three phases, but the City and County forced them to construct the entire road at once. This decision, imposed on the developers, created a hazardous and dangerous condition on the road, which resulted in the damage sustained by plaintiff-homeowners.

2. Utah Code Ann. §63-30-9 (1986)

Immunity from suit of all governmental entities is waived for any injury caused from a dangerous or defective condition of any public building, structure, dam, reservoir or other public improvement. Immunity is not waived for latent defective conditions.

Utah Code Ann. §63-30-9 (1986) provides for waiver of immunity for injury from dangerous or defective public improvement. In the instant case, the dangerous or defective

condition on the Bridlewood Project consisted of the deep cuts and denuding of vegetation required for the construction of the road. As more fully explained in the proceeding section, the actions of Bountiful City and Davis County in requiring that the road be constructed in a particular manner substantially enhanced the damage to abutting landowners.

3. Utah Code Ann. §63-30-10 (1986)

(1) Immunity from suit of all governmental entities is waived for injury proximately caused by a negligent act or omission of an employee committed within the scope of employment . . .

Utah Code Ann. §63-30-10 (1986) provides for waiver of immunity for injury caused by a negligent act or omission of an employee. Clearly, there is a genuine issue of material fact as to whether the representatives of Bountiful City and Davis County were negligent when they delayed development of Bridlewood, required construction of the access road over its entire length, and forced the developers to forego the development of their own on-site detention basin and participate in a regional basin which was not timely built.

4. Utah Code Ann. §63-30-10.5 (Supp. 1988)

Utah Code Ann. §63-30-10.5 (Supp. 1988) provides for the waiver of immunity for taking or damaging private property without compensation. The provision provides in pertinent part:

(1) Immunity from suit of all governmental entities is waived for the recovery of compensation from the governmental entity when the governmental entity has taken or damaged private property without just compensation.

In the instant case, the actions of Bountiful City and Davis County resulted in damage to the property of the plaintiffs. This section succinctly establishes liability for damages occasioned by the City and County's unreasonable delay and negligent instructions and requirements in regard to the Bridlewood Project. Because the City and County are responsible for at least a percentage of the damage incurred by the plaintiffs, the appellants are entitled to join them as parties pursuant to Utah Code Ann. §78-27-41 (1987).

- C. If the Court Concludes That Utah Code Ann. §63-30-3 Applies, the Immunity Granted by That Provision is Not Absolute and the Waivers of Immunity Are Still Applicable.

Utah Code Ann. §63-30-3 initially states:

Except as may be otherwise provided in this chapter, all governmental entities are immune from suit for any injury which results from the exercise of a governmental function . . .

The second paragraph proceeds to specify that:

The management of flood waters and other natural disasters and the construction, repair, and operation of flood and storm systems by governmental entities are considered to be governmental functions, and governmental entities and their officers and employees are immune from suit for any injury or damage resulting from those activities. (Emphasis added)

Assuming, arguendo, that the activities of Bountiful City and Davis County are encompassed within the second paragraph of Utah Code Ann. §63-30-3 (1986), that conclusion merely results in defining the activity as a governmental function which is not synonymous with absolute, unqualified immunity. The classification of an operation of a governmen-

tal entity as a governmental function does not signal unconditional immunity under this section since the grant of immunity is expressly subject to the operation of other sections of the Act. Frank v. State, 613 P.2d 517, 519 (Utah 1980).

It is incongruous to accept Bountiful City's and Davis County's argument for a potentially boundless construction of the phrases "management of flood waters" and "construction, repair and operation of flood and storm systems" and also accept the City's and County's arguments that this immunity is absolute and not subject to the waiver provisions of the act. If absolute immunity was intended, the Legislature would have termed it absolute immunity rather than a governmental function which in the preceding paragraph they had defined as being subject to certain enumerated waivers. Therefore, it does not make any difference if the status of governmental function is reached pursuant to the application of case law, or through activity defined as the "management of the flood waters" or the "construction, repair, and operation of flood and storm systems." If the activity is determined to be a governmental function, then it is subject to the waivers of immunity discussed previously. Several waiver provisions, as noted in the prior section, are relevant in this action.

D. Summary

Several alternative theories are set forth in Point II, any one of which precludes the conclusion that Bountiful City and Davis County are immune from liability in this

action. First, because the activities of the City and County do not constitute the "management of flood waters" or "the construction, repair and operation of flood and storm systems)", such activities must be analyzed pursuant to case law to determine whether the activities qualify as governmental functions. The definition of governmental function is "whether the activity under consideration is of such a unique nature that it can only be performed by a governmental agency or that it is essential to the core of governmental activity." The activities of the City and County, which are the subject of the third-party complaint, do not fall within such a definition.

Second, even if the activities of Bountiful City and Davis County are accorded governmental function status under case law, the express waivers of immunity in the Utah Governmental Immunity Act operate to negate Bountiful City's and Davis County's defense of governmental immunity.

Third, if the Court concludes that the activities of Bountiful City and Davis County do fall within the scope of Utah Code Ann. §63-30-3 (1986), that conclusion merely results in the classification of such activities as governmental functions subject to the express waivers of immunity contained in the Governmental Immunity Act.

POINT III.

UTAH CODE ANN. §63-30-3 (1986) IS
UNCONSTITUTIONAL IN LIGHT OF ARTICLE I,
SECTION 22 OF THE UTAH CONSTITUTION.

Article I, Section 22, of the Utah State Constitution
states that:

Private property shall not be taken or damaged
for public use without just compensation.

Utah Code Ann. §63-30-3 Immunity of Governmental
Entities From Suit is in derogation of that constitutional
provision. This statute provides in pertinent part:

The management of flood waters and other
natural disasters and the construction,
repair, and operation of flood and storm
systems by governmental entities are con-
sidered to be governmental functions, and
governmental entities and their officers and
employees are immune from suit for any injury
or damage resulting from those activities.

From the face of the statutory provision, it is apparent that
the immunity given to governmental entities may be used to
shield governmental agencies from liability for compensation
in situations squarely within the purview of Article I,
Section 22. For example, if a governmental entity damaged the
property of a private landowner in the course of constructing
a storm drainage system, under the District Court's view of
Utah Code Ann. §63-30-3 (1986), the government could
conceivably assert that it is immune from liability. This is
the type of uncompensated damage to private property
occasioned by a governmental entity in pursuit of a public use
that Article I, Section 22 was designed to protect against.

In this case, the actions of Bountiful City and Davis County caused damage to homeowners' property. The City and County assert that their actions in relation to the Bridlewood Project concerned the management of flood waters and that they are immune from suit for any injury or damage resulting from those activities. Section 63-30-3 defines the management of flood waters as a governmental function. The very essence of the definition of a governmental function is an action taken for the benefit of the public. Thus, any property taken or damaged as a result of the exercise of a governmental function is property taken for a public use.

Whether or not Article I, Section 22 establishes a cause of action has been analyzed by the Utah Supreme Court in the past. The main focus of these opinions is whether the state has waived its immunity to suit for actions instituted pursuant to Article I, Section 22. There are Utah cases which stand for the proposition that sovereign immunity protects governmental entities from suits brought for the purpose of obtaining compensation for the taking or damaging of private property for public use because Article I, Section 22 of the Utah Constitution is not self-executing so as to constitute a waiver of that immunity. Springville Banking Co. v. Burton, 10 Utah 2d 100, 349 P.2d 157 (1960); Fairclough v. Salt Lake County, 10 Utah 2d 417, 354 P.2d 105 (1960); and State Road Comm'n v. Parker, 13 Utah 2d 65, 368 P.2d 585 (1962). However, these cases are not well reasoned and have been

sharply criticized. See for example Justice Wade's stinging dissent in Fairclough and Judge Thomas Greene's decision in Katsos v. Salt Lake City Corp., 634 F.Supp. 100 (D. Utah 1986).

Other cases decided by this Court which have never been distinguished or overruled are persuasive. In State-by-State Road Comm'n v. District Court, Fourth Judicial District, 94 Utah 384, 78 P.2d 502 (1937), this Court recognized that rights guaranteed by the Constitution may be enforced by its citizens. In discussing the application of Article I, Section 22, this Court stated:

We think it is clear that the framers of the Constitution did not intend to give the rights granted by section 22, and then leave the citizen powerless to enforce such rights. We hold that this is so whether the injury complained of by the plaintiffs in the injunction suit is considered a "taking" of property, or a "damaging" of property. The framers of the fundamental law, after much debate and careful consideration of the hardship of the old rule which allowed compensation only in the case of a taking of property, wrote into the Constitution a provision by which we think they intended to guarantee to the landowner whose property is damaged just compensation with the same certainty as to the landowner whose property is physically taken. 78 P.2d at 508. [Emphasis added]

See also, Gray v. Salt Lake City, 44 Utah 204, 138 P. 1177 (1914) (cited with approval by the Federal District Court of Utah in Katsos v. Salt Lake City Corp., supra; Webber v. Salt Lake City, 40 Utah 221, 120 P. 503 (1911). Gray and Webber stand for exactly the same proposition as does State-by-State Road Commission, namely that the rights guaranteed by the state Constitution ought to be enforceable by state citizens.

In 1986, Judge Thomas Greene decided Katsos v. Salt Lake City Corp., supra. He held that actions for inverse condemnation are recognized and cognizable without enabling legislation. He held that Article I, Section 22 of the Utah Constitution is self-executing. In so holding, Judge Greene distinguished Fairclough and cited Gray with approval. Judge Greene stated:

Defendants' primary reliance [on Fairclough] appears to be on the statement by the Utah Supreme Court that the Utah Constitution [Article I, Section 22] is not "self-executing," but it is evident from the case that the court was most concerned with the fact that the state had not given its consent to be sued. The statute which arguably waives sovereign immunity was enacted after Fairclough. Moreover, it is apparent that actions for inverse condemnation are recognized and cognizable in the State of Utah without enabling legislation. See Gray v. Salt Lake City, 44 Utah 204, 138 Pac. 1177 (1914). Defendants' motion for summary judgment as to this claim is denied.

Clearly, it would not be consistent with a constitutional form of government to embody basic rights within the framework of the Constitution, but to hold that these rights were ineffectual unless the Legislature enacts legislation specifically recognizing those rights.

Because the Utah Constitution is the supreme law of the state of Utah, the Legislature has no power or authority to enact laws contrary to or at odds with the Constitution. If §63-30-3 is read to provide immunity to Davis County and Bountiful City in this case, 63-30-3 is in direct conflict with Article I, Section 22 of the Utah Constitution.

Accordingly, 63-30-3 should be declared unconstitutional.

Also, it appears that the Utah legislature has recognized the apparent conflict between Utah Code Ann. §63-30-3 (1986) and Article I, Section 22 of the Utah Constitution and specifically enacted Utah Code Ann. §63-30-10.5 (Supp. 1988) to remedy the situation. Section 63-30-10.5 entitled Waiver of Immunity For Taking Private Property Without Compensation, states:

- (1) Immunity from suit of all governmental entities is waived for the recovery of compensation from the governmental entity when the governmental entity has taken or damaged private property without just compensation.
- (2) Compensation and damages shall be assessed according to the requirements of Chapter 34, Title 78.

The language in the initial sentence is strikingly similar to Article I, Section 22 of the Utah Constitution which states "Private property shall not be taken or damaged for public use without just compensation." Clearly, the waiver contained in Utah Code Ann. §63-30-10.5 makes Utah Code Ann. §63-30-3 inapplicable in circumstances which would be in conflict with Article I, Section 22 of the Utah Constitution.

Obviously, the only logical interpretation of Utah Code Ann. §63-30-3 (1986) is that the immunity bestowed is qualified rather than absolute. Any other reasoning would place the statute and the constitutional provision hopelessly in conflict. (See supra, Point II, C). If the immunity is termed absolute, the waiver provision could not operate to

save the Utah Governmental Immunity Act from constitutional attack.

Under the cloak of governmental immunity, which has been ever-increasing in coverage, the state and its political subdivisions can effectively negate the purpose of Article I, Section 22. Whenever property is negligently damaged pursuant to a governmental function (public use), cities and counties should be required to pay compensation pursuant to the constitutional provision. The constitutional provision contained in Article I, Section 22 is negated if cities and counties are relieved from such liability through the Utah Governmental Immunity Act. This places Utah Code Ann. §63-30-3 squarely in conflict with an express constitutional provision and therefore §63-30-3 should be declared unconstitutional.

POINT IV.

TO EFFECTUATE THE PURPOSE OF THE UTAH COMPARATIVE FAULT ACT, THE FAULT OF ALL TORTFEASORS MUST BE COMPARED. GRANTING BOUNTIFUL CITY'S AND DAVIS COUNTY'S MOTION FOR SUMMARY JUDGMENT WOULD MAKE THAT COMPARISON IMPOSSIBLE.

The Utah Comparative Fault Act requires the fault of all parties to an occurrence to be compared at trial in order for the fault of the respective parties to be accurately apportioned. This result is mandated even if the City and County are held to be immune and thus not required to monetarily compensate the plaintiff-homeowners. Two of Utah's comparative fault statutes merit special attention. These are Utah Code Ann. §78-27-38 (1987) and Utah Code Ann. §78-27-40

(1987).

§78-27-38 Comparative Negligence. . . .
However, no defendant is liable to any person seeking recovery for any amount in excess of the proportion of fault attributable to that defendant.

§78-27-40. Amount of Liability Limited to Proportion of Fault--No Contribution.
Subject to §78-27-38, the maximum amount for which a defendant may be liable to any person seeking recovery is that percentage or proportion of fault attributed to that defendant. No defendant is entitled to contribution from any other person.

To effectuate the purpose of these two provisions, it is critical that the actions of both Bountiful City and Davis County be taken into account by the trier of fact. If the City and County are released from this action, and assuming that the landowners and developers are found to be liable to the homeowners, it is obvious that the landowners and developers will be assessed a damage award that is in excess of the proportion of fault actually attributable to them.

The 1986 Comparative Negligence Act abolished the doctrine of joint and several liability in Utah. Releasing the City and County from this action will effectively subject third-party plaintiffs to joint and several liability. This certainly does not appear to be the intent of the Legislature. Obviously, the Legislature intended that no party be held responsible for more than his pro-rata share of overall fault. Fairness dictates that the fault of Davis County and Bountiful City simply must be compared on the special verdict form submitted to the jury.

Other jurisdictions which have examined this issue have held that all parties' proportion of fault must be ascertained by the trier of fact even if a party cannot be held legally responsible for his proportion of fault. An early case espousing this view is Brown v. Keill, 580 P.2d 867 (Kan. 1978).

In Brown, the owner of an automobile involved in an intersectional accident while being driven by his son, sued the other driver to recover for damages sustained to his vehicle. Apparently, prior to this action, the defendant had settled with the driver (the son) out of court. In this proceeding, she did not seek to have the son joined as an additional formal party to the action. The trier of fact found that the owner was 0% negligent, his son was 90% negligent, and the defendant was 10% negligent. The defendant's vehicle sustained \$5,423 in damages; therefore the trial court entered judgment for the plaintiff for 10% of that amount, i.e., \$542.30.

Thus, the issue was whether it was appropriate to ascertain the proportion of fault of a party not formally joined to the action. The court held that, "[T]he intent and purpose of the legislature in adopting K.S.A. 60-258a [the Kansas Comparative Negligence Act] was to impose individual liability for damages based on the proportionate fault of all parties to the occurrence which gave rise to the injuries and damages even though one or more parties cannot be joined formally as a litigant or be held legally responsible for his or her proportionate fault." Id. at 876. As a prelude to this

holding, the court discussed the policy considerations applicable in reaching this determination. The court stated:

There is nothing inherently fair about a defendant who is 10% at fault paying 100% of the loss, and there is no social policy that should compel defendants to pay more than their fair share of the loss. Plaintiffs now take the parties as they find them. If one of the parties at fault happens to be a spouse or a governmental agency and if by reason of some competing social policy the plaintiff cannot receive payment for his injuries from the spouse or agency, there is no compelling social policy which requires the codefendant to pay more than his fair share of the loss. Id. at 874.

An additional Kansas case that deals with this issue is Wilson v. Probst, 581 P.2d 380 (Kan. 1978). In Wilson, a passenger of a vehicle brought an action for injuries sustained in a vehicular collision. The motorist of the vehicle in which the plaintiff was not a passenger joined the Secretary of Transportation as an additional party defendant based on the state's alleged negligence concerning the claimed highway defects. The Kansas Supreme Court held that the Secretary of Transportation was immune from liability based on negligence. Thus, the issue arose as to whether the other defendants to the lawsuit were entitled to have the negligence of the Secretary of Transportation taken into account in determining their proportionate share of liability.

The court quoted Brown v. Keill for the proposition that the proportion of fault of all parties to the occurrence must be taken into account even though one or more of the parties cannot be joined formally as a litigant or be held

legally responsible for his or her proportionate fault. The court went on to state, "In the context of comparative negligence, highway defects claimed to have contributed to the occurrence from which the injuries and damages arose must be compared to the alleged negligence of other parties if the intent of K.S.A. 60-258a is to be accomplished." Id. at 384.

The court then resolved the issue of whether the Secretary of Transportation must remain as a named party to the action or whether the trial court could enter an order allowing his percentage of negligence to be ascertained by the jury but dismissing him as a party for other purposes since no ultimate liability could be established against him. The court held that an additional party defendant in a comparative negligence action may not be dismissed from an action solely because of his immunity. Id. at 384. Therefore, the court required that the Secretary of Transportation remain as a named party in the action to adequately apportion the respective fault.

This type of apportionment has also been held to apply in instances in which the identity of the alleged concurrent tortfeasor was unknown. In Bartlett v. New Mexico Welding Supply, Inc., 646 P.2d 579 (N.M. App. 1982), an action was brought arising out of an automobile accident involving three vehicles. The driver of one of the cars involved in the accident was unknown. The jury found the defendant to be 30% at fault and found the unknown driver to be 70% at fault. The New Mexico court utilized this opinion to hold that the concept

of joint and several liability was not retained with the adoption of comparative negligence. The court therefore affirmed the jury's apportionment of liability for the damages sustained by the plaintiff though the unknown driver was not a party to the action and such a finding in essence precluded the plaintiff from receiving compensation for 70% of his damages. The court stated:

Joint and several liability is not to be retained in our pure comparative negligence system on the basis that a plaintiff must be favored.

We hold that defendant is not liable for the entire damage caused by defendant and the unknown driver. Defendant, as a concurrent tortfeasor, is not liable on a theory of joint and several liability. Id. at 586.

Workmen's compensation presents another area in which the fact finder is entitled to apportion the respective negligence of all parties involved in the dispute even if one party cannot be held liable to the plaintiff by operation of law. Connar v. West Shore Equipment of Milwaukee, 227 N.W.2d 660 (Wisc. 1975), is illustrative of this point. Connar concerned an appeal brought to ascertain whether it was proper to exclude from the special verdict form a question relating to the negligence of the employer, when the employer was not a party to the negligence action and could not be held liable by reason of the exclusivity of the workmen's compensation remedy. In holding that it was proper to ask the jury to consider the negligence of the employer, the court stated:

It is established without doubt that, when apportioning negligence, a jury must have the

opportunity to consider the negligence of all parties to the transaction, whether or not they be parties to the lawsuit and whether or not they can be liable to the plaintiff or to the other tortfeasors either by operation of law or because of a prior release. . . . At the requested-special-verdict stage of a lawsuit, it is immaterial that the entity is not a party or is immune from further liability. [Citations omitted] [T]he apportionment must include all whose negligence may have contributed to the arising of the cause of action. Id. at 662.

The Idaho court adopted this rule in Pocatello Ind. Park Co. v. Steel West, Inc., 621 P.2d 399 (Idaho 1980). The Idaho court stated that, "The reason for such [a rule] is that true apportionment cannot be achieved unless that apportionment includes all tortfeasors guilty of causal negligence either causing or contributing to the occurrence in question, whether or not they are parties to the case." Id. at 403, quoting Heft & Heft, Comparative Negligence Manual §8.131, at 12 (1978). The Idaho court also noted that apparently only Florida has adopted a contrary position. Other cases espousing this viewpoint include Bode v. Clark Equip. Co., 719 P.2d 824 (Okla. 1986); Couch v. Thomas, 497 N.E.2d 1372 (Ohio App. 1985).

The treatises which discuss this issue are in accord in concluding that the better reasoned approach is to require the negligence of all concurrent tortfeasors, whether they are parties to the action or not, to be taken into account by the jury in apportioning liability.

It is accepted practice to include all tortfeasors in the apportionment question. This

includes nonparties who may be unknown tortfeasors, phantom drivers, and persons alleged to be negligent but not liable in damages to the injured party such as in the third-party cases arising in the workmen's compensation area. Heft & Heft, Comparative Negligence Manual, §8.100, at 14 (Rev. Ed.)

See also, Schwartz, Comparative Negligence, at 262-3 (2d Ed. 1986).

Numerous other authorities can be cited in support of this proposition. See also, American Motorcycle Assn. v. Superior Court of Los Angeles County, 578 P.2d 899 (Ca. 1978); Lines v. Ryan, 272 N.W.2d 896 (Minn. 1978); Barron v. United States, 473 F.Supp. 1077 (D. Haw. 1979), affd. in part and rev'd in part 654 F.2d 644 (9th Cir. 1981).

In summation, it is evident that the respective negligence of Bountiful City and Davis County must be apportioned by the finder of fact in order to comply with the stated purpose of the Utah Comparative Fault Act. This is mandated even if Bountiful City and Davis County are found to be immune from liability to the plaintiff-homeowners. The only question remaining is whether to require Bountiful City and Davis County to remain as parties to the action or whether to merely require that the jury assess their respective negligence on the special verdict form and reduce the liability, if any, of the landowners and developers accordingly. The interests of accuracy and equity compel the conclusion that Bountiful City and Davis County should remain as named parties to the action. This will facilitate a more in depth development of the evi-

dence to aid the trier of fact in reaching a just result.

CONCLUSION

This appeal involves several issues regarding the construction, application and constitutionality of the Utah Governmental Immunity Act. In regard to the construction of the Act, landowners and developers submit to this Court that the trial court erred in classifying Bountiful City's and Davis County's actions as involving the "management of flood waters" or the "construction, repair, and operation of flood and storm systems." The activities of Bountiful City and Davis County which are at issue concern unwarranted delays and negligent decision making. These activities are not granted immunity pursuant to Utah Code Ann. §63-30-3 (1986). The mere fact that these activities resulted in a flood will not, or should not, place them within the confines of Utah Code Ann. §63-30-3 (1986).

Second, the acts and omissions of Davis County and Bountiful City do not constitute a governmental function as defined by applicable case law or statutory law and therefore no immunity applies. Even if the activities of the City and County were found to be a governmental function, immunity has been waived for those acts by express statutory waivers. Also, even were one to conclude that the conduct of Bountiful City and Davis County constituted a governmental function in the sense that those acts and omissions consisted of "the management of flood waters and/or the construction repair or operation

of flood and storm systems," such a finding would only result in qualified immunity rather than an absolute grant of immunity. Such qualified immunity is overridden by the express statutory waivers contained in §§63-30-8, 9, 10 and 10.5.

Third, Utah Code Ann. §63-30-3 (1986) is unconstitutional in light of Article I, Section 22 of the Utah Constitution. The Utah Governmental Immunity Act could arguably be applied in situations where the government takes or damages property pursuant to a public use. The constitutional provision requires compensation in such instances, but the Governmental Immunity Act could operate to extinguish the governmental entities' liability.

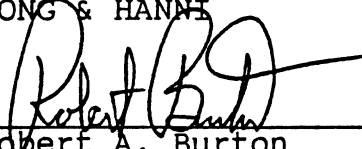
Fourth, even if §63-30-3 is found to be constitutional, and Bountiful City and Davis County are found to be immune, the purpose and the language of the Comparative Fault Act require that their respective fault be apportioned by the jury at the special verdict phase. To not allow such a result would effectively subject third-party plaintiffs to joint and several liability which has been statutorily abolished in Utah. The clear majority of jurisdictions which have examined the issue of apportionment of fault when a party cannot be held legally responsible for his percentage of fault or is not a party to the lawsuit, have held that the immune or absent party's liability must be apportioned by the jury at the special verdict phase. This result is necessary in order to insure that the defendant who is present is not held liable

for more than his proportionate degree of fault.

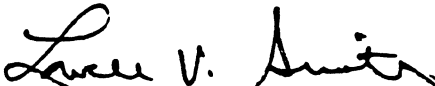
It is respectfully requested that the judgment of the trial court be reversed, the third-party claims be reinstated, and the entire case be remanded for trial.

DATED this 31 day of January, 1989.

STRONG & HANNI

By 
Robert A. Burton
Attorneys for Appellants and Third-
Party Plaintiffs Landforms Construction
Group, Landforms Development, Inc.

HANSON, EPPERSON & SMITH

By 
Lowell V. Smith
Attorneys for Appellants and Third-
Party Plaintiffs Mark S. Sandberg,
L. Wayne Redd, Lyle A. Hale, Hale/Redd
Investment Group, a general partnership,
and Hale/Redd Land Investment, a joint
venture

CERTIFICATE OF MAILING

I hereby certify that on this 31 day of
January, 1989, four true and correct copies of the
foregoing brief were mailed, postage prepaid, to:

MELVIN C. WILSON
Davis County Attorney
GERALD E. HESS
Chief Civil Deputy
Davis County Courthouse
P. O. Box 618
Farmington, Utah 84025

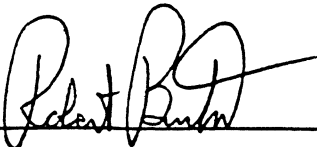
LAYNE B. FORBES
Bountiful City Attorney
P. O. Box 331
Bountiful, Utah 84010

I further certify that on this 31 day of
January, 1989, a courtesy copy of the foregoing brief was
mailed, postage prepaid, to:

RICH HUMPHERYS
CHRISTENSEN, JENSEN & POWELL, P.C.
Attorneys for Plaintiffs
510 Clark Leaming Building
175 South West Temple
Salt Lake City, Utah 84101

D. MICHAEL NIELSON
Attorney for Verl Smart
Sessions Place
505 South Main Street
Bountiful, Utah 84010

GEORGE FADEL
Attorneys for The Consortium
170 West 400 South
Bountiful, Utah 84010



FILED IN CLERK'S OFFICE
DAVIS COUNTY, UTAH

1988 OCT 11 PM 1:52

CLERK, 2ND DIST. COURT

BY AS
DEPUTY CLERK

Lowell V. Smith, #3006
HANSON, EPPERSON & SMITH
A Professional Corporation
Attorneys for Hale/Redd Investment Group
4 Triad Center, Suite 500
P.O. Box 2970
Salt Lake City, UT 84110-2970
(801) 363-7611

Robert A. Burton
STRONG & HANNI
Attorneys for Defendants
Landforms Construction Corp.
and Landforms Development, Inc.
Sixth Floor, Boston Building
Salt Lake City, UT 84111
(801) 532-7080

IN THE SECOND JUDICIAL DISTRICT COURT IN AND FOR
DAVIS COUNTY, STATE OF UTAH

WILLIAM & JUDY McCLEERY, MARK
& TERESIA PANTELAKIS; DENNIS &
GLORIA ANDERSON; JAMES & LINDA
STOVER; DAVID C. FRICKE; BARRIE
D. & KATHERINE BREWER; RONALD &
KERMA JONES; RICHARD & BARBARA
KRISTENSEN; LYLE & ALICE
LARAINÉ GORDON; and S. MICHAEL
& SANDRA J. INMAN,

Plaintiffs,

v.

LANDFORMS CONSTRUCTION CORP.;
LANDFORMS DEVELOPMENT INC.;
MARK S. SANDBERG; L. WAYNE
REDD; LYLE A. HALE;
HALE/REDD INVESTMENT GROUP, a
general partnership a/k/a REDD
HALE INVESTMENT GROUP;
HALE/REDD LAND INVESTMENT, a
joint venture; VERL G. SMART;
and THE CONSORTIUM, INC.,

Defendants.

SUMMARY JUDGMENT

Civil No.: 40616

Judge Rodney S. Page

FILMED

LANDFORMS DEVELOPMENT, INC.;	:
MARK S. SANDBERG; L. WAYNE	:
REDD; LYLE A. HALE; HALE/REDD	:
INVESTMENT GROUP, a General	:
Partnership, a/k/a REDD HALE	:
INVESTMENT GROUP; HALE/REDD	:
LAND INVESTMENT, a joint	:
venture,	:
	:
Third-Party Plaintiffs,:	:
	:
v.	:
	:
BOUNTIFUL CITY and DAVIS COUNTY,:	:
	:
Third-Party Defendants.:	:
	:

Third-Party Defendants Bountiful City and Davis County's Motions for Summary Judgment came on for hearing before the above-entitled Court on September 6, 1988. Third-Party Plaintiff Bountiful City was represented by Layne B. Forbes, City Attorney. Third-Party Defendant Davis County was represented by Gerald E. Hess, Chief Civil Deputy Attorney for Davis County. Third-Party Plaintiff Landforms Construction Corporation, Landforms Development, Inc. were represented by Attorney Robert A. Burton. Third-Party Plaintiffs Mark S. Sandberg, L. Wayne Redd, Lyle A. Hale, Hale/Redd Investment Group, Hale/Redd Land Investment were represented by Attorney Lowell V. Smith.

Having considered and reviewed the pleadings, affidavits and Memorandums of Points and Authorities on file, and being fully advised in the premises, the Court concludes:

1. Utah Code Annotated Section 63-30-3, the Governmental Immunity Act ("Act"), grants absolute immunity to the management of flood water and other natural disasters and grants immunity in the construction, repair and operation of flood and storm systems by governmental entities.

2. Count I of the Amended Third-Party Complaint against Bountiful City and Davis County alleges that all flood and storm control work performed by Third-Party Plaintiffs was done in accordance with Davis County and Bountiful City requirements and was done with the approval of Davis County and Bountiful City; that Third-Party Plaintiffs were prevented from constructing their own storm detention basin by the negligent and careless actions of Bountiful City and Davis County; that Bountiful City and Davis County negligently delayed making a decision concerning the construction of a regional storm detention basin and that such delay affected the ability of Third-Party Plaintiffs to construct their own, on-site detention basin; and that Bountiful City and Davis County required Third-Party Plaintiffs to construct a roadway through the entire development project, which roadway operated as a funnel or channel for the water, mud and silt which caused the plaintiffs' damages. The Amended Third-Party Complaint seeks indemnification, contribution and/or a comparison of fault between Third-Party Plaintiffs and Third-Party Defendants.

3. Count II of the Amended Third-Party Complaint seeks recovery from Davis County pursuant to a contract whereby Davis County was obligated to construct a regional detention basin. It is alleged that the regional detention basin was not timely constructed and that the damages sustained by plaintiffs were the proximate result of the alleged breach of contract by Davis County.

4. The immunity granted by the Act extends to the acts, or the failure to do the acts, of planning, designing, constructing, repairing and operating or managing flood waters and other natural disasters and in the constructing, repairing and operating of flood and storm systems before, during or after an actual flood emergency.

5. With the exception of Count II of the Amended Third-Party Complaint against Davis County, all acts and omissions of Davis County and Bountiful City upon which Third-Party Plaintiffs seek to rely to impose liability upon Bountiful City and Davis County are shielded by the broad grant of immunity contained in Section 63-30-3, Utah Code Annotated.

6. The Court determines there is no just reason for delay and, pursuant to Rule 54(b) of the Utah Rules of Civil Procedure, the Court hereby directs the entry of a final judgment as set forth below.

WHEREFORE, it is hereby ORDERED, ADJUDGED AND DECREED as follows:

1. On the basis of governmental immunity as contained in Section 63-30-3, Utah Code Annotated, Third-Party Defendant Bountiful City's Motion for Summary Judgment be and is hereby granted and the Amended Third-Party Complaint of Third-Party Plaintiffs be and is hereby dismissed with prejudice and on the merits. Final judgment is hereby entered in favor of Third-Party Defendant Bountiful City and against Third-Party Plaintiffs, no cause of action, with each party to bear his or its own costs.

2. On the basis of governmental immunity as contained in Section 63-30-3, Utah Code Annotated, Third-Party Defendant Davis County's Motion for Summary Judgment be and is hereby granted as to Count One of the Amended Third-Party Complaint and Count One of the Amended Third-Party Complaint be and hereby is dismissed with prejudice and upon the merits. Final judgment as to the claims set forth in Count One of the Amended Third-Party Complaint is hereby entered in favor of Third-Party Defendant Davis County and against Third-Party Plaintiffs, no cause of action, with each party to bear his or its own costs.

3. Third-Party Defendant Davis County's Motion for Summary Judgment as to Count Two of the Amended Third-Party Complaint is hereby denied, provided, however, that the only issues remaining as to Count Two are as to whether or not there

was any breach by Davis County of the Agreement dated May 12, 1986, between Davis County and the Hale/Redd Investment, and the damages, if any, sustained after January 12, 1987.

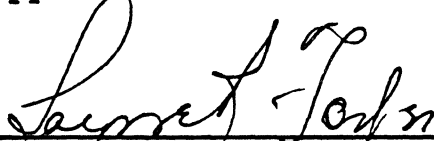
DATED this 11th day of ^{Oct}~~September~~, 1988.

BY THE COURT:

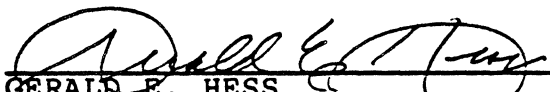


RODNEY S. PAGE
District Court Judge

Approved as to Form:



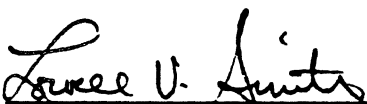
LAYNE B. FORBES
Attorney for Bountiful City



GERALD E. HESS
Attorney for Davis County



ROBERT A. BURTON
Attorney for Landform Construction
Corp. and Landforms Development, Inc.



LOWELL V. SMITH
Attorney for Mark S. Sandberg,
L. Wayne Redd, Lyle A. Hale,
Hale/Redd Investment Group, and
Hale/Redd Land Investment

L. Rich Humpherys, #1582
Christensen, Jensen & Powell, P.C.
ATTORNEY FOR PLAINTIFFS
510 Clark Leaming Building
175 South West Temple
Salt Lake City, UT 84101
Telephone: (801) 355-3431

FILED IN CLERK'S OFF
DAVIS COUNTY, UTAH
1037 OCT 30 AM 11:09
MICHAEL CALLOWAY, CLERK
BY

IN THE SECOND JUDICIAL DISTRICT COURT OF DAVIS COUNTY

STATE OF UTAH

WILLIAM & JUDY McCLEERY, MARK &)
TERESIA PANTELAKIS; DENNIS &)
GLORIA ANDERSON; JAMES & LINDA)
STOVER; DAVID C. FRICKE; BARRIE)
D. & KATHERINE BREWER; RONALD &)
KERMA JONES; RICHARD & BARBARA)
KRISTENSEN; LYLE & ALICE LARAIN)
GORDON; and S. MICHAEL & SANDRA)
J. INMAN,)

Plaintiffs,)

v.)

LANDFORMS CONSTRUCTION CORP.;)
LANDFORMS DEVELOPMENT INC.;)
MARK S. SANDBERG; L. WAYNE REDD;)
LYLE A. HALE; HALE/REDD)
INVESTMENT GROUP, a general)
PARTNERSHIP, a/k/a REDD HALE)
INVESTMENT GROUP; HALE/REDD LAND)
INVESTMENT, a joint venture;)
VERL G. SMART; and THE)
CONSORTIUM, INC.,)

Defendants.)

FIRST AMENDED COMPLAINT

Civil No. 40616

Plaintiffs complain against defendants and allege as follows:

PARTIES

1. Plaintiffs William & Judy McCleery are residents of Davis County, State of Utah, and at all times mentioned herein

F A 17

owned and resided on the real property located at 329 West 3500 South, Bountiful, Utah.

2. Plaintiffs Mark & Teresia Pantelakis are residents of Davis County, State of Utah, and at all times mentioned herein owned and resided on the real property located at 388 West Davis Boulevard, Bountiful, Utah.

3. Plaintiffs Dennis & Gloria Anderson are residents of Davis County, State of Utah, and at all times mentioned herein owned and resided on the real property located at 3737 Monarch Drive, Bountiful, Utah.

4. Plaintiffs James & Linda Stover are residents of Davis County, State of Utah, and at all times mentioned herein owned and resided on the real property located 482 West 3600 South, Bountiful, Utah.

5. Plaintiffs David C. Fricke was a resident of Davis County, State of Utah, and at all times mentioned herein owned and resided on the real property located at 3647 South Carriage Lane, Bountiful, Utah.

6. Plaintiffs Barrie D. & Katherine Brewer are residents of Davis County, State of Utah, and at all times mentioned herein owned and resided on the real property located at 447 West 3500 South, Bountiful, Utah.

7. Plaintiffs Ronald & Kerma Jones are residents of Davis County, State of Utah, and at all times mentioned herein owned and resided on the real property located at 357 West Davis

Boulevard, Bountiful, Utah.

8. Plaintiffs Richard & Barbara Kristensen are residents of Davis County, State of Utah, and at all times mentioned herein owned and resided on the real property located at 3302 South 300 West, Bountiful, Utah.

9. Plaintiffs Lyle and Alice Laraine Gordon are residents of Davis County, State of Utah, and at all times mentioned herein owned and resided on the real property located at 3326 South 300 West, Bountiful, Utah.

10. Plaintiffs S. Michael and Sandra J. Inman are residents of Davis County, State of Utah, and at all times mentioned herein owned and resided on the real property located at 3301 South 350 West, Bountiful, Utah.

11. Defendant Landforms Construction Corp. is a Utah corporation with its principal place of business in Bountiful, Utah.

12. Landforms Development Inc. is a Utah corporation with its principal place of business in Bountiful, Utah.

13. Defendants Mark S. Sandberg, L. Wayne Redd and Lyle A. Hale have been residents of Davis County, Utah, during all times mentioned herein.

14. Defendant Hale/Redd Investment Group a/k/a Redd Hale Investment Group is a general partnership, made up of defendants Redd, Sandberg and Lyle A. Hale as partners, and has been doing business in Davis County, Utah.

15. Defendant Hale/Redd Land Investment is a joint venture made up of some or all of the above defendants, and has been doing business in Davis County, Utah.

16. Defendant Verl G. Smart has been a resident of Davis County, Utah, and/or has owned a part of the property in Davis County which is described below.

17. Defendant The Consortium, Inc. is a Utah corporation, with its principal place of business in Davis County, Utah.

18. At all times material hereto, defendants and each of them worked in concert or as agents of the other.

FIRST CAUSE OF ACTION

(Negligence)

19. Defendants have owned an interest in and/or have been involved and participated in the planning, development and construction of improvements on large parcels of real property situated above plaintiffs' respective residences. This real property shall be referred to hereafter as "the Real Property."

20. Through their acts and omissions, defendants negligently and carelessly planned, designed, developed and constructed the Real Property improvements and in so doing changed the natural conditions and contour of the property, thereby increasing, aggravating, concentrating and diverting the natural flow of runoff water from the property.

21. As a direct and proximate result of the negligence and carelessness of defendants, plaintiffs have suffered substantial

flooding damages to their residences and personal property in an amount to be established at the time of trial. As a further cause of defendants' negligence and carelessness, plaintiffs have suffered a devaluation in their property and have suffered other consequential and general damages in excess of Five Hundred Thousand Dollars (\$500,000).

SECOND CAUSE OF ACTION

(Trespass)

22. Plaintiffs reallege paragraphs 1 through 23 above.

23. The wrongful actions and omissions of defendants in allowing excessive and substantial runoff water to flood plaintiffs' properties on numerous different occasions since December, 1985, constitutes unlawful trespasses.

24. As a direct and proximate result of defendants' unlawful trespasses, plaintiffs are entitled to recover against defendants all special, consequential and general damages in an amount in excess of Five Hundred Thousand Dollars (\$500,000).

THIRD CAUSE OF ACTION

(Nuisance)

25. Plaintiffs reallege paragraphs 1 through 26 above.

26. The instances of flooding caused by the wrongful actions and omissions of the defendants have occurred on numerous occasions since December, 1985, as recent as August, 1987, and plaintiffs believe and therefore allege that the actions of defendants and the conditions on the Real Property in question

have not been corrected and will continue to result in more flooding each time there is significant rainfall.

27. The wrongful actions and omissions of defendants have substantially interfered with plaintiffs' use and enjoyment of their property and therefore constitute a continuing nuisance.

28. On numerous occasions, plaintiffs have given notice to defendants of their wrongful conduct and have made demand that the unsafe conditions be corrected; but defendants have failed and refused to abate said nuisance. Plaintiffs are therefore threatened by the continuing nuisance through an indefinite time in the future.

29. Unless the unsafe conditions caused by the wrongful conduct of defendants are corrected, plaintiffs will suffer additional damages. Plaintiffs are therefore entitled to a permanent injunction restraining defendants from continuing the nuisance herein described and requiring defendants to abate the nuisance to avoid additional great and irreparable injury to plaintiffs and their properties.

30. As a direct and proximate result of the wrongful conduct of the defendants which constitute the maintenance of a nuisance, plaintiffs have sustained special and consequential damages as described above. In addition, plaintiffs have suffered great emotional trauma in being subjected to multiple floodings of their personal residence and belongings and have suffered other general damages, for which defendants are liable.

FOURTH CAUSE OF ACTION

(Intentional Infliction of Emotional Distress)

31. Plaintiffs reallege paragraphs 1 through 32 above.

32. Defendants have personally witnessed and have otherwise been put on notice of the numerous floodings and damages resulting therefrom since December, 1985, however, defendants have failed to take reasonable precautions and measures to correct the unsafe conditions. By failing to correct such unsafe conditions, defendants knew or reasonably should have known that additional flooding would occur to plaintiffs and that flooding would cause plaintiffs severe emotional distress.

33. Defendants wrongful actions and omissions have been outrageous and would constitute the intentional infliction of distress to the plaintiffs, for which defendants are liable for all special, consequential and general damages resulting therefrom.

FIFTH CAUSE OF ACTION

(Punitive Damages)

34. Plaintiffs reallege paragraphs 1 through 35 above.

35. As a result of defendants' wrongful actions and omissions, defendants have acted maliciously and wantonly and in complete disregard for the rights and safety of plaintiffs.

36. In order to deter such conduct of defendants in the future and prevent the repetition thereof as a practice, by way of punishment and as an example, plaintiffs pray that exemplary

damages be awarded in the amount of at least Five Hundred Thousand Dollars (\$500,000).

WHEREFORE, plaintiffs pray for judgment against defendants, jointly and severally, as follows:

1. For all special damages to be proven at the time of trial;
2. For consequential damages to be proven at the time of trial;
3. For general damages in an amount in excess of Five Hundred Thousand Dollars (\$500,000);
4. For exemplary and punitive damages in the amount of at least Five Hundred Thousand Dollars (\$500,000);
5. For prejudgment interest, attorney's fees, and court costs;
6. For a permanent injunction, restraining defendants from the described wrongful conduct and requiring defendants to correct the unsafe conditions as described above; and
7. For all other relief deemed equitable and just under the circumstances.

DATED this 19th day of October, 1987.

Christensen, Jensen & Powell, P.C.

By: 

L. Rich Humpherys
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing FIRST AMENDED COMPLAINT was mailed, postage prepaid, this 19th day of October, 1987, to:

Robert A. Burton
Strong & Hanni
ATTORNEY FOR DEFENDANTS LANDFORM
Sixth Floor Boston Building
Salt Lake City, UT 84111

Debra Hill

BY AL
CLERK

Partnership, a/k/a REDD HALE)
INVESTMENT GROUP; HALE/REDD)
LAND INVESTMENT, a joint)
venture; VERL G. SMART; and)
THE CONSORTIUM, INC.,)
)
Defendants.)
<hr/>	
LANDFORMS DEVELOPMENT, INC.;)
MARK S. SANDBERG; L. WAYNE REDD;)
LYLE A. HALE; HALE/REDD)
INVESTMENT GROUP, a General)
Partnership, a/k/a REDD HALE)
INVESTMENT GROUP; HALE/REDD)
LAND INVESTMENT, a joint)
venture,)
)
Third-Party)
Plaintiffs,)
)
vs.)
)
BOUNTIFUL CITY and DAVIS)
COUNTY,)
)
Third-Party)
Defendants.)

AMENDED CROSSCLAIM

Defendants Landforms Construction Corp., Landforms Development, Inc., Mark S. Sandberg, L. Wayne Redd, Lyle A. Hale, Hale/Redd Investment Group, a general partnership, a/k/a Redd Hale Investment Group and Hale/Redd Land Investment, a joint venture, crossclaim against co-defendant The Consortium, Inc. and allege as follows:

1. Plaintiffs have commenced an action in the above-entitled court by virtue of an Amended Complaint, dated October

19, 1987, wherein plaintiffs allege that these defendants are liable to plaintiffs for damages.

2. In their Amended Complaint plaintiffs have also set forth claims against The Consortium, Inc.

3. These defendants deny liability to plaintiffs.

4. These defendants allege that engineering and design work on the property in question was performed by The Consortium.

5. The Consortium also rendered professional advice and counsel to these defendants regarding temporary storm detention facilities.

6. In the event the engineering and design work was negligently performed, or the professional advice and counsel was negligently given, the responsibility for this negligence rests with The Consortium and not these defendants.

7. In the event these defendants are found liable to plaintiffs, which liability is expressly denied, then said liability would be passive, secondary and substitute in nature, whereas the liability of The Consortium would be primary and active in nature. Therefore, in such event, these defendants and counterclaimants are entitled to be fully indemnified and recover judgment over against The Consortium for the full amount of any judgment rendered against these defendants in favor of plaintiffs, together with all costs and attorney's fees incurred by these defendants.

8. In the alternative and in the event these defendants are found to be jointly liable with The Consortium for damages allegedly sustained by plaintiffs, and thus under the circumstances not entitled to complete indemnity, then these defendants are entitled to contribution from The Consortium in accordance with the Utah comparative negligence statutes in effect when plaintiffs first began to complain of damages.

9. Pursuant to §78-27-37 et seq. [Utah Code Annotated (1986)], these defendants are entitled to have the fault of The Consortium determined on the special verdict submitted to the jury, and any fault found to rest with The Consortium should reduce the liability, if any, of these defendants to plaintiffs.

WHEREFORE, in the event these defendants should be found liable to plaintiffs, which liability is expressly denied, then these defendants demand judgment against co-defendant The Consortium as follows:

- (1) Full and complete indemnity.
- (2) Contribution.
- (3) Comparison of fault of all parties pursuant to current comparative fault statutes.
- (4) Costs of court and such other and further relief as to the court seems just and equitable.

AMENDED THIRD-PARTY COMPLAINT

Defendants and third-party plaintiffs Landforms Construction Corp., Landforms Development, Inc., Mark S. Sandberg, L. Wayne Redd, Lyle A. Hale, Hale/Redd Investment Group, a general partnership, a/k/a Redd Hale Investment Group and Hale/Redd Land Investment, a joint venture, complain of Bountiful City and Davis County and allege as follows:

1. Plaintiffs have commenced an action in the above-entitled court by virtue of an Amended Complaint dated October 19, 1987, wherein plaintiffs allege that these defendants are liable to plaintiffs for damages.

2. These defendants and third-party plaintiffs reallege and incorporate by reference herein the jurisdictional allegations contained in paragraphs 1 through 17 of plaintiffs' Amended Complaint.

3. Third-party plaintiffs deny liability to plaintiffs.

COUNT I

4. Third-party plaintiffs reallege and incorporate by reference herein paragraphs 1 through 3 of the Third-Party Complaint.

5. All flood and storm control work performed by third-party plaintiffs or their contractors on the Bridlewood Subdivision was done in accordance with Davis County and Bountiful City requirements with the approval of Davis County and Bountiful City. If the work was negligently performed, which

third-party plaintiffs deny, this was because Bountiful City and Davis County requirements were deficient.

6. Third-party plaintiffs were prevented from developing their own storm detention basin by the negligent and careless actions of Bountiful City and Davis County.

7. Bountiful City and Davis County negligently delayed the construction of the Bridlewood Subdivision by their indecision with respect to the regional detention basin and their delay in other matters. This delay caused a potential flood hazard to exist in that Bridlewood remained only partially completed without curb and gutter, asphalt roads, catch basins, and a permanent storm detention facility for a much longer period of time than third-party plaintiffs originally planned or reasonably anticipated.

8. Bountiful City and Davis County negligently delayed making a decision on the regional storm detention basin for several months. Thereafter, Bountiful City and Davis County negligently delayed working out any meaningful plan for the construction and implementation of the detention basin. These delays affected the ability of third-party plaintiffs to move ahead with the Bridlewood project.

9. Third-party plaintiffs desired to develop Bridlewood in three phases and did not desire to cut a roadway into the subdivision from top to bottom, but rather planned to develop the

road in short phases or increments.

10. Bountiful City and Davis County negligently and carelessly required third-party plaintiffs to cut one roadway in Bridlewood from top to bottom, and refused to allow the roadway to be developed in phases.

11. Cutting the roadway from the top of the Bridlewood Subdivision to the bottom required much more excavation than third-party plaintiffs had planned and required more land to be devegetated than third-party plaintiffs initially planned. According to plaintiffs, these factors contributed to plaintiffs' damages.

12. According to plaintiffs, the long roadway from the top of Bridlewood to the bottom acted as a funnel or channel for water, mud, and silt which the plaintiffs alleged flowed onto their property and caused them damage.

13. Damages, if any, sustained by plaintiffs resulted from plaintiffs' own negligent actions, acts of God, and the omissions and negligent actions of The Consortium, Davis County, and Bountiful City.

14. In the event these defendants are found liable to plaintiffs, which liability is expressly denied, then said liability would be passive, secondary and substitute in nature, whereas the liability of Bountiful City and Davis County would be primary and active in nature. Therefore, in such event, these defendants are entitled to be fully indemnified and recover

judgment over against Bountiful City and Davis County for the full amount of any judgment rendered against them in favor of plaintiffs, together with all costs and attorney's fees incurred by these defendants.

15. In the alternative and in the event these defendants are found to be jointly liable with Bountiful City and Davis County for damages allegedly sustained by plaintiffs, and thus under the circumstances not entitled to complete indemnity, then these defendants are entitled to contribution from Bountiful City and Davis County in accordance with the Utah comparative negligence statutes in effect when plaintiffs first began to complain of damages.

16. Pursuant to §78-27-37 et seq. [Utah Code Annotated (1986)], these defendants are entitled to have the fault of Bountiful City and Davis County determined on the special verdict submitted to the jury, and any fault found to rest with Bountiful City and Davis County should reduce the liability, if any, of these defendants to plaintiffs.

COUNT II

17. These defendants reallege and incorporate by reference herein paragraphs 1 through 16 of the Third-Party Complaint.

18. On or about May 12, 1986, defendant Hale/Redd Investment Group signed a contract with Davis County, a copy of which is attached hereto as Exhibit 1.

19. Pursuant to the contract, Davis County was obligated to construct a regional detention storm basin for the protection of these defendants and third-party plaintiffs. The purpose of this basin was to control runoff, to prevent flooding, and protect these defendants from potential claims.

20. The detention basin was not timely constructed. Plaintiffs claim to have sustained damages after the basin should have been constructed and operational.

21. If the plaintiffs have sustained damages since the construction and operation of the regional detention basin, this damage resulted from the negligent design and operation of the basin.

22. Damages sustained by plaintiffs, if any, were caused by Davis County's breach of its agreement to properly and timely construct the regional detention basin.

23. Pursuant to contract, these defendants are entitled to be indemnified and held harmless from and against any and all claims asserted by plaintiffs against them.

24. In the event it is determined that these defendants are not entitled to full and complete indemnity under the contract, these defendants are nevertheless entitled to an implied right of contribution pursuant to the contract.

25. Pursuant to contract, these defendants are entitled to recover reasonable attorney's fees and costs incurred by them in the defense of this action.

WHEREFORE, in the event these defendants should be found

liable to plaintiffs, which liability is expressly denied, then these defendants demand judgment against third-party defendants Bountiful City and Davis County as follows:

- (1) Full and complete indemnity.
- (2) Contribution.
- (3) Comparison of fault of all parties pursuant to current comparative fault statutes.
- (4) Costs of court and such other and further relief as to the court seems just and equitable.

Dated this 9 day of August, 1987.

STRONG & HANNI

By 

Robert A. Burton
Attorneys for Defendants and
Third-Party Plaintiffs
Landforms Construction Group,
Landforms Development, Inc.,

LOWELL V. SMITH
HANSON, EPPERSON & SMITH
Attorneys for Mark S. Sandberg,
L. Wayne Redd, Lyle A. Hale,
Hale/Redd Investment Group, a
general partnership, a/k/a Redd
Hale Investment Group, Hale/Redd
Land Investment, a joint venture

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing was mailed, first class postage prepaid, this 11th day of August, 1987, to the following:

L. Rich Humpherys
Christensen, Jensen & Powell, P.C.
Attorneys for Plaintiffs
510 Clark Leaming Building
175 South West Temple
Salt Lake City, Utah 84101

Melvin C. Wilson
Davis County Attorney
Gerald E. Hess
Chief Civil Deputy
Davis County Courthouse
P. O. Box 618
Farmington, Utah 84025

D. Michael Nielsen
Attorney at Law
505 South Main Street
Bountiful, Utah 84010

Layne B. Forbes
Bountiful City Attorney
P. O. Box 331
Bountiful, Utah 84010

George F. Fadel
Attorney at Law
170 West 500 South
Bountiful, Utah 84010

Patsy Wyatt

L4-ACTPC8/8/88bc

Utah Constitution, Article I, Section 22

[Private property for public use.]

Private property shall not be taken or
damaged for public use without just compensation.

Utah Code Annotated, Section 63-30-2 (Supp. 1988)

Definitions.

As used in this chapter:

- (1) "Claim" means any claim or cause of action for money or damages against a governmental entity or against an employee.
- (2) (a) "Employee" includes a governmental entity's officers, employees, servants, trustees, commissioners, members of a governing body, members of a board, members of a commission, or members of an advisory body, student teachers certificated in accordance with Section 53A-6-101, educational aides, students engaged in providing services to members of the public in the course of an approved medical, nursing, or other professional health care clinical training program, volunteers, and tutors, but does not include an independent contractor.

(b) "Employee" includes all of the positions identified in Subsection (2)(a), whether or not the individual holding that position receives compensation.
- (3) "Governmental entity" means the state and its political subdivisions as defined in this chapter.
- (4) (a) "Governmental function" means any act, failure to act, operation, function, or undertaking of a governmental entity whether or not the act, failure to act, operation, function, or undertaking is characterized as governmental, proprietary, a core governmental function, unique to government, undertaken in a dual capacity, essential to or not essential to a government or governmental function, or could be performed by private enterprise or private persons.

- (b) A "governmental function" may be performed by any department, agency, employee, agent, or officer of a governmental entity.
- (5) "Injury" means death, injury to a person, damage to or loss of property, or any other injury that a person may suffer to his person, or estate, that would be actionable if inflicted by a private person or his agent.
- (6) "Personal injury" means an injury of any kind other than property damage.
- (7) "Political subdivision" means any county, city, town, school, district, public transit district, redevelopment agency, special improvement or taxing district, or other governmental subdivision or public corporation.
- (8) "Property damage" means injury to, or loss of, any right, title, estate, or interest in real or personal property.
- (9) "State" means the state of Utah, and includes any office, department, agency, authority, commission, board, institution, hospital, college, university, or other instrumentality of the state.

Utah Code Annotated, Section 63-30-3 (1986)

Immunity of governmental entities from suit.

Except as may be otherwise provided in this chapter, all governmental entities are immune from suit for any injury which results from the exercise of a governmental function, governmentally-owned hospital, nursing home, or other governmental health care facility, and from an approved medical, nursing, or other professional health care clinical training program conducted in either public or private facilities.

The management of flood waters and other natural disasters and the construction, repair, and operation of flood and storm systems by governmental entities are considered to be governmental functions, and governmental entities and their officers and employees are immune from suit for any injury or damage resulting from those activities.

Utah Code Annotated, Section 63-30-8 (1986)

Waiver of immunity for injury caused by defective, unsafe, or dangerous condition of highways, bridges, or other structures.

Immunity from suit of all governmental entities is waived for any injury caused by a defective, unsafe, or dangerous condition of any highway, road, street, alley, crosswalk, sidewalk, culvert, tunnel, bridge, viaduct or other structure located thereon.

Utah Code Annotated, Section 63-30-9 (1986)

Waiver of immunity for injury from dangerous or defective public building, structure, or other public improvement--Exception.

Immunity from suit of all governmental entities is waived for any injury caused from a dangerous or defective condition or any public building, structure, dam, reservoir or other public improvement. Immunity is not waived for latent defective conditions.

Utah Code Annotated, Section 63-30-10 (1986)

Waiver of immunity for injury caused by negligent act or omission of employee--Exceptions--Waiver for injury caused by violation of fourth amendment rights.

(1) Immunity from suit of all governmental entities is waived for injury proximately caused by a negligent act or omission of an employee committed within the scope of employment except if the injury:

(a) arises out of the exercise or performance or the failure to exercise or perform a discretionary function, whether or not the discretion is abused; or

(b) arises out of assault, battery, false imprisonment, false arrest, malicious prosecution, intentional trespass, abuse of process, libel, slander, deceit, interference with contract rights, infliction of mental anguish, or civil rights; or

(c) arises out of the issuance, denial, suspension, or revocation of, or by the failure or refusal to issue, deny, suspend, or revoke, any permit, license, certificate, approval, order, or similar authorization; or

(d) arises out of a failure to make an inspection, or by reason of making an inadequate or negligent inspection of any property; or

(e) arises out of the institution or prosecution of any judicial or administrative proceeding, even if malicious or without probable cause; or

(f) arises out of a misrepresentation by the employee whether or not it is negligent or intentional; or

(g) arises out of or results from riots, unlawful assemblies, public demonstrations, mob violence, and civil disturbances; or

(h) arises out of or in connection with the collection of and assessment of taxes; or

(i) arises out of the activities of the Utah National Guard; or

(j) arises out of the incarceration of any person in any state prison, county, or city jail or other place of legal confinement; or

(k) arises from any natural condition on state lands or the result of any activity authorized by the State Land Board; or

(l) arises out of the activities of providing emergency medical assistance, fighting fire, handling hazardous materials, or emergency evacuations.

(2) Immunity from suit of all governmental entities is waived for injury proximately caused or arising out of a violation of protected fourth amendment rights as provided in Chapter 16, Title 78 which shall be the exclusive remedy for injuries to those protected rights. If §78-16-5 or Subsection 77-35-12(g) or any parts thereof are held invalid or unconstitutional, this Subsection (2) shall be void and governmental entities shall remain immune from suit for violations of fourth amendment rights.

Utah Code Annotated, Section 63-30-10.5 (Supp. 1988)

Waiver of immunity for taking private property without compensation.

- (1) Immunity from suit of all governmental entities is waived for the recovery of compensation from the governmental entity when the governmental entity has taken or damaged private property without just compensation.
- (2) Compensation and damages shall be assessed according to the requirements of Chapter 34, Title 78.

Utah Code Annotated, Section 78-27-38 (1987)

Comparative negligence.

The fault of a person seeking recovery shall not alone bar recovery by that person. He may recover from any defendant or group of defendants whose fault exceeds his own. However, no defendant is liable to any person seeking recovery for any amount in excess of the proportion of fault attributable to that defendant.

Utah Code Annotated, Section 78-27-40 (1987)

Amount of liability limited to proportion of fault--
No contribution.

Subject to §78-27-38, the maximum amount for which a defendant may be liable to any person seeking recovery is that percentage or proportion of the damages equivalent to the percentage or proportion of fault attributed to that defendant. No defendant is entitled to contribution from any other person.

Utah Code Annotated, Section 78-27-41 (1987)

Joinder of defendants.

A person seeking recovery, or any defendant who is a party to the litigation, may join as parties any defendants who may have caused or contributed to the injury or damage for which recovery is sought, for the purpose of having determined their respective proportions of fault.