

1989

Leland A. Fitzgerald and Helen S. Fitzgerald v. Utah
County, a body corporate and politic of the State of
Utah and a governmental entity of the State of Utah
Jeff Mendenhall, Gordon Buckley Rose, Iva Snell,
Keith Richan, Jeril Wilson, Lynn Davis and John
Does 4 trough 20 : Brief of Appellant

Utah Court of Appeals

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APPEALS

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IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

LELAND A. FITZGERALD and
HELEN S. FITZGERALD,

Plaintiffs,

v.

UTAH COUNTY, a body corporate
and politic of the State of
Utah and a governmental
entity of the State of Utah,
JEFF MENDENHALL, GORDON
BUCKLEY ROSE, IVA SNELL,
KEITH RICHAN, JERIL WILSON,
LYNN DAVIS and JOHN DOES
4 through 20,

Defendants.

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Case number 89-4123

APPEAL FROM AN ORDER DISMISSING ALL CLAIMS
ENTERED IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

Honorable J. Thomas Greene, District Court Judge

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Point I

Plaintiffs' Federal Constitutional claims are sufficient as a matter of law to require factual determinations by the jury.

A. The applicable statutes and ordinances in question exceed the state's police power and are therefore constitutionally invalid.

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- Addendum C: Affidavit of Leland A. Fitzgerald, dated February 1989.
- Addendum D: Memorandum Decision of the United States District Court, dated September 7, 1988.
- Addendum E: Memorandum Decision of the United States District Court, dated July 25, 1989.
- Addendum F: Complaint in the Fourth Judicial District Court of Utah County, State of Utah, Utah County v. Leland A. Fitzgerald and Helen S. Fitzgerald, dated March 9, 1982.
- Addendum G: Lis Pendens, dated March 9, 1982.
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RELATED OR PRIOR APPEALS

J. WALTER FITZGERALD and BETTY FITZGERALD, and
PRINCESS K. FITZGERALD and JENIECE FITZGERALD vs.
UTAH COUNTY, IVA SNELL, BUCKLEY ROSE and JEFF
MENDENHALL, KEITH RICHAN, JERIL WILSON, LYNN DAVIS
and JOHN DOES 4 through 10.

In the United States Court of Appeals, Tenth Circuit,
Case no.: 88-2384

JURISDICTION

Jurisdiction of the United States District Court was premised on 28 U.S. C. §1343, 42 U.S. C. §1983, and 42 U.S.C. §1988 and by virtue of the doctrine of pendent jurisdiction of state law claims.

Jurisdiction of the Court of Appeals is conferred by the provisions of 28 U.S.C. §1291.

Judgment was entered August 21, 1989. Notice of Appeal was filed September 15, 1989.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether there are issues of fact which preclude the granting of summary judgment on the constitutionality of the county ordinances.

2. Whether the ruling by the trial court on the constitutionality of the county ordinances is erroneous as a matter of law.

3. Whether there was presented to the trial court sufficient basis for the trial court to hold that appellants had not exhausted adequate state remedies.

4. Whether the ruling by the trial court on the issue of the adequacy of state remedies is erroneous as a matter of law.

5. Whether there are fact issues which make the granting of summary judgment on the issue of defamation plus damage to a property interest erroneous.

6. Whether the trial court's grant of summary judg-

ment on the issue of defamation plus injury to a property interest is erroneous as a matter of law.

7. Whether there are issues of fact and law which preclude the summary judgment on the issue of an unconstitutional 'taking'.

STATEMENT OF THE CASE

Plaintiffs/Appellants are the owners of real estate holdings in an agricultural area of Cedar Valley, Utah. Plaintiffs/Appellants attempted to sell substantial parts of their farming interests in tracts of 160 acres or larger by complying with the County ordinances enacted under state legislation exempting sales of land for agricultural purposes from subdivision plat filing requirements. Plaintiffs/Appellants filed the restrictive covenants, limiting all of their land holdings in Cedar Valley to agricultural use until compliance with County ordinances. Defendant Utah County brought suit against Plaintiffs/Appellants in state court asking for injunctions and rescission of all contracts of sale entered into by plaintiffs with their buyers and asking to have their contracts declared void and enjoining them from obtaining building permits or selling of their lands.

Plaintiffs brought this action for injunctive relief, and for violation of their civil rights under §1983, by governmental action constituting defamation plus damaging their interests in property guaranteed under the United States

Constitution and applicable state law.

COURSE OF PROCEEDINGS

The trial Court entered a stay of proceedings pending the litigation brought by Utah County against the Plaintiffs/Appellants.

After Utah County had dismissed their state court proceeding against Plaintiffs/Appellants, the U.S. District Court withdrew the stay of proceedings.

After a period of discovery, Defendants filed a Motion for Summary Judgment on all issues.

On September 7, 1988, the trial court granted summary judgment on all issues except the defamation plus damage to an interest in property claim which was reserved for a later time.

On July 25, 1989, the trial court granted the Defendants Motion for Summary Judgment on all issues. Judgment dismissing all claims of the plaintiffs/appellants was granted on August 21, 1989.

STATEMENT OF FACTS

1. The plaintiffs have an ownership interest in approximately 27,000 acres of land in an area known as Cedar Valley in Utah County, State of Utah (Doc. 63 at 3, Defendants Memorandum in support of Motion for Summary Judgment)

2. The subject property in Cedar Valley is unincorporated (Doc. 63 at 4).

3. Defendant Utah County is a political subdivision

organized and existing under and by virtue of the laws of the State of Utah (Doc. 63 at 4).

4. Defendant Jeff Mendenhall is now employed as the Planning Director of Utah County and has been so employed since April of 1978 (Doc. 63 at 4).

5. Defendant Gordon Buckley Rose is currently employed as a planner by Utah County and, has been an employee of Utah County at all times mentioned within plaintiffs' Complaint (Doc. 63 at 4).

6. Defendant Iva Snell was employed by Utah County at all times mentioned in plaintiffs' Complaint, but has since retired (Doc. 63 at 4).

7. Defendant Keith Richan, previously named as defendant John Doe 1 in Plaintiffs' Designation of John Does, was formerly a member of the Board of County Commissioners of Utah County. He previously was the Chairman of the Utah County Planning Commission. (Doc. 63 at 4 and Doc. 80 Exhibit B at 6).

8. Defendant Jeril Wilson, previously named as defendant John Doe 2 in Plaintiff's Designation of Jon Does, was formerly a member of the Board of County Commissioners of Utah County (Doc. 63 at 4).

9. Defendant Lynn W. Davis, previously named as defendant John Doe 3 in Plaintiffs' Designation of John Does, was a Deputy County Attorney. (Doc. 63 at 5).

10. On or about December 22, 1978, Utah county passed the 1976 Revised Zoning Ordinance of Utah County, Utah

(Doc. 63 at 5).

11. Said ordinance contained a provision requiring the filing of a plat for the subdivision of land, §4-3-52, and allowed for an exemption from the subdivision plat filing requirement upon satisfactory completion of covenants precluding the residential or non-agricultural use of such land until an approved subdivision plat has been recorded, §4-3-53 (Doc. 63 at 5, Addendum K). The ordinance was enacted under the state enabling statute Section 17-27-27, Utah Code Annotated as amended (Addendum J).

12. The Monte Vista parcel, approximately 9,000 acres, was purchased on May 18, 1978 from Wallace Ohran, who had purchased the property from the Cooperative Security Corporation. Lee Fitzgerald's family purchased the stock in Monte Vista Ranch Corporation. (Deposition of Leland A. Fitzgerald, taken May 14, 1987, pp. 7-8, Doc. 63 at 6).

13. The McKinney Land, approximately 12,940 acres, was purchased from the McKinneys on January 31, 1977. It was Leland Fitzgerald's intent to ranch a portion of the parcel and sell part of it (Deposition of Leland A. Fitzgerald taken May 14, 1987, p. 50, Doc. 63 at 6).

14. The DuPratt land, approximately 5,000 acres, was purchased by Leland Fitzgerald on contract from James DuPratt in September, 1977. (Deposition of Leland A. Fitzgerald taken May 14, 1987, p. 89, Doc. 63 at 6).

15. The Nichols parcel, approximately 920 acres, was purchased from Eldred Nichols on March 19, 1979 (Deposition of

Leland A. Fitzgerald taken May 14, 1987, pp. 100-101, Doc. 63 at 6).

16. The Stewart parcel, approximately 53 acres, was purchased on October 11, 1978 from Robert Stewart (Deposition of Leland A. Fitzgerald taken May 14, 1987, p. 105, Doc. 63 at 7).

17. The subject parcels lie partially or entirely within the Mining and Grazing 1 (M&G-1), Rural Residential 5 (RR5), and Agricultural 1 (A01) zones (Doc. 63 at 7).

18. County government and county employees and officials (the Planning Commission and the County Commission) were in a state of confusion in their own minds as to the method and means by which to implement both the state statute and the county ordinance. (Deposition of Iva Snell, Affidavit of Walter and Printess Fitzgerald, Doc. 80 Exhibit F, Addendum B).

19. After purchasing the properties in Cedar Valley, Fitzgeralds developed the properties by clearing weeds from a dust bowl, leveling land, and placing 600 acres under cultivation. (Doc. 80 Exhibit B paragraph 7, Addendum A).

20. They drilled wells producing 87° hot water, made the land more productive, and developed water for both culinary and irrigation purposes (Doc. 80, Exhibit B, paragraph 8, Addendum A).

21. Fitzgerald put more than \$1,000,000 into improvements in the Cedar Valley project, including three new high-capacity wells (two sixteen-inch wells and one eight-inch

well) with the capacity of producing 20 second feet or approximately 9,000 gallons, per minute, sufficient to irrigate over 1,500 acres of Cedar Valley farmland. Other improvements included four water storage tanks, several miles of culinary pipeline, the beginning of a community park, constructing and graveling roads, and improving several hundred acres of dust bowl-quality land by planting crops (Doc. 80, Exhibit B, paragraph 10, Addendum A).

22. Combining with numerous people, the Fitzgeralds attempted to form an agricultural community (Doc. 80, Exhibit B, paragraph 9, Addendum A).

23. Before he started selling any of the farmland in Cedar Valley, Leland A. Fitzgerald went to the State of Utah to find out what was necessary to comply with the Land Sales Practices Act. They gave him papers to outline what was necessary to comply with the Act, and that outline included a requirement to comply with County zoning ordinances. As a result of that, he went to the County to try to comply with the County's zoning ordinances for the purpose of selling land only. His intent was to sell agricultural land in blocks and quantities of sufficient size to meet the needs of potential buyers (Doc. 80, Exhibit B Paragraph 24, Addendum A).

24. Thereafter, he went back to the State and told them that he was going to sell some agricultural tracts. They informed him that they were not interested in matters pertaining to the sale of agricultural tracts, and that that was not covered by the Land Sales Practices Act because it was

specifically exempted from the requirements (Doc. 80, Exhibit B, paragraph 25, Addendum A).

25. The Fitzgeralds complied with all the ordinances and statutory requirements and all reasonable requests of the county (Doc. 80, Exhibit B, paragraph 12- 13, 14, 15, 16, 17, 24, 25, 27, 28, 30, 32, 33, 34, Addendum A).

26. The county falsified the minutes of the planning commission meetings with the Fitzgeralds pertaining to their proposed community plans and used such falsified minutes as the springboard for the defamation of Fitzgeralds as "illegal developers" (Doc. 80, Exhibit B, paragraph 12-22, Addendum A).

27. Fitzgerald made numerous efforts to comply with county ordinances on a waiver of plat filing requirements under exemption of state statute and county ordinance (Doc. 80, Exhibit B, paragraph 27-34, Addendum A).

28. Fitzgeralds signed, filed, and recorded restrictive covenants on all the land to be sold on forms provided by Utah County restricting all of the land to agricultural non-residential use (Doc. 80, Exhibit B, paragraph 27-34, Doc. 80, Exhibit B(1) and F(8), Addendum H & I).

29. Plaintiffs entered into a contract to sell Boyd Corbett and Keith Gurr several thousand acres of land in Cedar Valley (Doc. 80, Exhibit B, paragraph 26, Addendum A).

30. Corbett and Gurr came to Fitzgerald requesting him to sign an agricultural waiver and recorded covenants restricting the use of the land to agricultural purposes until

a subdivision plat was filed, so that they could sell their land to their buyers (Doc. 80, Exhibit B, paragraph 27, Addendum A).

31. Corbett and Gurr and Fitzgerald signed the restrictive covenants in the County offices (Doc. 80, Exhibit B, paragraph 27, Addendum A).

32. Sometime later, the County Planning office notified them that they would have to have Richard McKinney sign the restrictive covenants limiting the property to agricultural useage. Fitzgerald approached Mr. McKinney and he objected to one of the paragraphs in the restrictive covenants provided to us by Utah County. Eventually, Mr. McKinney and Fitzgerald were referred to the Deputy County Attorney, Richard Dalebout. He informed them that they would take out the objectionable paragraphs and that it could then be processed and the agricultural waiver issued. When they returned to the office, Mr. McKinney wanted to discuss privately with Fitzgerald a matter, and asked to renegotiate the contract under which he was purchasing the McKinney properties, for a substantially larger price. Fitzgerald would not renegotiate the contract, and Mr. McKinney refused to sign the agricultural waiver as a result (Doc. 80, Exhibit B, paragraph 27, Addendum A).

33. In their efforts to get the approvals of the County at a subsequent time, Fitzgerald and Corbett and Gurr submitted restrictive covenants to the County on the County's forms which had been notarized at Valley Title (Doc 80,

Exhibit B, paragraph 29, Addendum A).

34. They presented them to Iva Snell. The County again insisted that they should obtain the signature of Richard McKinney, since they knew that he would not sign the restrictive covenants. Fitzgerald informed them that he was the owner of the land and that they had his signature and those of Corbett and Gurr, who were the new buyers of the land, and that they were going to record the restrictive covenants. Iva Snell informed him that if he recorded the restrictive covenants, the County would bring a lawsuit against him (Doc. 80, Exhibit B, paragraph 25-30, Addendum A).

35. At a later time, Walter Fitzgerald requested that Leland Fitzgerald go with him to place restrictive covenants on the land to limit it to agricultural useage so that he might obtain a waiver allowing his buyer, Printess Fitzgerald, to sell some of that land because Utah County had a new employee, Nick Zullo, who would work with them. Nick Zullo said that he would work with them if they would get the signatures of as many of the owners as they could. Fitzgerald obtained the signatures of Sterling Sill, T.H. Bell, Walter Fitzgerald, Nephi Fitzgerald, Kent Angel, Noal Batemen, and Jim Hillner. They took the restrictive covenants to Nick Zullo. Zullo said he was surprised they could get everybody's signature, but that they now had what was required and the waiver was approved (Doc. 80, Exhibit B, paragraph 32, Addendum A).

36. Zullo told Leland Fitzgerald to record the

restrictive covenants with the Utah County Recorder, and he did so. Later, Leland received a letter from Iva Snell informing him that the application for agricultural waiver had been denied, even though he had seen Nick Zullo sign the approval (Doc. 80, Exhibit B, paragraph 32, Addendum A).

37. On another occasion, Fitzgerald decided to proceed with an agricultural waiver on the DuPratt property. He went in to get the restrictive covenants from the county. Mr. DuPratt, agreed to sign the restrictive covenants. Iva Snell told him that he could not proceed on the DuPratt properties with an agricultural waiver until he proceeded with the McKinney properties. She told him she would not approve a non-agricultural waiver on the DuPratt land until he had McKinney's signature. (Doc. 80, Exhibit B, paragraph 33, Addendum A).

38. As a result of that refusal, he decided he would proceed on the Monte Vista Ranch properties. He went to the Planning office and was told by Iva Snell that he could not proceed on Monte Vista Ranch because he had to have the McKinney properties and the Dupratt properties approved first. She told him that in order to approve the Monte Vista Ranch properties, he would have to have the signature on the restrictive covenants of the Cooperative Security Corporation, which had been the seller to the Ohran group, who then formed Monte Vista Ranch. She also said she was going to require that the former stockholders of the Monte Vista Ranch sign the restrictive covenants. He argued with her that they were only

stockholders in the corporation and that the corporation owned the land, but she refused to let him process the application for nonagricultural waiver unless he secured the signature of the former stockholders of the corporation as well as the seller of the land, the Cooperative Security Corporation. He went to the Ohran people, and they refused to sign it, saying that they were not the owners of the land, that it was owned by the corporation. Iva Snell sent him a letter, telling him that they rejected the application of Monte Vista Ranch, even though it was the titled owner of the land (Doc. 80, Exhibit B, paragraph 34, Addendum A).

39. The county and the individually named defendants launched a series of newspaper articles in which they made references to unnamed persons characterized as "land developers" in Cedar Valley carrying out a multitude of illegal transactions. The articles were obviously aimed at plaintiffs (Doc. 80, Exhibit B, paragraph 35, Addendum A).

40. The articles referred to 374 "defendants" who had allegedly violated County ordinances and the State Land Sales Practices Act (Doc. 80, Exhibit B, paragraph 36, Addendum A).

41. On deposition, Buckley Rose said he did not know where the number of 374 had been obtained by the Daily Herald. When the deposition of Dawn Tracy, the reporter from the Daily Herald, was taken, she produced at that deposition a list of persons which included buyers and seller of land in Cedar Valley, as well as owners of land in Cedar Valley who

had neither bought nor sold land for more than 50 years. The designation at the top of that list was "374 defendants" (Doc. 80, Exhibit B, paragraph 38, Addendum A).

42. At the time Utah County brought the lawsuit against Fitzgerald and others, the request for suit was prepared by Gordon Buckley Rose and signed by Jeff Mendenhall, and approved by Keith Richan, Jeril Wilson, and the County Commission, as indicated in their depositions. Buckley Rose denied knowledge of the origin of the list of 374 defendants. When it was revealed by the deposition of Dawn Tracy, the list itself was shown to be in the handwriting of Buckley Rose. He had placed the designation "374 Defendants" on that list (Doc. 80, Exhibit B, Paragraph 39, Addendum A).

43. At the time of the request for suit against the defendants was submitted to the Utah County Attorney's Office, that list was attached to the request. At the time plaintiffs requested Utah County to furnish copies of the documents pertaining to the lawsuit, the request for litigation was provided, but the itemization of the 374 defendants had been removed and was not produced until the deposition of Dawn Tracy (Doc. 80, Exhibit B, paragraph 40, Addendum A).

44. Leland Fitzgerald was present when that list was produced by Dawn Tracy, who testified that it was obtained from a former employee of the Utah County Planning Department (Doc. 80, Exhibit B, paragraph 41, Addendum A).

45. The admissions on deposition by Jeril Wilson and Lynn Davis that they did not look at any of the individual

transactions before they filed the lawsuit against Fitzgerald demonstrates that the combined efforts of Keith Richan, Lynn Davis, Jeril Wilson, Jeff Mendenhall, Iva Snell, and Buckley Rose were a conspiracy to destroy Fitzgerald without even verifying the transactions reported by Buckley Rose (Doc. 80, Exhibit B, paragraph 38-42, Addendum A).

46. The references by the County Commissioners, Lynn Davis, and the other Planning personnel to the "land scam" and "illegal sales" of land in Cedar Valley, the alleged sale of land to which the sellers could not deliver title, all was calculated and in fact resulted in the complete destruction of the potential market and value of Fitzgeralds' land in Cedar Valley (Doc. 80, Exhibit B, paragraph 44, Addendum A).

47. The actions of the County not only destroyed the market for future sales, but destroyed many sales of valid and enforceable contracts by causing the buyers to refuse to go forward with their contracts because of the representations of the County that they were victims of a "land scam" (Doc. 80, Exhibit B, paragraph 45, Addendum A).

48. Keith Richan personally appeared on television and badmouthed Leland Fitzgerald. He used words such as land scam," "illegal subdivision," etc. (Doc. 80, Exhibit B, paragraph 46, Addendum A).

49. In March, 1983, Utah County brought a lawsuit against appellants, asking for injunctions prohibiting sales, abatement of sales, prohibiting obtaining of building permits, voiding all prior sales, and asking for attorneys fees and

costs (Doc. 80, Exhibit B (6), Addendum F).

50. In connection with the lawsuit Utah County filed a lis pendens on all of appellants lands in Cedar Valley (Doc. 80, Exhibit B (7), Addendum G).

51. The County brought the suit against Leland Fitzgerald and other parties for simply buying and selling land. At a later time, Utah County dismissed their complaint against Fitzgeralds in the State Court (Doc. 80, Exhibit B (8), Addendum L).

52. The lawsuit was filed after the Fitzgeralds had put more than 29,500 acres under restrictive covenants restricting the land from being used except for agriculture purposes (Doc. 80, Exhibit B, paragraph 51, Addendum A).

STANDARD OF REVIEW

This appeal is from the trial court grant of defendants Motion for Summary Judgment on all issues. As such, the standard of review is that it must be viewed in a light most favorable to the appellants, Poller v. Columbia Broadcasting System, Inc., (1962) 368 U.S. 464, 7 L.Ed 2d 458, 82 S. Ct 486, 5 FR Serv 2d 886. This court must consider factual inferences tending to show triable issues in a light most favorable to the existence of such issues, Redhouse v. Quality Ford Sales, Inc., (1975 , CA 10 Utah) 511 F2d 230, 19 FR Serv 2d 1309, on reh (CA 10 Utah) 523 F2d 1, 20 FR Serv 2d 864.

ARGUMENT

POINT I

PLAINTIFFS' FEDERAL CONSTITUTIONAL CLAIMS ARE SUFFICIENT
AS A MATTER OF LAW TO REQUIRE FACTUAL DETERMINATIONS
BY THE JURY

- A. The applicable statutes and ordinances in question exceed the state's police power and are therefore constitutionally invalid.

The U.S. Supreme Court has adopted the following approach in determining which deprivations occur "without due process of law therefore establishing a violation of the Fourteenth Amendment

The existence of an adequate state remedy to redress property damage inflicted by state officers avoided the conclusion that there has been any constitutional deprivation of property without due process of law within the meaning of the Fourteenth Amendment".

Parratt v. Taylor, 451 U.S. 527 at 542 (1981) (citing Bonner v. Coughlin, 517 F.2d 1311, 1319 (7th Cir. 1975)).

Moreover, "the burden is on plaintiffs to establish that the ordinances are arbitrary or capricious, having no substantial relationship to promoting the safety, order, prosperity and general welfare of the community". South Gwinnett Venture v. Pruitt, 491 F.2d 5, 7 (5th Cir.) (en banc), cert. denied, 419 U.S. 837 (1974). Violation of a procedural due process right requires allegations that a person acting under color of state law deprived a party of a protected property interest and that the state procedures available for challenging the alleged deprivation do not satisfy procedural due process requirements. Paratt v. Taylor, *supra*.

"Constitutional guarantees may be adequately satisfied when a state provides a meaningful post-deprivation process, and state action may not be complete "unless or until the state fails to provide an adequate post-deprivation remedy for the property loss." Williamson County Regional Planning Comm'n v. Hamilton Bank, 413 U.S. 172, 87 L.Ed.2d 126, 105 S.Ct. 3108, 3121 (1985) (quoting Hudson v. Palmer, 468 U.S. 517, 532, n.12 (1984)). Further, maximum deference should be given to the local zoning authority in confronting emerging land use issues. Berman v. Parker, 348 U.S. 26, 32 (1954); Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926)..

As such, the State Legislature in Utah Code Annotated, 17-27-27, 1953 as amended, granted the County's power to control growth within their borders and in unincorporated lands by requiring that all proposals to subdivide new territory for 'residential purposes' be submitted to the County governments for approval. However, the Legislature concurrently withheld authority to deny the sale of land for agricultural, manufacturing, industrial or commercial uses.

The pertinent part of the Statute states as follows:

"Subdivision" means the division of a tract, or lot or parcel of land into three or more lots, plats, sites or other divisions of land for the purpose, whether immediate or future of sale or building development; provided, that this definition shall not include a bona fide division or partition of agricultural land for agricultural purposes or of commercial manufacturing or industrial land for commercial, manufacturing or industrial purposes (emphasis added).

This Statute effectively bars counties from requiring subdivision approval for the enumerated exceptions. Indeed, the Legislative history of the Statute shows a conscious effort by the Legislature, to provide a specific, unambiguous exception to withhold authority from the counties to interfere with property rights to sell land for agricultural, commercial, manufacturing or industrial purposes.

Utah County exceeded the express limitations of this Statute by enacting Section 4-3-53 , Addendum K, of the 1976 Revised Zoning Ordinances of Utah County, which requires land owners to secure an approval by the county of a waiver of the plat filing requirements for dividing or sale of land. The provision is commonly referred to as the "Agricultural Waiver Provisions". This ordinance prohibits sale of any land without county approval and the recording of restrictive covenants prohibiting the nonagricultural use of the land.

The Utah Statute expressly denied the county's authority to create such an ordinance and, in fact, carved out an entitlement for property owners to sell their property for agricultural, industrial, manufacturing or commercial purposes without subdivision approval from the County. The Plaintiffs' federal constitutional right to alienate their property for agricultural or other nonresidential uses, which right was preserved by the State Statute, could not be taken away by this arbitrary restriction of sale provision in the Utah County Zoning Ordinance.

The evidence before the trial court demonstrated that the Fitzgeralds' sales were agricultural sales (by the affidavit of Leland A. Fitzgerald (Doc. 80 Exhibit B at page 7 par 24, Addendum A), and the affidavit of Leland A. Fitzgerald (Doc. 93, Addendum C), which show that the parcels sold were large tracts:

Johnson	320 acres	\$224,000.
Whipple	720 acres	\$216,000.
Heaps	160 acres	\$112,000.
Curley	400 acres	\$280,000.
Dale Jones	960 acres	\$591,360.
Stevens Anderson	320 acres	56,000.
Michael Fitzgerald	160 acres	\$64,000.
Paul Fitzgerald	160 acres	\$64,000.
Maxwell	160 acres	\$112,000.
Hall	1840 acres	\$295,327.
Corbett and Gurr	2629.16 acres	\$466,675.

The Plaintiffs in this case did not challenge Utah county's general zoning plan nor its right to enact valid land use ordinances, but instead challenged the County's exercise of authority in restricting the sale of land by prohibiting any sale of nonresidential land without obtaining County approval of the agricultural waiver and further requiring filing of restrictive covenants. The plaintiffs assert that the County has exceeded its authority; first by passing the unconstitutional ordinance, second by arbitrarily and discriminatorily applying it.

Furthermore, the plaintiffs allege that the ordinance bears no reasonable relationship to a legitimate governmental objective.

The defendants cited the trial court to Crestview-Holliday Homeowners Association v. Engh Floral Company 545 P.2d 1150, 1152 (Utah 1976), to support their contention that the role of the judiciary is extremely limited in scope when reviewing the legality of ordinances applied to specific parcels of property. However, the Homeowners Association in Crestview challenged a rezoning classification granted to Engh Floral. The association did not contend that the County Commissioners had exceeded their authority or that it had applied the zoning ordinance in an arbitrary or discriminatory manner, but challenged it as spot zoning. Hence, the case is readily distinguishable from the Plaintiff's claim of unconstitutionality in the present case.

On the other hand, considerable authority holds that local governmental decisions on proposed subdivision plats or similar approvals are adjudicatory and must be construed pursuant to principals of procedural due process. In Horn v. County of Ventura 596 P.2d 1134, 1138 (Cal 1979), the California Supreme Court held:

Subdivision approvals, like variances and conditional use permits, involve the application of general standards to specific parcels of real property. Such governmental conduct, affecting the relatively few, is "determined by facts peculiar to the individual case" and are "adjudicatory" in nature (emphasis added).

In Thurston v. Cache Valley 626 P.2d 440 (Utah, 1981), the Utah Supreme Court upheld Cache County's denial of a conditional use permit, but only upon finding that the County's ordinance delineated specific and extensive standards and procedures that insured that the Commissioners had not arbitrarily exercised their adjudicatory powers and provided that the applicant's proprietary rights were protected by sufficient due process.

As a adjudicatory process, the County's application of its ordinances must afford the Plaintiff the essentials of due process. These essentials include: 1. An adequate hearing, 2. Reasonable notice, 3. Articulated standards for decision, and 4. Express findings supported by substantial evidence. Horn v. County of Ventura, supra; and Hamlin v. Matarrozzo, 293 A.2d 450 (N.J. 1972).

The Utah County Ordinance, Section 4-3-53 requires land owners wishing to avoid subdivision plat filing requirements to not only record restrictive covenants, but also to apply for approval of agricultural waivers. The ordinance is unconstitutional on its face because it requires County approval of a waiver for those categories already exempted from plat filing requirements under the State Statute. Moreover, it is vague and ambiguous and violates the due process requirement that such ordinances be applied following articulated standards for decision.

The county ordinance articulates no standards for the granting or denying of the application for the waiver of plat

filing requirements. The facts showed the county had no such standards and was arbitrarily applied.

While it is reasonable to endow local zoning boards with grants of authority to ensure that land development advances in a harmonious manner, it is unjustified to grant them unlimited authority to exceed a state statute already restricting land development. Municipal governments should not be allowed to enact vague ordinances that can be easily manipulated to discriminate against land owners to satisfy whatever whim or fancy is presently in vogue among County officials. Allowing such, promotes confusion and unnecessary litigation in the County.

Since the enactment of Section 4-3-53 (Utah County Ordinances), there have been numerous applications for waiver of plat filing requirements from land owners in Cedar Valley. Those applications agreed to impose and record the restrictive covenants required by Utah County, but were nevertheless denied approval (Affidavit of J. Walter and Printess K. Fitzgerald). Exhibit F (1 through 15) (Doc. 80, Exhibit F, Addendum C).

The Fitzgeralds went to the County desiring to comply with the ordinance, they were, over a period of several years, given the run-around with changing interpretations and misdirections. First, they found that there were no set standards deliniating the requirements to obtain agricultural waivers. In fact, the County had no conception of what amounted to a satisfactory completion of the application for

waiver by an applicant. Then, after following a series of misleading instructions, they found their waivers at first granted and then denied after substantial reliance thereon. In essence, the waivers were no more than a smoke screen that granted the planning commission, through their planning staff, unlimited discretion to deny any alienation of the Plaintiffs' property (Affidavit of Lee A. Fitzgerald, Doc. 80, Exhibit B, Addendum A).

Not only was the approval arbitrarily denied, but where they had granted waiver approval to J. Walter and Printess K. Fitzgerald (purchasers through plaintiffs/appellants), the county subsequently withdrew such approval. The conditions pursuant thereto bear no relation to the advancement of the public's general welfare.

B. The Utah County Board of Adjustment
Does not have the Authority to Review the
Subject Matter of this suit

The trial court inferentially ruled that the plaintiffs had adequate state remedies through an appeal to the Board of Adjustment.

The Utah Courts have ruled that exhaustion of administrative remedies is unnecessary when such action would serve no useful purpose, be futile, or when it appears that the administrative body or persons have acted in excess of their powers, or acted arbitrarily, capriciously, and in abuse of their discretion. See Johnson v. Utah State Retirement Agency, 621 P.2d 1234 (1980); Central Bank & Trust Company vs.

Brimhall, 497 P.2d 638 (Utah 1972); Walker Bank & Trust v. Taylor, 390 P.2d 592 (Utah, 1964).

In the present litigation, the Utah County Ordinance does not grant the Utah County Board of Adjustment the authority to review decisions pertaining to subdividing approvals and agricultural waivers, sales, or the required imposition of recorded restrictive covenants.

The 1976 Revised Zoning Ordinance of Utah County, Section 4-7-13, grants to the Board of Adjustment the following powers and duties:

The powers and duties of the Board of Adjustment shall be limited to the following:

- A. To hear and decide appeals concerning errors of interpretation reportedly made by a zoning administrator.
- B. To hear and decide appeals concerning the interpretation of the zone map.
- C. To hear and decide appeals from special exceptions specifically authorized in this ordinance.
- D. to hear and decide appeals for variances.

The Plaintiffs' claim does not allege any errors of interpretation, any errors concerning the zoning map, and have not requested special exceptions or for variances. There is no provision in the Board of Adjustment ordinance of Utah County, giving authority to the board to decide the basis upon which approval of the waiver of the plat filing requirements must be made.

Plaintiffs were making sales of agricultural land exempted under the State statute. The County ordinance

imposed the restriction that plaintiffs needed the approval of the county before plaintiffs could make such sales. Plaintiffs' challenge is to the constitutionality of such ordinance. The Board of Adjustment has no adjudicatory power to hold that the County ordinance is unconstitutional or to hold in addition that such ordinance is beyond the enabling legislation granted to the counties by the state of Utah.

The plaintiffs were not applying for subdivision approval, they were not applying for building permits, but were trying to sell a part of their land to meet their contractual commitments. There is no remedy under the State law or under the County ordinances to redress the wrongs committed against the plaintiffs.

Plaintiffs have alleged that Utah County, as an entity and its individual officers, have unconstitutionally abused their discretion. The Board of Adjustment has no authority to rule on this issue.

The plaintiffs do not seek an exemption from the applicable land use law, but pray that the agricultural waiver provision be ruled unconstitutional or that, in the alternative, it be found that there are fact issues on whether it was unconstitutionally applied.

C. Denial of approval of the waiver of plat filing requirements does not provide Judicial Review since under state law all governmental entities could be immune from suit

The Defendants argument that administrative remedies

were not exhausted should have failed at the trial court level since there are substantial constitutional issues present in this case. Plaintiffs have already argued that an appeal to the Board of Adjustment would be futile since it lacks jurisdiction, it cannot rule on whether the individual defendants are liable for damages, and it could not obviate the constitutional issues raised in this case by any decision for or against plaintiff. Of vital significance, however, is the fact that under the provisions of Utah Code Ann. 63-30-10, government entities would be immune from suit, thus further making futile the requirement for exhausting judicial or administrative remedies.

Utah Code Annotated 63-30-10 provides in pertinent part:

63-30-10. Waiver of immunity - Injury caused by negligent act or omission of employee-Exceptions-Immunity from suit of all governmental entities is waived for injury proximately caused by negligent act or omission of an employee committed within the scope of his employment, except if the injury:

1. 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

2. arises out of ...malicious prosecution, ... abuse of process, ... interference with contract rights, ... or civil rights, or

3. 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 ...

However, in Monell v. New York City Department of Social Services, 436 U.S. 65, 691 (1978), the United States Supreme Court held that the remedial language of Section 1983 has been construed to provide a cause of action against local governments for "constitutional deprivations visited pursuant to government custom even though such a custom has not received formal approval through the body's official decision making channels...". Monell further held that a state cannot immunize itself from acts which are a violation of the constitutional protections and are addressible under the civil rights act.

The Tenth Circuit Court of Appeals in United States v. Community Bank & Trust Company, 768 F.2d 311 (10th Cir. 1988), emphasized the fact that the language of Section 1983 "plainly imposes liability on a government that, under color of law some official policy, 'causes' an employee to violate another's constitutional rights." Monell, 436 U.S. at 692, 98 S.Ct. at 2036. Furthermore, the court noted that "although the acts or omissions of no one employee may violate an individuals constitutional rights, the combined acts or omissions of several employees acting under a governmental policy or custom may violate an individual's constitutional right.

On page 40 of this memorandum, the two prong test for claims arising under Section 1983 is set forth as stated by the Gomez v. Toledo 446 U.S. 635, 100 S.Ct. 1920, 614 L.Ed 2d

72 (1980) court. As such, there should be very little doubt as to whether the issue that (1) the defendants acted under color of state law and of (2) whether the defendants deprived the plaintiffs of a federal right, either statutory or constitutional gives rise to the claims asserted by plaintiffs.

Furthermore, exhaustion of administrative remedies is not required when, as here, the plaintiff is proceeding under a Federal Civil Rights Statute and protesting unconstitutional action by a political unit of the state. See Patsy v. Board of Regents, 454 U.S. 813 (1982).

The Defendants' Motion (which was granted by the trial court) states that in order for the plaintiffs' constitutional claim to eliminate the need to exhaust administrative remedies, the court must find that the property interests asserted were legitimate entitlements deprived without due process of law.

As previously set forth, Section 17-27-27, Utah Code Annotated, as amended, granted an entitlement to the Plaintiffs to alienate their property for commercial, manufacturing, industrial or agricultural purpose without submitting a subdivision plat, without requiring county approval, and without requiring recording of restrictive covenants. These additional requirements created by the County are in contravention to the state statute requirements, and thus unconstitutionally encroach upon the rights of the plaintiffs to alienate their property.

In addition, these additional requirements were arbitrarily and discriminatorily enforced making compliance unduly burdensome and literally impossible for the Plaintiffs. Of further import is the fact that giving official sanction to the acts of its employees was the county filing suit against plaintiffs appellants to enjoin their sales and abrogate their contracts.

The County, claiming otherwise, makes this a fact issue subject to proof on trial, and could not, therefore, be determined in the abstract on a Motion for Summary Judgment.

POINT II

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON THE DEFAMATION PLUS CONSTITUTIONAL INJURY ISSUE

As outlined above in the procedural background, the defendants filed a Motion for Summary Judgment as to all issues in the case on July 15, 1987 with supporting memorandum. On September 7, 1988, the trial court granted summary judgment on all issues except the defamation plus constitutional injury, which was reserved for later determination (Doc. 89, Ruling of September 7, 1988 page 16 and 17, Addendum D).

In its ruling of July 25, 1989, the trial court rendered its decision on the final issue remaining in the case (Doc. #97, Addendum E).

The plaintiffs/appellants contend that property rights or interests asserted to have been damaged by

defendants are protected under the Fourteenth Amendment, and that such rights or interests are viable claims under 42 U.S.C. §1983.

Property rights have long been recognized as being guaranteed under the constitution. The plaintiffs cite the court to Washington EX REL, Seattle Title Trust Corp., v. Roburg, 36 A.L.R. 654 (1928) which stands for the proposition that a person may use their property in the way they wish to use it and such use is protected under the constitution. Fuentes v. Shevin, 406 U.S. 67, 32 L.Ed.2d 556, holds that the Fourteenth Amendment protects "any significant property interest." In Board of Regents v. Roth, 408 U.S. 564, 33 L.Ed.2d 584, the court said:

This Court has always made clear that the property interest protected by procedural due process extends well beyond actual ownership of real estate, chattels or money.

In Ritzholz v. City of Salt Lake, 3 Utah 2d 385, 284 P.2d 702 (1955), applicable in the instant case, the Utah Supreme Court stated:

Clearly among the rights attendant upon ownership and enjoyment of property are the rights to exchange, pledge, sell or otherwise dispose of it -- rights which must be adequately protected (emphasis added).

The Court is also cited to Pride Oil Company v. Salt Lake County, 13 Utah 2d 183, 370 P.2d 355 (1962) and Redd v. Western Savings & Loan Company, 646 P.2d 761 (Utah 1982). All advance the concept that the property interests which are protected under the constitution include a variety of property

interests, such as those which plaintiffs owned at the time of the actions for which they brought the suit at bar.

Although Hall v. Davis, 424 U.S. 693 (1976) ruled that defamation of reputation is not in and of itself a liberty protected under the constitution, such an injury, when coupled with damage to a property interest or a liberty protected by the constitution, establishes a §1983 action.

This is plaintiffs' position in this case, that the actions and generated press articles of the defendants defamed the plaintiffs and damaged their property interests guaranteed under the constitution.

While there is no federal right to protect business or professional reputations per se, when reputation is damaged concurrently with a deprivation or impairment of a property right, the claim is cognizable under the civil rights act, §1983. Marrero v. City of Halech, 625 F.2d 499, 515 (5th Cir. 1980).

In its analysis of this defamation plus deprivation of liberty or property interest claim, the trial court correctly recognized the presumption in favor of the non-moving party where at page 4 the court said

At the summary judgment stage, the court must view the evidence in the light most favorable to the non-movant, and "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." Anderson v. Liberty Lobby, 477 U.S. 242, 255 (1986) (citing Adickes v. S.H. Kress & Co., 398 U.S. 144, 158-59 (1970)). The court must determine whether "the evidence is such that a reasonable jury could return a verdict for

the nonmoving party." Anderson, 477 U.S. at 248.

The trial court set forth its evaluation of two elements of the "defamation plus" claim in the memorandum decision at page 5 as follows:

To succeed on their defamation claim, plaintiffs must prove that (1) defendants made defamatory statements under color of state law, and (2) that defendants' statements operated to deprive plaintiff of a recognizable liberty or property interest without due process of law.

The trial court made no finding on the sufficiency of the defamatory matters submitted in opposition to the motion for summary judgment. The trial court addressed the summary judgment by assuming that for purposes of the motion, the first requirement that defendants made defamatory statements under color of state law had been met and considered the Motion for Summary Judgment by analysis of the remaining second requirement of a defamation plus claim (Doc. 97 at 5, Addendum E).

For purposes of this appeal, this court must view the consideration of the motion for summary judgment in a light most favorable to the non-moving party, the same as the trial court did, and for purpose of reviewing the trial courts grant of summary judgment, this court must also, for purpose of appeal, assume the sufficiency of the claim of defamation because the trial court premised its grant of summary judgment on such assumption.

The trial court then reviewed the decisions of the

Courts in Paul v. Davis, 424 U.S. 693, 701 (1976), Corbitt v. Anderson, 778 F.2d 1471, 1474-75 (10th Cir. 1985), and Board of Regents v. Roth, 408 U.S. 565 (1972) and characterized the trial courts interpretation of those cases, and the burden necessary for the plaintiffs to maintain an action for defamation plus damage to a property interest as follows:

. . .it appears that tangible injury other than defamation damages must be inflicted by the government directly, apart from the consequences flowing from an injury to reputation because of the independent actions of third parties.

Although a few courts have interpreted Paul v. Davis differently, this court is of the opinion that the case stands for the proposition that in order to implicate a liberty or property interest protected by the Constitution, defamation by a state (or federal) actor must involve "some tangible change of status vis-a-vis the government." Doe v. U.S. Dept. of Justice, 753 F.2d 1092, 1109 (D.C. Cir. 1985).

(Doc. 97 at 10, Memorandum Decision, 7/25/89, Addendum E).

The trial court quoted from Corbitt v. Andersen, supra, and the trial courts interpretation of the elements necessary and went on the say at page 12 "... lending support to the proposition that tangible 'injury requires some change in plaintiffs status, vis-a-vis the state, rather than an injury caused by acts of the third parties acting upon the public officials defamatory remarks. In other words, the tangible injury resulting from the defamation must involve alteration or extiguishment by the state of some right previously protected by the state' ".

The trial court concluded that in the instant case,

the plaintiffs were legally as free to alienate their property before the defamatory remarks were made as they were afterwards (Doc. #97 at 13, Addendum E).

Apparently in the time lapse between the courts initial memorandum decision (Doc. #89) and the courts consideration of the defamation plus claim and its memorandum decision (Doc. #97) the court lost track of the factual basis of part of the plaintiffs claim. In its memorandum decision of July 25, 1989, the court said in the last sentence on page 2, "Plaintiffs did not execute any deed covenants." In fact, plaintiffs did comply with the county ordinance and execute such deed covenants as shown in the Memorandum in Opposition to the Motion for Summary Judgment, Doc 80, Exhibit B (1) & (F) 8, Addendum H & I (doc. #80). In the affidavit of plaintiff, Leland A. Fitzgerald, Exhibit B, page 9, "We were given the application for an agricultural waiver and the forms for recording the restrictive covenants limiting the land to agricultural usage until subdivision plats had been filed. Corbett, Gurr and I signed the restrictive covenants in the county offices."

At page 10, "I, Corbett and Gurr submitted the restrictive covenants to the county on the county forms which had been notarized at Valley Title", paragraph 29, and his affidavit at page 11, wherein he said, referring to Nick Zullo, "he told me to go and record the restrictive covenants with the Utah County Recorder and I did so". Attached to the affidavit is Exhibit B (1) restrictive covenants precluding

residential or other non-agricultural use of the land, showing the recording information by Leland A. Fitzgerald on 10 December 1980.

Appellants contend that the evidence was presented to the trial court of the direct involvement of the defendant, Utah County, in the deprivation of legally protected property interest recognized by the State of Utah in Ritzholz v. City of Salt Lake, supra.

The defendant, Utah County, the governmental entity acting through its agents, employees and attorneys, were not content with the damage caused by the defamation of the plaintiffs as alleged in the complaint on file herein and in the plaintiffs' Memorandum in Opposition to Defendant's Motion for Summary Judgment (Doc. 80), but the defendant Utah County became the prime actor in depriving the plaintiffs of their constitutionally protected rights to the use, exchange or selling of their properties by commencing a law suit in the State Court against the plaintiffs. A copy of that complaint was submitted to the trial court attached to the Memorandum in Opposition to Motion for Summary Judgment (Doc. 80, Exhibit B(6)1, and is attached to this brief as Addendum F).

That lawsuit was not a criminal misdemeanor proceeding, but was a civil suit brought by Utah County, wherein plaintiffs herein, Leland A. Fitzgerald and Helen S. Fitzgerald were named defendants along with 25 other defendants and 1000 John Does and 1000 Jane Does and sought civil remedies as follows:

Wherefor plaintiffs demand judgment as follows:

1. That defendants be immediately enjoined from disposing of any interest in the subject property as described in paragraph No. "6" of plaintiffs' first Cause of Action.

2. That defendants be permanently enjoined from any further sales, transfers and/or divisions of any parcels except in parcels as initially acquired by defendants, Leland A. Fitzgerald and Monte Vista Ranch Corporation.

3. That all subdivisions and/or past sales in subject property be enjoined, rescinded and abated.

4. That the defendants be enjoined from obtaining any building permits and/or occupancy permits on the subject property and that defendants further be enjoined from the construction on the property for residential purposes.

5. That upon the rescission of the subdivision that defendants be ordered to reimburse all purchasers, pursuant to Section 57-11-17, Utah Code Annotated, (1953), as amended.

6. That any stipulation or provisions contractual or otherwise, purporting to bind any person acquiring subdivided lands to waive compliance with the "Utah uniform Land Sales Practices Act or a rule or order adopted under it, be declared void ab initio.

7. That the defendants be ordered to pay plaintiffs reasonable attorney fees and all other court costs associated with this case as the court deems necessary.

8. For such further relief as the Court deems necessary and appropriate in the premises.

Dated this 9th day of March, 1982 (emphasis added).

That complaint was signed by Gordon Buckley Rose, Utah County Planning Commission staff, and Lynn W. Davis, Deputy Utah County Attorney. The remedies sought there were rescission of all of these plaintiffs contracts, injunctive relief, preventing all sales of properties by them,

declaration that all of the contractual stipulations and agreements be void ab initio, and asking for court costs and attorneys fees in favor of Utah County.

The characterization by the trial court that despite the defamatory acts by the defendant Utah County through its employees and agents, that the plaintiffs in this proceeding were as free to alienate their property before and after the defamatory press coverage outlined in the Memorandum in Opposition to the Motion for Summary Judgment ignored the direct involvement of Utah County in destroying the contractual relationships of the plaintiffs herein with their buyers.

At the filing of the lawsuit, the defendant Utah County also filed a lis pendens clouding title on 76 sections of ground comprising more than 48,000 acres (Doc. 80 Exhibit B(7), Addendum G).

Lis pendens literally means a pending suit. A lis pendens arises when a party to litigation wishes to protect his ownership interest against later claimants in a suit over the question of ownership of land. Burby, Handbook of the Law of Real Property (1965), p. 334.

Under Utah law, lis pendens has been codified in §78-40-2 U.C.A. (1953). The statute provides in part,

In any action affecting the title to, or the right of possession of, real property the plaintiff at time of filing of complaint or thereafter . . . may file for record with the recorder of the county in which the property or some part thereof is situated a notice of pendency of the action, containing

names of the parties, etc. . . . (emphasis added).

The common law and the statutory law as written are aimed at giving notice to third parties that the title to property is in question and the rights of a subsequent purchaser of that property will be subject to the outcome of the suit.

In the instant case, Utah County, through its agents, filed a suit pertaining to sales of land in Cedar Valley, the premise being that the named defendants were violating, or had violated, the county's zoning ordinances and State Land Sales Practices Act.

The complaint does not make claims that the plaintiffs' title to the property was in doubt, or that they had incurred unsatisfied tax obligations which were being satisfied by levying against the property. The focus of the county's complaint was that the activities of those named might somehow be in violation of state and county law. No claim was made in the suit disparaging to the title to plaintiffs' property. The claims filed by the County were later dismissed (Doc. 80, Exhibit B (8), Addendum L).

Plaintiffs contend that the county violated their rights to possess and exercise dominion and control over their property interests by filing the lis pendens, and that such action gave rise to a cause of action against the county and its officers.

Birch v. Fuller, 9 Utah 2d 79, 337 P.2d 964 (1959), allowed the filing of a damage claim where a lis pendens was

filed that was not in accordance with §78-40-2, U.C.A 1953, and did not constitute a republication of pleadings.

In the instant case, although Utah County filed a lawsuit, the action did not pertain to a question of title, or right of possession of real property, but rather was aimed at adjudicating the issue of whether sales and marketing of the land was in accordance with county ordinances and/or state law.

Therefore, if the actions of the county and its agents were not privileged or immunized, then plaintiffs should have the opportunity to establish their proof that the wrongful filing of the lis pendens created a slander of title or defamation of their property interests, and should be allowed to establish any damages flowing from this action.

In a companion case now pending before this court, Walter Fitzgerald et al v. Utah County, case 88-2384, the U.S. Magistrate made a report and recommendation to the trial court in that case which was cited by appellees to the trial court in this case (Doc.. 63 at 9).

As pointed out by the Magistrate in his Report and Recommendation in the companion case (Doc. no 63):

The filing of a lis pendens is not an exclusive governmental act to which the Governmental Immunity Act applies. It is not a function which can only be performed by a governmental entity. [Footnote 17:] Standiford v. Salt Lake City Corp., 605 P.2d 1230 (1980); Johnson v. Salt Lake City, 629 P.2d 432 (1981); Madsen v. Borthick, 658 P.2d 627 (Utah, 1983).

Plaintiffs further assert that the slander of title

created by filing of the lis pendens is a violation of rights in property guaranteed by the U.S. Constitution and is thus a claim cognizable under 42 U.S. §1983.

§1983 provides in pertinent part:

Every person who under color of any statute, ordinance, regulation, custom or usage, or any state or territory, subjects or causes to be subjected, any citizen in deprivation of any rights . . . secured by the constitution and laws shall be liable to the party injured. . .

To state a claim under §1983, the plaintiffs must show two things: (1) that the defendants acted under color of state law, and (2) that the defendants deprived the plaintiffs of a federal right, either statutory or constitutional. Gomez v. Toledo, supra.

Application of this test to plaintiffs' circumstances is as follows.

First, did Utah County and its officers act under color of state law? The answer is undoubtedly yes. All of the alleged defamation was by the county employees and claimed to be acting for the county. In addition, the county's agents, relying on state statutes and county ordinances, brought suit against the plaintiffs herein, alleging violation of state law and county ordinances. As part of that action, the county, through its agents, recorded the lis pendens of which complaint is made.

Second, did the defendants' actions deprive the plaintiffs of a federal right? The plaintiffs' rightful ownership of the property in Cedar Valley was never contested

by the county. The county's suit did not rest upon any theory that cast a shadow upon the plaintiffs' ownership or possession; rather, the suit focused upon the alleged noncompliance with state and county laws and ordinances. By filing the lis pendens, the county challenged the plaintiffs' rightful possession and ownership of the Cedar Valley property.

The filing of a lis pendens is aimed at giving notice of, or republishing the pleadings of a claim or suit being brought to establish rightful ownership or possession of property. 78-40-2 U.C.A. 1953. "The sole purpose of recording a lis pendens is to give constructive notice of the pendency of proceedings which may be derogatory to an owner's title or right to possession" (Emphasis added) Hidden Meadows Development Company v. Mills, 590 P.2d 1244 (Utah 1979) and that the "recording of a lis pendens serves as warning to all persons that any rights or interest they may acquire in the interim are subject to the judgment or decree" Bagnall v. Suburbia Land Co., 579 P.2d 914 (Utah 1978).

Clearly, the county had no basis to question the plaintiffs' ownership of the affected land, nor did the county express such a claim in its complaint. The plaintiffs contend that the county's action denied them their property rights protected under the U.S. Constitution, XIV Amendment. The U.S. Supreme Court has held that property rights are protected by the Fourteenth Amendment and violations thereof can be addressed by suit under 42 U.S.C. §1983. Lynch v. Household Finance Corp., 405 U.S. 538, 92 S.Ct. 1113, 31 L.Ed 2d 424

(1972). Also Rios v. Cessna Finance Corp., 488 F. 2d 25 (10th Cir. 1973).

By filing the lis pendens, the county created a cloud upon the plaintiffs' rightful ownership and possession of the Cedar Valley property. As a result, plaintiffs' efforts to sell its property were greatly impacted. It is self evident that the value and/or marketability of property is diminished in the eyes of a potential purchaser, when, during a review of the potential seller's chain of title, a lis pendens is discovered recorded against the seller's interest in the property. This is exactly what happened in the plaintiffs' case. By recording the lis pendens, the county put the world on notice that it was asserting a claim to the title of plaintiffs land and therefore deprived the plaintiffs of their protected property rights by destroying the value and marketability of the property interests of potential buyers.

The plaintiffs should be granted the opportunity to present this evidence and establish proof that this occurred and that the plaintiffs should be compensated by the county and its officials for this deprivation of property rights.

In addition to the defamatory remarks, the conduct and actions of the county as described in the affidavit of Leland A. Fitzgerald and Walter Fitzgerald attached to the Memorandum in Opposition for Summary Judgment (Doc. 80, Exhibit B, F, and H, Addendum A and B) illustrates that Plaintiffs have met the standards required by the trial judge to show that there was a change of status vis-a-vis the

government and that the "defamation by a state actor must involve" some tangible change of status vis-a-vis the government.

Despite their efforts to the contrary and despite the recording and filing of the restrictive covenants required by the ordinance of Utah County, the ongoing and pervasive prevention of compliance with the exemption provided in the ordinance of Utah County coupled with the lawsuit filed and asking for court orders prohibiting the sale of plaintiffs property, established the required nexus between the defamation committed by the county and the acts of the county in depriving the plaintiffs of their constitutionally and statutorily protected rights regarding their property.

It is not sufficient to say that if the alleged claims in the lawsuit filed by Utah County were unsupported by adequate foundation that the suit could have been defended. Under the state laws the county claims governmental immunity pursuant to the reservation of the waiver of immunity granted as quoted herein on page 26. As addressed elsewhere herein in a 1983 civil rights action, the governmental immunity cannot be used as a means of defeating the claim under §1983. Thus the damage done to the property of the plaintiffs by the conduct described herein; the filing of the lawsuit attacking and attempting to abrogate all of plaintiffs contracts, the filing of the lis pendens, the refusal to grant approval despite the recording of the restrictive covenants in compliance with the ordinance of the plaintiffs, all rise to

the level of the damaging and desparaging of property interest, neccessary to meet the second element of the defamation plus claim.

POINT III

The actions of Utah County constitute a "Taking"
under established law

As previously described, plaintiffs contention is that the challenged ordinance is not a land-use planning ordinance, it is blatantly a device for controlling the sale of land. While property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. First Evangelical Lutheran Church of Glendale v. County of Los Angeles, 107 S.Ct 2378, 96 L.Ed 2, 265, from Pennsylvania Coal Company v. Mahan, 260 U.S. 393, 67 L.Ed 322, 43 S.Ct. 158, 28 A.L.R. 1321.

Utah county had in place its regular zoning ordinances wherein the property of the plaintiffs was subject to zoning as: Mining and Grazing, Rural Residential 5 and Agricultural Zone. (Defendant's Motion for Summary Judgment docket 63, page 7 at paragraph 21). Those zoning ordinances already prohibited the "use" of plaintiff's land except in conformity to the zoning ordinances. The provision of the county ordinances requiring the placing of a restrictive covenant on the land as a condition of entitlement to the exemption already provided for in the State statute as discussed elsewhere in this brief is an intrusion that reaches

beyond that necessary to accomplish a valid government purpose.

Of even greater significance is the provision of the ordinance which required that the obtaining of the agricultural waiver application be approved by the county before any sales of land could be consummated. This approval by the county was required as to land exempted from the plat filing requirements, both by the state statute and by the county ordinance. As stated in First Lutheran Church v. Los Angeles by the United States Supreme court, quoting itself from Pumpelly v. Green Bay Company, 13 Wall 166, 167-178-20 L.Ed 557 (1872)

It would be a very curious and unsatisfactory result if . . . it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to an extent, can, in effect, subjected to total destruction without making any compensation, because in the narrow sense of the word, it is not taken for the public use.

The U.S. Supreme Court in First Lutheran Church further said

It would require a considerable extension of these decisions to say that no compensable regulatory taking may occur until a challenged ordinance has ultimately been held invalid.

The trial court in this case held that the ordinances substantially advanced the legitimate state interest of promoting orderly growth and safety measures as well as fostering the states agricultural industry. That conclusion by the trial court was made without submission of any evidence

or even a claim as to the purpose to be served by the requirement that the county approve the exemption and the waiver of the plat filing requirements before sale of the property.

With the zoning ordinances already in place, the restrictions were already of record on the use of the land, the restriction in 4-3-53 of the county ordinances reaches beyond permissible limits in restricting the right to even sell the property without the approval of the county.

The defendant County takes the position that appellants herein, the plaintiffs, did not submit evidence to the court negating the purpose of the ordinance and that the presumption of the validity carries that burden for the county. The presumption of validity of ordinances does not deal with the conclusion made by the trial judge that the ordinance substantially advanced the legitimate state interest as required by the U.S. Supreme Court in First Lutheran Church v. Los Angeles County, and as described in Nollan v. California Coastal Commission, 97 L.Ed 2d 677, 687 107 S.Ct 381, 481, 55 U.S.L.W. 5154, (1987). There is no basis in the opinion nor is there a statement from the ordinance itself setting forth what the purpose of the ordinance was to be as it relates to the prohibition on sales of property without county approval. As such, the ordinance comports with those ordinances described in Nollan and First Lutheran Church, supra, which go beyond permissible constitutional limits and and constitute a taking of the plaintiffs property.

The commencement of the lawsuit by Utah County in an effort to not only enjoin further sales by the plaintiffs but asking the court to rescind all sales, abrogate all sales, and declare all sales by them invalid is evidence of the pervasive efforts by Utah County which constitute a taking.

An examination of the restrictive covenants, which were provided by Utah County to applicants for waiver of the plat filing requirements, demonstrates that in essence the covenants reach beyond the state enabling legislation, in that, instead of limiting the useage to agricultural, commercial, manufacturing, and industrial purposes, as exempted by the enabling legislation, the County's restrictive covenants would limit use to the sole purpose of agriculture. Beyond that, the restrictive covenants would require that the land not be used for other than agricultural purposes until subdivision plats are filed.

Since the county already had and has ordinances setting forth the circumstances and requirements for filing of subdivision plats, the restrictive covenants only require that the owners of the land comply with County ordinances. Since the law requires them to do so anyway, the restrictive covenants are of highly dubious value in promoting any orderly growth or development of the County.

The real purpose of the restrictive covenants in the scheme established by Utah County is to require that before anyone sells land in the County, they must have the approval of the County Planning department, which requires the

application for a waiver of the plat filing requirement.

This ordinance requiring approval by the County of all sales of land within the County is a direct invasion of the plaintiffs' constitutional right to own, hold and alienate their property guaranteed by the United States Constitution.

While it is quite appropriate and within constitutional permissibility for the County to pass an appropriate ordinance and zoning plan which requires or sets forth certain uses and allowable buildings or structures in the specified zones, it is quite another thing for the County to pass an ordinance providing that no one can sell their land unless the County has approved the sale.

An examination of Lee Fitzgerald's affidavit demonstrates that no matter how hard plaintiffs tried to comply with the county's ordinances, both as to the filing of the restrictive covenants and as to requesting the County's approval, the county denied that approval, thus making the Fitzgeralds unable to sell their land for bona fide agricultural purposes (Doc. 8, Exhibit B, Addendum A).

The combined acts of the county in promoting the defamation and the lawsuit brought against the plaintiffs/appellants constitutes a regulatory "taking" of and an actual taking of the plaintiffs/appellants interests in real estate prohibited by the Fifth Amendment to the United States Constitution.

CONCLUSION

This court is now asked to overturn the Summary Judgment granted by the trial court.

Plaintiffs/Appellants ask this court to rule that the ordinances in question are invalid as to the requirement requiring Restrictive Covenants to be filed and requiring approval of Utah County of the application for waiver of plat filing requirements.

Plaintiffs/Appellants ask this court to hold that Summary Judgment was erroneous on the claim of defamation plus injury to property.

Plaintiffs/Appellants also ask this court to hold that the trial court erred in granting summary judgment on the issue of an unconstitutional 'taking' both by a regulatory taking and an actual deprivation of a property interest.

Appellants ask this court to reverse the trial court on the issues raised in this brief.

Plaintiffs request oral argument. Page limitations prevent a thorough analysis of these complex constitutional issues. Appellants believe the Court will want counsel to respond as to appellants' position on several points.

Dated this 18th day of September, 1990.

Respectfully submitted,


M. Dayle Jeffs

Exhibits

Exhibit A

FILED
UNITED STATES
DISTRICT COURT
DISTRICT OF UTAH

AUG 21 1 55 PM '89

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OFFICE OF JUDGE
J. THOMAS GUTHE

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF UTAH, CENTRAL DIVISION

LELAND FITZGERALD and HELEN S.
FITZGERALD,

JUDGMENT

Plaintiff,

Civil No. C82-0736G

vs.

UTAH COUNTY, a body corporate
and politic of the State of
Utah and a governmental entity
of the State of Utah, JEFF
MENDENHALL, GORDON BUCKLEY
ROSE, IVA SNELL, KEITH RICHAN,
JERIL WILSON, LYNN DAVIS and
JOHN DOES 4 through 20,

Defendants.

The Court previously issued a Memorandum Decision and Order granting defendants' Motion for Summary Judgment on all but one claim in the plaintiffs' Amended Complaint (September 7, 1988 Memorandum Decision and Order). The single remaining claim was defamation-plus separate constitutional injury cognizable under

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42 U.S.C. § 1983. The Court directed counsel to file supplemental briefs and supporting affidavits on this issue.

The Court has reviewed the memoranda and affidavits submitted by the parties and the relevant pleadings in the file and has issued its Memorandum Decision and Order granting defendants' Motion for Summary Judgment on the § 1983 defamation-plus claim. It is the judgment of the Court that the plaintiffs have failed to establish essential elements of the remaining claim, there are no disputes of material fact and defendants are therefore entitled to judgment as matter of law. Accordingly,

IT IS HEREBY ORDERED ADJUDGED AND DECREED that defendants' Motion for Summary Judgment on all claims asserted by the plaintiffs is granted, with prejudice. Parties will bear their own costs and attorney's fees.

DATED this 21st day of August, 1989.

BY THE COURT:

ies mailed to cnsl 8/23/89mp:
Dayle Jeffs, Esq.
dore E. Kanell, Esq.
Burningham, Esq.
y K. Burnett, ESq.
art B. Hansen, Esq.

By J. Thomas Greene
J. Thomas Greene
Federal District Court Judge

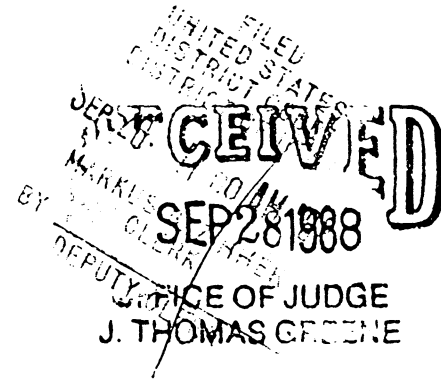
APPROVED AS TO FORM:

Dated this 10th day of August, 1989.

M. Dayle Jeffs
Plaintiff's Attorney
Dayle M. Jeffs

Exhibit B

JODY K BURNETT
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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

LEE A. FITZGERALD and HELEN
FITZGERALD,

SUMMARY JUDGMENT AND ORDER

Plaintiffs, .

vs.

UTAH COUNTY, a body corporate and
politic of the State of Utah and
a governmental entity of
the State of Utah, JEFF MENDENHALL,
GORDON BUCKLEY ROSE, IVA SNELL
and JOHN DOES 1 through 10,

Civil No. 82-C-0736G

Defendants.

This matter came on for hearing before the above-entitled court,
the Honorable J. Thomas Greene presiding, on December 22, 1987,
on defendants' Motion for Summary Judgment. Plaintiffs were
represented by M. Dayle Jeffs and defendants were represented by
Jody K Burnett and Craig L. Barlow. The court reviewed the
extensive memoranda of law with supporting affidavits and exhibits

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that had been filed, heard extensive oral argument on behalf of the parties, took the matter under advisement, and being fully advised, thereafter issued its Memorandum Decision and Order dated September 7, 1988 in which it determined that there is no genuine issue as to any material fact as to all claims in the plaintiffs' Amended Complaint, but reserving for later ruling the "defamation-plus" claim. Based on the foregoing and good cause appearing therefore, it is hereby

ORDERED, ADJUDGED and DECREED that defendants, and each of them, are hereby granted summary judgment in their favor and against the plaintiffs on all of plaintiffs' claims except the "defamation-plus" claim and all such claims are hereby dismissed, with prejudice and upon the merits.

IT IS FURTHER ORDERED that the court reserves ruling on the "defamation-plus" claim pending receipt of additional memoranda of law and factual materials relating to the applicability of that cause of action to the facts of this case. Counsel for plaintiffs are directed to supply the court on or before October 10, 1988 with a further memorandum of law and materials regarding the "defamation-plus" cause of action. Thereafter, counsel for defendants should file a responsive memorandum by October 25, 1988. Upon receipt of the requested materials, that one remaining final aspect of the case will be deemed submitted to the court for a ruling thereon.

DATED this 28 day of September, 1988.

BY THE COURT:

Copies mailed to counsel, 9-29-88jm

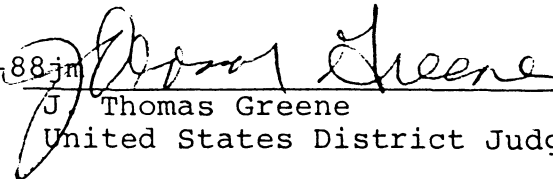
M. Dayle Jeffs, Esq.

Theodore E. Kanell, Esq.

Guy Burningham, Esq.

Jody K. Burnett, Esq.

Robert B. Hansen, Esq.


J. Thomas Greene
United States District Judge

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IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

LELAND A. FITZGERALD and
HELEN S. FITZGERALD,

V.

UTAH COUNTY, a body corporate
and politic of the State of
Utah and a governmental
entity of the State of Utah,
JEFF MENDENHALL, GORDON
BUCKLEY ROSE, IVA SNELL,
KEITH RICHAN, JERIL WILSON,
LYNN DAVIS and JOHN DOES
4 through 20,

Defendants.

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MAILING CERTIFICATE

Case number 89-4123

I hereby certify that the original and seven copies
of the Brief of Appellant was mailed to the Clerk of the
Court, United States Court of Appeals, 10th Circuit, and 2
copies of the Brief to the below named parties by placing same
in the United States mails, postage prepaid, this 1st day of
October, 1990 addressed as follows:

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M. Dayle Jeffs