

2003

Janalee Tobias & Judy Feld v. Anderson Development Co., L.C. : Reply Brief

Utah Supreme Court

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IN THE UTAH SUPREME COURT

JANALEE TOBIAS, JUDY FELD, :

Defendants/
Appellants, :

Consolidated
Appeal No. 20030469-SC

vs. :

ANDERSON DEVELOPMENT
CO., L.C. :

Trial Court No. 980902813

Plaintiff/
Appellee. :

CORRECTED APPELLANTS' REPLY BRIEF

**ON A CONSOLIDATED APPEAL FROM AN INTERLOCUTORY PARTIAL
SUMMARY JUDGMENT AND PARTIAL RULE 12(b)(6) DISMISSAL ORDER AND
FROM AN INTERLOCUTORY ORDER DENYING A MOTION FOR SUMMARY
JUDGMENT IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE
COUNTY, HONORABLE DOUGLAS CORNABY**

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Appellants Janalee S. Tobias and Judy Feld (hereinafter “Mrs. Tobias and Mrs. Feld”) respectfully submit this Appellants Reply Brief.

ARGUMENT

I. The District Court Erred in Dismissing the SLAPP Act Counterclaim. Ms. Tobias and Ms. Feld’s SLAPP Act Counterclaim Does Not Require Retroactive Application

Appellee Anderson Developer Co., L.C. (the “Developer”) claims that Mrs. Tobias’ and Mrs. Feld’s Counterclaim under the Citizen Participation in Government Act, Utah Code Ann. §§ 78-58-101 *et seq.*, (“SLAPP Act”) was properly dismissed by the lower court. In its Brief, the Developer argues that the SLAPP Act does not relate to actions that were filed and the participation in government occurred prior to enactment of the Act. But such a view misses the target. The clear aim of the Utah SLAPP Act is conduct of an individual in filing an action, which relates or is in response to the acts of the defendant (Mrs. Tobias and Mrs. Feld) while participating in the process of government and which action is filed primarily to harass, prevent or chill public participation in the process of government. If the action was commenced *or continued* after the enactment of the SLAPP Act, there is no issue of retroactive application.

The Developer’s claim that Ms. Tobias’ and Ms. Feld’s SLAPP Act claim is barred because “statutes are not applied retroactively unless retroactive application is expressly provided by the legislation,” evidences a clear misreading of the statute. The SLAPP Act was “designed to prevent interference with or chill public participation in the process of government...” *See* Utah Code Ann. § 78-58-103(1)(2)) It is the present actions of the Developer in continuing this improper legal action, which Mrs. Tobias and Mrs. Feld believe has been instituted and *continued*, to harass, chill and punish them for their effort before the South Jordan City Planning and Zoning Commission and City Council, that is the gravamen of Mrs. Tobias’ and Mrs. Feld’s SLAPP Act claim. The Developer’s argument that the Mrs.

Tobias' and Mrs. Feld's Counterclaim is barred due to the fact that nowhere in the statute has the legislature expressly provided for retroactive application is not relevant to the issues of this appeal. The legislature has also provided for protection from the *continuation* of any such action.

It is clear that a court must interpret a legislative enactment consistent with the principle that in enacting the statute, the "legislature used each word advisedly." Therefore, in interpreting a statute a court must give effect to each of the terms according to their ordinary and accepted meaning. *See Olsen v. Samuel McIntyre Investment Co.*, 956 P.2d 257, 259 (Utah 1998); *State v. Huntington - Cleveland Irrigation Co.*, 2002 Utah 75, ¶ 13, 52 P.3d 1257, 1261. As the Developer correctly states, "courts have a duty to construe a statute whenever possible so as to effectuate legislative intent and avoid and/or save it from constitutional conflicts or infirmities." *See State v. Bell*, 785 P.2d 390, 397 (Utah 1989).

Under the clear meaning of the terms of the SLAPP Act, giving effect to *all* the words and terms enacted by the legislature, if a defendant in a pending action believes that the action filed against her "is primarily based on, relates to or is in response to an act of the defendant while participating in the process of government and is done primarily to harass the defendant." Utah Code Ann. § 78-58-103(1). A SLAPP Act defense may be asserted or a SLAPP Act counterclaim may be filed by the defendant in such an action.

Perhaps the easiest way to demonstrate that retroactive application is not necessary in order for Ms. Tobias and Ms. Feld to state a valid claim is to examine the words and terms of the statute itself. Section 78-58-103, entitled "Applicability" explains in paragraph (1) that "A defendant in an action" may file an answer or a motion for judgment on the pleadings detailing that the present action "is designed to prevent, interfere with, or chill participation in the processes of government. Section 78-58-105 presents an alternative procedure. Under such circumstances the defendant may also file a counterclaim.

Thus, under the clear meaning of the enacted terms, if an individual is “a defendant” in an existing action which the defendant believes was filed for an unlawful purpose set forth in Section 78-58-103 that defendant may defend that action by alleging that the action was filed or continued for the unlawful purpose mentioned, or as defendants in the existing lawsuit have done, they may defend by filing a SLAPP Act counterclaim. In this action, the defendants Mrs. Tobias and Mrs. Feld selected the procedure provided by § 78-58-105.

If a defendant “believes” that the plaintiff’s primary purpose in filing the pending action is for the proscribed purposes set forth above the defendant has standing to sue. Clearly Mrs. Tobias and Mrs. Feld are defendants in an existing action, which is the subject of this appeal, and as set forth in their Counterclaim and Affidavits, they believe that the action was filed in response to their opposition of the Developer’s applications for Master Plan amendment, re-zoning, plat approval and other developmental approvals. Mrs. Tobias and Mrs. Feld therefore meet the standard of applicability of the statute. Their Counterclaim does not require the statute to be retroactively applied. The jurisdictional factor is that the action was *continued* and is pending after enactment of the SLAPP Act.

If defendants such as Mrs. Tobias and Mrs. Feld meet the requirements set forth in § 78-58-103, they are entitled to damages and attorneys’ fees. Section 78-58-105(1) provides that these damages may be awarded to “a defendant in an action,” (present tense), which action was “commenced or continued” for the unlawful purpose.¹ That is not an issue of retroactive application of the Act. The enactment of the term “continued” eliminates the need for retroactive application. This Court must give affect to each word of the phrase

¹ Subsection (a) of Section 78-58-105 provides that a defendant who has filed a SLAPP Act counterclaim is entitled to costs and reasonable attorneys’ fees “upon a demonstration that the action involving public participation in the process of government was “commenced or continued” without a substantial basis in fact and law, it could not be supported by a substantial argument for the extension, modification, or reversal of existing law...”

“commenced *or continued*.” The use of the word “or” is disjunctive, thus providing that the action need not be both “commenced” and “continued” after enactment. This action was continued and is continuing after the SLAPP Act was enacted. There is no retroactive application required as the action which the defendants believe and allege to violate the SLAPP Act was “continued” and is continuing after enactment of the Act.

The Developer also attempts to argue that the SLAPP Act amounts to a “Bill of Attainder.” In making this claim the Developer obviously does not understand the elements of a bill of attainder, or as properly titled a “bill of pains and penalties.” However, the cases cited by the Developer are instructive as to the misunderstanding.

The United States Supreme Court has defined a bill of attainder as a “legislative act which inflicts punishment on named individuals or members of an easily ascertainable group without a judicial trial.” *United States vs. O’Brien*, 391 U.S. 367, 383 n.30 (1968). In determining whether a particular statute is a bill of attainder, the analysis necessarily requires an inquiry into whether the three definitional elements - (1) specificity in identification, (2) punishment, and (3) lack of a judicial trial - are contained in the statute. Clearly the Utah SLAPP Act does not meet any of the three criteria.

- (1) The Developer is not named in the SLAPP Act nor is it a member of an “easily ascertainable group” mentioned in the Act. The Utah SLAPP Act applies to anyone who files a lawsuit for the proscribed unlawful purpose. It does not single out a specific individual or group of individuals.
- (2) No punishment is inflicted by the statute itself. For an example, in *United States v. Brown*, 381 U.S. 437 (1965), the statute at issue made it unlawful for “members of the Communist Party” to serve as officers or employees of labor unions. The Court found that this statute was an unconstitutional bill of attainder because it singled out members of a distinct group, the “Communist

Party,” and they were punished, *i.e.* excluded from being officers or employees of labor unions, because of their status as members of the Communist Party. The Utah SLAPP Act provides that the Act may be used as a defense or counterclaim, but the Act does not of itself deprive anyone of life, property or protect rights.

- (3) Finally, the punishment must be imposed without a judicial trial. In *United States v. Brown, supra*, the punishment imposed by the statute was deprivation of the right to be an officer or employee of a labor union. This punishment was imposed by the legislature, not by a court. Again, the court, not the legislature, must decide whether the defendant has a valid SLAPP Act defense or counterclaim.

Clearly the elements of a bill of attainder are not present in the case before this Court. Neither the Developer, nor any other readily ascertainable group, is singled out as being the subject of the legislation. No punishment is imposed upon the Developer or anyone else without judicial action. The SLAPP Act provides that the SLAPP Act defense or counterclaim must be adjudicated in court before any penalty may be imposed.

Finally, the Developer sets forth on numerous pages, including exceedingly long, single-spaced footnotes, statements made by state senators and former state senators that were involved in the passage of the SLAPP Act, all for the purpose of showing that this Act is somehow improper or unconstitutional because those proposing and supporting passage of the legislation had a specific individual or entity in mind in seeking the legislation. Generally legislation rises out of specific situations. None of this, however, is relevant as the United States Supreme Court explained in *United States v. O'Brien, supra*, “Inquiries into congressional motive or purposes are a hazardous matter.” 391 U.S. at 383. The Court

further explained that it “will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive.” *Id.*

Inquiries into congressional motives or purposes are a hazardous matter...What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high to eschew guesswork. We decline to void essentially on the ground that it is unwise legislation which congress had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a “wiser” speech about it.

Id. at 383-84.

The Utah SLAPP Act Counterclaim filed by Mrs. Tobias and Mrs. Feld in this action does not require retroactive application in order to state a SLAPP Act claim. The SLAPP Act clearly is not a Bill of Attainder and the Developer’s citations to numerous legislator statements do not change the United States Supreme Court analysis and direction.

II. The Developer’s Recitation of and Focus on Disputed Facts is Not Helpful in Determining Whether the Undisputed Facts Require a Summary Judgment Dismissal of the Developer’s Claims for “Intentional Interference with Prospective Economic Relations” and “Intentional Interference with Existing Contractual Relations”²

The Developer spends 58 pages of its overlength brief laying out disputed facts -- nine pages in the text of its brief and 49 pages in the brief’s appendix. In doing so, the Developer avoids the “facts relevant to the issues presented for review”³ and impermissibly attempts to try its whole case on paper. As demonstrated in this Brief, the Developer’s factual allegations are disputed. More importantly, however, the Developer’s approach fails to address the dispositive undisputed facts that demonstrate the lower Court should have entered a summary judgment dismissing the Developer’s SLAPP suit. In short, the Developer’s attempt to try its case in this Court simply is not helpful.

² These are the headings of the claims used by the Developer in its Amended Complaint. A copy of the Developer’s Amended Complaint is attached as Addendum 1.

³ Rule 24(a)(7), Utah R. App. P.

Boiled down from the 58 pages of scattershot hyperbole, the Developer's SLAPP suit rests on three wobbly legs, each and all of which do not withstand a disciplined analysis and review. First, the Developer says that Mrs. Tobias and Mrs. Feld asked the Williams family to breach the first Real Estate Purchase Contract (the "First REPC").⁴ Whether they did so is disputed. Mrs. Feld and Mrs. Tobias testified by affidavit that they did not ask the Williams to breach their contract. *See* Affidavit of Janalee Tobias dated April 19, 2002, p. 2, ¶ 4; Affidavit of Janalee Tobias dated January 3, 2004, p. 36, ¶ 178; Affidavit of Judy Feld dated April 19, 2002, p. 2, ¶ 4; Affidavit of Judy Feld dated January 3, 2004, p. 36, ¶ 178. (R. 769, 783, 2134, 2173). The Williams say they did. Whether they did or did not is not dispositive.

What is dispositive is that it is undisputed that the Williams never intended to breach and did not breach any REPC with the Developer. *See* Deposition of Boyd Williams dated March 12, 1999 ("Williams Depo.")(R. 3272-75). Neither did any request made to the Williams impair the performance of any contract. In fact, the Developer admits in the Statement of Facts in its Brief that nothing said to the Williams interfered or impaired the performance of the First REPC: "When they [Mrs. Tobias and Mrs. Feld] concluded that despite these efforts, the Williams were going to honor the first REPC, they changed tactics

⁴ On page 40, line 1, of its Brief, the Developer admits "ADC has alleged from the outset that its claims are based upon an interference with exiting [sic] contractual relations." But the Developer fails to disclose that this theory that Mrs. Tobias and Mrs. Feld interfered with the First REPC or the consummation of the First REPC (prospective economic relations) was never pled. The Developer's Amended Complaint defined "Contract" as the Second REPC (Amended Complaint, ¶ 18, ln. 3 [R. 147]) and complained that Mrs. Tobias and Mrs. Feld had interfered with its prospective economic relations, *i.e.*, the "consummation of the Contract," which was actually the Second REPC (Amended Complaint, ¶ 25, ln. 2 [R. 153]), and "interference with the present contractual relationship between Williams and Anderson Development." (Amended Complaint, ¶ 34, lns. 1-2 [R. 155]). At the time the lawsuit was filed, the only "present contractual relationship" was the Second REPC contractual relationship.

. . . they needed to delay the zoning changes over the property until after the first REPC expired.” (Developer’s Brief, p. 3, ¶ 9, Ins. 1-3).

It is undisputed that the Williams were ready, willing, and able to perform the First REPC. *See Williams Depo.* (R. 3274-75). It is undisputed that the Developer elected not to close on the First REPC (although it had the contractual right to do so) solely because at that time, the Developer did not have the commercial and office zoning it sought. (R. 3212-3213). In summary, it is undisputed that no one breached the First REPC. And it is undisputed that the Developer’s performance of the First REPC was not affected by any purported request to the Williams to breach the First REPC. Consequently, no claim for intentional interference with existing contractual or prospective economic relations can be based upon the factually disputed request to breach the First REPC.

The same is true for the Second REPC. The only “prospective economic relationship” the Developer pled was “Anderson Development’s potential economic relations with Williams in the consummation of the Contract.” Amended Complaint, ¶ 25 (R. 153)⁵. The Developer’s pleading defined “Contract” as the Second REPC. Amended Complaint, ¶ 18 (R. 147). Likewise, the only “Contract”, the Developer pleads was interfered with was the Second REPC. *See Amended Complaint*, ¶¶ 18 and 29 (R.147, 154). Because it is undisputed that the Second REPC was timely “consummated” exactly according to its terms after the Developer filed this lawsuit, a summary judgment dismissing both claims should have been entered. Stated another way, because it is undisputed that the Second REPC and the consummation of the Second REPC were not breached or impaired, the Developer’s claims cannot pass a summary judgment challenge.

⁵A copy of the Amended Complaint is attached as Addendum 4 to the Appellants’ Opening Brief.

Next, the Developer says that Mrs. Tobias and Mrs. Feld interfered with the Second REPC by telling the Williams that they had located buyers who were willing to pay more than the Developer, and that the Williams' property was worth more than what Anderson offered under the First REPC. Again, it is disputed that Mrs. Tobias and Mrs. Feld made the complained-of statements (R. 771, 2134, 2173); however, what is *not* in dispute is dispositive.

First, the one and only reason the Developer did not close on the less expensive First REPC was because it had not yet secured the required zoning. (R. 3212-13). That is the one and only cause of Developer's claimed loss of benefit-of-the-bargain damages. Second, it is undisputed that the complained-of statements, if they were made, were made after the expiration of the First REPC and before the signing of the Second REPC, at a time when anyone could try to purchase the Williams ground. (R. 3277-79). Plainly, at the time the disputed statements were allegedly made, there was no legally protectable contractual or economic relationship between the Developer and the Williams. Any and all could try to purchase the Williams' land in a competitive market.

Third, it is undisputed that during this period of time, Mrs. Tobias and Mrs. Feld did introduce potential buyers to the Williams and the City and that an offer was actually made by Utah Open Lands. (R. 3282). Fourth, the Second REPC itself conclusively proves the land was worth more than what the Developer initially offered. The price paid was between a willing seller and a willing buyer. Finally, as set forth above, it is undisputed that the "Contract" and "consummation of the Contract" the Developer complained about was not breached or impaired. These undisputed dispositive facts show that any claim for intentional interference with existing contractual or prospective economic relations should have been dismissed on summary judgment.

The Developer's third, but unpled, intentional interference theory is that Mrs. Tobias and Mrs. Feld "conned" the South Jordan City Council into delaying the Developer's zoning request by misrepresenting that they could or had raised money and could find a purchaser for the Williams' property⁶. Again these factual allegations are in dispute. The Developer has failed to direct the court's attention to any City Council meeting minutes which reflect that such statements were made by Mrs. Tobias or Mrs. Feld. Further, Mrs. Tobias and Mrs. Feld deny that they ever said anything like the statements exhaustively, but mistakenly, listed by the Developer.⁷ (R. 2134, 2173). Again, however, what was said or not said to the City officials doesn't matter because a citizen's exercise of her First Amendment right to petition governmental decision makers "is not an improper interference." *Searle v. Johnson*, 709 P.2d 328, 330 (Utah 1985).

Further, the sham exception to the *Noerr-Pennington* doctrine as described and advocated by the Developer no longer exists.⁸ In *City of Columbia v. Omni Outdoor*

⁶ Again the Developer in a contradictory fashion keeps changing its legal claim theories. On page 1, ¶ 2, lns. 1-5 of its Brief, the Developer acknowledges that Mrs. Tobias and Mrs. Feld exercised their properly protected rights in the public forum to criticize the development, but says, "they also chose to engage in actions outside the public forum." In fact, the Developer seeks to sue Mrs. Tobias and Mrs. Feld under the third unpled claim theory for what went on in the **public** forum - the delay of zoning.

⁷ Further, Mrs. Tobias and Mrs. Feld do not "gloat," as mistakenly alleged on page 7 at ¶ 24 of the Developer's Brief. First, Brent Foutz, not Mrs. Tobias or Mrs. Feld made the statement that "We've cost Hutchings millions of dollars." See Exhibit 1 to Deposition of Brent Foutz dated November 6, 2002 ("Foutz Depo."). Second, Mr. Foutz testified that he did not recall making the statement "quite" the way it was reported. See Foutz Depo., p. 89, ln. 17 through P. 90, ln. 1. Finally, Mr. Foutz made it clear in his deposition that the "millions of dollars" he was referring to was the Developer's failed request for formation of the River Park Economic Development Agency. See Foutz Depo., p. 90, lns. 5-6, p. 90, ln. 23 through p. 91, ln. 6. Because the Developer has gone outside the record to make these inaccurate factual allegations, Mrs. Tobias and Mrs. Feld have attached copies of the relevant portion of the Foutz Depo. for the Court's review as Addendum 1.

⁸Moreover, the *Noerr-Pennington* doctrine took a great leap out of the antitrust arena when the Supreme Court applied it in the famous civil rights case of *NAACP v.*

Advertising, Inc., 499 U.S. 365 (1991), the United States Supreme Court rejected subjective fact-sensitive tests about either a SLAPP suit filer's or a SLAPP suit target's "intent," "good faith," "purpose," and the like. Instead, the *Omni* opinion limits the "sham" exception to just one situation, where the SLAPP suit target's activities are not aimed at procuring a governmental action at all. *Id.* at 380-81. It does not matter whether the SLAPP suit target's motives were impure. *Id.* It is undisputed that Mrs. Tobias and Mrs. Feld always sought a City denial of the Developer's municipal applications. Consequently, the sham exception does not apply, and application of the *Noerr-Pennington* doctrine mandates a dismissal of the Developer's two claims.⁹

III. Common Law SLAPP-suit Remedies Include the Torts of Intentional and Negligent Infliction of Emotional Distress

A threshold problem with the lower court's Rule 12(b)(6) dismissal of Mrs. Tobias' and Mrs. Feld's claims for intentional and negligent infliction of emotional distress and Point III of the Developer's Brief are that both fail to acknowledge that common law SLAPP-suit remedies include the torts of intentional and negligent infliction of emotional distress.

SLAPP-suits are becoming an organized and promoted strategy. They are gaining momentum. But once firms realize that they're in for a countersuit, they'll think twice.

GEORGE W. PRING AND PENELOPE CANAN, SLAPPS – GETTING SUED FOR SPEAKING OUT, 168 (1996)(quoting Ralph Nader).

A promising prevention and cure for the SLAPP phenomenon is what is called the "SLAPP-back" – a countersuit in which "targets" turn the tables and sue filers for the injuries and losses caused by the SLAPP. *Id.* The SLAPP and the SLAPP-back suits stand on

Claiborne Hardware Co., 458 U.S. 886, 911-12, 914, 916, 933 (1982).

⁹Further, the Developer's unpled "delay of zoning" legal claim does conclusively demonstrate that the purpose of its lawsuit is to punish Mrs. Tobias and Mrs. Feld for participating in the process of government.

different footings. The SLAPP is an abuse of the courts, a violation of constitutional rights, and an unconstitutional effort to quell participation in government. In contrast, the SLAPP-back is an accepted use of the courts, a vindication of constitutional rights, and an effort to hold persons accountable for the injuries they cause individuals and the body politic. *Id.*

Of the various legal theories used in SLAPP-backs, a common counterclaim is a claim for intentional infliction of emotional distress combined with a backstop charge of negligent infliction. *Id.* at 181. Indeed what makes these claims attractive is their triability. It permits testimony about targets' stress, anxiety, fear, political chill, and resultant injuries from the SLAPP before the jury. *Id.* However, if the lower court's Rule 12(b)(6) dismissal and the Developer's misplaced arguments are accepted, SLAPP-suit victims will not have these related torts to defend themselves and to discourage Developer SLAPP-suit misconduct.

Fortunately, both the lower court's ruling and the Developer's Point III are contrary to well-settled case law. First, it is not correct that the tort of negligent infliction of emotional distress requires outrageous misconduct as mistakenly reasoned by the lower court and as urged by the Developer in Point III B of its Brief. The tort of negligent infliction of emotional distress does not contain outrageous conduct as an element. *See Johnson v. Rogers*, 763 P.2d 771, 780 (Utah 1988). Outrageous conduct is required only by the tort of *intentional* infliction of emotional distress. *See* RESTATEMENT (SECOND) OF TORTS § 46, cmt. a, § 312 and § 313 (1965).

Further, while it may be correct that "where . . . a party acts in good faith to pursue its own legal rights, the conduct is privileged as argued by the Developers." But, the result is different when there is systemic harassing by attorneys asking personal questions, prolonging the litigation, and abusing the process. *See Campbell v. State Farm Mutual Ins. Co.*, 2001 UT 89, ¶ 31, 65 P.3d 1134, 1166 (*rev'd on other grounds*, 538 U.S. 408 [2003]).

SLAPP-suits which cause emotional distress, like the case at bar, are distinguishable from garden-variety lawsuits like *Bennett v. Jones, Waldo, Holbrook & McDonough*, 2003 UT 9, 70 P.3d 17, and the other garden-variety lawsuits cited by the Developer in Point III of its Brief.¹⁰ The harm or emotional distress SLAPP-suit doesn't stem from the content of the pleading itself or what is or is not said in court. Content is privileged. *Bennett*, ¶ 67, 70 P.3d at 32 (citing *DeBry v. Godbe*, 1999 UT 111, 992 P.2d 979). The harm or emotional distress in a SLAPP-suit proceeding is caused by why and how the legal system is used:

The purpose in such gamesmanship ranges from simple retribution . . . to discouraging further activism Those who lack the financial resources and emotional stamina . . . face the difficult choice of defaulting despite meritorious defenses are being brought to their knees to settle.

Gordon v. Marrone, 155 Misc. 2d 726, 736, 590 N.Y. S.2d 649, 656 (N.Y. Sup. Ct. 1992).

Whether a pleading states a claim for infliction of emotional distress is determined by a review of the facts pled. *Bennett*, ¶ 60, 70 P.3d at 30. In the case at bar, the Counterclaim facts are summarized as follows:

The Developer's contradictory legal claim theories are meritless (*See* Point II, *supra*).

The Developer filed an application to amend the South Jordan City Master Plan and to change the zoning with respect to the Williams parcel on or about October 7, 1996. *See* Counterclaim of Janalee S. Tobias and Judy Feld ("Counterclaim") ¶ 16 (R.992). A copy of the Counterclaim is attached as Addendum 2 for the Court's ease of reference.

Within a few days prior to the first Planning and Zoning Commission meeting on the Developer's application, Mrs. Tobias and Mrs. Feld, as part of a grass roots campaign to oppose the Master Plan and zoning change, prepared and distributed fliers to concerned

¹⁰It is true that whether a pleading states a claim for intentional interference is determined by a review of the facts pled rather than the conclusion stated. *Bennett*, ¶ 60, 70 P.3d at 30.

citizens, met with citizens and drafted a Master Plan Petition urging preservation of the Jordan River Parkway. Counterclaim, ¶¶ 31-37 (R. 996-97).

At the meeting on November 20, 1996, the Planning and Zoning Commission denied the application on a 2-2 vote. Consequently, the Developer's application went to the City Council. *Id.*, ¶ 48 (R. 999).

Mrs. Tobias and Mrs. Feld continued to oppose the Master Plan and zoning changes, communicating with city and state government officials, distributing fliers to South Jordan City citizens, and participating in meetings with both citizens and City officials. *Id.* ¶¶ 49-68 (R. 999-1005).

By letter dated December 13, 1996, the Developer intentionally threatened Mrs. Tobias and Mrs. Feld with a multi-million dollar lawsuit. The Developer intentionally timed the letter to be delivered on December 17, 1996 - the day of the City Council public hearing on the Developer's application, *Id.*, ¶¶ 70-71 (R. 1005). The Developer also transmitted copies of the threatening letter to City officials to undermine Mrs. Tobias' and Mrs. Feld's ability to participate in the process of government. *Id.*, ¶ 73 (R. 1006).

The City Council voted to table the Developer's application. *Id.*, ¶ 79 (R. 1007).

Mrs. Tobias and Mrs. Feld subsequently sent a letter to the Governor and made a presentation at a South Jordan City Council meeting on January 7, 1997. *Id.*, ¶¶ 80-81 (R. 1007). On January 14, 1997, Mrs. Tobias and Mrs. Feld also sent a letter to two City Councilmen asking them to vote no on the Developer's project. *Id.*, ¶ 83 (R. 1008).

The Developer complained to South Jordan City officials that the City should not "accommodate some vocal private citizens." *Id.*, ¶ 88 (R. 1009).

On January 28, 1997, they adopted a Master Plan amendment, but did not change the Master Plan with respect to the Williams' property because the City was negotiating with Anderson Development and the Williams regarding the location of a City park. *Id.*, ¶¶ 91-92

(R. 1009-10). The Developer then gave permission to Mrs. Tobias and Mrs. Feld to contact the Williams. *Id.*, ¶ 97 (R. 1011).

Numerous letters, meetings, city presentations, and petitions followed. *Id.*, ¶¶ 101-04, 106-08, 116, 123, 128, 135, 139, 144-45, 146-48, 151, 154 (R. 1012-1022). The activities of Mrs. Tobias and Mrs. Feld culminated in a March 6, 1998 meeting with Mayor Dix McMullin, less than a week before the final Planning and Zoning Commission meeting scheduled on the Developer's application respecting the Williams property. *Id.*, ¶ 156 (R. 1023).

The *day after* Mrs. Tobias and Mrs. Feld met with Mayor McMullin, the Developer served its lawsuit. *Id.*, 156-157 (R. 1023). No mention of a delay in zoning is found in any of the Developer's complaints - the original Complaint which was never filed, the Revised Complaint filed on March 17, 1998 (R. 1.), or the Amended Complaint, filed on June 10, 1999 (R. 143.)

Further, nowhere in any Complaint does the Developer complain about interference with the First REPC, only the Second REPC, which had been signed but not closed at the time the Developer filed this lawsuit. *See* Counterclaim ¶¶ 138, 169 (R. 1019, 1025).

The Developer refused to let the lawsuit lapse, even though it languished for two years and the lower court was prepared to dismiss it for lack of prosecution. (R. 326-28). The Developer was only willing to dismiss the lawsuit if Mrs. Tobias and Mrs. Feld were willing not to participate in any discussion about the Developer's project in any public proceeding.

¹¹ *See* Counterclaim, ¶ 174 (R. 1026).

¹¹Directing this Court's attention to the Developer's proposed settlement agreement is not improper. Courts have been willing to admit evidence of settlement offers or agreements to show a defendant's improper or retaliatory motive, *see Schafer v. RMS Realty*, 741 N.E.2d 155 (Ohio Ct. App. 2000), *Resolution Trust Corp. v. Blasdel*, 154 F.R.D. 675 (D. Ariz. 1993); to show a defendant's improper purpose, *see Eugene Burger Management Corp. v. United States Dep't of Housing and Urban Dev.*, 192 F.R.D. 1 (D.D.C. 1999); and for impeachment or rebuttal purposes, *see e.g. Davidson v.*

After Mrs. Tobias and Mrs. Feld answered the lawsuit *pro se*, the Developer constrained them to obtain counsel to defend SOS, and then immediately moved to dismiss SOS as an unnecessary party. (R. 636, 643).

As noted by the lower court judge, the all-day deposition of Mrs. Tobias focused not on relevant issues, but on personal harassing matters. (R. 4405, p. 78.). Continuing in the proceedings below and in their Brief, the Developers for no apparent reason, continue to try and demean Mrs. Tobias for her participation in various public causes and groups. (R. 4004 P. 17, n.8 & 9; Developer's Brief, pp. 52-55.)

The foregoing clearly shows that the emotional distress incurred by Mrs. Tobias and Mrs. Feld has been a result of why and how the legal system was abused by the Developer and is *not* based on the content of what was said in a court proceeding. Stated another way, the Developer's SLAPP-suit misconduct is not privileged.

Finally, the Rule 12(b)(6) ruling below and Point III of the Developer's Brief again ignore the fact that where reasonable men may differ, it is for the jury to determine whether the conduct is sufficiently extreme and outrageous to result in liability. *Gygi v. Storch*, 503 P.2d 449, 450 (Utah 1972)(citing RESTATEMENT (SECOND) OF TORTS § 46, cmt. h (1965)).

IV. Mrs. Tobias and Mrs. Feld's Claims for Abuse of Process Should Not Have Been Dismissed on Summary Judgment.

A. Whether the Developer Perverted the Judicial Process Presents Questions of Material Fact.

The gist of an abuse of process claim, as defined in *Crease v. Pleasant Grove City*, 519 P.2d 888 (Utah 1974), is as follows:

The essence of [abuse of process] is a perversion of the process to accomplish some other purpose, such as compelling its victim to do something which he would not otherwise be obligated to do. On the other hand, if it is used for its proper and intended

Prince, 813 P.2d 1225 (Utah App.1991).

purpose, the mere fact that it has some other collateral effect does not constitute abuse of process.

Crease at 890.

Whether the Developer abused the process in the case at bar is clearly a question of fact for a jury to resolve. *Cf. Smith v. Vuicich*, 699 P.2d 763 (Utah 1985) (jury was properly instructed on elements of abuse of process). Consequently, in reviewing the summary judgment proceedings below, it is not helpful to do as the Developer has done, *i.e.*, cite to portions of the record that support his claims, but ignore other portions of the record from which the jury could conclude that the Developer has on numerous occasions abused the process to compel Mrs. Tobias or Mrs. Feld to do something they would not otherwise do.

The facts for jury consideration are summarized as follows: First, the Developer had no intention of suing Mrs. Tobias and Mrs. Feld after December of 1996, which is when it says Mrs. Tobias and Mrs. Feld asked the Williams to breach the First REPC. Instead, the Developer's decision to sue was made a year and a half later **after** Mrs. Tobias and Mrs. Feld met with the South Jordan City Mayor and less than a week before the final Planning and Zoning Commission hearing on the Developer's application regarding the Williams parcel. *See* Counterclaim ¶ 157 [R. 1023]; Deposition of Gerald Anderson ("Anderson Depo."), p. 14, ln.1 through p. 16, ln.3 [R. 3615].

Second, after the First REPC expired, but before the Second REPC was signed in November of 1997, Mrs. Tobias and Mrs. Feld introduced the development controversy to the following public officials: County Commissioner Brent Overson, County Commissioner Randy Horiuchi, and Congressman Merrill Cook. *See* Tobias Affidavit, ¶¶ 61, 62, 123, 125, 156-58; Feld Affidavit, ¶¶ 61, 62, 122, 123, 125, 156-58 (R. 2113, 2124-25, 2131, 2151-52, 2163-64, 2170).

In his deposition, Mr. Anderson testified that he did not like Mrs. Tobias and Mrs. Feld doing so. He characterized their acts as "trying to use political pressure by various

politicians, mayor, councilmen, Congressman Cook as well as county officials to try and convince them not to sell the ground to us.” Gerald Anderson Depo. p. 26 lns.18-27 [R. 3617]..

Mr. Anderson and his partner, Michael Hutchings, also did not like Mrs. Tobias and Mrs. Feld speaking to the City Council:

Q. Why do you think it was wrong for Janalee and Judy to ask the City Council to delay the zoning application?”

A. I believe that any time someone’s due process is delayed, due process is denied.

Michael L. Hutchings Depo. p. 28, lns.13-18 [R. 3624].

In the Developer’s view, it was okay to speak at public hearings if Mrs. Tobias and Mrs. Feld were asking for reasonable things, but in the Developer’s view not changing the master plan was “unreasonable” and leaving the riverbottom land as open space was not okay. Anderson Depo. p. 96, lns.13-21 [R. 3618].

Further, Gerald Anderson did not like Mrs. Tobias and Mrs. Feld speaking to the press. He kept a file on all their public statements. Some of them were made at City Council meetings and some of them were in newspaper clippings. Anderson Depo. p. 93, ln.11 through 94 ln. 9 [R.3618]. “I believe there was a lot of coverage, almost daily . . . it appears that the attempt was to elevate the public awareness of the open space and try to put pressure on the landowners not to sell.” *Id.*, p. 92 ln.21 through p. 93 ln. 1. A reasonable inference of the foregoing is that the timing and filing of the lawsuit was calculated to chill participation in the then-upcoming hearing and to punish them for opposing the Developer’s project in past meetings.

A jury may find that other possible abuses occurred. Selectively arguing that the separate litigation steps taken by the Developer were each permissible is not helpful because abuse of process, unlike the tort of wrongful use of civil process, is determined as an issue

independent from the rightness or wrongness of the steps in a legal proceeding. *Crease*, 519 P.2d at 890. The purpose for which the process is used, once it is issued, is the only thing of importance. *Keller v. Ray Quinney & Nebeker*, 890 F. Supp. 1563, 1570 (D. Utah 1995).

For example, a jury could find that the Developer's mostly unsuccessful motion to strike 114 paragraphs of Mrs. Tobias' and Mrs. Feld's Counterclaim was brought to increase the cost and expense to Mrs. Tobias and Mrs. Feld¹². The jury could also conclude that the taking of Mrs. Tobias and Mrs. Feld's deposition was not taken for the purpose of pursuing relevant issues, but instead was taken to personally harass Mrs. Tobias as was found by the lower court:

I was impressed as it certainly asked personal information and harassing information. If the SLAPP Act had been enacted and effective back to the period of time, 1996-1999 up to the act of Plaintiff's interest terminating the contract, I would have thought the Defendants had a good counterclaim. . . ."

Tr. 1-27-03 (R. 4405, p. 78).

A jury could also conclude that by forcing Mrs. Tobias and Mrs. Feld to obtain an attorney to defend SOS and then immediately thereafter moving to dismiss SOS as a party, was a scheme to increase the cost of the litigation to Mrs. Tobias and Mrs. Feld.

In summary, there are plenty of facts and evidence from which a jury could conclude that the Developer has abused the judicial process. Consequently, the Motion for Summary Judgment dismissing Mrs. Tobias' and Mrs. Feld's abuse of process claim should not have been entered.

B. The Abuse of Process Claim is Not Premature

Unlike the tort of malicious prosecution or wrongful use of civil proceedings,¹³

¹² Only two paragraphs of the Counterclaim were ultimately stricken.

¹³ The RESTATEMENT (SECOND) OF TORTS § 674 denominates wrongful use of civil proceedings as the civil counterpart to malicious prosecution. See RESTATEMENT

a claim for abuse of process is quite different in character from those [claims] which are concerned with the initiation of [the] proceeding against the victim. Therefore, whether there was an abuse of process is . . . determined as an issue independent from the rightness or wrongness of the prior steps in the proceeding.

Crease v. Pleasant Grove City, 519 P.2d 890 (Utah 1974). Consequently, an abuse of process claim, unlike a claim for the wrongful use of civil proceedings does not require a favorable termination of the earlier civil proceedings. Compare RESTATEMENT (SECOND) OF TORTS § 674 (1977) (wrongful civil proceedings) with RESTATEMENT (SECOND) OF TORTS § 682 (1977) (abuse of process).

The question of whether a Defendant can litigate an abuse of process counterclaim without waiting for the complaint proceedings to terminate was decided in *Smith v. Vuicich*, 699 P.2d 763 (Utah 1985). The Utah Supreme Court affirmed an abuse of process counterclaim claim and explained, “the jury was properly instructed on the elements of an abuse of process in language similar to that found in *Crease v. Pleasant Grove City*, 30 Utah 2d 451, 519 P.2d 888 (1974).” “[Utah] is therefore in accord with virtually all authorities in recognizing that an abuse of process claim may be brought prior to termination of the proceedings – most frequently as a counterclaim.” *Keller v. Ray Quinney & Nebeker*, 896 F. Supp. 1563, 1570 n.15 (D. Utah 1995)(emphasis added)(citations omitted).

The Developer’s mistaken notion that an abuse of process claimant must wait springs from *Baird v. Intermountain School Fed. Credit Union*, 555 P.2d 877, 878 (Utah 1976) and cited in *Amica Mutual Ins. Co. v. Schettler*, 768 P.2d 950 (Utah App. 1989). But, *Baird* was not an abuse of process case. It was a malicious prosecution case. See *Keller*, 896 F.Supp. at 1570 n. 15. While it is true that a malicious prosecution case ordinarily may not be

(SECOND) OF TORTS § 674. The Utah Supreme Court accepted the RESTATEMENT’S nomenclature and analysis in *Gilbert v. Ince*, 981 P.2d 841, 845 (Utah 1999).

brought by way of a counterclaim, it is also true that a defendant can plead an abuse of process counterclaim. *Smith*, 699 P.2d at 763.

V. The Punitive Damages Error Committed below Was the Court's Rule 12(b)(6) Ruling That Mrs. Tobias and Mrs. Feld Could Not Seek Punitive Damages Even If They Are Ultimately Successful on Their Abuse of Process Claim

The Developer's Brief mistakenly addresses punitive damage issues not on appeal and fails to address the plain error committed below. The issue isn't whether Mrs. Tobias and Mrs. Feld can prove to the satisfaction of a jury that punitive damages should be awarded under Utah Code Ann. § 78-18-1, *et seq.* The error is that the lower court's Rule 12(b)(6) ruling precludes Mrs. Tobias and Mrs. Feld from ever putting on evidence that they should receive punitive damages.

Likewise, the issue is not whether Mrs. Tobias and Mrs. Feld can seek punitive damages if they are not successful on an underlying claim. The issue is whether they can seek punitive damages if they are successful on an abuse of process claim. The law is crystal clear that they can,¹⁴ but the lower court ruled they cannot. Consequently, the lower court's Rule 12(b)(6) punitive damage ruling must be reversed.

VI. The Developer Apparently Concedes Its Failure to Comply with Rule 4-501(2)(b) and Its Failure to Directly Controvert a Single Fact Below

The Developer's Brief does not address its failure to comply with Rule 4-501(2)(B) and to directly controvert Mrs. Tobias and Mrs. Feld's Statement of Facts below. Apparently, the Developer concedes this issue. Former Rule 4-501(2)(B) provided in pertinent part that "[a]ll material facts set forth in the movant's statement and properly supported by an accurate reference to the record **shall be deemed admitted** for purpose of summary judgment unless **specifically controverted** by the opposing party's statement." (emphasis added). The Developer failed to specifically controvert the material facts set forth

¹⁴*Van Dyke v. Mt. Coin Machine Distrib.*, 758 P.2d 962, 966 (Utah App. 1988); Am. Jur. 2d Abuse of Process § 29 (1994).

in Mrs. Tobias' and Mrs. Feld's Statement of Facts in their Motion for Summary Judgment. Accordingly, the lower court should have deemed those facts as admitted for purposes of summary judgment. If the facts are deemed admitted, reversal of the summary judgment issued below is required.

VII. The Developer's Brief Does Not Comply with Rule 24

In a fashion similar to the Developer's noncompliance with Rule 4-501 below, the Developer fails to comply with Rule 24 in this Court. Specifically, it is improper for the Developer to attempt to enlarge the page limitation set by an Order of this Court by placing facts in 49 pages of appendices. *DeBry v. Cascade Enterprises*, 879 P.2d 1353, 1360 n.3 (Utah 1994).

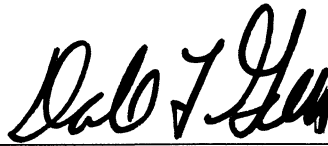
CONCLUSION

The Developer's lawsuit is the prototypical lawsuit filed and continued contrary to Utah's anti-SLAPP-suit statute. No constitutional infirmities are triggered by application of the statute. A correction of the lower Court's legal conclusions requires a reinstatement of Mrs. Tobias' and Mrs. Feld's statutory and common law counterclaims. In contrast, the undisputed dispositive facts require a summary judgment dismissal of the Developer's SLAPP suit.

For these reasons, the two interlocutory Orders should be reversed and the case remanded for trial on Mrs. Tobias' and Mrs. Feld's counterclaims.

DATED this 16/4 day of July, 2004.

PARRY ANDERSON & GARDINER

A handwritten signature in black ink, appearing to read "Dale F. Gardiner", written over a horizontal line.

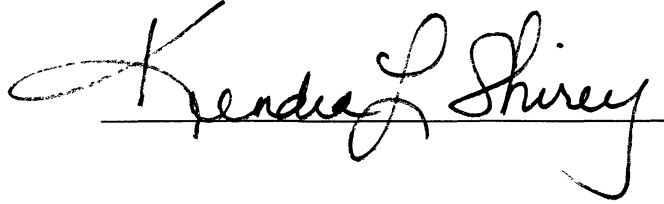
Dale F. Gardiner

A handwritten signature in black ink, appearing to read "Douglas J. Parry", written over a horizontal line.
Douglas J. Parry
Attorneys for Appellants

MAILING CERTIFICATE

I hereby certify that I mailed, postage prepaid, two (2) true and exact copies of the foregoing **Corrected Appellants' Reply Brief** to the following party on the 16th day of July, 2004:

D. Miles Holman
Jeffrey N. Walker
Holman & Walker
9537 South 700 East
Sandy, UT 84070

A handwritten signature in black ink, reading "Kendra L. Shirey", is written over a horizontal line. The signature is cursive and fluid.

ADDENDUM 1

THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

ANDERSON DEVELOPMENT COMPANY,)
L.C., a Utah limited liability)
company,)
) Civil No.
Plaintiff,) 980902813
)
VS.)
) JUDGE:
JANALEE S. TOBIAS, an individual;) Douglas Cornaby
JUDY FELD, an individual; SAVE OUR)
SOUTH JORDAN RIVER VALLEY, INC., a)
Utah Corporation, dba SOS and SAVE)
OPEN SPACES; BRENT FOUTZ, an)
individual; and JANE and JOHN)
DOES 1 through 19, inclusive,)
)
Defendants.)

COPY

DEPOSITION UPON ORAL EXAMINATION OF
BRENT FOUTZ

TAKEN AT: 9537 South 700 East
Sandy, Utah
DATE: Wednesday, November 6, 2002
REPORTED BY: Catherine L. Kennedy, RPR, CSR



333 SOUTH RIO GRANDE SUITE F
SALT LAKE CITY UTAH 84101
(801) 328 1188 / 1 800 DEPOMAX
FAX 328 1189



1 Hutchings ever paid any money to the attorneys in
2 that action?

3 A He denies it. Now, if you'll restrain
4 yourself from suing my 87-year-old father, it was my
5 father that told me that Mike Hutchings was paying
6 the attorney fees. As soon as I found out that --
7 you know, as soon as my father told me that, almost
8 immediately depositions were set for Mike Hutchings
9 and my wife, and in the depositions both Mike and my
10 wife admitted that he had at least made the offer to
11 pay her attorney fees.

12 Q Do you remember being part of an
13 interview that ended up resulting in an article
14 written by the Voice newspaper?

15 A I do.

16 MR. WALKER: I'm going to have this
17 marked, if we could.

18 (Exhibit No. 1 was marked for
19 identification.)

20 Q (BY MR. WALKER) I'm going to hand you
21 what's been marked as Exhibit 1, and represent to you
22 that this is a copy of that article and see if you
23 can identify it as the same.

24 A Okay. Skipping over to page seven --

25 Q I just want you to look at the whole

1 with bullets and shooting in relation to Janalee
2 Tobias; isn't that right?

3 A No. I have never given her a bullet
4 that she fired at somebody in that sense.

5 Q I think that's -- so it was a play on
6 words? You weren't talking about real bullets and
7 real guns being shot at anyone?

8 A It wasn't a play on words. It was a
9 figure of speech.

10 Q And then you note, "We've cost Hutchings
11 millions of dollars."

12 Now, is we referring then to you and
13 Janalee?

14 A Well, it would be -- I think it would be
15 anybody that got sued has cost them millions of
16 dollars.

17 Q So we isn't -- I'm trying to read what
18 you have said, and you said, "I do the detail work
19 and give her the bullets and she fires them. We've
20 cost Hutchings millions of dollars."

21 So the we there is you and Janalee?

22 A Okay. Well, like I say, when I first
23 saw this I didn't remember saying it quite like this.
24 You know, I might have. I wish there were a tape
25 recording. I don't think there is. I would like to

1 see what I really said. But, anyway, I -- as far as
2 costing millions of dollars, I will plead guilty to
3 that.

4 Q That you believe that --

5 A I believe that I -- I believe that I,
6 more than anyone, cost you the EDA.

7 MR. WALKER: All right. I think I'm
8 done. I just want to take a second. Okay? Let
9 me --

10 THE WITNESS: Stay on --

11 MR. WALKER: -- just take a break just
12 for a second --

13 THE WITNESS: I want to finish my
14 thought here.

15 MR. WALKER: -- and go off the record.

16 MS. REPORTER: Do you want to stay on or
17 not?

18 MR. WALKER: No.

19 (Whereupon, an off-the-record discussion
20 was held.)

21 THE WITNESS: Okay. Are we back on now?

22 MS. REPORTER: Back on.

23 THE WITNESS: Okay. The millions of
24 dollars is the EDA. One of the members of the taxing
25 agency committee told me that one of the reasons the

1 River Park EDA was turned down is because of the
2 lawsuit. They saw how brutally we had been treated
3 by Holman and Walker and Anderson Development, and
4 that was one of the reasons the River Park EDA was
5 turned down. And that comes straight from one of the
6 members of the taxing agency committee.

7 Q (BY MR. WALKER) Who was that that said
8 it?

9 A I will call the County Attorney and see
10 if it's all right to tell you.

11 MR. GARDINER: Oh --

12 Q (BY MR. WALKER) Brent --

13 MR. GARDINER: -- I don't know of any
14 reason why it wouldn't be okay, Brent.

15 THE WITNESS: It's my creed.

16 Q (BY MR. WALKER) When did you have that
17 conversation with them?

18 A Right after it was killed.

19 Q And you knew that --

20 A There's your millions of dollars.

21 Q And you knew that Mike Hutchings didn't
22 own the property at that time, didn't you?

23 A I don't believe anything you or Mike
24 Hutchings ever says. I think it's highly unlikely
25 that he has bailed out completely from River Park. I

VOICE

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Information about and for our community

Utah's Quality, Progressive Voice

Ex-Judge Aids Developer's Slap-Suit Juggernaut in Salt Lake County

PAUL SWENSON
MANAGING EDITOR

SOUTH JORDAN—The meandering Jordan River and its picturesque river bottoms—abundant with natural life, and the clatter of developers' machinery and controversy—is the last thing on the mind of ex-judge and real estate legal eagle Michael Hutchings these days.

"We've got other fish to fry," he shrugs, seemingly oblivious to his unfortunate choice of metaphor, since his conflict with grass roots citizens has partially centered on destruction of environmental habitat.

Hutchings' casual phrase refers to his continuing service with Anderson Development, which has sold its interest in the contentious \$200 million RiverPark development here between 10600 and 11400 South, but which sweeps on like a moving army of occupation as it cuts new swaths through other southwest Salt Lake County communities.

Ex-Circuit Court Judge Hutchings, 47, introduces himself as "Mike" to a reporter. His blond good looks and smoothly bland manner belie his aggressive behavior as a legal consultant for Anderson Development, where high profile land deals and Hutchings' litigious pursuit of citizens opposed to these deals have kept his name in the news while the private man has remained in the corporate shadows.

Flamboyant developer Gerald Anderson—who sports the transparent symbol of either a black or a white ten-gallon cowboy hat, depending on his media mood—has been widely photographed and quoted over five years of controversy that has raged on the river bottoms battleground. Hutchings, meanwhile, has remained a somewhat mysterious and largely silent partner, although his antipathy for the opposition—the unlikely trio of activist Brent Foutz and housewives Jana Lee Tobias and Judy Felt,

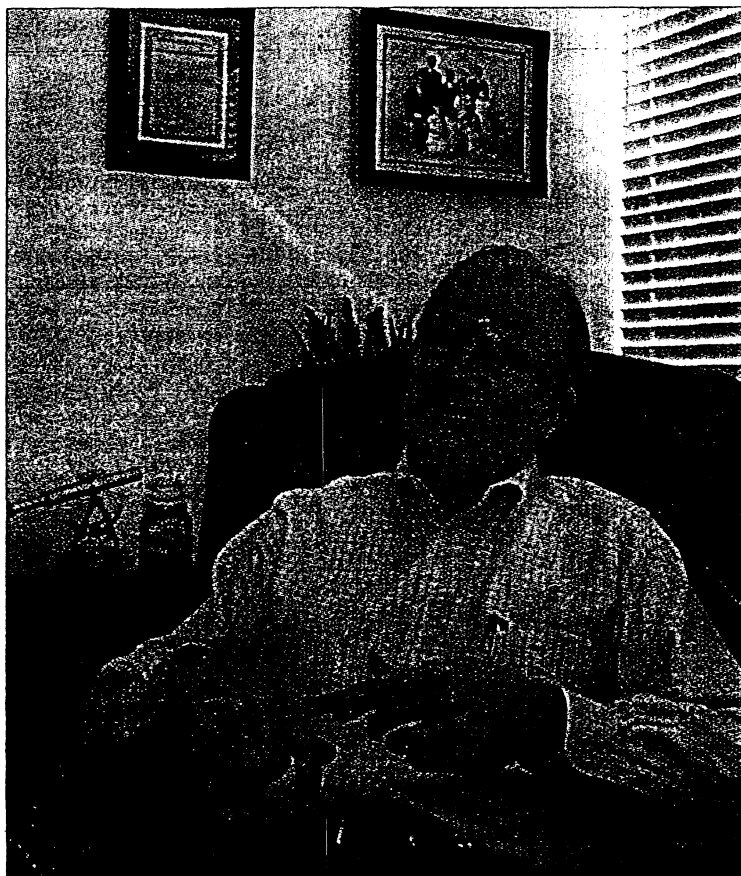


Photo: Rafael A. Cabrera

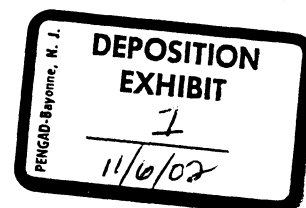
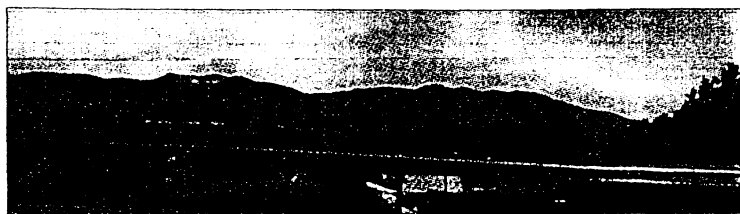
Beneath a portrait of his family in formal attire, Mike Hutchings plays with scissors while cutting up his detractors.

SEE SLAP SUIT PAGE 5

Police Chief Tragedy Raises Tricky Rights Questions

Debate framed as safety vs. freedom on Helmet Use

DEREK JENSEN



Now, when he could hide behind the scenes, Hutchings has chosen to answer questions

FROM COVER EX JUDGE

founders of Save Open Space (SOS)—has occasionally surfaced publicly

That antipathy has led Hutchings to openly suggest to a state legislator that Foutz may be untrustworthy because of mental health problems to refer to Foutz's alleged "marital difficulties" and to imply that Foutz and his SOS colleague Jana Lee Tobias were having an extra-marital affair. Meanwhile, Hutchings was meeting openly with Foutz's wife Jane to solicit her views on the river bottoms debate—a situation that led Foutz to file an unsuccessful "alienation of affection" suit.

At a time when he could comfortably hide behind the scenes, now that RiverPark's new owners—The Argent Group including CEO John Petersen, Dave Layton of Layton Construction and Bill Child of R. C. Willey—are bearing the brunt of a whole slew of new difficulties for the project—Hutchings has chosen to submit to questions. Whether because of nervousness or simply out of habit, he swivels in his office chair throughout the taped conversation, constantly playing with a pair of gray handled scissors.

By the end of the interview, conducted in his sleek, airy office in one of an elegant grouping of business cottages at 9537 South 700 East in Sandy, Hutchings tosses off a revealing comment as the reporter is on his way out the door:

"I'm so glad we're not involved with RiverPark now."

Once called High Uinta Investment Properties, the current name for the ambitious dream of a sprawling office building



In a shot from the bluffs high above the highway, 10600 South snakes its way west to the lonely framework of RiverPark's new construction (left), hard beside the Jordan River.

complex (17 million square feet of commercial space)—just a stone's throw from the Jordan River's fragile ecosystem—is RiverPark LLC. But a series of related names is also on file with the Utah Department of Commerce should they be needed in continuing litigation—RiverPark I, RiverPark One, RiverPark II and RiverPark Three.

"What Anderson Development does is

purchase large tracts of land, gets it master planned and zoned for development and then sells it to the actual builders," Hutchings explains, making it appear as if the firm is a quasi-governmental body.

Not quite—although in South Jordan the developer has had the advantage of a compliant city council eager for an expanded tax base and therefore a willing partner for its grandiose but controversial vision. In addition, Anderson Development's coziness with local governments has extended to hiring former Riverton city administrator Ken Leatham, former Bluffdale City Attorney Gary Crane, and former South Jordan City Manager Dave Millheim to help grease the political skids in those communities. (While Millheim was still city manager, he had admitted accom-

panying Gerald Anderson on an African safari, a prelude to their eventual business arrangement in which they would pursue even bigger game.)

Having washed their hands of RiverPark 18 months ago, "we've had no contact with South Jordan City," Hutchings said, seemingly glad to distance Anderson Development from its one-time political allies now under increasing siege.

After pursuing big projects in Bluffdale and Riverton, Anderson and Hutchings are now trying new fish in a large venture west of Copper Hills High School in West Jordan.

Hutchings' relief that the RiverPark project is no longer his and Anderson's concern is likely fueled by recent reversal. The venture that was once thought to be a fait accompli, tempered by the fact that the developers' attempts to disempower and democratize their opponents

with SLAPP (Strategic Lawsuit Against Public Participation) suits resulted in counter suits, thousands of dollars in lawyer fees, and years of litigation still working its way through the courts.

While the stark metal frame of the first building in the RiverPark complex squats unfinished (and significantly without a single pledged tenant) on the banks of the Jordan, the new owners are having to deal with two unexpected bolts from the blue.

First was the decision of the Jordan Board of Education to refuse to participate in an Economic Development Area (EDA) project that would have tunneled \$73 million to RiverPark over the life of the undertaking.

At a meeting of the RiverPark Economic Development Project Area Taxing Agency Committee, where public comment preceded the board's

unprecedented decision to say "no" to the proposal, South Jordan City Manager Rick Horst warned the agency that without the infusion of EDA money, "there is a good possibility that the whole project (RiverPark) could go belly up."

For the Jordan School Board, however, more convincing was the testimony of Mike Reed, newly elected as vice chairman of the taxing agency committee. He said draining public moneys through EDAs rather than fulfilling traditional expectations that the developer should bear the cost of development would eventually force citizens to lose the ability to educate their kids.

South Jordan Mayor Dick McMullen, in City Manager Horst's role, the educators' lig the heels in even further by fixing. Little to the school board that noted that it might not be able to afford nearly \$200,000 in school program without reciprocity. Possibly calculated as a show of political

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'I told him it was not appropriate for me to listen to these accusations'

FROM PAGE 6 ANSWER QUESTIONS

ical muscle, the scheme appeared to guarantee the city could kiss the hopes of EDA funds good-bye.

While city fathers and the builders of RiverPark were still absorbing this blow in early August, a second strike rattled the foundations of new construction at the site. A consortium of environmental groups, including Brent Foutz's Jordan River Nature Center Inc. and Friends of Midas Creek Inc., asked South Jordan to issue a stop work order on the basis that the development's parking lot intrudes 350 feet into the river's meander corridor, a violation of a little known Salt Lake County ordinance.

Argent CEO Petersen sought to place the onus on the city by responding that the group has followed—to exact specifications—what the city has permitted. He said his firm would be "leery" of disturbing any natural life near the river.

The environmentalists' attorney, Jennifer Crane, of Appel & Warlaumont, filed an appeal of continuing work at the site with the city's Board of Adjustment. As the *VOICE* went to press, no decision had been reached.

Mike Hutchings was appointed a circuit court judge in 1983 by Gov. Scott Matheson. He had wanted to be a prosecuting attorney—"to participate in real life events that end up in court." And for three years prior to his judgeship, he did just that.

His personal concept of fairness and justice that he says he developed on the bench "has its basis in personal accountability," he told the *VOICE*. "We must be held accountable for our choices, including those that are socially unacceptable."

While still on the bench, Hutchings began serving as a legal consultant to Anderson Development part-time, and in 1999 joined the firm full-time, having decided that he had made his contribution to the judiciary after 16 years of service. He left the bench, he said, to grasp "the marvelous and intriguing opportunities in real estate."

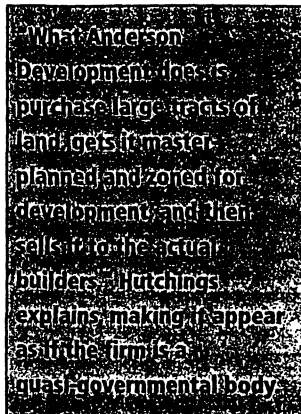
He couches his real estate service in effusive and high flown phrases, indicating it has brought him "more satisfaction than I thought it would. We have been engaged in high profile fights regarding high density housing and moderate income housing. There are a lot of great people, such as schoolteachers, firemen and police officers who can't find affordable housing. They are excluded from our communities—especially in the South Valley. I am satisfied that despite resistance and barriers, we have helped add more housing diversity."

Hutchings does not perceive that his business techniques have been in any way socially unacceptable, nor does he detect any tension between his values of personal accountability and fairness and his dogged pursuit in court of private citizens fighting for their rights to participate in the political process.

In March, 1998, Anderson Development filed a lawsuit seeking \$1.2 million in damages from Jana Lee Tobias, Judy Feld and Save Open Space (SOS), plus "Jane and John Does, 1 through 20," referring to unnamed supporters of Feld and Tobias.

At the time, Tobias refused to supply the names of supporters, saying "I'm not going to permit a developer to turn our neighbors against each other. The buck stops with me and Judy."

Gerald Anderson denied that Hutchings



was a party to the lawsuit. Tobias called the claim "malarkey," contending that the judge had been present at every public hearing on the project.

Ross (Rocky) Anderson, the pro bono attorney for Feld and Tobias (who would later become Salt Lake City Mayor), the Utah Chapter of the American Civil Liberties Union (ACLU) and Utah State Sen. Mont Evans, R-Riverton, among others, referred to the suit as a typical SLAPP action, contending that its purpose was to silence SOS and other resistors at public meetings and chill opposition to the project.

Gerald Anderson and Hutchings contend that this was not a SLAPP suit, but was instead aimed at preventing SOS from interfering in their business practices by pressuring landowner Boyd Williams to break his earnest money agreement with Anderson Development and sell to another buyer the last parcel the developer needed for RiverPark.

(Tobias and Felt argue they did nothing of the kind. During a three-month period after Anderson's Development's option to buy had expired, Felt and Tobias were encouraged by the South Jordan city council to try and find a buyer. Margaret Eadington of Trust Republic Lands flew out from San Francisco to bargain with Williams, but he eventually decided to sell to Anderson.)

Although Brent Foutz was not included in the action against Felt and Tobias, Hutchings asserts that he was "unhappy" he was left out of the suit and demanded at a South Jordan public meeting that he be included as a defendant.

"There are some mental health issues with Brent, you know," Hutchings told the *VOICE*, calling such concerns "troubling."

At this point in the interview, Hutchings was questioned about whether he had ever publicly mocked Brent Foutz's manic depression, an illness that afflicts thousands of Americans, and which Foutz has not attempted to hide.

"No" was his direct and unequivocal reply.

But Mont Evans tells the *VOICE* a far different story. Evans had at least three interactions with Hutchings, one involving a Sunday meeting on Father's Day, 1999, at Rocky Anderson's law office, in which he was attempting to facilitate a settlement between Foutz and SOS on one side and Anderson Development on the other.

"As a member of the Senate, I was trying to help my constituents, one of them being Foutz, in resolving issues regarding the SLAPP lawsuit," Evans says.

"In a telephone conversation with Mr. Hutchings, I listened to him rehearse the alleged mental incapacity of Mr. Foutz and the purported marital problems between

Mr. and Mrs. Foutz. He also raised questions of alleged sexual behavior between the people that Anderson Development was suing (i.e., that Foutz may have been carrying on an affair with Jana Lee Tobias)," Evans said.

"I told him it was not appropriate and was not part of my role to listen to these accusations," Evans said. "Stories about mental illness and marital problems are quite frankly none of my business."

Evans has had his own experience with a threatened SLAPP suit from Anderson Development, which may explain his frankness.

"Last time they came to Riverton with a high density housing proposal, I testified before the city council. I was immediately subpoenaed with a series of interrogatories; they were looking for something to sue me on. I had to get an attorney to get it thrown out. This is abhorrent in a Democratic society—I exercise my First Amendment Rights, I speak my mind at city council, and all of a sudden I'm a party to a lawsuit. These are not honorable people."

Evans made clear he was speaking on the record to the *VOICE*.

Jana Lee Tobias, who takes a right wing position on such issues as gun control and opposition to light rail while championing environmental causes, is an anomaly, all on her own. Teamed with liberal activist Brent Foutz, the pair are curious compatriots.

"If we hadn't come together to try to save the river bottoms, Jana Lee and I would have never been acquainted, let alone been friends," Foutz says. "I do the detail

work and give her the bullets and she fires them. We've cost Hutchings millions of dollars."

They both take jolly fun in the absurdity that someone would imply that they are lovers, although they are not amused that anyone of high principle would spread the story.

As Hutchings spoke to the *VOICE*, he made occasional veiled references to Tobias, labeling her, for example, as "a real maverick," who frequently blabs to the press. "There are some real interesting Jana Lee Tobias stories out there," he offered, vaguely. "You may wish to keep in mind the con-

CONTINUED ON PAGE 9 RIVER

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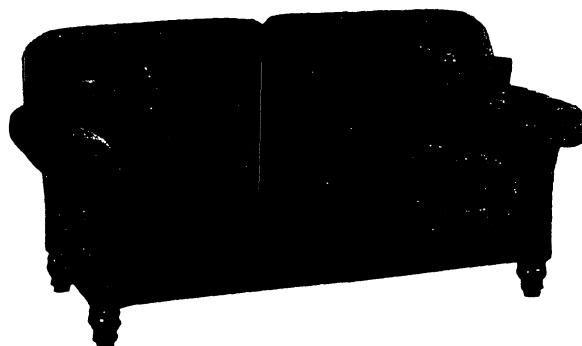
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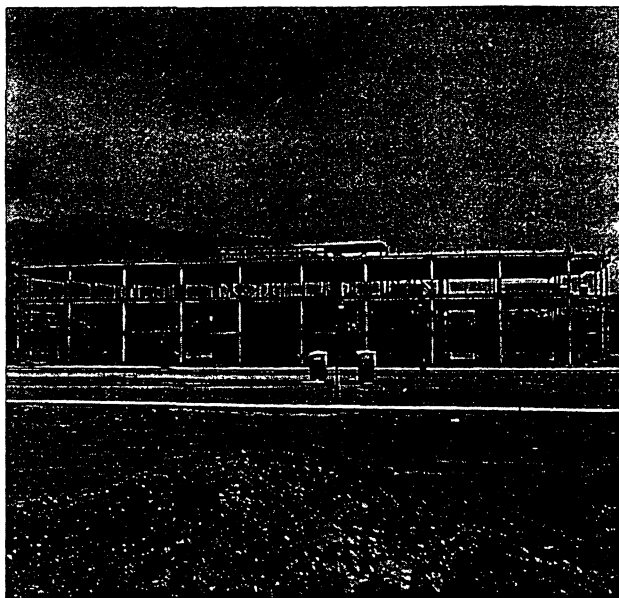
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'But the river belongs to everybody, upstream and downstream'



Opponents are contending that the parking lot for this RiverPark structure intrudes 350 feet into the meander corridor of the Jordan River in violation of a Salt Lake County ordinance

FROM PAGE 7 SLAPP

text as you do your research."

Referring to Foutz, Tobias and SOS co-founder Judy Felt, Hutchings charged that "they're generally looking for a cause. They go from one cause to another," he said.

"I don't think their motivations are pure. They want to call attention to themselves. They are reckless with the facts."

As an example, Hutchings cited litigation brought against him by Foutz and South Jordan resident Drew Chamberlain, "alleging that I was responsible for cows grazing on a city park. They did this without bothering to research the facts. I didn't own the cows and had nothing to do with any decision to allow them on the park. The suit was dismissed at some expense and aggravation to me," Hutchings said. "That's an example of being reckless with the facts."

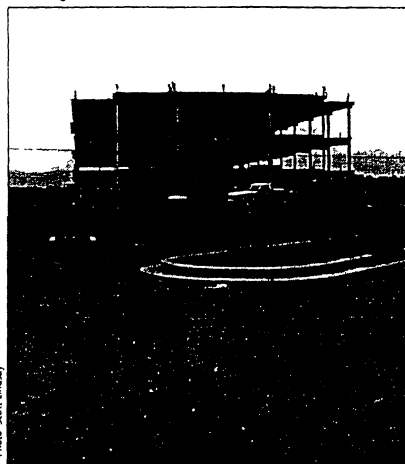
Foutz responds that his non-lawyerly approach to the suit was perhaps "clumsy but not frivolous," in contending that the grazing was a violation of a conservation easement. The charge was made just as the deed for the land was being transferred to Hutchings and Anderson Development. Foutz said.

As construction continues at the RiverPark site where workers seem oblivious to the possibility of a stop-work order, squirrels, snakes, roadrunners, deer, white-faced ibis, foxes and a variety of additional wildlife play amid the cattails of the

adjacent wetlands.

"Yet these people want to pave paradise and put up a parking lot," Tobias says. "But the river belongs to everybody, upstream and downstream. We're trying to preserve something beautiful for those who haven't got enough money to go to Lake Powell. You shouldn't have to be a millionaire to enjoy nature."

Although forced to be somewhat subdued over a period by the threat of more lawsuits, Tobias says, "it will be a cold day in hell before I ever bow down and kiss the feet of people trying to stifle my constitutional rights."



Wildlife has been observed on the dusty premises of RiverPark construction site, straying from nearly Jordan River habitat

Meanwhile, after a series of failed attempts to get the river bottoms issue on the ballot, Foutz is thinking about planning another ballot initiative that would

require the city to exercise its option on the land and transform it to open space.

Without tenants for its first building, Argent has to be worried that Zions Bank will call in its \$8 million loan, Foutz said. The land under RiverPark is now some of the most expensive in the state, \$300,000 an acre or more. Argent is paying \$1,400 a day interest (half a million a year). Without the EDA money, the project may be deep in doubt without a foreseeable way to get out. "With 120 acres encumbered with \$8 million of debt, no one may be willing to buy a parcel should Argent want to sell."

MOMS Club Branches Out in South Valley

The international MOMS Club is once again branching out in Utah. "Those living south or directly west of Sandy, previously the southern most club, will soon have their own chapter called the South Valley MOMS Club," says new South Valley President Jenny Billings.

Goal of the MOMS Club (Moms Offering Moms Support) is to offer support to at-home mothers, including those working part time or working out of the home. It provides a forum for topics of interest to women and offers mothers association with others without having to leave their children to do so.

Members choose their

level of involvement by attending only those activities that interest them. Some of the activities offered by the MOMS Club include toddler play groups, book club, fitness group, zoo days, park days, field trips, Mom's Night Out (without the kids) and a monthly business meeting.

MOMS Club chapters along the Wasatch Front include Layton, Bountiful, Salt Lake City, Salt Lake City-West, Midvale-Murray, Sandy and South Valley.

Free monthly newsletters that list activities for Moms and their kids are available on request. For more information about The MOMS Club in your area, e-mail to utahmoms@hotmail.com.

MOMS Club to start new South Valley chapter which was previously the Sandy club, West Haven, Tooele, and Free monthly calendars are available by request. Call or email for more information or 446-8474.

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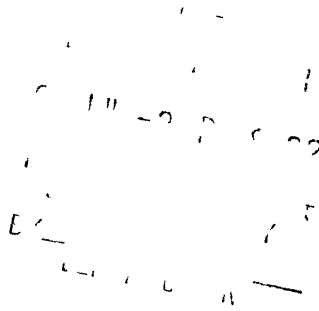


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ADDENDUM 2



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Attorneys for Janalee S. Tobias and Judy Feld

**IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH**

ANDERSON DEVELOPMENT
COMPANY, L.C., a Utah limited liability
company,

Plaintiff,

v.

JANALEE S. TOBIAS, an individual, JUDY
FELD, an individual; SAVE OUR SOUTH
JORDAN RIVER VALLEY, INC., a Utah
Corporation, dba SOS and SAVE OPEN
SPACES; Brent Foutz and JANE and JOHN
DOES 1 through 20, inclusive,

Defendants.

**COUNTERCLAIM OF
JANALEE S. TOBIAS
AND JUDY FELD**

(Jury Demanded)

Civil No. 980902813

Judge Douglas Cornaby

JANALEE S. TOBIAS, an individual; and
JUDY FELD, an individual,

Counterclaim Plaintiffs,

v.

ANDERSON DEVELOPMENT
COMPANY, L.C., a Utah limited liability
company,

Counterclaim Defendant.

Pursuant to this Court's Ruling On Motions dated May 21, 2002, Defendants and Counterclaim Plaintiffs Janalee S. Tobias ("Mrs. Tobias") and Judy Feld ("Mrs. Feld") hereby plead their SLAPP Suit Counterclaim against Plaintiff and Counterclaim Defendant Anderson Development Company, L.C. ("Anderson Development"), and allege as follows:

GENERAL ALLEGATIONS

1. Mrs. Tobias is an individual residing in Salt Lake County, State of Utah.
2. Mrs. Feld is an individual residing in Salt Lake County, State of Utah.
3. On information and belief, Anderson Development is a Utah limited liability company with its principal place of business in Salt Lake County, State of Utah.
4. Jurisdiction and venue are proper in this court pursuant to Utah Code Ann. § 78-3-4 and § 78-13-7.
5. Anderson Development served a Summons and Complaint (the "Original Complaint") upon defendant Save Our South Jordan River Valley, Inc. ("SOS") on March 6, 1998,

prior to filing a Complaint. A copy of the Original Complaint is attached hereto as Exhibit 1. Anderson Development made changes to the Complaint initially served upon SOS in this action and filed a revised Complaint (the “Revised Complaint”) on March 17, 1998.

6. The Revised Complaint contains a conclusory “Preliminary Statement” in which Anderson Development claims its Complaint was filed “solely for the purpose to stop the wrongful conduct, as alleged herein, by SOS of interfering with contractual and economic relationships of Anderson Development.” No such “Preliminary Statement” appears in the Original Complaint. This language was added in response to press reports that Anderson Development had initiated this suit against Mrs. Tobias and Mrs. Feld to punish and intimidate them for their political and community activities.

7. Contrary to Anderson Development’s “Preliminary Statement,” Anderson Development’s suit against Mrs. Tobias and Mrs. Feld is a classic Strategic Lawsuit Against Public Participation (a “SLAPP suit”), specifically designed to punish Mrs. Tobias and Mrs. Feld for their vocal, but unsuccessful, opposition to Anderson Development’s proposed development of the Jordan Riverbottoms and to deter and intimidate Mrs. Tobias and Mrs. Feld and others from speaking out against the proposed Commercial Development and related issues, including a land trade involving the South Jordan City Park and the Redevelopment Agency (“RDA”).

8. In direct response to this specific suit, the Utah State Legislature enacted the Citizen Participation in Government Act, Utah Code Ann. § 78-58-101, *et seq.*, which provides procedural protections and remedies for citizens who are sued for their participation in the process of government.

9. Anderson Development filed its SLAPP suit against Mrs. Tobias and Mrs. Feld, who are nongovernment individuals, because of Mrs. Tobias' and Mrs. Feld's communications to South Jordan City governing bodies and officials, to county, state, and federal government officials, and to the electorate of South Jordan City on the issue of preservation of open spaces, specifically the Jordan Riverbottoms, which is a substantive issue of public interest and concern.

10. Anderson Development included Jane and John Does in its SLAPP suit to frighten and intimidate supporters of Mrs. Tobias and Mrs. Feld and to chill participation of their supporters in the process of government. At one time, "SOS," the citizens' group founded by Mrs. Tobias and Mrs. Feld, had hundreds of supporters, but immediately after citizens became aware of the filing of Anderson Development's SLAPP suit, the number dwindled to a handful.

11. Anderson Development has demanded huge money damages that are totally out of proportion to any possible harm suffered by Anderson Development.

12. Anderson Development has a history of securing approvals for its developments via SLAPP suit intimidation. Anderson Development has filed comparable lawsuits against those who oppose its projects in Bluffdale, Utah and Riverton, Utah. *See N.A.A.C.P., Inc. et al. v. Bluffdale City, et al.*, Civil No. 000205566, Third District Court for Salt Lake County, Murray Department; *Anderson Development, L.C. et al. v. Steve Brooks, et al.*, Civil No. 2:01CV 00165 ST, U.S. District Court for the District of Utah.

13. Anderson Development camouflaged its SLAPP suit in this matter by labeling it as a claim for intentional interference with prospective and existing economic relations. However, these

claims are totally without merit and this suit was filed by Anderson Development in bad faith for the sole purpose of punishing and harassing Mr. Tobias and Mrs. Feld..

14. The alleged interference pleaded in the Amended Complaint involves Anderson Development's acquisition of certain real property (the "Williams Property") from Boyd G. Williams, Dorothy D. Williams, and/or the Boyd and Dorothy Williams Charitable Trust (the "Williams Trust").

15. As set forth below, Anderson Development ultimately purchased the Williams Property. At no time did Boyd G. Williams, Dorothy D. Williams, or the Williams Trust ever breach, repudiate, or otherwise fail to perform any purchase agreement with Anderson Development.

16. Anderson Development, as the agent of Boyd Williams, filed an application for a Master Plan change and zoning change (the "Application") regarding the Williams Property with South Jordan City on or about October 7, 1996. Anderson Development filed the Application prior to obtaining any interest in the Williams Property. A copy of the Application is attached as Exhibit 1A.

17. On or about October 28, 1996, Anderson Development entered into a Real Estate Purchase Contract (the "First REPC") with Boyd G. Williams and Dorothy D. Williams for purchase of the Williams Property for development of the RiverPark Business Park (the "Project"). A copy of the First REPC is attached as Exhibit 2.

18. The First REPC recites in Addendum "A" that the First REPC is between "Anderson Development Company L.C. and/or assigns or nominee, as Buyer(s) and Boyd and Dorothy Williams

Charitable Remainder Trust, Seller(s),” however, Boyd G. Williams or Dorothy D. Williams signed the First REPC as individuals, not in any representative capacity.

19. Paragraph 5 of Addendum #1 to the First REPC provides:

Seller agrees to assist Buyer in the application and necessary filings to obtain necessary zoning to accommodate among other uses, the construction of class A grade offices buildings within the City of South Jordan. Seller to sign as “owner” and Buyer to sign as “applicant”. All costs associated therewith are the sole responsibility of the Buyer. The sale can be cancelled by the Buyer or the Seller if the city of South Jordan does not grant the necessary zoning and masterplan changes by June 30, 1997. Zoning also needs to have specific approval of the Seller.

20. Paragraph 7 of Addendum #1 to the First REPC provides, in pertinent part:

The sale is subject to the successful completion of the following tasks, all of which are contingencies required to be paid for by the buyer and are to be completed to the sole satisfaction of the Buyer prior to closing, which closing is to be upon the earlier of 1) **June 30, 1997** [or upon a subsequent date mutually acceptable to the Buyer and Seller] or 2) within 45 days after the successful completion of or **waiver** by the **Buyer** of the completion of the following tasks:

...

- e. Successful completion of the masterplanning and zoning requests referenced in paragraph 5 above.
- f. Buyer being successful in obtaining ownership to or rights-or-purchase on the neighboring lands to the north that now belong to the City of South Jordan.

21. On or about November 6, 1996, Mrs. Feld received a notice stating that a public hearing was to be held regarding the amendment of the Master Plan for certain properties, including the Williams Property, located at approximately 700 West to approximately 1000 West and from 10600 South to 11200 South, in South Jordan, Utah.

22. Mrs. Feld distributed a flier inviting neighbors to attend a meeting at her house on November 15, 1996, to meet with Gerald Anderson, the principal owner of Anderson Development, to hear about his proposed Commercial Development. A copy of this flier is attached as Exhibit 3.

23. On November 15, 1996, Mrs. Feld held the meeting with Mr. Anderson at her home for citizens who were concerned about the proposed Commercial Development. Mrs. Tobias had received a copy of the flier and attended the meeting at Mrs. Feld's home.

24. Mrs. Tobias and Mrs. Feld began to oppose amendment of the South Jordan City Master Plan and the zoning change requested by Anderson Development.

25. Mrs. Tobias and Mrs. Feld, as well as many other citizens of South Jordan City, opposed any change to the Master Plan and zoning that would allow commercial development because of the threatened destruction of precious open space and wildlife habitat.

26. South Jordan City adopted the Master Plan in 1992 after thorough public review and comment. *See Public Participation in the Planning Process, "A Master Plan for the preservation and development of the South Jordan Riverway Park"* (the "Master Plan Brochure"), attached as Exhibit 3A.

27. The goal of the Master Plan was "to provide present and future residents of South Jordan City with a unique open space and greenway corridor that preserves and reestablishes the riparian ecosystem and expands recreational and educational opportunities along the Jordan River within South Jordan." *See Exhibit 3A, Introduction.*

28. The Introduction further states:

Recognizing that development pressures along the Jordan River will continue, the South Jordan City Planning Commission, Mayor and City Council have prepared this master plan for the protection and enhancement of the natural areas along the river. The South Jordan Riverway Park area represents an outstanding and unique opportunity for the preservation of open space and environmentally sensitive lands and vegetation.

See Exhibit 3A, Introduction (emphasis added.)

29. The Master Plan concludes:

The South Jordan Riverway Park Master Plan will also function as a working document. It will serve as a valuable planning tool as the character of South Jordan continues to change. Implementation of the plan will occur over many years and will require the consistent effort and commitment of future staffs and administrations. More importantly, development of the riverway will require the continued support of South Jordan residents in order for it to be successful.

See Exhibit 3A, Conclusion (emphasis added.)

30. Mrs. Tobias and Mrs. Feld were merely defending the South Jordan City's well-established plan for the river bottoms, which included a wildlife habitat and wetland area, riverbank stabilization, picnic shelters, trails, an equestrian park, boat and canoe docks, staging areas, and recreation and entertainment areas. *See Exhibit 3A.*

31. Mrs. Tobias and Mrs. Feld, who are stay-at-home moms and homemakers, began a grass-roots campaign to express their concerns regarding the proposed amendment of the Master Plan and the proposed zoning change, to express opposition to the Commercial Development, to

advise local residents of meetings of the Planning and Zoning Commission and the South Jordan City Council, and to urge public participation in these meetings.

32. Mrs. Tobias' and Mrs. Feld's activities and opinions were highly publicized in the local press.

33. After their meeting with Gerald Anderson on November 15, 1996, Mrs. Tobias and Mrs. Feld prepared and distributed a flier opposing the Master Plan changes and zoning changes requested by Anderson Development, urging concerned citizens to contact the members of the South Jordan Planning Commission, and urging citizens to attend the public hearing on November 20, 1996. A copy of this flier is attached as Exhibit 4.

34. Mrs. Tobias and Mrs. Feld also distributed a flier inviting citizens to attend a strategy meeting at Mrs. Feld's home on November 18, 1996, to discuss ways to "stop the glass city from coming to South Jordan" and to discuss "saving our South Jordan Heritage for our families." A copy of this flier is attached as Exhibit 5.

35. On November 18, 1996, Mrs. Tobias and Mrs. Feld held a meeting with concerned citizens at Mrs. Feld's home and discussed their strategy for the South Jordan City Planning and Zoning Commission meeting to be held on November 20, 1996. A copy of the agenda for that meeting is attached as Exhibit 6.

36. At the November 18, 1996, meeting, Mrs. Tobias and Mrs. Feld, among others, drafted a petition (the "Master Plan Petition") containing the following language:

We, the residents of South Jordan, petition the South Jordan City Council and the South Jordan Planning Committee to preserve and protect the Jordan River Parkway in South Jordan. We demand that the zoning adhere to the current south Jordan Master Plan which has been designated as open spaces, including the 25 acre park.

37. Mrs. Tobias, Mrs. Feld and other supporters of SOS immediately began circulating the Master Plan Petition to concerned citizens of South Jordan City.

38. On November 19, 1996, Mrs. Feld spoke with South Jordan City Councilman Richard Warne to discuss the traffic impact of the Commercial Development. Mrs. Feld gave Councilman Warne information she had received from UDOT and the Wasatch Front Regional Council regarding traffic on 106th South. Councilman Warne advised Mrs. Feld to contact the Sharon Steel Mitigation, the Central Utah Project and the Utah State Legislature regarding possible purchase and preservation of the Jordan River wetlands and river bottoms. Mrs. Feld and Mrs. Tobias did contact these groups, as well as other groups who had an interest in preserving wetlands.

39. On November 20, 1996, Mrs. Tobias and Mrs. Feld, as well as many other concerned citizens, attended the Planning and Zoning Commission meeting at the South Jordan City Hall. One of the issues discussed at the hearing was whether to amend the Future Land Use Element of the General Plan for properties generally located west of the Jordan River to 1055 West and 10600 South to 11200 South Street from Open Space-Preservation to Office and Commercial development. A copy of the minutes from the November 20, 1996, Planning and Zoning Commission Meeting is attached as Exhibit 7

40. At the November 20, 1996, meeting, Mrs. Tobias and Mrs. Feld, as well as many others, voiced their opposition to the zoning change and their desire to preserve the land as open space, rather than allow its development.

41. Mrs. Feld read the Master Plan Petition and advised the Planning and Zoning Commission that the Master Plan Petition was being circulated and would be submitted to the Planning and Zoning Commission. Mrs. Feld also requested that traffic and environmental impact studies be done before any decision was made. *See* November 20, 1996 Minutes, p. 21.

42. Mrs. Tobias stated that she believed the residents of South Jordan cared enough about the property that they would come forward with enough money to save the property, if given time. *See* November 20, 1996 Minutes, p. 23.

43. Many concerned citizens came forward with money, including City Councilman Bradley G. Marlor, who put a \$100 bill on the dais, while others made pledges to donate money to purchase the property. *See* November 20, 1996 minutes, p. 31.

44. Councilman Marlor challenged the citizens then present to donate money to the Parks and Recreation Department to preserve the property because the City of South Jordan did not have the money. *See* November 20, 1996 minutes, p. 31.

45. Boyd Williams attended the November 20, 1996 meeting and stated that he already had three other offers pending on his property if Anderson Development's offer fell through. *See*

November 20, 1996 Minutes, p. 24. None of these offers was connected in any way to Mrs. Tobias or Mrs. Feld.

46. David Hatton, Boyd Williams' son-in-law, confirmed that Mr. Williams had offers from at least three developers who were present at the meeting who wanted to put in high-density housing on the Williams Property. *See* November 20, 1996 Minutes, p. 25.

47. The November 20, 1996, meeting lasted for nearly six hours, ending at 1:30 a.m. More than a hundred people attended the meeting to oppose the Commercial Development. So many citizens came that all of them could not fit into the room and many did not sign the sign-in sheet. Many citizens who wished to be heard did not have the opportunity to speak because of the length of the meeting and the lateness of the hour. (The City Council had allowed the City Planner and Anderson Development to speak for over two hours before allowing time for citizen comments.)

48. At the November 20, 1996 meeting, the Planning and Zoning Commission voted two (2) in favor and two (2) against amendment of the Master Plan. Because of the split vote, the issue was required to go before the City Council on December 17, 1996.

49. After the November 20, 1996 meeting, Mrs. Tobias and Mrs. Feld distributed a flier expressing their views on the proposed amendment of the Master Plan, opposing the amendment, and urging citizens to call South Jordan City Council members regarding their own opinions. A copy of the flier is attached as Exhibit 8.

50. Mrs. Tobias and Mrs. Feld also distributed a flier listing the “Top 10 Reasons to SOS (Save Our South Jordan River Valley),” which expressed their views on issues of public interest raised by the proposed Commercial Development. A copy of the flier is attached as Exhibit 9.

51. Also after the November 20, 1996 meeting, Mrs. Tobias contacted Governor Michael Leavitt’s office to seek the Governor’s assistance.

52. On November 25, 1996, Bob Linnell Deputy of Intergovernmental Relations from Governor Leavitt’s office, returned Mrs. Tobias’ call to advise Mrs. Tobias and Mrs. Feld to call Courtland Nelson, State Director of Parks and Recreation, and to call Mayor Theron Hutchings to ask for a citizens’ meeting.

53. On November 26, 1996, Mrs. Tobias and Mrs. Feld, as representatives of SOS, sent a letter to Dave Millheim, the South Jordan City Administrator, requesting that the residents of South Jordan City be given a three-month time period to present a better plan for development of the Jordan River Parkway and that the citizens be allowed to make a presentation of their plan to the South Jordan City Council in March 1997. A copy of the November 26, 1996 letter is attached as Exhibit 10.

54. The November 26, 1996 letter requested that Anderson Development be required to do some homework, including the following:

- A. We ask that Mr. Anderson gather information concerning the impact on traffic his mammoth project will generate on 10600 South and the surrounding roads including quiet residential streets located near the project.

- B. We also ask that Mr. Anderson complete a comprehensive Environmental Impact Study with particular interest paid to the viable ecosystem along the Jordan River Parkway.
- C. In order to make the landowners and residents confident in Mr. Anderson's ability to finance the project, we ask that he shows proof of funding. Residents have a concern with all the problems associated with building on a flood plain. More importantly, when an earthquake occurs [sic], the Jordan River Parkway is located on a dangerous earthquake zone where liquefaction is at its highest danger. Given these and other obstacles, Mr. Anderson may not be able to obtain financial backing and/or INSURANCE.
- D. We also request Mr. Anderson to hire an architect to do a rendering of his proposed project so that the City of South Jordan and its residents may more fully understand how 14 office buildings, hotels, and restaurants will affect the quality of life in South Jordan.

See Exhibit 10.

55. The November 26, 1996 letter also requested that no vote be taken with regard to changing the Master Plan until the residents of South Jordan City and Anderson Development completed their "homework." A copy of the letter was also sent to the South Jordan City Mayor and City Council.

56. Mrs. Tobias and Mrs. Feld included with the November 26, 1996 letter the original Master Plan Petitions signed by hundreds of South Jordan residents. Copies of signed Master Plan Petitions are attached as Exhibit 11.

57. By notice dated December 3, 1996, Mrs. Tobias and Mrs. Feld learned of a public meeting of the South Jordan City Council to be held on Tuesday, December 17, 1996, at the South Jordan Middle School for the purpose of receiving public comment on the application filed by

Anderson Development to amend the Master Plan. The meeting had to be held at the school in order to accommodate the large number of citizens anticipated to attend to voice their concerns and opinions.

58. On December 5, 1996, Mrs. Tobias and Mrs. Feld held a meeting with affected property owners at Tom Peterson's home to educate the property owners regarding conservation easements in the event that the City of South Jordan did not re-zone their property and Anderson Development did not purchase the Williams property.

59. Mrs. Tobias and Mrs. Feld opened the meeting by specifically stating that the purpose of the meeting was not to get the landowners to break the contracts they had entered into with Anderson Development, but rather to inform the landowners regarding a possible alternative for their land if the Master Plan was not amended and the re-zoning was not approved.

60. Mrs. Tobias and Mrs. Feld hoped that the property would not be re-zoned because citizens of South Jordan City wanted to preserve the established Master Plan; however, they were still in favor of the property owners receiving fair value for their land, even if it remained open space.

61. Wendy Fisher of Utah Open Lands (who was also a member of the Governor's Executive Committee for Open Space) was scheduled to make the presentation at the December 5, 1996, meeting. However, a sudden heavy snowstorm prevented her from making the drive from Park City to the meeting. Mrs. Tobias and Mrs. Feld spoke generally with the property owners about

the Utah Open Lands program with information that Wendy Fisher had faxed to the Peterson home.

62. On or about December 7, 1996, Mrs. Tobias saw Congressman-elect Merrill Cook at the GOP State Central Committee Meeting held in Sandy City Hall and invited him to drive past the ground. Mrs. Tobias spoke with Mr. Cook about the possibility of federal funds to preserve the ground as open space.

63. Mrs. Tobias and Mr. Cook drove to the area and while there, stopped to talk with Kay Edmunds, a property owner. Mrs. Tobias related to Mr. Edmunds that she had asked Mr. Cook to see if there were any federal funds available to help preserve the land in the event that it was not rezoned and Anderson Development did not purchase the property. Mr. Cook did not ever speak with Boyd Williams.

64. Mrs. Tobias and Mrs. Feld distributed a flier which advertised a concerned citizens meeting to be held on December 9, 1996, at the South Jordan Middle School to educate citizens about the Commercial Development and to prepare for a public meeting of the South Jordan City Council on December 17, 1996. The flier also gave the names and phone numbers of the City Council members and urged concerned citizens to contact the City Council regarding the Commercial Development. A copy of this flier is attached as Exhibit 12.

65. On December 9, 1996, Mrs. Tobias and Mrs. Feld attended the meeting for concerned citizens at the South Jordan Middle School. The citizens discussed how to present their concerns

to the City Council, especially with respect to the impact on traffic and the three schools affected by the proposed Commercial Development, at the upcoming City Council meeting on December 17, 1996.

66. Mrs. Tobias and Mrs. Feld subsequently prepared fliers announcing the public hearing on December 17, 1996 and arranged with the principal of the South Jordan Elementary School for these fliers to be sent home with students from South Jordan Elementary School. The flier contained information regarding traffic issues and encouraged citizens of South Jordan City to attend the public meeting of the City Council on December 17, 1996. The flier also contained the names and phone numbers of the Mayor and members of the City Council and urged citizens to contact these officials. A copy of the flier is attached as Exhibit 13.

67. By letter to Dave Millheim and the South Jordan City Council dated December 16, 1996, Mrs. Tobias, Mrs. Feld and other members of SOS requested that they be allowed to present five or six spokespersons to present information on the various topics discussed at the December 9, 1996 meeting. A copy of this letter is attached as Exhibit 14.

68. By separate letter to Dave Millheim and the South Jordan City Council, also dated December 16, 1996, Mrs. Tobias, Mrs. Feld, and other members of SOS requested that Anderson Development provide the following pertinent information: 1) Traffic Impact Study, 2) Site Plan to include details of the Commercial Development, and 3) an Environmental Impact Study. They requested that the City Council require Anderson Development to complete these studies before any

changes to the Master Plan or zoning were considered. A copy of this letter was also forwarded to Governor Leavitt. A copy of the letter is attached hereto as Exhibit 15.

69. Included with the letter was a document entitled "Traffic Watch Facts" which summarized traffic impact information Mrs. Feld had received from UDOT. A copy of "Traffic Watch Facts" is attached hereto as Exhibit 16.

70. By letter dated Friday, December 13, 1996, which Mrs. Tobias and Mrs. Feld did not receive until Tuesday, December 17, 1996, Anderson Development specifically threatened Mrs. Tobias and Mrs. Feld with litigation if they continued to exercise their First Amendment rights, stating, in pertinent part:

I will review some of the [sic] your activities that concern us: . . . asking South Jordan City officials to violate our due process right to a decision on our application for masterplan and zoning so that options on the properties would expire and that you would have more time to raise money to attempt to purchase the land yourselves...

Your ... effort to delay our due process at South Jordan City clearly extend[s] beyond the limits of the law. ... Any effort by you or anyone else to interfere with any [sic] our rights may subject each person involved to the possibility of litigation and the payment of damages. Damages literally could be in the millions of dollars.

A copy of this letter is attached as Exhibit 17.

71. Mr. Anderson's letter was intentionally timed to be delivered to Mrs. Tobias and Mrs. Feld on the day of the scheduled public meeting with the South Jordan City Council.

72. Mr. Anderson's purpose in sending this letter was to frighten and intimidate Mrs. Tobias and Mrs. Feld and other supporters of SOS to punish them for voicing their opinions, and to discourage them from speaking out in the future.

73. In an attempt to further frighten and intimidate Mrs. Tobias and Mrs. Feld, to diminish their credibility, and to otherwise undermine their exercise of their right to participate in the process of government, Mr. Anderson also sent copies of this letter to government officials, including Michael Mazuran, (South Jordan City Attorney), and Dave Millheim, (then the South Jordan City Administrator, who later was hired by Anderson Development).

74. Notwithstanding Mr. Anderson's threat, on December 17, 1996, Mrs. Tobias and Mrs. Feld and other members of SOS attended the public hearing at the South Jordan Middle School.

75. Supporters of SOS presented their views regarding issues such as infrastructure, property values, tax base, city parks, buffer zones, wildlife, foot access to the park, liquefaction, and alternative sites for the proposed Development. *See* South Jordan City Council Minutes, pertinent parts of which are attached as Exhibit 18, at pp. 16-19.

76. Mrs. Feld presented information she had received from Wasatch Front Regional Council and UDOT regarding the traffic impact on the community, expressed her concerns regarding the traffic impact, and forwarded UDOT's recommendation that a traffic impact study be done before any more construction in the area be considered. A copy of the text of Mrs. Feld's remarks is attached as Exhibit 19. *See also* Exhibit 18, p. 17.

77. Mrs. Tobias expressed her concerns over property value, preserving parks, and the possible availability of government funds to preserve the park if given time. Mrs. Tobias asked that the zoning not be changed. *See Exhibit 18, pp. 18-19.*

78. Numerous other concerned citizens voiced their opinions as well. *See Exhibit 18, pp. 19-29.*

79. The City Council voted to table Anderson Development's request to amend the Master Plan and to refer the issues to a subcommittee for review and recommendation. *See Exhibit 18, pp. 30-31.*

80. On December 26, 1996, Mrs. Tobias transmitted a letter to Governor Leavitt voicing her concerns regarding amendment of the Master Plan and the change of zoning from open space/recreation to commercial along the Jordan River Parkway. A copy of the letter is attached as Exhibit 20.

81. On January 7, 1997, Mrs. Tobias made a presentation at a meeting of the South Jordan City Council regarding preservation of the river bottom, open space and air quality. *See South Jordan City Council Minutes, pertinent portions of which are attached as Exhibit 21.*

82. Another SOS supporter, Theresa Royce, presented the "Jordan River Parkway Ecology Center Proposal," regarding development of the river bottoms as a science center. A copy of this proposal is attached as Exhibit 22.

83. On January 14, 1997, Mrs. Tobias and Mrs. Feld, as representatives of SOS, sent a proposal to Richard Warne and Kent Money of the South Jordan City Council asking them to recommend that the City Council vote against amending South Jordan City's Master Plan and to require developers to build projects in conformity with the requirements of the Master Plan. A copy of this letter is attached as Exhibit 23.

84. Mrs. Tobias and Mrs. Feld also sent out a flier inviting concerned citizens to attend an informal discussion on January 17, 1997, at Kay's Interiors to discuss development of the South Jordan River Parkway land. Mrs. Tobias and Mrs. Feld participated in this meeting with other citizens. A copy of the flier is attached as Exhibit 24.

85. By letter dated January 27, 1997, Gerald Anderson pleaded with Dave Millheim, the South Jordan City Administrator, for a "positive masterplan vote" by the end of January, 1997, "or we will lose the project." A copy of this letter is attached as Exhibit 25, p. 1.

86. Mr. Anderson acknowledged that other developers, particularly single family developers, were already interested in the property and were "attempting making back up offers if the project falls apart on [January] 31st." See Exhibit 25, p. 1.

87. Mr. Anderson's acknowledgment corresponds with Boyd Williams' statement at the November 20, 1996, South Jordan City Council meeting that he already had three pending offers if the Anderson Development offer fell through. See Exhibit 7, p. 24.

88. Mr. Anderson further complained that “The City has proposed that the Williams ground not be remasterplaned [sic] to accomodate [sic] some vocal private citizens who desire to build a science center,” a clear reference to citizens’ legitimate participation in the process of government. *See* Exhibit 25.

89. On January 28, 1997, the City Administrator, Dave Millheim, who later was hired by Anderson Development, submitted a recommendation to the South Jordan City Council to adopt a Resolution Amending the Future Land Use Plan Map to designate an area for an office park project on property running south from 10600 South to the northern boundary of the South Jordan City Park. A copy of the recommendation and the resolution proposed by Mr. Millheim is attached as Exhibit 26.

90. The recommendation and proposed resolution did not apply to the Williams Property.

91. The South Jordan City Council voted unanimously to approve, by resolution, amendment of the Future Land Use Plan with respect to properties lying between 106th South and the South Jordan City Park, subject to certain conditions regarding zoning, Class A office space and office park design standards, building criteria, open space, streets and traffic, site plan, and public improvements. The resolution also included a reverter clause. A copy of the relevant portions of the January 28, 1997 Minutes is attached as Exhibit 27.

92. The Master Plan amendment did not include the Williams Property. Boyd Williams expressed a concern that the area not be anything but office. However, the City Council deferred

answering Mr. Williams' questions pending negotiations with Anderson Development and Mr. Williams regarding location of the South Jordan City Park. *See Exhibit 27, page 20.*

93. SOS subsequently lodged with the South Jordan City Council a memorandum dated January 27, 1997 regarding their "Concerns with the *Resolution Adopting an Amended Future Land Use Plan Map and establishing certain requirements and conditions for properties located in the area West of the Jordan River to the Beckstead Ditch and from 10600 South to approximately 10900 South.*" A copy of this memorandum is attached as Exhibit 28.

94. On Thursday, February 20, 1997, Mrs. Tobias held a meeting at her house with Jodi Ketelsen, the South Jordan City long-range planner, Wendy Fisher of Utah Open Lands, Theresa Royce, and Mrs. Feld and others. The purpose of the meeting was to introduce Ms. Ketelsen to Ms. Fisher and to discuss conservation easements in general.

95. On February 21, 1997, Theresa Royce, Mrs. Tobias, Mrs. Feld, and other SOS supporters met with Gerald Anderson and Michael Hutchings (who was then a Third District Court Judge) of Anderson Development and Dave Millheim, Kent Money and Richard Warne of South Jordan City. The purpose of this meeting was to discuss the possibility of a citizens group purchasing the options on the Williams Property from Gerald Anderson to develop an educational nature center.

96. At that meeting, Theresa Royce told Gerald Anderson that SOS members had spoken with Wendy Fisher of Utah Open Lands and Jodi Ketelson of South Jordan City regarding

conservation easements. She invited Gerald Anderson to contact Wendy Fisher regarding a conservation easement for the Williams Property.

97. Members of SOS, not Mrs. Tobias or Mrs. Feld, requested permission from Gerald Anderson to allow Wendy Fisher to talk directly with Boyd Williams. Mr. Anderson responded “At this point, you can talk to Williams all you want.” However, to the best of Mrs. Tobias’ and Mrs. Feld’s knowledge, Wendy Fisher did not talk with Boyd Williams while the First REPC was in effect.

98. On March 6, 1997, Anderson Development, as agent for Boyd Williams, filed two applications to change the zoning for the Williams Property - one to change the zoning to OS, or in the alternative to CFF zone, and the other to change to R-1.8 to accommodate single family residences. Copies of the applications are attached as Exhibit 30.

99. In April of 1997, Mrs. Tobias and Mrs. Feld learned that Anderson Development’s request for the zoning change for the property north of the South Jordan City Park (which did not include the Williams Property) would be discussed at a meeting of the South Jordan City Planning and Zoning Commission on April 24, 1997, and at a special meeting of the South Jordan City Council on April 28, 1997.

100. Mrs. Tobias and Mrs. Feld distributed a flier inviting concerned neighbors to meet at the Feld Residence on April 23, 1997, to discuss issues raised by the rezoning application.

101. The flier also notified concerned citizens of the Planning and Zoning Commission hearing to be held on April 24, 1997, and the special meeting of the South Jordan City Council to be held on April 28, 1997, and urged citizens to attend these meetings. A copy of the flier is attached as Exhibit 29.

102. On April 23, 1997, Mrs. Tobias and Mrs. Feld met with other concerned citizens at the Feld home.

103. On April 24, 1997, Mrs. Tobias and Mrs. Feld attended the Planning and Zoning Commission hearing. Mrs. Tobias expressed her views regarding preservation of open space and wetlands and suggested that Anderson Development move its Commercial Development near the Bangerter Highway. She requested that the Planning and Zoning Commission table the request for re-zoning and that the Commission think it over before deciding. See Planning and Zoning Commission April 24, 1997 minutes, pertinent portions of which are as Exhibit 31, at p. 11.

104. Mrs. Feld stated that she had requested a citizen survey, that this request was initially denied, and that although the City was now doing a survey, the results were not available. Mrs. Feld asked the Commission to table the re-zone until the survey was available to see what citizens wanted for the area.¹ She suggested the City try to get a planetarium, children's museum or similar

¹ The results of the citizens survey, which were published in the June/July 1997 of the South Jordan City *Focus*, after the rezoning was approved, showed that over 90% of the citizens of South Jordan City thought that preservation of Natural landscapes, trees, and rivers was important or very important. The survey also showed that 86% of the citizens of South Jordan City would be willing to pay up to \$10 per month for five years to preserve and acquire open spaces.

development. She also presented her Traffic Facts handout to the Commission. *See Exhibit 31, p. 11 and Exhibit 16.*

105. The Planning and Zoning Commission voted unanimously to recommend that the property be re-zoned to Office/Service, and recommended allowing eight months for the developer to submit site plans and enter into a Development Agreement with South Jordan City. *See Exhibit 31, p. 12.*

106. On April 28, 1997, Mrs. Tobias and other concerned citizens attended the Jordan City Council Special Meeting.

107. Mrs. Tobias expressed her opposition to Anderson Development's massive Commercial Development and recommended that the City Council maintain the current zoning. She also expressed her desire that the City Council place a moratorium on building until a solution could be worked out to preserve the land. She suggested the Commercial Development be put out by the Bangerter Highway. *See Minutes of the City Council Special Meeting, April 28, 1997, pertinent portions of which are attached as Exhibit 32, p. 3*

108. Other concerned citizens spoke in opposition to the Commercial Development. *See Exhibit 32, pp. 3-4*

109. The City Council adopted Ordinance 97-7, which addressed building criteria, open space, trails, streets, traffic, site plan requirements public improvements and other issues with regard to the Commercial Development. A copy of Ordinance No. 97-7 is attached as Exhibit 33.

110. Section 3 of Ordinance 97-7 contains a self-executing reverter clause which provides:

In the event the property owner or developer have not complied with the requirements of this Ordinance and satisfied all of the conditions as set forth herein with the time(s) provided for satisfying the same, this Ordinance granting rezoning of the Property and amendment to the Zoning Map and Ordinance of the City to OS shall become null and void and the zoning for the Property shall revert to Agricultural A-5 which was in effect immediately prior to the effective date of this Ordinance without further action of the City Council being required therefor.

111. By its terms, Ordinance 97-7 would expire on December 28, 1997.

112. The City Council also voted unanimously to approve the rezoning application to Office/Service for approximately 65 acres, but did not include the Williams Property.

113. The City Council took no action to re-zone the Williams Property prior to June 30, 1997, the closing date for the First REPC.

114. Anderson Development did not ever close the sales transaction contemplated by the First REPC, even though the language of the First REPC specifically provided that Anderson Development could unilaterally waive the zoning and masterplanning requirements and proceed with the transaction. *See* First REPC Addendum #1, paragraph 7.

115. Boyd G. Williams, Dorothy D. Williams, and the Williams Trust did not ever breach or repudiate the First REPC. The sale failed to close prior to June 30, 1997, as required by the express terms of the First REPC, when Anderson Development did not waive the zoning and masterplanning changes described in the First REPC.

116. On June 10, 1997, Mrs. Tobias transmitted a fax to Congressman Merrill Cook seeking his help in locating funds to preserve the South Jordan River Valley Riverbottoms. A copy of the fax is attached as Exhibit 34.

117. After the closing dated for the First REPC had passed, Boyd Williams informed Mrs. Tobias, Mrs. Feld and others that he was interested in having an individual or organization make an offer on the Williams Property.

118. In the summer of 1997, Mrs. Tobias contacted Wendy Fisher of Utah Open Lands regarding possible purchase of the Williams Property.

119. In or about July of 1997, Dorothy Williams called Mrs. Tobias to obtain a copy of a video that Mrs. Tobias and Mrs. Feld had made of the Ogden Nature Center because Mrs. Williams wanted to show it to Gerald Anderson and Michael Hutchings. Dorothy Williams came to Mrs. Tobias' house to get the video.

120. In or about August of 1997, Boyd Williams advised Mrs. Tobias and Mrs. Feld that he was 90% certain that he wanted to sell the Williams Property to a preservation organization, but that he had some conflicts to overcome. He suggested that if Mrs. Tobias and Mrs. Feld would help him resolve some issues, he would be more inclined to selling the Williams Property to a preservation organization.

121. Mrs. Tobias and Mrs. Feld worked with South Jordan City, Dave Ross (the developer of Parkway Palisades, the subdivision just south of the Williams Property), and Kay Morrill (Mr.

Williams' neighbor) to resolve the fencing and water control issues identified by Mr. Williams, so that Mr. Williams would entertain the possibility of selling the Williams Property to a preservation organization to create an educational nature park. A copy of Mr. & Mrs. Williams' notes and diagrams regarding fencing and water is attached as Exhibit 35.

122. The fencing and water control issues were ultimately resolved, due in large measure to the efforts of Mrs. Tobias and Mrs. Feld.

123. In late summer of 1997, Mrs. Tobias and Mrs. Feld visited on two separate occasions with then County Commissioner Randy Horiuchi about preserving open spaces. Mr. Horiuchi indicated to Mrs. Tobias and Mrs. Feld that the County Commissioners were interested in providing money for preservation of open space, including the Williams Property.

124. Mr. Horiuchi said that he thought Salt Lake County could pledge about \$300,000 to purchase the Jordan River meander corridor, but would not be able to purchase the ground surrounding the meander corridor. Mr. Horiuchi suggested that Mrs. Tobias hurry and ask for funding so that he could present the request at the Commission's next budget meeting. He told Mrs. Tobias that he would send someone from his office to appraise the value of the ground.

125. Mrs. Tobias and Mrs. Feld relayed all of this information to Boyd Williams. Boyd Williams responded that he had a standing offer from a Mr. McArthur of McArthur Homes to purchase the Williams Property.

126. In October of 1997, Mrs. Tobias and Mrs. Feld met with then County Commissioner Brent Overson to discuss the possibility of getting funds to preserve open spaces, including the Williams Property. Mr. Overson confirmed what Mr. Horiuchi had said about purchasing the Jordan River meander corridor. Mr. Overson toured the Williams Property with Boyd Williams, Mrs. Tobias and Mrs. Feld, and talked with Mr. Williams.

127. In late October, 1997, Mrs. Tobias and Mrs. Feld learned that Anderson Development was negotiating with South Jordan City to trade the South Jordan City Park for other property to enlarge his Commercial Development.

128. Mrs. Tobias and Mrs. Feld distributed a flier called "Save Our Park, " which expressed their view of the issues raised by the proposed park trade, together with a "Help Save Our Park" sign-up-sheet, seeking in-kind contributions of materials, skill and time, as well as financial contributions, to preserve the park in the Jordan Riverbottoms. Copies of the flier and signed "Help Save Our Park" sign-up sheets are attached as Exhibit 36.

129. Mrs. Tobias and Mrs. Feld also distributed a "Petition: Do Not Move the Park By the Jordan River, Do Not Open Jordan River Drive." Copies of the signed petitions are attached as Exhibit 37.

130. On October 23, 1997, Mrs. Tobias and Mrs. Feld issued a news release regarding their efforts to save the Jordan Riverbottoms. This news release was transmitted to the Mayor of South

Jordan City and members of the South Jordan City Council on or about November 6, 1997. A copy of the news release is attached as Exhibit 38.

131. On or about November 4, 1997, Mrs. Tobias and Mrs. Feld sent a letter to Courtland Nelson, State Director of Parks, regarding their work with Wendy Fisher, Utah Open Lands, to preserve the park. A copy of the first page of this letter is attached as Exhibit 39.

132. On November 6, 1997, Mrs. Tobias and Mrs. Feld met with Wes Johnson and Terry Green of the State Parks and Recreation Department to ask them not to trade the City Park and not to move it from its present location. During this meeting, they talked about the threatening letter from Anderson Development.

133. Mrs. Tobias and Mrs. Feld transmitted a copy of Anderson Development's threatening letter, together with their responses to Mr. Anderson's accusations, to Mr. Johnson and Mr. Green by letter dated November 7, 1997. A copy of the letter is attached as Exhibit 40.

134. Environmental groups besides SOS were also interested in preserving the river bottoms. In November 1997, a group called Better Alternatives, LLC, submitted a proposal to South Jordan City to develop a "Master Plan for Nature Interpretation and Environmental Learning Along Identified Sections of the Jordan River." A copy of their proposal is attached as Exhibit 41.

135. Mrs. Tobias and Mrs. Feld made arrangements for Wendy Fisher to talk to the South Jordan City Council in their work meeting on November 18, 1997, about a road issue that needed to be resolved for the Utah Open Lands transaction, but Wendy Fisher was bumped from the agenda

by the South Jordan City Administrator, Dave Millheim, who subsequently was hired by Anderson Development. Mr. Millheim scheduled Anderson Development on the agenda in place of Wendy Fisher.

136. In November 1997, Mrs. Tobias and Mrs. Feld learned that the South Jordan City Council would hold a public hearing on November 25, 1997, regarding Anderson Development's request for a 4-month extension of time to meet the requirements of Ordinance 97-7 so that the land would not revert back to open space.

137. Mrs. Tobias and Mrs. Feld distributed a flier advising citizens of the public hearing to be held on November 25, 1997, and urging public participation at the hearing. A copy of the Flier is attached as Exhibit 42.

138. Unknown to Mrs. Tobias and Mrs. Feld, Anderson Development entered into a Real Estate Purchase Contract (the "Second REPC") with the Williams Trust for purchase of the Williams Property on November 25, 1997, prior to the meeting of the South Jordan City Council. A copy of the Second REPC is attached as Exhibit 43.

139. On November 25, 1997, Mrs. Tobias and Mrs. Feld attended the meeting of the South Jordan City Council, where Anderson Development asked for a 4-month extension of time to meet the requirements of Ordinance 97-7 so that the land would not revert back to open space.

140. At the South Jordan City Council Meeting on November 25, 1997, after he had already entered into the Second REPC with Anderson Development, Boyd Williams stated that

anyone who could offer as much as Anderson Development had offered could purchase the Williams Property, the opportunity was there. He stated he had never received an offer. *See Minutes of November 25, 1997 City Council Meeting*, pertinent portions of which are attached as Exhibit 44, p. 16.

141. David Hatton, Boyd Williams' son-in-law, stated privately immediately after the meeting that Utah Open Lands had made an offer to purchase the Williams Property, but it was "ridiculously low."

142. Mrs. Tobias and Mrs. Feld both spoke at the November 25, 1997 meeting about their efforts to preserve the river bottoms. *See Exhibit 44*, pp. 14-15

143. The City Council voted to postpone a decision on Anderson Development's request for an extension of time until its December 16, 1997, meeting.

144. Hopeful that the City Council would be willing to address their concerns, Mrs. Tobias and Mrs. Feld distributed a flier in South Jordan City to advise the South Jordan City citizens of the December 16, 1997, meeting and to urge public attendance at the meeting. A copy of the flier is attached as Exhibit 45.

145. Mrs. Tobias, Mrs. Feld and others attended the December 16, 1997 City Council meeting and urged the City Council not to grant the proposed extension.

146. Notwithstanding citizen opposition, the City Council adopted Ordinance 97-20 and granted an extension of time until April 28, 1998, for Anderson Development to comply with Ordinance 97-7. A copy of Ordinance 97-20 is attached as Exhibit 46.

147. Mrs. Tobias and Mrs. Feld, among others, sought to challenge the City Council's decision to grant Anderson Development a 4-month extension. Mrs. Tobias and Mrs. Feld and others decided to circulate petitions to allow voters the opportunity to overturn the extension of time through a ballot initiative.

148. Accordingly, on January 20, 1998, Mrs. Tobias, Mrs. Feld and others each submitted an Application to Circulate a Referendum Petition to South Jordan City to challenge Ordinance 97-20 by a referendum. Copies of Mrs. Tobias' and Mrs. Feld's applications are attached as Exhibit 48.

149. The South Jordan City Council held a Special Meeting on January 26, 1998, to discuss the Commercial Development. The minutes reflect:

Councilman Chandler made a motion to form negotiating teams. One that would have Mayor McMullin and Councilman Warne that would deal mainly with parks, open space, etc. The other group would consist of Mayor McMullin, Councilman Chandler, Staff, the City Attorney (as needed), as well as any community groups that might need to be represented when appropriate. Councilman Criner seconded the motion.

See Minutes of South Jordan City Council Special Meeting, January 26, 1998, attached as Exhibit 47, p. 3 (emphasis added.)

150. The vote was unanimous in favor of involving community groups in the process. *See Exhibit 48, p. 4.*

151. On January 30, 1998, Mrs. Tobias and Mrs. Feld and others, including State Senator R. Mont Evans, met with Governor Mike Leavitt regarding their efforts to save the South Jordan Riverbottoms and to seek Governor Leavitt's help. Governor Leavitt expressed his appreciation for the citizens' efforts to save open spaces. A photograph of Mrs. Tobias and Mrs. Feld and other supporters of SOS is attached as Exhibit 49.

152. By letter dated February 13, 1998, Dave Millheim the acting South Jordan City Recorder (who was also the City Administrator and was later hired by Anderson Development) advised Mrs. Tobias and Mrs. Feld that "On February 10, 1998, the City Council formally responded in open meeting rejecting your application."

153. Millheim refused to provide Mrs. Tobias and Mrs. Feld, as referendum sponsors, with the referendum petitions required by Utah Code Ann. §20A-7-604(2), thus thwarting the referendum process.

154. On February 19, 1998, Mrs. Tobias, Mrs. Feld and Brent Foutz filed a Petition for Extraordinary Writ with the Utah Supreme Court, seeking an order requiring the South Jordan City Recorder to accept their applications and to furnish them with five copies of the referendum petition and five signature sheets as required by Utah Code Ann. § 20A-7-604(2). A copy of the Petition is attached as Exhibit 50.

155. Mrs. Feld and Mrs. Tobias subsequently distributed a flier urging citizen participation in meetings to be held on March 5, 1998, regarding a 5-lane highway to be built through Parkway

Palisades and the glass city consisting of up to 14 six-story building to be built from 10600 South south to Parkway Palisades. A copy of the flier is attached as Exhibit 51.

156. On March 5, 1998, Mrs. Tobias and Mrs. Feld, met with other concerned citizens. Following this meeting, 19 citizens met with South Jordan City Mayor, Dix McMullin, at South Jordan City Hall to express their concerns regarding the 5-lane highway and the “glass city.”

157. Anderson Development served its Original Complaint on March 6, 1998, the day after the citizens’ meeting with Mayor McMullin.

158. Service of Anderson Development’s SLAPP suit Original Complaint was clearly meant to frighten and intimidate Mrs. Tobias and Mrs. Feld from further participation in the public discussions regarding the Commercial Development.

159. The City Council had unanimously voted to involve community groups in future discussions regarding the Commercial Development and Anderson Development clearly did not want Mrs. Tobias and Mrs. Feld to participate.

160. Notwithstanding Anderson Development’s SLAPP suit, Mrs. Tobias and Mrs. Feld continued to participate in the process of government and attended the next Planning & Zoning Commission hearing on March 11, 1998.

161. Mrs. Tobias and Mrs. Feld voiced their concerns regarding Anderson Development’s General Site Plan. Other citizens also spoke in support of Mrs. Tobias’ and Mrs. Feld’s efforts, and spoke against the General Site Plan. Some citizens spoke in favor of the General Site Plan. *See*

Minutes of Planning and Zoning Commission Meeting, March 11, 1998, relevant portions of which are attached as Exhibit 52, pp. 6-13.

162. The Planning and Zoning Commission voted to approve Anderson Development's General Site Plan.

163. Although Anderson Development had already served its Original Complaint, Anderson Development waited to file its Revised Complaint after the Planning and Zoning Commission had already approved Anderson Development's General Site Plan.

164. On or about April 7, 1998, Mrs. Tobias and Mrs. Feld mailed 7000 referendum and initiative petition forms to citizens in South Jordan City. The initiative was to protect the 25 acre South Jordan City Park by returning it to Utah State Parks and Recreation and to prohibit future commercial development in the riverbottoms. The referendum petition was to submit Ordinance 97-20, granting Anderson Development a 4-month extension of time to comply with Ordinance 97-7, to a vote. A copy of the mailing is attached as Exhibit 53.

165. Mrs. Tobias and Mrs. Feld and other SOS members sent out the petitions hoping that if the Supreme Court ruled in their favor regarding denial of their referendum request, they would have at least 1500 signatures by the time the decision was handed down and they could get the issue on the ballot.

166. Within one week after Mrs. Tobias and Mrs. Feld mailed out the petitions, hundreds of citizens had signed the petitions and returned the signed petitions to Mrs. Tobias and Mrs. Feld.

167. Mrs. Tobias and Mrs. Feld were extremely gratified by the response of so many citizens, who put forth the effort to read six pages of information, to sign the petitions in front of witnesses, and to return the petitions using their own stamps. This effort by the citizens demonstrates the extremely high interest level of citizens in South Jordan City in the issues surrounding the Commercial Development.

168. On April 14, 1998, Mrs. Feld and other citizens obtained a Temporary Restraining Order restraining South Jordan City from “permitting use contrary to A-5 zoning with respect to the open lands located just south of 10600 between the Jordan River and Beckstead Canal, which are the subject of Ordinance 97-7, until this matter is heard by the Court on the Motion for a Temporary Restraining Order.”

169. On April 15, 1998, the sale of the Williams Property closed in accordance with its terms. The Williams Trust did not ever breach or repudiate the Second REPC.

170. At a hearing on April 21, 1998, the motion for a Preliminary Injunction was denied and the Temporary Restraining Order was lifted.

171. At 4:00 p.m. on Friday, April 24, 1998, South Jordan City posted a notice of a City Council meeting to be held the next day, Saturday, April 25, 1998, at 5:00, to discuss the General Site Plan.

172. On Saturday, April 25, 1998, the City Council approved Anderson Development’s General Site Plan without receiving public comment.

173. Mrs. Tobias and Mrs. Feld continued to oppose the park trade and the re-zone of the Williams Property, but public interest in the issues was chilled when citizens learned of Anderson Development's suit against Mrs. Tobias and Mrs. Feld.

174. In the spring of 1999, Anderson Development proposed to dismiss its SLAPP suit if Mrs. Tobias and Mrs. Feld would agree to be restrained for not less than three years from (1) opposing or otherwise participating in any discussion or public meeting regarding the Commercial Development, (2) encouraging participation by anyone else in public meetings regarding the Commercial Development, (3) discussing the Commercial Development with the media, and (4) threatening or initiating any lawsuits, ethical complaints or regulatory action against ADC and its employees or agents arising out of the Commercial Development.

175. Mrs. Tobias and Mrs. Feld refused to submit to Anderson Development's oppressive demands to refrain from participating in the process of government.

176. Anderson Development subsequently filed its Amended Complaint on or about June 8, 1999.

FIRST CLAIM FOR RELIEF

(SLAPP Suit Counterclaim - Utah Code Ann. § 78-58-101, *et seq.*)

177. Mrs. Tobias and Mrs. Feld reallege the allegations of the foregoing paragraphs.

178. Mrs. Tobias and Mrs. Feld believe that this action is primarily based on, relates to, and is in response to the acts of Mrs. Tobias and Mrs. Feld while participating in the process of

government, including the exercise of their rights to influence government decisions as set forth above, and that this action was brought by Anderson Development primarily to harass Mrs. Tobias and Mrs. Feld, within the meaning of Utah Code Ann. § 78-58-101, *et seq.*

179. Mrs. Tobias and Mrs. Feld further believe that this action is designed to prevent, interfere with, and chill public participation in the process of government and that the primary reason for the filing of the Complaint was to interfere with Mrs. Tobias' and Mrs. Feld's First Amendment rights, within the meaning of Utah Code Ann. § 78-58-101, *et seq.*

180. Mrs. Tobias and Mrs. Feld believe that their conduct, as specifically set forth above and in the Affidavit of Janalee S. Tobias and the Affidavit of Judy Feld filed concurrently herewith, which constitutes participation in the process of government, gives rise to Anderson Development's complaint.

181. This action was commenced and has been continued by Anderson Development without a substantial basis in fact and law and cannot be supported by a substantial argument for the extension, modification or reversal of existing law.

182. The thrust of Anderson Development's claim is that, because of Tobias' and Feld's actions, the zoning change necessary for development of the massive Project was delayed, that the more favorable terms of the First REPC expired before the necessary zoning change was enacted, and that, because of the delayed zoning change, Anderson Development was ultimately forced to

enter into the Second REPC that required Anderson Development to pay the Williams Trust more for the Williams Property.

183. Tobias' and Feld's' efforts to oppose the Commercial Development before municipal decision makers are privileged by the First Amendment to the United States Constitution.

184. Tobias and Feld had a valid interest in protecting the Jordan Riverbottoms as open space and in preserving their quality of life and the value of their own property and community and were justified in their efforts to oppose the amendment of the Master Plan, the zoning changes, and the park trade.

185. Anderson Development's claims that Tobias and Feld intentionally interfered with the REPCs are a sham because the Williams Trust never breached or repudiated either of the REPCs.

186. Neither Mrs. Tobias nor Mrs. Feld ever urged Mr. Williams, Mrs. Williams, or the Williams Trust to breach either of the REPC's or to sell the Williams Property to other buyers.

187. Boyd Williams acknowledged in November of 1996 that he had other offers pending if the Anderson Development's offer represented by the First REPC did not close. These offers were wholly unrelated to Mrs. Tobias and Mrs. Feld.

188. Mrs. Tobias and Mrs. Feld never brought potential purchasers to Boyd Williams during the term of the either REPC.

189. Mrs. Tobias and Mrs. Feld never assured Mr. Williams that they could raise money to buy the Williams Property for more than Anderson Development was offering.

190. Anderson Development intentionally chose not to close the sales transaction contemplated by the First REPC, notwithstanding that Anderson Development had the option to unilaterally waive any masterplan or zoning requirements.

191. Mr. Williams invited people to make offers on the Williams Property after he had already executed the Second REPC in November of 1997.

192. The Second REPC closed in accordance with its terms one month after Anderson Development filed this action.

193. Comparison of the First REPC and the Second REPC shows that the actual purchase price for the Williams Property decreased by \$50,000.

194. This action was commenced, and has been continued, by Anderson Development for the sole purpose of harassing, intimidating, punishing, and otherwise maliciously inhibiting the free exercise of Mrs. Tobias' and Mrs. Feld's First Amendment rights and to chill other citizens who opposed the Commercial Development. It was not commenced to "stop" Mrs. Tobias and Mrs. Feld from "interfering" with Anderson Development's contractual and economic relationship with Boyd Williams.

195. Pursuant to Utah Code Ann. § 78-58-104(2), Tobias and Feld are entitled to dismissal of Anderson Development's claims against them.

196. Pursuant to Utah Code Ann. § 78-58-105(1)(a), Tobias and Feld are entitled to recover from Anderson Development their costs and reasonable attorney's fees incurred in defending this action.

197. Pursuant to Utah Code Ann. § 78-58-105(1)(b), Tobias and Feld are entitled to recover from Anderson Development compensatory damages in an amount to be determined at trial.

SECOND CLAIM FOR RELIEF

(SLAPP Suit Counterclaim - Abuse of Process)

198. Mrs. Tobias and Mrs. Feld incorporate by reference the allegations of the foregoing paragraphs.

199. The essence of abuse of process is a perversion of the process to accomplish some improper purpose, such as compelling its victim to do something which he would not otherwise be legally obligated to do.

200. This action is designed to compel Mrs. Tobias and Mrs. Feld to relinquish their First Amendment right to participate in the process of government and to speak out on public matters. Mrs. Tobias and Mrs. Feld would not otherwise be obligated to relinquish such rights.

201. Anderson Development served its Original Complaint on March 6, 1998, only one day after a citizens meeting with the Mayor of South Jordan City, within one month after the filing of the Petition for Extraordinary Writ, and less than one week before an important hearing before the Planning and Zoning Commission.

202. Anderson Development's clear intent was to punish and intimidate Tobias and Feld and to forestall them and other citizens from exercising their First Amendment rights.

203. As the direct and proximate result of Anderson Development's abuse of process, Mrs. Tobias and Mrs. Feld have suffered severe emotional distress and have incurred substantial money damages.

204. As the reasonably foreseeable, direct and proximate result of Anderson Development's abuse of process, Mrs. Tobias and Mrs. Feld have been forced to retain counsel to defend themselves against Anderson Development's meritless, bad faith lawsuit and have incurred substantial attorney fees.

205. Tobias and Feld are entitled to recover compensatory damages from Anderson Development in an amount to be determined at trial.

206. Mrs. Tobias and Mrs. Feld are further entitled to recover their reasonable attorney's fees from Anderson Development in an amount to be determined at trial.

THIRD CLAIM FOR RELIEF

(SLAPP Suit Counterclaim - Wrongful Civil Proceedings)

207. Mrs. Tobias and Mrs. Feld incorporate by reference the allegations of the foregoing paragraphs.

208. Anderson Development has brought its malicious civil claims against Mrs. Tobias and Mrs. Feld without probable cause.

209. As set forth above, Anderson Development's clear intent is to punish and harass Mrs. Tobias and Mrs. Feld, rather than to secure the just adjudication of legitimate claims.

210. As the direct and proximate result of Anderson Development's wrongful use of civil proceedings, Mrs. Tobias and Mrs. Feld have suffered severe emotional distress and incurred substantial money damages.

211. As the reasonably foreseeable, direct and proximate result of Anderson Development's wrongful use of civil proceedings, Mrs. Tobias and Mrs. Feld have been forced to retain counsel to defend themselves against Anderson Development's meritless, bad faith lawsuit and have incurred substantial attorney fees.

212. Tobias and Feld are entitled to recover compensatory damages from Anderson Development in an amount to be determined at trial.

213. Mrs. Tobias and Mrs. Feld are further entitled to recover their reasonable attorney's fees from Anderson Development in an amount to be determined at trial.

FOURTH CLAIM FOR RELIEF

(SLAPP Suit Counterclaim - Intentional Infliction of Emotional Distress)

214. Mrs. Tobias and Mrs. Feld incorporate by reference the allegations of the foregoing paragraphs.

215. Anderson Development's bad faith filing of this meritless \$1.2 million lawsuit against ordinary citizens in order to punish them for exercising their First Amendment rights and to deter

them from further exercising their rights is outrageous and offends generally accepted standards of decency and morality in the community.

216. By committing these outrageous acts, Anderson Development intended to cause Tobias and Feld emotional distress, or acted with reckless disregard of the probability of causing emotional distress.

217. As the direct and proximate result of Anderson Development's outrageous conduct, Tobias and Feld have suffered severe emotional distress, including but not limited to anxiety and fear over losing their homes and businesses, as well as political chill.

218. Mrs. Tobias and Mrs. Feld are entitled to recover compensatory damages from Anderson Development in an amount to be determined at trial.

219. Mrs. Tobias and Mrs. Feld are entitled to recover their reasonable costs and attorneys' fees to the extent permitted by Utah law, in an amount to be determined at trial.

FIFTH CLAIM FOR RELIEF

(SLAPP Suit Counterclaim - Negligent Infliction of Emotional Distress)

220. Mrs. Tobias and Mrs. Feld incorporate by reference the allegations of the foregoing paragraphs.

221. In committing the wrongful acts set forth above, Anderson Development should have realized that its conduct involved an unreasonable risk of causing Mrs. Tobias and Mrs. Feld to suffer emotional distress.

222. As the direct and proximate result of Anderson Development's conduct, Mrs. Tobias and Mrs. Feld have suffered severe emotional distress, including but not limited to anxiety and fear over losing their homes and business, and political chill.

223. Mrs. Tobias and Mrs. Feld have also suffered physical and mental injury as the direct and proximate result of Anderson Development's conduct.

224. Mrs. Tobias and Mrs. Feld are entitled to recover compensatory damages from Anderson Development in an amount to be determined at trial.

225. Mrs. Tobias and Mrs. Feld are entitled to recover their reasonable costs and attorneys' fees to the extent permitted by Utah law.

SIXTH CLAIM FOR RELIEF

(SLAPP Suit Counterclaim - Punitive Damages)

226. Mrs. Tobias and Mrs. Feld incorporate by reference the allegations of the foregoing paragraphs.

227. Anderson Development's actions as described herein constitute willful and malicious conduct with a manifest disregard of, and a knowing and reckless indifference for, the rights of Mrs. Tobias and Mrs. Feld, and justify an award of punitive damages in accordance with Utah Code Ann § 78-18-1 and Utah law.

228. Mrs. Tobias and Mrs. Feld are entitled to recover punitive damages in an amount sufficient to punish them and to warn others not to use the courts for improper purposes, which amount is to be determined at trial.

229. Mrs. Tobias and Mrs. Feld are entitled to recover their reasonable costs and attorney fees to the extent permitted by Utah law.

SEVENTH CLAIM FOR RELIEF

(SLAPP Suit Counterclaim - Attorney Fees for Filing of Meritless Claims in Bad Faith)

230. Mrs. Tobias and Mrs. Feld incorporate the foregoing paragraphs by reference.

231. Anderson Development's claims are without merit and were not brought or asserted in good faith within the meaning of Utah Code Ann. § 78-27-56(1).

232. As set forth above, Anderson Development's claims have no basis in law or fact.

233. Anderson Development lacked an honest belief in the propriety of its claims, Anderson Development filed its claims with the intent to take unconscionable advantage of Mrs. Tobias and Mrs. Feld, and Anderson Development intended to act with the knowledge that its activities would injure Mrs. Tobias and Mrs. Feld.

234. Mrs. Tobias and Mrs. Feld are entitled to an award of their reasonable attorney's fees incurred in defending this action pursuant to Utah Code Ann. 78-27-56.

PRAYER FOR RELIEF

WHEREFORE, Defendants and Counterclaim Plaintiffs Janalee S. Tobias and Judy Feld hereby pray for judgment against Anderson Development Company, L.C., as follows:

1. On the First Claim for Relief:

a. That this Court adjudge and decree that the primary purpose of this action is to prevent, interfere with, and chill the rights of Defendants and Counterclaim Plaintiffs Janalee S. Tobias and Judy Feld to participate in the process of government;

b. That this Court adjudge and decree that this action was commenced and continued without a substantial basis in fact and law and cannot be supported by a substantial argument for the extension, modification or reversal of existing law;

c. That this Court adjudge and decree that this action was commenced and continued for the purpose of harassing, intimidating, punishing or otherwise maliciously inhibiting the free exercise of rights granted under the First Amendment to the U.S. Constitution;

d. That this Court dismiss Anderson Development's claims against Defendants and Counterclaim Plaintiffs Janalee S. Tobias and Judy Feld, with prejudice and on the merits, pursuant to Utah Code Ann. § 78-58-104(2);

e. That Defendants and Counterclaim Plaintiffs Janalee S. Tobias and Judy Feld have and recover their costs and reasonable attorney's fees incurred in this action, pursuant to Utah Code Ann. § 78-58-105(1)(a); and

f. That Defendants and Counterclaim Plaintiffs Janalee S. Tobias and Judy Feld have and recover compensatory damages pursuant to Utah Code Ann. § 78-58-105(1)(b) in an amount to be determined at trial.

2. On the Second Claim for Relief:

a. That Defendants and Counterclaim Plaintiffs Janalee S. Tobias and Judy Feld have and recover compensatory damages in an amount to be determined at trial; and

b. That Defendants and Counterclaim Plaintiffs Janalee S. Tobias and Judy Feld have and recover their reasonable costs and attorneys' fees to the extent permitted by Utah law.

3. On the Third Claim for Relief:

a. That Defendants and Counterclaim Plaintiffs Janalee S. Tobias and Judy Feld have and recover compensatory damages in an amount to be determined at trial; and

b. That Defendants and Counterclaim Plaintiffs Janalee S. Tobias and Judy Feld have and recover their reasonable costs and attorneys' fees and cost to the extent permitted by Utah law.

4. On the Fourth Claim for Relief:

a. That Defendants and Counterclaim Plaintiffs Janalee S. Tobias and Judy Feld have and recover compensatory damages in an amount to be determined at trial; and

b. That Defendants and Counterclaim Plaintiffs Janalee S. Tobias and Judy Feld have and recover their reasonable costs and attorneys' fees to the extent permitted by Utah law.

On the Fifth Claim for Relief:

a. That Defendants and Counterclaim Plaintiffs Janalee S. Tobias and Judy Feld have and recover compensatory damages in an amount to be determined at trial; and

b. That Defendants and Counterclaim Plaintiffs Janalee S. Tobias and Judy Feld have and recover their reasonable costs and attorney fees to the extent permitted by Utah law.

5. On the Sixth Claim for Relief:

a. That Defendants and Counterclaim Plaintiffs Janalee S. Tobias and Judy Feld have and recover punitive damages in an amount to be determined at trial.

7. On the Seventh Claim for Relief:

a. That Defendants and Counterclaim Plaintiffs Janalee S. Tobias and Judy Feld have and recover their reasonable attorneys' fees pursuant to Utah Code Ann. § 78-27-56.


8. For such other relief as the Court shall deem reasonable and appropriate.

JURY DEMAND

Pursuant to Rule 38(b) of the Utah Rules of Civil Procedure, Defendants and Counterclaim Plaintiffs Janalee S. Tobias and Judy Feld hereby demand a jury trial on all issues triable by a jury. The jury demand fee has been paid.

DATED this 2 day of July, 2002.

PARRY ANDERSON & MANSFIELD

A handwritten signature in black ink, appearing to read "Dale F. Gardiner", is written over a horizontal line.

Douglas J. Parry

Dale F. Gardiner

Attorneys for Defendants and Counterclaim Plaintiffs
Janalee S. Tobias and Judy Feld

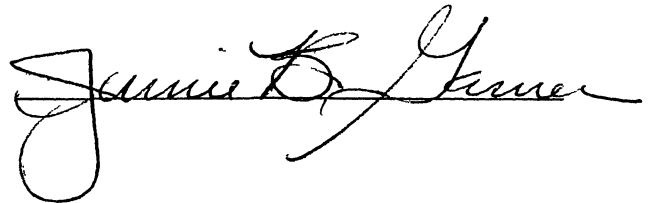
CERTIFICATE OF SERVICE

I hereby certify on this 2^d day of July 2002, I served the foregoing **COUNTERCLAIM OF JANALEE S. TOBIAS AND JUDY FELD** by mailing true and correct copies thereof via first class

United States mail, postage prepaid, addressed as follows:

D. Miles Holman
Jeffrey N. Walker
HOLMAN & WALKER
9537 South 700 East
Sandy, UT 84070

Brent Foutz
Defendant pro se
1320 East 500 South
Salt Lake City, UT 84101

A handwritten signature in black ink, appearing to read "Jamie B. Garner". The signature is written in a cursive style with a large, looped initial "J" and a horizontal line extending from the end of the name.