

1990

Joseph and Evelyn Flint v. Darlene Hutchinson,  
West Valley City Board of Adjustments, West Valley  
Board of Adjustments : Petition for Writ of  
Certiorari

Utah Supreme Court

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Grant W.P. Morrison, Aric Cramer; Attorneys for Appellant.

Paul T. Morris; West Valley City Attorney; Gary R. Crane; Assistant W.V.C. Attorney; Attorneys for Respondents.

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### Recommended Citation

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DOCUMENT

BRIEF

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DOCKET NO.

900397

IN AND FOR THE SUPREME COURT  
STATE OF UTAH

JOSEPH AND EVELYN FLINT,  
PETITIONER/ APPELLANT,

VS.

DARLENE HUTCHINSON, CHAIRMAN  
WEST VALLEY CITY BOARD OF  
ADJUSTMENTS AND WEST VALLEY BOARD  
OF ADJUSTMENTS,  
RESPONDENT/APPELLEE.

CASE NO.

900397

PETITION FOR THE WRIT OF CERTIORARI

Petition for a Review of the Decision of the Utah Court of Appeals

GRANT W.P. MORRISON, ESQ  
1200 EAST 3300 SOUTH  
SALT LAKE CITY, UTAH 84106

ARIC CRAMER, ESQ  
1200 EAST 3300 SOUTH  
SALT LAKE CITY, UTAH 84106  
ATTORNEYS FOR APPELLANTS

PAUL T. MORRIS, ESQ  
WEST VALLEY CITY  
GARY R. CRANE  
ASSISTANT WEST VALLEY ATTORNEY  
2470 SOUTH REDWOOD ROAD  
WEST VALLEY CITY, UTAH 84111

ATTORNEYS FOR THE  
RESPONDANTS

**FILED**

AUG 15 1990

Clerk, Supreme Court, Utah

IN AND FOR THE SUPREME COURT  
STATE OF UTAH

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JOSEPH AND EVELYN FLINT,	)	
PETITIONER/ APPELLANT,	)	
	)	
	)	
VS.	)	CASE NO.
	)	
	)	
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A...COURT OF APPEALS AND LOWER COURT DECISIONS

B...ATTORNEY SIGNATURE

C...PROOF OF SERVICE

## QUESTIONS PRESENTED FOR REVIEW

Was the action taken by the Board of Adjustments and the City Attorney, i.e., in the failing to inform the Flints of their time period in which to appeal in 1987, thus forcing them into requesting a hearing founded on "new evidence" but without benefit of knowing what constituted a "new evidence" to the Board of Adjustment one week prior to the 1988 hearing, an abuse of discretion and therefore reversible by the District Court?

## CITATION TO OPINION OF THE COURT OF APPEALS

CASE NO. 900230-CA Memorandum Decision (Not for Publication)

## STATEMENT OF JURISDICTION

This case is brought before the Utah Supreme Court on appeal from the Utah Court of Appeals.

## CONSTITUTIONAL PROVISIONS , STATUTES AND RULES

Utah Code Annotated Chapter 10-9-1

Utah Code Annotated Chapter 10-9-6

Utah Code Annotated Chapter 10-9-15

## STATEMENT OF THE CASE

The date of the judgement seeking to be reviewed is the judgement signed by the Honorable Michael R. Murphy, on 26 February 1990; which order was granted after a Motion for Summary Judgement; which Motion is dated 6 December 1989. the request for decision as submitted by Petitioners Attorney on 27 November 1989. Notice of appeal from the District Court's decision was filed on 21 March 1990. Notice of Appeal was filed on March 21, 1990 in the Supreme Court of Utah, and a Request of Transcript was filed on March 30, 1990. A Docketing Statement was filed on April 11, 1990 by the Appellant. On April 24, 1990, the Utah Supreme Court transferred this case to the Utah Court of Appeals. On April 27, 1990, The Respondents filed a Motion for Summary Disposition and a supporting Memorandum. On May 23, 1990, Appellants filed a Motion to Extend the Time in which to respond to the Respondents Motion. On May 29, 1990, the Utah Court of Appeals granted the motion, and gave Appellants until June 13 to respond. On June 13, 1990 a Responsive motion and brief were submitted by Appellant. On July 6, 1990, the Utah Court of Appeals submitted a Memorandum Decision in which the District Court's decision was affirmed. The Flints then took this Appeal.

## ARGUMENT

### A.FACTUAL BACKGROUND

1. On April 7, 1987, a complaint was filed with the West

Valley City's Ordinance Enforcement Division by Appellant's neighbors stating that at the Flint's home there was a two-family dwelling i a single-family residential zone in violation of the City's Zoning Code.

2. On June 5, 1987, joseph and Evelyn Flint (Flints), owners of the home, applied for an exception from the West Valley City Planning Commission. The Planning Commission referred the Flints to the Board of Adjustments, assuring them the matter was purely routine. The Flints then filed the application for declaration of legal non-conforming use status. An initial hearing was held on September 2, 1987 at which two items were concluded. First, the Board determined that the addition to the home had not existed prior to the zoning and second, that no complaint had been filed in the five year period after the new zoning ordinance. The Flints were not represented by counsel on their initial hearings before the Planning Commission and the Board Of Adjustment.

3. On August 22, 1988, the Flints, through their attorney, Mr. Grant W.P. Morrison, requested a hearing before the Board of Adjustments on the originals applications.

4. Prior to the re-hearing on September 7, 1988, the city Attorney briefed the City Counsel on the legal standard of "New Evidence". Prior to this time the City Counsel had no legal instruction on new evidence.

5. On September 7, 1988, The West Valley City Board Of Adjustment, after an extensive public hearing on the matter, decided not to rehear the Flint application.

6. On October 6, 1988, the Flints filed a petition with the

Third Judicial District Court for review from the Board of Adjustment decision not to rehear their application.

7. On September 25, 1989, Respondents filed a motion to dismiss Petitioners Appeal.

8. On February 26, 1990, a judgement was rendered by the Honorable Michael R. Murphy, a copy of which is attached to this memorandum.

9. On March 21, 1990, Petitioners filed a notice of appeal and on April 11, 1990, Petitioners filed a docketing Statement with this court serving a copy of that statement upon Petitioners by mail on the 17th day of April, 1990.

## B. LEGAL ARGUMENTS

### I. RESPONDENTS/APPELLEE AND THEIR ATTORNEY HAVE A LEGAL RESPONSIBILITY TO NOT BE ARBITRARY AND CAPRICIOUS IN THEIR ACTIONS AND JUDGMENTS TOWARDS THEIR CITIZENS.

1. The city was acted in an arbitrary and capricious manner in deciding this case. No complaints were filed within five years after the date of the zoning becoming effective. On the September 2, 1987 hearing, the issue of whether there had been no complaint for more than five years was not, and has not been addresses since by the city, and is the basis on which the case should be decided.

The Board should have judged the prior non conforming use as outlined in case law by balancing the justice to the applicant against the public goal, and not merely refusing to hear the issue due to a technicality.

2. The city was acting in an arbitrary and capricious



manner in that when the Flints were not represented by counsel in 1987, the impression given the Flints was that they had the right to appeal at any time. On the September 2, 1987 hearing the minutes show that a committee member asked if the Flints could appeal their decision. The City Attorney casually stated that they could come back with new evidence or appeal directly to the District Court. No mention of any deadline or statute of limitations was ever given.

The Flints were never told of a 30 day statute of limitations, and detrimentally relied on the impression they received from the City Attorney. Since the Flints had no legal background or assistance, they should have been given the highest degree of deferral, or at least informed that they should seek legal counsel. Instead, the city held them to a rigid standard of a 30 day appeal.

3. The Flints are now in a "Catch-22" circumstances. Because they did not file an appeal within 30 days of their initial hearing, they have no right of further review of that hearing. Because they then relied on being able to have a new hearing with new evidence, and the city has now denied them this hearing, they are simply out of court with absolutely no redress.

THEREFORE, Petitioners/Appellants request the Court overturn the District Court's Summary Judgment as there are legal grounds shown herein that the Board of Adjustment acted in an arbitrary, capricious and unreasonable manner.

FILED

IN THE UTAH COURT OF APPEALS

JUL 6 1990

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Evelyn Flint and Joseph Flint, )  
 )  
Plaintiffs and Appellants, )  
 )  
v. )  
 )  
Darlene Hutchinson, Chairman, )  
West Valley City Board of )  
Adjustment; and West Valley )  
City Board of Adjustment, )  
 )  
Defendants and Appellees. )

MEMORANDUM DECISION  
(Not For Publication)

Case No. 900230-CA

Before Judges Billings, Greenwood, and Davidson (On Law and Motion).

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PER CURIAM:

Appellants Evelyn and Joseph Flint ("Flints") seek review of a district court summary judgment, which affirmed the denial of a rehearing by the West Valley City Board of Adjustment ("The Board"). The issue on appeal is whether the Board abused its discretion by not advising Flints regarding their right to and time for appeal from the Board's original decision. We summarily affirm.

On July 13, 1987, Flints filed Application No. B-15-87 with the Board of Adjustment to declare legal the nonconforming use of a duplex home in a single-family residential zone. On September 2, 1987, the Board, after hearing all the evidence presented by Flints, found that the duplex dwelling did not exist prior to the adoption of the 1965 Zoning Ordinance prohibiting duplex buildings in a single-family residential neighborhood. The request for nonconforming use status was denied. No appeal from that decision was filed by Flints as permitted by Utah Code Ann. § 10-9-15 (1953). See also West Valley City Code, § 7-6-106.

Almost one year later, Flints' attorney requested a rehearing before the Board on the original application. On

September 7, 1988, the Board, after an extensive public hearing, decided not to reconsider the Flint application. This decision was affirmed on appeal to the Third Judicial District Court. Flints now appeal to this court and, in their docketing statement, have framed their challenge to the district court's judgment as follows: "was the action taken by the Board . . . and the City Attorney, i.e., in failing to inform the Flints of their time period in which to appeal in 1987, thus forcing them into requesting a hearing founded on 'new evidence' . . ., an abuse of discretion?"

Appellees moved for summary affirmance of the appeal under Utah R. App. P. 10(a), correctly arguing that the City has no duty to inform Flints regarding their appeal rights. Appellees also argue that, on the facts and record established, the Board was not required to grant rehearing of Flints' request for a nonconforming use because there was no "new evidence" presented. Flints' response to the motion does not cite any authority to this court supporting their claim that the Board, or its attorney, had a responsibility to inform Flints how to appeal the Board's original decision. None of the statutes or cases cited in Flints' docketing statement support this contention on appeal. We do not find any support for Flints' novel suggestion.

And, there is no requirement that appellees must advise a petitioner in advance as to what might constitute "new evidence" sufficient to justify a subsequent rehearing of a petition. In reality, Flints' complaint is that appellees did not give them the legal advice that Flints should have received from an attorney representing their interests. The district court properly entered summary judgment against Flints.

In an action for relief from a board of adjustment decision, it does not lie within the prerogative of the district court to substitute its judgment for the board's when that judgment is supported by a reasonable basis. Xanthos v. Board of Adjustment, 685 P.2d 1032, 1034-5 (Utah 1984); Cottonwood Heights Citizen Ass'n. v. Board of Commissioners, 593 P.2d 138, 140 (Utah 1979); Naylor v. Salt Lake City Corp., 16 Utah 2d 192, 398 P.2d 27 (Utah 1965); cf. Triangle Oil v. North Salt Lake City, 609 P.2d 1338, 1340 (Utah 1980) (Courts will generally not interfere in the discretionary functions or decisions of municipal government). Flints argue that they are now left without any remedy or avenue to obtain redress from the Board's decisions. Flints had a remedy and right to appeal the Board's first decision. This they failed to do. Having

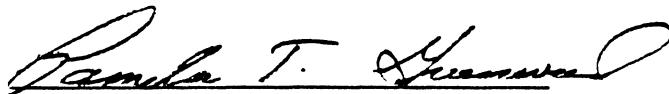
waived their right of appeal, they cannot complain that now they have none. Flints were, and are, capable of ascertaining and asserting their legal rights. They made no cognizable argument that appellees should be obliged to do so for them.

The district court's summary judgment is summarily affirmed.

ALL CONCUR:



Judith M. Billings, Judge



Pamela T. Greenwood, Judge



Richard C. Davidson, Judge

Paul T. Morris, (3738)  
West Valley City Attorney  
Gary R. Crane, (5054)  
Assistant West Valley City Attorney  
Attorneys for Respondents  
2470 South Redwood Road  
West Valley City, UT 84119  
Telephone: (801) 974-5501

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

---

EVELYN FLINT and  
JOSEPH FLINT,

Petitioners, / *me*

vs.

DARLENE HUTCHINSON, CHAIRMAN,  
WEST VALLEY CITY BOARD OF  
ADJUSTMENT and WEST VALLEY  
CITY BOARD OF ADJUSTMENT,

Respondents. / *me*

JUDGMENT

Civil No. C88-6509

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This matter came before the above-entitled Court on the 6th day of December, 1989, upon Defendant's Motion To Dismiss, which was treated by the Court as a Motion for Summary Judgment. The matter, having been submitted to the Court, and the Court having considered the same and being fully informed in the premises, now makes and enters the following:

It is hereby ordered, adjudged and decreed as follows:

1. That the West Valley City Board of Adjustment, on the 7th day of December, 1988, heard Application No. B-23-88, a request by Petitioners Evelyn and Joseph Flint that the Board rehear their request for an official determination that their residence, located

at 3689 South 4445 West, in West Valley City, was legally converted to a duplex prior to the zoning being enacted in their neighborhood in February 1965.

2. That after a review of the record below, this Court has determined that the West Valley City Board of Adjustment acted with a rational basis in deciding not to grant a rehearing to Petitioners Evelyn and Joseph Flint.

3. That the Board's decision was not arbitrary, capricious or unreasonable or without any basis in fact.

4. That Petitioner's appeal in the above-captioned case is hereby ordered dismissed with prejudice.

DATED this 26 day of FEBRUARY, 1990.

BY THE COURT:

151  
Judge

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on this 10th day of January, 1990, I personally served a copy of the forgoing Judgment upon the Petitioner by depositing the same in U.S. mails, postage prepaid, to the following person at the following address:

Grant W.P. Morrison  
Attorney at Law  
1200 East 3300 South  
Salt Lake City, Utah 84106

Barbara Hettig

ATTORNEY'S SIGNATURES

Grant Morrison by Aric Cramer  
GRANT W. P. MORRISON

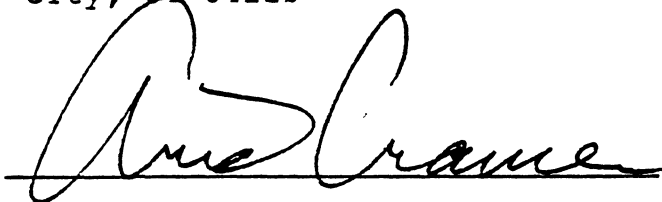
Aric Cramer  
ARIC CRAMER

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing motion in the United States Mail, postage prepaid, on this 6 day of August, 1990, to the following:

Paul T. Morris  
West Valley City Attorney  
Gary R. Crane  
Assistant West Valley Attorney  
Attorneys for Respondent/Appellees  
2470 South Redwood Road  
West Valley City, UT 84119

Mr. & Mrs. Joseph Flint  
3689 S. 4445 W.  
West Valley City, UT 84120

  
\_\_\_\_\_



UTAH SUPREME COURT.

# BRIEF

45.9  
IS9

DOCKET NO.

900397

AND FOR THE SUPREME COURT  
STATE OF UTAH

JOSEPH AND EVELYN FLINT,  
PETITIONER/ APPELLANT,

VS.

DARLENE HUTCHINSON, CHAIRMAN  
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ASSISTANT WEST VALLEY ATTORNEY  
2470 SOUTH REDWOOD ROAD  
WEST VALLEY CITY, UTAH 84111

ATTORNEYS FOR THE  
RESPONDENTS

**FILED**

AUG 15 1944

**Clerk, Supreme Court, Utah**

IN AND FOR THE SUPREME COURT  
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JOSEPH AND EVELYN FLINT,	)	
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B...ATTORNEY SIGNATURE

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## CITATION TO OPINION OF THE COURT OF APPEALS

CASE NO. 900230-CA Memorandum Decision (Not for Publication)

## STATEMENT OF JURISDICTION

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## ARGUMENT

### A.FACTUAL BACKGROUND

1. On April 7, 1987, a complaint was filed with the West

Valley City's Ordinance Enforcement Division by Appellant's neighbors stating that at the Flint's home there was a two-family dwelling i a single-family residential zone in violation of the City's Zoning Code.

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### I. RESPONDENTS/APPELLEE AND THEIR ATTORNEY HAVE A LEGAL RESPONSIBILITY TO NOT BE ARBITRARY AND CAPRICIOUS IN THEIR ACTIONS AND JUDGMENTS TOWARDS THEIR CITIZENS.

1. The city was acted in an arbitrary and capricious manner in deciding this case. No complaints were filed within five years after the date of the zoning becoming effective. On the September 2, 1987 hearing, the issue of whether there had been no complaint for more than five years was not, and has not been addresses since by the city, and is the basis on which the case should be decided.

The Board should have judged the prior non conforming use as outlined in case law by balancing the justice to the applicant against the public goal, and not merely refusing to hear the issue due to a technicality.

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manner in that when the Flints were not represented by counsel in 1987, the impression given the Flints was that they had the right to appeal at any time. On the September 2, 1987 hearing the minutes show that a committee member asked if the Flints could appeal their decision. The City Attorney casually stated that they could come back with new evidence or appeal directly to the District Court. No mention of any deadline or statute of limitations was ever given.

The Flints were never told of a 30 day statute of limitations, and detrimentally relied on the impression they received from the City Attorney. Since the Flints had no legal background or assistance, they should have been given the highest degree of deferral, or at least informed that they should seek legal counsel. Instead, the city held them to a rigid standard of a 30 day appeal.

3. The Flints are now in a "Catch-22" circumstances. Because they did not file an appeal within 30 days of their initial hearing, they have no right of further review of that hearing. Because they then relied on being able to have a new hearing with new evidence, and the city has now denied them this hearing, they are simply out of court with absolutely no redress.

THEREFORE, Petitioners/Appellants request the Court overturn the District Court's Summary Judgment as there are legal grounds shown herein that the Board of Adjustment acted in an arbitrary, capricious and unreasonable manner.



JUL 6 1990  
*Henry Jones*  
 100-443883-100  
 100-443883-100

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Case No. 900230-CA

— — — — —

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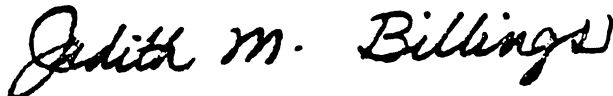
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In an action for relief from a board of adjustment decision, it does not lie within the prerogative of the district court to substitute its judgment for the board's when that judgment is supported by a reasonable basis. Xanthos v. Board of Adjustment, 685 P.2d 1032, 1034-5 (Utah 1984); Cottonwood Heights Citizen Ass'n. v. Board of Commissioners, 593 P.2d 138, 140 (Utah 1979); Naylor v. Salt Lake City Corp., 16 Utah 2d 192, 398 P.2d 27 (Utah 1965); cf. Triangle Oil v. North Salt Lake City, 609 P.2d 1338, 1340 (Utah 1980) (Courts will generally not interfere in the discretionary functions or decisions of municipal government). Flints argue that they are now left without any remedy or avenue to obtain redress from the Board's decisions. Flints had a remedy and right to appeal the Board's first decision. This they failed to do. Having

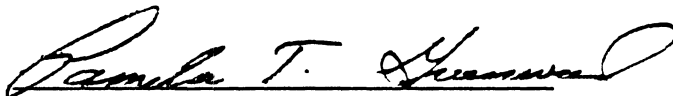
waived their right of appeal, they cannot complain that now they have none. Flints were, and are, capable of ascertaining and asserting their legal rights. They made no cognizable argument that appellees should be obliged to do so for them.

The district court's summary judgment is summarily affirmed.

ALL CONCUR:



Judith M. Billings, Judge



Pamela T. Greenwood, Judge



Richard C. Davidson, Judge

Paul T. Morris, (3738)  
West Valley City Attorney  
Gary R. Crane, (5054)  
Assistant West Valley City Attorney  
Attorneys for Respondents  
2470 South Redwood Road  
West Valley City, UT 84119  
Telephone: (801) 974-5501

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

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EVELYN FLINT and  
JOSEPH FLINT,

Petitioners, / *PLT*

vs.

DARLENE HUTCHINSON, CHAIRMAN,  
WEST VALLEY CITY BOARD OF  
ADJUSTMENT and WEST VALLEY  
CITY BOARD OF ADJUSTMENT,

Respondents. / *DEL*

JUDGMENT

Civil No. C88-6509

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This matter came before the above-entitled Court on the 6th day of December, 1989, upon Defendant's Motion To Dismiss, which was treated by the Court as a Motion for Summary Judgment. The matter, having been submitted to the Court, and the Court having considered the same and being fully informed in the premises, now makes and enters the following:

It is hereby ordered, adjudged and decreed as follows:

1. That the West Valley City Board of Adjustment, on the 7th day of December, 1988, heard Application No. B-23-88, a request by Petitioners Evelyn and Joseph Flint that the Board rehear their request for an official determination that their residence, located

at 3689 South 4445 West, in West Valley City, was legally converted to a duplex prior to the zoning being enacted in their neighborhood in February 1965.

2. That after a review of the record below, this Court has determined that the West Valley City Board of Adjustment acted with a rational basis in deciding not to grant a rehearing to Petitioners Evelyn and Joseph Flint.

3. That the Board's decision was not arbitrary, capricious or unreasonable or without any basis in fact.

4. That Petitioner's appeal in the above-captioned case is hereby ordered dismissed with prejudice.

DATED this 26 day of FEBRUARY, 1990.

BY THE COURT:

151  
Judge

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on this 10th day of January, 1990, I personally served a copy of the forgoing Judgment upon the Petitioner by depositing the same in U.S. mails, postage prepaid, to the following person at the following address:

Grant W.P. Morrison  
Attorney at Law  
1200 East 3300 South  
Salt Lake City, Utah 84106

Barbara Holtz

ATTORNEY'S SIGNATURES

Grant Morrison by Aric Cramer  
GRANT W. P. MORRISON

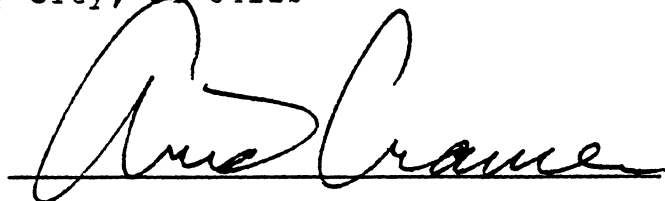
Aric Cramer  
ARIC CRAMER

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing motion in the United States Mail, postage prepaid, on this 6 day of August, 1990, to the following:

Paul T. Morris  
West Valley City Attorney  
Gary R. Crane  
Assistant West Valley Attorney  
Attorneys for Respondent/Appellees  
2470 South Redwood Road  
West Valley City, UT 84119

Mr. & Mrs. Joseph Flint  
3689 S. 4445 W.  
West Valley City, UT 84120

A handwritten signature in cursive script, appearing to read "Gary R. Crane", is written over a horizontal line.